JUDGE NEIL M. GORSUCH

SENATE JUDICIARY COMMITTEE QUESTIONNAIRE

APPENDIX 12(b)

Committee and Other Organizational Material

ADVISORY COMMITTEE
ON
APPELLATE RULES

Washington, D.C.
October 18, 2016

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Agenda for Fall 2016 Meeting of
Advisory Committee on Appellate Rules
October 18, 2016
Washington, D.C.

I. Introductions

II. Public Comment on Proposed Amendments to Rule 29

III. Approval of Minutes of Spring 2016 Meeting and Report on June 2016 Meeting of Standing Committee

IV. Action Item - Item 11-AP-C (Amendments to Rules 3(c) and (d))

V. Discussion Items

A. Item No. 12-AP-D (Civil Rule 62 / appeal bonds)

B. Item No. 08-AP-R (disclosure requirements)

C. Item No. 12-AP-F (class action settlement objectors)

D. Item Nos. 15-AP-A, 15-AP-E, 15-AP-H (electronic filing by pro se litigant)

E. Circuit Splits over the Meaning of Appellate Rules 4(c), 7, and 39(a)(4)

F. Initiatives to Improve the Efficiency of Federal Appeals

VI. New Business

VII. Adjournment

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TAB 1

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Advisory Committee on Appellate Rules
Table of Agenda Items —October 2016

FRAP Item	Proposal	Source	Current Status
07-AP-E	Consider possible FRAP amendments in response to Bowles v. Russell (2007).	Mark Levy, Esq.	Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 04/11 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15
07-AP-I	Consider amending FRAP 4(c)(1) to clarify the effect of failure to prepay first-class postage.	Hon. Diane Wood	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16

FRAP Item	Proposal	Source	Current Status
08-AP-C	Abolish FRAP 26(c)'s three-day rule.	Hon. Frank H. Easterbrook	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16
09-AP-B	Amend FRAP 1(b) to include federally recognized Indian tribes within the definition of "state"	Daniel I.S.J. Rey-Bear, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed and retained on agenda 10/11 Discussed and retained on agenda 04/12; Committee will revisit in 2017
11-AP-C	Amend FRAP 3(d)(1) to take account of electronic filing	Harvey D. Ellis, Jr., Esq.	Discussed and retained on agenda 04/13 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16

FRAP Item	Proposal	Source	Current Status
11-AP-D	Consider changes to FRAP in light of CM/ECF	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/11 Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16
12-AP-B	Consider amending FRAP Form 4's directive concerning institutional-account statements for IFP applicants	Peter Goldberger, Esq., on behalf of the National Association of Criminal Defense Lawyers (NACDL)	Discussed and retained on agenda 09/12 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16
12-AP-D	Consider the treatment of appeal bonds under Civil Rule 62 and Appellate Rule 8	Kevin C. Newsom, Esq.	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16
12-AP-E	Consider treatment of length limits, including matters now governed by page limits	Professor Neal K. Katyal	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15
12-AP-F	Consider amending FRAP 42 to address class action appeals	Professors Brian T. Fitzpatrick and Brian Wolfman and Dean Alan B. Morrison	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16

FRAP Item	Proposal	Source	Current Status
13-AP-B	Amend FRAP to address permissible length and timing of an amicus brief in support of a petition for rehearing and/or rehearing en banc	Roy T. Englert, Jr., Esq.	Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15
13-AP-H	Consider possible amendments to FRAP 41 in light of Bell v. Thompson, 545 U.S. 794 (2005), and Ryan v. Schad, 133 S. Ct. 2548 (2013)	Hon. Steven M. Colloton	Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Draft approved 10/15 for submission to Standing Committee Approved by Standing Committee 01/16
14-AP-D	Consider possible changes to Rule 29's authorization of amicus filings based on party consent	Standing Committee	Awaiting initial discussion Draft approved 10/15 for submission to Standing Committee Discussed by Standing Committee 1/16 but not approved Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16
15-AP-A	Consider adopting rule presumptively permitting pro se litigants to use CM/ECF	Robert M. Miller, Ph.D.	Awaiting initial discussion Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16
15-AP-B	Technical amendment – update cross-reference to Rule 13 in Rule 26(a)(4)(C)	Reporter	Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15
15-AP-C	Consider amendment to Rule 31(a)(1)'s deadline for reply briefs	Appellate Rules Committee	Awaiting initial discussion Draft approved 10/15 for submission to Standing Committee Approved by Standing Committee 01/16
15-AP-D	Amend FRAP 3(a)(1) (copies of notice of appeal) and 3(d)(1) (service of notice of appeal)	Paul Ramshaw, Esq.	Awaiting initial discussion Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16

FRAP Item	Proposal	Source	Current Status
15-AP-E	Amend the FRAP (and other sets of rules) to address concerns relating to social security numbers; sealing of affidavits on motions under 28 U.S.C. § 1915 or 18 U.S.C. § 3006A; provision of authorities to pro se litigants; and electronic filing by pro se litigants	Sai	Awaiting initial discussion Discussed and retained on agenda 10/15 Partially removed from Agenda and draft approved for submission to Standing Committee 4/16 Approved for publication by Standing Committee 06/14
15-AP-H	Electronic filing by pro se litigants	Robert M. Miller, Ph.D.	Awaiting initial discussion Discussed and retained on agenda 10/15 Discussed and retained on agenda 4/16

TAB 2A

DRAFT Minutes of the Spring 2016 Meeting of the
Advisory Committee on Appellate Rules

April 5, 2016
Denver, Colorado

Attendance and Introductions

The Chair, Judge Steven M. Colloton, called the meeting of the Advisory Committee on Appellate Rules to order on Tuesday, at 9:00 a.m., at the Colorado Supreme Court in Denver, Colorado.

In addition to Judge Colloton, the following Advisory Committee members were present: Professor Amy Coney Barrett, Judge Michael A. Chagares, Justice Allison H. Eid, Gregory G. Katsas, Esq., Neal K. Katyal, Esq., Judge Brett M. Kavanaugh, Judge Stephen Joseph Murphy III, and Kevin C. Newsom, Esq. Gregory Garre, Esq. participated by telephone. Solicitor General Donald Verrilli was represented by Mr. H. Thomas Byron III, Appeals Counsel of the Appellate Staff of the Civil Division.

Reporter Gregory E. Maggs was present and kept these minutes. Also present were Judge Jeffrey S. Sutton, Chair of the Standing Committee on Rules of Practice and Procedure; Ms. Rebecca A. Womeldorf, Secretary of the Standing Committee on Rules of Practice and Procedure and Rules Committee Officer; Marie Leary, Esq., Research Associate, Appellate Rules Committee, Federal Judicial Center; Mr. Michael Ellis Gans, Clerk of Court Representative to the Advisory Committee on Appellate Rules; and Ms. Shelly Cox, Administrative Specialist in the Rules Committee Support Office of the Administrative Office. Mr. Derek Webb, law clerk to Judge Sutton, participated by telephone.

Judge Colloton began the meeting by introducing Chief Justice Nancy E. Rice of the Colorado Supreme Court. Chief Justice Rice welcomed the Committee to the courthouse and spoke of the history of the building. Judge Colloton also welcomed Judge Kavanaugh to his first meeting.

Approval of the Minutes of the October 2015 Meeting

A spelling error on page 11 of the draft minutes of the October 2015 Meeting was identified and corrected. The draft minutes were then approved.

Report on the January 2016 Meeting of the Standing Committee

Judge Colloton reported that the Standing Committee had approved two proposals from the Appellate Rules Committee for publication and public comment. One was Item 13-AP-H, which concerned proposed amendments to Rule 41(b) and (d) regarding the stays of a mandate. The other was Item 15-AP-C, which concerned proposed amendments to Rule 31(a)(1) and Rule 28.1(f)(4) to lengthen the time for filing a reply brief from 14 days to 21 days.

Judge Colloton said that a third proposal, Item No. 14-AP-D, which concerns amicus briefs filed by party consent under Appellate Rule 29(a), prompted suggestions from the Style Consultants and substantive comments from the Committee Members. Judge Colloton therefore decided to bring the item back for further discussion at today's Committee meeting.

Item No. 12-AP-D (Civil Rule 62: Bonds)

Mr. Newsom led the discussion of this item. He began by reporting the status of proposed revisions to Civil Rule 62 and addressed the discussion draft of this rule on page 70 of the Agenda Book. He explained that the revision to Rule 62 aims to accomplish three things: (1) to extend the automatic stay to 30 days; (2) to allow a party to provide security other than a bond; and (3) to require only one security for all stayed periods. He also explained that the Advisory Committee Note was edited to make it more concise.

Mr. Newsom then turned to the proposed conforming amendments to Appellate Rules 8, 11, and 39, addressing the discussion drafts of these rules on pages 61-64 of the Agenda Book. The Committee agreed with the general approach of the drafts and the policy decision to make Rule 8(b) apply to providers of security other than sureties. The Committee decided to amend the discussion draft in the following three ways:

(1) Rule 8(a)(1)(B) [lines 6-7]: The bracketed phrase "[provided to obtain the stay of a judgment or order of a district court pending appeal]" should be included but edited to say "provided to obtain the stay."

(2) Rule 8(a)(2)(E) [line 15]: The word "appropriate" should be deleted.

(3) Rule 8(b) [lines 16-20]: The wording of this section should be rephrased to say: "If a party gives security in any form, including a bond, other security, stipulation, or other undertaking, with one or more sureties or other security providers, each security provider submits . . . ." The subsequent references to "surety" in the provision should then be replaced with "security provider."

The Committee addressed the discussion draft of Rule 11(g) at length. It considered various possible amendments but ultimately did not alter the discussion draft. The Committee did not make any amendments to the discussion draft of Rule 39(e).

Mr. Newsom moved to approve the discussion draft as amended and to send it to the Standing Committee for publication. The motion was seconded and approved.

Item No.12-AP-F (Civil Rule 23: Class Action Settlement Objectors)

Judge Colloton introduced this item, which concerns class action settlement objections. Class members sometimes object to settlements not because they have good faith objections but instead because they want to receive payments to withdraw their objections so that the settlements can go forward. Judge Colloton explained that the Civil Rules Committee decided to address this matter through what it calls "the simple approach." Under this approach, Civil Rule 23(e)(5)(B) would be amended to provide that "no payment or other consideration" can be given to an objector in exchange for withdrawing an objection without the district court's approval. The simple approach would not require amending the Appellate Rules.

Judge Colloton asked the Committee to consider whether the proposed "simple approach" was a good solution to the problem of class action objections. He also asked the Committee to consider whether requiring a district court to approve consideration paid to an objector impermissibly interferes with an appellate court's jurisdiction.

Mr. Derek Webb spoke regarding his memorandum included in the Agenda Book at page 109. He informed the Committee that the Civil and Appellate rules allow a district court to continue to act in a variety of situations even though a notice of appeal has been filed.

Two judge members expressed agreement with the "simple approach" of the Civil Rules Committee. An attorney member expressed some concern about the policy behind the approach. He was not sure that the district court would always know the case better than the court of appeals. He offered the example of a case in which there was a proposed payment to withdraw an objection after oral argument in the court of appeals. He asked, "Should the district court really decide whether the payment should be made?" The attorney member, however, thought that such situations might be rare.

Judge Sutton saw some potential for conflict between the district court and court of appeals. He noted that nothing in the proposed revision of Civil Rule 23 would require or prevent the dismissal of an objection by a court of appeals. He suggested that another, possibly better, approach might have been to require a court of appeals to ask the district court for an indicative ruling under Appellate Rule 12.1 before deciding whether to dismiss an objection. He said that this option

remains open to the courts of appeals and suggested that the Advisory Committee Note could address this point.

Following further discussion, Judge Colloton summarized the apparent views of the Committee as follows: The Appellate Rules Committee prefers not to address the issue of class action objectors with an appellate rule, and whether the proposed revision of Civil Rule 23 is desirable is ultimately a policy question for the Civil Rules Committee.

Item No. 16-AP-A (Appellate Rule 4(b)(1) and Criminal Case Notice of Appeals)

The Reporter introduced this item, which concerns a proposal to amend Appellate Rule 4(b)(1)(A) to increase the period for filing a notice of appeal in a criminal case from 14 days to 30 days. The reporter explained that the Committee previously had considered and rejected essentially the same proposal when it addressed Item 11-AP-E. The Committee discussed Item 11-AP-E at its Spring 2012 and Fall 2012 meetings and then voted to remove the item from the Agenda without taking action.

A judge member said that limiting the period for filing a notice of appeal to 14 days was necessary for having prompt appeals. He also noted that the interests of lawyers may differ from clients; lawyers may want more time but clients may want speedier action. Expressing the view of the Department of Justice, Mr. Byron said no real need has been shown for the amendment. Other speakers emphasized that the Committee had previously considered and decided the matter.

Judge Colloton asked whether there should be further study. No member believed that further study was required. A motion to remove the item from the Committee's agenda was seconded and approved.

Item No. 14-AP-D (Appellate Rule 29(a) on Amicus Briefs Filed with Party Consent)

Judge Colloton introduced this item, which concerns amicus briefs filed by party consent. He reminded the Committee that it had proposed a modification of Appellate Rule 29(a) at its October 2016 meeting. He then explained that the Standing Committee was generally favorable to the proposal but identified issues that may require further consideration.

Judge Colloton began by discussing the policy issue of whether a court should be able to reject not only amicus briefs filed by party consent but also amicus briefs filed by the government. An attorney member said that the rules should continue to provide the government a right to file an amicus brief. Mr. Byron said that the Department of Justice's position was that the government should have a right to file an amicus brief.

Judge Colloton then addressed the discussion draft line-by-line. The sense of the Committee was to make the following revisions:

(1) line 3: strike the hyphen in "amicus-curiae"

(2) line 5: adopt the "except" clause rather than the separate "but" sentence proposed by the Style Consultants

(3) line 6: strike "by local rule"

(4) line 6: replace "prohibit" with "prohibit or strike"

At the suggestion of a judge member, the Committee also decided to replace the Advisory Committee Note for the proposed amendment to Appellate Rule 29(a) on page 140 of the Agenda Book with the following: "The amendment authorizes orders or local rules, such as those previously adopted in some circuits, that prohibit the filing of an amicus brief by party consent if the brief would result in a judge's disqualification. The amendment does not alter or address the standards for when an amicus brief requires a judge's disqualification."

The Committee approved a motion to submit the revised version of the Rule to the Standing Committee.

Item No. 08-AP-R (Appellate Rules 26.1 and 29(c) on Disclosures)

Judge Colloton introduced this item, which concerns Appellate Rules 26.1 and 29(c). These rules currently require corporate parties and amici curiae to file corporate disclosure statements. The purpose of these disclosure requirements is to assist judges in deciding whether they need to recuse themselves. Judge Colloton explained that some local rules go further. He explained that, in the memorandum included at page 159 of the Agenda Book, Professor Daniel Capra had tried to pull together suggestions for additional disclosure requirements without necessarily advocating for them. Judge Colloton said that the initial decisions for the Committee were (1) whether to include some or all of the proposed disclosures; (2) whether to conduct more study; or (3) whether to drop the matter.

A judge member asked the attorney members how burdensome they considered such disclosure requirements. An attorney member said that some disclosure requirements are very burdensome. The committee discussed the requirement of disclosing witnesses. Several members suggested that the cost was not worth the benefit. An attorney member also said that disclosing affiliates of corporations would be burdensome. He said that such disclosures are sometimes required in state courts.

Judge Sutton asked whether the list of required disclosures would carry with it a presumption that recusal was necessary when the listed information was disclosed. An attorney member asked whether the Advisory Committee Note could address this potential concern by saying that the additional disclosure requirements do not change the recusal standards.

Another attorney member asked how strong the need was for changing the current rules. Mr. Byron, speaking for the Justice Department, agreed that additional disclosure requirements would be burdensome and that it was not clear how beneficial they would be.

Judge Sutton said that the current rule requires disclosure of things that by statute automatically require disclosure. The proposed rule would go further. He also said that the proposal should not go to the Standing Committee for publication at this time because the Bankruptcy Rules Committee was still working on its own disclosure requirements.

Judge Colloton questioned the need for requiring parties to disclose the identity of judges, asking whether there were many judges who have to recuse themselves because of the identity of a judge during earlier proceedings in a case.

Several committee members expressed concern that disclosing the identity of all lawyers who had worked on a matter could be very burdensome, especially if there had been an administrative proceeding below. But a countervailing consideration was that judges still may have to recuse themselves based on the participation of a lawyer.

The Committee discussed the question whether clauses (a)(2), (a)(3), and (a)(4) should use the term "proceeding" or "case" or some other term. A judge member pointed out that some appeals come directly from agencies. Another judge member suggested that the word "matter" might be better. Another judge member suggested that perhaps local rules should address matters coming directly to the court of appeals from administrative proceedings.

Judge Colloton asked whether the draft of Rule 26.1(e) corresponded to any similar provision in the draft revision to the Bankruptcy Rules. The Committee decided that the reporter should coordinate with the Criminal Rules and Bankruptcy Rules Committees.

It was the sense of the committee that the following action should be taken with respect to the discussion drafts of Rule 26.1 and Rule 29(c) beginning on page 150 of the Agenda Book.

(1) The "except clause" in line 3 should be deleted so that Rule 26.1 applies to all parties.

(2) The term "affiliated" in line 5 should be deleted. A Fourth Circuit local rule requires disclosure of affiliates. But the term is complicated to define.

(3) The term “matter” rather than “case” or “proceeding” should be in lines 10, 12, and 14

(4) The “good cause” exception in lines 17 and 18 should be included. The formulation differs from the formulation in the criminal law rules. The exception has to be included at the end of the sentence because of everything else at the start of the sentence. The substance is the same.

(5) There was no objection to the proposed language in lines 31-32 regarding persons who want to intervene.

(6) The Advisory Committee note should make clear that the Committee is not trying to change the recusal requirements.

(7) The Committee had no objection to the proposed change to Rule 29(c)(5)(D).

The Committee determined that no amendment should be proposed at this time, and that the matter should be carried over for further consideration. The Chair may receive input from the Standing Committee at its June 2016 meeting.

Item 12-AP-B (Appellate Rules Form 4 and Institutional Account Statement)

This Item concerns a proposal to add the parenthetical phrase "(not including a decision in a habeas corpus proceeding or a proceeding under 28 U.S.C. § 2255)" to one of the questions in Appellate Form 4. The reporter introduced the time and summarized the arguments in Reporter Struve's memorandum for and against the adding the parenthetical phrase.

After a brief discussion, the Committee decided to take no action for two reasons. First, the language of the Form already tracks the applicable statute. Second, although the parenthetical phrase might prevent the filing of institutional account statements unnecessarily, the consequence was not very burdensome to either confinement institutions or prisoners. A motion to remove this item from the agenda was made, seconded, and approved.

Item No. 15-AP-E (Appellate Rules Form 4 and Social Security Numbers)

The reporter introduced this item, which included five proposals. The first proposal was to amend Appellate Form 4 to remove the question asking litigants seeking leave to proceed in forma pauperis to provide the last four digits of their social security numbers. The reporter presented this item. As discussed in the memorandum on page 215 of the Agenda Book, the clerks of the courts of appeals report that this information is no longer needed for any purpose. The Committee

discussed the matter briefly and decided that the question should be deleted. The Committee will send a proposal for publication to the Standing Committee.

The second proposal was to amend Appellate Rule 25(a)(5) to prohibit filings from containing any part of a social security number. The Committee decided to take no action on this matter because Appellate Rule 25(a)(5) incorporates the privacy standards from the Civil Rules. Any change should come from the Civil Rules.

The third proposal was to amend Appellate Rule 24(a)(1) to add a presumption that an affidavit filed in support of a motion for leave to proceed in forma pauperis would be sealed. The Committee previously had discussed this matter at its October 2015 meeting. Following a brief discussion, the sense of the Committee was that the proposal should be rejected.

The fourth proposal was that Appellate Rule 32.1(b) should be amended to require litigants to provide pro se applicants with unpublished opinions that are not available without cost from a publicly accessible database. An attorney member suggested that this proposal raised a substantive policy question about how much financial assistance should be given to pro se litigants and that this question was better addressed by Congress than by a Rules Committee. Another attorney member pointed out that the proposal concerned all pro se litigants, not just those seeking leave to proceed in forma pauperis. Some pro se litigants might be able to afford access to commercial databases. Another member of the Committee asked whether a court might order a party to provide unpublished opinions on an individual basis. The sense of the Committee was that the proposal should be rejected.

The fifth proposal was to amend Appellate Rule 25(d)(2)(D) to allow pro se litigants to file or serve documents electronically. A member suggested that the Committee should consider this proposal as part of its general consideration of electronic filing issues.

A motion was made to present the first matter (concerning social security numbers) to the Standing Committee for publication, to remove the second, third, and fourth matters from the agenda, and to fold the fifth matter into the rest of the other agenda items concerning electronic filing. The motion was seconded and approved.

Item No. 15-AP-F (Appellate Rule 39(e) and Recovery of Appellate Fees)

The reporter introduced this item, which the Committee discussed for the first time at the October 2015 Meeting. The item concerns the procedure by which an appellant who prevails on appeal may recover the $5 fee for filing a notice of appeal and the $500 fee for docketing an appeal. Rule 39(e)(4) says that the fee for filing a notice of appeal is taxable as a cost in the district court.

In most circuits, the $500 docketing fee is seen as a cost taxable in the court of appeals, but at least three circuits require appellants to recover this fee in the district court.

The Committee considered the question whether Rule 39 should be amended. The clerk representative said that the clerks in most circuits want to tax the whole thing in the court of appeals. Mr. Byron suggested the possibility of deleting (e)(4). A judge member said that he thought that the rule was correct as written.

Following further discussion the sense of the Committee was that the Chair should communicate with the chief judges of the various circuits about the problem, with the goal of finding a resolution without amending the rules. The motion to remove the item from the agenda was made, seconded, and approved.

Item Nos. 08-AP-A, 11-AP-C, 11-AP-D, 15-AP-A, 15-AP-D, 15-AP-H (Electronic Filing and Service)

These items concern electronic filing, signature, service, and proof of service. The reporter described the progress that the Civil Rules Committee had made on revising the Civil Rules to address these subjects. Several members of the Committee expressed agreement with the four major characteristics of the reform: First, parties represented by counsel must file electronically absent an exception, such as an exception for good cause. Second, use of the court's electronic filing system constitutes a signature. Third, parties will serve papers through the court's electronic filing system. Fourth, no proof of service is required for papers served through the electronic filing system.

The Committee concluded that the reporter should prepare a discussion draft of Appellate Rule 25 that would follow the most recent draft of Civil Rule 5. The reporter would then circulate the draft to the committee members by email. The goal is to present a proposed revision of Appellate Rule 25 to the Standing Committee in June.

The Committee also directed the reporter to determine whether other Appellate Rules would also require amendment to address electronic filing.

Memo on Circuit Splits

The Committee also considered a memorandum prepared by Mr. Webb. The memorandum listed a number of circuit splits on issues under the Appellate Rules. The Committee decided to study three of these issues for possible inclusion on its agenda in the future: (1) whether delay by prison authorities in delivering the order from which the prisoner wishes to appeal can be used in computing time for appeal under Rule 4(c); (2) whether the costs for which a bond may be required under Rule 7 can include attorney's fees; and (3) whether "the court" in Rule 39(a)(4) refers to the

appellate court or the district court. The Committee also agreed to study the other issues in the memorandum further.

Adjournment

Judge Colloton thanked Justice Eid for her 6 years of service on the Committee and for providing her input from the perspective of a state court. Judge Colloton also thanked Prof. Barrett for her service on the Committee and for hosting the meeting in Chicago. Judge Colloton noted that this was the last meeting for Judge Sutton at the Appellate Rules Committee. He also noted that this was the last meeting for Mr. Gans and himself. He noted that Mr. Gans has served for in clerk's office of the Eighth Circuit for 33 years. Judge Colloton thanked him for his insight and polling of his colleagues.

Judge Sutton announced that Judge Neil Gorsuch will be the new chair of this committee. Judge Sutton thanked Judge Colloton for his four years of service, care, and fair-mindedness. Judge Sutton also read comments from former reporter Cathie Struve who complimented and thanked Judge Colloton for his service as chair of the Committee.

The meeting adjourned.

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MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 6, 2016 | Washington, D.C.

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ATTENDANCE

The Judicial Conference on Rules of Practice and Procedure held its fall meeting in Washington, D.C., on June 6, 2016. The following members participated in the meeting:

Judge Jeffrey S. Sutton, Chair
Associate Justice Brent E. Dickson
Roy T. Englert, Jr., Esq.
Daniel C. Girard, Esq.
Judge Neil M. Gorsuch
Judge Susan P. Graber
Professor William K. Kelley
Judge Patrick J. Schiltz
Judge Amy St. Eve
Judge Richard C. Wesley
Judge Jack Zouhary

The following attended on behalf of the advisory committees:

Advisory Committee on Appellate Rules –
Judge Steven M. Colloton, Chair
Professor Gregory E. Maggs, Reporter

Advisory Committee on Bankruptcy Rules –
Judge Sandra Segal Ikuta, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Michelle M. Harner, Associate Reporter

Advisory Committee on Civil Rules –
Judge John D. Bates, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate Reporter

Advisory Committee on Criminal Rules –
Judge Donald W. Molloy, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter

Advisory Committee on Evidence Rules –
Judge William K. Sessions III, Chair
Professor Daniel J. Capra, Reporter

The Honorable Sally Quillian Yates, Deputy Attorney General, represented the Department of Justice, along with Diana Erbsen, Joshua Gardner, Elizabeth J. Shapiro, and Natalia Sorgente.

Other meeting attendees included: Judge David G. Campbell; Judge Robert M. Dow; Judge Paul W. Grimm; Sean Marlaire, staff to the Court Administration and Case Management Committee (CACM); Professor Bryan A. Garner, Style Consultant; Professor R. Joseph Kimble, Style Consultant; and Professor Joseph F. Spaniol, Jr., Consultant.

Providing support to the Committee:

Professor Daniel R. Coquillette	Reporter, Standing Committee
Rebecca A. Womeldorf	Secretary, Standing Committee
Julie Wilson	Attorney Advisor, RCSO
Scott Myers	Attorney Advisor, RCSO
Bridget M. Healy	Attorney Advisor, RCSO
Shelly Cox	Administrative Specialist
Hon. Jeremy D. Fogel	Director, FJC
Emery G. Lee	Senior Research Associate, FJC
Tim Reagan	Senior Research Associate, FJC
Derek A. Webb	Law Clerk, Standing Committee
Amelia G. Yowell	Supreme Court Fellow, AO

INTRODUCTORY REMARKS

Judge Sutton called the meeting to order. He first acknowledged a number of imminent departures from the Standing Committee effective October 1, 2016: Justice Brent Dickson, Roy Englert, Judge Neil Gorsuch, and Judge Patrick Schiltz are ending their terms as members of the Standing Committee and Judge Steve Colloton is ending his term as Chair of the Appellate Rules Advisory Committee, a position that will be assumed by Judge Gorsuch. Judge Sutton offered remarks on the contributions each has made to the Committee over the years and warmly thanked them for their service.

Judge Sutton recognized three individuals for reaching milestones of service to the Committee. Rick Marcus has served for twenty years as the Associate Reporter to the Advisory Committee on Civil Rules. Dan Capra has served for twenty years as the Reporter to the Advisory Committee on Evidence Rules. And Joe Spaniol has served twenty-five years as a style consultant to the Standing Committee.

Finally, Dan Coquillette took a moment to thank Judge Sutton, whose tenure as Chair of the Standing Committee comes to an end October 1, 2016.

APPROVAL OF THE MINUTES OF THE LAST MEETING

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee approved the minutes of the January 7, 2016 meeting.**

VISIT OF CHIEF JUSTICE ROBERTS

Chief Justice Roberts and Jeffrey Minear, the Counselor to the Chief Justice, visited the Standing Committee. Chief Justice Roberts made some brief remarks. He thanked the members of the Committee for their service and acknowledged, as an alumnus of the Appellate Rules Committee himself, that such service could be a significant commitment of time. And he congratulated the Committee on the new discovery rules that went into effect on December 1, 2015, rule amendments he highlighted in his 2015 Year-End Report on the Federal Judiciary.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Sessions and Professor Capra provided the report on behalf of the Advisory Committee on Evidence Rules, which met on April 29, 2016, in Washington, D.C. Judge Sessions presented two action items and a number of information items.

Action Items

RULE 803(16) – The first matter for final approval was an amendment to Rule 803(16), the ancient documents exception to the hearsay rule, to limit its application to documents prepared before January 1, 1998. The version of Rule 803(16) published for comment would have eliminated the exception entirely. After hearing from many lawyers who continue to rely on the ancient documents exception, the Advisory Committee decided against eliminating the exception. Instead, the Advisory Committee revised its proposal to provide a cutoff date for the application of the exception. The Advisory Committee decided against leaving the exception in its current form because, unlike certain "ancient" hard copy documents, the retention of electronically-stored information beyond twenty years does not by itself suggest reliability. Judge Sessions acknowledged that any cutoff date will have a degree of arbitrariness, but also observed that electronically-stored information (known as "ESI") first started to explode around 1998 and that the ancient documents exception itself set an arbitrary time period of twenty years for its applicability.

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 803(16), as amended after publication, for submission to the Judicial Conference for final approval.**

RULE 902 (13) & (14) – The second matter for final approval was an amendment to Rule 902 to add two new subdivisions ((13) and (14)) that would allow for the authentication of certain electronic evidence through certification by a qualified person without requiring that person to testify in person. The first provision would allow self-authentication of machine-generated information upon a submission of a certification prepared by a qualified person. The second provision would provide a similar certification procedure for a copy of data taken from an electronic device, medium, or file. The proposals for new Rules 902(13) and 902(14) would have the same effect as current Rules 902(11) and 902(12), which permit a foundation witness to establish the authenticity of business records by way of certification. One Committee member suggested providing instructions on the application of the rule with the inclusion of examples in the Committee Note. After discussion, Professor Capra agreed to do that.

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee unanimously approved the proposed amendments to Rule 902 (13) and (14) for submission to the Judicial Conference for final approval.**

Information Items

Judge Sessions highlighted several information items on behalf of the Advisory Committee.

GUIDE FOR AUTHENTICATING ELECTRONIC EVIDENCE – The Standing Committee discussed the use and dissemination of the draft Guide for Authenticating Electronic Evidence. Written by Judge Grimm, Gregory Joseph, and Professor Capra, the manual would be for the use of the bench and bar and can be amended as necessary to keep pace with technological advances. The manual will be published by the Federal Judicial Center (FJC). The manual is not an official publication of the Advisory Committee itself. The members of the Standing Committee discussed the manual, noting its great value to judges and practitioners who regularly deal with the issue of authenticating electronic evidence, and expressed deep gratitude to its three authors for their work creating it and to the FJC for its assistance with publication.

POSSIBLE AMENDMENTS TO THE NOTICE PROVISIONS IN THE EVIDENCE RULES – The Advisory Committee has been considering ways to amend and make more uniform several notice provisions throughout the Federal Rules of Evidence. For the notice provision of Rule 807(b), the Residual Exception to the hearsay rule, the Advisory Committee is inclined to add a good cause exception to excuse lack of timely notice of the intent to offer statements covered under this exception. The Advisory Committee is also inclined to require that notice under 807(b) be written and not just oral. For the notice provision of Rule 404(b), the Advisory Committee is inclined to remove the requirement that the defendant in a criminal case must first specifically request that the government provide notice of their intent to offer evidence of previous crimes or other bad acts against the defendant. The Advisory Committee concluded that this requirement in Rule 404 was an unnecessary trap for the unwary lawyer and differs from most local rules. Finally, the Advisory Committee has concluded that the notice provisions in Rules 412, 413, 414, and 415 should not be changed through the Rules Enabling Act process as those rules were congressionally enacted and, in any event, are rarely used.

RESIDUAL EXCEPTION: RULE 807 – Judge Sessions reported on the symposium held in connection with the Advisory Committee's fall 2015 Chicago meeting regarding the potential elimination of the categorical hearsay exceptions (excited utterance, dying declaration, etc.) in favor of expanding the residual hearsay exception. The lawyers who testified before the Advisory Committee unanimously opposed the elimination of the hearsay exceptions. The Advisory Committee agrees that the exceptions should not be eliminated. But the Advisory Committee continues to consider expansion of the residual exception to allow the admission of reliable hearsay even absent "exceptional circumstances." The Advisory Committee included a working draft of amended Rule 807 in the agenda materials. It is planning a symposium in the fall to continue to discuss possible amendments to Rule 807, to be held at Pepperdine School of Law.

TESTIFYING WITNESS'S PRIOR INCONSISTENT STATEMENT: RULE 801(D)(1)(A) – The Advisory Committee is considering an expansion beyond what Rule 801(d)(1)(A) currently allows, which

are prior inconsistent statements made under oath during a formal proceeding. The Advisory Committee has rejected the idea of expanding the rule to cover all prior inconsistent statements, but continues to consider inclusion of prior inconsistent statements that have been video recorded.

EXCITED UTTERANCES: RULE 803(2) – The Advisory Committee considered four separate proposals to amend or eliminate Rule 803(2) on the grounds that "excited utterances" are not necessarily reliable. It determined not to take up any of the suggestions given the impact on other rules, as well as an FJC report regarding various social science studies on Rule 803(2) which provided some empirical support for the proposition that immediacy and excitedness tend to guarantee reliability.

CONVERTING CATEGORICAL HEARSAY EXCEPTIONS INTO GUIDELINES – At the suggestion of Judge Milton Shadur, the Advisory Committee considered reconstituting the categorical hearsay exceptions as standards or guidelines rather than binding rules. The Advisory Committee ultimately decided against doing so.

CONSIDERATION OF A POSSIBLE AMENDMENT TO RULE 803(22) – At the suggestion of Judge Graber, the Advisory Committee considered eliminating two exceptions to Rule 803(22): convictions from nolo contendere pleas and misdemeanor convictions. The Advisory Committee concluded that retaining each of these exceptions was warranted.

RULE 704(B) – Similarly, the Advisory Committee determined not to proceed with suggestions to eliminate Rule 704(b) or to create a specific rule regarding electronic communication and hearsay.

IMPLICATIONS OF *CRAWFORD* – The Advisory Committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*, in which the Court held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to confront and cross-examine the declarant.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Colloton and Professor Maggs provided the report on behalf of the Advisory Committee on Appellate Rules, which met on April 5, 2016, in Denver, Colorado. Judge Colloton advised that Judge Gorsuch will be the new chair of the Advisory Committee as of October 2016.

Judge Colloton reported that the Advisory Committee had four action items in the form of four sets of proposed amendments to be published this upcoming summer for which it sought the approval of the Standing Committee.

Action Items

CONFORMING AMENDMENTS TO RULES 8, 11, AND 39(E)(3) – The first set of amendments recommended for publication were amendments to Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), and 39(e)(3) to conform to the amendment to Rule of Civil Procedure 62 by revising any clauses that use the antiquated term "supersedeas bond." The language would be changed to "bond or other

security" as appropriate in each of the rules. Judge Colloton noted that the Civil Rules Committee would discuss the amendment to Rule 62 later in the meeting. He added that the Style Consultants suggested a minor edit to proposed Rule 8(b) (adding the word "a" before "stipulation" on line 16) after the publication of the agenda book materials, and that the Advisory Committee accepted the edit. The Standing Committee discussed the phrase "surety or other security provider" and whether "security provider" contained within it the term "surety" and made minor edits to the proposed amendments.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed conforming amendments to Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), and 39(e)(3), contingent on the Standing Committee's approval of the proposed amendment to Civil Rule 62 later in the meeting.**

LIMITATIONS ON THE FILING OF AMICUS BRIEFS BY PARTY CONSENT: RULE 29(A) – The proposed amendment to Rule 29(a) would allow a court to prohibit or strike the filing of an amicus brief based on party consent where the filing of the brief might cause a judge's disqualification. This amendment would ensure that local rules that forbid the filing of an amicus brief when the filing could cause the recusal of one or more judges would be consistent with Rule 29(a). Professor Coquillette observed that, as important as preserving room for local rules may be, congressional committees in the past have responded to the proliferation of local rules by urging the Rules Committee to allow them only if they respond to distinctive geographic, demographic, or economic realities that prevail in the different circuits. Judge Colloton explained that this proposed amendment is particularly relevant to the rehearing en banc process which traditionally has been decentralized and subject to local variations. He further explained that the Advisory Committee discussed and rejected expanding the exception to other types of amicus filings. The Advisory Committee made minor stylistic edits to the proposed amended rule.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Rule 29(a)**.

APPELLATE FORM 4 – Litigants seeking permission to proceed in forma pauperis are currently required by Appellate Form 4 to provide the last four digits of their Social Security number. Given the potential security and privacy concerns associated with Social Security numbers, and the consensus of the clerks of court that the last four digits of a Social Security number are not needed for any purpose, the Advisory Committee proposes to amend Form 4 by deleting this question.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Appellate Form 4**.

REVISION OF APPELLATE RULE 25 TO ADDRESS ELECTRONIC FILING, SIGNATURES, SERVICE, AND PROOF OF SERVICE – In conjunction with the publication of the proposed amendment to Civil Rule 5, and in an effort to achieve an optimal degree of uniformity, the Advisory Committee

proposes to amend Appellate Rule 25 to address electronic filing, signatures, service, and proof of service. The proposed revision generally requires all parties represented by counsel to file electronically. The Standing Committee discussed the use of "person" versus "party" throughout the proposed amended rule, as well as the use of these phrases in the companion Criminal and Civil Rules. One minor stylistic amendment was proposed. The Standing Committee decided to hold over the vote to approve publication of the proposed amendment to Rule 25 until the discussion regarding Civil Rule 5.

Information Item

Judge Colloton discussed whether Appellate Rules 26.1 and 29(c) should be amended to require additional disclosures to provide further information for judges in determining whether to recuse themselves. It is an issue that the Advisory Committee will consider at its fall meeting.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates and Professors Cooper and Marcus provided the report on behalf of the Advisory Committee on Civil Rules, which met on April 14, 2016, in Palm Beach, Florida. The Advisory Committee had four action items in the form of three sets of proposed amendments to be published this upcoming summer and the pilot project proposal.

Action Items

RULE 5 – The Advisory Committees for Civil, Appellate, Bankruptcy, and Criminal Rules have recently worked together to create uniform provisions for electronic filing and service across the four sets of rules to achieve an optimal degree of uniformity. Professor Cooper explained that the Advisory Committee for Criminal Rules wisely decided to create their own stand-alone rule, proposed Criminal Rule 49.

With regard to filing, the proposed amendment to Rule 5 requires a party represented by an attorney to file electronically unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule. It allows unrepresented parties to file electronically if permitted by court order or local rule. And it provides that an unrepresented party may be required to file electronically only by court order or by a local rule that includes reasonable exceptions. Under the amended rule, a paper filed electronically would constitute a written paper for purposes of the rules.

With regard to service, the amended rule provides that a paper is served by sending it to a registered user by filing it with the court's electronic filing system or by sending it by other electronic means if that person consents in writing. In addition, service is complete upon filing via the court's electronic filing system. Rule 5(b)(3), which allows electronic service only if a local rule authorizes it, would be abrogated to avoid inconsistency with the amended rule.

The Standing Committee discussed the use of the terms "person" and "party" throughout Rule 5 and across other sets of rules and agreed to consider this issue further after the meeting.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved the proposed amendments to Civil Rule 5 for publication for public comment**.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved for publication for public comment the proposed amendment to Appellate Rule 25 that conforms to the amended Civil Rule 5**.

RULE 23 – Judge Bates detailed six proposed changes to Rule 23, many of which concern settlements in class action lawsuits. Rule 23(c)(2)(B) extends notice consideration to a class proposed to be certified for settlement. Rule 23(e) applies the settlement procedural requirements to a class proposed to be certified for purposes of settlement. Rule 23(e)(1) spells out what information parties should give the courts prior to notice and under what circumstances courts should give notice to the parties. Rule 23(e)(2) lays out general standards for approval of the proposed settlement. Rule 23(e)(5) concerns class action objections, requiring objectors to state to whom the objection applies, requiring court approval for any payment for withdrawing an objection or dismissing an appeal, and providing that the indicative ruling procedure be used if an objector seeks approval of a payment for dismissing an appeal after the appeal has already been docketed. Finally, Rule 23(f) specifies that an order to give notice based on a likelihood of certification under Rule 23(e)(1) is not appealable and extends to 45 days the amount of time for an appeal if the United States is a party. Judge Robert Dow, the chair of the Rule 23 Subcommittee, explained the outreach efforts by the subcommittee and stated that many of the proposed changes would provide more flexibility for judges and practitioners. The Rule 23 Subcommittee, under Judge Dow's leadership and with research support from Professor Marcus, has devoted years to generating these proposed amendments, organized multiple conferences around the country with class action practitioners, and considered many other possible amendments.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved the proposed package of amendments to Civil Rule 23 for publication for public comment**.

RULE 62 – Judge Bates reported that a subcommittee composed of members of the Appellate and Civil Rules Committees and chaired by Judge Scott Matheson laid the groundwork for amendments to Rule 62. The proposed amendment includes three changes to the rule. First, Rule 62(a) extends the automatic stay from 14 days to 30 days in order to eliminate the "gap" between the 14-day automatic stay and the 28 days allowed for various post-judgment motions. Second, it recognizes the court's authority to dissolve the automatic stay or replace it with a court-ordered stay for a longer duration. Third, Rule 62(b) clarifies that security other than a bond may be posted. Another organizational change is a proposed new subsection (d) that would include language from current subsections (a) and (c). Judge Bates added that the word "automatic" would be removed from the heading of Rule 62(c) and that conforming edits will be made to the proposed rule to accommodate changes made to the companion Appellate Rules. Professor Cooper stated that Rule 65.1 would be conformed to Appellate Rules 8, 11, and 39 after the conclusion of the meeting.

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Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved the proposed amendments to Civil Rule 62 for publication for public comment**. **It also approved granting to the Civil Rules Advisory Committee the authority to make amendments to Rule 65.1 to conform it to Appellate Rules 8, 11, and 39 with the goal of seeking approval of the Standing Committee in time to publish them simultaneously in August 2016. Finally, with the amendment to Civil Rule 62 officially approved for publication, it also approved for publication the proposed amendments to Appellate Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), and 39(e)(3) which all conform to the amended Civil Rule 62**.

PILOT PROJECTS – Judge Campbell provided the report of the Pilot Projects Subcommittee, which included participants from the Standing Committee, CACM, and the FJC. The Subcommittee has collected and reviewed a lot of information, including working with focus groups of lawyers with experience with these types of discovery regimes. As a result of this work, the Advisory Committee seeks approval to forward the Mandatory Initial Discovery Pilot Project and Expedited Procedures Pilot Project to the Judicial Conference for approval. The first project would test a system of mandatory initial discovery requests to be adopted in each participating court. The second would test the effectiveness of court-wide adoption of practices that, under the current rules, have proved effective in reducing cost and delay.

Judge Campbell proceeded to detail each pilot project and asked for comments and suggestions on the proposals. For the first pilot project, Judge Campbell explained the proposed procedures. The Standing Committee then discussed whether or not all judges in a district would be required to participate in the pilot project, how to choose the districts that should participate, and how to measure the results of the pilot studies. Judge Bates noted the Advisory Committee's strong support of the project. Several Standing Committee members voiced their support as well.

For the second pilot project, many of the procedures are already available, and the purpose of the pilot project is to use education and training to achieve greater use of available procedures. Judge Campbell advised the Committee that CACM has created a case dashboard that will be available to judges via CM/ECF, and that judges will be able to use this tool to monitor the progress of their cases. The pilot would require a bench/bar meeting each year to monitor progress.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved the recommendation to the Judicial Conference of the (i) Mandatory Initial Discovery Pilot Project and (ii) Expedited Procedures Pilot Project, with delegated authority for the Advisory Committee and the Pilot Projects Subcommittee to make refinements to the projects as discussed by the Committee.**

Information Items

EDUCATIONAL EFFORTS REGARDING 2015 CIVIL RULES PACKAGE – Judge Bates outlined some of the efforts undertaken by the Advisory Committee and the FJC to educate the bench and the bar about the 2015 discovery reforms of the Rules of Civil Procedure. Among other efforts, he mentioned the production of several short videos, a 90-minute webinar, plenary sessions at

workshops for district court judges and magistrate judges, segments on the discovery reforms at several circuit court conferences, and other programs sponsored by the American Bar Association.

Judge Bates advised that a subcommittee has been formed, chaired by Judge Ericksen, to consider possible amendments to Rule 30(b)(6). Professor Cooper stated that the Advisory Committee is considering amending Rule 81(c) in light of a concern that it may not adequately protect against forfeiture of the right to a jury trial after a case has been removed from state court.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Molloy and Professors Beale and King provided the report for the Advisory Committee on Criminal Rules, which met on April 18, 2016, in Washington, D.C. He reported that the Advisory Committee had three action items in the form of three proposed amendments to be published this upcoming summer for which it sought the approval of the Standing Committee.

Action Items

RULE 49 – Judge Molloy explained the proposed new stand-alone rule governing electronic service and filing in criminal cases. The Advisory Committee determined to have a stand-alone rule for criminal cases rather than to continue the past practice of incorporating Civil Rule 5 by reference. The proposed amendments to Rule 49 track the general order of Civil Rule 5 rule and much of its language. Unlike the civil rule, Rule 49's discussion of electronic filing and service comes before nonelectronic filing and service in the new criminal rule. Both rules provide that an unrepresented party must file nonelectronically unless allowed to file electronically by court order or local rule. But one substantive difference between the two rules is that, under Civil Rule 5, an unrepresented party may be required to file electronically by court order or local rule. A second substantive difference is that all nonparties must file and serve nonelectronically in the absence of a contrary court order or local rule. This conforms to the current architecture of CM/ECF which only allows the government and the defendant to file electronically in a criminal case. Third, proposed Rule 49 contains language borrowed from Civil Rule 11(a) regarding signatures.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendments to Rules 49 for publication for public comment.**

RULE 45(C) – The proposed amendment to Rule 45(c) is a conforming amendment. It replaces the reference to Civil Rule 5 with a reference to Rule 49(a)(4)(C),(D), and (E).

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rules 45(c) for publication for public comment.**

RULE 12.4 – The proposed amendment to Rule 12.4, changes the required disclosures for statements under Rule 12.4 regarding organizational victims. It permits a court, upon the showing of good cause, to relieve the government of the burden of filing a statement identifying any organizational victim. The proposed amendments reflect changes to the Code of Judicial Conduct and require a party to file the Rule 12.4(a) statement within 28 days after the defendant's initial appearance. The Standing Committee briefly discussed similar potential changes to the Appellate Rules regarding disclosure of organizational victims. And the Advisory Committee discussed removing the word "supplemental" from the title and body of Rule 12.4(b) in order to avoid potential confusion.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendments to Rule 12.4 for publication for public comment.**

Information Items

Judge Molloy reviewed several of the pending items under consideration by the Advisory Committee. The Cooperator Subcommittee continues to consider the problem of risk of harm to cooperating defendants and the kinds of procedural protections that might alleviate this problem. The Subcommittee includes representatives from the Advisory Committee, Standing Committee, CACM, and the Department of Justice. The Advisory Committee has formed subcommittees to consider suggested amendments to Criminal Rule 16 dealing with discovery in complex criminal cases and Rule 5 of the Rules Governing Section 2255 Proceedings regarding petitioner reply briefs. And in response to an op-ed by Judge Jon Newman, the Advisory Committee will consider the wisdom of reducing the number of peremptory challenges in federal trials.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Sandra Ikuta and Professors Gibson and Harner presented the report on behalf of the Advisory Committee on Bankruptcy Rules, which met on March 31, 2016, in Denver, Colorado. The Advisory Committee had nine action items, and sought final approval for three of the items: Rule 1001; Rule 1006, and technical changes to certain official forms.

Action Items

RULE 1001 – The first item was a request for final approval of Rule 1001, dubbed the "civility rule" by Judge Ikuta, which was published in August 2015 to track changes to Civil Rule 1. Judge Ikuta explained that the Advisory Committee considered the comments submitted, but made no changes to the published version of the amended rule.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendments to Rule 1001 for submission to the Judicial Conference for final approval.**

RULE 1006 – The second item was a proposed change to Rule 1006(b), also published for comment in August 2015. The rule explains how a person filing a petition in bankruptcy can pay

the filing fee in installments, as allowed by statute. The proposed amendment clarified that courts may not refuse to accept petitions or summarily dismiss a case because the petitioner failed to make an initial installment payment at the time of filing (even if such a payment was required by local rule). Judge Ikuta said that the Advisory Committee considered the comments submitted, but made no changes to the published version of the amended rule.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendments to Rule 1006 for submission to the Judicial Conference for final approval.**

TECHNICAL CHANGES TO OFFICIAL FORMS – Judge Ikuta next described the Advisory Committee's recommendation for retroactive approval of technical changes to nine official forms. She explained that the Judicial Conference at its March 2016 meeting approved a new process for making technical amendments to official bankruptcy forms. Under the new process, the Advisory Committee makes the technical changes, subject to retroactive approval by the Committee and report to the Judicial Conference. Judge Sutton thanked Judge Ikuta for developing the new streamlined approval process for technical changes to official bankruptcy forms.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed technical changes to Official Forms 106E/F, 119, 201, 206, 206E/F, 309A, 309I, 423, and 424, for submission to the Judicial Conference for final approval.**

Judge Ikuta reported that the Advisory Committee had six additional action items in the form of six sets of proposed amendments to be published this upcoming summer for which it sought the approval of the Committee.

Before focusing on these specific recommendations, however, Judge Ikuta first suggested that the Committee adopt a procedure for more systematically coordinating publication and approval of amendments that affect multiple rules across different advisory committees. The chair recommended that the Rules Committee Support Office lead the coordination effort over the next year and that the Committee then evaluate whether further refinement of the process is needed. Judge Ikuta next explained and sought approval for a package of conforming amendments:

RULE 5005(A)(2) – Judge Ikuta said that the proposed amendments to Rule 5005(a)(2) would make the rule consistent with the proposed amendment to Civil Rule 5(d)(3).

RULES 8002(C), 8011(A)(2)(C), OFFICIAL FORM 417A, RULE 8002(B), RULES 8013, 8015, 8016, 8022, OFFICIAL FORM 417C, PART VIII APPENDIX, AND RULE 8017 – Judge Ikuta next discussed proposed changes to Rules 8002(c), 8011(a)(2)(C), and Official Form 417A; Rule 8002(b) (regarding timeliness of tolling motions); Rules 8013, 8015, 8016, 8022, Official Form 417C, and Part VIII Appendix (regarding length limits), and Rule 8017 (regarding amicus filings). The rule and form changes were proposed to conform to pending and proposed changes to the Federal Rules of Appellate Procedure.

RULE 8002(A)(5) – The new subdivision (a)(5) to Rule 8002 includes a provision similar to FRAP 4(a)(7) specifying when a judgment or order is "entered" for purposes of appeal.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the package of conforming amendments to Rules 5005(a)(2), 8002(C), 8011(a)(2)(C), Official Form 417C, Part VIII Appendix, Rule 8017, and Rule 8002(a)(5) for publication for public comment.**

RULES 3015 AND 3015.1 – Judge Ikuta explained that the Advisory Committee published the first version of the plan form and nine related rule amendments in August 2013. The Advisory Committee received a lot of comments, made significant changes, and republished in 2014. During the second publication, the Advisory Committee again received many comments, including one comment signed by 144 bankruptcy judges who opposed a national official form for chapter 13 plans. Late in the second comment period, the Advisory Committee received a comment proposing that districts be allowed to opt out of the national plan if their local plan form met certain requirements. Many of the bankruptcy judges who opposed a national plan form supported the "opt-out" proposal.

At its fall 2015 meeting, the Advisory Committee approved the national plan form and related rule amendments, but voted to defer submitting those items for final approval pending further consideration of the opt-out proposal. The Advisory Committee reached out to bankruptcy interest groups, made refinements to the opt-out proposal, and received support from most interested parties, including many of the 144 opposing judges.

The proposed amendment to Rule 3015 and new Rule 3015.1 would implement the opt-out provision. Rule 3015 would require that the national chapter 13 plan form be used unless a district adopts a local district-wide form plan that complies with requirements set forth in proposed new Rule 3015.1. The Advisory Committee determined that a third publication period would allow for full vetting of the opt-out proposal, but it recommended a shortened three-month public comment period because of the narrow focus of the proposed change. To avoid confusion, the Advisory Committee recommended that opt-out rules be published in July 2016, a month earlier than the rules and forms to be published in August 2016.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendments to Rule 3015 and 3015.1 for publication for public comment.**

RULE 8006 – The Advisory Committee proposed to amend subdivision (c) of Rule 8006 to allow a bankruptcy court, bankruptcy appellate panel, or district court to file a statement in support of or against a direct appeal certification filed by the parties.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendment to Rule 8006 for publication for public comment.**

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RULE 8018.1 –This new rule would help guide district courts in light of the Supreme Court's *Stern v. Marshall* trilogy of cases (*Stern*, *Arkison* and *Wellness*). Proposed Rule 8018.1 would address a situation where the bankruptcy court has mistakenly decided a *Stern* claim by allowing the district court to treat the bankruptcy court's erroneous final judgment as proposed findings of fact and conclusions of law to be decided de novo without having to remand the case to the bankruptcy court.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed Rule 8018.1 for publication for public comment.**

RULE 8023 – The proposed amendment to Rule 8023 would add a cross-reference to Rule 9019 to remind the parties that when they enter a settlement and move to dismiss an appeal, they may first need to obtain the bankruptcy court's approval of the settlement first.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendment to Rule 8023 for publication for public comment.**

OFFICIAL FORM 309F – Judge Ikuta said that the Advisory Committee recommended publication of amendments to five official bankruptcy forms. The first of the five forms was a proposed amendment to Official Form 309F. The form currently requires that a creditor who wants to assert that certain corporate and partnership debts are not dischargeable must file a complaint by a specific deadline. A recent district court decision evaluated the relevant statutory provisions and concluded that the form is incorrect and that no deadline should be imposed. The Advisory Committee agreed that the statute is ambiguous, and therefore proposed that Official Form 309F be amended to avoid taking a position.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendment to Official Form 309F for publication for public comment.**

OFFICIAL FORMS 25A, 25B, 25C, AND 26 – Four forms, Official Forms 25A, 25B, 25C (the small business debtor forms), and 26 (Periodic Report Regarding Value, Operations, and Profitability) were renumbered as 425A, 425B, 425C and 426 to conform with the remainder of the Forms Modernization Project, and revised to be easier to understand and more consistent with the Bankruptcy Code.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendment to Official Forms 25A, 25B, 25C, 26 for publication for public comment.**

Information Items

Judge Ikuta, Professor Elizabeth Gibson, and Professor Michelle Harner discussed the Advisory Committee's two information items. The first item was about the status of the Advisory Committee's proposal to add a new subdivision (h) to Rule 9037 in response to a suggestion

from CACM. Judge Ikuta and Professor Gibson explained that although the Advisory Committee approved an amendment, it decided to delay its recommendation for publication until the Advisory Committees for Appellate, Criminal and Civil Rules can decide whether to add a similar procedure to their privacy rules. Professor Harner summarized the second information item regarding the Advisory Committee's decision not to recommend any changes at this time to Rule 4003(c) in response to a suggestion.

REPORT OF THE ADMINISTRATIVE OFFICE

STRATEGIC PLAN FOR THE FEDERAL JUDICIARY – Rebecca Womeldorf discussed the Executive Committee's *Strategic Plan for the Federal Judiciary* which lays out various goals and priorities for the federal judiciary. She invited members to review this report and offer any input or feedback that they might have to her or Judge Sutton for inclusion in communications back to the Executive Committee.

LEGISLATIVE REPORT – There are bills currently pending in the House of Representatives and Senate intended to prevent proposed Criminal Rule 41 from becoming effective. Members of the Rules Committee have discussed this proposed rule with various members of Congress to respond to their concerns and explain the purpose and limited scope of the proposed rule.

CONCLUDING REMARKS

Judge Sutton thanked the Reporters for all their impressive work and Rebecca Womeldorf and the Rules Committee Support Office for helping to coordinate the meeting. Professor Coquillette thanked Judge Sutton again for all of his work as Chair of the Standing Committee over the past four years. Judge Sutton concluded the meeting. The Standing Committee will next meet in Phoenix, Arizona, on January 3–4, 2017.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

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TAB 3A

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MEMORANDUM

To: Advisory Committee on Appellate Rules

From: Gregory E. Maggs, Reporter

Date: September 24, 2016

Subject: Items 08-AP-A, 11-AP-C, and 15-AP-D: Amending Rule 3(a) and 3(d) to Address the Electronic Filing and Service of a Notice of Appeal

These items concern Appellate Rules 3(a) and (d). Rule 3(a) requires an appellant to file a notice of appeal with the district clerk. Rule 3(d) requires the district clerk to serve the notice. The question for the Advisory Committee is whether these Rules require revision in light of the attached recently proposed amendments to Appellate Rule 25 concerning electronic filing and service. This memorandum examines each sentence of Rules 3(a) and 3(d) and then presents a discussion draft showing recommended changes.

Appellate Rule 3(a) currently contains two sentences. The first sentence of Rule 3(a) says: "An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4." No amendment to this sentence is necessary because it does not specify how the appellant must file the notice. The proposed amendments to Appellate Rule 25(a)(2), as published for public comment, will determine when parties will file papers electronically or non-electronically.

The second sentence of Appellate Rule 3(a) says: "At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d)." At first, it might seem that this rule should not apply if the appellant files the notice of appeal electronically. But sometimes it may apply. Under Appellate Rule 3(d), the district clerk must serve the notice of appeal. The clerk will follow the revised provisions in Appellate Rule 25 on whether to send the notice electronically or non-electronically. If the appellee is not represented by counsel (and local rules or a court order do not permit the appellee to use the electronic filing system), then clerk must mail the notice to the appellee. Accordingly, even if the appellant files the notice electronically, the appellant should provide the clerk with a paper copy to serve on the appellee. The second sentence of Appellate Rule 3(a) therefore does not require amendment. That said, the Committee might consider amending the second sentence of Rule 3(a) by adding the word "nonelectronic" before the word copies to prevent confusion about this point. In addition, the Committee could explain the point in a Committee Note.

Rule 3(d) requires several minor amendments in light of the new rules on electronic filing and service. The first sentence of Rule 3(d)(1) says: "The district clerk must serve notice of the filing of a notice of appeal by mailing a copy to each party's counsel of record—excluding the appellant's—or, if a party is proceeding pro se, to the party's last known address." The first clause of the sentence requires revision because it directs the district clerk to make service by mail. This requirement is inconsistent with Appellate Rule 25. Accordingly, I suggest revising Rule 3(d)(1) by substituting the word "sending" for "mailing." The sentence would require the clerk to serve the notice by "sending" it, but would not specify the means. The clerk would follow the revised provisions in Rule 25 in deciding whether to send the notice electronically or nonelectronically.

The second sentence of Rule 3(d)(1) says: "When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant, either by personal service or by mail addressed to the defendant." My suggested revision is to delete the second clause of this sentence. Again, the clerk would follow the revised provisions in Rule 25 in deciding whether to send the notice electronically or nonelectronically.

The third sentence of Rule 3(d)(1) says: "The clerk must promptly send a copy of the notice of appeal and of the docket entries—and any later docket entries—to the clerk of the court of appeals named in the notice." This sentence does not require revision. As written, the rule does not require the clerk to send the copy by mail, and nothing prohibits the clerk from sending the copy electronically.

The fourth sentence of Rule 3(d)(1) says: "The district clerk must note, on each copy, the date when the notice of appeal was filed." This sentence does not appear to require revision. A clerk could continue to note the date on a paper copy, and nothing would prevent the clerk from noting the date on an electronic copy.

Rule 3(d)(2) does not appear to require revision. It does not concern the method of filing or serving notice.

Rule 3(d)(3)'s first sentence also does not require revision because it also does not concern the method of filing or serving notice. Rule 3(d)(3)'s second sentence says: "The clerk must note on the docket the names of the parties to whom the clerk mails copies, with the date of mailing." Given that the clerk might serve parties either electronically or by mail, this sentence needs to be revised. I suggest rewriting the rule to say: "The clerk must note on the docket the names of the parties to whom the clerk ~~mails~~ sends copies, with the date of ~~mailing~~ sending." As revised, the rule would apply regardless of whether the clerk sends the copies electronically or nonelectronically.

Below is a discussion draft showing all of the proposed revisions suggested in the foregoing paragraphs:

1 **Rule 3. Appeal as of Right—How Taken**

2 **(a) Filing the Notice of Appeal.**

3 (1) An appeal permitted by law as of right from a district court to a court
4 of appeals may be taken only by filing a notice of appeal with the district clerk
5 within the time allowed by Rule 4. At the time of filing, the appellant must furnish
6 the clerk with enough [nonelectronic][1] copies of the notice to enable the clerk to
7 comply with Rule 3(d).

8 * * *

9 **(d) Serving the Notice of Appeal.**

10 (1) The district clerk must serve notice of the filing of a notice of appeal
11 by ~~mailing~~ sending[2] a copy to each party's counsel of record—excluding the
12 appellant's—or, if a party is proceeding pro se, to the party's last known address.
13 When a defendant in a criminal case appeals, the clerk must also serve a copy of
14 the notice of appeal on the defendant~~, either by personal service or by mail~~
15 ~~addressed to the defendant~~.[3] The clerk must promptly send a copy of the notice of
16 appeal and of the docket entries—and any later docket entries—to the clerk of the
17 court of appeals named in the notice. The district clerk must note, on each copy,

---

[1] The word "nonelectronic" is not essential but it might make the rule clearer. Even if the appellant files the notice of appeal electronically, the appellant must provide the district clerk with enough paper copies of the notice to serve on any appellee whom the district court may not serve electronically.

[2] The word "mailing" is replaced with "sending." The clerk will follow the revised provisions in Rule 25 in deciding whether to send the notice electronically or nonelectronically.

[3] I recommended deleting this phrase because it would prohibit electronic service. Deleting the phrase would not prevent the clerk from serving the notice either by mail or by personal service.

18 the date when the notice of appeal was filed.[4]

19 (2) If an inmate confined in an institution files a notice of appeal in the
20 manner provided by Rule 4(c), the district clerk must also note the date when the
21 clerk docketed the notice.

22 (3) The district clerk's failure to serve notice does not affect the validity of
23 the appeal. The clerk must note on the docket the names of the parties to whom
24 the clerk ~~mails~~ sends copies, with the date of ~~mailing~~ sending.[5] Service is
25 sufficient despite the death of a party or the party's counsel.

26 ADVISORY COMMITTEE NOTE

27 Amendments to Subdivisons (a) and (d) change the words "mail" and
28 "mailing" to "send" and "sending" to make electronic filing and service possible.
29 Other rules determine when a party or the clerk may or must send a notice
30 electronically or non-electronically. [In Subdivision (a), the word "nonelectronic"
31 is added to clarify that, even if the appellant files the notice of appeal
32 electronically, the appellant must provide the district clerk with enough paper
33 copies of the notice to serve on any appellee whom the district court may not
34 serve electronically.] Subdivision (d)(1) no longer specifies the manner in which
35 the clerk must serve the defendant in a criminal case. Other rules will determine
36 whether the clerk serves the notice electronically or non-electronically.

Attachment

Proposed Revision of Appellate Rule 25 as published for public comment in Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of

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[4] When this rule was written, the clerk would note the date of filing on paper copies. But nothing in the text of the rule would prevent the clerk from adding the date of filing to electronic copies. A court's electronic filing system may do that automatically.

[5] Substituting the words "sends" and "sending" for "mails" and "mailing" will permit electronic service.

Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure 27-37 (Aug. 2016)

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Proposed Revision of Appellate Rule 25 as published for public comment in Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure 27-37 (Aug. 2016)

1 **Rule 25. Filing and Service**

2 **(a) Filing.**

3 (1) **Filing with the Clerk.** A paper required or
4 permitted to be filed in a court of appeals must
5 be filed with the clerk.

6 (2) **Filing: Method and Timeliness**.

7 (A) **Nonelectronic Filing**

8 ~~(A)~~(i) **In general.** ~~Filing~~For a paper
9 not filed electronically, filing
10 may be accomplished by mail
11 addressed to the clerk, but filing
12 is not timely unless the clerk
13 receives the papers within the
14 time fixed for filing.

15 ~~(B)~~(ii) **A brief or appendix.** A brief or
16 appendix not filed electronically

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17 is timely filed, however, if on or
18 before the last day for filing, it is:
19 ~~(i)~~• mailed to the clerk by ~~First-~~
20 ~~Class Mail~~first-class mail,
21 or other class of mail that is
22 at least as expeditious,
23 postage prepaid; or
24 ~~(ii)~~• dispatched to a third-party
25 commercial carrier for
26 delivery to the clerk within
27 3 days.
28 ~~(C)~~(iii) **Inmate filing.** A paper ~~filed~~not
29 filed electronically by an inmate
30 confined in an institution is
31 timely if deposited in the
32 institution's internal mailing
33 system on or before the last day

12b-000061

34 for filing. If an institution has a
35 system designed for legal mail,
36 the inmate must use that system
37 to receive the benefit of this rule.
38 Timely filing may be shown by a
39 declaration in compliance with
40 28 U.S.C. § 1746 or by a
41 notarized statement, either of
42 which must set forth the date of
43 deposit and state that first-class
44 postage has been prepaid.
45 ~~(D) **Electronic filing.** A court of appeals may~~
46 ~~by local rule permit or require papers to be~~
47 ~~filed, signed, or verified by electronic~~
48 ~~means that are consistent with technical~~
49 ~~standards, if any, that the Judicial~~
50 ~~Conference of the United States establishes.~~

51 ~~A local rule may require filing by electronic~~
52 ~~means only if reasonable exceptions are~~
53 ~~allowed. A paper filed by electronic means~~
54 ~~in compliance with a local rule constitutes a~~
55 ~~written paper for the purpose of applying~~
56 ~~these rules.~~
57 (B) **Electronic Filing and Signing.**
58 (i) **By a Represented Person—**
59 **Generally Required; Exceptions.**
60 A person represented by an
61 attorney must file electronically,
62 unless nonelectronic filing is
63 allowed by the court for good
64 cause or is allowed or required by
65 local rule.
66 (ii) **By an Unrepresented Person—**
67 **When Allowed or Required.** A

12b-000063

68 person not represented by an
69 attorney:
70 • may file electronically only if
71 allowed by court order or by
72 local rule; and
73 • may be required to file
74 electronically only by court
75 order, or by a local rule that
76 includes reasonable
77 exceptions.
78 (iii) **Signing**. The user name and
79 password of an attorney of
80 record, together with the
81 attorney's name on a signature
82 block, serves as the attorney's
83 signature.

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84 (iv) **Same as Written Paper**. A
85 paper filed electronically is a
86 written paper for purposes of
87 these rules.
88 (3) **Filing a Motion with a Judge.** If a motion
89 requests relief that may be granted by a single
90 judge, the judge may permit the motion to be
91 filed with the judge; the judge must note the
92 filing date on the motion and give it to the clerk.
93 (4) **Clerk's Refusal of Documents.** The clerk must
94 not refuse to accept for filing any paper
95 presented for that purpose solely because it is not
96 presented in proper form as required by these
97 rules or by any local rule or practice.
98 (5) **Privacy Protection.** An appeal in a case whose
99 privacy protection was governed by Federal Rule
100 of Bankruptcy Procedure 9037, Federal Rule of

101 Civil Procedure 5.2, or Federal Rule of Criminal
102 Procedure 49.1 is governed by the same rule on
103 appeal. In all other proceedings, privacy
104 protection is governed by Federal Rule of Civil
105 Procedure 5.2, except that Federal Rule of
106 Criminal Procedure 49.1 governs when an
107 extraordinary writ is sought in a criminal case.

108 **(b) Service of All Papers Required.** Unless a rule
109 requires service by the clerk, a party must, at or before
110 the time of filing a paper, serve a copy on the other
111 parties to the appeal or review. Service on a party
112 represented by counsel must be made on the party's
113 counsel.

114 **(c) Manner of Service.**

115 (1) ~~Service~~Nonelectronic service may be any of the
116 following:

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117 (A) personal, including delivery to a
118 responsible person at the office of counsel;
119 (B) by mail; or
120 (C) by third-party commercial carrier for
121 delivery within 3 days~~; or~~.
122 ~~(D) by electronic means, if the party being~~
123 ~~served consents in writing.~~
124 (2) ~~If authorized by local rule, a party may use the~~
125 ~~court's transmission equipment to make~~
126 ~~electronic service under Rule 25(c)(1)(D)~~
127 Electronic service may be made by sending a
128 paper to a registered user by filing it with the
129 court's electronic-filing system or by using other
130 electronic means that the person consented to in
131 writing.
132 (3) When reasonable considering such factors as the
133 immediacy of the relief sought, distance, and

12b-000067

134 cost, service on a ~~party~~person must be by a
135 manner at least as expeditious as the manner
136 used to file the paper with the court.
137 (4) Service by mail or by commercial carrier is
138 complete on mailing or delivery to the carrier.
139 Service by electronic means is complete on
140 ~~transmission~~filing or sending, unless the
141 ~~party~~person making service is notified that the
142 paper was not received by the ~~party~~person
143 served.
144 **(d) Proof of Service.**
145 (1) A paper presented for filing must contain either
146 of the following if it was served other than
147 through the court's electronic-filing system:
148 (A) an acknowledgment of service by the
149 person served; or

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150 (B) proof of service consisting of a statement
151 by the person who made service certifying:
152 (i) the date and manner of service;
153 (ii) the names of the persons served; and
154 (iii) their mail or electronic addresses,
155 facsimile numbers, or the addresses of
156 the places of delivery, as appropriate
157 for the manner of service.
158 (2) When a brief or appendix is filed by mailing or
159 dispatch in accordance with
160 Rule 25(a)~~(2)(B)~~(2)(A)(ii), the proof of service
161 must also state the date and manner by which the
162 document was mailed or dispatched to the clerk.
163 (3) Proof of service may appear on or be affixed to
164 the papers filed.
165 **(e) Number of Copies.** When these rules require the
166 filing or furnishing of a number of copies, a court may

12b-000069

167 require a different number by local rule or by order in

168 a particular case.

Committee Note

The amendments conform Rule 25 to the amendments to Federal Rule of Civil Procedure 5 on electronic filing, signature, service, and proof of service. They establish, in Rule 25(a)(2)(B), a new national rule that generally makes electronic filing mandatory. The rule recognizes exceptions for persons proceeding without an attorney, exceptions for good cause, and variations established by local rule. The amendments establish national rules regarding the methods of signing and serving electronic documents in Rule 25(a)(2)(B)(iii) and 25(c)(2). The amendments dispense with the requirement of proof of service for electronic filings in Rule 25(d)(1).

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MEMORANDUM

To: Advisory Committee on Appellate Rules

From: Gregory E. Maggs, Reporter

Date: September 19, 2016

Subject: Item 12-AP-D: Treatment of appeal bonds under Civil Rule 62 and Appellate Rule 8

I. Introduction

At its April 2016 meeting, the Advisory Committee proposed changes to Appellate Rule 8 and other rules to eliminate the term "supersedeas bond." In June 2016, the Standing Committee then made minor additional alterations to Appellate Rule 8 and published the proposed revised rule for public comment. This memorandum concerns two developments that occurred after the Standing Committee's meeting. First, Professor Ed Cooper, Reporter for the Civil Rules Advisory Committee, noticed a discrepancy between the proposed revision to Appellate Rule 8(d) and a corresponding provision in Civil Rule 65.1. Second, inquiry into ways of addressing this discrepancy revealed a separate internal discrepancy in Rule 8(d). This memorandum describes both problems and identifies possible ways of addressing them. The Committee, however, may wish to postpone any formal action on these matters until receiving public comments on the published version of Rule 8(d) in February 2017.

II. Background

As discussed in previous meetings, Civil Rule 62(b) currently requires appellants to post a "supersedeas bond" to stay a judgment pending an appeal. The Civil Rules Advisory Committee has proposed changing this rule to allow an appellant to post a "bond or other security." It also has proposed conforming amendments to several other Civil Rules, including Civil Rule 65.1. In April 2016, the Appellate Rules Advisory Committee proposed various changes to Rule 8 and other Appellate Rules to make them conform to the proposed amendments to the Civil Rules. The Standing Committee has now published all of the proposed changes for public comment.

III. Inconsistency Between Appellate Rule 8 and Civil Rule 65.1

Attached to this memorandum are copies of the published versions of revised Appellate Rule 8 and Civil Rule 65.1. Reporter Cooper has pointed out that lines 26-27 of Appellate Rule

8 use this phrase: "its liability on the bond or undertaking." In contrast, line 11 of Civil Rule 65.1 uses this phrase: "its liability on the bond, undertaking, or other security." Reporter Cooper suggests the Appellate Rules Advisory Committee should add the words "or other security" to Rule 8(b) to make it match Civil Rule 65.1. Including these words would not only make Appellate Rule 8(b) consistent with Civil Rule 65.1, but also would make the second clause of the first sentence of Rule 8(b) more consistent with the first clause of Rule 8(b) (lines 21-22). The following text shows the suggested correction to the version of Rule 26.1 published for public comment:

19 **(b) Proceeding Against a Surety or Other Security**
20 **Provider.** If a party gives security in the form of a
21 bond, other security, a stipulation, or other
22 undertaking with one or more sureties or other
23 security providers, each provider submits to the
24 jurisdiction of the district court and irrevocably
25 appoints the district clerk as its agent on
26 whom any papers affecting its liability on
27 the bond, ~~or~~ undertaking, or other security may be served. On motion, a
28 security provider's liability may be enforced
29 in the district court without the necessity of an
30 independent action. The motion and any notice that
31 the district court prescribes may be served on the
32 district clerk, who must promptly mail a copy to each
33 security provider provider whose address is known.

IV. Rule 8(b)'s Internal Discrepancy Concerning the Term "Stipulation"

In addressing the problem above another discrepancy became apparent: the first clause of the first sentence of Rule 8(d) [lines 20-23 above] mentions four forms of security: "a bond, other security, a stipulation, or other undertaking." But the second clause [lines 23-27 above], even with the proposed correction, would only mention "a bond, undertaking, or other security" and not a "stipulation." The Advisory Committee appears to have four options regarding this inconsistency:

Option (1): Delete the word "stipulation" in line 21. This option would make the two clauses of Rule 8(d)'s first sentence consistent with each other and would not create an inconsistency with Rule 65.1. The possibility of pursuing this option is not entirely new. At its April 2016 meeting, the Advisory Committee discussed the possibility of deleting the word "stipulation" but did not agree to take this action. The Committee appeared to be worried about the unknown consequences of deleting the word "stipulation." No reported cases under Rule 8(b) involve "stipulations," and the leading treatises do not explain how stipulations might serve as security.

Option (2): Add the word "stipulation" to line 27, so that the second clause of the first sentence would refer to "the bond, stipulation, undertaking, or other security." This action would make the first and second clauses of the first sentence of Rule 8(d) consistent. But it would make the second clause inconsistent with Civil Rule 65.1. The Committee may wish to consult with the Civil Rules Advisory Committee before taking this step.

Option (3): Rephrase the second clause of the first sentence of Rule 8(b) to refer simply to "the security" instead re-listing all the forms of security in the first clause of the sentence. Under this option for revision, Rule 8(b) would read as follows:

19 **(b) Proceeding Against a Surety or Other Security**
20 **Provider.** If a party gives security in the form of a
21 bond, other security, a stipulation, or other
22 undertaking with one or more sureties or other
23 security providers, each provider submits to the
24 jurisdiction of the district court and irrevocably
25 appoints the district clerk as its agent on
26 whom any papers affecting its liability on
27 the security ~~bond or undertaking~~ may be served. On motion, a
28 security provider's liability may be enforced
29 in the district court without the necessity of an
30 independent action. The motion and any notice that
31 the district court prescribes may be served on the
32 district clerk, who must promptly mail a copy to each
33 security provider provider whose address is known.

Under this option, the generic term "security" would cover all the forms of security in the first clause without eliminating any of them. This option arguably also cures the discrepancy between Rule 65.1 and Rule 8(b) noticed by Reporter Cooper because the second clause would be broad enough to cover everything in Rule 65.1.

Option (4): Make no revision to Rule 8(b). The argument for this option is that the inconsistency between the first and second clauses of the first sentence of Rule 8(b) exists in the current version of Rule 8(b) and has not caused any known problems.[1] The published version of Rule 8(b) perpetuates the issue but does not make it any worse.

V. Conclusion

The Committee may wish to express its sense now how it would like to address the two problems above. Alternatively, the Committee may wish to postpone any formal action on these matters until receiving public comments on the published version of Rule 8(d) in February 2017.

Attachment

Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure 21-23, 239-240 (August 2016)

[1] The first sentence of Rule 8(b) currently says: "If a party gives security in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the district court and irrevocably appoints the district clerk as the surety's agent on whom any papers affecting the surety's liability on the bond or undertaking may be served." The first clause mentions a "stipulation" but the second clause does not.

TAB 4B

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Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure 21-23, 239-240 (August 2016)

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

1 **Rule 8. Stay or Injunction Pending Appeal**

2 **(a) Motion for Stay.**

3 (1) **Initial Motion in the District Court.** A party
4 must ordinarily move first in the district court for
5 the following relief:

6 * * * * *

7 (B) approval of a ~~supersedeas~~bond or other
8 security provided to obtain a stay of
9 judgment; or

10 * * * * *

11 (2) **Motion in the Court of Appeals; Conditions**
12 **on Relief.** A motion for the relief mentioned in
13 Rule 8(a)(1) may be made to the court of appeals
14 or to one of its judges.

15 * * * * *

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

12b-000080

16 (E) The court may condition relief on a party's
17 filing a bond or other ~~appropriate~~security in
18 the district court.

19 **(b) Proceeding Against a Surety or Other Security**
20 **Provider.** If a party gives security in the form of a
21 bond, other security, ~~or~~ a stipulation, or other
22 undertaking with one or more sureties or other
23 security providers, each ~~surety~~provider submits to the
24 jurisdiction of the district court and irrevocably
25 appoints the district clerk as ~~the surety's~~its agent on
26 whom any papers affecting ~~the surety's~~its liability on
27 the bond or undertaking may be served. On motion, a
28 ~~surety's~~security provider's liability may be enforced
29 in the district court without the necessity of an
30 independent action. The motion and any notice that
31 the district court prescribes may be served on the

To conform to line 11 of Civil Rule 65.1, the highlighted phrase should say: "its liability on the bond, undertaking, or other security."

32 district clerk, who must promptly mail a copy to each

33 ~~surety~~security provider whose address is known.

34 * * * * *

Committee Note

The amendments to subdivisions (a)(1)(B) and (b) conform this rule with the amendment of Federal Rule of Civil Procedure 62. Rule 62 formerly required a party to provide a "supersedeas bond" to obtain a stay of the judgment and proceedings to enforce the judgment. As amended, Rule 62(b)(2) allows a party to obtain a stay by providing a "bond or other security."

Rule 65.1. Proceedings Against a Surety or Other Security Provider

Whenever these rules (including the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions) require or allow a party to give security, and security is given through a bond, other security, or other undertaking, with one or more sureties or other security providers, each ~~surety~~provider submits to the court's jurisdiction and irrevocably appoints the court clerk as its agent for receiving service of any papers that affect its liability on the bond, ~~or~~ undertaking, or other security. The ~~surety's~~security provider's liability may be enforced on motion without an independent action. The motion and any notice that the court orders may be served on the court clerk, who must promptly mail a copy of each to every ~~surety~~security provider whose address is known.

12b-000083

Committee Note

Rule 65.1 is amended to reflect the amendments of Rule 62. Rule 62 allows a party to obtain a stay of a judgment "by providing a bond or other security." Limiting Rule 65.1 enforcement procedures to sureties might exclude use of those procedures against a security provider that is not a surety. All security providers are brought into Rule 65.1 by these amendments.

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TAB 5A

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MEMORANDUM

DATE: September 20, 2016

TO: Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

SUBJECT: Item No. 08-AP-R: Rule 26.1 & 29(c) disclosure requirements

I. Introduction

This item concerns proposed revisions to Appellate Rules 26.1 and 29(c), which require parties and amici curiae to make certain disclosures. Part II describes the current versions of these rules and reviews the impetus for possibly changing them. Part III presents updated discussion drafts for the Advisory Committee to consider at the October meeting. Part IV then identifies a number of specific questions that the Advisory Committee may wish to resolve.

II. Background

Appellate Rule 26.1 requires any "nongovernmental corporate party" to make certain disclosures when filing briefs and other documents so that the judges assigned to the case can determine whether to recuse themselves. The rule currently says:

1 **Rule 26.1. Corporate Disclosure Statement**
2 **(a) Who Must File.** Any nongovernmental corporate party to a proceeding in
3 a court of appeals must file a statement that identifies any parent corporation and
4 any publicly held corporation that owns 10% or more of its stock or states that
5 there is no such corporation.
6 **(b) Time for Filing; Supplemental Filing.** A party must file the Rule 26.1(a)
7 statement with the principal brief or upon filing a motion, response, petition, or
8 answer in the court of appeals, whichever occurs first, unless a local rule requires
9 earlier filing. Even if the statement has already been filed, the party's principal
10 brief must include the statement before the table of contents. A party must
11 supplement its statement whenever the information that must be disclosed under

12 Rule 26.1(a) changes.

13 **(c) Number of Copies.** If the Rule 26.1(a) statement is filed before the
14 principal brief, or if a supplemental statement is filed, the party must file an
15 original and 3 copies unless the court requires a different number by local rule or
16 by order in a particular case.

Appellate Rule 29(c)(1) and (5) also require certain disclosures in amicus briefs for the same purpose. These provisions currently provide:

1 **Rule 29. Brief of an Amicus Curiae**

2 * * *

3 **(c) Contents and Form.** An amicus brief must comply with Rule 32. In
4 addition to the requirements of Rule 32, the cover must identify the party or
5 parties supported and indicate whether the brief supports affirmance or reversal.
6 An amicus brief need not comply with Rule 28, but must include the following:

7 (1) if the amicus curiae is a corporation, a disclosure statement like
8 that required of parties by Rule 26.1;

9 * * *

10 (5) unless the amicus curiae is one listed in the first sentence of
11 Rule 29(a), a statement that indicates whether:

12 (A) a party's counsel authored the brief in whole or in part;

13 (B) a party or a party's counsel contributed money that was
14 intended to fund preparing or submitting the brief; and

15 (C) a person—other than the amicus curiae, its members, or
16 its counsel—contributed money that was intended to fund
17 preparing or submitting the brief and, if so, identifies each such
18 person;

19 * * *

Local rules in some circuits currently impose disclosure requirements that go beyond those found in Appellate Rules 26.1 and 29(c). In addition, judges may need additional information in order to comply with their ethical duties to recuse themselves in certain situations. In March 2015, Professor Dan Capra prepared the attached memorandum on the subject, and

proposed a number of possible amendments for discussion.

The Advisory Committee has discussed Prof. Capra's proposed amendments to Rule 26.1 and 29(c) at its last several meetings. The Criminal Rules Advisory Committee also has been working on the subject of disclosure statements. At its Spring 2016 meeting, it proposed revisions to Criminal Rule 12.4, which is the analogue of Appellate Rule 26.1. The revisions to Criminal Rule 12.4 address the identification of organizational victims of crimes and the filing of supplemental disclosure statements. The Standing Committee discussed the Criminal Rules Advisory Committee's proposed revisions to Rule 12.4 at its June 2016 meeting and, in August 2016, published them for public comment. An excerpt from the report of the Criminal Rules Advisory Committee on to the Standing Committee is attached.

II. Revised Discussion Drafts of Appellate Rule 26.1 and Rule 29(c)

The discussion drafts below are modified versions of the discussion drafts that first appeared in Prof. Capra's memorandum. These modified drafts reflect (1) changes discussed at the Advisory Committee's October 2015 and April 2016 meetings; (2) proposed modifications to make Rule 26.1 conform to the proposed revisions of Criminal Rule 12.4; and (3) several suggested additional revisions. Footnotes indicate the locations of the changes in the discussion drafts since the April 2016 meeting.

1 **Rule 26.1. ~~Corporate~~ Disclosure Statement**

2 **(a) Who Must File; <u>What Must Be Disclosed</u>.** Any ~~nongovernmental~~

3 ~~corporate~~ party to a proceeding in a court of appeals must file a statement that

4 lists:[1]

5 <u>(1)</u> any parent[2] corporation<u>,</u> and any publicly held ~~corporation~~ <u>entity,</u>[3] ~~that~~

---

[1] The April 2016 discussion draft said: "~~Any nongovernmental corporate~~ <u>Except for an individual or a governmental unit, any</u> party to a proceeding in a court of appeals must file a statement that lists . . . ." As recounted in the draft minutes of the April 2016 meeting, the Advisory Committee decided to eliminate the "except" clause in Rule 26.1(a). The Committee believed that non-corporate parties should make the disclosures listed in Rule 26.1(a)(2)-(4). Non-corporate parties—like many corporate parties—simply will have nothing to disclose under Rule 26.1(a)(1).

[2] Earlier discussion drafts would have required parties to list any "affiliated" corporation in addition to any parent corporation, adopting a requirement of a Fourth Circuit local rule. But at the April 2016 meeting, the Advisory Committee decided to eliminate the requirement of

6 ~~owns 10% or more of its stock~~ that has a 10% or greater ownership interest in
7 the party or states that there is no such corporation or entity;
8 (2) the names of all judges in the matter[4] and in any related [state][5] matter;
9 (3) the names of all lawyers and legal organizations that have appeared or
10 are expected to appear for the party in the matter [and any related matter][6]; and
11 (4) the names of all witnesses who have testified on behalf of the party in
12 the matter [and any related matter].[7]
13 **(b) Time ~~for~~ to File~~ing~~; ~~Supplemental~~ Later Filing.**[8] A party must file the

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disclosing affiliated corporations because of the difficulty of defining the term "affiliated."

[3] The Appellate Rules do not define the term "publicly held entity." Professor Capra's memorandum suggests that the term might apply to certain trade associations and limited partnerships. One of the questions in Part IV below is whether the lack of a definition should preclude this proposed change.

[4] At the April 2016 meeting, the Advisory Committee decided to use the term "matter" instead of "case" or "proceeding" in Rule 26.1(a)(2)-(4) because some appeals come directly from federal agencies. The term "matter" is broad enough to cover any kind of previous proceeding.

[5] The previous discussion draft did not include brackets around the word "state" in this discussion draft. I have added the brackets because the Advisory Committee may wish to delete the word "state." The deletion would change the proposed revision to require disclosure of the names of the judges in any related matter, whether it was a federal or state matter.

[6] I have added the bracketed words "and any related matter." Including this phrase would make the disclosure requirement in Rule 26.1(a)(3) similar to the disclosure requirement in Rule 26.1(a)(2).

[7] As recounted in the draft minutes of the April 2016 meeting, the Advisory Committee discussed deleting the proposed requirement of disclosing the names of witnesses because of its potential burden. The Committee, however, did not reach a conclusion on the issue. In addition, I have added the bracketed words "and any related matter" to make the disclosure requirement in Rule 26.1(a)(4) similar to the disclosure requirement in Rule 26.1(a)(2).

[8] The previous discussion drafts of Rule 26.1 did not propose any changes to Rule 26.1 (b). The proposed changes in this discussion draft would partially conform Rule 26.1(b) to the

14 Rule 26.1(a) statement with the principal brief or upon filing a motion, response,
15 petition, or answer in the court of appeals, whichever occurs first, unless a local
16 rule requires earlier filing. Even if the statement has already been filed, the party's
17 principal brief must include the statement before the table of contents. A party
18 must ~~supplement~~ file a statement promptly if the party learns of any additional
19 required information or any changes in required information ~~upon its statement~~
20 ~~whenever the information that must be disclosed under Rule 26.1(a) changes~~.
21 * * *
22 **(d) Organizational Victim in a Criminal Case**.[9] [In a criminal case,] unless
23 the government shows good cause, it must file a statement identifying any
24 organizational victim of the alleged criminal activity. If the organizational victim
25 is a corporation,[10] the statement must also disclose the information required by
26 Rule Rule 26.1(a)(1) to the extent it can be obtained through due diligence.
27 **(e) Bankruptcy Proceedings.**[11] In a bankruptcy proceeding, the debtor or the

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recently published proposed revision of Criminal Rule 12.4(b). Further discussion of this matter appears in Part IV of this memorandum.

[9] The language of the current discussion draft is copied from the recently published proposed revision of Criminal Rule 12.4(a)(2). Further discussion of this matter appears in Part IV of this memorandum. The April 2016 discussion draft of Appellate Rule 26.1(d) said: "In a criminal case if an organization is a victim of [the alleged] criminal activity, the government must file a statement identifying the victim, unless the government shows good cause for not complying with this requirement. If the organizational victim is a corporation or publicly held entity, the statement must also disclose the information required by Rule 26.1(a)(1) to the extent it can be obtained through due diligence."

[10] This proposal (following Criminal Rule 12.4) refers only to corporations. In contrast, the proposed revision of Rule 26.1(a)(1) refers to both corporations and "publicly held entities." The Committee may wish to reconcile this discrepancy. Further discussion of this matter appears in Part IV of this memorandum.

[11] The Bankruptcy Rules do not currently require these disclosures and the Bankruptcy Rules Advisory Committee is not currently contemplating any changes to disclosure requirements. Further discussion of this matter appears in Part IV of this memorandum.

28 trustee of the bankruptcy estate—or the appellant if the debtor or trustee is not a
29 party—must file a statement that lists:
30 (1) any debtor not named in the caption;
31 (2) the members of each committee of creditors;
32 (3) the parties to any adversary proceeding; and
33 (4) any active participants in a contested matter.
34 **(f) Intervenors.** A person who wants to intervene[12] must file a statement that
35 discloses the information required by Rule 26.1.
36 [**(g) Local Rules.** A local rule may not impose greater or lesser disclosure
37 requirements on a party.][13]
38 COMMITTEE NOTE
39 Under federal law and ethical standards, judges must decide whether to recuse
40 themselves from participating in cases for various reasons. Prior to this
41 amendment Rule 26(a) required corporations to disclose only "any parent
42 corporation and any publicly held corporation that owns 10% or more of its
43 stock." Local rules of court have attempted to help judges determine whether
44 recusal is necessary by requiring the parties to make additional disclosures. The
45 amendment to subdivision (a) follows the lead of these local rules by requiring the
46 listed additional disclosures. The change to subdivison (b) establishes that a
47 supplemental filing is required not only when information that has been disclosed
48 changes, but also when a party learns of additional information that is subject to

---

[12] At its April 2016 meeting, the Advisory Committee approved the phrase "a person who wants to intervene," which comes from Rule 15.1(d). The October 2015 draft had used the word "intervenors."

[13] This suggested provision is new. One of the reasons for amending Rule 26.1 is to bring it in line with local rules. Barring local rules from increasing or decreasing the required disclosures could further this goal. Further discussion of this matter appears in Part IV of this memorandum.

49 the disclosure requirements.[14] Subdivision (d) requires disclosure of
50 organizational victims in criminal cases because a judge might have an interest in
51 one of the victims. But the disclosure requirement is relaxed in situations in
52 which disclosure would be overly burdensome to the government. For example,
53 thousands of corporations might be the victims of a criminal antitrust violation,
54 and the government may have great difficulty identifying all of them. Subdivision
55 (e) is based on local rules and requires disclosures unique to bankruptcy cases.
56 Subdivision 26.1(f) imposes disclosure requirements on persons who want to
57 intervene because their intervention, if allowed, might require a judge's recusal.
58 The amendments to this rule change only the disclosure requirements and do not
59 change the standards for recusal.[15] [In order to make federal appellate practice
60 more uniform, Subdivision 26.1(g) prohibits local rules from increasing or
61 decreasing disclosure requirements.][16]

62 **Rule 29. Brief of an Amicus Curiae**

63 * * *

64 (c) **Contents and Form.** * * * An amicus brief need not comply with Rule
65 28, but must include the following:

66 (1) ~~if the amicus curiae is a corporation,~~ a disclosure statement with
67 the information required of parties by Rule 26.1(a)(1), unless the amicus
68 curiae is an individual or governmental unit;

69 * * *

---

[14] This sentence is new. It explains the purpose of the proposed amendment to Rule 26.1(b) on supplemental filings. As explained above, this proposed amendment follows the proposed revision of Criminal Rule 12.4(b).

[15] The last sentence of this note is new. At the April 2016 meeting, the Advisory Committee concluded that the Advisory Committee Note should indicate that the Committee is not trying to change existing recusal requirements by mandating additional disclosures.

[16] This sentence would explain the purpose of the proposed new Rule 26.1(g).

70 (5) unless the amicus curiae is one listed in the first sentence of Rule
71 29(a), a statement that indicates whether:
72 (A) a party's counsel authored the brief in whole or in part;
73 (B) a party or a party's counsel contributed money that was
74 intended to fund preparing or submitting the brief;
75 (C) a person— other than the amicus curiae, its members, or its
76 counsel— contributed money that was intended to fund preparing or
77 submitting the brief and, if so, identifies each such person; and
78 (D) a lawyer or legal organization authored the brief in whole or in
79 part, and, if so, identifies each such lawyer or legal organization.[17]
80 COMMITTEE NOTE
81 Subdivision (c)(1) conforms this rule with the amendment to Rule 26.1(a).
82 Subdivision (c)(5)(D) expands the disclosure requirements to include disclosures
83 about the lawyers and legal organizations who participated in writing an amicus
84 brief because a judge also may need this information in order to decide whether
85 recusal is required.

IV. Issues for Discussion at the October 2016 Meeting

At the October 2016 meeting, the Advisory Committee may wish to consider the following issues about the discussion drafts above.

A. Questions about the Proposed Revision to Rule 26.1(a)

1. Should efforts to amend Rule 26.1(a) continue?

Although the Committee has discussed the text of proposed revisions of Rule 26.1(a), it has not formally decided the fundamental question of whether to recommend any revision. Even at this late date, the Committee still might decide that the benefit of requiring additional disclosures does not justify the effort required to amend Rule 26.1(a) and to coordinate the

[17] At the April 2016 meeting, the Advisory Committee had no objection to the phrasing of Rule 29(c)(5)(D).

changes with the other Advisory Committees. The current language of Rule 26.1(a) is almost identical to the current version of Civil Rule 7.1(a), Criminal Rule 12.4(a)(1), and Bankruptcy Rules 7007.1(a) and 8012(a) . The other Advisory Committees are not currently considering revisions to these provisions. (The Criminal Rules Advisory Committee did not propose amendments to Criminal Rule 12.4(a)(1) when it recommended the recently published proposed revisions of other parts of Criminal Rule 12.4.)

2. Should the term "publicly held corporation" be changed to "publicly held entity" in Rule 26.1(a)(1)?

The discussion draft of Rule 26.1(a)(1) proposes changing the term "publicly held corporation" to "publicly held entity." Making this change may cause some uncertainty because the Appellate Rules do not define the term "publicly held entity." Professor Capra's memorandum suggests that the term might apply to certain trade associations and limited partnerships.

If the Committee approves the proposal to change the word "corporation" to "entity" in Rule 26.1(a) then it also may wish to add a definition. Although I could find no specific definition of "publicly held entity" in federal law, various legal treatises use the term. A typical definition is: "A publicly held entity is an entity whose interests are traded in a public exchange." John M. Cunningham & Vernon R. Proctor, Drafting Limited Liability Company Operating Agreements § 3.02 (2016). In addition, the Committee also may wish to change the term "corporation" to "entity" in Rule 26.1(d).

3. Should the phrase "any related state matter" be changed to "any related matter" in Rule 26.1(a)(2)?

The discussion draft of Rule 26.1(a)(2) proposes requiring a party to disclose the names of the judges in "any related state matter." The Advisory Committee may wish to delete the word "state" so that the provision would require disclosure of the names of the judges in any related matter, whether it is a federal or state matter.

4. Should the proposed provision of disclosure of witnesses be included in Rule 26.1(a)(4)?

At the April 2016 meeting, several members of the Advisory Committee suggested that the additional disclosure requirements in Rule 26.1(a) might be overly burdensome to litigants. These members questioned whether the benefits of additional disclosures were actually worth the cost. As recounted in the draft minutes of the April 2016 meeting, the Advisory Committee discussed deleting the proposed requirement of disclosing the names of witnesses in Rule

26.1(a)(4) because of its potential burden. The Advisory Committee did not reach a conclusion on the issue. Disclosure might be easy when a case contains a record of a complete trial because such a record usually contains a list of the witnesses who testified. But it might be more difficult in other cases.

5. How should the Advisory Committee coordinate revisions of Rule 26.1(a) with the other Advisory Committees?

As noted above, Civil Rule 7.1(a), Criminal Rule 12.4(a)(1), and Bankruptcy Rules 7007.1(a) and 8012(a) are very similar to Appellate Rule 26.1(a). If the Advisory Committee decides to propose changes Rule 26.1(a), it presumably should have a plan to coordinate changes with the other Advisory Committees. Anticipating this possibility, the Criminal Rules Advisory Committee's report to the Standing Committee says: "Efforts to coordinate the changes will continue if the Appellate Rules Committee decides to move forward with an amendment on this subject [i.e., disclosures under Rule 26.1(a)]." One possibility would be to create a joint subcommittee.

B. Questions about the Proposed Revision to Rule 26.1(b)

The Criminal Rules Advisory Committee has proposed changes to Criminal Rule 12.4(b), which the Standing Committee has now published for public comment (see the second attachment to this memorandum). The changes concern supplemental disclosure statements. The changes are as follows:

1 **Criminal Rule 12.4**

2 * * *

3 **(b) Time ~~for~~ <u>to</u> File~~ing~~; ~~Supplemental~~ <u>Later</u> Filing.** A party must:

4 (1) file the Rule 12.4(a) statement <u>within 28 days after</u>~~upon~~ the

5 defendant's initial appearance; and

6 (2) ~~promptly~~ file a ~~supplemental~~ statement <u>at a later time promptly if the</u>

7 <u>party learns of any additional required information or any changes in required</u>

8 <u>information</u>~~upon any change in the information that the statement requires~~.

The Criminal Rules Advisory Committee has explained the proposed amendments as follows:

> The proposed amendment to Rule 12.4(b) makes two changes. It specifies that the time for making the disclosures is within 28 days after the initial appearance, and

it makes clear that a supplemental filing is required not only when information that has been disclosed changes, but also when a party learns of additional information that is subject to the disclosure requirements.

The discussion drafts of Rule 26.1 that the Advisory Committee considered at previous meetings did not address supplemental disclosure statements. Assuming that the Advisory Committee would want to follow the Criminal Rules Advisory Committee on this matter, I have now addressed supplemental filing statements in the discussion draft of Rule 26.1(b) above.

The discussion draft of Rule 26.1(b) copies the language in the proposed revision of Criminal Rule 12.4(b)(2) regarding the requirement of filing supplemental statements. But the proposed revision does not attempt to conform Appellate Rule 26.1 to the first change in Criminal Rule 12.4(b)(1), which now requires the initial disclosure statement to be filed within 28 days after the initial appearance. Instead, the time for filing under Rule 26.1(b) remains the time when the first brief or other listed document is filed. I see no reason that the Appellate Rules and Criminal Rules must be uniform on this matter given the differences between trial and appellate procedure.

The Advisory Committee may wish to decide whether this is the correct approach. In addition, the Committee may wish to decide whether to propose this change to the Standing Committee even if the Committee does not recommend revisions to other parts of Rule 26.1.

C. Questions about the Proposed Revision to Rule 26.1 (d)

In the discussion draft above, Rule 26.1(d) now follows the language of the recently published revised version of Criminal Rule 12.4(a)(2) (see the second attachment to this memorandum). The text of the previous discussion draft of Rule 26.1(d) is shown in footnote 9. The substance is not much different, but Criminal Rule 12.4(a)(2) is slightly less detailed.

As with the proposed revision to Rule 26.1(b), the Advisory Committee may wish to decide whether this is the correct approach. In addition, the Committee may wish to decide whether to propose this change to the Standing Committee even if it does not recommend revisions to other parts of Rule 26.1.

D. Questions about the Proposed Revision to Rule 26.1(d)

Bankruptcy Rules 7007.1(a) and 8012(a) require corporate disclosure statements in bankruptcy cases. These Bankruptcy Rules are very similar to the current version of Appellate Rule 26.1. A possible argument against the proposed revisions in the discussion draft of Rule 26.1(d) above is that the Bankruptcy Rules Advisory Committee is not currently considering

changes to Rules 7007.1 and 8012. Although Prof. Capra included a proposed version of Rule 26.1(d) in his memorandum, he advised the Committee: "The lack of movement in the Bankruptcy Rules Committee probably counsels some caution in proceeding at the appellate level, as one would think that the Bankruptcy Rules would be the primary source for defining who is a party in a bankruptcy proceeding for purposes of the disclosure rules." Based on this concern, the Advisory Committee may wish to consider whether it would be more appropriate to allow the Bankruptcy Rules Advisory Committee to take the lead on this matter.

E. Questions about the Proposed Revision to Rule 26.1(g)

As described in Professor Capra's memorandum, various local rules require disclosures that are not currently required by Rule 26.1. One of the purposes of revising Rule 26.1 is to incorporate those local rules to make federal practice uniform. To prevent future disunity, the newly suggested Rule 26.1(g) in the discussion draft would prohibit local rules from imposing greater or lesser disclosure requirements on a party. The Committee has not previously consider this question but may wish to do so at it October 2016 meeting.

Attachments:

1. Memorandum from Prof. Daniel J. Capra to the Advisory Committee on Appellate Rules, Subject: Item No. 08-AP-R (March 31, 2015)

2. Excerpt from the May 14, 2016 Report of the Advisory Committee on Criminal Rules (Revised July 6, 2016), as reprinted in Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure 248, 249, 251-253 (Aug. 2016)

MEMORANDUM

To: Advisory Committee on Appellate Rules

From: Daniel J. Capra

Re: Item No. 08-AP-R (disclosure requirements)

Date: March 31, 2015

This item focuses on local circuit provisions that impose disclosure requirements broader than those requirements found in the Appellate Rules. The Committee has been discussing whether any of the additional requirements in these local rules should be considered for inclusion in the Appellate rules. At its last meeting, the Committee considered several areas in which certain circuits had imposed additional disclosure requirements. These included:

- Judge's connection with a prior or current participant in the litigation (including lawyers);
- Disclosures in criminal appeals;
- Disclosures in bankruptcy appeals;
- Disclosure by intervenors;
- Disclosure of an ownership interest other than stock;
- Disclosure of ownership interests held other than by publicly traded corporations;
- Disclosure by public entities not in the corporate form;
- Disclosure of affiliates; and
- Greater disclosure by amici.

In addition, at the Standing Committee meeting, one of the members asked the Committee to consider whether the parties should be required to disclose the witnesses in any proceeding in the lower court.

This memo provides, for discussion purposes only, some drafting language for adding disclosure requirements in the areas that the Committee has discussed. Part One of this memo sets forth background and a brief discussion of the cost/benefit analysis attendant to disclosure requirements. Part Two sets forth the drafting possibilities, and discusses some considerations

that the Committee might take into account in determining whether to pursue an amendment to the existing disclosure requirements in the Appellate Rules.[1] Part Three sets forth a draft, for discussion purposes only, on how the Appellate Rules would have to be amended to accommodate all the colorable additional disclosure requirements that have been discussed by the Committee.

I. Rules on Disclosure, and the Cost-Benefit Analysis:

A. Appellate Rules

Two Appellate Rules deal with disclosure. **Rule 26.1(a) provides:**

> **(a) Who Must File.** Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.

Appellate Rule 29(c)(1) provides disclosure requirements for amici. It is essentially an absorptive provision: it imposes the same disclosure requirements as are imposed on a party:

> **(c) Contents and Form.** * * * An amicus brief need not comply with Rule 28, but must include the following:
>
> > (1) If the amicus curiae is a corporation, a disclosure statement like that required of parties by Rule 26.1; [2]

[1] The memo does not treat all the options for greater disclosure provided by the local rules. The options treated are those that received at least preliminarily positive comments in memos prepared by Subcommittee members, or as reflected in the minutes from the last meeting. It also treats the one suggestion made by a Standing Committee member when the topic of disclosure rules was raised at the June Standing Committee meeting.

[2] The Appellate Rules Committee has previously considered a suggestion that Rule 29(c)(1) should be clarified because the language "like that required" might be thought to mean that the disclosure requirements for amici might be somehow different from the disclosure requirements for parties. But the Committee decided not to proceed with any such amendment, on the ground that the language was intended to and does mean that the disclosure requirements for parties and amici are coextensive.

B. Statute

These disclosure rules --- and any consideration of whether to expand upon them --- must be evaluated in light of the statute that predominantly regulates recusal and disqualification decisions. That provision is **28 U.S.C.§ 455**, which provides in pertinent part as follows:

§ 455. Disqualification of justice, judge, or magistrate judge

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

> **(c)** A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.[3]

In addition, **28 U.S.C. § 47** provides that "'[n]o judge shall hear or determine an appeal from the decision of a case or issue tried by him."

C. Cost-Benefit Analysis for Disclosure Rules

The general requirement of section 455 --- recusal should occur where impartiality might reasonably be questioned --- is broad and fuzzy enough that almost any scenario of a judge's relationship to a matter is at least potentially one that would call for disclosure. For example, if a corporate party has an affiliate, and the judge has an ownership interest in the affiliate, one can probably spin a factual situation in which the relationship is so close, or the effect on the affiliate is so profound, that impartiality might reasonably be questioned. A review of the local rules that require greater disclosure, conducted by Cathie Struve's research assistant in 2013, in fact concluded that every single one of the additional requirements could facilitate a judge's recusal decision. That is not an irrational conclusion given the breadth of the "impartiality might reasonably be questioned" standard.

So disclosure rules provide a benefit in informing the judge's recusal decisions. But of course these rules impose costs on the parties; investigation and disclosure of all the required details (affiliates, participating law firms, trade associations, etc.) adds to the expense of litigation. Thus, it would seem that a disclosure requirement should not be added simply because it might in some attenuated circumstance give a judge relevant information for recusal. It is hard to know where to draw the line, but if you have to spin an unlikely scenario to conclude that the information could be relevant to a recusal decision, then perhaps the disclosure should not be required. Another factor is the type of information demanded --- the more it is readily at hand, the more acceptable the disclosure requirement.

[3] Canon 3(C) of the Code of Conduct for United States Judges also governs disqualifications, but it is substantively identical to section 455.

II. Areas for Additional Disclosure

A. Judge's Connection With a Prior or Current Participant in the Litigation

The local rules in some circuits focus on two types of connections between a judge and a participant in the litigation: 1) a judge's prior participation in the case; and 2) lawyers who have previously appeared in the case. Both these connections are certainly in some cases relevant to disqualification/recusal considerations. They will be discussed in turn.

1. Prior Participation

Section 47 requires recusal if the judge tried the case or issue. Section 455(b)(2) provides that a judge must recuse himself where he served as lawyer in the matter. Section 455(b)(3) provides that if the judge was previously employed by the government, he must recuse if he participated as "counsel, advisor, or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case or controversy." Finally, section 455(b)(1) requires recusal when the judge has "personal knowledge of disputed evidentiary facts concerning the proceeding" and section 455(b)(2) requires recusal where the judge has been a material witness.

But while the statute does specifically regulate a judge's prior participation, the factors listed cannot easily be made the subject of disclosure requirements. Some of these connections would be probably be beyond a party's ability to know. For example, how is a party to know that the judge in his former life as a government lawyer "expressed an opinion concerning the merits of a particular case or controversy"? And how is a party to know whether the judge has personal knowledge of disputed evidentiary facts? It is probably for this reason that the local rules providing additional disclosure provisions on this subject are focused on the judge's actual participation in the proceeding or in related state proceedings.

The Eleventh Circuit provision might be a good model for discussion. As incorporated into Rule 26.1, and amended slightly to cover related state court proceedings, it would read like this:

> **(a) Who Must File.** Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that:
>
> > **(1)** identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation;
> >
> > **(2)** provides a list of the trial judges in the proceeding and in any related state proceeding.

2. Lawyer Participation

Under section 455(b)(2), a judge must recuse if "a lawyer with whom he previously practiced law" was involved with the case during their association. A judge must also recuse if he or his spouse, or anyone within three degrees of relationship of either of them, or a spouse of such a person, is an attorney in a proceeding. Given the connection between participating lawyers and grounds for recusal --- and the possibility that a judge has family members who are lawyers within the specified degree of relationship --- it is probably not surprising that five circuits seek information about lawyers' participation in the case. The cost of such a disclosure would not seem high as it should be information that the party has fairly easily at its disposal.

The most direct and comprehensive language on the subject is found in Federal Circuit Rule 47.4. As added to Rule 26.1, it would look like this:

> **(a) Who Must File.** Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that:
>
> > **(1)** identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation;
> >
> > **(2)** lists the trial judges in the proceeding and in any related state proceeding;
> >
> > **(3)** lists the names of all law firms and the partners and associates that have appeared or are expected to appear for the party in the proceeding;

B. Disclosures in Criminal Appeals

The disclosure provisions in the Criminal Rules are found in Rule 12.4. Rule 12.4(a)(1) is identical to Appellate Rule 26.1. Rule 12.4(a)(2) is an additional provision that requires the government to file a statement identifying an organizational victim, and also requires the government to disclose the ownership information required by Rule 12.4(a)(1) "to the extent it can be obtained through due diligence."[4]

[4] That language is a recognition that the government might not have ready access about whether the victim has a parent or 10% or more ownership by a public company. In contrast, parties would clearly have that information, so a due diligence standard is unnecessary in Rule 26.1(a). It should be noted, however, that adding

The minutes of the last Committee meeting describe a discussion led by Judge Chagares, who stated that some attorneys were under the impression that the Rule 26.1 disclosure requirements do not apply to criminal appeals. Judge Chagares concluded that an amendment to Rule 26.1 that would specify that it applies to criminal appeals would be unnecessary, because the rule plainly does apply, and because the Committee's work on the question had sensitized Circuit Clerks as to its applicability.

Therefore, the only question remaining for criminal cases is whether to add a provision regarding disclosure of organizational victims. It would seem that the need for disclosure is not dramatic. There are not many appeals involving corporate victims, and recoveries by organizational victims in criminal cases would seldom be so substantial as to raise an inference of impartiality.

On the other hand, there is no apparent explanation for having disclosure requirements as to victims in criminal trials, but not in criminal appeals. So if the Committee were to proceed with an amendment, it would have the positive effect of providing uniformity across the two sets of rules.

There is a drafting problem, however. A provision about an organizational victim does not fit well within the structure of the existing rule. It can't be efficiently incorporated into subdivision (a), and it is probably not worth it to make it subdivision (b) and move everything else down, as renumbering (or relettering) imposes transaction costs. The best solution is to add a subdivision at the end of the rule.

If Criminal Rule 12.4(a)(2) were added to the Appellate Rules, it might look like this (in a rule that adds, in building block fashion, to what has been added above).

> **(a) Who Must File.** Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that:
>
> > **(1)** identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation;
> >
> > **(2)** lists the trial judges in the proceeding and in any related state proceeding;
> >
> > **(3)** lists the names of all law firms and the partners and associates that have appeared or are expected to appear for the party in the proceeding;
>
> **(b) Time for Filing; Supplemental Filing.**

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certain disclosure requirements may raise a question of what kind of effort a party must undertake to find the information – in which case the addition of a due diligence standard might be warranted.

* * *

(c) Number of Copies.

* * *

(d) Organizational Victim in a Criminal Case. In a criminal case, if an organization is a victim of [the alleged][5] criminal activity, the government must file a statement identifying the victim. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 26.1(a)(1) to the extent it can be obtained through due diligence.

C. Disclosures in Bankruptcy Appeals

As Judge Chagares noted at the last meeting, not every person or entity involved in a bankruptcy proceeding is treated as a party for purposes of disclosure issues. The Code of Conduct Committee's Advisory Opinion No. 100 states that the following participants in a bankruptcy proceeding have a sufficient relationship to that proceeding to be considered parties for purposes of the disclosure rules: 1) the debtor; 2) members of the creditors' committee; 3) the trustee; 4) parties to an adversary proceeding; and 5) participants in a contested matter.

The clarification provided by Advisory Opinion No. 100 is not currently set forth in either the Appellate Rules or the Bankruptcy Rules on disclosure. In 2008, the Codes of Conduct Committee suggested that the Bankruptcy Rules Committee "may wish to consider the special conflict screening issues related to bankruptcy proceedings, especially the potential need for corporate parent information in adversary proceedings and contested matters."[6] But the Bankruptcy Rules Committee has never adopted, and is not currently considering, any change to its disclosure rule. The lack of movement in the Bankruptcy Rules Committee probably counsels some caution in proceeding at the appellate level, as one would think that the Bankruptcy Rules would be the primary source for defining who is a party in a bankruptcy proceeding for purposes of the disclosure rules.

That said, if the Committee were interested in clarifying who the "parties" are in a bankruptcy, then it may wish to consider language along the lines of the Third Circuit Rule. As applied to the working draft as it has been set forth thus far, the language might be added as follows (it only works as a separate subdivision):

---

[5] "Alleged" is used in the Criminal Rules. There is an argument that "alleged" is not the right term at the appellate level.

[6] Letter from Chair of Codes of Conduct Committee to Chair of Rules Committee, May 8, 2008, at 2.

(a) Who Must File. Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that:

(1) identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation;

(2) lists the trial judges in the proceeding and in any related state proceeding;

(3) lists the names of all law firms and the partners and associates that have appeared or are expected to appear for the party in the proceeding;

(b) Time for Filing; Supplemental Filing.

* * *

(c) Number of Copies.

* * *

(d) Organizational Victim in a Criminal Case. In a criminal case, if an organization is a victim of [the alleged] criminal activity, the government must file a statement identifying the victim. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 26.1(a)(1) to the extent it can be obtained through due diligence.

(e) Bankruptcy Proceedings. In a bankruptcy proceeding, the debtor or the trustee of the bankruptcy estate --- or the appellant if the debtor or trustee is not a party --- must file a statement identifying:

- the debtor, if not named in the caption;
- the members of the creditors' committees;
- the parties to an adversary proceeding; and
- the active participants in a contested matter.

The Eleventh Circuit adds a requirement that "other entities whose stock or equity value may be substantially affected by the outcome of the proceedings" must be disclosed. But this language seems pretty fuzzy. There could be a lot of collateral damage in a bankruptcy proceeding and it would often be difficult to determine at the time disclosure is required what

kind of effect there will be. And it will certainly be difficult to determine if the effect may be "substantial" --- whatever that means. So it is probably better to avoid such fuzzy language.

D. Disclosure of an Ownership Interest Other Than Stock

Currently the only financial interest in a party or amici that must be disclosed is the parent corporation and "any public corporation that owns 10% or more of its stock." There are local rules that require disclosure of ownership interests other than stock. For example, the D.C. Circuit requires disclosure of any publicly held company "that has a 10% or greater ownership interest (such as stock or partnership shares)." Because recusal rules focuses on financial interest, it should make no difference whether the ownership interest is in stock or in some other unit.

An amendment that would expand the disclosure requirement beyond stock ownership would be straightforward. As applied to our already-altered Rule 26.1(a), it might look like this:

> **(a) Who Must File.** Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that:
>
> > **(1)** identifies any parent corporation and any publicly held corporation that ~~owns 10% or more of its stock~~ **has a 10% or greater ownership interest in the party,** or states that there is no such corporation;
> >
> > **(2)** lists the trial judges in the proceeding and in any related state proceeding; and
> >
> > **(3)** lists the names of all law firms and the partners and associates that have appeared or are expected to appear for the party in the proceeding.

E. Disclosure of Ownership Interests Held Other Than By Publicly Traded Corporations

Currently the 10% ownership disclosure requirement applies only if that interest is held by a publicly traded corporation. The Fourth Circuit recognizes that the financial interest that might be relevant to recusal is not limited to ownership by a publicly traded corporation. That is, nothing in 28 U.S.C. § 455 distinguishes between businesses organized as corporations and those organized in another way, such as a real estate investment trust.

Neal Katyal suggested, in his memo to the Committee prepared for the Subcommittee, that it is unlikely that parties are using the term "corporation" to avoid disclosure where the ownership interest is held by an entity in another form. That is a plausible conclusion, but it would seem hard to answer that question empirically with any certainty. In any event, if the Committee were to decide to amend the rule to expand disclosure requirements beyond corporate ownership, that amendment might look like this:

> **(a) Who Must File.** Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that:
>
> > **(1)** identifies any parent corporation and any publicly held ~~corporation~~ **entity** that ~~owns 10% or more of its stock~~ has a 10% or greater ownership interest in the party, or states that there is no such ~~corporation~~ **entity**;
> >
> > **(2)** lists the trial judges in the proceeding and in any related state proceeding; and
> >
> > **(3)** lists the names of all law firms and the partners and associates that have appeared or are expected to appear for the party in the proceeding.

F. Disclosure By Public Entities Not in the Corporate Form

As discussed at the previous meeting, the rule limiting the disclosure requirements to corporations is hard to square with the fact that a judge's ownership interest in an entity doing business other than in the corporate form --- such as an LLC or a trade association --- could in some cases be grounds for recusal. That is to say, for recusal purposes there is no substantive distinction between corporations and other non-governmental entities. The financial-interest prohibition in 28 U.S.C. § 455(b)(4) applies to all "parties" to a proceeding, and is not dependent on corporate form.

Neal Katyal stated in his previous memo on the subject that it is unlikely that parties believe they are exempt from disclosure requirements when the entity is not in corporate form. Again, this conclusion is very difficult to address empirically. If the Committee does decide to expand the parties' (and, by absorption, amici's) disclosure requirements to include entities other than in corporate form, the rule could be amended as follows:

> **(a) Who Must File.** ~~Any nongovernmental corporate~~ **Except for governmental units and individuals, any** party to a proceeding in a court of appeals must file a statement that:
>
> > **(1)** identifies any parent corporation and any publicly held ~~corporation~~ entity that ~~owns 10% or more of its stock~~ has a 10% or greater ownership interest in the party, or states that there is no such ~~corporation~~ entity;
> >
> > **(2)** lists the trial judges in the proceeding and in any related state proceeding; and
> >
> > **(3)** lists the names of all law firms and the partners and associates that have appeared or are expected to appear for the party in the proceeding.

It should be noted that if a change is made to require entities other than corporations to disclose, there will have to be conforming changes to Rule 29 (as discussed below) and to Rule 28(a)(1), which states that the brief must include "a corporate disclosure statement if required by Rule 26.1." The conforming change would be easy: just delete the word "corporate."

G. Disclosure of Affiliates

When Rule 26.1 was amended in 1998, the Advisory Committee specifically declined to require disclosure of a party's affiliates. The Committee Note explains that "disclosure of a party's subsidiaries or affiliated corporations is ordinarily unnecessary" because "the possibility is quite remote that the judge might be biased by the fact that the judge and the litigant are co-owners of the same corporation." Nothing has been presented to indicate that the interests supporting disclosure have somehow become more compelling since 1998. Moreover, the Committee on Codes of Conduct has advised that a judge need not automatically recuse simply because the judge owns stock in a subsidiary and the parent corporation is a party.[7] If that is so, then it follows that recusal is not required when the judge has an ownership interest in a party's corporate affiliate.

When it comes to affiliates, the question is whether the judge's interest in the affiliate "will be substantially affected by the outcome of the proceeding" under section 455(b)(4). The affiliate connection in general is more attenuated than when the judge has an ownership interest in a parent of the party, and so it is questionable whether affiliate status should be elevated to the same status as parent-sub, i.e., automatic reporting of the relationship. As stated above, many relationships that the judge might have --- financial, familial, etc. --- might in extreme cases be substantially affected by the outcome of the proceeding. But at some point the burdens of disclosure outweigh the benefits to judges, because the information disclosed will so rarely lead to recusal.

Nonetheless, if the Committee did wish to include corporate affiliation in the disclosure requirements, the rule amendment might look like this:

> **(a) Who Must File.** ~~Any nongovernmental corporate~~ **Except for governmental units and individuals, any** party to a proceeding in a court of appeals proceeding must file a statement that:
>
> > **(1)** identifies any parent **or affiliated** corporation and any publicly held ~~corporation~~ entity that ~~owns 10% or more of its stock~~ that has a 10% or greater ownership interest in the party, or states that there is no such ~~corporation~~ entity;
> >
> > **(2)** lists the trial judges in the proceeding and in any related state proceeding; and

[77] Advisory Opinion No. 57, *Disqualification Based on Stock Ownership in Parent Corporation of a Party or Controlled Subsidiary of a Party* (June 2009).

(3) lists the names of all law firms and the partners and associates that have appeared or are expected to appear for the party in the proceeding.

H. Intervenors

Intervenors obviously have an interest in the proceeding, and so theoretically intervenors should be subject to the same disclosure requirements as are imposed on a party. Three circuits have a local rule imposing disclosure requirements on intervenors that are the same as if they had been a party initially.

There are some strong arguments, though, for not amending the rule to deal specifically with intervenors. Probably the strongest argument is that intervention at the appellate level is so rare that it is not worth treating with a disclosure rule. It is true that the *government* intervenes at the appellate level with some frequency, but intervention on appeal by non-governmental corporate parties appears very rare. It is notable that in 2010, the Committee was asked by the DOJ representative to consider a rule on intervention, because the Appellate Rules have no general provision governing intervention along the lines of Civil Rule 24. The minutes of the meeting indicate that the Committee's discussion "did not produce any suggestions for moving forward with a rulemaking proposal on this item"; in 2011 the proposal on intervenors was taken off the Committee's agenda. Given the fact that the Committee has decided not to establish standards for intervention generally, it seems a bit odd to amend the disclosure rules to cover it. It seems odder still that Rule 26.1 should be amended to cover intervenors given the absence of movement on the subject by the Civil Rules Committee. It can be argued that a more systematic solution would be to consider a general rule on intervenors with a disclosure provision in that rule, or to consider a disclosure rule that tracked an amendment in the Civil Rules to that effect.

Another reason for questioning the need for an amendment treating intervenors is that when they do intervene, they have the same rights as a party to the proceeding. *See, e.g., City of Cleveland v. Nuclear Regulatory Commission,* 17 F.3d 1515, 1517 (D.C. Cir. 1994). If that is the case, then it is probable that a corporate intervenor is *already subject* to the disclosure requirements that apply to parties under Rule 26.1. Thus, imposing a disclosure requirement on intervenors specifically may be superfluous and even confusing, because the amendment would raise an inference that the Committee had determined that intervenors are *not* parties to the appeal. At a minimum, more thought should probably be given to the status of intervenors and

whether they are properly considered as parties before a disclosure amendment on the subject is proposed.

If the Committee were to decide to specify that the disclosure requirements apply to intervenors, it should be done by adding another subdivision to Rule 26.1. Lumping intervenors with parties results in balky drafting, especially if new disclosure requirements are to be added. For example, instead of having a provision requiring disclosure of an ownership interest "in the party" the rule would have to say "ownership interest in the party or intervenor." And so forth. Also, it needs to be specified in the amendment that intervenors are only subject to disclosure requirements if they would have those obligations as parties --- so, for example, an individual intervenor should not be subject to any disclosure obligations.

Here is what a separate subdivision covering intervenors might look like (as added to all the additions that have been discussed previously in this memo):

(a) Who Must File. ~~Any nongovernmental corporate~~ **Except for governmental units and individuals, any** party to a proceeding in a court of appeals proceeding must file a statement that:

(1) identifies any parent **or affiliated** corporation and any publicly held ~~corporation~~ entity that ~~owns 10% or more of its stock~~ that has a 10% or greater ownership interest in the party, or states that there is no such ~~corporation~~ entity;

(2) lists the trial judges in the proceeding and in any related state proceeding; and

(3) lists the names of all law firms and the partners and associates that have appeared or are expected to appear for the party in the proceeding.

(b) Time for Filing; Supplemental Filing.

* * *

(c) Number of Copies.

* * *

(d) Organizational Victim in a Criminal Case. In a criminal case, if an organization is a victim of [the alleged] criminal activity, the government must file a statement identifying the victim. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 26.1(a)(1) to the extent it can be obtained through due diligence.

(e) Bankruptcy Proceedings. In bankruptcy proceedings, the debtor or the trustee of the bankruptcy estate --- or the appellant if the debtor or trustee is not a party --- must file a statement identifying:

- the debtor, if not named in the caption;
- the members of the creditors' committees;
- the parties to an adversary proceeding; and
- the active participants in a contested matter.

(f) Intervenors. Intervenors have the same disclosure requirements as parties under Rule 26.1(a) and (a)(1).[8]

I. More Disclosure by Amici

At the last meeting, Committee members noted that the interest of a judge in an amicus could warrant recusal. It was also noted that there have been instances in which parties engineered the participation of an amicus in order to generate a recusal. These concerns about amici are currently addressed in Rule 29(c)(1), which provides that a "corporation" must file "a disclosure statement like that required of parties by Rule 26.1."

The same issues of greater disclosure that have previously been discussed as to parties --- e.g., extension to non-corporate entities, different ownership interests, affiliates, etc. ---would appear to apply equally to amici. There does not seem to be any reason to try to impose a disclosure obligation on an amicus that would not be imposed on a party. For example, there would be no reason to conclude that an amicus must disclose affiliates, while a party is not required to do so. Indeed that is the very point of the absorptive Rule 29(c)(1) --- whatever parties must disclose, amici must disclose. That absorption would seem to be efficient and elegant rulemaking.

But that absorption works currently because the only disclosure requirement is that of a corporation, which must disclose its parent and any publicly held corporation that holds more than 10% of stock. The relevance of that interest is obvious for both parties and amici, and both parties and amici will be disclosing individualized and not cumulative information. Absorption is

[8] It would be unnecessary, and burdensome, to require intervenors to disclose judge and lawyer participation, because that information will already have been disclosed by the parties and an intervenor may not have easy access to that information.

more problematic if some of the extra disclosure requirements considered above are added to Rule 26.1. For example, the provisions discussed above, if enacted, would require parties to disclose the trial judges in the proceeding or in any related state proceeding, and the names of law firms and lawyers that have appeared or will appear in the proceeding. There would be no reason to impose those obligations on an amicus, because the parties will already have made those disclosures and the information demanded is not logically related to the amicus role and may be difficult for the amicus to access. The point here is not that a judge's interest in a party should be treated differently from an interest in an amicus, but rather that parties have access to information and will have disclosed that information independently of the amicus and so there is no reason to impose the requirement on the amicus.

In sum, if additional disclosure requirements on amici are to be imposed, Rule 29(c)(1) will have to be changed so that there is a proper fit between it and an amended Rule 26.1. There would be three problematic additions to Rule 26.1 considered so far as applied to current Rule 29(c)(1): 1) covering all non-governmental public entities (because Rule 29(c)(1) currently applies only to corporations); 2) requiring disclosure of trial judges in the proceeding; and 3) requiring disclosure of all participating lawyers. (All of the other possible extensions could be absorbed without changing the language of Rule 29(c)(1)). Assuming these three extensions were to be added, Rule 29(c)(1) could be changed as follows:

> **(c) Contents and Form.** * * * An amicus brief need not comply with Rule 28, but must include the following:
>
> (1) ~~If the amicus curiae is a corporation, a~~ A disclosure statement like that required of parties by Rule 26.1, with the following exceptions:
>
> (A) a disclosure statement is not required if the amicus curiae is a governmental unit or an individual; and
>
> (B) an amicus curiae is not required to disclose the information set forth in Rule 26.1(a)(2) and (3). [9]

Finally, in one respect it might be argued that amici should have an independent disclosure obligation: would it not be useful to disclose whether entities or lawyers not on the brief have actually contributed in some way (financially or otherwise) to the amicus's cause? The

[9] It could be argued that the rule's language requiring a statement "like that" made by parties, could be flexible enough to allow some differences and so it would be unnecessary to say anything about differences in disclosure. But failing to specify the different disclosure provisions is confusing, and moreover the Appellate Rules Committee has already determined that the term "like that" does not indicate any differences in disclosure requirements between parties and amici.

answer is, probably yes, as the judge's relationship to those with such interests could be pertinent to the recusal decision. It should be noted, though, that Rule 29 currently *does* require at least some disclosure of participation in the amicus brief. Rule 29(c)(4) already requires amici to provide "a concise statement of the identity of the amicus curiae and its interest in the case" --- and more importantly, Rule 29(c)(5)(C) requires all non-governmental amici to file a statement that indicates whether

> "a person --- other than the amicus curiae, its members, or its counsel --- contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person."

It could be argued that the language of Rule 29(c)(5) could be usefully amended to require disclosure of all the lawyers who worked on the brief, in order to determine whether the judge needs to exclude due to a family relationship. If such a changes were made, it would be best to add it as a new subpart might look like this:

> (C) a person --- other than the amicus curiae, its members, or its counsel --- contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person <u>; and</u>
>
> <u>(D) a lawyer or law firm contributed to the preparation of the brief, and, if so, identifies each such lawyer or firm.</u>

J. Witness Lists

When the Committee's consideration of disclosure rules was discussed at the January Standing Committee meeting, a Committee member from the Ninth Circuit suggested that it would be useful to amend Rule 26.1 to require disclosure of the names of witnesses who testified in the proceeding. Certainly a scenario could be crafted in which the judge's relationship with one of the witnesses at trial is a strong enough connection as that his impartiality "might reasonably be questioned." 28 U.S.C. §455(b). Also, 28 U.S.C.§455(b)(5)(iv) requires a judge to recuse himself where a person who is within the necessary degree of relationship is "likely to be a material witness in the proceeding." That statutory provision is not addressed to appellate judges but rather to trial judges --- the provision looks forward and not backward. It seems to be grounded in the concern that a witness could receive preferential treatment by the trial judge. The relationship of an appellate judge to a witness in the case appears to be more attenuated. But it might be concluded that section 455(b)(v) has some relevance because it generally shows a concern about certain relationships between judges and witnesses.

That said, it is certainly the rare case in which an appellate judge's relationship to a trial witness raises cause for concern. On the other hand, the disclosure requirement would simply be producing a witness list, and that seems a minimal burden. It is of course for the Committee to determine whether the costs of disclosure with regard to witness lists outweighs the benefit of providing information to judges that could in some few cases be relevant to a recusal decision.

If witness lists are added to the disclosure requirement, the addition might look like this:

(a) Who Must File. ~~Any nongovernmental corporate~~ **Except for governmental units and individuals, any** party ~~to a proceeding~~ or intervenor in a court of appeals proceeding must file a statement that:

(1) identifies any parent **or affiliated** corporation and any publicly held ~~corporation~~ entity that ~~owns 10% or more of its stock~~ that has a 10% or greater ownership interest in the party, or states that there is no such ~~corporation~~ entity;

(2) lists the trial judges in the proceeding and in any related state proceeding;

(3) lists the names of all law firms and the partners and associates that have appeared or are expected to appear for the party in the proceeding; and

(4) lists the names of all witnesses who have testified on behalf of the party in the proceeding.

Under the drafts as set forth above, the witness list requirement would not apply to amici --- requiring amici to disclose this information would be burdensome on the amici and duplicative to the court. Nor would intervenors be subject to this requirement.

K. Reporting by Individuals?

There remains a concern about adding new disclosure requirements beyond corporate ownership that has not yet been discussed. The additional requirements – list of judges, list of lawyers, list of witnesses --- are not tied to the nature or identity of the *party.* And yet the disclosure requirement at the threshold is definitely dependent on the nature of the party. Only corporate parties (and, if added, other entities) are required to make disclosures. And yet the risk

of recusal because of trial judge participation, lawyer participation, and witness participation are the same regardless of whether the parties are business entities or individuals. So logically, individual parties should have disclosure requirements when it comes to these additional, non-business grounded recusal factors.

To date, however, none of the local rules require individuals to report, even though the information that needs to be reported goes well beyond corporate ownership in many of these rules. So the rules are logically inconsistent but at least avoid the concern that individual parties --- at least certain of them --- might be especially burdened by disclosure obligations.

If the Committee were to determine that individual parties should disclose non-business related factors, then Rule 26.1 would need substantial amendment. There would be a conflict with the opening clause ("Except for governmental units and individuals"). The draft incorporating all the other changes, set forth immediately below, would probably have to be subdivided: business entities would disclose ownership information in one subdivision and then individuals would be added to the requirement for disclosing the other information. Relettering would probably be required. Joe Kimble would surely be required.

Because this memo has ended up to be complicated enough, I chose not to give the Committee two separate drafts, one for exempting individuals and one for including them. The version below does not cover individuals.

III. Discussion Draft of All Possible Changes Discussed in This Memorandum

Rule 26.1. ~~Corporate~~ Disclosure Statement[10]

(a) Who Must File; What Must Be Disclosed.[11] ~~Any nongovernmental corporate~~ **Except for governmental units and individuals, any** party to a proceeding in a court of appeals must file a statement that:

> **(1)** identifies any parent **or affiliated** corporation and any publicly held ~~corporation~~ entity that ~~owns 10% or more of its stock~~ that has a 10% or greater ownership interest in the party, or states that there is no such ~~corporation~~ entity;
>
> **(2)** lists the trial judges in the proceeding and in any related state proceeding; and
>
> **(3)** lists the names of all law firms and the partners and associates that have appeared or are expected to appear for the party in the proceeding; and
>
> **(4)** lists the names of all witnesses who have testified on behalf of the party in the proceeding.

(b) Time for Filing; Supplemental Filing.

* * *

(c) Number of Copies.

* * *

(d) Organizational Victim in a Criminal Case. In a criminal case, if an organization is a victim of [the alleged] criminal activity, the government must file a statement identifying the victim. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 26.1(a)(1) to the extent it can be obtained through due diligence.

---

[10] "Corporate" is no longer descriptive if the rule governs other business entities.

[11] The caption of this subdivision is insufficiently descriptive --- even today --- because the subdivision covers not only the "who" but the "what."

(e) Bankruptcy Proceedings. In bankruptcy proceedings, the debtor or the trustee of the bankruptcy estate --- or the appellant if the debtor or trustee is not a party --- must file a statement identifying:

- the debtor, if not named in the caption;
- the members of the creditors' committees;
- the parties to an adversary proceeding; and
- the active participants in a contested matter.

(f) Intervenors. Intervenors have the same disclosure requirements as parties under Rule 26.1(a) and (a)(1).[12]

Rule 29. Brief of an Amicus Curiae

* * *

(c) Contents and Form. An amicus brief must comply with Rule 32. * * * . An amicus brief need not comply with Rule 28, but must include the following:

(c) Contents and Form. * * * An amicus brief need not comply with Rule 28, but must include the following:

(1) ~~If the amicus curiae is a corporation, a~~ A disclosure statement like that required of parties by Rule 26.1, with the following exceptions:

(A) a disclosure statement is not required if the amicus curiae is a governmental unit or an individual; and

(B) an amicus curiae is not required to disclose the information set forth in Rule 26.1(a)(2)-(4).]

* * *

[12] It would be unnecessary, and burdensome, to require intervenors to disclose judge and lawyer participation, witness lists, etc., because that information will already have been disclosed by the parties.

(5) unless the amicus curiae is one listed in the first sentence of Rule 29(a),[13] a statement that indicates whether:

(A) a party's counsel authored the brief in whole or in part;

(B) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief;

(C) a person --- other than the amicus curiae, its members, or its counsel --- contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person; and

(D) a lawyer or law firm contributed to the preparation of the brief, and, if so, identifies each such lawyer or firm.

[13] This is odd phrasing. Why not just say who is excepted? "Unless the amicus curiae is the United States or its officer or its agency or a state . . ." If the rule ever does get amended, that would seem to be a stylistic and user-friendly improvement.

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TAB 5B

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Excerpt from the May 14, 2016 Report of the Advisory Committee on Criminal Rules (Revised July 6, 2016)

IV. Action Item: Rule 12.4

The Criminal Rules Committee recommends publication of an amendment to Rule 12.4, which governs the parties' disclosure statements. Rule 12.4(a)(2) requires the government to identify organizational victims to assist judges in complying with their obligations under the Judicial Code of Conduct. Rule 12.4 was a new rule added in 2002. The Committee Note states that "[t]he purpose of the rule is to assist judges in determining whether they must recuse themselves because of a 'financial interest in the subject matter in controversy.' Code of Judicial Conduct, Canon 3C(1)(c) (1972)." Prior to 2009, the Code of Judicial Conduct treated any victim entitled to restitution as a party, and the committee note stated that the purpose of the disclosures required by Rule 12.4 was to assist judges in determining whether to recuse. In 2009, however, the Code of Judicial Conduct was amended. It no longer treats any victim who may be entitled to restitution as a party, and it requires disclosure only when the judge has an interest "that could be substantially affected by the outcome of the proceedings."

The proposed amendment to Rule 12.4(a) brings the scope of the required disclosures in line with the 2009 amendments, allowing the court to relieve the government of the burden of

making the required disclosures upon a showing of "good cause." The amendment will avoid the need for burdensome disclosures when there are numerous organizational victims, but the impact of the crime on each is relatively small. For example, nearly every organization in the United States could be affected by price fixing concerning a widely-used product, such as a computer program. But each victim would suffer only a very minor harm from a price increase that might be pennies for each product purchased. In such cases, it seems unnecessarily burdensome (even if possible) for the government even to name every corporation, partnership, union, or other organizational victim. The amendment allows the government to show good cause to be relieved of making the disclosure statements because the organizations' interests could not be "substantially affected by the outcome of the proceedings."

The requirement that the government show "good cause" is a flexible standard that allows the court to weigh all of the relevant factors and determine on a case-by-case basis whether to relieve the government of the obligation to make disclosures under Rule 12.4. Although the style consultants expressed concern that the phrase "good cause" was vague, that phrase is used throughout the Criminal Rules where exceptions to general requirements are permitted, and it is well understood by judges and litigants. Moreover, "good cause" allows a holistic approach to the question whether to relieve the government of its disclosure responsibility, taking into account all of the relevant factors. It also allows the court to take a broad view of the scope of recusal and the information required in particular cases.

The proposed amendment to Rule 12.4(b) makes two changes.[5] It specifies that the time for making the disclosures is within 28 days after the initial appearance, and it makes clear that a supplemental filing is required not only when information that has been disclosed changes, but also when a party learns of additional information that is subject to the disclosure requirements. The Committee concluded that adding these details while amending Rule 12.4(a) would be beneficial, although they might not, by themselves, warrant an amendment.

The Appellate Rules Committee has a parallel amendment under consideration, and its reporter participated in the development of the Committee's proposed amendment. However, because the Appellate Rules proposal is part of a more comprehensive revision, it is on a slower timeline. Efforts to coordinate the changes will continue if the Appellate Rules Committee decides to move forward with an amendment on this subject.[6]

* * * * *

[5] An additional change was made to accommodate a point raised at the Standing Committee meeting. If the government was unaware there were any organizational victims until after the 28-day period had expired, it would make no initial filing and its disclosure of information subsequently learned about organizational victims would not be "supplemental." Accordingly, by post-meeting votes, the Criminal Rules Committee proposed and Standing Committee approved revising the caption and text of 12.4(b) to refer to a "later"—rather than a "supplemental"—filing.

[6] If that occurs, one of the issues will be the proposal that the Appellate Rule include disclosures not only for corporations, but also other "publicly held entities."

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE[1]

1 **Rule 12.4. Disclosure Statement**

2 **(a) Who Must File.**

3 **(1)** ***Nongovernmental Corporate Party.*** Any
4 nongovernmental corporate party to a proceeding
5 in a district court must file a statement that
6 identifies any parent corporation and any
7 publicly held corporation that owns 10% or more
8 of its stock or states that there is no such
9 corporation.

10 **(2)** ***Organizational Victim.*** Unless the government
11 shows good cause, it must file a statement
12 identifying any organizational victim of the
13 alleged criminal activity.~~If an organization is a~~
14 ~~victim of the alleged criminal activity, the~~

[1] New material is underlined in red; matter to be omitted is lined through.

15 ~~government must file a statement identifying the~~
16 ~~victim~~. If the organizational victim is a
17 corporation, the statement must also disclose the
18 information required by Rule 12.4(a)(1) to the
19 extent it can be obtained through due diligence.

20 **(b) Time ~~for~~to Fil~~ing~~e; ~~Supplemental~~Later Filing**. A
21 party must:

22 **(1)** file the Rule 12.4(a) statement within 28 days
23 after~~upon~~ the defendant's initial appearance; and

24 **(2)** ~~promptly~~ file a ~~supplemental~~ statement at a later
25 time promptly if the party learns of any
26 additional required information or any changes
27 in required information~~upon any change in the~~
28 ~~information that the statement requires~~.

Committee Note

Subdivision (a). Rule 12.4 requires the government to identify organizational victims to assist judges in complying with their obligations under the Judicial Code of

Conduct. The 2009 amendments to Canon 3(C)(1)(c) of the Judicial Code require recusal only when a judge has "an interest that could be substantially affected by the outcome of the proceeding." In some cases, there are numerous organizational victims, but the impact of the crime on each is relatively small. In such cases, the amendment allows the government to show good cause to be relieved of making the disclosure statements because the organizations' interests could not be "substantially affected by the outcome of the proceedings."

Subdivision (b). The amendment specifies that the time for making the disclosures is within 28 days after the initial appearance, and it makes clear that a supplemental filing is required not only when information that has been disclosed changes, but also when a party learns of additional information that is subject to the disclosure requirements.

Because a filing made after the 28 day period may disclose organizational victims in cases in which none were previously known or disclosed, the caption and text have also been revised to refer to a later, rather than a supplemental, filing.

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MEMORANDUM

DATE: September 11, 2016

TO: Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

SUBJECT: Item No.12-AP-F: Proposed Amendments to Appellate Rule 42 to address Class Action Settlement Objectors

Item No.12-AP-F concerns a possible problem with some objections to class action settlements. Class members sometimes object to settlements not because they have good faith objections but instead because they want to receive payments to withdraw their objections so that the settlements can go forward.

Discussion of Item 12-AP-F at the October 2015 and April 2016 Committee Meetings

In October 2015, the Appellate Rules Advisory Committee discussed possible amendments to Appellate Rule 42 and Civil Rule 23 to address this potential problem. The amendment to Rule 42 would have addressed situations in which a district court denied a class member's objection and the class member appealed the denial. In such situations, if the class member entered into a settlement and then sought to dismiss the appeal, the amendment would have required the court of appeals to refer the request to the district court.[1]

At the April 2016 meeting, however, the Appellate Rules Advisory Committee learned that the Civil Rules Advisory Committee had decided to address this matter of class action objections through what it called "the simple approach." This approach would require amending

---

[1] The Advisory Committee considered this "sketch" of a new section to be added to Appellate Rule 42: "A motion to dismiss an appeal from an order denying an objection made to approval of a class-action settlement under Rule 23(e)(5) of the Federal Rules of Civil Procedure [must][may] be referred to the district court for its determination whether to permit withdrawal of the objection and appeal under Rule 23(e)(5)(B) if the objector or the objector's counsel is to receive any payment or consideration in [exchange for] {connection with} dismissal of the appeal." This sketch appeared in the Rule 23 Subcommittee Report (Oct. 2015), which was included in the Appellate Rules Advisory Committee's October 2015 Agenda Book.

Civil Rule 23 but would not require amending Appellate Rule 42.

The proposed amendment to Rule 23 under the simple approach would require a district court to approve any consideration paid to an objector for withdrawing an objection or seeking to dismiss an appeal of an order denying an objection. The theory behind the amendment is that a class member will not object to a settlement in bad faith with the hope of extracting money for withdrawing the objection or dismissing an appeal if the class member does not think a court will approve the consideration for doing so. If a class member does make an objection, and then agrees to withdraw the objection or dismiss an appeal, the district court might approve or disapprove the consideration. If the district court approves the consideration, there is no reason to restrict withdrawal of an appeal. If the district court does not approve the consideration, then the class member presumably would not want to withdraw the objection. In any event, the appellate court retains its power to decide whether to allow or not allow the withdrawal of an appeal. Accordingly, no amendment to Appellate Rule 42 is necessary.

The Appellate Rules Advisory Committee discussed this "simple approach" at length at its April 2016 meeting. As described in the draft minutes, although some members of the Appellate Rules Advisory Committee expressed concern about various aspects of the proposal, the sense of the Committee was to leave the issue to the Civil Rules Advisory Committee. Judge Colloton summarized the apparent views of the Advisory Committee as follows: "The Appellate Rules Committee prefers not to address the issue of class action objectors with an appellate rule, and whether the proposed revision of Civil Rule 23 is desirable is ultimately a policy question for the Civil Rules Committee."

Subsequent Action at the June 2016 Standing Committee Meeting

At it June 2016 Meeting, the Standing Committee agreed with Civil Rules Advisory Committee's approach and decided to publish the proposed amendments to Civil Rule 23 for public comment. The published version of the key provision, proposed Civil Rule 23(e)(5)(B), reads as follows:

1 **Rule 23. Class Actions**

2 * * *

3 **(e) Settlement, Voluntary Dismissal, or Compromise.**

4 * * *

5 **(5) Class-Member Objections.**

6 * * *

7 **(B) Court Approval Required For Payment to an Objector or**
8 **Objector's Counsel.** Unless approved by the court after a hearing, no
9 payment or other consideration may be provided to an objector or
10 objector's counsel in connection with:
11 (i) forgoing or withdrawing an objection, or
12 (ii) forgoing, dismissing, or abandoning an appeal from a
13 judgment approving the proposal.

The published Committee Note for this amendment to Civil Rule 23 explains in relevant part:

> Rule 23(e)(5)(B)(ii) applies to consideration in connection with forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal. Because an appeal by a class-action objector may produce much longer delay than an objection before the district court, it is important to extend the court-approval requirement to apply in the appellate context. The district court is best positioned to determine whether to approve such arrangements; hence, the rule requires that the motion seeking approval be made to the district court. Until the appeal is docketed by the circuit clerk, the district court may dismiss the appeal on stipulation of the parties. See Fed. R. App. P. 42(a). Thereafter, the court of appeals has authority to decide whether to dismiss the appeal. This rule's requirement of district court approval of any consideration in connection with such dismissal by the court of appeals has no effect on the authority of the court of appeals over the appeal. It is, instead, a requirement that applies only to providing consideration in connection with forgoing, dismissing, or abandoning an appeal. A party dissatisfied with the district court's order under Rule 23(e)(5)(B) may appeal the order.

More details about the proposed amendment to Civil Rule 23 and its relation to the former proposal to amend Appellate Rule 42 appear in the attached excerpt from the Draft Minutes of the Civil Rules Advisory Committee (April 14, 2016).

Issue for the October 2016 Meeting

If the Appellate Rules Advisory Committee continues to believe this amendment to Civil Rule 23 adequately addresses the problem of class action objectors, and that no change to Appellate Rule 42 is necessary, the Advisory Committee might decide to remove Item

No.12-AP-F from its agenda. Alternatively, the Committee might leave the item on its agenda at least until after the period for public comment on the proposed amendments to Civil Rule 23 ends in February 2017.

Attachment

Excerpt from Draft Minutes of the Civil Rules Advisory Committee 12-15 (April 14, 2016).

TAB 6B

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539 Objectors. In all the many encounters with bar groups and at the
540 miniconference last fall, there was virtually unanimous agreement
541 that something should be done to address the problem of "bad"
542 objectors. The problem is posed by the objector who files an open-
543 ended objection, often copied verbatim from routine objections
544 filed in other cases, then "lies low," saying almost nothing, and
545 — after the objection is denied — files a notice of appeal. The
546 business model is to create, at low cost, an opportunity to seek
547 advantage, commonly payment, by exploiting the cost and delay
548 generated by an appeal.

549 Part of the Rule 23(e)(5) proposal addresses the problem of
550 routine objections by requiring that the objection state whether it
551 applies only to the objector, to a specific subset of the class, or
552 to the entire class. It also directs that the objection state with
553 specificity the grounds for the objection. The Committee Note says

554 that failure to meet these requirements supports denial of the
555 objection.

556 Another part of the proposal deletes the requirement in
557 present Rule 23(e)(5) that the court approve withdrawal of an
558 objection. There are many good-faith withdrawals. Objections often
559 are made without a full understanding of the terms of the
560 settlement, much less the conflicting pressures that drove the
561 parties to their proposed agreement. Requiring court approval in
562 such common circumstances is unnecessary.

563 At the same time, proposed Rule 23(e)(5)(B) deals with payment
564 "in connection with" forgoing or withdrawing an objection, or
565 forgoing, dismissing, or abandoning an appeal from a judgment
566 approving the proposed settlement. No payment or other
567 consideration may be provided unless the court approves. The
568 expectation is that this approach will destroy the "business model"
569 of making unsupported objections, followed by a threat to appeal
570 the inevitable denial. A court is not likely to approve payment
571 simply for forgoing or withdrawing an appeal. Imagine a request to
572 be paid to withdraw an appeal because it is frivolous and risks
573 sanctions for a frivolous appeal. Or a contrasting request to
574 approve payment to the objector, not to the class, for withdrawing
575 a forceful objection that has a strong prospect of winning reversal
576 for the class or a subclass. Approval will be warranted only for
577 other reasons that connect to withdrawal of the objection. An
578 agreement with the proponents of the settlement and judgment to
579 modify the settlement for the benefit of the class, for example,
580 will require court approval of the new settlement and judgment and
581 may well justify payment to the now successful objector. Or an
582 objector or objector's counsel may, as the Committee Note observes,
583 deserve payment for even an unsuccessful objection that illuminates
584 the competing concerns that bear on the settlement and makes the
585 court confident in its judgment that the settlement can be
586 approved.

587 The requirement that the district court approve any payment or
588 compensation for forgoing, dismissing, or abandoning an appeal
589 raises obvious questions about the allocation of authority between
590 district court and court of appeals if an appeal is actually taken.
591 Before a notice of appeal is filed, the district court has clear
592 jurisdiction to consider and rule on a motion for approval. If it
593 rules before an appeal is taken, its ruling can be reviewed as part
594 of a single appeal. The Subcommittee has decided not to attempt to
595 resolve the question whether a pre-appeal motion suspends the time
596 to appeal. Something may well turn on the nature of the motion. If
597 it is framed as a motion for attorney fees, it fits into a well-
598 established model. If it is for payment to the objector, matters
599 may be more uncertain — it may be something as simple as an
600 argument that the objector should be fit into one subclass rather
601 than another, or that the objector's proofs of injury have been

602 dealt with improperly.

603 After the agenda materials were prepared, the Subcommittee
604 continued to work on the relationship between the district court
605 and the court of appeals. It continued to put aside the question of
606 appeal time. But it did develop a new proposed Rule 23(e)(5)(C) to
607 address the potential for overlapping jurisdiction when a motion to
608 approve payment is not made, or is made but not resolved, before an
609 appeal is docketed. The proposal is designed to be self-contained,
610 operating without any need to amend the dismissal provisions in
611 Appellate Rule 42. "The question is who has the case." The
612 proposal, as it evolved in the Subcommittee, reads:

613 (C) *Procedure for Approval After Appeal*. If approval
614 under Rule 23(e)(5)(B) has not been obtained before
615 an appeal is docketed in the court of appeals, the
616 procedure of Rule 62.1 applies while the appeal
617 remains pending.

618 Invoking the indicative ruling procedure of Rule 62.1 facilitates
619 communication between the courts. The district court retains
620 authority to deny the motion without seeking a remand. It is
621 expected that very few motions will be made simply "for" approval
622 of payment, and that denial will be the almost inevitable fate of
623 any motion actually made. But if the motion raises grounds that
624 would lead the district court either to grant the motion or to want
625 more time to consider the motion if that fits with the progress of
626 the case on appeal, the court of appeals has authority to remand
627 for that purpose.

628 Representatives of the Appellate Rules Committee have endorsed
629 this approach in preference to the more elaborate earlier drafts
630 that would amend Appellate Rule 42.

631 The first comment was that it is extraordinary that it took so
632 long to reach such a sensible resolution.

633 The next reaction asked how this proposal relates to waiver.
634 If an objector fails to make an objection with the specificity
635 required by proposed Rule 23(e)(5)(A), for example, can the appeal
636 request permission to amend the objection? Isn't this governed by
637 the usual rule that you must stand by the record made in the
638 district court? And to be characterized as procedural forfeiture,
639 not intentional waiver? The purpose of (e)(5)(A) is to get a useful
640 objection; an objection without explanation does not help the
641 court's evaluation of the proposed settlement. Pro se objectors
642 often fail to make helpful objections. So a simple objection that
643 the settlement "is not fair" is little help if it does not explain
644 the unfairness. At the same time, the proposed Committee Note
645 recognizes the need to understand that an objector proceeding
646 without counsel cannot be expected to adhere to technical legal

647 standards. The Note also states something that was considered for
648 rule text, but withdrawn as not necessary: failure to state an
649 objection with specificity can be a basis for denying the
650 objection. That, and forfeiture of the opportunity to supply
651 specificity on appeal, is a standard consequence of failure to
652 comply with a "must" procedural requirement. The courts of appeals
653 can work through these questions as they routinely do with
654 procedural forfeiture. Forfeiture, after all, can be forgiven, most
655 likely for clear error. It is not the same as intentional waiver.

656 The Committee approved a recommendation that the Standing
657 Committee approve publication of proposed Rule 23(e)(5) this
658 summer.

TAB 7A

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MEMORANDUM

DATE: September 24, 2016

TO: Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

SUBJECT: Items 15-AP-A, 15-AP-E, 15-AP-H: Electronic Filing by Pro Se Litigants

These three items concern proposals to modify the Appellate Rules so that they generally would allow pro se litigants to file documents electronically. The Committee considered but did not approve these proposals when it recently recommended changes to Appellate Rule 25. This memorandum reviews the previous consideration of these items and suggests questions that the Advisory Committee may wish to consider at the October 2016 meeting.

Previous Consideration of these Items

The Appellate Rules currently leave most questions about who can and who cannot file documents electronically to local rules. Rule 25(a)(2)(D) says:

> (D) Electronic filing. A court of appeals may by local rule permit or require papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A local rule may require filing by electronic means only if reasonable exceptions are allowed. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.

Some local rules currently treat pro se parties differently from represented parties. For example, Second Circuit Local Rule 25.1(b)(3) says: "A pro se party who wishes to file electronically must seek permission from the court . . . ."

As discussed in previous memoranda, the proponents of Items 15-AP-A, 15-AP-E, and 15-AP-H have asked the Advisory Committee to amend Rule 25 to authorize pro se parties to file electronically or at least to treat pro se and represented parties equally in setting rules regarding electronic filing. Robert H. Miller, Ph.D., the proponent of Items 15-AP-A and 15-AP-H, wrote:

> Pro se litigants are already disadvantaged relative to the Federal agencies they are arguing against. Aside from the burden of proof as an appellant, the costs, rules,

> and research capabilities are onerous. It cost me hundreds of dollars to print, copy, and mail my briefs and appendices. I risked untimely filing merely because of unforseeable problems at the copy store or delivery service. Filing electronically eliminates several last minute hangups that can dispose of a worthy case.
>
> I believe that pro se litigants should be permitted to use ECF unless and until they demonstrate an inability to use the system above and beyond mistakes commonly made by seasoned attorneys admitted to the bar. This request is for the consideration of fairness as well as cost. The Ninth Circuit routinely approves this motion, and I don't believe its experience leaves them worse for wear.

Sai, the proponent of Item 15-AP-E, similarly wrote:

> [C]ourts should not prohibit pro se litigants from having CM/ECF access where represented parties would have it. Doing so imposes a disparate burden of time, expense, effort, processing delays, reduction in the visual quality of papers due to printing and scanning, removal of hyperlinks in papers, and reduction in ADA / Rehab Act accessibility.

The Advisory Committee considered these arguments at its October 2015 and April 2016 meetings and during its consideration of amendments to Appellate Rule 25 following the April 2016 meeting. The Committee, however, ultimately did not support them. On the contrary, the proposed revised version of Appellate Rule 25(a)(2)(B)(ii), as published for public comment (and reprinted in this Agenda Book), provides:

> **(ii) By an Unrepresented Person—When Allowed or Required.** A person not represented by an attorney:
> • may file electronically only if allowed by court order or by local rule; and
> • may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

This provision does not give pro se litigants the same rights to file electronically as represented parties.

Questions for Possible Decision at the October 2016 Meeting

Despite its approval of the proposed Appellate Rule 25(a)(2)(B)(ii), the Advisory Committee did not remove Items 15-AP-A, 15-AP-E, and 15-AP-H from its table of agenda items. Accordingly, at the October 2016 meeting, the Advisory Committee may wish to decide

whether to (a) study these items further, (b) remove them from the Committee's agenda, or (c) postpone any additional action until it receives public comments on the recently proposed and published revision of Rule 25.

Attachments

1. Submission from Dr. Miller (Mar. 9, 2015)
2. Submission from Dr. Miller (Oct. 26, 2015)
3. Submission from Sai (Sept. 7, 2015)

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TAB 7B

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15-AP-A

Proposed change to Federal Circuit ECF rules
Rob Miller
to:
Rules_Support
03/09/2015 10:09 PM
Hide Details
From: Rob Miller <robmiller44@hotmail.com>

To: Rules_Support@ao.uscourts.gov

History: This message has been forwarded.

I, Robert M. Miller, am a petitioner for three cases before the US Court of Appeals for the Federal Circuit. I also have an appeal being heard by the Ninth Circuit.

The Ninth Circuit permitted me, a pro se appellant, to file briefs electronically. However, Federal Circuit rules currently prohibit pro se petitioners from doing so. I filed an unopposed motion to use Electronic Case Filing (ECF) for two of my cases at the Federal Circuit, and the Court denied both motions.

Pro se litigants are already disadvantaged relative to the Federal agencies they are arguing against. Aside from the burden of proof as an appellant, the costs, rules, and research capabilities are onerous. It cost me hundreds of dollars to print, copy, and mail my briefs and appendices. I risked untimely filing merely because of unforseeable problems at the copy store or delivery service. Filing electronically eliminates several last minute hangups that can dispose of a worthy case.

I believe that pro se litigants should be permitted to use ECF unless and until they demonstrate an inability to use the system above and beyond mistakes commonly made by seasoned attorneys admitted to the bar. This request is for the consideration of fairness as well as cost. The Ninth Circuit routinely approves this motion, and I don't believe its experience leaves them worse for wear.

Respectfully submitted,

Robert M. Miller, Ph.D.

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TAB 7C

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Suggested Rule Change - ECF for Pro Se Litigants
Rob Miller
to:
Rules_Support
10/26/2015 02:26 PM
Hide Details
From: "Rob Miller" <robmiller44@hotmail.com>
To: <Rules_Support@ao.uscourts.gov>

To whom it may concern:

I have been a pro se litigant in one district court and two US Courts of Appeals. In the U.S. District Court for Northern California and the U.S. Court of Appeals for the Ninth Circuit, I was permitted to use Electronic Case Filing for my lawsuit and appeal.

In a recent appeal to the U.S. Court of Appeals for the Federal Circuit, I discovered that pro se litigants are not permitted to e-file. Since I discovered this rule the day before my Notice of Appeal was due in Washington, DC, I forfeited my right to appeal.

I discovered today that I am not entitled to file using ECF in an appeal to the U.S. District Court for the Eastern District of Virginia. The rule was not prominent in the local rules or the pro se handbook, and I only learned about it by calling the Clerk's office. Later, I found one line in the rules regarding this restriction that was difficult to see. Oddly, this court allows pro se litigants to receive service of documents through PACER.

Whether or not the courts have reasons from experience to believe pro se litigants have difficulty with electronic filing, litigants such as myself have been unjustly burdened relative to our legal adversaries based not on our own failures, but with failures by other pro se litigants. The US Courts could look to the Ninth Circuit's experiment in permitting all litigants to e-file to see what the results are. In any case, clerks in the Ninth Circuit have informed me that even experienced attorneys and paralegals make errors in ECF. Pro se litigants should not be held to a higher standard than professional litigants, but have their errors excused or unexcused consistent with the courts' approach to professional litigants.

These rules have an adverse impact on pro se litigants relative to their adversaries. While the defendants, government officials, can use ECF from the convenience of their home or office right up until a midnight deadline, I must submit documents through the mail at great expense or drop the documents at the court house in person, taking time off work and dealing with heavy traffic and scarce parking.

The rules of the courts must ensure that no party is disadvantaged relative to another. Pro se litigants already suffer from a lack of experience and resources. These rules only further compound the disadvantage.

Sincerely,

Robert M. Miller, Ph.D.
4094 Majestic Lane
#278
Fairfax, VA 22033

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TAB 7D

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Re: Proposed rule changes for fairness to pro se and IFP litigants
Sai to: Rules_Support 09/07/2015 10:36 AM

History: This message has been forwarded.

Dear Committee on Rules of Practice and Procedure -

I further request parallel changes to the non-civil rules, and defer to the Committee on how to mirror them appropriately, as I am only familiar with the civil rules.

In particular, I note an error in my draft below for proposal #2: 18 U.S.C. 3006A (the Criminal Justice Act) would of course come under the FRCrP, not the FRCvP, so the FRCvP rule should refer only to 28 U.S.C. 1915 (the IFP statute).

Sincerely,
Sai

On Mon, Sep 7, 2015 at 10:02 AM, Sai <dccc@s.ai> wrote:
> Dear Committee on Rules of Practice and Procedure -
>
> I hereby propose the following four changes to the Federal Rules of
> Civil Procedure.
>
>
> 1. FRCP 5.2: amend (a)(1) to read as follows:
> (1) any part of the social-security number and taxpayer-identification
number
>
> The last four digits of an SSN, prior to a recent change by the SSA,
> is the only part that is random. The first digits can be strongly
> derived from knowing the person's place and date of birth.
>
> Disclosure of the last four digits of an SSN effectively gives away
> all of the private information, serves no public purpose in
> understanding the litigation, and should therefore be sealed by
> default (absent a court order to the contrary, as already provided for
> by FRCP 5.2).
>
> See, e.g.:
> Alessandro Acquisti and Ralph Gross, Predicting Social Security
> numbers from public data, DOI 10.1073/pnas.0904891106, PNAS July 7,
> 2009 vol. 106 no. 27 10975-10980 and supplement
> https://www.pnas.org/content/106/27/10975.full.pdf
> http://www.heinz.cmu.edu/~acquisti/ssnstudy/
>
> EPIC: Social Security Numbers (Nov. 13, 2014)
> https://epic.org/privacy/ssn/
>
> Latanya Sweeney, SSNwatch, Harvard Data Privacy Lab; see also demo
> http://latanyasweeney.org/work/ssnwatch.html
> http://dataprivacylab.org/dataprivacy/projects/ssnwatch/index.html
>
>
> 2. FRCP 5.2: add a new paragraph, to read as follows:
>
> (i) Any affidavit made in support of a motion under 28 U.S.C. 1915 or

> 18 U.S.C. 3006A shall be filed under seal and reviewed ex parte. Upon
> a motion showing good cause, notice to the affiant and all others
> whose information is to be disclosed, and opportunity for the same to
> contest the motion, the court may order that such affidavits be
> (1) disclosed to other parties under an appropriate protective order; or
> (2) unsealed in appropriately redacted form.
>
> For extensive argument, please see the petition and amicus briefs in
> my petition for certiorari regarding this issue: http://s.ai/ifp
>
>
> 3. Add new rule 7.2, matching that of S.D. & E.D. NY:
>
> Rule 7.2. Authorities to Be Provided to Pro Se Litigants
> In cases involving a pro se litigant, counsel shall, when serving a
> memorandum of law (or other submissions to the Court), provide the pro
> se litigant (but not other counsel or the Court) with copies of cases
> and other authorities cited therein that are unpublished or reported
> exclusively on computerized databases. Upon request, counsel shall
> provide the pro se litigant with copies of such unpublished cases and
> other authorities as are cited in a decision of the Court and were not
> previously cited by any party.
>
> See:
> Local Civil Rule of the Southern and Eastern Districts of New York 7.2
> Lebron v. Sanders, 557 F.3d 76 (2d Cir. 2009)
>
>
> 4. Add new subparagraph to rule 5(d)(3):
> (1) A court may not require a pro se litigant to file any paper by
> non-electronic means solely because of the litigant's pro se status.
>
> Pro se litigants should still be permitted (not required) to file by
> paper, to ensure that those without access to CM/ECF or familiarity
> with adequate technology have access to the courts.
>
> Pro se litigants may of course be required to register with CM/ECF in
> the same manner as an attorney, including signing appropriate
> declarations or passing the same CM/ECF training or testing required
> of attorneys.
>
> However, courts should not prohibit pro se litigants from having
> CM/ECF access where represented parties would have it. Doing so
> imposes a disparate burden of time, expense, effort, processing
> delays, reduction in the visual quality of papers due to printing and
> scanning, removal of hyperlinks in papers, and reduction in ADA /
> Rehab Act accessibility.
>
>
>
> I request to be notified by email of any progress related to the four
> changes I have proposed above.
>
> Respectfully submitted,
> /s/ Sai

TAB 8

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MEMORANDUM

To: Advisory Committee on Appellate Rules

From: Gregory E. Maggs, Reporter

Date: September 25, 2016

Subject: Circuits Splits over the Meaning of Appellate Rules 4(c), 7, and 39(a)(4)

I. Introduction

At the April 2016 meeting, the Appellate Rules Advisory Committee considered a memorandum by Mr. Derek Webb, law clerk to the Standing Committee, which identified numerous circuit splits on issues arising under the Appellate Rules. As noted in the draft minutes, the Committee decided to study three of these issues "for possible inclusion on its agenda in the future." These three issues were: (1) whether delay by prison authorities in delivering the order from which an inmate wishes to appeal can be used in computing the time for appeal under Rule 4(c); (2) whether the costs for which a bond may be required under Rule 7 can include attorney's fees; and (3) whether an appellate court in awarding costs under Rule 39(a)(4) must specify the specific costs to be taxed. This memorandum describes the circuit splits over these three issues in greater depth so that the Advisory Committee can decide whether to place these matters on the agenda for resolution at future meetings.

II. Summary of the Circuit Conflicts Under Consideration

The following sections of this memorandum briefly summarize the circuit conflicts under consideration. In deciding whether to place any of these matters on the agenda for future resolution, the Advisory Committee may wish to consider that conflicts among the circuits over the meaning of Appellate Rules can have different causes and in turn may merit different responses. In some cases, a conflict may result from what the Committee recognizes as a gap or ambiguity in the text of a rule. In such cases, the Advisory Committee may wish to recommend amendments to the rule to correct the problem. In other instances, the Advisory Committee may believe that the text of the rule is correctly stated and that the conflict exists because one or more courts have misinterpreted the rule. In some such cases, the Advisory Committee may decide that no amendment is necessary and may leave the matter to be sorted out through litigation. But in other instances, the Committee may decide to amend the rule, not for the purpose of changing its meaning, but instead to clarify what the Committee believes is the correct practice. *See, e.g.,* Fed. R. Civ. P. 4 Committee Note (1993) ("In most circuits [the amended] language simply

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restates the current practice . . . . Two circuits, however, have questioned that practice . . ., and the Committee wishes to clarify the rule.").

A. Computation of Time for Inmate Appeals under Rule 4

The first conflict concerns the computation of the time that an inmate has to file a notice of Appeal under Rule 4. Rule 4 provides in relevant part:

1 **Rule 4. Appeal as of Right—When Taken**
2 **(a) Appeal in a Civil Case.**
3 **(1) Time for Filing a Notice of Appeal.**
4 (A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and
5 4(c), the notice of appeal required by Rule 3 must be filed with the district
6 clerk within 30 days after entry of the judgment or order appealed from.
7 (B) The notice of appeal may be filed by any party within 60 days after
8 entry of the judgment or order appealed from if one of the parties is:
9 (i) the United States;
10 * * *
11 **(b) Appeal in a Criminal Case.**
12 (1) Time for Filing a Notice of Appeal.
13 (A) In a criminal case, a defendant's notice of appeal must be filed in
14 the district court within 14 days after the later of:
15 (i) the entry of either the judgment or the order being appealed; or
16 (ii) the filing of the government's notice of appeal.
17 * * *
18 **(c) Appeal by an Inmate Confined in an Institution.**
19 (1) If an inmate confined in an institution files a notice of appeal in either
20 a civil or a criminal case, the notice is timely if it is deposited in the
21 institution's internal mail system on or before the last day for filing. If an
22 institution has a system designed for legal mail, the inmate must use that
23 system to receive the benefit of this rule. Timely filing may be shown by a

24 declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement,
25 either of which must set forth the date of deposit and state that first-class
26 postage has been prepaid..
27 * * *

A circuit split currently exists on the issue of whether the period for filing a notice of appeal may be extended if prison officials delay in notifying an inmate of the entry of a judgment or appealable decision. For example, a court may enter a judgment on October 1 but the inmate may not learn of the entry of the judgment until October 10. The question is whether the pro se inmate should have 10 additional days to file a notice of appeal. My research assistant, Mr. Frank Chang, has prepared the following summary of the circuit split on this issue:

> Unlike an ordinary appellant, the *pro se* prison inmate does not need to file the notice of appeal with the district court clerk. *Compare* Fed. R. App. P. 4(c)(1) *with* Fed. R. App. P. 4(a)(1)(A), (b)(1)(A). Under Rule 4(c)(1), the inmate may simply deliver the notice of appeal to the prison's internal mail system or legal mail system, if one exists, before the last day for filing permitted by the Rules.
>
> Rule 4(c) was added as a part of the 1993 Amendment to the Federal Rules of Appellate Procedure and was a codification of the Supreme Court's decision in *Houston v. Lack*, 487 U.S. 266 (1988). *See* Rule 4, Notes of Advisory Committee on Rules – 1993 Amendment. The Court had created the colloquially-called "mailbox rule," or "*Houston* rule, to "address[] the effect of delay in transmission of court papers by prison authorities on the timeliness of a notice of appeal." *United States v. Grana*, 864 F.2d 312, 315 (3d Cir. 1989). The Supreme Court declined to interpret Rule 4 as barring an inmate's notice of appeal that was received in the district court one day late, because "*pro se* prisoners have no control over delays between the prison authorities' receipt of the notice and its filing." *Houston*, 487 U.S. at 273-74. So the Court in *Houston* interpreted "filed" as "delivered to prison officials for forwarding to the clerk of the district court." *Id.* 272. The dissent in *Houston* asserted that the decision lacked textual support. *See id.* at 277, 284 (Scalia, J., dissenting). But this possible objection to the majority's decision is now moot because the principle in *Houston* was subsequently adopted by amending Rule 4(c).
>
> The current circuit split under Rule 4 is about when the clock starts for computing the amount of time available to an inmate for filing a notice of appeal. Relying on the Supreme Court's observation that inmates do not have control over transmission of court papers, the Third Circuit and others have held that delay by

prison authorities in delivering the notice of entry of the judgment should be excluded from computing the time for appeal. In contrast, the Tenth Circuit has relied on the text of Rule 4 and 28 U.S.C. § 2109 and has declined to exclude delay by prison authorities from the time for appeal.

A timely filing of a notice of appeal is required in both civil and criminal appeals, and the failure to make a timely filing is fatal to an appeal. In civil cases, an appellant's compliance with Rule 4(a)(1)(A)'s thirty-day filing deadline is jurisdictional and mandatory because Congress prescribed a thirty-day filing deadline through a jurisdictional statute. 28 U.S.C. § 2107(a); *Bowles v. Russell*, 551 U.S. 205, 214 (2007). Without the appellant's compliance with Rule 4(a)(1)(A)'s thirty-day filing deadline, the court of appeals is without jurisdiction to hear the appeal. Similarly, in criminal appeals, the appellant must comply with Rule 4(b)(1)(A)'s fourteen-day filing deadline. But several circuits have recognized that compliance with Rule 4(b)(1)(A) is not a jurisdictional requirement because Congress has not created a jurisdictional filing deadline. *E.g.*, *United States v. Lopez*, 562 F.3d 1309, 1312-13 (11th Cir. 2009) (citing *Bowles*, 551 U.S. at 205 and cases from five other circuits). Nevertheless, Rule 4(b)(1)(A)'s filing deadline, like other court-adopted rules, "assure[s] relief to a party properly raising them." *Eberhart v. United States*, 546 U.S. 12, 19 (2005).

In a civil appeal, the thirty-day period begins to run "after entry of the judgment or order appealed from." Fed. R. App. P. 4(a)(1)(A); *see also* 28 U.S.C. § 2107 ("[N]o appeal shall bring any judgment . . . for review unless notice of appeal is filed, within thirty days after the entry of such judgment . . . ."). In a criminal appeal, the fourteen-day period begins to run "after the later of: (i) the entry of either the judgment or the order being appealed; or (ii) the filing of the government's notice of appeal." Fed. R. App. P. 4(b)(1)(A). Entry of judgment is defined in civil cases as "when the judgment or order is entered in the civil docket under Federal Rules of Civil Procedure 79 (a)." Fed. R. App. P. 4(a)(7)(A). A judgment is entered in a criminal case "when it is entered on the criminal docket." Fed. R. App. P. 4(b)(6).

A potential problem for *pro se* prisoners seeking to file an appeal is that they may not discover immediately that an appealable judgment has been entered. The district court may mail the notice of the entry of judgment to the prisoners, but a delay by prison authorities in delivering the notice to prisoners – negligent or otherwise – could cause the prisoners to exceed the filing deadline for the notice of appeal.

The Third Circuit excludes any delay by prison authorities in transmitting the notice of entry of the judgment from determining the timeliness of a *pro se* prisoner's appeal. *Long v. Atl. City Police Dep't*, 670 F.3d 436, 441 (3d Cir. 2012) (citing *United States v. Grana*, 864 F.2d 312, 316 (3d Cir. 1989)). The Third Circuit "perceive[s] no difference between delay in transmitting the prisoner's papers to the court [as in *Houston*] and transmitting the court's final judgment to him so that he may prepare his appeal." *Grana*, 864 F.2d at 316. If the prison receives from the district court the notice of entry of judgment, but does not deliver the notice of entry of judgment to the prisoner for four days, then those four days do not count against the prisoner in determining the timeliness of his appeal. The Third Circuit holds that the prison inmates lose control over the timeliness of their appeal and must "depend upon the prison authorities to deliver to him the notice of the entry of a final order." *Id.* The inmate may not have the means to contact the district court to inquire about the status of his case. *Id.* at 315. In a criminal case, "the appeal period . . . is shorter than that in civil cases" so even a slight delay could compromise the right to appeal. *Id.*

At least two circuits have issued unreported opinions relying on the Third Circuit's decision in *Grana* in remanding the case or dismissing the appeal. *See Bingham v. Dist. of Columbia*, 1996 WL 103739, at *1 (D.C. Cir. Jan. 18, 1996) (per curiam) (remanding the case to "ascertain the actual date appellant received a copy of that memorandum order and whether a delay, if any, in appellant's receipt was attributable to prison authorities."); *Brown v. Riverside Corr. Facility*, 1992 WL 102504, at *2-*3 (6th Cir. Apr. 29, 1992) (per curiam) (dismissing the appeal because even after "[e]xcluding all delay attributable to the prison authorities, the notice of appeal was not filed within the requisite thirty-day period").

The Tenth Circuit, on the other hand, expressly declined to follow the Third Circuit's *Grana* approach and does not exclude the delay by prison authorities in transmitting the notice of entry of judgment. *Jenkins v. Burtzloff*, 69 F.3d 460, 461 (10th Cir. 1995). The Tenth Circuit found the Third Circuit's application of *Houston* irreconcilable with the word "entry" found in Rule 4 and 28 U.S.C. § 2107. Rule 4 states that in a civil case the notice of appeal must be filed "within 30 days of the date of *entry of the judgment* or order appealed from." Fed. R. App. P. 4(a)(1)(A) (emphasis added). In addition, 28 U.S.C. § 2107 says that the notice of appeal must be filed "within thirty days after the *entry of such judgment*, order or decree" (emphasis added). Rule 4(a)(7) then defines when a judgment or order is "entered." Given these texts and definitions, the Tenth Circuit held that "[t]he date of entry is the beginning point for when the time period begins to run," and that "the word 'entry' can[not] be construed differently."

Id. at 461. The Tenth Circuit also observed a practical, administrative difficulty with a contrary decision in that "[t]he date of entry for a single order could be different for each of the incarcerated parties." *Id.* at 462.

B. Bond Costs under Appellate Rule 7

The second circuit split under consideration is about whether a district court, acting under Appellate Rule 7, may include attorney's fees as "costs" of the appeal for which the appellant must file a bond. Rule 7 provides:

1 **Rule 7. Bond for Costs on Appeal in a Civil Case**

2 In a civil case, the district court may require an appellant to file a bond or
3 provide other security in any form and amount necessary to ensure payment of
4 costs on appeal. Rule 8(b) applies to a surety on a bond given under this rule.

My research assistant, Mr. Chang, has prepared the following summary of the disagreement over the meaning of "costs on appeal" under Appellate Rule 7:

> The purpose of Rule 7, as shown in its text, is "to ensure payment of costs on appeal," and "to protect the rights of appellees brought into appeals court by such appellants" who "pose a payment risk." *Adsani v. Miller*, 139 F.3d 67, 75 (2d Cir. 1998). Where the district court orders filing of a bond or security, an appellant's failure to file a bond can result in a dismissal of the appeal. *See Sckolnick v. Harlow*, 820 F.2d 13, 15 (1st Cir. 1987) (per curiam).
>
> A circuit split exists over whether the district court, acting under Rule 7, may include attorney's fees as "costs" of the appeal for which the appellant must file a bond. *See* 16A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3953 (4th ed. 2016). Under the majority approach, the district court may include attorney's fees as costs as long as there is a fee-shifting statute that permits recovery of attorney's fees as costs. Under the minority approach, the district court, acting under Rule 7, cannot include attorney's fees as costs.
>
> The majority approach is followed by the Second, Sixth, Ninth, and Eleventh Circuits. *See Adsani*, 139 F.3d at 75; *In re Cardizem CD Antitrust Litig.*, 391 F.3d 812, 817 (6th Cir. 2004); *Azizian v. Federated Dep't Stores, Inc.*, 499 F.3d 950, 953 (9th Cir. 2007); *Pedraza v. United Guar. Corp.*, 313 F.3d

1323, 1333 (11th Cir. 2002). This approach was heavily influenced by the Supreme Court's decision in *Marek v. Chesny*, 473 U.S. 1 (1985), which interpreted the term "costs" found in Federal Rule of Civil Procedure 68 to include attorney's fees awardable under 42 U.S.C. § 1988. Although Rule 68 did not itself define the term "costs," the Rule was written when a number of federal statutes allowed recovery of attorney's fees as part of costs. *Id.* at 7-8. So the Court concluded that the term "costs" in Rule 68 "incorporates the definition of costs that otherwise applies to the case" through underlying statutes. *Id.* at 9 n.2. The majority of circuits have held that the term "costs" in Federal Rules of Appellate Procedure 7 operates like "costs" in Rule 68, because Rule 7 also does not define "costs." *See* Fed. R. App. P. 7. Moreover, Rule 7 was drafted and amended with the awareness "that numerous federal statutes encompass attorneys' fees within the definition of 'costs.' " *Pedraza*, 313 F.3d at 1332. Therefore, these courts have found the meaning of "costs" in Rule 7 "should be derived from the statutory fee shifting provision that attends the plaintiff's underlying cause of action." *Id.* at 1333.

The minority approach, followed by the Third and D.C. Circuits, holds that the district court, acting under Rule 7, cannot include attorney's fees as costs because Rule 39 defines "costs" in Rule 7 but does not include attorney's fees. *See Hurschensohn v. Lawyers Title Ins. Corp.*, No. 96-7312, 1997 WL 307777, *1 (3d Cir. June 10, 1997); *In re Am. President Lines, Inc.*, 779 F.2d 714, 716 (D.C. Cir. 1985) (per curiam); *see also* Fed. R. App. P. 39. The D.C. Circuit also rejected a district court's holding that the purpose in requiring a bond was to screen out frivolous appeals. *In re Am. President Lines, Inc.*, 779 F.2d at 716. The D.C. Circuit noted that Rule 7's primary purpose or function is not to deter frivolous appeals. Rule 38, "Frivolous Appeal," fulfills that purpose. The D.C. Circuit further held that such efforts burden "those [appeals] possessing merit." *Id.* at 718. Lastly, the court reasoned that the appellate court, not the district court, should decide whether an appeal is frivolous or not. *Id.* at 717. The Third Circuit largely relied on the D.C. Circuit's decision. *See Hurschensohn*, 1997 WL 307777, at *1. The Third Circuit found the Supreme Court's interpretation of 28 U.S.C. § 1920 to be instructive in interpreting the term "costs" in Rule 39, and, thus, Rule 7. *Id.* at *1-*2 (citing *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980)). The Third Circuit noted that "various items" listed in Rule 39 "have their source in 28 U.S.C. § 1920," which "does not provide for attorneys' fees." *Id.* at *1. The court found this to mean that Rule 39, and necessarily Rule 7, does not provide for attorney's fees.

C. Recovery of Costs Ordered under Rule 39(a)(4)

The third circuit split under consideration is about whether an appellate court, in awarding costs pursuant to Rule 39(a)(4), must specify the costs to be taxed under Rule 39(e) before a district court may entertain an application for those costs. Rule 39 provides in pertinent part:

1 **Rule 39. Costs**
2 **(a) Against Whom Assessed.** The following rules apply unless the law
3 provides or the court orders otherwise:
4 (1) if an appeal is dismissed, costs are taxed against the appellant, unless
5 the parties agree otherwise;
6 (2) if a judgment is affirmed, costs are taxed against the appellant;
7 (3) if a judgment is reversed, costs are taxed against the appellee;
8 (4) if a judgment is affirmed in part, reversed in part, modified, or vacated,
9 costs are taxed only as the court orders.
10 * * *
11 **(e) Costs on Appeal Taxable in the District Court.** The following costs on
12 appeal are taxable in the district court for the benefit of the party entitled to costs
13 under this rule:
14 (1) the preparation and transmission of the record;
15 (2) the reporter's transcript, if needed to determine the appeal;
16 (3) premiums paid for a supersedeas bond or other bond to preserve rights
17 pending appeal; and
18 (4) the fee for filing the notice of appeal.

My research assistant, Mr. Chang, prepared the following summary of the conflicting interpretations of Rule 39(a)(4):

> Subsections (a)(1), (2), and (3) specify when costs are to be taxed against either the appellant or the appellee. Subsection (a)(4), however, leaves discretion to the appellate court on how costs are to be taxed when a judgment is affirmed in part, reversed in part, modified, or vacated. *E.g.*, *Stewart Park & Reserve Coal.,*

Inc. v. Slater, 352 F.3d 545, 561 (2d Cir. 2003) (asserting "we may tax the costs of this appeal as we see fit" (quotation marks and alterations omitted)); *Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n*, 117 F.3d 1328, 1340 (11th Cir. 1997) ("Rule 39(a) leaves the imposition of costs to the discretion of the appellate court where the lower court judgment is affirmed in part, reversed in part or vacated."). Subsection (a)(4) acknowledges that "there are circumstances in which the disposition on appeal will not lend itself to a ready determination of which party, if any, should bear costs on appeal" and grants the appellate court with discretion to award costs as it is necessary. *L-3 Commc'n Corp. v. OSI Sys., Inc.*, 607 F.3d 24, 29 (2d Cir. 2010).

Rule 39(a)(4) works in tandem with other subsections in Rule 39 that list taxable costs of appeal. In particular, Rule 39(e), "Costs on Appeal Taxable in the District Court," provides that some "costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule." Fed. R. App. P. 39(e). Rule 39(e) lists the following costs taxable in the district court: "the preparation and transmission of the record"; "the reporter's transcript, if needed to determine the appeal"; "premiums paid for a supersedeas bond or other bond to preserve rights pending appeal"; and "the fee for filing the notice of appeal." *Id.*

There is a circuit split over whether the appellate court, in awarding costs pursuant to Rule 39(a)(4), must "specify which particular Rule 39(e) costs are to be taxed before a district court may entertain an application for those costs . . . ." *L-3 Commc'n, Corps.*, 607 F.3d at 29-30. The Eleventh Circuit and the Eight Circuit have held that the appellate court must do so, but the Second Circuit has held it is not required to do so.

In *Golden Door*, the Eleventh Circuit held that an appellate court "must provide a specific directive" as to what costs the parties are entitled. *Golden Door*, 117 F.3d at 1340. The Eleventh Circuit interpreted the phrase "only as ordered by the court" in Rule 39(a)(4) as providing the parties only the relief the court grants, but not as "provid[ing] parties with [an] unfettered right to all costs incurred on appeal." *Id.* Where an appellate court's order does not explicitly grant a class of costs, the Eleventh Circuit treats that "silence as a rejection of those costs." *Id.* In *Golden Door*, the appellant secured and posted supersedeas bonds for the appeal. The subsequent appeal resulted in the judgment being vacated. The appellate court's order awarded to the appellant "costs on appeal to be taxed by the Clerk of *this court*." *Id.* (emphasis added). When the appellant sought to recover the premiums paid for the supersedeas bond pursuant to Rule 39(e), the district court interpreted the appellate court's order to exclude the Rule 39(e)

costs, because the order only granted costs "to be taxed by the Clerk of *this court* [appellate court]." *Id.* (emphasis added). Because the appellate court's order did not include costs to be taxed by the clerk of the *district court*, the district court held it did not have the authority to tax Rule 39(e) costs. The Eleventh Circuit affirmed and held that "in cases where this court's determination does not produce closure, we must determine the relief to which the parties are entitled." *Id.* at 1340.

The Eighth Circuit relied on the Eleventh Circuit's decision in *Golden Door* in holding that the district court was without authority to award costs, unless the appellate court indicates which Rule 39(e) costs are recoverable in the district court. *Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corps.*, 497 F.3d 805, 808-09 (8th Cir. 2007). The Eighth Circuit held "the appellate court must specify whether one party or the other, or both, are entitled to costs, and if so, what costs." *Id.* at 808. It found that Rule 39(e) "limits the costs taxable in the district court to those a party is 'entitled to . . . under this rule.'" *Id.* In *Reeder-Simco*, the appellate court never entered an order indicating which party was entitled to costs of appeal, because neither party brought a motion for costs. *Id.* at 808. Therefore, the Eighth Circuit held that, in the absence of an appellate court order, Volvo was not entitled to recover any Rule 39(e) costs in the district court. *Id.* at 808-09.

To the contrary, under the Second Circuit's interpretation, the appellate court only needs to determine which party is entitled to cost, but does not need to specify what costs. In *L-3 Communications Corporation*, the Second Circuit interpreted Rule 39(a)(4) as "requiring the appellate court to make a determination about which party, if any, should bear costs." The Second Circuit held this was consistent with the structure of Rule 39. Rule 39(a)(4), after all, is listed under Subsection (a), entitled "Against Whom Assessed." *Id.* at 28. However, as with Subsections (a)(1), (2), and (3), the court did not interpret (a)(4) "as requiring the appellate court to delineate precisely what costs under Rule 39 that party will bear." *Id.* at 29. The Second Circuit treated "party entitled to costs" under Subsection (a)(4) as if it was the prevailing party under Subsections (a)(1), (2), and (3). The party designated by the appellate court as the party entitled to cost "is entitled to seek costs in the same manner as is a prevailing party under subsections (a)(1), (2), and (3)." *Id.* at 29.

The Second Circuit distinguished *Golden Door* and *Reeder-Simco*. The Second Circuit distinguished *Golden Door* by finding that the Eleventh Circuit's order limited costs of appeal by awarding only the cost "to be taxed by the Clerk of this court" and excluded costs taxable in the district court. The Second Circuit

holds that the appellate court retains the ability to "tax the costs of the appeal as it sees fit." *Id.* at 29 (quotation marks and alterations omitted). But the Second Circuit disagreed with the Eleventh Circuit to the extent *Golden Door* implied that the appellate court must "specify which particular Rule 39(e) costs are to be taxed before a district court may entertain an application of cost." *Id.* at 29-30. The Second Circuit then found the language from *Reeder-Simco* ("the appellate court must specify whether one party or the other, or both, are entitled to costs, and if so what costs") as a dictum that is neither binding nor persuasive on the court, because "there was no order regarding costs that had ever been entered" in *Reeder-Simco*. *Id.* at 30.

III. Questions for the Advisory Committee at the October 2016 Meeting

At the October 2016 Meeting, the Advisory Committee may wish to decide whether to include any or all of these three circuit conflicts on its agenda for future action. If the Committee decides to include an issue on its agenda, it may also wish to give the Reporter guidance for preparing materials for the spring meeting. For example, it might requests discussion drafts of amendments that would revise or clarify the Rules 5, 7, and 39 so that they would clearly require the current approach of the majority and/or minority of the circuits that have considered the issue.

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TAB 9A

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MEMORANDUM

DATE: September 28, 2016

TO: Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

SUBJECT: Discussion Item: Initiatives to Improve the Efficiency of Federal Appeals

In his 2015 Year-End Report on the Federal Judiciary, Chief Justice John Roberts praised the Standing Committee and Advisory Committees for their efforts to reduce "serious impediments to just, speedy, and efficient resolution" of federal litigation. Chief Justice Roberts also spoke at the June 2016 meeting of the Standing Committee, and in his remarks he challenged those attending the meeting to work to improve the efficiency of the federal procedural rules. The Advisory Committee, accordingly, may wish to discuss the possibility of initiating efforts to amend the Appellate Rules for the specific purpose of making federal appellate litigation faster and less expensive, without sacrificing the rights of litigants.

The Advisory Committee members all have extensive experience with appellate litigation, and may have ideas for changes to the Appellate Rules that might improve the efficiency of the U.S. Courts of Appeals. Other suggestions for how to improve efficiency may come from published sources. For example, the following recent articles suggest various reforms that could make federal appeals faster and less expensive:

- Martin H. Siegel, *Let's Revamp the Appellate Rules Too*, 42 Litigation 30 (2016): The author suggests a number of cost saving reforms for appellate practice, including: providing simple forms for run-of-the mill motions (e.g., requests for extensions of time, requests concerning oral arguments, etc.); eliminating redundant portions of briefs (e.g., the summary of the argument, issue statements, etc.); having judges email questions to the parties in advance of (or instead of) holding oral argument; and using more video conferencing for oral argument. This article is available at: http://www.americanbar.org/content/dam/aba/publications/litigation_journal/spring2016/revamp-appellate-rules.authcheckdam.pdf

- Robert K. Christensen & John Szmer, *Examining the Efficiency of the U.S. Courts of Appeals: Pathologies and Prescriptions*, 32 Int'l Rev. L. & Econ. 30 (2012): The authors use empirical data to make twelve claims about policies that affect the efficiency of appellate courts. Some of their claims could lead to amendments to the Appellate Rules

(e.g., "Orally argued cases contribute to longer disposition times"), while other claims concern matters that only Congress could address (e.g., "Circuit size in terms of active judges decreases efficiency"). This article is available at: http://polis.unipmn.it/pubbl/RePEc/uca/ucaiel/iel004.pdf

- Nicole L. Waters & Michael Sweikar, *Efficient and Successful ADR in Appellate Courts: What Matters Most?*, 62 Disp. Resol. J. 42 (2007): The authors use empirical data to make two claims about how to improve the efficiency of appellate alternative dispute resolution (ADR) policies. These claims are: (1) there is "no correlation between successful outcomes and cases referred to ADR based on case-level facts"; and (2) "successful outcomes were best achieved where there was greater court supervision of and involvement in the ADR programs." This article is available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=913320

- Hannah M. Smith, Note, *Using the Scientific Method in the Law: Examining State Interlocutory Appeals Procedures that would Improve Uniformity, Efficiency, and Fairness in the Federal System*, 61 Clev. St. L. Rev. 259 (2013): The author uses empirical evidence in comparing the federal approach to interlocutory appeals to different and arguably more efficient approaches in certain state courts. This article is available at: http://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1403&context=clevstlrev

- Joseph Delehanty, *Enhancing Efficiencies in the Appellate Process Through Technology*, 15 J. App. Prac. & Process 77 (2014): The author makes several suggestions for using technology to reduce costs, such as doing more oral arguments by video teleconference. This article is available at: http://lawrepository.ualr.edu/cgi/viewcontent.cgi?article=1357&context=appellatepracticeprocess

In addition to these published recommendations, the Advisory Committee also might solicit suggestions. Many knowledgeable groups or individuals may have useful ideas. For example, Betsy Shumaker, the Clerk of Court of the U.S. Court of Appeals for the Tenth Circuit and Clerk Liaison to the Advisory Committee, has prepared the attached memorandum suggesting that the Advisory Committee may wish to update Appellate Rules 10, 11, 27, and 30 to address electronic records, motions, and appendices.

At the October 2016 meeting, the Advisory Committee may wish to discuss whether it should undertake initiatives aimed at improving the efficiency of federal appellate litigation and, if so, how it would like to begin such initiatives (e.g., by creating a subcommittee, asking for outside opinions, etc.).

Attachment

Memorandum from Clerk of Court Betsy Shumaker to Judge Neil Gorsuch, Subject: Potential Fed. R. App. P. Updates (Sept. 23, 2016)

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TAB 9B

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MEMO

To: Judge Neil Gorsuch

From: Betsy Shumaker

Date: September 23, 2016

Re: Potential Fed. R. App. P. Updates

When we talked about the Rules, you asked me if there were other rules or sections of the rules that I had identified as needing updating. While I don't know how realistic it might be to review some or all of the provisions noted below, these stand out to me as being particularly outdated given our commitment to and dependence on electronic filing. I have also included the date of the last update as a reference point. Please don't hesitate to let me know if you have any questions.

Fed. R. App. P. 10—The Record on Appeal (last updated 2009)

This rule has not been modified since the advent of the electronic appendix. While every circuit does things differently, and not all courts have electronic records and appendices (or "record excerpts" as many courts call them) the rule clearly contemplates only paper records. For instance, Rule 10(a)(1) states the record on appeal must include "the original papers and exhibits filed in the district court." It also states the record must include "a certified copy of the docket entries prepared by the district clerk." While "papers" could certainly be read to include electronic papers, the rule doesn't even reference electronic alternatives. I would also note Rule 10(e)(2) references corrections to the record and directs that it "may be corrected and a supplemental record may be certified and forwarded." Again—while some of the language could certainly be construed to include electronic transmission, language updates would make that more clear.

Fed. R. App. P. 11—Forwarding the Record (last updated 1998)

This is the rule I referenced when we were talking on the phone. It has not been updated since 1998—a time when no circuit court transmitted anything electronically. In particular, Rule 11(a) states the appellant must "do whatever . . . is necessary to enable the clerk to assemble and forward the record." Rule 11(b)(2) describes forwarding record

materials "of unusual bulk or weight." Rule 11(c) discusses "retaining the record temporarily in the district court for use in preparing the appeal." Again, there may be circuits which receipt some materials in hard copy, but the majority does not, and the rule doesn't even reference the possibility of electronic transmission.

Fed. R. App. P. 27—Motions (last updated 2009)

The majority of this rule still works well. In part 27(d)(1), however, the Rule references formatting requirements and speaks to "reproduction" and "binding." Again, there may be courts requiring the submission of paper copies of motions (we do not) but it seems the rule should also acknowledge and speak to electronic submission of motions. At a minimum I think it should include language noting that courts may alter the requirements of this section via local rule or practice.

Fed. R. App. P. 30—Appendix to the Briefs (last updated 2009)

As with Rule 27, much of this rule can still be applied easily in the electronic world. I believe, however, that updates to the language of the Rule to acknowledge electronic filing and the impact of local rules on electronic filing would eliminate confusion. For instance, Rule 30(d) states that when transcripts are included in an appendix "the transcript page numbers must be shown in brackets immediately before the included pages." In the electronic world pagination is consecutive and automatic (using either the district court's CM program or pagination features in Adobe Acrobat). Likewise, Rule 30(e) is titled "Reproduction of Exhibits" and states exhibits "may be reproduced in a separate volume . . . [and must be] suitably indexed." Again, I'm not aware of any circuit which receipts exhibit materials in this manner. Like some of the other rules identified here, I think adding language to reference local alternatives, at a minimum, would be helpful.

Conclusion

I do not think any of these rules require a total overhaul. In particular given how different the circuits are in terms of their practices it is desirable to have rules of general application. The issue is, however, that none of these rules have been updated since all of the courts became electronic. They do not even acknowledge the electronic filing world, and that can be confusing to lawyers and litigants. All of the courts have local rules to address our reality (that is, the electronic filing of most everything) but that seems to me to be one of the concerns—right now in most circuits there is a significant disconnect between the Fed. R. App. P. and the local rules. For instance, our local rule 30.1, which addresses the submission of electronic appendices, is longer than all of Fed. R. App. P. 30. I think with some language tweaks the Fed. R. App. P. could be updated to lessen the confusion.

ADVISORY COMMITTEE
ON
CIVIL RULES

Washington, DC
April 9-10, 2015

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Agenda

April 9-10, 2015

Meeting of the Advisory Committee on Civil Rules

1. Welcome by the Chair

Standing Committee Meeting and Judicial Conference

2. **Action Item**: Minutes for October Meeting.

3. Status of Amendment Proposals Pending Before the Supreme Court

   Publicizing the amendment proposals if they take effect December 1

4. Legislative activity.

5. **Action Items: Rules Published for Comment**

   Rule 4(m)

   Rule 6(d)

   Rule 82

6. **Action Items: Rules Proposed for Publication**

   Rule 5(d)(3)

   Rule 5(b)(2)(E)

   Rule 5(d)(1)

7. Rule 68 report

8. Rule 23 Subcommittee Report

9. Discovery Subcommittee Report

10. Appellate-Civil Subcommittee Report

    Manufactured Finality

    Rule 62

11. Pilot Projects

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Liaison for the Advisory Committee on Bankruptcy Rules	**Roy T. Englert, Jr., Esq.**	***(Standing)***
Liaison for the Advisory Committee on Civil Rules	**Judge Arthur I. Harris**	***(Bankruptcy)***
Liaison for the Advisory Committee on Civil Rules	**Judge Neil M. Gorsuch**	***(Standing)***
Liaison for the Advisory Committee on Criminal Rules	**Judge Amy J. St. Eve**	***(Standing)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Paul S. Diamond**	***(Civil)***
Liaison for the Advisory Committee on Evidence Rules	**Judge James C. Dever III**	***(Criminal)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Richard C. Wesley**	***(Standing)***

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Members	Position	District / Circuit	Start Date	End Date
David G. Campbell Chair	D	Arizona	Member: 2005 Chair: 2011	---- 2015
John M. Barkett	ESQ	Florida	2012	2017
Elizabeth J. Cabraser	ESQ	California	2010	2016
Stuart F. Delery*	DOJ	Washington, DC	----	Open
Paul S. Diamond	D	Pennsylvania (Eastern)	2009	2015
Robert Michael Dow, Jr.	D	Illinois (Northern)	2013	2016
Parker C. Folse	ESQ	Washington	2012	2015
Paul W. Grimm	D	Maryland	2009	2015
Robert Klonoff	ACAD	Oregon	2011	2017
Scott M. Matheson, Jr.	C	Tenth Circuit	2012	2015
David E. Nahmias	CJUST	Georgia	2012	2015
Solomon Oliver, Jr.	D	Ohio (Northern)	2011	2017
Gene E.K. Pratter	D	Pennsylvania (Eastern)	2010	2016
Virginia A. Seitz	ESQ	District of Columbia	2014	2017
Craig B. Shaffer	M	Colorado	2014	2017
Edward H. Cooper Reporter	ACAD	Michigan	1992	Open
Richard Marcus Assit. Reporter	ACAD	California	1996	Open

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TAB 1

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 8–9, 2015
Phoenix, Arizona

Draft Minutes

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ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Phoenix, Arizona, on January 8 and 9, 2015. The following members were present:

Judge Jeffrey S. Sutton, Chair
Dean C. Colson, Esquire
Associate Justice Brent E. Dickson
Roy T. Englert, Jr., Esquire
Gregory G. Garre, Esquire
Judge Neil M. Gorsuch
Judge Susan P. Graber
Dean David F. Levi
Judge Patrick J. Schiltz
Judge Amy J. St. Eve
Judge Richard C. Wesley
Judge Jack Zouhary

Elizabeth J. Shapiro, Esq., represented the Department of Justice in place of Deputy Attorney General James M. Cole. Larry D. Thompson, Esq., was unable to attend.

Also present were Professor Geoffrey C. Hazard, Jr., consultant to the committee; Professor R. Joseph Kimble, the committee's style consultant; and Judge Jeremy D. Fogel, director of the Federal Judicial Center. Judge Anthony J. Scirica, Judge Sidney A. Fitzwater, and Judge Eugene R. Wedoff participated in a panel discussion chaired by Judge Sutton. Associate Justice Sandra Day O'Connor attended as an observer.

The advisory committees were represented by:

Advisory Committee on Appellate Rules —
Judge Steven M. Colloton, Chair
Professor Catherine T. Struve, Reporter (tel)
Advisory Committee on Bankruptcy Rules —
Judge Sandra Segal Ikuta, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Troy A. McKenzie, Associate Reporter
Advisory Committee on Civil Rules —
Judge David G. Campbell, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate Reporter
Advisory Committee on Appellate Rules —
Judge Reena Raggi, Chair
Professor Sara Sun Beale, Reporter (tel)
Advisory Committee on Evidence Rules —
Judge William K. Sessions III, Chair
Professor Daniel J. Capra, Reporter (tel)
Subcommittee on CM/ECF
Judge Michael A. Chagares, Chair

The committee's support staff consisted of:

Professor Daniel R. Coquillette	Reporter, Standing Committee
Jonathan C. Rose	Secretary, Standing Committee; Rules Committee Officer
Julie Wilson	Attorney, Rules Committee Support Staff (tel)
Scott Myers	Attorney, Rules Committee Support Staff (tel)
Bridget M. Healy	Attorney, Rules Committee Support Staff (tel)
Andrea L. Kuperman	Chief Counsel to the Rules Committee
Frances F. Skillman	Rules Office Paralegal Specialist
Toni Loftin	Rules Office Administrative Specialist
Michael Shih	Law Clerk to Judge Jeffrey S. Sutton

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INTRODUCTORY REMARKS

Judge Sutton called the meeting to order by thanking the Rules Office staff and the marshals for their service. He introduced one new member of the Committee, Associate Justice Brent E. Dickson of the Indiana Supreme Court. He also introduced Judge Sandra Segal Ikuta of the Ninth Circuit, the new chair of the Bankruptcy Committee, and Judge William K. Sessions III of the District of Vermont, the new chair of the Evidence Committee. Finally, he introduced Judge Anthony Scirica of the Third Circuit, who helped coordinate the afternoon's panel discussion on pilot projects.

He then summarized the results of the September 2014 Judicial Conference, which unanimously approved both the Bankruptcy Committee's one proposal and the entire Duke Package. The proposed amendments are now before the Supreme Court of the United States.

Finally, Judge Sutton announced that, on December 1, 2014, many other proposals took effect, including Criminal Rule 12 and a multitude of changes to the Bankruptcy Rules and Forms. He thanked Judge Raggi and Judge Wedoff for their efforts in making those proposals law.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The Committee, by voice vote and without objection, approved the minutes of its previous meeting, held on May 29–30, 2014, as well as a set of technical amendments to those minutes proposed by Professor Cooper.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Colloton presented the advisory committee's report, set out in his memorandum and attachments of December 15, 2014 (Agenda Item 3). He reported that the committee has published a package of rules changes for public comment. It plans to consider those comments after the February deadline expires, and to give a complete report at the upcoming spring meeting. He then highlighted three items currently on the committee's agenda.

Informational Items

FED. R. APP. P. 41

The advisory committee is considering how to relieve the tension between two provisions of Appellate Rule 41. Rule 41(d)(2) requires a court of appeals to issue its mandate immediately after the Supreme Court denies a petition for certiorari. However, Rule 41(b) allows courts of appeals to "extend the time" for issuing mandates under certain circumstances. These provisions present two questions. May a court of appeals stay its mandate after certiorari is denied? If so, must it do so in an order, or does mere inaction suffice?

The Supreme Court has twice considered these questions. As to the first issue, it has assumed without deciding that a court of appeals has authority to delay issuing a mandate, but

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only if "extraordinary circumstances" exist. As to the second, it has concluded that Rule 41(b) does not clearly foreclose delay through inaction.

Judge Colloton reported that the committee is inclined to insert the words "by order" into Rule 41(b) to clarify that a court of appeals may not delay a mandate by letting the matter lie fallow. (Those words had actually been removed from a previous version of the Rule, most likely to reduce redundancy). However, it is still working through the more fundamental question of whether such authority exists. It has considered reaffirming what Rule 41(d)(2) already appears to say: A mandate must issue immediately after certiorari is denied. But if appellate courts retain authority to recall an already-issued mandate under extraordinary circumstances, any change to Rule 41(d)(2) would serve little purpose. It thus might make more sense to codify the "extraordinary circumstances" rule. In either case, the committee will make a formal proposal to the Standing Committee, perhaps as early as the spring meeting.

DISCLOSURE RULES

The advisory committee has been considering what disclosures parties must make in briefs for a long time. Its review revealed a bevy of local disclosure requirements that augment the Appellate Rules to different degrees. Concerned that the Rules are insufficiently thorough, the committee is considering expanding their scope: for example, by extending them to intervenors, partnerships, victims in criminal cases, and amici curiae. It is also consulting the Committee on Codes of Conduct for additional guidance. Judge Colloton reported that, because the project remains ongoing, the committee may or may not be able to present a concrete proposal at the spring meeting.

One member proposed that, instead of taking the lead, the Appellate Committee should coordinate with judges at all levels of the federal judiciary. Another suggested that the Appellate Committee coordinate with its sister advisory committees, all of which have an interest in the outcome. In response, Judge Colloton noted that the project was still in a nascent stage and expressed willingness to solicit input from other committees once it had crystallized its thinking.

CM/ECF PROPOSALS

The advisory committee has been working with Judge Chagares and the CM/ECF subcommittee to resolve issues related to electronic filing. Judge Colloton deferred consideration of those issues to Judge Chagares's presentation.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Ikuta presented the advisory committee's report, set out in her memorandum and attachments of December 11, 2014 (Agenda Item 4).

125-000207

Amendment for Final Approval

FED. R. BANKR. P. 1001

On behalf of the advisory committee, Judge Ikuta sought approval to amend Bankruptcy Rule 1001, the bankruptcy counterpart to Civil Rule 1. Rather than incorporate the Civil Rule by reference, the Bankruptcy Rule echoes its language. However, Rule 1001 does not reflect recent amendments—approved and pending—to Rule 1. The proposal brings Rule 1001 in line with those changes, stating that "These rules shall be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every case and proceeding."

The committee, without objection and by voice vote, approved the proposed amendment to Rule 1001 for publication.

Informational Items

PROPOSED CHAPTER 13 NATIONAL PLAN FORM

The advisory committee has been working on a national chapter 13 plan form since 2011. Currently, more than a hundred chapter 13 forms exist. Led by Judge Wedoff, the committee distilled those forms into one. It also developed amendments to the Bankruptcy Rules to bring them in line with that form. After publishing the first version of the form and amendments in 2013, the committee received many critical comments. So it went back to the drawing board and published a revised proposal in 2014. The comment period has not yet expired, but the reaction to the revisions has been mixed.

Judge Ikuta reported that, in her view, the committee can fix specific concerns about the form. The real question is whether the need for national uniformity should override local preferences. She recommends implementing the national form incrementally—for instance, by making the form optional and asking various bankruptcy districts to opt into the form.

A professor wondered whether it was possible to make the national form an alternative to local ones. Judge Ikuta confirmed that his question tracked the committee's proposed incremental approach. By making the national form optional and soliciting compliance from individual districts, the committee hoped to build support for it over time.

An appellate judge asked why a national form was necessary. Professor McKenzie gave four reasons. First, the existing forms have generated a tremendous amount of confusion. Second, bankruptcy judges have an independent duty to scrutinize proposed plans, and a national form would reduce uncertainty about where such information may be found. Third, a national form could generate data more effectively. Finally, a national form would let entrepreneurs develop cheaper software for debtors' use.

Judge Wedoff explained why the committee decided to devise a national form in the first place. One bankruptcy judge said that, in the form's absence, bankruptcy courts could not easily

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discharge their duty to independently scrutinize chapter 13 plans. And a bankruptcy lawyers' association said that its members had trouble processing chapter 13 forms from different jurisdictions—and lacked the resources to obtain local counsel. Professor McKenzie added that the committee surveyed the chief judge of every bankruptcy court in the country before getting the project started. The response was overwhelmingly positive.

A district judge asked about the reaction from bankruptcy practitioners. Their comments, Professor McKenzie said, were mixed. Some lawyers liked the idea so long as this word or that word could be changed. Others opposed it. A few lawyers candidly explained that they feared the competition an easily accessible national form would create.

FORMS MODERNIZATION PROJECT

The advisory committee's forms modernization project is almost complete. Unfortunately, the Administrative Office is having trouble integrating the new forms into its new CM/ECF system and may miss its December 2015 deadline—when the forms are scheduled to take effect. The question is whether to delay rolling out the forms until all technological kinks have been ironed out.

Judge Ikuta reported that the committee will discuss the issue at its April meeting, but she recommends releasing the forms on schedule. Doing so, she said, would not disrupt operations in the vast majority of courts. True, three bankruptcy districts give pro se debtors access to forms software on court-run computer terminals. But not enough debtors use that service to justify delaying the forms' national release.

A district judge said that the AO had told her that forms integration was mutually exclusive with the CM upgrade project. As it turns out, Judge Ikuta received that same answer too, but the AO changed its mind once it realized what the forms integration project entailed.

CM/ECF PROPOSALS

The advisory committee considered three of the CM/ECF subcommittee's proposals at its fall meeting. It will defer decision on two of them until the Civil Rules Committee acts. It is independently considering whether to redefine the word "information" to include electronic documents and the word "action" to include electronic action.

REPORT OF THE INTER-COMMITTEE CM/ECF SUBCOMMITTEE

Judge Chagares presented the subcommittee's report, set out in his memorandum and attachments of November 30, 2014 (Agenda Item 8). He announced that the subcommittee had successfully completed its work.

125-000209

Informational Items

ABROGATION OF THE THREE-DAY RULE AS APPLIED TO ELECTRONIC SERVICE

The subcommittee previously proposed that parties should not receive three extra days to take action after electronic service. It worked with the relevant advisory committees to draft amendments to Appellate Rule 26(c), Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rule 45. These amendments, Judge Chagares reported, thus far have been well received.

ELECTRONIC SIGNATURES

The subcommittee previously proposed that Bankruptcy Rule 5005 be changed to provide for more flexible electronic signatures, but the Bankruptcy Committee withdrew that proposed amendment after public comment. After that withdrawal, the subcommittee asked the Administrative Office to figure out how local rules treated electronic signatures. Judge Chagares thanked the AO for its diligence and hard work.

The AO's exhaustive survey revealed that nearly every local rule treats filing users' login and password as an electronic signature. The various districts are not nearly so uniform when it comes to nonfilers, but the most prevalent rule requires the user to obtain and retain the signatory's ink signature. In light of these findings, Judge Chagares concluded, the Bankruptcy Committee's decision was probably correct. The local rules appeared sufficient to meet present needs, and any formal rulemaking risked being overtaken by rapid technological developments.

CIVIL AND CRIMINAL RULES REQUIRING ELECTRONIC FILING

The subcommittee previously recommended that Civil Rule 5(d)(3) and Criminal Rule 49(e) be amended to mandate electronic filing as opposed to merely permitting it. Judge Chagares reported that the advisory committees are still considering those proposals.

UNIFORM AMENDMENTS TO ACCOMMODATE ELECTRONIC FILING AND INFORMATION

The current rules do not appear to accommodate electronic filing and information. Thus, the subcommittee proposed defining "information" to include electronic documents and "action" to include electronic action. The advisory committees considered these proposals but reached different conclusions. For example, the Appellate and Civil Rules Committees have decided not to adopt them, while the Bankruptcy and Criminal Rules Committees have submitted them to subcommittees for further study. Judge Chagares reported that the proposal to redefine "information" appears to be the more viable of the two.

Dissolution of the Subcommittee

Judge Sutton thanked Judge Chagares, Professor Capra, Julie Wilson, and Bridget Healy for their hard work, and praised the subcommittee for fulfilling its mandate quickly and efficiently. Professor Capra reiterated Judge Sutton's comments and thanked his fellow reporters.

Judge Sutton and Judge Chagares have agreed that, now that the subcommittee has run its course, there is no need to keep it in place.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rose presented the Administrative Office's report (Agenda Item 10).

Informational Items

The Administrative Office is preparing an updated version of its 2010 *Strategic Plan for the Federal Judiciary*. Because the Long-Range Planning Committee will be meeting in March, Mr. Rose noted, the time for input is now.

Mr. Rose asked anybody corresponding with the Office to copy both the head of the Rules Office and Frances Skillman. That, he said, is the best way to ensure the message gets where it needs to go. He also summarized recent personnel arrivals and departures at the AO.

Finally, Mr. Rose announced that this meeting would be his last as head of the Rules Office. He thanked the committee for the opportunity to work with and learn from such talented people. Judge Sutton thanked Mr. Rose for his leadership and lauded his commitment to public service over a long and distinguished career. He also introduced Rebecca Womeldorf, Mr. Rose's successor, and described her impressive background.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raggi presented the advisory committee's report, set out in her memorandum and attachments of December 11, 2014 (Agenda Item 6). She announced that the amendments to Criminal Rule 12 have now taken effect.

Informational Items

FED. R. CRIM. P. 4

The Standing Committee previously approved for comment a proposed amendment to Rule 4 that would govern service of process abroad. Judge Raggi reported that the advisory committee has received no critical feedback on that proposal.

FED. R. CRIM. P. 41

The Standing Committee previously approved for comment a proposed amendment to Rule 41 to govern venue for searches of electronic devices whose location is unknown. The advisory committee held a lengthy hearing and reviewed extensive public comments. Judge Raggi reported that the critical response has largely focused not on the amendment itself but on concerns about electronic searches more generally.

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These thought-provoking comments led the committee to request a response from the U.S. Department of Justice. The Department endorsed the proposal and suggested ways for the government to satisfy the particularity requirement if the amendment takes effect. Judge Raggi noted that the Federal Judicial Center might consider educating judges about how to analyze such warrant applications down the road. But that, she concluded, is a question for later. For now, the committee is debating whether the amendment needs to be changed. Judge Raggi expects the committee to propose something at the spring meeting, although the current proposal may be tweaked.

SUGGESTED AMENDMENT TO RULE 52

A Second Circuit judge asked the advisory committee to consider amending Rule 52 to provide fresh review—as opposed to plain-error review—for defaulted sentencing errors. He reasoned that, unlike a new trial, a resentencing proceeding imposes an incidental burden on the judiciary. And it is unfortunate when a prisoner is forced to remain in jail longer than he deserves.

Judge Raggi reported that the committee decided not to proceed with this request. Professor Nancy King, the committee's associate reporter, surveyed cases in this area and discovered that the number of defaulted sentencing errors is not high—and were typically corrected on plain-error review. The committee was also concerned that the proposal would generate extensive frivolous litigation. Finally, drawing on its experience with the 2014 Rule 12 amendments, it expressed doubts that the Supreme Court would be willing to create an exception to the general rule that defaulted claims are reviewed for plain error.

One appellate judge proposed an alternative. He suggested that the rules might be amended to reflect what many circuits have already held: that a clear guidelines-calculation error presumptively satisfies the last two elements of plain-error review. The judge acknowledged, however, that his suggestion came close to the edge of the committee's rulemaking authority. Another appellate judge wondered whether a different approach might solve the problem. In his circuit, a defendant can never forfeit a substantive reasonableness challenge, so arguments that a sentence is unjustly long are always reviewed afresh. Judge Raggi responded that, in her view, no judge should ever rely on the guidelines unless that sentence also satisfies the § 3553 factors. Plain-error review is enough to fix the vast majority of problems, and loosening Rule 52's standards would open the floodgates to a host of defaulted sentencing claims. She suggested instead that circuits interested in these alternative proposals adopt them as a local rule or as circuit-specific precedent.

FED. R. CRIM. P. 11

The judges of the Northern District of California asked the advisory committee to let judges refer criminal cases to their colleagues to explore the possibility of a plea bargain. Judges in that district had routinely used this procedure until the Supreme Court held that the Criminal Rules barred it.

125-000212

Judge Raggi reported that the committee decided not to proceed with this request either. 95% of criminal cases are already resolved by plea bargains nationally, and the Northern District is no exception to that norm. More, implementing this change would create a host of practical problems—and might raise separation-of-powers concerns to boot.

Judge Raggi also reported that, at around the same time, a judge from the Southern District of New York published an article advocating judicial involvement in plea bargaining to reduce the risk that someone would plead guilty to a crime he didn't commit. The committee was not persuaded by this argument either. If a district judge is not convinced that a defendant is guilty of the crime to which he pleaded guilty, the judge should reject that plea under Criminal Rule 11.

HABEAS RULE 5

A judge from the Eastern District of Pennsylvania asked the advisory committee to amend Habeas Rule 5. Currently, that Rule requires a State to give a habeas petitioner copies of all exhibits attached to its response. The judge proposed relieving the State of that obligation in the absence of a judicial order to the contrary.

Judge Raggi reported that the advisory committee unanimously rejected this proposal. Every court expects these documents to be provided, and the States themselves have not complained about the problem.

FED. R. CRIM. P. 35

The New York Council of Defense Attorneys asked the committee to grant judges authority to reduce a sentence if (1) the defendant can identify new evidence casting doubt on his conviction, (2) the defendant can show he has been fully rehabilitated, or (3) the defendant can point to medical problems justifying his release.

Judge Raggi reported that a subcommittee is still examining this proposal, but she thinks it will not ultimately succeed. Proposal 1 effectively repeals AEDPA's statutory time limits on presenting such evidence in a habeas petition. Proposal 2 would subject the courts to a flood of rehabilitation claims. And Proposal 3 is redundant, since prisoners can already be released on humanitarian grounds when appropriate.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell presented the advisory committee's report, set out in his memorandum and attachments of December 2, 2014 (Agenda Item 5).

125-000213

Informational Items

CM/ECF PROPOSALS

Judge Campbell reported that the advisory committee has finished considering the CM/ECF Subcommittee's proposals. It recommended that the Civil Rules mandate electronic filing and service with appropriate exceptions for good cause. It recommended against changing the Rules' approach to electronic signatures, having observed the Bankruptcy Rules Committee's experience. It also recommended against defining "information" or "action" to include "electrons" (e.g., electronic filing), although it remains open to making that change if the existing regime becomes unworkable.

FED. R. CIV. P. 68

The advisory committee considered several proposals to amend Civil Rule 68, which governs offers of judgment. The committee has studied the Rule twice in the last two decades, and it provoked a storm of controversy both times. Nevertheless, Judge Campbell reported that the committee is once again looking at the question—this time by surveying how the States implement their own offer-of-judgment procedures. The committee will consider next steps at its April meeting.

FED. R. CIV. P. 26

The advisory committee considered a proposal to add the presence of third-party litigation financing to the list of Civil Rule 26(a) disclosures. The committee agreed that the issue is important but determined that rulemaking is not yet appropriate. Litigation finance is a relatively new field. Besides, judges already have tools to obtain this information when relevant. And the absence of a mandatory-disclosure rule does not appear to hinder the resolution of cases involving litigation financiers.

FED. R. CIV. P. 23 SUBCOMMITTEE ACTIVITY

The advisory committee appointed a subcommittee to consider issues related to Civil Rule 23. Currently, it is charged with gathering facts to identify questions worth further study. So far, Judge Campbell reported, the subcommittee has spotted six primary issues. It plans to present a set of conceptual proposals to the full committee at its April meeting that may generate more concrete proposals for the fall. It is also considering convening a mini-conference in 2016 to evaluate any suggestions that might emerge.

One member asked the subcommittee to examine the procedures governing multidistrict litigation. He said that mass-tort MDLs make up half the federal courts' civil docket, and the rules regulating them may be worth reexamining. He also observed that the MDL bar is a small and tightly knit group of lawyers with links to the MDL Panel. None of this is to say that MDLs are being mishandled. But because MDLs occupy such a large part of the civil system, the subcommittee ought to ensure that the process is working.

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Two members responded that, judging from their past experience with the subject, they doubted whether Rule 23—and for that matter the Rule 23 subcommittee—was the best place to address any problems MDLs might pose. Two judges who have presided over MDL cases also expressed their doubts. One reported that, in his experience, the MDL process *was* working. The other reported hearing complaints about the system, but those focused more on the process of MDL certification and counsel selection than on the process of trying MDL cases once certified. Both questioned whether a one-size-fits-all approach was possible or desirable. Finally, a practitioner pointed out that a small bar is an efficient bar. MDL trial firms get along with MDL defense firms, so MDL cases tend to run smoothly. And from most firms' perspective, the cost of entering the MDL arena is prohibitively high, making MDL cases poor investments.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Sessions presented the advisory committee's report, set out in his memorandum and attachments of November 15, 2014 (Agenda Item 7). The committee considered proposals developed from its April 2014 Symposium on the Challenges of Electronic Evidence. The *Fordham Law Review* has published the proceedings from that Symposium.

Informational Items

FED. R. EVID. 803(16)

Evidence Rule 803(16) provides a hearsay exception for authenticated documents over twenty years old. Judge Sessions reported that this Rule has almost never been used, but it may become more significant in an era of electronic evidence. The advisory committee thinks this Rule is inappropriate but is still deciding what to do about it. One option is to leave it be. Another is to abrogate it or narrow it to exclude electronically stored information. Still another is to amend it to require a showing of necessity or reliability.

RECENT PERCEPTIONS

The advisory committee considered whether to add a new hearsay exception for electronically reported recent perceptions to Evidence Rules 801(d)(1) and 804(b). This change would arguably prevent reliable statements made in texts, tweets, and Facebook posts from being excluded.

Judge Sessions reported that the committee is continuing to study whether these changes are necessary. With respect to Rule 801(d)(1), the committee has decided not to change that provision without first asking whether prior statements of testifying witnesses should even be defined as hearsay. It will begin that study at its next meeting. With respect to Rule 804(b), the committee is continuing to monitor the caselaw to see if courts have actually been excluding reliable evidence of this sort. A district judge asked the committee to study whether a witness's prior statement should be treated as hearsay when that witness is available to testify. Professor Capra responded that such a rule might open the door to all prior consistent statements.

125-000215

STANDARDS FOR AUTHENTICATING ELECTRONIC EVIDENCE

The advisory committee considered whether to amend Evidence Rules 901 and 902 to provide specific grounds for authenticating electronic evidence. Judge Sessions reported that, in the committee's view, devising authentication standards against a rapidly changing technological backdrop would create more problems than they would solve. However, it unanimously decided to develop a best-practices manual to guide courts and litigants.

FED. R. EVID. 902

The advisory committee considered two proposals to make it easier for litigants to authenticate certain kinds of electronic evidence. They mirror the self-authentication procedure for business records in Evidence Rule 902(11) by shifting the burden for proving inadmissibility to the opposing party. Judge Sessions reported that the committee unanimously supports these proposals and will consider introducing them as formal amendments at its next meeting.

CONCLUDING REMARKS

Judge Sutton concluded this portion of the meeting by recognizing four departing individuals for their service: Jonathan Rose, Andrea Kuperman, Judge Sidney Fitzwater, and Judge Eugene Wedoff. He summarized their remarkable achievements and thanked them all for their tremendous work on the committee's behalf.

PROMOTING JUDICIAL EDUCATION THROUGH VIDEOS

The committee considered the Federal Judicial Center's proposal to produce videos that would educate judges and lawyers about changes to the Federal Rules. Judge Sutton explained how the proposal came to be. Education has always been a key component of the Duke Package, which was designed in part to change the culture of civil litigation. Judge Fogel came up with the idea of disseminating information through video presentations. Initially, the FJC planned to create test videos for all of the rules that took effect in December 2014. However, the committee expressed concern that such videos—if released to the public—would constitute a form of post-enactment legislative history. So it postponed a final decision on the FJC's proposal until it could review a sample video.

Judge Fogel showed a sample film featuring Judge Sessions and Professor Capra, who discussed recent amendments to Evidence Rules 801 and 803. He acknowledged concerns about post-enactment legislative history but argued that the video format was a much more dynamic way to communicate information. He also explained that the videos would reach a wide audience even if restricted to judges and judicial employees. For example, a thousand viewers watched a recent webinar on § 1983 litigation.

Many members supported the FJC proposal. The Duke Package depends on education for its success, and videos might help reach previously inaccessible constituencies. Several judges recommended presenting the videos to their law clerks and at judicial meetings both private and

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public. As for the legislative-history concern, that issue can be solved with a disclaimer—or a rule that no such video could be used in court.

One appellate judge expressed reservations. He argued that the written word is superior to video in conveying this sort of information. In response, a member proposed releasing the transcript of the video with the video itself. Another member suggested that the videos might be more useful if they provided practice tips. This triggered concerns that expanding the videos beyond the text of the committee notes would stretch the bounds of proper rulemaking.

Judge Sutton recommended that the FJC proceed slowly. He asked it to work with any committee chairs and reporters willing to produce videos describing significant rule changes that took effect in December 2014. Those videos would be then placed on the private judicial intranet. The committee could then use that experience to determine whether to continue the program and whether to make the videos public. He thanked Judge Fogel, Judge Sessions, and Professor Capra for putting together the demonstration video.

PANEL DISCUSSION ON THE CREATION OF PILOT PROJECTS

Introduction

Judge Sutton presided over a panel discussion on the creation of pilot projects to facilitate civil discovery reform. When coupled with the Duke Package reforms, pilot projects offer a powerful way to change litigation norms for the better and to gather data for future reforms in the process. By convening the panel, he hoped to give the Civil Rules Committee some potential projects to consider. Judge Sutton introduced the panelists: Judge Eugene Wedoff of the Bankruptcy Court for the Northern District of Illinois, Judge Anthony Scirica of the Third Circuit, and Judge Sidney Fitzwater of the Northern District of Texas. Finally, he welcomed a special guest: Associate Justice Sandra Day O'Connor, who joined the Standing Committee for this panel discussion and for the dinner that followed.

Judge Wedoff: Improving the Speed of Case Administration

PRESENTATION

Judge Wedoff spoke about the impact of "rocket dockets" on case administration. The term was first applied to the Eastern District of Virginia, which implemented a series of procedural reforms in the 1970s. It has since been applied to several other jurisdictions that have adopted similar procedures, including the Western District of Wisconsin and the Eastern District of Texas. But their reputations sometimes do not match the data. The Eastern District of Virginia is truly one of the fastest courts in the country—but the Eastern District of Texas operates *above* the nation's median case disposition time, and the Western District of Wisconsin has fallen off substantially. Meanwhile the Southern District of Florida works with remarkable speed despite not being labeled a rocket-docket court.

Based on this study, Judge Wedoff concluded that judges affect case-disposition time more powerfully than rules. Judges who impose credible deadlines, for example, resolve cases

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faster than judges who don't. At the same time, efficient districts have certain procedural rules in common. For example, the Eastern District of Virginia sets short deadlines for discovery and trial that cannot be altered without a substantial showing to the court. For its part, the Southern District of Florida places every case into one of three tranches: expedited, standard, and complex. None of these tranches allows discovery to exceed one year.

DISCUSSION

The first question is whether to encourage district courts to adopt rocket-docket procedures district-wide. Many members said yes. Competition for litigants among courts can help everyone, said one professor, pointing to the creation of an omnibus hearing as an example of a useful procedural innovation that arose from one bankruptcy district's attempt to entice debtors to file there. Other committee members observed that, even if rocket-docket procedures make things harder for lawyers and judges, such procedures are *always* good for clients. And pilot projects implementing them may well change attorneys' hearts and minds in the process.

Attendees made several suggestions about what such pilot projects might look like. One recommended setting hard and credible trial deadlines. Another recommended capping not only a party's total deposition hours but also the number of hours he has available to conduct each deposition. He also recommended creating a tranches system for document production. And everybody who spoke emphasized the importance of making the pilot project mandatory.

The committee then moved to the question of implementation. Certain rocket-docket procedures—like the Eastern District of Virginia's weekly argument day—might conflict with local rules mandating one judge per case. More fundamentally, creating a rocket docket from scratch would be much harder than studying the ones that already exist, since district courts are unlikely to change in the absence of a strong leader backing the project.

One member counseled against implementing pilot projects too quickly. He recommended letting the FJC study the existing projects first, and moving only when the committee was sure that the projects' contents would work. Judge Sutton responded that he saw no reason why pilot-project advocacy should stop—especially since such advocacy isn't designed to mandate effective procedures but to suggest potentially useful ones. Another member agreed, and pointed out that studies and pilot projects could always take place simultaneously.

Finally, members sounded a note of caution about research methodology. One stressed the importance of getting independent opinions from participants, recalling an instance where rocket-docket practitioners were asked about their views on the process in full view of rocket-docket judges. Two district judges reiterated that numbers do not tell the whole story. Sometimes a case gets delayed for wholly appropriate reasons. And sometimes statistics are skewed by background factors not immediately apparent.

125-000218

Judge Scirica: Requiring Initial Disclosure of Unfavorable Material

PRESENTATION

Judge Scirica explored the feasibility of requiring parties to disclose material unfavorable to their side by rule. In the 1990s, he said, the committee tried to do just that, but the proposal triggered a firestorm. Opponents argued that most cases did not require adverse disclosures, and that aggressive discovery techniques would ferret out such information in the cases that did. They also invoked the adversarial nature of the American justice system, arguing that a "civil *Brady* regime" would disrupt the attorney-client relationship. Eventually, the committee settled on a compromise position—explored through pilot projects in the Central District of California and the Northern District of Alabama—that retained initial disclosures but eliminated the requirement to disclose unfavorable material.

Today, Judge Scirica continued, an expanded initial disclosure regime might find a warmer reception. To test the waters, he envisioned two separate types of pilot projects. One would apply a robust but general initial disclosure regime to all civil cases. Another would apply a tailored initial disclosure requirement to certain categories of cases—say, employment discrimination or civil rights. The former is best left to the Standing and Civil Rules Committee, he advised; the latter, to a committee of experienced lawyers from both sides of the podium.

DISCUSSION

Every member who spoke expressed support for an expanded initial disclosure regime. One provided an especially powerful example from Arizona. In 1991, the Arizona Supreme Court adopted a robust mandatory disclosure rule that covered favorable and unfavorable material. The same debate took place. Now, however, Arizona's local rules have overwhelming support. In fact, seventy percent of lawyers who practice in both federal and Arizona state court prefer the state disclosure system to the federal one.

Another speaker, who served on the committee during its first attempt to mandate adverse disclosures, argued that the committee should not be traumatized by that experience. The committee, he said, had been right all along. And this time, it knows what pitfalls to avoid. For example, it will not keep the bar in the dark until the very end of the process.

The committee also endorsed category-specific disclosures. Many district judges have already embraced the Federal Initial Discovery Protocols for Employment Cases. One member reported that, although the Protocols encountered initial resistance, the employment bar now loves them because they generate information that would otherwise require a six- to seven-month discovery battle to get. Another member explained that the Southern District of New York had successfully implemented similar protocols for § 1983 cases that helped clear out its cluttered docket. One district judge advised the committee to make sure it doesn't define categories too narrowly. She has used the Employment Protocols for two years, in which time only three cases have qualified under its definition of "employment." Finally, one member reiterated his belief that the committee should not endorse new pilot projects without studying the existing ones more thoroughly.

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Judge Sutton concluded that the committee appears to support studying an expanded initial disclosure system. This, he said, might be the time to try again.

Judge Fitzwater: Streamlined Procedure

PRESENTATION

Judge Fitzwater surveyed the many existing pilot projects that offer litigants streamlined procedures. According to the Institute for the Advancement of the American Legal System (IAALS), successful projects have five key features:

- a short trial that limits time to present evidence,
- a credible trial date,
- an expedited and focused pretrial process,
- relaxed evidentiary standards that encourage parties to agree to admission, and
- voluntary participation.

Judge Fitzwater then summarized two examples of what such a pilot project might look like. He could not find data about how often summary procedures had been used, but the procedures themselves are well-known. He started with the short-trial regime established by the District of Nevada in 2013. Litigants who opt into that system lose their right to discovery. In return, they receive a trial within 150 days of initial assignment, with a 60-day continuance available in limited circumstances. Evidence may be admitted without authentication or foundation by a live witness, and parties are encouraged to submit expert testimony through reports and not live testimony. At the trial itself, each party receives 9 hours to allocate among all trial phases as it chooses. The litigants present their arguments before a condensed jury—and once the trial is over, their ability to file post-trial motions is limited.

He then contrasted Nevada's system with the short-trial process in the Western District of Pennsylvania. That district does not eliminate a party's right to discovery but instead puts numerical limits upon it. Each party only has three hours to present evidence to the jury, with additional time for jury selection allocated at the judge's discretion. Finally, and most critically, the system bars parties from filing motions for summary judgment or motions in limine. Other pretrial motions may be filed only with leave of court.

Judge Fitzwater placed particular emphasis on this last provision. In the mine-run civil case, dispositive motions—not discovery disputes—were the main source of delay. Ironically, the Criminal Justice Reform Act's reporting procedures reinforce the incentive to work on motions, not cases: Judges must report a motion as pending after six months, but need not report a case as pending until three years elapse.

DISCUSSION

Many committee members expressed skepticism that a voluntary program would succeed. One pointed out that the Northern District of California abandoned a similar short-trial

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procedure after litigants declined to use it. Several district judges on the committee who have given litigants an expedited-trial option encountered the same problem. In light of that experience, they recommended that any pilot project in this area be mandatory, not voluntary.

Judge Sutton asked Professor Cooper why his proposal in the 1990s to apply simplified procedural rules to small-stakes cases failed to gain traction. Professor Cooper explained that the proposal failed after a district judge pronounced it "elegant on paper but of no practical use." He also pointed out two potential implementation issues: First, different lawyers define a "small-stakes case" differently; and second, how should a simplified system treat a small-stakes case with a demand for injunctive relief?

One appellate judge recommended against defining "small stakes" using a dollar amount. She cited her experience with the Class Action Fairness Act, which contains a similar dollar-amount requirement, and collateral litigation over manipulation of that requirement. Another appellate judge warned that mandating streamlined procedures for certain categories of cases, but not others, will be tricky.

* * *

Judge Sutton summed up the conversation. At a minimum, he said, everybody agrees that the committee should study the many pilot projects in existence. And nobody thinks the committee should refrain from considering the possibility of civil litigation reform; the only worry is that specific reforms might be more complicated than anticipated. As such, he asked the Civil Rules Committee to study this topic and give its thoughts at the upcoming May meeting. He also advised it to consult Judge Fogel to see what FJC resources are available, and to coordinate with IAALS and the legal academy as well.

NEXT COMMITTEE MEETING

Judge Sutton concluded the meeting by announcing that the committee will next convene on May 28–29, 2015, in Washington, D.C.

Respectfully submitted,

Judge Jeffrey S. Sutton
Chair

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TAB 2

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DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

OCTOBER 30, 2014

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts in Washington, D.C., on October 30, 2014. (The meeting was scheduled to carry over to October 31, but all business was concluded by the end of the day on October 30.) Participants included Judge David G. Campbell, Committee Chair, and Committee members John M. Barkett, Esq.; Hon. Joyce Branda; Elizabeth Cabraser, Esq.; Judge Paul S. Diamond; Judge Robert Michael Dow, Jr.; Parker C. Folse, Esq.; Judge Paul W. Grimm; Dean Robert H. Klonoff; Judge Scott M. Matheson, Jr.; Justice David E. Nahmias; Judge Solomon Oliver, Jr.; Judge Gene E.K. Pratter; Virginia A. Seitz, Esq.; and Judge Craig B. Shaffer. Outgoing members Peter D. Keisler, Esq. and Judge John G. Koeltl also attended. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge Arthur I. Harris participated as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., the court-clerk representative, also participated. The Department of Justice was further represented by Theodore Hirt. Jonathan C. Rose and Julie Wilson represented the Administrative Office. Emery Lee attended for the Federal Judicial Center. Observers included Donald Bivens (ABA Litigation Section); Joseph D. Garrison, Esq. (National Employment Lawyers Association); Ken Lazarus, Esq. (AMA); Jerome Scanlan (EEOC); Alex Dahl, Esq. (Lawyers for Civil Justice); John Beisner, Esq.; John Vail, Esq.; Valerie M. Nannery, Esq. (Center for Constitutional Litigation); Ariana Tadler, Esq.; Henry Kelsen, Esq.; and William Butterfield, Esq.

Judge Campbell opened the meeting by noting that Judge Sutton, Chair of the Standing Committee, was unable to maintain his usual practice of attending the meeting because he is in Australia.

Judge Campbell continued by marking the "comings and goings." Both of the outgoing members, Peter Keisler and John Koeltl, have been kind enough to attend this meeting to lend their help in committee deliberations. Both will be sorely missed.

Judge Koeltl won a rare one-year extension after the conclusion of his second three-year term to enable him to carry through to conclusion in the Standing Committee and Judicial Conference the proposed rules amendments that came to be described as the "Duke package." It would be more honest to describe them as the Koeltl Package. He single-handedly brought the Duke Conference together, and then guided the Duke Conference Subcommittee through an examination of countless possible amendments before settling on the package that is now before the Supreme Court. It is difficult to imagine anyone working harder than he has worked. Judge Koeltl responded that working with the Committee "has been a wonderful

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experience." The Duke Rules package "has been a true group production, in Subcommittee and Committee." "I treasure my time on the Committee."

Peter Keisler will be equally missed. "He has a unique ability to clarify complexity, to see purpose and policy beneath the details." Most recently, he has worked hard with both the Duke Conference Subcommittee and the Discovery Subcommittee as it worked through Rule 37(e) on the failure to preserve electronically stored information. The Committee was graced by his presence not only through the six years of his two terms as a member from the bar but also during his earlier years as Assistant Attorney General for the Civil Division. Peter Keisler responded that his first contact with the Rules Committees was when Judge Scirica and Judge Levi visited him at the Department of Justice to urge that the Department actively urge Congress to defer to the Rules Committees as Rule 23 amendments were being developed. At the time, he wondered why Congress should not take up such matters when it wishes. But now the advantages of the Enabling Act process are clear. The Committees are open-minded, impartial, richly experienced in the real world of procedure. "I am glad for term limits on Committee membership. But I am also glad that there are no term limits on friendship."

Two new members were welcomed.

Judge Shaffer has been a magistrate judge in Colorado for many years. "I knew him years ago from reading his opinions." His recent opinions have helped the Committee work through the proposed revisions of Rule 37(e). His earlier career included litigation in private practice, following litigation in the Department of Justice in environmental cases and civil rights cases. He also served as a lawyer in the Navy.

Virginia Seitz is a partner of Peter Keisler. She has recently served as Assistant Attorney General for the Office of Legal Counsel. She has a long-established appellate practice.

Acting Assistant Attorney General for the Civil Division, Joyce Branda, was also welcomed.

Donald Bivens was welcomed as the new liaison from the ABA Section of Litigation.

Judge Campbell reported that the Duke Package and Rule 37(e) proposals went through the Judicial Conference on the consent calendar. The next step is review by the Supreme Court. If the proposals succeed there, they will go on to Congress.

April 2014 Minutes

The draft minutes of the April 2014 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

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Legislative Report

Julie Wilson provided the legislative report for the Administrative Office. It does not seem likely that the remainder of this Congress will enact laws that bear on the rules committees' work. Variations of bills made familiar from past Congresses have been introduced, including a lawsuit abuse reduction act, a sunshine in litigation act, and a job creations act. Patent legislation passed in the House, but it was pulled from the discussion calendar in the Senate. Some form of patent legislation may be introduced in the new Congress. There also have been efforts to federalize some parts of trade secret law through bills that invoke Civil Rule 65, the injunctions rule. These matters are being monitored by the Administrative Office staff.

The Committee was reminded that the recent patent litigation bills would create a lot of work for the Committee. Virtually every version directed the rules committees to write new rules; some of these provisions directed that the rules be prepared within a period of six months.

Forms

Judge Campbell reported that the Forms Working Group in the Administrative Office has already begun deliberating what response they might make if the proposed abrogation of Rule 84 and the Rule 84 Forms is approved by the Supreme Court and Congress. They have begun to think about new forms that might be created. This Committee will keep in touch with the Working Group, perhaps by means as formal as appointing a liaison member.

Rule 67

Judge Diamond reported that Rule 67(b) directs that money paid into court under Rule 67(a) "must be deposited in an interest-bearing account or invested in a court-approved, interest-bearing instrument." Most often, the money paid into court is a relatively modest sum. By statute, the clerk of the district court cannot administer the funds. There must be some other administrator. And the IRS recently decided that quarterly tax forms are required. The burdens of complying with these tax-reporting obligations led some Administrative Office staff to suggest that Rule 67(b) be amended to delete the requirement that money be deposited in an interest-bearing account. But it seemed foolish to forgo interest, whether at present low interest rates or at the rates that may prevail in the future. Working with AO staff, Judge Diamond urged a different approach. The IRS has at last agreed that it will be proper to establish a single general interest-bearing account, administered

133 by the Administrative Office, to receive all Rule 67 deposits. All
134 can be reported in a single tax form. Any need to consider Rule 67
135 amendments seems to have passed.

136 Judge Campbell thanked Judge Diamond for his successful work
137 on this project.

138 *e-Rules*

139 Judge Campbell introduced the e-Rules topic by observing that
140 the Rules straddle the old world of paper and the new e-world. The
141 Standing Committee has established a subcommittee chaired by Judge
142 Chagares and constituted by members from each advisory committee.
143 Judge Oliver and Laura Briggs represent this Committee.

144 Judge Oliver noted that the subcommittee is looking at all of
145 the sets of rules to determine whether there are common problems
146 that may yield to common solutions. There indeed appears to be some
147 commonality, but it also has been agreed that there is no one-size-
148 fits-all resolution.

149 All committees have published for comment rules amendments
150 that would eliminate the allowance of "3 added days" to respond to
151 a paper served by electronic means.

152 Attention has turned to e-filing and e-service.

153 e-filing: e-filing now is left to local rules. 92 districts have e-
154 filing rules. 85 districts require e-filing, with various
155 exceptions. Rule 5(b)(2)(E) provides for service of papers
156 described by Rule 5(a) by electronic means, but only if the person
157 served consented in writing. Despite the requirement for consent,
158 many districts effectively force consent by requiring e-filing and
159 making consent to e-service a condition of entering the e-filing
160 system.

161 Laura Briggs noted that she, Judge Oliver, and the Reporter
162 agree that mandatory e-filing should be adopted as a general
163 national matter. Mandatory e-service also seems ripe for adoption.
164 So too, it seems time to provide that a Notice of Electronic
165 filing, automatically generated on e-filing, serves as a
166 certificate of service on anyone served through the court's system.
167 The question of what to do about e-signatures, on the other hand,
168 is a mess. A proposal addressing e-signatures was published by the
169 Bankruptcy Rules Committee in the summer of 2013 but has been
170 withdrawn in the face of the comments it generated.

171 The e-filing draft Rule 5(d)(3) on page 82 of the agenda
172 materials was presented for discussion, with a revision suggested

173 by Laura Briggs and also by the Appellate Rules Committee (the
174 revision is double-underlined):

175 **(d) Filing**. * * *

176 (3) *Electronic Filing, Signing, or Verification*. ~~A court may,~~
177 ~~by local rule, allow papers to be filed~~ All filings must
178 be made, signed, or verified by electronic means that are
179 consistent with any technical standards established by
180 the Judicial Conference of the United States. Paper
181 filing must be allowed for good cause, and may be
182 required, or may be allowed for other reasons, by local
183 rule. ~~A local rule may require electronic filing only if~~
184 ~~reasonable exceptions are allowed.~~

185 Discussion began with the observation that the series "made,
186 signed, or verified" should not be carried over in the disjunctive
187 from the present rule. The question of e-signatures has continued
188 to cause trouble. It may be useful to allow local rules that
189 experiment with e-signatures, as the present rule seems to allow,
190 but it is not yet time to require them. Verification is tightly
191 tied to signatures. Alternative drafting should be found. The
192 drafting will depend on choices yet to be made. If, for example, it
193 is determined that courts should be allowed to experiment with
194 electronic signing or verification, the rule could be recast: "All
195 filings must be made by electronic means * * *. A court may, by
196 local rule, allow papers to be signed or verified by such
197 electronic means. Paper filing must be allowed * * *." This
198 approach is subject to the perennial "cosmic issue" posed by local
199 rules. Do we want 94 approaches to e-signing or verification? But
200 it is hard to establish a uniform rule at this stage of practice.
201 And it is at least possible that there may be geographic or
202 demographic differences that make different approaches suitable in
203 different areas.

204 Why, it was asked, do 9 districts not require electronic
205 filing? If there are good local reasons, should we defer? Or if it
206 seems likely they will gradually move to require e-filing, should
207 we simply await the outcome? No one could recall any suggestions
208 from the bar that the present rule is not working. But it was
209 answered that a uniform rule will be useful. At the same time,
210 exceptions must be allowed. "Good cause" may not be sufficient to
211 capture the need for exceptions. Local conditions may vary in ways
212 that support categorical exceptions suitable to one district but
213 not others.

214 e-service: The draft in the agenda book, pages 83-84, adapts
215 present Rule 5(b)(2)(E):

(b) Service: How made. * * *

(2) *Service in General.* A paper is served under this rule by: * * *

(E) sending it by electronic means — unless ~~if~~ the person ~~consented in writing~~ shows good cause to be exempted from such service or is exempted from electronic service by local rule — in which event service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served; or * * *

The first suggestion was that the long phrase set off by em dashes is too long to support easy reading. An easy fix may work by framing this subparagraph as two sentences:

(E) sending it by electronic means, unless the person shows good cause to be exempted from such service or is exempted by local rule. Electronic service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served; or * * *

The exemption for good cause provoked a question asking who would show good cause? A pro se litigant? A prisoner? Will it be difficult to show good cause? Laura Briggs answered that in her court she had never encountered a request to be exempt. But her court automatically excludes pro se litigants. A judge observed that his court automatically exempts pro se litigants from e-service unless a judge authorizes it. Another judge observed that a "good cause" showing is something separate from a categorical exemption — it implies that a judge will be involved. His court had some requests for exemptions in the early days of e-service.

Notice of Electronic Filing: The Committee on Court Administration and Case Management has suggested that a notice of electronic filing automatically generated by the court's filing system should count as a certificate of service. The simpler of the versions in the agenda materials, set out at pages 84-85, would add this provision at the end of Rule 5(d)(1):

(d) Filing.

(1) *Required Filings; Certificate of Service.* Any paper after the complaint that is required to be served ~~— together with a certificate of service —~~ must be filed within a reasonable time after service; a certificate of service also must be filed, but a notice of electronic filing is a certificate of service on any party served through the court's transmission facilities.

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It was reported that two districts in the Seventh Circuit have local rules to this effect. The rules also provide that a certificate must be filed to show service on parties that were not served by electronic means.

The circuit clerk representative on the Appellate Rules Committee surveyed other circuit clerks. A majority of them were comfortable with allowing a notice of electronic filing to stand as a certificate of service. But a minority preferred to require a separate certificate of service because that may prompt the party making service to think about the need to make paper service on parties who are not participating in the e-filing system.

This proposal was not much discussed. The agenda materials opened a further question by asking whether there must be a certificate of service for the certificate of service; Rule 5(a)(1)(E), requiring service of "[a] written notice, appearance, demand, or offer of judgment, or any similar paper," is ambiguous. Discussion was limited to the observation that in one district lawyers include a certificate of service at the end of the document that is served, so that the certificate of service is itself served with the document. There was no interest in addressing this question by rule amendment.

Generic e=paper Rule: The Standing Committee subcommittee has prepared a template rule that in generic terms provides that electrons are equal to paper. The first part provides that a reference in a set of rules to information in written form includes electronically stored information. The second part provides that any action that can or must be completed by filing or sending paper may also be accomplished by electronic means. Each part could include an "unless otherwise provided" qualification.

The "otherwise provided" provision could be adapted to any particular set of rules by either of two approaches. One would list all of the exceptions as part of the generic rule. The other would include only the bland "otherwise provided" provision in the generic rule, but then provide exemptions — with or without a cross-reference to the generic rule — in individual rules. The subcommittee discussions have recognized that different approaches may be suitable in different sets of rules, and that any particular set of rules may raise so many questions about exceptions that it is better to avoid any generic provision.

The Appellate Rules Committee is attracted to the first part, providing that any reference to paper embraces electrons. It is more concerned about the complications of providing that electronic means can be used to effect any act that can be effected with paper.

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303 The questions for the Civil Rules may be distinct from the
304 questions presented by other sets of rules. It is clear that many
305 exceptions are likely to be desirable, beginning with several rules
306 that provide for initiating process — not only the familiar Rule 4
307 provisions for serving summons and complaint, but also process
308 under Rule 4.1, third-party complaints, warrants in admiralty
309 proceedings, and others. A great many different words in the rules
310 may imply paper. A simple example, complicated by evolving
311 technology and social mores, is the references to "newspaper" for
312 notice in condemnation proceedings, Rule 71.1(3)(B), and in
313 limitation-of-liability proceedings, Supplemental Rule F(4). What
314 counts as a "newspaper" today? Tomorrow? Sorting through all these
315 words, carefully, will not only be a lengthy chore. It may tax
316 understanding of present and evolving realities in an ever more
317 complex network world.

318 Discussion began with the observation that Evidence Rule
319 101(b)(6) already includes a generic provision: "a reference to any
320 kind of written material or any other medium includes
321 electronically stored information." But the Evidence Rules deal
322 with a totally different set of problems. The Civil Rules, for
323 example, embody due process notions of notice. The Civil Rules,
324 further, include a great many different words that would have to be
325 studied as possible occasions for exceptions from the equation of
326 electrons with paper.

327 The discussion turned to an open question put to the judge and
328 lawyer members: are there actual problems in practice caused by
329 uncertainties about what can be done by electronic means? No
330 committee member had encountered such problems. No one knew of any
331 local rules that address this question, apart from Local Rule 5.1
332 in the Northern, Eastern, and Western Districts of Oklahoma: "Any
333 paper filed electronically constitutes a written paper for purposes
334 of applying these rules and the Federal Rules of Civil Procedure."
335 It would be possible to ask the Federal Judicial Center to do a
336 study, but their research capacities are finite and may be better
337 devoted to more important topics. It also was observed that no
338 matter what the form of service, the common problem arises when a
339 party protests "I did not get it."

340 The Committee concluded that the very complex and time-
341 consuming task of reviewing and revising the Civil Rules to reflect
342 modern e-developments is not warranted in the absence of actual
343 problems. Because no one has encountered such problems and the
344 rules seem to be working well in the modern electronic world, the
345 Committee concluded that the time has not yet come for the Civil
346 Rules to adopt either part of the generic template.

347 <u>Other Civil Rule e-issues</u>: The agenda materials, pages 89-93, list

348 a number of rules that might include specific provisions equating
349 electrons with paper. Brief discussion narrowed the list to Rule
350 72(b)(1), which directs that the clerk must promptly "mail" to each
351 party a copy of a magistrate judge's recommended disposition. "No
352 one mails." Changing it to a direction that the clerk "serve" a
353 copy is an easy and quite safe change. But this may be an
354 illustration of a gradual phenomenon in which it will come to be
355 accepted that "mail" embraces both postal and electronic delivery.
356 This rule change might be included at a time when other e-rule
357 changes are proposed. But there is no urgent need to bless what
358 clerks are doing now.

359 A particular example was discussed briefly. Rule 7.1 requires
360 that 2 copies of a disclosure statement be filed. The apparent
361 purpose was to provide one copy for the court file and one copy for
362 the judge assigned to the case. In an era of electronic court
363 records, there is no apparent need for 2 copies. But the Appellate
364 Rules Committee is considering possible substantive changes in
365 their disclosure rule, Rule 26.1. Changes in one disclosure rule
366 will require reconsideration of other disclosure rules — the rules
367 were adopted in common, through joint deliberations. It is better
368 to hold off on a minor amendment today when there is a real
369 prospect of more serious amendments in the near future.

370 It was concluded that the "other civil rules" changes to
371 embrace electronic practice should be deferred.

372 **Rule 81: Signatures on Notice of Removal**

373 The general removal provision, 28 U.S.C. § 1441(a), provides
374 for removal "by the defendant or the defendants." Section
375 1446(b)(2)(A) provides that "When a civil action is removed solely
376 under section 1441(a), all defendants who have been properly joined
377 and served must join in or consent to the removal of the action."
378 Several circuits have taken different approaches to a simple
379 question: can the attorney for one party file a notice of removal
380 on behalf of all, expressly stating that all other defendants join
381 in or consent to the removal?

382 It has been suggested that it might be useful to resolve this
383 circuit split by amending Rule 81(c)(2). Either answer could be
384 given: each defendant must separately sign, or one could sign on
385 behalf of all with an express statement that all others consent or
386 join in the removal. Drafting would have to resolve a particular
387 question. Some removal statutes clearly provide that any defendant
388 can remove the entire action. Others are, by their terms,
389 ambiguous. Section 1442 provides that an action against United
390 States officers "may be removed by them." It is said that this
391 statute, and the similar provisions in §§ 1442a and 1443, allow

392 removal by any one defendant. But it is not clear that it would be
393 wise to assume this answer in drafting Rule 81. Beyond that, there
394 is a split in the circuits with respect to removal under the § 1452
395 provision for claims related to bankruptcy cases — some hold that
396 all defendants must join in removing, while others allow any one
397 defendant to remove. If a Rule 81 provision were drafted to apply
398 only to removals under § 1441(a), reflecting § 1446(b)(2)(A), it
399 would at least leave the question of § 1452 removal in limbo. But
400 it would hardly do to take sides on this question of statutory
401 interpretation. An alternative might be to draft a rule that
402 applies to any removal that requires joinder of all defendants who
403 have been properly joined and served. That approach would be
404 neutral on the questions of statutory interpretation.

405 Discussion began with an expression of hesitancy. Should the
406 Committee become involved in resolving a circuit split in
407 interpreting, not a Civil Rule, but a statute, and a statute that
408 deals with jurisdiction at that? A parallel example is provided by
409 an issue that has divided members of this judge's court — what to
410 do when a defendant who has diversity of citizenship with the
411 plaintiff removes before diversity-destroying defendants are
412 served. Should we try to address questions like that?

413 A lawyer observed that when the question of consent by all
414 arises, the practice is to make sure that everyone in fact joins in
415 the notice.

416 Another observation was framed as a question whether anyone
417 had encountered a situation in which a case was remanded because
418 one party had attempted to sign on behalf of all, with an express
419 statement that all had agreed? Removal tends to be approached with
420 care to meet all requirements. Lawyers are likely to find out how
421 the local circuit interprets the statute. This question probably
422 does not lead to "gotcha" problems.

423 A further observation was that it is wise to show caution in
424 using § 2072 to approach statutory problems. "The preemption power
425 is precious," and should be jealously protected by sparing use.

426 It was agreed that this question will be tabled.

427 **Pending Docket Matters**

428 Judge Campbell introduced a long series of pending docket
429 matters by noting that it is important to undertake periodic
430 surveys of public proposals that have accumulated during periods of
431 intense work on other matters. It is important to provide close
432 attention to every proposal.

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433 *Third-Party Litigation Financing: Dkt. 14-CV-B*

434 This proposal would add automatic initial disclosure of third-
435 party litigation financing agreements to Rule 26(a)(1)(A).

436 Third-party litigation financing is, or seems to be, a
437 relatively new phenomenon. It is not clear just what forms of
438 financial assistance to a lawyer or to a party might be included
439 under this label, nor is it clear whether the label itself should
440 be adopted. Many ads offering financial support to lawyers seem to
441 involve general loans to the firm, or to be ambiguous on the
442 relationship between possible financing terms and specific
443 individual litigation.

444 The proposal seeks to exclude contingent-fee agreements from
445 the disclosure requirement, referring to "any agreement under which
446 any person, other than an attorney permitted to charge a contingent
447 fee representing a party, has a right to receive compensation that
448 is contingent on, and sourced from any proceeds of the civil
449 action, by settlement, or otherwise." This language could include
450 assignments. If work proceeds, the rule language will require
451 careful attention to capturing the arrangements that seem fair
452 subjects for mandatory disclosure, excluding others.

453 The proposal has been supplemented in the few days before this
454 meeting by submissions from opponents and proponents of disclosure
455 addressing some issues raised in the Committee’s agenda memo.

456 The proponents of disclosure may be concerned more with
457 generating information to support careful examination of third-
458 party litigation financing in general than with the impact on
459 disclosure in any particular action.

460 Supporters of disclosure invoke the provision for initial
461 disclosure of liability insurance. This disclosure provision grew
462 out of 1970 amendments that resolved a disagreement among district
463 courts by allowing discovery of liability insurance. The idea was
464 that liability insurance plays an important role in the practical
465 decisions lawyers make in determining whether to settle and in
466 preparing to litigate. Permission for discovery was converted to
467 initial disclosure in 1993, making it routine. But the analogy is
468 not perfect. Long before 1970, liability insurance had come to play
469 a central role in supporting actual effectuation of general tort
470 principles. Litigation financing is too new, and experience with it
471 too limited, to come squarely within the same principle. The effect
472 on settlement negotiations, for example, may be rather different.
473 The 1970 Committee Note recognized that discovery of insurance
474 terms and limits might encourage settlement, but in other cases
475 might make settlement more difficult. The role of insurers in

476 settlement negotiations is familiar, and in many states has led to
477 rules of liability for bad-faith refusal to settle. What role
478 litigation financing firms may play in settlement decisions,
479 properly or otherwise, is a thorny question.

480 The settlement question is one example of a broader range of
481 questions. Some third-party financing arrangements may, by their
482 terms or in operation, raise questions of professional
483 responsibility. How far may the lender intrude on the client's
484 freedom to decide whether to accept a settlement — for example, an
485 offer on terms that would reward the lender but leave very little
486 for the client? How far may the lender, either in making the
487 arrangement initially or as the action progresses, ask for
488 disclosures that intrude on confidentiality — and what protections
489 may there be to ensure truly informed client consent?

490 The proponents offer several policy reasons for disclosure.

491 First, it is urged that disclosure will help ensure that
492 judges do not have conflicts of interest arising from the judge's
493 stake in an enterprise that, directly or indirectly, is providing
494 the litigation financing. Present Rule 7.1 does not seem to extend
495 this far. Third-party litigation financing, further, may be
496 provided for the first time pending appeal, when the case is no
497 longer in the district court. Should a disclosure rule attempt to
498 reach this far, or should the Appellate Rules be revised in
499 parallel?

500 Another argument is that a defendant should know who is really
501 on the other side of the action. This can affect settlement
502 decisions, for example by knowing that the plaintiff has financial
503 support to stay in the litigation for the long haul. But is it
504 desirable to facilitate settlement at lower values when the
505 defendant knows there is no outside support and that it may be
506 easier to wear out the plaintiff's reserves? Third-party financing
507 firms, moreover, assert that they are always interested in quick,
508 sure payment through settlement.

509 Disclosure also is supported by arguing that it may be
510 important in deciding motions that seek to shift the burden of
511 litigation expenses. Even before the current pending proposals, the
512 rules provide that a court determining the proportionality of
513 discovery should consider the parties' resources. The pending
514 proposals would amend Rule 26(c) to include an express reference to
515 allocating the expense of discovery as part of a protective order,
516 reflecting established practice. The argument is that it would be
517 unfair, or worse, to allow a party to pretend to have no more than
518 the party's own resources to bear the expenses of discovery. But
519 cost-shifting does not seem to happen often, and an inquiry into

520 third-party financing can always be made at the time of a cost-
521 shifting motion.

522 Finally, it is argued that information about third-party
523 financing can be useful in determining sanctions. Support is found
524 in a case from a Florida state court.

525 These questions are interesting. There is much to learn.
526 DePaul Law School held a conference on third-party financing last
527 year, generating more than 500 pages of articles. They provide a
528 fascinating introduction, but not a complete picture.

529 Discussion after this introduction began with the observation
530 that the question is not whether third-party financing agreements
531 are discoverable. They might — or might not — be discoverable as an
532 incident to settlement negotiations. The question whether to
533 provide for automatic initial disclosure may be premature. Whether
534 characterized as a range of phenomena or a broad phenomenon that
535 includes many variations, there are too many things involved to
536 justify adopting a disclosure requirement now. "This is too much
537 different from insurance." These views were echoed by others.

538 Another member offered an analogy to Supreme Court Rule 37.6,
539 which requires disclosures for briefs amicus curiae. The lawyer who
540 files the brief must reveal "whether counsel for a party authored
541 the brief in whole or in part and whether such counsel or a party
542 made a monetary contribution intended to fund the preparation or
543 submission of the brief," and identify contributors other than the
544 identified friend. The Court’s interest in knowing who may be
545 masquerading as an amicus is perhaps different from third-party
546 financing of litigation as a whole, but suppose the identified
547 plaintiff has actually been paid off and is as much a shell as a
548 purported amicus?

549 A different member stated that he deals with third-party
550 financing in about half his cases, often in representing plaintiffs
551 in patent cases. The cost of litigating patent actions is ever
552 increasing. Simple out-of-pocket expenses can run into the millions
553 of dollars. Fewer lawyers are able to take these cases on
554 contingent-fee agreements alone. "Third-party litigation financing
555 makes it possible to bring cases that deserve to be brought." At
556 the same time, the ethical issues are real. Attention has been paid
557 to these issues, and more attention will be paid to them. It is not
558 clear that initial disclosure will advance consideration of these
559 questions. And, although it seems clear that knowledge of third-
560 party financing can advance decision of specific issues in an
561 individual case — cost-shifting is an example — that is better
562 dealt with in the case than by adopting initial disclosure. So too,
563 the analogy to insurance disclosure is not close. It is hard to

564 follow the argument that disclosure will remove a deterrent to
565 settlement. Knowing the specific terms of the financing agreement
566 will not contribute to that. There are, moreover, many different
567 forms of financing: it may be as simple as a loan, with contingent
568 repayment, that leaves the lender entirely out of the conduct of
569 the litigation. But some funders want to be involved in developing
570 and pursuing the case, and in settlement. These arrangements bear
571 on attorney-client privilege, and may lead to divided loyalties as
572 between lender and client. Again, those problems do not have much
573 to do with the disclosure proposal.

574 A judge expressed doubts about the need for disclosure. He
575 routinely requires the person with settlement authority to be
576 present at conferences; "I can get the information I need."
577 Similarly, the information can be got if it is relevant to cost-
578 shifting.

579 Another judge agreed that the proposal is premature. We do not
580 yet know enough about the many kinds of financing arrangements to
581 be able to make rules.

582 A member noted that the ABA 20/20 Commission on Ethics
583 produced a white paper on alternative litigation funding. The paper
584 noted that these practices are evolving. The paper expressed a hope
585 that work would continue toward studying the impact of funding on
586 counsel's independence, candor, confidentiality, and undivided
587 loyalty.

588 A third judge thought third-party funding "is like ghost-
589 writing; I like to know who's writing what I read." The judges on
590 her court have not yet agreed whether they can compel disclosure of
591 third-party financing. But this belongs in the array of things that
592 judges should be aware of.

593 A fourth judge agreed with a different analogy. Professional-
594 looking filings appear in pro se cases. It is useful to know
595 whether the party has had professional help in order to decide
596 whether to measure a pleading by the more forgiving standards that
597 apply to pro se parties. "I do ask questions at status hearings;
598 some of my colleagues are more aggressive." His court is
599 considering a local rule to address this question. The third judge
600 agreed — she has a standing order that requires identification of
601 the actual author.

602 A fifth judge suggested that the concern about potential
603 conflicts extends beyond judges to include opposing counsel. But
604 this is not a study for this Committee to undertake.

605 And a sixth judge agreed that courts have the tools to get the

606 information needed to rule on discovery issues, and to order
607 appearance by a person with settlement authority, and so on. The
608 task of determining the author of nominally pro se papers presents
609 a different question.

610 Discussion concluded with the observation that no one has
611 argued that these questions are unimportant. Nor has it been argued
612 that they should be ignored. But third-party financing practices
613 are in a formative stage. They are being examined by others. They
614 have ethical overtones. We should not act now.

615 Another member agreed that the question is premature. There
616 has been a flurry of articles. "The authors are all over the
617 place." Some, highly respected, have suggested that the concerns
618 reflected by this proposal are premature.

619 The Committee decided not to act on these issues now.

620 *Nonparty Rule 30(b)(6) Depositions: Dkt. 13-CV-E*

621 The Committee on Federal Courts of the New York City Bar
622 submits proposals to address problems they believe arise from
623 notices to take Rule 30(b)(6) depositions of entities that are not
624 parties to the underlying litigation. The central problem is that
625 notices set the deposition at a time too early to enable the
626 nonparty to properly educate the witnesses who will appear to
627 provide testimony for the nonparty named as the deponent. The
628 response to this problem takes two forms: Objections are advanced
629 as to the scope of the subpoena, and the witnesses are prepared
630 only on subjects within the scope accepted by the nonparty entity.
631 The nonparty also may move for a protective order, and take the
632 position that it need not appear for the deposition before the
633 court rules on the objections.

634 The proposal rejects one possible remedy, adaptation of the
635 Rule 45(d)(2)(B) procedure that allows an objection to a subpoena
636 to produce and suspends the subpoena until the court orders
637 enforcement. This approach is thought too severe for depositions,
638 because a deposition is a discrete event and does not provide the
639 opportunities for negotiation that occur in the course of a
640 "rolling" response to a subpoena to produce. Instead, it is urged
641 that the rules should require a minimum 21-day notice of the
642 deposition. In addition, the proposal would require that a subpoena
643 addressed to a nonparty entity for a Rule 30(b)(6) deposition state
644 the reasons for seeking discovery of the matters identified in the
645 notice. Finally, the suggestion would amend Rule 30, probably by
646 adding a new subdivision, to provide that a motion for a protective
647 order or to quash or modify the subpoena voids the time stated for
648 the deposition.

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649 Reasons for caution were sketched. This proposal is the first
650 indication of the problem it describes. Rule 30(b)(6) was explored
651 in some depth a few years ago in response to suggestions made by a
652 committee of the New York State Bar Association; the question of
653 inadequate notice to a nonparty Rule 30(b)(6) deponent was not even
654 mentioned then. Nor have there been any other suggestions of this
655 problem.

656 Discussion began with a similar observation that the Committee
657 recently engaged in an in-depth exploration of Rule 45. The work
658 began with identification of 17 possible topics that might be
659 addressed, and narrowed the list to the changes that became
660 effective less than a year ago. This proposal comes as describing
661 a surprise set of issues.

662 Judge Koeltl said that any suspicion that the proposal may
663 reflect problems unique to practice in the Southern or Eastern
664 Districts of New York should be laid to rest. "I do not see it as
665 a problem." He expressed enormous respect for the City Bar's
666 Federal Courts Committee. It did wonderful work for the Duke
667 Conference, and again in its comments on the Duke Rules Package.
668 But this should not be a problem in the Southern District. Local
669 rules require a conference with the court before making a discovery
670 motion. "I've never seen this as a problem."

671 Another judge observed that if the nonparty deponent is in
672 another state, enforcement of the subpoena will be in the court
673 where compliance is expected. And the party serving the subpoena is
674 required to take steps to avoid imposing unreasonable burdens on
675 the deponent. Rule 45(d)(3)(A) provides further protection,
676 requiring the court to quash or modify a subpoena that fails to
677 allow a reasonable time to comply. "The rules provide pretty good
678 protection" now.

679 A third judge suggested that generally the Committee seeks to
680 frame rules of general application. "This seems a very specific
681 problem; a rule addressed to it could create collateral problems.
682 If there's a problem, it arises from judges who are not tending to
683 their cases."

684 A fourth judge thought that the problem reflects the kinds of
685 concerns that underlie the pending proposal to amend Rule 1 to
686 include the parties in the obligation to construe and administer
687 the rules to achieve the just, speedy, and inexpensive
688 determination of the action. The deponent's lawyer should describe
689 the problem to the lawyer who issued the subpoena, and they should
690 work out a suitable time for the deposition. It is in no one's
691 interest to have an ill-prepared witness.

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692 Still another judge observed that in some circumstances a
693 lawyer may have strategic reasons to hope for an ill-prepared
694 witness testifying under Rule 30(b)(6) for an entity that is a
695 party — that was the subject of the earlier Rule 30(b)(6) inquiry.
696 But there is no similar potential for strategic advantage when the
697 witness testifies for a nonparty entity. "Lawyers should be able to
698 resolve this."

699 A member noted that the ABA Litigation Section Pretrial Task
700 Force has Rule 30(b)(6) on its agenda, and may eventually bring
701 forward proposals for revision. The question of setting the time
702 for a nonparty Rule 30(b)(6) deposition too soon has not been on
703 its list.

704 It was concluded that this proposal should be set aside.

705 *Attorney-Client Privilege Appeals: Dkt. 10-CV-A*

706 Professor Marcus introduced this proposal, which would amend
707 Rule 37 to authorize a court of appeals to grant a petition for
708 immediate interlocutory review of a ruling that grants or denies a
709 motion to compel discovery of information claimed to be protected
710 by attorney-client privilege. The revision would be drawn on lines
711 that parallel permissive Rule 23(f) appeals from orders granting or
712 denying class certification. A similar provision has been submitted
713 to the Appellate Rules Committee, which has decided not to pursue
714 it. Their view is that existing opportunities for review suffice,
715 although they are not often invoked. The traditional remedy is to
716 disobey the order to produce, be held in contempt, and appeal the
717 contempt order — and even that approach is limited by the rule that
718 a party can appeal only a criminal contempt order, not a civil
719 contempt order. Another remedy is by extraordinary writ; mandamus
720 may be somewhat more freely available to test questions of
721 privilege and other confidentiality concerns, but still is
722 carefully limited. Extending beyond the limits of these remedies —
723 and recognizing the possible availability of § 1292(b) appeals by
724 permission of both the district court and the court of appeals —
725 will create difficult problems of drawing lines that promote
726 desirable opportunities for appeal without stimulating many ill-
727 founded attempts.

728 The question arises from the decision in Mohawk Industries,
729 Inc. v. Carpenter, 130 S.Ct. 599 (2009). The Court ruled that the
730 collateral-order doctrine supports "finality" only as to all cases
731 within a described "category," or as to none of them. An order
732 compelling production of materials found to have been initially
733 protected by attorney-client privilege, but to have lost the
734 protection by waiver, was in a category that did not fit the
735 criteria for collateral-order appeal in all cases. Alternative

736 means of review provide adequate protection. At the same time, the
737 Court suggested that if it is desirable to provide somewhat greater
738 opportunities for interlocutory review, it is better that they be
739 established through the Rules Enabling Act than by judicial
740 elaboration of § 1291 or other judicial doctrines.

741 Invocation of the Rule 23(f) analogy helps to frame the
742 question. Grant or denial of class certification can have an
743 enormous impact on the case — denials were once held appealable as
744 the "death knell" of actions that could not be expected to survive
745 if only individual claims remained to be litigated (another example
746 of collateral-order appeal doctrine rejected by the Supreme court),
747 while grants can exert a hydraulic pressure to settle when facing
748 the great costs of defending a class action and the risks of "bet-
749 the-company" judgments. The stakes are high. And, although there
750 are many class actions and no small number of requests for Rule
751 23(f) appeals, the occasions for potential appeals remain finite.
752 Even if the categories of appeal were limited to attorney-client
753 issues, these issues arise far more often, and are likely to be
754 much less momentous.

755 A judge observed that the opportunities for appellate review
756 that remain available after the Mohawk decision "are not much
757 help." But attorney-client privilege is invoked in an overwhelming
758 number of cases. And it often is raised without even attempting to
759 comply with the requirements of Rule 26(b)(5)(A) to describe the
760 nature of the matters objected to in a way that will enable other
761 parties to assess the claim of privilege. "The potential
762 applications are enormous."

763 A lawyer noted that if the problem involves waiver of the
764 privilege, Evidence Rule 502(d) and the proposed Civil Rules
765 amendments that provide express reminders of Rule 502(d) "reflect
766 a big effort to reduce the occasions for waiver." Judges, moreover,
767 generally do a really good job in ruling on privilege issues. These
768 issues come up far more often than reported cases might suggest.
769 The Appellate Rules Committee seems to have got it right.

770 Another judge noted that there are many privileges apart from
771 the attorney-client privilege beloved by lawyers. Why should a
772 special appeal provision be limited to just this one privilege? And
773 what of work-product protection? We should stay away from these
774 issues.

775 The Committee concluded that this subject should be removed
776 from the agenda.

777 *Rule 41: Dkt. 14-CV-D; 10-CV-C*

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778 Docket item 14-CV-D was the submission of a law review article
779 by Professor Bradley Scott Shannon, "Dismissing Federal Rule of
780 Civil Procedure 41," 52 U. of Louisville L.Rev. 265 (2014).

781 The article advances two basic packages of suggestions. The
782 first identifies several well-known shortcomings in Rule 41. The
783 second bewails the reliance of Rule 41 on the often-criticized
784 terms "with prejudice," "without prejudice," and "on the merits."

785 Among the perceived shortcomings are these: (1) The unilateral
786 right to dismiss without prejudice should be terminated by a motion
787 to dismiss as well as by an answer or a motion for summary
788 judgment. There is an obvious analogy to the right to amend a
789 pleading once as a matter of course under Rule 15(a)(1)(A) — Rule
790 15 was recently amended to cut off this right 21 days after a
791 motion under Rule 12(b), (e), or (f). (2) Rule 41(a)(1)(A)
792 addresses dismissal of "an action." Provision should be made for
793 dismissing part of an action, whether it be one of several claims
794 or one of several parties. Dismissal of a claim might better be
795 accomplished by Rule 15 amendment of the pleading — Rule 15 covers
796 not only an initial period when amendment does not require court
797 permission but also later times in the action when leave is
798 required but is freely granted. Addressing dismissal of a "claim"
799 without prejudice, further, might invite confusion about the
800 various approaches that define what is a "claim" according to the
801 context of inquiry. There is a risk of confusing what is a "claim"
802 for the claim-preclusion aspect of res judicata with what might
803 suitably be treated as a "claim" for voluntary abandonment.
804 Dismissal of all claims against a party also can be accomplished
805 through Rule 15, but Rule 41 might be amended to address this. (3)
806 Rule 41(c) addresses voluntary dismissal of a counterclaim,
807 crossclaim or third-party claim; other claims are not addressed. As
808 just one example, a third-party defendant may file a claim against
809 the original plaintiff. The suggestion is that Rule 41(c) should be
810 amended to provide that it "applies similarly" to dismissal of any
811 type of claim not enumerated. (4) A related possibility would be to
812 add a motion for summary judgment (or a Rule 12 motion) to the
813 events that cut of unilateral dismissal without prejudice of a
814 counterclaim, crossclaim, or third-party claim under Rule 41(c).
815 (There is a respectable view that "summary judgment" was omitted
816 from Rule 41(c) by simple absent-mindedness.)

817 The difficulties that inhere in the concepts of "prejudice,"
818 "on the merits," and the like also are well known. For example,
819 Rule 41(b) provides that a dismissal for lack of jurisdiction is
820 not on the merits. But the dismissal in fact establishes issue
821 preclusion on any matter necessarily decided in finding a lack of
822 jurisdiction. The claim, on the other hand, is not precluded if a
823 subsequent action is brought in a court that does have

824 jurisdiction. The proposed remedy is to amend Rule 41 to refer
825 directly to preclusion consequences — "does not preclude,"
826 "precludes," and so on. Reasons for caution on this score begin
827 with the proposition that the intricacies of applying present Rule
828 41 are well known and have been thoroughly addressed by the courts
829 and in the literature. So there is a real prospect that abandoning
830 the familiar and familiarly interpreted phrases in favor of open-
831 ended invocations of general preclusion law could invite new
832 confusions and unsettling arguments. There is little reason to
833 believe that better preclusion results would be reached.

834 Discussion began by asking the Committee whether they see
835 these problems in practice.

836 A judge said that these problems are easily worked out in
837 practice. For example, a motion may be made for default judgment
838 against one defendant when another defendant has not been properly
839 served. To get to and through a hearing on damages, the plaintiff
840 may amend the complaint to dismiss the defendant not served. Or on
841 a motion to review a proposed settlement under the Fair Labor
842 Standards Act, the parties may discover that they have unresolved
843 issues as to attorney fees and prefer to dismiss so they can work
844 out a full settlement.

845 The conclusion was that Professor Shannon has pointed to ways
846 in which Rule 41 can be improved. But the Committee operates in the
847 instinctive belief that it is better to resist the temptation to
848 make abstract improvements in the rules. The risk of unintended
849 consequences counsels caution. Amendments to address real-world
850 problems are more important. For Rule 41, that holds for these
851 proposals. They will be put aside.

852 *Rule 48: Non-Unanimous Verdicts in Diversity Cases: Dkt. 13-CV-A*

853 This proposal would amend Rule 48 to adopt state majority-
854 verdict rules for diversity cases. The suggested reason is that
855 defendants commonly view majority-verdict rules as something that
856 favors plaintiffs. When an action that could be brought in federal
857 diversity jurisdiction is brought in a state court that has a
858 majority-verdict rule, a defendant has an incentive to remove for
859 the purpose of invoking the federal unanimity requirement. Cases
860 are brought to federal courts that would not come there if the
861 federal courts adhered to the state-court majority-verdict rule.

862 The first issues raised by this proposal are whether majority-
863 verdict rules are better than a unanimity requirement, and, if so,
864 whether the Seventh Amendment permits a majority-verdict without
865 the parties' consent. If majority verdicts are better, and if the
866 Seventh Amendment permits — almost certainly a requisite even for

867 a rule limited to diversity cases — then Rule 48 should provide for
868 majority verdicts in all cases, or at least for all diversity and
869 supplemental jurisdiction cases. Otherwise, the question is whether
870 it is better to defer to state practice either from a pragmatic
871 desire to reduce removals or from an Erie-like sensitivity to the
872 prospect that majority verdicts are sufficiently "bound up" with
873 state substantive principles to deserve relief from the general
874 Rule 48 command for uniformity.

875 The majority-verdict question may intersect the question of
876 jury size. A couple of decades ago the Committee explored
877 restoration of the 12-person civil jury, expressly deferring
878 consideration of majority-verdict rules pending resolution of that
879 issue. That attempt failed. But the underlying questions remain:
880 how far do the dynamics of deliberation in a 12-person jury differ
881 from those in a 6-person jury? How far are the dynamics of
882 deliberation affected by allowing a majority verdict? How do these
883 effects interact if a verdict can be reached by a majority of a 6-
884 person jury?

885 Discussion began with the observation that many considerations
886 affect a defendant's decision whether to remove an action, whether
887 it is a diversity action or a federal-question action. "If we are
888 to start addressing the reasons defendants have for removing, it
889 will be a daunting task. The premise is troubling."

890 Agreement was expressed as to strategic concerns. A variety of
891 strategic factors may lead to removal. But "this one is
892 significant." Generally plaintiffs like majority verdicts, which
893 may facilitate horsetrading between damages and liability. There
894 are sound Erie-like reasons to honor state rules on jury size and
895 unanimity. "We should not distrust state policymaking on this."
896 There is no important federal policy to be served by deferring to
897 defendants' strategic choices. The proposal can be drafted easily.
898 But it will generate a lot of controversy. It is not clear whether
899 the value of the change will be worth enduring the controversy.

900 The problem of supplemental jurisdiction was raised. Many
901 cases present federal questions and state-law questions that
902 involve many of the same issues of fact. There may be diversity
903 jurisdiction as well as federal-question jurisdiction, or there may
904 be only supplemental jurisdiction over the state-law questions, or
905 — in a particularly convoluted area of jurisdiction — there may be
906 federal-question jurisdiction over a state-created claim that
907 centers on a federal question. Should the majority-verdict rule
908 that would apply to the state-law questions extend to the federal
909 questions as well, so as to avoid the grim spectacle of telling the
910 jury it must answer common questions unanimously as to part of the
911 case, but can answer the same questions by majority verdict as to

912 other parts?

913 Professor Coquillette recalled an article he wrote with David
914 Shapiro on the fetish of jury trials. The majority-verdict question
915 is a complicated one.

916 Another member agreed with the view that clear drafting can be
917 achieved. She also agreed with the view that it is a good thing to
918 reduce the strategic use of diversity jurisdiction. Courts and
919 others are interested anew in the importance of jury trials. Any
920 proposal will be controversial, but this is a matter of genuine
921 interest to the present and future of jury trials. We ask juries to
922 apply different standards of persuasion to different issues in a
923 single trial, and expect them to perform this feat. They could
924 likewise manage to apply majority-verdict rules to some elements,
925 and a unanimity requirement to others. Or we could draft a
926 compromise rule that gives the court discretion whether to apply a
927 majority-verdict rule.

928 Brief discussion found no confident answer to the question of
929 how many states permit majority verdicts.

930 Doubts about adopting state practice were expressed by noting
931 that "this is not like service of process," a purely technical
932 matter. There may be substantial federal interests involved in the
933 unanimity requirement.

934 The question turned to other aspects of jury practice. Some
935 states are beginning to follow Arizona, which has been a leader in
936 relaxing many traditional practices. Jurors can ask questions. They
937 can take notes. They can deliberate throughout the trial. Should a
938 federal court follow these practices in diversity cases that would
939 be tried in such a state, even if it would not do so in a federal-
940 question case? Or, to take a nonjury example, cases have been
941 removed by defendants because they like the expert-witness report
942 requirements of Rule 26(a)(2), or because they like the Daubert
943 approach to expert witnesses. Do we want to eliminate all federal
944 practices that may affect the outcome?

945 A similar question asked whether the federal court should be
946 required to draw the jury from the same area that would supply
947 jurors to the state court. An example was offered of experience in
948 criminal cases, where state authorities may cede the lead to
949 federal prosecutors in order to draw the jury from a broader area
950 than would supply the state-court jurors. There are areas where it
951 is appropriate to follow federal-court jury practices; it is
952 difficult to see why the unanimity issues should be different.

953 Turning back to reasons that may support the proposal, it was

954 noted that a defendant's hope for a unanimity requirement may be
955 different from other strategic concerns. Majority-verdict rules
956 reflect long-held state policies. The federal unanimity requirement
957 can be seen as archaic, even odd.

958 A related phenomenon was noted. A case is removed, dismissed
959 by the plaintiff, then filed again in state court with an added
960 defendant that destroys diversity. If removal is attempted again,
961 the federal court does not evaluate the plaintiff's strategic
962 choices; it asks only whether the new party is properly joined.

963 A judge observed that under Rule 81(c), federal procedures
964 apply after removal. We should adhere to that principle here.

965 Discussion turned to the policies that underlie the grant of
966 diversity jurisdiction in § 1332. It would be difficult to
967 attribute any intent to Congress with respect to jury unanimity —
968 § 1332 goes back to the First Judiciary Act, and its perpetuation
969 by successive Congresses in confronting periodic attempts to revise
970 or eliminate the jurisdiction leaves too many uncertainties to
971 support any attribution of relevant intent. Nor does it seem that
972 the question can be usefully approached as an attempt to rebalance
973 strategic motivations. The purpose of § 1332 "is to alleviate
974 perceived unfairness." The change "would be a large move."

975 A related suggestion was that diversity jurisdiction was
976 established "to avoid hometown advantage." This purpose is
977 difficult to apply across the wide range of practices that can
978 affect outcome. Maryland, for example, does not have individual
979 judge case assignments. The District of Maryland does. That can
980 have a strong influence on the cost and speed of bringing the case
981 to a conclusion. Or, for a different example, the summary-judgment
982 rules in state and federal court look the same on paper. But there
983 are significant differences in actual practice.

984 The question whether to take up this proposal was put to a
985 voice vote. A clear majority voted to remove it from the docket.

986 *Rule 56: Summary-Judgment Standards: Dkt. 14-CV-E*

987 Professor Suja A. Thomas submitted for the docket her article
988 on Rule 56, "Summary Judgment and the Reasonable Jury Standard," 97
989 Judicature 222 (2014). The article suggests that it is not really
990 possible for a single trial judge, nor even a panel of three
991 appellate judges, to know or imagine what facts a reasonable jury
992 might find with the benefit of reasoning together in the dynamic
993 process of deliberation. That part of it ties to her earlier
994 writing, which casts doubt on the constitutionality of summary
995 judgment under the Seventh Amendment. The conclusion, however, is

996 that the standard for summary judgment "is ripe for reexamination.
997 The rules committee, if so inclined, would be an appropriate body
998 to engage in this study with assistance from the Federal Judicial
999 Center, and such study would be welcome."

1000 The suggestion for study goes beyond work of the sort the
1001 Federal Judicial Center has already done. A broad study of pretrial
1002 motions is now underway. But these studies count such things as the
1003 frequency of motions; the rate of grants, partial grants, and
1004 denials; variations along these dimensions according to categories
1005 of cases; variations among courts; and other objective matters that
1006 yield to counting. There has not been an attempt to evaluate the
1007 faithfulness of actual decisions to the announced standard.
1008 Consultation with the Federal Judicial Center staff suggests that
1009 there are good reasons for this. The only way to appraise the
1010 actual operation of the summary-judgment standard in the hands of
1011 judges would be to provide an independent redetermination of a
1012 large number of decisions. To be fully reliable, the
1013 redetermination would have to be made by judges believing they were
1014 actually resolving a real motion in a real case — a determination
1015 made without that pressure might be reached casually because it is
1016 only for research, not real life. Substituting lawyers or scholars
1017 or other researchers would lose not only the reality but also the
1018 training and experience of judges. It has not seemed possible to
1019 frame such a study.

1020 Discussion began with a statement that Professor Thomas
1021 believes that summary judgment violates the Seventh Amendment. "The
1022 idea that judges cannot determine the limits of reasonableness is
1023 wrong." Even in a criminal case, a judge may refuse to submit a
1024 proffered defense to the jury if it lacks evidentiary support.

1025 Another judge observed that experience with Professor Thomas
1026 while she was in practice showed her to be a wonderful lawyer. Rule
1027 56 is a subject that has concerned the plaintiff’s bar because of
1028 the ways in which it is administered. Professor Arthur Miller is
1029 another who thinks that summary judgment is at times granted
1030 unreasonably, leading to dismissal without trial. "There are too
1031 many Rule 56 motions that should not be made." "I try to discourage
1032 some of them in pre-motion conferences, but they get made." But it
1033 is difficult to know what could be done to improve application by
1034 changing the rule language.

1035 Still another judge suggested that "the problem is with
1036 judges, not the rule." Motions invoking qualified immunity provide
1037 an example — we regularly entrust to judges the determination of
1038 what a reasonable officer would know. No doubt judges bring their
1039 own biases to bear. "We can educate judges about this, but we
1040 cannot dehumanize judges."

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1041 Similar observations were offered by another judge. Judges
1042 make determinations of reasonableness all the time. They decide
1043 motions for judgment as a matter of law. They decide motions for
1044 acquittal in criminal cases. They make determinations under the
1045 Evidence Rules.

1046 A member said that the article was entertaining, but left an
1047 uncertain impression as to what the Committee should do, apart from
1048 undertaking a study.

1049 This discussion turned to the question whether judgment as a
1050 matter of law violates the Seventh Amendment. The summary-judgment
1051 standard is anchored in judgment as a matter of law. The 1991
1052 amendments of Rule 50, indeed, were undertaken in part to emphasize
1053 the continuity of the standard between Rules 50 and 56. But if we
1054 were to take literally the general statement that the Seventh
1055 Amendment measures the right to jury trial by practice in 1791, it
1056 would be difficult to support judgment as a matter of law. In 1794,
1057 a unanimous Supreme Court instructed a jury in an original-
1058 jurisdiction trial that although the general rule assigns
1059 responsibility for the law to the court and responsibility for the
1060 facts to the jury, still the jury has lawful authority to determine
1061 what is the law. If a jury can determine that the law is something
1062 different from what the judges think is the law, it would be nearly
1063 impossible to imagine judgment "as a matter of law." But by 1850
1064 the Supreme Court recognized the directed verdict, and the standard
1065 has evolved ever since. Professor Coquillette added that there were
1066 many differences among the colonies-states in jury-trial practices
1067 as of 1791. A member added that it is clear a court may direct
1068 acquittal in a criminal case, a power that exists for the
1069 protection of the defendant.

1070 The Committee unanimously agreed to remove this proposal from
1071 the agenda.

1072 *Rule 68: Dockets 13-CV-B, C, D; 10-CV-D; 06-CV-D; 04-CV-H; 03-CV-B;*
1073 *02-CV-D*

1074 Rule 68, dealing with offers of judgment, has a long history
1075 of Committee deliberations followed by decisions to avoid any
1076 suggested revisions. Proposed amendments were published for comment
1077 in 1983. The force of strong public comments led to publication of
1078 a substantially revised proposal in 1984. Reaction to that proposal
1079 led the Committee to withdraw all proposed revisions. Rule 68 came
1080 back for extensive work early in the 1990s, in large part in
1081 response to suggestions made by Judge William W Schwarzer while he
1082 was Director of the Federal Judicial Center. That work concluded in
1083 1994 without publishing any proposals for comment. The Minutes for
1084 the October 20-21 1994 meeting reflect the conclusion that the time

1085 had not come for final decisions on Rule 68. Public suggestions
1086 that Rule 68 be restored to the agenda have been considered
1087 periodically since then, including a suggestion in a Second Circuit
1088 opinion in 2006 that the Committee should consider the standards
1089 for comparing an offer of specific relief with the relief actually
1090 granted by the judgment.

1091 Although there are several variations, the most common feature
1092 of proposals to amend Rule 68 is that it should provide for offers
1093 by claimants. From the beginning Rule 68 has provided only for
1094 offers by parties opposing claims. Providing mutual opportunities
1095 has an obvious attraction. The snag is that the sanction for
1096 failing to better a rejected offer by judgment has been liability
1097 for statutory costs. A defendant who refuses a $80,000 offer and
1098 then suffers a $100,000 judgment would ordinarily pay statutory
1099 costs in any event. Some more forceful sanction would have to be
1100 provided to make a plaintiff's Rule 68 offer more meaningful than
1101 any other offer to settle. The most common proposal is an award of
1102 attorney fees. But that sanction would raise all of the intense
1103 sensitivities that surround the "American Rule" that each party
1104 bears its own expenses, including attorney fees, win or lose.
1105 Recognizing this problem, alternative sanctions can be imagined —
1106 double interest on the judgment, payment of the plaintiff's expert-
1107 witness fees, enhanced costs, or still other painful consequences.
1108 The weight of many of these sanctions would vary from case to case,
1109 and might be more difficult to appraise while the defendant is
1110 considering the consequences of rejecting a Rule 68 offer.

1111 Another set of concerns is that any reconsideration of Rule 68
1112 would at least have to decide whether to recommend departure from
1113 two Supreme Court interpretations of the present rule. Each rested
1114 on the "plain meaning" of the present rule text, so no disrespect
1115 would be implied by an independent examination. One case ruled that
1116 a successful plaintiff's right to statutory attorney fees is cut
1117 off for fees incurred after a rejected offer if the judgment falls
1118 below a rejected Rule 68 offer, but only if the fee statute
1119 describes the fee award as a matter of "costs." It is difficult to
1120 understand why, apart from the present rule text, a distinction
1121 should be based on the likely random choice of Congress whether to
1122 describe a right to fees as costs. More fundamentally, there is a
1123 serious question whether the strategic use of Rule 68 should be
1124 allowed to defeat the policies that protect some plaintiffs by
1125 departing from the "American Rule" to encourage enforcement of
1126 statutory rights by an award of attorney fees. The prospect that a
1127 Rule 68 offer may cut off the right to statutory fees, further, may
1128 generate pressures on plaintiff's counsel that might be seen as
1129 creating a conflict of interests with the plaintiff. The other
1130 ruling is that there is no sanction under Rule 68 if judgment is
1131 for the defendant. A defendant who offers $10,000, for example, is

1132 entitled to Rule 68 sanctions if the plaintiff wins $9,000 or $1,
1133 but not if judgment is for the defendant. Rule 68 refers to "the
1134 judgment that the offeree finally obtains," and it may be read to
1135 apply only if the plaintiff "obtains" a judgment, but the result
1136 should be carefully reexamined.

1137 The desire to put "teeth" into Rule 68, moreover, must
1138 confront concerns about the effect of Rule 68 on a plaintiff who is
1139 risk-averse, who has scant resources for pursuing the litigation,
1140 and who has a pressing need to win some relief. The Minutes for the
1141 October, 1994 meeting reflect that "[a] motion to abrogate Rule 68
1142 was made and seconded twice. Brief discussion suggested that there
1143 was support for this view * * *." Abrogation remains an option that
1144 should be part of any serious study.

1145 Finally, it may be asked whether it is better to leave Rule 68
1146 where it lies. It is uniformly agreed that it is not much used,
1147 even in cases where it might cut off a statutory right to attorney
1148 fees incurred after the offer is rejected. It has become an
1149 apparently common means of attempting to defeat certification of a
1150 class action by an offer to award complete relief to the putative
1151 class representative, but those problems should not be affected by
1152 the choice to frame the offer under Rule 68 as compared to any
1153 other offer to accord full relief. Courts can work their way
1154 through these problems absent any Rule 68 amendment; whether Rule
1155 23 might be amended to address them is a matter for another day.

1156 Discussion began with experience in Georgia. Attorney-fee
1157 shifting was adopted for offers of judgment in 2005, as part of
1158 "tort reform" measures designed to favor defendants. "It creates
1159 enormously difficult issues. Defendants take advantage." And it is
1160 almost impossible to frame a rule that accurately implements what
1161 is intended. Already some legislators are thinking about repealing
1162 the new provisions. If Rule 68 is to be taken up, the work should
1163 begin with a study of the "enormous level of activity at the state
1164 level."

1165 Any changes, moreover, will create enormous uncertainty, and
1166 perhaps unintended consequences.

1167 Another member expressed fear that the credibility of the
1168 Committee will suffer if Rule 68 proposals are advanced, no matter
1169 what the proposals might be. Debates about "loser pays" shed more
1170 heat than light.

1171 A judge expressed doubts whether anything should be done, but
1172 asked what effects would follow from a provision for plaintiff
1173 offers? One response was that the need to add "teeth" would likely
1174 lead to fee-shifting, whether for attorneys or expert witnesses.

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1175 It was noted that California provides expert-witness fees as
1176 consequences. But expert fees are variable, not only from expert to
1177 expert but more broadly according to the needs for expert testimony
1178 in various kinds of cases.

1179 The value of undertaking a study of state practices was
1180 repeated. "I pause about setting it aside; this has prompted
1181 several suggestions." State models might provide useful guidance.

1182 Another member agreed — "If anything, let's look to the
1183 states." When people learn he's a Committee member, they start to
1184 offer Rule 68 suggestions. Part 36 of the English Practice Rules —
1185 set in a system that generally shifts attorney fees to the loser —
1186 deals with offers in 22 subsections; this level of complication
1187 shows the task will not be easy. There is ground to be skeptical
1188 whether we will do anything — early mediation probably is a better
1189 way to go. Still, it is worthwhile to look to state practice.

1190 A member agreed that "studies do little harm. But I suspect a
1191 review will not do much to help us." It is difficult to measure the
1192 actual gains and losses from offers of judgment.

1193 One value of studying offers of judgment was suggested:
1194 Arguments for this practice have receded from the theory that it
1195 increases the rate of settlement — so few cases survive to trial
1196 that it is difficult to imagine any serious gain in that dimension.
1197 Instead, the argument is that cases settle earlier. If study shows
1198 that cases do not settle earlier, that offers are made only for
1199 strategic purposes, that would undermine the case for Rule 68.

1200 Another member suggested that in practice the effect of Rule
1201 68 probably is to augment cost and delay. In state courts much time
1202 and energy goes into the gamesmanship of statutory offers.
1203 "Reasonable settlement discussion is unlikely. The Rule 68 timing
1204 is wrong; it's worse in state courts."

1205 It also was observed that early settlement is not necessarily
1206 a good thing if it reflects pressure to resolve a case before there
1207 has been sufficient discovery to provide a good sense of the
1208 claim's value. This was supplemented by the observation that early
1209 mediation may be equally bad.

1210 Another member observed that a few years ago he was struck by
1211 the quagmire aspects of Rule 68, by the gamesmanship, by the fear
1212 of unintended consequences from any revision. There is an analogy
1213 to the decision of the Patent Office a century ago when it decided
1214 to refuse to consider any further applications to patent a
1215 perpetual motion machine. "The prospect of coming up with something
1216 that will be frequently utilized to good effect is dim." There is

1217 an unfavorable ratio between the probability of good results and
1218 the effort required for the study.

1219 A judge responded that the effort could be worth it if the
1220 study shows such a dim picture of Rule 68 that the Committee would
1221 recommend abrogation.

1222 The Department of Justice reported little use of Rule 68,
1223 either in making or receiving offers. When it has been used, it is
1224 at the end, when settlement negotiations fail. In two such cases,
1225 it worked in one and not the other.

1226 A member observed that if Rule 68 is little used, is
1227 essentially inconsequential, "we don’t gain much by abrogating it."
1228 He has used it twice.

1229 The discussion closed by concluding that the time has not come
1230 to appoint a Subcommittee to study Rule 68, but that it will be
1231 useful to undertake a study of state practices in time for
1232 consideration at the next meeting.

1233 *Rule 4(c)(1): "Copy" of Complaint: Dkt. 14-CV-C*

1234 Rule 4(c)(1) directs that "[a] summons must be served with a
1235 copy of the complaint." Rule 10(c) provides that "a copy of a
1236 written instrument that is an exhibit to a pleading is a part of
1237 the pleading for all purposes." A federal judge has suggested that
1238 it may be useful to interpret "copy" to allow use of an electronic
1239 copy, on a CD or other computer-readable medium. The suggestion was
1240 prompted by a case brought by a pro se prisoner with a complaint
1241 and exhibits that ran 300 pages and 30 defendants. The cost of
1242 copying and service was substantial.

1243 The suggestion is obviously attractive. But there will be
1244 defendants who do not have access to the technology required to
1245 read whatever form is chosen, no matter how basic and widespread in
1246 general use. This practice might be adopted for requests to waive
1247 service, and indeed there is no apparent reason why a plaintiff
1248 could not request waiver by attaching a CD to the request. Consent
1249 to waive would obviate concerns for the defendant’s ability to use
1250 the chosen form.

1251 A more general concern is that this proposal approaches the
1252 general question of initial service by electronic means, although
1253 it seems to contemplate physical delivery of the storage medium.
1254 These issues may be better resolved as part of the overall work on
1255 adapting the Civil Rules and all other federal rules to ever-
1256 evolving technology.

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1257 A practical example was offered. In the Southern District of
1258 Indiana, the court has an agreement with prison officials who agree
1259 to accept e-copies on behalf of multiple defendants. It works. But
1260 it works by agreement, a simpler matter than drafting a general
1261 rule.

1262 It was concluded that no action should be taken on this
1263 matter.

1264 *Rule 30(b)(2): Adding "ESI": 13-CV-F*

1265 Rule 30(b)(2) addresses service of a subpoena duces tecum on
1266 a deponent, and provides that the notice to a party deponent may be
1267 accompanied by a request under Rule 34 to produce "documents and
1268 tangible things at the deposition." This suggestion would add
1269 "electronically stored information" to the list of things to
1270 produce at a deposition.

1271 This suggestion revisits a question that was deliberately
1272 addressed during the course of developing the 2006 amendments that
1273 explicitly recognized discovery of electronically stored
1274 information. It was decided then that ESI should not be folded into
1275 the definition of "document," but should be recognized as a
1276 separate category in Rule 34. At the same time, it was decided that
1277 references to ESI might profitably be added at some points where
1278 other rules refer to documents, but that other rules that refer to
1279 documents need not be supplemented by adding ESI. Rule 30(b)(2) was
1280 one of those that was not revised to refer to ESI.

1281 Professor Marcus noted that there may be room to argue that it
1282 would have been better to add references to ESI everywhere in the
1283 rules that refer to documents, or at least to add more references
1284 to ESI than were added. But those choices were made, and it might
1285 be tricky to attempt to change them now. Rule 26(b)(3), protecting
1286 trial materials, is an example: on its face, it covers only
1287 documents and tangible things. Surely electronically generated and
1288 preserved work product deserves protection. But any proposal to
1289 amend Rule 26(b)(3) might stir undesirable complications. So for
1290 other rules.

1291 There is no indication that the omission of "ESI" from Rule
1292 30(b)(2) has caused any difficulties in practice.

1293 Discussion began with the observation that the 2006 amendments
1294 have created a general recognition that "documents" includes ESI.
1295 This judge has never seen a party respond to a request to produce
1296 documents by failing to include ESI in the response. An attempt to
1297 fix Rule 30(b)(2) would start us down the path to revising all the
1298 rules that were allowed to remain on the wayside in generating the

1299 2006 amendments. This concern was echoed by another member, who
1300 asked whether undertaking to amend Rule 30(b)(2) would require an
1301 overall effort to consider every rule that now refers to documents
1302 but not to ESI.

1303 Another judge suggested that rather than refer to documents,
1304 ESI, and tangible things, Rule 30(b)(2) could be revised to refer
1305 simply and generally to "a request to produce under Rule 34."

1306 A lawyer observed that the 2006 Committee Note says that a
1307 request to produce documents should be understood to include ESI.
1308 Most state courts have followed the path of defining "documents" to
1309 include ESI.

1310 Discussion concluded with the observation that no problems
1311 have been observed. There is no need to act on this suggestion.

1312 *Rule 4(e)(1): Sewer Service: Dkt. 12-CV-A*

1313 This proposal arises from Rule 4(e)(1), which provides for
1314 service on an individual by following state law. State law may
1315 provide for leaving the summons and complaint unattended at the
1316 individual's dwelling or usual place of abode. The suggestion is
1317 that photographic evidence should be required when service is made
1318 by this means. Apparently the photograph would show the summons and
1319 complaint affixed to the place.

1320 The proposal does not address the more general problem of
1321 deliberately falsified proofs of service. Nor does it explain how
1322 a server intent on making ineffective service would be prevented
1323 from removing the summons and complaint after taking the picture.
1324 The picture requirement might serve as an inducement to actually go
1325 to the place, alleviating faked service arising from a desire to
1326 avoid that chore, but that may not be a great advantage.

1327 Discussion began with a suggestion that this proposal is
1328 unnecessary.

1329 Another member agreed that the suggestion should not be taken
1330 up. But he recounted an experience representing a pro bono client
1331 who had lost a default judgment in state court and who could not
1332 remember having been served or having learned about the lawsuit by
1333 any other means. State court records were of no avail, because the
1334 state practice is to discard all records after judgment enters. The
1335 matter was eventually resolved without needing to resolve the
1336 question whether service had actually been made, but he remains
1337 doubtful whether it was.

1338 Another member said that "the problem is very real. It bothers

1339 me a lot. Paper service can be difficult and costly. Process
1340 servers cut corners." But it is difficult to do anything by rule
1341 that will correct these practical shirkings. What we need is a
1342 technology for cost-effective service. "I don't know that this
1343 Committee is the body to fix it." Another member agreed that
1344 advancing technology may eventually provide the answer. That is
1345 better suited to the agenda of the e-rules subcommittee.

1346 This proposal was set aside.

1347 *Rule 15(a)(3): Any required response: Dkt 12-CV-B*

1348 Rule 15(a)(3) sets the time for "any required response" to an
1349 amended pleading. Before the Style Project, the rule directed that
1350 "a party shall plead in response" within the designated times. The
1351 question is whether an ambiguity has been introduced, and whether
1352 it should be fixed.

1353 The earlier direction that a party "shall plead in response"
1354 relied on the tacit understanding that there is no need to plead in
1355 response to an amended pleading when the original pleading did not
1356 require a response. A plaintiff is not required to reply to an
1357 answer absent court order, and is not required to reply to an
1358 amended answer. The same understanding should inform "any required
1359 response," but that may not end the question. What of an amendment
1360 to a pleading that does require a response? If there was a response
1361 to the original pleading — the most common illustration will be an
1362 answer to a complaint — must there always be an amended responsive
1363 pleading, no matter how small the amendments to the original
1364 pleading and no matter how clearly the original responsive pleading
1365 addresses everything that remains in the amended pleading?

1366 There is something to be said for a simple and clear rule that
1367 any amendment of a pleading that requires a responsive pleading
1368 should be followed by an amended response, even if the only effect
1369 is to maintain a tidy court file. But is this always necessary?

1370 A judge opened the discussion by stating that the need for an
1371 amended responsive pleading depends on the nature of the amendment
1372 to the original pleading. If it is something minor, it suffices to
1373 put it on the record that the answer stands. There is no need for
1374 a rule that requires that there always be an amended answer. But
1375 generally he asks for an amended answer to provide a clear record.

1376 Another judge noted that when lawyers are involved in the
1377 litigation, they virtually always file an amended response.

1378 A lawyer recounted a current case with a 400-page complaint
1379 and, initially, 27 defendants. "One defendant has been let out. We

1380 reached a deal that our 45-page answer would stand for the
1381 remaining 26 defendants. Everyone was happy."

1382 It was agreed that no further action should be taken on this
1383 suggestion.

1384 *Rule 55(b): Partial Default Judgment: Dkt. 11-CV-A*

1385 This proposal arises from a case that included requests for
1386 declaratory, injunctive, and damages relief on a trademark. The
1387 defendant defaulted. The apparent premise is that the clerk is
1388 authorized to enter a default judgment granting injunctive and
1389 declaratory relief, while the amount of damages must be determined
1390 by the court. And the wish is for a way to make final the judgment
1391 for declaratory and injunctive relief, in the expectation that if
1392 the defendant does not take a timely appeal the plaintiff may
1393 decide to abandon the request for damages rather than attempt to
1394 prove them. The problem is that Rule 55(b)(1) allows the clerk to
1395 enter judgment only if the claim is for a sum certain or a sum that
1396 can be made certain by computation. The court must act on a request
1397 for declaratory or injunctive relief. Since it is the court that
1398 must act, the court has whatever authority is conferred by Rule
1399 54(b) to enter a partial final judgment. Since Rule 54(b) requires
1400 finality as to at least a "claim," there may be real difficulty in
1401 arguing that the request for damages is a claim separate from the
1402 claim for specific relief. But that question is addressed by the
1403 present rule and an ample body of precedent.

1404 It was concluded without further discussion that this
1405 suggestion should not be considered further.

1406 *New Rule 33(e): 11-CV-B*

1407 This suggestion would add a new Rule 33(e) that would embody
1408 specific language for an interrogatory that would not count against
1409 the presumptive limit of 25 interrogatories and that would ask for
1410 detailed specific information about the grounds for failing to
1411 respond to any request for admission with an "unqualified
1412 admission." The suggestion is drawn from California practice.

1413 Brief discussion suggested that adopting specific
1414 interrogatory language in Rule 33 seems to fit poorly with the
1415 current proposal to abrogate Rule 84 and all of the official forms
1416 that depend on Rule 84. Apart from that, there are always risks in
1417 choosing any specific language.

1418 The Committee decided to remove this proposal from the docket.

1419 *Rule 8: Pleading: Dkt. 11-CV-H*

1420 This proposal would amend Rule 8 to establish a general format
1421 for a complaint. There should be a brief summary of the case, not
1422 to exceed 200 words; allegations of jurisdiction; the names of
1423 plaintiffs and defendants; "alleged acts and omissions of the
1424 parties, with times and places"; "alleged law regarding the facts";
1425 and "the civil remedy or criminal relief requested."

1426 Pleading has been on the Committee agenda since 1993. The
1427 Twombly and Iqbal cases, and reactions to them, brought it to the
1428 forefront. Active consideration has yielded to review of empirical
1429 studies, particularly those done by the Federal Judicial Center,
1430 and to anticipation of another Federal Judicial Center study that
1431 remains ongoing. There has been a growing general sense that
1432 pleading practice has evolved to a nearly mature state under the
1433 Twombly and Iqbal decisions. The time may come relatively soon to
1434 decide whether there is any role that might profitably be played by
1435 attempting to formulate rules amendments that might either embrace
1436 current practice or attempt to revise it.

1437 The Committee concluded that the time to take up pleading
1438 standards has not yet come, and that this specific proposal does
1439 not deserve further consideration.

1440 *Rule 15(a)(1): Dkt. 10-CV-E, F*

1441 These proposals, submitted by the same person, address the
1442 time set by Rule 15(a)(1) for amending once as a matter of course
1443 a pleading to which a responsive pleading is required. The present
1444 rule allows 21 days after service of a responsive pleading or 21
1445 days after service of a motion under Rule 12(b), (e), or (f),
1446 whichever is earlier. The concern is that the time to file a motion
1447 may be extended. The nature of the concern is not entirely clear,
1448 since the time to amend runs from actual service. The initial
1449 proposal sets the cutoff at 21 days before the time to respond to
1450 any of the listed Rule 12 motions. The revised proposal sets the
1451 cutoff at 21 days after the time to respond after service of one of
1452 the Rule 12 motions.

1453 It was agreed that no action need be taken on this proposal

1454 *Rule 12(f): Motion to strike from motion: Dkt 10-CV-F*

1455 This proposal would expand the Rule 12(f) motion to strike to
1456 reach beyond striking matters from a pleading to include striking
1457 matters from a motion.

1458 The Committee agreed that there is no apparent need to act on
1459 this proposal. It will be removed from the docket.

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1460 *Discovery Times: Dkt. 11-CV-C*

1461 This proposal, submitted by a pro se litigant, suggests
1462 extension of a vaguely described 28-day time limit to 35 days. It
1463 touches on the continuing concerns whether the rules should be
1464 adapted to make them more accessible to pro se litigants. Those
1465 concerns are familiar, and until now have been resolved by
1466 attempting to frame rules as good as can be drawn for
1467 implementation by professional lawyers. This proposal does not seem
1468 to provide any specific occasion to rethink that general position.

1469 The Committee agreed that there is no need to act on this
1470 proposal. It will be removed from the docket.

1471 *e-Discovery: Dkts. 11-CV D, E, G, I*

1472 All of these docket items address questions that were
1473 thoroughly examined in preparing the discovery rules amendments
1474 that are now pending in the Supreme Court. They were carefully
1475 evaluated, and were often helpful, in that process. Only one issue
1476 was raised that was put aside in that work. That issue goes to "the
1477 current lack of guidance as to reasonable preservation conduct (and
1478 standards for sanctions) in the context of cross-border discovery
1479 for U.S. based litigation." That issue was found complex,
1480 difficult, and subject to evolving standards of privacy in other
1481 countries, particularly within the European Union. The time does
1482 not seem to have come to take it up.

1483 The Committee agreed that there is no need to act further on
1484 these proposals. They will be removed from the docket.

1485 **Rule 23 Subcommittee**

1486 Judge Dow presented the report of the Rule 23 Subcommittee.
1487 The Subcommittee is in the stage of refining the agenda for deeper
1488 study of specific issues. All Subcommittee members appeared for a
1489 panel at the ABA National Class Action Institute in Chicago on
1490 October 23 to seek input on the subjects that might be usefully
1491 concluded in ongoing work. It was emphasized at the outset that the
1492 first question is whether it is now possible to undertake changes
1493 that promise more good than harm. Many interesting suggestions were
1494 advanced and will be considered.

1495 The Appellate Rules Committee is considering proposals to
1496 address the problems of settlement pending appeal by class-action
1497 objectors. The Subcommittee will continue working with the
1498 Appellate Rules Committee in refining those efforts.

1499 A miniconference will be planned for some time in 2015.

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1500 It may prove too ambitious to attempt to present draft
1501 proposals for discussion in 2015. The target is to present polished
1502 proposals for discussion in the spring meeting in 2016.

1503 The Chicago discussions helped to give a better sense that
1504 some potential problems "are not real, or are evolving in ways that
1505 may thwart any opportunity for present improvement."

1506 One broad category of issues surround settlement classes. Not
1507 even Arthur Miller could have predicted in 1966 what could emerge
1508 as settlement-class practices. The questions include the criteria
1509 for certifying a settlement class as compared to certification of
1510 a trial class, and whether the rule text should include specific
1511 criteria for evaluating a settlement.

1512 Cy pres recoveries have generated a lot of interest. A
1513 conference of MDL judges this week prompted many questions on this
1514 topic.

1515 The Chicago discussion also reflected widespread objections to
1516 objectors among lawyers who represent plaintiffs, lawyers who
1517 represent defendants, and academics.

1518 Discussions of notice requirements regularly raise questions
1519 whether more efficient and effective notice can be accomplished by
1520 electronic means.

1521 And there has been a lot of attention to issues classes, and
1522 the relationship between Rule 23(c)(4) and Rule 23(b)(3).

1523 Beyond these front-burner issues, a few side-burner issues
1524 remain open. Can anything be done to address consideration of the
1525 merits at the certification stage? There has been a lot of concern
1526 about the newly emerging criterion of the "ascertainability" of
1527 class membership, focused by recent Third Circuit decisions. The
1528 use of Rule 68 offers of judgment to moot individual
1529 representatives has prompted a practice that may be specific to the
1530 Seventh Circuit's views — plaintiffs file a motion for
1531 certification with the complaint to forestall a Rule 68 offer
1532 designed to moot the representatives, and then ask that
1533 consideration of the motion be deferred. Courts in the Seventh
1534 Circuit work around the problem; perhaps it need not be addressed
1535 in the rules.

1536 What other questions might offer promising opportunities for
1537 consideration? What is missing from this tentative set of issues?

1538 Professor Marcus noted that the work will either desist, or
1539 will proceed down the paths that seem promising. It is important to

1540 identify those paths now, because it becomes increasingly difficult
1541 to forge off in new directions after traveling a good way along the
1542 paths initially chosen.

1543 The Administrative Office will establish some form of
1544 repository to gather and retain suggestions from all sources.

1545 A Subcommittee member suggested that the ABA group showed a
1546 good bit of agreement that it will be useful to consider objectors,
1547 notice, and settlements. There is a lot of disagreement on other
1548 issues.

1549 A Committee member suggested that settlement-class issues are
1550 difficult. We know that the standard for certification is
1551 different, but we do not know how or why.

1552 This suggestion was followed by the observation that one set
1553 of settlement issues goes to how many criteria for reviewing a
1554 proposed settlement might be written into the rule. Another goes to
1555 certification criteria, a question addressed by advancing and then
1556 withdrawing a "Rule 26(b)(4)" settlement-class provision in 1996.
1557 A Federal Judicial Center study undertaken after the Amchem
1558 decision asked whether settlement classes had been impeded.
1559 Settlement classes seem to continue, but there may be complicated
1560 relationships to the continually growing number of MDL
1561 consolidations.

1562 Another Subcommittee member noted that settlement-class issues
1563 had presented real challenges to the ALI Principles of Aggregate
1564 Litigation work, but that they managed to work through to unanimous
1565 agreement.

1566 Another suggestion was that partial settlements should be part
1567 of the process. In MDL consolidations, some defendants settle on a
1568 class basis. Does that pre-decide class certification as to other
1569 defendants? Some settlements include a most-favored-nations clause
1570 that expands the definition of the class with respect to the
1571 settling defendant upon each successive settlement with another
1572 defendant.

1573 A new issue was suggested by the observation that the 14-day
1574 time limit to seek permission for an interlocutory appeal under
1575 Rule 23(f) is not long enough for the Department of Justice. The
1576 rule should be amended to provide a longer period in cases that
1577 include the United States (etc.) as a party.

1578 The question of cy pres settlements came on for discussion.
1579 The issues include the perception that an increasing number of
1580 cases settle on terms that provide only cy pres recovery; other

1581 cases where cy pres recovery is a significant part of the original
1582 settlement terms; and still others where cy pres recovery is
1583 provided only for a residuum of funds that cannot be effectively
1584 distributed to class members. Another issue asks whether the
1585 recipient of a cy pres award should be closely aligned in interest
1586 with the class members. Cy pres seems a useful option. Some
1587 defendants like it because it supports a fixed dollar limit on
1588 liability, and a way to distribute the dollars.

1589 The ALI proposal on cy pres recovery is linked to the proposal
1590 on settlement classes. The Principles collapse the criteria for
1591 reviewing a proposed settlement from the 14 or 16 factors that can
1592 be identified in the cases to a shorter, more manageable number.
1593 For certification, they establish that there is no need to consider
1594 either manageability (as recognized in the Amchem decision) or
1595 predominance. The Principles that address cy pres recovery have
1596 been more often cited and relied on by courts than any other of the
1597 Principles. They establish an order of preference: first,
1598 distribute to as many class members as possible; second, if funds
1599 remain, make a second distribution to class members who have
1600 already participated in the first distribution; and finally, when
1601 that is exhausted, try to distribute to a recipient that is closely
1602 aligned with class interests.

1603 The ALI cy pres provisions were said to have gained traction
1604 in the early going. "But there are problems with views of what
1605 class actions are designed to do." Different states have different
1606 policies. California, with its civil-law heritage, is predisposed
1607 to embrace cy pres awards more eagerly than most states.

1608 A related suggestion was made: it is important to seek real
1609 value through the claims process. The defendant may have an
1610 incentive to have undistributed settlement funds revert to the
1611 defendant. Cy pres recovery can address that.

1612 California practice provides a means of avoiding review of cy
1613 pres recipients by approving distribution of unclaimed settlement
1614 funds to Legal Aid. "There is a cycle that relates cy pres to the
1615 question of undistributed funds." And this ties to settlement
1616 review: will the defendant actually wind up paying what seems to be
1617 a fair amount, or will the fair amount provided by the overall
1618 figure be diminished by reversion to the defendant. There can be a
1619 surprise surplus. But usually that is dealt with in the settlement
1620 agreement. And it can be resolved in proceedings to approve the
1621 settlement. But there may be a growing problem when, in response to
1622 increasing uneasiness about cy pres recoveries, the parties seek to
1623 avoid the issue by not addressing cy pres in the settlement terms.
1624 There may, moreover, be suits in which only a group remedy is
1625 appropriate — it may be enough that the amount is fair, reasonable,

1626 and adequate even though none of it goes to individual class
1627 members.

1628 Cy pres recoveries also figure in determining attorney fees.
1629 The question is whether cy pres distributions should be counted in
1630 the same way as actual distributions to class members.

1631 It was urged that cy pres issues can be profitably addressed
1632 through rules amendments.

1633 An observer suggested that cy pres practices depend on the
1634 jurisdiction. It is common to address cy pres recovery in general
1635 terms in the settlement, but delaying identification of the
1636 recipient until distribution to class members has been
1637 accomplished. This is appropriate because the choice of recipient
1638 may depend on how much money is left for cy pres distribution.

1639 Turning to objectors, it was asked whether there is "a bar of
1640 objectors." If there is, the Committee should learn their views
1641 before framing rules for objections. A response was that there are
1642 objectors who seek to improve the settlement, and to gain a share
1643 of the fee in return, while other objectors act for principle —
1644 Public Citizen is an example. We do not want to discourage useful
1645 objections. It was noted again that the Appellate Rules Committee
1646 has been considering the subset of issues that arise from
1647 settlement with an objector pending appeal. That work included
1648 hearing from two professors "who had different views." No objectors
1649 appeared at that meeting. It also was noted that the 2013 ABA
1650 National Institute had a panel that featured a "repeat objector."

1651 An observer suggested that the question of awarding damages
1652 incident to a (b)(2) class deserves consideration. Rule 23(b)(2) is
1653 a perfect vehicle for certifying low-dollar consumer claims, but it
1654 is tied to "equitable relief. There is no real reason to maintain
1655 this tie to equity. Due process is satisfied by adequate
1656 representation. We could establish a mandatory class without the
1657 cost of notice. The origins of class actions are very practically
1658 oriented."

1659 A response noted that a professor at the recent ABA National
1660 Institute said that she would be making suggestions on other (b)(2)
1661 issues. The question of the "ascertainability" of class membership
1662 ties to this. The Carrera case in the Third Circuit is an
1663 illustration of small-stakes consumer classes. But it should be
1664 remembered that (b)(2) speaks of injunctive relief or corresponding
1665 declaratory relief, not equity. It can be invoked for traditional
1666 legal claims. A further response suggested that due process may
1667 require notice and an opportunity to opt out when money damages are
1668 at issue. But the observer rejoined that the Committee should study

1669 this question — he believes that due process allows a no opt-out
1670 class, and that individual notice can be discarded when there is no
1671 opportunity to act on it by opting out.

1672 A look to the past recalled that in 2001 the Committee
1673 proposed mandatory notice for (b)(1) and (b)(2) classes, but
1674 retreated in face of protests that the cost would defeat some
1675 potential civil-rights actions before they are even brought. But
1676 the ABA National Institute reflected the growing sense that due
1677 process may allow notice by social media and other internet means
1678 that work better, at lower cost, than mail or newspaper
1679 publication. "Perhaps we should remember there are a lot of balls
1680 in the air."

1681 Judge Campbell expressed thanks to the Subcommittee for its
1682 ongoing work.

1683 **Pilot Projects**

1684 Judge Campbell opened the discussion of pilot projects by
1685 praising the panelists and papers at the Duke Conference for
1686 teaching many good lessons about current successes and failures of
1687 the Civil Rules. But these lessons were based on the experience of
1688 the participants more often than solid empirical measurement. And
1689 some empirical work that looks good still may not be complete
1690 enough to support heavy reliance. Carefully structured pilot
1691 projects may be a better means of providing information. The
1692 employment protocols are a good example. So what would a pilot
1693 project look like if it is to provide reliable information?

1694 Emery Lee began by observing that "‘Data’ is a plural that we
1695 use a lot. No one uses ‘datum.’ A datum is a piece of information.
1696 Data are plural pieces of information." What we need to do is to
1697 organize pieces of information into useful information. That task
1698 has to be addressed during the design phase of a project. The first
1699 question is what information can be collected that will be helpful
1700 in considering reforms? What will the end product look like? What
1701 are the questions to be answered? It can be important to enlist the
1702 help of the Federal Judicial Center at this initial point. "Call
1703 me. I can get the ball rolling."

1704 Lee further observed that he met with some of the architects
1705 of the SDNY Complex Case pilot project at its inception. That is
1706 helpful. For the Seventh Circuit e-discovery project, the FJC did
1707 two surveys. "Judges always evaluate a program higher than the
1708 attorneys do." The world is complicated. Attorneys see a lot more
1709 of the case than the judges see. And "parties have interests. Cases
1710 that go to trial are weird cases — someone does not want to
1711 settle." And a pilot project cannot address differences that arise

1712 from the level of litigation resources available to the parties.
1713 Nor can a pilot project tamper with the law.

1714 Surveys can be a really useful way of gathering information.
1715 But the FJC has become concerned that too many surveys from too
1716 many sources may have worn out the collective welcome, partciularly
1717 from judges. "Surveys will be dead in 10 years. No one wants to
1718 respond."

1719 Docket-level data are available in employment cases. That may
1720 provide a secure foundation for evaluating the employment
1721 protocols.

1722 Turning to pilot projects, the first question was whether they
1723 should be voluntary. If parties have a choice whether to
1724 participate on the experimental side of the project, is there a
1725 risk that self-selection will skew the results? But if cases are
1726 assigned on a random but mandatory basis, is the implementation
1727 invalid whenever the terms of the pilot are inconsistent with the
1728 national rules?

1729 Emery Lee replied that opt-out programs are a problem. IAALS
1730 did a survey of a Colorado program for managed litigation and found
1731 that parties represented by attorneys tended to opt out. So a large
1732 percentage of the cases involved in the first round wound up as
1733 defaults. And the lawyers opted out because they thought the
1734 program unattractive.

1735 Judge Dow noted that there are 35 judges in the Northern
1736 District of Illinois. Many are dead set against cameras in the
1737 court room. But they agreed to participate in a pilot program "so
1738 we could be heard, not because we like it."

1739 Another suggestion was that it is possible to imagine pilot
1740 programs on such things as cameras in the courtroom or initial
1741 disclosure. But is it possible to have a pilot that addresses
1742 "standards"? Emery Lee replied that it is possible to do empirical
1743 work on standards, but not in the form of a pilot project. It would
1744 take the form of comparing different regimes. And there are
1745 different problems. With the survey of final pretrial conferences,
1746 for example, the FJC found only a small number of cases that
1747 actually had final pretrial conferences. That makes it difficult to
1748 draw any sustainable conclusions.

1749 A different form of research was brought into the discussion
1750 by asking whether interviews establish data? The FJC closed-case
1751 survey of discovery relied on interviews. Is it possible to get
1752 hard data? Emery Lee replied that the question can be viewed
1753 through the prism of Rule 1. It is easy to measure speed. So for

1754 cost, it is easy enough to measure cost, and to measure costs
1755 incurred by different parties and in different types of cases. But
1756 how do you count "just"? "We can count motions filed. We can look
1757 at discovery disputes in a broad swath of discovery cases. We can
1758 compare protocol data with cases that do not use the protocol." But
1759 for other things, we need interviews. The greater the number of
1760 sources, the better. "Interviews can shed light on the numbers." In
1761 like fashion the Committee looks at the numbers and helps the
1762 researchers understand what the numbers mean, or may mean.

1763 Judge Koeltl described three projects.

1764 The employment discovery protocols developed out of the Duke
1765 Conference. A group of lawyers engaged for plaintiffs or for
1766 defendants in individual employment cases worked to define core
1767 discovery that should be provided automatically in every case. The
1768 protocol directs what information plaintiffs should provide to
1769 defendants, and what defendants should provide to plaintiffs, 30
1770 days after the defendant files a response. For this initial stage
1771 there is no need for Rule 34 requests, or initial disclosures under
1772 Rule 26(a)(1). The Southern District of New York has mandatory
1773 mediation in employment cases; lawyers say the protocols are
1774 helpful for that. Some 14 judges in the District have adopted the
1775 protocol; nationwide, some 50 judges use it. It is hard to imagine
1776 a more attractive way of beginning an employment case than by
1777 providing automatic disclosure of information that otherwise will
1778 be dragged out through costly and time-consuming discovery. Judge
1779 Koeltl implements it by a uniform order entered in each case to
1780 which the protocols apply; that seems suitable. He has never had an
1781 objection. Some judges incorporate the protocols as part of their
1782 individual rules so that parties are aware of them and use the
1783 protocols in applicable cases.

1784 SDNY also has a pilot project for § 1983 cases that involve
1785 false arrest, unreasonable use of force, unlawful searches, and the
1786 like. Mandatory disclosure of core discovery is required. The
1787 plaintiff is required to make a settlement demand and the defendant
1788 is required to respond. The case goes automatically to mediators;
1789 this ties to settlement. Either plaintiff or defendant can opt out
1790 of the program; parties often opt out in cases that are unlikely to
1791 settle. And judges can remove a case from the program, as may be
1792 done when they think a case will settle early. This program is
1793 established by local rule. 70% of the cases in the program have
1794 settled without any intervention by the assigned judge. It is not
1795 clear whether a judge can override a party's choice to opt out of
1796 the program. Plaintiffs may opt out if they think the process takes
1797 too long. The City opts out when it takes the position that it will
1798 not settle a particular case.

1799 Finally, SDNY has a complex case pilot project. After the Duke
1800 Conference the Judicial Improvements Committee put together a set
1801 of best practices for complex cases. It was adopted by the court as
1802 a whole. It was designed to last for 18 months. It was renewed for
1803 an additional 18 months. Now it has met its sunset limit. But it is
1804 on the SDNY website, and the court has a resolution encouraging
1805 attorneys and judges to consider the best practices. "It covers all
1806 steps." There is a detailed checklist for what should be discussed
1807 at the parties' conferences. There is an e-discovery checklist. And
1808 a checklist for the pretrial conference itself. It includes a limit
1809 of 25 requests to admit, not counting requests to admit the
1810 genuineness of documents. Furthermore, a request to admit can be no
1811 longer than 20 words. There are procedures for motion conferences,
1812 and encouragement for oral argument on motions. The local rules
1813 call for a "Rule 56.1 statement" and a response in similar form,
1814 like the published but then withdrawn proposal to add a "point-
1815 counterpoint" procedure to Rule 56 itself. Some SDNY lawyers think
1816 the Rule 56.1 statement is more trouble than it is worth; so the
1817 best practices provide that the parties can ask the judge to let
1818 them dispense with this procedure. It has proved hard to define
1819 what is a complex action. Class actions are included, for example,
1820 in terms that reach collective actions under the Fair Labor
1821 Standards Act, but those cases are less complex than most class
1822 actions; some judges take FLSA cases out of the project

1823 Thirty-six months is not a long time to study complex cases.
1824 It is hard to say that there has been enough experience to evaluate
1825 the best practices. "But there is a value in generating experiences
1826 to discuss even if their actual effect cannot be measured
1827 statistically." As a small and unrelated illustration, one judge of
1828 the court came back from a conference enthusiastic about what he
1829 had heard about the "struck juror" procedure for selecting a jury.
1830 "We tried it, and most of us came to prefer it even without any
1831 empirical data."

1832 Judge Dow reported on the Seventh Circuit e-discovery project.
1833 All districts in the Circuit are covered. It is "an enormous,
1834 ongoing project." The first year recruited a few judges and
1835 magistrate judges to attempt to identify cases that would involve
1836 extensive e-discovery. The second phase drew in many more judges.
1837 The third phase is ongoing. The web site includes a lot of reports,
1838 and orders, and protocols. "This changed the culture in our
1839 Circuit." Great expertise in e-discovery has developed, especially
1840 among the magistrate judges. The early focus on complex cases
1841 helped. Judge Dow was led to introduce proportionality, aiming to
1842 first discover the important 20% of information as a basis for
1843 planning further discovery. One particularly successful idea is to
1844 require each side to appoint a "technology liaison." These
1845 technologists work together to solve problems, not to try to spin

1846 problems to partisan advantage as lawyers do. Getting them in to
1847 deal with the judge as problem solvers has been a great change in
1848 culture. The program has anticipated many of the provisions in the
1849 discovery rules amendments that are now pending in the Supreme
1850 Court. "Judges love it. The lawyers do the work and may not love it
1851 as much. The culture change is very valuable." The work has been
1852 sustained by volunteers: all sorts of people "wanted in." A
1853 Committee member who has participated in some parts of developing
1854 the Seventh Circuit program, although he does not practice there,
1855 agreed. The initial work of drafting principles was done by
1856 volunteer lawyers — he was one of them. No cost was involved.

1857 Discussion turned to more general approaches that might
1858 advance the cause of more effective procedure.

1859 A historic note was sounded by quoting from an article by
1860 Charles Clark written in 1950, appearing a 12 F.R.D. 131. He noted
1861 that the 1938 Federal Rules, drawing from many sources, established
1862 a discovery regime more detailed and sweeping than anything that
1863 had been before. But he also noted that as of 1950, there was not
1864 yet any clear picture of its actual operation, not even in all
1865 experience and with 1948 surveys and interviews in five circuits.
1866 Nothing has really changed.

1867 The Seventh Circuit pilot project was noted as something
1868 designed to enforce cooperation, to urge lawyers to work together
1869 and to authorize sanctions when they agree to the principles. This
1870 is of a piece with the current proposals to emphasize in Rule 1
1871 that the parties are charged with construing and administering the
1872 rules to achieve the goals of Rule 1.

1873 It also may be useful to expand the Seventh Circuit approach
1874 to technology liaisons by establishing a position for technology
1875 experts on court staffs. These experts could come to the help of
1876 parties who need it.

1877 Other suggestions will be submitted for Committee
1878 consideration.

1879 It was observed that there are categories of cases that may
1880 have discrete characteristics that yield to routinized discovery.
1881 Individual employment cases seem to have these characteristics. The
1882 same may be true of police-conduct cases under § 1983. But it
1883 should be asked how many more such categories of cases can be
1884 identified. It is not clear how many will fit this paradigm. It was
1885 agreed that the issue is to get plaintiffs and defendants to work
1886 together to establish a protocol acceptable on all sides. It has
1887 been suggested that employment class actions may be suitable, but
1888 work has not started. "It takes enthusiasm and impetus to bring

1889 them together." It was suggested that other categories of cases
1890 that would be ideal candidates include actions under the
1891 Individuals with Disabilities Education Act and actions under the
1892 Fair Credit Reporting Act.

1893 The nationwide pilot project for patent cases was noted. It
1894 was established by Congress, and is designed to last for 10 years.
1895 Without knowing a lot about it, it can be described as relying on
1896 designating judges who are willing to do patent cases, and
1897 providing them with training packages and model local rules that
1898 can be used as orders. But patent cases are still assigned at
1899 random; the assigned judge can transfer the case to a designated
1900 patent judge, but some assigned judges do not give up their cases.
1901 The idea of identifying judges who volunteer to learn and develop
1902 best practices is intriguing.

1903 A judge asked how do you get buy-in from lawyers for
1904 experimental programs? The employment protocol experience was
1905 described as an example. The plaintiff side was led by Joseph
1906 Garrison, a past president of the National Employment Lawyers
1907 Association. The defense side was led by Chris Kitchel, the liaison
1908 from the American College of Trial Lawyers to the Civil Rules
1909 Committee. Encouragement was provided by Judges Kravitz, Rosenthal,
1910 and Koeltl. The IAALS promoted it. "It almost fell apart." It was
1911 like a labor negotiation, in which the sides took turns at walking
1912 out of the negotiations and then returning to the table. The judges
1913 who were involved then actively promoted the protocols in their own
1914 courts.

1915 A judge suggested that many judges revel in being generalists,
1916 and believe that they can do anything. Programs to provide special
1917 training to some judges may not work if they depend on voluntary
1918 transfer by judges who draw cases by random selection. But it was
1919 noted that one benefit of the pilot project for patent cases is
1920 that the specialized judges become a resource for other judges on
1921 the same court.

1922 The IAALS is tracking innovative practices in the states,
1923 mostly innovations in discovery. Their report will be available for
1924 consideration at the April meeting.

1925 Discovery problems may be affected by the observation offered
1926 by many participants at the Duke Conference. "We live in a
1927 discovery-centered world." Lawyers do not ask — indeed, too often
1928 do not know how to ask — for information that will be needed at
1929 trial. They think about, and get paid for, vast discovery. Criminal
1930 trials without discovery of this kind seem to be just as effective
1931 as civil trials, at about a tenth of the cost. "Surely there must
1932 be cases where the parties want trial." But an experiment to test

1933 this failed. In every case this judge offered a trial within 4
1934 months, with minimal or no discovery and no motions for summary
1935 judgment. The order directed the lawyers to discuss this option
1936 with their clients, and to provide a budget for proceeding with
1937 this option and an alternative budget for proceeding without taking
1938 it up. The experiment was abandoned after using the order in more
1939 than 1,100 cases. The option was picked up in 3 cases, and then
1940 rejected within a week in one of them. Neither of the other 2 went
1941 to trial. "How is it that we have come to depend so much on
1942 discovery"?

1943 It was noted that the same fate had met the expedited trial
1944 project in the Northern District of California. It died for want of
1945 takers. And it was wondered whether perhaps these outcomes could be
1946 changed by getting "buy-in" from insurers who bear the costs of
1947 defending.

1948 A judge suggested that "lawyers are trained to do discovery,
1949 and get paid for it. It has got to the point of too much."

1950 Another judge observed that "we don’t have a chance to talk to
1951 the clients. Should I require them to come to the Rule 16
1952 conference? If not to require attendance, to invite them"?

1953 Another observation was that most young lawyers to not get any
1954 training in trial, unlike earlier days when many were given many
1955 small trials to develop trial competence.

1956 The comparison to criminal cases was taken up by the
1957 observation that the prosecution has "discovery" through
1958 investigators and then a grand jury. Some or all of this
1959 information makes its way to the defendant at some point. And
1960 criminal lawyers have more trial experience. Together, these
1961 phenomena may help to explain the relative success of criminal
1962 trials as compared to civil trials that follow vast civil
1963 discovery. But another judge countered that federal prosecutors on
1964 average try less than one case per year per lawyer in the office.
1965 On the state side, however, there are trials in low-dollar, low-
1966 significance cases. A young lawyer who wants trial experience can
1967 go to a district attorney’s office, or a solicitor’s office for
1968 misdemeanor cases, or a 2-person personal injury firm trying low-
1969 dollar cases.

1970 A lawyer suggested that it is premature to despair of
1971 expedited trial programs. In MDL cases there are bellwether trials
1972 that are expensive and protracted, in part because they are
1973 symbolic. But the post-bellwether trials tend to be much more
1974 compact; they can be tried in a few days or even hours.

January 5, 2015

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1975 These problems will continue to be part of the Committee
1976 agenda.

1977 **Pending Rules Amendments**

1978 Important amendments are now pending in the Supreme Court. If
1979 the Court decides to adopt them, and if Congress allows them to
1980 proceed, they will go into effect on December 1, 2015. "We as a
1981 Committee should try to spearhead an effort to get word out about
1982 what they are intended to do, and what not."

1983 Judge Fogel has brought the Federal Judicial Center on board
1984 with efforts to educate judges in the new rules should they take
1985 effect. Experience shows that simply adopting new rules does not
1986 automatically transfer into prompt implementation in practice.
1987
1988 Beyond FJC programs aimed at judges, the word can be got out
1989 through conferences, articles, and related efforts. Circuit
1990 conferences seem to be reviving — they would be a good focus. Inns
1991 of Court will be another good forum. A prepared packet of materials
1992 for use by these and other groups, such as Federal Bar
1993 Associations, could be useful.

1994 An observer noted that programs are already being offered to
1995 explore the proposed amendments. She attended one in which
1996 discovery hypotheticals were presented to magistrate judges with
1997 arguments on both sides. The judges then addressed the outcome
1998 under present rules and under the proposed rules. It was effective.

1999 Once it becomes clear that the proposed rules will go into
2000 effect — a desirable outcome that cannot be presumed — the
2001 Administrative Office may find some role to play in getting out the
2002 word.

2003 **Subcommittee Projects**

2004 Judge Campbell noted ongoing Subcommittee work in addition to
2005 the Rule 23 Subcommittee.

2006 The Appellate and Civil Rules Committees have formed a joint
2007 subcommittee to explore two topics. Judge Matheson and Virginia
2008 Seitz are the Civil Rules members. The Subcommittee will study
2009 manufactured finality devices that are treated differently by the
2010 circuits. It also will study a number of problems that seem to
2011 affect stays and appeal bonds under Rule 62.

2012 The Discovery Subcommittee will begin work on a proposal that
2013 it expand the use of "requester pays" in discovery.

January 5, 2015

2014 **Future Meetings**

2015 The next meeting will be on April 9-10, 2015, at the
2016 Administrative Office. The fall meeting will be at the University
2017 of Utah Law School.

Respectfully submitted,

Edward H. Cooper
Reporter

January 5, 2015

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TAB 3

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125-000273

Item 3 will be an oral report.

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LEGISLATIVE REPORT

Patent Legislation

Congress continues to study patent litigation. A reform bill passed in the House during the 113th Congress. H.R. 9, the "Innovation Act," has been introduced in the 114th Congress by Representative Goodlatte, with several cosponsors. Section 3 includes many provisions that bear on procedure in patent actions, including pleading, joinder of parties, and discovery. The discovery provisions, § 3(d), would add a new § 299A to the Patent Code, staging discovery to begin with matters relevant to claim interpretation if the court finds that construction of the claims is required. Section 4(b)requires initial disclosure to the Patent and Trademark Office, the court, and the parties of information identifying those who have authority to enforce the patent or a financial interest in the patent. Section 5 contains an elaborate provision for staying an action against a "covered customer" if the "covered manufacturer" is a party to the action or to another action involving the same patent.

Section 6 is of particular interest to the rules committees. Section 6(a)(1) directs the Judicial Conference, "using existing resources," to "develop rules and procedures to implement the issues and proposals described in paragraph (2) to address the asymmetries in discovery burdens and costs in" patent litigation. "Such rules and procedures shall include how and when payment for document discovery in addition to the discovery of core documentary evidence is to occur, and what information must be presented to demonstrate financial capacity before permitting document discovery in addition to the discovery of core documentary evidence."

Section 6(a)(2) begins: "The rules and procedures required under paragraph (1) should address each of the following issues and proposals:" What follows runs from pages 27 to 35 of the bill. The matters to be addressed in rulemaking include, among other things, providing "core documentary evidence" at the expense of the producing party (page 27); a requirement that discovery of ESI be specific and include the identies of specific custodians and search terms and be limited to 5 custodians, subject to expansion on court order or an undertaking by the requesting party to pay the costs of discovery from additional custodians, and a behest that the parties cooperate in identifying the proper custodians and time frame (page 28); a requirement that the requesting party pay the reasonable costs, including attorney fees, of document discovery beyond core documents, and that the requesting party post a bond or other security (or shows financial capacity to pay) before obtaining the additional requested documents (page 29). Unlike some earlier bills, H.R. 9 does not set a deadline for adopting these rules. But § 6(a)(4) directs "Not later than 6 months after the date on which the Judicial Conference has developed the rules and procedures required by this subsection, each United States District Court and the United States Court of Federal Claims shall revise the applicable local rules for such court to implement such rules and

125-000280

procedures."

Section 6(b) directs the Judicial Conference to "develop case management procedures" for patent actions, "including initial disclosure and early case management conference practices" to identify potential dispositive issues and "focus on early summary judgment motions when resolution of issues may lead to expedited disposition of the case."

The views of Committee members on these proposals may prove helpful if the Committee is afforded an opportunity to comment on the proposed legislation. Committee study of these provisions will also be helpful in preparing to be ready to participate in the work that will become necessary if H.R. 9 or similar legislation is enacted. There is a lot in these provisions. Focus on Section 6(a) may be most important for now.

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.....

(Original Signature of Member)

114TH CONGRESS
1ST SESSION

H. R. _____

To amend title 35, United States Code, and the Leahy-Smith America Invents Act to make improvements and technical corrections, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

Mr. GOODLATTE (for himself, Mr. DEFAZIO, Mr. ISSA, Mr. NADLER, Mr. SMITH of Texas, Ms. LOFGREN, Mr. CHABOT, Ms. ESHOO, Mr. FORBES, Mr. PIERLUISI, Mr. CHAFFETZ, Mr. JEFFRIES, Mr. MARINO, Mr. FARENTHOLD, Mr. HOLDING, Mr. JOHNSON of Ohio, Mr. HUFFMAN, Mr. HONDA, and Mr. LARSEN of Washington) introduced the following bill; which was referred to the Committee on _____

A BILL

To amend title 35, United States Code, and the Leahy-Smith America Invents Act to make improvements and technical corrections, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Innovation Act".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.
Sec. 2. Definitions.
Sec. 3. Patent infringement actions.
Sec. 4. Transparency of patent ownership.
Sec. 5. Customer-suit exception.
Sec. 6. Procedures and practices to implement recommendations of the Judicial Conference.
Sec. 7. Small business education, outreach, and information access.
Sec. 8. Studies on patent transactions, quality, and examination.
Sec. 9. Improvements and technical corrections to the Leahy-Smith America Invents Act.
Sec. 10. Effective date.

SEC. 2. DEFINITIONS.

In this Act:

(1) DIRECTOR.—The term ''Director'' means the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

(2) OFFICE.—The term ''Office'' means the United States Patent and Trademark Office.

SEC. 3. PATENT INFRINGEMENT ACTIONS.

(a) PLEADING REQUIREMENTS.—

(1) AMENDMENT.—Chapter 29 of title 35, United States Code, is amended by inserting after section 281 the following:

''§ 281A. Pleading requirements for patent infringement actions

''(a) PLEADING REQUIREMENTS.—Except as provided in subsection (b), in a civil action in which a party asserts a claim for relief arising under any Act of Con-

gress relating to patents, a party alleging infringement shall include in the initial complaint, counterclaim, or cross-claim for patent infringement, unless the information is not reasonably accessible to such party, the following:

"(1) An identification of each patent allegedly infringed.

"(2) An identification of each claim of each patent identified under paragraph (1) that is allegedly infringed.

"(3) For each claim identified under paragraph (2), an identification of each accused process, machine, manufacture, or composition of matter (referred to in this section as an 'accused instrumentality') alleged to infringe the claim.

"(4) For each accused instrumentality identified under paragraph (3), an identification with particularity, if known, of—

"(A) the name or model number of each accused instrumentality; or

"(B) if there is no name or model number, a description of each accused instrumentality.

"(5) For each accused instrumentality identified under paragraph (3), a clear and concise statement of—

"(A) where each element of each claim identified under paragraph (2) is found within the accused instrumentality; and

"(B) with detailed specificity, how each limitation of each claim identified under paragraph (2) is met by the accused instrumentality.

"(6) For each claim of indirect infringement, a description of the acts of the alleged indirect infringer that contribute to or are inducing the direct infringement.

"(7) A description of the authority of the party alleging infringement to assert each patent identified under paragraph (1) and of the grounds for the court's jurisdiction.

"(8) A clear and concise description of the principal business, if any, of the party alleging infringement.

"(9) A list of each complaint filed, of which the party alleging infringement has knowledge, that asserts or asserted any of the patents identified under paragraph (1).

"(10) For each patent identified under paragraph (1), whether a standard-setting body has specifically declared such patent to be essential, poten-

tially essential, or having potential to become essential to that standard-setting body, and whether the United States Government or a foreign government has imposed specific licensing requirements with respect to such patent.

"(b) INFORMATION NOT READILY ACCESSIBLE.—If information required to be disclosed under subsection (a) is not readily accessible to a party, that information may instead be generally described, along with an explanation of why such undisclosed information was not readily accessible, and of any efforts made by such party to access such information.

"(c) CONFIDENTIAL INFORMATION.—A party required to disclose information described under subsection (a) may file, under seal, information believed to be confidential, with a motion setting forth good cause for such sealing. If such motion is denied by the court, the party may seek to file an amended complaint.

"(d) EXEMPTION.—A civil action that includes a claim for relief arising under section 271(e)(2) shall not be subject to the requirements of subsection (a).".

(2) CONFORMING AMENDMENT.—The table of sections for chapter 29 of title 35, United States Code, is amended by inserting after the item relating to section 281 the following new item:

"281A. Pleading requirements for patent infringement actions.".

(b) FEES AND OTHER EXPENSES.—

(1) AMENDMENT.—Section 285 of title 35, United States Code, is amended to read as follows:

"§ 285. Fees and other expenses

''(a) AWARD.—The court shall award, to a prevailing party, reasonable fees and other expenses incurred by that party in connection with a civil action in which any party asserts a claim for relief arising under any Act of Congress relating to patents, unless the court finds that the position and conduct of the nonprevailing party or parties were reasonably justified in law and fact or that special circumstances (such as severe economic hardship to a named inventor) make an award unjust.

''(b) CERTIFICATION AND RECOVERY.—Upon motion of any party to the action, the court shall require another party to the action to certify whether or not the other party will be able to pay an award of fees and other expenses if such an award is made under subsection (a). If a nonprevailing party is unable to pay an award that is made against it under subsection (a), the court may make a party that has been joined under section 299(d) with respect to such party liable for the unsatisfied portion of the award.

''(c) COVENANT NOT TO SUE.—A party to a civil action that asserts a claim for relief arising under any Act

of Congress relating to patents against another party, and that subsequently unilaterally extends to such other party a covenant not to sue for infringement with respect to the patent or patents at issue, shall be deemed to be a nonprevailing party (and the other party the prevailing party) for purposes of this section, unless the party asserting such claim would have been entitled, at the time that such covenant was extended, to voluntarily dismiss the action or claim without a court order under Rule 41 of the Federal Rules of Civil Procedure.''.

(2) CONFORMING AMENDMENT AND AMENDMENT.—

(A) CONFORMING AMENDMENT.—The item relating to section 285 of the table of sections for chapter 29 of title 35, United States Code, is amended to read as follows:

''285. Fees and other expenses.''.

(B) AMENDMENT.—Section 273 of title 35, United States Code, is amended by striking subsections (f) and (g).

(3) EFFECTIVE DATE.—The amendments made by this subsection shall take effect on the date of the enactment of this Act and shall apply to any action for which a complaint is filed on or after the first day of the 6-month period ending on that effective date.

(c) JOINDER OF INTERESTED PARTIES.—Section 299 of title 35, United States Code, is amended by adding at the end the following new subsection:

"(d) JOINDER OF INTERESTED PARTIES.—

"(1) JOINDER.—In a civil action arising under any Act of Congress relating to patents in which fees and other expenses have been awarded under section 285 to a prevailing party defending against an allegation of infringement of a patent claim, and in which the nonprevailing party alleging infringement is unable to pay the award of fees and other expenses, the court shall grant a motion by the prevailing party to join an interested party if such prevailing party shows that the nonprevailing party has no substantial interest in the subject matter at issue other than asserting such patent claim in litigation.

"(2) LIMITATION ON JOINDER.—

"(A) DISCRETIONARY DENIAL OF MOTION.—The court may deny a motion to join an interested party under paragraph (1) if—

"(i) the interested party is not subject to service of process; or

"(ii) joinder under paragraph (1) would deprive the court of subject matter jurisdiction or make venue improper.

"(B) REQUIRED DENIAL OF MOTION.—The court shall deny a motion to join an interested party under paragraph (1) if—

"(i) the interested party did not timely receive the notice required by paragraph (3); or

"(ii) within 30 days after receiving the notice required by paragraph (3), the interested party renounces, in writing and with notice to the court and the parties to the action, any ownership, right, or direct financial interest (as described in paragraph (4)) that the interested party has in the patent or patents at issue.

"(3) NOTICE REQUIREMENT.—An interested party may not be joined under paragraph (1) unless it has been provided actual notice, within 30 days after the date on which it has been identified in the initial disclosure provided under section 290(b), that it has been so identified and that such party may therefore be an interested party subject to joinder under this subsection. Such notice shall be provided by the party who subsequently moves to join the interested party under paragraph (1), and shall include language that—

"(A) identifies the action, the parties thereto, the patent or patents at issue, and the pleading or other paper that identified the party under section 290(b); and

"(B) informs the party that it may be joined in the action and made subject to paying an award of fees and other expenses under section 285(b) if—

"(i) fees and other expenses are awarded in the action against the party alleging infringement of the patent or patents at issue under section 285(a);

"(ii) the party alleging infringement is unable to pay the award of fees and other expenses;

"(iii) the party receiving notice under this paragraph is determined by the court to be an interested party; and

"(iv) the party receiving notice under this paragraph has not, within 30 days after receiving such notice, renounced in writing, and with notice to the court and the parties to the action, any ownership, right, or direct financial interest (as described in paragraph (4)) that the inter-

ested party has in the patent or patents at issue.

"(4) INTERESTED PARTY DEFINED.—In this subsection, the term 'interested party' means a person, other than the party alleging infringement, that—

"(A) is an assignee of the patent or patents at issue;

"(B) has a right, including a contingent right, to enforce or sublicense the patent or patents at issue; or

"(C) has a direct financial interest in the patent or patents at issue, including the right to any part of an award of damages or any part of licensing revenue, except that a person with a direct financial interest does not include—

"(i) an attorney or law firm providing legal representation in the civil action described in paragraph (1) if the sole basis for the financial interest of the attorney or law firm in the patent or patents at issue arises from the attorney or law firm's receipt of compensation reasonably related to the provision of the legal representation; or

"(ii) a person whose sole financial interest in the patent or patents at issue is ownership of an equity interest in the party alleging infringement, unless such person also has the right or ability to influence, direct, or control the civil action.".

(d) DISCOVERY LIMITS.—

(1) AMENDMENT.—Chapter 29 of title 35, United States Code, is amended by adding at the end the following new section:

"§ 299A. Discovery in patent infringement action

"(a) DISCOVERY IN PATENT INFRINGEMENT ACTION.—Except as provided in subsections (b) and (c), in a civil action arising under any Act of Congress relating to patents, if the court determines that a ruling relating to the construction of terms used in a patent claim asserted in the complaint is required, discovery shall be limited, until such ruling is issued, to information necessary for the court to determine the meaning of the terms used in the patent claim, including any interpretation of those terms used to support the claim of infringement.

"(b) DISCRETION TO EXPAND SCOPE OF DISCOVERY.—

"(1) TIMELY RESOLUTION OF ACTIONS.—In the case of an action under any provision of Federal law

(including an action that includes a claim for relief arising under section 271(e)), for which resolution within a specified period of time of a civil action arising under any Act of Congress relating to patents will necessarily affect the rights of a party with respect to the patent, the court shall permit discovery, in addition to the discovery authorized under subsection (a), before the ruling described in subsection (a) is issued as necessary to ensure timely resolution of the action.

"(2) RESOLUTION OF MOTIONS.—When necessary to resolve a motion properly raised by a party before a ruling relating to the construction of terms described in subsection (a) is issued, the court may allow limited discovery in addition to the discovery authorized under subsection (a) as necessary to resolve the motion.

"(3) SPECIAL CIRCUMSTANCES.—In special circumstances that would make denial of discovery a manifest injustice, the court may permit discovery, in addition to the discovery authorized under subsection (a), as necessary to prevent the manifest injustice.

"(4) ACTIONS SEEKING RELIEF BASED ON COMPETITIVE HARM.—The limitation on discovery pro-

vided under subsection (a) shall not apply to an action seeking a preliminary injunction to redress harm arising from the use, sale, or offer for sale of any allegedly infringing instrumentality that competes with a product sold or offered for sale, or a process used in manufacture, by a party alleging infringement.

''(c) EXCLUSION FROM DISCOVERY LIMITATION.—The parties may voluntarily consent to be excluded, in whole or in part, from the limitation on discovery provided under subsection (a) if at least one plaintiff and one defendant enter into a signed stipulation, to be filed with and signed by the court. With regard to any discovery excluded from the requirements of subsection (a) under the signed stipulation, with respect to such parties, such discovery shall proceed according to the Federal Rules of Civil Procedure.''.

(2) CONFORMING AMENDMENT.—The table of sections for chapter 29 of title 35, United States Code, is amended by adding at the end the following new item:

''299A. Discovery in patent infringement action.''.

(e) SENSE OF CONGRESS.—It is the sense of Congress that it is an abuse of the patent system and against public policy for a party to send out purposely evasive demand letters to end users alleging patent infringement.

Demand letters sent should, at the least, include basic information about the patent in question, what is being infringed, and how it is being infringed. Any actions or litigation that stem from these types of purposely evasive demand letters to end users should be considered a fraudulent or deceptive practice and an exceptional circumstance when considering whether the litigation is abusive.

(f) DEMAND LETTERS.—Section 284 of title 35, United States Code, is amended—

(1) in the first undesignated paragraph, by striking ''Upon finding'' and inserting ''(a) IN GENERAL.—Upon finding'';

(2) in the second undesignated paragraph, by striking ''When the damages'' and inserting ''(b) ASSESSMENT BY COURT; TREBLE DAMAGES.—When the damages'';

(3) by inserting after subsection (b), as designated by paragraph (2) of this subsection, the following:

''(c) WILLFUL INFRINGEMENT.—A claimant seeking to establish willful infringement may not rely on evidence of pre-suit notification of infringement unless that notification identifies with particularity the asserted patent, identifies the product or process accused, identifies the ultimate parent entity of the claimant, and explains with

particularity, to the extent possible following a reasonable investigation or inquiry, how the product or process infringes one or more claims of the patent.''; and

(4) in the last undesignated paragraph, by striking ''The court'' and inserting ''(d) EXPERT TESTIMONY.—The court''.

(g) EFFECTIVE DATE.—Except as otherwise provided in this section, the amendments made by this section shall take effect on the date of the enactment of this Act and shall apply to any action for which a complaint is filed on or after that date.

SEC. 4. TRANSPARENCY OF PATENT OWNERSHIP.

(a) AMENDMENTS.—Section 290 of title 35, United States Code, is amended—

(1) in the heading, by striking ''**suits**'' and inserting ''**suits; disclosure of interests**'';

(2) by striking ''The clerks'' and inserting ''(a) NOTICE OF PATENT SUITS.—The clerks''; and

(3) by adding at the end the following new subsections:

''(b) INITIAL DISCLOSURE.—

''(1) IN GENERAL.—Except as provided in paragraph (2), upon the filing of an initial complaint for patent infringement, the plaintiff shall disclose to the Patent and Trademark Office, the court, and

each adverse party the identity of each of the following:

"(A) The assignee of the patent or patents at issue.

"(B) Any entity with a right to sublicense or enforce the patent or patents at issue.

"(C) Any entity, other than the plaintiff, that the plaintiff knows to have a financial interest in the patent or patents at issue or the plaintiff.

"(D) The ultimate parent entity of any assignee identified under subparagraph (A) and any entity identified under subparagraph (B) or (C).

"(2) EXEMPTION.—The requirements of paragraph (1) shall not apply with respect to a civil action filed under subsection (a) that includes a cause of action described under section 271(e)(2).

"(c) DISCLOSURE COMPLIANCE.—

"(1) PUBLICLY TRADED.—For purposes of subsection (b)(1)(C), if the financial interest is held by a corporation traded on a public stock exchange, an identification of the name of the corporation and the public exchange listing shall satisfy the disclosure requirement.

"(2) NOT PUBLICLY TRADED.—For purposes of subsection (b)(1)(C), if the financial interest is not held by a publicly traded corporation, the disclosure shall satisfy the disclosure requirement if the information identifies—

"(A) in the case of a partnership, the name of the partnership and the name and correspondence address of each partner or other entity that holds more than a 5-percent share of that partnership;

"(B) in the case of a corporation, the name of the corporation, the location of incorporation, the address of the principal place of business, and the name of each officer of the corporation; and

"(C) for each individual, the name and correspondence address of that individual.

"(d) ONGOING DUTY OF DISCLOSURE TO THE PATENT AND TRADEMARK OFFICE.—

"(1) IN GENERAL.—A plaintiff required to submit information under subsection (b) or a subsequent owner of the patent or patents at issue shall, not later than 90 days after any change in the assignee of the patent or patents at issue or an entity described under subparagraph (B) or (D) of sub-

section (b)(1), submit to the Patent and Trademark Office the updated identification of such assignee or entity.

"(2) FAILURE TO COMPLY.—With respect to a patent for which the requirement of paragraph (1) has not been met—

"(A) the plaintiff or subsequent owner shall not be entitled to recover reasonable fees and other expenses under section 285 or increased damages under section 284 with respect to infringing activities taking place during any period of noncompliance with paragraph (1), unless the denial of such damages or fees would be manifestly unjust; and

"(B) the court shall award to a prevailing party accused of infringement reasonable fees and other expenses under section 285 that are incurred to discover the updated assignee or entity described under paragraph (1), unless such sanctions would be unjust.

"(e) DEFINITIONS.—In this section:

"(1) FINANCIAL INTEREST.—The term 'financial interest'—

"(A) means—

"(i) with regard to a patent or patents, the right of a person to receive proceeds related to the assertion of the patent or patents, including a fixed or variable portion of such proceeds; and

"(ii) with regard to the plaintiff, direct or indirect ownership or control by a person of more than 5 percent of such plaintiff; and

"(B) does not mean—

"(i) ownership of shares or other interests in a mutual or common investment fund, unless the owner of such interest participates in the management of such fund; or

"(ii) the proprietary interest of a policyholder in a mutual insurance company or of a depositor in a mutual savings association, or a similar proprietary interest, unless the outcome of the proceeding could substantially affect the value of such interest.

"(2) PROCEEDING.—The term 'proceeding' means all stages of a civil action, including pretrial and trial proceedings and appellate review.

"(3) ULTIMATE PARENT ENTITY.—

"(A) IN GENERAL.—Except as provided in subparagraph (B), the term 'ultimate parent entity' has the meaning given such term in section 801.1(a)(3) of title 16, Code of Federal Regulations, or any successor regulation.

"(B) MODIFICATION OF DEFINITION.—The Director may modify the definition of 'ultimate parent entity' by regulation.".

(b) TECHNICAL AND CONFORMING AMENDMENT.—The item relating to section 290 in the table of sections for chapter 29 of title 35, United States Code, is amended to read as follows:

"290. Notice of patent suits; disclosure of interests.".

(c) REGULATIONS.—The Director may promulgate such regulations as are necessary to establish a registration fee in an amount sufficient to recover the estimated costs of administering subsections (b) through (e) of section 290 of title 35, United States Code, as added by subsection (a), to facilitate the collection and maintenance of the information required by such subsections, and to ensure the timely disclosure of such information to the public.

(d) EFFECTIVE DATE.—The amendments made by this section shall take effect upon the expiration of the 6-month period beginning on the date of the enactment

of this Act and shall apply to any action for which a complaint is filed on or after such effective date.

SEC. 5. CUSTOMER-SUIT EXCEPTION.

(a) AMENDMENT.—Section 296 of title 35, United States Code, is amended to read as follows:

"§ 296. Stay of action against customer

''(a) STAY OF ACTION AGAINST CUSTOMER.—Except as provided in subsection (d), in any civil action arising under any Act of Congress relating to patents, the court shall grant a motion to stay at least the portion of the action against a covered customer related to infringement of a patent involving a covered product or process if the following requirements are met:

''(1) The covered manufacturer and the covered customer consent in writing to the stay.

''(2) The covered manufacturer is a party to the action or to a separate action involving the same patent or patents related to the same covered product or process.

''(3) The covered customer agrees to be bound by any issues that the covered customer has in common with the covered manufacturer and are finally decided as to the covered manufacturer in an action described in paragraph (2).

"(4) The motion is filed after the first pleading in the action but not later than the later of—

"(A) the 120th day after the date on which the first pleading in the action is served that specifically identifies the covered product or process as a basis for the covered customer's alleged infringement of the patent and that specifically identifies how the covered product or process is alleged to infringe the patent; or

"(B) the date on which the first scheduling order in the case is entered.

"(b) APPLICABILITY OF STAY.—A stay issued under subsection (a) shall apply only to the patents, products, systems, or components accused of infringement in the action.

"(c) LIFT OF STAY.—

"(1) IN GENERAL.—A stay entered under this section may be lifted upon grant of a motion based on a showing that—

"(A) the action involving the covered manufacturer will not resolve a major issue in suit against the covered customer; or

"(B) the stay unreasonably prejudices and would be manifestly unjust to the party seeking to lift the stay.

"(2) SEPARATE MANUFACTURER ACTION INVOLVED.—In the case of a stay entered based on the participation of the covered manufacturer in a separate action involving the same patent or patents related to the same covered product or process, a motion under this subsection may only be made if the court in such separate action determines the showing required under paragraph (1) has been met.

"(d) EXEMPTION.—This section shall not apply to an action that includes a cause of action described under section 271(e)(2).

"(e) CONSENT JUDGMENT.—If, following the grant of a motion to stay under this section, the covered manufacturer seeks or consents to entry of a consent judgment relating to one or more of the common issues that gave rise to the stay, or declines to prosecute through appeal a final decision as to one or more of the common issues that gave rise to the stay, the court may, upon grant of a motion, determine that such consent judgment or unappealed final decision shall not be binding on the covered customer with respect to one or more of such common issues based on a showing that such an outcome would unreasonably prejudice and be manifestly unjust to the covered customer in light of the circumstances of the case.

"(f) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to limit the ability of a court to grant any stay, expand any stay granted under this section, or grant any motion to intervene, if otherwise permitted by law.

"(g) DEFINITIONS.—In this section:

"(1) COVERED CUSTOMER.—The term 'covered customer' means a party accused of infringing a patent or patents in dispute based on a covered product or process.

"(2) COVERED MANUFACTURER.—The term 'covered manufacturer' means a person that manufactures or supplies, or causes the manufacture or supply of, a covered product or process or a relevant part thereof.

"(3) COVERED PRODUCT OR PROCESS.—The term 'covered product or process' means a product, process, system, service, component, material, or apparatus, or relevant part thereof, that—

"(A) is alleged to infringe the patent or patents in dispute; or

"(B) implements a process alleged to infringe the patent or patents in dispute.".

(b) CONFORMING AMENDMENT.—The table of sections for chapter 29 of title 35, United States Code, is

amended by striking the item relating to section 296 and inserting the following:

"296. Stay of action against customer.".

(c) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of the enactment of this Act and shall apply to any action for which a complaint is filed on or after the first day of the 30-day period that ends on that date.

SEC. 6. PROCEDURES AND PRACTICES TO IMPLEMENT RECOMMENDATIONS OF THE JUDICIAL CONFERENCE.

(a) JUDICIAL CONFERENCE RULES AND PROCEDURES ON DISCOVERY BURDENS AND COSTS.—

(1) RULES AND PROCEDURES.—The Judicial Conference of the United States, using existing resources, shall develop rules and procedures to implement the issues and proposals described in paragraph (2) to address the asymmetries in discovery burdens and costs in any civil action arising under any Act of Congress relating to patents. Such rules and procedures shall include how and when payment for document discovery in addition to the discovery of core documentary evidence is to occur, and what information must be presented to demonstrate financial capacity before permitting document discovery

in addition to the discovery of core documentary evidence.

(2) RULES AND PROCEDURES TO BE CONSIDERED.—The rules and procedures required under paragraph (1) should address each of the following issues and proposals:

(A) DISCOVERY OF CORE DOCUMENTARY EVIDENCE.—Whether and to what extent each party to the action is entitled to receive core documentary evidence and shall be responsible for the costs of producing core documentary evidence within the possession or control of each such party, and whether and to what extent each party to the action may seek non-documentary discovery as otherwise provided in the Federal Rules of Civil Procedure.

(B) ELECTRONIC COMMUNICATION.—If the parties determine that the discovery of electronic communication is appropriate, whether such discovery shall occur after the parties have exchanged initial disclosures and core documentary evidence and whether such discovery shall be in accordance with the following:

(i) Any request for the production of electronic communication shall be specific

and may not be a general request for the production of information relating to a product or business.

(ii) Each request shall identify the custodian of the information requested, the search terms, and a time frame. The parties shall cooperate to identify the proper custodians, the proper search terms, and the proper time frame.

(iii) A party may not submit production requests to more than 5 custodians, unless the parties jointly agree to modify the number of production requests without leave of the court.

(iv) The court may consider contested requests for up to 5 additional custodians per producing party, upon a showing of a distinct need based on the size, complexity, and issues of the case.

(v) If a party requests the discovery of electronic communication for additional custodians beyond the limits agreed to by the parties or granted by the court, the requesting party shall bear all reasonable costs caused by such additional discovery.

(C) ADDITIONAL DOCUMENT DISCOVERY.—Whether the following should apply:

(i) IN GENERAL.—Each party to the action may seek any additional document discovery otherwise permitted under the Federal Rules of Civil Procedure, if such party bears the reasonable costs, including reasonable attorney's fees, of the additional document discovery.

(ii) REQUIREMENTS FOR ADDITIONAL DOCUMENT DISCOVERY.—Unless the parties mutually agree otherwise, no party may be permitted additional document discovery unless such a party posts a bond, or provides other security, in an amount sufficient to cover the expected costs of such additional document discovery, or makes a showing to the court that such party has the financial capacity to pay the costs of such additional document discovery.

(iii) LIMITS ON ADDITIONAL DOCUMENT DISCOVERY.—A court, upon motion, may determine that a request for additional document discovery is excessive, irrelevant, or otherwise abusive and may set

limits on such additional document discovery.

(iv) GOOD CAUSE MODIFICATION.—A court, upon motion and for good cause shown, may modify the requirements of subparagraphs (A) and (B) and any definition under paragraph (3). Not later than 30 days after the pretrial conference under Rule 16 of the Federal Rules of Civil Procedure, the parties shall jointly submit any proposed modifications of the requirements of subparagraphs (A) and (B) and any definition under paragraph (3), unless the parties do not agree, in which case each party shall submit any proposed modification of such party and a summary of the disagreement over the modification.

(v) COMPUTER CODE.—A court, upon motion and for good cause shown, may determine that computer code should be included in the discovery of core documentary evidence. The discovery of computer code shall occur after the parties have exchanged initial disclosures and other core documentary evidence.

(D) DISCOVERY SEQUENCE AND SCOPE.—Whether the parties shall discuss and address in the written report filed pursuant to Rule 26(f) of the Federal Rules of Civil Procedure the views and proposals of each party on the following:

(i) When the discovery of core documentary evidence should be completed.

(ii) Whether additional document discovery will be sought under subparagraph (C).

(iii) Any issues about infringement, invalidity, or damages that, if resolved before the additional discovery described in subparagraph (C) commences, might simplify or streamline the case, including the identification of any terms or phrases relating to any patent claim at issue to be construed by the court and whether the early construction of any of those terms or phrases would be helpful.

(3) DEFINITIONS.—In this subsection:

(A) CORE DOCUMENTARY EVIDENCE.—The term ''core documentary evidence''—

(i) includes—

(I) documents relating to the conception of, reduction to practice of, and application for, the patent or patents at issue;

(II) documents sufficient to show the technical operation of the product or process identified in the complaint as infringing the patent or patents at issue;

(III) documents relating to potentially invalidating prior art;

(IV) documents relating to any licensing of, or other transfer of rights to, the patent or patents at issue before the date on which the complaint is filed;

(V) documents sufficient to show profit attributable to the claimed invention of the patent or patents at issue;

(VI) documents relating to any knowledge by the accused infringer of the patent or patents at issue before the date on which the complaint is filed;

(VII) documents relating to any knowledge by the patentee of infringement of the patent or patents at issue before the date on which the complaint is filed;

(VIII) documents relating to any licensing term or pricing commitment to which the patent or patents may be subject through any agency or standard-setting body; and

(IX) documents sufficient to show any marking or other notice provided of the patent or patents at issue; and

(ii) does not include computer code, except as specified in paragraph (2)(C)(v).

(B) ELECTRONIC COMMUNICATION.—The term ''electronic communication'' means any form of electronic communication, including email, text message, or instant message.

(4) IMPLEMENTATION BY THE DISTRICT COURTS.—Not later than 6 months after the date on which the Judicial Conference has developed the rules and procedures required by this subsection, each United States district court and the United

States Court of Federal Claims shall revise the applicable local rules for such court to implement such rules and procedures.

(5) AUTHORITY FOR JUDICIAL CONFERENCE TO REVIEW AND MODIFY.—

(A) STUDY OF EFFICACY OF RULES AND PROCEDURES.—The Judicial Conference shall study the efficacy of the rules and procedures required by this subsection during the 4-year period beginning on the date on which such rules and procedures by the district courts and the United States Court of Federal Claims are first implemented. The Judicial Conference may modify such rules and procedures following such 4-year period.

(B) INITIAL MODIFICATIONS.—Before the expiration of the 4-year period described in subparagraph (A), the Judicial Conference may modify the requirements under this subsection—

(i) by designating categories of ''core documentary evidence'', in addition to those designated under paragraph (3)(A), as the Judicial Conference determines to be appropriate and necessary; and

(ii) as otherwise necessary to prevent a manifest injustice, the imposition of a requirement the costs of which clearly outweigh its benefits, or a result that could not reasonably have been intended by the Congress.

(b) JUDICIAL CONFERENCE PATENT CASE MANAGEMENT.—The Judicial Conference of the United States, using existing resources, shall develop case management procedures to be implemented by the United States district courts and the United States Court of Federal Claims for any civil action arising under any Act of Congress relating to patents, including initial disclosure and early case management conference practices that—

(1) will identify any potential dispositive issues of the case; and

(2) focus on early summary judgment motions when resolution of issues may lead to expedited disposition of the case.

(c) REVISION OF FORM FOR PATENT INFRINGEMENT.—

(1) ELIMINATION OF FORM.—The Supreme Court, using existing resources, shall eliminate Form 18 in the Appendix to the Federal Rules of Civil Procedure (relating to Complaint for Patent In-

fringement), effective on the date of the enactment of this Act.

(2) REVISED FORM.—The Supreme Court may prescribe a new form or forms setting out model allegations of patent infringement that, at a minimum, notify accused infringers of the asserted claim or claims, the products or services accused of infringement, and the plaintiff's theory for how each accused product or service meets each limitation of each asserted claim. The Judicial Conference should exercise the authority under section 2073 of title 28, United States Code, to make recommendations with respect to such new form or forms.

(d) PROTECTION OF INTELLECTUAL-PROPERTY LICENSES IN BANKRUPTCY.—

(1) IN GENERAL.—Section 1522 of title 11, United States Code, is amended by adding at the end the following:

''(e) Section 365(n) shall apply to cases under this chapter. If the foreign representative rejects or repudiates a contract under which the debtor is a licensor of intellectual property, the licensee under such contract shall be entitled to make the election and exercise the rights described in section 365(n).''.

(2) TRADEMARKS.—

(A) IN GENERAL.—Section 101(35A) of title 11, United States Code, is amended—

(i) in subparagraph (E), by striking ''or'';

(ii) in subparagraph (F), by striking ''title 17;'' and inserting ''title 17; or''; and

(iii) by adding after subparagraph (F) the following new subparagraph:

''(G) a trademark, service mark, or trade name, as those terms are defined in section 45 of the Act of July 5, 1946 (commonly referred to as the 'Trademark Act of 1946') (15 U.S.C. 1127);''.

(B) CONFORMING AMENDMENT.—Section 365(n)(2) of title 11, United States Code, is amended—

(i) in subparagraph (B)—

(I) by striking ''royalty payments'' and inserting ''royalty or other payments''; and

(II) by striking ''and'' after the semicolon;

(ii) in subparagraph (C), by striking the period at the end of clause (ii) and inserting ''; and''; and

(iii) by adding at the end the following new subparagraph:

''(D) in the case of a trademark, service mark, or trade name, the trustee shall not be relieved of a contractual obligation to monitor and control the quality of a licensed product or service.''.

(3) EFFECTIVE DATE.—The amendments made by this subsection shall take effect on the date of the enactment of this Act and shall apply to any case that is pending on, or for which a petition or complaint is filed on or after, such date of enactment.

SEC. 7. SMALL BUSINESS EDUCATION, OUTREACH, AND INFORMATION ACCESS.

(a) SMALL BUSINESS EDUCATION AND OUTREACH.—

(1) RESOURCES FOR SMALL BUSINESS.—Using existing resources, the Director shall develop educational resources for small businesses to address concerns arising from patent infringement.

(2) SMALL BUSINESS PATENT OUTREACH.—The existing small business patent outreach programs of the Office, and the relevant offices at the Small Business Administration and the Minority Business Development Agency, shall provide education and awareness on abusive patent litigation practices. The

Director may give special consideration to the unique needs of small firms owned by disabled veterans, service-disabled veterans, women, and minority entrepreneurs in planning and executing the outreach efforts by the Office.

(b) IMPROVING INFORMATION TRANSPARENCY FOR SMALL BUSINESS AND THE UNITED STATES PATENT AND TRADEMARK OFFICE USERS.—

(1) WEB SITE.—Using existing resources, the Director shall create a user-friendly section on the official Web site of the Office to notify the public when a patent case is brought in Federal court and, with respect to each patent at issue in such case, the Director shall include—

(A) information disclosed under subsections (b) and (d) of section 290 of title 35, United States Code, as added by section 4(a) of this Act; and

(B) any other information the Director determines to be relevant.

(2) FORMAT.—In order to promote accessibility for the public, the information described in paragraph (1) shall be searchable by patent number, patent art area, and entity.

SEC. 8. STUDIES ON PATENT TRANSACTIONS, QUALITY, AND EXAMINATION.

(a) STUDY ON SECONDARY MARKET OVERSIGHT FOR PATENT TRANSACTIONS TO PROMOTE TRANSPARENCY AND ETHICAL BUSINESS PRACTICES.—

(1) STUDY REQUIRED.—The Director, in consultation with the Secretary of Commerce, the Secretary of the Treasury, the Chairman of the Securities and Exchange Commission, the heads of other relevant agencies, and interested parties, shall, using existing resources of the Office, conduct a study—

(A) to develop legislative recommendations to ensure greater transparency and accountability in patent transactions occurring on the secondary market;

(B) to examine the economic impact that the patent secondary market has on the United States;

(C) to examine licensing and other oversight requirements that may be placed on the patent secondary market, including on the participants in such markets, to ensure that the market is a level playing field and that brokers in the market have the requisite expertise and adhere to ethical business practices; and

(D) to examine the requirements placed on other markets.

(2) REPORT ON STUDY.—Not later than 18 months after the date of the enactment of this Act, the Director shall submit a report to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate on the findings and recommendations of the Director from the study required under paragraph (1).

(b) STUDY ON PATENTS OWNED BY THE UNITED STATES GOVERNMENT.—

(1) STUDY REQUIRED.—The Director, in consultation with the heads of relevant agencies and interested parties, shall, using existing resources of the Office, conduct a study on patents owned by the United States Government that—

(A) examines how such patents are licensed and sold, and any litigation relating to the licensing or sale of such patents;

(B) provides legislative and administrative recommendations on whether there should be restrictions placed on patents acquired from the United States Government;

(C) examines whether or not each relevant agency maintains adequate records on the pat-

ents owned by such agency, specifically whether such agency addresses licensing, assignment, and Government grants for technology related to such patents; and

(D) provides recommendations to ensure that each relevant agency has an adequate point of contact that is responsible for managing the patent portfolio of the agency.

(2) REPORT ON STUDY.—Not later than 1 year after the date of the enactment of this Act, the Director shall submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate a report on the findings and recommendations of the Director from the study required under paragraph (1).

(c) STUDY ON PATENT QUALITY AND ACCESS TO THE BEST INFORMATION DURING EXAMINATION.—

(1) GAO STUDY.—The Comptroller General of the United States shall, using existing resources, conduct a study on patent examination at the Office and the technologies available to improve examination and improve patent quality.

(2) CONTENTS OF THE STUDY.—The study required under paragraph (1) shall include the following:

(A) An examination of patent quality at the Office.

(B) An examination of ways to improve patent quality, specifically through technology, that shall include examining best practices at foreign patent offices and the use of existing off-the-shelf technologies to improve patent examination.

(C) A description of how patents are classified.

(D) An examination of procedures in place to prevent double patenting through filing by applicants in multiple art areas.

(E) An examination of the types of off-the-shelf prior art databases and search software used by foreign patent offices and governments, particularly in Europe and Asia, and whether those databases and search tools could be used by the Office to improve patent examination.

(F) An examination of any other areas the Comptroller General determines to be relevant.

(3) REPORT ON STUDY.—Not later than 1 year after the date of the enactment of this Act, the Comptroller General shall submit to the Committee on the Judiciary of the House of Representatives

and the Committee on the Judiciary of the Senate a report on the findings and recommendations from the study required by this subsection, including recommendations for any changes to laws and regulations that will improve the examination of patent applications and patent quality.

(d) STUDY ON PATENT SMALL CLAIMS COURT.—

(1) STUDY REQUIRED.—

(A) IN GENERAL.—The Director of the Administrative Office of the United States Courts, in consultation with the Director of the Federal Judicial Center and the United States Patent and Trademark Office, shall, using existing resources, conduct a study to examine the idea of developing a pilot program for patent small claims procedures in certain judicial districts within the existing patent pilot program mandated by Public Law 111–349.

(B) CONTENTS OF STUDY.—The study under subparagraph (A) shall examine—

(i) the necessary criteria for using small claims procedures;

(ii) the costs that would be incurred for establishing, maintaining, and operating such a pilot program; and

(iii) the steps that would be taken to ensure that the procedures used in the pilot program are not misused for abusive patent litigation.

(2) REPORT ON STUDY.—Not later than 1 year after the date of the enactment of this Act, the Director of the Administrative Office of the United States Courts shall submit a report to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate on the findings and recommendations of the Director of the Administrative Office from the study required under paragraph (1).

(e) STUDY ON DEMAND LETTERS.—

(1) STUDY.—The Director, in consultation with the heads of other appropriate agencies, shall, using existing resources, conduct a study of the prevalence of the practice of sending patent demand letters in bad faith and the extent to which that practice may, through fraudulent or deceptive practices, impose a negative impact on the marketplace.

(2) REPORT TO CONGRESS.—Not later than 1 year after the date of the enactment of this Act, the Director shall submit a report to the Committee on the Judiciary of the House of Representatives and

the Committee on the Judiciary of the Senate on the findings and recommendations of the Director from the study required under paragraph (1).

(3) PATENT DEMAND LETTER DEFINED.—In this subsection, the term ''patent demand letter'' means a written communication relating to a patent that states or indicates, directly or indirectly, that the recipient or anyone affiliated with the recipient is or may be infringing the patent.

(f) STUDY ON BUSINESS METHOD PATENT QUALITY.—

(1) GAO STUDY.—The Comptroller General of the United States shall, using existing resources, conduct a study on the volume and nature of litigation involving business method patents.

(2) CONTENTS OF STUDY.—The study required under paragraph (1) shall focus on examining the quality of business method patents asserted in suits alleging patent infringement, and may include an examination of any other areas that the Comptroller General determines to be relevant.

(3) REPORT TO CONGRESS.—Not later than 1 year after the date of the enactment of this Act, the Comptroller General shall submit to the Committee on the Judiciary of the House of Representatives

and the Committee on the Judiciary of the Senate a report on the findings and recommendations from the study required by this subsection, including recommendations for any changes to laws or regulations that the Comptroller General considers appropriate on the basis of the study.

(g) STUDY ON IMPACT OF LEGISLATION ON ABILITY OF INDIVIDUALS AND SMALL BUSINESSES TO PROTECT EXCLUSIVE RIGHTS TO INVENTIONS AND DISCOVERIES.—

(1) STUDY REQUIRED.—The Director, in consultation with the Secretary of Commerce, the Director of the Administrative Office of the United States Courts, the Director of the Federal Judicial Center, the heads of other relevant agencies, and interested parties, shall, using existing resources of the Office, conduct a study to examine the economic impact of sections 3, 4, and 5 of this Act, and any amendments made by such sections, on the ability of individuals and small businesses owned by women, veterans, and minorities to assert, secure, and vindicate the constitutionally guaranteed exclusive right to inventions and discoveries by such individuals and small business.

(2) REPORT ON STUDY.—Not later than 2 years after the date of the enactment of this Act, the Director shall submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate a report on the findings and recommendations of the Director from the study required under paragraph (1).

SEC. 9. IMPROVEMENTS AND TECHNICAL CORRECTIONS TO THE LEAHY-SMITH AMERICA INVENTS ACT.

(a) POST-GRANT REVIEW AMENDMENT.—Section 325(e)(2) of title 35, United States Code is amended by striking ''or reasonably could have raised''.

(b) USE OF DISTRICT-COURT CLAIM CONSTRUCTION IN POST-GRANT AND INTER PARTES REVIEWS.—

(1) INTER PARTES REVIEW.—Section 316(a) of title 35, United States Code, is amended—

(A) in paragraph (12), by striking ''; and'' and inserting a semicolon;

(B) in paragraph (13), by striking the period at the end and inserting ''; and''; and

(C) by adding at the end the following new paragraph:

''(14) providing that for all purposes under this chapter—

"(A) each claim of a patent shall be construed as such claim would be in a civil action to invalidate a patent under section 282(b), including construing each claim of the patent in accordance with the ordinary and customary meaning of such claim as understood by one of ordinary skill in the art and the prosecution history pertaining to the patent; and

"(B) if a court has previously construed the claim or a claim term in a civil action in which the patent owner was a party, the Office shall consider such claim construction.".

(2) POST-GRANT REVIEW.—Section 326(a) of title 35, United States Code, is amended—

(A) in paragraph (11), by striking "; and" and inserting a semicolon;

(B) in paragraph (12), by striking the period at the end and inserting "; and"; and

(C) by adding at the end the following new paragraph:

"(13) providing that for all purposes under this chapter—

"(A) each claim of a patent shall be construed as such claim would be in a civil action to invalidate a patent under section 282(b), in-

cluding construing each claim of the patent in accordance with the ordinary and customary meaning of such claim as understood by one of ordinary skill in the art and the prosecution history pertaining to the patent; and

"(B) if a court has previously construed the claim or a claim term in a civil action in which the patent owner was a party, the Office shall consider such claim construction.".

(3) TECHNICAL AND CONFORMING AMENDMENT.—Section 18(a)(1)(A) of the Leahy-Smith America Invents Act (Public Law 112–29; 126 Stat. 329; 35 U.S.C. 321 note) is amended by striking "Section 321(c)" and inserting "Sections 321(c) and 326(a)(13)".

(4) EFFECTIVE DATE.—The amendments made by this subsection shall take effect upon the expiration of the 90-day period beginning on the date of the enactment of this Act, and shall apply to any proceeding under chapter 31 or 32 of title 35, United States Code, as the case may be, for which the petition for review is filed on or after such effective date.

(c) CODIFICATION OF THE DOUBLE-PATENTING DOCTRINE FOR FIRST-INVENTOR-TO-FILE PATENTS.—

(1) AMENDMENT.—Chapter 10 of title 35, United States Code, is amended by adding at the end the following new section:

"§ 106. Prior art in cases of double patenting

''A claimed invention of a patent issued under section 151 (referred to as the 'first patent') that is not prior art to a claimed invention of another patent (referred to as the 'second patent') shall be considered prior art to the claimed invention of the second patent for the purpose of determining the nonobviousness of the claimed invention of the second patent under section 103 if—

''(1) the claimed invention of the first patent was effectively filed under section 102(d) on or before the effective filing date of the claimed invention of the second patent;

''(2) either—

''(A) the first patent and second patent name the same individual or individuals as the inventor; or

''(B) the claimed invention of the first patent would constitute prior art to the claimed invention of the second patent under section 102(a)(2) if an exception under section 102(b)(2) were deemed to be inapplicable and the claimed invention of the first patent was, or

were deemed to be, effectively filed under section 102(d) before the effective filing date of the claimed invention of the second patent; and

"(3) the patentee of the second patent has not disclaimed the rights to enforce the second patent independently from, and beyond the statutory term of, the first patent.".

(2) REGULATIONS.—The Director shall promulgate regulations setting forth the form and content of any disclaimer required for a patent to be issued in compliance with section 106 of title 35, United States Code, as added by paragraph (1). Such regulations shall apply to any disclaimer filed after a patent has issued. A disclaimer, when filed, shall be considered for the purpose of determining the validity of the patent under section 106 of title 35, United States Code.

(3) CONFORMING AMENDMENT.—The table of sections for chapter 10 of title 35, United States Code, is amended by adding at the end the following new item:

"106. Prior art in cases of double patenting.".

(4) EXCLUSIVE RULE.—A patent subject to section 106 of title 35, United States Code, as added by paragraph (1), shall not be held invalid on any nonstatutory, double-patenting ground based on a

patent described in section 3(n)(1) of the Leahy-Smith America Invents Act (35 U.S.C. 100 note).

(5) EFFECTIVE DATE.—The amendments made by this subsection shall take effect upon the expiration of the 1-year period beginning on the date of the enactment of this Act and shall apply to a patent or patent application only if both the first and second patents described in section 106 of title 35, United States Code, as added by paragraph (1), are patents or patent applications that are described in section 3(n)(1) of the Leahy-Smith America Invents Act (35 U.S.C. 100 note).

(d) PTO PATENT REVIEWS.—

(1) CLARIFICATION.—

(A) SCOPE OF PRIOR ART.—Section 18(a)(1)(C)(i) of the Leahy-Smith America Invents Act (35 U.S.C. 321 note) is amended by striking ''section 102(a)'' and inserting ''subsection (a) or (e) of section 102''.

(B) EFFECTIVE DATE.—The amendment made by subparagraph (A) shall take effect on the date of the enactment of this Act and shall apply to any proceeding pending on, or filed on or after, such date of enactment.

(2) AUTHORITY TO WAIVE FEE.—Subject to available resources, the Director may waive payment of a filing fee for a transitional proceeding described under section 18(a) of the Leahy-Smith America Invents Act (35 U.S.C. 321 note).

(e) CLARIFICATION OF LIMITS ON PATENT TERM ADJUSTMENT.—

(1) AMENDMENTS.—Section 154(b)(1)(B) of title 35, United States Code, is amended—

(A) in the matter preceding clause (i), by striking ''not including—'' and inserting ''the term of the patent shall be extended 1 day for each day after the end of that 3-year period until the patent is issued, not including—'';

(B) in clause (i), by striking ''consumed by continued examination of the application requested by the applicant'' and inserting ''consumed after continued examination of the application is requested by the applicant'';

(C) in clause (iii), by striking the comma at the end and inserting a period; and

(D) by striking the matter following clause (iii).

(2) EFFECTIVE DATE.—The amendments made by this subsection shall take effect on the date of the

enactment of this Act and apply to any patent application that is pending on, or filed on or after, such date of enactment.

(f) CLARIFICATION OF JURISDICTION.—

(1) IN GENERAL.—The Federal interest in preventing inconsistent final judicial determinations as to the legal force or effect of the claims in a patent presents a substantial Federal issue that is important to the Federal system as a whole.

(2) APPLICABILITY.—Paragraph (1)—

(A) shall apply to all cases filed on or after, or pending on, the date of the enactment of this Act; and

(B) shall not apply to a case in which a Federal court has issued a ruling on whether the case or a claim arises under any Act of Congress relating to patents or plant variety protection before the date of the enactment of this Act.

(g) PATENT PILOT PROGRAM IN CERTAIN DISTRICT COURTS DURATION.—

(1) DURATION.—Section 1(c) of Public Law 111–349 (124 Stat. 3674; 28 U.S.C. 137 note) is amended to read as follows:

"(c) DURATION.—The program established under subsection (a) shall be maintained using existing resources, and shall terminate 20 years after the end of the 6-month period described in subsection (b).".

(2) EFFECTIVE DATE.—The amendment made by paragraph (1) shall take effect on the date of the enactment of this Act.

(h) TECHNICAL CORRECTIONS.—

(1) NOVELTY.—

(A) AMENDMENT.—Section 102(b)(1)(A) of title 35, United States Code, is amended by striking "the inventor or joint inventor or by another" and inserting "the inventor or a joint inventor or another".

(B) EFFECTIVE DATE.—The amendment made by subparagraph (A) shall be effective as if included in the amendment made by section 3(b)(1) of the Leahy-Smith America Invents Act (Public Law 112–29).

(2) INVENTOR'S OATH OR DECLARATION.—

(A) AMENDMENT.—The second sentence of section 115(a) of title 35, United States Code, is amended by striking "shall execute" and inserting "may be required to execute".

(B) EFFECTIVE DATE.—The amendment made by subparagraph (A) shall be effective as if included in the amendment made by section 4(a)(1) of the Leahy-Smith America Invents Act (Public Law 112–29).

(3) ASSIGNEE FILERS.—

(A) BENEFIT OF EARLIER FILING DATE; RIGHT OF PRIORITY.—Section 119(e)(1) of title 35, United States Code, is amended, in the first sentence, by striking ''by an inventor or inventors named'' and inserting ''that names the inventor or a joint inventor''.

(B) BENEFIT OF EARLIER FILING DATE IN THE UNITED STATES.—Section 120 of title 35, United States Code, is amended, in the first sentence, by striking ''names an inventor or joint inventor'' and inserting ''names the inventor or a joint inventor''.

(C) EFFECTIVE DATE.—The amendments made by this paragraph shall take effect on the date of the enactment of this Act and shall apply to any patent application, and any patent issuing from such application, that is filed on or after September 16, 2012.

(4) DERIVED PATENTS.—

(A) AMENDMENT.—Section 291(b) of title 35, United States Code, is amended by striking ''or joint inventor'' and inserting ''or a joint inventor''.

(B) EFFECTIVE DATE.—The amendment made by subparagraph (A) shall be effective as if included in the amendment made by section 3(h)(1) of the Leahy-Smith America Invents Act (Public Law 112–29).

(5) SPECIFICATION.—Notwithstanding section 4(e) of the Leahy-Smith America Invents Act (Public Law 112–29; 125 Stat. 297), the amendments made by subsections (c) and (d) of section 4 of such Act shall apply to any proceeding or matter that is pending on, or filed on or after, the date of the enactment of this Act.

(6) TIME LIMIT FOR COMMENCING MISCONDUCT PROCEEDINGS.—

(A) AMENDMENT.—The fourth sentence of section 32 of title 35, United States Code, is amended by striking ''1 year'' and inserting ''18 months''.

(B) EFFECTIVE DATE.—The amendment made by this paragraph shall take effect on the date of the enactment of this Act and shall

apply to any action in which the Office files a complaint on or after such date of enactment.

(7) PATENT OWNER RESPONSE.—

(A) CONDUCT OF INTER PARTES REVIEW.—Paragraph (8) of section 316(a) of title 35, United States Code, is amended by striking ''the petition under section 313'' and inserting ''the petition under section 311''.

(B) CONDUCT OF POST-GRANT REVIEW.—Paragraph (8) of section 326(a) of title 35, United States Code, is amended by striking ''the petition under section 323'' and inserting ''the petition under section 321''.

(C) EFFECTIVE DATE.—The amendments made by this paragraph shall take effect on the date of the enactment of this Act.

(8) INTERNATIONAL APPLICATIONS.—

(A) AMENDMENTS.—Section 202(b) of the Patent Law Treaties Implementation Act of 2012 (Public Law 112–211; 126 Stat. 1536) is amended—

(i) by striking paragraph (7); and

(ii) by redesignating paragraphs (8) and (9) as paragraphs (7) and (8), respectively.

(B) EFFECTIVE DATE.—The amendments made by subparagraph (A) shall be effective as if included in title II of the Patent Law Treaties Implementation Act of 2012 (Public Law 112–21).

SEC. 10. EFFECTIVE DATE.

Except as otherwise provided in this Act, the provisions of this Act shall take effect on the date of the enactment of this Act, and shall apply to any patent issued, or any action filed, on or after that date.

TAB 4B

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125-000343

Diversity Jurisdiction: Citizenship of Noncorporate Entities

The American Bar Association Section of Litigation has adopted a resolution urging amendment of 28 U.S.C. § 1332 "to provide that unincorporated business entities shall, for diversity jurisdiction purposes, be deemed citizens of their states of organization and the states where they maintain their principal places of business * * *." The proposal will be considered by the ABA House of Delegates in August, 2015.

The effect of this proposal would be to expand access to diversity jurisdiction. It is supported by looking to the difficulty of establishing the citizenship of every member, shareholder, partner, beneficiary of an unincorporated entity. The burden of discovery can be great, and the result may be defeat of subject-matter jurisdiction after substantial effort has been invested in a case.

Diversity jurisdiction is a subject primarily confided to the Federal-State Jurisdiction Committee. The Judicial Conference has often taken positions that favor proposals to restrict, not expand, the reach of diversity jurisdiction. Still, it will be useful to have the sense of the Committee whether this proposal should be supported. A copy of the current draft is attached.

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AMERICAN BAR ASSOCIATION

SECTION OF LITIGATION

RESOLUTION

RESOLVED, that the American Bar Association initiate and support an effort for Congress to amend the federal diversity statute, 28 U.S.C. § 1332, to provide that unincorporated business entities shall, for diversity jurisdiction purposes, be deemed citizens of their states of organization and the states where they maintain their principal places of business, as outlined in Appendix 1.

DRAFT AS OF MARCH 9, 2015

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REPORT

Introduction

Determining the citizenship of unincorporated business litigants has turned into a complicated jurisdictional morass. More businesses are operating as unincorporated associations, such as general partnerships, limited liability companies (LLCs), limited partnerships (LPs), professional corporations (PCs), limited liability partnerships (LLPs), business trusts, and other forms of business entities. The subject matter diversity jurisdiction statute was last amended to address citizenship of business entities in 1958. At that time, as a matter of substantive law only corporations were treated as "entities" with an existence apart from that of their membership. Since that change, substantive law has changed with respect to general and other partnerships, and a host of other entities have enjoyed expanding usage. Yet, under the current subject matter jurisdiction statute, in determining whether diversity jurisdiction exists there is still a major difference between corporations and all other entities. Corporations are treated as citizens only of the states (i) where they are incorporated, and (ii) where they maintain their principal place of business. By contrast, for all business entities that are *not* organized as corporations the citizenship of every member, shareholder, or other owner of any portion of the entity must be examined to determine whether complete diversity exists.

The current diversity regime sets a potential trap for plaintiffs, defendants, and even trial court judges every time litigation involves an unincorporated business entity. For example, the existence of a single, passive member of an LLC who was not even involved in the dispute or event being litigated can destroy diversity if he or she hails from the same state as one adverse party. Unfortunately, the LLC's records may not even reveal the citizenship of every member, thus making it difficult if not impossible for any party to determine quickly whether complete diversity exists prior to discovery. Yet because subject matter jurisdiction is not waivable and because federal courts must satisfy themselves *sua sponte* that they have subject matter jurisdiction over a matter, *see* Fed. R. Civ. P. 12(h)(3), this situation may be a ticking legal time bomb.

This problem affects plaintiffs and defendants alike. The uncertainty of whether a case can be filed in or removed to a federal forum not only increases the cost and complexity of litigation, it can completely undermine a fully-litigated case when it is discovered at the appellate stage that the trial court lacked jurisdiction in the first place. Given that litigants need absolute clarity in order to avoid litigating a case in federal court only to have it remanded on jurisdictional grounds after judgment, the diversity statute needs to be streamlined and simplified in order to apply the corporate citizenship test to business entities that are functionally equivalent to corporations.

Modest revisions to the diversity jurisdiction statute, 28 U.S.C. § 1332, can eliminate these traps and correlate federal court jurisdiction with modern business entity structures. These revisions, if enacted, will bridge the "disconnect between the modern business realities" of unincorporated business entities "and the formalistic rules" for determining their citizenship, simplifying the forum selection process and avoiding the waste of judicial resources and time. Debra R. Cohen, *Limited Liability Company Citizenship: Reconsidering an Illogical and Inconsistent Choice*, 90 MARQUETTE L. REV.

269, 269 (2006).

Background

Through a judicially-created rule, federal courts sitting in diversity have long required *complete* diversity between two or more joint plaintiffs and two or more joint defendants. *See Strawbridge v. Curtis*, 7 U.S. 267 (1806). Shortly after *Strawbridge*, the Supreme Court declared that corporations were *not* citizens, "and, consequently, cannot sue or be sued in the courts of the United States, unless the rights of the members, in this respect, can be exercised in their corporate name." *Bank of the U.S. v. Deveaux*, 9 U.S. 61 (1809). Because corporations enjoyed the aggregate citizenship of their owners and members, they were able to force litigants into state court if a single shareholder was nondiverse from a single plaintiff. *See* Cohen, *supra*, p. 284 & n.95.

Although the Supreme Court later overruled *Deveaux* and declared that corporations were legal entities separate and apart from their members and owners, *see Louisville, Cincinnati & Charleston R.R. v. Letson*, 43 U.S. 497 (1844), it took Congress over a hundred years to codify this rule. In 1958, Congress amended the federal diversity statute, 28 U.S.C. § 1332, to tie corporate citizenship to the states where the entities are incorporated and where they maintain their principal places of business. *J.A. Olson Co. v. Winona*, 818 F.2d 401, 404-05 (5th Cir. 1987), abrogated on other grounds by *Hertz Corp. v. Friend*, 559 U.S. 77 (2010); *see also* Case Comment, *Seventh Circuit Holds that the Term "Corporation" is Entirely State-Defined*, Hoagland v. Sandberg, Phoenix, & von Gontard, P.C., 118 HARV. L. REV. 1347-48, 1352 (2005). The 1958 amendment also was "intended to further the original purpose of diversity jurisdiction . . . to provide to out-of-state litigants a forum free of local bias." *J.A. Olson*, 818 F.2d at 406. Indeed, "the need for diversity jurisdiction is lessened when a foreign corporation has substantial visibility in the community." *See id*. at 404, 406.

This logic made sense in 1958. At the time, the primary unincorporated business entities—partnerships—were merely contracts between individuals who both owned and controlled the business. Corporations, by contrast, were legal fictions created by their states of incorporation for the sole purpose of separating ownership from control. *See* Cohen, *supra*, p. 289. The 1958 amendment thus recognized the functional differences between corporations and partnerships as they existed at the time and "highlighted the citizenship of the true litigants." *Id.* Those states that allowed the formation of partnerships, limited partnerships, limited liability companies, and other business entities did *not* recognize those business forms as entities separate and apart from their owners and members. For example, at the time of the first Uniform Partnership Act, promulgated in 1914, partnerships were frequently treated as conglomerations of the individual partners. As explained by the drafters of the 1994 revisions to the Uniform Partnership Act ("RUPA"), "The first essential change in UPA (1994) over the 1914 Act that must be discussed as a prelude to the rest of the revision concerns the nature of a partnership. There is age-long conflict in partnership law over the nature of the organization. Should a partnership be considered merely an aggregation of individuals or should it be regarded as an entity by itself? The answer to these questions considerably affects such matters as a partner's capacity to do business for the partnership, how property is to be held and treated in the partnership, and what constitutes dissolution of

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the partnership. The 1914 Act made no effort to settle the controversy by express language, and has rightly been characterized as a hybrid, encompassing aspects of both theories. . . . [the Revised Uniform Partnership Act] (1994) makes a very clear choice that settles the controversy. To quote Section 201: 'A partnership is an entity.' All outcomes in [the Revised Uniform Partnership Act] (1994) must be evaluated in light of that clearly articulated language."[1] In short, general partnerships are no longer viewed solely as aggregations of individuals. Thirty-seven states plus the District of Columbia have adopted the 1994 or 1997 version of the RUPA and its entity designation.[2] Even those states that have not adopted RUPA (1994) frequently recognize partnerships as a distinct entity for at least some purposes. In addition, while not adopting RUPA, Louisiana recognizes a partnership as a "judicial person, distinct from its partners." La. Civ. Code art. 2801. At least six other "non-RUPA (1994)" states recognize a partnership as a separate entity by statutes providing that partnerships can sue or be sued in the partnership name.[3] And some states have recognized entity status for at least some purposes, as recognized by case law. *See, e.g.*, *Hanson v. St. Luke United Methodist Church*, 704 N.E.2d 1020, 1026 (Ind. 1998) (explaining that a judgment by or against a partnership binds the partnership as if it were an entity and does not bind individual members unless they were named); *Michigan Employment Sec. Com. v. Crane*, 54 N.W.2d 616, 620 (Mich. 1952) ("The Michigan employment security act expressly recognizes that a partnership is an 'employing unit' within the meaning of the act."); *Philadelphia Tax Review Bd. v. Adams Ave. Assocs.*, 360 A.2d 817, 820 (Pa. Commw. Ct. 1976) ("[I]t does not follow that for purposes of taxation a partnership may not be taxed, or may not have a domicile for tax purposes, separate and distinct from that of the individuals who compose it. In other words, a partnership may be recognized as a legal entity for certain purposes."); *Dept. of Revenue v. Mark*, 483 N.W.2d 302, 304 (Wis. 1992) ("[T]he law recognizes a partnership as a separate legal entity for purposes of conveying real estate and for purposes of holding title." (emphasis omitted)). In short, contrary to the situation that existed in 1958, the concept of the partnership as a separate legal entity is now well established.

Much else has changed since 1958 as well. The past five decades have seen a rise in so-called "hybrid" business forms such as LLCs, LPs, MLPs, PCs, LLPs, and multi-state general partnerships. For example, the federal Internal Revenue Service reports that

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[1] Summary of 1994 revisions to Uniform Partnership Act ("RUPA"), "Uniform Partnership Act § 201 (1994), "Nature of a Partnership"; Partnership Act Summary, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, available at http://www.nccusl.org/ActSummary.aspx?title=Partnership%20Act (last visited Apr. 30, 2014).

[2] The states (13) that have not adopted the 1994 or subsequent versions of RUPA are: LA, GA, IN, MA, MI, MO, NH, NY, NC, PA, RI, SC and WI. Enactment Status Map, Partnership Act, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, available at http://www.nccusl.org/Act.aspx?title=Partnership%20Act (last visited Apr. 30, 2014).

[3] These "sue and be sued" as provided by statute states are Georgia (O.C.G.A. § 14-8-15.1), Indiana (Ind. R. Trial P. 17), Michigan (Mich. Comp. Laws 600.2051), New York (N.Y. C.P.L.R. § 1025), North Carolina (N.C. Gen Stat. § 1-69.1), and South Carolina (S.C. Code § 15-5-45). *Cf.* Pa. R. Civ. P. 2127; Pa. R. Civ. P. 2128 (together allowing a partnership to be sued in its firm name but requiring the partnership to bring suit as "A, B and C trading as X & Co.").

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in 1993, roughly 275,000 LPs and only 17,335 LLCs filed federal tax returns; by 2008, over 534,000 LPs and over 1,898,000 LLCs filed federal tax returns.[4] Accordingly, the prospect of facing a limited partnership nearly doubled from 1993 to 2008, while the prospect of facing a limited liability company increased nearly one hundred and tenfold.

With the rise of these hybrid entities, "[e]volving organizational laws caused the distinction between business organizations to blur." Cohen, *supra*, p. 289. Many states now recognize these other entities as existing separate and apart from their owners and members. *See* Christine M. Kailus, *Diversity Jurisdiction and Unincorporated Businesses: Collapsing the Doctrinal Wall*, 2007 UNIV. OF ILL. L.R. 1543, 1545-47 (Sept. 7, 2007). Similarly, the Uniform Limited Partnership Act ("ULPA") also now recognizes that a "limited partnership is an entity distinct from its partners."[5] Eighteen (18) states plus the District of Columbia have adopted the 2001 version of the ULPA.[6] And likewise, the 2006 revisions to the Uniform Limited Liability Company Act of 1996 ("ULLCA") recognizes that an LLC "is an entity distinct from its members."[7] Nine (9) states plus the District of Columbia have adopted the 2006 version of the ULLCA.[8]

The existing law has not kept up with reality. The corporate landscape simply looks much different than it did in 1958, but Section 1332(c) has not been amended to acknowledge unincorporated entities as "citizens" for diversity purposes. Nor have courts been willing to impute citizenship status on these entities because they are "corporate-like," as courts narrowly construe statutes conferring federal jurisdiction. *See, e.g., Carden v. Arkoma Assocs.*, 494 U.S. 185 (1990); *Northbrook Nat'l Ins. v. Brewer*,

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[4] *See* Internal Revenue Service, TABLE 1: NUMBER OF RETURNS, TOTAL RECEIPTS, BUSINESS RECEIPTS, NET INCOME (LESS DEFICIT), NET INCOME, AND DEFICIT BY FORM OF BUSINESS (1980-2008), available at http://www.irs.gov/uac/SOI-Tax-Stats-Integrated-Business-Data (last visited Apr. 30, 2014) and Internal Revenue Service, TABLE 1: NUMBER OF RETURNS, TOTAL RECEIPTS, BUSINESS RECEIPTS, NET INCOME (LESS DEFICIT), NET INCOME, AND DEFICIT BY FORM OF BUSINESS (1980-2008), available at http://www.irs.gov/uac/SOI-Tax-Stats-Integrated-Business-Data (last visited Apr. 30, 2014).

[5] Uniform Limited Partnership Act § 104(a) (2001), NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, available at http://www.uniformlaws.org/shared/docs/limited%20partnership/ulpa_final_2001rev.pdf (last visited Apr. 30, 2014).

[6] These states are: AL, AR, CA, DC, FL, HI, ID, IL, IA, KY, ME, MN, MO, NV, NM, ND, OK, UT, and WA. Legislative Fact Sheet, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, available at http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Limited%20Partnership%20Act (last visited Apr. 30, 2014).

[7] Uniform Limited Liability Company Act § 104(a) (2006), NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, available at http://www.uniformlaws.org/shared/docs/limited%20liability%20company/ullca_final_06rev.pdf (last visited Apr. 30, 2014).

[8] These states include: CA, DC, FL, ID, IA, MN, NE, NJ, UT, and WY. Legislative Fact Sheet, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, available at http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Limited%20Liability%20Company%20(Revised) (last visited Apr. 30, 2014).

493 U.S. 6, 9 (1989) ("'We must take the intent of Congress with regard to the filing of diversity cases in Federal District Courts to be that which its language clearly sets forth.'" (quoting *Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348, 352 (1961))); *Thompson v. Gaskill*, 315 U.S. 442, 446 (1942) ("The policy of the statute conferring diversity jurisdiction upon the district courts calls for its strict construction.").

The Supreme Court has explicitly held that Section 1332(c) only applies to traditional corporations. *See Carden*, 494 U.S. at 195-96. In *Carden*, the trial court dismissed an action brought by a limited partnership on the ground that one of the plaintiff's limited partners was a citizen of the same state as the defendants. The Court "firmly resist[s]" any judicial extension of "citizenship" status to entities other than corporations, and leaves any "further adjustments" to the status of business entities for diversity purposes in the hands of Congress. *Carden*, 494 U.S. at 189, 196.

Following *Carden's* clear mandate, courts have routinely concluded that the citizenship of every member of unincorporated business entities must be diverse from all opposing parties before complete diversity of citizenship exists. In one of the earliest post-*Carden* decisions, the Seventh Circuit concluded that *Carden* "crystallized as a principle" that members of an entity are citizens for diversity purposes, at least until "Congress provides otherwise." *Cosgrove v. Bartolotta*, 150 F.3d 729, 731 (7th Cir. 1998). Given the similarities between LLC's and LP's, the court applied *Carden* to LLC's. *Id.; see also Belleville Catering Co. v. Champaign Market Place L.L.C.*, 350 F.3d 691, 692 (7th Cir. 2003) (same). It does not matter that LP's and LLCs "are functionally similar to corporations;" they are not entitled to corporate treatment for diversity purposes. *See also Hoagland v. Sandberg, Phoenix & von Gontard, P.C.*, 385 F.3d 737, 739 (7th Cir. 2004). The Supreme Court drew a "bright line" in *Carden* between entities that are technically called "corporations" and all other types of entities, *see id.* at 741, such that judges need not "entangle themselves in functional inquiries into the differences among corporations," *see id.* at 743.

Every court of appeals to address this question directly has followed the 7th Circuit in analogizing to *Carden*'s treatment of limited partnerships. *See, e.g., Johnson v. Smithkline Beecham Corp.*, 724 F.3d 337 (3d Cir. 2013); *Zambelli Fireworks Mfg. Co. v. Wood*, 592 F.3d 412 (3d Cir. 2010); *Delay v. Rosenthal Collins Group, Inc.*, 585 F.3d 1003 (6th Cir. 2009); *Harvey v. Grey Wolf Drilling Co.*, 542 F.3d 1077 (5th Cir. 2008); *Pramco LLC v. San Juan Bay Marina, Inc.*, 435 F.3d 51 (1st Cir. 2006); *Johnson v. Columbia Properties Anchorage, LP*, 437 F.3d 894 (9th Cir. 2006); *Gen. Tech. Applications, Inc. v. Extro Ltda.*, 388 F.3d 114 (4th Cir. 2004); *GMAC Commercial Credit LLC v. Dillard Dept. Stores*, 357 F.3d 827 (8th Cir. 2004); *Rolling Greens MHP, LP v. Comcast SCH Holdings LLC*, 374 F.3d 1020 (11th Cir. 2004); *Belleville Catering Co. v. Champaign Mkt. Place, LLC*, 350 F.3d 691(7th Cir. 2003); *Handelsman v. Bedford Village Associates Ltd. Partnership*, 213 F.3d 48 (2d Cir. 2000). Neither the D.C. Circuit Court of Appeals nor the 10th Circuit Court of Appeals has directly decided this issue, though both the District of D.C. and at least the District of Colorado have agreed with other circuits that the citizenship of an LLC is determined by the citizenship of each of its members. *See, e.g., Makris v. Tindall*, No. 13-00750, 2013 U.S. Dist. LEXIS 41397 (D. Colo. Mar. 25, 2013); *Jackson v. HCA-HeathOne, LLC*, No. 13-02615, 2013 U.S. Dist. LEXIS 146023 (D. Colo. Oct. 9, 2013); *Shulman v. Voyou, LLC*, 305 F. Supp. 2d 36

(D.D.C. 2004); *Johnson-Brown v. 2200 M. St. LLC*, 257 F. Supp. 2d 175 (D.D.C. 2003).

Proposed Rule Revision

Attached as Appendix 1 is a proposed revision to the diversity statute that serves primarily as a technical fix to ensure that the letter of the diversity statute mirrors its spirit. This idea is nothing new or radical. In 1965—almost fifty years ago—the American Law Institute proposed giving unincorporated business entities the same citizenship status as corporations for diversity purposes. *See Diversity Jurisdiction Over Unincorporated Business Entities: The Real Party in Interest as a Jurisdictional Rule*, 56 TEXAS L. REV. 243, 244 n.8 (1978) (citing ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, PART I, 59 (Sept. 25, 1965, Official Draft)). It is well past time that courts recognize unincorporated business entities as what they effectively are—legal fictions, like corporations, with rights and duties separate and apart from their members and owners.

Why the Federal Diversity Rule Should Be Amended

A. The current statute leads to unacceptable and readily avoidable wastes of time, money, and judicial resources.

Uncertainty as to whether a case belongs in federal court increases not only the "cost and complexity of litigation," but also "the parties will often find themselves having to start their litigation over from the beginning." *Hoagland*, 385 F.3d at 739-40. Both potential plaintiffs and defendants often have difficulty determining the non-management members of opposing party entities, particularly if such membership is not public information. As a result, they lack a good faith basis for pursuing (or challenging) the propriety of the federal forum. The resulting uncertainties have led appellate courts to criticize the efforts expended to address citizenship at the outset and on appeal. *See, e.g.*, *Smoot v. Mazda Motors of America, Inc.* 469 F.3d 675, 677-78 (2006) (and cases cited therein) (criticizing jurisdictional statements of all parties on appeal and noting "the lawyers have wasted our time as well as their own and (depending on the fee arrangements) their clients' money. We have been plagued by the carelessness of a number of the lawyers practicing before the courts of this circuit with regard to the required contents of jurisdictional statements in diversity cases.").

This uncertainty means that parties can fully litigate a case, only to have an appellate court determine that the district court lacked jurisdiction in the first instance. *GMAC Commercial Credit LLC v. Dillard Department Stores, Inc.*, 357 F.3d 827 (8th Cir. 2004), presents an example of this waste of judicial resources and the court's inability effectively to address the waste. In that case, the LLC plaintiff sued the defendant in federal court on diversity grounds. Neither party challenged subject matter jurisdiction before the district court. The defendant won partial summary judgment and a jury verdict. *Id.* at 828. After obtaining new counsel, plaintiff moved to vacate the judgment award on the ground that diversity of citizenship did not exist and thus the court lacked subject matter jurisdiction from the outset. *Id.* Unable to determine, based on the record below, whether the citizenship of the plaintiff's members in fact destroyed complete diversity,

the Eight Circuit remanded for a discovery hearing on diversity. *Id.* at 829. Defendants also moved for attorneys fees because plaintiff—who chose the federal forum—never raised the diversity issue until appeal. *Id.* The appellate court left the decision of whether to award fees to the district court on remand. *Id.*

Sometimes even the type of entity involved can be unclear. *Tuck v. United Servs. Auto. Ass'n*, 859 F.2d 842 (10th Cir. 1988), involved an uninsured motorist who had killed Johnny Tuck in a collision. Tuck's estate and parents sued United Services Automobile Association ("USAA") to recover benefits under an uninsured motorist provision of Tuck's insurance policy. *Id.* Believing that USAA was a corporation, the Tucks alleged that USAA was diverse from the Tucks, and the pretrial order incorporated the jurisdictional allegations. *Id.* at 844. The jury returned a verdict for the Tucks on all claims. *Id.* at 843. USAA filed a motion for judgment notwithstanding the verdict, or in the alternative, for a new trial. *Id.* The district court denied both motions but did reduce the Tucks' actual damage award. *Id.* USAA appealed and "revealed, for the first time, that it was not a corporation, but rather an unincorporated association organized under the insurance laws of the state of Texas." *Id.* USAA's status as an association made it a citizen of every state in which its members were citizens, and in consequence, USAA argued, the court lacked subject matter jurisdiction. *Id.* at 844. Admonishing USAA, the court stated, "[t]his is not the first time that USAA has faced this problem." *Id.* at 845 (citing *Baer v. United Servs. Auto. Ass'n*, 503 F.2d 393 (2d Cir. 1974)). To salvage the case and halt USAA's attempted jettisoning of an unfavorable verdict, the court allowed the Tucks to amend their complaint on remand by dismissing all of the Oklahoma citizens who were "members" of USAA. *Id.* at 846. However, the court noted that even this dismissal plan might not work on the case before it as USAA had been sued as an entity, and not the individual members. Still, the appellate court remanded to allow the district court to determine if a jurisdictional basis could be identified. Otherwise, the jury verdict (even as reduced) could not stand. *Id.* at 846-67.

Two problems are highlighted by *Tuck*. First, under the current regime the distinction between a corporation and any other form of business entity drives whose "citizenship" determines the entity's citizenship. Thus, mistakenly believing that an entity with a national presence and operations in multiple states is a corporation can result in plaintiffs, defendants, and trial courts failing to examine citizenship properly. Second, and perhaps more substantively disturbing, *Tuck* highlights that once the proper analysis is applied some large unincorporated associations, with members in all 50 states, simply could not be haled into federal court (or seek relief in federal court) unless a federal question was presented. There is no practical reason for closing off access to federal courts in this manner.

Because federal courts are obligated to determine whether they may exercise subject matter jurisdiction *regardless* of whether the parties ever raise the issue, *see Chapman v. Barney*, 129 U.S. 677, 681 (1889), uncertainty as to forum can be an expensive and unexpected problem to address well into litigation, possibly requiring jurisdictional discovery. For example, one court addressed the LLC defendant's citizenship *sua sponte* in order to "satisfy itself" that federal jurisdiction existed, even though neither litigant raised the question of whether any LLC members were citizens of the same state (and the complaint failed to allege facts regarding the citizenship of the

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LLC's members). *See Delay v. Rosenthal Collins Group, Inc.*, 585 F.3d 1003, 1004-05 (6th Cir. 2009). The court directed the defendant "to submit a jurisdictional statement identifying the citizenship of all of its members." *Id.* at 1005.

In addition to the problems highlighted by *Tuck*, the problem of a case being reversed on appeal for lack of subject matter jurisdiction can wreak out-sized consequences upon plaintiffs. Should years pass and then a case be remanded as void ab initio due to a lack of subject matter jurisdiction, the plaintiff-litigant may discover that the statute of limitations has run during the time the matter was pending, although improperly, in federal court. Because states' tolling statutes will vary from state to state, particularly with respect to an action that was void (as opposed to voidable or subject to an affirmative defense) from the outset, further uncertainty is injected into an already uncertain process.

While the *Smoot* and *Tuck* courts, and others, have been quick to criticize attorneys for failing to investigate sufficiently deeply, the criticism can gloss over the difficulty of the investigation. It is not enough to examine who the members were of the unincorporated association at the time it came into existence; citizenship is determined as of the time of filing. Thus, an individual member who has moved from a diverse state to a non-diverse state can destroy diversity, even if the unincorporated association is not aware of the move. And as more and more communications take place via cell phones (with "traveling" area codes) and internet communications (which do not necessarily reflect physical addresses at all), the ability to unearth this information, let alone to unearth it in a timely enough manner to gather the information to file or remove a lawsuit, presents substantial practical difficulties. These difficulties are highlighted by the increased reliance upon unincorporated entities as a means of doing business that are shown in the IRS filing statistics quoted *supra*.

Given that litigants need absolute clarity in order to avoid litigating a case in federal court only to have it remanded on jurisdictional grounds after judgment, the diversity statute needs to be streamlined and simplified in order to apply the corporate citizenship test to business entities that are functionally equivalent to corporations.

B. The proposed amendment provides a workable, bright line rule that courts have been applying for decades to corporations.

Currently, counsel for plaintiffs and for defendants can find themselves guessing about citizenship at critical filing or removal stages. Plaintiffs in non-federal question cases who choose to file their lawsuits in federal court must plead that diversity jurisdiction exists. This requires pleading the citizenship of the defendant. Should the defendant be an LLC or other unincorporated association, however, the information may not be available to the plaintiff. Information regarding the ownership of unincorporated entities like LLCs frequently is not a matter of public record. While the LLCs themselves should be able to identify their members, even they may have difficulty identifying the citizenship of every member on any given date. Cohen, *supra*, p. 303. Yet plaintiffs filing or defendants trying to remove, are forced to determine and plead citizenship under tight timeframes.

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Further, the current rules, which ignore the reality of where an unincorporated association actually does business, can result in diversity citizenship, and thus removal, being available where the purposes of diversity jurisdiction are not met. In *Johnson v. Smithkline Beecham Corp.*, 724 F.3d 337 (3d Cir. 2013), the Third Circuit granted interlocutory appeal after plaintiffs unsuccessfully tried to remand their personal injury lawsuit after the defendants, including two LLC's, removed the action to federal court. Plaintiffs, who are citizens of Pennsylvania, argued that one LLC defendant was headquartered and largely managed in Pennsylvania. *See id.* at 342. The defendant's sole member, however, was incorporated in and operated primarily out of Delaware. The Third Circuit concluded that, even though the LLC was based in the same state where plaintiffs were citizens, the district court properly exercised diversity jurisdiction. *Id.* at 346-48; *see also Gen. Tech. Applications, Inc. v. Exro Ltda*, 388 F.3d 114, 116 (4th Cir. 2004) (remanding case after defendants removed and won summary judgment, concluding that there was not complete diversity, and the case should proceed in state court).

C. The proposed change will bring cohesion between 28 U.S.C. § 1332(c) and the Class Action Fairness Act.

Other changes to federal law have recognized the benefit of treating all unincorporated associations in the same manner as corporations. The Class Action Fairness Act of 2005 ("CAFA") expressly defines the citizenship of "unincorporated association[s]" as limited to the state where the association has its principal place of business and the state under whose laws the association is organized. *See* 28 U.S.C. § 1332(d)(10). While the statute does not clarify what entities are considered "unincorporated associations," several courts have construed it to include any business entity that is not organized as a corporation. *See, e.g., Ferrell v. Express Check Advance of SC LLC*, 591 F.3d 698, 699 (4th Cir. 2010) (holding that a limited liability company is an "unincorporated association" for diversity purposes under CAFA); *Bond v. Veolia Water Indianapolis, LLC*, 571 F. Supp. 2d 905, 910 (S.D. Ind. 2008) (same). Indeed, Congress' express purpose in adding subsection (d)(10) was to ensure that unincorporated entities were as protected from state-court bias in class actions as were incorporated entities. *See* Christine M. Kailus, *Diversity Jurisdiction and Unincorporated Businesses: Collapsing the Doctrinal Wall*, 2007 UNIV. OF ILL. L.R. 1543, 1554 (Sept. 7, 2007).

The CAFA citizenship test for unincorporated associations literally mirrors the test for corporations under the existing 28 U.S.C. § 1332(c), but it applies only in the context of class action litigation. This disconnect means that an LLC, for example, is a legal fiction with "separate entity" status if the lawsuit is a class action; in a non-class suit, the LLC is merely the sum of its members. It begs the question whether, had the Supreme Court decided *Carden* after CAFA was passed rather than 15 years prior, the Court might have reached a different result in order to avoid interpreting the diversity statute in a manner that yields an absurd result. Regardless, the proposed revision will ensure uniform treatment of unincorporated associations regardless of whether the plaintiff sues solely on his or her own behalf or on behalf of a putative class.

D. The proposed change will not lead to additional administrative difficulties but will lessen existing administrative burdens.

The proposed change should not result in new administrative difficulties. Experience with the Class Action Fairness Act (28 U.S.C. § 1332(d)(10)) has not led to difficulties in determining either the state under which entities are organized or where they have their principal places of business. To the extent issues may arise with respect to identifying a principal place of business, the experience regarding doing so for corporations, both that cited in and applying *Hertz Corp. v. Friend*, 559 U.S. 77 (2010), is available, as well as nearly a decade of experience under the Class Action Fairness Act. Moreover, removing the requirement of examining the citizenship of every member of unincorporated business associations can greatly simplify administrative burdens upon parties both filing and removing actions on the basis of diversity of citizenship.

E. The proposed change will not greatly increase filings in federal courts or removals to federal courts.

The proposed change only deals with citizenship of entities. The "complete diversity" requirement of *Strawbridge v. Curtiss* is retained. As a result, in situations where a member of an unincorporated association is an active participant in providing the services at issue (frequently professional services for various LLCs and LLPs), that individual may still be named as a defendant. If that naming destroys diversity because that individual is a citizen of the same state as the plaintiff, then the plaintiff's choice of a state forum will remain. The only situation in which a plaintiff would lose the ability to keep a case in state court due to the proposed change would involve the fortuitous citizenship of an uninvolved member of an entity.

While it is impossible to forecast the total number of "new" federal filings (including removed actions) that would become available, and thus might result, under the new proposal the impact should be minimal. Unincorporated associations with their principal place of business where they generally perform work (and thus impact potential plaintiffs), and which have as members citizens of that same state, will still have the same citizenship. The major change involves providing clarity concerning where to look – the now well-developed "principal place of business" and state of organization sites – and where not to look – eliminating the need to examine the citizenship of every record owner at the time the suit is filed.

A presumably accurate forecast of the proposed number of new filings and removals would require knowing or estimating the total number of cases currently being filed in state courts where (i) there is a lack of diversity *solely* because of the citizenship of a member of an unincorporated association[9], and (ii) either the plaintiff would wish to file in federal court or the defendant would wish to remove (assuming that the forum state is not the defendant's principal place of business). We are not aware of research from state court dockets that would reveal this type of information.

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[9] For purposes of this analysis we are assuming that the jurisdictional amount can be satisfied at a pleading stage for a Complaint or at the removal stage, if a defendant removes.

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Removal experience under CAFA is instructive for some comparative purposes. From 2005 through 2008 the Federal Judicial Center published four annual interim reports on "The Impact of the Class Action Fairness Act of 2005 on the Federal Courts." The final report of a two-phase study was published in April 2008,[10] and concluded the statistical analysis of filings through June 2007 with prior years, including a year-by-year comparison with experience under CAFA and a comparison to the pre-CAFA year of 2001. This study was limited to class actions, and the authors note that while there was an increase in federal filings, "[m]uch of that increase was in federal question cases, especially labor class actions and class actions filed under federal consumer protection statutes." Lee & Willging, "Impact" (April 2008) at 1. In fact, "about 86 percent of [of the increase in federal filings and removals from the pre-CAFA to post-CAFA periods studied] was accounted for by the increase in federal question class action filings and removals." Lee & Willging, "Impact" (April 2008), at 3, n.2. This impact in federal question cases does not reflect an increase due to CAFA, and serves as a noteworthy reminder that increased federal filings pursuant to federal statutes providing federal jurisdiction will not be impacted by the current proposal to change the citizenship analysis for diversity jurisdiction. That is, increased filings under consumer protection statutes such as the Fair Debt Collection Practices Act, Fair Credit Reporting Act, and similar statutes will be unaffected.

The April 2008 "Impact" study revealed two key points. First, there was an increase in class actions filed under CAFA's expanded diversity jurisdictions. This was, of course, one of the express purposes of CAFA.[11] The April 2008 "Impact" study notes that the number of cases varied widely jurisdiction to jurisdiction.

The "Impact" study also separately examined removed actions. As shown in the tables accompanying the study, "[a]lthough diversity class action removals, like filings, increased in the immediate post-CAFA period, the prevailing trend for such cases in both the pre-CAFA and post-CAFA periods is downward. . . . [D]iversity class action

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[10] Emery G. Lee, III, & Thomas E Willging, "The Impact of the Class Action Fairness Act of 2005 on the Federal Courts: Fourth Interim Report to the Judicial Conference Advisory Committee on the Civil Rules" (April 2008) (available online at http://www.classactionlitigation.com/cafa0408.pdf).

[11] The purpose section of CAFA expressly noted that: "Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are--

> (A) keeping cases of national importance out of Federal court;
>
> (B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and
>
> (C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States."

28 U.S.C. § 1711(a)(4).

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removals have been initiated in federal court in the last twelve months of the study period [2006-2007] at about the same rate as they were in the pre-CAFA period. CAFA appears to have temporarily increased the number of diversity class action removals to the federal courts, especially in comparison with the immediate pre-CAFA period, when removals of such cases were few. But in both the pre-CAFA and post-CAFA periods, the trend has been for fewer class actions to be removed to federal courts on the basis of diversity of citizenship jurisdiction." Lee & Willging, "Impact" (April 2008), at 7. In short, following CAFA's passage there was a temporary uptick in removals and then removals returned to pre-CAFA levels.[12]

With the proposed change in diversity jurisdiction, one would not expect the type of increase in original filings created with CAFA. CAFA's citizenship provisions were expressly crafted to increase diversity jurisdiction in a class action context and in response to concerns that a more uniform rule was needed. The diversity changes in the current proposal are more limited. Also significantly, the current proposal will still allow "local" disputes to be adjudicated "locally," because where the unincorporated association has its principal place of business in a state and deals with others within that state, diversity jurisdiction will not exist. Similarly, if a member, shareholder, partner, or other stakeholder of an entity is non-diverse from a party on the other side of the case, and if that member or shareholder or partner or the like was sufficiently actively involved in the matter giving rise to the lawsuit, then naming the member, shareholder, partner or the like would also defeat diversity. The only change occurs when a non-involved member, shareholder, partner, or the like happens to have the same citizenship as a party on the other side of the dispute.

Removal experience under the proposed statutory change may track that of CAFA. While there may be an initial increase in removals to federal court, the ability to craft a complaint within ethical bounds to still add non-diverse defendants and the fact that truly local disputes will likely remain local should avoid a long-term increase. The structure and purpose of CAFA would likely have resulted in a more significant prospect for removal, as one of the stated goals was to move multi-state actions filed in state courts to federal courts via the removal process.

Summary of Potential Costs/Benefits

Any analysis of the impact of the proposed change must not stop at attempting to "count new cases." Under the present system, as shown by cases such as *Smoot*, *Tuck*, and *GMAC Commercial Credit LLC v. Dillard Department Stores* (all cited *supra*), the judicial resources that can be expended are huge when a case is improperly in federal court due to a misapprehension of the current jurisdictional rules. A mistake on the part of both parties can result in the appellate reversal of a case tried to a jury because lack of subject matter jurisdiction is an unwaivable defect. On the other side of the equation, one can predict that a substantial percentage of new cases that are filed or removed solely

[12] A variety of reasons may be postulated for the return to pre-CAFA levels. Plaintiffs may have begun filing cases in federal court initially, thus obviating the need for removal. Or Plaintiffs desiring to litigate in state courts may have changed the mix of defendants named.

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because of the new citizenship proposal for unincorporated entities will not result in the resources of a full jury trial being expended. In short, for every case that, like *Dillard*, results in an appellate reversal, multiple cases would have to be filed and resolved before the same level of resources expended is reached. One late reversal under the current system would take the same resources as multiple new filings made possible by the proposed change in the statute.

The current difference in treatment between corporations and unincorporated entities was defensible when (i) there were far few unincorporated entities being used, (ii) partnership and other unincorporated entity rules in the majority of states did not recognize the entity as distinct from its members, and (iii) entities could reasonably be expected to keep up with the citizenship of their individual members at all times. Today, every one of these considerations has changed. Unincorporated entities are chosen as the appropriate structure for businesses at an ever-increasing rate. The rules on the entity/partnership distinction have completely reversed, with the entity being recognized as separate from its individual members and capable of suing and being sued in model statutes enacted across the country. And increased communication to non-physical locations has increased substantially the difficulty of knowing "where" individual members are "citizens" in an increasingly mobile society. In short, the time to re-examine the citizenship rules has long since arrived.

Respectfully submitted,

125-000359

Appendix 1: Proposed Revision

Existing Provisions (No changes to § 1332(c)(1) and (2) are proposed except the addition of a semicolon at the end of (2) in lieu of a period.)

28 U.S.C. 1332(c)(1):

A corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of—

(A) every State and foreign state of which the insured is a citizen;

(B) every State and foreign state by which the insurer has been incorporated; and

(C) the State or foreign state where the insurer has its principal place of business; and

28 U.S.C. 1332(c)(2):

The legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent;

New Provisions

and

28 U.S.C. 1332(c)(3):

Any unincorporated association that has the capacity to sue or be sued as determined as set forth in Federal Rule of Civil Procedure 17(b) (including any amendments or revisions as may subsequently be made thereto), including without limitation an entity that is a general partnership, a limited partnership, a master limited partnership, a professional corporation, a limited company, a limited liability company, a professional limited liability company, a business trust, a union, or any other unincorporated association irrespective of name or designation, shall be deemed to be a citizen of every State and foreign state in or by which it has been organized and of the State or foreign state where it has its principal place of business without reference to the citizenship of each partner, shareholder, member, or beneficiary, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of—

(A) every State and foreign state of which the insured is a citizen;

(B) every State and foreign state by which the insurer has been incorporated; and

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(C) the State or foreign state where the insurer has its principal place of business.

125-000361

GENERAL INFORMATION FORM

Submitting Entity: Section of Litigation

Submitted By:

1. Summary of Resolution(s). The resolution requests that Congress change the definition of "citizenship" for purposes of 28 U.S.C. § 1332 to provide that all unincorporated business entities be treated in the same manner as corporations.

2. Approval by Submitting Entity. Section of Litigation

3. Has this or a similar resolution been submitted to the House or Board previously? No.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

5. If this is a late report, what urgency exists which requires action at this meeting of the House? This is not a late report.

6. Status of Legislation. (If applicable) Legislation has not yet been introduced.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

8. Cost to the Association. (Both direct and indirect costs) None

9. Disclosure of Interest. (If applicable) None.

10. Referrals.

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

    Dennis Drasco
    Lum, Drasco & Positan LLC
    103 Eisenhower Parkway

125-000362

Roseland, NJ 07068
973-228-6770
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Gregory Hanthorn
Jones Day
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Atlanta, GA 30309
404-581-8425
ghanthorn@jonesday.com

Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

TBD

EXECUTIVE SUMMARY

1. Summary of the Resolution: The resolution requests that Congress change the definition of "citizenship" for purposes of 28 U.S.C. § 1332 to provide that all unincorporated business entities be treated in the same manner as corporations.

2. Summary of the Issue that the Resolution Addresses

Currently the definition of "citizenship" of unincorporated associations can lead to waste of judicial time and effort, needless appellate review and even reversals even following jury verdicts and judgments, and related problems with determining the citizenship of unincorporated associations. Because unincorporated associations are currently treated as citizens of every state where any of their members, shareholders, partners, beneficiaries, etc., are citizens; there can be significant problems arising when determining whether to sue in federal court in the first instance and whether a case can be removed to federal court. Because the citizenship issue impacts subject matter jurisdiction, a wrong determination mandates a dismissal from the outset, no matter how long the proceedings have been pending or what stage has been reached. Subject matter jurisdiction issues are not waivable.

3. Please Explain How the Proposed Policy Position will address the issue

The proposed amendments to the statute will treat unincorporated associations in the same manner as corporations. For diversity of citizenship purposes, the association will be deemed to be a citizen of up to two places: (i) the state of organization and (ii) the association's principal place of business.

4. Summary of Minority Views

The one potential, expected minority view is a concern that the amendment might result in more cases finding their way to federal courts. Yet, by replacing uncertainty with a more workable rule, the extreme judicial waste of cases being tried that would never have been filed in federal court can be substantially avoided. The avoidance of this waste alone may counterbalance any minimal increase in filings or removals. Moreover, the "complete diversity" rule will remain and is likely to lessen any potential, minimal increase in filings or removals.

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TAB 5

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125-000367

TAB 5A

125-000368

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86 **RULES PUBLISHED, AUGUST 2014**

87 *Rule 4(m)*

88 It is recommended that the proposed amendment of Rule 4(m) be
89 recommended for adoption. The text of published Rule 4(m) and
90 Committee Note follow the summary of comments.

91 Summary of Comments Rule 4(m)

92 CV-2014-0009, Federal Magistrate Judges Association: Supports the
93 proposal. Experience shows that "significant delays can often occur
94 in effecting service in a foreign country, and that the rules
95 governing service should be uniform and apply equally to
96 individuals, foreign states, corporations, partnerships, and
97 associations."

98 CV-2014-0010, Association of the Bar of the City of New York: The
99 Association had suggested this amendment in commenting on the 2013
100 proposal to shorten the presumptive time for service, and agrees
101 with the proposal.

102 2014-CV-0011, Federal Courts Committee, New York County Lawyers
103 Association: "[S]upports this clarification, which appears to
104 comport with the intent of the rule as originally written." The
105 importance of this amendment will increase if the Supreme Court
106 adopts the proposal to shorten to 90 days the presumptive time for
107 service set by Rule 4(m).

108 CV-2014-0014, Hon. Joyce R. Branda, U.S. Department of Justice:
109 "The Department supports this proposal."

125-000370

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

1 **Rule 4. Summons**

2 * * * * *

3 **(m) Time Limit for Service.** If a defendant is not served
4 within 90[1] days after the complaint is filed, the
5 court—on motion or on its own after notice to the
6 plaintiff—must dismiss the action without prejudice
7 against that defendant or order that service be made
8 within a specified time. But if the plaintiff shows
9 good cause for the failure, the court must extend the
10 time for service for an appropriate period. This
11 subdivision (m) does not apply to service in a foreign
12 country under Rule 4(f), 4(h)(2), or 4(j)(1).

---

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

[1] This wording reflects the proposed amendment published in August 2013.

125-000372

13 * * * * *

Committee Note

Rule 4(m) is amended to correct a possible ambiguity that appears to have generated some confusion in practice. Service in a foreign country often is accomplished by means that require more than the 120 days originally set by Rule 4(m)[, or than the 90 days set by amended Rule 4(m)]. This problem is recognized by the two clear exceptions for service on an individual in a foreign country under Rule 4(f) and for service on a foreign state under Rule 4(j)(1). The potential ambiguity arises from the lack of any explicit reference to service on a corporation, partnership, or other unincorporated association. Rule 4(h)(2) provides for service on such defendants at a place outside any judicial district of the United States "in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i)." Invoking service "in the manner prescribed by Rule 4(f)" could easily be read to mean that service under Rule 4(h)(2) is also service "under" Rule 4(f). That interpretation is in keeping with the purpose to recognize the delays that often occur in effecting service in a foreign country. But it also is possible to read the words for what they seem to say—service is under Rule 4(h)(2), albeit in a manner borrowed from almost all, but not quite all, of Rule 4(f).

The amendment resolves this possible ambiguity.

12b-000373

TAB 5B

125-000374

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110 *Rule 6(d)*

111 It is recommended that the proposed amendment of Rule 6(d) be
112 recommended for adoption. The text of published Rule 6(d) and
113 Committee Note follow the summary of comments.

114 This recommendation does not address a suggestion by the
115 Department of Justice that the Committee Note be amended by adding
116 the following language:

117 This amendment is not intended to discourage courts from
118 providing additional time to respond in appropriate
119 circumstances. When, for example, electronic service is
120 effected in a manner that will shorten the time to
121 respond, such as service after business hours or from a
122 location in a different time zone, or an intervening
123 weekend or holiday, that service may significantly reduce
124 the time available to prepare a response. In those
125 circumstances, a responding party may need to seek an
126 extension, sometimes on short notice. The courts should
127 accommodate those situations and provide additional
128 response time to discourage tactical advantage or prevent
129 prejudice to the responding party.

130 As noted below, initial reactions to this proposal have varied
131 among the different advisory committees. It may prove wise to allow
132 for accommodation if other advisory committees come to different
133 conclusions. It will be desirable to present uniform
134 recommendations to the Standing Committee if that proves possible.
135 The Committee might take a position subject to reconsideration by
136 e-mail exchanges if other committees take different positions, or
137 else -- if the question seems closely balanced -- authorize the
138 Committee Chair to adopt a uniform position that all advisory
139 committees are prepared to recommend.

140 The comments summarized below show some opposition. One theme
141 is that the various time periods set by the Civil Rules are too
142 short. Nothing should be done to further shorten the time to
143 respond after service.

144 Another argument is that e-filing and service facilitate
145 gamesmanship. Filing and ECF service will be postponed to a time
146 just before midnight, preferably on a Friday, to shorten the time
147 practically available to respond.

148 A somewhat different suggestion is that the problem of late e-
149 filing and service should be addressed by providing that anything
150 filed or served after 6:00 p.m. be considered as served on the next
151 day. That would make e-service equivalent to in-hand service, at
152 least if it were elaborated to consider service as made on the next
153 day that is not a Saturday, Sunday, or legal holiday. And it would
154 substitute a uniform national rule for the local rules that address
155 this question by choosing different cut-off times, e.g., 5:00 p.m.

125-000376

156 or 6:00 p.m.

157 The Federal Magistrate Judges Association makes a different
158 point. They fear that casual readers will come to the conclusion
159 that 3 days are in fact added after service by electronic means.
160 This will follow from the propositions that 3 days are added after
161 service by "other means * * * consented to in writing," Rule
162 5(b)(2)(F), and that electronic service requires written consent,
163 Rule 5(b)(2)(E). Amended Rule 6(d) will, to be sure, refer only to
164 service under Rule 5(b)(2)(C) (mail), (D) (leaving with the clerk,)
165 or F (other means consented to). But the deletion of (E)
166 (electronic service) will not appear on the face of Rule 6(d).
167 Apparently the hypothesis is that someone reading amended Rule 6(d)
168 will look back to Rule 5(b)(2), read (E) as requiring consent for
169 e-service, and read (F) "other means" to embrace (E) e-service. One
170 suggested cure is to omit the newly added parenthetical
171 descriptions of the modes of service that still allow 3 added days.
172 Rule 6(d) has existed without the parenthetical descriptions for
173 some time. But they are added as a helpful tool that will reduce
174 the need to thumb or scroll back to Rule 5(b)(2).

175 On balance, it seems better to stick with the proposal as
176 published. The magistrate judges have ample experience with the
177 ways in which careless readers may become confused by rule text
178 that should not be susceptible to misreading. Somewhere, some time,
179 someone may indeed fall into the trap they suggest. It seems
180 unlikely, however, that any serious consequences will follow.
181 Beyond that, these agenda materials include a proposal to publish
182 for comment an amendment of Rule 5(b)(2)(E) that will eliminate the
183 requirement of consent for e-service. If that is adopted, the
184 potential misreading will vanish. Retaining the parenthetical
185 descriptions offers enough value to accept the risk for a year, or
186 perhaps longer. (And revising the parenthetical for (F) to read
187 "(other means consented to, except electronic service)" would have
188 to be undone by publishing a proposal to delete these words at the
189 same time as the Rule 5(b)(2)(E) amendment is published.)

190 The Department of Justice expresses concerns about eliminating
191 the added 3-days, focusing on the risk that e-service will fail,
192 and the problems of late-night filing, particularly on a Friday or
193 before a legal holiday. And it recommends that "[i]f the Committee
194 decides to proceed with the proposal," it add to the Committee Note
195 the language quoted above. This proposed Note language has
196 stimulated conflicting responses in early discussions among the
197 Reporters for the several advisory committees. Some believe it
198 would be useful to add the language. Others -- including the Civil
199 Rules Reporter -- believe that the general principle of economy in
200 Committee Notes should prevail because courts will readily
201 understand and accommodate the needs of a party who has been put at
202 a disadvantage by the circumstances of e-service. The question may
203 be empirical: is there substantial ground for concern that some
204 courts, busy with many matters, impatient with lawyers who cannot

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205 reach reasonable accommodations among themselves, and anxious to
206 keep cases moving, will fail to recognize the need for reasonable
207 accommodations? And is there substantial reason to hope that this
208 problem, if it exists, will be reduced by Committee Note language?

209 Summary of Comments Rule 6(d)

210 CV-2014-0003, Auden L. Grumet, Esq.: Opposes the proposal. (1)
211 Response times throughout the Civil Rules are too restrictive. They
212 should not be shortened further. (2) The idea that this will
213 "simplify" time counting "is absurd and illogical." (a) The 3-
214 added-days provision will continue to apply to some other modes of
215 service, generating opportunities for confusion. (b) Calculating
216 time is far less complex than "the much more convoluted aspects of
217 being a practitioner in federal court." (c) The value of the added
218 3 days far outweighs any putative confusion. (d) The value of
219 counting days in increments of 7 would be better served by adding
220 7 days after service.

221 CV-2014-0004, Deanne Upson: "Being pro se, I completely agree [with
222 Auden L. Grumet, 0003] that more time is warranted and wise, not
223 less."

224 CV-2014-0007, Jolene Gordo, Esq.: This comment focuses on Rule
225 5(b)(2)(A) as the place to "make it absolutely clear that using the
226 ECF system is considered ‘personal’ service." But it ties to the
227 concern that e-filing may be deliberately delayed to 11:59 p.m. The
228 idea is that if e-service is treated as "personal service," it will
229 have to be made by the standard close of business, 5:00 or 6:00
230 p.m.

231 CV-2014-0008, Bryan Neal: Disagrees with the proposal. (1) When e-
232 service is made directly between the parties, not through the ECF
233 system, problems still occur with incompatible systems and spam
234 filters. (2) More importantly, filing may be deliberately delayed
235 to as late as 11:59 p.m. There should be more time to respond than
236 is allowed when personal service is made by hand delivery during
237 business hours. (3) E-service may be made on weekends and holidays:
238 If it is made on Saturday, does Sunday count as Day 1? So if filing
239 and service are made at 11:59 p.m. on Friday, that can effectively
240 shave 2 days off the response time. (4) Why is there any need to
241 shorten time periods? It just makes modern litigation more
242 difficult. (5) Discovery response times typically are set at 30
243 days, so the advantages of 7-day increments do not apply. It would
244 make more sense to reset the times to 28 days, plus 7 days for
245 anything but personal service. Or, still better, to provide a flat
246 35 days regardless of the method of service.

247 Separately, suggests that service by commercial carrier should
248 be allowed under Rule 5 without requiring consent of the person to
249 be served.

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250 CV-2014-0009, Federal Magistrate Judges Association: "[G]enerally
251 endorses" the proposal. But is concerned that the drafting creates
252 a potential confusion that will not be dispelled by the explicit
253 statement in the Committee Note. As published, parentheticals are
254 used to describe the enumerated modes of service that continue to
255 allow 3 added days: "(mail)," "(leaving with the clerk)," and
256 "(other means consented to)." Simply looking at the new rule text
257 will not reveal that e-service, covered by Rule 5(b)(2)(E), has
258 been omitted. An incautious reader may look back to Rule 5(b)(2),
259 discover that consent is required for service by electronic means,
260 and conclude that this is "other means consented to" and continues
261 to allow 3 added days. The confusion could be eliminated by
262 deleting the parenthetical descriptions, or by amending the last
263 one to read: "(F)(other means consented to except electronic
264 service)."

265 2014-CV-0010, Association of the Bar of the City of New York:
266 Agrees that advances in technology, along with greater
267 sophistication in using electronic communication, "have
268 substantially alleviated concerns over delays and other
269 difficulties in receiving, opening, and reviewing electronic
270 documents." Supports the proposal.

271 2014-CV-0011, Federal Courts Committee, New York County Lawyers
272 Association: New York courts treat electronic service in the same
273 way as in-hand service; this has not caused any problems. Generally
274 counsel work out briefing schedules, and can address the timing of
275 electronic service in their agreements. The dissenters in the
276 Committee point to problems that are not serious. To be sure, it is
277 possible to effect electronic service at 11:59 pm on Friday, and
278 time is required to print out lengthy filings. A party who needs
279 more time because of such practices will almost invariably get the
280 needed time. (The dissenters believe that the prospect of
281 gamesmanship requires that the present 3-added days provision be
282 retained.)

283 CV-2014-0012, Cheryl Siler, for Aderant CompuLaw: Endorses
284 elimination of the 3 added days. But suggests that Rule 6 should be
285 further amended to provide that a document served electronically
286 after 6:00 p.m. is considered served on the next day. As a
287 practical matter, that will make e-service equivalent to in-hand
288 service. In addition, it will establish a uniform national practice
289 that displaces local rules that establish similar but variable
290 provisions -- a document filed or served after 5:00 p.m., or after
291 6:00 p.m., is treated as filed the next day. It also would affect
292 the many local rules that require filing and service by 11:59 p.m.
293 in the court’s time zone.

294 CV-2014-0013, Pennsylvania Bar Association: Opposes the amendment.
295 "[T]he additional three days serves a useful purpose in alleviating
296 the burdens that can arise if a filing is electronically served at
297 extremely inconvenient times." With one dissent, arguing that
298 service at inconvenient times is not a problem.

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CV-2014-0014, Hon. Joyce R. Branda, U.S. Department of Justice: Expresses concerns about the consequences of eliminating the 3 added days. "Unlike personal service, electronic distribution does not assure actual receipt by a party." Prejudice is particularly likely when local rules require a response within 14 or fewer days. A filing in a different time zone can mean that e-service reaches a computer in the Eastern Time zone as late as 3:00 a.m., or even later. And the service may be made on a Friday, or the day before a holiday weekend. A 10-day period could become, in effect, 5 business days. "It is foreseeable that some attorneys will try to take advantage of the elimination of the three additional days * * *." But if the Committee decides to go ahead with the proposal, the Department recommends language for the Committee Note to recognize the need for additional time to respond in appropriate cases. This language is quoted above.

(Largely similar comments have been made in response to the parallel proposals published by the Appellate, Bankruptcy, and Civil Rules Committees.)

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1 **Rule 6. Computing and Extending Time; Time for**
2 **Motion Papers**

3 * * * * *

4 **(d) Additional Time After Certain Kinds of Service.**
5 When a party may or must act within a specified time
6 after being served[2] and service is made under
7 Rule 5(b)(2)(C) (mail), (D) (leaving with the
8 clerk), ~~(E),~~ or (F) (other means consented to), 3 days
9 are added after the period would otherwise expire
10 under Rule 6(a).

Committee Note

Rule 6(d) is amended to remove service by electronic means under Rule 5(b)(2)(E) from the modes of service that allow 3 added days to act after being served.

Rule 5(b)(2) was amended in 2001 to provide for service by electronic means. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that

[2] This wording reflects the proposed amendment published in August 2013.

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allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day periods that allow "day-of-the-week" counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Eliminating Rule 5(b) subparagraph (2)(E) from the modes of service that allow 3 added days means that the 3 added days cannot be retained by consenting to service by electronic means. Consent to electronic service in registering for electronic case filing, for example, does not count as consent to service "by any other means" of delivery under subparagraph (F).

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317 *Rule 82*

318 It is recommended that the proposed amendment of Rule 82 be
319 recommended for adoption. The text of published Rule 82 and
320 Committee Note follow the summary of comments.

321 Summary of Comments Rule 82

322 CV-2014-0009, Federal Magistrate Judges Association: Notes but does
323 not comment on the proposal.

324 2014-CV-0011, Federal Courts Committee, New York County Lawyers
325 Association: "[E]ndorses these proposed amendments."

326 CV-2014-0014, Hon. Joyce R. Branda, U.S. Department of Justice:
327 "The Department supports the proposal."

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125-000387

1 **Rule 82. Jurisdiction and Venue Unaffected**

2 These rules do not extend or limit the jurisdiction of the
3 district courts or the venue of actions in those courts. An
4 admiralty or maritime claim under Rule 9(h) is governed by
5 28 U.S.C. § 1390 ~~not a civil action for purposes of 28 U.S.C.~~
6 ~~§§ 1391-1392~~.

Committee Note

Rule 82 is amended to reflect the enactment of 28 U.S.C. § 1390 and the repeal of § 1392.

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Other Comments

Some of the comments received after the proposals to amend Rules 4, 6, and 82 were published in August go to other rules.

CV-2014-0005, Shawna Bligh: Urges that the Committee Notes to Rule 30(c)(2) regarding "form" be expanded to state that an objection to "form" is proper only if it explains the basis for the objection. The comment is supported by attaching the opinion in Security National Bank of Sioux City, Iowa v. Abbott Laboratories, 2014 WL 3704277. It may mean to address the Committee Note to Rule 32(d)(3)(B)(i).

2014-CV-0006, Stephen J. Herman, Esq.: This comment offers several suggestions for amending Civil Rule 23, including sharper distinctions between certification for trial and certification for settlement.

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TAB 6

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125-000395

Electronic Filing and Service

The Standing Committee Subcommittee on matters electronic has suspended operations. The several advisory committees, however, are cooperating in carrying forward consideration of the ways in which the several sets of rules should be revised to reflect the increasing dominance of electronic means of preserving and communicating information.

Earlier work has considered an open-ended rule that would equate electrons with paper in two ways. The first provision would state that a reference to information in written form includes electronically stored information. The second provision would state that any action that can or must be completed by filing or sending paper may also be accomplished by electronic means. Each provision would be qualified by an "unless otherwise provided" clause. Discussion of these provisions recognized that they might be suitable for some sets of rules but not for others. For the Civil Rules, many different words that seem to imply written form appear in many different rules. The working conclusion has been that at a minimum, several exceptions would have to be made. The time has not come to allow electronic service of initiating process as a general matter -- the most common example is the initial summons and complaint, but Rules 4.1, 14, and Supplemental Rules B, C, D, E(3) and G also are involved. And a blanket exception might not be quite right. Rule 4 incorporates state grounds of personal jurisdiction; if state practice recognizes e-service, should Rule 4 insist on other modes of service?

Determining what other exceptions might be desirable would be a long and uncertain task. Developing e-technology and increasingly widespread use of it are likely to change the calculations frequently. And there is no apparent sense that courts and litigants are in fact having difficulty in adjusting practice to ongoing e-reality.

The conclusion, then, has been that the time has not come to propose general provisions that equate electrons with paper for all purposes in all Civil Rules. The Evidence Rules already have a provision. It does not appear that the Appellate, Bankruptcy, or Criminal Rules Committees will move toward proposals for similar rules in the immediate future.

A related general question involves electronic signatures. Many local rules address this question now. A proposal to amend the Bankruptcy Rules to address electronic signatures was published and then withdrawn. There did not seem to be much difficulty with treating an electronic filing by an authorized user of the court e-filing system as the filer’s signature. But difficulty was encountered in dealing with papers signed by someone other than the authorized filer. Affidavits and declarations are common examples,

125-000396

389 as are many forms of discovery responses.

390 It seems to have been agreed that it is too early to attempt
391 to propose a national rule that addresses electronic signatures
392 other than the signature of an authorized person who makes an e-
393 filing.

394 The draft rules set out below do address the signature of an
395 authorized e-filer. The alternative drafts of Rule 5(d)(3) deserve
396 careful consideration.

397 The proposals set out below are advanced for consideration of
398 a recommendation that they be published for comment in August,
399 2015. They cover e-filing, e-service, and recognizing a notice of
400 electronic filing as proof of service.

401 ***e-Filing and Service; NEF as Proof of Service***

402 INTRODUCTORY NOTES

403 The draft Committee Notes are new. They are designed in part
404 to identify issues that may prompt further discussion and changes
405 in the draft rule texts.

406 ***e-Filing***

407 To be complete, alternative versions of this proposal have
408 been carried forward. But as noted with Alternative 2, at least
409 most participants favor Alternative 2. Discussion may well begin
410 with Alternative 2 unless Alternative 1 wins new fans.

411 Alternative 1

412 Alternative 2 has become the preferred version of at least
413 most of the reporters and the Civil Rules Committee members who
414 have participated in the subcommittee work.

415 (3) *Electronic Filing~~,~~ and Signing~~, or Verification~~.* ~~A court~~
416 ~~may, by local rule, allow papers to be filed~~ All filings
417 must be made~~, signed, or verified~~[1] by electronic means

[1] Deletion of verification by electronic means seems a conservative choice, but may be wrong. Is there any experience with local rules that might help? Verification is required for the complaint in a derivative action, Rule 23.1, a petition to perpetuate testimony, Rule 27(a), and is allowed as an alternative to an affidavit to support a motion for a temporary restraining order, Rule 65(b)(1)(A). Verification or an affidavit may be required in receivership proceedings, Rule 66. Supplemental Rule B(1)(A) requires a verified complaint to support attachment in an in personam action in admiralty. Rule C(2) requires verification of the complaint in an in rem action. Those are the only rules

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418 that are consistent with any technical standards
419 established by the Judicial Conference of the United
420 States. But paper filing must be allowed for good cause,
421 and may be required or allowed for other reasons by local
422 rule. The act of electronic filing constitutes the
423 signature of the person who makes the filing. A paper
424 filed electronically ~~in accordance with a local rule~~ is
425 a written paper for purposes of these rules.

426 COMMITTEE NOTE

427 Electronic filing has matured. Most districts have adopted
428 local rules that require electronic filing, and allow reasonable
429 exceptions as required by the former rule. The time has come to
430 seize the advantages of electronic filing by making it mandatory in
431 all districts. But exceptions continue to be available. Paper
432 filing must be allowed for good cause. And a local rule may allow
433 or require paper filing for other reasons. [Many courts now have
434 local rules that provide for paper filing by pro se litigants, and
435 may carry those rules forward.][2]

436 The act of electronic filing by an authorized user of the
437 court's system counts as the filer's signature. Under current
438 technology, the filer must log in and present a password. Those
439 acts satisfy the purposes of requiring a signature without need for
440 an additional electronic substitute for a physical signature. But
441 the rule does not make it improper to include an additional
442 "signature" by any of the various electronic means that may
443 indicate an intent to sign.[3]

444 The amended rule applies directly to the filer's signature.
445 It does not address others' signatures. Many filings include papers

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provisions that come to mind at the moment. Statutes also may require verification. There may be circumstances in which a federal court will adopt a state-law verification requirement, although that seems uncertain.

If verification is accomplished by the filer, the signature would have to be accompanied by some sort of statement that the paper is verified. Perhaps it is better, after all, to retain "verified" in rule text?

[2] Examples could be given of good cause, or other exceptions, but this may be a case where a terse Note is better.

[3] Civil Rule 11(a) provides that every pleading, written motion, and other paper must be signed. Rule 5(d)(3) already provides that a paper filed electronically in accordance with a local rule is a written paper for purposes of the Civil Rules. It seems useful to carry this provision forward in this place, not Rule 11, omitting only the reference to local rules.

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446 signed by someone other than the filer. Examples include affidavits
447 and declarations and, when filed, discovery materials. Provision
448 for these signatures may be made by local rule, but if the Judicial
449 Conference adopts standards that govern the means or form of
450 electronic signing, they may displace local rules.

451 **[**The former provision for verification by electronic means is
452 omitted. Verification is not often required by these rules. The
453 special policies that justify a verification requirement suggest
454 that it is better to defer electronic verification pending further
455 experience. {Local rules may address verification by electronic
456 means.**}]**

457 **Civil Rule 5(d)(3)**

458 **(d) Filing. * * ***

459 Alternative 2

460 (3) *Electronic Filing~~,~~ and Signing~~, or Verification~~.* ~~A court~~
461 ~~may, by local rule, allow papers to be filed~~ All filings
462 must be made and~~,~~ signed~~, or verified~~ by electronic means
463 that are consistent with any technical standards ~~or~~
464 ~~standards of form~~[4] established by the Judicial Conference
465 of the United States. ~~A local rule may require electronic~~
466 ~~filing only if reasonable exceptions are allowed.~~ But
467 paper filing must be allowed for good cause, and may be
468 required or allowed for other reasons by local rule. A
469 paper filed electronically ~~in accordance with a local~~
470 ~~rule~~ is a written paper for purposes of these rules.

471 COMMITTEE NOTE

472 Electronic filing has matured. Most districts have adopted
473 local rules that require electronic filing, and allow reasonable
474 exceptions as required by the former rule. The time has come to
475 seize the advantages of electronic filing by making it mandatory in
476 all districts. But exceptions continue to be available. Paper
477 filing must be allowed for good cause. [Many courts now have local
478 rules that provide for paper filing by pro se litigants, and may
479 carry those rules forward. And a local rule may allow or require
480 paper filing for other reasons.]

481 The means of electronic signing are left open; local rules can
482 specify appropriate means. If the Judicial Conference adopts
483 standards that govern the means or form of electronic signing, they
484 may displace local rules.

---

[4] This phrase likely should be omitted. It was included to recognize that Judicial Conference standards might go beyond the electronic technology to address such issues as whether a machine signature should be preceded by /s/ or some such (L.S.? locus sigilli?).

12b-000399

485 The amended rule applies directly to the filer's signature.[5]
486 It does not address others' signatures. Many filings include papers
487 signed by someone other than the filer. Examples include affidavits
488 and declarations and, when filed, discovery materials. Provision
489 for these signatures may be made by local rule, as many courts do
490 now, unless the Judicial Conference adopts a preemptive national
491 standard.[6]

492 **[**The former provision for verification by electronic means is
493 omitted. Verification is not often required by these rules. The
494 special policies that justify a verification requirement suggest
495 that it is better to defer electronic verification pending further
496 experience{; local rules may provide useful experience}.**]**[7]

497 ***e-Service***

498 **Civil Rule 5(b)(2)(E)**

499 **(b) Service: How Made. * * ***

500 (2) Service in General. A paper is served on the person to be
501 served[8] under this rule by:

502 (A) handing it to the person * * *

503 (E) sending it by electronic means ~~if the person~~
504 ~~consented in writing~~, unless the person shows
505 good cause to be exempted from such service or
506 is exempted by local rule. ~~--in which event~~
507 Electronic service is complete upon
508 transmission, but is not effective if the

---

[5] Should this proposition be asserted more directly in rule text? E.g., "must be made and signed by the filer"?

[6] Alternative 1 above avoids the questions raised by attempting to address non-filer signatures in a Committee Note to a rule that does not directly address the question.

[7] See footnote 1.

[8] This provision is included to address the question that arises when readers confront "the person" in (E). The stylists chose to use "the person" throughout (A), (B), (C), (D), (E), and (F). We cannot simply add "the person to be served" in (E) and leave the others untouched.

Adding "to be served" to all the other subparagraphs is awkward because "the person's" appears in (B)(i), (B)(ii), and (C).

But it works to add "on the person to be served" in the introduction. Do we want to second-guess the style choice?

12b-000400

509 serving party learns that it did not reach the
510 person to be served; or * * *

511 COMMITTEE NOTE

512 Provision for electronic service was first made when
513 electronic communication was not as widespread or as fully reliable
514 as it is now. Consent of the person served to receive service by
515 electronic means was required as a safeguard. Those concerns have
516 substantially diminished. The amendment makes electronic service
517 the standard. But it also recognizes that electronic service is not
518 always effective. Some litigants lack access to suitable electronic
519 devices. Exceptions are available on showing good cause in a
520 particular case. And local rules may establish other exceptions
521 that reflect local experience.

522 ***Notice of Filing as Proof of Service***

523 **Civil Rule 5(d)(1)**

524 **(d) Filing.**

525 (1) Required Filings; Certificate of Service. Any paper after
526 the complaint that is required to be served~~ -- together~~
527 ~~with a certificate of service --~~ must be filed within a
528 reasonable time after service; a certificate of service
529 also must be filed, but a notice of electronic filing
530 constitutes a certificate of service on any party served
531 through the court's transmission facilities [unless the
532 serving party learns that it did not reach the party to
533 be served]. But disclosures under Rule 26(a)(1) or (2)
534 and the following discovery requests and responses must
535 not be filed * * *.

536 COMMITTEE NOTE

537 The amendment provides that a notice of electronic filing
538 generated by the court's CM/ECF system is a certificate of service
539 on any party served through the court's transmission facilities.
540 But if the serving party learns that the paper did not reach the
541 party to be served, there is no service under Rule 5(b)(2)(E) and
542 there is no certificate of the (nonexistent) service.

543 When service is not made through the court's transmission
544 facilities, a certificate of service must be filed and should
545 specify the date as well as the manner of service.

546 Rule 5(d)(1) addresses the certificate of service only. It
547 does not address electronic service or a failure of electronic

12b-000401

548 service.[9]

549 Discussion

550 Judge Harris has drafted a revision of this proposal that
551 would provide uniform certificates of service across appellate,
552 bankruptcy, and civil rules, and across the districts and circuits.
553 He recognizes that since e-service has come to predominate in civil
554 practice there may be less need for such provisions in the civil
555 rules than in other sets of rules, but thinks the move toward
556 uniformity would still be a good thing. His draft omits the
557 underlined new material in the proposal set out above and
558 substitutes this:

559 When one or more parties are served in a manner other
560 than through the court's transmission facilities, a
561 certificate of service must be filed that specifies the
562 following as to [those parties][all parties served in a
563 manner other than through the court's transmission
564 facilities]:
565 (A) the date and manner of service;
566 (B) the names of the persons served; and
567 (C) the mail or electronic address, the fax number, or
568 the address of the place of delivery, as
569 appropriate for the manner of service, for each
570 person served.

571 Although there may be some fine-tuned drafting work to be done
572 if such details are to be added to the rule, the central question
573 is the perennial one: just how much detail should be provided in
574 the national rules? The provision requiring a certificate of
575 service was added to Rule 5 in 1991. The Committee Note explained
576 that local rules generally had imposed the requirement, and
577 observed that having "such information on file may be useful for
578 many purposes." It observed that generally the certificate would

---

[9] This brief sentence seems better than any attempt to explore what the person who attempted electronic service should do on learning that service failed. Information about the failure may be provided when the person to be served asks whether it will be receiving such a paper. More often, it will be provided when the attempted service is bounced back through the system. A study in the Southern District of Indiana found that most often the "bounceback" reflected failure of service on a secondary target, an assistant to the attorney or a paralegal, at the same time as the attorney was in fact served. There may be little point in requiring a renewed effort to serve a duplicate on the assistant, along with a certificate of service.

Alternatively, this paragraph could be dropped. Rule 5(b)(2)(E) addresses failure of electronic service. Why bother to state the obvious -- that proposed Rule 5(d)(1) does not?

12b-000402

579 state the date and manner of service, but that a party employing a
580 private delivery service might not be able to specify the date of
581 delivery. "In the latter circumstance, a specification of the date
582 of transmission of the paper to the delivery service may be
583 sufficient * * *." Has the time come to provide specifics that were
584 not attempted then? The risk is always that details will prove
585 incomplete or incorrect, either when adopted or eventually. One
586 example: if service is made by electronic means outside the court's
587 transmission facilities, is it enough to provide the e-address used
588 to send the message? Or is it then important to add a provision for
589 the party who later learns that the message did not go through?

590 Judge Solomon and Clerk Briggs, delegates to the all-
591 committees subcommittee, report that their experience shows that
592 adequate certificates of service are filed now. And it seems likely
593 that as e-service expands to include more pro se litigants there
594 will be fewer occasions for separate certificates. It well may be
595 that there is no need to add this level of detail to the rule text.

596 This issue arises in connection with a proposal to publish for
597 comment. It is not as important to achieve uniformity among the
598 advisory committees as it is to achieve uniformity on the 3-added-
599 days question in a rule that has been published and is moving
600 toward a recommendation on adoption. But if the contents of the
601 certificate are to be specified in the rule, it would be good to
602 act in a way that leaves the way open to move toward uniform
603 recommendations to the Standing Committee.

125-000403

TAB 7

125-000404

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TAB 7A

125-000406

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604 **OFFER OF JUDGMENT: RULE 68**

605 The Minutes for the October meeting reflect extensive
606 discussion of the offer-of-judgment provisions in Rule 68. Past
607 efforts to revise Rule 68 have collapsed. Proposals published for
608 comment in 1983 and 1984 met bitter resistance. A proposal
609 developed some 20 years ago eventually fell under its own weight as
610 the draft was revised to reflect a continually growing number of
611 complications.

612 A nearly constant feature of perennial suggestions for reform
613 is to impose liability for attorney fees as a sanction for failing
614 to improve on a rejected offer. Work to explore the theoretical
615 consequences of this potentially significant departure from "the
616 American Rule" has been considered, but not yet undertaken.

617 The conclusion last October was that it would be useful to
618 survey the experience with state offer-of-judgment rules and
619 parallel rules on offers to settle or on paying into court. The
620 Administrative Office staff has been asked to undertake this work,
621 but the competing demands on staff time during a period of
622 transition have impeded progress. Jon Rose did some helpful
623 preliminary research. His message describing the overall results is
624 attached, along with an outline of state provisions and a Rule 68
625 bibliography.

626 These questions will remain on the active agenda.

125-000408

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125-000409

TAB 7B

125-000410

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From: Jonathan Rose
To: David Campbell, coopere, marcusr
Cc: coquille
Date: 11/28/2014 02:56 PM
Subject: Interim Materials on Rule 68 and State Law Offer of Judgment Provisions

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After our meeting in October, I consulted with Emery Lee on the research project assigned at the end. Our understanding was that it would have two components: (1) what variations of Rule 68 are found in state rules, and (2) are there any studies, data or reliable analyses as to how well they are working.

(Pursuant to a request from Ed Cooper, I inquired from the National Center for State Courts whether it had undertaken or was aware of any relevant research in this field since 2000 and received a negative reply).

In the interest of refining our research request to a Supreme Court fellow, I undertook a review of state law provisions to look for any recent variations of Rule 68. Unfortunately, the work over the past month revealed no jurisdiction which appeared to have found a recent "magic bullet" solution to the problems previously identified in other versions of rule 68 likely to cause it to be more utilized or effective. Further, there appeared to be little new empirical research which either validated or even suggested the way to any such solution. (Emery checked for empirical research also. What little we found has been included below.)

Most, but not all, of the academic literature, while not as prolific as during the periods when the Committee was actively reviewing the rule, continue to suggest that some version of the rule is desirable to promote the general goal of lawsuit settlement. Some of the articles cautioned that when the prospect of significant fees loom sufficiently large, a rule like Rule 68 can have the perverse effect of promoting the continuation of a suit as opposed to settlement. Thus, whatever can be done to stimulate early stage offers is strongly preferred by most authors.

At least one author suggested the Committee might be better served starting afresh looking toward a rule directly designed to encourage settlements, with conditional fee shifting as just one of the possible approaches, as opposed to continuing to tinker with a rule originally intended in his view to penalize recalcitrant plaintiffs.

The apparently singular Michigan practice of mandatory case evaluation was said to promote settlements; however, given a choice between case evaluation and ADR mediation, the latter was said to be far more effective in achieving a higher percentage of settlements. A recurrent theme in the commentary appeared to be that any mechanism which stimulates or requires contact and communication between the litigating parties at an early stage has a tangible and positive impact upon case resolution. None of these observations appeared particularly startling.

As the committee suspected, many jurisdictions have continued to experiment with variations of Rule 68 with the presumed goal of encouraging case settlement without undue sacrifice of appropriate citizen access to the courts.

Following the format originally used by the American College of Trial Lawyers in 2004, I have attached an updated survey in similar outline form of the current Offer ofJudgment provisions in the laws of the 50 states and the District of Columbia. I have also attached a compendium of state law offer of judgment provisions compiled in 2012 by a network of private firms called the USA Law Network in the hope it may help interpret the survey chart. I am also attaching a slightly expanded bibliography on Rule 68 from that provided by the 2013 submission of the Committee on Federal Courts of the New York City Bar.

Perhaps the material below will suggest the direction further research by the Supreme Court fellow should take if the Committee would find it useful. Possibilities could include: an extensive review of current Rule 68 decisions, a summary of the recent articles in the bibliography, or more extensive research on state law approaches to case settlements:

1. The updated outline of state law provisions concerning offers of judgment (i.e. cuurent state law variants of rule 68)

2. Link to the Compendium of State Law Offer of Judgment provisions (2012) compiled by U S Law Network

http://www.uslaw.org/files/Compendiums2012/Offer%20of%20Judgment/USLAW_OfferofJudgment_2012.pdf

3. Links to Recent Empirical Research on Rule 68

A. Albert Yoon and Tom Baker, Vanderbilt Law Review, Vol. 59, No. 1, pp. 155-196, 2006, Offer-of-Judgment Rules and Civil Litigation: An Empirical Study of Automobile Insurance Litigation in the East:

http://www.utexas.edu/law/wp/wp-content/uploads/centers/clbe/yoon_offer_judgment_rules_civil_litigation.pdf

B. William P. Lynch, New Mexico Law Review, Vol. 39, Issue 2 (Spring 2009), pp. 349-374, Rule 68 Offers of Judgment: Lessons from the New Mexico Experience:

http://lawschool.unm.edu/nmlr/volumes/39/2/07_lynch_rule.pdf

4. Selected Bibliography Relevant to Rule 68 and State Law Offers of Judgment Provisions

P.S. Perhaps the most noteworthy recent use of Rule 68 occurred in *Genesis Healthcare Corp. v. Symczyk,* 133 S.Ct.1523 (2013). Last term in that case, the Supreme Court in a 5-4 decision reversed the Third Circuit and reinstated the decision of the district court that a defendant's Rule 68 offer of judgment in full satisfaction of the named plaintiff's claim rendered that claim moot under the Fair Labor Standards Act (FLSA).
Given the technical posture of the case, the majority of the Court assumed, without deciding, that the plaintiffs' claim was moot, and held that the collective-action allegations in the complaint had therefore been appropriately dismissed for lack of subject matter jurisdiction. Even though the Court expressly noted that FLSA and class actions are different, this type of effort to "pick off" a named plaintiff in a putative collective action by tendering full relief at the outset seems likely to continue until the Court resolves a current split between the seventh and four other circuits as to whether such a plaintiff can continue to maintain the class action in the presence of such an offer.

Jon
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UPDATED OUTLINE OF STATE LAW
OFFER OF JUDGMENT PROVISIONS

State	Citation	Party	Filing Deadline	Response Deadline	Consequence of Non-acceptance	Significant Difference From Federal Rule
AL	Ala. Rule Civ. Proc. 68	DEF	15 days prior to trial (14 days District Court)	10 days after service (7 days in District Court)	Same as Federal Rule; offeree must pay costs incurred after offer if judgment is not more favorable than offer	
AS	Alaska Stat. § 09.30.065	ANY	10 days prior to trial	10 days after service	If judgment is 5% (10% in case of multiple defendants) less favorable than offer, offeree shall pay all costs (including deposition expenses and travel) plus attorneys' fees on a sliding scale from 30-75% depending upon timing of offer	Costs include attorneys' fees; 5% margin of error
AK	Ark. Rule Civ. Proc. 68	DEF	10 days prior to trial	10 days after service	Similar to Federal Rule; offeree must pay costs incurred after offer if judgment is not more favorable than offer; costs include all reasonable litigation expenses, excluding attorney's fees	Expanded definition of costs, but excludes attorneys' fees
AZ	Ariz..Rule Civ. Proc. 68	ANY	30 days prior to trial	30 days after service	If judgment not more favorable than offer, offeree shall pay expert witness fees, double the taxable costs of the offeror, and prejudgment interest on unliquidated claims (with interest accruing from the date of the offer); offer may exclude attorneys' fees but must specifically so state	Expanded definition of costs; available to any party; only taxable costs and attorneys' fees found by court as "reasonably incurred" will be allowed; double costs allowed
CA	Cal. Civil Code §998	ANY	10 days prior to trial or arbitration	30 days after service or commencement of trial, whichever is first	If the defendant is the offeror and the judgment is not more favorable than offer, the plaintiff shall pay the defendant's costs from the time of the offer. If the costs awarded exceed the damages awarded to the plaintiff, the net amount is awarded to the defendant; If the Plaintiff is the offeror and the defendant fails to obtain a more favorable judgment, the court or arbitrator, in its discretion, may require the defendant to pay a reasonable sum to cover costs of expert witnesses.	Expanded definition of costs; include expert witnesses; available to any party
CO	Colo. Rev. Stat. § 13-17-202	ANY	14 days prior to trial	14 days after service	Similar to Federal Rule; If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the "actual" costs incurred after the making of the offer.	So far, "actual" costs has been interpreted similarly to FRCP 68
CT	Conn. Gen. Stat. § 52-192a	PL	30 days prior to trial	60 days after service	If judgment is equal to or greater than an offer and is filed within 18 months of the filing of the complaint, the Court shall add 8% annually on the amount of the judgment from the date of the complaint; if the offer is filed more than 18 months after the complaint, interest runs from the date of the offer. Attorneys' fees up to $350 may also be awarded.	
	Conn. Gen. Stat. § 52-193 § 52-194 § 52-195-195	DEF	30 days prior to trial	10 days after service	If judgment is less than the offer, plaintiff recovers no costs accruing after receipt of notice of the offer; defendant recovers its costs incurred after date of offer. Such costs shall include attorney's costs not exceeding $350.	
DC	D.C. Super. Ct. Rule 68	DEF	10 days prior to trial	10 days after service	Same as Federal Rule; offeree must pay costs incurred after offer if judgment is not more favorable than offer	
DE	Del. Super. Ct. C.P.R. 68	DEF	10 days prior to trial	10 days after service	Same as Federal Rule; offeree must pay costs incurred after offer if judgment is not more favorable than offer	
FL	Fla. Stat. Ann. § 768.79; Fla. Rule Civ. Proc. 1.442(a)-(j)	ANY	Any time prior to trial	30 days after service	Offeror entitled to reasonable costs and attorneys' fees if judgment is 25% less favorable than offer; If offer not in good faith, court may disallow costs and fees	Costs include attorneys' fees; court must consider discretionary factors in awarding attorneys' fees; 25% margin of error
GA	Ga. Code Ann. § 9-11-68	ANY	30 days prior to trial	30 days after service	If the defendant is the offeror and the judgment is not at least 75% of the defendant's offer, the plaintiff shall pay the defendant's costs from the time of the offer. If the plaintiff is the offeror, the plaintiff's recovery must exceed 125% of the plaintiff's offer in order to recover reasonable attorneys' fees and expenses of litigation from the date of the rejection of the offer.	Twenty five percent margin of error. Costs include reasonable attorneys' fees; provision for separate hearing on "frivolous claim or defense"
HI	Haw. Rule Civ. Proc. 68	ANY	10 days prior to trial	10 days after service	Similar to Federal Rule; If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.	Available to any party; recovery allowed of "actual costs deemed reasonable by court," but not attorneys' fees
ID	Idaho Rule Civ. Proc. 68; Rule 54(d)(1); Rule 54(e)(1)	DEF	14 days prior to trial	14 days after service	If the "adjusted award" (i.e. the verdict, as well as the offeree's costs and attorney's fees prior to the service of the offer) is less than the offer, then the offeree must pay the offeror's costs incurred after the making of the offer, while the offeror must pay costs and attorney's fees incurred before the making of the offer; if the judgment is more than the "adjusted award", the offeror must pay the offeree its costs incurred both before and after the offer.	Costs include attorneys' fees

UPDATED OUTLINE OF STATE LAW
OFFER OF JUDGMENT PROVISIONS

State	Citation	Party	Filing Deadline	Response Deadline	Consequence of Non-acceptance	Significant Difference From Federal Rule
IL	None					No provision
IN	Ind. Rule Tr. Proc. 68.	DEF	10 days prior to trial	10 days after service	Same as Federal Rule; if judgment less favorable than offer, offeree must pay costs incurred after offer was made.	
IA	Iowa Code Ann. § 677.4 677.5 677.6.	DEF	Any time before judgment	immediate	Offer must be made "in court"; if offeree is present and refuses when offer is made or had three days' notice of its amount and fails to appear, offeree must pay costs incurred after offer if judgment is not more favorable than offer.	
	Iowa Code Ann. § 677.7, 677.8, 677.9, 677..10.	DEF	Any time before trial	5 days after service	Offeree must pay costs, not including attorney's fees, incurred after offer if judgment is not more favorable than offer; plaintiff also does not recover costs incurred after offer which would ordinarily be recoverable by prevailing party; permits offers conditional upon failure of defense.	
KS	Kan. Stat. Ann. § 60-2002(b).	DEF	21 days prior to trial	14 days after service	Same as Federal Rule except for filing deadline; offeree must pay costs incurred after offer if judgment is not more favorable than offer.	
KY	Ky. Court Rule 68; Ky. Rev. Stat. Ann. §453.160.	DEF	10 days prior to trial	10 days after service	Similar to Federal Rule; offeree must pay costs incurred after offer if judgment is not more favorable than offer; includes offer conditioned upon failure of defense; also applies to appeals.	
LA	La. Code. Civ. Proc. Ann. art. 970.	ANY	30 days prior to trial	10 days after service	Offer admits no liability; if defendant offers, plaintiff must pay costs if judgment is at least 25% less than offer; if plaintiff offers, defendant must pay costs if judgment is at least 25% greater than the offer; costs are after offer only and may include anything except attorney's fees, as fixed by the trial court.	Expanded definition of costs at discretion of court; but costs do not include attorneys' fees; available to any party; 25% margin of error
ME	Me. R. Civ. Proc. 68.	DEF	10 days prior to trial or less with court approval	10 days after service or less with court approval	Same as Federal Rule, except it allows court to approve filing deadline closer to trial and shorter response deadlines; offeree must pay costs incurred after offer if judgment is not more favorable than offer.	
MD	None					No provision – special provision for health care malpractice claim (2005)
MA	Mass. Rule Civ. Proc. 68; Mass. Gen. Laws Ann., ch. 231, § 88.	DEF	10 days prior to trial	10 days after service	Similar to Federal Rule; offeree must pay costs incurred after offer if judgment is not more favorable than offer; expressly excludes interest from amount of judgment.	
MI	Mich. Court Rule 2.403				An evaluation by 3 person panel mandatory for tort and medical malpractice cases, other money damage cases may be submitted by court.	No comparable process found in other states
	Mich. Court Rule 2.405	ANY	28 days prior to trial	21 days after service	Rule contemplates that offeree may make a counteroffer; average is used for determining consequences (if no counteroffer made, the offer is deemed the average); if an offer is rejected, the party rejecting must pay costs, including reasonable attorney's fees, incurred after the rejection if judgment is less favorable than the average offer; an offeree who does not make a counteroffer only recovers costs if the offer was made less than 42 days before trial; all costs within discretion of trial court who may refuse attorney's fees "in the interest of justice."	Costs include attorneys' fees; available to any party; costs may be awarded in cases subject to case evaluation only where evaluation was not unanimous
MN	Minn. Rule Civ. Proc. 68	ANY	10 days prior to trial	10 days after service	Similar to Federal Rule except that it contemplates an offer by any party and excludes provision regarding offers made after liability is determined; offeree must pay costs incurred after offer if judgment is not more favorable than offer.	Available to any party; fee award subject to hardship provisions; "costs" under rule exclude attorneys' fees
MS	Miss. Rule Civ. Proc. 68	DEF	15 days prior to trial	10 days after service	Same as Federal Rule except for timing; offeree must pay costs incurred after offer if judgment is not more favorable than offer.	
MO	Mo. Rule Civ. Proc. 77.04.	DEF	30 days prior to trial	10 days	Similar to Federal Rule, but excludes provision regarding offers made after liability is determined; offeree must pay costs incurred after offer if judgment is not more favorable than offer.	
MT	Mont. Rule Civ. Proc. 68	DEF	14 days prior to trial	14 days after service	Same as Federal Rule; if judgment less favorable than offer, offeree must pay costs incurred after offer was made.	

UPDATED OUTLINE OF STATE LAW
OFFER OF JUDGMENT PROVISIONS

State	Citation	Party	Filing Deadline	Response Deadline	Consequence of Non-acceptance	Significant Difference From
NE	Neb. Rev. Stat. §§ 25-901, 25-902	DEF	Any time prior to trial	5 days after service	Similar to Federal Rule; only applicable in actions for the recovery of money; if judgment less favorable than offer, offeree must pay costs incurred after offer was made.	
NV	Nev. Rule Civ. Proc. 68, Nev. Rev. Stat. §17.115	ANY	10 days prior to trial	10 days	Similar to Federal rule; allows for joint offers — joint offers to multiple parties may be conditioned on each party's acceptance; joint offers to defendants can only invoke penalties if there the theory of liability is the same for each; joint offers to plaintiffs can only invoke penalties if the damages claimed are all derivative of each other — If judgment not more favorable than offer, offeree shall not recover attorneys' fees and costs, and, if allowed, shall pay the fees and costs of offeror incurred from time of the offer.	Available to any party; costs include reasonable attorney's fees
NH	None					No provision
NJ	NJ Court Rules R. 4:58-1, 4:58-2, 4:58-3, 4:58-4	ANY	20 days prior to trial	10 days prior to trial, or 90 days after filing	(a) Plaintiff's offer. If plaintiff's offer is not accepted and judgment is as good or better for plaintiff, defendant must pay reasonable litigation expenses, attorney's fees, and 8% interest on the amount of recovery from the date the offer was made, or the discovery was completed. However if action is for un-liquidated damages, no such awards are given unless the amount of recovery is 120% of the offer. (b) Defendant's offer. If defendant's offer is not accepted and judgment is as favorable or more favorable for defendant, plaintiff must pay the cost of defendant's suit, litigation expenses, and attorney's fees. However, no such awards are given unless the amount awarded to plaintiff is less than 80% of the offer. Includes provisions for multiple parties.	Adds 8% interest to plaintiff's recovery; costs include attorneys' fees; available to any party; 20% margin of error
NM	N.M. Dist. Court Rule. Civ. Proc. 1-068	ANY	10 days prior to trial (but at least 120 days after filing of responsive pleading for plaintiff)	10 days	All penalties are barred in domestic relations actions. Acceptance of offer does not require judgment to be filed against defendant. (a) Plaintiff's offer. If plaintiff's offer is not accepted and the final judgment is more favorable to plaintiff than the offer, defendant must pay costs, excluding attorney's fees, including double the amount of costs incurred after the offer was made. (b) Defendant's offer. If defendant's offer is not accepted and the final judgment is more favorable to defendant, plaintiff must pay costs, excluding attorney's fees, incurred by defendant after the offer was made.	Available to any party; allows double costs to plaintiff
NY	N.Y. Civ. Practice Law and Rules 3219, 3220, 3221	DEF	10 days prior to trial	10 days	(a) R. 3219. This provision applies only to defendants to a contract action. Defendant must deposit tender offer to the clerk of the court. If not accepted by plaintiff within 10 days, defendant must request its return or the amount is deemed "paid into the court." If judgment is equal to or less than the amount offered, the plaintiff must pay defendant's costs from the time of the offer. (b) R. 3220. This provision applies only to defendants to a contract action. Defendant's offer is made conditional on a finding of liability — if defendant is not found liable, offer is invalid. If plaintiff does not accept, and defendant is found liable, but for less than the amount offered, plaintiff must pay defendant's expenses solely for trying the issue of damages. (c) R. 3221. This provision applies to all defendants not in a matrimonial action. If offer is not accepted, and judgment is for less than the amount offered, plaintiff must pay defendant's costs from the time of the offer.	Limited availability
NC	N.C. Gen Stat. § 1A-1, R. 68	DEF	10 days prior to trial	10 days; 20 days for conditional damage offer	Similar to Federal Rule; if judgment less favorable than offer, offeree must pay costs incurred after offer was made. Defendant may make offer conditional on a finding of liability — if defendant is not found liable, offer is invalid. If plaintiff does not accept offer, and defendant is found liable but for less than the amount offered, plaintiff must pay defendant's costs for litigating the damages issue.	
ND	N.D. Rule Civ. Proc. 68	ANY	14 days prior to trial	14 days	If judgment less favorable than offer, offeree must pay for the offeror's costs incurred after the making of the offer. Offer may be accepted without entering judgment against defendant.	Available to any party; expanded definition of costs awarded at courts' discretion, costs do not include attorneys' fees

UPDATED OUTLINE OF STATE LAW
OFFER OF JUDGMENT PROVISIONS

State	Citation	Party	Filing Deadline	Response Deadline	Consequence of Non-acceptance	Significant Difference From
OH	Ohio Rule Civ. Proc. 68				None	No provision
OK	12 Okla. Stat. Ann. §§ 1101, 1101.1	ANY	Any time for action for money damages only; 10 days prior to trial for all other actions	5 days of action for money damages only; 10 days for other actions	Only defendant can initiate procedure, but once initiated, plaintiff can make counteroffer and same rules apply to either party; different rules (and deadlines) apply to certain causes of action and claimed amounts, but in general if judgment is less favorable than offer, offeror is entitled to reasonable costs and attorneys' fees incurred after offer	Available to any party under certain conditions
OR	Or. R. Civ. P. 54(E)	DEF	14 days prior to trial	7 days	Similar to Federal Rule. If judgment not more favorable than offer, offeree shall not recover costs, prevailing party's fees, disbursements or attorney fees incurred after date of offer; and offeror shall recover costs and disbursements, not including prevailing party fees, from the time the offer was served.	Costs can include attorneys' fees
PA	None					No provision
RI	R.I. Dist. Court Rule 68	DEF	10 days prior to trial	10 days after service	Similar to Federal Rule; in addition to normal options, allows offeree to accept tender as part payment and proceed to trial solely on damages	
SC	S.C. Rule Civ. Proc. 68	ANY	20 days prior to trial	Earlier of 20 days after service or 10 days prior to trial	A plaintiff who receives a more favorable judgment is entitled to eight percent interest on the amount recovered. A defendant is entitled to a reduction of eight percent interest on the amount recovered if the plaintiff receives a less favorable judgment.	
SD	S.D. Cod. Laws § 15-6-68	ANY	10 days prior to trial	10 days after service	Similar to Federal Rule; offeree must pay costs incurred after offer if judgment is not more favorable than offer	
TN	Tenn. R. Civ. P. 68	ANY	10 days prior to trial	10 days after service	Similar to Federal Rule except for omission of provision allowing for offers of judgment prior to hearing for damages when liability has already been determined; offeree must pay costs incurred after offer if judgment is not more favorable than offer.	Available to any party
TX	E.D. Tex. Local Rules (Civil Justice Expense and Delay Reduction Plan, Art. 6 (2002))	ANY	Deadline varies	Deadline varies	If judgment is 20% or less beneficial than offer, offeree must pay the litigation costs incurred after offer was rejected; "litigation costs" are costs directly related to trial preparation and actual trial expenses. "Litigation costs" include but are not limited to attorney's fees.	Costs include attorneys' fees; available to any party; 20% margin of error
UT	Utah Rule Civ. Proc. 68(b)	DEF	10 days prior to trial	10 days	Similar to Federal Rule; Costs are defined by Utah R. Civ. P. 54 and do not include attorneys' fees.	
VT	Vt. Rule Civ. Proc. 68	DEF	10 days prior to trial unless court grants shorter time	10 days after service unless court grants shorter time	Similar to Federal Rule; offeree must pay costs incurred after offer if judgment is not more favorable than offer	
VA	None					
WA	Wash. Civ Rule 68	DEF	10 days prior to trial	10 days after service	Same as Federal Rule; offeree must pay costs incurred after offer if judgment is not more favorable than offer	
WV	W. Va. Rule Civ. Proc. 68 (a)-(d)	DEF	10 days prior to trial	10 days after service	Similar to Federal Rule; offeree must pay costs incurred after offer if judgment is not more favorable than offer; in addition to Federal Rule options, allows offeree to accept tender as payment and proceed to trial solely on damages.	

UPDATED OUTLINE OF STATE LAW
OFFER OF JUDGMENT PROVISIONS

State	Citation	Party	Filing Deadline	Response Deadline	Consequence of Non-acceptance	Significant Difference From
WI	Wis. Stat. Ann. § 807.01(1) and (2)	DEF	20 days prior to trial	10 days after service and prior to trial	Defendant can make offer for pretrial judgment or to have specified sum assessed on an adverse result at trial; If judgment less favorable than offer, plaintiff recovers no costs; defendant recovers costs	
	Wis. Stat. Ann. § 807.01(3) and (4)	PL	20 days prior to trial	10 days after service and prior to trial	If judgment greater than offer, plaintiff recovers double the amount of costs and interest on the award from the date of the offer (prejudgment interest is generally not allowed other than through the offer provision)	Plaintiff recovers double costs and interest
WY	Wyo. Rule Civ. Proc. 68	ANY	60 days after service; 30 days prior to trial	10 days after service	Similar to Federal Rule; offeree must pay cost incurred after offer if judgment is not more favorable than offer; costs do not include attorney's fees	Available to any party

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RULE 68
BIBLIOGRAPHY

Articles

Robert G. Bone, *"To Encourage Settlement": Rule 68, Offers of Judgment, and the History of the Federal Rules of Civil Procedure,* 102 Nw. U. L. Rev. 1561 (2008).

Lesley Bonney et al., *Rule 68: Awakening a Sleeping Giant,* 65 Geo. Wash. L. Rev. 379 (1997).

Christopher Carmichael, *Encouraging Settlements Using Federal Rule 68: Why Non-Prevailing Defendants Should be Awarded Attorney's Fees, Even in Civil Rights Cases,* 48 Wayne L. Rev. 1449 (2003).

D. Glimcher, Note, *Legal Dentistry: How Attorney's Fees and Certain Procedural Mechanisms Can Give Rule 68 the Necessary Teeth to Effectuate Its Purposes,* 27 Cardozo L. Rev. 1449 (2006).

Jay Horowitz, *Rule 68: The Settlement Promotion Tool That Has Not Promoted Settlements,* 87 Denver Univ. L. Rev. 485 (2010).

Laura Inglis, et al., *Experiments on the Effects of Cost-Shifting, Court Costs, and Discovery on the Efficient Settlement of Tort Claims,* 33 Fla. St. U. L. Rev. 89 (2005)

Randall L. Kiser, et al., *Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations,* Journal of Empirical Legal Studies 551 (2008)

H. Lewis, Jr. and T. Eaton, *The Contours of a New FRCP, Rule 68.1: A Proposed Two-Way Offer of Settlement Provision for Federal Fee Shifting Cases,* 252 F.R.D 551(2009).

Lewis and Eaton, *Rule 68 Offers of Judgment: The Practices and Opinions of Experienced Civil Rights and Employment Discrimination Attorneys,* 241 F.R.D 332 (2007).

Christopher R. McLennan, *The Price of Justice: Allocating Attorneys' Fees in Civil Litigation,* 12 Fla. Coastal L. Rev. 357 (2011).

W. David Paxton and Michael J. Finney, *Rule 68 Offers of Judgment – A Useful Defense Tool,* 24 Journal of Civil Litigation 532 (2012).

Alexander G. Osevala, *Let's Settle This: A Proposed Offer of Judgment Rules for Pennsylvania,* 85 Temple L. Rev. 185 (2012).

Danielle Shelton, *Rewriting Rule 68: Realizing the Benefits of the Federal Settlement Rule by Injecting Certainty into Offers of Judgment,* 91 Minn. L. Rev. 865 (2007).

Edward F. Sherman and Christopher M. Fairman, *Interplay Between Mediation and Offer of Judgment Rule Sanctions,* 26 Ohio St. Journal on Disp. Res. 327 (2011).

125-000422

Roy D. Simon, Jr., *The Riddle of Rule 68,* 54 Geo. Wash. L. Rev. 1 (1985).

Michael Solimine and Bryan Pacheco, *State Court Regulation of Offers of Judgment and Its Lessons for Federal Practice,* 13 Ohio St. J. on Disp. Resol. 51 (1997).

Anna Aven Sumner, Note, *Is the Gummy Rule of Today Truly Better than the Toothy Rule of Tomorrow? How Federal Rule 68 Should Be Modified,* 52 Duke L. J. 1055 (2003).

Symposium

Revitalizing FRCP 68: Can Offers of Judgment Provide Adequate Incentives for Fair, Early settlement of Fee-Recovery Cases?, Symposium, 53 Mercer L. Rev., 717-856 (2006)

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TAB 8

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RULE 23 SUBCOMMITTEE REPORT

The Rule 23 Subcommittee has continued to work on the areas it identified before the Advisory Committee's October, 2014, meeting. This work has included conference calls on Dec. 17, 2014, Feb. 6, 2015, and Feb. 12, 2015. Notes on those calls should be included with these agenda materials.

The Subcommittee continues its efforts to become fully informed about pertinent issues regarding Rule 23 practice today. Besides generally keeping an eye out to identify pertinent developments and concerns, Subcommittee members have attended, and expect to attend a considerable number of events about class action practice that together should offer a broad range of views. These events include the following:

ABA 18th Class Action Institute (Chicago, Oct. 23-24, 2014).

Lawyers for Civil Justice Membership Meeting (New York, Dec. 4-5, 2014).

The Impact Fund 13th Annual Class Action Conference (Berkeley, CA, Feb. 26-27, 2015).

George Washington University Roundtable on Settlement Class Actions (Washington, D.C. April 8, 2015).

ALI discussion of Rule 23 issues (Washington, D.C., May 17, 2015).

ABA Litigation Section Meeting (San Francisco, June 19)

American Assoc. for Justice Annual Meeting (Montreal, Canada, July 11-14)

Civil Procedure Professors' Conference (Seattle, WA, July 17)

Duke Law Conference on Class-Action Settlement (Washington, D.C., July 23-24)

Defense Research Institute Conference on Class Actions (Washington, D.C., July 23-24)

Discovery Subcommittee Mini-Conference (DFW Airport, Sept. 11, 2015).

Association of American Law Schools Annual Meeting (New York, Jan. 6-10, 2016) [Participation in this event has not been arranged, but efforts are underway to make such arrangements.]

As should be apparent, the Subcommittee is trying to gather

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information from many sources as it moves forward. Its present intention is to be in a position to present drafts for possible amendments to the full Committee at its Fall 2015 meeting. If that proves possible, it may be that a preliminary discussion of those amendment ideas can be had with the Standing Committee during its January, 2016, meeting, and a final review of amendment proposals at the Advisory Committee's Spring, 2016, meeting. That schedule would permit submission of proposed preliminary drafts to the Standing Committee at its meeting in May or June of 2016, with a recommended August, 2016, date for publication for public comment. If that occurred, rule changes could go into effect as soon as Dec. 1, 2018. But it is by no means clear that this will prove to be a realistic schedule.

For the present, the key point is that **there is no assurance that the Subcommittee will ultimately recommend any amendments. In addition, although it has identified issues that presently seem to warrant serious examination, it has not closed the door on other issues. Instead, it remains open to suggestions about other issues that might justify considering a rule change, as well as suggestions that the issues it has identified are not important or are not likely to be solved by a rule change. Even if the Subcommittee does eventually recommend that the full Committee consider changes to Rule 23, the recommendations may differ from the ideas explored in this memorandum.**

The purpose of this memorandum, therefore, is to share with the full Committee the content and fruit of the Subcommittee's recent discussions. The hope is that the discussion at the full Committee meeting will illuminate the various ideas generated so far, and also call attention to additional topics that seem to justify examination by the Subcommittee.

The time has come for moving beyond purely topical discussion, however. In order to make the discussion more concrete, this memorandum presents conceptual sketches of some possible amendments, sometimes accompanied with possible Committee Note language that can provide an idea of what a Note might actually say if rule changes along the lines presented were proposed. **These conceptual sketches are not intended as initial drafts of actual rule change proposals, and should not be taken as such. By the time the Subcommittee convenes its mini-conference in September, 2015, it may be in a position to offer preliminary ideas about such drafts. But as the array of questions in this memorandum attests, it has not reached that point yet.**

The Subcommittee's work has been greatly assisted by review of the ALI Principles of Aggregate Litigation. Those Principles embody a careful study of some of the issues covered in this memorandum, and occasionally provide a starting point in analysis

of those issues, and in drafting possible rule provisions to address them.

The topics covered in this memorandum are:

(1) Settlement Approval Criteria
(2) Settlement Class Certification
(3) Cy Pres Treatment
(4) Dealing With Objectors
(5) Rule 68 Offers and Mootness
(6) Issue Classes
(7) Notice
Appendix I: Settlement Review Factors -- 2000 Draft Note
Appendix II: Prevailing Class Action Settlement Approval Factors Circuit-By-Circuit

(1) Settlement Approval Criteria

In 2003, Rule 23(e) was amended to expand its treatment of judicial review of proposed class-action settlements. To a considerable extent, those amendments built on existing case law on settlement approval. As amended in 1966, Rule 23(e) required court approval for settlement, compromise, or voluntary dismissal of a class action, but it provided essentially no direction about what the court was to do in reviewing a proposed settlement.[1]

Left to implement the rule's requirement of court approval of settlement, the courts developed criteria. To a significant extent, that case law development occurred during the first two decades after Rule 23 was revised in 1966. It produced somewhat similar, but divergent, lists of factors to be employed in different circuits. The Subcommittee has compiled a list of the factors used in the various circuits that is attached as an Appendix to this memorandum.

Several points emerge from the lists of factors. One is that, although they are similar, they are not the same. Thus, lawyers in different circuits, even when dealing with nationwide class actions, would need to attend to the particular list employed in the particular circuit. A second point is that at least some of the factors that some courts adopted in the 1970s seem not to be very pertinent to contemporary class action practice. Yet they command obeisance in the circuits that employ them even though they probably do not facilitate the court's effort to decide whether to approve a proposed settlement. A third point is that there are other matters, not included in the courts' 1970s-era lists, that contemporary experience suggests should matter in assessing settlements.

The ALI Aggregate Litigation Principles proposed a different approach, which is partly reflected in the conceptual discussion draft below. The ALI explanation for its approach was as follows:

> The current case law on the criteria for evaluating settlements is in disarray. Courts articulate a wide range of factors to consider, but rarely discuss the significance to be given to each factor, let alone why a particular factor is probative. Factors mentioned in the cases include, among others [there follows a list of about 17 factors].

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[1] From 1966 to 2003, Rule 23(e) said, in toto: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal shall be given to all members of the class in such manner as the court directs."

> Many of these criteria may have questionable probative value in various circumstances. For instance, although a court might give weight to the fact that counsel for the class or the defendant favors the settlement, the court should keep in mind that the lawyers who negotiated the settlement will rarely offer anything less than a strong favorable endorsement.

ALI Aggregate Litigation Principles § 3.05 Comment (a) at 205-06.

There are two appendices at the end of the memorandum that offer further details and ideas. Appendix I is the draft Committee Note developed early in the evolution of Rule 23(e) amendments in 2000-02. It offers a list of factors that might be added to a rule revision, or to a Committee Note. The approach of the conceptual draft of the rule amendment idea below, however, trains more on reducing the focus to four specified considerations that seem to be key to approval, adding authority to decline approval based on other considerations even if positive findings can be made on these four topics.

Appendix II offers a review of the current "approval factors" in the various circuits, plus additional information about the California courts' standards for approving settlements and the ALI Principles approach.

As Committee members consider this conceptual draft and the alternative details in Appendix I and Appendix II, one way of approaching the topic is to ask whether adopting a rule like this would provide important benefits. Balanced against that prospect is the likelihood that amending the rule would also produce a period of uncertainty, particularly if it supersedes current prevailing case law in various circuits. At the same time, it may focus attention for courts, counsel, and even objectors, on matters that are more important than other topics included on some courts' lists of settlement-approval factors.

Conceptual Discussion Draft of Rule 23(e)
Amendment Idea

1 **(e) Settlement, Voluntary Dismissal, or Compromise.** The claims,
2 issues, or defenses of a certified class may be settled,
3 voluntarily dismissed, or compromised only with the court's
4 approval. The following procedures apply to a proposed
5 settlement, voluntary dismissal, or compromise:
6
7 * * * * *
8
9 **(2)** If the proposal would bind class members,
10

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Alternative 1

(A) the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate. The court may make this finding only on finding that:

Alternative 2

(A) the court may approve it only after a hearing and on finding that: ~~it is fair, reasonable, and adequate.~~

(i) the class representatives and class counsel have been and currently are adequately representing the class;

(ii) the relief awarded to the class (taking into account any ancillary agreement that may be part of the settlement) is fair, reasonable, and adequate given the costs, risks, probability of success, and delays of trial and appeal;

(iii) class members are treated equitably (relative to each other) based on their facts and circumstances and are not disadvantaged by the settlement considered as a whole; and

(iv) the settlement was negotiated at arm's length and was not the product of collusion.

(B) The court may also consider any other matter pertinent to approval of the proposal, and may refuse to approve it on any such ground.

Conceptual Sketch of Committee Note Ideas

In 2003, Rule 23(e) was amended to direct that a court may approve a settlement proposal in a class action only on finding that it is "fair, reasonable, and adequate." This provision was based in large measure on judicial experience with settlement review. Since 2003, the courts have gained more experience in settlement review.

Before 2003, many circuits had developed lists of "factors" that bore on whether to approve proposed class-action settlements. Although the lists in various circuits were similar, they differed on various specifics and sometimes included factors of uncertain utility in evaluating proposed

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settlements. The divergence among the lists adopted in various circuits could sometimes cause difficulties for counsel or courts.

This rule is designed to supersede the lists of factors adopted in various circuits with a uniform set of core factors[2] that the court must find satisfied before approving the proposal. Rule 23(e)(2)(A) makes it clear that the court must affirmatively find all four of the enumerated factors satisfied before it may approve the proposal.

But this is not a closed list; under Rule 23(e)(2)(B) the court may consider any matter pertinent to evaluating the fairness of the proposed settlement.[3] The rule makes it clear that the court may disapprove the proposal on such a ground even though it can make the four findings required by Rule 23(e)(2)(A). Some factors that have sometimes been identified as pertinent seem ordinarily not to be, however. For example, the fact that counsel for the class and the class opponent support the proposal would ordinarily not provide significant support for a court's approval of the proposal. Somewhat similarly, particularly in cases involving relatively small individual relief for class members, the fact the court has received only a small number of objections may not provide significant support for a finding the settlement is fair.[4]

[Before notice is sent to the class under Rule 23(e)(1), the court should make a preliminary evaluation of the proposal. If it is not persuaded that the proposal provides a substantial basis for possible approval, the court may decline to order notice. But a decision to order notice should not be treated as a "preliminary approval" of the proposal, for the required findings and the decision to approve a proposal must not be made until objections are evaluated and the hearing on the proposal occurs.][5]

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[2] Is this really accurate? The rule permits the court to refer to "any other matter pertinent to approval of the proposal." Should the point be to offer evaluations of factors endorsed in the past by some courts? See Appendix II regarding the factors presently employed in various circuits.

[3] It might be that a much more extensive discussion of other factors could be added here, along the lines of the material in Appendix I.

[4] Is this discussion of "suspect" factors sufficient?

[5] This paragraph attempts to introduce something endorsed by the ALI Principles -- that preliminary authorization for notice to the class not become "preliminary approval." Whether

48 The first factor calls for a finding that the class
49 representatives and class counsel have provided adequate
50 representation. This factor looks to their entire performance in
51 relation to the action. One issue that may be important in some
52 cases is whether, under the settlement, the class representatives
53 are to receive additional compensation for their efforts.[6]
54 Another may in some instances be the amount of any fee for class
55 counsel contemplated by the proposed settlement.[7] In some
56 instances, the court has already appointed class counsel under
57 Rule 23(g).[8] The court would then need only review the

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saying so is desirable could be debated. Whether saying so in the Note is sufficient if saying so is desirable could also be debated. One could, for example, consider revising Rule 23(e)(1) along the following lines:

> **(1)** The court must, after finding that giving notice is warranted by the terms of the proposed settlement, direct notice in a reasonable manner to all class members who would be bound by the proposal.

[6] This factor seems worth mentioning, but perhaps it should not be singled out. It could cut either way. In a small-claim case, it might be sensible to provide reasonable additional compensation for the representative, who otherwise might have had to do considerable work for no additional compensation. The better the "bonus" corresponds to efforts expended by the representation working on the case, the stronger this factor may favor the settlement. The more the amount of compensation reflects some sort of "formula" or set amount unrelated to effort from the representative, the more it may call the fairness of the settlement into question. When the individual recovery is small and the incentive bonus for the class representatives is large, that may, standing alone, raise questions about the settlement, given that the class representatives may have much to lose if the settlement is not approved but little to gain if the case goes to trial and the class recovers many times what the settlement provides.

[7] This factor also seems worth mentioning in the Note. Presumably an agreement that says the court will set the attorney fee, and nothing more, raises fewer concerns than one that says the defendant will not oppose a fee up to $*X*. But the amount of the fee is often included in the Rule 23(e) notice of proposed settlement so that an additional notice is not mandated by Rule 23(h)(1).

[8] This would include the appointment of "interim counsel" under Rule 23(g)(3), and that fact could be mentioned in the Note if it were considered desirable to do so.

performance of counsel since that time. In making this determination about the performance of class counsel in connection with the negotiation of the proposal, the court should be as exacting as Rule 23(g) requires for appointment of class counsel.

The second factor calls for the court to assess the relief awarded to the class under the proposed settlement in light of a variety of practical matters that bear on whether it is adequate. In connection with this factor, it may often be important for counsel to provide guidance to the court about how these considerations apply to the present action. For example, the prospects for success on the merits, and the likely dimensions of that success, should be evaluated. It may also be important for the court to attend to the degree of development of the case to determine whether the existing record affords a sufficient basis for evaluation of these factors. There is no "minimum" amount of discovery, or other work, that must be done before the parties reach a proposed settlement, but the court may seek assurance that it has a firm foundation for assessing the considerations listed in the second factor.[9]

The third factor requires the court to find that the proposed method of allocating the benefits of the settlement among members of the proposed class is equitable. A pro rata distribution is not required, but the court may inquire into the proposed method for allocating the benefits of the settlement among members of the class. [It is possible that this inquiry may suggest the need for subclassing.][10]

The fourth factor partly reinforces the first factor, and may take account of any agreements identified pursuant to Rule 23(e)(3). The court should pay close attention to specifics about the manner and content of negotiation of the proposed settlement. Any "side agreements" that emerged from the negotiations deserve scrutiny. These inquiries may shed light on the second and third factors as well.

Any other factors that are pertinent to whether to approve the proposed settlement deserve attention in the settlement-

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[9] This paragraph attempts to invite appropriate judicial scrutiny of the possible risks of a cheap "early bird" settlement, but also to ward off arguments that no settlement can be approved until considerable "merits" discovery has occurred, or something of the sort.

[10] Is this bracketed language a desirable thing to include in the Note? The point seems obvious in some ways, but the consequences of subclassing may be to delay, or perhaps derail, a settlement.

review process. The variety of factors that might bear on a given proposed settlement is too large for enumeration in a rule, although some that have been mentioned by some courts -- such as support from the counsel who negotiated the settlement -- would ordinarily not be entitled to much weight.

This rule provides guidance not only for the court, but also for counsel supporting a proposed settlement and for objectors to a proposed settlement. [The burden of supporting the proposed settlement falls initially on the proponents of the proposal. As noted above, the court's initial decision that notice to the class was warranted under Rule 23(e)(1) does not itself constitute a "preliminary" approval of the proposal's terms.][11]

[As noted in Rule 23(e)(4) regarding provision of a second opt-out right, the court may decline to approve a proposed settlement unless it is modified in certain particulars. But it may not "approve" a settlement significantly different from the one proposed by the parties. Modification of the proposed settlement may make it necessary to give notice the class again pursuant to Rule 23(e)(1) to permit class members to offer any further objections they may have, or (if the modifications increase significantly the benefits to class members) for class members who opted out to opt back into the class.][12] [13]

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[11] This language about the burden of supporting the settlement seems implicit in the rule, and corresponds to language in ALI § 3.05(c).

[12] This paragraph pursues suggestions in ALI § 3.05(e). Are these ideas worthy of inclusion in the Note?

[13] The above sketch of a draft Note says little about the claims process. It may be that more should be said. ALI § 3.05 comment (f) urges that, when feasible, courts avoid the need for submission of claims, and suggests that direct distributions are usually possible when the settling party has reasonably up-to-date and accurate records. This suggestion is not obviously tied to any black letter provision.

The whole problem of claims processing may deserve attention. It is not currently the focus of any rule provisions. It may relate to the cy pres phenomenon discussed in part (3) below. If defendant gets back any residue of the settlement funds, it may have an incentive to make the claims procedure long and difficult. Keeping an eye on that sort of thing is a valid consideration for the court when it passes on the fairness of the settlement. In addition, in terms of valuing the settlement for the class as part of the attorneys' fee decision, the rate of actual claiming may be an important criterion. Cf. 28 U.S.C. § 1712(a) (requiring, in "coupon settlement" cases, that the focus

(2) Settlement Class Certification

The Committee is not writing on a blank slate in addressing this possibility. In 1996, it published a proposal to adopt a new Rule 23(b)(4) explicitly authorizing certification for settlement purposes, under Rule 23(b)(3) only, in cases that might not qualify for certification for litigation purposes. This history may be very familiar to some members of the Committee, but for some it may have receded from view. In order to provide that background, the 1996 rule proposal and accompanying Committee Note are set out. In addition, footnotes call attention to developments since then and contemporary issues that seem relevant to the matter currently before the Committee.

1 **(b) Types of Class Actions.** A class action may be
2 maintained if Rule 23(a) is satisfied and if:
3
4 * * * * *
5
6
7 <u>(4) the parties to a settlement request certification</u>
8 <u>under subdivision (b)(3) for purposes of settlement,</u>
9 <u>even though the requirements of subdivision (b)(3)</u>
<u>might not be met for purposes of trial.</u>

* * * * *

The draft Committee Note that accompanied that proposal was as follows (with some footnotes to mention issues presented by doing the same thing as before).

1 Subdivision (b)(4) is new. It permits certification of

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in setting attorney fees be on "the value to class members of the coupons that are redeemed"). If there is a way to avoid the entire effort of claims submission and review, that might solve a number of problems that have plagued some cases in the past.

At the same time, a "streamlined" claims payment procedure may benefit some class members at the expense of others. A more particularized claims process might differentiate between class members in terms of their actual injuries in ways not readily achievable using only the defendant's records.

Altogether, these issues present challenges. Whether they are suitable topics for a rule provision is another matter. Up until now, they have largely been regarded as matters of judicial management rather than things to be addressed by rule. See Manual for Complex Litigation (4th) § 21.66 (regarding settlement administration).

a class under subdivision (b)(3) for settlement purposes, even though the same class might not be certified for trial. Many courts have adopted the practice reflected in this new provision. See, e.g., Weinberger v. Kendrick, 698 F.2d 61, 72-73 (2d Cir.1982); In re Beef Industry Antitrust Litigation, 607 F.2d 167, 170-71, 173-78 (5th Cir.1979). Some very recent decisions, however, have stated that a class cannot be certified for settlement purposes unless the same class would be certified for trial purposes. See Georgine v. Amchem Products, Inc., 83 F.3d 610 (3d Cir.1996); In re General Motors Corp. Pick-Up Trick Fuel Tank Litigation, 55 F.3d 768 (3d Cir. 1995). This amendment is designed to resolve this newly apparent disagreement.[14]

Although subdivision (b)(4) is formally separate, any class certified under its terms is a (b)(3) class with all the incidents of a (b)(3) class, including the subdivision (c)(2) rights to notice and to request exclusion from the class. Subdivision (b)(4) does not speak to the question whether a settlement class may be certified under subdivisions (b)(1) or (b)(2).[15] As with all parts of subdivision (b), all of the prerequisites of subdivision (a) must be satisfied to support certification of a (b)(4) settlement class.[16] In addition, the predominance and superiority requirements of subdivision (b)(3) must be

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[14] Obviously resolving that 1996 circuit conflict is no longer necessary given the Amchem decision; the issue now is whether to modify what Amchem said or implied.

[15] Deleting the limitation to (b)(3) classes would speak to that question. In speaking to it, one could urge that, at least where there really is "indivisible" relief sought, it does seem that a settlement class should be possible. Perhaps a police practices suit would be an example. Could the SDNY stop-and-frisk class action have been resolved as a settlement class action? It may be that using a class action would be essential to avoid standing issues. See City of Los Angeles v. Lyons, 461 U.S. 95 (1983) (holding that plaintiff injured by police use of choke-hold could sue for damages, but not for an injunction because he could not show it would likely be used on him again). Issues of class definition, and particularly ascertainability, may present challenges in such cases. But it may be that recognizing that settlements are available options in such cases as to future conduct is desirable. It is worth noting that Rule 23 currently has no requirement of notice of any sort to the class in (b)(2) actions unless they are settled.

[16] On this score, the application of (a)(2) in Wal-Mart Stores, Inc. v. Dukes may be of particular importance.

27 satisfied.[17] Subdivision (b)(4) serves only to make it
28 clear that implementation of the factors that control
29 certification of a (b)(3) class is affected by the many
30 differences between settlement and litigation of class
31 claims or defenses. Choice-of-law difficulties, for
32 example, may force certification of many subclasses, or even
33 defeat any class certification, if claims are to be
34 litigated.[18] Settlement can be reached, however, on terms
35 that surmount such difficulties. Many other elements are
36 affected as well. A single court may be able to manage
37 settlement when litigants would require resort to many
38 courts. And, perhaps most important, settlement may prove
39 far superior to litigation in devising comprehensive
40 solutions to large-scale problems that defy ready
41 disposition by traditional adversary litigation.[19]
42 Important benefits may be provided for those who, knowing of
43 the class settlement and the opportunity to opt out, prefer
44 to participate in the class judgment and avoid the costs of
45 individual litigation.
46
47 For all the potential benefits, settlement classes also
48 pose special risks. The court's Rule 23(e) obligations to
49 review and approve a class settlement commonly must surmount
50 the information difficulties that arise when the major
51 adversaries join forces as proponents of their settlement

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[17] This sentence was written before Amchem was decided; the Supreme Court fairly clearly said that predominance remained important, but that manageability (a factor in making both the predominance and superiority decision) did not. Whether to continue to require predominance to be established in (b)(4) class actions is open to discussion and raised by an alternative possible rule change explored below in text.

[18] Choice-of-law challenges might be precisely the sort of thing that could preclude settlement certification under a strong view of the predominance requirement. As Sullivan v. DB Investment suggests, differing state law may be accommodated in the settlement context.

[19] Arguably there is a principled tension among the courts of appeal that is pertinent to this point. The Third Circuit has said several times that class-action settlements are desirable to achieve a nationwide solution to a problem. The Seventh Circuit, on the other hand, has on one occasion at least said that "the vision of 'efficiency' underlying this class certification is the model of the central planner. * * * The central planning model -- one case, one court, one set of rules, one settlement price for all involved -- suppresses information that is vital to accurate resolution." In re Bridgestone/Firestone, 288 F.3d 1012, 1020 (7th Cir.2002).

52 agreement.[20] Objectors frequently appear to reduce these
53 difficulties, but it may be difficult for objectors to
54 obtain the information required for a fully informed
55 challenge. The reassurance provided by official
56 adjudication is missing. These difficulties may seem
57 especially troubling if the class would not have been
58 certified for litigation, or was shaped by a settlement
59 agreement worked out even before the action was filed.
60
61 These competing forces are reconciled by recognizing
62 the legitimacy of settlement classes but increasing the
63 protections afforded to class members. Certification of a
64 settlement class under (b)(4) is authorized only on request
65 of parties who have reached a settlement. Certification is
66 not authorized simply to assist parties who are interested
67 in exploring settlement, not even when they represent that
68 they are close to agreement and that clear definition of a
69 class would facilitate final agreement.[21] Certification
70 before settlement might exert untoward pressure to reach
71 agreement, and might increase the risk that the
72 certification could be transformed into certification of a

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[20] It should be noted that when this draft Note was written Rule 23(e) was relatively featureless, directing only that court approval was required for dismissal. In 2003, it was augmented with many specifics, and part (1) of this memorandum offers a proposal to refine and focus those specifics.

[21] Note that, as added in 2003, Rule 23(g)(3) authorizes appointment of interim class counsel, a measure that may enable the court to exercise some control over the cast authorized to negotiate a proposed class settlement in the pre-certification phase of the litigation. The Committee Note accompanying this rule addition in 2003 explained:

> Settlement may be discussed before certification. Ordinarily, such work is handled by the lawyer who filed the action. In some cases, however, there may be rivalry or uncertainty that makes formal designation of interim counsel appropriate. [The new rule provision] authorizes the court to designate interim counsel to act on behalf of the putative class before the certification decision is made. Failure to make the formal designation does not prevent the attorney who filed the action from proceeding in it. Whether or not formally designated interim counsel, an attorney who acts on behalf of the class before certification must act in the best interests of the class as a whole. For example, an attorney who negotiates a pre-certification settlement must seek a settlement that is fair, reasonable, and adequate for the class.

trial class without adequate reconsideration.[22] These protections cannot be circumvented by attempting to certify a settlement class directly under subdivision (b)(3) without regard to the limits imposed by (b)(4).

Notice and the right to opt out provide the central means of protecting settlement class members under subdivision (b)(3),[23] but the court also must take particular care in applying some of Rule 23's requirements. As to notice, the Federal Judicial Center study suggests that notices of settlement do not always provide the clear and succinct information that must be provided to support meaningful decisions whether to object to the settlement or -- if the class is certified under subdivision (b)(3) -- whether to request exclusion.[24] One of the most important contributions a court can make is to ensure that the notice fairly describes the litigation and the terms of the settlement. Definition of the class also must be approached with care, lest the attractions of settlement lead too easily to an over-broad definition. Particular care should be taken to ensure that there are not disabling conflicts of interests among people who are urged to form a single class. If the case presents facts or law that are unsettled and that are likely to be litigated in individual actions, it may be better to postpone any class certification until experience with individual actions yields sufficient information to support a wise settlement and effective review of the settlement.

Conceptual Draft of 23(e) Amendment Idea

The animating objective of the conceptual draft below is to place primary reliance on superiority and the invigorated settlement review (introduced in part (1) of this memorandum) to assure fairness in the settlement context, and therefore to remove emphasis on predominance when settlement certification is

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[22] This comment seems designed to make the point in ALI § 3.06(d) -- that statements made in support of settlement class certification should not be used against a party that favored such certification but later opposes litigation certification. Perhaps that asks too much of the judge.

[23] Needless to say, this comment is not applicable to (b)(1) or (b)(2) certification, if those were included in (b)(4). It could be noted that 23(e) requires notice (but not opt out) in such cases.

[24] Note that, as amended in 2003, Rule 23(c)(2)(B) responds to the sorts of concerns that were raised by the FJC study.

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under consideration.

An underlying question is whether such an approach should be limited to (b)(3) class actions. There may be much reason to include (b)(2) class actions in (b)(4) but perhaps less reason to include (b)(1) cases.

Another question is whether it should be required that in any case seeking certification for purposes of settlement under (b)(4) the parties demonstrate that all requirements of Rule 23(a) are satisfied. Arguably, some of those -- typicality, for example -- don't matter much at the settlement stage. Concern that the past criminal history of the class representative might come into evidence at trial (assuming that makes the representative atypical) may not matter then. On the other hand, introducing a new set of "similar" criteria that are different could produce difficulties. This conceptual draft therefore offers an Alternative 2 that does not invoke Rule 23(a), but the discussion focuses on Alternative 1, which does invoke the existing rule. If the Alternative 2 approach is later preferred, adjustments could be made.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

* * * * * *

Alternative 1

(4) the parties to a settlement [in an action to be certified under subdivision (b)(3),] request certification and the court finds that the action satisfies Rule 23(a), that the proposed settlement is superior to other available methods for fairly and efficiently adjudicating the controversy, and that it should be approved under Rule 23(e).

Alternative 2

(4) the parties to a settlement [in an action to be certified under subdivision (b)(3),] request certification and the court finds that significant common issues exist, that the class is sufficiently numerous to warrant classwide treatment, and that the class definition is sufficient to ascertain who is and who is not included in the class. The court may then grant class certification if the proposed settlement is superior to other available methods for fairly and efficiently adjudicating the controversy, and that it

should be approved under Rule 23(e).[25]

This approach seems clearly contrary to Amchem, which said that Rule 23(e) review of a settlement was not a substitute for rigorous application of the criteria of 23(a) and (b). It also may appear to invite the sort of "grand compensation scheme" quasi-legislative action by courts that the Court appeared to disavow in Amchem. Particularly if this authority were extended beyond (b)(3),[26] and a right to opt out were not required, this approach seems very aggressive. Below are some thoughts about the sorts of things that might be included in a sketch of a draft Committee Note.

Sketch of Draft Committee Note ideas
[Limited to Alternative 1]

Subdivision (b)(4) is new. In 1996, a proposed new subdivision (b)(4) was published for public comment. That new subdivision would have authorized certification of a (b)(3) class for settlement in certain circumstances in which certification for full litigation would not be possible. One stimulus for that amendment proposal was the existence of a conflict among the courts of appeals about whether settlement certification could be used only in cases that could be certified for full litigation. That circuit conflict was resolved by the holding in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), that the fact of settlement is relevant to class certification. The (b)(4)

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[25] ALI § 3.06(b) says that "a court may approve a settlement class if it finds that the settlement satisfies the criteria of [Rule 23(e)], and it further finds that (1) significant common issues exist; (2) the class is sufficiently numerous to warrant classwide treatment, and (3) the class definition is sufficient to ascertain who is and who is not included in the class. The court need not conclude that common issues predominate over individual issues."

[26] On this score, note that ALI § 3.06(c) said:

> In addition to satisfying the requirements of subsection (b) of this Section [quoted in a footnote above], in cases seeking settlement certification of a mandatory class, the proponents of the settlement must also establish that the claims subject to settlement involve indivisible remedies, as defined in the Comment to § 2.04.

Needless to say, "indivisible remedies" is not a term used in the civil rules. Attempting to define them, or some alternative term, might be challenging. § 2.04 has three subsections, and is accompanied by six pages of comments and six pages of Reporters' Notes.

amendment proposal was not pursued after that decision.

Rule 23(f), also in the package of amendment proposals published for comment in 1996, was adopted and went into effect in 1998. As a consequence of that addition to the rule, a considerable body of appellate precedent on class-certification principles has developed. In 2003, Rule 23(e) was amended to clarify and fortify the standards for review of class settlements, and subdivisions (g) and (h) were added to the rule to govern the appointment of class counsel, including interim class counsel, and attorney fees for class counsel. These developments have provided added focus for the court's handling of the settlement-approval process under Rule 23(e).

Concerns have emerged about whether it might sometimes be too difficult to obtain certification solely for purposes of settlement. Some reported that alternatives such as multidistrict processing or proceeding in state courts have grown in popularity to achieve resolution of multiple claims.

This amendment is designed to respond to those concerns by clarifying and, in some instances, easing the path to certification for purposes of settlement. Like the 1996 proposal, this subdivision is available only after the parties have reached a proposed settlement and presented it to the court. Before that time, the court may, under Rule 23(g)(3), appoint interim counsel to represent the interests of the putative class.

[Subdivision (b)(4) is not limited to Rule 23(b)(3) class actions. It is likely that actions brought under subdivision (b)(3) will be the ones in which it is employed most frequently, but foreclosing pre-certification settlement in actions brought under subdivisions (b)(1) or (b)(2) seems unwarranted. At the same time, it must be recognized that approving a class-action settlement is a challenging task for a court in any class action. Amendments to Rule 23(e) clarify the task of the judge and the role of the parties in connection with review of a proposed settlement.[27]]

Like all class actions, an action certified under subdivision (b)(4) must satisfy the requirements of Rule 23(a).[28]

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[27] This treatment may be far too spare. Note that the ALI proposal limited the use of "mandatory class action" settlement to cases involving "indivisible relief," a term that is not presently included in the civil rules and that the ALI spent considerable effort defining.

[28] This is a point at which Alternative 2, modeled on the ALI approach, would produce different Committee Note language. Arguments could be made that Wal-Mart Stores, Inc. v. Dukes has

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53 Unless these basic requirements can be satisfied, a class
54 settlement should not be authorized.
55
56 Increasing confidence in the ability of courts to evaluate
57 proposed settlements, and tools available to them for doing so,
58 provide important support for the addition of subdivision (b)(4).
59 For that reason, the subdivision makes the court's conclusion
60 under Rule 23(e) an essential component to settlement class
61 certification. Under amended Rule 23(e), the court can make the
62 required findings to approve a settlement only after completion
63 of the full Rule 23(e) settlement-review process. Given the
64 added confidence in settlement review afforded by strengthening
65 Rule 23(e), the Committee is comfortable with reduced emphasis on
66 some provisions of Rule 23(a) and (b).[29]
67
68 Subdivision (b)(4) also borrows a factor from subdivision
69 (b)(3) as a prerequisite for settlement certification -- that the
70 court must also find that resolution through a class-action
71 settlement is superior to other available methods for fairly and
72 efficiently adjudicating the controversy. Unless that finding
73 can be made, there seems no reason for the court or the parties
74 to undertake the responsibilities involved in a class action.
75
76 Subdivision (b)(4) does not require, however, that common
77 questions predominate in the action. To a significant extent,
78 the predominance requirement, like manageability, focuses on
79 difficulties that would hamper the court's ability to hold a fair
80 trial of the action. But certification under subdivision (b)(4)
81 assumes that there will be no trial. Subdivision (b)(4) is
82 available only in cases that satisfy the common-question
83 requirements of Rule 23(a)(2), which ensure commonality needed
84 for classwide fairness. Since the Supreme Court's decision in
85 Amchem, the courts have struggled to determine how predominance
86 should be approached as a factor in the settlement context. This
87 amendment recognizes that it does not have a productive role to
88 play and removes it.[30]

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raised the bar under Rule 23(a)(2) too high. The ALI approach is to say that "significant common issues" are presented. See ALI § 3.06(b).

[29] Without exactly saying so, this sentence is meant to counter the assertion in Amchem that Rule 23(e) is an additional factor, not a superseding consideration, when settlement certification is proposed.

[30] This material attempts to address Amchem's assertion that superiority continues to be important. Is it persuasive? If so, should the Note say that it is changing what the Supreme Court said in Amchem, perhaps by citing the passage in the decision where the court discussed superiority?

Settlement certification also requires that the court conclude that the class representatives are typical and adequate under Rule 23(a)(3) and (4).[31] Under amended Rule 23(e), the court must also find that the settlement proposal was negotiated at arms length by persons who adequately represented the class interests, and that it provides fair and adequate relief to class members, treating them equitably.

In sum, together with changes to Rule 23(e), subdivision (b)(4) ensures that the court will give appropriate attention to adequacy of representation and the fair treatment of class members relative to each other and the potential value of their claims. At the same time, it avoids the risk that a desirable settlement will prove impossible due to factors that matter only to a hypothetical trial scenario that the settlement is designed to avoid.

[Should the court conclude that certification under subdivision (b)(4) is not warranted -- because the proposed settlement cannot be approved under subdivision (e) or because the requirements of Rule 23(a) or superiority are not met -- the court should not rely on the parties' statements in connection with proposed (b)(4) certification in relation to later class certification or merits litigation.][32]

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[31] As at other points, adopting Alternative 2 would change this.

[32] The ALI Principles include such a provision in the rule. This suggests a comment the Note. The ALI provision seems to have been prompted by one 2004 Seventh Circuit decision, Carnegie v. Household Int'l, Inc., 376 F.3d 656, 660 (7th Cir. 2004). Carnegie was a rather remarkable case. It first came to the Seventh Circuit in Reynolds v. Beneficial National Bank, 288 F.3d 277 (7th Cir. 2002), after the district judge granted settlement class certification and, on the strength of that, enjoined litigation in various state courts against the same defendants on behalf of statewide classes. The Court of Appeals reversed approval of the proposed settlement in the federal court, "concerned that the settlement might have been the product of collusion between the defendants, eager to minimize their liability, and the class lawyers, eager to maximize their fees." 376 F.3d at 659.

The Court of Appeals (under its Local Rule 36), then directed that the case be assigned on remand to a different judge, and the new judge approved the substitution of a new class representative (seemingly an objector the first time around) and appointed new class counsel. This new judge later certified a litigation class very similar to the settlement class originally certified. Defendants appealed that class-certification

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(3) Cy pres

The development of cy pres provisions in settlements has not depended meaningfully on any precise provisions of Rule 23. The situations in which this sort of arrangement might be desired probably differ from one another. Several come to mind:

(1) Specific individual claimants cannot be identified but

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decision, objecting that the new judge had improperly directed the defendants initially to state their objections to litigation certification, thereby imposing on them the burden of proving that certification was not justified instead of making plaintiff justify certification. The Seventh Circuit rejected this argument because the new judge "was explicit that the burden of persuasion on the validity of the objections [to certification] would remain on the plaintiffs." 376 F.3d at 662.

The Court of Appeals also invoked the doctrine of judicial estoppel, which it explained involved an "antifraud policy" that precluded defendants "from challenging [the class's] adequacy, at least as a settlement class," noting that "the defendants benefitted from the temporary approval of the settlement, which they used to enjoin the other * * * litigation against them." Id. at 660. At the same time, the court acknowledged "that a class might be suitable for settlement but not for litigation." It added comments about the concern that its ruling might chill class-action settlement negotiations (id. at 663):

> The defendants tell us that anything that makes it easier for a settlement class to molt into a litigation class will discourage the settlement of class actions. * * * * But the defendants in this case were perfectly free to defend against certification; they just didn't put up a persuasive defense.

Whether this decision poses a significant problem is debatable. The situation seems distinctive, if not unique. The value of a rule provision concerning the "binding" effect of defendants' support for certification for settlement, or even a comment in the Note is therefore also debatable. In any event, it might not prevent a state court from doing what it says should not be done. Recall that in the original Reynolds appeal (described above), there was an injunction against state-court litigation. Whether a federal rule can prevent a state court from giving weight to these sorts of matters is an interesting issue. As a general matter, this subject reminds us of other provisions about the preclusive effect of class-certification rulings or to decisions disapproving a proposed class settlement. That has been an intriguing prospect in the past, but one the Advisory Committee has not followed.

measures to "compensate" them can be devised. The famous California case of Daar v. Yellow Cab, 433 P.2d 732 (Cal. 1967), is the prototype of this sort of thing -- because the Yellow Cab meters had been set too high in L.A. for a period of time, the class action resolution required that the Yellow Cab meters be set a similar amount too low for a similar period, thereby conferring a relatively offsetting benefit on more or less the same group of people, people who used Yellow Cabs in L.A. (Note that competing cab companies in this pre-Uber era may not have liked the possibility that customers would favor Yellow Cab cabs because they would be cheaper.)

(2) Individual claimants could be identified, but the cost of identifying them and delivering money to them would exceed the amount of money to be delivered.

(3) A residue is left after the claims process is completed, and the settlement does not provide that the residue must be returned to the defendant. (If it does provide for return to the defendant, there may be an incentive for the defendant to introduce extremely rigorous criteria class members have to satisfy to make claims successfully.)

Whether all these kinds of situations (and others that come to mind) should be treated the same is not certain. In some places state law may actually address such things. See Cal. Code Civ. Proc. § 384, which contains specific directions to California judges about residual funds left after payments to class members.

Much concern has been expressed in several quarters about questionable use of cy pres provisions, and the courts' role in approving those arrangements under Rule 23. Most notable is the Chief Justice's statement regarding denial of certiorari in Marek v. Lane, 134 S.Ct. 8 (2013) that the Court "may need to clarify the limits on the use of such remedies." Id. at 9. That case involved challenges to provisions in a settlement of a class action against Facebook alleging privacy claims.

§3.07 of the ALI Principles directly addresses cy pres in a manner that several courts of appeals have found useful. One might argue that the courts' adoption of §3.07 makes a rule change unnecessary. On the other hand, the piecemeal adoption by courts of the ALI provision seems a dubious substitute, and it may be wise to have in mind the Chief Justice's suggestion that the Supreme Court may need to take a case to announce rules for the subject.

The ALI provision could be a model for additions to Rule 23(e):

12b-000449

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

* * * * *

(3) The court may approve a proposal that includes a cy pres remedy [if authorized by law][33] even if such a remedy could not be ordered in a contested case. The court must apply the following criteria in determining whether a cy pres award is appropriate:

(A) If individual class members can be identified through reasonable effort, and the distributions are sufficiently large to make individual distributions economically viable, settlement

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[33] This bracketed qualification is designed to back away from creating new authority to use cy pres measures. It is clear that some courts have been authorizing cy pres treatment. Indeed, the Eighth Circuit's recent opinion in In re BankAmerica Corp. Securities Lit., 775 F.3d 1060 (8th Cir. 2015), suggested that it is impatient with their willingness to do so. It is less clear where the authority for them to do so comes from. In some places, like California, there is statutory authority, but there are probably few statutes. It may be a form of inherent power, though that is a touchy subject. Adding a phrase of this sort is designed to make clear that the authority does not come from this rule.

On the other hand, one might say that the inclusion of cy pres provisions in the settlement agreement is entirely a matter of party agreement and not an exercise of judicial power. But one might respond that the binding effect of a settlement class action judgment is dependent on the exercise of judicial power, and that the court has a considerable responsibility to ensure the appropriateness of that arrangement before backing it up with judicial power. So the rule would guide the court in its exercise of that judicial power.

In any event, it may be that there is not need to say "if authorized by law" in the rule because -- like many other agreements included in settlements -- cy pres provisions do not depend on such legal authorization, even if their binding effect does depend on the court's entry of a judgment.

19 proceeds must[34] be distributed directly to
20 individual class members;
21
22 **(B)** If the proposal involves individual distributions
23 to class members and funds remain after
24 distributions, the settlement must provide for
25 further distributions to participating class
26 members unless the amounts involved are too small
27 to make individual distributions economically
28 viable or other specific reasons exist that would
29 make such further distributions impossible or
30 unfair;
31
32 **(C)** The proposal may provide that, if the court finds
33 that individual distributions are not viable under
34 Rule 23(e)(3)(A) or (B), a cy pres approach may be
35 employed if it directs payment to a recipient
36 whose interests reasonably approximate those being
37 pursued by the class. [The court may presume that
38 individual distributions are not viable for sums
39 of less than $100.][35] [If no such recipient can
40 be identified, the court may approve payment to a
41 recipient whose interests do not reasonably
42 approximate the interests being pursued by the
43 class if such payment would serve the public
44 interest.][36]

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[34] The ALI uses "should," but "must" seems more appropriate.

[35] There have been reports that in a significant number of cases distributions of amounts less than $100 can be accomplished. This provision is borrowed from a proposed statutory class-action model prepared by the Commissioners on Uniform State Laws. It may be that technological improvements made such an exclusion from the mandatory distribution requirements of (e)(3)(A) and (B) unnecessary.

[36] This bracketed material is drawn from the ALI proposal. It might be questioned on the ground that it goes beyond what the Enabling Act allows a rule to do. But this provision is about approving what the parties have agreed, not inventing a new "remedy" to be used in litigated actions. It may be that in some litigated actions there is a substantive law basis for a court-imposed distribution measure of the sort the bracketed language describes. Claims for disgorgement, for example, might support such a measure. Though the substantive law upon which a claim is based might, therefore, support such a measure, this provision does not seek to authorize such a remedy.

(4~~3~~) The parties seeking approval * * *

As noted above, the ALI proposal has received considerable support from courts. A recent example is In re BankAmerica Securities Litigation, 775 F.3d 1060 (8th Cir. 2015), in which the majority vigorously embraced ALI § 3.07, in part due to "the substantial history of district courts ignoring and resisting circuit court cy pres concerns and rulings in class action cases." It also resisted the conclusion that the fact those class members who had submitted claims had received everything they were entitled to receive under the settlement is the same as saying they were fully compensated, which might respond to arguments against proposed (3)(B) above that further distributions to class members who made claims should not occur if they already received the maximum they could receive pursuant to the settlement.

The possibility of Enabling Act issues should be noted, but the solution may be that this is an agreement subject to court approval under Rule 23(e), not a new "remedy" provided by the rules for litigated actions. The situation in California may be illustrative.

Cal. Code Civ. Proc. § 384 directs a California state court to direct left-over funds to groups furthering the proposes sought in the class action or to certain public interest purposes. In a federal court in California, one might confront arguments that §384 dictates how such things must be handled. Reports indicate that the federal courts in California do not regard the statute as directly applicable to cases in federal court, but that they do find it instructive as they apply Rule 23.

An argument in favor of Enabling Act authority could invoke the Supreme Court's Shady Grove decision and say that Rule 23 occupies this territory and the state law provision on cy pres treatment cannot be applied in federal court as a result. If that argument is right, it seems to provide some support for a rule that more explicitly deals with the sort of thing addressed

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Note that the Class Action Fairness Act itself has a small provision that authorizes something along this line. Thus, 28 U.S.C. § 1712(e) provides: "The court, in its discretion, may also require that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to 1 or more charitable or governmental organizations, as agreed to by the parties." This section of the statute deals with coupon settlements more generally, and not in a manner that encourages parties to use them. It is not certain whether resort to the cy pres aspect of CAFA has been attempted with any frequency.

above. But the bracketed sentence at the end of (C) might raise Enabling Act concerns. The bracketed "if authorized by law" suggestion in the draft rule above is a first cut at a way to sidestep these issues.

It may be said that the bracketed language is not necessary because this provision is only about settlement agreements. Settlement agreements can include provisions that the court could not order as a remedy in a litigated case. So there is latitude to give serious attention to adding references to cy pres treatment in the settlement-approval rule. But it can also be emphasized that the real bite behind the agreement comes from the court's judgment, not the agreement itself.

If the rule can provide such authority, should it so provide? Already quite a few federal judges have approved cy pres arrangements. Already some federal courts have approved the principles in the ALI's § 3.07, from which the first sketch above is drawn.

Despite all those unresolved issues, it may nonetheless be useful to reflect on what sorts of things a Committee Note might say:

Sketch of Draft Committee Note ideas

When a class action settlement for a payment of a specified amount is approved by the court under Rule 23(e), there is often a claims process by which class members seek their shares of the fund. In reviewing a proposed settlement, the court should focus on whether the claims process might be too demanding, deterring or leading to denial of valid claims.[37] Ideally, the entire fund provided will be used (minus reasonable administrative costs) to compensate class members in accord with the provisions of the settlement.

On occasion, however, funds are left over after all initial claims have been paid. Courts faced with such circumstances have resorted on occasion to a practice invoking principles of *cy pres* to support distribution of at least some portion of the settlement proceeds to persons or entities not included in the class. In some instances, these measures have raised legitimate

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[37] It might be attractive to be more forceful (and probably negative) somewhere about reversionary provisions. For example, the Note might say that if there is a reverter clause the court should look at the claims process very carefully to make sure that it does not impose high barriers to claiming. Probably that belongs in the general Rule 23(e) Committee Note about approving settlement proposals. It seems somewhat out of place here, even though it logically relates to the topic at hand.

concerns.

Subdivision (e)(3) recognizes and regularizes this activity. The starting point is that the settlement funds belong to the class members and do not serve as a resource for general "public interest" activities overseen or endorsed by the court.[38] Nonetheless, the possibility that there will be a residue after the settlement distribution program is completed makes provision for this possibility appropriate. Unless there is no prospect of a residue after initial payment of claims, the issue should be included in the initial settlement and evaluated by the court along with the other provisions of that proposal.[39] [If no such provision is included in the initial proposal but a residue exists after initial distribution to the class, the court may address the question at that point, but then should consider whether a further notice to the class should be ordered regarding the proposed disposition of the residue.[40]]

Subdivision (e)(3) does not create a new "remedy" for class actions. Such a remedy may be available for some sorts of claims, such as disgorgement of ill-gotten funds, but this rule does not authorize such a remedy for a litigated class action. The cy pres provision is something the parties have included in their proposal to the court, and the court is therefore called upon to decide whether to approve what the parties have agreed upon to resolve the case.

Subdivision (e)(3) provides rules that must be applied in deciding whether to approve cy pres provisions. Paragraph (A) requires that settlement funds be distributed to class members if they can be identified through reasonable effort when the

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[38] Is this too strongly worded, or too much a bit of "political" justification?

[39] Is this too strong? It seems that addressing these issues up front is desirable, and giving notice to the class about the provision for a residue is also valuable. That ties in with the idea that this is about the court's general settlement review authority, and it may prompt attention to whether the claims process is too demanding.

[40] Note that the Eighth Circuit raised the question whether, in the latter situation, there would be a need to notice the class a second time about this change in circumstances and the cy pres treatment under consideration. It seems that the better thing is to get the matter on the table at the outset, although that might make it seem that the parties expect the claims process to have faults. Probably devising a "perfect" claims process is very difficult, so a residue is not proof that the claims process was seriously flawed.

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distributions are large enough to be to make distribution economically viable. It is not up to the court to determine whether the class members are "deserving," or other recipients might be more deserving.[41] Thus, paragraph (A) makes it clear that cy pres distributions are a last resort, not a first resort.

Paragraph (B) follows up on the point in paragraph (A), and provides that even after the first distribution is completed there must be a further distribution to class members of any residue if a further distribution is economically viable. This provision applies even though class members have been paid "in full" in accordance with the settlement agreement. Settlement agreements are compromises, and a court may properly approve one that does not provide the entire relief sought by the class members through the action. Unless it is clear that class members have no plausible legal right to receive additional money, they should receive additional distributions.[42]

Paragraph (C), therefore, deals only with the rare case in which individual distributions are not viable. The court should not assume that the cost of distribution is prohibitive unless presented with evidence firmly supporting that conclusion.[43] It should take account of the possibility that electronic means may make identifying class members and distributing proceeds to them inexpensive in some cases.[44] [The rule does provide that the court may so assume for distributions of less than $100.[45]] When the court finds that individual distributions would be

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[41] This responds to an argument made in the Eight Circuit case -- that the funds distributed would be to institutional investors, who were less deserving than the legal services agencies that would benefit from the cy pres distributions.

[42] This is an effort to deal with the "paid in full" or "overcompensation" point.

[43] If we are to authorize the "only cy pres" method, what can we say about the predicate for using it? The Note language addresses cost. How about cases in which there simply is no way to identify class members? Should those fall outside this provision?

[44] This assertion is based on a hunch.

[45] Should we include such a provision? As noted above, smaller distributions are reportedly done now. Suppose a bank fee case in which the bank improperly charged thousands of account holders amounts less than $100. Assuming the bank could easily identify those account holders and the amount of improperly charged fees, why not direct that their accounts be credited?

economically infeasible, it may approve an alternative use of the settlement funds if the substitute recipient's interests "reasonably approximate those being pursued by the class." In general, that determination should be made with reference to the nature of the claim being asserted in the case. [Only if no such recipient can be identified may the court authorize distribution to another recipient, and then only if such distribution would serve the public interest.[46]]

[46] This is in brackets in the rule and the Note because, even if the parties agree and the class receives notice of the agreement, it seems a striking use of judicial power. Perhaps, as indicated above in the Note, it is mainly the result of the parties' agreement, not the court's power, which is limited to reviewing and deciding whether to approve the parties' agreement.

(4) Objectors

The behavior of some objectors has aroused considerable ire among class-action practitioners. But it is clear that objectors play a key role in the settlement-approval process. Rule 23(e)(5) says that class members may object to the proposed settlement, and Rule 23(h)(2) says they may object to the proposed attorney fee award to class counsel. Judges may come to rely on them. CAFA requires that state attorneys general (or those occupying a comparable state office) receive notice of proposed settlements, and they may be a source of useful information to the judge called upon to approve or disapprove a proposed settlement.

The current rules place some limits on objections. Rule 23(e)(5) also says that objections may be withdrawn only with the court's permission. That requirement of obtaining the court's permission was added in 2003 in hopes that it would constrain "hold ups" that some objectors allegedly used to extract tribute from the settling parties.

Proposals have been made to the Appellate Rules Committee to adopt something like the approval requirement under rule 23(e)(5) for withdrawing an appeal from district-court approval of a settlement. Since the delay occasioned by an appeal is usually longer than the period needed to review a proposed settlement at the district-court level, that sort of rule change might produce salutary results. But it might be that the district judge would be better positioned to decide whether to permit withdrawal of the appeal than the court of appeals. The Rule 23 Subcommittee intends to remain in touch with the Appellate Rules Committee on these issues as it proceeds with its attention to the civil rules.

Another set of ideas relates to requiring objectors to post a bond to appeal. In Tennille v. Western Union Co., 774 F.3d 1249 (10th Cir. 2014), the district court, relying on Fed. R. App. P. 7, entered an order requiring objectors who appealed approval of a class-action settlement to post a bond of over $1 million to cover (1) the anticipated cost of giving notice to the class a second time, (2) the cost of maintaining the settlement pending resolution of the appeals, and (3) the cost of printing and copying the supplemental record in the case (estimated at $25,000). The court of appeals ruled that the only costs for which a bond could be required under Appellate Rule 7 were those that could be imposed under a statute or rule, so the first two categories were entirely out, and the third category was possible, but that the maximum amount the appellate court could uphold would be $5,000. Other courts have occasionally imposed bond requirements. But the Subcommittee is not presently suggesting any civil rule changes on this subject.

Regarding the civil rules, it is not certain whether the adoption of the approval requirement in Rule 23(e)(5) in 2003 had a good effect in district court proceedings, although some reports indicate that it has. Two sets of ideas are under consideration. One slightly amplifies the Rule 23(e)(5) process by borrowing an idea from Rule 23(3)(2) -- that the party seeking to withdraw an objection advise the court of any "side agreements" that influenced the decision to withdraw. The other follows a suggestion in the ALI Aggregate Litigation principles for imposition of sanctions on those who make objections for improper purposes.

Adding a reporting obligation to (e)(5)

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

* * * * *

Alternative 1

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval<u>, and the parties must file a statement identifying any agreement made in connection with the withdrawal</u>.

Alternative 2

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only <u>after the filing of a statement identifying any agreement made in connection with the withdrawal, and court approval of the request to withdraw the objection</u> ~~with the court's approval~~.

If it is true that the current provision requiring court approval for withdrawing an objection does the needed job, there may be no reason to add this reporting obligation. There is at least some reason to suspect that class counsel may take the position that there is already some sort of implicit reporting obligation. Experience with the efficacy of the existing reporting provision in (e)(3) may also shed light whether adding one to (e)(5) would be desirable.

Objector sanctions

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§ 3.08(d) of the ALI Principles says:

> If the court concludes that objectors have lodged objections that are insubstantial and not reasonably advanced for the purpose of rejecting or improving the settlement, the court should consider imposing sanctions against objectors or their counsel under applicable law.

Comment c to this section says that it "envisions that sanctions will be invoked based upon existing law (e.g., Fed. R. Civ. P. 11, 28 U.S.C. § 1927)."

This proposal raises a number of questions. One idea might be to say explicitly that any objection is subject to Rule 11. That may seem a little heavy handed with lay objectors, and a statement in the class settlement notice appearing to threaten sanctions might do more harm than good. Another idea might be to indicate in a rule that § 1927 is a source of authority to impose sanctions. But that would be a peculiar rule, since it would not provide any authority but only remind the court of its statutory authority. The ALI proposal's "should consider" formulation seems along that line. It does not say the court should do it, but only that the court should think about imposing sanctions.

It seems that a provision along these lines could serve a valuable purpose. In the 2000-02 period, when the 2003 amendments were under consideration, there was much anguish about how to distinguish "good" from "bad" objectors. There is no doubt whatsoever that there are good ones, whose points assist the court and improve the settlement in many instances. But it seems very widely agreed that there are also some bad objectors who seek to profit by delaying final consummation of the deal.

Defining who is a "good" or a "bad" objector in a rule is an impossible task. But there is reason to think that judges can tell in the specific context of a given case and objection. So the goal here would be to rely on the judge's assessment of the behavior of the objector rather than attempt in a rule to specify. Discussion on this topic has only begun in the Subcommittee, but for purposes of broader airing of the issues the following conceptual draft ideas might be informative:

Alternative 1

1 **(5)** Any class member may<u>, subject to Rule 11,</u> object to the
2 proposal if it requires court approval under this
3 subdivision (3); the objection may be withdrawn only
4 with the court's approval.
5
6 *Alternative 2*
7

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8 **(5)** Any class member may object to the proposal if it
9 requires court approval under this subdivision (e); the
10 objection may be withdrawn only with the court's
11 approval. <u>If the court finds that an objector has made</u>
12 <u>objections that are insubstantial [and] {or} not</u>
13 <u>reasonably advanced for the purpose of rejecting or</u>
14 <u>improving the settlement, the court [should] {may}</u>
15 <u>impose sanctions on objectors or their counsel {under</u>
<u>applicable law}.</u>

Simply invoking Rule 11 (Alternative 1) may be simplest. But as noted above, it may also deter potential objectors too forcefully. One might debate whether the certifications of Rule 11(b) are properly applied here. Invoking Rule 11(c) in this rule might be simpler than trying to design parallel features here. On the other hand, (e)(5) says that the objector may withdraw the objection only with the court's approval while Rule 11's safe harbor provision seems not to require any court approval but instead to permit (perhaps to prompt) a unilateral withdrawal. Rule 11(c) also requires that the party who seeks Rule 11 sanctions first prepare and serve (but not file) a motion for sanctions, which might be a somewhat wasteful requirement.

Alternative 2 is more along the lines of the ALI proposal. But perhaps a provision like this one should create authority for imposing sanctions. The ALI approach seems to rely on authority from somewhere else. If the rule does not create such authority, it sounds more like an exhortation than a rule. The choice between possible verbs -- "should" or "may" -- seems to bear somewhat on this issue. To say "may" is really saying only that courts are permitted to do what the rules already say they may do; it's like a reminder. To say "should" is an exhortation. Does it supplant the "may" that appears in Rule 11? Perhaps judges are to be quicker on the draw with objectors than original parties. One could also consider saying "must," but since that was rejected for Rule 11 it would seem odd here. In any event, if the rule creates authority to impose sanctions, perhaps it should say what sanctions are authorized.

The description in Alternative 2 of the finding that the court must make to proceed to sanctions on the objector deserves attention. There is a choice between "and" and "or" regarding whether objections that are "insubstantial" were also not advanced for a legitimate purpose. Probably a judge would not distinguish between these things; if the objection is substantial, maybe it is nonetheless advanced for improper reasons. But would a judge ever think so? Does the fact of proposed withdrawal show that an objection was insubstantial? Seemingly not. Objectors often abandon objections when they get a full explanation of the details of the proposed settlement. So for them the use of "and" seems important; they withdraw the

objections when they learn more about the deal, and that shows that they were not interposing the objections for an improper purpose. Could an objector who raises substantial objections but also has an improper purpose be sanctioned? The ALI proposal does not condition sanctions on a finding that the objection is meritless. Maybe the judge will act on the objection even though the objector has tried to withdraw it.

It seems worthwhile to mention another question that might arise if sanctions on objectors were considered -- should the court consider sanctions on the parties submitting a flawed proposal to settle? If it is really a "reverse auction" type of situation -- odious to the core -- should the court be reminded that Rule 11 surely does apply to the submissions in support of the proposal? Should it at least be advised to consider replacing class counsel or the class representative or both to give effect to the adequate representation requirements of Rule 23(a)(4)?

It is obvious that much further attention will be needed to sort through the various issues raised by the sanctions possibility. For the present, the main question is whether it is worthwhile to sort through those difficult questions. The sketches above are offered only to provide a concrete focus for that discussion.

(5) Rule 68 Offers and Mootness

The problem of settlement offers made to the proposed class representative that fully satisfy the representative's claim and thereby "pick off" and moot the class action seems to exist principally in the Seventh Circuit. Outside the 7th Circuit there is little enthusiasm for "picking off" the class action with a Rule 68 offer or other sort of settlement offer. Below are three different (perhaps coordinated) ways of dealing with this problem. The first is Ed Cooper's sketch circulated on Dec. 2.

First Sketch: Rule 23 Moot
(Cooper approach)

(x) (1) When a person sues [or is sued] as a class representative, the action can be terminated by a tender of relief only if
(A) the court has denied class certification and
(B) the court finds that the tender affords complete relief on the representative's personal claim and dismisses the claim.
(2) A dismissal under Rule 23(x)(1) does not defeat the class representative's standing to appeal the order denying class certification.

Committee Note

A defendant may attempt to moot a class action before a certification ruling is made by offering full relief on the individual claims of the class representative. This ploy should not be allowed to defeat the opportunity for class relief before the court has had an opportunity to rule on class certification.

If a class is certified, it cannot be mooted by an offer that purports to be for complete class relief. The offer must be treated as an offer to settle, and settlement requires acceptance by the class representative and approval by the court under Rule 23(e).

Rule 23(x)(1) gives the court discretion to allow a tender of complete relief on the representative's claim to moot the action after a first ruling that denies class certification. The tender must be made on terms that ensure actual payment. The court may choose instead to hold the way open for certification of a class different than the one it has refused to certify, or for reconsideration of the certification decision. The court also may treat the tender of complete relief as mooting the representative's claim, but, to protect the possibility that a new representative may come forward, refuse to dismiss the action.

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25 If the court chooses to dismiss the action, the would-be
26 class representative retains standing to appeal the denial of
27 certification. [say something to explain this?]
28
29 [If we revise Rule 23(e) to require court approval of a
30 settlement, voluntary dismissal, or compromise of the representative's personal claim, we could cross-refer to that.]

Rule 68 approach

Rule 68. Offer of Judgment

* * * * *

1 **(e)** **Inapplicable in Class and Derivative Actions.** This
2 rule does not apply to class or derivative actions under Rules 23, 23.1, or 23.2.

This addition is drawn from the 1984 amendment proposal for Rule 68. See 102 F.R.D. at 433.

This might solve a substantial portion of the problem, but does not seem to get directly at the problem in the manner that the Cooper approach does. By its terms, Rule 68 does not moot anything. It may be that an offer of judgment strengthens an argument that the case is moot, because what plaintiffs seek are judgments, not promises of payment, the usual stuff of settlement offers. Those judgments do not guarantee actual payment, as the Cooper approach above seems intended to do with its tender provisions. But a Committee Note to such a rule might be a way to support the conclusion that we have accomplished the goal we want to accomplish. Here is what the 1984 Committee Note said:

> The last sentence makes it clear that the amended rule does not apply to class or derivative actions. They are excluded for the reason that acceptance of any offer would be subject to court approval, see Rules 23(e) and 23.1, and the offeree's rejection would burden a named representative-offeree with the risk of exposure to potentially heavy liability that could not be recouped from unnamed class members. The latter prospect, moreover, could lead to a conflict of interest between the named representative and other members of the class. See, Gay v.Waiters & Dairy Lunchmen's Union, Local 30, 86 F.R.D. 500 (N.D. Cal. 1980).

Alternative Approach in Rule 23

Before 2003, there was a considerable body of law that treated a case filed as a class action as subject to Rule 23(e) at least until class certification was denied. A proposed individual settlement therefore had to be submitted to the judge

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for approval before the case could be dismissed. Judges then would try to determine whether the proposed settlement seemed to involve exploiting the class-action process for the individual enrichment of the named plaintiff who was getting a sweet deal for her "individual" claim. If not, the judge would approve it. If there seemed to have been an abuse of the class-action device, the judge might order notice to the class of the proposed dismissal, so that other class members could come in and take up the litigation cudgel if they chose to do so. Failing that, the court might permit dismissal.

The requirement of Rule 23(e) review for "individual" settlements was retained in the published preliminary draft in 2003. But concerns arose after the public comment period about how the court should approach situations in which the class representative did seem to be attempting to profit personally from filing a class action. How could the court force the plaintiff to proceed if the plaintiff wanted to settle? One answer might be that plaintiff could abandon the suit, but note that "voluntary dismissal" is covered by the rule's approval requirement. Another might be that the court could sponsor or encourage some sort of recruitment effort to find another class representative. In light of these difficulties, the amendments were rewritten to apply only to claims of certified classes.

1 **(e) Settlement, Voluntary Dismissal, or Compromise.**
2
3 (1) **Before certification.** An action filed as a class
4 action may be settled, voluntarily dismissed, or
5 compromised before the court decides whether to grant
6 class-action certification only with the court's
7 approval. The [parties] {proposed class
8 representative} must file a statement identifying any
9 agreement made in connection with the proposed
10 settlement, voluntary dismissal, or compromise.
11
12 (2) **Certified class.** The claims, issues, or defenses of a
13 certified class may be settled, voluntarily dismissed,
14 or compromised only with the court's approval. The
15 following procedures apply to a proposed settlement,
16 voluntary dismissal, or compromise:
17
18 **(A~~1~~)** The court must direct notice in a reasonable
19 manner * * * * *
20
21 (3) **Settlement after denial of certification.** If the court
22 denies class-action certification, the plaintiff may
23 settle an individual claim without prejudice to seeking
24 appellate review of the court's denial of
certification.

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The Committee Note could point out that there is no required notice under proposed (e)(1). It could also note that prevailing rule before 2003 that the court should review proposed "individual" settlements. The ALI Principles endorsed such an approach:

> This Section favors the approach of requiring limited judicial oversight. The potential risks of precertification settlements or voluntary dismissals that occur without judicial scrutiny warrant a rule requiring that such settlements take effect only with prior judicial approval, after the court has had the opportunity to review the terms of the settlement, including fees paid to counsel. Indeed the very requirement of court approval may deter parties from entering into problematic precertification settlements.

ALI Principles § 3.02 comment (b).

Proposed (e)(3) seeks to do something included also in the Cooper approach above -- ensure that the proposed class representative can appeal denial of certification even after settling the individual claim. Whether something of the sort is needed is uncertain. The issues involved were the subject of considerable litigation in the semi-distant past. See, e.g., United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980); Deposit Guaranty Nat. Bank v. Roper, 445 U.S. 326 (1980); United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977). It is not presently clear whether this old law is still good law. It might also be debated whether the class representative should be allowed to appeal denial of certification. Alternatively, should class members be given notification that they can appeal? In the distant past, there were suggestions that class members should be notified when the proposed class representative entered into an individual settlement, so that they could seek to pursue the class action.

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(6) Issue Classes

A major reason for considering possible rule amendments to deal with issue classes is that there has seemed to be a split in the circuits about whether they can only be allowed if (b)(3) predominance is established. At a point in time, it appeared that the Fifth and Second Circuits were at odds on this subject. But recent reports suggest that all the circuits are coming into relative agreement that in appropriate cases Rule 23(c)(4) can be used even though full Rule 23(b)(3) certification is not possible due to the predominance requirement. If agreement has arrived, it may be that a rule amendment is not in order. But even if agreement has arrived, an amendment might be in order to permit immediate appellate review of the district court's decision of the issue on which the class was certified, before the potentially arduous task of determination of class members' entitlement to relief begins.

Clarifying that predominance is not
a prerequisite to 23(c)(4) certification

1 **(3)** the court finds that the questions of law or fact
2 common to class members predominate over any questions
3 affecting only individual members<u>, subject to Rule</u>
4 <u>23(c)(4),</u> and that a class action is superior to other
5 available methods for fairly and efficiently
6 adjudicating the controversy. The matters pertinent to
these findings include: * * * *

The goal of placement here is to say that predominance, but not superiority, is subject to Rule 23(c)(4). A Committee Note could amplify this point. It might also say that a court trying to decide whether issue certification is "appropriate" (as (c)(4) says it should decide) could consider the factors listed in (A) through (D) of (b)(3). It does not seem there would be a need to consider changing (A) through (D) in (b)(3). In 1996, draft amendments to those factors were published for public comment and, after a very large amount of public comment, not pursued further. The relation between (b)(3) and (c)(4) does not seem to warrant considering changes to the factors.

Allowing courts of appeals to review
decision of the common issues
immediately rather than only after final judgment

Because the resolution of the common issue in a class action certified under Rule 23(c)(4) is often a very important landmark in the action, and one that may lead to a great deal more effort to determine individual class members' entitlement to relief, it seems desirable to offer an avenue of immediate review. Requiring that all that additional effort be made before finding

out whether the basic ruling will be reversed may in many instances be a strong reason for granting such immediate review. But there may be a significant number of cases in which this concern is not of considerable importance.

§ 2.09(a) of the ALI Principles endorses this objective: "An opportunity for interlocutory appeal should be available with respect to * * * (2) any class-wide determination of a common issue on the merits * * * ." The ALI links this interlocutory review opportunity to review of class certification decisions (covered in ALI § 2.09(a)(1)). It seems that the logical place to insert such a provision is into Rule 23(f), building on the existing mechanism for interlocutory review of class-certification orders:

1 **(f) Appeals.** A court of appeals may permit an appeal from
2 an order granting or denying class-action certification
3 under this rule<u>, or from an order deciding an issue</u>
4 <u>with respect to which [certification was granted under</u>
5 <u>Rule 23(c)(4)] {a class action was allowed to be</u>
6 <u>maintained under Rule 23(c)(4)} [if the district court</u>
7 <u>expressly determines that there is no just reason for</u>
8 <u>delay],</u> if a petition for permission to appeal is filed
9 with the circuit clerk within 14 days after the order
is entered. * * *

The Subcommittee has only recently turned its attention to these issues; as a result the above conceptual sketch is particularly preliminary. Several choices are suggested by the use of brackets or braces around language in the draft above.

One is whether to say "certification was granted under Rule 23(c)(4)" or to stick closer to the precise language of (c)(4) -- "was allowed to be maintained under Rule 23(c)(4)." It may be that referring to "class certification" would be preferred because it ties in with the term used in the current provisions of the rule. Rule 23(b) says "may be maintained" but that terminology is not repeated in current 23(f) when addressing the decision that it may be maintained. On the other hand, it is not that decision that would be subject to review under the added provision of the rule. Instead, it is the later resolution of that issue by further proceedings in the district court.

Another choice is suggested by the bracketed language referring to district-court certification that there is no just reason for delay. That is modeled on Rule 54(b). It might be useful to intercept premature or repeated efforts to obtain appellate review with regard to issues as to which (c)(4) certification was granted. For example, could a defendant that moved for summary judgment on the common issue contend that the denial of the summary-judgment motion "decided" the issue?

Perhaps it would be desirable to endow the district court with some latitude in triggering the opportunity to seek appellate review, since a significant reason for allowing it is to avoid wasted time resolving individual claims of class members in the wake of the decision of the individual issue.

On the other hand, if the goal of the amendment is to ensure the losing party of prompt review of the decision of the common issue, it might be worrisome if the district judge's permission were required. It is not required with regard to class-certification decisions, and there may be instances in which parties contend that the district court has delayed resolution of class certification, thereby defeating their right to obtain appellate review of certification.

Lying in the background is the question whether this additional provision in Rule 23(f) would serve an actual need. As noted above, it appears that use of issue classes has become widespread. What is the experience with the "mop up" features of those cases after that common issue is resolved? Does that "mop up" activity often consume such substantial time and energy that an interlocutory appeal should be allowed to protect against waste? Are those issues straightened out relatively easily, leading to entry of a final judgment from which appeal can be taken in the normal course? Is there a risk that even a discretionary opportunity for interlocutory appeal would invite abuse? Are there cases in which the court declines to proceed with resolution of all the individual issues, preferring to allow class members to pursue them in individual litigation? If so, how is a final appealable judgment entered in such cases? If that route is taken, what notice is given to class members of the need to initiate further proceedings?

So there are many questions to be addressed in relation to this possible addition to the rules. Another might be whether it should be considered only if the amendment to Rule 23(b)(3) went forward. If it seems that amendment is not really needed because the courts have reached a consensus on whether issue classes can be certified even when (b)(3) would not permit certification with regard to the entire claim, there could still be a need for a revision to Rule 23(f) along the lines above. Answers to the questions in the previous paragraph about what happens now might inform that background question about the importance of proceeding on the 23(f) possibility.

(7) Notice

Changing the notice requirement
in (b)(3) cases

In Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), the Court observed (id. at 173-71, emphasis in original):

> Rule 23(c)(2) provides that, in any class action maintained under subdivision (b)(3), each class member shall be advised that he has the right to exclude himself from the action on request or to enter an appearance through counsel, and further that the judgment, whether favorable or not, will bind all class members who not requesting exclusion. To this end, the court is required to direct to class members "the best notice practicable under the circumstances *including individual notice to all members who can be identified through reasonable effort*." We think the import of this language is unmistakable. Individual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort.
>
> The Advisory Committee's Note to Rule 23 reinforces this conclusion. The Advisory Committee described subdivision (e)(2) as "not merely discretionary" and added that the "mandatory notice pursuant to subdivision (c)(2) . . . is designed to fulfill requirements of due process to which the class procedure is of course subject." [The Court discussed Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), and Schroeder v. City of New York, 371 U.S. 208 (1962), emphasizing due process roots of this notice requirement and stating that "notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable."]
>
> Viewed in this context, the express language and intent of Rule 23(c)(2) leave no doubt that individual notice must be provided to those class members who are identifiable through reasonable effort.

Research would likely shed light on the extent to which more recent cases regard means other than U.S. mail as sufficient to give "individual notice." The reality of 21st century life is that other means often suffice. The question is whether or how to alter Rule 23(c)(2) to make it operate more sensibly. Here are alternatives:

1 **(2) Notice**
2
3 * * * * *
4

5 **(B)** *For (b)(3) Classes.* For any class certified under Rule
6 23(b)(3), the court must direct to class members the
7 best notice that is practicable under the
8 circumstances, including individual notice by
9 electronic or other means to all members who can be
identified through reasonable effort. * * * * *

It is an understatement to say that much has changed since Eisen was decided. Perhaps it is even correct to say that a communications revolution has occurred. Certainly most Americans are accustomed today to communicating in ways that were not possible (or even imagined) in 1974. Requiring mailed notice of class certification seems an anachronism, and some reports indicate that judges are not really insisting on it.

Indeed, the current ease of communicating with class members has already arisen with regard to the cy pres discussion, topic (3) above. There, the possibility of excusing payouts to class members for amounts smaller than $100 is raised as a possibility, but it is also suggested that much smaller payouts can now be made efficiently using refined electronic means. More generally, it appears that enterprises that specialize in class action administration have gained much expertise in communicating with class members. Particularly in an era of "big data," lists of potential class members may be relatively easy to generate and use for inexpensive electronic communications.

For the present, the main question is whether there is reason not to focus on some relaxation of the current rule that would support a Committee Note saying that first class mail is no longer required by the rule. Such a Note could presumably offer some observations about the variety of alternative methods of communicating with class members, and the likelihood that those methods will continue to evolve. The likely suggestion will be that courts should not (as Eisen seemed to do) embrace one method as required over the long term.

Notice in Rule 23(b)(1) or (b)(2) actions

Another question that could be raised is whether these developments in electronic communications also support reconsideration of something that was considered but not done in 2001-02.

The package of proposed amendments published for comment in 2001 included a provision for reasonable notice (not individual notice, and surely not mandatory mailed notice) in (b)(1) and (b)(2) class actions. Presently, the rule contains no requirement of any notice at all in those cases, although Rule 23(c)(2)(A) notes that the court "may direct appropriate notice to the class." In addition, Rule 23(d)(1)(B) invites the court

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to give "appropriate notice to some or all class members" whenever that seems wise. And if a settlement is proposed, the notice requirement of Rule 23(e)(1) applies and "notice in a reasonable manner" is required. But if a (b)(1) or (b)(2) case is fully litigated rather than settled, the rule does not require any notice at any time.

It is thus theoretically possible that class members in a (b)(1) or (b)(2) class action might find out only after the fact that their claims are foreclosed by a judgment in a class action that they knew nothing about.

In 2001-02, there was much forceful opposition to the proposed additional rule requirement of some reasonable effort at notice of class certification on the ground that it was already difficult enough to persuade lawyers to take such cases, and that this added cost would make an already difficult job of getting lawyers to take cases even more difficult, and perhaps impossible. The idea was shelved.

Is it time to take the idea off the shelf again? One question is whether the hypothetical problem of lack of notice is not real. It is said that (b)(2) classes exhibit more "cohesiveness," so that they may learn of a class action by informal means, making a rule change unnecessary. It may also be that there is almost always a settlement in such cases, so that the Rule 23(e) notice requirement does the needed job. (Of course, that may occur at a point when notice is less valuable than it would have been earlier in the case.) And it may be that the cost problems that were raised 15 years ago have not abated, or have not abated enough, for the vulnerable populations that are sometimes the classes in (b)(2) actions.

The Subcommittee has not devoted substantial attention to these issues. For present purposes, this invitation is only to discuss the possibility of returning to the issues not pursued in 2002. If one wanted to think about how a rule change might be made, one could consider replacing the word "may" in Rule 23(c)(2)(A) with "must." A Committee Note might explore the delicate issues that courts should have in mind in order to avoid unduly burdening the public interest lawyers often called upon to bring these cases, and the public interest organizations that often provide support to counsel, particularly when the actions may not provide substantial attorney fee or cost awards.

Appendix I

Settlement Review Factors: 2000 Draft Note

As an alternative approach to factors, particularly not on the list of four the conceptual draft rule endorses as mandatory findings for settlement approval, the following is an interim draft of possible Committee Note language considered during the drafting of current Rule 23(e).

Reviewing a proposed class-action settlement often will not be easy. Many settlements can be evaluated only after considering a host of factors that reflect the substance of the terms agreed upon, the knowledge base available to the parties and to the court to appraise the strength of the class's position, and the structure and nature of the negotiation process. A helpful review of many factors that may deserve consideration is provided by *In re: Prudential Ins. Co. America Sales Practice Litigation Agent Actions*, 148 F.3d 283, 316-324 (3d Cir.1998). Any list of these factors must be incomplete. The examples provided here are only examples of factors that may be important in some cases but irrelevant in others. Matters excluded from the examples may, in a particular case, be more important than any matter offered as an example. The examples are meant to inspire reflection, no more.

Many of the factors reflect practices that are not fully described in Rule 23 itself, but that often affect the fairness of a settlement and the court's ability to detect substantive or procedural problems that may make approval inappropriate. Application of these factors will be influenced by variables that are not listed. One dimension involves the nature of the substantive class claims, issues, or defenses. Another involves the nature of the class, whether mandatory or opt-out. Another involves the mix of individual claims — a class involving only small claims may be the only opportunity for relief, and also pose less risk that the settlement terms will cause sacrifice of recoveries that are important to individual class members; a class involving a mix of large and small individual claims may involve conflicting interests; a class involving many claims that are individually important, as for example a mass-torts personal-injury class, may require special care. Still other dimensions of difference will emerge. Here, as elsewhere, it is important to remember that class actions span a wide range of heterogeneous characteristics that are important in appraising the fairness of a proposed settlement as well as for other purposes.

Recognizing that this list of examples is incomplete, and includes some factors that have not been much developed in reported decisions, among the factors that bear on review of a settlement are these:

(A) a comparison of the proposed settlement with the probable outcome of a trial on the merits of liability and damages as to the claims, issues, or defenses of the class and individual class members;

(B) the probable time, duration, and cost of trial;

(C) the probability that the [class] claims, issues, or defenses could be maintained through trial on a class basis;

(D) the maturity of the underlying substantive issues, as measured by the information and experience gained through adjudicating individual actions, the development of scientific knowledge, and other facts that bear on the ability to assess the probable outcome of a trial and appeal on the merits of liability and individual damages as to the claims, issues, or defenses of the class and individual class members;

(E) the extent of participation in the settlement negotiations by class members or class representatives, a judge, a magistrate judge, or a special master;

(F) the number and force of objections by class members;

(G) the probable resources and ability of the parties to pay, collect, or enforce the settlement compared with enforcement of the probable judgment predicted under Rule 23(e)(5)(A);

(H) the existence and probable outcome of claims by other classes and subclasses;

(I) the comparison between the results achieved for individual class or subclass members by the settlement or compromise and the results achieved — or likely to be achieved — for other claimants;

(J) whether class or subclass members are accorded the right to opt out of the settlement;

(K) the reasonableness of any provisions for attorney fees, including agreements with respect to the division of fees among attorneys and the terms of any agreements affecting the fees to be charged for representing individual claimants or objectors;

(L) whether the procedure for processing individual claims under the settlement is fair and reasonable;

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(M) whether another court has rejected a substantially similar settlement for a similar class; and

(N) the apparent intrinsic fairness of the settlement terms.

Apart from these factors, settlement review also may provide an occasion to review the cogency of the initial class definition. The terms of the settlement themselves, or objections, may reveal an effort to homogenize conflicting interests of class members and with that demonstrate the need to redefine the class or to designate subclasses. Redefinition of the class or the recognition of subclasses is likely to require renewed settlement negotiations, but that prospect should not deter recognition of the need for adequate representation of conflicting interests. This lesson is entrenched by the decisions in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), and *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

Appendix II

Prevailing Class Action Settlement Approval Factors Circuit-By-Circuit

First Circuit

No "single test." See: In re Compact Disc Minimum Advertised Price Antitrust Litigation, 216 F.R.D. 197-206-207 (D. Me. 2003) (Hornby, J.):

> "There is no single test in the First Circuit for determining the fairness, reasonableness and adequacy of a proposed class action settlement. In making this assessment, other circuits generally consider the negotiating process by which the settlement was reached and the substantive fairness of the terms of the settlement compared to the result likely to be reached at trial. See, e.g., Weinberger v. Kendrick, 698 F.2d 61, 73-74 (2d Cir. 1982). Specifically, the appellate courts consider some or all of the following factors: (1) comparison of the proposed settlement with the likely result of litigation; (2) reaction of the class to the settlement; (3) stage of the litigation and the amount of discovery completed; (4) quality of counsel; (5) conduct of the negotiations; and (6) prospects of the case, including risk, complexity, expense and duration. [citing cases.] Finally, the case law tells me that a settlement following sufficient discovery and genuine arm's-length negotiation is presumed fair." [citing cases.]

Second Circuit

"*Grinnell* Factors"

City of Detroit v. Grinnell, 495 F.2d 448, 463 (2d Cir. 1974):

> ". . (1) the complexity, expense and likely duration of the litigation . . .; (2) the reaction of the class to the settlement . . .; (3) the stage of the proceedings and the amount of discovery completed . . .; (4) the risks of establishing liability . . .; (5) the risks of establishing damages . . .; (6) the risks of maintaining the class action through the trial . . .; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery . . .; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. . . ."

Third Circuit

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"*Girsh* Factors" (adopts *Grinnell* factors)

Girsh v. Jepson, 521 F.2d 153, 157 (3rd Cir. 1975)

Fourth Circuit

"*Jiffy Lube* Factors"

In re Jiffy Lube Securities Litigation, 927 F.2d 155, 158-159 (4th Cir. 1991):

> "In examining the proposed . . . settlement for fairness and adequacy under Rule 23(e), the district court properly followed the fairness factors listed in Maryland federal district cases which have interpreted the Rule 23(e) standard for settlement approval. See In re Montgomery County Real Estate Antitrust Litigation, 83 F.R.D. 305 (D. Md. 1979).) The court determined that the settlement was reached as a result of good-faith bargaining at arm's length, without collusion, on the basis of (1) the posture of the case at the time settlement was proposed, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the negotiations, and (4) the experience of counsel in the area of securities class action litigation. . . .
>
> The district court's assessment of the adequacy of the settlement was likewise based on factors enumerated in Montgomery: (1) the relative strength of the plaintiffs' case on the merits, (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial, (3) the anticipated duration and expense of additional litigation, (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment, and (5) the degree of opposition to the settlement."

Fifth Circuit

"*Reed* Factors"

Reed v. General Motors Corp., 703 F.2d 170, 172 (5th Cir. 1983):

> "(There are six focal facets: (1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of the class counsel, class representatives, and absent members."

Sixth Circuit

"*UAW* Factors"

Int'l Union, United Auto. Workers, etc. v. General Motors Corp., 497 F.3d 615 (Sixth Cir. 2007):

> "Several factors guide the inquiry: (1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest. See Granada Invs., Inc. v. DWG Corp., 962 F.2d 1203, 1205 (6th Cir. 1992); Williams v. Vukovich, 720 F.2d 909, 922-23 (6th Cir. 1983).

Seventh Circuit

"*Armstrong* Factors"

Armstrong v. Jackson, 616 F.2d 305, 315 (7th Cir. 1980):

> "Although review of class action settlements necessarily proceeds on a case-by-case basis, certain factors have been consistently identified as relevant to the fairness determination. The district court's opinion approving the settlement now before us listed these factors:
>
> > Among the factors which the Court should consider in judging the fairness of the proposal are the following:
> >
> > "(1) " * * * the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement';
> >
> > "(2) "(T)he defendant's ability to pay';
> >
> > "(3) "(T)he complexity, length and expense of further litigation';
> >
> > "(4) "(T)he amount of opposition to the settlement';"
> >
> > Professor Moore notes in addition the factors of:
> >
> > "(1) * * *
> >
> > "(2) Presence of collusion in reaching a settlement;
> >
> > "(3) The reaction of members of the (class to the settlement;

"(4) The opinion of competent counsel;

"(5) The stage of the proceedings and the amount of discovery completed."

3B Moore's Federal Practice P 23.80(4) at 23-521 (2d ed. 1978)"

Eighth Circuit
"*Grunin* Factors"

Grunin v. International House of Pancakes, 513 F.2d 114, 124 (8th Cir. 1975):

> "The district court must consider a number of factors in determining whether a settlement is fair, reasonable, and adequate: the merits of the plaintiff's case, weighed against the terms of the settlement; the defendant's financial condition; the complexity and expense of further litigation; and the amount of opposition to the settlement. Grunin, 513 F.2d at 124. . . .; Van Horn v. Trickey, 840 F.2d 604, 607 (8th Cir. 1988)."

Ninth Circuit

"*Hanlon* Factors"

Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998):

> "Assessing a settlement proposal requires the district court to balance a number of factors: the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement."

Tenth Circuit

"*Jones* Factors"

Jones v. Nuclear Pharmacy, 741 F.2d 322 (10th Cir. 1984):

> "In exercising its discretion, the trial court must approve a settlement if it is fair, reasonable and adequate. In assessing whether the settlement is fair, reasonable and adequate the trial court should consider:
>
> (1) whether the proposed settlement was fairly and honestly negotiated;

(2) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt;

(3) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; and

(4) the judgment of the parties that the settlement is fair and reasonable."

Eleventh Circuit

"*Bennett* Factors"

Bennett v. Behring Corp., 737 F.2d 982, 986 (11th Cir. 1984) (quoting Cotton v. Hinton, 559 F.2d at 1330-31 (5th Cir. 1977):

"Our review of the district court's order reveals that in approving the subject settlement, the court carefully identified the guidelines established by this court governing approval of class action settlements. Specifically, the court made findings of fact that there was no fraud or collusion in arriving at the settlement and that the settlement was fair, adequate and reasonable, considering (1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved."

D.C. Circuit

No "single test." Courts consider factors from other jurisdictions.

See *In re Livingsocial Marketing and Sales Practice Litigation*, 298 F.R.D. 1, 11 (D.R.C. 2013):

"There is "no single test" for settlement approval in this jurisdiction; rather, courts have considered a variety of factors, including: "(a) whether the settlement is the result of arms-length negotiations; (b) the terms of the settlement in relation to the strengths of plaintiffs' case; (c) the status of the litigation proceedings at the time of settlement; (d) the reaction of the class; and (e) the opinion of experienced counsel." In re Lorazepam & Clorazepate Antitrust Litig., 205 F. R. D. 369, 375 (D.D.C. 2002) ("Lorazect") (collecting cases)."

Federal Circuit

Dauphin Island Property Owners Assoc. v. United States, 90 Fed. Cl. 95 (2009):

> "The case law and rules of this court do not provide definitive factors for evaluating the fairness of a proposed settlement. Many courts have, however, considered the following factors in determining the fairness of a class settlement:
>
> > (1) The relative strengths of plaintiffs' case in comparison to the proposed settlement, which necessarily takes into account:
> >
> > > (a) The complexity, expense and likely duration of the litigation; (b) the risks of establishing liability; (c) the risks of establishing damages; (d) the risks of maintaining the class action through trial; (e) the reasonableness of the settlement fund in light of the best possible recovery; (f) the reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation; (g) the stage of the proceedings and the amount of discovery completed; (h) the risks of maintaining the class action through trial;
> >
> > (2) The recommendation of the counsel for the class regarding the proposed settlement, taking into account the adequacy of class counsels' representation of the class;
> >
> > (3) The reaction of the class members to the proposed settlement, taking into account the adequacy of notice to the class members of the settlement terms;
> >
> > (4) The fairness of the settlement to the entire class;
> >
> > (5) The fairness of the provision for attorney fees;
> >
> > (6) The ability of the defendants to withstand a greater judgment, taking into account whether the defendant is a governmental actor or a private entity. . . .
>
> Most importantly, this court must compare the terms of the settlement agreement with the potential rewards of litigation and consider the negotiation process through which agreement was reached."

California

Kullar v. Foot Locker Retail Inc., 168 Cal. App. 4th 116, 128

(Cal. App. 2008) (quoting *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (Cal. App. 1996):

> "The well-recognized factors that the trial court should consider in evaluating the reasonableness of a class action settlement agreement include "the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement."

Principles of Aggregate Litigation (ALI 2010)

§ 3.05 Judicial Review of the Fairness of a Class Settlement

(a) Before approving or rejecting any classwide settlement, a court must conduct a fairness hearing. A court reviewing the fairness of a proposed class-action settlement must address, in on-the-record findings and conclusions, whether:

(1) the class representatives and class counsel have been and currently are adequately representing the class;

(2) the relief afforded to the class (taking into account any ancillary agreement that may be part of the settlement) is fair and reasonable given the costs, risks, probability of success, and delays of trial and appeal;

(3) class members are treated equitably (relative to each other) based on their facts and circumstances and are not disadvantaged by the settlement considered as a whole; and

(4) the settlement was negotiated at arm's length and was not the product of collusion.

(b) The court may approve a settlement only if it finds, based on the criteria in subsection (a), that the settlement would be fair to the class and to every substantial segment of the class. A negative finding on any of the criteria specified in subsections (a)(1)-(a)(4) renders the settlement unfair. A settlement may also be found to be unfair for any other significant reason that may arise from the facts and circumstances of the particular case.

(c) The burden is on the proponents of a settlement to establish that the settlement is fair and reasonable to the absent class members who are to be bound by that settlement. In reviewing a proposed settlement, a court should not apply any

presumption that the settlement is fair and reasonable.

(d) A court may approve or disapprove a class settlement but may not of its own accord amend the settlement to add, delete, or modify any term. The court may, however, inform the parties that it will not approve a settlement unless the parties amend the agreement in a manner specified by the court. This subsection does not limit the court's authority to set fair and reasonable attorneys' fees.

(e) If, before or as a result of a fairness hearing, the parties agree to modify the terms of a settlement in any material way, new notice must be provided to any class members who may be substantially adversely affected by the change. In particular:

(1) For opt-out classes, a new opportunity for class members to opt out must be granted to all class members substantially adversely affected by the changes to the settlement.

(2) When a settlement is modified to increase significantly the benefits to the class, class members who opted out before such modifications must be given notice and a reasonable opportunity to opt back into the class.

(f) For class members who did not opt out of the class, new notice and opt-out rights are not required when, as a result of a fairness hearing, a settlement is revised and the new terms would entitle such class members to benefits not substantially less than those proposed in the original settlement.

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Notes of Conference Call
Feb. 12, 2015
Rule 23 Subcommittee
Advisory Committee on Civil Rules

On Feb. 12, 2015, the Rule 23 Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participants included Hon. Robert Dow (Chair, Rule 23 Subcommittee), Hon. David Campbell (Chair, Advisory Committee), Elizabeth Cabraser, Robert Klonoff, Prof. Edward Cooper (Reporter of the Advisory Committee), and Prof. Richard Marcus (Reporter of the Rule 23 Subcommittee).

Settlement Approval Criteria

Since the last call, Prof. Marcus had drafted alternative language to address issues raised during the call and circulated the redraft, which (as slightly modified to add "adequate" into factor (ii)) has two alternative lead-ins before the four criteria are listed:

Alternative 1

(2) If the proposal would bind class members,

(A) the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate. The court may make this finding only on finding that:

Alternative 2

(2) If the proposal would bind class members,

(A) the court may approve it only after a hearing and on finding that ~~it is fair, reasonable, and adequate.~~:

(i) the class representatives and class counsel have been and currently are adequately representing the class;

(ii) the relief awarded to the class (taking into account any ancillary agreement that may be part of the proposal) is fair, reasonable, and adequate given the costs, risks, probability of success, and delays of trial and appeal;

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(iii) class members are treated equitably (relative to each other) based on their facts and circumstances and are not disadvantaged by the proposal considered as a whole; and

(iv) the proposal was negotiated at arm's length and was not the product of collusion.

(B) The court may also consider any other matter pertinent to approval of the proposal, and may refuse to approve it on any such ground.

It was noted that this revision of the draft discussed on Feb. 6 was designed to put into the rule (1) an explicit requirement that the court find all four requirements satisfied to approve the proposal, and (2) an explicit recognition that the court may disapprove the proposal on other grounds even if all four listed findings can be made. There was no further discussion of this topic.

Settlement Class Certification

The call began by returning to the settlement class certification (b)(4) subject on which the Feb. 6 call had focused at the end. The question was whether further discussion was needed. One abiding concern is the extent to which (b)(4) treatment should be available for classes certified under (b)(1) or (b)(2). A suggestion was that this should be kept open, as it is with the brackets around the phrase "in an action under subdivision (b)(3)."

A reaction was that, upon reflection, it seems wise to leave this issue open for further consideration. People with experience in employment law litigation would be useful resources about whether settlements of (b)(2) class actions would be assisted by inclusion of those cases within (b)(4). With (b)(1) settlements, there is usually a monetary fund created.

That prompted the question whether one could really compromise on the question whether there is actually a limited fund. The answer was that usually settlements like this involve a discrete fund (such as insurance coverage), as in an interpleader situation. Sometimes there may be a company on the brink of bankruptcy that does not want to file a bankruptcy proceeding. It might be that there are situations in which it is legitimate and important to have a (b)(4) option for (b)(1) type cases.

But it was affirmed that the chief concern underlying this discussion was the (b)(3) class action and particularly the role of superiority in that setting. For present purposes, it seems wisest to go forward with essentially the sort of draft that we

have discussed. That would need some further attention on topics the subcommittee has discussed, but should be suitable for wider examination and discussion.

Cy Pres Treatment

This topic was introduced as involving several issues. One is whether any rule amendment is really needed. Several courts of appeals have endorsed, or even adopted, directions very much like (sometimes explicitly based upon) ALI § 3.07. So one might say that this judicial action is rapidly solving any problem that existed. Another and potentially challenging issue is suggested by the bracketed phrase "if authorized by law." The question has two aspects. One is whether a civil rule could create such a new "remedy." Another is to ask where authority to approve such provisions comes from unless provided by civil rule. Yet another set of issues is whether the provision should have to be inserted into the settlement for the court to be able to approve it. The reason that might not happen is that the parties may not appreciate that the settlement claims procedure will end up leaving a residue, and therefore fail to take account of that possibility. Another question has to do with the possible permission to skip distributions of less than $100. There seem to have been effective distribution programs that involved payouts considerably lower than $100. Is that really a level at which we can assume it costs too much to distribute the funds?

An initial response focused on the last point. It's become much more cost-effective to send checks to class members, at least if defendant has a list of most of them. Some in the claims distribution business say that if it's more than one dollar they can do it at reasonable cost if they have an address list. The goal really should be to dispense with a time-consuming or burdensome claims submission process. So things seem to be improving. At the same time, it seems clear that we need a rule to address these issues. Chief Justice Roberts' statement in the Facebook case makes it clear that something should be done. And the ALI guidelines are cited fairly often by courts, so they offer an initial roadmap for rulemaking. Having guidance in the rules will assist judges. It will also provide some focus and guidance for objectors by indicating what sorts of provisions are subject to challenge. Including cy pres provisions in a settlement agreement is almost certain to draw objections in today's climate. Having a rule would probably channel, and might reduce, that objector activity.

Attention was drawn to (e)(3)(iii) of the draft, which says that when distributions to the class are not economically reasonable it is permissible to distribute instead to someone else "whose interest reasonably approximate those being pursued by the class." Can a civil rule do that?

The reaction was that this is a difficult topic. The "if authorized by law" clause partly addresses that question, by indicating that the rule itself does not purport to create authority to order such a remedy. On the other hand state law or some federal source may do so. For example, in California Cal. Civ. Pro. Code § 384 essentially forbids reversion provisions in class-action settlements and also directs that any residue after distribution to the class should be to an entity pursuing the goals of the class action and, if that is not possible, to an entity providing legal representation to the needy.

It might be an interesting question whether one could seek to have a California federal court enforce the California provision in a class action based on state law. One response would be that the state statute cannot be enforced because Rule 23 applies in federal court and it governs. That is something like the view the Supreme Court adopted in its Shady Grove case, where the majority said that a New York limitation on use of class actions did not apply in federal court -- even though the claim being asserted was based on New York law -- because Rule 23 defines when class actions may be brought in federal court. So if the California statute is held not to apply to federal-court class actions based on California law because that's governed by Rule 23, that may imply that Rule 23 can affirmatively deal with the problem. On the other hand, another aspect of the substance/procedure distinction in the Rules Enabling Act is to guard Congress's right to make substantive federal rules, and a lot of the cases are based on federal claims rather than state law.

An initial reaction to these problems was that the California statute is treated as "procedural" by the California federal courts. Perhaps that is on the notion that it was not intended to be applied by other courts (including federal courts), but perhaps it reflects a view that Rule 23 already covers the subject. On the other hand, it is true that California federal judges have seemed to find § 384 to provide useful guidance in deciding how to handle similar problems. There are more complications if one discusses claims created by Congress. But over all there is a saving grace here -- this is created by settlement, not a "remedy" created by the court.

Another reaction was that the ALI Principles handle cy pres in exactly that way -- something that parties may include in a settlement.

Another thought was that cy pres has equity origins. The sort of judicial authority we are talking about when we address cy pres is something that has been recognized for a long time.

This discussion prompted a question: Shouldn't the Committee Note make it clear that the rule provision does not

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purport to create a remedy for a litigated case, but only to provide guidance for a court in evaluating a provision the parties have included in a settlement agreement? So the court authority that is involved here is not in designing "remedies," but the authority that's always been in the rule for reviewing and evaluating settlements. That is what Rule 23(e) is all about, and this is consistent with that longstanding authority.

That raised a question: In how many cases in which cy pres provisions were included in settlement agreements could the court have included a similar provision in a litigated judgment? A response was that probably there would usually have to be a reversionary feature of a litigated judgment. That drew the response that cy pres is probably necessarily confined to the settlement context, and therefore that a rule about that context would not "create a remedy."

At the same time it was also observed that there are legal grounds for disgorgement in some circumstances, and a reversion is inconsistent with the remedy. Thus, it would probably be wise to note that the underlying substantive law of remedies might provide a justification for use of something like a cy pres solution. That remedy would not be created by Rule 23, however. Sometimes, when there is a residue in such circumstances the result is escheat to the state. In Texas, that is the view of state officials.

Another view of the issue was offered: In a way this gets at what the goal of such litigation is. Often, perhaps usually, it is designed for compensation purposes. But sometimes it is a form of public enforcement of legal protections, somewhat like qui tam proceedings.

Another reaction was that "if authorized by law" should be retained for present. However much one might find some instances hard to categorize, there surely are instances (and are surely some cases) in which the parties propose measures that cannot be justified by any sensible cy pres notions. And from the perspective of judges, there is not a lot of law on this subject. That may be something the Chief Justice had in mind in his Facebook statement, when he suggested the Court may need to take up the topic. Even if there may be cases in which the right outcome is debatable, judges would benefit from having rules that exclude lots of improper things.

That view was supported on the ground that such a rule would also provide guidance and ground rules for objections. In recent years, cy pres provisions have been a magnet for objections. It may even happen that settling parties will put a reversion clause into the settlement agreement rather than a cy pres provision just to avoid having the cy pres provision draw objections. Right now, if there is a cy pres provision, the courts have to

figure out on a case-by-case basis what should be allowed. And objectors have no direction about what is and is not a questionable provision or use of cy pres. Both would benefit from sensible rules. Unless cy pres is addressed in the rules, it will continue to generate litigation and burdens for the courts. That might in some instances prompt statutory regulation of the subject. California § 384 was a product of a political compromise. A nationwide statute might be very difficult to design. A rule is a better way to go.

That drew a question: Should a rule say that any cy pres provision must be included in a settlement agreement so it can be approved as part of a settlement agreement? One issue might be a need to re-notice the class after it was determined that there was a residue. Another is that it seems to draw objections (although that might be less of a problem if there were a rule providing guidance). Should the rule require it to be in the settlement agreement?

The response was that including the provision in the settlement agreement is o.k. The judge should know that it's there. The agreement is posted online, and anyone can read it. Relating particularly to what the rule is about, that provision is one of the things approved by the court under Rule 23(e). And putting it in the agreement means there is a way to avoid a reverter provision. Having a reverter provision provides an incentive for the defendant to try to design an arduous claims process.

The resolution was to proceed with a revised version of the draft before the Subcommittee to provide a focus for discussion during the April Advisory Committee meeting. One thing in particular would be to include in the Committee Note the point that this is a rule about provisions of the parties' settlement, not a freestanding "remedy" for the court to use in a litigated case.

Dealing With Objectors

The question was introduced with the drafts before the subcommittee that addressed two general topics -- whether to forbid withdrawal of objections (Alternative 1) and whether to direct the parties to file a statement when seeking permission to withdraw an objection that identifies any agreement made in connection with that objection (Alternative 2). In addition there was a draft of an amendment idea to focus on "standing to object." There was also discussion about the possibility of requiring a bond from the objector who seeks to appeal, and finding a spot in the rules (probably at least partly in the Appellate Rules) for approval of withdrawal of an appeal. The current reality seems to be that Rule 23(e)(5) may solve the problem of objectors who hold the settlement hostage at the

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district court level, when the delay is necessarily rather limited, but that there is presently no remedy for the much longer delay taking an appeal can produce. So perhaps the overall reality is that the only real problem is with appeals.

A first reaction was that this is an area where we need to hear from the specialty bars -- employment discrimination litigation, consumer litigation, securities fraud litigation, etc. The bonding technique has been employed by many courts, although the 10th Circuit has recently disapproved it or significantly limited its use. Requiring a bond may be effective in dealing with serial objectors, but not if they are well-funded. In fact, it seems that there is a growing "objector industry," and a significant number of objectors are well funded.

A question was raised: How can a court refuse to permit an objection to be withdrawn? That is what Alternative 1 calls for, and it is also implicit in Alternative 2, augmented by information about side agreements. The response was that this is, in a way, a quandary under the current rule. Rule 23(e)(5) already says that an objection may be withdrawn only with the court's permission. Perhaps an objection can be "abandoned" without invoking this rule provision, and perhaps class counsel and the objector could reach a "side agreement" that the objector would abandon the objection. So the possible amendments don't create this basic problem, which is a feature of the current rule. On the other hand, it is not certain how well the present rule is working. It seems that the current problems relate to appeals, not objections in the district court, so that the current rule is not producing this sort of problems. Maybe (hopefully) it has actually solved problems.

Another reaction was that the current rule is valuable. Having that rule means that class counsel can tell objectors who are trying to extract tribute that they can't go along because the court must approve withdrawal of an objection and the court must now be informed of the terms for that withdrawal. That goes some distance toward solving the hostage problem that can result from an objection, but the basic purpose of all this is to help the court evaluate the settlement. For that purpose, we actually almost want to encourage objectors; as has sometimes been said, there are "good" objectors and "bad" objectors.

Regarding the "bad" objectors, it was asked whether judges sometimes impose sanctions on objectors. An immediate reaction was that the bond requirements imposed on occasion seem somewhat like that, though they are different. On at least one occasion, a court became impatient enough with an objector to bar that person from making further objections in that district.

On the same subject, it was noted that the development of the ALI Principles included consideration of urging punishment

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for "bad" objectors. But one concern was that those provisions might also deter "good" objectors.

Another reaction was that it is likely some judges calibrate their handling of the bond requirement in part by asking whether this is one of those notorious serial objectors.

But it was asked whether this is basically a problem with the appeal, not at the district court. That is before the Appellate Rules Committee. That drew agreement: If the only delay issue were in the district court, nobody would care. It's the time required to dispose of an appeal that is the major club "bad" objectors can wield.

That drew attention to § 3.08(d) of the ALI Principles, which was an effort to calibrate an appropriate sanctions regime for abusive objectors. Looking at that might offer ideas for possible rule provisions. Whether any of those would be useful is unclear, but probably they deserve some consideration at this stage.

It was noted that § 3.08(d) resulted from intense consideration of the two-edged potential of sanctions provisions in this area. There is a good chance that some of the most prominent "good" objectors would support something along those lines. They think that judges can differentiate on a case-by-case basis between "good" and "bad" objectors. A rule probably cannot do so in an all-purpose manner, or using specified criteria, but judges can react to it when they see it.

The resolution was that Prof. Marcus should look at § 3.08(d) and consider how or where some provisions along those lines might fit into the civil rules. If a way can be found, Prof. Marcus should circulate ideas to the Subcommittee. More generally, the topic of dealing with objectors should go forward as outlined during the call.

Another question was whether to focus also on "standing to object," as had been suggested in one comment received by the Committee. But the question was raised how a court should react to a very valid objection when offered by a class member whose "standing" is challenged. The court's obligation, after all, is to decide whether the proposal is fair, reasonable, and adequate. If it is not, should it matter that the objection is raised by somebody without standing? Don't we want to encourage good-faith objections? Indeed, some of the objectors who are most likely to be helpful, such as Public Citizen, are not themselves class members.

A reaction was that outfits like Public Citizen almost always present objections on behalf of class members, so standing is not likely to be an impediment for them. On the other hand,

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CAFA requires that state attorneys general or comparable officials be given notice of proposed settlements when the class includes citizens of their states. Perhaps the CAFA notice provision implicitly gives these officials "standing" to object. 28 U.S.C. § 1715(d) says that the court may not approve the proposal until 90 days after notice is given to the appropriate officials. Presumably they can *do* something during that 90-day period, and objecting seems like what they would do if they saw problems with the proposal. Maybe their objections are "on behalf of" their citizens and therefore supported by standing, but it seems not to be useful to introduce this issue.

One way of looking at these issues was: "What do we gain by adding the issue of standing?" The real question is whether to approve the proposal, and spending energy scrutinizing the impact of various provisions on specific class members who object seems a distraction. The consensus emerged that this idea had dubious utility and was not worth the effort. Courts surely will listen to arguments that a given objector is just a spoiler looking for a payoff, particularly when supported with convincing proof that the objection is actually contrary to the objector's interest.

Therefore, going forward, the agenda materials will (1) not raise the standing issue; (2) present only what was Alternative 2, not the complete prohibition on withdrawing objections; and (3) explore the possibility of some sanctions provision along the line of ALI § 3.08.

More generally, it would be important for the Rule 23 Subcommittee to maintain contacts with the Appellate Rules Committee to coordinate work on possible methods of addressing the withdrawal of objections or appeals after a notice of appeal is filed. It would be important to contact the Chair and the Reporter of that committee about where we are. Probably it would be preferable to have approval done by the district court if that can be worked out.

Rule 68 and "Picking Off" the Class Rep.

In the 7th Circuit, the "pick off" technique of promptly offering the class rep. the maximum amount he or she could individually recover and thereby mooting the case has evidently had some success. The "solution" to that problem is an "out of the chute" class certification motion before the defendant makes an offer. But it is a rare case in which plaintiff is ready to litigate class certification this early in the litigation. So in some places plaintiffs who make such early motions also move to stay decision on them pending discovery and briefing of the class certification issue. Judges in other parts of the country sometimes seem to be impatient with this tactic, and some have stricken such early motions with comments like "This is not the Seventh Circuit." At least the 11th Circuit seems impatient with

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the whole set of issues.

The materials present a variety of methods of dealing with these problems. Whether this is a serious problem anywhere but the 7th Circuit could be debated. The general subject is a focus of a panel at the Impact Fund class-action conference on Feb. 27 that Elizabeth Cabraser and Prof. Marcus intend to attend. For present purposes, the matter should be kept on the Subcommittee's agenda and carried forward using the existing materials to the full Committee in April.

Issues Classes

The materials for the call included two possible approaches to this set of concerns. The first sought to build into Rule 23(b)(3) a recognition that at least predominance should be viewed differently when it is appropriate to use (c)(4). The second went the other way, and would amend Rule 23(c)(4) to provide that issues certification may only be used in cases that independently satisfy Rules 23(a) and (b).

These issues were introduced as raising a somewhat basic question about whether such a rule change is needed. The main opponent to use of issues classes -- and therefore in favor of something like the second approach -- seems to have been the Fifth Circuit, in particular in a footnote in its Castano decision nearly 20 years ago. Since then, panels of that court have seemed more receptive to issues class treatment in some cases. So if one reason for adopting this approach is to reconcile or resolve a circuit split, that reason may be disappearing.

At the same time, a number of what might be called subsidiary issues could be important. Many of them revolve around what should be done once the central issue that supported issue certification is resolved. It does not seem the resolution of that issue leads to entry of judgment on behalf of the class members. Should notice then be sent to them that they must take action to prove their individual entitlement to relief? Can the court award attorney fees to class counsel at that time? If the common fund principle is the basis for an attorney fee award, it does not seem that there is yet a fund to draw upon. Should major efforts be made to determine the amount of individual relief if there is a prospect that the ruling on the issue so resolved will be altered or reversed on appeal?

A slightly different set of questions addressed whether issues classes should apply outside the (b)(3) format. In a (b)(2) case, it may be that there is really nothing more to resolve, or at least no individual issues to resolve, in determining the nature and extent of relief. The class members need not "prove up" their claims in that situation. Given the

Supreme Court's treatment of "incidental" monetary relief in (b)(2) class actions in Wal-Mart v. Dukes, the prospect of time-consuming individual determinations seems to have vanished.

One idea might be to ensure the availability an immediate appeal from the resolution of the common issue. That would at least deal with the risk that the initial district court ruling would be significantly altered after much work had been done on determining individual claim amounts. The ALI spent a great deal of time evaluating this problem, and it was among the most controversial in its Aggregation Principles. It may be that some sort of avenue for discretionary review along the lines of Rule 23(f) is the most suitable course. That might achieve finality with respect to that issue.

The Rule 23(f) model drew support. Another analogy is to Rule 54(b), which calls for an initial certification by the district court. Prof. Marcus should try to develop a possible amendment to enable immediate review.

Discussion returned to the set of problems surrounding how courts actually handle the "mop up" that follows resolution of the common issue, assuming that can be done in a way to achieve adequate finality. What actually happens? The response was that the court retains jurisdiction to resolve the merits of individual claims for relief. This happens in employment cases, and is starting to happen in consumer cases. The damages determination is made under the court's auspices, using either written or oral proof. Practical solutions can be found.

The reaction was that most of the issues raised -- notice to the class, entry of a "final judgment," etc. -- seem to have been resolved by practical lawyers and practical judges. The "big issue" is appellate review. The rulemaking issues should be carried forward, largely in the format already developed. One additional possible question is whether issues classes should be limited to (b)(3) cases. Nothing in the current rule says they are, and the proposed change to (b)(3) does not say that they cannot be used in (b)(1) or (b)(2) cases, so perhaps that change to (b)(3) can go forward with a Committee Note recognizing that this change made no change in the use of issues classes under (b)(1) or (b)(2). That does not say we are affirmatively authorizing such use, but only that we are not trying to alter it.

Notice

This issue was introduced as also seeking a pragmatic solution that takes account of modern realities. Eisen's insistence on notice by first class mail to all class members who can be identified seems truly antique.

The drafts before the Subcommittee included one alternative that would simply remove the current requirement of individual notice in (b)(3) cases, and another that would add "by electronic or other means" to the notice requirement in (c)(2)(B).

An initial reaction was that giving individual notice in many cases, particular certain kinds of consumer cases, has become vastly easier. There are enterprises that specialize in managing claims and distribution in class actions, and the people who run those enterprises know how to do this job. The reality is that they can identify, contact, and even pay class members at a modest cost per capita. That is a reason why the $100 exclusion from individual distributions in the cy pres proposal seems unnecessary. Smaller distributions can often be made fairly readily.

Against this background, the consensus was that Alternative 1 -- removing the requirement of individual notice -- seems like overkill. Something like Alternative 2 -- explicitly recognizing in the rule that electronic means may be used -- is a better way to go. That should be the approach presented to the full Committee in April.

Notes of Conference Call
Feb. 6, 2015
Rule 23 Subcommittee
Advisory Committee on Civil Rules

On Feb. 6, 2015, the Rule 23 Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participants included Hon. Robert Dow (Chair, Rule 23 Subcommittee), Hon. David Campbell (Chair, Advisory Committee), Elizabeth Cabraser, Robert Klonoff, John Barkett, Prof. Edward Cooper (Reporter of the Advisory Committee), and Prof. Richard Marcus (Reporter of the Rule 23 Subcommittee).

Logistics

Judge Dow called attention to the list of upcoming events that might involve some or all Subcommittee members:

Impact Fund Class Action Conference (Feb. 26-27, Berkeley): Elizabeth Cabraser is on a panel and Rick Marcus intends to attend.

George Washington University Roundtable on Settlement Class Actions (April 8): All members intend to attend.

ALI May 17 discussion: All Subcommittee members except Judge Dow intend to attend.

AAJ meeting in Montreal (July 11-14): It is uncertain whether there will be events specifically about class actions. Elizabeth Cabraser will inquire. Several members could attend if there were pertinent events.

Civ. Pro. Professors' Conference in Seattle (July 17): Subcommittee participants from the West Coast (Cabraser, Klonoff, and Marcus) will attend if possible. The second day of this event is supposed to focus on aggregate litigation.

Duke Conference (in July?): Plans are not certain about this event. Judge Dow has been in touch with John Rabiej about it.

Subcommittee mini-conference: After discussion, the date for the conference was selected -- Sept. 11, 2015. The tentative location is the Dallas Fort Worth Airport. Subcommittee members should plan to remain until Sept. 12 so that the Subcommittee can have a follow-up discussion of the points made by conferees.

Advisory Committee meeting in Salt Lake City (Nov. 5-6): Assuming that the Subcommittee can convene at DFW on Sept. 12, it does not seem useful to try to schedule a Subcommittee get-together on Nov. 4. It may be useful to

schedule such a meeting on Nov. 7, but that is not certain yet.

AALS Annual Meeting (January, 2016): It would be desirable to be on the agenda for this meeting, perhaps as one of the "hot topics" items for the meeting. There may be a scheduling conflict with the Standing Committee meeting on Jan. 7-8 in Phoenix, but that would not affect most of the Subcommittee. Judge Dow will make contact with Dean Daniel Rodriguez (President of the AALS) about whether and when a time can be found during the annual meeting, which is in New York beginning on Jan. 6, 2016. If something can be set up, it would be useful to suggest including mention of it in newsletters for several sections of the AALS, including civil procedure, litigation, and federal courts. It might also be desirable to mention this event on the Civil Procedure listserv that includes many civil procedure professors.

(1) Settlement approval criteria

Discussion turned to the first of the seven potential amendment topics. It was introduced as presenting the question what should be carried forward now for further discussion with the full Advisory Committee during the April meeting and also for reactions from the roundtable panelists at the GW event on April 8. One approach is the ALI version -- identifying a relatively short list of mandatory topics and leaving open any others that are relevant to a given proposed settlement. Another approach, illustrated by Appendix I to Ed Cooper's circulation, would enumerate a rather long list. That longer list resembled the list that Elizabeth Cabraser developed of current factors articulated in the various circuits, but it also includes some subjects that are not on any court's list, and does not include some things that are on some courts' lists.

Another introductory comment stressed that one way of looking at the present choices is between leaving the rule as it is now and changing it. Any change is likely to cause some difficulties early on, simply because it is different. Adding new factors might be more destabilizing. But adding (or changing) factors might also identify important considerations. An example is to suggest that the court give particular attention to whether public officials have expressed a view on the desirability of the proposed settlement. CAFA invites them to do so, and they may be important sources of independent reactions to a settlement proposal. Several of the factors on the Cooper list are not on the Cabraser list, and vice versa. To the extent any new list is open-ended, and permits reference to other factors, adopting a list might not be worth doing. But if it is important to get courts to think about things they are not currently considering, having a longer list might be preferred.

An initial reaction was that "the factors lists are old." One might even say some are fossilized. Most of these factors come from cases from the 1970s and 1980s. Very few were formulated after Amchem was decided in 1997. And they antedate the current trend to backload the certification decision. Now is a good time to look at all of the factors. The current long lists contribute to settlement reviews that consist of "duly checking off" the circuit's various factors, often with a conclusory one-sentence reference to the factor -- "This does not apply" or "This is satisfied." In addition, the lists are things that objectors focus upon. Shortening the list will narrow the range of things that objectors can bring up. Eliminating unimportant items can be a value then, and can also focus objectors on what really matters.

Attention focused on the additional factors on the Cooper list from 2000 that seemed not to be on the actual existing list. These included:

Factor (D) -- the maturity of the underlying substantive issues.

Factor (E) -- the participation in the negotiation of the settlement proposal by class members or representatives.

Factor (H) -- the existence and prospects of other pending class actions.

Factor (L) -- the claims processing procedure in the settlement.

Factor (M) -- whether another court has rejected a substantially similar settlement.

Some of these seem to be connected to topics addressed in the 1996 package, such as maturity of claims as a Rule 23(b)(3) factor on certification. Others seem related to the concern considered at length in 2000-01 -- addressing the binding effect of federal-court decisions on whether to approve a given settlement and whether state court could be required to respect those decisions.

A reaction was that maturity might also look to some things that courts do now consider, such as the amount of discovery done in this case. The suitability of the claims process is very important but did not seem to get onto the courts' lists of 30 or 40 years ago. Now there is an FJC Class Action Notice And Claims Checklist, which has detailed advice about how to evaluate such a claims process. Judges use it, and it is very good. It tells judges (and lawyers) what such processes should look like.

Another reaction to the list from 15 years ago is that it

was partly addressed to concerns in mass tort class actions. It is not clear that current concerns are exactly the same.

A different question was about how the court is to employ the list of criteria. That list was drawn from the ALI Principles. That is a sensible beginning. The ALI project involved much consideration of the various lists that had emerged from court decisions, and was an attempt to distill them and leave out some that seemed unhelpful. But the draft does not say in the rule (v. the Note) that a court may not approve a settlement unless it can make those findings. It also does not say that the court may refuse to approve a settlement even though the four findings are satisfied. The ALI Principles also say that there should be no presumption that a proposed settlement is reasonable just because it has been proposed by the lawyers.

One focus for these concerns was on alternative rule language at lines 14-15 of the discussion draft of the rule -- whether the court must "consider whether" or "find that" the four conditions specified in the draft are satisfied. Saying "find that" seems pretty clearly to say that the court may not approve the settlement unless it so finds. Saying that the court "may consider" any other matters seems implicitly to mean that it can refuse to approve even if it can make the findings that are required.

Another participant emphasized that it would be important to be crystal clear about these matters in the text. At least some Supreme Court decisions indicate that Committee Notes don't count for much when rules are applied. Leaving important things only in the Note is risky.

Consensus: A recapitulation was that the consensus of the call seemed to be that (1) the rule should require findings on the four matters; (2) the rule should make clear that a settlement may not be approved if those findings cannot be made; and (3) the court may disapprove a settlement even if it can make those findings.

The third point drew support: "Don't create arguments that somebody is entitled to approval." It should always depend ultimately on the court's informed discretion.

A suggestion was that one way to do it would be "must find and may consider." Reference might be had to § 3.05(b) of the ALI Principles.

Another reaction was that this sort of enumeration would be useful to judges and helpful to practitioners.

Attention was drawn to the draft Note, which says that the rule is designed to "supersede" the lists adopted in the various

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circuits, but it then says that other factors may be considered. Is that consistent? One reaction was that the goal is to make clear that the court has authority to refuse approval on grounds that, in a given case, counsel against approval, but that a court may not approve unless the four main criteria are satisfied.

That approach drew support. The goal is to capture the essential point -- the four factors must be established in every case, but in given cases there may well be additional factors specific to the case that matter in that case. A goal is to force lawyers and enable judges to focus on the things that really matter. Although the composite of the current circuit factor lists looks long, it really is not so long; to a significant extent, the various courts use different language to describe essentially the same thing. The basic objective should be to identify the subjects on which the judge must feel comfortable making a finding.

That effort received support emphasizing the use of "just" in Rule 1: The handling of class actions should be consistent around the country. Having a relatively short list will contribute to that outcome.

It was asked why the ALI's formulation had not been much cited by the courts. The cy pres section of the Principles has received much attention, but the settlement approval provisions have not. Does this suggest that the courts do not accept the settlement criteria formulation? A response was the many judges probably feel that they have circuit precedent that tells them they must adhere to and discuss that circuit's list of factors.

That explanation drew agreement. "People address things that don't matter because they are on the circuit's list." People are afraid to deviate from the approved list, and therefore try to shoehorn what matters into the list rather than isolate and emphasize those things that matter. Both sides of the v. will favor having this clarified.

At the same time, the question of having a different list should be kept alive. The solution there would be to include the Cooper factors as an Appendix to this segment of the evolving draft of amendment ideas.

(2) Settlement Class Certification

This subject was introduced as involving at least two major issues: (1) whether to extend beyond (b)(3) classes, and (2) whether to countermand things that Amchem held, and if so whether to say so.

An initial question was whether the Committee can change what the Supreme Court ruled. The answer is that changing the

rule can alter the outcome the Court reached under the rule as it was at the time the Court decided. Probably it would be desirable to make it clear that is the objective, if it is indeed the objective.

One aspect of Amchem that has drawn much attention is the Court's insistence there that predominance be satisfied even for settlement certification. How has that worked out? The answer was that there is a fair amount of jurisprudence about what predominance means in the settlement context, as opposed in a litigation class situation.

The "central question" was put: Is there something in current practice that should be liberated by a rule amendment? The response was that, for the most part, people are plugging along. But the issues presented by Amchem can distract courts from the things that really should matter. For one thing, objectors sometimes seize on the predominance issue. Resolving that question will be helpful. It will probably receive more support from defense lawyers than plaintiff lawyers, but it will help both sides of the bar.

Another issue was whether it would be useful to say that a case can be a settlement class only if it "satisfies Rule 23(a)." The ALI Principles put this differently, by making settlement certification contingent on whether there are significant common issues a sufficiently numerous class. Would that be better?

A reaction was that invoking Rule 23(a) seems simpler, but may raise difficulties. For example, typicality may not matter in the settlement context. Whether or not the named plaintiff would be subject to embarrassing examination at trial due to a criminal record, etc., that does not matter in the settlement context.

Another problem is that Wal-Mart v. Dukes has heightened concerns about involving the common question requirement of 23(a)(2). It may be better to substitute a reference to commonality as in the ALI version. More generally, the ALI approach was to introduce selective reference to matters identified in Rule 23(a), rather than invoking that rule provision wholesale.

Another response was that the real goal should be to put the emphasis on whether the class is cohesive.

A question was raised: How can the defendant support a settlement when approval depends on finding that 23(a) is satisfied and simultaneously oppose certification for litigation purposes on the ground 23(a) is not satisfied?

The response was that "parties don't toss away their

arguments." Defendants make it clear that they are reserving all arguments about litigation certification when they agree to support certification for purposes of settlement.

But, it was asked, isn't there a law of the case problem if the court declines to approve the settlement? That drew the response that this is kind of like an "escrow" situation; the concessions for settlement review are only good if that goes through, and if it does not go through they are all retracted.

The bottom line was that a draft should offer an alternative to invoking and relying on satisfying 23(a). This might be based in part on the approach adopted by the ALI Principles.

Discussion returned to whether a new (b)(4) should be limited to (b)(3) certification. An immediate response was that there are lots of (b)(2) cases that settle. The courts have recognized settlement outside the (b)(3) context.

Another question was whether Amchem has had an impact on settlement of cases brought under (b)(2), to which the answer was that it has.

But that raised the question whether opting out should be a feature of (b)(1) or (b)(2) cases. How can the injunction forbid the defendant from using certain practices with class members but permit it to continue to use challenged practices with those who opted out? Another response was that allowing opting out would completely defeat the purposes of (b)(1) certification.

A further response was that the courts can still permit opting out for equitable reasons in specific cases.

The time for this call had expired; the discussion will resume on Feb. 12.

Notes of Conference Call
Dec. 17, 2014
Rule 23 Subcommittee
Advisory Committee on Civil Rules

On Dec. 17, 2014, the Rule 23 Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participants included Hon. Robert Dow (Chair, Rule 23 Subcommittee), Elizabeth Cabraser, Robert Klonoff, John Barkett, Prof. Edward Cooper (Reporter of the Advisory Committee), and Prof. Richard Marcus (Reporter to the Rule 23 Subcommittee).

Judge Dow introduced the call by explaining that discussions after the October Advisory Committee meeting suggested that the Rule 23 amendment possibilities might move forward somewhat more rapidly than had previously been discussed. A plausible goal would be to have an amendment package ready for consideration by the Standing Committee and publication in June, 2016, which would mean approval by the Advisory Committee at its Spring, 2016, meeting. That, in turn, would probably call for relatively advanced drafts to be discussed during the Fall 2015 meeting, and some sort of initial discussion drafts circulated for discussion during the April, 2015, meeting.

This revised timetable depends on the Subcommittee's comfort with the list of possible amendment ideas it has identified. Certainly nothing is entirely off the table even if not on that list, but it does seem that various sources identify these topics, and therefore that this is the right list. For this conference call, then, the goal is to march through the list circulated for the call and see if some should be removed from the list. In addition, it would be important to determine whether there are other topics that should be added to the list.

(1) Settlement Approval Criteria

This topic was introduced as frequently of concern to judges, who probably have to review proposed settlements much more frequently than they certify classes (at least for litigation purposes -- certification for settlement is considered under the next heading). The judges (and the lawyers) may confront very long lists of criteria under the precedent in various circuits. The same sort of message emerged during the ALI work on the Aggregate Litigation project -- that the range of criteria was too large.

The ideas for approaching this set of concerns build from the ALI work. One tension is whether to limit the factors that can be considered. The ALI reported considerable unhappiness with the variety of factors that crop up in the lists used in various circuits. Keeping track of all the various lists may be a concern mainly for lawyers who practice across the country. But having identified the particular ones for a given circuit often does not assist the court or the lawyers much in making the

settlement-approval judgment.

One model for an approach to Rule 23(e) might be the approach of Rule 23(g) to appointment of class counsel. Rule 23(g) says that there are four factors that must be considered whenever the court makes a class-counsel appointment, and that any other pertinent factor may also be considered. A rule might have a closed list, or a mandatory list with authority to consider any other pertinent factor. The 2000 draft of Rule 23(e) possibilities took a somewhat different approach, identifying a very large number of possible factors.

A reaction to these possibilities was that courts would benefit from having a touchstone for making decisions about whether to approve proposed settlements. It was agreed that identifying a few things that the court must consider is useful, but not trying to shut the door on a variety of other considerations that might be important in given cases. On the other hand, some things courts have cited should be removed from consideration. A prime candidate for removal is the opinion of counsel; they have negotiated the deal and are supporting it. That is a make-weight reason for judicial approval, but does show up on some lists of factors. The number of opt-outs, any possible conflict of interest, etc., are all things that may be important in some cases.

Another participant agreed that the variety of factors included on one circuit's list or another is quite daunting. The goal of a rule should be to list the "core factors." It should not try to be a closed list; it would never be possible to list all the factors that could ever matter. A rule cannot disable courts from exercising their discretion about what is a fair settlement, and it should not try to do so. Moreover, it is not really true that the various lists are hugely different; instead, it seems that they vary somewhat in terms of terminology and also in terms of emphasis. At the same time, at least some might best come out, and the opinion of proposing counsel heads the list of those that do not make sense.

It was remarked that the Subcommittee would benefit by having a "spreadsheet" or something like that listing the factors included in the various tests like the Grinnell factors (2d Circuit) and Gerst factors (3d Circuit). An effort could be made to put together such a listing; lawyers who practice in the area have to develop their own, so it should not be too difficult to compile one.

Another idea was that a Committee Note to such a "core factors" rule could say that it supersedes the various items on circuits' lists to the extent that may have been regarded as mandatory "checkoffs" in those circuits. That is not to say they may not be pertinent in given cases, but the "checklist" could be

confined to the ones in Rule 23, not all the others that found their way onto a given circuit's list.

At the same time, it was noted that the circuits' lists are not particularly diverse. Indeed, it seems that circuits have been borrowing from one another. Certainly adopting the core factors of the sort identified by the ALI would not involve overruling the decision of any circuit. To the contrary, it would probably be more like adopting the common features of various lists and including them in the national rule. That idea drew support -- "I like the idea of collecting the law of the land on settlement review."

A caution was noted: It will be important to keep in mind how such a listing of factors ties in with the possibility of certification for settlement only. In addition, it would be useful to keep in mind the possibility of mentioning factors (at least in a Committee Note) that have not been included on any circuit's list.

It was also noted that borrowing directly from the ALI principles could cause difficulties because it was an integrated document that used its own terms. One example is the idea of "indivisible relief" as the sort of thing that at least Rule 23(b)(2) addresses.

A concluding comment was that there is virtually a unanimous desire in the bar for sensible and consistent settlement approval criteria, and also for criteria for settlement class certification.

(2) Settlement Class Certification

This topic was introduced with the 1996 draft (b)(4), which sought to undo a Third Circuit line of cases that permitted settlement certification only if litigation certification would be warranted. After the Supreme Court made its Amchem decision in 1997, this proposal was shelved. It might be time to bring it out again. And one possibility would be to do something that is out of step with Amchem's interpretation of the current rule. Amchem said that 23(e) settlement review is no substitute for rigorous application of the criteria of 23(a) and (b) (except for manageability). A prime sticking point has been the role for predominance in this analysis. So one possibility sketched in the materials for the call was to say (at least with regard to (b)(3) certification) that settlement class certification is permitted if the court approves the settlement under 23(e).

One reaction was that there are a few decisions in which the lower courts have tried to work through what predominance means in the settlement certification setting. One example is Hanlon v. Chrylser, a Ninth Circuit decision. Another might be at least

some parts (particularly Judge Scirica's concurring opinion) in Sullivan v. DeBeers.

This discussion led to a question: Do we want to limit this to (b)(3) classes? Predominance is only required in those class actions. Should mandatory class actions be included also? That would open the prospect of a "stand alone" (b)(4). A reaction to this idea was that it seems "more practical." True, most settled class actions are (b)(3) cases. But the (b)(1) and (b)(2) examples are "remedy driven." They are not, however, cases in which settlement class certification is never a possibility.

One idea that was expressed was that it would be good to have a compilation of the factors used in various courts for settlement class certification. One reaction was that it is likely the various settlement approval criteria are delineated more clearly under current case law than the handling of predominance in settlement class certification.

Another question was to look at the factors for settlement approval and settlement certification to see whether the courts actually are using them or just intoning them because they are "on the list." An example is the approval of counsel factor that was noted before Amchem was decided; now it gets "backhanded." It may be that other factors have really fallen out of use.

(3) Cy Pres

This topic was introduced as getting a lot of attention. Some have very strong views that such methods are simply improper. Among judges, the focus is likely more practical than theoretical. Using that mindset, the ALI approach makes sense. And one thing that seems widely agreed is that in settlement fund situations allowing a reversion to the defendant is not a good idea, leaving the question what to do with amounts left over after claims have been paid. The ALI proposal offers ways to address those questions.

At the same time, there are some Enabling Act concerns that should be kept in mind. On the one hand, to the extent a rule explicitly authorizes this new "remedy," it might be challenged as going beyond the sorts of things that a rule should do. On the other hand, under the law of some jurisdictions, such measures have been a part of practice for a long time, so a rule that disallows them in federal court could be challenged on Enabling Act grounds as well as one that explicitly authorizes them. At least on some occasions, situations like the old California case of Daar v. Yellow Cab really do call for creative solutions. The vitamins antitrust case was probably one of those.

But in most cases, the main concern is the residue after

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claims processing. The ALI's proposal is "becoming the standard in the courts." It would be helpful for the rule to provide the factors that should be considered. In the Seventh Circuit, it seems that the courts may approve cy pres arrangements as the sole remedy in some consumer cases.

It was observed that, for some reason, the prominence of cy pres became more significant after 2010, just after the ALI proposal was adopted. Putting something modeled on the ALI's work into the rule would be helpful, and a lot better than "going back to square one." It was suggested that judges probably would favor that approach as simplifying and clarifying their work. These factors are not absolutes, but can focus the controversy.

Again, it was suggested that it would be helpful for the Subcommittee to arrange for cases to be gathered on current practices. A reaction to this suggestion was that the ALI itself is assiduous about keeping track of adoption in the courts of its proposals; it probably can provide a reasonably complete report on cases addressing the cy pres provision in the Aggregate Litigation principles.

The consensus was that the ALI proposal's orientation seems to be where the bulk of people find the law should go, and the topic therefore should not be too controversial to take on. Whether it should include some general "good works" fallback, or escheat to the state, is not certain. Indeed, at least some of the more fervent commentary on the general subject seems ideological, suggesting that it reflects a substantive rather than procedural concern.

(4) Handling Objectors

The set of issues was introduced with the observation that it seems that the present provisions of Rule 23(e)(5), added in 2003, adequately police the withdrawal of objections in the trial court. The problem appears to happen after an appeal is filed, when Rule 23 arguably no longer applies. The Appellate Rules Committee has been looking at those problems. Another issue was raised by Stephen Herman, who urged that the rule limit objections to matters the objector has "standing" to raise. A possible analogy for that would be Rule 23(h)(2), which permits objections to an attorney's fee award by a class member or a party from whom payment is sought, but not by others. Perhaps something like that could serve to screen objecting class members.

A reaction was that the Herman letter identifies a familiar problem. An example was in the DeBeers litigation, where the objection to payment to those from states that had not adopted Illinois Brick repealers was made by somebody who seemed to come from such a state. Thus, the objector's point was, in essence,

that she should not be paid anything and more should be paid to others resident in states with Illinois Brick repealers. This sounded like an objection this person should not be allowed to make.

But, it was responded, if the objector points up something that "really stinks," does that mean the judge can't consider it because it seems that this repellent part of the deal does not adversely affect this particular class member? It was agreed that would probably be going too far, but that it points up the relationship between this factor and the settlement approval criteria.

Regarding the problem on appeal, the suggestion was that the solution was for the court of appeals to send the matter back to the district court. Even now, sometimes those perturbed by bad faith objectors approach the district court and ask that a high bond be set. On the other hand, "we can't make objecting a felony." It may be that nothing need be done.

But it was noted that the Appellate Rules Committee may be receptive to adjustments that facilitate the handling of ill-intentioned appeals. It would be important to keep a way open for the Rule 23 Subcommittee to play a role in that process, perhaps even a lead role. This subject should be pursued with that committee.

(5) Rule 68 Mootness Issues

A starting point was that the Seventh Circuit approach has produced "out-of-the-chute" certification motions in that circuit that make little sense. This "creates makework for all," but is necessary to guard against inappropriate outcomes in the Seventh Circuit. But whether a rule-based solution would be wise is not clear. Perhaps the simplest way would be to add a sentence to Rule 68 saying that it does not apply in class actions and derivative actions. Something like that is already in Rule 41.

That raised the possibility that it may be that additional changes to Rule 68 seem worth pursuing for unrelated reasons that were discussed during the last Advisory Committee meeting.

A further point was that Rule 68 is not really about mooting cases, and that cases can be mooted without a Rule 68 offer. If a small change to Rule 68 were made to deal with this problem there, it might be possible in a Committee Note to say something about the impropriety of seeking to "pick off" class actions with individual settlement proffers to the class representatives (at least before the district court rules on class certification).

The consensus was to carry forward this topic, but without confidence about what should be the resolution.

(6) Issue Classes

The introduction stressed that there are basically two approaches. The first would permit (c)(4) certification without regard to the predominance requirement of (b)(3). That would recognize what seems to be the view of the majority of the circuits. The other would be to implement the Castano 5th Circuit view that (c)(4) is not an end run around predominance by specifying in (c)(4) that it may be used only in cases that satisfy 23(a) and (b).

The discussion focused on whether there really is a split in the circuits on this issue. Some 5th Circuit decisions appear to accept (c)(4) solutions to (b)(3) problems. Most circuits never took the Castano view.

If that's so, the question was whether the rule should be changed. As things now stand, the two rule provisions don't easily fit together. Excusing the predominance requirement when appropriate measures can be taken using (c)(4) could clarify the present confusion. That would largely recognize the majority view among the courts.

Alternatively, (c)(4) could be changed to give teeth to the Castano view. But that would seem to go against the view of most or all the other circuits, and also might be out of step with some 5th Circuit decisions.

This matter would be carried forward.

(7) Notice

The consensus was that this set of issues should be carried forward. Presently, notice is partly "buried" in Rule 23(d). Rule 23(c) notice in (b)(3) cases, meanwhile, can be a major cost but not a major value to class members. The meaning of "individual" notice in the Digital Age might need to be reconsidered. The centrality of first class mail to achieve that notice surely seems ripe for reexamination. Finding practical solutions should be the goal, and finding rule language that would permit or facilitate practical solutions should be the rulemaking goal.

It was suggested that it would be good to collect best practices from around the country. This sort of thing "should not be the subject of argument" once the experience of the courts is on the table.

Another limitation that might be considered is to dispense with individual notice in low-value claims (perhaps those worth less than $100, the amount suggested in the 1976 Uniform Act, an amount whose current value would be nearly $500).

* * * * *

Good progress was made toward developing discussion drafts. The Subcommittee should reconvene by conference call in January, 2015.

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DISCOVERY SUBCOMMITTEE REPORT
"REQUESTER PAYS" ISSUES

During its November, 2013, meeting, the Committee had an initial discussion of whether the rules ought to include some additional "requester pays" provisions regarding the cost of responding to discovery. That meeting occurred the day after the first hearing on the package of proposed amendments published for public comment in August, 2013. The Committee was thereafter focused largely on addressing the large volume of public commentary it received regarding that package. The package was eventually revised and is now before the Supreme Court awaiting its possible adoption.

The Discovery Subcommittee presents this topic for further general discussion because it has been raised by several sources (including some communications to the Committee from Congress) and seems to present basic issues. In addition, aspects of "requester pays" are included in some legislative proposals dealing with "patent trolls" that have been introduced in Congress. If legislation passes, it may be that requester pays issues will be included, and the legislation may direct rulemaking in relatively short order. That, of course, depends on developments in Congress.

The Discovery Subcommittee is not recommending any further rulemaking at this time. Indeed, as addressed in somewhat greater detail below, the current package of amendments pending before the Supreme Court may affect the utility and nature of any requester pays rule provisions that might emerge in the future.

Instead, the Subcommittee is responding to expressions of support for serious consideration of such rulemaking. Whether further rule amendments should be seriously considered before there is a basis for evaluating the effect of the amendment package currently before the Supreme Court, should it be adopted, is a matter for consideration. The goal of the discussion at this Committee meeting is to solicit the full Committee's views on how best to prepare for addressing these issues in the future.

Besides this memo, the agenda book should also include several additional items bearing on this topic:

Notes from the Discovery Subcommittee's March 13, 2015, conference call;

Notes from the Discovery Subcommittee's Feb. 13, 2015, conference call;

An excerpt from the minutes of the full Committee's Nov., 2013, meeting, dealing with these issues;

Notes from the Discovery Subcommittee's Sept. 16, 2013, conference call discussing these issues;

Introduction to Proposals for Cost-Bearing Provisions in the Rules, a memorandum prepared by Prof. Marcus to provide background for the Sept. 16 conference call.

The idea behind considering some sort of explicit requester pays provision, as expressed by those who have asked the Committee to consider such a provision, is that there is a significant number of instances in which discovery requests are pressed even though the likely importance of the information being sought is dwarfed by the cost of complying with the discovery request. Indeed, there are even assertions that some litigants may deploy broad discovery requests precisely to impose costs on adversaries.

But it is not at all clear that "cost infliction" happens with significant frequency, even though there probably are instances in which one might say it has occurred. And (particularly in the Digital Age, during which huge amounts of data may be requested through discovery) self interest could prompt those seeking discovery to try to avoid asking for too much. In addition, it is surely true that those seeking discovery must be concerned about narrowing their requests so much that critical information can be withheld on the ground it was not requested. Modulating the use of cost-bearing in this environment is accordingly a challenging task.

As already noted, one starting point is to focus on the current amendment package, which includes provisions that may assist the court and parties in performing that task. Since 1983, Rule 26(b)(2) has directed judges to limit discovery that is disproportionate, and a reminder of that directive was included in Rule 26(b)(1) in 2000. The current amendment package imports the proportionality provision directly into the scope definition. It might be said that the presence of a proportionality provision in the rules since 1983 has not sufficiently solved the problem so as to justify confidence that the relocation of that provision will now solve the problem. So it remains possible that, if adopted, the current amendment package will leave important problems unsolved.

At the same time, as the Committee learned during the public hearing process concerning the amendment package currently before the Supreme Court, at least a significant number of observers foresee that these amendments will produce significant changes and curtail discovery in some cases. That possibility might be a reason to defer serious consideration of additional or more aggressive measures, and also to think now about ways to try to determine the actual impact of the current package if it is adopted.

Another starting point is to recognize "the presumption is that the responding party must bear the expense of complying with the discovery requests." Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978). This starting point seems implicit in several current rules:

Rule 26(g)(1)(B) says that the signature of a lawyer on a discovery request certifies that the request has not been made for an improper purpose such as increasing the cost of litigation and that the request is not unduly burdensome or expensive.

Rule 26(b)(2)(C)(iii) requires the court to limit or prohibit discovery that would disproportionately burden the responding party. [This is the provision that the current amendment package would move up into Rule 26(b)(1), and also revise a bit.]

Rule 26(c) now authorizes a protective order to protect a party from "undue burden or expense." In *Oppenheimer Fund*, the Supreme Court recognized that Rule 26(c) provided authority for "orders conditioning discovery on the requesting party's payment of the costs of discovery."

Rule 26(b)(2)(B) explicitly authorizes the court to condition discovery from sources of electronically stored information that are not reasonably accessible due to burden or expense, and the Committee Note confirms that cost-bearing is one such condition.

A third starting point is to recognize that past rulemaking efforts present background for the current consideration of these issues. That background (including the summary of commentary during the public comment period in 1998-99 on one such proposal) is presented in Prof. Marcus's memo that should be included in this agenda book. It is clear that the public comment in 1998-99 showed that there are strong views on these subjects in some sectors of the bar.

It is critical that any approach to these issues include close attention to access-to-justice concerns. Discovery is an important source of evidence for litigants. At the same time, it may sometimes be an important cost for litigants that could actually impede access to justice by deterring some potential litigants from seeking relief in court due to the cost of the discovery that effort would entail. Already, significant numbers of litigants seem to be priced out of hiring lawyers, so the prospect that lawyers would have to bear additional discovery costs might compound that concern. As noted in connection with pending legislative initiatives, recent concern about patent "trolls" could illustrate this concern.

At the same time, the recent development of protocols for discovery in individual employment discrimination cases could indicate that it may be possible in other significant categories of litigation to develop an idea of what constitutes "core" discovery. If so, one could perhaps consider cost bearing for discovery beyond that "core" information. Alternatively, even without developing protocols for other whole categories of litigation, it may be that judicial case management could facilitate the handling of cost-bearing possibilities in individual cases.

As it was during the November, 2013, meeting, the goal of raising these issues during this meeting is to canvas the Committee's views on how further exploration should be pursued. Disciplined examination of these issues would depend on developing a substantial information base, and that in turn depends partly on identifying the issues that should be pursued. There should be no assumption that this effort will lead to actual rule-change proposals; drafting any such proposals would involve many tough questions. But at the same time it seems important for the Committee to examine these issues seriously; even if it concludes that no further changes to the rules are indicated, it will be important that it have a solid information base for its conclusion.

A problem in addressing any of these concerns is that discussion often seems to be dominated by what some call "anecdata" -- horror stories that, however accurate they may be about individual cases, do not suitably portray the broad realities of most litigation. So one aspect of this discussion should be to identify methods to develop better information than we currently have. Preliminary discussions with Emery Lee of the FJC have begun to explore these issues. And ideas about how to involve bar groups and others who may be able to shed light on these issues using a solid data-base rather than anecdotes would be welcomed.

Similarly, ideas about which issues seem most important and promising would be welcome. Examples of local rules, practices, standing orders, or guidelines that have seemed to yield good results would be helpful and might provide a basis for further inquiry.

From presently available information, it seems that some case management efforts (like Judge Grimm's standard order, which was included in the agenda book for the November, 2013, meeting) have been effective in avoiding wasteful discovery. Work done to date by the FJC indicates that most cases in federal court are resolved with a modest amount of discovery. Though hardly the predominant form of litigation today, it seems that large cases between two large entities probably would not benefit from a requester-pays system, which might be more likely to complicate

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the litigation.

More generally, particularly regarding discovery of electronically stored information, there may be inherent constraints on over-discovery due to the cost of reviewing vast amounts of ESI. Perhaps some sort of requester-pays rule would be sensible if it could be tailored to large cases with asymmetrical discovery, but such a rule would likely depend on judicial discretion and oversight that might be exactly the sort of judicial activity encouraged by the package of amendments now before the Supreme Court.

If the Subcommittee decides to move forward, a likely step would be to convene some sort of mini-conference, but that seems premature now. For one thing, the Committee has other issues (such as class actions) that may be time-consuming in the immediate future. For another, it could conclude that it is necessary to learn how the current package of amendments works (assuming it is adopted) before venturing to propose further significant changes to the discovery rules.

So in the spirit of getting discussion going, rather than suggesting any conclusion, here are some thoughts that have received attention in Subcommittee discussions:

(1) Is there a serious problem of over-discovery that might be solved by some form of requester pays rule? We know that in much litigation it seems that the discovery is roughly proportional to the stakes. We know also that in a significant number of cases high discovery costs are reported. How should one try to identify over-discovery? How can one evaluate the potential utility of requester pays approaches to dealing with those problem cases?

(2) Should any rules along this line focus mainly on certain kinds of cases, or on certain kinds of discovery?

(a) In general, the rules are to be "transsubstantive," applying to all cases with relative equality. But there are rules that are keyed to specific types of cases, such as Rule 9(b), with its specific pleading requirements for fraud. Is there a workable way for a rule to identify "problem" or "contentious" cases? [Note that, as mentioned above, "patent troll" legislation may call for rules specific to some or all patent cases.]

(b) Since discovery regarding electronically stored information has assumed such great importance, should a "requester pays" idea be considered only for that sort of discovery? The current Rule 37(e) proposed amendment is similarly limited, as is current Rule

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37(e). Even more pertinent, current Rule 26(b)(2)(B), with its cost-bearing possibility, is also only about electronically stored information.

(3) Should cost-bearing ever be mandatory? All models of possible rule changes that have been actively considered so far have essentially been discretionary. That means that the court must become involved before cost-bearing is a possibility. Perhaps cost bearing could be presumed in certain situations unless the court directed otherwise. But if so, how would one define those situations? Defining them could be quite difficult, and disputes about whether given discovery fell on one side or the other side of such a line could themselves impose significant costs on the litigants and burdens on judges.

(4) Would it be useful to consider broadening initial disclosure if requester pays changes are actively studied? As amended in 2000, Rule 26(a)(1) only requires disclosure of information the disclosing party may use to prove its claims or defenses. Some question the utility of the current rule. It could be that broadening initial disclosure would be a useful adjunct to adding requester pays provisions.

(5) Could introduction or emphasis on these issues itself justify substantial discovery? If the question is whether providing requested discovery will be highly burdensome, or would not provide useful evidence, it may be that some parties will seek to explore these issues using discovery. One method for making Rule 26(b)(2)(B) determinations about whether to order discovery from "inaccessible" sources of electronically stored information is to see what can be found in a sample of those sources, and at what cost. Perhaps that is a model that would be useful, but it might also suggest "discovery about discovery," something that may be unnerving.

(6) Would requester pays provisions have a significant effect on judicial workload? It is likely such provisions would focus on something like "reasonable expenses." Determining what is "reasonable" could be an effort for the court. But perhaps that inquiry is sufficiently implicated in the basic proportionality analysis -- balancing the cost of proposed discovery against its apparent value -- so that there would not be significant added effort for the court.

In sum, there are many things that might profitably be pursued, and the Subcommittee invites suggestions about how best to proceed. Hopefully this brief introduction adequately highlights some of the considerations.

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Notes of Conference Call
March 13, 2015
Discovery Subcommittee
Advisory Committee on Civil Rules

On Feb. 13, 2015, the Discovery Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participants included Hon. Paul Grimm (Chair, Discovery Subcommittee), Hon. Craig Shaffer, Hon. David Nahmias, John Barkett, Emery Lee (FJC), Prof. Edward Cooper (Reporter of the Advisory Committee), and Prof. Richard Marcus (Reporter of the Discovery Subcommittee).

The call began with a summary of the current work on the subject. There was an initial discussion during the full Committee's November 2013 meeting, but from that time forward the Committee was occupied by the public comment on the proposed amendment package that was published for comment in August, 2013. Meanwhile, "patent troll" legislation had been introduced in Congress that included some "requester pays" aspects. Hearings in Congress about discovery more generally had addressed similar issues, and some in Congress had been in touch with the Committee about those issues.

The current work is designed to re-introduce the issues to the full Committee, and this call is particularly concerned with what information might be generated to inform decisions about whether to proposed further requester pays rule provisions.

The reference to patent troll legislation suggested a focus in part on patent litigation. Many districts have patent pilot projects that involve tailored practices and procedures for those cases.

In addition, there may be other types of identifiable sets of litigations that raise similar cases, such as MDL cases.

A different set of issues deals with the difference between requester pays and loser pays. In the UK, the loser pays approach calls for assessment of "reasonable costs" after the termination of the litigation (when the "loser" can be identified).

Meanwhile, there seem to be quite a few existing federal rules and statutes, and many more state rules and statutes, that involve something like requester pays.

Against that broad background, the immediate focus is not on presently proposing rule changes or solutions of another kind, but on what sorts of information might be obtained and how much effort might be involved in obtaining that information. It seems well accepted that discovery costs are relatively moderate in most cases, but also that there are cases in which discovery sometimes costs a huge amount. There may be an inherent limit on voracious discovery in the era of E-Discovery -- who wants to try

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to deal with five terabytes of data? And the current package of proposed amendments before the Supreme Court may affect the handling of these issues in the future.

This drew the initial reaction that a considerable amount of data has been developed (mainly by CACM) on the patent pilot projects. It should not be difficult to see what light that data-collection effort could shed on this set of issues.

At the same time, it does not seem that existing studies include much detailed empirical information. In May, 2014, IAALS issued a study with a brief reference to some FJC research and some work by the 7th Circuit E-Discovery project on cost bearing sorts of issues.

The question of existing rules and statutes prompted the observation that there is a lot of existing law, but not much (if any) existing empirical evaluation of what those existing rules do. One idea (suggested by Prof. Spencer's article) is that judicial pre-screening of discovery might be more promising than some post hoc cost bearing. But that sort of screening likely would impose very significant burdens on the courts, and might not make sense in many cases, given that in most cases there is not a problem with disproportionate discovery.

A different approach would be to try to identify types of cases with frequent overdiscovery. Patents, MDL cases, cases with heavy ESI discovery all come to mind. Perhaps the right focus is on "asymmetrical" big cases, or high stakes cases. But there is both a problem of identifying the cases and determining what tools might be used to identify the cases.

On asymmetrical cases, one category might be pro se litigation. But general experience suggests that plaintiffs in those cases usually do not know how to make discovery demands, much less disproportionate ones.

Another way to approach the issues was suggested -- Is there a way to determine when courts have been asked to allocate discovery costs? Could that be obtained from databases available to the FJC?

There seems no easy way to do this. We know how to do Westlaw research to find cases on that database that involve use of certain terms. But Westlaw is not a representative collection of cases. There may be ways to search the entire CM/ECF replication database to identify cases of interest. But that effort would be considerable, and the utility of the results cannot presently be known. Moreover, under current A.O. policy (since May, 2014), it is necessary that there be a formal request from a rules committee before even exploratory investigation can be done to determine what might be learned with what level of

effort.

The subject was pursued -- Could we search for all cost-shifting orders, or all motions seeking cost-shifting? Alternatively, could we search for all cases involving motions under Rule 26(b)(2)(B), which authorizes conditioning retrieval from inaccessible electronic sources on payment of some or all of the cost? Can we find out how often that is done?

It would be possible to search docket text for notations indicating such motions, but what appears in the docket depends on what the docketing clerk decided to put there. It may not be as reliable as we would prefer. A text search could probably be done using the replication database, searching district by district.

That prompted a question -- could we use certain representative districts rather than all districts? The answer is that one certainly can do that, and reduce the burden of doing the search. Indeed, it is almost a given that such searches are done district by district. It may be that a relatively limited collection of districts could be identified to do at least a "test bore." And then one could determine, perhaps, whether this is a "dry hole."

This discussion prompted the observation that what we are talking about is "proportionality" in terms of gathering information for the Committee's use. The idea is to come up with four or five districts whose information might be investigated, and to see what information from those districts shows can be gleaned from the replication database.

But to do that would first require some formal request from the Committee.

Turning from data-gathering, the discussion focused on whether anything more would be needed to make a presentation to the full Committee during its April meeting. The reaction was that the biggest unknown is what Congress will do about patent troll legislation. If it directs rulemaking to proceed rapidly, much of the information gathering that was discussed cannot occur because the information would take too long to obtain.

So this is a two-track process before us: A "fast track" if Congress directs fast action, and a "deliberate track" if it does not. It seems that H.R. 9 is one piece of legislation, and some effort should be made to find out what it would direct the Committee to do. (A check after the call showed that the proposed legislation does not now seem to have a rigid time limit for rulemaking activity.) But even a full answer to that question does not tell us what, if anything, Congress will actually enact.

Under these circumstances, it seems that we have the most we can present presently, and that we may have some additional information about empirical data to be presented orally at the April meeting.

Notes of Conference Call
Feb. 13, 2015
Discovery Subcommittee
Advisory Committee on Civil Rules

On Feb. 13, 2015, the Discovery Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participants included Hon. Paul Grimm (Chair, Discovery Subcommittee), Hon. David Campbell (Chair, Advisory Committee), Hon. David Nahmias, John Barkett, Parker Folse, Prof. Edward Cooper (Reporter of the Advisory Committee), and Prof. Richard Marcus (Reporter of the Discovery Subcommittee).

The call began with a summary of prior discussions of the general subject of requester pays rules or measures. The Subcommittee discussed this subject in a conference call on September 16, 2013, and the full Committee considered it during its meeting on Nov. 8, 2013. Copies of the notes of that conference call and the minutes of the discussion at the Committee meeting were circulated before this call. In addition, a recent article by Prof. Spencer of the University of Virginia and a piece by IAALS from last Fall have been circulated to the Subcommittee. The IAALS study looked not only at U.S. federal courts, but also state courts in the U.S. and courts in Canada and the U.K.

Introductory thoughts recognized that there have been strong views on both sides of these issues. Some believe that the absence of requester pays principles is an unfortunate feature of our legal system, particularly given the broad discovery it affords. It has even been urged that the American principle that the producing party must produce without recompense even if it wins the case violates due process. At the same time, many strongly believe that American discovery is essential for access to justice.

Under these circumstances, as this Committee considers these issues it must be careful to be transparent and solicit input from all stakeholders. It also probably should take account of the package of proposed amendments now before the Supreme Court, for that package includes many provisions that may address some of the concerns that seem to be animating the push for changing the producer pays rule that has been true in U.S. litigation.

But it is also important to appreciate the extent to which legal provisions already exist to undo the American rule that the producer pays. The Spencer article is quite thorough in showing that there is already a wide variety of rule provisions and statutory provisions that permit a court in appropriate circumstances to shift the cost of responding to the requesting party. In some states (such as California, see Toshiba America Elec. Components, Inc. v. Superior Court, 21 Cal.Rptr.2d 532 (Cal.Ct.App. 2004) -- holding that a California statute imposes the cost of restoring backup tapes on the party seeking

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discovery) there are provisions that are more focused on requester pays solutions. According to the IAALS study, there are more than 200 statutes that might authorize something like requester pays. So one question might be: Why is that not enough?

Another thing that the IAALS study shows is that our assumptions about how things operate in other countries may not be right. In the U.K., for example, we may assume that the virtually automatic rule is that the loser pays. But that does not seem to be what really happens most of the time now. Instead, the amount paid is often scaled back, and in general in civil cases only a modest amount is shifted. In addition, particularly since the Jackson Report reforms in 2009 or so, there is a strong judicial push to do budgeting for the litigation up front.

In addition, the U.K. has a strong form of initial disclosure, including unfavorable information, which is probably a central explanation for the limited discovery available after that. In this country, there was strong resistance to such a disclosure provision when one was published for public comment in 1991, and the optional weaker version actually adopted in 1993 was replaced by amendments in 2000 that limited disclosure to information and witnesses the disclosing party might use for its case. That is often significant, but it is a good deal less significant (as a substitute for formal discovery) than what's normal in the U.K. That baseline in the U.K. probably explains the frugal attitude about further information exchange thereafter.

A first reaction to these points was to invite reflection on the types of cases that make up the federal civil docket today. Perhaps 25% to 30% involve some sort of employment dispute. Many social security appeals occur. Prisoner petitions of various sorts are very numerous. In many of these sorts of litigation there is a fee-shifting statute that may be interpreted, even if it is not explicitly written, in a pro-plaintiff manner. Other kinds of cases are less numerous, but may be the sort that prompt interest in a requester pays regime, such as securities fraud, antitrust, and RICO. In addition, in the U.K. there is a strong form of offer of judgment that has implications for cost recovery. There is also insurance against such costs.

Another reaction was that those expressing interest in requester pays are primarily what we might call defense interests. For them, probably attorney fees are a major part of the actual costs. Screening of potentially discoverable material for responsiveness and privilege takes a large amount of time, and the time is expensive.

There is presently a further factor -- patent litigation

legislation under consideration in Congress. Both the House and the Senate have bills moving forward. Some members of Congress are making statements about possibly producing legislation by March. There was a hearing in the House yesterday about whether recent Supreme Court and lower court decisions in patent cases eliminate the need for legislation, and it seemed that the theme was that, though desirable, these developments do not solve the problem. Several of the draft bills direct our Committee to draft rules to achieve goals spelled out in the bills. The general thrust of those goals includes allowing cost-free production of a "core" set of documents, and then making discovery beyond that core set of documents proceed on a requester pays basis. There seems at least a considerable chance some such directive will come our way.

An attorney addressed these issues by noting that his experience is with a narrow slice of cases, those involving one successful business suing another one. So "mutually assured destruction" through over-discovery is likely to be a concern to both sides. At the same time, this sort of litigation is sometimes the poster child for discovery abuse tales. In this business v. business world of litigation, there are deterrents to discovery abuse without regard to rules. There is much wrangling about how to search electronically stored information, and a lot of labor to sort through what you eventually get from the other side. There is also an aspect of mutually assured destruction for the litigant that is obdurate.

A related problem is that there is little real communication about what the resolution of these discovery disputes really means for the other side. A lawyer observed: "I have been horrified to find how much my opponents did to respond to my Rule 34 requests. That was not what we wanted." Parties may not be candid enough about what they really need and how much it will really cost to respond to discovery requests. This sort of face off may often lead to overcharges and satellite litigation about those charges.

Owing to the reported patent legislation proposals in Congress, the question was raised about how discovery works in those cases. The answer was that they seem distinctive in that often the first step is claim construction -- "how the program or device works." That involves a finite amount of information. The huge discovery volume is more likely at the damages stage, when the question is what the royalty base will look like. Up to that point, the issues are not particularly factually complicated in the sense that one must sort through mounds of material to find the pertinent evidence.

That prompted the reaction that there must be some reason why the Federal Circuit adopted guidelines for E-Discovery. The reaction to that was that it may be that litigation about

computer and software patents is different from other kinds.

A suggestion was made about patent litigation: There are a number of districts with patent pilot projects. It seems they have staged discovery, starting with infringement issues, and then validity issues. That could be a source of guidance about what holds promise if we need to move quickly on patent discovery. Another suggestion was that bifurcating the trial between infringement/validity and damages could in some instances avoid (or at least defer) the heaviest discovery.

Another question arose: If one wants to design rules only for patent cases, how often does one find that there are also other claims in patent infringement cases? Antitrust claims, unfair competition claims, and others may be coupled with (or asserted as counterclaims in) patent infringement litigation. Do we have one set of rules for one claim and another for another claim, all in the same case?

Yet another wrinkle came up -- the PTO now has its own process to reexamine an issued patent. What happens when that is initiated while litigation is ongoing? The answer to that was that usually the court will stay the litigation pending the completion of the reexamination proceedings.

Regarding fees and costs, it was observed also that there is lots of case law about attorney fee awards, including recent cases on recovery of E-Discovery costs under amended 28 U.S.C. § 1920. But that's a statute; what can a rule do about that?

This prompted the observation that there seem to be two distinct sets of issues or problems. One has to do with what Congress does about patent litigation, if it does something. That could have a temporal element that would call for fast action. The other has to do with a long-term examination of the basic questions of requester pays in the array of rules and statutes already in place. And related to that is the additional set of rule provisions that may go into effect on Dec. 1. On that score, it seems that all we can be doing now is gathering information for future use.

That said, there seem to be several things that might suitably be on the agenda for exploration now: (1) a literature search; (2) a statutory and rule search to find out what exists presently; (3) exploration of regimes that are "pay as you go" v. "collect at the end of the case"; (4) more detailed information about the case type breakdown of the federal courts' contemporary caseload; and (5) exploring what the FJC could provide in the way of insights on these subjects.

A related question arose about judicial experience with either phasing of discovery more generally or hard limits on

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discovery activities. The answer is that judges involved have found that it almost never happens that litigants come back and ask for more than what the judge allows initially. That sort of regime depends on active attention from the judge at the outset of the case, and a tailored discovery regime. Retaining flexibility is critical. But the basic point is that the flexibility is almost never actually used. Another technique that can help is a mandatory pre-motion conference, for that can intercept a dispute before it gets out of hand. These results have emerged even from standard orders that have hard limits on Rule 34 and Rule 36 requests.

In the same vein, it seems undeniable that the vast majority of cases get resolved with a modest and appropriate amount of discovery. Those litigants are not the ones who feel the desire for introducing requester pays into the rules. So any rules we might develop are really not for most cases. What we need is a rule for "problem cases."

That drew agreement. The IAALS study shows that the key thing to keep in sight is proportionality. That's also the solution endorsed by Prof. Spencer of the U. Va. And it depends on more, and more active, judicial management.

These realities create challenges for transsubstantive rules. We need to keep in mind that rules designed for problem cases may create problems in cases that would not be problems but for the rules. That would be a bad thing. But defining "problem cases" in the rules is very difficult and may be impossible. A judge has to make the assessment in an individual case.

One reaction was that a review of cases citing proportionality since it was first introduced in 1983 suggests that a limited number of red flags typify the cases that caused problems. In a real sense, this is a judicial education problem. For one thing, hands-on management does work. For another, experience does show where the problems lie, and what red flags to look out for.

Another participant summed up: This does not seem to be a trans-substantive problem. Congress can direct us to look specifically at a certain type of case, but there may not be a good way for us to determine how rules should segregate the cases.

That drew a suggestion: How about a rule for all cases in which more than $1 million is at stake? Those cases would seem not to involve the access to justice problems that are most unnerving. On the other hand, whatever the stakes, a requester pays system makes no sense when both sides are of the same size and have similar assets and relatively symmetrical discovery needs and demands. Mutually assured destruction should work

there.

One specific was suggested, however: Under CAFA, for a state-law class action to be in federal court, it must involve aggregate claims exceeding $5 million. So focusing on whether more than $1 million is in issues may mean that requester pays applies to all cases in federal court due to CAFA.

A question was raised about possible amendments: Are we talking about changing Rule 26 or adding something to it. This drew the response that we are not at a point of devising even discussion drafts of rule changes.

There are, however, lots of ideas worthy of investigation. How can we delegate responsibility to do that investigation? The goal is to determine whether there is a problem, and what it is. Another goal is to find out what we can about solutions that have been tried in the past.

In addition, it really seems that we are on two tracks. One is long term -- to build an information base for handling the general problem of requester pays and cost bearing. The other is out of our hands, and depends on what Congress does.

It was resolved that all participants would reflect on these issues and convene another conference call in the next two weeks or so.

MINUTES

CIVIL RULES ADVISORY COMMITTEE

NOVEMBER 7-8, 2013

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[The following is an excerpt from the Nov., 2013, minutes of the Advisory Committee meeting, containing the discussion of "Requester Pays" during that meeting.]

Requester Pays For Discovery

Judge Campbell opened discussion of "requester pays" discovery issues by noting that various groups, including members of Congress, have asked the Committee to explore expansion of the circumstances in which a party requesting discovery can have discovery only by paying the costs incurred by the responding party. The suggestions are understood to stop short of a general rule that the requesting party must always bear the cost of responding to any discovery request. Instead they look for more modest ways of shifting discovery costs among the parties.

Judge Grimm outlined the materials included in the agenda book. There is an opening memorandum describing the issues; a copy of his own general order directing discovery in stages and contemplating discussion of cost-shifting after core discovery is completed; notes of the September 16 conference-call meeting of the Discovery Subcommittee; and Professor Marcus' summary of a cost-shifting proposal that the Standing Committee approved for adoption in 1998, only to face rejection by the Judicial Conference.

Several sources have recommended further consideration of cost-shifting. Congress has held a hearing. Patent-litigation reform bills provide for it. Suggestions were made at the Duke Conference. The proposed amendments published for comment this August include a revision of Rule 26(c) to confirm in explicit rule text the established understanding that a protective order can direct discovery on condition that the requester pay part or all of the costs of responding. That builds on the recently added provisions in Rule 26(b)(2)(B).

The Subcommittee has approached these questions by asking first whether it is possible to get beyond the "anecdata" to find whether there are such problems as to justify rules amendments. Are such problems as may be found peculiar to ESI? to particular categories of actions? What are the countervailing risks of limiting access to justice? How do we get information that carries beyond the battle cries uttered on both sides of the debate?

The 1998 experience with a cost-bearing proposal that ultimately failed in the Judicial Conference is informative. The

Committee began by focusing on Rule 34 requests to produce as a major source of expense. Document review has been said to be 75% of discovery costs. Technology assisted review is being touted as a way to save costs, but it is limited to ESI. The 1998 Committee concluded that a cost-bearing provision would better be placed as a general limit on discovery in Rule 26(b), as a lead-in sentence to the proportionality factors.

Discussions since 1998 have suggested that a line should be drawn between "core" discovery that can be requested without paying the costs of responding and further discovery that is available only if the requester pays.

Emery Lee is considering the question whether there is a way to think about getting some sense of pervasiveness and types of cases from the data gathered for the 2009 case study. Andrea Kuperman will undertake to survey the literature on cost shifting. Other sources also will be considered. There may be standing orders. Another example is the Federal Circuit e-mail discovery protocol, which among other provisions would start with presumptive limits on the number of custodians whose records need be searched and on the number of key words to be used in the search.

One of the empirical questions that is important but perhaps elusive is framed by the distinction between "recall" and "precision." Perfect recall would retrieve every responsive and relevant document; it can be assured only if every document is reviewed. Perfect precision would produce every responsive and relevant document, and no others. Often there is a trade-off. Total recall is totally imprecise. There is no reason to believe that responses to discovery requests for documents, for example, ever achieve perfect precision. But such measures as limiting requests to 5 key words are likely to backfire — one of the requests will use a word so broad as to yield total recall, and no precision.

Judge Grimm continued by describing his standard discovery order as designed to focus discovery on the information the parties most need. It notes that a party who wants to pursue discovery further after completing the core discovery must be prepared to discuss the possibility of allocating costs. This approach has not created any problems. Case-specific orders work. For example, it might be ordered that a party can impose 40 hours of search costs for free, and then must be prepared to discuss cost allocation if it wants more.

Although this approach works on a case-by-case basis, "drafting a transsubstantive rule that defines core discovery would be a real challenge."

The question is how vigorously the Subcommittee should continue to pursue these questions.

Professor Marcus suggested that the "important policy issues have not changed. Other things have changed." It will be important to learn whether we can gather reliable data to illuminate the issues.

Emery Lee sketched empirical research possibilities. Simply asking lawyers and judges for their opinions is not likely to help with a topic like this. It might be possible to search the CM/ECF system for discovery disputes to identify the subjects of the disputes and the kinds of cases involved. That would be pretty easy to do. Beyond that, William Hubbard has pointed out that discovery costs are probably distributed with a "very long tail of very expensive cases." The 2009 Report provided information on the costs of discovery. Extrapolating from the responses, it could be said that the costs of discovery force settlement in about 6,000 cases a year. That is a beginning, but no more. Interviewing lawyers to get more refined explanations "presents a lot of issues." One illustration is that we have had little success in attempts to survey general counsel — they do not respond well, perhaps because as a group they are frequently the subjects of surveys. A different possibility would be to create a set of hypothetical cases and ask lawyers what types of discovery they would request to compare to the assumptions about core and non-core discovery made in developing the cases. The questions could ask whether requester-pays rules would make a difference in the types of discovery pursued.

Discussion began with a Subcommittee member who has reflected on these questions since the conference call and since the testimony at the November 6 congressional hearing. Any proposal to advance cost-bearing beyond the modest current proposal to amend Rule 26(c) would draw stronger reactions than have been drawn by the comments on the "Duke Package" proposals. "So we need data. But what kind? What *is* the problem?" Simply learning how much discovery costs does not tell us much. E-discovery is a large part of costs. But expert witnesses also are a large part of costs. So is hourly billing. But if the problems go beyond the cost of discovery, what do we seek? Whether cost is in some sense disproportionate, whether the same result could be achieved at lower cost? How do we measure that? Would it be enough to find — if we can find it — whether costs have increased over time? Then let us suppose that we might find cost is a problem. Can rulemaking solve it? And will a rule that addresses costs by some form of requester pays impede access to the courts? There is a risk that if we do not do it, Congress will do it for us. But it is so difficult to grapple with these questions that we should wait a while to see what may be the results of the current proposed amendments.

Another member said that these questions are very important. "The time needed to consider, and to decide whether to advance a proposal, is enormous." It took two years to plan the Duke Conference, which was held in 2010. It took three years more to

advance the proposed amendments that were published this summer. That is a lot of preparation. It is, however, not too early to start now. Among the questions are these: Does discovery cost "too much"? How would that be defined? Requester-pays rules could reduce the incidence of settlements reached to avoid the costs of discovery; in some cases that would unnecessarily discourage trial, but there also are cases that probably should settle. A different measure of excess cost is more direct — does discovery cost more than necessary to resolve the case, resulting in wasted resources? What data sources are available? We have not yet mined a lot of the empirical information provided for the Duke Conference. The RAND report reviewed corporate general counsel, assuring anonymity; its results can be considered. We might enlist the FJC to interview people who have experience with the protocol developed for individual employment cases under the leadership of NELA — it would be good to know what information they got by exchanges under the protocol, and how much further information they gathered by subsequent discovery. All of these things take time. The pilot project for patent cases is designed for ten years. FJC study can begin, but will take a long time to complete. And other pilot projects will help, remembering that they depend on finding lawyers who are willing to participate. All of this shows that it is important to keep working on these questions, without expecting to generate proposed rules amendments in the short-term future.

A member expressed great support for case management, but asked how far it is feasible to approach these problems by general national rules. "What is our jurisdiction"?

A partial response was provided by another member who agreed that this is a very ambitious project. "Apart from ‘jurisdiction,’ what is our capacity to do this?" Forty-one witnesses at the hearing yesterday divided in describing the current proposals — some found them modest, others found them a sea-change in discovery as we know it. Requester-pays proposals are far more sensitive. A literature search may be the best starting point. What is already out there? And we can canvass and inventory the pilot projects. That much work will provide a better foundation for deciding whether to go further. If the current proposals are adopted — no earlier than December 1, 2015 — they may work some real changes that will affect any decisions about requester-pays proposals.

A lawyer member observed that Rule 26(b)(2)(B) provides for cost shifting in ordering discovery of ESI that is difficult to access. "There have been a number of orders. We could follow up with experience." One anecdote: in one case a plaintiff seeking discovery of 94 backup tapes, confronted by an order to pay 25% of the search costs, reacted by reducing the request to 4 tapes. Beyond that, Texas Rule 196.4 has long provided for requester payment of extraordinary costs of retrieving ESI. We might learn from experience. So, reacting to the Federal Circuit model order for discovery in patent actions, the Eastern District of Texas has

raised the initial limit from 5 custodians to 8, and has omitted the provision for cost-shifting if the limit is exceeded; it prefers to address cost-shifting on a case-by-case basis. And we should remember that "cloud" storage may have an impact on discovery costs.

The Committee was reminded that if the proposed Rule 26(c) amendment is adopted, experience in using it could provide a source of data to support further study.

The discussion concluded by determining to keep this topic on the agenda. The Duke data can be mined further. We can look for cases that follow in the wake of the Supreme Court's recognition that the presumption is that the responding party bears the expense of response, *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978).

Notes on Conference Call
Discovery Subcommittee
Advisory Committee on Civil Rules
Sept. 16, 2013

The Discovery Subcommittee of the Advisory Committee on Civil Rules held a conference call on Sept. 16, 2013. Participating were Judge Paul Grimm (Chair, Discovery Subcommittee), Judge David Campbell (Chair, Advisory Committee), Judge John Koeltl (Chair, Duke Subcommittee), Elizabeth Cabraser, Peter Keisler, John Barkett, Parker Folse, Andrea Kuperman (Chief Counsel, Rules Committees), Prof. Edward Cooper (Reporter, Advisory Committee), and Prof. Richard Marcus (Assoc. Reporter, Advisory Committee).

Judge Grimm introduced the call as focused on an initial consideration of a set of issues often raised in recent years that are separate from the current package of amendment proposals. The current package contains a small change to Rule 26(c) explicitly authorizing the court to enter a protective order addressing allocation of discovery expenses. That explicit authorization really adds little to already recognized judicial authority in the area. Indeed, when the Supreme Court recognized that the cost of responding to discovery is customarily borne by the responding party in Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978), it also recognized that a protective order could alter that customary arrangement.

Prof. Marcus circulated a memorandum before the call sketching the Committee's past activity on cost-bearing issues. Most recently, in 1998-99, it published alternative proposals for adding explicit cost-bearing authority to Rule 34 or to Rule 26(b)(2). The proposals elicited much vigorous commentary, highlighting the sensitivity of the subject. One argument made often was that everyone agreed that the court already had this authority, so there seemed no value in saying so. Another point was that amending the rules might be taken to encourage increased use of the existing authority, a move that many who commented thought ill-advised.

Though this background is important, the main focus of today's discussion is on how or whether to proceed to serious consideration of further amendment possibilities. Many issues are on the table, and many possible ways to approach these issues in the rules exist.

Initially, it is worth appreciating that one school of thought is that parties will approach discovery in a more responsible manner if they know that they have to pay part of the resulting cost of production. On the other hand, there are important access to justice issues to be kept constantly in mind.

Therefore, one set of issues would be the extent to which one could properly identify types of cases that might be exempted

from rule provisions authorizing cost-bearing. Of course, doing something like that cuts against the grain of the Civil Rules, which are supposed to be the same for all kinds of cases. Another sort of question is like an issue raised in 1998-99 -- whether any such provision should be limited to Rule 34 discovery or applicable to all discovery. In 1998-99, there was concern that a provision limited to Rule 34 might seem to favor defendants, or at least those litigants with large quantities of discoverable information, while other types of discovery (notably depositions) might impose more costs on other litigants. Whether these concerns remain the same in the Digital Age, and with the introduction of numerical and time limits for depositions, remains to be explored.

Another set of concerns emerges from the summary of the comments and testimony submitted on the 1998-99 proposals. Much of that commentary was premised on empirical assumptions about the consequences of any cost-bearing rule that few could illuminate with real data. Instead, anecdotes or hyperbole seemed to predominate. The Committee's more recent experience has suggested that this sort of advocacy my reappear. It would be very useful to have more informative data to address these issues.

With all that in mind, the participants were invited to offer initial reactions. This discussion is just that -- initial -- and the only issue now is to develop a plan for proceeding in a methodical manner to evaluate the issues raised.

An attorney offered the view that "I'm still mulling this over." A good deal of reading on the history of the adoption of the Federal Rules has brought home the fact that the Framers of the Rules were very concerned about "fishing expeditions" using discovery. So that concern has been with us from the beginning. On the other hand, we do not want to interfere with the ability of litigants to obtain needed information. If the pending amendment proposals are adopted, it may be that they will make a significant difference and that these changes alone could be sufficient to redress the balance, to the extent it has gotten out of balance. In data rich cases, the problem is that parties will seek huge amounts of information. But rules are blunt instruments to deal with the challenges of such cases. Instead, we need an order like the one Judge Grimm uses in his cases. The real problem in some other cases is disproportionate costs, and it's not clear that cost shifting is a solution to the real problem. Again, informed judicial management seems a better way than revised rules. With leadership provided (as by Judge Grimm), the pending proposed rule changes may do as much as should be done.

A second attorney agreed. All U.S. lawsuits impose nonrecoverable costs. That is the American way of handling these

things. Discovery can, however, create a unique problem of strategic imposition of costs. This risk means that the discovery process requires some degree of policing. Judge Grimm's order is very interesting in this context. It means that core information is produced at the cost of the producing party, but further discovery may be reviewed with some cost-bearing in mind. Nonetheless, it is not clear that putting something of this sort into the rules will produce desirable results, and there might be a risk of undesirable consequences from adding some such provision to the rules. For one thing, there could be very energetic disputes about what is "core" or collateral information. The real emphasis should on proportionality, and that's already in the rules, with a boost in its profile if the current proposed amendments are adopted. Translating these concerns into more focused rule language would be very difficult.

A judge reacted that it would be quite tough to draft a rule with presumptions that could be applied across the full range of cases in federal court. This may best be handled as a practice subject, not by a rule provision.

Another attorney reacted along the same general lines. Given the history (partly outlined in Prof. Marcus's memorandum), the reactions a proposal might prompt are fairly predictable. "This will be opposed on a very profound level." It would be best to see if there are other ways to go about it. And it should not be forgotten that the party seeking discovery bears costs when enormous amounts of information are forthcoming. This attorney has never seen an instance where some lawyer thought "I'll ask for a lot to impose expenses on the other side." People seek information to prove their cases, not to impose expenses on the other side. It's not surprising that some may seek a magic method of limiting discovery to what's really needed. But that may be a chimera, at least if sought by rule. Moreover, cost allocation probably won't do much to deter the really bad actors, to the extent they exist. And cost allocation would be a new and significant additional burden for the courts; it would not save them time or energy.

Another attorney agreed that the review of past rulemaking experiences on this subject is a good reminder that many people will react strongly based on their perceived advantage or disadvantage. "It all depends on where you are sitting." The real challenge is whether the existence or extent of this problem can be objectively identified. We will need to focus on whether a rule change can provide needed focus. One size fits all won't serve here. An effort to try to draw baselines on costs presents very tough policy issues. Perhaps a rule that distinguishes some types of cases (or exempts them) would raise even tougher policy issues. It will be important to keep in mind that excessive discovery (or responses) impose costs on both sides. At the same time, the commentary during the 1998-99 public comment period

suggests that any change will prompt comments fueled by perceived self-interest. Right now, the realities compel lawyers on both sides of the "v." to think long and hard about how much to seek through discovery. This attorney's inclination is to let the present proposed changes have time to sink in before giving serious thought to something more aggressive on cost-bearing.

These thoughts prompted a question: Had the careful calibration of amount of discovery this attorney reported resulted from rules or from orders like the one used by Judge Grimm, or from other factors such as the simple cost of getting too much information? The answer is that it is not prompted by rules or orders, but rather by the dynamics of contemporary litigation. That leads to voluntary discovery parameters, such as limiting the number of custodians whose materials must be reviewed, and/or limiting the search terms to be used.

Another attorney agreed. "The notion of an asymmetry -- of one-way discovery -- is misleading." Being data-poor is also a cost factor, because one has to rely on discovery and wants only an amount that makes sense and is tailored to the case. "You don't want to be the dog that catches the pick-up truck." Lawyers are acutely aware of this risk in today's environment, but it is very difficult to quantify this concern even on a case-by-case basis. Putting it into a rule would be even more difficult.

Another attorney reacted: Actually, the place where the cost disparity looms largest nowadays is not on cost of production but cost of preservation. That cost can be enormous, but it's not what we are discussing here.

Another attorney agreed that in larger cases this is a fair description of the current situation. But there are a significant number of other cases where fishing expeditions occur often. Mega-cases may actually not be the model we should have in mind.

A judge commented that he agreed with much the attorneys had said. He was not optimistic that a rule could be devised that would be appropriate for the broad range of litigation in federal courts today. It remains unclear where, or how frequently, there are real abuses. And the current amendment package has features that ideally will facilitate identifying and dealing with those cases. It would be important to find out whether the current package can do what it is designed to do. At the same time, cost allocation is something the Committee should examine. And it would be wisest to do this with data instead of anecdotes. It will be important to talk to the FJC about developing data that go beyond anecdotes. Although rule changes in the near term would be premature, careful study would take time and could be initiated soon. True, some may be distressed to see the

Committee even examining this subject, but it is an important one that deserves careful evaluation. In somewhat the same vein, the British experience with costs bears looking at.

A reaction was that the U.K. experience may be significantly different. For example, lawyers there have pushed back against the most recent reforms, seeking to exempt all cases involving claims of more than £1 million. And the U.K. experience is heavily affected by the availability of insurance against the cost of paying the other side's cost bill, and by the success incentive fees allowed there, which are paid by the other side but negotiated between the client and lawyer (who know that the only one who will actually have to pay this fee is the other side).

Another judge noted that there has been very strong support for expanded cost-bearing from some who have commented, and that a hearing was held in Congress on this general subject in December, 2011. The chair of a Subcommittee of the House Judiciary Committee that held this hearing supported inquiry into cost-bearing in a letter to the Committee. It is important for the Committee to be responsive to such interest. The hearing in Congress signifies the breadth of interest in this subject. The suggestion that the Committee should look seriously at the issues is what the Rules Enabling Act contemplates it should do. It may be that we begin with some skepticism about whether or how a useful rule change could be identified, but inaction would be quite difficult to justify. Instead, there seem to be several avenues that offer promise:

(1) It would be good to do a literature search to identify what has been written about the effects of cost-bearing provisions.

(2) It would be good to look carefully at Lord Jackson's study of costs in the U.K. That look should take account, however, of the very significant differences between the U.K. system and ours. It has a "full indemnity" system, very different from the American Rule that each litigant bears its own costs. It consequently has a fairly elaborate and longstanding system of cost masters who apportion costs after the case is over. And (as noted above) the entire handling of these issues has recently been affected by the availability of insurance.

(3) The FJC should be approached. Like other governmental units, it is operating under significant fiscal constraints. We must be cautious about asking for help that would overstretch FJC Research. But perhaps the data from the 2009 closed case survey can be mined to provide some insights, and it would be valuable to try to determine now if there are cost-effective ways to gather data more closely

calibrated to these specific issues.

(4) It might be good to solicit input from outside groups. If we were to proceed with a rule proposal, we could expect those groups to offer their views then. It may be best to try to involve them now, both in terms of what they can offer in the way of data, and (perhaps) in terms of ways to generate more data.

This would not be a wasted effort; even if the result is that the Committee concludes that the current package of amendments sufficiently addresses these concerns, it may be very important for us to have a full explanation of why we reached this conclusion. Without a firm basis in data, we cannot assume that everyone will accept our conclusion.

Another judge asked how we could get beyond the anecdotal. Certainly the 2009 and 1997 closed case studies by the FJC did not show a widespread problem of over-discovery. In the Digital Age in which we now operate, would those results still obtain? It was particularly striking how varied the bar group responses to the 1998-99 proposal proved to be. Two sections of the ABA even came out on different sides of the issue. It would be ideal if there were a way to get input from bar groups and the like on the design of a research effort. We need not follow all proposals, but it is probably more useful to find out about them in advance than only later, when the same sort of thing might be an objection to the data-gathering method actually adopted. On the other hand, it could be that inviting suggestions now about how to design a research effort would prompt more objections later from all those whose suggestions were not followed.

It is not yet time to consider a mini-conference, even though such an event might be extremely helpful if this effort moves forward. For the present, the main issue is what to tell the full Committee at the November meeting. It will be useful then to have a full discussion along the lines of this conference call with the full Committee. It may be useful some time to try to arrange a conference call with U.K. judges experienced in dealing with the issues presented there. Though the institutional attributes of the U.K. system are significantly different from ours, it is likely that proportionality will be the first word out of their mouths. That was the byword of the Lord Woolf reforms in the U.K. in the late 1990s.

Another judge agreed. We should defer serious work on any amendment ideas a reasonable way into the future, in large part to find out how our current package works. And before doing a mini-conference we will need to think about concrete possible amendment ideas. It will be important to make clear then that any such proposals are only intended to be a focus for discussion, and that they are not on their way to inevitable

adoption. In order to have the broadest possible views, it will be important to include those unlikely to embrace the general idea of cost-bearing.

A reaction from an attorney was that reliance on the U.K. system could become a "flash point." To shift to something like that could even rise to the level of requiring a constitutional change. At some point, the intensity of debate might deter clear thought. "Don't issue a call to arms any time soon."

It was noted that Texas has had a rule that appears to embrace cost-bearing for some time; perhaps data could be gathered on the results of that rule. In addition, IAALS has been gathering data on related topics; maybe it has data of the sort we are seeking.

A further caution about avoiding anything that could become a flash point was emphasized. The goal now is to obtain the broadest sort of real data. For the November meeting, the necessary ingredients in the agenda book probably include Prof. Marcus's background memo, the notes on this conference call, and a short memo introducing the issues. There should be sufficient time in November for a full discussion with the full Committee. And before that, perhaps a week or two before the meeting, it would be good for the Subcommittee to confer by phone again to touch bases on where things stand.

INTRODUCTION TO PROPOSALS FOR COST-BEARING PROVISIONS IN THE RULES

Rick Marcus
(Sept. 6, 2013)

The purpose of this memorandum is to provide some additional background for the Sept. 16 exploratory conference call about addressing cost-bearing in the rules. Judge Grimm has already introduced the issues. The goal of this memorandum is to provide some additional background about the way the rules have addressed (or not addressed) these issues, and the reaction in 1998-99 to a proposal then to add a cost-bearing provision regarding disproportionate discovery requests. As an Appendix, the memo includes the public comments on that 1998 proposal.

As things develop on the cost-bearing front, the inquiry into past experience may expand. But as an introduction, some information may be helpful.

1980 amendments -- cost-bearing aspect to discovery conference

In 1978, a proposed set of amendments to the rules was published for public comment. Probably the most prominent among those proposals was a change to Rule 26(b)(1) that was later withdrawn. Also included was a new Rule 26(f), regarding a discovery conference. The Committee Note said that "[i]t is not contemplated that requests for discovery conferences will be made routinely." Instead, counsel were to try to confer among themselves to avoid the need for such a meeting with the judge, and the Note suggested that "[s]anctions may be imposed upon counsel who initiates a request without good cause as well as upon counsel who fails to cooperate with counsel who seeks agreement." It added:

> The Committee is extremely reluctant even to appear to suggest additional burdens for the district court. It proposes the discovery conference for the exceptional case in which counsel are unable to discharge their responsibility for conducting discovery without intervention by the court. In such a case, early intervention by the court appears preferable to a series of motions to compel or to limit discovery.

So this was a very different creature from the Rule 26(f) conference we know today, which is to occur in most cases and be followed by entry of the scheduling order. Indeed, neither the proportionality provisions nor the requirement of more active judicial management (both added in 1983) were yet in the rules.

The 1980 version of Rule 26(f) included the following provisions:

> Following the discovery conference, the court shall enter an order identifying the issues for discovery purposes, establishing a plan and schedule of discovery, setting limitations upon discovery if any, and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the case.
>
> The court may exercise powers under Title 28 U.S.C. § 1927 and Rule 37(e) to impose sanctions for the failure of a party or counsel without good cause to have cooperated in the framing of an appropriate discovery plan by agreement.

These particular features did not receive attention in the Committee Note, but it should be apparent that the thrust was that the entire discovery conference apparatus was to apply only to exceptional cases. See Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 77 F.R.D. 613, 624-25 (1978).

The initial public reaction to the Rule 26(b)(1) scope proposal was quite vigorous, and the Advisory Committee published a revised package in 1979 that omitted that amendment but retained the new Rule 26(f). See Revised Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 80 F.R.D. 323 (1979). For more general background, see Marcus, Discovery Containment Redux, 39 Bos. Col. L. Rev. 747, 756-60 (1998).

The 1979 Committee Note still said that "[i]t is not contemplated that requests for discovery conferences will be made routinely," and it added the following (which may indicate that feedback from the first round of public comment suggested greater receptivity on the bench to the idea of supervising discovery):

> A number of courts routinely consider discovery matters in preliminary pretrial conferences held shortly after the pleadings are closed. This subdivision does not interfere with such a practice. It authorizes the court to combine a discovery conference with a pretrial conference under Rule 16 if a pretrial conference is held sufficiently early to secure judicial intervention to prevent or curb abuse.

The 1979 Rule 26(f) proposal was adopted as published. See Amendments to the Federal Rules of Civil Procedure, 80 F.R.D. 521 (1980). Justice Powell, joined by Justices Stewart and Rehnquist, dissented from the adoption of the amendment package, not because there was anything wrong with these "modest amendments," id. at 523, but rather because they did not do enough. Justice Powell argued that "the changes embodied in the amendments fall short of those needed to accomplish reforms in civil litigation that are long overdue." Id. at 521. He added

(id. at 523):

> Lawyers devote an enormous number of "chargeable hours" to the practice of discovery. We may assume that discovery usually is conducted in good faith. Yet all too often, discovery practices enable the party with greater financial resources to prevail by exhausting the resources of a weaker opponent. The mere threat of delay or unbearable expense denies justice to many actual or prospective litigants. Persons or businesses of comparatively limited means settle unjust claims and relinquish just claims simply because they cannot afford to litigate. Litigation costs have become intolerable, and they cast a lengthening shadow over the basic fairness of our legal system.

So far as I am aware, the 1980 discovery conference was not much used, and the cost-allocation provisions even less used. So this is a cost-bearing model that was intended for the exceptional case and was not much used in such cases.

1983 -- Proportionality and
case management

In 1983, further amendments implemented much of what we find now in the rules regarding case management; the Rule 16 changes that continue to this day (with revisions) were installed then. In addition, the 1983 amendments introduced into Rule 26 the concept of proportionality.

Not too long after the new rules became effective, Magistrate Judge Wayne Brazil (soon to become a member of the Advisory Committee) gave voice to the goal of proportionality in In re Convergent Technologies, 108 F.R.D. 328, 331 (N.D. Cal. 1985):

> Discovery is not now and never was free. Discovery is expensive. The drafters of the 1983 amendments to sections (b) and (g) of Rule 26 formally recognized that fact by superimposing the concept of proportionality on all behavior in the discovery arena. It is no longer sufficient, as a precondition for conducting discovery, to show that the information sought "appears reasonably calculated to lead to the discovery of admissible evidence." After satisfying this threshold requirement counsel also *must* make a common sense determination, taking into account all the circumstances, that the information sought is of sufficient potential significance to justify the burden the discovery probe imposes, that the discovery tool selected is the most efficacious of the means that might be used to acquire the desired information (taking into account cost effectiveness and the nature of the information being sought), and that the timing of the probe is sensible, i.e., that there is no

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other juncture in the pretrial period when there would be a clearly happier balance between the benefit derived from and the burdens imposed by the particular discovery effort.

This articulation of the responsibilities counsel must assume in conducting or responding to discovery may make it appear that the 1983 amendments require counsel to conduct complex analyses each time they take action in the discovery arena. Not so. What the 1983 amendments require is, at heart, very simple: good faith and common sense.

1993 amendments
Initial disclosure and routine
Rule 26(f) conferences

In 1991, the Advisory Committee published another package of amendment proposals. Included were a proposed initial disclosure requirement and a new Rule 26(f) (replacing the 1980 version) that directed the parties to meet and confer in most cases to formulate a discovery plan that they would then submit to the court as part of the Rule 16 case management effort. As most are likely to recall, the initial disclosure proposal provoked a strong reaction. For discussion, see Marcus, Of Babies and Bathwater: The Prospects for Procedural Progress, 59 Brook. L. Rev. 761, 805-12 (1993) (describing the initial disclosure controversy).

1998 cost-bearing proposal

In 1996, the Advisory Committee inaugurated its Discovery Project, which was intended to undertake a comprehensive review of discovery issues. After considerable study (including a mini-conference at Hastings in January, 1997, and a two-day conference at Boston College in September, 1977, and based on an extensive study of recently closed cases by FJC Research), the Advisory Committee produced a package of amendment proposals that was published for public comment in 1998. Among those proposals was the revision of Rule 26(b)(1) into essentially its present form (now proposed to be changed again in the package of proposed amendments published in August).

The published package included a proposal to add the following provision to Rule 34(b):

> On motion under Rule 37(a) or Rule 26(c), or on its own motion, the court shall -- if appropriate to implement the limitations of Rule 26(b)(2)((i), (ii), or (iii) [current Rule 26(b)(2)(C)(i), (ii), and (iii)] -- limit the discovery or require the party seeking discovery to pay part or all of the reasonable expenses incurred by the responding party.

Preliminary Draft of Proposed Amendments to the Federal Rules of

Civil Procedure and Evidence, 181 F.R.D. 18, 65-66 (1998).

The Committee Note accompanying this proposal provided (id. at 89-91):

> The amendment makes explicit the court's authority to condition document production on payment by the party seeking discovery of part or all of the reasonable costs of that document production if the request exceeds the limitations of Rule 26(b)(1)(i), (ii), or (iii). This authority was implicit in the 1983 adoption of Rule 26(b)(2), which states that in implementing its limitations the court may act on its own initiative or pursuant to a motion under Rule 26(c). The court continues to have such authority with regard to all discovery devices. If the court concludes that a proposed deposition, interrogatory, or request for admission exceeds the limitations of Rule 26(b)(2)(i), (ii), or (iii), it may, under authority of that rule and Rule 26(c), deny discovery or allow it only if the party seeking it pays part or all of the reasonable costs.
>
> This authority to condition discovery on cost-bearing is made explicit with regard to document discovery because the Committee has been informed that in some cases document discovery poses particularly significant problems of disproportionate cost. Cf. Rule 45(c)(2)(B) (directing the court to protect a nonparty against "significant expense" in connection with document production required by a subpoena). The Federal Judicial Center's 1997 survey of lawyers found that "[o]f all the discovery devices we examined, document production stands out as the most problem-laden." T. Willging, J. Shapard, D. Stienstra & D. Miletich, Discovery and Disclosure Practice, Problems, and Proposals for Change, at 36 (1997). These problems were "far more likely to be reported by attorneys whose cases involved high stakes, but even in low-to-medium stakes cases . . . 36% of the attorneys reported problems with document production." *Id* at 35. Yet it appears that the limitations of Rule 26(b)(2) have not been much implemented by courts, even in connection with document discovery. See 8 Federal Practice & Procedure § 2008.1 at 121. Accordingly, it appears worthwhile to make the authority for a cost-bearing order explicit in regard to document discovery.
>
> Cost-bearing might most often be employed in connection with limitation (iii), but it could be used as well for proposed discovery exceeding limitation (i) or (ii). It is not expected that this cost-bearing would be used routinely; such an order is only authorized when proposed discovery exceeds the limitations of subdivision (b)(2). But it cannot be said that such excesses might occur only in certain types of cases; even in "ordinary" litigation it is

possible that a given document request would be disproportionate or otherwise unwarranted.

The court may employ this authority if doing so would be "appropriate to implement the provisions of Rule 26(b)(2)(i), (ii), or (iii." In any situation in which a document request exceeds these limitations, the court may fashion an appropriate order including cost-bearing. When appropriate it could, for example, order that some requests be fully satisfied because they are not disproportionate, excuse compliance with certain requests altogether, and condition production in response to other requests on payment by the party seeking the discovery of part or all of the costs of complying with the request. In making the determination whether to order cost-bearing, the court should ensure that only reasonable costs are included, and (as suggested by Rule 26(b)(2)(iii)) it may take account of the parties' relative resources in determining whether it is appropriate for the party seeking discovery to shoulder part or all of the cost of responding to the discovery.

The court may enter such a cost-bearing order in connection with a Rule 37(a) motion by the party seeking discovery, or on a Rule 26(c) motion by the party opposing discovery. The responding party may raise the limits of Rule 26(b)(2) in its objection to the document request or in a Rule 26(c) motion. Alternatively, as under Rule 26(b)(2), the court may act on its own initiative, either in a Rule 16(b) scheduling order or otherwise.

The invitation for public comment offered an alternative provision to be inserted directly into Rule 26(b)(2) (id. at 37):

The court shall limit the frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule ~~shall be limited by the court~~, or require a party seeking discovery to pay part or all of the reasonable expenses incurred by the responding party, if it determines that (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

The invitation for comment also offered the following explanation for this alternative to the Rule 34(b) proposal (id.

at 38):

> There are two arguments for inclusion of this cost-bearing provision in Rule 26(b)(2). First, as a policy matter it is more evenhanded and complete to include the provision there. Treatment in Rule 34(b) may be seen as primarily benefitting defendants, who are usually the parties with large repositories of documentary information. Depositions, on the other hand, may be exceedingly burdensome to plaintiffs, and the placement of the provision in Rule 26(b)(2) would make explicit its application to other forms of discovery, including depositions.
>
> Second, as a matter of drafting, the cost-bearing provision fits better in Rule 26(b)(2). Including it in Rule 34(b) creates the possibility of a negative implication about the power of the court to enter a similar order with regard to other types of discovery. The draft Committee Note to Rule 34(b) tries to defuse that implication, but this risk remains. Moreover, there is a dissonance between Rule 26(b)(2), which says that if there is a violation of (i), (ii), or (iii) the discovery shall be limited, and Rule 34(b), which says it does not have to be limited if the party seeking discovery will pay. It is true that, in a way, this dissonance points up the apparent authority to enter such an order under the current provision with regard to other types of discovery, but that is also another way of recognizing the tension that dealing with the problem in Rule 34(b) creates.

As noted above, the summaries of the resulting public commentary are included as an Appendix.

After the public comment period, the Advisory Committee decided to include the cost-bearing provision in Rule 26(b)(2) rather than Rule 34(b), and the Standing Committee approved it for submission to the Judicial Conference, but the Judicial Conference removed it from the package of amendments that went into effect in 2000. See the Communication from the Chief Justice to Congress transmitting the 2000 amendments to the rules, 192 F.R.D. 340 (2000), including the Memorandum from Judge Paul Niemeyer to Judge Anthony Scirica, 192 F.R.D. 354, 360 n.* (2000) ("At its September 15, 1999, session the Judicial Conference of the United States did not approve the proposed cost-bearing provision").

Rule 26(b)(2)(B) in 2006

In 2006, Rule 26(b)(2)(B) was added to address discovery of sources of electronically stored information that are not reasonably accessible due to burden or cost. Even if the showing is made that the sources are not reasonably accessible, the party

seeking discovery may ask the court to order production by showing good cause. The rule adds that: "The court may specify conditions for the discovery." The Committee Note explains:

> The good-cause inquiry and consideration of the Rule 26(b)(2)(C) limitations are coupled with the authority to set conditions for discovery. The conditions may take the form of limits on the amount, type, or sources of information required to be accessed and produced. The conditions may also include payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible. A requesting party's willingness to share or bear the access costs may be weighed by the court in determining whether there is good cause. But the producing party's burdens in reviewing the information for relevance and privilege may weigh against permitting the requested discovery.

Current Rule 26(c) proposal

It seems worth noting that our current proposed amendment package includes an amendment to Rule 26(c)(1)(B) to authorize that a protective order issued for good cause could include a provision "specifying terms, including time and place <u>or the allocation of expenses</u>, for the disclosure or discovery." The draft Committee Note observes:

> Rule 26(c)(1)(B) is amended to include an express recognition of protective orders that specify terms allocating expenses for disclosure or discovery. Authority to enter such orders is included in the present rule, and courts are coming to exercise this authority. Explicit recognition will forestall the temptation some parties may feel to contest this authority.

* * * * *

Going forward, we will address new issues as well as enduring ones. But familiarity with prior experience, at least in general terms, seems useful.

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APPENDIX

Summary of public comments on proposed
cost-bearing amendment to Rule 34(b)
1998-99

8. Rule 34(b)

(a) General desirability

Comments

Alfred W. Cortese, 98-CV-001: (See Rule 26(a)(1) for list of organizations represented) Supports the addition of explicit cost-bearing provisions.

N.Y. St. Bar Assoc. Comm. & Fed. Lit. Sec, 98-CV-012: This change is unnecessary and misleading. The authority to shift costs already exists under Rule 26(b)(2). Thus, there is no real change. The Section disagrees with the assertion that Rule 26(b)(2) has rarely been applied, citing four cases. The FJC Study found that document requests generated the largest number of discovery problems, but these were not generally in the overproduction area. Thus, if there were a change it would not address the problems identified. The FJC Survey does not show that the cost of document production is a problem; even in the high-stakes cases in which such costs are relatively high, they are commensurate with the stakes involved. Moreover, the proposed amendment is unclear on what costs may be shifted. If attorneys' fees, client overhead and the like are included, the proposal involves funding an adversary's case.

Maryland Defense Counsel, Inc., 98-CV-018: Supports the proposed amendment. Document production is not only the most expensive, but also the most institutionally disruptive aspect of discovery for the clients represented by this organization's lawyers. Suggests that the Note stress that an outright bar on proposed discovery often may be preferable to simply shifting its overtly quantifiable costs.

J. Ric Gass, 98-CV-031: (individually and as President of Fed. of Ins. & Corp. Counsel) "The burden of the cost of production of documents should be on the party initiating the request. That burden will make 'discovery initiators' think before making abusive document requests."

Assoc. of the Bar of the City of N.Y., 98-CV-039: Endorses the change, so long as either the rule itself or the Committee Note makes it clear that the power granted should be applied only in the unusual or exceptional case. This is consistent with the general trend of making discovery more efficient. It would give the party requesting discovery an incentive to limit requests and

lessen the financial burden on the producing party. But the provision should be used only in the unusual or exceptional case. Liberal application of the proposed rule would unfairly tilt the playing field in favor of litigants with larger financial resources.

James A. Grutz, 98-CV-040: Opposes the change. If costs become onerous, a litigant can request the court's aid. The provision is unnecessary.

Thomas J. Conlin, 98-CV-041: Opposes the change. If a document request is excessive, it should be limited in accordance with the current rules. The court already can protect parties against excessive expenses, and it should not be permitting or requiring a response to excessive requests even if the requesting party has to pay some of the cost.

John Borman, 98-CV-043: Opposes the change. It deters parties seeking discovery from being aggressive in pursuing information, and it will encourage responding parties to employ this new device to resist. It places the burden of proving that the benefit of the discovery sought outweighs its burden or expense on the party who does not even know what is in the material.

Michael J. Miller, 98-CV-047: This proposal will be used as a weapon by corporations who seek to prevent the discovery of relevant information under the guise of cost.

ABA Section of Litigation, 98-CV-050: Supports the proposal because it encourages courts to overcome their reluctance to apply existing limitations on excessive discovery, and it offers courts an alternative when they view a complete denial of excessive discovery as too harsh. The cost-bearing proposal will not deter legitimate discovery because, by definition, it applies only when a document demand exceeds the limitations of Rule 26. The court's power to shift these costs is already implicit in Rule 26(c). The Antitrust Section opposes this proposal because it believes that it could create a new standard for discovery that is dependent an a party's financial ability to pay for discovery as opposed to the current standard based on relevance, etc. Because of this important concern, the Litigation Section suggests that the Note urge that the courts be particularly sensitive to this issue.

Richard L. Duncan, 98-CV-053: Opposes this proposal. It will create more litigation.

Charles F. Preuss, 98-CV-060: Supports this explicit authorization to impose part or all of the costs of document discovery that exceeds the limits of Rule 26(b)(2).

Lawyers' Club of San Francisco, 98-CV-061: The probable impact

of the proposed amendment would be to increase the prevalence of cost-bearing orders. Doing so would increase financial disincentives for individuals to conduct litigation against corporate and institutional defendants. As such, it would impede and restrict discovery unnecessarily by individual claimants.

Jay H. Tressler, 98-CV-076: Applauds this proposal.

E.D.N.Y. Comm. on Civil Lit, 98-CV-077: Opposes the proposal. The provision is unnecessary, because the courts already have the power to do this. At the same time, cost-bearing is not to be applied routinely. Given these two propositions, the Committee can't comprehend the benefit of the amendment. More generally, the Committee would favor a direct limitation on discovery as opposed to cost-shifting, which may favor deep-pocket litigants. It might even further use of discovery to harass.

Michael S. Allred, 98-CV-081: Opposes the change. This is biased in favor of not making discovery, but gives no remedy if discovery is unjustifiably refused.

Amer. Coll. of Trial Lawyers Fed. Cts. Comm., 98-CV-090: Supports the change. Document production is where the most serious problems currently are found. It is appropriate that if a party wishes to pursue broad and unlimited forms of document production, it should pay the reasonable expenses that result.

National Assoc. of Consumer Advocates, 98-CV-120: Opposes the change. It will lead to additional delay, ancillary litigation, and increased costs. Objections by defendants that document production costs too much are full of sound and fury but not based on valid concerns. Usually the parties can reach an equitable solution to the costs of document production. If that doesn't happen, the current rules provide adequate tools for the problem. Since this is a power the courts already have under Rule 26(c) and 26(b)(2), the change is not needed. It may cause judges to cast an especially jaundiced eye on requests for documents, above and beyond the limits that already exist. Because defendants have most of the documents in the cases handled by N.A.C.A. members, this change will have a disparate impact on plaintiffs.

National Assoc. of Railroad Trial Counsel, 98-CV-155: Supports the changes. They will assist the trial court in controlling discovery abuses in document production.

Chicago Chapter, Fed. Bar Ass'n, 98-CV-156: Endorses the change. Courts already have the power to do this, but there is no harm in saying so expressly.

Federal Practice Section, Conn. Bar Ass'n, 98-CV-157: Endorses the rule, understanding it to say that everything beyond the

"claims and defenses" scope would be allowed only on payment of costs.

Penn. Trial Lawyers Ass'n, 98-CV-159: Supports the amendment as written because it permits the court to reasonably limit discovery and gives the judge discretion to extend the limits on a good cause showing, providing that the cost is to be borne by the party seeking discovery.

Richard C. Miller, 98-CV-162: Opposes the change. It "strikes at the heart of our juridical system by eliminating access to justice." Defendants already have an incentive to draw things out and increase expense to defeat claims. This change will magnify that tendency.

William C. Hopkins, 98-CV-165: The cost shifting proposal means that plaintiffs will face a price tag on the first discovery request. This is not desirable.

Timothy W. Monsees, 98-CV-165: He is afraid this will extend to more than simple copying costs, which no one has a problem with paying. He envisions getting a bill for a couple of thousand dollars for defendants to hire people to search their records. Why should a party have to pay for production of relevant material?

Mary Beth Clune, 98-CV-165: This change would be very unfair to plaintiffs. In employment cases, the defendant has all the documents, and such defendants often produce files of meaningless documents in an effort to bury the relevant documents. Requiring the plaintiff to finance the "reasonable expenses" of discovery will likely lead to abuse by defendants.

Frederick C. Kentz, III, 98-CV-173: (Gen. Counsel, and on behalf of, Roche) Supports the change. In pharmaceutical litigation, plaintiffs routinely seek discovery of all reported adverse events, clinical trials and other documents not relevant to the core issues in the case. It would be preferable if the discovery of these materials were not permitted. The company strongly opposes cost shifting with respect to depositions. The appropriate cost control measure there is to limit the duration of the deposition.

Gary M. Berne, 98-CV-175: The change is unnecessary, for courts already have the authority to take needed measures. The FJC report shows that the main problem is not overproduction, but failure to produce, which the amendments don't address.

Public Citizen Litigation Group, 98-CV-181: Does not support. The rule provision is not needed, and may lead to the incorrect negative inference that cost-bearing is only authorized in connection with document discovery.

Association of Trial Lawyers of America, 98-CV-183: Opposes the change. ATLA generally opposes proposals to institute cost-shifting measures as leading to abrogation of the American Rule that parties bear their own costs of litigation. Even if the proposal only makes explicit authority that was already in the rules, it appears a move in the wrong direction.

James B. Ragan, 98-CV-188: Concerned about the proposed change. It purports to shift the burden to the party seeking discovery in some instances. In fact, this should be a situation that never occurs. Rule 26(b)(2) directs the court to limit excessive discovery, so the circumstance identified in the proposed amendment should not happen.

Ohio Academy of Trial Lawyers, 98-CV-189: Opposed. This is not needed, since the court already has the power under Rule 37 to impose this sanction.

Hon. Carl J. Barbier (E.D. La.), 98-CV-190: Although the Committee Note says that this cost-shifting should not be a routine matter, this will certainly result in additional motions to determine in any particular case whether or not the costs should be shifted to the requesting party.

Philadelphia Bar Assoc., 98-CV-193: Supports the amendment. Placing an explicit cost-bearing provision in Rule 34 might clarify and reinforce the judge's ability to condition discovery on payment of costs. This might encourage more negotiation and cooperation in cases where large document productions are involved.

James C. Sturdevant, 98-CV-194: The Committee does not say that this authority is only to be used in "extraordinary" cases or "massive discovery cases." There is a very real potential that it will be invoked in many cases to support cost-bearing, which would be undesirable. The courts already have adequate authority to deal with abuse.

Maryland Trial Lawyers Assoc., 98-CV-195: Urges rejection. Often the injured party is at an economic disadvantage to the opposing entity, which is usually insured. Coupled with the limitation of disclosure to supporting information, this change will work a harsh result. It is unnecessary and unduly restrictive.

James B. McIver, 98-CV-196: (98-CV-203 is exactly the same as no. 196 and is not separately summarized) This will have the effect of harming victims, consumers, and other plaintiffs.

Lawyers' Committee for Civil Rights Under Law, 98-CV-198: Opposes the change. This will establish what some judges will view as a presumption that documents should only be produced on payment of

the other party's costs of production. It would also establish a two-track system of justice based on wealth.

Trial Lawyers for Public Justice, 98-CV-201: Courts already have this power, and the proposal is therefore redundant. But the signal to judges is obviously that they should impose sanctions more frequently against parties who ask for too much information, and that they have not imposed such sanctions with sufficient regularity in the past. This will strengthen the hands of defendants and encourage stonewalling.

Minn. State Bar Assoc. Court Rules and Admin. Comm. Subcommittee on Federal Rules, 98-CV-202: Supports the change.

Sharon J. Arkin, 98-CV-204: Opposes the change. The defense deliberately engages in dump truck tactics. If this change is adopted, the rules will impose on the consumer the obligation to pay for the costs of such productions, and they will be further victimized by corporate defendants.

Nicholas J. Wittner, 98-CV-205: (on behalf of Nissan North America) Supports the proposal. It will reduce needless discovery requests and related expense.

F.B.I., 98-CV-214: Supports the change.

Michigan Trial Lawyers Assoc., 98-CV-217: Opposes the proposal. Courts already have the power to impose this sanction. But making it explicit in the rules will send a signal to judges to impose sanctions more frequently. This will encourage responding parties to stonewall.

Stuart A. Ollanik, 98-CV-226: A general rule promoting cost-shifting is an invitation to evidence suppression. It will be in the responding party's best interests to exaggerate the cost of production, in order to make access to relevant information prohibitively expensive. It will be one more tool for hiding the facts.

Jon B. Comstok, 98-CV-228: This is an excellent idea. He realizes it is somewhat redundant because the authority already exists in Rule 26. But it is laudable to make modifications that will somehow get the judge to become more involved in discovery.

Edward D. Robertson, 98-CV-230: Opposes the proposal. It is a first, and ill-advised, step by the representatives of corporate America toward the English system that requires losers to pay. Defendants are the primary violators of reasonable discovery and the chief advocates of discovery limitation. If the proposed rule is adopted defendants will file for costs to pay for their excessive responses to reasonable discovery requests.

Martha K. Wivell, 98-CV-236: The rule is unnecessary because there is already authority to do this. Nonetheless, defendants will seek to shift costs in almost every products liability case, for they always say the costs are too high. Then the proof of the benefit of discovery is placed on the party who does not even know what there is to be discovered.

Jeffrey P. Foote, 98-CV-237: Opposes the change. This will simply lead to further litigation.

Eastman Chem. Corp., 98-CV-244: Strongly favors the amendment. It notes, however, that a better course would be forbidding discovery altogether.

Anthony Tarricone, 98-CV-255: Opposes the change. There is no need to revise the rule in this manner.

New Mexico Trial Lawyers Ass'n, 98-CV-261: Finds the change troublesome. It appears to be an invitation to increased litigation about what constitutes an excessive request.

Robert A. Boardman, 98-CV-262: (Gen. Counsel, Navistar Int'l Corp.) The cost-bearing provision will hopefully encourage a litigant to think twice before requesting every conceivable document, no matter how attenuated its relevancy. Navistar has been an easy target for burdensome discovery about information remote in time from the events in suit.

U.S. Dep't of Justice, 98-CV-266: Because this proposal reinforces the proposed amendment to Rule 26(b)(1) limiting access to information relevant to the "subject matter of the litigation," it is subject to the same concerns the Department presented about that change. The Department would be less concerned about the proposed change to Rule 34 if the "subject matter" standard of current Rule 26(b)(1) were retained. Thus, if the current Rule 26(b)(1) is retained, and if the proposed amendment retains its reference to Rule 26(b)(2)(i)-(iii), the Department supports this proposal.

Courts, Lawyers and Administration of Justice Section, Dist. of Columbia Bar, 98-CV-267: The Section agrees with this proposal. The Committee should make it clear, however, that the change is not intended to change the standard that judges should apply in deciding whether to condition discovery on payment of reasonable expenses.

Federal Magistrate Judges Ass'n Rules Committee, 98-CV-268: The Committee supports the amendment. It is apparent that the court already has this power, but the amendment makes the authority clear. Perhaps even more beneficial is the Committee Note, which provides considerable guidance to everyone as to when and how these costs may be assessed.

Thomas E. Willging (Fed. Jud. Ctr.), 98-CV-270: Based on a further review of the data collected in the FJC survey, prompted by concerns about the potential impact of cost-bearing on civil rights and employment discrimination litigation, this comment reports the results of the further examination of the FJC survey data. It includes tables providing the relevant data in more detail, and generally provides more detail than can easily be included in a summary of this sort. The study found "few meaningful differences between civil rights cases and non-civil rights cases" that might bear on the operation of proposed Rule 34(b). Discovery problems and expenses related to those problems differed little between the two groups of cases, and the percentage of document production expenses deemed unnecessary, and document production expenses as a proportion of stakes, were comparable in both sets of cases (civil rights and non-civil rights). The differences that were observed included that defendants in non-employment civil rights cases were more likely to attribute discovery problems to pursuit of discovery disproportionate to the needs of the case; civil rights cases had a modestly higher proportion of litigation expenses devoted to discovery; nonmonetary stakes were more likely to be of concern to clients in civil rights cases; and total litigation expenses were a higher proportion of stakes in civil rights cases (but stakes were considerably lower in such cases). Complex cases have higher expenses than non-complex cases, but for complex civil rights cases the dollar amounts of discovery expenses, especially for document production, were far lower than in complex non-civil rights cases. Overall, the report offers the following observations: "First, because discovery and particularly document production expenses are relatively low in complex civil rights cases, defendants would have less room to argue that a judge should impose cost-bearing or cost-sharing remedies on the plaintiff. Second, our finding that total litigaton expenses were a higher proportion of litigation stakes in civil rights cases may give defendants some basis for arguing that discovery requests are disproportionate to the stakes in the case and that cost-bearing or cost-sharing should be ordered. On the other hand, our finding that nonmonetary stakes are more likely to be of concern in civil rights cases may give plaintiffs a counterargument in some cases. Third, one might read our finding that defendants are more likely to attribute discovery problems to pursuit of disproportionate discovery as suggesting that defendants' attorneys will look for opportunitites to act on that attribution by moving for cost-bearing remedies."

Testimony

Baltimore Hearing

Robert E. Scott, Jr., prepared stmt. and Tr. 4-18: (president of Defense Research Institute and representing it) This is a

positive step, giving litigants the opportunity to obtain items to which they are not entitled by right under Rule 26(b)(2) by paying the costs of production. This will not shift the costs of document discovery related to the core allegations of the case, but recognizes that the court should not allow expansive discover on tangential matters without consideration of reallocating the costs and burdens involved in ordering production.

Allen D. Black, prepared stmt. and Tr. 18-30: Opposes the change. This will favor well-heeled litigants, whether plaintiffs or defendants. It thus runs against the basic democratic underpinnings of the American judicial system. It will also add a new layer of litigation to a substantial number of cases--to determine who should pay what portion of the costs of document production. Yet the proposal provides no standards whatsoever to guide the court's decision about whether and how to shift these discovery costs. The invocation of Rule 26(b)(2) aggravates the problem because it contains no objective standard and instead asks the court to make an impossible prediction concerning the potential value of the proposed discovery. Virtually every producing party will argue vehemently that the burdens and costs outweigh the possible benefit of the proposed discovery. Should the court take evidence on the likely cost of discovery to decide these disputes? Even if it could do that, how could it determine the "likely benefit" of proposed discovery? This will produce a whole new layer of litigation about who will pay and how much. (Tr. 25-26)

Robert Klein (Tr. 45-58): (on behalf of Maryland Defense Counsel) Supports the change. The policy of proportionality has been overlooked, and this should re-awaken the parties to the existence of this limitation on discovery. Notes that document discovery is the only type of discovery that cannot have numerical limitations. Interrogatories and depositions do in the national rules, and requests for admissions can be limited by local rule, but not document requests.

F. Paul Bland, Tr. 89-106: (on behalf of Trial Lawyers for Public Justice) Opposes the proposal. The authority already exists without the change. The goal, then, is again to send a signal that the problem judges should address is over-discovery even though the evidence does not support that concern.

Prof. Edward D. Cavanaugh, prepared stmt. and Tr. 116-26: Opposes the change. Courts already have this power, and the Committee Note acknowledges that the power is not to be used routinely. He would favor a direct limitation on discovery as opposed to a cost-shifting limitation.

Stephen G. Morrison, prepared stmt. and Tr. 126-42: Supports the proposal. Believes that emphasis on the proportionality provisions is essential since they have been overlooked or

misapplied in the past. Believes that the impecunious plaintiff argument is specious. In his entire career as a defendant's lawyer, he has never encountered a case in which a plaintiff in a personal injury case reimbursed counsel for costs in an unsuccessful case. The real issue is that this is an investment decision for counsel for plaintiffs, and this is not a violation of professional responsibility rules. This might be different in other sorts of cases -- employment discrimination, for example, with pro se plaintiffs. But in those cases the proposed change allows the judge to take the ability of the plaintiff's side to bear the expense into account. His own experience, however, has been limited to cases involving plaintiffs with lawyers who took the case on a contingency fee basis.

San Francisco Hearing

Maxwell M. Blecher, prepared stmt. and Tr. 5-14: Together with the proposed change to Rule 26(b)(1), this is pernicious and gives a collective message that there should be less discovery to plaintiff at increased cost. The standards set forth in Rule 26(b)(2) are so vague that the court can't sensibly apply them. Moreover, if costs are shifted and the documents contain a "silver bullet" there should be another hearing to seek reimbursement. This is not worth it. The basic message is that even if plaintiff manages to persuade the judge to expand discovery to the subject matter scope, plaintiff must pay for the additional discovery to that point. He has nothing against making plaintiff pay if the specific discovery foray is unduly expensive. For example, if defendant usually has e-mail messages deleted upon receipt and plaintiff wants to require a hugely expensive effort to locate these deleted messages, there is nothing wrong with presenting plaintiff with the option of paying for that material. But that is different from institutionalizing the process of shifting costs every time plaintiff goes beyond a claim or defense. This is how he reads the current proposal. He feels that the judge could both find that there is good cause and that the plaintiff has to pay for the added discovery. In the real world, judges will be likely to link the two and think that as soon as plaintiff gets beyond claims and defenses it's pay as you go. At present, the limitations of Rule 26(b)(2) are only applied in the most exceptional cases, where a party does a huge and marginal search, such as reconstructing electronic data. But the rule will encourage the same sort of thing in many cases. This will institutionalize a process that is already available today. It will up the stakes in antitrust litigation, which is already very expensive. (Tr. 7-10)

Kevin J. Dunne, prepared stmt. and Tr. 14-23: (President of Lawyers for Civil Justice) This change can work in tandem with the revision of Rule 26(b)(1), and the court could shift costs if it found good cause to allow discovery to the subject matter limit. But courts should be admonished not to assume that a

party is automatically entitled to discovery it will pay for. There are now plaintiffs' law firms which are as wealthy as small corporations, and their willingness to pay should not control whether irrelevant discovery is allowed. The rich plaintiffs' lawyers won't hesitate to put up the money for such discovery forays, so their willingness to pay should not be determinative. They will continue going after the same stuff whether or not they have to pay.

G. Edward Pickle, prepared stmt and Tr. 36-47: (Gen. counsel, Shell Oil Co.) Shell emphatically endorses the proposed change. Document production abuses are at the core of most discovery problems, particularly in larger or more complex matters. Shell strongly urges that the rule or the Note state that "court-managed" discovery on a good cause showing under Rule 26(b)(1) presumptively be subject to cost shifting, absent a showing of bad faith on the part of the responding party.

H. Thomas Wells, prepared stmt. and Tr. 47-60: This change is more of a clarification of the existing rule's intent than a new rule change. The authority has always been present in the existing rule, and the problem is that it was rarely invoked in the manner originally intended. The proposed change adequately recognizes the original intent of the provisions.

Hon. Owen Panner (D. Ore.), prepared stmt. and Tr. 74-87: In every speech he makes to young lawyers or bars, he talks about Rule 26(b)(2) and seldom gets anyone to bring such concerns to him. He likes this change to encourage attention to this. Notes that he had Shell in his court and did not hear from it on this score. (See testimony of G. Edward Pickle, above.)

Larry R. Veselka, Tr. 99-108: Does not see this change as a particular problem. That's the way to solve problems about costs. (Tr. 107-08)

Mark A. Chavez, prepared stmt. and Tr. 108-17: Opposes the change. It would encourage further resistance to discovery, result in extensive litigation over cost-bearing issues, and inhibit plaintiffs from adequately investigating their claims.

Weldon S. Wood, Tr. 140-46: Supports the change. Document production is where the problems are found. Most discovery is reasonable. It is the exceptional case that causes the problems.

Alfred W. Cortese, Jr., prepared stmt. and Tr. 174-82: Because of the enormous cost that litigants can impose on adversaries, it is essential that the rules recognize the power to require a party seeking non-essential, discretionary discovery to bear the cost of it. At the same time, there should be a limit on a party's ability to impose discovery on an adversary just because it is willing to pay the cost of the discovery.

Chicago Hearing

Elizabeth Cabraser, Tr. 4-16: She fears that this change may lead to a repeat of the kind of collateral litigation that occurred under Rule 11, where every motion was accompanied with a motion for sanctions. The courts already have authority to shift costs in cases where it's truly necessary. She believes there is not a large volume of unnecessary discovery, so that this "solution" may be more of a problem than the problem it seeks to solve. She doesn't think that what we now know about discovery of electronic materials shows that some power like this is needed for that sort of discovery. The problem is that too often what's permissive becomes mandatory.

James J. Johnson, Tr. 47-63: (Gen. Counsel, Procter & Gamble) To date he has not found the existing cost-bearing possibilities helpful to Procter because when judges find out that it is a multi-billion dollar company they don't have any interest in shifting any of its substantial costs of document preparation. (For details on these, see supra section 3(a).) This is at the heart of the unevenness of cost between the discovering party and the producing party. This sort of activity takes place even when both sides are large entities with considerable documents to produce. (Tr. 57-58) He suggests that the Note to this rule suggest cost-bearing as an effective tool for discovery management.

Robert T. Biskup, prepared stmt. and Tr. 73-84: (Ford Motor Co.) This is integrally linked with the proposed Rule 26 scope change because it calls for an ex ante determination about the proper allocation of costs. This would avoid the risk of a new brand of satellite litigation, as with Rule 11. If it works the way Ford thinks it should, the fee shifting issue would be before the court at the time that the issue of expanding to the subject matter limit is also before the court.

John Mulgrew, Jr., prepared stmt. and Tr. 98-101: He agrees with the cost-bearing provision. Documentary discovery requests are among the most costly and time-consuming efforts for defendants. For peripheral materials, courts should have explicit authority to condition discovery on cost-bearing.

David C. Wise, Tr. 113-19: There is already a mechanism in place to deal with these problems when they arise. What this change would do would be to send a message to the defendants to make plaintiffs pay for their discovery. And plaintiffs simply can't pay. Companies like Ford aren't paying anything for their document production; they are simply passing the cost along to the consumer. If there were no link to expanding discovery beyond the claims and defenses, suggesting that if expansion occurs the plaintiff must pay, his opposition to the proposed amendment would be less vigorous.

John M. Beal, prepared stmt. and Tr. 119-26: (Chair, Chi. Bar Assoc. Fed. Civ. Pro. Comm.) The CBA has no objections to this amendment.

Bruce R. Pfaff, prepared stmt. and Tr. 126-34: Opposes the change. This will result in motion practice and satellite litigation. The court already has sufficient authority to deal with problems.

Todd Smith, Tr. 134-47: (on behalf of Assoc. of Tr. Lawyers of America) Opposes the change. This is another proposal to impose costs on individuals, and ATLA is opposed to that.

John H. Beisner, prepared stmt. and Tr. 147-54: Without doubt, this is a positive change. But the Note does not go far enough in stressing that there may be circumstances in which a court should say "no" to proposed discovery. The Note should stress that there should be no presumption that the court should authorize discovery that the propounding party wants, even if it will pay for it.

Jonathan W. Cuneo, prepared stmt. and Tr. 160-65: This change will disadvantage plaintiffs and could restrict the types of cases lawyers in small firms like his could undertake. The existing rules provide adequate protections for defendants. There is no reason to provide more.

Lloyd H. Milliken, prepared stmt. and Tr. 211-17: (president-elect of Defense Res. Inst.) Favors the change. This will not be a sword to be held over the plaintiffs' heads or a shield for defendants. The Note is perfectly clear that this is to happen only in extreme cases, where the discovery is essentially tenuous.

Michael J. Freed, prepared stmt. and Tr. 226-35: The proposal will favor litigants, whether plaintiffs or defendants, that have significant financial resources, over other litigants. It will create a new layer of litigation in a significant number of cases. The reference to the standards in Rule 26(b)(2) really provides no guidance on when this authority should be used.

Douglas S. Grandstaff, prepared stmt. and Tr. 245-51: (Senior Lit. Counsel, Caterpillar, Inc.) Although Caterpillar believes that use of Rule 26(b)(2) to bar excessive discovery altogether would be preferable, this change should give judges a tool to put a quick end to incrementally escalating discovery abuses. However, the Note's statement that the court should take account of the parties' relative resources is at odds with the goal of limiting unnecessary and irrelevant discovery. This comment suggests that a party with few resources is entitled to demand discovery beyond the limitations set by Rule 26 at no cost.

Kevin E. Condron, Tr. 259-67: This may be the most meritorious of the proposals. Document discovery is where the cost is, and it should be curtailed if there is no reason for it.

Robert A. Clifford, prepared stmt.: Opposes the change. The court already has powers to deal with abuse, and it is unnecessary to amend the rule in this way.

Thomas Demetrio, prepared stmt.: This is nothing more than a surreptitious attempt to push the cost of litigation so high that individual citizens will not be able to exercise their rights or seek redress for wrongdoing. "Business builds the 'cost' of legal defense into the 'cost of doing business.' That cost is passed on to the consumer. We already bear our share of the burden of defense costs. By requiring individual litigants to bear the cost again, industry gets not only a free ride but a windfall."

John G. Scriven, prepared stmt.: (Gen. Counsel, Dow Chem. Co.) This change is well worth making, but it is important to recognize that many plaintiffs will only be able to pay a fraction, if any,of the attendant financial costs in any event. Accordingly, the Note should stress that the primary goal should be for the judge to carefully scrutinize any discovery beyond the initial disclosure, and that the presumption should be toward barring that discovery.

(b) Placement of provision

Comments

ABA Section of Litigation, 98-CV-050: The Litigation Section favors including the cost-bearing proposal in Rule 26(b)(2) rather than Rule 34. This would avoid the negative implication that cost shifting is not available for all forms of discovery. It would also avoid an otherwise seeming inconsistency with Rule 26(b)(2), which merely permits courts to "limit" discovery, without mentioning the court's power to shift the cost of discovery.

Philip A. Lacovara, 98-CV-163: Supports the change, but would go further. He believes that the change should be in Rule 26 because document discovery is not the only place where problems exist that should be remedied by this method. Even though the Note says that inclusion in Rule 34 does not take away the power to make such an order in relation to other sorts of discovery, there is a significant risk that it will be so read. But he thinks it should be in Rule 26(b)(1), not Rule 26(b)(2), and that it should go hand in hand with decisions to expand to the "subject matter" limit. As the proposals presently read, it would not seem that a court could find good cause to expand, but then conclude that Rule 26(b)(2) is violated. He would therefore add the following to Rule 26(b)(1):

> If the court finds good cause for ordering discovery of information relevant to the subject matter of the action, the court may require the party seeking this discovery to pay part or all of the reasonable expenses incurred by the responding party.

This kind of provision would protect plaintiffs as well as defendants, for plaintiffs are often burdened by excessive depositions. Unless there is some further provision on recovery of these costs, it would seem that some of them might be taxable under 28 U.S.C. § 1920; in that sense, the discovering party's willingness to press forward is a measure of that party's confidence in the merits of its case as well as the value of the discovery.

Prof. Ettie Ward, 98-CV-172: For the reasons expressed in Judge Niemeyer's transmittal memorandum, suggests that any reference to cost-bearing should be in Rule 26(b)(2) rather than Rule 34(b). That placement is more evenhanded, and it fits better as a drafting matter. Including it in Rule 34 appears to favor defendants and deep-pocket litigants. In addition, the standards for shifting costs are not as clear as they would be if the provision were in Rule 26(b)(2).

Public Citizen Litigation Group, 98-CV-181: Does not support.

But if additional language is to be added, favors the alternative proposal to amend Rule 26(b)(2).

Federal Magistrate Judges Ass'n Rules Committee, 98-CV-268: The Committee recommends that the cost-bearing provision be included in Rule 26(b)(2) rather than in Rule 34(b). This would make it explicit that the authority applies to all types of discovery, including depositions. Additionally, placement in Rule 26(b)(2) eliminates the possibility of a negative implicaton about the power of a court to enter a similar order with regard to other types of discovery, notwithtanding the Committee Note that tries to defuse that implication.

Testimony

Baltimore Hearing

F. Paul Bland, Tr. 89-106: (on behalf of Trial Lawyers for Public Justice) Moving the provision to Rule 26(b)(2) would not be desirable, because that would stress the same message. If that would make the message even broader, it would be worse.

Stephen G. Morrison, prepared stmt. and Tr. 126-42: This provision should be in Rule 34 because that's the only type of discovery that creates the serious problem of disproportionate costs. Both sides do depositions, roughly in equal numbers, and so also with interrogatories. But in personal injury cases, one side has documents and the other does not. That's the way it is.

San Francisco Hearing

G. Edward Pickle, prepared stmt and Tr. 36-47: (Gen. counsel, Shell Oil Co.) Placing the cost-shifting provision in Rule 34 rather than Rule 26 places the emphasis where it belongs.

H. Thomas Wells, prepared stmt. and Tr. 47-60: Regarding placement of the provision, in his experience a provision limited to document production would reach the most abusive and expensive discovery problems, and that the rule should be so limited.

Alfred W. Cortese, Jr., prepared stmt. and Tr. 174-82: The placement of this provision in Rule 34 is correct, as opposed to Rule 26. The real need for the provision is in Rule 34.

Chicago Hearing

Robert T. Biskup, prepared stmt. and Tr. 73-84: Rule 34 is the right place for this sort of provision to be, rather than Rule 26. This would avoid the risk of a new brand of satellite litigation, as with Rule 11.

Todd Smith, Tr. 134-47: (on behalf of Assoc. of Tr. Lawyers of America) Because ATLA is adamantly opposed to cost shifting, there was no discussion about whether it might be preferable to put such a provision in Rule 26(b)(2) rather than in Rule 34.

Lorna Schofield, Tr. 193-202: (speaking for ABA Section of Litigation) The Section of Litigation favors that the cost-bearing provision be included in Rule 26 rather than Rule 34. There is already implicit power to make such an order, and if the provision is only explicit in Rule 34 that might support the argument that it can't be used for other types of discovery.

Rex K. Linder, prepared stmt.: Suggests that the provision should be included in Rule 26(b)(2), for it should be readily applicable to all discovery and will correspond to the concept of proportionality. It implicitly exists already under Rule 26(b)(2), and there seems no logical reason not to make it express.

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TAB 10

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TAB 10A

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627 **APPELLATE-CIVIL SUBCOMMITTEE REPORT: MANUFACTURED FINALITY**

628 The two projects of the Appellate-Civil Subcommittee reported
629 here began in the Appellate Rules Committee. As often happens,
630 potential solutions to problems identified by the Appellate Rules
631 Committee seem to lie as much in the Civil Rules as in the
632 Appellate Rules. Joint subcommittees have proved invaluable in
633 focusing the work of both committees.

634 Both of the present topics have lingered for some time.
635 Manufactured finality was considered in some depth by an earlier
636 Subcommittee. The provisions of Rule 62 addressing stays of
637 execution pending post-judgment motions and appeal have been
638 considered in the Appellate Rules Committee and then transferred to
639 the Subcommittee. Manufactured finality is discussed here. Rule 62
640 comes next.

641 "Manufactured finality" refers to attempts to accelerate the
642 time when an appeal can be taken following an interlocutory ruling
643 that is not independently appealable under any other elaboration of
644 the final decision requirement of 28 U.S.C. § 1291 or under the
645 statutes that permit interlocutory appeals.

646 Many circumstances may lead a party to prefer an immediate
647 appeal to test an interlocutory order that is not appealable
648 without more. A few common illustrations set the stage. A plaintiff
649 may have several demands for relief. An order dismissing some of
650 them may leave only fragments that, standing alone, do not seem to
651 warrant the costs and uncertainties of continuing litigation. Even
652 if the plaintiff can afford to litigate the rest of the way to a
653 final judgment, banking on the prospect that the interlocutory
654 order will be reversed, the cost may be high, and can easily be
655 wasted whether the result on appeal is reversal or affirmance. And
656 delay is an inevitable cost. So too, the court may dismiss some
657 theories that support a single claim, leaving only theories that
658 the plaintiff thinks weaker either as a matter of law or as a
659 matter of available evidence. Or the court may enter an in limine
660 order excluding the most important -- and perhaps indispensable --
661 parts of the plaintiff’s evidence.

662 Faced with these, and often enough more complicated
663 circumstances, an attempt may be made to "manufacture" finality by
664 arranging voluntary or stipulated dismissal of all, or substantial
665 parts, of what otherwise remains to be done in the trial court.

666 Three rough categories of manufactured finality can be
667 identified. Most decisions agree that most of the time a final
668 judgment cannot be manufactured by dismissing without prejudice
669 everything that remains unfinished in the action. Most decisions
670 agree that most of the time a dismissal with prejudice of all

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671 unfinished parts of an action does establish finality. And most
672 circuits reject the approach of "conditional finality" that has
673 been accepted in the Second Circuit and apparently the Federal
674 Circuit. This tactic dismisses all unfinished parts of the action
675 with prejudice, subject to the condition that they can be revived
676 --the prejudice dissolves -- if the interlocutory orders thus made
677 final are reversed on appeal.

678 The question whether to propose rules provisions addressing
679 manufactured finality is beset by two major concerns.

680 One major concern is that the cases have recognized
681 circumstances in which a dismissal without prejudice does achieve
682 appealable finality. A rule that rejects finality for all
683 dismissals without prejudice might come at significant cost. These
684 concerns are reflected in the memorandum attached below.

685 A related concern is that a rule recognizing that a dismissal
686 with prejudice can achieve finality accomplishes nothing useful.
687 Courts understand that now. A rule that states that only a
688 dismissal with prejudice can achieve finality, on the other hand,
689 runs into the same problems as a rule that rejects finality for all
690 dismissals without prejudice.

691 Discussions of conditional prejudice have tended to divide
692 practicing lawyers from judges. It may be that the division is more
693 accurately described as between practicing lawyers and trial judges
694 on one side and appellate judges on the other. Practicing lawyers
695 believe that a dismissal with conditional prejudice can be a
696 valuable means of achieving finality. Since most appeals lead to
697 affirmance, the opportunity to revive the parts of the action that
698 were dismissed with conditional prejudice will not cause as much
699 risk of repeated appeals in the same action as might be feared. The
700 party who is willing to risk all that remains in the action on the
701 opportunity to win reversal of the interlocutory orders made before
702 the dismissal will be able to continue only if there is reversible
703 error. If the alternative is to persist in litigating to a true
704 final judgment the parts that would be dismissed with conditional
705 prejudice, both the trial court and the opposing party pay a price
706 that is not redeemed even if the eventual appeal leads to
707 affirmance. And those proceedings are likely to become pure waste
708 on reversal of the interlocutory orders that would have been
709 reviewed on a conditional-finality appeal.

710 Judges (at least appellate judges), on the other hand, fear
711 that dismissals with conditional prejudice will threaten the core
712 values of the final-judgment rule. As with an avowedly
713 interlocutory appeal, the result may be added cost and delay and a
714 risk that the appellate court will have to revisit familiar terrain
715 on a subsequent appeal.

716 One way of viewing the conditional prejudice issue is to ask
717 whether there is a real need to address it by rules amendments.

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718 There is no indication that the Second Circuit regrets its
719 approach. Apart from the Federal Circuit, the other circuits that
720 have confronted the question refuse to allow manufactured finality
721 on these terms. Is there a need to adopt a rule that prohibits
722 reliance on conditional prejudice by the courts that find it a
723 useful adjustment of the final-judgment rule?

724 The Subcommittee, building on work by an earlier subcommittee,
725 has discussed these issues at length. The competing arguments on
726 all sides continue to defy confident resolution. Four alternatives
727 are presented for Committee consideration. The Subcommittee does
728 not recommend a choice among them.

729 The first alternative is to do nothing. The reasons for doing
730 nothing are easily summarized. Most situations are governed by two
731 clear rules that are generally recognized. A voluntary dismissal
732 without prejudice, even if it sweeps away an entire action, does
733 not achieve finality. A voluntary dismissal with prejudice that
734 sweeps away an entire action does achieve finality. Little would be
735 accomplished by adopting a rule that states either or both of these
736 points. And so simple a rule would create a risk of undoing
737 decisions that now recognize finality in circumstances that would
738 not seem to fit within the new rule. The most obvious example is
739 conditional prejudice, discussed further below. Other examples are
740 described in the attached memorandum discussing the choices between
741 simple rules, complex rules, or no rules.

742 The argument for going ahead with simple rules is direct. It
743 is important to have clear rules of appeal jurisdiction. And
744 uniformity across the circuits is an important component of clarity
745 -- no matter how clear the rules may seem within any particular
746 circuit, disuniformity will encourage attempts to manufacture
747 finality that backfire against sloppy or risk-taking lawyers. This
748 argument, however, is subject to challenge on the ground that no
749 rule text will be so perfect as to exclude all opportunities for
750 interpretation and thus for disuniform interpretation.

751 The second alternative is to adopt a rule that says only that
752 a plaintiff -- or perhaps any party asserting a claim for relief --
753 can achieve appeal finality by dismissing with prejudice all claims
754 and parties that remain the action. Although this rule is accepted
755 as a general matter now, recognition in rule text would provide
756 guidance for lawyers who are not expert in the complexities of the
757 final-judgment rule. It also would provide reassurance for lawyers
758 who are familiar with the idea, but feel pressure to confirm their
759 understanding by expensive research.

760 This simple rule would leave ambiguities at the margin. The
761 clearest example is a dismissal with conditional prejudice. Is that
762 with prejudice or without prejudice? Other examples occur in cases
763 that, on one theory or another, recognize de facto prejudice. One
764 illustration is a dismissal without prejudice in circumstances that
765 seem to preclude any new action because the applicable limitations

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766 period has run. Litigants and lawyers would face new uncertainties
767 in the attempt to reconcile existing decisions with the new rule
768 text.

769 The third alternative is to adopt a rule that says that only
770 a dismissal with prejudice achieves finality. This rule would
771 actually do something, as compared to a rule that recognizes
772 finality on a dismissal with prejudice but that does not expressly
773 foreclose other means of manufacturing finality. But the
774 ambiguities would remain, and expressly foreclosing all but
775 dismissals with prejudice would raise the stakes of uncertainty.

776 A fourth alternative is to adopt a rule that recognizes or
777 requires that a voluntary dismissal be with prejudice and that also
778 expressly addresses conditional prejudice. Either answer could be
779 given. Conditional prejudice could be recognized as a valid path to
780 finality. This answer might be adopted in a form that would defer
781 to courts that recognize conditional prejudice now, and leave the
782 choice open for courts that have not expressly rejected it, without
783 requiring other circuits to change their views. That path would
784 leave disuniformity. Instead, the rule might require all courts to
785 recognize conditional prejudice. That path likely would stir
786 significant opposition. Or conditional prejudice could be rejected,
787 not so much because of any sense that it has proved undesirable
788 when recognized as because of a desire to achieve national
789 uniformity. A clear majority of the decisions that address the
790 question reject conditional prejudice. There is no indication that
791 it is frequently used in circuits that do recognize it. Uniformity,
792 on this view, would be achieved at little cost, and indeed would be
793 an added benefit if conditional prejudice is in fact a bad means of
794 achieving finality.

795 A choice among these alternatives will be influenced by a more
796 general sense of the need to prevent further erosion of the final-
797 judgment rule. The rule is far more complicated than the initial
798 statement that finality requires complete disposition of an entire
799 case, leaving nothing to be done in the trial court apart from
800 execution of a judgment that provides relief. Expansions,
801 exceptions, and occasional evasions are familiar in practice. The
802 complication reflects case-specific, or at times more general,
803 rebalancing of the competing needs that allocate jurisdiction
804 between trial courts and appellate courts. An openly ad hoc
805 approach that allows a court of appeals to assert jurisdiction
806 whenever a present appeal seems a good idea would destroy the
807 balance achieved by a general requirement of finality. But many
808 more restricted qualifications are recognized by statute, court
809 rule, and interpretation of 28 U.S.C. § 1291 itself. The choices
810 are seldom easy. But it may be difficult to identify any general
811 practical losses incurred by ongoing and somewhat divergent
812 approaches to manufactured finality. If so, the more abstract
813 desire for more precise rules in this particular corner of appeal
814 jurisdiction may not be enough to justify the potential costs of
815 more precise rules.

12b-000581

The attachments include several things. Initial sketches of simple rules that ignore all potential complications come first. Next is a memorandum addressing some of the complications of manufactured finality. Notes on three Subcommittee conference calls addressing manufactured finality are set out with Notes on two conference calls addressing stays of execution following the discussion of Rule 62.

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823 **MANUFACTURED FINALITY DRAFTS**

824 These drafts illustrate the narrowed range of approaches that
825 have emerged from Subcommittee discussions. They do not attempt to
826 capture in rule text the subtle distinctions that may be found in
827 some cases. Something might be said in a Committee Note to suggest
828 that flexibility is possible at the margins, but more than a hint
829 of qualifications could derail the project.

830 One potential approach has been put aside. There is no current
831 enthusiasm for adopting a simple rule stating that a voluntary
832 dismissal without prejudice does not establish an appealable final
833 judgment. That proposition is broadly accepted as a general matter,
834 leaving little to be accomplished by adopting an Enabling Act Rule.
835 A simple rule, moreover, might thwart appeals that have been
836 allowed and that perhaps should remain available. "Constructive" or
837 "de facto" prejudice may be found when other circumstances will
838 prevent a new action, or at least a new action in the federal
839 courts.

840 A simple rule could recognize that a voluntary dismissal with
841 prejudice establishes an appealable final judgment. That
842 proposition is accepted in many cases, but it could be useful to
843 establish it by a formal rule for the benefit of those who want
844 reassurance or who, absent guidance by rule, would devote
845 substantial effort to determining what the cases say. This approach
846 could be expanded to state that finality can be achieved by a
847 voluntary dismissal only if it is with prejudice. The rule can be
848 kept simple by requiring dismissal of everything -- all claims and
849 all parties -- that remain in the action after the order or series
850 of orders a claimant wishes to appeal. The Committee Note would be
851 simple to write if the rule is intended to close off every
852 variation of manufactured finality that has emerged here or there
853 in the cases. Writing the Note could be more difficult if it seems
854 better to leave some reason for departures.

855 Conditional prejudice also can be addressed in rule text. If
856 the choice is to prohibit this means of achieving finality, it may
857 be important to add the prohibition to rule text. Otherwise a court
858 that likes the idea could interpret "with prejudice" to include
859 conditional prejudice, perhaps even in defiance of a Committee Note
860 that attempts to insist on unconditional prejudice. And if the
861 choice is to recognize conditional prejudice, rule text is
862 necessary to overcome the cases that reject it.

863 **[Only] With Prejudice**
864 **Rule 41. Dismissal of Actions**
865 (a) VOLUNTARY DISMISSAL.
866 (1) *By the Plaintiff.* * * *
867 (C) *Appealable Finality*. A [plaintiff][party asserting a

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868 claim for relief][10] may establish a final decision
869 [for purposes of appeal] by a voluntary dismissal
870 [only] if the dismissal is with prejudice to all
871 claims and parties remaining in the action.[11]

872
873 COMMITTEE NOTE

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[10] There may be three choices. Limiting the rule to dismissal by a plaintiff would capture many of the cases, and seems easier to put into effect. Often a plaintiff can dismiss all claims against all parties without further confusion. If the case is complicated by counterclaims, crossclaims, third-party claims, or whatever, it still may be possible to arrange a stipulation of all parties.

If the rule applies to any party asserting a claim, it may be more difficult to work out. A defendant whose counterclaim has been hamstrung but not dismissed, for example, may have a hard time of it in attempting to arrange dismissal of all other claims and parties. And attempting to develop a rule that allows a defendant to manufacture finality on less complete terms is likely to prove more complicated than it is worth. Addressing other sorts of claims would be still more complicated.

All of the discussion has focused on parties asserting a claim for relief. That seems to reflect the cases. It remains to decide whether comparable provisions should be adopted for a defending party who is not asserting any claim. A defendant, for example, might believe that an order striking a defense, or partial summary judgment, or even just an order excluding important evidence, leaves so little hope of prevailing that it is better to submit to an adverse judgment and appeal the adverse rulings. The answer may be that a judgment against a defendant is inherently "with prejudice" and final, no matter whether entered on a stipulation that reserves the right to appeal or on a partial default. If that works, this potential wrinkle can be passed by.

[11] The rule text would look better if it read "may establish a final judgment [only] by voluntarily dismissing with prejudice * * *." But if we keep "only," the rule might seem to exclude means of achieving finality other than voluntary dismissal. A stipulated judgment reserving the right to appeal interlocutory orders would be an example.

As drafted, this provision reaches both unilateral dismissal by notice and dismissal by stipulation signed by all parties who have appeared, Rule 41(a)(1)(A)(ii). Should we distinguish, so that a stipulation of all parties can achieve finality? That could be seen as an end-run around Rule 54(b) if the dismissal is without prejudice. But if all parties prefer to shift the forum to the court of appeals, should the rules stand in the way?

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874 28 U.S.C. § 1291 establishes jurisdiction of appeals from
875 "final decisions." A final decision is traditionally reached when
876 the district court has completed everything it intends to do in an
877 action. This traditional concept of finality has been relaxed in
878 some circumstances; the "collateral-order" doctrine is a clear
879 example. Rule 54(b) authorizes entry of a partial final judgment
880 before the district court has disposed of all parts of a multi-
881 claim or multi-party action. Avowedly interlocutory appeals are
882 permitted by some statutes, most notably 28 U.S.C. § 1292. And
883 outside of appeals, review occasionally can be had by extraordinary
884 writ, see 28 U.S.C. § 1651.

885 A party who has lost an important interlocutory ruling may
886 wish to appeal even though none of these established alternatives
887 is available. The final decision rule represents a balance of
888 competing considerations that usually serves the interests of the
889 judicial system and the parties. But it may lead to prolonged,
890 expensive, and unnecessarily duplicated proceedings. It is not
891 surprising that a party may seek to establish an appealable final
892 decision by means within the party's control. Voluntary dismissals
893 have been a common ploy.

894 If it could establish finality, a voluntary dismissal without
895 prejudice would impose relatively low costs on a party who wishes
896 to manufacture a final decision. Unless a statute of limitations
897 bars a new action, affirmance of the disputed interlocutory ruling
898 imposes delay and the costs of initiating a new action, but the
899 effect may be not much different from an explicitly interlocutory
900 appeal. And so many cases reject most attempts to achieve
901 appealability by a voluntary dismissal without prejudice.

902 A voluntary dismissal with prejudice is quite different. An
903 interlocutory order, or a series of interlocutory orders, may leave
904 little reason to continue the litigation. An in limine ruling
905 excluding evidence may defeat any likely chance of success. An
906 order dismissing some theories or claims, or partial summary
907 judgment, may reduce the stakes to a level not worth litigating
908 alone. The interests that are balanced by the final-decision
909 requirement can be served, indeed advanced, if a claimant is
910 prepared to surrender all claims and parties that survive the
911 interlocutory orders. Allowing the interlocutory orders to merge
912 into the final decision accomplished by the dismissal means only
913 that if the orders are reversed, the case can continue on remand
914 only as to the subjects caught up in those orders. There is no
915 reviving the other matters or parties that have been dismissed with
916 prejudice. Although many cases recognize this means of achieving
917 finality, clear notice in rule text will provide guidance and
918 reassurance, and reduce unnecessary research costs.

919 [Recognizing finality only upon dismissal with prejudice of
920 all claims and all parties that remain in the action means that
921 dismissal with prejudice as to less than all claims and parties,
922 and dismissal without prejudice, do not establish a final decision.

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923 {Nor can finality be established by showing that other constraints
924 give a dismissal without prejudice the practical effect of a
925 dismissal with prejudice. As one example, courts should not be
926 forced to struggle with what may be difficult fact-bound arguments
927 to determine whether a statute of limitations would bar a new
928 action. As another example, the interests of opposing parties are
929 served by denying finality if a dismissal attempts to support a
930 federal appeal by barring any new action in the federal courts
931 while being without prejudice to a new action in a state court.[12]}]

932 [A dismissal "with prejudice" is not accomplished by
933 attempting to reserve the right to revive the matters dismissed
934 with prejudice if the interlocutory order challenged by the appeal
935 is reversed. Such "conditional prejudice" exposes the courts and
936 adversary parties to the same risks that would flow from staying
937 district-court proceedings pending an avowedly interlocutory
938 appeal. Worse, the apparent dismissal with prejudice would defeat
939 any occasion for the district court to continue its own proceedings
940 when that seems the wise course pending what is, in effect, an
941 interlocutory appeal.]

942 *Court Control*

943 This draft addresses a voluntary dismissal with prejudice by
944 adding a new Rule 41(a)(1)(C). That makes it necessary to consider
945 the question of court control. The issue is most likely to arise
946 when all parties join in a stipulation of dismissal, see Rule
947 41(a)(1)(A)(ii). Should the court be able to reject an attempt by
948 all parties to manufacture finality? This concern is most important
949 if conditional prejudice is recognized. Allowing the parties to
950 short-circuit continuing trial-court proceedings could be contrary
951 to the interests of the judicial system.

952 One approach would be to add a requirement of court approval:
953 "may establish a final decision [for purposes of appeal] by a
954 voluntary dismissal [only] if the dismissal is with prejudice to
955 all claims and parties remaining in the action <u>and is approved by</u>
956 <u>the court</u>."

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[12] This is particularly difficult. One illustration: The federal plaintiff has a federal claim and either diversity or supplemental jurisdiction over parallel state claims. The defendant has a parallel action pending in state court. After partial summary judgment rejecting the federal claim, all parties may prefer to dismiss the balance of the federal action without prejudice to joining the federal plaintiff's claims as counterclaims in the state action. If they are astute enough to manage this task by stipulating to a judgment that preserves the opportunity to appeal the partial summary judgment in federal court, while leaving the way to advance the state-law claims only in the state court, there are strong reasons to allow them to do so. This is one of the several illustrations that test the "only with prejudice" approach.

957 Another approach would be more indirect, working through Rule
958 41(a)(2):

959 **(2)** *By Court Order: Effect*. Except as provided in Rule
960 41(a)(1)(A) and (B), an action may be dismissed at the
961 plaintiff's request only by court order, on terms that
962 the court considers proper.
963 Dismissal under Rule 41(a)(1)(C) then would require approval, and
964 the provision for proper terms would be explicit.

965 CONDITIONAL PREJUDICE

966 *Conditional Prejudice Denied*

967 If a Committee Note to a rule that recognizes finality only on
968 a voluntary dismissal with prejudice does not seem protection
969 enough, conditional prejudice could be expressly rejected in rule
970 text:

971 (C) *Appealable Finality*. A party asserting a claim for
972 relief may establish a final decision [for purposes
973 of appeal] by a voluntary dismissal [only] if the
974 dismissal is with prejudice to all claims and
975 parties remaining in the action. The dismissal may
976 not be subject to revocation if an appeal results
977 in vacatur or reversal of any order entered before
978 the dismissal.[13]

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[13] At least on the first go-round, it is difficult to capture "conditional prejudice" in rule language. "conditioned" leads to a choice of what the dismissal is conditioned on. Is it affirmance -- affirmance perfects the prejudice? Or is it reversal -- reversal dissolves the prejudice? Still, the rule text would be simpler if the attempt made in this sentence is abandoned in favor of a simpler statement: "only if the dismissal is with unconditional prejudice * * *."

Probably it would not be enough to refer only to "reversal." The appellate court may vacate without reversing. "Vacatur" has an antique air about it, but the world may not be ready for "vacation or reversal." Even that phrase leaves an ambiguity. A court of appeals may remand without actually vacating or reversing, and in some circumstances may even retain jurisdiction pending further action in the district court. "Remand" might be added to the list, although that raises nice questions whether the conditional prejudice should be undone simply because of a remand that does not vacate or reverse.

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979 COMMITTEE NOTE

980 Some opinions have allowed a party to establish finality,
981 supporting review of interlocutory orders, by a dismissal with
982 prejudice that is conditioned on the decision on appeal. If the
983 orders are affirmed, the prejudice remains. But if one or more
984 orders are reversed, the prejudice dissolves and the appellant is
985 allowed to revive everything that had been dismissed. This tactic
986 exposes the courts and adversary parties to the same risks that
987 would flow from staying district-court proceedings pending an
988 avowedly interlocutory appeal. Worse, the apparent dismissal with
989 prejudice would defeat any occasion for the district court to
990 continue its own proceedings when that seems the wise course
991 pending what is, in effect, an interlocutory appeal. The amended
992 rule rejects "conditional prejudice."

993 *Conditional Prejudice Recognized*

994 (C) *Appealable Finality*. A party asserting a claim for
995 relief may establish a final decision [for purposes
996 of appeal] by a voluntary dismissal [only] if the
997 dismissal is with prejudice to all claims and
998 parties remaining in the action. But a notice or
999 stipulation of dismissal may provide that the
1000 dismissal will be vacated if an appeal results in
1001 vacatur or reversal of any order entered before the
1002 dismissal.[14]

1003 COMMITTEE NOTE

1004 Some opinions have allowed a party to establish finality,
1005 supporting review of interlocutory orders, by a dismissal with

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These questions may be related. There is no difficulty if the orders are affirmed, even though the case is remanded for entry of final judgment. Prejudice remains prejudice, no further condition about it. So "remand" alone will not do it.

[14] This version does not expressly address the question whether the dismissal should distinguish between elements that are dismissed with real prejudice and elements that are dismissed with conditional prejudice. An appellant may intend to abandon some claims -- or perhaps more likely some parties -- for good. Do we need that level of refinement, either in rule text or Committee Note?

A freestanding conditional prejudice rule could be drafted without adding the general provision for dismissal with prejudice, and without the "only with prejudice" provision.

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1006 prejudice that is conditioned on the decision on appeal. If the
1007 orders are affirmed, the prejudice remains. But if one or more
1008 orders are reversed, the prejudice dissolves and the appellant is
1009 allowed to revive everything that had been conditionally dismissed.
1010 Many other opinions have rejected this form of conditional
1011 prejudice. The amended rule accepts it. An interlocutory order that
1012 does not completely dispose of an action may leave a party in a
1013 position that barely supports the cost of further litigation, or
1014 does not support the cost except for the purpose of persisting to
1015 a conventional final decision that will afford an opportunity to
1016 appeal the order. A party confronting this dilemma may be willing
1017 to stake the entire litigation on its belief that the order is
1018 reversibly wrong. If the order is affirmed -- and most orders are
1019 affirmed -- the district court and the parties are spared the
1020 burdens of further litigation, and the court of appeals has not had
1021 to face repetitive appeals. If the order is reversed, litigation on
1022 remand can be shaped in ways that are more efficient and effective
1023 than whatever might have been done in the interval between the
1024 order and a traditional final judgment. And the dead loss of those
1025 intervening proceedings is avoided.

1026 [The rule text and this much of a Committee Note do not
1027 address the question whether a dismissal with conditional prejudice
1028 should specify the order or orders to be appealed. If that seems a
1029 good idea, it seems likely better to add it to the Civil Rule than
1030 to amend Appellate Rule 3 to shift the specificity requirement to
1031 the notice of appeal. If explicit rule text is not adopted, it may
1032 be better to avoid the question in the Committee Note. But perhaps
1033 a bit of practice advice would be helpful?]

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1034 *Manufactured Finality: Simple, Complex, or No Rules?*

1035 PREFACE

1036 These notes are designed to frame the central choices that
1037 might be made in considering possible rules to address
1038 "manufactured finality."

1039 One choice is to adopt clear, simple rules. Another is to
1040 adopt complex rules that respond to the nuances that may be found
1041 in the cases admirably recounted in Professor Struve's memorandums.
1042 And the third is to do nothing. Doing nothing would reflect a
1043 judgment that simple rules might defeat appeals that fit well
1044 within the purposes of the final-judgment rule, but that
1045 unacceptable uncertainties would hobble any attempt to craft
1046 complex rules.

1047 "Manufactured finality" may embrace a variety of strategies
1048 adopted to achieve appellate review of an interlocutory ruling
1049 that, without more, is not yet appealable. The common element is an
1050 attempt to create a final judgment that can be appealed under §
1051 1291. The appeal invokes the rule that once there is a final
1052 judgment, interlocutory orders "merge" into it and become
1053 reviewable. The strategies may depend on unilateral acts by a
1054 single party, or may depend on joint action of two or more parties.

1055 Many issues arise from manufactured finality. Some are clearly
1056 resolved in the cases, at least for the most part, by general
1057 rules. There may be room for refinements, but these rules seem to
1058 work predictably and to achieve reasonable results. For these
1059 issues, the question is whether the modest gains in clarity that
1060 might be achieved by adopting explicit Enabling Act Rules would
1061 come at the risk of undue rigidity. Other issues are not so clearly
1062 resolved. In some areas, it may be fair to say that the cases are
1063 messy. For these issues the central question is whether it is
1064 possible to identify sound general approaches and to implement them
1065 effectively in Enabling Act Rules.

1066 The argument that supports forgoing reliance on Enabling Act
1067 Rules to channel manufactured finality is essentially an argument
1068 for the virtues of the common-law process. Nuanced results can be
1069 better achieved by confronting specific cases than by general
1070 rules. The argument for adopting new rules is that rules of
1071 appellate jurisdiction should be clear, simple, and categorical.
1072 There are true advantages to such rules. Earlier drafts of
1073 illustrative rules may support the choice. They are attached.

1074 CLEAR RULES

1075 The clearest rule is that voluntary actions by the parties
1076 that resolve "with prejudice" all the claims among all parties that
1077 remain after an interlocutory order establish a final judgment and
1078 support review of the interlocutory order. Professor Struve's case-

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1079 law memorandums are clear.

1080 The view may be found in some cases that a party who has
1081 voluntarily dismissed a claim with prejudice in order to establish
1082 finality, even if by court order, lacks "standing" to challenge a
1083 judgment that the party sought. Judge Tjoflat has expressed this
1084 view, urging that a party is not injured by an order that it
1085 invited. OFS Fitel, LLC v. Epstein, Becker and Green, P.C., 549
1086 F.3d 1344, 1370-1371 (11th Cir.2008)(dissenting opinion). Most
1087 courts reject this view. But if indeed Article III defeats appeal
1088 standing, revision by court rule would require careful explanation.
1089 The task would begin with 28 U.S.C. § 2072(c), the source of
1090 authority for the current inquiry into manufactured finality.
1091 Section 2072(c) authorizes Enabling Act Rules that "define when a
1092 ruling of a district court is final for the purposes of appeal
1093 under section 1291 of this title." So long as there is an
1094 underlying dispute, standing is assured -- the OFS Fitel case, for
1095 example, involved an invited dismissal based on a disputed order
1096 that, as a discovery sanction, excluded expert testimony essential
1097 to establish the plaintiff’s claim. Once finality is achieved,
1098 having had to ask for the order that established finality to
1099 support an appeal is not a waiver of the right to appeal, and does
1100 not moot the dispute.

1101 Voluntary actions that dismiss parts of an action "without
1102 prejudice" often encounter an offsetting general rule that a
1103 dismissal without prejudice cannot achieve appealable finality.
1104 Here too, Professor Struve’s memorandums provide a generous array
1105 of authority. Opinions often say that this tactic is no more than
1106 an attempt to "end-run" the final-judgment rule. But there are many
1107 variations on dispositions without prejudice, and some of them have
1108 succeeded in achieving appealable finality. Several of these
1109 variations are explored below.

1110 It would be possible to supersede the opinions that have
1111 introduced some flexibility in dealing with the finality of
1112 judgments reached by party acts that leave the way open for future
1113 litigation. Either of two mirror-image approaches could be taken.
1114 One would be to adopt a flat rule that one or more parties can
1115 manufacture finality only by with-prejudice dismissal of all claims
1116 among all parties. The other would adopt a flat rule that a
1117 voluntary dismissal without prejudice does not support review of
1118 adverse interlocutory orders entered before the dismissal. Support
1119 for either approach could be found by analogy to the evolution of
1120 collateral-order finality toward a "categorical" approach designed
1121 to defeat case-specific determinations that immediate appeal is a
1122 good idea for a particular situation, whether or not it would be
1123 desirable in other but similar cases.

1124 Another possibility is to craft rules that preserve some
1125 elements of a flexible approach. That task may not be easy.

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1126 And a third approach is to do nothing in the rules process.
1127 The potential advantage of doing nothing depends on a judgment
1128 about the value of preserving the process by which courts have
1129 struggled to accommodate the strong desire to preserve the values
1130 of a clear final-judgment rule with situations in which allowing
1131 "manufactured" finality seems to enhance the efficient allocation
1132 of authority between trial and appellate courts. If the cases are
1133 messy in some areas, there may be good reasons for the mess.

1134 The next sections begin by describing established practices
1135 that should be protected against the potential unintended
1136 consequences of adopting clear but simple rules on appeals after
1137 dismissals with, or without, prejudice. The following section
1138 explores a number of circumstances that have prompted some courts
1139 to accept manufactured finality despite the prospect that a party
1140 may remain free to pursue further litigation after the appellate
1141 decision. The questions that pervade all of these examples are
1142 whether they might support specific rules that support manufactured
1143 finality, or whether they provide persuasive reasons for leaving
1144 courts free to carry forward a case-specific process that allows an
1145 occasional exception to a categorical approach.

1146 Reactions to these multiple examples will be influenced by the
1147 value placed on the availability of appellate review, the costs
1148 that may be imposed on access to it, and the role of alternatives
1149 that enable astute counsel to achieve what others may not. One
1150 illustration is provided by Palmieri v. Defaria, 88 F.3d 136 (2d
1151 Cir.1996). Three days before trial the court entered an in limine
1152 order excluding many items of the plaintiff’s intended evidence. At
1153 trial the plaintiff repeatedly stated that the evidence not
1154 excluded was insufficient. The court repeatedly invited the
1155 plaintiff to proceed to trial. Eventually the action was dismissed
1156 because the plaintiff refused to go to trial. The court of appeals
1157 was uncertain whether the order represented a voluntary dismissal
1158 without prejudice -- if so, appeal jurisdiction would be denied
1159 because that would be an end-run around the requirement of
1160 finality. In the alternative, the order might be a dismissal for
1161 failure to prosecute. In that event, the in limine ruling could not
1162 be reviewed because it did not merge in the dismissal, as it might
1163 have if there had been no possibility that the in limine ruling
1164 would be reconsidered during the course of trial. Rule 54(b) is not
1165 available in such circumstances because there was no disposition of
1166 a separate claim. Disobedience and contempt were not available. But
1167 review might have been had by proceeding to trial, offering no
1168 evidence, and inviting an adverse judgment as a matter of law. And
1169 review would have been had if the plaintiff had gone to trial,
1170 offered some evidence, and then rested, to be dismissed on judgment
1171 as a matter of law. The value of forcing this seeming waste effort
1172 would depend on the prospect that the evidence produced at trial
1173 would persuade the trial judge to reconsider the in limine ruling.
1174 It may be fairly debated whether that prospect was sufficient to
1175 deny any review.

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1176 ESTABLISHED PRACTICES TO BE PRESERVED

1177 The topics noted in this section actually involve approaches
1178 that are likely to be accepted by most courts. They are included
1179 here because they must be kept in mind when drafting a rule
1180 designed to enshrine a "with prejudice" mandate for manufactured
1181 finality.

1182 Functionally with Prejudice: An example is provided by Campbell v.
1183 Altec Indus., Inc., 605 F.3d 839, 841 n. 1 (1st Cir.2010). The
1184 plaintiff won an order allowing amendment of the complaint to
1185 withdraw the only claim that remained after summary judgment for
1186 the defendant. The plaintiff stated on the record that he would not
1187 renew the withdrawn claim. The order granting leave to amend did
1188 not say that the resulting dismissal was with prejudice. Finality
1189 was found in "the functional equivalent of a dismissal with
1190 prejudice of this claim." Another example is Fairley v. Andrews,
1191 578 F.3d 518, 521-522 (7th Cir.2009), certiorari denied, 130 S.Ct.
1192 3320. After a pretrial order excluding evidence, the plaintiffs
1193 acknowledged that they could not prove their case without the
1194 excluded evidence. The district court responded by entering
1195 judgment for the defendants so the plaintiffs could appeal. "The
1196 rule is simple: if plaintiff loses on A and abandons B in order to
1197 make the judgment final and thus obtain immediate review, the court
1198 will consider A, but B is lost forever." (This passage reflects a
1199 common rule that a choice to appeal is a binding election. An
1200 example from the same court is International Marketing, Ltd. v.
1201 Archer-Daniels-Midland Co., 192 F.3d 724, 727, 733 (7th Cir.1999):
1202 The plaintiff chose not to amend the complaint following dismissal
1203 with leave to amend as to some claims, instead dismissing all
1204 claims with prejudice. There was a final judgment, but the court
1205 would not allow the plaintiff to seek remand to take up the leave
1206 to amend.)

1207 The concept of functional prejudice may become elusive.
1208 Professor Struve's memorandums trace cases that rely on the running
1209 of the statute of limitations as a bar that effectively establishes
1210 the equivalent of "with prejudice" for a "without prejudice"
1211 dismissal. But a cogent caution was expressed in Cochran v.
1212 Herring, 61 F.3d 20, 21-22 & n. 6 (11th Cir.1995), certiorari
1213 denied 516 U.S. 1073: "Statute of limitations matters often need
1214 much thought. And, an appellate court, such as this one, is poorly
1215 situated to litigate and decide, in the first instance, whether a
1216 statute of limitations has run to the point of barring an action."
1217 There may be tolling events not reflected in the record.

1218 "High-Low" Agreements: A high-low agreement may be reached after a
1219 truly final judgment. A judgment for $1,000,000 faces appeals by
1220 both plaintiff, seeking more, and defendant, seeking to pay
1221 nothing. They might agree that on affirmance the defendant will pay
1222 $1,500,000, or on reversal will pay $500,000. A similar agreement
1223 might be reached after a trial on liability alone. Manufactured
1224 finality of this sort should be kept secure. Further trial

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1225 proceedings are avoided, both before appeal and after decision on
1226 appeal.

1227 Failure to Prosecute: The cases are not entirely uniform, but the
1228 general rule seems to be that a party who feels aggrieved by an
1229 interlocutory order should not be able to obtain appellate review
1230 by withdrawing from all further proceedings and appealing a
1231 dismissal for failure to prosecute. The adverse judgment is as
1232 final as a dismissal with prejudice -- Rule 41(b) provides it is an
1233 adjudication on the merits unless the court orders otherwise. But
1234 a sullen refusal to participate creates unnecessary burdens for the
1235 court and adversary parties. It is better to insist that the
1236 offended party explicitly seek dismissal with prejudice. A rule
1237 that recognizes manufactured finality by a voluntary dismissal with
1238 prejudice should not upset the general practice. (And it also might
1239 be useful to distinguish the practice accepted in U.S. v. Procter
1240 & Gamble, 356 U.S. 677, 680-681 (1958): Facing an order to produce
1241 a grand-jury transcript in a civil action, the government asked
1242 that the order be amended to provide that failure to produce would
1243 lead to dismissal of the action. The Court accepted the amended
1244 order and dismissal as a means of establishing both finality and
1245 reviewability.)

1246 Dispute About Authority To Dismiss: There should be no question
1247 about this one. In University of South Alabama v. American Tobacco
1248 Co., 168 F.3d 405, 408 n. 1 (11th Cir.1999), the university brought
1249 suit without asking the state attorney general to participate. The
1250 attorney general appeared and dismissed the action without
1251 prejudice. The university was allowed to appeal to challenge the
1252 attorney general's authority to effect the dismissal. Any rule that
1253 denies finality upon dismissal without prejudice will have to
1254 reflect this risk.

1255 Dismissal Not by Appellant CSX Transp., Inc. v. City of Garden
1256 City, 235 F.3d 1325, 1327-1329 (11th Cir.2000) found finality.
1257 After summary judgment against the plaintiff, the defendant
1258 voluntarily dismissed without prejudice its third-party complaint.
1259 To deny finality here would deprive the plaintiff of any
1260 opportunity for appeal. Horn v. Berdon, Inc., Defined Benefit
1261 Pension Plan, 938 F.3d 125, 126-127 n. 1 (9th Cir.1991), is
1262 similar. After summary judgment for the defendants a counterclaim
1263 for indemnification was dismissed without prejudice by stipulation.
1264 Appeal jurisdiction was accepted: "[T]he revivable claim was solely
1265 for indemnification * * *. It could not have been heard by the
1266 district court after the court granted summary judgment."

1267 Administrative Closing A court's response to an attempt to dismiss
1268 without prejudice may be found to be an administrative closing that
1269 in effect denies dismissal, leaving the way open to revive the
1270 pending action. It may be difficult to make this diagnosis with
1271 confidence, but it can avoid any need to struggle with variations
1272 on the approach to a dismissal without prejudice. See Morton
1273 Internat. Inc. v. A.E. Staley Mfg. Co., 460 F.3d 170, 176-483 (3d

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1274 Cir.2006); Richards v. Firestone Tire & Rubber Co., 928 F.3d 241
1275 (7th Cir.1991).

1276 AREAS OF UNCERTAINTY

1277 District Court Connivance: The district court may agree that an
1278 interlocutory appeal is desirable and cooperate in manufacturing
1279 finality. This cooperation should alleviate concerns that immediate
1280 appeal will interfere with the court's authority to manage the
1281 litigation. It may also represent a determination, informed by the
1282 district court's understanding of the case, that immediate appeal
1283 will serve the interests of the appellate court. (Rule 54(b) is not
1284 a perfect instrument.) But the perspective of the court of appeals
1285 may be different.

1286 A tolerant approach is reflected in James v. Price Stern
1287 Sloan, Inc., 283 F.3d 1064 (9th Cir.2002). The district court
1288 approved a stipulation to dismiss the claims that remained after
1289 dismissal of most claims. The court accepted the appeal, finding
1290 that the district court's approval "is usually sufficient to ensure
1291 that everything is kosher," and "is an additional factor
1292 alleviating concerns about a possible manipulation of the appellate
1293 process." (Several Ninth Circuit opinions look to "manipulation" as
1294 a criterion in approaching manufactured finality. See the next
1295 paragraph.) PSN Illinois, LLC v. Ivoclar Vivadent, Inc., 525 F.3d
1296 1159, 1164 & n.2 (Fed.Cir.2008), certiorari denied 129 S.Ct. 647,
1297 found a final judgment on entry of a stipulated judgment that
1298 dismissed counterclaims without prejudice. Golan v. Pingel
1299 Enterprise, Inc., 310 F.3d 1360, 1366 n. 3 (Fed.Cir.2002), applying
1300 Ninth Circuit law, found finality in an order based on the parties'
1301 stipulation to dismiss the remaining claims without prejudice. And
1302 Robinson-Reeder v. American Council on Educ., 571 F.3d 1333
1303 (D.C.Cir. 2009), suggests that jurisdiction would have been
1304 established if the court had entered an order on the parties'
1305 stipulation dismissing the remaining claim without prejudice; the
1306 stipulation alone was not enough.

1307 Many other decisions are less tolerant. American States Ins.
1308 Co. v. Dastar corp., 318 F.3d 881 (9th Cir.2003), dismissed the
1309 appeal after the district court approved a stipulation dismissing
1310 without prejudice the claim and counterclaim that remained alive.
1311 Although this device was "not as patently manipulative" as some
1312 other attempts to manufacture finality, it did not satisfy Rule
1313 54(b) and created a danger of piecemeal litigation. (There was a
1314 dissent.) Rabbi Jacob Joseph School v. Province of Mendoza, 425
1315 F.3d 207, 210-211 (2d Cir.2005), adopts a firmer view. The
1316 plaintiff sought to dismiss the remaining claim without prejudice
1317 and without leave to replead in the instant action. The court
1318 entered an order striking the language about repleading and
1319 ordering dismissal. This was not a final judgment, which can be
1320 achieved only by dismissing the whole action with prejudice. This
1321 is not a matter of prudence, but of appeal jurisdiction. Horwitz v.
1322 Alloy Auto Co., 957 F.2d 1431, 1435-1437 (7th Cir. 1992), is

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1323 similar: "Were it only a matter of our discretion we might have
1324 been willing to help them out, but there are good reasons the rules
1325 are the way they are."

1326 Collaboration of the Parties: Many cases involve a stipulation by
1327 the parties that attempts to establish finality by dismissing
1328 without prejudice parts of the action that remain after a disputed
1329 interlocutory order. It might be urged that considerable respect
1330 should be given to the view of all parties that immediate appeal is
1331 desirable. But that view encounters difficulty not only with the
1332 settled rule that the parties' consent cannot establish
1333 jurisdiction but also with the underlying reasons for the rule. The
1334 rules of jurisdiction that allocate authority between trial courts
1335 and appellate courts are not as fundamental as the rules of
1336 subject-matter jurisdiction that limit the authority of all federal
1337 courts, but they reflect interests of the federal judicial system
1338 that often may be independent of the parties' interests.

1339 So it is no surprise that most cases reject the joint attempts
1340 of all parties to manufacture finality by dismissals without
1341 prejudice. In Federal Home Loan Mort. Corp. v. Scottsdale Ins. Co.,
1342 316 F.3d 431, 437-442 (3d Cir.2003), appeal jurisdiction was saved
1343 only by converting the dismissal to one with prejudice after oral
1344 argument on appeal.

1345 Adonican v. City of Los Angeles, 297 F.3d 1106 (9th Cir.2002),
1346 is representative of Ninth Circuit cases denying jurisdiction.

1347 But note the cases summarized above in which finality was
1348 found on entry of a court order adopting the parties' stipulation
1349 to dismiss without prejudice.

1350 Party Collaboration: Winner Helps Loser: The approach to
1351 collaborative finality may be mollified if the court chooses to
1352 focus on the fact that the party who won an interlocutory order is
1353 willing to cooperate in achieving finality by dismissing the
1354 winner's own claims without prejudice.

1355 Local Motion, Inc. v. Niescher, 105 F.3d 1278, 1279 (9th
1356 Cir.1997), found a final judgment when the plaintiff dismissed its
1357 remaining claims without prejudice and the defendant appealed. The
1358 court observed that a party who has lost on an interlocutory order
1359 cannot manufacture finality by dismissing remaining claims without
1360 prejudice, but dismissal without prejudice by a victorious party
1361 does not "use similar manipulation to thwart an appeal." (Remember
1362 the Ninth Circuit cases often use an open-ended approach that asks
1363 whether there is an attempt to manipulate jurisdiction.) A similar
1364 ruling was made in United Nat. Ins. Co. v. R & D Latex Corp., 141
1365 F.3d 916, 918 n. 1 (9th Cir.1998), finding that a prevailing
1366 plaintiff's dismissal of a remaining claim without prejudice to
1367 facilitate appeal by the losing defendant is not manipulation of
1368 the appellate process. U.S. ex rel. Shutt v. Community Home &
1369 Health Care Services, Inc., 550 F.3d 764, 766 (9th Cir.2008) seems

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1370 similar. After the government won summary judgment on the False
1371 Claims Act claims it dismissed the common-law claims without
1372 prejudice. "A prevailing party's decision to dismiss its remaining
1373 claims without prejudice generally renders a partial grant of
1374 summary judgment final."

1375 Less explicit reflections of this approach may be found in
1376 other cases. Equity Investment Partners, LP v. Lenz, 594 F.3d 1338,
1377 1341-1342 n. 2 (11th Cir. 2010), accepted jurisdiction of the
1378 appeal -- after the court denied a motion by the IRS to add a new
1379 party to a crossclaim and counterclaim, the parties stipulated to
1380 dismiss the crossclaim and counterclaim without prejudice. The
1381 court found this was not an improper attempt to manufacture a final
1382 judgment, noting that the stipulation was prompted by the refusal
1383 to permit joinder of an indispensable party. The result was review
1384 and reversal only of the earlier order granting partial summary
1385 judgment to the IRS.

1386 Other decisions seem contrary. In Heimann v. Snead, 133 F.3d
1387 767 (10th Cir.1998), six of the plaintiff's seven counts were
1388 dismissed. The plaintiff and defendant agreed to dismiss the
1389 seventh count with prejudice and to dismiss the defendants'
1390 counterclaims without prejudice. Not final. In Best Buy Stores,
1391 L.P. v. Benderson-Wainberg Associates, L.P., 668 F.3d 1019, 1032-
1392 1033 (8th Cir.2012), the plaintiff won on contract claims and moved
1393 to dismiss its fraud claims without prejudice on condition that
1394 they could be revived if the defendants were successful on appeal.
1395 The district court refused and dismissed the fraud claims with
1396 prejudice. The court of appeals ruled that dismissal with prejudice
1397 was not an abuse of discretion. (The case seems an attempt at
1398 "conditional prejudice," but undertaken by the party who prevailed
1399 on the interlocutory ruling.)

1400 Relaxed View of Without Prejudice: Hope v. Klabal, 457 F.3d 784
1401 (8th Cir.2006), accepted jurisdiction when, after summary judgment
1402 for both defendants on all but one claim against one defendant, the
1403 plaintiff dismissed the remaining claim without prejudice.
1404 "Admittedly, this circuit has been less than clear" about these
1405 matters. But this case resembled others in which jurisdiction was
1406 accepted. The dismissal without prejudice left nothing for the
1407 district court to resolve. Earlier Eighth Circuit decisions are
1408 similar. See Helm Fin. Corp. v. MNVA R.R., 212 F.3d 1076, 1079-1080
1409 (8th Cir.2000); and Great Rivers Co-op v. Farmland Indus., Inc.,
1410 198 F.3d 685, 688-690 (8th Cir.1999)(finding "the question is one
1411 of discretion, not jurisdiction"). Later cases, however, express
1412 remorse, see Fairbrook Leasing, Inc. v. Mesaba Aviation, Inc., 519
1413 F.3d 421, 425 n. 4, and the earlier relaxed approach may have been
1414 abandoned outright, see Ruppert v. Principal Life Ins. Co., 705
1415 F.3d 839, 842-843 (8th Cir.2013)(finality is achieved only if the
1416 appellant's claims "are unequivocally dismissed without prejudice").

1417 Rubin v. Schottenstein, Zox & Dunn, 110 F.3d 1247, 1250-1253
1418 (6th Cir.1997), on rehearing en banc 143 F.3d 263 (6th Cir.1998)

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1419 also seems to take a relaxed view, but it is difficult to make much
1420 of it.

1421 "Unjoinder" Some cases take the view that dismissal without
1422 prejudice as to one defendant suffices to establish the finality of
1423 rulings as to another defendant. The explanation is that since the
1424 plaintiff did not have to join the later-dismissed defendant,
1425 "unjoinder" is a suitable step to finality.

1426 A relatively early statement was provided in Missouri ex rel.
1427 Nixon v. Coeur D'Alene Tribe, 164 F.3d 1102, 1105-1107 (8th
1428 Cir.1999), certiorari denied 527 U.S. 1039. The plaintiff sued the
1429 Tribe and a contractor. The Tribe was dismissed for immunity
1430 reasons. Voluntary dismissal without prejudice as to the contractor
1431 established finality. The court relied on the policy against
1432 splitting claims to explain that dismissal without prejudice of
1433 some claims against a single defendant does not establish finality
1434 as to other claims defeated by court order. It found this policy
1435 does not apply to "unjoining" a defendant the plaintiff need not
1436 have joined in the first place. The same approach was taken in
1437 Willkinson v. Shackelford, 478 F.3d 957, 962 (8th Cir.2007),
1438 allowing appeal when the plaintiff, after the district court
1439 dismissed the diversity-destroying defendant and refused to remand,
1440 voluntarily dismissed without prejudice as to the diverse
1441 defendant. The "unjoin" approach was also applied in Duke Energy
1442 Trading & Marketing, L.L.C. v. Davis, 267 F.3d 1042, 1048-1050 (9th
1443 Cir.2001).

1444 Special Circumstances for Without Prejudice Finality There may be
1445 some identifiable circumstances that warrant acceptance of finality
1446 achieved by voluntary dismissal without prejudice of whatever
1447 remains after an adverse ruling. Finality is recognized in some of
1448 the cases noted here, but not others.

1449 Gannon Intern., Ltd. v. Blocker, 684 F.3d 785, 791-792 (8th
1450 Cir.2012), involved a motion to dismiss an entire action without
1451 prejudice to enable refiling in an action the defendants had
1452 brought against the plaintiff in a state court. The motion was made
1453 after the defendant moved for partial summary judgment but before
1454 the court ruled on the motion. The court granted the partial
1455 summary judgment and then granted the motion to dismiss without
1456 prejudice the parts of the action that remained. The court of
1457 appeals accepted jurisdiction. The motion to dismiss was made
1458 before the summary-judgment ruling, so it was not an attempt to
1459 evade the finality requirement. The plaintiff, moreover, asserted
1460 to the court it had no intent to refile the action in federal
1461 court.

1462 In Dearth v. Mukasey, 516 F.3d 413, 415, 416 (6th Cir.2008),
1463 the defendants moved to dismiss for lack of venue or to transfer
1464 under § 1406. The plaintiff requested that the court dismiss
1465 without prejudice rather than transfer if it were otherwise
1466 inclined to transfer. The court declined to decide whether venue

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1467 was proper, concluded that it would transfer if venue were proper,
1468 and granted both motions. The appeal was dismissed because the
1469 plaintiffs were left in the same position as if they had never
1470 filed suit. But that left the plaintiffs without an opportunity to
1471 appeal the question whether venue was proper. A dismissal for
1472 improper venue is not on the merits, but is appealable. The result
1473 could be questioned.

1474 Hood v. Plantation General Medical Center, 251 F.3d 932 (11th
1475 Cir.2001) began with one plaintiff who asserted two claims. One
1476 claim was dismissed for lack of standing. A second plaintiff was
1477 joined. The original plaintiff dismissed his remaining claim with
1478 prejudice. The second plaintiff dismissed its claims without
1479 prejudice. The appeal by the original plaintiff was dismissed.
1480 Because the second plaintiff remained free to refile, "the
1481 litigation is not finally over for all parties on all claims."
1482 Although dismissal for lack of standing ordinarily is not "on the
1483 merits" of the claim, it should preclude relitigation of the
1484 standing issue. The original plaintiff thus seems to have been
1485 caught in a finality trap -- the attempt to manufacture finality
1486 likely defeated any opportunity for appellate review of the
1487 standing ruling, in this action or any other. The decisions that
1488 allow a plaintiff to achieve finality by "unjoining" a defendant
1489 might be extended to allow the later, second plaintiff, to create
1490 finality for the original plaintiff by unjoining itself.

1491 Great Rivers Co-op v. Farmland Indus., Inc., 198 F.3d 685,
1492 688-690 (8th Cir.1999), raises the question whether a special
1493 approach may be appropriate in class actions. Rule 23(f) addresses
1494 appeals from an order granting or denying class-action
1495 certification. It seems to be working. But suppose the court
1496 dismisses some claims before deciding on certification, leaving
1497 only claims that do not seem worth pursuing even on a class basis?
1498 Or dismisses most claims after granting certification? Might it be
1499 appropriate to allow the class representatives to achieve finality
1500 by dismissing without prejudice what remains? Or, in a nice twist,
1501 by allowing dismissal without prejudice to other class members but
1502 with prejudice as to the class representatives? (This could be an
1503 attractive occasion for "conditional" prejudice -- if the
1504 dismissals are reversed, the class representatives who have proved
1505 the adequacy of their representation by the successful appeal might
1506 well be allowed to revive the dismissed claims on remand rather
1507 than search out new representatives.)

1508 Prejudice only in Federal Court Erie Cty. Retirees Assn. v. County
1509 of Erie, 220 F.3d 193, 201-202 (3d Cir.2000), reflects a desire to
1510 protect the court of appeals rather than the adversaries. After
1511 summary judgment against part of their federal claim, the
1512 plaintiffs withdrew the remaining part without prejudice. The
1513 district court then declined supplemental jurisdiction over the
1514 state-law claims and dismissed them without prejudice. On appeal
1515 the plaintiffs responded to the court’s question about appeal
1516 jurisdiction by withdrawing with prejudice the part of the federal

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1517 claim they had dismissed without prejudice. The plaintiffs also
1518 undertook to pursue the state-law claims only in state court. This
1519 established finality to review the summary judgment against the
1520 other part of the federal claim. Dismissal of the state-law claims
1521 without prejudice did not defeat finality because they could be
1522 pursued further only in a state court.

1523 A like result was reached in Sneller v. City of Bainbridge
1524 Island, 606 F.3d 636, 638 (9th Cir.2010). Finality was achieved by
1525 dismissal of the remaining federal claims with prejudice and
1526 dismissal of the state-law claims without prejudice. The reason for
1527 dismissal, that any future suit on the remaining state-law claims
1528 would be brought in state court, "appears legitimate." (A dismissal
1529 without prejudice for the purpose of consolidating all remaining
1530 claims in a state-court action is not likely to establish finality
1531 if there is no assurance the claims cannot be brought again in a
1532 federal court. See Chappelle v. Beacon Communications Corp., 84
1533 F.3d 652 (2d Cir.1996).)

1534 Conditional Prejudice This topic provoked a split in the earlier
1535 subcommittee. A party seeking to appeal may seek to dismiss
1536 surviving claims with "conditional prejudice." Summary judgment is
1537 granted against the plaintiff's most important claims, for example,
1538 leaving only relatively minor claims that will not alone justify
1539 the burden of further litigation. The plaintiff prefers to stake
1540 all on its belief that the summary judgment is reversible error. It
1541 dismisses the surviving claims with prejudice, subject to the
1542 condition that they can be revived if -- and only if -- the summary
1543 judgment is reversed.

1544 Conditional prejudice has an undeniable charm. It protects the
1545 trial court and the parties against the burden of litigating minor
1546 claims in order to achieve a final judgment and review of the major
1547 claims. Often it will protect the appellate court against the
1548 burden of repeated appeals in the same case because the trial court
1549 did not commit reversible error. If the summary judgment is
1550 affirmed, that is the end of the case and of the dispute.

1551 The offsetting view is that a dismissal with conditional
1552 prejudice may lead to reversal, further proceedings on all claims
1553 on remand, and a later appeal that will force the court of appeals
1554 to renew its acquaintance with the case. The opportunity to review
1555 the whole case all at once, on the first appeal, is highly prized.

1556 The Second Circuit accepts conditional finality. SEC v.
1557 Gabelli, 653 F.3d 49, 56-57 (2d Cir.2011), reversed on the merits,
1558 133 S.Ct. 1216 (2013)(Professor Struve's case-law update explains
1559 why the Supreme Court's action does not count as approving finality
1560 through conditional prejudice); Purdy v. Zeldes, 337 F.3d 253, 257-
1561 258 (2d Cir.2003). The Federal Circuit also seems to have accepted
1562 it. Jang v. Boston Scientific Corp., 532 F.3d 1330, 1334
1563 (Fed.Cir.2008); Doe v. U.S., 513 F.3d 1348, 1352-2354
1564 (Fed.Cir.2008). Romoland School Dist. v. Inland Empire Energy

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1565 Center, LLC, 548 F.3d 738,747-751 (9th Cir.2008), employing the
1566 Ninth Circuit "manipulation" approach to manufactured finality,
1567 might be read to leave the question open.

1568 Many other decisions reject attempts to manufacture finality
1569 through a dismissal with conditional prejudice. Professor Struve's
1570 memorandums establish the point.

1571 CRIMINAL CASES

1572 If any rules amendments are confined to the Civil Rules, there
1573 is no need to worry about finality in criminal prosecutions.

1574 But if amendments are made in the Appellate Rules, care should
1575 be taken either to exclude criminal prosecutions or to address them
1576 after separate consideration. One example: U.S. v. Kaufmann, 985
1577 F.2d 884, 890-891 (7th Cir.1993). The jury convicted on one count,
1578 but failed to agree on two others. The court of appeals dismissed
1579 an appeal by the defendant even though the government informed the
1580 trial court that it would not proceed on the two remaining counts
1581 if the one conviction were affirmed. On remand the government
1582 dismissed the two remaining counts without prejudice. The court of
1583 appeals accepted this basis for finality, rejecting as "imperfect"
1584 the analogy to a dismissal without prejudice in a civil action, and
1585 observing that many other courts of appeals would have accepted the
1586 initial appeal even without dismissal of the remaining counts.

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TAB 10B

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1587 **APPELLATE-CIVIL SUBCOMMITTEE REPORT: RULE 62 (STAY OF EXECUTION)**

1588 Discussion of Rule 62 stays of execution began in the
1589 Appellate Rules Committee. The initial focus was on the fit of Rule
1590 62 with a convenient practice adopted by some appellate lawyers.
1591 Rather than arrange separate bonds to secure a stay pending post-
1592 judgment proceedings and then to secure a stay pending appeal, they
1593 arrange a single bond designed to secure a stay until completion of
1594 all appeal proceedings. It has not been clear how this strategy
1595 fits Rule 62.

1596 A particular twist on the single-bond question arises from the
1597 fit between the 14-day automatic stay provided by Rule 62(a) and
1598 the Rule 62(b) provision for a stay "pending disposition of" post-
1599 judgment motions that may be made up to 28 days after entry of
1600 judgment. Before the Time Calculation Project the Rule 62(a)
1601 automatic stay lasted for 10 days, and 10 days also was the period
1602 for making the post-judgment motions. The automatic stay was
1603 redefined as 14 days (the prior conventions for counting meant that
1604 a 10-day period was always at least 14 days, and might run longer).
1605 The times for the post-judgment motions, however, were extended to
1606 28 days because experience had shown that more time was needed in
1607 many complex cases. The result is an apparent "gap." A district
1608 judge wrote to the Civil Rules Committee that the gap creates
1609 uncertainty whether the court can order a stay after expiration of
1610 the automatic stay but before a post-judgment motion is made. The
1611 Committee concluded that a court has inherent power to stay its own
1612 judgment, and that there was no need to revise Rule 62(b) unless
1613 practice should show persistent confusion.

1614 Consideration of these initial questions has led to other
1615 questions. Successive sketches of possible Rule 62 revisions have
1616 taken on ever more possible changes. Should the court be able to
1617 dissolve the automatic stay before it expires of its own force?
1618 Should it be able to require that the judgment creditor post
1619 security as a condition of dissolving a stay or refusing to grant
1620 one? Should it be able to recognize security other than a bond? To
1621 set the amount of security less than the judgment? And is it wise
1622 to carry forward the supersedeas bond provision of Rule 62(d) that
1623 many understand to create a right to a stay pending appeal? And, to
1624 return to the questions that launched the inquiry, why not
1625 recognize that a single security may be accepted for a stay that
1626 continues from expiration (or dissolution) of the automatic stay
1627 through issuance of the appellate mandate and disposition of
1628 proceedings on a petition for certiorari?

1629 Subcommittee consideration of these questions is in mid-
1630 stream. It has been supported by detailed memoranda prepared by
1631 Professor Struve, Reporter for the Appellate Rules Committee. These
1632 memoranda reach beyond the questions that have been actively
1633 considered. The Subcommittee has yet to determine whether to
1634 recommend that consideration of Rule 62 extend beyond subdivisions
1635 (a) through (d).

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1636 The Subcommittee invites discussion of all of the issues it
1637 has identified, and any others that may deserve consideration.

1638 One simple starting point is to ask whether Committee members
1639 have encountered difficulty as a result of the "gap" between
1640 expiration of the automatic Rule 62(a) stay and the time allowed to
1641 make the motions that support a stay under Rule 62(b). Rule 62(b)
1642 speaks of a stay "pending disposition" of these post-judgment
1643 motions. Are courts receptive to ordering a stay before a motion is
1644 filed under Rules 50, 52, 59, or 60, either in general or after an
1645 express representation that a motion will be, or is quite likely to
1646 be, filed? Would problems arise from extending the automatic stay
1647 to 28 or 30 days? Would the problems be reduced if Rule 62 is
1648 amended to make clear the court's authority to modify or dissolve
1649 the automatic stay?

1650 How often do problems arise in agreeing on the form of
1651 security, whether a bond or something else? Are there practical
1652 difficulties in arranging a convenient and seamless form of
1653 security that runs from expiration of the automatic stay through
1654 final disposition of an appeal?

1655 More generally, would it be desirable to amend Rule 62 to
1656 provide more explicit recognition of the district court's authority
1657 to modify, dissolve, or deny any stay? And its authority to set
1658 appropriate terms both for the form and amount of security? And to
1659 exact security as a condition of allowing immediate execution of
1660 part or all of a judgment?

1661 These questions are set against the background of Appellate
1662 Rule 8(a)(1), which directs that a party must ordinarily move first
1663 in the district court for a stay pending appeal or approval of a
1664 supersedeas bond. When the court of appeals does act, Rule
1665 8(a)(2)(E) says blandly that it "may condition relief on a party's
1666 filing a bond or other appropriate security in the district court."
1667 The combination of district-court primacy and appellate court
1668 flexibility suggest the possible value of recognizing a full range
1669 of district-court discretion in Rule 62.

1670 The materials attached below are presented to stimulate
1671 initial discussion of experience with Rule 62 stays. The
1672 Subcommittee solicits advice and guidance on the need for revision,
1673 and the most profitable areas for continuing work.

1674 The attachments include a pair of Rule 62 drafts that would
1675 replace present Rule 62(a), (b), (c), and (d). The second is a more
1676 ambitious approach than the first. Many other possibilities could
1677 be considered. Review of the drafts will be helpful.

1678 The other attachments are notes on Subcommittee discussions.
1679 They show that the work is in progress, without having reached even
1680 tentative views on what recommendations may be made.

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1681 Rule 62. Stay of Proceedings to Enforce a Judgment.

1682 **(a)** Automatic Stay of Judgment to Pay Money.[15] Unless the court
1683 orders otherwise,[16] no execution may issue on a judgment to pay
1684 money, nor may proceedings be taken to enforce it, until 14
1685 [X][17] days have passed after its entry.[18]

---

[15] "judgment to pay money" is not an established term of art. The idea is to work clear of any association with "money judgment," see Rules 67, 69. There is a further complication — Rule 54(a) defines "judgment" to include "any order from which an appeal lies." It does not purport to exclude an order that cannot be appealed. But there may be some confusion.

One alternative would be to refer to "an order to pay money." Or "an immediately enforceable order to pay money."

The choice of language may be affected by the question of contempt sanctions, see footnote 18.

[16] I'm not sure whether this authority to order immediate execution is provided in present Rule 62. But there may be circumstances where it is a good idea.

[17] The new rule text allows a motion for a stay immediately upon entry of judgment. This draft also omits any reference to post-judgment motions, so there is no apparent "gap" between this 14-day period and the 28-day period for motions under Rules 50, 52, and 59. [If we restore that part of present 62(b), we might think about the open-ended reference to Rule 60 -- should it be limited to a Rule 60 motion made within 28 days from entry of judgment?]

It remains an open question whether 14 days is the proper length for the automatic stay. Judgment debtors, particularly the slippery ones that we worry about, can do a lot to hide or dissipate assets even within 14 days. The longer the automatic stay, the greater the danger. On the other hand, 14 days may not suffice, as a practical matter, to arrange security. For that matter, the reasons for extending the time for post-judgment motions to 28 days may apply here as well: if a party needs that much time to prepare a good motion, it may need that much time to prepare a persuasive showing as to the need for security and the form and amount of security.

If the period is to be extended, 30 days might make sense. That would allow 2 days after expiration of the period for post-judgment motions to decide what to do next and, if appropriate, to arrange security.

[18] Should there be an automatic stay of a contempt order to pay money? A civil contempt order may order payment as compensation

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1686 **(b)** FURTHER STAY OF JUDGMENT TO PAY MONEY.[19]
1687 **(1)** *By Court Order:* On appropriate terms for the opposing
1688 party's security,[20] the court may [at any time] stay the
1689 execution of a judgment to pay money -- or any
1690 proceedings to enforce it -- from expiration of[21] the
1691 automatic stay under Rule 62(a)[22] and until [the][a] time

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for injury caused by violating a specific decree. Or it may order payment to make good on a provision designed to coerce compliance -- "$1,000 a day until * * *."

An automatic stay under (a), or by supersedeas bond under (c), might impede effective exercise of the court's authority.

Present Rule 62 does not clearly address the question whether a money judgment for contempt is embraced by 62(a)(1), which provides that an interlocutory or final judgment in an action for an injunction is not stayed unless the court orders a stay. 11 Wright, Miller & Kane, F P & P 3d, § 2902, notes that some courts have ruled that a commitment for contempt is not covered by the automatic stay because a contempt proceeding is by its nature sui generis. The authors suggest that this may be desirable, but should be accomplished by revising the rule.

[19] The rule is cleaner if money judgments are separated from other forms of relief. "[A] judgment to pay money" should include any order to pay money, whether characterized as "damages," "disgorgement," or something else. That can be asserted in a Committee Note. The question of contempt remains open; see footnote 18. Some direction may be given in the Committee Note.

[20] This allows security other than a bond. And it allows the court to dispense with any security. When the stay extends through appeal, this provision confirms the authority courts have found in present Rule 62(d) to waive any bond for a supersedeas pending appeal.

[21] "from expiration of" is intended to begin with the time the Rule 62(a) stay ends. Ordinarily that will be 14 days after the judgment is entered. But the court might shorten the period. If the period is shortened for the purpose of permitting immediate execution, the court is not likely to issue a stay. Then a stay will depend on a prompt appeal and a supersedeas bond (see note 27 below on the question whether the court has discretion to set aside a supersedeas). But the automatic stay may be shortened for the purpose of allowing a stay on providing appropriate security.

[22] This provision supersedes the present provisions that address only stays pending disposition of post-judgment motions.

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1692 designated by the court[, which may be as late as
1693 issuance of the mandate on appeal].[23] The stay takes
1694 effect when the court approves any required security.
1695 [The court may{, for good cause,} dissolve the stay or
1696 modify the terms for security.][24]
1697 **(2)** *By Supersedeas Bond.*[25] If an appeal is taken, the

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The apparent "gap" between expiration of the automatic 14-day stay and the 28-day period allowed for motions under Rules 50, 52, and 59 is closed even if proposed 62(a) continues to limit the automatic stay to 14 days.

[23] This structure supports approval of a stay, and security, for the entire period between expiration of the automatic stay in Rule 62(a) and completion of all proceedings, including appeal.

The Committee Note would state that the court may set the time to run until issuance of the mandate resolving any appeal. (It may not be worth the complications to address what happens when the mandate does not simply affirm the judgment.)

The rule or Committee Note could suggest that the stay terminates if only an untimely appeal is filed. But that would multiply the opportunities to contest timeliness -- it seems better to leave resolution of timeliness to the court of appeals for the most part, although the district court should have discretion to terminate the stay if it finds immediate execution important and concludes that the appeal is untimely.

One advantage of the open-ended reliance on a time set by the court is that the time could include disposition of a petition for certiorari or lapse of the time for filing a petition. That could be pointed out in describing the time for issuing the appellate mandate.

[24] Present Rule 62 does not provide for dissolving a stay. If we make express provisions for entering a stay that can endure as late as issuance of the appellate mandate, it may be useful to recognize authority to modify or dissolve the stay. It seems appropriate to lodge this authority in the district court even if an appeal is pending.

[25] Although (1) authorizes the court to order a stay that endures through completion of all proceedings on appeal, present 62(d) provides that an appellant "may obtain a stay by supersedeas bond." Carrying that language forward absorbs whatever measure of right to a stay exists under the present rule. The discussion of integrating the provisions of Rule 62 has not yet suggested any need to reconsider this point, but further consideration should remain open.

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1698 appellant may obtain a stay of a judgment to pay money by
1699 supersedeas bond or other security [in an amount equal to
1700 one hundred and twenty-five percent of the amount of the
1701 money judgment].[26] The bond [or other security] may be
1702 given upon or after filing the notice of appeal or after
1703 obtaining the order allowing the appeal. The stay takes
1704 effect when the court approves the bond or other
1705 security.
1706 **(c)** STAY OF INJUNCTION, RECEIVERSHIP, AND PATENT ACCOUNTING ORDERS.
1707 **(1)** Unless the court orders otherwise, the following are not
1708 stayed after being entered, even if an appeal is taken:
1709 **(A)** an interlocutory or final judgment in an action for
1710 an injunction or a receivership; or
1711 **(B)** a judgment or order that directs an accounting in an
1712 action for patent infringement.
1713 **(2)** While an appeal is pending from an interlocutory order or
1714 final judgment that grants,[27] dissolves, or denies an
1715 injunction, the court may suspend, modify, restore, or
1716 grant an injunction on terms for bond or other terms that
1717 secure the opposing party's rights. If the judgment
1718 appealed from is rendered by a statutory three-judge
1719 district court, the order must be made either:
1720 **(A)** by that court sitting in open session; or
1721 **(B)** by the assent of all its judges, as evidenced by
1722 their signatures.

"Other security" allows forms other than a bond, as in (1).

[26] This could be complicated further by allowing a bond or other security for a lesser amount; present Rule 62(d) has been read to allow the court to dispense with any bond at all, see note 20 above. A possible complication would be to recognize a partial stay, leaving the way open to execute for the difference between the amount of the judgment and the amount of the bond or other security.

[27] Should this list include the other categories in § 1292(a)(1): orders that modify or continue an injunction? That refuse to dissolve or modify an injunction? For that matter, should "denies" become "refuses" to parallel § 1292(a)(1)?

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1723 Alternative, More Efficient Drafting[28]

1724 **Rule 62. Stay of Proceedings to Enforce a Judgment.**
1725 **(a) STAY OF JUDGMENT TO PAY MONEY.** Execution on a judgment to pay money,
1726 and proceedings to enforce it, are stayed as follows:
1727 **(1)** *Automatic Stay.* Unless the court orders otherwise, for 30
1728 days after the judgment is entered.[29]
1729 **(2)** *By Court Order.* The court may at any time order a stay
1730 until a time designated by the court[, which may be as
1731 late as issuance of the mandate on appeal].
1732 **(3)** *By Supersedeas Bond.*[30] If an appeal is taken, the
1733 appellant may obtain a stay by supersedeas bond or other
1734 security [in an amount equal to one hundred and twenty-
1735 five percent of the amount of the money judgment]. The
1736 bond [or other security] may be given upon or after
1737 filing the notice of appeal or after obtaining the order
1738 allowing the appeal. The stay takes effect when the court

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[28] This version picks up on suggestions made during the February 4 conference call, and may go further than intended in departing from present Rule 62 language. If we intend to do anything like this, it is better to get started now.

Being this bold for the first part of Rule 62 need not imply a need to go through the rest of the rule with a fine-toothed comb. But there is no apparent rush to get these first parts out for comment. We can go further if it appears we can do good without running much risk.

[29] The 30-day period allows only 2 days after expiration of the 28-day period for post-judgment motions under Rules 50, 52, and 59. A longer period could be adopted. Or separate provision could be made for cases in which a timely motion is made under Rules 50, 52, or 59, or a motion is made under Rule 60 within the time allowed to move under Rules 50, 52, or 59.

[30] This is carried forward for the moment, without attempting to answer the question whether a stay should require a court order, compare the injunction provisions carried forward here as subdivision (c).

11 Wright, Miller & Kane, Federal Practice & Procedure: Civil 3d, § 2905, states flatly that a stay on posting a supersedeas bond is a matter of right. It also asserts that the courts have inherent power to dispense with any security, to set the amount at less than the judgment, and to specify a form of security other than a bond.

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1739 approves the bond or other security.

1740 **(b) TERMS [OF STAY].**
1741 **(1)** *Terms.* The court may set appropriate terms for the
1742 opposing party's security[31] for any[32] stay or on denying
1743 or terminating a stay.[33]
1744 **(2)** *Dissolving or Modifying a Stay*. The court may[, for good
1745 cause,] dissolve the stay or modify [the terms set under
1746 Rule 62(b)(1)] [its terms].

1747 **(c) STAY OF INJUNCTION, RECEIVERSHIP, AND PATENT ACCOUNTING ORDERS.**
1748 **(1)** Unless the court orders otherwise, the following are not
1749 stayed after being entered, even if an appeal is taken:
1750 **(A)** an interlocutory or final judgment in an action for
1751 an injunction or a receivership; or
1752 **(B)** a judgment or order that directs an accounting in an
1753 action for patent infringement.
1754 **(2)** While an appeal is pending from an interlocutory order or
1755 final judgment that grants,[34] dissolves, or denies an
1756 injunction, the court may suspend, modify, restore, or
1757 grant an injunction on terms for bond or other terms that
1758 secure the opposing party's rights. If the judgment
1759 appealed from is rendered by a statutory three-judge
1760 district court, the order must be made either:
1761 **(A)** by that court sitting in open session; or
1762 **(B)** by the assent of all its judges, as evidenced by
1763 their signatures.

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[31] Is this clear enough to support discretion to deny any security, and discretion as to the form and amount of security?

[32] "any" rather than "a" to emphasize that the court can terminate the automatic stay.

[33] This is new, but seems to make sense: Execution cannot always be undone. It may be useful to allow execution only if there is security for the judgment debtor.

[34] Should this list include the other categories in § 1292(a)(1): orders that modify or continue an injunction? That refuse to dissolve or modify an injunction? For that matter, should "denies" become "refuses" to parallel § 1292(a)(1)?

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TAB 10C

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1764 Appellate Civil Subcommittee Conference Call Notes

1765 Appellate-Civil Subcommittee
1766 Manufactured Finality Notes, Conference Call 12 December 2014

1767 The Appellate-Civil Rules Subcommittee met by conference call
1768 on December 12, 2014. Participants included Hon. Scott Matheson,
1769 Subcommittee Chair; Hon. Peter Fay; Douglas Letter, Esq.; Kevin
1770 Newsom, Esq.; and Virginia Seitz, Esq. Professors-Reporters
1771 Catherine Struve and Edward Cooper also participated.

1772 Judge Matheson welcomed the members to the work of the newly
1773 reconstituted Subcommittee. Two topics were to be considered:
1774 apparent gaps in the Civil Rule 62 provisions for staying execution
1775 of a judgment and the array of questions that arise from efforts to
1776 "manufacture" a final judgment in order to win appellate review of
1777 an interlocutory order that otherwise is not subject to immediate
1778 appeal. Separate notes describe the discussions of these topics.

1779 Discussion began by summarizing the alternatives that were
1780 discussed in an earlier joint subcommittee that eventually
1781 suspended consideration of manufactured finality. Relatively simple
1782 rules might be adopted to reflect points that have generated
1783 substantial agreement among the circuits. Or more complex rules
1784 might be adopted in an attempt to capture the nuances that have
1785 generated differences of opinion. One particular illustration would
1786 be a rule recognizing "conditional prejudice"-- dismissal of parts
1787 of a case with prejudice, subject to revival if the judgment on
1788 another point is reversed. Yet another possibility is to do
1789 nothing.

1790 One simple rule would be to adopt a rule recognizing the
1791 general agreement that a party aggrieved by an unappealable
1792 interlocutory order can achieve appealable finality by dismissing
1793 everything that remains in the action with prejudice. This would
1794 require dismissal of all claims that remain among all parties. It
1795 should be possible to draft such a rule in clear terms. But it may
1796 not be possible to avoid undesirable implications for situations
1797 where it may be desirable to recognize finality manufactured by
1798 means that fall short of this absolute.

1799 A similar simple rule would provide that finality cannot be
1800 achieved by dismissing without prejudice whatever remains after the
1801 contested ruling. Drafting might not be as simple. And the risk of
1802 intruding on desirable uses of manufactured finality seems greater.
1803 Examples are provided in the materials supplied for this call.

1804 Beyond these starting points, a variety of complications can
1805 be found. Identifying them, describing them clearly in rule text,
1806 and sorting out the potentially useful exceptions from those that

1807 should be prohibited will be a difficult task. It would be easy to
1808 wind up doing more mischief than good.

1809 One specific situation is presented by "conditional
1810 prejudice." This concept is clearly recognized in the Second
1811 Circuit, and apparently in the Federal Circuit as well. Several
1812 circuits have rejected it. The practice is easily described. An in
1813 limine ruling excluding crucial evidence, a grant of important
1814 parts of a motion to dismiss, a grant of summary judgment against
1815 the most important claims, may leave so little in the case that the
1816 costs and risks of proceeding to final judgment on the remaining
1817 elements seem undue. The party who lost such a ruling may be
1818 willing to stake all on the belief that the ruling is reversibly
1819 erroneous. At the same time, the parts that remain may have
1820 potential value that easily justifies the cost of continued
1821 litigation if the adverse ruling is in fact reversed. Dismissal of
1822 what remains with prejudice, subject to revival only if reversal is
1823 won on appeal, may protect both the parties and the district court
1824 against the costs of litigating the parts that remain for the
1825 primary purpose of reaching a final judgment that can be appealed.
1826 And there is no cost to the court of appeals unless it determines
1827 that indeed there is reversible error as to an important -- usually
1828 the most important -- component of the case.

1829 Compared to these possibilities, it might prove wise to do
1830 nothing. The law is generally clear as to dismissals with prejudice
1831 and also as to dismissals without prejudice. The complications that
1832 generate differences among the circuits do not seem to arise often,
1833 and in at least some circuits reasonably confident answers can be
1834 found on the questions most likely to arise. Allowing further
1835 development in the common-law process might be better than
1836 attempting to generate clear and easily accessible rules that, for
1837 all their clarity and accessibility, impose undesirable costs.

1838 One nuance in the cases was offered as an example. Some
1839 decisions find that a dismissal of parts of a case without
1840 prejudice establishes a final judgment if a statute of limitations
1841 bars any further litigation on the dismissed parts. The idea is
1842 that this circumstance shows a "practical finality" that is
1843 equivalent to a dismissal with prejudice. But one court of appeals
1844 has observed that this is a tricky concept. It may be difficult to
1845 know what statute governs, both as a matter of the applicable
1846 source of limitations law and as a matter of determining which
1847 statutory period applies. Determining the time when a claim arose
1848 may be difficult, and may turn on questions of fact that a court of
1849 appeals cannot readily resolve. So too for "tolling" events. For
1850 that matter, applicable limitations law might allow revival of the
1851 dismissed claims as part of continuing proceedings in the same
1852 action on reversal of the final judgment achieved by the dismissal.
1853 That would become the equivalent of conditional prejudice. It could
1854 be tricky either to preserve or end this approach in a rule that
1855 generally rejects dismissal without prejudice as a means of
1856 manufacturing finality.

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1857 A somewhat similar difficulty might arise from a rule that
1858 recognizes dismissal with prejudice as a means of achieving
1859 finality. There has been a strain of concern that a party who
1860 invites a dismissal with prejudice lacks Article III standing to
1861 appeal -- invited injury is no injury. This view seems to have been
1862 abandoned in the Eleventh Circuit, the source of recent concern,
1863 but it might revive.

1864 Discussion recognized that it may be difficult to draft a good
1865 rule. No rule will be perfect. But it is worth some effort to
1866 determine whether some of the issues can be made clear. Even things
1867 that experts know to be settled are not always accessible to other
1868 practitioners. A specific rule, or rules, would help. It is
1869 undesirable to forfeit legitimate appellate issues because a
1870 practitioner has been unable to frame an appealable judgment.

1871 The role of the Rules Enabling Act in determining finality
1872 also was discussed. Section 2072(c) authorizes rules that "define
1873 when a ruling of a district court is final for the purposes of
1874 appeal under section 1291." The Supreme Court regularly shows an
1875 interest in drawing the lines of appealable finality. Often it acts
1876 to rein in attempts to inject more flexibility than it thinks wise,
1877 despite the implicit views of the courts of appeals that more
1878 effective relationships with the district courts can be structured
1879 by recognizing some measure of flexibility. The collateral-order
1880 version of finality, for example, is moving more and more toward a
1881 "categorical" approach that recognizes finality only when all
1882 orders in a more or less clearly defined category should be treated
1883 as final. Thus attempts to allow collateral-order appeal from some
1884 orders that reject claims of attorney-client privilege were
1885 repudiated by a ruling that none are appealable under collateral-
1886 order theory. At the same time, the Court recognized the Enabling
1887 Act provision and suggested that the rulemaking process is a better
1888 means of elaborating finality concepts than the decisional process.
1889 There is ample room for the rules committees to work toward rules
1890 on manufactured finality if good rules can be drafted.

1891 The risk that clear rules might thwart desirable exceptions
1892 must be taken into account. Clear rules, or not-so-clear rules, may
1893 prove desirable only if the way is left open for courts to continue
1894 to struggle with some of the nuances that are not ripe for
1895 resolution by court rule. One good beginning would be to study one
1896 or more draft provisions recognizing that finality can be achieved
1897 by dismissing with prejudice all that remains of an action.

1898 So too, it was agreed that further work should be done on the
1899 concept of conditional prejudice.

1900 The next step will be to review a number of alternative drafts
1901 of rules language that were prepared for work by the earlier
1902 subcommittee.

1903 Appellate-Civil Subcommittee

1904 The Appellate-Civil Rules Subcommittee met by conference call
1905 on January 23, 2015. Participants included Hon Scott Matheson,
1906 Subcommittee Chair; Hon. Steven Colloton; Hon. Peter Fay; Douglas
1907 Letter, Esq.; Kevin Newsom, Esq.; and Virginia Seitz, Esq.
1908 Professors-Reporters Catherine Struve and Edward Cooper also
1909 participated.

1910 Judge Matheson opened the meeting by noting that sketches of
1911 possible rule language prepared a few years ago had been circulated
1912 to help focus discussion of the general alternatives being
1913 considered. One pair of alternatives is to recommend a simple rule
1914 -- one version would provide simply that a final decision can be
1915 achieved by a voluntary dismissal with prejudice that encompasses
1916 all claims and all parties. A more restrictive version of this
1917 simple rule would provide that this is the only way to achieve
1918 finality by voluntary dismissal. More complex rules also can be
1919 imagined. One would expressly prohibit, and another would expressly
1920 recognize, the opportunity to achieve finality by dismissing with
1921 "conditional prejudice" so that the dismissal remains with
1922 prejudice if the rulings challenged on appeal are affirmed, but
1923 becomes a dismissal without prejudice if the rulings are reversed.
1924 None of these approaches would attempt to capture in rule text the
1925 more complex situations in which voluntary action by a party has
1926 been found to establish finality for appeal. Whether those complex
1927 alternatives would be foreclosed by any of the simpler rules would
1928 remain uncertain, although a Committee Note might provide some
1929 guidance. Yet another alternative is to abandon the attempt to
1930 adopt an Enabling Act rule. Most courts agree that most of the time
1931 finality is achieved by a voluntary dismissal with prejudice that
1932 completely disposes of an action. Most courts also agree that most
1933 of the time finality is not achieved by a voluntary dismissal
1934 without prejudice. Conditional finality is clearly recognized in
1935 one circuit, and perhaps in another, and it might be concluded that
1936 there is no need to act on that front.

1937 Discussion began by asking whether anything would be lost by
1938 adopting a simple rule that states that a party can establish a
1939 final judgment by voluntarily dismissing with prejudice all claims
1940 and parties remaining in the action. Some possible difficulties
1941 were suggested. If the rule is that simple, it would leave open any
1942 alternative approach to manufactured finality that proves
1943 acceptable to an appellate court. Many cases now have recognized
1944 finality by means that do not fit within this simple rule. At least
1945 some of the results may be desirable. Perhaps more importantly,
1946 leaving the way open to alternative means of manufacturing finality
1947 would leave the law as uncertain at the margins as it is now. And
1948 the rule text would not speak clearly to "conditional prejudice,"
1949 a question that has continued to provoke divided opinions within
1950 the Subcommittee. A Committee Note might address conditional
1951 prejudice, one way or the other, but it seems unwise to attempt to
1952 resolve this question by a Committee Note that interprets

1953 potentially ambiguous rule text.

1954 Collective memory produced only a vague recollection of an
1955 inquiry about conditional prejudice that was addressed a few years
1956 ago to United States Attorneys in the Second Circuit. The clear
1957 sense was that they were not aware of any difficulties created by
1958 the Circuit's acceptance of conditional prejudice, but no details
1959 were recalled.

1960 Support was expressed for a simple rule. The rule would "cover
1961 plenty of cases" and provide guidance for lawyers and courts. It
1962 would spare them the need to look for lots of cases to confirm the
1963 general practice and understanding. Unclear cases would remain, but
1964 there would be less uncertainty than we have now. "A basic
1965 proposition could cover a lot of cases." And many Enabling Act
1966 Rules leave uncertainty at the margins. One example is Criminal
1967 Rule 6(e) on grand jury confidentiality.

1968 This member suggested that it also would be good to address
1969 conditional prejudice. It would be useful to accept a dismissal
1970 with conditional prejudice to support appeal on an important issue
1971 without having to continue to litigate less important issues
1972 through to final judgment. The cost to the court system would be
1973 low, since most appeals result in affirmance. The conditional
1974 prejudice then would become final prejudice. "I have seen lots of
1975 cases where litigants gamble on persisting to a traditional final
1976 judgment by litigating less important issues, believing that when
1977 the opportunity to appeal does arise they will win reversal on the
1978 earlier interlocutory orders and be able to reopen the entire case
1979 on remand."

1980 A response noted that there are different views on conditional
1981 prejudice. In earlier discussions judges generally have opposed
1982 this means of establishing finality. Lawyers, on the other hand,
1983 are attracted to it. Conditional prejudice seems part way between
1984 unconditional prejudice, which does establish finality, and
1985 dismissal without prejudice, which does not.

1986 This observation continued by suggesting that if the
1987 recommendation is to adopt a simple rule stating only that finality
1988 is achieved by a dismissal with prejudice of everything that
1989 remains in the case, "I would take my chances" as to the possible
1990 ambiguities. This text would not clearly address conditional
1991 prejudice. Nor would it clearly address such concepts as "de facto
1992 prejudice," as accepted in an occasional ruling that a dismissal
1993 without prejudice counts as a dismissal with prejudice because a
1994 new action would be barred by the statute of limitations.

1995 Extending these observations, the same member recalled that
1996 the Appellate Rules Committee was uncertain about whether to
1997 recognize conditional prejudice. It favored a rule recognizing that
1998 a dismissal with prejudice establishes finality, but recognized
1999 that the most likely location for such a rule is in the Civil

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2000 Rules.

2001 A variation was suggested by asking whether conditional
2002 prejudice would be more acceptable if it were subject to control by
2003 the district judge, or if it required agreement of the parties.

2004 Another question asked why there is any need to supplement the
2005 opportunities for avowedly interlocutory review under § 1292(b), by
2006 mandamus, or by a Rule 54(b) partial final judgment. "What is the
2007 open space that should be filled"?

2008 Section 1292(b) raises several high thresholds, and it
2009 requires both certification by the district court and permission
2010 from the court of appeals. Mandamus continues to be a genuinely
2011 extraordinary remedy -- it does not issue simply to correct
2012 reversible error. Rule 54(b) includes its own limits. There must be
2013 final disposition of at least a single "claim," or all claims among
2014 at least a pair of opposing parties. Two examples were offered of
2015 important rulings that would not fit within Rule 54(b). One,
2016 illustrated by some of the cases summarized for the Subcommittee,
2017 is an in limine ruling that excludes vitally important evidence.
2018 There may be no point in proceeding to trial without the evidence,
2019 but the ruling does not finally decide any claim. Another, which
2020 arises regularly, arises from the uncertainty surrounding the
2021 concept of a "claim." There is an analogy to the concept invoked by
2022 the claim-preclusion aspects of res judicata, but the analogy is
2023 not perfect. A plaintiff, for example, may claim a fraud worked by
2024 five misrepresentations. A ruling that three of them will not be
2025 considered is not a formal final decision on that claim, but may
2026 have the same effect.

2027 Further discussion noted the occasionally conflicting
2028 interests of district courts and courts of appeals. There are
2029 circumstances in which the district court believes its own work
2030 will proceed more efficiently if one of its important rulings can
2031 be subjected to immediate review. The court of appeals may believe
2032 in the same case that its own work will proceed more efficiently if
2033 the district court completes all action in the case before there is
2034 any appeal. This difference of views at times leads to a
2035 determination that even though the technical requirements of Rule
2036 54(b) are met, it was an abuse of discretion to enter a partial
2037 final judgment. And, in parallel, there may be other circumstances
2038 in which the district court is unreasonably unwilling to let the
2039 case go up for immediate appeal.

2040 These considerations led back to the question whether control
2041 by the district court is better than control by the parties.

2042 These concerns led one member to suggest that it will be safe
2043 to adopt a simple rule recognizing finality on unconditional
2044 dismissal with prejudice. Anything beyond that will present "real
2045 problems."

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2046 This observation led to the question whether it is appropriate
2047 to take an incremental approach when the committees are uncertain
2048 about some of the issues. Is it better to go forward with a simple
2049 rule that addresses only part of a problem, reserving more complex
2050 issues for development in the cases and possible future rulemaking?
2051 Or is it better to defer any rulemaking? The rules committees often
2052 do engage in incremental rulemaking. Civil Rule 23, for example,
2053 has been amended in some important respects, but without attempting
2054 to reexamine the most fundamental questions that surround class
2055 actions.

2056 If an incremental approach is taken, the materials suggest a
2057 choice between two simple rules on dismissal with prejudice. One
2058 would say simply that a dismissal with prejudice of all remaining
2059 claims and parties establishes a final decision. It would not say
2060 that this is the only way to achieve a final decision. The
2061 alternative is a rule that says that such a dismissal is the "only"
2062 way to establish a final decision. The more modest incremental
2063 approach would be the first, omitting the exclusionary "only."

2064 The first reaction is that a rule simply saying that finality
2065 can be achieved by voluntarily dismissing with prejudice everything
2066 that remains in the case would be "surplusage. All courts
2067 recognize" this means of establishing finality. If we mean to do
2068 something to clarify present practice, the incremental approach
2069 would be the rule that defines dismissal with prejudice as the only
2070 means of establishing finality. On this view, the "only" rule would
2071 defeat attempts to assert conditional prejudice. And it might also
2072 supersede the decisions that find what might be called
2073 "constructive prejudice," as in the cases that conclude a dismissal
2074 without prejudice is final because a statute of limitations would
2075 bar a new action. The same might happen with the occasional cases
2076 that have found finality on a dismissal without prejudice to
2077 bringing a new action in a state court, but on terms that foreclose
2078 bringing a new action in any federal court. The "only" rule could
2079 establish a bright line, and establish an incremental move beyond
2080 some present decisions.

2081 The prospect of a bright line was greeted with enthusiasm. "I
2082 like bright lines. This helps the occasional practitioner" who does
2083 not regularly deal with appeal jurisdiction in the federal courts.

2084 The Subcommittee then considered the question whether it
2085 should seek to present only a single proposal to the advisory
2086 committees, or whether it would be better to present a set of
2087 alternatives with the reasons that led the Subcommittee to prefer
2088 one of them. The Subcommittee agreed that it will be better to
2089 present at least the more prominent alternatives, with the full
2090 range of Subcommittee reasoning, to enable full debate in the
2091 Appellate and Civil Rules Committees.

2092 That led to discussing the range of options that might be
2093 presented. The view was expressed that two or three choices might

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2094 be advanced, falling far short of the full range illustrated by the
2095 initial rules sketches.

2096 The next suggestion was that the recommendation might be for
2097 the simplest rule, saying that finality can be achieved by
2098 dismissal with prejudice. The alternative saying that a party can
2099 achieve finality "only" by dismissing with prejudice all that
2100 remains in the case would be advanced for discussion, but not as a
2101 recommendation. Another member offered support for this view.

2102 It was pointed out that "with prejudice" might be found
2103 ambiguous as to conditional prejudice. If the decision is that the
2104 Second Circuit should be told that it cannot any longer recognize
2105 finality achieved by a dismissal with conditional prejudice, it
2106 would be better to recommend rule text that clearly says that.

2107 A recommendation to supersede conditional finality was
2108 supported by urging that the purpose of exploring manufactured
2109 finality has been to achieve uniformity across all circuits.

2110 More generally, it was suggested that the important choice
2111 lies between a simple "may establish finality" rule and a more
2112 limiting "may establish finality only by" rule. A rule saying only
2113 that dismissal with prejudice suffices to establish finality may
2114 seem too trivial to warrant adoption. To be sure, this restatement
2115 of a proposition that is accepted by all the circuits might be
2116 helpful to lawyers who appear infrequently in federal court, but
2117 expanding the rules to guide neophytes to clearly established
2118 propositions may not be a desirable use of the Enabling Act.

2119 This discussion was summarized by the suggestion that the
2120 Subcommittee should be ready to go to the advisory committees with
2121 a recommendation and a discussion of the most prominent
2122 alternatives. The questions would be whether to adopt any rule;
2123 whether the rule should be simple recognition of finality by
2124 dismissing with prejudice or should limit finality to dismissing
2125 with prejudice; whether conditional prejudice should be addressed,
2126 and in what way; and perhaps whether something should be said about
2127 the means of attributing "constructive" or "de facto" finality to
2128 a dismissal that formally is made without prejudice.

2129 It was concluded that it will be useful to allow these issues
2130 to ferment for a few days, looking toward a Subcommittee
2131 recommendation of a recommended rule. Alternative rules will be
2132 described, and the policy considerations underlying the
2133 recommendation and alternatives will be described. One sensitive
2134 issue will relate to conditional finality. If the Subcommittee
2135 decides that dismissal with conditional finality is an undesirable
2136 means of establishing a basis for appeal, it will remain to decide
2137 whether the interest of uniformity -- and perhaps a fear that
2138 lawyers in other circuits will come to grief by looking to the
2139 Second Circuit, only to have conditional prejudice rejected in
2140 their circuit -- justifies telling the Second Circuit that it can

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no longer adhere to its practice. The fact that this is an issue that tends to provoke differences of view between practicing appellate lawyers and judges may bear on this decision.

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2144 Appellate-Civil Subcommittee

2145 The Appellate-Civil Rules Subcommittee met by conference call
2146 on February 13, 2015. Participants included Hon Scott Matheson,
2147 Subcommittee Chair; Hon. Steven Colloton; Hon. Peter Fay; Hon.
2148 David Campbell; Douglas Letter, Esq.; and Kevin Newsom, Esq.
2149 Professors-Reporters Catherine Struve and Edward Cooper also
2150 participated.

2151 Discussion addressed drafts that illustrated several
2152 alternative approaches to manufactured finality. The drafts
2153 deliberately bypass the potential complexities that are reflected
2154 in the cases at the margins of manufactured finality.

2155 The drafts also omit one alternative that has been considered
2156 in earlier deliberations. No draft says simply that finality cannot
2157 be achieved by dismissing without prejudice all that remains in an
2158 action. Two reasons underlie the choice to bypass this possibility.
2159 One is that this proposition is well recognized for most
2160 circumstances; little would be accomplished by casting it in rule
2161 text. The other is that a simple rule like this could have
2162 undesirable collateral effects. Some cases now recognize that a
2163 voluntary dismissal without prejudice has indeed achieved finality,
2164 and some of them may reach desirable results. And, although
2165 strained, there is a risk that such a rule would generate
2166 implications for dismissals with prejudice. The Subcommittee agreed
2167 unanimously that there is no need to continue to consider this
2168 alternative.

2169 All the drafts address manufactured finality through a new
2170 Rule 41(a)(1)(C). The first draft presents a choice between two
2171 quite different approaches. One is to say simply that a party
2172 asserting a claim for relief may establish a final decision for
2173 purposes of appeal by a voluntary dismissal if the dismissal is
2174 with prejudice to all claims and parties remaining in the action.
2175 This simple approach recognizes a proposition that is readily
2176 recognized in case law. The reason to state it in explicit rule
2177 text would be to provide information for lawyers who do not often
2178 have reason to attempt to manufacture finality, and to provide
2179 reassurance for those who want to make quite sure what they are
2180 doing. The most likely source of uncertainty has been a minority
2181 view that a party who voluntarily dismisses lacks standing to
2182 appeal because the dismissal is what the party asked for. That view
2183 seems to have disappeared from the cases, but providing a clear
2184 rule will avoid the risk of resurgence. Clear jurisdictional rules
2185 are intrinsically desirable.

2186 (Discussion did not reach a potential issue that was not
2187 reflected in the drafts. It may prove desirable to recognize
2188 district court authority to defeat manufactured finality. This
2189 could be accomplished by a slight revision of Rule 41(a)(2):
2190 "Except as provided in Rule 41(a)(1)<u>(A) and (B)</u>, an action may be
2191 dismissed at the plaintiff's request only by court order, on terms

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2192 that the court considers proper.")

2193 The first draft Rule 41(a)(1)(C) includes an optional word
2194 that substantially changes its effect. Under this version, a
2195 voluntary dismissal establishes finality "only" if the dismissal is
2196 with prejudice. This approach would reject the decisions that, in
2197 various circumstances, have found finality in a voluntary dismissal
2198 without prejudice. But it might not do so completely; some of the
2199 decisions rely on finding de facto prejudice in a dismissal that
2200 purports to be without prejudice. The draft Committee Note includes
2201 an illustration of language that might be used to reject a
2202 "practical prejudice" approach. Whether it is desirable to reject
2203 the cases that support this approach is an open question.

2204 The "only with prejudice" text also may be ambiguous on the
2205 question of conditional prejudice. In form, the dismissal is with
2206 prejudice, but on condition that the prejudice dissolves if the
2207 pre-dismissal orders challenged on appeal are reversed. It seems
2208 difficult to characterize such a dismissal as "without prejudice,"
2209 but it also may not seem to be "with prejudice." Addressing this
2210 question only in the Committee Note will open the recurring
2211 question whether the Note would become an attempt to legislate by
2212 Note, not by Rule.

2213 The final two drafts are mirror provisions for explicit rule
2214 text addressing conditional prejudice. The first rejects
2215 conditional prejudice as a means of establishing finality: "The
2216 dismissal may not be subject to revocation if an appeal results in
2217 reversal of any order entered before the dismissal." The second
2218 accepts conditional prejudice: "But a notice or stipulation of
2219 dismissal may provide that the dismissal will be vacated if an
2220 appeal results in reversal of any order entered before the
2221 dismissal."

2222 Discussion began by suggesting that some good might be gained
2223 by a rule saying simply that a dismissal with prejudice of all that
2224 remains in an action establishes finality. This simple rule would
2225 not insist that "only" a dismissal with prejudice will do; that
2226 question would be left to continuing development in the courts, and
2227 the Committee Note could say so. And some good would be
2228 accomplished in providing guidance for practitioners who do not
2229 often encounter these problems, and in providing reassurance for
2230 those who otherwise would invest resources in confirming that this
2231 potentially risky step will cut off everything that is dismissed
2232 but not the right to review of the pre-dismissal orders.

2233 The next question asked why conditional prejudice would remain
2234 in limbo if the rule text says that only dismissal with prejudice
2235 establishes finality. Why might conditional prejudice count as real
2236 prejudice? The response was that it likewise does not count as
2237 without prejudice. It was suggested that this ambiguity could be
2238 readily fixed: "only if the dismissal is with <u>unconditional</u>
2239 prejudice * * *."

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2240 The arguments for and against recognizing conditional
2241 prejudice as a means of establishing finality were rehearsed.
2242 Opinions seem to divide between judges and lawyers, or perhaps more
2243 accurately between appellate judges who disfavor conditional
2244 prejudice and lawyers -- perhaps with trial judges as allies -- who
2245 favor conditional prejudice. The arguments for conditional
2246 prejudice have become familiar. Interlocutory orders may
2247 dramatically reduce the potential value of a case. If there is no
2248 opportunity for present appeal, the parties may be forced to
2249 litigate the way through to a final judgment on relatively minor
2250 theories or claims solely for the purpose of achieving a final
2251 judgment that supports review of the interlocutory orders.
2252 Recognizing finality by a dismissal with conditional prejudice may
2253 spare the parties and the trial court the burden of these
2254 continuing proceedings. If appeal leads to affirmance of the
2255 interlocutory orders, the parties and both courts have gained. And
2256 affirmance is more likely than reversal on most appeals, although
2257 the experience may be rather different when a party is so firmly
2258 convinced as to wager all on a dismissal with conditional
2259 prejudice. And if appeal leads to reversal, the proceedings on
2260 remand may come earlier, and be more efficient, than if the appeal
2261 and reversal were delayed while proceedings were exhausted on the
2262 matters that would have been dismissed with conditional prejudice.

2263 The argument against conditional prejudice comes from the
2264 appellate perspective. There are at least enough complications and
2265 exceptions in the final-judgment rule as it is. We do not need any
2266 more risks that the same case will come before the appellate court
2267 twice, forcing inefficient refamiliarization with the record. Ample
2268 means exist to serve whatever genuine needs for interlocutory
2269 review may exist. Collateral-order doctrine, partial final
2270 judgments under Civil Rule 54(b), and openly interlocutory appeals
2271 by permission under § 1292(b) are the chief resources. Why do we
2272 need more?

2273 Rule 54(b) was used as an illustration of possible needs for
2274 some alternative. It avowedly relies on the district judge as
2275 "dispatcher," responsible for determining whether efficient
2276 management of a particular case will be advanced or impeded by an
2277 immediate appeal as to some part. But it has conceptual limits. The
2278 district judge may focus too much on the value of uninterrupted
2279 trial proceedings, at the expense of the parties and at its own
2280 expense when an erroneous order is eventually reversed for further
2281 proceedings. More importantly, Rule 54(b) requires final
2282 disposition of all of a "claim," or of all claims between at least
2283 one identified pair of opposing parties. What is a "claim" for this
2284 purpose is not always clear. If it approaches the definition of
2285 "claim" for res judicata purposes, it reaches circumstances where
2286 a dismissal with conditional prejudice may make sense. A plaintiff,
2287 for example, may seek unitary relief on any of seven legal
2288 theories. An order that dismisses two of the theories leaves open
2289 the same request for relief, but those two theories may have been
2290 the strongest in relation to the ease and cost of proof. Or, and

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2291 more clearly, a critically important interlocutory order may not
2292 dispose of all of a single claim. Cases explored in earlier
2293 Subcommittee discussions provide illustrations. An in limine ruling
2294 may exclude important evidence, leaving only much weaker evidence
2295 to support a claim that still remains alive. Rule 54(b) cannot be
2296 used to enter a partial final judgment.

2297 The next comment was that recognizing dismissal with
2298 conditional prejudice will, overall, save resources for the system.
2299 It will not often be risked. When it is used, affirmance will end
2300 the matter sooner, at lower cost. And reversal still may achieve a
2301 faster and less costly disposition than would result from dragging
2302 out trial court proceedings before the first appeal. It can be
2303 important to the litigants.

2304 An analogy was offered to support further thought. As much as
2305 they honor the final-judgment rule, the courts of appeals have
2306 repeatedly collaborated in developing expansions, exceptions, and
2307 occasional evasions. The temptation to reach out to respond to
2308 particular and particularly attractive requests for appellate
2309 justice runs strong. Collateral-order reasoning has often been used
2310 to succumb to this temptation. But the Supreme Court has undertaken
2311 to discourage open-ended reliance on collateral-order theory. It
2312 has come to insist that collateral-order appeals can be allowed
2313 only when immediate appeal is justified in all of the cases that
2314 fall within the particular "category" of challenged orders. There
2315 is an implicit message that courts should be astute to protect
2316 against erosion of the final-judgment rule. Perhaps the same is
2317 true of manufactured finality -- if not the Supreme Court, the
2318 rulemaking committees should advance the cause of true finality.

2319 The analogy to Rule 54(b) was pursued further. Rule 54(b)
2320 assigns primary responsibility to the district judge to weigh the
2321 values of the final judgment rule in determining, on a case-
2322 specific basis, the most efficient allocation of responsibilities
2323 between the trial court and the court of appeals. Should there be
2324 some similar safeguard in approaching manufactured finality by
2325 voluntary dismissal? If dismissal terminates with unconditional
2326 prejudice every claim and all parties that remain, there may be no
2327 need to invoke review by the judge. Still, it would be good to know
2328 what the orders of dismissal actually provide and whether, after
2329 the opportunities to dismiss under Rule 41(a)(1) without court
2330 action have been exhausted, judges at times refuse to allow a
2331 dismissal with prejudice. And if dismissal is attempted with
2332 conditional prejudice, absent stipulation by the parties, the same
2333 questions may be even more important.

2334 This discussion was summarized by suggesting that a
2335 competition seems to exist between efficiency in the district court
2336 and efficiency in the court of appeals. "Without a rule, the courts
2337 of appeals win the debate." But if there is a circuit that is
2338 willing to recognize conditional-prejudice finality -- to risk some
2339 appellate efficiency for the sake of the district court and the

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2340 parties -- should we pursue a rule that tells them they cannot do
2341 that?

2342 Discussions in the earlier joint subcommittee were recalled.
2343 There was almost a consensus of the judges and lawyers that it is
2344 important to have certainty as to appellate jurisdiction. Certainty
2345 is advanced by a uniform rule. Different practices in different
2346 circuits may confuse lawyers, generating uncertainty. Still, it can
2347 be argued that so long as each circuit has a clear rule, there is
2348 not much cost to the system simply because the clear rules differ.

2349 It was suggested that some measure of certainty on
2350 manufactured finality could be achieved by a simple rule saying
2351 that dismissal with prejudice establishes finality. The Committee
2352 Note could say that most circuits do not recognize conditional
2353 prejudice. One or two do. The rule does not attempt to resolve that
2354 issue. The Subcommittee itself seems to hold divided views; the
2355 simple approach may be the most we can agree on. This approach was
2356 seconded by noting that this simple rule would not say that
2357 dismissal with prejudice is the "only" voluntary means to achieve
2358 finality.

2359 A practical thought was ventured. A rule that recognizes
2360 conditional prejudice would encounter strong resistance in the
2361 Judicial Conference. A majority of the chief circuit judges come
2362 from circuits that do not recognize conditional prejudice. A rule
2363 that rejects conditional finality would have some clarity, but
2364 likely would not win unanimous support. Members of the Appellate
2365 and Civil Rules Committee, as well the Standing Committee, could
2366 easily divide on the question. And even in the Judicial Conference,
2367 a few chief circuit judges, and some district judges, might be
2368 attracted to conditional prejudice. Perhaps the simple rule,
2369 without "only" with prejudice, is the best approach.

2370 The rejoinder asked whether it is worth the effort to adopt
2371 the simple rule without "only." It does no more than confirm what
2372 most lawyers and judges know and do now. And it might stir debate.
2373 It also might create confusion about conditional prejudice. If we
2374 are prepared to reject conditional prejudice, it is likely to be
2375 for the sake of uniformity more than because of a broadly based
2376 conclusion that it is a bad idea. And uniformity will be better
2377 achieved by a rule that says "only" by dismissal with prejudice,
2378 perhaps adding "unconditional prejudice" to make the point clear in
2379 rule text.

2380 Discussion turned to the report that should be made to the
2381 April meetings of the Appellate and Civil Rules Committees.
2382 Discussion so far has suggested that it is valuable to have a
2383 uniform national rule, but has not shown agreement on what the
2384 uniform rule should be. Nor does it seem likely that further
2385 Subcommittee deliberations will generate greater certainty. The
2386 issues have been extensively studied for some time. Division
2387 continues as to conditional prejudice. One identifiable issue is

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2388 the importance of uniformity across the circuits on conditional
2389 prejudice. If uniformity does not seem so important as to justify
2390 telling the Second Circuit, and apparently the Federal Circuit,
2391 that they cannot do as they have been doing, we could decide it is
2392 better to propose no new rule. Or if uniformity seems more
2393 important, we could propose a rule that rejects conditional
2394 prejudice and see how it fares in the advisory committees, Standing
2395 Committee, and Judicial Conference.

2396 This approach was seconded. "The Subcommittee has talked it
2397 out. There are nuances and complications, but we have the decision
2398 points." There is some support for a simple rule, without "only."
2399 That rule may not accomplish very much.

2400 Further discussion examined the importance of uniform rules of
2401 appeal jurisdiction. Practicing lawyer members of the Subcommittees
2402 past and present, have been attracted to the virtues of dismissals
2403 with conditional prejudice, but have been attracted even more
2404 strongly to the values of uniform rules. Even when a rule that
2405 seems clear leaves some uncertainties -- and any of the simple
2406 rules drafts will leave some uncertainties -- it is important to
2407 advance toward greater clarity. This is true even if, as experience
2408 seems to be in the Second Circuit, conditional prejudice dismissals
2409 remain uncommon. And it is true even if clear rules on conditional
2410 prejudice can be found in the decisions of many circuits. Many
2411 lawyers will spend time looking for them. Some lawyers may find the
2412 Second Circuit rule that recognizes conditional prejudice and rely
2413 on it even though their appeals are in a circuit that has rejected
2414 it, or has not spoken to it. A clear rule will protect against such
2415 misadventures, and will reduce the amount of time devoted to trying
2416 to figure out just what opportunities there are.

2417 Once again, doubt was expressed whether any rule should be
2418 pursued. Conditional prejudice is the central problem that
2419 continues to thread through these discussions. The variety of other
2420 complications that have attended voluntary dismissals undertaken to
2421 manufacture finality do not seem susceptible to rule-based
2422 solutions. Any simple rule may do more harm than good. And
2423 expressly rejecting conditional prejudice for the sake of advancing
2424 uniformity may not accomplish much in uniformity, given the
2425 remaining areas of uncertainty.

2426 The outcome of this discussion was agreement to report several
2427 alternative models to the Appellate and Civil Rules Committees. One
2428 will be to do nothing. The second will be the simple rule that
2429 recognizes finality by voluntary dismissal with prejudice. The
2430 third will be the expanded rule that recognizes finality only by
2431 voluntary dismissal with prejudice. And the fourth will be a rule
2432 that explicitly rejects conditional prejudice: "[only] if the
2433 dismissal is with unconditional prejudice * * *." The Civil Rules
2434 Committee meets two weeks before the Appellate Rules Committee
2435 meets in April, and will report the results of its deliberations to
2436 the Appellate Rules Committee.

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2437 Appellate-Civil Subcommittee
2438 Civil Rule 62 Notes, Conference Call 12 December 2014

2439 The Appellate-Civil Rules Subcommittee met by conference call
2440 on December 12, 2014. Participants included Hon. Scott Matheson,
2441 Subcommittee Chair; Hon. Peter Fay; Douglas Letter, Esq.; Kevin
2442 Newsom, Esq.; and Virginia Seitz, Esq. Professors-Reporters
2443 Catherine Struve and Edward Cooper also participated.

2444 Judge Matheson welcomed the members to the work of the newly
2445 reconstituted Subcommittee. Two topics were to be considered:
2446 apparent gaps in the Civil Rule 62 provisions for staying execution
2447 of a judgment and the array of questions that arise from efforts to
2448 "manufacture" a final judgment in order to win appellate review of
2449 an interlocutory order that otherwise is not subject to immediate
2450 appeal. Separate notes describe the discussions of these topics.

2451 The stay provisions in Civil Rule 62 begin with Rule 62(a),
2452 which provides an automatic stay of execution and other enforcement
2453 proceedings for 14 days after entry. This period was set at 10 days
2454 until the Time Counting Project amendments took effect in 2009. The
2455 Project converted most 10-day periods to 14 days and eliminated the
2456 complex rules that disregarded Saturdays, Sundays, and legal
2457 holidays in calculating time periods shorter than 11 days. So it
2458 was done for the automatic stay.

2459 One set of 10-day periods, however, was reset to 28 days --
2460 the periods to move for judgment as a matter of law under Rule 50,
2461 for amended or additional findings under Rule 52, or for a new
2462 trial or amended judgment under Rule 59. The 28-day period was
2463 chosen to allow enough time to prepare careful motions, but also to
2464 end before expiration of the 30-day period that governs most
2465 notices of appeal. Rule 62(b) provides that on appropriate terms
2466 for security, the court must stay execution and enforcement
2467 proceedings, pending disposition of any of these motions. The
2468 result is a period of as much as 14 days between expiration of the
2469 automatic stay and the time allowed to file a motion that will
2470 require a stay.

2471 Two obvious questions are posed by this "gap." One is whether
2472 the court has authority to stay the judgment after expiration of
2473 the 14-day automatic stay and before any post-judgment motion is
2474 filed. The Civil Rules Committee believes that inherent authority
2475 is fully equal to the job, but it may prove useful to adopt an
2476 explicit provision to make this clear. The related question is
2477 whether it would be better to extend the automatic stay to 28 days,
2478 restoring the earlier practice that avoided any need to involve the
2479 court during this period.

2480 Extending the automatic Rule 62(a) stay to 28 days would not
2481 be an entirely neat cure. Rule 62(b) also authorizes the court to
2482 stay execution pending disposition of a motion under Rule 60 for
2483 relief from a judgment or order. A Rule 60 motion can be made more

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2484 than 28 days after judgment, and indeed it is common to rule that
2485 if a motion is made within 28 days it often should be framed under
2486 Rule 59, or perhaps Rule 52 or even Rule 50. True Rule 60 motions
2487 would continue to be available after expiration of a 28-day
2488 automatic stay, but there seems little harm in that. An amended
2489 rule can be drafted in terms that allow the court to order a stay
2490 whenever one of these motions is pending.

2491 The draft Rule 62(b) presented for discussion did not address
2492 the question whether the automatic stay under Rule 62(a) should be
2493 extended to 28 days. It did provide that the court may stay
2494 execution until the time to appeal has expired without any appeal,
2495 or until an appeal has been filed and a determination has been made
2496 whether to approve a supersedeas bond under Rule 62(d).

2497 A different sort of gap may be found in the provisions for a
2498 stay before an appeal is filed and for a stay by supersedeas bond
2499 under Rule 62(d) pending appeal. The stay by supersedeas takes
2500 effect when the court approves the bond. What happens between
2501 "disposition of" a motion listed in Rule 62(b) and the filing of an
2502 appeal and approval of the bond? Experienced appellate
2503 practitioners may seek a single bond that will hold for the entire
2504 period between expiration of the automatic Rule 62(a) stay and
2505 final disposition of the appeal. The draft Rule 62(b) presented for
2506 discussion addressed this question by providing that the Rule 62(b)
2507 stay may last until the court has determined whether to approve a
2508 supersedeas bond under Rule 62(d). That process could include
2509 initial approval of a bond framed to endure until conclusion of the
2510 appeal, but need not.

2511 Discussion began with an accounting of the reasons that
2512 prompted adding Rule 62 to the Appellate Rules Committee’s agenda.
2513 The bond and stay process is "totally mysterious," even to regular
2514 appellate practitioners. "Most of it is done off the books." "There
2515 are horror stories," and there is reason to fear that lawyers who
2516 do not regularly take appeals may need help. It is useful to seek
2517 a single bond for the entire process. But this approach comes at a
2518 cost. A Rule 62(b) stay calls for "appropriate terms for the
2519 opposing party’s security." Often it is possible to provide
2520 security by means less expensive and cumbersome than a bond. A
2521 letter of credit is one example. Other undertakings might do as
2522 well. Rule 62(d), on the other hand, requires a supersedeas bond
2523 pending appeal. At least it seems to. One participant noted that he
2524 had got permission to post a letter of credit as security under
2525 Rule 62(d).

2526 A distinct question was raised: Should Rule 62 include
2527 provisions addressing the amount of the security or bond? Many
2528 local district rules, and many state rules, do so. One common
2529 provision is to set the amount at the face of the judgment, or the
2530 face of the judgment plus interest. Some provisions set an
2531 automatic increase -- for example, 125% of the judgment. It was
2532 agreed that if such a provision is included, there should be

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2533 discretion to set a different amount. The traditional example is
2534 the inability of Texaco to post bond, as required by Texas law, for
2535 the full amount of the multi-billion-dollar judgment in the
2536 Pennzoil litigation, leaving it vulnerable to immediate execution.
2537 Even with this discretion, setting a presumptive amount in rule
2538 text could "stave off satellite litigation" and make the procedure
2539 easier for the inexperienced.

2540 Further work was encouraged by observing that real advantages
2541 can be gained by providing greater detail and clarity in Rule 62
2542 text. Practitioners would not need to spend as much time with the
2543 treatises and cases.

2544 The gap between the 14-day automatic stay and the time to make
2545 post-judgment motions was questioned. Why not extend the automatic
2546 stay to 28 days? This seems a pragmatic question. Because of time-
2547 counting conventions, the 10-day stay provided before 2009 was
2548 automatically at least 14 days, and in some combinations of
2549 holidays could run a few days longer. There are obvious risks that
2550 opportunities for effective execution will diminish even during
2551 this period, whether assets subject to execution suffer natural
2552 diminution or are concealed. Expanding the automatic stay without
2553 security expands these risks. This question deserves further
2554 inquiry.

2555 The form of security also deserves attention. The participants
2556 in the call noted that they were seldom required to post security
2557 after expiration of the automatic stay. One reason is that the
2558 costs of a bond are recoverable, a prospect that encourages
2559 responsible behavior by parties who hold a judgment for the time
2560 being -- a party who is confident that it will be able to execute
2561 its judgment if the judgment survives may prefer to avoid exposure
2562 to this cost in case the judgment does not survive. More generally,
2563 it will be desirable to consider the requirement that security
2564 pending appeal be in the form of a bond -- other forms of security
2565 may be more flexible, and more appropriate. This thought was
2566 repeated -- it is important to allow different forms of security.
2567 Rule 62(d) might well be revised to parallel present Rule 62(b),
2568 calling for "appropriate terms for the opposing party’s security."
2569 This discussion led to a further suggestion: There is no apparent
2570 advantage in separating the provisions for stays pending conclusion
2571 of proceedings in the district court and pending appeal. The two
2572 provisions should be structured to flow naturally from district-
2573 court proceedings to appeal. This might be accomplished by
2574 rearranging Rule 62, or by combining (b) and (d) in a single
2575 subdivision. One practitioner supported this approach by noting
2576 that in his experience, 80% of judgments are headed for post-
2577 judgment motions and appeal. Merger should be attempted.

2578 This discussion carried on with the observation that it is
2579 important to allow different forms of security.

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2580 It was agreed that there should be discretion as to the form
2581 of security both while proceedings continue in the district court
2582 and pending appeal. This led to a recommendation to attempt a
2583 merger of these provisions into a single subdivision.

2584 Technical questions also were addressed. The discussion draft
2585 of Rule 62(b) separated proceedings in the trial court from
2586 proceedings on appeal by referring to the time when "a notice of
2587 appeal has been filed and become effective." This provision
2588 addresses the questions that might arise when the effect of a
2589 notice of appeal is suspended by post-judgment motions, questions
2590 that are addressed in Appellate Rule 4. The formula is borrowed
2591 from Civil Rule 58(e), where it was adopted in a deliberate plan to
2592 integrate with Appellate Rule 4. It was agreed that this is the
2593 proper phrase to express the thought.

2594 A second question raised by the draft will be addressed in
2595 different terms if it proves possible to create a single
2596 subdivision for stays pending district-court proceedings and
2597 pending appeal. The draft extends the stay pending district-court
2598 proceedings to the point where the court has determined whether to
2599 approve a supersedeas bond. A fully integrated procedure will take
2600 care of this.

2601 A third question was raised for the first time. Stays and
2602 bonds ordinarily are framed in terms of an "appeal." What does this
2603 mean after a court of appeals has concluded its proceedings but
2604 before expiration of the time to petition for certiorari or
2605 disposition of a petition? This question can be addressed in the
2606 terms of the bond. But it seems likely that not everyone will think
2607 to do so. Would it be useful to adopt a provision in the rules?

2608 Other Rule 62 issues may deserve consideration if this project
2609 proceeds to fairly significant amendments. The role of state law
2610 under Rule 62(f) is one example.

2611 The immediate tasks, then, are these: To consider extension of
2612 the automatic stay in Rule 62(a) to 28 days; to attempt to
2613 integrate the provisions for stays pending district-court
2614 proceedings and stays pending appeal into a single subdivision, or
2615 at least into a more natural flow without the interruption of Rule
2616 62(c) addressing stays pending appeal of orders regarding
2617 injunctions; to adopt more flexible forms of security for stays
2618 pending appeal; and to consider adding a formula setting a
2619 presumptive amount for security.

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2620 Notes, Appellate-Civil Subcommittee February 4, 2015

2621 The Appellate-Civil Subcommittee met by conference call on
2622 February 4, 2015. Participants included Hon. Scott Matheson,
2623 Subcommittee Chair; Hon. David G. Campbell, Civil Rules Committee
2624 Chair; Hon. Peter Fay; Douglas Letter, Esq.; and Virginia Seitz,
2625 Esq. Reporters Catherine Struve and Edward Cooper also
2626 participated.

2627 The meeting focused on a draft of a revised Rule 62 that was
2628 designed to frame the issues discussed in an earlier meeting. These
2629 issues have not addressed all of the questions that might be
2630 addressed in a complete overhaul of Rule 62. Instead, they are
2631 framed around the questions that initially inspired the Appellate
2632 Rules Committee to believe that there is work to be done, and the
2633 related questions that grew out of that beginning. These issues
2634 look toward a better integration of the automatic stay provisions
2635 of Rule 62(a); the provisions in Rule 62(b) for a stay pending
2636 disposition of post-judgment motions under Rules 50, 52, 59, and
2637 60; and the supersedeas bond provisions of Rule 62(d). In addition,
2638 it may be valuable to add express provisions recognizing that
2639 security may take a form other than a bond, and that there is
2640 discretion in setting the amount of security.

2641 The issue that sparked the initial interest in Rule 62 arose
2642 from the practice of experienced appellate lawyers that looks to
2643 provide a single bond (or other form of security) that will cover
2644 all stages of the case after expiration of the automatic stay
2645 provided by Rule 62(a). This security will cover post-judgment
2646 proceedings in the district court and any appeal that may be taken.
2647 It was thought useful to recognize this practice in rule text.

2648 The "single bond" question led naturally to the apparent "gap"
2649 that exists between Rule 62(a) and 62(b). The automatic stay under
2650 Rule 62(a) expires 14 days after judgment is entered. Rule 62(b)
2651 recognizes that the court may order a stay pending disposition of
2652 motions made under Rules 50, 52, 59, and 60. These two provisions
2653 dovetailed nicely when the time to move under Rules 50, 52, and 59
2654 was 10 days. (Ten days always meant at least 14 days under the
2655 time-counting conventions established by Rule 6). But the "Time
2656 Project" changed the time for Rule 50, 52, and 59 motions to 28
2657 days. The change was prompted by the sense that many cases present
2658 such complicated issues that 14 days (or a few more, depending on
2659 intervening legal holidays) is not enough to prepare an effective
2660 motion. The period was set at 28 days -- unique in the Civil Rules
2661 -- to allow the parties a brief grace period to decide whether to
2662 file a notice of appeal within the 30 days allowed by Appellate
2663 Rule 4 for most civil appeals. Knowing whether the time to appeal
2664 has been suspended by a timely motion under any of these rules, or
2665 a Rule 60 motion filed within 28 days, can be important in deciding
2666 whether and when to file a notice of appeal.

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2667 The gap between expiration of the automatic stay under Rule
2668 62(a) and the provision in Rule 62(b) for a stay pending
2669 disposition of a post-judgment motion led a district judge to
2670 suggest that the Civil Rules Committee should consider amending
2671 Rule 62(b). The Committee considered the question and concluded
2672 that the court has inherent power to stay its own judgment. It
2673 determined that revision of Rule 62(b) should be considered only if
2674 ongoing practice did not settle this question.

2675 If Rule 62 is to be considered for other reasons, it seems
2676 wise to reconsider the fit between Rules 62(a) and 62(b).

2677 Reconsideration does not lead to an obvious answer. There are
2678 good reasons to keep a tight rein on the automatic stay. It is
2679 possible to dissipate or conceal assets promptly after an adverse
2680 judgment, and the greater the time available the greater the
2681 prospect that the judgment debtor can choose means that resist
2682 undoing. On the other hand, the value of the post-judgment motions
2683 may be defeated if the judgment creditor is allowed to execute on
2684 the judgment. Just as a judgment debtor may avoid payment, so a
2685 judgment creditor may be able to avoid repayment. (If a rule is
2686 drafted that recognizes the court's authority to terminate the
2687 automatic stay, it may be desirable to include a provision that
2688 recognizes authority to require security by the judgment creditor
2689 as a condition of allowing immediate execution.)

2690 One possible resolution is to extend the automatic stay to 30
2691 days, but to recognize the court's authority to terminate the
2692 automatic stay. Termination of the automatic stay could easily be
2693 integrated with a provision that allows the court to order a stay
2694 on appropriate terms for security: the risk presented by the
2695 automatic stay, and the risk presented by the absence of a stay,
2696 could be counterbalanced. Security need not be ordered, whether in
2697 the form of a bond or some other form (a certificate of deposit,
2698 other security, the manifest ability of the judgment debtor to make
2699 good on the judgment). But security could be ordered on terms that
2700 are calculated to eliminate any risk to the judgment creditor or,
2701 if immediate execution is allowed, the judgment debtor.

2702 Express authority to order a stay at any time, on appropriate
2703 terms for security, would address the desire to have a single bond
2704 that endures for the life of the case, at least through appeal.

2705 It also may be desirable to include in the rule text express
2706 recognition of authority to dissolve a stay or modify the terms for
2707 security. Circumstances change, and may be particularly likely to
2708 change if security is ordered before decision of any post-judgment
2709 motions.

2710 Present Rule 62(d) provides what seems to be a right to a stay
2711 upon posting a supersedeas bond. The illustrative draft carries
2712 subdivision (d) forward, although relocated within the rule. The
2713 only change is to recognize that security may take a form other

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2714 than a bond. One important question that needs to be addressed is
2715 whether Rule 62(d) now establishes at least a very strong
2716 presumption for -- and perhaps something approaching a right to --
2717 a stay on posting a bond approved by the court. At least some
2718 courts have recognized that the requirement of a bond may be
2719 excused. Research needs to be done to determine whether a stay may
2720 be denied even though a satisfactory bond (or other satisfactory
2721 security) has been tendered.

2722 The central features of the draft rule, then, emphasize the
2723 value of establishing court authority to control stays of
2724 execution. The automatic stay may be terminated. A stay may be
2725 ordered at any time, beginning with entry of the judgment. It may
2726 be subject to appropriate terms for security, establishing
2727 discretion whether to demand any security and as to the form of any
2728 security and the amount. The stay may be ordered for any period, up
2729 through issuance of the appellate mandate. (This feature can be
2730 integrated through the Appellate Rules on issuing the mandate to
2731 cover the period for petitioning for certiorari, possibly before
2732 but ordinarily after judgment in the court of appeals.)

2733 Discussion began by focusing on the "gap" between expiration
2734 of the automatic stay after 14 days and the 28-day period for
2735 filing post-judgment motions under Rules 50, 52, and 59.

2736 The most elemental question is why there should be an
2737 automatic stay at all. Why not put the burden on the judgment
2738 debtor to justify a stay? And perhaps to provide security? The need
2739 for some automatic stay may flow from the need to recognize the
2740 entry of judgment, to prepare a motion, and to arrange security.
2741 Some judgment debtors may be able to anticipate the need and act
2742 almost instantly on receiving e-notice of judgment. But others may
2743 not. Immediate execution by an aggressive judgment creditor is a
2744 possibility. The rule has long provided for an automatic stay, and
2745 there has not been any evident sense that this has been a mistake.

2746 The more direct question about the "gap" was addressed by
2747 suggesting there is a need to protect the opportunities for
2748 correction of the judgment by a post-judgment motion. As the rule
2749 stands now, there is a risk that an inexperienced lawyer may not
2750 recognize the need to ask for an extension of the automatic stay --
2751 or a stay issued on the court’s inherent authority, and on such
2752 terms as the court may impose in exercising its authority -- and
2753 expose the judgment debtor to the serious risks of immediate
2754 execution. Recovery of the amounts seized in execution may not
2755 provide much protection for a judgment debtor who cannot function
2756 without those assets. The judgment creditor can oppose the stay;
2757 authority to grant a stay is not an automatic entitlement. If there
2758 are strong reasons to deny a stay, the stay will be denied.

2759 The draft submitted for discussion was intended to address
2760 this question by one or the other of two alternatives. One was to
2761 extend the automatic stay to 30 days. That would leave the burden

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2762 on the judgment creditor to seek to dissolve the stay. The other
2763 was to retain the automatic stay at 14 days, but allow the judgment
2764 debtor to move at any time, including the moment judgment is
2765 entered or perhaps even before judgment is entered, to win a stay
2766 on "appropriate terms for security."

2767 One important question, then, is which party should have the
2768 burden with respect to security after -- or perhaps during -- an
2769 automatic stay.

2770 A related question asked about the burden on the court of
2771 addressing these questions. The greater the court's responsibility,
2772 the greater the prospect that disputes about stays and security
2773 will eat into scarce judicial resources. The first response was
2774 that these problems do not seem to arise in practice. Once judgment
2775 is entered, "the parties talk and work it out." Motions to extend
2776 the automatic stay do not arise. (This may indicate one value in
2777 the automatic stay -- it provides shelter for these discussions.)

2778 Discussion turned to the question whether it is useful to
2779 carry forward the present provision for obtaining a stay by posting
2780 a supersedeas bond. Perhaps the supersedeas should be superseded by
2781 a procedure that makes the court responsible for all stays, at
2782 least after an automatic stay expires. Discussion recalled the
2783 question whether present Rule 62(d) establishes something like a
2784 "right" to a stay on posting bond approved by the court. Approval
2785 by the court seems to allow delegation of approval authority to the
2786 court clerk. Some courts have local rules that expressly authorize
2787 the clerk to approve a supersedeas bond, at least if the bond
2788 satisfies criteria set out in the rule. But why allow this
2789 opportunity for a second bite at the apple? If the court has denied
2790 a stay sought on motion under the open-ended provision of draft
2791 Rule 62(b)(1), why should that not end the matter?

2792 One value of carrying forward the present supersedeas
2793 provision may be that it allows a party to forgo any motion.
2794 Judgment is entered. An appeal is taken, perhaps without any post-
2795 judgment motions. An appeal bond is posted. End of story. Or, at
2796 least, end of story if the present rule establishes something that
2797 at least approaches a right to a stay on posting bond.

2798 Another way of asking the question was whether there is a need
2799 to provide for a discretionary stay ordered by the court if the
2800 automatic stay is extended to 30 days. To be sure, there is a need
2801 if a timely post-judgment motion is filed; the court ordinarily
2802 will need more time to dispose of the motion, or perhaps several
2803 motions.

2804 One possibility to avoid a "second bite" would be to draft
2805 terms that allow a party to secure a stay by posting a supersedeas
2806 bond only if that party has not sought a court-ordered stay. It was
2807 noted that this approach would generate strategic behavior by
2808 discouraging an application for a court-ordered stay, which may be

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2809 important in the period before any appeal is filed, so as to
2810 preserve the automatic stay that seems available under the
2811 supersedeas procedure.

2812 Discussion turned to the question whether Rule 62 should
2813 provide more detailed terms governing the form of security. The
2814 national rules once had such provisions. They were abandoned. Brief
2815 discussion suggested that it would be a mistake to attempt to
2816 address such issues, which often call for a pragmatic exercise of
2817 discretion, in national rule text. Local rules can address some
2818 parts of these issues, but the time has not come for national-rule
2819 provisions.

2820 A different structure was suggested. Rule 62(a) could have
2821 three paragraphs. (1) would address the automatic stay. (2) would
2822 address stays pending disposition of post-judgment motions, perhaps
2823 restoring explicit reference to Rules 50, 52, 59, and 60. It might,
2824 or might not, address more general authority to order a stay that
2825 persists from expiration (or termination) of the automatic stay
2826 through appeal. (3) would address stays pending appeal. This
2827 structure might reduce the potential overlap between subdivisions
2828 (a) and (b) in the illustrative draft. It would provide for a stay
2829 for the benefit of a party who needs this protection pending
2830 preparation and disposition of post-judgment motions.

2831 It was suggested that whatever structure is adopted, it will
2832 be important to recognize the opportunity to secure a stay that
2833 persists from the end of the automatic stay through appeal, with a
2834 single security (unless the terms of security are modified by the
2835 court to address changing circumstances, such as actual decision of
2836 the post-judgment motions).

2837 It was noted that the Subcommittee has not yet considered
2838 other possible questions raised by Rule 62. They will continue on
2839 the Subcommittee agenda.

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TAB 11

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2840 **PILOT PROJECTS**

2841 *Introduction*

2842 Rulemaking has long relied heavily on the knowledge,
2843 experience, wisdom, and judgment of leaders of the bench, bar, and
2844 academy. Starting at least 50 years ago, however, interest has
2845 grown in using the methods of the social sciences to establish more
2846 rigorous measures of actual experience. Reliance on "anecdotes" is
2847 challenged, often forcefully. Surveys have been used, often
2848 successfully, to multiply the numbers of those whose experience can
2849 be brought to bear. The continually growing volume of data to be
2850 found in court files -- particularly electronic files -- has
2851 supported large-scale studies that correlate many different factors
2852 and subject them to sophisticated statistical analysis. Powerful
2853 associations between procedures and outcomes may be revealed. But
2854 shortcomings remain.

2855 The next step is the rulemaking equivalent of controlled
2856 experiments. In broad outline, the ideal is to identify a set of
2857 cases that are as nearly identical as possible in every
2858 characteristic that can be identified as potentially relevant to
2859 the inquiry. That in itself is no small matter. Among the more
2860 obvious variations are substantive subject matter; amount in
2861 controversy; experience of the lawyers (including years at the bar;
2862 frequency of litigation; typical patterns of representing
2863 plaintiffs, defendants, or both; firm structure); the basis for
2864 calculating attorney fees; court; judge; time of filing; pre-
2865 litigation negotiations; liability insurance coverage; third-party
2866 financing; and no doubt other things as well.

2867 Once the set of cases is identified, the ideal is to allocate
2868 them at random to two (or more) different sets. One set is
2869 litigated under prevailing procedure. The other set is litigated
2870 under the prevailing procedure in general, but the new procedure
2871 that is to be tested is substituted for the counterpart in
2872 prevailing procedure. A structure is established at the beginning
2873 to gather information on all the points that may distinguish the
2874 tested procedure from the prevailing procedure. The structure is
2875 followed. The study should endure for some significant period after
2876 the court and parties have learned how to work the new procedure.
2877 Then the data are collected and analyzed. Often it will be
2878 important to survey or interview the participants to gather their
2879 explanations and understandings of how the new procedure worked.

2880 None of that is easy. And it depends on making a binding and
2881 random assignment of cases. If participants are allowed to opt out
2882 of the new procedure that is being tested, there is a great risk
2883 that the results will be skewed. Those who are skeptical of
2884 whatever results are reported will argue, often with good reason,
2885 that the effects depend on self-selection of the cases where the

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2886 lawyers thought the new procedure would be helpful to their cause.
2887 And what is helpful may depend not on a disinterested desire for a
2888 just, speedy, and inexpensive determination, a hope to reduce cost
2889 and delay, but quite the opposite.

2890 *State Court Laboratories*

2891 The 1938 Federal Rules were created against the background of
2892 the Equity Rules and, in actions at law, the practices of all the
2893 states as absorbed through the Conformity Act. Many state courts
2894 have returned the favor by shaping their procedures to reflect, and
2895 often to absorb, federal procedure. Many states, however, have
2896 procedures that differ from federal procedure, often substantially.

2897 State practices remain a potentially valuable source of
2898 information in considering revisions of federal procedure. One
2899 recent example is the effort to survey state rules that parallel
2900 the offer-of-judgment procedure established by Civil Rule 68. But
2901 it may be at least as difficult, and often likely is more
2902 difficult, to gather rigorous information about the rules in actual
2903 operation.

2904 State practices may provide more useful information when state
2905 courts establish pilot projects, or adopt new procedures and
2906 undertake to assess the effects of the new procedures. The
2907 Institute for the Advancement of the American Legal System has
2908 become a leader in efforts to study state procedures, seeking
2909 information that can be used by other states and by federal courts
2910 as well. We have already learned a lot from their work, and expect
2911 to continue to learn still more.

2912 There always will be reasons to be cautious about transporting
2913 successful procedures from state courts to federal courts. The mix
2914 of cases may be different. Local "legal culture" may be important
2915 -- a procedure that works well in the courts of one state, and will
2916 work equally well in federal courts in that state, may not work as
2917 well in all courts across the country. But caution should not
2918 obscure the valuable lessons that can be learned.

2919 *Rules Committee Projects*

2920 The questions for the rules committees are whether to become
2921 involved in supporting pilot projects for small-scale testing of
2922 ideas that do not yet seem ripe for adoption nationwide. Both
2923 conceptual and practical concerns will shape the answer.

2924 The conceptual questions begin with the role of the advisory
2925 committees and the Standing Committee in the Enabling Act process.
2926 The committees work for and through the Judicial Conference. The
2927 Judicial Conference makes recommendations for action by the Supreme
2928 Court to adopt "general rules of practice and procedure" under §
2929 2072. Ad hoc directions to be implemented as an experiment in no
2930 more than a few courts may not seem to be "general rules." But the

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2931 Judicial Conference's authority to recommend "changes in and
2932 additions to" the general rules is stated in a single paragraph of
2933 § 331 that charges the Conference with "carry[ing] on a continuous
2934 study of the operation and effect of the general rules of practice
2935 and procedure * * * as prescribed by the Supreme Court for the
2936 other courts of the United States." "Continuous study" may well
2937 include pilot projects. And the Standing Committee and advisory
2938 committees are the natural bodies to assist the Conference in
2939 discharging this function.

2940 A second conceptual question arises from the means chosen to
2941 implement a pilot project. One natural approach would be to adopt
2942 a local district rule that embodies the project. A potential
2943 difficulty arises from § 2071(a), which directs that a local court
2944 rule "shall be consistent with * * * rules of practice and
2945 procedure prescribed under section 2072 * * *." Rule 83(a)(1)
2946 mirrors this direction: "A local rule must be consistent with --
2947 but not duplicate -- federal statutes and rules adopted under 28
2948 U.S.C. §§ 2072 and 2075 * * *." A practice to be evaluated through
2949 a pilot project may well be subject to the objection that it is
2950 inconsistent with a national rule. Much will depend on the test
2951 used to measure inconsistency. A narrow test would allow wide
2952 latitude to experiment. A local rule that does not allow or require
2953 what a national rule forbids, nor forbid what a national rule
2954 allows or requires, would pass muster. But even on that approach,
2955 uneasiness will remain. One proposal that drew considerable support
2956 in recent work was to shorten the presumptive duration of an oral
2957 deposition to 4 hours. Is that inconsistent with Rule 30(d)(1),
2958 which sets it at one day of 7 hours? Or not inconsistent, because
2959 a court has authority under Rule 30(d)(1) to "otherwise * * *
2960 order"?

2961 One response to the possibility of inconsistency with the
2962 national rules may be to revise Rule 83 to allow experimental local
2963 rules. That approach has been considered. Appendix A provides
2964 materials that describe the most recent exploration of this area.
2965 The proposal was eventually abandoned, at least in part because of
2966 uncertainty about the effect of § 2071(a) on a national rule that
2967 purports to authorize local rules inconsistent with the national
2968 rules.

2969 A different response may be to promote pilot projects by means
2970 other than local rules. It will always be important to have support
2971 -- preferably unanimous and enthusiastic support -- from a
2972 district's judges. Such devices as standing orders might substitute
2973 for local rules, although it is important to remember the uncertain
2974 foundations for a "standing order" that looks like a local rule and
2975 acts like a local rule.

2976 The local rule question is important because it ties to the
2977 question of mandatory participation. Questions of inconsistency
2978 with the national rules subside -- although they may not disappear
2979 entirely -- if litigants are allowed to opt out of a pilot project.

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2980 But, as noted, that may substantially undermine the value of the
2981 project.

2982 One example of local rules that might become a subject for
2983 pilot-project study is provided by rules that set expeditious time
2984 schedules. The well-known "rocket docket" in the Eastern District
2985 of Virginia was the subject of a panel presentation to the
2986 Committee a while ago, and the somewhat similar practices in the
2987 Western District of Wisconsin have been explored in a presentation
2988 to the Standing Committee. The Southern District of Florida, which
2989 has a 3-track system, also has achieved speedy disposition of
2990 cases. Several districts have local rules for patent cases that
2991 seem to expedite disposition. Judge Wedoff presented a valuable set
2992 of statistics on experience under these programs to the Standing
2993 Committee last January. These beginnings might be elaborated into
2994 a more rigorous effort to evaluate their operation and to determine
2995 whether they depend on local cultures that could be grafted onto
2996 litigation cultures in other districts. One important question will
2997 be whether it is better to study the established programs than to
2998 attempt to launch new programs in other courts. But care must be
2999 taken in evaluating existing programs. Judges must cooperate
3000 willingly. It may be difficult to get frank evaluations from
3001 lawyers, and an attempt must be made to determine whether things
3002 that may seem undesirable to lawyers seem attractive to their
3003 clients.

3004 Pragmatic and conceptual concerns blend in another direction.
3005 On a practical level, it must be asked how far the rules committees
3006 are able to promote effective pilot projects. The actual
3007 structuring of the project so as to support effective evaluation
3008 will require the assistance of experts in social science
3009 methodology. The Federal Judicial Center is the obvious source of
3010 assistance, but its capacities are finite. Help might be found in
3011 other sources. The IAALS is a prominent example. But great care
3012 must be taken in working with any nongovernmental entity.

3013 Practical questions blend with more conceptual questions at
3014 the point of identifying particular proposals that could be tested
3015 through pilot projects. The rules committees should be good at
3016 identifying promising rules changes that would benefit from
3017 controlled empirical testing. They may even be good at designing a
3018 rule they would like to study for potential adoption through the
3019 Enabling Act. But framing a model for testing that comes close to
3020 the rule that might be proposed for publication after arduous work,
3021 and even close to the rule that might be recommended for adoption
3022 in light of public comments, may be more difficult. A pilot project
3023 rule that is conceived in a less exhaustive fashion may provide
3024 only uncertain light. Better light than abstract guessing, but
3025 still uncertain. Whether it is wise to set out down such roads
3026 deserves attention.

3027 These concerns can be focused by offering one example of a
3028 possible pilot project. Rule 26(a)(1)(A), mandating initial

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3029 disclosures, was first adopted in 1993. It required all parties to
3030 identify witnesses and documents bearing on "disputed facts alleged
3031 with particularity in the pleadings." One purpose was to jump-start
3032 the inevitable first wave of discovery. Disclosure extended to
3033 information adverse to the disclosing party, sometimes called
3034 "heartburn" disclosure. A second purpose was to encourage
3035 particularized pleading that would expand an adversary's disclosure
3036 responsibilities. The rule was vigorously opposed during the public
3037 comment period. One concession was to allow districts to opt out of
3038 the rule by local rule. The result was a patchwork of disclosure
3039 practices across the country. Many districts opted out entirely.
3040 Some opted out in part. And many, at least at the district level,
3041 adhered to the national rule. The rule was amended seven years
3042 later, however, in the culmination of a process that began before
3043 there was much experience with the national rule in the courts that
3044 adhered to it. The amendment did not reflect a judgment by the
3045 rules committees that the 1993 version was too ambitious. The
3046 amendment reflected a judgment that national uniformity was more
3047 important than relatively broad disclosure, and a further
3048 prediction that it would be difficult to win approval for an
3049 amendment that simply deleted the local option. So the 2000 version
3050 scaled initial disclosure back to witnesses and documents that the
3051 disclosing party may use to support its claims or defenses.

3052 The workings of Rule 26(a)(1)(A) have been touched on in
3053 various projects on discovery. An example was the Duke Conference
3054 in 2010. The reactions of lawyers tend to fall into one of three
3055 categories. One category finds that initial disclosures are
3056 sometimes useful. A second finds that initial disclosures are
3057 useless because the limit to information a party may use in its own
3058 case means that full-scale discovery must be pursued without regard
3059 to the disclosures. And a third finds that initial disclosure is
3060 not of much use now, but suggests that it could become useful if it
3061 were restored to something like the 1993 rule.

3062 There are many possible ways to expand initial disclosures.
3063 One is indirect. The protocols for automatic initial discovery
3064 created for individual employment cases provide a good example.
3065 They call for automatic exchanges of information that correspond to
3066 the discovery routinely and properly undertaken in cases of this
3067 type. Initial experience suggests that they are working well in the
3068 courts that have adopted them. Enthusiasm for this approach has led
3069 to suggestions that attempts should be made to create similar
3070 protocols for other specific litigation subjects that commonly come
3071 to federal courts. The next steps might well focus on subjects that
3072 tend to be litigated by a relatively specialized bar populated by
3073 lawyers who frequently litigate with each other. They will know
3074 what discovery is routine, and will know how to frame the first
3075 wave in ways that will reduce delay, contentiousness, and cost. One
3076 example may be police conduct cases under § 1983; the Southern
3077 District of New York has had a pilot project for such cases, and is
3078 on the brink of adopting a local rule 83.10 for cases against the
3079 City of New York. Other subjects that have been proposed include

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3080 actions under the Individuals with Disabilities Education Act and
3081 actions under the Fair Credit Reporting Act.

3082 Another way is to examine experience under state rules.
3083 Arizona Rule 26.1 provides sweeping initial disclosures. Appendix
3084 B includes extensive materials on experience with the Arizona rule.
3085 This experience could be helpful in crafting a rule to be tested by
3086 a pilot project. It might even provide sufficient experience to
3087 justify treating the Arizona outcome as a successful pilot project
3088 in itself.

3089 Pilot projects, in short, offer significant promise of
3090 advancing empirical research that will support effective
3091 rulemaking. But they also present questions about the most
3092 effective role to be played by the rules committees. These
3093 questions may prove to be addressed most successfully in the
3094 context of one or more specific proposals. Initial disclosure may
3095 be a promising example. Other tests may be provided by thinking
3096 about topics on the current agenda. Pilot projects on class actions
3097 may be difficult to launch, given the sensitivity of these
3098 procedures. Projects on stays of execution pending post-judgment
3099 proceedings and appeals may be difficult for rather different
3100 reasons. Perhaps something could be managed for offers of judgment
3101 -- as, for example, a revised offer-to-settle rule -- but that too
3102 would require a deliberate approach.

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APPENDIX A

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THE UNIVERSITY OF MICHIGAN
LAW SCHOOL
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ASSOCIATE DEAN

October 20, 1992

Dean Daniel R. Coquillette
Boston College Law School
885 Centre Street
Newton Centre
Massachusetts 02159

FILED
10-20-92

Dear Dean Coquillette:

I have reviewed the rule drafts on local rules and technical changes from the advisory committees on Appellate, Bankruptcy, and Civil rules. To the extent that there are differences, I tend to prefer the form submitted by the Civil Rules committee. The one change that the Civil Rules committee might embrace is to expand Civil Rule 84 to allow technical rule amendments of form and style to conform to statutory changes. I enclose a copy of the May, 1992 draft for your convenience, marked with the possible revision of Rule 84.

Two comments about draft Bankruptcy Rule 9037. It does not provide for amendment of "the explanatory notes" as well as the rules. I think it is better to retain Judicial Conference power to amend the explanatory notes. Changing the text of a rule without corresponding changes in the notes could produce a source of arcane knowledge and satisfaction for a few, but confusion for many. The minutes of the bankruptcy rules committee meeting suggest a concern to preserve the committee role. I suppose the committee role will be preserved in the same way it is preserved with respect to the text of the rules--and that the committee role is more important with respect to the text.

The other comment on Bankruptcy Rule 9037 addresses the possible revision of Civil Rule 84. The February, 1992 draft of Rule 84 provided for amendments "to conform to statutory changes." Committee discussion of this draft led to deletion of this phrase for fear that it might justify inappropriately broad changes in the rules. The minutes of the Bankruptcy Rules committee reflect a similar process. The initial draft provided for amendments to make the rules "consistent in form and style with statutory changes." There was a motion to strike this phrase. Judge Keeton suggested substitution of the phrase actually adopted, allowing amendments to make the rules "consistent in form and style with statutory changes." The limitation to matters of form and style addresses the concern of the Civil Rules committee and may well be satisfactory to it. I will report any discussion of this question at the November meeting of the committee.

The differences in the local rules provisions seem matters of style. Civil Rule 83(a) requires local rules to "conform to any uniform numbering system"; that seems more graceful than such alternatives as "shall be numbered or identified in conformity with any uniform system," but such matters are in your hands.

I enjoyed talking with you last week and look forward to working with you.

Best regards,

Edward H. Cooper

EHC/lm
encl.
xc: Judge Pointer

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE

SUBMITTED TO

STANDING COMMITTEE
ON
RULES OF PRACTICE AND PROCEDURE

BY

ADVISORY COMMITTEE
ON
CIVIL RULES

MAY 1992

Rule 83. Rules by District Courts; *Orders*

1 *(a) Local Rules.* Each district court by action of a majority of the judges
2 thereof may from time to time, after giving appropriate public notice and an
3 opportunity to comment, make and amend rules governing its practice ~~not in~~consistent
4 with *Acts of Congress and consistent with, but not duplicative of,* ~~these~~ rules *adopted*
5 *under 28 U.S.C. §§ 2072 and 2075*. A local rule so adopted shall *conform to any*
6 *uniform numbering system prescribed by the Judicial Conference of the United States and*
7 *shall* take effect upon the date specified by the district court and shall remain in effect
8 unless amended by the district court or abrogated by the judicial council of the circuit
9 in which the district is located. Copies of rules and amendments so made by any
10 district court shall upon their promulgation be furnished to the judicial council and the
11 Administrative Office of the United States Courts and be made available to the public.
12 *(b) Experimental Rules. With the approval of the Judicial Conference of the*
13 *United States, a district court may adopt an experimental local rule inconsistent with rules*
14 *adopted under 28 U.S.C. §§ 2072 and 2075 if it is otherwise consistent with Acts of*
15 *Congress and is limited in its period of effectiveness to five years or less.*
16 *(c) Orders.* In all cases not provided for by rule, the district judges and
17 magistrates *judges* may regulate their practice in any manner ~~not in~~consistent with *Acts*
18 *of Congress, with* ~~these~~ rules ~~or~~ *adopted under 28 U.S.C. §§ 2072 and 2075, and with*
19 *local rules* ~~those~~ of the district in which they act.
20 *(d) Enforcement. Rules and orders pursuant to this rule shall be enforced in a*
21 *manner that protects all parties against forfeiture of rights as a result of negligent failure*
22 *to comply with a requirement of form imposed by such a local rule or order.*

COMMITTEE NOTES

SPECIAL NOTE: Mindful of the constraints of the Rules Enabling Act, the Committee calls the attention of the Supreme Court and Congress to new subdivision (b). Should this limited authorization for adoption of rules inconsistent with national rules without Supreme Court and Congressional approval be rejected, the Committee nevertheless recommends adoption of the balance of the rule, with subdivisions (c) and (d) being renumbered. The Committee Notes would be revised to eliminate references to experimental rules.

Purpose of Revision. A major goal of the Rules Enabling Act was to achieve national uniformity in the procedures employed in federal courts. The primary purpose of this revision is to encourage district courts to consider with special care the possibility of conflict between their local rules and practices and the nationally-promulgated rules. At various places within these rules (e.g., Rule 16), district courts are specifically authorized, if not encouraged, to adopt local rules to implement the purposes of Rule 1 in the light of local conditions. The omission of a similar explicit authorization in other rules should not be viewed as precluding by implication the adoption of other local rules subject to the constraints of this Rule 83.

Subdivision (a). The revision conforms the language of the rule to that contained in 28 U.S.C. § 2071 and also provides that local district court rules should not conflict with the national Bankruptcy Rules adopted under 28 U.S.C. § 2075. Particularly in light of statutory and rules changes that may encourage experimentation through local rules as to such matters as disclosure requirements and limitations on discovery, it is important that, to facilitate awareness within a bar that is increasingly national in scope, these rules be numbered or identified in conformity with any uniform system for such rules that may be prescribed from time to time by the Judicial Conference. Revised Rule 83(a) prohibits local rules that are merely duplicative or a restatement of national rules; this restriction is designed to prevent possible conflicting interpretations arising from minor inconsistencies between the wording of national and local rules, as well as to lessen the risk that significant local practices may be overlooked by inclusion in local rules that are unnecessarily long.

Subdivision (b). This subdivision is new. Its aim is to enable experimentation by district courts with variants on these rules to better achieve the objectives expressed in Rule 1. District courts in recent years have experimented usefully with court-annexed arbitration and are now encouraged by the Judicial Improvements Act of 1990 to find new methods of resolving disputes with dispatch and reduced costs. These rules need not be an impediment to the search for new methods provided that the experimentation is suitably monitored as a learning opportunity.

Experimentation with local rules inconsistent with the national rules should be permitted only with approval of the Judicial Conference of the United States, and then only

for a limited period of time and if not contrary to applicable statutes. It is anticipated that any request would be accompanied by a plan for evaluation of the experiment and that the requests for approval of experimental rules would be reviewed by the Standing Committee on Rules of Practice and Procedure before submission to the Judicial Conference.

Subdivision (c). The revision conforms the language of the rule to that contained in 28 U.S.C. § 2071, and also provides that a judge's orders should not conflict with the national Bankruptcy Rules adopted under 28 U.S.C. § 2075. The rule continues to authorize--without encouraging--individual judges to enter orders that establish standard procedures in cases assigned to them (e.g., through a "standing order") if the procedures are consistent with these rules and with any local rules. In such circumstances, however, it is important to assure that litigants are adequately informed about any such requirements or expectations, as by providing them with a copy of the procedures.

Subdivision (d). This provision is new. Its aim is to protect against loss of rights in the enforcement of local rules and standing orders against by who may be unfamiliar with their provisions.

Local rules and standing orders have become quite voluminous in some courts. Even diligent counsel can on occasion fail to learn of an applicable rule or order. In such circumstances, the court must be careful to protect the interests of the parties. Elaborate local rules enforced so rigorously as to sacrifice the merits of the claims and defenses of litigants may be unjust.

Moreover, the Federal Rules of Civil Procedure are often forgiving of inadvertent lapses of counsel. In part, this reflects the policy of the Rules Enabling Act, 28 U.S.C. § 2071, which aims to establish a uniform national procedure familiar to attorneys in all districts. That policy might be endangered by proliferation of local rules and standing orders enforced so rigorously that attorneys might be reluctant to hazard an appearance or parties might be reluctant to proceed without local counsel fully familiar with the intricacies of local practice. Cf. Kinder v. Carson, 127 F.R.D. 543 (S.D. Fla. 1989).

This constraint on the enforcement of local directives poses no problem for court administration, for useful and effective local rules and standing orders can be enforced with appropriate caution to counsel or by means that do not impair the rights of the parties.

Rule 84. Forms; *Technical Amendments*

1 *(a) Forms.* The forms contained in the Appendix of Forms are sufficient under
2 the rules and are intended to indicate the simplicity and brevity of statement which the
3 rules contemplate. *The Judicial Conference of the United States may authorize*
4 *additional forms and may revise or delete forms.*

5 *(b) Technical Amendments. The Judicial Conference of the United States may*
6 *amend these rules or the explanatory notes to correct errors in grammar, spelling, cross-*
7 *references, or typography, and to make other similar technical changes of form or style.*

to make them consistent in form and style with statutory changes

COMMITTEE NOTES

SPECIAL NOTE: Mindful of the constraints of the Rules Enabling Act, the Committee calls the attention of the Supreme Court and Congress to these changes, which would eliminate the requirement of Supreme Court and Congressional approval in the limited circumstances indicated. The changes in subdivisions (a) and (b) are severable from each other, and from other proposed amendments to the rules.

The revision contained in subdivision (a) is intended to relieve the Supreme Court and Congress from the burden of reviewing changes in the forms prescribed for use in civil cases, which, by the terms of the rule, are merely illustrative and not mandatory. Rule 9009 of the Federal Rules of Bankruptcy Procedure similarly permits the adoption and revision of bankruptcy forms without need for review by the Supreme Court and Congress.

Similarly, the addition of subdivision (b) will enable the Judicial Conference, acting through its established procedures and after consideration by the appropriate Committees, to make technical amendments to these rules without having to burden the Supreme Court and Congress with such changes. This delegation of authority, not unlike that given to Code Commissions with respect to legislation, will lessen the delay and administrative burdens that can unnecessarily encumber the rule-making process on non-controversial non-substantive matters, at the risk of diverting attention from items meriting more detailed study and consideration. As examples of situations where this authority would have been useful, one might cite the numerous amendments that were required to make the rules "gender-neutral," section 11(a) of P.L. 102-198 (correcting a cross-reference contained in the 1991 revision of Rule 15), and the various changes contained in the current proposals in recognition of the new title of "Magistrate Judge" pursuant to a statutory change.

1992

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MINUTES

Advisory Committee on Civil Rules

November 1992

The Advisory Committee on Civil Rules met on November 12, 13, and 14, 1992, at the Westin Hotel, Denver, Colorado. The meeting was attended by Judge Sam C. Pointer, Chairman, and committee members Judge Wayne D. Brazil; Carol J. Hansen Fines, Esq; Chief Justice Richard W. Holmes; Dennis G. Linder, Esq.; Dean Mark A. Nordenberg; and Judge Joseph E. Stevens, Jr. Judge William O. Bertelsman, Liaison Member from the Standing Committee on Rules of Practice and Procedure, and Judge Robert E. Keeton, Chairman of the Standing Committee, also attended. Also present were Peter McCabe, Joseph A. Spaniol, and John K. Rabiej of the Administrative Office of the United States Courts; Joe Cecil of the Federal Judicial Center; Ted Hurt of the Department of Justice; Bryan Garner, Esq., of LawProse, consultant to the Standing Committee Style Subcommittee; and Edward H. Cooper, Reporter. Observers included Tripp Baltz, Alfred W. Cortese, Jr., and Joseph Womack.

The meeting began with a report on the progress of the recommendations that were submitted by the Advisory Committee to the Standing Committee at its June, 1992, meeting. The Standing Committee determined to hold Evidence Rule 702 for review by the reconstituted Advisory Committee on Evidence Rules, and made changes to Civil Rule 11 and some portions of Civil Rule 26. Civil Rules 83 and 84 were held back to provide an opportunity to achieve uniformity in the parallel submissions by several advisory committees. With these modifications, the recommendations of the Advisory Committee were submitted to the Judicial Conference. The Judicial Conference made changes in the Civil Rule 4 provisions affecting waiver of service by foreign defendants and determined not to send Civil Rule 56 to the Supreme Court. With these changes, the recommendations have been submitted to the Supreme Court.

Civil Rules 83, 84

Rules 83 and 84 were held back by the Standing Committee at its June meeting to seek uniform language for the parallel rules submitted by different advisory committees.

Rule 84 was discussed first. It was agreed that the draft, with changes in style to conform to the style system being developed by the Style Subcommittee of the Standing Committee, was in proper form for submission to the Standing Committee. The Chairman and Reporter were authorized to negotiate changes in language if appropriate to conform with the versions reported by other committees.

Discussion of Rule 83 focused first on subdivision (d).

Subdivision (d) of the draft rule would authorize district courts to adopt experimental local rules inconsistent with national rules adopted under 28 U.S.C. §§ 2072 or 2075. The experimental rules must be approved by the Judicial Conference and be limited to a maximum life of five years. Some concern was expressed about the length of time that might be required to secure approval by the Judicial Conference. It was suggested that the process would require review by the Advisory Committee and Standing Committee, leading to submission to the Judicial Conference. At the same time, it was believed that this process could be made to work rapidly. It was pointed out that the time required to secure approval need not diminish the five-year length of an experimental rule, since the rule could be made effective upon approval.

Discussion of the draft focused primarily on the tension between the local experimentation encouraged by the Civil Justice Reform Act and the provisions of the Rules Enabling Act, including the goal of national rule uniformity. Local plans adopted under the Civil Justice Reform Act are generating a wide variety of local practices that must soon be evaluated. That process will take some years yet, and it was recognized that national uniformity will not be attainable until that process is worked through. Discussion of the difficulty of fitting the experimental rules process proposed for Rule 83(d) with current local plans led to the conclusion that it would be better to defer consideration of the proposal to 1994 or 1995. A motion to defer consideration passed unanimously.

Attention then turned to proposed Rule 83(c), which protects against "forfeiture of rights as a result of negligent failure to comply with a requirement of form" imposed by a local rule. The discussion in part emphasized the narrowness of the "form" concept. As examples, a local rule specifying a particular place on a pleading for a jury demand would be a matter of form; a requirement that a witness list include a summary of testimony would be a matter of substance. The forfeiture of rights concept also was discussed, noting that imposition of financial sanctions on a party does not involve a forfeiture of rights. Other points made were that the rule is limited to negligent violations--the problem of deliberate flouting of local rules by counsel from other places is outside the rule; and that sanctions may be imposed on counsel for negligent violations.

With amendments of the Committee Note to reflect the discussion, a motion to send forward Rule 83 was adopted by vote of six to one.

Rule 43

The proposed amendment of Rule 43(a) would do two things. The first change would establish the power of the court to permit or require written presentation of part or all of the direct examination of a witness in a nonjury trial. This proposal reflects the fact that a number of courts have adopted this practice, particularly in bankruptcy proceedings. Some courts

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regulatory agencies cannot demand production of information they do not know about; they are not adequately staffed to follow all litigation all around the country. There is a need to scrutinize carefully the extent of the possible problems with protective orders. There is a view that they are desirable because they facilitate discovery. More often than not, however, "good cause" is not shown — the parties stipulate, or the judge simply orders protection. Even if the primary purpose of litigation is to resolve private disputes, it is wrong to conclude that courts have no role in protecting the public interest. There is only anecdotal information about harms to public interests, much of it arising from automobile crash litigation including such matters as the risks of rear-seat lapbelts, sidesaddle gas tanks, and crash-testing. Perhaps courts should not be required to inquire into every stipulated protective order, but at least the parties should be required to stipulate that there is no public interest involved. The bill now pending in fact would require the court to make findings in each case. And courts will be able to administer a "public health or safety" standard.

Stephen Yagman, Esq., testified on Rule 83. He would oppose any action that might weaken the requirement that orders by individual judges be consistent with the Federal Rules and local rules. His own experience litigating 42 U.S.C.A. § 1983 actions in a small firm shows that there are far too many standing orders, as set out in his written statement. It is very difficult to achieve effective review of standing orders by an appellate court. The rule should be further amended to provide effective means of enforcement. It is not clear what authority the Judicial Council of a Circuit has to review standing orders under 28 U.S.C. §§ 332 and 2071. Perhaps a committee of judges should be established in each district to review the standing orders of that district on an ongoing basis. He also urged that Rule 30 should be amended to allow the attorney taking a deposition to administer the oath or affirmation, saving the cost of having a court reporter attend. Finally, he urged that Rule 45 should be amended so that attendance of a party at trial could be compelled by notice, without need to resort to a subpoena.

MEETING

The meeting began after the hearing concluded. Judge Higginbotham welcomed Judge Stotler and noted that the press of other duties has led Chief Justice Holmes to resign as a member of the Committee.

The draft minutes of the October, 1993, and February, 1994 meetings were approved with corrections.

Comments on Proposed Rules

Discussion of the proposed amendments to Rules 50, 52, and 59 focused in part on the history of the proposal. Each rule now sets 10 days as the period for these post-trial motions, but the period is allowed variously to "serve" the motion, to "file and serve" the motion, or to "make" the motion. The Bankruptcy Rules Committee suggested that the rules be changed so that each allows 10 days from entry of judgment to file the motion. This suggestion drew from the desire to further integrate bankruptcy practice with practice under the Civil Rules. A parallel change has been proposed for Appellate Rule 4. Filing was chosen as the requirement because ordinarily it is an objective phenomenon that can be easily verified at the clerk's office. Some concern was expressed with the difficulty of accomplishing timely filing by lawyers located in remote areas.

It was urged on behalf of the Bankruptcy Rules Committee that the Note to Rule 59 should be revised by adding the information that Bankruptcy Rule 9006(a) treats "intervening Saturdays, Sundays, and legal holidays" differently than Civil Rule 6(a). This request was adopted.

A motion to send Rules 50, 52, and 59 to the Standing Committee for approval, with the addition to the Rule 59 note, was adopted.

Rule 83

The Bankruptcy Rules Committee recommended that the proposed Rule 83(a)(2) reference to "negligent" failure to comply with a local rule requirement of form be changed to "nonwillful." The change reflects the prospect that read literally, the proposal would not reach an unavoidable failure to comply. The Committee accepted this recommendation without dissent.

The discussion of proposed Rule 83(b) focused on the question whether it might be possible to do something more effective to restrict or eliminate standing orders. Several Committee members thought it would be desirable to reduce drastically the use of standing orders. It was noted, however, that past efforts to reduce even the use of local rules have proved difficult; efforts to reduce the use of individual judge standing orders seem all the more likely to prove difficult.

A motion to send Rule 83 to the Standing Committee for approval was adopted.

Rule 84

Discussion began with the proposal to add a new Rule 84(b). It was suggested that the proposal is ultra vires. The Rules

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December 17, 1999

Honorable Paul Niemeyer
U.S. Court of Appeals for the Fourth Circuit
101 West Lombard Street
Baltimore, Maryland 21201

Re: Report on Local Rules

Dear Judge Niemeyer:

For your information, I have enclosed a copy of the report and recommendation on local rules prepared by the ABA Section of Litigation. The Recommendation has been modified somewhat and has now been endorsed by a number of ABA entities, including the Judicial Division.

The ABA House of Delegates will consider this proposal at its meeting in Dallas in February. Unless and until the House of Delegates approves the proposal, it is not the official policy of the ABA.

I wanted you to see the latest version, which is slightly different from a version that I provided John Rabiej a month or two ago.

Once again, the assistance of Ed Cooper, Lee Rosenthal, Rick Marcus, and Mary Squiers was invaluable.

Very truly yours,

Scott J. Atlas

Scott J. Atlas

Enclosures

cc: Mr. John Rabiej *(w/Enclosures)*
Hon. Lee Rosenthal *(w/Enclosures)*
Prof. Edward H. Cooper *(w/Enclosures)*
Ms. Mary Squiers *(w/Enclosures)*

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SECTION OF LABOR AND EMPLOYMENT LAW
TORT AND INSURANCE PRACTICE SECTION
STANDING COMMITTEE ON FEDERAL JUDICIAL IMPROVEMENTS

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED THAT the ABA urges compliance with the following principles in connection with the adoption or modification of any of the Federal Rules of Civil Procedure (the "Civil Rules"), local rules adopted or modified in any federal district applicable to all cases in all the courts of that district ("local rules"), and rules or standing orders of general applicability adopted or modified by an individual federal district judge to regulate practice in that judge's court ("individual court rules"):

1. The local rules of every federal district and the individual court rules of every federal district court should be conveniently and fully accessible to the public in both written and electronic format in a single national location. In addition, the clerk of each district should maintain and make readily available to the public that district's local rules and the individual court rules adopted by each judge in that district.

2. The uniform numbering system required by Rule 83 of the Civil Rules should be universally implemented.

3. Variations on procedures prescribed by the Civil Rules or by local rules should be accomplished by issuance of case-specific orders that are tailored to each case, rather than by adoption of additional local rules or individual court rules.

4. In general, a Civil Rule should authorize a federal district to opt out of the Civil Rule only under very limited circumstances when there is a clear need for a local exception, and a similar limit should apply to a local rule that authorizes an individual judge to opt out of the local rule.

December 17, 1999
Word - Houston:29806.1

125-000661

REPORT

Federal courts have had rulemaking power from their inception.[1] The exercise of that power, however, was severely limited by the Conformity Act, which compelled federal district courts to follow the procedures of the states in which they sat.[2]

Modern authority to adopt local rules dates to 1938, with the adoption of Rule 83 of the Federal Rules of Civil Procedure (the "Civil Rules"), which authorized each federal district, acting by a majority of its judges, to make and amend rules ("local rules") regulating that district's practice in any manner "not inconsistent with" the Civil Rules.[3] The premise of Rule 83 was to permit courts to deal with local docket control matters and gaps in the national rules.[4]

This report provides a chronology of events affecting the process of adopting local rules, demonstrates the benefits and pitfalls of local rules, and recommends improvements for courts' local rules practices.

1. Overview of Positives and Negatives of Local Rules

Since 1938, local rules generally have proven very useful. They have addressed issues that were not covered by the Civil Rules and helped keep the Civil Rules relatively brief. They have standardized routine court tasks and added predictability by communicating standard court practices to the bar. They have provided flexibility to accommodate local docket circumstances and professional habits that derived from local state practice. They have facilitated experimentation with new procedural ideas. Compared to the lengthy and complex Enabling Act process for amending a Civil Rule,[5] changing a local rule has been easy and quick.

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1 Note, *Rule 83 and the Local Federal Rules*, 67 COLUM. L. REV. 1251, 1253-54 & nn. 8-9 (1967) (citing statutes dating back to 1792); *see* JACK B. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 117 (1977).

2 Note, *supra* note 1, 67 COLUM. L. REV. at 1253.

3 Rule 83, *in* 1 F.R.D. cxlviii (1940). *See also* Act of June 25, 1948, c. 646, 62 Stat. 961 (codified at 28 U.S.C. § 2071); Historical and Statutory Notes, 28 U.S.C.A. § 2071, at 523 (West 1994) (section 2071 consolidates several statutes); Note, *supra* note 1, 67 COLUM. L. REV. at 1253-55 & nn.10-11 (quoting pre-1938 laws).

4 12 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3151, at 494, 496 (2d. ed. 1997) [hereinafter "WRIGHT, MILLER & MARCUS"].

5 *See, e.g., id.* § 3152, at 497-98. The process is described in detail in *Procedures for the Conduct of Business by the Judicial Conference Committee on Rules of Practice and Procedure, in* 181 F.R.D. 162-69 (1999); and Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assentions: An Exorcism of the Bogy of Non-Transsubstantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2119-24 (1989).

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But the use of local rules has not been devoid of problems and controversy. Some local rules have been ill-advised. Many have been duplicative of — and others inconsistent with — the Civil Rules. The sheer volume of local rules and individual court rules in some districts combined with an inadequate reporting system have deprived many litigators of effective access to these rules. In some districts, a current set of local rules has been difficult to locate. Even easy accessibility and universal compliance with the uniform numbering system mandated by Rule 83, however, could not avoid significant burdens on practitioners who appear infrequently in a particular federal district court.

2. *1940 Study by Special Committee of U.S. Judicial Conference*

In 1940, a committee of federal district judges appointed by the Judicial Conference of the United States (the "Judicial Conference") to examine local rules and "make recommendations so that the greatest practicable degree of uniformity throughout the country should be secured," reported finding that many new local rules adopted pursuant to Rule 83 were "not in complete harmony" with the Civil Rules and "strongly recommend[ed] that no additional local rules be promulgated except when experience has shown that a pressing need for them exists."[6] At the same time, the Committee acknowledged that local rules were needed to deal with certain matters and could prove a useful source of suggestions for future rules revisions.[7]

3. *Problems Identified by Studies in the 1960's*

Two student law review articles in the mid-1960's described studies demonstrating that many local rules were inconsistent with the Civil Rules.[8] Moreover, some courts recognized that lawyers from other districts who were unaware of local rules—and even more oblivious to standing orders adopted by individual district judges to regulate practice in their own courtrooms ("individual court rules")—occasionally found the rules becoming "a series of traps."[9]

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[6] *Report on Local District Court Rules*, 4 Fed. R. Serv. 969-70 (Callaghan 1941).

[7] 12 WRIGHT, MILLER & MARCUS, *supra* note 4, § 3152, at 496; Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2016-17 (1989).

[8] *See* Note, *supra* note 1, 67 COLUM. L. REV. at 1259-63; *id.* at 1251-52 ("the majority of district courts have, in promulgating rules, ignored the principles of simplicity, scarcity, and uniformity which guided the formulation of the [Civil] Rules"); Note, *The Local Rules of Civil Procedure in the Federal District Courts—A Survey*, 1966 DUKE L.J. 1011, 1012 (local federal rules are a "maze of decentralized directives, encumbered by trivia and often devoid of explanation").

[9] *See, e.g., Woodham v. American Cystoscope Co.*, 335 F.2d 551, 552 (5th Cir. 1964) (quoted in 12 WRIGHT, MILLER & MARCUS, *supra* note 4, § 3152, at 497).

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4. *1977 Criticisms and Recommendations by Judge Jack Weinstein*

In 1977, a leading commentator on the rulemaking process, Judge Jack Weinstein, described the explosion of topics covered by local rules,[10] including areas more appropriately left to either congressional legislation or the Civil Rules.[11] He criticized the lack of public notice and debate in the local rules adoption process.[12] He urged that local rules be adopted only after public notice and hearing, and become effective only after being approved by the Judicial Conference or its Committee on Rules of Practice and Procedure (the "Standing Committee on Rules").[13] He recommended elimination of most individual court rules.[14] He also insisted that all local rules and individual court rules "should be made available in a readily usable and up-to-date form to the bench, bar, and public."[15]

5. *1985 Amendments to Rule 83*

A 1985 House Judiciary Committee Report noted the benefits of local rules, including tailoring federal practice to the local state court practice, providing guidance in areas that are not covered by the Civil Rules, and standardizing routine court tasks.[16] The Report acknowledged, however, that local rules have been criticized for their sheer numbers as well as their potential conflict with the letter and spirit of the Civil Rules and with a number of federal statutes.[17]

Rule 83 was amended in 1985 to (1) mandate public notice and an opportunity to comment before local rules are adopted, (2) require that a copy of each newly adopted rule be provided to the circuit judicial council and the Administrative Office of the U.S. Courts (the "AO"), and (3) authorize a circuit council to modify or abrogate local rules within a circuit.[18] The Advisory Committee expressed the "expectation" that judicial councils would actively review all local rules, new and

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[10] *See* WEINSTEIN, *supra* note 1, at 118-20.

[11] *See, e.g., id.* at 130-33 (use of depositions in admiralty cases; six-person juries; restrictions on public comments by attorneys).

[12] *Id.* at 133-37.

[13] *Id.* at 150-51.

[14] *Id.* at 151-52.

[15] *Id.* at 152.

[16] H.R. Rep. No. 422, 99th Cong., 1st Sess. 14 (1985).

[17] *Id.* at 14-17; *see also* David M. Roberts, *The Myth of Uniformity in Federal Civil Procedure: Federal Civil Rule 83 and District Court Local Rulemaking Powers*, 8 U. PUGET SOUND L. REV. 537, 540-45 (1985) (citing numerous examples of such conflicts).

[18] *See Court Rules*, 105 F.R.D. 179, 202, 226-27 (1985).

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preexisting, for validity and consistency with the Civil Rules and that each district would adopt procedures for reviewing individual court rules.[19] The amendment also added the requirement that individual court rules should be "not inconsistent with" local rules or the Civil Rules.[20] The amendment did not, however, articulate a clear, workable standard against which local rules could be evaluated.[21] Nor did the amendment make compliance with any of Rule 83's requirements a prerequisite to enforcing either a local rule or an individual court rule.

6. ***Local Rules Project Study and Recommendations, Late 1980's***

In 1984, the Judicial Conference had authorized the Standing Committee on Rules to review the many local rules governing civil cases that had been adopted. The Standing Committee on Rules, in turn, established a Local Rules Project to review the local rules of the 94 federal districts.

In 1986, the Local Rules Project collected approximately 5,000 local rules, not counting subparts, from the 94 federal districts — excluding other general orders and internal operating procedures.[22] The rules addressed the entire spectrum of federal practice, such as attorney admissions and discipline, the various stages of trial, including pleading and filing requirements, discovery procedures, and how costs are taxed.[23] The Project categorized the rules into 103 separate topics.[24]

Some districts had adopted only one or two local rules, while others had hundreds.[25] The Local Rules Project found that some local rules supplemented or expanded the existing Civil Rules—*e.g.*, by defining the content and scope of the pretrial conferences and scheduling requirements outlined in Rule 16, or providing greater detail on motion practice than in Rule 7(b); while others appeared to expand federal statutory mandates—*e.g.*, in habeas corpus proceedings and in the authority given to magistrates.[26] Other local rules dealt with procedures that were purely administrative and were not adequately covered elsewhere—*e.g.*, courtroom security and the custody of exhibits.

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[19] Advisory Committee Note, *id.* at 227.

[20] *See id.* at 226, 228.

[21] Roberts, *supra* note 17, 8 U. PUGET SOUND L. REV. at 554 (the standard of "inconsistency" with the Civil Rules is inadequate).

[22] *See* Committee on Rules of Practice and Procedure, Judicial Conference of the United States, Local Rules Project, pt. I, at 1 (Apr. 1989) [hereinafter "Local Rules Project"].

[23] *Id.*

[24] Subrin, *supra* note 7, 137 U. PA. L. REV. at 2021. For a list of those topics, see 12 WRIGHT, MILLER & MARCUS, *supra* note 4, § 3154, at 537-39 n.12.

[25] Subrin, *supra* note 7, 137 U. PA. L. REV. at 2020.

[26] 1989 Local Rules Project, *supra* note 22, pt. I, at 2.

The Local Rules Project also found that the numbering systems for local rules varied greatly among districts, complicating a practitioner's ability to find rules concerning a certain topic.[27]

In November 1987, Boston College Law School hosted a conference for a number of leading experts on federal rulemaking for the purpose of "examining and fully discussing the tentative proposals and findings of the Local Rules Project to date."[28] The conferees urged adoption of a uniform numbering system and structure for local rules to make it easier for attorneys to locate them and for legal publishing companies and computer services to index the local rules and cases under them.[29]

The conferees also suggested ways that the courts could draft more effective rules and recommended that outdated or redundant ones be eliminated — including rules that were inconsistent with each other or other federal law, that merely repeated existing federal law, that restated the law only partially or incorrectly, or that unnecessarily added to the number of court directives that must be considered by counsel.[30]

The Boston College conferees disagreed about how diverse local rules among the individual federal districts should be. Some argued that the federal system should be as uniform as possible, so that local rules should be standardized, with the best ones incorporated into the Civil Rules as an appendix. Others believed that decentralization is desirable (by permitting adjustment to local conditions, facilitating experimentation, and creating efficiencies) and that the individual federal district courts should merely be encouraged to eliminate obviously inconsistent or unnecessary rules.[31]

All seemed to agree, however, that voluntary implementation would be the most successful way to proceed, at least initially. They recommended that the Project send to each federal district a list of questionable rules in that district so that the district could decide whether to rescind any repetitive or otherwise inappropriate local rules.[32]

After the conference, the Local Rules Project analyzed every local rule to determine whether it (1) repeated existing law (*i.e.*, the Civil Rules and other federal law), (2) conflicted with existing law, (3) should form the basis of a Model Local Rule for consideration by each federal district court,

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[27] *Id.* pt. II, at 1.

[28] *Id.* pt. I, at 5-6.

[29] *Id.* at 6.

[30] *Id.* at 7.

[31] *Id.* at 7-8.

[32] *Id.* at 8.

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(4) should remain subject to local variation, or (5) should be reviewed by the Standing Committee on Rules' Civil Rules Advisory Committee for possible inclusion in the Civil Rules themselves.[33]

The Project developed an outline using the structure of the Civil Rules, with other topics added that were covered by local rule.[34] This outline was then used to identify those federal districts with rules falling within the above-noted five categories (*e.g.*, whether it repeated existing law, *etc.*). The Project found 809 instances of possible repetition of existing law and 837 instances of possible inconsistences.[35]

7. ***1988 Statutory Revisions to Local Rules Adoption Process***

In 1988 hearings, the House Judiciary Committee "found a proliferation of local rules, many of which conflict with national rules of general applicability."[36] One widely cited example was an individual court rule adopted by several federal district judges in the Second Circuit that prohibited attorneys from making a motion without the judge's permission. Despite frequent and outspoken complaints from members of the private bar, the barrier to interlocutory appeal[37] made effective appellate review of such rules impossible in many cases and left such rules intact for years.[38] The Second Circuit ultimately invalidated such rules.[39]

In response to these problems, Congress enacted 28 U.S.C. § 332(d)(4), effective December 1, 1988, explicitly requiring periodic review by each circuit judicial council of all local rules to ensure that they are consistent with the Civil Rules.[40] The same law also codified, in 28 U.S.C. § 2071(b), the 1985 changes to Rule 83 requiring that appropriate public notice and an opportunity for comment

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[33] *Id.* at 9.

[34] For a full list of topics, see 12 WRIGHT, MILLER & MARCUS, *supra* note 4, § 3154, at 540-42.

[35] *Id.* § 3152, at 502; Subrin, *supra* note 7, 137 U. PA. L. REV. at 2021.

[36] H.R. Rep. No. 100-889, at 27, U.S. CODE CONG. & ADMIN. NEWS 1988, at 5988 (1988); *accord*, H.R. Rep. No. 99-422, at 16 (1985).

[37] *See* 28 U.S.C. §§ 1291-92 (1993).

[38] David Siegel, *Commentary on 1988 Revision, in* 28 U.S.C.A. § 332, at 553 (West 1993).

[39] *See Richardson Greenshields Securities, Inc. v. Lau*, 825 F.2d 647, 649, 652-53 (2d Cir. 1987). *See also Rodgers v. U.S. Steel Corp.*, 508 F.2d 152 (3d Cir. 1975) (invalidating local rule that was outside district court's statutory authority and "raise[d] serious first amendment concerns").

[40] Judicial Improvement and Access to Justice Act, Pub. L. No. 100-702, tit. IV, § 403(a)(2), 102 Stat. 4651 (codified at 28 U.S.C. § 332(d)(4) (1993)).

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be provided for all local rules and that copies of all newly prescribed local rules be furnished to the judicial council and the AO.[41] The test for inconsistency articulated in the House Report was "whether the local rule can co-exist with the general rule without negating the purpose of the general rule."[42] While requiring judicial councils to review local rules, the new law did not provide for suspending enforcement of a local rule until the judicial council actually acts.[43]

8. ***Enactment of CJRA in 1991 and of Amendments to Civil Rule 26 in 1993***

The enactment in 1990 of the Civil Justice Reform Act ("CJRA") encouraged each district to adopt a plan designed to reduce the cost and delay of civil litigation. The result was the adoption of even more local rules and a diminished focus on maintaining a uniform numbering system and avoiding repetitive rules.[44]

In 1991, in response to the CJRA, the Civil Rules Advisory Committee proposed amending Rule 83 to explicitly permit a district, subject to Judicial Conference approval, to adopt experimental local rules inconsistent with the Civil Rules, provided they were consistent with applicable federal statutes and limited in duration to five years or less.[45] During the public comment period, the Civil Rules Advisory Committee received some criticisms of this proposal but recommended adoption of the revision largely unchanged.[46] Several months later, the Standing Committee on Rules recommitted this proposed change to the Civil Rules Advisory Committee for further study.[47] The proposed amendment never resurfaced.

After many years of public debate, in 1993 the Judicial Conference included in amendments to the Civil Rules a revised Rule 26 that included a procedure requiring the disclosure of the identity

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[41] *Id.* § 403(a)(1), 102 Stat. 4650 (codified at 28 U.S.C. § 2071(b) (1994)).

[42] H.R. Rep. No. 99-422, at 27 (1985).

[43] *See also* David Siegel, *Changes in Federal Jurisdiction and Practice Under the New Judicial Improvements and Access to Justice Act, in* 123 F.R.D. 399, 410 (1988) (arguing that individual court rules exhibit many of the same problems as local rules, so they should be subject to the same rulemaking requirements as local rules).

[44] *See* 12 WRIGHT, MILLER & MARCUS, *supra* note 4, § 3152, at 505-08.

[45] *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence, in* 137 F.R.D. 53, 63, 72, 152-54 (1991).

[46] *See* Letter from Hon. Sam C. Pointer, Jr., Chairman, Advisory Committee on Civil Rules, to Hon. Robert E. Keeton, Chairman, Standing Committee on Rules, dated May 1, 1992, Ex. B, *in* 146 F.R.D. 519, 533 (1993).

[47] *See* Excerpt from the Report of the Standing Committee on Rules, Sept. 1992, *in* 146 F.R.D. 515, 517 (1993).

of certain witnesses and documents, with each district permitted to opt out of the disclosure procedure.[48] The amendments also added local rule options to other Rule 26 requirements.[49]

9. *1995 Amendment to Rule 83: Numbering System for Local Rules*

Concerned about the difficulty of finding pertinent local rules, the Local Rules Project had proposed that uniform numbering be used to standardize all local rules in parallel with the Civil Rules.[50] In 1995, Civil Rule 83(a)(1) was amended to require that local rules conform to any numbering system prescribed by the Judicial Conference.[51] In March 1996, the Judicial Conference adopted a numbering system for local rules corresponding to the relevant Civil Rules.[52] For example, the designation "LR26.1" would indicate that a given local rule ("LR") is related to Rule 26 and is the first local rule that deals with Rule 26; the second local rule related to Rule 26 would be designated "LR26.2."

The 1995 amendment to Rule 83 also prohibited local rules from duplicating a Civil Rule or an Act of Congress and prohibited individual court rules from contradicting federal law.[53] In addition, the amendment prohibited a loss of rights for either (1) a "nonwillful" failure to comply with a local rule or (2) a failure to follow an individual court rule by someone lacking actual notice of the rule.[54]

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[48] *See* Fed. R. Civ. P. 26(a)(1); *Amendments to Federal Rules of Civil Procedure*, 146 F.R.D. 401, 404, 431-36 (1993); *Notice Concerning Amendments to Federal Rules, in* 151 F.R.D. 145 (1994); *compare Amendments to Federal Rules of Civil Procedures, in* 146 F.R.D. 401, 519, 527 (1993).

[49] *See* Fed. R. Civ. P. 26(a)(4) (requirement of prompt service and filing of initial, expert, and pretrial disclosures); *id.* 26(b)(2) (presumptive limit on number and length of depositions and number of interrogatories); *id.* 26(f) (requirement that parties meet in person and plan for discovery); *id.* 26(d) (prohibition on formal discovery before complying with meet-and-confer requirement of Rule 26(f)). For an overview of the history of the adoption of this provision, see Richard L. Marcus, *Discovery Containment Redux*, 39 B.C.L. REV. 747, 764-68 (1998), and ABA Section of Litigation, Report in Support of Proposed Amendments to the Federal Rules of Civil Procedure Concerning Discovery 1-3 (Jan. 8, 1999) (supporting *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and Evidence, in* 181 F.R.D. 18 (1999)).

[50] 1989 Local Rules Project, *supra* note 22, pt. I, at 6.

[51] *Amendments to Federal Rules of Civil Procedure, in* 161 F.R.D., 149, 149-50, 152, 161 (1995); *Notice Concerning Federal Rules, in* 163 F.R.D. 367 (1995).

[52] 12 WRIGHT, MILLER & MARCUS, *supra* note 4, § 3152, at 503 n.36.

[53] Fed R. Civ. P. 83(a)(1).

[54] *Id.* 83(a)(2) & (b).

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Many district courts (approximately 70% at last count) have adopted the uniform numbering system mandated by Rule 83; eliminated repetitive and inconsistent local rules; and adopted some of the proposed Model Local Rules. The remaining districts, however, never adopted a uniform numbering system, and many of them have not revised their rules along the lines suggested by the Project.

10. ***Late 1990's: Practitioner Dissatisfaction with Rule 26 Opt-Out Provision***

During the last few years, the opt-out provision in the mandatory disclosure section of Rule 26 has come under increasing criticism by commentators in the face of studies reflecting dissatisfaction by practitioners, who have found troublesome the "riotous blooming" of [discovery] rules creating divergent practices in the district courts" that resulted from the opt-out provision.[55]

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[55] Letter from Judge Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to The Chief Justice of the United States and Members of the Judicial Conference of the United States 2(Sept. 1, 1999); *see, e.g.,* ABA Section of Litigation, Report in Support of Proposed Amendments to the Federal Rules of Civil Procedure Concerning Discovery 6 (accompanying letter from Lorna G. Schofield, Co-Chair, Discovery Task Force, ABA Section of Litigation, to Secretary of the Standing Committee on Rules, Jan. 8, 1999) (urging nationwide uniformity of discovery rules except as provided in Rule 83's provisions allowing local rules); Thomas E. Willging *et al.*, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C.L. REV. 525, 526, 541-43, 582-83 (1998) (Federal Judicial Center survey on discovery sent to 2,000 lawyers in mid-1997 revealed that 60% of attorneys with opinions on the topic responded that nonuniformity in the disclosure rules across districts creates moderate or serious problems and that 68% wanted a national rule on initial disclosure); Paul V. Niemeyer, *Here We Go Again: Are the Federal Discovery Rules Really in Need of Amendment?*, 39 B.C.L. REV. 517, 518-23 (1998) (suggesting that the local district court management plans required by the CJRA in 1990 and the opt-out provision adopted in the 1993 Civil Rules amendments have given rise to the question of whether the federal rules for discovery should be made uniform nationally and noting that most lawyers responding to the 1997 FJC survey wanted greater uniformity of discovery rules); Judicial Conference of the United States, *Final Report on the Civil Justice Reform Act of 1990*, at 45 (May 1997), *in* 175 F.R.D. 62, 107 (1998) (the CJRA opt-out process created by the 1993 amendments "raises serious questions about the relative balance between national uniformity and local option in development of litigation procedure"); *cf.* Statement of ABA on the Federal Court Rulemaking Process to the Subcommittee on Long Range Planning of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States 6 (Mar. 1994) (criticizing likely impact of 1993 amendments' opt-out provision on goal of having uniform national rules of procedure); *id.* at 8 (urging rules drafters to assess further the possibility of conflicts between local rules and the Civil Rules and to explicitly state which rules govern in case of conflict).

11. ***1999 Elimination of Local Rule Options in Rule 26***

In response to these concerns, in 1998 the Civil Rules Advisory Committee proposed to restore national uniformity to discovery by deleting most of the local rule options from Rule 26.[56] In September 1999, the Judicial Conference approved these changes.[57]

12. ***The Difficulty of Policing Local Rules***

Despite the increased review of local rules prescribed by Rule 83 and by Congress, policing inconsistencies between local and national rules has proved difficult for several reasons. Lawyers lack the opportunity and incentive to challenge local rules, while judicial council review has varied in thoroughness and can be problematic, and the standard for invalidating a local rule has not been entirely clear.[58]

13. ***Current Views of Standing Committee on Rules Concerning Reform of Local Rules Process***

The increasing proliferation of inconsistent local rules and the failure of many districts to comply with Rule 83's numbering requirement have become the subjects of increasing interest for the Standing Committee on Rules and its Civil Rules Advisory Committee.[59]

For a description of the variety of responses to the 1993 amendments among the various districts, see Donna Stienstra, *Implementation of Disclosure in the United States District Courts, with Specific Attention to Courts' Responses to Selected Amendments to Federal Rule of Civil Procedure 26* (Mar. 30, 1998), *in* 182 F.R.D. 305 (1999).

[56] *See, e.g., Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and Evidence*, *in* 181 F.R.D. 18, 72-81 (1999).

[57] *See* AO, *News Release* (Sept. 28, 1999) <http://www.uscourts.gov/Press_Releases/judconf 091599.htm>.

[58] *See* 12 WRIGHT, MILLER & MARCUS, *supra* note 4, § 3153, at 511-35; Note, *supra* note 1, 67 COLUM. L. REV. at 1263-65 ("only a foolhardy lawyer" would defy a local rule, hoping for a favorable appellate ruling); WEINSTEIN, *supra* note 1, at 121 (lawyers and local bar associations are "reluctant to cross swords" with local judges by contesting local rules in litigation).

[59] *See, e.g.,* Minutes of Standing Committee on Rules 9-10 (Jan. 7-8, 1999) (describing several changes to Rule 83 being given preliminary consideration by the Advisory Committee on Civil Rules, including conditioning a rule's enforceability on its availability for public comment and its approval by the judicial council of the circuit; noting that the Advisory Committee on Civil Rules "would like to see greater national procedural uniformity and fewer local rules"); Minutes of Civil Rules Advisory Committee 30 (Nov.

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In response to the failure of many judicial councils to periodically review the local rules for consistency with the Civil Rules as required by 28 U.S.C. § 332(d)(4) and out of continuing concern about the difficulty of finding many districts' local rules, the Civil Rules Advisory Committee is considering more drastic action.[60] At its November 1998 meeting, the Advisory Committee reviewed several versions of a proposed amendment to Rule 83(a)(1). One version would require the AO to publish local rules electronically by means that provide convenient public access and to review all new local rules for conformity with federal statutes and the Civil Rules. No local rule could be enforced until 60 days after the district had given the required notice to the judicial council and the AO and until the rule had been made available to the public by convenient means, including electronic means "where feasible."[61] If the AO were to conclude that a local rule did not conform, it must report that finding to both the district and the judicial council; no court could enforce any reported rule until it had been approved by the judicial council.[62]

14. Approval of New Local Rules Project, 1999

At the June 1998 meeting of the Standing Committee on Rules, the Committee Chairman asked the Director of the Local Rules Project to consider preparing and submitting a proposal requesting funding for a new national survey of local rules.[63] At its January 1999 meeting, the Standing Committee on Rules approved such a proposal for a two-year (and if needed, three-year) project. The Director of the Local Rules Project intends to follow the same general approach in the new study as that used in the previous study.[64]

15. Study by ABA Section of Litigation Task Force, 1998-1999

In 1998-99, the Federal Practice Task Force of the Section of Litigation conducted an abbreviated review of the local rules in a number of predominantly urban districts. The Task Force found that the quantity of local rules has continued to grow, that the topics they cover continue to

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11-12, 1998) (explaining that the Standing Committee on Rules is "attempting to encourage hold-out districts to conform to the uniform numbering system as required by Rule 83(a)).

[60] *See* Minutes of Civil Rules Advisory Committee 32-33 (Nov. 11-12, 1998).

[61] *Id.* at 33.

[62] *Id.* at 31.

[63] *See* Minutes of Standing Committee on Rules 42 (June 18-19, 1998). *See generally* Minutes of Standing Committee on Rules 23-24 (Jan. 7-8, 1999) (citing policy issues that should be decided before beginning a new study of local rules).

[64] *See* Minutes of Standing Committee on Rules 37 (June 14-15, 1999).

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be remarkably diverse, and that the local rules in many districts remain difficult to find, especially for lawyers who do not regularly practice there.

The Task Force also identified problems with individual court rules. For example, after years of study and debate, the Southern District of New York recently proposed a set of "model individual rules," but these were adopted in their entirety by only 18 of the court's judges (split almost equally between active and senior judges). Another 15 judges adopted some variant of them, while 10 judges retained their existing rules. The result, while an improvement, still leaves largely uncorrected the principal problem with the old system, as described by one lawyer: "Practitioners were forced to look at the Federal Rules, the Local Rules and then the individual judge's rules. Then they had to reconcile the three to make sense of the mess."[65]

The Task Force noted that the Commonwealth of Virginia recently enacted a law providing that local court rules "shall be strictly limited to only those rules absolutely necessary to promote proper order and decorum and the efficient use of courthouse facilities and clerks' offices."[66] The implementing paragraph of the legislation provides that "[i]t is the clear intent of the General Assembly that there be no local rules and that any docket control procedures not affect the substantive rights of the litigants."[67]

16. Need for Accessibility of Local Rules

Members of the Civil Rules Advisory Committee have expressed the view that "[t]he most important single thing to ensure is that all litigants can have assured access to all local rules for their district in a single, central place."[68] At minimum, local rules and individual court rules should be available electronically in one central location on the Internet (in addition to any separate home pages for districts that maintain a web site), perhaps as an adjunct to the Federal Judiciary's website, using the AO's expertise. For districts that have a home page on which their local rules are posted and timely updated, the Federal Judiciary's home page could simply include a hyperlink to each such district's local rules. In addition, each such district could easily include on its home page a hyperlink to the Federal Judiciary's home page, so that each practitioner seeking the local rules of several courts need remember only a single address.

There are several realistic options available to maximize compliance with such a rule. For example, the proposed changes to Rule 83(a)(1) currently being considered by the Civil Rules Advisory Committee have much to commend them, in particular the prohibition on any local rule becoming effective until 60 days after it has been made available in electronic format to the AO,

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[65] Deborah Pines, *Federal Judges Adopt New Individual Rules*, N.Y.L.J., July 20, 1998, at 1, 5.

[66] VA. CODE ANN. § 8.01-4 (Michie 1999).

[67] Dawn Chase, *A Challenge to 'Local Rules,'* VA. LAW. WEEKLY, Apr. 26, 1999, at B-1.

[68] Minutes of Civil Rules Advisory Committee 32 (Nov. 12-13, 1998).

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which would be responsible for operating and regularly updating the rules section of the web site. Individual court rules could be included in this procedure. A number of districts (*e.g.*, Central District of Illinois, Southern District of New York, Central District of California) already post their local rules and individual court rules on a home page.[69]

17. ***Possible Need for Future Changes***

Anecdotal evidence and a cursory review of selected districts strongly suggest that the problem of too many local rules being inconsistent with or duplicative of the Civil Rules and too many individual court rules conflicting with or duplicating pertinent local rules or the Civil Rules, persists. If the new Local Rules Project confirms a widespread problem with local rules, then a more far-reaching revision of Rule 83(a)(1) — such as the proposal currently being discussed by the Civil Rules Advisory Committee that would impose an AO review-and-report requirement and judicial council action as preconditions to enforcement of all new local rules — will likely become even more attractive.

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[69] For a hyperlink to the home page of dozens of trial and appellate courts, by circuit, see <http://www.uscourts.gov/links.html>.

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APPENDIX B

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Rule 26. General Provisions Governing Discovery; *Duty of Disclosure*

1 **(a)** ***Required Disclosures;*** ~~**Discovery**~~ **Methods** ***to Discover Additional Matter.***

2 ***(1) Initial Disclosures.*** *Except to the extent otherwise stipulated or directed*

3 *by the court, a party shall, without awaiting a discovery request, provide to other*

4 *parties:*

5 *(A) the name and, if known, the address and telephone number of each*

6 *individual likely to have discoverable information relevant to disputed facts*

7 *alleged with particularity in the pleadings, identifying the subjects of the*

8 *information;*

9 *(B) a copy of, or a description by category and location of, all*

10 *documents, data compilations, and tangible things in the possession, custody,*

11 *or control of the party that are relevant to disputed facts alleged with*

12 *particularity in the pleadings;*

13 *(C) a computation of any category of damages claimed by the disclosing*

14 *party, making available for inspection and copying as under Rule 34 the*

15 *documents or other evidentiary material, not privileged or protected from*

16 *disclosure, on which such computation is based, including materials bearing*

17 *on the nature and extent of injuries suffered; and*

18 *(D) for inspection and copying as under Rule 34 any insurance*

19 *agreement under which any person carrying on an insurance business may be*

20 *liable to satisfy part or all of a judgment which may be entered in the action*

21 *or to indemnify or reimburse for payments made to satisfy the judgment.*

22 *Unless otherwise stipulated or directed by the court, these disclosures shall be made*

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23 *at or within 10 days after the meeting of the parties under subdivision (f). A party*
24 *shall make its initial disclosures based on the information then reasonably available*
25 *to it and is not excused from making its disclosures because it has not fully*
26 *completed its investigation of the case or because it challenges the sufficiency of*
27 *another party's disclosures or because another party has not made its disclosures.*

28 *(2) Disclosure of Expert Testimony.*

29 *(A) In addition to the disclosures required by paragraph (1), a party*
30 *shall disclose to other parties the identity of any person who may be used at*
31 *trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of*
32 *Evidence.*

33 *(B) Except as otherwise stipulated or directed by the court, this*
34 *disclosure shall, with respect to a witness who is retained or specially employed*
35 *to provide expert testimony in the case or whose duties as an employee of the*
36 *party regularly involve giving expert testimony, be accompanied by a written*
37 *report prepared and signed by the witness. The report shall contain a complete*
38 *statement of all opinions to be expressed and the basis and reasons therefor;*
39 *the data or other information considered by the witness in forming the*
40 *opinions; any exhibits to be used as a summary of or support for the opinions;*
41 *the qualifications of the witness, including a list of all publications authored*
42 *by the witness within the preceding ten years; the compensation to be paid for*
43 *the study and testimony; and a listing of any other cases in which the witness*
44 *has testified as an expert at trial or by deposition within the preceding four*
45 *years.*

46 *(C) These disclosures shall be made at the times and in the sequence*
47 *directed by the court. In the absence of other directions from the court or*
48 *stipulation by the parties, the disclosures shall be made at least 90 days before*
49 *the trial date or the date the case is to be ready for trial or, if the evidence is*
50 *intended solely to contradict or rebut evidence on the same subject matter*
51 *identified by another party under paragraph (2)(B), within 30 days after the*
52 *disclosure made by the other party. The parties shall supplement these*
53 *disclosures when required under subdivision (e)(1).*
54 *(3) Pretrial Disclosures. In addition to the disclosures required in the*
55 *preceding paragraphs, a party shall provide to other parties the following information*
56 *regarding the evidence that it may present at trial other than solely for impeachment*
57 *purposes:*
58 *(A) the name and, if not previously provided, the address and telephone*
59 *number of each witness, separately identifying those whom the party expects*
60 *to present and those whom the party may call if the need arises;*
61 *(B) the designation of those witnesses whose testimony is expected to be*
62 *presented by means of a deposition and, if not taken stenographically, a*
63 *transcript of the pertinent portions of the deposition testimony; and*
64 *(C) an appropriate identification of each document or other exhibit,*
65 *including summaries of other evidence, separately identifying those which the*
66 *party expects to offer and those which the party may offer if the need arises.*
67 *Unless otherwise directed by the court, these disclosures shall be made at least 30*
68 *days before trial. Within 14 days thereafter, unless a different time is specified by*

69 *the court, a party may serve and file a list disclosing (i) any objections to the use*
70 *under Rule 32(a) of a deposition designated by another party under subparagraph*
71 *(B) and (ii) any objection, together with the grounds therefor, that may be made to*
72 *the admissibility of materials identified under subparagraph (C). Objections not so*
73 *disclosed, other than objections under Rules 402 and 403 of the Federal Rules of*
74 *Evidence, shall be deemed waived unless excused by the court for good cause shown.*
75 *(4) Form of Disclosures; Filing. Unless otherwise directed by order or local*
76 *rule, all disclosures under paragraphs (1) through (3) shall be made in writing,*
77 *signed, served, and promptly filed with the court.*
78 *(5) Methods to Discover Additional Matter.* Parties may obtain discovery
79 by one or more of the following methods: depositions upon oral examination or
80 written questions; written interrogatories; production of documents or things or
81 permission to enter upon land or other property *under Rule 34 or 45(a)(1)(C),*
82 for inspection and other purposes; physical and mental examinations; and
83 requests for admission. *Discovery at a place within a country having a treaty with*
84 *the United States applicable to the discovery must be conducted by methods*
85 *authorized by the treaty except that, if the court determines that those methods are*
86 *inadequate or inequitable, it may authorize other discovery methods not prohibited*
87 *by the treaty.*
88 **(b) Discovery Scope and Limits.** Unless otherwise limited by order of the court
89 in accordance with these rules, the scope of discovery is as follows:
90 **(1) In General.** Parties may obtain discovery regarding any matter, not
91 privileged, which is relevant to the subject matter involved in the pending action,

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92 whether it relates to the claim or defense of the party seeking discovery or to the
93 claim or defense of any other party, including the existence, description, nature,
94 custody, condition, and location of any books, documents, or other tangible
95 things and the identity and location of persons having knowledge of any
96 discoverable matter. ~~It is not a ground for objection that t~~*T*he information
97 sought *need not be* ~~will be in~~admissible at the trial if the information sought
98 appears reasonably calculated to lead to the discovery of admissible evidence.

99 *(2) Limitations. By order or by local rule, the court may alter the limits in*
100 *these rules on the number of depositions and interrogatories and may also limit the*
101 *length of depositions under Rule 30 and the number of requests under Rule 36.* ~~a~~
102 frequency or extent of use of the discovery methods ~~set forth in subdivision (a)~~
103 *otherwise permitted under these rules and by any local rule* shall be limited by the
104 court if it determines that: (i) the discovery sought is unreasonably cumulative
105 or duplicative, or is obtainable from some other source that is more convenient,
106 less burdensome, or less expensive; (ii) the party seeking discovery has had
107 ample opportunity by discovery in the action to obtain the information sought;
108 or (iii) ~~the discovery is unduly burdensome or expensive~~ *the burden or expense of*
109 *the proposed discovery outweighs its likely benefit*, taking into account the needs of
110 the case, the amount in controversy, ~~limitations on~~ the parties' resources, ~~and~~ the
111 importance of the issues at stake in the litigation*, and the importance of the*
112 *proposed discovery in resolving the issues*. The court may act upon its own
113 initiative after reasonable notice or pursuant to a motion under subdivision (c).

114 ~~(2) Insurance Agreements. A party may obtain discovery of the existence~~

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115 ~~and contents of any insurance agreement under which any person carrying on an~~
116 ~~insurance business may be liable to satisfy part or all of a judgment which may~~
117 ~~be entered in the action or to indemnify or reimburse for payments made to~~
118 ~~satisfy the judgment. Information concerning the insurance agreement is not by~~
119 ~~reason of disclosure admissible in evidence at trial. For purpose of this~~
120 ~~paragraph, an application for insurance shall not be treated as part of an~~
121 ~~insurance agreement.~~
122 * * * *
123 **(4) Trial Preparation: Experts.** ~~Discovery of facts known and opinions~~
124 ~~held by experts, otherwise discoverable under the provisions of subdivision (b)(1)~~
125 ~~of this rule and acquired or developed in anticipation of litigation or for trial,~~
126 ~~may be obtained only as follows:~~
127 (A)~~(i)~~ A party may ~~through interrogatories require any other party~~
128 ~~to identify each person whom the other party expects to call as an expert~~
129 ~~witness at trial, to state the subject matter on which the expert is expected~~
130 ~~to testify, and to state the substance of the facts and opinions to which the~~
131 ~~expert is expected to testify and a summary of the grounds for each~~
132 ~~opinion. (ii) Upon motion, the court may order further discovery by other~~
133 ~~means, subject to such restrictions as to scope and such provisions,~~
134 ~~pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses~~
135 ~~as the court may deem appropriate.~~ *depose any person who has been*
136 *identified as an expert whose opinions may be presented at trial. If a report*
137 *from the expert is required under subdivision (a)(2)(B), the deposition shall*

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138 *not be conducted until after the report is provided.*

139 **(B)** A party may, *through interrogatories or by deposition,* discover
140 facts known or opinions held by an expert who has been retained or
141 specially employed by another party in anticipation of litigation or
142 preparation for trial and who is not expected to be called as a witness at
143 trial, only as provided in Rule 35(b) or upon a showing of exceptional
144 circumstances under which it is impracticable for the party seeking
145 discovery to obtain facts or opinions on the same subject by other means.

146 **(C)** Unless manifest injustice would result, (i) the court shall require
147 that the party seeking discovery pay the expert a reasonable fee for time
148 spent in responding to discovery under *this* subdivisions ~~(b)(4)(A)(ii) and~~
149 ~~(b)(4)(B) of this rule~~; and (ii) with respect to discovery obtained under
150 ~~subdivision (b)(4)(A)(ii) of this rule the court may require, and with~~
151 ~~respect to discovery obtained under~~ subdivision (b)(4)(B) of this rule the
152 court shall require, the party seeking discovery to pay the other party a fair
153 portion of the fees and expenses reasonably incurred by the latter party in
154 obtaining facts and opinions from the expert.

155 *(5) Claims of Privilege or Protection of Trial Preparation Materials. When a*
156 *party withholds information otherwise discoverable under these rules by claiming that*
157 *it is privileged or subject to protection as trial preparation material, the party shall*
158 *make the claim expressly and shall describe the nature of the documents,*
159 *communications, or things not produced or disclosed in a manner that, without*
160 *revealing information itself privileged or protected, will enable other parties to assess*

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161 *the applicability of the privilege or protection.*

162 (c) **Protective Orders.** Upon motion by a party or by the person from whom
163 discovery is sought, *accompanied by a certificate that the movant has in good faith*
164 *conferred or attempted to confer with other affected parties in an effort to resolve the*
165 *dispute without court action,* and for good cause shown, the court in which the action
166 is pending or alternatively, on matters relating to a deposition, the court in the district
167 where the deposition is to be taken may make any order which justice requires to
168 protect a party or person from annoyance, embarrassment, oppression, or undue
169 burden or expense, including one or more of the following:

170 (1) that the *disclosure or* discovery not be had;

171 (2) that the *disclosure or* discovery may be had only on specified terms and
172 conditions, including a designation of the time or place;

173 (3) that the discovery may be had only by a method of discovery other
174 than that selected by the party seeking discovery;

175 (4) that certain matters not be inquired into, or that the scope of the
176 *disclosure or* discovery be limited to certain matters;

177 (5) that discovery be conducted with no one present except persons
178 designated by the court;

179 (6) that a deposition, after being sealed, be opened only by order of the
180 court;

181 (7) that a trade secret or other confidential research, development, or
182 commercial information not be ~~disclosed~~ *revealed* or be ~~disclosed~~ *revealed* only
183 in a designated way; *and*

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184 **(8)** that the parties simultaneously file specified documents or information
185 enclosed in sealed envelopes to be opened as directed by the court.
186 If the motion for a protective order is denied in whole or in part, the court may,
187 on such terms and conditions as are just, order that any party or *other* person provide
188 or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses
189 incurred in relation to the motion.

190 **(d) ~~Sequence and~~ Timing *and Sequence* of Discovery.** *Except when authorized*
191 *under these rules or by local rule, order, or agreement of the parties, a party may not seek*
192 *discovery from any source before the parties have met and conferred as required by*
193 *subdivision (f).* Unless the court upon motion, for the convenience of parties and
194 witnesses and in the interests of justice, orders otherwise, methods of discovery may
195 be used in any sequence, and the fact that a party is conducting discovery, whether by
196 deposition or otherwise, shall not operate to delay any other party's discovery.

197 **(e) Supplementation of *Disclosures and* Responses.** A party who has *made a*
198 *disclosure under subdivision (a) or* responded to a request for discovery with a *disclosure*
199 *or* response ~~that was complete when made~~ is under ~~no~~ *a* duty to supplement *or correct*
200 the *disclosure or* response to include information thereafter acquired~~, except as follows~~
201 *if ordered by the court or in the following circumstances*:

202 **(1)** A party is under a duty ~~seasonably~~ to supplement ~~the response with~~
203 ~~respect to any question directly addressed to (A) the identity and location of~~
204 ~~persons having knowledge of discoverable matters, and (B) the identity of each~~
205 ~~person expected to be called as an expert witness at trial, the subject matter on~~
206 ~~which the person is expected to testify, and the substance of the person's~~

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207 ~~testimony.~~ *at appropriate intervals its disclosures under subdivision (a) if the party*
208 *learns that in some material respect the information disclosed is incomplete or*
209 *incorrect and if the additional or corrective information has not otherwise been*
210 *made known to the other parties during the discovery process or in writing. With*
211 *respect to testimony of an expert from whom a report is required under subdivision*
212 *(a)(2)(B) the duty extends both to information contained in the report and to*
213 *information provided through a deposition of the expert, and any additions or other*
214 *changes to this information shall be disclosed by the time the party's disclosures*
215 *under Rule 26(a)(3) are due.*

216 (2) A party is under a duty seasonably to amend a prior response *to an*
217 *interrogatory, request for production, or request for admission* if the party *learns*
218 ~~obtains information upon the basis of which (A) the party knows~~ that the
219 response ~~was incorrect when made, or (B) the party knows that the response~~
220 ~~though correct when made is no longer true and the circumstances are such that~~
221 ~~a failure to amend the response is in substance a knowing concealment~~ *is in*
222 *some material respect incomplete or incorrect and if the additional or corrective*
223 *information has not otherwise been made known to the other parties during the*
224 *discovery process or in writing.*

225 ~~(3) A duty to supplement responses may be imposed by order of the court,~~
226 ~~agreement of the parties, or at any time prior to trial through new requests for~~
227 ~~supplementation of prior responses.~~

228 (f) *Meeting of Parties; Planning for* Discovery ~~Conference. At any time after~~
229 ~~commencement of an action the court may direct the attorneys for the parties to~~

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230 ~~appear before it for a conference on the subject of discovery. The court shall do so~~
231 ~~upon motion by the attorney for any party if the motion includes~~ *Except in actions*
232 *exempted by local rule or when otherwise ordered, the parties shall, as soon as practicable*
233 *and in any event at least 14 days before a scheduling conference is held or a scheduling*
234 *order is due under Rule 16(b), meet to discuss the nature and basis of their claims and*
235 *defenses and the possibilities for a prompt settlement or resolution of the case, to make*
236 *or arrange for the disclosures required by subdivision (a)(1), and to develop a proposed*
237 *discovery plan. The plan shall indicate the parties' views and proposals concerning:*
238 **(1)** ~~A statement of the issues as they then appear;~~ *what changes should be*
239 *made in the timing, form, or requirement for disclosures under subdivision (a) or*
240 *local rule, including a statement as to when disclosures under subdivision (a)(1)*
241 *were made or will be made;*
242 **(2)** ~~A proposed plan and schedule of discovery;~~ *the subjects on which*
243 *discovery may be needed, when discovery should be completed, and whether*
244 *discovery should be conducted in phases or be limited to or focused upon particular*
245 *issues;*
246 **(3)** ~~Any limitations proposed to be placed on discovery;~~ *what changes*
247 *should be made in the limitations on discovery imposed under these rules or by local*
248 *rule, and what other limitations should be imposed; and*
249 **(4)** ~~A~~any other ~~proposed~~ orders ~~with respect to discovery~~ *that should be*
250 *entered by the court under subdivision (c) or under Rule 16(b) and (c).*~~; and~~
251 ~~(5) A statement showing that the attorney making the motion has made~~
252 ~~a reasonable effort to reach agreement with opposing attorneys on the matters~~

253 ~~set forth in the motion. Each party and each party's attorney are under a duty~~
254 ~~to participate in good faith in the framing of a discovery plan if a plan is~~
255 ~~proposed by the attorney for any party. Notice of the motion shall be served on~~
256 ~~all parties. Objections or additions to matters set forth in the motion shall be~~
257 ~~served not later than 10 days after service of the motion.~~

258 *The attorneys of record and all unrepresented parties that have appeared in the case*
259 *are jointly responsible for arranging and being present or represented at the meeting, for*
260 *attempting in good faith to agree on the proposed discovery plan, and for submitting to the*
261 *court within 10 days after the meeting a written report outlining the plan.* ~~Following the~~
262 ~~discovery conference, the court shall enter an order tentatively identifying the issues~~
263 ~~for discovery purposes, establishing a plan and schedule for discovery, setting~~
264 ~~limitations on discovery, if any; and determining such other matters, including the~~
265 ~~allocation of expenses, as are necessary for the proper management of discovery in the~~
266 ~~action. An order may be altered or amended whenever justice so requires.~~

267 ~~Subject to the right of a party who properly moves for a discovery conference to~~
268 ~~prompt convening of the conference, the court may combine the discovery conference~~
269 ~~with a pretrial conference authorized by Rule 16.~~

270 **(g) Signing of *Disclosures,* Discovery Requests, Responses, and Objections.**

271 *(1) Every disclosure made pursuant to subdivision (a)(1) or subdivision*
272 *(a)(3) shall be signed by at least one attorney of record in the attorney's individual*
273 *name, whose address shall be stated. An unrepresented party shall sign the*
274 *disclosure and state the party's address. The signature of the attorney or party*
275 *constitutes a certification that to the best of the signer's knowledge, information, and*

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276 *belief, formed after a reasonable inquiry, the disclosure is complete and correct as*
277 *of the time it is made.*

278 *(2)* Every *discovery* request, ~~for discovery or~~ response, or objection ~~thereto~~
279 made by a party represented by an attorney shall be signed by at least one
280 attorney of record in the attorney's individual name, whose address shall be
281 stated. A*n unrepresented* party ~~who is not represented by an attorney~~ shall sign
282 the request, response, or objection and state the party's address. The signature
283 of the attorney or party constitutes a certification ~~that the signer has read the~~
284 ~~request, response, or objection, and~~ that to the best of the signer's knowledge,
285 information, and belief, formed after a reasonable inquiry, ~~it~~ *the request, response,*
286 *or objection* is:

287 (~~1~~*A*) consistent with these rules and warranted by existing law or a
288 good faith argument for the extension, modification, or reversal of existing
289 law;

290 (~~2~~*B*) not interposed for any improper purpose, such as to harass or
291 to cause unnecessary delay or needless increase in the cost of litigation;
292 and

293 (~~3~~*C*) not unreasonable or unduly burdensome or expensive, given the
294 needs of the case, the discovery already had in the case, the amount in
295 controversy, and the importance of the issues at stake in the litigation.

296 If a request, response, or objection is not signed, it shall be stricken unless it
297 is signed promptly after the omission is called to the attention of the party
298 making the request, response, or objection, and a party shall not be obligated to

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299 take any action with respect to it until it is signed.

300 (3) If *without substantial justification* a certification is made in violation of

301 the rule, the court, upon motion or upon its own initiative, shall impose upon the

302 person who made the certification, the party on whose behalf the *disclosure,*

303 request, response, or objection is made, or both, an appropriate sanction, which

304 may include an order to pay the amount of the reasonable expenses incurred

305 because of the violation, including a reasonable attorney's fee.

COMMITTEE NOTES

Subdivision (a). Through the addition of paragraphs (1)-(4), this subdivision imposes on parties a duty to disclose, without awaiting formal discovery requests, certain basic information that is needed in most cases to prepare for trial or make an informed decision about settlement. The rule requires all parties (1) early in the case to exchange information regarding potential witnesses, documentary evidence, damages, and insurance, (2) at an appropriate time during the discovery period to identify expert witnesses and provide a detailed written statement of the testimony that may be offered at trial through specially retained experts, and (3), as the trial date approaches, to identify the particular evidence that may be offered at trial. The enumeration in Rule 26(a) of items to be disclosed does not prevent a court from requiring by order or local rule that the parties disclose additional information without a discovery request. Nor are parties precluded from using traditional discovery methods to obtain further information regarding these matters, as for example asking an expert during a deposition about testimony given in other litigation beyond the four-year period specified in Rule 26(a)(2)(B).

A major purpose of the revision is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information, and the rule should be applied in a manner to achieve those objectives. The concepts of imposing a duty of disclosure were set forth in Brazil, The Adversary Character of Civil Discovery: A Critique and Proposals for Change, 31 Vand. L. Rev. 1348 (1978), and Schwarzer, The Federal Rules, the Adversary Process, and Discovery Reform, 50 U. Pitt. L. Rev. 703, 721-23 (1989).

The rule is based upon the experience of district courts that have required disclosure of some of this information through local rules, court-approved standard interrogatories, and standing orders. Most have required pretrial disclosure of the kind of information described in Rule 26(a)(3). Many have required written reports from experts containing information like that specified in Rule 26(a)(2)(B). While far more limited, the experience of the few state and federal courts that have required pre-discovery exchange of core information such as is contemplated in Rule 26(a)(1) indicates that savings in time and expense can be

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achieved, particularly if the litigants meet and discuss the issues in the case as a predicate for this exchange and if a judge supports the process, as by using the results to guide further proceedings in the case. Courts in Canada and the United Kingdom have for many years required disclosure of certain information without awaiting a request from an adversary.

Paragraph (1). As the functional equivalent of court-ordered interrogatories, this paragraph requires early disclosure, without need for any request, of four types of information that have been customarily secured early in litigation through formal discovery. The introductory clause permits the court, by local rule, to exempt all or particular types of cases from these disclosure requirement or to modify the nature of the information to be disclosed. It is expected that courts would, for example, exempt cases like Social Security reviews and government collection cases in which discovery would not be appropriate or would be unlikely. By order the court may eliminate or modify the disclosure requirements in a particular case, and similarly the parties, unless precluded by order or local rule, can stipulate to elimination or modification of the requirements for that case. The disclosure obligations specified in paragraph (1) will not be appropriate for all cases, and it is expected that changes in these obligations will be made by the court or parties when the circumstances warrant.

Authorization of these local variations is, in large measure, included in order to accommodate to the Civil Justice Reform Act of 1990, which implicitly directs districts to experiment during the study period with differing procedures to reduce the time and expense of civil litigation. The civil justice delay and expense reduction plans adopted by the courts under the Act differ as to the type, form, and timing of disclosures required. Section 105(c)(1) of the Act calls for a report by the Judicial Conference to Congress by December 31, 1995, comparing experience in twenty of these courts; and section 105(c)(2)(B) contemplates that some changes in the Rules may then be needed. While these studies may indicate the desirability of further changes in Rule 26(a)(1), these changes probably could not become effective before December 1998 at the earliest. In the meantime, the present revision puts in place a series of disclosure obligations that, unless a court acts affirmatively to impose other requirements or indeed to reject all such requirements for the present, are designed to eliminate certain discovery, help focus the discovery that is needed, and facilitate preparation for trial or settlement.

Subparagraph (A) requires identification of all persons who, based on the investigation conducted thus far, are likely to have discoverable information relevant to the factual disputes between the parties. All persons with such information should be disclosed, whether or not their testimony will be supportive of the position of the disclosing party. As officers of the court, counsel are expected to disclose the identity of those persons who may be used by them as witnesses or who, if their potential testimony were known, might reasonably be expected to be deposed or called as a witness by any of the other parties. Indicating briefly the general topics on which such persons have information should not be burdensome, and will assist other parties in deciding which depositions will actually be needed.

Subparagraph (B) is included as a substitute for the inquiries routinely made about the

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existence and location of documents and other tangible things in the possession, custody, or control of the disclosing party. Although, unlike subdivision (a)(3)(C), an itemized listing of each exhibit is not required, the disclosure should describe and categorize, to the extent identified during the initial investigation, the nature and location of potentially relevant documents and records, including computerized data and other electronically-recorded information, sufficiently to enable opposing parties (1) to make an informed decision concerning which documents might need to be examined, at least initially, and (2) to frame their document requests in a manner likely to avoid squabbles resulting from the wording of the requests. As with potential witnesses, the requirement for disclosure of documents applies to all potentially relevant items then known to the party, whether or not supportive of its contentions in the case.

Unlike subparagraphs (C) and (D), subparagraph (B) does not require production of any documents. Of course, in cases involving few documents a disclosing party may prefer to provide copies of the documents rather than describe them, and the rule is written to afford this option to the disclosing party. If, as will be more typical, only the description is provided, the other parties are expected to obtain the documents desired by proceeding under Rule 34 or through informal requests. The disclosing party does not, by describing documents under subparagraph (B), waive its right to object to production on the basis of privilege or work product protection, or to assert that the documents are not sufficiently relevant to justify the burden or expense of production.

The initial disclosure requirements of subparagraphs (A) and (B) are limited to identification of potential evidence "relevant to disputed facts alleged with particularity in the pleadings." There is no need for a party to identify potential evidence with respect to allegations that are admitted. Broad, vague, and conclusory allegations sometimes tolerated in notice pleading--for example, the assertion that a product with many component parts is defective in some unspecified manner--should not impose upon responding parties the obligation at that point to search for and identify all persons possibly involved in, or all documents affecting, the design, manufacture, and assembly of the product. The greater the specificity and clarity of the allegations in the pleadings, the more complete should be the listing of potential witnesses and types of documentary evidence. Although paragraphs (1)(A) and (1)(B) by their terms refer to the factual disputes defined in the pleadings, the rule contemplates that these issues would be informally refined and clarified during the meeting of the parties under subdivision (f) and that the disclosure obligations would be adjusted in the light of these discussions. The disclosure requirements should, in short, be applied with common sense in light of the principles of Rule 1, keeping in mind the salutary purposes that the rule is intended to accomplish. The litigants should not indulge in gamesmanship with respect to the disclosure obligations.

Subparagraph (C) imposes a burden of disclosure that includes the functional equivalent of a standing Request for Production under Rule 34. A party claiming damages or other monetary relief must, in addition to disclosing the calculation of such damages, make available the supporting documents for inspection and copying as if a request for such materials had been made under Rule 34. This obligation applies only with respect to documents then reasonably available to it and not privileged or protected as work product.

Likewise, a party would not be expected to provide a calculation of damages which, as in many patent infringement actions, depends on information in the possession of another party or person.

Subparagraph (D) replaces subdivision (b)(2) of Rule 26, and provides that liability insurance policies be made available for inspection and copying. The last two sentences of that subdivision have been omitted as unnecessary, not to signify any change of law. The disclosure of insurance information does not thereby render such information admissible in evidence. See Rule 411, Federal Rules of Evidence. Nor does subparagraph (D) require disclosure of applications for insurance, though in particular cases such information may be discoverable in accordance with revised subdivision (a)(5).

Unless the court directs a different time, the disclosures required by subdivision (a)(1) are to be made at or within 10 days after the meeting of the parties under subdivision (f). One of the purposes of this meeting is to refine the factual disputes with respect to which disclosures should be made under paragraphs (1)(A) and (1)(B), particularly if an answer has not been filed by a defendant, or, indeed, to afford the parties an opportunity to modify by stipulation these obligations. The time of this meeting is generally left to the parties provided it is held at least 14 days before a scheduling conference is held or before a scheduling order is due under Rule 16(b). In cases in which no scheduling conference is held, this will mean that the meeting must be held within 75 days after a defendant has first appeared in the case.

Before making its disclosures, a party has the obligation under subdivision (g)(1) to make an inquiry into the facts of the case. The rule does not demand an exhaustive investigation at this stage of the case, but one that is reasonable under the circumstances, focusing on the facts that are alleged with particularity in the pleadings. As provided in the last sentence of subdivision (a)(1), a party is not excused from the duty of disclosure merely because its investigation is incomplete. The party should make its initial disclosures based on the pleadings and the information then reasonably available to it. As its investigation continues and as the issues in the pleadings are clarified, it should supplement its disclosures as required by subdivision (e)(1). A party is not relieved from its obligation of disclosure merely because another party has not made its disclosures or has made an inadequate disclosure.

Paragraph (2). This paragraph imposes an additional duty to disclose information regarding expert testimony sufficiently in advance of trial that opposing parties have a reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses. Normally the court should prescribe a time for these disclosures in a scheduling order under Rule 16(b), and in most cases the party with the burden of proof on an issue should disclose its expert testimony on that issue before other parties are required to make their disclosures with respect to that issue. In the absence of such a direction, the disclosures are to be made by all parties at least 90 days before the trial date or the date by which the case is to be ready for trial, except that an additional 30 days is allowed (unless the court specifies another time) for disclosure of expert testimony to be used solely to contradict or rebut the testimony that may be presented by another

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party's expert. For a discussion of procedures that have been used to enhance the reliability of expert testimony, see M. Graham, Expert Witness Testimony and the Federal Rules of Evidence: Insuring Adequate Assurance of Trustworthiness, 1986 U. Ill. L. Rev. 90.

Paragraph (2)(B) requires that persons retained or specially employed to provide expert testimony, or whose duties as an employee of the party regularly involve the giving of expert testimony, must prepare a detailed and complete written report, stating the testimony the witness is expected to present during direct examination, together with the reasons therefor. The information disclosed under the former rule in answering interrogatories about the "substance" of expert testimony was frequently so sketchy and vague that it rarely dispensed with the need to depose the expert and often was even of little help in preparing for a deposition of the witness. Revised Rule 37(c)(1) and revised Rule 702 of the Federal Rules of Evidence provide an incentive for full disclosure; namely, that a party will not ordinarily be permitted to use on direct examination any expert testimony not so disclosed. Rule 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports, and indeed, with experts such as automobile mechanics, this assistance may be needed. Nevertheless, the report, which is intended to set forth the substance of the direct examination, should be written in a manner that reflects the testimony to be given by the witness and it must be signed by the witness.

The report is to disclose the data and other information considered by the expert and any exhibits or charts that summarize or support the expert's opinions. Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions--whether or not ultimately relied upon by the expert--are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

Revised subdivision (b)(3)(A) authorizes the deposition of expert witnesses. Since depositions of experts required to prepare a written report may be taken only after the report has been served, the length of the deposition of such experts should be reduced, and in many cases the report may eliminate the need for a deposition. Revised subdivision (e)(1) requires disclosure of any material changes made in the opinions of an expert from whom a report is required, whether the changes are in the written report or in testimony given at a deposition.

For convenience, this rule and revised Rule 30 continue to use the term "expert" to refer to those persons who will testify under Rule 702 of the Federal Rules of Evidence with respect to scientific, technical, and other specialized matters. The requirement of a written report in paragraph (2)(B), however, applies only to those experts who are retained or specially employed to provide such testimony in the case or whose duties as an employee of a party regularly involve the giving of such testimony. A treating physician, for example, can be deposed or called to testify at trial without any requirement for a written report. By local rule, order, or written stipulation, the requirement of a written report may be waived for particular experts or imposed upon additional persons who will provide opinions under Rule 702.

Paragraph (3). This paragraph imposes an additional duty to disclose, without any request, information customarily needed in final preparation for trial. These disclosures are to be made in accordance with schedules adopted by the court under Rule 16(b) or by special order. If no such schedule is directed by the court, the disclosures are to be made at least 30 days before commencement of the trial. By its terms, rule 26(a)(3) does not require disclosure of evidence to be used solely for impeachment purposes; however, disclosure of such evidence--as well as other items relating to conduct of trial--may be required by local rule or a pretrial order.

Subparagraph (A) requires the parties to designate the persons whose testimony they may present as substantive evidence at trial, whether in person or by deposition. Those who will probably be called as witnesses should be listed separately from those who are not likely to be called but who are being listed in order to preserve the right to do so if needed because of developments during trial. Revised Rule 37(c)(1) provides that only persons so listed may be used at trial to present substantive evidence. This restriction does not apply unless the omission was "without substantial justification" and hence would not bar an unlisted witness if the need for such testimony is based upon developments during trial that could not reasonably have been anticipated--e.g., a change of testimony.

Listing a witness does not obligate the party to secure the attendance of the person at trial, but should preclude the party from objecting if the person is called to testify by another party who did not list the person as a witness.

Subparagraph (B) requires the party to indicate which of these potential witnesses will be presented by deposition at trial. A party expecting to use at trial a deposition not recorded by stenographic means is required by revised Rule 32 to provide the court with a transcript of the pertinent portions of such depositions. This rule requires that copies of the transcript of a nonstenographic deposition be provided to other parties in advance of trial for verification, an obvious concern since counsel often utilize their own personnel to prepare transcripts from audio or video tapes. By order or local rule, the court may require that parties designate the particular portions of stenographic depositions to be used at trial.

Subparagraph (C) requires disclosure of exhibits, including summaries (whether to be offered in lieu of other documentary evidence or to be used as an aid in understanding such evidence), that may be offered as substantive evidence. The rule requires a separate listing of each such exhibit, though it should permit voluminous items of a similar or standardized character to be described by meaningful categories. For example, unless the court has otherwise directed, a series of vouchers might be shown collectively as a single exhibit with their starting and ending dates. As with witnesses, the exhibits that will probably be offered are to be listed separately from those which are unlikely to be offered but which are listed in order to preserve the right to do so if needed because of developments during trial. Under revised Rule 37(c)(1) the court can permit use of unlisted documents the need for which could not reasonably have been anticipated in advance of trial.

Upon receipt of these final pretrial disclosures, other parties have 14 days (unless a different time is specified by the court) to disclose any objections they wish to preserve to

the usability of the deposition testimony or to the admissibility of the documentary evidence (other than under Rules 402 and 403 of the Federal Rules of Evidence). Similar provisions have become commonplace either in pretrial orders or by local rules, and significantly expedite the presentation of evidence at trial, as well as eliminate the need to have available witnesses to provide "foundation" testimony for most items of documentary evidence. The listing of a potential objection does not constitute the making of that objection or require the court to rule on the objection; rather, it preserves the right of the party to make the objection when and as appropriate during trial. The court may, however, elect to treat the listing as a motion "in limine" and rule upon the objections in advance of trial to the extent appropriate.

The time specified in the rule for the final pretrial disclosures is relatively close to the trial date. The objective is to eliminate the time and expense in making these disclosures of evidence and objections in those cases that settle shortly before trial, while affording a reasonable time for final preparation for trial in those cases that do not settle. In many cases, it will be desirable for the court in a scheduling or pretrial order to set an earlier time for disclosures of evidence and provide more time for disclosing potential objections.

Paragraph (4). This paragraph prescribes the form of disclosures. A signed written statement is required, reminding the parties and counsel of the solemnity of the obligations imposed; and the signature on the initial or pretrial disclosure is a certification under subdivision (g)(1) that it is complete and correct as of the time when made. Consistent with Rule 5(d), these disclosures are to be filed with the court unless otherwise directed. It is anticipated that many courts will direct that expert reports required under paragraph (2)(B) not be filed until needed in connection with a motion or for trial.

Paragraph (5). Language is added to this paragraph to reflect a policy of balanced accommodation to international agreements bearing on methods of discovery. Cf. Société Nationale Industrielle Aérospatiale v. United States District Court, 482 U.S. 522 (1987). Although such treaties typically do not preclude the use of Rules 26-37 to secure information from persons in other countries, attorneys and judges should be cognizant of the adverse impact upon international relations of unduly intrusive discovery methods that offend the sensibilities of those governing other countries. See generally J. Weis, The Federal Rules and the Hague Conventions: Concerns of Conformity and Comity, 50 U. Pitt. L. Rev. 903 (1989); E. Alley & D. Prescott, Recent Developments in the United States under the Hague Evidence Convention, 2 Leiden J. Int'l Law 19 (1989). If certain methods of discovery have been approved for international use, positive international relations require that these methods be preferred, and that ordinarily other methods should not be employed in discovery at places in foreign countries, at least if the approved methods are adequate to meet the need of the litigant for timely access to the information.

The new provision applies only with respect to discovery sought to be conducted within a country that has an applicable convention or treaty with the United States. It does not cover discovery requests that a party subject to the power of the court provide in the United States (such as by answering interrogatories, appearing at a deposition, or producing documents for inspection in this country) information that may be located abroad or derived

from materials located abroad. Nevertheless, in such situations, although not governed by the amendment to Rule 26(a)(5), the court should consider, as part of its obligation to prevent discovery abuses involving foreign litigants, the availability and practicality of discovery through convention methods. See Société Nationale Industrielle Aérospatiale v. United States District Court, 482 U.S. 522 (1987). Likewise, the court should consider the general principles of comity in deciding what discovery to permit in countries not signatories to a convention or treaty with the United States.

The rule does not require resort to convention methods where such methods would be "inadequate." This provision allows the court to make a discreet determination on the particular facts as to the sufficiency of the internationally agreed discovery methods. For example, the court might excuse a party from having to resort to Hague Convention procedures if a country in which necessary information is located has imposed a blanket reservation that would prevent such discovery.

The rule also permits the court to authorize the use of non-convention discovery methods when needed to assure that discovery is not "inequitable." Foreign litigants should not be placed in a favored position when compared to domestic parties in the litigation, especially in commercial matters with respect to which the American litigants may be their economic competitors. Thus, an international litigant should not be permitted to obtain discovery from its American adversaries using the broader forms of discovery contained in Rules 26-37, while asserting constraints under a convention or the law of the party's own country to create obstacles to equivalent discovery initiated by its adversaries.

Indeed, the court is not precluded by the rule from authorizing use of discovery methods that may violate the laws of another country if necessary to assure that discovery is not inadequate or inequitable and if not prohibited by a treaty or convention with the United States. The court should, however, exercise caution in ordering such discovery, particularly if the impediment to the discovery is imposed at the instance of the foreign authority, not at the request of the litigant or non-party from whom information is sought. Moreover, in deciding upon an appropriate sanction for failure to comply with an order for such discovery, the court should take into account the fact that non-compliance was motivated by the party's need to conform to the law of a foreign country. See Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958). In no circumstance can the court authorize discovery methods that are prohibited by a treaty that is the law of the United States, for the proscriptions of the treaty take precedence over these rules.

This paragraph is also revised to take note of the availability of revised Rule 45 for inspection from non-parties of documents and premises without the need for a deposition.

Subdivision (b). This subdivision is revised in several respects. First, former paragraph (1) is subdivided into two paragraphs for ease of reference and to avoid renumbering of paragraphs (3) and (4). Textual changes are then made in new paragraph (2) to enable the court to keep tighter rein on the extent of discovery. The information explosion of recent decades has greatly increased both the potential cost of wide-ranging

discovery and the potential for discovery to be used as an instrument for delay or oppression. Amendments to Rules 30, 31, and 33 place presumptive limits on the number of depositions and interrogatories, subject to leave of court to pursue additional discovery. The revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery and to authorize courts that develop case tracking systems based on the complexity of cases to increase or decrease by local rule the presumptive number of depositions and interrogatories allowed in particular types or classifications of cases. The revision also dispels any doubt as to the power of the court to impose limitations on the length of depositions under Rule 30 or on the number of requests for admission under Rule 36.

Second, former paragraph (2), relating to insurance, has been relocated as part of the required initial disclosures under subdivision (a)(1)(D), and revised to provide for disclosure of the policy itself.

Third, paragraph (4)(A) is revised to provide that experts who are expected to be witnesses will be subject to deposition prior to trial, conforming the norm stated in the rule to the actual practice followed in most courts, in which depositions of experts have become standard. Concerns regarding the expense of such depositions should be mitigated by the fact that the expert's fees for the deposition will ordinarily be borne by the party taking the deposition. The requirement under subdivision (a)(2)(B) of a complete and detailed report of the expected testimony of certain forensic experts may, moreover, eliminate the need for some such depositions or at least reduce the length of the depositions. Accordingly, the deposition of an expert required by subdivision (a)(2)(B) to provide a written report may be taken only after the report has been served.

Paragraph (4)(C), bearing on compensation of experts, is revised to take account of the changes in paragraph (4)(A).

Paragraph (5) is a new provision. A party must notify other parties if it is withholding materials otherwise subject to disclosure under the rule or pursuant to a discovery request because it is asserting a claim of privilege or work product protection. To withhold materials without such notice is contrary to the rule, subjects the party to sanctions under Rule 37(b)(2), and may be viewed as a waiver of the privilege or protection. The paragraph also applies

The party must also provide sufficient information to enable other parties to evaluate the applicability of the claimed privilege or protection. Although the person from whom the discovery is sought decides whether to claim a privilege or protection, the court ultimately decides whether, if this claim is challenged, the privilege or protection applies. Providing information pertinent to the applicability of the privilege or protection should reduce the need for in camera examination of the documents.

The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are

withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories. A party can seek relief through a protective order under subdivision (c) if compliance with the requirement for providing this information would be an unreasonable burden. In rare circumstances some of the pertinent information affecting applicability of the claim, such as the identity of the client, may itself be privileged; the rule provides that such information need not be disclosed.

The obligation to provide pertinent information concerning withheld privileged materials applies only to items "otherwise discoverable." If a broad discovery request is made--for example, for all documents of a particular type during a twenty year period--and the responding party believes in good faith that production of documents for more than the past three years would be unduly burdensome, it should make its objection to the breadth of the request and, with respect to the documents generated in that three year period, produce the unprivileged documents and describe those withheld under the claim of privilege. If the court later rules that documents for a seven year period are properly discoverable, the documents for the additional four years should then be either produced (if not privileged) or described (if claimed to be privileged).

Subdivision (c). The revision requires that before filing a motion for a protective order the movant must confer--either in person or by telephone--with the other affected parties in a good faith effort to resolve the discovery dispute without the need for court intervention. If the movant is unable to get opposing parties even to discuss the matter, the efforts in attempting to arrange such a conference should be indicated in the certificate.

Subdivision (d). This subdivision is revised to provide that formal discovery--as distinguished from interviews of potential witnesses and other informal discovery--not commence until the parties have met and conferred as required by subdivision (f). Discovery can begin earlier if authorized under Rule 30(a)(2)(C) (deposition of person about to leave the country) or by local rule, order, or stipulation. This will be appropriate in some cases, such as those involving requests for a preliminary injunction or motions challenging personal jurisdiction. If a local rule exempts any types of cases in which discovery may be needed from the requirement of a meeting under Rule 26(f), it should specify when discovery may commence in those cases.

The meeting of counsel is to take place as soon as practicable and in any event at least 14 days before the date of the scheduling conference under Rule 16(b) or the date a scheduling order is due under Rule 16(b). The court can assure that discovery is not unduly delayed either by entering a special order or by setting the case for a scheduling conference.

Subdivision (e). This subdivision is revised to provide that the requirement for supplementation applies to all disclosures required by subdivisions (a)(1)-(3). Like the former rule, the duty, while imposed on a "party," applies whether the corrective information is learned by the client or by the attorney. Supplementations need not be made as each new item of information is learned but should be made at appropriate intervals during the discovery period, and with special promptness as the trial date approaches. It may be useful

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for the scheduling order to specify the time or times when supplementations should be made.

The revision also clarifies that the obligation to supplement responses to formal discovery requests applies to interrogatories, requests for production, and requests for admissions, but not ordinarily to deposition testimony. However, with respect to experts from whom a written report is required under subdivision (a)(2)(B), changes in the opinions expressed by the expert whether in the report or at a subsequent deposition are subject to a duty of supplemental disclosure under subdivision (e)(1).

The obligation to supplement disclosures and discovery responses applies whenever a party learns that its prior disclosures or responses are in some material respect incomplete or incorrect. There is, however, no obligation to provide supplemental or corrective information that has been otherwise made known to the parties in writing or during the discovery process, as when a witness not previously disclosed is identified during the taking of a deposition or when an expert during a deposition corrects information contained in an earlier report.

Subdivision (f). This subdivision was added in 1980 to provide a party threatened with abusive discovery with a special means for obtaining judicial intervention other than through discrete motions under Rules 26(c) and 37(a). The amendment envisioned a two-step process: first, the parties would attempt to frame a mutually agreeable plan; second, the court would hold a "discovery conference" and then enter an order establishing a schedule and limitations for the conduct of discovery. It was contemplated that the procedure, an elective one triggered on request of a party, would be used in special cases rather than as a routine matter. As expected, the device has been used only sparingly in most courts, and judicial controls over the discovery process have ordinarily been imposed through scheduling orders under Rule 16(b) or through rulings on discovery motions.

The provisions relating to a conference with the court are removed from subdivision (f). This change does not signal any lessening of the importance of judicial supervision. Indeed, there is a greater need for early judicial involvement to consider the scope and timing of the disclosure requirements of Rule 26(a) and the presumptive limits on discovery imposed under these rules or by local rules. Rather, the change is made because the provisions addressing the use of conferences with the court to control discovery are more properly included in Rule 16, which is being revised to highlight the court's powers regarding the discovery process.

The desirability of some judicial control of discovery can hardly be doubted. Rule 16, as revised, requires that the court set a time for completion of discovery and authorizes various other orders affecting the scope, timing, and extent of discovery and disclosures. Before entering such orders, the court should consider the views of the parties, preferably by means of a conference, but at the least through written submissions. Moreover, it is desirable that the parties' proposals regarding discovery be developed through a process where they meet in person, informally explore the nature and basis of the issues, and discuss how discovery can be conducted most efficiently and economically.

As noted above, former subdivision (f) envisioned the development of proposed discovery plans as an optional procedure to be used in relatively few cases. The revised rule directs that in all cases not exempted by local rule or special order the litigants must meet in person and plan for discovery. Following this meeting, the parties submit to the court their proposals for a discovery plan and can begin formal discovery. Their report will assist the court in seeing that the timing and scope of disclosures under revised Rule 26(a) and the limitations on the extent of discovery under these rules and local rules are tailored to the circumstances of the particular case.

To assure that the court has the litigants' proposals before deciding on a scheduling order and that the commencement of discovery is not delayed unduly, the rule provides that the meeting of the parties take place as soon as practicable and in any event at least 14 days before a scheduling conference is held or before a scheduling order is due under Rule 16(b). (Rule 16(b) requires that a scheduling order be entered within 90 days after the first appearance of a defendant or, if earlier, within 120 days after an answer has been served on any defendant.) The obligation to participate in the planning process is imposed on all parties that have appeared in the case, including defendants who, because of a pending Rule 12 motion, may not have yet filed an answer in the case. Each such party should attend the meeting, either through one of its attorneys or in person if unrepresented. If more parties are joined or appear after the initial meeting, an additional meeting may be desirable.

Subdivision (f) describes certain matters that should be accomplished at the meeting and included in the proposed discovery plan. This listing does not exclude consideration of other subjects, such as the time when any dispositive motions should be filed and when the case should be ready for trial.

The parties are directed under subdivision (a)(1) to make the disclosures required by that subdivision at or within 10 days after this meeting. The additional time is afforded in recognition that the discussion at the meeting of the claims and defenses may be useful in defining the issues with respect to which the initial disclosures should be made. The parties should also discuss at the meeting what additional information, although not subject to the disclosure requirements, can be made available informally without the necessity for formal discovery requests.

The report is to be submitted to the court within 10 days after the meeting and should not be difficult to prepare. In most cases counsel should be able to agree that one of them will be responsible for its preparation and submission to the court. Form 35 has been added in the Appendix to the Rules, both to illustrate the type of report that is contemplated and to serve as a checklist for the meeting.

The litigants are expected to attempt in good faith to agree on the contents of the proposed discovery plan. If they cannot agree on all aspects of the plan, their report to the court should indicate the competing proposals of the parties on those items, as well as the matters on which they agree. Unfortunately, there may be cases in which, because of disagreements about time or place or for other reasons, the meeting is not attended by all parties or, indeed, no meeting takes place. In such situations, the report--or reports--should

describe the circumstances and the court may need to consider sanctions under Rule 37(g).

By local rule or special order, the court can exempt particular cases or types of cases from the meet-and-confer requirement of subdivision (f). In general this should include any types of cases which are exempted by local rule from the requirement for a scheduling order under Rule 16(b), such as cases in which there will be no discovery (e.g., bankruptcy appeals and reviews of social security determinations). In addition, the court may want to exempt cases in which discovery is rarely needed (e.g., government collection cases and proceedings to enforce administrative summonses) or in which a meeting of the parties might be impracticable (e.g., actions by unrepresented prisoners). Note that if a court exempts from the requirements for a meeting any types of cases in which discovery may be needed, it should indicate when discovery may commence in those cases.

Subdivision (g). Paragraph (1) is added to require signatures on disclosures, a requirement that parallels the provisions of paragraph (2) with respect to discovery requests, responses, and objections. The provisions of paragraph (3) have been modified to be consistent with Rules 37(a)(4) and 37(c)(1); in combination, these rules establish sanctions for violation of the rules regarding disclosures and discovery matters. Amended Rule 11 no longer applies to such violations.

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Pretrial limitations on extent of evidence. Several opposed the proposed amendment of subdivision (c)(15) authorizing the court, after meeting with counsel, to enter "an order establishing a reasonable limit on the length of time allowed for the presentation of evidence or on the number of witnesses or documents that may be presented." The opposition reflects, in part, a concern about managerial judging or about infringing on counsels' ability to control the trial process, and in part a fear that many judges will misuse this discretion. The Advisory Committee has modified the language of this subdivision, but remains convinced that a reasonable limit on the length of trial is desirable in some cases, that such a limitation can be fairer to the parties when determined in advance of trial than when imposed during trial, and that abuses can be corrected through appellate review.

Timing of scheduling orders. The published draft changed the date by which a scheduling order should be entered from 120 days after the complaint is filed to 60 days after a defendant has appeared. Several suggest that this deadline may come too early, particularly in multi-party cases. The Advisory Committee concludes that the language from the published draft should be changed to provide that the order be entered within 90 days after a defendant has appeared or within 120 days after the complaint has been served on a defendant. Of course, courts can and frequently should enter scheduling orders before such deadlines.

The Advisory Committee has carefully considered the various criticisms and suggestions, as well as those comments favoring the published proposal. The Committee is unanimous in recommending adoption of the proposed amendment of Rule 16. As noted above, several changes have been made to the language of the amendment as originally published. These changes, however, either are essentially technical and clarifying in nature, or represent less of a modification of the current Rule 16 than had been proposed in the published draft; and the Committee believes that the proposed amendment can and should be forwarded to the Judicial Conference without an additional period for public notice and comment.

Fed. R. Civ. P. 26. (Drafts published October 1989 and August 1991)

Controversial. The last sentence in subdivision (a)(5) was contained in the draft published in October 1989. The other proposed changes were contained in the draft published in August 1991 and, particularly with respect to proposed subdivision (a)(1), have provoked the most intense division within the bench and bar of any of the proposed amendments. However, as discussed below, the Advisory Committee has made changes to the language contained in the published drafts which should eliminate many of the concerns expressed. The principal criticisms and suggestions are as follows:

Mandatory early pre-discovery disclosures. Subdivision (a)(1) of the August 1991 published draft required litigants to disclose specified core information about the case; namely, potential witnesses, documentary evidence, damage claims, and insurance. The objectives were to eliminate the time and expense of preparing formal discovery requests with respect to that information and to enable the parties to plan more effectively for the discovery that would be needed. Critics attacked the timing and scope of the disclosure requirements, as well as the related penalty provisions for noncompliance, viewing them as both impractical, counterproductive, and disruptive of the attorney-client relationship. On further consideration, the Advisory Committee has made certain changes with respect to the scope of the disclosures and provisions for sanctions that, coupled with the provisions mandating an early meeting of the parties, should alleviate some of these concerns. One Committee member preferred, as suggested by many critics, that initial disclosures be limited to potential witnesses and documents supporting the party's contentions; the other members, however, remained of the view that the obligation should relate to all such witnesses and documents. Many critics also urged that early disclosure requirements not be adopted until after the studies of the experience of courts under the Civil Justice Reform Act. To delay consideration of rules changes until completion of those studies would effectively postpone the effective date of any national standards until December 1998, a delay the Advisory Committee believed unwise. However, the proposed rule is written in a manner that permits district courts during the period of experimentation to depart from the national standards and determine whether and to what extent pre-discovery disclosures should be required.

Pre-discovery planning meeting of parties. The August 1991 published draft contemplated that the exchange of pre-discovery disclosures under subdivision (a)(1) should preferably occur at a meeting of the parties, but did not require that such a meeting take place. The most severe critics of the disclosure requirement supported the concept of an early meeting of the parties to explore and clarify the issues in the case as a prelude to conduct of discovery and, indeed, generally urged that such a meeting be mandatory, whether or not early disclosures were required. Complementing the changes made in subdivision (a)(1), the Advisory Committee has changed the published draft so that subdivision (f), rather than being deleted, is modified to require that the parties meet and attempt to agree on a proposed discovery plan for incorporation in the scheduling order and to facilitate the exchange of required disclosures.

"Notice pleading" and scope of discovery. Many comments suggested that reductions in the time and expense of discovery and other pretrial proceedings require a reconsideration of "notice pleading" and discovery relevant to the "subject matter" or "reasonably calculated to lead to the discovery of admissible evidence." While these suggestions may have merit, they could not, in the opinion of the Advisory Committee, be effected incident to the present publication notice and are ones that should be given careful study and consideration in the future.

Expert reports. The August 1991 published draft required that detailed written reports of parties' experts be exchanged during the discovery period and generally limits the direct testimony of such experts to the matters contained in those reports as may have been seasonably supplemented prior to trial. Several comments argued that this requirement would cause unnecessary additional expenses, discourage "real" experts from agreeing to testify, and create problems at trial. Requirements such as these have, however, been beneficially used in several courts for many years, and the Advisory Committee remains convinced that the concept is sound. However, the Committee has changed the language in subdivision (a)(2) to make clear that it applies only to specially retained or employed experts--and not, for example, to treating physicians. It has also made changes in the text of subdivision (e) to lessen the burden of supplementation and in the Notes to proposed FRE Rule 702 in recognition that intervening events may sometimes justify a change in expert testimony.

Discovery in a foreign country. The last sentence in proposed subdivision (a)(5) is drawn from language published in October 1989 and later submitted to the Supreme Court, which, like Rule 4, was subsequently returned by the Supreme Court for further consideration. While the amendment was pending before the Court, the British Embassy had expressed its concern that, particularly with respect to the Committee Notes, the provisions relating to discovery in foreign countries were inconsistent with the Hague Convention. A similar concern was more recently expressed by Switzerland. On the other hand, the Department of Justice believes the change unnecessarily restricts discovery from foreign litigants and has urged that the Rule not contain any language relating to foreign discovery. The Committee has made minor changes in the text of the rule and more significant changes in the Notes that, in the Committee's view, represent an appropriate balance between the competing considerations that affect foreign discovery. The proposed revision does not, however, attempt to overturn Société Nationale Industrielle Aérospatiale v. United States District Court, 482 U.S. 522 (1987), which, no doubt, is what some foreign litigants would prefer.

> Special Note: If the Committee's proposal regarding foreign discovery is disapproved, the remainder of Rule 26 need not be rejected. The last sentence of proposed Rule 26(a)(5) could be deleted, together with introductory clause to Rule 28(b). The Committee Notes would be modified for conformity with those changes.

Claims of privilege. The August 1991 published draft contains, like Rule 45 as became effective in December 1991, provisions requiring that notice be given when information is withheld on a claim of privilege or work product. Based upon suggestions made in several comments, the Advisory Committee has changed the language of the draft to make clear that the obligation to describe items withheld does not require disclosure of matters that are themselves privileged and only relates to items that are otherwise discoverable (and hence not when unreasonably burdensome requests are made).

The Advisory Committee has carefully considered the various criticisms and suggestions, as well as those

phenomenon, albeit in a setting quite different from the small-claims class action that acts on claims that otherwise would be abandoned without litigation. There are interdependencies between the Enabling Act rules process and legislation that cannot be ignored.

Various models will be drafted "just to see what they look like." It is hoped that the specific focus provided by even a crude first attempt to anticipate some of the procedural and jurisdictional questions raised by various approaches will enrich the advice provided to the working group.

After the April and May meetings, the working group and staff will reflect on the advice gathered at the meetings and attempt to refine the initial models or develop new models. This experience may suggest the need for a third and similar meeting early in the fall. The target will be to prepare a draft report for consideration by the Advisory Committee at its fall meeting. Although it is not entirely clear what date should be viewed as the beginning and end of the one-year term of the working group, the report should be made no later than the March 4 anniversary of the first group meeting. Consideration by the Advisory Committee thus must be at a fall meeting.

Minutes approved

The Minutes for the October, 1997 meeting were approved.

Discovery

Judge Niemeyer opened discussion of the report presented by the Discovery Subcommittee. He noted that the question is whether changes can be made in discovery that will reduce cost while preserving the full information values we now enjoy. Related questions are whether we can restore a uniform national practice, particularly with respect to disclosure, and whether it is possible to elicit greater judicial involvement with discovery problems.

The Boston College conference in September, 1997, provided fine support for the developing efforts of the Discovery Subcommittee. The symposium articles and working papers will be a good resource for the future, as the conference itself has provided strong support for the subcommittee.

The subcommittee report itself is consistent with the three-level model of discovery that has been before the committee. There is initial disclosure, followed by attorney-managed discovery, within a framework that will provide for judicially managed discovery for cases that extend beyond a reasonably permissive core level of attorney-managed discovery.

The discovery discussion was then turned over to the subcommittee, led by Judge Levi and Professor Marcus.

Disclosure

Four disclosure alternatives were presented by the subcommittee.

The first alternative would retain the disclosure system adopted in 1993, but eliminate the provision that allows individual districts to opt out by local rule. This would establish national uniformity. As reflected in the subcommittee working papers, this alternative would be supported by the initial studies that find the present system effective. The Federal Judicial Center study is the most recent and detailed. On the other hand, this approach would likely encounter vigorous resistance in districts that have chosen to opt out of the national rule. An attempt to force disclosure on reluctant courts, with no more support than the tentative conclusions of early studies, could fail, leaving no disclosure system at all.

The second alternative would repeal most of the present disclosure rule, leaving only the damages and insurance disclosure provisions of Rule 26(a)(1)(C) and (D). These limited disclosures would again be made uniform by defeating the opportunity to opt out by local rule. This approach has the virtue of simplicity, and would accommodate the resistance to disclosure found in many courts.

The third alternative is the main "middle-ground" proposal. This approach would be to retain the present disclosure system and make it national, but limit the witness and document disclosure requirement to items that are in some way favorable to the disclosing party. This proposal would eliminate the "heartburn" that arises from requiring disclosure of the identity of unfavorable witnesses and documents. The model built to illustrate this alternative includes several features that probably should be added to the present rule if it is retained and made nationally uniform. One new feature is an express provision for parties who join the action after disclosure by the original parties. A second is a method of designating the exclusion of categories of cases that should not routinely be made the subjects of disclosure and the Rule 26(f) party conference. Exclusion could be accomplished either by designating categories of excluded cases in the national rule or by incorporating by reference the local district categories of cases excluded from Rule 16(b). The third reaches cases at the opposite end, allowing exemption from initial disclosure because the case is so complex or contentious that it seems more useful to proceed straight to discovery. The draft provides for exclusion by allowing any party to stall disclosure until the district court has an opportunity to review the objection as part of the Rule 26(f) process.

The final alternative is a much-reduced system that virtually eliminates disclosure by reducing it to an item to be considered by the parties at the Rule 26(f) conference. There would be initial disclosure only if the parties agree on it, a possibility that in any event is available without encouragement in the rules. Form 35 would be amended to emphasize the need to consider disclosure.

All subcommittee members agreed that the Rule 26(f) conference was a successful innovation, and should be retained whatever may be done with initial disclosure. It was suggested that Rule 26(f) provides a natural occasion for opening settlement discussions, and that the parties will exchange the information needed to support settlement whether or not there is any disclosure system.

The approach of abandoning disclosure was supported by the observation that in the real world, people know how to use discovery effectively as soon as the action is filed. A great deal of effort should be devoted to preparation and investigation before the case is filed, providing the framework within which discovery can be managed without any need for delay while the limited and relatively formal information required by Rule 26(a)(1) is exchanged. Many districts have decided to manage without disclosure, and are managing quite well. Many problems would disappear if we got rid of this initial disclosure.

In response, it was observed that there are studies indicating that initial disclosure often is a neutral force, but -- as in the FJC study results -- rather often succeeds in reducing cost or delay, or promoting settlement, or leading to better outcomes. The subcommittee as a whole thought that some form of disclosure should be retained.

The reformulated response was that the names-and-addresses-of-witnesses form of disclosure can help, but that it is not enough to justify the moratorium on discovery that was adopted to support initial disclosure. The names of witnesses and identity of documents can be obtained on first-wave discovery, and the overall discovery process will work more efficiently if there is no need to wait for several months while process is served and the Rule 26(f) conference is arranged.

The subcommittee report then made it explicit that the subcommittee's first choice is the mid-ground that requires

disclosure of information favorable to the disclosing party. This approach is, to be sure, a compromise. But it seems to work well in two districts that now have it, the Central District of California and the Northern District of Alabama. If this form of disclosure is adopted on a uniform national basis and continues to work well, it may provide the foundation for an eventual return to the 1993 disclosure system as a uniform national system.

The Rule 26(f) meeting was again hailed as the key, with the suggestion that it should be made to run with as little interference as possible. The middle ground, synthesized with Rule 26(f), is the best system. Paul Carrington's approach seems best. We should set out the things the parties must exchange, and time limits. The court should become involved only if the parties cannot do it. This alternative would include more detailed instructions on what must be accomplished at the Rule 26(f) conference.

Another approach, not recommended by the subcommittee, is to separate disclosure into separate phases, with the plaintiff making disclosure first. The defendant would follow after a suitable period, responding directly to the plaintiff's disclosures as well as to the issues framed by the pleadings. This approach could support much more detailed disclosures than can be made with simultaneous exchanges based on notice pleadings. The District of South Carolina standing interrogatory approach provides an illustration. It was asked why the subcommittee has not recommended this approach. The subcommittee response was that most cases now have minimal discovery. And in most cases what discovery there is works well. The prospect of forcing detailed discovery of the sort reflected in the South Carolina interrogatories on all cases seems unattractive. They cover more ground than seems likely to be covered in most cases now, and more than is likely to be needed in most cases.

The South Carolina standing interrogatories approach suggests a different possibility, that of drafting pattern discovery requests for complex cases in specific subject areas. Allen Black and Robert Heim are working on an illustrative set for antitrust cases to help measure whether this task is feasible. If promising results emerge, the subcommittee will want to consider the means for generating pattern discovery systems and for advancing them to the world.

Disclosure could be sequenced in waves without adopting the South Carolina interrogatories. Sequencing, however, increases the number of conflict points. It also encourages those who go next to protest that those who went first did not fulfill the disclosure obligation and that this excuses their own failure to respond or sketchy responses.

The need for disclosure was then championed as a prop for the Rule 26(f) conference. Knowing that disclosure will be required soon after the conference encourages preparation for the conference. The mid-ground that requires disclosure of favorable information was supported on the related ground that if the conference does not lead to settlement, the parties know that the disclosures will be followed immediately by discovery demands for unfavorable information.

Brief mention was made of the subcommittee's review of (a)(2) expert-witness disclosure and (a)(3) pretrial disclosure. The subcommittee believes they should be retained. They now are national rules without the opportunity to opt out by local rule that is available for (a)(1) initial disclosure. Some districts, to be sure, have adopted local rules that purport to opt out of these disclosure requirements. The local rules are not consistent with the national rule and appear invalid.

A question was asked as to the strength of the positive responses to disclosure experience. Is it simply a matter that lawyers think they can live with the present (a)(1) system, or that it actually accomplishes real benefits? The FJC study seems encouraging, but is it enough?

The mid-ground proposal discussion then turned to the means of excluding "low-end" cases from the obligation to disclose even favorable information. One possibility studied by the subcommittee but not advanced for further discussion would be delegation to the Judicial Conference. Disclosure would be required in all cases except those excluded by resolution of the Judicial Conference. The possible advantage of this approach is that it would allow more flexible adaptation of the exemption list to changing experience, free from the lengthy Enabling Act process. It was concluded, however, that this advantage also is the vice of this technique. This matter is too much part of the procedure rules to be delegated out of the deliberately thorough Enabling Act process.

A variation on the subcommittee proposal would be to list some excluded categories of cases, in the manner of the list of affirmative defenses in Rule 8(c), with a concluding catch-all equivalent to the Rule 8(c) "and any other matter constituting an avoidance or affirmative defense." It was quickly concluded that this approach would provide more confusion than guidance. It was pointed out that the FJC discovery study sought to exclude cases that typically have little or no discovery, and by adopting half a dozen excluded categories eliminated more than half the cases on a typical docket. It should be possible to adopt a specific list of eight or ten or twelve categories that will exclude a great share of the cases that ought not be subject to the burdens of even limited, favorable-information disclosure.

One additional safety valve is provided by the opportunity of the parties to agree that disclosure is not appropriate. Rule 26(a)(1) now allows the parties to stipulate out of disclosure, and this provision will be retained. The Rule 26(f) conference, in addition, provides the natural focus for agreeing to exclude disclosure when it seems redundant or unnecessary.

The alternative middle ground, which would essentially eliminate witness and document disclosure but leave agreement on such disclosure as an explicit topic for the Rule 26(f) conference was noted briefly. It was provided as an alternative to the "favorable information" disclosure, but without strong support.

Turning to the "high-end" exclusion, it was asked whether there was a risk that obstructionist parties would overuse the opportunity to stall disclosure by objecting. The draft Committee Note attempts to deal with this by discussing the nature of the cases that might make disclosure inappropriate. As an illustration, the draft suggests that disclosure may properly be deferred pending disposition of motions challenging the court's jurisdiction. The draft raises the question whether deferral also may be appropriate pending decision of dispositive motions, particularly those addressed to the pleadings. This sort of question is something that can be worked out in generating the next draft.

The subcommittee's support for the mid-ground approach was reiterated. There are some challenging drafting problems, but they are not so great as to defeat the enterprise. Disclosure in some form should be retained, and made uniform on a national basis.

It was asked whether trial judges would encounter substantial burdens in administering the distinction between favorable and not favorable information. Thomas Willging responded that in studying the two districts that take this approach to disclosure, the FJC found that attorneys spend less time with the court, and more time meeting and conferring with each other. It seems to work. But this information does not address the prospect that claimed failures to disclose will become issues at trial. At the same time, limiting the disclosure requirement to favorable information provides a much more natural and effective base for the exclusion sanction at trial. The threat of exclusion does not work well as to information a party does not want to use at trial, but should work well as to information a party does want to use.

Professor Carrington observed that the 1991 committee would say that the mid-ground proposal goes in the right

direction. During the deliberations then, disclosure was not limited to favorable information because of the expectation that favorable-information disclosure would inevitably be followed by discovery demands for unfavorable information. But in the setting of adopting a truly national rule, the recommendation is a politic step. There is no virtue in the local option, which was added to the 1993 amendments from a sense of compulsion arising from the variety of practices that had proliferated under the Civil Justice Reform Act. There are enough virtues in disclosure to support adoption of a uniform national rule.

The committee voted unanimously to adopt the favorable-information approach to disclosure, and to work further on the details.

Work on the details must be done expeditiously after the committee has gone as far as can be done in full meeting to establish the general directions. The Style Subcommittee must be allowed time to review the drafts, and then the full Advisory Committee must review them. A report to the Standing Committee must be prepared by mid-May.

The first detailed drafting question is how to describe "favorable information." Those words will not do the job; too much information is potentially favorable or unfavorable to any given position. Three alternatives were considered: (1) "information that tends to support the positions that the disclosing party has taken or is reasonably likely to take in the action"; (2) "information that the disclosing party may use to support its positions in the action"; and (3) "information upon which the party bases its claims, prayer for damages or other relief, denials, or defenses in the action." Difficulties can be imagined in each formulation, and offsetting advantages.

The "may use" formulation was supported on the ground that it ties directly to the incentive to disclose, and best describes to all parties the disclosure obligation. The subcommittee recommended -- with the support of the committee -- that the duty to supplement disclosures imposed by Rule 26(e)(1) be retained. A party can easily understand and implement the duty to disclose the names of witnesses and identity of documents it may want to use at trial. It can as easily understand and implement its freedom to fail to identify the material -- which may amount to warehouses full of documents -- that it does not want to use at trial. As trial preparation proceeds, the disclosure obligation can be supplemented easily and naturally. There is no real risk that a party can avoid the duty to supplement by arguing that it did not know at the time of the initial disclosure that it might want to use information it later decided to use.

The formulation that addresses information on which a party bases its claims, denials, or defenses was supported on the ground that "bases" implies that the information is significant. The information need not be everything that the party may want to use at trial; this formulation narrows the obligation of initial disclosure. In particular, it avoids the need to identify witnesses or documents that will be used only for impeachment purposes.

Discussion of the draft drawn from information on which claims are based quickly concluded that whatever approach is taken, there is no need to refer to the "prayer for damages or other relief." Damages and relief are part of the claim, and the disclosure requirement of Rule 26(a)(1)(C), which will be continued under all proposals, will catch up most of the damages element as a double precaution.

An initial expression of preferences canvassed four possible descriptions of disclosure information: "tends to support" got one vote. "Supports" got three votes. "May use to support" got three votes. "Upon which bases" got four votes. Further discussion led to further endorsements for "supports." It was urged that this term fits the time of initial disclosure, a time when the parties do not know what they may want to use at trial. "We want to know what you know will support your positions." "Supports" clearly signals the intention to exclude an obligation to disclose unfavorable information. "May," in the "may use" formulation, is equivocal. And "positions," in any of the

formulations, is too broad. "May use" again was endorsed because it provides the focus for enforcement by exclusion at trial. It is an essential qualifier, because a party may not know with certainty what it will use. And "use" avoids the ambiguity of "supports," since the same information may both support and undermine a position -- many a witness has both supporting and undercutting information, as does many a document. And parties will disclose more than they will with "supports."

The next vote provided 7 votes for "supports claims, denials, or defenses," no votes for the "bases" formulation, and 4 votes for "may use to support the disclosing party's claims, denials, or defenses." It was decided to adopt the "supports" formulation, most likely to be rendered as "discoverable information supporting the claims, denials, or defenses of the disclosing party."

With disclosure limited to supporting information, attention turned to the limitation in present (a)(1)(A) and (B) that witnesses and documents need be identified only as relevant "to disputed facts alleged with particularity in the pleadings." This limit was introduced to the disclosure provision because notice pleading often makes it very difficult for an opposing party to know the contours of the case as it will emerge from discovery. The whole design of the 1938 system, indeed, was to transfer much of the information exchange between the parties from pleading to discovery. Contention interrogatories, requests for admission, and Rule 16 practice have developed over the years to augment the subordination of pleading even as to identification of the legal issues. But this concern is greatly reduced when the nature of disclosure is reduced to disclosure of information supporting the claims, denials, or defenses of the disclosing party. The disclosing party presumably knows at the time of disclosure what its positions will be, and is obliged to supplement its disclosure as it perfects its understanding of its own positions. Nor is it simply that there is no apparent reason for continuing this limitation. A major reason for adopting it was the hope that it would encourage each party to plead with greater particularity so as to enhance the disclosure obligation imposed on its adversaries. With disclosure changed to supporting witnesses and documents only, the limitation would encourage each party -- and perhaps most especially the plaintiff -- to plead in broad terms so that it has no disclosure obligation. The committee voted 9 to 2 to delete the words that limit disclosure to disputed facts pleaded with particularity.

Discussion next turned to the draft designed to relieve the parties of the disclosure obligation in "high-end" cases that are better handled through court-managed discovery. The draft Rule 26(a)(1)(E) provides for disclosure with 10 days [later changed to 14 days] after the Rule 26(f) meeting "unless a party contends that initial disclosure is inappropriate in the circumstances of the action, in which event disclosure need not be made until 10 [later changed to 14] days after the initial scheduling order is entered by the court pursuant to Rule 16(b)." The effect would be that disclosure occurs if all parties want it, and -- under the "unless otherwise stipulated" language carried over from the current rule -- does not happen if all parties agree to dispense with it.

It was asked whether language should be included to identify "complex or class actions" as inappropriate for disclosure. The subcommittee responded that this possibility had been considered because it is indeed the complex cases that today are routinely exempted from disclosure in favor of judicial discovery management. Anecdotal experience suggests strongly that disclosure is inappropriate in such cases. But all of the studies suggest that it is not possible to define "complex" cases by subject-matter or other criteria.

Further discussion of drafting alternatives led to adoption of this formulation:

These initial disclosures must be made at or within 14 days after the subdivision (f) meeting of the parties unless otherwise stipulated or directed by the court. If a party objects before this time that initial disclosures are not appropriate in the circumstances of the action, the court must determine what disclosures -- if any -- are to be made, and direct that any disclosures be made no earlier than 14 days after entry of the initial scheduling order

under Rule 16(b).

The next set of problems arises from the failure of the present rule to address the disclosure obligation of parties who join the action after the time for initial disclosures. The Rule 26(e)(1) duty to supplement does not reach later-added parties because it applies only to a party who has made a disclosure. The proposed draft, also part of proposed 26(a)(1)(E), would provide that: "Any party not served at the time of the meeting of the parties under subdivision (f) shall make these disclosures within 30 days after the date on which the party first appears in the action unless otherwise stipulated or ordered by the court, or unless the disclosure obligation has been excused for other parties by stipulation or order." Difficulties in this formulation were recognized. The reference to a party "served" seems to overlook those who join by intervention, plaintiffs added by amendment of the complaint, and perhaps others. The reference to a person not a party "at the time of the meeting of the parties" seems to fit awkwardly with those who become parties immediately before the meeting. It was agreed that the problem of later-added parties should be addressed, and that these apparent drafting glitches should be worked out. The resolution may look something like this: "A person who becomes a party after the eleventh day before the subdivision (f) meeting of the parties must make these disclosures within 30 days after becoming a party unless otherwise stipulated or ordered by the court, or unless the disclosure obligation has been excused for other parties by stipulation or order."

A question not raised by the subcommittee was presented by the question whether disclosure should occur before the Rule 26(f) meeting. Paul Carrington noted that this had been the initial thought of the committee when Rule 26(f) was rewritten for 1993, but that it had been concluded that the meeting is necessary to make disclosure effective. The need may be reduced to some extent by the proposed retrenchment of disclosure to supporting information. But even under this reduced disclosure system, the meeting may well serve to focus the positions -- the claims, denials, and defenses -- of the parties. It was suggested that perhaps the note to the amended Rule 26(f) should suggest that disclosure before the meeting is desirable. But it was responded that even if that would be desirable in an ideal world, the meeting is where arrangements particular to the case are made. Disclosure may not be important to what actually is done. And the committee was reminded that Rule 26(f) seems widely regarded as the most useful of the 1993 discovery changes -- and there have not been any complaints that it would be improved by requiring disclosure before the meeting. The meeting "breaks the ice." Disclosure often occurs at the meeting. The committee agreed that no change should be made.

Another question not raised by the subcommittee was identified in the timing provisions of Rule 26(f). It sets the meeting at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b). It requires a report to the court "within 10 days after the meeting." Because of Rule 6(a), "intermediate Saturdays, Sundays, and legal holidays" are excluded from the 10-day period. With a three-day legal holiday weekend, it is possible that the report will be due one day after the scheduling conference or order (the intermediate weekend and holidays are not excluded from a 14-day period). The need to have the report due in time to allow consideration before the conference has led one member to routinely order that the Rule 26(f) conference be held within 30 days after an answer is filed; the report is to be filed 14 days after the meeting. The Rule 16(b) conference follows the report unless the parties do not want the conference -- and most often the parties work things out at the meeting. It might be desirable to adopt an idea suggested by Paul Carrington, setting the meeting within 90 days after a defendant is served.

Renewed discussion of the 26(f) time limits agreed that it is not desirable to have the report of the meeting presented to the court for the first time at the scheduling conference. It was agreed that the time for the meeting should be set at 21 days, rather than the present 14 days, before the scheduling conference or order. The time for the report of the meeting also should be changed, to 14 days after the meeting. This change will coincide with the change to Rule 26(a)(1)(E) that sets the time for disclosure at 14 days after the Rule 26(f) meeting, and -- in part

by moving outside the Rule 6(a) rules for calculating periods of less than 11 days -- set a clear date one week before the scheduling conference. This sequence will allow the parties to focus on a common deadline for disclosures and report, and will ensure adequate time for the court's consideration of the report.

Other Rule 26(f) matters also were raised. The subcommittee report had not suggested any exclusions, but its recommendation to delete the power to adopt exclusions by local rule is accepted by the committee. That leaves a need to provide for exclusion in low-end cases. It was noted at the Boston College conference that the meet-and-confer requirement is an unnecessary burden in many simple cases, simply one more useless hoop to jump through. The committee agreed that Rule 26(f) should be modified to incorporate the same low-end exclusions as are adopted for initial disclosures under Rule 26(a)(1). The court will continue to have discretion to exclude other cases.

The final Rule 26(f) question is posed by the language requiring that the parties "meet to discuss," and making them responsible for "being present or represented at the meeting." The 1993 Committee Note states that the rule requires a face-to-face meeting. This obligation ordinarily is reasonable in dense urban areas, but may impose untoward burdens in large and sparsely populated districts. The present power to exempt cases by local rules enables each district to take account of its own circumstances and adopt mollifying exemptions -- one example was offered of a rule that allows a telephone meeting when any attorney is located more than 100 miles from the court. Removal of the option to have local rules requires that this issue be reconsidered for the national rules. There are great advantages in a face-to-face meeting that cannot be duplicated by telephone, and are not likely soon to be duplicated by videoconferencing. It might be possible to adopt a compromise rule that seeks to preserve these advantages by requiring the parties to "confer in person if geographically practicable." Potential administrative difficulties, however, persuaded the committee to agree without dissent to change the "meet" requirement to a "confer" requirement.

The topic of low-end exclusions from disclosure and the Rule 26(f) meeting returned. With the help of the Federal Judicial Center, a survey of exclusions adopted by local rules shows an astonishing array of categories of cases that have been excluded in at least one district. Some of the exclusions are unique, and a few are inscrutable. Some are fairly common, and some are almost universal. The effort must be directed toward identifying common categories of actions that typically will not benefit from disclosure or a Rule 26(f) meeting because typically there is little or no occasion for discovery. A first rough estimate includes at least these cases: bankruptcy appeals; bankruptcy matters withdrawn from the bankruptcy court (see § 157(d)); actions for review on an administrative record; social security review cases; prisoner pro se cases; habeas corpus; actions challenging conditions of institutional confinement (perhaps unnecessary if prisoner pro se cases are excluded, particularly since complex actions needing discovery are brought under the Civil Rights of Institutionalized Persons Act); actions to enforce or quash administrative summonses or subpoenas; other Internal Revenue Service actions; government collection actions; civil forfeiture proceedings; student loan collections (perhaps only those below $75,000); proceedings ancillary to proceedings in other courts -- as for discovery or to register or enforce a judgment; and actions to enforce arbitral awards. Further thought will be given to which of these categories may make most sense, and the Administrative Office will be asked for help in developing formulas that accurately describe the intended categories. It was agreed that it would be unwise to exclude all pro se cases; the disclosure requirement can prove especially useful in focusing some pro se actions.

Scope of Discovery

The subcommittee reminded the committee that a major impetus for the present discovery project was the recommendation of the American College of Lawyers that the committee adopt the discovery scope limitation first advanced by the American Bar Association Litigation Section in 1977. The subcommittee brought three

An alternate dispute resolution bill was enacted, requiring that every court have some type of ADR system. The choice of ADR systems is left to local rule; the Administrative Office worked with Congress to improve the provisions invoking the local rulemaking power.

Class-action bills have been introduced. They bear directly on class-action practice, removal of class actions from state court, and other matters. Civil Rule 11 would be restructured for class actions by at least one bill. It is likely that many of these bills will reappear.

Offer-of-judgment proposals have been perennial topics of Congressional attention, and seem likely to return.

Report on Standing Committee

Judge Niemeyer reported on the consideration of Civil Rules proposals at the June meeting of the Standing Committee. Discussion of the proposals to publish discovery rules amendments for comment went rather well. There was less enthusiastic support for some of the proposals than for others. It is clear that the vote to approve publication does not represent a commitment by the Standing Committee to recommend adoption of any proposal that emerges unscathed from the public comment process. The Standing Committee did direct a change in proposed Rule 5(d). As proposed by the Advisory Committee, the rule would provide that discovery materials "need not be filed" until used in the action. The Standing Committee directed that the proposal be that the materials "must not be filed" until used in the action. Discussion of the change was rather cursory; it may be that after public comment and testimony, the Advisory Committee should consider whether a strong case can be made for returning to the "need not" formulation.

The proposed one-day, seven-hour limit for depositions was approved for publication by the narrowest margin, a vote of 6 for to 4 against. The reasons for concern are summarized in the draft Standing Committee minutes at pages 27 to 28. There is concern that the limit will not work well, particularly in multiparty cases. There has been favorable experience, however, with an Arizona rule that sets a presumptive 3-hour time limit for depositions. The proposal was made by the Advisory Committee in part because of the complaints of plaintiffs that deposition practice in some courts is being used to impose unwarranted, and at times unbearable, costs. Mr. Schreiber observed that he continues to believe that it would be desirable to supplement the one-day limit with a requirement that documents be exchanged before the deposition. This practice would facilitate the best use of the limited time. There also is concern about the provision that requires consent of the deponent for a stipulated extension of time; deponent consent may become a problem when the deponent is a party, or a person designated to testify for an organization party under Civil Rule 30(b)(6).

The progress of the Mass Torts Working Group also was reported to the Standing Committee.

The Standing Committee also approved publication of proposed amendments to Civil Rules 4 and 12, dealing with actions brought against United States employees in their individual capacities, and to Admiralty Rules B, C, and E.

Discovery

A number of proposed discovery rule amendments were published for comment last August. Hearings will be held in Baltimore in December, and in San Francisco and Chicago in January. The development of these proposals was reviewed, in part for the benefit of new Committee members and in part to inform all Committee members of the steps that were taken by the Discovery Subcommittee to implement the decisions made at the

March Committee meeting.

Judge Niemeyer began the discussion by noting that the discovery effort had been as streamlined as seems possible for a big project. From the beginning, the question has been whether we can get pretty much the same exchange of information at lower cost. After the undertaking was launched by appointing the Discovery Subcommittee, the first step was a January, 1997 meeting with experienced lawyers, judges, and academics. This meeting gave some sense of the areas in which it may be possible to improve on present discovery practice without forcing sacrifice of some recognizable sets of interests for the benefit of other recognizable sets of interests. This small conference was followed by a large-scale conference at Boston College in September, 1997. The conference was designed to provide expression of every point of view, and succeeded in this ambition. In addition to the information gathered at these conferences, empirical work was reviewed. The RAND data on experience under local Civil Justice Reform Act plans were studied, and the Federal Judicial Center undertook a new survey for Committee use. The FJC data proved very interesting. The data, in line with earlier studies, show that discovery is not used at all in a substantial fraction of federal civil actions, and that in more than 80% of federal civil actions discovery is not perceived to be a problem.

The Subcommittee compiled a list of nearly forty discovery proposals for consideration by the Committee. The Committee chose the most promising proposals and asked the Subcommittee to refine these proposals for consideration at the March, 1998 meeting. The refined proposals were further modified at the March meeting, with directions to the Subcommittee to make further changes. The proposals presented to the Standing Committee in June conformed to the Committee's actions and directions. Approval for publication, it must remembered, does not represent unqualified Standing Committee endorsement of the proposals. Even apart from the lessons to be learned from public comments and testimony, the Standing Committee expressed reservations that must be addressed if this Committee recommends adoption of any of the proposals.

Professor Marcus then provided a detailed review of the published proposals and their origins. The Discovery Subcommittee met in San Francisco in April, in conjunction with a conference held by the Judicial Conference Mass Torts Working Group. The revised discovery proposals were then circulated to the full Committee, and the Committee reactions were incorporated in the set of proposals approved by the Standing Committee.

Some preliminary reactions were provided by an ABA Litigation Section Panel during the August annual meeting. The first small set of written comments are starting to come in, including an analysis by the New York State Bar Association that runs more than forty pages. The topics that most deserve summary reminders and updating at this meeting include uniformity; disclosure; the scope of discovery; cost-sharing; and the duration of depositions. These are the topics that are most likely to provoke extensive public comments.

Uniformity. The local rule opt-out provision built into Rule 26(a)(1) in 1993 was not intended to endure for many years. The published proposal deletes the opt-out provision, and indeed proposes to prohibit local rules variations on discovery topics other than the number of Rule 36 requests to admit and the Rule 26(f) "conference" requirement. The proposed Committee Notes contain strong language invalidating local rules that are inconsistent with present and proposed national rules.

There is likely to be much comment about the need for national uniformity as against the value of local rules. Many district judges are strongly attached to their local rules. Some local rules, indeed, may provide practices that are more effective than present or proposed national practices. The strength of the desire for local autonomy is reflected by local rules that purport to opt out of portions of Rule 26(a) that do not authorize local rule departures.

Local rules, however, undercut the national rules regime. They also complicate the handling of cases that are transferred between districts that adhere to different practices. And local rules even complicate life for judges who are assigned to cases in districts away from home.

Disclosure. The disclosure obligations set out in Rule 26(a)(1)(A) and (B) were discussed extensively during the Subcommittee and Committee deliberations. The eventual recommendation limits the disclosure requirement to "supporting" information, not because of any direct ground for dissatisfaction with the 1993 rule but because of the desire to achieve a uniform national practice. Uniform adherence in all districts to the 1993 rule does not seem achievable now. The question remains whether this retrenchment is appropriate. The proposal proved popular at the August ABA Litigation Section meeting. Disclosure is described as information that supports the disclosing party's claims or defenses, drawing from the phrase used to define the scope of discovery. Some uncertainty was expressed at the Standing Committee meeting as to the reach of this phrase -- does it require disclosure of information that will support a party's efforts to controvert a defense? This issue may need to be addressed.

A minority drafting view won significant support in Committee deliberations, and has been pointed out in Judge Niemeyer's memorandum to Judge Stotler inviting public comment, on page 8 of the publication book. This drafting view would require disclosure of information that "may be used to support" the claims or defenses of the disclosing party. This issue should be kept in mind during the comment process and subsequent deliberations.

Proposed Rule 26(a)(1)(E) seeks to address arguments that disclosure is appropriate only in a middle run of litigation. It is too much to ask in "small" cases, and superfluous in complex or hotly contested cases. The approach taken to the complex cases is to allow any party to postpone disclosure by objecting to the process, forcing determination by the court whether disclosure is appropriate for the case. The alternative of attempting to define complex or contentious cases by rule was thought unattractive. The approach for small cases became known as the "low-end" exclusion. It was readily agreed that disclosure often is unsuitable for cases that would not involve discovery in the ordinary course of litigation. The drafting approach has been to attempt to identify categories of cases in which discovery is unlikely and in which disclosure often would be unnecessary work. Inspiration was sought in local rules that identify categories of cases excluded from Rule 16(b) requirements, but the inspiration was mixed -- there are only a few categories of cases that are excluded by many local rules, and there are many categories of cases that are excluded by one local rule or a small number of local rules. After the March meeting, a list of 10 categories was prepared. At the Standing Committee meeting, however, the Bankruptcy Rules Advisory Committee pointed out flaws in two categories aimed at bankruptcy proceedings even before the discussion began. These two categories were withdrawn; the published draft excludes eight categories of cases. These categories are avowedly tentative -- advice is sought on whether all of these cases should be excluded, whether other categories of cases should be excluded, and whether the words used to describe the excluded cases are appropriate. A preliminary review by Federal Judicial Center staff suggests that the proposed list would exclude about 30% of federal civil actions. The exemptions carry over, excepting the same cases from the Rule 26(f) party conference requirement and the Rule 26(d) discovery moratorium.

It was pointed out that the published proposals do not revise Rule 16(b), leaving in place the provision that authorizes local rules that exempt categories of cases from Rule 16(b) requirements. It was recognized that Rule 16(b) could be tied in to the same approach, identifying categories of cases to be excluded. But it is too late to graft this approach onto the current proposals -- separate publication of a Rule 16(b) proposal would be required. And it also is a question whether there is a need for national uniformity in this area that parallels the perceived need for uniformity in disclosure practice. The wide variation that exists among local exemption rules today also may suggest grounds for going slow. It also was observed that it would be risky to go the other way, adopting local Rule 16(b) exclusions into disclosure practice -- districts opposed to disclosure might adopt Rule 16(b) exclusions for the purpose of defeating disclosure.

Returning to the exclusion of "high-end" cases, it was noted that any case can be excluded from disclosure on stipulation of all the parties. It cannot be predicted what fraction of all federal cases may be excluded either by party stipulation or by the process of objection and eventual court order.

Rule 26(a)(1)(E) also would address, for the first time, the problem of late-added parties. An attempt was made to draft detailed provisions for this problem, but the drafting exercise identified too many problems to permit sensible resolution by uniform rule. The published proposal is deliberately open-ended and flexible.

Finally, some early reactions to the broad disclosure proposal were reported. The New York State Bar Association wants a uniform national rule, but a rule of no disclosure at all. A Magistrate Judges group, on the other hand, has urged continuation of the full present disclosure practice, including "heartburn" information that harms the position of the disclosing party.

Rule 26(b)(1) Scope of Discovery. A Committee Note has been written to explain the proposal. The goal is to win involvement of the court when discovery becomes a problem that the lawyers cannot manage on their own. The present full scope of discovery remains available, as all matters relevant to the subject matter of the litigation, either when the parties agree or when a recalcitrant party is overruled by the court. Absent court order, discovery is limited to matters relevant to the claims or defenses of the parties. No one is entirely clear on the breadth of the gap between information relevant to the claims and defenses of the parties and information relevant to the subject matter of the action, but the very juxtaposition makes it clear that there is a reduction in the scope of discovery available as a matter of right. There have been some preliminary responses to this proposal. One is that simply because it is a change, it will generate litigation over the meaning of the change. Another, from the New York State Bar Association, applauds the proposal, but urges that the Committee Note state that it is a clear change. And the concept of "good cause" for resorting to "subject-matter" discovery is thought too vague.

Committee discussion urged that the Note not belittle the nature of the change -- this is a significant proposal. But it was urged that the draft Note in fact is strict. Another observation was that any defendant will move that discovery is too broad; the proposal, if adopted, will generate a "huge load of motion practice." Together with the cost-bearing proposal [more accurately called cost-shifting, on this view], thousands of motions will be generated.

Cost-bearing. The published Rule 34(b) language was drafted after the March meeting, in response to deserved dissatisfaction with the proposals offered there. At the Standing Committee meeting, it was asked whether the proposed language adequately describes the intent to apply cost-bearing only as an implementation of Rule 26(b)(2) principles -- whether cost-bearing could be ordered as to discovery that would be permitted to proceed under present applications of (b)(2) principles. The problem of drafting Rule 34 language, indeed the general problem of incorporating this provision specifically in Rule 34, joined with policy doubts to suggest reconsideration of the question whether cost-bearing would better be incorporated directly in Rule 26(b)(2). There was extensive debate of this question at the April Subcommittee meeting, leading to a close division of views. The Rule 26(b)(2) approach would have at least two advantages in addition to better drafting. The Reporters believe that Rule 26(b)(2) and Rule 26(c) now authorize cost-bearing orders; incorporation in Rule 26(b)(2) would quash the doubts that might arise by implication from location in Rule 34. In addition, it is important to emphasize that the cost-bearing principle can be applied in favor of plaintiffs as well as in favor of defendants; there is a risk that location in Rule 34 will stir questions whether the proposal is aimed to help defendants in light of the fact that defendants complain of document production, while plaintiffs tend to complain more of deposition practice. This question is raised in Judge Niemeyer's letter to Judge Stotler, at pages 14 to 15 of the publication book.

It was observed that the arguments for relocation of the cost-bearing provision in Rule 26(b)(2) are strong. The Committee should feel free to consider the matter further in light of the views that may emerge from the public comments and testimony.

An important question was raised at the Standing Committee meeting that may deserve a drafting response. After a court allows discovery on condition that the requesting party pay the costs of responding, the response may provide vitally important information that belies the court's initial prediction that the request was so tenuous that the requesting party should bear the response costs. Should the rule provide a clear answer whether the cost-bearing order can be overturned in light of the value of the information provided in response?

The New York State Bar Association opposes this proposal because it agrees that the intended authority already exists. Adoption of an explicit rule will lead some litigants to contend for -- and perhaps win -- a broader sweep of cost-sharing than is intended.

Some preference was expressed for leaving the proposed amendment in Rule 34. This view was that "there is too much in Rule 26" now; "no one reads all of Rule 26." The most important source of the most extravagantly expensive over-discovery is document production. The explicit cost-bearing protection should be expressed in Rule 34.

It also was noted that at the Standing Committee meeting, it had been urged that if the target is the complex or "big documents" case, the rule should be drafted expressly in terms of complex cases. It also was feared that the proposal will create a "rich-poor" issue: there will be a marked effect on civil rights and employment cases, where poor plaintiffs will be denied necessary discovery because neither they nor their lawyers can afford to pay for response costs. There have been few cost-bearing orders in the past; no matter what the rule intends, it will be difficult to convince lawyers that they can continue to afford to bring these cases. They will fear that cost-bearing will be ordered in cases where discovery is now allowed.

These concerns were met by responses that Rule 26(b)(2) now says that the court shall deny disproportionate discovery; the cost-bearing provision simply confirms a less drastic alternative that allows access to otherwise prohibited discovery. No one is required to pay for anything; it is only that if you want to force responses to discovery requests that violate Rule 26(b)(2) limits, you can at times obtain discovery by agreeing to pay the costs of responding. All reasonable discovery will be permitted without interference, as it now is under Rule 26(b)(2). Rule 26(b)(2) principles expressly include consideration of the parties' resources; there is no reason to anticipate that poor litigants will be put at an unfair disadvantage. And it has proved not feasible, even after some effort, to define "big," "complex," or "contentious" cases in terms that would make for administrable rules.

Deposition Length. The proposal is to establish a presumptive limit of one business day of seven hours for a deposition. The most frequently expressed concern is that this proposal will prove too rigid, and by its rigidity will promote stalling tactics. The Standing Committee also expressed concern over allocation of the time in multiparty cases; perhaps the Committee Note should be revised to address this concern. The proposal also requires consent of the deponent as well as the parties for an extension by consent without court order. The Committee may well not have thought hard enough about the requirement of deponent consent for cases in which the deponent is a party; perhaps further thought should be given to requiring deponent consent only when the deponent is not a party. It also might be desirable to amend the Note to express general approval of the practice of submitting documents to the deponent before the deposition occurs, so as to save time during the deposition. Among early comments, the New York State Bar Association opposes this proposal for fear that it will promote undesirable behavior at depositions.

Other Matters. Rule 26(f) would be amended to delete the requirement of a face-to-face meeting; recognizing the great values of a face-to-face meeting, however, provision has been made for local rules that require the meeting. The draft Committee Note emphasizes the success of present practice, but recognizes that some districts may be so geographically extended that face-to-face meetings cannot realistically be required in every case.

This Committee recommended publication of a draft Rule 5(d) that would have provided that discovery materials "need not" be filed until used in the action or ordered by the court. The Standing Committee changed the provision, so that the rule published for comment provides that discovery materials "must not" be filed until used in the action or ordered by the court. The discussion in the Standing Committee did not focus special attention on the public access debate that met a similar proposal in 1980. Depending on the force of public comments and testimony on the published proposal, the Advisory Committee may wish to urge reconsideration of this issue.

It was asked in the Standing Committee whether there had been a "judicial impact study" of the proposed amendments. The amendments are designed to encourage -- and perhaps force -- greater participation in discovery matters by the substantial minority of federal judges who may not provide as much supervision as required to police the lawyers who appear before them. But it is not clear whether these judges in fact have time to devote to discovery supervision. It also was asked why the rules should be changed for all cases, if fewer than 20% of the cases are causing the problems. In considering this question, it should be remembered that it is difficult to draft rules only for "problem" cases. And it also should be remembered that figures that refer only to percentages of all cases in federal courts are misleading. There is no discovery at all in a significant fraction of cases, and only modest discovery in another substantial number of cases. Rules changes that nominally apply to all cases are not likely to affect these cases in any event. Lawyers perceive significant problems in a large portion of the cases that have active discovery. It is worthwhile to attempt to reach these cases.

It was suggested that if possible, it would be useful to acquire information -- including anecdotal information, if as seems likely nothing rigorous is available -- about the experiences in Arizona and Illinois with rules that limit the time for depositions. And it was predicted that one effect of deposition time limits will be that documents are exchanged before the litigation, even though there is no express requirement. And even without an express requirement that a deponent read the documents provided, failure to read them will provide a strong justification for an order directing extra time. The potential problems are likely to be sorted out in practice by most lawyers in most cases.

It was noted that discovery is likely to be the central focus of the agenda for the spring meeting.

Mass Tort Working Group

Judge Niemeyer noted that class actions have been on the Advisory Committee agenda since 1991. The Rule 23 proposals published in 1996 generated many enlightening comments that addressed mass torts among other topics. The problems identified by the comments were far-reaching, and often seemed to call for answers that are beyond the reach of the Enabling Act process. The Committee found so many puzzles that it recommended present adoption only for the interlocutory appeal provision that is about to take effect as new Rule 23(f).

The Judicial Conference independently began to consider appointment of a "blue ribbon" committee on mass torts. An entirely independent committee seemed likely to duplicate work already done by the Advisory Committee. It was suggested that the best approach would be to establish a cooperative process among the several Judicial Conference committees that might be interested in the mass torts phenomenon. An initial recommendation was made to establish a formal task-force across committee lines. The Chief Justice reacted to

433 in Rule 30(f)(1).

434 Another protest was that a lawyer cannot lose or destroy
435 documents during a litigation. The Note, in attempting to address
436 this issue in incomplete terms, will lead to mischief. There is a
437 risk that the Note language will be read to narrow the duty that
438 presently exists. We just do not need this language; both sides
439 have discovery material, and all parties recognize the need and
440 obligation to preserve it.

441 An alternative suggestion was that the Note could refer to the
442 duty to preserve discovery materials indirectly by stating that the
443 prohibition on filing does not alter the responsibility to
444 preserve.

445 On the question whether to add lines 271 to 282 of the
446 Subcommittee Memorandum to the Rule 5(d) note, it was decided
447 unanimously not to add this material.

448 Rule 26(a)(1): "May use" formulation. After extensive discussion
449 at the March, 1998 meeting, it was decided to frame the revised
450 initial disclosure provisions of Rule 26(a)(1) to require a party
451 to disclose witnesses and documents "supporting its claims or
452 defenses, unless solely for impeachment." The alternative
453 formulation called for a party to disclose information it "may use
454 to support its claims or defenses, unless solely for impeachment."
455 In publishing the Rule 26(a)(1) proposal, the alternative
456 formulation was identified for comment. There was little comment.

457 The choice between "supporting" and "may use to support"
458 divided the committee by a margin of 7 to 4 in 1998. The
459 Subcommittee has reconsidered the question, and concluded to submit
460 the issue to the committee without recommendation. Because there
461 is no Subcommittee recommendation, the question whether to depart
462 from the earlier vote and from the published version was opened
463 without a motion. A motion was then made to change to the "may
464 use" formulation.

465 The arguments for the competing proposals were set out at some
466 length in summaries by the Reporter and the Special Reporter,
467 appearing at pages 11 to 21 of the Subcommittee Memorandum. The
468 Reporter and Special Reporter presented these arguments in
469 condensed form. The supporting memoranda are set out as Appendix
470 A to these Minutes.

471 Committee discussion began with an expression of concern about
472 the cost of extensive disclosure. The "supporting" approach
473 requires disclosure of information that the disclosing party has no
474 intention to use, requires investigation to unearth supporting
475 information that the party would not undertake for its own
476 purposes, and may require disclosure of witnesses or documents that
477 in any way involve supporting information even though the balance
478 is heavily unfavorable to the disclosing party. An example was
479 offered of an automobile design developed from 1985, first produced
480 in 1990, and embodied in a vehicle sold in 1995 that was involved

481 in a 1997 accident. Information about all of these matters will be
482 used, and is properly disclosed. Information about events in 1955
483 that might seem to support the continuing evolution of automobile
484 design would not be sought out or used, and should not be subject
485 to a disclosure requirement.

486 An alternative view was that the narrower version is better,
487 but that it is not clear whether "supporting" is broader or
488 narrower than "may use." The committee should adopt the language
489 that is narrower, less open-ended. We should focus on material
490 that a party actually intends, at the time of disclosure, to use at
491 trial. It was responded that "may use" is closer to intent, and
492 narrows the obligation in a way that "supporting" does not. The
493 Reporter and Special Reporter agree that "may use" would create a
494 lesser disclosure duty. The proponent of the "intent" approach
495 urged that the Note should say that "may use" means "intends at
496 this time to use."

497 It was noted that Rule 26(a)(1) already provides that
498 disclosure is to be made "based on information then reasonably
499 available to" a party and is not excused because the disclosing
500 party "has not fully completed its investigation of the case."
501 This provision is supplemented by the continuing duty to supplement
502 created by Rule 26(e)(1). "May use" is not "will use," but speaks
503 only to current estimates. The duty to supplement means that the
504 disclosure obligation in effect merges with the discovery process:
505 the more thorough the discovery process is, the less occasion there
506 will be to disclose.

507 It also was suggested that in reality, most parties pay little
508 attention to initial disclosure obligations. Most plaintiffs would
509 rather get on directly to discovery.

510 Scott Atlas noted that when the ABA Litigation Section
511 selected "supporting" over "may use," it had not particularly
512 focused on the arguments presented to the committee. He suspected
513 that the Section would prefer the narrower version.

514 When the alternative formulations were put to a vote, 11 votes
515 preferred "may use," and 1 vote preferred "supporting."

516 It was urged again that the Note should say that the "may use"
517 formulation is narrower than the published proposal to require
518 disclosure of "supporting" information.

519 <u>Rule 26(a)(1): "High-end exclusion"</u>. Proposed Rule 26(a)(1)
520 provides that initial disclosures are to be made within 14 days
521 after the Rule 26(f) conference unless a party objects during the
522 conference that initial disclosures are not appropriate in the
523 circumstances of the action. This proposal reflects the view that
524 in some circumstances it may be better to proceed directly to
525 discovery and other pretrial management devices. Lines 784 to 795
526 of the Subcommittee Memorandum propose language that might be added
527 to the Committee Note to provide examples of such circumstances.
528 Many lawyers have advised the committee that initial disclosures

529 are routinely bypassed in complex litigation. The prospect of
530 early disposition for lack of jurisdiction, or failure to state a
531 claim, suggests other circumstances that might justify delay or
532 disregard of initial disclosure procedure.

533 It was suggested that it would be better not to address this
534 topic in the Committee Note. There is a special risk that
535 suggesting that dispositive motions may toll disclosure will invite
536 more motions.

537 The committee mustered 3 votes to include the proposed Note
538 language, and 8 votes to omit it.

539 Rule 26(a)(1)(E): "Low-end exclusion". Proposed Rule 26(a)(1)(E)
540 enumerates eight categories of proceedings that are exempted from
541 the initial disclosure requirement. These exemptions are
542 incorporated as well in proposed Rules 26(d) and 26(f) — in these
543 categories of proceedings there is no Rule 26(f) conference
544 obligation, and no Rule 26(d) discovery moratorium. When the
545 proposals were published, the committee asked for comment on the
546 categories chosen for exemption, and also on the ways to express
547 the exemptions. There were not many comments.

548 The first exemption, (i), covers "an action for review on an
549 administrative record." Some of the comments suggested that this
550 description is ambiguous because administrative actions are at
551 times "reviewed" in settings that are collateral to the main object
552 of a proceeding. The committee approved the addition of two new
553 sentences to the Committee Note, following the statement that the
554 descriptions of the exemptions are generic and are to be
555 administered flexibly: "The exclusion of an action for review on an
556 administrative record, for example, is intended to reach a
557 proceeding that is framed as an 'appeal' based solely on an
558 administrative record. The exclusion would not apply to a
559 proceeding in a form that commonly permits admission of new
560 evidence to supplement the record."

561 The third exemption, (iii), covers "an action brought without
562 counsel by a person in custody of the United States, a state, or a
563 state subdivision." One suggestion was that disclosure should be
564 required of the government when it is involved in such an action,
565 but not of the plaintiff. Another suggestion was that the
566 exemption should cover all pro se actions. Committee discussion
567 noted that pro se employment cases have come to occupy a
568 substantial portion of the docket in some courts, and that there
569 can be problems with disclosure and the Rule 26(f) conference in
570 such cases. But it also was observed that the practice in both the
571 Eastern and Southern Districts of New York is that the defense
572 discloses to a pro se plaintiff, and that this works. Another
573 judge observed that disclosure and the Rule 26(f) conference help
574 to move pro se cases. When the parties come to court, there has
575 been at least an initial discussion, and the plaintiff often has a
576 better idea of what the case is about. The committee concluded
577 that the exemption should not be changed.

578 The fifth and sixth exemptions, (v) and (vi), cover "an action
579 by the United States to recover benefit payments" and "an action by
580 the United States to collect on a student loan guaranteed by the
581 United States." The Department of Justice urged that these two
582 exemptions be combined into one exemption, and extended to cover
583 all actions by the United States to recover on a loan. Consumer
584 groups urged that the exemptions be deleted, urging that disclosure
585 is important because the United States frequently fails to maintain
586 adequate records and will be forced by disclosure to present a
587 coherent account of the amounts due. Committee discussion
588 suggested that the consumer group concerns do not have much
589 support. These actions are not filed without thought, and usually
590 the information underlying the claim is narrow, straightforward,
591 and clear. The reasons for not requiring disclosure apply at least
592 to all loans. But it also was noted that there are many
593 foreclosure actions, and that foreclosure actions may not be so
594 simple. The committee concluded that these exemptions should not
595 be changed.

596 A motion was made to drop the student loan exemption on the
597 ground that disclosure and the Rule 26(f) conference will expedite
598 the proceedings. It was further observed that once the defendant
599 "knows the number," there are a lot of quick settlements. If there
600 is not a settlement, disclosure and a Rule 26(f) conference may be
601 the most efficient means to dispose of these cases. But it also
602 was observed that there is disclosure in practice — that the
603 collection process typically is managed by a paralegal or other
604 staff person who calculates the amount due and delivers the
605 calculation to the debtor. Even in cases that do not go by
606 default, the answer typically admits the amount due. The vote was
607 one to drop the exemption, and all others to retain the exemption.

608 The seventh exemption, (vii), covers "a proceeding ancillary
609 to proceedings in other courts." This exemption was intended to
610 reach such matters as ancillary discovery proceedings, judgment
611 registration, an action to enforce a judgment entered by a state or
612 foreign court, and the like. A group of bankruptcy judges,
613 however, expressed concern that the exemption might apply to an
614 adversary proceeding in bankruptcy. The Reporter for the
615 Bankruptcy Rules Committee agreed that the exemption should not be
616 read to reach adversary proceedings in bankruptcy, but suggested
617 that the Committee Note might include an express statement on this
618 subject. The Committee determined to add this new sentence at the
619 end of the last full paragraph on page 51 of the published
620 proposals: "Item (vii), excluding a proceeding ancillary to
621 proceedings in other courts, does not refer to bankruptcy
622 proceedings; application of the Civil Rules to bankruptcy
623 proceedings is determined by the Bankruptcy Rules."

624 In addition to discussion of the exemptions included in
625 proposed Rule 26(a)(1)(E), the comments and testimony suggested
626 another 23 enumerated exemptions. It also was suggested that the
627 rule should authorize further exemptions by local district rule.

628 The committee agreed that it is better not to propose additional
629 exemptions for public comment. It will be time enough to consider
630 additional exemptions after developing experience with the present
631 proposals.

632 Rule 26(b)(1): Drafting Change. The Discovery Subcommittee offered
633 no recommendations with respect to the substance of the proposal to
634 redefine the scope of discovery in Rule 26(b)(1). It did, however,
635 suggest a one-word change in drafting. Rule 26(b)(1), now and as
636 it would be amended, allows discovery of "any matter" relevant to
637 the litigation. In the present rule, it is any matter relevant to
638 the subject matter of the pending action. In the proposed rule, it
639 is any matter relevant to the claim or defense of any party. The
640 proposed rule then allows the court to expand discovery back to the
641 "subject matter" scope. As published, see line 131 on page 42, the
642 expansion allows the court to order discovery of any "information"
643 relevant to the subject matter. Use of "information" in this
644 setting introduces a potential ambiguity. The intent of this
645 "court-managed" discovery provision is to allow discovery within
646 the full scope of the present rule; the only change is that
647 discovery to this extent requires a showing of good cause and a
648 court order. Unambiguous communication of this intention requires
649 that the court-managed discovery provision be drafted in the
650 language of the present rule. The committee unanimously agreed to
651 change this provision to read: "For good cause shown, the court may
652 order discovery of any ~~information~~ matter relevant to the subject
653 matter involved in the action."

654 Rule 26(b)(1): "Background" information. Many of the comments on
655 proposed Rule 26(b)(1) expressed doubt whether the change in
656 lawyer-managed discovery from information relevant to the "subject
657 matter" to information relevant to a claim or defense would require
658 a court order to win discovery of various forms of information now
659 commonly discoverable. This doubt was expressed in general terms
660 of "background" information, but also in more focused terms. The
661 most common examples involved impeachment information;
662 "organizational" information identifying the people and documents
663 or things to be subjected to further discovery; and "other
664 incident" information involving such matters as other injuries
665 involving similar products or the treatment of other employees for
666 comparison with an employment-discrimination plaintiff. Additional
667 Committee Note language was proposed to address these concerns,
668 appearing at lines 1110 to 1123 of the agenda materials. This
669 language is rather general. The material at lines 1112 to 1115
670 dealing with "other incident" information was discussed by the
671 Discovery Subcommittee.

672 Discussion of the proposed Note language began with the
673 observation that such phrases as "could be" and "might be" are
674 troubling. They imply that the described information also might
675 not be discoverable. The Note material, moreover, "reads like an
676 application note to a Sentencing Guideline."

MINUTES

CIVIL RULES ADVISORY COMMITTEE

October 14 and 15, 1999

The Civil Rules Advisory Committee met on October 14 and 15, 1999, at Kennebunkport, Maine. The meeting was attended by Judge Paul V. Niemeyer, Chair; Sheila Birnbaum, Esq.; Judge John L. Carroll; Justice Christine M. Durham; Mark O. Kasanin, Esq.; Judge David F. Levi; Myles V. Lynk, Esq.; Judge John R. Padova; Acting Assistant Attorney General David W. Ogden; Judge Lee H. Rosenthal; Judge Shira Ann Scheindlin; and Andrew M. Scherffius, Esq.. Chief Judge C. Roger Vinson and Professor Thomas D. Rowe, Jr., attended this meeting as the first meeting following conclusion of their two terms as Committee members. Professor Richard L. Marcus was present as Special Reporter for the Discovery Subcommittee; Professor Edward H. Cooper attended by telephone as Reporter. Judge Anthony J. Scirica attended as Chair of the Standing Committee on Rules of Practice and Procedure, and Professor Daniel R. Coquillette attended as Standing Committee Reporter. Judge Adrian G. Duplantier attended as liaison member from the Bankruptcy Rules Advisory Committee. Peter G. McCabe and John K. Rabiej represented the Administrative Office of the United States Courts. Thomas Willging, Judith McKenna, and Carol Krafka represented the Federal Judicial Center; Kenneth Withers also attended for the Judicial Center. Observers included Scott J. Atlas (American Bar Association Litigation Section); Alfred W. Cortese, Jr.; and Fred Souk.

Judge Niemeyer introduced Judge Padova as one of the two new members of the committee. Professor John C. Jeffries, Jr., the other new member, was unable to attend because of commitments made before appointment to the committee.

Judge Niemeyer expressed the thanks of the committee to Chief Judge Vinson and Professor Rowe for six years of valuable contributions to committee deliberations. Each responded that the privilege of working with the committee had provided great professional and personal rewards.

Introduction

Judge Niemeyer began the meeting by summarizing the discovery proposals that emerged from the committee's April meeting and describing the progress of those proposals through the next steps of the Enabling Act process. The April debates in this committee were at the highest level. Committee members were arguing ideas. If the ideas are inevitably influenced by personal experience, the discussion was enriched by the experiential foundation. It is difficult to imagine a better culmination of the painstaking process that led up to the April meeting. During those debates the disclosure amendments were shaped to win acceptance despite the strong resistance from many district judges who did not want to

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have local practices disrupted by national rules. The decision to reallocate the present scope of discovery between lawyer-managed discovery and court-directed discovery met the question whether the result would be to increase abuses by hiding information and would lead to increased motion practice. The committee concluded that any initial increase of motion practice would be likely to subside quickly, and that the result would be the same level of useful information exchange. The committee also decided to recommend an explicit cost-bearing provision, notwithstanding the belief that this power exists already. The opposing motion made by committee member Lynk proved prophetic, as his arguments proved persuasive to the Judicial Conference. The seven-hour deposition limit also provoked much discussion, and significant additions to the Committee Note, before it was approved.

The responsibility of presenting the multi-tiered advisory committee debates and recommendations to the Standing Committee was heavy. The Standing Committee, however, provided a full opportunity to explore all the issues. The carefulness of the advisory committee inquiry, the deep study, and the broad knowledge brought to bear persuaded the Standing Committee to approve the recommendations by wide margins.

The Standing Committee recommendations then were carried to the Judicial Conference, where the central discovery proposals were moved to the discussion calendar. Because all members of the Judicial Conference are judges, there were no practicing lawyer members to reflect the concerns of the bar with issues like national uniformity of procedural requirements and the desire to win greater involvement of judges in policing discovery practices. Some of the district judge members were presented resolutions of district judges in their circuits, and felt bound to adopt the positions urged by the resolutions. Practicing lawyers sent letters. The Attorney General wrote a letter expressing the opposition of the Department of Justice to the discovery scope provisions of Rule 26(b)(1).

With this level of interest and opposition, the margin of resolution seemed likely to be close. Judge Scirica and Judge Niemeyer were allowed considerably more time for their initial presentations than called for by the schedule, and then sufficient time for each individual proposal.

Discussion of the disclosure proposals began with a motion to vote on two separate issues — elimination of the right to opt out of the national rule by local rule, and elimination of the requirement to find and disclose unfavorable information that the disclosing party would not itself seek out or present at trial. The proposal to restore national uniformity was approved by a divided vote. Approval likewise was given to the proposal to scale back initial disclosure to witnesses and documents a party may use to support its claims or defenses.

93 The proposal to divide the present scope of discovery between
94 attorney-managed discovery and court-directed discovery was
95 discussed before the lunch break, while the vote came after the
96 break. This vote too was divided, but the proposal was approved.
97 The discussion mirrored, in compressed form, the debates in the
98 advisory committee. Professor Rowe's motion to defeat the proposal
99 was familiar to the Conference members, who explored the concern
100 that the proposal might lead to suppression of important
101 information.

102 The presentation of the cost-bearing proposal was not long.
103 It was noted that the advisory committee believes courts already
104 have the power to allow marginal discovery only on condition that
105 the demanding party bear the cost of responding. Although the
106 purpose is only to make explicit a power that now exists, several
107 Conference members feared that public perceptions would be
108 different. Again, the views expressed in advisory committee
109 debates on Myles Lynks's motion to reject cost-bearing were
110 reviewed by the Conference. The Conference rejected the proposal.

111 The presumptive seven-hour limit on depositions met a much
112 easier reception; it was quickly approved.

113 The next step for the discovery amendments lies with the
114 Supreme Court. There may well be some presentations by members of
115 the public to the Court. If the Court approves, the proposals
116 should be sent to Congress by the end of April, to take effect —
117 barring negative action by Congress — on December 1, 2000.

118 In the end, the discovery proposals were accepted not only
119 because the content seems balanced and modest, but also because of
120 the extraordinarily careful and thorough process that generated the
121 amendments. The Discovery Subcommittee's work was a model. It is
122 to be hoped that a detailed account of this work will be prepared
123 for a broader audience, as an inspiration for important future
124 Enabling Act efforts.

125 Judge Scirica underscored the observations that the debate on
126 the discovery proposals was very close. The debate, with the help
127 of Judge Niemeyer's excellent presentation, mirrored the
128 discussions in the advisory committee. Conference members know a
129 lot about these issues. They came prepared; some had called either
130 Judge Scirica or Judge Niemeyer before the meeting to ask for
131 additional background information. All of the arguments were put
132 forth; nothing was overlooked.

133 Assistant Attorney General Ogden noted that the Department of
134 Justice appreciated the efforts that were made to explain the
135 advisory committee proposals to Department leaders. Although
136 official Department support was not won on all issues, the
137 Department supports ninety percent of the proposals. The
138 Department, moreover, recognizes that its views were given full
139 consideration. For that matter, there are differences of view
140 within the Department itself. Opposition to the proposed changes

in the scope-of-discovery provision, however, was strongly held by some in the enforcement divisions. From this point on, it is important that the Enabling Act process work through to its own conclusion.

Judge Niemeyer responded that it is important that the advisory committee maintain a full dialogue with the Department of Justice. The Department works with the interests of the whole system in mind.

Judge Duplantier reported that he had observed the Standing Committee debate. The written materials submitted by the advisory committee were read by district judges, and they recognized that the advisory committee had worked hard on close issues. This recognition played an important role in winning approval of the proposals.

Judge Niemeyer observed that the questions that arise from local affection for local rules will continue to face the advisory committee.

Scott Atlas expressed appreciation for the efforts of the advisory committee to keep the ABA Litigation Section informed of committee work. The Section will continue to support the discovery proposals.

It also was noted that the Judicial Conference considered on its consent calendar the packages of proposals to amend Civil Rules 4 and 12, and to amend Admiralty Rules B, C, and E with a conforming change to Civil Rule 14. These proposals were approved and sent on to the Supreme Court.

In June, the Standing Committee approved for publication a proposal to amend Rule 5(b) to provide for electronic service of papers other than the initial summons and like process, along with alternatives that would — or would not — amend Rule 6(e) to allow an additional 3 days to respond following service of a paper by any means that requires consent of the person served. A modest change in Rule 77(d) would be made to parallel the Rule 5(b) change. Publication occurred in August, in tandem with the proposal to repeal the Copyright Rules of Practice, and make parallel changes in Rule 65 and 81; these proposals were approved by the Standing Committee last January.

Judge Niemeyer noted that the admiralty rules proposals grew from an enormous behind-the-scenes effort by Mark Kasanin, the Maritime Law Association, the Department of Justice, and the Admiralty Rules Subcommittee. The package was so well done and presented that it has not drawn any adverse reaction.

Appointment of Subcommittees

Judge Niemeyer announced that changes in advisory committee membership and new projects require revisions in the subcommittee assignments and creation of a new subcommittee.

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1991 Amendment

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The rejection of Federal Rule 26(g), and the concomitant loss of its language expressly requiring certification that the discovery request, response or objection is not unreasonable or unduly burdensome or expensive, is not intended to diminish the protection provided by Rule 26(c).

Rule 26(g). Discovery motions

No discovery motion will be considered or scheduled unless a separate statement of moving counsel is attached thereto certifying that, after personal consultation and good faith efforts to do so, counsel have been unable to satisfactorily resolve the matter.

Added and effective June 27, 2001.

Rule 26(h). Deleted. Effective Nov. 1, 1970

Rule 26.1. Prompt disclosure of information

(a) Duty to Disclose, Scope. Within the times set forth in subdivision (b), each party shall disclose in writing to every other party:

(1) The factual basis of the claim or defense. In the event of multiple claims or defenses, the factual basis for each claim or defense.

(2) The legal theory upon which each claim or defense is based including, where necessary for a reasonable understanding of the claim or defense, citations of pertinent legal or case authorities.

(3) The names, addresses, and telephone numbers of any witnesses whom the disclosing party expects to call at trial with a fair description of the substance of each witness' expected testimony.

(4) The names and addresses of all persons whom the party believes may have knowledge or information relevant to the events, transactions, or occurrences that gave rise to the action, and the nature of the knowledge or information each such individual is believed to possess.

(5) The names and addresses of all persons who have given statements, whether written or recorded, signed or unsigned, and the custodian of the copies of those statements.

(6) The name and address of each person whom the disclosing party expects to call as an expert witness at trial, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, the qualifications of the witness and the name and address of the custodian of copies of any reports prepared by the expert.

(7) A computation and the measure of damage alleged by the disclosing party and the documents or testimony on which such computation and measure are based and the names, addresses, and telephone numbers of all damage witnesses.

(8) The existence, location, custodian, and general description of any tangible evidence, relevant documents, or electronically stored information that the disclosing party plans to use at trial and relevant insurance agreements.

(9) A list of the documents or electronically stored information, or in the case of voluminous documentary information or electronically stored information, a list of the categories of documents or electronically stored information, known by a party to exist whether or not in the party's possession, custody or control and which that party believes may be relevant to the subject matter of the action, and those which appear reasonably calculated to lead to the discovery of admissible evidence, and the date(s) upon which those documents or electronically stored information will be made, or have been made, available for inspection, copying, testing or sampling. Unless good cause is stated for not doing so, a copy of the documents and electronically stored information listed shall be served with the disclosure. If production is not made, the name and address of the custodian of the documents and electronically stored information shall be indicated. A party who produces documents for inspection shall produce them as they are kept in the usual course of business.

Court Comment to 1991 Amendment

In March, 1990 the Supreme Court, in conjunction with the State Bar of Arizona, appointed the Special Bar Committee to Study Civil Litigation Abuse, Cost and Delay, which was specifically charged with the task of studying problems pertaining to abuse and delay in civil litigation and the cost of civil litigation.

Following extensive study, the Committee concluded that the American system of civil litigation was employing methods which were causing undue expense and delay and threatening to make the courts inaccessible to the average citizen. The Committee further concluded that certain adjustments in the system and the Arizona Rules of Civil Procedure were necessary to reduce expense, delay and abuse while preserving

the traditional jury trial system as a means of resolution of civil disputes.

In September, 1990 the Committee proposed a comprehensive set of rule revisions, designed to make the judicial system in Arizona more efficient, more expeditious, less expensive, and more accessible to the people. It was the goal of the Committee to provide a framework which would allow sufficient discovery of facts and information to avoid "litigation by ambush." At the same time, the Committee wished to promote greater professionalism among counsel, with the ultimate goal of increasing voluntary cooperation and exchange of information. The intent of the amendments was to limit the adversarial nature of proceedings to those areas where there is a true and legitimate dispute between the parties, and to preclude hostile, unprofessional, and unnecessarily adversarial conduct on the part of counsel. It was also the intent of the rules that the trial courts deal in a strong and forthright fashion with discovery abuse and discovery abusers.

After a period of public comment and experimental implementation in four divisions of the Superior Court in Maricopa County, the rule changes proposed by the Committee were promulgated by the Court on December 18, 1991, effective July 1, 1992.

Committee Comment to 1991 Amendment

This addition to the rules is intended to require cooperation between counsel in the handling of civil litigation. The Committee has endeavored to set forth those items of information and evidence which should be promptly disclosed early in the course of litigation in order to avoid unnecessary and protracted discovery as well as to encourage early evaluation, assessment and possible disposition of the litigation between the parties.

It is the intent of the Committee that there be a reasonable and fair disclosure of the items set forth in Rule 26.1 and that the disclosure of that information be reasonably prompt. The intent of the Committee is to have newly discovered information exchanged with reasonable promptness and to preclude those attorneys and parties who intentionally withhold such information from offering it later in the course of litigation.

The Committee originally considered including in Rule 26.1(a)(5) a requirement for disclosure of all cases in which an expert had testified within the prior five (5) years. The Committee recognized in its deliberations that information as to such cases might be important in certain types of litigation and not in others. On balance, it was decided that it would be burdensome to require this information in all cases.

Committee Comment to 1996 Amendment

Rule 26.1(a)(3). With regard to the degree of specificity required for disclosing witness testimony, it is the intent of the rule that parties must disclose the substance of the witness' expected testimony. The disclosure must fairly apprise the parties of the information and opinion known by that person. It is not sufficient to simply describe the subject matter upon which the witness will testify.

Rule 26.1(a)(5) was not intended to require automatic production of statements. Production of statements remains subject to the provisions of Rule 26(b)(3).

Rule 26.1(a)(6). A specially retained expert as described in Rule 26(b)(4)(B) is not required to be disclosed under Rule 26.1.

(b) Time for Disclosure; a Continuing Duty.

(1) The parties shall make the initial disclosure required by subdivision (a) as fully as then possible within forty (40) days after the filing of a responsive pleading to the Complaint, Counterclaim, Crossclaim or Third Party Complaint unless the parties otherwise agree, or the Court shortens or extends the time for good cause. If feasible, counsel shall meet to exchange disclosures; otherwise, the disclosures shall be served as provided by Rule 5. In domestic relations cases involving children whose custody is at issue, the parties shall make disclosure regarding custody issues no later than 30 days after mediation of the custody dispute by the conciliation court or a third party results in written notice acknowledging that mediation has failed to settle the issues, or at some other time set by court order.

(2) The duty prescribed in subdivision (a) shall be a continuing duty, and each party shall make additional or amended disclosures whenever new or different information is discovered or revealed. Such additional or amended disclosures shall be made seasonably, but in no event more than thirty (30) days after the information is revealed to or discovered by the disclosing party. A party seeking to use information which that party first disclosed later than sixty (60) days before trial shall seek leave of court to extend the time for disclosure as provided in Rule 37(c)(2) or (c)(3).

(3) All disclosures shall include information and data in the possession, custody and control of the parties as well as that which can be ascertained, learned or acquired by reasonable inquiry and investigation.

Committee Comment to 1991 Amendment

The Committee does not intend to affect in any way, any party's right to amend or move to amend or supplement pleadings as provided in Rule 15.

Possible Responses to the ACTL/IAALS Report: The Arizona Experience

Andrew D. Hurwitz*

The primary goal of the framers of the 1938 Federal Rules of Civil Procedure ("FRCP") is neatly described in Rule 1 -- "to secure the just, speedy, and inexpensive determination of every action and proceeding." At least two of the more notable proponents of the federal rules, however, also had an ambitious secondary agenda, hoping that the FRCP would also "properly be a model to all the states."[1]

Although much analysis has been devoted to whether and to what extent this secondary objective has been achieved,[2] there is little doubt that the original enactment of the FRCP and over seventy years of the amendment process have had a powerful influence on state rulemaking.[3] The effect has been particularly profound in Arizona. Arizona adopted the 1938 federal model in its 1939 Code,[4] and the Arizona Rules of Civil Procedure ("ARCP") have been amended regularly

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1 CHARLES E. CLARK & JAMES WM. MOORE, *A New Federal Civil Procedure*, 44 YALE L.J. 387, 387 (1935); *see also* CHARLES E. CLARK, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 307 (1938) ("The new federal reform is likely . . . to have an important effect, beyond the direct and immediate changes it makes in federal practice, in setting the standard and tone of procedural reform throughout the country generally.")

2 *See, e.g.*, JOHN B. OAKLEY & ARTHUR F. COON, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986); JOHN B. OAKLEY, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354 (2003).

3 CHARLES E. CLARK, *Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 435 & n.2 (1958) ("[H]ardly a local jurisdiction remains unaffected"). Recognizing the important influence of the various federal rules on the states, the Advisory Committees for the federal civil, evidence, appellate, and criminal rules, as well as the Standing Committee, have long included state supreme court justices among their membership. E-mail from Heather Williams, Offices of Judges Program, Administrative Office of the United States Courts, to author, (Aug. 3, 2009, 10:34 PST) (on file with author).

4 ARIZ. CODE § 21-201 (1939) (effective January 1, 1940); *see* ARIZ. R. CIV. P. 1, Hist. Note (2009)

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during the succeeding seventy years to reflect changes in their federal counterparts.[5]

The Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System ("Final Report") persuasively questions whether the core objectives of FRCP 1 are still being effectively served by the federal rules.[6] Similar concerns were raised in Arizona over twenty years ago. In response, the Arizona Supreme Court in 1990 appointed a committee, headed by Tucson trial lawyer (and later Chief Justice) Thomas A. Zlaket, to address discovery abuse, excessive cost, and delay in civil litigation.[7] The result was the "Zlaket Rules," a thorough revision of the ARCP adopted by the Supreme Court effective July 1, 1992. Those rules enacted a discovery regime that, in some respects, is still not reflected in the FRCP. In addition to the Zlaket Rules, Arizona has adopted a number of other procedural mechanisms worth considering as the Advisory Committee on the Federal Rules of Civil Procedure ponders the appropriate response to the Final Report. This paper reviews several of the more significant Arizona undertakings, in the hope of provoking discussion on the utility of such state procedural reforms.

I.
The Zlaket Rules

A. Disclosure

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[5] For example, ARCP 34(b) was amended on September 5, 2007 to track the 2006 changes to FRCP 34(b) concerning electronically stored information.

[6] AMERICAN COLLEGE OF TRIAL LAWYERS & INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 3 (March 11, 2009), *available at* http://www.du.edu/legalinstitute/form-ACTL-Final-Report.html [hereinafter *Final Report*]. The Final Report was preceded by an Interim Report which set forth the results of the 2008 Litigation Survey of the Fellows of the American College of Trial Lawyers. *See* AMERICAN COLLEGE OF TRIAL LAWYERS & INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, INTERIM REPORT & 2008 LITIGATION SURVEY OF THE FELLOWS OF THE AMERICAN COLLEGE OF TRIAL LAWYERS (Sept. 9, 2008) [hereinafter *Interim Report*].

[7] THOMAS A. ZLAKET, *Encouraging Litigators to Be Lawyers: Arizona's New Civil Rules*, 25 ARIZ. ST. L.J. 1, 1-3 (1993).

In one of its more sweeping suggestions, the Final Report urges that "[n]otice pleading should be replaced by fact-based pleading."[8] The Supreme Court's *Twombly* and *Iqbal* decisions, which require a claim for relief to demonstrate "plausibility," have of course already signaled a significant change in the previous general understanding of the pleading requirements of FRCP 8(a).[9] The Final Report takes somewhat different tack, arguing that pleadings should set forth "*all* material facts that are known to the pleading party to support the elements of a claim for relief or an affirmative defense."[10]

Although more precise than the *Twombly*/*Iqbal* "plausibility" standard, the Final Report's approach could lead to increased Rule 12(b)(6) motion practice, in which the parties argue about whether the initial pleading -- and any amended pleading permitted thereafter under the liberal standard in FRCP 15(a) -- disclosed sufficient material facts.[11] It was precisely this kind of extended dilatory motion practice – and concern over the length of pleadings -- that prompted the adoption of the "short and plain statement of the claim" standard in FRCP 8(a)(2) in the first place.[12]

The Arizona rules take a different approach, mandating disclosure of more information than the Final Reportat a very early stage of the case, but outside the pleading process. This requirement is contained in the centerpiece of the Zlaket Rules, ARCP 26.1, entitled "Prompt Disclosure of Information." The rule requires

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[8] *Final Report*, *supra* note 6, at 5.

[9] *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965-66 (2007).

[10] *Final Report*, *supra* note 6, at 6 (emphasis added).

[11] *But cf.* INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, CIVIL CASE PROCESSING IN THE OREGON COURTS: AN ANALYSIS OF MULTNOMAH COUNTY 2, 20-24 (2010), *available at* http://www.du.edu/legalinstitute/pubs/civil_case.pdf (noting that, for specified case types, proportionately fewer motions to dismiss were filed in one Oregon state court under rules requiring pleading of "ultimate facts" than in cases governed by FRCP 8 filed in the United States District Court for the District of Oregon).

[12] *See, e.g.*, *Knox v. First Sec. Bank*, 196 F.2d 112, 117 (10th Cir. 1952) (stating that the purpose of Rule 8(a)(2) was to dispense with "prolixity in pleading and to achieve brevity, simplicity, and clarity").

a broad set of initial disclosures by all parties within forty days after a responsive pleading is filed to a complaint, counterclaim, cross-claim, or third party complaint.[13] The duty of disclosure is continuing; each party must make additional or amended disclosures "whenever new or different information is revealed."[14] Each disclosure must be "under oath, signed by the party making the disclosure."[15]

The scope of disclosure required under ARCP 26.1 is much broader than that provided under the later enacted (and subsequently amended) FRCP 26(a).[16] ARCP 26.1 requires disclosure not only of "[t]he factual basis of the claim or defense,"[17] but also "[t]he legal theory upon which each claim or defense is based, including, where necessary for a reasonable understanding of the claim or defense, citations of pertinent legal or case authorities."[18] There are no counterparts to these requirements in the initial disclosure requirements of FRCP 26(a). The potential sanction for failure to disclose is severe – absent a showing of good cause, the offending party "shall not, unless such failure is harmless, be permitted to use as evidence at trial, at a hearing, or on a motion, the information or witness not disclosed."[19]

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[13] ARIZ. R. CIV. P. 26.1 (b)(1).

[14] *Id.* at (b)(2)

[15] *Id.* at (d)

[16] The 1993 version of FRCP 26(a) contained a local "opt out" provision to mandatory disclosure. The 2000 amendments to FRCP 26(a) eliminated the opt out provision, but narrowed the scope of disclosure. *See* FED. R. CIV. P. 26, Advisory Comm. Notes, 2000 Amendment, Note to Subdivision (a) (2007).

[17] ARIZ. R. CIV. P. 26.1(a)(1).

[18] *Id.* at 26.1(a)(2).

[19] *Id.* at 37(c)(1); *see also id.*, State Bar Comm. Note to 1996 Amendment (stating that the amendment was intended to codify the holding of *Allstate Ins. Co. v. O'Toole*, 896 P.2d 254 (Ariz. 1995), which exempted harmless non-disclosure from the sanction of exclusion). Before the 1996 amendment, ARCP 26.1(c) provided that the trial court "shall exclude" non-disclosed evidence, except for "good cause shown." *Id*. at 256. Some courts had interpreted this language as mandating exclusion in the absence of a showing of good cause for the non-disclosure, even if the opposing party was not prejudiced. *Id*. at 256-57.

Under the Arizona approach, trial courts are not required to adjudicate a series of Rule 12(b)(6) motions in which differing versions of the complaint are measured against an indefinite "plausibility" standard.[20] Neither are Arizona courts required to determine whether a pleading seeking relief discloses all "material" facts, nor speculate as to the legal theory asserted. Each party is provided with disclosures made under oath, and the disclosure can thus serve as a basis for a summary judgment motion if either the disclosed facts or the legal theory asserted is insufficient to support a claim or defense as a matter of law. The disclosure can also inform the court in considering a motion under ARCP 56(f) (the counterpart of FRCP 56(f)) to continue consideration of a summary judgment motion pending specified further discovery.

The Supreme Court's recent FRCP 8 jurisprudence has been prompted in part by dissatisfaction with the notion that a bare bones complaint can force the parties to engage in expensive discovery to learn the relevant facts and legal theories.[21] The Final Report reflects similar concerns. Even assuming the merits and longevity of the *Twombly* doctrine,[22] broadened mandatory disclosure under FRCP 26(a) could alleviate the concerns expressed in the Final Report without returning us to the problems that originally led to the adoption of FRCP 8.

B. Depositions

The Final Report urges that "[p]roportionality should be the most important principle applied to all discovery," and that only "limited additional discovery should be permitted" after initial disclosures.[23] Both the FRCP and the ARCP contain limits on the length of depositions; these differ in time, but not in

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[20] Perhaps in part informed by the requirements of ARCP 26.1, the Arizona Supreme Court recently declined to adopt the *Twombly* doctrine. *See Cullen v. Auto-Owners Ins. Co.*, 189 P.3d 344, 347 (Ariz. 2008).

[21] *See Iqbal*, 129 S. Ct. at 1950 ("Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions").

[22] Sen. Specter has introduced the "Notice Pleading Restoration Act of 2009," which would abrogate *Twombly* and *Iqbal*, and mandate application of the standards in *Conley v. Gibson*, 355 U.S. 41 (1957), to all motions under FRCP 12(b)(6). *See* S. Res. 1504, 111th Cong. (2009).

[23] *Final Report*, *supra* note 6, at 7, 9.

principle.[24] Both sets of rules limit the number of depositions, and here the difference is more substantive.

Under FRCP 30(a)(1), a party may "depose any person, including a party, without leave of court." Absent stipulation or leave of court, however, the party is limited to no more than ten depositions.[25] Under ARCP 30, in contrast, only depositions of parties, expert witnesses, and document custodians may be taken without stipulation or court permission.

In less complicated cases, the Arizona approach forces the parties to agree upon whether a deposition is truly needed,[26] or, in the alternative, to convince the trial judge of the need. In such cases, the presumptive limit of ten depositions per side in the FRCP creates the need for judicial intervention when a party believes that fewer depositions would suffice. Although a protective order under the federal regime could produce the same result as the ARCP, the burden on the moving party – and the absence of a presumption that non-party, non-expert depositions must be justified – has the potential of unnecessarily increasing discovery costs.

C. Document Production

The Final Report suggests that "[s]hortly after the commencement of litigation, each party should produce all reasonably available nonprivileged, non-work product documents and things that may be used to support that party's claims, counterclaims or defenses."[27]

ARCP 26.1(a)(9) responds to these concerns. It requires identification in the disclosure not only of documents and electronically stored information, "whether or not in the party's possession, custody or control," that "may be relevant to the subject matter of the action," but also of "all documents which appear reasonably

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[24] *See* FED. R. CIV. P. 30(d)(1) (presumptive limit of one day of seven hours); Ariz. R. Civ. P. 30(d) (presumptive limit of 4 hours).

[25] *Id.* at (a)(2).

[26] "Refusal to agree to the taking of a reasonable and necessary deposition should subject counsel to sanctions under Rule 26(f)." ARIZ. R. CIV. P. 30(a), Comm. Comment to 1991 Amendment.

[27] *Final Report*, *supra* note 6, at 7.

calculated to lead to the discovery of admissible evidence." Those documents must be produced with the disclosure, absent good cause; if production is not made, the party must indicate the name and address of the custodian. The scope of disclosure is thus broader than FRCP 26(a), which only requires identification of documents supportive of the disclosing party's position.

D. Witnesses

FRCP 26(a)(1)(A)(i) mandates initial disclosure of all persons "likely to have discoverable information," and FRCP 26(e) imposes a duty of supplementing such disclosures. The names of trial witnesses, however, are not required in the initial disclosure. Rather, they are treated under FRCP 26(a)(1)(D) as "Pretrial Disclosures," to be made at least thirty days before trial absent contrary order of the court. The Final Report urges early identification of trial witnesses, subject to a continuing duty to update.[28]

The ARCP directly respond to the Final Report's recommendation. ARCP 26.1(a)(3) mandates initial disclosure of all witnesses "whom the disclosing party expects to call at trial," along "with a fair description of each witness' expected testimony." In conjunction, ARCP 26.1(b)(2) imposes a continuing duty to make "additional or amended disclosures" within thirty days of the party learning about new or different information." Thus, the Zlaket Rules ensure that the opposing party is provided with an up-to-date witness list well before trial. That duty is reinforced by the provision in ARCP 26.1(b)(2) preventing use of information disclosed within sixty days of trial without leave of court.

E. Expert Witnesses

The Final Report recommends that "[e]xcept in extraordinary cases, only one expert witness per party should be permitted for any given issue."[29]

ARCP 26(b)(4)(D) addresses this issue and goes further, providing that "each side shall be presumptively entitled to only one independent expert on an issue, except on a showing of good cause." This rule also allows the trial court, if

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[28] *Id.* at 9.

[29] *Id.* at 17.

multiple parties on a side cannot agree as to which independent expert will be called on an issue, to designate the expert to testify.[30]

F. Reaction of the Bar and Bench to the Zlaket Rules

1. Early reactions.

The proposed Zlaket Rules received extensive public comment and were "test-driven" in four divisions of the Maricopa County Superior Court before adoption.[31] In 1997, while serving as Chief Justice of the Arizona Supreme Court, their namesake admitted that he was "not sure I can get very good read on how the Rules are working," noting that most of his information was anecdotal.[32] He stated, however, that trial judges reported no problems with the disclosure rules, and the "restrictions we placed on discovery draw nothing but praise."[33] An early article by an experienced Arizona civil litigator found results of the first five years of experience under the new regime "mixed," noting the process worked well "when the parties and their counsel comply with the letter and spirit of the disclosure rules," but lamenting that some counsel did not comply and some judges were less than strict in enforcing the rules.[34]

2. The 2008 survey of the ACTL Fellows.

The survey of ACTL Fellows conducted in 2008 by the Institute for the Advancement of the American Legal System ("IAALS") and the ACTL Task Force on Discovery, the results of which were presented in the Interim Report, suggests that, after some fifteen years of experience with the Zlaket Rules,

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30 ARIZ. R. CIV. P. 26(b)(4)(D).

31 *See* ZLAKET, *supra* note 7, at 8; ROBERT D. MYERS, *MAD Track: An Experiment in Terror*, 25 ARIZ. ST. L. J. 11 (1993).

32 *Zlaket Takes Over as Chief Justice*, ARIZ. ATTORNEY, March 1997, at 37.

33 *Id.* at 38.

34 ANTHONY R. LUCIA, *The Creation and Evolution of Discovery in Arizona*, 16 REV. LITIG. 255, 268 (1997). In 2006, then retired Justice Zlaket reportedly expressed disappointment in the way the disclosure rules "have been implemented by lawyers." Thomas A. Zlaket, 2006 Goldwater Lecture Series: Common Misperceptions about Judges and the Justice System in Arizona (July 30, 2006).

experienced Arizona trial lawyers prefer the state court procedural regime to the FRCP.[35] Seventy-eight percent of the Arizona respondents indicated that when they had a choice, they preferred litigating in state court to federal court.[36] In contrast, only forty-three percent of the national respondents to the ACTL survey preferred litigation in state court over federal court.[37]

Sixty-seven percent of the Arizona respondents indicated that cases were disposed of more quickly in state court; fifty-six percent believed that processing cases was less expensive in the state forum.[38] Almost half (forty-eight percent) cited the ARCP as an advantage to state court litigation; only four percent of the Arizona respondents cited the FRCP as an advantage of federal litigation.[39]

3. The 2009 IAALS Arizona Rules Survey

In 2009, the IAALS conducted a comprehensive Arizona Rules Survey, to explore the opinions of the Arizona bench and bar about civil procedure in the State's superior courts.[40] The Survey was created by IAALS and the Butler Institute, an independent social science research organization at the University of Denver.[41] The State Bar of Arizona (a mandatory membership organization) distributed the survey to its membership.[42]

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[35] The survey was sent to 3812 Fellows of the American College of Trial Lawyers ("ACTL"); the response rate was forty-two percent. *Interim Report*, *supra* note 6, at 2. Twenty-seven of the respondents identified Arizona as the state where their primary practice was located. INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, BREAKDOWN OF RESPONSES TO ACTL SURVEY – ARIZONA ATTORNEYS 1 (Mar. 11, 2009) (on file with author) [hereinafter *2009 Memorandum*].

[36] *Id.* at 2.

[37] *Id.*

[38] *Id.* at 3.

[39] *Id.*

[40] INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, SURVEY OF THE ARIZONA BENCH AND BAR ON THE ARIZONA RULES OF CIVIL PROCEDURE 1 (2010) [hereinafter *2009 Arizona Rules Survey*].

[41] *Id.* at 6.

[42] *Id.* at 6-7.

The survey produced 767 valid responses, a statistically valid sample.[43] Survey respondents had practiced law in Arizona for nineteen years on average.[44] Respondents were virtually evenly divided between those routinely representing plaintiffs and defendants in civil litigation.[45] Typical respondents had significant trial court experience.[46]

The Survey showed significant preference among the Arizona Bar for litigating in state court.[47] Over seventy percent of respondents reported litigation experience in the United States District Court for the District of Arizona; those respondents preferred litigating in state court over federal court by a two-to-one ratio.[48] Respondents favoring the state court forum cited the applicable rules and procedures, particularly the state disclosure and discovery rules.[49] Respondents favoring the state forum indicated that state court is faster and less costly.[50]

In the aggregate, the Survey demonstrated that the Arizona Bar overwhelmingly believes that the innovative aspects of the ARCP are beneficial.[51] Over half of the respondents reported superior court experience before the adoption of the Zlaket Rules.[52] Those with pre-1992 experience favored state over federal court at a higher rate (fifty-five percent) than those with no such experience (forty

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43 *Id.* at 7.

44 *Id.* at 8.

45 *Id.* at 8-9.

46 *Id.* at 9.

47 *Id.* at 12.

48 *Id.*

49 *Id.* at 13.

50 *Id.*

51 *Id.* at 14.

52 *Id.*

percent).[53] Among the group with pre-1992 experience, only a small minority viewed the 1992 amendments as a negative development.[54]

a. ARCP 26.1 disclosures

There was strong consensus among Survey respondents that ARCP 26.1 disclosures "reveal the pertinent facts early in the case" (seventy-six percent) and "help narrow the issues early in the case" (seventy percent).[55] A majority (fifty-four percent) of respondents also believed that the disclosures facilitate agreement on the scope and timing of discovery.[56] Plaintiffs' and defense counsel responded in the same way on these issues.[57] Similarly, respondents overwhelmingly disagreed with the notion that the Arizona disclosure rules either add to the cost of litigation (fifty-eight percent) or unduly front-load investment in a case (seventy-one percent).[58]

Respondents also preferred the timing of ARCP 26.1 disclosures, which must occur within forty days after the pleadings are closed, to disclosure under FRCP 26(a), which does not occur until after an initial FRCP 26(f) conference.[59] A substantial majority (fifty-six percent) also preferred the content and scope of ARCP 26.1 disclosures to those under FRCP 26(a)—twenty-five percent expressed no preference.[60]

Most criticisms centered on behavior of counsel and failure of trial judges to enforce the disclosure rules vigorously.[61] A significant number of respondents also

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53 *Id.* at 15.

54 *Id.* at 14.

55 *Id.* at 19.

56 *Id.*

57 *Id.*

58 *Id.* at 19-20.

59 *Id.* at 21.

60 *Id.*

61 *Id.* at 23, 26.

questioned whether the disclosures themselves ultimately reduce the volume of discovery or the total time required to conduct discovery.[62]

b. Presumptive Limits on Discovery.

The 2009 IAALS Arizona Rules Survey also demonstrated a favorable opinion among the Arizona bench and bar about the ARCP's presumptive limits on discovery. Over sixty percent of the respondents would not change the presumptive limit on depositions.[63] Among the most experienced lawyers (those with pre-1992 experience) who expressed an opinion, the percentage of those who would make no change increased to over sixty-five percent.[64] Similarly, some seventy-two percent of respondents would make no change in the four-hour presumptive deposition time limit.[65] That number increased to seventy-five percent among those with pre-1992 experience who expressed an opinion.[66] Among those expressing a preference, over fifty-five percent of respondents preferred the ARCP limitations on deposition discovery to those in the FRCP; that percentage increased to over sixty percent among the lawyers with most experience in civil litigation.[67]

Almost two-thirds of respondents (sixty-four percent) would not change the presumptive limits on interrogatories; six percent would make the limits even lower.[68] The Survey produced similar responses with respect to requests for admission; some sixty-two percent of respondents would not modify the presumptive limits, and seven percent would lower the limits.[69]

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62 *Id.* at 19.

63 *Id.* at 29

64 *Id.*

65 *Id.* at 31-32.

66 *Id.*

67 *Id.* at 32.

68 *Id.* at 32-33.

69 *Id.* at 35.

The Arizona Rules Survey found less consensus regarding production requests. A narrow plurality of surveyed attorneys (forty-seven percent) would either maintain or lower the current limits.[70] Forty-six percent, however, favored making the limit higher.[71] Among those with pre-1992 experience who expressed an opinion, the percentage of those favoring retention of current limits increased to fifty-three percent.[72]

c. Number of Expert Witnesses.

Over three-quarters of respondents to the 2009 Survey (seventy-seven percent) approved of the presumptive limit on expert witnesses.[73] The small minority of those who would raise the limits (twelve percent) were relatively equally divided between the plaintiffs' and defense bar.[74] By a three-to-one ratio, respondents with federal experience prefer the ARCP over the FRCP regarding the number of expert witnesses.[75] Of respondents who expressed a preference, over seventy percent with pre-1992 experience prefer the ARCP.[76]

d. The Presumptive Discovery Limits as a Whole

The 2009 Survey showed broad consensus that presumptive discovery limits force parties to "focus their discovery efforts to the disputed issues" (sixty-four percent) and reduce the total volume of discovery (fifty-eight percent agreed).[77] Over seventy percent of respondents reported frequent adherence to the limits on

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70 *Id.* at 34.

71 *Id.*

72 *Id.*

73 *Id.* at 27.

74 *Id.* at 28.

75 *Id.*

76 *Id.* at 29.

77 *Id.* at 37.

deposition time, number of requests for admission, and number of interrogatories.[78] Nearly sixty-five percent reported frequent adherence to the limitations on the number of expert witnesses.[79] A large majority (seventy-eight percent) disagreed with the notion that the presumptive limits force parties to go to trial with insufficient information.[80]

The 2009 Survey did disclose, however, some areas of concern. Only a bare majority (fifty-two percent) reported frequent adherence to the limits on requests for production.[81] When asked whether the limits reduce the total time for litigation, make costs more predictable, or reduce the use of discovery as a tool to force settlement, at least fifty-three percent of respondents answered in the negative.[82] Respondents also reported that courts did not enforce presumptive discovery limits in many cases,[83] and at least seventy percent of respondents reported that sanctions for misconduct related to discovery and disclosure were either "almost never" or "occasionally" imposed by the trial bench. [84]

II.
"Different Strokes for Different Folks"[85]

The Final Report argues against the "'one size fits all' approach of the current federal and most state rules," suggesting "different sets of rules for certain types of cases."[86] The existing FRCP largely rely on judicial management to

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78 *Id.* at 39.

79 *Id.*

80 *Id.*

81 *Id.* at 39-40.

82 *Id*. at 37.

83 *Id.* at 41.

84 *Id.* at 43.

85 Sly and the Family Stone, *Everyday People, on* Stand! (Epic Records 1969).

86 *Final Report, supra* note 6, at 4. The notion that the same procedural rules should apply regardless of the substance of the case has been referred to as the "trans-substantivity principle." *See, e.g.,* DAVID MARCUS, *The Past, Present and Future of Trans-Substantivity in Federal Civil*

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differentiate cases, although FRCP 26(a)(1)(B) does exempt a small class of cases from initial disclosure requirements.

The ARCP, in contrast, set up distinct procedural regimes for medical malpractice litigation, claims involving less than $65,000, and complex litigation.

A. Medical Malpractice

ARCP 26.2 was adopted in 1989 as a result of the report of a committee appointed by the Arizona Supreme Court to study malpractice procedure.[87] Together with ARCP 16(c), which governs comprehensive pretrial conferences in medical malpractice cases, ARCP 26.2 sets up a distinct procedural approach to such litigation, and adds subject matter-specific disclosure requirements to the general ones imposed by ARCP 26.1(a).

Within five days after all defendants have filed answers or motions responding to the complaint, the plaintiff must notify the court so that a comprehensive pretrial conference can be scheduled.[88] Within five days after this notice, the plaintiff must serve on all defendants "copies of all of plaintiff's available medical records relevant to the condition which is the subject matter of the action."[89] All defendants must do the same within ten days thereafter.[90] Before the comprehensive pretrial conference, the only interrogatory discovery permitted is the service of uniform interrogatories and ten additional non-uniform interrogatories.[91] An appendix to the ARCP contains three sets of court-approved comprehensive uniform medical malpractice interrogatories, one designed for service by a plaintiff on an individual health care provider, another for plaintiff to

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Procedure 59 DEPAUL L. REV. (forthcoming 2010), *available at* http://ssrn.com/abstract=1428992.

[87] The Rule was originally adopted as part of the Uniform Rules of Practice for Medical Malpractice Cases, and incorporated into the ARCP in 2000. ARIZ. R. CIV. P. 26.2, State Bar Comm. Note, 2000 Amendment.

[88] ARIZ. R. CIV. P. 16(c).

[89] *Id.* at 26.2(a)(1).

[90] *Id.* at 26.2(a)(2).

[91] *Id.* at 26(b).

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serve on an institutional health care provider, and third to be directed by defendants to the plaintiff.[92] Document discovery prior to the comprehensive pretrial conference is sharply limited, and depositions are limited to the parties and experts.[93]

At the comprehensive pretrial conference, which must be held within sixty days after the plaintiff's ARCP 16(c) notice, the court determines the scope and scheduling of future discovery and sets up a schedule for disclosure of witnesses.[94] No motion for summary judgment for lack of expert testimony can be filed by the defendant before the time for disclosure of experts has passed.[95] In addition to the general presumption in ARCP 26(b)(4)(D) limiting each side to one expert per issue, the ARCP specifically deal with a frequent occurrence in medical malpractice cases -- the decision of a physician-defendant to present testimony in addition to that of an independent expert on the standard of care applicable to his conduct. Under such circumstances, absent court permission, the plaintiff is not entitled to call a second expert on that issue.[96]

At the pretrial conference, the trial court also discusses alternative dispute resolution, sets a time for a mandatory settlement conference, sets a date for filing the final joint pretrial statement, and sets a trial date.[97] Thus, the ARCP contemplate not only specialized disclosure and discovery procedures in medical

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92 *Id.* at 84, Form 4. In addition, the ARCP contain uniform personal injury, and contract interrogatories. *Id.* at 84, Forms 5 & 6. Absent stipulation or leave of court, plaintiffs in non-medical malpractice litigation are limited to serving forty interrogatories on any other party. *Id.* at 33.1(a). Each uniform interrogatory and its various subparts are counted as one interrogatory; in contrast, subparts to a non-uniform interrogatory are counted as separate interrogatories. *Id.* Uniform interrogatories need not be reproduced for service; they can be served by reference to number alone. *Id.* at 33.1(f); *see also* ARIZ. R. FAM. LAW P. 61, 97 Form 7 (governing interrogatories in family law cases).

93 ARIZ. R. CIV. P. 26.2(b).

94 *Id.* at 16(c) (1) – (3), (5).

95 *Id.* at 16(c)(2). As to each expert, ARCP 26.1(a)(6) requires comprehensive disclosure of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, and a listing of the expert's qualifications.

96 *Id.* at 26(b)(4)(D).

97 *Id.* at 16(b)(14)-(16).

malpractice actions, but also mandate an early timetable toward a specific trial date.[98]

B. Mandatory Arbitration

Since 1971, Arizona courts may require arbitration of claims in which the amount in controversy does not exceed a specified jurisdictional limit;[99] the current statute allows the trial court to set a jurisdictional limit not to exceed $65,000.[100] Virtually every county has adopted such a program.[101] ARCP 72 through 77 implement the compulsory arbitration program.

The program is triggered when the trial court judges in a county "provide for arbitration of claims and establish[] jurisdictional limits."[102] The court can mandate arbitration in cases falling under the chosen amount in controversy, which cannot exceed $65,000.[103] At the time the complaint is filed, the plaintiff must file a separate certificate on compulsory arbitration; if the defendant disagrees as to arbitrability, the issue is determined by the court.[104] Unless the parties stipulate otherwise, the trial court assigns the arbitrator from a list of active members of the State Bar.[105] The arbitrator must set a hearing within sixty to one hundred and twenty days of appointment.[106] The arbitrator may not grant a motion to dismiss or

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98 There do not appear to have been any empirical studies of lawyer or judge satisfaction with the medical malpractice rules. One early article by a medical malpractice specialist, however, indicated satisfaction with the rules. JOJENE MILLS, *Practical Implications of the Zlaket Rules from a Plaintiff's Lawyer's Perspective*, 25 ARIZ. ST. L. J. 149, 149 (1993).

99 1971 Ariz. Sess. Laws., ch. 142, § 1 (codified at ARIZ. REV. STAT. § 12-133).

100 ARIZ. REV. STAT. ANN. § 12-133(A)(1) (Supp. 2008-09).

101 *See* ROSELLE L. WISSLER & ROBERT DAUBER, *Court-Connected Arbitration in the Superior Court of Arizona: A Study of its Performance and Proposed Rules Changes*, 2007 J. DISP. RES. 65, 68-9, n. 18-22.

102 ARIZ. R. CIV. P. 72(a).

103 ARIZ. REV. STAT. ANN. § 12-133 (A) (Supp. 2008-09).

104 ARIZ. R. CIV. P. 72(e)(2)-(3).

105 *Id.* at 73(b).

106 *Id.* at 74(b).

rule on a case-dispositive motion for summary judgment,[107] but is otherwise authorized to make most interlocutory legal decisions, including rulings on discovery disputes.[108] Because "the purpose of compulsory arbitration is to provide for the efficient and inexpensive handling of small claims," the arbitrator is directed to limit discovery "whenever appropriate."[109]

In cases subject to mandatory arbitration, ARCP 26.1(a) initial disclosures must be made within thirty days of the filing of the answer.[110] The parties must file a pre-hearing statement, in which they are encouraged to agree on facts and issues.[111] In general, the Arizona Rules of Evidence apply to arbitration hearings,[112] but foundational requirements are waived for a number of documents, and sworn statements of any witness other than an expert are admissible.[113] The arbitrator must issue a decision within ten days of the hearing.[114]

In the absence of an appeal to the court of the arbitrator's decision, any party may obtain judgment on the award.[115] If an appeal is filed, a trial de novo is held in trial court; any party entitled to a jury may demand one.[116] An appeal is not

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[107] If a motion for summary judgment is filed, it is assigned to the trial judge, who may impose sanctions if the filing was frivolous or for purposes of delaying the arbitration hearing. *Id.* at 74(d).

[108] *Id.* at 74(c)(1).

[109] *Id.* at 74(c)(3). Any discovery ruling requiring disclosure of documents alleged to be privileged is subject to prompt interlocutory review by the assigned superior court judge. *Id.* at 74(c)(4).

[110] *Id.* at 75(b).

[111] *Id.* at 75(c).

[112] *Id.* at 75(d).

[113] *Id.* at 75(e)(7).

[114] *Id.* at 76(a).

[115] *Id.* at 76(c).

[116] *Id.* at 77(a), (c).

without risk, however. If the appellant fails to recover a judgment on appeal at least twenty-three percent more favorable than the arbitration result, the appellant is assessed not only normal taxable costs, but also the compensation paid to the arbitrator, attorneys' fees incurred by the opposing party on the appeal, and expert fees incurred during the appeal.[117]

1. Previous Empirical Research on the Arbitration System.

In 2004, the Arizona Supreme Court commissioned a study to examine the efficiency and effectiveness of compulsory arbitration, as well as user satisfaction.[118] The findings were considered by the Arizona Supreme Court Committee on Compulsory Arbitration, and adjustments were made to the governing rules in 2007 in light of the report. The study revealed some criticisms of the system (most often regarding the speed of adjudication or expertise of the arbitrator), and the amendments attempted to address those concerns.[119] The study also revealed, however, that most lawyers who had recently represented a client in mandatory arbitration had "highly favorable assessments" of both the hearing and the eventual decision.[120] Sixty-four percent of lawyers with caseloads subject to arbitration favored continuation of the system.[121] And, it is clear that the system reduced trial court workload. In most counties, an award was filed in less than half the cases assigned to arbitration, and a trial de novo was sought in less than a third of all cases in which an award was filed.[122] This suggests that most cases assigned to the program either settled or produced a result satisfactory to the parties after the arbitration hearing. Moreover, most appealed cases never proceeded to trial.[123] These initial reviews of the Arizona experiment strongly suggest that if small

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117 *Id.* at 77(f).

118 WISSLER & DAUBER, *supra* note 100.

119 These amendments expanded the types of motions on which the arbitrator may not rule and allowed the clerk of the court to deliver the record to the arbitrator in electronic format. *See* ARIZ. R. CIV. P. 74(c), (e), State Bar Comm. Note, 2007 Amendments (2009).

120 WISSLER & DAUBER, *supra* note 100, at 86.

121 *Id*. at 90.

122 *Id*. at 75.

123 *Id*. at 76.

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claims are subject to mandatory court-annexed arbitration, even if it is non-binding, a great majority of those claims can be diverted from the trial judge's docket.

2. The 2009 IAALS Arizona Rules Survey

Over sixty-five percent of all respondents to the 2009 Survey had a case in superior trial court qualifying for compulsory arbitration.[124] Approximately ninety percent of respondents with a qualifying case had a case proceed through the system.[125] In Maricopa County, sixty-eight percent of the respondents either would maintain or increase the number of cases that qualified for compulsory arbitration.[126] In comparing compulsory arbitration to litigation, large majorities of respondents agreed that arbitration reduces the time to disposition (sixty-two percent) and reduces costs (fifty-eight percent).[127] And, most respondents (sixty-five percent) either found the compulsory arbitration process at least as fair (fifty-seven percent), or more fair (eight percent), than conventional litigation.[128]

Most criticism of the arbitration system centered on the appointment process, which selects arbitrators randomly among members of the Maricopa County bar, some of whom lack litigation experience or familiarity with the substantive subject matter at issue.[129] A majority of respondents also indicated that arbitrators infrequently limited discovery during the arbitration process.[130]

C. Complex Case Courts

In 2001, the Arizona Supreme Court appointed a Committee to Study Complex Litigation, with membership drawn not only from the bar and bench, but

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124 *2009 Arizona Rules Survey*, *supra* note 39, at 46.

125 *Id.* at 49.

126 *Id.*

127 *Id.* at 49-50.

128 *Id.*

129 *Id.* at 50.

130 *Id.*

also including policy experts, a court clerk, court administrators, and a state senator.[131] The Committee issued its report in the following year, after studying complex and commercial case programs in other states.[132] After receiving the report, the Arizona Supreme Court established a pilot program for complex litigation in the Maricopa County Superior Court.[133] The Arizona Supreme Court thereafter adopted, and has since amended, several rules of civil procedure to govern the program.[134]

The Maricopa County program involves three judges with substantial experience in complex civil litigation.[135] Cases are eligible for assignment to the complex litigation court based on a number of factors, including the prospect of substantial pre-trial motion practice, the number of parties, the need for extensive discovery, the complexity of legal issues, and whether "[t]he case would benefit from permanent assignment to a judge who would have acquired a substantial body of knowledge in [the] specific area of the law."[136] When filing a complaint, a plaintiff must identify the action as complex if it meets the stated criteria.[137] A defendant may also designate a case as complex or contest the plaintiff's designation; the presiding superior court judge, or a designee, then determines whether the case qualifies for the program.[138]

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131 *See* ARIZONA SUPREME COURT, COMMITTEE TO STUDY COMPLEX LITIGATION, FINAL REPORT 2-3 (September, 2002).

132 *Id*. at 3.

133 Admin. Order No. 2002-107. The program has been extended several times since 2002. *See* Admin. Order No. 2004-27; Admin. Order No. 2006-123; Admin. Order No. 2009-11 (amended by Admin. Order No. 2009-30).

134 *See* ARIZ. R. CIV. P. 8(h), 8(i), 16.3, 39.1.

135 MARICOPA COUNTY SUPERIOR COURT, COMPLEX CIVIL LITIGATION COMMITTEE, JOINT REPORT TO THE ARIZONA SUPREME COURT 2 (December 2006), *available at* http://www.supreme.state.az.us/courtserv/ComplexLit/JointRptFinal.pdf [hereinafter *2006 Report*].

136 ARIZ. R. CIV. P. 8(i)(2)(A)-(I).

137 *Id.* at 8(h)(3).

138 *Id.* at 8(i)(3) – (6).

The complex litigation court judges are assigned an experienced staff attorney, provided courtrooms equipped with up-to-date electronic technology, and are able to mandate e-filing well in advance of other civil trial court divisions.[139] A complex litigation case is governed by a separate set of pre-trial rules. An initial case management conference is scheduled at the "earliest practical date," and a comprehensive case management order is issued after that conference.[140] That order establishes and schedules particular disclosure requirements; the general requirements in ARCP 26.1 do not apply, and no disclosure or discovery takes place before issuance of the order.[141] The complex litigation court is authorized to segment the case into phases and to establish time limits for the completion of each phase.[142]

As of 2006, more than 560 attorneys had experience with cases in complex litigation court.[143] A survey of this group revealed that ninety-six percent of respondents favored continuation of the pilot program.[144] The respondents gave high marks both to the quality of the judges assigned and their ability to devote more attention than usual to the assigned cases.[145]

The program remains a pilot, in part because of funding constraints, and in part because counties with substantially smaller case volumes and numbers of complex cases than Maricopa have not yet seen the need for expansion.[146] Nonetheless, the program suggests that specially-designated judges and special rules for the most complex cases is an approach worth considering in response to the concerns raised in the Final Report.

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139 *2006 Report*, *supra* note 134, at 2-3. Virtually all Maricopa Superior Court civil divisions now have access to e-filing.

140 ARIZ. R. CIV. P. 16.3(a).

141 *Id.* at 16.3(a)(12), (e).

142 *Id.* at 16.3(d).

143 *2006 Report*, *supra* note 134, at 4.

144 *Id*. at 5. Eighty-three attorneys responded to the survey. *Id.*

145 *Id*.

146 *Id*. at 6.

III.
Conclusion

Arizona's willingness to deviate from the federal model is not unique. For example, Oregon's Rules of Civil Procedure differ substantially from the federal model both with respect to pleading and discovery.[147] It is not my purpose today to argue that Arizona – or any other state – has necessarily created a better mousetrap or that the FRCP should blindly adopt a particular approach. Rather, I suggest only that the states – even those whose civil rules are modeled on the FRCP – have long been engaged in experimentation and modification of existing rules in order to respond to the very concerns raised in the Final Report. The 2009 IAALS Arizona Rules Survey demonstrates that those rules experiments have garnered widespread support among the Arizona bench and bar. The Civil Rules Advisory Committee and Standing Committee should consider these state initiatives when considering the appropriate response to the Final Report. The FRCP can properly be a "model" to the nation not only through original innovation, but also by adopting proven mechanisms from the various states.

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[147] INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, A SUMMARY OF COMPARATIVE APPROACHES TO CIVIL PROCEDURE 1-2, 9, 21, 23-24, 27, 42, 44 (2009), *available at* http://www.du.edu/legalinstitute/pubs/Synthesis%20FINAL.pdf.

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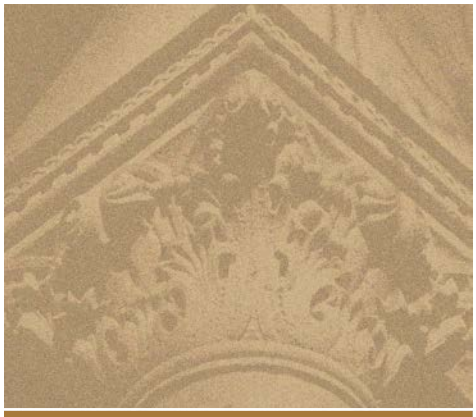

SURVEY *of the* ARIZONA BENCH & BAR

ON THE ARIZONA RULES OF CIVIL PROCEDURE

INSTITUTE *for the* ADVANCEMENT *of the* AMERICAN LEGAL SYSTEM

UNIVERSITY OF DENVER

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INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM

The Institute for the Advancement of the American Legal System (IAALS) is a national, non-partisan organization dedicated to improving the process and culture of the civil justice system. Executive Director and former Colorado Supreme Court Justice Rebecca Love Kourlis leads a staff distinguished not only by their expertise but also by their diversity of ideas, backgrounds and beliefs.

IAALS provides principled leadership, conducts comprehensive and objective research, and develops innovative and practical solutions—all focused on serving the individuals and organizations who rely on the system to clarify rights and resolve disputes.

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This Report sets forth the results of the Institute for the Advancement of the American Legal System's Survey of the Arizona Bench and Bar on the Arizona Rules of Civil Procedure ("Arizona Rules Survey").

EXECUTIVE SUMMARY

The Arizona Rules Survey explored the views of members of the State Bar of Arizona concerning civil procedure in Arizona Superior Court ("Superior Court"), the state court of general jurisdiction. There are significant differences between the current Arizona Rules of Civil Procedure ("ARCP") and those used prior to 1992, as well as differences between the current ARCP and the Federal Rules of Civil Procedure ("FRCP"). This survey was developed to examine the practical impact of these rules variations, and to contribute additional information to the dialogue on civil procedure reform.

The survey was completed by a diverse group of Arizona practitioners, representing a mix of newer and more experienced attorneys. Nearly 30% of respondents have 10 or fewer years of experience practicing law in Arizona, and over 30% have more than 25 years of experience. Respondents include both plaintiffs' and defense attorneys in fairly equal measure, as well as attorneys in private, government, and in-house practice. Judges also responded. Highlights of the survey appear below.

Arizona practitioners prefer the current Arizona Superior Court civil justice system to both the federal system and to the state system prior to the 1992 rules amendments.

A majority of survey respondents have relevant comparative experience. Over 70% of all survey respondents have litigated in the U.S. District Court for the District of Arizona, and over 50% litigated in Arizona Superior Court prior to the 1992 amendments to the state rules (which increased disclosure obligations and set lower presumptive limits on discovery).

Respondents with experience litigating in the U.S. District Court for the District of Arizona prefer litigation in Superior Court by a two-to-one ratio. These respondents frequently cited the state rules and procedures, particularly disclosure and discovery rules, as the basis for that preference. They stated that state court is faster, less costly, and more accessible. In addition, the vast majority of respondents with experience litigating in Superior Court prior to the 1992 amendments to the ARCP indicated that the amendments were a positive or neutral development for stakeholders (litigants, lawyers, judges, and the public).

Arizona practitioners find comprehensive pretrial conferences to be beneficial.

A majority of respondents indicated that ARCP 16(b) comprehensive pretrial conferences establish early judicial management of cases, improve trial preparation, and expedite case dispositions. Further, over 60% of respondents find the conferences to be "cost-effective," and exactly 60% believe that this conference should be mandated in every case. Respondents commented that, in order to fulfill their purposes, the conferences must be taken seriously and treated as more than an administrative formality. Further, the conferences must occur early enough to make a difference, but not so early as to preclude a good understanding of the case.

Arizona practitioners find the state system's liberal disclosure standard to be beneficial.

In Superior Court, the parties are required to make full, mutual, and simultaneous disclosure of all relevant information known by or available to them at the outset of a case, and to supplement as new information is obtained. There is a consensus among respondents that disclosures reveal the pertinent facts early in the case, help to narrow the issues early in the case, and facilitate agreement on the scope and timing of discovery. Further, there is consensus that disclosures do not require excessive investment early in a case, do not substantially increase satellite litigation, and do not raise litigation costs. Respondents commented that the disclosure rule leads to more effective communication and decreases litigation tactics that detract from the merits. However, it was also noted that the standard imposes a greater burden on conscientious parties and counsel, as proper disclosures involve higher costs than simply providing useless generalizations or a flood of documents. Nevertheless, respondents with federal experience tend to prefer the state disclosure standard with respect to both the timing of initial disclosures and the substance of mandatory disclosures.

Arizona practitioners find the state system's presumptive limits on expert witnesses and discovery to be beneficial.

In Superior Court, the number of independent expert witnesses is presumptively limited to one per side per issue. Given the opportunity to modify the presumptive expert witness limit, nearly 80% of respondents would either maintain or lower this limit. Moreover, respondents with federal experience prefer the Arizona rule on the number of expert witnesses by a three-to-one ratio.

Depositions in Superior Court are presumptively limited to four hours, and only certain individuals may be deposed automatically (parties, expert witnesses, and document custodians). Given the opportunity to modify the presumptive limit on deposition length, over three-quarters of respondents would either maintain or lower the limit. Given the opportunity to modify the presumptive limit on who may be deposed, over two-thirds of respondents would either maintain or lower the limit. Moreover, respondents with federal experience prefer the Arizona rules on the extent of deposition discovery by a two-to-one ratio.

There are also presumptive limits in Superior Court on the number of interrogatories, requests for admission, and requests for production. Given the opportunity to modify the presumptive limit of 40 interrogatories that may be served upon another party, exactly 70% of respondents would either maintain or lower the limit, while fewer than one-quarter would allow for more interrogatories. Given the opportunity to modify the presumptive limit of 25 requests for admission per case, nearly 70% of respondents would either maintain or lower the limit. Given the opportunity to modify the presumptive limit on requests for production to 10 distinct items or categories of items, a narrow plurality would either maintain or lower the limit, but a significant portion (46%) would allow for more requests.

A majority of respondents indicated that the presumptive discovery limits – considered collectively – require parties to focus their discovery efforts on the disputed issues and ultimately reduce the total volume of discovery. A plurality indicated that the limits reduce the total cost of litigation. Further, there is a general consensus that the limits do not favor defendants over plaintiffs, do not increase satellite litigation over whether to depart from the limits, and do not result in insufficient information at trial.

Arizona practitioners would generally like to see stronger rule enforcement.

The opinion that practitioners deviate from the letter and spirit of the rules was fairly widespread in the written comments. One respondent wrote: "If everyone does what they should, it is a good system." Many respondents expressed a desire for more consistent rule enforcement, including more frequent sanctions for misconduct.

Respondents reported that sanctions are rarely requested or imposed, though they are utilized more often for discovery misconduct than for pretrial conference misconduct. Moreover, only about 20% of respondents reported that the sanctions rules consistently deter misconduct, while over 60% reported that the rules "almost never" or only "occasionally" serve as a deterrent.

Arizona practitioners believe there is room for improvement in the state civil justice system.

While acknowledging that many aspects of the Superior Court system reduce litigation time and costs in comparison to other systems, exactly 70% of respondents still indicated that the system takes too long and nearly 85% indicated that it is too expensive.

A majority of respondents agreed that "the system of hourly billing for attorneys contributes disproportionately to litigation costs." With respect to access, a majority of respondents in private practice belong to firms that will not refuse a case based on the amount in controversy. However, one-third stated that, as a general matter, their firm will not file or defend a case unless the amount in controversy exceeds a certain dollar amount (with a median of $25,000).

While most respondents do not believe that notice pleading prevents early identification of issues, nearly one-third find that it does. More than one respondent commented on the relationship between the pleading standard and disclosures, as related to the need to narrow issues. Specifically, notice pleading can diminish the effectiveness of disclosures, as they are required before the legal theories and factual claims have sufficient definition.

Arizona practitioners find that the Superior Court compulsory arbitration program has some benefits but also some significant drawbacks.

In Superior Court, monetary actions with claims below a certain amount (set at the county level) are subject to compulsory arbitration. Three-quarters of respondents have had most of their qualifying cases filed in Maricopa County, which has a $50,000 jurisdictional threshold.

A majority of respondents indicated that the arbitration process has a faster time to disposition and a lower cost than litigation. A majority of respondents also indicated that there is no difference in procedural fairness between arbitration and litigation. Significantly, however, 35% of respondents indicated that the arbitration process is less fair.

The written comments concerning compulsory arbitration were generally negative. Appeal of an arbitration award results in the case being tried *de novo*, which means increased delay and costs. Commenting respondents were also critical of the system for appointing arbitrators, stating that forcing unsuspecting, inexperienced, and untrained members of the bar to arbitrate leads to resentment and a poor process.

I. INTRODUCTION

The Institute for the Advancement of the American Legal System at the University of Denver ("IAALS") is a national, non-partisan organization dedicated to improving the process and culture of the civil justice system. Focusing on the needs of those who use the system, IAALS conducts research to identify problems and develop innovative, practical solutions.

In September 2009, IAALS conducted the Arizona Rules Survey to examine the innovative aspects of the Arizona Rules of Civil Procedure ("ARCP"). This survey was completed by judges and attorneys with civil litigation experience in Arizona Superior Court ("Superior Court"), the state trial court of general jurisdiction governed by the ARCP.[1]

Originally modeled after the FRCP,[2] the ARCP "shall be construed to secure the just, speedy, and inexpensive determination of every action."[3] However, a 1988 citizen review of Arizona's civil justice system concluded that it was becoming unaffordable, wasteful, and uncivilized.[4] In early 1990, the Arizona Supreme Court and the State Bar of Arizona appointed a committee to consider and recommend amendments to the ARCP.[5] The resulting amendments became effective on July 1, 1992.[6] Intended to address a legal culture of "abusive, obstructive, and contentious behavior by members of the bar,"[7] these changes introduced comprehensive pretrial conferences, extensive disclosures, and presumptive limits on discovery.

Given the intent of the 1992 amendments and the significant differences between the ARCP and the FRCP, IAALS determined that a survey of the Arizona Bench and Bar would make a valuable empirical contribution to the current national dialogue on civil procedure reform. Although such evaluative surveys are necessarily subjective, IAALS believes that attorneys and judges can speak to the successes and failures of procedural rules – and should have a stage on which to do so. In addition to their meaningful contact with litigants, they have a technical understanding of the civil justice system, possess intimate knowledge of its governing rules, and play a significant role in how it operates. Indeed, as then-Chief Justice Thomas Zlaket wrote shortly after the new Arizona rules became effective:

> If the bench and bar are willing to give them a good faith try, the rules can succeed. Otherwise, they will likely fail. In any event, the rules surely will need some fine tuning as we gain experience and discover the mistakes that inevitably accompany such an effort.[8]

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[1] ARIZ. CONST. art. VI, §14.
[2] In 1940, the Arizona Supreme Court became the first state to promulgate a procedural system replicating the Federal Rules. John B. Oakley & Arthur F. Coons, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1381 (1986); *see also* Daniel J. McAuliffe & Shirley J. Wahl, ARIZONA PRACTICE SERIES: CIVIL TRIAL PRACTICE §§ 2.4, 2.5 (2d ed. 2009)
[3] ARIZ. R. CIV. P. 1.
[4] Thomas A. Zlaket, *Encouraging Litigators to Be Lawyers: Arizona's New Civil Rules*, 25 ARIZ. ST. L.R. 1, 1 (1993).
[5] *Id.* at 2-3.
[6] Supreme Court of Arizona, Order Amending Rules 4, 6, 16, 26.1, 30, 32, 33, 33.1, 34, 36, 43, Rules of Civil Procedure, and Rule VI, Uniform Rules of Practice of the Superior Court, 168 ARIZ. LXXXI (Dec. 20, 1991).
[7] Zlaket, *supra* note 4, at 9.
[8] *Id.*

The Arizona Rules Survey explored the opinions of the Arizona Bench and Bar concerning civil procedure in Superior Court, focusing on the distinctive state rules and how they operate. The global research questions included:

- Do comprehensive pretrial conferences lead to more effective case management?
- Does mandatory disclosure of all relevant information advance the goals of efficiency, affordability, and procedural fairness?
- Do presumptive limits on discovery and expert witnesses advance the goals of efficiency and affordability, without sacrificing procedural fairness?
- To what extent are the ARCP followed, respected, and enforced?
- Does compulsory arbitration provide a satisfactory alternative to litigation?
- How could Arizona's system be further improved?

II. METHODOLOGY

The Arizona Rules Survey was created by IAALS, with the input of Arizona Supreme Court Justice Andrew Hurwitz and the help of the Butler Institute ("Butler"), an independent social science research organization at the University of Denver. The State Bar of Arizona ("SBA"), a mandatory organization established by the Arizona Supreme Court to govern the legal profession in the state,[9] agreed to support the effort and distribute the survey to its membership.[10]

A. SURVEY DEVELOPMENT

The survey development process began with a series of hypotheses and research questions concerning the ARCP and practice in Superior Court. The survey instrument was then shaped over the course of several months in an iterative process of review and revisions, informed by a previous survey of the American College of Trial Lawyers.[11] IAALS created two versions of the Arizona Rules Survey, which were identical in content. A computerized version was produced using Qualtrics online survey software, while a paper version was produced using Adobe PDF.

Once completed, the survey instrument was pilot-tested by three diverse Arizona civil practitioners.[12] The volunteer pilot participants were first informed that their responses would not be eligible for inclusion in the final survey population, and were then given access to both the online and hard-copy versions and instructed to complete the survey. Thereafter, an IAALS research analyst conducted a telephone interview with each participant, using a standard set of questions. Through the interviews, IAALS obtained invaluable feedback on the presentation and substance of the survey questions. IAALS also received feedback from an Arizona state court administrator.

Upon conclusion of the pilot process, IAALS and Butler finalized the survey instrument and obtained approval for its administration from the University of Denver's Institutional Review Board.

B. SURVEY DISTRIBUTION

The survey was designed for all attorneys and judges with past or present civil litigation experience in Arizona Superior Court, regardless of status, position, or specialty. Accordingly, IAALS decided to cast a wide net within the SBA membership. Every active and inactive member with an e-mail address on file with the state bar received an e-mail invitation to participate, with the exclusion of attorneys categorized as "ineligible to practice" (deceased or disbarred). There were 17,779 e-mail addresses on file.[13]

The SBA sent three survey-related e-mails through its listserv. On August 31, 2009, an e-mail signed by SBA President Ray Hanna informed potential participants of the upcoming study.

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[9] *See* ARIZ. SUP. CT. R. 32; State Bar of Arizona, http://www.azbar.org.

[10] This decision was made under the leadership of SBA President Ray Hanna and SBA Chief Executive Officer/Executive Director John Phelps.

[11] Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System, *Interim Report & Litigation Survey of the Fellows of the American College of Trial Lawyers* (Sept. 9, 2008).

[12] The pilot group consisted of: a seasoned plaintiffs' personal injury lawyer with experience as a Superior Court judge; a seasoned director of a non-profit constitutional litigation center; and a fifth-year associate at a national firm.

[13] One day after the survey was launched, a rule requiring all members to provide the state bar office with a current e-mail address went into effect. Arizona Supreme Court, Order 23 (effective Sept. 3, 2009).

On September 2, 2009, an e-mail signed by Mr. Hanna and Justice Hurwitz explained the importance of the study and provided a universal link to the online version.[14] This e-mail was distributed to a total of 16,438 addresses (1,341 were "undeliverable"). On the evening of September 15, 2009, an e-mail signed by Mr. Hanna reminded potential participants to complete the survey and again provided the survey link. This e-mail was distributed to a total of 16,332 addresses (1,447 were "undeliverable"). All three e-mails encouraged participation and contained instructions for requesting a hard-copy version of the survey. The survey was officially in the field for three weeks, from September 2, 2009 until September 23, 2009. However, responses were accepted for six weeks, until October 14, 2009.

C. SURVEY ADMINISTRATION

Butler administered the survey. In order to preserve the confidentiality of responses, a Butler researcher served as the point of contact for survey participants. While the survey was in the field, Butler monitored operation of the online version, responded to requests for hard-copy versions, and collected the data in a password-protected environment. Upon conclusion of the survey period, Butler exported the data into an analytical software program in a password-protected file. Thereafter, Butler conducted a data verification process, eliminating respondents who did not provide an answer to any of the substantive questions and running descriptive statistics to detect and eliminate clear errors (such as answers outside the permissible ranges). Butler then provided the data to IAALS, removed of all identifiers.

D. SURVEY RESPONSES

Survey emails were sent to all active and inactive Arizona attorneys with an e-mail address on the SBA roster, regardless of experience. The survey e-mails explicitly informed SBA members that this was a study of civil litigation in Superior Court. In addition, a threshold question asked whether the respondent had the requisite civil litigation experience in Superior Court. Due to the application of a different set of procedural rules for family law actions,[15] "civil litigation" was defined to exclude domestic relations or family law.

The morning after the survey closed on October 14, 2009, the online link had been accessed 1,031 times, 947 individuals had given consent to participate in the study, and 834 had answered "yes" to the threshold question on the requisite experience. Although three individuals requested and received hard-copy versions, none were returned within the applicable time frame. After the data verification process, there were a total of 767 valid responses to the survey. At a 95% confidence level, the overall results are within +/– 3.54% of the reported percentages.

Due to the voluntary nature of the study, respondents were not required to answer all survey questions. Further, certain questions were inapplicable to some respondents, based on previous answers given. As a result of these permitted omissions and skip patterns, the precise number of respondents varies from question to question.

Due to the unknown composition of the target population, sample weights could not be used to better approximate the responses of that population. As a result of rounding, the sum of reported percentages may not equal exactly 100%.

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[14] It was not possible to provide a unique link to each potential participant due to distribution through the SBA's listserv rather than the online survey software.

[15] *See* ARIZ. R. FAMILY LAW P. 1.

III. RESPONDENT DEMOGRAPHICS

The survey contained a number of background questions, for the purpose of putting the responses into a context. The survey was completed by a diverse group of individuals.

A. LEGAL EXPERIENCE

Survey respondents have practiced law in Arizona for an average of 19 years. Figure 1 shows the relatively even distribution of respondents by years of legal experience in the state. Nearly 30% of respondents have 10 or fewer years of Arizona experience, and over 30% have more than 25 years of experience.

Figure 1 (Survey Question 1)

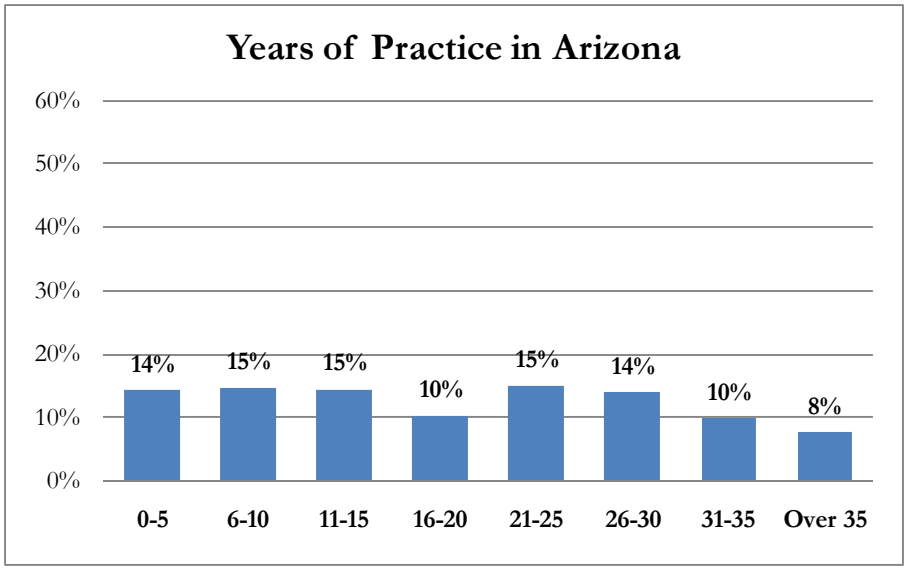

To obtain their overall perspective on civil litigation, respondents were asked to categorize their role over the course of their career, according to the type of party they have most frequently represented.[16] Respondents could also indicate "neutral decision-maker," a selection allowed in addition to any other response. Excluding those who selected neutral decision-maker as their *only* career role (2% of respondents), the distribution between plaintiffs' and defense attorneys was uniform, as seen in Figure 2.

[16] The response options were: represent plaintiffs in all or nearly all cases; represent plaintiffs and defendants, but plaintiffs more frequently; represent plaintiffs and defendants equally; represent plaintiffs and defendants, but defendants more frequently; represent defendants in all or nearly all cases; neutral decision-maker.

Figure 2 (Survey Question 5)

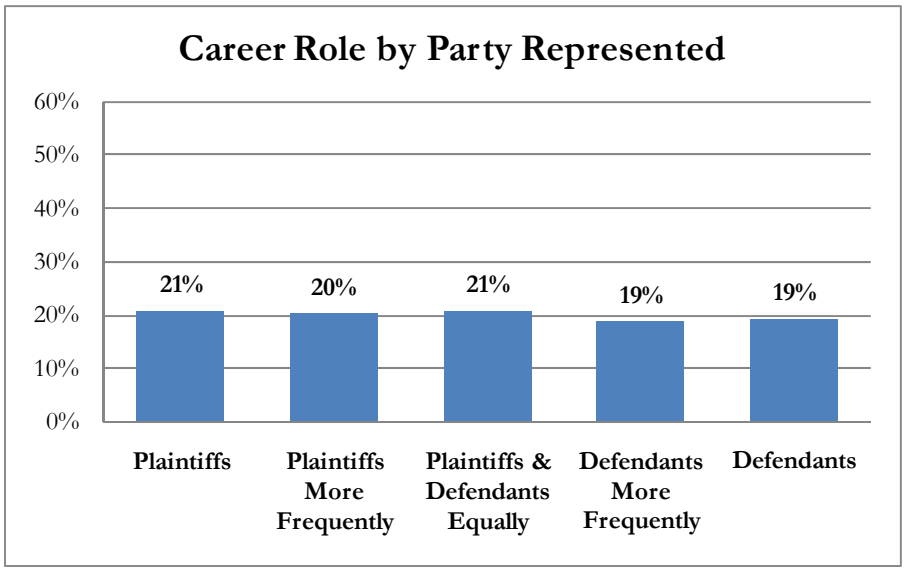

In total, 8% of respondents selected "neutral decision-maker." Of those, 76% selected a second primary career role: 33% have primarily represented plaintiffs, 19% have represented both equally, and 48% have primarily represented defendants.

B. Arizona Superior Court Experience

Respondents were asked to indicate up to three case types with which they have had the most experience in Superior Court. Respondents reported having the most experience litigating contract disputes (selected by 42%) and personal injury cases (selected by 33%). Complex commercial and real property litigation were both reported by 17% of respondents, while construction and general tort cases were both reported by 16% of respondents.

Figure 3 shows the distribution of respondents by number of Superior Court civil cases in the last five years. Over 60% of respondents have been an attorney of record or a judge in more than 20 cases.

Figure 3 (Survey Question 2)

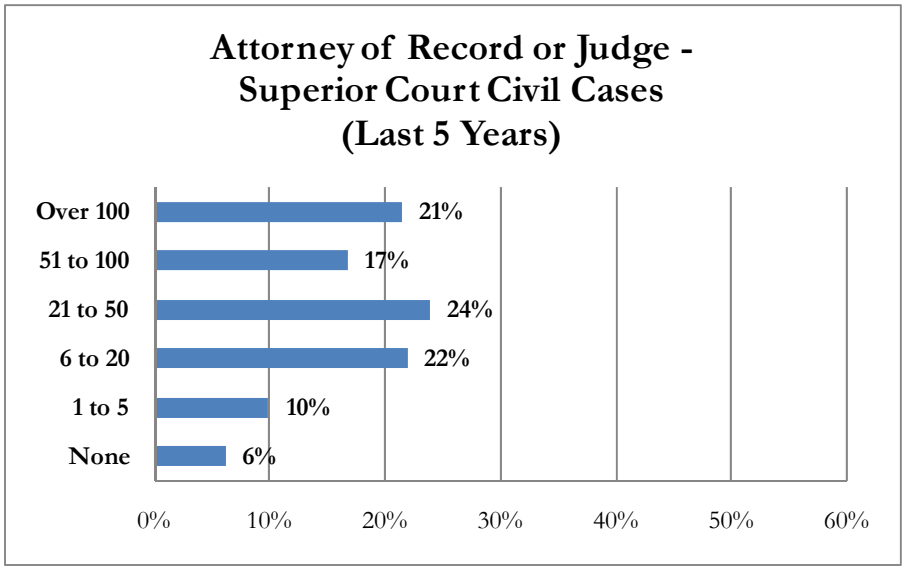

Figure 4 shows the distribution of respondents by number of Superior Court trials in the last five years. About three-quarters averaged less than one Superior Court civil trial per year, while about one-quarter averaged more than one trial per year.

Figure 4 (Survey Question 3)

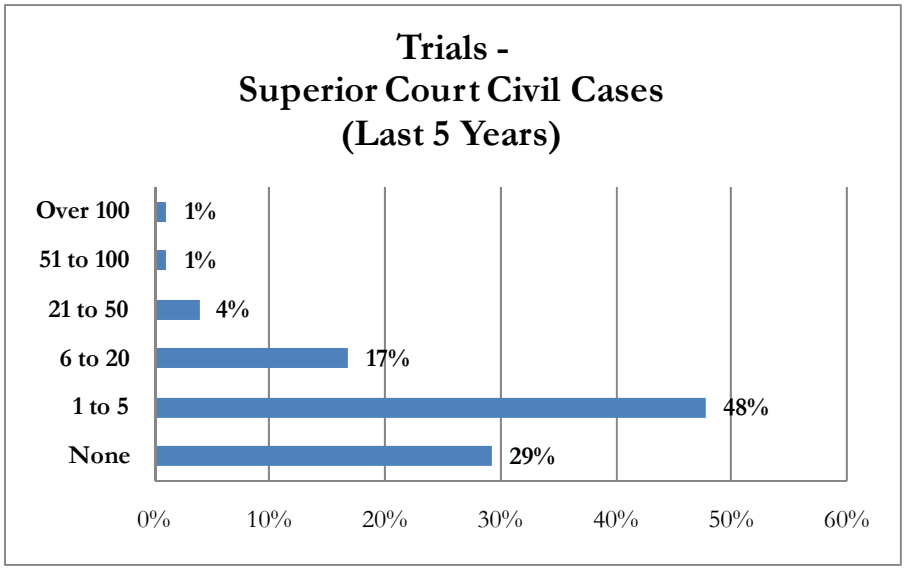

C. CURRENT POSITION

Three-quarters of respondents indicated that they are currently in private practice as a law firm attorney or solo practitioner. One respondent in ten indicated a current position as government counsel, while 4% indicated a current position as in-house counsel. Over 3% of respondents are currently judges. Less than 2% of respondents indicated retired status, and the same number reported inactive status.

Private practice, in-house, and government attorneys (89% of respondents) were asked the number of full- and part-time attorneys working for their organization in their office location. A majority work in offices with five or fewer attorneys, while only 5% work in offices with over 100 attorneys. Figure 5 shows the distribution of respondents by office size.

Figure 5 (Survey Question 7)

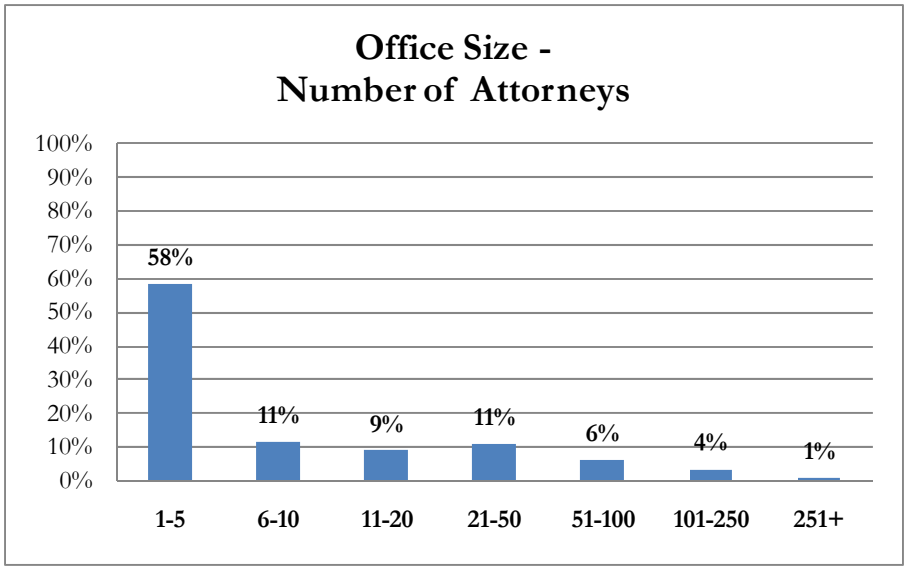

125-000772

IV. THE SURVEY RESULTS

This survey asked general questions about practice in Arizona Superior Court, as well as more specific questions about the ARCP.

Respondents were not required to answer every question. Moreover, certain questions were not asked of respondents for whom the question would be inapplicable. Accordingly, the number of responses to a particular question may not equal the total number of survey respondents. Unless otherwise indicated, percentages reported are the portion of total responses to the particular question, not the portion of total respondents to the survey. For each figure, the number of responses to the question is noted, labeled as "*n*".

A. ARIZONA ATTORNEYS AND JUDGES ARE GENERALLY POSITIVE ABOUT THE ARIZONA STATE SYSTEM

Arizona practitioners generally prefer state court to federal court, and prefer the current state procedural rules to those of the past. First, this section will discuss respondents' preferred forum for civil litigation in Arizona and the reasons therefor. Second, this section will discuss respondent opinions on the 1992 amendments, which implemented many of Arizona's innovative rules.

1. STATE COURT V. FEDERAL COURT

Over 70% of all survey respondents reported experience litigating in the U.S. District Court for the District of Arizona. Those with federal experience prefer litigating in Arizona Superior Court over the federal court at a two-to-one ratio. In fact, nearly three-quarters of respondents either prefer the state forum or have no preference. Figure 6 shows the level of preference for each Arizona forum.

Figure 6 (Survey Question 12)
n = 548

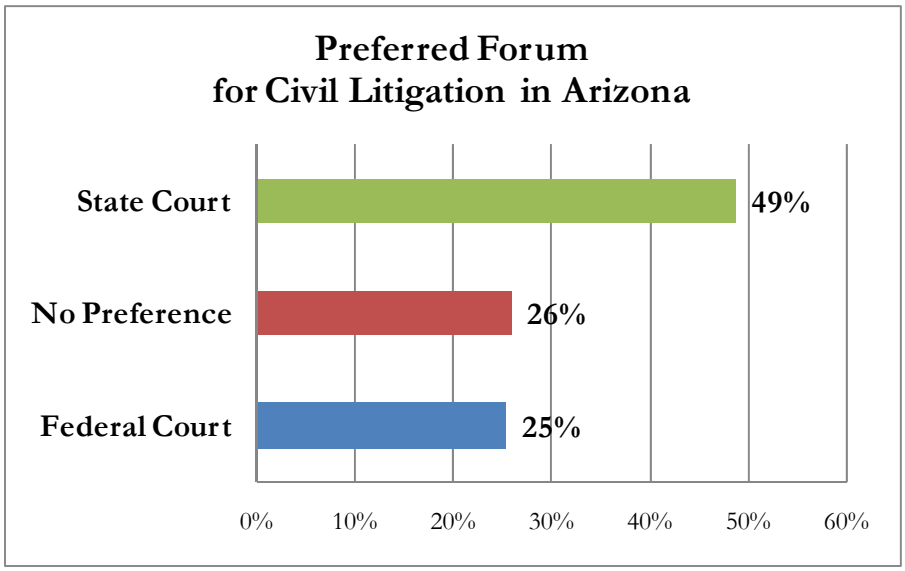

126-000773

Respondents who prefer Superior Court over the U.S. District of Arizona often cited the applicable rules and procedures, particularly the state disclosure and discovery rules. In terms of quantity, respondents indicated that state court is faster, less costly, and more accessible (for both litigants and small firm attorneys). In terms of quality, respondents indicated that state court is more relaxed, collegial, and user-friendly. According to these respondents, state court does not emphasize form over substance, which results in fewer technical dismissals and a greater likelihood of a decision on the merits. Other reasons given for preferring state court: partiality for state judges; court dedication to either civil or criminal cases; one decision-maker at a time (*i.e.*, no magistrate judge); the automatic right to a change of judge; less paperwork; non-unanimous verdicts; and more familiarity with state court.

Respondents who prefer the U.S. District of Arizona over Superior Court also cited the applicable rules and procedures, but there was a more specific focus on the consistent application and enforcement of the rules in federal court. For example, one respondent stated that federal judges are "far more willing to deal with counsel who will not comply with the rules."[17] Another wrote: "the timelines are clearer and adhered-to." In terms of quantity, respondents indicated that the federal court has more resources in comparison to its caseload (including time, staff, facilities, and technology), which leads to improved preparation and better decisions. In terms of quality, respondents indicated that the federal court has higher levels of professionalism, decorum, and formality. Further, according to these respondents, judges are more proactive in managing and progressing cases, and are more available to resolve discovery disputes. Other reasons given for preferring federal court: partiality for federal judges; the fact that one judge generally handles a case from start to finish; unanimous verdicts; and higher quality juries.

Many respondents who indicated "no preference" for either state or federal court cited the advantages (or disadvantages) of each forum, as described above. Some respondents indicated that the answer depends on the judge or the case, while others found both courts to be equally good or equally bad. One respondent wrote: "Good attorneys with good facts get good results in either forum." Another wrote: "Both [courts] have their applicable rules, and so long as they are applied uniformly to all parties and [followed], I have no preference." Other reasons given: being comfortable in both courts and enjoying the variety of two different systems.

[17] Where quotation marks are utilized without a cited source, the language has been pulled directly from the written comments submitted by survey respondents.

2. THE EFFECTS OF THE 1992 AMENDMENTS

Over 50% of all survey respondents reported Superior Court experience prior to the 1992 amendments to the ARCP. As is apparent from Figure 7, the vast majority of respondents with pre-1992 experience indicated that the amendments were a positive or neutral development for stakeholders – litigants, lawyers, judges, and the public – rather than a negative development.

Figure 7 (Survey Question 14)
n = 398; 388; 372; 372

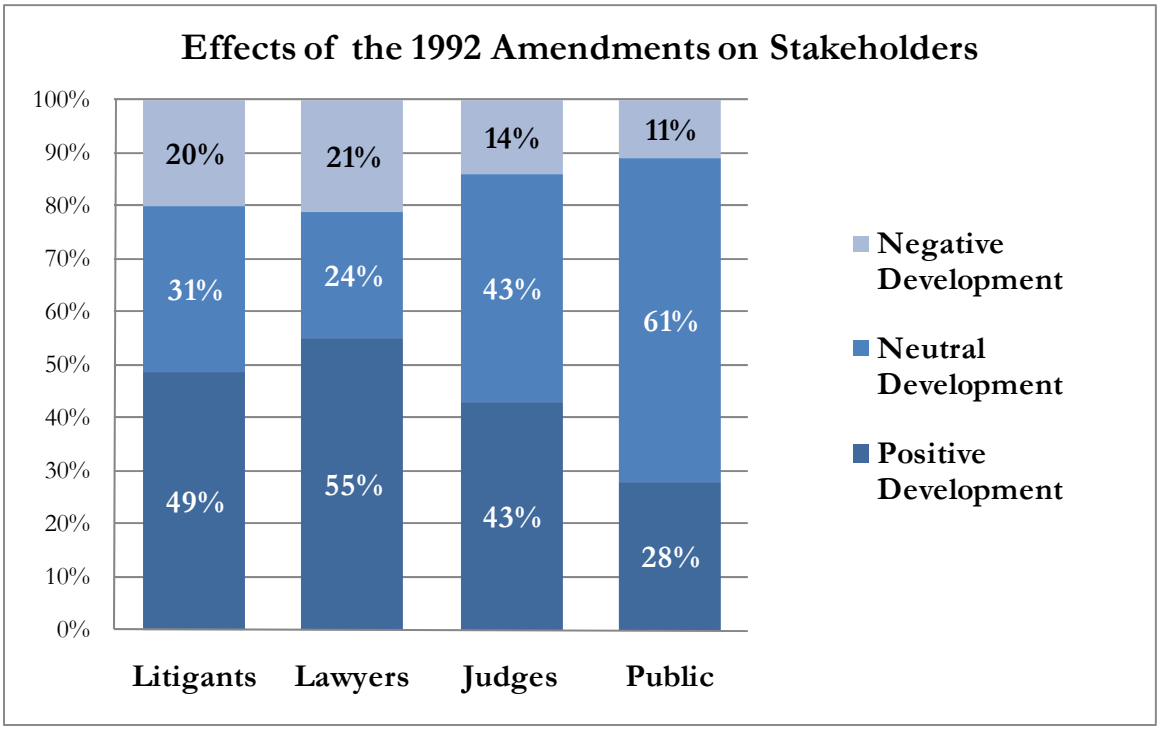

By and large, those who view the 1992 amendments positively and those who view them negatively came to different conclusions with respect to the following questions: Are the rules a tool for the effective management of the pretrial process, or are they another hurdle to clear? Do the rules focus energy on the merits, or do they detract from the merits? Do the rules decrease discovery disputes, or do they create additional issues to fight over? Do the rules ultimately make the process more or less efficient? Do the rules ultimately decrease or increase litigation costs?

Positive comments focused on the fact that the rules get to the heart of the case and require those involved to "face facts" sooner rather than later. Essentially, the rules require a beneficial evaluation of the case before the burden of discovery must be incurred. Moreover, less information is withheld due to discovery "wordsmithing," resulting in a reduction of "trial by ambush."

Generally, negative comments related to the implementation, rather than the substance, of the rules. As one respondent stated: "If everyone does what they should[,] it is a good system. That is a big 'IF'." The opinion that lawyers and judges do not follow the letter and spirit of the rules was fairly widespread in the written comments. Although no one admitted to personally contributing to problems,[18] the Arizona Bar was particularly hard on itself.

[18] One respondent did go so far as to say: "Everybody fudges, but everybody fudges to a different degree."

12b-000775

Respondents indicated that attorneys misuse the rules for "gamesmanship" purposes, fail to cooperate, and are suspicious that opposing counsel may be "hiding the ball." One respondent stated that the 1992 amendments did not change the "culture of lying" among lawyers. Moreover, respondents indicated that judges do not enforce the rules effectively or consistently. Judges are also too reluctant to get involved in and resolve discovery disputes. The following comment is illustrative of the general sentiment contained in the written comments:

> Where the "Zlaket" rules are followed in good faith, they provide a clearer exposition of the legal issues and the nature of the dispute that helps reach a more expeditious result, and one that is based more on the law than individual tactics. However, lawyers who choose to use obfuscation as a tactical weapon can do so with the "Zlaket" rules just as they could with the old discovery rules. Control over abuses of the rules, under either set, ultimately comes down to the level of supervision by judges, which is notoriously lacking.

There were an equal number of comments maintaining that the 1992 amendments favor plaintiffs, as there were comments maintaining that the amendments favor defendants. In addition, one respondent wrote that, when enforced, the "rules allow everyone to be on a somewhat level playing field."

Those who have pre-1992 experience tend to prefer state court at a higher rate than those who do not have such experience, as shown in Figure 8.

Figure 8 (Questions 12, 13)
n = 319; 227

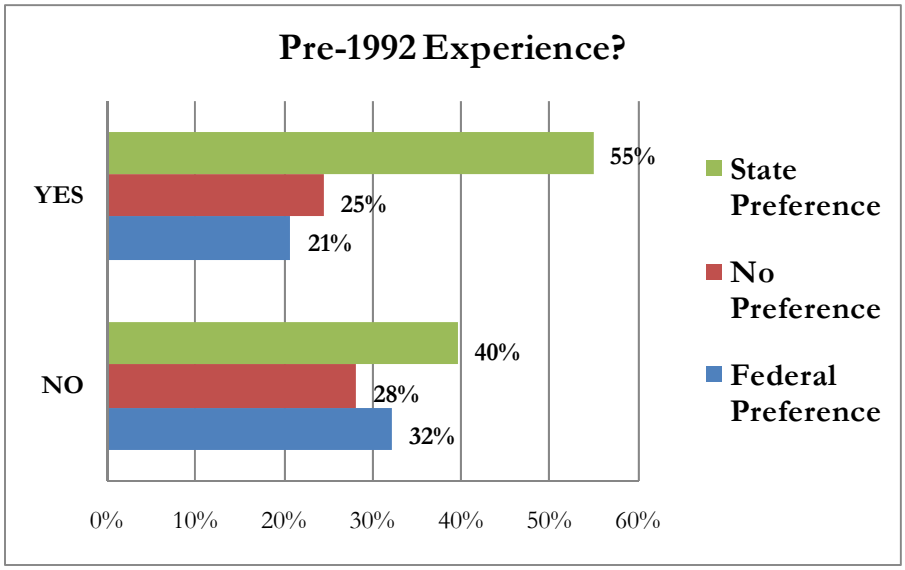

125-000776

B. THE INNOVATIVE ASPECTS OF THE ARIZONA RULES AND THE GOALS OF EFFICIENCY, AFFORDABILITY, AND PROCEDURAL FAIRNESS

In the aggregate, Arizona practitioners overwhelmingly believe that the innovative aspects of the ARCP are beneficial. This section will discuss respondent reactions to those rules, including comprehensive pretrial conferences, extensive disclosures, and presumptive limits on expert witnesses and discovery.

1. RULE 16(b) COMPREHENSIVE PRETRIAL CONFERENCES

ARCP 16(b) provides that, "upon written request of any party the court shall, or upon its own motion the court may, schedule a comprehensive pretrial conference."[19] The rule then enumerates 19 (non-exclusive) topics that may be addressed by the court at the conference. This portion of the survey sought to determine the effects of Rule 16 conferences and the frequency with which they are employed.

Figure 9 shows what Arizona practitioners perceive to be the effects of Rule 16(b) conferences when they occur.[20] The most profound effect is the establishment of early judicial management of cases (indicated by 71%). The conferences also improve trial preparation for most respondents (59%), and expedite case dispositions for the majority (52%). However, practitioners are more evenly split on whether the conferences encourage judges to stay involved throughout the case (49% agreed; 41% disagreed) and whether Rule 16(b) conferences "focus discovery to the disputed issues" (41% agreed; 49% disagreed). These figures do not add up to 100% because of the "no opinion" response option.

[19] Medical malpractice cases are specifically excluded from this provision.

[20] The categories "strongly disagree" and "disagree" are collapsed into one category unless otherwise noted. The same is true for the "strongly agree" and "agree" categories.

Figure 9 (Survey Questions 15a-15e)
n = 728; 726; 727; 728; 727

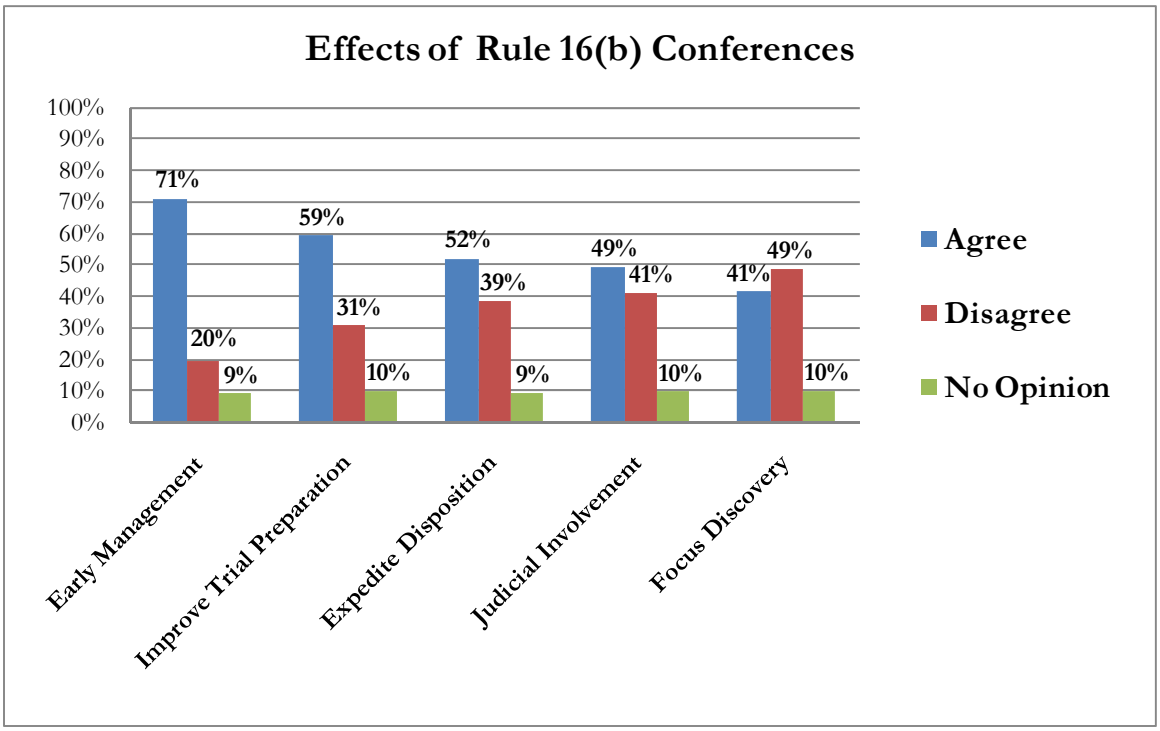

The less than clear ability to focus discovery on the disputed issues is surprising, as the rule explicitly encourages use of the conferences to set disclosure and discovery parameters, eliminate non-meritorious claims or defenses, permit amendment of the pleadings, assist in identifying disputed issues of fact, and obtain stipulations on the admissibility of evidence.[21] Considering *only* respondents who expressed an opinion on the issue, those who primarily represent plaintiffs were more evenly split (51% agreed; 49% disagreed) than those who primarily represent defendants (40% agreed; 60% disagreed) and those who represent both equally (43% agreed; 57% disagreed).[22] However, no more than 13% of any respondent group felt strongly about the issue either way.

Regardless of the specific effects, the Arizona Bar generally believes that "Rule 16(b) conferences are cost-effective" (62% agreed; 24% disagreed).

As Rule 16(b) conferences are not mandatory unless requested by a party or sought by the court, the survey asked the extent to which the conferences are actually held in Superior Court, in the experience of respondents. Nearly 50% of respondents indicated that they occur "often" or "almost always," and nearly two-thirds of respondents indicated that these conferences take place at least half of the time. However, about one-quarter indicated only infrequent experience with the conferences. See Figure 10.

[21] ARIZ. R. CIV. P. 16(b)(1)-(9).
[22] The category "primarily represent plaintiffs" is an aggregate of the responses given by those who "represent plaintiffs in all or nearly all cases" and those who "represent plaintiffs and defendants, but plaintiffs more frequently." The same applies to the category "primarily represent defendants."

Figure 10 (Survey Question 16a)
n = 729

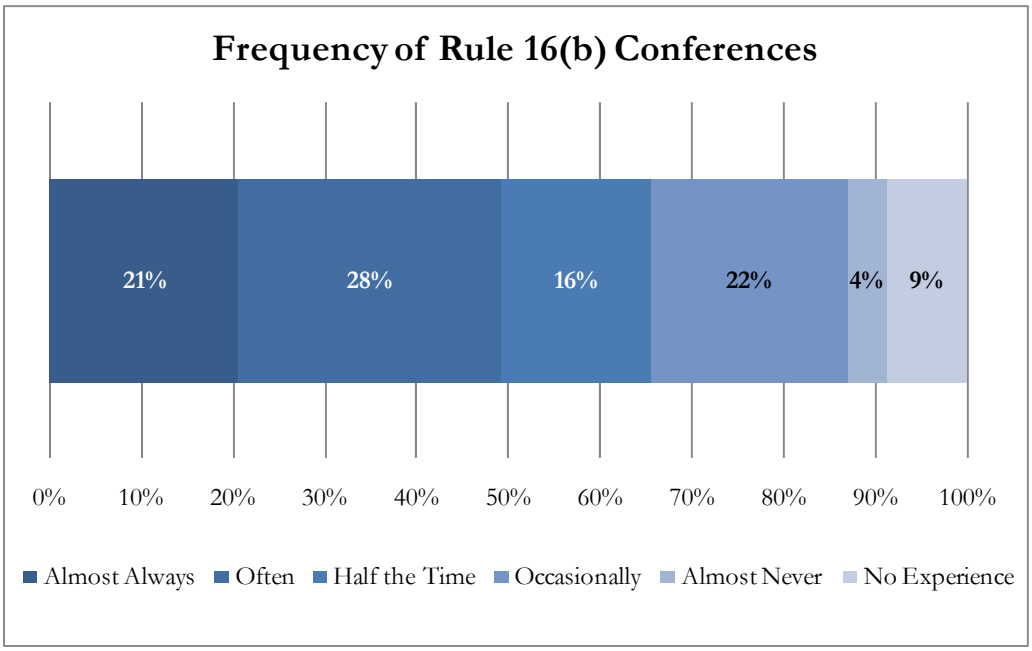

A majority (60%) of respondents believe that a Rule 16(b) conference should be mandated in every case. These respondents cited the fact that the conferences set reasonable ground rules, expectations, deadlines, and benchmarks for efficient case resolution, while preventing languish and inadvertent dismissal. Respondents also indicated that the conferences force both the judge and counsel to become familiar with the case, engage in a realistic evaluation, communicate with one another, and reach agreements. However, many comments were qualified. The timing appears to be crucial, as it was indicated that the conferences must occur early enough to make a difference, but not so early as to preclude a good understanding of the case and an appropriate timeline. Further, one respondent wrote: "I think the courts need to do more than simply tell the parties to discuss and submit a proposed form of order." Finally, another respondent stated that judges have to be "willing to enforce the discovery orders and police discovery disputes."

Respondents who favor discretionary Rule 16(b) conferences indicated that, depending on the case, the circumstances, and the attorneys, this additional court appearance may not be necessary and may simply add an unnecessary step for counsel, increase costs for the parties, and further congest the court's calendar. Many of these respondents described the conferences as an administrative formality that does not truly accomplish its goals, due to arbitrary deadlines, inappropriate conduct of counsel, or inapt enforcement by the court. Some respondents indicated that attorneys should be trusted and empowered to manage cases, with dispute resolution by the court only as required. Others believe that Rule 26.1 disclosures (discussed below) render these conferences superfluous. It was also noted that such conferences should not be mandatory for cases diverted to compulsory arbitration.

2. EXTENSIVE DISCLOSURES

ARCP 26.1 "basically states that at the outset of a case the parties must make a full, mutual and simultaneous disclosure of all relevant information known by or available to them and their lawyers."[23] This portion of the survey sought to determine the effects and operation of Rule 26.1 disclosures.

Figure 11 shows what Arizona practitioners perceive to be the effects of Rule 26.1 disclosures on discovery, when made as provided in the rule. There is a strong consensus that disclosures "reveal the pertinent facts early in the case" (76% agreed; 23% disagreed) and "help narrow the issues early in the case" (70% agreed; 28% disagreed). In addition, a majority of the Bar believes that disclosures facilitate agreement on the scope and timing of discovery (54% agreed; 41% disagreed). For all three of these statements, the responses were similar among plaintiffs' and defense attorneys. Despite the positive effects of disclosures noted by respondents, however, there is no consensus within the Arizona Bar concerning whether disclosures ultimately reduce the total volume of discovery (49% agreed; 48% disagreed) or reduce the total time required to conduct discovery (46% agreed; 50% disagreed).

Figure 11 (Survey Questions 20a – 20e)
n = 692; 690; 690; 689; 689

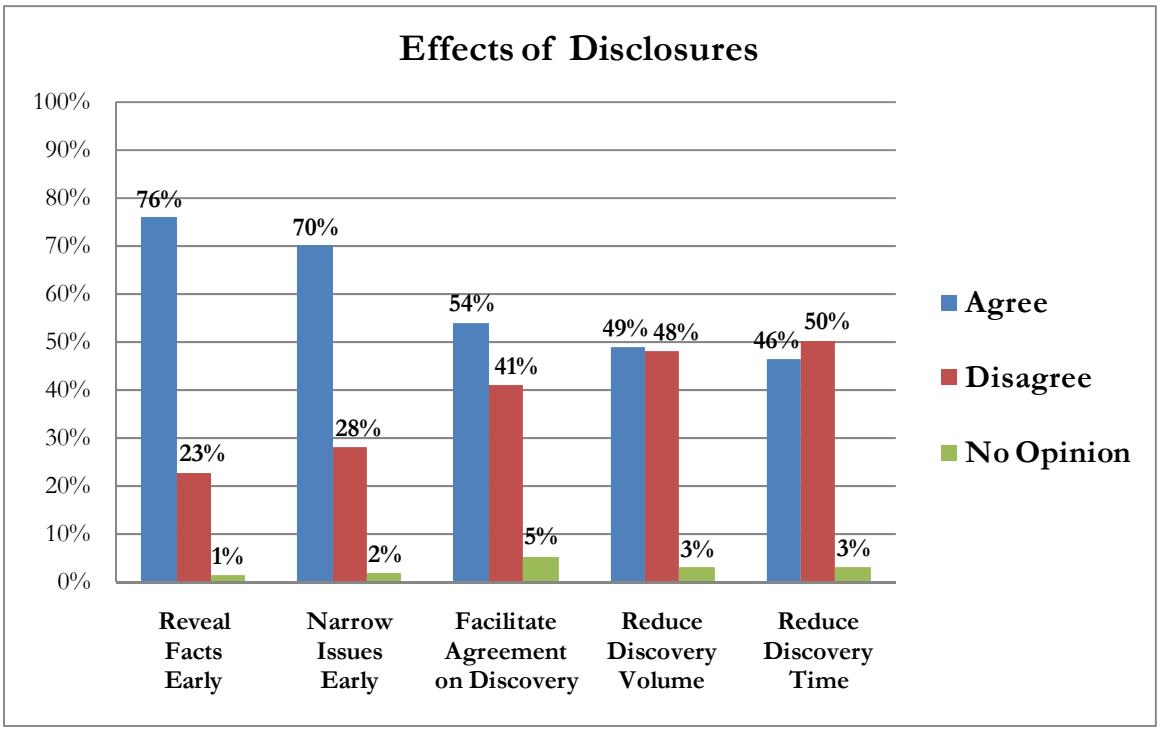

Figure 12 shows Arizona practitioners' perception of whether Rule 26.1 disclosures have negative effects when made as provided in the rule, by either front-loading or increasing costs. The Bar generally does not believe that disclosures "require too much investment early in the case" (26% agreed; 71% disagreed) or that disclosures increase the cost of litigation (38% agreed; 58% disagreed). On both issues, the most frequent answer among both plaintiffs' and defense attorneys was "disagree."

[23] Zlaket, *supra* note 4, at 5.

Figure 12 (Survey Questions 20f, 20g)
n = 688; 690

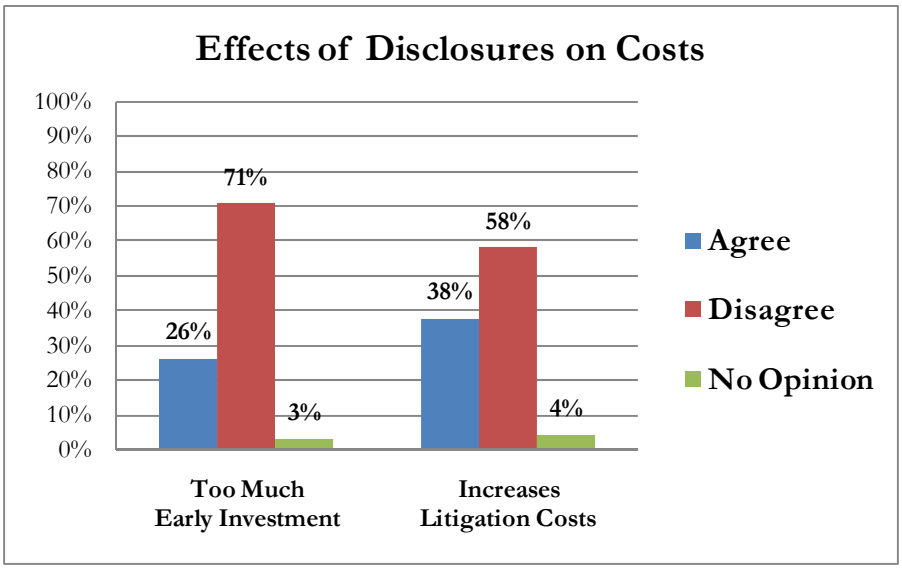

Moreover, disclosures do not appear to substantially increase satellite litigation, as 64% of respondents indicated that parties litigate the scope and adequacy of disclosures only "occasionally" or "almost never." This data challenges the belief that the 1992 amendments have increased the number of pretrial disputes.

In describing their preference for Superior Court generally, respondents cited the state rule on disclosures more than any other specific rule. One respondent described the system of disclosures as "superior." Other comments include:

- "The disclosure rules permit early identification of issues and facts."
- "Rule 26.1 prevents a lot of gamesmanship and trial by ambush."
- "Superior Court rules require parties to disclose early and often in an attempt to do away with trial by fire and other litigation tactics that are not conducive to reaching a decision on the merits."
- "Arizona's disclosure rules are stronger and lead to more effective communication between parties and support settlement."

One concern expressed was that Rule 26.1 imposes a greater burden on conscientious attorneys. Respondents stated that proper disclosures involve higher costs (for the client if the fee is hourly and for the attorney if the fee is contingent) than simply providing "simplistic generalizations" or flooding the other party with disorganized and mostly irrelevant documents. In addition, one respondent indicated that clients lose faith in counsel when forced to reveal information voluntarily. Nevertheless, by and large, Arizona practitioners prefer the Arizona rules to the federal rules on both the timing of initial disclosures under ARCP 26.1(b) and the substance of mandatory disclosures under ARCP 26.1(a).

The Arizona rules provide that initial disclosures shall occur "within forty (40) days after the filing of a responsive pleading to the Complaint, Counterclaim, Crossclaim or Third Party Complaint unless the parties otherwise agree, or the Court shortens or extends the time for good cause."[24] As seen in Figure 13, about two in three respondents either prefer the ARCP or have no preference concerning the timing of initial disclosures.

Figure 13 (Survey Question 25a)
n = 494

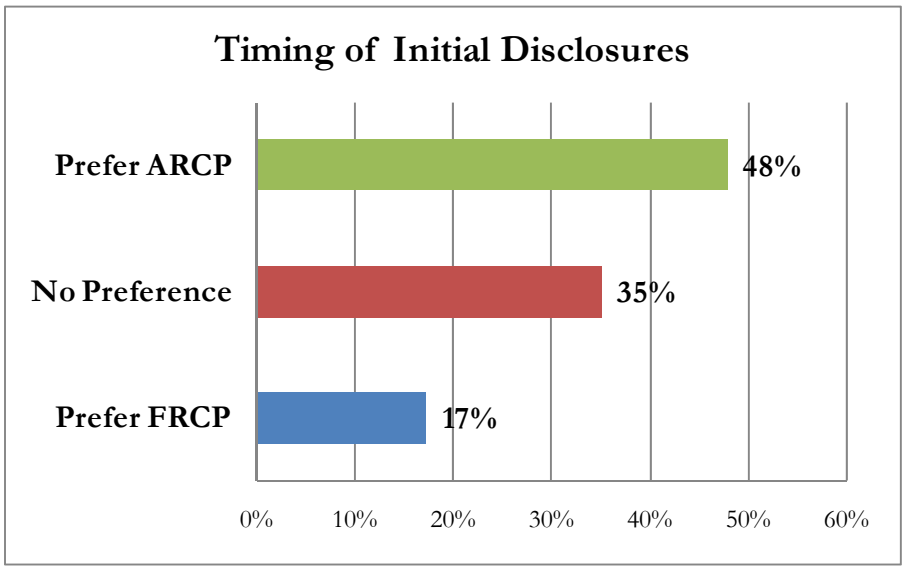

Considering *only* those who expressed a preference between the state and federal rules, the ARCP standard for the timing of initial disclosures received majority support from all respondent groups. When broken out by party represented, at least 72% of all groups prefer the ARCP, with the exception of those who represent defendants in all or nearly all cases. However, even that group expressed majority support for the state rule (56%). When broken out by those who have pre-1992 experience and those who do not have such experience, more than two-thirds of each group prefers the ARCP.

The written comments reflect a belief that the timing of disclosures is important to their efficacy, although there is disagreement concerning the most beneficial time. Some respondents are in favor of providing initial disclosures along with the pleadings, in order to have the fullest information concerning the dispute as soon as possible. Others expressed concern that disclosures can be a wasted effort if they occur before the real issues have been identified. Further, disputes often "cool down" with time, so it is not always beneficial to incur costs during the early stages. One respondent suggested: "Change the disclosures to be 40 days after the *first* responsive pleading. How do you ever get to disclosures if the pleadings never end because not all the parties are ever served, etc.?" Another respondent suggested that disclosures should be made before the Rule 16 pretrial conference is held.

[24] ARIZ. R. CIV. P. 26.1(b)(1).

As seen in Figure 14, fully 75% of respondents either prefer the ARCP or have no preference concerning the content and scope of mandatory disclosures.

Figure 14 (Survey Question 25b)
n = 494

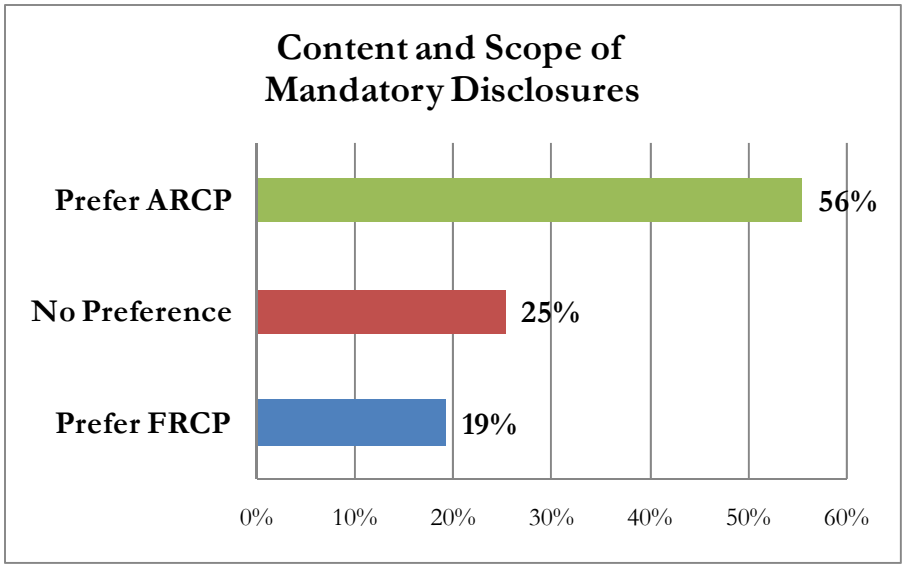

Considering *only* those who expressed a preference between the state and federal rules, the ARCP standard for the substance of mandatory disclosures received majority support from all respondent groups. Separated by party represented, more than 60% of all respondent groups prefer the ARCP. Separated by whether the respondent has pre-1992 experience or not, more than 70% of each group prefers the ARCP.

One respondent who also practices in New Mexico (where such disclosure is lacking outside of the domestic relations context),[25] contrasted the two systems and stated that New Mexico defendants consider early negotiations a sign of weakness. "It appears that they perceive a willingness to assess the facts facing all parties honestly (pseudo disclosure), to come to a mutually acceptable resolution, indicates that I know something devastatingly damaging about my case and don't want to enter discovery."

Respondents were asked the extent to which, in their experience, Arizona litigants adhere to the rules on the timing and substance of disclosures. As seen in Figure 15, parties diverge from the rules regarding the timing of initial disclosures more frequently than the rules on the substance of disclosures. Regarding the time limit, a majority of respondents indicated that the parties follow the rule at least half the time, with about one-third indicating adherence to the rule "often" or "almost always." Significantly, however, more than one in three respondents indicated infrequent adherence to the time limit. Regarding the content and scope of disclosures, nearly three-quarters of respondents indicated that parties follow the rule at least half of the time, with a plurality (48%) indicating adherence to the rule "often" or "almost always." Nevertheless, one in four respondents indicated infrequent adherence on the substance of disclosures.

[25] *See* N.M. R. CIV. P. FOR DIST. CT. 1-123.

Figure 15 (Survey Questions 18a, 18b)
n = 708; 709

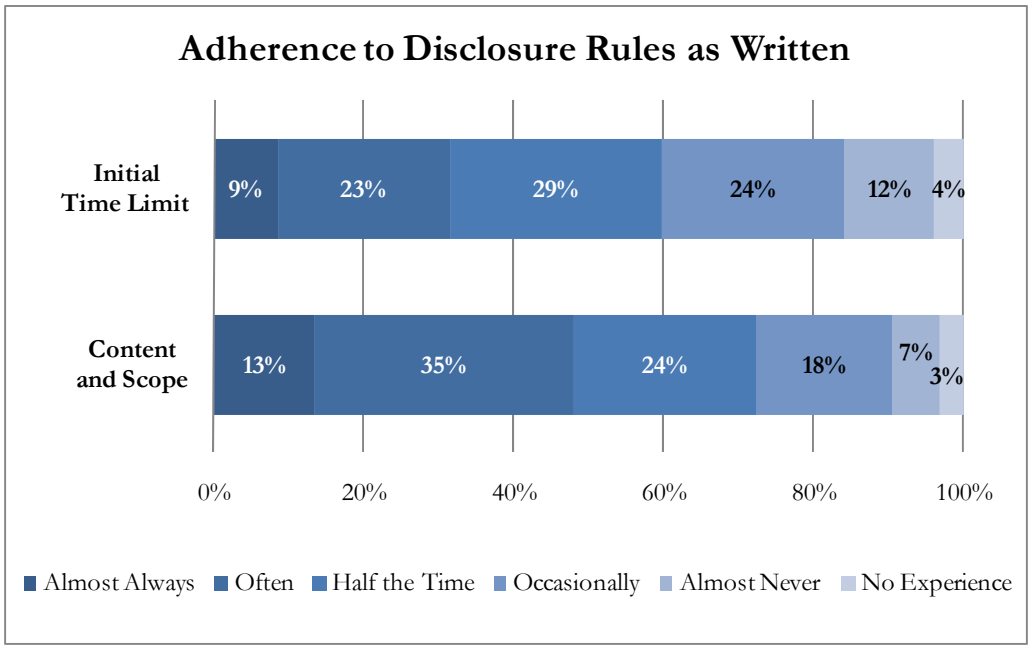

Respondents were also asked about the frequency of certain types of disclosure "abuse." The responses are shown in Figure 16. The most commonly reported type of abuse was "revealing information late," as over 50% of respondents reported that abusive late disclosures occur at least half of the time, with over one in three reporting this behavior "often" or "almost always." The second most commonly reported type of abuse was "withholding information," as over 45% of respondents reported that information is abusively withheld at least half of the time, with approximately one in three reporting this behavior "often" or "almost always." Abusive "overproduction" seems to be less common, as nearly 80% of respondents reported that it only "occasionally" or "almost never" occurs.

12b-000784

Figure 16 (Survey Questions 21a, 21b, 21c)
n = 692; 690; 690

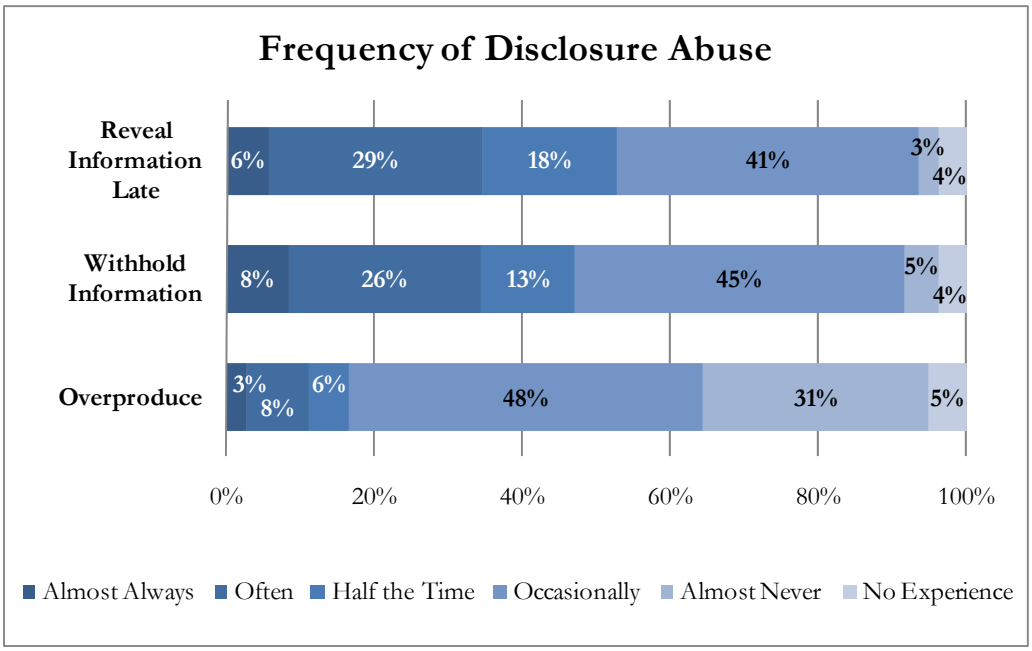

Of those who expressed an opinion on the frequency of disclosure abuse, the most popular response was "occasionally," regardless of the party represented. Figures 17, 18, and 19 compare the respondent groups for the three types of disclosure abuse.

Figure 17 (Survey Question 21c)
n = 124; 141; 134; 124; 129

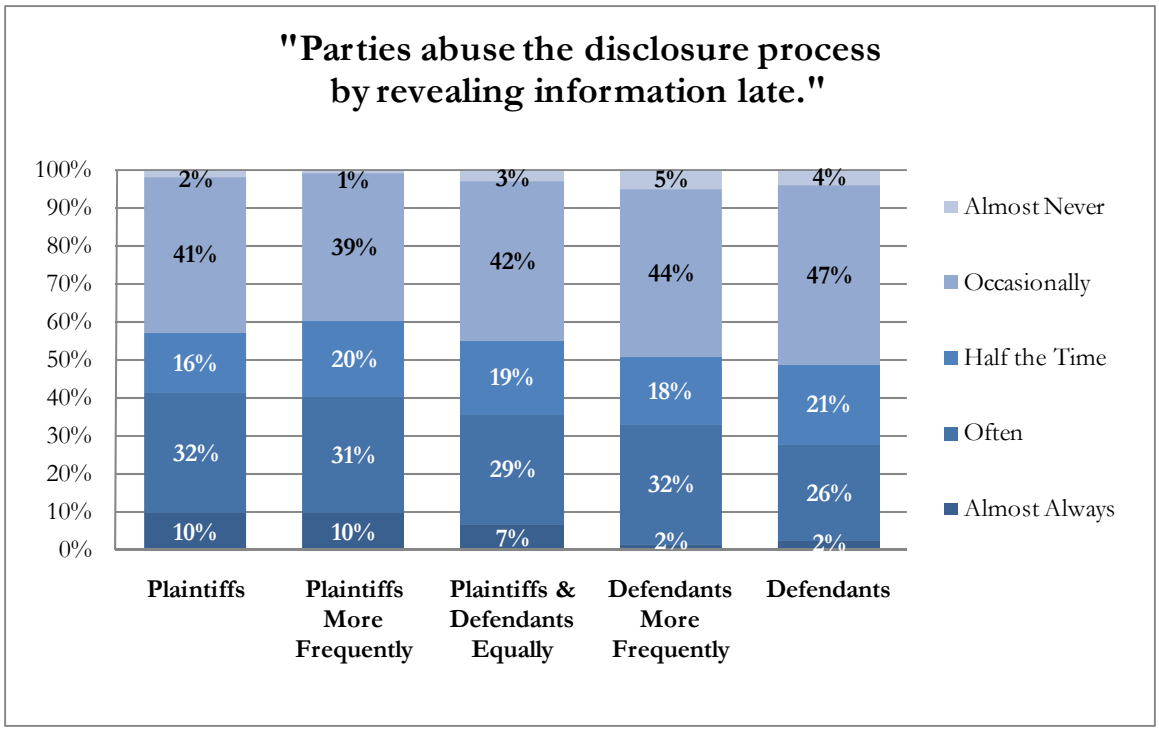

125-000785

Figure 18 (Survey Question 21b)
n = 124; 143; 133; 125; 128

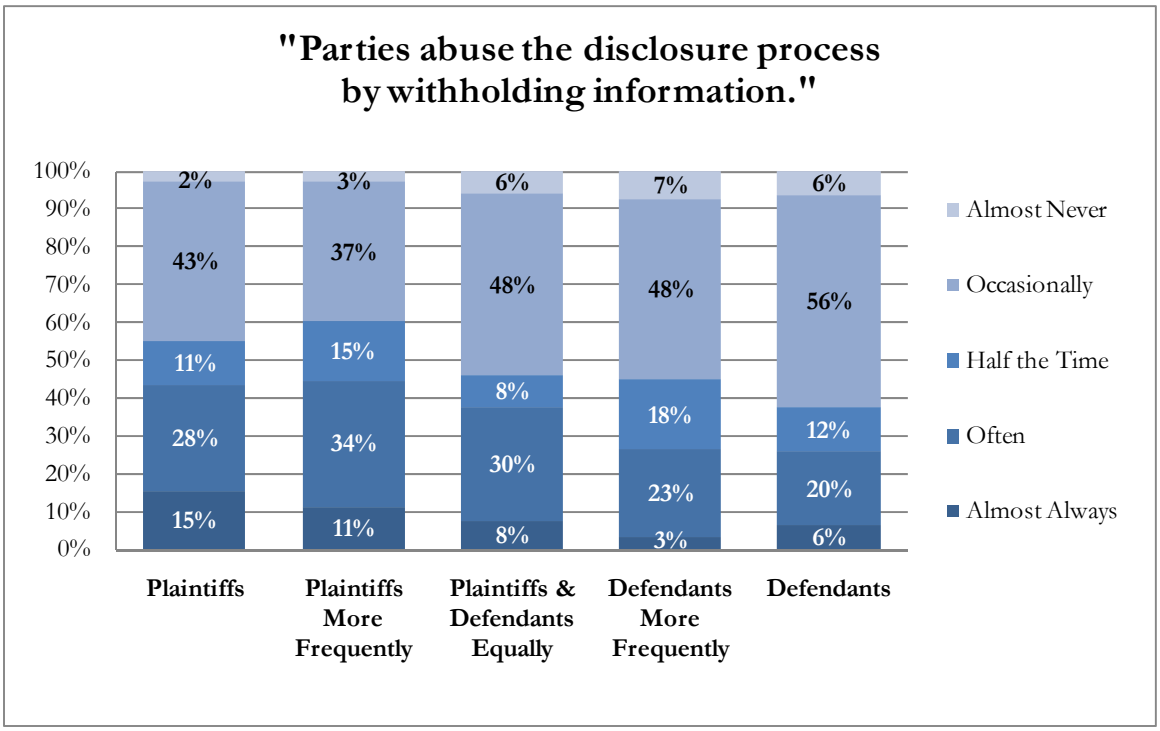

Figure 19 (Survey Question 21a)
n = 119; 143; 134; 125; 125

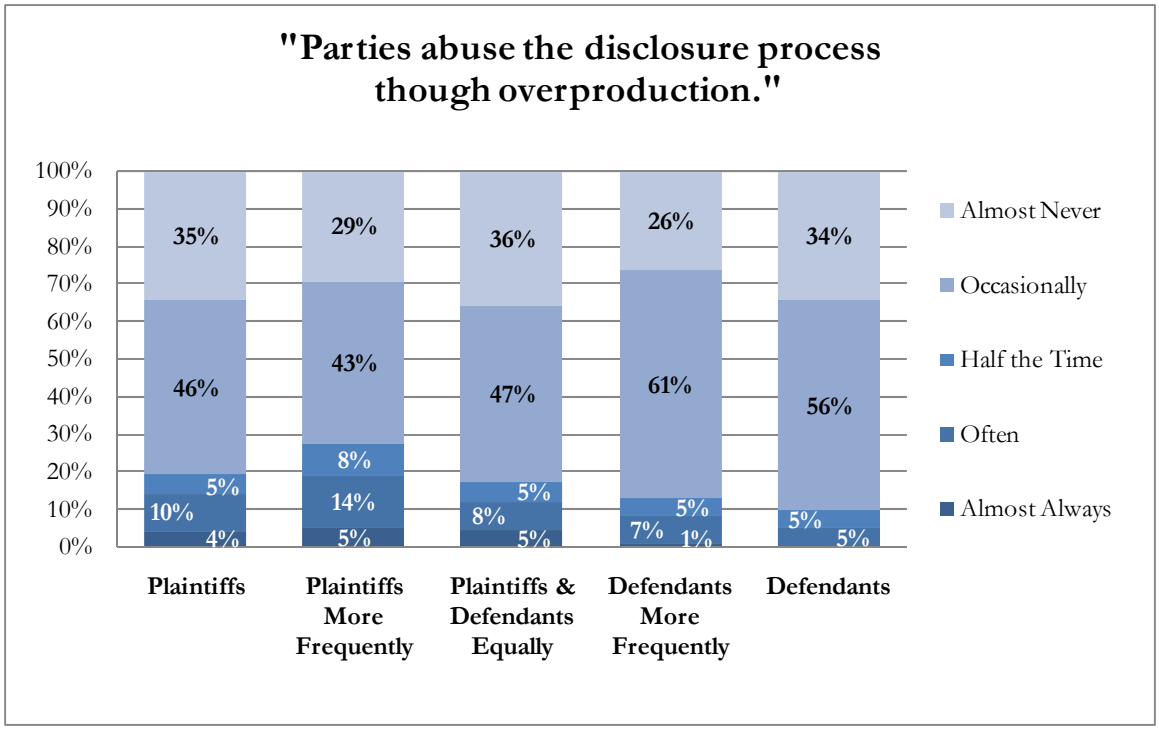

According to Arizona practitioners, courts do not routinely enforce disclosure rules. Almost three-quarters of respondents indicated that courts enforce disclosure requirements only half the time or less. Figure 20 shows the distribution of responses.

Figure 20 (Survey Question 21d)
n = 691

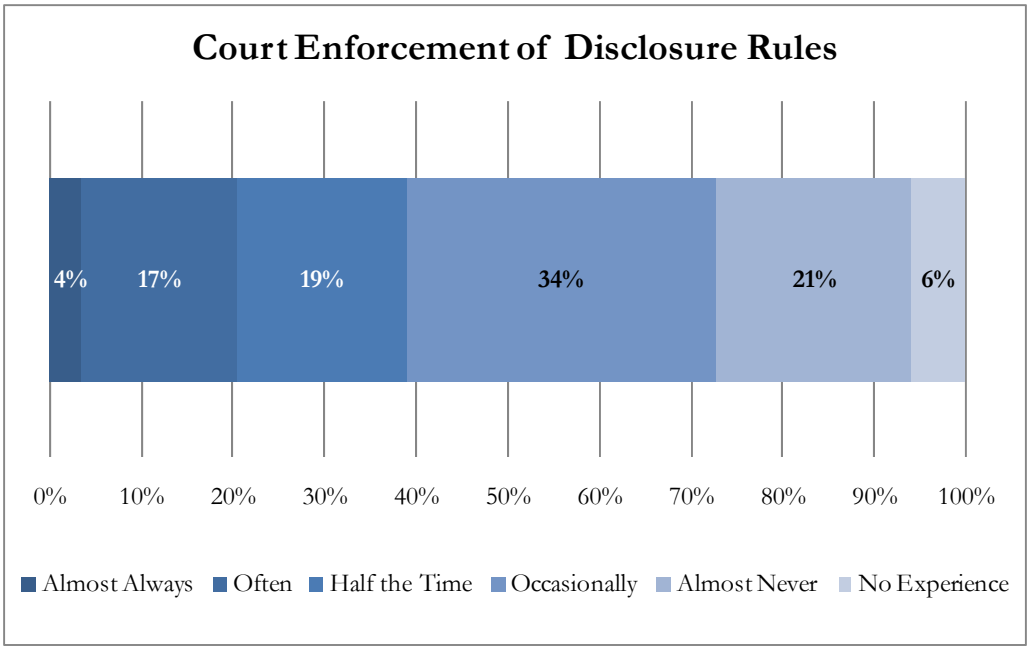

It appears that Arizona practitioners would welcome more strict enforcement of the most common offense – revealing information late. Fully 80% of respondents agreed that parties "should be prevented from introducing supporting evidence that was not timely disclosed," and nearly 40% expressed strong agreement with the statement.

The written comments also show a desire for stronger judicial enforcement of the disclosure rules. As one respondent wrote:

> I wouldn't change any rule; I would enforce [Rule 26.1] to require parties that have information or experts to disclose them within 60 days of receiving the information and that failing to do so . . . would result in exclusion. I would get rid of the "hold everything until the last day" philosophy.

Another respondent stated: "Trial judges are too lenient with parties who wrongfully withhold damning information. I have never had the experience where the judge would exclude certain evidence for failure to timely disclose."

3. Presumptive Limits

Overall, the Arizona Bar has a favorable opinion of the ARCP's presumptive limits on expert witnesses and discovery. This section includes discussion of: the limit on the number of expert witnesses; the limits on deposition discovery (who may be deposed and the time limits for doing so); the limit on interrogatories; the limit on requests for production; and the limit on requests

125-000787

for admission. This section also discusses the collective effects of the presumptive discovery limits, as well as the extent to which the limits are followed.

a. The Limit on the Number of Expert Witnesses

Under ARCP 26(b)(4)(D), each side is entitled to only one independent expert witness per issue. Multiple parties on the same side must agree on the expert, or the court will designate the witness. Additional experts require a court order.

As demonstrated in Figure 21, over 75% of respondents would maintain the presumptive limit, while fewer than 15% of respondents would raise the limit to allow for more expert witnesses.

Figure 21 (Survey Question 24a)
n = 663

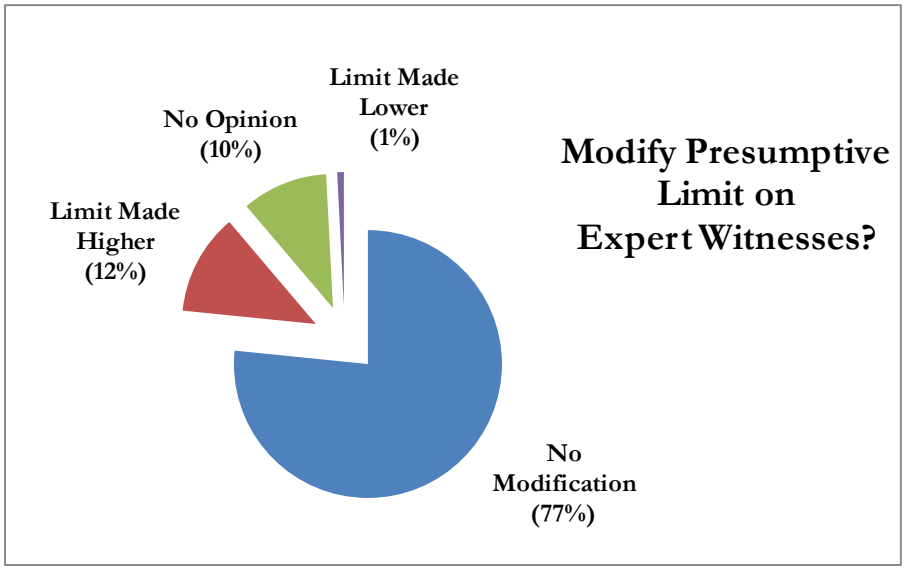

Considering *only* those who expressed an opinion on the issue, a majority of all respondent groups would like to see no modification to the expert witness limit. Whether divided by party represented or by experience, over 80% of all groups believe the current limit should be maintained.

One interesting question is whether respondents who primarily represent plaintiffs or defendants would like to raise the limit more than those who represent the other party. Considering *all* respondents who indicated a party most frequently represented, the desire to raise the limit does not differ across parties, as seen in Figure 22.

Figure 22 (Survey Questions 5, 24a)
n = 155; 151; 155; 140; 143

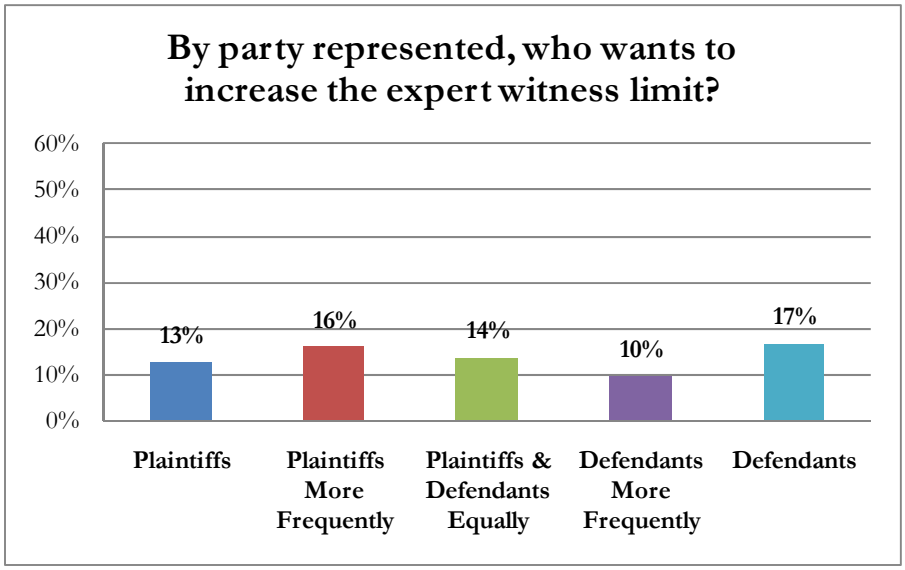

By a three-to-one ratio, respondents with federal experience prefer the ARCP over the FRCP on the number of expert witnesses. In fact, over 85% either prefer the state rule or have no preference. See Figure 23.

Figure 23 (Survey Question 25c)
n = 494

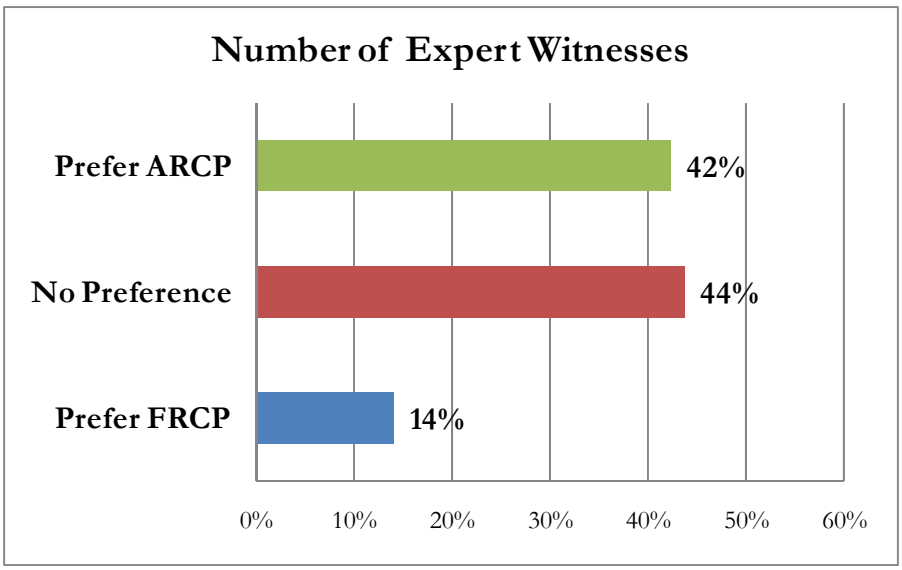

126-000789

Considering *only* those who expressed a preference between the state and federal rules, the ARCP standard on the number of experts received majority support from all respondent groups. Separated by party represented, over 60% of all groups prefer the ARCP. Separated by whether the respondent has pre-1992 experience or not, over 70% of each group prefers the ARCP.

One respondent commented: "The 'one expert rule' is generally a reasonable limitation, but there has to be some ability to define an 'issue' in a way that makes this more flexible in some types of complex litigation cases."

b. The Limits on the Extent of Deposition Discovery

Arizona practitioners strongly support the ARCP's limits on deposition discovery, including who may be deposed and the time limit for doing so.

i. *Deposing Only Certain Individuals*

Under ARCP 30(a), only parties, expert witnesses, and document custodians may be deposed automatically. The deposition of other individuals requires either a stipulation or a court order.

As demonstrated in Figure 24, over two-thirds of respondents would either maintain or lower the presumptive limit, while only one in five respondents would raise the limit to allow for more automatic depositions.

Figure 24 (Survey Question 24b)
n = 661

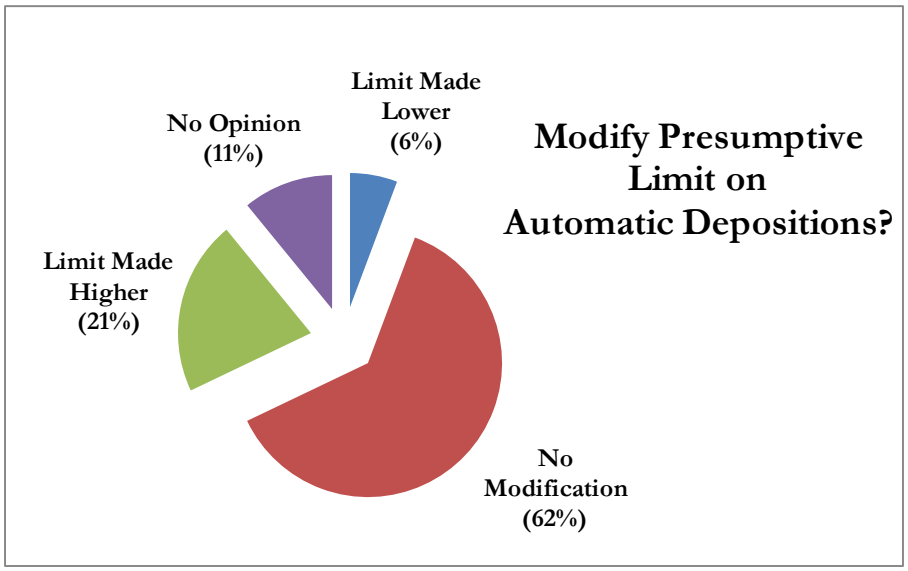

Considering *only* those who expressed an opinion on the issue, a majority of all respondent groups would like to see no modification to the presumptive limits on automatic depositions. Separated by party represented, over 60% of all groups believe the current limit should be maintained. Separated by whether the respondent has pre-1992 experience or not, over 65% of each group believes the current limit should be maintained.

126-000790

Considering *all* respondents who indicated a party most frequently represented, the extent of the desire to raise the limit does not correspond with the party represented, as seen in Figure 25.

Figure 25 (Survey Questions 5, 24b)
n = 155; 151; 155; 151; 140

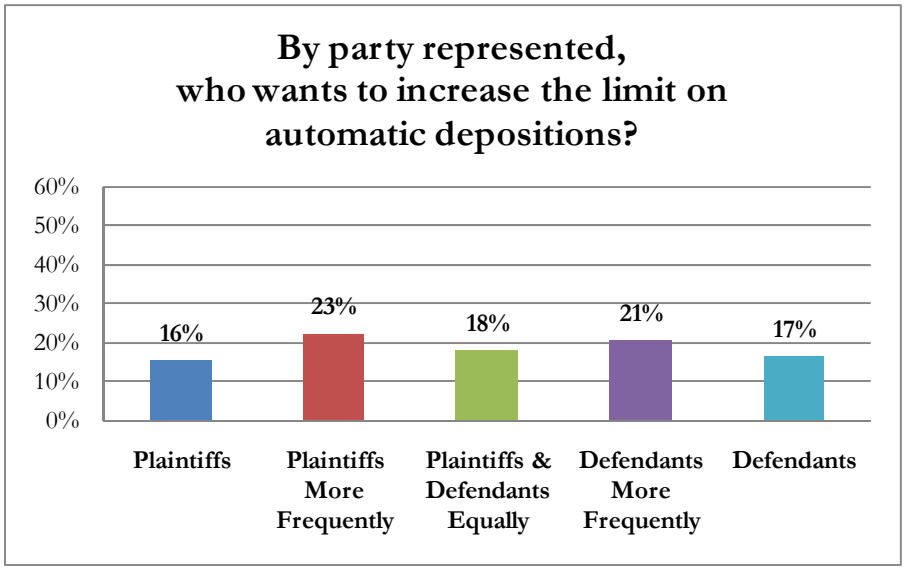

ii. *Deposition Time Limit*

Under ARCP 30(d), depositions must be reasonable in length and shall not exceed four hours. Longer depositions require either a stipulation or a court order.

As demonstrated in Figure 26, over three-quarters of respondents would either maintain or lower the presumptive time limit, while fewer than one in five respondents would raise the limit to allow for longer depositions.

Figure 26 (Survey Question 24c)
n = 662

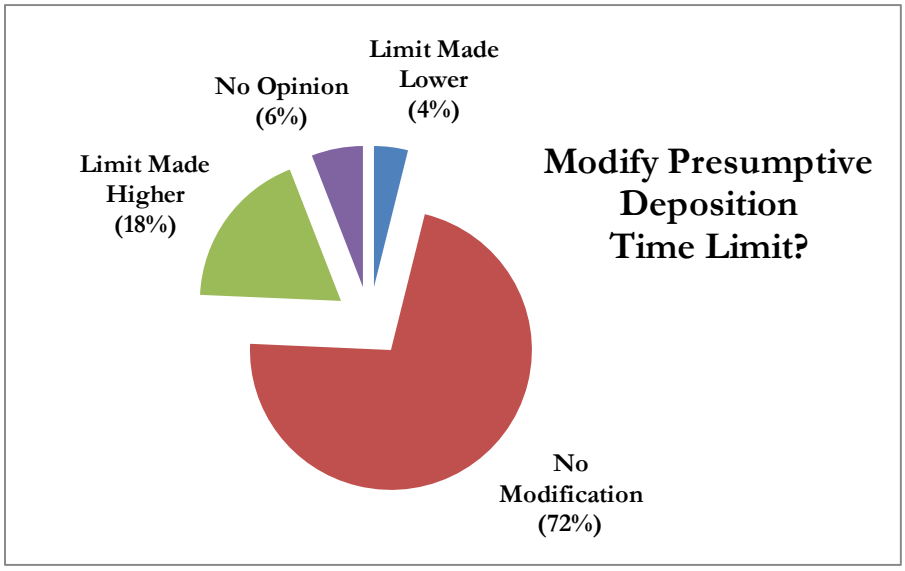

125-000791

Considering *only* those who expressed an opinion on the issue, a majority of all respondent groups would like to see no modification to the deposition time limit. Separated by party represented, over 60% of all groups believe the current limit should be maintained. Separated by whether the respondent has pre-1992 experience or not, at least 75% of each group believes the current limit should be maintained.

Considering *all* respondents who indicated a party most frequently represented, the desire to raise the limit does not necessarily differ across parties, as seen in Figure 27.

Figure 27 (Survey Questions 5, 24c)
n = 155; 151; 155; 140; 143

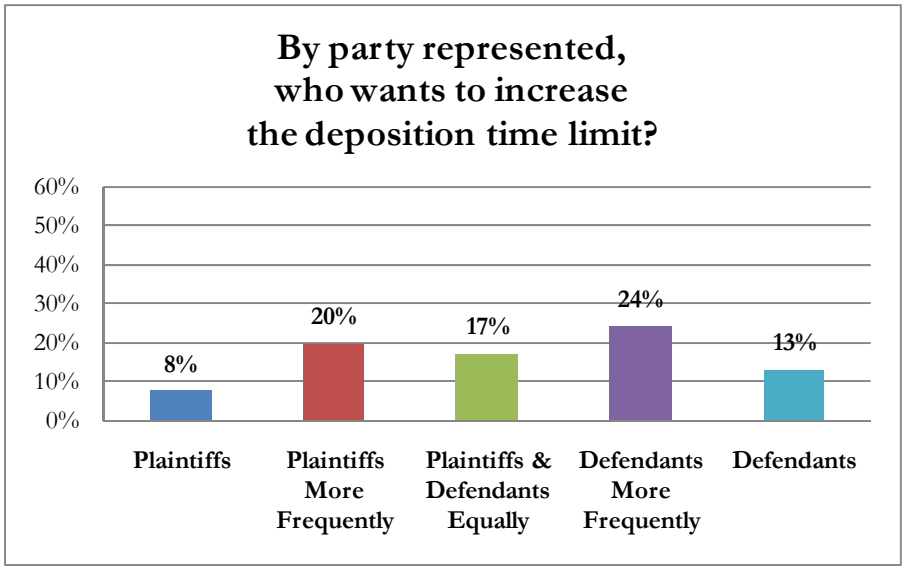

One respondent commented: "I believe that any deposition worth taking can be finished in four hours, and I am grateful for that rule because it has saved my clients considerable expense over the years since it was adopted."

125-000792

iii. *Deposition Discovery Generally*

By a two-to-one ratio, respondents with federal experience prefer the ARCP over the FRCP on the extent of deposition discovery. In fact, close to 80% either prefer the state rules or have no preference. See Figure 28.

Figure 28 (Survey Question 25d)
n = 492

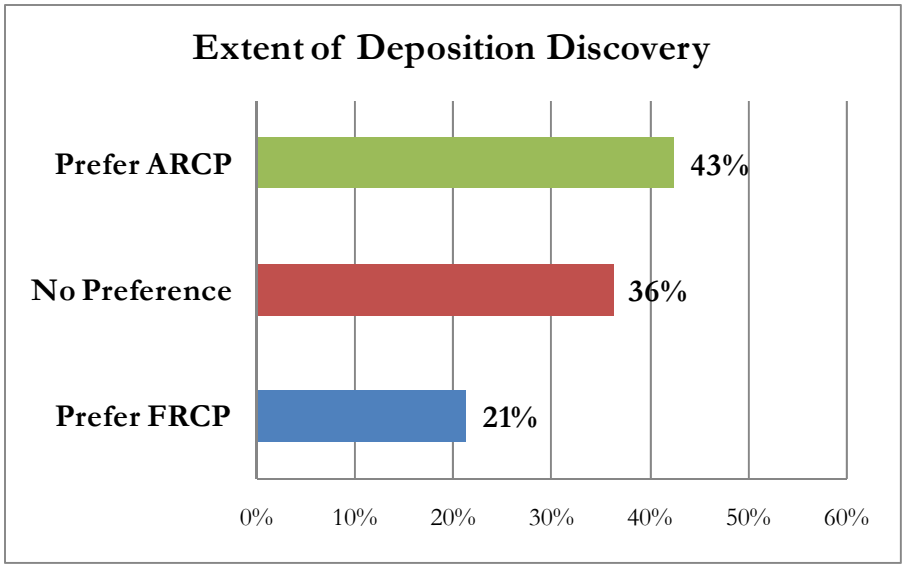

Considering *only* those who expressed a preference between the state and federal rules, the ARCP standards for deposition discovery received majority support from all respondent groups. Separated by party represented, over 55% of all groups prefer the ARCP. Separated by whether the respondent has pre-1992 experience or not, at least 60% of each group prefers the ARCP.

c. The Limit on Interrogatories

Under ARCP 33.1(a), a party shall not serve more than 40 interrogatories (uniform or non-uniform) upon any other party. Additional interrogatories require either a stipulation or a court order.

As demonstrated in Figure 29, 70% of respondents would either maintain or lower the presumptive limit, while fewer than one in four respondents would raise the limit to allow for more interrogatories.

126-000793

Figure 29 (Survey Question 24d)
n = 661

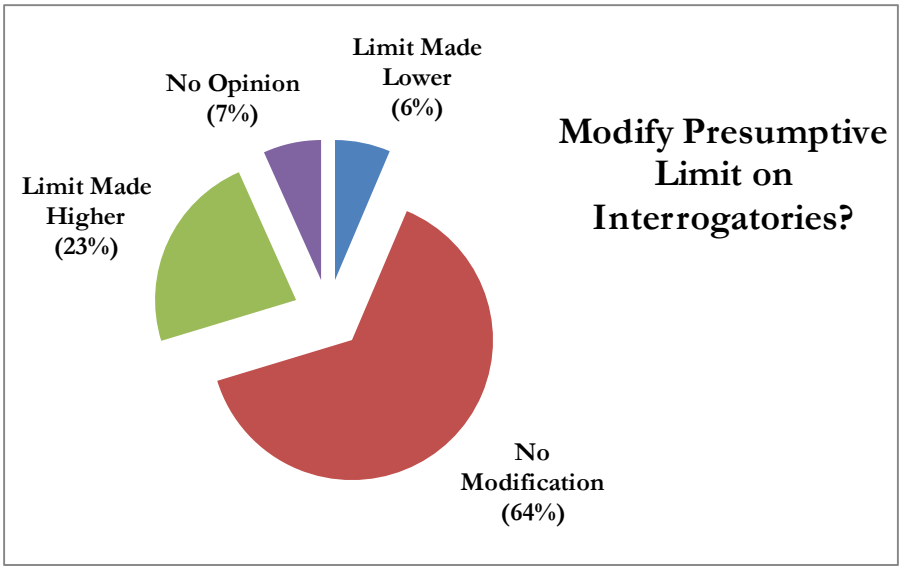

Considering *only* those who expressed an opinion on the issue, a majority of all respondent groups would like to see no modification of the interrogatory limit. Whether divided by party represented or by experience, over 65% of all groups believe the current limit should be maintained.

Considering *all* respondents who indicated a party most frequently represented, the desire to raise the limit tends to be slightly higher for those who primarily represent plaintiffs, as seen in Figure 30.

Figure 30 (Survey Questions 5, 24d)
n = 155; 151; 155; 140; 143

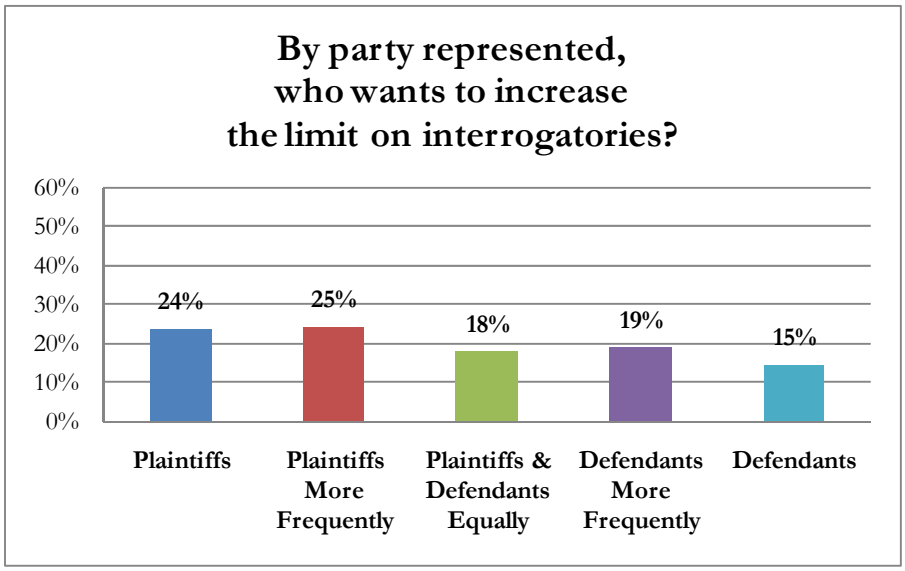

One respondent suggested that answers to all uniform interrogatories (as well as initial disclosures) be produced simultaneously with the pleadings.

126-000794

d. The Limit on Requests for Production

ARCP 34 limits requests for production to 10 distinct items or categories of items. Items include "documents, electronically stored information, and things and entry upon land for inspection and other purposes." Additional requests require a stipulation or a court order.

As demonstrated in Figure 31, a narrow plurality (47%) of respondents would either maintain or lower the presumptive limit. However, nearly that number (46%) would raise the limit to allow for more requests for production.

Figure 31 (Survey Question 24e)
n = 665

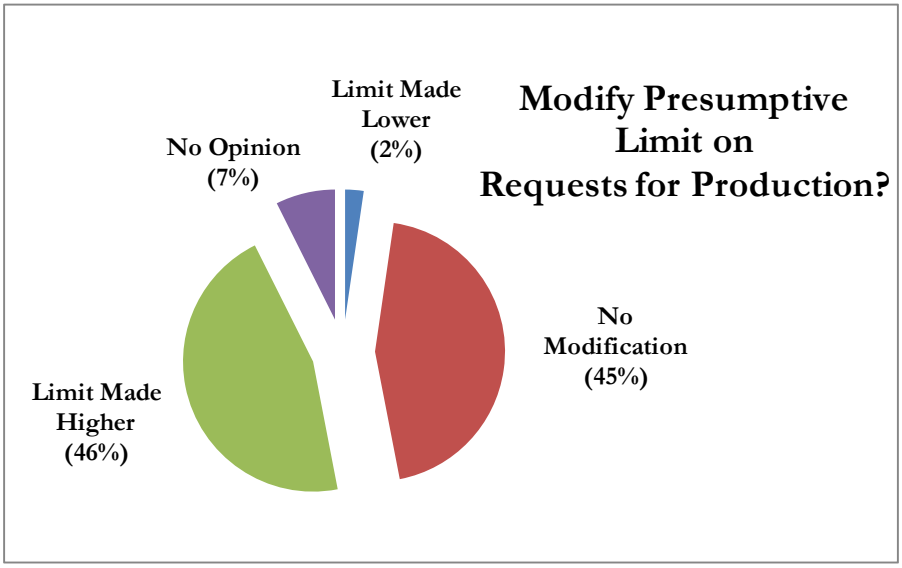

Considering *only* those who expressed an opinion on the issue, all respondent groups were split. Separated by party represented, all groups had a slightly higher percentage of respondents who believe that the limit should be raised, with the exception of those who represent defendants in all or nearly all cases. Separated by experience, those with pre-1992 experience were more likely to believe the current limit should be maintained (53% for no modification; 45% for raising the limit), while those without pre-1992 experience were more likely to believe that the limit should be raised (43% for no modification; 54% for raising the limit).

125-000795

Considering *all* respondents who indicated a party most frequently represented, the desire to raise the limit does not necessarily differ across parties, as seen in Figure 32.

Figure 32 (Survey Questions 5, 24e)
n = 155; 151; 155; 140; 143

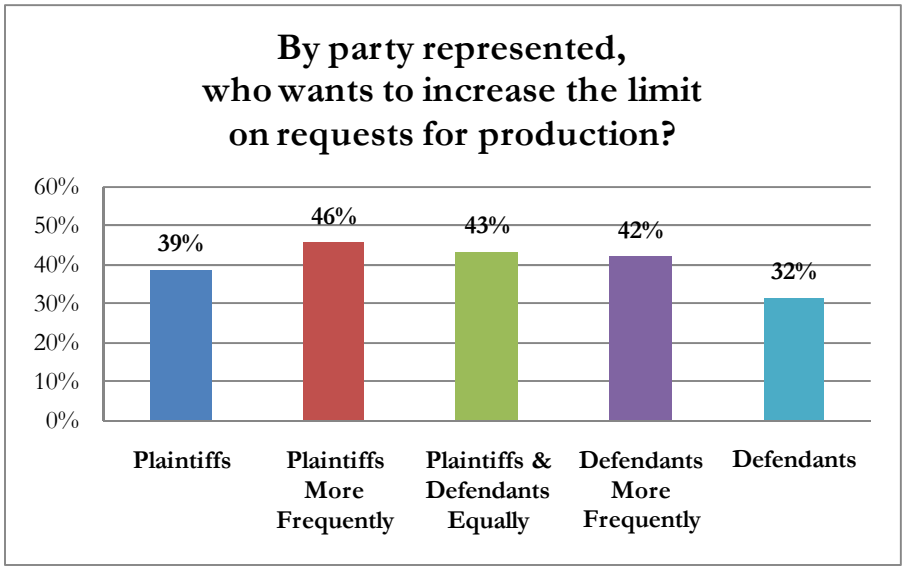

e. The Limit on Requests for Admission

Under ARCP 36(b), each party can issue up to 25 requests for admission per case. Additional requests require a stipulation or a court order.

As demonstrated in Figure 33, nearly 70% of respondents would either maintain or lower the presumptive limit, while fewer than one in four respondents would raise the limit to allow for more requests for admission.

Figure 33 (Survey Question 24f)
n = 661

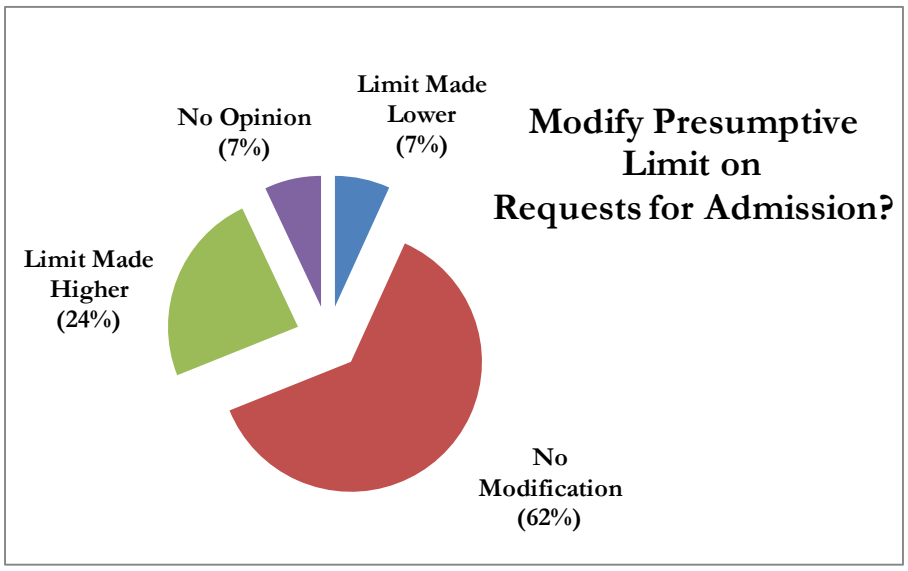

125-000796

Considering *only* those who expressed an opinion on the issue, a majority of all respondent groups would like to see no modification of the limit on requests for admission. Whether divided by party represented or by experience, over 60% of each group believes the current limit should be maintained.

Considering *all* respondents who indicated a party most frequently represented, the desire to raise the limit is lower for those who represent defendants in all or nearly all cases, but otherwise does not differ much across parties, as seen in Figure 34.

Figure 34 (Survey Questions 5, 24f)
n = 155; 151; 155; 140; 143

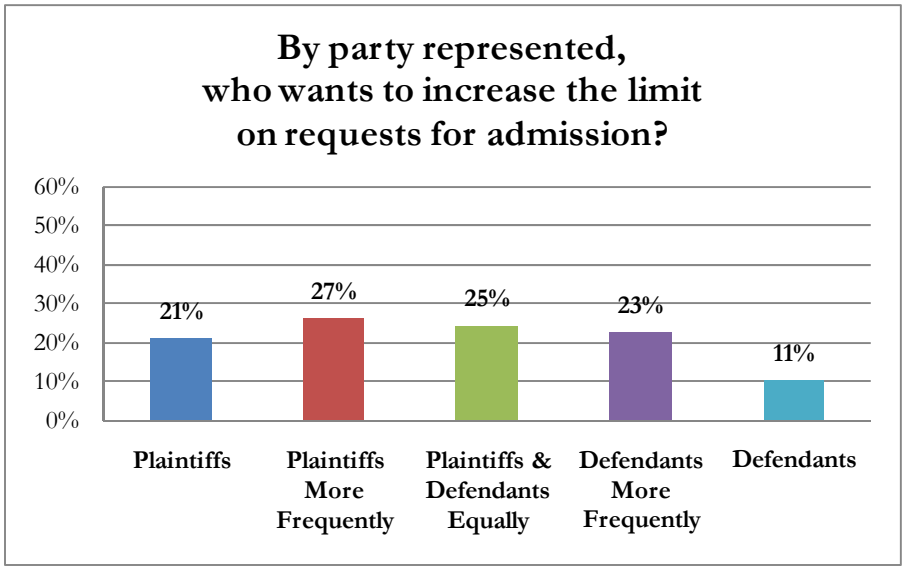

However, in the written comments, two respondents pointed out that requests for admission are designed to focus the issues and streamline the litigation process, so there is no "legitimate" need to limit them.

f. The Presumptive Discovery Limits as a Whole

Figure 35 shows what Arizona practitioners perceive to be the effects of the presumptive discovery limits, collectively, on litigation. There is a consensus that the limits require parties to "focus their discovery efforts to the disputed issues" (64% agreed; 28% disagreed) and reduce the total volume of discovery (58% agreed; 35% disagreed). In addition, a plurality of the Bar believes that the limits reduce the total cost of litigation (47% agreed; 44% disagreed). Overall, however, the Bar indicated that the presumptive limits do not reduce the total time required for litigation (39% agreed; 53% disagreed), do not make litigation costs "more predicable" (34% agreed; 55% disagreed), and do not "reduce the use of discovery as a tool to force settlement" (33% agreed; 55% disagreed).

125-000797

Figure 35 (Survey Questions 22a-22f)
n = 665; 665; 665; 665; 664; 661

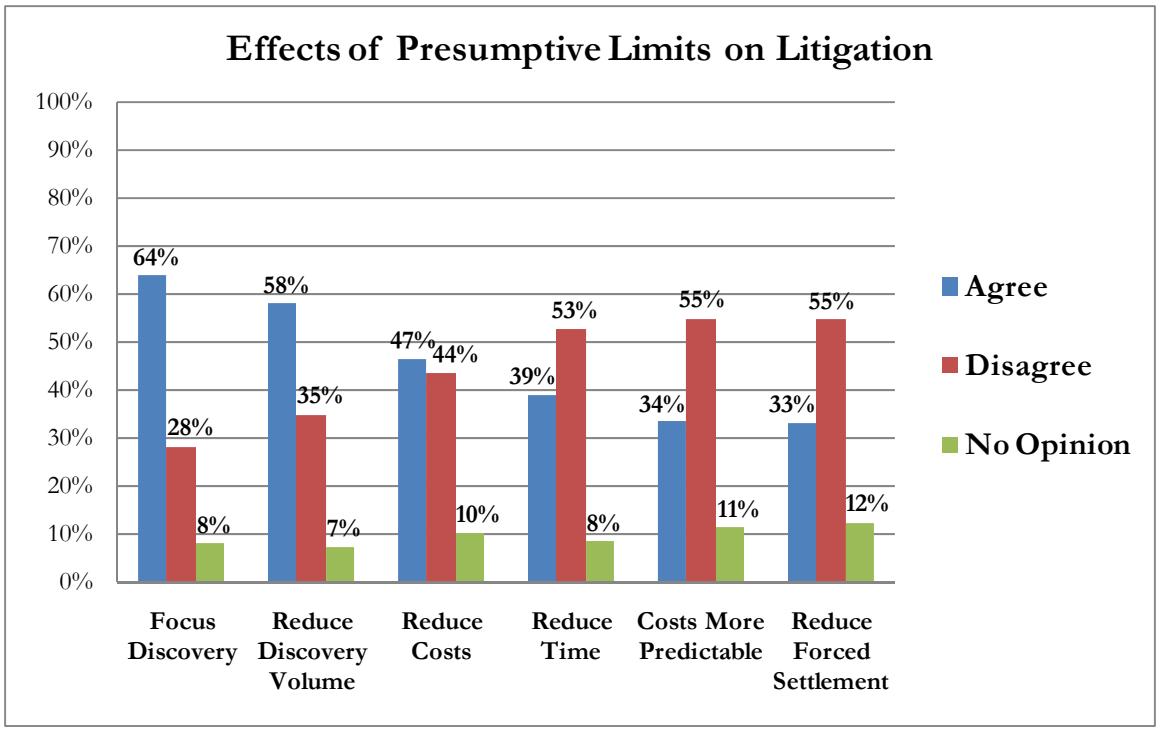

Considering *only* those who expressed an opinion on the effects of the presumptive limits, all respondent groups tended to answer in the same way, regardless of party represented. The majority of all groups expressed agreement that the limits focus discovery and reduce the volume of discovery. Every group was split on the issue of whether the limits reduce litigation costs, but a notable majority of those who primarily represent plaintiffs agreed that the limits reduce costs. Between 55% and 60% of every group disagreed that the limits reduce litigation time, while between 40% and 45% of every group agreed. A majority of all groups also disagreed that the limits increase the predictability of costs, with approximately one in ten in each group expressing strong disagreement. On whether the limits reduce the use of discovery to force settlement, the most common choice of all respondent groups was "disagree," the second most common choice was "agree," and the third most common choice was "strongly disagree."

When faced with the statement that "presumptive limits favor defendants over plaintiffs," a majority (56%) of those who provided a response disagreed or strongly disagreed with the statement. See Figure 36.

Figure 36 (Survey Question 22g)
n = 657

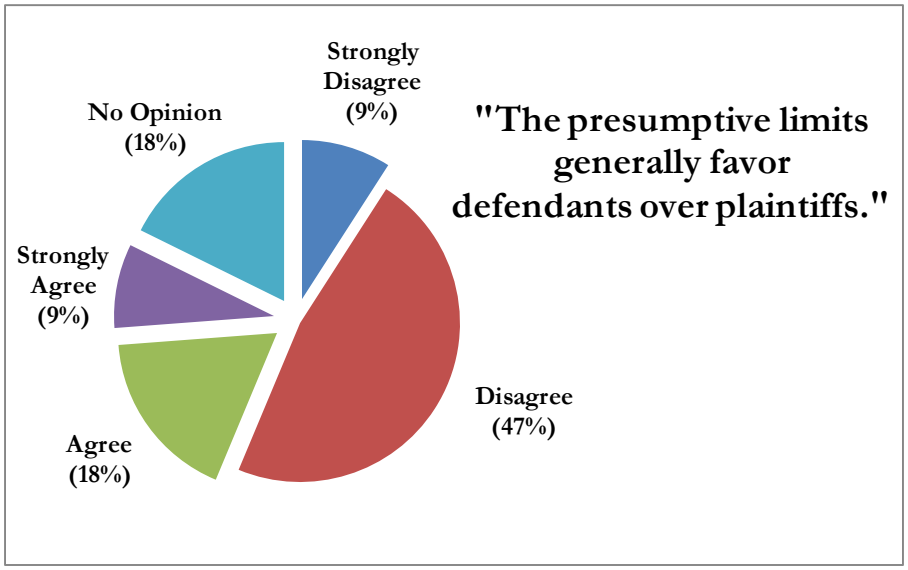

Considering *all* respondents who indicated a party most frequently represented, Figure 37 shows the differences across parties. Although those who primarily represent plaintiffs were more likely to agree that the presumptive limits favor defendants, a majority of all groups disagreed or were neutral on the issue.[26]

Figure 37 (Survey Questions 5, 22g)
n = 155; 151; 155; 140; 143

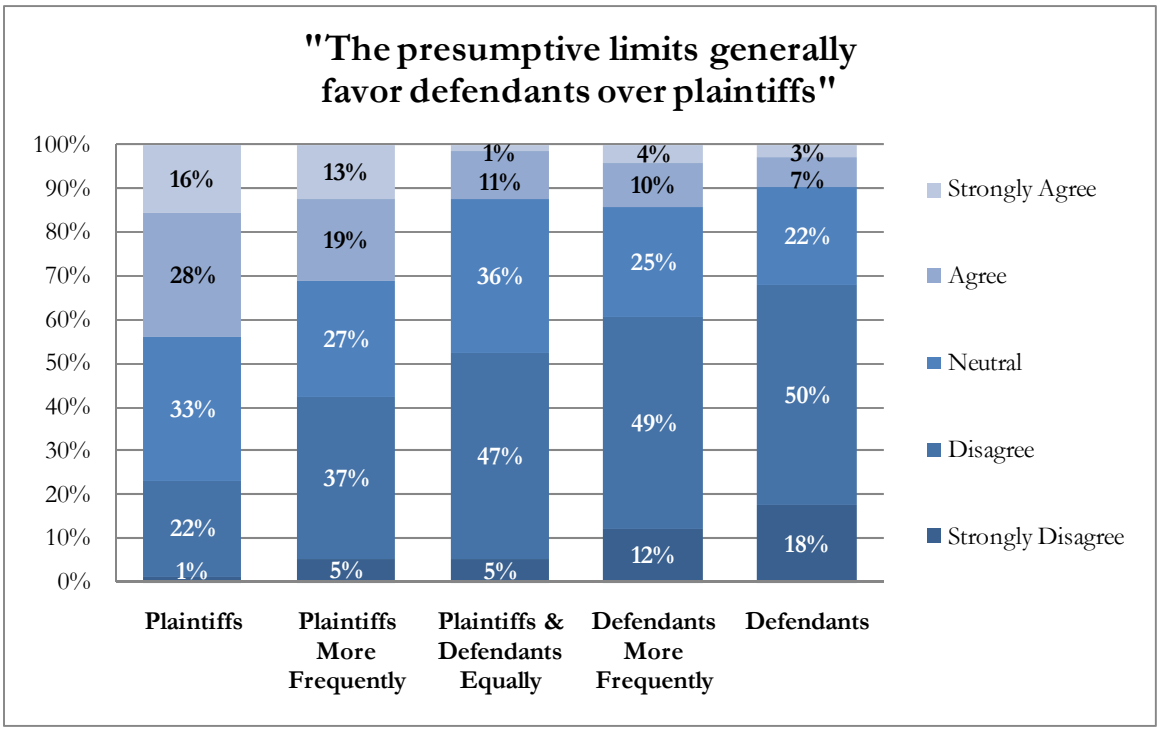

[26] In Figure 37, the "neutral" category includes both those who selected "no opinion" and those who declined to answer the question.

When faced with the statement that "presumptive limits force parties to go to trial with insufficient information," more than three out of four respondents (78%) expressed some level of disagreement with the statement. See Figure 38 for the distribution of answers.

Figure 38 (Survey Question 22h)
n = 665

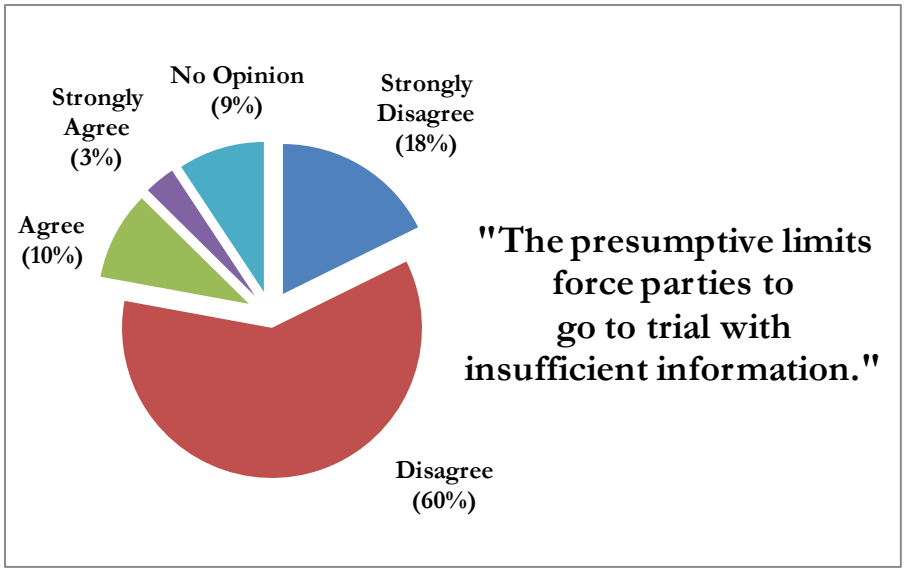

Moreover, a majority of all respondent groups do not find that the presumptive limits result in insufficient information at trial. Whether divided by party represented or by experience, about 60% or more of all groups disagree that the presumptive limits result in insufficient information at trial.

g. Adherence to the Presumptive Limits

The survey asked the extent to which litigants actually adhere to the ARCP's presumptive limits on the amount of and time for discovery, in the experience of respondents. Whether divided by party represented or by experience, all respondent groups were quite consistent.

Figure 39 shows the frequency of adherence to the presumptive limits on the amount of discovery conducted. Litigants are most likely to follow the four-hour deposition rule, and least likely to follow the rule on the types of individuals that may be deposed. Approximately 70% of respondents reported frequent adherence to the deposition time limit, the limit on requests for admission, and the limit on interrogatories. In addition, nearly 65% of respondents reported frequent adherence to the number of expert witnesses. Given that respondents are split on whether to increase the limit on requests for production, it is not surprising that there is less frequent adherence to that rule. However, the level of divergence from the rule on which individuals may be automatically deposed is surprising, given that a strong majority believes the current rule is appropriate.

Figure 39 (Survey Questions 18c-18e, 18g, 18i, 18k)
n = 708; 701; 706; 705; 703; 708

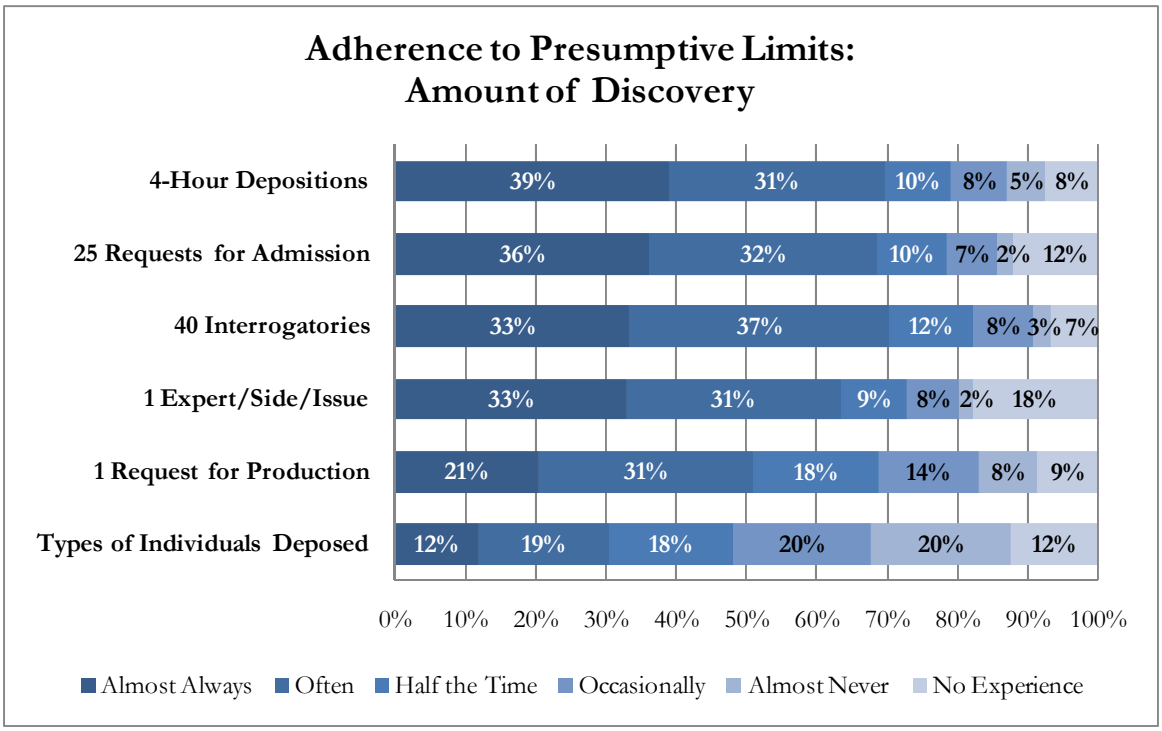

Figure 40 shows the frequency of adherence to the presumptive 40- and 60-day time limits for completing certain discovery. Litigants are most likely to follow the time for answering requests for admission under ARCP 36(a), as about 70% of respondents indicated that this occurs "almost always" or "often." Litigants are equally likely to follow the time for answering interrogatories and fulfilling requests for admission, as about 50% of respondents selected "almost always" or "often."

125-000801

Figure 40 (Survey Questions 18f, 18h, 18j)
n = 703; 703; 705

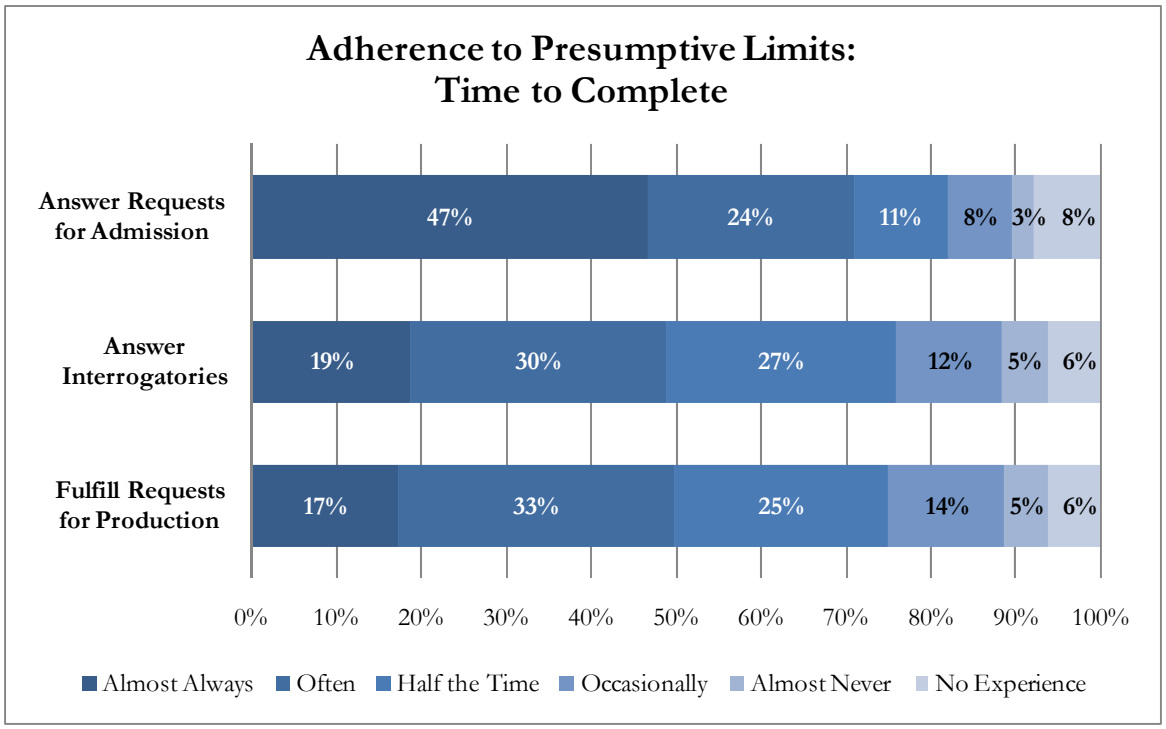

Only one-third of respondents reported that the court enforces presumptive discovery limits half the time or more, while nearly half of respondents reported infrequent enforcement of the limits. Notably, approximately 18% selected "no experience." See Figure 41.

Figure 41 (Survey Question 23a):
n = 662

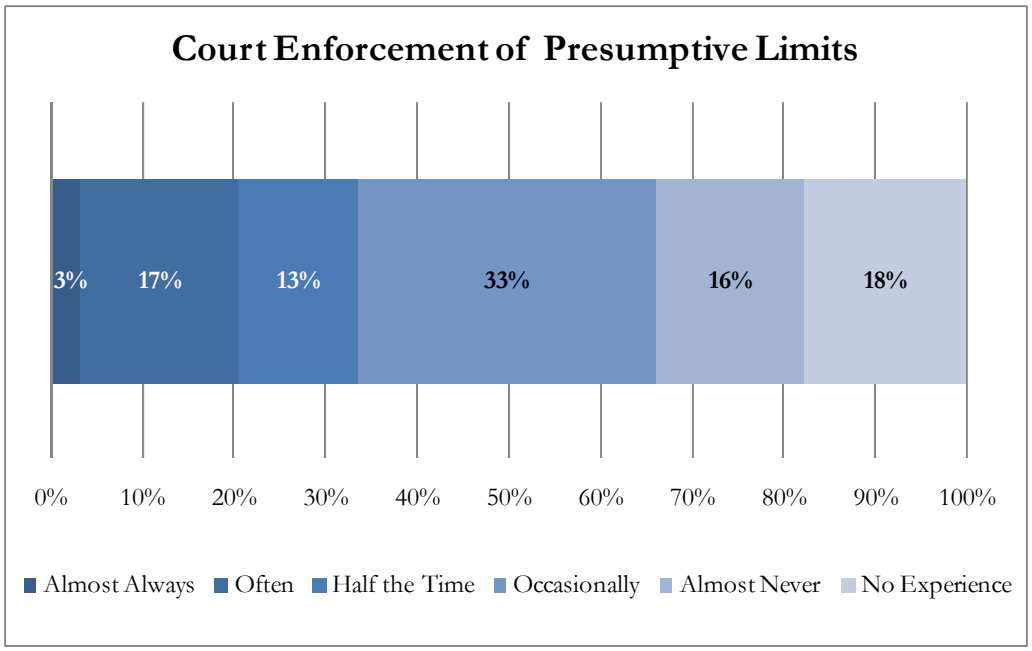

126-000802

Arizona practitioners are evenly split on the issue of whether the courts should have more control over the discovery process. About the same portion of respondents were in favor of more court control (44.3%) as against it (44.6%). Further, separated by party represented, none of the respondent groups expressed strong sentiment either way.

The presumptive limits do not appear to increase satellite litigation, as about 30% of respondents indicated that parties "almost never" litigate whether to depart from the limits and over 40% indicated that parties do so only "occasionally." An additional 17% indicated "no experience" with the issue.

C. THE ROLE OF SANCTIONS

ARCP 16(f) gives judges the power to sanction parties for non-compliance with Rule 16, including ordering the payment of "reasonable expenses incurred."[27] Non-compliance encompasses failure to prepare for or participate in the pretrial conference, as well as failure to obey a scheduling or pretrial order.

As shown in Figure 42, in the experience of a significant majority of respondents, sanctions for non-compliance with the letter and spirit of Rule 16(b) are only rarely requested or imposed. In fact, a majority indicated that they are "almost never" requested or imposed. Notably, between 19% and 28% of respondents have "no experience" with a failure to comply with Rule 16(b).

Figure 42 (Survey Questions 16b-16d)
n = 731; 730; 730

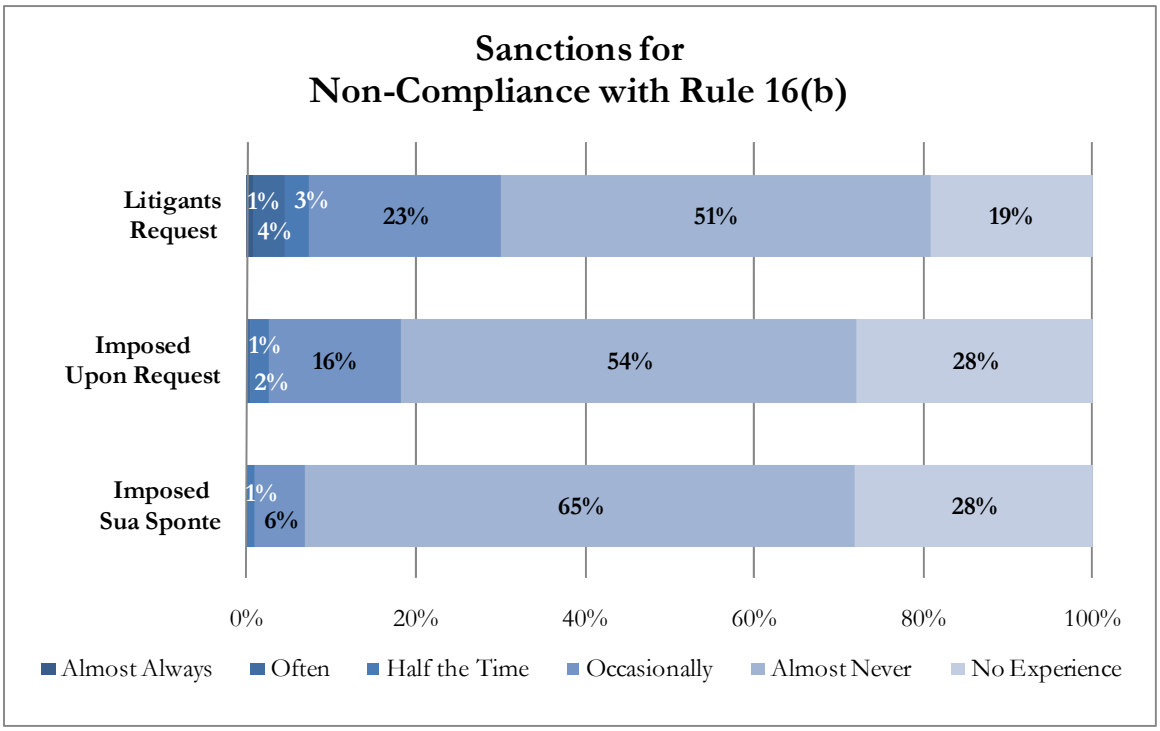

ARCP 37 specifically provides for sanctions for misconduct related to disclosure and discovery. As shown in Figure 43, sanctions are more often imposed for discovery misconduct than

[27] Such expenses include attorneys' fees and/or an assessment by the court clerk.

for pretrial conference misconduct, although it is still quite rare for the majority of respondents. In fact, at least 70% of respondents indicated that sanctions are "almost never" or only "occasionally" requested or imposed. One respondent commented: "[A]lmost never will a judge impose sanctions against a party for failing to comply with discovery rules and enforce the payment when the violation occurs." Notably, only between 6% and 13% of respondents have "no experience" with discovery misconduct.

Figure 43 (Survey Questions 19a-19c)
n = 696; 698; 696

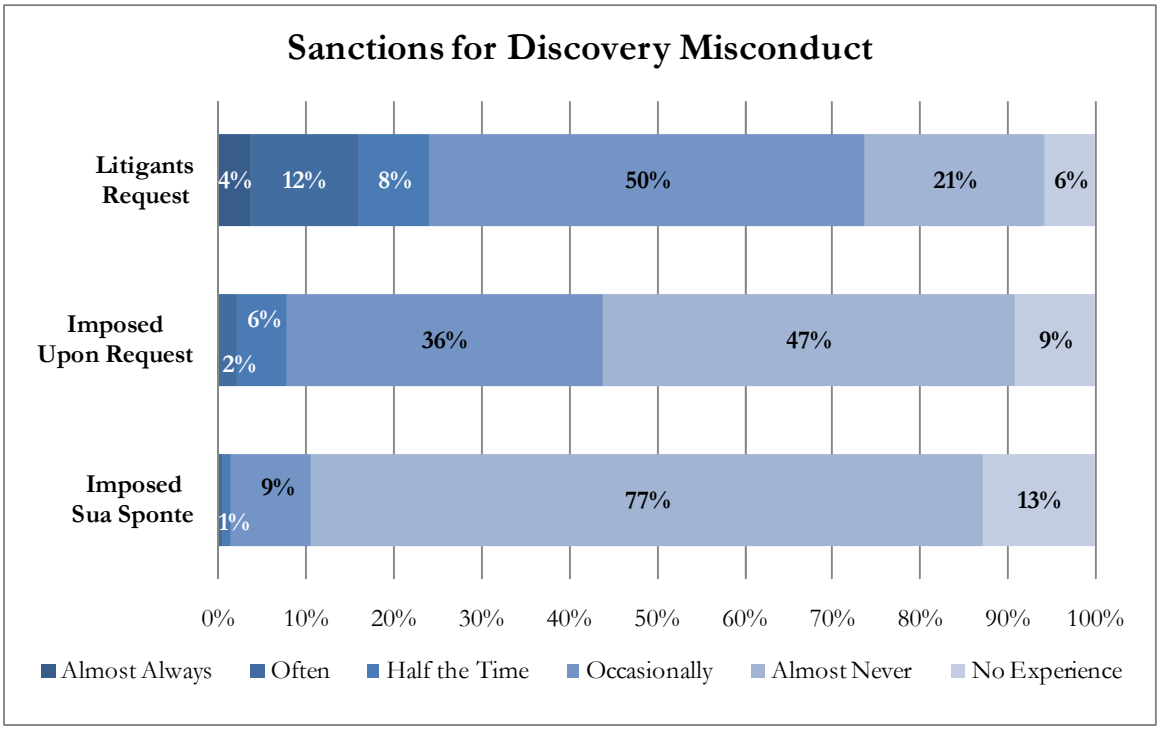

According to over 60% of respondents, the sanctions rules "almost never" (30%) or only "occasionally" (31%) deter discovery misconduct. Only about 20% of respondents reported that the rules consistently deter misconduct.

Many respondents expressed a desire for the imposition of sanctions with greater consistency and frequency. For example:

- "Make sanctions for non-compliance tougher and apply them more often."
- "Why have sanctions when judges never enforce them?"
- "Courts are too reluctant to sanction, in a meaningful way, the nonsense that sometimes occurs when people violate the rules for no good reason or unduly complicate the case and play lawyer games."
- "[O]bstructionist attorneys and judges' unwillingness to impose meaningful sanctions on them for discovery, particularly deposition, abuses were the most frustrating part of litigation."

D. Sources and Causes of Discontent With the System

The survey asked the extent to which "common complaints" about the American civil justice system apply to litigation in Superior Court.

A majority (55%) of respondents disagreed that the Superior Court civil justice system is "too complex," though a significant portion (42%) agreed with the statement. Moreover, a strong majority (70%) agreed that the system takes "too long," with over one-quarter (28%) expressing strong agreement. In addition, Arizona practitioners overwhelmingly (84%) responded that the Superior Court system is "too expensive," with a plurality (44%) expressing strong agreement. Figure 44 shows the distribution of Arizona responses for these three issues.

Figure 44 (Survey Questions 9a-9c)
n = 756; 755; 756

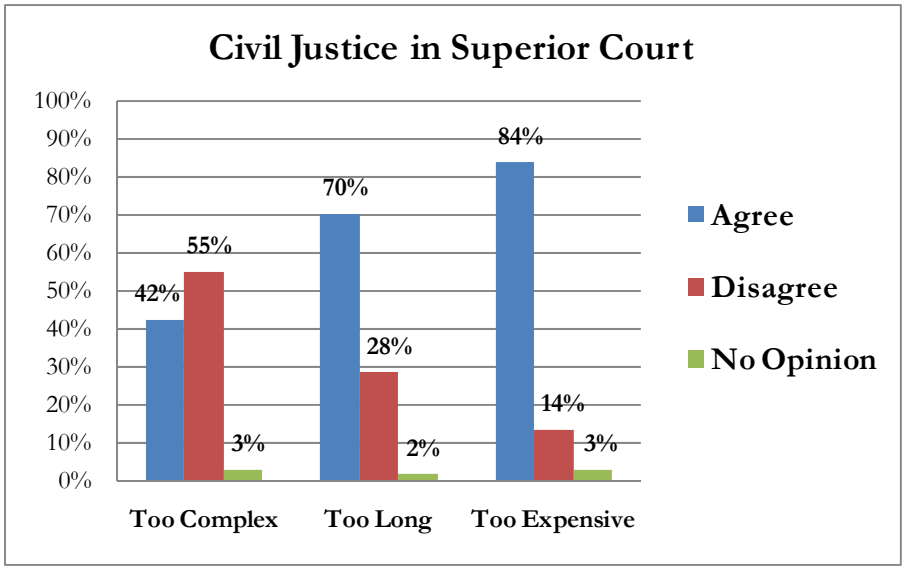

On the extent to which the attorney culture contributes to problems, Arizona practitioners do not generally find lack of cooperation by opposing counsel to be an issue. Almost two-thirds of respondents disagreed that "opposing counsel are generally uncooperative." However, the practice of hourly billing was identified as a problem. A majority of respondents agreed that "the system of hourly billing for attorneys contributes disproportionately to litigation costs," with nearly one-quarter (24%) expressing strong agreement. Figure 45 shows the distribution of Arizona responses.

Figure 45 (Survey Questions 9d, 9f)
n = 755; 754

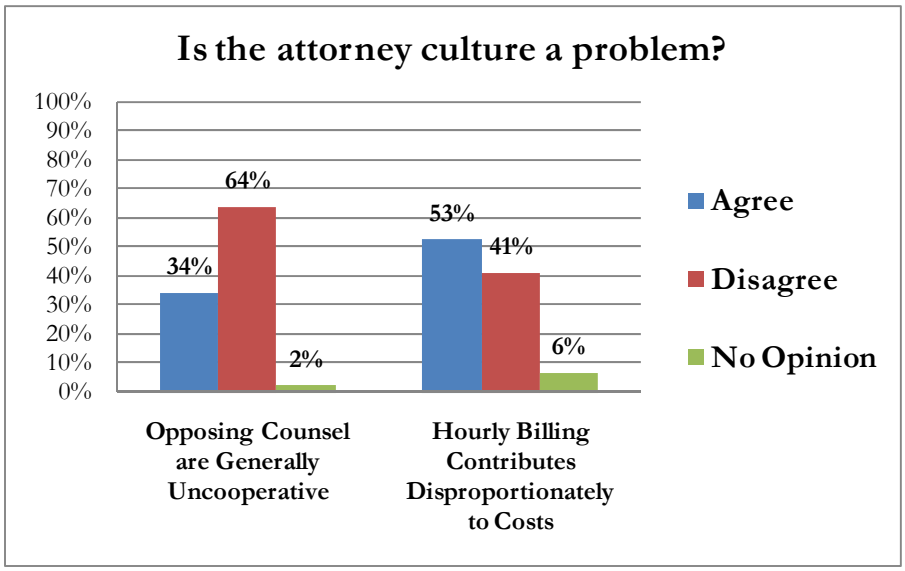

The written comments reflect significant concerns about the legal culture and contain a call for increased civility and reduced gamesmanship. There was a sentiment expressed by those who commented that attorneys "know they can get away with practically anything, and some do." One respondent stated: "Litigation is difficult enough and I would appreciate dealing with more professional attorneys."

With respect to access, a slim majority (52%) of Arizona attorneys in private practice reported belonging to a firm that will not refuse a case based on the amount in controversy. However, one-third (33%) stated that, as a general matter, their firm will not file or defend a case unless the amount in controversy exceeds a certain dollar amount. The dollar limits ranged from $250 to $20 million, with a median of $25,000 and a mean of $296,640.

While most do not view notice pleading as preventing the early identification of issues, nearly one-third agreed that "notice pleading prevents disputed issues from being identified early enough" (30% agreed; 66% disagreed). Considering *all* respondents who indicated a party most frequently represented, Figure 46 shows the differences across parties. "Disagree" was the most common answer, regardless of the party represented. However, those who represent plaintiffs in almost all cases were more likely to "strongly disagree."[28]

[28] In Figure 46, the "neutral" category includes both those who selected "no opinion" and those who declined to answer the question.

Figure 46 (Survey Question 9e)
n = 155; 151; 155; 140; 143

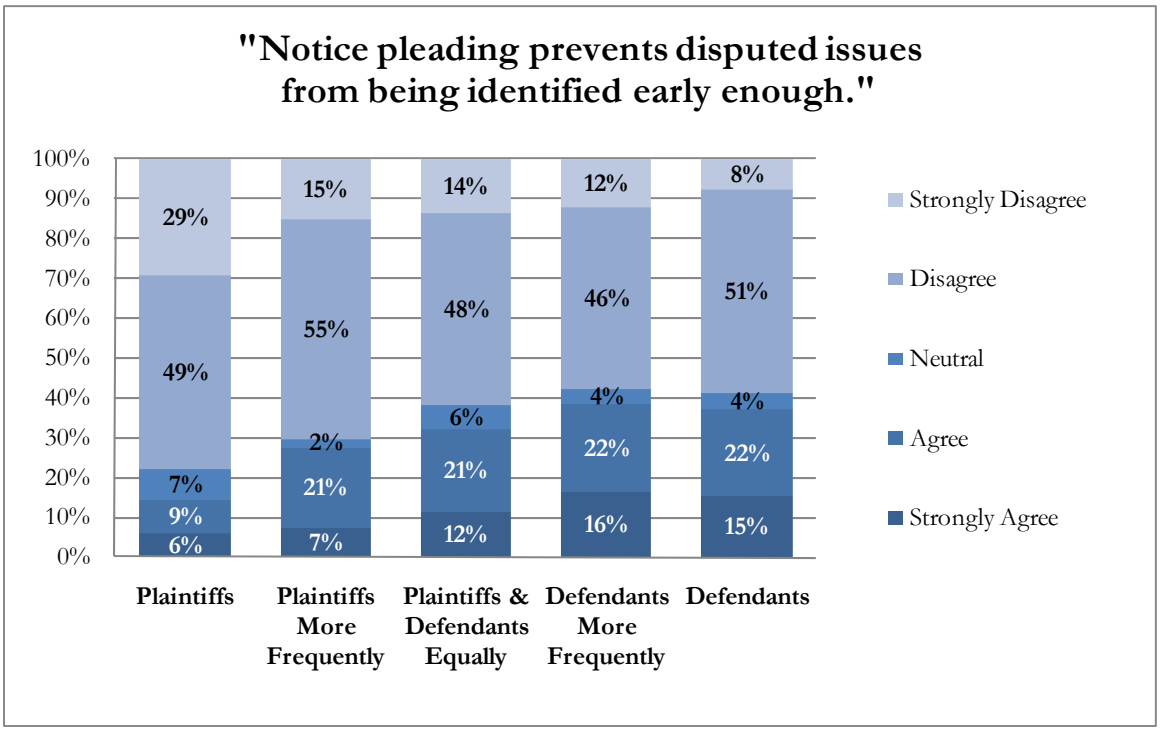

In the written comments, two respondents expressed support for notice pleading, while two respondents called for pleading the specific factual and legal basis of claims and damages calculations. There were also comments on the relationship between the pleading standard and disclosures, as related to the need to narrow the issues. One respondent suggested that the system of notice pleading followed by disclosures is not effective because disclosures are required to occur "too early to assess legal theories and factual claims, and it becomes a cat and mouse game." Another respondent suggested: "If you continue notice pleadings, consider making Plaintiff's first Rule 26.1 disclosure due *prior* to the Answer…it will force some focus and allow an answer to be meaningful rather than a form denial or vague allegations."

E. THE ROLE OF COMPULSORY ARBITRATION: MOVING CASES OUT OF LITIGATION

Under ARCP 72-77 and A.R.S. § 12-133, Superior Court claims involving only requests for monetary relief that do not exceed a certain jurisdictional limit qualify for compulsory arbitration. The jurisdictional amount for arbitration varies by county. The arbitrator's decision may be appealed to the Superior Court, which then holds a trial *de novo*.

1. CASES QUALIFYING FOR COMPULSORY ARBITRATION

Considering *all* respondents to the survey, almost 65% indicated that they have had a Superior Court case qualify for compulsory arbitration. Considering *only* those respondents who provided an answer to the question on whether they have had a qualifying case, nearly 75% answered in the affirmative.

Figure 47 depicts the frequency with which parties opt out of the compulsory arbitration process in qualifying cases. The vast majority of respondents indicated that opt-out occurs only "occasionally" or "almost never." However, it appears that parties opt out for another alternative dispute resolution process more frequently than by showing "other good cause" for avoiding compulsory arbitration.

Figure 47 (Survey Questions 27a, 27b)
n = 482; 480

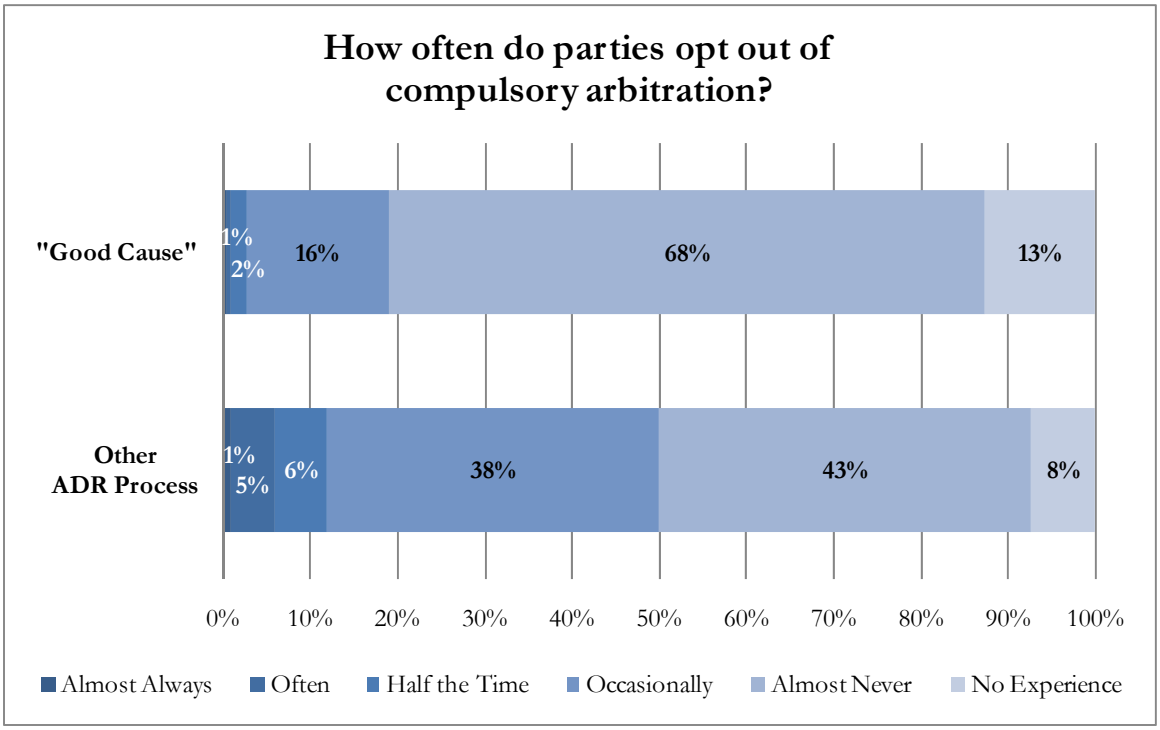

In Arizona, most people reside in counties with a $50,000 jurisdictional limit for compulsory arbitration (including Maricopa, Pima, Yuma, and Cochise Counties).[29] The survey asked what the limit should be, in the best interest of litigants. Approximately one-third of respondents in all counties felt that $50,000 was the right limit. Approximately one-third felt that the limit should be at a higher level, which would increase the number of qualifying cases. Approximately one-third felt that the limit should be lower or the program should not exist, which would decrease or eliminate qualifying cases. Significantly, almost 20% indicated that "[t]here should not be a compulsory arbitration program in Superior Court." See Figure 48.

[29] U.S. Census Bureau, *State and County QuickFacts, Arizona*, http://quickfacts.census.gov/qfd/states/04000.html (2008 estimate; each county must be selected separately in the drop-down menu).

Figure 48 (Survey Question 29)
n = 482

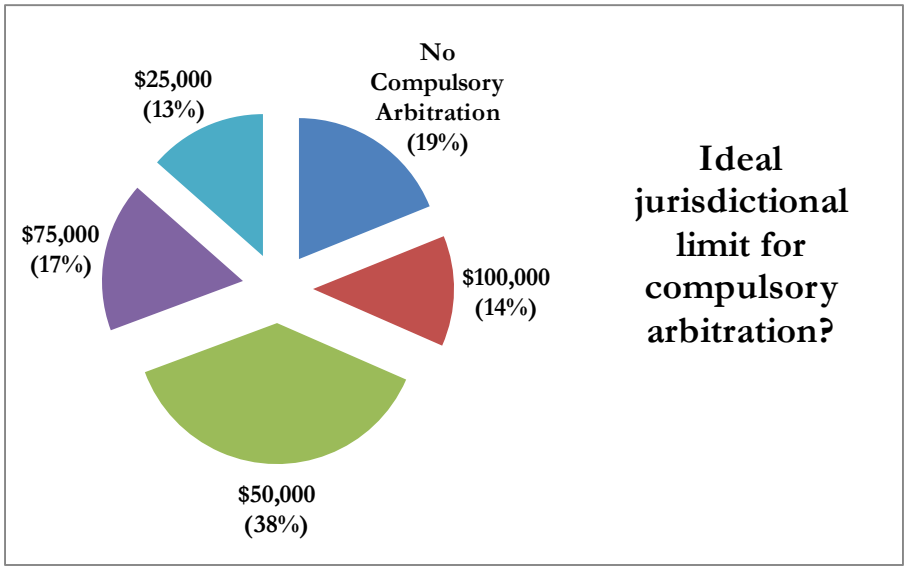

For the ideal limit for compulsory arbitration, Figure 49 shows the distribution of responses by party (for those who have had a qualifying case and indicated a party most frequently represented). The responses do not vary widely by group.

Figure 49 (Questions 5, 29)
n = 78; 118; 110; 83; 82

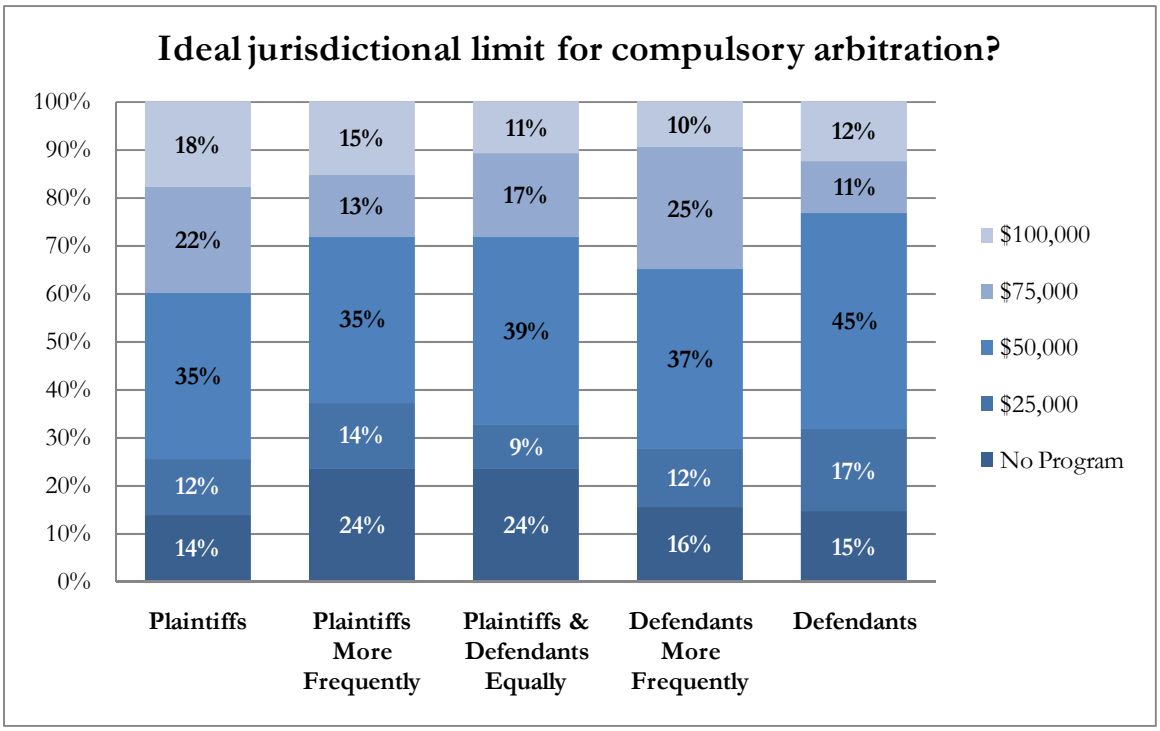

126-000809

Three-quarters of respondents (76%) have had the most cases qualify for arbitration in Maricopa County, which has a $50,000 jurisdictional limit. Using respondents' ideal jurisdictional limit as an indication of whether the number of cases that proceed through compulsory arbitration should remain the same, be reduced, or be expanded, it is clear that there is not a consensus in that County.[30] See Figure 50.

Figure 50 (Questions 28, 29)
n = 362

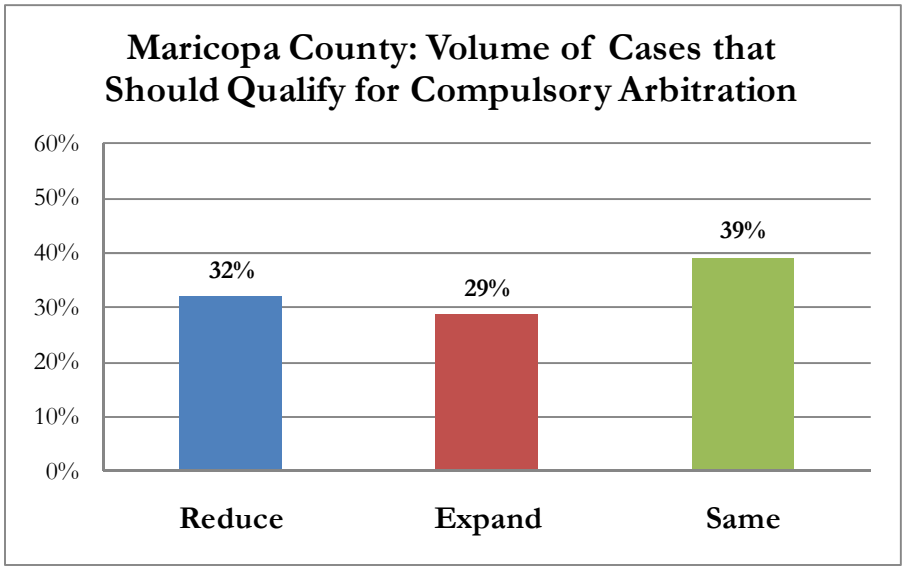

2. CASES PROCEEDING THROUGH COMPULSORY ARBITRATION

Almost 90% of respondents who had a case qualify for arbitration have also had a case proceed through the arbitration process (56% of total respondents).

As shown in Figure 51, according to Arizona practitioners, compulsory arbitration has a faster time to disposition[31] and a lower cost than litigation. However, it does not compare favorably to litigation on the issue of procedural fairness.

[30] The "reduce" category includes those who wish to eliminate compulsory arbitration completely.

[31] According to court data collected in a 2004-2005 study, cases in Maricopa and Pima Counties that were *subject to* compulsory arbitration were resolved more quickly than cases not subject to arbitration (by three to five months, on average). However, "the faster resolution can not necessarily be attributed to the arbitration process," due to differences in the amount in controversy and associated differences in complexity and the amount of discovery. Moreover, tort and contract cases subject to arbitration still did not meet the Arizona Supreme Court's time processing standards (90% resolved within 9 months). Finally, the time to disposition was longer for the subset of cases actually *assigned to* arbitration. In Maricopa and Pima Counties, only 50% of cases assigned to arbitration concluded within 10-14 months of the complaint. Roselle L. Wissler & Bob Dauber, *A Study of Court-Connected Arbitration in the Superior Courts of Arizona*, SUBMITTED TO THE SUP. CT. OF ARIZ. ADMIN. OFFICE OF THE CTS., http://www.law.asu.edu/?id=607, Executive Summary, vi (July 13, 2005).

Figure 51 (Survey Questions 31a-31c)
n = 422; 421; 422

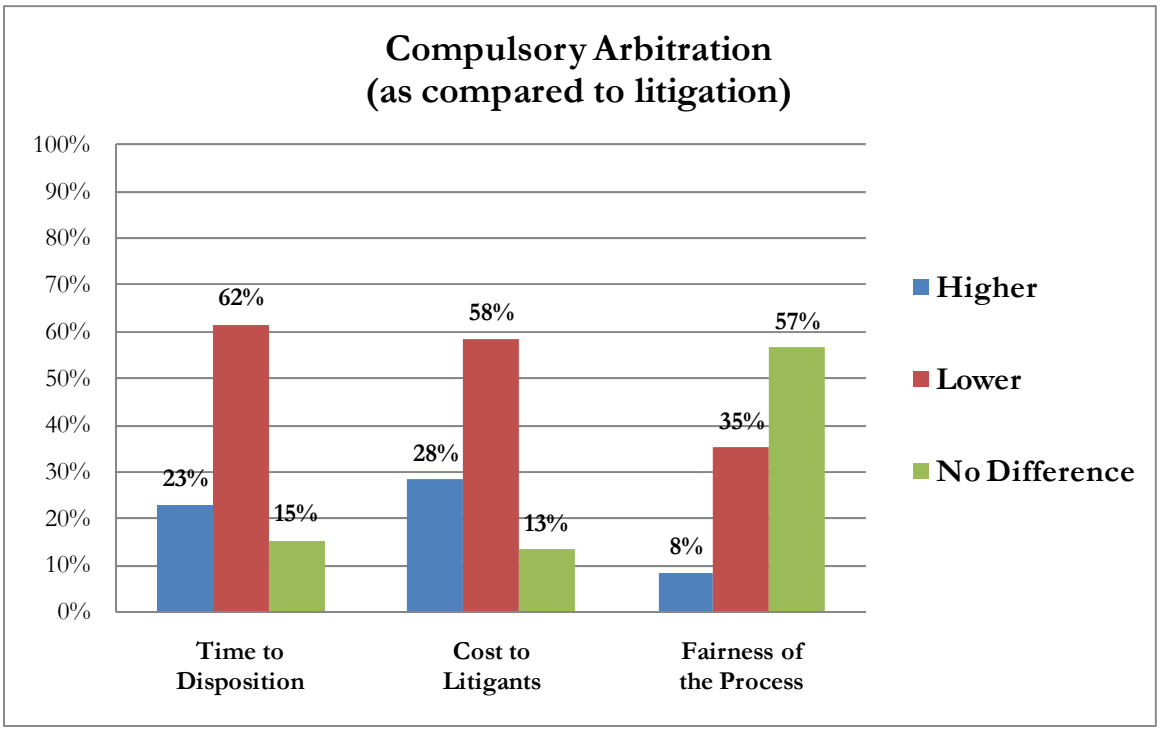

By and large, the written comments concerning compulsory arbitration were negative. Due to appeal provisions resulting in trial *de novo*,[32] those respondents characterized the program as wasting time, causing delay, and increasing costs. Commenting respondents were also critical of the system for appointing arbitrators. They believe that randomly selecting an "unsuspecting" member of the bar – who may not have any litigation experience or any familiarity with the substantive area – and requiring service without proper training or compensation leads only to resentment and a poor process. As one respondent stated:

> All that mandatory arbitration accomplishes in Maricopa County is to relieve the [court] for a time from having to do anything on a civil case, hoping that one or more of the parties will abandon the case before it emerges from arbitration. Forcing an outside member of the Bar to perform unfamiliar legal work whilst the court waits for the natural effects of attrition to reduce its civil caseload is not good public policy.

Also, a respondent indicated that in small counties where the attorneys know each other well, it is difficult for an arbitrator to be fair knowing that the roles will soon be reversed.

A majority (57%) of respondents with experience in compulsory arbitration indicated that arbitrators "almost never" limit discovery during the arbitration process to ensure an efficient and inexpensive resolution. An additional 22% believe that discovery is limited in arbitration only "occasionally." Only 12% of respondents indicated that arbitrators limit discovery half the time or

[32] According to the 2004-2005 study of court data, the frequency of appeal in cases with an arbitration award ranged from 17% to 46%, and was 22% in both Maricopa and Pima Counties. *Id.* at v.

more. One respondent wrote: "[T]he person who will ultimately be deciding the matter often has little or no interest in hearing arguments regarding discovery prior to arbitration."

As shown in Figure 52, compulsory arbitration does not seem to generate much satellite litigation. Two-thirds of respondents (67%) with a qualifying case indicated that parties "almost never" litigate the issue of arbitrability and another 20% or so indicated that the issue is litigated only "occasionally." Notably, however, over 10% of respondents with experience in compulsory arbitration indicated that parties have to seek assistance from the court at least half of the time in order to move cases forward in arbitration.

Figure 52 (Survey Questions 27c, 32b)
n = 477; 422

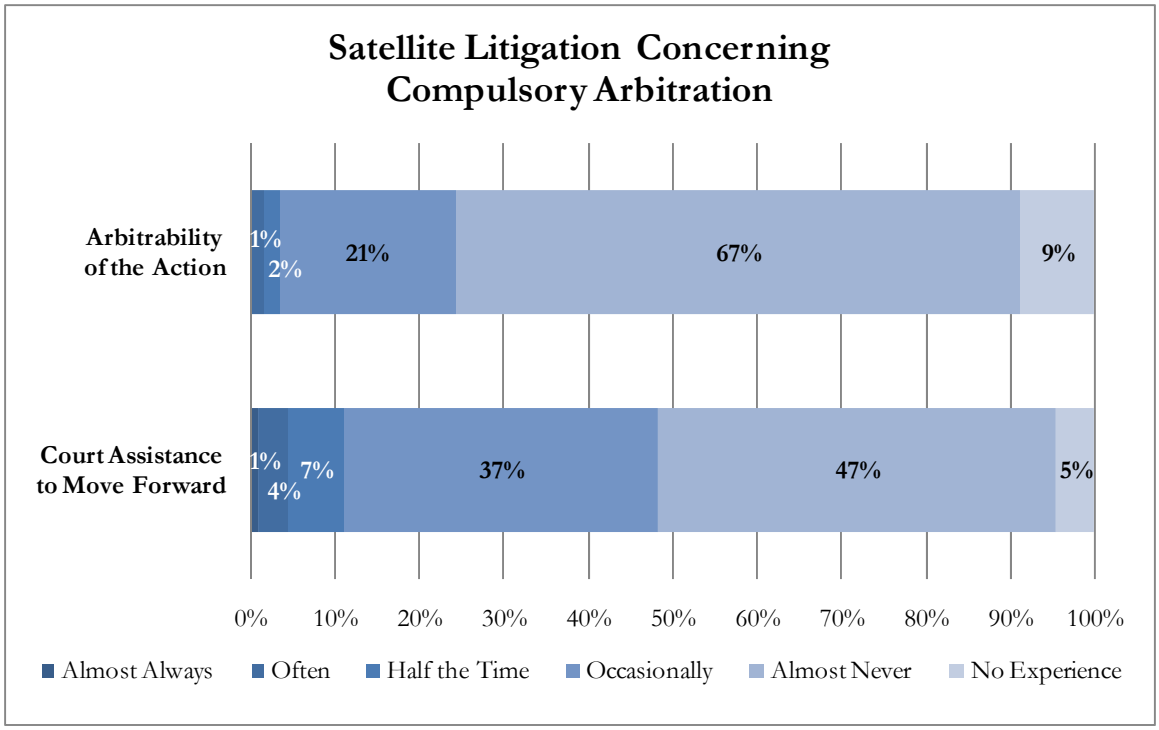

F. Respondent Suggestions for a More Timely and Cost-Effective Process

While respondents generally view Arizona's civil litigation process in a positive light, the survey asked respondents to name one rule or procedure they would change to achieve a more timely and cost-effective process for litigants. Suggestions not incorporated into the previous discussion are set forth below.

A number of respondents would like to see early involvement in and monitoring of the case by the judge, though one respondent qualified the suggestion with a plea for attorneys to generally maintain control over case management. Respondents believe that judges should be more consistent in enforcing the existing rules. Respondents also expressed a preference for setting the trial date early in the litigation.

A number of respondents would like to see a faster and better mechanism for handling disclosure and discovery disputes. It was proposed that a discovery "master" or "proctor" dedicated

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to such issues could be appointed and readily available to resolve disputes and enforce the rules. An alternative proposal: have sitting judges reserve a couple of hours each afternoon for immediate hearings in a "mass-docket" setting.

A number of respondents would like to see a system of mandatory settlement conferences after initial disclosures, for the purpose of obtaining a third-party assessment of the case at an early stage in the litigation. Some specifically stated that this should occur in lieu of arbitration.

Several respondents suggested adopting the British "loser pays" system of fee shifting. Two respondents suggested allowing attorneys to appear by telephone. One respondent suggested limiting motions for reconsideration to situations involving the discovery of new facts or a change in the law.

Finally, there is the issue of increasing funding for Arizona courts. As one respondent commented, state courts can only be an "engine of justice" if they are adequately resourced to meet that mission.

V. CONCLUSION

IAALS sincerely thanks all of the individuals and organizations who dedicated precious time, effort, and energy to make the Arizona Rules Survey possible. It is our hope that this study will make a valuable contribution to the national dialogue on civil justice reform. We look forward to processing this information in conjunction with other efforts to understand and improve the American civil justice system.

APPENDIX: SURVEY INSTRUMENT

Are you an attorney or judge with past or present CIVIL LITIGATION experience in the SUPERIOR COURTS of Arizona? For this survey, civil litigation does not include domestic relations or family law.

☐ Yes
☐ No

If you answered "Yes," please proceed to Question 1. If you answered "No," you may stop here. The Institute for the Advancement of the American Legal System thanks you for your time. We encourage you to learn more about our work by visiting www.du.edu/legalinstitute.

I. ATTORNEY BACKGROUND

1. **Number of years you have practiced law in Arizona, rounded to the nearest year:**

   _____

2. **Estimated number of Arizona Superior Court civil cases in which you have been an attorney of record (entered an appearance) or a judge within the last five years:**

   ☐ None
   ☐ 1 to 5
   ☐ 6 to 20
   ☐ 21 to 50
   ☐ 51 to 100
   ☐ Over 100

3. **Estimated number of your Arizona Superior Court civil cases that have gone to trial over the last five years (judges, please include cases over which you have presided at trial):**

   ☐ None
   ☐ 1 to 5
   ☐ 6 to 20
   ☐ 21 to 50
   ☐ 51 to 100
   ☐ Over 100

4. **Types of civil cases with which you have the most experience in Arizona Superior Court:**

   Select up to three areas, but do not include areas of minimal involvement.

   ☐ Administrative law
   ☐ Breach of fiduciary duty
   ☐ Civil rights
   ☐ Complex commercial
   ☐ Construction
   ☐ Consumer fraud
   ☐ Contract disputes
   ☐ Domestic relations
   ☐ Employment discrimination
   ☐ Insurance disputes
   ☐ Labor law
   ☐ Personal injury
   ☐ Probate
   ☐ Product liability
   ☐ Professional malpractice (generally)
   ☐ Property damage
   ☐ Real property
   ☐ Tax
   ☐ Torts (generally)
   ☐ Mass torts
   ☐ Medical malpractice
   ☐ Other _____
   ☐ Other _____
   ☐ Other _____

5. **Your civil litigation role over the course of your career:**

   If applicable, you may check "neutral decision-maker" in addition to any other box.

   ☐ Represent plaintiffs in all or nearly all cases
   ☐ Represent defendants in all or nearly all cases
   ☐ Represent plaintiffs and defendants, but plaintiffs more frequently
   ☐ Represent plaintiffs and defendants, but defendants more frequently
   ☐ Represent plaintiffs and defendants equally
   ☐ Neutral decision-maker

6. **Your current position:**

☐ Law firm lawyer or solo practitioner
☐ In-house counsel
☐ Government lawyer
☐ Judge
☐ Law clerk
☐ ADR provider
☐ Academician or researcher
☐ Retired, last year of practice: _____
☐ Inactive, last year of practice in Arizona: _____
☐ Other, please specify: _____

If your current position as indicated in Question 6 is "Law firm lawyer or solo practitioner," "In-house counsel," or "Government lawyer," please answer Questions 7 and 8. If you do not hold one of these positions, please skip to Question 9.

7. **Current number of full- and part-time attorneys at your organization who work in YOUR office location:**

☐ 1 to 5
☐ 6 to 10
☐ 11 to 20
☐ 21 to 50
☐ 51 to 100
☐ 101 to 250
☐ 251 to 500
☐ Over 500

8. **Current number of full- and part-time attorneys at your organization who work in ALL office locations:**

☐ 1 to 5
☐ 6 to 10
☐ 11 to 20
☐ 21 to 50
☐ 51 to 100
☐ 101 to 250
☐ 251 to 500
☐ Over 500

II. CIVIL LITIGATION GENERALLY

9. **Below is a list of common complaints about the American civil justice system. Please indicate your level of agreement with each statement as a whole, as it relates specifically to ARIZONA SUPERIOR COURT.**

	Strongly Disagree	Disagree	Agree	Strongly Agree	No Opinion
a. The civil justice system is too complex.	☐	☐	☐	☐	☐
b. The civil justice system takes too long.	☐	☐	☐	☐	☐
c. The civil justice system is too expensive.	☐	☐	☐	☐	☐
d. Opposing counsel are generally uncooperative.	☐	☐	☐	☐	☐
e. Notice pleading prevents disputed issues from being identified early enough.	☐	☐	☐	☐	☐
f. The system of hourly billing for attorneys contributes disproportionately to litigation costs.	☐	☐	☐	☐	☐

If your current position as indicated in Question 6 is "Law firm lawyer or solo practitioner," please answer Question 10. If not, please skip to Question 11.

10. As a general matter, your firm will not file or defend a case unless the amount in controversy exceeds:
$_____
☐ Firm will not refuse a case based on the amount in controversy
☐ Don't know

III. COMPARATIVE QUESTIONS

11. Do you have experience litigating in FEDERAL court in the District of Arizona?
☐ Yes
☐ No

If you answered "Yes" to Question 11, please answer Question 12. If you answered "No," please skip to Question 13.

12. Between Arizona Superior Court and the U.S. District Court for the District of Arizona:
☐ I prefer litigating in the Arizona state court.
Reason: _____
☐ I prefer litigating in the Arizona federal court.
Reason: _____
☐ No preference.
Reason: _____

13. Do you have Superior Court civil litigation experience prior to the July 1, 1992 amendments to the Arizona rules ("Zlaket" amendments)?
☐ Yes
☐ No

If you answered "Yes" to Question 13, please answer Question 14. If you answered "No," please skip to Question 15.

14. Please indicate your opinion as to the effect of the "Zlaket" amendments on the following groups and state the reason for your answer.

	Negative Development	Neutral Development	Positive Development	Reason
a. Litigants	☐	☐	☐	
b. Lawyers	☐	☐	☐	
c. Judges	☐	☐	☐	
d. Public	☐	☐	☐	

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IV. RULES OF CIVIL PROCEDURE FOR THE SUPERIOR COURTS OF ARIZONA

A. Rule 16(b) Comprehensive Pretrial Conferences

15. Below is a list of statements about Arizona Rule 16(b) comprehensive pretrial conferences. Assuming that a conference takes place, please indicate your level of agreement with each statement as a whole.

	Strongly Disagree	Disagree	Agree	Strongly Agree	No Opinion
a. Rule 16(b) conferences establish early judicial management of cases.	☐	☐	☐	☐	☐
b. Rule 16(b) conferences encourage judges to stay involved throughout the case.	☐	☐	☐	☐	☐
c. Rule 16(b) conferences focus discovery to the disputed issues.	☐	☐	☐	☐	☐
d. Rule 16(b) conferences improve trial preparation.	☐	☐	☐	☐	☐
e. Rule 16(b) conferences expedite case dispositions.	☐	☐	☐	☐	☐
f. Rule 16(b) conferences are cost-effective.	☐	☐	☐	☐	☐

16. Please indicate how often the following occur, in your experience. If you have no personal experience with the topic, please select "No Experience."

	Almost Never	Occasion-ally	About Half the Time	Often	Almost Always	No Exper-ience
a. Rule 16(b) conferences are held.	☐	☐	☐	☐	☐	☐
b. Litigants request sanctions for noncompliance with the letter and spirit of Rule 16(b).	☐	☐	☐	☐	☐	☐
c. Upon request, courts impose sanctions for noncompliance with the letter and spirit of Rule 16(b).	☐	☐	☐	☐	☐	☐
d. Courts *sua sponte* impose sanctions for noncompliance with the letter and spirit of Rule 16(b).	☐	☐	☐	☐	☐	☐

17. Should a Rule 16(b) conference be mandated in every case?

☐ Yes

Reason: _____

☐ No

Reason: _____

B. Initial Disclosures And Presumptive Discovery Limits

18. Please indicate the extent to which, in your experience, litigants ADHERE to the following Arizona discovery rules AS WRITTEN.

	Almost Never	Occasion-ally	About Half the Time	Often	Almost Always	No Exper-ience
a. The content and scope of initial disclosures under Rule 26.1(a)	☐	☐	☐	☐	☐	☐
b. The 40-day time limit for initial disclosures under Rule 26.1(b)	☐	☐	☐	☐	☐	☐
c. The presumptive limit of one expert per side per issue under Rule 26(b)(4)(D)	☐	☐	☐	☐	☐	☐
d. The presumption against deposing individuals who are not parties, testifying expert witnesses, or document custodians under Rule 30(a)	☐	☐	☐	☐	☐	☐
e. The presumptive limit of four hour depositions under Rule 30(d)	☐	☐	☐	☐	☐	☐
f. The 40- and 60-day time limits for answering interrogatories under Rule 33(a)	☐	☐	☐	☐	☐	☐
g. The presumptive limit of 40 interrogatories per party under Rule 33.1(a)	☐	☐	☐	☐	☐	☐
h. The 40- and 60-day time limits for fulfilling requests for production under Rule 34	☐	☐	☐	☐	☐	☐
i. The presumptive limit of one request for production of not more than 10 distinct items or categories of items under Rule 34	☐	☐	☐	☐	☐	☐
j. The 40- and 60-day time limits for answering requests for admission under Rule 36(a)	☐	☐	☐	☐	☐	☐
k. The presumptive limit of 25 requests for admission of one factual matter under Rule 36(b)	☐	☐	☐	☐	☐	☐

19. In Arizona, discovery misconduct is defined as "unreasonable, groundless, abusive, or obstructionist conduct." Please indicate how often the following occur, in your experience.

	Almost Never	Occasion-ally	About Half the Time	Often	Almost Always	No Exper-ience
a. Litigants request sanctions for discovery misconduct.	☐	☐	☐	☐	☐	☐
b. Upon request, courts impose sanctions for discovery misconduct.	☐	☐	☐	☐	☐	☐
c. Courts *sua sponte* impose sanctions for discovery misconduct.	☐	☐	☐	☐	☐	☐
d. The rules providing for sanctions deter discovery misconduct.	☐	☐	☐	☐	☐	☐

20. Below is a list of statements about Arizona Rule 26.1 DISCLOSURES. Assuming adherence to the rule AS WRITTEN, please indicate your level of agreement with each statement as a whole.

	Strongly Disagree	Disagree	Agree	Strongly Agree	No Opinion
a. Disclosures reveal the pertinent facts early in the case.	☐	☐	☐	☐	☐
b. Disclosures help narrow the issues early in the case.	☐	☐	☐	☐	☐
c. Disclosures facilitate agreement on the scope and timing of discovery.	☐	☐	☐	☐	☐
d. Disclosures reduce the total volume of discovery.	☐	☐	☐	☐	☐
e. Disclosures reduce the total time required to conduct discovery.	☐	☐	☐	☐	☐
f. Disclosures require too much investment early in the case.	☐	☐	☐	☐	☐
g. Disclosures increase the cost of litigation.	☐	☐	☐	☐	☐
h. Parties should be prevented from introducing supporting evidence that was not timely disclosed.	☐	☐	☐	☐	☐

21. Please indicate how often the following occur with respect to Rule 26.1 DISCLOSURES, in your experience.

	Almost Never	Occasion-ally	About Half the Time	Often	Almost Always	No Exper-ience
a. Parties abuse the disclosure process through overproduction.	☐	☐	☐	☐	☐	☐
b. Parties abuse the disclosure process by withholding information.	☐	☐	☐	☐	☐	☐
c. Parties abuse the disclosure process by revealing information late.	☐	☐	☐	☐	☐	☐
d. Courts enforce disclosure requirements.	☐	☐	☐	☐	☐	☐
e. Parties litigate the scope and adequacy of disclosures.	☐	☐	☐	☐	☐	☐

22. Below is a list of statements about Arizona's PRESUMPTIVE LIMITS ON DISCOVERY. Assuming adherence to the rules AS WRITTEN, please indicate your level of agreement with each statement as a whole.

	Strongly Disagree	Disagree	Agree	Strongly Agree	No Opinion
a. The presumptive limits require parties to focus their discovery efforts to the disputed issues.	☐	☐	☐	☐	☐
b. The presumptive limits reduce the total volume of discovery.	☐	☐	☐	☐	☐
c. The presumptive limits reduce the total cost of litigation.	☐	☐	☐	☐	☐
d. The presumptive limits reduce the total time required for litigation.	☐	☐	☐	☐	☐
e. The presumptive limits make litigation costs more predictable.	☐	☐	☐	☐	☐
f. The presumptive limits reduce the use of discovery as a tool to force settlement.	☐	☐	☐	☐	☐
g. The presumptive limits generally favor defendants over plaintiffs.	☐	☐	☐	☐	☐
h. The presumptive limits force parties to go to trial with insufficient information.	☐	☐	☐	☐	☐
i. The court should have more control over the discovery process.	☐	☐	☐	☐	☐

23. Please indicate how often the following occur with respect to PRESUMPTIVE LIMITS, in your experience.

	Almost Never	Occasion-ally	About Half the Time	Often	Almost Always	No Exper-ience
a. Courts enforce presumptive limits on discovery.	☐	☐	☐	☐	☐	☐
b. Parties litigate whether to depart from the presumptive limits.	☐	☐	☐	☐	☐	☐

24. In the best interest of litigants, presumptive limits should be modified – if at all – in the following way:

	Limit Made Lower	No Modification	Limit Made Higher	No Opinion
a. One expert per side per issue	☐	☐	☐	☐
b. Automatic depositions only for parties, experts, and custodians	☐	☐	☐	☐
c. Depositions limited to four hours	☐	☐	☐	☐
d. Interrogatories limited to 40 per party	☐	☐	☐	☐
e. Requests for production limited to one request for not more than 10 items	☐	☐	☐	☐
f. Requests for admission limited to 25 requests for one factual matter	☐	☐	☐	☐

If you answered "Yes" to Question 11, indicating that you have experience litigating in federal court, please answer Question 25. If you answered "No," please skip to Question 26.

25. Please indicate whether you prefer the Arizona Rules of Civil Procedure or the Federal Rules of Civil Procedure with respect to each of the following:

	State Court	Federal Court	No Preference
a. Timing of initial disclosures	☐	☐	☐
b. Content and scope of mandatory disclosures	☐	☐	☐
c. Number of expert witnesses	☐	☐	☐
d. Extent of deposition discovery	☐	☐	☐

C. <u>Compulsory Arbitration</u>

26. Have any of your SUPERIOR COURT cases QUALIFIED FOR Arizona's compulsory arbitration program (A.R.S. § 12-133 and Rules 72-77)?

Superior Court claims involving only requests for monetary relief that do not exceed a certain jurisdictional limit qualify for compulsory arbitration. The jurisdictional amount for arbitration varies by county.

☐ Yes
☐ No

If you answered "Yes" to Question 26, please answer Questions 27-30. If you answered "No," please skip to Question 33.

27. Please indicate how often the following occur, in your experience.

	Almost Never	Occasion-ally	About Half the Time	Often	Almost Always	No Exper-ience
a. In cases qualifying for compulsory arbitration, parties opt out in favor of some other alternative dispute resolution process.	☐	☐	☐	☐	☐	☐
b. In cases qualifying for compulsory arbitration, parties opt out for "other good cause."	☐	☐	☐	☐	☐	☐
c. Parties litigate the issue of arbitrability.	☐	☐	☐	☐	☐	☐

28. County in which you have had the most cases qualify for compulsory arbitration:

☐ Cochise - $50,000 limit
☐ Coconino - $65,000 limit
☐ Gila - $25,000 limit
☐ Graham - $30,000 limit
☐ La Paz - $25,000 limit
☐ Maricopa - $50,000 limit
☐ Mohave - $25,000 limit
☐ Navajo - $25,000 limit
☐ Pima - $50,000 limit
☐ Pinal - $40,000 limit
☐ Yavapai - $65,000 limit
☐ Yuma - $50,000 limit

29. In the best interest of litigants, the jurisdictional limit for compulsory arbitration in Superior Court should be:

☐ $25,000
☐ $50,000
☐ $75,000
☐ $100,000
☐ There should not be a compulsory arbitration program in Superior Court.

30. Have any of your SUPERIOR COURT cases PROCEEDED THROUGH compulsory arbitration?

☐ Yes
☐ No

If you answered "Yes" to Question 30, please answer Questions 31-32. If you answered "No," please skip to Question 33.

31. Compulsory arbitration (generally), as compared to litigation (generally):

a. Time	b. Cost to Litigants	c. Fairness of the Process
☐ Shortens time to disposition	☐ Decreases cost	☐ Less fair
☐ No difference in time	☐ No difference in cost	☐ No difference in fairness
☐ Lengthens time to disposition	☐ Increases cost	☐ More fair

32. Please indicate how often the following occur, in your experience.

	Almost Never	Occasion-ally	About Half the Time	Often	Almost Always	No Exper-ience
a. Arbitrators limit discovery to ensure an efficient and inexpensive resolution.	☐	☐	☐	☐	☐	☐
b. Parties have to seek assistance from the court to move the case forward in arbitration.	☐	☐	☐	☐	☐	☐

V. CONCLUSION

33. If you could change any one rule or procedure in Arizona Superior Court to achieve a more timely and cost-effective process for litigants, what would it be and why?

_____
_____
_____
_____
_____

34. Please include any information, clarification, or comment you would like to add:

_____
_____
_____
_____
_____

35. Are you willing to be contacted to participate in further studies concerning civil litigation in Arizona? By selecting "yes," your contact information will not be associated with your responses to this survey, which remain confidential. Contact information will be used only for the purpose indicated above, and will not be shared or distributed.

☐ Yes

First name: _____
Last name: _____
Email: _____
Phone: _____
How would you prefer to be contacted? ☐ By email
☐ By phone

☐ No

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125-000825

MINUTES

CIVIL RULES ADVISORY COMMITTEE

APRIL 9, 2015

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts in Washington, D.C., on April 9, 2015. (The meeting was scheduled to carry over to April 10, but all business was concluded by the end of the day on April 9.) Participants included Judge David G. Campbell, Committee Chair, and Committee members John M. Barkett, Esq.; Elizabeth Cabraser, Esq.; Judge Paul S. Diamond; Judge Robert Michael Dow, Jr.; Parker C. Folse, Esq.; Judge Paul W. Grimm; Dean Robert H. Klonoff; Judge Scott M. Matheson, Jr.; Hon. Benjamin C. Mizer; Justice David E. Nahmias; Judge Solomon Oliver, Jr.; Judge Gene E.K. Pratter; Virginia A. Seitz, Esq.; and Judge Craig B. Shaffer. Judge John D. Bates, Chair-designate, also attended. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Judge Jeffrey S. Sutton, Chair, Judge Neil M. Gorsuch, liaison, and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge Arthur I. Harris participated as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., the court-clerk representative, also participated. The Department of Justice was further represented by Theodore Hirt. Rebecca A. Womeldorf and Julie Wilson represented the Administrative Office. Judge Jeremy Fogel and Emery G. Lee attended for the Federal Judicial Center. Observers included Donald Bivens (ABA Litigation Section); Henry D. Fellows, Jr. (American College of Trial Lawyers); Joseph D. Garrison, Esq. (National Employment Lawyers Association); Alex Dahl, Esq. (Lawyers for Civil Justice); John Vail, Esq.; Valerie M. Nannery, Esq. (Center for Constitutional Litigation); Pamela Gilbert, Esq.; Ariana Tadler, Esq.; Henry Kelsen, Esq.; William Butterfield, Esq.; Nathaniel Gryll, Esq., and Michelle Schwartz, Esq. (Alliance for Justice); Andrea B. Looney, Esq. (Lawyers for Civil Justice); Stuart Rossman, Esq. (NACA, NCLC); and Ira Rheingold (National Association of Consumer Advocates).

Judge Campbell opened the meeting by greeting newcomers Acting Assistant Attorney General Benjamin Mizer and Rebecca Womeldorf, the new Rules Committee Officer. He also noted the hope that Sheryl Walter, General Counsel of the Administrative Office, would attend parts of the meeting.

This is the last meeting for Committee members Grimm and Diamond. Deep appreciation was expressed for "both Pauls." Judge Diamond has been a direct and incisive participant in Committee discussions, and has taken on a variety of special tasks, including the task of working with the Internal Revenue Service and the Administrative Office to establish means of paying taxes on funds deposited with the courts that avoided the need to consider amending Rule 67(b). Judge Grimm chaired the Discovery Subcommittee through arduous work, especially including the revision of Rule

47 37(e) that we hope will take effect this December 1 and advance
48 resolution of disputes arising from the loss of electronically
49 stored information. His contributions in guiding this work were
50 invaluable.

51 Judge Campbell further noted that Judge Bates has been named
52 by the Chief Justice to become the next chair of this Committee.
53 Judge Bates has recently been Director of the Administrative
54 Office. He also has served as a member of an important parallel
55 committee of the Judicial Conference, the Court Administration and
56 Case Management Committee.

57 Judge Campbell also reported on the meeting of the Standing
58 Committee in January. The Civil Rules Committee did not seek
59 approval of any proposals at that meeting. But there was a
60 stimulating discussion of pilot projects, a topic that will be
61 explored at the end of this meeting.

62 Judge Sutton said that this Committee did great work on the
63 Duke Rules package. It will be important to support educational
64 efforts that will guide lawyers and judges toward effective
65 implementation of the new rules. He also noted that the Standing
66 Committee is enthusiastic about the prospect that carefully
67 designed pilot projects will help further advance the goals of good
68 procedure.

69 Judge Campbell reminded the Committee that the Supreme Court
70 had asked whether a couple of changes might be made in the
71 Committee Notes to the amendments now pending before the Court. The
72 changes were approved by an e-mail vote of the Committee, and were
73 approved by the Judicial Conference without discussion. If the
74 Court approves the amendments and transmits them to Congress, it
75 will be important that the Committee find ways to educate people to
76 use the rules and to encourage all judges to engage in active case
77 management. These efforts are not a sign that the Committee is
78 presuming that Congress will approve the rules if transmitted by
79 the Supreme Court. Instead they will just begin the process of
80 preparing people to implement them effectively. Judge Fogel says
81 that the Federal Judicial Center is ready for judicial education
82 programs. The Committee can help to prepare educational materials
83 that can be used in Circuit Conferences in 2016, in bar
84 associations, Inns of Court, and other forums. The Duke Law School
85 is planning a parallel effort. This work can be advanced by
86 designating a Subcommittee of this Committee. Members who are
87 interested in participating should make their interest known.

88 A member noted that a package of CLE materials "available for
89 free" would be seized by many law firms for their own internal
90 programs. Judge Fogel noted that the Federal Judicial Center
91 "really wants to collaborate with this Committee." The Center has
92 two TV studios, and does many video productions. Videos, webinars,

93 and like means can be used to get the word out.

94 Judge Campbell suggested that it will be good to use Committee
95 alumni to get the word out, especially those who were involved in
96 shaping the proposals. One important need is to say what is
97 intended, to forestall use of the new rules in ways not intended.
98 The Committee Notes were changed in light of the public comments to
99 dispel several common misunderstandings, but ongoing efforts will
100 be important.

101 *October 2014 Minutes*

102 The draft minutes of the October 2014 Committee meeting were
103 approved without dissent, subject to correction of typographical
104 and similar errors.

105 *Legislative Report*

106 Rebecca Womeldorf provided the legislative report for the
107 Administrative Office. Two familiar sets of bills have been
108 introduced in this Congress.

109 The Lawsuit Abuse Reduction Act (LARA) would amend Rule 11 by
110 reinstating the essential aspects of the Rule as it was before the
111 1993 amendments. Sanctions would be mandatory. The safe harbor
112 would be removed. In 2013 Judge Sutton and Judge Campbell submitted
113 a letter urging respect for the Rules Enabling Act process, rather
114 than undertake to amend a Civil Rule directly.

115 H.R. 9, the Innovation Act, embodies patent reform measures
116 like those in the bill that passed in the House last year. There
117 are many provisions that affect the Civil Rules. Parallel bills
118 have been introduced in the Senate, or are likely to be introduced.
119 There are some indications that a bipartisan bill will be
120 introduced in the Senate.

121 A participant observed that informal conversations suggest
122 that some form of patent legislation will pass this year. The
123 President agrees with the basic idea. The question for Congress is
124 to reach agreement on the details.

125 Judge Campbell noted that H.R. 9 directs the Judicial
126 Conference to prepare rules. Logically, the Conference will look to
127 the rules committees. But the bill does not say anything of the
128 Enabling Act process; the simple direction that the Judicial
129 Conference act seems to eliminate the roles that the Supreme Court
130 and Congress play in the final stages of the Enabling Act process.

131 Parts of H.R. 9 adopt procedure rules directly, without adding
132 them to the Civil Rules. Discovery, for example, is initially
133 limited to issues of claim construction in any action that presents

134 those issues. Discovery expands beyond that only after the court
135 has construed the claims.

136 Other parts of H.R. 9 direct the Judicial Conference to adopt
137 rules that address specific points. The rules should distinguish
138 between discovery of "core documents," which are to be produced at
139 the expense of the party that produces them, and other documents
140 that are to be produced only if the requester pays the costs of
141 production and posts security or shows financial ability to pay.
142 These rules also are to address discovery of "electronic
143 communications," which may or may not embrace all electronically
144 stored information. The party requesting discovery can designate 5
145 custodians whose electronic communications must be produced; the
146 court can order that the number be expanded to 10, and there is a
147 possibility for still more.

148 A participant suggested that Congressional interest in these
149 matters is inspired by the Private Securities Litigation Reform
150 Act.

151 Experience with the Bankruptcy Abuse Prevention and Consumer
152 Protection Act was recalled. The Bankruptcy Rules Committee was
153 responsible for adopting interim rules on a truly rush basis, and
154 then for adopting final rules on a somewhat less pressed schedule.
155 The press of work was incredible.

156 It was agreed that it will be important to keep close track of
157 these bills in order to be prepared to act promptly if urgent
158 deadlines are set.

159 A matter of potential interest also was noted. The Litigation
160 Section of the American Bar Association will present a resolution
161 on diversity jurisdiction to the House of Delegates this August.
162 The recommendation will be to amend 28 U.S.C. § 1332 to treat any
163 entity that can be sued in the same way as a corporation.
164 Partnerships, limited partnerships, limited liability companies,
165 business trusts, unions, and still other organizations would be
166 treated as citizens of any state under which they are organized and
167 also of the state where they have their principal place of
168 business. The effect would be to expand access to diversity
169 jurisdiction because present law treats such entities as citizens
170 of any state of which any member is a citizen. The reasons for this
171 recommendation include experience with the difficulty of
172 ascertaining the citizenship of these organizations before filing
173 suit, the costs of discovery on these issues if suit is filed, and
174 the particularly onerous costs that may result when a defect in
175 jurisdiction is discovered only after substantial progress has been
176 made in an action.

177 Discussion noted that in the Judicial Conference structure,
178 primary responsibility for issues affecting subject-matter

179 jurisdiction lies with the Federal-State Jurisdiction Committee.
180 The Civil Rules Committee cannot speak to these questions as a
181 committee.

182 One question was asked: How would a court determine the
183 citizenship of a law firm — for example a nationwide, or
184 international firm, with offices in many different places. Can a
185 "nerve center" be identified in the way it may be identified for a
186 corporation?

187 The conclusion was that if individual Committee members have
188 thoughts about this proposal, they can be transmitted to the
189 Litigation Section.

190 *Rules Recommended for Adoption*

191 Proposals to amend Rules 4(m), 6(d), and 82 were published for
192 comment in August, 2014. This Committee now recommends that the
193 Standing Committee recommend them for adoption, with a possible
194 change in the Committee Note for Rule 6(d).

195 RULE 4(m)

196 Rule 4(m) sets a presumptive limit on the time to serve the
197 summons and complaint. The present rule sets the limit at 120 days;
198 the Duke Package of rule amendments now pending in the Supreme
199 court would reduce the limit to 90 days as part of a comprehensive
200 effort to expedite the initial phases of litigation.

201 It has long been recognized that more time is often needed to
202 serve defendants in other countries. Rule 4(m) now recognizes this
203 by stating that it does not apply to service in a foreign country
204 under Rule 4(f) or Rule 4(j)(1). These cross-references create an
205 ambiguity. Service on a corporation in a foreign country is made
206 under Rule 4(h)(2). Rule 4(h)(2) in turn provides for service
207 outside any judicial district of the United States on a
208 corporation, partnership, or other unincorporated association "in
209 any manner prescribed by Rule 4(f) for serving an individual,"
210 except for personal delivery. It can be argued that by invoking
211 service "in any manner prescribed by Rule 4(f)," Rule 4(h)(2)
212 service is made under Rule 4(f). But that is not exactly what the
213 rule says. At the same time, it is clear that the reasons that
214 justify exempting service under Rules 4(f) and 4(j)(1) from Rule
215 4(m) apply equally to service on corporations and other entities.
216 At least most courts manage to reach this conclusion. But many of
217 the comments responding to the proposal to reduce the Rule 4(m)
218 presumptive time to 90 days reflected a belief that the present
219 120-day limit applies to service on a corporation in a foreign
220 country. It seems wise to amend Rule 4(m) to remove any doubt.

221 There were only a few comments on the proposal. All supported

222 it.

223 The proposed amendment is commended to the Standing Committee
224 with a recommendation to recommend it for adoption as published.

225 RULE 6(d)

226 Under Rule 6(d), "3 days are added" to respond after service
227 is made in four described ways, including electronic service. The
228 proposal published last August removes service by electronic means
229 from this list. It also adds parenthetical descriptions of service
230 by mail, leaving with the clerk, or other means consented to, so as
231 to relieve readers of the need to constantly refer back to the
232 corresponding subparagraphs of Rule 5(b)(2).

233 The 3-added days provision has been the subject of broader
234 inquiry, but it has been decided that for the time being it is
235 better to avoid eliminating the 3 added days for every means of
236 service.

237 For service by electronic means, however, the conclusion has
238 been that the original concerns with imperfections in electronic
239 communication have greatly diminished with the rapid expansion of
240 electronic technology and the growing numbers of people who can use
241 it easily.

242 This conclusion was challenged by some of the comments. One
243 broad theme is that the time periods allowed by the rules are too
244 short as they are. Busy, even harassed practitioners, need every
245 concession they can get. More specific comments repeatedly
246 complained of "gamesmanship." Electronic filing is delayed until a
247 time after the close of the ordinary business day and after the
248 close of the clerk's office. Many comments invoked the image of
249 filings at 11:59 p.m. on a Friday, calculated to reach other
250 parties no earlier than Monday.

251 A more specific concern was expressed by the Magistrate Judges
252 Association. As published, the rule continues to add 3 days after
253 service under Rule 5(b)(2)"(F)(other means consented to)." They
254 fear that careless readers will look back to present Rule
255 5(b)(2)(E), which allows electronic service only with the consent
256 of the person served, and conclude that 3 days are added because
257 service by electronic means is an "other means consented to." This
258 is an obvious misreading of Rule 5(b)(2), since (F) embraces only
259 means other than those previously enumerated, including (E)'s
260 provision for service by electronic means. Nonetheless, the
261 magistrate judges have great experience with inept misreading of
262 the rules, and it is difficult to dismiss this prospect out of
263 hand. At the same time, there are reasons to avoid the recommended
264 cures. One would eliminate the parenthetical descriptions added to
265 illuminate the cross-references to subparagraphs (C), (D), and (F).

266 These descriptions have been blessed by the Style Consultant as a
267 useful addition to the rule, and they do seem useful. The other
268 would expand the parenthetical to subparagraph (F) to read: "(other
269 means consented to, except electronic service.)" One reason to
270 resist these suggestions is that it seems unlikely that serious
271 consequences will be imposed on a party who manages to misread the
272 rule. A 3-day overrun in responding is likely to be treated
273 leniently. More important is that the proposals to amend Rule
274 5(b)(2)(E) discussed below will eliminate the consent requirement
275 for registered users of the court's electronic system. The
276 Committee agreed that neither of the recommended changes should be
277 made.

278 The Department of Justice has expressed concerns about the 3-
279 added days provision, and particularly about the prospect of
280 gamesmanship in filing just before midnight on the eve of a weekend
281 or legal holiday. It has proposed a lengthy addition to the
282 Committee Note to describe these concerns and to state expressly
283 that courts should accommodate those situations and provide
284 additional time to discourage tactical advantage or prevent
285 prejudice. An alternative shorter version was prepared by the
286 Reporter to illustrate possible economies of language: "The ease of
287 making electronic service outside ordinary business hours may at
288 times lead to a practical reduction in the time available to
289 respond. Eliminating the automatic addition of 3 days does not
290 limit the court's authority to grant an extension in appropriate
291 circumstances."

292 Discussion began with the statement that the Department of
293 Justice feels strongly about adding an appropriate caution to the
294 Committee Note. Some changes might be made in the initial
295 Department draft — the list of examples of filing practices that
296 may shorten the time to respond could be expanded by adding a few
297 words to one example: "or just before or during an intervening
298 weekend or holiday * * *." Their longer language is more helpful
299 than the more compact version. "Our attorneys are often beset by
300 gamesmanship."

301 A member asked whether there really will be difficulties in
302 getting appropriate extensions of time. His experience is that this
303 is not a problem, and problems seem unlikely. In any event, the
304 shorter version seems better. The second sentence respects what
305 most courts do.

306 Another member was "not keen on adding admonitions to judges
307 to be reasonable." This is not a general practice in Committee
308 Notes. If we are to go down this road, it might be better to have
309 a single general admonition in a Note attached to one rule.

310 A lawyer member reported that he recently had encountered a
311 problem in delivering an electronic message. The recipient's firm

312 had recently installed a new system and the message was sorted out
313 by the spam filter. "Consent comforted me." It took a few days to
314 clear up the difficulty. That leads to the question: when does the
315 clock start? The sensible answer is not from the time of the
316 transmission that failed, but from the time of sending a
317 transmission that succeeded. On the broader question of
318 gamesmanship, "I'm always served Friday afternoon at the end of the
319 day."

320 A judge member "shares the ambivalence." Does a judge really
321 need to be told to be reasonable? Should Committee Notes go on to
322 suggest reasonable accommodations for extenuating family
323 circumstances, or clinical depression?

324 Another lawyer member observed that "Judges are busy. They do
325 not notice the abuses I see all the time." Adding to the Committee
326 Note as the Department suggests serves a useful purpose because it
327 implicitly condemns the abuses that judges do not — and should not
328 — see on a regular basis.

329 Still another judge member suggested that the Department's
330 draft language is opaque. The first sentence says the amended rule
331 is not intended to discourage judges from granting additional time.
332 The final sentence directs them that they should do so. Whatever
333 else can be said, it needs editing.

334 A judge suggested that "Much of what we do here is to write
335 rules for colleagues who do not do their jobs. Too often this is
336 simply writing more rules for them to ignore. I do keep aware of
337 counsel's behavior." The Duke Rules Package served the need to
338 encourage judges to manage their cases. "We know this already."

339 The concern with preaching to judges in a Committee Note was
340 addressed by suggesting that the Note could instead address advice
341 to lawyers that they should not be diffident about seeking
342 extensions in appropriate circumstances.

343 One more judge suggested that the kinds of gamesmanship feared
344 by the Department "is obviously bad conduct, easily brought to the
345 court's attention." The response for the Department was that "we
346 try not to be whiners about bad lawyers." And the reply was that it
347 can be done without whining.

348 The Department renewed the suggestion of the member who
349 thought an addition to the Note would be a reminder to lawyers to
350 behave decently. "At least the more economical version is helpful."

351 Actual practice behavior was described by another member.
352 "Whether or not it's sharp practice, the routine filing is at 11:59
353 p.m. on Friday, unless the court directs a different time. No one
354 gets to go home until after midnight." It would help to amend the

355 rule to set 6:00 p.m. as the deadline for filing.

356 This observation was seconded by observing that sometimes
357 late-night filing is bad behavior. Sometimes it is routine habit,
358 or a simple reflection of routine procrastination. Adding something
359 to the Note may be appropriate, but it should be more neutral than
360 the reference to "outside ordinary business hours" in the compact
361 sketch.

362 Judge Campbell summarized the discussion as showing that three
363 of four practicing lawyers on the Committee say late filing is a
364 common event. The Department says the same. Other advisory
365 Committees are working on the same issue. Rather than work out
366 final Note language in this Committee, it would be good to delegate
367 to the Chair and Reporter authority to work out common language
368 with the other committees, as well as to resolve with them whether
369 anything at all should be added to the Committee Note.

370 The Committee voted unanimously to recommend the published
371 text of Rule 6(d) for adoption. And it agreed to delegate to the
372 Chair and Reporter responsibility for working with the other
373 committees to adopt a common approach to the Committee Notes.

374 RULE 82

375 The published proposal to amend Rule 82 responds to amendments
376 of the venue statutes. It has long been understood that admiralty
377 and maritime actions are not governed by the general provisions for
378 civil actions. When the admiralty rules were folded into the Civil
379 Rules, this understanding was embodied in Rule 82 by providing that
380 an admiralty or maritime claim under Rule 9(h) is not a civil
381 action for purposes of 28 U.S.C. §§ 1391-1392. The recent statutory
382 amendments repeal § 1392. They also add a new § 1390. Section
383 1390(b) excludes from the general venue chapter "a civil action in
384 which the district court exercises the jurisdiction conferred by
385 section 1333" over admiralty or maritime claims.

386 The proposed amendment provides that an admiralty or maritime
387 claim under Rule 9(h) is governed by 28 U.S.C. § 1390, and deletes
388 the statement that the claim is "not a civil action for purposes of
389 28 U.S.C. §§ 1391-1392." It was not addressed in the comments after
390 publication.

391 The Committee voted unanimously to recommend the published
392 Rule 82 proposal for adoption.

393 *Rules Recommended for Publication*

394 The rules recommended for publication deal with aspects of
395 electronic filing and service. Judge Solomon and Clerk Briggs were
396 this Committee's members of the all-Committees Subcommittee for

397 matters electronic, and have carried forward with the work after
398 the Subcommittee suspended operations at the beginning of the year.
399 The choice to suspend operations may have been premature. The
400 Appellate, Bankruptcy, Civil, and Criminal Rules Committees are all
401 working on parallel proposals. It is desirable to frame uniform
402 rule text when there is no reason to treat common questions
403 differently, recognizing that different sets of rules may operate
404 in circumstances that create differences in what might have seemed
405 to be common questions. But the process of seriatim preparation for
406 the agendas of different committees meeting at different times has
407 impeded the benefits of simultaneous consideration. For the Civil
408 Rules, the result has been that worthy ideas from other Committees
409 have had to be embraced in something of a hurry, and have been
410 presented to the Civil Rules Committee in a posture that leaves the
411 way open for accommodations for uniformity with the other
412 Committees. The Committee Note language issue for Rule 6(d) is an
413 illustration. The e-filing and e-service rules provide additional
414 illustrations.

415 These proposals emerge from a process that winnowed out other
416 possible subjects for e-rules. The Minutes for the October 2014
417 meeting reflect the decision to set aside rules that would equate
418 electrons with paper. Filing, service, and certificates of service
419 remain to be considered.

420 E-FILING: RULE 5(d)(3)

421 Rule 5(d)(3) provides that a court may allow papers to be
422 filed, signed, or verified by electronic means. It further provides
423 that a local rule may require e-filing only if reasonable
424 exceptions are allowed. Great progress has been made in
425 establishing and becoming familiar with e-filing systems since Rule
426 5(d)(3) was adopted. The amendment described in the original agenda
427 materials directed that all filings must be made by electronic
428 means, but further directed that paper filing must be allowed for
429 good cause and that paper filing may be required or allowed for
430 other reasons by local rule. This approach reflected the great
431 advantages of efficiency that e-filing can achieve for the filer,
432 the court, and other parties. Those advantages accrue to an adept
433 pro se party as well as to represented parties. Indeed the burdens
434 of paper filing may weigh more heavily on a pro se party than on a
435 represented party.

436 The Criminal Rules Committee considered similar questions at
437 its meeting in mid-March. Criminal Rule 49 incorporates the Civil
438 Rules provisions for filing. Their discussion reflected grave
439 doubts about the problems that could arise from requiring pro se
440 criminal defendants and prisoners to file by electronic means.
441 Access to e-communications systems, and the ability to use them at
442 all, are the most basic problems. In addition, training pro se
443 litigants to use the court system could impose heavy burdens on

444 court staff. Means must be found to exact payment for filings that
445 require payment. There are risks of deliberate misuse if a court is
446 unable to limit a defendant or prisoner's access by blocking access
447 to all other cases. Constitutional concerns about access to court
448 would arise if exceptions are not made. This array of problems
449 could be met by adopting local rules, but the burden of adopting
450 new local rules should not be inflicted on the many courts whose
451 local rules do not now provide for these situations.

452 It was recognized that the problems facing criminal defendants
453 and prisoners may be more severe than those facing pro se civil
454 litigants, but questions were asked whether the differences are so
455 great as to justify different provisions in the Criminal and Civil
456 Rules. The Criminal Rules Committee asked that these issues be
457 considered in addressing Civil Rule 5, and that if this Committee
458 continues to prefer that adjustments for pro se litigants be made
459 by local rules or on a case-by-case basis it consider deferring a
460 recommendation to publish Rule 5 amendments while the Criminal
461 Rules Committee further considers these issues.

462 A conference call was held by the Chair of the Criminal Rules
463 Committee, the immediate past and current chairs of their
464 subcommittee for e-issues, their Reporters, and the Civil Rules e-
465 rules contingent. Thorough review of the Criminal Rules Committee
466 concerns led to a revised Rule 5(d)(3) proposal. The revised
467 proposal was circulated to the Committee as a supplement to the
468 agenda materials, and endorsed by Judge Campbell, Judge Oliver, and
469 Clerk Briggs.

470 The version of Rule 5(d)(3) presented to the Committee
471 mandates e-filing as a general matter, except for a person
472 proceeding without an attorney. E-filing is permitted for a person
473 proceeding without an attorney, but only when allowed by local rule
474 or court order. This approach is designed to hold the way open for
475 pro se litigants to seize the benefits of e-filing as they are
476 competent to do so. It well may be that these advantages will
477 become more generally available to pro se civil litigants than to
478 criminal defendants or prisoners filing § 2254 or § 2255
479 proceedings, but that event will not interfere with adopting local
480 rules that reflect the differences.

481 Judge Solomon endorsed the revised approach. Although the
482 Civil Rule draft started in a different place, the Criminal Rules
483 Committee's concerns were persuasive. The pro se problem is greater
484 in the criminal arena, but there also are problems in the civil
485 arena. The new approach does no harm in the short run, and it is
486 likely that we can live with it longer than that. And it is an
487 advantage to have rules that are as parallel as can be.

488 Clerk Briggs agreed. It will not be burdensome to address pro
489 se civil filings through local rules or by court order. For now,

490 there will not be many pro se litigants that will be trusted with
491 e-filing. But it should be noted that the present CM/ECF system can
492 be used to ensure that a pro se litigant is able to file and access
493 files only in his own case. And the system screens for viruses. And
494 yes, there is a disaster recovery plan — everything is replicated
495 on an essentially constant basis and stored in distant facilities.

496 A specific drafting question was raised: is there a better way
497 to refer to pro se parties than "a person proceeding without an
498 attorney"? It was agreed that this language seems adequate. One
499 advantage is that it includes an attorney who is proceeding without
500 representation by another attorney — such an attorney party may not
501 be a registered user of the system, and may not be admitted to
502 practice as an attorney in the court.

503 Another question is whether the rule should continue to say
504 that a paper may be signed by electronic means, or whether it is
505 better to provide only for e-filing, adding a statement that the
506 act of filing constitutes the signature of the person who makes the
507 filing. The reasons for omitting a statement about signing by
508 electronic means are reflected in the history of a Bankruptcy Rule
509 provision that was published for comment and then withdrawn. Many
510 filings include things that are signed by someone other than the
511 filer. Common civil practice examples include affidavits or
512 declarations supporting and opposing summary-judgment motions, and
513 discovery materials. Means for verifying electronic signatures are
514 advancing rapidly, but have not reached a point of common
515 acceptance and practice that would support attempted rules on the
516 issue. It was agreed that the rule text should adhere to the
517 approach that describes only filing by e-means, and then states
518 that the act of filing constitutes the filer's signature. But it
519 also was agreed that it would be better to delete the next-to-last
520 paragraph of the draft Committee Note that discusses these possible
521 signature issues.

522 Another issue was presented by the bracketed final paragraph
523 in the Committee Note that raised the question whether anything
524 should be said about verification. Present Rule 5(d)(3) recognizes
525 local rules that allow a paper to be verified by electronic means.
526 The proposed amendment omits any reference to verification. Not
527 many rules provide for verification. Rule 23.1 provides for
528 verification of the complaint in a derivative action. Rule 27(a)
529 requires verification of a petition to perpetuate testimony. Rule
530 65(b)(1)(A) allows use of a verified complaint rather than an
531 affidavit to support a temporary restraining order. Verification or
532 an affidavit may be required in receivership proceedings. Verified
533 complaints are required by Supplemental Rules B(1)(A) and C(2).
534 Although these add up to a fair number of rules by count, they
535 touch only a small part of the docket. It was concluded that it
536 would be better to omit this paragraph from the recommendation to
537 publish.

538 RULE 5(b)(2)(E): E-SERVICE

539 Rule 5(b)(2)(E) now allows service by electronic means if the
540 person served consents in writing. Rule 5(b)(3) allows this service
541 to be made through the court's transmission facilities if
542 authorized by local rules. In practice consent has become a fiction
543 as to attorneys — in almost all districts an attorney is required
544 to become a registered user of the court's system, and access to
545 the court's system is conditioned on consent to be served through
546 the system. The proposed revision of Rule 5(b)(2)(E) set out in the
547 agenda materials deletes the consent element, and simply provides
548 that service may be made by electronic means. It further provides
549 that a person may show good cause to be exempted from such service,
550 and that exemptions may be provided by local rule.

551 This time it is preparation of the agenda materials for an
552 Appellate Rules Committee meeting later this month that has raised
553 complicating issues. The complications again involve pro se
554 litigants. The concern is that many pro se litigants may not have
555 routine, continuous access to means of electronic communication,
556 and in any event may not be adept in its use. This has not been a
557 problem under the present rule, since it requires consent to e-
558 service. A pro se party need not consent, and is not subject to the
559 fictive consent that applies to attorneys. But eliminating consent
560 will generate substantial work in case-specific court orders or in
561 amending local rules.

562 These questions were presented on the eve of this meeting.
563 Drafting to accommodate them can be considered, but subject to
564 further polishing. The draft presented for consideration responded
565 by distinguishing registered users of the court's system from
566 others. It continues to say simply that service may be made by
567 electronic means on a person who is a registered user of the
568 court's system. But it requires consent for others. The consent can
569 provide ample protection by specifying the electronic address to
570 use, and a form of transmission that can be used by the recipient.
571 Consent also will be available for registered users of the court's
572 system who find it convenient to serve some papers by means other
573 than the court's system. For civil cases, discovery requests and
574 responses are a common example. These papers are not to be filed
575 with the court until they are used in the case or the court orders
576 filing. It may prove desirable to serve them by electronic means
577 outside the court's system. Here too, consent will afford important
578 protections by specifying the address to be used and the form of
579 communication.

580 A judge observed that he encounters many pro se litigants who
581 exchange with attorneys by e-mail.

582 Another judge noted that bankruptcy practice is moving to bar
583 pro se filing, but to recognize consent to service by e-mail. "This

584 saves costs."

585 It was noted that the CM/ECF system allows service without
586 filing. One court, as an example, requires a court order after a
587 litigant moves for permission. It would be good to have a rule that
588 allows consent to serve this function without need for a court
589 order.

590 A separate question was whether written consent should be
591 required, as in the present rule. Why not allow consent in an e-
592 communication? One way written consent can be accomplished would be
593 to add consent to the check list of provisions on the pro se
594 appearance form. Another judge suggested that it would be prudent
595 to get written consent, but the rule should not specify it.

596 If the rule is framed to require consent for service outside
597 the court's system, it was agreed that there is no need to carry
598 forward from the agenda draft the exceptions that allow a person to
599 be exempted for good cause or by local rule.

600 Further discussion reiterated the point that the revised draft
601 distinguishes service through the court system on registered users,
602 which would not require consent, from service by other electronic
603 means, which would require consent. This is an advance over the
604 original suggestion, which focused on service through the court's
605 system. The Committee Note can address consent among the parties,
606 refer to a check-the-box pro se appearance form, the availability
607 of direct e-mail service with consenting parties, and the need for
608 court permission for consent by a person who is not a registered
609 user to receive service through the court system.

610 The Committee agreed to go forward with a recommendation to
611 publish a version of Rule 5(b)(2)(E) that distinguishes between
612 service on registered users through the court's system and service
613 by other e-means with consent. Precise rule language and
614 corresponding changes in the Committee Note will be settled, if
615 possible in ways that achieve uniformity with other advisory
616 committees.

617 (An observer raised a particular question outside the agenda
618 materials. She has twice encountered difficulties with e-filing in
619 this circumstance: A discovery subpoena is served on a nonparty
620 outside the district where the action is pending. A motion to
621 compel compliance becomes necessary in the district where the
622 discovery will be taken. There is no current docket in the district
623 for enforcement. Two courts have refused to allow her to use
624 electronic means to open a miscellaneous docket item. They insisted
625 on a personal appearance. This is an unnecessary inconvenience.
626 There is a patchwork of rules around the country.

627 (This problem may not be a subject for rulemaking. Certainly

628 it is not fit for rulemaking on the spur of the moment. But the
629 problem may be helped by proposed Rule 5(d)(3), which will allow e-
630 filing unless a local rule requires paper filing. It might be
631 possible to add a comment on this problem to the Committee Note for
632 Rule 5(d)(3). That possibility was taken under advisement.)

633 NOTICE OF ELECTRONIC FILING AS PROOF OF SERVICE: RULE 5(d)(1)

634 The agenda materials include an amendment of Rule 5(d)(1) that
635 would provide that a notice of electronic filing constitutes a
636 certificate of service on any party served through the court's
637 transmission facilities. The draft includes in brackets a provision
638 that would add a statement similar to Rule 5(b)(2)(E): the notice
639 of electronic filing does not constitute a certificate of service
640 if the serving party learns that the filing did not reach the party
641 to be served.

642 Allowing a notice of electronic filing to constitute a
643 certificate of service on any party served through the court's
644 transmission facilities may not seem to do much. A party accustomed
645 to serving through the court's system includes in the filing a
646 certificate that says the paper was served through the court's
647 system. Eliminating those lines is a small gain. But the amendment
648 also protects those who do not think to add those lines, and also
649 avoids the instinctive reaction of cautious filers that prompts
650 filing a separate certificate just to be sure. The amended rule
651 text was approved as a recommendation to publish.

652 Brief discussion concluded that the bracketed material
653 addressing failed delivery is not necessary. As drafted, it is
654 limited to service through the court's facilities. Ordinarily the
655 court system will flag a failed transmission. It may be that a
656 party will learn that a successful transmission somehow did not
657 come to the recipient's attention, but that situation seems too
658 rare to require rule text. That will be deleted from the
659 recommendation to publish.

660 Judge Harris, after these questions were discussed in the
661 Bankruptcy Rules Committee, suggested that it would be useful to
662 expand the rule by adding a statement of what should be included in
663 a certificate of service when service is not made through the
664 court's electronic facilities. The added language would address the
665 elements that should be included in a certificate: the date and
666 manner of service; the names of the persons served; and the address
667 used for whatever form of service was made. The advantage of adding
668 this language to the several sets of rules that address
669 certificates of service would be to establish a uniform certificate
670 for all federal courts. Uniformity is desirable in itself, and
671 uniformity would protect against the need to consult local rules,
672 or the ECF manual, for each district. Certificates now may vary. It
673 may be as bland as "I served by mail," or "I served by mail on this

674 date, to this address," and so on. The proposed language is taken
675 from Appellate Rule 25(d)(1)(B) for a proof of service. The
676 language works there, and would work elsewhere.

677 This proposal was countered: the courts and parties seem to be
678 doing well without help from a detailed rule prescription. And
679 service by these other means is likely to decline continually as
680 electronic service takes over and provides a notice of electronic
681 filing. Another member added that he routinely includes all of this
682 information in the certificate of service. It was further noted
683 that the Civil Rules did not provide for certificates of service
684 until 1991. The present provision was added then to supersede a
685 variety of local rules. The Committee then considered a provision
686 that would prescribe the contents of the certificate, but feared
687 that in some situations the party making service would not be able
688 to provide all of the information that might be included.

689 Brief further discussion showed that no Committee member
690 favored adding a provision that would define the contents of a
691 certificate of service by means other than the court's transmission
692 facilities.

693 A style question was left for resolution by the Style
694 Consultant. Rule 5(d)(1) now concludes with a sentence introduced
695 by "But." A paper that is required to be served must be filed.
696 "But" disclosure and discovery materials must not be filed except
697 in defined circumstances. The question is whether "but" remains
698 appropriate after lengthening the first sentence.

699 RULE 68

700 Judge Campbell summarized the discussion of Rule 68 at the
701 October 2014 meeting. Rule 68 was the subject of two published
702 amendment proposals in 1983 and 1984. The project was abandoned in
703 face of fierce controversy and genuine difficulties. Rule 68 was
704 taken up again early in the 1990s and again the project was
705 abandoned. Multiple problems surround the rule, including the basic
706 question whether it is wise to maintain any rule that augments
707 natural pressures to settle. But, aside from all the discovery
708 rules taken together, Rule 68 is the most frequent subject of
709 public suggestions that amendments should be undertaken. Most of
710 the suggestions seek to add "teeth" to the rule by adding more
711 severe consequences for failing to win a judgment better than a
712 rejected offer. The Committee decided in October that the most
713 fruitful line of attack will be to explore practices in state
714 courts to see whether there are rules that in fact work better than
715 Rule 68. Jonathan Rose undertook preliminary research that produced
716 a chart of state rules, comparing their features to Rule 68. He
717 also provided a bibliography. It was hoped that the Supreme Court
718 Fellow at the Administrative Office could make time to explore
719 these materials, and perhaps to look for state-court decisions.

720 There have been too many competing demands on his time, however,
721 and little progress has been made. This work will be pursued,
722 aiming at a report to the meeting next November.

723 DISCOVERY: "REQUESTER PAYS"

724 Judge Grimm opened the subject of requester-pay discovery
725 rules by noting that these questions were opened at the fall
726 meeting in 2013 in response to suggestions that "requester-" or
727 "loser-pays" rules be adopted to shift the costs of responding to
728 discovery requests in cases where the burdens of responding to
729 discovery are disproportionate among the parties or otherwise
730 unfair. The focus of these suggestions ordinarily is Rule 34
731 document production. The background is the shared assumption, not
732 articulated in any rule but recognized in the 1978 Oppenheimer
733 opinion in the Supreme Court, that ordinarily the responding party
734 bears the burdens and costs of responding. The Court noted then,
735 and it is also widely understood, that a court order can shift the
736 costs, in whole or in part, to the requesting party.

737 The Rule 26(c) proposal now pending in the Supreme Court as
738 part of the Duke Rules Package expressly confirms the common
739 understanding that a protective order can allocate the expenses of
740 discovery among the parties.

741 The House of Representatives has held hearings to examine the
742 possibilities of requester-pay practices. Patent law reform bills
743 recently introduced in Congress contain such provisions.

744 Subcommittee work on these issues was sidetracked for a year
745 while the Subcommittee concentrated on the Rule 37(e) provisions
746 addressing loss of electronically stored information that now are
747 pending before the Supreme Court. The work is resuming now.

748 Passionate views are held on all sides of requester pays. Much
749 of the discussion focuses on asymmetric discovery cases in which
750 one party has little discoverable information and is able to impose
751 heavy burdens in discovering vast deposits of information held by
752 an adversary. The explosion of discoverable matter embodied in
753 electronically stored information adds to the passion. And it is
754 often suggested that a data-poor party may deliberately engage in
755 massive discovery for tactical reasons.

756 The other side of the debate is framed as an issue of access
757 to justice. Often a data-poor party is poor in other resources as
758 well, and cannot afford to pay the expenses of sorting through
759 information held by a data-rich party. This viewpoint was expressed
760 in public comments on many of the discovery rules provisions in the
761 Duke Rules Package, and particularly in the comments on proposed
762 Rule 26(c).

763 A 2014 publication of the Institute for the Advancement of the
764 American Legal System provides information about these issues. A
765 recent law review article catalogues the current rules that allow
766 shifting litigation costs — most of them discovery rules — and
767 explores many of the surrounding issues, including possible due
768 process implications. The closed-case study done by the Federal
769 Judicial Center in conjunction with the Duke Conference shows that
770 most cases do not generate significant discovery burdens. But it
771 also shows that there are outliers that involve serious burdens and
772 present serious issues for possible reform. It remains a challenge
773 to determine whether these problems are unique to identifiable
774 types of cases. One particular opportunity will be to explore the
775 experience of "patent courts." Other subject-matter areas may be
776 identifiable. Or other characteristics of litigation may be
777 associated with disproportionate discovery, whether or not it is
778 possible to address them in any particular way by court rules.

779 One line of inquiry will be to attempt to find out through the
780 Federal Judicial Center what kinds of cases are now associated with
781 motions to order a requester to bear the costs of discovery.

782 Emery Lee reported that it is difficult to sort the cases out
783 of general docket entries. He began an inquiry by key-citing the
784 headnotes in the Zubulake opinions, which are prominent in
785 addressing cost-shifting in discovery of ESI. They have not been
786 much cited. Looking at the cases he found through Pacer, he
787 developed search terms. Then he undertook a docket search in four
788 districts that have high volumes of cases — S.D.N.Y., N.D.Ill,
789 N.D.Cal., and S.D.Tex. A "fuzzy search" turned up nothing useful.
790 There were, to be sure, "lots of hits" in the Northern District of
791 Illinois because the e-pilot there requires the parties to discuss
792 cost bearing. And a lot of the hits involved the costs of
793 depositions, not documents. There were not many hits for document
794 discovery.

795 Judge Grimm asked what further research might be done: law
796 review articles? State experience? Case law? A survey or other
797 empirical inquiry? The quest would be to refine our understanding
798 of how often burdensome costs are encountered.

799 Judge Grimm further noted that England has cost shifting, but
800 it also has broad bilateral initial disclosures.

801 The Subcommittee hopes to narrow what needs be considered.
802 What guidance can be provided?

803 Judge Campbell reminded the Committee that the Committee Note
804 to Rule 26(c) in the pending package of Duke Rules amendments was
805 revised after publication to provide reassurance that it is not
806 intended to become a general requester-pays rule. Many comments on
807 the published proposal expressed fears on this score

808 A judge urged that it is not wise "to write rules for
809 exceptional-exceptional cases. There is a cost of litigation. Part
810 of that is the cost of discovery." It is really depositions that
811 drive the cost of discovery in most cases. And the requesting party
812 pays for most of the costs of a deposition. Document production
813 does not drive discovery costs in most cases. There are not many
814 cases where the plaintiff does not have to bear some discovery
815 costs, especially depositions. The rules already limit the numbers
816 of interrogatories and depositions, and proposals to tighten these
817 limits were rejected for good reasons after publication of the Duke
818 Rules Package. And "counsel has to invest time in depositions." It
819 is better not to attempt to write rules for the massive document
820 discovery cases that do come up.

821 Another judge asked what is the scope of the problem? We need
822 to know that before making a rule. Whose problem needs to be fixed?
823 Why do we think we should redistribute the costs of discovery?

824 Judge Grimm responded that the Subcommittee shares these
825 concerns. "We can understand there are problem cases without
826 knowing what to do about them. The source of the problems remains
827 to be determined."

828 A member asked what protections there are for discovery from
829 third parties who do not have a stake in the game? Rule 45(d)(1)
830 directs that a party or attorney responsible for issuing and
831 serving a subpoena take reasonable steps to avoid imposing undue
832 burden or expense on a person subject to the subpoena. Rule
833 45(d)(2) further provides that a person directed to produce
834 documents or tangible things may serve objections. An objection
835 suspends the obligation to comply, which revives only when ordered
836 by the court, and the order "must protect a person who is neither
837 a party nor a party's officer from significant expense resulting
838 from compliance." Perhaps that is protection enough.

839 One possible approach was suggested — to sample a pool of
840 district judges to ask whether they have problems with excessive
841 discovery that should be addressed by explicit requester-pays rules
842 provisions. Much civil litigation now occurs in MDL proceedings;
843 perhaps we could look there.

844 A different suggestion was that "this looks like a solution in
845 search of a problem. The requester-pays proposals have the air of
846 a strategic effort to deter access to justice in certain types of
847 cases. District judges will have a much better sense of it —
848 whether there are patterns of abuse that can be dealt with by rule,
849 rather than case management. I litigate cases with massive
850 discovery, but the pressures are to be reasonable because it's 2-
851 way, and I have to search through what I get." Perhaps there are
852 problems in asymmetric cases. "But the very fact that the Committee
853 is struggling to figure out whether there is a problem suggests we

854 pause" before plunging in.

855 Another member said that the mega-cases tend to be MDL
856 proceedings. The purpose of MDL is to centralize discovery, to
857 avoid constant duplication. The management orders are for
858 production that occurs once, and for one deposition per witness.
859 MDL proceedings are likely to save costs, reaping the efficiency
860 advantages of economies of scale. MDL judges seek to tailor cost
861 sharing in ways that make sense.

862 Another lawyer member noted the many protective provisions
863 built into the rules. Rule 45(d)(2)(B) expressly protects
864 nonparties. Rule 26(b)(2)(B) regulates discovery of ESI that is not
865 reasonably accessible, and contemplates requester-pays solutions.
866 Rule 26(b)(2)(C)(iii) directs the court to limit discovery on a
867 cost-benefit analysis. Rule 26(c) is used now to invoke requester-
868 pays protections. Rule 26(g) requires counsel to avoid unduly
869 burdensome discovery requests. The Duke Rules package pending
870 before the Supreme Court is designed to invigorate these
871 principles. If the Court and Congress allow the proposed rules to
872 take effect, we will need to find out whether they have the
873 intended effect. Among them is the explicit recognition in Rule
874 26(c) of protective orders for cost-sharing. Together, these rules
875 provide many opportunities to control unreasonable discovery.

876 Continuing, this member noted that something like 300,000
877 cases are filed in federal courts every year. Perhaps 15,000 to
878 30,000 of them will involve document-heavy discovery. The FJC
879 closed-case study shows that most cases have little discovery. We
880 need to find out whether there are types of cases that generate
881 problems. But even that inquiry might be deferred for a while to
882 see how the proposed amended rules will work. "I do not know that
883 it’s a big problem now in most cases." Problems are most likely to
884 arise when discovery pairs a data-poor party against a data-rich
885 party. Perhaps we should defer acting on requester-pays rules for
886 a while.

887 It was noted that the Department of Justice has a lot of
888 experience with discovery, both asking and responding. Further
889 inquiry probably is warranted. The Department can undertake further
890 internal inquiries.

891 A judge said that there are not many reported cases invoking
892 Rule 45(d)(2). That may suggest there is little need for new rules
893 to protect nonparties. More generally, the rules we have now seem
894 adequate to address any problems. "The need may be to use them, not
895 to add new rules."

896 A lawyer echoed these views, observing that a great deal of
897 work went into shaping the Duke Rules package with the goal of
898 advancing proportionality in discovery. We should wait to see what

899 effect the new rules have if they are allowed to become effective.

900 Another judge suggested that study of initial disclosure may
901 be a good place to start. It may be helpful to return to the
902 original rule, requiring disclosure of what is relevant to the case
903 as a whole, not merely "your case." The present limited disclosure
904 rule seems to fit awkwardly with our focus on cooperation and
905 proportionality. Initial disclosure rules, indeed, will be
906 discussed later in this meeting as a possible subject for a pilot
907 project.

908 Discussion of initial disclosure continued. The original idea
909 was to get the core information on the table at the outset. That
910 proved too ambitious at the time — local rule opt-outs were
911 provided to meet resistance, and many districts opted out in part
912 or entirely. National uniformity was attained only by narrowing
913 disclosure to "your case." The employment protocols now adopted by
914 50 judges may show that broad initial disclosure can work. So it
915 was suggested that we could look to state practices. The Institute
916 for the Advancement of the American Legal System has generated
917 reports. Broad initial disclosure remains a controversial idea:
918 "You can be right, but too soon."

919 The final observation was that the Committee undertook to
920 study requester-pays rules in response to a letter from members of
921 Congress.

922 *Appellate-Civil Rules Subcommittee*

923 A joint subcommittee has been reconstituted to explore issues
924 that overlap the Appellate Rules and Civil Rules. Judge Matheson
925 chairs the Subcommittee. Virginia Seitz is the other Civil Rules
926 member. Appellate Rules Committee members are Judge Fay, Douglas
927 Letter, and Kevin Newsom.

928 The Subcommittee is exploring two sets of issues that first
929 arose in the Appellate Rules Committee. As often happens, if it
930 seems wise to act on these issues, the most likely means will be
931 revisions of Civil Rules. That is why a joint Subcommittee is
932 useful. The issues involve "manufactured finality" and post-
933 judgment stays of execution under Civil Rule 62.

934 MANUFACTURED FINALITY

935 Judge Matheson introduced the manufactured finality issues.
936 "This is not a new topic." An earlier subcommittee failed to reach
937 a consensus. "Nor is consensus likely now." The Subcommittee seeks
938 direction from the Appellate and Civil Rules Committees.

939 "Manufactured finality" refers to a wide variety of strategies
940 that may be followed in an attempt to appeal an interlocutory order

941 that does not fit any of the well-established provisions for
942 appeal. Rule 54(b) partial finality is, for any of many possible
943 reasons, not available. Other elaborations of the final-judgment
944 rule, most obviously collateral-order doctrine, also fail. Avowedly
945 interlocutory appeals under § 1292 are not available. The
946 theoretical possibility of review by extraordinary writ remains
947 extraordinary.

948 Many examples of orders that prompt a wish to appeal could be
949 offered. A simple example is dismissal of one claim while others
950 remain, and a refusal to enter a Rule 54(b) judgment. Or important
951 theories or evidence to support a single claim are rejected,
952 leaving only weak grounds for proceeding further.

953 If the would-be plaintiff manages to arrange dismissal of all
954 remaining claims among all remaining parties with prejudice, courts
955 recognize finality. Finality is generally denied, however, if the
956 dismissal is without prejudice. And an intermediate category of
957 "conditional prejudice" has caused a split among the circuits. This
958 tactic is to dismiss with prejudice all that remains open in the
959 case after a critical interlocutory order, but on terms that allow
960 revival of what has been dismissed if the court of appeals reverses
961 the order that prompted the appeal. Most circuits reject this
962 tactic, but the Second Circuit accepts it, and the Federal Circuit
963 has entertained such appeals. There is a further nuance in cases
964 that conclude a dismissal nominally without prejudice is de facto
965 with prejudice because some other factor will bar initiation of new
966 litigation — a limitations bar is the most common example.

967 The Subcommittee has narrowed its discussion to four options:
968 (1) Do nothing. The courts would be left free to do whatever they
969 have been doing. (2) Adopt a simple rule stating what is generally
970 recognized anyway — a dismissal with prejudice achieves finality.
971 Although this is generally recognized, an explicit rule would
972 provide a convenient source of guidance for practitioners who are
973 not familiar with the wrinkles of appeal jurisdiction and
974 reassurance for those who are. But the rule might offer occasion
975 for arguments about implied consequences for dismissals without
976 prejudice, particularly the "de facto prejudice" and "conditional
977 prejudice" situations. (3) Adopt a clear rule saying that <u>only</u> a
978 dismissal with prejudice establishes finality. Still, that might
979 not be as clear as it seems. Only elaborate rule text could
980 definitively defeat arguments for de facto prejudice or conditional
981 prejudice. Committee Note statements might lend further weight.
982 Assuming a clear rule could be drafted to close all doors, it would
983 remain to decide whether that is desirable. (4) A rule could
984 directly address conditional prejudice, whether to allow it or
985 reject it.

986 Rules sketches illustrating the three alternatives for rules
987 approaches are included in the agenda materials. The Subcommittee

988 deliberated its way to the same pattern as the earlier
989 subcommittee. It has not been possible to reach consensus. On the
990 conditional prejudice question, the circuit judges on the
991 Subcommittee would not propose a rule that would manufacture
992 finality in this way. The lawyers seemed to like the idea, and
993 there are indications that district judges also like the idea.

994 This introduction was followed by reflections on the general
995 setting. The final-judgment rule rests on a compromise between
996 competing values. The paradigm final judgment leaves nothing more
997 to be done by the district court, apart from execution if there is
998 a judgment awarding relief. Insisting on finality is a central
999 element in allocating authority between trial courts and appellate
1000 courts. It also conduces to efficiency, both in the trial court and
1001 in the appellate court. Many issues that seem to loom large as a
1002 case progresses will be mooted by the time the case ends in the
1003 district court. Free interlocutory appeal from many orders would
1004 delay district-court proceedings and, upon affirmance, produce no
1005 offsetting benefit. Periodic interruptions by appeals could wreak
1006 havoc with effective case management.

1007 The values of complete finality are offset by the risk that
1008 all trial-court proceedings after a critical and wrong ruling will
1009 be wasted. Some interlocutory orders, moreover, have real-world
1010 consequences or exert pressures on the parties that, if the order
1011 is wrong, are distorting pressures. These concerns underlie not
1012 only the provision for partial final judgments in Rule 54(b) but a
1013 number of elaborations of the final-judgment concept. The best
1014 known elaboration is found in collateral-order doctrine, an
1015 interpretation of the "final decision" language in § 1291 that
1016 allows appeals from orders that do not resemble a traditional final
1017 judgment. Other provisions are found in avowedly interlocutory-
1018 appeal provisions, most obviously in § 1292 and Rule 23(f) for
1019 orders granting or refusing class certification. Extraordinary writ
1020 review also provides review in compelling circumstances.

1021 The recent process of elaborating § 1291 seems, on balance, to
1022 show continuing pressure from the Supreme Court to restrain the
1023 inventiveness shown by the courts of appeals. The courts of appeals
1024 embark on lines of decision that expand appeal opportunities,
1025 confident in their abilities to achieve a good balance among the
1026 competing forces that shape appeal jurisdiction on terms that at
1027 times seem to approach case-specific rules of jurisdiction. The
1028 Supreme Court believes that it is better to resist these
1029 temptations. The clearest illustrations are provided by the line of
1030 cases that have restricted collateral-order appeals by insisting
1031 that collateral-order appeal is proper only when all cases in a
1032 "category" of cases are appealable. Otherwise, no case in a
1033 particular "category" will support appeal.

1034 These are the pressures that have shaped approaches to

1035 manufactured finality. A bewildering variety of circumstances have
1036 been addressed in the cases without generating clear patterns. The
1037 concept of "de facto prejudice" is an example. The seemingly clear
1038 example of dismissal nominally without prejudice in circumstances
1039 that would defeat a new action by a statute of limitations is clear
1040 only if the limitations outcome is clear. But the limitations
1041 question may depend on fact determinations, and even choice of law,
1042 that cannot easily be made in deciding on appeal jurisdiction.
1043 Another example is found in cases that have accepted jurisdiction
1044 when a dismissal is without prejudice to bringing a new action in
1045 a state court — often with very good reason if the critical ruling
1046 by the federal court is affirmed on appeal — but the dismissal is
1047 on terms that bar filing a new action in federal court. And a
1048 particularly clear example is provided by a case in which the
1049 University of Alabama filed an action, only to have the state
1050 Attorney General appear and dismiss the action without prejudice.
1051 The University was allowed to appeal to challenge the Attorney
1052 General's authority to assume control if the action.

1053 The Rules Committees have clear authority under § 2072(c) to
1054 adopt rules that "define when a ruling of a district court is final
1055 for the purposes of appeal under section 1291." But regulating
1056 appeal jurisdiction is an important undertaking. There is great
1057 value in having clear rules. Attorneys who are not thoroughly
1058 familiar with appeal practice may devote countless hours to
1059 attempts to determine whether and when an appeal can be taken, and
1060 may reach wrong conclusions. Even attorneys who are familiar with
1061 these rules may seek reassurance by costly reexamination. And
1062 misguided attempts to appeal can disrupt district-court proceedings
1063 while imposing unnecessary work on the court of appeals.

1064 Clear rules, however, may not always be the best approach.
1065 Clarity can sacrifice important nuances. The pattern of common-law
1066 elaborations of a simply worded appeal statute shows an astonishing
1067 array of subtle distinctions that may provide important protections
1068 by appeal.

1069 The choice to proceed to recommend a clear rule, any clear
1070 rule, is beset by these competing forces.

1071 Discussion began by recognizing that these are hard choices.
1072 Courts of appeals often believe strongly in the opportunity to
1073 shape appeal jurisdiction to achieve an optimal concept of
1074 finality. How would they react, for example, to a recommendation
1075 that adopts finality by dismissal with conditional prejudice?

1076 A related suggestion was that it may be better to leave these
1077 issues to resolution by the Supreme Court in the ordinary course of
1078 reviewing individual cases. Circuit splits can be identified on
1079 some easily defined issues, such as conditional prejudice.

1080 It was further suggested that the Committee does not believe
1081 that it must always act to resolve identifiable circuit splits. The
1082 conditional prejudice issue, for example, "is of first importance
1083 to appellate judges." The Subcommittee, as the earlier
1084 subcommittee, has shown the difficulty of the question through its
1085 divided deliberations. Do we need to act to establish clarity for
1086 lawyers?

1087 These questions are not for the Civil Rules Committee alone.
1088 The Appellate Rules Committee shares responsibility for determining
1089 what is best. So far it has happened that actual rules provisions
1090 tend to wind up in the Civil Rules, in part because many appeal-
1091 affecting provisions remained in the Civil rules when the Appellate
1092 Rules were separated out from their original home in the Civil
1093 Rules. But it is possible to imagine that new rules could be
1094 located in the Appellate Rules, or even in a new and independent
1095 Federal Rules of Appeal Jurisdiction.

1096 Further discussion suggested that everyone agrees that a
1097 dismissal with prejudice is final. It may be useful to say that in
1098 a rule. The Committee Note can say that the rule text does not
1099 address the question whether "conditional prejudice" qualifies as
1100 "with prejudice." It may be worth doing.

1101 A response asked what is the value of a rule that states an
1102 obvious proposition widely accepted? The reply was that people who
1103 are not familiar with appellate practice may benefit.

1104 Judge Sutton noted that these questions first came up in 2005.
1105 "My first reaction was that this is a manufactured problem." The
1106 circuit split on conditional prejudice may be worth addressing, but
1107 either answer could prove difficult to advance through the full
1108 Enabling Act process. And any more general rule would incur the
1109 risk of negative implications. The time has come to fish or cut
1110 bait.

1111 Judge Matheson observed that it would be useful to have the
1112 sense of the Committee to report to the Appellate Rules Committee
1113 when it meets in two weeks.

1114 The first question put to the Committee was whether the best
1115 choice would be to do nothing. Thirteen members voted in favor of
1116 doing nothing. One vote was that it would be better to do
1117 something.

1118 STAYS OF EXECUTION: RULE 62

1119 Judge Matheson began by observing that the questions posed by
1120 Rule 62 and stays of execution arose in part in the Appellate Rules
1121 Committee. They have not been as much explored by the Subcommittee
1122 as the manufactured-finality issues. The focus has been on

1123 execution of money judgments, not judgments for specific relief.
1124 The provisions for injunctions, receiverships, or directing an
1125 accounting may be relocated, but have not been considered for
1126 revision.

1127 Rule 62(a) provides an automatic stay. Until the Time
1128 Computation Project the automatic stay provision dovetailed neatly
1129 with the Rule 62(b) provision for a court-ordered stay pending
1130 disposition of post-judgment motions under Rules 50, 52, 59, and
1131 60. The automatic stay lasted for 10 days, and the time to make the
1132 Rule 50, 52, and 59 motions was 10 days. The Time Computation
1133 Project, however, set the automatic stay at 14 days, but extended
1134 to 28 days the time to move under Rules 50, 52, and 59. A district
1135 judge asked the Committee what to do during this apparent "gap."
1136 The Committee concluded at the time that the court has inherent
1137 authority to stay its own judgment after expiration of the
1138 automatic stay and before a post-judgment motion is made. The
1139 question of amending Rule 62 was deferred to determine whether
1140 actual difficulties arise in practice.

1141 A separate concern arose in the Appellate Rules Committee.
1142 Members of that committee have found it useful to arrange a single
1143 bond that covers the full period between expiration of the
1144 automatic stay and final disposition on appeal. That bond
1145 encompasses the supersedeas bond taken to secure a stay pending
1146 appeal, and is already in place when an appeal is filed.

1147 The Subcommittee has begun work focusing on Rule 62(a), (b),
1148 and (d). Other parts of Rule 62 have yet to be addressed. A
1149 detailed memorandum by Professor Struve, Reporter for the Appellate
1150 Rules Committee, addresses other issues that remain for possible
1151 consideration.

1152 The Subcommittee brings a sketch of possible revisions to the
1153 Committee for reactions. The first question is whether in its
1154 present form Rule 62 causes uncertainties or problems.

1155 The second of two sketches in the agenda book became the
1156 subject of discussion. This sketch rearranges subdivisions (a),
1157 (b), (c), and (d). Revised Rule 62(a) and (b) addresses "execution
1158 on a judgment to pay money, and proceedings to enforce it." It
1159 carries forward an automatic stay, extending the period to 30 days.
1160 But it also recognizes that the court can order a stay at any time
1161 after judgment is entered, setting appropriate terms for the amount
1162 and form of security or denying any security. The court also can
1163 dissolve the automatic stay and deny any further stay, subject to
1164 a question whether to allow the court to dissolve a stay obtained
1165 by posting a supersedeas bond. An order denying or dissolving a
1166 stay may be conditioned on posting security to protect against the
1167 consequences of execution. The order may designate the duration of
1168 a stay, running as late as issuance of the mandate on appeal. That

1169 period could extend through disposition of a petition for
1170 certiorari.

1171 The question whether a supersedeas bond should establish a
1172 right to stay execution pending appeal remains open for further
1173 consideration. Consideration of the amount also remains open — if
1174 a stay is to be a matter of right, the rule might set the amount of
1175 the bond at 125% of the amount of a money judgment.

1176 The purpose of this sketch is to emphasize the primary
1177 authority of the district court to deny a stay, to grant a stay,
1178 and to set appropriate terms for security on granting or denying a
1179 stay. It also recognizes authority to modify or terminate a stay
1180 once granted. Appellate Rule 8 reflects the primacy of the district
1181 court. Explicit recognition of matters that should lie within the
1182 district court's inherent power to regulate execution before and
1183 during an appeal may prove useful.

1184 Discussion began with a judge's suggestion that he had not
1185 seen any problems with Rule 62. The question whether any other
1186 judge on the Committee had encountered problems with Rule 62 was
1187 answered by silence.

1188 The next question was whether the lack of apparent problems
1189 reflects the practice to work out these questions among the
1190 parties. A lawyer member responded that "you wind up stipulating to
1191 a stay through the decision on appeal." Another lawyer member
1192 observed, however, that "there may be power struggles."

1193 It was noted that the "gap" between expiration of the
1194 automatic stay and the time to make post-judgment motions seems
1195 worrisome, but perhaps there are no great practical problems.

1196 Another member said that the "more efficient" draft presented
1197 for discussion is simple, and collects things in a pattern that
1198 makes sense. Most cases are resolved without trial. Even
1199 recognizing summary judgments for plaintiffs, problems of execution
1200 may not arise often. This "little rewrite" seems useful. A judge
1201 repeated the thought — this version "makes for a cleaner rule."

1202 Judge Matheson concluded by noting that the Subcommittee is
1203 "still in a discussion phase." Knowing that Committee members have
1204 not encountered problems with Rule 62 "makes a point. But we can
1205 address the 'gap,' and perhaps work toward a better rule."

1206 *Rule 23 Subcommittee*

1207 Judge Dow began the report of the Rule 23 Subcommittee by
1208 pointing to the list of events on page 243 of the agenda materials.

1209 The Subcommittee has attended or will attend many of these events;
1210 some Subcommittee members will attend others that not all members
1211 are able to attend. The events for this year will culminate in a
1212 miniconference to be held at the Dallas airport on September 11.
1213 The miniconference will be asked to discuss drafts that develop
1214 further the approaches reflected in the preliminary sketches
1215 included in the agenda materials. The most recent of these events
1216 was a roundtable discussion of settlement class actions at George
1217 Washington University Law School. It brought together a terrific
1218 group of practitioners, judges, and academics. It was very helpful.
1219 Suggestions also are arriving from outside sources and are
1220 being posted on the Administrative Office web site. The suggestions
1221 include many matters the Subcommittee has not had on its agenda. It
1222 is important to have the Committee's guidance on just how many new
1223 topics might be added to the Rule 23 agenda. The Subcommittee's
1224 sense has been that there is no need for a fundamental rewrite of
1225 Rule 23. But some of the submissions suggest pretty aggressive
1226 reformulations of Rule 23(a) and (b) that seem to start over from
1227 scratch. These suggestions have overtones of a need to strengthen
1228 the perspective that class actions should be advanced as a means of
1229 increasing private enforcement of public policy values.

1230 A Subcommittee member noted that several professors propose
1231 deletion of Rule 23(a)(1), (2), and (3). Adequacy of representation
1232 would remain from the present rule. And they would add a new
1233 paragraph looking to whether a class action is the best way to
1234 resolve the case as compared to other realistic alternatives. The
1235 question for the Committee is whether we should spend time on such
1236 fundamental issues.

1237 A first reaction was that no compelling justifications have
1238 been offered for these suggestions. It was noted that in deciding
1239 to take up Rule 23, the Committee did not have a sense that a broad
1240 rewrite is needed, but instead focused on specific issues. "The
1241 burden of proof for going further has not been carried."

1242 The next question was whether new issues should be added to
1243 the seven issues listed in the Subcommittee Report that will be
1244 brought on for discussion today.

1245 Multidistrict proceedings were identified as a topic related
1246 to Rule 23. There was a presentation on MDL proceedings to the
1247 Judicial Conference in March. MDL proceedings overlap with Rule 23.
1248 It will be important to pay attention to developments in MDL
1249 practice. And it was noted that discussion at the George Washington
1250 Roundtable included the thought that some of the current Rule 23
1251 sketches reflect approaches that could reduce the pressures that
1252 mass torts exert on MDL practice. Further development of
1253 settlement-class practice might move cases into Rule 23, with the
1254 benefits of judicial review and approval of settlements, and away
1255 from widespread private settlements of aggregated cases free from

1256 any judicial review or supervision. One way of viewing these
1257 possibilities is the idea of a "quasi class action" — a sensible
1258 system for certifying settlement classes could be helpful. So a big
1259 concern is how to settle mass-tort cases after Amchem.

1260 Another suggestion was that the "biggest topic not on our
1261 list" is the concept of "ascertainability" that has recently
1262 emerged from Third Circuit decisions.

1263 Settlement class certification: Discussion turned to the question
1264 whether there should be an explicit rule provision for certifying
1265 settlement classes. One question will be whether the rule should
1266 prescribe the information provided to the court on a motion to
1267 certify and for preliminary "approval." Should the concept be not
1268 preliminary "approval," but instead preliminary "review"? The
1269 review could focus on whether the proposed settlement is
1270 sufficiently cogent to justify certification and notice to the
1271 class. What information does the judge need for taking these steps?
1272 Something like what Rule 16 says should be given to the judge? An
1273 explicit rule provision could guide the parties in what they
1274 present, as well as help the judge in evaluating the proposal.
1275 There was a lot of interest in this at the George Washington
1276 Roundtable.

1277 Further discussion noted that Rule 23(e) does not say anything
1278 about the procedure for determining whether to certify a settlement
1279 class in light of a proposed settlement. At best there is an
1280 oblique implication in the Rule 23(e)(1) provision for directing
1281 notice in a reasonable manner to all class members who would be
1282 bound by the proposal.

1283 A judge observed that once the parties agree on a settlement
1284 and take it to the judge, the judge's reaction is likely to be that
1285 it is good to settle the action. The result may be that notice is
1286 sent to the class without a sufficiently detailed appraisal of the
1287 settlement terms. Problems may appear as class members respond to
1288 the notice, but the process generates a momentum that may lead to
1289 final approval of an undeserving settlement. Another judge observed
1290 that there are great variations in practice. Some judges scrutinize
1291 proposed settlements carefully. Some do not. It would be helpful to
1292 have criteria in the rule.

1293 A choice was offered. The rule could call for a detailed
1294 "front load" of information to be considered before sending out
1295 notice to the class. Or instead it could follow the ALI Aggregate
1296 Litigation Project, characterizing the pre-notice review as review,
1297 not "approval." Discussion at the George Washington Roundtable "was
1298 almost all for front-loading."

1299 A judge said that most of the time in a "big value case" the
1300 lawyers know they should front-load the information. "But when the

1301 parties are not so sophisticated, the late information that emerges
1302 after notice to the class may lead me to blow up the settlement."
1303 And if the settlement is rejected after the first notice, a second
1304 round of notice is expensive and can "eat up most of the case
1305 value."

1306 Another judge observed that "it gets dicey when some
1307 defendants settle and others do not." What seems fairly
1308 straightforward at the time of the early settlement may later turn
1309 out to be more complicated.

1310 A lawyer thought that front-loading sounds like it makes
1311 sense. But the agenda materials do not include rule language for
1312 this. What factors should be addressed by the parties and
1313 considered by the court? It was suggested that the factors are
1314 likely to be much the same as the factors a court considers in
1315 determining whether to give final approval. One perspective is
1316 similar to the predictions made when considering a preliminary
1317 injunction: a "likelihood of approval" test at the first stage.

1318 Another judge said that the Third Circuit "is pretty clear on
1319 what I should consider. Lawyers who practice class actions
1320 understand the factors." But there are many class actions — for
1321 example under the Fair Credit Reporting Act — brought by lawyers
1322 who do not understand class-action practice. Those lawyers will not
1323 be helped by a new rule. There is no problem calling for a more
1324 detailed rule. A different judge agreed that the problem lies with
1325 the less experienced lawyers.

1326 Yet another judge expressed surprise at this discussion. "We
1327 go through pretty much the same information as needed for final
1328 approval of a settlement." It may help to say that in generic terms
1329 in rule text, but it is less clear whether detailed standards
1330 should be stated in the rule.

1331 And another judge said "I do less work on the front end than
1332 at the back end. But the factors are the same."

1333 The final comment was that drafting a rule provision will
1334 require careful balancing. There are impulses to make the criteria
1335 for final approval simpler and clearer, as will be discussed. But
1336 there also are impulses to demand more information up front.

1337 It was agreed that the Subcommittee agenda would be expanded
1338 to include a focus on the procedure for determining whether to
1339 approve notice to the class of a settlement, looking toward final
1340 certification and approval.

1341 Rule 23(f) Appeal of Settlement Class Certification: The question
1342 whether a Rule 23(f) appeal can be taken from preliminary approval
1343 of a settlement class has come to prominence with the Third Circuit

1344 decision in the NFL case. Given the language of Rule 23(f) as it
1345 stands, the answer seems to turn on whether preliminary approval of
1346 a settlement and sending out notice to the class involves
1347 "certification" of the settlement class. The deeper question is
1348 whether it is desirable to allow appeal at that point, remembering
1349 that appeal is by permission and that it might be hoped that a
1350 court of appeals will quickly deny permission to appeal when there
1351 are not compelling reasons to risk derailing the settlement by the
1352 delays of appeal.

1353 The question of appeal at the preliminary review and notice
1354 stage is not academic. High profile cases are likely to draw the
1355 attention of potential objectors well before the preliminary
1356 review. They may view the opportunity to seek permission to appeal
1357 at this stage as a powerful opportunity to exert leverage.

1358 The Third Circuit ruled that Rule 23(f) does not apply at this
1359 stage. But other courts of appeals have simply denied leave to
1360 appeal without saying whether Rule 23(f) would authorize an appeal
1361 if it seemed desirable. This issue will arise again. The Third
1362 Circuit reasoned that the record at this early stage will not be
1363 sufficient to support informed review. But if the rules are amended
1364 to require the parties to present sufficient information for a
1365 full-scale evaluation of the proposed settlement at the preliminary
1366 review stage, that problem may be reduced.

1367 A judge observed that Rule 23(f) hangs on the seismic effect
1368 of certification or a refusal to certify. Certification of a
1369 settlement class is very important. It is rare to go to trial.
1370 Certification even for trial tends to end the case by settlement.
1371 So what, then, of certification for settlement? Will an opportunity
1372 to appeal enable objectors to derail settlements? Given the
1373 agreement of class and the opposing parties to settle, a court of
1374 appeals will be reluctant to grant permission to appeal.

1375 Uncertainty was expressed whether the possibility of a §
1376 1292(b) appeal with permission of the trial court as well as the
1377 court of appeals may provide a sufficient safety valve.

1378 An observer stated that "the notice process is what brings out
1379 objectors." If Rule 23(f) appeal is available on preliminary
1380 review, the way may be opened for a second Rule 23(f) appeal after
1381 notice has gone out.

1382 It was agreed that seriatim Rule 23(f) appeals would be
1383 undesirable.

1384 The discussion concluded with some sense that the Third
1385 Circuit approach seems sensible. Whether Rule 23(f) should be
1386 revised to entrench this approach may depend on the text of any
1387 rule that formalizes the process of certifying a settlement class.

1388 If the rule calls for certification only after preliminary review,
1389 notice, review of any objections, and final approval of the
1390 settlement, then there will be no room to argue that the
1391 preliminary review grants certification, nor, for that matter, that
1392 refusal to send out notice after a preliminary review denies
1393 certification.

1394 A final Rule 23(f) question was noted later in the meeting.
1395 The Department of Justice continues to experience difficulties with
1396 the requirement that the petition for permission to appeal be filed
1397 with the circuit clerk within 14 days after the order is entered.
1398 It will explore this question further and present the issue in
1399 greater detail in time for the fall meeting.

1400 With this, discussion turned to the seven topics listed in the
1401 agenda materials.

1402 Criteria for Settlement Approval: Rule 23(e) was revised in the
1403 last round of amendments to adopt the "fair, reasonable, and
1404 adequate" phrase that had developed in the case law to express the
1405 multiple factors articulated in somewhat different terms by the
1406 several circuits. At first a long list of factors was included in
1407 draft rule text. The factors were then demoted to a draft Committee
1408 Note that is set out in the agenda materials. Eventually the list
1409 of factors as abandoned for fear it would become a "check list"
1410 that would promote routinized presentations on each factor, no
1411 matter how clearly irrelevant to a particular case, and divert
1412 attention from serious exploration of the factors that in fact are
1413 important in a particular case.

1414 The question now is whether the rule text should elaborate, at
1415 least to some extent, on the bland "fair, reasonable, and adequate"
1416 phrase. The ALI Aggregate Litigation Project criticized the "grab
1417 bag" of factors to be found in the decisions, but provided a model
1418 of a more focused set of criteria requiring four findings, looking
1419 to adequate representation; evaluation of the costs, risks,
1420 probability of success, and delays of trial and appeal; equitable
1421 treatment of class members relative to each other; and arm's-length
1422 negotiation without collusion. These factors are stated in the
1423 agenda sketch as a new Rule 23(e)(2)(A), supplemented by a new (B)
1424 allowing a court to consider any other pertinent factor and to
1425 refuse approval on the basis of any such other factor. The goal is
1426 to focus attention on the matters that are useful. A related goal
1427 is to direct attention away from factors that have been articulated
1428 in some opinions but that do not seem useful. The common example of
1429 factors that need not be considered is the opinion of counsel who
1430 shaped the proposed settlement that the settlement is a good one.

1431 One reaction to this approach may be "I want my Circuit
1432 factors." Another might be that the draft Committee Note touches on
1433 too many factors. And of course yet another reaction might be that

1434 these are not the right factors.

1435 A participant recalled a remark by Judge Posner during the
1436 George Washington Roundtable discussion: "why three words?
1437 'Reasonable' says it all" — the appropriate amendment would be to
1438 strike "fair" and adequate" from the present rule text. The
1439 response was that these three words had become widely used in the
1440 cases when Rule 23(e) was amended. They were designed to capture
1441 ongoing practice. There is little need to delete them simply to
1442 save two words in the body of all the rules.

1443 The agenda materials include a spreadsheet comparing the lists
1444 of approval factors that have been articulated in each Circuit. It
1445 was asked whether each of these factors is addressed in the draft
1446 Committee Note. Not all are. Greater detail could be added to the
1447 Note. Some factors are addressed negatively in the note, such as
1448 support of the settlement by those who negotiated it. The
1449 formulation in rule text was built on the foundation provided by
1450 the ALI. The question is how far the Committee Note should go in
1451 highlighting things that really matter.

1452 A judge observed that the sketch of rule text required the
1453 court to consider the four listed elements, but the text then went
1454 on to allow the court to reject a settlement by considering other
1455 matters even though the settlement had been found fair, reasonable,
1456 and adequate. Would it not be better to frame it to make it clear
1457 that these other factors bear on the determination whether the
1458 settlement is fair, reasonable, and adequate? What factors might
1459 those be?

1460 A response was that this sketch of a Rule 23(e)(2)(B) is a
1461 catch-all for case- or settlement-specific factors. Such factors
1462 may be important. It might be used to invoke the old factors lists,
1463 but it seems more important to capture unique circumstances.

1464 Subparagraph (B) also generated this question: Is this
1465 structure designed so that passing inspection under the required
1466 elements of subparagraph (A) creates a presumption of fairness that
1467 shifts the burden from the proponents of the settlement to the
1468 opponents? The immediate response was that this question requires
1469 further thought, but that often it is not useful to think of
1470 sequential steps of procedure as creating a "presumption" that
1471 invokes shifting burdens.

1472 A different approach asked what is gained by this middle
1473 ground that avoids any but a broad list of considerations without
1474 providing a detailed list of factors? So long as these open-ended
1475 considerations remain, they can be used to carry forward all of the
1476 factors that have been identified in any circuit. All of those
1477 factors were used to elaborate the capacious "fair, reasonable, and
1478 adequate" formula, and they still will be.

1479 A response was that various circuits list 10, or 12, or 15
1480 factors. Some are more important than others. "Distillation could
1481 help." But the reply was that "then we should make clear that these
1482 are the only factors."

1483 The next step was agreement that if a proposal to amend Rule
1484 23(e) emerges from this work, it should be sent out for comment
1485 without the "any other matter pertinent" provision sketched in
1486 subparagraph (B).

1487 Turning back to subparagraph (A), it was noted that it will be
1488 difficult to implement criterion (iv), looking to arm's-length
1489 negotiation without collusion. The lawyers will always say that
1490 they negotiated at arm's length and did not collude. The response
1491 was that this element is one to be shown by objectors. If they make
1492 the showing of "collusion" — an absence of arm's length negotiation
1493 — the settlement must be disapproved. This was challenged by asking
1494 whether a court should be required to disapprove a settlement that
1495 in fact is fair, reasonable, and adequate — perhaps the best deal
1496 that can be made — simply for want of what seems an arm's-length
1497 negotiation?

1498 A broader perspective was brought to bear. Courts commonly
1499 recognize separate components in evaluating a proposed settlement,
1500 one procedural and the other substantive. There may be striking
1501 examples that combine both components, as in one case where a
1502 settlement was quickly arranged for the purpose of preempting a
1503 competing class action in a state court. It may be hoped that such
1504 examples are rare.

1505 A twist was placed on the nature of "collusion." One dodge may
1506 be that parties who have engaged in amicable negotiations take the
1507 deal to some form of ADR — often a retired judge — for review and
1508 blessing. "If reputable counsel are involved, it's different from
1509 a rushed settlement by an inexperienced lawyer."

1510 Item (iv), then, might be dropped. But the focus on procedural
1511 fairness and adequacy may be important. It may be useful to
1512 highlight it in rule text.

1513 Discussion of these issues concluded with a reminder that the
1514 federal law of attorney conduct is growing. Collusion is prohibited
1515 by state rules of attorney conduct. These rules are adopted into
1516 the local rules of federal courts. Item (iv) will become "another
1517 rule governing attorney conduct."

1518 Settlement Class Certification: A settlement-class rule was
1519 published for comment as a new subdivision (b)(4) at virtually the
1520 same time as the Amchem decision in the Supreme Court. The
1521 Committee suspended consideration to allow time to evaluate the
1522 aftermath of the Amchem decision. The idea of reopening the

1523 question is that certification to settle is different from
1524 certification to try the case. The ALI Aggregate Litigation Project
1525 is something like this. Most participants in the George Washington
1526 Roundtable discussion were of similar views.

1527 One common thread that distinguishes proposals to certify a
1528 settlement class from trial classes is to downplay the role of
1529 "predominance" in a (b)(3) class.

1530 Two alternative sketches are presented in the agenda
1531 materials. The first expressly invokes Rule 23(a), and includes an
1532 optional provision invoking subdivision (b)(3). Certification
1533 focuses on the superiority of the proposed settlement and on
1534 finding that the settlement should be approved under Rule 23(e).
1535 The second includes a possible invocation of Rule 23(b)(3), but
1536 focuses on reducing the Rule 23(a) elements by looking to whether
1537 the class is "sufficiently numerous to warrant classwide
1538 treatment," and the sufficiency of the class definition to
1539 determine who is in the class.

1540 Is either alternative a useful addition to Rule 23?

1541 A judge offered no answers, but only questions. "It is a big
1542 step to downplay predominance." At some point a settlement class
1543 judgment where common issues do not predominate might violate
1544 Article III or due process. "Huge numbers of cases will be moved
1545 from (b)(3) to (b)(4)."

1546 The first response was that many predominance issues are
1547 obviated by settlement. The common illustration is choice of law.
1548 By adopting common terms, the settlement avoids the difficulties
1549 that arise when litigation would require applying different bodies
1550 of law, emphasizing different elements, to different groups within
1551 the class. But the reply was that the sketch does not refer to
1552 predominance for settlement.

1553 The next observation was that "manageability" appears in the
1554 text of Rule 23(b)(3) now, and at the time of Amchem, but the Court
1555 ruled in Amchem that manageability concerns can be obviated by the
1556 terms of settlement. Commonality, on the other hand, provides
1557 protection to class members, even if its significance is reduced by
1558 the terms of settlement.

1559 That observation led to the question whether, if Rule 23(a)
1560 continues to be invoked for settlement classes, the result will be
1561 to place greater weight on typicality. The first response was that
1562 "typicality is easy." But what of common causation issues, and
1563 defenses against individual claimants, that are not common? The
1564 only response was that if class treatment is not recognized, cases
1565 will settle by other aggregated means that provide no judicial
1566 review or control.

1567 Cy pres: The agenda materials include a sketch that would add an
1568 extensive set of provisions for evaluating cy pres distributions to
1569 Rule 23(e)(1). The sketch is based on the ALI Aggregate Litigation
1570 Project, § 3.07. The value of addressing these issues in rule text
1571 turns in part on the fact that cy pres distributions seem to be
1572 rather common, and in part on the hesitations expressed by Chief
1573 Justice Roberts in addressing a denial of certiorari in a cy pres
1574 settlement case. Nothing in the federal rules addresses cy pres
1575 issues now. Some state provisions do — California, for example, has
1576 a cy pres statute.

1577 The sketch narrowly limits cy pres recoveries. The first
1578 direction is to distribute settlement proceeds to class members
1579 when they can be identified and individual distributions are
1580 sufficiently large to be economically viable. The next step, if
1581 funds remain after distributions to individual class members, is to
1582 make a further distribution to the members that have participated
1583 in the first distribution unless the amounts are too small to be
1584 economically viable or other specific reasons make further
1585 individual distributions impossible or unfair. Finally, a cy pres
1586 approach may be employed for remaining funds if the recipient has
1587 interests that reasonably approximate the interests of class
1588 members, or, if that is not possible, to another recipient if that
1589 would serve the public interest. This cy pres provision includes a
1590 bracketed presumption that individual distributions are not viable
1591 for sums less than $100, but recent advice suggests that in fact
1592 claims administrators may be able to provide efficient
1593 distributions of considerably smaller sums.

1594 The opening lines of the sketch include, in brackets, a
1595 provision that touches a sensitive question. These words allow
1596 approval of a proposal that includes a cy pres remedy "if
1597 authorized by law." There is virtually no enacted authority for cy
1598 pres remedies in federal law. The laws of a few states do address
1599 the question. It may be possible to speak to the sources of
1600 authority in the general law of remedies. But the question remains:
1601 courts are approving cy pres distributions now. If the practice is
1602 legitimate, there should be authority to regulate it by court rule.
1603 If it is not legitimate, it would be unwise to attempt to
1604 legitimate it by court rule.

1605 The value of cy pres distributions depends in large measure on
1606 how effective the claims process is in reducing the amounts left
1607 after individual claims are paid. Courts are picking up the ALI
1608 principle. It seems worthwhile to confirm it in Rule 23.

1609 The first question was whether the rule should require the
1610 settlement agreement to address these issues. That would help to
1611 reduce the Article III concerns. This observation was developed
1612 further. Suppose the agreement does not address disposition of
1613 unclaimed funds. What then? Must there be a second (and expensive)

1614 notice to the class of any later proposal to dispose of them? The
1615 sketch Committee Note emphasizes that cy pres distribution is a
1616 matter of party agreement, not court action.

1617 It was observed that even though a cy pre distribution is
1618 agreed to by the parties, it becomes part of the court's judgment.
1619 It can be appealed. And there is a particular problem if cy pres
1620 distribution is the only remedy. Suppose, for example, a
1621 defendant's wrong causes a ten-cent injury to each of a million
1622 people. Individual distributions do not seem sensible. But finding
1623 an alternative use for the $100,000 of "damages" seems to be
1624 creating a new remedy not recognized by the underlying substantive
1625 law of right and remedy.

1626 Another judge noted that "courts have been doing this, but
1627 it's a matter of follow-the-leader." There is not a lot of
1628 endorsement for the practice, particularly at the circuit level. Cy
1629 pres theory has its origins in trust law. Settlement class
1630 judgments ordinarily are not designed to enforce a failed trust.
1631 "What is the most thoughtful judicial discussion" that explains the
1632 justification for these practices?

1633 The response was that cy pres recoveries have been discussed
1634 in a number of California state cases. California recognizes "fluid
1635 recovery," as illustrated by the famous case of an order reducing
1636 cab fares in Los Angeles — there was likely to be a substantial
1637 overlap between the future cab users who benefit from the period of
1638 reduced fares and the past cab users who paid the unlawful high
1639 fares, but the overlap was not complete. The Eighth Circuit has
1640 provided a useful review this year. And cy pres distribution can be
1641 made only when the court has found the settlement to be fair,
1642 reasonable, and adequate. That determination itself requires an
1643 effort to compensate class members — by direct distribution if
1644 possible, but if that is not possible in some other way.

1645 A judge noted a recent case in his court involving a defendant
1646 who sent out 100,000,000 spam fax messages. The records showed the
1647 number of faxes, but then the records were spoliated. There was no
1648 record of where the faxes had gone. The liability insurer agreed to
1649 settle for $300 for each of the class representatives. But what
1650 could be done with the remaining liability, which — with statutory
1651 damages — was for a staggering sum? Seven states in addition to
1652 California provide for distributing a portion of a cy pres recovery
1653 to Legal Services. That still leaves the need to dispose of the
1654 rest. Addressing these questions in rule text must rest on the
1655 premise that such distributions are proper.

1656 It was agreed that these questions are serious. The ALI
1657 pursued them to cut back on cy pres distributions, to make it
1658 difficult to bypass class members. Perhaps a rule should say that
1659 it is unfair to have all the settlement funds distributed to

1660 recipients other than class members.

1661 Discussion concluded on two notes: these questions cannot be
1662 resolved in a single afternoon. And although it would be possible
1663 to adopt a rule that forbids cy pres distributions, that probably
1664 is not a good idea.

1665 Objectors: Objectors play a role that is recognized by Rule 23 and
1666 that is an important strand in reconciling class-action practice
1667 with the dictates of due process. Well-framed objections can be
1668 very valuable to the judge. At the same time, it is widely believed
1669 that there are "bad objectors" who seek only strategic personal
1670 gain, not enhancement of values for the class. On this view, some
1671 objectors may seek to exploit their ability to delay a payout to
1672 the class in order to extract tribute from class counsel that may
1673 be to the detriment of class interests. Rule 23(e)(5) was added to
1674 reflect the concern with improperly motivated objections by
1675 requiring court approval for withdrawal of an objection. This
1676 provision appears to have been "somewhat successful."

1677 The Appellate Rules Committee is studying proposals to
1678 regulate withdrawal of objections on appeal. The Rule 23
1679 Subcommittee is cooperating in this work.

1680 Alternative sketches are presented at page 273 in the agenda
1681 materials. In somewhat different formulations, each requires the
1682 parties to file a statement identifying any agreement made in
1683 connection with withdrawal of an objection. An alternative approach
1684 is illustrated by sketches at pages 274-275 of the agenda
1685 materials. The first simply incorporates a reminder of Rule 11 in
1686 rule 23(e)(5). The second creates an independent authority to
1687 impose sanctions on finding that an objection is insubstantial or
1688 not reasonably advanced for the purpose of rejecting or improving
1689 the settlement.

1690 No rule can define who is a "good" or a "bad" objector. The
1691 idea of these sketches is to alert and arm judges to do something
1692 about bad objectors when they can be identified.

1693 Another possibility that has been considered is to exact a
1694 "bond" from an objector who appeals. The more expansive versions of
1695 the bond would seek to cover not simply the costs of appeal — which
1696 may be considerable — but also "delay costs" reflecting the harm
1697 resulting from delay in implementing the settlement when the appeal
1698 fails.

1699 A "good" objector who participated in the George Washington
1700 Roundtable commented extensively on the obstacles that already
1701 confront objectors.

1702 The first comment was that sanctions on counsel "are more and

1703 more regulation of attorney conduct."

1704 And the first question from an observer was whether discovery
1705 is appropriate to support objections. The response was that it is
1706 not likely that a rule would be written to provide automatic access
1707 to discovery. There is a nexus to opt-out rights. At most such
1708 issues might be described in a Committee Note, recognizing that at
1709 times discovery may be valuable.

1710 The next question was whether courts now have authority under
1711 Rule 11 and 28 U.S.C. § 1927 to impose sanctions on frivolous
1712 objections or objections that multiply the proceedings unreasonably
1713 and vexatiously. The response was that the second alternative, on
1714 page 275, seems to cut free from these sources of authority,
1715 creating an independent authority for sanctions. But it remains
1716 reasonable to ask whether independent authority really is needed.
1717 One departure from Rule 11, for example, is that Rule 11 creates a
1718 safe harbor to withdraw an offending filing as a matter of right;
1719 the Rule 23 sketch does not include this.

1720 Rule 68 Offers: The sketches in the agenda materials, beginning at
1721 page 277, provide alternative approaches to a common problem.
1722 Defendants resisting class certification often attempt to moot the
1723 representative plaintiff by offering complete individual relief.
1724 Often the offers are made under Rule 68. Although acceptance of a
1725 Rule 68 offer leads to entry of a judgment, it is difficult to find
1726 any principled reason to suppose that a Rule 68 offer has greater
1727 potential to moot an individual claim than any other offer,
1728 particularly one that may culminate in entry of a judgment. Courts
1729 have reacted to this ploy in different ways. The Supreme Court has
1730 held that a Rule 68 offer of complete relief to the individual
1731 plaintiff in an opt-in action under the Fair Labor Standards Act
1732 moots the action. The opinion, however, simply assumed without
1733 deciding that the offer had in fact mooted the representative
1734 plaintiff's claim, and further noted that an opt-in FLSA action is
1735 different from a Rule 23 class action. Beyond that, courts seem to
1736 be increasingly reluctant to allow a defendant to "pick off" any
1737 representative plaintiff that appears, and thus forever stymie
1738 class certification. Some of the strategies are convoluted. In the
1739 Seventh Circuit, for example, a class plaintiff is forced to file
1740 a motion for class certification on filing the complaint because
1741 only a motion for certification defeats mooting the case by an
1742 offer of complete individual relief. But it also is recognized that
1743 an attempt to rule on certification at the very beginning of the
1744 action would be foolish, so the plaintiff also requests, and the
1745 courts understand, that consideration of the certification motion
1746 be deferred while the case is developed. This convoluted practice
1747 has not commended itself to judges outside the Seventh Circuit.

1748 The first sketch attacks the question head-on. It provides
1749 that a tender of relief to a class representative can terminate the

1750 action only if the court has denied certification and the court
1751 finds that the tender affords complete individual relief. It
1752 further provides that a dismissal does not defeat the class
1753 representative's standing to appeal the order denying
1754 certification.

1755 The second sketch simply adopts a provision that was included
1756 in Rule 68 amendments published for comment in 1983 and again in
1757 1984. This provision would direct that Rule 68 does not apply to
1758 actions under Rules 23, 23.1, and 23.2. It did not survive
1759 withdrawal of the entire set of Rule 68 proposals.

1760 The third sketch begins by reviving a one-time practice that
1761 was at first embraced and then abandoned in the 2003 amendments.
1762 This practice required court approval to dismiss an action brought
1763 as a class action even before class certification. The parties must
1764 identify any agreement made in connection with the proposed
1765 dismissal. The sketch also provides that after a denial of
1766 certification, the plaintiff may settle an individual claim without
1767 prejudice to seeking appellate review of the denial of
1768 certification.

1769 The first question was whether these proposals reflect needs
1770 that arise from limits on the ability to substitute representatives
1771 when one is mooted. The first response was that it is always safer
1772 to begin with multiple representatives. But it was suggested that
1773 the problem might be addressed by a rule permitting addition of new
1774 representatives. That approach is often taken when an initial
1775 representative plaintiff is found inadequate.

1776 The next observation was that substituting representatives may
1777 not solve the problem. The defendant need only repeat the offer to
1778 each successive plaintiff. The approach taken in the first sketch
1779 is elegant.

1780 Another member observed that courts allow substitution of
1781 representatives at the inadequacy stage of the certification
1782 decision. But substitution may require formal intervention. That is
1783 too late to solve the mootness problem. These issues are worth
1784 considering.

1785 The last observation was that the Seventh Circuit work-around
1786 seems to be effective. "It's not that big a deal." But the first
1787 and second sketches are simple.

1788 Issues Classes: The relationship of Rule 23(c)(4) issues classes to
1789 the predominance requirement in Rule 23(b)(3) has been a
1790 longstanding source of disagreement. One view is that an issue
1791 class can be certified only if common issues predominate in the
1792 claims considered as a whole. The other view is that predominance
1793 is required only as to the issues certified for class treatment.

1794 There are some signs that the courts may be converging on the view
1795 that predominance is required only as to the issues.

1796 The first sketch in the agenda materials, page 281, simply
1797 adds a few words to Rule 23(b)(3): the court must find that
1798 "questions of law or fact common to the class predominate over any
1799 questions affecting only individual class members, subject to Rule
1800 23(c)(4), and * * *." The "subject to Rule 23(c)(4)" phrase may
1801 seem somewhat opaque, but the meaning could be elaborated in the
1802 Committee Note.

1803 The second sketch, at page 282, would amend Rule 23(f) to
1804 allow a petition to appeal from an order deciding an issue
1805 certified for class treatment. The rule might depart from the
1806 general approach of Rule 23(f), which requires permission only from
1807 the court of appeals, by adding a requirement that the district
1808 court certify that there is no just reason for delay. This added
1809 requirement, modeled on Rule 54(b), might be useful to avoid
1810 intrusion on further management of the case. An opportunity for
1811 immediate appeal could be helpful before addressing other matters
1812 that remain to be resolved.

1813 A judge asked the first question. "Every case I have seen
1814 excludes issues of damages. Does this mean that every class is a
1815 (c)(4) issues class that does not need to satisfy the predominance
1816 requirement"? That question led to a further question: What is an
1817 issue class? An action clearly is an issue class if the court
1818 certifies a single issue to be resolved on a class basis, and
1819 intends not to address any question of individual relief for any
1820 class member. The action, for example, could be limited to
1821 determining whether an identified product is defective, and perhaps
1822 also whether the defect can be a general cause of one or more types
1823 of injury. That determination would become the basis for issue
1824 preclusion in individual actions if defect, and — if included —
1825 general causation were found. Issues of specific causation,
1826 comparative responsibility, and individual injury and damages would
1827 be left for determination in other actions, often before other
1828 courts. But is it an "issue" class if the court intends to
1829 administer individual remedies to some, or many, or all members of
1830 the class? We have not thought of an action as an issue class if
1831 the court sets the questions of defect and general causation for
1832 initial determination, but contemplates creation of a structure for
1833 processing individual claims by class members if liability is found
1834 as a general matter.

1835 This plaintive question prompted a response that predominance
1836 still is required for an issue class. This view was repeated.
1837 Discussion concluded at that point.

1838 Notice: The first question of class-action notice is illustrated by
1839 a sketch at page 285 of the agenda materials. Whether or not it was

1840 wise in 1974 to read Rule 23(c) to require individualized notice by
1841 postal mail whenever possible, that view does not look as
1842 convincing today. Reality has outstripped the Postal Service. The
1843 sketch would add a few words to Rule 23(c)(2)(B), directing
1844 individual notice "by electronic or other means to all members who
1845 can be identified through reasonable effort." The Committee Note
1846 could say that means other than first class mail may suffice.

1847 This proposal was accepted as an easy thing to do.

1848 The Committee did not discuss a question opened in the agenda
1849 materials, but not yet much explored by the Subcommittee. It may be
1850 time to reopen the question of notice in Rule 23(b)(1) and (2)
1851 classes, even though the concern to enable opt-out decisions is not
1852 present. It is not clear whether the Subcommittee will recommend
1853 that this question be taken up.

1854 *Pilot Projects*

1855 Judge Campbell opened the discussion of pilot projects by
1856 describing the active panel presentation and responses at the
1857 January meeting of the Standing Committee. Panel members explored
1858 three possible subjects for pilot projects: enhanced initial
1859 disclosures, simplified tracks for some cases, and accelerated
1860 ("Rocket") dockets.

1861 The Standing Committee would like to encourage this Committee
1862 to frame and encourage pilot projects. It likely will be useful to
1863 appoint a subcommittee to study possible projects, looking to what
1864 has been done in state courts and federal courts, and to recommend
1865 possible subjects.

1866 One potential issue must be confronted. Implementation of a
1867 pilot project through a local district court rule must come to
1868 terms with Rule 83 and the underlying statute, 28 U.S.C. § 2071(a),
1869 which direct that local rules must be consistent with the national
1870 Enabling Act rules. The agenda materials include the history of a
1871 tentative proposal twenty years ago to amend Rule 83 to authorize
1872 local rules inconsistent with the national rules, subject to
1873 approval by the Judicial Conference and a 5-year time limit. The
1874 proposal was abandoned without publication, in part for uncertainty
1875 about the fit with § 2071(a).

1876 The Rule 83 question will depend in part on the approach taken
1877 to determine consistency, or inconsistency, with the national
1878 rules. The current employment protocols employed by 50 district
1879 judges are a good illustration. They direct early disclosure of
1880 much information that ordinarily has been sought through discovery.
1881 But they seem to be consistent with the discovery regime
1882 established in Rule 26, recognizing the broad discretion courts
1883 have to guide discovery.

1884 Initial Disclosures: Part of the Rule 26(a)(1) history was
1885 discussed earlier in this meeting. The rule adopted in 1993
1886 directed disclosure of witnesses with knowledge, and documents,
1887 relevant to disputed matters alleged with particularity in the
1888 pleadings. It included a provision allowing districts to opt out by
1889 local rule; this provision was included under pressure from
1890 opponents who disliked the proposal. The rule was revised in 2000
1891 as part of the effort to eliminate the opt-out provision of the
1892 1993 rule, limiting disclosure to witnesses and documents the
1893 disclosing party may use. Arizona Rule 26.1 requires much broader
1894 disclosure even than the 1993 version of Rule 26(a)(1). It is
1895 clearly intended to require disclosure of unfavorable information
1896 as well as favorable information. The proposal for adoption was
1897 greeted by protests that such disclosures are inconsistent with the
1898 adversary system. The Arizona court nonetheless persisted in
1899 adoption. This broad disclosure is coupled with restrictions on
1900 post-disclosure discovery. Permission is required, for example, to
1901 depose nonparty witnesses. Arizona lawyers were surveyed to gather
1902 reactions to this rule in 2008 and 2009. In the 2008 survey, 70% of
1903 the lawyers with experience in both state and federal courts
1904 preferred to litigate in state court. (Nationally, only 43% of
1905 lawyers with experience in both state and federal courts prefer
1906 their state courts.) The results in the 2009 survey were similar.
1907 More than 70% of the lawyers who responded said that initial
1908 disclosures help to narrow the issues more quickly. The Arizona
1909 experience could be considered in determining whether to launch a
1910 pilot project in the federal courts.

1911 An observer from Arizona said that debate about the initial
1912 disclosure rule declines year-by-year. "It does require more work
1913 up front, but it is, on average, faster and cheaper. Unless a
1914 client wants it slow and expensive, we often recommend state
1915 court." An action can get to trial in state court in 12, or 16,
1916 months. Two years is the maximum. It takes longer in federal court.
1917 He further observed that Arizona should be considered as a district
1918 to be included in a federal pilot project because the bar, and much
1919 of the bench, understand broad initial disclosures.

1920 The next comment observed that a really viable study should
1921 include districts where broad initial disclosure "is a complete
1922 shock to the system." There may be a problem with a project that
1923 exacts disclosures inconsistent with the limited requirements of
1924 Rule 26(a)(1). But it is refreshing to consider a dramatic
1925 departure, as compared to the usually incremental changes made in
1926 the federal rules. This comment also observed that even in
1927 districts that adhered to the 1993 national rule, lawyers often
1928 agreed among themselves to opt out.

1929 A member asked whether comparative data on case loads were
1930 included in the study of Arizona experience. The answer was that
1931 they were not in the study. But Maricopa County has 120 judges.

1932 Their dockets show case loads per judge as heavy as the loads in
1933 federal court.

1934 A judge observed that a mandatory initial disclosure regime
1935 that includes all relevant information would be an integral part of
1936 ensuring proportional discovery. The idea is to identify what it is
1937 most important to get first. A pilot project would generate this
1938 information as a guide to judicial management. The judge could ask:
1939 "What more do you need"? This process could be integrated with the
1940 Rule 26(f) plan. This is an extraordinarily promising prospect.
1941 There will be enormous pushback. Justice Scalia, in 1993, wondered
1942 about the consistency of initial disclosure with an adversary
1943 system. But the success in Arizona provides a good response.

1944 Accelerated Dockets: This topic was introduced with a suggestion
1945 that the speedy disposition rates recently achieved in the Western
1946 District of Wisconsin appear to be fading. The Southern District of
1947 Florida has achieved quick disposition times for some cases. "Costs
1948 are proportional to time." Setting a short time for discovery
1949 reflects what is generally needed. State-court models exist. The
1950 "patent courts" are experimenting with interesting possibilities.
1951 The Federal Judicial Center will report this fall on experience
1952 with the employment protocols.

1953 These and other practices may help determine whether a pilot
1954 project on simplified procedures could be launched. Federal-court
1955 tracking systems could be studied at the beginning. State court
1956 practices can be consulted.

1957 A member provided details on the array of cases filed in
1958 federal court. The four most common categories include prisoner
1959 actions, tort claims, civil rights actions (labor claims can be
1960 added to this category), and contract actions. Smaller numbers are
1961 found for social security cases, consumer credit cases, and
1962 intellectual property cases. Some case types lend themselves to
1963 early resolution. Early case evaluation works if information is
1964 shared. Early mediation also works, although the type of case
1965 affects how early it can be used.

1966 One thing that would help would be to have an e-discovery
1967 neutral available on the court's staff to help parties work through
1968 the difficulties. Many parties do not know what they're doing with
1969 e-discovery. This member has worked as an e-discovery master.
1970 "Weekly phone calls can save the parties a lot of money." One ploy
1971 that works is to begin with a presumption that the parties will
1972 share the master's costs equally, unless the master recommends that
1973 one party should bear a larger share. That provision, and the fact
1974 that they're being watched, dramatically reduces costs and delay.
1975 And e-discovery mediation can help.

1976 It also helps when the parties understand the case well enough

1977 for early mediation.

1978 And experience as an arbitrator, where discovery is limited to
1979 what the arbitrator directs, shows that it is possible to control
1980 costs in a fair process.

1981 Another suggestion was that a statute allows summary jury
1982 trial. If the parties agree, it can be a real help. The trial can
1983 be advisory. It may be limited, for example to 3 hours per party.
1984 Summaries of testimony, or live witnesses, may be used. Charts may
1985 be used. "Juries love it." After the jury decides, lawyers can ask
1986 the jury why they did what they did. This practice can be a big
1987 help in conjunction with a settlement conference.

1988 Another suggestion was that it would help to devise rules to
1989 dispose of cases that require the court to review a "record."
1990 Social Security cases, IDEA cases, and ERISA fiduciary cases are
1991 examples.

1992 Another judge noted that the Northern District of Ohio has a
1993 differentiated case management plan. The categories of cases
1994 include standard, expedited, complex, mass tort, and
1995 administrative. There are ADR options, and summary jury trial. It
1996 would be good to study this program to see how it works out over
1997 time.

1998 Discussion concluded with the observation that if done well,
1999 study of these many alternatives could lead to useful pilot
2000 projects.

2001 Judge Sutton concluded the discussion of pilot projects by
2002 noting that the Standing Committee is grateful for all the work
2003 done on the Duke Rules package and on Rule 37(e). He further noted
2004 that Rule 26(a)(1) failed in its initial 1993 form because it was
2005 a great change from established habits. It may be worthwhile to
2006 restore it, or something much like it, as a pilot project in 10 or
2007 15 districts to see how it might be made to work now.

2008 Judge Sutton concluded the meeting by noting that Judge
2009 Campbell's term as Committee Chair will conclude on September 30.
2010 Judge Campbell will attend the November meeting, and the Standing
2011 Committee meeting in January, for proper recognition of his many
2012 contributions to the Rules Committees. "Surely 100% of Arizona
2013 lawyers would prefer David Campbell to anyone else." His
2014 stewardship of the Committee has been characterized by steadiness,
2015 even-handedness, patience, and insight. And he is always cheerful.
"Thank you."

Respectfully submitted,

Edward H. Cooper
Reporter

ADVISORY COMMITTEE
ON
CIVIL RULES

Salt Lake City, UT
November 5-6, 2015

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Agenda

November 5-6, 2015

Meeting of the Advisory Committee on Civil Rules

1. Welcome by the Chair

   Standing Committee Meeting and Judicial Conference

2. **Action Item**: Minutes for April Meeting

3. Status of Pending Amendment Proposals

4. Publicizing the amendment proposals if they take effect December 1

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12. Pilot Projects

    Initial Disclosure

    Other

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Elizabeth J. Cabraser	ESQ	California	2010	2016
Benjamin C. Mizer*	DOJ	Washington, DC	----	Open
Robert Michael Dow, Jr.	D	Illinois (Northern)	2013	2016
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Brian Morris	D	Montana	2015	2018
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Solomon Oliver, Jr.	D	Ohio (Northern)	2011	2017
Gene E.K. Pratter	D	Pennsylvania (Eastern)	2010	2016
Virginia A. Seitz	ESQ	District of Columbia	2014	2017
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Liaison for the Advisory Committee on Civil Rules	**Judge Neil M. Gorsuch**	***(Standing)***
Liaison for the Advisory Committee on Criminal Rules	**Judge Amy J. St. Eve**	***(Standing)***
Liaison for the Advisory Committee on Evidence Rules	**Judge James C. Dever III**	***(Criminal)***
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TAB 1

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Item 1 will be an oral report.

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TAB 2

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MINUTES

CIVIL RULES ADVISORY COMMITTEE

APRIL 9, 2015

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts in Washington, D.C., on April 9, 2015. (The meeting was scheduled to carry over to April 10, but all business was concluded by the end of the day on April 9.) Participants included Judge David G. Campbell, Committee Chair, and Committee members John M. Barkett, Esq.; Elizabeth Cabraser, Esq.; Judge Paul S. Diamond; Judge Robert Michael Dow, Jr.; Parker C. Folse, Esq.; Judge Paul W. Grimm; Dean Robert H. Klonoff; Judge Scott M. Matheson, Jr.; Hon. Benjamin C. Mizer; Justice David E. Nahmias; Judge Solomon Oliver, Jr.; Judge Gene E.K. Pratter; Virginia A. Seitz, Esq.; and Judge Craig B. Shaffer. Judge John D. Bates, Chair-designate, also attended. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Judge Jeffrey S. Sutton, Chair, Judge Neil M. Gorsuch, liaison, and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge Arthur I. Harris participated as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., the court-clerk representative, also participated. The Department of Justice was further represented by Theodore Hirt. Rebecca A. Womeldorf and Julie Wilson represented the Administrative Office. Judge Jeremy Fogel and Emery G. Lee attended for the Federal Judicial Center. Observers included Donald Bivens (ABA Litigation Section); Henry D. Fellows, Jr. (American College of Trial Lawyers); Joseph D. Garrison, Esq. (National Employment Lawyers Association); Alex Dahl, Esq. (Lawyers for Civil Justice); John Vail, Esq.; Valerie M. Nannery, Esq. (Center for Constitutional Litigation); Pamela Gilbert, Esq.; Ariana Tadler, Esq.; Henry Kelsen, Esq.; William Butterfield, Esq.; Nathaniel Gryll, Esq., and Michelle Schwartz, Esq. (Alliance for Justice); Andrea B. Looney, Esq. (Lawyers for Civil Justice); Stuart Rossman, Esq. (NACA, NCLC); and Ira Rheingold (National Association of Consumer Advocates).

Judge Campbell opened the meeting by greeting newcomers Acting Assistant Attorney General Benjamin Mizer and Rebecca Womeldorf, the new Rules Committee Officer. He also noted the hope that Sheryl Walter, General Counsel of the Administrative Office, would attend parts of the meeting.

This is the last meeting for Committee members Grimm and Diamond. Deep appreciation was expressed for "both Pauls." Judge Diamond has been a direct and incisive participant in Committee discussions, and has taken on a variety of special tasks, including the task of working with the Internal Revenue Service and the Administrative Office to establish means of paying taxes on funds deposited with the courts that avoided the need to consider amending Rule 67(b). Judge Grimm chaired the Discovery Subcommittee through arduous work, especially including the revision of Rule

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37(e) that we hope will take effect this December 1 and advance resolution of disputes arising from the loss of electronically stored information. His contributions in guiding this work were invaluable.

Judge Campbell further noted that Judge Bates has been named by the Chief Justice to become the next chair of this Committee. Judge Bates has recently been Director of the Administrative Office. He also has served as a member of an important parallel committee of the Judicial Conference, the Court Administration and Case Management Committee.

Judge Campbell also reported on the meeting of the Standing Committee in January. The Civil Rules Committee did not seek approval of any proposals at that meeting. But there was a stimulating discussion of pilot projects, a topic that will be explored at the end of this meeting.

Judge Sutton said that this Committee did great work on the Duke Rules package. It will be important to support educational efforts that will guide lawyers and judges toward effective implementation of the new rules. He also noted that the Standing Committee is enthusiastic about the prospect that carefully designed pilot projects will help further advance the goals of good procedure.

Judge Campbell reminded the Committee that the Supreme Court had asked whether a couple of changes might be made in the Committee Notes to the amendments now pending before the Court. The changes were approved by an e-mail vote of the Committee, and were approved by the Judicial Conference without discussion. If the Court approves the amendments and transmits them to Congress, it will be important that the Committee find ways to educate people to use the rules and to encourage all judges to engage in active case management. These efforts are not a sign that the Committee is presuming that Congress will approve the rules if transmitted by the Supreme Court. Instead they will just begin the process of preparing people to implement them effectively. Judge Fogel says that the Federal Judicial Center is ready for judicial education programs. The Committee can help to prepare educational materials that can be used in Judicial Conferences in 2016, in bar associations, Inns of Court, and other forums. The Duke Law School is planning a parallel effort. This work can be advanced by designating a Subcommittee of this Committee. Members who are interested in participating should make their interest known.

A member noted that a package of CLE materials "available for free" would be seized by many law firms for their own internal programs. Judge Fogel noted that the Federal Judicial Center

91 "really wants to collaborate with this Committee." The Center has
92 two TV studios, and does many video productions. Videos, webinars,
93 and like means can be used to get the word out.

94 Judge Campbell suggested that it will be good to use Committee
95 alumni to get the word out, especially those who were involved in
96 shaping the proposals. One important need is to say what is
97 intended, to forestall use of the new rules in ways not intended.
98 The Committee Notes were changed in light of the public comments to
99 dispel several common misunderstandings, but ongoing efforts will
100 be important.

101 *October 2014 Minutes*

102 The draft minute of the October 2014 Committee meeting were
103 approved without dissent, subject to correction of typographical
104 and similar errors.

105 *Legislative Report*

106 Rebecca Womeldorf provided the legislative report for the
107 Administrative Office. Two familiar sets of bills have been
108 introduced in this Congress.

109 The Lawsuit Abuse Reduction Act (LARA) would amend Rule 11 by
110 reinstating the essential aspects of the Rule as it was before the
111 1993 amendments. Sanctions would be mandatory. The safe harbor
112 would be removed. In 2013 Judge Sutton and Judge Campbell submitted
113 a letter urging respect for the Rules Enabling Act process, rather
114 than undertake to amend a Civil Rule directly.

115 H.R. 9, the Innovation Act, embodies patent reform measures
116 like those in the bill that passed in the House last year. There
117 are many provisions that affect the Civil Rules. Parallel bills
118 have been introduced in the Senate, or are likely to be introduced.
119 There are some indications that a bipartisan bill will be
120 introduced in the Senate.

121 A participant observed that informal conversations suggest
122 that some form of patent legislation will pass this year. The
123 President agrees with the basic idea. The question for Congress is
124 to reach agreement on the details.

125 Judge Campbell noted that H.R. 9 directs the Judicial
126 Conference to prepare rules. Logically, the Conference will look to
127 the rules committees. But the bill does not say anything of the
128 Enabling Act process; the simple direction that the Judicial
129 Conference act seems to eliminate the roles that the Supreme Court
130 and Congress play in the final stages of the Enabling Act process.

June 2, 2015 version

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131 Parts of H.R. 9 adopt procedure rules directly, without adding
132 them to the Civil Rules. Discovery, for example, is initially
133 limited to issues of claim construction in any action that presents
134 those issues. Discovery expands beyond that only after the court
135 has construed the claims.

136 Other parts of H.R. 9 direct the Judicial Conference to adopt
137 rules that address specific points. The rules should distinguish
138 between discovery of "core documents," which are to be produced at
139 the expense of the party that produces them, and other documents
140 that are to be produced only if the requester pays the costs of
141 production and posts security or shows financial ability to pay.
142 These rules also are to address discovery of "electronic
143 communications," which may or may not embrace all electronically
144 stored information. The party requesting discovery can designate 5
145 custodians whose electronic communications must be produced; the
146 court can order that the number be expanded to 10, and there is a
147 possibility for still more.

148 A participant suggested that Congressional interest in these
149 matters is inspired by the Private Securities Litigation Reform
150 Act.

151 Experience with the Bankruptcy Abuse Prevention and Consumer
152 Protection Act was recalled. The Bankruptcy Rules Committee was
153 responsible for adopting interim rules on a truly rush basis, and
154 then for adopting final rules on a somewhat less pressed schedule.
155 The press of work was incredible.

156 It was agreed that it will be important to keep close track of
157 these bills in order to be prepared to act promptly if urgent
158 deadlines are set.

159 A matter of potential interest also was noted. The Litigation
160 Section of the American Bar Association will present a resolution
161 on diversity jurisdiction to the House of Delegates this August.
162 The recommendation will be to amend 28 U.S.C. § 1332 to treat any
163 entity that can be sued in the same way as a corporation.
164 Partnerships, limited partnerships, limited liability companies,
165 business trusts, unions, and still other organizations would be
166 treated as citizens of any state under which they are organized and
167 also of the state where they have their principal place of
168 business. The effect would be to expand access to diversity
169 jurisdiction because present law treats such entities as citizens
170 of any state of which any member is a citizen. The reasons for this
171 recommendation include experience with the difficulty of
172 ascertaining the citizenship of these organizations before filing
173 suit, the costs of discovery on these issues if suit is filed, and
174 the particularly onerous costs that may result when a defect in

175 jurisdiction is discovered only after substantial progress has been
176 made in an action.

177 Discussion noted that in the Judicial Conference structure,
178 primary responsibility for issues affecting subject-matter
179 jurisdiction lies with the Federal-State Jurisdiction Committee.
180 The Civil Rules Committee cannot speak to these questions as a
181 committee.

182 One question was asked: How would a court determine the
183 citizenship of a law firm — for example a nationwide, or
184 international firm, with offices in many different places. Can a
185 "nerve center" be identified in the way it may be identified for a
186 corporation?

187 The conclusion was that if individual Committee members have
188 thoughts about this proposal, they can be taken to the Litigation
189 Section.

190 *Rules Recommended for Adoption*

191 Proposals to amend Rules 4(m), 6(d), and 82 were published for
192 comment in August, 2014. This Committee now recommends that the
193 Standing Committee recommend them for adoption, with a possible
194 change in the Committee Note for Rule 6(d).

195 RULE 4(m)

196 Rule 4(m) sets a presumptive limit on the time to serve the
197 summons and complaint. The present rule sets the limit at 120 days;
198 the Duke Package of rule amendments now pending in the Supreme
199 court would reduce the limit to 90 days as part of a comprehensive
200 effort to expedite the initial phases of litigation.

201 It has long been recognized that more time is often needed to
202 serve defendants in other countries. Rule 4(m) now recognizes this
203 by stating that it does not apply to service in a foreign country
204 under Rule 4(f) or Rule 4(j)(1). These cross-references create an
205 ambiguity. Service on a corporation in a foreign country is made
206 under Rule 4(h)(2). Rule 4(h)(2) in turn provides for service
207 outside any judicial district of the United States on a
208 corporation, partnership, or other unincorporated association "in
209 any manner prescribed by Rule 4(f) for serving an individual,"
210 except for personal delivery. It can be argued that by invoking
211 service "in any manner prescribed by Rule 4(f)," Rule 4(h)(2)
212 service is made under Rule 4(f). But that is not exactly what the
213 rule says. At the same time, it is clear that the reasons that
214 justify exempting service under Rules 4(f) and 4(j)(1) from Rule
215 4(m) apply equally to service on corporations and other entities.

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At least most courts manage to reach this conclusion. But many of the comments responding to the proposal to reduce the Rule 4(m) presumptive time to 90 days reflected a belief that the present 120-day limit applies to service on a corporation in a foreign country. It seems wise to amend Rule 4(m) to remove any doubt.

There were only a few comments on the proposal. All supported it.

The proposed amendment is commended to the Standing Committee with a recommendation to recommend it for adoption as published.

RULE 6(d)

Under Rule 6(d), "3 days are added" to respond after service is made in four described ways, including electronic service. The proposal published last August removes service by electronic means from this list. It also adds parenthetical descriptions of service by mail, leaving with the clerk, or other means consented to, so as to relieve readers of the need to constantly refer back to the corresponding subparagraphs of Rule 5(b)(2).

The 3-added days provision has been the subject of broader inquiry, but it has been decided that for the time being it is better to avoid eliminating the 3 added days for every means of service.

For service by electronic means, however, the conclusion has been that the original concerns with imperfections in electronic communication have greatly diminished with the rapid expansion of electronic technology and the growing numbers of people who can use it easily.

This conclusion was challenged by some of the comments. One broad theme is that the time periods allowed by the rules are too short as they are. Busy, even harassed practitioners, need every concession they can get. More specific comments repeatedly complained of "gamesmanship." Electronic filing is delayed until a time after the close of the ordinary business day and after the close of the clerk’s office. Many comments invoked the image of filings at 11:59 p.m. on a Friday, calculated to reach other parties no earlier than Monday.

A more specific concern was expressed by the Magistrate Judges Association. As published, the rule continues to add 3 days after service under Rule 5(b)(2)"(F)(other means consented to)." They fear that careless readers will look back to present Rule 5(b)(2)(E), which allows electronic service only with the consent of the person served, and conclude that 3 days are added because

service by electronic means is an "other means consented to." This is an obvious misreading of Rule 5(b)(2), since (F) embraces only means other than those previously enumerated, including (E)'s provision for service by electronic means. Nonetheless, the magistrate judges have great experience with inept misreading of the rules, and it is difficult to dismiss this prospect out of hand. At the same time, there are reasons to avoid the recommended cures. One would eliminate the parenthetical descriptions added to illuminate the cross-references to subparagraphs (C), (D), and (F). These descriptions have been blessed by the Style Consultant as a useful addition to the rule, and they seem useful. The other would expand the parenthetical to subparagraph (F) to read: "(other means consented to, except electronic service.)" One reason to resist these suggestions is that it seems unlikely that serious consequences will be imposed on a party who manages to misread the rule. A 3-day overrun in responding is likely to be treated leniently. More important is that the proposals to amend Rule 5(b)(2)(E) discussed below will eliminate the consent requirement for registered users of the court's electronic system. The Committee agreed that neither of the recommended changes should be made.

The Department of Justice has expressed concerns about the 3-added days provision, and particularly about the prospect of gamesmanship in filing just before midnight on the eve of a weekend or legal holiday. It has proposed a lengthy addition to the Committee Note to describe these concerns and to state expressly that courts should accommodate those situations and provide additional time to discourage tactical advantage or prevent prejudice. An alternative shorter version was prepared by the Reporter to illustrate possible economies of language: "The ease of making electronic service outside ordinary business hours may at times lead to a practical reduction in the time available to respond. Eliminating the automatic addition of 3 days does not limit the court's authority to grant an extension in appropriate circumstances."

Discussion began with the statement that the Department of Justice feels strongly about adding an appropriate caution to the Committee Note. Some changes might be made in the initial Department draft — the list of examples of filing practices that may shorten the time to respond could be expanded by adding a few words to one example: "or just before or during an intervening weekend or holiday * * *." Their longer language is more helpful than the more compact version. "Our attorneys are often beset by gamesmanship."

A member asked whether there really will be difficulties in getting appropriate extensions of time. His experience is that this

303 is not a problem, and problems seem unlikely. In any event, the
304 shorter version seems better. The second sentence respects what
305 most courts do.

306 Another member was "not keen on adding admonitions to judges
307 to be reasonable." This is not a general practice in Committee
308 Notes. If we are to go down this road, it might be better to have
309 a single general admonition in a Note attached to one rule.

310 A lawyer member reported that he recently had encountered a
311 problem in delivering an electronic message. The recipient's firm
312 had recently installed a new system and the message was sorted out
313 by the spam filter. "Consent comforted me." It took a few days to
314 clear up the difficulty. That leads to the question: when does the
315 clock start? The sensible answer is not from the time of the
316 transmission that failed, but from the time of sending a
317 transmission that succeeded. On the broader question of
318 gamesmanship, "I'm always served Friday afternoon at the end of the
319 day."

320 A judge member "shares the ambivalence." Does a judge really
321 need to be told to be reasonable? Should Committee Notes go on to
322 suggest reasonable accommodations for extenuating family
323 circumstances, or clinical depression?

324 Another lawyer member observed that "Judges are busy. They do
325 not notice the abuses I see all the time." Adding to the Committee
326 Note as the Department suggests serves a useful purpose because it
327 implicitly condemns the abuses that judges do not — and should not
328 — see on a regular basis.

329 Still another judge member suggested that the Department's
330 draft language is opaque. The first sentence says the amended rule
331 is not intended to discourage judges from granting additional time.
332 The final sentence directs them that they should do so. Whatever
333 else can be said, it needs editing.

334 A judge suggested that "Much of what we do here is to write
335 rules for colleagues who do not do their jobs. Too often this is
336 simply writing more rules for them to ignore. I do keep aware of
337 counsel's behavior." The Duke Rules Package served the need to
338 encourage judges to manage their cases. "We know this already."

339 The concern with preaching to judges in a Committee Note was
340 addressed by suggesting that the Note could instead address advice
341 to lawyers that they should not be diffident about seeking
342 extensions in appropriate circumstances.

343 One more judge suggested that the kinds of gamesmanship feared

344 by the Department "is obviously bad conduct, easily brought to the
345 court's attention." The response for the Department was that "we
346 try not to be whiners about bad lawyers." And the reply was that it
347 can be done without whining.

348 The Department renewed the suggestion of the member who
349 thought an addition to the Note would be a reminder to lawyers to
350 behave decently. "At least the more economical version is helpful."

351 Actual practice behavior was described by another member.
352 "Whether or not it's sharp practice, the routine filing is at 11:59
353 p.m. on Friday, unless the court directs a different time. No one
354 gets to go home until after midnight." It would help to amend the
355 rule to set 6:00 p.m. as the deadline for filing.

356 This observation was seconded by observing that sometimes
357 late-night filing is bad behavior. Sometimes it is routine habit,
358 or a simple reflection of routine procrastination. Adding something
359 to the Note may be appropriate, but it should be more neutral than
360 the reference to "outside ordinary business hours" in the compact
361 sketch.

362 Judge Campbell summarized the discussion as showing that three
363 of four practicing lawyers on the Committee say late filing is a
364 common event. The Department says the same. Other advisory
365 Committees are working on the same issue. Rather than work out
366 final Note language in this Committee, it would be good to delegate
367 to the Chair and Reporter authority to work out common language
368 with the other committees, as well as to resolve with them whether
369 anything at all should be added to the Committee Note.

370 The Committee voted unanimously to recommend the published
371 text of Rule 6(d) for adoption. And it agreed to delegate to the
372 Chair and Reporter responsibility for working with the other
373 committees to adopt a common approach to the Committee Notes.

374 RULE 82

375 The published proposal to amend Rule 82 responds to amendments
376 of the venue statutes. It has long been understood that admiralty
377 and maritime actions are not governed by the general provisions for
378 civil actions. When the admiralty rules were folded into the Civil
379 Rules, this understanding was embodied in Rule 82 by providing that
380 an admiralty or maritime claim under Rule 9(h) is not a civil
381 action for purposes of 28 U.S.C. §§ 1391-1392. The recent statutory
382 amendments repeal § 1392. They also add a new § 1390. Section
383 1390(b) excludes from the general venue chapter "a civil action in
384 which the district court exercises the jurisdiction conferred by
385 section 1333" over admiralty or maritime claims.

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386 The proposed amendment provides that an admiralty or maritime
387 claim under Rule 9(h) is governed by 28 U.S.C. § 1390, and deletes
388 the statement that the claim is "not a civil action for purposes of
389 28 U.S.C. §§ 1391-1392." It was not addressed in the comments after
390 publication.

391 The Committee voted unanimously to recommend the published
392 Rule 82 proposal for adoption.

393 *Rules Recommended for Publication*

394 The rules recommended for publication deal with aspects of
395 electronic filing and service. Judge Solomon and Clerk Briggs were
396 this Committee's members of the all-Committees Subcommittee for
397 matters electronic, and have carried forward with the work after
398 the Subcommittee suspended operations at the beginning of the year.
399 The choice to suspend operations may have been premature. The
400 Appellate, Bankruptcy, Civil, and Criminal Rules Committees are all
401 working on parallel proposals. It is desirable to frame uniform
402 rule text when there is no reason to treat common questions
403 differently, recognizing that different sets of rules may operate
404 in circumstances that create differences in what might have seemed
405 to be common questions. But the process of seriatim preparation for
406 the agendas of different committees meeting a different times has
407 impeded the benefits of simultaneous consideration. For the Civil
408 Rules, the result has been that worthy ideas from other Committees
409 have had to be embraced in something of a hurry, and have been
410 presented to the Civil Rules Committee in a posture that leaves the
411 way open for accommodations for uniformity with the other
412 Committees. The Committee Note language issue for Rule 6(d) is an
413 illustration. The e-filing and e-service rules provide additional
414 illustrations.

415 These proposals emerge from a process that winnowed out other
416 possible subjects for e-rules. The Minutes for the October 2014
417 meeting reflect the decision to set aside rules that would equate
418 electrons with paper. Filing, service, and certificates of service
419 remain to be considered.

420 E-FILING: RULE 5(d)(3)

421 Rule 5(d)(3) provides that a court may allow papers to be
422 filed, signed, or verified by electronic means. It further provides
423 that a local rule may require e-filing only if reasonable
424 exceptions are allowed. Great progress has been made in adopting
425 and becoming familiar with e-filing systems since Rule 5(d)(3) was
426 adopted. The amendment described in the original agenda materials
427 directed that all filings must be made by electronic means, but
428 further directed that paper filing must be allowed for good cause

429 and that paper filing may be required or allowed for other reasons
430 by local rule. This approach reflected the great advantages of
431 efficiency that e-filing can achieve for the filer, the court, and
432 other parties. Those advantages accrue to an adept pro se party as
433 well as to represented parties. Indeed the burdens of paper filing
434 may weigh more heavily on a pro se party than on a represented
435 party.

436 The Criminal Rules Committee considered similar questions at
437 its meeting in mid-March. Criminal Rule 49 incorporates the Civil
438 Rules provisions for filing. Their discussion reflected grave
439 doubts about the problems that could arise from requiring pro se
440 criminal defendants and prisoners to file by electronic means.
441 Access to e-communications systems, and the ability to use them at
442 all, are the most basic problems. In addition, training pro se
443 litigants to use the court system could impose heavy burdens on
444 court staff. Means must be found to exact payment for filings that
445 require payment. There are risks of deliberate misuse if a court is
446 unable to limit a defendant or prisoner's access by blocking access
447 to all other cases. Constitutional concerns about access to court
448 would arise if exceptions are not made. This array of problems
449 could be met by adopting local rules, but the burden of adopting
450 new local rules should not be inflicted on the many courts whose
451 local rules do not now provide for these situations.

452 It was recognized that the problems facing criminal defendants
453 and prisoners may be more severe than those facing pro se civil
454 litigants, but questions were asked whether the differences are so
455 great as to justify different provisions in the Criminal and Civil
456 Rules. The Criminal Rules Committee asked that these issues be
457 considered in addressing Civil Rule 5, and that if this Committee
458 continues to prefer that adjustments for pro se litigants be made
459 by local rules or on a case-by-case basis it consider deferring a
460 recommendation to publish Rule 5 amendments while the Criminal
461 Rules Committee further considers these issues.

462 A conference call was held by the Chair of the Criminal Rules
463 Committee, the immediate past and current chairs of their
464 subcommittee for e-issues, their Reporters, and the Civil Rules e-
465 rules contingent. Thorough review of the Criminal Rules Committee
466 concerns led to a revised Rule 5(d)(3) proposal. The revised
467 proposal was circulated to the Committee as a supplement to the
468 agenda materials, and endorsed by Judge Campbell, Judge Oliver, and
469 Clerk Briggs.

470 The version of Rule 5(d)(3) presented to the Committee
471 mandates e-filing as a general matter, except for a person
472 proceeding without an attorney. E-filing is permitted for a person
473 proceeding without an attorney, but only when allowed by local rule

474 or court order. This approach is designed to hold the way open for
475 pro se litigants to seize the benefits of e-filing as they are
476 competent to do so. It well may be that these advantages will
477 become more generally available to pro se civil litigants than to
478 criminal defendants or prisoners filing § 2254 or § 2255
479 proceedings, but that event will not interfere with adopting local
480 rules that reflect the differences.

481 Judge Solomon endorsed the revised approach. Although the
482 Civil Rule draft started in a different place, the Criminal Rules
483 Committee's concerns were persuasive. The pro se problem is greater
484 in the criminal arena, but there also are problems in the civil
485 arena. The new approach does no harm in the short run, and it is
486 likely that we can live with it longer than that. And it is an
487 advantage to have rules that are as parallel as can be.

488 Clerk Briggs agreed. It will not be burdensome to address pro
489 se civil filings through local rules or by court order. For now,
490 there will not be many pro se litigants that will be trusted with
491 e-filing. But it should be noted that the present CM/ECF system can
492 be used to ensure that a pro se litigant is able to file and access
493 files only in his own case. And the system screens for viruses. And
494 yes, there is a disaster recovery plan — everything is replicated
495 on an essentially constant basis and stored in distant facilities.

496 A specific drafting question was raised: is there a better way
497 to refer to pro se parties than "a person proceeding without an
498 attorney"? It was agreed that this language seems adequate. One
499 advantage is that it includes an attorney who is proceeding without
500 representation by another attorney — such an attorney party may not
501 be a registered user of the system, and may not be admitted to
502 practice as an attorney in the court.

503 Another question is whether the rule should continue to say
504 that a paper may be signed by electronic means, or whether it is
505 better to provide only for e-filing, adding a statement that the
506 act of filing constitutes the signature of the person who makes the
507 filing. The reasons for omitting a statement about signing by
508 electronic means are reflected in the history of a Bankruptcy Rule
509 provision that was published for comment and then withdrawn. Many
510 filings include things that are signed by someone other than the
511 filer. Common civil practice examples include affidavits or
512 declarations supporting and opposing summary-judgment motions, and
513 discovery materials. Means for verifying electronic signatures are
514 advancing rapidly, but have not reached a point of common
515 acceptance and practice that would support attempted rules on the
516 issue. It was agreed that the rule text should adhere to the
517 approach that describes only filing by e-means, and then states
518 that the act of filing constitutes the filer's signature. But it

also was agreed that it would be better to delete the next-to-last paragraph of the draft Committee Note that discusses these possible signature issues.

Another issue was presented by the bracketed final paragraph in the Committee Note that raised the question whether anything should be said about verification. Present Rule 5(d)(3) recognizes local rules that allow a paper to be verified by electronic means. The proposed amendment omits any reference to verification. Not many rules provide for verification. Rule 23.1 provides for verification of the complaint in a derivative action. Rule 27(a) requires verification of a petition to perpetuate testimony. Rule 65(b)(1)(A) allows use of a verified complaint rather than an affidavit to support a temporary restraining order. Verification or an affidavit may be required in receivership proceedings. Verified complaints are required by Supplemental Rules B(1)(A) and C(2). Although these add up to a fair number of rules by count, they touch only a small part of the docket. It was concluded that it would be better to omit this paragraph from the recommendation to publish.

RULE 5(b)(2)(E): E-SERVICE

Rule 5(b)(2)(E) now allows service by electronic means if the person served consents in writing. Rule 5(b)(3) allows this service to be made through the court's transmission facilities if authorized by local rules. In practice consent has become a fiction as to attorneys — in almost all districts an attorney is required to become a registered user of the court's system, and access to the court's system is conditioned on consent to be served through the system. The proposed revision of Rule 5(b)(2)(E) set out in the agenda materials deletes the consent element, and simply provides that service may be made by electronic means. It further provides that a person may show good cause to be exempted from such service, and that exemptions may be provided by local rule.

This time it is preparation of the agenda materials for an Appellate Rules Committee meeting later this month that has raised complicating issues. The complications again involve pro se litigants. The concern is that many pro se litigants may not have routine, continuous access to means of electronic communication, and in any event may not be adept in its use. This has not been a problem under the present rule, since it requires consent to e-service. A pro se party need not consent, and is not subject to the fictive consent that applies to attorneys. But eliminating consent will generate substantial work in case-specific court orders or in amending local rules.

These questions were presented on the eve of this meeting.

563 Drafting to accommodate them can be considered, but subject to
564 further polishing. The draft presented for consideration responded
565 by distinguishing registered users of the court's system from
566 others. It continues to say simply that service may be made by
567 electronic means on a person who is a registered user of the
568 court's system. But it requires consent for others. The consent can
569 provide ample protection by specifying the electronic address to
570 use, and a form of transmission that can be used by the recipient.
571 Consent also will be available for registered users of the court's
572 system who find it convenient to serve some papers by means other
573 than the court's system. For civil cases, discovery requests and
574 responses are a common example. These papers are not to be filed
575 with the court until they are used in the case or the court orders
576 filing. It may prove desirable to serve them by electronic means
577 outside the court's system. Here too, consent will afford important
578 protections by specifying the address to be used and the form of
579 communication.

580 A judge observed that he encounters many pro se litigants who
581 exchange with attorneys by e-mail.

582 Another judge noted that bankruptcy practice is moving to bar
583 pro se filing, but to recognize consent to service by e-mail. "This
584 saves costs."

585 It was noted that the CM/ECF system allows service without
586 filing. One court, as an example, requires a court order after a
587 litigant moves for permission. It would be good to have a rule that
588 allows consent to serve this function without need for a court
589 order.

590 A separate question was whether written consent should be
591 required, as in the present rule. Why not allow consent in an e-
592 communication? One way written consent can be accomplished would be
593 to add consent to the check list of provisions on the pro se
594 appearance form. Another judge suggested that it would be prudent
595 to get written consent, but the rule should not specify it.

596 If the rule is framed to require consent for service outside
597 the court's system, it was agreed that there is no need to carry
598 forward from the agenda draft the exceptions that allow a person to
599 be exempted for good cause or by local rule.

600 Further discussion reiterated the point that the revised draft
601 distinguishes service through the court system on registered users,
602 which would not require consent, from service by other electronic
603 means, which would require consent. This is an advance over the
604 original suggestion, which focused on service through the court's
605 system. The Committee Note can address consent among the parties,

606 refer to a check-the-box pro se appearance form, the availability
607 of direct e-mail service with consenting parties, and the need for
608 court permission for consent by a person who is not a registered
609 user to receive service through the court system.

610 The Committee agreed to go forward with a recommendation to
611 publish a version of Rule 5(b)(2)(E) that distinguishes between
612 service on registered users through the court's system and service
613 by other e-means with consent. Precise rule language and
614 corresponding changes in the Committee Note will be settled, if
615 possible in ways that achieve uniformity with other advisory
616 committees.

617 (An observer raised a particular question outside the agenda
618 materials. She has twice encountered difficulties with e-filing in
619 this circumstance: A discovery subpoena is served on a nonparty
620 outside the district where the action is pending. A motion to
621 compel compliance becomes necessary in the district where the
622 discovery will be taken. There is no current docket in the district
623 for enforcement. Two courts have refused to allow her to use
624 electronic means to open a miscellaneous docket item. They insisted
625 on a personal appearance. This is an unnecessary inconvenience.
626 There is a patchwork of rules around the country.

627 (This problem may not be a subject for rulemaking. Certainly
628 it is not fit for rulemaking on the spur of the moment. But the
629 problem may be helped by proposed Rule 5(d)(3), which will allow e-
630 filing unless a local rule requires paper filing. It might be
631 possible to add a comment on this problem to the Committee Note for
632 Rule 5(d)(3). That possibility was taken under advisement.)

633 NOTICE OF ELECTRONIC FILING AS PROOF OF SERVICE: RULE 5(d)(1)

634 The agenda materials include an amendment of Rule 5(d)(1) that
635 would provide that a notice of electronic filing constitutes a
636 certificate of service on any party served through the court's
637 transmission facilities. The draft includes in brackets a provision
638 that would add a statement similar to Rule 5(b)(2)(E): the notice
639 of electronic filing does not constitute a certificate of service
640 if the serving party learns that the filing did not reach the party
641 to be served.

642 Allowing a notice of electronic filing to constitute a
643 certificate of service on any party served through the court's
644 transmission facilities may not seem to do much. A party accustomed
645 to serving through the court's system includes in the filing a
646 certificate that says the paper was served through the court's
647 system. Eliminating those lines is a small gain. But the amendment
648 also protects those who do not think to add those lines, and also

649 avoids the instinctive reaction of cautious filers that prompts
650 filing a separate certificate just to be sure. The amended rule
651 text was approved as a recommendation to publish.

652 Brief discussion concluded that the bracketed material
653 addressing failed delivery is not necessary. As drafted, it is
654 limited to service through the court's facilities. Ordinarily the
655 court system will flag a failed transmission. It may be that a
656 party will learn that a successful transmission somehow did not
657 come to the recipient's attention, but that situation seems too
658 rare to require rule text. That will be deleted from the
659 recommendation to publish.

660 Judge Harris, after these questions were discussed in the
661 Bankruptcy Rules Committee, suggested that it would be useful to
662 expand the rule by adding a statement of what should be included in
663 a certificate of service when service is not made through the
664 court's electronic facilities. The added language would address the
665 elements that should be included in a certificate: the date and
666 manner of service; the names of the persons served; and the address
667 used for whatever form of service was made. The advantage of adding
668 this language to the several sets of rules that address
669 certificates of service would be to establish a uniform certificate
670 for all federal courts. Uniformity is desirable in itself, and
671 uniformity would protect against the need to consult local rules,
672 or the ECF manual, for each district. Certificates now may vary. It
673 may be as bland as "I served by mail," or "I served by mail on this
674 date, to this address," and so on. The proposed language is taken
675 from Appellate Rule 25(d)(1)(B) for a proof of service. The
676 language works there, and would work elsewhere.

677 This proposal was countered: the courts and parties seem to be
678 doing well without help from a detailed rule prescription. And
679 service by these other means is likely to decline continually as
680 electronic service takes over and provides a notice of electronic
681 filing. Another member added that he routinely includes all of this
682 information in the certificate of service. It was further noted
683 that the Civil Rules did not provide for certificates of service
684 until 1991. The present provision was added then to supersede a
685 variety of local rules. The Committee then considered a provision
686 that would prescribe the contents of the certificate, but feared
687 that in some situations the party making service would not be able
688 to provide all of the information that might be included.

689 Brief further discussion showed that no Committee member
690 favored adding a provision that would define the contents of a
691 certificate of service by means other than the court's transmission
692 facilities.

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693 A style question was left for resolution by the Style
694 Consultant. Rule 5(d)(1) now concludes with a sentence introduced
695 by "But." A paper that is required to be served must be filed.
696 "But" disclosure and discovery materials must not be filed except
697 in defined circumstances. The question is whether "but" remains
698 appropriate after lengthening the first sentence.

699 RULE 68

700 Judge Campbell summarized the discussion of Rule 68 at the
701 October 2014 meeting. Rule 68 was the subject of two published
702 amendment proposals in 1983 and 1984. The project was abandoned in
703 face of fierce controversy and genuine difficulties. Rule 68 was
704 taken up again early in the 1990s and again the project was
705 abandoned. Multiple problems surround the rule, including the basic
706 question whether it is wise to maintain any rule that augments
707 natural pressures to settle. But, aside from all the discovery
708 rules taken together, Rule 68 is the most frequent subject of
709 public suggestions that amendments should be undertaken. Most of
710 the suggestions seek to add "teeth" to the rule by adding more
711 severe consequences for failing to win a judgment better than a
712 rejected offer. The Committee decided in October that the most
713 fruitful line of attack will be to explore practices in state
714 courts to see whether there are rules that in fact work better than
715 Rule 68. Jonathan Rose undertook preliminary research that produced
716 a chart of state rules, comparing their features to Rule 68. He
717 also provided a bibliography. It was hoped that the Supreme Court
718 Fellow at the Administrative Office could make time to explore
719 these materials, and perhaps to look for state-court decisions.
720 There have been too many competing demands on his time, however,
721 and little progress has been made. This work will be pursued,
722 aiming at a report to the meeting next November.

723 DISCOVERY: "REQUESTER PAYS"

724 Judge Grimm opened the subject of requester-pay discovery
725 rules by noting that these questions were opened at the fall
726 meeting in 2013 in response to suggestions that "requester-" or
727 "loser-pays" rules be adopted to shift the costs of responding to
728 discovery requests in cases where the burdens of responding to
729 discovery are disproportionate among the parties or otherwise
730 unfair. The focus of these suggestions ordinarily is Rule 34
731 document production. The background is the shared assumption, not
732 articulated in any rule but recognized in the 1978 Oppenheimer
733 opinion in the Supreme Court, that ordinarily the responding party
734 bears the burdens and costs of responding. The Court noted then,
735 and it is also widely understood, that a court order can shift the
736 costs, in whole or in part, to the requesting party.

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737 The Rule 26(c) proposal now pending in the Supreme Court as
738 part of the Duke Rules Package expressly confirms the common
739 understanding that a protective order can allocate the expenses of
740 discovery among the parties.

741 The House of Representatives has held hearings to examine the
742 possibilities of requester-pay practices. Patent law reform bills
743 recently introduced in Congress contain such provisions.

744 Subcommittee work on these issues was sidetracked for a year
745 while the Subcommittee concentrated on the Rule 37(e) provisions
746 addressing loss of electronically stored information that now are
747 pending before the Supreme Court. The work is resuming now.

748 Passionate views are held on all sides of requester pays. Much
749 of the discussion focuses on asymmetric discovery cases in which
750 one party has little discoverable information and is able to impose
751 heavy burdens in discovering vast deposits of information held by
752 an adversary. The explosion of discoverable matter embodied in
753 electronically stored information adds to the passion. And it is
754 often suggested that a data-poor party may deliberately engage in
755 massive discovery for tactical reasons.

756 The other side of the debate is framed as an issue of access
757 to justice. Often a data-poor party is poor in other resources as
758 well, and cannot afford to pay the expenses of sorting through
759 information held by a data-rich party. This viewpoint was expressed
760 in public comments on many of the discovery rules provisions in the
761 Duke Rules Package, and particularly in the comments on proposed
762 Rule 26(c).

763 A 2014 publication of the Institute for the Advancement of the
764 American Legal System provides information about these issues. A
765 recent law review article catalogues the current rules that allow
766 shifting litigation costs — most of them discovery rules — and
767 explores many of the surrounding issues, including possible due
768 process implications. The closed-case study done by the Federal
769 Judicial Center in conjunction with the Duke Conference shows that
770 most cases do not generate significant discovery burdens. But it
771 also shows that there are outliers that involve serious burdens and
772 present serious issues for possible reform. It remains a challenge
773 to determine whether these problems are unique to identifiable
774 types of cases. One particular opportunity will be to explore the
775 experience of "patent courts." Other subject-matter areas may be
776 identifiable. Or other characteristics of litigation may be
777 associated with disproportionate discovery, whether or not it is
778 possible to address them in any particular way by court rules.

779 One line of inquiry will be to attempt to find out through the

780 Federal Judicial Center what kinds of cases are now associated with
781 motions to order a requester to bear the costs of discovery.

782 Emery Lee reported that it is difficult to sort the cases out
783 of general docket entries. He began an inquiry by key-citing the
784 headnotes in the Zubulake opinions, which are prominent in
785 addressing cost-shifting in discovery of ESI. They have not been
786 much cited. Looking at the cases he found through Pacer, he
787 developed search terms. Then he undertook a docket search in four
788 districts that have high volumes of cases — S.D.N.Y., N.D.Ill,
789 N.D.Cal., and S.D.Tex. A "fuzzy search" turned up nothing useful.
790 There were, to be sure, "lots of hits" in the Northern District of
791 Illinois because the e-pilot there requires the parties to discuss
792 cost bearing. And a lot of the hits involved the costs of
793 depositions, not documents. There were not many hits for document
794 discovery.

795 Judge Grimm asked what further research might be done: law
796 review articles? State experience? Case law? A survey or other
797 empirical inquiry? The quest would be to refine our understanding
798 of how often burdensome costs are encountered.

799 Judge Grimm further noted that England has cost shifting, but
800 it also has broad bilateral initial disclosures.

801 The Subcommittee hopes to narrow what needs be considered.
802 What guidance can be provided?

803 Judge Campbell reminded the Committee that the Committee Note
804 to Rule 26(c) in the pending package of Duke Rules amendments was
805 revised after publication to provide reassurance that it is not
806 intended to become a general requester-pays rule. Many comments on
807 the published proposal expressed fears on this score

808 A judge urged that it is not wise "to write rules for
809 exceptional-exceptional cases. There is a cost of litigation. Part
810 of that is the cost of discovery." It is really depositions that
811 drive the cost of discovery in most cases. And the requesting party
812 pays for most of the costs of a deposition. Document production
813 does not drive discovery costs in most cases. There are not many
814 cases where the plaintiff does not have to bear some discovery
815 costs, especially depositions. The rules already limit the numbers
816 of interrogatories and depositions, and proposals to tighten these
817 limits were rejected for good reasons after publication of the Duke
818 Rules Package. And "counsel has to invest time in depositions." It
819 is better not to attempt to write rules for the massive document
820 discovery cases that do come up.

821 Another judge asked what is the scope of the problem? We need

822 to know that before making a rule. Whose problem needs to be fixed?
823 Why do we think we should redistribute the costs of discovery?

824 Judge Grimm responded that the Subcommittee shares these
825 concerns. "We can understand there are problem cases without
826 knowing what to do about them. The source of the problems remains
827 to be determined."

828 A member asked what protections there are for discovery from
829 third parties who do not have a stake in the game? Rule 45(d)(1)
830 directs that a party or attorney responsible for issuing and
831 serving a subpoena take reasonable steps to avoid imposing undue
832 burden or expense on a person subject to the subpoena. Rule
833 45(d)(2) further provides that a person directed to produce
834 documents or tangible things may serve objections. An objection
835 suspends the obligation to comply, which revives only when ordered
836 by the court, and the order "must protect a person who is neither
837 a party nor a party's officer from significant expense resulting
838 from compliance." Perhaps that is protection enough.

839 One possible approach was suggested — to sample a pool of
840 district judges to ask whether they have problems with excessive
841 discovery that should be addressed by explicit requester-pays rules
842 provisions. Much civil litigation now occurs in MDL proceedings;
843 perhaps we could look there.

844 A different suggestion was that "this looks like a solution in
845 search of a problem. The requester-pays proposals have the air of
846 a strategic effort to deter access to justice in certain types of
847 cases. District judges will have a much better sense of it —
848 whether there are patterns of abuse that can be dealt with by rule,
849 rather than case management. I litigate cases with massive
850 discovery, but the pressures are to be reasonable because it's 2-
851 way, and I have to search through what I get." Perhaps there are
852 problems in asymmetric cases. "But the very fact that the Committee
853 is struggling to figure out whether there is a problem suggests we
854 pause" before plunging in.

855 Another member said that the mega cases tend to be MDL
856 proceedings. The purpose of MDL is to centralize discovery, to
857 avoid constant duplication. The management orders are for
858 production that occurs once, and for one deposition per witness.
859 MDL proceedings are likely to save costs, reaping the efficiency
860 advantages of economies of scale. MDL judges seek to tailor cost
861 sharing in ways that make sense.

862 Another lawyer member noted the many protective provisions
863 built into the rules. Rule 45(c)(2)(B) expressly protects
864 nonparties. Rule 26(b)(2)(B) regulates discovery of ESI that is not

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865 reasonably accessible, and contemplates requester-pays solutions.
866 Rule 26(b)(2)(C)(iii) directs the court to limit discovery on a
867 cost-benefit analysis. Rule 26(c) is used now to invoke requester-
868 pays protections. Rule 26(g) requires counsel to avoid unduly
869 burdensome discovery requests. The Duke Rules package pending
870 before the Supreme Court is designed to invigorate these
871 principles. If the Court and Congress allow the proposed rules to
872 take effect, we will need to find out whether they have the
873 intended effect. Among them is the explicit recognition in Rule
874 26(c) of protective orders for cost-sharing. Together, these rules
875 provide many opportunities to control unreasonable discovery.

876 Continuing, this member noted that something like 300,000
877 cases are filed in federal courts every year. Perhaps 15,000 to
878 30,000 of them will involve document-heavy discovery. The FJC
879 closed-case study shows that most cases have little discovery. We
880 need to find out whether there are types of cases that generate
881 problems. But even that inquiry might be deferred for a while to
882 see how the proposed amended rules will work. "I do not know that
883 it’s a big problem now in most cases." Problems are most likely to
884 arise when discovery pairs a data-poor party against a data-rich
885 party. Perhaps we should defer acting on requester-pays rules for
886 a while.

887 It was noted that the Department of Justice has a lot of
888 experience with discovery, both asking and responding. Further
889 inquiry probably is warranted. The Department can undertake further
890 internal inquiries.

891 A judge said that there are not many reported cases invoking
892 Rule 45(d)(2). That may suggest there is little need for new rules
893 to protect nonparties. More generally, the rules we have now seem
894 adequate to address any problems. "The need may be to use them, not
895 to add new rules."

896 A lawyer echoed these views, observing that a great deal of
897 work went into shaping the Duke Rules package with the goal of
898 advancing proportionality in discovery. We should wait to see what
899 effect the new rules have if they are allowed to become effective.

900 Another judge suggested that study of initial disclosure may
901 be a good place to start. It may be helpful to return to the
902 original rule, requiring disclosure of what is relevant to the case
903 as a whole, not merely "your case." The present limited disclosure
904 rule seems to fit awkwardly with our focus on cooperation and
905 proportionality. Initial disclosure rules, indeed, will be
906 discussed later in this meeting as a possible subject for a pilot
907 project.

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908 Discussion of initial disclosure continued. The original idea
909 was to get the core information on the table at the outset. That
910 proved too ambitious at the time — local rule opt-outs were
911 provided to meet resistance, and many districts opted out in part
912 or entirely. National uniformity was attained only by narrowing
913 disclosure to "your case." The employment protocols now adopted by
914 50 judges may show that broad initial disclosure can work. So it
915 was suggested that we could look to state practices. The Institute
916 for the Advancement of the American Legal System has generated
917 reports. Broad initial disclosure remains a controversial idea:
918 "You can be right, but too soon."

919 The final observation was that the Committee undertook to
920 study requester-pays rules in response to a letter from members of
921 Congress.

922 *Appellate-Civil Rules Subcommittee*

923 A joint subcommittee has been reconstituted to explore issues
924 that overlap the Appellate Rules and Civil Rules. Judge Matheson
925 chairs the Subcommittee. Virginia Seitz is the other Civil Rules
926 member. Appellate Rules Committee members are Judge Fay, Douglas
927 Letter, and Kevin Newsom.

928 The Subcommittee is exploring two sets of issues that first
929 arose in the Appellate Rules Committee. As often happens, if it
930 seems wise to act on these issues, the most likely means will be
931 revisions of Civil Rules. That is why a joint Subcommittee is
932 useful. The issues involve "manufactured finality" and post-
933 judgment stays of execution under Civil Rule 62.

934 MANUFACTURED FINALITY

935 Judge Matheson introduced the manufactured finality issues.
936 "This is not a new topic." An earlier subcommittee failed to reach
937 a consensus. "Nor is consensus likely now." The Subcommittee seeks
938 direction from the Appellate and Civil Rules Committees.

939 "Manufactured finality" refers to a wide variety of strategies
940 that may be followed in an attempt to appeal an interlocutory order
941 that does not fit any of the well-established provisions for
942 appeal. Rule 54(b) partial finality is, for any of many possible
943 reasons, not available. Other elaborations of the final-judgment
944 rule, most obviously collateral-order doctrine, also fail. Avowedly
945 interlocutory appeals under § 1292 are not available. The
946 theoretical possibility of review by extraordinary writ remains
947 extraordinary.

948 Many examples of orders that prompt a wish to appeal could be

949 offered. A simple example is dismissal of one claim while others
950 remain, and a refusal to enter a Rule 54(b) judgment. Or important
951 theories or evidence to support a single claim are rejected,
952 leaving only weak grounds for proceeding further.

953 If the would-be plaintiff manages to arrange dismissal of all
954 remaining claims among all remaining parties with prejudice, courts
955 recognize finality. Finality is generally denied, however, if the
956 dismissal is without prejudice. And an intermediate category of
957 "conditional prejudice" has caused a split among the circuits. This
958 tactic is to dismiss with prejudice all that remains open in the
959 case after a critical interlocutory order, but on terms that allow
960 revival of what has been dismissed if the court of appeals reverses
961 the order that prompted the appeal. Most circuits reject this
962 tactic, but the Second Circuit accepts it, and the Federal Circuit
963 has entertained such appeals. There is a further nuance in cases
964 that conclude a dismissal nominally without prejudice is de facto
965 with prejudice because some other factor will bar initiation of new
966 litigation — a limitations bar is the most common example.

967 The Subcommittee has narrowed its discussion to four options:
968 (1) Do nothing. The courts would be left free to do whatever they
969 have been doing. (2) Adopt a simple rule stating what is generally
970 recognized anyway — a dismissal with prejudice achieves finality.
971 Although this is generally recognized, an explicit rule would
972 provide a convenient source of guidance for practitioners who are
973 not familiar with the wrinkles of appeal jurisdiction and
974 reassurance for those who are. But the rule might offer occasion
975 for arguments about implied consequences for dismissals without
976 prejudice, particularly the "de facto prejudice" and "conditional
977 prejudice" situations. (3) Adopt a clear rule saying that <u>only</u> a
978 dismissal with prejudice establishes finality. Still, that might
979 not be as clear as it seems. Only elaborate rule text could
980 definitively defeat arguments for de facto prejudice or conditional
981 prejudice. Committee Note statements might lend further weight.
982 Assuming a clear rule could be drafted to close all doors, it would
983 remain to decide whether that is desirable. (4) A rule could
984 directly address conditional prejudice, whether to allow it or
985 reject it.

986 Rules sketches illustrating the three alternatives for rules
987 approaches are included in the agenda materials. The Subcommittee
988 deliberated its way to the same pattern as the earlier
989 subcommittee. It has not been possible to reach consensus. On the
990 conditional prejudice question, the circuit judges on the
991 Subcommittee would not propose a rule that would manufacture
992 finality in this way. The lawyers seemed to like the idea, and
993 there are indications that district judges also like the idea.

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994 This introduction was followed by reflections on the general
995 setting. The final-judgment rule rests on a compromise between
996 competing values. The paradigm final judgment leaves nothing more
997 to be done by the district court, apart from execution if there is
998 a judgment awarding relief. Insisting on finality is a central
999 element in allocating authority between trial courts and appellate
1000 courts. It also conduces to efficiency, both in the trial court and
1001 in the appellate court. Many issues that seem to loom large as a
1002 case progresses will be mooted by the time the case ends in the
1003 district court. Free interlocutory appeal from many orders would
1004 delay district-court proceedings and, upon affirmance, produce no
1005 offsetting benefit. Periodic interruptions by appeals could wreak
1006 havoc with effective case management.

1007 The values of complete finality are offset by the risk that
1008 all trial-court proceedings after a critical and wrong ruling will
1009 be wasted. Some interlocutory orders, moreover, have real-world
1010 consequences or exert pressures on the parties that, if the order
1011 is wrong, are distorting pressures. These concerns underlie not
1012 only the provision for partial final judgments in Rule 54(b) but a
1013 number of elaborations of the final-judgment concept. The best
1014 known elaboration is found in collateral-order doctrine, an
1015 interpretation of the "final decision" language in § 1291 that
1016 allows appeals from orders that do not resemble a traditional final
1017 judgment. Other provisions are found in avowedly interlocutory-
1018 appeal provisions, most obviously in § 1292 and Rule 23(f) for
1019 orders granting or refusing class certification. Extraordinary writ
1020 review also provides review in compelling circumstances.

1021 The recent process of elaborating § 1291 seems, on balance, to
1022 show continuing pressure from the Supreme Court to restrain the
1023 inventiveness shown by the courts of appeals. The courts of appeals
1024 embark on lines of decision that expand appeal opportunities,
1025 confident in their abilities to achieve a good balance among the
1026 competing forces that shape appeal jurisdiction on terms that at
1027 times seem to approach case-specific rules of jurisdiction. The
1028 Supreme Court believes that it is better to resist these
1029 temptations. The clearest illustrations are provided by the line of
1030 cases that have restricted collateral-order appeals by insisting
1031 that collateral-order appeal is proper only when all cases in a
1032 "category" of cases are appealable. Otherwise, no case in a
1033 particular "category" will support appeal.

1034 These are the pressures that have shaped approaches to
1035 manufactured finality. A bewildering variety of circumstances have
1036 been addressed in the cases without generating clear patterns. The
1037 concept of "de facto prejudice" is an example. The seemingly clear
1038 example of dismissal nominally without prejudice in circumstances
1039 that would defeat a new action by a statute of limitations is clear

1040 only if the limitations outcome is clear. But the limitations
1041 question may depend on fact determinations, and even choice of law,
1042 that cannot easily be made in deciding on appeal jurisdiction.
1043 Another example is found in cases that have accepted jurisdiction
1044 when a dismissal is without prejudice to bringing a new action in
1045 a state court — often with very good reason if the critical ruling
1046 by the federal court is affirmed on appeal — but the dismissal is
1047 on terms that bar filing a new action in federal court. And a
1048 particularly clear example is provided by a case in which the
1049 University of Alabama filed an action, only to have the state
1050 Attorney General appear and dismiss the action without prejudice.
1051 The University was allowed to appeal to challenge the Attorney
1052 General's authority to assume control if the action.

1053 The Rules Committees have clear authority under § 2072(c) to
1054 adopt rules that "define when a ruling of a district court is final
1055 for the purposes of appeal under section 1291." But regulating
1056 appeal jurisdiction is an important undertaking. There is great
1057 value in having clear rules. Attorneys who are not thoroughly
1058 familiar with appeal practice may devote countless hours to
1059 attempts to determine whether and when an appeal can be taken, and
1060 may reach wrong conclusions. Even attorneys who are familiar with
1061 these rules may seek reassurance by costly reexamination. And
1062 misguided attempts to appeal can disrupt district-court proceedings
1063 while imposing unnecessary work on the court of appeals.

1064 Clear rules, however, may not always be the best approach.
1065 Clarity can sacrifice important nuances. The pattern of common-law
1066 elaborations of a simply worded appeal statute shows an astonishing
1067 array of subtle distinctions that may provide important protections
1068 by appeal.

1069 The choice to proceed to recommend a clear rule, any clear
1070 rule, is beset by these competing forces.

1071 Discussion began by recognizing that these are hard choices.
1072 Courts of appeals often believe strongly in the opportunity to
1073 shape appeal jurisdiction to achieve an optimal concept of
1074 finality. How would they react, for example, to a recommendation
1075 that adopts finality by dismissal with conditional prejudice?

1076 A related suggestion was that it may be better to leave these
1077 issues to resolution by the Supreme Court in the ordinary course of
1078 reviewing individual cases. Circuit splits can be identified on
1079 some easily defined issues, such as conditional prejudice.

1080 It was further suggested that the Committee does not believe
1081 that it must always act to resolve identifiable circuit splits. The
1082 conditional prejudice issue, for example, "is of first importance

1083 to appellate judges." The Subcommittee, as the earlier
1084 subcommittee, has shown the difficulty of the question through its
1085 divided deliberations. Do we need to act to establish clarity for
1086 lawyers?

1087 These questions are not for the Civil Rules Committee alone.
1088 The Appellate Rules Committee shares responsibility for determining
1089 what is best. So far it has happened that actual rules provisions
1090 tend to wind up in the Civil Rules, in part because many appeal-
1091 affecting provisions remained in the Civil rules when the Appellate
1092 Rules were separated out from their original home in the Civil
1093 Rules. But it is possible to imagine that new rules could be
1094 located in the Appellate Rules, or even in a new and independent
1095 Federal Rules of Appeal Jurisdiction.

1096 Further discussion suggested that everyone agrees that a
1097 dismissal with prejudice is final. It may be useful to say that in
1098 a rule. The Committee Note can say that the rule text does not
1099 address the question whether "conditional prejudice" qualifies as
1100 "with prejudice." It may be worth doing.

1101 A response asked what is the value of a rule that states an
1102 obvious proposition widely accepted? The reply was that people who
1103 are not familiar with appellate practice may benefit.

1104 Judge Sutton noted that these questions first came up in 2005.
1105 "My first reaction was that this is a manufactured problem." The
1106 circuit split on conditional prejudice may be worth addressing, but
1107 either answer could prove difficult to advance through the full
1108 Enabling Act process. And any more general rule would incur the
1109 risk of negative implications. The time has come to fish or cut
1110 bait.

1111 Judge Matheson observed that it would be useful to have the
1112 sense of the Committee to report to the Appellate Rules Committee
1113 when it meets in two weeks.

1114 The first question put to the Committee was whether the best
1115 choice would be to do nothing. Thirteen members voted in favor of
1116 doing nothing. One vote was that it would be better to do
1117 something.

1118 STAYS OF EXECUTION: RULE 62

1119 Judge Matheson began by observing that the questions posed by
1120 Rule 62 and stays of execution arose in part in the Appellate Rules
1121 Committee. They have not been as much explored by the Subcommittee
1122 as the manufactured-finality issues. The focus has been on
1123 execution of money judgments, not judgments for specific relief.

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1124 The provisions for injunctions, receiverships, or directing an
1125 accounting may be relocated, but have not been considered for
1126 revision.

1127 Rule 62(a) provides an automatic stay. Until the Time
1128 Computation Project the automatic stay provision dovetailed neatly
1129 with the Rule 62(b) provision for a court-ordered stay pending
1130 disposition of post-judgment motions under Rules 50, 52, 59, and
1131 60. The automatic stay lasted for 10 days, and the time to make the
1132 Rule 50, 52, and 59 motions was 10 days. The Time Computation
1133 Project, however, set the automatic stay at 14 days, but extended
1134 to 28 days the time to move under Rules 50, 52, and 59. A district
1135 judge asked the Committee what to do during this apparent "gap."
1136 The Committee concluded at the time that the court has inherent
1137 authority to stay its own judgment after expiration of the
1138 automatic stay and before a post-judgment motion is made. The
1139 question of amending Rule 62 was deferred to determine whether
1140 actual difficulties arise in practice.

1141 A separate concern arose in the Appellate Rules Committee.
1142 Members of that committee have found it useful to arrange a single
1143 bond that covers the full period between expiration of the
1144 automatic stay and final disposition on appeal. That bond
1145 encompasses the supersedeas bond taken to secure an stay pending
1146 appeal, and is already in place when an appeal is filed.

1147 The Subcommittee has begun work focusing on Rule 62(a), (b),
1148 and (d). Other parts of Rule 62 have yet to be addressed. A
1149 detailed memorandum by Professor Struve, Reporter for the Appellate
1150 Rules Committee, addresses other issues that remain for possible
1151 consideration.

1152 The Subcommittee brings a sketch of possible revisions to the
1153 Committee for reactions. The first question is whether in its
1154 present form Rule 62 causes uncertainties or problems.

1155 The second of two sketches in the agenda book became the
1156 subject of discussion. This sketch rearranges subdivisions (a),
1157 (b), (c), and (d). Revised Rule 62(a) and (b) addresses "execution
1158 on a judgment to pay money, and proceedings to enforce it." It
1159 carries forward an automatic stay, extending the period to 30 days.
1160 But it also recognizes that the court can order a stay at any time
1161 after judgment is entered, setting appropriate terms for the amount
1162 and form of security or denying any security. The court also can
1163 dissolve the automatic stay and deny any further stay, subject to
1164 a question whether to allow the court to dissolve a stay obtained
1165 by posting a supersedeas bond. An order denying or dissolving a
1166 stay may be conditioned on posting security to protect against the
1167 consequences of execution. The order may designate the duration of

1168 a stay, running as late as issuance of the mandate on appeal. That
1169 period could extend through disposition of a petition for
1170 certiorari.

1171 The question whether a supersedeas bond should establish a
1172 right to stay execution pending appeal remains open for further
1173 consideration. Consideration of the amount also remains open — if
1174 a stay is to be a matter of right, the rule might set the amount of
1175 the bond at 125% of the amount of a money judgment.

1176 The purpose of this sketch is to emphasize the primary
1177 authority of the district court to deny a stay, to grant a stay,
1178 and to set appropriate terms for security on granting or denying a
1179 stay. It also recognizes authority to modify or terminate a stay
1180 once granted. Appellate Rule 8 reflects the primacy of the district
1181 court. Explicit recognition of matters that should lie within the
1182 district court's inherent power to regulate execution before and
1183 during an appeal may prove useful.

1184 Discussion began with a judge's suggestion that he had not
1185 seen any problems with Rule 62. The question whether any other
1186 judge on the Committee had encountered problems with Rule 62 was
1187 answered by silence.

1188 The next question was whether the lack of apparent problems
1189 reflects the practice to work out these questions among the
1190 parties. A lawyer member responded that "you wind up stipulating to
1191 a stay through the decision on appeal." Another lawyer member
1192 observed, however, that "there may be power struggles."

1193 It was noted that the "gap" between expiration of the
1194 automatic stay and the time to make post-judgment motions seems
1195 worrisome, but perhaps there are no great practical problems.

1196 Another member said that the "more efficient" draft presented
1197 for discussion is simple, and collects things in a pattern that
1198 makes sense. Most cases are resolved without trial. Even
1199 recognizing summary judgments for plaintiffs, problems of execution
1200 may not arise often. This "little rewrite" seems useful. A judge
1201 repeated the thought — this version "makes for a cleaner rule."

1202 Judge Matheson concluded by noting that the Subcommittee is
1203 "still in a discussion phase." Knowing that Committee members have
1204 not encountered problems with Rule 62 "makes a point. But we can
1205 address the 'gap,' and perhaps work toward a better rule."

1206 *Rule 23 Subcommittee*

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1207 Judge Dow began the report of the Rule 23 Subcommittee by
1208 pointing to the list of events on page 243 of the agenda materials.
1209 The Subcommittee has attended or will attend many of these events;
1210 some Subcommittee members will attend others that not all members
1211 are able to attend. The events for this year will culminate in a
1212 miniconference to be held at the Dallas airport on September 11.
1213 The miniconference will be asked to discuss drafts that develop
1214 further the approaches reflected in the preliminary sketches
1215 included in the agenda materials. The most recent of these events
1216 was a roundtable discussion of settlement class actions at George
1217 Washington University Law School. It brought together a terrific
1218 group of practitioners, judges, and academics. It was very helpful.
1219 Suggestions also are arriving from outside sources and are
1220 being posted on the Administrative Office web site. The suggestions
1221 include many matters the Subcommittee has not had on its agenda. It
1222 is important to have the Committee's guidance on just how many new
1223 topics might be added to the Rule 23 agenda. The Subcommittee's
1224 sense has been that there is no need for a fundamental rewrite of
1225 Rule 23. But some of the submissions suggest pretty aggressive
1226 reformulations of Rule 23(a) and (b) that seem to start over from
1227 scratch. These suggestions have overtones of a need to strengthen
1228 the perspective that class actions should be advanced as a means of
1229 increasing private enforcement of public policy values.

1230 A Subcommittee member noted that several professors propose
1231 deletion of Rule 23(a)(1), (2), and (3). Adequacy of representation
1232 would remain from the present rule. And they would add a new
1233 paragraph looking to whether a class action is the best way to
1234 resolve the case as compared to other realistic alternatives. The
1235 question for the Committee is whether we should spend time on such
1236 fundamental issues.

1237 A first reaction was that no compelling justifications have
1238 been offered for these suggestions. It was noted that in deciding
1239 to take up Rule 23, the Committee did not have a sense that a broad
1240 rewrite is needed, but instead focused on specific issues. "The
1241 burden of proof for going further has not been carried."

1242 The next question was whether new issues should be added to
1243 the seven issues listed in the Subcommittee Report that will be
1244 brought on for discussion today.

1245 Multidistrict proceedings were identified as a topic related
1246 to Rule 23. There was a presentation on MDL proceedings to the
1247 Judicial Conference in March. MDL proceedings overlap with Rule 23.
1248 It will be important to pay attention to developments in MDL
1249 practice. And it was noted that discussion at the George Washington
1250 Roundtable included the thought that some of the current Rule 23
1251 sketches reflect approaches that could reduce the pressures that

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1252 mass torts exert on MDL practice. Further development of
1253 settlement-class practice might move cases into Rule 23, with the
1254 benefits of judicial review and approval of settlements, and away
1255 from widespread private settlements of aggregated cases free from
1256 any judicial review or supervision. One way of viewing these
1257 possibilities is the idea of a "quasi class action" — a sensible
1258 system for certifying settlement classes could be helpful. So a big
1259 concern is how to settle mass-tort cases after Amchem.

1260 Another suggestion was that the "biggest topic not on our
1261 list" is the concept of "ascertainability" that has recently
1262 emerged from Third Circuit decisions.

1263 Settlement class certification: Discussion turned to the question
1264 whether there should be an explicit rule provision for certifying
1265 settlement classes. One question will be whether the rule should
1266 prescribe the information provided to the court on a motion to
1267 certify and for preliminary "approval." Should the concept be not
1268 preliminary "approval," but instead preliminary "review"? The
1269 review could focus on whether the proposed settlement is
1270 sufficiently cogent to justify certification and notice to the
1271 class. What information does the judge need for taking these steps?
1272 Something like what Rule 16 says should be given to the judge? An
1273 explicit rule provision could guide the parties in what they
1274 present, as well as help the judge in evaluating the proposal.
1275 There was a lot of interest in this at the George Washington
1276 Roundtable.

1277 Further discussion noted that Rule 23(e) does not say anything
1278 about the procedure for determining whether to certify a settlement
1279 class in light of a proposed settlement. At best there is an
1280 oblique implication in the Rule 23(e)(1) provision for directing
1281 notice in a reasonable manner to all class members who would be
1282 bound by the proposal.

1283 A judge observed that once the parties agree on a settlement
1284 and take it to the judge, the judge's reaction is likely to be that
1285 it is good to settle the action. The result may be that notice is
1286 sent to the class without a sufficiently detailed appraisal of the
1287 settlement terms. Problems may appear as class members respond to
1288 the notice, but the process generates a momentum that may lead to
1289 final approval of an undeserving settlement. Another judge observed
1290 that there are great variations in practice. Some judges scrutinize
1291 proposed settlements carefully. Some do not. It would be helpful to
1292 have criteria in the rule.

1293 A choice was offered. The rule could call for a detailed
1294 "front load" of information to be considered before sending out
1295 notice to the class. Or instead it could follow the ALI Aggregate

1296 Litigation Project, characterizing the pre-notice review as review,
1297 not "approval." Discussion at the George Washington Roundtable "was
1298 almost all for front-loading."

1299 A judge said that most of the time in a "big value case" the
1300 lawyers know they should front-load the information. "But when the
1301 parties are not so sophisticated, the late information that emerges
1302 after notice to the class may lead me to blow up the settlement."
1303 And if the settlement is rejected after the first notice, a second
1304 round of notice is expensive and can "eat up most of the case
1305 value."

1306 Another judge observed that "it gets dicey when some
1307 defendants settle and others do not." What seems fairly
1308 straightforward at the time of the early settlement may later turn
1309 out to be more complicated.

1310 A lawyer thought that front-loading sounds like it makes
1311 sense. But the agenda materials do not include rule language for
1312 this. What factors should be addressed by the parties and
1313 considered by the court? It was suggested that the factors are
1314 likely to be much the same as the factors a court considers in
1315 determining whether to give final approval. One perspective is
1316 similar to the predictions made when considering a preliminary
1317 injunction: a "likelihood of approval" test at the first stage.

1318 Another judge said that the Third Circuit "is pretty clear on
1319 what I should consider. Lawyers who practice class actions
1320 understand the factors." But there are many class actions — for
1321 example under the Fair Credit Reporting Act — brought by lawyers
1322 who do not understand class-action practice. Those lawyers will not
1323 be helped by a new rule. There is no problem calling for a more
1324 detailed rule. A different judge agreed that the problem lies with
1325 the less experienced lawyers.

1326 Yet another judge expressed surprise at this discussion. "We
1327 go through pretty much the same information as needed for final
1328 approval of a settlement." It may help to say that in generic terms
1329 in rule text, but it is less clear whether detailed standards
1330 should be stated in the rule.

1331 And another judge said "I do less work on the front end than
1332 at the back end. But the factors are the same."

1333 The final comment was that drafting a rule provision will
1334 require careful balancing. There are impulses to make the criteria
1335 for final approval simpler and clearer, as will be discussed. But
1336 there also are impulses to demand more information up front.

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1337 It was agreed that the Subcommittee agenda would be expanded
1338 to include a focus on the procedure for determining whether to
1339 approve notice to the class of a settlement, looking toward final
1340 certification and approval.

1341 Rule 23(f) Appeal of Settlement Class Certification: The question
1342 whether a Rule 23(f) appeal can be taken from preliminary approval
1343 of a settlement class has come to prominence with the Third Circuit
1344 decision in the NFL case. Given the language of Rule 23(f) as it
1345 stands, the answer seems to turn on whether preliminary approval of
1346 a settlement and sending out notice to the class involves
1347 "certification" of the settlement class. The deeper question is
1348 whether it is desirable to allow appeal at that point, remembering
1349 that appeal is by permission and that it might be hoped that a
1350 court of appeals will quickly deny permission to appeal when there
1351 are not compelling reasons to risk derailing the settlement by the
1352 delays of appeal.

1353 The question of appeal at the preliminary review and notice
1354 stage is not academic. High profile cases are likely to draw the
1355 attention of potential objectors well before the preliminary
1356 review. They may view the opportunity to seek permission to appeal
1357 at this stage as a powerful opportunity to exert leverage.

1358 The Third Circuit ruled that Rule 23(f) does not apply at this
1359 stage. But other courts of appeals have simply denied leave to
1360 appeal without saying whether Rule 23(f) would authorize an appeal
1361 if it seemed desirable. This issue will arise again. The Third
1362 Circuit reasoned that the record at this early stage will not be
1363 sufficient to support informed review. But if the rules are amended
1364 to require the parties to present sufficient information for a
1365 full-scale evaluation of the proposed settlement at the preliminary
1366 review stage, that problem may be reduced.

1367 A judge observed that Rule 23(f) hangs on the seismic effect
1368 of certification or a refusal to certify. Certification of a
1369 settlement class is very important. It is rare to go to trial.
1370 Certification even for trial tends to end the case by settlement.
1371 So what, then, of certification for settlement? Will an opportunity
1372 to appeal enable objectors to derail settlements? Given the
1373 agreement of class and the opposing parties to settle, a court of
1374 appeals will be reluctant to grant permission to appeal.

1375 Uncertainty was expressed whether the possibility of a §
1376 1292(b) appeal with permission of the trial court as well as the
1377 court of appeals may provide a sufficient safety valve.

1378 An observer stated that "the notice process is what brings out
1379 objectors." If Rule 23(f) appeal is available on preliminary

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1380 review, the way may be opened for a second Rule 23(f) appeal after
1381 notice has gone out.

1382 It was agreed that seriatim Rule 23(f) appeals would be
1383 undesirable.

1384 The discussion concluded with some sense that the Third
1385 Circuit approach seems sensible. Whether Rule 23(f) should be
1386 revised to entrench this approach may depend on the text of any
1387 rule that formalizes the process of certifying a settlement class.
1388 If the rule calls for certification only after preliminary review,
1389 notice, review of any objections, and final approval of the
1390 settlement, then there will be no room to argue that the
1391 preliminary review grants certification, nor, for that matter, that
1392 refusal to send out notice after a preliminary review denies
1393 certification.

1394 A final Rule 23(f) question was noted later in the meeting.
1395 The Department of Justice continues to experience difficulties with
1396 the requirement that the petition for permission to appeal be filed
1397 with the circuit clerk within 14 days after the order is entered.
1398 It will explore this question further and present the issue in
1399 greater detail in time for the fall meeting.

1400 With this, discussion turned to the seven topics listed in the
1401 agenda materials.

1402 Criteria for Settlement Approval: Rule 23(e) was revised in the
1403 last round of amendments to adopt the "fair, reasonable, and
1404 adequate" phrase that had developed in the case law to express the
1405 multiple factors articulated in somewhat different terms by the
1406 several circuits. At first a long list of factors was included in
1407 draft rule text. The factors were then demoted to a draft Committee
1408 Note that is set out in the agenda materials. Eventually the list
1409 of factors as abandoned for fear it would become a "check list"
1410 that would promote routinized presentations on each factor, no
1411 matter how clearly irrelevant to a particular case, and divert
1412 attention from serious exploration of the factors that in fact are
1413 important in a particular case.

1414 The question now is whether the rule text should elaborate, at
1415 least to some extent, on the bland "fair, reasonable, and adequate"
1416 phrase. The ALI Aggregate Litigation Project criticized the "grab
1417 bag" of factors to be found in the decisions, but provided a model
1418 of a more focused set of criteria requiring four findings, looking
1419 to adequate representation; evaluation of the costs, risks,
1420 probability of success, and delays of trial and appeal; equitable
1421 treatment of class members relative to each other; and arm's-length
1422 negotiation without collusion. These factors are stated in the

1423 agenda sketch as a new Rule 23(e)(2)(A), supplemented by a new (B)
1424 allowing a court to consider any other pertinent factor and to
1425 refuse approval on the basis of any such other factor. The goal is
1426 to focus attention on the matters that are useful. A related goal
1427 is to direct attention away from factors that have been articulated
1428 in some opinions but that do not seem useful. The common example of
1429 factors that need not be considered is the opinion of counsel who
1430 shaped the proposed settlement that the settlement is a good one.

1431 One reaction to this approach may be "I want my Circuit
1432 factors." Another might be that the draft Committee Note touches on
1433 too many factors. And of course yet another reaction might be that
1434 these are not the right factors.

1435 A participant recalled a remark by Judge Posner during the
1436 George Washington Roundtable discussion: "why three words?
1437 'Reasonable' says it all" — the appropriate amendment would be to
1438 strike "fair" and adequate" from the present rule text. The
1439 response was that these three words had become widely used in the
1440 cases when Rule 23(e) was amended. They were designed to capture
1441 ongoing practice. There is little need to delete them simply to
1442 save two words in the body of all the rules.

1443 The agenda materials include a spreadsheet comparing the lists
1444 of approval factors that have been articulated in each Circuit. It
1445 was asked whether each of these factors is addressed in the draft
1446 Committee Note. Not all are. Greater detail could be added to the
1447 Note. Some factors are addressed negatively in the note, such as
1448 support of the settlement by those who negotiated it. The
1449 formulation in rule text was built on the foundation provided by
1450 the ALI. The question is how far the Committee Note should go in
1451 highlighting things that really matter.

1452 A judge observed that the sketch of rule text required the
1453 court to consider the four listed elements, but the text then went
1454 on to allow the court to reject a settlement by considering other
1455 matters even though the settlement had been found fair, reasonable,
1456 and adequate. Would it not be better to frame it to make it clear
1457 that these other factors bear on the determination whether the
1458 settlement is fair, reasonable, and adequate? What factors might
1459 those be?

1460 A response was that this sketch of a Rule 23(e)(2)(B) is a
1461 catch-all for case- or settlement-specific factors. Such factors
1462 may be important. It might be used to invoke the old factors lists,
1463 but it seems more important to capture unique circumstances.

1464 Subparagraph (B) also generated this question: Is this
1465 structure designed so that passing inspection under the required

1466 elements of subparagraph (A) creates a presumption of fairness that
1467 shifts the burden from the proponents of the settlement to the
1468 opponents? The immediate response was that this question requires
1469 further thought, but that often it is not useful to think of
1470 sequential steps of procedure as creating a "presumption" that
1471 invokes shifting burdens.

1472 A different approach asked what is gained by this middle
1473 ground that avoids any but a broad list of considerations without
1474 providing a detailed list of factors? So long as these open-ended
1475 considerations remain, they can be used to carry forward all of the
1476 factors that have been identified in any circuit. All of those
1477 factors were used to elaborate the capacious "fair, reasonable, and
1478 adequate" formula, and they still will be.

1479 A response was that various circuits list 10, or 12, or 15
1480 factors. Some are more important than others. "Distillation could
1481 help." But the reply was that "then we should make clear that these
1482 are the only factors."

1483 The next step was agreement that if a proposal to amend Rule
1484 23(e) emerges from this work, it should be sent out for comment
1485 without the "any other matter pertinent" provision sketched in
1486 subparagraph (B).

1487 Turning back to subparagraph (A), it was noted that it will be
1488 difficult to implement criterion (iv), looking to arm's-length
1489 negotiation without collusion. The lawyers will always say that
1490 they negotiated at arm's length and did not collude. The response
1491 was that this element is one to be shown by objectors. If they make
1492 the showing of "collusion" — an absence of arm's length negotiation
1493 — the settlement must be disapproved. This was challenged by asking
1494 whether a court should be required to disapprove a settlement that
1495 in fact is fair, reasonable, and adequate — perhaps the best deal
1496 that can be made — simply for want of what seems an arm's-length
1497 negotiation?

1498 A broader perspective was brought to bear. Courts commonly
1499 recognize separate components in evaluating a proposed settlement,
1500 one procedural and other substantive. There may be striking
1501 examples that combine both components, as in one case where a
1502 settlement was quickly arranged for the purpose of preempting a
1503 competing class action in a state court. It may be hoped that such
1504 examples are rare.

1505 A twist was placed on the nature of "collusion." One dodge may
1506 be that parties who have engaged in amicable negotiations take the
1507 deal to some form of ADR — often a retired judge — for review and
1508 blessing. "If reputable counsel are involved, it's different from

1509 a rushed settlement by an inexperienced lawyer."

1510 Item (iv), then, might be dropped. But the focus on procedural
1511 fairness and adequacy may be important. It may be useful to
1512 highlight it in rule text.

1513 Discussion of these issues concluded with a reminder that the
1514 federal law of attorney conduct is growing. Collusion is prohibited
1515 by state rules of attorney conduct. These rules are adopted into
1516 the local rules of federal courts. Item (iv) will become "another
1517 rule governing attorney conduct."

1518 Settlement Class Certification: A settlement-class rule was
1519 published for comment as a new subdivision (b)(4) at virtually the
1520 same time as the Amchem decision in the Supreme Court. The
1521 Committee suspended consideration to allow time to evaluate the
1522 aftermath of the Amchem decision. The idea of reopening the
1523 question is that certification to settle is different from
1524 certification to try the case. The ALI Aggregate Litigation Project
1525 is something like this. Most participants in the George Washington
1526 Roundtable discussion were of similar views.

1527 One common thread that distinguishes proposals to certify a
1528 settlement class from trial classes is to downplay the role of
1529 "predominance" in a (b)(3) class.

1530 Two alternative sketches are presented in the agenda
1531 materials. The first expressly invokes Rule 23(a), and includes an
1532 optional provision invoking subdivision (b)(3). Certification
1533 focuses on the superiority of the proposed settlement and on
1534 finding that the settlement should be approved under Rule 23(e).
1535 The second includes a possible invocation of Rule 23(b)(3), but
1536 focuses on reducing the Rule 23(a) elements by looking to whether
1537 the class is "sufficiently numerous to warrant classwide
1538 treatment," and the sufficiency of the class definition to
1539 determine who is in the class.

1540 Is either alternative a useful addition to Rule 23?

1541 A judge offered no answers, but only questions. "It is a big
1542 step to downplay predominance." At some point a settlement class
1543 judgment where common issues do not predominate might violate
1544 Article III or due process. "Huge numbers of cases will be moved
1545 from (b)(3) to (b)(4)."

1546 The first response was that many predominance issues are
1547 obviated by settlement. The common illustration is choice of law.
1548 By adopting common terms, the settlement avoids the difficulties
1549 that arise when litigation would require applying different bodies

1550 of law, emphasizing different elements, to different groups within
1551 the class. But the reply was that the sketch does not refer to
1552 predominance for settlement.

1553 The next observation was that "manageability" appears in the
1554 text of Rule 23(b)(3) now, and at the time of Amchem, but the Court
1555 ruled in Amchem that manageability concerns can be obviated by the
1556 terms of settlement. Commonality, on the other hand, provides
1557 protection to class members, even if its significance is reduced by
1558 the terms of settlement.

1559 That observation led to the question whether, if Rule 23(a)
1560 continues to be invoked for settlement classes, the result will be
1561 to place greater weight on typicality. The first response was that
1562 "typicality is easy." But what of common causation issues, and
1563 defenses against individual claimants, that are not common? The
1564 only response was that if class treatment is not recognized, cases
1565 will settle by other aggregated means that provide no judicial
1566 review or control.

1567 Cy pres: The agenda materials include a sketch that would add an
1568 extensive set of provisions for evaluating cy pres distributions to
1569 Rule 23(e)(1). The sketch is based on the ALI Aggregate Litigation
1570 Project, § 3.07. The value of addressing these issues in rule text
1571 turns in part on the fact that cy pres distributions seem to be
1572 rather common, and in part on the hesitations expressed by Chief
1573 Justice Roberts in addressing a denial of certiorari in a cy pres
1574 settlement case. Nothing in the federal rules addresses cy pres
1575 issues now. Some state provisions do — California, for example, has
1576 a cy pres statute.

1577 The sketch narrowly limits cy pres recoveries. The first
1578 direction is to distribute settlement proceeds to class members
1579 when they can be identified and individual distributions are
1580 sufficiently large to be economically viable. The next step, if
1581 funds remain after distributions to individual class members, is to
1582 make a further distribution to the members that have participated
1583 in the first distribution unless the amounts are too small to be
1584 economically viable or other specific reasons make further
1585 individual distributions impossible or unfair. Finally, a cy pres
1586 approach may be employed for remaining funds if the recipient has
1587 interests that reasonably approximate the interests of class
1588 members, or, if that is not possible, to another recipient if that
1589 would serve the public interest. This cy pres provision includes a
1590 bracketed presumption that individual distributions are not viable
1591 for sums less than $100, but recent advice suggests that in fact
1592 claims administrators may be able to provide efficient
1593 distributions of considerably smaller sums.

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1594 The opening lines of the sketch include, in brackets, a
1595 provision that touches a sensitive question. These words allow
1596 approval of a proposal that includes a cy pres remedy "if
1597 authorized by law." There is virtually no enacted authority for cy
1598 pres remedies in federal law. The laws of a few states do address
1599 the question. It may be possible to speak to the sources of
1600 authority in the general law of remedies. But the question remains:
1601 courts are approving cy pres distributions now. If the practice is
1602 legitimate, there should be authority to regulate it by court rule.
1603 If it is not legitimate, it would be unwise to attempt to
1604 legitimate it by court rule.

1605 The value of cy pres distributions depends in large measure on
1606 how effective the claims process is in reducing the amounts left
1607 after individual claims are paid. Courts are picking up the ALI
1608 principle. It seems worthwhile to confirm it in Rule 23.

1609 The first question was whether the rule should require the
1610 settlement agreement to address these issues. That would help to
1611 reduce the Article III concerns. This observation was developed
1612 further. Suppose the agreement does not address disposition of
1613 unclaimed funds. What then? Must there be a second (and expensive)
1614 notice to the class of any later proposal to dispose of them? The
1615 sketch Committee Note emphasizes that cy pres distribution is a
1616 matter of party agreement, not court action.

1617 It was observed that even though a cy pre distribution is
1618 agreed to by the parties, it becomes part of the court’s judgment.
1619 It can be appealed. And there is a particular problem if cy pres
1620 distribution is the only remedy. Suppose, for example, a
1621 defendant’s wrong causes a ten-cent injury to each of a million
1622 people. Individual distributions do not seem sensible. But finding
1623 an alternative use for the $100,000 of "damages" seems to be
1624 creating a new remedy not recognized by the underlying substantive
1625 law of right and remedy.

1626 Another judge noted that "courts have been doing this, but
1627 it’s a matter of follow-the-leader." There is not a lot of
1628 endorsement for the practice, particularly at the circuit level. Cy
1629 pres theory has its origins in trust law. Settlement class
1630 judgments ordinarily are not designed to enforce a failed trust.
1631 "What is the most thoughtful judicial discussion" that explains the
1632 justification for these practices?

1633 The response was that cy pres recoveries have been discussed
1634 in a number of California state cases. California recognizes "fluid
1635 recovery," as illustrated by the famous case of an order reducing
1636 cab fares in Los Angeles — there was likely to be a substantial
1637 overlap between the future cab users who benefit from the period of

1638 reduced fares and the past cab users who paid the unlawful high
1639 fares, but the overlap was not complete. The Eighth Circuit has
1640 provided a useful review this year. And cy pres distribution can be
1641 made only when the court has found the settlement to be fair,
1642 reasonable, and adequate. That determination itself requires an
1643 effort to compensate class members — by direct distribution if
1644 possible, but if that is not possible in some other way.

1645 A judge noted a recent case in his court involving a defendant
1646 who sent out 100,000,000 spam fax messages. The records showed the
1647 number of faxes, but then the records were spoliated. There was no
1648 record of where the faxes had gone. The liability insurer agreed to
1649 settle for $300 for each of the class representatives. But what
1650 could be done with the remaining liability, which — with statutory
1651 damages — was for a staggering sum? Seven states in addition to
1652 California provide for distributing a portion of a cy pres recovery
1653 to Legal Services. That still leaves the need to dispose of the
1654 rest. Addressing these questions in rule text must rest on the
1655 premise that such distributions are proper.

1656 It was agreed that these questions are serious. The ALI
1657 pursued them to cut back on cy pres distributions, to make it
1658 difficult to bypass class members. Perhaps a rule should say that
1659 it is unfair to have all the settlement funds distributed to
1660 recipients other than class members.

1661 Discussion concluded on two notes: these questions cannot be
1662 resolved in a single afternoon. And although it would be possible
1663 to adopt a rule that forbids cy pres distributions, that probably
1664 is not a good idea.

1665 Objectors: Objectors play a role that is recognized by Rule 23 and
1666 that is an important strand in reconciling class-action practice
1667 with the dictates of due process. Well-framed objections can be
1668 very valuable to the judge. At the same time, it is widely believed
1669 that there are "bad objectors" who seek only strategic personal
1670 gain, not enhancement of values for the class. On this view, some
1671 objectors may seek to exploit their ability to delay a payout to
1672 the class in order to extract tribute from class counsel that may
1673 be to the detriment of class interests. Rule 23(e)(5) was added to
1674 reflect the concern with improperly motivated objections by
1675 requiring court approval for withdrawal of an objection. This
1676 provision appears to have been "somewhat successful."

1677 The Appellate Rules Committee is studying proposals to
1678 regulate withdrawal of objections on appeal. The Rule 23
1679 Subcommittee is cooperating in this work.

1680 Alternative sketches are presented at page 273 in the agenda

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1681 materials. In somewhat different formulations, each requires the
1682 parties to file a statement identifying any agreement made in
1683 connection with withdrawal of an objection. An alternative approach
1684 is illustrated by sketches at pages 274-275 of the agenda
1685 materials. The first simply incorporates a reminder of Rule 11 in
1686 rule 23(e)(5). The second creates an independent authority to
1687 impose sanctions on finding that an objection is insubstantial or
1688 not reasonably advanced for the purpose of rejecting or improving
1689 the settlement.

1690 No rule can define who is a "good" or a "bad" objector. The
1691 idea of these sketches is to alert and arm judges to do something
1692 about bad objectors when they can be identified.

1693 Another possibility that has been considered is to exact a
1694 "bond" from an objector who appeals. The more expansive versions of
1695 the bond would seek to cover not simply the costs of appeal — which
1696 may be considerable — but also "delay costs" reflecting the harm
1697 resulting from delay in implementing the settlement when the appeal
1698 fails.

1699 A "good" objector who participated in the George Washington
1700 Roundtable commented extensively on the obstacles that already
1701 confront objectors.

1702 The first comment was that sanctions on counsel "are more and
1703 more regulation of attorney conduct."

1704 And the first question from an observer was whether discovery
1705 is appropriate to support objections. The response was that it is
1706 not likely that a rule would be written to provide automatic access
1707 to discovery. There is a nexus to opt-out rights. At most such
1708 issues might be described in a Committee Note, recognizing that at
1709 times discovery may be valuable.

1710 The next question was whether courts now have authority under
1711 Rule 11 and 28 U.S.C. § 1927 to impose sanctions on frivolous
1712 objections or objections that multiply the proceedings unreasonably
1713 and vexatiously. The response was that the second alternative, on
1714 page 275, seems to cut free from these sources of authority,
1715 creating an independent authority for sanctions. But it remains
1716 reasonable to ask whether independent authority really is needed.
1717 One departure from Rule 11, for example, is that Rule 11 creates a
1718 safe harbor to withdraw an offending filing as a matter of right;
1719 the Rule 23 sketch does not include this.

1720 Rule 68 Offers: The sketches in the agenda materials, beginning at
1721 page 277, provide alternative approaches to a common problem.
1722 Defendants resisting class certification often attempt to moot the

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1723 representative plaintiff by offering complete individual relief.
1724 Often the offers are made under Rule 68. Although acceptance of a
1725 Rule 68 offer leads to entry of a judgment, it is difficult to find
1726 any principled reason to suppose that a Rule 68 offer has greater
1727 potential to moot an individual claim than any other offer,
1728 particularly one that may culminate in entry of a judgment. Courts
1729 have reacted to this ploy in different ways. The Supreme Court has
1730 held that a Rule 68 offer of complete relief to the individual
1731 plaintiff in an opt-in action under the Fair Labor Standards Act
1732 moots the action. The opinion, however, simply assumed without
1733 deciding that the offer had in fact mooted the representative
1734 plaintiff's claim, and further noted that an opt-in FLSA action is
1735 different from a Rule 23 class action. Beyond that, courts seem to
1736 be increasingly reluctant to allow a defendant to "pick off" any
1737 representative plaintiff that appears, and thus forever stymie
1738 class certification. Some of the strategies are convoluted. In the
1739 Seventh Circuit, for example, a class plaintiff is forced to file
1740 a motion for class certification on filing the complaint because
1741 only a motion for certification defeats mooting the case by an
1742 offer of complete individual relief. But it also is recognized that
1743 an attempt to rule on certification at the very beginning of the
1744 action would be foolish, so the plaintiff also requests, and the
1745 courts understand, that consideration of the certification motion
1746 be deferred while the case is developed. This convoluted practice
1747 has not commended itself to judges outside the Seventh Circuit.

1748 The first sketch attacks the question head-on. It provides
1749 that a tender of relief to a class representative can terminate the
1750 action only if the court has denied certification and the court
1751 finds that the tender affords complete individual relief. It
1752 further provides that a dismissal does not defeat the class
1753 representative's standing to appeal the order denying
1754 certification.

1755 The second sketch simply adopts a provision that was included
1756 in Rule 68 amendments published for comment in 1983 and again in
1757 1984. This provision would direct that Rule 68 does not apply to
1758 actions under Rules 23, 23.1, and 23.2. It did not survive
1759 withdrawal of the entire set of Rule 68 proposals.

1760 The third sketch begins by reviving a one-time practice that
1761 was at first embraced and then abandoned in the 2003 amendments.
1762 This practice required court approval to dismiss an action brought
1763 as a class action even before class certification. The parties must
1764 identify any agreement made in connection with the proposed
1765 dismissal. The sketch also provides that after a denial of
1766 certification, the plaintiff may settle an individual claim without
1767 prejudice to seeking appellate review of the denial of
1768 certification.

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1769 The first question was whether these proposals reflect needs
1770 that arise from limits on the ability to substitute representatives
1771 when one is mooted. The first response was that it is always safer
1772 to begin with multiple representatives. But it was suggested that
1773 the problem might be addressed by a rule permitting addition of new
1774 representatives. That approach is often taken when an initial
1775 representative plaintiff is found inadequate.

1776 The next observation was that substituting representatives may
1777 not solve the problem. The defendant need only repeat the offer to
1778 each successive plaintiff. The approach taken in the first sketch
1779 is elegant.

1780 Another member observed that courts allow substitution of
1781 representatives at the inadequacy stage of the certification
1782 decision. But substitution may require formal intervention. That is
1783 too late to solve the mootness problem. These issues are worth
1784 considering.

1785 The last observation was that the Seventh Circuit work-around
1786 seems to be effective. "It's not that big a deal." But the first
1787 and second sketches are simple.

1788 Issues Classes: The relationship of Rule 23(c)(4) issues classes to
1789 the predominance requirement in Rule 23(b)(3) has been a
1790 longstanding source of disagreement. One view is that an issue
1791 class can be certified only if common issues predominate in the
1792 claims considered as a whole. The other view is that predominance
1793 is required only as to the issues certified for class treatment.
1794 There are some signs that the courts may be converging on the view
1795 that predominance is required only as to the issues.

1796 The first sketch in the agenda materials, page 281, simply
1797 adds a few words to Rule 23(b)(3): the court must find that
1798 "questions of law or fact common to the class predominate over any
1799 questions affecting only individual class members, subject to Rule
1800 23(c)(4), and * * *." The "subject to Rule 23(c)(4)" phrase may
1801 seem somewhat opaque, but the meaning could be elaborated in the
1802 Committee Note.

1803 The second sketch, at page 282, would amend Rule 23(f) to
1804 allow a petition to appeal from an order deciding an issue
1805 certified for class treatment. The rule might depart from the
1806 general approach of Rule 23(f), which requires permission only from
1807 the court of appeals, by adding a requirement that the district
1808 court certify that there is no just reason for delay. This added
1809 requirement, modeled on Rule 54(b), might be useful to avoid
1810 intrusion on further management of the case. An opportunity for
1811 immediate appeal could be helpful before addressing other matters

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1812 that remain to be resolved.

1813 A judge asked the first question. "Every case I have seen
1814 excludes issues of damages. Does this mean that every class is a
1815 (c)(4) issues class that does not need to satisfy the predominance
1816 requirement"? That question led to a further question: What is an
1817 issue class? An action clearly is an issue class if the court
1818 certifies a single issue to be resolved on a class basis, and
1819 intends not to address any question of individual relief for any
1820 class member. The action, for example, could be limited to
1821 determining whether an identified product is defective, and perhaps
1822 also whether the defect can be a general cause of one or more types
1823 of injury. That determination would become the basis for issue
1824 preclusion in individual actions if defect, and — if included —
1825 general causation were found. Issues of specific causation,
1826 comparative responsibility, and individual injury and damages would
1827 be left for determination in other actions, often before other
1828 courts. But is it an "issue" class if the court intends to
1829 administer individual remedies to some or many or all members of
1830 the class? We have not thought of an action as an issue class if
1831 the court sets the questions of defect and general causation for
1832 initial determination, but contemplates creation of a structure for
1833 processing individual claims by class members if liability is found
1834 as a general matter.

1835 This plaintive question prompted a response that predominance
1836 still is required for an issue class. This view was repeated.
1837 Discussion concluded at that point.

1838 Notice: The first question of class-action notice is illustrated by
1839 a sketch at page 285 of the agenda materials. Whether or not it was
1840 wise to read Rule 23(c) to require individualized notice by postal
1841 mail in 1974 whenever possible, that view does not look as
1842 convincing today. Reality has outstripped the Postal Service. The
1843 sketch would add a few words to Rule 23(c)(2)(B), directing
1844 individual notice "by electronic or other means to all members who
1845 can be identified through reasonable effort." The Committee Note
1846 could say that means other than first class mail may suffice.

1847 This proposal was accepted as an easy thing to do.

1848 The Committee did not discuss a question opened in the agenda
1849 materials, but not yet much explored by the Subcommittee. It may be
1850 time to reopen the question of notice in Rule 23(b)(1) and (2)
1851 classes, even though the concern to enable opt-out decisions is not
1852 present. It is not clear whether the Subcommittee will recommend
1853 that this question be taken up.

1854 *Pilot Projects*

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1855 Judge Campbell opened the discussion of pilot projects by
1856 describing the active panel presentation and responses at the
1857 January meeting of the Standing Committee. Panel members explored
1858 three possible subjects for pilot projects: enhanced initial
1859 disclosures, simplified tracks for some cases, and accelerated
1860 ("Rocket") dockets.

1861 The Standing Committee would like to encourage this Committee
1862 to frame and encourage pilot projects. It likely will be useful to
1863 appoint a subcommittee to study possible projects, looking to what
1864 has been done in state courts and federal courts, and to recommend
1865 possible subjects.

1866 One potential issue must be confronted. Implementation of a
1867 pilot project through a local district court rule must come to
1868 terms with Rule 83 and the underlying statute, 28 U.S.C. § 2071(a),
1869 which direct that local rules must be consistent with the national
1870 Enabling Act rules. The agenda materials include the history of a
1871 tentative proposal twenty years ago to amend Rule 83 to authorize
1872 local rules inconsistent with the national rules, subject to
1873 approval by the Judicial Conference and a 5-year time limit. The
1874 proposal was abandoned without publication, in part for uncertainty
1875 about the fit with § 2071(a).

1876 The Rule 83 question will depend in part on the approach taken
1877 to determine consistency, or inconsistency, with the national
1878 rules. The current employment protocols employed by 50 district
1879 judges are a good illustration. They direct early disclosure of
1880 much information that ordinarily has been sought through discovery.
1881 But they seem to be consistent with the discovery regime
1882 established in Rule 26, recognizing the broad discretion courts
1883 have to guide discovery.

1884 Initial Disclosures: Part of the Rule 26(a)(1) history was
1885 discussed earlier in this meeting. The rule adopted in 1993
1886 directed disclosure of witnesses with knowledge, and documents,
1887 relevant to disputed matters alleged with particularity in the
1888 pleadings. It included a provision allowing districts to opt out by
1889 local rule; this provision was included under pressure from
1890 opponents who disliked the proposal. The rule was revised in 2000
1891 as part of the effort to eliminate the opt-out provision of the
1892 1993 rule, limiting disclosure to witnesses and documents the
1893 disclosing party may use. Arizona Rule 26.1 requires much broader
1894 disclosure even than the 1993 version of Rule 26(a)(1). It is
1895 clearly intended to require disclosure of unfavorable information
1896 as well as favorable information. The proposal for adoption was
1897 greeted by protests that such disclosures are inconsistent with the
1898 adversary system. The Arizona court nonetheless persisted in
1899 adoption. This broad disclosure is coupled with restrictions on

1900 post-disclosure discovery. Permission is required, for example, to
1901 depose nonparty witnesses. Arizona lawyers were surveyed to gather
1902 reactions to this rule in 2008 and 2009. In the 2008 survey, 70% of
1903 the lawyers with experience in both state and federal courts
1904 preferred to litigate in state court. (Nationally, only 43% of
1905 lawyers with experience in both state and federal courts prefer
1906 their state courts.) The results in the 2009 survey were similar.
1907 More than 70% of the lawyers who responded said that initial
1908 disclosures help to narrow the issues more quickly. The Arizona
1909 experience could be considered in determining whether to launch a
1910 pilot project in the federal courts.

1911 An observer from Arizona said that debate about the initial
1912 disclosure rule declines year-by-year. "It does require more work
1913 up front, but it is, on average, faster and cheaper. Unless a
1914 client wants it slow and expensive, we often recommend state
1915 court." An action can get to trial in state court in 12, or 16,
1916 months. Two years is the maximum. It takes longer in federal court.
1917 He further observed that Arizona should be considered as a district
1918 to be included in a federal pilot project because the bar, and much
1919 of the bench, understand broad initial disclosures.

1920 The next comment observed that a really viable study should
1921 include districts where broad initial disclosure "is a complete
1922 shock to the system." There may be a problem with a project that
1923 exacts disclosures inconsistent with the limited requirements of
1924 Rule 26(a)(1). But it is refreshing to consider a dramatic
1925 departure, as compared to the usually incremental changes made in
1926 the federal rules. This comment also observed that even in
1927 districts that adhered to the 1993 national rule, lawyers often
1928 agreed among themselves to opt out.

1929 A member asked whether comparative data on case loads were
1930 included in the study of Arizona experience. The answer was that
1931 they were not in the study. But Maricopa County has 120 judges.
1932 Their dockets show case loads per judge as heavy as the loads in
1933 federal court.

1934 A judge observed that a mandatory initial disclosure regime
1935 that includes all relevant information would be an integral part of
1936 ensuring proportional discovery. The idea is to identify what it is
1937 most important to get first. A pilot project would generate this
1938 information as a guide to judicial management. The judge could ask:
1939 "What more do you need"? This process could be integrated with the
1940 Rule 26(f) plan. This is an extraordinarily promising prospect.
1941 There will be enormous pushback. Justice Scalia, in 1993, wondered
1942 about the consistency of initial disclosure with an adversary
1943 system. But the success in Arizona provides a good response.

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1944 Accelerated Dockets: This topic was introduced with a suggestion
1945 that the speedy disposition rates recently achieved in the Western
1946 District of Wisconsin appear to be fading. The Southern District of
1947 Florida has achieved quick disposition times for some case. "Costs
1948 are proportional to time." Setting a short time for discovery
1949 reflects what is generally needed. State-court models exist. The
1950 "patent courts" are experimenting with interesting possibilities.
1951 The Federal Judicial Center will report this fall on experience
1952 with the employment protocols.

1953 These and other practices may help determine whether a pilot
1954 project on simplified procedures could be launched. Federal-court
1955 tracking systems could be studied at the beginning. State court
1956 practices can be consulted.

1957 A member provided details on the array of cases filed in
1958 federal court. The four most common categories include prisoner
1959 actions, tort claims, civil rights actions (labor claims can be
1960 added to this category), and contract actions. Smaller numbers are
1961 found for social security cases, consumer credit cases, and
1962 intellectual property cases. Some case types lend themselves to
1963 early resolution. Early case evaluation works if information is
1964 shared. Early mediation also works, although the type of case
1965 affects how early it can be used.

1966 One thing that would help would be to have an e-discovery
1967 neutral available on the court’s staff to help parties work through
1968 the difficulties. Many parties do not know what they’re doing with
1969 e-discovery. This member has worked as an e-discovery master.
1970 "Weekly phone calls can save the parties a lot of money." One ploy
1971 that works is to begin with a presumption that the parties will
1972 share the master’s costs equally, unless the master recommends that
1973 one party should bear a larger share. That provision, and the fact
1974 that they’re being watched, dramatically reduces costs and delay.
1975 And e-discovery mediation can help.

1976 It also helps when the parties understand the case well enough
1977 for early mediation.

1978 And experience as an arbitrator, where discovery is limited to
1979 what the arbitrator directs, shows that it is possible to control
1980 costs in a fair process.

1981 Another suggestion was that a statute allows summary jury
1982 trial. If the parties agree, it can be a real help. The trial can
1983 be advisory. It may be limited, for example to 3 hours per party.
1984 Summaries of testimony, or live witnesses, may be used. Charts may
1985 be used. "Juries love it." After the jury decides, lawyers can ask
1986 the jury why they did what they did. This practice can be a big

1987 help in conjunction with a settlement conference.

1988 Another suggestion was that it would help to devise rules to
1989 dispose of cases that require the court to review a "record."
1990 Social Security cases, IDEA cases, and ERISA fiduciary cases are
1991 examples.

1992 Another judge noted that the Northern District of Ohio has a
1993 differentiated case management plan. The categories of cases
1994 include standard, expedited, complex, mass tort, and
1995 administrative. There are ADR options, and summary jury trial. It
1996 would be good to study this program to see how it works out over
1997 time.

1998 Discussion concluded with the observation that if done well,
1999 study of these many alternatives could lead to useful pilot
2000 projects.

2001 Judge Sutton concluded the discussion of pilot projects by
2002 noting that the Standing Committee is grateful for all the work
2003 done on the Duke Rules package and on Rule 37(e). He further noted
2004 that Rule 26(a)(1) failed in its initial 1993 form because it was
2005 a great change from established habits. It may be worthwhile to
2006 restore it, or something much like it, as a pilot project in 10 or
2007 15 districts to see how it might be made to work now.

2008 Judge Sutton concluded the meeting by noting that Judge
2009 Campbell's term as Committee Chair will conclude on September 30.
2010 Judge Campbell will attend the November meeting, and the Standing
2011 Committee meeting in January, for proper recognition of his many
2012 contributions to the Rules Committees. "Surely 100% of Arizona
2013 lawyers would prefer David Campbell to anyone else." His
2014 stewardship of the Committee has been characterized by steadiness,
2015 even-handedness, patience, and insight. And he is always cheerful.
"Thank you."

Respectfully submitted,

Edward H. Cooper
Reporter

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Report to the Civil Advisory Rules Committee

A subcommittee of the Civil Rules Advisory Committee ("Committee") has been created to coordinate steps to educate judges and practitioners about the pending changes to the Civil Rules that are to take effect on December 1, 2015. Members of the subcommittee are: Judge John Bates, Judge David Campbell, Judge Jeremy Fogel, Judge Paul Grimm (chair), Judge John Koeltl, Judge Gene Pratter, Judge Craig Shaffer, and John Barkett.

Since its formation, the subcommittee has held a number of conference calls to identify how best to get the word out to judges and lawyers regarding the new rules. The following measures are being pursued:

1. Letters to Chief Judges and to Judges. Once the new rules go into effect, a letter will be sent to each Chief Circuit Judge, Chief District Judge, and Chief Bankruptcy Judge informing them of the new rules and the key concepts that underlie them, as well as informing them about educational materials that have been and will be developed for use in educating judges during 2016 at judicial education seminars. The letter will encourage the Chief Judges to include instruction on the new rules at any judicial education seminars in the upcoming year. The letter will be signed jointly by Judge John Bates and Judge Jeff Sutton. In addition, a similar letter will be drafted and sent to each Circuit, District, Magistrate and Bankruptcy Judge, informing them of the new rules and the key concepts underlying them.
2. Educational Videos. Prior to the effective date of the new rules five videos will be recorded by the FJC discussing various aspects of the new rules. They include a 20 minute "stand alone" video that is an overview of all the new rules that discusses the four interrelated goals of the new rules: fostering cooperation among parties; achieving discovery that is proportional to what is at issue in the litigation; promoting active judicial management of the discovery process; and implementing a rule to address the duty to preserve electronically stored information ("ESI") and setting forth the curative and other measures that may be taken when ESI that should have been preserved in the anticipation or conduct of litigation is not, because a party failed to take reasonable measures to preserve it. This video is intended to be used as part of an educational program, augmented by written materials and/or speakers, and is short enough to be easily viewed in one session, but detailed enough to impart the critical information about the new rules. Additionally, four separate videos will be prepared regarding the areas of Cooperation, Proportionality, Active Judicial Management, and ESI preservation and the consequences for failure to preserve ESI. These videos will be more detailed than the discussion of each of these areas in the 20 minute overview, and are intended to be viewed individually or together. It is expected that the longer videos collectively will total 60-90 minutes. Scripts have been written for all five videos, and they will be recorded by the FJC in October and November so that they are available by the time the new rules take effect. It is expected that the videos will be hosted at the FJC website, and available to judges and the public for use in educational programs about the new rules.
3. Coordinating with Bar Associations: The subcommittee plans to communicate to national, regional, and specialty bar associations to inform them of the new rules,

their key concepts, and to encourage them to include articles on the new rules in their publications, and to include segments on the new rules in any educational programs they sponsor during 2016. They will be informed about educational materials that they may use as part of this effort, including the videos mentioned above.

4. Identification of written materials that discuss the new rules. Finally, the subcommittee is identifying written materials that discuss the new rules that may be of value in educational programs discussing them. A chart comparing the new rules with the old has been prepared for use as a handout, and it has been used with good results at several educational programs to date. A powerpoint presentation also is being discussed as an educational tool to be made available. It is hoped that these materials will be posted on the FJC website and available for judges and the public.

Paul W. Grimm

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Item 5 will be an oral report.

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RULE 23 SUBCOMMITTEE REPORT

The Rule 23 Subcommittee has been quite active since the full Committee's April meeting. In total, it has attended, or at least had representatives participate in, roughly a dozen conferences since late 2014, culminating in the Subcommittee's own mini-conference at the DFW Airport on Sept. 11, 2015. Since April the Subcommittee has also held a number of conference calls and meetings.

This memorandum is designed to summarize the ideas developed during this activity and to present the six rule-amendment ideas that presently seem to hold the most promise for productive effort. In addition, it reports on a variety of other possible rule-revision ideas that the Subcommittee has discussed with the full Committee on occasion since the first full Committee discussion of these issues during the March, 2012, meeting.

Accompanying this memorandum, the agenda book should contain a variety of additional materials developed during the Subcommittee's work. These should include the issues memo for the Sept. 11 mini-conference and notes of the mini-conference. It also should include notes on Subcommittee meetings or conference calls on Sept. 25, 2015, Sept. 11, 2015, July 15, 2015, July 12, 2015, and June 26, 2015. The Subcommittee held other conference calls principally addressed to more logistical matters, and also discussed these issues during the many conferences it has attended. Notes on those events are not included.

It is also worth noting that the Subcommittee has received submissions from many individuals and groups about possible amendments to Rule 23. During 2015, approximately 25 submissions have been received. These submissions are posted at www.uscourts.gov.

Based on the input the Subcommittee has received, it has concluded that some topics that initially seemed to warrant proceeding with rule-amendment preparation no longer seem to support immediate activity. In part, that conclusion is based on relatively recent developments, including developments in the case law. In part, that conclusion recognizes that further developments in the relatively near future may cause the Subcommittee to conclude that further work on some of these topics is justified. So it is possible that some of the topics on which further action has been deferred will return to the full Committee at its Spring 2016 meeting. The Subcommittee is still contemplating a schedule that would permit publication of preliminary drafts of rule amendments in August, 2016.

The list of "front burner" topics has evolved considerably since the April full Committee meeting, which discussed a list of topics that had already evolved quite a lot since the first full

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Committee discussion of these issues at the March 2012 meeting. Below are presentations on six topics the Subcommittee currently regards as most suited to immediate work. After introducing those topics, this memorandum will discuss other topics that have received considerable attention during the Subcommittee's work, including some on which it contemplates that further work may be in order.

The topics on which the Subcommittee proposes to focus its immediate attention are:

1. "Frontloading"

2. Excluding "preliminary approvals" of class certification and orders regarding notice to the class about possible settlements from immediate appeal under Rule 23(f)

3. Clarifying Rule 23(c)(2)(B) to state that Rule 23(e)(1) notice triggers the opt-out period

4. Notice to unnamed class members

5. Handling objections by class members to proposed settlements

6. Criteria for judicial approval of class-action settlements

After presenting these topics on which the Subcommittee makes recommendations, the memorandum presents a composite version of the amendment sketches so that Committee members can see how they might fit together.

This memorandum reflects the Subcommittee's present thinking, which has evolved further even since its last conference call on September 25. Thus, one topic on which the Subcommittee was uncertain about proceeding during that conference call has been restored to its list of recommendations. Besides making these recommendations, this memorandum also presents additional ideas that the Subcommittee has examined in detail and discussed with many participants in conferences and meetings it has attended. These issues are presented for discussion in order to support full discussion in Salt Lake City. That discussion will provide a basis for introducing the issues during the Standing Committee's January, 2016, meeting. Meanwhile, the Subcommittee will continue its work on Rule 23, and the rule language and Committee Note language presented in the sketches will surely be refined.

The additional issues presented for discussion can be generally separated into three categories:

Issues "on hold"

Two issues seem not suitable for current rulemaking efforts, although developments may justify reconsidering that conclusion. Fuller explanations of the current situation will be presented later in this memorandum, but it seems useful to introduce these two issues:

Ascertainability: During the full Committee's April meeting, the Subcommittee was urged to look carefully at issues of ascertainability. In part due to a series of decisions by the Third Circuit, this topic appeared to have growing importance. It is clear that the court must include a class definition when it certifies a class. Indeed, as amended in 2003, Rule 23(c)(1)(B) instructs the court to "define the class." Particularly in consumer class actions, much attention has been given recently to whether there is a workable way to identify class members and scrutinize claims submitted by class members, particularly those who do not have receipts for retail purchases of relatively small-value items that sometimes give rise to claims. A key question is the extent to which courts ought to insist, at the certification stage, on a definite game plan for possible later distribution of benefits. The Third Circuit view appears to emphasize this concern. The Seventh Circuit has issued an opinion offering distinctive views supported by provisions presently in the rule, and raising doubts about the need to inquire into the manner of distribution of benefits to the class at the certification stage. [Copies of three recent decisions -- all rendered since the full Committee's April meeting -- should be included in this agenda book, for those who wish to review them.]

Rule 68 and pick-off individual offers of judgment: This set of issues has achieved considerable prominence during recent years, in part because the Seventh Circuit took a position that enabled defendants in some class actions to pick off the class-action aspects of the case by offering the named plaintiff full relief before a motion to certify was filed. A consequence was sometimes that plaintiffs would file "out of the chute" motions to certify, which plaintiffs sometimes asked the courts to stay pending development of a record suitable to deciding class certification. The Seventh Circuit has recently changed its views on these issues, and the Supreme Court has granted certiorari in a case that appears to raise these issues, with oral argument scheduled in October.

Topic the Subcommittee brings
before the full Committee
without a recommendation

Settlement class certification: After the mini-conference, the Subcommittee initially decided that the potential

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difficulties of proceeding with a new Rule 23(b)(4) on settlement class certification outweighed any benefits in doing so. Presented below is the material that relates to that conclusion. Further reflection prompts the Subcommittee to bring this question before the full Committee. As an alternative, this memorandum also introduces an idea drawn from the 1999 Report on Mass Tort Litigation for adding reference to settlement to Rule 23(b)(3). Subcommittee members can address these issues during the meeting in Salt Lake City.

Topics the Subcommittee would
take off the agenda

Besides deciding that the two issues identified above should be put "on hold," the Subcommittee has also determined that the following issues that it has previously discussed with the Committee should be taken off the agenda for the present Rule 23 reform effort. The notes of the mini-conference and the various Subcommittee meetings and conference calls show the consideration given these issues. Details on what was before the mini-conference can be found in the issues memorandum submitted to participants in that event. All of these items should be included in the agenda book. These issues are:

Cy pres: In his separate statement regarding denial of certiorari in a case involving Facebook, Chief Justice Roberts expressed concern about the manner in which what have been called cy pres issues have been handled in some cases. The ALI, in § 3.07 of its Principles of Aggregate Litigation, addressed these issues, and the courts are increasingly referring to the ALI formulation in addressing these issues. The Subcommittee has concluded that a rule amendment would not be likely to improve the handling of these issues, and that it could raise the risk of undesirable side effects. One point on which many agree is that, when there are lump sum class-action settlements, there often is some residue after initial claims distribution is completed. The topics on which the Subcommittee recommends proceeding, particularly amendments to Rules 23(e)(1) and 23(e)(2), include reference in the Committee Note to the importance of addressing these eventualities in submissions to the court at the beginning of the settlement process and in the handling of final approval of a proposed settlement. The Notes also focus attention on the claims process recommended by the settlement proposal, in an effort to ensure that it is suited to the case.

Issue classes: Considerable discussion has been had of the possible tension between the predominance requirement of Rule 23(b)(3) and the invitation in Rule 23(c)(4) to certify a class with regard to particular issues. Included in this discussion was the possibility of recommending an amendment to Rule 23(f) to authorize discretionary immediate appellate review of the district court's resolution of such issues. Eventually, the

conclusion was reached that there is no significant need for such a rule amendment. The various circuits seem to be in accord about the propriety of such treatment "[w]hen appropriate," as Rule 23(c)(4) now says. And this treatment may sometimes be warranted in actions under Rule 23(b)(2), a practice that might be called into question under some of the amendment ideas the Subcommittee has examined. On balance, these issues appear not to warrant amendment of the rules.

1. "Frontloading"

This issue was not on the list the Subcommittee presented to the full Committee in April. It has emerged from various discussions since then, which emphasized that it is important to ensure that vital information is provided to judges asked to approve class-action settlements, and to ensure that class members can learn enough about proposed settlements to make informed decisions whether to opt out or object.

At the mini-conference, the Subcommittee presented a more elaborate sketch of a "frontloading" rule that enumerated 14 specific topics on which parties must present the court with information when asking the court to authorize notice to the class under Rule 23(e). But there was widespread unhappiness among the conferees with a "laundry list" approach to such a rule even though the idea of getting more important information on the table early in the settlement-review process received considerable support. The sketch below responds to these concerns.

1 **Rule 23. Class Actions**
2
3 * * * * *
4
5 **(e) Settlement, Voluntary Dismissal, or Compromise.** The
6 claims, issues, or defenses of a certified class, or a
7 class proposed to be certified as part of a settlement,
8 may be settled, voluntarily dismissed or compromised
9 only with the court's approval. The following
10 procedures apply to a proposed settlement, voluntary
11 dismissal, or compromise:
12
13 **(1)** After the parties have provided [relevant]
14 {sufficient} information about the proposed
15 settlement, ~~T~~the court must direct notice in a
16 reasonable manner to all class members who would
17 be bound by the proposal if it determines that
18 giving notice is justified by the prospect of
19 class certification and approval of the proposal.

Sketch of Draft Committee Note

Subdivision (e). The introductory paragraph of Rule 23(e) is amended to make explicit that its procedural requirements apply in instances in which the court has not certified a class at the time that a proposed settlement is presented to the court. The notice required under Rule 23(e)(1) then could also satisfy the notice requirements of Rule 23(c)(2)(B) in a class to be certified under Rule 23(b)(3), and trigger the class members' time to opt out. Information about the opt-out rate could then

be available to the court at the time that it considers final approval of the proposed settlement.

Subdivision (e)(1). The decision to give notice to the class of a proposed settlement is an important event. It should be based on a solid record supporting the conclusion that the proposed settlement will likely earn final approval after notice and an opportunity to object. If the court has not previously certified a class, this showing should also provide a basis for concluding that the court will certify a class for purposes of settlement. Although the order to send notice is often called a "preliminary approval" of class certification, it is not appealable under Rule 23(f). It is, however, sufficient to require notice under Rule 23(c)(2)(B) calling for class members in Rule 23(b)(3) classes to decide whether to opt out.

There are many types of class actions, and class-action settlements are of many types. As a consequence, no single list of topics to be addressed in the submission to the court would apply to each one. Instead, the subjects to be addressed depend on the specifics of the particular class action and the particular proposed settlement. General observations can be made, however.

One key element is class certification. If the court has already certified a class, the only information necessary in regard to a proposed settlement is whether the proposed settlement calls for any change in the class certified, or of the claims, defenses, or issues regarding which certification was granted. But if class certification has not occurred, the parties must ensure that the court has a basis for concluding that it will be able, after the final hearing, to certify the class. Although the standards for certification differ for settlement and litigation purposes, the court cannot make the decision that the prospects for certification are warranted without a suitable basis in the record. The ultimate decision to certify the class for purposes of settlement cannot be made until the hearing on final approval of the proposed settlement. If the settlement is not approved and certification for purposes of litigation is later sought, the parties' submissions in regard to the proposed settlement should not be considered in relation to the later request for certification.

Regarding the proposed settlement, a great variety of types of information might appropriately be included in the submission to the court. A basic focus is the extent and nature of benefits that the settlement will confer on the members of the class. Depending on the nature of the proposed relief, that showing may include details on the nature of the claims process that is contemplated [and about the take-up rate anticipated]. The possibility that the parties will report back to the court on the

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take-up rate after notice to the class is completed is also often important. And because there are often funds left unclaimed, it is often important for the settlement agreement to address the use of those funds. Many courts have found guidance on this subject in § 3.07 of the American Law Institute, Principles of Aggregate Litigation (2010).

It is often important for the parties to supply the court with information about the likely range of litigated outcomes, and about the risks that might attend full litigation. In that connection, information about the extent of discovery completed in the litigation or in parallel actions may often be important. In addition, as suggested by Rule 23(b)(3)(A), the existence of other pending or anticipated litigation on behalf of class members involving claims that would be released under the proposal is often important.

The proposed handling of an attorney fee award under Rule 23(h) is another topic that ordinarily should be addressed in the parties' submission to the court. In some cases, it will be important to relate the amount of an attorney fee award to the expected benefits to the class, and to take account of the likely take-up rate. One method of addressing this issue is to defer some or all of the attorney fee award determination until the court is advised of the actual take-up rate and results. Another topic that normally should be included in the report is identification of any agreement that must be identified under Rule 23(e)(3).

The parties may supply information to the court on any other topic that they regard as pertinent to the determination whether the proposal is fair, reasonable, and adequate. The court may direct the parties to supply further information about the topics they do address, or to supply information on topics they do not address. It must not direct notice to the class until the parties' submissions demonstrate the likelihood that the court will have a basis to approve the proposal after notice to the class and a final approval hearing.

(2) 23(f) and the Rule 23(e)(1) order for notice to the class

1 **Rule 23. Class Actions**
2
3 * * * * *
4
5 **(f) Appeals.** A court of appeals may permit an appeal from
6 an order granting or denying class-action certification
7 under this rule if a petition for permission to appeal
8 is filed with the circuit clerk within 14 days after
9 the order is entered. <u>An order under Rule 23(e)(1) may</u>
10 <u>not be appealed under Rule 23(f).</u> An appeal does not
11 stay proceedings in the district court unless the
12 district judge or the court of appeals so orders.

Sketch of Draft Committee Note

Subdivision (f). As amended, Rule 23(e)(1) provides that the court should direct notice to the class regarding a proposed class-action settlement in cases in which class certification has not yet been granted only after determining that the prospect of eventual class certification justifies giving notice. This decision is often characterized as a "preliminary approval" of the proposed class certification. But it is not a final approval of class certification, and review under Rule 23(f) would be premature. This amendment makes it clear that the court of appeals may not permit an appeal under this rule until the district court decides whether to certify the class. If it approves the settlement as well, that may often lead to entry of an appealable judgment. If it does not approve class certification -- thus leaving class certification for litigation purposes for possible later resolution -- there is no order subject to review under Rule 23(f).

(3) Clarifying that Rule 23(e)(1) notice triggers the opt-out period

Rule 23. Class Actions

* * * * *

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses

* * * * *

(2) ***Notice.***

* * * * *

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), <u>or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified [for settlement] under Rule 23(b)(3),</u> the court must direct to class members the best notice that is practicable under the circumstances to all members who can be identified through reasonable effort. * * * * *

Sketch of Draft Committee Note

As amended, Rule 23(e)(1) provides that the court must direct notice to the class regarding a proposed class-action settlement only after determining that the prospect of class certification and approval of the proposed settlement justifies the giving of notice. This decision is sometimes called a "preliminary approval" of the proposed class certification in Rule 23(b)(3) actions, and it is commonplace that notice to the class is sent simultaneously under both Rule 23(e)(1) and Rule 23(c)(2)(B), including a provision for class members to decide by a certain date whether to opt out. This amendment recognizes the propriety of that practice. Requiring repeat notices to the class can be wasteful and confusing to the class members.

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(4) Notice in 23(b)(3) class actions

Rule 23. Class Actions

* * * * *

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses

* * * * *

(2) ***Notice***

* * * * *

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice [by the most appropriate means, including first class mail, electronic, or other means] {by first class mail, electronic mail, or other appropriate means} to all members who can be identified through reasonable effort. * * * * *[1]

Sketch of Draft Committee Note

Subdivision (c)(2). Since Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), interpreted the rule's individual notice requirement for class members in Rule 23(b)(3) class actions, many courts interpreted that requirement to mean that first class mail would be necessary in every case. But technological change since 1974 has meant that other forms of communication are more reliable and important to many. As that technological change has evolved, courts and counsel have begun to employ new technology to make notice more effective, and sometimes less costly.

Rule 23(c)(2)(B) is amended to take account of these changes, and to call attention to them. No longer should courts assume that first class mail is the "gold standard" for notice in Rule 23(b)(3) class actions. As amended, the rule calls for giving notice "by the most appropriate means." It does not specify any particular means as preferred. Although it may often be true that online methods of notice, for example by email, are the most promising, it is important to keep in mind that a significant portion of class members in certain cases may have limited or no access to the Internet.

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[1] The alternative language was suggested by a Subcommittee member.

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Instead of assuming one size fits all, therefore, courts and counsel should focus on the means most likely to be effective to notify class members in the case before the court. Professional claims administration firms have achieved expertise in evaluating differing methods of reaching class members. There is no requirement that such professional assistance be sought in every case, but in appropriate cases it may be important, and provide a resource for the court and counsel. In providing the court with information supporting notice to the class of a proposed class-action settlement under Rule 23(e)(1), for example, it may often be important to include a report about the proposed method of giving notice to the class, and perhaps a forecast of the anticipated take-up rate, as well as the proposed form of notice and any proposed claims form.

[Careful attention should also be given to the content and format of the notice and any claim form. The ultimate goal of giving notice is to enable class members to make decisions about whether to opt out or object, or to make claims. The rule requires that the court use the "best notice that is practicable." To achieve that goal, attention to format and content are in order. Format and content that would be appropriate for class members likely to be sophisticated, for example in a securities fraud class action, might not be appropriate for a class made of up of members likely to be less sophisticated. As with the method of notice, the form of notice should be tailored to the class members' expectations and capabilities.

Particular attention to the method for class members to make claims is an important ingredient of the process of developing the notice and claims process. Although it is important to guard against groundless claims by purported class members, it is also important to avoid making the claims process unnecessarily burdensome, particularly when the amounts available for successful claimants are relatively small. Submissions to the court under Rule 23(e)(1) often should address the possibility that after initial submission of claims a residue of funds will be left for further distribution. In addition, it may often be desirable for the court to direct that the parties report back at the end of the claims distribution process about the actual pay-out rate. The goal of a notice and claims process in a Rule 23(b)(3) class action is to deliver relief to the class members. A claims process that maximizes delivery of relief to class members should be a primary objective of the notice program.

Attention should focus also on the method of opting out provided in the notice. As with making claims, the process of opting out should not be unduly difficult or cumbersome. At the same time, it is important to guard against the risk of unauthorized opt-out notices. As with other aspects of the notice process, there is no single method that is suitable for all cases.][2]

This amendment recognizes that technological change since 1974 calls for recalibrating methods of notice to take account of current realities. There is no reason to think that technological change will halt soon, and there is no way to forecast what further technological developments will affect the methods used to communicate. Courts seeking "the most appropriate means" of giving notice to class members under this rule should attend to existing technology, including class members' likely access to that technology, when reviewing the methods proposed in specific cases.

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[2] This Note discussion draws from comments made to the Subcommittee in numerous conferences. It is supported by the rule's current reference to the "best notice that is practicable." It might be debated whether that rule language, which has long been in the rule, precisely supports this Note language, for the Note is mainly about the changes being proposed for the rule, not what has long been in it. But the amendment addresses "appropriate" notice methods, so a Note that addresses questions of format and content based on experience seems in order.

(5) Objectors

Although the Subcommittee's many conferences and meetings with experienced class-action lawyers have revealed considerable disagreement about many of the topics discussed, this topic is one on which there was widespread agreement, if not virtual unanimity. Even those who have presented objections to class-action settlements in many instances also express chagrin about the behavior of some objectors or objector counsel who exploit the objection process, and the ability to appeal from denial of an objection, to extract unjustified payments from class counsel desirous of completing the settlement and delivering the agreed relief to the members of the class.

The amendment ideas below essentially adopt two methods for dealing with these problems. First, the rule would direct objectors to state the grounds for their objections. The Subcommittee has been informed that, on occasion, objectors submit virtual one-line objections that are placeholders for appeals that in turn present the opportunity to extract tribute from class counsel. Not only does that behavior constitute a sort of a "tax" on successful class actions, it also denies the district court the benefit of a ground for evaluating the objections it receives.

The idea of objector disclosure was suggested to the Subcommittee during the conferences it attended after the full Committee's April meeting, and initially produced a detailed list of items that an objector would have to provide the court. Although a demanding list of disclosure requirements might be an inviting way of dealing with bad faith objectors, such requirements could also constitute an undue obstacle to objections by other class members not intent on extracting tribute. Accordingly, the sketch below is more general about what must be disclosed, and includes bracketed language that might strengthen this aspect of this approach.

The second feature of this amendment approach seeks to remove, or at least to regulate, the apparent inducement for bad faith objections -- the pay off. It builds on suggestions made to the Civil Rules Committee and to the Appellate Rules Committee recommending that there be a complete prohibition of any payment to objectors or objector counsel. The sketch below does not go that far. Instead, it builds on the 2003 amendments to Rule 23, which in Rule 23(e)(5) already require that an objector who wants to withdraw an objection must obtain the court's approval to do so. This approach is designed to put the court in a position to review any such payment rather than prohibit all such payments.

The appropriate court to make the approval decision is not certain. An initial reaction might be that the district court, having recently performed the review required under Rules

23(e)(1) and 23(e)(2) would be in a much better position than the court of appeals, which may be unfamiliar with the case. The Subcommittee has been told that often the "payoff" sort of situation arises shortly after the notice of appeal is filed, or even before it is filed. If that is so, it seems likely that the district court would be much better situated than the court of appeals to evaluate the matter.

On the other hand, it is possible that the question could arise much later in the process. An FJC study several years ago revealed that there is a striking divergence among circuits with regard to the resolution of objector appeals on the merits. The "hold up" paradigm for the sort of objector behavior addressed in this sketch seems to presume an early deal and no resolution on the merits. In two of the circuits studied by the FJC that was what happened in the great majority or all the objector appeals during the period studied. But in another circuit about two-thirds of the objector appeals resulted in an appellate decision on the merits of the objector's appeal. At least in that circuit, it may be that after the appeal has resulted in substantial appellate proceedings, the court of appeals is better equipped to evaluate a proposed dismissal of the appeal than the district court, which may not have seen the case for a year or two.

1 **(e) Settlement, Voluntary Dismissal, or Compromise.** The claims,
2 issues, or defenses of a certified class may be settled,
3 voluntarily dismissed, or compromised only with the court's
4 approval. The following procedures apply to a proposed
5 settlement, voluntary dismissal, or compromise:
6
7 * * * * *
8
9 **(5)** **(A)** Any class member may object to the proposal if it
10 requires court approval under this subdivision
11 (e)~~,~~. The objection must [state whether the
12 objection applies only to the objector or to the
13 entire class, and] state [with specificity] the
14 grounds for the objection. [Failure to state the
15 grounds for the objection is a ground for
16 rejecting the objection.]
17
18 **(B)** T~~t~~he objection, or an appeal from an order denying
19 an objection, may be withdrawn only with the
20 court's approval. If [a proposed payment in
21 relation to] a motion to withdraw an appeal was
22 referred to the court under Rule 42(c)[3] of the

[3] For purposes of discussion at this meeting, one possibility that has been the subject of discussions with the

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23 Federal Rules of Appellate Procedure, the court
24 must inform the court of appeals of its action.[4] [5]

Appellate Rules Committee is the addition of an Appellate Rule 42(c), providing as follows:

> **(c) Dismissal of Class-Action Objector's Appeal**. A motion to dismiss an appeal from an order denying an objection made to approval of a class-action settlement under Rule 23(e)(5) of the Federal Rules of Civil Procedure [must][may] be referred to the district court for its determination whether to permit withdrawal of the objection and appeal under Rule 23(e)(5)(B) [if the objector or the objector's counsel is to receive any payment or consideration in [exchange for] {connection with} dismissal of the appeal].

The use of "may" above recognizes that the court of appeals may wish to deal with the matter itself. For one thing, if no payment or consideration is to be paid to the objector or objector counsel, there may be no reason for reference to the district court. For another, there may be cases in which the court of appeals concludes that it is better situated to resolve the matter than the district court. If the motion to withdraw the appeal arises shortly after the notice of appeal is filed, and therefore also shortly after the district court has reviewed the proposed settlement and rejected the objection, it would be unlikely the court of appeals would feel itself better equipped to deal with the matter. On the other hand, if the appeal has been fully briefed and argued, the court of appeals may be more familiar with the issues than the district court, for the district court's action might be several years old by then.

[4] The sketch presents in brackets the question whether the rule should be directed only to withdrawal of an objection or dismissal of an appeal, or instead to payment to the objector or objector counsel for withdrawing the objection or appeal. Current Rule 23(e)(5) focuses only on withdrawal of the objection. That may be sufficient. But it would seem that many objections are, in effect, abandoned after the class member obtains a fuller understanding of the issues. Whether one wants to burden that withdrawal with a court-approval requirement could be debated. On the other hand, it may be that the filing of a notice of appeal shows that something more serious is going forward. Then perhaps the focus on payment should be more pronounced. This issue has been discussed by the Subcommittee and it continues to consider the right balance.

[5] Another consideration might be whether to include something like current Rule 23(e)(3), which requires

12b-000973

Alternative 1

(C) Unless approved by the district court, no payment may be made to any objector or objector's counsel in [exchange for] {connection with} withdrawal of an objection or appeal from denial of an objection.

Alternative 2

(C) The court must approve any payment to the objector in connection with withdrawing the objection or[, if acting on referral from the court of appeals, withdrawing] an appeal from denial of an objection.[6]

[This sketch assumes collaborative work with the Appellate Rules Committee on devising a combination of Civil Rule and Appellate Rule provisions that would suitably implement the regime of judicial review of any dismissal of an appeal from denial of an objection. Communications are under way with the Appellate Rules Committee to develop a coordinated response. The content of any amendments to the Appellate Rules is committed to the Appellate Rules Committee. One possible place for an Appellate Rule would be in Rule 42, which is why that designation is used in the above sketch of a Civil Rules.]

Sketch of Draft Committee Note

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identification of "side agreements" reached in connection with proposed settlements. Perhaps requiring disclosure (not just identification) of such side agreements would be a good idea in connection with proposed withdrawal of an objection or appeal from denial of the objection. That might somewhat sidestep the question of having a rule require court approval for payments themselves, as opposed to court approval for withdrawal of the objection or dismissal of the appeal.

[6] As a matter of form of amendment, it has been suggested that the better way to present an amendment along these lines would be to retain the first portion of the rule ("Any class member may object to the proposal if it requires court approval.") as 23(e)(5), and to make the remainder of (A) new Rule 23(e)(5)(A). Then (B) and (C) might be combined. These drafting possibilities will be kept in mind as the Subcommittee moves forward.

12b-000974

Subdivision (e)(5). Objecting class members can play a critical role in the Rule 23(e) process. They can be a source of important information about possible deficiencies in a proposed settlement, and thus provide assistance to the court. With access to the information regarding the proposed settlement submitted to the court under Rule 23(e)(1), objectors can make an accurate appraisal of the merits and possible failings of a proposed settlement. By raising these matters, they can assist the court in making its decision whether to approve the settlement.

The amendment therefore directs that objections state [with specificity] the grounds on which they are made. A simple "I object" does not assist the court in evaluating the proposal. [Accordingly, the amended rule specifies that failure to state the grounds for the objection is a reason to reject the objection during the final approval process.] Care must be taken, however, to avoid unduly burdening class members who wish to object. Particularly if they are not assisted by counsel, class members cannot be expected to present objections that adhere to technical legal requirements. Instead, they should only be expected to specify what aspect of the settlement they find objectionable. [In particular, they should state whether they are objecting only for themselves, for the entire class, or for some discrete part of the class.] With these specifics, the court and the parties may suitably address the concerns raised during the final approval hearing.

The rule is also amended to require court approval of any payment to an objector or objector's counsel in exchange for withdrawing an objection or appeal from denial of an objection. Although good-faith objections have provided assistance to courts reviewing proposed settlements, the Committee has been informed that in at least some instances objectors or their counsel appear to be acting in counterproductive ways. Some may submit delphic objections that do not go much beyond "I object," and thus do not assist the court in evaluating the proposed settlement. The requirement that the objection state the grounds [and authority to reject any objection that does not] addresses this problem.

Another problem is that objectors may exploit the delay potential of an appeal to extract concessions for themselves. The 2003 amendments to Rule 23 permitted withdrawal of an objection before the district court only with that court's approval, an initial step to assure judicial supervision of the objection process. Whatever the success of that measure in ensuring the district court's ability to supervise the behavior of objectors during the Rule 23(e) review process, it seems not to have had a significant effect on the handling of objector appeals. But the delay resulting from an objector appeal may enable objectors to extract special concessions in return for

dropping the appeal. That is certainly not to say that most objector appeals are intended for inappropriate purposes, but only that some may have been pursued inappropriately, leading class counsel to conclude that a substantial payment to the objector or the objector's counsel is warranted -- without particular regard to the merits of the objection -- in order to enable the class to receive the benefits of the settlement.

This amendment therefore extends the requirement of court approval to apply to withdrawal of an appeal as well to withdrawal of an objection before the district court whether or not the objector or objector counsel is to receive a payment or other consideration for dropping the appeal. A parallel amendment to Appellate Rule 42(c) confirms that the Court of Appeals may refer the question whether to approve the dismissal of the appeal to the district court upon receipt of a motion to dismiss the appeal. The district court is likely often to be better equipped to decide whether to approve the payment than the court of appeals because the district court is more familiar with the case and with the settlement.

[In reviewing requests for withdrawal of an appeal -- as with requests for approval of withdrawal of an objection before the district court under current Rule 23(e)(5) -- the court should adopt a standard of reasonableness. Attention should focus particularly on instances in which a payment is to be made to the objector or objector counsel in return for the withdrawal. The request for approval should include details on any agreements made in connection with the withdrawal.

When the payment recognizes that the objector is in a distinctive or unique position that warrants treatment different from the other members of the class, that would ordinarily be a ground for approving the payment. When the objection results in a change in the settlement that affords additional relief to other class members as well as the objector, that would ordinarily be a sufficient basis for approving the payment [unless the amount of the payment is disproportionate to the overall benefits for other members of the class]. Even if the objection does not result in any change to the proposal, it may be that it assisted the district court in evaluating the proposal. For example, it may be that the objection enabled more careful review of certain aspects of the proposal or the value of the entire proposal. Even if the court concluded, after that review of the adequacy of the proposal, that approval was warranted, the value of the objection to the review process may justify a reasonable payment to the objector or objector counsel.][7]

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[7] The bracketed paragraphs are largely about the standards the court might use when passing on requests to withdraw an

(6) Settlement approval criteria

The Subcommittee early focused on the diversity and divergence of settlement-approval "checklists" employed in various circuits. The ALI had expressed concern in its Aggregate Litigation Principles that existing precedent produced an unduly diffuse and unfocused settlement review process, frustrating both judges and lawyers.

In place of that existing process, the Subcommittee presented in April a sketch that emphasized four approval principles and also contained a "catch all" authorization to consider whatever else the court thought important. During the April Committee meeting, it was suggested that a revised sketch for discussion at the mini-conference omit the catch-all provision.

The issues memorandum for the Sept. 11 mini-conference included such a sketch. It produced concern that in given cases other matters not directly invoked among the four factors distilled in the Subcommittee's list could matter enough to mention the possibility that such factors supported rejection of the proposal. Accordingly, both alternatives below offer a version of a "catch all" authorization for consideration of other things. At the same time, it might be argued that the listed four factors suffice for this purpose, and that anything that might trouble a court should bear on one of those four factors. Indeed, as the brackets around factor (B) suggest, it might be that we need only three, and can trust factor (A) to cover the problems that might also be presented under factor (B).

The sketch below also includes two alternative formulations. It could be said that Alternative 2 is more focused, and potentially more confining than Alternative 1. Alternative 1 merely says that the court should consider the listed factors in deciding whether the proposed settlement is "fair, reasonable, and adequate." It may be that this phrase, in the current rule, is so elastic as to encompass virtually any factor ever mentioned by any court considering a class-action settlement. Alternative 2 may be more focused, since it says that the court must find that all four (or three) factors are met. So it could be that in a given case a judge would consider approval forbidden under Alternative 2, even though the proposed settlement would be found

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objection or dismiss an appeal. It might be argued that they go too far beyond the actual provisions of the rule. On the other hand, the rule does require court approval, so Note language about how the court should approach that duty seems legitimate. It could also be noted that the court of appeals may sometimes be able to apply these standards when the appellant moves to dismiss an appeal.

12b-000977

fair, reasonable, and adequate using the more expansive direction in Alternative 1, and would win approval under that alternative.

The Subcommittee is somewhat divided on whether to adopt Alternative 1 or Alternative 2. In part, this division results from debates about the extent to which a rule should constrain courts in their review of proposed settlements. It also results from uncertainty about whether any rule would really constrain courts if it turns on whether the judge thought the settlement "fair, reasonable, and adequate."

There may also be some disagreement on the Subcommittee on whether either of these formulations -- particularly with a "catch all" provision -- would actually change judicial behavior. One view is that they would not, since judges could continue to do exactly what they did before the amendment. Another view is that such a rule change would provide much-needed structure and focus for the settlement-review process. It would also provide a basis for judges in any district to look to decisions in any other district for guidance in that process, without the complication that the other district was employing a different circuit's list of factors.

The Subcommittee is presenting these two alternatives to the full Committee, along with the question whether to include a "catch all" provision. Although it has not reached consensus as between Alternative 1 and Alternative 2, it is persuaded that the choice is not of monumental importance.

1 **Rule 23. Class Actions**
2
3 * * * * *
4
5 **(e) Settlement, Voluntary Dismissal, or Compromise.** The
6 claims, issues, or defenses of a certified class may be
7 settled, voluntarily dismissed, or compromised only
8 with the court's approval. The following procedures
9 apply to a proposed settlement, voluntary dismissal, or
10 compromise.
11
12 * * * * *
13
14 *Alternative 1*
15
16 **(2)** If the proposal would bind class members, the
17 court [may disapprove it on any ground the court
18 deems pertinent to approval of the proposal, but]
19 may approve it only after a hearing and [only] on
20 finding that it is fair, reasonable, and
21 adequate~~.~~, considering whether:
22

12b-000978

23 *Alternative 2*
24
25 **(2)** If the proposal would bind class members, the
26 court may approve it only after a hearing and on
27 finding that: ~~it is fair, reasonable, and~~
28 ~~adequate.~~
29
30
31 (A) the class representatives and class counsel
32 have [been and currently are] adequately
33 represented [representing] the class [in
34 preparing to negotiate the settlement];
35
36 [(B) the settlement was negotiated at arm's length
37 and was not the product of collusion;]
38
39 (C) the relief awarded to the class -- taking into
40 account the proposed attorney fee award [and
41 the timing of its payment,] and any ancillary
42 agreement made in connection with the
43 settlement -- is fair, reasonable, and
44 adequate, given the costs, risks, probability
45 of success, and delays of trial and appeal;
46 [and]
47
48 (D) class members are treated equitably relative
49 to each other [based on their facts and
50 circumstances and are not disadvantaged by
51 the settlement considered as a whole] and the
52 proposed method of claims processing is fair
53 [and is designed to achieve the goals of the
54 class action]; [and]
55
56 [(E) approval is warranted in light of any other
57 matter that the court deems pertinent.]

[For purposes of simplicity, the draft Committee Note below assumes that Alternative 1 will be adopted.]

Sketch of Draft Committee Note

Subdivision (e)(2). Since 1966, Rule 23(e) has provided that a class action may be settled or dismissed only with the court's approval. Many circuits developed lists of "factors" to be considered in connection with proposed settlements, but these lists were not the same, were often long, and did not explain how the various factors should be weighed. In 2003, Rule 23(e) was amended to clarify that the court should approve a proposed class-action settlement only if it is "fair, reasonable, and adequate." Nonetheless, in some instances the existing lists of factors used in various circuits may have been employed in a

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"checklist" manner that has not always best served courts and litigants dealing with settlement-approval questions.

This amendment is designed to provide more focus for courts called upon to make this important decision. Rule 23(e)(1) is amended to ensure that the court has a broader knowledge base when initially reviewing a proposed class-action settlement and deciding whether giving notice to the class is warranted by the prospect that the settlement will win final approval. The submissions to the court under Rule 23(e)(1), supporting notice to the class, should provide class members with more information to evaluate a proposed settlement. Objections under Rule 23(e)(5) can therefore be calibrated more carefully to the actual specifics of the proposed settlement. Rule 23(e)(5) is amended to direct objectors to state the grounds for their objections, which should assist the court and the parties in connection with the possible final approval of the proposed settlement.

Amended Rule 23(e)(2) builds on the knowledge base provided by the Rule 23(e)(1) disclosures and any objections from class members. It focuses the court and the parties on the core considerations that should be the prime factors in making the final decision whether to approve a settlement proposal. It is not a straitjacket for the court, but does recognize the central concerns that judicial experience has shown should be the main focus of the court as it makes a decision whether to approve the settlement.

Paragraphs (A) and (B). These paragraphs identify matters that might be described as "procedural" concerns, looking to the conduct of the litigation and of the negotiations leading up to the proposed settlement. If the court has appointed class counsel or interim class counsel, it will have made an initial evaluation of counsel's capacities and experience. But the focus at this point is on the actual performance of counsel acting on behalf of the class.

The information submitted under Rule 23(e)(1) may provide a useful starting point in assessing these topics. For example, the nature and amount of discovery may indicate whether counsel negotiating on behalf of the class had an adequate information base. The pendency of other litigation about the same general subject on behalf of class members may also be pertinent. The conduct of the negotiations may also be important. For example, the involvement of a court-affiliated mediator or facilitator in those negotiations may bear on whether they were conducted in a manner that would protect and further the class interests.

In making this analysis, the court may also refer to Rule 23(g)'s criteria for appointment of class counsel; the concern is whether the actual conduct of counsel has been consistent with

12b-000980

what Rule 23(g) seeks to ensure. Particular attention might focus on the treatment of any attorney fee award, both in terms of the manner of negotiating the fee award and the terms of the award.

Paragraphs (C) and (D). These paragraphs focus on what might be called a "substantive" review of the terms of the proposed settlement. A central concern is the relief that the settlement is expected to provide to class members. Evaluating the proposed claims process and expected or actual claims experience (if the notice to the class calls for simultaneous submission of claims) may bear on this topic. The contents of any agreement identified under Rule 23(e)(3) may also bear on this subject, in particular the equitable treatment of all members of the class.

Another central concern will relate to the cost and risk involved in pursuing a litigated outcome. Often, courts may need to forecast what the likely range of possible classwide recoveries might be and the likelihood of success in obtaining such results. That forecast cannot be done with arithmetic accuracy, but it can provide a benchmark for comparison with the settlement figure. And the court may need to assess that settlement figure in light of the expected or actual claims experience under the settlement.

[If the class has not yet been certified for trial, the court may also give weight to its assessment whether litigation certification would be granted were the settlement not approved.]

Examination of the attorney fee provisions may also be important to assessing the fairness of the proposed settlement. Ultimately, any attorney fee award must be evaluated under Rule 23(h), and no rigid limits exist for such awards. Nonetheless, the relief actually delivered to the class is often an important factor in determining the appropriate fee award. Provisions for reporting back to the court about actual claims experience, and deferring a portion of the fee award until the claims experience is known, may bear on the fairness of the overall proposed settlement.

Often it will be important for the court to scrutinize the method of claims processing to ensure that it is suitably receptive to legitimate claims. A claims processing method should deter or defeat unjustified claims, but unduly demanding claims procedures can impede legitimate claims. Particularly if some or all of any funds remaining at the end of the claims process must be returned to the defendant, the court must be alert to whether the claims process is unduly exacting.

12b-000981

[**Paragraph (E)**. Rule 23(e)(5)'s distillation of core settlement-approval criteria does not prevent the court from considering any other matter that, in its discretion, appears pertinent to the overall fairness, reasonableness, or adequacy of the proposal. In order to permit effective evaluation of such matters, the court may direct the parties to provide information that will assist in its review of the settlement.]

Ultimately, the burden of establishing that a proposed settlement is fair, reasonable, and adequate rests on the proponents of the settlement. But no formula is a substitute for the informed discretion of the district court in assessing the overall fairness of proposed class-action settlements. Rule 23(e)(2) provides the focus the court should use in undertaking that analysis.

Composite of possible amendments
that might become an amendment package

In order to facilitate comprehension of the overall package of possible amendments, the following attempts to combine all six sketches above into a single presentation. Before any such package goes forward, it would certainly be modified and refined. Nonetheless, the overall composite may be helpful to Committee members.

Rule 23. Class Actions

* * * * *

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses

* * * * *

(2) ***Notice***

* * * * *

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified [for settlement] under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice [by the most appropriate means, including first class mail, electronic, or other means] {by first class mail, electronic mail, or other appropriate means} to all members who can be identified through reasonable effort. * * * * *

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class, or a class proposed to be certified as part of a settlement, may be settled, voluntarily dismissed or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) After the parties have provided [relevant] {sufficient} information about the proposed settlement, ~~T~~the court must direct notice in a reasonable manner to all class members who would be bound by the proposal if it determines that giving notice is justified by the prospect of class certification and approval of the proposal.

12b-000983

Alternative 1

(2) If the proposal would bind class members, the court [may disapprove it on any ground the court deems pertinent to approval of the proposal, but] may approve it only after a hearing and [only] on finding that it is fair, reasonable, and adequate~~.~~, considering whether:

Alternative 2

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that: ~~it is fair, reasonable, and adequate.~~

(A) the class representatives and class counsel have [been and currently are] adequately represented [representing] the class [in preparing to negotiate the settlement];

[(B) the settlement was negotiated at arm's length and was not the product of collusion;]

(C) the relief awarded to the class -- taking into account the proposed attorney fee award [and timing of its payment,] and any ancillary agreement made in connection with the settlement -- is fair, reasonable, and adequate, given the costs, risks, probability of success, and delays of trial and appeal; and

(D) class members are treated equitably relative to each other [based on their facts and circumstances and are not disadvantaged by the settlement considered as a whole] and the proposed method of claims processing is fair [and is designed to achieve the goals of the class action].

[(E) approval is warranted in light of any other matter that the court deems pertinent.]

* * * * *

(5) (A) Any class member may object to the proposal if it requires court approval under this subdivision (e)~~;~~. The objection must [state whether the objection applies only to the

12b-000984

objector or to the entire class, and] state [with specificity] the grounds for the objection. [Failure to state the grounds for the objection is a ground for rejecting the objection.]

(B) T~~t~~he objection, or an appeal from an order denying an objection, may be withdrawn only with the court's approval. If [a proposed payment in relation to] a motion to withdraw an appeal was referred to the court under Rule 42(c) of the Federal Rules of Appellate Procedure, the court must inform the court of appeals of its action.

Alternative 1

(C) Unless approved by the district court, no payment may be made to any objector or objector's counsel in [exchange for] {connection with} withdrawal of an objection or appeal from denial of an objection.

Alternative 2

(C) The court must approve any payment to the objector in connection with withdrawing the objection or[, if acting on referral from the court of appeals, withdrawing] an appeal from denial of an objection.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An order under Rule 23(e)(1) may not be appealed under Rule 23(f). An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Topics on which the Subcommittee
is not recommending we go forward now

Based on the input it has received, including the mini-conference, the Subcommittee is not bringing forward several topics on which it has spent considerable time. These topics fall into essentially three categories.

(1) The first includes two topics that are "on hold" -- "ascertainability" and "pick-off" offers of judgment or settlement offers. The Subcommittee has concluded that activity on these topics is not warranted at this time, but recognizes that developments in the relatively near future may mean that it may be suitable for the Subcommittee to return to one or the other of these topics in light of developments.

(2) The second category includes one topic -- settlement class certification -- which the Subcommittee initially concluded should be dropped from the agenda, but later concluded should be presented to the full Committee without a Subcommittee recommendation

(3) The third category includes another two topics -- cy pres provisions and issue class certification. The Subcommittee has concluded that these topics should be dropped from the Subcommittee's current agenda because there is no need for current rule-amendment action, or too many questions about what that action might be, to warrant further work at this time.

(1) Topics "on hold"

Ascertainability

During the April, 2015, meeting of the full Committee, the conclusion was reached that the Subcommittee should examine the question of ascertainability. Since then, it has received much advice and commentary about this subject, and it included a segment on ascertainability in the issues memo for the mini-conference that is included in this agenda book. That memorandum presented a sketch of a possible "minimalist" rule change dealing with ascertainability issues that was unfavorably received by a number of participants in the mini-conference. As reflected in the Subcommittee's post-conference meeting, the Subcommittee concluded that the state of the law on this topic was too unsettled, and that any effort to address it now by pursing rule amendments would present great difficulties. Particularly because this issue was discussed during the Committee's April meeting, a rather full discussion is presented here even though the Subcommittee does not presently recommend proceeding with rule-amendment ideas.

In order to provide some examples of ascertainability decisions, included in the agenda book should be three recent court of appeals decisions grappling with the concept: Brecher v. Republic of Argentina, ___ F.3d ___, 2015 WL 5438797 (2d Cir. No. 14-4385, Sept. 16, 2015); Mullins v. Direct Digital, LLC, 795 F.3d 654 (7th Cir. 2015); and Byrd v. Aaron's, Inc., 784 F.3d 184 (3d Cir. 2015). All three of these cases have been decided since the Committee's April meeting, and they illustrate the unsettled nature of the law, and the variety of issues that this general topic can encompass.

A starting point in approaching these issues is to recognize that a number of Rule 23 provisions deal with matters that relate to concerns addressed under the heading ascertainability. Thus:

> Rule 23(a) refers to a suit on behalf of "members of a class," implying that one must be able to define who is in the class.
>
> Rule 23(a)(1) says that a class action is proper only if the "class" is so numerous that joinder of all members is impracticable, implying that there must be a way to determine who is in the class.
>
> Rule 23(c)(1)(B) directs the court, upon certifying the class action to "define the class."
>
> Rule 23(c)(2)(B) says that in Rule 23(b)(3) class actions the court must direct individual notice to "all members who can be identified through reasonable effort."

Rule 23(c)(3)(A) says that the judgment in a (b)(1) or (b)(2) class action must "describe those whom the court finds to be class members" and that the judgment binds them.

Rule 23(c)(3)(B) says that the judgment in a (b)(3) class action should specify those "whom the court finds to be class members" and that the judgment binds them.

The list goes on. For decades it is been apparent that the proponent of class treatment must provide a reasonable definition of the proposed class; "all those similarly situated" usually would not suffice.

A recurrent theme has been that the definition must be objective, and eschew reliance on potential class members' state of mind. Another concern has been the "fail safe" class defined as something like "all those injured by defendant's illegal behavior." In that situation, a defendant victory would mean that there are no members of the class.

Thus, a considerable body of case law has developed on Rule 23's expectations about class definition. Recently, in part sparked by a series of Third Circuit decisions, the "implicit" requirement of ascertainability has emerged in the decisions of some courts. In significant measure, cases have focused on problems of identifying all class members, and whether a form of self-identification (e.g., by affidavit) should suffice initially for that purpose. Some have emphasized the need to ensure at the class certification stage that no difficulties will be encountered later in the case when the proceeds of the action are to be distributed to class members. Others have regarded such efforts as premature and unnecessary at the class certification stage.

It seems widely agreed that the most significant category of cases involving ascertainability problems are consumer class actions involving low-value products purchased by retail consumers who probably do not retain receipts. Identifying all such people may prove quite difficult. Verifying that they actually made the purchases might be quite burdensome to the class opponent and the court.

Various of the submissions to the Subcommittee that are mentioned at the beginning of this memorandum illustrate ways that experienced lawyers favored rule amendments to address this issue:

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No. 15-CV-D, from Professors Adam Steinman, Joshua Davis, Alexandra Lahav & Judith Resnik, proposes adding the following to Rule 23(c)(1)(B):

> A class definition shall be stated in a manner that such an individual could ascertain whether he or she is potentially a member of the class.

No. 15-CV-I, from Jennie Anderson, proposes adding the following to Rule 23(c)(1)(B):

> An order must define the class in objective terms so that a class member can ascertain whether he or she is a member of the class. A class definition is not deficient because it includes individuals who may be ineligible for recovery.

No. 15-CV-J, from Frederick Longer proposes addressing the "splintering interpretation" of ascertainability by adding the following to Rule 23(c)(2)(B)(ii):

> the definition of the class in clear terms so that class members can be identified and ascertained through ordinary proofs, including affidavits, prior to issuance of a judgment.

No. 15-CV-N, from Public Justice, proposes adding the following to Rule 23(c)(1)(B):

> In certifying a class under Rule 23(b)(3), the court must define the class so that it is ascertainable by reference to objective criteria. The ascertainability or identifiability of individual class members is not a relevant consideration at the class certification stage.

No. 15-CV-P, from the National Consumer Law Center and National Assoc. of Consumer Advocates proposes adding the following to Rule 23(c)(1)(B):

> A class is sufficiently defined if the class members it encompasses are described by reference to objective criteria. It is not necessary to prove at the class certification stage that all class members can be precisely identified by name and contact information.

The case law, meanwhile, appears fluid. The three recent decisions included in this agenda book illustrate the point. In Brecher v. Republic of Argentina, ___ F.3d ___ (2d Cir. No. 14-4385, Sept. 16, 2015), the court observed (citations omitted):

> Like our sister Circuits, we have recognized an "implied requirement of ascertainability" in Rule 23 of the Federal Rules of Civil Procedure. While we have noted this requirement is distinct from predominance, we have not further defined its content. We here clarify that the touchstone of ascertainability is whether the class is "sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member." "A class is ascertainable when defined by objective criteria that are administratively feasible and when identifying its members would not require a mini-hearing on the merits of each case."
>
> On appeal, Appellee argues that a class defined by "reference to objective criteria . . . is all that is required" to sustain ascertainability. We are not persuaded. * * * [T]he use of objective criteria cannot alone determine ascertainability when those criteria, taken together, do not establish the definite boundaries of a readily identifiable class.

The court found that, under the rather distinctive circumstances of the litigation before the court on behalf of those with beneficial interests in Argentinean bonds, the ascertainability requirement was not satisfied. The following discussion illustrates the difficulties that persuaded the court that the case was different from ordinary consumer class actions, such as actions on behalf of recipients of gift cards. The court's analysis of this contrast illustrates the fact-bound nature of potential ascertainability analyses:

> Appellee argued that the class here is comparable to those cases involving gift cards, which are fully transferable instruments. However, gift cards are qualitatively different: For example, they exist in a physical form and possess a unique serial number. By contrast, an individual holding a beneficial interest in Argentina's bond series possesses a right to the *benefit* of the bond but does not hold the physical bond itself. Thus, trading on the secondary market changes only to whom the benefit inures. Further, all bonds from the same series have the same trading number identifier (called a CUSIP/ISIN) making it practically impossible to trace purchases and sales of a particular beneficial interest. Thus, when it becomes necessary to determine who holds bonds that opted into (or out of) the class, it will be nearly impossible to distinguish between them once traded on the secondary market.

This analysis suggests some of the challenges that framing an ascertainability rule might present.

In Mullins v. Direct Digital, LLC, 795 F.3d 654 (2d Cir. 2015), the court cited Third Circuit precedent (including the Third Circuit's Byrd v. Aaron's decision included in the agenda materials) and referred to "doctrinal drift" toward what it described as a "heightened" ascertainability requirement that "has defeated certification, especially in consumer class actions.". It explained:

> We decline to follow this path and will stick with our settled law. Nothing in Rule 23 mentions or implies this heightened requirement under Rule 23(b)(3), which has the effect of skewing the balance that district courts must strike when deciding whether to certify classes. The policy concerns motivating the heightened ascertainability requirement are better addressed by applying carefully the explicit requirements of Rule 23(a) and especially (b)(3). These existing requirements already address the balance of interests that Rule 23 is designed to protect. A court must consider "the likely difficulties in managing a class action," but in doing so it must balance countervailing interests to decide whether a class action "is superior to other available methods for fairly and efficiently adjudicating the controversy."

In particular, the Seventh Circuit pointed out, "some courts have used this requirement to erect a nearly insurmountable hurdle at the class certification stage in situations where a class action is the only viable way to pursue valid but small individual claims," worrying that the Third Circuit approach "effectively bars low-value consumer class actions, at least where plaintiffs do not have documentary proof of purchases." It also noted, regarding the Third Circuit's cases, that "several members of the court [the Third Circuit] have expressed doubts about the expanding ascertainability doctrine," adding that "we agree in essence with Judge Rendell's concurring opinion in Byrd [v. Aaron's, Inc.], which urged "retreat from [the] heightened ascertainability requirement in favor of following the historical meaning of ascertainability under Rule 23."

In Byrd v. Aaron's, Inc., 784 F.3d 154 (3d Cir. 2015), the court reversed a district court's denial of class certification on grounds of ascertainability. It explained that "the District Court confused ascertainability with other relevant inquiries under Rule 23." It introduced its discussion as follows (id. at 161-62):

> Before discussing these errors, however, we believe it is necessary to address the scope and source of the ascertainability requirement that our cases have articulated. Our ascertainability decisions have been consistent and reflect a relatively simple requirement. Yet there has been apparent confusion in the invocation and

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> application of ascertainability in this Circuit. (Whether that is because, for example, the courts of appeals have discussed ascertainability in varying and distinct ways, or the ascertainability requirement is implicit rather than explicit in Rule 23, we need not say.) Not surprisingly, defendants in class actions have seized upon this lack of precision by invoking the ascertainability requirement with increasing frequency in order to defeat class certification.

As noted above, Judge Rendell concurred in the holding that the district court's denial of class certification was wrong, but added the following (id. at 172):

> [T]he lengths to which the majority goes in its attempt to clarify what our requirement of ascertainability means, and to explain how this implicit requirement fits in the class certification calculus, indicate that the time has come to do away with this newly created aspect of Rule 23 in the Third Circuit. Our heightened ascertainability requirement defies clarification.

Having received much input about this issue, the Subcommittee has concluded that it is not prepared at present to advance a rule provision that would helpfully address this set of issues. As the discussion above shows, this area is still in a state of considerable flux. It might even receive Supreme Court attention in the near future. In any event, it does seem likely that the courts of appeals and district courts will continue to grapple with issues and that the "common law" of ascertainability will evolve and emerge during the coming months. Part of the reason for the gradual nature of this process is that aspects of this topic touch on very basic principles of class-action jurisprudence. Any attempt to modify the handling of those basic principles will likely produce very considerable controversy. Although that prospect is not an argument against proceeding with needed rule amendments, it is a reason for caution about proceeding before the actual state of the law has become clear enough to make the consequences of rulemaking relatively predictable.

Rule 68 and Pick-Off offers

The Subcommittee does not recommend proceeding with work on an amendment to address the problem presented by "pick off" offers of settlement of judgment or settlement that might moot the claims of proposed class representatives before class certification could be decided.

Until recently, the Seventh Circuit had held that, at least in some circumstances, such offers would moot proposed class actions. See Damasco v. Clearwire Corp., 662 F.3d 891 (7th Cir. 2011). In reaction, plaintiff lawyers inside and outside the Seventh Circuit filed "out of the chute" class certification motions to guard against mootness, because the Seventh Circuit regarded making such a motion as sufficient to cure the potential mootness problem. On occasion, plaintiffs would also move to stay resolution of the class-certification motion until discovery and other work had been done to support resolution of certification.

The issues memorandum for the mini-conference contained three different possible rule-amendment approaches for dealing with these problems. The memo also raised the question whether the problem warranted the effort involved in proceeding to amend the rules. After the mini-conference, the Subcommittee decided that proceeding at this time is not indicated.

In Chapman v. First Index, Inc., 796 F.3d 783 (7th Cir. 2015), the Seventh Circuit overruled *Damasco* and a number of its cases following that decision "to the extent they hold that a defendant's offer of full compensation moots the litigation or otherwise ends the Article III case or controversy." Judge Easterbrook noted that "Justice Kagan's dissent in Genesis Healthcare Corp. v. Symczyk, 133 S.Ct. 1523, 1532-37 (2013) (joined by Ginsburg, Breyer & Sotomayor, JJ.), shows that an expired (and unaccepted) offer of a judgment does not satisfy the Court's definition of mootness, because relief remains possible." He added:

> Courts of appeals that have considered this issue since Genesis Healthcare uniformly agree with Justice Kagan. See, e.g., Tanasi v. New Alliance Bank, 786 F.3d 195 (2d Cir. 2015); Gomez v. Campbell-Ewald Co., 768 F.3d 871 (9th Cir. 2014), cert. granted, 135 S.Ct. 2311 (2015). The issue is before the Supreme Court in *Gomez*, and we think it best to clean up the law of this circuit promptly, rather than require Chapman and others in his position to wait another year for the Supreme Court's decision.

See also Hooks v. Landmark Indus. Inc., 797 F.3d 309 (5th Cir. 2015) (holding that "an unaccepted offer of judgment cannot moot a named-plaintiff's claim in a putative class action").

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As noted by Judge Easterbrook, the Supreme Court has this issue before it in the *Campbell-Ewald* case. The oral argument in that case occurred on Oct. 14, 2015. It seems prudent to await the result of the Court's decision, and quite possible that the issue will recede from the scene after that decision. It could recede even if the Court did not decide the case, or the decision left some questions open.

(2) Topic which the Subcommittee presents without a recommendation -- adopting a settlement certification rule

Below is introductory material on a topic that the Subcommittee has been considering since it began its deliberations in 2011. As set forth below, the Subcommittee's initial reaction after the mini-conference was that this topic should be taken off the agenda. But some reactions since then have prompted the Subcommittee to conclude that the subject should be presented to the full Committee. Below is the sketch presented to the Dallas mini-conference, the notes on the discussion of this topic during the conference, and the notes on the Subcommittee's discussion of the issue during its meeting after the conclusion of the conference.

After the sketch presented at the mini-conference, there appears an alternative inspired by the 1999 Report on Mass Tort Litigation to the Chief Justice from the Advisory Committee and the Working Group on Mass Torts. It proposes amending Rule 23(b)(3) to authorize certification under that subdivision if "interests in settlement" predominate over individual questions. This alternative approach has emerged only recently and has not been discussed in detail by the Subcommittee.

A. Rule 23(b)(4) Authorization
for Settlement Certification

Issues memo for mini-conference

(6) Settlement Class Certification

As noted again below, a key question is whether a settlement-certification addition to Rule 23(b) is needed to deal with difficulty in obtaining such certification under *Amchem*. A subsidiary issue is whether such additional certification authorization should be added only for actions brought under 23(b)(3).

1 **(b) Types of Class Actions.** A class action may be
2 maintained if Rule 23(a) is satisfied and if:
3
4 * * * * * *
5
6
7 (4) the parties to a settlement [in an action to be
8 certified under subdivision (b)(3)] request
9 certification and the court finds that the proposed
10 settlement is superior to other available methods for
11 fairly and efficiently adjudicating the controversy,
and that it should be approved under Rule 23(e).

Sketch of Draft Committee Note

Subdivision (b)(4) is new. In 1996, a proposed new subdivision (b)(4) was published for public comment. That new subdivision would have authorized certification of a (b)(3) class for settlement in certain circumstances in which certification for full litigation would not be possible. One stimulus for that amendment proposal was the existence of a conflict among the courts of appeals about whether settlement certification could be used only in cases that could be certified for full litigation. That circuit conflict was resolved by the holding in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), that the fact of settlement is relevant to class certification. The (b)(4) amendment proposal was not pursued after that decision.

Rule 23(f), also in the package of amendment proposals published for comment in 1996, was adopted and went into effect in 1998. As a consequence of that addition to that rule, a considerable body of appellate precedent on class-certification principles has developed. In 2003, Rule 23(e) was amended to clarify and fortify the standards for review of class settlements, and subdivisions (g) and (h) were added to the rule to govern the appointment of class counsel, including interim

class counsel, and attorney fees for class counsel. These developments have provided added focus for the court's handling of the settlement-approval process under Rule 23(e). Rule 23(e) is being further amended to sharpen that focus.

Concerns have emerged about whether it might sometimes be too difficult to obtain certification solely for purposes of settlement. Some report that alternatives such as multidistrict processing or proceeding in state courts have grown in popularity to achieve resolution of multiple claims.

This amendment is designed to respond to those concerns by clarifying and, in some instances, easing the path to certification for purposes of settlement. Like the 1996 proposal, this subdivision is available only after the parties have reached a proposed settlement and presented it to the court. Before that time, the court may, under Rule 23(g)(3), appoint interim counsel to represent the interests of the putative class.

[Subdivision (b)(4) addresses only class actions maintained under Rule 23(b)(3). The (b)(3) predominance requirement may be an unnecessary obstacle to certification for settlement purposes, but that requirement does not apply to certification under other provisions of Rule 23(b). Rule 23(b)(4) has no bearing on whether certification for settlement is proper in class actions not brought under Rule 23(b)(3).]

Like all class actions, an action certified under subdivision (b)(4) must satisfy the requirements of Rule 23(a). Unless these basic requirements can be satisfied, a class settlement should not be authorized.

Increasing confidence in the ability of courts to evaluate proposed settlements, and the tools available to them for doing so, provides important support for the addition of subdivision (b)(4). For that reason, the subdivision makes the court's conclusion under Rule 23(e)(2) an essential component to settlement class certification. Under amended Rule 23(e), the court can approve a settlement only after considering specified matters in the full Rule 23(e) settlement-review process, and amended Rules 23(e)(1) and (e)(5) provide the court and the parties with more information about proposed settlements and objections to them. Given the added confidence in settlement review afforded by strengthening Rule 23(e), the Committee is comfortable with reduced emphasis on some provisions of Rule 23(a) and (b).

Subdivision (b)(4) also borrows a factor from subdivision (b)(3) as a prerequisite for settlement certification -- that the court must also find that resolution through a class-action settlement is superior to other available methods for fairly and efficiently adjudicating the controversy. Unless that finding

can be made, there seems no reason for the court or the parties to undertake the responsibilities involved in a class action.

Subdivision (b)(4) does not require, however, that common questions predominate in the action. To a significant extent, the predominance requirement, like manageability, focuses on difficulties that would hamper the court's ability to hold a fair trial of the action. But certification under subdivision (b)(4) assumes that there will be no trial. Subdivision (b)(4) is available only in cases that satisfy the common-question requirements of Rule 23(a)(2), which ensure commonality needed for classwide fairness. Since the Supreme Court's decision in *Amchem*, the courts have struggled to determine how predominance should be approached as a factor in the settlement context. This amendment recognizes that it does not have a productive role to play and removes it.

Settlement certification also requires that the court conclude that the class representatives are typical and adequate under Rule 23(a)(3) and (4). Under amended Rule 23(e)(2), the court must also consider whether the settlement proposal was negotiated at arms length by persons who adequately represented the class interests, and that it provides fair and adequate relief to class members, treating them equitably.

In sum, together with changes to Rule 23(e), subdivision (b)(4) ensures that the court will give appropriate attention to adequacy of representation and the fair treatment of class members relative to each other and the potential value of their claims. At the same time, it avoids the risk that a desirable settlement will prove impossible due to factors that matter only to a hypothetical trial scenario that the settlement is designed to avoid.

Should the court conclude that certification under subdivision (b)(4) is not warranted -- because the proposed settlement cannot be approved under subdivision (e) or because the requirements of Rule 23(a) or superiority are not met -- the court should not rely on any party's statements in connection with proposed (b)(4) certification in relation to later class certification or merits litigation.

Reporter's Comments and Questions

A key question is whether a provision of this nature is useful and/or necessary. The 1996 proposal was prompted in part by Third Circuit decisions saying that certification could never be allowed unless litigation certification standards were satisfied. But *Amchem* rejected that view, and recognized that the settlement class action had become a "stock device." At the same time, it said that predominance of common questions is required for settlement certification in (b)(3) cases. Lower

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courts have sometimes seemed to struggle with this requirement. Some might say that the lower courts have sought to circumvent the *Amchem* Court's requirement that they employ predominance in the settlement certification context. A prime illustration could be situations in which divergent state laws would preclude litigation certification of a multistate class, but those divergences could be resolved by the proposed settlement.

If predominance is an obstacle to court approval of settlement certification, should it be removed? One aspect of the sketch above is that it places great weight on the court's settlement review. The sketch of revisions to Rule 23(e)(2) is designed to focus and improve that process. Do they suffice to support reliance on that process in place of reliance on the predominance prong of 23(b)(3)?

If predominance is not useful in the settlement context, is superiority useful? One might say that a court that concludes a settlement satisfies Rule 23(e)(2) is likely to say also that it is superior to continued litigation of either a putative class action or individual actions. But eliminating both predominance and superiority may make it odd to say that (b)(4) is about class actions "certified under subdivision (b)(3)." It seems, instead, entirely a substitute, and one in which (contrary to comments in *Amchem*), Rule 23(e) becomes a supervening criterion for class certification. That, in turn, might invite the sort of "grand-scale compensation scheme" that the *Amchem* Court regarded as "a matter fit for legislative consideration," but not appropriate under Rule 23.

Another set of considerations focuses on whether making this change would actually have undesirable effects. Could it be said that the predominance requirement is a counterweight to "hydraulic pressures" on the judge to approve settlements in class actions? If judges are presently dealing in a satisfactory way with the *Amchem* requirements for settlement approval, will making a change like this one prompt the filing of federal-court class actions that should not be settled because of the diversity of interests involved or for other reasons? And could this sort of development also prompt more collateral attacks later on the binding effect of settlement class-action judgments?

Discussion during mini-conference

There was extensive discussion of the Rule 23(b)(4) settlement certification sketch during the mini-conference. A thorough report on that discussion appears on the notes of the mini-conference, included in this agenda book. The discussion included the question whether the Supreme Court's Amchem decision unduly limited settlement certification in practice, and whether adding a new (b)(4) might invite inappropriate class action filings.

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Notes on Subcommittee discussion after conference.

The following is an excerpt from the notes of the Subcommittee's meeting after the mini-conference

Topic 6 -- settlement class certification

Initial reactions to the discussion of this topic were that parties are presently able to navigate the issues presented by settlement class certification under current precedents. Another view was that fashioning a rule would be quite difficult, and that it is not clear it is worth the effort.

Concerns include the risk that proceeding with the amendment sketch in the conference materials would encourage abuse of class actions, and invite reverse auctions to an extent not happening under current law.

Another view was that "people are satisfied with current work-arounds." In addition, we have heard concern that a rule like our sketch could lead to undisciplined gathering of claims.

On the other hand, a rule on this subject would bring some discipline to the actual resolution of related claims. One could regard MDL treatment of massed claims as the equivalent of a mandatory class action unregulated by rule. That is a particular problem in certain types of cases. And the volume of MDL actions has grown in recent years. By some calculations they constitute more than a third of all pending civil cases in the federal judicial system.

That drew a skeptical response: "Can we fix the problems with MDL handling of mass claims situations?" We have been advised to leave this problem alone. Maybe a manual of some sort would be desirable, but the Civil Rules are not a manual. A reaction to this point was that MDL proceedings are inherently unique, and that "Judges are just doing it."

The consensus was that a separate settlement class rule should not be pursued at this time.

B. Alternative proposal based on 1999 Report on Mass Tort Litigation

In 1998-99, an ad hoc Working Group on Mass Torts, chaired by Judge Anthony Scirica, studied mass tort issues. It prepared a report that the Advisory Committee submitted to the Chief Justice in 1999. See Report of the Advisory Committee on Civil Rules and the Working Group on Mass Torts to the Chief Justice of the United States and the Judicial Conference of the United States (Feb. 15, 1999). Ed Cooper, who served as co-Reporter for the Working Group, developed the following possible amendment to Rule 23(b)(3) in the wake of Amchem:

> **(3)** the court finds that the questions of law or fact common to class members, or interests in settlement, predominate over any questions affecting only individual class members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

Cooper, Aggregation and Settlement of Mass Torts, 148 U. Pa. L. Rev. 1943, 1995 (2000).

This approach may offer advantages to the 23(b)(4) approach sketched above, by introducing flexibility without creating a new species of settlement class in Rule 23(b). Indeed, it may recognize what some who have spoken with the Subcommittee have reported -- that the courts are actually taking account of settlement interests in deciding whether to certify classes for purposes of settlement. Moreover, it could involve the court at an earlier point in the negotiation, and perhaps design, of a proposed settlement. To some extent, the court may sometimes become involved when asked to designate interim class counsel under Rule 23(g)(3), but this approach would invite broader attention from the court before the settlement is reached.

This approach also takes account of the many potential benefits of settlement. As Prof. Cooper explained in 2000 (148 U. Pa. L. Rev. at 1994-95):

> There is a powerful shared interest in achieving all of the things that can be achieved only by settlement. Indeed, * * * the greatest charm of settlement is that it enables a disposition that cuts free from the shortcomings of substantive law as well as the fallibility of our procedural institutions. Neither individual litigation nor disposition of an aggregated litigation by adjudication can do as well. From this perspective we would do well to focus on crafting the best settlement procedure possible, and to put aside lingering doubts about the importance of individual opportunities to opt out, the enormous complexities that

charge the professional responsibility of class counsel with almost unendurable pressures, as well as other doubts.

Genuine questions could be raised about this approach as well. Cutting free of the shortcomings of substantive law may be questioned.[8] Here are some: (1) Is it better to have the court involved before the parties reach a settlement? The (b)(4) proposal requires the parties to reach a proposed settlement before certification for purposes of settlement can occur. (2) Should this possibility be limited to (b)(3) classes? One might urge that a similar opportunity should be available for (b)(2) classes.[9] Whether it could be justified in (b)(1) situations might raise difficult questions. (3) If this is "certification" under (b)(3), does it trigger the notice requirements and opt-out rights in Rule 23(c)(2)(B)? If the settlement is not ultimately approved under Rule 23(e), does that invalidate the opt-outs of class members who opted out? Should a second notice be sent if the case is later certified for litigation purposes? (4) Is there a risk that courts would routinely conclude that "interests in settlement" predominate over individual issues? Some with whom the Subcommittee has talked speak of "hydraulic pressure" toward settlement, and this change might increase that pressure.

As noted above, the Subcommittee has only recently given any consideration to this possible approach, and it has not had an opportunity to discuss it at any length. It invites input about this alternative approach.

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[8] For an exploration of these issues, see Marcus, They Can't Do That, Can They? Mass Tort Reform via Rule 23, 80 Cornell L. Rev. 858 (1995).

[9] Indeed, the Report on Mass Tort Litigation itself included a more aggressive idea that would have applied to all class actions, but would depend on major surgery on Rule 23:

> **(b)** ~~**Class Actions Maintainable**~~ **When Class Actions May be Certified.** An action may be ~~maintained~~ certified as a class action fur purposes of settlement or trial if the prerequisites of subdivision (a) are satisfied and in addition * * * * *

Report on Mass Tort Litigation, Appendix F-5 (Settlement Classes). This approach seems to equate settlement and trial as co-equal possibilities, but the possibility would exist for (b)(2) and even (b)(1) classes as well as (b)(3) classes. So more aggressive approaches could be considered.

(3) Topics the Subcommittee recommends taking off the current agenda

The Subcommittee has previously brought the following issues before the full Committee, but has now concluded that further work on these issues is not warranted at this time.

Cy pres

Chief Justice Roberts articulated concerns about cy pres provisions in his separate opinion regarding denial of certiorari in Marek v. Lane, 134 S.Ct. 8 (2013). The ALI Aggregate Litigation Principles, in § 3.07, offered a series of recommendations about cy pres provisions that many courts of appeals have adopted. Indeed, this provision is the one that has been most cited and followed by the courts.

Beginning with several ideas from the ALI recommendations, the Subcommittee developed a draft provision to be added to Rule 23(e) specifically addressing use of cy pres provisions. A fairly lengthy sketch of both a possible rule amendment and a possible Committee Note were included in the issues memo for the mini-conference. That sketch has drawn very considerable attention, and also raised a wide variety of questions.

One question is whether there is any need for a rule in light of the widespread adoption of the ALI approach. It is not clear that any circuit has rejected the ALI approach, and it is clear that several have adopted it.

Another question is whether adopting such a provision would raise genuine Enabling Act concerns. The sketch the Subcommittee developed authorized the inclusion of a cy pres provision in a settlement agreement "even if such a remedy could not be ordered in a contested case." The notion is that the parties may agree to many things in a settlement that a court could not order after full litigation. Yet it might also be stressed that, from the perspective of unnamed members of the class, the binding effect of the class-action settlement depends on the court's decree, not just the parties' agreement. So it might be said that a rule under which a court could substitute a cy pres arrangement for the class members' causes of action is subject to challenge. That argument could be met, however, with the point that the court has unquestioned authority to approve a class-action settlement that implements a compromise of the amount claimed, so assent to a cy pres arrangement for the residue after claims are paid should be within the purview of Rule 23.

At the same time, some submissions to the Subcommittee articulated reasons for caution in the area. Some urged, for example, that cy pres provisions serve valuable purposes in supporting such worthy causes as providing legal representation

to low-income individuals who otherwise would not have access to legal services. Examples of other worthy causes that have benefitted from funds disbursed pursuant to cy pres arrangements have been mentioned. See, e.g., Cal. Code Civ. Pro. § 384(b) (directing that the residue left after distribution of benefits from class-action settlements should be distributed to child advocacy programs or nonprofit organizations providing civil legal services to the indigent, or to organizations supporting projects that will benefit the class).

It seems widely agreed that lump-sum settlements often produce a residue of undistributed funds after the initial claims process is completed. The ALI approach favors attempting to make a further distribution to class members who have submitted claims at that point, but it may be that the very process of trying to locate more class members or make additional distributions would use up most or all of the residue.

It is also troubling, however, that there may be cases in which very large amounts of money are unclaimed, raising questions about the purpose of such class actions. Though deterrence is often cited as a purpose beyond compensating class members, crafting a rule of procedure principally to strengthen deterrence may be questionable.

Ultimately, the Subcommittee concluded that the combination of (a) uncertainty about whether guidance beyond the ALI provision and judicial adoption of it is needed and (b) uneasiness about the proper limits of the rulemaking authority cautioned against adopting a freestanding provision on cy pres provisions.

At the same time, it also concluded that emphasizing the importance of considering the possibility of a residue and including attention to cy pres arrangements in the "frontloading" Committee Note would be a desirable way to call attention to the general issues.

Issue classes

The Subcommittee included several sketches of possible amendments to Rule 23(b) or (c) better to integrate Rule 23(b)(3) and 23(c)(4). For a time it appeared that there was a significant conflict among the circuits about whether these two provisions could both be effectively employed under the current rule. But it is increasingly clear that the dissonance in the courts has subsided. At the same time, there have been some intimations that changing the rule along the lines the Subcommittee has discussed might actually create rather than solve problems.

The Subcommittee also circulated a sketch of a change to Rule 23(f) to authorize discretionary immediate appellate review of the district court's resolution of issues on which it had based issue class certification. This sketch raised a variety of potential difficulties about whether there should be a requirement for district-court endorsement of the timing of the appeal, and whether a right to seek appellate review might lead to premature efforts to obtain review.

The Subcommittee eventually concluded that there was no significant need for rule amendments to deal with issue class issues, and that there were notable risks of adverse consequences.

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Rule 23 Subcommittee
Advisory Committee on Civil Rules
Conference Call
Sept. 25, 2015

On Sept. 25, 2015, the Rule 23 Subcommittee held a conference call. Participating were Judge Robert Dow (Chair, Rule 23 Subcommittee), Judge David Campbell (Chair, Advisory Committee), Judge John Bates (Chair-designate, Advisory Committee), Elizabeth Cabraser, Dean Robert Klonoff, John Barkett, Prof. Edward Cooper (Reporter, Advisory Committee), Prof. Richard Marcus (Reporter, Rule 23 Subcommittee), and Derek Webb of the Administrative Office.

The purpose of the call was to consider further the matters discussed during the Subcommittee's meeting on Sept. 11 and also review the initial draft of some portions of the Subcommittee's report to the full Committee in the agenda book for the November full Committee meeting.

Topics on which the Subcommittee does presently recommend proceeding

The discussion began with the topics that had initially been identified as not justifying further rule-amendment action now. The draft agenda memo contained only a very brief identification of those topics. The objective in the final agenda memo will be to make a fuller presentation of the issues involved with those topics, but it is likely that discussion during the full Committee meeting will pursue some of them more vigorously than others.

Ascertainability

An immediate reaction was that ascertainability is likely to draw attention at the meeting, and that the Subcommittee should expect that there will be a substantive discussion of this collection of issues.

That drew agreement. The level of interest in ascertainability issues is very high. Quite a few decisions, including decisions by members of the full Committee, have addressed these issues recently. It is not entirely clear whether these decisions are genuinely inconsistent, but it is relatively clear that they have generated much attention and concern.

The reaction was not that the Subcommittee should reconsider its conclusion that ascertainability is not a promising topic for rule amendments at this time. One way of illustrating the challenges of a rulemaking effort would be to include in the agenda book some of the leading recent decisions. The Seventh Circuit's Mullins decision seems a good candidate, and probably the Third Circuit's Bird v. Aarons, along perhaps with the recent

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Second Circuit decision involving Argentinean bonds. Another idea would be to include the various submissions on the subject included as an Appendix to the issues memo for the Sept. 11 mini-conference.

The most important thing to communicate to the full Committee is probably that the Subcommittee's initial effort to draft a "minimalist" treatment of the subject prompted some at the mini-conference to react that the sketch appeared to adopt the Third Circuit's Carrera approach. The sketch's use of the phrase "when necessary" was meant to highlight the idea that it would usually not be necessary to ensure ascertainability at the class certification stage. But that phrase prompted several at the conference to conclude that it was actually meant to say affirmatively that certification ought not be granted without assurances about later ascertainability. This experience underscores the delicacy and difficulty of the project.

Subcommittee members will undertake to gather more information as the final agenda memo is completed. The goal of that memo will be to describe the basic issues and the challenges of the area. The recommendation that rulemaking on this subject not be pursued now remains the Subcommittee's consensus view.

Cy pres

It was also mentioned that the cy pres topic may receive attention during the November meeting. At least some with whom the Subcommittee has spoken will probably be disappointed that rulemaking is not going forward in this subject. In particular, those who wished to promote use of cy pres provisions to support various activities such as legal services for the poor will likely be discouraged. But it was noted that it is important to appreciate that -- even putting aside Enabling Act concerns -- there are other considerations to take into account. The whole topic of the relation between cy pres "benefits" for the class and attorney fee awards keyed to results obtained is a difficult one that can converge on these issues.

Rule 68

The other issue (besides ascertainability) that the Subcommittee is putting "on hold" rather than taking off the agenda is the pick-off problem and the role of Rule 68. It was noted that these problems may look considerably different in a few months, given the Seventh Circuit's change of position on the subject and the pendency of the Campbell-Ewald case in the Supreme Court, with argument expected in October.

Other topics identified on Sept. 11
as not warranting current rulemaking

There was no suggestion that either amendments to the issue classes provisions or providing stand-alone rule on settlement class certification should be returned to the active calendar. Discussion therefore turned to the seven issues presented as possible topics for moving forward in the draft agenda memo.

(1) Frontloading

There was general agreement that the more restrained treatment presented in the redrafted sketch was an improvement on the elaborate 14-point disclosure requirement presented in the issues memo for the mini-conference. In place of a laundry list, the draft Committee Note identifies many subjects that may often be important but also recognizes that not all subjects will be pertinent in all cases.

A more general question was raised: It seems odd for the rule to make notice to the class the vehicle for all this important activity. That may be an occasion for insisting on attention to these matters, but hardly seems as important as the decision whether to "preliminarily certify" the class. Part of the problem lies in Rule 23(e) itself, for it refers only to notice to "a certified class." So that may support the argument that notice can't be given until the class is fully certified.

A reaction was that the point is a good one about what the rule says, but that the longstanding reality of practice under the rule has been that it routinely includes exactly what the amendment sketch addresses. It was estimated that some 75% of cases in which Rule 23(e)(1) notice is sent are cases in which there has been no prior class-action certification by the court. And the actual juncture at which the court must make its first decision about these issues is when the question whether to send notice to the class.

It was suggested that this practice reality might be inserted into Rule 23(e) somewhat along the following lines:

> **(e) Settlement, Voluntary Dismissal, or Compromise.** The claims, issues, or defenses of a certified class<u>, or a class proposed to be certified as part of a settlement,</u> may be settled, voluntarily dismissed or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

It was cautioned, however, that it would be important to reflect on what might be the collateral consequences of such a change.

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As has been noted, Rule 23 is already rather long and complicated. One of the problems with the laundry list in the mini-conference materials was simply that it was too long, although that was not the major objection. Perhaps, given the longstanding practice under the current wording of the rule, this further change is not needed.

The resolution was that "we should take a couple of days to decide how to say this." It was noted also that the rule works appropriately as presently written, and that we should be leery of unforeseen consequences of changing the rule.

An alternative approach to the risk of unforeseen consequences was "This is not a problem until it is." Waiting until that happens could cause unfortunate costs when it does happen. Maybe the risk that the current language could cause problems justifies an effort now to deal with that language, before the problems arise.

An alternative view of the current language of the rule was expressed: "It's an accurate statement, because it refers to 'a proposed settlement.'" That drew the response "That's where 'preliminary certification' came from." Another possible locution that was suggested was that the rule should say it applies to "any action sought to be settled as a class action."

Other questions were raised: How does this apply to a voluntary dismissal? How does the inclusion of "compromise" bear on these issues?

Another point that came up was that the rule should apply to the proposed voluntary dismissal of a certified class. Would changing the introductory language in Rule 23(e) raise questions about that?

The consensus was that the basic thrust of the redraft after Sept. 11 seemed sensible, but that the questions raised during the call could not be finally resolved during the call. They would have to be re-examined once a redraft of the agenda memo was completed.

That led to the question what schedule should be used. Initially, it seems that the Administrative Office would like to receive all agenda materials by October 13 or so, in order to be able to send out the agenda materials by Friday of that week. That may be a bit challenging for this agenda memo. A redraft should be available for review by the Subcommittee by Friday, Oct. 2. Then it would be best if all commentary on the redraft were received by Friday, Oct. 9. On that schedule, it may be possible to provide the Administrative Office with a final in time for the currently scheduled distribution date. But if necessary that date could be used for other materials, with the

Rule 23 agenda memo delayed until a bit later and distributed separately. Because most or all members receive and use these materials in digital form, that should not present great difficulties. And there would still be quite a lot of time for Advisory Committee members to review the agenda memo before the meeting at the end of the first week of November. This sort of schedule might be particularly important because there likely will be considerable attention outside the Committee in what the Subcommittee reports. Note that we have received more than 25 submissions about Rule 23 thus far in 2015 alone.

(2) Rule 23(f) appeals from Rule 23(e)(1) orders

An initial question was whether this is a real problem. Keeping in mind the current length of Rule 23, we should try to avoid unnecessarily lengthening the rule.

An initial response was that the NFL case showed that this can be a problem. In that case, the Third Circuit, by a 2-1 vote, held that the current rule means what the proposed amendment says. Another response was that the Ninth Circuit also recently rejected an attempted petition for a writ of mandamus or appeal from a district court's rejection of a proposed settlement. A third reaction was that the proposed changes to Rule 23(e)(1) emphasize the need to address this possible problem because they amplify the rule provisions about decisions to send notice to the class. It would be "the ultimate irony" if these changes meant to improve and streamline the settlement process also introduced a big delay due to premature efforts to obtain appellate review. Another Subcommittee member agreed: This change would not create confusion but abate it. Even the dissenting judge in the Third Circuit, who thought that the rule as written would permit immediate review, was antagonistic to that idea. And since the NFL example "led the way," others have tried the same route.

It was noted that courts of appeals are not rushing to grant Rule 23(f) motions. The court of appeals judges do not want to rush into this field. But failing to clear this up may mean a good deal of work for courts of appeals dealing with the issues that the Third Circuit had to unravel in the NFL case. In that case, the district court had made a preliminary certification decision, but the attempted appeal was almost entirely about the fairness of the settlement, not the certification issue.

The discussion returned to the reality that giving notice itself is not the focus of these disputes. Instead, it is either whether the class should be certified or whether the settlement should be approved. It's not really about whether notice should be given to the class. Yet the proposed amendment speaks of an order "directing notice to the class." Why highlight that in the amendment?

A response was that the custom that has taken hold is that the focus is on the decision whether to give notice. The reality is that all these things converge on the decision to give notice to the class.

A language simplification was suggested to address this concern, at least partially, in the new sentence proposed for Rule 23(f):

> An order ~~directing notice to the class~~ under Rule 23(e)(1) is not subject to review under Rule 23(f).

There was general agreement that this change would be a helpful clarification. More generally, the goal is to address what's really happening in the courts.

(3) Triggering the opt-out provision when notice is sent to a class proposed to be certified as part of a settlement

The draft agenda memo contained a draft provision amendment to Rule 23(c)(2)(B) as follows:

> **(B)** *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified [for settlement] under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances to all members who can be identified through reasonable effort. * * * * *

An initial question was "Is this how things are done?" The answer was that it is. The notice to the class of the proposed settlement of an uncertified (b)(3) class action includes a deadline for opting out. One of the things that the court should be told when final approval is before the court is the number of class members who have opted out. Since 2003, the rule has said that if notice has already been given and the opt-out date has passed, the court can insist that there be a second opportunity to opt out once the particulars of the settlement are know. And, it was noted, sometimes those who initially opted out are allowed to opt back in. That is the actual experience in the field.

But as presently written, the rule might permit an argument that, after final (b)(3) certification in conjunction with approval of a settlement, notice must again be sent to the class. That is contrary to what the practice has involved. Nobody would want to introduce that costly and time-consuming extra step.

The question was raised whether there is really any risk under the current rule that this extra step will be required.

One participant in the mini-conference raised this issue, but none on the Subcommittee was aware of any case in which the actual problem had arisen. And making this change might introduce problems that we do not foresee. Perhaps doing nothing is safer than making a rule change when there is not actual evidence that this interpretation has ever been adopted by any court.

The consensus was to drop this proposal.

(4) Binding effect of submissions in support of certification for purposes of settlement

The draft agenda memo contained a draft Rule 23(e)(6) providing as follows:

> **(6)** If the proposed class has not been certified for trial and the court does not approve the proposal, neither the court's order nor the parties submissions under Rule 23(e) [is binding] {may be considered} if certification for purposes of trial is later sought.

Again, a key question was "Is there really a problem?" A reaction was "People argue about this. It is really a problem."

But another reaction was: Could we handle this with a comment in the Note? One possible place might be in the Note to Rule 23(e)(1) in the draft agenda memo:

> One key element is class certification. If the court has already certified a class, the only information necessary in regard to a proposed settlement is whether the proposed settlement calls for any change in the class certified, or of the claims, defenses, or issues regarding which certification was granted. But if class certification has not occurred, the parties must ensure that the court has a basis for concluding that it will be able, after the final hearing, to certify the class as part of the proposed settlement. Although the standards for certification differ for settlement and litigation purposes, the court cannot make the decision that the prospects for certification are warranted without a suitable basis in the record. If the court ultimately does not approve the proposed settlement including class certification, neither the court's order nor the parties' submissions under Rule 23(e) [is binding] {may be considered} if certification for purposes of trial is later sought.

This suggestion drew the response that something like this probably should be in the rule. Put differently, on occasion comments on proposed amendments urge that things in the Note are

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good ideas, but that they will not be effective unless they are included in the rule.

It was explained that the ALI Aggregate Litigation Principles included a recommendation along these lines. That recommendation responded to a single Seventh Circuit decision that treated positions taken about certification for purposes of settlement as creating "judicial estoppel" when litigation certification was later before the court.

Another reaction was that parties routinely include disclaimers in their settlement agreements that ensure that if the settlement falls through nobody's position in connection with the settlement may be considered in resolving matters raised later in the litigation. That drew a response: "I've seen language like that recently. Should we be bulking up Rule 23 to address this nonproblem?"

A different question was raised: Except for the Seventh Circuit decision that prompted the ALI recommendation, have any on the call heard of another court taking this view? One response was that this does not sound like a proper use of the judicial estoppel doctrine. That should be limited to situations in which the court has relied on the assertion in making a decision. Presumably these assertions were not the basis for the court's decision because presumably the settlement was ultimately not approved.

Another reaction was that we could present this question to the full Committee to see whether any member of the Committee is aware of a case in which this caused a problem.

This drew the response that nobody had raised this issue since the 2010 publication of the ALI Principles. It may be that some who attended the DRI event in Washington in late July had this concern, but no submissions to the Subcommittee has raised it.

The consensus was to take this issue off the agenda, but to alert the full Committee that it had been taken off the agenda.

(5) Form of notice

The revised amendment approach to Rule 23(c)(2)(B) developed during the Subcommittee's Sept. 11 meeting drew continued support.

Discussion focused on the importance of making notice and claims processes work in consumer class actions. Those cases are the ones in which low response rates are most frustrating. Indeed, it may often be that the best solution is just to send checks to all class members rather than awaiting submission of

formal claims. Another member agreed that this is the "tip of the iceberg." The FJC class-action checklist focuses on the concerns with consumer class actions. Judges Posner and Hamilton of the Seventh Circuit have both discussed them in recent opinions. The case law is moving in the right direction, and an amendment like this one could helpfully nudge that process along.

The consensus was to go forward to the full Committee with a slightly revised proposal based on the one in the draft agenda memo:

> **(B)** *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice by the most appropriate means, including first class mail, electronic, or other means, to all members who can be identified through reasonable effort. * * * * *

(6) Handling Objectors

The draft agenda memo contained a proposed revision of Rule 23(e)(5) as follows:

> **(5)** Any class member may object to the proposal if it requires court approval under this subdivision (e)~~;~~. The objection must [state whether the objection applies only to the objector or to the entire class, and] state [with specificity] the grounds for the objection. [Failure to state the grounds for the objection is a ground for rejecting the objection.] T~~t~~he objection may be withdrawn only with the court's approval. Unless approved by the district court, no payment may be made to any objector or objector's counsel in exchange for withdrawal of an objection or appeal from denial of an objection. Any request by an objector or objector's counsel for payment based on the benefit of the objection to the class must be made to the district court, which retains jurisdiction during the pendency of any appeal to rule on any such request.

This was introduced as presenting two separate sets of issues. One is disclosure, and that involves some language choices. Those language choices can be brought to the attention of the full Committee. No members expressed an interest in discussing that set of issues.

The second set of issues deal with court approval payments to objectors or objector counsel. In a sense, these issues

derive from the provision already in the rule requiring the court's approval for withdrawal of an objection. But the proposed language goes beyond that in two ways: (a) It affirmatively forbids any payment to the objector or objector counsel, and (b) it calls for the question whether to approve that payment to be made by the district court.

Somewhat separately, the Appellate Rules Committee has received and discussed proposed changes to the Appellate Rules to deal with the problem that arises when an objector notices an appeal and then strikes a deal to drop the appeal. The draft language says that district court "retains jurisdiction" to approve or disapprove such a payment. Perhaps a Civil Rule that says so can do that, but it would seem much better to rely on combined attention from the Appellate and Civil Rules Committees. Judge Colloton attended the DFW mini-conference and the Appellate Rules Committee has indicated flexibility about approaching these problems.

Under these circumstances, it seemed best to reach out to the Appellate Rules Committee about how best to proceed. That Committee will have its Fall meeting before the Civil Rules meeting. For the present, it may be that the best thing is to put the new language at the end of the rule into brackets pending efforts to design an integrated Appellate/Civil Rules solution.

At the same time, it was emphasized that we have heard from very many experienced practitioners that this is a VERY important issue.

For the present, the objective is to interact with the Appellate Rules Committee and look toward a presentation of ideas to the Standing Committee during its January meeting. The shared goal is to develop rule changes that will work in the desired way. The best way to do that remains uncertain. The question of "jurisdiction" can be a tricky one. And even though it is likely in the great majority of cases that the district court will be better situated to evaluate a proposed payment to an objector or objector counsel, that may sometimes not be true. It may be that the initial call on whether the district court should make this call belongs to the court of appeals.

The Rule 23 Subcommittee will reach out to Judge Colloton and the Appellate Rules Committee Reporter to explore the best way to proceed.

(7) Settlement approval criteria

The general view was that this draft is in good shape with some clarification for presentation to the full Committee. Clarification is called for in regard to Alternative 2 by adding something like the phrase following bracketed phrase in the draft

circulated to the Subcommittee:

> **(2)** If the proposal would bind class members, the court [may disapprove it on any ground it deems pertinent to approval of the proposal, but] may approve it only after a hearing and on finding that: ~~it is fair, reasonable, and adequate.~~

Somewhat similarly, new proposed (E), which goes with Alternative 1, needs change along the following lines:

> [(E) approval is warranted in light of any other matters the court deems pertinent.]

The consensus was that Professor Marcus would make adjustments to the draft along the foregoing lines.

Possible "front burner" additions

Discussion turned to four additional matters that were included in the draft agenda memo as possible topics for further work.

Forbidding reversions

Frequent discussion of the potential drawbacks of settlement provisions that permit reversions to defendant of unclaimed funds might support an effort to forbid such provisions, perhaps with an exceptional circumstances exception.

An initial reaction was that this issue reminds us of the various difficulties that persuaded us not to proceed on a cy pres rule.

Another point along these lines was that this really addresses a Rule 23(h) point because a reversion can mean that a settlement that appears to have considerable value for the class actually has no value, but the purported value is advanced as a ground for a substantial attorney fee award. The place where this issue really should be addressed is in connection with Rule 23(h), not Rule 23(e). It is horrendous to contemplate a fee award based on an arguably illusory benefit to the class. Perhaps there should be a presumption in Rule 23(h) that a cy pres fund or a reversion mean that money not paid to the class does not count for calculation of an attorney fee based on the value of the settlement.

Another reaction was that in practice there is a wide array of situations that might be affected by such a rule. The variety is so large that it would be undesirable to codify specifics into a rule. The courts need flexibility in handling these issues.

Moreover, there court be a risk of infringing on the substantive law.

Concern was expressed about changing Rule 23(h). When that was added to the rule in 2003, it was the result of a very long and laborious drafting process. It could be reexamined now, but probably the bias should be against making changes to it. It is designed to provide guidance in such a variety of situations that attempting now to make changes could open up many of the resolutions that were necessary to arrive at a rule then. Professor Marcus would look at the question, but there is not great optimism that a helpful change would emerge.

Another way of dealing with some of these issues was raised: Could this not be emphasized in the Note on settlement approval standards? Indeed, the draft Committee Note for Rule 23(e)(2) already has a paragraph stressing attention to attorney fee provisions that mentions the possibility of deferring final calculation of the fee until the court gets a report on the actual benefits received by class members. Perhaps that paragraph can be strengthened to stress the potential problems of reversion provisions.

In the same vein, it was stressed that beginning to list or emphasize criteria that bear on the "reasonable fee" authorized by Rule 23(h) could prove very challenging and divisive. Highlighting these issues in the Note to an amended Rule 23(e)(2) seems much less potentially difficult.

This reasoning was countered with the suggestion that if we want to say something about attorney fee awards we should say it in the rule provision that addresses those -- 23(h). A response was that, at least as to reversion provisions, there is a case to be made for the idea that they are really something that bear importantly on the basic settlement-approval review, not just on attorney fee awards. True, those may be separate, but if the court is unwilling to approve the reversion in the first place the fee award issues will not arise.

This view was supported as reflecting the way the rules work in the real world. Class members are given a chance to object to the entire settlement proposal, which often includes specifics on the attorney fee award. They often object to that award. They can also object to a reversion if one is included. The consideration of all these things will likely be before the court at the same time.

Further discussion focused on whether the Note to Rule 23(e)(2) ought to address cy pres provisions. It might be that this topic could be approached with a predicate like "If suggested by the parties, the court should approach cy pres provisions with caution." On the other hand, there seems

considerable value in addressing the likelihood funds will be left over in the initial settlement proposal, as suggested in the Note to the sketch of amendments to Rule 23(e)(1).

It was resolved that there was no reason for a free-standing rule provision on reversion provisions.

Requiring filings supporting the proposed settlement be on file before objection date

This topic was introduced with the idea that "all agree that this is desirable." Indeed, in many circuits it is the case law rule. "Everybody recognizes it." Under these circumstances, there seemed no reason to add such a provision to Rule 23. This idea would be dropped.

Setting a standard for approving payments to objectors

This notion was prompted in part by a comment by a judge at the mini-conference. Rule 23(e)(5) already requires court approval for withdrawing an objection. The Subcommittee is working on further rules provisions (in collaboration with the Appellate Rules Committee) that would broaden the court approval requirement to include what happens after a notice of appeal is filed. Perhaps a rule could tell the judge how to decide whether to approve.

The consensus was that this is not a real problem, and that a rule of reasonableness already applies. Moreover, some mention of the court's attitude already appears in the draft Note to the sketch of a rule provision requiring court approval. The freestanding rule provision idea would be dropped.

Rule 23(f) amendment for issue classes

The Subcommittee had already decided not to proceed with a rule amendment clarifying when issues classes are warranted. The mini-conference had also had a sketch of an addition to Rule 23(f) permitting discretionary immediate appellate review of the district court's resolution of the common issue in such situations. The ALI Principles had recommended a provision along these lines.

No member of the Subcommittee saw a benefit in pursuing this idea, so it will be dropped.

Next steps

Professor Marcus will try to circulate a draft agenda memo by Friday, Oct. 2, and the Subcommittee members will try to offer reactions by Friday, Oct. 9. If possible, the agenda memo will then be submitted to the A.O. in time for inclusion with the rest of the materials for the agenda book for the November meeting.

Rule 23 Subcommittee
Advisory Committee on Civil Rules
Sept. 11, 2015, meeting

After the completion of the Sept. 11 Mini-conference on class actions, the Rule 23 Subcommittee held a meeting to discuss initial reactions to the very helpful insights provided by participants in the conference. Participating were Hon. Robert Dow (Chair, Rule 23 Subcommittee), Hon. David Campbell (Chair, Advisory Committee), Hon. John Bates (Chair-designate, Advisory Committee), Hon. Jeffrey Sutton (Chair, Standing Committee), Elizabeth Cabraser, Dean Robert Klonoff, John Barkett, Prof. Edward Cooper (Reporter, Advisory Committee), Prof. Richard Marcus (Reporter, Rule 23 Subcommittee), and Rebecca Womeldorf (Administrative Office).

The discussion proceeded generally from less difficult to more difficult issues. The goal was to reach initial conclusions about next steps on the issues the Subcommittee had identified.

Topic 9 -- Pick-off and Rule 68

The consensus was that this issue should be retained on the agenda but that the Subcommittee should be in a waiting mode. The Supreme Court's decision of the case in which it has granted certiorari is likely to be come out before the Advisory Committee's spring meeting, and that should cast considerable light on whether any rule change is in order. Trying to devise a suitable rule change before that decision seems risky. Moreover, the Seventh Circuit's abandonment of its former position may also have effects that bear on whether any rule change would be advisable. Even if the Supreme Court does not resolve all issues, the need for rule-amendment action may subside.

Topic 7 -- Issue classes

The consensus was that the question of amending either Rule 23(b)(3) or 23(c)(4) to clarify treatment of issue classes is not ripe for action, and this issue should be dropped from the Subcommittee's agenda for the present. Not only was there no significant support for amending the rules on this subject during the mini-conference, the DRI submission on the eve of the mini-conference was antagonistic to such changes. Moreover, recent decisions and statements by the Fifth Circuit indicate that there is no longer a serious circuit conflict problem on this subject. Under these circumstances, it does not seem that adopting rule changes like the ones in the sketches would actually make a difference.

There was little or no discussion of the possibility of amending Rule 23(f) to facilitate immediate review of the district court's resolution of the common issue when issue class certification is used.

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Issue 5 -- Ascertainability and class definition

The consensus was that, for the present, it would be prudent to leave this topic to development in the case law. The Seventh Circuit decision in Mullins finds that the current rule contains all the guidance needed on the subject. So under that view, there is no need for a change in the rule. It is possible that certiorari will be sought in that case, but not possible to know whether it might be granted. If certiorari were granted, it would seem premature to embark on amendment efforts until the Supreme Court decides the case. If certiorari is not granted, the case law will likely continue to develop. Action by the Advisory Committee now does not seem likely to produce positive changes.

Discussion shifted to one possibility that was mentioned during the mini-conference -- that Rule 23(c)(1) could be amended to use a term like "objectively definable," and thereby to support a Committee Note discussing some of these issues. But the unsettled state of the law counsels against that sort of effort. Indeed, it is not impossible that the Third Circuit might look again at its handling of these issues, and might be influenced by the Seventh Circuit's Mullins decision.

Topic 8 -- Notice

The consensus was that tweaking the rule to reflect contemporary realities in electronic communication is warranted, and retiring the Eisen preference for first class mail also makes sense. For example, one suggestion during the mini-conference was "the most appropriate means under the circumstances." The concern during the mini-conference was that the wording of the sketch in the conference materials might indicate that electronic means of notice should be preferred over other means. That should be avoided, for the goal was not to state a preference. The problem could probably be avoided by using language suggested below.

Another subject that arose during the mini-conference focused more on the content of notices than on the manner of providing them. Formatting of the notice may be important. Those in the claims administration business probably have the most useful knowledge on this sort of thing. But we must have in mind that they operate competing businesses, and we can't be favoring one over another. Nonetheless, it would be desirable to say something about formatting. Perhaps the Committee Note could emphasize the need to seek plain language and consider alternative methods of presenting the information that is being sent to the class to maximize comprehension by class members.

It was noted also that the word "individual" in the current rule could present problems. That could be something to reflect on as we move forward.

As an initial starting point for a revised approach, it seemed desirable to consider something like the following:

Rule 23. Class Actions

* * * * *

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses

* * * * *

(2) ***Notice***

* * * * *

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice <u>by the most appropriate means, including</u> first class mail, <u>electronic, or other means</u> to all members who can be identified through reasonable effort. * * * * *

This initial idea should also suffice to support a Committee Note about the importance and concerns regarding format of notice and comprehension for class members.

The concerns about manner of providing notice have focused on Rule 23(c)(2)(B). Rules 23(c)(2)(A), 23(e)(1), and 23(h)(1) direct the court to provide "appropriate notice" or "notice in a reasonable manner" to the class, and therefore do not raise the sort of problem presented by the enduring shadow of the Eisen decision.

Issues 1 and 2 -- Frontloading and Settlement Review

The mini-conference made it clear that laundry list rules like the laundry list sketch before the conferees are not favored. The approach to frontloading in the mini-conference materials therefore needs reconsideration. At the same time, there is surely support for a more flexible approach to emphasizing the need to provide the court (and the class members) with more information and more definite information earlier in the settlement-review process.

Experienced class-action lawyers have recognized the need for this sort of presentation, but that is not the only sort of lawyers who come before federal courts seeking approval of class-action settlements. Guidance will be useful for less sophisticated lawyers.

Another issue here is the "preliminary approval" question. Many favor use of a term like that, and moving beyond focusing only on the decision to give notice. That may be important to showing that this notice suffices to trigger the need to opt out, but at the same time to avoid making the decision potentially subject to immediate appeal under Rule 23(f). Those two objectives are addressed in the current sketch by (D) on p. 5 of the issues memorandum for the conference. Also in (D) is an effort to guard against estoppel on the subject of litigation certification by positions taken during settlement review.

It was suggested that, important though they may be, the three assertions in current (D) really are not related to each other, and that they should be redistributed. The first sentence probably should be added to Rule 23(f). The second should actually be in Rule 23(c)(2)(B), as in footnote 1 on p. 5 of the mini-conference materials. And the third belongs more appropriately in the treatment of settlement approval than in a provision about giving notice to the class.

The real focus, it was suggested, would be to replace current 23(e)(1) with a general directive about providing information to the court. The rule should apply to all cases. This could also use the standard set forth in Alternative 4 on p. 5 of the mini-conference materials:

Rule 23. Class Actions

* * * * *

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) After the parties have provided relevant information about the proposed settlement, ~~T~~the court must direct notice in a reasonable manner to all class members who would be bound by the proposal if it determines that giving notice is justified by the prospect of class certification and approval of the proposal.

This sort of generalized rule directive would avoid the pitfalls of a laundry list but provide support for a Committee Note identifying many of the topics that often should be addressed in the submission to the court, while also noting that given settlements do not require attention to all of these topics. Another thing that a Committee Note could suggest is that convening a case management conference may be a useful way for the court and the parties to identify the topics on which information should be submitted. It might also be a location for recommending that the court or the parties ensure that the information submitted is made available to the class members. It may be that class action settlement web sites exist presently to do that job in many cases. But we do not know who goes to these sites; it may be that the visits are mainly from lawyers, not class members. Perhaps that difference does not matter much. If there is not such a web site in a given case, alternatives may need to be considered.

This formulation would not go back "before 2003" and treat the putative class action as a class action until the court denies class certification. That does not seem necessary, although it could (as suggested in the mini-conference materials) be a way of addressing the Rule 68 pick-off issues. But the Subcommittee is not moving forward on that subject at this time.

It was also noted that the N.D. Cal. has a model order on what should be submitted to the court. That order might be a useful referent for ideas on what should be included in the Note. Perhaps the Note could also suggest that districts could develop their own preferred lists.

The discussion emphasized that the big cases are not the ones in which frontloading direction is needed. It's the small class actions, perhaps involving inexperienced counsel, where the problems emerge.

Regarding the risk of premature efforts to obtain Rule 23(f) review (as in the NFL concussion case), below is a first effort to include that in Rule 23(f):

> **(f) Appeals.** A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. <u>An order directing notice to the class under Rule 23(e)(1) is not subject to review under Rule 23(f).</u> An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

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The second sentence of current (D) on p. 5 of the mini-conference materials should be addressed in Rule 23(c)(2)(B) as follows:

> **(B)** *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), <u>or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified [for settlement] under Rule 23(b)(3),</u> the court must direct to class members the best notice that is practicable under the circumstances. * * * * *

The third point in current (D) could be addressed in a new Rule 23(e)(6):

> **(6)** If the proposed class has not been certified for trial and the court does not approve the proposal, neither the court's order nor the parties submissions under Rule 23(e) [is binding] {may be considered} if certification for purposes of trial is later sought.

The question whether this idea needed to be in the rules remained open.

Topic 2

Further discussion of the settlement standards topic focused on Alternative 1 and Alternative 2 on p. 9 of the conference materials.

A starting point was the suggestion that it would probably be best to avoid saying that any proposed amendment "overrules" any circuit's stated standards. Indeed, it was suggested that the Note should reassure the circuits that they can "keep their factors." The goal is consistency in achieving the shared goal of careful settlement review, not preferring one circuit's precise formulation over another. One way to guard against that would be to provide a catch-all in the rule that permits a court to reject a proposal even if all four of the listed criteria seem met. This approach can be supported by recognizing that most -- nearly all -- of the factors can be useful guides in some cases.

An argument was made in favor of Alternative 1, which is arguably more relaxed, using the general "fair, reasonable, and adequate" rubric as a general guideline informed by the listed four "considerations." Using Alternative 2, it was suggested, was not really much more focused, particularly if a catch-all fifth "whatever else you regard as important" factor is added. Adding that factor would move back toward what the Subcommittee brought to the April Advisory Committee meeting. At that meeting, the view was that leaving in the catch-all then in the rule sketch robbed the rule provision of its force since it was

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something of an "anything goes" addition. The discussion after the mini-conference was whether any articulation of the "fair, reasonable, and adequate" criterion would inevitably be open-ended because the criterion is inherently open-ended.

A reaction to this argument was that there is a problem with all the lists now in use that an amendment along the lines under consideration could help solve. The current lists were articulated at different times. Having a single set of four basic concerns will promote a national pattern for the case law under the rule. It may even discourage "circuit shopping." The existing lists do not allow that, and may cut against coherent analysis in a given case. Some lists have as many as three different factors for essentially the same concern. The focus provided by the proposed amendment can be useful because it can displace the "squishy balancing process" that can result from the multi-factor activity now in place in some courts.

Another member agreed that this set of diffuse and sometimes dubious criteria harms the quality of the briefing.

A reaction to these arguments is that perhaps we should be saying we are overruling the existing lists.

The response was that the four listed factors are the "core factors." It's not so much overruling any circuit's list of factors as organizing and focusing the themes in the current case law. It was asked whether any court has approved a settlement that does not actually satisfy all four of the factors in the sketch's list.

Another reaction was "I'd like to look at the factor analysis again."

A third reaction was that further reflection on these questions seems in order. Indeed, it seems as though different members of the Subcommittee have different views on how constraining an amended rule should be. One view is that the basic standard (fair, reasonable, and adequate) is really as much as a rule can prescribe, and anything beyond that is really just illustrative. This view might favor Alternative 1 on p. 9. Another view is that more focus should be imposed by the rule, and that therefore Alternative 2 is preferable, including presenting the "fair, reasonable, and adequate" rule language only once, in factor (C). It might be that this choice should be brought to the full Advisory Committee, but it does not seem that the Subcommittee has reached consensus at present on which tack to take.

Further discussion pursued these points. One reaction is that the choice between Alternative 1 and Alternative 2 is "not a huge problem." Another was that "No circuit rejects these four

things." On the other hand, the circuit lists do not rank order their many factors. Another observation was that it's somewhat surprising that the Subcommittee is uncertain about this point. "This was not controversial at the ALI."

A different question was raised: "Why do this if there's really no change because the four factors are essentially shortened lists of the longer ones now in use?" A reaction was that this sort of rule could smooth out the use of these factors nationwide. At present, it is disfavored to cite settlement-review decisions from another circuit. One could argue that this attitude does not make sense; any decision that provides useful guidance would seem helpful. On the other hand, if it's under "their" factors instead of "our" factors, that may deter profitable use of out-of-circuit precedent. Moreover, having such a long list gives objectors searching for ways to raise problems a much greater variety of possible arguments even though most of those really don't matter much.

Issue 3 -- Cy pres

An initial reaction was "I was optimistic that this topic would produce broad agreement on proceeding with a rule modeled on the ALI proposal. But the subject has turned out to produce much more controversy than originally seemed likely."

Another reaction was that "Nobody articulated a reason for us to work on this. Why venture into a controversy when the courts seem to be working things out without rule guidance?" It was added that the courts seem to be converging on the ALI § 3.07 approach, a convergence that may make it unnecessary (perhaps disruptive) to adopt a rule. Moreover, at some point there may be concerns about approaching the elusive line between substance and procedure.

One idea would be to put a reference to cy pres into the Committee Note on frontloading. The laundry list in the rule sketch for that rule has been jettisoned, although much of that list may reappear in the Note. The use of cy pres may be an important topic to address in the Committee Note. The vote in the ALI on this provision was unanimous. Perhaps a nod to the ALI provision could be included in the Note as well, though with care taken to avoid "rulemaking by Committee Note."

At the same time, it is probably best for the rules not to get into what appears to be a vigorous debate about whether cy pres is a good way to provide money for public purposes. At the same time, the Chief Justice's observations in his separate statement in the Facebook case underscores the delicacy of the topic.

The question of situations when it seems that all or virtually all money paid by defendant will go to the cy pres recipient was raised. Should the rules take a position on that? One reaction is that the ALI provision sets up a hierarchy in which that outcome should not be a frequent occurrence because it calls for further distributions to class members as a first reaction. A cy pres provision is not a substitute for trying hard to send the money to class members.

The problem cases are cases in which very large sums are left after distribution to the class. It seems widely agreed that some amount of money will be left over in most, or all, lump-sum settlement cases unless there is a device for direct deposit or payment by defendant. Some class members will not cash the checks or do whatever is needed to receive the payment. Some will have moved and not get the notice. And at some point, paying the claims administrator all the remaining money to pursue an unpromising effort to beat the bushes for more claimants is not as good as delivering the modest residue to the cy pres organization.

In part, this analysis emphasizes the importance of the nexus requirement in the ALI proposal -- that the recipient organization's objectives be closely tied to the nature of the claims asserted in the lawsuit. General "do good" efforts (e.g., supporting legal services for the poor or feeding the hungry) are not the same. But it can be said that the work of an organization that can satisfy a tight nexus requirement really does confer a benefit on the class.

The consensus was that the Committee Note on frontloading is the best way to address this issue. If cy pres is a possibility (as it seems very often to be), it is likely that it should be addressed in the proposed settlement and that the class should be alerted to that possibility. It also appears important to make the parties, not the court, responsible for identifying the cy pres recipient. Then the court could fashion careful guidelines on how it should be used could be modeled on the ALI approach.

Brief discussion of "fluid recovery" concluded that it likely is not appropriate to raise this alternative in a Committee Note.

Topic 6 -- settlement class certification

Initial reactions to the discussion of this topic were that parties are presently able to navigate the issues presented by settlement class certification under current precedents. Another view was that fashioning a rule would be quite difficult, and that it is not clear it is worth the effort. Providing rule language to deal with the issue of predominance in (b)(3) class actions might cast a negative shadow on the availability of

settlement certification in (b)(2) actions.

Concerns include the risk that proceeding with the amendment sketch in the conference materials would encourage abuse of class actions, and invite reverse auctions to an extent not happening under current law.

Another view was that "people are satisfied with current work-arounds." In addition, we have heard concern that a rule like our sketch could lead to undisciplined gathering of claims.

On the other hand, a rule on this subject would bring some discipline to the actual resolution of related claims. One could regard MDL treatment of massed claims as the equivalent of a mandatory class action unregulated by rule. That is a particular problem in certain types of cases. And the volume of MDL actions has grown in recent years. By some calculations they constitute more than a third of all pending civil cases in the federal judicial system.

That drew a skeptical response: "Can we fix the problems with MDL handling of mass claims situations?" We have been advised to leave this problem alone. Maybe a manual of some sort would be desirable, but the Civil Rules are not a manual. A reaction to this point was that MDL proceedings are inherently unique, and that "Judges are just doing it."

The consensus was that a separate settlement class rule should not be pursued at this time.

Objectors

The consensus was that many report experienced lawyers report serious problems with blackmail behavior by some objectors, probably involving a relatively small cadre of serial objectors, but that relatively modest rule changes should suffice to accomplish a great deal to solve the problem.

One measure that did not seem to warrant rulemaking was a detailed rule on objector disclosure. Even those "good" objectors whom we thought would be able easily to satisfy the disclosure provisions have some misgivings about them. Policing a disclosure regime is probably not worth the effort. Extensive arguments on whether objections satisfy a multipart rule could waste more time and energy than having no rule.

Instead, it seems that the court approval of payments model is the way to go. Initial arguments for absolute prohibitions on payments to resolve objections seemed overblown. Instead, the informed discretion of the court in evaluating such payouts seems the way to go, and disclosures about the terms of the payout could be included. But there may be some questions raised about

whether a procedure rule can prevent parties from reaching what is in effect a settlement with the objector.

There may also be some tricky problems about the interaction of the Court of Appeals and the district court when these issues arise. Perhaps the Rule 62.1 approach to indicative rulings would offer a model worth borrowing. At the same time, it may be that the district court could be regarded as retaining jurisdiction to rule on such developments (cf. Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375 (1994)).

The question of requiring some disclosure of the grounds for the objection was raised. One problem is with objectors who hide "in the weeds" without specifying their grounds for objecting until after the district court approves the settlement. Then they file appeals and may eventually provide some specifics (but perhaps won't if they can extract tribute without bothering to do so). This tactic deprives the district judge of needed information about the grounds for objections. Building on the approach to disclosures by the proponents of the settlement -- a general rule provision with elaboration in the Committee Note -- perhaps a general directive to the objector on what the objection should say is in order. This could be built into the amendment idea on p. 25 of the mini-conference materials:

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

* * * * *

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e)~~:~~. The objection must [state whether the objection applies only to the objector or to the entire class, and] state [with specificity] the grounds for the objection. [Failure to state the grounds for the objection is a ground for rejecting the objection.] T~~t~~he objection may be withdrawn only with the court's approval. Unless approved by the district court, no payment may be made to any objector or objector's counsel in exchange for withdrawal of an objection or appeal from denial of an objection. Any request by an objector or objector's counsel for payment based on the benefit of the objection to the class must be made to the district court, which retains jurisdiction during the pendency of any appeal to rule on any such request.

If we go forward on this ground, it will be important to coordinate with the Appellate Rules Committee because there probably has to be some sort of Appellate Rules aspect to this reform. In particular, the "retains jurisdiction" locution in the above sketch may not be appropriate in a Civil Rule.

It was noted that, although some disclosure is important, it is also important to avoid imposing significant burdens on objectors.

Other matters

It was noted that these discussions have identified other matters that also might be addressed somewhere or somehow. A prime example is the idea that all material that will be submitted in support of approval of the proposed settlement, including the attorney fees application, should be on file and accessible to class members well in advance of the date for opting out or objecting. Too often, we have also been told, these materials are filed just before, or even after, that date arrives. Some courts (e.g., the 9th Circuit) have pretty clearly said that the filings should precede the due date for opt-outs and objections.

MINI-CONFERENCE ON CLASS ACTIONS
Rule 23 Subcommittee
Advisory Committee on Civil Rules
Dallas, Texas
Sept. 11. 2015

Participating as representatives of the Rule 23 Subcommittee were Judge Robert Dow (Chair, Rule 23 Subcommittee), Elizabeth Cabraser, Dean Robert Klonoff, and John Barkett. Also participating were Judge David Campbell (Chair, Advisory Committee), Judge Jeffrey Sutton (Chair, Standing Committee), Judge John Bates (Chair-designate, Advisory Committee), Prof. Edward Cooper (Reporter, Advisory Committee), and Prof. Richard Marcus (Reporter, Rule 23 Subcommittee). Emery Lee represented the Federal Judicial Center. Representing the Administrative Office were Rebecca Womeldorf, Derek Webb, and Frances Skillman.

Invited participants included David M. Bernick (Dechert LLP), Sheila Birnbaum (Quinn Emanuel), Leslie Brueckner (Public Justice), Theodore H. Frank (Center for Class Action Fairness), Daniel C. Girard (Girard Gibbs LLP), Jeffrey Greenbaum (Sills Cummis & Gross, P.C.), Theodore Hirt (Department of Justice), Paul G. Karlsgodt (Baker Hostetler), Prof. Alexandra Lahav (Univ. of Connecticut), Jocelyn Larkin (Impact Fund), Brad Lerman (Medtronic), Gerald Maatman (Seyfarth Shaw LLP), Prof. Francis McGovern (Duke), Prof. Alan Morrison (G.W.), Prof. Martin Redish (Northwestern), Joseph Rice (Motley Rice LLC), Stuart Rossman (Nat. Consumer Law Center), Eric Soskind (Department of Justice), Hon. Amy St. Eve (N.D. Ill.), Hon. Patti Saris (D. Mass. and U.S. Sentencing Comm'n), Christopher Seeger (Seeger Weiss), Hon. D. Brooks Smith (3d Cir.), and Ariana Tadler (Milberg LLP).

Observers included Alex Dahl (LCJ), Prof. Brendan Maher (Univ. of Connecticut), Roger Mandel (Lackey Hershman LLP), and Mary Morrison (Plunkett Cooney and LCJ).

Judge Dow welcomed and thanked all the participants, and announced that the morning session would be focused on the first three of the Subcommittee's nine topics for possible rule amendments, with the next four topics occupying most of the time after lunch and the last two topics touched upon only if time allowed. He also invited participants to introduce themselves and indicate which topics they felt were most important. Among the topics so identified by several invitees were ascertainability, cy pres, settlement approval criteria, and settlement class certification.

Topic 1 -- Disclosures regarding class-action settlements

This idea has been known as "frontloading," and emerged from the Subcommittee discussions with interested groups during the past year about possible class-action reforms. It is designed to focus more on the decision whether or when to send notice to the

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class of a proposed settlement under Rule 23(e)(1) rather than as "preliminary approval" of the proposed settlement or (if the class has not yet been certified) of class certification. The ALI Aggregate Litigation Project and others have cautioned against the "preliminary approval" nomenclature, since the court should have an open mind until objectors have had an opportunity to state their views. In addition, the effort is designed to blunt arguments that Rule 23(f) review is available at the time of the decision to send notice to the class, while ensuring that the notice can call for class members in Rule 23(b)(3) cases to make their opt-out decisions.

Discussion began with the suggestion that it might be desirable to promote a more adversarial presentation at the "front end" of the class settlement process. In the Silicon Gel litigation, for example, Judge Pointer promoted an open process that got many class members involved at an early point. Is there a way to have the judge reach out to members or putative members of the class to solicit their views at this point?

A reaction to this suggestion was there is a serious problem with relying on the judge to take the place of the adversary process. There are strong reasons for getting objectors involved as soon as possible to ensure that the judge has an adversary process to evaluate the proposed settlement.

That idea brought the reaction "This is not doable. You don't know who the objectors are." Right now, counsel proceed on the basis of "preliminary approval." But there is no articulated standard for granting such preliminary approval. Instead, the parties themselves make sure that there are solid grounds to support the settlement proposal, and to support class certification if that has not yet been granted. They very much want to avoid final disapproval.

Putting aside the concern about the term "preliminary approval," a different concern was with a "laundry list" rule like the sketch in the materials, with fully 14 different topics to address. Many of those topics would not be relevant in many cases. In different types of cases, different concerns exist.

Another participant announced strong support for frontloading. This could "shift the paradigm," making the judge more inquisitorial. That is consistent with the view of courts that say that the judge has a fiduciary obligation to protect the interests of the unnamed class members. Indeed, it has been said that in most class actions the judge is "main objector," because there may not be any others.

Another reaction was that a detailed list of topics to address is useful for many of the lawyers who now are bringing class actions in federal courts. The lawyers invited to this

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event are the leaders of the bar, and have broad experience in the field. They already know what they have to present to the judge. Many, many lawyers do not know, and judges need help in getting the information that is necessary to making the decision whether to send notice and, later, whether to approve the proposed settlement.

A judge applauded efforts to frontload, an important adjunct to the "contingent certification" that often attends a decision to send notice to the class. Even though it is long, the 14-factor list might be expanded. One thing that is not specifically raised is the basic fairness of the settlement -- why is this damage number appropriate? Actually, although there is no articulated standard for whether to send the notice, it is a reasonableness test; one might even call it a "blush" test.

Another participant agreed that it is good to prompt disclosure of more information. Nonetheless, a laundry list rule should be avoided. That sort of detail is more appropriate in a Committee Note or a Manual.

A note of caution was sounded. This sort of requirement will compound costs. Some factors are not relevant in many cases. How much does it help to have the parties say "We produced 4.2 million documents"? Does that mean that all the members of the class get access to all those documents? How about protective orders that apply to those documents? And the reference to insurance seems far too broad; insurance is simply not relevant in many cases. The inclusion of take rates creates difficulties because that is always hard to estimate at the outset, although calling for disclosure at the end would not be a problem. Requiring disclosure of side agreements could raise many difficulties. Consider agreements with "blow provisions" that permit the settling defendants to withdraw if more than a certain number of opt outs occur. That could produce serious problems. The 2003 amendments have worked pretty well in organizing and focusing the settlement-approval process; having this laundry list is not warranted.

Another participant reported that "We have high take rates." Laundry lists are not useful and can cause problems. And something like this one is not needed now. "Judges are beginning to do this right." For example, in the NFL concussion cases the judge promoted outreach early in the process. There was a even a liaison for the objectors. That sort of good and creative management of a class action cannot be mandated by rule. It was asked whether such outreach could be required by a rule, prompting the answer that the NFL concussion case was the first time this lawyer had seen such an aggressive effort on this front.

Another participant expressed disapproval of laundry list rules, and worried that this might seem like "piling on" on this topic. But it is important to note that in (b)(2) cases many of these factors simply do not apply. More generally, the idea that the information this rule would require will be of use to class members is not persuasive. It will not be comprehensible to class members. For example, how many of them can interpret complicated insurance policies? The average American reading level is about the sixth grade, and if you want to provide class members with information that is useful to them you need to keep that in mind.

A judge observed that the idea of early notice to the court is very attractive. It is important, however, to say that the judge can insist on any information that seems likely to be useful, whether or not it is on the list. And even though there are instances of judges becoming active in soliciting input from class members, that sort of initiative is not true of all judges, perhaps not of most judges. A rule like this would likely produce more early involvement by judges.

Another lawyer participant expressed misgivings about laundry list rules. Guidance in some form for judges and for less experienced lawyers would be useful, but this lawyer is not confident that even this (rather costly) effort of assembling information will be useful to many objectors.

A competing view was that too often critical information does not surface until it is too late or almost too late for class members to act on it. The concern with costs is valid, but providing potential objectors with needed information need not raise costs too much. Nobody is going to want to look at 4.2 million documents. And if there is a protective order, the objectors would have to be bound by it with regard to documents covered by the order. Moreover, focusing on the claims process is very important. Having that front and center is valuable.

A suggestion was offered for those who dislike checklist or laundry list rules: How about rule with a general direction to the court to require appropriate and pertinent information from the proponents of the settlement, coupled with a Committee Note offering a variety of ideas about topics that might be important in individual cases? That concept produced support from many participants.

A different concern emerged, however: "Why do this under the heading of notice. It's not about notice. It's about preliminary approval."

Another idea emerged: An ideal process in many cases is scheduling or case management conference with the judge when the possibility of a settlement proposal looks likely. Then the

parties and the judge can review what's needed. After that's done, the parties should prepare and file all their materials supporting approval of the settlement up front. There's no need to do this whole briefing effort twice. Then, if there are objections or if additional issues arise, supplemental briefing is available to address these matters. That is the way to go; laundry lists are not helpful, particularly in (b)(2) cases.

This suggestion drew support. At least it is critical that all pertinent materials be on file well before the date when class members must decide whether to opt out or object. Too often in the past, it has happened that such things as the attorney fee application come in only after it's too late to opt out or object.

Another participant noted that CAFA sometimes produces involvement by state attorneys general, particularly in consumer class actions. Having access to details on the case and the settlement would be useful for the AGs.

Another voice was raised for keeping the rule open textured and short. It was suggested that perhaps local rules or standing orders could be used to provide pertinent specifics instead of a rule with a laundry list. But a concern was expressed: Adding frontloading may not work without some specifics. Nonetheless, if one wants to do this by rule, it probably should be simple. That drew the response that the default position should be that all supporting materials should be filed up front.

Another participant asked "How can you fight the idea of notice to judges?" On the other hand, this participant did not understand how there could be an obligation to decide whether to opt out unless the class has already been certified. The opt out must follow certification.

That drew concerns. The way this is done is to combine all notices into one notice program. One question is what the judge's action should be called -- "preliminary approval" or "ordering notice." On that score, it seems important not to hamstring the judge. The other is to recognize that this should be done only once; the possible need for a second notice should be avoided.

Another reaction was that "This is certainly certification. You call them class members." That drew the reaction that this highlights the problem. Unless this is certification there's no authority to require an opt-out decision.

An effort to summarize the discussion suggested that a shift to a more general rule or a shorter list seemed indicated. On that score, one could compare the more general orientation of the second topic -- settlement review criteria -- in which one might

say that the current reality is that each circuit has its own laundry list for settlement review. Beyond that, it might be said at least that the best practice is to get all the specifics on the table early.

That drew a warning that one must be careful about the possibility that such a rule would lead to Rule 23(f) appeals from this preliminary or contingent decision.

Another participant suggested that the goal should be a rule that (1) prompts initial care in compiling information that will be needed; (2) makes it clear that notice can call for opt-out decisions; and (3) includes "preliminary certification." This approach will "make the documents" flow. At the same time, it should avoid wasteful and costly activity. Doing discovery just to be able to say that you did discovery is not sensible.

Topic 2 -- Expanded treatment of settlement-approval criteria

This topic was introduced as involving "11 dialects" of settlement review in the federal courts today. Indeed, considering the reaction to laundry lists in relation to Topic 1, one might suggest that Topic 2 seeks to replace competing laundry lists with a single set of considerations. The sketch before the group has four (and perhaps three) "core" factors that seek to consolidate and simplify the variety of expressions adopted in various circuits.

An initial reaction was skeptical: "This is a solution in search of a problem. The courts of appeals have developed their lists to make sure judges are careful. The lists we have now do the job."

A differing view was expressed: "I generally like this approach, but would add a catch-all." Certainly one could simplify too much. For example, if one argued that "fair, reasonable, and adequate" uses too many words, one answer would be that some courts have found that "fairness" and "adequacy" are different things. Meanwhile, the current lists include things that are not useful. For example, in the Third Circuit, the Gersh factors include several things that really don't often, or ever, matter.

It was observed that one thing that is not explicitly included is consideration of take rates and payouts to the class, and relating those to the attorney fee award. This is a difficult problem from the defense side, where the goal is to get the case resolved.

A reaction was that considering the take-up rate is very important. Indeed, a proposal has been submitted to the

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Subcommittee to mandate reports at the end of the claims period on the take-up rate. That's where it's needed -- on the back end. That could come with some sort of hold-back of a portion of the attorney fee award.

Discussion returned to the standard for initial Rule 23(e) notice. The suggestion was that Alternative 4 on p. 5 of the materials expresses what should guide the court, looking to whether the court "preliminarily determines that giving notice is justified by the prospect of class certification and approval of the proposal." That would not be a "preliminary approval" supporting immediate review under Rule 23(f), but should suffice to support a requirement that class members decide whether to opt out.

A judge agreed. This reflects what is happening, and it is what should be happening.

That idea drew opposition: "What governs the opt-out is real certification." One can't skip that step. This same sort of problem comes up again with the settlement-class certification proposal. The fact that something is convenient does not mean that it is justified or proper.

Another participant shifted focus to the choice between Alternative 1 and Alternative 2 on p. 9 of Topic 2, expressing support for Alternative 2 because it permits the court to approve the settlement only when it can find that all four requirements are satisfied. Separate consideration of each and separate findings would be better than generalized "consideration" (as directed by Alternative 1) of all four sets of concerns. This participant also thought that it would be good to standardize the factors.

Another participant agreed with the skepticism of the first speaker on this topic. "I'm not sure these factors are better than the current lists." This participant would certainly keep "fair, reasonable, and adequate" as a standard for the overall consideration of the factors (as in Alternative 1). This participant also does not like the bracketed language in (D) on p. 10. It also seems dubious to focus so heavily on collusion; that is not a frequent concern.

The question whether this listing is exclusive was raised. One reaction was that even if such a rule is adopted, rote listing of existing circuit factors will continue.

Another participant noted that the Third Circuit Gersh factors are also aimed at collusion. In addition, factor (C) -- the adequacy of the benefits to the class, and comparison to the amount of the attorney fee award -- is very important. Emphasizing the importance of this factor is a good idea. In

addition, this participant favors the Alternative 1 approach -- calling for an overall fairness assessment rather than discrete affirmative attention to each of the four factors. This participant agrees that it is important to avoid a rule that would permit a 23(f) appeal from these preliminary settlement review activities.

Topic 3 -- Cy pres provisions

This topic was introduced with a quick summary of some comments received from participants before the conference began. Several participants favored dropping the bracketed phrase "if authorized by law" and also favored removing any reference to making distributions to class members whose claims were rejected on grounds of timeliness. Other topics that have been raised in recent comments include reversion provisions, and the tightness of the nexus between the goals of the class action and the goals of a potential recipient of cy pres funds. Finally, some raised questions about whether cy pres amounts should count in making attorney fee awards.

The first participant raised two levels of problems. (1) It is troubling that the Civil Rules might be amended to include a substantive remedy. The "if authorized by law" proviso would be an important way to steer clear of this risk. But it's contradicted by the very next phrase -- "even if such a remedy could not be ordered in a contested case." (2) The whole idea presents great difficulties unless it is limited to cases involving trivial claims where delivering relief to class members would obviously not be possible. The procedure rules can't be used as a way to create or justify civil fines. Claims in federal court arise under the pertinent substantive law, and the procedure rules cannot be augment the remedies that substantive law provides. Moreover, cy pres provisions in settlements are used too often to create faux class actions -- vehicles for enrichment of lawyers and "public interest" organizations affiliated with the lawyers.

Another participant disagreed. The "if authorized by law" phrase is inappropriate. These provisions are a matter of agreement. Certainly we want to avoid Enabling Act problems, but this is not necessary for that purpose. It's not right to say that the sole purpose of a suit is to compensate. It is also a method to enforce the law. Cy pres fulfills that private enforcement function. But there must be a significant nexus between the rights asserted in the lawsuit and the objectives and work of the cy pres recipient.

It was asked whether there is really any need for a rule. The ALI section on cy pres has gotten much support in the federal courts. Would that suffice without a rule?

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One reaction was that there is a division between the state and federal courts on these points. This speaker would favor applying the ALI standards, but they are not universally invoked even in the federal courts. Another participant noted that there are many state law provisions that deal, in one way or another, with these issues. That drew the question whether federal courts had ever applied those standards in cases governed by state law, and the answer was that there might be a Washington case that does so, but that it surely has not been frequent.

It was suggested that empirical data on the frequency of cy pres provisions would be useful. This participant has attempted to determine how often reported instances have occurred in the last seven years, and believes there have been about 550 cases.

One approach that was suggested is class member consent. Surely class members could consent to using their claims to support public service activities. Perhaps the class notice would support the conclusion that the class has consented to such use if it specifies the cy pres provisions and enables class members to object. If some do object, that shows that others do not.

Another participant expressed considerable concern about the use of cy pres. With "leftover money," this is not really troubling, so long as it's not a huge amount. But these sorts of provisions seem to invite what might be called the "classless class." Particularly troublesome is the possibility that some lawyer would devise a "claim" about a product and claim that everyone who bought it suffered some "harm," so that the solution is that the court should direct that the defendant pay a considerable sum to a "public interest" organization selected by the lawyer. This participant would worry that any rule provision would promote such activity. It would be better to leave this to the courts, particularly under the guidance of the ALI Principles.

A judge noted that in more than ten years on the bench, only two cases had involved cy pres provisions. That drew the reaction that "there's always leftover money."

Concern was expressed about reversionary provisions, under which the defendant gets back unclaimed money. One could read the Committee Note sketch on p. 16 as endorsing such provisions. It was asked whether a rule should forbid a reversion. That drew the response that in some districts, such as the N.D. Cal., the experience is that having such a provision will lead to disapproval of the settlement.

A response was offered to the idea that class member consent can be assumed from lack of objection to cy pres provisions in settlement agreements. The purpose of litigation is to

compensate. If class members want to make donations, they can do that on their own. But having this alternative to getting the money to class members raises very troubling issues. Whether or not this rises to a due process level, it would seem much better to give class counsel an incentive to make sure the money mainly gets to the class instead of the lawyer's pet charity. Indeed, it's odd that nobody has suggested the fluid class recovery concept. That is more like compensation than simply imposing a "civil fine" that is paid to a public interest outfit.

This prompted the observation that sometimes, particularly in some consumer class actions, the amounts left over are huge. It's very difficult to get the class members to make claims.

That prompted the reaction that, in such situations, reversion to the defendant is the logical answer. What this rule proposes instead is that the class's money can be used for public policy purposes the judge endorses. Why can't companies insist on a reversion? That facilitates settlements. The company knows that if the class members don't bother to claim the money, it will get the money back. In bankruptcy reorganizations, reversions occur all the time; why not here also? The class is not a judicial entity that can make a donation to a public interest outfit.

A reaction to this idea was that the Committee Note bracketed material on p. 16 seems to endorse reverter, but that endorsing it is a bad idea. To the contrary, the Enabling Act concern and the concern about the faux class action enabled by cy pres are both based on a false premise. The reality is that the defendant has been found to have violated the law, and the class consists of the victims. True, the defendant says that it does not concede violating the plaintiffs' rights, but usually the payment is enough to show that something wrong has occurred.

A different point was made: Usually there is money left after the initial claims process is completed. Speaking the realistically, the choice is between giving that money to the claims administrator or to the cy pres recipient.

That prompted the reaction that this is the place for reversion to the defendant. Indeed, there is no right to these funds unless the claimants come forward and claim them. Their failure to make claims does not make this a pot of money for "do good" purposes. But it was asked: What if the defendant has agreed to this arrangement. Why wouldn't that provide a sufficient basis for cy pres uses?

Another participant reacted that if defendant wants to insist on a reversion provision, that can be a target for objectors. A defense attorney participant reported that "I have been a proponent of reverters. I will push for them." Not all

settlements are lump sum settlements. Some are claims made settlements. Then a reversion provision makes perfect sense. The amount to be paid is determined by the amount that is claimed. It was asked how one presents a claims made settlement to the court. The answer that it is really about attorney fees. From the defendant's perspective, one looks to the maximum amount that could be awarded, and that is used for the fee award. But the amount paid to the class depends on claims actually made.

The question whether a rule amendment was needed returned. "This is the most cited section of the ALI Principles. Do we need to put it into a rule? It's already being adopted in the courts."

The response was that the district courts are "all over the map." A recent Eleventh Circuit case dealt with a situation in which the class got $300,000 and the lawyers got $6 million in fees.

Another response was that cy pres is not compensation. Even fluid recovery is compensatory in orientation, but cy pres is not. If there is a substantial amount left after the claims process is completed, that indicates that the case should not have been certified. The right solution is to add a new Rule 23(a)(5), saying that a class should not be certified unless it is determined that there will be an effective method to distribute relief to the class members.

That idea drew strong disagreement: The bottom line is that defendant has violated the substantive rights of the class members, even if they are hard to identify and do not all seek compensation. Defendant must disgorge its unjust benefits. The bankruptcy comparison offered earlier is not analogous. That does not involve law enforcement, as is often the case in consumer class actions where many class members do not claim what they could claim under the settlement. Under CAFA, attorney fees are a separate consideration. Claims made is not an alternative in consumer cases. Having a reverter is anathema.

A different reaction was that the right question is the substantive law question. The procedural rules should not be distorted in order to "punish" "bad" defendants. Defendants agree to cy pres provisions because they want settlements approved and expect that a reverter would not be accepted. That is "agreement" with a gun to your head.

A response was that there already are rules that deal with "remedies." Rule 64 deals with some, and Rule 65 addresses TROs and preliminary injunctions. Moreover, this is really a common law development. If state law requires escheat, for example, the federal courts must obey that state law. But we must avoid getting caught up in formalist distinctions.

That prompted the question why the Advisory Committee should not simply leave these matters to common law development. Does anyone favor rulemaking in this area?

One reaction was to agree that the rules committees need not venture into this area. Another participant agreed. Consider the Third Circuit Baby Products decision. The court dealt with the problem creatively using common law principles. What actually happened in that case was that another outreach effort located additional claimants; the massive cy pres provision proved unnecessary.

A contrasting view was expressed: There is a value in having a rule. We need to squelch arguments about what is permissible and how these recurrent issues should be handled. It would be good to have a rule saying (1) cy pres is allowed, and (2) reversion is disfavored.

Another plaintiff-side lawyer reported being "very much on the fence." It is good to have clarity. But these are really tough issues. The problem of nexus is serious; class action settlements are not a form of taxation to do public good. But it is also true that entities like legal aid have very worthy goals and very serious needs that cy pres may partly satisfy.

One approach was offered: Is there a case in the last few years in which the ALI approach was rejected by a court? Maybe that proves we don't need a new rule. A participant identified three -- an Eleventh Circuit case that declined to adopt the ALI approach, a Google case, and a Facebook case.

An observer observed that this discussion is missing a key point. This is in Rule 23(e). It is only about the parties' agreement. The reason to have a rule is to achieve consistent treatment, not to create important new authority for such arrangements.

A reaction was that "this is not really a private contract. It requires court approval, which shows that it is not entirely private. And it achieves the goals of the court (and the parties) only if the court order is binding on both sides, including the absent plaintiffs."

Topic 4 -- Objectors

This topic was introduced as involving two general subjects, disclosure by objectors and a ban on payments to objectors or objector counsel.

One participant reported seeking test cases to try to claw back payments to bad faith objectors on behalf of the class. Rule 23(e)(3) calls for disclosure of all side agreements, and this should be a way to support such potential litigation.

A response was that the difficulty is with the delay after filing of a notice of appeal. At least the Rule 23(e)(5) requirement for court approval of withdrawal of the objection does not seem to apply then. The reaction was that even that sort of thing could be addressed in the settlement agreement, if one is really concerned about greenmail. Although an Appellate Rule amendment might close the appeal window partly, there would still be a 30-day gap between the entry of judgment in the district court and the filing of the notice of appeal. During that time there would be no policing.

Another participant noted that the big problem is that it makes great sense for class counsel to pay off the objectors to get the benefits to the class. Class members may be dying or in dire need of the relief that is being held up by the objector. But the proposed disclosure requirements are not effective. They are just a burden on the objector. The main solution is to require court approval of the payment to the objector or objector counsel.

That prompted the point that the proposal made to the Appellate Rules Committee was that there be a flat ban on any payments to objectors or objector counsel, not payments allowed with court approval. The response was that the important goal is to improve settlement agreements and avoid freeloading on them.

Another participant noted that there are surely good objectors, and this lawyer has recently seen several examples. A problem is that one often sees a mix of objectors. Requiring court approval is a way to shed light on this bad activity. Ideally, the courts of appeals would name names, and list the bad faith repeat-objector lawyers. But for class counsel to do this asks a lot. "Do we want to be in the business of name calling?"

Another plaintiff-side lawyer agreed. Hedge funds are stepping into this area and financing objections in hope of payoffs. We need as much transparency as possible. As a result, this lawyer likes the disclosure requirements, even though they may be burdensome to objectors, particularly good faith objectors.

Another plaintiff attorney agreed. There has to be a response. We need to know who these people are and do something about them.

A question was raised about the 2003 addition of the requirement in Rule 23(e)(3) about "identifying" side agreements.

That did not require that the contents of the agreement be revealed. For true transparency, revealing the details would be desirable. But it was observed that some things are properly and importantly kept secret. An recurrent example is the "blow factor," the level of opt-outs that will permit the defendant to withdraw from the settlement. 15 years ago "opt-out farmers" were thought to misuse such information.

Another reaction was that "the limitation on payments on page 25 is very appealing." Sunlight is desirable, and may be an antidote to the public disdain in many quarters for class actions. Suspicions are fed by secrecy.

A judge asked what the standard is for approving payments to objectors. Those who opt out can make whatever deal they prefer. Compare frivolous objectors. The judge suspects a hold up. What standard should the judge use in deciding whether to approve the payment that counsel has agreed to make?

A plaintiff-side lawyer said: "The only way to do it is to refuse to approve."

Another plaintiff-side attorney noted that the idea is that the court approval requirement will support court scrutiny. The district court could approve under some circumstances, but if the district judge refuses to approve the objector is really without a leg to stand on before the appellate court.

Another idea was suggested: What if a rule said the district court must not approve any payment to an objector unless it finds that the payment is reasonable in light of changes or improvements to the settlement resulting from the objection? That would be consistent with the orientation of Rule 23(h).

A first reaction to this idea was that often the improvement is hard to measure. "Cosmetic" improvements might be contrived. And on the other hand, changes in injunctive relief, for example, might be quite significant but difficult to value.

A defense-side lawyer noted that this is more a plaintiff-side problem. For the defendant, the delay in consummating the settlement may not be similarly urgent. Also, why can't the court approve the added payment even though it's not keyed to an "improvement" in the settlement?

Another participant warned "Be very careful what you ask for." Satellite litigation could easily occur about whether there has been an improvement. It's not always easy to determine what is a good faith objection. Indeed, the whole area is probably not typified by binary choices.

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A counter to that was the example of the one-sentence objection to really says nothing. That robs the process of the legitimate purpose of class member objections. The basic goal is to inform the district court about possible problems with the deal. The one-sentence objection is a ticket to the appellate court, where the objector attorney can play the delay game.

That prompted the objection that courts of appeals wouldn't credit a one-sentence objection. That would lead to summary affirmance.

A different topic arose: requiring objector intervention to appeal. That would, of course, require a close consideration of Devlin v. Scardeletti, but the desirability of such a rule would be dubious anyway. If that can be litigated, it will be litigated. This lawyer has confronted such litigation three times already, even though he offers to stipulate that he will not accept any side payments and wants only to get an appellate ruling on the merits of his objections. Disclosure, on the other hand, is o.k. so long as it does not create additional things to litigate.

A defense-side lawyer said he was not in favor of a separate intervention or standing requirement for objectors. "If you're bound, how can you not have standing?"

A judge expressed support for a standard that was keyed to improvements in the settlement. That could recognize that more money was not the only way in which a settlement could be improved, but would provide the judge guidance.

But another participant pointed out that this created another appealable issue -- where the payment is rejected, the propriety of that rejection under the rule's standard could be appealed.

Topic 5 -- Ascertainability

This topic was introduced as having received much attention and somewhat divergent treatment lately. A key question is whether a rule change should be pursued, or alternatively that the committee should await a consensus in the courts.

A plaintiff-side lawyer said that the "minimalist" sketch the Subcommittee had circulated seemed to adopt the Third Circuit standard from Carrera. But the Seventh Circuit decision in Mulins "takes apart" Carrera. Carrera should be rejected insofar as it requires that certification turn on whether the court is certain that the identity of each class member can be ascertained later, and that the method of ascertaining it will be administratively feasible. All that should be required at the certification stage is that there is an objective definition of

the class. The sketch relies on the phrase "when necessary" to do too much work. Moreover, any rule should be addressed only to (b)(3) class actions; even the Third Circuit has recognized that Carrera does not apply in (b)(2) cases. The Third Circuit standard makes identifiably a stand-alone factor for certification, and it should not be. The Committee should not proceed this way.

It was asked whether a rule change is needed. The answer was that it is needed. The Third Circuit decision in Bird v. Aaron's preserves the problem. "The Third Circuit has made it clear that you can't have a consumer class action." And the Eleventh Circuit seems to be siding with the Third Circuit on this subject.

A judge asked whether it might be that Carrera has been somewhat over-read in some quarters. A footnote in the case emphasizes that it was not announcing a new or additional requirement.

Another question was raised: Does this apply to settlements also? If so, that's a ground a for objections to settlements.

A defense-side attorney urged that any effort to address this question must take account of what happens after class certification is granted -- it is necessary to confront the question how you distribute the fruits of the suit.

Another response was that the Tyson case in the Supreme Court raises some of these issues.

Another defense lawyer argued that this "goes to the heart of what is a class action." Is it just about one person's gripe? Consumer fraud cases are good examples. It should be implicit in the rule that the objection is actually shared by others who can be identified. Indeed, typicality might be urged to require something of the sort. This lawyer supports the proposal, but thinks "it probably is a bit too early."

Another defense-side lawyer noted that trial plans also call for a relatively specific forecast of how a case will be handled. That drew the point that Judge Hamilton in Mullins said that the current rule has all the pieces needed to deal with these issues.

A plaintiff-side lawyer responded that "If you agree with Hamilton, the rule should be written to make it clear that at the certification stage only an objective definition is required." And it would be valuable to say that a Carrera-style ascertainability requirement is not a prerequisite for certification, and that self-identification is o.k.

Another plaintiff-side lawyer agreed.

Topic 6 -- Settlement class certification

The initial reaction expressed was skepticism from a defense-side lawyer. The settlement class dynamic has been in place for a long time. It reflects a fundamental tension about the proper role of class actions, and in particular about the centrality of the concept of predominance in the (b)(3) setting. Common question class actions are a precise exception to the normal course of business for American courts. They produce a quantum change in the dynamics of litigation. Though they may be very efficient for resolving multiple claims, they also exert huge leverage for compromise from defendants that have a strong basis for resisting claims on the merits. The 1990s experience emphasized mass torts, and involved quick certification decisions. First the courts of appeals put on the brakes. Then the Supreme Court emphasized in Amchem that predominance under (b)(3) is more than commonality under (a)(2). Since Amchem, the rules have tightened, but the problem of pressures has not gone away in the class action marketplace. The recent interest in issue classes and settlement class certification is evidence of this recent pressure. But the core point is that only with a vigorous predominance check can the collective pressure exerted by a (b)(3) class action be suitably cabined and focused. Weakening that check weakens the entire structure.

That statement produced the reaction "I'm not sure that's right. For example, the Third Circuit in Sullivan v. DB Investments struggled with the concept of predominance in the settlement class context." That reaction drew the response that there really is no way to try these cases. The Florida state court litigation following the Engle class action ruling, in effect an issues class outcome, proves that this effort produces a total mess. A judge that certifies for the "limited" purpose of resolving an issue will inevitably look for a settlement after that issue is resolved, at least if it is resolved in favor of the plaintiffs. We need a standards-driven activity, and removing predominance from its central position is the wrong way to go. Don't institutionalize this settlement urge.

Another participant added that there are serious Article III questions regarding a settlement class. "Contingent" certification in regard to a possible settlement destroys the adversarialness that is vital to American litigation. Similar Article III issues arise with regard to issue class certification. That produces an advisory opinion.

A defense-side lawyer responded that settlement classes are used all the time. If the courts shut down one avenue for resolving cases, lawyers will find another one. For examples, inventory settlements come into vogue if in-court resolutions are not possible. But there's no judicial involvement at all in relation to inventory settlements. That is not an improvement.

With class settlements the court has a role to play, and these possible amendments can shape that role. Amchem is not really illustrative of the issues that arise today. That case presented critical future claims problems. Compare the NFL concussion litigation. There is no comparable futures problem there.

A plaintiff-side lawyer identified the problem: Defendants don't have tools that can be used to settle cases. That is a reason to support the settlement class idea. We need more flexibility. If the Florida situation after the Engle decision is a mess it's a mess because this set of defendants won't settle. That prompted the question whether there is any need for a rule on this subject. One could say that the courts are not following Amchem. The response was "I strongly support a rule. We need to have this in the rule book rather than relying on judicial improvisation."

Another participant said the proper attitude had a lot to do with the type of case involved. Two things are important: (1) The reverse auction problem must be kept constantly in mind, and (2) Whatever the rules, there may be courts that in essence play fast and loose with the rules. It is clear that defendants want global peace and want to use settlement classes to get it. But they also want to make litigation class certification difficult to obtain. There is an innate tension between these two desires, which tempts one to regard settlement class certification as worlds apart from litigation class certification. But that view is often hard to maintain when claims are based on class members' very varied circumstances, or on significantly different state laws. Fitting mass tort class actions into a class-action settlement with a transsubstantive rule is a great challenge.

Another participant had no strong view about the necessity of a settlement class rule, and was not troubled by the question of different standards for the settlement and litigation settings. The real concern should be fair treatment of class members. That is the weakness of settlement classes -- how the settlement pot is divided up.

Another participant recalled opposing the 1996 Rule 23(b)(4) proposal, particularly because of the reverse auction problem. How can a plaintiff lawyer drive a hard bargain when there's no way to go to trial? Inevitably the defendant is in the driver's seat, and various plaintiff lawyers are tempted to "bid" against each other by undercutting other plaintiff lawyers.

This discussion produced a question: Should there be a rule forbidding settlement in any case unless a class has already been certified? That resembles the Third Circuit attitude that prompted the publication of the 1996 Rule 23(e)(4) proposal. It also corresponds to some mid 1970s interpretations of the "as soon as possible" language then in Rule 23 about when class

certification should be resolved. The idea was that class certification was the absolute first thing that should be resolved. That primacy has been removed, but maybe Rule 23(e) should forbid settlements in any case that cannot qualify for certification under existing Rules 23(a) and (b).

A reaction was that it's simply true that courts will try to achieve settlements. MDLs are like that; the judge regards reaching a settlement as a big part of the job. The point is that this existing pressure becomes overwhelming if the bar is lowered for certification. To offer a lower threshold for settlement certification will mean that there will be even more pressure to settle. The inventory analogy is not an apt comparison. With inventory settlements, one begins with clients who contact lawyers and have cases. That's the MDL model. Acting for the clients who have hired them, those lawyers can push for a settlement. But in a class action the "clients" don't hire the lawyer or otherwise initiate the process. They don't even know about it. The court deputizes the lawyer to make a deal for the "clients." Where is there another rule that is designed for settlement purposes? The class action setting is not the place to start.

A reaction to these points was that Rule 23 has a variety of protections in the settlement context that are not in place for MDLs. Doesn't that argue for favoring the class-action setting? The response was that the situations are qualitatively different -- in the MDL setting the client initiates the process, but in the class action the initiative belongs entirely to the lawyers.

A judge noted that the defendant can insist on a full-blown certification process. Then if that results in certification, the defendant can settle, and that sequence would not trouble those unnerved by the settlement class possibility. The reality, however, is that the parties -- including the defendant -- want resolution without that extra step. Indeed, the plaintiff lawyers could rebuff settlement overtures until the case is certified in order to strengthen their hand in settlement negotiations. But that does not happen much of the time. The parties are pushing for settlement before a full-dress certification decision.

A settlement-class skeptic responded that making a formal rule inviting settlement class certification will cause ripple effects. The process just described will be magnified. This prospect will affect how and whether cases are brought.

A settlement-class proponent noted that Rule 23(e) says that settlement is a valid outcome for a class action, albeit with the conditions the rule specifies. That drew the response that every other time settlement is referred to in the rules it is as an adjunct to the adversary proceedings that are the norm of

American litigation. In this situation, that adversarialness is missing.

A reaction to this point was that it would make consent decrees unconstitutional. The response to that point was that consent decrees are a different category because they involve governmental enforcement. That is not the same as the settlement classes we should expect under this rule. In those cases, private profit-oriented lawyers are initiating and controlling the cases. Coupled with cy pres possibilities, they may even support a deal that involves absolutely no direct payments to the class members they "represent."

Topic 7 -- Issue class certification

This topic was introduced as involving two sorts of issues. (1) Is there a split in the courts that justifies some effort to clarify how courts are to approach the option provided by (c)(4) in cases certified under (b)(3)? (2) In any event, should there be an amendment to Rule 23(f) to deal with immediate review of the court's resolution of a common issue under (c)(4)?

An initial reaction was that the effect on MDL proceedings is an important consideration. This participant's bias is to "leave the matter to the marketplace."

Another participant (defense-side) agreed. "There are so many issues with issue classes. They are really very hard to do."

A plaintiff-side participant agreed. The case law is actually fairly stable. And it bears noting that (c)(4) is also used in (b)(2) cases. This sketch might disrupt that valuable practice.

Another plaintiff-side participant agreed. In consumer cases, the issue may be the same for all class members, and (b)(2) treatment may be preferred.

A defense-side participant said that changing the rule would be "very dangerous." There would be an explosion of issue classes." Such treatment raises important 7th Amendment jury trial issues, with the jury seeing only part of the case.

Another defense-side participant did not disagree, but mentioned that the sketch's invocation of a "materially advance the litigation" standard for using this device seemed a valuable gloss on the current rule. But the courts may well be embracing this attitude on their own. Rule 23(c)(4) already says that the court should use this route only "when appropriate." That seems the most important consideration in determining whether (c)(4) certification is appropriate.

No voices were raised to support moving forward on the possible revisions to (b)(3) or (c)(4), and the modification to Rule 23(f) did not receive attention.

Topic 8 -- Notice

This topic was introduced with the widely shared view that everyone thinks that being flexible about ways to give notice makes sense, and that taking the 1974 Eisen decision as interpreting the current rule as requiring first class mail seems inflexible.

An initial reaction was that some public interest lawyers say the poor do not have easy access to the Internet, so email or other online notice may not reach them.

A public interest participant agreed. Consumers too often are not able to access online resources. But there may be another concern of at least equal importance -- the cognitive capability of the members of a consumer class. Even if notice "reaches" them, they may not be able to understand or interpret it. Finding ways to ensure that notices are understandable to such class members may be just as important as flexibility in method of delivery.

Another public interest participant said that electronic notice can usually be useful. But it would be important -- whatever the form of notice -- that the rule direct that it be in easily readable format. And creative use of online communications must be approached with suitable caution. For example, one might be intrigued by the possibility of opting out by email, but that raises concerns about verification of who is doing the purported opting out.

Another participant noted that first class mail is far from foolproof. Particularly with the vulnerable groups mentioned by others, is it clear that first-class mail is more likely to reach them and be understood than alternative means of communication? Don't people who have email actually change their email addresses must less frequently than their residential addresses? Many in the most vulnerable groups probably move often.

A different concern was introduced -- spam filters. As the volume of email escalates, those are increasingly prominent. How can one make sure that email notice of a class action certification or settlement does not end up in spam? A response was: How do you make sure first class mail is not discarded without being opened?

It was suggested that claims administrators actually have considerable experience and data about these very subjects. A participant with extensive experience in claims administration

observed that people i the claims administration business are very resistant to revealing this information. The effectiveness of various methods of reaching class members is regarded as proprietary information.

Beyond simply reaching people at all, it was emphasized, there are serious issues about what you reach them with, and what they actually will understand. The goal should be to write the communications in a way that makes it easy for a recipient to make a decision. That will increase the response rate. Another comment was that one needs to tailor the notice to the case involved. A securities fraud case and a consumer class action may call for very different strategies in communicating with class members. The fundamental issue is that the judge should be paying attention to the practicalities of notice to the class in the case before the court; that focus may be more important than what any rule says.

Attention shifted to what the amendment sketch on p. 46 said. It invites "electronic or other means" to give notice. But that seems to give electronic means priority. Is that right? For one thing, it's difficult to foresee what new means of communication may arise in the future; perhaps some of them may become almost universal but not be "electronic." For another, it is not clear that electronic means should be preferred to others across the board. The discussion thus far shows that class actions are not all the same, and that tailoring the notice program to the case before the court is important. Perhaps this amendment would send the wrong signal.

Another participant suggested that "appropriate" might be more appropriate in the rule than "electronic." Then the Committee Note could say that for many Americans electronic communications are the most utilized method of communicating, but that for others more traditional means continue to predominate.

A reaction to these suggestions about phrasing of a rule change was to note the Eisen interpreted the current rule to prefer, perhaps to require, first-class mail. Should that really be privileged over other forms in the 21st century?

A response was that you can make a case for use of email in many cases. But there is no reason to throw out first class mail altogether. At the same time, another participant cautioned, one would not want the rule to appear to require the court to use first class mail where it does not make sense. It's quite expensive, and can be cumbersome and time-consuming.

An observer suggested that the rule should direct that notice be given "by the most appropriate means under the circumstances." Then the Committee Note could say that Eisen's endorsement of first class mail no longer makes sense. The Note

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could also add a discussion of the manner of presentation and content of the notice. Claims administrators do have data on what works, and it makes sense to prefer evidence-based decisions about such matters.

Another reaction focused on the method of opting out. At present, the norm still is that class members must mail in something to opt out. In practice, that can operate as a disincentive to opting out. Can this be done electronically instead?

A reaction was that things are evolving very rapidly on these techniques. Sometimes it seems that the preferred way of handling these topics changes between the time the settlement is negotiated and the time that it is presented to the court.

Another comment reminded the group to keep one more thing in mind -- the distinction between reach and claims rate. It is important for a realistic assessment of differing notice strategies to attend to the matters of greatest importance.

Topic 9 -- Pick-off offers and Rule 68

This topic was introduced by noting that the Seventh Circuit announced a month before the conference that it was abandoning its prior interpretation of the effectiveness of pick-off offers, and that the Supreme Court has granted certiorari in a case that may resolve some or all issues surrounding this topic. So the question presently is how the Advisory Committee should approach the issues.

The first response was that the Committee should "pass" -- not take amendment action at this time.

A second response was that the Rule 68 sketch has appeal. Since the Kagan dissent in the FLSA case, no circuit has embraced pick-off maneuvers, but there are a couple of circuits in which this continues to be a potential issue. But there's a considerable likelihood that the Supreme Court will decide the issue in the Campbell-Ewald case.

Another participant favored the "Cooper approach." Rule 68 is not the only place where this problem can arise. It would be desirable to direct in Rule 23 that if a proposed class representative is found inadequate the court must grant time to find a substitute representative. Another thing that might warrant attention is that some district courts are entertaining motions to strike class allegations. But Rule 12(f) is not designed for such a purpose, and the rules should say that it is not.

A judge agreed that it is prudent to see what the Supreme Court does with the case in which it has granted certiorari. That prompted a prediction from another participant that the Court will not contradict what the lower courts have done. At the same time, this defense-side participant noted, a class action is extremely expensive to defend, and it's not at all clear that nullifying the pick-off offer possibility is important to protect significant interests of the class. That drew the response that this is a putative class upon filing of the proposed class action, and there has to be time to find another class representative if the defendant tries to behead the action at this point.

Other issues

Finally, participants were invited to suggest other topics on which the Advisory Committee might focus its attention.

One suggestion was back-end disclosures. Courts should order the parties to report back on take-up rates and other settlement administration matters when it approves a class-action settlement. This might link up to a court order deferring some of the attorney fee award until the actual claims rate is known. That might tie in somewhat with the cy pres discussion, and the question whether moneys paid to a cy pres recipient should be considered to confer a benefit on the class sufficient to warrant an award based on the "value" of the settlement.

Another topic was whether there should be a second try outreach effort if the initial claims process seems not to have drawn much response. There have been instances in which such second efforts very significantly increase the claims rate. A plaintiff-side participant reacted by saying that "I have a duty to the class to ensure delivery to class members of the agreed relief in an effective manner." Indeed NACA has guidelines on this very topic. See Guideline 15 at 299 F.R.D. 228. This is important.

* * * * *

The mini-conference having concluded, Judge Dow reiterated the hearty thanks with which he opened the event. The participants' contributions have been critical to a careful analysis of the various possible amendment ideas, and the Subcommittee is deeply indebted for the participation of each person who attended the event.

INTRODUCTORY MATERIALS
RULE 23 SUBCOMMITTEE
ADVISORY COMMITTEE ON CIVIL RULES
MINI-CONFERENCE ON RULE 23 ISSUES
SEPT. 11, 2015

This memorandum is designed to introduce issues that the Rule 23 Subcommittee hopes to explore during its mini-conference on Sept. 11, 2015. This list of issues has developed over a considerable period and is still evolving. The Subcommittee has had very helpful input from many sources during this period of development. The Sept. 11 mini-conference will provide further insights as it develops its presentation to the full Advisory Committee during its Fall 2015 meeting.

Despite the considerable strides that the Subcommittee has made in refining these issues, it is important to stress at the outset that **the rule amendment sketches and Committee Note possibilities presented below are still evolving. It remains quite uncertain whether any formal proposals to amend Rule 23 will emerge from this process. If formal proposals do emerge, it is also uncertain what those proposals would be.**

The topics addressed below range across a spectrum of class-action issues that has evolved as the Subcommittee has analyzed these issues. They are arranged in a sequence that is designed to facilitate consideration of somewhat related issues together. As to each issue, the memorandum presents some introductory comments, sketches of possible amendment ideas, often a draft (and often brief) sketch of a draft Committee Note and some Reporter's comments and questions that may help focus discussion. This memorandum does not include multiple footnotes and questions of the sort that might be included in an agenda memorandum for an Advisory Committee meeting; the goal of this mini-conference is to focus more about general concepts than implementation details, though those details are and will be important, and comments about them will be welcome.

The topics can be introduced as follows:

(1) "Frontloading" of presentation to the court of specifics about proposed class-action settlements -- Would such a requirement be justified to assist the court in deciding whether to order notice to the class and to afford class members access to information about the proposed settlement if notice is sent?;

(2) Expanded treatment of settlement approval criteria to focus and assist both the court and counsel in evaluating the most important features of proposed settlements of class actions -- Would changes be helpful and effective?;

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(3) Guidance on handling cy pres provisions in class-action settlements -- Are changes to Rule 23 needed, and if so what should they include?;

(4) Provisions to improve and address objections to a proposed settlement by class members, including both objector disclosures and court approval for withdrawal of appeals and payments to objectors or their counsel in connection with withdrawal of appeals -- Would rule changes facilitate review of objections from class members, and would court approval for withdrawing an appeal be a useful way to deal with seemingly inappropriate use of the right to object and appeal?;

(5) Addressing class definition and ascertainability more explicitly in the rule -- Would more focused attention to issues of class definition assist the court and the parties in dealing with these issues?;

(6) Settlement class certification -- should a separate Rule 23(b) subdivision be added to address this possibility?;

(7) Issue class certification under Rule 23(c)(4) -- should Rule 23(b)(3) or 23(c)(4) be amended to recognize this possibility, and should Rule 23(f) be amended to authorize a discretionary interlocutory appeal from resolution of an issue certified under Rule 23(c)(4)?;

(8) Notice -- Would a change to Rule 23(c)(2) be desirable to recognize that 21st century communications call for flexible attitudes toward class notice?; and

(9) Pick-off offers of individual settlement and Rule 68 offers of judgment -- Would rule amendments be useful to address this concern?

(1) Disclosures regarding proposed settlements

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(A) When seeking approval of notice to the class, the settling parties must present to the court:

(i) the grounds, including supporting details, which the parties contend support class certification [for purposes of settlement];

(ii) details on all provisions of the proposal, including any release [of liability];

(iii) details regarding any insurance agreement described in Rule 26(a)(2)(A)(iv);

(iv) details on all discovery undertaken by any party, including a description of all materials produced under Rule 34 and identification of all persons whose depositions have been taken;

(v) a description of any other pending [or foreseen] {or threatened} litigation that may assert claims on behalf of some class members that would be [affected] {released} by the proposal;

(vi) identification of any agreement that must be identified under Rule 23(e)(3);

(vii) details on any claims process for class members to receive benefits;

(viii) information concerning the anticipated take-up rate by class members of

benefits available under the proposal;

(ix) any plans for disposition of settlement funds remaining after the initial claims process is completed, including any connection between any of the parties and an organization that might be a recipient of remaining funds;

(x) a plan for reporting back to the court on the actual claims history;

(xi) the anticipated amount of any attorney fee award to class counsel;

(xii) any provision for deferring payment of part or all of class counsel's attorney fee award until the court receives a report on the actual claims history;

(xiii) the form of notice that the parties propose sending to the class; and

(xiv) any other matter the parties regard as relevant to whether the proposal should be approved under Rule 23(e)(2).

(B) The court may refuse to direct notice to the class until the parties supply additional information. If the court directs notice to the class, the parties must arrange for class members to have reasonable access to all information provided to the court.

Alternative 1

(C) The court must not direct notice to the class if it has identified significant potential problems with either class certification or approval of the proposal.

Alternative 2

(C) If the preliminary evaluation of the proposal does not disclose grounds to doubt the fairness of the proposal or other obvious deficiencies [such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation for attorneys] and appears to fall within the range of possible approval,

101 the court may direct notice to the class.
102
103 *Alternative 3*
104
105 **(C)** The court may direct notice to the class only
106 upon concluding that the prospects for class
107 certification and approval of the proposal
108 are sufficiently strong to support giving
109 notice to the class.
110
111 *Alternative 4*
112
113 **(C)** The court should direct notice to the class
114 if it preliminarily determines that giving
115 notice is justified by the prospect of class
116 certification and approval of the proposal.
117
118
119 **(D)** An order that notice be directed to the class
120 is not a preliminary approval of class
121 certification or of the proposal, and is not
122 subject to review under Rule 23(f)(1). But
123 such an order does support notice to class
124 members under Rule 23(c)(2)(B). If the class
125 has not been certified for trial, neither the
126 order nor the parties' submissions in
127 relation to the proposal are binding if class
128 certification for purposes of trial is later
sought.[1]

Sketch of Draft Committee Note

Subdivision (e)(1). The decision to give notice to the class of a proposed settlement is an important event. It is not the same as "preliminary approval" of a proposed settlement, for approval must occur only after the final hearing that Rule 23(e)(2) requires, and after class members have an opportunity to object under Rule 23(e)(5). It is not a "preliminary certification" of the proposed class. In cases in which class certification has not yet been granted for purposes of trial, the

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[1] To drive home the propriety of requiring opt-out decisions at this time, Rule 23(c)(2)(B) could also be amended as follows:

(B) *For (b)(3) classes.* For any class certified under Rule 23(b)(3), or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified [for settlement] under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances. * * * * *

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parties' submissions regarding the propriety of certification for purposes of settlement [under Rule 23(b)(4)] are not binding in relation to certification for purposes of trial if that issue is later presented to the court.

Paragraph (A). Many types of information may be important to the court in deciding whether giving notice to the class of a proposed class-action settlement is warranted. This paragraph lists many types of information that the parties should provide the court to enable it to evaluate the prospect of class certification and approval of the proposal. Item (i) addresses the critical question whether there is a basis for certifying a class, at least for purposes of settlement. Items (ii) through (xiii) call for a variety of pieces of information that are often important to evaluating a proposed settlement, [although in some cases some of these items will not apply]. Item (xiv) invites the parties to call the court's attention to any other matters that may bear on whether to approve the proposed settlement; the nature of such additional matters may vary from case to case.

Paragraph (B). The court may conclude that additional information is necessary to make the decision whether to order that notice be sent to the class. In any event, the parties must make arrangements for class members to have access to all the information provided to the court. Often, that access can be provided in some electronic or online manner. Having that access will assist class members in evaluating the proposed settlement and deciding whether to object under Rule 23(e)(5).

Paragraph (C). The court's decision to direct notice to the class must take account of all information made available, including any additional information provided under Paragraph (B) on order of the court. **[Once a standard is agreed upon, more detail about how it is to be approached might be included here.]**

Paragraph (D). The court's decision to direct notice to the class is not a "preliminary approval" of either class certification or of the proposal. Class certification may only be granted after a hearing and in light of all pertinent information. Accordingly, the decision to send notice is not one that supports discretionary appellate review under Rule 23(f)(1). Any such review would be premature, [although the court could in some cases certify a question for review under 28 U.S.C. § 1292(b)].

Often, no decision has been made about class certification for purposes of trial at the time a proposed settlement is submitted to the court. [Rule 23(b)(4) authorizes certification for purposes of settlement in cases that might not satisfy the requirements of Rule 23(b)(3) for certification for trial.] Should certification ultimately be denied, or the proposed

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settlement not approved, neither party's statements in connection with the proposal under Rule 23(e) are binding on the parties or the court in connection with a request for certification for purposes of trial.

Although the decision to send notice is not a "preliminary" certification of the class, it is sufficient to support notice to a Rule 23(b)(3) class under Rule 23(c)(2)(B), including notice of the right to opt out and a deadline for opting out. [Rule 23(c)(2)(B) is amended to recognize this consequence.] The availability of the information required under Paragraphs (A) and (B) should enable class members to make a sensible judgment about whether to opt out or to object. If the class is certified and the proposal is approved, those class members who have not opted out will be bound in accordance with Rule 23(c)(3). This provision reflects current practice under Rule 23.

Reporter's Comments and Questions

The listing in Paragraph (A) is quite extensive. Some language alternatives are suggested, but a more basic question is whether all of the items should be retained, and whether other items should be added. The judicial need for additional information in evaluating proposed class-action settlements has been emphasized on occasion. See, e.g., Bucklo & Meites, What Every Judge Should Know About a Rule 23 Settlement (But Probably Isn't Told), 41 Litigation Mag. 18 (Spring 2015). The range of things that could be important in regard to a specific case is very broad, so Paragraph (B) enables the court to direct additional information about other subjects, and item (xiv) invites the parties to submit information about other subjects.

How often is this sort of detailed submission presently provided at the time a proposed settlement is submitted to the court? Some comments suggest that sophisticated lawyers already know that they should fully advise the court at the time of initial submission of the proposal. Other comments suggest that the "real" briefing in support of the proposed settlement should occur at the time of initial submission, and that the further briefing at the time of the final approval hearing is largely an afterthought. This sketch does not compel that briefing sequence. Would that be desirable, or unduly intrude into the flexibility of district-court proceedings? Then further submissions by the settling parties could be limited to responding to objections from class members.

Do class members already have access to this range of information at the time they have to decide whether to opt out or object? At least some judicial doctrine suggests that on occasion important information has been submitted only after the time to opt out or object has passed. For example, information about the proposed attorney fee award may not be available at the time class members must decide whether to object.

Are there items on the list that are so rarely of interest that they should be removed? Are there items on the list that are too demanding, and therefore should not be included? For example, information about likely take-up rates (item (viii)) may be too difficult to obtain. But if so, perhaps a plan for reporting back to the court (item (x)) and/or for taking actual claims experience into account in determining the final attorney fee award (item (xii)) might be in order.

How best should the standard for approving the notice to the class be stated? To some extent, there is a tension between saying two things in proposed Paragraph (D) -- that the decision to send notice is not an order certifying or refusing to certify the class that is subject to review under Rule 23(f), and that it is nonetheless sufficient to require class members to decide whether to opt out under Rule 23(c)(2)(B).

(2) Expanded treatment of settlement criteria

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise.

* * * * *

Alternative 1

(2) If the proposal would bind class members, the court may approve it only after a hearing and [only] on finding that it is fair, reasonable, and adequate~~.~~, considering whether:

Alternative 2

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that: ~~it is fair, reasonable, and adequate.~~[2]

(A) the class representatives and class counsel have [been and currently are] adequately represented the class [in preparing to negotiate the settlement];

[(B) the settlement was negotiated at arm's length and was not the product of collusion;]

(C) the relief awarded to the class -- taking into account the proposed attorney fee award and any ancillary agreement made in connection with the

[2] These two alternatives offer a choice whether a rule should be more or less "confining." Alternative 1 is less confining for the district court, since it only calls for "consideration" of the listed factors. It may be that a court would regard some as more important than others in a given case, and conclude that the overall settlement is fair, reasonable, and adequate even if it might not find that all four were satisfied. Alternative 2, on the other hand, calls for separate findings on each of the four factors, and thus directs that the district court refuse to approve the settlement even though its overall judgment is that the settlement is fair, reasonable and adequate. This difference in treatment might also affect the scope of appellate review.

17 settlement -- is fair, reasonable, and adequate,
18 given the costs, risks, probability of success,
19 and delays of trial and appeal; and
20
21 (D) class members are treated equitably relative to
22 each other [based on their facts and circumstances
23 and are not disadvantaged by the settlement
24 considered as a whole] and the proposed method of
25 claims processing is fair [and is designed to
achieve the goals of the class action].

Sketch of Draft Committee Note

Subdivision (e)(2). Since 1966, Rule 23(e) has provided that a class action may be settled or dismissed only with the court's approval. Many circuits developed lists of "factors" to be considered in connection with proposed settlements, but these lists were not the same, were often long, and did not explain how the various factors should be weighed. In 2003, Rule 23(e) was amended to direct that the court should approve a proposed settlement only if it is "fair, reasonable, and adequate." Nonetheless, in some instances the existing lists of factors used in various circuits may have been employed in a "checklist" manner that has not always best served courts and litigants dealing with settlement-approval questions.

This amendment provides more focus for courts called upon to make this important decision. Rule 23(e)(1) is amended to ensure that the court has a broader knowledge base when initially reviewing a proposed class-action settlement in order to decide whether it is appropriate to send notice of the settlement to the class. The disclosures required under Rule 23(e)(1) will give class members more information to evaluate a proposed settlement if the court determines that notice should be sent to the class. Objections under Rule 23(e)(5) can be calibrated more carefully to the actual specifics of the proposed settlement. In addition, Rule 23(e)(5) is amended to elicit information from objectors that should assist the court and the parties in connection with the possible final approval of the proposed settlement.

Amended Rule 23(e)(2) builds on the knowledge base provided by the Rule 23(e)(1) disclosures and any objections from class members, and focuses the court and the parties on the core considerations that should be the prime factors in making the final decision whether to approve a settlement proposal. It is not a straitjacket for the court, but does recognize the central concerns that judicial experience has shown should be the main focus of the court as it makes a decision whether to approve the settlement.

Paragraphs (A) and (B). These paragraphs identify matters that might be described as "procedural" concerns, looking to the conduct of the litigation and of the negotiations leading up to the proposed settlement. If the court has appointed class counsel or interim class counsel, it will have made an initial evaluation of counsel's capacities and experience. But the focus at this point is on the actual performance of counsel acting on behalf of the class.

Rule 23(e)(1) disclosures may provide a useful starting point in assessing these topics. For example, the nature and amount of discovery may indicate whether counsel negotiating on behalf of the class had an adequate information base. The pendency of other litigation about the same general subject on behalf of class members may also be pertinent. The conduct of the negotiations may also be important. For example, the involvement of a court-affiliated mediator or facilitator in those negotiations may bear on whether they were conducted in a manner that would protect and further the class interests.

In making this analysis, the court may also refer to Rule 23(g)'s criteria for appointment of class counsel; the concern is whether the actual conduct of counsel has been consistent with what Rule 23(g) seeks to ensure. Particular attention might focus on the treatment of any attorney fee award, both in terms of the manner of negotiation of the fee award and the terms of the award.

Paragraphs (C) and (D). These paragraphs focus on what might be called a "substantive" review of the terms of the proposed settlement. A central concern is the relief that the settlement is expected to provide to class members. Various Rule 23(e)(1) disclosures may bear on this topic. The proposed claims process and expected or actual claims experience (if the notice to the class calls for simultaneous submission of claims) may bear on this topic. The contents of any agreement identified under Rule 23(e)(3) may also bear on this subject, in particular the equitable treatment of all members of the class.

Another central concern will relate to the cost and risk involved in pursuing a litigated outcome. Often, courts may need to forecast what the likely range of possible classwide recoveries might be and the likelihood of success in obtaining such results. That forecast cannot be done with arithmetic accuracy, but it can provide a benchmark for comparison with the settlement figure. And the court may need to assess that settlement figure in light of the expected or actual claims experience under the settlement.

[If the class has not yet been certified for trial, the court may also give weight to its assessment whether litigation certification would be granted were the settlement not approved.]

Examination of the attorney fee provisions may also be important to assessing the fairness of the proposed settlement. Ultimately, any attorney fee award must be evaluated under Rule 23(h), and no rigid limits exist for such awards. Nonetheless, the relief actually delivered to the class is often an important factor in determining the appropriate fee award. Provisions for deferring a portion of the fee award until the claims experience is known may bear on the fairness of the overall proposed settlement. Provisions for reporting back to the court about actual claims experience may also bear on the overall fairness of the proposed settlement.

Often it will be important for the court to scrutinize the method of claims processing to ensure that it is suitably receptive to legitimate claims. A claims processing method should deter or defeat unjustified claims, but unduly demanding claims procedures can impede legitimate claims. Particularly if some or all of any funds remaining at the end of the claims process must be returned to the defendant, the court must be alert to whether the claims process is unduly exacting.

Ultimately, the burden of establishing that a proposed settlement is fair, reasonable, and adequate rests on the proponents of the settlement. But no formula is a substitute for the informed discretion of the district court in assessing the overall fairness of proposed class-action settlements. Rule 23(e)(2) provides the focus the court should use in undertaking that analysis.

Reporter's Comments and Questions

The question whether a rule revision along these lines would produce beneficial results can be debated. The more constrictive a rule becomes (as in Alternative 2), the more one could say it provides direction. But that direction may unduly circumscribe the flexibility of the court in making a realistic assessment of the entire range of issues presented by settlement approval. On the other hand, a more expansive rule, like Alternative 1, might not provide the degree of focus sought.

Another question revolves around the phrase now in the rule -- "fair, reasonable, and adequate," which receives more emphasis in Alternative 1. That is an appropriately broad phrase to describe the concern of the court in evaluating a proposed settlement. But to the extent that a rule amendment is designed to narrow the focus of the settlement review, perhaps the breadth of that phrase is also a drawback. Changing that phrase would vary from longstanding case law on Rule 23(e) analysis. Will a

new rule along the lines sketched above meaningfully concentrate analysis if that overall description of the standard is retained?

At least a revised rule might obviate what reportedly happens on numerous occasions -- the parties and the court adopt something of a rote recitation of many factors deemed pertinent under the case law of a given circuit. Would the sketch's added gloss on "fair, reasonable, and adequate" be useful to lawyers and district judges addressing settlement-approval applications?

If this approach holds promise to improve settlement review, are there specifics included on the list in the sketch that should be removed? Are there other specifics that should be added?

(3) Cy pres provisions in settlements

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

* * * * *

(3) The court may approve a proposal that includes a cy pres remedy [if authorized by law][3] even if such a remedy could not be ordered in a contested case. The court must apply the following criteria in determining whether a cy pres award is appropriate:

(A) If individual class members can be identified through reasonable effort, and individual

---

[3] This bracketed qualification is designed to back away from creating new authority to use cy pres measures. It is clear that some courts have been authorizing cy pres treatment. Indeed, the Eighth Circuit's opinion in In re BankAmerica Corp. Securities Lit., 775 F.3d 1060 (8th Cir. 2015), suggested that it is impatient with their willingness to do so. It is less clear where the authority for them to do so comes from. In some places, like California, there is statutory authority, but there are probably few statutes. It may be a form of inherent power, though that is a touchy subject. Adding a phrase of this sort is designed to make clear that the authority does not come from this rule.

On the other hand, one might say that the inclusion of cy pres provisions in the settlement agreement is entirely a matter of party agreement and not an exercise of judicial power. Thus, the sketch says such a provision may be used "even if such a remedy could not be ordered in a contested case." That phrase seems to be in tension with the bracketed "authorized by law" provision. One might respond that the binding effect of a settlement class action judgment is dependent on the exercise of judicial power, and that the court has a considerable responsibility to ensure the appropriateness of that arrangement before backing it up with judicial power. So the rule would guide the court in its exercise of that judicial power.

In any event, it may be that there is no need to say "if authorized by law" in the rule because -- like many other agreements included in settlements -- cy pres provisions do not depend on such legal authorization, even if their binding effect does depend on the court's entry of a judgment.

17 distributions would be economically viable,
18 settlement proceeds must be distributed to
19 individual class members;
20
21 **(B)** If the proposal involves individual distributions
22 to class members and funds remain after initial
23 distributions, the proposal must provide for
24 further distributions to participating class
25 members [or to class members whose claims were
26 initially rejected on timeliness or other grounds]
27 unless individual distributions would not be
28 economically viable {or other specific reasons
29 exist that would make such further distributions
30 impossible or unfair}];
31
32 **(C)** The proposal may provide that, if the court finds
33 that individual distributions are not viable under
34 Rule 23(e)(3)(A) or (B), a cy pres approach may be
35 employed if it directs payment to a recipient
36 whose interests reasonably approximate those being
37 pursued by the class.
38

(4~~3~~) The parties seeking approval * * *

Sketch of Draft Committee Note

Because class-action settlements often are for lump sums with distribution through a claims process, it can happen that funds are left over after the initial claims process is completed. Rule 23(e)(1) is amended to direct the parties to submit information to the court about the proposed claims process and forecasts of uptake at the time they request notice to the class of the proposed settlement. In addition, they are to address the possibility of deferring payment of a portion of the attorney fee award to class counsel until the actual claims history is known. These measures may affect the frequency and amount of residual funds remaining after the initial claim distribution process is completed. Including provisions about disposition of residual funds in the settlement proposal and addressing these topics in the Rule 23(e)(1) report to the court (which should be available to class members during the objection/opt out period) should obviate any need for a second notice to the class concerning the disposition of such a residue if one remains.

Rule 23(e)(3) guides the court and the parties in handling such provisions in settlement proposals and in determining disposition of the residual funds when that becomes necessary. [It permits such provisions in settlement proposals only "if authorized by law." Although parties may make any agreement they prefer in a private settlement, because the binding effect of the

class-action judgment on unnamed class members depends on the court's authority in approving the settlement such a settlement may not bind them to accept "remedies" not authorized by some source of law beyond Rule 23.]

[One alternative to *cy pres* treatment pursuant to Rule 23(e)(3) might be a provision that any residue after the claims process should revert to the defendant which funded the settlement program. But because the existence of such a reversionary feature might prompt defendants to press for unduly exacting claims processing procedures, a reversionary feature should be evaluated with caution.[4]]

Paragraph (A). Paragraph (A) requires that settlement funds be distributed to class members if they can be identified through reasonable effort when the distributions are large enough to make distribution economically viable. It is not up to the court to determine whether the class members are "deserving," or other recipients might be more deserving. Thus, paragraph (A) makes it clear that cy pres distributions are a last resort, not a first resort.

Developments in telecommunications technology have made distributions of relatively small sums economically viable to an extent not similarly possible in the past; further developments may further facilitate both identifying class members and distributing settlement funds to them in the future. This rule calls for the parties and the court to make appropriate use of such technological capabilities.

Paragraph (B). Paragraph (B) follows up on the point in paragraph (A), and directs that even after the first distribution is completed there must be a further distribution to those class members who submitted claims of any residue if a further distribution is economically viable. This provision applies even though class members have been paid "in full" in accordance with the settlement agreement. Settlement agreements are compromises, and a court may properly approve one that does not provide the entire relief sought by the class members through the action. Unless it is clear that class members have no plausible legal right to receive additional money, they should receive additional distributions.

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[4] Is this concern warranted?

[As an alternative, or additionally, a court may designate residual funds to pay class members who submitted claims late or otherwise out of compliance with the claim processing requirements established under the settlement.[5]]

Paragraph (C). Paragraph (C) deals only with the rare case in which individual distributions to class members are not economically viable. The court should not assume that the cost of distribution to class members is prohibitive unless presented with evidence firmly supporting that conclusion. It should take account of the possibility that electronic means may make identifying class members and distributing proceeds to them inexpensive in some cases. When the court finds that individual distributions would be economically infeasible, it may approve an alternative use of the settlement funds if the substitute recipient's interests "reasonably approximate those being pursued by the class." In general, that determination should be made with reference to the nature of the claim being asserted in the case. Although such a distribution does not provide relief to class members that is as direct as distributions pursuant to Paragraph (A) or (B), it is intended to confer a benefit on the class.

Reporter's Comments and Questions

A basic question is whether inclusion of this provision in the rules is necessary and/or desirable. One could argue that it is not necessary on the ground that there is a growing jurisprudence, including several court of appeals decisions, dealing with these matters. And several of those decisions invoke the proposal in the ALI Aggregate Litigation Principles that provided a starting point for this rule sketch. On the other hand, the rule sketch has evolved beyond that starting point, and would likely be refined further if the rule-amendment process proceeds. Moreover, a national rule is a more authoritative directive than an ALI proposal adopted or invoked by some courts of appeals.

A different sort of argument would be that this kind of provision should not be in the rules because that would somehow be an inappropriate use of the rulemaking power. That argument might be coupled with an argument in favor of retaining the limitation "if authorized by law." It could be supported by the proposition that the only reason such an agreement can dispose of the rights of unnamed class members is that the court enters a

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[5] This follows up on bracketed language in the sketch. Would this be a desirable alternative to further distributions to class members who submitted timely and properly filled out claims?

judgment that forecloses their individual claims. And the only reason the class representative and/or class counsel can negotiate such a provision is that they have been deputized to act on behalf of the class by the court.

One might counter this argument by observing that class-action settlements often include provisions that likely are not of a type that a court could adopt after full litigation. Yet those arrangements are often practical and supported by defendants as well as the class representatives. From this point of view, a rule that forbade them might seem impractical.

And it might also seem odd to regard certain provisions of a settlement agreement as qualitatively different from others. Assuming a class action for money damages, for example, one could contend that a primary interest of the class is in maximizing the monetary relief, via judgment or settlement. Yet nobody would question the propriety of a compromise by the class representative on the amount of monetary relief, if approved by the court under Rule 23(e). So it could be said to be odd that this sort of "plenary" power to compromise on monetary relief and surrender a claim that might result in a judgment for a higher amount is qualitatively different from authority to make arrangements for disposition of an unclaimed residue. Put differently, if the class representative and class counsel can compromise in a way that surrenders the potential for a much larger recovery, is there a reason why they can't also agree to a *cy pres* provision that creates the possibility that some of the money would be paid to an organization that would further the goals sought by the class action?

Another argument that might be made is that alternative uses for a residue of funds should be encouraged to achieve deterrence or otherwise effectuate the substantive law. Under some circumstances, a remedy of disgorgement may be authorized by pertinent law. And the law of at least some states directly addresses the appropriate use of the residue from class actions. See Cal. Code Civ. Pro. § 384. Whether a Civil Rule should be fashioned to further such goals might be questioned, however.

The sketch is not designed to confront these issues directly. Instead, it is inspired in part by the reality that cy pres provisions exist and have been included in class-action settlements with some frequency. One could say that the rules appropriately should address practices that are widespread, but perhaps treatment in the Manual for Complex Litigation is sufficient.

A related topic is suggested by a bracketed paragraph in the Committee Note draft -- whether courts should have a bias against reversionary clauses in lump fund class-action settlements. The sketches of amendments to Rule 23(e)(1) and 23(e)(2) both direct

the court's attention to the details of the claims processing method called for by the settlement. Fashioning an effective and fair claims processing method is a challenge, and can involve considerable expense. To the extent that a defendant hoping to recoup a significant portion of the initial settlement payment as unclaimed funds might be tempted to insist on unduly exacting requirements for claims, something in the rules that encouraged courts to resist reversionary provisions in settlements might be appropriate.

A related concern might arise in relation to attorney fee awards to class counsel. Particularly when those awards are keyed to the "value" of the settlement, treating a lump sum payment by the defendant as the value for purposes of the attorney fee award might seem inappropriate. Particularly if there were a reversionary provision and the bulk of the funds were never paid to the class, it could be argued that the true value of the settlement to the class was the amount paid, not the amount deposited temporarily in the fund by the defendant. But see Boeing Co. v. Van Gemert, 444 U.S. 472 (1980) (holding that the existence of the common fund conferred a benefit on all class members -- even those who did not submit claims -- sufficient to justify charging the entire fund with the attorney fee award for class counsel).

(4) Objectors

The problem of problem objectors has attracted much attention. Various possible responses have been suggested, and they are introduced below. They have reached different levels of development, and likely would not be fully effective without adoption of some parallel provisions in the Appellate Rules. The Appellate Rules Committee has received proposals for rule amendments that might dovetail with changes to the Civil Rules.

Below are two approaches to the problems sometimes presented by problem objectors. The first relies on rather extensive required disclosure, coupled with expanded court approval requirements designed to reach appeals of denied objections as well as withdrawal of objections before the district court, covered by the present rule. The second is more limited -- seeking only to forbid any payments to objectors or their attorneys for withdrawing objections or appeals, and to designate the district court as the proper court to approve or disapprove such payments.

Objector disclosure

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

* * * * *

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e).~~;~~ ~~the objection may be withdrawn only with the court's approval.~~ The objection must be signed under Rule 26(g)(1) and disclose this information:

(A) the facts that bring the objector within the class defined for purposes of the proposal or within an alternative class definition proposed by the objector;

(B) the objector's relationship to any attorney representing the objector;

(C) any agreement describing compensation that may be paid to the objector;

(D) whether the objection seeks to revise or defeat the proposal on behalf of:

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(i) the objector alone,
(ii) fewer than all class members, or
(iii) all class members;

(E) the grounds of the objection, including objections to:
(i) certification of any class,
(ii) the class definition,
(iii) the aggregate relief provided,
(iv) allocation of the relief among class members,
(v) the procedure for distributing relief[, including the procedure for filing claims], and
(vi) any provisions for attorney fees;

[**(6)** The objector must move for a hearing on the objection.]

[**(6.1)** An objector [who is not a member of the class included in the judgment] can appeal [denial of the objection] {approval of the settlement} only if the court grants permission to intervene for that purpose.]

(7) Withdrawal of objection or appeal

(A) An objection filed under Rule 23(e) or an appeal from an order denying an objection may be withdrawn only with the court's approval.

(B) A motion seeking approval must include a statement identifying any agreement made in connection with the withdrawal.

Alternative 1

(C) The court must approve any compensation [to be paid] to the objector or the objector's counsel in connection with the withdrawal.

Alternative 2

(C) Unless approved by the district court, no payment may be made to any objector or objector's counsel in exchange for withdrawal of an objection or appeal from denial of an objection. Any request by an objector or objector's counsel for payment based on the benefit of the objection to the class must be made to the district court, which retains jurisdiction during the pendency of any appeal to rule on any such request.

80 **(D)** If the motion to withdraw [the objection] was
81 referred to the court under Rule *XY* of the Federal
82 Rules of Appellate Procedure, the court must
83 inform the court of appeals of its action on the motion.

[As should be apparent, this would be a rather extensive rule revision, and would likely depend upon some change in the Appellate Rules as well. That possible change is indicated by the reference to an imaginary Appellate Rule *XY*[6] in the sketch above. As illustrated in a footnote, such an Appellate Rule could direct that an appeal by an objector from a court's approval of a settlement over an objection may be dismissed only on order of the court, and directing that the court of appeals would refer the decision whether to approve that withdrawal to the district court.]

Sketch of Committee Note Ideas

[The above sketches are at such a preliminary stage that it would be premature to pretend to have a draft Committee Note, or even a sketch of one. But some ideas can be expressed about what points such a Note might make.]

Objecting class members play an important role in the Rule 23(e) process. They can be a source of important information about possible deficiencies in a proposed settlement, and thus provide assistance to the court. With access to the information regarding the proposed settlement that Rule 23(e)(1) requires be submitted to the court, objectors can make an accurate appraisal

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[6] The Advisory Committee on Civil Rules does not propose changes to the Appellate Rules. But for purposes of discussion of the sketches of possible Civil Rule provisions in text, it might be useful to offer a sketch of a possible Appellate Rule 42(c):

(c) Dismissal of Class-Action Objection Appeal. A motion to dismiss an appeal from an order denying an objection under Rule 23(e)(5) of the Federal Rules of Civil Procedure to approval of a class-action settlement must be referred to the district court for its determination whether to permit withdrawal of the objection and appeal under Civil Rule 23(e)(7). The district court must report its determination to the court of appeals.

As noted above, any such addition to the Appellate Rules would have to emanate from the Advisory Committee on Appellate Rules, and this sketch is provided only to facilitate discussion of the Civil Rule sketches presented in this memorandum.

of the merits and possible failings of a proposed settlement.

But with this opportunity to participate in the settlement review process should also come some responsibilities. And the Committee has received reports that in a significant number of instances objectors or their counsel appear to have acted in an irresponsible manner. The 2003 amendments to Rule 23 required that withdrawal of an objection before the district court occur only with that court's approval, an initial step to assure judicial supervision of the objection process. Whatever the success of that measure in ensuring the district court's ability to supervise the behavior of objectors during the Rule 23(e) review process, it seems not to have had a significant effect on the handling of objector appeals. At the same time, the disruptive potential of an objection at the district court seems much less significant than the disruption due to delay of an objector appeal. That is certainly not to say that most objector appeals are intended for inappropriate purposes, but only that some may have been pursued inappropriately, leading class counsel to conclude that a substantial payment to the objector or the objector's counsel is warranted -- without particular regard to the merits of the objection -- in order to finalize the settlement and deliver the settlement funds to the class.

The goal of this amendment is to employ the combined effects of sunlight and required judicial approval to minimize the risk of possible abuse of the objection process, and to assist the court in understanding objections more fully. It is premised in part on the disclosures of amended Rule 23(e)(1), which are designed in part to provide class members with extensive information about the proposed settlement. That extensive information, in turn, makes it appropriate to ask objectors to provide relatively extensive information about the basis for their objections.

Thus, paragraphs (A), (B), and (C) of Rule 23(e)(5) seek "who, what, when, and where" sorts of information about the role of this objector. Paragraph (B) focuses particularly on the relationship with an attorney because there have been reports of allegedly strategic efforts by some counsel to mask their involvement in the objection process, at least at the district court.

Paragraph (D) and (E), then, seek to elicit a variety of specifics about the objection itself. The Subcommittee has been informed that on occasion objections are quite delphic, and that settlement proponents find it difficult to address these objections because they are so uninformative. Calling for specifics is intended to remedy that sort of problem, and thus to provide the court and with details that will assist it in evaluating the objection.

Paragraph 6 suggests, in brackets, that one might require an objector to move for a hearing on the objection. It may be that the ordinary Rule 23(e) settlement-approval process suffices because Rule 23(e)(2) directs the court not to approve the proposed settlement until after a hearing. Having multiple hearings is likely not useful.

Paragraph 6.1, tentative not only due to brackets but also due to numbering, suggests a more aggressive rein on objectors. It relies on required intervention as a prerequisite for appealing denial of an objection. Anything along those lines would require careful consideration of the Supreme Court's decision in Devlin v. Scardeletti, 534 U.S. 1 (2002), in which the Court held that an objector in a Rule 23(b)(1) "mandatory" class action who had been denied leave to intervene to pursue his objection to the proposed settlement nevertheless could appeal. The Court was careful to say that the objector would "only be allowed to appeal that aspect of the District Court's order that affects him -- the District Court's decision to disregard his objections." Id. at 9. And the Court emphasized the mandatory nature of that class action (id. at 10-11):

> Particularly in light of the fact that petitioner had no ability to opt out of the settlement, appealing the approval of the settlement is petitioner's only means of protecting himself from being bound by a disposition of his rights he finds unacceptable and that a reviewing court might find legally inadequate.

The Court also rejected an argument advanced by the United States (as amicus curiae) that class members who seek to appeal rejection of their objections must intervene in order to appeal. The Government "asserts that such a limited purpose intervention generally should be available to all those, like petitioner, whose objections at the fairness hearing have been disregarded," id. at 12, and the Court noted that "[a]ccording to the Government, nonnamed class members who state objections at the fairness hearing should easily meet" the Rule 24(a) criteria for intervention of right. Id. The Court reacted (id.):

> Given the ease with which nonnamed class members who have objected at the fairness hearing could intervene for purposes of appeal, however, it is difficult to see the value of the government's suggested requirement.

But it is not clear that the Court's ruling would prevent a rule requiring intervention. Thus, the Court rejected the Government's argument that "the structure of the rules of class action procedure requires intervention for the purposes of appeal." Id. at 14. It added that "no federal statute or procedural rule directly addresses the question of who may appeal from approval of class action settlements, while the right to

appeal from an action that finally disposes of one's rights has a statutory basis. 28 U.S.C. § 1291." Id.

And it may be that reports about allegedly abusive recent experience with objectors would provide a basis for adopting such a rule. Thus, in *Devlin* the Court noted that the Government did not cite the concern with abusive appeals that has been highlighted by commentators (id. at 13):

> It [the Government] identifies only a limited number of instances where the initial intervention motion would be of any use: where the objector is not actually a member of the settlement class or is otherwise not entitled to relief from the settlement, where an objector seeks to appeal even though his objection was successful, where the objection at the fairness hearing was untimely, or where there is a need to consolidate duplicative appeals from class members.

Court approval requirement

As an alternative to the objector disclosure sketch, the following sketch relies entirely on judicial approval of any payment to an objecting class member of the objector's lawyer. It is possible that this simpler approach would be effective in dealing with inappropriate behavior by objectors. But it should be borne in mind that court approval is also an integral feature of the objector disclosure approach.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

* * * * *

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval. <u>Unless approved by the district court, no payment may be made to any objector or objector's counsel in exchange for withdrawal of an objection or appeal from denial of an objection. Any request by an objector or objector's counsel for payment based on the benefit of the objection to the class must be made to the district court, which retains jurisdiction during the pendency of any appeal to rule on any such request.</u>

Sketch of Committee Note Ideas

Many of the general comments included in the sketch of Committee Note ideas for the objector disclosure draft could introduce the general problem in relation to this approach, but it would emphasize the role of judicial approval rather than the utility of disclosure. The reason for taking this approach would be that the prospect of a financial benefit is the principal apparent stimulus for the kind of objections that the amendment is trying to prevent or deter.

A starting point in evaluating this approach could be the 2003 amendment to add Rule 23(h), which recognized that "[a]ctive judicial involvement in measuring fee awards is singularly important to the proper operation of the class-action process." That involvement is no less important when the question is payment to an objector's counsel rather than to class counsel. Although payment may be justified due to the contribution made by the objector to the full review of proposed settlement, that decision should be for the court to make, not for the parties to negotiate entirely between themselves.

The sketch focuses on payments to objectors or their attorneys because that has been the stimulus to this concern; instances of nonmonetary accommodations leading to withdrawal of objections have not emerged as similarly problematical.

The rule focuses on "the benefit of the objection to the class." Particularly with payments to the objector's attorney, that focus may be paramount. If the objection raises an issue unique to the objector, rather than one of general application to the class, that may support a payment to the objector. As the Committee Note to the 2003 amendment to Rule 23(e) explained, approval for a payment to the objector "may be given or denied with little need for further inquiry if the objection and the disposition go only to a protest that the individual treatment afforded the objector under the proposed settlement is unfair because of factors that distinguish the objector from other class members." But compensation of the objector's attorney would then ordinarily depend on the contractual arrangements between the objector and its attorney.

Ordinarily, if an objector's counsel seeks compensation, that compensation should be justified on the basis of the benefits conferred on the class by the objection. Ordinarily, that would depend in the first instance on the objection being sustained. It is possible that even an objection of potentially general application that is not ultimately sustained nonetheless provides value to the Rule 23(e) review process sufficient to justify compensation for the attorney representing the objector, particularly if such compensation is supported by class counsel. But an objection that confers no benefit on the class ordinarily should not produce a payment to the objector's counsel.

[Objections sometimes lack needed specifics, with the result that they do not facilitate the Rule 23(e) review process. It may even be that some objections raise points that are actually not pertinent to the proposed settlement before the court. Such objections would not confer a benefit on the class or justify payment to the objector's counsel.[7]]

Reporter's Comments and Questions

Both of these rule sketches are particularly preliminary, and should be approached with that in mind. Obviously, a basic question is whether the disclosure approach (coupled with court approval) or the court approval approach should be preferred. Requiring disclosures by objectors may be helpful to the court in evaluating objections as well as determining whether to approve payments to objectors or their lawyers. It may even be that the disclosure provisions would assist good-faith objectors in focusing their objections on the issues presented in the case.

One significant question in evaluating the court-approval approach is whether Rule 23(e)(5)'s current court-approval requirement has been effective. If it has not, does that bear on whether an expanded court-approval requirement, including a parallel provision in the Appellate Rules, would be effective? Perhaps Rule 23(e)(5) has not been fully effective because filing a notice of appeal after denial of an objection serves as something like an "escape valve" from the rule's requirement of judicial approval. If so, that may suggest that the existing rule is effective, or can become effective with this expansion.

A different question is whether the requirements of the disclosure approach would impose undue burdens on good-faith objectors. The Committee gave some consideration to various sanction ideas, but feedback has not favored that approach. One reason is that emphasizing sanctions has the potential to chill

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[7] This point may be worth making if the objector disclosure provisions are not included. If they are included, these points seem unnecessary.

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good-faith objections. The rule sketch says the disclosures must be signed under Rule 23(g)(1), which does have a sanctions provision. See Rule 26(g)(1)(C). Would that deter good-faith objectors? Except for some difficulty in supplying the information required, it would not seem that the disclosure requirements themselves would raise a risk of *in terrorem* deterrence of good-faith objectors.

Yet another question is whether such an elaborate disclosure regime could burden the court, the parties, and the objectors with disputes about whether "full disclosure" had occurred. Should there be explicit authority for a motion to require fuller disclosure? Rule 37(a)(3)(A) could be amended as follows:

> **(A)** *To Compel Disclosure.* If a party fails to make a disclosure required by Rule 26(a), <u>or if a class member fails to make a disclosure required by Rule 23(e)(5),</u> any other party may move to compel disclosure and for appropriate sanctions.

But it might be said to be odd to have a Rule 37(a) motion apply to a class member, and also unnerving to raise the possibility of Rule 37(b) sanctions if the order were not obeyed (although one sanction might be rejection of the objection). This approach would have the advantage of avoiding the procedural aspects of Rule 11, such as the "safe harbor" for withdrawn papers, given that Rule 23(e)(5) says that an objection may be withdrawn only with the court's approval.

Alternatively, should the rule simply say that the court may disregard any objection that is not accompanied by "full disclosure"? Should satisfying the "full disclosure" requirement be a prerequisite to appellate review of the objection? Some comments have stressed that delphic objections sometimes seem strategically designed to obscure rather than clarify the grounds that may be advanced on appeal, or as a short cut to filing a notice of appeal without actually having identified any real objections to the proposed settlement, and then inviting a payoff to drop the appeal. Disclosure could, in such circumstances, have a prophylactic effect. Should the court of appeals affirm rejections of objections on the ground that full disclosure was not given without considering the merits of the objections? Could that appellate disposition be achieved in an expedited manner, compared to an appeal on the merits of the objection?

Although not principally the province of the Civil Rules Committee, it is worthwhile to note some complications that might follow from an Appellate Rule calling on the district court to approve or disapprove withdrawals of appeals. The operating assumption may be that the district court could make quick work of those approvals, while the appellate court would have little

familiarity with the case. That may often be true, but not in all cases. A 2013 FJC study of appeals by objectors found that the rate of appellate decision on the merits of the objector's appeal varied greatly by circuit. Thus, in the Seventh Circuit, none of the objector appeals had led to a resolution on the merits in the court of appeals during the period studied, while in the Second Circuit fully 63% had. Had the parties in the Second Circuit cases reached a settlement after oral argument, one might argue that the court of appeals would by then be better positioned to evaluate the proposed withdrawal of the appeal than the busy district judge, who may have approved the settlement two years earlier.

Finally, it may be asked whether focusing on whether the objector "improved" the settlement might be useful. It seems that such a focus might invite cosmetic changes to a settlement that confer no significant benefit on the class. And it also may be that some objections that are not accepted may nonetheless impose significant costs on the objector that the court could consider worth compensating because the input was useful to the court in evaluating the settlement.

(5) Class Definition & Ascertainability

Relatively recently, the issue of ascertainability has received a considerable amount of attention. There have been assertions that a circuit conflict is developing or has developed on this topic. The concept that a workable class definition is needed has long been recognized; "all those similarly situated" is unlikely to suffice often. In 2003, Rule 23(c) was amended to make explicit the need to define the class in a meaningful manner. The amendment sketch below builds on that 2003 amendment.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses

(1) Certification Order:

* * *

(B) *Defining the Class*~~*; Appointing Class Counsel*~~. An order that certifies a class action must define the class ~~and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g)~~ so that members of the class can be identified [when necessary] in [an administratively feasible] {a manageable} manner.

(C) *Defining the Class Claims, Issues, or Defenses.* An order that certifies a class action must define the class claims, issues, or defenses.

(D) *Appointing Class Counsel*. An order that certifies a class action must appoint class counsel under Rule 23(g).

(E~~C~~) *Altering or Amending the Order*. * * *

Initial Sketch of Draft Committee Note

A class definition can be important for various reasons. Rule 23(a)(1) requires that the members of a class be too numerous to be joined, so some clear notion who is included is necessary.. Rule 23(c)(2) requires notice to the Rule 23(b)(3) class after certification. Rule 23(c)(3) directs that the judgment in the class action is binding on all class members. Rule 23(e)(1) says that the court must direct notice of a proposed settlement to the class if it would bind them. Rule 23(e)(5) directs objectors to provide disclosures showing that they are in fact class members. And Rule 23(h)(1) requires that

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notice of class counsel's application for an award of attorney's fees be directed to class members. So a workable class definition can be important under many features of Rule 23.

But the class definition requirements of the rule are realistic and pragmatic. Thus, the rule also recognizes that identifying all class members may not be possible. For example, Rule 23(c)(2)(B) says that in Rule 23(b)(3) class actions the court must send individual notice to "all members who can be identified through reasonable effort." And in class actions under Rule 23(b)(2) -- such as actions to challenge alleged discrimination in educational institutions -- there may be instances in which it is not possible at the time the class is certified to identify all class members who might in the future claim protection under the court's injunctive decree.

Under these circumstances, Rule 23(c)(1)(B) calls for a pragmatic approach to class definition at the certification stage. As a matter of pleading, a class-action complaint need not satisfy this requirement. The requirement at the certification stage is that the court satisfy itself that members of the class can be identified in a manner that is sufficient for the purposes specified in Rule 23. It need not, at that point, achieve certainty about such identification, which may not be needed for a considerable time, if at all.

[The rule says that the court's focus should be on whether identification can be accomplished "when necessary." This qualification recognizes that the court need not always provide individual notice at the certification stage, even in Rule 23(b)(3) class actions, to all class members. Instead, that task often need be confronted only later. If the case is litigated to judgment, it may then become necessary to identify class members with some specificity whether or not the class prevails. If the case is settled, the settlement itself may include measures designed to identify class members.]

Ultimately, the class definition is significantly a matter of case management. [It is not itself a method for screening the merits of claims that might be asserted by class members.[8]] As with other case-management issues, it calls for judicial resourcefulness and creativity. Although the proponents of class certification bear primary responsibility for the class definition, the court may look to both sides for direction in fashioning a workable definition at the certification stage, and in resolving class-definition issues at later points in the action. In balancing these concerns, the court must recognize that the class opponent has a valid interest in ensuring that a claims process limits relief to those legally entitled to it,

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[8] Is this a pertinent or helpful observation?

while also recognizing that claims processing must be realistic in terms of the information likely to be available to class members with valid claims. And the court need not make certain at the time of certification that a perfect solution will later be found to these problems.

Reporter's Comments and Questions

Would a rule provision along the lines above be useful? One might regard the sketch above as a "minimalist" rule provision on this subject, in light of the considerable recent discussion of it. It avoids the use of both "ascertainable" and "objective," words sometimes used in some recent discussions of this general subject.

Some submissions to the Advisory Committee have urged that rule provisions directly address some questions that have been linked to these topics,[9] including:

> *Ensuring that all within the class definition have valid claims*: A class definition that is expressed in terms of having a valid claim can create "fail safe" class problems, because a defense victory would seem to mean that the class contains no members. A class definition that "objectively" ensures that all class members have valid claims may routinely present similar challenges.
>
> *Use of affidavits or other similar "proofs":* Another topic that has arisen is whether affidavits or similar proofs can suffice to prove membership in the class. This problem can be particularly acute when the class claim asserts that defendant made false or misleading statements in connection with inexpensive retail products. A requirement that class members present receipts proving purchase of the product may sometimes be asking too much.
>
> *"No injury" classes:* Somewhat similar to the two points above is the question whether the class includes many who have suffered no injury. Such issues may, for example, arise in data breach situations. In those cases, there may be a debate about whether the breach actually revealed confidential information from class members, and what use was made of that information. The Supreme Court has granted certiorari in a case that may present some such issues. See Bouaphakeo v. Tyson Foods, Inc., 765 F.3d 791 (6th Cir. 2014), cert. granted, 135 S.Ct. 2806 (2015).

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[9] In case these submissions might be of interest, an Appendix to this memorandum presents some of the suggestions that the Advisory Committee has received.

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The rule sketch above does not purport to address directly any of these issues. There are likely additional issues that have been discussed under the general heading "ascertainability" that this sketch does not directly address. Would that mean a rule change along these lines would not be useful?

If it appears that a rule change requires an effort to confront the sorts of issues just identified, could it be said that those issues can be handled in the same way across the wide variety of class actions in federal courts?

The courts' resolutions of these issues appear to be in a state of rapid evolution. For one recent analysis, see Mullins v. Direct Digital, ___ F.3d ___, 2015 WL 4546159 (7th Cir. No. 15-1776, July 28, 2015). Would it be best to rely on the evolving jurisprudence to address these issues rather than attempt a rule change that could become effective no sooner than Dec. 1, 2018? If the courts are genuinely split, is there a genuine prospect that the split will be resolved by judicial decisionmaking?

(6) Settlement Class Certification

As noted again below, a key question is whether a settlement-certification addition to Rule 23(b) is needed to deal with difficulty in obtaining such certification under *Amchem*. A subsidiary issue is whether such additional certification authorization should be added only for actions brought under 23(b)(3).

1 **(b) Types of Class Actions.** A class action may be
2 maintained if Rule 23(a) is satisfied and if:
3
4 * * * * * *
5
6
7 (4) the parties to a settlement [in an action to be
8 certified under subdivision (b)(3)] request
9 certification and the court finds that the proposed
10 settlement is superior to other available methods for
11 fairly and efficiently adjudicating the controversy,
and that it should be approved under Rule 23(e).[10]

Sketch of Draft Committee Note

Subdivision (b)(4) is new. In 1996, a proposed new

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[10] The Subcommittee has also discussed an alternative formulation that would invoke criteria proposed in the ALI Aggregate Litigation project:

> (4) the parties to a settlement [in an action to be certified under subdivision (b)(3),] request certification and the court finds that significant common issues exist, that the class is sufficiently numerous to warrant classwide treatment, and that the class definition is sufficient to ascertain who is and who is not included in the class. The court may then grant class certification if the proposed settlement is superior to other available methods for fairly and efficiently adjudicating the controversy, and that it should be approved under Rule 23(e).

This approach does not fit well with the current lead-in language to Rule 23(b), which says that class actions may be maintained "if Rule 23(a) is satisfied." But the reformulation appears either to offer substitute approaches to matters covered in Rule 23(a) ("significant common issues" and "sufficiently numerous") or to call for more exacting treatment of topics also covered in Rule 23(a).

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subdivision (b)(4) was published for public comment. That new subdivision would have authorized certification of a (b)(3) class for settlement in certain circumstances in which certification for full litigation would not be possible. One stimulus for that amendment proposal was the existence of a conflict among the courts of appeals about whether settlement certification could be used only in cases that could be certified for full litigation. That circuit conflict was resolved by the holding in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), that the fact of settlement is relevant to class certification. The (b)(4) amendment proposal was not pursued after that decision.

Rule 23(f), also in the package of amendment proposals published for comment in 1996, was adopted and went into effect in 1998. As a consequence of that addition to that rule, a considerable body of appellate precedent on class-certification principles has developed. In 2003, Rule 23(e) was amended to clarify and fortify the standards for review of class settlements, and subdivisions (g) and (h) were added to the rule to govern the appointment of class counsel, including interim class counsel, and attorney fees for class counsel. These developments have provided added focus for the court's handling of the settlement-approval process under Rule 23(e). Rule 23(e) is being further amended to sharpen that focus.

Concerns have emerged about whether it might sometimes be too difficult to obtain certification solely for purposes of settlement. Some report that alternatives such as multidistrict processing or proceeding in state courts have grown in popularity to achieve resolution of multiple claims.

This amendment is designed to respond to those concerns by clarifying and, in some instances, easing the path to certification for purposes of settlement. Like the 1996 proposal, this subdivision is available only after the parties have reached a proposed settlement and presented it to the court. Before that time, the court may, under Rule 23(g)(3), appoint interim counsel to represent the interests of the putative class.

[Subdivision (b)(4) addresses only class actions maintained under Rule 23(b)(3). The (b)(3) predominance requirement may be an unnecessary obstacle to certification for settlement purposes, but that requirement does not apply to certification under other provisions of Rule 23(b). Rule 23(b)(4) has no bearing on whether certification for settlement is proper in class actions not brought under Rule 23(b)(3).]

Like all class actions, an action certified under subdivision (b)(4) must satisfy the requirements of Rule 23(a). Unless these basic requirements can be satisfied, a class settlement should not be authorized.

Increasing confidence in the ability of courts to evaluate proposed settlements, and the tools available to them for doing so, provides important support for the addition of subdivision (b)(4). For that reason, the subdivision makes the court's conclusion under Rule 23(e)(2) an essential component to settlement class certification. Under amended Rule 23(e), the court can approve a settlement only after considering specified matters in the full Rule 23(e) settlement-review process, and amended Rules 23(e)(1) and (e)(5) provide the court and the parties with more information about proposed settlements and objections to them. Given the added confidence in settlement review afforded by strengthening Rule 23(e), the Committee is comfortable with reduced emphasis on some provisions of Rule 23(a) and (b).

Subdivision (b)(4) also borrows a factor from subdivision (b)(3) as a prerequisite for settlement certification -- that the court must also find that resolution through a class-action settlement is superior to other available methods for fairly and efficiently adjudicating the controversy. Unless that finding can be made, there seems no reason for the court or the parties to undertake the responsibilities involved in a class action.

Subdivision (b)(4) does not require, however, that common questions predominate in the action. To a significant extent, the predominance requirement, like manageability, focuses on difficulties that would hamper the court's ability to hold a fair trial of the action. But certification under subdivision (b)(4) assumes that there will be no trial. Subdivision (b)(4) is available only in cases that satisfy the common-question requirements of Rule 23(a)(2), which ensure commonality needed for classwide fairness. Since the Supreme Court's decision in *Amchem*, the courts have struggled to determine how predominance should be approached as a factor in the settlement context. This amendment recognizes that it does not have a productive role to play and removes it.

Settlement certification also requires that the court conclude that the class representatives are typical and adequate under Rule 23(a)(3) and (4). Under amended Rule 23(e)(2), the court must also consider whether the settlement proposal was negotiated at arms length by persons who adequately represented the class interests, and that it provides fair and adequate relief to class members, treating them equitably.

In sum, together with changes to Rule 23(e), subdivision (b)(4) ensures that the court will give appropriate attention to adequacy of representation and the fair treatment of class members relative to each other and the potential value of their claims. At the same time, it avoids the risk that a desirable settlement will prove impossible due to factors that matter only to a hypothetical trial scenario that the settlement is designed

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to avoid.

Should the court conclude that certification under subdivision (b)(4) is not warranted -- because the proposed settlement cannot be approved under subdivision (e) or because the requirements of Rule 23(a) or superiority are not met -- the court should not rely on any party's statements in connection with proposed (b)(4) certification in relation to later class certification or merits litigation. See Rule 23(e)(1)(D).

Reporter's Comments and Questions

A key question is whether a provision of this nature is useful and/or necessary. The 1996 proposal was prompted in part by Third Circuit decisions saying that certification could never be allowed unless litigation certification standards were satisfied. But *Amchem* rejected that view, and recognized that the settlement class action had become a "stock device." At the same time, it said that predominance of common questions is required for settlement certification in (b)(3) cases. Lower courts have sometimes seemed to struggle with this requirement. Some might say that the lower courts have sought to circumvent the *Amchem* Court's requirement that they employ predominance in the settlement certification context. A prime illustration could be situations in which divergent state laws would preclude litigation certification of a multistate class, but those divergences could be resolved by the proposed settlement.

If predominance is an obstacle to court approval of settlement certification, should it be removed? One aspect of the sketch above is that it places great weight on the court's settlement review. The sketch of revisions to Rule 23(e)(2) is designed to focus and improve that process. Do they suffice to support reliance on that process in place of reliance on the predominance prong of 23(b)(3)?

If predominance is not useful in the settlement context, is superiority useful? One might say that a court that concludes a settlement satisfies Rule 23(e)(2) is likely to say also that it is superior to continued litigation of either a putative class action or individual actions. But eliminating both predominance and superiority may make it odd to say that (b)(4) is about class actions "certified under subdivision (b)(3)." It seems, instead, entirely a substitute, and one in which (contrary to comments in *Amchem*), Rule 23(e) becomes a supervening criterion for class certification. That, in turn, might invite the sort of "grand-scale compensation scheme" that the *Amchem* Court regarded as "a matter fit for legislative consideration," but not appropriate under Rule 23.

Another set of considerations focuses on whether making this change would actually have undesirable effects. Could it be said

that the predominance requirement is a counterweight to "hydraulic pressures" on the judge to approve settlements in class actions? If judges are presently dealing in a satisfactory way with the *Amchem* requirements for settlement approval, will making a change like this one prompt the filing of federal-court class actions that should not be settled because of the diversity of interests involved or for other reasons? And could this sort of development also prompt more collateral attacks later on the binding effect of settlement class-action judgments?

(7) Issue Class Certification

This topic presents two different sorts of questions or concerns. One is whether experience shows that a change in Rule 23(b) or (c) is needed to ensure that issue class certification is available in appropriate circumstances. Various placements are possible for this purpose. An overarching issue, however, is whether any of these possible rule changes is really needed; if the courts are finding sufficient flexibility in the rule as presently written to make effective use of issues classes, it may be that a rule change is not indicated.

The second question looks to proceedings after resolution of the issue on which certification was based. Particularly if the class is successful on that issue, the resolution of that issue often would not lead to entry of an appealable judgment. But to complete adjudication of class members' claims might require considerable additional activity which might be wasted if there were later a reversal on appeal of the common issue. So a revision of Rule 23(f) might afford a discretionary opportunity for immediate appellate review of the resolution of that issue.

A. Revising Rule 23(b) or (c)

Rule 23(b) approaches

Alternative 1

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

* * * * *

1 **(3)** the court finds that the questions of law or fact
2 common to class members predominate over any
3 questions affecting only individual members,
4 except when certifying under Rule 23(c)(4), and
5 finds that a class action is superior to other
6 available methods for fairly and efficiently
7 adjudicating the controversy. The matters
pertinent to these findings include: * * * *

Alternative 2

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

* * * * *

1 **(4)** the court finds that the resolution of particular
2 issues will materially advance the litigation,

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3 making certification with respect to those issues
4 appropriate. [In determining whether
5 certification limited to particular issues is
6 appropriate, the court may refer to the matters
identified in Rule 23(b)(3)(A) through (D).]

Rule 23(c)(4) approach

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

* * * * *

1 **(4)** ***Particular issues.*** ~~When appropriate, a~~An action
2 may be brought or maintained as a class action
3 with respect to particular issues if the court
4 finds that the resolution of such issues will
5 materially advance the litigation. [In
6 determining whether certification limited to
7 particular issues is appropriate, the court may
8 refer to the matters identified in Rule
23(b)(3)(A) through (D).]

Sketch of Committee Note Ideas

[Very general; would need to be adapted to actual rule change pursued]

Particularly in actions brought under Rule 23(b)(3), there are cases in which certification to achieve resolution of common issues would be appropriate even if certification with regard to all issues involved in the action would not. Since its amendment in 1966, Rule 23(c)(4) has recognized this possibility. This amendment confirms that such certification may be employed.

The question whether such certification is warranted in a given case may be addressed in light of the factors listed in Rule 23(b)(3)(A) through (D). A primary consideration will be whether the resolution of the common issue or issues will materially advance the resolution of the entire litigation, or the entire claims of class members. When certifying an issues class, the court should specify the issues on which certification was granted in its order under Rule 23(c)(1)(B) and, for Rule 23(b)(3) classes, include that specification in its notice to the class under Rule 23(c)(2)(B)(iii).

[Resolution of the issues for which certification was granted may result in an appealable judgment. But even if those issues are resolved in favor of the class opponent, that may not mean that all related claims of class members are also resolved. Should resolution of the common issues not result in entry of an

appealable judgment, discretionary appellate review may be sought under Rule 23(f)(2).]

Reporter's Comments and Questions

These sketches are obviously at an early stage of development. At a point in time, it appeared that there was a circuit split on whether (c)(4) certification could be sought in an action brought under Rule 23(b)(3) even though predominance could not be satisfied as to the claims as a whole. It is uncertain whether that seeming split has continued, and whether amendments of this sort are needed and helpful in resolving it.

If a rule change is useful, which route seems most promising? Alternative 1 may be the simplest; it seeks only to overcome preoccupation with overall predominance. It could be coupled with a revision of Rule 23(c)(4) that recognizes that the "materially advances" idea is a guide in determining whether it is appropriate to certify as to particular issues. At present, Rule 23(c)(4) says only that such certification may be granted "when appropriate." Alternatively or additionally, one could refer to the factors in Rule 23(b)(3)(A) through (D). But would they be appropriate in relation to issue certification under Rule 23(b)(1) or (2)?

Is issue certification really a concern only as to Rule 23(b)(3) cases? It may be that, particularly after *Wal-Mart*, Rule 23(b)(2) cases are not suited to (c)(4) certification. Rule 23(b)(2) says that certification is proper only when the class opponent has "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." It may be that this definition makes issue certification unimportant. In (b)(1) classes, it may be that there is a common issue such as whether there is a "limited fund" that would warrant (c)(4) certification, but if that produced the conclusion that there is a limited fund certification under (b)(1)(B) seems warranted.

B. Interlocutory Appellate Review

1 **(f) Appeals.**
2
3 (1) *From order granting or denying class-action*
4 *certification.* A court of appeals may permit an
5 appeal from an order granting or denying class-
6 action certification under this rule if a petition
7 for permission to appeal is filed with the circuit
8 clerk within 14 days after the order is entered.
9 An appeal does not stay proceedings in the
10 district court unless the district judge or the
11 court of appeals so orders
12
13 (2) *From order resolving issue in class certified*
14 *under Rule 23(c)(4).* A court of appeals may
15 permit an appeal from an order deciding an issue
16 with respect to which [certification was granted
17 under Rule 23(c)(4)] {a class action was allowed
18 to be maintained under Rule 23(c)(4)} [when the
19 district court expressly determines that there is
20 no just reason for delay], if a petition for
21 permission to appeal is filed with the circuit
22 clerk within 14 days after the order is entered.
23 An appeal does not stay proceedings in the
24 district court unless the district judge or the
court of appeals so orders.

Sketch of Draft Committee Note Ideas

In 1998, Rule 23(f) was added to afford an avenue for interlocutory review of class-certification orders because they are frequently of great importance to the conduct of the action. That provision is retained as Rule 23(f)(1).

Rule 23(f)(2) is added to permit immediate review of another decision that can be extremely important to the further conduct of an action. Rule 23(c)(4) authorizes class certification limited to particular issues when resolution of those issues would materially advance the ultimate resolution of the litigation. In some cases, the resolution of the common issues may lead to entry of an appealable final judgment. But often it will not, and even though that resolution should materially advance the ultimate resolution of the litigation a great deal more may need to be done to accomplish that ultimate resolution.

Before the court and the parties expend the time and effort necessary to complete resolution of the class action, it may be prudent for the court of appeals to review the district court's resolution of the common issue. Rule 23(f)(2) authorizes such review, which is at the discretion of the court of appeals, as is an appeal of a certification order under Rule 23(f)(1). Such an

appeal is allowed only from an order deciding an issue for which certification was granted. That would not include some orders relating to that issue, such as denial of a motion for summary judgment with regard to the issue.

[But to guard against premature appeals, an application to the Court of Appeals for review under Rule 23(f)(2) must be supported by a determination from the district court that there is no just reason for delay. For example, if the court has resolved one of several issues on which certification was granted, it may conclude that immediate appellate review would not be appropriate.]

Reporter's Comments and Questions

A basic question is whether adding Rule 23(f)(2) would produce positive or negative effects. Related to that is the question "What happens now when an issue is resolved in an issues class action?"

One answer to that second question is that if the defendant wins on the common issue judgment is entered in the defendant's favor and the class action ends. That may not mean that class members may not pursue individual claims, but they would likely be bound by the resolution of the common issue and limited to claims not dependent on it. Cf. Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867 (1984) (after court ruled that there was no general pattern or practice of discrimination in defendant's operation, class members could still pursue claims of individual intentional discrimination but could not rely on pattern or practice proof). But it would ordinarily mean that immediate review is available under 28 U.S.C. § 1291 with regard to the class action.

Another answer is that common issue certification often involves multiple issues, so that even if some are definitively resolved in the district court others may remain to be resolved. Under those circumstances, it may be that the district court would conclude that there is just reason for delay. Is it important to condition immediate review on the district court's determination that there is no just reason for delay? That seems to afford the appellate court useful information about whether to allow an immediate appeal, but may also give the district court undue authority to prevent immediate review.

Yet another answer is that if the class opponent loses on the common issue, that might invariably lead to a settlement essentially premised on that resolution of that issue. It could be that the settlement sometimes preserves the class opponent's right to seek appellate review, but may often be that it does not. Is that an argument for adopting Rule 23(f)(2)? One view might be that it would become a "free bite" for the class

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opponent.

Could appellate courts develop standards for decisions whether to grant review under Rule 23(f)(2)? Under current Rule 23(f), they have developed standards for review. But it may be that a similar set of general standards would not be easy to fashion. Would input from the district court be useful in making decisions on whether to permit immediate appeals? If so, is the bracketed provision calling for a district court determination that there is no just reason for delay in the appeal a useful method of providing that assistance to the court of appeals? Would it actually be more of a burden to the district court than boon to the court of appeals?

(8) Notice

This topic has received limited attention in discussion to date. Therefore this memorandum presents the discussion that appeared in the agenda memo for the April 9 Advisory Committee meeting and adds some comments and questions.

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In Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), the Court observed (id. at 173-74, emphasis in original):

> Rule 23(c)(2) provides that, in any class action maintained under subdivision (b)(3), each class member shall be advised that he has the right to exclude himself from the action on request or to enter an appearance through counsel, and further that the judgment, whether favorable or not, will bind all class members not requesting exclusion. To this end, the court is required to direct to class members "the best notice practicable under the circumstances *including individual notice to all members who can be identified through reasonable effort*." We think the import of this language is unmistakable. Individual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort.
>
> The Advisory Committee's Note to Rule 23 reinforces this conclusion. The Advisory Committee described subdivision (e)(2) as "not merely discretionary" and added that the "mandatory notice pursuant to subdivision (c)(2) . . . is designed to fulfill requirements of due process to which the class procedure is of course subject." [The Court discussed Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), and Schroeder v. City of New York, 371 U.S. 208 (1962), emphasizing due process roots of this notice requirement and stating that "notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable."]
>
> Viewed in this context, the express language and intent of Rule 23(c)(2) leave no doubt that individual notice must be provided to those class members who are identifiable through reasonable effort.

Research would likely shed light on the extent to which more recent cases regard means other than U.S. mail as sufficient to give "individual notice." The reality of 21st century life is that other means often suffice. The question is whether or how to alter Rule 23(c)(2) to make it operate more sensibly. Here are alternatives:

1 **(2) Notice**

2 * * * * *
3
4 **(B)** *For (b)(3) Classes.* For any class certified under Rule
5 23(b)(3), the court must direct to class members the
6 best notice that is practicable under the
7 circumstances, including individual notice by
8 electronic or other means to all members who can be
identified through reasonable effort. * * * * *

It is an understatement to say that much has changed since Eisen was decided. Perhaps it is even correct to say that a communications revolution has occurred. Certainly most Americans are accustomed today to communicating in ways that were not possible (or even imagined) in 1974. Requiring mailed notice of class certification seems an anachronism, and some reports indicate that judges are not really insisting on it.

Indeed, the current ease of communicating with class members has already arisen with regard to the cy pres discussion, topic (3) above. It appears that enterprises that specialize in class action administration have gained much expertise in communicating with class members. Particularly in an era of "big data," lists of potential class members may be relatively easy to generate and use for inexpensive electronic communications.

For the present, the main question is whether there is reason not to focus on some relaxation of the current rule that would support a Committee Note saying that first class mail is no longer required by the rule. Such a Note could presumably offer some observations about the variety of alternative methods of communicating with class members, and the likelihood that those methods will continue to evolve. The likely suggestion will be that courts should not (as *Eisen* seemed to do) embrace one method as required over the long term.

Notice in Rule 23(b)(1) or (b)(2) actions

Another question that could be raised is whether these developments in electronic communications also support reconsideration of something that was considered but not done in 2001-02.

The package of proposed amendments published for comment in 2001 included a provision for reasonable notice (not individual notice, and surely not mandatory mailed notice) in (b)(1) and (b)(2) class actions. Presently, the rule contains no requirement of any notice at all in those cases, although Rule 23(c)(2)(A) notes that the court "may direct appropriate notice to the class." In addition, Rule 23(d)(1)(B) invites the court to give "appropriate notice to some or all class members" whenever that seems wise. And if a settlement is proposed, the

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notice requirement of Rule 23(e)(1) applies and "notice in a reasonable manner" is required. But if a (b)(1) or (b)(2) case is fully litigated rather than settled, the rule does not require any notice at any time.

It is thus theoretically possible that class members in a (b)(1) or (b)(2) class action might find out only after the fact that their claims are foreclosed by a judgment in a class action that they knew nothing about.

In 2001-02, there was much forceful opposition to the proposed additional rule requirement of some reasonable effort at notice of class certification on the ground that it was already difficult enough to persuade lawyers to take such cases, and that this added cost would make an already difficult job of getting lawyers to take cases even more difficult, and perhaps impossible. The idea was shelved.

Is it time to take the idea off the shelf again? One question is whether the hypothetical problem of lack of notice is not real. It is said that (b)(2) classes exhibit more "cohesiveness," so that they may learn of a class action by informal means, making a rule change unnecessary. It may also be that there is almost always a settlement in such cases, so that the Rule 23(e) notice requirement does the needed job. (Of course, that may occur at a point when notice is less valuable than it would have been earlier in the case.) And it may be that the cost problems that were raised 15 years ago have not abated, or have not abated enough, for the vulnerable populations that are sometimes the classes in (b)(2) actions.

The Subcommittee has not devoted substantial attention to these issues. For present purposes, this invitation is only to discuss the possibility of returning to the issues not pursued in 2002. If one wanted to think about how a rule change might be made, one could consider replacing the word "may" in Rule 23(c)(2)(A) with "must." A Committee Note might explore the delicate issues that courts should have in mind in order to avoid unduly burdening the public interest lawyers often called upon to bring these cases, and the public interest organizations that often provide support to counsel, particularly when the actions may not provide substantial attorney fee or cost awards.

Reporter's Comments and Questions

Recurrent references in cases mainly addressing other issues to use of electronic means for giving notice and giving class members access to information about a class action or proposed settlement suggest that creative work is occurring without the need for any rule change. The sketch of additions to Rule 23(e)(1) in Part (1) above directs that the resulting information be made available to class members, and the likely method for

doing so would be some sort of electronic posting. In at least some cases, electronic submission of claims is done.

No doubt participants in the Sept. 11 mini-conference are more familiar with these developments than those who only read the case reports. But these developments raise the question whether there is really any need for a rule change.

If changes are warranted for Rule 23(b)(3) actions, the question remains whether the time has come for revisiting the question of required notice of some sort in (b)(1) and (b)(2) actions.

(9) Pick-Off and Rule 68

This topic has received limited attention since the April 9 Advisory Committee meeting. Accordingly, the material below is drawn from the agenda materials for that meeting.

One development is that the Supreme Court has granted cert. in a case that may address related issues. Gomez v. Campbell-Ewald Co., 768 F.3d 871 (9th Cir. 2014), cert. granted, 135 S.Ct. 2311 (2015). Another is the Seventh Circuit decision in Chapman v. First Index, Inc., ___ F.3d ___, 2015 WL 4652878 (7th Cir. No. 14-2772, Aug. 6, 2015). See also Hooks v. Landmark Indus., Inc., ___ F.3d ___, 2015 WL _____ (5th Cir. No. 14-20496, Aug. 12, 2015) (holding that "an unaccepted offer of judgment cannot moot a named-plaintiff's claim in a putative class action"). Below in the Reporter's Comments and Questions section, a key inquiry will be whether the present state of the law calls for rule changes.

April 2015 Agenda Materials

First Sketch: Rule 23 Moot
(Cooper approach)

(x) (1) When a person sues [or is sued] as a class representative, the action can be terminated by a tender of relief only if
(A) the court has denied class certification and
(B) the court finds that the tender affords complete relief on the representative's personal claim and dismisses the claim.
(2) A dismissal under Rule 23(x)(1) does not defeat the class representative's standing to appeal the order denying class certification.

Committee Note

A defendant may attempt to moot a class action before a certification ruling is made by offering full relief on the individual claims of the class representative. This ploy should not be allowed to defeat the opportunity for class relief before the court has had an opportunity to rule on class certification.

If a class is certified, it cannot be mooted by an offer that purports to be for complete class relief. The offer must be treated as an offer to settle, and settlement requires acceptance by the class representative and approval by the court under Rule 23(e).

Rule 23(x)(1) gives the court discretion to allow a tender of complete relief on the representative's claim to moot the action after a first ruling that denies class certification. The tender must be made on terms that ensure actual payment. The

17 court may choose instead to hold the way open for certification
18 of a class different than the one it has refused to certify, or
19 for reconsideration of the certification decision. The court also
20 may treat the tender of complete relief as mooting the
21 representative's claim, but, to protect the possibility that a
22 new representative may come forward, refuse to dismiss the
23 action.
24
25 If the court chooses to dismiss the action, the would-be
26 class representative retains standing to appeal the denial of
27 certification. [say something to explain this?]
28
29 [If we revise Rule 23(e) to require court approval of a
30 settlement, voluntary dismissal, or compromise of the
representative's personal claim, we could cross-refer to that.]

Rule 68 approach

Rule 68. Offer of Judgment

* * * * *

1 **(e)** **Inapplicable in Class and Derivative Actions.** This
2 rule does not apply to class or derivative actions
under Rules 23, 23.1, or 23.2.

This addition is drawn from the 1984 amendment proposal for Rule 68. See 102 F.R.D. at 433.

This might solve a substantial portion of the problem, but does not seem to get directly at the problem in the manner that the Cooper approach does. By its terms, Rule 68 does not moot anything. It may be that an offer of judgment strengthens an argument that the case is moot, because what plaintiffs seek are judgments, not promises of payment, the usual stuff of settlement offers. Those judgments do not guarantee actual payment, as the Cooper approach above seems intended to do with its tender provisions. But a Committee Note to such a rule might be a way to support the conclusion that we have accomplished the goal we want to accomplish. Here is what the 1984 Committee Note said:

> The last sentence makes it clear that the amended rule does not apply to class or derivative actions. They are excluded for the reason that acceptance of any offer would be subject to court approval, see Rules 23(e) and 23.1, and the offeree's rejection would burden a named representative-offeree with the risk of exposure to potentially heavy liability that could not be recouped from unnamed class members. The latter prospect, moreover, could lead to a conflict of interest between the named representative and other members of the class. See, Gay v.Waiters & Dairy

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Lunchmen's Union, Local 30, 86 F.R.D. 500 (N.D. Cal. 1980).

Alternative Approach in Rule 23

Before 2003, there was a considerable body of law that treated a case filed as a class action as subject to Rule 23(e) at least until class certification was denied. A proposed individual settlement therefore had to be submitted to the judge for approval before the case could be dismissed. Judges then would try to determine whether the proposed settlement seemed to involve exploiting the class-action process for the individual enrichment of the named plaintiff who was getting a sweet deal for her "individual" claim. If not, the judge would approve it. If there seemed to have been an abuse of the class-action device, the judge might order notice to the class of the proposed dismissal, so that other class members could come in and take up the litigation cudgel if they chose to do so. Failing that, the court might permit dismissal.

The requirement of Rule 23(e) review for "individual" settlements was retained in the published preliminary draft in 2003. But concerns arose after the public comment period about how the court should approach situations in which the class representative did seem to be attempting to profit personally from filing a class action. How could the court force the plaintiff to proceed if the plaintiff wanted to settle? One answer might be that plaintiff could abandon the suit, but note that "voluntary dismissal" is covered by the rule's approval requirement. Another might be that the court could sponsor or encourage some sort of recruitment effort to find another class representative. In light of these difficulties, the amendments were rewritten to apply only to claims of certified classes.

(e) Settlement, Voluntary Dismissal, or Compromise.

(1) **Before certification.** An action filed as a class action may be settled, voluntarily dismissed, or compromised before the court decides whether to grant class-action certification only with the court's approval. The [parties] {proposed class representative} must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(2) **Certified class.** The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(A~~1~~) The court must direct notice in a reasonable

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19 manner * * * * *
20
21 (3) **Settlement after denial of certification.** If the court
22 denies class-action certification, the plaintiff may
23 settle an individual claim without prejudice to seeking
24 appellate review of the court's denial of certification.

The Committee Note could point out that there is no required notice under proposed (e)(1). It could also note that prevailing rule before 2003 that the court should review proposed "individual" settlements. The ALI Principles endorsed such an approach:

> This Section favors the approach of requiring limited judicial oversight. The potential risks of precertification settlements or voluntary dismissals that occur without judicial scrutiny warrant a rule requiring that such settlements take effect only with prior judicial approval, after the court has had the opportunity to review the terms of the settlement, including fees paid to counsel. Indeed the very requirement of court approval may deter parties from entering into problematic precertification settlements.

ALI Principles § 3.02 comment (b).

Proposed (e)(3) seeks to do something included also in the Cooper approach above -- ensure that the proposed class representative can appeal denial of certification even after settling the individual claim. Whether something of the sort is needed is uncertain. The issues involved were the subject of considerable litigation in the semi-distant past. See, e.g., United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980); Deposit Guaranty Nat. Bank v. Roper, 445 U.S. 326 (1980); United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977). It is not presently clear whether this old law is still good law. It might also be debated whether the class representative should be allowed to appeal denial of certification. Alternatively, should class members be given notification that they can appeal? In the distant past, there were suggestions that class members should be notified when the proposed class representative entered into an individual settlement, so that they could seek to pursue the class action.

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Reporter's Comments and Questions

The above materials suggest a variety of questions that might be illuminated by discussion on Sept. 11. A basic one is the extent of the problem. One view is that (at least pending the Supreme Court's decision in the case it has taken) this problem was largely limited to one circuit, which has seemingly overruled the cases that had presented the problem.

But another view might be that the existence of this issue casts a shadow over cases filed in other circuits. It has happened that parties in such cases have felt obligated to file out-of-the-chute certification motions, and some district judges have stricken such motions in the ground they are premature.

Assuming there is reason to give serious consideration to a rule change, there are a variety of follow-up questions. One is whether anything more than "the minimum" change is needed. And if the minimum is all that is needed, would a change to Rule 68 saying that it is inapplicable in actions under Rules 23, 23.1, and 23.2 suffice?

As illustrated by the above sketches, a number of other issues might be addressed. These include:

(1) Undoing the limitation of Rule 23(e) to settlements that purport in form to bind the class. This limitation was added in 2003. Before that, most circuits held that court review was required for "individual" settlements as well as "class" settlements, but that notice to the class was not.

(2) A rule could require court approval of a dismissal and also require that the parties submit details of the deal to the court.

(3) A rule could affirmatively preserve the settling individual's right to seek appellate review of the district court's denial of class certification.

(4) A rule could specify that the parties must seek judicial approval of an individual settlement before certification, but leave notice to the class to the discretion of the court.

There surely are additional possibilities.

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APPENDIX
Selected Ascertainability Suggestions

This listing does not purport to exhaust the submissions on this topic.

No. 15-CV-D, from Professors Adam Steinman, Joshua Davis, Alexandra Lahav & Judith Resnik, proposes adding the following to Rule 23(c)(1)(B):

> A class definition shall be stated in a manner that such an individual could ascertain whether he or she is potentially a member of the class.

No. 15-CV-I, from Jennie Anderson, proposes adding the following to Rule 23(c)(1)(B):

> An order must define the class in objective terms so that a class member can ascertain whether he or she is a member of the class. A class definition is not deficient because it includes individuals who may be ineligible for recovery.

No. 15-CV-J, from Frederick Longer proposes addressing the "splintering interpretation" of ascertainability by adding the following to Rule 23(c)(2)(B)(ii):

> the definition of the class in clear terms so that class members can be identified and ascertained through ordinary proofs, including affidavits, prior to issuance of a judgment.

No. 15-CV-N, from Public Justice, proposes adding the following to Rule 23(c)(1)(B)

> In certifying a class under Rule 23(b)(3), the court must define the class so that it is ascertainable by reference to objective criteria. The ascertainability or identifiability of individual class members is not a relevant consideration at the class certification stage.

No. 15-CV-P, from the National Consumer Law Center and National Assoc. of Consumer Advocates proposes adding the following to Rule 23(c)(1)(B):

> A class is sufficiently defined if the class members it encompasses are described by reference to objective criteria. It is not necessary to prove at the class certification stage that all class members can be precisely identified by name and contact information.

Notes of conference call
Rule 23 Subcommittee
July 15, 2015

On July 15, 2015, the Rule 23 Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participants were Judge Robert Dow (Chair, Rule 23 Subcommittee), Judge John D. Bates (Chair designee, Civil Rules Advisory Committee), Judge Stephen Colloton (Chair, Appellate Rules Advisory Committee), Elizabeth Cabraser, Dean Robert Klonoff, John Barkett, Rebecca Womeldorf (Administrative Office), Prof. Edward Cooper (Reporter, Civil Rules Advisory Committee), Prof. Catherine Struve (Reporter, Appellate Rules Advisory Committee), and Prof. Richard Marcus (Reporter, Rule 23 Subcommittee).

Objectors

Judge Colloton and Prof. Struve participated in the call because the issues raised by class-action objectors potentially involved both the Civil Rules and the Appellate Rules. Proposals had been made to the Appellate Rules Committee regarding appeals by objectors, and concerns about objectors had been voiced by many participants in the Rule 23 Subcommittee event during the Montreal convention of the American Association for Justice. Related issues were raised by a suggested rule change submitted by Prof. Samuel Issacharoff. And the Subcommittee participants during the Montreal event had explored these issues in some detail during their meeting in Montreal after the session with AAJ members.

The topic was introduced with the background that during the April Advisory Committee meeting the Subcommittee had presented proposals of two types -- a disclosure requirement and a sanctions provision. After the Montreal discussion, Prof. Cooper circulated a sketch of a revision to Rule 23(e)(5) that built upon the discussions had in Montreal. A copy of this sketch is attached to these notes as Appendix 1. It calls for a variety of disclosures by class members who file objections, directing that the signature on the disclosure be done under Rule 26(g)(1), which means that the disclosures are complete and correct, and that the objection is "not interposed for any improper purpose."

These disclosures might dovetail with the "frontloading" provisions that the Subcommittee has recently discussed, which call for proponents of a settlement proposal to supply a variety of pieces of pertinent information to the judge at the time they request that the judge order notice to the class under Rule 23(e)(1).

A further introduction is that it is becoming clear that the problem lawyers want addressed relates to appeals from settlement approval, not from district court proceedings. Although unjustified or ill-founded objections can be an annoyance during the district court's Rule 23(e) consideration of a settlement

proposal, they do not create serious problems. The serious problems happen after the notice of appeal is filed; then the appeal presents the prospect of an extended delay in relief to the class.

While these discussions have been occurring with regard to Rule 23, there have not been discussions recently in the Appellate Rules Committee, which has been expecting input from the Civil Rules committee. It does seem, however, that to the extent approval of the court is required for withdrawal of appeals and/or consideration in return for withdrawal of appeal, the district judge would be a more suitable gatekeeper than a motions panel of the court of appeals.

That gatekeeper function could take various forms. One might be to try to require that the objector obtain permission to appeal from the district judge -- something like a certificate of appealability. At a point in time, there was some discussion of whether to limit objectors' appeals to objectors who are granted leave to intervene in the district court. The Supreme Court's 2002 decision in Devlin v. Scardeletti strongly supported the right of class members to appeal without first being granted leave to intervene. And even if there were an intervention requirement in the rule, there is no question that denial of leave to intervene can be appealed, so that requirement might well fail to solve the problem.

Regarding the Cooper sketch, one member noted that it would important to add a requirement that the court approve any payment to the objector or the objector's attorney. At present, it seems to require disclosure and to permit withdrawal of the appeal, but it should be made clear that approval of the payment itself must come from the judge. That would tie in with Rule 23(h), which permits awards to objector's counsel, but relies on the judge to determine those awards.

A question was raised about whether there could be an Article III problem with a rule that says the court may make orders with regard to a non-adversarial matter, which is what would occur if the objector sought to drop the appeal. Can the court really say "you can't leave"? A response compared Rule 11 sanctions imposed after the underlying action was dismissed; the notion was that the court could continue to act in connection with possible misuse of its processes. The same might be said of appeals taken to extract unwarranted tribute from class counsel.

The Cooper sketch also contains a draft of an appellate rule directing that the question whether to approve the withdrawal of the appeal be referred to the district court for disposition. The underlying notion is that the district judge is in a much better position to evaluate a request to withdraw an appeal than the appellate court. Indeed, in some circuits there may be

motions panels and merits panels, so as many as six appellate judges could be called upon to absorb and evaluate the settlement and the objection.

A reaction to this discussion of whether it is best to have these matters decided in the district court or the appellate court was that there probably is no across-the-board answer. Should the motion to withdraw be made shortly after the notice of appeal is filed, it is easy to say that the district court is a much better choice. The appellate court has, by then, invested nothing in the case, and the district court, having recently approved the settlement, should be well equipped to address the matter. But consider an alternative scenario -- the motion to withdraw comes after full briefing and full argument before a merits panel. That might be 18 months or two years after the district judge's approval. By then, the judges on the merits panel will be quite familiar with the case, and it might have faded in the memory of a busy district judge.

A response to this concern was that it is unlikely this sort of situation will occur with the sorts of objectors who are causing the problems, or one might say the sorts of lawyers who are causing the problem. Sometimes they will approach class counsel right after filing the notice of appeal and say something like "I want $250,000 to drop the appeal. But if you make me write a brief the price goes up to $750,000." These are not lawyers who are seeking to litigate the issues raised by the objection. The likelihood of this happening after a merits argument is very low. Good faith objectors are entirely different; they *want* to present their arguments.

This discussion prompted the reaction "I'm in favor of a rule that stops this activity." But to do that effectively probably requires both a Civil Rule and an Appellate Rule. The disclosure provisions in the Cooper sketch should provide a record for deciding a motion to withdraw an appeal. It may be that the Appellate Rule piece would fit in FRAP 42.

A different question arose. Assuming the district court may approve a payment to an objector to settle the matter raised on appeal, could that trigger a need to re-notice the class? The answer was that it is unlikely that would be necessary. The settlement agreement almost certainly sets an attorney fee ceiling, whether or not the fees are paid out of the overall settlement funds payable to the class. So any payment to objector or objector counsel likely would not come out of the amounts to be paid to class members under the settlement. The Manual for Complex Litigation (3d) addressed this notice question in terms of whether the change "materially affects" the rights of the class members.

A different reaction was that this is likely a subject on which there will not be a division between plaintiff and defense lawyers. Both sides of the "v" want the settlement approved, or at least don't want them hijacked by opportunistic behavior of this sort. And the "good" objectors, who do careful work and engage in extensive preparations before objecting, intending to litigate the appeal to obtain relief from the appellate court, may well buy into this sort of approach. They likely do not appreciate the behavior of the sorts of objectors who have prompted this amendment idea.

At the same time, it is not impossible that there is a good reason for compensation of some sort to an objector whose objection is rejected. For example, in one case objectors spent a lot of money on an expert in support of an argument that the proposed deal would actually work out very differently from the way in which the proponents of the settlement expected. Although their arguments ultimately were not accepted, these objectors helped the district court to gain a full appreciation of the issues presented.

The resolution for the present was to substitute the Cooper sketch for the sketches presented in April, and to use it as a basis for materials for the September mini-conference. It will likely connect up with the frontloading sketch during the mini-conference. It is possible the Appellate Rules Committee can discuss these issues during its meeting in October, and the results of that discussion should be available to the Civil Rules Committee for its meeting in November. Meanwhile, the Chairs and Reporters of the two committees will remain in touch.

Settlement Approval Criteria

Judge Colloton and Prof. Struve left the call, and discussion turned to settlement approval criteria. After the June 26 conference call, Prof. Marcus circulated a set of revised sketches on frontloading, ascertainability, and settlement approval criteria. During the Montreal meeting, the first two of these topics were discussed. That left the presentation of the settlement approval criteria for the mini-conference to be addressed. A copy of these revised sketches is attached to these notes as Appendix 2.

The revised sketches were introduced as presenting at least one question that the Subcommittee could attempt to resolve during today's call. The revised sketches had two alternative introductory "lead-ins." Alternative 1 could be called the less confining one; it said only that the judge should determine whether the proposed settlement is fair, reasonable, and adequate "considering whether" it satisfies the four criteria we have identified in the past. Alternative 2 is the more confining; as drafted the sketch says that the district court "must approve [the proposal] on finding that" the four criteria are satisfied.

For present purposes, it may be that preserving both alternatives is appropriate to provide a full range of opinions during the mini-conference. On the other hand, it may be that discussion should be centered on the approach favored by the Subcommittee if it is fairly strongly favored.

An initial reaction was that "we want a good discussion, but I think I favor the less confining approach." For one thing, using the word "must" makes it seem that the district court's decision is entitled to limited deference on appellate review. At the same time, it may be that the old factors of the various circuits hold a warm sentimental spot in the hearts of some lawyers and judges, so something more directive could be preferable.

Another reaction was that it would be very desirable to meld the various "dialects" used in different circuits into a single language of settlement review. But though the more permissive approach could dilute that objective by inviting less uniformity the more permissive approach could still provide significant focus compared to the present laundry lists of factors employed in some circuits.

Another thought was that the way to pursue this goal is to present the criteria as focusing attention on the core considerations likely to be important in most or all proposed class-action settlements. At the same time, to the extent it "supersedes" anything presently in circuit law, what the sketch seeks to replace is "ritual recitation" of compliance with a laundry list of factors. That sort of recitation probably does not improve either the district court's ability to assess the settlement or the court of appeals' ability to review the district court's approval. Perhaps some of these points could be made in the Committee Note.

Looking to the Dallas mini-conference, confidence was expressed that the Subcommittee should come away from that meeting with an appreciation whether the more or less constricting approach is preferable. That sort of resolution is one of the goals of holding the mini-conference.

A question was raised about the factors, however: Where is attention to the proposed attorney fee award? It would seem that would fit into (iii), to the extent it would fit into any of them. But shouldn't it be made explicit?

A first reaction to this question was that usually an application for an attorney fee award under Rule 23(h) is included with the submission of the proposed settlement to the district court under Rule 23(e). At least in the Ninth Circuit, the application must be filed by the time that class members must decide whether to object or opt out. Thus, the settlement approval hearing serves a dual purpose.

Another suggestion was that factor (i), looking to adequate representation, might comprehend the proposed attorney fee award. But a response was that this is sufficiently important to call for explicit inclusion among the factors.

This discussion drew the reaction that it is beginning to appear that the Subcommittee is not uncertain about the choice between the more directive and less directive approaches. Instead, the consensus is tending toward favoring the less directive approach embodied in Alternative 1. It was suggested that approach should be presented as the pending sketch at the Dallas mini-conference, and the more directive alternative should be offered in a footnote, with a prologue like "The Subcommittee also considered, but decided not to prefer, an alternative formulation:" That suggestion drew support and became the consensus of the group.

The need to include the attorney fees issue among the factors also received consensus support. The Dallas sketch should include that topic.

Cy Pres

This subject was introduced as involving a number of potential questions. First, is a rule change needed? The ALI Principles treatment has been very well received by the courts, and the current amendment sketch is modeled on the ALI Principles. It seems it should be carried forward to the mini-conference, but that this basic question should be kept in mind. The comments by Chief Justice Roberts in his separate statement in Marek v. Lane suggests that close attention be paid to this topic.

Other questions focus on bracketed language in the current sketch. Should the "if authorized by law" proviso be retained? Would that mean that the parties could not agree to anything a court could not order as final relief in a litigated case? That would not sit well with the general flexibility of settlements. Should the presumption that distributions smaller than $100 are

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not economically viable be retained? That seems to be a holdover from a time when distributions could not be done as readily as they are now done. Should the last bracketed material in (C), authorizing distribution that serves the "public interest," be retained for situations in which no suitable group can be found with interests that "reasonably approximate the interests being pursued by the class"? Given the latitude that the rule would afford without that provision, it seems to invite difficulties to include that.

A first reaction was that comments we have received about whether this should be in the rules are persuasive. It seems that the right place for guidance of this sort is not in the rules, but a manual or another source. But for purposes of the mini-conference, this member would retain the topic on our list.

Another member indicated tentative agreement with this stance. It will be useful to hear more from public interest organizations of the sort that might be appropriate recipients of cy pres grants. It may be that the best response is the "let the jurisprudence develop." These issues tend to be very fact-specific.

Another issue that was mentioned is the link with settlement more generally. Probably it is often true that some residue remains when there is a money settlement. Our "frontloading" sketch asks the parties to tell the judge what they intend to do about that possibility. If cy pres treatment is possible, it is usually better to get it on the table at the outset of settlement review rather than have the possibility that the class will have to be re-noticed once it proves necessary.

Another reaction is that this topic gets to the heart of what cy pres is about. It may be that it is a mechanism to ensure that a defendant that has profited does not retain the profits because it is too difficult to identify the victims, or because the magnitude of the payouts is not sufficient to motivate them to seek payment. Alternatively, it may be viewed as something of a "cleanup device" in connection with settlements.

Another reaction was that, to the extent this sketch would prevent public interest organizations from obtaining money in cases in which they would formerly have received money, they will not be happy about that. On the other hand, an open-ended invitation for all those who serve the "public interest" to seek money is likely to be a source of headaches for the judge and potential embarrassment for the courts.

It was also noted that other problems can arise. In the Facebook case, it seems that an organization was created to be the recipient of the funds, and that the defendant would have a

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considerable say in the operation of that organization. There surely could sometimes be serious problems with that sort of arrangement. Perhaps they could even be the subject of parody: "We founded an organization to hound our competitors for doing what we got sued for." Whether that has actually happened is uncertain, but it is useful to recognize the possibility.

For present purposes, it was suggested, retaining the sketch is important because "we will hear a lot about it on Sept. 11."

The consensus was to carry this forward. That left the question whether to retain the three bracketed items mentioned in the introduction. The "if authorized by law" limitation will be retained because it may be useful to have it before the mini-conference participants. But the $100 presumption and the "public interest" possibility in the last bracketed phrase in (C) should come out. Those seem not to be useful.

Issue Class Certification

The issues presented under this heading were introduced as including at least three sorts of questions. One is whether it is important to make any change to Rule 23(b)(3) or 23(c)(4) in light of the possible disappearance of the one-time apparent conflict about using the issue certification authority in (c)(4). A second was whether the rewording of the possible tweak to (b)(3) was satisfactory for current purposes. A third was whether to pursue the idea of amending Rule 23(f) to permit appellate review of the resolution of the common issue. That change to Rule 23(f) might be warranted even in the absence of a need to change (b)(3) or (c)(4).

Overall question carrying forward

It was acknowledged that the seeming split in the courts of appeals on the availability of (c)(4) certification without satisfying (b)(3) had largely disappeared. There have been at least some indications that some district courts still believe that they may not use (c)(4) without insisting that the predominance requirements of (b)(3) are satisfied. "The *Castano* footnote continues to come up." That happens even though the Fifth Circuit has largely fallen in line with the other circuits. But that circuit has not repudiated the statement in *Castano* that nimble use of (c)(4) is no substitute for satisfying the predominance requirements of (b)(3).

A different issue is whether amending (b)(3) would prevent use of (c)(4) in (b)(2) class actions. Is there a negative implication because the amendment is only about (b)(3) class actions. That point drew the response that the (b)(3) predominance factor is the one that has, at least for a period, stood as an obstacle to use of (c)(4). There have not been

reports of similar obstacles to use of (c)(4) in (b)(2) cases. And it is uncertain whether (c)(4) is actually used with any frequency in (b)(2) cases. Perhaps the solution would be for a Committee Note to say this amendment is not intended to affect (c)(4) certification, if appropriate, in actions brought under (b)(2). Instead, it is directed only at the existing concern with issue class certification in (b)(3) cases. The consensus seemed to be that this approach was the way to go for the present, and the question whether (c)(4) is used with any frequency in (b)(2) cases deserved ongoing attention.

Wording of (b)(3) sketch

The initial suggestion in the Subcommittee's April report to the full Committee was that (b)(3) be changed to say that the predominance factor was "subject to" (c)(4). This formulation raised concerns, and has been replaced with an alternative -- "except when certifying under Rule 23(c)(4)." In addition, after the call another slight refinement came to mind -- adding the word "find" before the superiority prong to make clear that this prong applies even when (c)(4) is employed. So revised, (b)(3) would look as follows:

1 **(3)** the court finds that the questions of law or fact
2 common to class members predominate over any questions
3 affecting only individual members<u>, except when</u>
4 <u>certifying under Rule 23(c)(4),</u> and [<u>finds</u>] that a
5 class action is superior to other available methods for
6 fairly and efficiently adjudicating the controversy.
7 The matters pertinent to these findings include: * * *
*

This formulation would support a Note saying that superiority may often focus on the value of the common resolution of the issue to full resolution of class members' claims. It would also support a Note that says the (c)(4) invitation to use that route only "[w]hen appropriate" could be amplified by reference to the factors in (b)(3).

The discussion prompted a question about what the real or exact nature of an issues class would be. A question that has arisen on occasion is "What happens after the issue is resolved?" In part, that bears on the appealability question under Rule 23(f) that is addressed below. But more basically, it seems that there could be different kinds of "issue certification." If the court says from the beginning that "This certification is only with regard to issue *X*, it would seem that after the issue is resolved in the district court it can enter judgment. On the other hand, if the court says "We will certify as to issue *X* and then, in light of that resolution, proceed to determine the individual claims of class members," the court clearly cannot

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enter a judgment at that point because there is more to be done.

Another related question is when notice to the class is appropriate in a (b)(3) issues class. Is notice done right after certification, as suggested by Rule 23(c)(2)? That would seem to include triggering the opt-out opportunity. But what if some class members do opt out, can they nevertheless claim issue preclusion if defendant loses to the class on the common issue? See Premier Elec. Const. Co. v. National Elec. Contractors' Ass'n, 814 F.2d 358 (7th Cir. 1987) (adopting a "categorical rule" forbidding opt-outs from using the class action result to support offensive collateral estoppel); Note, Offensive Assertion of Collateral Estoppel by Persons Opting Out of a Class Action, 31 Hast. L.J. 1189 (1980).

If opt-outs could claim issue preclusion, what would be the difference between opting out and not opting out if the certification is limited to the common issue and there is no intention to proceed further and resolve individual claims? Whether or not they opt out, it would seem that class members must file their own lawsuits if defendant loses on the common issue. Should they receive notice of that resolution and a reminder that they must do more to obtain relief? Then perhaps the only difference between an opt-out class member and a regular class member is entitlement to notice. But except for Rule 23(d), where is there a provision for giving them notice? As with some other areas of class-action practice, issue classes pose substantial questions.

The 2003 amendment to Rule 23(c)(1)(B) that directs the court to define "the class claims, issues, or defenses" seems to highlight these questions because it may pinpoint the nature of the class certification. Indeed, one could say that Rule 23(c)(1)(B) already contemplates a variety of "issues classes" because it envisions certification only of certain claims, issues, or defenses. And Rule 23(c)(2)(B)(iii) seems to come close to saying this definition should be included in the notice to the class in a (b)(3) action.

A reaction to these issues was that they are not directly related to the concern that prompted this amendment discussion at first. That concern was the seeming conflict over whether issue certification is allowed when (b)(3) predominance cannot be satisfied. This amendment idea is directed at that issue. There are surely other issues relating to issue classes that could be addressed, but they already exist separately and need not preoccupy us just yet. Although the Subcommittee has identified these issues, nobody outside the Subcommittee has said, thus far, that these issues are a problem that should be addressed by rule amendment. So although they are extremely challenging to unravel, they do not seem to present a similar need that they be unraveled.

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But this discussion prompted a related question -- Why wasn't (c)(4) included in Rule 23(b) in 1962-66, when the modern class-action rule was developed? Isn't it really more like a free-standing alternative to (b)(3) than a subset of (b)(3)?

No entirely satisfactory answer seemed to emerge to this basic question. One reaction was that when modern Rule 23 was drafted in the 1960s, there was limited familiarity with this form of litigation. Indeed, Professor Charles Alan Wright said at the time that he expected the rule would be used only rarely. Another reaction was that the issues class was something of "an afterthought." Another was that this sort of inquiry might shed light at least on the question of the expectation (if any) whether (c)(4) would be used in (b)(2) cases. A look at (b)(2) suggests that issue certification would be a curious approach, since it authorizes certification only when the defendant "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief * * * is appropriate respecting the class as a whole." That does not seem like a case that could be segmented, with certification limited to certain issues and relief for individual members left open.

On the other hand, as the Supreme Court held in *Cooper v. Federal Reserve Bank of Richmond*, in some employment class actions the defendant's victory on classwide discrimination claims (suitable for certification) need not have a claim preclusive effect on individual claims of intentional discrimination against individual plaintiffs. In that sense, the preclusive effect of an employment discrimination class action may sometimes be limited to what would ordinarily be considered issue preclusion, and thus consistent with the issue class idea.

Summing up this discussion, one member said that this is a "very complicated area, and I'm not sure where I come out." For the present, however, the consensus was to proceed with the revised language noted above to focus on these issues during the July 23-24 conference in D.C. and later during the mini-conference.

Appealability -- Possible Rule 23(f) expansion

Related to the above discussion is the question whether to expand Rule 23(f) to authorize a discretionary interlocutory appeal of the resolution of the common issue. Of course, if the class certification was arranged in a way that meant the court undertook nothing more than resolution of that issue, it may be that an appealable final judgment would result without resort to Rule 23(f). But it does not seem that the ordinary expectation is that the class-action court will fold up its tent after resolving the common issues in most instances where (c)(4) is employed.

One reaction was an analogy -- This is like a Rule 42 consolidation of many separate cases for a common trial of a common issue. Then, there may be a great virtue in having the resolution of that issue subject to appellate review before much judicial and litigant time and energy are spent on ensuing matters where that effort could be wasted if the resolution of the common issue were reversed. How is that sort of thing handled?

The answer to this question was -- "confusedly." In essence, it's a Rule 54(b) question, but it may not readily fit what that rule seems to be talking about. That rule speaks of an action with "more than one claim for relief," and that does not seem to be what we are talking about with issue classes, because the idea is that the claims of all class members share a common issue that it would be appropriate to resolve in the class action. But it does not follow that the common issue constitutes a "claim" by itself, somehow separate from individual issues that attend the prospect of relief for individual class members.

Another comparison was to the Supreme Court's recent decision in *Gelboim v. Bank of America* that the entry of summary judgment ending some of multiple actions combined pursuant to 28 U.S.C. § 1407 is final for purposes of immediate appeal even though many other centralized, perhaps consolidated, actions remain pending. But this ruling did not suggest that there could also be an immediate appeal of related issues raised in other consolidated cases that remained pending in the district court.

For present purposes, it appears not to be necessary to try to resolve all these questions, however. Indeed, it might be said that there is "a large amount of law review material" that could address these questions. But the Subcommittee's objective is to provide a practical solution to a practical problem, more than resolving law review questions. And in doing so it should attempt to spot any gaps that would cause difficulties. One that has been called to the Subcommittee's attention is the confusing nature of the sketch of Rule 23(f) presented to the April meeting of the full Committee. On reflection, it seems that the sketch would be clearer if it treated present Rule 23(f) as 23(f)(1) and then separated out the new matter as a Rule 23(f)(2):

1 **(f) Appeals.**
2
3 (1) *From order granting or denying class-action*
4 *certification.* A court of appeals may permit an
5 appeal from an order granting or denying class-
6 action certification under this rule if a petition
7 for permission to appeal is filed with the circuit
8 clerk within 14 days after the order is entered.
9 An appeal does not stay proceedings in the
10 district court unless the district judge or the

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11 court of appeals so orders
12
13 (2) *From order resolving issue in class certified*
14 *under Rule 23(c)(4).* A court of appeals may
15 permit an appeal from an order deciding an issue
16 with respect to which [certification was granted
17 under Rule 23(c)(4)] {a class action was allowed
18 to be maintained under Rule 23(c)(4)} [if the
19 district court expressly determines that there is
20 no just reason for delay], if a petition for
21 permission to appeal is filed with the circuit
22 clerk within 14 days after the order is entered.
23 An appeal does not stay proceedings in the
24 district court unless the district judge or the
court of appeals so orders.

Concern was expressed about whether this idea might prompt undue negative reactions. "The appeals issue can be very complicated and problematic." A response was that the issue is actually already "out there." It was included in the agenda materials for the April full Committee meeting and was before the ALI participants in the May 17 event, and before the AAJ participants in the Montreal event on July 12. So even though the sketch above presents the appeal idea in a different way, it is not a fundamentally different idea. To date it has not prompted a strong reaction, either positive or negative. Moreover, if we want careful consideration of a possible measure like this one, having a concrete example of what it might look like will improve the focus of comments. Being concrete works better with commentators. We will attempt to make clear that neither the Subcommittee nor the full Committee has resolved the question whether these sketches should proceed into more formal drafting.

Brackets in the above proposal present two issues. First, there are two ways of describing the orders that may be appealed. The bracketed version seems a bit more direct than the one in braces, but the one in braces hews closer to the rule language in (c)(4).

The second issue raises the possibility that a petition to the court of appeals may be submitted only if the district court determines that there is no just reason for delay. That is modeled on Rule 54(b)'s requirement that the district court so determine before an appeal of right may be taken. Whether that limitation is appropriate with a discretionary appeal could be debated. Creating new avenues for possibly disruptive interlocutory review might cause more problems than it would solve, and having such a requirement of district court certification could guard against that result. Moreover, this device might be a useful way for the district court to indicate whether the order in question really does resolve the common

issue that led to (c)(4) certification. That question might be disputed among the parties and tricky for the court of appeals to resolve.

In addition, it would be important to alert the Appellate Rules Committee that this topic is under consideration by the Civil Rules Committee because there might be ramifications for the Appellate Rules that would need attention. It seems that Appellate Rule 5(a) would, as presently written, cover this situation without need for revision. The Committee Note to the 1998 amendment to that rule said that it "is intended to govern all discretionary appeals from district-court orders, judgments, or decrees." Should the Rule 23(f)(2) proposal go forward, it would seem to fit within the current rule. But this issue should be flagged for the Appellate Rules Committee.

A different question was whether there is a need to involve the joint Civil/Appellate Subcommittee in this work. That Subcommittee has been working on Rule 62 regarding stays of execution. The resolution was that it was not necessary because the Rule 23 Subcommittee is better positioned to address this topic.

Appendix 1

Cooper sketch of objector disclosure
(as refined on July 16)

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e).~~; the objection may be withdrawn only with the court's approval.~~ The objection must be signed under Rule 26(g)(1) and disclose this information:

(A) the facts that bring the objector within the class defined for purposes of the proposal or within an alternative class definition proposed by the objector;

(B) the objector's relationship to any attorney representing the objector;[1]

(C) any agreement describing compensation that may be paid to the objector;

(D) whether the objection seeks to revise or defeat the proposal on behalf of:
(i) the objector alone,
(ii) fewer than all class members, or
(iii) all class members;

(E) the grounds of the objection, including objections to:
(i) certification of any class,
(ii) the class definition,
(iii) the aggregate relief provided,
(iv) allocation of the relief among class members,
(v) the procedure for distributing relief[, including the procedure for filing claims], and
(vi) any provisions for attorney fees;

[(6) The objector must move for a hearing on the objection.]

[(6.1) An objector who is not a member of the class included in the judgment can appeal [denial of the objection][approval of the settlement] only if the court grants permission to intervene for that purpose.]

(7)

(A) An objection filed under Rule 23(e) or an appeal from an order denying an objection may be withdrawn only with the court's approval.

(B) A motion seeking approval must include a statement identifying any agreement made in connection with the withdrawal.

(C) The court must approve any compensation [to be] paid to the objector or the objector's counsel in connection with the withdrawal.

---

[1] Is it feasible to add disclosure of every case in which any attorney for the objector has presented objections to a class-action settlement? The snag is the "Batman" problem — how to draft a provision that reaches the mastermind objector behind nominally different attorneys.

(D) If the motion to withdraw [the objection] was referred to the court under Rule XY of the Federal Rules of Appellate Procedure, the court must inform the court of appeals of its action on the motion.

Appellate Rule XY

A motion to withdraw an appeal from an order denying an objection to approval of a class-action settlement under Rule 23(e)(5) of the Federal Rules of Civil Procedure must be referred to the district court for disposition under Rule 23(e)(6)[(7)].

Comments - Alternatives

Relying on disclosure gets to the interest reflected in the several comments that discovery about the objector is important, without paving the way for discovery of the sort that is inappropriate even as to a class representative.

An advantage of disclosure is that it is possible to invoke the sanctions provisions of Rule 26(g). No need to create a new and independent provision. And none of the procedural incidents of Rule 11.

Many alternatives have been suggested. One would be to require an objector to qualify as an additional class representative whenever the objections seek to improve the settlement for the entire class or for some part of the class (whether or not subclassed). That may be a bit much. Although the essence of the objection in these situations is that the class representatives are not adequately representing the class, there is a powerful argument that class members should be allowed to make that argument without having to meet the requirements imposed on representatives. The class member is going to be bound by a judgment negotiated by a "representative" recognized by the court but not by the class member. But there may be a qualification. We have noted the proposition that it is not enough to offer an objector an opportunity to opt out of the class. The objector may respond that the objector prefers to have its claim resolved on a class basis, just not by this inadequate settlement. That interest could be addressed by providing that an objector who challenges the adequacy of class relief must be prepared to assume the role of class representative. That may be more powerful medicine than we need.

Requiring permission to withdraw an objector’s appeal may be sufficient. An absolute prohibition on paying anything incident to withdrawal of an appeal would have to be qualified by recognizing that payment may be appropriate if the objection goes only to the argument that the objector has distinctive circumstances that distinguish the objector from other class members. That could be difficult to administer. And there might be some difficulty in administering a rule that allows payment to the objector who withdraws an appeal because the settlement has

been improved — distinguishing cosmetic changes from meaningful changes may not always be easy.

Appendix 2

Re-sketches for discussion on July 12 and 15

Based on the June 26 conference call, the following presents interim revisions to the original sketches ("re-sketches"). A few notes will be included also, but this does not present an exhaustive chronicle of possible issues. Together with the notes of the June 26 conference call, however, it will hopefully provide a basis for further discussion. For the present, the goal is to settle on what should be put before the conferees at our Sept. 11 mini-conference. That leads, of course, to the framing of the materials for the Advisory Committee's November meeting and, after that, probably to a presentation of pending thoughts during the Standing Committee's January meeting.

Frontloading

(e) **Settlement, Voluntary Dismissal, or Compromise.** The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(A) When seeking approval of notice to the class, the settling parties must present to the court:

(i) the grounds, including supporting details, which the parties contend support class certification [for purposes of settlement];

(ii) details on all provisions of the proposal;

(iii) details regarding any insurance agreement described in Rule 26(a)(2)(A)(iv);

(iv) details on all discovery undertaken by any party, including a description of all materials produced under Rule 34 and identification of all persons whose depositions have been taken;

(v) a description of any other pending [or foreseen] {or threatened} litigation that may assert claims on behalf of some class members that would be [affected] {released} by the proposal;

(vi) identification of any agreement that must be identified under Rule 23(e)(3);

(vii) details on any claims process for class members to receive benefits;

(viii) a forecast [based on expert reports] of the anticipated take-up rate by class members of benefits available under the proposal;

(ix) any plans for disposition of settlement funds remaining after the initial claims process is complected;

(x) a plan for reporting back to the court on the actual claims history;

(xi) the anticipated amount of any attorney fee award to class counsel;

(xii) any provision for deferring payment of part or all of class counsel's attorney fee award to class counsel until the court receives a report on the actual claims history;

(xiii) the form of notice that the parties propose sending to the class; and

(xiv) any other matter the parties regard as relevant to whether the proposal should be approved under Rule 23(e)(2).

(B) The court must not direct notice to the class unless satisfied based on the parties' presentation that class certification and approval of the proposal under Rule 23(e)(2) is [substantially] probable. [An order that notice be sent to the class is not a "preliminary approval" of either class certification or of the proposal {but does support notice to class members under Rule 23(c)(2)(B)}.] The court may refuse to authorize notice to the class until the

parties supply additional information. If the court directs notice to the class, the parties must arrange for class members to have reasonable access to all information provided to the court.

[**(C)** An order that notice be sent to the class is not a "preliminary approval" of either class certification or of the proposal {but does support notice to class members under Rule 23(c)(2)(B)}.]

This sketch adds a requirement that the parties supply the court with their grounds for class certification, including a possible link to a new provision on settlement class certification. The sketch adds a (C) that seeks to put into the rule a basis for a Committee Note saying that sending notice does not constitute preliminary approval of class certification or of the proposed settlement. That might fortify arguments against immediate appeal. (c) also tries to confirm that the order that notice be given suffices to support notice to the class that starts the opt-out and objection periods running.

Ascertainability

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses

(1) Certification Order:

* * *

(B) *Defining the Class*~~*; Appointing Class Counsel*~~. An order that certifies a class action must define the class ~~and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g)~~ so that members of the class can be identified [when necessary] in [an administratively feasible] {a manageable} manner.

(C) *Defining the Class Claims, Issues, or Defenses*. An order that certifies a class action must define the class claims, issues, or defenses.

(D) *Appointing Class Counsel*. An order that certifies a class action must appoint class counsel under Rule 23(g).

(E~~C~~) *Altering or Amending the Order*. * * *

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This is a "minimalist" approach to the ascertainability issues that eschews both "ascertainable" and "objective," words that appeared in the sketch before us on June 26. It also does not address whether the court should insist that the definition limit the class to persons who would be entitled to relief, or the manner of proof of eligibility for relief.

This sketch might support a Committee Note saying that the problem of class definition at the certification point is different from the ultimate question of criteria for relief under a settlement or judgment. The "when necessary" phrase might be necessary to support that idea in the Note. It might also support a Committee Note emphasizing that the problem of class definition and eligibility for relief are both essentially management issues. At the same time a Note might recognize that there are sometimes competing considerations, with plaintiffs concerned that the task of providing an airtight definition at the outset and defendants concerned that they face the risk of being required to pay people how really have no claim against them.

A Note might also say, somehow, that it adopts a less exacting approach than *Carrera*. Perhaps we would be permitted to cite that case (as we were ultimately allowed to cite *Residential Funding*) in the Note, but the general rulemaking preference is against such citations. There is also the reality that we are somewhat uncertain what the Third Circuit's actual take on things is, and later Third Circuit cases have somewhat muddied the waters. On the other hand *Carrera* seems to have become shorthand in some quarters for a certain attitude on this subject.

For present purposes, there are at least two questions: (1) Would this be of any real utility? (2) Is there anything more a rule amendment could do without venturing into the center of controversy?

Settlement Approval Criteria

The discussion last time, and ensuing reflection about it, suggests that there are at least two basic ways to go. One might be called the more confining, and the other the less confining. Choosing between them turns in part on the extent to which we think that the term "fair, reasonable, and adequate" is a large tent that includes all the factors every circuit has articulated (even though they have not all articulated the same ones), and whether something that aggressively said that courts could no longer rely on things they formerly declared to be important would invite fervent opposition from at least some judges.

This basic choice may inform, but seems somewhat distinct from the refinement of details of the "approved" list. So to afford a basis for discussion, here are sketches of the two possibilities:

Alternative 1

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate, considering whether:

Alternative 2

(2) If the proposal would bind class members, the court may approve it only after a hearing and must approve it on finding that:

(i) the class representatives and class counsel have [been and currently are] adequately represented the class [in preparing to negotiate the settlement];

[(ii) the settlement was negotiated at arm's length and was not the product of collusion;]

(iii) the relief awarded to the class -- taking into account any ancillary agreement [that may be part of] {made in connection with} the settlement -- is [fair, reasonable, and adequate] {sufficient} given the costs, risks, probability of success, and delays of trial and appeal; and

(iv) class members are treated equitably relative to each other [based on their facts and circumstances and are not disadvantaged by the settlement considered as a whole] {and the proposed method of claims processing is fair {and is designed to achieve the goals of the class action}].

It seems worthwhile to discuss this general set of alternatives. For the Sept. 11 conference, we might want to preserve both approaches. But perhaps we sufficiently prefer one of them now so that we need take only one of these two. This will hopefully be something we can discuss in Montreal, and perhaps revisit on July 15.

The factors list above has been reworked a bit from the original one that was modeled on ALI Principles § 3.07(a). It is perhaps premature to try to do more work on them, but some tentative revisions deserve note. One is that the arm's length provision that was at the end has been moved up as item (ii); whether that is really different from (i) (as augmented with bracketed material) might be debated. In (iii), the question whether to repeat "fair reasonable and adequate" if Alternative 1 is used is raised, with a placeholder substitute ("sufficient"). Maybe it is best to use the same words twice. In (iv) it may be that the bracketed material is not needed in the rule and could be mentioned in a Note. In addition, a bracketed addition to (iv) focuses on the claims processing method. That concern seems worth elevating to the rule rather than only mentioning in the Note. Perhaps it could be included in (iii) instead of (iv).

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Notes of meeting
Rule 23 Subcommittee
Advisory Committee on Civil Rules
Montreal, July 12, 2015

The Rule 23 Subcommittee of the Advisory Committee on Civil Rules held a meeting in Montreal after its session with AAJ members on July 12, 2015. Participating were Judge Robert Dow (Chair, Rule 23 Subcommittee), Elizbeth Cabraser, Dean Robert Klonoff, Prof. Edward Cooper (Reporter, Advisory Committee), and Prof. Richard Marcus (Reporter, Rule 23 Subcommittee).

Objectors

During the AAJ session beginning at 8:30 on July 12 (and continuing until 10:45 despite the official end time of 10:00), the most frequent topic of comments by AAJ members was that objectors who engage in holdup tactics have become a major difficulty. In part, this problem has arisen due to the Supreme Court's 2002 decision in Devlin v. Scardeletti, which allows any objecting class member to appeal if the settlement is approved despite the objection. There is, at present, no screening device the court may use to limit this activity by objectors. And after the notice of appeal is filed, the Rule 23(e)(5) requirement of court approval to withdraw the objection disappears. So that is when the holdup happens.

At least sometimes, vague objections come in from class members (rather than their counsel), and counsel appear on the scene only after the notice of appeal is filed, and then make demands for large amounts of money despite having done almost no work. Some objections are so generic that they don't even relate to the provisions of the settlement in question. They are mere placeholders for later demands for payment. They provide no assistance to the court in making its decision whether to approve the proposed settlement. Indeed, one might even say that these objectors would not be in business if the court rejected the settlement; they profit only when the court approves the settlement despite their objections and they can exploit the delay resulting from their filing of an appeal. The picture painted by the participants in the AAJ meeting is of lawyers who do essentially no work but demand very considerable tribute to go away. And their leverage comes from their ability to hold up the entire settlement implementation.

One idea endorsed by some at the AAJ session was that objectors should be subject to some court scrutiny before their objections can be the basis for an appeal after approval of the settlement. It was noted that in Matsushita v. Epstein, the Ninth Circuit (later reversed by the Supreme Court) once spoke of "certified objectors," and support was expressed for the idea of applying Rule 23(a) typicality and adequacy requirements to objectors. Long before *Devlin* was decided, some courts required

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that class members formally intervene before they could appeal. See Gottlieb v. Wiles, 11 F.3d 4 (10th Cir. 1993); Guthrie v. Evans, 815 F.2d 626 (11th Cir. 1987) (noting that class member had not qualified to act on behalf of the class); Walker v. City of Mesquite, 858 F.2d 1971 (5th Cir. 1988) (foreclosing appeal by class member denied leave to intervene).

A major reason for requiring either that objecting class members gain intervention or otherwise be deemed qualified to act on behalf of the class is that, by objecting, they hold up relief for the whole rest of the class. The class representatives have to qualify under Rule 23(a) to seek relief for the class. That prompted the question: Why shouldn't the objectors, whose behavior may impact the class members just as much, have to satisfy similar requirements?

It was also suggested during the session with AAJ members that, at least in 23(b)(3) class actions, where opting out is possible, the rule should not allow objections, or at least not allow appeals without some scrutiny of the objectors' bona fides. Perhaps the court could be authorized to "deport" objecting class members by redefining the class to exclude them. Then they could not appeal. That would, however, seem directly contrary to Rule 23(e)(5), which says that class members can object.

The Subcommittee meeting began with the comment that many interesting ideas had been raised about the objector problem during the AAJ meeting. One is that there should be presumptive discovery from objectors. By objecting, they have distinguished themselves from the passive unnamed class members. At least they should be subject to discovery about matters that might bear on their objections. Perhaps, beyond that, the idea that was once floated in the Advisory Committee that they could be denied the right to appeal absent intervention. That would allow the district court to deny intervention with regard to groundless objections. Perhaps that idea should be reexamined.

The idea of requiring intervention might be attractive. It could be likened to the CJA requirement in some circumstances that the district court issue a certificate of appealability. Perhaps that could be supported by the experience since 2002, when Devlin was decided. But it was cautioned that we probably can't cut off the right to object (now guaranteed by Rule 23(e)(5)) or the right to appeal. At least, that would call for a serious look at whether there is room under Devlin for such a rule. And there are policy reasons why requiring formal intervention to obtain appellate review could be questioned.

An alternative that has been suggested to the Appellate Rules Committee is to prohibit any consideration at all for dismissing, abandoning, or withdrawing an appeal. Whether this would be workable is uncertain. An alternative to such a flat

prohibition would be requiring court approval for withdrawal (and for any consideration given in connection with withdrawal of the appeal), but that really should be referred to the district judge, not to the court of appeals. The district judge is, after all, much more familiar with the case than the court of appeals.

It was agreed that the basic problem is at the appeal stage, not the district court stage. Although it may be that objectors produce some delay at the district court stage, there is no serious "holdup" problem then, and Rule 23(e)(5) applies there.

One idea might be to forbid consideration for withdrawing an appeal unless the settlement were improved. But that would likely lead to a regime of "cosmetic" changes to settlements that really do nothing except provide the predicate for the blackmail payment. And determining whether the change is more than cosmetic might be a real challenge for the court of appeals.

A more fruitful avenue might be to look to discovery from the objector. Although that prospect should not be a club to scare away objections, it would be important for the district court to have the sort of record that discovery could provide. This discovery could be channeled but sometimes would be really revealing. Perhaps the objector is really not a class member. Perhaps the objector is a close relative of his or her lawyer. Perhaps this is the 46th time this person has objected to a settlement using this close relative as his or her lawyer. And perhaps, in every one of those 45 prior cases, the appeal was promptly withdrawn after money was paid to the lawyer.

But the possibility of discovery from objectors could raise problems of its own. Objectors may argue that they should get discovery of class counsel to support their objections. In the past, such efforts to depose class counsel had led to pitched battles. Evidence Rule 408 shrouds the negotiations in confidentiality, but the relationship between class members and class counsel, who is in a sense their lawyer, is tricky. At least in some situations, discovery could appear to be a club wielded by objectors as much as it is a device for screening their objections.

Another contrast is to discovery efforts directed to unnamed members of the class. The courts rightly keep a very tight leash on such efforts, which may be strategic measures designed to impose costs on class counsel, frighten away class members, and provide a predicate for seeking dismissal of the claims of class members who do not respond to the discovery. There was no interest in broadening discovery from unnamed class members in general.

Another topic raised was sanctions. "I don't understand the lack of interest in sanctions on bad objectors." Many of the

lawyers who participated in the AAJ session are understandably angry about the behavior they describe. Why not urge sanctions against those who do these things?

One answer is that Rule 11 is ill suited to do the job. Its procedural requirements are ill suited to this situation. The safe harbor is, in a sense, too safe. Moreover, a lot of judges simply don't like Rule 11 and regard Rule 11 litigation as a distraction.

A different consideration, more generally, was that many district judges need some guidance about these issues. Judges who were prosecutors are out of their element when called upon to evaluate a proposed class-action settlement. Rule provisions or Manual directions would be very helpful to them.

A different question was "What would be the sanction?" In the 10th Circuit's bond on appeal case, the largest amount covered by the bond -- about $500,000 -- was for delay costs, the time value of the large amount of money that would be available once the settlement approval became final, but would be held up by the appeal. Is that the proper measure of a sanction? That drew the comment "The harm here is enormous."

Another observation was that until the mid 1990s, defendants would often agree to pay the settlement funds once the district court issued a final approval, without regard to whether there was an appeal. But starting about 20 years ago, defendants stopped doing that. For them, the additional delay may be attractive.

It was suggested that requiring a bond on appeal might be a good way to go. That drew the objection that it could shut down the very type of objectors we want to see in court --- Public Citizen and Public Justice, for example. Those objectors are doing a public service, and assisting district judges. Nothing should be done to endanger their ability to present objections.

Ultimately, it may be that the Civil Rules can't control this activity once it moves into the appellate sphere. But there should be support for "reception" into Rule 23 of whatever is needed to make this work fairly and efficiently. Neither the appellate courts nor the district courts would benefit from shutting the district judge out of evaluating proposals to withdraw the appeal.

At the same time, we must be careful not to overreact. "It's not a capital offense to be stupid or to make a stupid objection." "Don't use a bomb for a gnat." A punitive attitude is not generally indicated with regard to objectors.

Another point was that, ultimately, it is the lawyers, usually class counsel, who are paying off the objectors. This is not pursuant to any court-ordered attorney fee award; no judge makes them do so. Maybe there's an argument that the court has no role in holding up those payments and, thereby, the consummation of the settlement. But class counsel usually are not paying off objectors and their lawyers because they fear the settlement will be overturned. It's merely to end the holdup.

But sometimes there may be some value in paying objectors even if their objections ultimately are rejected. Years ago there was a suggestion that the rule should authorize the judge to compensate objectors for the cost of objecting even if the settlement was ultimately approved without change to respond to the objection. Objectors can be the district judge's friend when they act in good faith. That is one of the frustrations about the "I object" behavior of bad-faith objectors. They don't provide any assistance to the district judge, and keep their powder dry for appeal. They don't want the district judge to reject the settlement, or prompt improvements in it.

Discussion shifted to the possibility of requiring objectors to make certain disclosures when they object. This might tie in with a right to take discovery from them, or instead to provide the needed information without opening the Pandora's Box of discovery. Perhaps these disclosures could reveal grounds for rejecting objections not supported by the required disclosures. A problem might arise with the good faith objectors who do not have lawyers behind them; they might not do the disclosures correctly. And how would this insulate against appeal of the denial of the objection on this ground? At present, the objections are rejected on their merits and we still have this problem.

Another way of looking at this set of issues is that it resembles our frontloading proposals for approval of notice to the class. Under the frontloading approach, we would ensure that a list of items would have to be disclosed to the judge and available to the class. With objector disclosure, we would provide a list of items the objector must provide that could show that discovery is needed. It could also provide a record that would be of value if there is an appeal.

Ideas for inclusion on such a list included (1) specifics on why the objector believes he or she is in the class; (2) whether the objector consulted or was assisted by counsel in preparing the objection; (3) details about the relationship between counsel and the objector (e.g., close relative, repeat objector); (4) whether the objector has objected to another settlement (using the same lawyer?); (5) whether the objector has received any offer or promise of compensation for making the objection.

At least some of this is of vital importance to class counsel. For example, one cannot directly contact an opposing party represented by counsel. True, class counsel is in some sense the lawyer for all class members, but in this instance it might be an ethical violation for class counsel to call the represented objector. Moreover, it may be that this sort of disclosure would make discovery unnecessary.

These ideas drew support. There's an array of specific factual inquiries that would be useful, and it would not violate due process to insist that they be disclosed. The objector has, by objecting, stepped out of the crowd and into the foreground. The court and class counsel are entitled to know more about her.

Another reaction was that "This sort of requirement won't deter the good objectors. Public Citizen and Public Justice do their homework and would not have difficulty with this sort of disclosure regime." But that drew the further comment that the bad objectors monitor the objections of the good objectors and then join them as free riders. Also, in securities cases the big class members may simply opt out.

Another reaction was that "Public Citizen and Public Justice are very strategic about what they challenge. If they object, you know you need to address that concern." Moreover, some of the things on the disclosure list are not burdensome. For example, it's not hard to reveal whether objector counsel is your relative.

The consensus was to look at the possibility of required objector disclosure. This might be mentioned during the conference in D.C. on July 23-24, and put before the participants in the Sept. 11 mini-conference.

Frontloading

It seemed apparent that the general idea of frontloading had considerable support and should be brought forward during the Sept. 11 mini-conference. The current list of items for inclusion has 14 separate things. A present effort to narrow that list seemed not to be a productive use of time. Almost certainly, some of these items will prompt concerns. It will be informative to see which prompt concerns and what those concerns are.

Proposed (A) was expanded in the revision after the June 26 conference call to include a new (i) on the grounds for class certification. (This redraft is included as an Appendix to the notes on the July 15 conference call.) This addition responds to the reality that certification is an important part of any class-action settlement package, and something the judge should focus upon in deciding whether to send notice.

Attention shifted to (B) of the rewritten sketch. The problem of articulating the standard that should guide the court in making the decision whether to order notice is difficult. On the one hand, sending notice is an important decision and notice should not be sent unless there is good reason to think that the settlement can survive the scrutiny that Rule 23(e) requires, and that the case can support certification, at least for settlement purposes. On the other hand, this decision is also necessarily preliminary and conditional, for class members have had no opportunity to object, and the court has not had the benefit of the insights they can offer. Indeed, since almost always both sides support the settlement, there is a non-adversarial aspect to the setting in which this decision must be made.

The sketch offered something like the preliminary injunction standard -- "that class certification and approval of the proposal under Rule 23(e)(2) is [substantially] likely." But something like the preliminary injunction standard may well not be appropriate for this decision. A preliminary injunction is a weightier judicial action than authorization for notice to the class of a possible settlement of a class action. An injunction often has real and immediate effect on the litigants outside the context of the case. The notice does call for attention by class members, but does not immediately affect their rights. And in (b)(3) class actions they can simply opt out.

Discussion shifted to alternative possible formulations of what we are getting at -- a standard that recognizes the importance of this decision, but also recognizes that it is tentative and based on the limited information available at the time it must be made, and before objectors can be heard. Various ideas were suggested:

a negative standard -- "the court may not order notice sent if it has identified significant potential problems with either class certification or approval of the proposal"

a somewhat circular standard: "the prospects for class certification and approval of the proposal are [good enough} {sufficiently strong} to support giving notice to the class"

a blending of the preliminary aspect and forecast, also somewhat circular -- "preliminarily determines that giving notice is justified by the prospect of class certification and approval of the proposal"

borrowing from the language in Manual of Complex Litigation (3d), § 30.41, p. 237: "If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation for attorneys, and

appears to fall within the range of possible approval, the court should direct that notice under Rule 23(e) be given to the class members of a formal fairness hearing."

A separate but related issue is to address the Rule 23(f) problem -- would the standard for deciding to sent notice arguably qualify as a decision to certify or not certify a class that can be immediately appealed under Rule 23(f)? The desired goal is that it be clear that the decision is too tentative for that. It may be that an affirmative negative in the sketch would be desirable -- "The decision to send notice is not subject to review under Rule 23(f)." That could foreclose arguments. And if there is a really good reason for appellate review, 28 U.S.C. § 1292(b) is available. True, that requires certification by the district judge, but it should suffice as a safety valve. It is hard to imagine why there would be a good reason for immediate review, in any event, given that the thing that matters is final approval and judgment. If, for example, the court also enjoins other litigation in order to permit full review of the proposed settlement, that injunction would be subject to immediate review under 28 U.S.C. § 1291.

Another sightly different subject is to make it clear that this determination triggers notice of the right to opt out, and the court can set a schedule for opting out. It may be that a reference to Rule 23(e)(2) would clarify and fortify this message.

Ascertainability

Other than objectors, it is likely that the topic that drew most attention in the AAJ session on July 12 was ascertainability. [During another AAJ session on class actions after the Subcommittee's meeting, there was considerable further attention to this topic.]

The redraft after the June 26 conference call included a "minimalist" treatment of ascertainability. It avoided using the word "ascertainable" and the word "objective."

There was discussion on what orientation a sketch for Sept. 11 should adopt. One approach would be aggressive and reject the Third Circuit's *Carrera* approach. That idea drew the observation that it is not entirely clear what the Third Circuit's actual view is.

The sketch included the bracketed phrase "when necessary." It was observed that this phrase in the rule would support a Committee Note the focus of the class definition is only on the need to give notice and determine whether those who claim they are class members actually are . That, after all, is one of the issues that we may include among the possible disclosures for

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those who file objections. It would seem that a class definition should enable them to make the determination whether they are included and explain how they reached the conclusion that they are.

Another point was that the Third Circuit has recognized that the class definition need not be done as assiduously for a (b)(2) class. Indeed, there may be many of those where the members cannot be identified at the time the case is resolved. Consider, for example, a suit seeking to change the practices of a prison or a school. At the time the case is decided, there is no way to know who will be imprisoned or enrolled a decade later. But a class definition should be sufficient if it would enable the court to make that determination later (e.g., when somebody sought to have the defendant held in contempt for treatment of the applicant that she says violates the class-action injunction). And there is no opt-out right for (b)(2) class members.

Another approach might be to make clear, in rule or Note, that ascertainability does not exist as an additional requirement for class certification, and that problems of administration later should not prevent certification. At the same time, a Note to such a rule should make clear that concerns about fraudulent claims are valid, and that defendants have a valid interest in contesting claims to settlement funds. It might be added that genuine class members also have an interest in making sure that payouts are only to valid class members. As our cy pres discussions show, if there is a residue after initial payouts there may well be a further distribution. So those who might benefit from that distribution should be assured that only genuine class members are getting paid.

In the limited time available, the Subcommittee was not able to refine its approach to these issues. The issue surely should be carried forward. But it is not so clear that it will ultimately appear that there is a good rule amendment to propose. This should be a significant focus of the Sept. 11 mini-conference. One approach might be to re-examine Judge Rendell's separate opinion in Byrd v. Aaron's. That opinion may inspire solutions, but none have emerged as yet. It might be useful to invite the judge to the mini-conference, for her opinion was very thoughtful. But we need also to ensure an opportunity to be heard to those who favor a strong ascertainability requirement.

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Notes on Conference Call
Rule 23 Subcommittee
Advisory Committee on Civil Rules
June 26, 2015

The Rule 23 Subcommittee of the Advisory Committee on Civil Rules held a conference call on June 26, 2015. Participating were Judge Robert Dow (Chair, Rule 23 Subcommittee), Elizabeth Cabraser, Dean Robert Klonoff, John Barkett (for only part of the call), Prof. Edward Cooper, Reporter of the Advisory Committee, Rebecca Womeldorf (Rules Committee Support Office), and Prof. Richard Marcus (Reporter of the Rule 23 Subcommittee).

The call began with discussion of legislative developments and of logistics for the mini-conference on Sept. 11, 2015. It then turned to the three topics on the agenda for this call:

Frontloading

During the April 9 Advisory Committee meeting, the Subcommittee decided that it would look seriously at the possibility of adding rule provisions specifying what should be presented to the judge at the time that judicial approval for sending notice to the class is sought in regard to a proposed settlement. Before the Subcommittee's May 12 conference call, Prof. Marcus circulated a sketch of a possible rule. For the record, a copy of the circulated sketches is attached to these Notes as an Appendix.

The topic was introduced with the observation that this possibility raised some competing considerations. One is that judges would benefit from having more information about proposed class-action settlements. Judge Bucklo (N.D. Ill.) recently wrote an article about that problem. Bucklo & Meites, What Every Judge Should Know About a Rule 23 Settlement (But Probably Isn't Told), 41 Litigation 18 (Spring 2015). So there seem to be positive benefits to providing specifics on a variety of topics.

On the other hand, there is a competing concern with making the decision to send notice tantamount to approval of the proposed settlement. The ALI resisted the commonplace term "preliminary approval" to describe this initial review, even when based on rather cursory presentations at that stage of the proceedings. Bolstering the requirements in the way suggested by the sketch would seem to strengthen the argument that "this has all been decided already," thereby seeming to freeze out the objectors.

But something along this line could also operate to the benefit of objectors. Too often, the details class members would need to decide whether to object, or what to object to, come out after notice goes out. Sometimes they come out only after the due date for objections. Something like this approach would provide a method for objectors to obtain needed information in a timely fashion.

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Even if this opportunity is not essential for most objectors, the sketch offers something of value to the "number 1 objector" -- the district judge. As explained in Judge Bucklo's article, some courts of appeals regard the judge as something of a fiduciary for the class members when reviewing a proposed settlement. Getting the details before the judge up front could be valuable because it would permit the judge to intercept problems early on, before large amounts of money had been spent on notice to the class and other activities. It could also enable the judge then to offer guidance on where changes to the proposal would be important to support later approval.

A first reaction was "I like the idea a lot." The general concept is good, but it will be valuable to make clear at the same time that this is not "preliminary approval." There is also the detail question which factors should be included.

A second reaction was concurrence with this positive attitude. The Bucklo article is "terrific." It's hard to imagine a valid objection to laying this out for the lawyers and the judge.

Another reaction was that this is what the good lawyers are providing already, but it is hardly universal and having something to guide the other lawyers would be valuable.

A salutary side effect was noted -- screening out useless objections resulting from lack of information. A big selling point is that class members should get considerably more information if this procedure is employed.

The initial discussion was summed up: "There's no dissent from the view that trying to do this is a good idea." That shifted attention to what a rule amendment should say.

One reaction on that point was that it would be important to put in a cross-reference to the Rule 23(e) factors for approving a proposed settlement. But that met the objection that it would cut against saying that this order to send notice is not a "preliminary approval" of the settlement. Instead, the listing on the sketch is desirable because it consists of factual items rather than calling for evaluative judgments.

Another member agreed. Collapsing this into a one-stage process lends support to the view that the settlement is a done deal out of the gate. That would make it seem that there is an unduly heavy burden on objectors.

A response was that it could be very important to know such things as (1) who participated in the negotiation of the proposed settlement; (2) when did these negotiations begin?; (3) how long did they last?

Another reaction was that if one asked ten judges about what they needed to know, you might get ten different answers. Perhaps we should try to poll some judges and see what they think they need to know.

Another consideration, in terms of need to know, would distinguish between judges who are active case managers and those who are not. The former are more likely to be up to speed on a class action assigned to them than the latter, and therefore in less need of a detailed menu at the time the question of notice to the class comes up.

That idea prompted the reaction that a different breakdown might be between cases of different types. Securities fraud and antitrust class actions, for example, are likely to generate a lot of pretrial activity. Judges will almost unavoidably become familiar with them. Probably employment cases are somewhat like that. But consumer cases may not come to the judge's attention before a proposed settlement arrives in chambers.

The point was made again that good lawyers know what the judge needs to make an informed decision, and make a point of providing it. But not all lawyers are good lawyers, and for those who need guidance the sort of points made in Judge Bucklo's article are very useful.

A new point was raised -- Should there also be specifics on whether certification would be appropriate, not just on whether the settlement should be approved? Particularly if we go forward with a Rule 23(b)(4) settlement certification proposal, that could be cross-referenced. Isn't something like "tentative" or "conditional" certification implicit in giving notice to the class of the settlement proposal? In (b)(3) classes, this notice is ordinarily the way to give notice of the right to opt out. Doesn't that presume that the court has, at least tentatively, certified the class? If so, shouldn't the showing include whatever is needed to support certification under (b)(4) or otherwise?

That point raised a problem -- this sort of approach would seem to mean that Rule 23(f) appellate review could be sought upon approval of notice to the class. It also raised the point that the 2003 amendments removed authority for "conditional" class certification.

Another observation was that there are really three separate notice provisions in Rule 23. For Rule 23(b)(3) cases, Rule 23(c)(2)(B) requires notice "for any class certified under Rule 23(b)(3)," including notice of the right to opt out. The precise question here seems to be whether, at the time notice of a proposed settlement is sent out one can -- for purposes of Rule 23(c)(2)(B) say that the class has been "certified." That has certainly been the assumption for decades. But what if the court refuses to

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approve the settlement and therefore backs away from "tentative" class certification? There is something of a chicken/egg question of sequencing here.

Second, Rule 23(e)(1) independently and additionally requires, in all class actions, that the court give notice of a proposed settlement to the class along with notice of the right to opt out.

Third, Rule 23(h)(1) calls for notice to the class of class counsel's motion for an attorney's fee award.

The normal reality is that all three notices are given at once. The idea of sending the class three separate notices is extremely unattractive. Not only might that be very costly, it also would probably confuse class members. Getting one omnibus notice is confusing enough for them without adding two additional notices.

So the prevalent current practice assumes notice of proposed settlements directed by the court under Rule 23(e)(1) suffices to satisfy the Rule 23(c)(2)(B) and Rule 23(h)(1) notice requirements. And it "starts the opt-out period running." That can be important because (a) the proposed settlement may authorize the defendant to withdraw if more than a certain number of class members opt out, and (b) the notice also gives class members the right to object and sets a time limit for that. Normally those who opt out should not be heard also to object. So it is important to know, when there are objectors, whether they are also opt-outs.

Altogether, this discussion was summed up as leading to at least two conclusions: (1) Nothing requires that the court certify the class to give notice. Indeed Rule 23(d) has an additional authorization for giving notice to the class when that seems wise without regard to certification. (2) There are definite reasons to want to make sure the Rule 23(e)(1) notice triggers the time for opting out, although Rule 23(c)(2)(B) seems to authorize that only after the class has been certified.

One reaction was that the sketch of a new (b)(4) assumes that certification under the provision is appropriate only after the court grants certification. "If that's not what we mean, we should rewrite it."

Other possibilities exist. One is a right to opt out after approval of the settlement. Another might be to recognize in the rule that, despite the prohibition in general on "conditional" certification, something like that can be done in conjunction with the decision to authorize notice to the class of the proposed settlement. The rule might say that this invokes and satisfies the Rule 23(c)(2)(B) notice (including opt-out) requirements.

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Another way of looking at the notice issue in (b)(3) class actions is to focus on what 23(c)(2)(B) says must be done and when. In connection with a proposed settlement, it is worth noting that Rule 23(e)(4) says that the court may insist on a second opportunity to opt out if there has already been one and the time to opt out has passed. The rule does not seem explicitly to address the situation in which the parties change their agreement to satisfy the court's concerns. That can happen, and may happen in part because the full hearing after notice and objections acquaints the court with concerns that were not originally evident. The "frontloading" idea should reduce the likelihood that will happen, and the fact that it can happen shows that "preliminary approval" is not final approval. But the question when it becomes necessary to re-notice the class (at least in (b)(3) cases) is worth having in mind.

A related consideration is whether there should be an opportunity for those who opted out to "opt back in" in light of changes made after notice was originally given.

It was noted that practical concerns and objectives should be kept in mind: (1) There is no rule requirement that full certification happen before notice to the class; (2) It is important to enable the court to trigger the time limit for opting out; (3) Rule 23(c)(2)(B) should be given a practical reading to achieve its objective of providing fair notice to class members of the right to opt out; (4) Of necessity, there will be occasions when the actual deal approved by the court differs in some ways from what was initially agreed upon; (5) In some situations, a re-notice is required due to those changes, but not in every case, particularly if the change is favorable to the class; (6) If the change is favorable, it is possible the opt-outs should be allowed to opt back in; and (7) There should nonetheless be some latitude to provide for post-approval notice and a new right to opt out, as contemplated by Rule 23(e)(4). Surely more points of this nature could be identified

Current practice might be said to exist in gaps in the current rule. Current practice calls for final approval of a proposed settlement only after notice to the class, an opportunity to object or opt out, and (if the district court approves the settlement) possible appeal by objectors if the settlement is approved over their objections. Current practice does not require that any change to a proposed deal (perhaps in response to objections) trigger a new right to opt out. There is no requirement that the court notice the class that the settlement has been approved. Class members who do not object can, of course, monitor proceedings in the case. Class members who object will be notified of the court's ruling on their objections, and this notice triggers their time to appeal.

One inviting possibility might be that a national website could be established to provide notice in all class actions nationwide, at least in federal court. One might say that existing MDL practice offers something like that in connection with cases centralized by the Judicial Panel. But a Civil Rule probably can't provide that sort of thing.

A reaction to this discussion was that it may be better for a rule to articulate a standard rather than including a great deal of detail like the sketch before the Subcommittee. What seems to have happened under the current rule is that what some might call "gaps" in the rule have permitted timing practices that seem to work pretty well.

Another member pointed out that the current effort is to get more information up front. But putting more details into the rule probably means that we also need to provide more specifics on class certification, and particularly chronology.

Another member supported including details in the rule. It's simply true in many cases that the "preliminary approval" is something like what that phrase says. Probably 90% of all federal-court class action settlements do not draw objectors. That's the sense in which the district judge is the "main objector." There are no others.

A summary of the discussion emphasized that it would good if the rule could explain how things are to work -- initial review comes first, perhaps with a detailed list of topics for presentation; notice to the class follows; informing class members of the right to object and opt-out, with a schedule for doing so.

It was noted that all of this could be linked to new (b)(4) on settlement certification. Adoption of that provision would introduce something a great deal like "certification without prejudice." At the same time, many of the issues under discussion do not depend on adoption of a (b)(4) settlement certification provision. Instead, they show that there are gaps in the current rule compared to the practice.

One idea that was suggested was to focus on Rule 23(e), which speaks of the claims of "a certified class." That might be a place to build in provisions addressing the concerns under discussion.

Another focus might be pp. 320-21 of the Manual for Complex Litigation (4th), which presents considerable detail about how the process works.

Another point was that the initial hearing is often fairly pro forma at present. The only ones on notice are the proponents of the settlement. This discussion is about the information that should be presented to the judge at that point, and (if something

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along these lines is adopted) that would then be in the record and should be available to the class members as they decide whether to opt out or object.

Summing the overall discussion, the view of the participants in the call was that the general idea of guidance on what the judge should be presented with at the point of authorizing notice to the class is a good one, but that the current sketch does not address things on which the discussion has focused. In all likelihood, it will be important to add some specifics about matters bearing on class certification, and also stress that authorization to send notice does not constitute "preliminary approval" by the court before it has heard from objectors.

Ascertainability

This topic was introduced with two overall reactions: (1) The level of interest in the issues described by the word "ascertainability" suggests that it should be brought forward as a possible topic for rule changes, but (2) It is not at all clear what ascertainability is as a legal doctrine, and even the Third Circuit's treatment leaves some uncertainty about whether it is presently possible to ascertain what ascertainability implicates.

Another participant had a similar reaction. From the perspective of some judges, the problems involved are really not difficult. At least in cases involving low value retail purchases, using an affidavit is a simple way to screen claims. The simplest solution would, like the sketch in the Appendix to these Notes, build on the existing requirement that the court define the class upon granting certification.

Another participant agreed in general, but said that ascertainability is really not the same a class definition. It comes into play in regard to two basic issues -- certification and preclusive effect of the class-action judgment. And this participant thought that the Committee Note to an amendment should say that the rule rejects the Third Circuit *Carrera* doctrine. The most recent effort by the Third Circuit to "explain" that doctrine in the *Byrd* case is almost impossible to follow. This drew agreement. "We should walk back from *Carrera*."

Another point made was that it would be valuable to work hard to be nonpartisan in drafting. That means the effort should be to avoid taking a stance that embraces one side or the other. But that drew the comment that achieving that goal may prove very difficult. Almost any resolution of the issues at the heart of the "ascertainability" debate will appear to take one side or the other.

On this subject, one view was that the ascertainability decisions seem to reflect some hostility to consumer class actions.

Indeed, the debate seems to be very merits related. On the one hand, the concern is that defendants have a right to defend against fraudulent claims. On the other hand, wholehearted embrace of the most aggressive versions of ascertainability could doom consumer class actions, as some judges have noted in declining to follow what they understand to be the *Carrera* view.

One possibility might be to regard these issues as essentially case management matters. Rather than embodying some across-the-board solution, perhaps a rule could be developed that would delegate to the presiding judge the task of dealing with these concerns in the context of the pending case.

It was also suggested that the Third Circuit's *Baby Products* case provides important guidance on the general questions presented, and should be studied.

On the need for action by the Committee, it was noted that there is a clear division among the circuits about how to address this problem, even if there is not an absolutely clear definition of the approach of the Third Circuit and some other circuits, as illustrated by a recent Eleventh Circuit decision.

With these introductory comments, the discussion turned to the pending sketches. One suggestion was that using "ascertainable" in the rule text is probably an invitation to conflict instead of a way to resolve conflict. It was suggested that the same point can be made without using that word -- "so that members of the class can be identified [when necessary] . . ."

Another possible problem is to use the word "objective" in the rule text, because that word has been invoked much in the cases.

This discussion prompted the suggestion that it may be most prudent to be sparing as well as trying to avoid use of charged terms. The pending sketch has various alternatives that address whether the class definition must ensure that all within it have valid claims (whether or not they ultimately come forward to make claims), and/or that "ordinary proofs" including affidavits can be used to establish claims. It may be that Robins v. Spokeo, Inc., 742 F.3d 409 (9th Cir. 2014), cert. granted, 135 S.Ct. 1892 (2015), will shed some light on the proper handling of the "no injury" class, which could also bear on the ascertainability issues.

A very simple version could be:

> An order that certifies a class action must define the class <u>so that members of the class can be identified [when necessary] in [an administratively feasible] {manageable} manner</u>.

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That would leave some of the heavy lifting for the Committee Note. One possibility would be to say in the Note that the *Carrera* approach is rejected, but that would seem to depend on more confidence than presently exists about exactly what that approach is. Another idea for a Note would be to recognize the competing concerns of ensuring the defendant has a genuine opportunity to challenge groundless claims and also ensure that the class action remains a viable device for consumer cases in situations in which valid claims are presented. Perhaps that should be presented as a management issue to be addressed principally on the basis of the specifics of the particular case rather than some general legal rule on ascertainability. This is not the same as the "fail safe" class problem, but involves somewhat similar issues.

One way of looking at it was suggested by a thoughtful *Yale Law Journal* student Note that offered an example -- "everyone who bought a rotisserie chicken from a specific supermarket chain in Florida on Jan. 1, 2000." This is an "objective" definition, but how does one identify members of the class in an administratively feasible manner? Perhaps adding "when necessary" would at least punt on this issue, allowing the parties to say that bridge can be crossed later and assuming the case will actually settle and the court will be presented with an agreed claims processing regime. Trial courts will often say that they are confident they will be able to sort these things out when and if that becomes necessary.

That drew the response that there is probably presently a divide on these questions between two camps. One says something like "trust the judge." The other says something like "insist on certainty up front."

This discussion pointed up the reality that these issues are "enormously case specific." Implicitly, something must assure that class actions cannot be used for legal extortion. It is hard to deny that this core concern is important. But the way in which it's been employed in some cases shows that it can be a very blunt instrument. "This is a hard one."

The conclusion was that we should stay at a high level of generality in the rule text, and avoid using either "ascertainable" or "objective."

Settlement Approval Standards

The final topic on the agenda for the call was to revisit the first item on the "front burner" list -- clarifying the standards for determining whether a proposed settlement is "fair, reasonable, and adequate."

The topic was introduced as presenting questions of at least two general sorts -- whether it would be helpful to try to develop more explicit criteria, and whether these criteria are good ones.

At the April 9 meeting of the full Committee, the advice was to remove (B) in the sketch then before us, which explicitly authorized the judge to reject a settlement that satisfied the four enumerated criteria in (A) on any other ground the judge found important. Relatedly, an issue had been raised in email discussion prompted by a recent Ninth Circuit decision reversing approval of a settlement that some court of appeals criteria may actually have merit, and that "superseding" them could be unfortunate. On the other hand, since the "fair, reasonable and adequate" standard, all by itself, is quite flexible, it would seem adequate to capture anything that a judge would seize upon under (B). A similar drafting issue bears on whether the word "must" should be added:

> the court may approve it [the proposed settlement] only after a hearing <u>and must approve it</u> on finding that<u>:</u>

Finally, Dean Kane (and others) had suggested that some explicit reference to the claims process should be incorporated into the factors. It was noted that this would correspond to the inclusion of that among the various things that should be presented to the judge under the "frontloading" sketch discussed earlier in the call.

A drafting issue involved a choice between Alternative 1 and Alternative 2 of the lead-in in (A). The basic difference was the Alternative 1 retains "fair, reasonable, and adequate" in the prologue as well as in item (ii). That might be regarded as nearly circular; if item (ii) is as broad as suggested above, using the phrase twice could be overkill.

An initial reaction emphasized a judge's view expressed in one of the meetings attended by Subcommittee members that replacing the diverse checklists in different circuits would be very beneficial for judges. At present, this judge really can't give full weight to decisions by district judges outside his circuit because they are using different standards. With a single set of national standards, a body of case law could develop.

One participant was very dubious about whether adopting something like the current sketch -- even without (B) -- will really produce anything like national uniformity, or even change circuit law in any circuit. Though the various circuits use different factors or different words for what seem to be similar factors, the key point is that almost everything they invoke could be linked up to one of the enumerated factors and tied in with the "fair, reasonable, and adequate" standard.

In 2000, the initial drafting of a revised 23(e) began with a very detailed list of factors that were later demoted to Committee Note and then removed from the Note. Many of those factors were in Appendix I to the agenda materials for the April meeting of the full Committee.

Others were less pessimistic about whether adopting a set of factors like those in the sketch would promote uniformity. A rule change is, after, a rule change. It says something should be done differently, and the Committee Note with the current sketch says that it is intended to replace the various factor lists that have dominated many circuits' treatment of things for 30 or 40 years. At a minimum, an amended rule should focus the presentations lawyers will make, and that should prompt judges to focus in much the same way. Perhaps a court of appeals will nonetheless insist that one of its former factors is essential to make a settlement "fair, reasonable, and adequate," but (particularly without (B)) the rule may ward off such reactions.

The conclusion was to move forward. "We should try to push judges who are now speaking essentially eleven dialects into using a single language, even if that does not ensure absolute uniformity." It seemed that there was no dissent from going forward on the basis of Alternative 2 in the April 9 agenda materials (using "fair, reasonable, and adequate" only once) and trying to fit something about the claims process into the rule.

A final comment warned against trying to say that this rule is really "superseding" anything, given the elasticity of the provisions in the sketch.

APPENDIX

SKETCHES ON FRONTLOADING AND ASCERTAINABILITY

Tentative drafting ideas for possible
discussion during May 12 conference call

The following initial sketches attempt to provide a starting point on the two additional topics that have been added to our list of potential subjects for consideration. These sketches may be discussed during our May 12 conference call.

The goal of the sketches is to get the discussion started; to some extent, then, they include possible items that may well not commend themselves to the Subcommittee. As refinement proceeds, it is likely not only that some things included below will be removed, but that new items will be added. Assuming the Subcommittee concludes that serious consideration of these issues should go forward, we will probably want to include sketches of rule changes and Committee Note drafts among the materials for the Sept. 11 mini-conference.

Approving notice to class

(e) **Settlement, Voluntary Dismissal, or Compromise.** The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(A) When seeking approval of notice to the class, the settling parties must present to the court:

(i) details on all provisions of the proposal;

(ii) details regarding any insurance agreement described in Rule 26(a)(2)(A)(iv);

(iii) details on all discovery undertaken by any party, including a description of all materials produced under Rule 34 and identification of all persons whose depositions have been taken;

(iv) a description of any other pending [or foreseen] {or threatened} litigation that may assert claims on behalf of some class members that would be [affected] {released} by the proposal;

(v) identification of any agreement that must be identified under Rule 23(e)(3);

(vi) details on any claims process for class members to receive benefits;

(vii) a forecast [based on expert reports] of the anticipated take-up rate by class members of benefits available under the proposal;

(viii) any plans for disposition of settlement funds remaining after the initial claims process is complected;

(ix) a plan for reporting back to the court on the actual claims history;

(x) the anticipated amount of any attorney fee award to class counsel;

(xi) any provision for deferring payment of part or all of class counsel's attorney fee award to class counsel until the court receives a report on the actual claims history;

(xii) the form of notice that the parties propose sending to the class; and

(xiii) any other matter the parties regard as relevant to whether the proposal should be approved under Rule 23(e)(2).

(B) The court must not direct notice to the class unless satisfied based on the parties' presentation that approval under Rule 23(e)(2) is [substantially] probable. The court may refuse to authorize notice to the class until the parties supply additional information. If the court directs notice to the class, the parties must arrange for class members to have reasonable access to all information provided to the court.

Committee Note Thoughts

In part, the above listing reflects suggestions contained in Judge Bucklo's recent article, What Every Judge Should Know About a Rule 23 Settlement (But Probably Isn't Told), 41 Litigation (no. 3) 18 (Spring 2015).

What to say in a Committee Note really must await clarification on what is in the rule. The above list of features to include in the submission to the court tries to list many we heard about on April 8 (and at other times). The listing may be redundant (everything included within (A)(i) or unduly demanding (for example, (iii), (vii), and (xi). There are surely lots of others that could be added.

Item (ix) may be responsive to the request from Deborah Hensler and several others that courts begin to collect information about the actual pay-outs, etc., in class actions. That is a side effect; the main focus is on the utility of that information in administration of this class action. Nonetheless, the collection of this information might serve the goal urged on us by Prof. Hensler.

Another idea we have heard that is not included is whether unnamed members of the class have expressed views on the proposal. Some have suggested that there be a prod toward seeking such views at this stage. It is not clear how that would be done.

A Note could also say that this decision to send notice is not a "preliminary approval," and emphasize that the approval can come only after the court considers all objections (perhaps as directed by amendments to Rule 23(e)(2)).

(e)(1)(B), then, makes the point that this decision to send notice is only that, and that the accumulated information should be available to the class members. This might be one place to say that electronic means (posting on a "settlement website") would be a useful method of affording access to this information.

But the draft uses something like the preliminary injunction standard ("probability of success on the merits") as the conclusion the court must reach to justify ordering that notice be sent. That may cut against saying this is not a "preliminary approval," although it obviously cannot take account of objections from class members.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses

(1) Certification Order:

* * *

(B) *Defining the Class*~~*; Appointing Class Counsel*~~. An order that certifies a class action must define the class ~~and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g)~~ so that membership in the class is ascertainable by objective criteria in an administratively feasible manner.

Alternative 1

The class definition may include class members who may ultimately prove ineligible for judicial relief.

Alternative 2

The court need not find that all persons included in the class definition will be entitled to relief if the class prevails.

Alternative 3

The class definition is sufficient if class members can be identified through ordinary proofs {including affidavits} prior to issuance of a judgment.

(C) *Defining the Class Claims, Issues, or Defenses*. An order that certifies a class action must define the class claims, issues, or defenses.

(D) *Appointing Class Counsel*. An order that certifies a class action must appoint class counsel under Rule 23(g).

(E~~C~~) *Altering or Amending the Order*. * * *

Committee Note Thoughts

Along with this memo there should be a copy of the recent article The Ascendency of Ascertainability as a Threshold Requirement for Certification, by Jamie Zysk Isani and Jason B. Sherry, from the CCH Class Action Litigation Report (May 4, 2015).

Approaching this issue involves a moving target. The most recent Third Circuit decision suggests that court is still grappling with its ascertainability idea. Other courts of appeals have not directly addressed their take on the Third Circuit view. And the Subcommittee has not discussed the attitude it thinks should be adopted about *Carrera* and kindred cases.

Another issue is suggested by Spokeo, Inc. v. Robins, No. 13-1339, cert. granted, April 27, 2015. This is a proposed class action under the Fair Credit Reporting Act, raising the issue whether the named plaintiff has standing in the absence of an allegation of a concrete injury. Plaintiff alleges online posting of incorrect personal information about him. Defendant contends that he must allege some injury to sue. The basic issue is how to handle the "no injury" class action, as some have labeled the problem. Although that is not the same as the rule's requirements on class definition, it seems related.

The above draft offers two efforts to phrase what the Subcommittee may decide to favor -- a rule requirement that does not require assurances (or a finding) that every person in the defined class has been injured or has a viable claim.

A Committee Note could explore the ascertainability issues at length or limit itself to recognizing that much case law has addressed these issues, and that the rule is designed to handle those problems.

2015 WL 5438797
Only the Westlaw citation is currently available.
United States Court of Appeals,
Second Circuit.

Henry H. BRECHER, individually and on behalf of all others similarly situated, Plaintiff–Appellee,
v.
REPUBLIC OF ARGENTINA,
Defendant–Appellant.

No. 14–4385. | Argued: Aug. 21, 2015. | Decided: Sept. 16, 2015.

Synopsis
Background: Holders of defaulted bonds brought class actions against Republic of Argentina for losses arising out of country's default on roughly $80 to $100 billion of sovereign debt. The United States District Court for the Southern District of New York, Griesa, J., modified the class definition. Republic of Argentina appealed.

[Holding:] The Court of Appeals, Wesley, Circuit Judge, held that modification of class definition by expanding class to all holders of beneficial interests in relevant defaulted bond series without limitation as to time held violated ascertainability requirement.

Vacated and remanded.

Appellant the Republic of Argentina appeals from an order entered on August 29, 2014, in the United States District Court for the Southern District of New York (Griesa, J.), modifying the class definition. On November 25, 2014, a panel of this Court granted permission to appeal pursuant to Federal Rule of Civil Procedure 23(f). Appellant argues that the District Court's new class definition violates the requirements of ascertainability contained in Rule 23 of the Federal Rules of Civil Procedure. We agree and hold that the class definition's reference to objective criteria is insufficient to establish an identifiable and administratively feasible class. We therefore VACATE and REMAND the case for an evidentiary hearing on damages.

Attorneys and Law Firms

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Jason A. Zweig (Steve W. Berman, on the brief), Hagens Berman Sobol Shapiro LLP, New York, NY, for Plaintiff–Appellee.

Before CALABRESI, RAGGI, AND WESLEY, Circuit Judges.

Opinion

WESLEY, Circuit Judge:

***1** Defining the precise class to which Argentina owes damages for its refusal to meet its bond payment obligations and calculating those damages have proven to be exasperating tasks. In this, the fourth time this Court has addressed the methods by which damages must be calculated and the manner in which the class is defined in this case and several similar matters, *see Seijas v. Republic of Argentina (Seijas I*), 606 F.3d 53 (2d Cir.2010); *Hickory Sec., Ltd. v. Republic of Argentina (Seijas II*), 493 F. App'x 156 (2d Cir.2012) (summary order); *Puricelli v. Republic of Argentina* (*Seijas III*), No. 14–2104–cv(L), 797 F.3d 213, 2015 WL 4716474 (2d Cir. Aug.10, 2015), we again must vacate the District Court's order and remand for specific proceedings.

By now, the factual background of these cases is all too familiar. After Argentina defaulted on between $80 and $100 billion of sovereign debt in 2001, *see Seijas I,* 606 F.3d at 55, numerous bondholders, including Appellee here and those in the related *Seijas* cases, filed suit. In Appellee's suit, the District Court entered an order on May 29, 2009, that certified a class under a continuous holder requirement, *i.e.,* the class contained only those individuals who, like Appellee, possessed beneficial interests in a particular bond series issued by the Republic of Argentina from the date of the complaint-December 19, 2006–through the date of final judgment in the District Court. *Cf. Seijas I,* 606 F.3d at 56 (same requirement in class definition).

After this Court held in *Seijas I* and *II* that the District Court's method of calculating damages was inflated and remanded with instructions to conduct an evidentiary hearing, *see Seijas I,* 606 F.3d at 58–59; *Seijas II,* 493 F. App'x at 160, the Appellee in this case offered the District Court an alternative solution to its difficulties in assessing damages—simply modifying the class definition by removing the continuous holder requirement

and expanding the class to all holders of beneficial interests in the relevant bond series without limitation as to time held. The District Court granted the motion, Argentina promptly sought leave to appeal under Rule 23(f) of the Federal Rules of Civil Procedure, and on November 25, 2014, a panel of this Court granted leave to appeal.

DISCUSSION

[1] [2] We review a district court's class certification rulings for abuse of discretion, but we review *de novo* its conclusions of law informing that decision. *In re Pub. Offerings Secs. Litig.*, 471 F.3d 24, 32 (2d Cir.2006). The District Court below neither articulated a standard for ascertainability of its new class nor made any specific finding under such a standard. Absent that analysis, we must determine whether the District Court's ultimate decision to modify the class "rests on an error of law ... [or] cannot be located within the range of permissible decisions."*Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 18 (2d Cir.2003) (internal quotation marks omitted). The District Court's decision rests upon an error of law as to ascertainability; the resulting class definition cannot be located within the range of permissible options.

***2** [3] Like our sister Circuits, we have recognized an "implied requirement of ascertainability" in Rule 23 of the Federal Rules of Civil Procedure. *In re Pub. Offerings Secs. Litig.*, 471 F.3d at 30; *accord, e.g., Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 592–93 (3d Cir.2012); *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir.1970). While we have noted this requirement is distinct from predominance, *see In re Pub. Offerings Secs. Litig.*, 471 F.3d at 45, we have not further defined its content. We here clarify that the touchstone of ascertainability is whether the class is "sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member." 7A CHARLES ALAN WRIGHT & ARTHUR R. MILLER ET AL., FEDERAL PRACTICE & PROCEDURE § 1760 (3d ed.1998); *see also Weiner v. Snapple Beverage Corp.*, No. 07 Civ. 8742(DLC), 2010 WL 3119452, at *12 (S.D.N.Y. Aug.5, 2010) (a class must be "readily identifiable, such that the court can determine who is in the class and, thus, bound by the ruling" (internal quotation marks omitted)).“A class is ascertainable when defined by objective criteria that are administratively feasible and when identifying its members would not require a mini-hearing on the merits of each case."*Charron v. Pinnacle Grp. N.Y. LLC*, 269 F.R.D. 221, 229 (S.D.N.Y.2010) (citations and internal quotation marks omitted).

[4] On appeal, Appellee argues that a class defined by "reference to objective criteria ... is all that is required" to satisfy ascertainability. Appellee Br. at 19. We are not persuaded. While objective criteria may be necessary to define an ascertainable class, it cannot be the case that any objective criterion will do.[1]A class defined as "those wearing blue shirts," while objective, could hardly be called sufficiently definite and readily identifiable; it has no limitation on time or context, and the ever-changing composition of the membership would make determining the identity of those wearing blue shirts impossible. In short, the use of objective criteria cannot alone determine ascertainability when those criteria, taken together, do not establish the definite boundaries of a readily identifiable class.[2]

This case presents just such a circumstance where an objective standard—owning a beneficial interest in a bond series—is insufficiently definite to allow ready identification of the class or the persons who will be bound by the judgment. *See Weiner*, 2010 WL 3119452, at *12. The secondary market for Argentine bonds is active and has continued trading after the commencement of this and other lawsuits. *See NML Capital Ltd. v. Republic of Argentina*, 699 F.3d 246, 251 (2d Cir.2012); *Seijas II*, 493 F. App'x at 160. The nature of the beneficial interest itself and the difficulty of establishing a particular interest's provenance make the objective criterion used here, without more, inadequate. *See Bakalar v. Vavra*, 237 F.R.D. 59, 65–66 (S.D.N.Y.2006) (necessity of individualized inquiries into provenance of artwork made class insufficiently "precise, objective and presently ascertainable" (internal quotation marks omitted)).

***3** Appellee argues that the class here is comparable to those cases involving gift cards, which are fully transferable instruments. However, gift cards are qualitatively different: For example, they exist in a physical form and possess a unique serial number. By contrast, an individual holding a beneficial interest in Argentina's bond series possesses a right to the *benefit* of the bond but does not hold the physical bond itself. Thus, trading on the secondary market changes only to whom the benefit enures. Further, all bonds from the same series have the same trading number identifier (called a CUSIP/ISIN), making it practically impossible to trace purchases and sales of a particular beneficial interest. Thus, when it becomes necessary to determine who holds bonds that opted into (or out of) the class, it will be nearly impossible to distinguish between them once traded on the secondary market. *See Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561, 567 (S.D.N.Y.2014) (observing that

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ascertainability requirement "prevent[s] the certification of a class whose membership is truly indeterminable" (internal quotation marks omitted)).

A hypothetical illustrates this problem. Two bondholders—*A* and *B*—each hold beneficial interests in $50,000 of bonds. *A* opts out of the class, while *B* opts in. Both *A* and *B* then sell their interests on the secondary market to a third party, *C*. *C* now holds a beneficial interest in $100,000 of bonds, half inside the class and half outside the class. If *C* then sells a beneficial interest in $25,000 of bonds to a fourth party, *D*, neither the purchaser nor the court can ascertain whether *D*'s beneficial interest falls inside or outside of the class.[3]Even if there were a method by which the beneficial interests could be traced, determining class membership would require the kind of individualized mini-hearings that run contrary to the principle of ascertainability. *See Charron*, 269 F.R.D. at 229; *Bakalar*, 237 F.R.D. at 64–66. The features of the bonds in this case thus make the modified class insufficiently definite as a matter of law. Although the class as originally defined by the District Court may have presented difficult questions of calculating damages, it did not suffer from a lack of ascertainability. The District Court erred in attempting to address those questions by introducing an ascertainability defect into the class definition.

There remains the question of determining damages on remand. Given that Appellee here is identically situated to the *Seijas* plaintiffs and this Court has already addressed the requirements for determining damages in those cases, we conclude that the District Court should apply the same process dictated by *Seijas II* for calculating the appropriate damages:

> Specifically, it shall: (1) consider evidence with respect to the volume of bonds purchased in the secondary market after the start of the class periods that were not tendered in the debt exchange offers or are currently held by opt-out parties or litigants in other proceedings; (2) make findings as to a reasonably accurate, non-speculative estimate of that volume based on the evidence provided by the parties; (3) account for such volume in any subsequent damage calculation such that an aggregate damage award would "roughly reflect" the loss to each class, *see Seijas I*, 606 F.3d at 58–59; and (4) if no reasonably accurate, non-speculative estimate can be made, then determine how to proceed with awarding damages on an individual basis. Ultimately, if an aggregate approach cannot produce a reasonable approximation of the actual loss, the district court must adopt an individualized approach.

***4** 493 F. App'x at 160; *see also Seijas III*, 797 F.3d 213, 2015 WL 4716474, at *4 (repeating instructions). The hearing will ensure that damages do not "enlarge[ ] plaintiffs' rights by allowing them to encumber property to which they have no colorable claim."*Seijas I*, 606 F.3d at 59.

CONCLUSION

Because we conclude the District Court's order violated the requirement of ascertainability contained in Rule 23, it is not necessary for us to reach the remaining issues raised by Appellant. Therefore, for the reasons stated above, the order of the District Court is VACATED, and the case is REMANDED for an evidentiary hearing on damages.

1 Even Appellee's principal sources for this standard use the requirement in context to observe that *subjective* criteria are inappropriate and, thus, any criteria used in defining a class need to be "objective." Appellee Br. at 20 (citing *Fears v. Wilhelmina Model Agency, Inc.*, No. 02 Civ. 4911 HB, 2003 WL 21659373, at *2 (S.D.N.Y. July 15, 2003); *In re Methyl Tertiary Butyl Ether (MBTE) Prods. Liab. Litig.*, 209 F.R.D. 323, 337 (S.D.N.Y.2002); MANUAL FOR COMPLEX LITIGATION (FOURTH)) § 21.222, at 270 (2004)). This approach accords with our prior discussions of objective criteria. *See In re Initial Pub. Offerings Secs. Litig.*, 471 F.3d at 44–45.

2 Of course, "identifiable" does not mean "identified"; ascertainability does not require a complete list of class members at the certification stage. *See*1 MCLAUGHLIN ON CLASS ACTIONS § 4:2 (11th ed. 2014) ("The class need not be so finely described, however, that every potential member can be specifically identified at the commencement of the action; it is sufficient that the general parameters of membership are determinable at the outset.").

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3 This hypothetical was posed by the panel at oral argument; counsel for Appellee was unable to offer a method by which the District Court would be able to make this determination.

All Citations

--- F.3d ----, 2015 WL 5438797

125-001165

795 F.3d 654
United States Court of Appeals,
Seventh Circuit.

Vince MULLINS, on behalf of himself and all others similarly situated, Plaintiff–Appellee.
v.
DIRECT DIGITAL, LLC, a Delaware Limited Liability Company, Defendant–Appellant.

No. 15–1776. | Argued June 3, 2015. | Decided July 28, 2015.

Synopsis
Background: Consumers brought putative class action against seller of dietary joint supplement, alleging that seller made fraudulent statements about supplement's effectiveness in advertising and marketing materials. The United States District Court for the Northern District of Illinois, Charles R. Norgle, J., 2014 WL 5461903, granted motion to certify the class. Seller appealed.

Holdings: The Court of Appeals, Hamilton, Circuit Judge, held that:

[1] federal rules do not impose a heightened ascertainability requirement for class certification;

[2] class definition satisfied certification requirements;

[3] district court did not abuse its discretion in deferring ascertainability and management issues; and

[4] questions of law were common to the class.

Affirmed.

Attorneys and Law Firms

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Before BAUER, KANNE, and HAMILTON, Circuit Judges.

Opinion

HAMILTON, Circuit Judge.

We agreed to hear this appeal under Federal Rule of Civil Procedure 23(f), which permits interlocutory review of orders granting or denying class action certification, to address whether Rule 23(b)(3) imposes a heightened "ascertainability" requirement as the Third Circuit and some district courts have held recently. See, e.g., *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir.2013). In this case, the plaintiff alleges consumer fraud by the seller of a dietary supplement, and the district court certified a plaintiff class. The court found that the proposed class satisfies the explicit requirements of Rule 23(a) and (b)(3), and the court rejected's argument that Rule 23(b)(3) implies a heightened ascertainability requirement.

[1] We affirm. We and other courts have long recognized an implicit requirement under Rule 23 that a class must be defined clearly and that membership be defined by objective criteria rather than by, for example, a class member's state of mind. In addressing this requirement, courts have sometimes used the term "ascertainability." They have applied this requirement to all class actions, regardless of whether certification was sought under Rule 23(b)(1), (2), or (3). Class definitions have failed this requirement when they were too vague or subjective, or when class membership was defined in terms of success on the merits (so-called "fail-safe" classes). This version of ascertainability is well-settled in our circuit, and this class satisfies it.

More recently, however, some courts have raised the bar for class actions under Rule 23(b)(3). Using the term "ascertainability," at times without recognizing the extension, these courts have imposed a new requirement that plaintiffs prove at the certification stage that there is a "reliable and administratively feasible" way to identify all who fall within the class definition. These courts have moved beyond examining the adequacy of the class definition itself to examine the potential difficulty of

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identifying particular members of the class and evaluating the validity of claims they might eventually submit. See *Byrd v. Aaron's Inc.,* 784 F.3d 154, 168 (3d Cir.2015) (distinguishing between our circuit's standard and the Third Circuit's ascertainability requirement).

This heightened requirement has defeated certification, especially in consumer class actions. See, e.g., *Karhu v. Vital Pharmaceuticals, Inc.,* ——Fed.Appx. ——, —— – ——, 2015 WL 3560722, at *2–4 (11th Cir. June 9, 2015) (purchasers of dietary supplements); *Carrera,* 727 F.3d at 307–12 (purchasers of dietary supplements); *Xavier v. Philip Morris USA Inc.,* 787 F.Supp.2d 1075, 1089–90 (N.D.Cal.2011) (Marlboro smokers); *Weiner v. Snapple Beverage Corp.,* No. 07 Civ. 8742(DLC), 2010 WL 3119452, at *12–13 (S.D.N.Y. Aug. 5, 2010) (purchasers of Snapple beverages). All of these classes would seem to have satisfied the established meaning of "ascertainability." See generally Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small–Claims Consumer Class Actions,* 59 DePaul L.Rev. 305 (2010) (describing recent cases).

***658** [2] We decline to follow this path and will stick with our settled law. Nothing in Rule 23 mentions or implies this heightened requirement under Rule 23(b)(3), which has the effect of skewing the balance that district courts must strike when deciding whether to certify classes. The policy concerns motivating the heightened ascertainability requirement are better addressed by applying carefully the explicit requirements of Rule 23(a) and especially (b)(3). These existing requirements already address the balance of interests that Rule 23 is designed to protect. A court must consider "the likely difficulties in managing a class action," but in doing so it must balance countervailing interests to decide whether a class action "is superior to other available methods for fairly and efficiently adjudicating the controversy." See Fed.R.Civ.P. 23(b)(3).

The heightened ascertainability requirement upsets this balance. In effect, it gives one factor in the balance absolute priority, with the effect of barring class actions where class treatment is often most needed: in cases involving relatively low-cost goods or services, where consumers are unlikely to have documentary proof of purchase. These are cases where the class device is often essential "to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 617, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), quoting *Mace v. Van Ru Credit Corp.,* 109 F.3d 338, 344 (7th Cir.1997); see also *Suchanek v. Sturm Foods, Inc.,* 764 F.3d 750, 760 (7th Cir.2014) (reversing denial of class certification: "a class action has to be unwieldy indeed before it can be pronounced an inferior alternative—no matter how massive the fraud or other wrongdoing that will go unpunished if class treatment is denied—to no litigation at all"), quoting *Carnegie v. Household Int'l, Inc.,* 376 F.3d 656, 661 (7th Cir.2004) (affirming certification of class with millions of members).

I. *Factual and Procedural Background*

Plaintiff Vince Mullins sued defendant Direct Digital, LLC for fraudulently representing that its product, Instaflex Joint Support, relieves joint discomfort. He alleges that statements on the Instaflex labels and marketing materials—"relieve discomfort," "improve flexibility," "increase mobility," "support cartilage repair," "scientifically formulated," and "clinically tested for maximum effectiveness"—are fraudulent because the primary ingredient in the supplement (glucosamine sulfate) is nothing more than a sugar pill and there is no scientific support for these claims. Mullins asserts that Direct Digital is liable for consumer fraud under the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq.,* and similar consumer protection laws in nine other states.

Mullins moved to certify a class of consumers "who purchased Instaflex within the applicable statute of limitations of the respective Class States for personal use until the date notice is disseminated." The district court certified the class under Rule 23(b)(3).

Direct Digital filed a petition for leave to appeal under Rule 23(f) arguing that the district court abused its discretion in certifying the class without first finding that the class was "ascertainable." Direct Digital also argued that the district court erred by concluding that the efficacy of a health product can qualify as a "common" question under Rule 23(a)(2). We granted the Rule 23(f) petition primarily to address the developing law of ascertainability, including among district courts within this circuit. See *Blair v. Equifax Check Services, Inc.,* 181 F.3d 832, 835 (7th Cir.1999) (granting an appeal is appropriate to "facilitate ***659** the development of the law" governing class actions).[1]

1 Compare *Jenkins v. White Castle Mgmt. Co.,* No. 12 CV 7273, 2015 WL 832409, at *3–4 (N.D.Ill. Feb. 25,

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2015) (favorably citing *Carrera* and denying certification), with *Boundas v. Abercrombie & Fitch Stores, Inc.,* 280 F.R.D. 408, 417–18 (N.D.Ill.2012) (rejecting stringent version of ascertainability and certifying class); see also *Balschmiter v. TD Auto Finance LLC,* 303 F.R.D. 508, 514 (E.D.Wis.2014) (noting "a dearth of case law from this circuit on the requirement" of ascertainability and discussing Third Circuit precedent); *Harris v. comScore, Inc.,* 292 F.R.D. 579, 587–88 (N.D.Ill.2013) (favorably citing Third Circuit precedent adopting heightened ascertainability but also the district court opinion in *Carrera,* which was later vacated by the Third Circuit).

[3] We review the grant or denial of a motion for class certification for an abuse of discretion, e.g., *Harper v. Sheriff of Cook County,* 581 F.3d 511, 514 (7th Cir.2009), but a decision based on an erroneous view of the law, such as imposing a new requirement under Rule 23(b)(3), is likely to be an abuse of discretion. E.g., *Ervin v. OS Restaurant Services, Inc.,* 632 F.3d 971, 976 (7th Cir.2011) ("If, however, the district court applies an incorrect legal rule as part of its decision, then the framework within which it has applied its discretion is flawed, and the decision must be set aside as an abuse.").

II. *Analysis*

A. *The Established Meaning of "Ascertainability"*

We begin with the current state of the law in this circuit. Rule 23 requires that a class be defined, and experience has led courts to require that classes be defined clearly and based on objective criteria. See William B. Rubenstein, *Newberg on Class Actions* § 3:3 (5th ed.2015); Joseph M. McLaughlin, *McLaughlin on Class Actions* § 4:2 (11th ed.2014); see, e.g., *Matamoros v. Starbucks Corp.,* 699 F.3d 129, 139 (1st Cir.2012); *Bakalar v. Vavra,* 237 F.R.D. 59, 64 (S.D.N.Y.2006); *DeBremaecker v. Short,* 433 F.2d 733, 734 (5th Cir.1970) (per curiam). When courts wrote of this implicit requirement of "ascertainability," they trained their attention on the adequacy of the class definition itself. They were not focused on whether, given an adequate class definition, it would be difficult to identify particular members of the class.

This "weak" version of ascertainability has long been the law in this circuit. See *Jamie S. v. Milwaukee Public Schools,* 668 F.3d 481, 495 (7th Cir.2012) ("It's not hard to see how this class lacks the definiteness required for class certification; there is no way to know or readily ascertain who is a member of the class."); *Oshana v. Coca–Cola Co.,* 472 F.3d 506, 513 (7th Cir.2006) (class definition "must be definite enough that the class can be ascertained"); accord, *Adashunas v. Negley,* 626 F.2d 600, 604 (7th Cir.1980) ("In summary, the proposed class of plaintiffs is so highly diverse and so difficult to identify that it is not adequately defined or nearly ascertainable.").

The language of this well-settled requirement is susceptible to misinterpretation, though, which may explain some of the doctrinal drift described below. To understand its established meaning, it's better to focus on the three common problems that have caused plaintiffs to flunk this requirement.

[4] First, classes that are defined too vaguely fail to satisfy the "clear definition" component. See, e.g., *Young v. Nationwide Mutual Ins. Co.,* 693 F.3d 532, 538 (6th Cir.2012) ("There can be no class action if the proposed class is amorphous or imprecise." (citation and internal quotation marks omitted)); *APB Associates, Inc. v. Bronco's Saloon, Inc.,* 297 F.R.D. 302, 316 (E.D.Mich.2013) (denying certification because ***660** proposed class definition was too "imprecise and amorphous"); *DeBremaecker,* 433 F.2d at 734 (affirming denial of certification for proposed class defined as residents "active in the 'peace movement' "); 7A Charles Alan Wright et al., *Federal Practice & Procedure* § 1760 (3d ed.2005) (collecting cases). Vagueness is a problem because a court needs to be able to identify who will receive notice, who will share in any recovery, and who will be bound by a judgment. See *Kent v. SunAmerica Life Ins. Co.,* 190 F.R.D. 271, 278 (D.Mass.2000). To avoid vagueness, class definitions generally need to identify a particular group, harmed during a particular time frame, in a particular location, in a particular way. See *McLaughlin on Class Actions* § 4:2; see, e.g., *Rodriguez v. Berrybrook Farms, Inc.,* 672 F.Supp. 1009, 1012 (W.D.Mich.1987) (granting certification and noting the class definition specified "a group of agricultural laborers during a specific time frame and at a specific location who were harmed in a specific way").

[5] Second, classes that are defined by subjective criteria, such as by a person's state of mind, fail the objectivity requirement. E.g., *Simer v. Rios,* 661 F.2d 655, 669–70 (7th Cir.1981) (affirming denial of certification of class of people who felt discouraged from applying for government energy assistance); *Alliance to End Repression v. Rochford,* 565 F.2d 975, 977–78 (7th

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Cir.1977) (affirming certification of class defined by actions of defendants rather than class members' states of mind); *Harris v. General Development Corp.*, 127 F.R.D. 655, 659 (N.D.Ill.1989) (denying class certification of proposed subclass defined by mental state: "The proposed class of persons who allegedly were discouraged from applying at GDC is too imprecise and speculative to be certified."); 7A Wright et al., *Federal Practice & Procedure* § 1760 (collecting cases). Plaintiffs can generally avoid the subjectivity problem by defining the class in terms of conduct (an objective fact) rather than a state of mind. See, e.g., *National Org. for Women, Inc. v. Scheidler*, 172 F.R.D. 351, 358–59 (N.D.Ill.1997) (accepting modified class definition so that "membership in the classes sought to be certified is based exclusively on the defendants' conduct with no particular state of mind required"); *Newberg on Class Actions* § 3:5.

[6] Third, classes that are defined in terms of success on the merits—so-called "fail-safe classes"—also are not properly defined. See *In re Nexium Antitrust Litig.*, 777 F.3d 9, 22 (1st Cir.2015); *Young*, 693 F.3d at 538; *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir.2012); *Randleman v. Fidelity Nat'l Title Ins. Co.*, 646 F.3d 347, 352 (6th Cir.2011); but see *In re Rodriguez*, 695 F.3d 360, 369–70 (5th Cir.2012) (affirming fail-safe class certification). Defining the class in terms of success on the merits is a problem because "a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment." *Messner*, 669 F.3d at 825. This raises an obvious fairness problem for the defendant: the defendant is forced to defend against the class, but if a plaintiff loses, she drops out and can subject the defendant to another round of litigation. See Erin L. Geller, Note, *The Fail–Safe Class as an Independent Bar to Class Certification*, 81 Fordham L.Rev. 2769 (2013). The key to avoiding this problem is to define the class so that membership does not depend on the liability of the defendant.

[7] The class definition in this case complies with this settled law and avoids all of these problems. It is not vague. It identifies a particular group of individuals (purchasers of Instaflex) harmed in a particular way (defrauded by labels and marketing ***661** materials) during a specific period in particular areas. The class definition also is not based on subjective criteria. It focuses on the act of purchase and Direct Digital's conduct in labeling and advertising the product. It also does not create a fail-safe class. If Direct Digital prevails, *res judicata* will bar class members from re-litigating their claims.

Direct Digital argues, however, that we should demand more. It urges us to adopt a new component to the ascertain-ability requirement that goes beyond the adequacy of the class definition itself. Drawing on recent decisions by the Third Circuit, Direct Digital argues that class certification should be denied if the plaintiff fails to show a reliable and administratively feasible way to determine whether a particular person is a member of the class. And, Direct Digital continues, affidavits from putative class members are insufficient as a matter of law to satisfy this requirement.

In support of this argument, Direct Digital asserts that the only method of identifying class members here is by affidavit from the putative class members themselves. That remains to be seen. We do not know yet what sales and customer records Direct Digital has. We assume for purposes of this decision that Direct Digital will have no records for a large number of retail customers. We also assume that many consumers of Instaflex are unlikely to have kept their receipts since it's a relatively inexpensive consumer good.

B. *The Recent Expansion of "Ascertainability"*

To understand the genesis of Direct Digital's argument, we briefly summarize the law of the Third Circuit, which has adopted this more stringent version of ascertainability. The Third Circuit's innovation began with *Marcus v. BMW of North America, LLC*, 687 F.3d 583 (3d Cir.2012), where the court vacated certification of a poorly defined class. The decisive portion of the opinion, *id.* at 592–94, certainly seems sound, but the opinion went on to caution that on remand, if defendants' records would not identify class members, the district court should not approve a method relying on "potential class members' say so," and the opinion said that reliance on class members' affidavits might not be "proper or just," *id.* at 594 (internal quotation marks omitted). The opinion did not explain this new requirement other than to cite an easily distinguishable district court decision.

Since *Marcus*, the court has applied this heightened ascertainability requirement in several more cases: *Hayes v. Wal–Mart Stores, Inc.*, 725 F.3d 349, 354–56 (3d Cir.2013); *Carrera v. Bayer Corp.*, 727 F.3d 300, 305–12 (3d Cir.2013); *Grandalski v. Quest Diagnostics Inc.*, 767 F.3d 175, 184–85 (3d Cir.2014); *Shelton v. Bledsoe*, 775 F.3d 554, 559–63 (3d Cir.2015); *Byrd v. Aaron's Inc.*,

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784 F.3d 154, 161–71 (3d Cir.2015). As the requirement has evolved, several members of the court have expressed doubts about the expanding ascertainability doctrine. See *Byrd*, 784 F.3d at 172–77 (Rendell, J., concurring); *Carrera v. Bayer Corp.*, No. 12–2621, 2014 WL 3887938, at *1–3 (3d Cir. May 2, 2014) (Ambro, J., dissenting from denial of rehearing en banc).[2]

[2] The Eleventh Circuit recently applied a fairly strong version of an ascertainability requirement in a non-precedential decision, *Karhu v. Vital Pharmaceuticals, Inc.*, —— Fed.Appx. ——, —— – ——, 2015 WL 3560722, at *2–4 (11th Cir. June 9, 2015) (unpublished). Some courts have followed the Third Circuit's innovation. See, e.g., *Jenkins v. White Castle Mgmt. Co.*, No. 12 CV 7273, 2015 WL 832409, at *3–4 (N.D.Ill. Feb. 25, 2015); *Jones v. ConAgra Foods, Inc.*, No. C 12–01633 CRB, 2014 WL 2702726, at *8–11 (N.D.Cal. June 13, 2014), appeal docketed, No. 14–16327; *Sethavanish v. ZonePerfect Nutrition Co.*, No. 12–2907–SC, 2014 WL 580696, at *5–6 (N.D.Cal. Feb. 13, 2014). Others have rejected it. See, e.g., *Daniels v. Hollister Co.*, 440 N.J.Super. 359, 113 A.3d 796, 798–803 (N.J.App.2015); *Rahman v. Mott's LLP*, No. 13–cv–03482–SI, 2014 WL 6815779, at *4 (N.D.Cal. Dec. 3, 2014); *Lilly v. Jamba Juice Co.*, No. 13–cv–02998–JST, 2014 WL 4652283, at *4–6 (N.D.Cal. Sept. 18, 2014); *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 565–67 (C.D.Cal.2014).

***662** As it stands now, the Third Circuit's test for ascertainability has two prongs: (1) the class must be "defined with reference to objective criteria" (consistent with long-established law discussed above), and (2) there must be "a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." *Byrd*, 784 F.3d at 163, quoting *Hayes*, 725 F.3d at 355; see also *Shelton*, 775 F.3d at 560 (making clear that "the question of ascertainability" is separate from "the question of whether the class was properly defined").

This second requirement sounds sensible at first glance. Who could reasonably argue that a plaintiff should be allowed to certify a class whose members are impossible to identify? In practice, however, some courts have used this requirement to erect a nearly insurmountable hurdle at the class certification stage in situations where a class action is the only viable way to pursue valid but small individual claims.

The demands of this heightened requirement are most apparent from the Third Circuit's discussion of self-identification by affidavit. It has said that affidavits from putative class members cannot satisfy the stringent ascertainability requirement. See *Carrera*, 727 F.3d at 308–12 (remanding to give plaintiff "another opportunity to satisfy the ascertainability requirement" but rejecting plaintiff's attempt to use affidavits from class members to show their purchases of weight loss supplement); *Hayes*, 725 F.3d at 356 ("But the nature or thoroughness of a defendant's recordkeeping does not alter the plaintiff's burden to fulfill Rule 23's requirements."); *Marcus*, 687 F.3d at 594 ("We caution, however, against approving a method that would amount to no more than ascertaining by potential class members' say so."). Direct Digital urges us to adopt this rule and to reverse the certification order here because the only method for identifying class members proposed by Mullins in the district court was self-identification by affidavit.

We decline to do so. The Third Circuit's approach in *Carrera*, which is at this point the high-water mark of its developing ascertainability doctrine, goes much further than the established meaning of ascertainability and in our view misreads Rule 23. *Carrera* and cases like it have given four policy reasons for requiring more than affidavits from putative class members. We address each one below and find them unpersuasive.

[8] In general, we think imposing this stringent version of ascertainability does not further any interest of Rule 23 that is not already adequately protected by the Rule's explicit requirements. On the other side of the balance, the costs of imposing the requirement are substantial. The stringent version of ascertainability effectively bars low-value consumer class actions, at least where plaintiffs do not have documentary proof of purchases, and sometimes even when they do. Accordingly, we conclude that the district court here did not abuse its discretion by deferring until later in the litigation decisions about more detailed aspects of ascertainability and the management of any claims process. At bottom, the district court was correct not to let a quest for perfect treatment of one issue become a reason to deny class certification and with it the hope of any effective relief at all.

We now turn to the policy concerns identified by the courts that have embraced ***663** this heightened ascertainability requirement. The policy concerns are substantial and legitimate, but we do not believe they justify the new requirement. As will become clear, we agree in essence with Judge Rendell's concurring opinion in *Byrd*, 784 F.3d at 172–77, which urged "retreat from

[the] heightened ascertainability requirement in favor of following the historical meaning of ascertainability under Rule 23," *id.* at 177.

1. *Administrative Convenience*

Some courts have argued that imposing a stringent version of ascertainability "eliminates serious administrative burdens that are incongruous with the efficiencies expected in a class action by insisting on the easy identification of class members." *Marcus*, 687 F.3d at 593 (citation and internal quotation marks omitted). It does this by ensuring that the court will be able to identify class members without "extensive and individualized fact-finding or mini-trials." *Carrera*, 727 F.3d at 307 (citation and internal quotation marks omitted).

This concern about administrative inconvenience is better addressed by the explicit requirements of Rule 23(b)(3), which requires that the class device be "superior to other available methods for fairly and efficiently adjudicating the controversy." One relevant factor is "the likely difficulties in managing a class action." Fed.R.Civ.P. 23(b)(3)(D).

[9] The superiority requirement of Rule 23(b)(3) is clarified by substantial case law. See 7AA Wright et al., *Federal Practice & Procedure* §§ 1779, 1780. Imposing a stringent version of ascertainability because of concerns about administrative inconvenience renders the manageability criterion of the superiority requirement superfluous. See Daniel Luks, Note, *Ascertainability in the Third Circuit: Name That Class Member*, 82 Fordham L.Rev. 2359, 2395 (2014). It also conflicts with the well-settled presumption that courts should not refuse to certify a class merely on the basis of manageability concerns. See, e.g., *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 140 (2d Cir.2001) (Sotomayor, J.) (noting that failure to certify a class action under Rule 23(b)(3) solely on manageability grounds is generally disfavored), *overruled on other grounds by In re IPO*, 471 F.3d 24 (2d Cir.2006); accord, *Byrd*, 784 F.3d at 175 (Rendell, J., concurring) ("Imposing a proof-of-purchase requirement does nothing to ensure the manageability of a class or the 'efficiencies' of the class action mechanism; rather, it obstructs certification by assuming that hypothetical roadblocks will exist at the claims administration stage of the proceedings.").

A reader might fairly ask whether there is any practical difference between addressing administrative inconvenience as a matter of ascertainability versus as a matter of superiority. In fact, there is. When administrative inconvenience is addressed as a matter of ascertainability, courts tend to look at the problem in a vacuum, considering only the administrative costs and headaches of proceeding as a class action. See, e.g., *Sethavanish*, 2014 WL 580696, at *6 (purchasers of "all natural" nutrition bars sold through retailers; denying class certification solely on the ground of ascertainability without addressing other available methods for adjudicating the controversy). But when courts approach the issue as part of a careful application of Rule 23(b)(3)'s superiority standard, they must recognize both the costs *and benefits* of the class device. See 7AA Wright et al., *Federal Practice & Procedure* § 1780 ("Viewing the potential administrative difficulties from a comparative perspective seems sound and a decision against class-action treatment should be rendered only ***664** when the ministerial efforts simply will not produce corresponding efficiencies. In no event should the court use the possibility of becoming involved with the administration of a complex lawsuit as a justification for evading the responsibilities imposed by Rule 23.").

Rule 23(b)(3)'s superiority requirement, unlike the freestanding ascertainability requirement, is comparative: the court must assess efficiency with an eye toward "other available methods." In many cases where the heightened ascertainability requirement will be hardest to satisfy, there realistically is no other alternative to class treatment. See *id.* ("If judicial management of a class action ... will reap the rewards of efficiency and economy for the entire system that the drafters of the federal rule envisioned, then the individual judge should undertake the task. Ironically, those Rule 23(b)(3) actions requiring the most management may yield the greatest pay-off in terms of effective dispute resolution."); cf. *Schleicher v. Wendt*, 618 F.3d 679, 686–87 (7th Cir.2010) (rejecting defendant's invitation to "tighten" Rule 23 requirements for class certification and noting that doing so would make certification impossible in many securities fraud cases).

This does not mean, of course, that district courts should automatically certify classes in these difficult cases. But it does mean that before refusing to certify a class that meets the requirements of Rule 23(a), the district court should consider the alternatives as Rule 23(b)(3) instructs rather than denying certification because it may be

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challenging to identify particular class members. District courts have considerable experience with and flexibility in engineering solutions to difficult problems of case management.

[10] In addition, a district judge has discretion to (and we think normally should) wait and see how serious the problem may turn out to be after settlement or judgment, when much more may be known about available records, response rates, and other relevant factors. And if a problem is truly insoluble, the court may decertify the class at a later stage of the litigation. See *Carnegie v. Household Int'l, Inc.,* 376 F.3d 656, 661 (7th Cir.2004).

If faced with what appear to be unusually difficult manageability problems at the certification stage, district courts have discretion to insist on details of the plaintiff's plan for notifying the class and managing the action. In conducting this inquiry, district courts should consider also whether the administrative burdens can be eased by the procedures set out in Rule 23(c) and (d). See, e.g., *Bobbitt v. Academy of Court Reporting, Inc.,* 252 F.R.D. 327, 344–45 (E.D.Mich.2008) (granting class certification despite potential manageability problems and noting options "a special master, representative trials, or other means" to manage the problems).

[11] Under this comparative framework, refusing to certify on manageability grounds alone should be the last resort. See *Carnegie,* 376 F.3d at 661 ("a class action has to be unwieldy indeed before it can be pronounced an inferior alternative—no matter how massive the fraud or other wrongdoing that will go unpunished if class treatment is denied—to no litigation at all"), quoted in *Suchanek,* 764 F.3d at 760. In all events, deciding whether and when to insist on details, and how many details, are matters for the sound discretion of district judges who have so much first-hand experience managing class actions.

On the other hand, if courts look only at the cost-side of the equation and fail to consider administrative solutions like those available under Rule 23(c) and (d), courts will err systematically against certification. See Geoffrey C. Shaw, Note, *Class Ascertainability,* ***665** 124 Yale L.J. 2354, 2396–99 (2015) (explaining why addressing issue of manageability under umbrella of superiority is preferable to addressing it as a matter of ascertainability). The stringent version of ascertainability invites precisely this type of systemic error.

2. *Unfairness to Absent Class Members*

Courts also have asserted that the heightened ascertainability requirement is needed to protect absent class members. If the identities of absent class members cannot be ascertained, the argument goes, it is unfair to bind them by the judicial proceeding. See *Carrera,* 727 F.3d at 307; *Marcus,* 687 F.3d at 593. A central premise of this argument is that class members must receive actual notice of the class action so that they do not lose their opt-out rights.

[12] We believe that premise is mistaken. For Rule 23(b)(3) classes, Rule 23(c)(2)(B) requires the "best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." The rule does not insist on actual notice to all class members in all cases. It recognizes it might be *impossible* to identify some class members for purposes of actual notice. See Shaw, 124 Yale L.J. at 2367–69. While actual individual notice may be the ideal, due process does not always require it. See *Mirfasihi v. Fleet Mortgage Corp.,* 356 F.3d 781, 786 (7th Cir.2004) (rejecting requirement of individual notice); *Juris v. Inamed Corp.,* 685 F.3d 1294, 1321 (11th Cir.2012) (noting that "even in Rule 23(b)(3) class actions, due process does not require that class members actually receive notice" and collecting cases); accord, *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 811–12, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985); *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314–15, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

[13] [14] When class members' names and addresses are known or knowable with reasonable effort, notice can be accomplished by first-class mail. See, e.g., *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 174–75, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). When that is not possible, courts may use alternative means such as notice through third parties, paid advertising, and/or posting in places frequented by class members, all without offending due process. See *Hughes v. Kore of Indiana Enterprise, Inc.,* 731 F.3d 672, 676–77 (7th Cir.2013). As long as the alternative means satisfy the standard of Rule 23(b)(3), there is no due process violation. See, e.g., *Lilly v. Jamba Juice Co.,* No. 13–cv–02998–JST, 2014 WL 4652283, at *5 (N.D.Cal. Sept. 18, 2014) (rejecting notice argument for same reason); *Boundas v. Abercrombie & Fitch Stores, Inc.,* 280 F.R.D. 408, 418 (N.D.Ill.2012) (same). Due process simply does not require the ability to identify all members of the class at the certification stage.

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More broadly, the stringent version of ascertainability loses sight of a critical feature of class actions for low-value claims like this one. In these cases, "only a lunatic or a fanatic" would litigate the claim individually, *Carnegie v. Household Int'l, Inc.,* 376 F.3d 656, 661 (7th Cir.2004), so opt-out rights are not likely to be exercised by anyone planning a separate individual lawsuit. When this is true, it is particularly important that the types of notice that courts require correspond to the value of the absent class members' interests. Cf. *Mathews v. Eldridge,* 424 U.S. 319, 334–35, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). That is why in *Hughes,* for example, where each plaintiff's claim was valued at approximately $1,000 or less, we approved a notice plan consisting of sticker notices on the defendant's two ATMs, publication ***666** of a notice in the primary local newspaper, and notice on a website. *Hughes,* 731 F.3d at 676–77. We did not insist on first-class mail even though the notice plan likely would not reach everyone in the class. We approved the plan because the notice plan was "commensurate with the stakes." *Id.* at 676.

The heightened ascertainability approach upsets this balance. It comes close to insisting on actual notice to protect the interests of absent class members, yet overlooks the reality that without certification, putative class members with valid claims would not recover anything at all. See *Amchem,* 521 U.S. at 617, 117 S.Ct. 2231; *Eisen,* 417 U.S. at 161, 94 S.Ct. 2140; *Hughes,* 731 F.3d at 677; *Butler v. Sears, Roebuck & Co.,* 727 F.3d 796, 798 (7th Cir.2013); see also, e.g., *Ebin v. Kangadis Food Inc.,* 297 F.R.D. 561, 567 (S.D.N.Y.2014) ("Against this background, the ascertainability difficulties, while formidable, should not be made into a device for defeating the action."); *Astiana v. Kashi Co.,* 291 F.R.D. 493, 500 (S.D.Cal.2013) ("If class actions could be defeated because membership was difficult to ascertain at the class certification stage, there would be no such thing as a consumer class action." (citation and internal quotation marks omitted)). When it comes to protecting the interests of absent class members, courts should not let the perfect become the enemy of the good.

3. *Unfairness to Bona Fide Class Members*

The third concern offered to justify the heightened ascertainability requirement is the interests of class members with valid claims. Courts have expressed concern that if class members are identified only by their own affidavits, individuals without a valid claim will submit erroneous or fraudulent claims and dilute the share of recovery for true class members. See *Carrera,* 727 F.3d at 310 ("It is unfair to absent class members if there is a significant likelihood their recovery will be diluted by fraudulent or inaccurate claims.").[3]

[3] *Bello v. Beam Global Spirits & Wine, Inc.,* No. 11–5149 (NLH/KMW), 2015 WL 3613723 (D.N.J. June 9, 2015), is a striking example of how demanding this approach has become, requiring something close to perfection in identifying class members. When the plaintiff first moved to certify a class of consumers who had purchased a beverage product, she attempted to satisfy the ascertainability requirement with affidavits from putative class members. The court, relying on the recent Third Circuit cases, denied the motion without prejudice and gave her another opportunity to propose "a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." *Id.* at *11, quoting *Hayes,* 725 F.3d at 355. The plaintiff renewed her motion, this time proposing a detailed screening method to weed out mistaken or fraudulent claims. See *id.* at *6–7 (describing three levels of review). The court denied her renewed motion, holding that even this screening method failed to satisfy *Carrera's* heightened ascertainability requirement. See *id.* at *11–14. At one point, the court wrote that even an affidavit *plus a receipt* would not be enough to clear the ascertainability hurdle. See *id.* at *12.

Again, this concern about the danger of fraudulent or mistaken claims is legitimate and understandable, especially when contemplating the prospect that money might seem available just for the asking. In the words of then-future President John Adams, "it is prudent not to put virtue to too serious a test." 2 John Adams, *The Works of John Adams, Second President of the United States: Diary, with A Life of the Author, Notes & Illustrations* 457 (Charles Francis Adams ed. 1850) (during 1775 debate on whether to open ports for trade and the need for customs officials to regulate the ports).

***667** We see two problems with using these concerns to impose the heightened ascertainability standard. First, in practice, the risk of dilution based on fraudulent or mistaken claims seems low, perhaps to the point of being negligible. We are aware of no empirical evidence that the risk of dilution caused by inaccurate or fraudulent claims in the typical low-value consumer class action is significant. In most cases, the expected recovery is so

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small that we question whether many people would be willing to sign affidavits under penalty of perjury saying that they purchased the good or service. See *Byrd*, 784 F.3d at 175 (Rendell, J., concurring). In this case, for example, the value of each claim is approximately $70 (the retail price). Direct Digital has provided no evidence, and we have found none, that claims of this magnitude have provoked the widespread submission of inaccurate or fraudulent claims.

We could be wrong, of course, about this empirical prediction. Suppose people are more willing to file inaccurate or fraudulent claims for low-value recoveries than we suspect. Even then, the risk of dilution appears small because only a tiny fraction of eligible claimants ever submit claims for compensation in consumer class actions. See Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 Fla. L.Rev. 71, 119–20 (2007) (noting that it is not unusual to have participation rates of 10 to 15 percent and examining more recent examples of rates lower than 5 percent). Any participation rate less than 100 percent leaves unclaimed funds in the pot, whether it is a judgment award or a settlement fund. When there are unclaimed funds, the addition of a fraudulent or inaccurate claim typically does not detract from a bona fide class member's recovery because the non-deserving claimant merely takes from unclaimed funds, not the deserving class member. It is of course theoretically possible that the total sum claimed by non-deserving claimants exceeds the total amount of unclaimed funds, in which case there would be dilution, but given the low participation rates actually observed in the real world, this danger is not so great that it justifies denying class certification altogether, at least without empirical evidence supporting the fear. See Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small–Claims Consumer Class Actions*, 59 DePaul L.Rev. 305, 315 (2010) (given actual claims rates in practice, "it is simply not true that compensation of uninjured parties affects the compensation interests of injured class members"). *Carrera* and cases like it have given no reason to think otherwise.

We recognize that the risk of mistaken or fraudulent claims is not zero. But courts are not without tools to combat this problem during the claims administration process. They can rely, as they have for decades, on claim administrators, various auditing processes, sampling for fraud detection, follow-up notices to explain the claims process, and other techniques tailored by the parties and the court to take into account the size of the claims, the cost of the techniques, and an empirical assessment of the likelihood of fraud or inaccuracy. See Manual for Complex Litigation §§ 21.66–.661 (4th ed.2004); *Newberg on Class Actions* § 12:20; see also, e.g., *Boundas v. Abercrombie & Fitch Stores, Inc.*, 280 F.R.D. 408, 417 (N.D.Ill.2012) (affirming class certification where class included individuals who threw away promotional gift cards because they were told that the balances had been voided: "anybody claiming class membership on that basis will be required to submit an appropriate affidavit, which can be evaluated during the claims administration process"). Relying on concerns about what are essentially claim administration issues to deny ***668** certification and to prevent any recovery on valid claims upsets the balance a district judge must consider. In the face of such empirical uncertainty, a district judge has discretion to say let's wait until we know more and see how big a problem this turns out to be.

The second problem with this dilution argument is that class certification provides the only meaningful possibility for bona fide class members to recover anything at all. Keep in mind what's at stake. If the class is certified and fraudulent or inaccurate claims actually cause dilution, then deserving class members still receive something. But if class certification is denied, they will receive nothing, for they would not have brought suit individually in the first place. See *Amchem*, 521 U.S. at 617, 117 S.Ct. 2231; *Eisen*, 417 U.S. at 161, 94 S.Ct. 2140; *Hughes*, 731 F.3d at 677; *Butler*, 727 F.3d at 798. To deny class certification based on fear of dilution would in effect deprive bona fide class members of any recovery as a means to ensure they do not recover too little.

This stringent approach has far-reaching consequences, too. By "focusing on making absolutely certain that compensation is distributed only to those individuals who were actually harmed," the heightened ascertainability requirement "has ignored an equally important policy objective of class actions: deterring and punishing corporate wrongdoing." *Byrd*, 784 F.3d at 175–76 (Rendell, J., concurring), discussing *Hughes*, 731 F.3d at 677 ("A class action, like litigation in general, has a deterrent as well as a compensatory objective."). Even if the risk of dilution is not trivial, refusing to certify on this basis effectively immunizes defendants from liability because they chose not to maintain records of the relevant transactions. See *Daniels v. Hollister Co.*, 440 N.J.Super. 359, 113 A.3d 796, 801 (N.J.App.2015) ("Ascertainability ... is particularly misguided when applied to a case where any difficulties encountered in identifying class members

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are a consequence of a defendant's own acts or omissions.... Allowing a defendant to escape responsibility for its alleged wrongdoing by dint of its particular recordkeeping policies ... is not in harmony with the principles governing class actions."); *Birchmeier v. Caribbean Cruise Line, Inc.,* 302 F.R.D. 240, 250 (N.D.Ill.2014) ("Doing this—or declining to certify a class altogether, as defendants propose—would create an incentive for a person to violate the TCPA on a mass scale and keep no records of its activity, knowing that it could avoid legal responsibility for the full scope of its illegal conduct."); *Lilly v. Jamba Juice Co.,* No. 13–cv–02998–JST, 2014 WL 4652283, at *4 (N.D.Cal. Sept. 18, 2014) ("Adopting the *Carrera* approach would have significant negative ramifications for the ability to obtain redress for consumer injuries."); *Carrera v. Bayer Corp.,* No. 12–2621, 2014 WL 3887938, at *3 (3d Cir. May 2, 2014) (Ambro, J., dissenting from denial of rehearing en banc) (explaining that *Carrera* may have gone too far where "a defendant's lack of records and business practices make it more difficult to ascertain the members of an otherwise objectively verifiable low-value class").

When faced with this counterargument, courts applying the heightened ascertainability approach have tended to emphasize that the plaintiff has the burden to satisfy Rule 23 and that the deterrence concern is therefore irrelevant. See, e.g., *Hayes v. Wal–Mart Stores, Inc.,* 725 F.3d 349, 356 (3d Cir.2013) ("Rule 23's requirements that the class be administratively feasible to ascertain and sufficiently numerous to warrant class action treatment cannot be relaxed or adjusted on the basis of Hayes' assertion that Wal–Mart's records are of no help to him."). With respect, that response begs an important question. Why are affidavits from putative class members ***669** deemed *insufficient as a matter of law* to satisfy this burden? In other words, no one disputes that the plaintiff carries the burden; the decisive question is whether certain evidence is sufficient to meet it. Cf. *Carrera,* 2014 WL 3887938, at *1 (Ambro, J., dissenting from denial of rehearing en banc) ("Even if ... the ability to identify class members is a set piece for Rule 23 to work, how far we go in requiring plaintiffs to prove that ability at the outset is exceptionally important and requires a delicate balancing of interests.").

If not disputed, self-serving affidavits can support a defendant's motion for summary judgment, for example, and defendants surely will be entitled to a fair opportunity to challenge self-serving affidavits from plaintiffs. We are aware of only one type of case in American law where the testimony of one witness is legally insufficient to prove a fact. See U.S. Const., Art. III, § 3, cl. 1 ("No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."). There is no good reason to extend that rule to consumer class actions.

Given the significant harm caused by immunizing corporate misconduct, we believe a district judge has discretion to allow class members to identify themselves with their own testimony and to establish mechanisms to test those affidavits as needed.

4. *Due Process Interest of the Defendant*

Finally, courts have said the heightened ascertainability requirement is needed to protect a defendant's due process rights. Relying on cases about a defendant's right to "present every available defense," e.g., *Lindsey v. Normet,* 405 U.S. 56, 66, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972), these courts have argued that the defendant must have a similar right to challenge the reliability of evidence submitted to prove class membership. See *Carrera,* 727 F.3d at 307 ("Ascertainability provides due process by requiring that a defendant be able to test the reliability of the evidence submitted to prove class membership."); *Marcus,* 687 F.3d at 594 ("Forcing BMW and Bridgestone to accept as true absent persons' declarations that they are members of the class, without further indicia of reliability, would have serious due process implications.").

[15] We agree with the due process premise but not the conclusion. A defendant has a due process right to challenge the plaintiffs' evidence at any stage of the case, including the claims or damages stage. That does not mean a court cannot rely on self-identifying affidavits, subject as needed to audits and verification procedures and challenges, to identify class members. To see why, separate the two claims about a defendant's interest. It is certainly true that a defendant has a due process right not to pay in excess of its liability and to present individualized defenses if those defenses affect its liability. See *Wal–Mart Stores, Inc. v. Dukes,* 564 U.S. ——, 131 S.Ct. 2541, 2560–61, 180 L.Ed.2d 374 (2011). It does not follow that a defendant has a due process right to a *cost-effective* procedure for challenging every individual claim to class membership. Cf. *American Express Co. v. Italian Colors Restaurant,* 570 U.S. ——,

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133 S.Ct. 2304, 2309, 186 L.Ed.2d 417 (2013) ("the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim"). And we should not underestimate the ability of district courts to develop effective auditing and screening methods tailored to the individual case.

Whether a defendant's due process interest is violated depends on the nature of the class action, the plaintiff's theory of recovery, and the defendant's opportunity ***670** to contest liability and the amount of damages it owes. The due process question is not whether the identity of class members can be ascertained with perfect accuracy at the certification stage but whether the defendant will receive a fair opportunity to present its defenses when putative class members actually come forward. A district court can tailor fair verification procedures to the particular case, and a defendant may need to decide how much it wants to invest in litigating individual claims.

To see why this due process argument does not justify the heightened ascertainability requirement, consider three types of class actions. The first type is where the total amount of damages can be determined in the aggregate. A leading treatise provides an example:

> Assume a class of employees has a $50 million pension fund with each employee's share determinable only by a complex formula concerning age, years in service, retirement age, etc. Further assume that the fund's trustee simply transfers the full $50 million to her own personal account. In a case for conversion or fraud, the class would have to demonstrate damage to show liability. They could make that showing simply by demonstrating the aggregate damage the class has suffered—the amount the defendant converted. Individual damages could be worked out later or in subsequent proceedings.

Newberg on Class Actions § 12:2 (footnote omitted). In this situation, the identity of particular class members does not implicate the defendant's due process interest at all. The addition or subtraction of individual class members affects neither the defendant's liability nor the total amount of damages it owes to the class. See, e.g., *In re Urethane Antitrust Litig.,* 768 F.3d 1245, 1269 (10th Cir.2014) (rejecting Seventh Amendment challenge to allocation of damages award among class members because defendant "has no interest in the method of distributing the aggregate damages award among the class members"); *In re Pharmaceutical Industry Average Wholesale Price Litig.,* 582 F.3d 156, 197–98 (1st Cir.2009) (rejecting due process challenge to entry of class-wide judgment and award of aggregate damages); *Allapattah Services, Inc. v. Exxon Corp.,* 333 F.3d 1248, 1258 (11th Cir.2003) ("[A] defendant has no interest in how the class members apportion and distribute a [n] [aggregate] damage [award] among themselves."), *aff'd,* 545 U.S. 546, 125 S.Ct. 2611, 162 L.Ed.2d 502 (2005); *Hilao v. Estate of Marcos,* 103 F.3d 767, 786 (9th Cir.1996) (noting that defendant's interest is "only in the total amount of damages for which it will be liable," not "the identities of those receiving damage awards"); *Six (6) Mexican Workers v. Arizona Citrus Growers,* 904 F.2d 1301, 1307 (9th Cir.1990) ("Where the only question is how to distribute the damages, the interests affected are not the defendant's but rather those of the silent class members.").

The second type of class action is where the total amount of damages cannot be determined in the aggregate, but there is a common method of determining individual damages. (Most consumer fraud class actions fit this model.) The same treatise provides this example:

> Now assume that [the] same class of current employees is statutorily entitled to overtime wages at time and a half after 40 hours work/week but that the defendant employer has never paid such overtime. In a case alleging violation of the statute, it may be sufficient to demonstrate that the defendant failed to pay overtime without assessing a full aggregate liability. There would be a common method for showing individual damages—a simple formula could be applied to each class member's employment records ***671** —and that would be sufficient for the predominance and superiority requirements to be met.

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Newberg on Class Actions § 12:2 (footnote omitted). In this situation, the defendant's due process interest is implicated because the calculation of each class member's damages affects the total amount of damages it owes to the class. That's why the method of determining damages must match the plaintiff's theory of liability and be sufficiently reliable. See *Comcast Corp. v. Behrend,* 569 U.S. ——, 133 S.Ct. 1426, 1433, 185 L.Ed.2d 515 (2013). It's also why the defendant must be given the opportunity to raise individual defenses and to challenge the calculation of damages awards for particular class members. See *Allapattah Services,* 333 F.3d at 1259.

But neither of these requirements has any necessary connection to the heightened ascertainability requirement. Whether putative class members self-identify by affidavits simply does not matter. Suppose an employee files an affidavit falsely claiming that she worked 60 hours a week when in fact she worked only 50, or suppose a person files an affidavit falsely claiming to have been an employee. In either case, so long as the defendant is given a fair opportunity to challenge the claim to class membership and to contest the amount owed each claimant during the claims administration process, its due process rights have been protected.

The third type of class action is where the defendant's liability can be determined on a class-wide basis, but aggregate damages cannot be established and there is no common method for determining individual damages. In this situation, courts often bifurcate the case into a liability phase and a damages phase. See *Butler v. Sears, Roebuck & Co.,* 727 F.3d 796, 800 (7th Cir.2013) ("a class action limited to determining liability on a class-wide basis, with separate hearings to determine—if liability is established—the damages of individual class members, or homogeneous groups of class members, is permitted by Rule 23(c)(4) and will often be the sensible way to proceed").

[16] It has long been recognized that the need for individual damages determinations at this later stage of the litigation does not itself justify the denial of certification. See *Schleicher v. Wendt,* 618 F.3d 679, 685 (7th Cir.2010) ("The possibility that individual hearings will be required for some plaintiffs to establish damages does not preclude certification."); *Pella Corp. v. Saltzman,* 606 F.3d 391, 394 (7th Cir.2010) (per curiam); *Arreola v. Godinez,* 546 F.3d 788, 799–801 (7th Cir.2008); *Carnegie v. Household Int'l, Inc.,* 376 F.3d 656, 661 (7th Cir.2004). Here again, using the heightened ascertainability requirement to deny class certification is not the only means, or even the best means, to protect the defendant's due process rights.

[17] As long as the defendant is given the opportunity to challenge each class member's claim to recovery during the damages phase, the defendant's due process rights are protected. See *Lilly v. Jamba Juice Co.,* No. 13–cv–02998–JST, 2014 WL 4652283, at *6 (N.D.Cal. Sept. 18, 2014) ("Defendants would certainly be entitled to object to a process through which a non-judicial administrator 'ascertains' each applicant's class membership on the basis of the applicants' own self-identification, gives a defendant no opportunity to challenge that determination, and then racks up the defendant's bill every time an individual submits a form."); *Johnson v. General Mills, Inc.,* 276 F.R.D. 519, 524 (C.D.Cal.2011) ("If Mr. Johnson establishes liability for the class, Defendants may challenge reliance and causation individually during a determination of damages, after the issues that are common have been litigated and resolved."); *Godec* ***672** *v. Bayer Corp.,* No. 1:10–CV–224, 2011 WL 5513202, at *7 (N.D.Ohio Nov. 11, 2011) ("In any event, to the extent Bayer has individualized defenses, it is free to try those defenses against individual claimants.").[4]

4 What we have said is consistent with *Comcast Corp. v. Behrend,* 569 U.S. ——, 133 S.Ct. 1426, 185 L.Ed.2d 515 (2013), which held that class treatment is inappropriate where the class-wide measure of damages does not match the plaintiff's theory of liability. See *Butler v. Sears, Roebuck & Co.,* 727 F.3d 796, 799–800 (7th Cir.2013); see also *In re Nexium Antitrust Litig.,* 777 F.3d 9, 18–19 (1st Cir.2015); *In re Deepwater Horizon,* 739 F.3d 790, 817 (5th Cir.2014); *In re Whirlpool Corp. Front–Loading Washer Products Liability Litig.,* 722 F.3d 838, 860–61 (6th Cir.2013); *Leyva v. Medline Industries Inc.,* 716 F.3d 510, 514 (9th Cir.2013).

In sum, the concern about protecting a defendant's due process rights does not justify the heightened ascertainability requirement. In all cases, the defendant has a right not to pay in excess of its liability and to present individual defenses, but both rights are protected by other features of the class device and ordinary civil procedure. *Carrera* itself appeared to recognize this rejoinder, but it pivoted to the argument discussed above about protecting absent class members. See 727 F.3d at 310 ("Because Bayer's total liability cannot be so affected by unreliable affidavits, Carrera argues Bayer lacks an

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interest in challenging class membership.... But ascertainability protects absent class members as well as defendants, so Carrera's focus on Bayer alone is misplaced." (citation omitted)). *Carrera* gave no other reason to think the heightened ascertainability requirement is needed to protect a defendant's due process rights. We can't think of one either.

Ultimately, we decline Direct Digital's invitation to adopt a heightened ascertainability requirement. Nothing in Rule 23 mentions or implies it, and we are not persuaded by the policy concerns identified by other courts. Those concerns are better addressed by a careful and balanced application of the Rule 23(a) and (b)(3) requirements, keeping in mind under Rule 23(b)(3) that the court must compare the available alternatives to class action litigation. District courts should continue to insist that the class definition satisfy the established meaning of ascertainability by defining classes clearly and with objective criteria. If a class is ascertainable in this sense, courts should not decline certification merely because the plaintiff's proposed method for identifying class members relies on affidavits. If the proposed class presents unusually difficult manageability problems, district courts have discretion to press the plaintiff for details about the plain-tiff's plan to identify class members. A plaintiff's failure to address the district court's concerns adequately may well cause the plaintiff to flunk the superiority requirement of Rule 23(b)(3). But in conducting this analysis, the district court should always keep in mind that the superiority standard is comparative and that Rule 23(c) and (d) permit creative solutions to the administrative burdens of the class device.

C. *Commonality*

[18] Direct Digital's other primary challenge to the district court's certification order relates to the commonality requirement of Rule 23(a)(2). The district court found this requirement satisfied by a preponderance of the evidence, see *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir.2012), explaining that whether Instaflex has been clinically tested or scientifically formulated to relieve joint pain, improve flexibility, increase mobility, and support cartilage repair ***673** are questions common to the class. [See R. 89 at 2, 3–4]

Direct Digital argues that Mullins cannot satisfy the commonality requirement because his suit alleges that Instaflex is ineffective. The efficacy of a health product can never form the basis of a common question, Direct Digital argues, because efficacy depends on individual factors such as the severity of the consumer's pre-use medical condition, the consumer's pattern of use, and other potentially confounding variables such as the consumer's overall health, age, activity level, use of other drugs, and the like.

Direct Digital's objection fails because it has mischaracterized Mullins's theory of liability. Mullins does not claim that Instaflex was ineffective, ergo defendant is liable. He alleges that Direct Digital's statements representing that Instaflex has been "clinically tested" and "scientifically formulated" to relieve joint discomfort, improve flexibility, increase mobility, and repair cartilage are false or misleading because they imply there was scientific support for these claims but in fact no reasonable scientific expert would conclude that glucosamine sulfate (the primary ingredient in the supplement) has any positive effect on joint health. Mullins alleges that these statements would have misled a reasonable consumer. See *Barbara's Sales, Inc. v. Intel Corp.*, 227 Ill.2d 45, 316 Ill.Dec. 522, 879 N.E.2d 910, 925–27 (2007) (reasonable consumer standard); accord, *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 756–57 (7th Cir.2014) (discussing consumer fraud statutes in Illinois and other states). As the district court correctly concluded, this theory presents a common question: Were the statements false or misleading? This is a "common contention" that is "capable of classwide resolution" because the "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal–Mart Stores, Inc. v. Dukes*, 564 U.S. ——, 131 S.Ct. 2541, 2551, 180 L.Ed.2d 374 (2011). Nothing more is required to satisfy Rule 23(a)(2).

Of course the efficacy of the product can be *relevant* to that determination. If consumers experience the reduction or elimination of their symptoms, then that is evidence that the supplement does in fact relieve joint discomfort consistent with Direct Digital's representations. But that's not the focus of Mullins's theory of consumer fraud. What really matters under his theory is whether there is any scientific support for the assertions contained in the labels and advertising materials. In other words, Mullins's claims do not rise or fall on whether individual consumers experienced health benefits, due to the placebo effect or otherwise. They rise or fall on whether Direct Digital's representations were deceptive. See *Suchanek*, 764 F.3d at 756–57 (reversing district court's order denying class certification; commonality is satisfied where plaintiff's theory of liability turns on proving unfair or deceptive

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marketing and packaging of consumer product).

That's why even if Direct Digital were to prove that consumers experienced less joint pain because of a placebo effect (a theory Direct Digital appears to embrace on appeal), it could still be liable for consumer fraud. Consumers might have paid more than they otherwise would have because of the representations about clinical testing. Or they could have decided not to seek out better therapeutic alternatives because they believed Instaflex was addressing their underlying condition. See *FTC v. QT, Inc.,* 512 F.3d 858, 862–63 (7th Cir.2008) (placebo effect is not a defense to consumer fraud where defendant has made specific claims about intended benefits; requiring truth in labeling leads to appropriate ***674** prices and ensures that consumers do not forgo better alternatives in reliance on the placebo). At any rate, we express no view on the merits of Mullins's allegations. The key point is that whether the representations were false or misleading is a common question suitable for class treatment, even if Instaflex relieved joint discomfort for some consumers.

III. *Conclusion*

Direct Digital raises a number of other, less developed objections to the district court's certification order. None of these issues would have justified granting an appeal under Rule 23(f), but we have considered them and find them without merit. Direct Digital has not demonstrated that the district court abused its discretion in certifying the class. The order of the district court granting class certification is AFFIRMED.

All Citations

795 F.3d 654

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784 F.3d 154 (3d Cir. 2015)

United States Court of Appeals,
Third Circuit.

Crystal BYRD; Brian Byrd, Individually, and on Behalf of all Similarly Situated Persons, Appellants
v.
AARON'S INC; Aspen Way Enterprises Inc, d/b/a Aaron's Sales and Leasing, A Franchisee of Aaron's Inc.; DesignerWare LLC; AH & H Leasing LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; AMG Enterprises Group LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Arona Corporation d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Bear Rental Purchase LTD, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Boxer Enterprise Inc, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Circle City Rentals, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; CMH Leasing Partners, LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Cram Leasing, Inc., d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; DC Sales and Lease Inc, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Dirigo Leasing Inc, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; DPR Alaska LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; DPR Colorado LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; DW3 LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; DWC Ventures LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Fairway Leasing LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Five Star Financials LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; FT Got Three LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; GNS & Associates INC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Great American Rent to Own Inc, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Green River Corp, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Hanson Holding Co., d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Honey Harbor Investments LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Howard Rents LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; HPH Investments LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; J & L Beach Enterprises Inc, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; J.R. Rents, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; J.M. Darden and Co, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Jenfour LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Jenkins Rental LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; KFJ Enterprises LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Lifestyle Furniture Leasing, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; LTL Investments LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Madison Capital Investments INC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; MKW Investments INC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; No Three Putts Enterprises LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; NW Freedom Corp, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Pomona Lane Partners LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; R & Double K LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Rebco Investments LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Rex Neal Inc, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Royal Rents Inc, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Royal Rocket Retail LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Shining Star, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Showcase Home Furnishings Inc, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Sultan Financial Corp, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Tanglewood Management LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; TDS Foods INC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; TUR INC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; Watershed Development Corp, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; WGC LLC, d/b/a Aaron's Sales and Leasing, a Franchisee of Aaron's, Inc.; John Does (1–45) Aaron's Franchisees.

No. 14–3050. | Argued Jan. 23, 2015. | Filed April 16, 2015. | Amended April 28, 2015.

Synopsis

Background: Lessee of computer from rent-to-own store brought putative class action against lessor store, its

franchisor, and other franchisee stores alleging violations of the Electronic Communications Privacy Act (ECPA), invasion of privacy, conspiracy, and aiding and abetting for installing and using software on leased computers allowing remote and surreptitious access and transmission of electronic communications and images. The United States District Court for the Western District of Pennsylvania, Cathy Bissoon, J., 2014 WL 1316055, denied motion for class certification. Lessee took an interlocutory appeal.

Holdings: The Court of Appeals, Smith, Circuit Judge, held that:

[1] proposed classes consisting of "owners" and "lessees" were ascertainable;

[2] proposed classes consisting of "household members" of owners or lessees were ascertainable; and

[3] ascertaining "household members" though reconciling their identities with known class members and some public records would not violate due process rights of defendants.

Reversed and remanded.

Rendell, Circuit Judge, filed concurring opinion.

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Before: RENDELL, SMITH, and KRAUSE, Circuit Judges.

OPINION

SMITH, Circuit Judge.

Plaintiffs Crystal and Brian Byrd bring this interlocutory appeal under Rule 23(f) of the Federal Rules of Civil Procedure. The Byrds brought a putative class action against Aaron's, Inc. and its franchisee store Aspen Way Enterprises, Inc. (collectively "Defendants"), who they allege violated the Electronic Communications Privacy Act of 1986 ("ECPA"), 18 U.S.C. § 2511. Concluding that the Byrds' proposed classes were not ascertainable, the District Court denied their motion for class certification. Because the District ***159** Court erred in applying our ascertainability precedent, we will reverse and remand.

I.

Aaron's operates company-owned stores and also oversees independently-owned franchise stores that sell and lease residential and office furniture, consumer electronics, home appliances, and accessories. On July 30, 2010, Crystal Byrd entered into a lease agreement to rent a laptop computer from Aspen Way, an Aaron's franchisee. Although Ms. Byrd asserts that she made full payments according to that agreement, on December 22, 2010, an agent of Aspen Way came to the Byrds' home to repossess the laptop on the grounds that the lease payments had not been made. The agent allegedly presented a screenshot of a poker website Mr. Byrd had visited as well as a picture taken of him by the laptop's camera as he played. The Byrds were troubled and surprised by what they considered a significant and

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unauthorized invasion of their privacy.

Aspen Way obtained the picture and screenshot through spyware—a type of computer software—designed by DesignerWare, LLC and named "PC Rental Agent." This spyware had an optional function called "Detective Mode," which could collect screenshots, keystrokes, and webcam images from the computer and its users. Between November 16, 2010 and December 20, 2010, the Byrds alleged that this spyware secretly accessed their laptop 347 times on eleven different days.[1] In total, "the computers of 895 customers across the country ... [had] surveillance conducted through the Detective Mode function of PC Rental Agent." *Byrd v. Aaron's, Inc.*, No. CIV.A. 11101E, 2014 WL 1316055, at *2 (W.D.Pa. Mar. 31, 2014).

[1] The spyware allegedly captured a wide array of personal information: "credit and debit card numbers, expiration dates, security codes, pin numbers, passwords, social security numbers, birth dates, identity of children and the children's personal school records, tax returns, personal health information, employment records, bank account records, email addresses, login credentials, answers to security questions and private communications with health care providers, therapists, attorneys, and other confidants." The record also reveals what appear to be screenshots of adult-oriented and active webcam transmissions and conversations of an intimate nature.

The spyware, as described in the Byrds' complaint, was Orwellian-like in that it guaranteed that "[t]here was of course no way of knowing whether you were being watched at any given moment," George Orwell, *1984*, at 3 (Signet Classics 1950), because Aspen Way's corporate intranet (and Aaron's corporate server by proxy) apparently activated the PC Rental Agent's Detective Mode "whenever they wanted to." *Id.*

The Byrds' operative class-action complaint asserts claims against Aaron's, Aspen Way, more than 50 other independent Aaron's franchisees, and DesignerWare, LLC.[2] The complaint alleges violations of and conspiracy to violate the ECPA, common law invasion of privacy, and aiding and abetting. On Defendants' motion to dismiss, the District Court dismissed the claims against all Aaron's franchisees other than Aspen Way for lack of standing and also all claims for common law invasion of privacy, conspiracy, and aiding and abetting. Thus, the Byrds' remaining claims, and those of the class, are against Aaron's and Aspen Way for direct liability under the ECPA.

[2] On March 20, 2012, the District Court issued an order noting that DesignerWare filed for bankruptcy in the U.S. Bankruptcy Court for the Western District of Pennsylvania. Accordingly, the District Court ordered that no action be taken against DesignerWare and that the case be administratively closed as to that defendant.

In the meantime, the Byrds moved to certify the class under ***160** Federal Rules of Civil Procedure 23(b)(2) and 23(b)(3), in which the Byrds provided two proposed classes and one alternative proposed class.[3] In briefing the motion, the Byrds proposed the following alternative class definitions:

[3] In the motion for class certification, the Byrds proposed the following classes:

Class I (against Aaron's Inc. for direct liability under ECPA)—

All persons residing in the United States, who have purchased, leased, rented or rented to own, Aaron's computers and individuals who used said computers whose personal information, electronic communications and/or images were intercepted, used, disclosed, accessed, monitored and/or transmitted via PC Rental Agent or other devices or software without the customers [sic] authorization.

Class II (against Aaron's Inc., Aspen Way, and all other Franchisee Defendants for direct liability under ECPA, invasion of privacy, conspiracy, and aiding and abetting)—

All customers of the Aaron's Defendants who reside in the United States, who have purchased, leased, rented or rented to own, Aaron's computers and individuals who used said computers whose personal information, electronic communications and/or images were intercepted, used, disclosed, accessed, monitored and/or transmitted by the Aaron's Defendants via PC Rental Agent or other devices or software without the customers [sic] authorization.

Byrd, 2014 WL 1316055, at *4. The Byrds also set forth an alternative class definition for Class II as:

Class II (against Aaron's Inc., and Aspen Way for direct liability under the ECPA, invasion of privacy, conspiracy, and aiding and abetting (under Wyoming law))—

All persons residing in the United States, who have purchased, leased, rented or rented to own, Aaron's computers from Aspen Way Enterprises, Inc., d/b/a Aarons Sales and Leasing, and individual[s] who used said computers whose personal information, electronic communications and/or images were intercepted, used, disclosed, accessed, monitored and/or transmitted by Aspen Way and/or Aaron's via PC Rental Agent or other devices or software without the customers [sic] authorization.

Id. It is worth noting that the Byrds' revised proposed class definitions did not expressly require

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an electronic communication to be "intercepted," although that is a necessary element in successfully proving their ECPA claims. See 18 U.S.C. §§ 2511, 2520(a).

Class I—All persons who leased and/or purchased one or more computers from Aaron's, Inc., and their household members, on whose computers DesignerWare's Detective Mode was installed and activated without such person's consent on or after January 1, 2007.

Class II—All persons who leased and/or purchased one or more computers from Aaron's, Inc. or an Aaron's, Inc. franchisee, and their household members, on whose computers DesignerWare's Detective Mode was installed and activated without such person's consent on or after January 1, 2007.

Byrd, 2014 WL 1316055, at *5.

The Magistrate Judge recommended denying the Byrds' motion for certification because the proposed classes were not ascertainable. Regarding owner and lessee class members, the Magistrate Judge concluded that the proposed classes were underinclusive because they did "not encompass all those individuals whose information [was] surreptitiously gathered by Aaron's franchisees." *Id.* The Magistrate Judge also determined that the classes were "overly broad" because not "every computer upon which Detective Mode was activated will state a claim under the ECPA for the interception of an electronic communication." *Id.* Regarding "household members," the Magistrate Judge took issue with the fact that the Byrds did not define the phrase. *Id.* Further, although the Byrds stated that the identity of household members could be gleaned from "public records," the Magistrate Judge, citing to *Carrera v. Bayer Corp.*, 727 F.3d 300, 306, 308 (3d Cir.2013), reasoned that "[i]t [was] not ***161** enough to propose a method by which this information may be obtained." *Byrd*, 2014 WL 1316055, at *5. The District Court adopted the Report and Recommendation as the opinion of the court over the Byrds' objections. The Byrds timely appealed.

II.

[1] [2] The District Court had federal question jurisdiction under 28 U.S.C. § 1331. We have jurisdiction under 28 U.S.C. § 1292(e) and Federal Rule of Civil Procedure 23(f). "We review a class certification order for abuse of discretion, which occurs if the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact." *Grandalski v. Quest Diagnostics Inc.*, 767 F.3d 175, 179 (3d Cir.2014) (quoting *Hayes v. Wal–Mart Stores, Inc.*, 725 F.3d 349, 354 (3d Cir.2013)) (internal quotation marks omitted). We review de novo a legal standard applied by a district court. *Carrera*, 727 F.3d at 305.

III.

The central question in this appeal is whether the District Court erred in determining that the Byrds' proposed classes were not ascertainable. Because the District Court confused ascertainability with other relevant inquiries under Rule 23, we conclude it abused its discretion and will vacate and remand.

Before discussing these errors, however, we believe it is necessary to address the scope and source of the ascertainability requirement that our cases have articulated. Our ascertainability decisions have been consistent and reflect a relatively simple requirement. Yet there has been apparent confusion in the invocation and application of ascertainability in this Circuit. (Whether that is because, for example, the courts of appeals have discussed ascertainability in varying and distinct ways,[4] or the ascertainability requirement ***162** is implicit rather than explicit in Rule 23,[5] we need not say.) Not surprisingly, defendants in class actions have seized upon this lack of precision by invoking the ascertainability requirement with increasing frequency in order to defeat class certification.[6]

4 For example, some of our sister courts of appeals have interspersed their analysis of ascertainability, or "identifiability," with explicit Rule 23 requirements. *See, e.g., Colo. Cross Disability Coal. v. Abercrombie & Fitch Co.*, 765 F.3d 1205, 1215 (10th Cir.2014) (discussing ascertainability and numerosity simultaneously); *Romberio v. Unumprovident Corp.*, 385 Fed.Appx. 423, 431 (6th Cir.2009) (unpublished) (discussing ascertainability but reversing class certification based on lack of typicality); *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 44–45 (2d Cir.2006) (discussing ascertainability and predominance simultaneously, although noting they are separate inquiries), *decision clarified on denial of reh'g sub nom. In re Initial Pub. Offering Sec. Litig.*, 483 F.3d 70 (2d Cir.2007); *Oshana v. Coca–Cola Co.*, 472 F.3d 506, 514 (7th Cir.2006) (discussing identifiability—the Seventh Circuit's approximation of the "ascertainability" standard—in conjunction with the typicality requirement).

Conversely, others have framed ascertainability as requiring that there be an "objective standard" to

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determine whether class members are included in or excluded from the class without reference to any particular portion of Rule 23. *See, e.g., EQT Prod. Co. v. Adair,* 764 F.3d 347, 358–60 (4th Cir.2014) (explaining the Fourth Circuit's implicit "readily identifiable" requirement for a proposed class is the same as our Circuit's "ascertainability" requirement, without discussing the source of the standard); *In re Deepwater Horizon,* 739 F.3d 790, 821 (5th Cir.2014) (requiring a class to be "adequately defined and clearly ascertainable" (citation and internal quotation marks omitted)), *cert. denied sub nom. BP Exploration & Prod. Inc. v. Lake Eugenie Land & Dev., Inc.,* —— U.S. ——, 135 S.Ct. 754, 190 L.Ed.2d 641 (2014); *Matamoros v. Starbucks Corp.,* 699 F.3d 129, 139 (1st Cir.2012) (discussing only that the "presence of such an objective criterion overcomes the claim that the class is unascertainable"); *Little v. T–Mobile USA, Inc.,* 691 F.3d 1302, 1308 (11th Cir.2012) (mentioning ascertainability but ruling under Rule 23(b)(3)'s predominance standard); *Oshana,* 472 F.3d at 513–14 (applying an "identifiab[ility]" standard without discussing the source of the rule); *Shook v. El Paso Cnty.,* 386 F.3d 963, 972 (10th Cir.2004) (noting an "identifiability" requirement for 23(b)(3) classes but declining to apply the standard to a Rule 23(b)(2) class).

Even the citations we relied upon in *Marcus v. BMW of North America, LLC,* to discuss the policy rationales behind ascertainability, 687 F.3d 583, 593 (3d Cir.2012), failed to address squarely the undergirding for this implicit requirement. *See, e.g., Xavier v. Philip Morris USA, Inc.,* 787 F.Supp.2d 1075, 1089 (N.D.Cal.2011) (relying in part on our decision in *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 259 F.3d 154, 191–93 (3d Cir.2001), which in fact analyzed a proposed class under Rule 23(b)(3) and the superiority requirement); *Sanneman v. Chrysler Corp.,* 191 F.R.D. 441, 446 & n. 9 (E.D.Pa.2000) (blending the issue of ascertainability with class definition and cross-referencing a later discussion on predominance and superiority); Federal Judicial Center, *Manual for Complex Litigation* § 21.222 (4th ed.2004) (citing to Rule 23(c)(2)'s requirement that class members in a Rule 23(b)(3) action receive the "best notice practicable").

5 Ascertainability is an "essential prerequisite," or an *implied* requirement, of Rule 23, "at least with respect to actions under Rule 23(b)(3)." *Marcus,* 687 F.3d at 592–93. *Marcus* identified "important objectives," *id.* at 593, or policy rationales, supporting the ascertainability requirement. These included removing administrative burdens that were "incongruous with the efficiencies expected in a class action," providing the best notice practicable under Rule 23(c)(2) in a Rule 23(b)(3) action, and protecting defendants by ensuring that those persons ultimately bound by the final judgment could be clearly identified. *Id.* at 593. Our opinion in *Carrera* expanded on some of the concerns addressed in *Marcus,* specifically relating to a defendant's "due process right to challenge the proof used to demonstrate class membership." 727 F.3d at 307.

6 *See, e.g.,* Class Action Reporter, *Courts Scrutinize Class Certification "Ascertainability,"* Vol. 17, Feb. 6, 2015, (explaining that "courts across the country are increasingly scrutinizing 'ascertainability' at the class certification stage"); Melody E. Akhavan, *Ascertainability Challenge Is Viable Weapon for* Defense, Law360, Nov. 26, 2014, http://www.law360.com/articles/599335/ascertainability-challenge-is-viable-weapon-for-defense ("Courts' focus on ascertainability has become an increasingly useful tool for defendants fighting class certification."); Alida Kass, *Third Circuit Case Could Limit Consumer Class Actions,* N.J. Law Journal, June 25, 2014 ("[T]he Third Circuit will be a fertile ground for exploring the boundaries of ascertainability.").

[3] We seek here to dispel any confusion. The source of, or basis for, the ascertainability requirement as to a Rule 23(b)(3) class is grounded in the nature of the class-action device itself. In endeavoring to further explain this concept, we adhere to the precise boundaries of ascertainability previously iterated in the quartet of cases we discuss below. The ascertainability requirement as to a Rule 23(b)(3) class is consistent with the general understanding that the class-action device deviates from the normal course of litigation in large part to achieve judicial economy. *See Comcast,* 133 S.Ct. at 1432 (discussing generally the nature of the class-action device). Ascertainability functions as a necessary prerequisite (or implicit requirement) because it allows a trial court effectively to evaluate the explicit requirements of Rule 23. In other words, the independent ascertainability inquiry ensures that a proposed class will actually function as a class. This understanding of the source of the ascertainability requirement takes a forward-looking view of the administration of the Rule 23(b)(3) class-action device in practice.

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[4] [5] [6] The class-action device is an exception to the rule that litigation is usually " 'conducted by and on behalf of the individual named parties only.' " *Comcast Corp. v. Behrend,* —— U.S. ——, 133 S.Ct. 1426, 1432, 185 L.Ed.2d 515 (2013) (quoting *Califano v. Yamasaki,* 442

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U.S. 682, 700–01, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979)). Accordingly, the party proposing class-action certification bears the burden of affirmatively demonstrating by a preponderance of the evidence her compliance with the requirements of Rule 23. *Id.* And a court evaluating a motion for class certification is obligated to probe behind the pleadings when necessary and conduct a "rigorous analysis" in order to determine whether the Rule 23 certification requirements are satisfied. *Id.; In re Hydrogen Peroxide Antitrust Litig.,* 552 F.3d 305, 309 (3d Cir.2008), *as amended* (Jan. 16, 2009). A plaintiff seeking certification of a Rule 23(b)(3) class must prove by a preponderance of the evidence that the class is ascertainable.[7] *Hayes,* 725 F.3d at 354. The rigorous analysis requirement applies equally to the ascertainability inquiry. *Carrera,* 727 F.3d at 306.

[7] In *Shelton v. Bledsoe,* we held that ascertainability is not a requisite of a Rule 23(b)(2) class. 775 F.3d 554, 559–63 (3d Cir.2015). The Byrds sought certification of their proposed classes under both Rule 23(b)(2) and Rule 23(b)(3). Lacking the benefit of our *Shelton* decision, the District Court denied certification without distinguishing between Rule 23(b)(2) and Rule 23(b)(3). Accordingly, the District Court on remand should also consider whether the classes may be separately certified under Rule 23(b)(2).

[7] [8] [9] The ascertainability inquiry is two-fold, requiring a plaintiff to show that: (1) the class is "defined with reference to objective criteria"; and (2) there is "a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." *Id.* at 355 (citing *Marcus v. BMW of N. Am., LLC,* 687 F.3d 583, 593–94 (3d Cir.2012)). The ascertainability requirement consists of nothing more than these two inquiries. And it does not mean that a plaintiff must be able to identify all class members at class certification—instead, a plaintiff need only show that "class members *can* be identified." *Carrera,* 727 F.3d at 308 n. 2 (emphasis added). This preliminary analysis dovetails with, but is separate from, Rule 23(c)(1)(B)'s requirement that the class-certification order include "(1) a readily discernible, clear, and precise statement of the parameters defining the class or classes to be certified, and (2) a readily discernible, clear, and complete list of the claims, issues or defenses to be treated on a class basis." *Wachtel ex rel. Jesse v. Guardian Life Ins. Co. of Am.,* 453 F.3d 179, 187–88 (3d Cir.2006).

We have on four occasions addressed the requirement that a Rule 23(b)(3) class be "ascertainable" in order to be certified. Our quartet of cases began with *Marcus v. BMW of North America, LLC,* in which we adopted this implicit ascertainability requirement. 687 F.3d at 592–94. We explained, "If class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials,' then a class action is inappropriate." *Id.* at 593. We concluded that the proposed class "raise[d] serious ascertainability issues," largely because the plaintiffs could not identify cars with the allegedly defective run-flat tires. *Id.* at 593. The defendants did not maintain records that would demonstrate whether a putative class member's run-flat tires " 'ha[d] gone flat and been replaced,' as the class definition require[d]," and the plaintiffs had not proposed "a reliable, administratively feasible alternative" to identify class members. *Id.* at 594.

***164** Shortly thereafter, in *Hayes v. Wal–Mart Stores, Inc.,* we straightforwardly applied the ascertainability rule established by *Marcus* and remanded the case to the district court to apply *Marcus* 's standard and to allow the plaintiffs to "offer some reliable and administratively feasible alternative that would permit the court to determine" whether the class was ascertainable. 725 F.3d at 355. That same month, we decided *Carrera v. Bayer Corp.,* an appeal involving the proposed certification of a "class of consumers who purchased Bayer's One–A–Day WeightSmart diet supplement in Florida." 727 F.3d at 303. To prove ascertainability, the plaintiff proposed using retailer records and class member affidavits attesting to purchases of the diet supplement. *Id.* at 308. Although we opined that retail records "may be a perfectly acceptable method of proving class membership," we noted that the plaintiff's proposed retail records did not identify a single purchaser of the Bayer diet supplement. *Id.* at 308–09. We therefore rejected the proposed methods of proving ascertainability.

As to the use of affidavits, we began by explaining that in *Marcus,* "[w]e cautioned 'against approving a method that would amount to no more than ascertaining by potential class members' say so.' " *Id.* at 306 (quoting *Marcus,* 687 F.3d at 594). We rejected the plaintiff's proposed methodology to screen out false affidavits because the plaintiff's expert declaration did not establish that the "affidavits will be reliable" or "propose a model for screening claims." *Id.* at 311. Remarkably, even the named plaintiff could not recall whether he had purchased the diet supplement. *Id.* at 311 n. 9.

[10] We were careful to specify in *Carrera* that "[a]lthough some evidence used to satisfy ascertainability, such as corporate records, will actually identify class members at the certification stage, ascertainability only requires the plaintiff to show that class members *can be identified.*" *Id.* at 308 n. 2 (emphasis added). Accordingly, there is no records requirement. *Carrera* stands for the proposition that a party cannot merely provide assurances to the district court that it will later meet Rule 23's

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requirements. *Id.* at 306. Nor may a party "merely propose a method of ascertaining a class without any evidentiary support that the method will be successful." *Id.* at 306, 307, 311.

Following the *Marcus-Hayes-Carrera* trilogy, we again considered the issue of ascertainability in *Grandalski v. Quest Diagnostics Inc.*, 767 F.3d at 184–85. There we affirmed the denial of certification of a Rule 23(b)(3) class on predominance grounds, but noted that the district court also erred in denying certification based on ascertainability. *Id.* at 184–85. We concluded that the district court's analysis "conflated ascertainability with the predominance inquiry." *Id.* at 184. The predominance and ascertainability inquiries are distinct, we explained, because " 'the ascertainability requirement focuses on whether individuals fitting the class definition may be identified without resort to mini-trials, whereas the predominance requirement focuses on whether essential elements of the class's claims can be proven at trial with common, as opposed to individualized, evidence.' " *Id.* (quoting *Hayes*, 725 F.3d at 359).

[11] Ascertainability is closely tied to the other relevant preliminary inquiry we addressed in *Marcus*, 687 F.3d at 592, that plaintiffs provide a proper class definition, Fed.R.Civ.P. 23(c)(1)(B). A trial court also needs a class to be "defined with reference to objective criteria" and some assurance that there can be "a reliable and administratively feasible mechanism for determining whether putative class members fall ***165** within the class definition," *Hayes*, 725 F.3d at 355, in order to rigorously analyze the explicit Rule 23(a) and (b) certification requirements, *Comcast*, 133 S.Ct. at 1432. When combined with the separate class-definition requirement from *Wachtel*, that a class-certification order contain "a readily discernible, clear, and precise statement of the parameters defining the class or classes to be certified," 453 F.3d at 187–88, district courts have the necessary tools to determine whether "a party seeking to maintain a class action" can " 'affirmatively demonstrate his compliance' with Rule 23." *See Comcast*, 133 S.Ct. at 1432 (quoting *Wal–Mart Stores, Inc. v. Dukes*, —— U.S. ——, 131 S.Ct. 2541, 2551, 180 L.Ed.2d 374 (2011)).

And after certification, a trial court is tasked with providing "the best notice that is practicable" to the class members under Rule 23(c)(2)(B), " 'including individual notice to all class members who can be identified through reasonable effort.' " *Larson v. AT & T Mobility LLC*, 687 F.3d 109, 123 (3d Cir.2012) (quoting Fed.R.Civ.P. 23(c)(2)(B)). We are "stringent in enforcing th[at] individual notice requirement." *Id.* at 126. The separate ascertainability requirement ensures that class members can be identified after certification, *Carrera*, 727 F.3d at 308 n. 2, and therefore better prepares a district court to "direct to class members the best notice that is practicable under the circumstances," Fed.R.Civ.P. 23(c)(2)(B); *see also Larson*, 687 F.3d at 117 n. 10, 123–31 (applying the Rule 23(c)(2)(B) requirement).[8]

8 An additional post-certification concern relates to the argument by some that the class-action device fails in its purpose if a judgment or settlement cannot be executed without resulting in a largely *cy pres* fund. *E.g., Marek v. Lane*, —— U.S. ——, 134 S.Ct. 8, 9, 187 L.Ed.2d 392 (2013) (Roberts, C.J., statement respecting denial of certiorari) (noting "fundamental concerns surrounding the use of [*cy pres*] remedies in class action litigation"); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 172–74 (3d Cir.2013) (upholding limited use of *cy pres* distributions but cautioning against largely *cy pres* funds). Although we need not address the propriety of *cy pres* funds in this case, we do note that the risk of a *cy pres* fund is reduced, even if not entirely removed, when a court has affirmatively concluded that there is "a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." *See Hayes*, 725 F.3d at 355.

The ascertainability inquiry is narrow. If defendants intend to challenge ascertainability, they must be exacting in their analysis and not infuse the ascertainability inquiry with other class-certification requirements. As we said in *Carrera*, "ascertainability only requires the plaintiff to show that class members can be identified." 727 F.3d at 308 n. 2. This inquiry will not be relevant in every case and is independent from the other requirements of Rule 23.

B.

[12] With this explanation of ascertainability in mind, we will reverse the District Court for four reasons. First, the District Court abused its discretion by misstating the rule governing ascertainability. Second, the District Court engrafted an "underinclusive" requirement that is foreign to our ascertainability standard. Third, the District Court made an errant conclusion of law in finding that an "overly broad" class was not ascertainable. And fourth, the District Court improperly applied the legal principles from *Carrera* to the issue of whether "household members" could be ascertainable.

1.

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The District Court misstated the law governing ascertainability by conflating our standards governing class definition ***166** with the ascertainability requirement. The District Court prefaced its discussion with the section header "Ascertainability and Defining the Class." The District Court then stated the following as the applicable legal standard:

> "As an 'essential prerequisite' to the Rule 23 analysis, the Court must consider 1) whether there is a precisely defined class and 2) whether the named Plaintiffs are members of the class. *Marcus v. BMW of North America*, 687 F.3d 583, 596 (3d Cir.2012). ... At the first step of the analysis, determining whether there is a precisely defined class entails two separate and important elements: 'first, the class must be defined with reference to objective criteria' and 'second, there must be a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.' *Hayes v. Wal–Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir.2013)."

Byrd, 2014 WL 1316055, at *3.

[13] Although the District Court is correct that the class definition requirements are applicable to a class-certification order, *Wachtel*, 453 F.3d at 187–88, and that class definition is a valid preliminary consideration, *Marcus*, 687 F.3d at 591–92, it was not the reason the District Court denied class certification. What the District Court described as the two requirements for a "precisely defined class" was in fact the inquiry relevant to the *ascertainability* standard. *See Hayes*, 725 F.3d at 355. In blending the issue of ascertainability with that of class definition (which *Marcus* took pains to address as separate preliminary inquiries that preceded the Rule 23 analysis, 687 F.3d at 591–94), the District Court erred.

Also troubling is the District Court's discussion of class membership. *Byrd*, 2014 WL 1316055, at *3, *6 n. 8. The question of "whether the named Plaintiffs are members of the class" has nothing to do with either the requirements of a class definition, *Wachtel*, 453 F.3d at 187–88, or the ascertainability standard, *Marcus*, 687 F.3d at 592–94. In fact, the District Court's citation to *Marcus* on this point related to its discussion of numerosity—not class definition or ascertainability. *See Byrd*, 2014 WL 1316055, at *3 (citing *Marcus*, 687 F.3d at 596 (discussing numerosity)). And although the District Court generally cited to *Hayes*, in that case we addressed "membership" not as relating to ascertainability and only with regard to whether the named plaintiff had Article III standing to sue as a class representative. *See Hayes*, 725 F.3d at 360–61. In sum, we conclude that the District Court should have applied nothing more or less than the ascertainability test that has been consistently laid out by this Court.

2.

The District Court also abused its discretion in determining that the proposed classes were not ascertainable because they were underinclusive. The District Court reasoned that although the records provided by Aaron's "may reveal the computers upon which Detective Mode was activated and the owner/lessee of that computer," the Byrds did "not provide an administratively feasible way to determine whose information was surreptitiously gathered." *Byrd*, 2014 WL 1316055, at *5. For this reason, the District Court explained, the proposed "class definition [did] not encompass all those individuals whose information ha[d] been surreptitiously gathered by Aaron's franchisees." *Id.* But the District Court was looking to an old, no-longer-operative class definition, *see supra*, n. 3, because the Byrds had redefined the proposed classes by eliminating the requirement that a class member's information ***167** was "intercepted" or "surreptitiously gathered."[9] Thus, the District Court's analysis was not germane to the Byrds' proposed class definitions or the relevant bases for class membership.

9 The ECPA permits any person to bring a civil action "whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter." 18 U.S.C. § 2520(a); *see also id.* § 2511. The Byrds' operative complaint alleges that the PC Rental Agent "allows its installer (here, the rent-to-own store) to remotely and surreptitiously build and activate the 'Detective Mode' function on the laptop over the Internet and through the Aaron's Inc. and DesignerWare websites." *Byrd*, 2014 WL 1316055, at *2. The relevant statutory terms were discussed because the District Court observed that "not all information gathered surreptitiously will constitute an 'interception' of the 'contents' of an 'electronic communication' " by the PC Rental Agent. *Id.*

[14] Defendants contend that "underinclusiveness" was an appropriate consideration in support of the denial of class certification. They rely on a district court decision, *Bright v. Asset Acceptance, LLC*, 292 F.R.D. 190, 197 (D.N.J.2013), to support their argument. But "whether the defined class specifies a particular group that was *harmed* during a particular time frame, in a particular location, in a particular way," *Bright*, 292 F.R.D. at 197 (emphasis added), is not included in our ascertainability test. Further, requiring such specificity may be unworkable in

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some cases and approaches requiring a fail-safe class. *See Messner v. Northshore Univ. HealthSystem,* 669 F.3d 802, 825 (7th Cir.2012) (explaining that a fail-safe class is "one that is defined so that whether a person qualifies as a member depends on whether the person has a valid claim"). Defining the class "in terms of the legal injury," *In re Nexium Antitrust Litig.,* 777 F.3d at 22, is not the same as requiring the class to be defined "with reference to objective criteria." *See Hayes,* 725 F.3d at 355.

[15] We decline to engraft an "underinclusivity" standard onto the ascertainability requirement. Individuals who are injured by a defendant but are excluded from a class are simply not bound by the outcome of that particular action. *Cf., e.g., Taylor v. Sturgell,* 553 U.S. 880, 884, 894, 128 S.Ct. 2161, 171 L.Ed.2d 155 (2008) ("Representative suits with preclusive effect on nonparties include properly conducted class actions."); *United States v. Mendoza,* 464 U.S. 154, 158 n. 3, 104 S.Ct. 568, 78 L.Ed.2d 379 (1984) ("Under res judicata, a final judgment on the merits bars further claims by parties or their privies on the same cause of action."). In the context of ascertainability, we have only mentioned "underinclusivity" with regard to whether the *records* used to establish ascertainability were sufficient, *see Hayes,* 725 F.3d at 355 (citing *Marcus,* 687 F.3d at 594), not whether there are injured parties that could also be included in the class. Requiring a putative class to include all individuals who may have been harmed by a particular defendant could also severely undermine the named class representative's ability to present typical claims (Fed.R.Civ.P. 23(a)(3)) and adequately represent the interests of the class (Fed.R.Civ.P. 23(a)(4)). The ascertainability standard is neither designed nor intended to force all potential plaintiffs who may have been harmed in different ways by a particular defendant to be included in the class in order for the class to be certified.

3.

Similarly, the District Court also abused its discretion in determining that the proposed classes were not ascertainable ***168** because they were "overly broad." The District Court concluded that "more problematic for Plaintiffs is the fact that the alternative definitions are overly broad" because "[n]ot every computer upon which Detective Mode was activated will state a claim under the ECPA for the interception of electronic communication." *Byrd,* 2014 WL 1316055, at *5. There was, again, no reference to our ascertainability precedent or that of any other court.

Defendants also rely on *Bright* for the proposition that a class is not "ascertainable if it is decoupled from the underlying allegations of harm rendering it ... overbroad." *See Bright,* 292 F.R.D. at 197. They also cite myriad cases from other district courts and courts of appeals to justify the consideration of overbreadth in our ascertainability standard. Such applications of the ascertainability standard fuel the precise mistake we attempted to correct in *Grandalski v. Quest Diagnostics Inc.*—that is, injecting the explicit requirements of Rule 23 into the ascertainability standard without actually analyzing those requirements under the correct portion of Rule 23. *See* 767 F.3d at 184 n. 5 ("Predominance and ascertainability are separate issues."). And at oral argument, Defendants conceded that the District Court's analysis regarding overbreadth was really identifying a potential predominance problem.

Defendants' reliance on authority outside this Circuit does nothing to bolster their argument. For example, they extensively discuss *Oshana v. Coca–Cola Co.,* 472 F.3d 506 (7th Cir.2006), to support the proposition that an overbroad class is not ascertainable. In *Oshana,* the Seventh Circuit considered whether a class consisting of "all Illinois purchasers of fountain Diet Coke from March 12, 1999 forward" was certifiable under Rule 23. *Id.* at 509. The Court required that in addition to satisfying the Rule 23(a) and (b) requirements, a "plaintiff must also show ... that the class is indeed identifiable as a class." *Id.* at 513. Reasoning that the proposed class could "include millions who were not deceived and thus have no grievance under the [Illinois Consumer Fraud and Deceptive Practices Act]," the Seventh Circuit affirmed the district court's determination that the proposed class was "not sufficiently definite to warrant class certification." *Id.* at 513–14.

The "definiteness" standard from *Oshana* is distinguishable from our Circuit's ascertainability requirement. The standard applied in the Seventh Circuit is based on the premise that because "[i]t is axiomatic that for a class action to be certified a 'class' must exist," *Simer v. Rios,* 661 F.2d 655, 669 (7th Cir.1981), a class definition must be *definite enough* for the class to be ascertained, *Alliance to End Repression v. Rochford,* 565 F.2d 975, 977 (7th Cir.1977). In short, the class must be "indeed identifiable as a class." *Oshana,* 472 F.3d at 513. A class may be indefinite where "the relevant criteria for class membership [is] unknown." *Jamie S. v. Milwaukee Pub. Sch.,* 668 F.3d 481, 495 (7th Cir.2012). Although this doctrine is similar to the parameters laid out in our ascertainability cases, it blends together our Circuit's ascertainability and class definition requirements. *Compare Oshana,* 472 F.3d at 513, *with Hayes,* 725 F.3d at 355, and *Wachtel,* 453 F.3d at 187–88. As we made patent in *Marcus,* we address class definition and ascertainability as separate inquiries. 687 F.3d at 591–94.

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Defendants also argue that a proposed class is overbroad "where putative class members lack standing or have not been injured." Defendants' argument conflates the issues of ascertainability, overbreadth (or predominance), and Article III standing. We have explained that the issue of ***169** standing is separate from the requirements of Rule 23. *See, e.g., Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 135 (3d Cir.2000) ("In addition to the requirements expressly enumerated in Rule 23, class actions are also subject to more generally applicable rules such as those governing standing and mootness."). To the extent Defendants meant to challenge any potential differences between the proposed class representatives and unnamed class members, such differences should be considered within the rubric of the relevant Rule 23 requirements—such as adequacy, typicality, commonality, or predominance. *See Grandalski*, 767 F.3d at 184–85; *see also Holmes*, 213 F.3d at 137–38 (discussing an "overbroad" class as requiring individual determinations that fail to satisfy Rule 23(b)(3)'s predominance requirement). Conversely, if Defendants intended to argue that all putative class members must have standing, such challenges should be squarely raised and decided by the District Court. Because the District Court has yet to conduct a rigorous analysis of the Rule 23 requirements, we decline to address these issues in the first instance.

The Byrds' proposed classes consisting of "owners" and "lessees" are ascertainable. There are "objective records" that can "readily identify" these class members, *cf. Grandalski*, 767 F.3d at 184 n. 5, because, as explained by the District Court, "Aaron's own records reveal the computers upon which Detective Mode was activated, as well as the full identity of the customer who leased or purchased each of those computers." *Byrd*, 2014 WL 1316055, at *5. The District Court's conclusion to the contrary was an abuse of discretion.

4.

[16] The District Court again abused its discretion in determining that "household members" were not ascertainable. The District Court concluded that the inclusion of the phrase "household members" in the Byrds' revised class definitions was vague and not ascertainable. In the Byrds' reply brief on the motion for class-action certification, they asserted in a footnote that "[h]ousehold members can easily be objectively verified through personal and public records. And their usage of the owner/lessee's computers can also be easily objectively established." The Magistrate Judge recommended denying class certification because the Byrds did not define "household members" or prove by a preponderance of the evidence how " 'household members' can be verified through personal and public records."

In their objections to the Magistrate Judge's Report and Recommendation, the Byrds argued that they intended "the plain meaning of 'household members.' " On appeal, the Byrds continue to argue that they intended the plain meaning of "household members" to be "all of the people, related or unrelated, who occupy a housing unit." By way of example, the Byrds cite to multiple definitions used in government documents for census, taxation, and immigration purposes. With these definitions, they contend that the simple act of confirming membership would mean matching addresses in public records with that of an owner or lessee that had already been identified.

The "household members" of owners or lessees are ascertainable. Although the government documents cited by the Byrds do contain slight variations on the definition of a household member (as noted by Defendants), the Byrds presented the District Court with various ways in which "household members" could be defined and how relevant records could be used to verify the identity of household members. ***170** Because the District Court summarily adopted the Magistrate Judge's Report and Recommendation, and no oral argument was held on the class-certification motion, we are left to wonder why the District Court determined that the Byrds' explanation in their objections to the Report and Recommendation was inadequate.

The parties also dispute whether the phrase "household members" is often used in class definitions. Although it is true that the phrase "household members" has been used in other class definitions,[10] we decline the invitation categorically to conclude that the use of this phrase will always have sufficient precision in the ascertainability context. The inquiry in any given case should be whether a class is "defined with reference to objective criteria" and whether there is a "reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." *Hayes*, 725 F.3d at 355. Whether a class is ascertainable is dependent on the nature of the claims at issue. But as used here, "household members" is a phrase that is easily defined and not, as Defendants argue, inherently vague.

10 *See, e.g., Ortiz*, 527 U.S. at 827 n. 5, 119 S.Ct. 2295 (reversing the approval of an asbestos settlement class that happened to include "household member" in the class definition); *Amchem Prods., Inc.*, 521 U.S. at 602, 117 S.Ct. 2231 (analyzing the validity of a class that included "household members" on grounds other than

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ascertainability); *Georgine v. Amchem Prods., Inc.,* 83 F.3d 610, 619 & n. 3, 633 (3d Cir.1996) (including in the class "occupational exposure of a spouse or household member to asbestos, or to asbestos-containing products"), *aff'd sub nom. Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997); *In re Flonase Antitrust Litig.,* 291 F.R.D. 93, 108 (E.D.Pa.2013) (settlement class definition that included "household members"), *appeal dismissed* (July 25, 2013); *Carlough v. Amchem Prods., Inc.,* 158 F.R.D. 314, 319 (E.D.Pa.1993) (using a similar definition as *Georgine*).

We also conclude that Defendants' and the District Court's reliance on *Carrera* is misplaced. In *Carrera,* we concluded that the plaintiffs' proposed reliance on affidavits alone, without any objective records to identify class members or a method to weed out unreliable affidavits, could not satisfy the ascertainability requirement. 727 F.3d at 311. Here the Byrds presented the District Court with multiple definitions of class members and simply argued that a form similar to those provided could be used to identify household members. This is a far cry from an unverifiable affidavit, or the absence of any methodology that can be used later to ascertain class members. *See id.* at 310–11.

[17] The Byrds' proposed method to ascertain "household members" is neither administratively infeasible nor a violation of Defendants' due process rights. Because the location of household members is already known (a shared address with one of the 895 owners and lessees identified by the Byrds), there are unlikely to be "serious administrative burdens that are incongruous with the efficiencies expected in a class action." *Marcus,* 687 F.3d at 593 (citation and internal quotation marks omitted). There will always be some level of inquiry required to verify that a person is a member of a class; for example, a person's statement that she owned or leased an Aspen Way computer would eventually require anyone charged with administering the fund resulting from a successful class action to ensure that person is actually among the 895 customers identified by the Byrds. Such a process of identification does not require a " 'mini-trial,' " nor does it amount to " 'individualized fact-finding,' " *Carrera,* 727 F.3d at 307 (quoting *Marcus,* 687 F.3d at 594), and ***171** indeed must be done in most successful class actions.

[18] Certainly, *Carrera* does not suggest that *no* level of inquiry as to the identity of class members can ever be undertaken. If that were the case, no Rule 23(b)(3) class could ever be certified. We are not alone in concluding that "the size of a potential class and the need to review individual files to identify its members are not reasons to deny class certification." *See Young v. Nationwide Mut. Ins. Co.,* 693 F.3d 532, 539–40 (6th Cir.2012) (collecting cases). To hold otherwise would seriously undermine the purpose of a Rule 23(b)(3) class to aggregate and vindicate meritorious individual claims in an efficient manner. Fed.R.Civ.P. Rule 23(b)(3) 1966 advisory committee's notes (Rule 23(b)(3) "achieve[s] economies of time, effort, and expense, and promote[s] uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.").

As to Defendants' contention that their due process rights would be violated, *Carrera* counsels that this due process right relates to the ability to "challenge the proof used to demonstrate class membership." 727 F.3d at 307. Here, the Byrds are not relying solely on unverified affidavits to establish ascertainability. *See id.* at 307–08; *Hayes,* 725 F.3d at 356 (reasoning that a class is not ascertainable where "the only proof of class membership [was] the say-so of putative class members"). Any form used to indicate a household member's status in the putative class must be reconciled with the 895 known class members or some additional public records. Defendants are not foreclosed from challenging the evidence the Byrds propose to use.

In sum, the District Court erred in its application of *Carrera* and in concluding that the phrase "household members" was inherently vague.

C.

In light of the errors discussed above, we will remand to the District Court to consider the remaining Rule 23 certification requirements in the first instance. At oral argument and in their briefs, Defendants urged us to read the District Court's ruling as one on predominance, independently review the record in this case, and conclude that the Byrds' proposed classes fail to satisfy Rule 23(b)(3)'s predominance requirement. Defendants contend that the elements of an ECPA claim, particularly that each plaintiff must show the interception of the "contents" of an "electronic communication," create insurmountable barriers to proving predominance. *See* 18 U.S.C. § 2511(1)(a), (c), (d). Formidable though these barriers may be, they are not for us to address in the first instance.

Beginning in *General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, 160–161, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982), through its recent decision in *Comcast Corp. v. Behrend,* 133 S.Ct. at 1432, the

Supreme Court has repeatedly emphasized the need for a district court to conduct a rigorous analysis of the evidence in support of certification under Rule 23. "By their nature, interlocutory appeals are disruptive, time-consuming, and expensive"; thus, it makes sense to allow the "district court an opportunity to fine-tune its class certification order ... rather than opening the door too widely to interlocutory appellate review." *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 294–95 (1st Cir.2000) (exercising discretionary authority under Rule 23(f) in order to give a district court "a better sense as to which aspects of the class certification decision might reasonably be open to subsequent reconsideration"). This is consistent with ***172** the narrow, yet flexible, set of considerations we address in granting a Rule 23(f) petition. *See Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164–65 (3d Cir.2001); *see also In re Nat'l Football League Players Concussion Injury Litig.*, 775 F.3d 570, 578 n. 9 (3d Cir.2014). We best exercise appellate review when the dust has settled and a district court has fully considered a motion for class-action certification.

What is more, a close reading of Defendants' response briefs demonstrates how they continue to conflate ascertainability with the other relevant requirements of Rule 23. We write again to emphasize that at class certification, Rule 23's explicit requirements go beyond and are separate from the ascertainability inquiry. Precise analysis of *relevant* Rule 23 requirements will always be necessary. We therefore decline to go beyond the scope of the District Court's opinion.

IV.

The District Court erred both in relying on an errant conclusion of law and improperly applying law to fact. Accordingly, we will reverse and remand for further consideration in light of this opinion.

RENDELL, Circuit Judge, concurring:

I agree with the majority that, under our current jurisprudence, the class members here are clearly ascertainable. Indeed, as Judge Smith points out, "Aaron's own records reveal the computers upon which Detective Mode was activated, as well as the full identity of the customer who leased or purchased each of those computers." (Maj. Op. at 169) (quoting *Byrd v. Aaron's, Inc.*, No. 11–cv–101, 2014 WL 1316055, at *5 (W.D.Pa. Mar. 31, 2014)). It is hard to argue otherwise, and I do not. However, I do suggest that the lengths to which the majority goes in its attempt to clarify what our requirement of ascertainability means, and to explain how this implicit requirement fits in the class certification calculus, indicate that the time has come to do away with this newly created aspect of Rule 23 in the Third Circuit. Our heightened ascertainability requirement defies clarification. Additionally, it narrows the availability of class actions in a way that the drafters of Rule 23 could not have intended.

Historically, the ascertainability inquiry related to whether the court will be able to determine who fits within the class definition for purposes of award or settlement distribution and the preclusion of the relitigation of claims.[1] It is a test that scrutinizes the class definition, and properly so.[2] But this is now only the first element of our two-part test for ascertainability. ***173** *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 594 (3d Cir.2012); *see also Hayes v. Wal–Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir.2013) ("The class must be defined with reference to objective criteria.").

1 *See* Manual for Complex Litigation (Fourth) § 21.222 (2004) ("An identifiable class exists if its members can be ascertained by reference to objective criteria."); Joseph M. McLaughlin, McLaughlin on Class Actions § 4:2 (11th ed.2014) ("[C]lass members need to be able to determine with certainty from a class notice whether they are in the class.... If the class definition is amorphous, persons may not recognize that they are in the class, and thus may be deprived of the opportunity to object or opt out."); 5 James Wm. Moore et al., Moore's Federal Practice ¶ 23.21[1] (3d ed.1999) (noting that a class must be "susceptible to precise definition").

2 Courts have found classes to be ascertainable when the class definition is sufficiently specific. *Compare Parkinson v. Hyundai Motor Am.*, 258 F.R.D. 580, 593 (C.D.Cal.2008) (holding that prospective plaintiffs are capable of determining whether they were class members because class definition included purchasers of a certain vehicle who paid for the replacement of a certain part in a certain time period), *and Bynum v. District of Columbia*, 214 F.R.D. 27, 31–32 (D.D.C.2003) (holding that prospective class members are capable of identifying themselves based on the dates of their incarceration included in the class definition), *and Pigford v. Glickman*, 182 F.R.D. 341, 346 (D.D.C.1998) (holding that class members are capable of identifying themselves based on whether they had applied for participation in a USDA federal farm program during the specified dates), *with In re Copper Antitrust Litig.*, 196 F.R.D. 348, 350–51, 358–60 (W.D.Wis.2000) (refusing to certify class of "[a]ll copper or metals dealers ... that purchased

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physical copper" during a specified time period "at prices expressly related to LME or Comex copper future prices" because the class definition fell "far short of communicating to copper purchasers what they need to know to decide whether they are in or outside the proposed class," in that the definition failed to explain the terms "copper or metals dealers," "physical copper," and "expressly related to").

In 2012 we adopted a second element, namely, requiring district courts to make certain that there is "a reliable, administratively feasible" method of determining who fits into the class, thereby imposing a heightened evidentiary burden. *Marcus,* 687 F.3d at 594. We have precluded class certification unless there can be objective proof—beyond mere affidavits—that someone is actually a class member. *Id.; accord Carrera v. Bayer Corp.,* 727 F.3d 300, 308–12 (3d Cir.2013). This concept has gained traction in recent years.[3] I submit that this "business record" or "paper trail" requirement is ill-advised.[4] In most low-value consumer class actions, prospective class members are unlikely to have documentary proof of purchase, because very few people keep receipts from drug stores or grocery stores. This should not be the reason to deny certification of a class.[5] As Judge Ambro's dissent from the denial of the petition for rehearing en banc in *Carrera* noted, "[w]here a defendant's lack of records ... make it more difficult to ascertain the members of an otherwise objectively verifiable low-value class, the consumers who make up that class should not be made to suffer." *Carrera v. Bayer Corp.,* No. 12–2621, 2014 WL 3887938, at *3 (3d Cir. May 2, 2014) (Ambro, J. dissenting).

[3] Several courts have denied class certification on ascertainability grounds similar to our current ascertainability test. *See, e.g., Randolph v. J.M. Smucker Co.,* 303 F.R.D. 679, 689 (S.D.Fla.2014) (denying certification of class suing defendant for mislabeling product as "All Natural" in violation of Florida's deceptive advertising law because potential class members were unlikely to remember if they bought a product with such a label); *In re Skelaxin (Metaxalone) Antitrust Litig.,* 299 F.R.D. 555, 572 (E.D.Tenn.2014) (denying certification of class suing drug manufacturer for violating antitrust laws because plaintiffs did not propose feasible model for screening fraudulent claims); *Brey Corp. v. LQ Mgmt. LLC,* No. 11–cv–718, 2014 WL 943445, at *1 (D.Md. Jan. 30, 2014) (denying certification of class suing defendant for violating antitrust laws because ascertaining who belongs in the class would require individualized fact-finding).

[4] While the majority cites a footnote in *Carrera* as standing for the proposition that we have no "records requirement," the class in *Carrera* failed the ascertainability test because there were no records from which the class members could be ascertained with certainty. (Maj. Op. at 164 (citing *Carrera,* 727 F.3d at 308, n. 2)).

[5] *See, e.g., McCrary v. Elations Co., LLC,* No. 13–cv–242, 2014 WL 1779243, at *8 (C.D.Cal. Jan. 13, 2014) ("It appears that pursuant to *Carerra* [sic] in any case where the consumer does not have a verifiable record of its purchase, such as a receipt, and the manufacturer or seller does not keep a record of buyers, *Carerra* [sic] prohibits certification of the class."); *Ries v. Ariz. Beverages USA LLC,* 287 F.R.D. 523, 535 (N.D.Cal.2012) (warning that, if lack of receipts dooms certification, "there would be no such thing as a consumer class action" in cases concerning false or deceptive labeling of small-value items).

Records are not the only way to prove that someone is in a class. It is the trial ***174** judge's province to determine what proof may be required at the claims submission and claims administration stage. It is up to the judge overseeing the class action to decide what she will accept as proof when approving the claim form. Could not the judge decide that, in addition to an individual's "say so" that he is a member of the class, the claimant needs to submit an affidavit from another household member or from his doctor corroborating his assertion that he did, in fact, take Bayer aspirin? Is that not permissible and appropriate? Yet, we foreclose this process at the outset of the case by requiring that plaintiffs conjure up all the ways that they might find the evidence sufficient to approve someone as a class member.

This puts the class action cart before the horse and confuses the class certification process, as this case makes manifest. The irony of this result is that it thwarts "[t]he policy at the very core of the class action mechanism," i.e., "to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 617, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (quoting *Mace v. Van Ru Credit Corp.,* 109 F.3d 338, 344 (7th Cir.1997)). Indeed, "[a] class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." *Id.* We have effectively thwarted small-value consumer class actions by defining ascertainability in such a way that consumer classes will necessarily fail to satisfy for lack of adequate substantiation.[6] Consumers now need to keep a receipt or

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a can, ***175** bottle, tube, or wrapper of the offending consumer items in order to succeed in bringing a class action.

6 Small-value consumer class actions certified by district courts nationwide would not pass muster in our Circuit because of our heightened ascertainability requirement. *See, e.g., Hughes v. Kore of Ind. Enter., Inc.,* 731 F.3d 672, 675 (7th Cir.2013) (reversing district court's order decertifying class of consumers who brought action against owners of automatic teller machines for failing to post notice on machines that they charged fee for use despite difficulty in determining which plaintiffs would have been deceived by lack of notice); *Ebin v. Kangadis Food Inc.,* 297 F.R.D. 561, 567 (S.D.N.Y.2014) (certifying class of consumers who claimed defendant placed misleading "All Natural" label on olive oil bottles even though plaintiffs were unlikely to have retained receipts or packaging proving membership in class); *Boundas v. Abercrombie & Fitch Stores, Inc.,* 280 F.R.D. 408, 417 (N.D.Ill.2012) (certifying class of plaintiffs who possessed promotional gift cards stating "No expiration date" that were voided by defendant or told that the cards had expired or been voided and thrown away cards even though some class members would only be able to claim class membership through affidavit); *see also Lilly v. Jamba Juice Co.,* No. 13–cv–2998, 2014 WL 4652283, at *4 (N.D.Cal. Sept. 18, 2014) (certifying class of consumers who purchased frozen smoothie kits containing label "All Natural" where product allegedly contained various artificial ingredients and where consumers did not necessarily have proof of purchase); *Allen v. Hyland's, Inc.,* 300 F.R.D. 643, 658–59, 672 (C.D.Cal.2014) (certifying class of plaintiffs who purchased homeopathic products where packaging contained alleged misrepresentations even though class members would have to self-identify without corroborating evidence); *Forcellati v. Hyland's, Inc.,* No. 12–1983, 2014 WL 1410264, at *5, *13 (C.D.Cal. Apr. 9, 2014) (certifying class of plaintiffs who purchased children's cold or flu products within a prescribed time frame despite purchasers' lack of proof of purchase and defendants' lack of records identifying consumers who purchased their products via retail intermediaries); *McCrary,* 2014 WL 1779243, at *7–8 (certifying class of purchasers of dietary joint supplement containing allegedly deceptive label despite plaintiffs' lack of proof of purchase); *Astiana v. Kashi Co.,* 291 F.R.D. 493, 500 (S.D.Cal.2013) (certifying class of consumers who purchased cereal and snack products labeled as "All Natural" or "Nothing Artificial" but which allegedly contained synthetic ingredients in violation of various false advertising laws even though plaintiffs unlikely to have retained receipts or containers); *Ries,* 287 F.R.D. at 535 (certifying class of consumers who purchased iced tea with "natural" on label despite plaintiffs' lack of proofs of purchase, finding self-identification sufficient for ascertainability).

The policy rationales that we cite in support of our expanded ascertainability requirement are relatively weak when compared to the significant policy justifications that motivate the class action mechanism. We have noted three rationales for our ascertainability requirement: (1) eliminating administrative burdens "incongruous" with the efficiencies of a class action, (2) protecting absent class members' rights to opt out by facilitating the best notice practicable, and (3) protecting the due process rights of defendants to challenge plaintiffs' proffered evidence of harm. *Marcus,* 687 F.3d at 593.

Eliminating "administrative burdens" really means short-circuiting the claims process by assuming that when individuals file claims, they burden the court. But claims administration is part of every class action. Imposing a proof-of-purchase requirement does nothing to ensure the manageability of a class or the "efficiencies" of the class action mechanism; rather, it obstructs certification by assuming that hypothetical roadblocks will exist at the claims administration stage of the proceedings.[7]

7 *See Carnegie v. Household Int'l, Inc.,* 376 F.3d 656, 661 (7th Cir.2004) ("[T]here is a big difference from the standpoint of manageability between the liability and remedy phases of a class action.").

Denying class certification due to concerns about providing notice to class members makes little sense. Rule 23 requires the "best notice that is practicable under the circumstances" to potential class members after a class has been certified.[8] Potential difficulties in providing individualized notice to all class members should not be a reason to deny certification of a class. As the Supreme Court noted in *Phillips Petroleum Co. v. Shutts,* due process is satisfied when notice is "reasonably calculated" to reach the defined class. 472 U.S. 797, 812, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). The question is not whether every class member will receive actual individual notice, but whether class members can be notified of their opt-out rights consistent with due process. *See Dusenbery v. United States,* 534 U.S. 161, 122 S.Ct. 694, 151 L.Ed.2d 597 (2002) (holding that due process did not require actual notice to federal prisoner of his right to contest civil forfeiture, but rather, due process must be "reasonably calculated" to apprise a party of the pendency of an action).[9]

8 Fed.R.Civ.P. 23(c)(2)(B).

9 *See also Girsh v. Jepson,* 521 F.2d 153, 159 n. 12 (3d

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Cir.1975) ("We do not mean to indicate that individual notice must be given in all cases."). Furthermore, Rule 23 requires courts to provide the best practicable notice *after* a class has been certified. *See* Fed.R.Civ.P. 23(c)(2)(B).

The concerns regarding the due process rights of defendants are unwarranted as well, because there is no evidence that, in small-claims class actions, fabricated claims impose a significant harm on defendants. The chances that someone would, under penalty of perjury, sign a false affidavit stating that he or she bought Bayer aspirin for the sake of receiving a windfall of $1.59 are far-fetched at best. On the other hand, while most injured individuals will find that it is not worth the effort to claim the few dollars in damages that the class action can provide, in the aggregate, this sum is significant enough to deter corporate misconduct. Our ascertainability doctrine, by focusing on making absolutely ***176** certain that compensation is distributed only to those individuals who were actually harmed, has ignored an equally important policy objective of class actions: deterring and punishing corporate wrongdoing. As Judge Posner, writing for the Court of Appeals for the Seventh Circuit, stated in *Hughes v. Kore of Indiana Enterprise, Inc.*, "when what is small is not the aggregate but the individual claim ... that's the type of case in which class action treatment is most needful.... A class action, like litigation in general, has a deterrent as well as a compensatory objective." 731 F.3d 672, 677 (7th Cir.2013). The rigorous application of the ascertainability requirement translates into impunity for corporate defendants who have harmed large numbers of consumers in relatively modest increments.[10] Without the class action mechanism, corporations selling small-value items for which it is unlikely that consumers would keep receipts are free to engage in false advertising, overcharging, and a variety of other wrongs without consequence.

[10] As one court has noted,

> [a]dopting the *Carrera* approach would have significant negative ramifications for the ability to obtain redress for consumer injuries. Few people retain receipts for low-priced goods, since there is little possibility they will need to later verify that they made the purchase. Yet it is precisely in circumstances like these, where the injury to any individual consumer is small, but the cumulative injury to consumers as a group is substantial, that the class action mechanism provides one of its most important social benefits.

Lilly, 2014 WL 4652283, at *4 (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974)).

The concerns about defendants' due process rights are also overblown because damages liability under Rule 23 is determined in the aggregate: courts determine the extent of a defendant's monetary liability to the entire class. Therefore, whether an individual can establish membership in that class does not affect the rights of defendants not to pay in excess of their liability. *Carrera* 's concern that allowing undeserving individuals to claim damages will dilute deserving class members' recoveries is unrealistic in modern day class action practice, and it makes little sense when used to justify the wholesale dooming of the small-value class action such that *no* injured plaintiff can recover at all. Moreover, this is an issue to be dealt with in the implementation of a class action settlement, not in conjunction with ascertaining the class for purposes of certification. Concerns about claims processing should not be used to scuttle these types of class actions altogether.

The policy concerns animating our ascertainability doctrine boil down to ensuring that there is a surefire way to get damages into the hands of only those individuals who we can be 100% certain have suffered injury, and out of the hands of those who may not have. However, by disabling plaintiffs from bringing small-value claims as a class, we have ensured that other policy goals of class actions—compensation of at least *some* of the injured and deterrence of wrongdoing, for example—have been lost. In small-claims class actions like *Carrera*, the real choice for courts is between compensating a few of the injured, on the one hand, versus compensating none while allowing corporate malfeasance to go unchecked, on the other. As such, where there are small-value claims, class actions offer the only means for achieving individual redress. As the Supreme Court stated in *Eisen*, when individual damages are so low, "[e]conomic reality dictates that petitioner's suit proceed as a class action or not at all." 417 U.S. at 161, 94 S.Ct. 2140. The ***177** concern that we are defeating what is at the "core" of what the class action was designed to accomplish is very real. As Judge Rakoff noted in certifying a class over objections regarding ascertainability based on receipts or documentation:

> [T]he class action device, at its very core, is designed for cases like this where a large number of consumers have been defrauded but no one consumer has suffered an injury sufficiently large as to justify bringing an individual lawsuit. Against this background, the ascertainability difficulties, while formidable, should not be made into a device for defeating the

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action.

Ebin v. Kangadis Food Inc., 297 F.R.D. 561, 567 (S.D.N.Y.2014). While a rigorous insistence on a proof-of-purchase requirement, which our heightened ascertainability jurisprudence has imposed, keeps damages from the uninjured, it does an equally effective job of keeping damages from the truly injured as well, and "it does so with brutal efficiency."[11]

[11] Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small–Claims Consumer Class Actions*, 59 DePaul L.Rev. 305, 308 (2010).

Therefore, while I concur in the judgment, I suggest that it is time to retreat from our heightened ascertainability requirement in favor of following the historical meaning of ascertainability under Rule 23. I would therefore reverse the District Court's ruling, and hold that (1) hereafter, our ascertainability analysis will focus on class definition only, and (2) the District Court's analysis regarding the second prong of our ascertainability test was unnecessary. We thus would instruct the District Court to proceed to determine whether the class can be certified under the traditional mandates of Rule 23. Until we revisit this issue as a full Court or it is addressed by the Supreme Court or the Advisory Committee on Civil Rules, we will continue to administer the ascertainability requirement in a way that contravenes the purpose of Rule 23 and, in my view, disserves the public.

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7. DISCOVERY SUBCOMMITTEE: REQUESTER PAYS

Outside groups have urged that the discovery rules should be amended to include some form of "requester pays" provisions. Members of Congress have shown an interest in this topic. In response to this interest, the Discovery Subcommittee has carried the topic on its agenda while it devoted its attention to the major projects that developed the rules that the Supreme Court adopted and transmitted to Congress last April. Further consideration has led to the conclusion that the time has not yet come for active work on the questions that must be answered in developing any "requester pays" proposal.

The first set of questions address just what form of changes might be made. The most sweeping change would be an across-the-boards rule that a party requesting discovery must pay all the reasonable costs of responding. The proponents of change do not seem to be pressing that approach. If adopted, it would work a fundamental transformation in the system of civil litigation that has developed around the innovative discovery regime created on the adoption of the Civil Rules in 1938. Although modern discovery was created and expanded through the Rules Enabling Act process and natural evolution in the courts, it has become a necessary element in enforcing a broad range of laws. It shapes and implements policies that reach beyond private interests to profound social and political goals. Drastic revision could be justified only by a sense of crisis that does not now appear.

More modest changes seem to be the goal of those who seek change. The central concept is that some measure of discovery should continue as it has been — a request is made, and the party who responds bears all the costs of understanding the request, gathering all the information that bears on the response, and responding. But the cost of more extensive discovery reaching beyond an appropriate core should be borne by the requesting party. This approach might be undertaken in an individual case-management order. A first "wave" of discovery would be defined, to be followed by consideration of the need for further discovery and of the question whether the requesting party should bear part or all of the costs of responding. This approach could work when the parties can define the core in relation to the needs of a particular case. One judge who uses this approach has reported that it works so well that the question of a "requester pays" order has never had to be addressed. But any attempt to expand this approach into a general rule that depends on an all-purpose concept of "core" is not now possible. Even for cases that fall within a common descriptive category — wrongful discharge, for example — a workable definition is thwarted by variations in the specific claim, the total amount of information that may be available, the difficulty of uncovering the information and reviewing it, and the pre-discovery distribution of information among the parties. The task of defining core discovery has seemed simply unworkable if it is to be approached in the context of present discovery rules that are framed to apply across the full

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range of civil litigation in the district courts.

There are additional difficulties in any general attempt to adopt rules that require the requesting party to bear the costs of discovery beyond some core. An immediate difficulty is policing the costs that may be claimed for responding. What of the party who reports devoting 1,000 hours to searching for information that, in the end, could not be found? Or the party who claims the fees of attorneys who devoted many costly hours to reviewing information for privilege, work-product, and other protections? Workable answers might be reached in practice, but only after many years of uncertainty. They could be alleviated in some measure by establishing discretion to award only some part of the response costs, but that could prove difficult to administer.

Another question goes to the reallocation of costs after judgment on the merits. One relatively clear case would be put by a requester who paid to discover information that enabled the requester to win the judgment. Should the requester recover the cost? Or is that simply another cost of victory that should be borne by the victor, just as attorney fees must be borne in many cases? One step down the line would be the victor who paid to discover both information that was essential to the victory and also other information that was not important, perhaps not even used. Many steps would follow.

These questions of implementation are supplemented by concerns that address the basic concept of imposing cost-bearing after the completion of core discovery. Often the concerns focus on the need for discovery in specific subjects of litigation, and on the imbalance of information typically available to plaintiffs and defendants. Strong statements of these concerns were made in hundreds of public comments on the package of discovery amendments transmitted by the Supreme Court to Congress last April. These statements led to revisions in some of the proposals as published. The most readily identifiable changes were retraction of the proposals to reduce the presumptive number of depositions to 5 per side and the presumptive number of interrogatories to 15, while creating a first-time presumptive limit to 25 requests to admit (apart from requests addressed to the authenticity of documents). Individual wrongful-discharge litigation featured prominently in these comments. The comments noted that individual employees often have very little discoverable information, while employers hold virtually all of the information needed to prove the case against them. A proposal that would require the employee to pay part of the employer’s response costs would be strongly resisted, a sentiment that would

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be paralleled across many other fields of litigation. The resistance would draw in part from the costs that may be incurred in responding to discovery requests for electronically stored information. And the concern would regularly focus on access to justice, emphasizing the role of litigation in advancing important public interests as well as protecting the private rights of an individual plaintiff.

Another reason supports deferring consideration of this difficult topic. In a matter of weeks, we will know whether the discovery amendments now pending in Congress will take effect this December 1. They are part of a broader package that is designed to reduce the cost of discovery and to encourage universal, early, hands-on case management. As with all rules changes, assessment of the outcome will be possible only after a few years of experience and, perhaps, experimentation. One outcome may be an increase in the frequency of case-specific management that allocates the costs of discovery reaching beyond the central information clearly important to the case. Another outcome may be that the refocused emphasis on the scope of discovery permitted by Rule 26(b)(1) will of its own force lead to more nearly proportional discovery, more often. And yet another may be that cost bearing is at times addressed through Rule 26(c) protective orders, given the new emphasis on specifying terms that include "the allocation of expenses," although as observed in the Committee Note this provision "does not imply that cost-shifting should become a common practice." The landscape may look different in five years. If experience proves the value of the new rules, there may be less apparent reason to move toward more general cost-bearing rules. But if experience shows that discovery costs are excessive, there may be stronger reason to undertake the arduous task of moving toward more general rules.

Finally, there is one further, although contingent, reason to go slowly. Initial disclosure rules continue to command attention. Several states have adopted rules that go beyond Civil Rule 26(a)(1)(A). The recently developed protocols for individual employment claims seem to be proving successful. It may be that initial disclosure practices can be developed, most likely in ways that assume the cost of disclosure is borne by the party making the disclosures. Any such developments would shed a different light on the value of allocating the costs of such discovery as remains necessary after, or along with, the initial disclosures.

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8. RULE 62: STAYS OF EXECUTION

Introduction

These Rule 62 proposals are made to the Appellate and Civil Rules Committees by a joint subcommittee appointed by the two Committees. The Subcommittee was chaired by Judge Scott Matheson. Its other members include Judge Peter Fay, Douglas Letter, Kevin Newsom, and Virginia Seitz.

The Rule 62 proposals reorganize present subdivisions (a) through (d) and make several additions to rule text. The provisions in present subdivisions (a) and (c) that address judgments for injunctions, receiverships, and accountings in actions for patent infringement are consolidated in a single subdivision (d), with a few minor style revisions. The provisions that address stays of execution on judgments for other remedies provide the occasion for the additions to rule text. Most of those judgments simply award money, but some award other forms of relief such as foreclosing a lien or quieting title.

It seems likely that most of the revisions do no more than make explicit the authority to do things that courts have understood can be done in the shadow of present Rule 62. The broad theme is to recognize authority to grant, modify, or refuse a stay in all of the circumstances addressed by — or perhaps inadvertently omitted from — the present rule. Any of those actions can be taken with or without security. For example, the proposals allow the court to refuse or vacate an automatic stay, and at the same time decide whether to require the judgment creditor to post security as a condition of permitting present enforcement. The proposal expressly recognizes the opportunity to post security in a form other than a bond, and makes it clear that a party who wishes to do so can arrange security in a single undertaking that will run from the moment judgment is entered through completion of the final acts on appeal. Throughout, the emphasis is on trial court discretion to adjust to the circumstances of a particular case.

Proposed Rule 62(a) identifies three types of stay: The automatic stay, present Rule 62(a); a stay initiated by the judgment debtor by posting a bond or other security, succeeding to the "supersedeas" bond provisions of present Rule 62(d); and a stay ordered by the court, expanding the provisions of present Rule 62(b) for a stay pending disposition of post-trial motions. Proposed Rule 62(b) allows the court, for good cause, to refuse a stay sought by posting a bond, and to dissolve any stay or modify its terms. Proposed Rule 62(c) establishes broad discretion to require and set appropriate terms for security or to deny security.

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The next section briefly describes the origins of the Rule 62 work and several of the broad concerns that emerged as the work progressed. Detailed discussion of the proposed rule text is provided in the concluding section.

Developing the Proposal

Rule 62 came to the agenda by two paths, one beginning in the Appellate Rules Committee and the other in the Civil Rules Committee.

The Appellate Rules Committee took up Rule 62 at the suggestion of a member who was interested in making it clear that a judgment debtor can secure a stay by posting continuing security, whether as a bond or by other means, that will last from termination of the automatic stay through completion of all acts by the court of appeals. This beginning led to a comprehensive report by Professor Struve, Reporter for the Committee, examining many different aspects of Rule 62 stays.

The Civil Rules Committee first looked at Rule 62 in response to a question raised by a district judge. The question arose from a complication in the relationship between automatic stays and the authority to order a stay pending disposition of a post-judgment motion. The complication arose from the Time Computation Project that led each of the several advisory committees to reset many of the time periods set in the various sets of rules. Before the Time Project changes, Civil Rules 50, 52, and 59 set the time for motions at 10 days after entry of judgment. Rule 62(a) extinguished the automatic stay 10 days after entry of judgment. Rule 62(b) recognized authority to issue a stay pending disposition of a motion under Rule 50, 52, 59, or 60. The Time Project reset the time for motions under Rules 50, 52, or 59 at 28 days. It also reset expiration of the automatic stay at 14 days after entry of judgment. The result was that the automatic stay expired half-way through the time allowed to make a post-judgment motion. Rule 62(b), however, continued to authorize a stay "pending disposition of any of" these motions. The judge submitted a suggestion that Rule 62 should be amended to make it clear that a stay could be issued before a post-judgment motion is made. The Committee decided against any immediate action. It believed that there is inherent authority to issue a stay as part of the court’s necessary control over its own judgment. It concluded that the usual conservative approach made it sensible to wait to see whether actual problems might emerge in practice.

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Consultation through the joint Subcommittee led to consideration of many other questions. The central questions are described here. Other questions are addressed in looking at particular provisions of the proposal.

The "gap" between expiration of the automatic stay and the later time allowed to make a post-trial motion was addressed from the beginning. The simplest adjustment would be to rewrite the rule to allow the court to enter a stay at any time after expiration of the automatic stay. That would make explicit the authority that should exist in any event. It would avoid any need to worry whether a pre-motion stay could be ordered only on a party's representation that a post-judgment motion would, or likely would, be made. But it would add to the burdens imposed on the judgment debtor, to some extent vitiating the advantages sought by extending the motion time to 28 days. The alternative was to adopt two approaches. Proposed Rule 62(a)(3) authorizes the court to order a stay at any time, including a stay that supersedes the automatic stay before it expires. And proposed Rule 62(a)(1) extends the time of the automatic stay to 30 days. That time allows two days beyond the time for making a post-trial motion, an advantage that could become important in cases in which decisions whether to appeal may be affected by the absence of any post-trial motion. It also provides a brief window to arrange security for a court-ordered stay.

The possible disadvantage of extending the automatic stay is the risk that it will become easier to take steps to defeat any execution, ever. That risk is addressed at the outset of proposed Rule 62(a)(1): the automatic stay takes hold "unless the court orders otherwise." There may be no automatic stay at all. Or the court may supersede the automatic stay by ordering a stay under Rule 62(a)(3). So too, proposed Rule 62(b) authorizes the court to dissolve or modify a stay for good cause — the automatic stay is included. The countering risks that denial of a stay may work irremediable injury on the judgment debtor are addressed by the court's authority under proposed Rule 62(c) to require security on refusing or dissolving a stay.

The single-security question turned attention to present Rule 62(d)'s provisions for a stay by supersedeas bond. An attempt to post a single bond to cover a stay both during post-judgment proceedings and during an appeal might run afoul of the present rule language that recognizes this procedure "If an appeal is taken," and directs that "[t]he bond may be given upon or after filing the notice of appeal." It should not be hard work to redraft to dispel the implication that a pre-appeal bond is premature. Proposed Rule 62(a)(2) does that by enabling a party

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to obtain a stay by providing a bond "at any time after judgment is entered." So too, it is easy enough to add language authorizing security in a form other than a bond. Proposed Rule 62(a)(2) does that by recognizing "a bond or other security."

But consideration of the stay by supersedeas bond raised the question whether there is an absolute right to a stay. Practitioners report a belief that this provision establishes a right to stay execution on posting a satisfactory bond. This belief may be supported by the rule text: "the appellant may obtain a stay by supersedeas bond * * *." There may be some offsetting implication in the further provision that the stay takes effect when the court approves the bond, although approval may be limited to considering the amount of the security, the form of the bond, and the assurance that the bond can be made good. This question was discussed at length. In the end, the Subcommittee concluded that it is better to recognize authority to refuse a stay for good cause even if adequate security is tendered. Even as to a money judgment, delay in execution may inflict harms that cannot be compensated by full payment of the judgment, with interest, after affirmance. Judgments for other forms of relief may present risks comparable to the risks posed by staying an injunction. Staying a declaration of title may defeat a favorable transaction that cannot be accurately measured in setting a bond amount. (The alternative of exercising Enabling Act authority to allow bond provisions for "delay damages" might invite significant difficulties.)

The final major decision was to reorganize and carry forward the provisions in present Rule 62(a) and (c) for stays of judgments in an action for an injunction or a receivership, or directing an accounting in an action for patent infringement. They are joined in proposed subdivision (d). One change is proposed. Present Rule 62(c) incorporates some, but not all, of the words used in the interlocutory injunction appeal statute, 28 U.S.C. § 1292(a)(1). The Rule refers to "an interlocutory order or final judgment that grants, dissolves, or denies an injunction." The formula in § 1292(a)(1) is more elaborate. Although the Subcommittee is not aware of any difficulties arising from the differences, it has seemed wise to forestall any arguments about appeals from such orders as those that "continue" or "modify" an injunction.

The Subcommittee also considered present Rules 62(e) and (f). Rule 62(e) is captured in its tag line: "Stay without Bond on an Appeal by the United States, Its Officers, or Its Agencies." Representatives of the Department of Justice reported that they were not aware of any difficulties arising from this

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subdivision. Rule 62(f) invokes state law that entitles a judgment debtor to a stay when a judgment is a lien on the judgment debtor's property under the law of the state where the court is located. Professor Struve's memorandum described potential problems of the sort that might be expected when incorporating state law. These questions were put aside for want of any clear sense whether there are significant problems in practice, or how to address any problems that might be identified.

Details of The Rule

Automatic Stay:

(a) STAY OF EXECUTION. Except as provided in Rule 62(d), execution on a judgment, or proceedings to enforce it, are stayed as follows:

(1) *Automatic Stay.* Unless the court orders otherwise, for 30 days after the judgment is entered.

Two points may be noted about the introduction. It begins with a reminder that subsection (d) sets out different rules for judgments in actions for an injunction or receivership, or for an accounting in an action for patent infringement. It also carries forward the part of the present rule that includes "proceedings to enforce" the judgment. It would be a legitimate use of the Committee Note to note that a court might distinguish between execution and other proceedings to enforce the judgment. Discovery in aid of future execution, and perhaps security orders aimed to preserve discovered assets, would be an obvious example. The current draft Note has not gone that far, in part for uncertainty whether courts or even litigants need to be reminded of this distinction in the present rule.

The automatic stay itself is discussed above. The draft adds express authority to defeat the automatic stay, either from the inception by ordering otherwise, by superseding it under Rule 62(a)(3), or by dissolving it under subdivision (b). The automatic stay is extended from 14 days to 30 days. And the "gap" between the end of the 14th day and the time to make post-judgment motions is eliminated.

Stay by Bond:

(2) *By Bond or Other Security.* A party may at any time after judgment is entered obtain a stay by providing a bond or other security. The stay takes effect when the court

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approves the bond or other security and remains in effect for the time specified in the bond or security.

As noted above, the time for seeking a stay by posting a bond is advanced from "upon or after filing the notice of appeal" to "at any time after judgment is entered." This change securely establishes the practice that allows a party to obtain a single security that lasts from expiration of the automatic stay — or, with fast action, from the entry of judgment — through completion of all proceedings on appeal.

The proposed rule text also expressly recognizes authority to accept "other security." As compared to bond premiums, for example, a party might find it advantageous to place the amount of the judgment in escrow. A showing that the judgment debtor has assets that amply ensure future execution also might displace any need for security; subsection (c) confirms the court's authority to approve that outcome.

The provision that the bond takes effect when the court approves the bond is taken verbatim from present Rule 62(d); "other security" is added. No attempt is made, either in rule text or Committee Note, to explore whatever measure of discretion has been established in determining whether to approve the bond. Similar discretion is appropriate as to other forms of security, although the parties are likely to exercise greater inventiveness, exacting closer scrutiny by the court. Most importantly, no suggestion is offered either way as to the possibility that the court's authority to approve the security establishes authority to deny a stay on any terms — that question is important under the present rule, but is expressly answered by subdivision (b) of the proposal, which establishes authority to refuse a stay under subdivision (a)(2) for good cause.

The further provision that the bond remains in effect for the time specified complements the time for posting, reinforcing the opportunity to provide a single bond or other security that runs from judgment through post-judgment proceedings and appeal.

By Court Order:

(3) *By Court Order.* The court may at any time order a stay that remains in effect until a time designated by the court[, which may be as late as issuance of the mandate on appeal].

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"[A]t any time" does at least two things. It authorizes the court to issue a stay that displaces the automatic stay, either before the automatic stay arises with entry of judgment or during its initial life. The purpose of displacing the stay with the court-ordered stay may be to require security, or perhaps to establish other terms. It also ensures the power established by present Rule 62(b) to issue a stay pending disposition of post-judgment motions.

The "remains in effect" language confirms the "single bond" for a court-ordered stay, whether or not security is required. The bracketed clause is redundant, but it may be a helpful reminder to court and parties that the time can run to completion of all proceedings in the court of appeals.

Refusing, Dissolving, or Modifying:

(b) REFUSING, DISSOLVING, OR MODIFYING STAY. The court may, for good cause, refuse a stay under Rule 62(a)(2) or dissolve a stay or modify its terms.

This subdivision explicitly establishes the court's authority to control the stay process.

The first authority, described above, is to refuse a stay even though a judgment debtor is prepared to post full security. Good cause is required to refuse. This outcome may depart from the present rule — at least some lawyers believe that posting adequate security establishes an indefeasible right to a stay. But there may be circumstances in which immediate execution seems important because the judgment creditor will be irreparably harmed by delay, because only wasting (or disappearing) assets can be identified for execution, because the judgment orders relief that is not for money but also is not an injunction, or for still other reasons. Protection for the judgment debtor is provided by proposed subdivision (c), which expressly authorizes the court to demand that the judgment creditor post security as a condition of refusing the stay.

The other aspects of the court's control extend to dissolving a stay or modifying its terms. Again, good cause is required. This authority extends to all stays. In addition to the (a)(2) stay-by-bond, it includes the (a)(3) court-ordered stay. It also includes the (a)(1) automatic stay, although the occasions to dissolve or modify may be reduced by the initial authority to "order otherwise" before the automatic stay even takes effect. The court also may supersede an automatic stay by

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issuing a stay under Rule 62(a)(3). (There is no explicit "good cause" requirement to forestall the automatic stay before it springs into effect under (a)(1), but the court's discretion will be influenced by the same factors that enter into a good-cause determination.)

Security:

(c) SECURITY ON GRANTING, REFUSING, OR DISSOLVING A STAY. The court may, on entering a stay or on refusing or dissolving a stay, require and set appropriate terms for security or deny security.

This subdivision is new. It recognizes full authority as to security. The increased emphasis on authority to deny any stay is supported by expressly recognizing authority to require security as a condition of refusing or dissolving a stay.

Injunctions, etc.:

Proposed subdivision (d) consolidates the provisions of present subdivisions (a) and (c) that address judgments in actions for an injunction or receivership, or for an accounting in an action for patent infringement. Apart from new subdivision, paragraph, and subparagraph designations, the only change is to incorporate all of the many terms used in 28 U.S.C. § 1292(a)(1) to establish jurisdiction of appeals from interlocutory orders with respect to injunctions.

Rule 62: September 2015 Draft

Rule 62. Stay of Proceedings to Enforce a Judgment.

(a) STAY OF EXECUTION. Except as provided in Rule 62(d), execution on a judgment, and proceedings to enforce it, are stayed as follows:

(1) *Automatic Stay.* Unless the court orders otherwise, for 30 days after the judgment is entered.

(2) *By Bond or Other Security.* A party may at any time after judgment is entered obtain a stay by providing a bond or other security. The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or security.

(3) *By Court Order.* The court may at any time order a stay

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that remains in effect until a time designated by the court[, which may be as late as issuance of the mandate on appeal].

(b) REFUSING, DISSOLVING, OR MODIFYING STAY. The court may, for good cause, refuse a stay under Rule 62(a)(2) or dissolve a stay or modify its terms.

(c) SECURITY ON GRANTING, REFUSING, OR DISSOLVING A STAY. The court may, on entering a stay or on refusing or dissolving a stay, require and set appropriate terms for security or deny security.

(d) STAY OF INJUNCTION, RECEIVERSHIP, AND PATENT ACCOUNTING ORDERS.

(1) Unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

(A) an interlocutory or final judgment in an action for an injunction or a receivership; or

(B) a judgment or order that directs an accounting in an action for patent infringement.

(2) While an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction on terms [for bond or other terms] that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:

(A) by that court sitting in open session; or

(B) by the assent of all its judges, as evidenced by their signatures.

* * * * *

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44 COMMITTEE NOTE

45 Subdivisions (a), (b), (c), and (d) of former Rule 62 are
46 reorganized and the provisions for staying a judgment are
47 revised.

48 The provisions for staying an injunction, receivership, or
49 patent accounting order are reorganized by consolidating them in
50 new subdivision (d). There is no change in meaning. The language
51 is revised to include all of the words used in 28 U.S.C. §
52 1292(a)(1) to describe the right to appeal from interlocutory
53 actions with respect to an injunction, but subdivision (d)
54 applies to both interlocutory injunction orders and final
55 judgments that grant, refuse, or otherwise deal with an
56 injunction.

57 The provisions for staying a judgment are revised to clarify
58 several points. The automatic stay is extended to 30 days, and it
59 is made clear that the court may forestall any automatic stay or
60 vacate an automatic stay before it expires. The former provision
61 for a court-ordered stay "pending the disposition of" enumerated
62 post-judgment motions is superseded by establishing authority to
63 order a stay at any time. This provision closes the apparent gap
64 in the present rule between expiration of the automatic stay
65 after 14 days and the 28-day time set for making these motions.
66 The court’s authority to issue a stay designed to last through
67 final disposition on any appeal is established, and it is made
68 clear that the court can accept security by bond or by other
69 means, can set the amount of security, can dispense with any
70 security, and can order security as a condition of refusing or
71 dissolving any stay. A single bond or other form of security can
72 be provided for the life of the stay.

73 The provision for obtaining a stay by posting a supersedeas
74 bond is changed. New subdivision (a)(2) provides for a stay by
75 providing a bond or other security at any time after judgment is
76 entered. The stay takes effect when the court approves the bond
77 or other security and remains in effect for the time specified in
78 the bond or security. The stay may be refused, dissolved, or
79 modified by the court for good cause under subdivision (b).
80 Refusal can be accomplished by refusing to approve the bond or
81 other security.

82 Subdivisions (a), (b), and (c) address stays of all
83 judgments, except as provided in subdivision (d). The
84 determination whether to direct a stay and what its terms should
85 be may be more complicated when a judgment includes provisions
86 for relief other than — or in addition to — a payment of money,

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87 and that are outside subdivision (d). Examples include a variety
88 of non-injunctive orders directed to property, such as enforcing
89 a lien, or quieting title.

90 Some orders that direct a payment of money may not be a
91 "judgment" for purposes of Rule 62. An order to pay money to the
92 court as a procedural sanction is a matter left to the court's
93 inherent power. The decision whether to stay the sanction is made
94 as part of the sanction determination. The same result may hold
95 if the sanction is payable to another party. But if some
96 circumstance establishes an opportunity to appeal, the order
97 becomes a "judgment" under Rule 54(a) and is governed by Rule 62.

98 Special concerns surround civil contempt orders. The
99 ordinary rule is that a party cannot appeal a civil contempt
100 order, whether it is compensatory or coercive. A nonparty,
101 however, can appeal a civil contempt order. If appeal is
102 available, effective implementation of the contempt authority may
103 counsel against any stay. This need is adequately protected by
104 the discretion to refuse a stay. So too, a stay of an order
105 committing a person for contempt is left to the court's inherent
106 control of the contempt power and the authority to refuse a stay.

107 New Rule 62(a)(1) extends the period of the automatic stay
108 to 30 days. Former Rule 62(a) set the period at 14 days, while
109 former Rule 62(b) provided for a court-ordered stay "pending
110 disposition of" motions under Rules 50, 52, 59, and 60. The time
111 for making motions under Rules 50, 52, and 59, however, was
112 extended to 28 days, leaving an apparent gap between expiration
113 of the automatic stay and any of those motions (or a Rule 60
114 motion) made more than 14 days after entry of judgment. The
115 revised rule eliminates any need to rely on inherent power to
116 issue a stay during this period. Setting the period at 30 days
117 coincides with the time for filing most appeals in civil actions,
118 providing a would-be appellant the full period of appeal time to
119 arrange a stay by other means. Thirty days of automatic stay also
120 is sufficient in cases governed by a 60-day appeal period.

121 Amended Rule 62(a)(1) expressly recognizes the court's
122 authority to supersede the automatic stay. Several reasons may
123 suggest that the court act. Among them are these: A stay may be
124 justified, but security seems appropriate. The court can make an
125 appropriate order under Rule 62(a)(3). Or immediate execution may
126 seem important. Again, the court can make an appropriate order,
127 and under Rule 62(c) may order security as a condition of denying
128 a stay.

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129 Subdivision 62(a)(2) carries forward in modified form the
130 supersedeas bond provisions of former Rule 62(d). A stay may be
131 obtained under subdivision (a)(2) at any time after judgment is
132 entered. Thus a stay may be obtained before the automatic stay
133 has expired, or after the automatic stay has been lifted by the
134 court. The new rule text makes explicit the opportunity to post
135 security in a form other than a bond. The stay remains in effect
136 for the time specified in the bond or security — a party may find
137 it convenient to arrange a single bond or other security that
138 persists through completion of post-judgment proceedings in the
139 trial court and on through completion of all proceedings on
140 appeal by issuance of the appellate mandate. This provision does
141 not supersede the opportunity for a stay under 28 U.S.C.
142 § 2101(f) pending review by the Supreme Court on certiorari.

143 Rule 62(a)(2), like former Rule 62(d), does not specify the
144 amount of the bond or other security provided to secure a stay.
145 As before, the stay takes effect when the court approves the bond
146 or security. And as before, the court may consider the amount of
147 the security as well as its form, terms, and quality of the
148 security or the issuer of the bond. The amount may be set higher
149 than the amount of a monetary award. Some local rules set higher
150 figures. [E.D. Cal. Local Rule 151(d) and D.Kan. Local Rule 62.2,
151 for example, set the figure at one hundred and twenty-five
152 percent of the amount of the judgment.] The amount also may be
153 set to reflect relief that is not an award of money but also is
154 not covered by Rule 62(d). And, in the other direction, the
155 amount may be set at a figure lower than the value of the
156 judgment. One reason might be that the cost of obtaining a bond
157 is beyond the appellant's means. And, although the stay is
158 ordinarily available on posting a bond or other security, the
159 court may for good cause refuse the stay, or dissolve or modify
160 it, under subdivision (b). A stay with lesser or different
161 security may be obtained by court order under subdivision (a)(3).

162 Subdivision (a)(3) recognizes the court's broad general and
163 discretionary power to stay, or to refuse to stay, execution and
164 proceedings to enforce a judgment. This broad authority is
165 supplemented by subdivision (b), which authorizes modification or
166 dissolution of a stay for good cause. The court may set terms for
167 any of these actions under subdivision (c). A stay may be granted
168 or modified with no security, partial security, full security, or
169 security in an amount greater than the amount of a money
170 judgment. Security may be in the form of a bond or another form.
171 In some circumstances appropriate security may inhere in the
172 events that underlie the litigation — for example, a contract
173 claim may be fully secured by a payment bond. So too the court
174 may, under subdivision (c), require security on refusing or

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175 dissolving a stay. Security may be an important safeguard when
176 immediate execution seems important but may entail consequences
177 that cannot, absent security, be cured if the judgment on appeal
178 reverses, vacates, or modifies the judgment.

179 Subdivision (b) authorizes the court to dissolve or modify
180 any stay for good cause, including one initially obtained by
181 posting bond under subdivision (a)(2).

182 Rule 62 applies no matter who appeals. A party who won a
183 judgment may appeal to request greater relief. The automatic stay
184 of subdivision (a)(1) applies as on any appeal. The appellee may
185 seek a stay under subdivisions (a)(2) and (3), although a failure
186 to cross-appeal may be an important factor in determining whether
187 to order a stay. And, if the judgment awards money to the
188 appellee as well as to the appellant, the appellant also may seek
189 a stay.

190 **Style Revision**

191 Professor Kimble has made a first pass at styling the
192 proposed draft. He may wish to suggest further revisions. The
193 current version is set out here. When the time comes, the
194 Subcommittee will consider final styling decisions.

1 **Rule 62. Stay of Proceedings to Enforce a Judgment.**
2 **(a)** **AUTOMATIC STAY.** Except as provided in Rule 62(e), execution on
3 a judgment and proceedings to enforce it are stayed for 30
4 days after its entry, unless the court orders otherwise.
5 **(b)** *Stay by Other Means.*
6 *(1) By Court Order.* The court may at any time order a stay
7 that remains in effect until a designated time[, which
8 may be as late as issuance of the mandate on appeal].
9 *(2) By Bond or Other Security.* At any time after judgment is
10 entered, a party may obtain a stay by providing a bond
11 or other security. The stay takes effect when the court
12 approves the bond or other security and remains in
13 effect for the time specified in the bond or security.
14 But the court may, for good cause, refuse the stay.
15 **(c)** *Dissolving, or Modifying a Stay.* The court may, for good
16 cause, dissolve a stay or modify its terms.

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(d) *Security on Granting, Refusing, or Dissolving a Stay.* On entering a stay or on refusing or dissolving one, the court may require and set appropriate terms for security or deny security.

(e) **STAY OF INJUNCTION, RECEIVERSHIP, OR PATENT ACCOUNTING ORDERS.** Unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

(1) an interlocutory or final judgment in an action for an injunction or a receivership; or

(2) a judgment or order that directs an accounting in an action for patent infringement.

(f) *Injunction Pending an Appeal.* While an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction on terms [for bond or other terms] that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:

(1) by that court sitting in open session; or

(2) by the assent of all its judges, as evidenced by their signatures.

Present Rule 62

Rule 62. Stay of Proceedings to Enforce a Judgment.

(a) *Automatic Stay; Exceptions for Injunctions, Receiverships, and Patent Accountings.* Except as stated in this rule, no execution may issue on a judgment, nor may proceedings be taken to enforce it, until 14 days have passed after its entry. But unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

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9 **(1)** an interlocutory or final judgment in an action for an
10 injunction or a receivership; or
11 **(2)** a judgment or order that directs an accounting in an
12 action for patent infringement.
13 **(b)** *Stay Pending the Disposition of a Motion.* On appropriate terms
14 for the opposing party's security, the court may stay the
15 execution of a judgment--or any proceedings to enforce
16 it--pending disposition of any of the following motions:
17 **(1)** under Rule 50, for judgment as a matter of law;
18 **(2)** under Rule 52(b), to amend the findings or for additional
19 findings;
20 **(3)** under Rule 59, for a new trial or to alter or amend a
21 judgment; or
22 **(4)** under Rule 60, for relief from a judgment or order.
23 **(c)** *Injunction Pending an Appeal.* While an appeal is pending from
24 an interlocutory order or final judgment that grants,
25 dissolves, or denies an injunction, the court may suspend,
26 modify, restore, or grant an injunction on terms for bond or
27 other terms that secure the opposing party's rights. If the
28 judgment appealed from is rendered by a statutory three-judge
29 district court, the order must be made either:
30 **(1)** by that court sitting in open session; or
31 **(2)** by the assent of all its judges, as evidenced by their
32 signatures.
33 **(d)** *Stay with Bond on Appeal.* If an appeal is taken, the appellant
34 may obtain a stay by supersedeas bond, except in an action
35 described in Rule 62(a)(1) or (2). The bond may be given upon
36 or after filing the notice of appeal or after obtaining the
37 order allowing the appeal. The stay takes effect when the
38 court approves the bond.
39 **(e)** *Stay Without Bond on an Appeal by the United States, Its*
40 *Officers, or Its Agencies.* The court must not require a bond,
41 obligation, or other security from the appellant when granting
42 a stay on an appeal by the United States, its officers, or its

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43 agencies or on an appeal directed by a department of the
44 federal government.
45 **(f)** *Stay in Favor of a Judgment Debtor Under State Law.* If a
46 judgment is a lien on the judgment debtor's property under the
47 law of the state where the court is located, the judgment
48 debtor is entitled to the same stay of execution the state
49 court would give.
50 **(g)** *Appellate Court's Power Not Limited.* This rule does not limit
51 the power of the appellate court or one of its judges or
52 justices:
53 **(1)** to stay proceedings--or suspend, modify, restore, or grant
54 an injunction--while an appeal is pending; or
55 **(2)** to issue an order to preserve the status quo or the
56 effectiveness of the judgment to be entered.
57 **(h)** *Stay with Multiple Claims or Parties.* A court may stay the
58 enforcement of a final judgment entered under Rule 54(b) until
59 it enters a later judgment or judgments, and may prescribe
60 terms necessary to secure the benefit of the stayed judgment
61 for the party in whose favor it was entered.

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TAB 8B

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Notes, Appellate-Civil Subcommittee September 24, 2015

The Appellate-Civil Subcommittee met by conference call on September 24, 2015. Participants included Hon. Scott Matheson, Subcommittee Chair; Hon. John D. Bates; Hon. Peter Fay; H. Thomas Byron, Esq.; Douglas Letter, Esq.; Kevin Newsom, Esq.; and Julie Wilson, Esq. Reporters Catherine Struve and Edward Cooper also participated.

Judge Matheson opened the meeting by observing that the Notes describing the August 20 meeting showed that serious progress was made. The most important change in the August draft was recognition that it had been a mistake to move away from present Rule 62 by addressing only judgments for money in the provisions for judgments other than injunctions, receiverships, and accountings in proceedings for patent infringement. Present Rule 62 addresses all judgments. Something should be said about judgments that are not for money, but also are not injunctions. Familiar examples may be a judgment quieting title or foreclosing a lien. Restoring provisions for non-money judgments, however, leads to complex drafting issues if we retain the provision establishing a presumption that the bond for a stay obtained by posting bond should be set at 125% of the amount of the judgment. The answer may be that complex rule provisions are worthwhile. The answer instead may be that it is better to let the rule go on as it has been, silent as to the amount of the bond or other security.

Discussion began with a related issue. Even under earlier drafts that addressed only judgments for money, problems could be foreseen as to some forms of money awards. Sanctions and civil contempt are common examples. It does not seem likely that a procedural sanction should be subject to an automatic stay, nor many civil contempt awards — particularly those designed to encourage compliance. Often those orders are not immediately appealable. And it is important that the trial court's authority be maintained. Those questions are addressed in the draft Committee Note. There was no further discussion of this point.

Discussion then moved to the decision to return to the present scope of Rule 62, addressing all "judgments." The Department of Justice has become concerned about the effects of stays on types of non-money, non-injunctive judgments it often wins. The concerns focus on the part of the draft that extends the automatic stay from 14 days to 30 days. Civil asset forfeiture is one setting. Often the government seizes property incident to a criminal prosecution, but rather than seek criminal forfeiture waits for a conviction and then initiates civil forfeiture proceedings. The seized property can be expensive to hold and maintain — common examples include

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boats, automobiles, and houses. Storage and maintenance costs can be steep. And the value of the assets may decline directly with time. An added 16 days of automatic say may aggravate these costs.

Discussion pointed out that an additional 16 days after a prolonged period may not seem a significant marginal aggravation of preservation costs. A fix, even if narrowly tailored to these and perhaps some other kinds of cases, would intrude on the purpose to close the "gap" in the present rule between expiration of the automatic stay after 14 days and the 28 days allowed to make any of the post-judgment motions that suspend appeal time and, under the present rule, trigger the first express provision for a court-ordered stay. The court, moreover, seems to have useful authority to address preservation costs and diminishing value assets through Supplemental Rule G(7). Most importantly, the draft rule text establishing the automatic stay begins: "Unless the court orders otherwise * * *." The court has wide discretion to deny any automatic stay when judgment is entered. In addition, draft Rule 62(b) allows the court to dissolve any stay for good cause.

The Department has similar concerns about other types of non-money judgments. An example is provided by disputes with ranchers who use government land to graze their cattle. The judgment may do no more than declare that the United States owns the land and the defendant has been trespassing. An automatic stay for 30 days could aggravate the damage done by the trespassing cattle. But the same ameliorating features of the draft rule apply.

More generally, it may be that the United States has more frequent encounters than most judgment creditors with judgment debtors who are bent on dissipating or concealing their assets.

One suggestion was that perhaps the rule text should be expanded to provide some sort of criterion to guide the court’s exercise of discretion in determining whether to "order otherwise" against an automatic stay. The consensus was that it is better to provide open-ended discretion. The judge knows the case and parties, and often will confront circumstances that can be addressed only awkwardly by any rule language. No change will be made on this score.

It also was noted that the Committee Note makes clear what the text of draft Rule 62(b) clearly says: the court can, for good cause, dissolve any stay.

This part of the discussion concluded with the Department’s undertaking to consider the issue further. If it decides to recommend some changes in rule text to still further alleviate the risks posed by a 16-day extension of the automatic stay, it will

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also consider whether it would be better to work through Supplemental Rule G than through Rule 62.

Discussion then turned to the questions that arise from adding to a rule that covers all judgments a provision that a stay obtained by posting a bond should be secured by a bond or other security for one hundred and twenty-five percent of the amount of the judgment. The questions were illustrated by bracketed language introduced to draft Rule 62(a)(2): "The bond must be for an amount equal to [at least] one hundred and twenty-five percent of the [net] amount of any monetary award [plus an amount for any other relief not governed by Rule 62(d)]." (Draft Rule 62(d) carries forward the provisions of present Rule 62(a) and (c) for injunctions, receiverships, and patent accountings.)

"[A]t least" 125% of the monetary award was added as an introduction to the provision for adding "an amount for any other relief not governed by Rule 62(d)." The judgment, for example, might both quiet title and award damages for trespass. A stay of the declaration of title might encourage the defendant to continue the activities found to be trespassing. If that is the effect of the stay, the amount of the bond should reflect the ongoing damages caused by continuing the activities that may be affirmed on appeal to be trespassing. This part of the drafting seems reasonably clear, but only on reflecting about the circumstances it addresses. It may not seem so clear to those who come to it afresh.

Greater complications are suggested by referring to the "net" amount of the judgment. This word opens onto cases in which two or more parties win awards. Even the simplest situations can call for close thought. Suppose the judgment awards $40,000 to the plaintiff and $50,000 to the defendant. In most circumstances, the awards will be set off, leaving the defendant with a net recovery of $10,000. (Set off may not be available in some circumstances — in some states, if both awards are covered by liability insurance, each party may be allowed to recover the full award. That is simply one added wrinkle.) The amount to be secured — or 125% of that amount — will depend on who appeals, and to what purpose. If the plaintiff is the only appellant, a stay imposes only a $10,000 risk on the defendant, whether the plaintiff seeks only to increase the award to the plaintiff, to decrease the award to the defendant, or both. At least in most circumstances, the defendant’s failure to appeal means that the award to the plaintiff cannot be decreased, and the award to the defendant cannot be increased. If the defendant is the only appellant, the award to the plaintiff cannot be increased and the award to the defendant cannot be decreased. No matter whether the defendant seeks to diminish the award to the plaintiff or to increase its own award, the plaintiff will not be

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entitled to any recovery even if the judgment is affirmed. There is no apparent need for security for the plaintiff. But things become much messier if both parties appeal. Should the court begin by looking at the appellant? Or should it shift focus when there is a cross-appeal? Does the answer depend on whether both parties want a stay — and is there a risk of strategic behavior in that dimension?

No obvious or easy solution was found so long as the 125% super-security provision remains. The original proponent of adopting this feature from the practice in some states, and some local rules in the federal courts, suggested that the problems that arise on close consideration may justify putting aside any effort to address this in rule text. The Committee Note could mention the possibility of setting a presumptive amount by local rule, perhaps referring to one or two of the existing local rules. That would leave the rule where we find it — present Rule 62 does not say anything about the amount of the bond.

An alternative might be to add a few words to rule text: "the bond must be for an appropriate amount." No such language appears in the present rule. It might interfere with the current practice, recognized by at least some courts, allowing the bond to be set at an amount below the amount of the judgment, perhaps as low as zero. This risk would be offset by the provisions in draft Rule 62(b) and (c) that allow the court to modify the terms of a stay and to set appropriate terms for security, but there could be some internal dissonance in the rule text. This possibility was rejected.

The conclusion was that the provision for 125% security should be removed. The accompanying rule text complications would disappear with it.

Other issues were discussed briefly.

The tag line for draft Rule 62(a)(2) is "By bond or Other Security." It is not elegant. It reflects a choice to drop the reference to "supersedeas bond" in present Rule 62(d). This choice reflects the determination that the rule text should refer expressly to "other security." The rule still could refer to "supersedeas bond or other security," but the traditions of supersedeas bonds might carry implications inconsistent with the deliberately pragmatic and discretionary focus of the draft rule. No changes were suggested.

Another question is raised by bracketed language in draft Rule 62(a)(2): "A party may at any time [after judgment is entered] obtain a stay by providing a bond or other security * * *." The

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question posed by the bracketed words relates to one of the original purposes that launched reexamination of Rule 62 stays. A party may wish to secure a single bond that covers the entire period from termination of the automatic stay (if there is one) through the conclusion of all proceedings on appeal. Present Rule 62(d) authorizes an appeal by bond "If an appeal is taken." Draft Rule 62(a)(3), on the other hand, provides that a court may at any time order a stay. Might it be that a party who prefers to obtain a stay by posting a bond or other security will wish to arrange the bond even before judgment is entered? But should the rule cater to any such wish? The court may make the terms of the judgment clear some time before judgment is actually entered, particularly if there is a lapse between entry of the dispositive order and entry of judgment on a separate document. But both present Rule 62(d) and draft Rule 62(a)(2) provide that the stay becomes effective only when the court approves the bond (or other security). A party who is anxious to proceed by way of bond or other security, depending on a court order only for approval of the bond or other security, can submit the security to the court with a request that it be approved at the same time as judgment is entered. There is no need for a stay until judgment is entered. Further discussion concluded that there is no need for "jumping the gun." "after judgment is entered" will be retained in rule text without brackets.

Earlier discussions explored the possibility that the provisions for a stay on posting a bond or other security might be combined in a single paragraph with the provisions for a stay ordered by the court. An illustrative draft was prepared. Brief discussion concluded that greater clarity is achieved by the present separation into paragraphs (1), (2), and (3).

Draft Rule 62(d) combines the provisions of present Rule 62(a) and (c) for judgments for injunctions, receiverships, and patent accountings. But it revises present (c) by adopting the full language of 28 U.S.C. § 1292(a)(1) for appeals from interlocutory orders with respect to injunctions. The statutory language is comprehensive. The effort to streamline it is worthy. But departures from the statute create a risk of unintended gaps. This change was approved.

The next step will be circulation of revised rule text to reflect these decisions. A revised draft Committee Note also will be circulated. The plan is to receive written (likely e-written) comments by early October, facilitating preparation of a draft that can be submitted for discussion at the October meeting of the Appellate Rules Committee and the November meeting of the Civil Rules Committee.

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Notes, Appellate-Civil Subcommittee August 20, 2015

The Appellate-Civil Subcommittee met by conference call on August 20, 2015. Participants included Hon. Scott Matheson, Subcommittee Chair; Hon. John D. Bates; Hon. Peter Fay; Douglas Letter, Esq.; Kevin Newsom, Esq.; Virginia Seitz, Esq.; Hon. Jeffrey Sutton, Chair, Standing Committee; and Rebecca Womeldorf, Esq. Reporters Catherine Struve and Edward Cooper also participated.

Judge Matheson began the meeting by noting that as compared to the "mid-stream" point of progress reached at the start of the June 30 conference call, the work on Civil Rule 62 has moved further along the stream. It may prove useful to begin by confirming that the Subcommittee has indeed reached substantial agreement on some of the points discussed in earlier meetings.

30-Day Automatic Stay: Draft Rule 62(a)(1) extends the automatic stay from the 14 days provided by the current rule to 30 days. One purpose is to eliminate the "gap" between expiration of the 14 days and the 28-day time allowed to make post-judgment motions under Rules 50, 52, 59, and (for this purpose) 60. The present rule seems to contemplate a court-ordered stay only "pending disposition" of those motions. It does not address the availability of a stay in contemplation of a motion that has not yet been made.

It was noted that the Time Project established a presumption in favor of measuring time in 7-day intervals. Most of the time provisions set at less than 30 days were reset to 7, 14, or 21 days. When it was decided that more than 14 days were needed for many motions under Rules 50, 52, and 59, the initial choice was to set them at 30 days. Existing 30-day periods were kept at 30 days, rather than reduce them to 28 days or expand them to 35 days. But this convention was put aside because a timely motion under these rules (and a Rule 60 motion made within the same time) suspends appeal time. Setting the time at 28 days avoided the prospect that a party uncertain whether to appeal would not know whether a timely post-judgment motion had been made on the last day of a 30-day appeal period.

Against this background, setting the automatic stay at 30 days has the advantage that a party who has lost a judgment has not only 28 days to decide whether to make a post-judgment motion, but the remaining two days both to file a notice of appeal and take steps to secure a stay after expiration of the automatic stay. The full advantage of the 30-day appeal period might be diminished if a party, still uncertain whether to appeal, must arrange a continuing stay 2 days before finally deciding whether to appeal.

The 30-day period was accepted.

It was noted that many civil actions have a 60-day period to appeal because the government is a party. The Committee Note should not convey any misleading impression on this score. But there is no need to provide an automatic 60-day stay in those cases.

The automatic stay provision came on for further discussion in conjunction with the question whether the court should have authority to dissolve a stay obtained by posting a bond or other security for 125% of the amount of the judgment. Present Rule 62(a) does not speak to dissolution of the automatic stay. Why should it be amended to begin "unless the court orders otherwise"? The concern is that some judgment debtors may manage to dissipate or conceal assets even during a 14-day period. Extension to 30 days will exacerbate this risk. And the automatic stay arises automatically, without any bond. This explanation came to be accepted in comparing the provision for obtaining a stay by providing a bond or other security. So too, although "good cause" is required by the draft provision for dissolving a stay, there is no need to add a "good cause" threshold for ordering away an automatic stay. Courts will understand that they should not act lightly. This discussion was summarized by observing that with the automatic stay, discretion is important "because of bad people." It is different with an appeal-bond stay: "you're putting up a lot of money to get the bond," and there is less need to dissolve it.

Further attention should be paid to the wording of draft (b)(1). It recognizes authority to require security for a stay under draft (a)(3), "or on denying or lifting a stay." "Lifting" seems an unusual word in the Rules. "Vacating" or "dissolving" are more familiar. "Denying" might be "refusing," a common word in the rules. And there may be a subtle difference — "denying" might be read back to imply authority to forestall a stay by posting bond. "Refusing" may not pose the same risk, since it implies that action by the court had to be sought in the effort to obtain a stay. A stay obtained without more on posting bond does not involve court action.

Single Bond: Recognizing the practice of securing a single bond that extends from expiration of the automatic stay through the completion of all appeal proceedings that may be taken was generally approved in June. Brief discussion confirmed that this approach should go forward.

Right to a Stay: The question whether the court can dissolve or modify a stay obtained by filing a full-value appeal bond was not firmly resolved in June. Present Rule 62(d) says "the appellant may

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obtain a stay by supersedeas bond * * *." Practitioners widely believe that there is a right to a stay on posting a bond in the full amount of the judgment. The current draft of a new Rule 62(a)(2) sets the amount of the bond at one hundred and twenty-five percent of the amount of the [money] judgment. One Subcommittee member went looking for cases that might authorize dissolution of a stay obtained by a supersedeas bond. None were found. That is not conclusive; obscure practices may exist or even thrive below the most visible levels.

This question was initially tied to the questions that arise when a sanction or civil-contempt order directs payment of money. But those pose broader questions about the risks that a stay may undermine the court's authority to compel compliance with its orders. They will be considered separately.

The question was then confronted directly. The reason to recognize authority to dissolve a stay obtained by posting a 125% bond is that eventual full payment after affirmance, with interest, may not compensate for harm done by the stay. The continuing example is the judgment creditor whose business is on the brink of failure. Collecting on the judgment after the business has failed may afford no real protection. It might be that a litigation finance firm would be willing to advance the value of the judgment, but that may not always be available and is likely to be costly. Concern about recapture could be met by the court's authority under draft (b)(1) to require security on "denying or lifting" a stay. [Those words may be revised — perhaps to "refusing or dissolving" a stay.]

One member expressed strong support for recognizing authority to dissolve a stay obtained by posting a bond or other security.

This question is reflected in the draft in two stages. Subdivision (a)(2), drawing from present Rule 62(d), provides that a party "may * * * obtain a stay" by providing the bond. This language is similar to Civil Rule 23(b), where the words "[a] class action may be maintained" were read in the Shady Grove decision to establish a right to maintain a class action. Then subdivision (b)(2) provides in general terms that the court may, for good cause, dissolve a stay. This language embraces all stays issued under subdivision (a). The idea is that a judgment debtor is assured that normally a bond will obtain a stay, but also will recognize that the court may dissolve it for good cause.

Discussion opened by asking whether the power to deny a stay on posting a bond should be set out in (a)(2), as it is for the automatic stay in (a)(1): "Unless the court orders otherwise, a

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party may * * * obtain a stay." That would make the point clear immediately. But addressing authority to dissolve in a later subdivision may be wise. This approach subtly underscores the expectation that posting bond under (a)(2) will usually establish a stay that endures for the time specified in the bond or other security.

Addressing authority to dissolve in a separate subdivision prompted the observation that this will be authority to dissolve, not to deny before the bond is posted. That will "avoid watering down the presumption" in favor of the stay.

But it was asked whether "may obtain" is strong enough. Should the rule be expressed as an entitlement: "A party is entitled to obtain a stay by providing a bond or other security * * *"? That would bolster the implication that the stay can be dissolved only in extraordinary circumstances. And it might add force to arguments that if the judgment creditor manages to win dissolution, the price should be reimbursement of the considerable costs likely to have been incurred by the judgment debtor in securing a bond. It was pointed out that "entitled" is used in Rule 62(f), and is used — albeit in a quite different sense — in Rule 8(a)(2) directing that a pleading "show[] that the pleader is entitled to relief." But fear was expressed that "entitlement" "would skew the debate."

Further discussion suggested that sufficient clarity is achieved by the draft structure. The authority to dissolve is clearly expressed in (b)(2). Unlike the automatic stay, which does not provide security, there is less need to emphasize the authority to dissolve by beginning (a)(2) with "unless the court orders otherwise." It was further observed that "judges tend to be practical." If a judgment creditor anticipates a bond stay and approaches the court before bond is posted, the problem will be worked out, quite possibly in a way that protects the judgment debtor against incurring the cost of a bond only to have the stay dissolved.

At the end, it was agreed that "good cause" should be retained in the provision for dissolving or modifying a stay.

<u>Security for immediate execution</u>: Draft 62(b)(1) authorizes the court to require security for a stay "or on denying or lifting a stay." (As above, this may become "or on refusing or dissolving [vacating] a stay.") This is a reciprocal of security for a stay. Allowing immediate execution exposes the judgment debtor to the risk that the amounts collected will not be recaptured upon final disposition of the case. Brief discussion approved this approach.

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Structure: Some ambivalence continues as to the structure of draft subdivision (a). It is divided into (1), automatic stay; (2) stay by posting bond; and (3) stay by court order.

The question is whether, although this structure seems clear enough, greater clarity could be achieved by reducing it to two paragraphs. (1) would be the automatic stay. (2), most likely divided into subparagraphs (A) and (B), would be all other stays. It was agreed that an alternative draft would be prepared to illustrate this approach.

Sanctions, contempt: Uncertainty continues as to the best approach to orders that impose sanctions or civil contempt. Staying a sanction may impair the court's authority to direct compliance with the rules and its orders. Civil contempt may present similar problems. In part, these questions are caught up with the "judgment" concept. Rule 54(a) defines "judgment" for purposes of the Civil Rules. It "includes a decree and any order from which an appeal lies." A sanction order often cannot be appealed when entered. The traditional rule is that an adjudication of civil contempt cannot be appealed by a party before the action proceeds to a final judgment, but can be appealed by a nonparty. Some part of the contempt issues may be approached through present Rule 62(a)(1), to be carried forward in the draft. This rule provides that an interlocutory or final judgment in an action for an injunction is not stayed unless the court orders otherwise. But contempt may be imposed for disobeying an order that is not an injunction.

These questions were supplemented by asking why draft 62(a) limits Rule 62 to stays of "execution on a judgment to pay money, and proceedings to enforce it." Present Rule 62 simply addresses "a judgment." There may be judgments that fall between injunctions and money judgments. What about foreclosure of a lien? A declaration of title? Various of the orders authorized by Rule 70 — a vesting order, an attachment or sequestration to compel obedience to an order, a writ of assistance on an order for possession? And what does Rule 65(f) mean for purposes of Rule 62 by providing that Rule 65 — injunctions and restraining orders — applies to copyright impoundment proceedings?

The initial impulse to draft a revised Rule 62 to address money judgments reflected a desire to separate out injunctions. What should be done for other forms of judgments that do not direct payment of money remains for further discussion. The first step will be an inquiry within the Department of Justice to determine whether their collective experience sheds any light on these issues.

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A new draft will be prepared and circulated for further work.

Notes, Appellate-Civil Subcommittee June 30, 2015

The Appellate-Civil Subcommittee met by conference call on June 30, 2015. Participants included Hon. Scott Matheson, Subcommittee Chair; Hon. David G. Campbell, Civil Rules Committee Chair; Hon. John D. Bates; Hon. Peter Fay; H. Thomas Byron, Esq. (for Douglas Letter, Esq.); Kevin Newsom, Esq.; Virginia Seitz, Esq.; and Rebecca Womeldorf, Esq. Reporters Catherine Struve and Edward Cooper also participated.

Judge Matheson began the meeting by recounting events in the advisory committees and the Standing Committee following the Subcommittee conference call in February.

The Subcommittee reported to the Civil Rules Committee and the Appellate Rules Committee that, just as an earlier Subcommittee, it had not been able to reach a consensus on the multiple questions gathered under the "manufactured finality" label. The advisory committees appreciated the work the Subcommittee had done, and also appreciated the difficulty in deciding whether it might be useful to address these questions by explicit provisions in the rules. The Civil Rules Committee explored the Subcommittee report and concluded, by a nearly unanimous vote, that the topic should be put aside. It is better to let the issues percolate in the courts. The Appellate Rules Committee came out in the same basic place. These conclusions were reported to the Standing Committee, which accepted them. Manufactured finality is not on the active docket of either advisory committee. But it can be moved back for active consideration if further developments in the courts show an opportunity for improvement by rule.

The Subcommittee also reported to the advisory committees on stays of execution under Civil Rule 62. The report was clear in characterizing this work as "midstream." Neither committee reported any sense of difficulties under present Rule 62, either in general or by anecdote. At the same time, there was a sense that it is worthwhile to continue Subcommittee consideration. The seeming "gap" between expiration of the automatic stay and the time to make the post-judgment motions covered by Rule 62(b) is worth addressing. So is the prospect of expressly allowing a single bond to cover the period between expiration of the automatic stay and completion of all appeal proceedings. It also is appropriate, having begun to consider Rule 62, to open the inquiry. It is better to make this the occasion to examine all of Rule 62 and to determine whether other changes may be desirable.

Discussion of Rule 62 in the Standing Committee was, for the most part, similar to the discussion in the advisory committees.

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Some concerns were expressed about the best way to address the three types of stays presented by the draft of Rule 62(a): (1) the automatic stay; (2) stays ordered by the court; and (3) a stay as of right obtained by filing a supersedeas bond. A better integration may be possible. A related concern was noted: a court should have authority to insist on full security as a condition of staying execution. This concern was reflected in an anecdote describing a case in which the judgment debtor sought a stay without a bond, the court exacted a full bond, and it was only the bond that enabled execution after the appellant-debtor became insolvent. A stay without security should be approached with caution.

Discussion turned to the drafts circulated for this call: the two versions from February that were before the advisory committees and the Standing Committee, and an annotated version of the draft prepared by Kevin Newsom.

The first question went to the "gap" between expiration of the Rule 62(a) automatic stay 14 days after judgment enters and the ambiguous provision of Rule 62(b) for a stay pending disposition of post-judgment motions under Rules 50, 52, 59, or 60. Motions under Rules 50, 52, and 59 may be made as late as 28 days after entry of judgment. Rule 60 has a different time table, but a Rule 60 motion made within the 28-day period is treated for many purposes in the same way as motions under Rules 50, 52, and 59. Rule 62(b) authorizes the court to order a stay "pending disposition of any of" those motions. Can it order a stay before the motion is made? If it can, must it insist on a firm commitment to make such a motion within the allotted time?

Other questions also were identified at the outset. Should the rule address the single-bond practice? Are there broader questions about the court’s authority to grant or deny a stay? To require security — for example, to require the judgment creditor to post security as a condition of denying a stay? To allow a stay with diminished security, or no security? Should there be general recognition of authority to accept security in a form other than a bond? Should there be an absolute right to a stay on posting adequate security?

The first of these questions to be addressed was whether the automatic stay should remain set at 14 days, or be expanded — most likely to 28 days or 30 days.

The purpose of the automatic stay was described from a practitioner’s viewpoint: It allows the judgment debtor to "get his act together," to file a bond, to prepare post-judgment motions. In

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the end, it was decided that 30 days is an appropriate period. It endures through the 28 days for making post-judgment motions that would suspend appeal time, and allows a small 2-day margin to the expiration of appeal time. It is fair to ask that a party take appropriate steps to secure a stay by motion or other means within that time.

But it was asked whether the automatic stay should be invulnerable. The discussion draft implements an automatic stay "unless the court orders otherwise." Current Rule 62(a) does not say that, although Rule 62(g)(2) says that a court may "issue an order to preserve the status quo or the effectiveness of the judgment to be entered." There may be circumstances in which even a 14-day stay will enable the judgment debtor to conceal or dissipate assets, thwarting collection on the judgment. Subcommittee members described experience with such circumstances.

Having agreed that the court should have authority to lift the automatic stay, the discussion turned to the question whether the authority should be limited by adding a "good cause" requirement. It was pointed out that the discussion draft included a bracketed option that would include "for good cause" in describing authority to dissolve or modify a stay. On the other hand, "good cause" should be implicit in most grants of authority: who would read the rule to contemplate whimsical or arbitrary action? The choice whether to refer to good cause recurs continually in drafting proposed rules. There is no apparent consensus on a general approach . Nor was a consensus reached for this setting. The discussion draft will go ahead with a simple "Unless the court orders otherwise," recognizing that an exhortation to find good cause may be added.

The next question addressed the draft provision that allows a court to order a stay "at any time." The structure of the draft contemplates three varieties of stay: (1) The automatic stay, subject to action by the court to lift the stay; (2) a stay ordered by the court; and (3) a stay obtained as a matter of right by posting a supersedeas bond or equivalent security. Is this structure the best means of explaining the alternatives? Or could everything after the automatic stay be set out in a single provision?

This structural question leads to the underlying question whether the court should be able to deny a stay even though a supersedeas bond has been posted. The draft provides alternatives. It is noted that a leading treatise "states flatly that a stay on posting a supersedeas bond is a matter of right." But it also suggests that this approach might be rejected by adopting an

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express provision that the court may dissolve or modify any stay. The argument for allowing the court to reject an absolute right to a stay is that there may be circumstances in which the judgment creditor is not adequately protected by recovering the full amount of the judgment only after the appeal process culminates in affirmance. "My case is so strong that I won summary judgment that the defendant has wrongfully withheld the final million dollars due under our contract. I plan to seek sanctions under Appellate Rule 38 for taking a frivolous appeal. But my business is on the brink of insolvency. It will not survive through the time required to complete the appeal process. I can post security for enforcement." This question was deferred for further discussion of the structure issues.

Kevin Newsom provided a draft that also had three parts: the automatic stay, a stay pending disposition of post-judgment motions, and a stay pending appeal. These parts reflect the way he thinks of stay issues in practice, but still can be used to recognize the "single bond" practice. But the drafting may be more difficult than at first appeared.

Everyone agreed that it is desirable to craft a rule that authorizes a single bond that covers the period from issuance of any stay that supersedes the automatic stay through the completion of all proceedings on appeal. That feature will be retained no matter how many subdivisions or paragraphs are used to describe the various means of obtaining a stay.

Returning to the question whether there should be an absolute right to a stay on posting adequate security, it was asked what should be done about a judgment that combines money and specific relief. The answer was that the separate parts of the judgment present separate stay questions — so far, we have considered only the stay of a judgment to pay money, and have thought to carry forward without change the provisions for stays of an injunction or similar relief. The only change for those provisions is to combine them into a single subdivision, making for easier tracking than allowed by the present rule.

The question whether there should be an absolute right to a stay on posting an adequate supersedeas bond returned. It was agreed that it is possible to imagine circumstances in which it might be desirable to direct immediate execution. But it seems to be understood now that although immediate execution should be available absent full security, posting full security establishes a right to a stay that cannot be undone. At the same time, a court may authorize a stay on less than full security. One reason may be

that full security cannot be obtained. Other reasons may arise.[1]

Recognizing an absolute right to a stay on posting a supersedeas bond may affect the choice of rule structure. It was agreed that this right should arise when the automatic stay is lifted by the court or expires at the end of 30 days. That will facilitate security by a single bond that endures through the end of all appeals, if the judgment debtor chooses to post such a bond. It will mean there is no need to seek a stay from the court, either pending disposition of post-judgment motions or pending appeal after the time for motions has expired or all motions have been decided.

The right to a stay on posting full security leaves open the opportunity to obtain a stay on less than full security. Courts implementing the present supersedeas bond requirement assert the right to dispense with any security, to set the amount at less than the judgment, and to specify a form of security other than a bond. All of these alternatives seem attractive. So the rule should provide for these alternatives. The discussion draft does that, allowing the court to order a stay at any time. It further provides that the court may set appropriate terms for security, and for that matter can require security as a condition of denying a stay. And the court may dissolve or modify a stay, subject to the question whether there should be authority to undo the right to a stay on posting an adequate bond.

The structure question remains after all of this discussion. Which structure will achieve greater clarity? A sequence that begins with the automatic stay and then brings together in one provision the supersedeas stay as of right and the discretionary stay by court order? Or a sequence that follows the automatic stay with separate provisions — perhaps beginning with the stay as of right on posting full security, and then recognizing authority to grant or deny a stay absent full security? This sequence may make sense if it is decided to deny discretion to defeat the stay obtained on posting full security.

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[1] A related question was not discussed. Present Rule 62(a) and (b) both provide for a stay of execution and of "proceedings to enforce" the judgment. Present Rule 62(d) providing a stay on giving a supersedeas bond refers only to "a stay." It may be desirable to allow proceedings in aid of enforcement even if actual execution is stayed. Discovery in aid of execution is an obvious example. It also may be useful to think about other possibilities — a lien on executable assets, as directed by the court, might be an example.

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Discussion turned to the amount of the security that should be required to obtain a stay as of right. The draft suggests one hundred and twenty-five percent of the amount of the money judgment. This amount was taken from a state statute. Local rules in the federal courts often address this question, specifying amounts that range from 110% to 125%, or even to 150% of small judgments below a specified amount. The reason for rising above the amount of the money judgment goes to the time value of money. Interest rates are low just now. But they have been higher in the past, and indeed there have been times when the interest allowed on a judgment falls below the returns the judgment debtor may expect from devoting the amount of the judgment to other purposes. Those days may return.

A related question went unanswered. Are bond premiums geared directly to the amount of the bond, so a 125% bond will always cost 25% more than a 100% bond? Or is allowance made for the prospect that even full affirmance will lead to total liability less than 125%? For that matter, are bond premiums calculated with an eye to such questions as the judgment debtor's probable ability to pay, or even the apparent risk of affirmance? And what about security by means other than a bond — including a showing of assets sufficient to ensure payment if the judgment is affirmed?

Another question as to the amount of the bond was considered briefly. An injunction bond can be set to compensate the harm done by complying with the injunction. Should the amount of an appeal bond be set to reflect the harms that may flow from the stay apart from delay in collecting? That question may seem more pressing if there is an absolute right to a stay on posting full security. But the complications of attempting to measure various kinds of damages that may arise from delay seem daunting. And our courts are structured around the right to appeal. Perhaps exercising the right to appeal should not expose the appellant to the risk of liability for delay damages, particularly when the decision to appeal is made reasonably and in good faith.

This discussion concluded by agreeing to set the amount at 125%. The choice can be informed by public comment if this project leads to proposals to amend Rule 62.

Parts of Rule 62 not yet explored were then considered. The Subcommittee has focused its initial work on the basic provisions for staying money judgments. It has concluded that the provisions for injunctions, receiverships, and patent accountings can be rearranged and carried forward without substantive change. But Professor Struve's comprehensive memorandum at the beginning of this work addresses other issues. Should any of them be taken up?

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It was agreed that the most complex questions presented by other parts of Rule 62 arise from Rule 62(f), which provides that when state law provides a lien on the judgment debtor's property, the judgment debtor is entitled to the same stay of execution the state court would give. Professor Struve will explore these issues a second time and make recommendations whether this question should be added to the agenda.

Rule 62(e), dispenses with a "bond, obligation, or other security" when the United States (etc.) is granted a stay on appeal. No problems with this subdivision are familiar at the moment, but an inquiry will be made to determine whether this subject should also be added to the agenda.

It was agreed that it would be undesirable to limit the present work short of identifying every part of Rule 62 that might be improved by feasible amendments. The Rule should be overhauled as may prove desirable, so that it seems designed to survive for some time without a need for further consideration in a separate project.

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9. e-RULES: CIVIL RULE 5

Last April this Committee voted to recommend publication of proposed amendments addressing e-filing, e-service, and recognition of a Notice of Electronic Filing as a certificate of service. Work on parallel proposals in the other advisory committees, however, made it wise to defer the recommendation to await conclusion of their work. The Appellate and Bankruptcy Rules Committees have worked toward conclusions that are compatible with the Civil Rules proposals, with an adjustment to fit within the particular structure of the Appellate Rules. The Criminal Rules Committee, however, has faced a more arduous task. Criminal Rule 49(b) has directed that service be made in the manner provided for a civil action, and Rule 49(d) has directed that a paper be filed in a manner provided for in a civil action. The Criminal Rules Committee has undertaken to develop specific service and filing provisions in Rule 49, sparing litigants and courts the need to resort to a separate set of rules. Much of the work was accomplished at their September meeting, but time has not proved available to address the task of developing common language for the Civil and Criminal Rules.

The Criminal Rules Committee does not expect to have a proposal ready to recommend to the Standing Committee at the January meeting. But there will be opportunities to work toward common provisions before then, and the common work will benefit from discussion with the Standing Committee. There may not be much work left to be done at this Committee's April meeting.

To refresh memory, the materials submitted to the Standing Committee last May are set out here:

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Standing Committee Agenda Materials, May, 2014, pages 155-162

The following materials on e-filing, e-service, and recognition of a Notice of Electronic Filing as a certificate of service are taken verbatim from the Civil Rules Committee report to the May, 2015 meeting of the Standing Committee. The purpose is to be prepared to work further on these topics if that comes to be useful in light of such progress as may have been made at the meetings of the Appellate, Bankruptcy, and Criminal Rules Committees. The Criminal Rules Committee met at the end of September and had the most work to do. The fruits of that work are noted here. The work of the other committees will be reported separately if time and purpose allow.

The Standing Committee Subcommittee on matters electronic has suspended operations. The several advisory committees, however, are cooperating in carrying forward consideration of the ways in which the several sets of rules should be revised to reflect the increasing dominance of electronic means of preserving and communicating information. For the Civil Rules, the Committee initially worked through to recommendations to publish three rules amendments for comment in August, 2015: Rule 5(d)(3) on electronic filing; Rule 5(b)(2)(E) on electronic service, with the corresponding abrogation of Rule 5(b)(3) on using the court's transmission facilities; and Rule 5(d)(1) on using the Notice of Electronic Filing as a certificate of service. But, as noted in the Introduction, continuing exchanges with the other advisory committees show that further work is needed to achieve as much uniformity as possible in language, and at times in meaning. The drafts presented here have gone through several variations, but cannot yet be regarded as the assuredly final recommendations to approve for publication. There is no urgent need to publish now, and good reason for delay. Criminal Rule 49(b) now directs that "service must be made in the manner provided for a civil action." The Criminal Rules Committee hopes to move free from this cross-reference, adopting a self-contained provision that will avoid the need to consult another set of rules. And the familiar problems with signing an electronic filing continue to resist confident drafting resolution.

Earlier work considered an open-ended rule that would equate electrons with paper in two ways. The first provision would state that a reference to information in written form includes electronically stored information. The second provision would state that any action that can or must be completed by filing or sending paper may also be accomplished by electronic means. Each provision would be qualified by an "unless otherwise provided" clause. Discussion of these provisions recognized that they might be

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suitable for some sets of rules but not for others. For the Civil Rules, many different words that seem to imply written form appear in many different rules. The working conclusion has been that at a minimum, several exceptions would have to be made. The time has not come to allow electronic service of initiating process as a general matter — the most common example is the initial summons and complaint, but Rules 4.1, 14, and Supplemental Rules B, C, D, E(3) and G also are involved. And a blanket exception might not be quite right. Rule 4 incorporates state grounds of personal jurisdiction; if state practice recognizes e-service, should Rule 4 insist on other modes of service?

Determining what other exceptions might be desirable would be a long and uncertain task. Developing e-technology and increasingly widespread use of it are likely to change the calculations frequently. And there is no apparent sense that courts and litigants are in fact having difficulty in adjusting practice to ongoing e-reality.

The conclusion, then, has been that the time has not come to propose general provisions that equate electrons with paper for all purposes in all Civil Rules. The Evidence Rules already have a provision. It does not appear that the Appellate, Bankruptcy, or Criminal Rules Committees will move toward proposals for similar rules in the immediate future.

A related general question involves electronic signatures. Many local rules address this question now, often drawing from a Model Rule. A proposal to amend the Bankruptcy Rules to address electronic signatures was published and then withdrawn. There did not seem to be much difficulty with treating an electronic filing by an authorized user of the court’s e-filing system as the filer’s signature. But difficulty was encountered in dealing with papers signed by someone other than the authorized filer. Affidavits and declarations are common examples, as are many forms of discovery responses.

It seems to have been agreed that it is too early to attempt to propose a national rule that addresses electronic signatures other than the signature of an authorized person who makes an e-filing. The draft Rule 5(d)(3) does provide that the user name and password of an attorney of record serves as the attorney’s signature. And some issues may remain in drafting even that proposal.

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Rule 5(d)(3): Electronic Filing

The draft Rule 5(d)(3) amendment would establish a uniform national rule that makes e-filing mandatory except for filings made by a person proceeding without an attorney, and with a further exception that paper filing must be allowed for good cause and may be required or allowed for other reasons by local rule. A person proceeding without an attorney may file electronically only if permitted by court order or local rule. And the user name and password of an attorney of record serves as the attorney's signature.

This proposal rests on the advantages that e-filing brings to the court and the parties. Attorneys in most districts already are required to file electronically by local rules. The risks of mistakes have been reduced by growing familiarity with, and competence in, electronic communication. At the same time, deliberation in consultation with other advisory committees showed that the general mandate should not extend to pro se parties. Although pro se parties are thus exempted from the requirement, the proposal allows them access to e-filing by local rule or court order. This treatment recognizes that some pro se parties have already experienced success with e-filing, and reflects an expectation that the required skills and access to electronic systems will expand. The court and other parties will share the benefits when pro se litigants can manage e-filing.

RULE 5. SERVING AND FILING PLEADINGS AND OTHER PAPERS

(d) FILING * * *

(3) *Electronic Filing and Signing* ~~*, or Verification*~~*.*

(A) *When Required or Allowed; Paper Filing.* ~~A court may, by local rule, allow papers to be filed, signed, or verified~~ All filings, except those made by a person proceeding without an attorney, must be made by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. But paper filing must be allowed for good cause, and may be required or allowed for other reasons by local rule.

(B) *Electronic Filing by Unrepresented Party.* A person proceeding without an attorney may file by electronic means only if allowed by court order or by local rule.

(C) *Electronic Signing.* The user name and password of an

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attorney of record[, together with the attorney's name on a signature block,] serves as the attorney's signature. A paper filed electronically ~~in compliance with a local rule~~ is a written paper for purposes of these rules.

COMMITTEE NOTE

Electronic filing has matured. Most districts have adopted local rules that require electronic filing, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts, except for filings made by a person proceeding without an attorney. But exceptions continue to be available. Paper filing must be allowed for good cause. And a local rule may allow or require paper filing for other reasons.

Filings by a person proceeding without an attorney are treated separately. It is not yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing. Encounters with the court's system may prove overwhelming to some. Attempts to work within the system may generate substantial burdens on a pro se party, on other parties, and on the court. Rather than mandate electronic filing, filing by pro se litigants is left for governing by local rules or court order. Efficiently handled electronic filing works to the advantage of all parties and the court. Many courts now allow electronic filing by pro se litigants with the court's permission. Such approaches may expand with growing experience in these and other courts, along with the growing availability of the systems required for electronic filing and the increasing familiarity of most people with electronic communication.

The user name and password of an attorney of record[, together with the attorney's name on a signature block,] serves as the attorney's signature.

Clean Rule Text

(3) *Electronic Filing and Signing.*

(A) *When Required or Allowed; Paper Filing.* All filings, except those made by a person proceeding without an attorney, must be made by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. But paper filing must be allowed for good cause, and may be required or allowed for other reasons by local rule.

(B) *Electronic Filing by Unrepresented Party.* A person proceeding without an attorney may file by electronic means only if allowed by court order or by local rule.

(C) *Electronic Signing.* The user name and password of an attorney of record[, together with the attorney's name on a signature block,] serves as the attorney's signature. A paper filed electronically is a written paper for purposes of these rules.

Rule 5(b)(2)(E): e-Service

Present Rule 5(b)(2)(E) allows service by electronic means only if the person to be served consented in writing. It is complemented by Rule 5(b)(3), which provides that a party may use the court's transmission facilities to make electronic service "[i]f a local rule so authorizes." The proposal deletes the requirement of consent when service is made through the court's transmission facilities on a registered user. It also abrogates Rule 5(b)(3) as no longer necessary.

Consent continues to be required for electronic service in other circumstances, whether the person served is a registered user or not. A registered user might consent to service by other electronic means for papers that are not filed with the court. In civil litigation, a common example is provided by discovery materials that must not be filed until they are used in the action or until the court orders filing. A pro se litigant who is not a registered user — and very few are — is protected by the consent requirement. In either setting, consent may be important to ensure effective service. The terms of consent can specify an appropriate address and format, and perhaps other matters as well.

Although consent remains important when it is required, the Committee recommends deletion of the requirement that consent be in writing. Consent by electronic means is the most likely form; many people now rely routinely on e-communication rather than paper. Beyond that, the Committee believes that in some circumstances less formal means of consent may do, such as a telephone conversation.

Rule 5. Serving and Filing Pleadings and Other Papers

(B) SERVICE: HOW MADE. * * *

(2) *Service in General.* A paper is served under this rule by:

(A) handing it to the person * * *

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(E) sending it through the court's electronic transmission facilities to a registered user or by other electronic means ~~if~~ that the person consented to ~~in writing — in which event~~. Electronic service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served; or * * *

COMMITTEE NOTE

Provision for electronic service was first made when electronic communication was not as widespread or as fully reliable as it is now. Consent of the person served to receive service by electronic means was required as a safeguard. Those concerns have substantially diminished, but have not disappeared entirely, particularly as to persons proceeding without an attorney.

The amended rule recognizes electronic service through the court's transmission facilities as to any registered user. A court may choose to allow registration only with the court's permission. But a party who registers will be subject to service through the court's facilities unless the court provides otherwise. With the consent of the person served, electronic service also may be made by means that do not utilize the court's facilities. [Consent can be limited to [service at] a prescribed address or in a specified form, and may be limited by other conditions.]

Because Rule 5(b)(2)(E) now authorizes service through the court's facilities as a uniform national practice, Rule 5(b)(3) is abrogated. It is no longer necessary to rely on local rules to authorize such service.

Clean Rule Text

Rule 5. Serving and Filing Pleadings and Other Papers

(B) SERVICE: HOW MADE. * * *

(2) *Service in General.* A paper is served under this rule by:

(A) handing it to the person * * *

(E) sending it through the court's electronic transmission facilities to a registered user or by other electronic means that the person consented to. Electronic service is complete upon transmission, but is not effective if the

> serving party learns that it did not reach the person to be served; or * * *

Permission to Use Court's Facilities: Abrogating Rule 5(b)(3)

As noted above, this package of drafts includes a proposal to abrogate Rule 5(b)(3) to reflect the amendment of Rule 5(b)(2)(E) that allows service through the court's facilities on a registered user without requiring consent. Rule 5(b)(3) reads:

> (3) *Using Court Facilities.* If a local rule so authorizes, a party may use the court's transmission facilities to make service under Rule 5(b)(2)(E).

The basic reason to abrogate (b)(3) is to avoid the seeming inconsistency of authorizing service through the court's facilities in (b)(2)(E) and then requiring authorization by a local rule as well. Probably there is no danger that a local rule might opt out of the national rule, but eliminating (b)(3) would ensure that none will. It remains important to ensure that a court can refuse to allow a particular person to become a registered user. It may be safe to rely on the Committee Note to (b)(2)(E), with added support in a Committee Note explaining the abrogation of (b)(3).

The published proposal would look like this:

> ~~(3) *Using Court Facilities.* If a local rule so authorizes, a party may use the court's transmission facilities to make service under Rule 5(b)(2)(E).~~

COMMITTEE NOTE

Rule 5(b)(3) is abrogated. As amended, Rule 5(b)(2)(E) directly authorizes service on a registered user through the court's transmission facilities. Local rule authority is no longer necessary. The court retains inherent authority to deny registration [or to qualify a registered user's participation in service through the court's facilities].

Notice of Electronic Filing as Proof of Service

Rule 5(d)(1) was amended in 1991 to require a certificate of service. It did not specify any particular form. Many lawyers include a certificate of service at the end of any paper filed in the court's electronic filing system and served through the court's transmission facilities. This practice can be made automatic by

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amending Rule 5(d)(1) to provide that a Notice of Electronic Filing constitutes a certificate of service on any party served through the court's transmission facilities. The draft amendment does that, retaining the requirement for a certificate of service following service by other means.

Treating the Notice of Electronic Filing as the certificate of service will not save many electrons. The certificates generally included in documents electronically filed and served through the court's facilities are brief. It may be that cautious lawyers will continue to include them. But there is an opportunity for some saving, and protection for those who would forget to add the certificate to the original document, whether the protection is against the burden of generating and filing a separate document or against forgetting to file a certificate at all. Other parties will be spared the need to check court files to determine who was served, particularly in cases in which all parties participate in electronic filing and service.

The Notice of Electronic Filing automatically identifies the means, time, and e-address where filing was made and also identifies the parties who were not authorized users of the court's electronic transmission facilities, thus flagging the need for service by other means. There might be some value in amending Rule 5(d)(1) further to require that the certificate for service by other means specify the date and manner of service; the names of the persons served; and the address where service was made. Still more detail might be required. The Committee considered this possibility but decided that there is no need to add this much detail to rule text. Lawyers seem to be managing nicely without it.

The draft considered by the Committee included, as a subject for discussion, a further provision that the Notice of Electronic Filing is not a certificate of service if "the serving party learns that it did not reach the person to be served." That formula appears in Rule 5(b)(2)(E), both now and in the proposed revision. The Committee concluded that this caution need not be duplicated in Rule 5(d)(1). Learning that the attempted e-service did not work means there is no service. No service, no certificate of service.

Rule 5. Serving and Filing Pleadings and Other Papers

(d) FILING.

(1) *Required Filings: Certificate of Service.*

(A) *Papers after the Complaint.* Any paper after the complaint

that is required to be served ~~— together with a certificate of service —~~ must be filed within a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed * * *.

(B) *Certificate.* A certificate of service must be filed within a reasonable time after service, but a notice of electronic filing constitutes a certificate of service on any party[2] served through the court's transmission facilities.

COMMITTEE NOTE

The amendment provides that a notice of electronic filing generated by the court's CM/ECF system is a certificate of service on any party served through the court's transmission facilities. But if the serving party learns that the paper did not reach the party to be served, there is no service under Rule 5(b)(2)(E) and there is no certificate of the (nonexistent) service.

When service is not made through the court's transmission facilities, a certificate of service must be filed and should specify the date as well as the manner of service.

Clean Rule Text

Rule 5. Serving and Filing Pleadings and Other Papers

(d) FILING.

(1) *Required Filings: Certificate of Service.*

(A) *Papers after the Complaint.* Any paper after the complaint that is required to be served must be filed within a reasonable time after service.

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[2] We have yet to resolve the question whether this should change to "person." The Civil Rules participants report that persons who are not yet formal parties are treated as if parties for filing purposes. "Party" in rule text could — and should — be read to include anyone who is asking the court to do something. Opening a miscellaneous docket to enforce a discovery subpoena in aid of litigation pending in another district would be an example. The applicant-movant would count as a party.

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(B) *Certificate.* A certificate of service must be filed within a reasonable time after service — a notice of electronic filing constitutes a certificate of service on any party served through the court's transmission facilities. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed * * *.

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10. RULE 68

Proposals for dramatic amendments of Rule 68 were published in 1983 and 1984 before the project was abandoned. Rule 68 was studied again twenty years ago; the elaborate draft developed then was put aside without publication. Spontaneous public suggestions for revisions are submitted regularly. In response to proposals made over several years, Rule 68 was discussed extensively at the meeting in October 2014. Rather than reach a conclusion, the Committee decided to sponsor research into similar state provisions to determine whether effective models for reform may be found. The Administrative Office was asked to help with the research. Resources were not immediately available. A brief report at the meeting last April held out hope that the work could begin later this year.

The Administrative Office hopes that advances in this work can be made soon. Some impetus may be provided by 15-CV-V, the most recent public suggestion. This suggestion points to New Jersey Court Rule 4:58 and urges that, like it, Rule 68 should provide for offers by plaintiffs. The New Jersey rule follows the lead of most of those who urge that Rule 68 should include plaintiffs — if a defendant rejects a plaintiff's offer that is lower than the judgment, the plaintiff is awarded "all reasonable litigation expenses incurred following non-acceptance," enhanced interest, and "a reasonable attorney's fee for such subsequent services as are compelled by the non-acceptance." Recognizing that many cases present a range of potentially reasonable awards, these consequences are triggered only if the plaintiff recovers at least 120% of the rejected offer. The consequences for a plaintiff who fails to win at least 80% of a rejected offer are similar, but qualified by several features designed to protect the plaintiff against undue hardship.

Rule 68 remains on the agenda. It will be brought back when further materials become available.

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11. New Docket Items

Many public submissions have been made since the October, 2014 meeting to propose various Civil Rules amendments. Many of the submissions relate to Rule 23, and are being considered by the Rule 23 Subcommittee. One, 15-CV-V, relates to Rule 68; it can be considered when pending research on state-court analogs to Rule 68 has concluded. Others are presented here. For each, the question is whether to act now to remove the submission from the docket or to undertake more extensive study.

Informal submissions by members of the rules committees are noted separately at the end of this section.

15-CV-A: Rule 81(c)(3)(A)

This submission addresses a single word in Rule 81(c)(3)(A), altered in the Style Project. The specific problem is narrow; it will be identified after setting out the full text of Rule 81(c)(3). Examination of the specific problem in the setting of the full rule suggests more serious questions. It seems worthwhile to identify the questions, even if the most likely outcome will be to put all of them aside to defer to more pressing work. Apart from this one submission, there is little reason to believe that significant problems are arising in practice.

Rule 81. Applicability of the Rules in General; Removed Actions

(c) Removed Actions.

(1) *Applicability.* These rules apply to a civil action after it is removed from a state court. * * *

(3) *Demand for a Jury Trial.*

(A) *As Affected by State Law.* A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal. If the state law ~~does~~ did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time. The court must so order at a party's request and may so order on its own. A party who fails to make a demand when so ordered waives a jury trial.

(B) *Under Rule 38.* If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38 must be given one if the party serves a demand within 14 days after:

(i) it files a notice of removal; or

(ii) it is served with a notice of removal filed by another party.

12b-001270

[The Style Project rewording challenged by 15-CV-A is shown by overlining the pre-2007 word, "does," and underlining the substitute, "did."]

The specific suggestion focuses narrowly on the change from "does" to "did." The suggestion is that the change has created a trap for the unwary. So long as the rule said "does," it was clear that an express demand for jury trial must be made unless state law allows a jury trial without making an express request at any time. Saying "did" may lead some to believe that they need not make an express demand for jury trial after removal if state law, although requiring a demand at some point, allowed the demand to be made later than the time the case was removed to federal court. Cases are cited to show that federal courts continue to interpret the rule as if it says "does;" an appendix includes a decision granting a motion to strike a jury demand made by the lawyer who made the submission. The opinion relies on the 2007 Committee Note stating that the changes were intended to be stylistic only.

Initial research into the change from "does" to "did" has explored Civil Rules Committee agenda books, Committee Minutes, and a substantial number of memoranda prepared for the Style Subcommittees. They show that "did" appeared in the style draft at least as early as September 30, 2004, but do not show any discussion of this specific change. They also show an intriguing hint in a note recognizing that "Joe Spaniol is right" that there is a gap in the rule, but suggesting that it cannot be fixed — if fixing is needed — in the Style Project. One question is whether there is a gap that is worth filling. A broader question is whether the whole rule is unnecessarily complicated. The complication can be illustrated by looking for the gap.

At least these situations can be imagined:

(1) A jury trial was "expressly demanded * * * in accordance with state law" before removal. It makes sense to carry the demand forward after removal.

(2) Rule 81(c)(3)(B): All necessary pleadings have been served at the time of removal, but no express demand for jury trial was made. The rule applies the same principle as Rule 38(b)(1), adjusting the time for the circumstance of removal — a demand must be served, "not 14 days after the last pleading directed to the issue is served," but 14 days after removing or being served with the notice of removal. This provides the advantages sought by Rule 38(b): the parties and the court know whether this is to be a jury case early in the proceedings.

12b-001271

(3) All necessary pleadings have not been served at the time of removal. Here the principle of Rule 81(c)(1) seems to do the job — Rule 38 applies of its own force after removal. The most sensible reading of the rule text is that an exception is made for cases where state law does not require a demand for jury trial.

(4) State law does not require a demand for jury trial at any point. The Rule was amended in 1963 to say that a demand need not be made after removal. The Committee Note said this is "to avoid unintended waivers of jury trial." But the amendment went on to provide, as the rule still does, that the court may order that a demand be made; failure to comply waives the right to jury trial. The Committee Note added the suggestion that "a district court may find it convenient to establish a routine practice of giving these directions to the parties in appropriate cases." Professor Kaplan, Reporter for the Committee, elaborated on the Note in a law review article quoted in 9 Federal Practice & Procedure: Civil 3d, § 2319, p, 230, n. 12. He suggested that it might be useful to adopt a local rule "under which the direction is to be given routinely." But he further suggested that it is important to give the parties notice in each case, since relying on a local rule alone "would recreate the difficulty which the amendment seeks to meet." These observations may address the question why it would not be better to complement subparagraph (B) by providing that if all necessary pleadings have not been served at the time of removal, Rule 38(b) applies. The apparent concern is that people will not pay attention to the Federal Rules after removal when they are habituated to a state procedure that provides jury trial without requiring an express demand at any point. That explanation seems to fit with the observation in § 2319 that "a number of courts have held that this provision is applicable only if the case automatically would have been set for jury trial in the state court * * * without the necessity of any action on the part of the party desiring jury trial."

(5) State law does require an express demand for jury trial, but the time for the demand is set at a point after the time when the case is removed. The Nevada rule involved in the docket suggestion, for example, allows a demand to be made not later than entry of the order first setting the case for trial. This is the circumstance in which the change from "does" to "did" may create some uncertainty. One possible reading is that the change reflects concern that state law may have changed after removal: it did not require an express demand at any time in the progress of the case, but has been revised after removal to require an express demand. That is a fine-grained explanation. Another possible reading is that no demand need be made after removal so long as the state-court deadline had not been reached before removal. That reading

12b-001272

can be resisted on at least two grounds. One is that the change was made in the Style Project, and thus must be read to carry forward the meaning of the rule as it was. A second is that the result is unfortunate: although both state and federal systems require an express demand, none need be made because of the differences in the deadlines. There is little reason to suppose that a party who wishes a jury trial should believe that removal provides relief from the demand requirement. Anyone who actually reads the rules should at least recognize the uncertainty and make a demand. It makes little sense to read the rule in a way that is most likely to make a difference only when a party belatedly decides to opt for a jury trial.

The immediate question is whether the style choice should be reversed to promote clarity. "Does" took on an apparently established and quite limited meaning. It is possible to read "did" in the Style Rule to have a different meaning. But the Committee has been reluctant to revisit choices made in the Style Project, particularly when the courts — no matter what may be the experience of particular lawyers — seem to be getting it right. If that were all that might be considered, the case for amending the rule may not be strong.

But it is worth asking whether it makes sense to perpetuate the exception for cases removed from courts in however many states there be that do not require a demand for jury trial at all. One example would be a state that does not provide for jury trial in a particular case — but that does not offer much reason to excuse a demand requirement after removal. Perhaps the rule has been too eager to protect those who refuse to read Rule 81(c) to find out that federal procedure governs after removal. There is a strong federal interest in the early demand requirement of Rule 38(b). All parties and the court know from the outset whether they are moving toward a jury trial, however likely it is that the case will ever get there. The risk that a party may decide to opt for a jury trial only because the judge does not seem sufficiently sympathetic is reduced. Rule 39(b) protects the opportunity to reclaim a jury trial after failing to make a timely demand.

Rule 81(c) would be much simpler, a not inconsiderable virtue in this setting, if it were recast to read something like this:

(3) *Demand for a Jury Trial.* Rule 38(b) governs a demand for jury trial unless, before removal, a party expressly demanded a jury trial in accordance with state law. If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38

12b-001273

must be given one[3] if the party serves a demand within 14 days after:
(A) it files a notice of removal, or
(B) it is served with a notice of removal filed by another party.

With all of this, the two most likely choices are these: Do nothing, or undertake a thorough reexamination of Rule 81(c). Matters can be resolved reasonably without changing "did" back to "does." But the complex and incomplete structure of Rule 81(c), built on sympathy for those who refuse to consult the rules, might benefit from significant simplification.

[3] This version simply tracks the current rule. It might be shortened: "If all necessary pleadings have been served at the time of removal, a demand must be served within 14 days after * * *."

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125-001275

From: Mark Wray <mwray@markwraylaw.com>
To: "Rules_Support@ao.uscourts.gov" <Rules_Support@ao.uscourts.gov>
Date: 01/17/2015 06:51 PM
Subject: Change to Rule 81

As for the body of people that apparently is meeting April 9-10 in Wash., D.C., to discuss the civil rules, please consider the following:

I propose that Fed. R. Civ. P. 81 be amended by adding words to clarify that in a case removed from state to federal court, if the state law requires a jury demand to be filed, and one was not required to be filed before the removal under the applicable state law, a jury demand does not have to be filed following removal until the federal judge orders it to be filed.

I actually think the rule already reads the way I stated it in the previous sentence, but in the Ninth Circuit, relying on an old case that predates the 2007 rule changes, the judges have uniformly denied jury demands for allegedly being untimely, using an interpretation of the rule that frankly is contrary to the way the rule actually reads. I have attached a brief and a court order to prove my point. I am not alone on this issue. There are dozens of cases from across the country that have dealt with it.

One would think that of all the things that should be protected by a simple rule, it is the ability to have a jury trial. Under Rule 81, however, that fundamental right is easily lost, due to the botched "style" changes of 2007.

As my reason for this rule change, I submit that Rule 81 as amended by this Committee in 2007 during the so-called "style" changes has created a trap for the unwary by changing the present tense to the past tense, and yet courts continue interpreting the rule in the present tense, to make jury demands untimely, as occurred in my case. If what I just said is unclear, please read the attached brief, which I hope will make the problem clearer. In short, the rule itself needs to be clarified, so that the courts will apply it according to the way it is actually written.

Many of the contributors to the process of the 2007 "style" changes objected repeatedly that the "style" changes would lead to costs to parties that were not acceptable. They included the group from the Eastern District of New York and others. I don't know why their cogent and compelling input was ignored, but it was ignored.

Somehow, some sub-committee of persons operating under the auspices of the full committee (the administrative office of the courts repelled my efforts to get the actual records to find out who, and why, and where, and how) approved Rule 81 language that changed the present tense to past tense, and the overall rules committee then pronounced that draft acceptable.

The big committee has minutes stating that the big committee felt that whatever "costs" may be borne by those of us subject to the substantive and unintended consequences of "style" changes, those costs are "acceptable".

I respectfully disagree. Enough people, like my client, have paid the "costs", and the "costs" are unacceptable. This is an unfairly tricky rule that can be easily clarified, and needs to be fixed. Please do so. Thanks.

Regards,

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Attorneys for Plaintiff
TOM GONZALES

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

TOM GONZALES,

Plaintiff,

vs.

SHOTGUN NEVADA INVESTMENTS, LLC, a Nevada limited liability company; SHOTGUN CREEK LAS VEGAS, LLC, a Nevada limited liability company; SHOTGUN CREEK INVESTMENTS, LLC, a Washington State limited liability company; and WAYNE PERRY, an individual,

Defendants.
_____/

Case No. 2:13-cv-00931-RCJ-VPC

(Eighth Judicial District Court Case No. A-13-679826)

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO STRIKE JURY DEMAND

In this action removed from the District Court in and for Clark County, Nevada, Plaintiff filed a jury demand September 18, 2014, two days after this Court denied the Defendants' motion for summary judgment. With summary judgment having been denied, Plaintiff believed it was appropriate to consolidate

this action with the Desert Lands case (3:11-cv-00613-RCJ-VPC), file demands for jury in both cases, and prepare for trial. *See Wray Decl., attached.*

According to the applicable rule for jury demands in actions removed from state court, Plaintiff believes his jury demand was timely. Fed. R. Civ. P. 81(c)(3)(A) states:

> (3) *Demand for a Jury Trial.*
>
> (A) *As Affected by State Law.* A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal. If the state law did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time. The court must so order at a party's request and may so order on its own. A party who fails to make a demand when so ordered waives a jury trial.

This case was removed from a state court in Nevada. Under Nevada law, "[a]ny party may demand a trial by jury of any issue triable of right by a jury by serving as required by Rule 5(b) upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than the time of the entry of the order first setting the case for trial." Nev. R. Civ. P. 38(b). Thus, jury demands are not required to be filed in Nevada state court until the time of the entry of the order first setting the case for trial.

Defendants removed this action within 30 days of being served with the Summons and Complaint and before even filing their Answer to the Complaint. *ECF No. 1, 4.* Obviously, at that point in time, a jury demand was not required by Nevada law. In such a situation, the second sentence of Rule 81(c)(3)(A) states: "If the state law did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time." The Court still has not ordered the parties to file a jury demand

within a specified time, and thus the Plaintiff's jury demand filed September 18, 2014 was timely under the rule.

Defendants now bring this Motion to Strike Plaintiff's Jury Demand (*ECF No. 69*), objecting that the second sentence of Fed. R. Civ. P. 81(c)(3)(A) is inapplicable because "the second sentence applies where State Law *does not require an express demand for jury trial* and Nevada law, NRCivP Rule 38, does require an express demand for a jury trial." *Motion, ECF No. 69, p. 8:5-7* (*emphasis* in original).

The Defendants' argument incorporates a subtle, yet significant, anachronism that leads to a faulty interpretation of Rule 81(c)(3)(A). The Defendants argue that Rule 81(c)(3)(A) applies when state law "**does** not require an express demand for jury trial," thus using the present tense of the verb. The second sentence of the rule actually is written in the past tense: "If the state law **did** not require an express demand for jury trial . . .". The shift from present to past tense results in a change in the meaning of the rule that is significant to deciding this motion.

Using the present tense, as the Defendants choose to do, the meaning is that if the state law does not require an express demand for jury trial; i.e., if no express demand for jury trial is required by state law *at any time*, then the Court must order the parties to file a demand. Stated alternatively, using the present tense, if *at any time* the state law requires an express demand for jury trial, then Rule 81(c)(3)(A) does not apply, and a jury demand must be filed with 14 days of filing of the last pleading directed to the issue. *See Fed. R. Civ. P. 38(b)(1).*

On the other hand, using the past tense, which is how the rule is written, of course, the meaning is that if the state law did not require an express demand for jury trial; i.e., if the Plaintiff did not have to make a jury demand under state law *before the case was removed*, then the Plaintiff need not make a jury demand until

ordered to do so. Reading Rule 81(c)(3)(A) as it is written, therefore, Plaintiff filed a timely jury demand on September 18, 2014.

The use of the present tense is an anachronism because prior to 2007, the rule was written in the present tense -- "does not" -- and starting in 2007, the rule was changed to the past tense -- "did not". The Defendants' motion disregards this distinction, but in fairness, court decisions have overlooked it as well.

A leading case on Rule 81(c) in the Ninth Circuit is *Lewis v. Time, Inc.,* 710 F.2d 549, 556 (9th Cir. 1983), which has been cited by courts in the Ninth Circuit at least 27 times for its interpretation of the rule. When *Lewis* was decided in 1983, Rule 81(c) was written in the present tense, and stated, in pertinent part: "If state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they need not make demands after removal unless the court directs that they do so. . . ". *Id.* The court held in *Lewis* that California law does require an express demand when the trial is set. *Id.* Lewis had not requested a trial before his case was removed from California state court. *Id.* "Therefore, F.R. Civ. P. 38(d), made applicable by Rule 81(c), required Lewis to file a demand 'not later than 10 days after the service of the last pleading directed to such issue [to be tried].' Failure to file within the time provided constituted a waiver of the right to trial by jury. Rule 38(d)." *Id.* (The 10-day deadline subsequently was extended to 14 days by other rule amendments.)

This holding from *Lewis* continues to be followed, uncritically, by district courts in the Ninth Circuit. *See, e.g., Ortega v. Home Depot U.S.A., Inc.,* 2012 U.S. Dist. LEXIS 2787 (E.D.Cal. 2012) (following *Lewis* as to its interpretation of Rule 81(c)(3)(A)); *Nascimento v. Wells Fargo Bank,* 2011 U.S. Dist. LEXIS 111019 (D.Nev. 2011) (applying the *Lewis* holdings to an action removed from Nevada state court); *Kaldor v. Skolnik*, 2010 U.S. Dist. LEXIS 137109 (D.Nev. 2010) (finding that under *Lewis*, Rule 81(c)(3)(A) is inapplicable if state law

requires an express demand for jury trial, "regardless of when the demand is required").

With due respect for these district court decisions, it is questionable that they would follow the holding in *Lewis* today, as a matter of *stare decisis*, given the intervening changes in Rule 81(c). For *Lewis* to supply the rule of decision, it would seem that one must discount the change from the present to the past tense – from "does not" to "did not" -- as having no effect on the meaning of the second sentence of Rule 81(c)(3)(A). Disregarding differences in words runs counter to well-established rules of statutory construction. *See Boise Cascade Corp. v. United States EPA,* 942 F.2d 1427, 1432 (9th Cir. 1991) ("Under accepted canons of statutory interpretation, we must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous."); *In re Transcon Lines,* 58 F.3d 1432, 1437 (9th Cir. 1995) (the cardinal principle is that the plain meaning of a statute controls).

Furthermore, taking the view that the change from "does not " to "did not" makes no difference to the meaning of the second sentence then begs the question as to why rule-makers made the change at all.

The Notes of the Advisory Committee on 2007 Amendments state: "The language of Rule 81 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only."

The problem with the Advisory Committee's note is that a change in "style" can also affect meaning, and therefore affect substance. A practitioner can read the amended Rule 81(c)(3)(A) to mean exactly what it says, and can reasonably believe that a jury trial demand that state law did not require to be filed before removal is not required to filed in federal court unless and until ordered by the federal judge. The problem with the note of the Advisory Committee is that in the

case of Rule 81(c)(3)(A), the effect of "style" changes is a critical change in meaning; if that meaning is not applied and the result is the loss of the right to trial by jury, the rule has become a trap for the unwary.

Many district courts in the Ninth Circuit have acknowledged that Rule 81 suffers from poor drafting and tricky wording, but have applied *Lewis* regardless. In *Rump v. Lifeline,* 2009 U.S. Dist. LEXIS 98506 (N.D.Cal. 2009), the court said:

> The Court recognizes that the federal rules governing jury demands after removal, in conjunction with California's rules permitting a plaintiff to make a jury demand up until the time of trial, creates ambiguity and a trap for the unwary. However, *Lewis* addressed the interplay between California's rules and Rules 38 and 81, and held that a jury demand must be made within 10 days of removal. Accordingly, ***because the Court is bound by Lewis***, the Court GRANTS defendants' motion and STRIKES plaintiff's jury demand.

Id., emphasis added; see also: Gilmore v. O'Daniel Motor Ctr., Inc., 2010 U.S. Dist. LEXIS 57792 (D.Neb. 2010); *Cross v. Monumental Life Ins. Co.,* 2008 U.S. Dist. LEXIS 109235 (D.Ariz. 2008) ("[T]he needless complexity of the removal rule, Rule 81(c), sometimes creates a trap for the unwary.")

Indeed, if Rule 81(c)(3)(A) cannot be relied upon to mean what it says, it is not only a trap for the unwary, it is an *unfair* trap for the unwary.

The problem with altering the "style" of any rule is that it requires changes in language, and changes in language alter meaning, which is a principle that was recognized by the people who changed the rules in 2007. The Judicial Conference Committee on Rules of Practice and Procedure keeps online records of its proceedings through the Administrative Office of the U.S. Courts in Washington, D.C. The online archives[1] contain the minutes and reports of various rules committee meetings. Attached as Exhibit 1 to this Opposition are copies of

[1] http://www.uscourts.gov/rulesandpolicies/rules/archives.aspx

excerpts from the June 2, 2006 report of the Civil Rules Advisory Committee on the subject of "style" changes, with portions highlighted for purpose of emphasis. The report refers to various contributors to the process who were highly critical of the "style" changes, including the Committee on Civil Litigation of the U.S. District Court for the Eastern District of New York, whose members wrote:

> The unanimous judgment of every member of the Committee who expressed a view was that the costs and other disadvantages of the style revision project outweigh its benefits. First, there is the risk of unintended consequences. After finding a number of ambiguities and apparent substantive changes, review of the Burbank-Joseph report found they had uncovered many more – and there was almost no overlap, suggesting that there remain a significant number of unintended consequences that neither we nor they have spotted. Second, any style revisions will bring disruptions. The sheer magnitude of the rewording and subdivision of rules that have become familiar to the courts and the profession in their present form will complicate research and reasoning about the rules for many years to come.

See Exhibit 1, attached. The words of the committee from the Eastern District of New York are amazingly prescient in anticipating the current situation with the Plaintiff.

In its "Overall Evaluation", the rules committee asked Profession Stephen B. Burbank and Gregory P. Joseph, Esq. (the "Burbank-Joseph" group) to comment on their working group's view of the wisdom of the style project. Burbank-Joseph reported that 14 members participated in the final conference call. "Of them, nine believed that the project should not be carried to a conclusion, while five believed that the advantages of adopting the Style Rules outweigh the costs that will be entailed." *See Exhibit 1, attached.*

The rules committee spoke of "costs that will be entailed", which in this case, is the cost of losing the right to a jury trial. Forfeiting that Constitutional

right because of a tricky rule, which cannot be relied upon to mean what it says, is not a cost that can or should be borne by the Plaintiff or any other litigant.

Nor is the situation in the Plaintiff's case in any way unique. Dozens of cases are reported from U.S. District Courts across the country where a party was deprived of a right to a jury trial in a case removed from state court based on an interpretation of Rule 81(c)(3)(A). This means attorneys across the land are losing the right to jury trials for their clients in cases that are removed from state court to federal court because the rule is not being interpreted the way it reads.

To Plaintiff's knowledge, only one of the many reported decisions on this issue explicitly discusses the change from the present to past tense, and is the only case that squarely addresses the issue raised by this Opposition. In *Kay Beer Distrib. v. Energy Brands, Inc.,* 2009 U.S. Dist. LEXIS 49792 (E.D. Wisc. 2009), the district judge analyzed and decided the issue as follows:

> The language of the current Rule 81 is ambiguous. At least one court has observed that the Rule is "poorly crafted." Cross v. Monumental Life Ins. Co., 2008 U.S. Dist. LEXIS 109235, 2008 WL 2705134, *1 (D. Ariz. July 8, 2008). This court agrees. The use of the past tense -- "If state law did not require an express demand" -- without any qualification, makes it unclear whether the exception is intended to apply to cases in which a demand for a jury under state law was not yet due when the case was removed, or to cases in which a demand is not required at all. Kay's interpretation of Rule 81(c)(3)(A) thus has some merit. But ultimately, I conclude that Energy's interpretation is correct. Rule 81(c)(3)(A) only applies when the applicable state law does not require a jury demand at all. It has no application when, as in this case, the applicable state law requires an express demand, but the time for making the demand has not yet expired when the case is removed.
>
> This is apparent from the language of the Rule prior to its amendment in 2007. Prior to the 2007 amendment to Rule 81, it read:
>
> If state law applicable in the court from which the case is removed *does not* require the parties to make express demands after removal in

order to claim trial by jury, they need not make demands after removal unless the court directs that they do so within a specified time if they desire to claim trial by jury.

Fed. Rule Civ. P. 81(c) (2006) (amended 2007) (italics added).

The Advisory Committee Notes for the 2007 Amendments to Rule 81 state that the language of the Rule was amended "as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules." The note states that the changes were intended to be "stylistic only."

The earlier version of Rule 81(c) was the result of the 1963 amendment to the Rules which added the exception in the first place. The Advisory Committee Notes relating to the 1963 Amendment state that the change was meant to avoid unintended waivers of a party's right to a jury trial in cases that are removed to federal court from state courts in which no demand is required. To achieve this purpose, "the amendment provides that where by State law applicable in the court from which the case is removed a party is entitled to jury trial without making an express demand, he need not make a demand after removal." Fed. R. Civ. P. 81 Advisory Committee Note, 1963 Amendment. See also 9 Wright & Miller, Federal Practice and Procedure (hereafter Wright & Miller) § 2319 at 228-29 (3d ed. 2008). It therefore follows that the exception in Rule 81(c)(3)(A), which relieves a party in a removed case from the obligation to demand a jury trial, applies only where the applicable state law does not require an express demand for a jury trial. Since Wisconsin law does require a jury demand, Rule 81(c)(3)(A)'s exception does not apply.

Kay cites Williams v. J.F.K. Int'l Carting Co., 164 F.R.D. 340 (S.D.N.Y. 1996) and Marvel Entm't Group, Inc. v. Arp Films, Inc., 116 F.R.D. 86 (S.D.N.Y. 1987), in support of its interpretation of Rule 81, but both dealt with actions removed from New York courts. Cases removed from New York court provide little guidance because "the practice in New York falls within a gray area not covered by Rule 81(c)." Cascone v. Ortho Pharm. Corp., 702 F.2d 389, 391 (2d Cir. 1983); see also 9 Wright & Miller § 2319 at 231 ("Many cases

> removed from New York state courts pose a unique situation."). Wisconsin law unequivocally requires a demand in order to preserve one's right to a jury trial. I therefore conclude that Rule 81(c)(3)(A) is inapplicable and Kay's demand for a jury trial was untimely under Rule 38(b).

Plaintiff respectfully urges that this Court *not* adopt the reasoning of *Kay Beer*. The court in *Kay Beer* did not apply the language of the rule as it reads today, and instead reverted to the former version of the rule. The court stated: "Rule 81(c)(3)(A) only applies when the applicable state law **does not** require a jury demand at all." (Emphasis added). The only rationale offered by the court in *Kay Beer* for applying the former version of the rule instead of the current rule is that the Notes of the Advisory Committee state that the 2007 changes to the rules were intended to be "stylistic only". Respectfully, changes that may have been intended to be "stylistic only" can in fact be substantive. The people that adopted the rules openly debated the effect that the "stylistic" changes would have on the substantive law, and ultimately, the rules committee adopted the rules knowing that certain "costs" would be borne by litigants and the court system, including "costs" in the form of substantive rule changes that may not have been intended. The rules committee nonetheless deemed these costs to be acceptable in adopting the new rules. *See Exhibit 1, attached.* When a "stylistic" change alters the meaning of a rule, this is deemed an acceptable cost, and the Court should apply the rule as it is written. Practitioners also should be able to rely on the rules as written.

As an additional consideration, the court in *Kay Beer* only followed the rationale that the general purpose of the 2007 changes was to effect changes in style and not substance. The court in *Kay Beer* had no apparent knowledge as to the specific reasons why the change was made from "does not" to "did not". One would have to access the minutes and reports of the style subcommittee of the Civil Rules Advisory Committee to obtain that knowledge. The minutes and reports of the style subcommittee do not appear to be available online or in any

readily available alternative source, however, and Plaintiff is unable to provide them to the Court. *See Wray Decl., attached.*

In the absence of the subcommittee minutes and reports, the proper approach is to apply ordinary rules of statutory construction and construe the rule as it is written. By applying the plain language of the rule, one must reasonably conclude that in cases removed from state to federal court, when the applicable state law requires an express jury demand, but the time for making the demand has not yet expired when the case is removed, the time for making a jury demand is to be set by the court.

Accordingly, the jury demand filed September 18, 2014 in this action is timely. It respectfully requested that the Defendants' Motion to Strike Plaintiff's Jury Demand be denied.

DATED: October 16, 2014 LAW OFFICES OF MARK WRAY

By __/s/ Mark Wray_____
MARK WRAY
Attorneys for Plaintiff TOM GONZALES

DECLARATION OF MARK WRAY IN SUPPORT OF OPPOSITION TO STRIKE JURY DEMAND

I, Mark Wray, declare:

1. My name is Mark Wray. I substituted in as attorney for Plaintiff Tom Gonzales in this action on June 11, 2014. I know the following facts of my personal knowledge and could, if asked, competently testify to the truth of the same under oath.

2. On September 16, 2014, the Court denied the Defendants' motion for summary judgment. *ECF No. 65.*

3. Upon receiving the order, I reviewed Fed. R. Civ. P. 81(c)(3)(A) and prepared a jury demand which I filed with the Court on September 18, 2014. I also called Defendants' counsel, Mr. Schwartzer, and asked if he would inquire about obtaining his clients' permission to consolidate the trial of the two related actions.

4. On September 26, 2014, Mr. Schwartzer advised me that his clients would not agree to consolidation and that he would be filing a motion to strike the jury demand.

5. After receiving the Defendants' motion and re-reading Rule 81(c)(3)(A), I reviewed minutes and reports of the Judicial Conference Committee on Rules of Practice and Procedure for the years 2003 through 2007. I also contacted the support staff of the committee in Washington, D.C. I learned there are six members of the support staff, headed by their chief, Jonathan Rose, and they are busy with six different committees. Over a period of days and follow-up phone calls, I attempted to find out whether anyone on the support staff has access to any minutes and reports of the style subcommittee of the Advisory Committee on Civil Rules during the years leading up to the 2007 rule changes. I spoke to Mr. Rose specifically about this subject, explaining my interest in knowing the genesis of the change from "does not" to "did not". Although I followed up several times

seeking to obtain this information from Mr. Rose or his staff, I did not receive a response from them before having to prepare and file this Opposition.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration was executed on October 16, 2014 at Reno, Nevada.

/s/ Mark Wray
MARK WRAY

CERTIFICATE OF SERVICE

The undersigned employee of the Law Offices of Mark Wray hereby certifies that a true copy of the foregoing document was sealed in an envelope with first-class postage prepaid thereon and deposited in the U.S. Mail at Reno, Nevada on October 16, 2014 addressed as follows:

Lenard E. Schwartzer
Schwartzer & McPherson Law Firm
2850 S. Jones Blvd., Suite 1
Las Vegas, NV 89146

_____/s/ Theresa Moore_____

EXHIBIT INDEX

Exhibit 1 Excerpts of Minutes of the Civil Rules Advisory Committee

EXHIBIT 1

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

DAVID F. LEVI
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

CARL E. STEWART
APPELLATE RULES

THOMAS S. ZILLY
BANKRUPTCY RULES

LEE H. ROSENTHAL
CIVIL RULES

SUSAN C. BUCKLEW
CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

To: **Honorable David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure**

From: **Honorable Lee H. Rosenthal, Chair, Advisory Committee on Federal Rules of Civil Procedure**

Date: **June 2, 2006**

Re: **Report of the Civil Rules Advisory Committee**

Introduction

The Civil Rules Advisory Committee met in Washington, D.C., on May 22-23, 2006. Draft minutes of the meeting are attached.

Part I of this report presents action items. Subpart A recommends approval for adoption of two sets of proposals. The first is Civil Rule 5.2, the Civil Rules version of the E-Government Rules developed under direction by the Standing Committee Subcommittee on the E-Government Act. The second is the package of Style amendments — Style Rules 1-86; Style-Substance amendments to Rules 4(k), 9(h), 11(a),14(b),16(c)(1), 26(g)(1), 30(b), 31, 40, 71.1, and 78; Style Forms; and the Style versions of the amended rules on electronic discovery now pending in Congress and scheduled to take effect on December 1, 2006 (Rules 16, 26, 33, 34, 37, and 45).

Subpart I B recommends approval for publication of new Rule 62.1 on indicative rulings and amendments to Rules 13(f), 15(a)(amended pleadings), and 48 (jury polling). The recommendation is to publish these proposals — along with the modest amendment of Rule 8(c) approved for publication at the January meeting — at a later date, presumably August, 2007, when they can be included in a package with other proposals.

Part II of this report presents information items describing the projects that are being developed for further consideration.

(b) Scire Facias and Mandamus. The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules.	**(b) Scire Facias and Mandamus.** The writs of scire facias and mandamus are abolished. Relief previously available through them may be obtained by appropriate action or motion under these rules.
(c) Removed Actions. These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal.	**(c) Removed Actions.** **(1)** ***Applicability.*** These rules apply to a civil action after it is removed from a state court.
Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest. If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if the party's demand therefor is served within 10 days after the petition for removal is filed if the party is the petitioner, or if not the petitioner within 10 days after service on the party of the notice of filing the petition.	**(2)** ***Further Pleading.*** After removal, repleading is unnecessary unless the court orders it. A defendant who did not answer before removal must answer or present other defenses or objections under these rules within the longest of these periods: **(A)** 20 days after receiving — through service or otherwise — a copy of the initial pleading stating the claim for relief; **(B)** 20 days after being served with the summons for an initial pleading on file at the time of service; or **(C)** 5 days after the notice of removal is filed.
A party who, prior to removal, has made an express demand for trial by jury in accordance with state law, need not make a demand after removal. If state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they need not make demands after removal unless the court directs that they do so within a specified time if they desire to claim trial by jury. The court may make this direction on its own motion and shall do so as a matter of course at the request of any party. The failure of a party to make demand as directed constitutes a waiver by that party of trial by jury.	**(3)** ***Demand for a Jury Trial.*** **(A)** *As Affected by State Law.* A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal. If the state law did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time. The court must so order at a party's request and may so order on its own. A party who fails to make a demand when so ordered waives a jury trial. **(B)** *Under Rule 38.* If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38 must be given one if the party serves a demand within 10 days after: **(i)** it files a notice of removal; or **(ii)** it is served with a notice of removal filed by another party.

Summary of Comments

The written comments on Style Rules 1-86, the Style-Substance Rules, and the Style Forms, are described in the Summary of Comments. The hearing on November 18, 2005, and discussion at the Committee meeting that followed, are described in the Notes on the meeting.

SUMMARY OF COMMENTS: STYLE RULES

(Two of the most detailed sets of comments are identified without repeating the full CV designation each time. One set, 05-CV-22, was submitted by Professor Stephen B. Burbank and Gregory P. Joseph, Esq., on the basis of work done by a 21-person working group, is identified simply as "Burbank-Joseph." Similarly, 05-CV-008, submitted by the Committee on Civil Litigation of the United States District Court for the Eastern District of New York, is identified as "EDNY.")

The summaries are at times embroidered by responses. Although this approach is new to the task of summarizing comments, the Style Project presents some issues that may benefit from counterpoint.

Overall Project

Hon. W. Eugene Davis, 05-CV-007: Judge Davis chaired the Criminal Rules Advisory Committee during the style revision project. He opposed the project while the decision to go ahead was deliberated, fearing that "we would make inadvertent, substantive changes or create ambiguities that would result in wasteful, satellite litigation." But the fears "turned out to be almost totally unfounded. We have experienced minimal litigation over the meaning of the style changes. Judge Will Garwood, who was Chair of the Appellate Rules Committee during their style revision project, also tells me that satellite litigation over the meaning of the changes to those rules has not been a problem." "I have every reason to believe that the concern about significant satellite litigation over the meaning of the changes to the Civil Rules will turn out to be just as unfounded as it was with the Criminal Rules."

EDNY: Review of the Burbank-Joseph comments led to an independent consideration of the costs of the style enterprise. "[T]he unanimous judgment of every member of the Committee who expressed a view" was that "the costs and other disadvantages of the style revision project outweigh its benefits." First, there is the risk of unintended consequences. After finding a number of ambiguities and apparent substantive changes, review of the Burbank-Joseph report found that they had uncovered many more — and that there was almost no overlap, suggesting that "there remain a significant number of unintended consequences that neither we nor [they] have spotted." Second, any style revision will bring "disruptions." "[T]he sheer magnitude of the rewording and subdivision of rules that have become familiar to the courts and the profession in their present form will complicate research and reasoning about the rules for many years to come." Third, courts and the profession will be so occupied "in digesting the style revisions" that it will be more difficult to accomplish desirable substantive rules revisions. It would be better to implement style revisions of particular rules or groups of rules "as the need for substantive changes in those rules or groups of rules becomes apparent."

Prof. Bradley Scott Shannon, 05-CV-009: "The non-substantive problems associated with the Federal Rules of Civil Procedure are sufficiently great so as to warrant revision. Overall, the Advisory Committee has done a fine job in this regard, and the restyled rules as proposed, whatever their flaws, are superior to the Rules as they currently exist."

Plain Language Action and Information Network (PLAIN), 05-CV-010: "This draft is a tremendous improvement over the current version. It will be easier to use, and thus should save time and effort, and achieve a higher degree of conformance with the procedures it outlines."

Hon. Peter D. Keisler, Assistant Attorney General, 05-CV-011: In the judgment of the United States Department of Justice "the revisions should help simplify and clarify the text of many of the Rules so that practitioners can better understand and apply them." Attorneys in the Criminal Division and in the Civil Division's appellate staff have found that the style changes in the Criminal Rules and Appellate Rules "have been positive and beneficial. the Department strongly supports the current initiative to restyle the Civil Rules * * *."

Susan Kleimann, President Kleimann Communications Group, 05-CV-012: The style amendments "will make it easier for judges, lawyers, and the public to find the information they need, understand what they find, and be able to use that information effectively."

Lawyers for Civil Justice, 05-CV-014: "Plain language is critical to clear understanding and our reading of the Style Revisions convinces us that lawyers and litigants will save lots of time and trouble in reading and interpreting these rules, if they are adopted. * * * Increased clarity will bring about easier and faster understanding of the Rules and dealings among lawyers will be simplified and facilitated." LCJ disagrees with those who believe the changes are not worth the effort. "Similar claims were made about the re-styling of the Criminal and Appellate Rules, but those have been on the books for some time and appear to have worked well in practice."

John Beisner, Esq. 05-CV-015: The restyled rules attempt to minimize the frequent debates about the meanings of even familiar Civil Rules, "to ensure that our federal judicial rules provide a clear roadmap to litigating in our federal courts — rather than construct a trap for the unwary." Simplifying the rules "will also increase attorney efficiency and even has the potential to reduce ever-escalating attorneys' fees. One study conducted in Australia found that on average, lawyers are able to arrive at a solution 30 percent faster when they consult plain versions of legislation versus traditionally styled legislation. See Law Reform Comm'n of Victoria, Plain English and the Law 69-70 (1987)." "[T]he restyling * * * reflects a broadly-based, overdue realization by public and private entities that simpler is better."

Some comments suggest that the Style Project will interfere with the more important need "to rewrite the rules for 21st Century legal practice. * * * I believe that these concerns are ill-founded." There is no apparent present plan to convene a "Constitutional convention" to rewrite the Civil Rules from scratch. The wisdom of any such project is questionable. Some of the rules are controversial, but gradational change is better than wholesale change. And in any event, a sweeping revision of the whole system would take many years, if not decades. "It makes no sense to force attorneys to litigate under potentially confusing rules for several years simply because a more ambitious project is being planned that could easily take many years to implement." Indeed, by making the rules clearer the style project will save attorneys time, not waste their time by forcing them to relearn a new set of rules and then put aside the new learning for a still newer set of rules.

Hon. Thomas S. Zilly, Advisory Committee on Bankruptcy Rules, 05-CV-016: "The restyling significantly improves the Civil Rules both as to their clarity and readability."

Donald P. Byrne, Esq., 05-CV-017: After a career writing FAA regulations as Assistant Chief Counsel for Regulations, finds the revised rules "a great improvement in communication, especially for lawyers like me who refer to the Civil Rules only occasionally. They're easier to read, digest, and remember." It was a challenge to get through the original rules. "The proposed style revisions make the ride much smoother and the road map much clearer."

ABA Section of Litigation, 05-CV-018: The Litigation Section Council has not taken a position on the Style Rules, but notes the honor and privilege of enjoying the opportunity to participate in the style process through two members assigned to assist in the project and through the Section's liaison to the Advisory Committee. The Committee responded to countless questions raised by these Section representatives.

Committee on United States Courts, State Bar of Michigan, 05-CV-019: "The amendments will enhance the readability, internal consistency and organization of the Federal Rules."

Hon. Bill Wilson, 05-CV-020: Writes in response to the doubts expressed by the EDNY committee. Judge Wilson was a member of the Style Subcommittee when the restyling of the Criminal Rules began. The same objections to restyling were voiced then. "The legal profession has traditionally been very conservative about changes (style or substantive) to any rules with which members of the profession have worked. I am satisfied that plain, simple language is to be preferred." "We need rules so plain that practicing lawyers can understand them. In fact, we ought to make them so plain that even judges can understand them. I urge full steam ahead on this restyling project and others."

Patricia Lee Refo, Esq., and Scott J. Atlas, Esq., 05-CV-021: Scott Atlas and Patricia Refo are past chairs of the ABA Section of Litigation and both were members of the Burbank-Joseph Committee. "In our view, the potential benefits outweigh any conceivable transaction costs. The revised rules represent a significant improvement over the existing rules in terms of resolving ambiguities to conform to clear case law and using plain English so that younger and less experienced federal court practitioners can more easily comprehend the text. We have long thought that the language used in the original rules has outlived its usefulness and that practitioners would be better served by a more straightforward text. The Restyling Project accomplishes this goal."

Burbank-Joseph: "[A] number of members favored continuing the effort." They thought the restyling of other sets of rules had been successful. They agreed that there will be some unintended changes in meaning, but noted that this Committee's comments and others will reduce the number. They conclude that such disadvantages are outweighed by the advantages in greater accessibility of the restyled rules, "particularly to younger and less experienced practitioners." But "[a] greater number of participants were either mildly or strongly negative." The Committee found a number of serious problems, and there may be many more that have not been identified. Whatever benefits may be realized "will pale in comparison with the transaction costs, not just those engendered by uncertainty about a change in meaning, but those generated by the need to learn the new rules (and pay for the new treatises), together with the additional transaction costs that will follow when local rules and standing orders are changed to conform to the restyled rules." Beyond these costs, restyling "might retard or make more difficult the more important task of determining whether we have an appropriate set of rules for litigation in the twenty-first century." It would be better to include restyling as one component of the substantive enterprise — "the bar would not tolerate having to relearn the rules more than once in a generation." Finally, Burbank and Joseph themselves are concerned with problems that "have negative implications for access to court (e.g., Rule 68) and/or for the protection of individual rights (e.g., Rule 65) * * *."

Federal Magistrate Judges Assn., 05-CV-024: "The FMJA supports the proposed restyling of the Civil Rules. The proposed style revisions improve the Civil Rules both as to their clarity and readability."

Rather than revert to the present rule, which refers only to stenographic reporting, there would be no harm in simply dropping Rule 80. Others suggested that perhaps Rule 80 should be retained, to be reconsidered in the context of a broader project to review the Civil Rules provisions on evidence for better integration with the Evidence Rules. It was further noted that Rule 80 should not be confused with possible evidentiary uses of deposition testimony — it addresses only testimony "at a trial or hearing." That might include an administrative hearing, or a state-court trial or hearing. The problems of various recording methods may not be as acute as they would be if deposition testimony were included. At the end, Mr. Joseph suggested that Style Rule 80 would be appropriate if it refers only to stenographically recorded testimony.

Rules 72, 73: Professor Burbank noted that Professor Linda Silberman, who was involved in drafting the original versions of Rules 72 and 73, was directed to follow the language of the magistrate-judge statute, and still thinks that is a good idea. Perhaps style conventions should not trump fealty to the statutory language here. To be sure, it was a new statute at the time, and one purpose of adhering to the statutory language may have been to serve a "teaching" purpose. They may have wanted to be sure they were not changing anything. That purpose may not be as important now. If we can be sure that there are no possible changes of meaning, and no significant transaction costs arising from transitional confusion or efforts to create confusion, the Style changes may be appropriate. So, it was noted, the Criminal Rules have adhered to the Civil Style drafts.

Rule 36(b): Professor Burbank noted that the Style-Substance proposal to amend Rule 36(b) presents a problem. The present rule permits amendment of an admission "[s]ubject to the provisions of Rule 16 governing amendment of a pre-trial order." Present Rule 16(e) states two different things about amending a pretrial order. First it provides generally that an order reciting the action taken at a Rule 16 conference "shall control the subsequent course of the action unless modified by a subsequent order." That provision does not establish any standard for modification; it simply recognizes that modification may occur. The second provision is that an order following a final pretrial conference "shall be modified only to prevent manifest injustice." The Style Rules divide these two provisions between Style Rule 16(d) and (e). The Style-Substance proposal is to limit Rule 36(b) to an order permitting withdrawal or amendment of an admission "that has not been incorporated in a pretrial order." The result is that there is no standard for withdrawal or amendment of an admission that has been incorporated in a pretrial order before the final pretrial order. The appropriate rule instead should be that the Rule 36(b) standard governs withdrawal or amendment except as to an admission that has been incorporated in a final pretrial order. Withdrawal or amendment of an admission incorporated in a final pretrial order should be governed by the more demanding standard of Style Rule 16(e).

Overall Evaluation: A Committee Member asked Professor Burbank and Mr. Joseph to comment on their written summary of the working group's views on the wisdom of undertaking the Style Project. Professor Burbank replied that the group was divided. Fourteen members participated in the final conference call. Of them, nine believed that the project should not be carried to a conclusion, while five believed that the advantages of adopting the Style Rules outweigh the costs that will be entailed. The strength of their convictions varied. Some thought the goals of the project are admirable, but were concerned that there are not insignificant problems even in light of the perception that the Styled Appellate Rules and Criminal Rules work. The problems that can be identified now can be fixed now. But there will be other problems that are not identified. And there will be transaction costs as lawyers attempt to bend the Style Rules by arguing for unintended changes of meaning. In addition, there is an opportunity cost in losing the occasion for addressing the entire corpus of rules by asking whether the present Federal Rules of Civil Procedure embody the right procedure for the 21st Century.

November 22 draft

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

TOM GONZALES, Plaintiff, vs. SHOTGUN NEVADA INVESTMENTS, LLC et al., Defendants.	)	2:13-cv-00931-RCJ-VPC **ORDER**

This case arises out of the alleged breach of a settlement agreement that was part of a confirmation plan in a Chapter 11 bankruptcy action. Pending before the Court are a Motion to Reconsider (ECF No. 68) and a Motion to Strike Jury Demand (ECF No. 69). For the reasons given herein, the Court denies the motion to reconsider and grants the motion to strike jury demand.

I. FACTS AND PROCEDURAL HISTORY

This is the second action in this Court by Plaintiff Tom Gonzales concerning his entitlement to a fee under a Confirmation Order the undersigned entered over ten years ago while sitting as a bankruptcy judge.

A. The Previous Case

On December 7, 2000, Plaintiff loaned $41.5 million to Desert Land, LLC and Desert

Oasis Apartments, LLC to finance their acquisition and/or development of land ("Parcel A") in Las Vegas, Nevada. The loan was secured by a deed of trust. On May 31, 2002, Desert Land and Desert Oasis Apartments, as well as Desert Ranch, LLC (collectively, the "Desert Entities"), each filed for bankruptcy, and the undersigned jointly administered those three bankruptcies while sitting as a bankruptcy judge. The court confirmed the second amended plan, and the Confirmation Order included a finding that a settlement had been reached under which Gonzales would extinguish his note and reconvey his deed of trust, Gonzales and another party would convey their fractional interests in Parcel A to Desert Land so that Desert Land would own 100% of Parcel A, Gonzales would receive Desert Ranch's 65% in interest in another property, and Gonzales would receive $10 million if Parcel A were sold or transferred after 90 days (the "Parcel Transfer Fee"). Gonzales appealed the Confirmation Order, and the Bankruptcy Appellate Panel affirmed, except as to a provision subordinating Gonzales's interest in the Parcel Transfer Fee to up to $45 million in financing obtained by the Desert Entities.

In 2011, Gonzales sued Desert Land, Desert Oasis Apartments, Desert Oasis Investments, LLC, Specialty Trust, Specialty Strategic Financing Fund, LP, Eagle Mortgage Co., and Wells Fargo (as trustee for a mortgage-backed security) in state court for: (1) declaratory judgment that a transfer of Parcel A had occurred entitling him to the Parcel Transfer Fee; (2) declaratory judgment that the lender defendants in that action knew of the bankruptcy proceedings and the requirement of the Parcel Transfer Fee; (3) breach of contract (for breach of the Confirmation Order); (4) breach of the implied covenant of good faith and fair dealing (same); (5) judicial foreclosure against Parcel A under Nevada law; and (6) injunctive relief. Defendants removed that case to the Bankruptcy Court. The Bankruptcy Court recommended moving to withdraw the reference, because the undersigned issued the underlying Confirmation Order while sitting as a bankruptcy judge. One or more parties so moved, and the Court granted the motion. The Court dismissed the second and fifth causes of action and later granted certain defendants' counter-

motion for summary judgment as against the remaining claims. Plaintiff asked the Court to reconsider and to clarify which, if any, of its claims remained, and defendants asked the Court to certify its summary judgment order under Rule 54(b) and to enter judgment in their favor on all claims. The Court denied the motion to reconsider, clarified that it had intended to rule on all claims, and certified the summary judgment order for immediate appeal. The Court of Appeals affirmed, ruling that the Parcel Transfer Fee had not been triggered based on the allegations in that case, and that Plaintiff had no lien against Parcel A.

B. The Present Case

In the present case, also removed from state court, Plaintiff recounts the Confirmation Order and the Parcel Transfer Fee. (*See* Compl. ¶¶ 10–14, Apr. 10, 2013, ECF No. 1, at 11). Plaintiff also recounts the history of the '613 Case. (*See id.* ¶¶ 17–21). Plaintiff alleges that Defendant Shotgun Nevada Investments, LLC ("Shotgun") began making loans to Desert Entities for the development of Parcel A between 2012 and January 2013 despite its awareness of the Confirmation Order and Parcel A transfer fee provision therein. (*See id.* ¶¶ 22–23). Plaintiff sued Shotgun, Shotgun Creek Las Vegas, LLC, Shotgun Creek Investments, LLC, and Wayne M. Perry for intentional interference with contract, intentional interference with prospective economic advantage, and unjust enrichment based upon their having provided financing to the Desert Entities to develop Parcel A. Defendants removed and moved for summary judgment, arguing that the preclusion of certain issues decided in the '613 Case necessarily prevented Plaintiffs from prevailing in the present case. The Court granted that motion as a motion to dismiss, with leave to amend.

Plaintiff filed the Amended Complaint ("AC"). (*See* Am. Compl., Aug. 20, 2013, ECF No. 28). Plaintiff alleges that the Confirmation Order permitted Parcel A to be used as collateral for up to $25,000,000 in mortgages of Parcel A itself or as collateral for a mortgage securing the purchase of real property subject to the FLT Option if the proceeds were used only for the

purchase of that real property, but that any encumbrance of Parcel A outside of these parameters would trigger the Parcel Transfer Fee. (*See id.* ¶¶ 15–16). Various Shotgun entities made additional loans to the Desert Entities in 2012 and 2013 "related to the development of Parcel A." (*Id.* ¶¶ 25–26). Multiple Shotgun entities have also invested in SkyVue Las Vegas, LLC ("SkyVue"), the company that owns the entities that own Parcel A. (*Id.* ¶ 27). Plaintiff alleges that the reason Perry, the principal of the Shotgun entities, did not document his $10 million investment was to "avoid evidence of a transfer," and thus the triggering of the Parcel Transfer Fee. (*See id.* ¶ 29).

Defendants moved for summary judgment, and Plaintiff moved to compel discovery under Rule 56(d). The Court struck the conspiracy and declaratory judgment claims from the AC, because Plaintiff had no leave to add them. The Court otherwise denied the motion for summary judgment and granted the motion to compel discovery, although the Court noted that the intentional interference with prospective economic advantage claim (but not the intentional interference with contractual relations claim) was legally insufficient. Defendants again moved for summary judgment after further discovery and filed a motion in limine asking the Court to exclude any testimony of witnesses or documents not disclosed in discovery. The Court denied the motion for summary judgment because the allegations in the AC concerned events subsequent to the events alleged in the '613 Case, and Plaintiff had submitted evidence sufficient to create a genuine issue of material fact for trial as to the sole remaining claim for intentional interference with contractual relations. The Court denied the motion in limine because it identified no particular evidence to exclude but simply asked the Court to enforce the evidence rules at trial as a general matter.

Defendants have asked the Court to reconsider their latest motion for summary judgment and to strike Plaintiff's recently filed jury demand.

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II. DISCUSSION

A. Motion to Reconsider

Defendants argue that the Court noted no timely reply had been filed, but that they in fact filed a reply that was timely under a stipulation to extend time. The Court has examined the reply, and it does not negate the genuine issue of material fact Plaintiff showed in his response.

B. Motion to Strike Jury Demand

Plaintiff did not demand a jury trial in the Complaint, (*see* Compl., ECF No. 1, at 11), or in the AC, (*see* Am. Compl., ECF No. 28). Defendants did not demand a jury trial in the Answer to the Complaint, (*see* Answer, ECF No. 4), or in the Answer to the AC, (*see* Answer, ECF No. 30). A jury must be demanded by serving the other parties with a written demand no later than fourteen days after service of the last pleading directed to the issue for which a jury trial is demanded. Fed. R. Civ. P. 38(b)(1). The last such pleading in this case was the Answer to the AC, which was served upon Plaintiff via ECF on September 3, 2013. (*See* Cert. Service, ECF No. 30, at 8). The deadline for any party to demand a jury trial was therefore Tuesday, September 17, 2013. The Jury Demand at ECF No. 67 was served upon Defendants via ECF on September 18, 2014, over a year after the deadline. (*See* Cert. Service, ECF No. 67, at 3). Defendants are therefore correct that the demand is untimely and should be stricken.

In response, Plaintiff notes that in removal cases such as the present one, an express jury demand made before removal that is sufficient under state law need not be renewed after removal, and that where state law requires no express jury demand, a party need not make such a demand after removal unless specially ordered to do so by the court within a specified time. *See* Fed. R. Civ. P. 81(c)(3)(A). Plaintiff argues that Nevada law requires a jury demand "not later than the time of the entry of the order first setting the case for trial." Nev. R. Civ. P. 38(b). Plaintiff argues that because a jury demand was not yet due under state law at the time the case was removed, he need not make such a demand after removal unless ordered to do so by the

court within a specified time, and the Court has not issued such an order in this case.

Rule 81 waives the requirements of Rule 38 where an express jury demand has been made under state law before removal. Plaintiff does not claim to have made any express jury demand before removal, however. It is also true that where state law does not require an express jury demand, none need be made after removal. The questions here are whether and when a party must make a jury demand in federal court after removal in cases where state law does in fact require a jury demand, but where it was not yet due under state law at the time of removal. In such cases, is the jury demand requirement under Rule 38 negated, as is the case where state law requires no demand at all?

Plaintiff candidly admits that the Court of Appeals has ruled that in such cases a jury demand must be made in accordance with Rule 38, and that district courts typically follow that rule. *See Lewis v. Time, Inc.*, 710 F.2d 549, 556 (9th Cir. 1983). However, Plaintiff also notes that the rule at the time of *Lewis* read, "If state law applicable in the court from which the case is removed *does* not require the parties to make express demands in order to claim trial by jury . . . ." *See id.* (quoting Fed. R. Civ. P. 81(c) (1983)) (emphasis added). Plaintiff argues that the result should be different today, because the rule was amended in relevant part in 2007 to read, "If the state law *did* not require an express demand for a jury trial . . . ." Fed. R. Civ. P. 81(c)(3)(A) (emphasis added). Plaintiff argues that because the current rule uses the past tense as to the requirement to make a jury demand under state law when viewed from the point of removal, that there is no requirement to make a jury demand in federal court if none was yet due under state law at the time of removal. Plaintiff admits that the 2007 amendments to the rules were "intended to be stylistic only," *see* Fed. R. Civ. P. 81 advisory committee's note, but argues that the stylistic change is an "unfair trap for the unwary."

The Court agrees with the district courts that continue to enforce the *Lewis* rule. Rule 81 is not a trap for the unwary. Even if that had been a fair argument when Rule 81 was newly

amended, as Plaintiff notes, district courts, including those in this district, have consistently enforced the *Lewis* rule under Rule 81 as amended. *See Nascimento v. Wells Fargo Bank*, No. 2:11-cv-1049, 2011 WL 4500410, at *2 (D. Nev. Sept. 27, 2011) (Mahan, J.); *Kaldor v. Skolnik*, No. 3:10-cv-529, 2010 WL 5441999, at *2 (D. Nev. Dec. 28, 2010) (Hicks, J.). And the new language of the rule is not particularly confusing. The Rule 38 demand is required unless the state law "did not require an express demand," not only if the state law "did not *yet* require an express demand *to have been served at the time of removal*." The latter reading of the rule is improbable. The committee's notes make clear that such a meaning was not intended, as the amendment was only for style. The authors of the rule surely knew how to distinguish the concepts of whether and when, and they did not add any language reasonably invoking the concept of timing into the amendment of Rule 81(c)(3)(A).

Moreover, Plaintiff's own Case Management Report of July 30, 2013 notes that "A jury trial has not been requested" under paragraph VIII, entitled "JURY TRIAL." (*See* Case Mgmt. Report 6, July 30, 2013, ECF No. 25). If Plaintiff had truly been under the impression that the right to a jury trial had been preserved under Rule 81(c)(3)(A) because no jury demand was yet due at the time of removal, he surely would have noted his expectation of a jury trial and/or explained his position that no jury demand was necessary; he would not have simply noted that no jury trial had been requested and left it at that. Plaintiff's "unfair trap for the unwary" argument in this case is therefore not made in good faith, even if the argument could avail a litigant in an appropriate case.

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CONCLUSION

IT IS HEREBY ORDERED that the Motion to Reconsider (ECF No. 68) is DENIED.

IT IS FURTHER ORDERED that the Motion to Strike Jury Demand (ECF No. 69) is GRANTED.

IT IS SO ORDERED.

Dated this 23rd day of October, 2014.

ROBERT C. JONES
United States District Judge

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125-001307

TAB 11B

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This submission seems to suggest only that the Committee create a "comment," not a change in the text of Rule 30(c)(2). It seems better to refuse to act on the proposal than to attempt to create a suitable change in rule text.

Rule 30(c)(2) says, among other things, that an objection at an oral deposition "must be stated concisely in a nonargumentative and nonsuggestive manner." The submission asks for a comment "indicating that it is improper to merely object to ‘form’ without providing more precise information as to how the question asked is ‘defective as to form’ (e.g., compound, leading, assumes facts not in evidence, etc.)."

Support for the submission is provided by attaching an opinion by Judge Mark W. Bennett in Security National Bank of Sioux City v. Abbott Laboratories, 2014 WL 3704277 (N.D.Iowa). The opinion imposes sanctions on a lawyer for making improper objections in defending depositions. "First, Counsel interposed an astounding number of ‘form’ objections, many of which stated no recognized basis for objection." Beyond that, the objections often coached the witness, and "Counsel excessively interrupted * * *." The opinion rejects the assumption "that uttering the word ‘form’ is sufficient to state a valid objection." Rule 32(d)(3)(B)(i) says that an objection to an error at an oral examination is waived by failure to make it timely at the deposition if it relates to "the form of a question or answer," or other matters that might have been corrected at the time. That does not mean that it suffices to say: "Object as to form."

It may be fair to assume that too many lawyers rely, too often, on unelaborated objections as to form. Providing a further explanation — if in fact the lawyer has thought of one — can only advance the conduct of the deposition and the value of the information discovered. It would be nice to find rule language that effectively alleviates this tendency.

But what language would do the job? "[I]n a nonargumentative, nonsuggestive, and helpful manner"? "[I]n a nonargumentative and nonsuggestive manner that reasonably explains the basis of the objection"? Is there a risk that directing more elaborate objections will prove counterproductive, encouraging non-concise, prolix, and otherwise obfuscating objections when the basis of the objection is in fact apparent without further explanation?

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Unless pragmatic judgment suggests there is an opportunity to do something useful to improve form objections, it is better not to take up this suggestion.

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jy-8e6l-60c3
Comments Due: February 17, 2015

Docket: USC-RULES-CV-2014-0003
Proposed Amendments to the Federal Rules of Civil Procedure

Comment On: USC-RULES-CV-2014-0003-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure

Document: USC-RULES-CV-2014-0003-0005
Comment from Shawna Bligh, NA

Submitter Information

Name: Shawna Bligh
Organization: NA

General Comment

Perhaps consider clarifying the statement in the advisory notes to Fed. R. Civ. P. 30(c)(2) regarding "form" objections. As discussed more fully in the case Security National Bank of Sioux City v. Abbott Laboratories, 2014 WL 3704277, objections to "form" of the question is merely a one of a "category of objections," but not a proper objection in and of itself. There should be a comment indicating that it is improper to merely object to "form" without providing more precise information as to how the question asked is "defective as to form" (e.g. compound, leading, assumes facts not in evidence, etc.). The above-referenced case (also attached with this comment) has a great discussion about how such "form" objections can "frustrate the goals underlying the Federal Rules," as well as provides a good example of how the use of such objections can be abused in the discovery process.

Attachments

sanctions-order

2014 WL 3704277
Only the Westlaw citation is currently available.
United States District Court,
N.D. Iowa,
Western Division.

The SECURITY NATIONAL BANK OF SIOUX CITY, IOWA, as Conservator for J.M.K., a Minor, Plaintiff,
v.
ABBOTT LABORATORIES, Defendant.

No. C 11–4017–MWB. | Signed July 28, 2014.

Synopsis
Background: Conservator for minor child brought products liability action against manufacturer of baby formula, alleging that formula contained dangerous bacteria. After jury trial, judgment was entered for manufacturer. The District Court, sua sponte, filed order to show cause as to why manufacturer's attorney should not be sanctioned for obstructive conduct at depositions.

Holdings: Following telephonic hearing, the District Court, Mark W. Bennett, J., held that:

[1] attorney's conduct violated procedural rule prohibiting witness coaching;

[2] attorney violated procedural rule that prohibited impeding, delaying, and frustrating examination of witnesses during depositions; and

[3] attorney's conduct warranted sanction in which attorney was required to write and produce training video that addressed impropriety of his conduct.

Ordered accordingly.

West Headnotes (8)

[1] **Federal Courts**

A federal court may consider collateral issues, like sanctions, after an action is no longer pending.

Cases that cite this headnote

[2] **Attorney and Client**

District courts have an inherent power to levy sanctions in response to abusive litigation practices; a primary aspect of that power is the ability to fashion an appropriate sanction for conduct which abuses the judicial process, and that power can be invoked even if procedural rules exist which sanction the same conduct.

Cases that cite this headnote

[3] **Attorney and Client**

Only the most extreme sanctions under a court's inherent power, like assessing attorney's fees or dismissing with prejudice, require a bad-faith finding; for less extreme sanctions, a finding of bad faith is not always necessary to the court's exercise of its inherent power to impose sanctions.

Cases that cite this headnote

[4] **Attorney and Client**

Unless a question is truly so vague or ambiguous that the defending lawyer cannot possibly discern its subject matter, the defending lawyer may not suggest to the witness that the lawyer deems the question to be unclear; lawyers may not object simply because they find a question to be vague, nor may they assume that the witness will not understand the question. Fed.Rules Civ.Proc.Rule 30(c)(2), 28 U.S.C.A.

Cases that cite this headnote

[5] **Attorney and Client**

Instructions to a witness at a deposition that they may answer a question "if they know" or "if they

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understand the question" are raw, unmitigated coaching, and are never appropriate. Fed.Rules Civ.Proc.Rule 30(c)(2), 28 U.S.C.A.

Cases that cite this headnote

[6] **Attorney and Client**

Attorney's conduct at depositions, i.e., making objections that prompted witnesses to request that examiner clarify otherwise cogent questions, concluding objections by telling witness to answer "if you know," and rephrasing examiner's questions, violated procedural rule prohibiting witness coaching. Fed.Rules Civ.Proc.Rule 30(c)(2), 28 U.S.C.A.

Cases that cite this headnote

[7] **Attorney and Client**

Attorney's excessive interruptions and objections at depositions, such that attorney's name appeared on average between one and three times per page of deposition transcript, violated procedural rule that prohibited impeding, delaying, and frustrating examination of witnesses during depositions. Fed.Rules Civ.Proc.Rule 30, 28 U.S.C.A.

Cases that cite this headnote

[8] **Attorney and Client**

Conduct of attorney in engaging in witness coaching and excessive interruptions at depositions warranted sanction in which attorney was required to write and produce training video that addressed impropriety of his conduct, so as to deter and change future improper tactics. Fed.Rules Civ.Proc.Rules 26, 30, 28 U.S.C.A.

Cases that cite this headnote

Attorneys and Law Firms

Amanda Brandy Van Wyhe, Timothy S. Bottaro, Vriezelaar, Tigges, et al, Sioux City, IA, Robert J. King, Stephen C. Rathke, Lommen, Abdo, Cole, King & Stageberg, PA, Minneapolis, MN, for Plaintiff.

John C. Gray, Jeff W. Wright, Heidman Law Firm, LLP, Sioux City, IA, Daniel E. Reidy, Gabriel H. Scannapieco, June K. Ghezzi, Paula Sue Quist, Jones Day, Chicago, IL, for Defendant.

Opinion

MEMORANDUM OPINION AND ORDER REGARDING SANCTIONS

MARK W. BENNETT, District Judge.

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*1 Something is rotten, but contrary to Marcellus's suggestion to Horatio, it's not in Denmark. [1] Rather, it's in discovery in modern federal civil litigation right here in the United States. Over two decades ago, Griffin Bell—a former United States Attorney General, United States appeals court judge, and private practitioner—observed: "The criticism of the civil justice system has reached a crescendo in recent years. Because much of the cost of litigation is incurred in discovery, the discovery process has been the focal point of considerable criticism." [2] How little things have changed.

Discovery—a process intended to facilitate the free flow of information between parties—is now too often mired in obstructionism. Today's "litigators" are quick to dispute discovery requests, slow to produce information, and all-too-eager to object at every stage of the process. They often object using boilerplate language containing every objection imaginable, despite the fact that courts have resoundingly disapproved of such boilerplate objections. [3] Some litigators do this to grandstand for their client, to intentionally obstruct the flow of clearly discoverable information, to try and win a war of attrition, or to intimidate and harass the opposing party. Others do it simply because it's how they were taught. As my distinguished colleague and renowned expert on civil procedure Judge Paul Grimm of the District of Maryland has written: "It would appear that there is something in the DNA of the American civil justice system that resists cooperation during discovery." [4] Whatever the reason, obstructionist discovery conduct is born of a warped view of zealous advocacy, often formed by insecurities and fear of the truth. This conduct fuels the astronomically costly litigation industry at the expense of "the just, speedy, and inexpensive determination of every action and proceeding." Fed.R.Civ.P. 1. It persists because most litigators and a few real trial lawyers—even very good ones, like the lawyers in this case—have come to accept it as part of the routine chicanery of federal discovery practice. [5]

But the litigators and trial lawyers do not deserve all the blame for obstructionist discovery conduct because judges so often ignore this conduct, [6] and by doing so we reinforce —even *incentivize*—obstructionist tactics. [7] Most litigators, while often inept in jury trials (only because they so seldom experience them), are both smart and savvy and will continue to do what has worked for them in the past. Obstructionist litigators, like Ivan Pavlov's dogs, salivate when they see discovery requests and are conditioned to unleash their treasure chest of obstructive weaponry. Unlike Pavlov's dogs, their rewards are not food but successfully blocking or impeding the flow of discoverable information. Unless judges impose serious adverse consequences, like court-imposed sanctions, litigators' conditional reflexes will persist. The point of court-imposed sanctions is to stop reinforcing winning through obstruction.

*2 While obstructionist tactics pervade all aspects of pretrial discovery, this case involves discovery abuse perpetrated during depositions. Earlier this year, in preparation for a hard-fought product liability jury trial, I was called upon by the parties to rule on numerous objections to deposition transcripts that the parties intended to use at trial. I noticed that the deposition transcripts were littered with what I perceived to be meritless objections made by one of the defendant's lawyers, whom I refer to here as "Counsel." I was shocked by what I read. Thus, for the reasons discussed below, I find that Counsel's deposition conduct warrants sanctions.

I do not come to this decision lightly. Counsel's partner, who advocated for Counsel during the sanctions hearing related to this case (and who is one of the best trial lawyers I have ever encountered), urged that sanctions by a federal judge, especially on a lawyer with an outstanding career, like Counsel, should be imposed, if at all, with great hesitation and a full appreciation for how a serious sanction could affect that lawyer's career. I wholeheartedly agree. I am still able to count each of the sanctions I have imposed on lawyers in my twenty years as a district court judge on less than all the fingers of one hand. Virtually all of those sanctions have been imposed on (or threatened to be imposed on) lawyers from out-of-state law firms. [8]

I. PROCEDURAL HISTORY

This matter arises out of a product liability case tried to a jury in January of 2014. Plaintiff Security National Bank (SNB), acting as conservator for a minor child, J.M.K., sued Defendant Abbott Laboratories (Abbott), claiming that J.M.K. suffered permanent brain damage after consuming baby formula, produced by Abbott, that allegedly contained a dangerous bacteria called enterobacter sakazakii. SNB went to trial against Abbott on design defect, manufacturing defect, and warning defect claims. On January 17, 2014, a jury found

in favor of Abbott on SNB's product liability claims. The Clerk entered judgment in favor of Abbott on January 21, 2014.

During the trial, I addressed Counsel's conduct in defending depositions related to this case. Specifically, I filed a *sua sponte* order to show cause as to why I should not sanction Counsel for the "serious pattern of obstructive conduct" that Counsel exhibited during depositions by making hundreds of "form" objections that ostensibly lacked a valid basis. Because I did not want to burden Counsel with the distraction of a sanctions hearing during trial, I suggested we table any discussion of sanctions until after the trial was over. Thus, the same day the judgment was filed, I entered a supplemental order to show cause, ordering Counsel to address three issues that potentially warrant sanctions: (1) Counsel's excessive use of "form" objections; (2) Counsel's numerous attempts to coach witnesses; and (3) Counsel's ubiquitous interruptions and attempts to clarify questions posed by opposing counsel. My supplemental order focused on Counsel's conduct in defending two particular depositions —those of Bridget Barrett–Reis and Sharon Bottock—but I noted that I would consider any relevant depositions in deciding whether to impose sanctions. On January 24, 2014, Counsel requested a substantial extension of time to respond to my supplemental order, which I granted. On April 21, 2014, Counsel responded to my supplemental order to show cause. My chambers later contacted Counsel to set this matter for telephonic hearing. Counsel requested another one-month delay, which I granted. Counsel filed an additional brief on July 9, 2014, and the hearing was finally held on July 17, 2014. During the hearing, I requested that Counsel follow up with an e-mail suggesting an appropriate sanction, should I decide to impose one. On July 21, 2014, Counsel's partner sent an e-mail to me declining to suggest a sanction, and urging me not to impose sanctions.

*3 After reviewing Counsel's submissions, I find that Counsel's conduct during depositions warrants sanctions. I discuss below the basis for imposing sanctions and the particular sanction that I deem appropriate in this case.

II. ANALYSIS

A. Standards for Deposition Sanctions

[1] "It is well established that a federal court may consider collateral issues [like sanctions] after an action is no longer pending." *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 395, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990). Because Counsel's deposition conduct is at issue here, Federal Rule of Civil Procedure 30 applies. Rule 30(d)(2) provides: "The court may impose an appropriate sanction—including the reasonable expenses and attorney's fees incurred by any party —on a person who impedes, delays, or frustrates the fair examination of the deponent." Rule 30(d)(2) does not limit the types of sanctions available; it only requires that the sanctions be "appropriate." *See Francisco v. Verizon S., Inc.,* 756 F.Supp.2d 705, 712 (E.D.Va.2010), *aff'd,* 442 F. App'x 752 (4th Cir.2011) ("Although Rule 30(d)(2) does not define the phrase 'appropriate sanction,' the imposition of discovery sanctions is generally within the sound discretion of the trial court." (citations omitted)).

[2] District courts also have a " 'well-acknowledged' inherent power ... to levy sanctions in response to abusive litigation practices." *Roadway Exp., Inc. v. Piper,* 447 U.S. 752, 765, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980). "A primary aspect of that [power] is the ability to fashion an appropriate sanction for conduct which abuses the judicial process." *Chambers v. NASCO, Inc.,* 501 U.S. 32, 44–45, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991). "[T]he inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct." *Id.* at 49.

Counsel incorrectly argues—without citing to any dispositive authority—that I may not impose sanctions *sua sponte* under Rule 30(d)(2). Because SNB's lawyers did not file a motion for sanctions, Counsel argues that I am without power to impose them under the Federal Rules.[9] Rule 30(d)(2)'s text, however, imposes no such limitation on a court's authority to sanction deposition conduct. The rule contains no motion-related preconditions whatsoever; it simply provides that "[t]he court may impose an appropriate sanction" on a person who obstructs a deposition. The advisory committee notes further suggest that courts may issue Rule 30(d)(2) sanctions without a motion from a party. The notes provide that sanctions under Rule 30(d) are congruent to those under Rule 26(g):

> The rule also explicitly authorizes the court to impose the cost resulting from obstructive tactics that unreasonably prolong a deposition on the person engaged in such obstruction. This sanction may be imposed on a non-party witness as well as a party or

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> attorney, but is otherwise congruent with Rule 26(g).

Fed.R.Civ.P. 30, advisory committee notes (1993 amendments). Under Rule 26(g), courts may issue sanctions *sua sponte:* "If a certification violates this rule without substantial justification, the court, on motion *or on its own,* must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both." Fed.R.Civ.P. 26(g)(3) (emphasis added). In addition to Rule 30(d)'s text and the advisory committee notes, the United States Supreme Court has noted that "court[s] generally may act *sua sponte* in imposing sanctions under the Rules." *Chambers,* 501 U.S. at 43 n. 8; *see also Jurczenko v. Fast Prop. Solutions, Inc.,* No. 1:09 CV 1127, 2010 WL 2891584, at *2–4 (N.D.Ohio July 20, 2010) (imposing sanctions under Rule 30(d)(2) where party moved for sanctions only under Rule 37(d)). And even if I lacked the power to issue sanctions under Rule 30(d), I would retain the authority to sanction Counsel under my inherent power. *See In re Itel Sec. Litig.,* 791 F.2d 672, 675 (9th Cir.1986) ("Sanctions may also be awarded sua sponte under the court's inherent power." (citing *Roadway Exp.,* 447 U.S. at 765)).

*4 [3] Counsel also claims to have acted in good faith during the depositions related to this case. Even if that is true, it is inapposite. In imposing sanctions under either Rule 30(d)(2) or my inherent power, I need not find that Counsel acted in bad faith. "[T]he imposition of sanctions under Federal Rule[ ] of Civil Procedure 30(d)(2) ... does not require a finding of bad faith." *GMAC Bank v. HTFC Corp.,* 248 F.R.D. 182, 196 (E.D.Pa.2008). Rather, the person sanctioned need only have "impede[d], delay[ed], or frustrate[d] the fair examination of the deponent." Fed.R.Civ.P. 30(d)(2). And only the most extreme sanctions under a court's inherent power—like assessing attorney's fees or dismissing with prejudice—require a bad-faith finding. *See Chambers,* 501 U.S. at 45–46 (noting that "a court may assess attorney's fees when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons" (citations and internal quotation marks omitted)); *Stevenson v. Union Pac. R. Co.,* 354 F.3d 739, 751 (8th Cir.2004) ("A bad faith finding is specifically required in order to assess attorneys' fees." (citations omitted)); *Lorin Corp. v. Goto & Co., Ltd.,* 700 F.2d 1202, 1207 (8th Cir.1983) ("Dismissal with prejudice is an extreme sanction and should not be imposed unless the default was wilful or in bad faith."). For less extreme sanctions, like those at issue here, "a finding of bad faith is not always necessary to the court's exercise of its inherent power to impose sanctions." *Stevenson,* 354 F.3d at 745 (citations omitted); *see also Harlan v. Lewis,* 982 F.2d 1255, 1260 (8th Cir.1993) ("We do not believe *Roadway* extends the 'bad faith' requirement to every possible disciplinary exercise of the court's inherent power, especially because such an extension would apply the requirement to even the most routine exercises of the inherent power. We find no statement in *Roadway, Chambers,* or any other decision cited by the parties, that the Supreme Court intended this 'bad faith' requirement to limit the application of monetary sanctions under the inherent power." (internal citations and footnote omitted)). Still, while I need not find bad faith before imposing sanctions, I find it difficult to believe that Counsel could, in good faith, engage in the conduct outlined in this opinion.

The Eighth Circuit Court of Appeals "review[s] the imposition of discovery sanctions for an abuse of discretion." *Craig v. St. Anthony's Med. Ctr.,* 384 F. App'x 531, 532 (8th Cir.2010).

B. Deposition Conduct

In defending depositions related to this case, Counsel proliferated hundreds of unnecessary objections and interruptions during the examiner's questioning. Most of these objections completely lacked merit and often ended up influencing how the witnesses responded to questions. In particular, Counsel engaged in three broad categories of improper conduct. First, Counsel interposed an astounding number of "form" objections, many of which stated no recognized basis for objection. Second, Counsel repeatedly objected and interjected in ways that coached the witness to give a particular answer or to unnecessarily quibble with the examiner. Finally, Counsel excessively interrupted the depositions that Counsel defended, frustrating and delaying the fair examination of witnesses. I will address each category of conduct in turn.

1. "Form" Objections

*5 In the two depositions I asked Counsel to review in my order to show cause, Counsel objected to the "form" of the examiner's question at least 115 times. That means that Counsel's "form" objections can be found on roughly 50% of the pages [10] of both the Barrett–Reis and Bottock depositions. Counsel made "form" objections with similar frequency while defending other depositions, too. Sometimes Counsel followed these "form" objections with a particular basis for objection, like "speculation" or "narrative." Other times, Counsel simply objected to "form," requiring the

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reader (and, presumably, the examiner) to guess as to the objection's basis.

In addition to the sheer number of "form" objections Counsel interposed, Counsel also demonstrated the "form" objection's considerable range, using it for a number of purposes. For example, Counsel used "form" objections to quibble with the questioner's word choice (for no apparent reason, other than, perhaps, to coach the witness to give a desired answer):

> Q. Would it be fair to say that in your career, work with human milk fortifier has been a significant part of your job?
>
> COUNSEL: Object to the form of the question. "Significant," it's vague and ambiguous. You can answer it.
>
> A. Yeah, I can't really say it's been a significant part. It's been a part of my job, but "significant" is rather difficult because I have a wide range of things that I do there.

(Barrett–Reis Depo. 56:19 to 57:4).[11] Counsel used "form" objections to voice absurdly hyper-technical truths:

> Q. Are there certain levels that one can get, that have catwalks or some similar apparatus so I can get to the dryer?
>
> A. The dryer is totally enclosed. You cannot get into the dryer from any of the levels.
>
> Q. Can I get on the outside of the dryer?
>
> COUNSEL: Object to the form of the question; outside of the dryer? Everything is—I mean, outside of the dryer is a huge expanse of space; anything that's not inside the dryer is outside the dryer, so I object to it as vague and ambiguous. Object to the form of the question.
>
> A. Rephrase the question.

(Bottock Depo. 130:3–15). Counsel also used "form" objections to break new ground, inventing novel objections not grounded in the rules of evidence or common law:

> Q. Are you familiar with the term "immunocompromised"?
>
> A. Yes.
>
> Q. And that would include premature babies?
>
> COUNSEL: Object to the form of the question, "that would include premature babies?" It's a non sequitur.[12]

(Barrett–Reis Depo. 54:15–21). (In case there is any doubt, *non sequitur* is not a proper objection.) But, whatever their purpose, Counsel's "form" objections rarely, if ever, followed a truly objectionable question.

In my view, objecting to "form" is like objecting to "improper"—it does no more than vaguely suggest that the objector takes issue with the question. It is not itself a ground for objection, nor does it preserve any objection. Instead, "form" objections refer to a *category* of objections, which includes objections to "leading questions, lack of foundation, assuming facts not in evidence, mischaracterization or misleading question, non-responsive answer, lack of personal knowledge, testimony by counsel, speculation, asked and answered, argumentative question, and witness' answers that were beyond the scope of the question." *NGM Ins. Co. v. Walker Const. & Dev., LLC,* No. 1:11–CV–146, 2012 WL 6553272, at *2 (E.D.Tenn. Dec.13, 2012). At trial, when I asked Counsel to define what "form" objections entail, Counsel gave an even broader definition. Counsel first stated simply, "I know it when I hear it." Counsel then settled on the barely narrower definition that "form" objections include "anything that can be remedied at the time of the deposition so that you do not waive the objection if the deposition is used at a hearing or trial." Given that "form" may refer to any number of objections, saying "form" to challenge a leading question is as useful as saying "exception" to admit an excited utterance.

***6** Yet, many lawyers—and courts for that matter—assume that uttering the word "form" is sufficient to state a valid objection. This assumption presumably comes from the terminology used in the Federal Rules. Rule 30(c)(2) governs deposition objections and provides in part:

> An objection at the time of the examination—whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition—must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner.

The advisory committee notes clarify the types of objections that must be noted on a deposition record:

> While objections may, under the revised rule, be made during a deposition, they ordinarily should be limited to those that under Rule 32(d)(3) might be waived if not made at that time, *i.e.*, objections on grounds that might be immediately obviated, removed, or cured, *such as to the form of a question* or the responsiveness of an answer.

Fed.R.Civ.P. 30, advisory committee notes (1993 amendments) (emphasis added). These notes refer to Rule 32(d)(3), which provides that certain objections are waived if not made during a deposition:

> An objection to an error or irregularity at an oral examination is waived if:
>
> (i) it relates to the manner of taking the deposition, the *form of a question* or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and
>
> (ii) it is not timely made during the deposition.

Fed.R.Civ.P. 32(d)(3)(B) (emphasis added). Together, these rules provide that any objection to the form of a question must be made on the record at a deposition, or that objection is waived.

But these rules do *not* endorse the notion that "form" is a freestanding objection. They simply describe categories of objections—like those to the form of a question—that must be noted during a deposition. Nothing about the text of Rules 30 or 32 suggests that a lawyer preserves the universe of "form" objections simply by objecting to "form." I agree with my colleague, Magistrate Judge Scoles, in his analysis of this issue:

> [Some] contend that the objection should be limited to the words "I object to the form of the question." The Rule, however, is not so restrictive. Rather, it simply provides that the objection must be "stated concisely in a nonargumentative and nonsuggestive manner ." ... [T]he general practice in Iowa permits an objector to state in a few words the manner in which the question is defective as to form (e.g., compound, vague as to time, misstates the record, etc.). This process alerts the questioner to the alleged defect, and affords an opportunity to cure the objection.

Rakes v. Life Investors Ins. Co. of Am., No. C06–0099, 2008 WL 429060, at *5 (N.D.Iowa Feb.14, 2008); *see also Cincinnati Ins. Co. v. Serrano*, No. 11–2075–JAR, 2012 WL 28071, at *5 (D.Kan. Jan.5, 2012) ("Although the [rules] talk about objections based on the 'form' of the question (or responsiveness of the answer), this does not mean that an objection may not briefly specify the nature of the form objection (e.g. 'compound,' 'leading,' 'assumes facts not in evidence')."). I would go further, however, and note that lawyers are *required*, not just permitted, to state the basis for their objections.

*7 Moreover, "form" objections are inefficient and frustrate the goals underlying the Federal Rules. The Rules contemplate that objections should be concise and afford the examiner the opportunity to cure the objection. *See* Fed.R.Civ.P. 30(c)(2) (noting that "objection[s] must be stated concisely"); *id.*, advisory committee notes (1993 amendments) (noting that "[d]epositions frequently have been unduly prolonged ... by lengthy objections and colloquy" and that objections "ordinarily should be limited to those ... grounds that might be immediately obviated, removed, or cured, such as to the form of a question"). While unspecified "form" objections are certainly concise, they do nothing to alert the examiner to a question's alleged defect. Because they lack specificity, "form" objections do not allow the examiner to immediately cure the objection. Instead, the examiner must ask the objector to clarify, which takes *more* time and *increases* the amount of objection banter between the lawyers. Briefly stating the particular ground for the objection, on the other hand, is no less concise and allows the examiner to ask a remedial question without further clarification.

Additionally, it is difficult, if not impossible, for courts to judge the validity of unspecified "form" objections:

> [U]nless an objector states with some specificity the nature of his objection, rather than mimicking the general language of the rule, i.e., "objection to the form of the question," it is impossible to determine, based upon the transcript of the deposition itself, whether the objection was proper when made or merely frivolous.

Mayor & City Council of Baltimore v. Theiss, 354 Md. 234, 729 A.2d 965, 976 (Md.1999). When called upon to rule on an unspecified "form" objection, a judge either must be

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clairvoyant or must guess as to the objection's basis. Neither option is particularly realistic or satisfying. This is reason enough to require a specific objection.

Requiring lawyers to state the basis for their objections is not the same thing as requiring "speaking objections" in which lawyers amplify or argue the basis for their objections. For example, "Objection, hearsay" is a proper objection. By contrast, "Objection, the last assertion by Mr. Jones was an out-of-court statement by Ms. Day, said in the hotel room, that Mr. Jones allegedly heard, that he never testified to in a deposition, and that is now being offered for the truth of Ms. Day's statement" is an improper speaking objection. I have always required the former and barred the latter.

I recognize, however, that not all courts share my views regarding "form" objections. In fact, some courts explicitly *require* lawyers to state nothing more than unspecified "form" objections during depositions. *See Offshore Marine Contractors, Inc. v. Palm Energy Offshore, L.L.C.,* No. CIV.A. 10–4151, 2013 WL 1412197, at *4 (E.D.La. Apr.8, 2013) ("The Court finds that the behavior of counsel for OMC does not warrant sanctions here. Indeed, most of the objections by OMC's counsel are simple form objections with no unwarranted, lengthy speaking objections."); *Serrano,* 2012 WL 28071, at *5 ("But such an objection [to a vague question] to avoid a suggestive speaking objection should be limited to an objection 'to form,' unless opposing counsel requests further clarification of the objection."); *Druck Corp. v. Macro Fund (U.S.) Ltd.,* No. 02 CIV.6164(RO)(DFE), 2005 WL 1949519, at *4 (S.D.N.Y. Aug. 12, 2005) ("Any 'objection as to form' must say only those four words, unless the questioner asks the objector to state a reason."); *Turner v. Glock, Inc.,* No. CIV.A. 1:02CV825, 2004 WL 5511620, at *1 (E.D.Tex. Mar.29, 2004) ("All other objections to questions during an oral deposition must be limited to 'Objection, leading' and 'Objection, form.' These particular objections are waived if not stated as phrased above during the oral deposition."); *Auscape Int'l v. Nat'l Geographic Soc'y,* No. 02 CIV. 6441(LAK), 2002 WL 31014829, at *1 (S.D.N.Y. Sept.6, 2002) ("Once counsel representing any party states, 'Objection' following a question, then all parties have preserved all possible objections to the form of the question unless the objector states a particular ground or grounds of objection, in which case that ground or those grounds alone are preserved."); *In re St. Jude Med., Inc.,* No. 1396, 2002 WL 1050311, at *5 (D.Minn. May 24, 2002) ("Objecting counsel shall say simply the word 'objection', and no more, to preserve all objections as to form."). [13] For the reasons discussed above, I think this approach makes little legal or practical sense.

***8** But, because there is authority validating "form" objections, I do not impose sanctions based on the fact that Counsel used these objections while defending depositions. Counsel's "form" objections, however, amplified two other issues: witness coaching and excessive interruptions. As I discuss below, *those* aspects of Counsel's deposition conduct warrant sanctions. Thus, I impose sanctions related to Counsel's "form" objections only to the extent that those objections facilitated the coaching and interruptions. Although I do not impose sanctions based on Counsel's "form" objections in this case, lawyers should consider themselves warned: Unspecified "form" objections are improper and will invite sanctions if lawyers choose to use them in the future.

2. Witness Coaching

While there appears to be disagreement about the validity of "form" objections, the law clearly prohibits a lawyer from coaching a witness during a deposition. Under Rule 30(c)(2), deposition "objection[s] must be stated concisely in a nonargumentative and nonsuggestive manner." *See also* Fed.R.Civ.P. 30, advisory committee notes (1993 amendments) ("Depositions frequently have been ... unfairly frustrated, by lengthy objections and colloquy, often suggesting how the deponent should respond."). This clause mandates what should already be obvious—lawyers may not comment on questions in any way that might affect the witness's answer:

> The Federal Rules of Evidence contain no provision allowing lawyers to interrupt the trial testimony of a witness to make a statement. Such behavior should likewise be prohibited at depositions, since it tends to obstruct the taking of the witness's testimony. It should go without saying that lawyers are strictly prohibited from making any comments, either on or off the record, which might suggest or limit a witness's answer to an unobjectionable question.

Hall v. Clifton Precision, 150 F.R.D. 525, 530–31 (E.D.Pa.1993); *see also Specht v. Google, Inc.,* 268 F.R.D. 596, 598 (N.D.Ill.2010) ("Objections that are argumentative

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or that suggest an answer to a witness are called 'speaking objections' and are improper under Rule 30(c)(2).").

Despite the Federal Rules' prohibition on witness coaching, Counsel's repeated interjections frequently prompted witnesses to give particular, desired answers to the examiner's questions. This happened in a number of ways. To start, Counsel often made "clarification-inducing" objections—objections that prompted witnesses to request that the examiner clarify otherwise cogent questions. For example, Counsel regularly objected that questions were "vague," called for "speculation," were "ambiguous," or were "hypothetical." These objections usually followed completely reasonable questions. But, after hearing these objections, the witness would usually ask for clarification, or even refuse to answer the question:

> Q. Is there—do you believe that there's—if there's any kind of a correlation that could be drawn from OAL environmental samples to the quality of the finished product?
>
> *9 COUNSEL: Objection; vague and ambiguous.
>
> A. That would be speculation.
>
> Q. Well, if there were high numbers of OAL, Eb samples in the factory, wouldn't that be a cause for concern about the microbiological quality of the finished product?
>
> COUNSEL: Object to the form of the question. It's a hypothetical; lacks facts.
>
> A. Yeah, those are hypotheticals.
>
> ...
>
> Q. Would that be a concern of yours?
>
> COUNSEL: Same objection.
>
> A. Not going to answer.
>
> Q. You're not going to answer?
>
> A. Yeah, I mean, it's speculation. It would be guessing.
>
> COUNSEL: You don't have to guess.

(Bottock Depo. 106:24 to 108:2). While it is impossible to know for certain what a witness would have said absent Counsel's objections, I find it inconceivable that the witnesses deposed in this case would so regularly request clarification were they not tipped-off by Counsel's objections. *See McDonough v. Keniston,* 188 F.R.D. 22, 24 (D.N.H.1998) ("The effectiveness of [witness] coaching is clearly demonstrated when the [witness] subsequently adopts his lawyer's coaching and complains of the broadness of the question...."); *Cordova v. United States,* No. CIV.05 563 JB/LFG, 2006 WL 4109659, at *3 (D.N.M. July 30, 2006) (awarding sanctions based on a lawyer's deposition coaching because "it became impossible to know if [a witness's] answers emanated from her own line of reasoning or whether she adopted [the] lawyer's reasoning from listening to his objections").

These same objections spilled over into the trial. The following colloquy occurred during the plaintiff's cross-examination of Counsel's expert:

> Q.... Isn't [J.M.K.'s mother] saying that every time she used a bottle she boiled it first?
>
> COUNSEL: Your Honor, I would just object that in the—it's not clear from the context of this one page or several pages what it is they're talking about in terms of which feedings, if he can point it out to him.
>
> THE COURT: And so what is the nature of that objection? I haven't ever heard that one before.
>
> COUNSEL: It's confusing.
>
> THE COURT: Well, it may be confusing to you, but he didn't ask the question to you. He asked it of the witness.
>
> COUNSEL: Okay. Might be confusing to the witness.
>
> THE COURT: Yeah, that's suggesting an answer which is exactly the problem I had with your depositions.
>
> COUNSEL: I would just object to the form of the question then, Your Honor.
>
> THE COURT: That's not a proper objection, so it's overruled.
>
> A. As I read this, I can't be certain as to what exactly she's referring to at what point here.

Once again, after Counsel's objection suggested that the question "might" confuse the witness, the witness replied that he "[couldn't] be certain" as to what was being asked.

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But perhaps the most egregious examples of clarification-inducing objections arose when Counsel defended the deposition of Sharon Bottock. During that deposition, Counsel lodged no fewer than 65 "form" objections, many of which did not specify any particular basis. Immediately after most of these "form" objections, the witness gave the seemingly Pavlovian response, "Rephrase." At times, the transcript feels like a tag-team match, with Counsel and witness delivering the one-two punch of "objection"—"rephrase":

> ***10** Q.... I'm wondering if you could perhaps in a ... little bit less technical language explain to me what they're talking about in that portion of the exhibit.
>
> COUNSEL: Object to the form of the question.
>
> A. So rephrase.
>
> Q. Could you tell me what they're saying here?
>
> COUNSEL: Same objection.
>
> A. Rephrase it again.
>
> ...
>
> Q. So it—that's what they're talking about, the two types, the finished product and the overs? Does it separate those two things?
>
> A. Yes.
>
> Q. What's an "over"?
>
> COUNSEL: Object to the form. He doesn't want you to characterize it. He wants to know what's it made out of, I think. [14]
>
> Q. I mean, is it too big?
>
> COUNSEL: Object to the form of the question.
>
> A. Rephrase.

(Bottock Depo. 58:20 to 59:25). Note the witness's first answer in this colloquy: *So* rephrase. The witness's language makes clear that she is requesting—actually, *commanding*—the examiner to rephrase based on Counsel's objection.

[4] These clarification-inducing objections are improper. Unless a question is truly so vague or ambiguous that the defending lawyer cannot possibly discern its subject matter, the defending lawyer may not suggest to the witness that the lawyer deems the question to be unclear. Lawyers may not object simply because *they* find a question to be vague, nor may they assume that the witness will not understand the question. The *witness*—not the lawyer—gets to decide whether he or she understands a particular question:

> Only the witness knows whether she understands a question, and the witness has a duty to request clarification if needed. This duty is traditionally explained to the witness by the questioner before the deposition. If defending counsel feels that an answer evidences a failure to understand a question, this may be remedied on cross-examination.

Serrano, 2012 WL 28071, at *5; *see also Hall,* 150 F.R.D. at 528–29 ("If the witness does not understand the question, or needs some language further defined or some documents further explained, the witness can ask the deposing lawyer to clarify or further explain the question. After all, the lawyer who asked the question is in a better position to explain the question than is the witness's own lawyer." (footnote omitted)); Peter M. Panken & Mirande Valbrune, *Enforcing the Prohibitions Against Coaching Deposition Witnesses,* Prac. Litig., Sept. 2006, at 15, 16 ("It is improper for an attorney to interpret that the witness does not understand a question because the lawyer doesn't understand a question. And the lawyer certainly shouldn't suggest a response. If the witness needs clarification, the witness may ask the deposing lawyer for clarification. A lawyer's purported lack of understanding is not a proper reason to interrupt a deposition.").

Counsel's clarification-inducing objections are reminiscent of the improper objections at issue in *Phillips v. Manufacturers Hanover Trust Co.,* No. 92 CIV. 8527(KTD), 1994 WL 116078 (S.D.N.Y. Mar.29, 1994). In *Phillips,* a lawyer

> ***11** objected or otherwise interjected during [the examiner's] questioning of the deponent at least 49 times though the deposition lasted only an hour and a half. Indeed, approximately 60 percent of the pages of the transcript contain such interruptions. Many of these were objections as to form, which are waived if not made at

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> the deposition, Fed.R.Civ.P. 32(d)(3)(B), but on numerous occasions [the lawyer's] objections appeared to have no basis.... Moreover, after 21 of [the lawyer's] objections as to form, the deponent asked for clarification or claimed he did not understand the question.... [The lawyer] objected as to form, and the deponent then stated he did not understand the question, subsequently asking that it be narrowed.

Id. at *3. In considering whether to impose sanctions, the court described the lawyer's conduct as "inappropriate" and "obnoxious." *Id.* The court also noted that the lawyer's conduct frustrated the deposition:

> Such interplay clearly did hamper the free flow of the deposition. Rather than answer [the examiner's] questions to the best of his ability, the deponent hesitated, asking for clarification of apparently unambiguous questions.... In addition, the deponent asked for such clarifications almost exclusively after [the lawyer] objected or interrupted in some fashion.

Id. Finally, the court recognized that the lawyer's conduct violated Rule 30, but chose not to impose sanctions because, at the time, Rule 30 was newly amended and because the examiner was able to finish the deposition. *Id.* at *4. The court warned, however, that "a repeat performance [would] result in sanctions." *Id.*

Like the lawyer in *Phillips,* Counsel's endless "vague" and "form" objections (and their variants described above) frustrated the free flow of the depositions Counsel defended. They frequently induced witnesses to request clarification to otherwise unambiguous questions. Counsel's "form" objections also emboldened witnesses to quibble about the legal basis for certain questions—*e.g.,* "That would be speculation"—and to stonewall the examiner—*e.g.,* "Not going to answer." In short, these objections were suggestive and amounted to witness coaching, thereby violating Rule 30.

[5] But Counsel's clarification-inducing objections are only part of the problem. In a related tactic, Counsel frequently concluded objections by telling the witness, "You can answer if you know" or something similar. Predictably, after receiving this instruction, witnesses would often claim to be unable to answer the question:

> Q. Are these the ingredients that are added after preparation or after pasteurization?
>
> COUNSEL: If you know. Don't guess.
>
> A. If you could rephrase the question. There's no ingredients on 28.
>
> COUNSEL: So you can't answer the question.

(Bottock Depo. 47:12–18).

> Q. If it's high enough to kill bacteria, why does Abbott prior to that go through a process of pasteurization?
>
> ***12** COUNSEL: If you know, and you're not a production person so don't feel like you have to guess.
>
> A. I don't know.

(Bottock Depo. 48:12–17).

> Q. Does it describe the heat treatment that you referred to a few moments ago, the heat treatment that occurs in the dryer phase?
>
> ...
>
> COUNSEL: Okay. Do you know his question? He's asking you if this is what you're describing.
>
> A. Yeah, I don't know.

(Bottock Depo. 57:8–21).

> Q.... Is there any particular reason that that language is stated with respect to powdered infant formula?
>
> COUNSEL: If you know. Don't—if you know.
>
> A. No, I—no, not to my knowledge.
>
> COUNSEL: If you know. I mean, do you know or not know?
>
> A. I don't know.

(Barrett–Reis Depo. 49:10–18). These responses are unsurprising. When a lawyer tells a witness to answer "if you know," it not-so-subtly suggests that the witness may not know the answer, inviting the witness to dodge or qualify an

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otherwise clear question. For this reason, "[i]nstructions to a witness that they may answer a question 'if they know' or 'if they understand the question' are raw, unmitigated coaching, and are never appropriate." *Serrano.* 2012 WL 28071, at *5; *see also Specht,* 268 F.R.D. at 599 ("Mr. Fleming egregiously violated Rule 30(c)(2) by instructing Mr. Murphy not to answer a question because his answer would be a 'guess.' "); *Oleson v. Kmart Corp.*, 175 F.R.D. 560, 567 (D.Kan.1997) (noting that an attorney violated Rule 30 when he "interrupted [a] deposition in mid-question, objected to the assumption of facts by the witness, and advised the witness that he was not obligated to assume facts").

Lastly, Counsel often directly coached the witness to give a particular, substantive answer. This happened in a few ways. Sometimes Counsel reinterpreted or rephrased the examiner's questions:

> Q. To what extent do you have knowledge of the testing procedures that Abbott employs in raw materials or the environment, the plant environment or final product?
>
> A. Very limited knowledge, again, because that would be product development.
>
> COUNSEL: He's just asking you what do you have. Do you have any? If it's no, then just say "no."
>
> A. Okay.

(Barrett–Reis Depo. 20:16 to 21:2).

> Q.... Do you know when that occurs or does it occur on a regular basis?
>
> COUNSEL: Object to the form, regular basis. It says, "Once a year." He means the same time once a year presumably but—
>
> A. On an annual basis, the time may vary when we close the facility to fumigate.

(Bottock Depo. 34:5–11).

> Q. At any rate, you'll see that on both the first page of Exhibit 22 and the first page of Exhibit 23, there's a picture of the product, and both of them have the word "NeoSure" on the product. Would you be able to tell me what the difference between those two products is?
>
> ...
>
> COUNSEL: Well, he said difference between the products. It lacks foundation that there's a difference between the products.
>
> *13 Q. There may not be. I don't know. Can you tell me?
>
> COUNSEL: Well, the question is—I object to the form of the question. He's not asking you just about the label. He's asking you is there a difference in the product. So can you answer that?

(Barrett–Reis Depo. 29:2–20). Sometimes Counsel gave the witness additional information to consider in answering a question:

> Q. For that particular infant who is not premature, like in this case was a twin, do you believe that NeoSure is an appropriate version of powdered infant formula?
>
> COUNSEL: Object to the form. Lack of foundation in terms of what this baby—whether this baby was preterm or not. It's not in evidence in this deposition nor in the record anyplace. And I object to the form of the question as calling for speculation.
>
> Q. Go ahead.
>
> COUNSEL: You can answer.
>
> A. I can't answer it without more information.

(Barrett–Reis Depo. 99:7–19). Sometimes Counsel answered the examiner's question first, followed by the witness:

> Q.... Is that accurate or is there something that they, you know, just chose not to put—
>
> COUNSEL: If you know. She didn't write this.
>
> A. Yes, I didn't write this.

(Bottock Depo. 27:20–25)

> Q. Okay. The part that counsel just read, is that basically an accurate summary of the process?
>
> COUNSEL: In general.
>
> A. In general.

(Bottock Depo. 28:21–24).

Q.... And then under "Follow–Up Test" for Eb it's essentially the same thing as E. sak negative; right?

COUNSEL: It says zero.

A. It says zero.

Q. But which would—that would be the same type of finding if it said E. sak negative; right?

COUNSEL: In other words, there's no Eb. There's no Eb; there's no—

A. It's zero. There's no Eb.

(Bottock Depo. 114:14–24). Counsel even audibly disagreed with a witness's answer, prompting the witness to change her response to a question:

Q. My question is, was that a test—do you know if that test was performed in Casa Grande or Columbus?

A. I don't.

COUNSEL: Yes, you do. Read it.

A. Yes, the micro—the batch records show finished micro testing were acceptable for the batch in question.

(Bottock Depo. 86:9–15).

[6] All of the objections described in this section violate Rule 30 by suggesting, in one way or another, how the witness should answer a question. More troublingly, these objections allowed Counsel to commandeer the depositions, influencing the testimony in ways not contemplated by the Federal Rules. Instead of allowing for a question-and-answer session between examiner and witness, Counsel acted as an intermediary, which frustrated the purpose of the deposition:

> The underlying purpose of a deposition is to find out what a witness saw, heard, or did—what the witness thinks. A deposition is meant to be a question-and-answer conversation between the deposing lawyer and the witness. There is no proper need for the witness's own lawyer to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers. The witness comes to the deposition to testify, not to indulge in a parody of Charlie McCarthy, with lawyers coaching or bending the witness's words to mold a legally convenient record. It is the witness—not the lawyer—who is the witness.

***14** *Hall,* 150 F.R.D. at 528 (footnote omitted); *see also Alexander v. F.B.I.,* 186 F.R.D. 21, 52–53 (D.D.C.1998) (noting that "[i]t is highly inappropriate for counsel for the witness to provide the witness with responses to deposition questions by means of an objection" or to "rephrase or alter the question" asked of the witness); Panken & Valbrune, *supra,* at 16 ("[C]ounsel is not permitted to state on the record an interpretation of questions, because those interpretations are irrelevant and are often suggestive of a particularly desired answer.").

In response to my order to show cause, Counsel explains what motivated many of the objections that I perceive to be coaching:

> In many places during the depositions of Abbott witnesses ... where it was clear that the plaintiff's counsel was on the wrong track factually ... defense counsel attempted to steer him to the correct ground. When things got bogged down, hours in, defense counsel also attempted to speed up the process by helping to clarify or facilitate things, for which the plaintiff's counsel seemed appreciative.

(Docket no. 193, at 4–5) (footnote omitted). It is not for the defending lawyer to decide whether the examiner is on the "wrong track," nor is it the defending lawyer's prerogative to "steer [the examiner] to the correct ground." While lawyers are encouraged to be collegial and helpful to one another during depositions, Counsel's conduct, on balance, was neither. It defies common sense to suggest that Counsel's omnipresent commentary sped up the depositions in this case. Moreover, most of Counsel's commentary during depositions were *objections,* not benign attempts to clarify. Because this commentary coached witnesses to give particular answers, I find that sanctions are appropriate.

3. Excessive Interruptions

[7] Beyond the "form" objections and witness coaching, Counsel's interruptions while defending depositions were grossly excessive. Counsel's name appears at least 92 times in the transcript of the Barrett–Reis deposition (about once per page), and 381 times in the transcript of the Bottock deposition (approaching three times per page). Counsel's name appears with similar frequency in the other depositions that Counsel defended. And, as I noted earlier, nearly all of Counsel's objections and interruptions are unnecessary and unwarranted.

These excessive and unnecessary interruptions are an independent reason to impose sanctions. The notes accompanying Rule 30 provide that sanctions may be appropriate "when a deposition is unreasonably prolonged" and that "[t]he making of an excessive number of unnecessary objections may itself constitute sanctionable conduct...." Fed.R.Civ.P. 30, advisory committee notes (1993 amendments); *see also Craig,* 384 F. App'x at 533 ("The notes also explain that an excessive number of unnecessary objections may constitute actionable conduct, though the objections be not argumentative or suggestive."). At least two courts in this circuit have imposed sanctions based, in part, on a lawyer's excessive and unnecessary objections during depositions. *See id.* (affirming a monetary sanction against a lawyer who made "a substantial number of argumentative objections together with suggestive objections" that "impeded, delayed, or frustrated [a] deposition"); *Van Pilsum v. Iowa State Univ. of Sci. & Tech.,* 152 F.R.D. 179, 181 (S.D.Iowa 1993) (sanctioning a lawyer who had "no justification for ... monopoliz[ing] 20% of his client's deposition" and whose objections "were for the most part groundless, and were only disputatious grandstanding").

***15** By interposing many unnecessary comments, clarifications, and objections, Counsel impeded, delayed, and frustrated the fair examination of witnesses during the depositions Counsel defended. Thus, sanctions are independently appropriate based on Counsel's excessive interruptions.

C. Appropriate Sanction

Based on Counsel's deposition conduct, I would be well within my discretion to impose substantial monetary sanctions on Counsel. But I am less interested in negatively affecting Counsel's pocketbook than I am in positively affecting Counsel's obstructive deposition practices. I am also interested in deterring others who might be inclined to comport themselves similarly to Counsel. The Federal Rules specifically acknowledge that one function of discovery sanctions should be deterrence. *See* Fed.R.Civ.P. 26, advisory committee notes (1983 amendments) ("Sanctions to deter discovery abuse would be more effective if they were diligently applied 'not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.' " (quoting *National Hockey League v. Metropolitan Hockey Club,* 427 U.S. 639, 643, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976)). Deterrence is especially important given that so many litigators are *trained* to make obstructionist objections. For instance, at trial, when I challenged Counsel's use of "form" objections, Counsel responded, "Well, I'm sorry, Your Honor, but that was my training...." While monetary sanctions are certainly warranted for Counsel's witness coaching and excessive interruptions, a more outside-the-box sanction [15] may better serve the goal of changing improper tactics that modern litigators are trained to use. *See* Matthew L. Jarvey, Note, *Boilerplate Discovery Objections: How They Are Used, Why They Are Wrong, and What We Can Do About Them,* 61 DRAKE L.REV. 913, 931–36 (2013) (discussing the importance of unorthodox sanctions in deterring discovery abuse).

[8] In light of this goal, I impose the following sanction: Counsel must write and produce a training video in which Counsel, or another partner in Counsel's firm, appears and explains the holding and rationale of this opinion, and provides specific steps lawyers must take to comply with its rationale in future depositions in any federal and state court. [16] The video must specifically address the impropriety of unspecified "form" objections, witness coaching, and excessive interruptions. The lawyer appearing in the video may mention the few jurisdictions that actually require only unspecified "form" objections and may suggest that such objections are proper in only those jurisdictions. The lawyer in the video must state that the video is being produced and distributed pursuant to a federal court's sanction order regarding a partner in the firm, but the lawyer need not state the name of the partner, the case the sanctions arose under, or the court issuing this order. Upon completing the video, Counsel must file it with this court, under seal, for my review and approval. If and when I approve the video, Counsel must (1) notify certain lawyers at Counsel's firm about the video via e-mail and (2) provide those lawyers with access to the video. The lawyers who must receive this notice and access include each lawyer at Counsel's firm—including its branch

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offices worldwide—who engages in federal or state litigation or who works in any practice group in which at least two of the lawyers have filed an appearance in any state or federal case in the United States. After providing these lawyers with notice of and access to the video, Counsel must file in this court, under seal, (1) an affidavit certifying that Counsel complied with this order and received no assistance (other than technical help or help from the lawyer appearing in the video) in creating the video's content and (2) a copy of the e-mail notifying the appropriate lawyers in Counsel's firm about the video. The lawyer appearing in the video need not state during the video that he or she agrees with this opinion, or that Counsel was the lawyer whose deposition conduct prompted this sanction. Counsel need not make the video publicly available to anyone outside Counsel's firm. Failure to comply with this order within 90 days may result in additional sanctions.

***16** To be clear, had Counsel made only a handful of improper objections or comments while taking depositions, I would not have raised these issues *sua sponte.* Depositions can be stressful and contentious, and lawyers are bound to make the occasional improper objection. But Counsel's improper objections, coaching, and interruptions went far beyond what judges should tolerate of any lawyer, let alone one as experienced and skilled as Counsel. Counsel's baseless interjections and obstructionist commentary were ubiquitous; they pervaded the depositions in this case and even spilled over into the trial. It is the repeated nature of Counsel's obstructionist deposition conduct that warrants sanctions here.

Finally, I note that, despite Counsel's deposition conduct, I was greatly impressed by how Counsel performed at trial. Unlike the "litigators" I discussed earlier, Counsel was extremely well-prepared, had clearly mastered the facts of this case, and did a great job of incorporating electronic evidence into Counsel's direct- and cross-examinations. Those aspects of Counsel's noteworthy trial skills, expertise, and preparation are laudable, but they do not excuse Counsel's pretrial conduct.

If Counsel appeals this sanctions order I will, *sua sponte,* automatically stay it pending the appeal.

III. CONCLUSION

For the reasons stated in this opinion, I find that sanctions are appropriate in response to Counsel's improper deposition conduct, which impeded, delayed, and frustrated the fair examination of witnesses in the depositions related to this case that Counsel defended. I therefore impose the sanction described above.

IT IS SO ORDERED.

Footnotes

1 WILLIAM SHAKESPEARE, HAMLET, act 1, sc. 4.

2 Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform,* 27 GA. L.REV. 1, 1 (1992).

3 *See* Matthew L. Jarvey, Note, *Boilerplate Discovery Objections: How They Are Used, Why They Are Wrong, and What We Can Do About Them,* 61 DRAKE L.REV. 913, 917 n. 20 (2013) (collecting cases disapproving of boilerplate objections); *St. Paul Reinsurance Co., Ltd. v. Commercial Fin. Corp.,* 198 F.R.D. 508, 513 (N.D.Iowa 2000) (same).

4 Hon. Paul W. Grimm & David S. Yellin, *A Pragmatic Approach to Discovery Reform: How Small Changes Can Make a Big Difference in Civil Discovery,* 64 S.C. L.REV. 495, 530 (2013).

5 Judge Grimm and David Yellin aptly describe some of the misplaced motivations behind obstructionist tactics:

> The truth is that lawyers and clients avoid cooperating with their adversary during discovery—despite the fact that it is in their clear interest to do so—for a variety of inadequate and unconvincing reasons. They do not cooperate because they want to make the discovery process as expensive and punitive as possible for their adversary, in order to force a settlement to end the costs rather than having the case decided on the merits. They do not cooperate because they wrongly assume that cooperation requires them to compromise the legitimate legal positions that they have a good faith basis to hold. Lawyers do not cooperate because they have a misguided sense that they have an ethical duty to be oppositional during the discovery process—to "protect" their client's interests—often even at the substantial economic expense of the client. Clients do not cooperate during discovery because they want to retaliate against their adversary, or "get back" at them for the events that led to the litigation. But the least persuasive of the reasons for not cooperating during the discovery process is the entirely misplaced notion that the "adversary system" somehow prohibits it.

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Grimm & Yellin, *supra* note 4, at 525–26 (footnotes omitted). Amen Brother Grimm and Mr. Yellin for being so insightful and refreshingly candid.

6 *Cf.* Daniel C. Girard & Todd I. Espinosa, *Limiting Evasive Discovery: A Proposal for Three Cost–Saving Amendments to the Federal Rules*, 87 DENV. U.L.REV., 473, 475 (2010) ("The Federal Rules prohibit evasive responses.... In practice, however, these rules are not enforced. Service of evasive discovery responses has become a routine—and rewarding—litigation tactic.").

7 *Cf. id.* at 483 ("The reluctance of courts to impose sanctions under Rule 37 has encouraged the use of evasive and dilatory behavior in response to discovery requests. Such behavior serves no purpose other than to increase the cost and delays of litigation.").

8 Iowa trial lawyers have a long and storied tradition and culture of civility that is first taught at the state's two law schools, the University of Iowa College of Law and the Drake University Law School. I know this because I have taught and lectured at both of these outstanding law schools that produce the bulk of Iowa lawyers. Civility is then taken very seriously, nourished and lead by the Iowa Supreme Court, and continually reinforced by the Iowa State Bar Association, the Iowa Academy of Trial Lawyers, and all of the other legal organizations in the state, as well as senior members of the bar, law firm partners from large to small firms, and solo practitioners across the state. There is great pride in being an Iowa lawyer, and describing someone as an Iowa lawyer almost always connotes that lawyer's high commitment to civility and professionalism. Of course, there are stinkers in the Iowa bar, but they are few and far between.

9 The fact that SNB's lawyers did not move for sanctions further suggests that lawyers have simply become numb to obstructionist discovery tactics, either because they are used to them, they choose to take the high ground, or perhaps because they use such tactics themselves. (After observing SNB's lead lawyer at trial, I seriously doubt the latter.) Based on my 39 years as a member of the federal bar, I surmise that SNB's lawyer did not move for sanctions because he has other enterobacter sakazakii cases against Counsel and did not want to undermine his ongoing relationship with Counsel by seeking sanctions. This rationale makes particular sense in a case like this where all of the information SNB's lawyer needed to prove SNB's manufacturing and product defect claim resided with Abbott and Counsel, and where there was no other avenue to obtaining case-critical information.

10 I calculated this number based on the number of deposition pages that actually contained testimony, excluding pages like the title page, etc.

11 In reproducing portions of the deposition transcripts for this opinion, I occasionally change the notation identifying the speaker for reasons of anonymity, consistency, and ease of reading. For example, I do not use Counsel's name, which appears in the transcripts. I also use "A." to indicate a witness's answer, whereas some of the transcripts use the phrase "the witness." The words used by the speakers, however, remain unaltered.

12 In response to my order to show cause, Counsel claims that "the question was misleading, confusing, vague and ambiguous[,]" and that it "call[ed] for a medical opinion or conclusion" (docket no. 193, at 13). None of these reasons relate to Counsel's original claim that the question was a non sequitur. But, in any event, there is absolutely nothing confusing about the question, nor does it call for a medical conclusion (the witness held a PhD in nutritional science, though). This litany of adjectives—"misleading, confusing, vague and ambiguous"—are all too common in federal depositions and roll too easily and too frequently off the lips of lawyers who engage in repeated obstructionist conduct. Multiple objections like this are often a harbinger of obstructionist lawyers. That Counsel would cite those objections in "defense" of Counsel's conduct suggests very strongly that Counsel just doesn't get it, and further undermines Counsel's claim of good faith. That these objections are part of an oft-used litigation strategy does not suggest that Counsel made them in good faith.

13 The record contains no indication that Counsel knew of, or relied on, these, or similar cases when Counsel made "form" objections during depositions. Counsel did not claim to know of these cases, or similar lines of authority, at the time Counsel made the "form" objections, in Counsel's response to either of my show-cause orders, or at the sanctions hearing.

14 Here, Counsel reinterprets the question for the witness—an issue that I address below.

15 For examples of outside-the-box discovery sanctions, see the following cases: *St. Paul Reinsurance Co.*, 198 F.R.D. at 518 (imposing a write-a-bar-journal-article sanction); *R.E. Linder Steel Erection Co., Inc. v. U.S. Fire Ins. Co.*, 102 F.R.D. 39, 41 (D.Md.1983) (imposing a $5.00–per–inturruption sanction); *Huggins v. Coatesville Area Sch. Dist.*, No. CIV.A. 07–4917, 2009 WL 2973044, at *4 (E.D.Pa. Sept.16, 2009) (imposing a sit-down-and-share-a-meal-together sanction).

16 I am not the first judge to suggest a video-related sanction. In *Florida Bar v. Ratiner*, 46 So.3d 35, 41 n. 4 (Fla.2010), the Florida Supreme Court noted that law students and members of the Florida bar could view footage of a videotaped deposition in which a later-suspended lawyer behaved unprofessionally toward his opposing counsel as part of a course on professionalism.

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125-001331

15-CV-E

This submission suggests amendments of Rules 12(a)(4) and 12(d). Rule 12(a)(4) extends the time to file a responsive pleading when "a motion under this rule" is made. The amendment of Rule 12(a)(4) would say expressly that the extension is available "even if the motion does not address all the claims in a pleading." Rule 12(d) would be amended to say that the extension under Rule 12(a)(4) applies even if a Rule 12(b)(6) motion is treated as one for summary judgment.

The substance of the proposals seems sound. The submission supports them by pointing to Federal Practice & Procedure: Civil, Vol. 5B, § 1346, p. 46, which says — citing one district-court opinion — that while "some courts" have ruled that a motion to dismiss only parts of a pleading does not enlarge the time to respond to other parts, "the weight of the limited authority" enlarges the time. Enlarging the time is supported because it avoids duplicative pleadings and confusion over the proper scope of discovery. The 2015 supplement adds eight cases to the four cases cited in the main volume to support this approach. An additional case is cited with new text. This case also enlarges the time to respond, but observes that as motions to dismiss have become more frequent in response to new pleading standards, "prompt resolution of cases is becoming increasingly difficult."

The submission addresses Rule 56 by pointing to Vol. 10A, Federal Practice & Procedure: Civil, pp. 303-304. The discussion criticizes a 1953 district-court decision that denied an enlargement of time when a defendant filed a motion for summary judgment before filing an answer. The argument is that Rule 12(a)(4) enlarges the time for a Rule 12(b)(6) motion, and thus enlarges the time when a Rule 12(b)(6) motion is converted to a motion for summary judgment. The argument continues that it makes no sense to distinguish between summary judgment motions filed directly under Rule 56 and those created by converting a Rule 12(b)(6) motion. One case is described to support this conclusion.

This submission proposes amendments that seem to make good practice explicit. But the dearth of cases involving these issues, and the apparent convergence on the desired outcome, suggest that it may be better to avoid increasing the length of the rules by adding these amendments.

12b-001332

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125-001333

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SUBMITTED ELECTRONICALLY

March 6, 2015

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

RE: Proposed Amendments to Federal Civil Rule 12(a)(4) and 12(d)

To Whom It May Concern:

The State Bar of Michigan Committee on United States Courts ("Committee") respectfully submits the following proposed amendments to FRCP 12(a)(4) and 12(d) for consideration:

> 12(a)
> (4) Effect of Motion. Unless the court sets a different time, serving a motion under this rule—even if the motion does not address all the claims in a pleading—alters these time periods as follows:...
>
> 12(d)
> Result of Presenting Matters Outside the Pleadings. If, on motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion. Unless the court orders otherwise, the time for filing a responsive pleading under Rule 12(a)(4) applies to a Rule 12(b)(6) motion treated as one for summary judgment under Rule 56."

Both amendments provide needed clarification to what happens to the deadline to file a responsive pleading in the event a 12(b) motion to dismiss is filed as to some but not all asserted claims or presents matters outside the pleadings. The underlying rationale for both proposed amendments is set forth in the attached memorandum.

The Committee is a standing committee of the State Bar of Michigan comprised of seventeen members appointed by the President of the State Bar of Michigan. Its mission is to make recommendations concerning the administration, organization, and operation of the United States Courts for the purpose of securing the effective administration of justice. The Committee's members are federal judges and attorneys who work in and are familiar with the federal court system.

The State Bar of Michigan has authorized the Committee to submit these comments to the Committee on Rules of Practice and Procedure. These Federal Civil Rule amendment proposals represent the position of the Committee on the United States Courts and should not be considered a position of the State Bar of Michigan.

Thank you for your consideration.

Sincerely,

Kelley Megan Haladyna
Chair, Committee on United States Courts

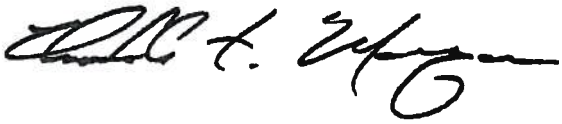

Thaddeus E. Morgan
Federal Civil Rule Amendment Sub-Committee

Attachment

12b-001335

MEMORANDUM

To: United States Courts Committee

From: Rule Amendment Subcommittee (Thad Morgan, Mark McInerney, and Matt Heron)

RE: Federal Civil Rule Amendment Proposals

Date: January 19, 2015

Introduction

The Subcommittee requests approval from the Committee to submit the following two rule amendment proposals to the Federal Rules Advisory Committee for consideration, and if accepted by the Advisory Committee, for publication and comment.

Rule Amendment Proposals

Issue: Rule 12(a)(4) provides that serving a Rule 12(b) motion to dismiss alters the time to serve responsive pleadings so that, if the motion is denied, "responsive pleadings must be served within 14 days after notice of the court's action[.]" Rule 12(a)(4), however, is silent on the issue of whether a partial Rule 12(b) motion that attacks some, but not all, of the claims raised in a pleading operates to toll the entire responsive pleading obligation.

Proposed Amendment and Rationale: An amendment to Rule 12(a)(4) is proposed for consideration by the Federal Rules Advisory Committee, and the Subcommittee submits the following two versions for consideration:

> (4) ***Effect of Motion.*** Unless the court sets a different time, serving a motion under this rule—even if the motion does not address all the claims in a pleading—alters these time periods as follows:…
>
> or
>
> (4) ***Effect of Motion.*** Unless the court sets a different time, serving ~~a~~ any motion under this rule alters ~~these~~ the time periods for filing answer to all or part of the complaint as follows:…

It is fairly settled that a party who files a partial Rule 12(b) motion gets the benefit of having its responsive pleading obligation tolled pending a decision on the motion.[1] There are, however, outlier decisions and some commentary to the contrary.[2] The rationale behind the majority rule seems to comport with Rule 1's admonition that the Rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." As *Wright & Miller* point out:

> Courts following this majority rule have noted that the minority approach would require duplicative sets of pleadings in the event that the Rule 12(b) motion is denied and cause confusion over the proper scope of discovery during the motion's pendency.[3]

Therefore, request is made for approval from the Committee to forward the proposed amendment to Rule 12(a) to the Federal Rules Advisory Committee for consideration, and, if accepted, for publication and comment by the Advisory Committee.

Issue: When matters outside the pleadings are presented to and not excluded by the court as part of a Rule (12)(b) motion, Rule 12(d) states that a court "must" treat the motion as one for summary judgment brought under Rule 56. When a Rule 12(b) motion is so converted, and no responsive pleading is filed, the open question is whether the Rule 12(a)(4) tolling continues to apply to the Rule 56 motion?

To begin, and ignoring for the moment the question of tolling in the context of a converted Rule 12(b) motion, there is disagreement on the basic question of whether a Rule 56 motion, clearly labeled as such and filed in lieu of an answer, abrogates the requirement that a defendant serve an answer within the prescribed time period. As *Wright & Miller*

---

[1] *See e.g. Gortat v. Capala Bros.*, 257 F.R.D. 353, 366 (E.D. N.Y. 2009); *Aslani v. Sparow Health Sys.*, 2009 WL 736654, at *4 n. 10 (W.D. Mich. 2009).
[2] *Gerlach v. Michigan Bell Tel. Co.*, 448 F.Supp 1168 (E.D. Mich. 1978); Scott L. Cagan, *A "Partial" Motion to Dismiss under Federal Rule of Civil Procedure 12: You Had Better Answer*, 39 Fed. B.J. 202 (1992).
[3] Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1346, p. 46 (3d ed. 2004) ("*Wright & Miller*").

contend, "[a] defending party is not required by [Rule 56] to file an answer before moving for summary judgment."[4] There are, however, a number of decisions to the contrary[5], and in *Rashidi v. Albright*[6], the district court confronted the question of whether it should entertain the plaintiff's request for entry of default in light of the defendants' motion for summary judgment filed without any accompanying responsive pleading. The district court rejected the request for entry of default reasoning:

> The ambiguity of the rules makes disposition of this issue difficult. Generally the best course of action is to complete the pleadings for the record. However, defendants' belief that the law supports the notion that a summary judgment motion falls within the scope of "defend" within the meaning contemplated by Rule 55 and that the summary judgment motion can toll the response time, minimally amounts to a good faith interpretation of the law or alternatively could be considered excusable neglect pursuant to Rule 6(b).[7]

Unlike summary judgment, motions to dismiss are designed to test the adequacy of pleadings, and expanding the inquiry to consider materials outside the pleadings would be inconsistent with the goals of Rule 12.[8] Further, mislabeled Rule 12 motions that rely upon materials extrinsic to the complaint are disfavored as an attempt to manipulate the Rules and gain an advantage:

> [T]he Court has no hesitancy concluding that [defendant] has labeled its Motion for Summary Judgment a 'Motion to Dismiss' simply to *avoid* filing an answer. Such an attempt to manipulate the Federal Rules of Civil Procedure should not be condoned or encouraged by the Court…A litigant should not be permitted to gain an advantage by intentionally mislabeling a filing.[9]

---

[4] *Id.* at § 2718, p. 301, citing *First Nat. Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253 (1968) (Supreme Court affirmed grant of summary judgment to a defendant who never answered in more than six years of litigation).
[5] *See Modrowski v. Pigatto*, 712 F.3d 1166, 1170 (7th Cir. 2013) ("While serving a Rule 12 motion tolls the deadline for a defendant to file an answer, filing a Rule 56 motion has no such effect."); *See also Poe v. Cristina Copper Mines*, 15 F.R.D. 85, 87 (D. Del. 1953) "[an] extension of time to file a responsive pleading until determination of a motion for summary judgment under Rule 56 is not a definite and fixed right but a matter to be granted or denied under Rule 6(b) from a consideration of all the circumstances.")
[6] 818 F.Supp. 1354 (D. Nev. 1993).
[7] *Id.* at 1356.
[8] *See Winget v. JP Morgan Chase Ban, N.A.*, 537 F.3d 565, 576 (6th Cir. 2008).
[9] *Ricke v. Armco, Inc.*, 158 F.R.D. 149, 150 (D. Minn. 1994) (citations omitted) (italics in original) (denying the defendant's motion to confirm that an answer did not need to filed).

Returning to the question of whether the Rule 12(a)(4) tolling continues when a Rule 12(b) motion is converted to one for summary judgment, the limited authority suggests that the tolling should continue.[10] This is also the approach taken by *Wright & Miller*: "By analogy, this [Rule 12(a)] language should apply to a Rule 56 motion."[11]

Proposed Amendment and Rationale: An amendment to Rule 12(d) is proposed for consideration by the Federal Rules Advisory Committee as follows:

> **(d) Result of Presenting Matters Outside the Pleadings.** If, on motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion. Unless the court orders otherwise—either on its own initiative or at the request of a party—the time for filing a responsive pleading under Rule 12(a)(4) applies.

Given the unsettled question of whether a Rule 56 motion operates to toll the time to answer[12], Rule 12(d) should be amended in the manner set-forth above to *at least* clarify that a converted Rule 12(b) motion continues to be subject to the tolling in Rule 12(a)(4), unless the court orders otherwise. There are several practical reasons in support of the amendment.

First, a party that files a Rule 12 motion should reasonably expect that the tolling provided for in Rule 12(a)(4) will apply even if the Rule 12 motion is converted to a Rule 56 motion. Second, the proposed amendment will eliminate the uncertainty that comes with notice from a court that a Rule 12 motion is converted to a Rule 56 motion, i.e. does the notice require a party to immediately answer or file a motion for an extension of time under Rule 6(b) on the basis of excusable neglect? *Rashidi, supra*. Or, is a plaintiff free to seek an entry of default? Third, the "matters outside the pleadings" may be so innocuous that

---

[10] *See Marquez v. Cable One, Inc.*, 463 F.3d 1118, 1120-1121 (10th Cir. 2006) ("Thus, the motion did toll the time to file an answer until the district court converted it to a motion for summary judgment and resolve the motion.")
[11] *Wright & Miller*, § 2718, p. 303.
[12] This could be a matter taken up by the Committee in the future.

12b-001339

responsive pleading is not warranted. For example, the additional material could consist of an undisputed declaration that the party has complied with all conditions precedent to an arbitration demand, such as compliance with a pre-demand settlement procedure.

To be sure, there may be instances where a party manipulates the tolling provided in Rule (a)(4) by filing a mislabeled Rule 12 motion to avoid filing an answer. *Ricke*, *supra* n. 9. That is why the proposed amendment allows either the court to order, or a party to request, that a responsive pleading be filed in connection with a converted Rule 12 motion. Currently, there is no such authority in the Rules to compel an answer. There are situations, in addition to mislabeled Rule 12 motions, where an answer should be compelled. For instance, again in the arbitration context, the party demanding arbitration in a Rule 12 motion that is converted to a Rule 56 motion could have counter-claims that are outside the ambit of, and unrelated to, the parties' agreement to arbitrate. In that situation, it seems reasonable to permit a party to compel responsive pleadings before the court orders the entire matter to arbitration.

Conclusion

Committee approval is sought to submit the proposed Rule amendments to the Federal Rules Advisory Committee, on State Bar letterhead, for consideration. The Subcommittee acknowledges that any proposal may need further approval from the State Bar Executive Committee prior to submission to the Rules Advisory Committee.

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15-CV-X

This submission proposes to amend the Rule 45 provisions for trial subpoenas in two ways. One would extend its geographic reach, "to force a representative of a non-resident corporate defendant to appear at trial in the court that has jurisdiction over the parties and case." The other would adopt the corporate deposition procedure of Rule 30(b)(6) into Rule 45, so that a subpoena could name an entity as witness and direct the entity to produce one or more real persons to testify for the entity.

The suggestion to expand the geographic reach of a trial subpoena raises an issue that was thoroughly explored in developing the Rule 45 amendments that took effect in 2013. The Committee considered conflicting interpretations of then-Rule 45(c)(3)(A)(ii). Some courts had interpreted the rule to authorize a trial subpoena for a witness who is a party or a party's officer without regard to the geographic limits in then-Rule 45(b)(2) on serving subpoenas. Other courts disagreed. The Committee concluded that parties and a party's officers should be protected by the same geographic limits as other witnesses. But, without recommending its adoption, the Committee invited comment on an alternative that was published for comment. The alternative was this:

> Notwithstanding the limitations of Rule 45(c)(1)(A), for good cause the court may order a party to appear and testify at trial, or to produce an officer to appear and testify at trial. In determining whether to enter such an order, the court must consider the alternative of an audiovisual deposition under Rule 30 or testimony by contemporaneous transmission under Rule 43(a), and may order that the party or officer be reasonably compensated for expenses incurred in attending the trial. The court may impose the sanctions authorized by Rule 37(b) on the party subject to the order if the order is not obeyed.

After considering extensive public comments, the Committee confirmed its decision that this alternative should not be adopted.

This recent history provides strong reason to decline to reopen this question. Reconsideration may be appropriate if experience comes to suggest broader subpoenas are needed. But at least several years of experience will be needed.

12b-001344

The suggestion to authorize a trial subpoena addressed to a non-human entity builds on analogy to the Rule 30(b)(6) deposition of an entity. The reach of this suggestion can be illustrated by recalling the central parts of Rule 30(b)(6). A subpoena may name an entity as deponent

> and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf, and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization.

The Committee has considered Rule 30(b)(6) on at least two separate occasions over the last several years. Each time it concluded that although valid concerns had been raised about its operation, it is better left as it is. That does not mean that comparable provisions should be added to Rule 45.

However well Rule 30(b)(6) works in discovery of corporate parties, the difficulties it presents would be magnified for nonparty corporations in discovery and at trial. At a minimum, a timing requirement would have to be added to ensure that the entity has sufficient time to find the "information known or reasonably available to the organization." Then it would have to inculcate this information into the minds of one or more people designated to testify to that information. The human witnesses inevitably would make mistakes, calling for correction by means still more unsatisfactory than whatever means may be available with a deposition.

The outer limits of the submission are uncertain. It could be pushed to the point of requiring a nonparty entity to produce witnesses to testify at a deposition in the district where an action is pending. The Committee has been concerned about the burdens a Rule 30(b)(6) deposition imposes on a nonparty. There is little to be said for expanding its geographic reach.

It is better to refuse to act on this submission.

12b-001345

Rule 45 Changes
Troy Doucet, Esq.
to:
Rules_Support
08/21/2015 03:31 PM
Hide Details
From: "Troy Doucet, Esq." <troy@troydoucet.com>
To: <Rules_Support@ao.uscourts.gov>

15-CV-X

1 Attachment

2015.08.21_Order Affirming District Court's Decision.pdf

Dear Rules Committee,

A change to Rule 45 is necessary so that a plaintiff has the power to compel an out-of-state corporate representative of the defendant to appear at trial in the court that has jurisdiction over the case.

The Sixth Circuit ruled in the attached *Hill v. Homeward,* 14-4168 (8/21/2015) that a plaintiff cannot use Rule 45 to force a representative of a non-resident corporate defendant to appear at trial in the court that has jurisdiction over the parties and case. Here, we attempted to compel the out-of-state corporation to produce a representative to appear at trial and answer questions regarding the matter at hand. Our subpoena was quashed, and affirmed on appeal. A corporate representative of the defendant appeared to give testimony during discovery, but was not compelled to appear at trial.

The court's decision means that the way the current Rules are drafted, a plaintiff can require a corporate defendant to produce a representative to appear at a deposition to testify about certain areas of knowledge during discovery, but cannot force a corporate representative to actually appear at trial.
The Sixth Circuit suggests that the way around this limitation is to use discovery depositions during trial, rather than read Rules 30(b)(6) and 45 together to be able to specify areas of knowledge for a representative (versus picking a particular person) to appear in person. Further, the court's decision allows a corporation to avoid the production of someone in the jurisdiction of the litigation when the corporation's headquarters is located elsewhere.

The way that Rule 45 is now drafted, the result is what happened in this case: Our client, the plaintiff, did not have the power to force the corporate defendant to have a corporate representative appear at trial. Because the corporation's headquarters was outside the jurisdiction of the Southern District of Ohio (its headquarters is in Florida), we also could not force someone from Florida to appear in Ohio for trial. Further, even if we were able to subpoena the corporation, the court's decision limits our ability to compel attendance by a representative in favor of requiring us to name a particular person. Of course, if we did name the very particular person who appeared as the corporate representative for the corporation, that person could be fired or otherwise made unavailable.

The end result of this decision allows for significant gamesmanship by corporate defendants, which is why the Rules need amended to allow a plaintiff to compel a defendant non-resident corporate representative to appear and give testimony at trial. Please feel free to contact me at the number below if you would like further information.

Thank you,

Troy Doucet, Esq.
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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

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Filed: August 21, 2015

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Ms. Kimberly Y. Smith Rivera
McGlinchey Stafford
25550 Chagrin Boulevard, Suite 406
Cleveland, OH 44122

Re: Case No. 14-4168, *Stephen Hill v. Homeward Residential, Inc.*
Originating Case No. : 2:13-cv-00388

Dear Counsel,

The court today announced its decision in the above-styled case.

Enclosed is a copy of the court's opinion together with the judgment which has been entered in conformity with Rule 36, Federal Rules of Appellate Procedure.

Yours very truly,

Deborah S. Hunt, Clerk

Cathryn Lovely
Deputy Clerk

cc: Mr. Richard W. Nagel

Enclosures

Mandate to issue.

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 15a0201p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

STEPHEN M. HILL,
Plaintiff-Appellant,

v.

HOMEWARD RESIDENTIAL, INC., fka American Home Mortgage Servicing, Inc.,
Defendant-Appellee.

No. 14-4168

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 2:13-cv-00388—Gregory L. Frost, District Judge.

Argued: August 4, 2015

Decided and Filed: August 21, 2015

Before: CLAY and McKEAGUE, Circuit Judges; BERTELSMAN, District Judge.*

COUNSEL

ARGUED: Troy J. Doucet, DOUCET & ASSOCIATES, CO., L.P.A., Dublin, Ohio, for Appellant. Kimberly Y. Smith Rivera, MCGLINCHEY STAFFORD, Cleveland, Ohio, for Appellee. **ON BRIEF:** Troy J. Doucet, DOUCET & ASSOCIATES, CO., L.P.A., Dublin, Ohio, for Appellant. Kimberly Y. Smith Rivera, MCGLINCHEY STAFFORD, Cleveland, Ohio, for Appellee.

McKEAGUE, J., delivered the opinion of the court in which CLAY, J., and BERTELSMAN, D.J., joined. CLAY, J. (pg. 11), delivered a separate concurring opinion.

---

*The Honorable William O. Bertelsman, United States District Judge for the Eastern District of Kentucky, sitting by designation.

OPINION

McKEAGUE, Circuit Judge. The Telephone Consumer Protection Act prohibits companies from making automated calls to a person's cellphone without that person's prior express consent. We must primarily decide whether a person gives his "prior express consent" when he gives his creditor his cellphone number in connection with a debt he owes. In line with the agency in charge of enforcing the Act, we conclude that this constitutes "prior express consent" to be called on that number about the debt. Because the district court's decision reflects that rule, and because the court did not commit any other error, we affirm.

I

Congress passed the Telephone Consumer Protection Act in response to "[v]oluminous consumer complaints about abuses of telephone technology—for example, computerized calls dispatched to private homes." *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 744 (2012). The Act accordingly "restricts certain kinds of telephonic and electronic" communications. *Sandusky Wellness Ctr., LLC v. Medco Health Solutions, Inc.*, 788 F.3d 218, 221 (6th Cir. 2015). For example, the Act prohibits any person from making "any call" to someone's cellphone "(other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice." 47 U.S.C. § 227(b)(1)(A)(iii). The recipient of one of these prohibited communications can sue for private money damages—for at least $500 per violation. § 227(b)(3)(B).

Stephen Hill claims he received well over a hundred of these prohibited phone calls from his creditor, Homeward Residential, Inc., in connection to a debt he owed. His story began in 2003 when he obtained a mortgage loan from Jordan West Companies. He provided his home and work numbers on that loan. Three years later, though, he cancelled his home phone and replaced it with a cellphone. After his loan transferred to Homeward, he contacted the company to advise it that his primary phone number had changed. Homeward then replaced Hill's

obsolete home number with his cellphone number in its records. Hill knew that this number would be used if Homeward needed to reach him about his mortgage.

Hill eventually fell behind on his mortgage, but Hill and Homeward worked out a loan modification so Hill could keep his home. Hill listed his cell phone number on that document. When he continued to fail to pay his mortgage payments on time, Homeward called him to collect its payments. In July 2010, Hill told Homeward not to call him at work anymore, instructing Homeward to call his cellphone instead. This left his cellphone number as the only number listed in his records with Homeward.

Hill's loan modification failed, and he ultimately defaulted on his mortgage. After that, from May 2011 through January 2013, Hill filled out at least ten forms with Homeward to try to mitigate his losses. He provided his cellphone number on all these forms. *See* Appellee Br. 3–4 (listing the forms). He also provided express written consent for Homeward to call his cellphone. *See, e.g.*, R. 19-3 (Uniform Borrower Assistance Form) at 30 ("I consent to being contacted concerning this request for mortgage assistance at any cellular or mobile telephone number I have provided[,] . . . includ[ing] . . . telephone calls to my cellular or mobile telephone."). By doing so, Hill testified that he understood Homeward "would call me at that cell phone number." R. 18-1 (Hill Depo.) at 49.

To collect from Hill and in other matters regarding his loan, Homeward called Hill on the number he provided: his cellphone. In all, Homeward called him an alleged 482 times from 2009 to 2013. One hundred seventy-six of these calls used Prairie, a device "capable of autodialing a phone number." Appellee Br. 13. But Homeward says that it didn't actually use its phone systems that way, instead only manually dialing Hill's number. Likewise, Homeward says it never used automated messages to call Hill, although Hill disputes the point.

Hill, upset at these repeated calls, sued Homeward in federal court. He complained that Homeward's calls constituted either knowing or negligent violations of the Telephone Consumer Protection Act, which, as explained, prohibits companies from using auto-dialers to call cellphone numbers without the called party's consent. After discovery, each side moved for summary judgment, but the court denied each motion. It held that two genuine issues of material fact existed: (1) whether Homeward used an "automatic telephone dialing system" to call Hill;

and (2) whether Hill offered his cellphone number to Homeward, or whether Homeward "captured" Hill's number and called Hill outside the scope of his consent. R. 31 at 3–11. The case would proceed to a jury on these two questions.

Before trial, Hill tried to subpoena an unidentified corporate representative of Homeward to testify about twenty-six topics at trial. Homeward moved to quash the subpoena because it did not comply with Federal Rule of Civil Procedure 45. Apparently recognizing its defects, Hill filed another subpoena one week before trial, mooting his first subpoena. Homeward again moved to quash this subpoena because it also failed to comply with Rule 45, including it did not identify a witness and did not tender the necessary fees. The district court agreed with Homeward and quashed the subpoena. The court also rejected Hill's subsequent efforts to compel Homeward to produce a corporate representative at trial.

Trial began—and ended nearly as quickly as it began. A jury returned a general verdict for Homeward after one day. The court accepted the verdict and issued judgment.

II

Hill appealed. He makes three arguments: (A) that the district court should have granted his summary-judgment motion because the record showed that Homeward used an auto-dialer to call his cellphone without his prior express consent; (B) that the jury instruction on "prior express consent" was too broad; and (C) that the district court should have compelled a Homeward witness to testify at trial. None has merit.

A

Hill's *post-trial* appeal from the district court's denial of his *pretrial* summary-judgment motion cannot succeed, because a losing party may not "appeal an order denying summary judgment after a full trial on the merits." *Ortiz v. Jordan*, 562 U.S. 180, 184 (2011); *accord Jarrett v. Epperly*, 896 F.2d 1013, 1016 (6th Cir. 1990). A district court's summary-judgment denial is "interlocutory" in nature—the antithesis of what Congress has given us jurisdiction to hear. 28 U.S.C. § 1291 (giving us jurisdiction over *final* decisions); *see Ortiz*, 562 U.S. at 188. When a court denies a summary-judgment motion because of a genuine issue of fact (as the court did here) it "decides only one thing—that the case should go to trial"; the denial "does not settle

or even tentatively decide anything about the merits of the claim." *Switzerland Cheese Ass'n, Inc. v. E. Horne's Mkt., Inc.*, 385 U.S. 23, 25 (1966). A trial, of course, *does* settle the matter on the merits and *is* final in nature. So once a trial occurs, the losing party may appeal from *that* judgment—but not from the summary-judgment denial, because § 1291 does not give us jurisdiction to hear those non-final appeals. *See Ortiz*, 562 U.S. at 184, 188–89.

We accordingly lack appellate jurisdiction over this portion of Hill's appeal. Hill lost his summary-judgment motion in August 2014 but did not appeal it until November 2014—after he lost at trial. He does not say that the evidence produced *at trial* shows that he must win, but rather that the evidence *at summary judgment* does. Here is what he should have done: make a Rule 50(a) motion, renew that motion after the jury verdict under Rule 50(b), and then appeal the denial of the Rule 50(b) motion. *See Maxwell v. Dodd*, 662 F.3d 418, 421 (6th Cir. 2011). But here is what he did instead: make an oral Rule 50(a) motion, fail to renew that motion, and then appeal the denial of the *Rule 56 motion* rather than the Rule 50 motion. *See* R. 59 (Notice of Appeal). His "failure to renew" or appeal his "motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b)" leaves us "with no warrant" to address the summary-judgment denial. *Ortiz*, 562 U.S. at 185; *see Barnes v. City of Cincinnati*, 401 F.3d 729, 736 (6th Cir. 2005). And even if his generic notice of appeal of the trial judgment encompassed the denial of his oral Rule 50(a) motion, *see, e.g.*, *Blockel v. J.C. Penney Co.*, 337 F.3d 17, 24 (1st Cir. 2003), he forfeited any argument on that issue by not discussing it in his briefing.

Even though Homeward did not address our lack of appellate jurisdiction, we have "a duty to consider [it] sua sponte." *Mattingly v. Farmers State Bank*, 153 F.3d 336, 336 (6th Cir. 1998) (per curiam). And this issue cannot be waived or forfeited by the parties. *See Page Plus of Atlanta, Inc. v. Owl Wireless, LLC*, 733 F.3d 658, 659–60 (6th Cir. 2013).

No exceptions apply. When a summary-judgment denial involves "a pure question of law," our caselaw says that we may review it. *In re AmTrust Fin. Corp.*, 694 F.3d 741, 750 (6th Cir. 2012). But that is not what happened here; like *Ortiz*, it involved questions of fact. The district court held, for example, that there was a genuine issue of *fact* whether Hill gave his cellphone number to Homeward (*i.e.* expressly consented) or whether Homeward acquired it by other means. R. 31 at 10; *see also* R. 63 (Trial Transcript) at 30. "Depending upon the answers"

to this and other factual issues, the court wrote, Hill may or may not have given his consent. R. 31 at 10. A jury had to decide. And after a jury has given its answer, we cannot review the court's pretrial order. *Nolfi v. Ohio Kentucky Oil Corp.*, 675 F.3d 538, 545 (6th Cir. 2012).

B

The district court's jury instructions on "prior express consent" were not overly broad. Our role in reviewing these instructions is merely to ensure they "adequately informed the jury of the relevant considerations" of the law. *United States v. Kuehne*, 547 F.3d 667, 679 (6th Cir. 2008) (citations omitted). A district court has discretion to deny proposed instructions, so we review this challenge "for abuse of discretion." *Id.* We may reverse only if the instructions "were confusing, misleading, or prejudicial." *Id.* (citations omitted). They were not here.

The court's jury instruction on this issue read, in full:

> "'Prior express consent' means that before Defendant made a call to Plaintiff's cellular telephone number, Plaintiff had given an invitation or permission to receive calls to that number.
>
> Autodialed and prerecorded message calls to wireless numbers that are provided by the called party to a creditor in connection with an existing debt are permissible as calls made with the 'prior express consent' of the called party."

R. 54 at 75.

This language adequately reflects the legal definition of prior express consent promulgated by the Federal Communications Commission (FCC). It was taken directly from the FCC's rulings—which shape the law in this area, *see* 47 U.S.C. § 227(b)(2) (charging the FCC with prescribing rules and regulations under the Act). The instructions paraphrased the FCC's original definition on "prior express consent"—that a party who gives an "invitation or permission to be called at [a certain] number" has given its express consent with respect to that number. *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 F.C.C. Rcd. 8752, 8769 (1992). And the instructions quote verbatim the FCC's later clarification of that definition in the debtor–creditor context—that a creditor doesn't violate the Act when it calls a debtor who has "provided [his number] in connection with an existing debt." *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*,

23 F.C.C. Rcd. 559, 564 (2008). A court does not misstate the law when it simply states the law. This jury instruction was proper.

Hill takes issue because the instruction leaves out a small excerpt from these rulings—that "prior express consent is . . . granted only if the wireless number was provided . . . during the transaction that resulted in the debt owed." *Id.* Hill adds the word *initial* before "transaction" and thus reads the rule to limit consent to only when it's given at the "initial transaction" that creates the debt. Appellant Br. 11 (emphasis in original); Reply Br. 4. That would be 2003 for Hill—before Homeward was Hill's creditor and before Hill even had a cellphone—too early, Hill says, for him to possibly give his express consent.

But this excerpt does not bear the weight Hill puts on it. Unlike Hill, the FCC never uses the words *initial* or *original* before "transaction." It instead says that the debtor has given his consent when he gives his number "*during the transaction*" that involves the debt (*i.e.*, "regarding the debt"). 23 F.C.C. Rcd. at 564–65, 567 (emphasis added). This language does not change the general definition of express consent; it instead "emphasize[s]" that creditors can call debtors only "to recover payment for obligations owed," not on any topic whatsoever. *See id.* at 564, 565 n.36. So it ensures that a debtor who gives his number *outside* the context of the debt has not given his consent to be called regarding the debt. FCC's Letter Brief, *Re: Nigro v. Mercantile Adjustment Bureau, LLC*, 2014 WL 3612689 (C.A.2), at *8–*9; *see Nigro v. Mercantile Adjustment Bureau, LLC*, 769 F.3d 804, 806–07 (2d Cir. 2014) (holding that a third party did not give his prior express consent to be called about a debt when he gave his number outside of the context of the debt). *Contra* Reply Br. 9–11. Still, then, any "autodialed and prerecorded message calls to wireless numbers *provided by the called party in connection with an existing debt* are made with the 'prior express consent' of the called party." 23 F.C.C. Rcd. at 564 (emphasis added). And that's precisely what this jury instruction said. R. 54 at 75.

Although the FCC has yet to explicitly address this issue, *see* FCC's Letter Brief, 2014 WL 3612689 at *10–*11, courts interpreting the excerpt agree with our reading. A debtor consents to calls about "an existing debt" when he gives his number "in connection with" that debt, 23 F.C.C. Rcd. at 564—including after his initial signing of the loan. *See Moore v. Firstsource Advantage, LLC*, No. 07-CV-770, 2011 WL 4345703, at *10 (W.D.N.Y. Sept. 15,

2011). While debtors may "[t]ypically" give their cellphone number "as part of a credit application" at the beginning of the debtor–creditor relationship, *see* 23 F.C.C. Rcd. at 565 n.36, it doesn't *have* to be that way. *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1122 (11th Cir. 2014); *see, e.g.*, *Sartori v. Susan C. Little & Associates, P.A.*, 571 F. App'x 677, 683 (10th Cir. 2014) (holding that the debtor gave his prior express consent, even though he didn't give his number until one year after debt was incurred). Unsurprisingly, then, a person gives his "prior express consent" under the statute if he gives a company his number before it calls him.

Finally, a debtor does not need to give his consent to automated calls specifically; his general consent to being called on a cellphone constitutes "prior express consent." The FCC's regulations for telemarketers now require a more specific type of consent—namely, that the called party consents, in writing, to being called *by an auto-dialer*. *E.g.*, 47 C.F.R. 64.1200(f)(8). But these telemarketer regulations do not apply in the debtor–creditor context. 23 F.C.C. Rcd. at 565. In this context, once the debtor gives his consent to be called on his cellphone, the creditor can use automated calls to that number. *See id.* at 564.

The district court did not err by leaving out the excerpt from the FCC's ruling; its instructions adequately informed the jury of the law and did not confuse or mislead them.

C

Hill's final argument—that the district court's denials of his requests to compel a Homeward representative to testify at trial—fares no better than his first two. The court made three rulings relating to Hill's request for a Homeward trial witness: It (1) quashed Hill's subpoena; (2) denied his request for a trial deposition; and (3) denied his motion to compel. We can reverse these rulings "only if . . . [they] w[ere] an abuse of discretion resulting in substantial prejudice." *B & H Med., L.L.C. v. ABP Admin., Inc.*, 526 F.3d 257, 268 (6th Cir. 2008); *accord* Appellant Br. 22. They were not even close.

(1) *The subpoena*. Hill's subpoena failed several aspects of Federal Rule of Civil Procedure 45, so the district court did not abuse its discretion in quashing it. Rule 45 requires, among other things, that the party serving it to tender certain fees, Fed. R. Civ. P. 45(b)(1), comply with geographical limitations, *id.* at 45(c), and allow a reasonable time to comply, *id.* at

45(d)(3)(A)(i). And it requires the party to specify the "person" who is being subpoenaed, and to serve it on that "named person." *Id.* at 45(a)(1)(A)(iii), (b)(1), (c)(1); *see* David D. Siegel, *Practice Commentaries to Rule 45*, at C45-9 ("If a particular person in the employ of a corporation or other entity is the person sought as a witness, the subpoena should of course be delivered to that person."). Hill's subpoena did none of these things. The court was thus within its discretion to quash it.

(2) *The trial deposition*. The district court was right to deny Hill's unusual request—made after his subpoena failed—to take a "deposition" on new topics at trial. The Rules don't allow for it. Hill's claimed support, Rule 30(b)(6), does not help, because that rule contemplates depositions during *discovery*, not at trial. Of course, discovery had long since closed when Hill made this request—only one full business day before trial. Allowing a trial "deposition" in these circumstances would allow "an end-run around the failed subpoenas." R. 49 (District Court Order) at 1. Like the district court, we will not require it.

(3) *The motion to compel*. The court also correctly rejected Hill's last-ditch effort: his motion to compel. When all else failed—on the Friday before the Monday trial—Hill moved the district court to compel Homeward to bring a witness to trial. There is no procedure for this request in the Rules; Hill attempted it because he was out of options. But his real option—one that, at least five-and-a-half weeks before trial, Homeward told him he would need to do—was to subpoena a corporate witness who either "resides, is employed, or regularly transacts business in person" in Ohio. Fed. R. Civ. P. 45(c)(1)(B). If no one that Hill wanted fit that description, then he could have taken a deposition of a corporate officer during discovery for its use at trial. Yet he waited (and waited) . . . and then filed a deficient subpoena. Like his previous efforts, his motion to compel fails. The district court did not abuse its discretion in denying this request.

Hill tries to avoid these conclusions by urging us to "temper[]" the "technical" Rules by interpreting them "through the lens of common sense." Appellant Br. 24. But these rules were not made to be "tempered"; they were made to be "technical"—from the specific amount of fees tendered, to the court issuing the subpoena, to the geographic scope of the request. It is not surprising, then, that Hill can point to only one case that supports his position, *Conyers v. Balboa Ins. Co.*, No. 8:12-CV-30-T-33EAJ, 2013 WL 2450108, at *1 (M.D. Fla. June 5, 2013) (using

Rule 30 to expand Rule 45). Even if that case persuaded us that the Rules should be modified by judicial fiat, the district court did not abuse its discretion in enforcing them as written.

III

For these reasons, we affirm.

CONCURRENCE

CLAY, Circuit Judge, concurring. I join the majority opinion in full. I write separately only to highlight the limited scope of the primary question presented in today's case. Plaintiff Stephen Hill challenges the district court's interpretation of the Federal Communications Commission (FCC) regulations concerning the circumstances under which a debtor gives a creditor "prior express consent" to call his cellphone. Hill does *not* challenge the FCC's interpretation of 47 U.S.C. § 227(b)(1)(A)(iii) as promulgated in paragraphs 9 and 10 of *In the Matter of Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 F.C.C. Rcd. 559 (2008).

I agree with the majority that "a debtor does not need to give his consent to automated calls specifically" because the FCC regulations say as much. Majority Op. at 8. However, I express serious doubt as to whether the FCC correctly interpreted the statute when it promulgated its regulations. The notion that a debtor gives his prior *express* consent to receiving calls from a creditor using an auto-dialer or prerecorded voice simply by giving his cellphone number to the creditor strikes me as contrary to both the plain language of the statute and the underlying legislative intent. *See id.* at 2 (quoting *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 744 (2012)). But because the plaintiff in this case does not challenge the FCC regulation itself, we do not have occasion to pass judgment on it. I concur in the majority opinion on the understanding that such a challenge is not foreclosed in a future case.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 14-4168

FILED
Aug 21, 2015
DEBORAH S. HUNT, Clerk

STEPHEN M. HILL,
Plaintiff - Appellant,

v.

HOMEWARD RESIDENTIAL, INC.,
fka American Home Mortgage Servicing, Inc.,
Defendant - Appellee.

Before: CLAY and McKEAGUE, Circuit Judges; BERTELSMAN, District Judge.

JUDGMENT

On Appeal from the United States District Court
for the Southern District of Ohio at Columbus.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

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125-001361

TAB 11E

125-001362

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125-001363

15-CV-EE

This submission addresses four topics. Some of them affect the Appellate, Bankruptcy, Civil, and Criminal Rules.

Social Security Numbers: The first proposal is to amend Civil Rule 5.2(a)(1) to forbid including any part of a social security or taxpayer identification number. The underlying concern is that if the place and date of birth are known, the last four digits "effectively give[] away all of the private information" because only the last four digits are random for numbers issued before "a recent change by the SSA." This concern was considered carefully when Rule 5.2 was first adopted. The risk was recognized then, but the several committees decided that the value of having the information overcame the risks. The Bankruptcy Rules Committee found particular needs for full numbers in some settings. Preliminary exchanges suggest that they continue to recognize these needs. This question should be resolved in coordination with the other advisory committees.

In forma pauperis Affidavits: The second proposal is to add a new subdivision to Rule 5.2 to address "any affidavit made in support of a motion under 28 U.S.C. § 1915." The rule would provide that the affidavit must be filed under seal and reviewed ex parte. For good cause, the court may order that the affidavit be disclosed to other parties under an appropriate protective order, or be unsealed in appropriately redacted form. The submission directs attention to a petition for certiorari regarding this issue. (The proposal includes affidavits under 18 U.S.C. § 3006A, which directs each district court to create a plan for furnishing representation for any person "financially eligible." It is not apparent that much would be accomplished by addressing representation of criminal defendants in a Civil Rule.)

Section 1915(a)(1) enables a court to

> authorize commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

The privacy interests affected by the affidavit are manifest. Whether a rule is required to deal with them is not so clear.

12b-001364

Current practice should be reviewed, beginning with the Federal Judicial Center study of sealing practices in general.

This proposal affects the other advisory committees. Coordination will be required if any committee decides to move toward consideration of new rule text.

New Rule 7.2 — Copies of Unpublished Authorities: This proposal is to adopt a new Rule 7.2 that would address the needs of pro se litigants created by citation by counsel of cases or other authorities "that are unpublished or reported exclusively on computerized databases." Counsel would be required to provide the pro se litigant with copies. In addition, counsel, upon request, must provide copies of such cases and authorities that are cited in a decision of the court if they were not previously cited by any party. The proposal tracks verbatim Local Rule 7.2, E.D. & S.D.N.Y.

Something like this is also to be found in Appellate Rule 32.1(b): "If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited." This rule is part of the rule on citing non-precedential opinions added in 2007. As compared to 2007, it seems likely that most, if not all, federal-court orders are now available from the court's own site. However that may be, this rule applies only on appeal, and does not reach decisions by state courts or courts in other countries.

This proposal raises the familiar question whether this level of detail should be fixed in the national rules, or is better left to local practice, and perhaps reflected in a local rule.

e-Filing by Pro Se Litigants: This proposal is that pro se litigants should be permitted, but not required, to file by paper. They must be permitted to qualify for CM/ECF access to avoid imposing burdens not borne by other parties who have such access.

This topic is addressed by the current e-filing proposals pending before all advisory committees other than the Evidence Rules Committee. This proposal will be considered in the final development of those proposals.

12b-001365

Re: Proposed rule changes for fairness to pro se and IFP litigants

Sai to: Rules_Support 09/07/2015 10:36 AM

History: This message has been forwarded.

Dear Committee on Rules of Practice and Procedure -

I further request parallel changes to the non-civil rules, and defer to the Committee on how to mirror them appropriately, as I am only familiar with the civil rules.

In particular, I note an error in my draft below for proposal #2: 18 U.S.C. 3006A (the Criminal Justice Act) would of course come under the FRCrP, not the FRCvP, so the FRCvP rule should refer only to 28 U.S.C. 1915 (the IFP statute).

Sincerely,
Sai

On Mon, Sep 7, 2015 at 10:02 AM, Sai <dccc@s.ai> wrote:
> Dear Committee on Rules of Practice and Procedure -
>
> I hereby propose the following four changes to the Federal Rules of
> Civil Procedure.
>
>
> 1. FRCP 5.2: amend (a)(1) to read as follows:
> (1) any part of the social-security number and taxpayer-identification
number
>
> The last four digits of an SSN, prior to a recent change by the SSA,
> is the only part that is random. The first digits can be strongly
> derived from knowing the person's place and date of birth.
>
> Disclosure of the last four digits of an SSN effectively gives away
> all of the private information, serves no public purpose in
> understanding the litigation, and should therefore be sealed by
> default (absent a court order to the contrary, as already provided for
> by FRCP 5.2).
>
> See, e.g.:
> Alessandro Acquisti and Ralph Gross, Predicting Social Security
> numbers from public data, DOI 10.1073/pnas.0904891106, PNAS July 7,
> 2009 vol. 106 no. 27 10975-10980 and supplement
> https://www.pnas.org/content/106/27/10975.full.pdf
> http://www.heinz.cmu.edu/~acquisti/ssnstudy/
>
> EPIC: Social Security Numbers (Nov. 13, 2014)
> https://epic.org/privacy/ssn/
>
> Latanya Sweeney, SSNwatch, Harvard Data Privacy Lab; see also demo
> http://latanyasweeney.org/work/ssnwatch.html
> http://dataprivacylab.org/dataprivacy/projects/ssnwatch/index.html
>
>
> 2. FRCP 5.2: add a new paragraph, to read as follows:
>
> (i) Any affidavit made in support of a motion under 28 U.S.C. 1915 or

> 18 U.S.C. 3006A shall be filed under seal and reviewed ex parte. Upon
> a motion showing good cause, notice to the affiant and all others
> whose information is to be disclosed, and opportunity for the same to
> contest the motion, the court may order that such affidavits be
> (1) disclosed to other parties under an appropriate protective order; or
> (2) unsealed in appropriately redacted form.
>
> For extensive argument, please see the petition and amicus briefs in
> my petition for certiorari regarding this issue: http://s.ai/ifp
>
>
> 3. Add new rule 7.2, matching that of S.D. & E.D. NY:
>
> Rule 7.2. Authorities to Be Provided to Pro Se Litigants
> In cases involving a pro se litigant, counsel shall, when serving a
> memorandum of law (or other submissions to the Court), provide the pro
> se litigant (but not other counsel or the Court) with copies of cases
> and other authorities cited therein that are unpublished or reported
> exclusively on computerized databases. Upon request, counsel shall
> provide the pro se litigant with copies of such unpublished cases and
> other authorities as are cited in a decision of the Court and were not
> previously cited by any party.
>
> See:
> Local Civil Rule of the Southern and Eastern Districts of New York 7.2
> Lebron v. Sanders, 557 F.3d 76 (2d Cir. 2009)
>
>
> 4. Add new subparagraph to rule 5(d)(3):
> (1) A court may not require a pro se litigant to file any paper by
> non-electronic means solely because of the litigant's pro se status.
>
> Pro se litigants should still be permitted (not required) to file by
> paper, to ensure that those without access to CM/ECF or familiarity
> with adequate technology have access to the courts.
>
> Pro se litigants may of course be required to register with CM/ECF in
> the same manner as an attorney, including signing appropriate
> declarations or passing the same CM/ECF training or testing required
> of attorneys.
>
> However, courts should not prohibit pro se litigants from having
> CM/ECF access where represented parties would have it. Doing so
> imposes a disparate burden of time, expense, effort, processing
> delays, reduction in the visual quality of papers due to printing and
> scanning, removal of hyperlinks in papers, and reduction in ADA /
> Rehab Act accessibility.
>
>
>
> I request to be notified by email of any progress related to the four
> changes I have proposed above.
>
> Respectfully submitted,
> /s/ Sai

12b-001367

TAB 11F

12b-001368

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125-001369

Civil Rule 56: Judge Zouhary

Judge Zouhary suggests consideration of an amendment to Rule 56 that would require a pre-motion conference with the court before filing a formal motion for summary judgment.

Several advantages may be realized by a pre-motion conference. The movant may decide not to make the motion, or may better focus the motion by omitting issues that are genuinely disputed. The nonmovant may realize that some issues should not be disputed, or are not material. These advantages may flow from better understanding of the facts, the law, or both. Supporting materials may be simplified. Discussion with the court may work better than a conference of the parties alone — the court's perspective can help a party understand that a motion will fail, or should be limited, or will impose unnecessary costs, or may impede opportunities for settlement.

Judge Zouhary notes that several other judges have adopted variations on these practices. He also notes that several courts of appeals have said that Rule 56 establishes a right to move for summary judgment. The court can confer and advise, but it cannot forbid a motion. The discussion that follows accepts the proposition that summary judgment should not be effectively denied without allowing a motion. One result would be to complicate the pre-motion procedure, often forcing it to become equivalent to a motion. Another might be to discourage desirable motions.

The advantages of a pre-motion conference are real. The proposed rule amendments now pending in Congress include the addition of a new Rule 16(b)(3)(B)(v), which provides that a scheduling order may "direct that before moving for an order relating to discovery, the movant must request a conference with the court." The advantages are described in the Committee Note: "Many judges who hold such conferences find them an efficient way to resolve most discovery disputes without the delay and burdens attending a formal motion." The Note adds, however, that "the decision whether to require such conferences is left to the discretion of the judge in each case." The choice to rely on discretion rather than mandate was deliberate. The Duke Conference Subcommittee discussed the choice at length. It concluded that the pre-motion conference procedure is not likely to work well with a judge who resists it. Encouragement was thought the more effective way to proceed.

The Duke Conference Subcommittee also discussed the possibility of addressing pre-motion conferences for summary judgment. The advantages of this practice were recognized. The

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decision not to add yet another feature to the broad package of proposals should not be taken to reflect a judgment that it would be unwise to address the practice by further rule revisions.

One modest approach would be to go once more to Rule 16. Rule 16(c)(2)(E) already lists among the matters for appropriate action at a pretrial conference "determining the appropriateness and timing of summary adjudication under Rule 56." It would be easy to extend anticipated Rule 16(b)(3)(B)(v) to include summary judgment in the pre-motion conference: "direct that before moving for an order relating to discovery <u>or for summary judgment</u>, the movant must request a conference with the court."

If it were decided to make a pre-motion conference mandatory, or mandatory subject to defeasance, it might be better to add the requirement directly to Rule 56. Without attempting polished drafting, Rule 56(b) could be amended to look something like this:

> **(b) Time to File a Motion**. Unless a different time is set by local rule or the court orders otherwise, a party may<u>, after requesting a conference with the court</u>, file a motion for summary judgment at any time until 30 days after the close of all discovery..

A comprehensive revision of Rule 56 was adopted in 2010. A proposed amendment could not take effect before 2018 in the ordinary course of Enabling Act procedure. The Rule 56 revision is not so recent as to deter a further worthwhile amendment. Nor should the fact that a pre-motion requirement was not adopted in 2010 be cause for reluctance. The importance of active case management has come to the fore since the time when the Rule 56 work was done, particularly with the Duke Conference.

If the Rule 56 revisions do not of themselves provide reason to go slow, the more recent work of the Duke Conference Subcommittee may. Many judges now exercise the authority to direct pre-motion conferences. Others seem not to. Even a direction in Rule 56 that a party must request a conference could be met by denying a conference. A direction that the parties and court must hold a conference before a motion is made could meet substantial resistance, and in any event could carry a generally worthy practice too far.

In short, this may be a good practice that should be encouraged without yet amending the rules to provide more formal encouragement or a general requirement.

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Civil Rule 58: Judge Pratter

Judge Pratter has transmitted a question raised by one of her colleagues about the "separate document" requirement of Rule 58:

Rule 58. Entering Judgment
(a) **SEPARATE DOCUMENT.** Every judgment and amended judgment must be set out in a separate document * * *.

The separate document requirement was added to Rule 58 in 1963. The Committee Note observed that "some difficulty has arisen, chiefly where the court has written an opinion or memorandum containing some apparently directive or dispositive words * * *." The difficulty was uncertainty as to the event that started the time to appeal. "The amended rule eliminates these uncertainties by requiring that there be a judgment set out on a separate document — distinct from any opinion or memorandum — which provides the basis for the entry of judgment."

Rule 58 was amended in 2002. The separate document requirement was retained, but Rule 58(c)(2) was added. Rule 58(c)(2)(B) provides that if a separate document is required, judgment is entered when it is entered on the civil docket "and the earlier of these events occurs: (A) it is set out in a separate document; or (B) 150 days have run from the entry in the civil docket." The Committee Note explained: "This simple separate document requirement has been ignored in many cases." One result was that the time for post-judgment motions never ended because it never began, but that did not seem to present serious problems. But another result was that appeal time also never started to run. The Note observed that "there have been many and horridly confused problems under Appellate Rule 4(a)." The 150-day fiction was adopted to ensure that appeal time would begin at that point, and conclude in due course. Appellate Rule 4 was revised in parallel with Rule 58.

The 2002 Committee Note added this:

> No attempt is made to sort through the confusion that some courts have found in addressing the elements of a separate document. It is easy to prepare a separate document that recites the terms of the judgment without offering additional explanation or citation of authority.

These amendments did not address all questions. Many of them arise from the provision in Rule 54(a) that defines "judgment" to "include[] a decree and any order from which an appeal lies." One

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example of the potential difficulties is provided by collateral-order finality. The most common example of collateral-order appeals arise from interlocutory orders that refuse to accept an official-immunity defense, ordinarily by denying a motion to dismiss or for summary judgment. The 2002 Committee Note suggests that "[t]he new all-purpose definition of the entry of judgment must be applied with common sense to other questions that may turn on the time when judgment is entered." It seems unlikely that many judges bother to enter a Rule 58 separate document when denying an official-immunity motion for summary judgment. But it is better not to allow 150 days plus the ordinary appeal time to take the appeal.

The 2002 amendment resulted from long and hard work by the Civil Rules and Appellate Rules Committees acting jointly. Judge Schiltz, then Reporter for the Appellate Rules Committee, studied hundreds of cases dealing with the "time bombs" of never-beginning and thus never-ending appeal time created by failures to enter judgment on a separate document.

The Appellate Rules Committee returned to the separate document requirement in 2008. Professor Struve prepared two memoranda for two separate meetings. Their liaison to circuit clerks undertook a survey of circuit clerks to determine the frequency of failures to enter judgment on a separate document. Experiences varied among the circuits, but noncompliance ranged from not uncommon to rather common. One circuit judge discussed the problem at a meeting of judges, resulting in communications with district court clerks that produced a marked increase in compliance. Discussion came to focus on a particular problem that had not been much considered during the work that led to the 2002 amendments. Judgment is entered, but not on a separate document. A timely appeal is taken. After the appeal is taken a motion for post-judgment relief is made. Because there is no separate document, the motion can be timely up to 178 days after judgment is entered on the document (150 days to the constructive entry under Rule 58(c)(2)(B) plus 28 days under Rules 50, 52, or 59, or for a Rule 60 motion made at a time that suspends appeal time). The post-judgment motion suspends the appeal. The court of appeals may — or may not — be informed of the post-judgment motion. If it is not informed, it may continue to invest effort in a case that is no longer technically in the court. The Committee found that this problem does not arise frequently. It gave some thought to eliminating the separate-document requirement as a nuisance, but in the end, it concluded that it is better to leave the rules as they are. The discussion noted both the simplicity of the requirement and the value of retaining it as a clear signal that starts appeal time. District clerks should be reminded of the need to police the separate-document requirement. And perhaps the CM/ECF system can be

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used to include a suitable prompt. These conclusions were reported to the Standing Committee in January 2009. They were accepted, with a suggestion that education efforts could be coordinated with the Committee on Court Administration and Court Management.

The separate document requirement survived this intense study. But it seems not to have taken on a more active life in practice. Judge Pratter's submission is accompanied by a "Not Precedential" opinion. Bazargani v. Radel, No. 14-3110 (3d Cir., March 3, 2015). The Bazargani case found an appeal timely because the time began 150 days after "[t]he District Court's opinion [was] set forth in the footnotes to the dismissal order * * *." The footnotes meant there was no separate document.

Judge Pratter asks

> whether it makes sense for the Rules to build in tolerance for such a significant timing difference simply because order language is accompanied by reasoning.

And she notes that perhaps the question is interesting only

> to those of us whose local judicial drafting culture is typically to incorporate reasoning (at least briefly) in orders in matters that do not merit lengthy opinions or memoranda but where it seems appropriate to give the litigants at least a brief explanation.

These succinct observations frame the question perfectly. Judges understand that it is important to explain the grounds for a decision, and that often the grounds can be stated clearly and effectively by a brief statement that is readily understood by the parties to the case. They do that. And at the same time the formal requirement to enter a still more succinct "judgment" in a separate document is easily overlooked — the district court's work is done, and there is no obvious prompt to remind the court of the needs for timing post-judgment motions and appeals that are advanced by entering judgment on a separate document.

Doing nothing to take up these questions probably will mean that matters lurch along into the future as they have for the 13 years since Rule 58(a) was most recently amended, and the 52 years since the separate document requirement was first adopted. Taking these questions up again, on the other hand, will run the risk of recreating the difficulty and uncertainties lamented in the 1963 Committee Note. Perhaps the best outcome would be to find a system that automatically prompts judges and court staff to always remember the separate document requirement. Short of that, it may

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be better to adhere to the judgment reached in formulating the 2002 amendments, retaining the separate document requirement and living with the occasional 150-day inadvertent extensions of appeal and motions times.

TAB 12

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M E M O R A N D U M

To: Advisory Committee

From: Pilot Project Subcommittee

Date: October 15, 2015

One of the conclusions reached in the process of developing the rule amendments that will become effective on December 1, 2015, was that additional innovations in civil litigation may be more likely if they are tested first in a series of pilot projects. To pursue the possible development of such pilot projects, a subcommittee was formed consisting of Jeff Sutton, John Bates, Paul Grimm, Neil Gorsuch, Amy St. Eve, John Barkett, Parker Folse, Virginia Seitz, Ed Cooper, and Dave Campbell. The charge for the subcommittee is to investigate pilot projects already completed in other locations and to recommend possible pilot projects for federal court.

The committee began its work by collecting information. Contact was made with the National Center for State Courts, the Institute for Advancement of the American Legal System, the Conference of State Court Chief Justices, various innovative federal courts, and even British lawyers. The subcommittee divided into three groups, one to study "rocket dockets," a second to study enhanced initial disclosures, and a third to study simplified procedures for some or all cases. These groups have conducted investigations, conferred, and made recommendations.

The purpose of this memo is two-fold: (1) acquaint the full committee with the work done to date by the subcommittee, and (2) present various thoughts for discussion at the November meeting. Exhibits A, B, C, and D contain summary memos prepared by some members of the subcommittee regarding pilot projects undertaken in various state and federal courts. Exhibits E, F, and G contain additional thoughts and recommendations compiled by the three groups on possible pilot projects. Exhibit H is a copy of Arizona's disclosure rule.

The subcommittee has focused on the three categories of pilot projects identified above: rocket dockets, enhanced initial disclosures, and simplified procedures. As discussion has proceeded through a series of phone calls, this focus has narrowed to two categories of pilot projects: procedures designed to move some or all civil cases more quickly through a court's docket, and enhanced initial disclosures. This memo will attempt

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to capture the subcommittee's thinking on these two subjects and raise questions for the Committee's consideration.

A. Expedited Procedures.

As you will see from reviewing Exhibits A-D, several states and some federal courts have experimented with procedures designed to reduce the cost and delay of civil litigation. These pilot projects have included a number of different procedures such as more detailed pleading in the complaint and answer, early case management conferences followed by early case management orders (with continuances granted rarely), more substantial initial disclosures, various limitations on discovery, limitations on expert discovery, expedited procedures for resolving discovery disputes, and mandatory trial dates within a relatively short time from the start of the case. The most robust and carefully-studied of the state pilot projects – Utah and Colorado – produced shorter times to disposition than existed in those states before the pilot projects. Additional results included fewer discovery disputes and higher settlement rates. Neither project produced an increase in the percentage of cases going to trial.

The subcommittee believes that pilot projects could be developed for federal court that use some or all of these procedures. The idea would be to put together a package of procedures and enlist the involvement of specific districts or specific judges to apply the procedures to some or all of their cases over a period of time long enough to measure results. Several questions have arisen, and we would appreciate input from the Committee:

1. If such a pilot were to be applied only to a category of cases on the court's docket, such as small- or modest-sized cases, the procedures could be quite streamlined and could test the question of whether federal courts can treat different sizes of cases differently as opposed to having one set of rules for all cases. The problem arises in trying to identify cases that would be included in such a pilot. One approach would be to simply set a dollar amount for the cases, say $100,000 or less. Another approach would be to identify various categories of federal-question cases (such as FDCPA, FCRA, non-class FLSA cases) and direct them into the pilot, and also task judges with identifying diversity-jurisdiction cases (with input from the parties) that are modest enough to go into the pilot. Some of the challenges presented by such an approach would include lawyers trying to plead around the pilot projects and requiring time from judges and their staffs to determine which cases should go into the pilot. Case tracking systems employed by individual federal courts to divide cases into categories for case management purposes have met with mixed success in the past.

2. An alternative would be to adopt tighter time frames and more expedited procedures for all cases in a particular district. This approach, which would be something like the faster dockets used in some courts such as the Southern District of Florida, would

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test the ability of courts to move civil litigation more quickly. Some flexibility would be needed to ensure that more complex cases receive sufficient discovery, but the idea would be to significantly shorten the time and the procedure afforded all cases. One difficulty presented by such an approach would be buy-in. Judges and lawyers in the district may be less than enthusiastic about aggressively reducing the amount of litigation applied to civil cases generally. This approach would avoid the problem of trying to classify cases for a pilot project, but obviously would introduce other complications.

3. It has been the view of the subcommittee that a pilot project will be effective only if it is mandatory. If parties are given the opportunity to opt out of a pilot project, only the most progressive and efficient lawyers are likely to opt in. This self-selection would skew any measurable results from the pilot project. A mandatory program would likely produce more reliable results. The challenge of a mandatory system, of course, is dealing with parties who object.

4. A further question is whether the pilot should be applied by an entire district or by individual judges. The challenge in presenting it to an entire district, again, is buy-in. There may be judges in a district who are less than enthusiastic about applying the pilot. The problem with applying it only through individual judges, however, is self-selection. The judges most likely to take on the pilot would likely be progressive, active-managers. Any results from such a pilot would be difficult to attribute to the pilot as opposed to the efficiency of the judges who chose to participate.

5. The subcommittee recognizes that some pilot provisions could raise Rules Enabling Act issues (where the pilot requirements arguably are inconsistent with the rules). For now, the subcommittee is focusing on general approaches. An analysis of this issue will be required before any pilot is approved.

B. Initial disclosures.

As you know, the Committee actually required mandatory disclosure of unfavorable information in the version of Rule 26(a)(1) that was in effect from 1993 to 2000, but it permitted individual districts to opt out. So many districts opted out that the Committee eventually concluded that elimination of the opt-out provision was needed, and the only way to get such a change through the full Enabling Act process was to dial back the 26(a)(1) disclosure requirements to information a party may use to support its own claims or defenses. There was no judgment reached on the actual merits of the more aggressive form of initial disclosures. Favorable results from a pilot might have helped.

Nevertheless, as shown in Exhibits A-D, many state court pilot projects have included enhanced initial disclosures. The idea, of course, is to get information on the table that otherwise would be found only through expensive discovery. The discovery

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protocols for federal employment cases appear to have shown that enhanced disclosures can improve the efficiency of litigation.

Some states require more substantial initial disclosures. One example is Arizona Rule 26.1(a), a copy of which is included as Exhibit H. The idea behind Rule 26.1(a)(9) is to require parties to produce all documents relevant to the case, including unfavorable documents, at the outset of the litigation. The rule also requires parties to identify all persons with knowledge of the case, and to provide a general description of their knowledge. These rules, combined with other Arizona innovations (depositions limited to parties and experts, depositions limited to four hours, limitations of one expert per issue) have produced favorable results. 73% of Arizona lawyers who practice in federal and state court say that they prefer state court, as compared to 43% of lawyers nationally.

Exhibit E includes a draft set of initial disclosure rules prepared by one of the subcommittee's groups. It includes portions of the Arizona rule, but is not as aggressive. The draft rules include several paragraphs of explanation and thought.

Several questions for your consideration: Should the Committee promote a pilot project that tests the benefits of initial disclosures? Should such a pilot project be undertaken separately from the more comprehensive expedited procedures pilots discussed above? If an initial disclosure pilot were to be undertaken, should it follow the more aggressive format of the Arizona rule or something like Exhibit E? If a pilot project includes only initial disclosures, what measurable results do we think would be achieved? Do we think initial disclosures would shorten the time to disposition? Reduce the number of discovery disputes? Reduce the overall cost of discovery? Which of these results would be measurable at the end of the pilot?

C. Other possible pilot projects.

The committee has focused on the pilot projects discussed above because they appear to address some of the more expensive aspects of civil litigation and they have been tested, with some success, in state courts. Should we be considering other pilot projects? There are at least a few possibilities.

1. The Seventh Circuit has sponsored an ongoing and comprehensive pilot project on the handling of electronically stored information in civil litigation. Details can be found at www.discoverypilot.com. Some of you were involved in that effort. Should we be encouraging similar pilot projects in other courts?

2. Several courts and judges have experimented with expedited jury trials. For example, the Northern District of California developed a program under which parties could obtain a jury trial within a relatively short time and after limited discovery and

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motion practice. The idea was to provide an opportunity for parties to get to trial quickly and avoid the expense and delay of discovery and motion practice. The proposal was rolled out with substantial fanfare, and produced no results. Not a single case enrolled in the program, which was voluntary. It died for lack of use. Other judges have tried similar programs with similar results. It would be wonderful to find a way to increase the use of juries to resolve disputes and decrease the expense and delay of litigation. Is there an approach to a pilot project that would be worth trying?

3. A pilot could also be designed to promote alternative dispute resolution for small cases. As discussed in Exhibit C, Arizona has adopted a system under which cases worth $50,000 or less are submitted to mandatory arbitration. Members of the state bar are required to act as arbitrators. Parties have the right to appeal an arbitrator's decision to the state trial court, in which event they receive a trial *de novo* on the merits, but unless they significantly improve their result over the result achieved in arbitration, they are liable for at least some of the costs of the state-court procedure. The majority of cases that go into this system are resolved without returning to state court. Other states have adopted similar approaches. Would something like this be a good idea for a federal court pilot project?

D. Final Thoughts.

One key to any pilot project will be to design it in a way that allows meaningful measurement of the results. Involvement of the FJC in the design and implementation of the pilot will be key.

In addition, any pilot effort likely will require the involvement of the Court Administration and Case Management Committee ("CACM") chaired by Judge Hodges. Amy St. Eve, a member of the Standing Committee and a CACM alum, has agreed to act as a liaison with CACM on this project. We will be apprising CACM of the results of the full Committee's November discussion.

We look forward to hearing your thoughts on these issues at the November meeting.

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EX. A

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MEMORANDUM

To: Simplified Procedures Working Group, Pilot Project Subcommittee

From: Virginia Seitz

Re: Summary of CO, MN, IA and MA Projects and Reforms

Date: October 2015

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To assist the Simplified Procedures working group of the Pilot Project Subcommittee, this memorandum summarizes recent reforms and pilot projects undertaken by courts in Colorado, Massachusetts, Iowa and Minnesota. The Colorado, Iowa, and Massachusetts pilots all focused on "business cases." Minnesota conducted an expedited case pilot project which focused on particular types of cases (e.g., contract and consumer injury cases). Generally, all of these actions were the product of study done by task forces within the states. As was true in the state reforms discussed in Judge St. Eve's memorandum, the purpose of the reforms and the pilots was to improve access to justice by decreasing costs and time to resolution in civil cases. I reviewed the task force recommendations, the pilot projects, available evaluations and the helpful material on the website of the Institute for the Advancement of the American Legal System's ("IAALS'") Rule One initiative project. As you will see, there was far more information about the Colorado pilot than any of the other three states' pilots which were less ambitious and which did not have the benefit of an IAALS evaluation.

I. Colorado Civil Access Pilot Project ("CAPP"). Based on the recommendations of a Task Force, Colorado implemented a pilot project that applied generally to "business actions" on January 1, 2012. Five district courts in the state participated in the project. Initially, the project had a term of two years, but it was twice extended and concluded only in June 2015.

A. Pilot Rules. The pilot rules incorporated a number of components that will sound familiar to this group:

1. The rules expressly provided that proportionality principles would guide the interpretation and application of the rules.

2. The rules required that complaints and responsive pleadings include all material facts. General denials in responsive pleadings were deemed admissions.

3. The rules required robust initial disclosures, including all matters beneficial and harmful, to be accompanied by a privilege log. Both the disclosures and the log had to be filed with the court. In addition, disclosures took place on a staggered schedule, that is, the plaintiff was required to make disclosures before the defendant was required to answer. The court had the power to impose sanctions if either party failed to make proper disclosures.

4. The rules required defendant(s) to answer the complaint even when moving to dismiss the complaint.

5. The rules required the parties to meet and confer on the preservation of documents shortly after the defendant answers the complaint. In addition, the parties were required to promptly prepare a joint case management report which states the issues, makes a proportionality assessment, and proposes timelines and levels of discovery.

6. Again every early on, the Judge was required to hold an initial case management conference to shape the pretrial process. That process was then set forth in a Case Management Order, which could be modified only for "good cause."

7. The rules provided that the scope of discovery should be matters that "enable a party to prove or disprove a claim or defense or to impeach a witness" and, again, should be subject to the proportionality principle.

8. The rules allowed each party only one expert per issue or specialty at issue. In addition, expert discovery and testimony was limited to the expert report. No depositions of expert witnesses were allowed.

9. The general rule was that one judge would handle all pretrial matters and the trial; the judge would engage in "active" management of the case, holding prompt conferences to address any issues that arise on summary briefing.

10. The rules provided that no continuances would be granted absent "extraordinary circumstances."

B. Pilot Hypotheses. The developers of the project had the following hypotheses about the effect of the CAPP rules:

1. There would be a reduction in the length of time to resolution for cases.

2. There would be a decrease in the cost of resolution for cases.

3. The process would be fair for all parties.

4. There would be a substantial increase in judicial involvement in cases.

5. The number of judges per case would decrease.

6. There would be a decrease in motions practice.

7. There would be a decrease in motions practice associated with discovery.

8. There would be a decrease in trial time.

9. There would be an increase in the number of cases that went to trial.

10. There would be a decrease in the amount of trial time per trial.

11. There would be an improvement in all aspects of proportionality.

C. Pilot Evaluation. At the request of the pilot project developers, IAALS conducted an evaluation and issued a report about the CAPP rules in October 2014. The report reached the following conclusions:

1. The CAPP rules reduced the time to resolution of cases over both the existing regular and expedited procedures. Four of five attorneys surveyed expressed the view that the time spent on the case was proportionate to the nature of the case.

2. Three of four attorneys surveyed expressed the view that the cost of cases under the CAPP rules was proportionate to the nature of the case.

3. Both a docket study and the attorney survey indicated that the CAPP process was not tilted toward plaintiffs or defendants.

4. The docket study and surveys reported a general adherence to the timelines imposed.

5. The evaluation reports that parties did see the judge in a case at a much earlier stage and that cases were generally handled by a single judge. This was by far the "most approved" part of the CAPP rules – the early, active and ongoing judicial management of the cases. In addition, the evaluation concluded that the initial case management conference was the most useful tool in shaping the pretrial process, including ensuring proportionate discovery. E.g., the evaluation states: "Judges point to the initial case management conference as the most useful tool in shaping the pre-trial process to ensure that it was proportional."

6. The evaluation found that the CAPP rules significantly reduce motions practice, especially extension requests.

7. The evaluation found that far fewer discovery motions were filed.

8. The evaluation concluded that discovery was both proportionate and sufficient.

9. **Notable Non-Results.** The evaluators were surprised to see that the CAPP rules had little effect on the rate at which cases went to trial, the length of trials or the number of dispositive motions filed or granted.

The evaluation also identified certain "challenges" with respect to the CAPP rules which might more forthrightly be called criticisms. First, parties were generally critical of the staggered deadlines for a number of reasons. Because the timing of a defendant's responsive disclosures and pleadings were keyed to the time of a plaintiff's disclosures, there was no predictability about that deadline. In addition, plaintiffs sometimes sought to compress a defendant's timing by immediately filing disclosures with his or her complaint or shortly thereafter. Both the parties and the courts complained about the uncertainty resulting from making one deadline contingent upon a prior event, preferring rules that specify due dates. Second, there were complaints about the enforcement of the requirements of both expanded pleading and robust early disclosures. Third, both litigants and judges complained about the uncertainty of the extraordinary circumstances test for continuances and extensions. Fourth, the parties surveyed strongly advocated for the return of depositions of expert witnesses. Finally, the parties and judges found that the categorization of cases as "business" and within the pilot or not was too difficult and should be simplified.

One other interesting point: The evaluators noted that the anecdotal responses and comments in the attorney and judicial surveys were not nearly as positive as the data was. The parties in particular cited the complexity and bureaucracy of the CAPP rules, and observed that it was inherently confusing to have several different sets of civil rules operating at the same time in the same court. This may be an under-appreciated downside of pilot projects.

II. Minnesota Civil Justice Reform Task Force. Pursuant to a December 2011 report from the Civil Justice Reform Task Force, Minnesota implemented revisions to its Rules of Civil Procedure and General Rules of Practice and a pilot project. Minnesota's Rules of Civil Procedure and General Rules of Practice for District Courts were amended in February 2013. The rules amendments included:

1. Incorporating proportionality into the scope of discovery.

2. Adoption of the federal regime of automatic initial disclosures.

3. Requirement of a discovery conference of counsel and discovery plan in every case.

4. An expedited process for non-dispositive motions.

5. A new program to address Complex Cases.

No evaluation of these rule changes has yet occurred.

On May 7, 2013, the Minnesota Supreme Court also authorized the creation of a Pilot Expedited Civil Litigation Track in two districts. This track applies to cases involving "contract disputes, consumer credit, personal injury and some other types of civil cases." The project is intended to answer the question whether this package of changes will reduce the duration and cost of civil suits.

1. The track requires early automatic disclosures from both parties, as well as a summary of the contentions in support of every claim, a witness list and contact information and any statements of those witnesses.

2. The track requires both parties to produce copies of all documents and things that will be used to support all claims or defenses, a description of the damages sought, a disclosure of insurance coverage, and a summary of any expert's qualifications accompanied by a statement that sets forth any facts and opinions of that expert and their grounds.

3. The track requires an early case management conference that includes a discussion of settlement prospects and the setting of a trial date, as well as deadlines for the submission of documents that will be used in trial.

4. The track limits discovery to 90 days after issuance of the case management order. The track both limits written discovery and requires that it be served within 30 days of issuance of the case management order.

5. The track requires parties to meet and confer on all motions and then limits the parties to letter briefs of two pages on issues submitted to the judge for resolution.

6. The "intention" of the track is to secure the setting of an early trial date (within four to six months of filing) and to have that date be a "date certain."

It appears that the Court intended that an initial evaluation of the pilot should have occurred by this time, but I have been unable to locate any evaluation. The 2014 Annual Report of the Minnesota Judicial Branch stated that an evaluation of the pilot project is now expected sometime in 2015.

III. Iowa Civil Justice Reform Task Force. Iowa is implementing a report called *Reforming the Iowa Civil Justice System*, issued in March 2012. That report called for a specialty business court pilot project for three years starting in May of 2013. "Cases are eligible to be heard in the Business Court Pilot Project if compensatory damages totaling $200,000 or more are alleged or the claims seek primarily injunctive or declaratory relief." Parties participate in the pilot only if both sides agree and if the state administrator accepts the case for the project. The court has assigned three judges who manage all cases assigned to the project. In every accepted matter, the court assigns one judge for litigation while another is assigned to handle settlement negotiations.

I found an "initial evaluation" of the pilot project that was issued in August 2014. At that point, this specialized court had handled only ten cases, and only one attorney had submitted an evaluation, so that data set was quite limited.

The judges assigned to the business court made the following observations:

1. The strategy of assigning a separate business court judge to handle settlement negotiations works well.

2. The judges suggested that videoconferencing could save travel time and money for lawyers using a specialized court.

3. Additional steps would be needed to publicize and promote the business court program.

In addition, on August 29, 2014, Iowa adopted new Iowa Rule of Civil Procedures 1.281, an expedited civil action rule for cases involving $75,000 or less in damages, to become effective January 1, 2015. Parties with higher damages may stipulate to proceeding under this rule. [The court separately amended its rules to require proportional discovery and initial disclosures; I did not review these provisions as they fall into another working group's area.] The key features of the expedited civil action rule are:

1. Limits on discovery, i.e., no more than 10 interrogatories, 10 requests for production and 10 requests for admission (absent leave of court). There are also limited numbers of depositions.

2. One summary judgment motion may be filed by each party.

3. When cases on this track go to trial, the jury includes only six persons, and trial time is limited to six hours. In addition, cases on this track shall be tried within one year of filing unless otherwise ordered for good cause.

The new expedited civil action rule has not yet been evaluated. Within the first month of its effective date, however, more than 25 cases were filed to proceed on the expedited track.

IV. Massachusetts Business Litigation Session Pilot Project. This project was implemented on a voluntary basis in only a couple of county courts. It is focused on initial disclosures and discovery, which are the purview of another working group. The project began in January 2010 and ran through December 2011. The pilot incorporated several of the IAALS principles, including:

1. Limiting discovery proportionally to the magnitude of the claims at issue.

2. Staging discovery where possible.

3. Requiring all parties to produce "all reasonably available non-privileged, non-work product documents and things that may be used to support the parties' claims, counterclaims or defenses."

4. Requiring the parties to confer early and often and to make periodic reports to the court especially in complex cases.

At the conclusion of the pilot, the court conducted a survey which had a low rate of response, but follow up questions elicited more feedback. A large majority

of users of the project rules reported high satisfaction (80%). I could locate no substantive evaluation of the project.

* * * *

There are several elements of any regime of simplified rules that we should consider if we pursue a pilot project in this area. The following elements seem to receive universal acclaim: Robust early disclosures; an early case management conference and case management order with firm deadlines for discovery and trial date; accessible, active judicial management of the case, with short letter briefs and quick decisions on non-dispositive motions. One regular bone of contention appears to be selecting the right cases for slimmed-down procedures.

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EX. B

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125-001397

SIMPLIFIED PROCEDURES SUBCOMMITTEE -- SUMMARY OF CERTAIN JUDICIAL REFORMS

As part of the "Simplified Procedures" Pilot Project Subcommittee, this memorandum summarizes recent judicial reforms employed by New Hampshire, New York, Ohio, and Texas. The New Hampshire and Ohio reforms arose out of pilot projects implemented in various counties in those states. The New York and Texas reforms were based on recommendations by Task Forces created by their respective Supreme Courts. The general goal of these judicial reforms was to increase access, decrease expenses, and increase judicial management in civil cases.

I have reviewed the relevant pilot projects, the Task Force recommendations, the new rules, various articles about the rules, an evaluation from the National Center for State Courts, and any relevant information on the Institute for the Advancement of the American Legal System's ("IAALS") Rule One initiative project.

I. New Hampshire Pilot Project:

In 2013, the Supreme Court of New Hampshire ordered the implementation of its Superior Court Proportional Discovery/Automatic Disclosure Pilot ("PAD") Rules in all counties in the state. New Hampshire originally implemented the pilot in two counties. The PAD Pilot Rules focus on changes to the pleading requirements and discovery rules. Specifically, the PAD Pilot Rules have five aspects:

1. **Pleading Standards:** The pleading standard changed from notice pleading to fact pleading for both complaints and answers. The parties must state the material factual basis on which any claim or defense is based. The intent behind the rule is to expedite the civil litigation process by giving sufficient factual information for the other side to evaluate the merits.

2. **Early Meet and Confer:** The parties must meet and confer within twenty days of the filing of the answer and establish deadlines for discovery, ADR, dispositive motions, and a trial date. The parties submit their agreement to the court and it becomes the "case structuring order." If the parties agree on the deadlines, they do not need a conference with the court.

3. **Early and Meaningful Initial Disclosures:** This requirement mandates automatic disclosure of names and contact information of those individuals who have information about a party's claims or defenses and a brief summary of such information. The parties also have to disclose all documents, ESI and tangible things to support their respective claims and defenses, including a) a category of damages, and b) insurance agreements or polices under which such damages may be paid. If a party fails to make

these disclosures, a court can impose sanctions including barring the use of them at trial. This rule is intended to expedite discovery.

4. Limit on Interrogatories and Deposition Hours: The fourth aspect of the pilot project limits the number of interrogatories to no more than 25 and the number of deposition hours to 20 hours. Given the early disclosures in number 3, the PAD Pilot Project anticipated that the parties would need less discovery. The parties can waive these limitations by stipulation or the court can waive them for good cause.

5. Preservation of ESI: The fifth rule requires the parties to meet and confer to discuss the preservation of ESI and to agree on deadlines and procedures for the production of ESI. This rule includes a proportionality requirement – the ESI costs must be proportional to the significance of the issues in dispute.

The National Center for State Courts ("NCSC") evaluated the New Hampshire PAD Pilot Rules. As part of the review, the NCSC interviewed judges, attorneys, court clerks, and staff of the Administrative Office of the Courts. They also evaluated pre-implementation and post-implementation case data. The NCSC's findings are discussed below.

First, the PAD Pilot Rules have not impacted the case disposition time, although the NCSC only had a small number of cases over a short period of time to evaluate. They have, however, significantly decreased the proportion of cases that ended in a default judgment.

Second, the PAD Pilot Rules have not had any real impact on discovery disputes based on the NCSC's review of the percentage of cases both pre-implementation and post-implementation with discovery disputes. New Hampshire thought the automatic disclosure requirement in number 3 would decrease discovery disputes.

The NCSC made several recommendations based on its review:

1. Clarify the existing ambiguity in the current appearance requirement.

2. Establish a firm trial date in the case structuring order.

3. Avoid aggressive enforcement of the rules except for intentional or bad faith noncompliance.

4. Establish a uniform time standard for return of service.

II. New York Task Force

New York created a Task Force on Commercial Litigation in the 21st Century to recommend reforms to enhance litigation in its Commercial Division. The New York Task Force submitted its final report to the Chief Judge in June 2012. The report made multiple recommendations that are not relevant to our pilot project's scope including endorsing the Chief

Judge's legislative proposal to establish a new class of Court of Claims judges; increasing the monetary threshold for actions to be heard in the Commercial Division; implementing several measures to provide additional support to the Division, including additional law clerks and the creation of a panel of "Special Masters"; assigning cases to the Commercial Division earlier in the process; creating standardized forms; improving technology in the courtrooms; and appointing a statewide Advisory Council to review the recommendations and guide implementation.

In addition, the Task Force made several recommendations, some of which have resulted in the implementation of new rules. All of the recommendations apply to cases in the Commercial Division only. These areas may be appropriate for pilot projects.

1. Robust expert disclosures: The Task Force recommended the parties make more robust and timely expert disclosures, similar to the disclosure requirements in the Federal Rules. The Rule would require expert disclosures, written reports, and depositions of testifying experts to be completed no later than four months after the close of fact discovery.

2. New privilege log rules to streamline discovery: The Task Force concluded that the creation of privilege logs has become a substantial, needless expense in many complex commercial cases. In order to limit unnecessary costs and delay in the creation of such logs, the Task Force recommended limitations on privilege logs. Specifically, the Task Force recommended that parties meet and confer in advance in an effort to stipulate to limitations on privilege logs. It referenced four orders or principles as examples for limiting privilege logs:

a) The Sedona Principles: The Sedona Principles encourage parties to meet in advance and reach mutually agreed-upon procedures for the production of privileged information. The Principles encourage the acceptance of privilege logs that classify privileged documents by categories, rather than individual documents.

b) The Facciola-Redgrave Framework: Magistrate Judge John Facciola and attorney Jonathan Redgrave have proposed that parties should meet regarding privilege logs and agree to limit documents that require logging, use categories to organize privileged documents, and use detailed logs only when necessary. *See* John Facciola & Jonathan Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, 4 The Fed. Cts. L. Rev. 19 (2009).

c) The Southern District of New York's Pilot Project Regarding Case Management Techniques for Complex Civil Cases: The SDNY addresses privilege assertions in its pilot project for complex cases. The following documents do not have to be included on a privilege log: 1) communications exclusively between a party and its trial counsel; 2) work product created by trial counsel, or an agent of trial counsel other than a party, after the commencement of

the action; 3) internal communications within a law firm, a legal assistance organization, a governmental law office, or a legal department of a corporation or of another organization; and 4) documents authored by trial counsel for an alleged infringer in a patent infringement action. The order also provides a specific procedure for a person who challenges the assertion of a privilege regarding documents, including the submission of a letter to the court with no more than five representative documents that are the subject of the request.

d) The District of Delaware's Default Standard for Discovery: The District of Delaware has a Standing Order governing default standards for discovery, including privilege logs. Under this order, parties must confer on the nature and scope of privilege logs, "including whether categories of information may be excluded from any logging requirements and whether alternatives to document-by-document logs can be exchanged." It also excludes two categories of documents from inclusion on privilege logs: 1) any information generated after the complaint was filed and 2) any activities "undertaken in compliance with the duty to preserve information from disclosure and discovery" under Rule 26(b)(3)(A) and (B). In addition, the order directs the parties to confer on a non-waiver order under Federal Rule of Evidence 502.

In response to the Task Force's recommendation, New York adopted a rule in the Commercial Division that requires parties to meet and confer at the inception of the case to discuss "the scope of privilege review, the amount of information to be set out in the privilege log, the use of categories to reduce document-by-document logging, whether any categories of information may be excluded from the logging requirement, and any other issues pertinent to privilege review, including the entry of an appropriate non-waiver order."

3. E-discovery: The Task Force recommended that parties who appear at a preliminary conference before the court have an attorney appear who has sufficient knowledge of the client's computer systems "to have a meaningful discussion of e-discovery issues." The Task Force also encouraged the E-Discovery Working Group to examine how other courts are addressing e-discovery issues.

4. Deposition and Interrogatory Limits: The Task Force recommended, and the Supreme Court ultimately adopted rules, that limit depositions to ten per side for the duration of seven hours per witness. The parties can extend the number by agreement or the court can order additional depositions for good cause. In addition, New York implemented a new rule consistent with the Task Force's recommendation to limit interrogatories to 25 per side unless the court orders otherwise.

5. An accelerated adjudication procedure: The Task Force recommended an accelerated adjudication procedure for the Commercial Division. This recommendation amounts to an expedited bench trial. The Task Force suggested that this procedure involve highly truncated discovery. The Chief Judge of the New York Supreme Court

adopted an accelerated adjudication rule in response to the recommendation. Under the rule, the parties have to agree to the procedure. By agreeing to the procedure, the parties agree to waive any objections based on lack of personal jurisdiction, the right to a jury trial, and the right to punitive or exemplary damages. Under this procedure, discovery is limited to seven interrogatories, five requests to admit, and seven depositions per side. The parties also agree to certain limits on electronic discovery. As part of the accelerated adjudication procedure, the parties agree to be ready for trial within nine months from the date of the filing of a request for assignment of the case to the Commercial Division.

New York adopted the new Commercial Division rules primarily in 2014. It is too early to assess their effectiveness.

III. Ohio Pilot Project

In April 2007, the Chief Justice of the Ohio Supreme Court created the Supreme Court Task Force on Commercial Dockets to "develop, oversee, and evaluate a pilot project implementing commercial civil litigation dockets in select courts of common pleas." Four counties agreed to serve as pilot project courts and commercial dockets were created in all four counties in 2009. The Supreme Court of Ohio's Task Force on Commercial Dockets made 27 recommendations for the permanent establishment of commercial dockets in Ohio's courts of common pleas. The recommendations pertained to the permanent establishment of commercial dockets in Ohio, the selection of judges to handle the commercial dockets, the training of judges, the assignment of cases, the balancing of the workload of the judges who handle commercial dockets, and certain case management procedures. The relevant case management procedures include:

1. **The Use of Special Masters:** The Task Force recommended the use of special maters because they provided a process through which pretrial, evidentiary, and post-trial matters could be addressed timely and effectively through extra-judicial resources.
2. **Alternative Dispute Resolution:** The Task Force recommended that a commercial docket judge in one county be able to refer a commercial case to a commercial docket judge of another county.
3. **Pretrial Order:** The Task Force recommended against adopting a mandatory model case management pretrial order because most of the participating pilot project judges use their own pretrial orders and procedures.
4. **Motion Timeline:** The Task Force also recommended that commercial judges decide dispositive motions no later than 90 days from completion of briefing or oral arguments, whichever is later. It also suggested that they decide all other motions no later than 60 days from completion of briefing or oral arguments, whichever is later.

The report found that the benefits of the program included accelerating decisions, creating expertise among judges, and achieving consistency in court decisions around the state. The Supreme Court of Ohio thereafter adopted rules pertaining to commercial dockets.

IV. Texas Task Force

In May 2011, the Texas legislature passed a bill regarding procedural reforms in certain civil actions, and directed the Texas Supreme Court to adopt rules to "promote the prompt, efficient and cost-effective resolution of civil actions when the amount in controversy does not exceed $100,000." In November 2012, the Texas Supreme Court issued mandatory rules for the expedited handling of civil cases. The rules limit pre-trial discovery and trials in cases where the party seeks monetary relief of $100,000 or less. In response to the legislation, the Texas Supreme Court appointed a Task Force to address the issues and "advise the Supreme Court regarding rules to be adopted" to address the legislation. The Task Force focused on: scope of discovery, disclosure, proof of medical expenses, time limits, expedited resolution, monetary limits, and alternative dispute resolution. The Task Force submitted various recommendations to the Texas Supreme Court, but it could not agree on whether the process should be mandatory or voluntary. Based on the recommendations of the Task Force, the Supreme Court issued mandatory rules in November 2012. The goal of the new rules is to "aid in the prompt, efficient and cost effective resolution of cases, while maintaining fairness to litigants." The Texas project is not based on a pilot project, although the Task Force apparently looked at the procedures that some other States were implementing.

The new rules include the following:

1. Expedited Actions: This Rule applies to all cases that seek $100,000 or less in damages, other than cases under the Family Code, Property Code, Tax Code, or a specific section of the Civil Practice & Remedies Code. It provides for limited, expedited discovery and a trial within 90 days after the discovery period ends. A court can only continue a trial for cause twice and each continuance cannot exceed a 60 days. Each side is allowed no more than eight hours to complete its portion of the trial. The Rule also limits the court's ability to require ADR and limits challenges to expert testimony. A court may remove a case from this process for good cause.

2. Pleading Requirements Regarding Relief Sought: The Texas Supreme Court amended its pleading requirements to require a more specific statement of the relief sought. A party must state the monetary relief it seeks so a court can determine if it falls within an Expedited Action. Texas does not require fact pleading for the underlying claims.

3. Discovery Plan: For Expedited Actions, the discovery period starts when the suit is filed and continues until 180 days after the date the first request for discovery is served on a party. Parties can serve no more than 15 written interrogatories, 15 requests for production, and 15 requests for admission, and spend no more than six hours in total to

examine and cross examine all witnesses in depositions. It also provides for requests for disclosure from a party that are separate and distinct from its requests for production.

I could not find any data on the effectiveness of these new rules. The NCSC currently is evaluating the use and effectiveness of the new rules and is expected to issue its report at some point in the Fall of 2015.

CONCLUSION

Based on the evaluations that exist of these reforms and the scope of our sub-committee to focus on "simplified procedures", I recommend having further discussion on three particular reforms:

1. The New Hampshire rule requiring early and meaningful initial disclosures. A pilot project focusing on these disclosures would be fairly easy to achieve and should expedite discovery. Interestingly, the NCSC found that the PAD Pilot Rules (which include early and meaningful initial disclosures) did not have any real impact on discovery disputes. This conclusion may be based, in part, on the fact that NCSC did not have a wide range of data to work with given the initial limited implementation of the program.

2. The New York Task Force's recommendation regarding new privilege logs to streamline discovery. This recommendation focuses on the expense such logs generate in relation to the usefulness of the logs in most cases. This proposal is worth discussing further, especially given the amount of privileged information ESI generates.

3. Expedited Actions. Both Texas' and New York's Task Forces recommended expedited actions for certain types of cases. Judge Campbell has been trying to get lawyers to adopt this efficient concept for some time. It is worth discussing with Judge Campbell's insights because it would save significant time and money for the parties.

Amy J. St. Eve
September 24, 2015

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EX. C

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125-001407

M E M O R A N D U M

To: Pilot Project Subcommittee

From: Dave Campbell

Date: September 25, 2015

Re: Innovations in Arizona, Utah, Oregon, and the District of Kansas

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This memo will summarize my review of materials related to civil litigation innovations adopted in Arizona, Utah, Oregon, and the Federal District Court for the District of Kansas. I have plagiarized language from various reports I have reviewed. I include a few conclusions at the end.

A. Arizona.

In 1990, the Arizona Supreme Court appointed a committee, headed by Tucson trial lawyer (and later Chief Justice) Thomas A. Zlaket, to address discovery abuse, excessive cost, and delay in civil litigation. The result was the "Zlaket Rules," a thorough revision of the state rules of civil procedure adopted by the Supreme Court effective July 1, 1992. Arizona has adopted a number of other unique procedures since then. Key provisions of the Arizona rules are described briefly.

1. Disclosures.

The rules require broad initial disclosures by all parties within 40 days after a responsive pleading is filed. Each disclosure must be under oath and signed by the party making the disclosure. The rules require disclosure of the following (in addition to disclosures required in the federal rules):

- The legal theory upon which each claim or defense is based, including, where necessary for a reasonable understanding of the claim or defense, citations of pertinent legal or case authorities;
- The names and addresses of all persons whom the party believes may have knowledge or information relevant to the case, and the nature of the knowledge or information;
- The names and addresses of all persons who have given statements related to the case, whether or not the statements were made under oath;

- The names and addresses of expert witnesses, including the substance of the facts and opinions to which the person is expected to testify;
- A list of the documents or ESI known by a party to exist and which the party believes may be relevant to the subject matter of the action, or reasonably calculated to lead to the discovery of admissible evidence, and the date on which the documents and ESI will be made available for inspection and copying.

2. Depositions.

Only depositions of parties, expert witnesses, and document custodians may be taken without stipulation or court permission, and depositions are limited to four hours each.

3. Experts.

Each side is presumptively entitled to only one independent expert on an issue, except on a showing of good cause.

4. Medical Malpractice Cases.

Within ten days after defendants answer, the plaintiff must serve on all defendants copies of all of plaintiff's available medical records relevant to the condition which is the subject matter of the action. All defendants must do the same within ten days thereafter.

5. Mandatory Arbitration.

Arizona rules require mandatory arbitration of all cases worth less than $50,000. At the time the complaint is filed, the plaintiff must file a certificate of compulsory arbitration stating the amount in controversy. If the defendant disagrees, the issue is determined by the court. Unless the parties stipulate otherwise, the trial court assigns the arbitrator from a list of active members of the State Bar.

The arbitrator must set a hearing within 60 to 120 days. Because the purpose of compulsory arbitration is to provide for the efficient and inexpensive handling of small claims, the arbitrator is directed to limit discovery "whenever appropriate." In general, the Arizona Rules of Evidence apply to arbitration hearings, but foundational requirements are waived for a number of documents, and sworn statements of any witness other than an expert are admissible. The arbitrator must issue a decision within 10 days of the hearing.

In the absence of an appeal to the court of the arbitrator's decision, any party may obtain judgment on the award. If an appeal is filed, a trial de novo is held in the state trial

court, and any party entitled to a jury may demand one. If the appellant fails to recover a judgment on appeal at least 23 percent more favorable than the arbitration result, the appellant is assessed not only normal taxable costs, but also the compensation paid to the arbitrator, attorneys' fees incurred by the opposing party on the appeal, and expert fees incurred during the appeal.

A 2004 study revealed that, in most counties, an arbitration award was filed in less than half the cases assigned to arbitration (suggesting the cases settled before the arbitration), and a trial de novo was sought in less than a third of all cases in which an award was filed. This suggests that most cases assigned to the program either settled or produced a result satisfactory to the parties after the arbitration hearing.

6. Complex Case Courts.

The Maricopa County Superior Court has established complex litigation courts staffed by judges experienced in complex case management. Cases are eligible for assignment to the complex litigation courts based on a number of factors, including the prospect of substantial pre-trial motion practice, the number of parties, the need for extensive discovery, the complexity of legal issues, and whether the case would benefit from permanent assignment to a judge who has acquired a substantial body of knowledge in the specific area of the law. A 2006 survey of attorneys who had used these courts found that 96% favored their continuation. Responding attorneys gave high marks both to the quality of the judges assigned and their ability to devote more attention than usual to the assigned cases.

7. Commercial Courts.

A few months ago, the Maricopa County Superior Court launched commercial courts for all business disputes that exceed $50,000, other than those that qualify for the complex case courts. Cases in these commercial courts will include an early conference on ESI, use of an ESI checklist and a standard ESI order, and an early case management conference that focuses on ADR options, sequencing of discovery, and proportionality in discovery.

8. Survey Results.

In a 2008 survey of fellows of the American College of Trial Lawyers, 78% of the Arizona respondents indicated that when they had a choice, they preferred litigating in state court to federal court. In contrast, only 43% of the national respondents to the ACTL survey preferred litigation in state court. 67% of the Arizona respondents indicated that cases were disposed of more quickly in state court. 56% believed that processing cases was less expensive in the state forum.

In 2009, the IAALS conducted a survey of the Arizona bench and bar about civil procedure in the State's superior courts. Over 70% of respondents reported litigation experience in federal district court, and they preferred litigating in state court over federal court by a two-to-one ratio. Respondents favoring the state court forum cited the applicable rules and procedures, particularly the state disclosure and discovery rules. Respondents favoring the state forum also indicated that state court is faster and less costly.

B. Utah.

On November 1, 2011, the Utah Supreme Court implemented a set of revisions to Rule 26 and Rule 26.1 of the Utah Rules of Civil Procedure designed to address concerns regarding the scope and cost of discovery in civil cases. The revisions included seven primary components:

- Proportionality is the key principle governing the scope of discovery — specifically, the cost of discovery should be proportional to what is at stake in the litigation.
- The party seeking discovery bears the burden of demonstrating that the discovery request is both relevant and proportional.
- The court has authority to order the requesting party to pay some or all of the costs of discovery if necessary to achieve proportionality.
- The parties must automatically disclose the documents and physical evidence which they may offer as evidence as well as the names of witnesses with a description of each witness's expected testimony. Failure to make timely disclosure results in the inadmissibility of the undisclosed evidence.
- Upon filing, cases are assigned to one of three discovery tiers based on the amount in controversy; each discovery tier has defined limits on the amount of discovery and the time frame in which fact and expert discovery must be completed. Cases in which no amount in controversy is pleaded (e.g., domestic cases) are assigned to Tier 2.
- Parties seeking discovery above that permitted by the assigned tier may do so by motion or stipulation, but in either case must certify to the court that the additional discovery is proportional to the stakes of the case and that clients have reviewed and approved a discovery budget.
- A party may either accept a report from the opposing party's expert witness or may depose the opposing party's expert witness, but not both. If a party accepts an expert witness report, the expert cannot testify beyond what is fairly disclosed in the report.

The three tiers and their limits are as follows:

- Tier 1 applies to cases of $50,000 or less and allows no interrogatories, 5 requests for production, 5 requests for admission, 3 total hours for depositions, and completion of discovery within 120 days.

- Tier 2 applies to cases between $50,000 and $300,000 and allows 10 interrogatories, 10 requests for production, 10 requests for admission, 15 total hours for depositions, and completion of discovery within 180 days.

- Tier 3 applies to cases of $300,000 or more and allows 20 interrogatories, 20 requests for production, 20 requests for admission, 30 total hours for depositions, and completion of discovery within 210 days.

Since these changes were adopted, some Utah courts have also adopted a procedure for expediting discovery disputes. It requires a requires a party to file a "Statement of Discovery Issues" no more than four pages in length in lieu of a motion to compel discovery or a motion for a protective order. The statement must describe the relief sought and the basis for the relief and must include a statement regarding the proportionality of the request and certification that the parties have met and conferred in an attempt to resolve or narrow the dispute without court involvement. Any party opposing the relief sought must file a "Statement in Opposition," also no more than 4 pages in length, within 5 days, after which the filing party may file a Request to Submit for Decision. After receiving the Request to Submit, the court must promptly schedule a telephonic hearing to resolve the dispute.

In April, 2015, the National Center for State Courts completed a comprehensive study of the Utah rule changes. The study produced the following findings:

- The new rules have had no impact on the number of case filings.
- Some plaintiffs may be increasing the amount in controversy in the complaint to secure a higher discovery tier assignment and more discovery.
- There have been increases of 13% to 18% in the settlement rate among the various tiers. The study associates this with the parties obtaining more information earlier in the litigation.
- Across all case types and tiers, cases filed after the implementation of the new rules tended to reach a final disposition more quickly than cases filed prior to the revisions.
- Contrary to expectations, the parties sought permission for additional discovery (called "extraordinary discovery" in the rules) in only a small minority of cases. Stipulations for additional discovery were filed in 0.9% of cases, and contested motions were filed in just 0.4% of cases.

- Discovery disputes fell in Tier 1 non-debt collection cases and Tier 3 cases and did not exhibit a statistically significant change in Tier 2 cases. Discovery disputes in post-implementation cases tended to occur about four months earlier in the life of the case compared to pre-implementation cases. Attorney surveys and judicial focus groups also provided evidence for the rarity of discovery disputes under the revised rules.

The NCSC study included a survey of attorneys that afforded the opportunity to make open-ended comments. Although it may have been due to self-selection by those unhappy with the new rules, 74% of the comments were negative, with only 9% positive. The negative comments were equally divided between plaintiff and defense lawyers.

The NCSC also did judge focus groups. Among the results:

- A recurring theme across all of the focus group discussions was the difficulty involved in changing well-established legal practices and culture in a relatively short period of time.
- The judges expressed widespread suspicion that attorneys are routinely agreeing to discovery stipulations at the beginning of litigation, but not filing those stipulations with the court unless they are unable to complete discovery within the required time frame.
- Many judges indicated that they had experienced significant decreases in the number of motions to compel discovery and motions for protective orders since implementation of the new rules.
- In general, the judges who participated in the focus groups were fairly positive about the impact of the rule revisions thus far.
- There was general agreement that one benefit of the revisions was that they leveled the playing field between smaller and larger law firms and that larger firms could no longer bury the small firms with excessive discovery requests.

C. Oregon.

Although not on our list, I have heard for some time about innovative practices in Oregon, so I took a quick look. These are some of the practices used in the Oregon state courts:

- Oregon's rules require parties to plead ultimate facts rather than providing mere notice of a cause of action. Civil complaints must contain a "plain and concise statement of the ultimate facts constituting a claim for relief without unnecessary repetition." The Oregon Supreme Court has interpreted this to mean that "whatever the theory of recovery, facts must be alleged which, if proved, will establish the right to recovery."

- Oregon's civil rules impose limitations on discovery. No more than 30 requests for admission are allowed, and interrogatories are not permitted at all.
- Discovery of experts is also significantly curtailed. The Oregon rules do not permit depositions of experts, nor do they require the production of expert reports. Indeed, the identity of expert witnesses need not even be disclosed until trial. A party may defeat summary judgment simply by filing an affidavit or a declaration of the party's attorney stating that an unnamed qualified expert has been retained who is available and willing to testify to admissible facts or opinions creating a question of fact.
- Plaintiffs must file a return or acceptance of service on the defendant within 63 days of the filing of a complaint. If the plaintiff does not meet this requirement, the court issues a notice of pending dismissal that gives the plaintiff 28 days from the date of mailing to take action to avoid the dismissal.
- Motions for summary judgment are relatively rare compared to federal court. In an IAALS study, only 91 motions were filed in 495 cases, and more than one-third of those motions were concentrated in two cases (23 motions in one case, and 11 motions in another). Interestingly, more than half of the summary judgment motions filed in Multnomah County (where Portland is located) never received a ruling from the court. Fewer than 30% of summary judgment motions filed were granted in whole or in part.
- As in Arizona, Oregon requires that all civil cases with $50,000 or less at issue, except small claims cases, go to arbitration.
- For the years 2005 to 2008 the statewide average for civil cases closed in a calendar year by trial was 1.6% and the average for Multnomah County was 1.4%.
- The IAALS study found that when compared to Oregon federal court, the Multnomah County system is faster, less prone to motion practice, and less likely to see schedules interrupted by continuances or extensions of time.

D. District of Kansas.

In early March 2012, the U.S. District Court for the District of Kansas undertook an effort to increase the just, speedy, and inexpensive determination of every matter. Spearheaded by the court's Bench-Bar Committee, the Rule 1 Task Force divided into six working groups with corresponding recommendations: 1) overall civil case management, 2) discovery involving ESI, 3) traditional non-ESI discovery, 4) dispositive-motion practice, 5) trial scheduling and procedures, and 6) professionalism and sanctions. Nearly all of the Rule 1 Task Force's recommendations were approved by the Bench-Bar Committee, and then by the court.

As a result of the Rule 1 Task Force's recommendations, the court revised its four principal civil case management forms: 1) the Initial Order Regarding Planning and

Scheduling, 2) the Rule 26(f) Report of Parties' Planning Conference, 3) the Scheduling Order, and 4) the Pre-trial Order. The court also revised its Guidelines for Cases Involving Electronically Stored Information and its Guidelines for Agreed Protective Orders, along with a corresponding pre-approved form order, and developed new guidelines for summary judgment. The court has also adopted corresponding amendments to its local rules.

I am not aware of any studies that have been completed regarding these changes, but the form orders contain many best practices and helpful suggestions. In addition to standard case management orders, the district has adopted helpful ESI guidelines and a form protective order.

E. Thoughts.

1. Arizona and Utah seem to have had success requiring greater disclosures at the outset of the case. We should consider that as part of a potential pilot program.

2. The Utah model for tiering cases, limiting the discovery in each tier, and limiting the time for discovery in each tier, is intriguing. It may be responsible for the reduced disposition time found in the NCSC survey. We have heard that assigning cases to tiers based solely on the amount in controversy could be problematic in federal court.

3. I find the Utah limit on total deposition hours very appealing. It creates the right incentive for lawyers – to conclude each deposition as efficiently as possible. I have used it in several cases and have received positive feedback. Such limits could be included in any pilot that involved tiering.

4. Mandatory arbitration of cases worth $50,000 or less seems to be working well in Utah and Oregon. The statistics in Arizona suggest that it is quite successful in removing a large number of cases from the trial court and resolving them quickly. It is not clear how many federal court cases would fall in this damages range (no diversity cases would). Could we get away with setting the number higher in a pilot – say $100,000?

5. The severe limitations placed on expert discovery in Oregon is another interesting idea, but it likely would be viewed as directly contrary to Rule 26(a)(2). I also suspect it is something unique to the Oregon culture (which the IAALS survey found quite different than other states) and would not be received well in federal court.

6. If we end up putting together a package of proposed orders or forms for pilot projects, we should look at Kansas's.

EX. D

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MEMORANDUM

To: Judge Neil M. Gorsuch

From: Stefan Hasselblad

Date: September 24, 2015

Re: Summary of Materials Concerning Simplified Federal Procedures

This memorandum briefly summarizes three reports and two law review articles that discuss the past, present, and future of efforts to reform the federal rules to create simplified procedures for less complex cases.

* * *

I. The Federal Simplified Procedure Project: A History, Institute for the Advancement of the American Legal System, 2009.

In 1999, Judge Niemeyer proposed that the Advisory Committee on Civil Rules develop a set of simplified procedural rules applicable to simple federal cases. This proposal stemmed from a concern that the current federal rules provided too much procedure for smaller cases, which raises costs and effectively bars access to courts for many litigants.

In response, the Advisory Committee initiated the Simplified Procedure Project, which aimed at developing procedures that would shift emphasis away from discovery, and toward disclosure and pleading in an effort to ensure prompt trials. As the Committee began its work, it discussed a number of possible options and difficulties: the interaction between simplified rules and federal diversity requirements, the possibility of capping damages, the possibility of simple majority jury verdicts, and whether simplified procedures could draw litigants from state to federal courts, thereby increasing federal case loads.

The Simplified Procedure Project met nine times between 1999 and 2001. The project's discussions were guided by a set of draft rules provided by Professor Edward H. Cooper, discussed below and later published in a law review article. During the project's two years of activity, some committee members

raised significant reservations about the possibility of capping damages, interference with ADR, and unintentionally creating a "cheap and inferior set of rules" for small claims. In 2001, the Advisory Committee found that the project lacked direction because of difficulty identifying the cases appropriate for application of the simplified rules. The project was then held in abeyance. Over the next seven years the project was occasionally mentioned in Committee minutes, but no further progress was made.

Professor Cooper wrote the draft rules that guided the committee's discussions. He later published these rules in a 2002 law review article. Edward H. Cooper, *Simplified Rules of Federal Procedure?*, 100 MICH. L. REV. 1794 (2002). The rationale behind Professor Cooper's simplified rules is that "current reliance on notice pleading and searching discovery puts too much weight on time-consuming and expensive discovery." *Id.* at 1796. The following is an overview of these simplified rules.

- The simplified rules are to be construed and administered to secure the just, speedy, and economical determination of simplified actions. Furthermore, discovery should be limited, and the costs of litigation should be proportional to the stakes.

- The simplified rules apply to all cases where the amount in controversy is less than $50,000, and may be applied voluntarily when the amount in controversy is between $50,000 and $250,000.

- The simplified rules provide for fact pleadings no longer than 20 pages. To the extent practicable, claims and answers must state details of the time, place, participants, and events involved in the claim. Furthermore, any documents relied on must be attached to the pleadings. This approach is designed to encourage careful preparation before litigation and limit costs for small claims. The rules also make clear that fact pleading should still be construed in the same spirit of liberality as notice pleading.

- The rules provide for a demand judgment procedure for plaintiffs, in which they may submit a demand asserting a contract claim for a sum certain. The demand must include any writings or sworn statements that establish the obligations owed under the contract. Sworn responses to demands for judgment, or admission of the amount due, must be submitted in the answer. Then, the clerk of the court is required to enter judgment for any amounts admitted due.

- Federal Rule 12 applies to simplified procedure cases, but the time frame for filing motions is limited. Motions to dismiss based on 12(b)(2)-(5) and (7) may be made in the answer or in a motion filed no later than 10 days after the answer.

- The simplified rules combine Rule 12(b)(6) and Rule 56 motions into a single motion filed no later than 30 days after an answer or reply. This reduces delay while preserving the functions of both rules.

- The simplified rules favor enhanced disclosure in an effort to make the pre-trial process more efficient. Both parties must disclose 1) the names and phone numbers of any person likely to have relevant information, 2) the source of information in any pleadings, 3) a sworn statement of known facts, and 4) any documents or tangible items known to be relevant to the facts disputed. Disclosure is based on information reasonably available to the parties and is not excused because either party has not completed an investigation or because a party believes an opponent has not provided sufficient disclosure.

- While pleading and disclosure requirements are expanded under the rules, discovery is limited. An FRCP 26(f) conference is available, but no discovery requests are available until after the conference. Even then, requests for production of documents and tangible things must specifically identify the things requested. Parties are limited to three depositions of three hours each.

- Expert witnesses are discouraged. The court should evaluate the issues and stakes of the claim to determine if party experts should be allowed.

- The simplified rules provide an early and firm trial date six months from the filing date in most cases. The rules specifically preclude consideration of a party's failure to complete investigations, disclosure, or discovery as a rationale for delaying trial.

II. Reforming Our Civil Justice System: A Report on Progress and Promise, The American College of Trial Lawyers Task Force on Discovery and Civil Justice & The Institute for the Advancement of the American Legal System, 2015.

The report presents 24 principles that aim to both reform civil rules and improve legal culture in a way that leads to full, fair, and rational resolution of disputes.

There are two "fundamental principles" for civil justice reform. The first principle makes FRCP 1 applicable to lawyers (in addition to parties and judges) in an effort to encourage lawyers to "secure the just, speedy, and inexpensive determination of every action." The second principle states that the "one size fits all approach" to current state and federal rules should be abandoned in favor of a flexible approach that applies different rules to different types of cases.

The report presents nine principles relating to case management. The first two of these principles relate to case management conferences. The report urges an initial, robust case management conference that informs the court about the issues (allowing judges to better plan case management), narrows the issues, and rationally limits discovery. These early conferences should discuss such topics as limits on discovery, financial limitations of the parties, a trial date, dispositive motions, preservation of electronic information, and the importance of cooperation and collegiality.

The report recommends engagement between the court and parties early in litigation. First, the court should set an early and firm trial date to encourage parties to work more efficiently and narrow the issues. Second, counsel should be required to confer and communicate early and often. Studies have shown that this reduces discovery and client costs. Third, all issues to be tried should be identified early so as to limit discovery.

The final case management principles deal with the general process of litigation. First, courts should have discretion to order mediation or other alternative dispute resolution unless *all* parties agree otherwise. Second, the court should rule promptly on motions, and prioritize motions that will advance the case more quickly. Third, judges should be more involved throughout the litigation process, which will likely require more judicial resources. Fourth, judges should be trained on managing trials and trial practice.

The report provides a single pleading principle: "[p]leadings should

concisely set out all material facts that are known to the pleading party to establish the pleading party's claims or defenses." Parties may plead facts on "information and belief" if they cannot obtain information necessary to support a claim, but they must still submit the basis for their belief. The report argues that more specific pleadings would enable courts to make proportionality determinations and allow parties to better target discovery.

The report's eleven principles on discovery begin by stating that proportionality should be the most important principle of discovery. Currently, discovery is crippling the legal system by creating inefficiency and undue expense. The first step is for courts to supervise an agreement to proportional discovery between the parties. Second, parties must recognize that all facts are not necessarily subject to discovery. This agreement should appropriately limit parties' expectations as they enter discovery.

The principles also call for parties to produce all known and reasonably available documents and tangible things that support or contradict specifically pleaded factual allegations. This principle is broader than the federal rules because it requires *production* rather than merely description. The next principle provides that, in general, discovery should be limited to documents or information that would enable a party to prove or disprove a claim or defense or enable a party to impeach a witness. In addition, parties should be required to disclose trial witnesses early in litigation.

After initial production, only limited discovery subject to proportionality should be allowed. And, once that discovery is complete, further discovery should be barred absent a court order granted only with a showing of good cause and proportionality. This would create more active judicial supervision of the discovery process, while reducing discovery in conjunction with increased disclosure. Finally, in some cases, courts should stay discovery and disclosure until after a motion to dismiss is decided. This procedure would ensure discovery is used to prove a claim, rather than to determine whether a valid claim exists.

Early in litigation, parties should meet and agree on procedures for preservation of electronically stored information (ESI). All parties should be responsible for reasonable efforts to protect ESI that may be relevant to claims, but all parties must also understand that it is unreasonable to expect other parties to take every conceivable step to preserve all potentially relevant ESI. Furthermore, the same principle of proportionality that controls discovery generally should apply to ESI specifically. To make ESI discovery more efficient, attorneys and judges should be trained on principles of ESI technology.

Finally, there should be only one expert per issue per party. Experts should furnish a written report setting forth their opinion, the basis for that opinion, a CV, a list of cases in which they have testified, and the materials they have reviewed. This final principle will limit the "battle of the experts" and reduce the cost of expert testimony.

III. Summary of Streamlined Pathway Efforts, Conference of Chief Justices, Civil Justice Improvements Committee, Rules/Litigation Subcommittee, 2015.

The Civil Justice Improvements Committee anticipates that in making recommendations for improving the civil justice system it will address three different paths for civil cases: the streamlined pathway, the general pathway, and the highly-managed pathway. Defining different approaches for different paths recognizes the modern reality that one size does not fit all.

In the streamlined pathway are cases with a limited number of parties, simple issues relating to liability and damages, few or no pretrial motions, few witnesses, and minimal documentary evidence. Case types that could be presumptively assigned to the streamlined pathway include:

- automobile, intentional, and premises liability torts
- insurance coverage claims arising out of such torts
- cases where a buyer or seller is a plaintiff
- consumer debt
- appeals from small claims decisions

The subcommittee is undertaking a draft of procedural rules for the streamlined pathway. Key features of rules applied to the streamlined pathway may include:

- a focus on case attributes rather than dollar value
- presumptive mandatory inclusion for cases identified by streamlined-pathway attributes
- mandatory disclosures
- truncated discovery
- simplified motion practice
- an easy standard for removal from the pathway
- conventional fact finding
- no displacement of existing procedural rules consistent with streamlined pathway rules
- an early and firm trial date

IV. Edward H. Cooper, *Simplified Rules of Federal Procedure?*, 100 MICH. L. REV. 1794 (2002).

The Federal Rules rightly provide for open-ended rules that call for wise discretion. However, there is reason to believe our litigation system does not sufficiently prevent inept misuse and deliberate strategic over-use of the rules. The draft rules in this article provide for more detailed pleading, enhanced disclosure obligations, restricted discovery opportunities, reduced motion practice, and an early and firm trial date. The purpose of these simplified rules is not to establish second-class procedures for second-class litigation, but rather to enable access to justice by creating more efficient and more affordable procedures without the unnecessary complexity of rules designed for high-stakes, multi-party litigation.

There are some potential problems with these rules. For one, it is unclear if they could be adopted as a local experiment because Civil Rule 83 only authorizes the adoption of national rules. Second, these simplified rules assume knowledge of the Federal Rules of Civil Procedure. This made drafting the rules easier, but it would make it more difficult for a *pro se* party to litigate. A self-contained, short, and clearly stated set of rules might be a better approach.

As for the rules themselves, Rule 102 states that the simplified rules apply in actions where the plaintiff seeks monetary relief less than $50,000, where the plaintiff seeks monetary relief between $50,000 and $250,000 and the defendants do not object, and where all parties consent. This rule is tentative and is included in part to illustrate the difficulty of defining the cases appropriate for simplified procedural rules. Other approaches are also possible. For example, consent of all parties could always be required, or the power to determine when to use simplified procedures could be left to the discretion of the district court.

Fact-based pleading is at the heart of the simplified rules. Rule 103 requires that a claim state, to the extent reasonably practicable, the details of time, place, participants, and events involved in the claim. Furthermore, pleaders must attach each document the pleader may use to support the claim. Answers require the same. And avoidances and affirmative defenses must be specifically identified in a pleading. These provisions should enhance parties' ability to litigate small claims effectively and efficiently. It is important to note, however, that fact-pleading should not be approached in a spirit of technicality. The spirit that has characterized notice pleading should animate Rule 103 fact pleading. What is expected is a clear statement in the detail that might be provided in proposed findings of fact. One question that remains to be answered is the

applicability of Rule 15's amendment procedures. Allowing amendments might lead to delay and strategic misuse, but *pro se* plaintiffs in simple cases may need to use good-faith amendments even more than typical litigants.

Rule 104 provides for a demand for judgment in which a party may attach a demand to a pleading that asserts a contract claim for a sum certain. The demand must be supported by a writing and sworn statements that evidence the obligation and the amount due. A defendant must admit the amount due or file a response. If the defendant admits an amount due, a court clerk may enter judgment. Essentially, Rule 104 creates a plaintiffs' motion for summary judgment. This rule is necessary because a substantial number of actions in federal court are brought to collect small sums due on contracts or unpaid loans.

Rule 104A limits motions practice. A motion to dismiss under the defenses of Rule 12(b)(2)-(5) and (7) may be made in an answer or within 10 days of an answer. The time periods to answer provided under Rule 12(a)(1)-(3) cannot be suspended by motion. And, a party seeking relief under Rule 56, 12(b)(6), 12(c), or 12(f) must combine that relief in a single motion filed no later than 30 days after the answer or reply. These rules are meant to prevent the strategic delays often created by protracted motion practice.

Rule 105's disclosure requirements are designed to reduce discovery. No later than 20 days after the last pleading, a plaintiff must provide 1) the name and telephone number of any person likely to have discoverable information relevant to the facts disputed in the pleadings, 2) sworn statements with any discoverable information known to the plaintiff or a person reasonably available, 3) a copy of all reasonably accessible documents and tangible things known to be relevant, and 4) damages computations and insurance information. 20 days later, other parties must make a corresponding disclosure. Such disclosures cannot be excused because a party has not fully completed an investigation, challenges another party's disclosure, or has not been provided another party's disclosure.

Of course, with heightened disclosure comes more limited discovery. Under Rule 106, a discovery request may only be made with the stipulation of all parties or in a Rule 26(f) conference. And a conference must be held only if requested in writing. Parties are limited to three depositions of three hours each, and 10 interrogatories. Finally, Rule 34 discovery requests must specifically identify the items requested.

Rule 108 provides that a court should first consider the issues, the amount in controversy, and the resources of the parties, and only then determine whether

to allow expert testimony. This rule is meant to reduce the risk that a better-resourced party will introduce expert testimony merely to increase the costs of litigating.

Finally, the draft rules provide for setting a trial date six months from the initial filing. This trial date should not be extended on the basis that discovery is incomplete or an action is too complex. There may be problems with this proposal. For example, it seems to give docket priority to cases that courts typically consider low-priority.

V. Paul V. Niemeyer, *Is Now the Time for Simplified Rules of Civil Procedure?*, 46 U. MICH. J.L. REFORM 673 (2013).

The current federal civil process is inadequate for the purpose of discharging justice speedily and inexpensively. It takes three years and hundreds of thousands of dollars to try a medium-sized commercial dispute. Meanwhile, the private bar is fleeing from courts to alternative dispute resolution systems.

Although well-intentioned, the 1938 transition from fact pleading to notice pleading is part of the problem. The reformers of 1938 sought to avoid procedural maneuvering in the pleading stage that often proved too complex for the common lawyer, effectively denying litigants access to courts. The reformers' solution was notice pleading and liberal discovery rules. This reassigned resolution of procedural battles from court-supervised pleading to attorney-controlled discovery. Then, reforms in 1946, 1963, 1966, and 1970 further liberalized pleading and discovery rules. The process grew increasingly expensive, complicated, and time-consuming.

In the late 1970s, the tides shifted and courts and reformers began to attempt to limit discovery practice. In 1993, the Civil Justice Reform Act required federal districts to conduct self-study and develop a civil case management plan to reduce costs and delays. In addition, the Act called for evaluation of these plans to identify best practices. That evaluation came to three conclusions. First, early court intervention in the management of cases reduced delay, but increased litigant costs. Second, setting a firm trial date early was the most effective tool of case management – reducing delay without producing more costs. Finally, reducing the length of discovery reduced both costs and delays without adversely affecting attorney satisfaction.

In 2000, the Rules Committee and Supreme Court made several small but

beneficial changes. First, they limited discovery to any matter related to a "claim or defense of a party," rather than any matter related to a "subject matter involved in the pending action." Under the new rules, parties could still seek broader discovery, but they would need a court order that required a showing of good cause. This amendment was designed to allow courts to better supervise discovery. Second, the Rules Committee expanded mandatory disclosure and reduced interrogatories and depositions. After these reforms, Supreme Court cases in the 2000s heightened pleading standards, requiring that a complaint allege enough factual matter to state a plausible claim for relief.

It is within this context that the Civil Rules Committee chaired by Judge Niemeyer sought to draft rules that would further reduce costs and delays. From 1999 to 2000, the Rules Committee discussed a number of reform proposals but did not begin detailed debate before Judge Niemeyer's term expired. However, the Committee's reporter, Professor Edward Cooper, drafted a set of proposed simplified rules that should be the starting point for further reforms.

Professor Cooper's proposed rules would apply to all small money-damage actions and parties could choose to apply them to larger money-damage actions. These draft rules incorporated five basic elements that address known problems of costs and delay in the federal civil process. First, the rules required more detailed pleadings, enabling an early look at the merits of a case. Second, the rules would enhance early disclosures, which would have to be made within twenty days of the filing of the last pleading. Third, the draft rules restrict discovery, authorizing only three depositions and ten interrogatories. Fourth, the draft rules would reduce the burden of motions practice, combining all motions to dismiss into a single motion that must be filed early in the proceedings. Finally, the draft requires an early and strict trial date scheduled six months from the filing.

Professor Cooper's draft rules are a good basis for further reform, but there are three other ideas worthy of consideration. First, simplified rules should be applied to a wider range of cases by making them available for all damage actions, and mandatory for a larger segment of damage actions. Second, it may be wise to include incentives to encourage plaintiffs' and defendants' attorneys to use simplified rules in damage actions, as some attorneys may initially shy away from the simplified track. Third, practice under Rule 56 may need to be trimmed down, as summary judgment is now often an expensive mini-trial within the pretrial phase, creating disproportionate costs and delays.

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INITIAL DISCLOSURE - DISCOVERY PILOT PROJECT RULE

Proposed Rule Sketch

The sketch set out below is proposed as a starting point in working toward a rule that might be tested to expand on the initial disclosure provisions in present Rule 26(a)(1). It is derived from Arizona Rule 26.1, but simplified in several ways. The reasons for this proposal follow.

(a) [*Version 1*: Within the times set forth in subdivision (b),[1] each party must disclose in writing to every other party:[2]] [*Version 2*: Before seeking discovery from any source, except in a proceeding listed in Rule 26(a)(1)(B), each party must answer these Rule 33 interrogatories {and Rule 34 requests to produce or permit entry and inspection}, providing:]

(1) (A) the factual basis of its claims or defenses;

(B) the legal theory upon which each claim or defense is based;

(C) a computation of each category of damages claimed by the disclosing party — who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of the injuries suffered;

(D) for inspection and copying as under Rule 34 any insurance [or other] agreement under which an insurance business [or other person] may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment;[3] and

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[1] The times established in present Rule 26(a)(1)(C) and (D) may need to be reconsidered in light of the increased disclosures required by this rule. See footnote 2.

[2] Version 2 makes this exchange of information a first wave of discovery. Adopting the full incidents of those rules will set times to respond, and address many other issues that may arise.

[3] This is present Rule 26(a)(1)(A)(iv) as a placekeeper. Are there reasons to broaden the disclosures it requires? Indemnification agreements, for example, are not covered. It has been observed that these questions do arise. The

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26 (2) whether or not the disclosing party intends to use them
27 in presenting its claims or defenses:

28 (A) the names and addresses of all persons whom
29 the party believes may have knowledge or
30 information relevant to the events,
31 transactions, or occurrences that gave rise
32 to the action;

33 (B) the names and addresses of all persons known to
34 have given statements, and — if known — the
35 custodian of any copies of those statements; and

36 (C) a list of the categories of documents,
37 electronically stored information,
38 nondocumentary tangible things or land or
39 other property, known by a party to exist
40 whether or not in the party's possession,
41 custody or control and which that party
42 reasonably believes may be relevant to any
43 party's claims or defenses, including — if
44 known — the custodian of the documents or
45 electronically stored information not in the
party's possession, custody, or control.

Discussion

RULE DESIGN

Designing the rule to be tested in a pilot project is not entirely separate from designing the project's structure. But the first task is to determine the elements of the rule that is to be tested.

Many real-world models could be used as a point of departure, perhaps combining elements from different models, adding new elements, or subtracting elements from a truly demanding model. This proposal was framed by reducing the scope of Arizona Rule 26.1. This foundation provides solid reassurance that the elements of the proposal have been tested in practice, and in combination with each other.

Arizona Rule 26.1 is the broadest disclosure rule we know of. Over the course of twenty years it seems to have built toward substantial success. It would be difficult to implement a more

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bracketed language is used to contrast with the otherwise unchanged language of the present rule; if disclosure is to reach further, integrated language may prove more attractive. Whatever may be done on that score, the Committee decided recently that the time has not yet come to consider disclosure of litigation finance arrangements.

demanding model. And to the extent that it may be possible to structure a pilot project in ways that make it possible to evaluate different components of the model, separating those that work from those that do not work, aiming high has real advantages.

Caution, however, suggests adoption of a model that is robust but not aggressive. The project will fail at the outset if the model is so demanding that no court can be found to test it. As described in more detail below, there may be independent reasons to question whether the Arizona rule can work on a nationwide basis, across courts with different mixes of cases and different local cultures. The proposal aims at a less demanding but still robust regime.

The first question to be addressed in working from the Arizona model is whether to frame the model as initial disclosure or as first-wave discovery. The original version of Rule 26(a)(1) was adopted in 1993 in an effort to streamline the exchange of information that inevitably would be sought in the first wave of discovery. Although more demanding than the version adopted in 2000, it was focused on a sufficiently narrow target to make it work as disclosure. The disclosure approach is illustrated by Version 1 in the model.

An alternative is to frame the model as mandatory initial discovery. This approach has at least two potential advantages. First, by incorporating Rules 33 [and 34], it incorporates the provisions of those rules that set times to respond and obligations in responding. (It might be helpful to complicate the rule text by prohibiting objections, but the complication seems unnecessary.) The second advantage is to avoid claims that the model is inconsistent with present Rule 26(a)(1). Everything in the model is well within the court’s authority to control discovery and disclosures, particularly through Rule 16(b)(3) and (c)(2)(F). These advantages may well lead to adopting this alternative.

The next questions go to the details: What elements of the Arizona rule might be reduced? Some of the changes are simple matters of drafting. For example, it suffices to say "the factual basis of its claims or defenses," instead of "the factual basis of the claim or defense. In the event of multiple claims or defenses, the factual basis for each claim or defense." Other changes are more substantive.

Model (a)(1)(B) is limited to "the legal theory on which each claim or defense is based." It omits "including, where necessary for a reasonable understanding of the claim or defense, citations of pertinent legal or case authorities." Requiring these added details will often lead to unnecessary information and provides a rich occasion for disputes about the adequacy of

the disclosures.

Arizona Rule 26.1(a)(3) calls for initial disclosure of expected trial witnesses, including a fair description of the substance of the expected testimony. It is omitted entirely, in the belief that present Rule 26(a)(3) pretrial disclosures do the job adequately, and at a more suitable time. Arizona Rule 26.1(a)(8) calls for initial disclosure of documents, electronically stored information, and tangible evidence the party plans to use at trial. It is omitted for similar reasons; the part that calls for disclosure of "relevant insurance agreements" is reflected in Model Rule (1)(D).

Model Rule subparagraphs (1)(C) and (D) are drawn verbatim from present Rule 26(a)(1)(A)(iii) and (iv). These rules seem to work well. They displace Arizona Rule 26.1(a)(7) on computation of damages and the part of (8) that calls for identification of "relevant insurance agreements."

Paragraph (2) of the model begins by requiring disclosure of additional matters "whether or not the disclosing party intends to use them in presenting its claims or defenses." Although this obligation is implicit in the initial direction to disclose, it seems wise to emphasize that this model goes beyond the "may use" limit in present Rule 26(a)(1)(A)(i) and (ii).

Subparagraph (2)(A), requiring disclosure of persons believed to have knowledge of the events in suit, is taken verbatim from the first part of Arizona Rule 26.1(a)(4), but omits "and the nature of the knowledge or information each such individual is believed to possess." There may be sufficient uncertainty or outright mistake, and sufficient difficulty in describing these matters, to urge caution in going so far.

Subparagraph (2)(B) departs from Arizona Rule 26.1(a)(5) in two ways. It omits the description of witness statements "whether written or recorded, signed or unsigned." Those words seem ambiguous as to oral "statements" not reduced to writing or recording. And it adds "if known" to the requirement to disclose the custodian of copies of the statement. This provision may need further work to decide whether to include oral statements, or to exclude them explicitly.

Subparagraph (2)(C) substantially shortens Arizona Rule 26.1(a)(9). First, the Arizona rule initially requires a list of all documents or electronically stored information, allowing a list by categories only "in the case of voluminous" information. The Model Rule is content with a list by categories for all cases. That is enough to pave the way and direction for later Rule 34 requests. Second, the Arizona rule invokes a term omitted from Federal Rule 26(b)(1) by the proposed amendments now pending in Congress: "relevant to the subject matter of the action." The

Model Rule substitutes "relevant to any party's claims or defenses." Third, the Model Rule eliminates the direction to list documents "reasonably calculated to lead to the discovery of admissible evidence." Whatever might be made of that familiar phrase in defining the outer scope of discovery, it overreaches for initial disclosure. Finally, and most importantly, the Model Rule eliminates the direction to serve a copy of the documents or electronically stored information with the disclosure "[u]nless good cause is stated for not doing so." The related provisions for identifying the custodian if production is not made, and for the mode of producing, are also omitted. Full production at this early stage is likely to encompass more — often far more — than would actually be demanded after the categories of documents and ESI are described. Too much production does no favors, either for the producing party or for the receiving party. The Arizona alternative of stating good cause for not producing everything that is listed might work if all parties behave sensibly, but it also could add another opportunity for pointless disputes.

Pilot Project Design

Designing the project itself will take a great deal of work, much of it by the experts at the Federal Judicial Center. It is imperative that the structure provide a firm basis for evaluating the model chosen for testing. But a few preliminary and often tentative thoughts may be offered.

The initial recommendation is to structure the pilot to mandate participation. The choice between mandatory or voluntary participation is one of the first questions common to all pilot projects. A choice could be introduced in various ways — as opt-in or opt-out, either at the behest of one party or on agreement of all parties. Resistance to a pilot is likely to decline as the degree of voluntariness expands. But there is a great danger that self-selection will defeat the purposes of the test. To be sure, it would be useful to learn that more and more parties opt to stay in the model as experience with it grows. But in many circumstances it would be difficult to draw meaningful lessons from comparison of cases that stay in the model to cases that opt out.

The second recommendation is that the pilot should include all cases, subject to the possibility of excluding the categories of cases now exempted by Rule 26(a)(1)(B) from initial disclosure. Those cases were selected as cases that seldom have any discovery, and they occupy a substantial portion of the federal docket. Nothing important is likely to be lost by excluding them, and much unnecessary work is likely to be spared. Beyond those cases, arguments can be made for excluding others. One of the concerns about the original version of Rule 26(a)(1) was that it would require useless duplicating work in the many cases in which the parties, not trusting the initial disclosures,

would conduct discovery exactly as it would have been without any disclosures. That might well be for complex, high-stakes, or otherwise contentious cases. But the more expanded disclosures required by the model provide some reassurance that this danger will be avoided. The model, particularly when seen as an efficient form of focused first-wave discovery, is designed in the hope that it really will reduce the cost and delay of discovery in many cases, including — perhaps particularly including — complex cases.

A quite different concern arises from cases with at least one pro se party. It may be wondered whether these initial requirements will prove overwhelming. But pro se litigants are subject to discovery now. And here too, it may be hoped that simple rule directions will provide better guidance than the complex language of lawyer-formulated Rule 33 [and Rule 34] discovery demands.

One particularly valuable consequence of including all cases is that information will be provided on how well the model actually works across the full range of litigation. There may be surprises, but that is the point of having a pilot. Any national rule that is eventually adopted would be crafted on the basis of this experience. If, for example, broad initial disclosures prove useless or even pernicious in antitrust cases, a way can be found to accommodate them. (It seems likely that the rule would recognize judicial discretion to excuse or modify the disclosure requirements, but that choice will await evaluation of the pilot’s lessons.)

Selection of pilot courts is also important. Potentially conflicting considerations must be weighed. There are obvious advantages in selecting courts in states that have some form of initial disclosure more extensive than the present federal rule. Lawyers will be familiar with the state practice, and can adapt to the federal model with some ease, at least if they can check reflexes ingrained by habitual state practice. The same may hold, although to a lesser extent, for the judges. From this perspective, the District of Arizona might be a natural choice. Another might be the District of Connecticut, where the judges have widespread experience with the protocols for initial discovery in individual employment cases. Courts in Colorado, New Hampshire, Texas, and Utah also might be considered: each state has experience with initial disclosure systems more extensive than the current federal model. A particular advantage of selecting such courts may be that because they are already primed, they will achieve better results than would be achieved in other courts. That could mean that other courts will be encouraged to adopt the practice, or the national rules to embrace it, even though success will take somewhat longer to achieve in other courts.

Reliance on courts already familiar with expanded disclosure, however, might undermine confidence in whatever favorable findings might be supported by the pilot court. That a rule works with courts and lawyers who have favorable attitudes is not a sure sign that it will work with lawyers who remain hostile. And there may be a further problem. A means must be found to compare cases managed under the model with other cases. Comparison of pilot cases with cases in the same court in earlier years runs the risk that the earlier cases were shaped by habits developed under the already familiar disclosure regime. Comparison of pilot cases with cases in other courts might encounter similar difficulties.

In the most attractive world, it might prove possible to engage a number of courts with different characteristics in the pilot program. But if the project is to be tested in only one court, or even two, it will be necessary to decide whether to look to a court that already has some experience, whether it is by vicarious connection to local practice or by direct experience.

The proper duration of a pilot project may vary by subject. A model that departs substantially from present practice in discovery and disclosure is likely to require a rather extensive period of adjustment. It takes time for lawyers and judges to learn how to make the most of a new model, and to learn how to defeat efforts to subvert it. Surely anything less than three years would be too short, and five years seems a more realistic duration.

There is a point of structure peculiar to disclosure. Comparison of results depends on sure knowledge whether the model was actually used. The pilot should include a requirement that the parties file a certificate of compliance that will lead researchers to the proper starting point.

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EX. F

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Re: Simplified Procedures Pilot Project Subcommittee

David Campbell (Dist Judge) to: Amy St Eve 10/07/2015 09:17 PM

Cc: coopere, Coquille, elee, jbarkett, Jeffrey Sutton, JFogel, John D. Bates, Judge Neil Gorsuch, Judge Paul Grimm, Nancy Outley, pfolse, Rebecca Womeldorf, vseitz

From: David Campbell/AZD/09/USCOURTS(Dist Judge)

To: Amy St Eve/ILND/07/USCOURTS@USCOURTS

Cc: coopere@umich.edu, Coquille@law.harvard.edu, elee@fjc.com, jbarkett@shb.com, Jeffrey Sutton/CA06/06/USCOURTS@USCOURTS, JFogel@fjc.gov, John D. Bates/DCD/DC/USCOURTS@USCOURTS, Judge Neil

History: This message has been replied to.

Dear everyone:

In preparation for our subcommittee conference call on Friday at 4:30 pm eastern, Amy St Eve yesterday circulated to you four summary reports regarding the pilot project information our group has reviewed over the last few weeks. Reviewing those reports will give you a helpful summary of what has been done in various state and federal courts over the last few years. The report provided by Neil Gorsuch also contains a helpful summary of some innovative simplified-procedure rules prepared by Ed Cooper some years ago. This email will add some additional thoughts for you to consider in advance of Friday's call.

Although our reviews and summaries of the various state and federal court projects have not identified a particularly revolutionary approach or result, several have received positive feedback. Utah, Colorado, and New Hampshire come to mind. We can identify a collection practices that have been used in these states, including (but not limited to):

- more detailed in pleading,
- early case management conference followed by an early case management order (with continuances granted rarely and only for good cause),
- more substantial disclosure requirements,
- some limitations on motions to dismiss (such as Ed proposed),
- limitations on discovery, with leave of court required for more,
- limitations on expert discovery,
- expedited procedures for resoling discovery disputes,
- a mandatory trial date 6 to 12 months from the start of the case.

A worthwhile federal pilot project may be to identify categories of cases that tend to be modest in size, and deal with them under a combination of such practices designed to achieve quick and less expensive resolution. The list practices would need to be refined considerably, and we would need to decide whether to give a pilot district a menu of practices to choose from or a more prescriptive program.

A key question will be how to identify cases that would be handled under such a pilot. The experience in some of the state pilots suggests that using a dollar amount to identify pilot cases may not be optimal, in part because parties can attempt to plead around them. And yet diversity jurisdiction makes it challenging to identify suitable cases by category. A diversity-jurisdiction contract case may be worth $75 thousand or ten times that much. One possible approach would be two-part: (1) identify categories of federal causes of action that would go into the pilot program (such as FDCPA, FCRA, and facilities-focused ADA cases), and (2), task judges with holding an early management conference in other cases and deciding, on the basis of the 26(f) report and the conference, which cases are suitable for the pilot. I often see cases that warrant only a modest amount of discovery and expedited treatment, and they usually are apparent at the case management conference.

Our group also discussed the possibility of including in the pilot a recommended list of best practices,

such as the privilege log practices seen in some of the pilots (such as New York). These could be provided to pilot judges as additional resources to be considered in the pilot effort.

We hope to get your reactions to these general thoughts during Friday's call.

Dave

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EX. G

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TRACKING PILOT PROJECT

I. Place Cases in Tracks for Presumptive Resolution

A. Basic—resolution within 6-9 months.

B. Standard—resolution within 9-14 months.

C. Complex—resolution within 14-24 months.

II. Criteria for placement

A. Estimated trial days.

B. Money demanded.

C. Type of action.

D. Number of parties and issues.

E. Number of potential witnesses and volume of exhibits.

F. Scope of discovery needed.

III. Responsibilities of District Court

A. With input from parties, pick a track and timetable.

B. Set firm discovery time tables (*e.g.*, 3 months in a basic case).

C. Set firm dates for dispositive motions and trial.

D. Resolve any discovery motions and dispositive motions promptly.

E. Adhere to schedule except in extraordinary circumstances.

IV. Responsibilities of Parties

A. Comply with time tables.

B. Engage in cooperative and proportionate discovery.

V. Premises and Goals

A. Should not create any Rules Enabling Act concerns.

B. Should be sufficiently flexible that different district courts may implement it in different ways.

C. Should streamline discovery and in the process should benefit plaintiffs (by decreasing the time between complaint, trial, and potential relief) and defendants (by lowering the costs of litigation).

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tions. The 1984 amendment to Rule 11 adequately accomplishes the purposes of Federal Rule 26(g).

The rejection of Federal Rule 26(g), and the concomitant loss of its language expressly requiring certification that the discovery request, response or objection is not unreasonable or unduly burdensome or expensive, is not intended to diminish the protection provided by Rule 26(c).

Rule 26(g). Discovery motions

No discovery motion will be considered or scheduled unless a separate statement of moving counsel is attached thereto certifying that, after personal consultation and good faith efforts to do so, counsel have been unable to satisfactorily resolve the matter.

Added and effective June 27, 2001.

Rule 26(h). Deleted. Effective Nov. 1, 1970

Rule 26.1. Prompt disclosure of information

(a) Duty to Disclose, Scope. Within the times set forth in subdivision (b), each party shall disclose in writing to every other party:

(1) The factual basis of the claim or defense. In the event of multiple claims or defenses, the factual basis for each claim or defense.

(2) The legal theory upon which each claim or defense is based including, where necessary for a reasonable understanding of the claim or defense, citations of pertinent legal or case authorities.

(3) The names, addresses, and telephone numbers of any witnesses whom the disclosing party expects to call at trial with a fair description of the substance of each witness' expected testimony.

(4) The names and addresses of all persons whom the party believes may have knowledge or information relevant to the events, transactions, or occurrences that gave rise to the action, and the nature of the knowledge or information each such individual is believed to possess.

(5) The names and addresses of all persons who have given statements, whether written or recorded, signed or unsigned, and the custodian of the copies of those statements.

(6) The name and address of each person whom the disclosing party expects to call as an expert witness at trial, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, the qualifications of the witness and the name and address of the custodian of copies of any reports prepared by the expert.

(7) A computation and the measure of damage alleged by the disclosing party and the documents or testimony on which such computation and measure are based and the names, addresses, and telephone numbers of all damage witnesses.

(8) The existence, location, custodian, and general description of any tangible evidence, relevant documents, or electronically stored information that the disclosing party plans to use at trial and relevant insurance agreements.

(9) A list of the documents or electronically stored information, or in the case of voluminous documentary information or electronically stored information, a list of the categories of documents or electronically stored information, known by a party to exist whether or not in the party's possession, custody or control and which that party believes may be relevant to the subject matter of the action, and those which appear reasonably calculated to lead to the discovery of admissible evidence, and the date(s) upon which those documents or electronically stored information will be made, or have been made, available for inspection, copying, testing or sampling. Unless good cause is stated for not doing so, a copy of the documents and electronically stored information listed shall be served with the disclosure. If production is not made, the name and address of the custodian of the documents and electronically stored information shall be indicated. A party who produces documents for inspection shall produce them as they are kept in the usual course of business.

Court Comment to 1991 Amendment

In March, 1990 the Supreme Court, in conjunction with the State Bar of Arizona, appointed the Special Bar Committee to Study Civil Litigation Abuse, Cost and Delay, which was specifically charged with the task of studying problems pertaining to abuse and delay in civil litigation and the cost of civil litigation.

Following extensive study, the Committee concluded that the American system of civil litigation was employing methods which were causing undue expense and delay and threatening to make the courts inaccessible to the average citizen. The Committee further concluded that certain adjustments in the system and the Arizona Rules of Civil Procedure were necessary to reduce expense, delay and abuse while preserving

the traditional jury trial system as a means of resolution of civil disputes.

In September, 1990 the Committee proposed a comprehensive set of rule revisions, designed to make the judicial system in Arizona more efficient, more expeditious, less expensive, and more accessible to the people. It was the goal of the Committee to provide a framework which would allow sufficient discovery of facts and information to avoid "litigation by ambush." At the same time, the Committee wished to promote greater professionalism among counsel, with the ultimate goal of increasing voluntary cooperation and exchange of information. The intent of the amendments was to limit the adversarial nature of proceedings to those areas where there is a true and legitimate dispute between the parties, and to preclude hostile, unprofessional, and unnecessarily adversarial conduct on the part of counsel. It was also the intent of the rules that the trial courts deal in a strong and forthright fashion with discovery abuse and discovery abusers.

After a period of public comment and experimental implementation in four divisions of the Superior Court in Maricopa County, the rule changes proposed by the Committee were promulgated by the Court on December 18, 1991, effective July 1, 1992.

Committee Comment to 1991 Amendment

This addition to the rules is intended to require cooperation between counsel in the handling of civil litigation. The Committee has endeavored to set forth those items of information and evidence which should be promptly disclosed early in the course of litigation in order to avoid unnecessary and protracted discovery as well as to encourage early evaluation, assessment and possible disposition of the litigation between the parties.

It is the intent of the Committee that there be a reasonable and fair disclosure of the items set forth in Rule 26.1 and that the disclosure of that information be reasonably prompt. The intent of the Committee is to have newly discovered information exchanged with reasonable promptness and to preclude those attorneys and parties who intentionally withhold such information from offering it later in the course of litigation.

The Committee originally considered including in Rule 26.1(a)(5) a requirement for disclosure of all cases in which an expert had testified within the prior five (5) years. The Committee recognized in its deliberations that information as to such cases might be important in certain types of litigation and not in others. On balance, it was decided that it would be burdensome to require this information in all cases.

Committee Comment to 1996 Amendment

Rule 26.1(a)(3). With regard to the degree of specificity required for disclosing witness testimony, it is the intent of the rule that parties must disclose the substance of the witness' expected testimony. The disclosure must fairly apprise the parties of the information and opinion known by that person. It is not sufficient to simply describe the subject matter upon which the witness will testify.

Rule 26.1(a)(5) was not intended to require automatic production of statements. Production of statements remains subject to the provisions of Rule 26(b)(3).

Rule 26.1(a)(6). A specially retained expert as described in Rule 26(b)(4)(B) is not required to be disclosed under Rule 26.1.

(b) Time for Disclosure; a Continuing Duty.

(1) The parties shall make the initial disclosure required by subdivision (a) as fully as then possible within forty (40) days after the filing of a responsive pleading to the Complaint, Counterclaim, Crossclaim or Third Party Complaint unless the parties otherwise agree, or the Court shortens or extends the time for good cause. If feasible, counsel shall meet to exchange disclosures; otherwise, the disclosures shall be served as provided by Rule 5. In domestic relations cases involving children whose custody is at issue, the parties shall make disclosure regarding custody issues no later than 30 days after mediation of the custody dispute by the conciliation court or a third party results in written notice acknowledging that mediation has failed to settle the issues, or at some other time set by court order.

(2) The duty prescribed in subdivision (a) shall be a continuing duty, and each party shall make additional or amended disclosures whenever new or different information is discovered or revealed. Such additional or amended disclosures shall be made seasonably, but in no event more than thirty (30) days after the information is revealed to or discovered by the disclosing party. A party seeking to use information which that party first disclosed later than sixty (60) days before trial shall seek leave of court to extend the time for disclosure as provided in Rule 37(c)(2) or (c)(3).

(3) All disclosures shall include information and data in the possession, custody and control of the parties as well as that which can be ascertained, learned or acquired by reasonable inquiry and investigation.

Committee Comment to 1991 Amendment

The Committee does not intend to affect in any way, any party's right to amend or move to amend or supplement pleadings as provided in Rule 15.

SUPPLEMENT TO THE AGENDA BOOK

ADVISORY COMMITTEE
ON
CIVIL RULES

Salt Lake City, UT
November 5-6, 2015

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SUPPLEMENTAL MEMORANDUM

To: Advisory Committee

From: Pilot Project Subcommittee

Date: October 23, 2015

This memorandum supplements the October 15, 2015 memorandum included in the agenda materials for the November 5-6, 2015 committee meeting in Salt Lake City (Tab 12). It addresses a comprehensive pilot project undertaken by the Judicial Conference in the early 1990s at the direction of Congress that we learned about through coordination with the Court Administration and Case Management Committee ("CACM"). A copy of a memorandum from Supreme Court Fellow Amelia Yowell summarizing the 1990s pilot project is attached. The subcommittee will continue to review the substantial information available about this pilot project and others as it formulates its pilot project recommendations, and we will continue to coordinate with CACM through our liaison member Amy St. Eve and committee staff.

When Congress passed the Civil Justice Reform Act ("CJRA") in 1990, it directed the federal courts to conduct an extensive test of procedures to reduce the delay and expense of civil litigation. The CJRA required the creation of advisory groups in every district, consisting of judges and lawyers, to come up with a "civil justice expense and delay reduction plan." JCUS Report at 15. The CJRA also required the Judicial Conference to choose 10 pilot districts, 10 comparison districts, and 5 "demonstration" districts to test CJRA-recommended procedures. In 1996, the RAND Corporation completed a study of more than 12,000 cases from the pilot and comparison districts using funds provided by Congress. The procedures tested in the pilot program are similar to some of those suggested in our October 15, 2015 memorandum:

- Case tracking, where cases are sorted into expedited, standard, and complex tracks that have specific procedures and time lines;

- Early and ongoing judicial control of the pretrial process, including early motion and trial dates and limits on the extent of discovery;

- Active management of complex cases, including bifurcation of issues, early trial dates, a defined discovery schedule, and encouragement to settle;

- Encouraging voluntary exchange of information and the use of cooperative discovery techniques;

- Prohibiting the consideration of discovery motions unless accompanied by a good-faith certification that the parties have conferred; and

- Encouraging alternative dispute resolution programs.

The subcommittee has not had time to digest the RAND study, which is four volumes and more than 1,000 pages, or an FJC study of the demonstration districts, which is 400 pages long. But we have reviewed the 50-page final report from the Judicial Conference to Congress, and share some thoughts in light of that summary.

1. Case Management, Discovery, and Firm Trial Dates. The RAND study found that case disposition times can be reduced without a cost increase through early judicial case management, shortened discovery cut-offs, and a fixed trial date. JCUS Report at 20. This result reinforces the findings of some state pilots and the thinking behind several of our recent rule amendments.[1]

One might reasonably ask, however, why the CJRA pilot and the RAND study did not lead to efficient case management in all federal courts? Why did participants in the 2010 Duke Conference – some 13 years after the pilot and RAND studies were completed – still complain that civil litigation takes too long, costs too much, and involves too little active case management? Perhaps the problem is not the principles, but their implementation. Perhaps we should consider a pilot that focuses on training and motivating judges rather than testing new procedures. What would happen, for example, if we picked some pilot districts where active training of judges would occur over the course of a few years on matters such as early and active case management, setting short but reasonable discovery schedules, and setting firm trial dates? The RAND study and state pilots provide data to show that these practices work if judges will use them.

2. Case Tracking. Our October 15, 2015 memorandum suggested a pilot under which medium and small cases are identified and placed on a track where they receive faster and less complicated process. This was tested in the CJRA pilot. The CJRA called for all districts to implement a system of Differentiated Case Management ("DCM") that divides cases into "expedited," "standard," and "complex" tracks, with each track having a specific set of procedures and event timelines. *Id.* at 31. The JCUS Report to Congress at the end of the pilot contained this observation:

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[1] The RAND study often noted that it could not draw conclusions on "causation" – whether a particular technique caused an observed favorable result. "It can only suggest a possible correlation between a technique and a given result." JCUS Report at 20. Given the many variables that affect case processing, this likely is true of any pilot.

> [T]he difficulty of determining in which track to place a particular case, based on the initial case filings, made the policy impracticable. For this reason, most courts placed the vast majority of cases in the "standard" track. Also, many courts found that a judge's ability to tailor the management of each particular case was more effective than rigid case tracks.

Id. at 31 (citation omitted). The FJC's separate study of demonstration districts found a generally favorable reaction to case tracking. *Id.* at 32.

Although the Judicial Conference "encourage[d] differential treatment of civil cases to reduce cost and delay," it declined to endorse a formal tracking approach:

> Track systems . . . may not always be the most efficient format for DCM. As the pilot courts demonstrated, such systems can be bureaucratic, unwieldy, and difficult to implement. For example, some courts found that they lacked sufficient information at the beginning of a case to know in which track a case belonged. Therefore, the Conference recommends that individual districts continue to determine on a local basis whether the nature of their caseload calls for the more rigid track model or the judicial discretion model for their DCM systems.

Id. (citation omitted).[2]

The subcommittee recognized in our October 15 memo that challenges could arise in attempting to classify cases for the application of certain streamlined and expedited procedures. For that reason we also suggested the idea of testing the application of tighter time frames and expedited procedures for all cases in particular districts.

3. Early Disclosures. The CJRA pilot included "[e]ncouragement of cost effective discovery through voluntary exchange of information among litigants[.]" *Id.* at 37. The 1993 amendments to Rule 26, which apparently came into effect as a result of the CJRA, required more robust disclosures than the current rule. That rule, which was optional for districts, was in play during the CJRA pilot. As a result, RAND found it difficult to measure the effects of the pilot project on initial disclosures and no firm conclusions were reached. *Id.* at 38. The Judicial Conference therefore declined to make specific recommendations, but encouraged the civil rules committee to continue studying

[2] During discussions of our subcommittee, it was noted that several districts still have local rules that call for case tracking, but members of the subcommittee were not aware of those rules being used. The rules apparently originated 25 years ago with the CJRA experiment.

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the issue. Although the CJRA study was inconclusive, promising signs were found both by RAND and the FJC. The 2000 amendment to Rule 26(a)(1) scaled back the 1993 disclosure regime because of a desire to achieve a uniform national rule rather than any sense that the 1993 rule was ineffective or undesirable. Enhanced initial disclosures should still be considered as a possible pilot project.

4. Changes since 1990s.

Review of the CJRA study has prompted the subcommittee to consider how civil litigation today differs from civil litigation in 1990-96. Several changes come to mind. The most significant, of course, is the advent of ESI and its growing influence in a wide range of civil cases. Other changes include a likely increase in small statutory cases (TCPA, FCRA, FDCPA), growth in the number of prisoner *pro se* cases, likely growth in the number of non-prisoner *pro se* cases, the increased use of magistrate judges to manage civil cases in some districts, and the arrival of electronic filing and case management. These developments have altered the civil litigation landscape to some extent, and we should keep them in mind as we continue to study the results of the CJRA pilot.

5. Thoughts for discussion.

We suggest a few thoughts for discussion at the November meeting in addition to those identified in our October 15, 2015 memo.

a. What effect should the CJRA pilot have on our own pilot initiatives? Has civil litigation changed sufficiently since the early 1990s to justify some duplication of the earlier study?

b. Reviewing the CJRA pilot has caused the subcommittee to identify other possible pilots that might be pursued (in addition to those mentioned in the October 15, 2015 memo):

- As noted above, we could attempt to design a pilot that tests the ability to train judges to apply early, active case management with short discovery schedules and firm trial dates.

- One tool adopted as a result of the CJRA did produce a meaningful drop in case backlogs. That tool was publishing, for each judge, statistics on the number of motions pending more than 6 months and the number of cases pending more than 3 years. These statistics are still published, but some think they have become an unfortunate docket-management tool. Some judges manage their dockets so as not to have motions on the CJRA report, but using that as the benchmark can result in lengthy delays in deciding motions. For

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example, a motion filed on September 29 need not be decided until March 30 to avoid the CJRA report, and a motion filed on October 1 need not be decided until the next September 29 to avoid the CJRA report. Thus, judges can avoid having any motions on the report if they decide motions between 5 months and 29 days after they are filed and 11 months and 29 days after they are filed. What about a pilot that reduces these public reporting times to 3 months for motions and 2 years for cases?

- Following the European model, what about a pleading-only pilot for small cases – no discovery?

- Should we focus on a pilot that tests some of the unique aspects of state-court practice that have not been tested in federal court, such as Oregon's aggressive position on expert discovery, Utah's total-hours limits on depositions, or the abolishment or limitation of interrogatories?

- Is there an ESI-focused pilot that would be helpful? Perhaps making e-discovery specialists available in small and medium-sized cases and requiring parties in large cases to include ESI experts in the Rule 26(f) conference?

We look forward to receiving your thoughts at the November meeting.

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To: Rebecca Womeldorf

Cc: Simplified Procedures Pilot Project Subcommittee

From: Amelia Yowell, Supreme Court Fellow

Date: October 15, 2015

RE: CACM report on the CJRA pilot program

The Civil Justice Reform Act of 1990 (CJRA) outlined a series of case management principles, guidelines, and techniques to reduce cost and delay in civil litigation. To test these procedures, Congress established a pilot program in ten districts. Congress directed the Judicial Conference to commission an independent evaluation of the program,[1] study the results, and assess whether other districts should be required to implement the same case management principles. Report at 11. I've provided a brief summary of the Judicial Conference's May 1997 final report below,[2] with an emphasis on the topics that overlap with those discussed at the pilot project subcommittee's conference call on Friday, October 9, 2015.

The CJRA Pilot Program

The pilot program consisted of twenty district courts. Report at 14–15. To obtain representative results, the Judicial Conference did not allow districts to volunteer. *Id.* at 15. Instead, the Judicial Conference chose districts based on their "size, the complexity and size of their caseloads, the status of their dockets and their locations." *Id.* At least five districts were located in a metropolitan area. *Id.* Ten of the districts were "pilot districts,"[3] which were required to implement the following principles:

- Differentiated Case Management, where cases are sorted into expedited, standard, and complex tracks that have a specific set of procedures and time lines;

- Early and ongoing control of the pretrial process, including setting early dispositive motion and trial dates and controlling the extent of discovery;

[1] The RAND Corporation conducted the independent evaluation. Report at 15.

[2] The Judicial Conference delegated oversight responsibility to the Court Administration and Case Management Committee (CACM). Report at 12–13.

[3] The ten pilot courts were: the Southern District of California, the District of Delaware, the Northern District of Georgia, the Southern District of New York, the Western District of Oklahoma, the Eastern District of Pennsylvania, the Western District of Tennessee, the Southern District of Texas, the District of Utah, and the Eastern District of Wisconsin. Report at 15 n.5.

- "Careful and deliberate monitoring" of complex cases, including bifurcation of issues, early trial dates, a defined discovery schedule, and encouragement to settle;

- Encouraging voluntary exchange of information and the use of cooperative discovery techniques;

- Prohibiting the consideration of discovery motions, unless accompanied by a good faith certification; and

- Encouraging alternative dispute resolution programs

Id. at 15, 26–38. The Judicial Conference also asked the pilot districts to implement the following litigation management techniques:

- Requiring the submission of joint discovery plans;

- Requiring a representative with the power to bind the parties to be present at all pre-trial conferences;

- Requiring all requests for extensions of discovery deadlines or trial postponements to be signed by an attorney and the party;

- Implementing a neutral evaluation program to hold a nonbinding ADR-like conference early in the litigation; and

- Requiring a representative with the power to bind the parties to be present at all settlement conferences

Id. at 15, 39–44.

These pilot districts were compared with ten "comparison districts,"[4] which were not required to implement the above principles or techniques. *Id.* at 15. In total, the RAND Study compared over 12,000 cases in the pilot and comparison courts, as well as case cost and delay data from before and after implementation of the CJRA. *Id.* The Study also collected data from

[4] The ten comparison courts were: the District of Arizona, the Central District of California, the Northern District of Florida, the Northern District of Illinois, the Northern District of Indiana, the Eastern District of Kentucky, the Western District of Kentucky, the District of Maryland, the Eastern District of New York, and the Middle District of Pennsylvania. Report at 15 n.6.

five other districts,[5] which implemented "demonstration programs to test systems of differentiated case management and alternative dispute resolution." *Id.* at 9.

The Judicial Conference's Assessment and Recommendation

After review, the Judicial Conference cautioned against implementation of the pilot program nationwide, at least "as a total package." *Id.* at 2, 15. The Conference based its recommendation on the RAND Study's finding that the pilot project, as a whole, did not have a great impact on reducing cost and delay.[6] *Id.* at 26. Assessing these results, the Conference noted that "there is a need for individualized attention to each case that a 'one size fits all' approach cannot satisfy."[7] *Id.* at 46.

The RAND Study outlined six procedures that likely were effective in reducing cost and delay: (1) establishing early judicial case management; (2) setting the trial schedule early; (3) establishing shortened discovery cutoff; (4) reporting the status of each judge's docket; (5) conducting scheduling and discovery conferences by phone; and (6) implementing the advisory group process. *Id.* at 15–16.

Notably, the RAND Study did not address several important questions: (1) the possible differential impact of procedural reforms on small law firms, solo practitioners, and those serving under contingency fee arrangements; (2) the impact of front-loading litigation costs under accelerated case management programs; and (3) the effects of the procedural reforms on particular case disposition types. *Id*. at 45–46. In particular, the Study noted that "[r]eforms that actually increase costs for small and solo practitioners may frustrate the aims of the Act by lessening access to justice for low-income litigants or those with small claims." *Id.* at 46.

The following chart summarizes the relevant parts of the CJRA Pilot Program, the RAND Study's findings, and the Judicial Conference's resulting recommendation.

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[5] The Western District of Michigan and the Northern District of Ohio experimented with systems of differentiated case management while the Northern District of California, the Western District of Missouri, and the Northern District of West Virginia experimented with various methods of reducing cost and delay, including ADR. Report at 16–17.

[6] One reason for this may be that the judiciary had already adopted many of the CJRA's case management procedures. Report at 26.

[7] The RAND Study reported that "reduction of litigation costs is largely beyond the reach of court-established procedures because: (a) most litigation costs are driven by the impact of attorney perceptions on how they manage their cases, rather than case management requirements; and (b) case management accounts for only half of the observed reductions in 'time to disposition.'" Report at 46.

Tested Procedure	Findings	Recommendation
Differentiated case management using a "track" system Report at 26–28	· The districts sorted cases into expedited, standard, and complex tracks. · The districts employed a variety of identification methods; many courts used an automatic track assignment process based on subject matter outlined in the initial pleadings. · Districts encountered significant difficulties classifying cases at the pleading stage, especially when identifying and evaluating complex cases. Because of this difficulty, most districts placed the vast majority of cases in the "standard" track. · Many districts found that a judge's ability to tailor the management of each particular case was more effective than rigid case tracks.	· Some form of differentiated case management should be used. · However, track systems "can be bureaucratic, unwieldy, and difficult to implement." · Therefore, individual districts should determine on a local basis whether the nature of the caseload calls for a more rigid track model or a judicial discretion model.
Early judicial case management Report at 19, 29–31	· Early judicial case management included "any schedule, conference, status report, joint plan, or referral to ADR that occurred within 180 days of case filing. · Early case management alone significantly reduced time to disposition (by up to two months), but significantly increased lawyer work hours. · If early judicial intervention was combined with shortened discovery (from 180 days to 120 days), then lawyer work hours (and therefore cost) decreased.	· Courts should follow Rule 16(b), which requires entry of a scheduling order within 120 days and encourages setting an early and firm trial date as well as a shorter discovery period. · The Conference was "opposed to the establishment of a uniform time-frame, such as eighteen months, within which all trials must begin," mainly because a standard time line would slow down cases that could be resolved more quickly.

Early voluntary exchange of information and use of cooperative discovery techniques Report at 33–	· All pilot and comparison courts instituted some form of voluntary or mandatory early exchange of information. · It was difficult to analyze the effects of voluntary disclosure versus mandatory discovery. · Discovery deadlines were a major factor in decreasing the cost and length of litigation.	· The Judicial Conference did not find enough information in the RAND Study to make a specific recommendation about voluntary versus mandatory initial disclosures · The Committee on Rules of Practice and Procedure should re-examine the need for national uniformity in applying Rule 26(a).

Based on these results and recommendations, the Judicial Conference proposed the following alternative cost and delay procedures:

- Continued and increased use of district court advisory groups, composed of attorneys and other litigant representatives;
- Public reporting of court dockets;
- Setting early, firm trial dates and shorter discovery periods in complex cases;
- Effective use of magistrate judges;
- Increased use of chief judges in case management;
- Increased use of visiting judges to help with backlogged dockets;
- Educating judges and lawyers about case management, especially considering the RAND Study's finding that one of the primary drivers of litigation costs is attorney perception of case complexity; and
- Increased use of technology

Id. at 18–26.

The Judicial Conference also made several recommendations that required the action of Congress or the Executive branch. For example, the Conference pointed out that "a high number of judicial vacancies, and the delay in filling these vacancies, contribute substantially to cost and

delay." Report at 22. The Conference also noted that a court's ability to try cases in a timely manner depended on available courtrooms and facilities. *Id.* at 25.

SUPPLEMENT TO THE AGENDA BOOK

ADVISORY COMMITTEE
ON
CIVIL RULES

Salt Lake City, UT
November 5-6, 2015

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October 14, 2015

The Honorable Raner C. Collins
U. S. District Court for the District of Arizona
Evo A. DeConcini U.S. Courthouse
405 West Congress Street, Suite 5190
Tucson, AZ 85701-5051

Dear Chief Judge Collins,

I understand that a training has been scheduled for the judges in your courthouse on the proportionality amendment to the Federal Rules of Civil Procedure. I write to express my concerns about this training entitled *Hello "Proportionality," Goodbye "Reasonably Calculated": Reinventing Case Management and Discovery Under the 2015 Civil Rules Amendments* and to ask Your Honor to consider not holding it.

As Your Honor may be aware, Judge Lee Rosenthal and Professor Steven Gensler, who served respectively as the chair of the advisory and standing committees and as a member of the advisory committee, will lead these trainings. In brief, they will use guidelines and practices, which were generated through Duke Law School's privately-funded Center for Judicial Studies, to train judges on how the rules should be interpreted. It is my opinion based on the law that the trainings are inappropriate under the Rules Enabling Act ("REA").

I have enclosed a copy of the eleven-page set of private guidelines and practices ("private guidelines"). Also enclosed is a copy of the proportionality amendment. In the program in Your Honor's courthouse, these eleven pages of private guidelines will be used to train your judges on this less than one sentence amendment.

As illustrated on diagram A, the guidelines are the result of a private corporate sponsored initiative. Through a parallel process designed to be akin to the rulemaking process under the Rules Enabling Act, this private initiative has attempted to portray itself as part of the official rulemaking process. It includes the same types of steps, including a so-called public commentary period. However, it is far from a public process like the rule-making process under the REA. For example, the private process started with an expensive "Invitation Only" conference which groups such as the NAACP Legal Defense Fund were unable to attend. Moreover, the corporate sponsors include companies that testified in the public commentary period about the proportionality rule. https://law.duke.edu/judicialstudies/sponsors/

As depicted on diagram B, the official process is supposed to be from A to B; the rule is adopted and judges interpret it. Instead, now, there is an attempt for the process to be from A

to X to B; the rule is adopted, private guidelines are formed, and judges are told to follow these guidelines. As illustrated on diagram B, this new process is even more problematic given that several judges, including current advisory committee members and/or those who were involved in proposing the original rule to the standing committee, are involved in the private guideline process.

The webpage on the federal courthouse trainings describes Judge Rosenthal and Professor Gensler chiefly in relationship to their advisory committee and standing committee affiliations, which again gives the training an imprimatur of approval. If the trainings on the guidelines continue, I believe a congressional hearing on this matter is warranted.

In the past, I wrote to Judge Campbell, the outgoing chair of the Advisory Committee, Judge Sutton, the chair of the Standing Committee, and Judge Bates, the newly-seated chair of the Advisory Committee about my concerns. Judge Campbell stated that the Advisory Committee was not part of this private guideline process, and the Committee did not propose the trainings.

To reiterate my concern: federal judges should not be trained on privately generated, corporate sponsored guidelines on any rules, including the proportionality rule.

Sincerely,

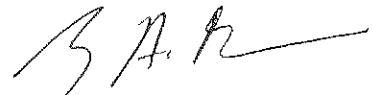

Suja A. Thomas
Professor

cc: (Original letters and enclosures were sent to the following thirteen Chief Judges where trainings are scheduled: Judges Loretta A. Preska, Petrese B. Tucker, Jerome B. Simandle, Catherine D. Perry, Thomas W. Thrash, Jr., Ruben Castillo, Richard W. Roberts, George H. King, Phyllis J. Hamilton, Raner C. Collins, Marcia S. Krieger, Jorge A. Solis, K. Michael Moore.)
Senator Chuck Grassley, Chairman, United States Senate Committee on the Judiciary (copy of one letter and enclosures)
Congressman Bob Goodlatte, Chairman, United States House Committee on the Judiciary (copy of one letter and enclosures)
Senator Patrick Leahy, Ranking Member, United States Senate Committee on the Judiciary (copy of one letter and enclosures)
Congressman John Conyers, Jr., Ranking Member, United States House Committee on the Judiciary (copy of one letter and enclosures)
The Honorable John Roberts, Jr. (copy of one letter and enclosures)
The Honorable Lee H. Rosenthal (copy of one letter and enclosures)
Professor Steven S. Gensler (copy of one letter and enclosures)
The Honorable Jeffrey Sutton (copy of one letter and enclosures)
The Honorable David G. Campbell (copy of one letter and enclosures)
The Honorable John D. Bates (copy of one letter and enclosures)

Diagram A

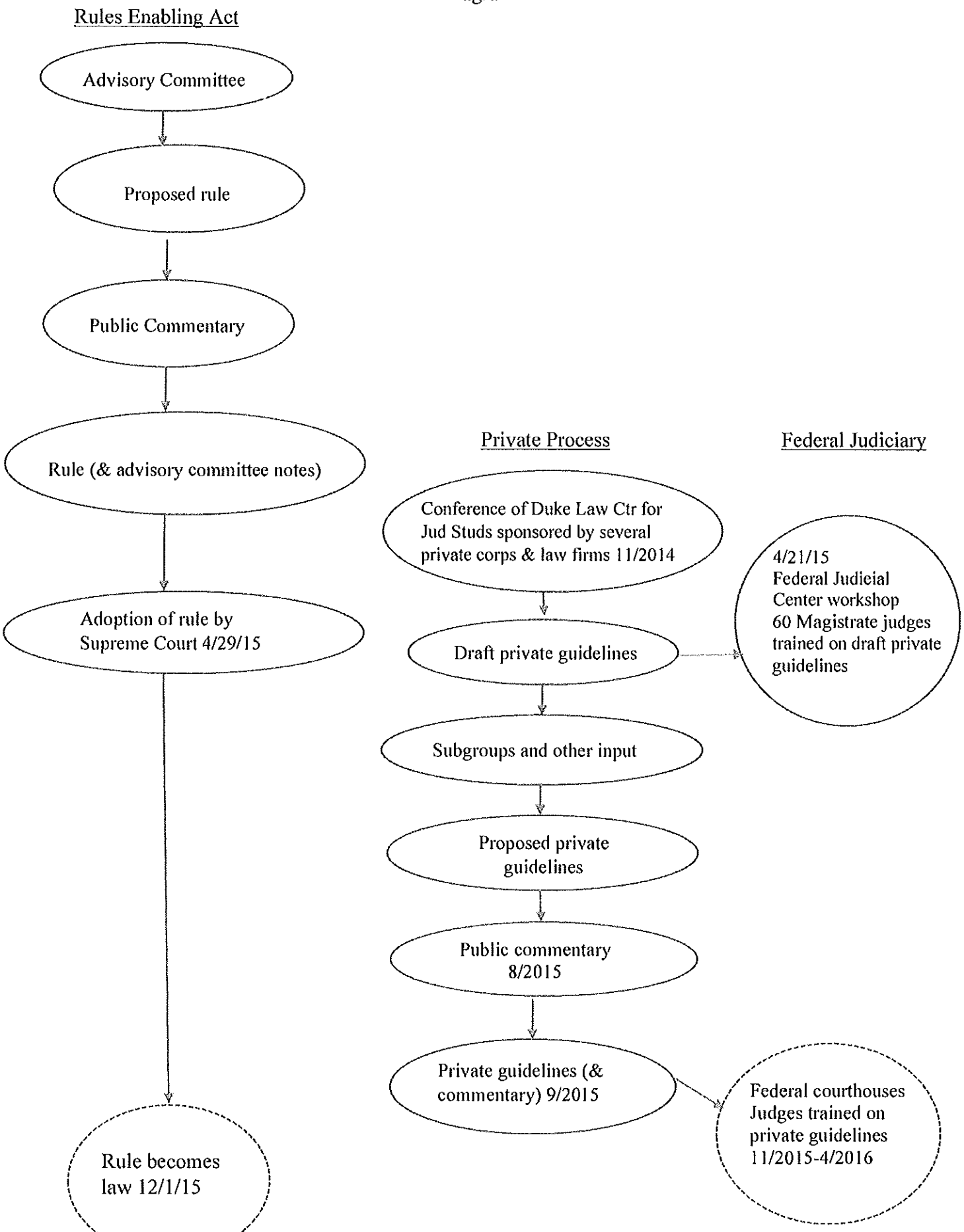

125-001468

Diagram B

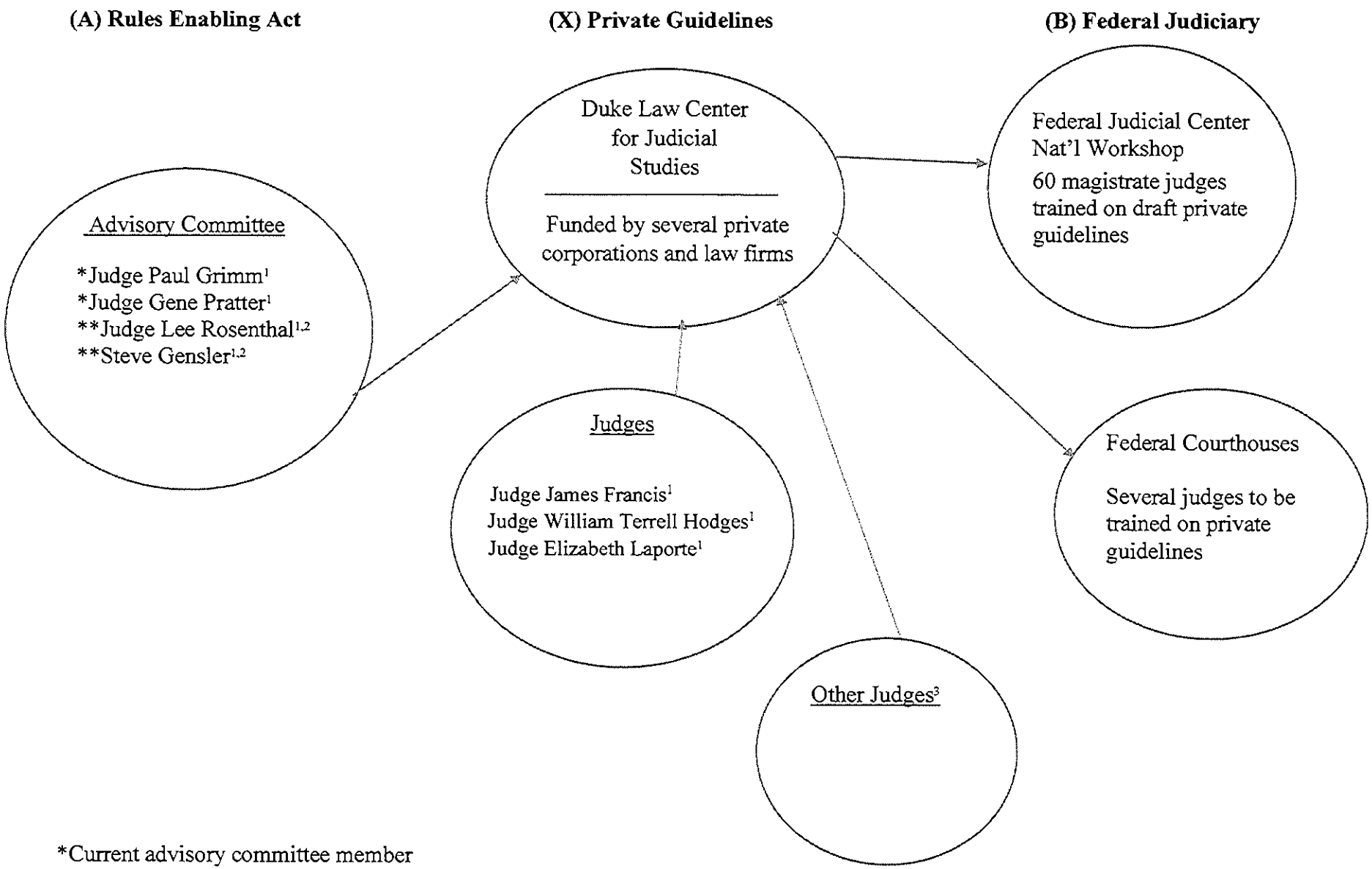

*Current advisory committee member
**Advisory committee member while proportionality was discussed

[1] Member of Duke group forming private guidelines
[2] Drafter of private guidelines
[3] Other input into private guidelines (may have current or former ties to a Committee under Rules Enabling Act)

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * * * *

(b) Discovery Scope and Limits.

(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

125-001470

Information within this scope of discovery need not be admissible in evidence to be discoverable.

(2) ***Limitations on Frequency and Extent.***

* * * * *

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

* * * * *

(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

* * * * *

(c) Protective Orders.

(1) ***In General.*** A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending —

125-001471

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

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REBECCA WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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APPELLATE RULES

SANDRA S. IKUTA
BANKRUPTCY RULES

JOHN D. BATES
CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

WILLIAM K. SESSIONS, III
EVIDENCE RULES

October 26, 2015

The Honorable Raner C. Collins

Dear Chief Judge Collins:

You recently received a letter from Professor Suja Thomas concerning a conference hosted by the Duke Center for Judicial Studies and the ABA Section of Litigation and scheduled to be held in your courthouse during the next few months about proposed amendments to the Federal Rules of Civil Procedure. We too received copies of the letter. In our capacities as the chair of the Judicial Conference Committee on Rules of Practice and Procedure (the Standing Committee) and the current and past chairs of the Advisory Committee on the Federal Rules of Civil Procedure, we wish to respond. The key points are these: The conferences do not involve official "judge" "training" of any sort, which remains the province of the Federal Judicial Center, and the Rules Committees do not endorse the "guidelines" developed by the Duke Center about the proposed amendments to the Civil Rules and any such guidelines are not part of the amendments or the Committee Notes to them.

Professor Thomas correctly points out that the Rules Enabling Act calls for amendments to the Federal Rules of Civil Procedure to be promulgated through a public and independent process of open meetings, publicly available committee materials, and public hearings. When it comes to the 2015 package of Civil Rules amendments currently in front of Congress, that process has been followed but is not complete. The Supreme Court approved the package last Spring, and it is slated to go into effect on December 1, 2015, absent congressional action.

If the current rules package goes into effect later this year, the Standing Committee and the Civil Rules Committee, in conjunction with the Federal Judicial Center, plan to educate judges and lawyers about the amendments. In particular, we hope to use judicial conferences over the next year or two to inform the bench and bar about these important changes to the Civil Rules. We expect other groups will devote conferences to the amendments as well, as they often do for important changes to the rules. That is not unusual or to be discouraged. Nor is it unusual (or to be discouraged) to have past and present members of the Rules Committees participate in

these kinds of events so long as they make clear that they do not speak for the Committees. Whether it is the ABA, the FBA, the ALI, the Institute for the Advancement of the American Legal System, the National Employment Lawyers Association, the Sedona Conference, the Duke Center for Judicial Studies, or any other bar, private, or university-related entity, all of them have something to offer when it comes to informing the legal community about significant rules changes. In that respect, we are grateful for their efforts in furthering our shared goal of a well-functioning legal system.

Professor Thomas does not appear to be concerned about these traditional methods of educating the bench and bar about rules amendments. Her concern instead seems to be twofold: (1) that the Duke Center is a private entity that has engaged groups from the legal community, including a few members of the Rules Committees, to draft guidelines for application of some of the new rule amendments; and (2) that the Center is using its 13 conferences to "train judges" about the amendments. Taken together, she believes, these two features of Duke's efforts create a Rules Enabling Act problem.

With all respect to Professor Thomas, we see no Rules Enabling Act problem. In the first place, the Duke Center is indeed a private entity. Its guidelines are not part of the new rules or the committee notes that accompany the rules, and they have not been endorsed by the Standing Committee or Advisory Committee. We understand that the introduction to the guidelines states that they do not represent the views of any Judicial Conference committee and are not part of the rules. In the second place, the conferences do not involve any form of official judicial training. Such training is the province of the federal courts, usually in conjunction with the FJC, and will begin after December 1, 2015, assuming Congress permits the new Civil Rules to go into effect. Although the Rules Committees have had no role in planning the conferences addressed in Professor Thomas's letter, we understand them to be CLE conferences sponsored by the ABA Litigation Section and the Duke Center. The conference website suggests that they are publicly open events with a variety of presenters, like many other CLE events being held with respect to the new rules. See www.frcpamendments2015.org.

That said, judges and present and former Rules Committee members should take the same precautions with regard to these conferences that they take with all similar conferences. The first is to respect the Rules Enabling Act process, which is not over. Congress has until December 1, 2015, to reject or modify the amendments. If federal judges and past and present Rules Committee members participate in such conferences before December 1, they should emphasize that the rules have not yet gone into effect and Congress may modify or reject them before December 1.

A second step is to make clear that the Duke guidelines and any presentation at the conferences do not come with the imprimatur of the Rules Committees. The Duke Center, like other groups, is free to hold conferences or propose guidelines with respect to the rules or any other area of law. But they are not entitled to communicate, or suggest, that they bear the stamp of approval of the Rules Committees.

As for whether the conferences should be held in federal courthouses, that of course is a choice for each Chief Judge and each court. If similar events are held in your courthouse, it is difficult to understand why this kind of conference cannot occur there. See Guide to Judiciary Policy, Vol. 2B, Chap. 3, section 4.7-1(d). The choice whether to attend a conference as a member of the audience is for each judge to make—just as it would be with respect to any other conference sponsored by a private organization.

We request that you share this letter with the judges in your district to make clear that the Rules Committees do not endorse the Duke Center's guidelines and are not sponsors of these conferences, and that the conferences are not any sort of committee- or judiciary-sanctioned "training" for judges. Please feel free to contact any of us if you have further questions.

Judge Jeffrey S. Sutton

Judge John D. Bates Judge David G. Campbell

cc: Senator Chuck Grassley
Congressman Bob Goodlatte
Senator Patrick Leahy
Congressman John Conyers, Jr.
The Honorable John G. Roberts, Jr.
The Honorable Lee H. Rosenthal
Professor Steven S. Gensler
James C. Duff, Director
Professor Suja A. Thomas

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
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WASHINGTON, D.C. 20544

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DONALD W. MOLLOY
CRIMINAL RULES

WILLIAM K. SESSIONS, III
EVIDENCE RULES

October 26, 2015

Professor Suja A. Thomas
University of Illinois
College of Law
504 East Pennsylvania Avenue
Champaign, Illinois 61820

Dear Professor Thomas:

We have received your letter concerning conferences scheduled at courthouses in several cities. We write to share our views on some of the concerns you have raised.

You are correct that the Rules Enabling Act calls for amendments to the Federal Rules of Civil Procedure to be promulgated through a public and independent process of open meetings, publicly available committee materials, and public hearings. The 2015 rules amendments were adopted through that process.

We know that the Duke Center for Judicial Studies has engaged groups from the legal community to draft "guidelines" for application of some of the new discovery rule amendments. Those guidelines are not part of the new rules or the committee notes that accompany the rules, and have received no approval by the Standing Committee or Advisory Committee. We understand and share your view that no private group should have, or appear to have, too close a connection to the rules committee. For that reason, after earlier communications from you, we specifically asked the Duke Center to include a statement in the guidelines stating that they do not represent the views of any judicial conference committee. We also reminded members of the Advisory Committee of the need to preserve the committee's independence, both in fact and in appearance.

We understand that the conferences addressed in your letter are being sponsored by the ABA Section of Litigation and the Duke Center. Your letter suggests that the purpose of the conferences is to "train judges." That is not our understanding of their purpose. From the conference website, we understand the conferences to be public CLE events for the bar with a variety of presenters covering a range of perspectives, like many other CLE events being held with respect to the new rules. To avoid any confusion on this issue, however, we have sent a letter to the Chief Judges addressed in your letter making clear that the conferences are not "judge training" in any form. We also have asked that our letter be shared with all judges in the districts where the conferences will be held. A copy of the letter is enclosed.

As you know, many bar associations and other groups hold conferences to discuss civil litigation issues, including the civil rules amendments. In our experience, it is not unusual for bar groups to hold CLE conferences at federal courthouses. Present and past members of the advisory committee have participated in a wide range of CLE conferences, and we have not thought that inappropriate. They appear as individuals, not as representatives of the committee, and they often find such conferences informative and helpful in their work as lawyers, judges, and committee members.

In summary, the Standing and Advisory Committees are not sponsoring or endorsing the conferences mentioned in your letter, and the Duke guidelines are not part of the civil rules or their committee notes and have received no approval from the Standing or Advisory Committees. We have tried to make these points as clearly as we could in the letter sent to Chief Judges and others today.

Thank you for your continuing interest in the rules process.

Sincerely,

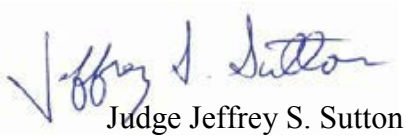
Judge Jeffrey S. Sutton

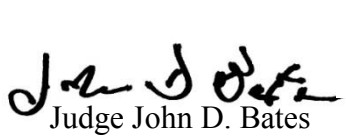
Judge John D. Bates

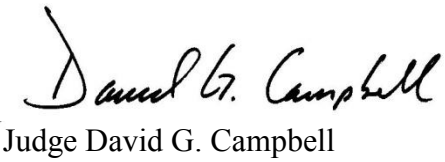
Judge David G. Campbell

MINUTES

CIVIL RULES ADVISORY COMMITTEE

NOVEMBER 5, 2015

The Civil Rules Advisory Committee met at S.J. Quinney College of the Law at the University of Utah on November 5, 2015. (The meeting was scheduled to carry over to November 6, but all business was concluded by the end of the day on November 5.) Participants included Judge John D. Bates, Committee Chair, and Committee members John M. Barkett, Esq.; Elizabeth Cabraser, Esq.; Judge Robert Michael Dow, Jr.; Judge Joan M. Ericksen; Dean Robert H. Klonoff; Judge Scott M. Matheson, Jr.; Hon. Benjamin C. Mizer; Judge Brian Morris; Justice David E. Nahmias; Judge Solomon Oliver, Jr.; Judge Gene E.K. Pratter; Virginia A. Seitz, Esq. (by telephone); and Judge Craig B. Shaffer. Former Committee Chair Judge David G. Campbell and former member Judge Paul W. Grimm also attended. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Judge Jeffrey S. Sutton, Chair, Judge Neil M. Gorsuch, liaison, Judge Amy J. St. Eve (by telephone), and (also by telephone) Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge Arthur I. Harris participated as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., the court-clerk representative, also participated. The Department of Justice was further represented by Theodore Hirt, Esq.. Rebecca A. Womeldorf, Esq., Amelia Yowell, Esq., and Derek Webb, Esq. represented the Administrative Office. Emery G. Lee, III, attended for the Federal Judicial Center. Observers included Jerome Scanlan, Esq. (EEOC); Joseph D. Garrison, Esq. (National Employment Lawyers Association); Brittany Kaufman, Esq. (IAALS); Alex Dahl, Esq. and Mary Massaron, Esq. (Lawyers for Civil Justice); John K. Rabiej, Esq.; John Vail, Esq.; Valerie M. Nannery, Esq. (Center for Constitutional Litigation); and Ariana Tadler, Esq..

Judge Bates opened the meeting by greeting new members, Judge Ericksen and Judge Morris.

Judge Bates also noted the presence of former Committee member Judge Grimm and former Committee Chair Judge Campbell. They, and Judge Diamond who rotated off the Committee at the same time, contributed in many and invaluable ways to the Committee's work. Looking to the package of rules amendments that are pending in Congress now, Judge Grimm chaired the Discovery Subcommittee and was a member of the Subcommittee chaired by Judge Koeltl that worked through proposals generated by the Committee's 2010 Conference on reforming the rules. Judge Campbell has devoted a decade to Committee work, and continues with the work on pilot projects and on educating bench and bar in what we hope will, on December 1, become the 2015 amendments. The Reporters also described the many lessons in drafting, practice, and wisdom they had learned in working closely with Judge Campbell as chair of the Discovery Subcommittee and then Committee Chair.

Judge Bates concluded these remarks by observing that the new members would soon witness the Committee's determination to work toward consensus in its deliberations. The package of amendments now pending in Congress emerged from a remarkable level of agreement even on the details. Judge Campbell's strong and tireless leadership was demonstrated at every turn. Professor Coquillette "seconded" all of this high praise.

Judge Campbell expressed appreciation for the "overly kind comments." He noted that special praise is due to Judge Grimm for contributions "as substantial as anyone," especially in chairing the Discovery Subcommittee. He emphasized that the Committee is indeed a collaborative group. It is the profession's best example of collective thinking, good-faith effort, and agenda-less work. Every member who moves into alumnus standing has expressed this view. The Reporters provide excellent support. Judge Bates and Judge Sutton will carry the work forward in outstanding fashion.

Judge Campbell also noted that in 1850 his great-great grandparents came to the valley where the Committee is meeting as Mormon pioneers. Robert Lang Campbell became the first Commissioner of Public Education and was a regent of the University of Deseret, a progenitor of the University of Utah. "The University is home to me and my family."

Dean Robert W. Adler welcomed the Committee to the Law School and its new building. The new building is designed both to improve the learning experience and to advance the Law School's involvement with the community. He noted that as a professor of civil procedure he always demands that his students read the Committee Notes as they study each rule. "You can see the lights going off in their heads" as they read the Notes and come to understand that there is more in the rule texts than may appear on first reading.

April 2015 Minutes

The draft minutes of the April 2015 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

Standing Committee and Judicial Conference

Judge Campbell reported on the May meeting of the Standing Committee and the September meeting of the Judicial Conference.

The Standing Committee meeting went well. There was a good discussion of pilot projects.

At the Judicial Conference, the Chief Justice invited Judge Sutton and Judge Campbell to present a summary of the amendments now pending in Congress. They urged the Chief Judges to offer programs to explain to judges and lawyers the nature and importance of these

100 amendments in the hoped-for event that they emerge from Congress.
101
102 The Judicial Conference approved and sent to the Supreme Court
103 amendments to Rule 4(m) dealing with service on corporations and other
104 entities outside the United States; Rule 6(d), clarifying that the
105 "3-added-days" provision applies to time periods measured after "being
106 served," and eliminating from the 3-added days service by electronic
107 means; and Rule 82, synchronizing it with recent amendments of the
108 venue statutes as they affect admiralty and maritime cases.
109
110 *Legislative Report*
111
112 Rebecca Womeldorf provided the legislative report for the
113 Administrative Office. Two familiar sets of bills have been introduced
114 in this Congress.
115
116 The Lawsuit Abuse Reduction Act of 2015 (LARA) has passed in the
117 House. It would amend Rule 11 by reinstating the essential aspects of
118 the Rule as it was before the 1993 amendments. Sanctions would be
119 mandatory. The safe harbor would be removed. This bill has been
120 introduced regularly over the years. In 2013 Judge Sutton and Judge
121 Campbell submitted a letter urging respect for the Rules Enabling Act
122 process, rather than undertake to amend a Civil Rule directly. The
123 prospects for enactment remain uncertain.
124
125 H.R. 9, the Innovation Act, embodies patent reform measures like
126 those in the bill that passed in the House last year. There are many
127 provisions that affect the Civil Rules. Parallel bills have been
128 introduced in the Senate, or are likely to be introduced. The earlier
129 strong support for some form of action seems to have diminished for
130 the moment.
131
132 A proposed Fairness in Class Action Litigation Act would directly
133 amend Rule 23. A central feature is a requirement that each proposed
134 class member suffer an injury of the same type and scope as every other
135 class member. The ABA opposes this bill.
136
137 *Publicizing the Anticipated 2015 Amendments*
138
139 Judge Grimm described the work of the Subcommittee that is seeking
140 to support programs that will educate members of the bench and bar in
141 the package of rules that will become law on December 1 unless Congress
142 acts to modify, suspend, or reject them.
143
144 The 2010 Conference emphasized themes that have persisted through
145 the ensuing work to craft these amendments. Substantial reductions in
146 cost and delay can be achieved by proportionality in discovery and all
147 procedure, cooperation of counsel and parties, and early and active
148 case management. These concepts have been reflected in the rules since
149 1983. They have been the animating spirit of succeeding sets of rules
150 amendments. The need for yet another round of amendments has suggested
151 that amending the rules is not always enough to get the job done. So

152 it was decided that the amendments should be advanced by promoting
153 efforts to bring them home to members of the bench and bar by focused
154 education programs. Work on the programs is progressing.
155
156 Five videotapes are being prepared. They will be structured in
157 segments, facilitating a choice between a single viewing and viewing
158 at intervals. Judge Fogel and the FJC have been a wonderful resource.
159 Tapes by Judge Koeltl and Judge Grimm have been made. The remaining
160 tapes will be made on November 6.
161
162 Letters from Judge Sutton and Judge Bates will alert district
163 judges to the new rules. A powerpoint presentation is being prepared.
164
165 Bar organizations have been encouraged to prepare programs. The
166 ABA has done one, and will do more; John Barkett is participating. The
167 American College of Trial Lawyers has planned a program. The Fifth
168 Circuit and Eighth Circuit will have programs; it is hoped that other
169 circuits will as well.
170
171 Many articles are being written. Judge Campbell has prepared one
172 for Judicature. Professor Gensler, a former Committee member, has
173 prepared a very good pamphlet.
174
175 One indication of the value of educational efforts is provided
176 by a poll Judge Grimm undertook. He asked 110 judges — 68 Magistrate
177 Judges and 42 District Judges — whether they actively manage discovery
178 from the beginning of an action or, instead, wait for the parties to
179 bring disputes to them. More than 80% replied that they wait for
180 disputes to emerge. "We hope to educate them that early management
181 reduces their work."
182
183 One caution was noted. The Duke Center for Judicial Studies has
184 convened a group of 30 lawyers, evenly divided between 15 who regularly
185 represent plaintiffs and 15 who regularly represent defendants, to
186 prepare a set of Guidelines on proportionality. Some present and former
187 Committee members reviewed drafts. These guidelines will be used in
188 13 conferences planned by the ABA and the Duke Center that aim to
189 advance the practice of proportionality. The first conference will be
190 held next week, a few weeks before we can know that the proposed
191 amendments will in fact take hold. Professor Suja Thomas has expressed
192 concern that these guidelines will be used to "train" judges, and to
193 be presented in a way that casts an aura of official endorsement. In
194 response to this concern, Judges Sutton, Bates, and Campbell have sent
195 out a letter to federal judges making it clear that the guidelines are
196 not endorsed by the rules committees. The letter also notes that these
197 conferences are not being used to "train" judges.
198
199 Judge Sutton noted that December 1 has not yet arrived. "We must
200 be very careful to show that we are not presuming Congress will approve
201 the amendments." It is appropriate to anticipate the expected birth
202 of the amendments by preparing to encourage implementation from and
203 after December 1. And it is appropriate to participate in programs that

204 are presented before December 1 if it is made clear that the amendments
205 remain pending in Congress and will become law only if Congress does
206 not intervene by December 1. It is proper for Committee members and
207 former Committee members to participate in these educational programs,
208 but it is important to continue the tradition that no favoritism should
209 be shown among the outside groups that organize the programs. An
210 invitation should be accepted only if the same invitation would be
211 accepted had it been extended by a different organization. And, as
212 always, it is important to emphasize both in opening and in closing
213 that no member speaks for the Committee.
214
215 Judge Campbell noted that the Duke Center has invested great
216 effort in promoting the new rules. "We should be grateful." It is
217 unfortunate that Professor Thomas has become concerned that the Center
218 is too closely connected to the Committee. It continues to be important
219 that all branches of the profession, teaching, practicing, and
220 judging, understand that the Committee is in fact independent of all
221 outside groups. The letter to federal judges is designed to provide
222 reassurance.
223
224 Judge Bates echoed this appreciation of the Duke Center's efforts.
225
226 John Rabiej noted that the Duke Center says, explicitly and
227 repeatedly, that the Guidelines are not binding. They are only
228 suggestions. And they emerged from a working group evenly divided
229 between plaintiff interests and defense interests.
230
231 A Committee member noted that she observed e-mail traffic,
232 including messages focused on the Duke Center's involvement, that
233 reflects a widespread perception that the rules result from an
234 adversary process in which "someone wins and someone loses." That wrong
235 impression is unfortunate. "The rules are for everyone." As a private
236 person, she tells people that the best course is to read the rules and
237 Committee Notes. Practicing lawyers may be forgiven for misperceiving
238 the process because they are largely unaware of it. But it is difficult
239 to forgive similar ignorance when it is shown by academics — within
240 the last few weeks she had occasion to ask a civil procedure teacher
241 what he thought of the pending amendments and he asked "what
242 amendments"?
243
244 Another Committee member observed that it is a good process. The
245 2010 Conference contributed a lot. But it remains important to stress,
246 without overdoing it, that the Duke guidelines are not ours.
247
248 Another Committee member underscored the importance of making it
249 clear that members do not speak for the Committee. "I always do it."
250 But it also is important to emphasize that the Committee is seeking
251 to achieve the effective administration of justice.
252
253 Yet another member noted that at least some judges are uncertain
254 whether it is appropriate to attend the ABA-Duke Center presentations.
255 Reassurances would be helpful.

256
257 *Rule 23*
258
259 Judge Bates introduced the Rule 23 proposals by noting that the
260 Class-action Subcommittee has been working with extraordinary
261 intensity. Over the course of the summer he participated in 10
262 Subcommittee conference calls working on the substance of the
263 proposals, and there was much other traffic by messages and calls on
264 incidental matters. Judge Dow and Professor Marcus deserve much credit
265 for pushing things along.
266
267 For today, the goal is to form a good idea of which proposals
268 should move forward. It may be possible to work on some specifics, but
269 "this is not the final round." The Committee will report to the Standing
270 Committee in January. By this Committee's meeting next April we may be
271 in a position to make formal recommendations for publication in 2016.
272 For today, we can view the package as a whole. Much of it deals with
273 settlements.
274
275 Judge Dow introduced the Subcommittee report by noting that it
276 presents 11 items for discussion, generally with illustrative rule
277 text and committee notes.
278
279 Six topics are recommended for continuing work: "frontloading"
280 the initial presentation of a proposed settlement; adding a provision
281 to Rule 23(f) to ensure that appeal by permission is not available from
282 an order approving notice of a proposed settlement; amending Rule
283 23(c)(1) to make it clear that the notice of a proposed settlement
284 triggers the opt-out and objection process, even though the class has
285 not yet been certified; emphasizing opportunities for flexible choice
286 among the means of notice; establishing a requirement that a court
287 approve any payment to be made in connection with withdrawing an
288 objection to a settlement or withdrawing an appeal from denial of an
289 objection, along with provisions coordinating the roles of district
290 courts and circuit courts of appeals when dismissal of an appeal is
291 involved; and expanding the rule text criteria for approving a proposed
292 settlement.
293
294 One topic, adoption of a separate provision for certifying a
295 settlement class, is presented for discussion, although the
296 Subcommittee is not inclined to move toward adopting such a provision.
297
298 Two other topics are on hold. Each awaits further development in
299 the courts. One is "ascertainability," a set of questions that are
300 percolating in the circuits. The other is the use of Rule 68 offers
301 of judgment or other settlement offers as a means of attempting to moot
302 a class action by "picking off" all class representatives; this
303 question has been argued in the Supreme Court, and any further
304 consideration should await the decision.
305
306 Finally, the Subcommittee recommends that two other topics be
307 removed from present work. One is "cy pres" awards in settlements. The

308 other is any attempt to address the role of "issue" classes. The reasons
309 for setting these topics aside will be developed in the later
310 discussion.
311
312 Frontloading: Draft Rule 23(e)(1) tells the court to direct notice of
313 a proposed class settlement if the parties have provided sufficient
314 information to support a determination that giving notice is justified
315 by the prospect of class certification and approval of the settlement.
316 The basic idea was developed in response to discussion at the George
317 Washington conference described in the Minutes for the April meeting,
318 and with help from an article by Judge Bucklo about the things judges
319 need to know about a proposed class settlement but often do not know.
320 The information will enable the judge to determine whether notice to
321 the class is justified. If the class has not already been certified,
322 the notice will be in the form required by Rule 23(c)(2) — for a (b)(3)
323 class, it will trigger the opportunity to request exclusion, and for
324 all classes it will provide a basis for appearing and for objecting
325 to the proposed settlement. These purposes are best served by detailed
326 notice of the terms of settlement. Many courts follow essentially this
327 practice now, but express rule text will advance the best practice for
328 all cases.
329
330 This proposal begins by adding language to the initial part of
331 Rule 23(e)(1), making it clear that court approval is required to
332 settle the claims not only of a certified class but also of a class
333 that is proposed for certification at the same time as the settlement
334 is approved.
335
336 The frontloading concept was presented to the September
337 miniconference in the form of rule text that listed 14 kinds of
338 information the parties should provide. This "laundry list" approach
339 met a lot of resistance. There is constant fear that an official list
340 of factors will be diluted in practice to become a simple check-list
341 that routinely checks off each factor without distinguishing those
342 that are important to the specific case from those that are not. The
343 present draft channels all these factors into an open-ended behest that
344 the parties provide "relevant" or "sufficient" information. Perhaps
345 some other descriptive word should be found to emphasize the purpose
346 to provide as much as possible of the information that will be presented
347 on the motion for final approval. This approach, leaving it to the court
348 and parties to identify and focus on the considerations that bear on
349 a particular proposed settlement, seemed to win support at the
350 miniconference. The Committee Note can go a long way toward calling
351 attention to the multiple factors that appeared in the "laundry list"
352 draft.
353
354 Judge Dow noted that the sophisticated lawyers who bring class
355 actions in his court commonly provide the kinds of information required
356 by the proposal. But not all lawyers do it. "The less sophisticated
357 practitioners need" more guidance in the rule.
358
359 Judge Dow further noted that the proposed rule text does not

360 address the question of what to do with the residue of the relief a
361 class defendant agreed to when not all class members make claims. It
362 would be possible to say something on this score, and to support the
363 rule text with a Committee Note that identifies the factors included
364 in the original laundry list rule draft. Professor Marcus added that
365 the Note attempts "to identify, advocate, convey." It does not say that
366 all 14 factors need be checked off every time.
367
368 A Committee member said that the draft rule reflects what has
369 become "procedural common law." Judges created this procedure. The
370 Manual for Complex Litigation adopts it. When the parties present a
371 proposed settlement for approval in an action that has not already been
372 certified as a class, the practice calls for "preliminary approval"
373 of certification and settlement, notice to the class with opportunity
374 to opt out or object, and final approval. Many experienced lawyers and
375 judges believe that Rule 23 says this. "The proposal is to have the
376 rule say what many think it says now." But too often, in the hands of
377 those who are not familiar with Rule 23 practice, the important
378 information comes out too late. Yet the draft is ambiguous in calling
379 for relevant information about the proposed settlement — is this
380 information about the quality of the settlement, or does it include
381 information about the reasons for certifying any class and about proper
382 class definition? The response was to point to the statement in the
383 draft Committee Note that "[o]ne key element is class certification."
384 But perhaps more could be said in the rule text.
385
386 A drafting question was raised: would it be better to begin in
387 this form: "The court must direct notice," etc., if the parties have
388 provided the required information and if the court determines that
389 giving notice is justified, etc.? And is either of the alternative
390 words used the best that can be found to describe the quantity and
391 quality of information that must be provided? "'Relevant' calls to mind
392 the scope-of-discovery provision in rule 26(b)(1)." The answer was
393 recognition that work will continue on the drafting. The earlier draft
394 that set out 14 factors was troubling because in many cases several
395 of the 14 "do not matter." But drafting a more open-ended approach is
396 a work in progress.
397
398 This answer prompted the reflection that "the information
399 relevant is quite different from one type of action to another." A
400 complex antitrust action may call for quite different types of
401 information than will be called for in an action involving a single
402 form of consumer deception.
403
404 A similar style suggestion was offered: "I like better rules that
405 tell the parties to do things," rather than "rules that tell the court
406 to do things." The purpose of this rule is to tell the parties to provide
407 more information. Such was the approach taken in the 14-factor draft,
408 set out at p. 189 in the agenda materials: when seeking approval, "the
409 settling parties must present to the court" all of the various
410 described items of information.
411

412 A finer-grained drafting comment also was made. The draft simply
413 grafts a reference to a proposed settlement class into the present text
414 of subdivision (e)(1):
415
416 The claims, issues, or defenses of a certified class, or a class
417 proposed to be certified as part of a settlement, may be
418 settled, voluntarily dismissed, or compromised only with
419 the court's approval. * * *
420
421 There is a miscue — the proposal described in the new operative text
422 is only to settle, not to voluntarily dismiss or compromise the action.
423 The broader sweep that includes voluntary dismissal or compromise fits
424 better with the class that has already been certified. It would be
425 better to separate this into separate parts: "The claims, issues, or
426 defenses of a certified class may be settled, voluntarily dismissed,
427 or compromised only with the court's approval; the claims, issues, or
428 defenses of a class proposed to be certified as part of a settlement
429 may be settled only with the court's approval. The following procedures
430 apply in seeking approval: * * *.
431
432 Judge Dow concluded the discussion by observing that the
433 Committee agrees that the frontloading proposal should be pursued
434 further, with work to refine the drafting. The rule will speak to the
435 parties' duty to provide information, and other improvements will be
436 made.
437
438 Rule 23(f): This proposal would add a new sentence to the Rule 23(f)
439 provision for appeal by permission "from an order granting or denying
440 class-action certification": "An order under Rule 23(e)(1) may not be
441 appealed under Rule 23(f)." The concern arises from the common practice
442 that refers to "preliminary certification" of a class when the court
443 approves notice to the class. An appeal was attempted at this stage
444 in the NFL concussion litigation; the Third Circuit decided not to
445 accept the appeal. But the possibility remains that appeals will be
446 sought in other cases. And the sense is that there should be only one
447 opportunity for appeal, at least as to a single grant of certification.
448
449 This introduction generated no further discussion. It was noted
450 later, however, that the Department of Justice continues to study a
451 proposal to expand the time available to ask permission to appeal under
452 Rule 23(f) when the request is made in actions involving the United
453 States or its officers or employees. The Department expects to have
454 a concrete proposal ready fairly soon.
455
456 Rule 23(c)(2)(B): This proposal is intended to solidify the practice
457 of sending out notice to the class before actual certification when
458 a proposed settlement seems likely to be approved:
459
460 For any class certified under Rule 23(b)(3), or upon ordering
461 notice under Rule 23(e)(1) to a class proposed to be
462 certified [for settlement] under Rule 23(b)(3), the court
463 must direct to class members the best notice practicable

464 under the circumstances * * *.
465
466 Judge Dow noted that sending out notice before certification and
467 approval of the settlement is intended to accomplish the purposes of
468 notice in a (b)(3) class, including establishing the deadline to
469 request exclusion and affording the opportunities to enter an
470 appearance and to object. This is consistent with present practice.
471 And it is mutually reinforcing with the frontloading proposal:
472 frontloading will support notice that provides more comprehensive
473 information, enabling better-informed decisions whether to opt out or
474 to object. The opt-out rate and objections in turn will support further
475 evaluation of the proposed settlement at the final-approval stage. An
476 important further benefit will be to reduce the risk that a second round
477 of notice will be required because the initial notice is made defective
478 by the parties' failure to provide adequate information to the court
479 and objections show the need for better notice or demonstrate the
480 inadequacy of the proposed settlement.
481
482 Professor Marcus added that this proposal is useful to respond
483 to an argument forcefully advanced by at least one participant in the
484 miniconference. The common practice, carried forward in this package
485 of proposals, is that actual certification of the class is made only
486 at the same time as approval of the settlement. As Rule 23(c)(2)(B)
487 stands now, its text literally directs that notice satisfying all the
488 requirements of (B) be sent out then, never mind that the notice of
489 proposed settlement sent out under (e)(1) has already triggered an
490 opt-out period and so on. It is better to make it clear that class
491 members can be required to decide whether to opt out, to appear, or
492 to object before the class is formally certified.
493
494 A committee member observed that courts believe now that the
495 notice of a proposed settlement discharges the function of (c)(2)(B).
496 Characterizing the court's initial action as preliminary certification
497 and approval brings it within the rule language. But, in turn, that
498 triggers the prospect that a Rule 23(f) appeal can be taken at that
499 stage, a disruptive prospect that is so unlikely to prove justified
500 by a grossly defective proposal that it should never be available. This
501 revision of (c)(2)(B) helps in all these dimensions.
502
503 General Notice Provisions. Discussion turned to the draft that would
504 introduce added flexibility to the description of notice in Rule
505 23(c)(2)(B):
506
507 For any class certified under Rule 23(b)(3), the court must direct
508 to class members the best notice that is practicable under
509 the circumstances, including individual notice [by the most
510 appropriate means, including first-class mail, electronic,
511 or other means] {by first-class mail, electronic mail, or
512 other appropriate means} to all members who can be
513 identified through reasonable effort * * *.
514
515 Judge Dow noted that this proposal would "bring notice into the

516 21st Century." First-class mail may not be the best means of informing
517 class members of their rights, but it seems to be settled into general
518 practice. The proposal is designed to establish the flexibility
519 required to provide notice by the most effective means. The objective
520 is the same as before — to provide the best notice possible to the
521 greatest number of class members. The alternative presented in the
522 first bracketed alternative, focusing on "the most appropriate means,"
523 emphasizes the importance of the choice. Whatever choice is made for
524 rule text, it is important to have text that supports the examples that
525 may be useful in the Committee Note.
526
527 The first suggestion, made and seconded, was that it might be
528 better to simplify the rule text by referring only to "the most
529 appropriate means." Amplification could be left to the Committee Note.
530 The response was that it may be important to add examples to rule text
531 to make it clear that the choice of means is technology-neutral. The
532 ingrained reliance on first-class mail may make it important to make
533 it clear that other means may be as good or better. This response was
534 elaborated by suggesting the advantages of the first alternative,
535 calling for the most appropriate means and referring to "electronic
536 means" rather than "electronic mail." It may be, particularly in the
537 not-so-distant future, that appropriate means of electronic
538 communication will evolve that cannot be fairly described as part of
539 the familiar "e-mail" practices we know today.
540
541 Further discussion suggested that limiting the rule text to "the
542 most appropriate means" would avoid an implication that first-class
543 mail or e-mail are always appropriate.
544
545 A separate question was addressed to the parts of the draft Note
546 that discuss the format and content of class notice: is it appropriate
547 to address these topics when the amended rule text does not directly
548 bear on them? The only response was that any amendment addressing
549 effective means of notice will support discussion of the importance
550 of making sure that the notice conveyed by appropriate means is itself
551 appropriately informative. Merely reaching class members does little
552 good if the notice itself is inadequate.
553
554 Objectors: Judge Dow began by observing that the Subcommittee has
555 repeatedly been reminded that there are both "good" and "bad"
556 objectors. Class-member objections play an important role in
557 class-action settlements. As a matter of theory, the opportunity to
558 object is a necessary check on adequate representation. As a practical
559 matter, objectors have shown the need to modify or reject settlements
560 that should not be approved as initially proposed. But there are also
561 objectors who seek to enrich themselves — that is, commonly to enrich
562 counsel — rather than to improve the settlement for the class. The
563 advice received at several of the meetings the Subcommittee has
564 attended, and at the miniconference, is that bad-faith objections can
565 be dealt with successfully in the trial court. The problem that
566 persists is appeals or threats to appeal a judgment based on an approved
567 settlement. An appeal can delay implementation of the judgment by a

568 year or more. That means that class members cannot secure relief, in
569 some cases relief that is important to their ongoing lives. The
570 objector offers not to appeal, or to dismiss the appeal, in return for
571 a payment that goes only to the objector's counsel, or perhaps in part
572 to the objector as well. Too often, class counsel are unwilling to
573 submit the class to the delay of an appeal and agree to buy off the
574 objector.
575
576 Starting in 2010, the Appellate Rules Committee has been
577 considering rules to regulate dismissal of objector appeals. The
578 Subcommittee has been working in coordination with them.
579
580 The first step in addressing objectors is a draft that requires
581 some measure of detail in making an objection. This draft responds to
582 suggestions that some "professional objectors" simply file routine,
583 boilerplate objections in every case, do nothing to explain or support
584 them, fail to appear at a hearing on objections, and then seek to appeal
585 the judgment approving the settlement. The draft adds detail to the
586 present provision that authorizes objections:
587
588 (A) Any class member may object to the proposal if it requires
589 court approval under this subdivision (e)~~,~~. The objection
590 must [state whether the objection applies only to the
591 objector or to the entire class, and] state [with
592 specificity] the grounds for the objection. [Failure to
593 state the grounds for the objection is a ground for rejecting
594 the objection.]
595
596 The first comment was that "this is the most oft-repeated topic
597 at all the conferences." The materials submitted for discussion at the
598 miniconference included a lengthy list of information an objector must
599 provide in making an objection. "It seemed too much."
600
601 Later discussion provided a reminder that the Subcommittee will
602 continue to consider whether to retain the bracketed words stating that
603 failure to state the grounds for the objection is a ground for rejecting
604 the objection.
605
606 The draft in the agenda materials addresses the question of
607 payment by adding to present Rule 23(e)(5) a new subparagraph:
608
609 (B) T~~t~~he objection, or an appeal from an order denying an
610 objection, may be withdrawn only with the court's approval.
611 If [a proposed payment in relation to] a motion to withdraw
612 an appeal was referred to the court under Rule 42(c) of the
613 Federal Rules of Appellate Procedure, the court must inform
614 the court of appeals of its action.
615
616 This draft is supplemented by alternative versions of a new
617 subparagraph (C) that require court approval of any payment for
618 withdrawing an objection or an appeal from denial of an objection. The
619 overall structure is built on the premise that payment to an objector

620 may be appropriate in some circumstances. Rather than prohibit
621 payment, approval is required. It may be that the district court finds
622 it appropriate to compensate the costs of making an objection that,
623 although it did not result in any changes in the settlement, played
624 an important role in assuring the court that the settlement had been
625 well tested and does merit approval. That prospect, however, is not
626 likely to extend to payment for withdrawing an appeal.
627
628 Recognizing that the Appellate Rules Committee has primary
629 responsibility for shaping a corresponding Appellate Rule, a sketch
630 of a possible Appellate Rule is included. The Appellate Rules Committee
631 met a week before this meeting. Their deliberations have suggested some
632 revisions in the package.
633
634 One question is how the court of appeals will know the problem
635 exists. A new sketch of a possible Appellate Rule 42(c) would direct
636 that a motion to dismiss an appeal from an order denying an objection
637 to a class-action settlement must disclose whether any payment to the
638 objector or objector's counsel is contemplated in connection with the
639 proposed dismissal. Then a possible Rule 42(d) would provide that if
640 payment is contemplated, the court of appeals may refer the question
641 of approval to the district court. The court of appeals would retain
642 jurisdiction of the appeal, pending final action after the district
643 court reports its ruling to the court of appeals. The court of appeals
644 can instead choose to rule on the payment without seeking a report from
645 the district court. Finally, a new Civil Rule 23(e)(5)(D) would direct
646 the district court to inform the court of appeals of the district
647 court's action if the motion to withdraw was referred to the district
648 court.
649
650 One initial question is whether there should be any provision
651 regulating withdrawal of an objector's appeal when there is no payment.
652 As a matter of theory, it may be wondered whether other objectors may
653 have relied on this appeal to forgo taking their own appeals. But that
654 theory may bear little relation to reality. It was not developed
655 further in the discussion.
656
657 The focus of the new structure is to provide the court of appeals
658 a clear procedure for getting advice from the district court. The
659 district court is familiar with the case and often will be in a better
660 position to know whether payment is appropriate. The Appellate Rules
661 Committee is anxious to retain jurisdiction in the court of appeals.
662 That can be done whether the action by the district court is simply
663 a recommended ruling or is a ruling by the district court subject to
664 review by the ordinary standards that govern the elements of fact and
665 the elements of discretion.
666
667 The first question was what happens when the district court
668 refuses to approve a payment and the objector wants to appeal. The
669 response was that the draft retains jurisdiction in the court of
670 appeals. The objector can address his grievance to the court of
671 appeals, whether the question be one of independent decision by the

672 court of appeals as informed by the district court's recommendation,
673 or be one of reviewing a ruling by the district court.
674
675 An analogy was offered: Appellate Rule 24(a) directs that a party
676 who desires to appeal in forma pauperis must file a motion in the
677 district court. If the district court denies the motion, the party can
678 file a motion in the court of appeals, in effect renewing the motion.
679 Here, the motion to dismiss the appeal is made in the court of appeals,
680 disclosing whether any payment is contemplated. But what happens if
681 the court of appeals simply dismisses the appeal without deciding
682 whether to approve the payment? The draft prohibits payment without
683 court approval, so the objector would have to seek approval from the
684 district court. The district court's action would itself be a final
685 judgment, subject to appeal.
686
687 Another analogy also is available. There are many circumstances
688 in which a court of appeals finds it useful to retain jurisdiction of
689 an appeal, while asking the district court to take specific action or
690 to offer advice on a specific question. The court of appeals can manage
691 its own proceedings as it wishes, but is most likely to defer further
692 proceedings until the district court reports what it has done in
693 response to the appellate court's request. There is a further analogy
694 in the "indicative rulings" provisions of Civil Rule 62.1 and Appellate
695 Rule 12.1 — one of the paths open under those rules is for the court
696 of appeals to remand to the district court for the purpose of ruling
697 on a motion that the district court otherwise could not consider
698 because of a pending appeal. The court of appeals retains jurisdiction
699 unless it expressly dismisses the appeal.
700
701 Further discussion suggested that at least one participant
702 thought it better to think of this process as a "remand," because a
703 "referral" does not seem to contemplate factfinding in the district
704 court.
705
706 A member expressed a skeptical view about the value of this
707 process. The hope is for an in terrorem effect that will deter payments
708 by the threat of exposure and the prospect that courts will never
709 approve a payment that is not supported by a compelling reason. But
710 the problem is delay in implementing the judgment; the more elaborate
711 the process for withdrawing an appeal, the greater the delay.
712
713 This view was countered. "The use of delay as leverage for a payoff
714 is the problem. If we say no payoff without court approval, we do a
715 lot. The bad-faith objector wants delay not for its own sake, but for
716 leverage." A legitimate objector will not be affected by the need for
717 approval of any payment.
718
719 A different doubt was expressed: the incentive is to get rid of
720 objectors, but will this process simply encourage objectors to pad
721 their bills? The response was that the objector's lawyer does not get
722 paid unless there is a benefit to the class. But the doubt was renewed:
723 that can be met by a stipulation of the objector and counsel that there

724 was a benefit to the class. The response in turn was that this procedure
725 will eliminate the incentive for delay. Bad-faith objectors
726 self-identify before taking an appeal, or after filing the notice of
727 appeal. They do not appear at the hearing on approval, they often do
728 no more than file form objections. And the good-faith objectors
729 articulate their objections in the district court. They appeal for the
730 purpose of defeating what they view as an inadequate settlement, not
731 for the purpose of delay or coercing payment for abandoning their
732 objections.
733
734 This view was supported by noting that a good-faith objector who
735 participated in the miniconference reported that the business model
736 of bad-faith objectors does not support actual work on an appeal. But
737 why not let the district court be the one that decides whether to
738 approve payment? The court of appeals can grant the motion to dismiss
739 the appeal, and remand to the district court to decide on payment. The
740 district-court ruling can be appealed. This view was supported by
741 noting that once the district court has ruled, "there is something
742 to review."
743
744 General support for the proposed approach was offered by noting
745 that "rulemaking cannot resolve every problem." But we can accomplish
746 the modest goal of insisting on sunlight, and creating a mechanism for
747 courts to address the issues as promptly as possible.
748
749 A wish for simplicity was expressed by suggesting that it may be
750 enough to provide in Rule 23(e)(5)(B) that court approval is required
751 to withdraw an objection or an appeal from denial of an objection, and
752 to limit new provisions in Appellate Rule 42 to a direction that any
753 payment for dismissing the appeal be disclosed to the court of appeals.
754 The court of appeals then "does what it does." It may choose to decide
755 the appeal. Or it can simply dismiss the appeal; the case is over. But
756 an objector who wants payment must apply to the district court. The
757 key is disclosure to the court of appeals. Appellate Rule 12.1 and Civil
758 Rule 62.1 already provide the opportunity to seek an indicative ruling
759 if a motion to approve payment is made in the district court while the
760 appeal remains pending. The full set of draft provisions is "too much
761 process."
762
763 A different vision of simplicity was suggested: the rules should
764 leave it open to the court of appeals to choose between acting itself,
765 referring to the district court, making a limited remand, or adopting
766 whatever approach seems to work best for a particular case.
767
768 The next question was whether it might be possible to provide some
769 guidance in rule text on the circumstances that justify payment for
770 withdrawing an objection or appeal? Apart from that, should we be
771 concerned that there may be means of compensation that are not
772 obviously "payment"? One possibility may be to accord some form of
773 benefit in collateral litigation — the objector may represent clients
774 who are not in the class, or it might be agreed to acquiesce in an
775 objection made in a different class action.

776
777 These questions were addressed by the observation that the only
778 familiar demands are for payments to lawyers, or to clients who want
779 more than the judgment gives them. But it is possible to imagine a
780 threat of objections in all future cases, or a promise to withdraw
781 objections in other cases. So the sketch of a possible Appellate Rule
782 42(c) on p. 102 of the agenda materials refers to "payment or
783 consideration."
784
785 The discussion concluded by noting the paths to be tested by
786 further drafting. It will be good to achieve as much simplicity as
787 possible. Full disclosure should be required of any payments (or
788 consideration) for withdrawing an objection or appeal from denial of
789 an objection. The district court should be the place for determining
790 whether to approve any payment. Beyond that, this structure can be
791 effective if lawyers for the plaintiff class do their part in resisting
792 requests for payment.
793
794 Settlement Approval: Judge Dow introduced the draft criteria for
795 approving a class-action settlement by noting that the draft is
796 inspired in part by the approach taken in the ALI Principles of
797 Aggregate Litigation. The ALI approach was shaped by the same concerns
798 that the Subcommittee has encountered. There are as many dialects as
799 there are circuits; each circuit has its own differently articulated
800 list of factors to be applied in determining whether a settlement is
801 "fair, reasonable, and adequate." The draft is an effort to capture
802 the most important procedural and substantive elements that should
803 guide the review and approval process. In its present form, it seeks
804 to capture the most important elements in four provisions that might
805 be viewed as "factors," or instead as the core concerns. The first
806 question is whether this focus will support meaningful improvement in
807 current practices.
808
809 Professor Marcus supplemented this introduction by identifying
810 two basic questions: Will the draft, or something like it, prove
811 helpful to judges and lawyers? The purpose begins with helping the
812 parties to shape the information they submit in seeking approval. Every
813 circuit now has a list of multiple factors. The draft presented to the
814 Committee last April included a catch-all "whatever else" provision.
815 Discussion then suggested that the provision was not helpful. It was
816 dropped during later drafting efforts, but has found renewed support
817 and is included in the agenda drafts for further discussion. It takes
818 different forms in the two alternative structures. In alternative 1,
819 the court "may disapprove * * * on any ground the court deems pertinent,
820 * * * considering whether." That is less restrictive than alternative
821 2, which directs that the court "may approve" "only * * * on finding"
822 the four core criteria are met and also that "approval is warranted
823 in light of any other matter that the court deems pertinent." The choice
824 here is whether to suggest the relevance of considerations in addition
825 to the four core showings that are explicitly described, and whether
826 to be more or less restrictive.
827

828 The second question is related: what prominence should be given
829 to the present rule formula, which was drawn from well-developed case
830 law, looking to whether the settlement is "fair, reasonable, and
831 adequate"? These words support consideration of every factor that has
832 been identified by any circuit. Should the process remain that open?
833
834 The first comment was that both alternatives are open-ended. A
835 "ground" or "matter" that "the court deems pertinent" is not a legal
836 standard.
837
838 The next comment was that the second alternative displaces the
839 present "fair, reasonable, and adequate" standard from its present
840 primacy, demoting it to a role as part of the factor that asks whether
841 the relief awarded to the class is fair, reasonable, and adequate,
842 taking into account the costs, risks, probability of success, and
843 delays of trial and appeal. The fair, reasonable, and adequate standard
844 is the over-arching concern. Another member agreed — this is an
845 argument for alternative 1, which allows approval "[only] on finding
846 it is fair, reasonable, and adequate." The brackets would be removed,
847 allowing approval only on making this finding.
848
849 Alternative 2 is "more focused." It allows approval only on
850 finding that all four factors are satisfied, compared to Alternative
851 1 that allows a finding that the settlement is fair, reasonable, and
852 adequate, after simply "considering" the four. Alternative 1 is less
853 rigorous.
854
855 Turning to one of the four core elements, it was asked how a court
856 is to determine whether a settlement "was negotiated at arm's length
857 and was not the product of collusion." Why is that not implicit in
858 finding the settlement is fair, reasonable, and adequate?
859
860 This question was addressed by observing that a number of circuits
861 distinguish between procedural and substantive fairness. The parties
862 must show that the process was free of collusion. This showing is made
863 by describing the process, or by having a special master or mediator
864 participate and report. Account is taken of how long the negotiations
865 endured, and whether there was actual negotiation.
866
867 The open-endedness of "considering whether" in Alternative 1
868 provoked the suggestion that, taken literally, it overrides a lot of
869 circuit law. It would allow a court to find a settlement is fair,
870 reasonable, and adequate, even though it was not negotiated at
871 arm's-length and was the product of collusion. But then perhaps the
872 intention is to overrule the various laundry lists of factors found
873 across the circuits?
874
875 A Subcommittee member responded that the purpose is not to
876 overrule existing circuit factors. In all but two circuits, these
877 factors were developed in the 1970s and 1980s. Any of these factors
878 may, at some time with respect to some proposed settlement, prove
879 relevant. But the purpose of identifying the core concerns is to

880 encourage the court to look closely at the settlement rather than move
881 unthinkingly down a check list of factors, none of them clearly
882 developed by the parties and many of them not relevant to the particular
883 settlement. Part of the purpose is to respond to the increasing
884 cynicism found in public views of class actions. Many people view
885 settlements in consumer-class actions as devices that provide no
886 meaningful value to consumers and provide undeserved awards to class
887 counsel.
888
889 In a similar vein, it was observed that the purpose of focusing
890 on four core concerns seems to be to simplify and codify the purposes
891 and best elements of present practice. But we should consider whether
892 the "considering whether" formula in alternative 1 might be seen as
893 overruling the circuit factors. "Would any circuit think we're changing
894 what it can do"?
895
896 A response was that the ALI concern was that the lengthy lists
897 of factors distract attention from the central elements. A related
898 concern was that there is a tendency to view the various "factors" as
899 things to be weighed in a balancing process, albeit without any
900 direction as to how any one is to be weighed. It is better to adopt
901 the approach of Alternative 2: the court may approve "only on finding."
902 This will redirect attention to the essential elements of approval.
903
904 But it was noted that the four subparagraphs attached to both
905 alternative 1 and alternative 2 are conjunctive: the court must
906 consider, or find, all of them. The rule is written not for the experts,
907 who understand this now. It focuses everyone on the key factors in a
908 way that is not always understood.
909
910 The fifth element, "any other matter" or "any ground" the court
911 deems pertinent, was questioned: what does it add? What is there that
912 could not be read into the four central elements identified in the first
913 four subparagraphs? The response was that "there still will be X
914 factors." The four factors focus on what is important, and focus the
915 parties on what to present to the court, and on what to present in the
916 notice to the class. But the rejoinder asked again: what else is
917 relevant if all four are satisfied — there is adequate representation,
918 not tainted by collusion, adequate relief, and equitable treatment of
919 class members relative to each other? Should it be made clear that the
920 burden is on the objector to show reasons to reject a settlement when
921 all of these elements are present?
922
923 It was noted that the alternative 2 formulation, "may approve only
924 * * * on finding" the four elements leaves discretion to refuse approval
925 even if all four are found. And it implies that the standard of review
926 should be abuse of discretion. So the court can draw on any factor that
927 has been identified in any circuit that seems relevant to evaluating
928 the settlement. "There are any number of things that cannot be captured
929 in factors." As one example: the settlement is negotiated while the
930 defendant is teetering on the brink of insolvency. By the time of the
931 hearing on objections, the defendant has been restored to a financial

932 position that would support more adequate relief. How do you write a
933 specific factor for that? Still, it was suggested that alternative
934 1, "considering whether," provides a more emphatic statement of
935 discretion.
936
937 A more particular question was asked: what happens if a lawyer
938 who initially supported a proposed settlement changes position to
939 challenge the proposal? No answer was attempted.
940
941 The summary of this discussion began by observing that the really
942 good lawyers the Subcommittee has been meeting in its travels do all
943 these good things now. But not all lawyers do. "These four factors are
944 aimed at the lowest common denominator" of lawyers who bring class
945 actions without much experience or background learning. They are not
946 intended to displace the factors identified in the many appellate
947 opinions that have been written over nearly a half-century of review.
948 The intent instead is to focus attention on the important core. The
949 plan is to displace the process in which parties and court are
950 distracted by routine, uninformative submissions that simply run
951 through the local check-list of factors, some important to the
952 particular case, some not important, and some irrelevant.
953
954 All of this pointed toward a synthesis of alternative 1 and
955 alternative 2. "fair, reasonable, and adequate" will be retained as
956 the entry point. The court may approve a settlement only on making the
957 four core findings. And "fair, reasonable, and adequate" will be
958 removed from the third core:
959
960 If the proposal would bind class members, the court may approve
961 it only after a hearing and only on finding that it is fair,
962 reasonable, and adequate because: * * *
963
964 (C) the relief awarded to the class * * * is ~~fair, reasonable,~~
965 ~~and~~ adequate, given the costs, risks * * *.
966
967 Settlement Classes: Judge Dow introduced this topic by asking whether
968 it would be useful, or perhaps necessary, to adopt a separate provision
969 for settlement classes. The underlying question arises from
970 uncertainty in applying the "predominance" requirement of Rule
971 23(b)(3) to settlements. The Subcommittee has reached a tentative view
972 that it should table this question, but is not prepared to recommend
973 that course without guidance from the Committee.
974
975 The dilemma can be framed by asking what might be gained by
976 adopting an express settlement-class provision, and what are the
977 "unnerving things that might happen" if one were adopted.
978
979 The first question was whether settlements have failed because
980 a class could or would not be certified? The answer was that this in
981 fact has happened. And there is a concern that people are deterred from
982 even attempting settlements by the obscurity of the predominance
983 requirement as applied to settlement.

984
985 The most common illustration of the value of subordinating
986 predominance is choice-of-law concerns. A class that spans several
987 states may present thorny choice-of-law questions, and present the
988 prospect that different laws will be chosen for different groups within
989 the class, forestalling predominance in litigation. These problems can
990 be readily resolved, however, by settlement. At least the Second and
991 Third Circuits have approved settlements despite choice-of-law
992 predominance concerns. Beyond that, a number of lawyers believe that
993 courts are pretty much ignoring the statements in the Amchem opinion
994 that predominance is required in certifying a class for settlement.
995
996 This comment was amplified by the observation that the role of
997 predominance in settlement classes has generated many objections by
998 "those who take Amchem literally." But courts have developed a gloss
999 on Amchem that takes the fact and value of settlement into account in
1000 finding that (b)(3) criteria have been satisfied. Still, the
1001 objections come in — often from "serial objectors." Adopting a
1002 settlement-class rule would clarify the law, restating where it is in
1003 practice today, helping to identify how account should be taken of
1004 settlement in determining whether to certify a class. But as for the
1005 empirical question, "I do not know how many settlements are
1006 disapproved, or not attempted," for want of a clear rule.
1007
1008 But, it was asked, why not require predominance? An immediate
1009 response was that Amchem would require the laws of 50 states to apply
1010 at trial; on settlement, there is no need to worry about that —
1011 "everyone gets the same." But it was objected that giving everyone "the
1012 same" may not be right if different sets of laws would prescribe
1013 differences in the awards. The rejoinder was that choice-of-law
1014 questions can be resolved in settlement, perhaps choosing different
1015 laws and relief for different subclasses. And if the case comes to be
1016 tried, the court may chose a single state's law to govern, or may choose
1017 the law of a few states to govern, grouping subclasses around the
1018 similarities in the chosen separate laws. So long as the class is given
1019 notice of a proposed settlement — everyone gets to see what is proposed
1020 and can object — why force it to trial?
1021
1022 A further response was that predominance addresses the
1023 efficiencies of trial on class claims. It does not address the fairness
1024 of settlement. The Court in Amchem recognized that manageability is
1025 not a concern on settlement, despite the inclusion of difficulties in
1026 managing a class action among the matters pertinent to finding
1027 predominance and superiority. The same can be true of predominance.
1028
1029 In the same vein, it was noted that in 1993 the Third Circuit said
1030 that a class action cannot be certified for settlement unless the same
1031 class could be certified for trial. Amchem has superseded that. Amchem
1032 led the Committee to stop work on its pre-Amchem proposal to add a
1033 settlement-class provision as a new Rule 23(b)(4). The current draft
1034 (b)(4), however, is different from the 1996 version.
1035

1036 A Subcommittee member said he was impressed by how little reaction
1037 was provoked by the draft of a settlement-class rule. People did not
1038 even seem to be worried about the prospect that representations made
1039 in promoting a proposed settlement might be used against them if the
1040 settlement falls through and a request is then made to certify a class
1041 for trial.
1042
1043 A different perspective was suggested by the observation that
1044 settlement generally is in the interests of the immediate parties. But
1045 that does not ensure fairness to absent class members. Settlement does
1046 avoid the risks of class adjudication, and that may justify some
1047 dilution of the predominance requirement. But does it justify
1048 abandoning any shadow of predominance?
1049
1050 It was suggested that the evolution that has followed Amchem shows
1051 a reduced emphasis on predominance in reviewing proposed class
1052 settlements.
1053
1054 Beyond that, an alternative approach that incorporates
1055 settlement classes into Rule 23(b)(3) itself is also sketched in the
1056 agenda materials from p. 130 to p. 132. This approach would allow
1057 certification on finding "that the questions of law or fact common to
1058 class members, or interests in settlement, predominate * * *." (The
1059 parallel structure could be tightened further by looking to "common
1060 interests in settlement.")
1061
1062 Still another approach was suggested. The role of predominance
1063 could be diminished by a rule provision that the court can consider
1064 whether settlement obviates problems that would arise at trial.
1065
1066 But it also was recognized that the defense bar is concerned that
1067 reducing the role of predominance in settlement classes will unleash
1068 still more class actions. And on the other side, there is concern that
1069 the bargaining position of class representatives will be eroded if they
1070 cannot make a plausible threat of certification for trial.
1071
1072 It was noted again that the interest in doing anything to add a
1073 separate provision for settlement classes diminished steadily as the
1074 Subcommittee made the rounds of many outside groups. There was
1075 substantial enthusiasm for doing something several years ago,
1076 prompting the ALI to address the question in the Principles of
1077 Aggregate Litigation. But that has faded.
1078
1079 The conclusion was to not go further with the settlement-class
1080 proposal.
1081
1082 Ascertainability: The question of criteria for the "ascertainability"
1083 of class membership has come to the fore recently. The most demanding
1084 approach is reflected in a series of Third Circuit decisions, many of
1085 them in consumer actions. The Seventh Circuit has expressly rejected
1086 the Third Circuit approach. Other circuits come close to one side or
1087 the other. This is an important topic, and it continues to be developed

1088 in the lower courts. There is some prospect that the Supreme Court may
1089 address it soon. And it is difficult to be confident about drafting
1090 rule language that would give effective guidance. The Subcommittee has
1091 put this topic on "hold," keeping it in the current cycle but without
1092 anticipating a recommendation for publication over the next several
1093 months. The Committee approved this approach.
1094
1095 Rule 68: Pick-off Offers: Judge Dow explained that the Subcommittee
1096 looked at the use of Rule 68 offers of judgment in an attempt to moot
1097 class actions because of the Seventh Circuit decision in the Damasco
1098 case. Under that approach, an offer of complete relief to the
1099 representative plaintiffs before class certification moots their
1100 individual claims and defeats certification. Plaintiffs commonly
1101 worked around this rule by moving for certification when they filed,
1102 but also by requesting that consideration of the motion be deferred
1103 until the case had progressed to a point that would support a
1104 well-informed certification ruling. The Seventh Circuit recently
1105 overruled its mootness rule. Most circuits now refuse to allow a
1106 defendant to defeat class certification by offers that attempt to moot
1107 the individual claims of any representative plaintiffs who may appear.
1108 More importantly, this question has been argued in the Supreme Court.
1109 The Subcommittee has deferred further work pending the Court's
1110 decision. The Committee agreed this course is wise.
1111
1112 Separately, it was noted that the Committee is committed to
1113 further study of Rule 68 in response to regularly repeated suggestions
1114 for revision. The timing will depend on the allocation of available
1115 resources between this and other projects that may seem more pressing.
1116
1117 Cy pres: For some time, the Subcommittee carried forward a proposal
1118 to address cy pres awards. The proposal was based, at least for purposes
1119 of illustration, on the model adopted by the ALI. This model attempts
1120 to achieve the maximum feasible distribution of settlement funds to
1121 class members. Only when it is not feasible to make further
1122 distributions could the court approve distribution of remaining
1123 settlement funds — and even then, the first effort must be to identify
1124 a beneficiary that would use the funds in ways that would benefit the
1125 class.
1126
1127 It seems to be generally agreed that many classes are defined in
1128 terms that make it impracticable to identify every class member and
1129 achieve complete distribution to class members. Some undistributed
1130 residue will remain. The ALI proposal would confine cy pres awards to
1131 those circumstances. That set of issues seems to fall comfortably
1132 within the scope of the Rules Enabling Act. But these are not the only
1133 circumstances that characterize cy pres awards in present practice.
1134 More creative awards are structured, often in cases involving small
1135 injuries to large numbers of consumers, most of whom cannot be easily
1136 identified. Attempting to address cy pres awards of this sort would
1137 present tricky questions about affecting substantive rights.
1138
1139 Cy pres awards have evolved in practice and have been accepted

1140 in many judgments. Some states have statutes addressing them. Given
1141 the difficulty of knowing how to craft a good rule, the Subcommittee
1142 recommended that further work on these questions be suspended. The
1143 Committee accepted this recommendation.
1144
1145 Issue Classes: Judge Dow introduced the question of issue classes by
1146 noting that the subject was taken up because of a perceived split
1147 between the Fifth Circuit and other circuits on the extent to which
1148 the predominance requirement of Rule 23(b)(3) limits the use of an
1149 issue class to circumstances in which the issue certified for class
1150 treatment predominates over all other issues in the litigation. More
1151 recent Fifth Circuit decisions, however, seem to belie the initial
1152 impression. "Dissonance in the courts has subsided." There seems
1153 little need to undertake work to clarify the law. And any attempt might
1154 well create new complications.
1155
1156 A Subcommittee member said that the Subcommittee has learned that
1157 courts address issue-class questions in case-specific ways. Difficult
1158 questions of appealability would be raised by any distinctive changes
1159 in the issue-class provisions in Rule 23(c)(4) so as to focus on final
1160 decision of a discrete issue without undertaking to resolve all
1161 remaining questions within the framework of the same action. The
1162 problems could be similar to those that arise after separate-issue
1163 trials under Rule 42.
1164
1165 The Committee agreed with the Subcommittee recommendation that
1166 further work on these questions be suspended.
1167
1168 Judge Bates concluded the class-action discussion by stating that
1169 the Committee had done good work. Thanks are due to both the
1170 Subcommittee and the Committee.
1171
1172 *Requester Pays for Discovery*
1173
1174 For some time the Committee and the Discovery Subcommittee have
1175 deliberated the questions raised by periodic suggestions that the
1176 discovery rules should be revised to transfer to the requesting party
1177 more of the costs incurred in responding to discovery requests. Many
1178 different approaches could be taken. Many suggestions cluster around
1179 a middle ground that would leave the costs of responding where they
1180 lie as to some "core" discovery, but require the requesting party to
1181 pay — or perhaps to justify not paying — for the costs of responding
1182 to requests outside the core. Those suggestions present obvious
1183 challenges in the task of defining core discovery in terms that apply
1184 across different subjects of litigation.
1185
1186 Beyond these questions, the assumption that the responding party
1187 bears the costs of responding is well-entrenched. Hundreds of comments
1188 addressed to the package of discovery amendments that is pending in
1189 Congress emphasize the role of discovery in supporting enforcement of
1190 public policies that provide important protection for public interests
1191 beyond the disposition of the particular action. Great difficulty

1192 would be encountered in attempting to devise a wise rebalancing of the
1193 competing interests.
1194
1195 Additional reasons for diffidence about requester-pays proposals
1196 arise from the pending discovery amendments. They are designed in many
1197 ways to reduce the costs of discovery. The renewed emphasis on
1198 proportionality, coupled with the strong encouragement of early and
1199 active case management, and perhaps supported by the encouragement of
1200 party cooperation, may achieve substantial reductions in the cost and
1201 delay that occasionally result from searching discovery. Beyond that,
1202 if the amendments take effect the Rule 26(c) protective-order
1203 provisions will be modified to recognize expressly the court's
1204 authority to allocate the costs of responding in a particular case.
1205 This provision is not designed to inaugurate any general practice of
1206 shifting response costs, but it can be used to address specific needs
1207 in particular cases.
1208
1209 In all, it was agreed that further work on requester-pays
1210 proposals would be premature. One or another aspect of discovery is
1211 usually on, or close to, the active agenda. Requester-pays issues will
1212 remain in the background, to be taken up again when it may seem
1213 appropriate.
1214
1215 *Rule 62: Stays of Execution*
1216
1217 Rule 62 came on for study in response to separate suggestions made
1218 to the Civil Rules Committee and to the Appellate Rules Committee. The
1219 work has been pursued through a joint subcommittee chaired by Judge
1220 Matheson. The materials in the agenda book were also on the agenda of
1221 the Appellate Rules Committee, which considered them last week.
1222
1223 Judge Matheson opened the Subcommittee Report by reminding the
1224 Committee that these questions were discussed in a preliminary way last
1225 April. The Appellate Rules Committee also took up the topic then, and
1226 both Committees agreed that it makes sense to carry the work forward.
1227 At the same time, no one identified any actual difficulties that have
1228 emerged in practice under the current rule, apart from the specific
1229 questions that prompted the project from the beginning. The
1230 Subcommittee worked through the summer and fall to simplify and improve
1231 the draft revision. The current version appears in the agenda materials
1232 at p. 342.
1233
1234 The draft reorganizes the allocation of subjects among present
1235 subdivisions (a) through (d), and changes the provisions for judgments
1236 that do not involve an injunction, an accounting in an action for patent
1237 infringement, or a receivership.
1238
1239 Draft Rule 62(a) addresses three kinds of stays: (1) the automatic
1240 stay; (2) a stay obtained by posting a bond; and (3) a stay ordered
1241 by the court. These provisions address all forms of judgment, whether
1242 the relief be an award of money or some other form of relief such as
1243 foreclosing a lien or a decree quieting title.

1244
1245 Several changes are made over the current rule.
1246
1247 The automatic stay is extended from 14 days to 30 days. This
1248 eliminates the "gap" in present Rule 62(b), which recognizes the
1249 court's authority to order a stay "pending disposition" of
1250 post-judgment motions that may be made up to 28 days after entry of
1251 judgment. This revision addresses one of the two questions that
1252 prompted the Committees to take up Rule 62. The draft also expressly
1253 recognizes the court's authority to "order otherwise," denying or
1254 terminating an automatic stay. (In response to a later question, it
1255 was explained that the stay was extended to 30 days to allow an orderly
1256 opportunity to begin to prepare for a further stay when expiration of
1257 the 28-day period shows there will be no post-judgment motion and while
1258 a brief period remains before expiration of the 30-day appeal time that
1259 governs most civil actions.)
1260
1261 The draft revises the supersedeas bond provisions of present Rule
1262 62(d) in various respects. It allows the bond to be posted at any time
1263 after judgment is entered, rather than "upon or after filing the notice
1264 of appeal." It allows "other security," not only a bond. These
1265 provisions address the questions that prompted the Appellate Rules
1266 Committee to study Rule 62 by enabling a party to post a single bond
1267 or other security that runs from entry of judgment through completion
1268 of any appeal. It also expressly recognizes the opportunity to rely
1269 on security other than a bond — one example might be a letter of credit,
1270 or establishment of an escrow fund.
1271
1272 Draft Rule 62(a)(3) allows the court to order a stay at any time.
1273 This authority could, for example, be used to substitute a stay with
1274 security for the automatic stay.
1275
1276 Draft Rule 62(b) authorizes a court, for good cause, to refuse
1277 a stay sought by posting security under draft 62(a)(2), or to dissolve
1278 or modify a stay. This is new.
1279
1280 Draft Rule 62(c), also new, authorizes the court to set
1281 appropriate terms for security, or to deny security, both on entering
1282 a stay and on refusing or dissolving a stay. One example could be an
1283 order denying a stay only on condition that the judgment creditor post
1284 security to protect the judgment debtor against the injury caused by
1285 execution in case the judgment is reversed on appeal.
1286
1287 Proposed Rule 62(d) does little more than consolidate the
1288 provisions in present subdivisions (a) and (c) for injunctions,
1289 receiverships, and accountings in actions for patent infringement. It
1290 does bring into rule text the complete array of actions that support
1291 appeal from an interlocutory order with respect to an injunction.
1292
1293 Some attention was paid to the possibility of revising present
1294 subdivisions (e) and (f), but it was decided that no changes are needed.
1295 Subdivisions (g) and (h) were addressed in extensive memoranda

1296 prepared by Professor Struve as Reporter for the Appellate Rules
1297 Committee, but no action has been recommended as to them.
1298
1299 The discussion by the Appellate Rules Committee led to agreement
1300 on extending the automatic stay to 30 days, closing the gap; to
1301 supporting the opportunity to post a single bond; and to recognizing
1302 alternative forms of security.
1303
1304 The practitioner members of the Appellate Rules Committee,
1305 however, expressed concern about the features of the draft that would
1306 authorize the court to deny a stay even when the judgment debtor offers
1307 adequate security in the form of a bond or another form. They believe
1308 that the present rule recognizes a nearly absolute right to a stay on
1309 posting adequate security, and that allowing a court to deny a stay,
1310 even for "good cause," would be a dangerous departure. This question
1311 must be taken seriously.
1312
1313 This introduction was followed by a reminder that there seems to
1314 be general agreement on the answers to the questions that launched this
1315 work. The automatic stay should be extended to 30 days, closing the
1316 potential gap between its expiration on the 14th day and the time when
1317 the court is authorized to order a stay pending disposition of a motion
1318 that may not be made until 28 days after judgment is entered. A judgment
1319 debtor should be able to post security in a form other than a bond,
1320 and should be allowed to post a single security that covers both
1321 post-judgment proceedings in the district court and all proceedings
1322 on appeal.
1323
1324 The questions that go beyond the initial concerns arose in a
1325 familiar way. Studying Rule 62 suggested ways in which it might be made
1326 more flexible, for the most part by provisions that would expressly
1327 recognize steps a court might well be prompted to take to protect the
1328 judgment or the parties even without explicit rule provisions. This
1329 approach often leads to the common dilemma: many ideas look good in
1330 the abstract. But there may be unforeseen problems that show both
1331 abstract and practical defects, and further difficulties may arise
1332 from the attempt to translate even good ideas into specific rule
1333 language. The wisdom of restraining ambition is underscored by the
1334 responses in the Standing Committee and both advisory committees that
1335 there have been no general complaints about Rule 62 in practice.
1336
1337 Turning more pointedly to the concerns raised in the Appellate
1338 Rules Committee, the Subcommittee discussed repeatedly, and in depth,
1339 the question whether there should be a nearly absolute right to a stay
1340 on posting adequate security. There does seem to be a general belief
1341 in this right. And it might be seen as an integral part of the system
1342 that assures one appeal as a matter of right from a final judgment.
1343 The purpose of appeal is to provide an opportunity for reversal, even
1344 if the standards of review narrow the opportunity with respect to
1345 matters of fact or discretion.
1346
1347 Counter considerations persuaded the Subcommittee to recognize

1348 authority to deny a stay. There may be cases in which the district court
1349 can accurately predict that there is little prospect of reversal, while
1350 also recognizing the risk of injuries that cannot be compensated even
1351 by assurance that the amount of a money judgment can be collected after
1352 affirmance. The judgment creditor may have immediate needs for money
1353 that cannot be addressed by collection of money after the delay of an
1354 appeal. For example, it may be possible to revive a damaged business
1355 by immediate action, while it may fail irretrievably pending appeal.
1356 A judgment for some other form of relief may pose comparable problems.
1357 A decree quieting title, for example, may open an opportunity for an
1358 immediate transaction that will be lost by delay. The "good cause"
1359 standard was thought to be sufficient protection of the judgment
1360 debtor's interests, particularly when coupled with the court's further
1361 authority to require security for the judgment debtor as a condition
1362 of denying a stay.
1363
1364 Discussion began in two directions. One question was whether
1365 there truly is a right to a stay on posting security. The other went
1366 in the other direction: why should the rule allow the court to order
1367 a stay without any security, as the draft clearly contemplates? Is the
1368 judgment itself not assurance enough of the judgment creditor's
1369 probable right to require that the judgment be protected against defeat
1370 by delay — with the potential for concealing or dissipating assets —
1371 by requiring security?
1372
1373 The question of absolute right turned into discussion of present
1374 Rule 62(d). It says that an appellant "may obtain a stay by supersedeas
1375 bond." Does "may obtain" imply discretion, so that the court may refuse
1376 the stay even though the bond is otherwise satisfactory in its amount,
1377 terms, and guarantor? That possible reading may be thwarted by the
1378 reading of parallel language in Rule 23(b), which begins: "A class
1379 action may be maintained if Rule 23(a) is satisfied and if" the
1380 requirements of paragraphs (1),(2), or (3) are satisfied. In Shady
1381 Grove Orthopedic Associates, P.A. v. Allstate Ins. Co., 130 S.Ct. 1431,
1382 1437, 1438 (2010), the Court read "may be maintained" to entitle the
1383 plaintiff to maintain a class action on satisfying Rule 23(a) and one
1384 paragraph of Rule 23(b). Rule 23 says not that the court may permit
1385 a class action, but that the class action may be maintained. "The
1386 Federal Rules regularly use 'may' to confer categorical permission."
1387 "The discretion suggested by Rule 23's 'may' is discretion residing in
1388 the plaintiff: He may bring his claim in a class action if he wishes."
1389 Parallel interpretation of present Rule 62(d) would read it to mean
1390 that all discretion resides in the judgment debtor, who has categorical
1391 permission to obtain a stay on posting suitable security.
1392
1393 It was noted that Appellate Rule 8(a)(1) directs that a party must
1394 ordinarily move first in the district court for a stay pending appeal
1395 or approval of a supersedeas bond. But Rule 8(a)(2) authorizes a motion
1396 in the court of appeals if it is impracticable to move first in the
1397 district court, or if the district court denied the motion or failed
1398 to afford the relief requested. Rule 8(a)(2)(E) says blandly that the
1399 court of appeals "may condition relief on a party's filing a bond or

1400 other appropriate security." This locution clearly recognizes
1401 appellate discretion to deny any stay — as seems almost inevitable if
1402 application has been made to the district court and denied — and to
1403 grant a stay without security.
1404
1405 It was suggested that district courts have authority now to order
1406 a stay without any security, but that it may be unwise to emphasize
1407 that authority by explicit rule text.
1408
1409 A tentative solution was suggested: the draft should be shortened
1410 by deleting subdivisions (b) and (c). Subdivision (b) reads: "The court
1411 may, for good cause, refuse a stay under Rule 62(a)(2) or dissolve a
1412 stay or modify its terms." Subdivision (c) reads: "The court may, on
1413 entering a stay or on refusing or dissolving a stay, require and set
1414 appropriate terms for security or deny security." The final words of
1415 (c) would be transferred to paragraph (a)(3): "The court may at any
1416 time order a stay that remains in effect until a time designated by
1417 the court[, which may be as late as issuance of the mandate on appeal,]
1418 <u>and set appropriate terms for security or deny security</u>.
1419
1420 A separate issue was raised. The draft rule does not describe the
1421 appeal bond as a "supersedeas" bond. It was agreed that it would be
1422 better to move away from that antique-sounding word. But "supersedeas"
1423 appears in Appellate Rule 8(a)(1)(B), most likely because it directs
1424 that application for a stay be made first to the district court.
1425 (Appellate Rule 8(a)(2)(E) is simpler — it refers only to conditioning
1426 a stay on "a bond or other appropriate security.") The Bankruptcy Rules
1427 also refer to a supersedeas bond. It would be good to strike the word
1428 from each set of rules.
1429
1430 Discussion concluded with the suggestion that the proposed rule
1431 should be simplified along the lines indicated above. The practicing
1432 lawyers on the Appellate Rules Committee believe there is a nearly
1433 absolute right to a stay on posting an adequate bond or other security.
1434 No one is pressing for revision. If the rule is amended to authorize
1435 the court to deny a stay by posting bond, even if the court must find
1436 good cause to deny the stay, there will be an increase in arguments
1437 seeking immediate execution. And it will be difficult to implement the
1438 good-cause concept. Imagine one simple argument: The judgment creditor
1439 is 85 years old and wants the chance to enjoy the fruits of judgment
1440 in this life time.
1441
1442 Judge Matheson agreed that the Subcommittee will reconsider these
1443 problems in light of the discussion here and in the Appellate Rules
1444 Committee.
1445
1446 *e-Rules*
1447
1448 The Committee was reminded of the recent history of work on the
1449 rules for electronic filing, electronic service, and use of the Notice
1450 of Electronic Filing as a certificate of service. Last April, this
1451 Committee voted to recommend publication of a set of rules amendments

1452 addressing these topics. The Criminal Rules Committee, however,
1453 decided at the same time that the time has come to write independent
1454 provisions for these topics into Criminal Rule 49. Rule 49 currently
1455 incorporates the practice of the civil rules for filing and service.
1456 Their project is designed to avoid cumbersome cross-references between
1457 different sets of rules, and also to determine whether differences in
1458 the circumstances of criminal prosecutions justify differences in the
1459 filing and service provisions. Brief discussions led to modifications
1460 in the Civil Rules provisions that were presented to the Standing
1461 Committee for discussion. The revised provisions are included in the
1462 agenda materials for this meeting. This Committee did not recommend
1463 publication at the May Standing Committee meeting. The Criminal Rules
1464 Committee continues to work on its new Rule 49. A conference call of
1465 the Criminal Rules Subcommittee will be held on November 13;
1466 representatives of this Committee will participate.
1467
1468 The goal of this undertaking is to work toward common proposals
1469 on all topics that merit uniform treatment across the different sets
1470 of rules. That goal leaves the way open to different treatment of topics
1471 that warrant different treatment in light of differences in the
1472 circumstances that confront the different sets of rules. The parallel
1473 proposals for the Appellate Rules already include some variations that
1474 integrate these subjects with the structure of the Appellate Rules.
1475 So it may be that the Criminal Rules Committee will find that criminal
1476 prosecutions deserve different treatment of some aspects of electronic
1477 filing and service.
1478
1479 One of the topics that has been discussed is access to electronic
1480 filing and service by pro se litigants. The Civil Rules proposals
1481 reflect a belief that a pro se litigant, the court, and all other
1482 parties may benefit from allowing electronic filing and service by a
1483 pro se litigant. The question is how to manage this practice. It may
1484 be that uniform provisions are suitable for all sets of rules. It may
1485 be that different approaches are desirable. These questions will be
1486 addressed as all committees work toward final proposals for
1487 publication. One committee member noted that her court has had
1488 difficulty with local rules that track each other for pro se litigants
1489 in criminal and civil proceedings — the problems really are different.
1490
1491 Once decisions are reached as to the appropriate level of
1492 substantive uniformity, style questions will remain. It will be
1493 important to work out style questions with the help of the style
1494 consultants so as to avoid any occasion for asking the Standing
1495 Committee to resolve any differences.
1496
1497 *Pilot Projects*
1498
1499 Judge Bates opened the discussion of pilot projects by asking
1500 Judge Campbell, who has chaired the pilot projects committee, to report
1501 on the committee's work.
1502
1503 Judge Campbell began by noting that many people have worked in

1504 the effort to advance consideration of pilot project proposals.
1505
1506 The interest in pilot projects was stimulated by experience in
1507 attempting to translate the lessons offered at the 2010 Conference into
1508 specific rules proposals. There are limits to what can be accomplished
1509 by rules. If a page of history is worth a volume of logic, the purpose
1510 of pilot projects may be to create pages of history by actual experience
1511 in testing new approaches. One result may be rules amendments. But
1512 pilot projects may provide valuable lessons that are implemented in
1513 other ways. The Committee on Court Administration and Case Management
1514 may find valuable practices that it can foster through its work. The
1515 Judicial Conference may gain similar benefits. It may be that
1516 approaches that have been tested and found valuable will be adopted
1517 by emulation without the need for formal action by any committee.
1518
1519 For the rules committees, the immediate plan is to prepare
1520 concrete proposals for possible pilot projects that can be discussed
1521 with the Committee on Court Administration and Case Management and with
1522 the Standing Committee this coming spring. The goal will be to identify
1523 one or more projects that could be implemented late in 2016.
1524
1525 One informal pilot project, the protocols for initial discovery
1526 in individual employment actions, is already being studied. Emery Lee
1527 at the FJC has been tracking experience.
1528
1529 Emery Lee reported that the first thing he learned was that the
1530 employment protocols are being used by more judges than he had thought.
1531 He has identified 70 judges that are using them. Drawing on cases that
1532 have concluded since 2011, he identified some 500 terminated cases.
1533 He drew a random sample of cases that did not use the protocols during
1534 the same period. Overall, he studied data on 1,150 cases.
1535
1536 The positive lesson is that there are fewer discovery motions in
1537 protocol cases: motions were made in 12% of these cases, as compared
1538 to 21% of the comparison cases. The average number of motions made was
1539 half as many in the protocol cases. "That is a big number." The number
1540 suggests that the protocols made an important difference. But it is
1541 not possible to draw firm conclusions because the judges who choose
1542 to adopt the protocols may be judges who are actively engaged in
1543 managing discovery in any event.
1544
1545 The negative lesson is that the time to disposition appears to
1546 be essentially identical in protocol cases and in non-protocol cases.
1547 The essential identity held true for the time taken to reach
1548 disposition by different methods — by motion to dismiss or by summary
1549 judgment. The time to settlement, however, appears to be different.
1550 The identity of times to disposition is puzzling.
1551
1552 The first comment was made by a judge who requires a request for
1553 a conference before a motion can be made. That may be happening in the
1554 employment cases — the same number of discovery disputes arise, but
1555 many of them are resolved at the pre-motion conference, reducing the

1556 number of motions.
1557
1558 A second comment was that the times to disposition may track
1559 closely if courts set the same discovery cut-off time in protocol cases
1560 as in non-protocol cases. The timing of dispositive motions tends to
1561 feed off the discovery cut-off.
1562
1563 Another judge offered a guess that protocol judges are likely to
1564 be "more progressive — to require a conference before a discovery
1565 motion can be made." But he uses the protocols, and thinks he is seeing
1566 fewer discovery disputes. "They don't fight over things they used to
1567 fight over because of automatic disclosures." As one example:
1568 confronted with a request to identify the person who made the decision
1569 to terminate a plaintiff, defendants used to argue that the information
1570 was protected by work product. It is not protected, but the argument
1571 had to be resolved. Now the information is automatically disclosed and
1572 there is no dispute.
1573
1574 Yet another judge said that lawyers use the protocols and "play
1575 nicely together." The similarity in times to disposition is probably
1576 because the case schedules are not changed.
1577
1578 Discussion turned to pilot projects in general. Various pilot
1579 projects aimed at reducing cost and delay have been identified in
1580 eleven states. Before that, the Civil Justice Reform Act stimulated
1581 a massive set of local experiments. The Conference of Chief Justices
1582 is working on a Civil Justice Improvement Project. The Institute for
1583 the Advancement of the American Legal System has studied several pilot
1584 projects, and recommended principles to improve civil litigation. The
1585 National Center for State Courts has evaluated some projects. Projects
1586 are upcoming in Texas and Minnesota. New York State is developing a
1587 program that is aimed at trading early trial dates for curtailed
1588 pretrial procedure.
1589
1590 One possible pilot project that has drawn attention is the one
1591 that would involve some form of expanded initial discovery, perhaps
1592 moving beyond the form embodied by Civil Rule 26(a)(1) between 1993
1593 and 2000 to a model drawn from the Arizona rule.
1594
1595 Other possibilities focus on assigning cases to different tracks
1596 that embody different levels of pretrial procedure, as many of the CJRA
1597 plans attempted. One problem that has confronted these programs has
1598 been identification of criteria for assigning cases to the different
1599 tracks. When dollar limits are set, lawyers tend to plead around them.
1600 Other criteria become difficult to manage.
1601
1602 A quite different approach would forgo formal experiments with
1603 new procedures to focus on training. The FJC study of the CJRA
1604 experiments confirmed that time to disposition can be reduced by a
1605 combination that includes early judicial case management, shorter
1606 discovery cut-offs, and early setting of a firm trial date. This
1607 learning could be demonstrated by a quasi-pilot project that trains

1608 judges in a district, gathers statistics, measures the progress of
1609 judges in reducing times to disposition, and seeks to persuade other
1610 judges of the value of these practices. Emery Lee noted that gathering
1611 information on individual judge performance can be sensitive. But the
1612 RAND study shows that there is real value. We know it is there.
1613
1614 A Committee member noted that he does a lot of arbitrations as
1615 an arbitrator, usually as a neutral member. "There is a convergence
1616 of what happens in arbitration with civil litigation." In arbitration,
1617 you get only the discovery the arbitrator orders. So a lawyer may
1618 request 10 depositions; the order is to come back after talking with
1619 the client about the cost. The next request is for one deposition.
1620 "People sign up for this." "At the Rule 16 conference you quickly learn
1621 what the case is about." The idea of training judges is terrific. But
1622 we have to be able to distinguish cases for tracking purposes — small
1623 cases have to be dealt with differently. And they must be identified
1624 early. Tracking can work. Arbitration hearing dates tend to be quite
1625 firm because they must coordinate the schedules of 8, 9, 10 different
1626 people — a missed date may push the next hearing back by half a year.
1627
1628 A judge noted that before he became a judge he was a member of
1629 the CJRA committee for his district. "We're still doing tracking." But
1630 "I can't say whether it's good or bad." Lawyers are required to address
1631 tracking in their Rule 26(f) conference. Then they discuss it with the
1632 judge. There are five tracks: expedited, standard, complex, mass tort,
1633 and administrative.
1634
1635 Another judge reported that "tracking works." For example, he
1636 reduces the time for discovery in FDCA cases and reduces the number
1637 of discovery events.
1638
1639 The same judge then asked how does the Arizona initial disclosure
1640 of legal theories relate to practice on motions to dismiss for failure
1641 to state a claim? Judge Campbell suggested that it does not seem to
1642 have made a significant change.
1643
1644 A broader perspective was suggested. The RAND study of CJRA
1645 experience was expensive. We should focus on what we can try to do,
1646 and on what resources are available. Comparing pilot projects in some
1647 districts with others can be interesting, but "we do not have a lot
1648 of resources for data-driven projects." Pilot projects, however, "can
1649 be about norm changing." None of the suggested projects embodies an
1650 idea that is strong enough to be adopted without testing in a national
1651 rule that binds all 94 districts. Instead, we can find 5 or 10 districts
1652 to implement known good ideas. The hope will be that they will like
1653 the experience, carry on with it, and perhaps encourage other districts
1654 to emulate their experience. A similar comment suggested that it may
1655 be more effective to develop ideas, label them as best practices or
1656 innovations, and then draw attention to successful adoptions. But
1657 another judge expressed doubt whether "it catches on that way among
1658 judges." A different judge, however, thought that judges will be
1659 willing to adopt a practice when they become convinced that it will

1660 help move cases effectively. The question "is how to get people off
1661 the mark." A more specific suggestion was that "we can convince people
1662 to have a pre-motion telephone conference."
1663
1664 Federal Judicial Center training of all judges may be another
1665 means of fostering ideas that have proved out in one or a few districts.
1666
1667 A judge suggested that the idea of pilots is to test ideas, such
1668 as initial disclosure. Initial disclosure can be tested to see how it
1669 affects the number of motions, the time to disposition, and other
1670 variables. The Committee on Court Administration and Case Management
1671 will meet to discuss these same pilot-project ideas in December. They
1672 support work on this. It was agreed that involving "CACM" is essential.
1673 If they identify districts that have long times to disposition, they
1674 can help to focus enhanced training there. And it may be possible to
1675 measure the results.
1676
1677 A suggestion from an absent member was relayed: "Why are we
1678 thinking of small cases"? We need fact pleading, short discovery, and
1679 firm trial dates in all cases. "Do we need two rounds of pleading in
1680 every case"? Unlimited discovery? State courts working along these
1681 lines are achieving cheaper, faster resolutions. "We should be driving
1682 toward pretty radical rule change."
1683
1684 Another judge noted that it is difficult to measure achievement
1685 of the "just" aspiration expressed in Rule 1. But it is possible to
1686 measure satisfaction of the parties, and that may be a good thing to
1687 study.
1688
1689 The initial disclosure proposal came on for more detailed
1690 discussion. This model aims at "robust, but not aggressive"
1691 disclosure. It works from the Arizona model, but reduces the level of
1692 required disclosures in several dimensions.
1693
1694 The first question asked why the model requires only
1695 identification of categories of relevant documents, rather than actual
1696 production. The Arizona rule requires actual production unless the
1697 documents are voluminous. Arizona lawyers report that the rule
1698 operates as a presumption for production of particular documents. The
1699 response was that the model reflects concern that too much burden will
1700 be imposed by requiring actual production at the outset of an action,
1701 particularly if that were added to the obligation to identify
1702 witnesses, the fact basis for claims and defenses, and legal theory.
1703 To be sure, not much is accomplished by disclosing that relevant
1704 information can be found in such categories as "personnel files," "R
1705 & D files," or the like. But the parties can figure out where to start
1706 discovery by other means. Still, this question is open to further
1707 consideration if this model moves toward testing in a pilot project.
1708
1709 Initial disclosure was viewed from an expanded perspective. The
1710 bar was not ready for the 1993 rule that required disclosure of
1711 information unfavorable to the disclosing party. "The Arizona

1712 experience may not convince" federal judges in 49 other states. It
1713 would be difficult to move directly to adopting a rule that embodies
1714 the Arizona practice. But if it works in 5 or 10 pilot districts, there
1715 could be support for adopting a national practice.
1716
1717 A member reported work on a CJRA committee that adopted an initial
1718 disclosure rule. "It failed. Lawyers weren't ready." But the "pilot
1719 project" label may not be effective in selling a program. We want to
1720 test ideas to see whether they work. We need something that facilitates
1721 culture change. Seeing that something actually works can do a lot.
1722
1723 A truly pointed question was asked: (a)(2) and (a)(2)(A) of the
1724 model require disclosuring:
1725
1726 (2) whether or not the disclosing party intends to use them in
1727 presenting its claims or defenses:
1728
1729 (A) the names and addresses of all persons whom the party believes
1730 may have knowledge or information relevant to the
1731 events, transactions, or occurrences that gave rise to
1732 the action * * *.
1733
1734 Just what is intended? The purpose is to require disclosure of
1735 information unfavorable to the disclosing party — it is enough that
1736 the information is relevant to the events, etc.
1737
1738 The alternative of judge training programs came back for expanded
1739 discussion with the question whether it is a fool's errand. A judge
1740 responded that there are some judges who will resist training. But
1741 overall, training can do more than can be done by rules. Still, it would
1742 be a mistake to adopt a pilot that forces all judges into training.
1743 Another judge said that newer judges are particularly likely to want
1744 to take training in subjects they do not know well. But forcing it will
1745 not work. Still another judge agreed that new judges are more amenable
1746 to this sort of training.
1747
1748 "Baby judges school" also was noted, but it was suggested that
1749 new judges are still so new at this point that the school cannot do
1750 the job of more focused and advanced programs. And in any event, "I'm
1751 not sure the problem is newer judges." However that may be, the training
1752 has to be meaningful. It will not work just to tell us judges that early
1753 case management is important. "Tell me how to make it happen."
1754
1755 A similar perspective was offered. "The important thing is to move
1756 from the abstract to the concrete." "Here's what actually works": A
1757 phone call on a 3-page statement of a motion to dismiss leads to an
1758 amended complaint. If the motion is renewed, whatever is dismissed is
1759 with prejudice. The ideas must be packaged in a way that makes it easier
1760 for the judge to do it.
1761
1762 So it was noted that "we learn more in gatherings of judges where
1763 we talk together." Mid-career judges help newer judges in informal

1764 exchanges that often are more useful than formal training programs.
1765 So one promising approach may be to go to the districts to get the local
1766 judges talking among themselves about topics they would not "fly to
1767 D.C. to learn about."
1768
1769 Other questions were raised about pilot projects. "We know a lot
1770 about what works." A pilot project will take 3 or 4 years in practice.
1771 Then it will have to be evaluated. And the result may be a simple message
1772 that it works better with more judge involvement.
1773
1774 One note of frustration was expressed. In many districts the
1775 district judges refer all pretrial matters to magistrate judges, but
1776 do not set trial dates. The magistrate judge can move cases, but the
1777 district judge has to be involved.
1778
1779 It was noted that sometimes a pilot project will not be able to
1780 enlist every judge in a district. It may be necessary to look for
1781 judges. The Administrative Office can tell a district whether it is
1782 moving faster or slower than the national average. "It's a question of
1783 putting the resources in the right place."
1784
1785 A final suggestion was that it could be useful to get on the agenda
1786 of the Chief District Judges conference.
1787
1788 *New Docket Items*
1789
1790 **15-CV-C**
1791
1792 This suggestion protests the overuse of "objection as to form"
1793 during oral depositions. The proposed remedy is to create a Committee
1794 Note "indicating that it is improper to merely object to 'form' without
1795 providing more precise information as to how the question asked is
1796 'defective as to form' (e.g., compound, leading, assumes facts not in
1797 evidence, etc.)."
1798
1799 It is well established that a Committee Note can be written only
1800 as part of the process of adopting or amending a rule. Rule 30(c)(2)
1801 could be amended to say something like this: "An objection must be
1802 stated in a nonargumentative and nonsuggestive manner <u>that reasonably</u>
1803 <u>explains the basis of the objection</u>." But the Committee concluded that
1804 any revisions of the rule text are unlikely to change behavior for the
1805 better, and might easily create more problems than would be solved.
1806
1807 This suggestion was removed from the docket.
1808
1809 **15-CV-E**
1810
1811 This suggestion addresses the time to file a responsive pleading
1812 when a Rule 12(b)(6) motion to dismiss addresses only part of a
1813 complaint or when the motion is converted to a motion for summary
1814 judgment. The concern is that some courts rule that the time to respond
1815 is suspended by Rule 12(a)(4) only as to the parts of the complaint

1816 challenged by the motion; an answer must be filed as to the remainder
1817 of the complaint. The same problem can persist if the motion to dismiss
1818 is converted to a motion for summary judgment.
1819
1820 It is urged that it is better to suspend the time to respond as
1821 to the entire complaint. This practice avoids duplicative pleadings
1822 and confusion over the proper scope of discovery. Many cases support
1823 it.
1824
1825 Discussion revealed that even though many cases support the
1826 suggested approach, not all judges follow it. One Committee member
1827 reported that some judges in his home district require a response to
1828 the parts of a pleading not addressed by the motion, even though the
1829 time to respond is suspended as to the parts addressed by the motion.
1830 There is some reason for concern.
1831
1832 Despite these possible concerns, the Committee concluded that
1833 there is not yet evidence of a problem so general as to warrant amending
1834 the rules. This suggestion will be removed from the docket, although
1835 without any purpose to suggest that it should not be considered further
1836 if a general problem is shown.
1837
1838 **15-CV-X**
1839
1840 This suggestion raises two or three issues.
1841
1842 One suggestion is that Rule 45 should be revised to extend the
1843 reach of trial subpoenas so as "to force a representative of a
1844 non-resident corporate defendant to appear at trial in the court that
1845 has jurisdiction over the parties and the case." This question was
1846 thoroughly explored in working through the recent amendments of Rule
1847 45. A proposal similar to this one was published for comment, albeit
1848 without any recommendation that it be adopted. No sufficient reasons
1849 are offered to justify reexamination now.
1850
1851 A second suggestion would adopt the procedure of Rule 30(b)(6)
1852 for trial subpoenas. A trial subpoena could name an entity as witness
1853 and direct the entity to produce one or more real persons to testify
1854 for the entity. Discussion noted that Rule 30(b)(6) itself has been
1855 examined twice in the recent past. Each time the Committee found
1856 problems in practice, but concluded that the problems were not
1857 sufficiently pervasive to justify amending the rule. It was concluded
1858 that however well Rule 30(b)(6) works for discovery, extending it to
1859 trial would generate additional problems that could become serious.
1860
1861 The suggestion also might be read to urge that a nonparty entity
1862 be required to produce witnesses to testify at a deposition in the
1863 district where an action is pending.
1864
1865 The Committee concluded that this set of suggestions should be
1866 removed from the docket.
1867

1868 **15-CV-EE**
1869
1870 This submission offers four discrete suggestions, all of which
1871 touch on other sets of rules in addition to the Civil Rules.
1872
1873 The first suggestion is to amend Rule 5.2(a)(1). The rule now
1874 permits disclosure in a filing of the last four digits of the
1875 social-security number and taxpayer-identification number. The
1876 suggestion is that no part of these numbers be disclosed. The reason
1877 is that the method of generating social security numbers relies on a
1878 well-known formula that, together with additional information about
1879 a person that is often readily available, can be used to reconstruct
1880 the full number. This phenomenon was considered by the joint
1881 subcommittee that drafted Rule 5.2 and the parallel Appellate,
1882 Bankruptcy, and Criminal Rules. The decision to allow filing the last
1883 four digits was made because this information was thought important
1884 for the Bankruptcy Rules. A preliminary inquiry suggests that this
1885 information may remain important for bankruptcy purposes. This
1886 suggestion will be carried forward for consultation with the other
1887 advisory committees.
1888
1889 The second suggestion is that any affidavit made to support a
1890 motion to proceed in forma pauperis under 28 U.S.C. § 1915 be filed
1891 under seal and reviewed ex parte. The court could order disclosure to
1892 another party for good cause and under a protective order, or permit
1893 unsealing in appropriately redacted form. The concern seems to be to
1894 protect privacy interests. Again, the other advisory committees are
1895 involved. Brief discussion suggested that filing under seal is not a
1896 general practice now. One judge says that he does not order sealing
1897 because it imposes costly burdens on the court. Another participant
1898 suggested that i.f.p. disclosures generally invade privacy only to the
1899 extent of disclosing a lack of financial resources, a state that could
1900 be inferred from a grant of in forma pauperis permission in any event.
1901 This suggestion too will be carried forward for consultation with other
1902 advisory committees.
1903
1904 The third suggestion is for a new Rule 7.2. It is modeled on a
1905 local rule for the Eastern and Southern Districts of New York. It would
1906 address citation by counsel of cases or other authorities "that are
1907 unpublished or reported exclusively on computerized data bases."
1908 Counsel who cites such authority would be required to provide copies
1909 to a pro se litigant. In addition, on request, counsel would be required
1910 to provide copies of such cases or authorities that are cited by the
1911 court if they were not previously cited by counsel. Discussion began
1912 by asking whether other courts have local rules similar to the E.D.
1913 & S.D.N.Y. rule; no one had information to respond. A judge noted that
1914 he makes copies available when he cites unpublished authority. A lawyer
1915 suggested that Assistant United States Attorneys seem to do this in
1916 some districts. It was suggested that some way might be found to
1917 encourage this as a best practice. A note of this suggestion will be
1918 sent to the head of the FJC. But it was concluded that this practice
1919 involves a detail of practice that need not be enshrined in the Civil

1920 Rules.
1921
1922 The final suggestion is that pro se litigants should be permitted,
1923 but not required, to file by paper, and should be permitted to qualify
1924 for e-filing and service to avoid burdens that other parties do not
1925 have to bear. These questions are being actively considered by several
1926 advisory committees, as noted during earlier parts of this meeting.
1927 They will continue to be considered.
1928
1929 **Pre-Motion Conference: Rule 56**
1930
1931 Judge Jack Zouhary, a member of the Standing Committee, has
1932 offered an informal suggestion that this Committee consider the
1933 practice of requiring a party to request a conference with the court
1934 before making a motion for summary judgment. He follows that practice,
1935 and finds that it has many benefits.
1936
1937 The benefits that may be realized by pre-motion conference
1938 include these possibilities: The movant may decide not to make the
1939 motion, or may focus it better by omitting issues that are genuinely
1940 disputed. The nonmovant may realize that some issues are not genuinely
1941 disputed or are not material. Discussion in the conference may lead
1942 the parties to a better understanding of the facts, the law, or both.
1943 A conference with the court may work better than a conference of the
1944 parties alone. The court may not use the conference to deny permission
1945 to make the motion — Rule 56 establishes a right to move. But the court
1946 can suggest and advise.
1947
1948 Similar advantages can be gained by holding a conference with the
1949 court before other motions are made. These advantages were discussed
1950 in developing the package of case-management amendments now pending
1951 in Congress. The result of those deliberations is to add a new Rule
1952 16(b)(3)(B)(v), which provides that a scheduling order may "direct
1953 that before moving for an order relating to discovery, the movant must
1954 request a conference with the court." This provision was limited to
1955 discovery motions in a spirit of conservatism in adding details to the
1956 rules. It was recognized that many courts require pre-motion
1957 conferences for motions other than discovery motions, including
1958 summary-judgment motions. But it also was recognized that some judges
1959 do not. One step was to reject any general requirement — the new Rule
1960 16(b) provision serves simply as a reminder and perhaps as an
1961 encouragement.
1962
1963 It would be easy enough to expand pending Rule 16(b)(3)(B)(v) to
1964 encompass summary-judgment motions. It would authorize a
1965 scheduling-order provision that "direct[s] that before moving for an
1966 order relating to discovery <u>or for summary judgment</u>, the movant must
1967 request a conference with the court." Or Rule 56(b) could be amended
1968 to mandate this procedure: "a party may<u>, after requesting a conference</u>
1969 <u>with the court,</u> file a motion for summary judgment at any time until
1970 30 days after the close of all discovery."
1971

1972 Discussion began with a judge who requires a pre-motion
1973 conference for "all sorts of motions." This practice has many benefits.
1974 Recognizing that some judges would oppose a mandate, why not expand
1975 Rule 16(b) to encompass not only discovery but any "substantive"
1976 motion?
1977
1978 Another judge thought the underlying idea is good. "But we have
1979 just been through one round of amendments. We did it carefully." We
1980 can find a way to recommend pre-motion conferences as a best practice,
1981 but should wait before suggesting another rule amendment. And then we
1982 will need to think about how broadly the rule should apply. For example,
1983 is there a sufficiently clear concept of what is a "substantive motion"
1984 to support use of that term in rule text?
1985
1986 A lawyer noted that the AAA rules used to provide for summary
1987 disposition in general terms. The rules were amended to require
1988 permission of the arbitrator before making the motion. As an
1989 arbitrator, he has denied permission when the motion seemed
1990 inappropriate. That is not to suggest that a judge be authorized to
1991 deny leave to make a summary-judgment motion, but requiring a
1992 conference would give the judge an opportunity to observe that a motion
1993 would not have much chance of succeeding.
1994
1995 The discussion concluded by determining to hold this suggestion
1996 open, without moving forward now.
1997
1998 **Rules 81, 58**
1999
2000 Two additional items were included in the agenda materials. One
2001 addresses the provisions of Rule 81(c) that govern demands for jury
2002 trial in an action that has been removed from state court. The other
2003 addresses the Rule 58 requirement that a judgment be entered in a
2004 "separate document." These items will be carried forward on the agenda.

Respectfully submitted,

Edward H. Cooper
Reporter

ADVISORY COMMITTEE
ON
CIVIL RULES

Palm Beach, FL
April 14-15, 2016

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AGENDA

Meeting of the Advisory Committee on Civil Rules
April 14-15, 2016

1. Opening Business
   a. Status of Proposed Amendments to Civil Rules 4, 6, and 82 Approved by the Judicial Conference and Transmitted to the Supreme Court
   b. Report on the January 2016 Meeting of the Committee on Rules of Practice and Procedure

2. ACTION ITEM: Approve Minutes of the November 2015 Meeting of the Advisory Committee on Civil Rules

3. Legislative Activity

4. ACTION ITEMS: Rules Proposed for Publication
   a. Rule 23
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5. ACTION ITEMS: New and Carry-Over Proposals for Study
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   g. 15-CV-JJ: Pro-se e-Filing
   h. 15-CV-KK: Third Party Litigation Financing
   i. 15-CV-LL: Rule 4(e)(2) Service on U.S. Employees as Individuals
   j. 15-CV-NN: Mini-Discovery and Prompt Trial
   k. 15-CV-OO: Time Stamps, Seals, Access for Visually Impaired
   l. Civil Rule 58: Judge Pratter

6. ACTION ITEM: Pilot Projects Subcommittee Report

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Chair	D DC	Washington, DC	Chair:	2015	2018
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Elizabeth J. Cabraser	ESQ	California		2010	2016
Robert Michael Dow, Jr.	D	Illinois (Northern)		2013	2016
Joan N. Ericksen	D	Minnesota		2015	2018
Parker C. Folse	ESQ	Washington		2012	2018
Robert Klonoff	ACAD	Oregon		2011	2017
Scott M. Matheson, Jr.	C	Tenth Circuit		2012	2018
Benjamin C. Mizer	DOJ	Washington, DC		NA	NA
Brian Morris	D	Montana		2015	2018
David E. Nahmias	CJUST	Georgia		2012	2018
Solomon Oliver, Jr.	D	Ohio (Northern)		2011	2017
Gene E.K. Pratter	D	Pennsylvania (Eastern)		2010	2016
Virginia A. Seitz	ESQ	District of Columbia		2014	2017
Craig B. Shaffer	M	Colorado		2014	2017
Edward H. Cooper					
Reporter	ACAD	Michigan		1992	Open
Richard Marcus					
Associate Reporter	ACAD	California		1996	Open

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* Ex-officio

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Liaison for the Advisory Committee on Bankruptcy Rules	**Roy T. Englert, Jr., Esq.**	***(Standing)***
Liaison for the Advisory Committee on Civil Rules	**Judge Arthur I. Harris**	***(Bankruptcy)***
Liaison for the Advisory Committee on Civil Rules	**Judge Neil M. Gorsuch**	***(Standing)***
Liaison for the Advisory Committee on Criminal Rules	**Judge Amy J. St. Eve**	***(Standing)***
Liaison for the Advisory Committee on Evidence Rules	**Judge James C. Dever III**	***(Criminal)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Solomon Oliver, Jr.**	***(Civil)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Richard C. Wesley**	***(Standing)***

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TAB 1

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TAB 1A

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Item 1A will be an oral report.

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TAB 1B

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MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 7, 2016 | Phoenix, AZ

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ATTENDANCE

The Judicial Conference on Rules of Practice and Procedure held its spring meeting in Phoenix, Arizona on January 7, 2016. The following members participated in the meeting:

Judge Jeffrey S. Sutton, Chair
Associate Justice Brent E. Dickson
Roy T. Englert, Esq.
Gregory G. Garre, Esq.
Daniel C. Girard, Esq.
Judge Neil M. Gorsuch
Judge Susan P. Graber
Professor William K. Kelley
Judge Patrick J. Schiltz
Judge Amy St. Eve
Judge Richard C. Wesley
Judge Jack Zouhary

The following attended on behalf of the advisory committees:

Advisory Committee on Appellate Rules –
Judge Steven M. Colloton, Chair
Professor Gregory E. Maggs, Reporter

Advisory Committee on Bankruptcy Rules –
Judge Sandra Segal Ikuta, Chair
Professor S. Elizabeth Gibson, Reporter (by teleconference)
Professor Michelle M. Harner, Reporter

Advisory Committee on Civil Rules –
Judge John D. Bates, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Reporter

Advisory Committee on Criminal Rules –
Judge Donald W. Molloy, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Reporter

Advisory Committee on Evidence Rules –
Judge William K. Sessions III, Chair
Professor Daniel J. Capra, Reporter

Elizabeth J. Shapiro, Esq., Deputy Director for the Civil Division of the Justice Department, represented the Department of Justice on behalf of the Honorable Sally Quillian Yates, Deputy Attorney General.

125-001541

Other meeting attendees included: Judge David G. Campbell; Judge Scott Matheson, Jr. (teleconference); Judge Robert M. Dow (teleconference); Judge Phillip R. Martinez and Sean Marlaire, representing the Court Administration and Case Management Committee ("CACM"); Professor Bryan A. Garner, Style Consultant; Professor R. Joseph Kimble, Style Consultant; Professor Geoffrey C. Hazard, Jr., Consultant.

Providing support to the Committee:

Professor Daniel R. Coquillette	Reporter, Standing Committee
Rebecca A. Womeldorf (by teleconference)	Secretary, Standing Committee
Julie Wilson (by teleconference)	Attorney Advisor, RCSO
Scott Myers	Attorney Advisor, RCSO
Bridget M. Healy (by teleconference)	Attorney Advisor, RCSO
Shelly Cox	Administrative Specialist
Tim Reagan	Senior Research Associate, FJC
Derek A. Webb	Law Clerk, Standing Committee
Amelia G. Yowell (by teleconference)	Supreme Court Fellow, AO

INTRODUCTORY REMARKS

Judge Sutton called the meeting to order. He introduced two new members of the Standing Committee, Daniel Girard and William Kelley, welcomed back Bryan Garner as a Style Consultant, welcomed Judge John Bates as the new chair of the Advisory Committee on Civil Rules and Judge Donald Molloy as the new chair of the Advisory Committee on Criminal Rules, and introduced Greg Maggs as the new reporter for the Advisory Committee on Appellate Rules and Michelle Harner as a new reporter for the Advisory Committee on Bankruptcy Rules. He thanked Judge Phillip Martinez and Sean Marlaire for representing CACM. And he reminded the attendees that Justice O'Connor would attend the dinner meeting.

Judge Sutton reported that the civil rules package, which included revisions of Rules 1, 4, 16, 26, 30, 31, 33, 34, 37, and 55, and abrogation of Rule 84, and Bankruptcy Rule 1007, went into effect on December 1, 2015. He observed that Chief Justice Roberts devoted his year-end report to that package.

Judge Sutton also reported that the Judicial Conference submitted various rule proposals to the Supreme Court on October 9, 2015 (Appellate Rules 4, 5, 21, 25, 26, 27, 28, 28.1, 29, 32, 35, and 40, and Forms 1, 5, and 6, and proposed new Form 7; Bankruptcy Rules 1010, 1011, 2002, 3002.1, 9006(f), and new Rule 1012; Civil Rules 4, 6, and 82; and Criminal Rules 4, 41, and 45) and again on October 29, 2015 (Bankruptcy Rules 7008, 7012, 7016, 9027, and 9033, known as the "*Stern* Amendments").

APPROVAL OF THE MINUTES OF THE LAST MEETING

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee approved the minutes of the May 28, 2015 meeting.**

125-001542

INTER-COMMITTEE WORK

Judge Sutton reserved discussion of electronic filing, service, and notice requirements for the Advisory Committee on Criminal Rules' report on Criminal Rule 49.

Professor Capra discussed the 2015 study conducted by Joe S. Cecil of the Federal Judicial Center entitled *Unredacted Social Security Numbers in Federal Court PACER Documents*, which discussed unredacted social security numbers in documents filed in federal courts and thus available in PACER, notwithstanding the "privacy rules" adopted in 2007 that require redaction of such information. The Standing Committee concluded that this problem could not be resolved by another rule amendment, and offered to support those in CACM who would address implementation of the existing rule at their summer 2016 meeting.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Molloy reported that the Advisory Committee on Criminal Rules had no action items and six information items.

Information Items

Rule 49 – Rule 49 provides that service and filing must be made "in the manner provided for a civil action." The Advisory Committee is considering ways to amend this rule in anticipation of a likely change in the civil rules that will require all parties to file and serve electronically. After study by the Rule 49 Subcommittee chaired by Judge David Lawson, the Advisory Committee concluded that such an electronic default rule could be problematic in the criminal context for two reasons. First, pro se defendants and pro se prisoners filing actions under § 2254 and § 2255 rarely have unfettered access to the CM/ECF system. Second, the architecture of CM/ECF does not permit non-party filings in criminal cases. Therefore, the Advisory Committee favors severing the link to the civil rules governing service and filing and is drafting a stand-alone Rule 49 that does not incorporate Civil Rule 5. They plan to submit a final draft rule to the Standing Committee in June 2016.

The Standing Committee then discussed the general topic of incorporation by reference across the various sets of rules. Consensus formed around the idea that whenever an advisory committee is considering changing a rule that is incorporated by reference, or is parallel with language in another set of rules, it should always first coordinate with the committee responsible for those other rules before sending proposed changes out for notice and comment.

Members also agreed that the presumption in favor of parallel language across the rules suggested that changes to Rule 49 should depart as little as possible from the language of Civil Rule 5.

Rule 12.4(a)(2) – After an amendment in 2009, the Code of Judicial Conduct no longer treats as "parties" all victims entitled to restitution. The Department of Justice consequently recommended a corresponding amendment to Rule 12.4(a)(2), which assists judges in

125-001543

determining whether to recuse themselves based on the identity of any organizational or corporate victims. The Advisory Committee agreed with this recommendation and created a subcommittee to draft a proposed amendment. Because a parallel provision exists in the Appellate Rules, the Advisory Committee on Criminal Rules is working with the Advisory Committee on Appellate Rules to draft the amendment.

Rule 15(d) – The Advisory Committee appointed a subcommittee to study whether to amend this rule and its accompanying note, which governs payment of deposition expenses, in light of an inconsistency between the text of the rule and the committee note. Judge Molloy said the text of the rule accurately identifies who bears the costs, but the note slightly mischaracterizes the rule by suggesting that the Department of Justice would have to pay for certain depositions overseas even if it did not request them. The Advisory Committee is struggling with how to fix this problem given the presumption that it cannot amend a note absent a rule revision. The Subcommittee will make its recommendations about how to fix this potential problem at the April 2016 meeting of the Advisory Committee.

Rule 32.1 – At the suggestion of Judge Graber, the Advisory Committee has examined whether Rule 32.1 should track the language of Rule 32 and require the court to give the government an opportunity to allocute at a hearing for revocation or modification of probation or supervised release. In a couple of cases, the United States Court of Appeals for the Ninth Circuit has held that the court must grant the government this opportunity and imported procedural rules from Rule 32 to fill "gaps" in Rule 32.1. After discussing the matter at its September 2015 meeting, the Advisory Committee decided to let this issue percolate and watch for developments in other circuits before considering any rule amendments.

Rule 23 – The Advisory Committee considered a suggestion to revise Rule 23 to allow oral waivers of trial by jury. The current rule requires a written stipulation from the defendant if they want to waive a jury trial and from the parties if they want to have a jury composed of fewer than twelve persons. Several cases have held that an oral waiver is sufficient if it is made knowingly and intelligently and have held that the failure to make the waiver in writing was harmless error. After study, the Advisory Committee decided against pursuing an amendment to Rule 23 because so many other criminal rules require written waivers and because the doctrine of harmless error covers this issue.

Rule 6 – In response to a suggestion to consider several amendments to Rule 6, which governs grand jury procedures, after a thorough discussion, the Advisory Committee decided to retain the current rule.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Colloton reported that the Advisory Committee on Appellate Rules had three action items in the form of three sets of proposed amendments to be published this upcoming summer for which it sought the approval of the Standing Committee.

Action Items

125-001544

STAYS OF THE ISSUANCE OF THE MANDATE: RULE 41 – The Advisory Committee sought approval of several amendments to Rule 41 designed to respond to two Supreme Court cases that highlighted some ambiguity within the Rule and to remove some redundancy from the Rule.

The proposed amendment to Rule 41(b) clarifies that a circuit court can extend the time of a stay of its mandate "by order" and not simply by inaction. In response to a question from a member, the Standing Committee discussed the pros and cons of inserting "only" in front of "by order" but decided to leave the language as is, with the potential to revisit at the June 2016 Standing Committee meeting. The proposed amendment to Rule 41(d)(4) next clarifies that a circuit court can "in extraordinary circumstances" stay a mandate even after it receives a copy of a Supreme Court order denying certiorari, thereby adopting the same extraordinary circumstances standard that the Supreme Court has found is required to recall a mandate. Finally, the Advisory Committee proposed deleting Rule 41(d)(1), which replicates Rule 41(b) regarding the effect of a petition for rehearing on the mandate, and is therefore redundant.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendments to Rule 41 and their accompanying Committee Notes.**

AUTHORIZING LOCAL RULES ON THE FILING OF AMICUS BRIEFS: RULE 29(A) – The Advisory Committee sought approval of an amendment to Rule 29(a) that would authorize local rules that prohibit the filing of amicus briefs, even if the parties have consented to their filing, in situations where they would disqualify a judge. As it stands, Rule 29(a) appears to be inconsistent with such local rules because it implies that there is an absolute right to file an amicus brief if the parties consent: "Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing." The proposed amendment adds to that sentence "except that a court of appeals may by local rule prohibit the filing of an amicus brief that would result in the disqualification of a judge."

The Standing Committee members raised and discussed several potential stylistic issues with the proposed amendment. Judge Colloton noted in advance that he plans to shorten "the disqualification of a judge" to "a judge's disqualification." Judge Sutton recommended omitting the phrase "by local rule," which received support from the members. Others raised stylistic concerns with the "except that" phrase as a whole, preferring to start a new sentence beginning with "But" or "A court of appeals may," or breaking up the sentence with a semicolon and beginning the second clause with "provided however that." Others pointed out that a third sentence might suggest that the exception would also apply to the first sentence of Rule 29(a), which governs amicus briefs submitted by the government. Finally, some members raised a concern with the meaning of the phrase "prohibit the filing," asking whether it referred to prohibiting the actual submission of the document, its delivery to the panel, or its continued appearance in the record.

Judge Colloton decided to "remand" the proposal back to the Advisory Committee for further consideration of these largely stylistic revisions before re-submission to the Standing Committee.

DRAFT

12b-001545

EXTENSION OF TIME FOR FILING REPLY BRIEFS: RULES 31(A)(1) AND 28.1(F)(4) – The Advisory Committee sought approval of an amendment to Rules 31(a)(1) and Rule 28.1(f)(4), which would lengthen the time to serve and file a reply brief from 14 days to 21 days after the service of the appellee's brief. This amendment comes in anticipation of the elimination of the "three day rule," which would effectively reduce the time to file a reply brief from 17 to 14 days. After appellate lawyers on the Advisory Committee expressed the concern that this reduced window of time would adversely effect the quality of reply briefs, and in the hope that the extra time might lead to shorter reply briefs, the Advisory Committee decided to increase the time allowed. The Advisory Committee elected to shift from 14 days to 21 days in keeping with the established convention to measure time periods in 7-day increments where feasible. Judge Colloton noted that the phrase "the committee concluded that" will be deleted from the draft Committee Notes for both amended rules.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendments to Rule 31(a)(1) and Rule 28.1(f)(4) and their accompanying Committee Notes.**

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Sessions reported that the Advisory Committee on Evidence Rules had no action items and four information items.

Information Items

SYMPOSIUM ON HEARSAY REFORM – Judge Sessions reported on the Symposium on Hearsay Reform in Chicago on October 9, 2015. Inspired by a recent decision by Judge Posner in which he had suggested the removal of all the specific exceptions to the federal rule against hearsay in favor of greater discretion for the presiding judge, the symposium brought together prominent judges, lawyers, and professors to re-examine the continuing vitality of the hearsay rule and its exceptions. Participants considered reform of the hearsay rule in the context of the electronic information era and discussed the pros and cons of various potential amendments to the hearsay rule. Participants entertained a proposal to replace the rule-based system with a guidelines system akin to the Sentencing Guidelines. Another proposal favored replacing the system of exceptions with a Rule 403 balancing analysis. And yet another was to retain the current system while expanding use of the residual exception in Rule 807. Judge Sessions added that none of these changes was likely to happen soon, particularly in view of the nearly uniform position of the practicing attorneys that the specificity of the current rules works well. He and several members remarked upon how successful the symposium had been and thanked Judge St. Eve, Judge Schiltz and Professor Capra for their help with the event.

PROPOSED AMENDMENTS TO RULES 803(16) AND RULE 902 ISSUED FOR PUBLIC COMMENT – The Advisory Committee has two proposed amendments out for public comment. The first, Rule 803(16), eliminates the hearsay exception for ancient documents. The second, Rule 902, would ease the burden of authenticating certain electronic evidence. Judge Sessions reported that since November 2015 the Advisory Committee has received more than 100 letters on the first rule governing the ancient documents exception, principally from lawyers in asbestos and

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environmental toxic litigation criticizing the proposed amendment. Most expressed concern that the proposed rule would prevent the admission of documents over 20 years old, a concern Judge Sessions believed misplaced because the proposed rule does not alter the rules for authenticity, but rather reliability. Judge Sutton asked whether a Committee Note might help clarify this issue, and Professor Capra concurred. With respect to Rule 902, the proposal elicited little public comment and seems to have been universally accepted. Professor Capra added that the magistrate judges support both proposed amendments.

PROPOSED AMENDMENTS TO THE NOTICE PROVISIONS IN THE FEDERAL RULES OF EVIDENCE – The Advisory Committee continues to consider ways to increase uniformity among the various notice provisions throughout the Federal Rules of Evidence. Uniformity cannot be achieved for all provisions. For example, the notice provisions of Rules 412–415 dealing with sex abuse offenses, are congressionally mandated and cannot therefore be amended through the rules process. The Advisory Committee continues to consider uniform language that would work for other notice provisions.

Turning to specific notice provisions, the Advisory Committee is considering removing the requirement in Rule 404(b) that a criminal defendant must request notice of the general nature of any evidence that the prosecutor intends to offer at trial. Judge Sessions added that the Advisory Committee believed the existing rule was a "trap for an incompetent lawyer" and unfair because it punishes defendants whose lawyers fail to request notice. The Advisory Committee is also considering inclusion of a good faith exception to the pretrial notice provision in Rule 807.

BEST PRACTICES MANUAL ON AUTHENTICATION OF ELECTRONIC EVIDENCE – In an effort to assist courts and litigants in authenticating electronic evidence such as e-mail, Facebook posts, tweets, YouTube videos, etc., and following a suggestion from Judge Sutton, the Advisory Committee is creating a best practices manual on the subject. Judge Sessions reported that Professor Capra has worked on this manual along with Greg Joseph and Judge Paul Grimm, and the final product should be completed for presentation to the Standing Committee by its June meeting.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Ikuta reported that the Advisory Committee had five action items and four information items to present to the Standing Committee. She also announced that the modernized bankruptcy forms became effective on December 1, 2015. She added that they have been well received and that the only "criticism" made against them is that they are so clear and easy to use that they might encourage more pro se filings.

Action Items

Judge Ikuta explained that because the first three action items (a proposed change to Rule 1015(b), proposed changes to Official Forms 20A and 20B, and a proposed change to Official Form 410S2) involved just minor or conforming changes, the Advisory Committee recommended to the Standing Committee that they go through the regular approval process but without notice and public comment. She added that this would result in a December 1, 2017

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effective date for the rule rather than the December 1, 2016 effective date stated in the agenda book. The forms, she said, would remain on track to go into effect on December 1, 2016.

RULE 1015(B) (CASES INVOLVING TWO OR MORE RELATED DEBTORS) – In light of the Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015), the Advisory Committee proposed that Rule 1015(b) be amended to substitute the word "spouses" for "husband and wife" in order to include joint bankruptcy cases of same-sex couples.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 1015(b).**

OFFICIAL FORMS 20A (NOTICE OF MOTION OR OBJECTION) AND 20B (NOTICE OF OBJECTION TO CLAIM) – The Advisory Committee proposed that Official Forms 20A and 20B be renumbered to 420A and 420B, to conform with the new numbering convention of the Forms Modernization Project. It also proposed substituting the word "send" for "mail" in this rule to encompass other permissible methods of service and to maintain consistency with other new forms.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Official Forms 20A and 20B.**

OFFICIAL FORM 410S2 (NOTICE OF POSTPETITION FEES, EXPENSES, AND CHARGES) – The Advisory Committee proposed resolving an inconsistency between Rule 3002.1(c) and Official Form 410S2. The rule requires a home mortgage creditor to give notice to the debtor of all fees without excluding ones already ruled on by the bankruptcy court. The form that implements the rule, however, says that the creditor should not "include…any amounts previously…ruled on by the bankruptcy court." The Advisory Committee proposed deleting the form's inconsistent instruction and adding an instruction that tells the lender to flag the fees that have already been approved by the bankruptcy court.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Official Form 410S2.**

RULE 3002.1(B) (NOTICE OF PAYMENT CHANGES) AND (E) (DETERMINATION OF FEES, EXPENSES, OR CHARGES) – The Advisory Committee sought approval from the Standing Committee of three proposed amendments to Rule 3002.1(b) for publication for public comment in August 2016. First, the Advisory Committee recommends creating a national procedure by which any party in interest can file a motion to determine whether a change in the mortgage payment made by the creditor is valid. Second, the Advisory Committee recommends giving the court the discretion to modify the 21-day notice requirement in the case of home equity lines of credit because the balance of such loans is constantly changing. And third, the Advisory Committee recommends amending Rule 3002.1(e) by allowing any party in interest, and not just a debtor or trustee as currently allowed under the rule, to object to the assessment of a fee, expense, or charge.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendments to Rule 3002.1(b) and 3002.1(e) for publication for public comment.**

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REQUEST FOR A LIMITED DELEGATION OF AUTHORITY – The Advisory Committee requested a limited delegation of authority to allow it to make necessary non-substantive, technical, and conforming changes to the official bankruptcy forms that would be effective immediately but subject to retroactive approval by the Standing Committee and notice to the Judicial Conference. Judge Ikuta explained that there were three categories of such changes that would benefit from this procedure: 1) typos; 2) changes to the layout or wording of a form to ensure that CM/ECF can capture the data; and 3) conforming changes when statutes, rules, or Judicial Conference policies change in non-substantive ways. Discussion led to consensus around the idea that after the Advisory Committee identified the need for a minor change in a form, it would vote on the proposed change, and notify the chair of the Standing Committee during that approval process. Some members observed that because the process to amend forms concludes with approval by the Judicial Conference, and does not require the full Rules Enabling Act process, the delegation of authority to the Advisory Committee to make minor changes effective immediately, but subject to retroactive approval by the Standing Committee and notice to the Judicial Conference, posed no procedural problems.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously agreed to seek Judicial Conference delegation of authority to the Advisory Committee on Bankruptcy Rules to make non-substantive, technical, and conforming changes to official bankruptcy forms, with any such changes subject to retroactive approval by the Standing Committee and notice to the Judicial Conference.**

Information Items

STERN AMENDMENTS RESUBMITTED TO THE SUPREME COURT – Professor Gibson gave a brief update on the *Stern* Amendments. After the Supreme Court's decision in *Wellness International Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015), which upheld the validity of party consent to bankruptcy courts entering final judgment on *Stern* claims, the Advisory Committee resubmitted to the Standing Committee its *Stern* Amendments. It had originally submitted these amendments in 2013, and secured the approval of the Standing Committee and the Judicial Conference, but the Judicial Conference withdrew them given the Supreme Court's decision to hear *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014). The Standing Committee reapproved the amendments by e-mail vote in October 2015 and the Judicial Conference approved them shortly thereafter. The Judicial Conference submitted them to the Supreme Court as a supplemental transmittal on October 29, 2015. If approved by the Supreme Court in the spring of 2016, they will go into effect on December 1, 2016. Professor Gibson and Judge Ikuta expressed the Advisory Committee's appreciation of the Standing Committee's quick action on the *Stern* Amendments.

CHAPTER 13 PLAN FORM AND OPT-OUT PROPOSAL – Judge Ikuta gave a report on the history and current status of the Advisory Committee's plan to create a national Chapter 13 plan official form. The Advisory Committee commenced work on this at its spring 2011 meeting. It published its proposed plan form and related rules in August 2013. In response to comments received, the package was revised and republished in August 2014. The second publication prompted additional comments, most notably from numerous bankruptcy judges expressing their

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preference to retain their local forms. In response, the Advisory Committee voted unanimously to consider a proposal to approve the plan form and most of the related rules with minor amendments, but to consider further rule revisions that would allow a district to use a single district-wide local plan form so long as it met certain criteria. At its April 2016 meeting, the Advisory Committee will decide whether to recommend that this "opt-out" proposal go forward without further notice and public comment. Judge Sutton and Professor Coquillette suggested that while republication might not be required because the Chapter 13 package has been published twice before, prudence might favor republication given the demonstrated public interest over the past two publication periods and the somewhat new concept of the opt-out proposal. Members generally supported the idea of further publication, but only to the rule changes needed to implement the proposed opt-out procedure, and, if acceptable to the Judicial Conference and the Supreme Court, on an accelerated basis that would allow for an effective date of December 2017, rather than December 2018. To accomplish this, the rule changes could be published for three months (August–November, 2016) and the entire Chapter 13 package could be considered by the Standing Committee in January 2017, the Judicial Conference in March 2017, and the Supreme Court by May 2017, with a target December 1, 2017 effective date assuming no contrary congressional action.

RULE 4003(C) (EXEMPTIONS – BURDEN OF PROOF) – Professor Harner reported the Advisory Committee's ongoing study regarding whether Rule 4003(c), which places the burden of proof in any litigation concerning a debtor's claimed exemptions on the objecting party, violates the Rules Enabling Act. In light of the Supreme Court's decision in *Raleigh v. Illinois Department of Revenue*, 530 U.S. 15 (2000), which held that the burden of proof is a substantive component of a claim, Chief Judge Christopher M. Klein, U.S. Bankruptcy Court for the Eastern District of California, suggested to the Advisory Committee that by placing the burden of proof on the objector, as opposed to the debtor which many states do, Rule 4003(c) alters a substantive right and thereby violates the Rules Enabling Act. Professor Harner explained that the Advisory Committee is studying whether, à la *Hanna v. Plumer*, the rule announced in *Raleigh* is substantive or procedural.

RULE 9037 (PRIVACY PROTECTION FOR FILINGS WITH THE COURT) – REDACTION OF PREVIOUSLY FILED DOCUMENTS – Judge Ikuta reported that the Advisory Committee is studying CACM's recent suggestion that it amend Rule 9037. CACM suggested that the rule require notice be given to affected individuals when a request is made to redact a previously filed document that mistakenly included unredacted information. Because a redaction request may flag the existence of unredacted information, consideration is being given to procedures to prevent the public from accessing the unredacted information before the court can resolve the redaction request. Further consideration at the Advisory Committee's spring 2016 meeting may result in a proposal.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates reported that the Advisory Committee on Civil Rules had no action items but four information items to put before the Standing Committee.

Information Items

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RULE 23 SUBCOMMITTEE – Judge Bates reported on the work of the Rule 23 Subcommittee, chaired by Judge Robert Dow, which has been in existence since 2011. After various conferences and multiple submissions, the Subcommittee has identified six topics for possible rule amendments:

1. "Frontloading" in Rule 23(e)(1), requiring upfront information relating to the decision whether to send notice to the class of a proposed settlement.
2. Amendment to Rule 23(f) to clarify that a decision to send notice to the class under Rule 23(e)(1) is not appealable under Rule 23(f).
3. Amendment to Rule 23(c)(2)(B) to clarify that the Rule 23(e)(1) notice triggers the opt-out period under a Rule 23(b)(3) class action.
4. Another amendment to Rule 23(c)(2)(B) to clarify that the means by which the court gives notice may be "by United States mail, electronic means or other appropriate means."
5. Addressing issues raised by "bad faith" class action objectors. Finding a way to deter objectors from holding settlements "hostage" while pursuing an appeal until they receive a payoff and withdraw their appeal has received considerable attention. Members of the Subcommittee seem inclined to recommend a simple solution which would require district court approval of any payment in exchange for withdrawing an appeal. One potential issue with this solution is jurisdictional: Once the notice of appeal is filed, jurisdiction over a case typically transfers from the district court to the court of appeals. The Subcommittee is currently studying this issue. The Subcommittee is also considering a more complicated solution whereby it would amend both Rule 23 and Appellate Rule 42(c), on the model of an indicative ruling.
6. Refining standards for approval of proposed class action settlements under Rule 23(e)(2). The proposed amendment focuses and expands upon the "fair, reasonable, and adequate" standard incorporated into the rule in 2003 by offering a short list of core considerations in the settlement-approval setting.

The Standing Committee principally discussed the "bad faith" objector issue. Some members raised the question of whether sanctioning lawyers might help address the problem. Others asked whether securing district court approval for a payoff might actually worsen the problem by incentivizing bad faith objectors to do more work and run up a bill that they can justify to a court.

Judge Bates next reported on those issues that the Rule 23 Subcommittee has decided to place on hold.

1. Ascertainability. Because this issue is currently getting worked out by several circuit courts, is the subject of a few pending cert petitions to the Supreme Court, and may be affected by the class action cases already argued this term before the Court, the Subcommittee has decided not to propose a rule amendment at this time.
2. "Pick-off" offers of judgment. This issue has also recently been litigated in the circuit courts and, as of the time of the meeting, was pending before the Supreme Court in *Campbell-Ewald v. Gomez*, 136 S.Ct. 663 (2016).

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3. Settlement class certification standards. Given the feeling of many in the bar that they and the courts can handle settlement class certification without the need for a rule amendment, the Subcommittee has decided to place this issue on hold.
4. Cy Pres. Given the many questions that have emerged in this controversial area, including the necessity of a rule and whether a rule might violate the Rules Enabling Act, the Subcommittee has decided to place this issue on hold.
5. Issue classes. The Subcommittee has concluded that whatever disagreement among the circuits there may have been on this issue at one time, it has since subsided.

RULE 62: STAYS OF EXECUTION – Judge Bates reported on the work of the joint Subcommittee of the Appellate and Civil Rules Advisory Committees chaired by Judge Scott Matheson. The Subcommittee has developed a draft amendment for Rule 62 that straightforwardly responds to three concerns raised by a district court judge and other members of the Appellate Rules Advisory Committee. First, the draft extends the automatic stay from 14 days to 30 days to eliminate a gap between the current 14-day expiration of the automatic stay and the 28-day time set for post-trial motions and the 30-day time allowed for appeals. Second, it allows security for a stay either by bond or some other security provided at any time after judgment is entered. And third, it allows security by a single act that will extend through the entirety of the post-judgment proceedings in the district court and through the completion of the appeal. Judge Bates concluded by noting that the Subcommittee had considered but withdrawn a proposal that spelled out several details of a court's inherent power to regulate several aspects of a stay. The Subcommittee withdrew it after discussion at the Advisory Committee meetings because a stay is a matter of right upon posting of a bond and because they concluded that such an amendment was not necessary to solve any problems. This preliminary draft has yet to be approved by either Advisory Committee. Judge Bates said that he planned to submit this to the Standing Committee in June 2016 for publication.

EDUCATIONAL PROGRAMS REGARDING THE CIVIL RULES PACKAGE – Judge Bates reported that the Advisory Committee has been collaborating with the Federal Judicial Center to create educational programs for judges and lawyers to help spread the word about the new discovery amendments that went into effect on December 1, 2015. Judge Campbell and others have starred in various educational videos highlighting the new rules. Judge Sutton and Judge Bates sent out letters to all chief judges of the circuit, district, and bankruptcy courts on December 1, 2015, explaining the changes. Various circuit courts are creating educational programs of their own for circuit conferences and other court gatherings. The American Bar Association and other bar groups have started to create programs as well. The Education Subcommittee, chaired by Judge Paul Grimm, is now working on additional steps in collaboration with the Federal Judicial Center. Judge Sutton underlined the ongoing responsibility of Standing Committee members to help support these local and national educational efforts.

PILOT PROJECTS – Judge Campbell reported on the ongoing work of the Pilot Project Subcommittee. The Subcommittee investigates ways to make civil litigation more efficient and collects empirical data on best practices to help inform rule making. The Subcommittee consists of members of the Advisory Committee on Civil Rules along with Judges Sutton, Gorsuch and St. Eve from the Standing Committee, Jeremy Fogel and others from the Federal Judicial Center, and in the near future one or more members of CACM. Over the past several months, members

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of the Subcommittee have been researching pilot projects and various studies that have already been conducted, including 11 projects in 11 different states, efforts in 2 federal courts particularly noted for their efficiency, a pilot project conducted during the 1990s at the direction of Congress, the work of the Conference of State Court Chief Justices, and a multi-year FJC study conducted at CACM's request that examined the root causes of court congestion.

The Subcommittee has decided to focus on two possible pilot projects. First, it is looking into enhanced initial disclosures in civil litigation. Some research indicates that initial disclosure of helpful and hurtful information known by each party can improve the efficiency of litigation. But the experience with a mandatory disclosure regime in the 1990s under then Rule 26(a), which involved fierce opposition, a dissent by three Supreme Court Justices, multiple district court opt-outs, and eventual abandonment of the rule, provides something of a cautionary tale. The Subcommittee is exploring and conducting empirical and historical research on this topic at both the federal and state level. They have concluded that conducting pilot projects that test the benefits of more robust initial disclosures would be a sensible next step before proceeding to the drafting and publishing of any new possible rule amendments. Judge Campbell sought the perspective of members on several tough questions, including what the scope of the discovery requirement should be, how to handle objections to discovery obligations, how to handle electronically stored information, how to get around a categories-of-documents-based approach to discovery obligations, and how to measure the success of any pilot projects in this area (cost of litigation, time to disposition, number of discovery disputes, etc.).

The second category of possible pilot projects would focus upon expedited litigation. The Federal Judicial Center has shown that there exists a linear relationship between the length of a lawsuit and its cost. There are already a number of federal and state courts that have expedited schedules, including the Eastern District of Virginia, Southern District of Florida, Western District of Wisconsin, and the state courts of Utah and Colorado. Under the CJRA, researchers found in the 1990s that early judge intervention, efficient and firm discovery schedules, and firm trial dates are among the factors most helpful in moving cases along. Because Rule 16, in existence in its current form since 1983, already permits judges to do all of this, a change in a federal rule of procedure is less necessary than a change in local legal culture to help speed up case disposition times. The Subcommittee is considering running a pilot project that could address a court's legal culture by setting certain benchmarks for it, including requiring case management conferences within 60 days, setting firm discovery schedules and trial dates, and measuring how well the local court is meeting those benchmarks over a three-year period. At the same time, the Federal Judicial Center would provide training for the pilot judges in that court in accelerated case management.

Judge Campbell discussed another possible pilot project of having the Federal Judicial Center regularly publish a chart showing the average disposition time by a district court of different kinds of suits compared to the national average.

And finally, speaking on his own and not on behalf of the Pilot Project Subcommittee, Judge Campbell discussed with members the pros and cons of possibly shortening the time before cases and motions were placed on the CJRA list from 3 years to 2 years, and from 6 months to 3 months.

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REPORT OF THE ADMINISTRATIVE OFFICE

REPORT ON THE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT'S CONSIDERATION OF PROTECTION OF COOPERATOR INFORMATION – Judge Martinez, assisted by Sean Marlaire, reported on CACM's work on the issue of harm or threat of harm to government cooperators and their families in criminal cases. This problem, which goes back at least a decade, has proven a tricky one, and seems to pit the interest in protecting cooperators from retaliation against the interest of access to court records and proceedings. CACM met in early December in Washington, D.C., where it discussed the issue. Judge Martinez reported that Judge William Terrell Hodges, the chair of CACM, recommends that the Standing Committee refer this issue to the Advisory Committee on Criminal Rules. CACM has concluded that a national approach, whether in the form of rule change or suggested best practices, would be preferable to one based on diverse local rules. Members of the Standing Committee generally agreed that the problem was a serious one that required collaboration across multiple committees and consultation with the Department of Justice and the Bureau of Prisons. Judge Molloy, on behalf of the Advisory Committee on Criminal Rules, and in consultation with his Reporters, welcomed the reference of the issue to his Committee. He added that he looked forward to inviting interested parties to the discussion, and pledged to keep the Advisory Committee on Appellate Rules informed of the Committee's work.

STRATEGIC PLAN FOR THE FEDERAL JUDICIARY – Judge Sutton observed that the Standing Committee had various ongoing initiatives that support the strategies and goals of the current *Strategic Plan for the Federal Judiciary*, which the Judicial Conference approved on September 17, 2015.

CONCLUDING REMARKS

Judge Sutton thanked the Reporters for all of the impressive work they had done on their memoranda for the meeting and the members of the Rules Committee Support Office for helping to coordinate the meeting. He then concluded the meeting. The Standing Committee will next meet in Washington, D.C., on June 6–7, 2016.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

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DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

NOVEMBER 5, 2015

The Civil Rules Advisory Committee met at S.J. Quinney College of the Law at the University of Utah on November 5, 2015. (The meeting was scheduled to carry over to November 6, but all business was concluded by the end of the day on November 5.) Participants included Judge John D. Bates, Committee Chair, and Committee members John M. Barkett, Esq.; Elizabeth Cabraser, Esq.; Judge Robert Michael Dow, Jr.; Judge Joan M. Ericksen; Dean Robert H. Klonoff; Judge Scott M. Matheson, Jr.; Hon. Benjamin C. Mizer; Judge Brian Morris; Justice David E. Nahmias; Judge Solomon Oliver, Jr.; Judge Gene E.K. Pratter; Virginia A. Seitz, Esq. (by telephone); and Judge Craig B. Shaffer. Former Committee Chair Judge David G. Campbell and former member Judge Paul W. Grimm also attended. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Judge Jeffrey S. Sutton, Chair, Judge Neil M. Gorsuch, liaison, Judge Amy J. St. Eve (by telephone), and (also by telephone) Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge Arthur I. Harris participated as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., the court-clerk representative, also participated. The Department of Justice was further represented by Theodore Hirt, Esq.. Rebecca A. Womeldorf, Esq., Amelia Yowell, Esq., and Derek Webb, Esq. represented the Administrative Office. Emery G. Lee, III, attended for the Federal Judicial Center. Observers included Jerome Scanlan, Esq. (EEOC); Joseph D. Garrison, Esq. (National Employment Lawyers Association); Brittany Kaufman, Esq. (IAALS); Alex Dahl, Esq. and Mary Massaron, Esq. (Lawyers for Civil Justice); John K. Rabiej, Esq.; John Vail, Esq.; Valerie M. Nannery, Esq. (Center for Constitutional Litigation); and Ariana Tadler, Esq..

Judge Bates opened the meeting by greeting new members, Judge Ericksen and Judge Morris.

Judge Bates also noted the presence of former Committee member Judge Grimm and former Committee Chair Judge Campbell. They, and Judge Diamond who rotated off the Committee at the same time, contributed in many and invaluable ways to the Committee's work. Looking to the package of rules amendments that are pending in Congress now, Judge Grimm chaired the Discovery Subcommittee and was a member of the Subcommittee chaired by Judge Koeltl that worked through proposals generated by the Committee's 2010 Conference on reforming the rules. Judge Campbell has devoted a decade to Committee work, and continues with the work on pilot projects and on educating bench and bar in what we hope will, on December 1, become the 2015 amendments. The Reporters also described the many lessons in drafting, practice, and wisdom they had learned in working closely with Judge Campbell as chair of the Discovery Subcommittee and then Committee Chair.

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Judge Bates concluded these remarks by observing that the new members would soon witness the Committee's determination to work toward consensus in its deliberations. The package of amendments now pending in Congress emerged from a remarkable level of agreement even on the details. Judge Campbell's strong and tireless leadership was demonstrated at every turn. Professor Coquillette "seconded" all of this high praise.

Judge Campbell expressed appreciation for the "overly kind comments." He noted that special praise is due to Judge Grimm for contributions "as substantial as anyone," especially in chairing the Discovery Subcommittee. He emphasized that the Committee is indeed a collaborative group. It is the profession's best example of collective thinking, good-faith effort, and agenda-less work. Every member who moves into alumnus standing has expressed this view. The Reporters provide excellent support. Judge Bates and Judge Sutton will carry the work forward in outstanding fashion.

Judge Campbell also noted that in 1850 his great-great grandparents came to the valley where the Committee is meeting as Mormon pioneers. Robert Lang Campbell became the first Commissioner of Public Education and was a regent of the University of Deseret, a progenitor of the University of Utah. "The University is home to me and my family."

Dean Robert W. Adler welcomed the Committee to the Law School and its new building. The new building is designed both to improve the learning experience and to advance the Law School's involvement with the community. He noted that as a professor of civil procedure he always demands that his students read the Committee Notes as they study each rule. "You can see the lights going off in their heads" as they read the Notes and come to understand that there is more in the rule texts than may appear on first reading.

April 2015 Minutes

The draft minutes of the April 2015 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

Standing Committee and Judicial Conference

Judge Campbell reported on the May meeting of the Standing Committee and the September meeting of the Judicial Conference.

The Standing Committee meeting went well. There was a good discussion of pilot projects.

86 At the Judicial Conference, the Chief Justice invited Judge
87 Sutton and Judge Campbell to present a summary of the amendments
88 now pending in Congress. They urged the Chief Judges to offer
89 programs to explain to judges and lawyers the nature and importance
90 of these amendments in the hoped-for event that they emerge from
91 Congress.

92 The Judicial Conference approved and sent to the Supreme Court
93 amendments to Rule 4(m) dealing with service on corporations and
94 other entities outside the United States; Rule 6(d), clarifying
95 that the "3-added-days" provision applies to time periods measured
96 after "being served," and eliminating from the 3-added days service
97 by electronic means; and Rule 82, synchronizing it with recent
98 amendments of the venue statutes as they affect admiralty and
99 maritime cases.

100 *Legislative Report*

101 Rebecca Womeldorf provided the legislative report for the
102 Administrative Office. Two familiar sets of bills have been
103 introduced in this Congress.

104 The Lawsuit Abuse Reduction Act of 2015 (LARA) has passed in
105 the House. It would amend Rule 11 by reinstating the essential
106 aspects of the Rule as it was before the 1993 amendments. Sanctions
107 would be mandatory. The safe harbor would be removed. This bill has
108 been introduced regularly over the years. In 2013 Judge Sutton and
109 Judge Campbell submitted a letter urging respect for the Rules
110 Enabling Act process, rather than undertake to amend a Civil Rule
111 directly. The prospects for enactment remain uncertain.

112 H.R. 9, the Innovation Act, embodies patent reform measures
113 like those in the bill that passed in the House last year. There
114 are many provisions that affect the Civil Rules. Parallel bills
115 have been introduced in the Senate, or are likely to be introduced.
116 The earlier strong support for some form of action seems to have
117 diminished for the moment.

118 A proposed Fairness in Class Action Litigation Act would
119 directly amend Rule 23. A central feature is a requirement that
120 each proposed class member suffer an injury of the same type and
121 scope as every other class member. The ABA opposes this bill.

122 *Publicizing the Anticipated 2015 Amendments*

123 Judge Grimm described the work of the Subcommittee that is
124 seeking to support programs that will educate members of the bench
125 and bar in the package of rules that will become law on December 1
126 unless Congress acts to modify, suspend, or reject them.

127 The 2010 Conference emphasized themes that have persisted
128 through the ensuing work to craft these amendments. Substantial
129 reductions in cost and delay can be achieved by proportionality in
130 discovery and all procedure, cooperation of counsel and parties,
131 and early and active case management. These concepts have been
132 reflected in the rules since 1983. They have been the animating
133 spirit of succeeding sets of rules amendments. The need for yet
134 another round of amendments has suggested that amending the rules
135 is not always enough to get the job done. So it was decided that
136 the amendments should be advanced by promoting efforts to bring
137 them home to members of the bench and bar by focused education
138 programs. Work on the programs is progressing.

139 Five videotapes are being prepared. They will be structured in
140 segments, facilitating a choice between a single viewing and
141 viewing at intervals. Judge Fogel and the FJC have been a wonderful
142 resource. Tapes by Judge Koeltl and Judge Grimm have been made. The
143 remaining tapes will be made on November 6.

144 Letters from Judge Sutton and Judge Bates will alert district
145 judges to the new rules. A powerpoint presentation is being
146 prepared.

147 Bar organizations have been encouraged to prepare programs.
148 The ABA has done one, and will do more; John Barkett is
149 participating. The American College of Trial Lawyers has planned a
150 program. The Fifth Circuit and Eighth Circuit will have programs;
151 it is hoped that other circuits will as well.

152 Many articles are being written. Judge Campbell has prepared
153 one for Judicature. Professor Gensler, a former Committee member,
154 has prepared a very good pamphlet.

155 One indication of the value of educational efforts is provided
156 by a poll Judge Grimm undertook. He asked 110 judges — 68
157 Magistrate Judges and 42 District Judges — whether they actively
158 manage discovery from the beginning of an action or, instead, wait
159 for the parties to bring disputes to them. More than 80% replied
160 that they wait for disputes to emerge. "We hope to educate them
161 that early management reduces their work."

162 One caution was noted. The Duke Center for Judicial Studies
163 has convened a group of 30 lawyers, evenly divided between 15 who
164 regularly represent plaintiffs and 15 who regularly represent
165 defendants, to prepare a set of Guidelines on proportionality. Some
166 present and former Committee members reviewed drafts. These
167 guidelines will be used in 13 conferences planned by the ABA and
168 the Duke Center that aim to advance the practice of
169 proportionality. The first conference will be held next week, a few

170 weeks before we can know that the proposed amendments will in fact
171 take hold. Professor Suja Thomas has expressed concern that these
172 guidelines will be used to "train" judges, and to be presented in
173 a way that casts an aura of official endorsement. In response to
174 this concern, Judges Sutton, Bates, and Campbell have sent out a
175 letter to federal judges making it clear that the guidelines are
176 not endorsed by the rules committees. The letter also notes that
177 these conferences are not being used to "train" judges.

178 Judge Sutton noted that December 1 has not yet arrived. "We
179 must be very careful to show that we are not presuming Congress
180 will approve the amendments." It is appropriate to anticipate the
181 expected birth of the amendments by preparing to encourage
182 implementation from and after December 1. And it is appropriate to
183 participate in programs that are presented before December 1 if it
184 is made clear that the amendments remain pending in Congress and
185 will become law only if Congress does not intervene by December 1.
186 It is proper for Committee members and former Committee members to
187 participate in these educational programs, but it is important to
188 continue the tradition that no favoritism should be shown among the
189 outside groups that organize the programs. An invitation should be
190 accepted only if the same invitation would be accepted had it been
191 extended by a different organization. And, as always, it is
192 important to emphasize both in opening and in closing that no
193 member speaks for the Committee.

194 Judge Campbell noted that the Duke Center has invested great
195 effort in promoting the new rules. "We should be grateful." It is
196 unfortunate that Professor Thomas has become concerned that the
197 Center is too closely connected to the Committee. It continues to
198 be important that all branches of the profession, teaching,
199 practicing, and judging, understand that the Committee is in fact
200 independent of all outside groups. The letter to federal judges is
201 designed to provide reassurance.

202 Judge Bates echoed this appreciation of the Duke Center's
203 efforts.

204 John Rabiej noted that the Duke Center says, explicitly and
205 repeatedly, that the Guidelines are not binding. They are only
206 suggestions. And they emerged from a working group evenly divided
207 between plaintiff interests and defense interests.

208 A Committee member noted that she observed e-mail traffic,
209 including messages focused on the Duke Center's involvement, that
210 reflects a widespread perception that the rules result from an
211 adversary process in which "someone wins and someone loses." That
212 wrong impression is unfortunate. "The rules are for everyone." As
213 a private person, she tells people that the best course is to read

214 the rules and Committee Notes. Practicing lawyers may be forgiven
215 for misperceiving the process because they are largely unaware of
216 it. But it is difficult to forgive similar ignorance when it is
217 shown by academics — within the last few weeks she had occasion to
218 ask a civil procedure teacher what he thought of the pending
219 amendments and he asked "what amendments"?

220 Another Committee member observed that it is a good process.
221 The 2010 Conference contributed a lot. But it remains important to
222 stress, without overdoing it, that the Duke guidelines are not
223 ours.

224 Another Committee member underscored the importance of making
225 it clear that members do not speak for the Committee. "I always do
226 it." But it also is important to emphasize that the Committee is
227 seeking to achieve the effective administration of justice.

228 Yet another member noted that at least some judges are
229 uncertain whether it is appropriate to attend the ABA-Duke Center
230 presentations. Reassurances would be helpful.

231 *Rule 23*

232 Judge Bates introduced the Rule 23 proposals by noting that
233 the Class-action Subcommittee has been working with extraordinary
234 intensity. Over the course of the summer he participated in 10
235 Subcommittee conference calls working on the substance of the
236 proposals, and there was much other traffic by messages and calls
237 on incidental matters. Judge Dow and Professor Marcus deserve much
238 credit for pushing things along.

239 For today, the goal is to form a good idea of which proposals
240 should move forward. It may be possible to work on some specifics,
241 but "this is not the final round." The Committee will report to the
242 Standing Committee in January. By this Committee's meeting next
243 April we may be in a position to make formal recommendations for
244 publication in 2016. For today, we can view the package as a whole.
245 Much of it deals with settlements.

246 Judge Dow introduced the Subcommittee report by noting that it
247 presents 11 items for discussion, generally with illustrative rule
248 text and committee notes.

249 Six topics are recommended for continuing work: "frontloading"
250 the initial presentation of a proposed settlement; adding a
251 provision to Rule 23(f) to ensure that appeal by permission is not
252 available from an order approving notice of a proposed settlement;
253 amending Rule 23(c)(1) to make it clear that the notice of a
254 proposed settlement triggers the opt-out and objection process,

255 even though the class has not yet been certified; emphasizing
256 opportunities for flexible choice among the means of notice;
257 establishing a requirement that a court approve any payment to be
258 made in connection with withdrawing an objection to a settlement or
259 withdrawing an appeal from denial of an objection, along with
260 provisions coordinating the roles of district courts and circuit
261 courts of appeals when dismissal of an appeal is involved; and
262 expanding the rule text criteria for approving a proposed
263 settlement.

264 One topic, adoption of a separate provision for certifying a
265 settlement class, is presented for discussion, although the
266 Subcommittee is not inclined to move toward adopting such a
267 provision.

268 Two other topics are on hold. Each awaits further development
269 in the courts. One is "ascertainability," a set of questions that
270 are percolating in the circuits. The other is the use of Rule 68
271 offers of judgment or other settlement offers as a means of
272 attempting to moot a class action by "picking off" all class
273 representatives; this question has been argued in the Supreme
274 Court, and any further consideration should await the decision.

275 Finally, the Subcommittee recommends that two other topics be
276 removed from present work. One is "cy pres" awards in settlements.
277 The other is any attempt to address the role of "issue" classes.
278 The reasons for setting these topics aside will be developed in the
279 later discussion.

280 Frontloading: Draft Rule 23(e)(1) tells the court to direct notice
281 of a proposed class settlement if the parties have provided
282 sufficient information to support a determination that giving
283 notice is justified by the prospect of class certification and
284 approval of the settlement. The basic idea was developed in
285 response to discussion at the George Washington conference
286 described in the Minutes for the April meeting, and with help from
287 an article by Judge Bucklo about the things judges need to know
288 about a proposed class settlement but often do not know. The
289 information will enable the judge to determine whether notice to
290 the class is justified. If the class has not already been
291 certified, the notice will be in the form required by Rule 23(c)(2)
292 — for a (b)(3) class, it will trigger the opportunity to request
293 exclusion, and for all classes it will provide a basis for
294 appearing and for objecting to the proposed settlement. These
295 purposes are best served by detailed notice of the terms of
296 settlement. Many courts follow essentially this practice now, but
297 express rule text will advance the best practice for all cases.

298 This proposal begins by adding language to the initial part of

299 Rule 23(e)(1), making it clear that court approval is required to
300 settle the claims not only of a certified class but also of a class
301 that is proposed for certification at the same time as the
302 settlement is approved.

303 The frontloading concept was presented to the September
304 miniconference in the form of rule text that listed 14 kinds of
305 information the parties should provide. This "laundry list"
306 approach met a lot of resistance. There is constant fear that an
307 official list of factors will be diluted in practice to become a
308 simple check-list that routinely checks off each factor without
309 distinguishing those that are important to the specific case from
310 those that are not. The present draft channels all these factors
311 into an open-ended behest that the parties provide "relevant" or
312 "sufficient" information. Perhaps some other descriptive word
313 should be found to emphasize the purpose to provide as much as
314 possible of the information that will be presented on the motion
315 for final approval. This approach, leaving it to the court and
316 parties to identify and focus on the considerations that bear on a
317 particular proposed settlement, seemed to win support at the
318 miniconference. The Committee Note can go a long way toward calling
319 attention to the multiple factors that appeared in the "laundry
320 list" draft.

321 Judge Dow noted that the sophisticated lawyers who bring class
322 actions in his court commonly provide the kinds of information
323 required by the proposal. But not all lawyers do it. "The less
324 sophisticated practitioners need" more guidance in the rule.

325 Judge Dow further noted that the proposed rule text does not
326 address the question of what to do with the residue of the relief
327 a class defendant agreed to when not all class members make claims.
328 It would be possible to say something on this score, and to support
329 the rule text with a Committee Note that identifies the factors
330 included in the original laundry list rule draft. Professor Marcus
331 added that the Note attempts "to identify, advocate, convey." It
332 does not say that all 14 factors need be checked off every time.

333 A Committee member said that the draft rule reflects what has
334 become "procedural common law." Judges created this procedure. The
335 Manual for Complex Litigation adopts it. When the parties present
336 a proposed settlement for approval in an action that has not
337 already been certified as a class, the practice calls for
338 "preliminary approval" of certification and settlement, notice to
339 the class with opportunity to opt out or object, and final
340 approval. Many experienced lawyers and judges believe that Rule 23
341 says this. "The proposal is to have the rule say what many think it
342 says now." But too often, in the hands of those who are not
343 familiar with Rule 23 practice, the important information comes out

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344 too late. Yet the draft is ambiguous in calling for relevant
345 information about the proposed settlement — is this information
346 about the quality of the settlement, or does it include information
347 about the reasons for certifying any class and about proper class
348 definition? The response was to point to the statement in the draft
349 Committee Note that "[o]ne key element is class certification." But
350 perhaps more could be said in the rule text.

351 A drafting question was raised: would it be better to begin in
352 this form: "The court must direct notice," etc., if the parties
353 have provided the required information and if the court determines
354 that giving notice is justified, etc.? And is either of the
355 alternative words used the best that can be found to describe the
356 quantity and quality of information that must be provided?
357 "'Relevant' calls to mind the scope-of-discovery provision in rule
358 26(b)(1)." The answer was recognition that work will continue on
359 the drafting. The earlier draft that set out 14 factors was
360 troubling because in many cases several of the 14 "do not matter."
361 But drafting a more open-ended approach is a work in progress.

362 This answer prompted the reflection that "the information
363 relevant is quite different from one type of action to another." A
364 complex antitrust action may call for quite different types of
365 information than will be called for in an action involving a single
366 form of consumer deception.

367 A similar style suggestion was offered: "I like better rules
368 that tell the parties to do things," rather than "rules that tell
369 the court to do things." The purpose of this rule is to tell the
370 parties to provide more information. Such was the approach taken in
371 the 14-factor draft, set out at p. 189 in the agenda materials:
372 when seeking approval, "the settling parties must present to the
373 court" all of the various described items of information.

374 A finer-grained drafting comment also was made. The draft
375 simply grafts a reference to a proposed settlement class into the
376 present text of subdivision (e)(1):

377 The claims, issues, or defenses of a certified class<u>, or</u>
378 <u>a class proposed to be certified as part of a settlement,</u>
379 may be settled, voluntarily dismissed, or compromised
380 only with the court's approval. * * *

381 There is a miscue — the proposal described in the new operative
382 text is only to settle, not to voluntarily dismiss or compromise
383 the action. The broader sweep that includes voluntary dismissal or
384 compromise fits better with the class that has already been
385 certified. It would be better to separate this into separate parts:
386 "The claims, issues, or defenses of a certified class may be

387 settled, voluntarily dismissed, or compromised only with the
388 court's approval; the claims, issues, or defenses of a class
389 proposed to be certified as part of a settlement may be settled
390 only with the court's approval. The following procedures apply in
391 seeking approval: * * *.

392 Judge Dow concluded the discussion by observing that the
393 Committee agrees that the frontloading proposal should be pursued
394 further, with work to refine the drafting. The rule will speak to
395 the parties' duty to provide information, and other improvements
396 will be made.

397 Rule 23(f): This proposal would add a new sentence to the Rule
398 23(f) provision for appeal by permission "from an order granting or
399 denying class-action certification": "An order under Rule 23(e)(1)
400 may not be appealed under Rule 23(f)." The concern arises from the
401 common practice that refers to "preliminary certification" of a
402 class when the court approves notice to the class. An appeal was
403 attempted at this stage in the NFL concussion litigation; the Third
404 Circuit decided not to accept the appeal. But the possibility
405 remains that appeals will be sought in other cases. And the sense
406 is that there should be only one opportunity for appeal, at least
407 as to a single grant of certification.

408 This introduction generated no further discussion. It was
409 noted later, however, that the Department of Justice continues to
410 study a proposal to expand the time available to ask permission to
411 appeal under Rule 23(f) when the request is made in actions
412 involving the United States or its officers or employees. The
413 Department expects to have a concrete proposal ready fairly soon.

414 Rule 23(c)(2)(B): This proposal is intended to solidify the
415 practice of sending out notice to the class before actual
416 certification when a proposed settlement seems likely to be
417 approved:

418 For any class certified under Rule 23(b)(3), or upon
419 ordering notice under Rule 23(e)(1) to a class proposed
420 to be certified [for settlement] under Rule 23(b)(3), the
421 court must direct to class members the best notice
422 practicable under the circumstances * * *.

423 Judge Dow noted that sending out notice before certification
424 and approval of the settlement is intended to accomplish the
425 purposes of notice in a (b)(3) class, including establishing the
426 deadline to request exclusion and affording the opportunities to
427 enter an appearance and to object. This is consistent with present
428 practice. And it is mutually reinforcing with the frontloading
429 proposal: frontloading will support notice that provides more

430 comprehensive information, enabling better-informed decisions
431 whether to opt out or to object. The opt-out rate and objections in
432 turn will support further evaluation of the proposed settlement at
433 the final-approval stage. An important further benefit will be to
434 reduce the risk that a second round of notice will be required
435 because the initial notice is made defective by the parties'
436 failure to provide adequate information to the court and objections
437 show the need for better notice or demonstrate the inadequacy of
438 the proposed settlement.

439 Professor Marcus added that this proposal is useful to respond
440 to an argument forcefully advanced by at least one participant in
441 the miniconference. The common practice, carried forward in this
442 package of proposals, is that actual certification of the class is
443 made only at the same time as approval of the settlement. As Rule
444 23(c)(2)(B) stands now, its text literally directs that notice
445 satisfying all the requirements of (B) be sent out then, never mind
446 that the notice of proposed settlement sent out under (e)(1) has
447 already triggered an opt-out period and so on. It is better to make
448 it clear that class members can be required to decide whether to
449 opt out, to appear, or to object before the class is formally
450 certified.

451 A committee member observed that courts believe now that the
452 notice of a proposed settlement discharges the function of
453 (c)(2)(B). Characterizing the court's initial action as preliminary
454 certification and approval brings it within the rule language. But,
455 in turn, that triggers the prospect that a Rule 23(f) appeal can be
456 taken at that stage, a disruptive prospect that is so unlikely to
457 prove justified by a grossly defective proposal that it should
458 never be available. This revision of (c)(2)(B) helps in all these
459 dimensions.

460 General Notice Provisions. Discussion turned to the draft that
461 would introduce added flexibility to the description of notice in
462 Rule 23(c)(2)(B):

463 For any class certified under Rule 23(b)(3), the court
464 must direct to class members the best notice that is
465 practicable under the circumstances, including individual
466 notice [by the most appropriate means, including first-
467 class mail, electronic, or other means] {by first-class
468 mail, electronic mail, or other appropriate means} to all
469 members who can be identified through reasonable effort
470 * * *.

471 Judge Dow noted that this proposal would "bring notice into
472 the 21st Century." First-class mail may not be the best means of
473 informing class members of their rights, but it seems to be settled

474 into general practice. The proposal is designed to establish the
475 flexibility required to provide notice by the most effective means.
476 The objective is the same as before — to provide the best notice
477 possible to the greatest number of class members. The alternative
478 presented in the first bracketed alternative, focusing on "the most
479 appropriate means," emphasizes the importance of the choice.
480 Whatever choice is made for rule text, it is important to have text
481 that supports the examples that may be useful in the Committee
482 Note.

483 The first suggestion, made and seconded, was that it might be
484 better to simplify the rule text by referring only to "the most
485 appropriate means." Amplification could be left to the Committee
486 Note. The response was that it may be important to add examples to
487 rule text to make it clear that the choice of means is technology-
488 neutral. The ingrained reliance on first-class mail may make it
489 important to make it clear that other means may be as good or
490 better. This response was elaborated by suggesting the advantages
491 of the first alternative, calling for the most appropriate means
492 and referring to "electronic means" rather than "electronic mail."
493 It may be, particularly in the not-so-distant future, that
494 appropriate means of electronic communication will evolve that
495 cannot be fairly described as part of the familiar "e-mail"
496 practices we know today.

497 Further discussion suggested that limiting the rule text to
498 "the most appropriate means" would avoid an implication that first-
499 class mail or e-mail are always appropriate.

500 A separate question was addressed to the parts of the draft
501 Note that discuss the format and content of class notice: is it
502 appropriate to address these topics when the amended rule text does
503 not directly bear on them? The only response was that any amendment
504 addressing effective means of notice will support discussion of the
505 importance of making sure that the notice conveyed by appropriate
506 means is itself appropriately informative. Merely reaching class
507 members does little good if the notice itself is inadequate.

508 Objectors: Judge Dow began by observing that the Subcommittee has
509 repeatedly been reminded that there are both "good" and "bad"
510 objectors. Class-member objections play an important role in class-
511 action settlements. As a matter of theory, the opportunity to
512 object is a necessary check on adequate representation. As a
513 practical matter, objectors have shown the need to modify or reject
514 settlements that should not be approved as initially proposed. But
515 there are also objectors who seek to enrich themselves — that is,
516 commonly to enrich counsel — rather than to improve the settlement
517 for the class. The advice received at several of the meetings the
518 Subcommittee has attended, and at the miniconference, is that bad-

519 faith objections can be dealt with successfully in the trial court.
520 The problem that persists is appeals or threats to appeal a
521 judgment based on an approved settlement. An appeal can delay
522 implementation of the judgment by a year or more. That means that
523 class members cannot secure relief, in some cases relief that is
524 important to their ongoing lives. The objector offers not to
525 appeal, or to dismiss the appeal, in return for a payment that goes
526 only to the objector's counsel, or perhaps in part to the objector
527 as well. Too often, class counsel are unwilling to submit the class
528 to the delay of an appeal and agree to buy off the objector.

529 Starting in 2010, the Appellate Rules Committee has been
530 considering rules to regulate dismissal of objector appeals. The
531 Subcommittee has been working in coordination with them.

532 The first step in addressing objectors is a draft that
533 requires some measure of detail in making an objection. This draft
534 responds to suggestions that some "professional objectors" simply
535 file routine, boilerplate objections in every case, do nothing to
536 explain or support them, fail to appear at a hearing on objections,
537 and then seek to appeal the judgment approving the settlement. The
538 draft adds detail to the present provision that authorizes
539 objections:

540 (A) Any class member may object to the proposal if it
541 requires court approval under this subdivision (e)~~,~~. The
542 objection must [state whether the objection applies only
543 to the objector or to the entire class, and] state [with
544 specificity] the grounds for the objection. [Failure to
545 state the grounds for the objection is a ground for
546 rejecting the objection.]

547 The first comment was that "this is the most oft-repeated
548 topic at all the conferences." The materials submitted for
549 discussion at the miniconference included a lengthy list of
550 information an objector must provide in making an objection. "It
551 seemed too much."

552 Later discussion provided a reminder that the Subcommittee
553 will continue to consider whether to retain the bracketed words
554 stating that failure to state the grounds for the objection is a
555 ground for rejecting the objection.

556 The draft in the agenda materials addresses the question of
557 payment by adding to present Rule 23(e)(5) a new subparagraph:

558 (B) T~~t~~he objection, or an appeal from an order denying an
559 objection, may be withdrawn only with the court's
560 approval. If [a proposed payment in relation to] a motion

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561 to withdraw an appeal was referred to the court under
562 Rule 42(c) of the Federal Rules of Appellate Procedure,
563 the court must inform the court of appeals of its action.

564 This draft is supplemented by alternative versions of a new
565 subparagraph (C) that require court approval of any payment for
566 withdrawing an objection or an appeal from denial of an objection.
567 The overall structure is built on the premise that payment to an
568 objector may be appropriate in some circumstances. Rather than
569 prohibit payment, approval is required. It may be that the district
570 court finds it appropriate to compensate the costs of making an
571 objection that, although it did not result in any changes in the
572 settlement, played an important role in assuring the court that the
573 settlement had been well tested and does merit approval. That
574 prospect, however, is not likely to extend to payment for
575 withdrawing an appeal.

576 Recognizing that the Appellate Rules Committee has primary
577 responsibility for shaping a corresponding Appellate Rule, a sketch
578 of a possible Appellate Rule is included. The Appellate Rules
579 Committee met a week before this meeting. Their deliberations have
580 suggested some revisions in the package.

581 One question is how the court of appeals will know the problem
582 exists. A new sketch of a possible Appellate Rule 42(c) would
583 direct that a motion to dismiss an appeal from an order denying an
584 objection to a class-action settlement must disclose whether any
585 payment to the objector or objector's counsel is contemplated in
586 connection with the proposed dismissal. Then a possible Rule 42(d)
587 would provide that if payment is contemplated, the court of appeals
588 may refer the question of approval to the district court. The court
589 of appeals would retain jurisdiction of the appeal, pending final
590 action after the district court reports its ruling to the court of
591 appeals. The court of appeals can instead choose to rule on the
592 payment without seeking a report from the district court. Finally,
593 a new Civil Rule 23(e)(5)(D) would direct the district court to
594 inform the court of appeals of the district court's action if the
595 motion to withdraw was referred to the district court.

596 One initial question is whether there should be any provision
597 regulating withdrawal of an objector's appeal when there is no
598 payment. As a matter of theory, it may be wondered whether other
599 objectors may have relied on this appeal to forgo taking their own
600 appeals. But that theory may bear little relation to reality. It
601 was not developed further in the discussion.

602 The focus of the new structure is to provide the court of
603 appeals a clear procedure for getting advice from the district
604 court. The district court is familiar with the case and often will

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605 be in a better position to know whether payment is appropriate. The
606 Appellate Rules Committee is anxious to retain jurisdiction in the
607 court of appeals. That can be done whether the action by the
608 district court is simply a recommended ruling or is a ruling by the
609 district court subject to review by the ordinary standards that
610 govern the elements of fact and the elements of discretion.

611 The first question was what happens when the district court
612 refuses to approve a payment and the objector wants to appeal. The
613 response was that the draft retains jurisdiction in the court of
614 appeals. The objector can address his grievance to the court of
615 appeals, whether the question be one of independent decision by the
616 court of appeals as informed by the district court's
617 recommendation, or be one of reviewing a ruling by the district
618 court.

619 An analogy was offered: Appellate Rule 24(a) directs that a
620 party who desires to appeal in forma pauperis must file a motion in
621 the district court. If the district court denies the motion, the
622 party can file a motion in the court of appeals, in effect renewing
623 the motion. Here, the motion to dismiss the appeal is made in the
624 court of appeals, disclosing whether any payment is contemplated.
625 But what happens if the court of appeals simply dismisses the
626 appeal without deciding whether to approve the payment? The draft
627 prohibits payment without court approval, so the objector would
628 have to seek approval from the district court. The district court's
629 action would itself be a final judgment, subject to appeal.

630 Another analogy also is available. There are many
631 circumstances in which a court of appeals finds it useful to retain
632 jurisdiction of an appeal, while asking the district court to take
633 specific action or to offer advice on a specific question. The
634 court of appeals can manage its own proceedings as it wishes, but
635 is most likely to defer further proceedings until the district
636 court reports what it has done in response to the appellate court's
637 request. There is a further analogy in the "indicative rulings"
638 provisions of Civil Rule 62.1 and Appellate Rule 12.1 — one of the
639 paths open under those rules is for the court of appeals to remand
640 to the district court for the purpose of ruling on a motion that
641 the district court otherwise could not consider because of a
642 pending appeal. The court of appeals retains jurisdiction unless it
643 expressly dismisses the appeal.

644 Further discussion suggested that at least one participant
645 thought it better to think of this process as a "remand," because
646 a "referral" does not seem to contemplate factfinding in the
647 district court.

648 A member expressed a skeptical view about the value of this

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649 process. The hope is for an in terrorem effect that will deter
650 payments by the threat of exposure and the prospect that courts
651 will never approve a payment that is not supported by a compelling
652 reason. But the problem is delay in implementing the judgment; the
653 more elaborate the process for withdrawing an appeal, the greater
654 the delay.

655 This view was countered. "The use of delay as leverage for a
656 payoff is the problem. If we say no payoff without court approval,
657 we do a lot. The bad-faith objector wants delay not for its own
658 sake, but for leverage." A legitimate objector will not be affected
659 by the need for approval of any payment.

660 A different doubt was expressed: the incentive is to get rid
661 of objectors, but will this process simply encourage objectors to
662 pad their bills? The response was that the objector's lawyer does
663 not get paid unless there is a benefit to the class. But the doubt
664 was renewed: that can be met by a stipulation of the objector and
665 counsel that there was a benefit to the class. The response in turn
666 was that this procedure will eliminate the incentive for delay.
667 Bad-faith objectors self-identify before taking an appeal, or after
668 filing the notice of appeal. They do not appear at the hearing on
669 approval, they often do no more than file form objections. And the
670 good-faith objectors articulate their objections in the district
671 court. They appeal for the purpose of defeating what they view as
672 an inadequate settlement, not for the purpose of delay or coercing
673 payment for abandoning their objections.

674 This view was supported by noting that a good-faith objector
675 who participated in the miniconference reported that the business
676 model of bad-faith objectors does not support actual work on an
677 appeal. But why not let the district court be the one that decides
678 whether to approve payment? The court of appeals can grant the
679 motion to dismiss the appeal, and remand to the district court to
680 decide on payment. The district-court ruling can be appealed. This
681 view was supported by noting that once the district court has
682 ruled, "there is something to review."

683 General support for the proposed approach was offered by
684 noting that "rulemaking cannot resolve every problem." But we can
685 accomplish the modest goal of insisting on sunlight, and creating
686 a mechanism for courts to address the issues as promptly as
687 possible.

688 A wish for simplicity was expressed by suggesting that it may
689 be enough to provide in Rule 23(e)(5)(B) that court approval is
690 required to withdraw an objection or an appeal from denial of an
691 objection, and to limit new provisions in Appellate Rule 42 to a
692 direction that any payment for dismissing the appeal be disclosed

693 to the court of appeals. The court of appeals then "does what it
694 does." It may choose to decide the appeal. Or it can simply dismiss
695 the appeal; the case is over. But an objector who wants payment
696 must apply to the district court. The key is disclosure to the
697 court of appeals. Appellate Rule 12.1 and Civil Rule 62.1 already
698 provide the opportunity to seek an indicative ruling if a motion to
699 approve payment is made in the district court while the appeal
700 remains pending. The full set of draft provisions is "too much
701 process."

702 A different vision of simplicity was suggested: the rules
703 should leave it open to the court of appeals to choose between
704 acting itself, referring to the district court, making a limited
705 remand, or adopting whatever approach seems to work best for a
706 particular case.

707 The next question was whether it might be possible to provide
708 some guidance in rule text on the circumstances that justify
709 payment for withdrawing an objection or appeal? Apart from that,
710 should we be concerned that there may be means of compensation that
711 are not obviously "payment"? One possibility may be to accord some
712 form of benefit in collateral litigation — the objector may
713 represent clients who are not in the class, or it might be agreed
714 to acquiesce in an objection made in a different class action.

715 These questions were addressed by the observation that the
716 only familiar demands are for payments to lawyers, or to clients
717 who want more than the judgment gives them. But it is possible to
718 imagine a threat of objections in all future cases, or a promise to
719 withdraw objections in other cases. So the sketch of a possible
720 Appellate Rule 42(c) on p. 102 of the agenda materials refers to
721 "payment or consideration."

722 The discussion concluded by noting the paths to be tested by
723 further drafting. It will be good to achieve as much simplicity as
724 possible. Full disclosure should be required of any payments (or
725 consideration) for withdrawing an objection or appeal from denial
726 of an objection. The district court should be the place for
727 determining whether to approve any payment. Beyond that, this
728 structure can be effective if lawyers for the plaintiff class do
729 their part in resisting requests for payment.

730 Settlement Approval: Judge Dow introduced the draft criteria for
731 approving a class-action settlement by noting that the draft is
732 inspired in part by the approach taken in the ALI Principles of
733 Aggregate Litigation. The ALI approach was shaped by the same
734 concerns that the Subcommittee has encountered. There are as many
735 dialects as there are circuits; each circuit has its own
736 differently articulated list of factors to be applied in

737 determining whether a settlement is "fair, reasonable, and
738 adequate." The draft is an effort to capture the most important
739 procedural and substantive elements that should guide the review
740 and approval process. In its present form, it seeks to capture the
741 most important elements in four provisions that might be viewed as
742 "factors," or instead as the core concerns. The first question is
743 whether this focus will support meaningful improvement in current
744 practices.

745 Professor Marcus supplemented this introduction by identifying
746 two basic questions: Will the draft, or something like it, prove
747 helpful to judges and lawyers? The purpose begins with helping the
748 parties to shape the information they submit in seeking approval.
749 Every circuit now has a list of multiple factors. The draft
750 presented to the Committee last April included a catch-all
751 "whatever else" provision. Discussion then suggested that the
752 provision was not helpful. It was dropped during later drafting
753 efforts, but has found renewed support and is included in the
754 agenda drafts for further discussion. It takes different forms in
755 the two alternative structures. In alternative 1, the court "may
756 disapprove * * * on any ground the court deems pertinent, * * *
757 considering whether." That is less restrictive than alternative 2,
758 which directs that the court "may approve" "only * * * on finding"
759 the four core criteria are met and also that "approval is warranted
760 in light of any other matter that the court deems pertinent." The
761 choice here is whether to suggest the relevance of considerations
762 in addition to the four core showings that are explicitly
763 described, and whether to be more or less restrictive.

764 The second question is related: what prominence should be
765 given to the present rule formula, which was drawn from well-
766 developed case law, looking to whether the settlement is "fair,
767 reasonable, and adequate"? These words support consideration of
768 every factor that has been identified by any circuit. Should the
769 process remain that open?

770 The first comment was that both alternatives are open-ended.
771 A "ground" or "matter" that "the court deems pertinent" is not a
772 legal standard.

773 The next comment was that the second alternative displaces the
774 present "fair, reasonable, and adequate" standard from its present
775 primacy, demoting it to a role as part of the factor that asks
776 whether the relief awarded to the class is fair, reasonable, and
777 adequate, taking into account the costs, risks, probability of
778 success, and delays of trial and appeal. The fair, reasonable, and
779 adequate standard is the over-arching concern. Another member
780 agreed — this is an argument for alternative 1, which allows
781 approval "[only] on finding it is fair, reasonable, and adequate."

782 The brackets would be removed, allowing approval only on making
783 this finding.

784 Alternative 2 is "more focused." It allows approval only on
785 finding that all four factors are satisfied, compared to
786 Alternative 1 that allows a finding that the settlement is fair,
787 reasonable, and adequate, after simply "considering" the four.
788 Alternative 1 is less rigorous.

789 Turning to one of the four core elements, it was asked how a
790 court is to determine whether a settlement "was negotiated at arm's
791 length and was not the product of collusion." Why is that not
792 implicit in finding the settlement is fair, reasonable, and
793 adequate?

794 This question was addressed by observing that a number of
795 circuits distinguish between procedural and substantive fairness.
796 The parties must show that the process was free of collusion. This
797 showing is made by describing the process, or by having a special
798 master or mediator participate and report. Account is taken of how
799 long the negotiations endured, and whether there was actual
800 negotiation.

801 The open-endedness of "considering whether" in Alternative 1
802 provoked the suggestion that, taken literally, it overrides a lot
803 of circuit law. It would allow a court to find a settlement is
804 fair, reasonable, and adequate, even though it was not negotiated
805 at arm's-length and was the product of collusion. But then perhaps
806 the intention is to overrule the various laundry lists of factors
807 found across the circuits?

808 A Subcommittee member responded that the purpose is not to
809 overrule existing circuit factors. In all but two circuits, these
810 factors were developed in the 1970s and 1980s. Any of these factors
811 may, at some time with respect to some proposed settlement, prove
812 relevant. But the purpose of identifying the core concerns is to
813 encourage the court to look closely at the settlement rather than
814 move unthinkingly down a check list of factors, none of them
815 clearly developed by the parties and many of them not relevant to
816 the particular settlement. Part of the purpose is to respond to the
817 increasing cynicism found in public views of class actions. Many
818 people view settlements in consumer-class actions as devices that
819 provide no meaningful value to consumers and provide undeserved
820 awards to class counsel.

821 In a similar vein, it was observed that the purpose of
822 focusing on four core concerns seems to be to simplify and codify
823 the purposes and best elements of present practice. But we should
824 consider whether the "considering whether" formula in alternative

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825 1 might be seen as overruling the circuit factors. "Would any
826 circuit think we're changing what it can do"?

827 A response was that the ALI concern was that the lengthy lists
828 of factors distract attention from the central elements. A related
829 concern was that there is a tendency to view the various "factors"
830 as things to be weighed in a balancing process, albeit without any
831 direction as to how any one is to be weighed. It is better to adopt
832 the approach of Alternative 2: the court may approve "only on
833 finding." This will redirect attention to the essential elements of
834 approval.

835 But it was noted that the four subparagraphs attached to both
836 alternative 1 and alternative 2 are conjunctive: the court must
837 consider, or find, all of them. The rule is written not for the
838 experts, who understand this now. It focuses everyone on the key
839 factors in a way that is not always understood.

840 The fifth element, "any other matter" or "any ground" the
841 court deems pertinent, was questioned: what does it add? What is
842 there that could not be read into the four central elements
843 identified in the first four subparagraphs? The response was that
844 "there still will be X factors." The four factors focus on what is
845 important, and focus the parties on what to present to the court,
846 and on what to present in the notice to the class. But the
847 rejoinder asked again: what else is relevant if all four are
848 satisfied — there is adequate representation, not tainted by
849 collusion, adequate relief, and equitable treatment of class
850 members relative to each other? Should it be made clear that the
851 burden is on the objector to show reasons to reject a settlement
852 when all of these elements are present?

853 It was noted that the alternative 2 formulation, "may approve
854 only * * * on finding" the four elements leaves discretion to
855 refuse approval even if all four are found. And it implies that the
856 standard of review should be abuse of discretion. So the court can
857 draw on any factor that has been identified in any circuit that
858 seems relevant to evaluating the settlement. "There are any number
859 of things that cannot be captured in factors." As one example: the
860 settlement is negotiated while the defendant is teetering on the
861 brink of insolvency. By the time of the hearing on objections, the
862 defendant has been restored to a financial position that would
863 support more adequate relief. How do you write a specific factor
864 for that? Still, it was suggested that alternative 1, "considering
865 whether," provides a more emphatic statement of discretion.

866 A more particular question was asked: what happens if a lawyer
867 who initially supported a proposed settlement changes position to
868 challenge the proposal? No answer was attempted.

869 The summary of this discussion began by observing that the
870 really good lawyers the Subcommittee has been meeting in its
871 travels do all these good things now. But not all lawyers do.
872 "These four factors are aimed at the lowest common denominator" of
873 lawyers who bring class actions without much experience or
874 background learning. They are not intended to displace the factors
875 identified in the many appellate opinions that have been written
876 over nearly a half-century of review. The intent instead is to
877 focus attention on the important core. The plan is to displace the
878 process in which parties and court are distracted by routine,
879 uninformative submissions that simply run through the local check-
880 list of factors, some important to the particular case, some not
881 important, and some irrelevant.

882 All of this pointed toward a synthesis of alternative 1 and
883 alternative 2. "fair, reasonable, and adequate" will be retained as
884 the entry point. The court may approve a settlement only on making
885 the four core findings. And "fair, reasonable, and adequate" will
886 be removed from the third core:

887 If the proposal would bind class members, the court may
888 approve it only after a hearing and only on finding that
889 it is fair, reasonable, and adequate because: * * *

890 (C) the relief awarded to the class * * * is ~~fair,~~
891 ~~reasonable, and~~ adequate, given the costs, risks *
892 * *.

893 Settlement Classes: Judge Dow introduced this topic by asking
894 whether it would be useful, or perhaps necessary, to adopt a
895 separate provision for settlement classes. The underlying question
896 arises from uncertainty in applying the "predominance" requirement
897 of Rule 23(b)(3) to settlements. The Subcommittee has reached a
898 tentative view that it should table this question, but is not
899 prepared to recommend that course without guidance from the
900 Committee.

901 The dilemma can be framed by asking what might be gained by
902 adopting an express settlement-class provision, and what are the
903 "unnerving things that might happen" if one were adopted.

904 The first question was whether settlements have failed because
905 a class could or would not be certified? The answer was that this
906 in fact has happened. And there is a concern that people are
907 deterred from even attempting settlements by the obscurity of the
908 predominance requirement as applied to settlement.

909 The most common illustration of the value of subordinating
910 predominance is choice-of-law concerns. A class that spans several

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911 states may present thorny choice-of-law questions, and present the
912 prospect that different laws will be chosen for different groups
913 within the class, forestalling predominance in litigation. These
914 problems can be readily resolved, however, by settlement. At least
915 the Second and Third Circuits have approved settlements despite
916 choice-of-law predominance concerns. Beyond that, a number of
917 lawyers believe that courts are pretty much ignoring the statements
918 in the Amchem opinion that predominance is required in certifying
919 a class for settlement.

920 This comment was amplified by the observation that the role of
921 predominance in settlement classes has generated many objections by
922 "those who take Amchem literally." But courts have developed a
923 gloss on Amchem that takes the fact and value of settlement into
924 account in finding that (b)(3) criteria have been satisfied. Still,
925 the objections come in — often from "serial objectors." Adopting a
926 settlement-class rule would clarify the law, restating where it is
927 in practice today, helping to identify how account should be taken
928 of settlement in determining whether to certify a class. But as for
929 the empirical question, "I do not know how many settlements are
930 disapproved, or not attempted," for want of a clear rule.

931 But, it was asked, why not require predominance? An immediate
932 response was that Amchem would require the laws of 50 states to
933 apply at trial; on settlement, there is no need to worry about that
934 — "everyone gets the same." But it was objected that giving
935 everyone "the same" may not be right if different sets of laws
936 would prescribe differences in the awards. The rejoinder was that
937 choice-of-law questions can be resolved in settlement, perhaps
938 choosing different laws and relief for different subclasses. And if
939 the case comes to be tried, the court may chose a single state's
940 law to govern, or may choose the law of a few states to govern,
941 grouping subclasses around the similarities in the chosen separate
942 laws. So long as the class is given notice of a proposed settlement
943 — everyone gets to see what is proposed and can object — why force
944 it to trial?

945 A further response was that predominance addresses the
946 efficiencies of trial on class claims. It does not address the
947 fairness of settlement. The Court in Amchem recognized that
948 manageability is not a concern on settlement, despite the inclusion
949 of difficulties in managing a class action among the matters
950 pertinent to finding predominance and superiority. The same can be
951 true of predominance.

952 In the same vein, it was noted that in 1993 the Third Circuit
953 said that a class action cannot be certified for settlement unless
954 the same class could be certified for trial. Amchem has superseded
955 that. Amchem led the Committee to stop work on its pre-Amchem

956 proposal to add a settlement-class provision as a new Rule
957 23(b)(4). The current draft (b)(4), however, is different from the
958 1996 version.

959 A Subcommittee member said he was impressed by how little
960 reaction was provoked by the draft of a settlement-class rule.
961 People did not even seem to be worried about the prospect that
962 representations made in promoting a proposed settlement might be
963 used against them if the settlement falls through and a request is
964 then made to certify a class for trial.

965 A different perspective was suggested by the observation that
966 settlement generally is in the interests of the immediate parties.
967 But that does not ensure fairness to absent class members.
968 Settlement does avoid the risks of class adjudication, and that may
969 justify some dilution of the predominance requirement. But does it
970 justify abandoning any shadow of predominance?

971 It was suggested that the evolution that has followed Amchem
972 shows a reduced emphasis on predominance in reviewing proposed
973 class settlements.

974 Beyond that, an alternative approach that incorporates
975 settlement classes into Rule 23(b)(3) itself is also sketched in
976 the agenda materials from p. 130 to p. 132. This approach would
977 allow certification on finding "that the questions of law or fact
978 common to class members, or interests in settlement, predominate *
979 * *." (The parallel structure could be tightened further by looking
980 to "common interests in settlement.")

981 Still another approach was suggested. The role of predominance
982 could be diminished by a rule provision that the court can consider
983 whether settlement obviates problems that would arise at trial.

984 But it also was recognized that the defense bar is concerned
985 that reducing the role of predominance in settlement classes will
986 unleash still more class actions. And on the other side, there is
987 concern that the bargaining position of class representatives will
988 be eroded if they cannot make a plausible threat of certification
989 for trial.

990 It was noted again that the interest in doing anything to add
991 a separate provision for settlement classes diminished steadily as
992 the Subcommittee made the rounds of many outside groups. There was
993 substantial enthusiasm for doing something several years ago,
994 prompting the ALI to address the question in the Principles of
995 Aggregate Litigation. But that has faded.

996 The conclusion was to not go further with the settlement-class

997 proposal.

998 Ascertainability: The question of criteria for the
999 "ascertainability" of class membership has come to the fore
1000 recently. The most demanding approach is reflected in a series of
1001 Third Circuit decisions, many of them in consumer actions. The
1002 Seventh Circuit has expressly rejected the Third Circuit approach.
1003 Other circuits come close to one side or the other. This is an
1004 important topic, and it continues to be developed in the lower
1005 courts. There is some prospect that the Supreme Court may address
1006 it soon. And it is difficult to be confident about drafting rule
1007 language that would give effective guidance. The Subcommittee has
1008 put this topic on "hold," keeping it in the current cycle but
1009 without anticipating a recommendation for publication over the next
1010 several months. The Committee approved this approach.

1011 Rule 68: Pick-off Offers: Judge Dow explained that the Subcommittee
1012 looked at the use of Rule 68 offers of judgment in an attempt to
1013 moot class actions because of the Seventh Circuit decision in the
1014 Damasco case. Under that approach, an offer of complete relief to
1015 the representative plaintiffs before class certification moots
1016 their individual claims and defeats certification. Plaintiffs
1017 commonly worked around this rule by moving for certification when
1018 they filed, but also by requesting that consideration of the motion
1019 be deferred until the case had progressed to a point that would
1020 support a well-informed certification ruling. The Seventh Circuit
1021 recently overruled its mootness rule. Most circuits now refuse to
1022 allow a defendant to defeat class certification by offers that
1023 attempt to moot the individual claims of any representative
1024 plaintiffs who may appear. More importantly, this question has been
1025 argued in the Supreme Court. The Subcommittee has deferred further
1026 work pending the Court's decision. The Committee agreed this course
1027 is wise.

1028 Separately, it was noted that the Committee is committed to
1029 further study of Rule 68 in response to regularly repeated
1030 suggestions for revision. The timing will depend on the allocation
1031 of available resources between this and other projects that may
1032 seem more pressing.

1033 Cy pres: For some time, the Subcommittee carried forward a proposal
1034 to address cy pres awards. The proposal was based, at least for
1035 purposes of illustration, on the model adopted by the ALI. This
1036 model attempts to achieve the maximum feasible distribution of
1037 settlement funds to class members. Only when it is not feasible to
1038 make further distributions could the court approve distribution of
1039 remaining settlement funds — and even then, the first effort must
1040 be to identify a beneficiary that would use the funds in ways that
1041 would benefit the class.

1042 It seems to be generally agreed that many classes are defined
1043 in terms that make it impracticable to identify every class member
1044 and achieve complete distribution to class members. Some
1045 undistributed residue will remain. The ALI proposal would confine
1046 cy pres awards to those circumstances. That set of issues seems to
1047 fall comfortably within the scope of the Rules Enabling Act. But
1048 these are not the only circumstances that characterize cy pres
1049 awards in present practice. More creative awards are structured,
1050 often in cases involving small injuries to large numbers of
1051 consumers, most of whom cannot be easily identified. Attempting to
1052 address cy pres awards of this sort would present tricky questions
1053 about affecting substantive rights.

1054 Cy pres awards have evolved in practice and have been accepted
1055 in many judgments. Some states have statutes addressing them. Given
1056 the difficulty of knowing how to craft a good rule, the
1057 Subcommittee recommended that further work on these questions be
1058 suspended. The Committee accepted this recommendation.

1059 Issue Classes: Judge Dow introduced the question of issue classes
1060 by noting that the subject was taken up because of a perceived
1061 split between the Fifth Circuit and other circuits on the extent to
1062 which the predominance requirement of Rule 23(b)(3) limits the use
1063 of an issue class to circumstances in which the issue certified for
1064 class treatment predominates over all other issues in the
1065 litigation. More recent Fifth Circuit decisions, however, seem to
1066 belie the initial impression. "Dissonance in the courts has
1067 subsided." There seems little need to undertake work to clarify the
1068 law. And any attempt might well create new complications.

1069 A Subcommittee member said that the Subcommittee has learned
1070 that courts address issue-class questions in case-specific ways.
1071 Difficult questions of appealability would be raised by any
1072 distinctive changes in the issue-class provisions in Rule 23(c)(4)
1073 so as to focus on final decision of a discrete issue without
1074 undertaking to resolve all remaining questions within the framework
1075 of the same action. The problems could be similar to those that
1076 arise after separate-issue trials under Rule 42.

1077 The Committee agreed with the Subcommittee recommendation that
1078 further work on these questions be suspended.

1079 Judge Bates concluded the class-action discussion by stating
1080 that the Committee had done good work. Thanks are due to both the
1081 Subcommittee and the Committee.

1082 *Requester Pays for Discovery*

1083 For some time the Committee and the Discovery Subcommittee

1084 have deliberated the questions raised by periodic suggestions that
1085 the discovery rules should be revised to transfer to the requesting
1086 party more of the costs incurred in responding to discovery
1087 requests. Many different approaches could be taken. Many
1088 suggestions cluster around a middle ground that would leave the
1089 costs of responding where they lie as to some "core" discovery, but
1090 require the requesting party to pay — or perhaps to justify not
1091 paying — for the costs of responding to requests outside the core.
1092 Those suggestions present obvious challenges in the task of
1093 defining core discovery in terms that apply across different
1094 subjects of litigation.

1095 Beyond these questions, the assumption that the responding
1096 party bears the costs of responding is well-entrenched. Hundreds of
1097 comments addressed to the package of discovery amendments that is
1098 pending in Congress emphasize the role of discovery in supporting
1099 enforcement of public policies that provide important protection
1100 for public interests beyond the disposition of the particular
1101 action. Great difficulty would be encountered in attempting to
1102 devise a wise rebalancing of the competing interests.

1103 Additional reasons for diffidence about requester-pays
1104 proposals arise from the pending discovery amendments. They are
1105 designed in many ways to reduce the costs of discovery. The renewed
1106 emphasis on proportionality, coupled with the strong encouragement
1107 of early and active case management, and perhaps supported by the
1108 encouragement of party cooperation, may achieve substantial
1109 reductions in the cost and delay that occasionally result from
1110 searching discovery. Beyond that, if the amendments take effect the
1111 Rule 26(c) protective-order provisions will be modified to
1112 recognize expressly the court's authority to allocate the costs of
1113 responding in a particular case. This provision is not designed to
1114 inaugurate any general practice of shifting response costs, but it
1115 can be used to address specific needs in particular cases.

1116 In all, it was agreed that further work on requester-pays
1117 proposals would be premature. One or another aspect of discovery is
1118 usually on, or close to, the active agenda. Requester-pays issues
1119 will remain in the background, to be taken up again when it may
1120 seem appropriate.

1121 *Rule 62: Stays of Execution*

1122 Rule 62 came on for study in response to separate suggestions
1123 made to the Civil Rules Committee and to the Appellate Rules
1124 Committee. The work has been pursued through a joint subcommittee
1125 chaired by Judge Matheson. The materials in the agenda book were
1126 also on the agenda of the Appellate Rules Committee, which
1127 considered them last week.

1128 Judge Matheson opened the Subcommittee Report by reminding the
1129 Committee that these questions were discussed in a preliminary way
1130 last April. The Appellate Rules Committee also took up the topic
1131 then, and both Committees agreed that it makes sense to carry the
1132 work forward. At the same time, no one identified any actual
1133 difficulties that have emerged in practice under the current rule,
1134 apart from the specific questions that prompted the project from
1135 the beginning. The Subcommittee worked through the summer and fall
1136 to simplify and improve the draft revision. The current version
1137 appears in the agenda materials at p. 342.

1138 The draft reorganizes the allocation of subjects among present
1139 subdivisions (a) through (d), and changes the provisions for
1140 judgments that do not involve an injunction, an accounting in an
1141 action for patent infringement, or a receivership.

1142 Draft Rule 62(a) addresses three kinds of stays: (1) the
1143 automatic stay; (2) a stay obtained by posting a bond; and (3) a
1144 stay ordered by the court. These provisions address all forms of
1145 judgment, whether the relief be an award of money or some other
1146 form of relief such as foreclosing a lien or a decree quieting
1147 title.

1148 Several changes are made over the current rule.

1149 The automatic stay is extended from 14 days to 30 days. This
1150 eliminates the "gap" in present Rule 62(b), which recognizes the
1151 court's authority to order a stay "pending disposition" of post-
1152 judgment motions that may be made up to 28 days after entry of
1153 judgment. This revision addresses one of the two questions that
1154 prompted the Committees to take up Rule 62. The draft also
1155 expressly recognizes the court's authority to "order otherwise,"
1156 denying or terminating an automatic stay. (In response to a later
1157 question, it was explained that the stay was extended to 30 days to
1158 allow an orderly opportunity to begin to prepare for a further stay
1159 when expiration of the 28-day period shows there will be no post-
1160 judgment motion and while a brief period remains before expiration
1161 of the 30-day appeal time that governs most civil actions.)

1162 The draft revises the supersedeas bond provisions of present
1163 Rule 62(d) in various respects. It allows the bond to be posted at
1164 any time after judgment is entered, rather than "upon or after
1165 filing the notice of appeal." It allows "other security," not only
1166 a bond. These provisions address the questions that prompted the
1167 Appellate Rules Committee to study Rule 62 by enabling a party to
1168 post a single bond or other security that runs from entry of
1169 judgment through completion of any appeal. It also expressly
1170 recognizes the opportunity to rely on security other than a bond —
1171 one example might be a letter of credit, or establishment of an

1172 escrow fund.

1173 Draft Rule 62(a)(3) allows the court to order a stay at any
1174 time. This authority could, for example, be used to substitute a
1175 stay with security for the automatic stay.

1176 Draft Rule 62(b) authorizes a court, for good cause, to refuse
1177 a stay sought by posting security under draft 62(a)(2), or to
1178 dissolve or modify a stay. This is new.

1179 Draft Rule 62(c), also new, authorizes the court to set
1180 appropriate terms for security, or to deny security, both on
1181 entering a stay and on refusing or dissolving a stay. One example
1182 could be an order denying a stay only on condition that the
1183 judgment creditor post security to protect the judgment debtor
1184 against the injury caused by execution in case the judgment is
1185 reversed on appeal.

1186 Proposed Rule 62(d) does little more than consolidate the
1187 provisions in present subdivisions (a) and (c) for injunctions,
1188 receiverships, and accountings in actions for patent infringement.
1189 It does bring into rule text the complete array of actions that
1190 support appeal from an interlocutory order with respect to an
1191 injunction.

1192 Some attention was paid to the possibility of revising present
1193 subdivisions (e) and (f), but it was decided that no changes are
1194 needed. Subdivisions (g) and (h) were addressed in extensive
1195 memoranda prepared by Professor Struve as Reporter for the
1196 Appellate Rules Committee, but no action has been recommended as to
1197 them.

1198 The discussion by the Appellate Rules Committee led to
1199 agreement on extending the automatic stay to 30 days, closing the
1200 gap; to supporting the opportunity to post a single bond; and to
1201 recognizing alternative forms of security.

1202 The practitioner members of the Appellate Rules Committee,
1203 however, expressed concern about the features of the draft that
1204 would authorize the court to deny a stay even when the judgment
1205 debtor offers adequate security in the form of a bond or another
1206 form. They believe that the present rule recognizes a nearly
1207 absolute right to a stay on posting adequate security, and that
1208 allowing a court to deny a stay, even for "good cause," would be a
1209 dangerous departure. This question must be taken seriously.

1210 This introduction was followed by a reminder that there seems
1211 to be general agreement on the answers to the questions that
1212 launched this work. The automatic stay should be extended to 30

1213 days, closing the potential gap between its expiration on the 14th
1214 day and the time when the court is authorized to order a stay
1215 pending disposition of a motion that may not be made until 28 days
1216 after judgment is entered. A judgment debtor should be able to post
1217 security in a form other than a bond, and should be allowed to post
1218 a single security that covers both post-judgment proceedings in the
1219 district court and all proceedings on appeal.

1220 The questions that go beyond the initial concerns arose in a
1221 familiar way. Studying Rule 62 suggested ways in which it might be
1222 made more flexible, for the most part by provisions that would
1223 expressly recognize steps a court might well be prompted to take to
1224 protect the judgment or the parties even without explicit rule
1225 provisions. This approach often leads to the common dilemma: many
1226 ideas look good in the abstract. But there may be unforeseen
1227 problems that show both abstract and practical defects, and further
1228 difficulties may arise from the attempt to translate even good
1229 ideas into specific rule language. The wisdom of restraining
1230 ambition is underscored by the responses in the Standing Committee
1231 and both advisory committees that there have been no general
1232 complaints about Rule 62 in practice.

1233 Turning more pointedly to the concerns raised in the Appellate
1234 Rules Committee, the Subcommittee discussed repeatedly, and in
1235 depth, the question whether there should be a nearly absolute right
1236 to a stay on posting adequate security. There does seem to be a
1237 general belief in this right. And it might be seen as an integral
1238 part of the system that assures one appeal as a matter of right
1239 from a final judgment. The purpose of appeal is to provide an
1240 opportunity for reversal, even if the standards of review narrow
1241 the opportunity with respect to matters of fact or discretion.

1242 Counter considerations persuaded the Subcommittee to recognize
1243 authority to deny a stay. There may be cases in which the district
1244 court can accurately predict that there is little prospect of
1245 reversal, while also recognizing the risk of injuries that cannot
1246 be compensated even by assurance that the amount of a money
1247 judgment can be collected after affirmance. The judgment creditor
1248 may have immediate needs for money that cannot be addressed by
1249 collection of money after the delay of an appeal. For example, it
1250 may be possible to revive a damaged business by immediate action,
1251 while it may fail irretrievably pending appeal. A judgment for some
1252 other form of relief may pose comparable problems. A decree
1253 quieting title, for example, may open an opportunity for an
1254 immediate transaction that will be lost by delay. The "good cause"
1255 standard was thought to be sufficient protection of the judgment
1256 debtor’s interests, particularly when coupled with the court’s
1257 further authority to require security for the judgment debtor as a
1258 condition of denying a stay.

1259 Discussion began in two directions. One question was whether
1260 there truly is a right to a stay on posting security. The other
1261 went in the other direction: why should the rule allow the court to
1262 order a stay without any security, as the draft clearly
1263 contemplates? Is the judgment itself not assurance enough of the
1264 judgment creditor's probable right to require that the judgment be
1265 protected against defeat by delay — with the potential for
1266 concealing or dissipating assets — by requiring security?

1267 The question of absolute right turned into discussion of
1268 present Rule 62(d). It says that an appellant "may obtain a stay by
1269 supersedeas bond." Does "may obtain" imply discretion, so that the
1270 court may refuse the stay even though the bond is otherwise
1271 satisfactory in its amount, terms, and guarantor? That possible
1272 reading may be thwarted by the reading of parallel language in Rule
1273 23(b), which begins: "A class action may be maintained if Rule
1274 23(a) is satisfied and if" the requirements of paragraphs (1),(2),
1275 or (3) are satisfied. In Shady Grove Orthopedic Associates, P.A. v.
1276 Allstate Ins. Co., 130 S.Ct. 1431, 1437, 1438 (2010), the Court
1277 read "may be maintained" to entitle the plaintiff to maintain a
1278 class action on satisfying Rule 23(a) and one paragraph of Rule
1279 23(b). Rule 23 says not that the court may permit a class action,
1280 but that the class action may be maintained. "The Federal Rules
1281 regularly use 'may' to confer categorical permission." "The
1282 discretion suggested by Rule 23's 'may' is discretion residing in
1283 the plaintiff: He may bring his claim in a class action if he
1284 wishes." Parallel interpretation of present Rule 62(d) would read
1285 it to mean that all discretion resides in the judgment debtor, who
1286 has categorical permission to obtain a stay on posting suitable
1287 security.

1288 It was noted that Appellate Rule 8(a)(1) directs that a party
1289 must ordinarily move first in the district court for a stay pending
1290 appeal or approval of a supersedeas bond. But Rule 8(a)(2)
1291 authorizes a motion in the court of appeals if it is impracticable
1292 to move first in the district court, or if the district court
1293 denied the motion or failed to afford the relief requested. Rule
1294 8(a)(2)(E) says blandly that the court of appeals "may condition
1295 relief on a party's filing a bond or other appropriate security."
1296 This locution clearly recognizes appellate discretion to deny any
1297 stay — as seems almost inevitable if application has been made to
1298 the district court and denied — and to grant a stay without
1299 security.

1300 It was suggested that district courts have authority now to
1301 order a stay without any security, but that it may be unwise to
1302 emphasize that authority by explicit rule text.

1303 A tentative solution was suggested: the draft should be

1304 shortened by deleting subdivisions (b) and (c). Subdivision (b)
1305 reads: "The court may, for good cause, refuse a stay under Rule
1306 62(a)(2) or dissolve a stay or modify its terms." Subdivision (c)
1307 reads: "The court may, on entering a stay or on refusing or
1308 dissolving a stay, require and set appropriate terms for security
1309 or deny security." The final words of (c) would be transferred to
1310 paragraph (a)(3): "The court may at any time order a stay that
1311 remains in effect until a time designated by the court[, which may
1312 be as late as issuance of the mandate on appeal,] <u>and set</u>
1313 <u>appropriate terms for security or deny security</u>.

1314 A separate issue was raised. The draft rule does not describe
1315 the appeal bond as a "supersedeas" bond. It was agreed that it
1316 would be better to move away from that antique-sounding word. But
1317 "supersedeas" appears in Appellate Rule 8(a)(1)(B), most likely
1318 because it directs that application for a stay be made first to the
1319 district court. (Appellate Rule 8(a)(2)(E) is simpler — it refers
1320 only to conditioning a stay on "a bond or other appropriate
1321 security.") The Bankruptcy Rules also refer to a supersedeas bond.
1322 It would be good to strike the word from each set of rules.

1323 Discussion concluded with the suggestion that the proposed
1324 rule should be simplified along the lines indicated above. The
1325 practicing lawyers on the Appellate Rules Committee believe there
1326 is a nearly absolute right to a stay on posting an adequate bond or
1327 other security. No one is pressing for revision. If the rule is
1328 amended to authorize the court to deny a stay by posting bond, even
1329 if the court must find good cause to deny the stay, there will be
1330 an increase in arguments seeking immediate execution. And it will
1331 be difficult to implement the good-cause concept. Imagine one
1332 simple argument: The judgment creditor is 85 years old and wants
1333 the chance to enjoy the fruits of judgment in this life time.

1334 Judge Matheson agreed that the Subcommittee will reconsider
1335 these problems in light of the discussion here and in the Appellate
1336 Rules Committee.

1337 *e-Rules*

1338 The Committee was reminded of the recent history of work on
1339 the rules for electronic filing, electronic service, and use of the
1340 Notice of Electronic Filing as a certificate of service. Last
1341 April, this Committee voted to recommend publication of a set of
1342 rules amendments addressing these topics. The Criminal Rules
1343 Committee, however, decided at the same time that the time has come
1344 to write independent provisions for these topics into Criminal Rule
1345 49. Rule 49 currently incorporates the practice of the civil rules
1346 for filing and service. Their project is designed to avoid
1347 cumbersome cross-references between different sets of rules, and

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1348 also to determine whether differences in the circumstances of
1349 criminal prosecutions justify differences in the filing and service
1350 provisions. Brief discussions led to modifications in the Civil
1351 Rules provisions that were presented to the Standing Committee for
1352 discussion. The revised provisions are included in the agenda
1353 materials for this meeting. This Committee did not recommend
1354 publication at the May Standing Committee meeting. The Criminal
1355 Rules Committee continues to work on its new Rule 49. A conference
1356 call of the Criminal Rules Subcommittee will be held on November
1357 13; representatives of this Committee will participate.

1358 The goal of this undertaking is to work toward common
1359 proposals on all topics that merit uniform treatment across the
1360 different sets of rules. That goal leaves the way open to different
1361 treatment of topics that warrant different treatment in light of
1362 differences in the circumstances that confront the different sets
1363 of rules. The parallel proposals for the Appellate Rules already
1364 include some variations that integrate these subjects with the
1365 structure of the Appellate Rules. So it may be that the Criminal
1366 Rules Committee will find that criminal prosecutions deserve
1367 different treatment of some aspects of electronic filing and
1368 service.

1369 One of the topics that has been discussed is access to
1370 electronic filing and service by pro se litigants. The Civil Rules
1371 proposals reflect a belief that a pro se litigant, the court, and
1372 all other parties may benefit from allowing electronic filing and
1373 service by a pro se litigant. The question is how to manage this
1374 practice. It may be that uniform provisions are suitable for all
1375 sets of rules. It may be that different approaches are desirable.
1376 These questions will be addressed as all committees work toward
1377 final proposals for publication. One committee member noted that
1378 her court has had difficulty with local rules that track each other
1379 for pro se litigants in criminal and civil proceedings — the
1380 problems really are different.

1381 Once decisions are reached as to the appropriate level of
1382 substantive uniformity, style questions will remain. It will be
1383 important to work out style questions with the help of the style
1384 consultants so as to avoid any occasion for asking the Standing
1385 Committee to resolve any differences.

1386 *Pilot Projects*

1387 Judge Bates opened the discussion of pilot projects by asking
1388 Judge Campbell, who has chaired the pilot projects committee, to
1389 report on the committee's work.

1390 Judge Campbell began by noting that many people have worked in

1391 the effort to advance consideration of pilot project proposals.

1392 The interest in pilot projects was stimulated by experience in
1393 attempting to translate the lessons offered at the 2010 Conference
1394 into specific rules proposals. There are limits to what can be
1395 accomplished by rules. If a page of history is worth a volume of
1396 logic, the purpose of pilot projects may be to create pages of
1397 history by actual experience in testing new approaches. One result
1398 may be rules amendments. But pilot projects may provide valuable
1399 lessons that are implemented in other ways. The Committee on Court
1400 Administration and Case Management may find valuable practices that
1401 it can foster through its work. The Judicial Conference may gain
1402 similar benefits. It may be that approaches that have been tested
1403 and found valuable will be adopted by emulation without the need
1404 for formal action by any committee.

1405 For the rules committees, the immediate plan is to prepare
1406 concrete proposals for possible pilot projects that can be
1407 discussed with the Committee on Court Administration and Case
1408 Management and with the Standing Committee this coming spring. The
1409 goal will be to identify one or more projects that could be
1410 implemented late in 2016.

1411 One informal pilot project, the protocols for initial
1412 discovery in individual employment actions, is already being
1413 studied. Emery Lee at the FJC has been tracking experience.

1414 Emery Lee reported that the first thing he learned was that
1415 the employment protocols are being used by more judges than he had
1416 thought. He has identified 70 judges that are using them. Drawing
1417 on cases that have concluded since 2011, he identified some 500
1418 terminated cases. He drew a random sample of cases that did not use
1419 the protocols during the same period. Overall, he studied data on
1420 1,150 cases.

1421 The positive lesson is that there are fewer discovery motions
1422 in protocol cases: motions were made in 12% of these cases, as
1423 compared to 21% of the comparison cases. The average number of
1424 motions made was half as many in the protocol cases. "That is a big
1425 number." The number suggests that the protocols made an important
1426 difference. But it is not possible to draw firm conclusions because
1427 the judges who choose to adopt the protocols may be judges who are
1428 actively engaged in managing discovery in any event.

1429 The negative lesson is that the time to disposition appears to
1430 be essentially identical in protocol cases and in non-protocol
1431 cases. The essential identity held true for the time taken to reach
1432 disposition by different methods — by motion to dismiss or by
1433 summary judgment. The time to settlement, however, appears to be

1434 different. The identity of times to disposition is puzzling.

1435 The first comment was made by a judge who requires a request
1436 for a conference before a motion can be made. That may be happening
1437 in the employment cases — the same number of discovery disputes
1438 arise, but many of them are resolved at the pre-motion conference,
1439 reducing the number of motions.

1440 A second comment was that the times to disposition may track
1441 closely if courts set the same discovery cut-off time in protocol
1442 cases as in non-protocol cases. The timing of dispositive motions
1443 tends to feed off the discovery cut-off.

1444 Another judge offered a guess that protocol judges are likely
1445 to be "more progressive — to require a conference before a
1446 discovery motion can be made." But he uses the protocols, and
1447 thinks he is seeing fewer discovery disputes. "They don't fight
1448 over things they used to fight over because of automatic
1449 disclosures." As one example: confronted with a request to identify
1450 the person who made the decision to terminate a plaintiff,
1451 defendants used to argue that the information was protected by work
1452 product. It is not protected, but the argument had to be resolved.
1453 Now the information is automatically disclosed and there is no
1454 dispute.

1455 Yet another judge said that lawyers use the protocols and
1456 "play nicely together." The similarity in times to disposition is
1457 probably because the case schedules are not changed.

1458 Discussion turned to pilot projects in general. Various pilot
1459 projects aimed at reducing cost and delay have been identified in
1460 eleven states. Before that, the Civil Justice Reform Act stimulated
1461 a massive set of local experiments. The Conference of Chief
1462 Justices is working on a Civil Justice Improvement Project. The
1463 Institute for the Advancement of the American Legal System has
1464 studied several pilot projects, and recommended principles to
1465 improve civil litigation. The National Center for State Courts has
1466 evaluated some projects. Projects are upcoming in Texas and
1467 Minnesota. New York State is developing a program that is aimed at
1468 trading early trial dates for curtailed pretrial procedure.

1469 One possible pilot project that has drawn attention is the one
1470 that would involve some form of expanded initial discovery, perhaps
1471 moving beyond the form embodied by Civil Rule 26(a)(1) between 1993
1472 and 2000 to a model drawn from the Arizona rule.

1473 Other possibilities focus on assigning cases to different
1474 tracks that embody different levels of pretrial procedure, as many
1475 of the CJRA plans attempted. One problem that has confronted these

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1476 programs has been identification of criteria for assigning cases to
1477 the different tracks. When dollar limits are set, lawyers tend to
1478 plead around them. Other criteria become difficult to manage.

1479 A quite different approach would forgo formal experiments with
1480 new procedures to focus on training. The FJC study of the CJRA
1481 experiments confirmed that time to disposition can be reduced by a
1482 combination that includes early judicial case management, shorter
1483 discovery cut-offs, and early setting of a firm trial date. This
1484 learning could be demonstrated by a quasi-pilot project that trains
1485 judges in a district, gathers statistics, measures the progress of
1486 judges in reducing times to disposition, and seeks to persuade
1487 other judges of the value of these practices. Emery Lee noted that
1488 gathering information on individual judge performance can be
1489 sensitive. But the RAND study shows that there is real value. We
1490 know it is there.

1491 A Committee member noted that he does a lot of arbitrations as
1492 an arbitrator, usually as a neutral member. "There is a convergence
1493 of what happens in arbitration with civil litigation." In
1494 arbitration, you get only the discovery the arbitrator orders. So
1495 a lawyer may request 10 depositions; the order is to come back
1496 after talking with the client about the cost. The next request is
1497 for one deposition. "People sign up for this." "At the Rule 16
1498 conference you quickly learn what the case is about." The idea of
1499 training judges is terrific. But we have to be able to distinguish
1500 cases for tracking purposes — small cases have to be dealt with
1501 differently. And they must be identified early. Tracking can work.
1502 Arbitration hearing dates tend to be quite firm because they must
1503 coordinate the schedules of 8, 9, 10 different people — a missed
1504 date may push the next hearing back by half a year.

1505 A judge noted that before he became a judge he was a member of
1506 the CJRA committee for his district. "We're still doing tracking."
1507 But "I can't say whether it's good or bad." Lawyers are required to
1508 address tracking in their Rule 26(f) conference. Then they discuss
1509 it with the judge. There are five tracks: expedited, standard,
1510 complex, mass tort, and administrative.

1511 Another judge reported that "tracking works." For example, he
1512 reduces the time for discovery in FDCA cases and reduces the number
1513 of discovery events.

1514 The same judge then asked how does the Arizona initial
1515 disclosure of legal theories relate to practice on motions to
1516 dismiss for failure to state a claim? Judge Campbell suggested that
1517 it does not seem to have made a significant change.

1518 A broader perspective was suggested. The RAND study of CJRA

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1519 experience was expensive. We should focus on what we can try to do,
1520 and on what resources are available. Comparing pilot projects in
1521 some districts with others can be interesting, but "we do not have
1522 a lot of resources for data-driven projects." Pilot projects,
1523 however, "can be about norm changing." None of the suggested
1524 projects embodies an idea that is strong enough to be adopted
1525 without testing in a national rule that binds all 94 districts.
1526 Instead, we can find 5 or 10 districts to implement known good
1527 ideas. The hope will be that they will like the experience, carry
1528 on with it, and perhaps encourage other districts to emulate their
1529 experience. A similar comment suggested that it may be more
1530 effective to develop ideas, label them as best practices or
1531 innovations, and then draw attention to successful adoptions. But
1532 another judge expressed doubt whether "it catches on that way among
1533 judges." A different judge, however, thought that judges will be
1534 willing to adopt a practice when they become convinced that it will
1535 help move cases effectively. The question "is how to get people off
1536 the mark." A more specific suggestion was that "we can convince
1537 people to have a pre-motion telephone conference."

1538 Federal Judicial Center training of all judges may be another
1539 means of fostering ideas that have proved out in one or a few
1540 districts.

1541 A judge suggested that the idea of pilots is to test ideas,
1542 such as initial disclosure. Initial disclosure can be tested to see
1543 how it affects the number of motions, the time to disposition, and
1544 other variables. The Committee on Court Administration and Case
1545 Management will meet to discuss these same pilot-project ideas in
1546 December. They support work on this. It was agreed that involving
1547 "CACM" is essential. If they identify districts that have long
1548 times to disposition, they can help to focus enhanced training
1549 there. And it may be possible to measure the results.

1550 A suggestion from an absent member was relayed: "Why are we
1551 thinking of small cases"? We need fact pleading, short discovery,
1552 and firm trial dates in all cases. "Do we need two rounds of
1553 pleading in every case"? Unlimited discovery? State courts working
1554 along these lines are achieving cheaper, faster resolutions. "We
1555 should be driving toward pretty radical rule change."

1556 Another judge noted that it is difficult to measure
1557 achievement of the "just" aspiration expressed in Rule 1. But it is
1558 possible to measure satisfaction of the parties, and that may be a
1559 good thing to study.

1560 The initial disclosure proposal came on for more detailed
1561 discussion. This model aims at "robust, but not aggressive"
1562 disclosure. It works from the Arizona model, but reduces the level

1563 of required disclosures in several dimensions.

1564 The first question asked why the model requires only
1565 identification of categories of relevant documents, rather than
1566 actual production. The Arizona rule requires actual production
1567 unless the documents are voluminous. Arizona lawyers report that
1568 the rule operates as a presumption for production of particular
1569 documents. The response was that the model reflects concern that
1570 too much burden will be imposed by requiring actual production at
1571 the outset of an action, particularly if that were added to the
1572 obligation to identify witnesses, the fact basis for claims and
1573 defenses, and legal theory. To be sure, not much is accomplished by
1574 disclosing that relevant information can be found in such
1575 categories as "personnel files," "R & D files," or the like. But
1576 the parties can figure out where to start discovery by other means.
1577 Still, this question is open to further consideration if this model
1578 moves toward testing in a pilot project.

1579 Initial disclosure was viewed from an expanded perspective.
1580 The bar was not ready for the 1993 rule that required disclosure of
1581 information unfavorable to the disclosing party. "The Arizona
1582 experience may not convince" federal judges in 49 other states. It
1583 would be difficult to move directly to adopting a rule that
1584 embodies the Arizona practice. But if it works in 5 or 10 pilot
1585 districts, there could be support for adopting a national practice.

1586 A member reported work on a CJRA committee that adopted an
1587 initial disclosure rule. "It failed. Lawyers weren't ready." But
1588 the "pilot project" label may not be effective in selling a
1589 program. We want to test ideas to see whether they work. We need
1590 something that facilitates culture change. Seeing that something
1591 actually works can do a lot.

1592 A truly pointed question was asked: (a)(2) and (a)(2)(A) of
1593 the model require disclosuring:

1594 (2) whether or not the disclosing party intends to use
1595 them in presenting its claims or defenses:

1596 (A) the names and addresses of all persons whom the
1597 party believes may have knowledge or information
1598 relevant to the events, transactions, or
1599 occurrences that gave rise to the action * * *.

1600 Just what is intended? The purpose is to require disclosure of
1601 information unfavorable to the disclosing party — it is enough that
1602 the information is relevant to the events, etc.

1603 The alternative of judge training programs came back for

1604 expanded discussion with the question whether it is a fool's
1605 errand. A judge responded that there are some judges who will
1606 resist training. But overall, training can do more than can be done
1607 by rules. Still, it would be a mistake to adopt a pilot that forces
1608 all judges into training. Another judge said that newer judges are
1609 particularly likely to want to take training in subjects they do
1610 not know well. But forcing it will not work. Still another judge
1611 agreed that new judges are more amenable to this sort of training.

1612 "Baby judges school" also was noted, but it was suggested that
1613 new judges are still so new at this point that the school cannot do
1614 the job of more focused and advanced programs. And in any event,
1615 "I'm not sure the problem is newer judges." However that may be,
1616 the training has to be meaningful. It will not work just to tell us
1617 judges that early case management is important. "Tell me how to
1618 make it happen."

1619 A similar perspective was offered. "The important thing is to
1620 move from the abstract to the concrete." "Here's what actually
1621 works": A phone call on a 3-page statement of a motion to dismiss
1622 leads to an amended complaint. If the motion is renewed, whatever
1623 is dismissed is with prejudice. The ideas must be packaged in a way
1624 that makes it easier for the judge to do it.

1625 So it was noted that "we learn more in gatherings of judges
1626 where we talk together." Mid-career judges help newer judges in
1627 informal exchanges that often are more useful than formal training
1628 programs. So one promising approach may be to go to the districts
1629 to get the local judges talking among themselves about topics they
1630 would not "fly to D.C. to learn about."

1631 Other questions were raised about pilot projects. "We know a
1632 lot about what works." A pilot project will take 3 or 4 years in
1633 practice. Then it will have to be evaluated. And the result may be
1634 a simple message that it works better with more judge involvement.

1635 One note of frustration was expressed. In many districts the
1636 district judges refer all pretrial matters to magistrate judges,
1637 but do not set trial dates. The magistrate judge can move cases,
1638 but the district judge has to be involved.

1639 It was noted that sometimes a pilot project will not be able
1640 to enlist every judge in a district. It may be necessary to look
1641 for judges. The Administrative Office can tell a district whether
1642 it is moving faster or slower than the national average. "It's a
1643 question of putting the resources in the right place."

1644 A final suggestion was that it could be useful to get on the
1645 agenda of the Chief District Judges conference.

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1646 *New Docket Items*

1647 **15-CV-C**

1648 This suggestion protests the overuse of "objection as to form"
1649 during oral depositions. The proposed remedy is to create a
1650 Committee Note "indicating that it is improper to merely object to
1651 'form' without providing more precise information as to how the
1652 question asked is 'defective as to form' (e.g., compound, leading,
1653 assumes facts not in evidence, etc.)."

1654 It is well established that a Committee Note can be written
1655 only as part of the process of adopting or amending a rule. Rule
1656 30(c)(2) could be amended to say something like this: "An objection
1657 must be stated in a nonargumentative and nonsuggestive manner <u>that</u>
1658 <u>reasonably explains the basis of the objection</u>." But the Committee
1659 concluded that any revisions of the rule text are unlikely to
1660 change behavior for the better, and might easily create more
1661 problems than would be solved.

1662 This suggestion was removed from the docket.

1663 **15-CV-E**

1664 This suggestion addresses the time to file a responsive
1665 pleading when a Rule 12(b)(6) motion to dismiss addresses only part
1666 of a complaint or when the motion is converted to a motion for
1667 summary judgment. The concern is that some courts rule that the
1668 time to respond is suspended by Rule 12(a)(4) only as to the parts
1669 of the complaint challenged by the motion; an answer must be filed
1670 as to the remainder of the complaint. The same problem can persist
1671 if the motion to dismiss is converted to a motion for summary
1672 judgment.

1673 It is urged that it is better to suspend the time to respond
1674 as to the entire complaint. This practice avoids duplicative
1675 pleadings and confusion over the proper scope of discovery. Many
1676 cases support it.

1677 Discussion revealed that even though many cases support the
1678 suggested approach, not all judges follow it. One Committee member
1679 reported that some judges in his home district require a response
1680 to the parts of a pleading not addressed by the motion, even though
1681 the time to respond is suspended as to the parts addressed by the
1682 motion. There is some reason for concern.

1683 Despite these possible concerns, the Committee concluded that
1684 there is not yet evidence of a problem so general as to warrant
1685 amending the rules. This suggestion will be removed from the

1686 docket, although without any purpose to suggest that it should not
1687 be considered further if a general problem is shown.

1688 **15-CV-X**

1689 This suggestion raises two or three issues.

1690 One suggestion is that Rule 45 should be revised to extend the
1691 reach of trial subpoenas so as "to force a representative of a non-
1692 resident corporate defendant to appear at trial in the court that
1693 has jurisdiction over the parties and the case." This question was
1694 thoroughly explored in working through the recent amendments of
1695 Rule 45. A proposal similar to this one was published for comment,
1696 albeit without any recommendation that it be adopted. No sufficient
1697 reasons are offered to justify reexamination now.

1698 A second suggestion would adopt the procedure of Rule 30(b)(6)
1699 for trial subpoenas. A trial subpoena could name an entity as
1700 witness and direct the entity to produce one or more real persons
1701 to testify for the entity. Discussion noted that Rule 30(b)(6)
1702 itself has been examined twice in the recent past. Each time the
1703 Committee found problems in practice, but concluded that the
1704 problems were not sufficiently pervasive to justify amending the
1705 rule. It was concluded that however well Rule 30(b)(6) works for
1706 discovery, extending it to trial would generate additional problems
1707 that could become serious.

1708 The suggestion also might be read to urge that a nonparty
1709 entity be required to produce witnesses to testify at a deposition
1710 in the district where an action is pending.

1711 The Committee concluded that this set of suggestions should be
1712 removed from the docket.

1713 **15-CV-EE**

1714 This submission offers four discrete suggestions, all of which
1715 touch on other sets of rules in addition to the Civil Rules.

1716 The first suggestion is to amend Rule 5.2(a)(1). The rule now
1717 permits disclosure in a filing of the last four digits of the
1718 social-security number and taxpayer-identification number. The
1719 suggestion is that no part of these numbers be disclosed. The
1720 reason is that the method of generating social security numbers
1721 relies on a well-known formula that, together with additional
1722 information about a person that is often readily available, can be
1723 used to reconstruct the full number. This phenomenon was considered
1724 by the joint subcommittee that drafted Rule 5.2 and the parallel
1725 Appellate, Bankruptcy, and Criminal Rules. The decision to allow

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1726 filing the last four digits was made because this information was
1727 thought important for the Bankruptcy Rules. A preliminary inquiry
1728 suggests that this information may remain important for bankruptcy
1729 purposes. This suggestion will be carried forward for consultation
1730 with the other advisory committees.

1731 The second suggestion is that any affidavit made to support a
1732 motion to proceed in forma pauperis under 28 U.S.C. § 1915 be filed
1733 under seal and reviewed ex parte. The court could order disclosure
1734 to another party for good cause and under a protective order, or
1735 permit unsealing in appropriately redacted form. The concern seems
1736 to be to protect privacy interests. Again, the other advisory
1737 committees are involved. Brief discussion suggested that filing
1738 under seal is not a general practice now. One judge says that he
1739 does not order sealing because it imposes costly burdens on the
1740 court. Another participant suggested that i.f.p. disclosures
1741 generally invade privacy only to the extent of disclosing a lack of
1742 financial resources, a state that could be inferred from a grant of
1743 in forma pauperis permission in any event. This suggestion too will
1744 be carried forward for consultation with other advisory committees.

1745 The third suggestion is for a new Rule 7.2. It is modeled on
1746 a local rule for the Eastern and Southern Districts of New York. It
1747 would address citation by counsel of cases or other authorities
1748 "that are unpublished or reported exclusively on computerized data
1749 bases." Counsel who cites such authority would be required to
1750 provide copies to a pro se litigant. In addition, on request,
1751 counsel would be required to provide copies of such cases or
1752 authorities that are cited by the court if they were not previously
1753 cited by counsel. Discussion began by asking whether other courts
1754 have local rules similar to the E.D. & S.D.N.Y. rule; no one had
1755 information to respond. A judge noted that he makes copies
1756 available when he cites unpublished authority. A lawyer suggested
1757 that Assistant United States Attorneys seem to do this in some
1758 districts. It was suggested that some way might be found to
1759 encourage this as a best practice. A note of this suggestion will
1760 be sent to the head of the FJC. But it was concluded that this
1761 practice involves a detail of practice that need not be enshrined
1762 in the Civil Rules.

1763 The final suggestion is that pro se litigants should be
1764 permitted, but not required, to file by paper, and should be
1765 permitted to qualify for e-filing and service to avoid burdens that
1766 other parties do not have to bear. These questions are being
1767 actively considered by several advisory committees, as noted during
1768 earlier parts of this meeting. They will continue to be considered.

1769 **Pre-Motion Conference: Rule 56**

January 11, 2016 draft

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1770 Judge Jack Zouhary, a member of the Standing Committee, has
1771 offered an informal suggestion that this Committee consider the
1772 practice of requiring a party to request a conference with the
1773 court before making a motion for summary judgment. He follows that
1774 practice, and finds that it has many benefits.

1775 The benefits that may be realized by pre-motion conference
1776 include these possibilities: The movant may decide not to make the
1777 motion, or may focus it better by omitting issues that are
1778 genuinely disputed. The nonmovant may realize that some issues are
1779 not genuinely disputed or are not material. Discussion in the
1780 conference may lead the parties to a better understanding of the
1781 facts, the law, or both. A conference with the court may work
1782 better than a conference of the parties alone. The court may not
1783 use the conference to deny permission to make the motion — Rule 56
1784 establishes a right to move. But the court can suggest and advise.

1785 Similar advantages can be gained by holding a conference with
1786 the court before other motions are made. These advantages were
1787 discussed in developing the package of case-management amendments
1788 now pending in Congress. The result of those deliberations is to
1789 add a new Rule 16(b)(3)(B)(v), which provides that a scheduling
1790 order may "direct that before moving for an order relating to
1791 discovery, the movant must request a conference with the court."
1792 This provision was limited to discovery motions in a spirit of
1793 conservatism in adding details to the rules. It was recognized that
1794 many courts require pre-motion conferences for motions other than
1795 discovery motions, including summary-judgment motions. But it also
1796 was recognized that some judges do not. One step was to reject any
1797 general requirement — the new Rule 16(b) provision serves simply as
1798 a reminder and perhaps as an encouragement.

1799 It would be easy enough to expand pending Rule 16(b)(3)(B)(v)
1800 to encompass summary-judgment motions. It would authorize a
1801 scheduling-order provision that "direct[s] that before moving for
1802 an order relating to discovery <u>or for summary judgment</u>, the movant
1803 must request a conference with the court." Or Rule 56(b) could be
1804 amended to mandate this procedure: "a party may<u>, after requesting</u>
1805 <u>a conference with the court,</u> file a motion for summary judgment at
1806 any time until 30 days after the close of all discovery."

1807 Discussion began with a judge who requires a pre-motion
1808 conference for "all sorts of motions." This practice has many
1809 benefits. Recognizing that some judges would oppose a mandate, why
1810 not expand Rule 16(b) to encompass not only discovery but any
1811 "substantive" motion?

1812 Another judge thought the underlying idea is good. "But we
1813 have just been through one round of amendments. We did it

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1814 carefully." We can find a way to recommend pre-motion conferences
1815 as a best practice, but should wait before suggesting another rule
1816 amendment. And then we will need to think about how broadly the
1817 rule should apply. For example, is there a sufficiently clear
1818 concept of what is a "substantive motion" to support use of that
1819 term in rule text?

1820 A lawyer noted that the AAA rules used to provide for summary
1821 disposition in general terms. The rules were amended to require
1822 permission of the arbitrator before making the motion. As an
1823 arbitrator, he has denied permission when the motion seemed
1824 inappropriate. That is not to suggest that a judge be authorized to
1825 deny leave to make a summary-judgment motion, but requiring a
1826 conference would give the judge an opportunity to observe that a
1827 motion would not have much chance of succeeding.

1828 The discussion concluded by determining to hold this
1829 suggestion open, without moving forward now.

1830 **Rules 81, 58**

1831 Two additional items were included in the agenda materials.
1832 One addresses the provisions of Rule 81(c) that govern demands for
1833 jury trial in an action that has been removed from state court. The
1834 other addresses the Rule 58 requirement that a judgment be entered
1835 in a "separate document." These items will be carried forward on
the agenda.

Respectfully submitted,

Edward H. Cooper
Reporter

January 11, 2016 draft

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TAB 3

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125-001602

Item 3 will be an oral report.

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TAB 4

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125-001610

I. Rules Proposed for Publication
A. Rule 23: Class Actions

Rule 23 Subcommittee Report

At the Advisory Committee's November 2015 meeting, the Rule 23 Subcommittee presented its sketches of possible rule amendments to address six issues. It also recommended that certain issues it had examined be dropped from its current agenda, and that others be put "on hold" pending developments.

Since the November meeting, the Subcommittee has continued to work on these six issues. It has also added an issue mentioned by the Department of Justice during the November meeting -- extending the time for the Government to decide whether to take an appeal under Rule 23(f). This work has included six conference calls and a presentation at the January 2016 meeting of the Standing Committee. Notes of the six conference calls (on Nov. 16, 2015, Nov. 23, 2015, Jan. 19, 2016, Jan. 29, 2016, Feb. 5, 2016, and Feb. 10, 2016) are included in this agenda book.

The Subcommittee now proposes that the package of amendments addressing these issues be forwarded to the Standing Committee with a recommendation that they be published for public comment. That recommendation is contained in Part I of this report.

Since the Advisory Committee's last meeting, the Subcommittee has refined several of the items presented at the Advisory Committee's last meeting. In particular, after discussions with the Standing Committee and extensive help from Judge Colloton (Chair, Appellate Rules Committee) and Prof. Maggs (Reporter, Appellate Rules Committee), it has identified what it regards as the preferred method of addressing the issue of problem objectors to class-action settlements. As set forth below, it has decided to endorse the "simple" approach of proceeding with only a change to the civil rules. It is expected that the topic of class-action objector appeals will be on the agenda for the April meeting of the Appellate Rules Committee, and that a report on the results of that discussion can be made during the Civil Rules meeting in Palm Beach.

Part II below is an informational report on other issues that are "on hold." One significant development has been the Supreme Court's decision in a case involving what have come to be called the "pick-off" issues. In the wake of that decision, discussion has continued to focus on amendment ideas included in the Subcommittee's mini-conference in September 2015, but has also prompted a new idea -- providing explicitly in Rule 23 that when a proposed class representative is unable to serve (whether due to mootness or another reason) class counsel should have an opportunity to locate and present a substitute representative. The Subcommittee has begun to work through the sketches of rule provisions that might address these issues. The most recent

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sketches are included in an Appendix to the notes of the Feb. 10, 2016, conference call, included in this agenda book.

At the April meeting of the full Committee, the Subcommittee does not propose detailed discussion of these sketches. Instead, it hopes to explore the general issues, including whether it appears that the pick-off efforts have continued to occur since the Supreme Court's decision in January 2016. It is particularly interested in receiving reactions to its one new idea -- enabling class counsel to seek a replacement class representative if the original class representative cannot serve.

The other informational issue is what has come to be known as the "ascertainability" question. One pending petition for certiorari raises that issue, and two cases not yet decided by the Supreme Court may also have some potential relevance.

The Subcommittee does not recommend proceeding with amendments regarding these "on hold" issues at this time, but it does recommend retaining them on its current agenda for further study. For that purpose, it invites reactions and ideas about the matters it continues to study.

I. **ACTION ITEM:** THE CURRENT PRELIMINARY DRAFT PACKAGE RECOMMENDED FOR TRANSMITTAL TO THE STANDING COMMITTEE

The Subcommittee recommends that the Advisory Committee forward the following preliminary draft of proposed amendments to Rule 23 to the Standing Committee for publication for public comment. These are the six items presented during the Committee's November 2015 meeting, plus a further change to Rule 23(f) (mentioned during that meeting) extending the time for the United States to seek review.

[The draft rule language below has been reviewed by the Standing Committee Style Consultants, and revised in response to their recommendations. One remaining language issue is mentioned in a footnote below, with the suggestion that the Advisory Committee support the Subcommittee's unanimous view on this question.]

1 **Rule 23. Class Actions**
2
3 * * * * *
4
5 **(c) Certification Order; Notice to Class Members; Judgment;**
6 **Issues Classes; Subclasses**
7
8 * * * * *
9
10

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(2) ***Notice.***

* * * * *

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3) -- or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3) -- the court must direct to class members the best notice that is practicable under the circumstances, by United States mail, electronic means or other appropriate means. The notice must include ~~including~~ individual notice to all members who can be identified through reasonable effort. * * * * *

* * * * *

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class -- or a class proposed to be certified for purposes of settlement -- may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) *Notice to the class*

(A) *Information Parties Must Provide to the Court.* The parties must provide the court with sufficient[1] information to enable it to determine whether to give notice of the proposal to the class.

(B) *Grounds for Decision to Give Notice.* The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(e)(2); and

[1] The Standing Committee Style Consultants suggested substituting "enough" for "sufficient" in (e)(1)(A). The Subcommittee developed this rule language after substantial discussions. It unanimously rejected the Style Consultants' substitute language, believing that "sufficient" carries pertinent connotations for the bench and bar. A clear choice by the Advisory Committee will be welcome.

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55
56 **(ii)** certify the class for purposes of
57 judgment on the proposal.
58 **(2)** *Approval of the proposal.* If the proposal would
59 bind class members, the court may approve it only
60 after a hearing and only on finding that it is
61 fair, reasonable, and adequate after considering
62 whether:~~.~~
63
64 **(A)** the class representatives and class counsel
65 have adequately represented the class;
66
67 **(B)** the proposal was negotiated at arm's length;
68
69 **(C)** the relief provided for the class is adequate,
70 taking into account:
71
72 **(i)** the costs, risks, and delay of trial and
73 appeal;
74
75 **(ii)** the effectiveness of the proposed method
76 of distributing relief to the class,
77 including the method of processing class-
78 member claims, if required;
79
80 **(iii)** the terms of any proposed attorney-fee
81 award, including timing of payment; and
82
83 **(iv)** any agreement required to be identified
84 under Rule 23(e)(3); and
85
86 **(D)** class members are treated equitably relative to
87 each other.
88
89 **(3)** *Identification of Side Agreements.* The parties
90 seeking approval must file a statement identifying
91 any agreement made in connection with the proposal.
92
93 **(4)** *New Opportunity to Be Excluded.* If the class was
94 previously certified under Rule 23(e)(2), the court
95 may refuse to approve a settlement unless it
96 affords a new opportunity to request exclusion to
97 individual class members who had an earlier
98 opportunity to request exclusion but did not do so.
99
100 **(5)** *Class-member Objections.*
101
102 **(A)** *In General.* Any class member may object to
103 the proposal if it requires court approval
104 under this subdivision (e)~~; the objection may~~
105 ~~be withdrawn only with the court's approval~~.
106 The objection must state whether it applies
107 only to the objector, to a specific subset of

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the class, or to the entire class, and also state with specificity the grounds for the objection.

(B) *Court Approval Required for Payment to an Objector or Objector's Counsel.* Unless approved by the court after a hearing, no payment or other consideration may be provided to an objector or objector's counsel in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

* * * * *

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). ~~if a petition for to appeal is filed~~ A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered, or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

COMMITTEE NOTE

Rule 23 is amended mainly to address issues related to settlement, and also to take account of issues that have emerged since the rule was last amended in 2003.

Subdivision (c)(2). As amended, Rule 23(e)(1) provides that the court must direct notice to the class regarding a proposed class-action settlement only after determining that the prospect of class certification and approval of the proposed settlement justifies giving notice. This decision is sometimes inaccurately called "preliminary approval" of the proposed class certification in Rule 23(b)(3) actions, and it is common to send notice to the class simultaneously under both Rule 23(e)(1) and Rule 23(c)(2)(B), including a provision for class members to decide by a certain date whether to opt out. This amendment recognizes the propriety of this notice practice. Requiring repeat notices to the class can be wasteful and confusing to class members.

Subdivision (c)(2) is also amended to recognize contemporary methods of giving notice to class members. Since Eisen v. Carlisle

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20 & Jacquelin, 417 U.S. 156 (1974), interpreted the individual notice
21 requirement for class members in Rule 23(b)(3) class actions, many
22 courts read the rule to require notice by first class mail in every
23 case. But technological change since 1974 has meant that other
24 forms of communication are more reliable and important to many.
25 Courts and counsel have begun to employ new technology to make
26 notice more effective, and sometimes less costly. Because there is
27 no reason to expect that technological change will halt soon,
28 courts giving notice under this rule should consider existing
29 technology, including class members' likely access to such
30 technology, when selecting a method of giving notice.
31
32 Rule 23(c)(2)(B) is amended to take account of these changes,
33 and to call attention to them. The rule calls for giving class
34 members "the best notice that is practicable." It does not specify
35 any particular means as preferred. Although it may often be true
36 that electronic methods of notice, for example by email, are the
37 most promising, it is important to keep in mind that a significant
38 portion of class members in certain cases may have limited or no
39 access to email or the Internet. Instead of preferring any one
40 means of notice, therefore, courts and counsel should focus on the
41 means most likely to be effective in the case before the court.
42 The amended rule emphasizes that the court must exercise its
43 discretion to select appropriate means of giving notice. In
44 providing the court with sufficient information to enable it to
45 decide whether to give notice to the class of a proposed class-
46 action settlement under Rule 23(e)(1), it may often be important to
47 include a report about the proposed method of giving notice to the
48 class.
49
50 Professional claims administration firms have become expert in
51 evaluating differing methods of reaching class members. There is
52 no requirement that such professional guidance be sought in every
53 case, but in appropriate cases it may be an important resource for
54 the court and counsel.
55
56 In determining whether the proposed means of giving notice is
57 appropriate, the court should give careful attention to the content
58 and format of the notice and, if this notice is given under Rule
59 23(e)(1) as well as Rule 23(c)(2)(B), any claim form class members
60 must submit to obtain relief. Particularly if the notice is by
61 electronic means, care is necessary not only regarding access to
62 online resources, but also the manner of presentation and any
63 response expected of class members. As the rule directs, the means
64 should be the "best * * * that is practicable" in the given case.
65 The ultimate goal of giving notice is to enable class members to
66 make informed decisions about whether to opt out or, in instances
67 where a proposed settlement is involved, to object or to make
68 claims. Means, format, and content that would be appropriate for
69 class members likely to be sophisticated, for example in a
70 securities fraud class action, might not be appropriate for a class
71 made up in significant part of members likely to be less
72 sophisticated. As with the method of notice, the form of notice
73 should be tailored to the class members' anticipated understanding

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74 and capabilities.
75
76 Attention should focus also on the method of opting out
77 provided in the notice. The proposed method should be as
78 convenient as possible, while protecting against unauthorized opt-
79 out notices. As with making claims, the process of opting out
80 should not be unduly difficult or cumbersome. As with other
81 aspects of the notice process, there is no single method that is
82 suitable for all cases.
83
84 **Subdivision (e).** The introductory paragraph of Rule 23(e) is
85 amended to make explicit that its procedural requirements apply in
86 instances in which the court has not certified a class at the time
87 that a proposed settlement is presented to the court. The notice
88 required under Rule 23(e)(1) then should also satisfy the notice
89 requirements of amended Rule 23(c)(2)(B) for a class to be
90 certified under Rule 23(b)(3), and trigger the class members' time
91 to request exclusion. Information about the opt-out rate could
92 then be available to the court at the time that it considers final
93 approval of the proposed settlement.
94
95 **Subdivision (e)(1).** The decision to give notice of a proposed
96 settlement to the class is an important event. It should be based
97 on a solid record supporting the conclusion that the proposed
98 settlement will likely earn final approval after notice and an
99 opportunity to object. The amended rule makes clear that the
100 parties must provide the court with sufficient information to
101 enable it to decide whether notice should be sent. The amended
102 rule also specifies the standard the court should use in deciding
103 whether to send notice -- that notice is justified by the parties'
104 showing regarding the likely approval of the proposal. The
105 prospect of final approval should be measured under amended Rule
106 23(e)(2), which provides criteria for the final settlement review.
107
108 If the court has not previously certified a class, this
109 showing should also provide a basis for the court to conclude that
110 it likely will be able to certify a class for purposes of
111 settlement. Although the order to send notice is often
112 inaccurately called "preliminary approval" of class certification,
113 it is not appealable under Rule 23(f). It is, however, sufficient
114 to require notice under Rule 23(c)(2)(B) calling for class members
115 in Rule 23(b)(3) classes to decide whether to opt out.
116
117 There are many types of class actions and class-action
118 settlements. As a consequence, no single list of topics to be
119 addressed in the submission to the court would apply to each case.
120 Instead, the subjects to be addressed depend on the specifics of
121 the particular class action and proposed settlement. But some
122 general observations can be made.
123
124 One key element is class certification. If the court has
125 already certified a class, the only information ordinarily
126 necessary in regard to a proposed settlement is whether the

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127 proposal calls for any change in the class certified, or of the
128 claims, defenses, or issues regarding which certification was
129 granted. But if a class has not been certified, the parties must
130 ensure that the court has a basis for concluding that it likely
131 will be able, after the final hearing, to certify the class.
132 Although the standards for certification differ for settlement and
133 litigation purposes, the court cannot make the decision regarding
134 the prospects for certification without a suitable basis in the
135 record. The decision to certify the class for purposes of
136 settlement cannot be made until the hearing on final approval of
137 the proposed settlement. If the settlement is not approved and
138 certification for purposes of litigation is later sought, the
139 parties' earlier submissions in regard to the proposed
140 certification for settlement should not be considered.
141
142 Regarding the proposed settlement, a great variety of types of
143 information might appropriately be included in the submission to
144 the court. A basic focus is the extent and type of benefits that
145 the settlement will confer on the members of the class. Depending
146 on the nature of the proposed relief, that showing may include
147 details of the claims process that is contemplated and the
148 anticipated rate of claims by class members. The possibility that
149 the parties will report back to the court on the actual claims
150 experience after notice to the class is completed is also
151 important. And because some funds are frequently left unclaimed,
152 it is often important for the settlement agreement to address the
153 use of those funds. Many courts have found guidance on this
154 subject in § 3.07 of the American Law Institute, Principles of
155 Aggregate Litigation (2010).
156
157 It is important for the parties to supply the court with
158 information about the likely range of litigated outcomes, and about
159 the risks that might attend full litigation. In that connection,
160 information about the extent of discovery completed in the
161 litigation or in parallel actions may often be important. In
162 addition, as suggested by Rule 23(b)(3)(A), information about the
163 existence of other pending or anticipated litigation on behalf of
164 class members involving claims that would be released under the
165 proposal -- including the breadth of any such release -- may be
166 important.
167
168 The proposed handling of an attorney-fee award under Rule
169 23(h) is another topic that ordinarily should be addressed in the
170 parties' submission to the court. In some cases, it will be
171 important to relate the amount of an attorney-fee award to the
172 expected benefits to the class, and to take account of the likely
173 take-up rate. One method of addressing this issue is to defer some
174 or all of the attorney-fee award until the court is advised of the
175 actual claims rate and results. Another topic that normally should
176 be considered is any agreement that must be identified under Rule
177 23(e)(3).
178

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179 The parties may supply information to the court on any other
180 topic that they regard as pertinent to the determination whether
181 the proposal is fair, reasonable, and adequate. The court may
182 direct the parties to supply further information about the topics
183 they do address, or to supply information on topics they do not
184 address. It must not direct notice to the class until the parties'
185 submissions show it is likely that the court will have a basis to
186 approve the proposal after notice to the class and a final approval
187 hearing.
188
189 **Subdivision (e)(2).** The central concern in reviewing a
190 proposed class-action settlement is that it be fair, reasonable,
191 and adequate. This standard emerged from case law implementing
192 Rule 23(e)'s requirement of court approval for class-action
193 settlements. It was formally recognized in the rule through the
194 2003 amendments. By then, courts had generated lists of factors to
195 shed light on this central concern. Overall, these factors focused
196 on comparable considerations, but each circuit developed its own
197 vocabulary for expressing these concerns. In some circuits, these
198 lists have remained essentially unchanged for thirty or forty
199 years. The goal of this amendment is not to displace any of these
200 factors, but rather to focus the court and the lawyers on the core
201 concerns of procedure and substance that should guide the decision
202 whether to approve the proposal.
203
204 One reason for this amendment is that a lengthy list of
205 factors can take on an independent life, potentially distracting
206 attention from the central concerns that inform the settlement-
207 review process. A circuit's list might include a dozen or more
208 separately articulated factors. Some of those factors -- perhaps
209 many -- may not be relevant to a particular case or settlement
210 proposal. Those that are relevant may be more or less important to
211 the particular case. Yet counsel and courts may feel it necessary
212 to address every single factor on a given circuit's list in every
213 case. The sheer number of factors can distract both the court and
214 the parties from the central concerns that bear on review under
215 Rule 23(e)(2).
216
217 This amendment therefore directs the parties to present the
218 settlement to the court in terms of a shorter list of central
219 concerns, by focusing on the primary procedural considerations and
220 substantive qualities that should always matter to the decision
221 whether to approve the proposal.
222
223 **Paragraphs (A) and (B).** These paragraphs identify matters
224 that might be described as "procedural" concerns, looking to the
225 conduct of the litigation and of the negotiations leading up to the
226 proposed settlement. Attention to these matters is an important
227 foundation for scrutinizing the specifics of the proposed
228 settlement. If the court has appointed class counsel or interim
229 class counsel, it will have made an initial evaluation of counsel's
230 capacities and experience. But the focus at this point is on the
231 actual performance of counsel acting on behalf of the class.

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232 The information submitted under Rule 23(e)(1) may provide a
233 useful starting point in assessing these topics. For example, the
234 nature and amount of discovery in this or other cases, or the
235 actual outcomes of other cases, may indicate whether counsel
236 negotiating on behalf of the class had an adequate information
237 base. The pendency of other litigation about the same general
238 subject on behalf of class members may also be pertinent. The
239 conduct of the negotiations may also be important. For example,
240 the involvement of a neutral or court-affiliated mediator or
241 facilitator in those negotiations may bear on whether they were
242 conducted in a manner that would protect and further the class
243 interests.
244
245 In undertaking this analysis, the court may also refer to Rule
246 23(g)'s criteria for appointment of class counsel; the concern is
247 whether the actual conduct of counsel has been consistent with what
248 Rule 23(g) seeks to ensure. Particular attention might focus on
249 the treatment of any attorney-fee award, with respect to both the
250 manner of negotiating the fee award and its terms.
251
252 **Paragraphs (C) and (D).** These paragraphs focus on what might
253 be called a "substantive" review of the terms of the proposed
254 settlement. The relief that the settlement is expected to provide
255 to class members is a central concern. Measuring the proposed
256 relief may require evaluation of the proposed claims process and a
257 prediction of how many claims will be made; if the notice to the
258 class calls for pre-approval submission of claims, actual claims
259 experience may be important. The contents of any agreement
260 identified under Rule 23(e)(3) may also bear on the adequacy of the
261 proposed relief, particularly regarding the equitable treatment of
262 all members of the class.
263
264 Another central concern will relate to the cost and risk
265 involved in pursuing a litigated outcome. Often, courts may need
266 to forecast what the likely range of possible classwide recoveries
267 might be and the likelihood of success in obtaining such results.
268 That forecast cannot be done with arithmetic accuracy, but it can
269 provide a benchmark for comparison with the settlement figure.
270
271 If the class has not yet been certified for trial, the court
272 may consider whether litigation certification would be granted were
273 the settlement not approved.
274
275 Examination of the attorney-fee provisions may also be
276 important to assessing the fairness of the proposed settlement.
277 Ultimately, any attorney-fee award must be evaluated under Rule
278 23(h), and no rigid limits exist for such awards. Nonetheless, the
279 relief actually delivered to the class can be an important factor
280 in determining the appropriate fee award. Provisions for reporting
281 back to the court about actual claims experience, and deferring a
282 portion of the fee award until the claims experience is known, may
283 bear on the fairness of the overall proposed settlement.
284

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285 Often it will be important for the court to scrutinize the
286 method of claims processing to ensure that it facilitates filing of
287 legitimate claims. A claims processing method should deter or
288 defeat unjustified claims, but unduly demanding claims procedures
289 can impede legitimate claims. Particularly if some or all of any
290 funds remaining at the end of the claims process must be returned
291 to the defendant, the court must be alert to whether the claims
292 process is unduly demanding.
293
294 Paragraph (D) calls attention to a concern that may apply to
295 some class action settlements -- inequitable treatment of some
296 class members vis-a-vis others. Matters of concern could include
297 whether the apportionment of relief among class members takes
298 appropriate account of differences among their claims, and whether
299 the scope of the release may affect class members in different ways
300 that affect the apportionment of relief.
301
302 **Subdivision (e)(3).** A heading is added to subdivision (e)(3)
303 in accord with style conventions. This addition is intended to be
304 stylistic only.
305
306 **Subdivision (e)(4).** A heading is added to subdivision (e)(4)
307 in accord with style conventions. This addition is intended to be
308 stylistic only.
309
310 **Subdivision (e)(5).** Objecting class members can play a
311 critical role in the settlement-approval process under Rule 23(e).
312 Class members have the right under Rule 23(e)(5) to submit
313 objections to the proposal. The submissions required by Rule
314 23(e)(1) may provide information important to decisions whether to
315 object or opt out. Objections can provide the court with important
316 information bearing on its determination under Rule 23(e)(2)
317 whether to approve the proposal.
318
319 **Subdivision (e)(5)(A).** The rule is amended to remove the
320 requirement of court approval for withdrawal of all objections. An
321 objector should be free to withdraw on concluding that an objection
322 is not justified. But Rule 23(e)(5)(B)(i) requires court approval
323 of any payment or other consideration for withdrawing the
324 objection.
325
326 The rule is also amended to clarify that objections must
327 provide sufficient specifics to enable the parties to respond to
328 them and the court to evaluate them. One feature required of
329 objections is specification whether the objection asserts interests
330 of only the objector, or of some subset of the class, or of all
331 class members. Beyond that, the rule directs that the objection
332 state its grounds "with specificity." Failure to provide needed
333 specificity may be a basis for rejecting an objection. Courts
334 should take care, however, to avoid unduly burdening class members
335 who wish to object, and to recognize that a class member who is not
336 represented by counsel cannot be expected to present objections
337 that adhere to technical legal requirements.

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338 **Subdivision (e)(5)(B).** Good-faith objections can assist the
339 court in evaluating a proposal under Rule 23(e)(2). It is
340 legitimate for an objector to seek payment for providing such
341 assistance under Rule 23(h). As recognized in the 2003 Committee
342 Note to Rule 23(h): "In some situations, there may be a basis for
343 making an award to other counsel whose work produced a beneficial
344 result for the class, such as * * * attorneys who represented
345 objectors to a proposed settlement under Rule 23(e)."
346
347 But some objectors may be seeking only personal gain, and
348 using objections to obtain benefits for themselves rather than
349 assisting in the settlement-review process. At least in some
350 instances, it seems that objectors -- or their counsel -- have
351 sought to extract tribute to withdraw their objections or dismiss
352 appeals from judgments approving class settlements. And class
353 counsel sometimes may feel that avoiding the delay produced by an
354 appeal justifies providing payment or other consideration to these
355 objectors.
356
357 The court-approval requirement currently in Rule 23(e)(5)
358 partly addresses this concern. Because the concern only applies
359 when consideration is given for withdrawal of an objection,
360 however, the amendment requires approval under Rule 23(e)(5)(i)
361 only when such consideration is involved. The term "consideration"
362 should be broadly interpreted, particularly when the withdrawal
363 includes some arrangements beneficial to objector counsel. If the
364 consideration involves a payment to counsel for an objector, the
365 proper procedure is by motion under Rule 23(h) for an award of
366 fees; the court may approve the fee if the objection contributed to
367 the settlement-review process even though the settlement was
368 approved as proposed.
369
370 Rule 23(c)(5)(B)(ii) applies to consideration for forgoing,
371 dismissing, or abandoning an appeal from a judgment approving the
372 proposal. Because an appeal by a class-action objector may produce
373 much longer delay than an objection before the district court, it
374 is important to extend the court-approval requirement to apply in
375 the appellate context. The district court is best positioned to
376 determine whether to approve such arrangements; hence, the rule
377 requires that the motion seeking approval be made to the district
378 court.
379
380 Until the appeal is docketed by the circuit clerk, the
381 district court may dismiss the appeal on stipulation of the
382 parties. See Fed. R. App. P. 42(a). Thereafter, the court of
383 appeals has authority to decide whether to dismiss the appeal.
384 This rule's requirement of district court approval of any
385 consideration in connection with such dismissal by the court of
386 appeals has no effect on the authority of the court of appeals over
387 the appeal. It is, instead, a requirement that applies only to
388 providing consideration for forgoing, dismissing, or abandoning an
389 appeal. A party dissatisfied with the district court's order under
390 Rule 23(e)(5)(B) may appeal the order.

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391 **Subdivision (f).** As amended, Rule 23(e)(1) provides that the
392 court should direct notice to the class regarding a proposed class-
393 action settlement in cases in which class certification has not yet
394 been granted only after determining that the prospect of eventual
395 class certification justifies giving notice. This decision is
396 sometimes inaccurately characterized as "preliminary approval" of
397 the proposed class certification. But it does not grant or deny
398 class certification, and review under Rule 23(f) would be
399 premature. This amendment makes it clear that an appeal under this
400 rule is not permitted until the district court decides whether to
401 certify the class.
402
403 The rule is also amended to extend the time to file a petition
404 for review of a class-action certification order to 45 days
405 whenever a party is the United States, one of its agencies, or a
406 United States officer or employee sued for an act or omission
407 occurring in connection with duties performed on the United States'
408 behalf. [Similar treatment is appropriate for an action involving
409 a United States corporation.] In such a case, the extension
410 applies to a petition for permission to appeal by any party. The
411 extension of time recognizes -- as under Rules 4(i) and 12(a) and
412 Appellate Rules 4(a)(1)(B) and 40(a)(1) -- that the United States
413 has a special need for additional time in regard to these matters.
414 The extension applies whether the officer or employee is sued in an
415 official capacity or an individual capacity; it may happen that the
416 defense is conducted by the United States even though the action
417 asserts claims against the officer or employee in an individual
418 capacity. An action against a former officer or employee of the
419 United States is covered by this provision in the same way as an
420 action against a present officer or employee. Termination of the
421 relationship between the individual defendant and the United States
does not reduce the need for additional time.[2]

II. **INFORMATIONAL ITEMS FOR DISCUSSION:** ISSUES "ON HOLD"

During the November 2015 meeting, the Rule 23 Subcommittee reported on two issues that it has considered with some care, but that it favored putting "on hold" pending further developments. The Subcommittee does not have recommendations at present for amendments responsive to those issues, in significant measure because developments on these issues remain in flux. It is therefore making this informational report in hopes of receiving

[2] The bracketed sentence was added at the suggestion of the Department of Justice. It was prompted by the fact (pointed out by the Standing Committee Style Consultants) that Rule 4(i)(2) refers to service on "a United States agency or corporation." Rule 12(a)(2), on the other hand, extends the time to answer only for "[t]he United States, a United States agency, or a United States officer or employee." Rule 12(a)(2) makes no reference to a United States corporation.

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reactions from the full Committee to inform its ongoing work on these issues.

On the first issue -- the "pick-off" question arising when defendant makes an offer to the class representative that may entirely satisfy the representative's claim and then seeks dismissal -- a Supreme Court decision in January 2016 has clarified some aspects of the question but left others uncertain. The Subcommittee has concluded that there are sufficient questions about the present circumstances to make proposing an amendment now inappropriate. It invites reactions from the full Advisory Committee on these matters. It has also identified an additional amendment idea prompted by the pick-off issues that may have wider importance -- time to recruit a substitute class representative if the initial class representative proves inadequate.

On the second issue -- "ascertainability" -- the case law continues to evolve. Petitions for certiorari were filed in two cases that present these issues to the Supreme Court, although one petition was recently denied. The Court has pending two other cases whose resolution may have some bearing on this collection of issues. The Subcommittee did not bring forward an amendment proposal in part because of the uncertain state of the law.

A. PICK-OFF ISSUES

It is useful to begin with some general background. Mootness questions can emerge in distinctive ways in class actions. For example, if class members' claims are inherently short-lived, it could happen that before the time needed to decide a certification motion has elapsed the class representative's claim might be moot. In some such circumstances, the Supreme Court has said that later certification suffices to solve the mootness problem. See United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980). Another issue that could arise occurs when the district court denies class certification and the individual plaintiffs continue with their suit. If they prevail, but decide not to appeal the certification issue, is the case moot? In United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977), the Court held that other putative class members could then intervene to pursue appellate review of the certification issue.

A similar issue can arise if defendant offers the proposed class representative "full relief" and then argues that the class action should be dismissed even though no relief has been offered to any other member of the proposed class. This is the "pick-off" situation. The Supreme Court disapproved such a maneuver in Deposit Guaranty Nat. Bank v. Roper, 445 U.S. 326 (1980). But in the lower courts defendants sometimes pursued a similar strategy, employing Rule 68 offers of judgment as methods of mooting the putative class representative's claims. In some courts, a plaintiff could blunt that maneuver by making a class certification motion before the pick-off offer arrived, leading to what came to be called "out of the chute" class certification motions. Given

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the need for a complete record to support the class-certification decision, this was not a welcome development.

One additional piece of background is useful. Until 2003, Rule 23(e) had said that a "class action" could not be voluntarily dismissed without court approval and notice to the class. The virtually unanimous view of the courts of appeals was that such court approval was required after a suit was filed as a class action even if the settlement was only of the "individual" claim of the putative class representative and without prejudice to the rights of any other class member. Concern expressed about this sort of thing included the risk that plaintiffs might be claiming a premium for bringing a class action, and that other class members might be desisting from asserting their own claims in reliance on the class action. But in 2003, Rule 23(e) was amended to require court approval only of settlements that would bind the class. The way was thus opened for "individual" settlements with the class representative. Pick-off activity seemingly picked up.

In Genesis Healthcare Corp. v. Symczyk, 133 S.Ct. 1523 (2013), the Court held, by a 5-4 vote, that a Rule 68 offer of full compensation to the plaintiff in a proposed Fair Labor Standards Act collective action did moot the case. Justice Kagan and three others argued in dissent that basic contract law -- and the provisions of Rule 68 itself -- should defeat such pick-off efforts. A rejected offer to contract has no importance, and the rule says that an offer of judgment that is not accepted may not be filed or otherwise used until the case is resolved, although it may then bear on allocation of costs. The question whether class actions should be handled in the same way as FLSA actions persisted, but after the Supreme Court's decision in 2013 the courts of appeals all concluded that Rule 68 offers to the individual plaintiff could not moot class actions, and the Seventh Circuit (which formerly had said they could) changed its rule.

In Campbell-Ewald Co. v. Gomez, 136 S.Ct. 663 (2016), the Court held that a Rule 68 offer to a putative class representative does not moot the case because "an unaccepted settlement offer has no force." But the decision left open possibilities that the Subcommittee is monitoring and evaluating. Some detail about the Court's various opinions therefore seems helpful.

The majority adopted Justice Kagan's analysis in her dissent in the 2013 FLSA case, relying on "basic principles of contract law" because an offer imposes no obligation on the offeree unless it is accepted. The court also noted that Rule 68 "hardly supports the argument that an unaccepted settlement offer can moot a complaint." But the majority qualified its holding:

> We need not, and do not, now decide whether the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount.

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Justice Thomas concurred in the judgment, but relied on "the common law history of tenders," which he said had "many rigid formalities" that had not been satisfied. Hence, the Rule 68 offer and additional settlement offer by defendant did not eliminate the court's jurisdiction to decide the case.

Chief Justice Roberts (joined by Justices Scalia and Alito) dissented on the ground that the offer of "full redress" for the representative's claim mooted the case. He agreed with the majority that rejection of the settlement offer meant that it was a "legal nullity" as a matter of contract law, but insisted that the pertinent issue was whether there was still a case or controversy under Article III. On that score, he said in footnotes that the fact the case was filed as a class action did not matter (footnote 1) and that Justice Thomas's insistence on a formal tender of the full amount also was wrong (footnote 3). He concluded by observing that the question of the effect of a deposited payment remained open.

As might be expected, the Court's decision has produced much discussion about what parties to class actions would do in the future. But as of this writing the answer to that sort of inquiry is not clear. As reflected in the notes on Subcommittee conference calls after the Court's decision, considerable time has been spent considering whether the Subcommittee should return to one or more of the various possible sketches presented in the past. It has also identified a further possibility -- requiring by rule that class counsel be afforded time to find a substitute class representative should the original class representative be found inadequate due to mootness or for another reason.

Approaches previously presented

Before its mini-conference in September 2015, the Subcommittee had developed three approaches to pick-off issues. It has resumed considering these ideas in light of the Supreme Court's decision. The current sketches themselves are in an Appendix to the notes on the Subcommittee's Feb. 10, 2016, conference call, included in these agenda materials. The purpose of this report is to provide a brief description of their features to enable a discussion not only about whether pick-off issues remain important, but also about possible rulemaking solutions. The approaches previously presented are:

The "Cooper Sketch" -- This approach would direct that "tender of relief" could terminate a proposed class action only if the court has already denied class certification and finds that the tender "affords complete relief on the class member's personal claim." It would also provide that such a dismissal would not defeat standing for the class member to appeal the denial of certification. This approach is the one most focused on the issues addressed in the Supreme Court's decision, and it would seemingly preserve standing even if the

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defendant deposited "full relief" into court and the court entered judgment in that amount in favor of the plaintiff.

Restoring part of pre-2003 Rule 23(e) -- This approach would restore the pre-2003 provision that an action filed as a class action may not be voluntarily dismissed without the court's approval, and require that any agreement made in connection with the proposed dismissal be disclosed to the court. It could also seek to preserve the right for the class representative to appeal denial of class certification.

Amending Rule 68 to specify that it does not apply in class actions or derivative actions -- This would amend Rule 68 in a way first formally proposed in 1984. But it does not seem to address directly the Supreme Court's decision, which placed emphasis on "basic principles of contract law" rather than Rule 68. So it might be a useful confirmation of other changes, but probably is not sufficient by itself to prevent pick-off maneuvers if those continue to occur.

New idea -- Affording a window of opportunity to recruit a substitute class representative

Subcommittee discussions after the Supreme Court decision prompted a further idea, which might be useful in dealing with pick-off issues and also other problems. The idea is that Rule 23 (perhaps Rule 23(c)) should guarantee an opportunity to recruit a replacement class representative when the original one was found wanting. There have been cases that said the court should afford such an opportunity. It may be difficult, however, to define in a rule what event triggers this opportunity, or how long it should last, or whether it should forbid a "revolving door" effort to locate an adequate representative somewhere. But it would move beyond the pick-off situation and include any instance of mootness, and also instances in which the class representative proved unsatisfactory for another reason.

Discussion at April 2016 meeting

The Subcommittee intends to continue studying these issues. It welcomes reactions regarding the actual practice since the Supreme Court's decision as well as reactions to the various approaches described above.

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B. ASCERTAINABILITY

During the Committee's April 2015 meeting, the Subcommittee was urged to look carefully at issues surrounding the concern with "ascertainability." Decisions by the Third Circuit had raised considerable concerns in other courts, and the Third Circuit had revised its views somewhat. The Subcommittee did focus on this issue, and presented a sketch of what it regarded as a "minimalist" approach at the mini-conference it held in September 2015. Several participants at the mini-conference regarded the Subcommittee's sketch as adopting a strong version of the Third Circuit view that many have questioned. The Subcommittee remains uncertain what should be in a rule amendment if one is warranted.

At the Advisory Committee's November 2015 meeting, the Subcommittee reported that it felt both the difficulty of identifying a suitable response to these issues and the shifting case law in the area made it wise to put these issues "on hold."

Meanwhile, there have been other developments. The Seventh Circuit, in Mullins v. Direct Digital, LLC, 795 F.3d 654 (7th Cir. 2015), petition for certiorari filed (no. 15-549), Oct. 28, 2015, articulated a view of ascertainability that contrasts with the view seemingly endorsed by the Third Circuit. In Rikos v. Procter & Gamble Co., 799 F.3d 497 (6th Cir. 2015), mandate stayed, Oct. 28, 2015, petition for certiorari filed (no. 15-835), Dec. 28, 2015, the Sixth Circuit rejected ascertainability objections to a consumer class action. As of this writing, the Supreme Court has denied the *Mullins* petition for certiorari. In addition, the Court has before it two cases -- Spokeo, Inc. v. Robins, 742 F.3d 409 (9th Cir. 2014), cert. granted, 135 S.Ct. 1892 (2015), and Tyson Foods, Inc. v. Bouaphakeo, 765 F.3d 791 (8th Cir. 2015), cert. granted, 135 S.Ct. 2806 (2015) -- whose resolution might also bear on these issues.

Under these circumstances, the Subcommittee believes it wise to retain ascertainability on its agenda, but "on hold" without a formal amendment proposal. It invites input from the full Committee.

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TAB 4A.2

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Rule 23 Subcommittee
Advisory Committee on Civil Rules
Conference Call
Feb. 10, 2016

On Feb. 10, 2016, the Rule 23 Subcommittee held a conference call. Participating were Judge Robert Dow (Chair, Rule 23 Subcommittee), Judge John Bates (Chair, Advisory Committee), Judge Gene Pratter, Elizabeth Cabraser, Dean Robert Klonoff, John Barkett, Prof. Richard Marcus (Reporter, Rule 23 Subcommittee), and Rebecca Womeldorf (A.O.).

Judge Bates summarized the discussion he had with Judge Sutton about the best way forward regarding the issues initially discussed by the Subcommittee during its Feb. 5 conference call. A prime concern is that progress on the current package not be impeded by addition of provisions addressing the pick-off question. Instead, the appropriate handling of that problem seems to depend significantly on what actually happens in the wake of the Campbell-Ewald decision.

That should not mean that the Subcommittee ought cease paying attention to pick-off issues, but that this attention be recognized as distinct from the package of amendment ideas that have been developed in discussions with the Advisory Committee and presented to the Standing Committee. The exact content of any remaining pick-off issues remains uncertain, and it could appear premature to try to design a rulemaking response to a problem whose contours are presently uncertain.

Additionally, on the "recruitment of a substitute class representative" issue presented on p. 11 of the memo for the Feb. 5 conference call, it does seem that this idea is pretty new, and not something that has been raised before. The sort of approach outlined on p. 11 seems to have a broader focus than only the pick-off idea. It could be important whenever the claim of the initial class representative becomes moot, for whatever reason, or that person turns out to be an unsuitable class representative for some other reason, not mootness of his or her individual claim.

A reaction to this report was that it seems consistent with the approach approved by the Advisory Committee in its November, 2015, meeting. The Subcommittee was to put the pick-off issue and ascertainability issues "on hold." The Supreme Court's Campbell-Ewald decision introduces new questions about that issue, but the existence of those additional questions may be a further reason for these issues to remain on hold a bit longer.

Another reaction was that there is much appeal in something along the lines sketched on p. 11 of the memo for the Feb. 5 conference call. It would be good to make it clear that judges may afford proposed class counsel a brief but reasonable time to locate a substitute class representative, and that judges need

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not dismiss the action or deny class certification without affording this opportunity. Such a provision would likely also address all or many of the pick-off issues that remain after the Campbell-Ewald decision. But it would also be helpful if the class representative dies, has a change of heart, or turns out to be inappropriate for another reason. This could be advanced for discussion to see if it proves at all controversial. If not, including it could be a useful addition to the current package.

Another participant echoed these sentiments. It would be good if a simple sentence could be added that would accomplish this result. Judges should not have to search through Rule 23 for authority to provide this sort of opportunity to class counsel. Maybe Rule 23(d) already does provide such authority. Maybe there is some sort of "inherent authority" implicit in Rule 23 that supports this activity. It is, ordinarily, the actual practice in the courts. It would be good to have explicit recognition in the rule of that practice.

Agreement was expressed about this practice being recognized already in many courts. In the 7th Circuit, it is surely recognized.

But a question was raised: "What exact language could capture this idea?" The existing initial sketch raises a number of obvious issues:

(1) What is the trigger? The draft says it is denial of certification under Rule 23(a)(3) or (4). That seems too narrow to address all the situations discussed. Suppose that the class representative's individual claim becomes moot, or the class representative experiences a change of heart. How can a rule provision accurately capture all the possible developments that would make this dispensation appropriate?

(2) How does the class opponent or the court become aware that the trigger has been pulled? If this is a time limit, it would be desirable to have a distinctive event that starts the time running.

(3) How does one approach these issues if the court has already certified the class? Certainly there is a stronger argument in that situation that a replacement representative could be found. Indeed, notice may already have gone out to the class informing the members that a class action has been certified. Surely the court ought not allow the unexpected difficulty with the class representative to sink the class action then, or at least it might be necessary to give notice to the class of this development.

(4) What verb should be used? The draft offers "may," "must," and "should." Is there really any question under the current rule that the court may afford time to find a

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substitute? Should that be mandatory in every case? Perhaps "should" comes closest to what has been discussed, but that could be regarded as a somewhat squishy rule.

(5) How much time is allowed? The shorter the time, the more important it might be to be very clear about the trigger.

(6) What does the rule allow to be done during that time? The sketch says it is "to permit one or more members of the class to seek leave to intervene as representative parties." Should a formal motion to intervene be required under these circumstances? Could amendment of the complaint suffice?

No doubt careful review of the issues would identify additional questions, but the variety that currently exist suggest that a simple fix is unlikely to emerge in the next two or three weeks, and the agenda materials for the April meeting will be due in a bit more than a month.

Another participant expressed concern about the process. "Questions will be raised about why this is being added at this juncture."

Another concern was expressed -- Would this lead to a revolving cast of "replacements"? If replacement no. 1 is unsatisfactory, is the court required to await no. 2, and then no. 3? The stronger the verb ("must," for example) the more one might want to focus on this issue.

A summary of the discussion was that "unless there's a clear and simple solution," trying to devise something and add it to the current package sounds risky. We really don't want to slow down progress on the current package. That drew agreement. "Maybe we can just keep thinking about these issues, and also learning more about what's actually happening. But we should make sure it does not slip between the cracks."

The consensus was that the presentation to the Advisory Committee in April would have two parts. The first would be the current package or six or seven items (depending on how one counts the DOJ proposal). That should be presented in what is hoped to be a final form to recommend to the Standing Committee to publish for public comment. Then the second part would be about the matters that are on hold. One would be the pick-off question, along with the recently identified question of explicit recognition in the rule of authority to postpone dismissal to recruit a substitute class representative. Another would be ascertainability. There are two petitions for certiorari seemingly raising such issues before the Supreme Court. It may be known by April whether the Court has granted one or both of them. Meanwhile, courts continue to address ascertainability

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issues in their class-certification decisions. The Subcommittee's report to the Advisory Committee should explain that it continues to examine the remaining issues. It should also afford a basis for discussion of the issues during the Advisory Committee meeting.

Meanwhile, a revised draft of the various ideas the Subcommittee has discussed could be included as an Appendix to the notes of this call in order to carry these issues forward.

Professor Marcus is to attempt to send out an initial draft of the agenda memo before he leaves the country on Feb. 12, and then Subcommittee members can offer comments on that draft by the time he returns on Feb. 20. That schedule should make it possible to see if a further conference call is necessary and meet the schedule for distribution of the agenda book to the Advisory Committee well in advance of the April meeting.

In addition, it seems that the Civil Rules treatment of the objector issue is to be at least an information item on the agenda of the Appellate Rules Committee. Prof. Maggs (Reporter of the Appellate Rules Committee) has said that he will be using the discussion items regarding an Appellate Rule treatment of objector issues in his agenda materials. It would be desirable for either Judge Bates or Judge Dow to try to participate by phone in that portion of the Appellate Rules Committee's meeting in order to be available to answer any questions that might arise.

APPENDIX

SKETCHES OF PICK-OFF MEASURES

The following is a revised version of the sketches the Subcommittee considered in its Feb. 10, 2016, conference call, including points discussed during that call.

Cooper Sketch
Focusing on pick-off alone

(x) (1) When a person sues [or is sued] as a class representative, the action can be terminated by a tender of relief only if
(A) the court has denied class certification and
(B) the court finds that the tender affords complete relief on the representative's personal claim and dismisses the claim.
(2) A dismissal under Rule 23(x)(1) does not defeat the class representative's standing to appeal the order denying class certification.

Committee Note

A defendant may attempt to moot a class action before a certification ruling is made by offering full relief on the individual claims of the class representative. This ploy should not be allowed to defeat the opportunity for class relief before the court has had an opportunity to rule on class certification.

If a class is certified, it cannot be mooted by an offer that purports to be for complete class relief. The offer must be treated as an offer to settle, and settlement requires acceptance by the class representative and approval by the court under Rule 23(e).

Rule 23(x)(1) gives the court discretion to allow a tender of complete relief on the representative's claim to moot the action after a first ruling that denies class certification. The tender must be made on terms that ensure actual payment. The court may choose instead to hold the way open for certification of a class different than the one it has refused to certify, or for reconsideration of the certification decision. The court also may treat the tender of complete relief as mooting the representative's claim, but, to protect the possibility that a new representative may come forward, refuse to dismiss the action.

If the court chooses to dismiss the action, the would-be class representative retains standing to appeal the denial of certification. [say something to explain this?]

29 [If we revise Rule 23(e) to require court approval of a
30 settlement, voluntary dismissal, or compromise of the representative's personal claim, we could cross-refer to that.]

Reporter's Notes

This approach is the most focused. Several points could be made about this approach:

(1) It does not undo the 2003 amendment that limited Rule 23(e) to settlements that are binding on class members.

(2) It is worded in terms of "tender," which has emerged in Campbell-Ewald as an operative term for some Justices at least.

(3) It does not make entry of judgment for the class representatives a necessary ingredient for dismissal of the action, although it could be reworded to do that.

(4) It precludes "termination" by "tender" before class certification.

(5) It preserves the ability of the class representative to seek appellate review of denial of class certification, but seemingly does not do that if the class representative voluntarily dismisses.

(6) It does not deal with the possibility that putative class members would want to intervene to appeal denial of class certification if the person who filed the suit does not want to appeal.

(7) It does not address the question whether class counsel must be afforded some period of time to recruit a replacement class representative if the original one is found wanting (or wants to accept an individual settlement).

Placement of this provision in current Rule 23 is uncertain. Perhaps it could be a new Rule 23(i), entitled something like "Termination by Tender."

Restoring part of pre-2003 23(e)

(e) Settlement, Voluntary Dismissal, or Compromise.

(1) **Before certification.** An action filed as a class action may be settled, voluntarily dismissed, or compromised before the court decides whether to grant class-action certification only with the court's approval. The [parties] {proposed class representative} must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(2) **Certified class.** The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(A~~1~~) The court must direct notice in a reasonable manner * * * * *

(3) **Settlement[, compromise, or voluntary dismissal] after denial of certification.** If the court denies class-action certification, the plaintiff may settle[, compromise, or voluntarily dismiss] an individual claim without prejudice to seeking appellate review of the court's denial of certification.

The Committee Note could point out that there is no required notice under proposed (e)(1). It could also note the prevailing rule before 2003 that the court should review proposed "individual" settlements. The ALI Principles endorsed such an approach:

> This Section favors the approach of requiring limited judicial oversight. The potential risks of precertification settlements or voluntary dismissals that occur without judicial scrutiny warrant a rule requiring that such settlements take effect only with prior judicial approval, after the court has had the opportunity to review the terms of the settlement, including fees paid to counsel. Indeed the very requirement of court approval may deter parties from entering into problematic precertification settlements.

ALI Principles § 3.02 comment (b).

This version is not drafted in terms of "tender" or "termination" of the action, which are (I think) not used elsewhere in the rules. It does not require that class certification be resolved before the court approves the

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settlement. It is thus broader and different in focus from the Cooper version because it includes situations in which the parties willingly agree to settle the individual claim and dismiss the action. That seems to be what the ALI was addressing. So this approach is, in that sense, broader. But like the Cooper approach, it does not address the question whether class counsel should be given a window of opportunity to seek a replacement class representative if the first one proves unworthy, or with intervention by putative class members who want to appeal denial of class certification.

Proposed (e)(3) seeks to do something included also in the Cooper approach above -- ensure that the proposed class representative can appeal denial of certification even after settling the individual claim. Adding the "voluntarily dismiss" provision could address the question now before the Supreme Court in Baker v. Microsoft Corp., 797 F.3d 607 (9th Cir. 2015), cert. granted, 136 S.Ct. ___ (no. 15-547, granted Jan. 15, 2016), presenting the following question: "Whether a federal court of appeals has jurisdiction under both Article III and 28 U.S.C. § 1291 to review an order denying class certification after the named plaintiffs voluntarily dismiss their claims with prejudice."

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Window of opportunity to recruit
substitute class representative

The Subcommittee's discussion of the pick-off issues prompted the suggestion that there should be a window of opportunity for proposed (or actual) class counsel to seek a substitute class representative should the original class representative be found wanting. One possible problem with that original class representative would be mootness due to some sort of development such as a deposit, etc. Another might be because the proposed class representative was found not to satisfy Rule 23(a)(3) or (a)(4). So this approach would be broader than the others mentioned above.

Probably the two possible methods of proceeding above would go some distance toward responding to this concern without explicitly saying so. Thus, the Cooper approach prevents termination by the court on the basis of the tender of "full" relief until class certification has been decided and preserves the right of the class representative to seek appellate review of that decision. The alternative keyed to undoing the 2003 amendment to Rule 23(e) does much the same. Neither explicitly addresses the situation in which class certification is denied on the ground that the proposed representative flunks 23(a)(3) or (4).

It may be that amending the rule to ensure a chance to recruit a replacement would be difficult and not necessary. If the goal is to provide some time to recruit a substitute, it would seem that the time required for defendant to obtain dismissal for mootness would afford some such opportunity. If the problem is that the original class representative is inadequate or atypical, that argument would presumably emerge from the briefing on class certification, which might afford an opportunity to locate a substitute representative.

For purposes of discussion, one might consider an addition to Rule 23(c):

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses; Replacement Representative Parties.

* * * * *

(6) ***Replacement Representative Parties.*** If the court denies class-action certification under Rule 23(a)(3) or 23(a)(4), it may [must] {should} defer dismissing the action for __ days [after denial of class-action certification] to permit one or more members of the class to seek leave to intervene as representative

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parties.

A number of questions come immediately to mind in relation to an approach like this one:

(1) What is the trigger? The draft says it is denial of certification under Rule 23(a)(3) or (4). That seems too narrow to address all the situations discussed. Suppose that the class representative's individual claim becomes moot, or the class representative experiences a change of heart. Is the pick-off situation clearly covered? How can a rule provision accurately capture all the possible developments that would make this dispensation appropriate?

(2) How does the class opponent or the court become aware that the trigger has been pulled? If this is a time limit, it would be desirable to have a distinctive event that starts the time running.

(3) How does one approach these issues if the court has already certified the class? Certainly there is a stronger argument in that situation that a replacement representative could be found. Indeed, notice may already have gone out to the class informing the members that a class action has been certified. Surely the court ought not allow the unexpected difficulty with the class representative to sink the class action then, or at least it might be necessary to give notice to the class of this development.

(4) What verb should be used? The draft offers "may," "must," and "should." Is there really any question under the current rule that the court may afford time to find a substitute? Should that be mandatory in every case? Perhaps "should" comes closest to what has been discussed, but that could be regarded as a somewhat squishy rule.

(5) How much time is allowed? The shorter the time, the more important it might be to be very clear about the trigger.

(6) What does the rule allow to be done during that time? The sketch says it is "to permit one or more members of the class to seek leave to intervene as representative parties." Should a formal motion to intervene be required under these circumstances? Could amendment of the complaint suffice?

For present purposes, the Subcommittee invites full Committee input on this approach to pick-off and other issues. It is not something that the Subcommittee has presented before. It may be the practice in many courts already. It seems (somewhat unlike the conventional pick-off situation) to be important in cases in which there has been much development

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already.

Rule 68 recognition

Rule 68. Offer of Judgment

* * * * *

1 **(e) Inapplicable in Class and Derivative Actions.** This
2 rule does not apply to class or derivative actions under Rules 23, 23.1, or 23.2.

This addition is drawn from the 1984 amendment proposal for Rule 68. See 102 F.R.D. at 433.

Assuming one of the above Rule 23 approaches is adopted, this provision could be added to reaffirm that this rule does not in any way undercut those changes. At least, Committee Note might note the simultaneous change to Rule 23 and explain that this change to Rule 68 is consistent with that change. But this amendment would not blunt all the possibilities left open by Campbell-Ewald because Campbell-Ewald does not make the mootness issue turn on the provisions of Rule 68.

12b-001642

Rule 23 Subcommittee
Advisory Committee on Civil Rules
Conference Call
Feb. 5, 2016

On Feb. 5, 2016, the Rule 23 Subcommittee held a conference call. Participating were Judge Robert Dow (Chair, Rule 23 Subcommittee), Judge John Bates (Chair, Advisory Committee), Judge Gene Pratter, Elizabeth Cabraser, Dean Robert Klonoff, John Barkett, Prof. Richard Marcus (Reporter, Rule 23 Subcommittee), and Derek Webb (Judge Sutton's Rules Law Clerk).

Pick off

The various ideas under the heading "pick off" were summarized as involving, probably, a basic choice between the first two approaches (pp. 7-8, and pp. 9-10). The features of both of those are introduced in the memorandum for the call. Although they could conceivably both be pursued, it seems that they are sufficiently overlapping that they should not be. There is a choice to be made between them.

Then the "recruit a substitute" idea (at pp. 11-12) addresses a distinctive issue that is related to the pick-off issue but not limited to it. So this one could exist separately from the first two ideas.

Finally, the Rule 68 idea on p. 13 might be useful if others justified going forward, although the Supreme Court's decision in Campbell-Ewald really did not seem keyed to this rule.

An initial observation was that, at least in mediated TLPA cases initiated as class actions, there have been instances in which the named plaintiff (and lawyer) received a premium for "walking away" from the proposed class action. That might be a reason for favoring the provision on p. 9 to require court approval for "individual" settlements before class certification is resolved. This is sort of a "reverse pick off" in that the plaintiff is using the class action device to extract money from the defendant, rather than the defendant using a settlement offer to the putative class representative in order to let the air out of the class action.

Another reaction was that the idea of a chance to find a replacement class representative was really designed for a case in which there have been considerable proceedings and then a problem arises with the class representative or representatives. The law in at least some circuits has recognized that there should be a fair period for recruiting a substitute.

A different subject emerged: Might it be too late to introduce this new idea? We have a package of six (perhaps -- with the DOJ proposal -- seven) amendments that together form a package. This set of ideas has not been included. Can this

12b-001643

really be readied for inclusion in the package for the April meeting of the Advisory Committee?

One reaction to that question was that all but the recruitment proposal had been presented to quite a few groups. What was included in the memo for this call was virtually identical to the ideas in the issues memo for the Sept. 11 mini-conference. So in a sense the only really new thing was the recruitment idea on p. 11.

Another reaction was to ask whether the Subcommittee really felt that it had reached consensus on these issues. The other proposals have all been very extensively examined and discussed. For a variety of reasons, the pick-off idea has not attracted much attention during the discussions of these other issues. That does not mean it is not important, but does mean that the full Advisory Committee has not had much exposure to it. Would this seem to come out of the blue?

Another question also arose -- Is there any possibility that any of the amendment ideas outlined in the memo might be thought to be substantive rather than procedural? On that question, the response was that at least one of the proposals -- requiring court approval for pre-certification "individual" settlements -- had been found to be required by the pre-2003 rule, and nobody had seriously questioned that it was a procedural requirement. The Supreme Court says that rules are valid so long as they are "arguably procedural," and these should qualify.

Another reaction to the "out of the blue" concern was whether we should seek comment from the full Advisory Committee before the April meeting. The time line for these items is quite different from the one used for the six that are now in the package. "It is hard to jump right into this without some background."

On the other hand, this is really a package. "It would be artificial" to leave out this ingredient. But it's also true that we really can't confidently say whether this is a problem. So if we can't resolve the matter, it could delay the entire package.

One reaction to these concerns was to recall the eventual revision of the Rule 37(e) amendment that went into effect last December 1. That was finally revised the night before the second day of the Advisory Committee's meeting in Portland, Ore., and the revised language was handed around the following morning before the vote. That is far from ideal, but shows that the process can be responsive to revisions, even after the public comment period is completed. Ideally, that will not happen again, but we are nowhere near that point at present.

Another possible issue would be the other issue put "on hold" -- ascertainability. There is not a great likelihood that

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the Supreme Court's pending decisions in Spokeo or Tyson Foods will have a significant bearing on handling of ascertainability. But it may be that the Supreme Court will grant certiorari in the 7th Circuit's Mullins case or the 6th Circuit's Procter & Gamble case. That would be a strong reason for the Subcommittee not to return to the issue until the Court had decided.

In these circumstances, it seemed important at the outset to determine whether there was a consensus on the Subcommittee about how best to handle the pick-off problem. It seemed that there was a general consensus that it was inappropriate for the defendant to be able in this manner to prevent a class action from going forward. But that did not mean there was consensus about whether pick-off maneuvers would continue to be a real problem and, if so, how best to craft an amendment to achieve the desired goal of dealing with them.

The shared sentiment was that although the pick-off maneuver should not sink the proposed class action, the Subcommittee members were not confident about whether the first or second approach would be preferable.

Another question emerged: "Do we have enough information to make this decision?" So far as the Supreme Court's recent decision is concerned, much seems to depend on whether things that have been discussed actually happen. It may not be sensible to hurry along a proposed amendment that deals with a "problem" that never actually emerges.

Similar points were made about the "recruit a substitute" idea on p. 11. "That is the one I like the best," but it is not clear that it would entirely solve the pick-off problem. And it is the one that does, in a sense, "come out of the blue." The Subcommittee has not suggested this before this conference call.

One reaction was "I'd like to take the weekend to reflect on these issues." Others agreed.

Another consideration emerged: It would be important to find out the views of Judge Sutton (Chair of the Standing Committee) on questions of deferring, etc. There is much to be said for having one Rule 23 package that includes everything the Advisory Committee things should be included. Adding this issue could require a year's delay, but not adding it could be unfortunate.

That produced the question: "Does anyone feel strongly in favor of the first or second alternative?" A response was "I'm not ready to pull the trigger yet." It was noted that the question what to include for the Advisory Committee agenda would have to be resolved by early to mid March for inclusion in the agenda materials for the Advisory Committee meeting. It would

12b-001645

not be desirable to try to add one issue via a supplemental circulation after the agenda materials are published.

On the other hand, repeated revisions of the rules -- particularly of Rule 23 -- should be avoided. There is a strong appeal to an "all at once" approach. If this issue is important enough to justify a rule amendment, it should be in the package.

But it would be important to consult Judge Sutton about how best to proceed. Judge Bates will try to do that early in the coming week. Meanwhile, the Subcommittee members can reflect on which approach is best, in hopes of reaching a consensus during the next conference call. For that purpose, a tentative date for the next call was set -- **Wednesday, Feb. 10, at 5:00 Eastern time**.

"Recruit a replacement" idea

There was brief further discussion of this proposal. As noted, this is new to a potential package. The idea is that neither the courts nor the plaintiffs should be stuck if a problem emerges with the original class representative. The Subcommittee is comfortable with that goal. It might go a considerable distance toward resolving the pick-off problem, as well as providing a response to other issues.

But at least one serious drafting issue exists. The draft on p. 11 of the memo for the call says that the trigger for the recruitment period occurs when "the court denies class-action certification under Rule 23(a)(3) or 23(a)(4)." That's not the pick-off situation, although an effective pick off might produce this result. Is there a different way to describe the event or events that trigger the need to find a substitute?

Style consultants' recommendations

There was some discussion of the presentation of the various recommendations from the style consultants. The resolution was that the Reporters, after consultation with Judge Bates, should communicate with the style consultants about the suggestions that alter the meaning of the proposed amendments. One goal is to work through any residual disagreements about style issues. The goal is to have these matters resolved before the Advisory Committee meeting if possible, and certainly before the Standing Committee meeting. The five matters identified in the memorandum seem to be the right focus, and the Subcommittee is comfortable with proceeding this way.

DOJ proposal

One style issue and one substantive issue were before the

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Subcommittee.

The style issue is that the style consultants proposed the addition of three words that could be added at line 3 of the draft on p. 16:

> . . . , but not from an order <u>to give notice</u> under Rule 23(e)(1). . . .

Whether those three words cause a problem could be left up to the Reporters, along with the other style issues. It may be that nobody would seek review from a court's refusal to give notice under Rule 23(e)(1). But perhaps that could be claimed to be a refusal to grant class-action certification and eligible for immediate review? The question deserves further reflection, and once resolved could be included in the communication to the style consultants.

The substantive matter was the question whether the extended period to seek review should be for all parties or only the governmental parties.

The first reaction was that the government gets special treatment on timing in several settings. And in criminal cases the defendant has a shorter period to appeal than the government.

But there are administrative reasons to have one time frame for all, and that seems to be the norm in civil cases. "In my experience, it is better to have an across-the-board time limit."

The consensus was to leave the draft as written -- an across-the-board extension for all parties if the government is a party.

Next conference call
Wed., Feb. 10, 5:00 Eastern

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126-001648

Rule 23 Subcommittee
Advisory Committee on Civil Rules
Conference Call
Jan. 29, 2016

On Jan. 29, 2016, the Rule 23 Subcommittee held a conference call. Participating were Judge Robert Dow (Chair, Rule 23 Subcommittee), Judge Gene Pratter, Elizabeth Cabraser, Dean Robert Klonoff, John Barkett, and Prof. Richard Marcus (Reporter, Rule 23 Subcommittee). Judge Stephen Colloton (Chair, Appellate Rules Committee) and Prof. Gregory Maggs (Reporter, Appellate Rules Committee) participated in the discussion of the objectors issues.

Objectors

"Simple" approach

The discussion began with the revised objector sketches circulated after the Jan. 19 conference call. The principal addition was a new (C), including a 60 day time limit for seeking court approval of a payment or other consideration for forgoing, dismissing, or abandoning an appeal.

The introduction included concerns about how a 60-day time limit could complicate some cases. At least one could predict that it is very unlikely the court of appeals would take important actions within 60 days of entry of judgment in the district court. But requiring that any amicable resolution of the appeal be completed within 60 days might be unrealistic. For example, the objector might persuade class counsel that she was really in a different position and deserved different treatment. Or the court of appeals' mediation efforts might produce a resolution that included some additional consideration for the objector. Absolutely forbidding those sensible solutions might be unfortunate. On the other hand, the original proposal made some years ago the Appellate Rules Committee was for an absolute ban on any consideration ever for dismissing an appeal, so a 60-day window for seeking district court approval would be more flexible than that approach.

An initial reaction was that the time limit simplification seemed on examination to present considerable difficulties. Maybe most cases involve deals within 60 (or perhaps 90) days, but that is not all cases.

Another reaction indicated agreement; this approach seems a very blunt instrument.

Another reaction was similar. "I'm in favor of time limits generally, but this one seems to create significant problems."

The resolution was to preserve a record of the consideration of this possibility for future reference. A copy of the revised

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objector sketch circulated for the conference call would in included as an appendix to these notes of the call for that purpose.

Possible reference in Appellate Rules

Discussion shifted to the possibility of calling attention in the Appellate Rules to the existence of the requirement that district court approval be sought. One prompt was an apparent concern at the Appellate Rules Committee's Fall 2015 meeting about whether appellate practitioners would be aware of a requirement in the civil rules. The idea is similar to the reference to Fed. R. Evid. 502 inserted into Rule 16 and 26 by the package of amendments that just went into effect. That addition was prompted partly by concerns that many civil litigators are not familiar with the evidence rules, and that a prompt to look at Rule 502 would be desirable. On the other hand, objector appeals can only be brought by those who object in the district court, which implies some familiarity with the civil rules, and class counsel (the likely other party to any agreement regarding dismissal) surely must be familiar with the civil rules.

An initial reaction to this idea was that it seems an odd appendage in the Appellate Rules. The draft says that the parties to the motion to dismiss the appeal must either notify the court of appeals or provide a copy of the district court's order. What is the point of that? Is the court of appeals supposed to review that order in some way? Is the court of appeals to feel constrained in making its decision about whether to dismiss the appeal? The overall point is that Rule 23 is amended to require district court approval.

Another concern was raised -- the appeal may languish if there is a suggestion in the Appellate Rules that it should be carried forward until the district court issues its approval. The court of appeals can do whatever it thinks appropriate with the appeal. The parties can ask it to defer action pending action by the district court, but nothing requires that it do so. And if the parties want to urge it to defer action (such as postponing the due date for filing briefs) they would need to provide a reason. That should be sufficient to cause them to alert the court of appeals to what is happening in the district court.

An additional observation was that the "jurisdictional" concern about intruding on the proper sphere of the court of appeals seems not too pressing, although some further exploration might be in order.

The discussion was summed up with the question: "Why do this?" The consensus was to resolve that the matter had been examined and set aside. If it is thought important at the Spring meeting of the Appellate Rules Committee, it can be revived. But

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it does not seem useful

Alternative of new Appellate Review 42(c)

This alternative was introduced as more complicated but not including the timing difficulties that were present with the 60-day limitation on district-court approval discussed earlier. Instead, the framework would be to recognize separate spheres of district court and court of appeals authority. So part (1) of draft Rule 42(c) would require the court of appeals to approve any payment or other consideration for dismissing or abandoning an appeal after the appeal was docketed by the circuit clerk, and part (2) would permit the court of appeals to refer the question whether to approve the payment to the district court. What exactly the district court would be doing might be described as a "recommendation" or an "indicative ruling." The latter seems to be about rulings that the district court could make upon remand, and that is not seemingly what is involved here (because the question is whether the court of appeals, not the district court, will approve the payment). A "recommendation," on the other hand, is something the court of appeals could follow or not follow.

Consistent with this approach, Rule 23(e)(5) would be amended in a different way. Up to the point of docketing of the appeal by the circuit clerk, the responsibility and authority to pass on the proposed consideration for abandoning the appeal would rest in the district court, under a new (B). Then a new (C) would direct the district court to report its recommendation or indicative ruling to the court of appeals if the matter were referred to it by the court of appeals.

The abiding question is whether this more complicated approach is preferable to the simpler approach involving an amendment only of the civil rule.

An initial reaction to the abiding question was that it is better to amend only the civil rule.

Another reaction was that appellate judges on the Standing Committee and the Appellate Rules Committee seem receptive to the simpler approach. There is some uneasiness about jurisdictional implications. But there are no firm arguments for the view that this sort of limitation on the parties' actions (in making a deal for dismissal of the appeal) intrudes on the authority of the court of appeals. The arguments have been significantly examined in the memorandum from Derek Webb, Judge Sutton's Rules Law Clerk. As yet, there do not seem to be strong counterarguments.

The current thinking, then, was that the preferable approach would be the simpler one limited to the civil rule amendment. Meanwhile, if questions arise later, the record should show that

the more complicated alternative approach was carefully examined. And if there is enthusiasm for returning to it, there is a starting point for drafting in the sketches developed already.

Another point was that, if the simpler approach goes out for public comment, the comment period can provide an occasion for illuminating any policy debates that may emerge.

Another view, more generally, was that a goal of working through subcommittees is to have those subcommittees examine various ideas and drop those that are not promising. The larger group can restore them to the agenda, but picking and choosing is part of this Subcommittee's job. It ought to make choices, like deciding to shelve the more complex approach involving amending the Appellate Rules. Should enthusiasm for these measures revive, the record should provide a basis for responding.

Drafting matters on simple approach

After completion of the choice to proceed with only the simpler approach, brief discussion addressed two questions raised by brackets in that approach.

At the end of (5)(A) there were brackets around the phrase "for the objection." The consensus was to remove the brackets and retain the phrase.

At the end of (5)(B)(ii), there were brackets around the phrase "despite the objection." The consensus was to remove that phrase as unnecessary. After a class member has objected to a proposed settlement, the entry of judgment approving the proposal intrinsically is "despite the objection." That need not be spelled out.

Rule 23(e)(2)
Settlement approval criteria

This topic was introduced as largely having been examined already, but involving several items that have not yet been resolved. The purpose of the call is mainly to resolve four that were identified in the Standing Committee agenda book with brackets or footnotes.

But an additional matter was brought up. In (C)(iv), the word "settlement" seems superfluous and possibly distracting. The rule is about the "proposal," so it was agreed that the word "settlement" will be dropped there.

Turning to the issues presented in the Standing Committee agenda book materials, the first is whether to combine (A) and (B) or leave them separate. In favor of combining might be the fact that the question of adequate representation inherently

includes the negotiation of the proposed settlement. On the other hand, there may be value in emphasizing that focusing on how the deal was negotiated is an important thing to do somewhat separately from the general question of overall adequate representation. The consensus was to leave the separation as presented in (A) and (B) in the text of the draft.

It was also noted that during the AALS discussion in New York in January, there was some sentiment for putting the "substantive" issues ((C) and (D)) first, and the "procedural" issues ((A) and (B)) afterwards. Shouldn't the substance matter more? A reaction was that it's difficult to draw a firm line between the two sorts of concerns, for the attitude one brings to the substantive matters is influenced by one's attitude toward the procedural matters. The consensus was to leave the ordering as presented in the draft.

Footnote 2 raises the question whether an additional consideration bearing on factor (C) should be added -- "the probable effectiveness of the proposal in accomplishing the goals of the class action." Much can be said in favor of emphasizing that general concern, but it is more difficult to determine what it means if it goes beyond "the relief provided for the class." The consensus was that adding this consideration to the rule would not be useful.

Footnote 3 presented an alternative formulation of the considerations in (C), which did not break them out into headings (i) through (iv). A question was raised on whether the version in text was consistent with prevailing style protocols. The answer was that, at a general level, it might be, but that this consideration is not critical. Discussion revealed, however, that the members were comfortable with the version in text, and that would be retained.

Attention shifted to a short paragraph in the draft Committee Note -- "If the class has not yet been certified for trial, the court may also give weight to its assessment whether litigation certification would be granted were the settlement not approved."

At least some circuits have noted this consideration among the very many that can bear on settlement approval decisions. The ways in which it bears on those decisions might be debated. One view could be that if certification could not be obtained for full litigation that strongly supports approving the settlement. One of the distinctive things about settlement certification is that it affords relief to class members in situations in which they might get none otherwise. On the other hand, in some situations one might regard the fact that the class cannot be certified as a reason for skepticism about approving a class settlement. Perhaps the reason is that the class is riven with

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conflicts, or that there really are not significant common issues. In that sort of situation, these possibilities probably would crop up as pertinent to the listed factors, but the role of the prospect of full certification seems ambivalent.

Brief discussion yielded a consensus that retaining the brackets for present seems appropriate. It was noted, however, that publishing an amendment proposal with brackets, even in the Note, would not be preferable.

Impact of Campbell-Ewald decision

The Subcommittee recommended putting the "pick-off issue" on hold pending the Supreme Court's Campbell-Ewald v. Gomez decision. The case was decided on Jan. 20. So the question whether to proceed with rulemaking has returned.

An initial reaction was that there has already been "a lot of discussion" about the impact of the decision in the week since the Court decided the case. It does not seem that the Court's decision was a knock-out blow for either side. On the plaintiff side, there is a lot of continuing worry about pick-offs. On the defense side, it seems that there is a lot of discussion about how defendants can exploit the opportunities left open by the Court's decision to nip class actions in the bud. So maybe the best idea would be the simplest -- exclude class actions and derivative actions from Rule 68. That was one of the ideas we developed before, and it might be useful now.

Another reaction was that "Somebody is going to pay money into court for the class representative and then demand that the court dismiss the case as moot." That will have to go back to the Supreme Court unless we do something about it. "It's only a matter of time."

Under these circumstances, it may be that a rule change could prevent a lot of litigation about what "works" and does not work after Campbell-Ewald.

Another reaction was that it's not clear that a change to Rule 68 will do the job. In the Court's decision, the rule played at best a secondary role. The main basis for the decision was "first year contract law" -- a rejected offer is nothing. Focusing on Rule 68, it says that neither party can file the offer unless the other party accepts, and that an unaccepted offer is "considered withdrawn." So the alternative maneuver mentioned by the Court in Campbell-Ewald (depositing the full amount in an account for the plaintiff) does not seem to be embodied in Rule 68. And it may be that the majority opinion requires that judgment be entered against the defendant to moot the case. Meanwhile, Justice Thomas's opinion seems to say that making a fully effective "tender" would constitute an admission

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of liability, which may deter defendants from doing so.

On the other hand, going back to the Court's decision in Deposit Guaranty National Bank v. Roper, 445 U.S. 326 (1980), shows that the Court then regarded pick-off behavior as unacceptable, and also regarded it as inimical to the proper functioning of the class action. United Air Lines v. McDonald, 432 U.S. 385 (1977), might also be pertinent. In that case, the district court denied class certification and the named class representatives indicated they intended to appeal that decision when final judgment was entered. But after they won on the merits they decided not to appeal the certification decision. At that point, other class members sought to intervene, and the Court held that they could, although only to obtain appellate review of the certification decision.

There has been much water under the bridge since these Supreme Court decisions, and some suggestions more recently that the Court is not of entirely the same mind. But these early decisions suggest many issues that might emerge.

Another view was that there's considerable risk for defendants who try a pick-off move in the current situation. "Allowing judgment to be entered against your client is very significant." Maybe this problem will not actually emerge.

A counterpoint was that there need not necessarily be any preclusion resulting from the entry of such a judgment. The main goal should be to ensure that the class action can remain viable if the pick off occurs before class certification is resolved. If certification has already been denied, that is a different matter.

It was observed that, if defendants react to the Court's decision by making deposits into court that is not a Rule 68 measure and not affected by a change to Rule 68.

That idea suggested another measure -- that, if a small amendment to Rule 68 will not do the job, there should be a mechanism in the rule assuring the opportunity to replace class representatives, at least if mootness is what prompts a need for replacing them. Perhaps that should have a time limit -- 30 to 60 days to find a replacement should suffice and should not seem an undue imposition from the perspective of the defense bar. There is a small amount of district court jurisprudence.[1] There

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[1] For a very old court of appeals case on the same general subject, consider Johnson v. American Credit Co., 581 F.2d 526, 533 n.13 (5th Cir. 1978):

When faced with a situation when no named plaintiff can

may be authority from the mid 1990s.

The basic point, it was emphasized, is that this sort of interruption of the class action is really contrary to the objectives of the rule. There are two basic issues: (1) whether the claim of the individual class representative is moot, and (2) what happens to the class claims if the named representative's claim becomes moot. This discussion is focused on the second issue.

Another pending Supreme Court decision was mentioned. On January 15, 2016, the Court granted cert. in Baker v. Microsoft Corp., 797 F.3d 607 (9th Cir. 2015), cert. granted, 136 S.Ct. ____ (no. 15-547, Jan. 15, 2016). The question presented is: "Whether a federal court of appeals has jurisdiction under both Article III and 28 U.S.C. § 1291 to review an order denying class certification after the named plaintiffs voluntarily dismiss their individual claims with prejudice." That is not the same as the topic under discussion here, but may be similar to a situation in which a named plaintiff either accepts a settlement or is in "receipt" of a payment deposited into court by the defendant. It is not certain, but seems unlikely that this case could be decided this Term.

An overall reaction was that the most promising next move would be to return to the sorts of sketches that were presented at the mini-conference and see how they might be adapted to the current setting. That would enable a concrete discussion of the issues. It might also begin to identify possible issues with such measures. It was stressed that several relatively basic issues might emerge.

A reaction to this proposal was that it seems fine to get more concrete, but also seems likely that if five Justices of the Court say there must be a judgment entered against a defendant to moot the claim of the resisting class representative, and another Justice says that making a tender constitutes an admission of liability, there may be few takers. This may turn out to be a non-issue. "I doubt the people on the defense side will really get excited about doing this."

But only Justice Thomas says that the judgment implies liability, it was responded. Moreover, as Rule 23(e) shows, a "judgment" may be pursuant to a settlement, and not be res

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represent a subclass, a trial court should consider whether it is in the interests of justice and judicial economy to postpone dismissal as to the subclass for a specified period in which members of the subclass could become plaintiffs by amendment of the Complaint or by intervention and thereby save the subclass action.

12b-001656

Appendix
Objector proposal
circulated before Jan. 29 call

Redraft of Objector provisions
After Jan. 19 conference call

Based on the Jan. 19, conference call, redrafting of the objector provisions might be as follows:

A. Simple Model
(favored by Subcommittee)

(5) **(A)** Any class member may object to the proposal if it requires court approval under this subdivision (e)~~; the objection may be withdrawn only with the court's approval~~. The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and state with specificity the grounds [for the objection].

(B) Unless approved by the court after a hearing, no payment or other consideration may be provided to an objector or objector's counsel in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal [despite the objection].

(C) A motion for court approval under Rule 23(e)(5)(B)(ii) must be filed no later than 60 days after the entry of judgment.[2]

DRAFT COMMITTEE NOTE

Subdivision (e)(5). Objecting class members can play a critical role in the settlement-approval process under Rule 23(e). Class members have the right under Rule 23(e)(5) to

[2] This timing requirement is modeled on Rule 59(b) regarding a motion for a new trial. An alternative model might be Rule 60(c), which requires that a motion for relief from a judgment be made "no more than a year after the entry of the judgment." A concern might be whether there is ambiguity about when judgment was entered if the district court has "retained jurisdiction" over some implementation aspects of the case.

judicata in any conventional sense.

Ascertainability

Discussion of the pick-off issue prompted brief reference to the other issue "on hold" -- ascertainability. The Court still has the Spokeo and Tyson Foods cases submitted. It may be that they will inform the handling of ascertainability. But given the experience with Campbell-Ewald, it may also be that they will not provide definitive answers. Moreover cert. petitions are pending in the 7th Circuit's Mullins case and a Sixth Circuit Procter & Gamble case.

Style Consultants' Suggestions

Brief discussion was had of the suggestions from the Standing Committee Style Consultants. Prof. Cooper has identified several issues with those recommendations. For one, the substitution of "enough" for "sufficient" seems to alter meaning. The Advisory Committee is ultimately in a position to decide whether recommendations intrude on meaning. The question seemed not to be ripe for discussion during this conference call, but the Subcommittee should carefully review the suggestions and determine which raise difficulties. Then communication can be had with the Style Consultants.

DOJ Proposal

The DOJ proposal would be discussed in the next conference call. Prof. Cooper has suggested a way of integrating it (and our pending Rule 23(f) proposal) into the rule. It was asked why the time to appeal should be extended for others -- not just the Department -- in every case in which a federal actor is a party. If the Government does not want to appeal, why should other litigants get more time? The tentative answer was that it is undesirable to give different litigants in the same case different times to appeal. But it may be that there are examples from other contexts in which such differences do exist. This possibility deserves exploration.

Next Call

Judge Dow will try to identify a good time for the next conference call.

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4 submit objections to the proposal. The submissions required by
5 Rule 23(e)(1) may provide information important to their
6 decisions whether to object or opt out. If class members file
7 objections, they can provide the court with important information
8 bearing on its determination under Rule 23(e)(2) whether to
9 approve the proposal.
10
11 **Subdivision (e)(5)(A).** The rule is amended to remove the
12 requirement of court approval for withdrawal of an objection
13 unless court approval is required under Rule 23(e)(5)(B)(i).
14 When objecting class members conclude that their objections are
15 not justified, there is no need to seek court approval if there
16 is no payment or other consideration for the withdrawal.
17
18 The rule is also amended to clarify that objections must
19 provide sufficient specifics to enable the parties to respond to
20 them and to enable the court to evaluate them. One feature
21 required of objections is specification whether the objection
22 asserts interests of only the objector, of all class members, or
23 of some subset of the class. Beyond that, the rule directs that
24 the objection state its grounds "with specificity." Failure to
25 provide needed specificity may be a basis for rejecting an
26 objection. Courts should take care, however, to avoid unduly
27 burdening class members who wish to object. Particularly if they
28 are not represented by counsel, they cannot be expected to
29 present objections that adhere to technical legal requirements.
30
31 **Subdivision (e)(5)(B).** Good faith objections can assist the
32 court in evaluating a proposal under Rule 23(e)(2), which is a
33 reason for the requirement of specifics in Rule 23(e)(5)(A). It
34 is legitimate for such objectors to seek payment for providing
35 such assistance under Rule 23(h). As recognized in the 2003
36 Committee Note to Rule 23(h): "In some situations, there may be
37 a basis for making an award to other counsel whose work produced
38 a beneficial result for the class, such as * * * attorneys who
39 represented objectors to a proposed settlement under Rule 23(e)."
40
41 But some objectors may be seeking personal gain, and using
42 objections to obtain benefits for themselves rather than
43 assisting in the settlement-review process. At least in some
44 instances, it seems that objectors -- or their counsel -- have
45 sought to extract tribute to withdraw their objections or dismiss
46 appeals from judgments approving class settlements. And class
47 counsel sometimes may feel that avoiding the delay produced by an
48 appeal justifies providing consideration to these objectors.
49
50 The court-approval requirement currently in Rule 23(e)(5)
51 partly addresses this concern. Because the concern only applies
52 when consideration is given for withdrawal of an objection, the
53 amendment requires approval under Rule 23(e)(5)(i) only when such
54 consideration is involved. The term "consideration" should be

55 broadly interpreted, particularly when the withdrawal includes
56 some arrangements beneficial to objector counsel. [Under Rule
57 23(h), the court may approve payments to objector counsel who
58 have contributed value to the litigation, and a court asked to
59 approve such arrangements might give weight to the contribution
60 the objection made to the settlement-review process.][3]
61
62 Rule 23(c)(5)(B)(ii) applies to consideration for forgoing,
63 dismissing, or abandoning an appeal from a judgment approving the
64 proposal. Because an appeal by a class-action objector may
65 produce much longer delay than an objection before the district
66 court, it is important to extend the court-approval requirement
67 to apply in that context. Because the district court is best
68 positioned to determine whether to approve such arrangements, the
69 rule requires that the motion seeking approval be made to the
70 district court.
71
72 Until the appeal is docketed by the circuit clerk, the
73 district court may dismiss the appeal on stipulation of the
74 parties. See Fed. R. App. P. 42(a). Thereafter, the court of
75 appeals has authority to decide whether to dismiss the appeal.
76 This rule's requirement of district court approval of any
77 consideration in connection with such dismissal by the court of
78 appeals has no effect on the authority of the court of appeals
79 over the appeal. It is, instead, a requirement that applies only
80 to provision of consideration for dismissal or abandonment of an
81 appeal, consistent with other circumstances in which both the
82 district court and the court of appeals have authority in
83 relation to the same case. See, e.g., Fed. R. App. P. 8(a)(1)
84 (requiring that a party seeking certain kinds of relief first
85 move in the district court before seeking relief in the court of
86 appeals). A party dissatisfied with the district court's order
87 under Rule 23(e)(5)(B) may seek review of the order in the court
88 of appeals.[4]
89
90 **Subdivision (e)(5)(C).** Any motion for approval of payment
91 or other consideration in connection with withdrawal of an
92 objection or forgoing, dismissing, or abandoning an appeal must
93 be filed within 60 days after entry of judgment approving the
94 proposal under Rule 23(e)(2). This deadline ensures that the

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[3] This is a first attempt to state something about how the district court should decide whether to approve such arrangements. It is intended to go beyond focusing solely on changes to the deal that "benefit" the class.

[4] Does there need to be some rule provision providing an avenue for such appeal? Note that Fed. R. App. P. 8(a)(2) says that a motion may be made in the court of appeals after the district court denies relief.

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95 district court retains familiarity with the details of the review
96 process under Rule 23(e)(2), which may be important to deciding
97 whether to approve the payment or other consideration, and also
98 that the court of appeals is unlikely to have taken substantive
99 action on the appeal.

Possible reference in Appellate Rules

One thought that emerged from the Fall 2015 meeting of the Appellate Rules Committee is the possibility that appellate litigators might not know about the Rule 23(e)(5) requirement of district-court approval. One way to address this concern might be as follows:

Rule 42. Voluntary Dismissal

* * * * *

1 **(b) Dismissal in the Court of Appeals.** The circuit clerk
2 may dismiss a docketed appeal if the parties file a signed
3 dismissal agreement specifying how costs are to be paid and pay
4 any fees that are due. But no mandate or other process may issue
5 without a court order. An appeal may be dismissed on the
6 appellant's motion on terms agreed to by the parties or fixed by
7 the court. <u>If any terms of the dismissal require district court</u>
8 <u>approval under Fed. R. Civ. P. 23(e)(5)(B), the parties must</u>
9 <u>[provide the district court's order of approval] {notify the</u>
10 <u>court}.</u>

DRAFT COMMITTEE NOTE

[As with any Appellate Rule language, this does not represent any presumption about authority to write a Committee Note for another committee. Still, it may offer some useful starting points if this approach is used.]

1 **Subdivision (b).** As amended, Fed. R. Civ. P.
2 23(e)(5)(B)(ii) requires district-court approval of any payment
3 or other consideration in connection with dismissal or
4 abandonment of an appeal by a class-action objector. This
5 amendment to Rule 42(b) ensures that the court of appeals is
6 notified that such approval has been obtained.

Reporter's Reactions

Many points might seem important in regard to this draft. Given the length of Subcommittee discussions already, it is probably not necessary to mention many of them.

One is whether the treatment of court of appeals

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jurisdiction in the Note is suitable. The goal is to reassure that this Civil Rule does not seek to intrude on the court of appeals' authority.

Another that springs to mind is whether (C) does present a risk of intrusion into the court of appeals' province. (C) seems to say no objector can ever receive anything for dropping its appeal more than 60 days after the district court entered judgment, even if its objection was for itself alone (per the requirement in (A) that the objector specify whether he is objecting only for himself).

Assume such an objection ("I should not be lumped in with all these other people because I'm different"). Assume further that the court of appeals has some sort of mediation setup, and that mediation produces an agreement six months after the appeal is noticed that actually this class member is different. Does this rule say that the court of appeals, despite having "encouraged" the settlement of the appeal, can't achieve the goals of that settlement if (as seems possible) the resolution involves a payment to the objector?

Similarly, consider a case in which (in the Second Circuit, say) the court of appeals has heard oral argument on the appeal and then the parties reach a settlement. Does this rule say that the court of appeals is required to go ahead and decide the appeal even though the parties have settled because more than 60 days have passed?

One answer might be to say that after 60 days the parties must seek approval from the court of appeals, but that seems to introduce complexities this approach seeks to avoid. On the other hand, the original proposal to the Appellate Rules Committee was to forbid payoffs at any time for dismissing an appeal, so this approach at least offers a 60-day window after entry of judgment in the district court.

No doubt many additional points will arise.

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Changing Appellate Rule 42(c) also
(not favored by Subcommittee)

An alternative approach would leave what one could call "primary" authority to deal with payoffs in connection with dismissals of appeals after they have been docketed by the circuit clerk to the court of appeals, while authorizing the court of appeals to refer the matter to the district judge.

Sketch of possible Appellate Rule 42(c)

Rule 42. Voluntary Dismissal

* * * * *

(c) **(1)** Unless approved by the court, no payment or other consideration may be provided to an objector or objector's counsel in connection with dismissing or abandoning an appeal from a judgment approving a proposed class-action settlement despite an objection under Rule 23(e)(5) of the Federal Rules of Civil Procedure [after the appeal has been docketed by the circuit clerk]. Such payment or consideration must be disclosed to the court.

(2) Before or after ruling on a motion to dismiss [or dismissing for failure to prosecute], the court may itself decide whether to approve a payment or other consideration disclosed under Rule 42(c)(1), or may refer the question whether to approve the payment to the district court for a [recommendation] {indicative ruling}, retaining jurisdiction to review the [recommendation] {indicative ruling} [on request by any party to the appeal].

DRAFT COMMITTEE NOTE

[As with any Appellate Rule language, this does not represent any presumption about authority to write a Committee Note for another committee. Still, it may offer some useful starting points if this approach is used.]

Subdivision (c). Fed. R. Civ. P. 23(e)(5) has been amended to forbid providing any payment or other consideration to a class-action objector in return for dismissing or abandoning an appeal before the appeal is docketed by the circuit clerk. The reasons for that amendment are set forth in the Committee Note accompanying the amendment to that rule.

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9 Rule 42(c) is added to address the handling of dismissal or
10 abandonment of a class-action objector's appeal after it is
11 docketed in the court of appeals. It requires the parties to
12 disclose any proposed payment or consideration to the court. As
13 under Fed. R. Civ. P. 23(e)(5), the term "consideration" should
14 be broadly interpreted, particularly when the withdrawal includes
15 some arrangements beneficial to objector counsel.
16
17 Rule 42(c)(2) authorizes the court of appeals to decide
18 itself whether to approve the payment or other consideration, or
19 to refer the question to the district court for a
20 [recommendation] {indicative ruling}. If the court of appeals
21 does refer the matter to the district court, the parties may seek
22 review, any party to the appeal may request that the court of
23 appeals review the district court's action.

Revised Fed. R. Civ. P. 23(e)(5)

[New 23(e)(5)(A) would remain as set forth earlier]

1 **(B)** Unless approved by the court after a hearing, no
2 payment or other consideration may be provided to
3 an objector or objector's counsel in connection
4 with forgoing or withdrawing an objection, or
5 forgoing, abandoning, or dismissing an appeal at
6 any time before the appeal is docketed by the
7 circuit clerk.
8
9 **(C)** If the court of appeals refers to the district
10 court the question whether to approve payment or
11 other consideration for dismissal or abandonment
12 of an appeal [under Rule 42(c)(2) of the Federal
13 Rules of Appellate Procedure], the district court
14 must[, after a hearing,] report its
15 [recommendation] {indicative ruling} to the court
16 of appeals.

DRAFT COMMITTEE NOTE

[The draft for (e)(5) presented above could be used up the point where (B) begins.]

1 **Subdivision (e)(5)(B).** Good faith objections can assist the
2 court in evaluating a proposal under Rule 23(e)(2), which is a
3 reason for the requirement of specifics in Rule 23(e)(5)(A). It
4 is legitimate for such objectors to seek payment for providing
5 such assistance under Rule 23(h). As recognized in the 2003
6 Committee Note to Rule 23(h): "In some situations, there may be
7 a basis for making an award to other counsel whose work produced

8 a beneficial result for the class, such as * * * attorneys who
9 represented objectors to a proposed settlement under Rule 23(e)."
10
11 But some objectors may be seeking personal gain, and using
12 objections to obtain benefits for themselves rather than
13 assisting in the settlement-review process. At least in some
14 instances, it seems that objectors -- or their counsel -- have
15 sought to extract tribute to withdraw their objections or dismiss
16 appeals from judgments approving class settlements. And class
17 counsel sometimes may feel that avoiding the attendant delay
18 justifies providing consideration to these objectors.
19
20 The court-approval requirement currently in Rule 23(e)(5)
21 partly addresses this concern. Because the concern only applies
22 when consideration is given for withdrawal of an objection, the
23 amendment requires approval under Rule 23(e)(5)(i) only when such
24 consideration is involved. The term "consideration" should be
25 broadly interpreted, particularly when the withdrawal includes
26 some arrangements beneficial to objector counsel. [Under Rule
27 23(h), the court may approve payments to objector counsel who
28 have contributed value to the litigation, and a court asked to
29 approve such arrangements might give weight to the contribution
30 the objection made to the settlement-review process.]
31
32 Rule 23(c)(5)(B)(ii) applies to consideration for forgoing,
33 dismissing, or abandoning an appeal from a judgment approving the
34 proposal. Because an appeal by a class-action objector may
35 produce much longer delay than an objection before the district
36 court, it is important to extend the court-approval requirement
37 to apply in that context. Until the appeal is docketed by the
38 circuit clerk, the district court may grant a stipulated motion
39 to dismiss the appeal. See Fed. R. App. P. 42(a). After that
40 date, the question whether to approve a payment or other
41 consideration to an objector or objector counsel is subject to
42 Fed. R. App. P. 42(c), which forbids any such consideration
43 unless approved by the court of appeals.
44
45 **Subdivision (C).** Under Fed. R. App. P. 42(c)(2), the court
46 of appeals may refer the question whether to approve the payment
47 or other consideration to the district court for its
48 [recommendation] {indicative ruling}. If the court of appeals
49 makes such a reference, the district court must report its
50 [recommendation] {indicative ruling} to the court of appeals.

Reporter's Reactions

This approach would be more elaborate. That is one of the reasons why the Subcommittee does not favor it. One question is whether or how to deal with "abandonment" in the court of appeals, or dismissal for failure to prosecute. One might expect that an order to show cause re dismissal would precede dismissal

for failure to prosecute, and that is the hook for requiring disclosure of the payoff to the court of appeals in the abandonment situation. Whether that method really is employed (or would be employed) is uncertain. There does not seem to be an Appellate Rule that provides a parallel to Civil Rule 41(b) regarding failure to prosecute. It would seem that class counsel would not be willing to pay off the objector until certain that the appeal is gone, and that the abandonment situation makes that less clear. So maybe the abandonment for payoff problem is not really a problem on appeal.

This approach does not have a hearing requirement in the court of appeals. Should one be added? Is that useful in the court of appeals? The idea of requiring it before the district court is to reduce the prospect class counsel might be willing to stipulate but not to support the payment face-to-face with the judge.

Rule 23 Subcommittee
Advisory Committee on Civil Rules
Conference Call
Jan. 19, 2016

On Jan. 19, 2016, the Rule 23 Subcommittee held a conference call. Participating were Judge Robert Dow (Chair, Rule 23 Subcommittee), Judge John Bates (Chair, Advisory Committee), Judge Gene Prater, Elizabeth Cabraser, Dean Robert Klonoff, John Barkett, Prof. Edward Cooper (Reporter, Advisory Committee), Prof. Richard Marcus (Reporter, Rule 23 Subcommittee), and Rebecca Womeldorf of the Administrative Office. Prof. Gregory Maggs (Reporter, Appellate Rules Committee) participated in the discussion of the objectors issues.

The call began with a brief review of points made during the Standing Committee meeting and the AALS Section of Civil Procedure discussion of Rule 23. The purpose of this call is to get started on the next steps. The goal remains to have a final set of proposals for the Advisory Committee's April meeting so it can be presented to the Standing Committee in June with a recommendation for publication for public comment.

Objectors

Because it was the topic on which the most attention had focused during the Standing Committee meeting, and because Prof. Maggs was present for this discussion, the first topic was the objector problem. This is one on which there has been near unanimity from the experienced bar in many events attended by Subcommittee members.

A starting point was the view expressed during the Standing Committee meeting that adopting a requirement for court approval might be harmful. A related concern was that this solution would not be successful in achieving its purpose of disrupting the business plan of bad faith objector counsel. But it will be important to keep in mind the possibility that such a rule might actually make things worse. On the other hand, publishing a proposal along the lines identified by the Subcommittee would provide an occasion for the public comment period to shed light on whether the rule change would produce desirable changes in behavior.

A distinct issue is presented by the problem of jurisdictional "overlap" between the court of appeals and the district court. This topic did not attract attention during the Standing Committee meeting, but it might influence the choice between the simpler amendment approach looking only to a change to Rule 37(e)(5), and a combined rule-amendment approach relying also on a change to the Appellate Rules.

On the jurisdictional question, the memorandum from Derek Webb (Judge Sutton's Rules Law Clerk) provides significant

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comfort by showing that, in many contexts, various matters are "retained" by the district court while other matters are on appeal. In somewhat the same vein, 16 Fed. Prac. & Pro. § 3937.1 deals with the topic "Retained Jurisdiction" of the court of appeals while further proceedings occur in the district court.

One reaction to the Webb memorandum was that, if we were to pursue the more complex rulemaking approach, the best analogy might be a limited remand rather than an indicative ruling. The goal should be a "real ruling."

A first reaction to the current set of choices was "I like the simple approach." Perhaps the best way to proceed would be to deal with the jurisdictional issues in a Committee Note. That Note could emphasize that this bifurcated authority to deal with different aspects of a piece of litigation has many parallels and implies no limitation on the jurisdiction of the court of appeals.

Another reaction was that (1) the Webb memorandum shows that there is a solid legal basis for something like what we have discussed, but (2) there may be a somewhat separate question of the attitudes of court of appeals judges.

Those ideas were pursued: Suppose that we go with the simple approach and say nothing about the handling of motions to dismiss appeals. Would the court of appeals refuse to suspend its briefing schedule based on a pending motion for district court approval of the payment for dismissal? Could it be that the case might have progressed so far in the court of appeals that it would want to proceed?

Those possibilities reminded the Subcommittee of an FJC study of the handling of class-action objector appeals in three circuits. In two of them, none or almost none of the appeals was decided on the merits. But in the Second Circuit some 63% of the objector appeals during the study period were resolved on the merits. It may be that the bad faith objectors will make their deals very early in the appellate process, fitting the model of the two circuits in which few or none of those appeals lead to an appellate decision. But consider a case in which the appeal has been fully argued and the decision is about to be handed down when the parties reach a settlement. Should the court of appeals then be required to await action by the district court before granting a motion to dismiss the appeal?

This possibility prompted a suggestion -- How about a civil rule that said nobody may accept payment for dismissing an appeal after more than a certain period of time -- 60 days, for example. This raised the question whether there would be a risk that parties would simply wait until after the deadline, but that could be solved by forbidding any payments after the deadline. A refinement would be that the deadline should apply to when the permission is sought from the district court, not to when the

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district court grants permission. That might produce a "pocket veto" that is not what the rule is trying to provide.

Another reaction was "The less we say in a Note the better." A response to that was agreement, but also the thought that it would be useful to emphasize in a Note that this is not a revolutionary approach to the division of responsibility between district courts and courts of appeals. This matter is like determining the amount of attorney fees, something often separated from the merits of the appeal of the underlying judgment. Such a comment might be reassuring to court of appeals judges concerned about possible encroachment on their jurisdiction.

A different concern was raised, prompted in part by a comment made during the Appellate Rules Committee meeting in Fall, 2015: Perhaps even with the "simple" version of a Civil Rule change it would be desirable to have some note in the Appellate Rules calling attention to the need to get district court approval if a payment would accompany dismissal of the appeal. The disappointing experience with use of Fed. R. Evid. 502 had been one thing that prompted putting a reference to that rule into the Civil Rules in the most recent package of amendments.

Another participant reported being unsurprised by the Standing Committee reaction to the court-approval possibility. Indeed, the Subcommittee has discussed some similar misgivings in the past. But given the widespread concern in the bar we ought to try to do something, even though this solution may not really work.

Another member echoed what others had said -- it is good to make an effort. We should move ahead. Another member agreed. Guarantees can't be given, and surely some people will try to find a way around the new rule.

A question arose about the role of the Appellate Rules Committee in the process. It seems that a Civil Rule that appeared to divest the courts of appeals of some portion of their jurisdiction would run into tough sledding. A reaction to this concern was that the simple model says nothing about the jurisdiction of the court of appeals. The district court acquires no authority to pass on a motion to dismiss an appeal.

It seemed best to try to refine the proposal and then to invite some from the Appellate Rules Committee to react to the idea. The Appellate Rules Committee will have its Spring meeting in early April, before the Civil Rules meeting.

It was suggested that there are essentially two kinds of concerns: (1) anxiety about appellate jurisdiction, and (2)

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functional considerations about which court is best equipped to evaluate the payment question.

The bottom line was that Prof. Marcus would attempt to do a redraft of the "simple" version on p. 200 of the Standing Committee agenda book, including an appropriate time limit on the request, and a draft Committee Note. It would probably also be good to redo the drafts on p. 202 for the more complicated treatment (including an Appellate Rule change). With regard to that, the consensus was to prefer the language in braces at lines 5-7 on p. 200 over the language in brackets at lines 3-5.

"take rate"

Another subject raised at the Standing Committee meeting was the use of the term "take rate" to describe the number or frequency of claims against the settlement funds. Should that be reconsidered?

An initial reaction was that this is "shorthand jargon." Perhaps a different term could be substituted.

A deeper concern was identified: This can mean different things in some class actions, particularly consumer class actions for small individual damages. There may be at least two types of issues:

(1) It is difficult to determine the take rate in terms of the overall number of potential claimants. There may be no way to determine how many potential claimants there are, and as a result a "take rate" that indicates how many of them actually sought relief could not be determined.

(2) Although there are large individual entitlements and a determinable class of potential claimants, there are few actual claims. Even institutional claimants in securities class actions may fail to claim their share of the settlement funds.

In addition to these sorts of considerations, there may also be debates like some we have seen in connection with cy pres issues. Is that "take rate" the right measure of the value of using the class action procedure? It is an imperfect measure.

On the other hand, it was suggested, there are various ways in which the clams history or prospect is relevant to topics we continue to consider. One focus might be the claim-making process; a low level of claims may show that it is too difficult. (Maybe it would be best, where possible, just to pay class members without insisting they submit claims.) Another focus might be the attorney fee award; one reason class actions have a negative aura in some settings is that occasionally it seems that

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only the lawyers get any real money. If the total paid out to class members who made claims is $10,000 and the lawyers got $3 million in fees, something looks wrong.

A reaction was that "you can't reduce it to a formula." Thus, trying to rank or evaluate all settlements in these terms is not justified. There is a lot of controversy about when attorney fees should be pegged to the claims payout. We have heard that cy pres provisions are important because there very often is at least some leftover residual money. Moreover, it may take a long time to determine that actual claims rate. Consider, for example, a case in which there is a ten-year claims period.

The consensus was that we should proceed with care in this area.

Department of Justice proposal

After the Advisory Committee's November meeting the Department of Justice submitted a proposal to extend the time to seek appellate review under Rule 23(f) from the current 14 days to 45 days for any case in which it is involved. The justification for this deferral is that the Government is a singularly complicated entity, and the Solicitor General's office needs time to consider proposed appeals and choose those that will be approved.

An initial reaction was that having the same period apply to all litigants in a given case seems clearly preferable to varying times for different litigants. Another reaction was to ask whether it was necessary to include former U.S. officers or employees, since a class action would presumably also be brought against current officers and employees to make the relief effective. One response to this concern was that it could happen that the Government had changed the practice in question, but that the former officer remained a defendant in a damages suit. Another was that in regard to Rules 4 and 12 the Committee Note said that references to officers or employees of the U.S. included former officers and employees. Perhaps similar treatment would work in this instance.

The question whether the Government was a unique litigant could be debated. There are surely others before the federal courts that are very large. After discussion, the consensus was that the Government does need more time, and that 45 days is probably an acceptable amount of time.

The consensus was that there is no basic problem with the DOJ proposal, and that drafting should go forward on it.

Style

12b-001671

The Standing Committee style consultants have reacted to the sketches included in the Standing Committee agenda book. The way to proceed will be to see what the drafts look with the style changes included. The question is, in theory, whether the Advisory Committee misgivings are about "substance" or "style." But the dividing line between the two is not absolute. For example, changing "sufficient" to "enough," as the style consultants propose at one point, may involve equivalents in terms of the dictionary, but may also produce subtle but importance shades of meaning. It is important that the Advisory Committee recognize its primary authority to produce rules that effectively state its choices, even if they are not stylistically exactly what the style consultants might prefer.

The resolution was that Judge Dow and Professors Cooper and Marcus would review the style consultants' reactions and share the result with the Subcommittee in a timely fashion.

Additional matters left open
in the Standing Committee memo

It seemed that all but one of the remaining choices on the face of the Standing Committee memo are about the standards for settlement approval under Rule 23(e)(2). That discussion seems likely to take too long to begin it this afternoon.

The one other issue involves lines 56-57 of the draft Committee Note on p. 195 of the Standing Committee agenda book. The choice there is whether to say particular attention should focus on the breadth of any release of class claims.

An initial reaction was that this is a distinctive and important issue. A response was that it is notwithstanding not so prominent that it deserves "particular attention" compared to all the others. So the suggestion was that the thought could be inserted into the prior sentence in somewhat the following way:

> In addition, as suggested by Rule 23(b)(3)(A), the existence of other pending or anticipated litigation on behalf of class members involves claims that would be released <u>-- including the breadth of any such release --</u> under the proposal is often important.

12b-001672

Rule 23 Subcommittee
Advisory Committee on Civil Rules
Conference Call
Nov. 23, 2015

On Nov. 23, 2015, the Rule 23 Subcommittee held a conference call. Participating were Judge Robert Dow (Chair, Rule 23 Subcommittee), Judge John Bates (Chair, Advisory Committee), Judge Gene E.K. Pratter, Elizabeth Cabraser, Dean Robert Klonoff, John Barkett, Prof. Edward Cooper (Reporter, Advisory Committee), Prof. Richard Marcus (Reporter, Rule 23 Subcommittee), and Rebecca Womeldorf and Derek Webb of the Administrative Office. Judge Steven Colloton (Chair, Appellate Rules Committee) and Prof. Gregory Maggs (Reporter, Appellate Rules Committee), participated in the discussion of the objectors issues.

The purpose of the call was to review the redrafting that had occurred since the Subcommittee's Nov. 16 conference call. Prof. Marcus and Prof. Cooper had both circulated redrafts of the sketches before the Subcommittee on Nov. 16.

Objectors

The topic was introduced as involving some basic questions about where the primary responsibility for evaluating payments to objectors should lie, and also whether it really is necessary to make any change in the Appellate Rules if a change to the Civil Rules would suffice. At the same time, there is a jurisdictional issue -- once a notice of appeal is docketed in the court of appeals, it (not the district court) has authority to decide whether to dismiss the appeal. And if that dismissal is contingent on approval of a payment by the district court, that could produce a jurisdictional complication should the district court have primary authority on approving such payments.

An initial subject was disclosure -- how is anyone to know about such a proposed payment? The redraft of a Civil Rule says nothing about disclosing the payment, but only that it must be approved. The alternative draft Appellate Rule does say that a motion to dismiss the appeal must disclose any such arrangement. A reaction was that the disclosure requirement is implicit in the sketch of a Civil Rule. How otherwise could one obtain approval?

A further reaction was that the simplest model is to have the district court decide. For that to work, there has to be disclosure. But that drew the observation that even if we say the court of appeals cannot approve the payment it would want to know about it. Whether that is necessarily true is unclear, however. Unless the court of appeals defers the due dates for briefing, the appeal goes forward. Assuming bad faith objectors do not want that, they would have to move to postpone the due date for their briefs. To justify the postponement, they would normally have to explain that they've sought approval from the district court for the deal under which the appeal would be

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dismissed.

That drew the question "How fast can the district court address the question of payment?" A reaction to that was that the objectors would dismiss the appeal to avoid having to write a brief, according to the "business plan" of bad faith objectors we have heard about. Another reaction was that there is no need for a rule requiring disclosure to the court of appeals if it is clear that the objector must seek approval of any payment from the district court.

Attention was drawn to the "after a hearing" proviso in the Civil Rule sketch on district court approval. The idea is that the hearing will occur in the district court. Holding a hearing in the court of appeals does not seem a sensible idea. The idea of requiring a hearing in the district court is that it may be too easy for class counsel to stipulate to a payment, but that explaining to the judge, face to face, what justifies a payment to this objector counsel will put a damper on inappropriate arrangements.

The question was raised whether lodging exclusive authority in the district court to approve payments would appear appropriate from the appellate court perspective. A response was that it should entail appropriate respect for the authority of the court of appeals. The appellate court retains authority to rule on the motion to dismiss the appeal. Another reaction was that it is best to lodge this authority in the district court. Even though authority would normally be in the court of appeals, this is a unique situation in which the district court is the right place. To the extent this is "encroaching" on the court of appeals' jurisdiction, that can be explained.

A different reaction was "This will never happen." Once this new regime is in place, the business plan of bad faith objectors will fail and they will go away. A response was that "they will still try to get around it." That drew the reply that "it takes two to tango." If class counsel will never agree to work-arounds, that will put an end to this behavior. But that is a reason to make sure that the prohibition is a broad one -- against any sort of consideration, not only direct payments -- for otherwise some may contrive ways around it.

A different perspective was to focus on the good objector. That person raises valid points, producing improvements in the settlement. The fact that an objector wants to be paid for the helpful effort surely does not show that it is a "bad" objector. To the contrary, the 2003 Committee Note to Rule 23(h) recognizes that payment may be appropriate. So the court can simply approve that payment. And more generally, it is important not to say that objectors are somehow per se "bad." They can contribute valuable insights to the settlement-review process.

The question of notice to the court of appeals returned. Won't we need to ensure that the court of appeals is notified of this proceeding in the district court? What if there are delays in the district court? The response was that the court of appeals only needs to know if the delays in the district court run up against the briefing schedule in the court of appeals. If so, the objector/appellant will move for an extension of time. Then it will also presumably inform the court of appeals of what's happening in the district court to explain its reasons for seeking an extension. So disclosure will take care of itself without the need for any rule.

This discussion prompted the observation that a stand-alone Civil Rule addition of a court-approval requirement would work without any need to change the Appellate Rules. That idea produced concerns about whether there might be difficulties that we have not yet identified. "We need to foresee the reactions of court of appeals judges." The solution for the present was to develop two rule-amendment approaches. In part, that would enable us to make clear how complicated it becomes to involve the court of appeals more deeply in this matter.

That idea drew agreement: "It behooves us to recognize that it's better to have fewer cooks in the kitchen." The district court is the proper forum for the decision whether to approve the payment, and it is equipped to hold the hearing that is an important adjunct to the process. That drew agreement -- any transmittal to the Standing Committee (which includes court of appeals judges) should say that the simpler approach is the clear preference of the Subcommittee.

A different subject was raised -- how about "abandoning" an appeal or an objection? Might that be a way around our new requirement? Rather than formally move to dismiss an appeal or formally withdraw an objection in the district court, the objector simply disappears and abandons the field. What happens then?

This possibility could produce uncertainty. "It's hard to figure out whether the objector is abandoning the objection or appeal, or is simply slow in getting things done." A response was that any such abandonment should require approval from the district court of any payment, if one is contemplated in return for the abandonment.

A related question was raised: How about forgoing an objection? The drafts before the Subcommittee mention forgoing an appeal, but not forgoing an objection. How about the bad faith objector counsel who sends class counsel an objection and says "We'll file this and appeal if it's not accepted by the district court unless you pay us off." Is that a risk? Should we try to cut that off? A reaction was that this is a

possibility. But is such a person "an objector" and thus subject to the court's authority? The response was "They are objectors, functionally." There is no need to refer to them as "potential" objectors.

A different issue was raised. Earlier drafts of rule amendments have included the idea that the district court retains jurisdiction to address payments to objectors even after approving and entering judgment on the settlement. Should that be considered? The response was that this does raise an issue. There is not a simple answer. Perhaps the right view is that this is a "collateral matter" that remains within the district court's authority even after an appeal is docketed in the court of appeals.

It was noted that there are other examples of "shared" jurisdiction between the district court and the court of appeals. Under Rule 23(f), the case may continue in the district court even if the court of appeals allows an appeal of class certification. With a preliminary injunction, an immediate appeal is available as a matter of right, but that does not stop the district court proceeding in its tracks.

One analogy might be the handling of costs on appeal. That is often regarded as "collateral" and subject to the district court's control (at least as to amount). Perhaps this is different, however, because the costs on appeal are assessed in accord with the disposition of the appeal and on direction of the court of appeals. The situation we are discussing is different from that.

Another possibility was raised: In some circuits, there is a "settlement master" who tries to get parties to compromise to resolve the appeal. What if such a court officer brokers a deal under which the class-action objector agrees to dismiss the appeal in response to some sort of consideration. Does our rule say that the district court must approve that deal? A reaction was that this is not a problem.

The consensus was that it is wiser to present both options (one limited to amending the Civil Rules, and other involving changes to the Appellate Rules also) to the Standing Committee to get additional input, but also to make clear that the simpler option (Civil Rule amendment only) is the distinct preference of the Subcommittee. The jurisdictional issues should be mentioned to the Standing Committee also. Prof. Marcus would try to circulate a redraft promptly for all to review.

It was also noted that it's striking that this is the only topic on which it seems all agree with the need for action and the objective, but that it's proving in many ways the most challenging to put into the rules in a way that will work. It

may be that research on the handling of "collateral matters" left to district court control in connection with appeals would be informative.

Frontloading

The first question raised had to do with line 22 of the redraft. It had been suggested that a comma and "but" be added before "only if it determines that giving notice is justified . . ." The goal was to make it clear that this is a serious requirement. A reaction was that the word "only" there seems to make the point, and indeed that some might object that it is an intensifier that adds nothing to "if it determines that." The risk that this could be read to say that a court could proceed without giving any notice on determining that giving notice is not justified is not a serious concern.

An alternative reaction was to ask whether we really need the "only" in the draft. Another participant mentioned having the same reaction. The requirement that the court determine that giving notice is justified would remain. Dropping "only" was supported on the ground that using fewer words is generally preferable. And one reaction to that idea was that we could go forward without "only" and see whether anyone raised concerns that made restoring it seem desirable. The consensus was to drop "only" for the draft to be presented to the Standing Committee.

Another correction was noted: we need to add "to" in line 16 between "enable it" and "determine."

Another concern was raised about bracketed Note language on p. 3. The language calls attention to the possible need for the court to review "continued certification" in light of the settlement proposal even if it has already certified a class. As the footnote mentions, this might suggest too strongly that "decertification" should be considered. The consensus was to drop this bracketed sentence.

This discussion called attention also to (B)(ii) in the redrafted sketch. That contains a bracketed portion ("for purposes of judgment pursuant to the proposal"). Including this provision in the rule calls attention to the reality that class certification must be confirmed to be proper for the actual settlement even if the court has already certified a class for purposes of litigation. In dealing with voluntary abandonment of claims after certification, we have already seen that refinement of the case after certification can happen. And a settlement proposal may do the same sort of thing. So this language may be important, and also make sense since the court's decision whether to send notice to a certified class is one of the things addressed in the rule provision.

The basic value of including this provision was accepted by consensus, but language issues arose. One is that "pursuant to" will not pass muster with the style consultants. It should be replaced by "on." Another was that it would be desirable to add "settlement" before "proposal." That is what the new language says in line 18 of (e)(1)(A). For present purposes, then, (B)(ii) would be revised as follows:

> class certification for purposes of judgment on the settlement proposal

Rule 23(f) amendment

The only concern about the redraft of this amendment idea (on p. 6) was about the phrase at the end -- "under Rule 23(f)." Various possibilities were considered (including "under this subdivision" or "under this rule"), and the eventual resolution was to use "under subdivision (f)."

Opt-out trigger in (b)(3) cases
upon notice under (e)(1).

The redraft of this proposal (p. 7) drew no further comments.

Form of notice in (b)(3) cases

The discussion focused on the right way to state what we want the rule to say. First, the use of em dashes to set off the new language was supported. Then the question whether to say "first class" mail was considered, in light of the risk that changes in mail service might mean it would cease to exist, at least under that name. Additionally, the comma after "electronic" was questioned on the ground that it is an adjective and that "electronic or other appropriate means" is the right thing to say. The consensus was to replace the new language on p. 8 with the following:

> -- by United States mail, electronic or other appropriate means --

Settlement approval criteria

The discussion began with a consideration of the choice between Alternative 1 ("and on finding that") and Alternative 2 ("after considering whether"). Several expressed support for Alternative 2.

A response urged consideration of Alternative 1. "How can one find that a settlement is fair, reasonable, and adequate if it flunks one of these criteria?" The basic thought in the ALI was that these four factors were fundamental. A reaction was "we

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are not robots." Judges need flexibility. But, it was responded, how about a settlement that was not negotiated at arm's length? How can one approve that?

A contrasting view was expressed: Even if it was done on a napkin in a bar, it might be a reasonable deal for the class. It should not be rejected out of hand just because it was initially reached in a bar.

An alternative hypothetical was offered: What if class counsel and defense counsel are spouses? Could a court approve the deal they reach? That drew the response that this was not at arms length. This drew the observation that real conflicts are not disregarded by judges nowadays.

A different consideration was raised: Shifting to a specific findings requirement could have a substantial effect on the nature of appellate review.

The majority preference going forward was to use Alternative 2.

Attention shifted to the factors. One question was whether to retain (B), which focused attention on whether the settlement was negotiated at arms length. It also added the language "and was not the product of collusion," but the consensus was that this language did not add to the "at arms length" directive and could be dropped.

Regarding "at arm's length," it was asked how that would work if counsel on both sides are very experienced in this sort of litigation and have worked on opposite sides of many cases. Suppose these repeat player lawyers negotiate a settlement in short order and a straightforward fashion. Would saying that negotiations must be "at arm's length" raise questions about whether such a negotiation was flawed? A quick response was "This is at arm's length."

[Clarify the following with Subcommittee]

Discussion shifted to the bracketed item (iii) in (C) -- "the probable effectiveness of the proposal in accomplishing the goals of the class action." An initial reaction was that this item is not about what (C) addresses -- the adequacy of the relief awarded to the class. It seems to be about whether the class settlement is adequate even though the class does not really get much out of it. Maybe the "goals" of the class action are nevertheless somehow furthered by the deal.

Another comment focused on item (ii) in the draft. That focuses on whether the settlement will effectively deliver relief to the members of the class. Perhaps the "goals" should be added

there.

Another reaction about (iii) was "we don't need it at all."

A caution was raised. Suppose a case in which the payout is only $15, and class members must do something to get that amount. Does their general indifference to making the effort show that the "goals" of the class action have or have not been achieved? One way of looking at this is to focus on (ii) -- the method of making claims and getting a payout. Should that suffice?

Another reaction was that this item tends to emphasize the issues that we have previously addressed in regard to cy pres arrangements. An extreme example is the idea that a class action in which no member of the class gets any direct relief is nevertheless one that achieves the "goals" of the class action because of something else.

Another comment was that these criteria should address the situation in which the relief is injunctive relief or other equitable relief. Then it seems that the question is whether it changes the defendant's conduct toward the plaintiff class, not whether it somehow otherwise achieves the "goals" of the class action.

The discussion reflected a consensus among those involved that dropping (iii) would be wise. But it was noted that not all members of the Subcommittee were present on the call at this time. Probably the best thing to do would be to leave the question somewhat open pending reactions from the other members of the Subcommittee. Professor Marcus would write and invite views on this subject.

Discussion shifted to other items in (C). On (ii), discussion led to a rewording of the factor:

> the proposed method of distributing relief effectively to the class, including the method of processing class member claims, if required.

This reformulation could serve to cover class actions for injunctive or declaratory relief as well as class actions for monetary relief. The question of low claims rates was raised, but one concern was that "you can't force people to make claims." At some point, some sort of cy pres alternative may be the way to go with leftover settlement funds, but this focus makes sense as a way to call the court's attention to the basic concern. There is also a concern with requiring that judges tick too many boxes when reviewing proposed settlements; this approach is designed to get away from having to tick too many boxes. We should be careful about adding new ones.

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On factor (iv), the suggestion was to remove the brackets around attention to the timing of payment.

On (e)(2)(D), the resolution was to remove the bracketed material. It is sufficient to focus on whether "class members are treated equitably relative to each other."

Attention turned to the Draft Committee Note. At lines 11-13, there was a statement that there is "nothing intrinsically wrong" with any factor used by any circuit. But at least one invoked by some -- support from the lawyers who negotiated the settlement -- does seem dubious. Instead of saying that, the following sentence would be amended by adding a thought to the end:

> The goal of this amendment is to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal, <u>not to displace any of these factors</u>.

Discussion turned to the Committee Note on item (4) in the Subcommittee's list -- manner of notice. On p. 9 of the memorandum, two paragraphs were in brackets about the content of the notice and the method of opting out. A question was asked about whether this Note material is really about the change being made to the rule.

A response was that the change to the rule deals with the means of notice, but directs the court to determine which is "appropriate." That links up rather naturally to the content of the notice. But more significantly, given the likelihood that electronic or similar means may be used for giving notice and submitting claims, it seems appropriate to emphasize the need for the court to determine whether that is appropriate. This need is reinforced by the existing rule requirement that the court give "the best notice that is practicable." The Note should make it clear that this discussion ties in with the mode of notice and the need for careful consideration of the content when that mode is electronic.

The call concluded with the anticipation that Prof. Marcus would circulate a draft of the agenda memo for the Standing Committee meeting. That is due at the A.O. on Dec. 14, and will be the basis for discussion during the Standing Committee meeting in January.

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Rule 23 Subcommittee
Advisory Committee on Civil Rules
Conference Call
Nov. 16, 2015

On Nov. 16, 2015, the Rule 23 Subcommittee held a conference call. Participating were Judge Robert Dow (Chair, Rule 23 Subcommittee), Judge John Bates (Chair, Advisory Committee), Elizabeth Cabraser, Dean Robert Klonoff, John Barkett, Prof. Edward Cooper (Reporter, Advisory Committee), Prof. Richard Marcus (Reporter, Rule 23 Subcommittee), and Rebecca Womeldorf of the Administrative Office. Judge Steven Colloton (Chair, Appellate Rules Committee) and Prof. Gregory Maggs (Reporter, Appellate Rules Committee) participated in the discussion of the objectors issues.

The purpose of the call was to consider further the matters discussed during the full Committee's meeting on Nov. 5 in Salt Lake City. Prof. Marcus had circulated a redraft addressing the six topics that would be presented to the Standing Committee before the call. The order of discussion was, somewhat, from the less challenging to the more challenging topics. The discussion of objectors occurred when both Judge Colloton and Prof. Maggs were linked to the call.

Rule 23(f) appellate review and
Rule 23(e)(1) order for notice

There was unanimity about this proposal, although some participants mentioned that they had some drafting ideas that they would send to Prof. Marcus.

Rule 23(c)(2)(B) acknowledgement that
Rule 23(e)(1) notice triggers opt-out

There was also unanimity about going forward with this proposal. One change is that the brackets around "for settlement" should be removed, but the phrase should be retained.

Manner of notice in 23(b)(3) class actions

The redraft suggested that Rule 23(c)(2)(B) be revised to add the phrase "by the most appropriate means[, including first class mail. electronic, or other means]" after "individual notice" in the current rule.

One suggestion was that the brackets be removed, and that the added language be "including first class mail or electronic means." That might be modified to direct "appropriate" electronic means.

Another suggestion was that one might add the possibility of hand deliver in some cases. That suggestion prompted a concern that if the rule invited hand delivery some people might insist

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on that. It would seem a very rare case in which hand delivery would be appropriate. It would be better to indicate flexibility about what is the "best notice practicable under the circumstances," which is the language currently in the rule.

A way to do so might be to add "or other means" at the end, or perhaps "or other appropriate means."

Attention shifted to the proposal to add the directive that the court select the "most appropriate means." Would that invite aggressive arguments in the district court or on appeal about what is "most appropriate"? Isn't it sufficient to be "appropriate" even if somebody might say the means selected are the "most appropriate."

Another possibility offered was: "by such means as . . . [listing two or three specific methods]."

The eventual consensus was to say "by first class mail, electronic mail, or other appropriate means." That would yield an amendment proposal as follows:

Rule 23. Class Actions

* * * * *

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses

* * * * *

(2) ***Notice***

* * * * *

> **(B)** *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice <u>by first class mail, electronic mail, or other appropriate means</u> to all members who can be identified through reasonable effort. * * * * *

Another question was raised about the inclusion of the word "individual." Does including that word invite trouble? An immediate reaction was that the word has been in the rule since 1966, and that any suggestion of removing it would likely generate considerable controversy. It was agreed that there was no sufficient reason to consider removing "individual" from the rule.

Objectors

This topic (including participation by Judge Colloton and Prof. Maggs) was introduced as involving questions about allocation of decisionmaking authority between the appellate courts and the district court and whether the focus should be on payments to objectors or their counsel rather than on withdrawal of objections or appeals.

The current rule says that court approval is necessary whether or not an objector receives anything in return for withdrawing the appeal. But that requirement seems to stop applying after a notice of appeal is filed, or after the appeal is docketed by the circuit clerk, since Fed. R. App. P. 42(a) permits the district court to dismiss the appeal on stipulation or noticed motion before the circuit clerk has docketed the appeal even though a notice of appeal has been filed.

The drafts of possible rule amendments also include disclosure requirements at both the district court and appellate court levels, at least with regard to any consideration for the withdrawal of the objection or the dismissal of the appeal.

An initial reaction was that the discussion in the Salt Lake City Advisory Committee meeting was about how simple the goal sought to be accomplished seems to be, compared to how difficult it is becoming to achieve that goal. The goal is to respond to bad behavior by some objectors or objector counsel -- to put an end to their "business model." That business model depends on exploiting the delays resulting from an appeal. The cure is to require that there be court approval for payments to such bad faith objectors. The problem is that by the time the payoff demand arrives (after entry of judgment in the district court) it seems that the jurisdictional ball has arrived in the court of appeals' lap. Can we set up something simple that will achieve our objective without requiring an elaborate "clockwork orange" sort of back-and-forth between the court of appeals and the district court?

A first reaction was to ask how this would work. The basic starting point is that the judicial action involved is dismissal of the appeal by the court of appeals. How does the court of appeals decide whether to dismiss? At least, it would seem essential that it be notified that there is a proposed payment to the objector or the objector's lawyer that is consideration for the dismissal. Otherwise, under Fed. R. App. 42(b) it seems that the appeal can be dismissed based on the appellant's motion or on terms agreed to by the parties to the appeal. That presumably includes passing on the propriety of payments for dismissal.

A reaction was that it is hard to characterize the payment in this case as payment for litigating the appeal. The business

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model described by experienced class-action litigators seems premised on the appellant not litigating the appeal. There may even be a demand for a much higher payoff "if we have to file a brief." Some of these appeals seemingly consist of nothing more than preparing an objection that says nothing more than "I object" and then filing a notice of appeal.

Another view was that the district court should have the principal responsibility to resolve the questions about attorney fee awards to class counsel and objector counsel. In an earlier sketch, that was achieved by providing in the rule that the district court "retained jurisdiction" to address those issues. But that idea seemed to raise serious questions about how far the Civil Rules could go in affecting the jurisdiction of the courts of appeals.

One possibility that was suggested was an analogy to an indicative ruling. But it was noted that such rulings seem to be on matters such as whether to grant a new trial, matters that ordinarily would be within the purview of the district judge but for the filing of the notice of appeal. The problem then is that -- absent a remand -- the district court lacks authority to grant a motion the parties direct to it. See Fed. R. App. P. 12.1. But that rule seems to be about motions the district court ordinarily could grant, and (except as provided in Fed. R. App. P. 42(a)) a motion to dismiss an appeal is not one of those.

It would perhaps be possible, however, for the dismissal to be "separated from the payment." If so, the court of appeals could dismiss the appeal and leave the question whether to approve any payment to the district court for later determination. That idea drew the question: "Would bad objectors agree to dismissal of the appeal with the possibility that the district court would refuse to approve the payment?"

A reaction to that question was that they would not agree. But this may nevertheless be the right direction to move. The point is to deter the bad objectors. The goal is to ensure that they can't get paid for doing nothing, and maybe this sort of rule would deter the bad conduct. The bad objectors do not want to face the district judge. A way to do that might be to make it clear that the Civil Rule requires district-court approval of such a payment "at any time," that might do the job all by itself.

It was suggested that something like that might be done with revisions to Rule 23(e)(5) alone, perhaps only with the (A) and (B) in the draft under discussion. But that drew a concern that such a rule "might step on the toes of the court of appeals." On the other hand, in the sorts of situations we have heard about the court of appeals is unlikely to know much about the case. That drew the suggestion that there might be no need to address

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the role or actions of the court of appeals in rule text. Perhaps, without a rule change, one could simply leave it to the court of appeals to "do whatever is appropriate."

That possibility prompted the question "Can a Civil Rule regulate the Court of Appeals? Why would the objector go to the district court once the case was in the Court of Appeals?" A response was that "You don't get paid without the district judge's approval."

This possibility may fit in with much general class-action practice. "District courts administer aspects of settlements while the case is on appeal. This happens all the time." The BP case is an example. The district court has continuing jurisdiction to administer the settlement even though there have been lots and lots of appeals. But that drew the question: "Is that continuing jurisdiction a result of a rule or an order in the particular case?"

A reaction was that it is commonplace that there is continuing jurisdiction to regulate fees and enforcement of the class-action decree. Indeed, the enforcement of the settlement is usually conditioned on the exhaustion of all appeals, even petitions for writs of certiorari. On the one hand, that's why the holdup is possible -- nothing can be finished until the appeals are finished. On the other hand, it shows that contemplating a decision by the district court fits right in with the customary handling of class settlements.

A different perspective was raised: "Can a Civil Rule prohibit the Court of Appeals from approving a payment to an objector for dismissing an appeal?" One answer was that "The Court of Appeals would be happy to refer that back." Another was that there already are civil rules that do something like that. Rule 62, for example, deals with a stay pending appeal. Perhaps the solution is to say that any payment to an objector after a notice of appeal is filed must be approved by the district court that entered the judgment. Then that decision whether to approve the payment can itself be appealed. In such a setup, the court of appeals could rule on the motion to dismiss the appeal, or deny approval to the payment, or await the district court's action on the payment.

This discussion prompted the observation that this is "mostly a rule about plaintiff attorneys, and it provides them with a basis to say 'we can't pay.' In essence, its a 'call your bluff rule.'" The reality is that the whole problem only arises when class counsel is willing to pay. The problem would go away if they would say "We will never pay anything," or "We will never agree to pay anything unless the district judge approves the payment."

A response to these thoughts was that, for class counsel, the point is not to burden the dismissal or delay classwide relief. The key is that, before money can change hands, some court must approve after disclosure.

The discussion was summed up with the observation that the Appellate Rule 42 draft included in the materials seemed a relatively clear way to move toward that outcome. "All agree on the policy objective. The problem is to arrange for review of the proposed payment before dismissal of the appeal." Perhaps there is a way to achieve that goal without having to change the Appellate Rules at all.

That idea drew support. "An elaborate procedure will invite people to use it. If you build it they will come; this is the Field of Dreams problem." Current practice comes close to providing a method -- particularly in cases where the district court has, by order, retained jurisdiction over various implementation features of the class-action settlement.

A caution was raised: Will making this kind of change put an end to the disfavored behavior? Suppose an objector who is willing to accept a relatively modest payoff, but insists that class counsel support the payment under the criteria of Rule 23(h). If class counsel affirmatively supports the payment (which comes out of class counsel's pocket), will the district court really refuse to approve it to get the settlement implemented and clear the case from the court's docket? If that can still be done under this rule, why will the rule solve the problem?

This led to an additional idea -- that sort of possibility would be less troubling if the rule required a hearing before payment to the objector occurs. It would be too easy to submit a nondescript "statement of support" in relation to the payment, and quite a different matter to have to face the district judge and support the payment while answering the judge's questions about it.

Another reaction was that the entire shake-down method creates an adequacy dilemma. It is surely possible for class counsel to take a "principled stand" and refuse to pay a penney. But doing that hurts the class, and it may seem that counsel is doing it just to keep the entire class counsel fee award.

The discussion was summed up as suggesting that two approaches should be explored. One would look to a "simple" solution, perhaps relying entirely on a Civil Rules amendment. The other would look to a more "complicated" approach, including both Civil Rules and Appellate Rules amendments.

It seemed expeditious to ask Prof. Cooper to try to work the

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"short version," and Prof. Marcus to refine the "long version." With those before the Subcommittee, it may be able to decide whether to be more or less elaborate in pursing the universally shared goal of defeating improper behavior by bad-faith objectors and their counsel.

Another question that will remain is whether it is necessary to make a rule change to achieve the desired result. One possibility might be for settlement agreements to address the question and provide for it. Why not say that any payment to objectors is forbidden unless approved by the district court in the settlement agreement itself? That idea drew the response that the practice might move that way, but that such provisions could be attacked as efforts to deter objections. It was also observed that the settlement agreement approach might be more complicated than at least the "simple" rule change approach.

Discussion shifted from the larger question of overall framework for the objector amendments to narrower issues raised by bracketed material in the draft.

One question was whether or how to say that the court could reject an objection if it were not sufficiently specific. A possible improvement would be to say failure to provide specifics would be a ground for "striking" rather than "rejecting" an objection, since the problem is that the objection does not provide a basis for evaluating it. But the larger question was whether there was any need to say that objections that do not comply need not be considered. Stating that specifics are required should suffice, and courts need not be told that they may refuse to credit objections that do not provide the specifics the rule says are required.

A different question is whether the rule should include phrases in brackets in the draft about what the objection should say -- "state whether the objection applies only to the objector or to the entire class" and state the objection "with specificity." The consensus was to include both those phrases in the amendment draft, removing the brackets.

Another wording change was explored. In draft (B) and (C), the trigger for court approval was payment to "the objector or objector's counsel." Should that be limited to payment to objector counsel? It might seem that payoffs for counsel are the main problem being addressed, but would there be a risk that counsel might agree that the objector would pay through some or all of the payment to counsel, thus defeating the effort. The consensus was that this is a real risk; "objector or objector's counsel" should remain.

Yet another wording question was presented. The draft includes in brackets the phrase "or other consideration" after

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"any payment." The idea is that some other tradeoff might occur if that were not included. For example, "If you withdraw your objection in this case, I will see that you are added to the executive committee in another case where I am class counsel." This sort of possibility seemed real, and the consensus was to retain "or other consideration."

Another question was raised about proposed (B). It actually narrows the approval requirement under current Rule 23(e)(5), which says that court approval is required for any withdrawal of an objection, whether or not there is any payment. Is that narrowing desirable. It seems that a significant number of objections are made in entire good faith by class members who conclude the objections are unwarranted when they learn more about the settlement. They withdraw, or perhaps "abandon," their objections at that point. Should the rule really require that they get court approval to do so? Do people really do that now? The answer was that the do not and they should not have to. Narrowing the approval requirement to apply only where a payment accompanies the withdrawal of the objection (or an appeal) is desirable. This limiting provision should go forward.

Frontloading

The redraft offered three alternatives for the lead-in paragraph. The first was the one before the Advisory Committee, adding "or a class proposed to be certified as part of a settlement" to the current situation in which court approval is required. The second alternative breaks that out and limits the approval requirement to settlement or compromise with regard to a class to be certified. The third alternative removes "voluntary dismissal" from the approval requirement of the rule, and (with that removal) treats certified classes and classes to be certified as part of a settlement the same, but without any approval for voluntary dismissals.

A first reaction was that the third possibility is risky because voluntary dismissal of a certified class could be abused. Consider a Rule 23(b)(3) class action in which the class has been given notice of class certification and the opt-out time has passed. What if defendant then proposes to pay the class representative a considerable sum for voluntary dismissal. Even if that is "without prejudice," it could result in considerable prejudice to the unnamed members of the class, who may have been relying on the notice they received from the court saying that they would be represented in the action. So that should limit consideration to the first two alternatives.

As between the first and the second, a key consideration is whether there is ever a settlement that includes a voluntary dismissal as well as class certification. An answer is that this happens with some frequency in practice. Suppose that a

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consolidated complaint is confected and, after that but before class certification is decided, interim class counsel reach a settlement that includes voluntary dismissal of certain claims and judgment in the class's favor on other claims after final approval by the court. The best practice currently would be to include that voluntary dismissal of certain claims as one of the things to be approved by the court under Rule 23(e). This is the "best practice" even if it is not clearly required by the current rule.

A question was raised: "What if I propose dismissal of all the claims as part of the settlement on behalf of the defendant?" The answer was that this is a package deal. The settlement agreement will almost certainly contain a classwide release of all related claims, and the only way to make that effective is probably to enter judgment. That judgment should require approval of the court. Alternatively, the solution may be to amend the complaint to drop certain claims, but it makes sense to require court approval of those rearrangements even if the class has not yet been certified. Indeed, the dismissal of certain claims (with prejudice) may be an important part of the overall deal.

The consensus was that Alternative 1 would be the best choice.

Turning to proposed (e)(1), the consensus was that the proposal should read as follows:

> The parties must provide the court sufficient information to enable it to determine whether to give notice to the class of the settlement proposal.

Then the redraft would tie in with this directive to the parties:

> The court must direct notice in a reasonable manner to all claims members who would be bound by the proposal <u>only if it determines that giving notice is justified by the parties' showing regarding the prospect of class certification and approval of the proposal.</u>

Settlement approval criteria

The redraft showed a revision in accord with what was discussed in Salt Lake City, but a concern had arisen with the use of "because." After the redraft was circulated, Prof. Marcus circulated another possibility -- leaving the current rule as is and adding to it:

<u>The court may approve the proposal only if it finds:</u>

Then the same four factors would be remain as finding

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requirements.

This approach was introduced as avoiding some of the difficulties that might attend the formulation included in the redraft initially sent out, for the use of "because" might mean to mean that any court that so finds must conclude that the settlement is fair, reasonable, and adequate. If one truly wants to authorize and/or direct the court to make a finding whether the proposal is fair, reasonable, and adequate, the "because" formulation raises problems.

A different issue was raised: The use of the word "only" in the reformulated rule might also raise concerns about overruling existing circuit precedent. A reaction was that it might be best only to require that the court take account of the listed factors as a minimum or baseline method of evaluating the proposal.

This approach was supported on the ground that the objective should be to move away from somewhat mindless checking off of a dozen or more factors; the idea is "think about the core concerns."

Various alternative formulations were suggested:

"The court must consider the following factors:"

The court could approve "only on a finding that the proposal is fair, reasonable, and adequate, including consideration of:"

"The court must consider whether:"

A concern was raised: Making findings, and perhaps consideration, mandatory could affect the standard of review. Now the district court's approval is reviewed under an abuse of discretion standard. We are not trying to change that. But the more pointed this rule becomes the more it introduces the possibility of enhanced appellate review.

The resolution of these issues for current purposes was that a redraft should offer two alternatives:

"fair, reasonable, and adequate <u>after considering:"</u>

"fair, reasonable and adequate. <u>The court must consider:"</u>

The discussion shifted to whether revisions of the factors themselves should be considered. One suggestion was combining factors (A) and (B). Presently factor (B) is in brackets recognizing the possibility that it is not really needed. Perhaps factor (A) is sufficient without (B).

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One reaction was that emphasizing a focus on the actual conduct of the negotiations is a valuable thing to include. At least one Seventh Circuit case actually involved a nationwide class-action settlement reached in a Chicago bar on a cocktail napkin by class counsel who had been relatively inactive and were willing to go along with defense counsel who were seeking a way to prevent a trial in a class action in a Texas state court that exposed the defendant to much greater liability. That proposed settlement was used as a basis for an injunction against proceeding in the Texas litigation.

A reaction was that this emphasis did not necessarily require that (B) be retained. One alternative that was suggested was that (A) be rewritten along the following lines:

> the class representatives and class counsel have adequately represented the class in [preparing for litigation and] in negotiating the proposal at arms length.

The possibility of combining (A) and (B) prompted the suggestion that (B) may not often be helpful to the judge (in addition to (A)).

* * * * *

The call concluded with the intention of resuming the discussion in a conference call at the same time on Monday, Nov. 23, at the same time. Before that, Prof. Marcus would circulate a redraft reflecting the discussion during this conference call, and Prof. Cooper would attempt to devise a simpler manner of dealing with objectors, perhaps without any need for change to the Appellate Rules.

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B. Rule 62: Stay of Enforcement

The Rule 62 proposal has been developed by a joint subcommittee appointed by the Appellate and Civil Rules Committees. The Subcommittee is chaired by Judge Scott Matheson. Its members have included Judge Peter Fay, Judge Brett Kavanaugh, Douglas Letter, Kevin Newsom, and Virginia Seitz. The Committee Chairs, Judge Steven Colloton and Judge John Bates, also participated in the Subcommittee's work.

A more elaborate draft was presented to the Committees for discussion at their fall meetings. The discussion in this Committee is described in the draft minutes for November 5. The Subcommittee prepared a revised draft that was presented to the Standing Committee for discussion in January. The revised draft deletes complicating provisions that seemed unnecessary. It also eliminates the provision that would have expressly authorized the court to refuse to approve a stay despite presentation of a satisfactory bond. The only question raised in the Standing Committee asked about the 30-day period recommended for the automatic stay in Rule 62(a). The explanation that 30 days accommodates the 28 days allowed for post-judgment motions and allows two more days to arrange security if the 28 days expire without a motion that suspends appeal time was readily accepted.

The Subcommittee continued work on the proposal presented to the Standing Committee after it met. The only change in the draft rule text deleted words suggesting that the stay can remain in effect "until a designated time~~[, which may be as late as issuance of the mandate on appeal]~~ * * *." Those words were found to imply an undesirable limit — it may be desirable to extend the stay beyond issuance of the mandate, recognizing the possibility of a petition for certiorari or post-mandate proceedings in the court of appeals.

The Committee Note also was simplified. Two paragraphs that briefly anticipated lengthier discussions in later paragraphs were deleted. Three more paragraphs that offered advice about issues that may arise in various circumstances were deleted to honor the tradition that the Note should not be used to offer advice beyond what is needed to explain the purpose and effect of the rule text amendments. Two sentences were removed from later paragraphs for similar reasons.

The Subcommittee now recommends that the Standing Committee be asked to approve publication of the present draft for comment.

This proposal serves all of the needs that prompted consideration of Rule 62. It eliminates the gap that exists under present Rule 62 between expiration of the automatic stay 14 days after judgment and the court's authority to order a stay "pending disposition of" a motion that may be made up to 28 days after judgment. It expressly authorizes security in a form other than a

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bond. And it authorizes a single security that endures from termination of the automatic stay through completion of all appellate proceedings.

Other changes reorganize the provisions of present Rule 62(a), (b), (c), and (d) to bring together closely related matters that had been separated. The remaining parts of Rule 62 were studied, some in detail, but the Subcommittee concluded that it is better to carry them forward without change.

The operation of the amended rule is described in the Committee Note.

Three versions of Rule 62 are set out below. The first is the clean text that is recommended for publication. The second shows the changes that have been made in the version that was presented to the Standing Committee in January. The third is the text of current Rule 62(a), (b), (c), and (d).

RULE 62 PROPOSED FOR PUBLICATION

1 **Rule 62. Stay of Proceedings to Enforce a Judgment.**
2 (a) *Automatic Stay.* Except as provided in Rule 62(c) and (d),
3 execution on a judgment and proceedings to enforce it are
4 stayed for 30 days after its entry, unless the court orders
5 otherwise.
6 **(b)** *Stay by Other Means.*
7 *(1) By Court Order.* The court may at any time order a stay
8 that remains in effect until a designated time, and may
9 set appropriate terms for security or deny security.
10 *(2) By Bond or Other Security.* At any time after judgment is
11 entered, a party may obtain a stay by providing a bond
12 or other security. The stay takes effect when the court
13 approves the bond or other security and remains in
14 effect for the time specified in the bond or security.
15 **(c)** *Stay of Injunction, Receivership, or Patent Accounting*
16 *Orders.* Unless the court orders otherwise, the following
17 are not stayed after being entered, even if an appeal is
18 taken:
19 **(1)** an interlocutory or final judgment in an action for an
20 injunction or a receivership; or
21 **(2)** a judgment or order that directs an accounting in an
22 action for patent infringement.

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23 **(d)** *Injunction Pending an Appeal.* While an appeal is pending
24 from an interlocutory order or final judgment that grants,
25 continues, modifies, refuses, dissolves, or refuses to
26 dissolve or modify an injunction, the court may suspend,
27 modify, restore, or grant an injunction on terms for bond or
28 other terms that secure the opposing party's rights. If the
29 judgment appealed from is rendered by a statutory three-
30 judge district court, the order must be made either:
31 **(1)** by that court sitting in open session; or
32 **(2)** by the assent of all its judges, as evidenced by their
signatures.

* * * * *

COMMITTEE NOTE

Subdivisions (a), (b), (c), and (d) of former Rule 62 are reorganized and the provisions for staying a judgment are revised.

The provisions for staying an injunction, receivership, or order for a patent accounting are reorganized by consolidating them in new subdivisions (c) and (d). There is no change in meaning. The language is revised to include all of the words used in 28 U.S.C. § 1292(a)(1) to describe the right to appeal from interlocutory actions with respect to an injunction, but subdivisions (c) and (d) apply both to interlocutory injunction orders and to final judgments that grant, refuse, or otherwise deal with an injunction.

New Rule 62(a) extends the period of the automatic stay to 30 days. Former Rule 62(a) set the period at 14 days, while former Rule 62(b) provided for a court-ordered stay "pending disposition of" motions under Rules 50, 52, 59, and 60. The time for making motions under Rules 50, 52, and 59, however, was later extended to 28 days, leaving an apparent gap between expiration of the automatic stay and any of those motions (or a Rule 60 motion) made more than 14 days after entry of judgment. The revised rule eliminates any need to rely on inherent power to issue a stay during this period. Setting the period at 30 days coincides with the time for filing most appeals in civil actions, providing a would-be appellant the full period of appeal time to arrange a stay by other means. Thirty days of automatic stay also suffices in cases governed by a 60-day appeal period.

Amended Rule 62(a) expressly recognizes the court's authority to dissolve the automatic stay or supersede it by a court-ordered stay. One reason for dissolving the automatic stay

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may be a risk that the judgment debtor's assets will be dissipated. Similarly, it may be important to allow immediate execution of a judgment that does not involve a payment of money. The court may address the risks of immediate execution by ordering dissolution of the stay only on condition that security be posted by the judgment creditor. Rather than dissolve the stay, the court may choose to supersede it by ordering a stay under Rule 62(b)(1) that lasts longer or requires security.

Subdivision (b)(1) recognizes the court's broad general and discretionary power to stay, or to refuse to stay, execution and proceedings to enforce a judgment. The court may set terms for security or deny security. A stay may be granted or modified with no security, partial security, full security, or security in an amount greater than the amount of a money judgment. Security may be in the form of a bond or another form. In some circumstances appropriate security may inhere in the events that underlie the litigation — for example, a contract claim may be fully secured by a payment bond.

Subdivision 62(b)(2) carries forward in modified form the supersedeas bond provisions of former Rule 62(d). A stay may be obtained under subdivision (b)(2) at any time after judgment is entered. Thus a stay may be obtained before the automatic stay has expired, or after the automatic stay has been lifted by the court. The new rule text makes explicit the opportunity to post security in a form other than a bond. The stay remains in effect for the time specified in the bond or security — a party may find it convenient to arrange a single bond or other security that persists through completion of post-judgment proceedings in the trial court and on through completion of all proceedings on appeal by issuance of the appellate mandate. This provision does not supersede the opportunity for a stay under 28 U.S.C. § 2101(f) pending review by the Supreme Court on certiorari.

Rule 62(b)(2), like former Rule 62(d), does not specify the amount of the bond or other security provided to secure a stay. As before, the stay takes effect when the court approves the bond or security. And as before, the court may consider the amount of the security as well as its form and terms, and the quality of the security or the issuer of the bond. The amount may be set higher than the amount of a monetary award. The amount also may be set to reflect relief that is not an award of money but also is not covered by Rule 62 (c) and (d). And, in the other direction, the amount may be set at a figure lower than the value of the judgment. One reason might be that the cost of obtaining a bond is beyond the appellant's means.

Rule 62 applies no matter who appeals. A party who won a judgment may appeal to request greater relief. The automatic stay of subdivision (a) applies as on any appeal. The appellee may seek a stay under subdivision (b), although a failure to cross-appeal may be an important factor in determining whether to order a stay. And, if the judgment awards money to the appellee as well

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as to the appellant, the appellant also may seek a stay.

RULE 62 PRESENTED TO STANDING COMMITTEE, WITH EDITS

Rule 62. Stay of Proceedings to Enforce a Judgment.

(a) *Automatic Stay.* Except as provided in Rule 62(c) and (d), execution on a judgment and proceedings to enforce it are stayed for 30 days after its entry, unless the court orders otherwise.

(b) *Stay by Other Means.*

(1) By Court Order. The court may at any time order a stay that remains in effect until a designated time~~[, which may be as late as issuance of the mandate on appeal]~~, and may set appropriate terms for security or deny security.

(2) By Bond or Other Security. At any time after judgment is entered, a party may obtain a stay by providing a bond or other security. The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or security.

(c) *Stay of Injunction, Receivership, or Patent Accounting Orders.* Unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

(1) an interlocutory or final judgment in an action for an injunction or a receivership; or

(2) a judgment or order that directs an accounting in an action for patent infringement.

(d) *Injunction Pending an Appeal.* While an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:

(1) by that court sitting in open session; or

(2) by the assent of all its judges, as evidenced by their signatures.

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* * * * *

COMMITTEE NOTE

Subdivisions (a), (b), (c), and (d) of former Rule 62 are reorganized and the provisions for staying a judgment are revised.

The provisions for staying an injunction, receivership, or order for a patent accounting are reorganized by consolidating them in new subdivisions (c) and (d). There is no change in meaning. The language is revised to include all of the words used in 28 U.S.C. § 1292(a)(1) to describe the right to appeal from interlocutory actions with respect to an injunction, but subdivisions (c) and (d) apply ~~to~~ both to interlocutory injunction orders and to final judgments that grant, refuse, or otherwise deal with an injunction.

~~The provisions for staying a judgment are revised to clarify several points. The automatic stay is extended to 30 days, and it is made clear that the court may forestall any automatic stay. The former provision for a court-ordered stay "pending the disposition of" enumerated post-judgment motions is superseded by establishing authority to order a stay at any time. This provision closes the apparent gap in the present rule between expiration of the automatic stay after 14 days and the 28-day time set for making these motions. The court's authority to issue a stay designed to last through final disposition on any appeal is established, and it is made clear that the court can accept security by bond or by other means. A single bond or other form of security can be provided for the life of the stay.~~

~~The provision for obtaining a stay by posting a supersedeas bond is changed. New subdivision (b)(2) provides for a stay by providing a bond or other security at any time after judgment is entered; it is no longer necessary to wait until a notice of appeal is filed. The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or security.~~

~~Subdivisions (a) and (b) address stays of all judgments, except as provided in subdivisions (c) and (d). Determining what the terms should be may be more complicated when a judgment includes provisions for relief other than — or in addition to — a payment of money, and that are outside subdivisions (c) and (d). Examples include a variety of non-injunctive orders directed to property, such as enforcing a lien, or quieting title.~~

~~Some orders that direct a payment of money may not be a "judgment" for purposes of Rule 62. An order to pay money to the court as a procedural sanction, for example, is a matter left to the court's inherent power. The decision whether to stay the sanction is made as part of the sanction determination. The same result may hold if the sanction is payable to another party. But~~

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~~if some circumstance establishes an opportunity to appeal, the order becomes a "judgment" under Rule 54(a) and is governed by Rule 62.~~

~~Special concerns surround civil contempt orders. The ordinary rule is that a party cannot appeal a civil contempt order, whether it is compensatory or coercive, before entry of a final judgment. A nonparty, however, can appeal a civil contempt order. If appeal is available, effective implementation of the contempt authority may counsel against any stay. This question is left to the court's inherent control of the contempt power and the authority to refuse a stay.~~

New Rule 62(a) extends the period of the automatic stay to 30 days. Former Rule 62(a) set the period at 14 days, while former Rule 62(b) provided for a court-ordered stay "pending disposition of" motions under Rules 50, 52, 59, and 60. The time for making motions under Rules 50, 52, and 59, however, was later extended to 28 days, leaving an apparent gap between expiration of the automatic stay and any of those motions (or a Rule 60 motion) made more than 14 days after entry of judgment. The revised rule eliminates any need to rely on inherent power to issue a stay during this period. Setting the period at 30 days coincides with the time for filing most appeals in civil actions, providing a would-be appellant the full period of appeal time to arrange a stay by other means. Thirty days of automatic stay also suffices in cases governed by a 60-day appeal period.

Amended Rule 62(a) expressly recognizes the court's authority to dissolve the automatic stay or supersede it by a court-ordered stay. One reason for dissolving the automatic stay may be a risk that the judgment debtor's assets will be dissipated. Similarly, it may be important to allow immediate execution of a judgment that does not involve a payment of money. The court may address the risks of immediate execution by ordering dissolution of the stay only on condition that security be posted by the judgment creditor. Rather than dissolve the stay, the court may choose to supersede it by ordering a stay under Rule 62(b)(1) that lasts longer or requires security.

Subdivision (b)(1) recognizes the court's broad general and discretionary power to stay, or to refuse to stay, execution and proceedings to enforce a judgment. The court may set terms for security or deny security. ~~An appellant may prefer a court-ordered stay under (b)(1), hoping for terms less demanding than the terms for obtaining a stay by posting a bond or other security under (b)(2).~~ A stay may be granted or modified with no security, partial security, full security, or security in an amount greater than the amount of a money judgment. Security may be in the form of a bond or another form. In some circumstances appropriate security may inhere in the events that underlie the litigation — for example, a contract claim may be fully secured by a payment bond.

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Subdivision 62(b)(2) carries forward in modified form the supersedeas bond provisions of former Rule 62(d). A stay may be obtained under subdivision (b)(2) at any time after judgment is entered. Thus a stay may be obtained before the automatic stay has expired, or after the automatic stay has been lifted by the court. The new rule text makes explicit the opportunity to post security in a form other than a bond. The stay remains in effect for the time specified in the bond or security — a party may find it convenient to arrange a single bond or other security that persists through completion of post-judgment proceedings in the trial court and on through completion of all proceedings on appeal by issuance of the appellate mandate. This provision does not supersede the opportunity for a stay under 28 U.S.C. § 2101(f) pending review by the Supreme Court on certiorari.

Rule 62(b)(2), like former Rule 62(d), does not specify the amount of the bond or other security provided to secure a stay. As before, the stay takes effect when the court approves the bond or security. And as before, the court may consider the amount of the security as well as its form, terms, and quality of the security or the issuer of the bond. The amount may be set higher than the amount of a monetary award. ~~Some local rules set higher figures. [E.D. Cal. Local Rule 151(d) and D.Kan. Local Rule 62.2, for example, set the figure at one hundred and twenty-five percent of the amount of the judgment.]~~ The amount also may be set to reflect relief that is not an award of money but also is not covered by Rule 62 (c) and (d). And, in the other direction, the amount may be set at a figure lower than the value of the judgment. One reason might be that the cost of obtaining a bond is beyond the appellant's means.

Rule 62 applies no matter who appeals. A party who won a judgment may appeal to request greater relief. The automatic stay of subdivision (a) applies as on any appeal. The appellee may seek a stay under subdivision (b), although a failure to cross-appeal may be an important factor in determining whether to order a stay. And, if the judgment awards money to the appellee as well as to the appellant, the appellant also may seek a stay.

PRESENT RULE 62(a), (b), (c), AND (d)

Rule 62. Stay of Proceedings to Enforce a Judgment

1 (a) AUTOMATIC STAY; EXCEPTIONS FOR INJUNCTIONS, RECEIVERSHIPS, AND PATENT
2 ACCOUNTINGS. Except as stated in this rule, no execution may
3 issue on a judgment, nor may proceedings be taken to enforce
4 it, until 14 days have passed after its entry. But unless
5 the court orders otherwise, the following are not stayed
6 after being entered, even if an appeal is taken:
7 (1) an interlocutory or final judgment in an action for an
8 injunction or a receivership; or
9 (2) a judgment or order that directs an accounting in an
10 action for patent infringement.
11 (b) STAY PENDING THE DISPOSITION OF A MOTION. On appropriate terms for
12 the opposing party's security, the court may stay the

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13 execution of a judgment — or any proceedings to enforce it —
14 pending disposition of any of the following motions:
15 (1) under rule 50, for judgment as a matter of law;
16 (2) under Rule 52(b), to amend the findings or for
17 additional findings;
18 (3) under Rule 59, for a new trial or to alter or amend a
19 judgment; or
20 (4) under Rule 60, for relief from a judgment or order.
21 (c) INJUNCTION PENDING AN APPEAL. While an appeal is pending from an
22 interlocutory order or final judgment that grants,
23 dissolves, or denies an injunction, the court may suspend,
24 modify, restore, or grant an injunction on terms for bond or
25 other terms that secure the opposing party's rights. If the
26 judgment appealed from is rendered by a statutory three-
27 judge district court, the order must be made either:
28 (1) by that court sitting in open session; or
29 (2) by the assent of all its judges, as evidenced by their
30 signatures.
31 (d) STAY WITH BOND ON APPEAL. If an appeal is taken, the appellant
32 may obtain a stay by supersedeas bond, except in an action
33 described in Rule 62(a)(1) or (2). The bond may be given
34 upon or after filing the notice of appeal or after obtaining
35 an order allowing the appeal. The stay takes effect when the
36 court approves the bond.
37

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C. Rule 5: e-service and e-filing

The Standing Committee Subcommittee on matters electronic has suspended operations. The several advisory committees, however, are cooperating in carrying forward consideration of the ways in which the several sets of rules should be revised to reflect the increasing dominance of electronic means of preserving and communicating information. For the Civil Rules, the Advisory Committee initially worked through to recommendations to publish three rules amendments for comment in August 2015: Rule 5(d)(3) on electronic filing; Rule 5(b)(2)(E) on electronic service, with the corresponding abrogation of Rule 5(b)(3) on using the court's transmission facilities; and Rule 5(d)(1) on using the Notice of Electronic Filing as a certificate of service. But continuing exchanges with the other advisory committees showed that further work was needed to achieve as much uniformity as possible in language, and at times in meaning. Much of the work has involved the Criminal Rules Committee. Criminal Rule 49 now invokes the Civil Rules on filing and service. The Criminal Rules Committee has worked long and hard to create a new and self-contained Rule 49 that will be independent of the Civil Rules. They have welcomed close collaboration with the Civil Rules e-representatives in their Subcommittee deliberations. The result has been great progress that has improved the earlier Civil Rules drafts.

There are powerful reasons to make Civil Rule 5 and Criminal Rule 49 as nearly identical as possible, recognizing that the different circumstances of criminal prosecutions may at times warrant differences in substance and that the different structural and linguistic context of the full sets of rules may at times warrant differences in expression. The drafts presented below represent the stage reached by the time for generating agenda materials. Further evolution may occur, but it is likely to be on fine points.

Before turning to the present proposals, it may be useful to provide a brief reminder of broader possibilities that have been put aside.

Earlier work considered an open-ended rule that would equate electrons with paper in two ways. The first provision would state that a reference to information in written form includes electronically stored information. The second provision would state that any action that can or must be completed by filing or sending paper may also be accomplished by electronic means. Each provision would be qualified by an "unless otherwise provided" clause. Reviewing these proposals against the full set of Civil Rules showed that it is still too early to attempt to adopt them as a general approach, even with exceptions — determining what

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exceptions to make would be difficult, and there were likely to be many of them.

A related general question involves electronic signatures. Many local rules address this question now, often drawing from a Model Rule. A proposal to amend the Bankruptcy Rules to address electronic signatures was published and then withdrawn. There did not seem to be much difficulty with treating an electronic filing by an authorized user of the court's e-filing system as the filer's signature. But difficulty was encountered in dealing with papers signed by someone other than the authorized filer. Affidavits and declarations are common examples, as are many forms of discovery responses. The several advisory committees share the view that it is too early to take on e-signatures in a general way. Draft Rule 5(d)(3) does provide that the user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.

Rule 5(d)(3): Electronic Filing

The Rule 5(d)(3) amendment would establish a uniform national rule that makes e-filing mandatory except for filings made by a person proceeding without an attorney, and with a further exception that paper filing must be allowed for good cause and may be required or allowed for other reasons by local rule. A person proceeding without an attorney may file electronically only if required or allowed by court order or local rule. And the user name and password of an attorney of record, along with the attorney's name on a signature block, serves as the attorney's signature.

This proposal rests on the advantages that e-filing brings to the court and the parties. Attorneys in most districts already are required to file electronically by local rules. The risks of mistakes have been reduced by growing familiarity with, and competence in, electronic communication. At the same time, deliberation in consultation with other advisory committees showed that the general mandate should not extend to pro se parties. Although pro se parties are thus generally exempted from the requirement, the proposal allows them access to e-filing by local rule or court order. This treatment recognizes that some pro se parties have already experienced success with e-filing, and reflects an expectation that the required skills and access to electronic systems will expand. The court and other parties will share the benefits when pro se litigants can manage e-filing. Finally, the proposal allows a court to require e-filing by an unrepresented party. This provision is designed to support existing programs that direct e-filing in collateral proceedings brought by prison inmates. But it is shown in brackets to reflect

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ongoing discussions with the Criminal Rules Committee. The Criminal Rules Subcommittee working with Rule 49.1 has expressed concerns that local rules or orders requiring e-filing by an unrepresented party might have the effect of barring access to court in collateral proceedings. One question is whether courts are likely to be so obtuse as to require e-filing when there is any risk that it would block access. A possible solution would be to amend the rules for habeas corpus and § 2255 proceedings, leaving it open to require e-filing by a pro se party in a purely civil action. A different solution would be to conclude that there are too few occasions to order e-filing by a pro se party to justify the "or require" provision. This question deserves further consideration.

RULE 5. SERVING AND FILING PLEADINGS AND OTHER PAPERS

(d) FILING * * *

(2) *Nonelectronic Filing* ~~*How Filing is Made — In General*~~. A paper [not filed electronically] is filed by delivering it:
(A) to the clerk; or
(B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(3) *Electronic Filing and Signing* ~~*, or Verification*~~.

(A) *Represented Party — When Required; Paper Filing Required or Allowed.* ~~A court may, by local rule, allow papers to be filed, signed, or verified~~ All filings, except those made by a person proceeding without an attorney, must be made by [filing with][*alternative:* using] the court's electronic-filing system ~~by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States~~. But paper *[alternative: nonelectronic]* filing must be allowed for good cause, and may be required or allowed for other reasons by local rule.

(B)[Alternative 1] *Unrepresented Party — When Allowed or Required.* A person proceeding without an attorney:

(i) may file electronically only if allowed by court order or by local rule, and
(ii) may be required to file electronically only by court order, or by a local rule that allows reasonable exceptions.

(B)[Alternative 2] *Unrepresented Party — When Allowed or Required.* A person proceeding without an attorney may

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file electronically only if allowed by court order or by local rule, and may be required to file electronically only by court order or by a local rule that allows reasonable exceptions.

(C) *Electronic Signing.* The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.

(D) *Same as Written Paper.* A paper filed electronically ~~in compliance with a local rule~~ is a written paper for purposes of these rules.

COMMITTEE NOTE

Electronic filing has matured. Most districts have adopted local rules that require electronic filing, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts, except for filings made by a person proceeding without an attorney. But exceptions continue to be available. Paper filing must be allowed for good cause. And a local rule may allow or require paper filing for other reasons.

Filings by a person proceeding without an attorney are treated separately. It is not yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing. Encounters with the court's system may prove overwhelming to some. Attempts to work within the system may generate substantial burdens on a pro se party, on other parties, and on the court. Rather than mandate electronic filing, filing by pro se litigants is left for governing by local rules or court order. Efficiently handled electronic filing works to the advantage of all parties and the court. Many courts now allow electronic filing by pro se litigants with the court's permission. Such approaches may expand with growing experience in these and other courts, along with the growing availability of the systems required for electronic filing and the increasing familiarity of most people with electronic communication. Room is also left for a court to require electronic filing by a pro se litigant. Care should be taken to ensure that an electronic-filing requirement does not impede access to the court. In the beginning, this authority is likely to be exercised only to support special programs, such as one requiring e-filing in collateral proceedings by pro se prisoners.

The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.

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Clean Rule Text

RULE 5. SERVING AND FILING PLEADINGS AND OTHER PAPERS

(d) FILING * * *

(2) *Nonelectronic Filing* A paper [not filed electronically] is filed by delivering it:
(A) to the clerk; or
(B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(3) *Electronic Filing and Signing.*

(A) *Represented Party — When Required; Paper Filing Required or Allowed.* All filings, except those made by a person proceeding without an attorney, must be made by [filing with][*alternative:* using] the court's electronic-filing system. But paper *[alternative: nonelectronic]* filing must be allowed for good cause, and may be required or allowed for other reasons by local rule.

(B)[Alternative 1] *Unrepresented Party — When Allowed or Required.* A person proceeding without an attorney:

(i) may file electronically only if allowed by court order or by local rule, and
(ii) may be required to file electronically only by court order, or by a local rule that allows reasonable exceptions.

(B)[Alternative 2] *Unrepresented Party — When Allowed or Required.* A person proceeding without an attorney may file electronically only if allowed by court order or by local rule, and may be required to file electronically only by court order or by a local rule that allows reasonable exceptions.

(C) *Electronic Signing.* The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.

(D) *Same as Written Paper.* A paper filed electronically is a written paper for purposes of these rules.

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Rule 5(b)(2)(E): e-Service

Present Rule 5(b)(2)(E) allows service by electronic means only if the person to be served consented in writing. It is complemented by Rule 5(b)(3), which provides that a party may use the court's transmission facilities to make electronic service "[i]f a local rule so authorizes." The proposal deletes the requirement of consent when service is made through the court's transmission facilities on a registered user. It also abrogates Rule 5(b)(3) as no longer necessary.

Consent continues to be required for electronic service in other circumstances, whether the person served is a registered user or not. A registered user might consent to service by other electronic means for papers that are not filed with the court. In civil litigation, a common example is provided by discovery materials that must not be filed until they are used in the action or until the court orders filing. A pro se litigant who is not a registered user — and very few now are — is protected by the consent requirement. In either setting, consent may be important to ensure effective service. The terms of consent can specify an appropriate address and format, and perhaps other matters as well.

[Striking this paragraph reflects a change made in working with the Criminal Rules Committee:] ~~Although consent remains important when it is required, the requirement that consent be in writing is deleted. Consent by electronic means is the most likely form; many people now rely routinely on e-communication rather than paper. Beyond that, the Committee believes that in some circumstances less formal means of consent may do, such as a telephone conversation.~~

Rule 5. Serving and Filing Pleadings and Other Papers

(b) SERVICE: HOW MADE. * * *

(2) *Service in General.* A paper is served under this rule by:

(A) handing it to the person * * *

(E) sending it <u>to a registered user by filing it with the court's electronic-filing system or [sending it]</u> by <u>other</u> electronic means ~~if~~ <u>that</u> the person consented <u>to</u> in writing — in <u>either of</u> which event<u>s</u> service is complete upon transmission, but is not effective if the serving party learns that it did not

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reach the person to be served; or * * *

COMMITTEE NOTE

Provision for electronic service was first made when electronic communication was not as widespread or as fully reliable as it is now. Consent of the person served to receive service by electronic means was required as a safeguard. Those concerns have substantially diminished, but have not disappeared entirely, particularly as to persons proceeding without an attorney.

The amended rule recognizes electronic service on a registered user by filing with the court's electronic-filing system. A court may choose to allow registration only with the court's permission. But a party who registers will be subject to service by filing with the court's system unless the court provides otherwise. With the consent of the person served, electronic service also may be made by means that do not use the court's system. [Consent can be limited to [service at] a prescribed address or in a specified form, and may be limited by other conditions.]

Because Rule 5(b)(2)(E) now authorizes service by filing with the court's electronic-filing system as a uniform national practice, Rule 5(b)(3) is abrogated. It is no longer necessary to rely on local rules to authorize such service.

Clean Rule Text

Rule 5. Serving and Filing Pleadings and Other Papers

(b) SERVICE: HOW MADE. * * *

(2) *Service in General.* A paper is served under this rule by:

(A) handing it to the person * * *

(E) sending it to a registered user by filing it with the court's electronic-filing system or [sending it] by other electronic means that the person consented to in writing — in either of which events service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served; or * * *

12b-001715

Permission to Use Court's Facilities: Abrogating Rule 5(b)(3)

This package includes a proposal to abrogate Rule 5(b)(3) to reflect the amendment of Rule 5(b)(2)(E) that allows service on a registered user by filing with the court's electronic-filing system without requiring consent. Rule 5(b)(3) reads:

> (3) *Using Court Facilities.* If a local rule so authorizes, a party may use the court's transmission facilities to make service under Rule 5(b)(2)(E).

The basic reason to abrogate (b)(3) is to avoid the seeming inconsistency of authorizing service by filing with the court's system in (b)(2)(E) and then requiring authorization by a local rule as well. Probably there is no danger that a local rule might opt out of the national rule, but eliminating (b)(3) would ensure that none will. It remains important to ensure that a court can refuse to allow a particular person to become a registered user. It may be safe to rely on the Committee Note to (b)(2)(E), with added support in a Committee Note explaining the abrogation of (b)(3).

The published proposal would look like this:

> ~~(3) *Using Court Facilities.* If a local rule so authorizes, a party may use the court's transmission facilities to make service under Rule 5(b)(2)(E).~~

COMMITTEE NOTE

Rule 5(b)(3) is abrogated. As amended, Rule 5(b)(2)(E) directly authorizes service on a registered user by filing with the court's electronic-filing system. Local rule authority is no longer necessary. The court retains inherent authority to deny registration [or to qualify a registered user's participation in service through the court's facilities].

Notice of Electronic Filing as Proof of Service

Rule 5(d)(1) was amended in 1991 to require a certificate of service. It did not specify any particular form. Many lawyers include a certificate of service at the end of any paper filed in the court's electronic filing system and served through the court's transmission facilities. This practice can be made automatic by amending Rule 5(d)(1) to provide that a Notice of Electronic Filing constitutes a certificate of service on any party served by filing with the court's electronic-filing system. The draft amendment does that, retaining the requirement for a

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certificate of service following service by other means.

Treating the Notice of Electronic Filing as the certificate of service will not save many electrons. The certificates generally included in documents electronically filed and served through the court's facilities are brief. It may be that cautious lawyers will continue to include them. But there is an opportunity for some saving, and protection for those who would forget to add the certificate to the original document, whether the protection is against the burden of generating and filing a separate document or against forgetting to file a certificate at all. Other parties will be spared the need to check court files to determine who was served, particularly in cases in which all parties participate in electronic filing and service.

The Notice of Electronic Filing automatically identifies the means, time, and e-address where filing was made and also identifies the parties who were not authorized users of the court's electronic-filing system, thus flagging the need for service by other means. There might be some value in amending Rule 5(d)(1) further to require that the certificate for service by other means specify the date and manner of service; the names of the persons served; and the address where service was made. Still more detail might be required. The Committee considered this possibility but decided that there is no need to add this much detail to rule text. Lawyers seem to be managing nicely without it.

The draft considered by the Committee included, as a subject for discussion, a further provision that the Notice of Electronic Filing is not a certificate of service if "the serving party learns that it did not reach the person to be served." That formula appears in Rule 5(b)(2)(E), both now and in the proposed revision. The Committee concluded that this caution need not be duplicated in Rule 5(d)(1). Learning that the attempted e-service did not work means there is no service. No service, no certificate of service.

Rule 5. Serving and Filing Pleadings and Other Papers

(d) FILING.

(1) *Required Filings: Certificate of Service.*

(A) *Papers after the Complaint.* Any paper after the complaint that is required to be served ~~— together with a certificate of service —~~ must be filed within a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed * * *.

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(B) *Certificate.* A certificate of service must be filed within a reasonable time after service, but a notice of electronic filing constitutes a certificate of service on any person served [using the court's electronic-filing system] [by filing with the court].

COMMITTEE NOTE

The amendment provides that a notice of electronic filing generated by the court's CM/ECF system is a certificate of service on any person served by filing with the court's electronic-filing system. But if the serving party learns that the paper did not reach the party to be served, there is no service under Rule 5(b)(2)(E) and there is no certificate of the (nonexistent) service.

When service is not made by filing with the court's electronic filing system, a certificate of service must be filed and should specify the date as well as the manner of service.

Clean Rule Text

(d) FILING.

(1) *Required Filings: Certificate of Service.*

(A) *Papers after the Complaint.* Any paper after the complaint that is required to be served must be filed within a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed * * *.

(B) *Certificate.* A certificate of service must be filed within a reasonable time after service, but a notice of electronic filing constitutes a certificate of service on any person served [using the court's electronic-filing system] [by filing with the court].

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TAB 5

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TAB 5A

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126-001722

II. New and Carry-Over Proposals for Study

A. Rule 5.2: Redact Filed Documents

The Bankruptcy Rules Committee is considering addition of a new subdivision (h) to Bankruptcy Rule 9037, the Bankruptcy Rules equivalent of Civil Rule 5.2. The draft would create an explicit procedure for deleting information protected by Rule 9037(a) but mistakenly included in a filed document. The Bankruptcy Rules Committee took up this subject in response to concerns raised by the Committee on Court Administration and Case Management.

Appellate Rule 25(a)(5), Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule 49.1 were adopted in a coordinated process that sought to achieve as much uniformity as possible. Appellate Rule 25(a)(5) adopts the other rules for appeals in cases that they governed in the district court, invokes Criminal Rule 49.1 when an extraordinary writ is sought in a criminal case, and adopts Civil Rule 5.2 for all other proceedings. Criminal Rule 49.1 largely parallels Civil Rule 5.2, but also limits home addresses to identifying the city and state, and expands the list of exemptions to include several matters peculiar to criminal proceedings. Bankruptcy Rule 9037 hews close to Civil Rule 5.2, with an additional exception and without Rule 5.2(c)(limitations on remote access).

This common origin adds extra weight to the growing tradition that parallel rules addressing the same problems should be as nearly identical as possible. Differences can be warranted by the different circumstances that confront different sets of rules. But care should be taken in assessing the need for differences.

There is good reason for this Committee to take seriously the prospect that Civil Rule 5.2 should be amended by adding a new subdivision (i) that essentially tracks Bankruptcy Rule 9037(h) if the Bankruptcy Rules Committee goes forward with the proposed amendment.

It is possible that the circumstances of civil practice differ from those that confront bankruptcy practice. The Committee on Court Administration and Case Management referred the question to the Bankruptcy Rules Committee, reacting to reports that bankruptcy courts are receiving creditors' requests to redact previously filed documents, sometimes involving thousands of documents in numerous courts. Bankruptcy courts are, of necessity, dealing with these requests now. CACM believes it is important to establish a uniform procedure. And it may be concerned that the pressures of bankruptcy practice make it more difficult to rely on parties and courts to act to accomplish

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required redactions in ways that restore protection as promptly as possible.

The problem may arise more frequently in bankruptcy practice, but surely it arises in civil and criminal practice as well. The need for uniform practice across different courts also may be more pressing in bankruptcy if an improper filing can involve thousands of documents in numerous courts. That circumstance is less likely to arise in civil and criminal practice. And it is nice to believe that courts and parties should be able to manage to act effectively without need for explicit prompting in Rule 5.2.

The prospect that there is little need to add a new Rule 5.2(i), on the other hand, is offset by the prospect that little harm will be done, apart from adding to the Civil Rules word-count. The Bankruptcy Rules Committee has led the way with a carefully considered draft. And although there may be little risk that adoption of a new Bankruptcy Rule 9037(h) would mislead courts if Rule 5.2(i) is not added in parallel, uniformity is reassuring. That is particularly so if the Criminal Rules Committee believes it useful to add a parallel provision to Criminal Rule 49.1.

A draft Rule 5.2(i) is set out below. Some style differences from the Bankruptcy Rule are unavoidable. Others are a matter to be worked out when all commitees have reached their own conclusions. This question has come up late enough in the winter cycle that it may not be feasible to ask all four of the advisory committees responsible for these rules to decide on recommendations in time to publish Bankruptcy Rule 9037(h) this summer. But it will be useful to have discussion now, even on the style issues identified in the footnotes.

Rule 5.2. Privacy Protection for Filings Made with the Court

* * * * *

1 (i) MOTION TO REDACT A PREVIOUSLY FILED DOCUMENT.

2 (1) *Content of the Motion.* Unless the court orders
3 otherwise, a person [1] that seeks to redact from a
4 previously filed document information that is

[1] Draft Bankruptcy Rule 9037(h) uses “entity” because the Bankruptcy Code definition of “person” does not include a governmental unit. “Entity” does. But “entity” is a poor fit for a natural person. “Person” as used in the Civil Rules regularly includes all sorts of entities.

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5 protected under Rule 5.2(a)[2] must file a motion
6 under seal. The motion must:
7 (A) include[3] an identical[4] copy of the original
8 document showing the proposed redactions;
9 (B) include the docket number of the original
10 document; and
11 (C) be served on all parties[5] and any person whose
12 identifying information[6] is to be redacted.
13 (2) *Restricting Public Access to an Unredacted*
14 *Document.* The court must:
15 (A) [promptly][7] restrict [deny][8] public access to

---

[2] The Bankruptcy draft is: "information that is subject to privacy protection under" seems longer than necessary.

[3] The Bankruptcy Draft reads: "attach a copy." That works in their draft. This version consolidates the various requirements for the motion in a series of subparagraphs. It is clearer that way: "The motion must * * *." "Include" works with that formula. It may be argued that "attach" treats the copy of the paper as an exhibit, while "include" makes it part of the motion. It is a copy either way. Although it applies only to pleadings, Civil Rule 10(c) suggests the mood: "A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes."

[4] "[I]dentical" is carried forward for uniformity with draft Rule 9037(h). But the 9037(h) Committee Note introduces an ambiguity. It explicitly states that the "identical" copy is identical to the unredacted document "except for the redaction." The intended meaning is "identical to the unredacted document except for the redactions." It seems better to delete "identical," relying on the sense of "copy" to prevent surreptitious deletion of information beyond that protected — or at least arguably protected — by Rule 5.2(a).

[5] The Bankruptcy Rule includes a long list of bankruptcy characters that does not fit the Civil Rules context.

[6] The Bankruptcy Rule is: "any individual whose personal identifying information is to be redacted." For the Civil Rule, "person" seems to fit better with a financial-account number that should have been redacted, at least assuming that an entity other than an individual can have a protected financial-account number.

[7] The Bankruptcy Rule begins: "Upon receipt of the motion, the court shall promptly restrict public access." The direction to act promptly reflects a concern that the motion itself may point out the existence and public availability of the unredacted

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16 the motion and the unredacted document:
17 (i) pending its ruling on the motion, and
18 (ii) if the motion is granted, until the
19 court amends or vacates the order; and
20 (B) restore public access if the motion is
denied.[9]

---

document in the court file.

Rendered in Civil Rules language, this approach would substitute “must” for “shall,” and “receiving” for “receipt of.” But “filed” may be better than “receiving”: “When the motion is filed, the court must promptly restrict public access * * *.”

But during the Style Project the Civil Rules Committee was continually reminded that directions that a court must act promptly, or immediately, or whatever, begin to seem like the often conflicting docket priority directions of earlier and unlamented days. Perhaps it is enough to rely on the movant to request prompt action to deny access, omitting the bracketed “[promptly].”

[8] “Deny” likely is better than restrict. No public access.

[9] The Bankruptcy Rule includes a final sentence: “If the motion is denied, the restrictions shall be lifted, unless the court orders otherwise.” It may not be necessary to add the provision for denial of the motion. Under (A), the document is protected pending the ruling, and that’s all. The restriction dissolves unless the ruling grants the motion. But there may be some risk that the restriction will carry forward by sheer inertia — that seems to be the fate of a fair share of sealed documents.

This draft shows one way to include a direction to lift the restrictions if the motion is denied. Better drafting can be crafted if the provision seems useful--if the Bankruptcy Rules Committee wishes to retain it, the gain in uniformity is worthwhile.

Uniformity also may require that “unless the court orders otherwise” be added to the rule text. But it is difficult to believe that a court will deny the motion without further opportunity to seek redaction if the unredacted document in fact includes protected information.

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COMMITTEE NOTE

Subdivision (i) is new. It is adopted to reflect the parallel adoption of new Bankruptcy Rule 9037(h). Subdivision (i) differs from Rule 9037(h) in some details that reflect differences from the circumstances that may arise in bankruptcy filings.

Any person may file a motion to redact a filed document to delete information protected by Rule 5.2(a).

The motion should include a copy that is identical to the filed document except for the redactions. It should identify the location of the unredacted document in the docket.

A single motion may relate to one or more unredacted documents. But if the proposed redactions involve different documents it may be better to file separate motions, particularly if different types of protected information are involved.

The motion should request immediate action to deny public access to [the motion and][10] the unredacted document pending the court's ruling on the motion. Because the motion itself may call attention to the unredacted document, the court should act as promptly as possible to deny public access pending its ruling. The movant may assist the court by invoking whatever means are compatible with the court's electronic and paper filing procedures.

If the motion is granted, the redacted document should be placed on the docket, and public access to [the motion and] the unredacted document should remain restricted. If the court denies the motion, generally the restriction on public access to [the motion and] the document should be lifted.

This procedure does not affect any remedies that a person whose personal identifiers are exposed may have against the person that filed the unredacted document.

---

[10] Once the unredacted document in the file is protected, is there any need to deny access to the motion? On the other hand, will there be any circumstances in which there is a public interest in access to the motion, so long as all parties have access to the motion?

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TAB 5B

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B. 16-CV-A: Rule 30(b)(6)

This proposal is submitted by "members of the Council and Federal Practice Task Force of the ABA Section of Litigation, in our individual capacities." It asks the Committee to "undertake a review of the Rule and the case law developed under it with the goal of resolving conflicts among the courts, reducing litigation on its requirements, and improving practice under the Rule, particularly in light of the purposes and text of the 2015 amendments to the Federal Rules."

The specific issues identified by the proposal are summarized briefly below. They are framed in ways that call to mind concerns that were raised by two earlier proposals advanced by other bar groups that have been valuable sources of information and ideas over the years. A set of proposals made in 2013 by the New York City Bar was considered and put aside, in large part because extensive efforts were devoted in 2006 to a set of proposals made by a committee of the New York State Bar Association. The present proposals overlap the 2013 proposal, and suggest expanding it. They also identify a number of points that cause aggravation in practice.

The history of recent and relatively recent proposals cuts two ways. Rule 30(b)(6) was studied extensively ten years ago. The conclusion then was, roughly, that although real problems may arise in deposing an entity, it would be at best difficult to craft rules amendments that would do more good than harm. A similar conclusion was reached in addressing the much more modest 2013 proposal. The present proposals, moreover, largely go to issues of administration that should be worked out as a matter of cooperative common sense. Some persuasive reason must be found to justify entering once again into this thicket.

The other side of the coin is that Rule 30(b)(6) has provoked genuine concern in three different and valuable bar groups. It seems worthwhile to at least consider the possibility that some rules changes might improve the practice.

In relatively short compass, these are the issues identified by the ABA group:

<u>(1) "Most knowledgeable person"</u>: Rule 30(b)(6) does not require that an entity designate the most knowledgeable person to testify on its behalf. The recommendation is that the rule should not be amended to add any such requirement.

<u>(2) Objections</u>: "Lawyers may object to the number of topics, their relevance, whether they are set forth with reasonable particularity, to the place specified for the deposition, or for

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other reasons." The only formally recognized way to advance such objections is by motion for a protective order. The proposal is to add a minimum advance-notice requirement, perhaps 28 days, with a set period for making objections. An objection would suspend the deposition pending a meet-and-confer and, if need be, a motion to compel. This proposal expands the New York City Bar proposal, which was similar but limited to nonparty Rule 30(b)(6) entities. It also is similar to issues that were considered in the elaborate work that led to the 2013 Rule 45 amendments.

(3) Number of Topics: Cases are noted approving designation of 47 topics, and 55 topics, and 35 topics with a direction to develop new topics because some of the 35 were too broad. It is recognized that although more topics impose more work, increasing the number may advance the purposes served by the requirement that the topics be described with reasonable particularity. In the end this issue is tied to the number of witnesses issue.

(4) Number of Witnesses: When Rule 30 was amended to establish a presumptive limit on the number of depositions, and again when it was amended to establish a presumptive limit on the duration of a deposition, the Notes to the amended rules advised that a Rule 30(b)(6) deposition counts as one deposition, no matter how many persons are designated to testify, and that the time limit begins anew for each designated witness. The result can be a vast amount of deposing, at seeming odds with the purposes of the limits. The proposal is rather vague beyond that. It would be simpler, if anything were to be done, to establish a presumptive time budget for a 30(b)(6) deposition, to be allocated among all persons testifying.

(5) Questioning Beyond the Topics: This issue is more fundamental than the first four. "Most courts will allow a 30(b)(6) witness to be questioned beyond the confines of the topics listed in the notice." The suggestion begins by approving this practice "if it will avoid the need to recall the witness and the questioning can be completed in a single day." If the entity wishes to avoid being "bound" by testimony on topics beyond the notice, it should object or note the departure on the record, so that the questions may be framed in a way that does make the answers "binding."

(6) "Reasonable Particularity": There may be difficulties in application, but "[w]e could not articulate a better standard." Let it be.

(7) Contention Depositions: Cases are described that, remarkably, allow contention questions. The proposal is that "30(b)(6) depositions should be confined to factual matters and not permitted to extend to contentions, defenses, opinions or

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legal interpretations." Well, yes.

(8) Evidentiary Value — Contradicting Answers: This topic goes straight to the earlier references to "binding" the entity by the deposition testimony. The proposal recognizes that the deposition testimony should not be treated as a "judicial admission" that cannot be contradicted. Some cases treat it that way. But a majority of the group believe that contradiction — explanation or supplementation — should be permitted. At the same time, the majority believes that contradiction should not be an easy way to defeat summary judgment; an analogy is drawn to the "sham affidavit" doctrine. Others in the group believe that contradiction should be allowed only on meeting the Rule 36 standard for withdrawing a Rule 36 admission.

(9) Organizations Without Knowledge: This issue seems to reflect various confusions in some cases that seek to administer the requirement that the entity named as deponent name persons who "must testify about information known or reasonably available to the organization." Mistakes may be made in the specific circumstances of particular cases. Some of the suggestions could readily be taken up under the present rule. If the only person with knowledge in the organization refuses to impart the knowledge to anyone else and refuses to testify for the organization, for example, the organization can so state, leaving it to the other party to subpoena the named person as deponent. A more complicated proposal addresses the situation in which the organization does not have access to documents or persons with relevant knowledge at the time of the 30(b)(6) deposition, but later gains access. The Rule 26(e) duty to supplement does not apply to depositions, apart from expert trial witnesses. The suggestion here is that the organization should not be barred from presenting the later-acquired information.

(10) Nonparty Organizations: After reviewing the New York City Bar proposal, it is suggested that it would be better to adopt the greater protection recommended under (2), "Objections," above.

(11) Multiple Depositions of the Same Entity: The suggestion is that a second deposition of the same organization should be allowed without requiring court permission under Rule 30(a)(2)(A)(ii), so long as the notice truly identifies new topics. It would count against the numerical limit as a second deposition. This practice would advance the goal of achieving proportionality through staged discovery.

(12) Discovery of Preparation: The extent of preparing the witness is a proper subject of questioning into "the basis for the education of the witness and the facts that are sought to be

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conveyed." A questioner can properly show a document to the witness and ask whether it is familiar and when it was last reviewed. But requiring an extensive list of documents reviewed should be protected as work product, "particularly when the selection was made by counsel."

The only thing to be done now is to decide whether to take up Rule 30(b)(6) for serious study, either now or in the near-term or intermediate future.

Summaries of 13-CV-E, the 2013 proposal, and materials on the 2006 proposal, are set out below after the text of 16-CV-A itself.

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16-CV-A

January 26, 2016

Hon. John D. Bates, Senior Judge
Chair, Advisory Committee on Civil Rules
US District Court, District of Columbia
E. Barrett Prettyman U.S. Cthse.
333 Constitution Avenue N.W.
Washington, DC 20001

Re: ABA Section of Litigation Federal Practice Task Force Report on Rule 30(b)(6) Depositions of Organizations

Dear Judge Bates:

We, the undersigned members of the Council and Federal Practice Task Force of the ABA Section of Litigation, in our individual capacities only, urge the Advisory Committee on Civil Rules to undertake a review of Federal Rules and Procedure 30(b)(6) and 45 with respect to the depositions of organizations.

The Task Force undertook a review of the 45 year-old Rule 30(b)(6), case law interpreting it, and current practice under the Rule. It identified a number of issues upon which courts interpret the Rule differently, it identified other issues upon which the Note suggests solutions which may no longer be the best approach, and it further identified areas upon which practice under the Rule may be improved. The Task Force's Report is enclosed.

Accordingly, we respectfully request that the Advisory Committee on Civil Rules undertake a review of the Rule and the case law developed under it with the goals of resolving conflicts among the courts, reducing litigation on its requirements, and improving practice under the Rule, particularly in light of the purposes and text of the 2015 Amendments to the Federal Rules.

The ABA Section of Litigation, through its Liaison to the Advisory Committee and its Federal Practice Task Force, remains available to assist the Advisory Committee in any way the Advisory Committee believes it could be helpful.

We continue to appreciate the tireless efforts of the Advisory Committee to improve our rules and hope to continue to be a positive voice in its ongoing efforts to improve federal practice under the Rules, to improve our court system, and to improve access to justice for all.

Respectfully yours,

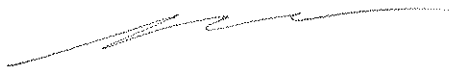

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Enclosure

ABA SECTION OF LITIGATION FEDERAL PRACTICE TASK FORCE REPORT ON RULE 30(b)(6) DEPOSITIONS OF ORGANIZATIONS

INTRODUCTION

The ABA Section of Litigation Federal Practice Task Force undertook a review of current practices with respect to deposing an organization under Rule 30(b)(6). Rule 30(b)(6) depositions have been the subject of frequent well-attended CLE programs at ABA Section of Litigation Section Annual Conferences,[1] demonstrating that not only has there been much interest in the subject, but that there is much confusion on the Rule's requirements. There is also much litigation over how to interpret those requirements. Moreover, our review has enabled us to conclude that there are many issues upon which courts disagree as to the Rule's existing requirements, there are other issues upon which the Advisory Committee Notes suggest a solution which practice has demonstrated may be no longer the best approach, and there are other areas upon which practice under the Rule may be improved. Accordingly, we recommend that the Advisory Committee on Civil Rules undertake a review of the Rule and the case law developed under it with the goal of resolving conflicts among the courts, reducing litigation on its requirements, and improving practice under the Rule, particularly in light of the purposes and text of the 2015 amendments to the Federal Rules.

BACKGROUND

Federal Rule of Civil Procedure 30(b)(6) allows a party to depose an organization through one or more witnesses designated by that organization. Adopted in 1970, it essentially

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[1] These programs were accompanied by excellent papers which provided some of the source material for this report. *See* Michael R. Gordon and Claudia De Palma, *Practice Tips and Developments in Handling 30(b)(6) Depositions*, Prepared for ABA Section of Litigation Section Annual Conference, April 2014; David Cannella, *Can I Get a Witness? 30(b)(6) overview, plus pitfalls, practical tips and consequences*, Prepared for ABA Section of Litigation Section Annual Conference, April 2015.

has remained unchanged for more than 45 years.[2] It was adopted to curb the practice of "bandying" where organizations would produce one deponent after another, each disclaiming knowledge of information that someone in the organization almost certainly knew. 1970 Advisory Committee Note.

The Rule in its current form provides as follows:

> (6) ***Notice or Subpoena Directed to an Organization.*** In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

This report will address areas of confusion under the Rule, areas where courts have divided on the Rule's requirements, and areas for suggested improvement.

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[2] Amendments in 1971 extended the practice to taking the deposition of a non-party organization by subpoena. The Note was amended in 1993 to address how to apply the 10 deposition numerical limit, suggesting a deposition under Rule 30(b)(6) should be treated as a single deposition, even though more than one person may be designated to testify. In 2000, with the introduction of the durational limit of one day of seven hours for any deposition, the Note was again amended to indicate "for the purposes of this durational limit, the deposition of each person designated under Rule 30(b)(6) should be considered a separate deposition." Finally, the style amendments were adopted in 2007, along with adding "or other entity" to the list of the types of organizations that may be named, to include limited liability companies and other forms of organization.

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SUBSTANTIVE PROVISIONS

A. Knowledge.

The Rule by its terms permits a party to notice the deposition of an organization setting forth "with reasonable particularity" the matters for examination. The named organization must then designate the one or more persons who will testify about information known or reasonably available to the organization.

Contrary to the understanding of many practitioners who seek the production of the most knowledgeable person on a given subject, the Rule does not require the organization to produce the "most knowledgeable" person on a given subject or even a person with any first-hand knowledge. *QBE Ins. Corp. v. Jorda Enters.*, 277 F.R.D. 676, 688 (S.D. Fla. 2012); *Crawford v. Franklin Credit Mgmt. Corp.*, 261 F.R.D. 34, 38 (S.D.N.Y. 2009); *Rodriguez v. Pataki*, 293 F. Supp. 2d 305, 311 (S.D.N.Y. 2003). The witness must be prepared to testify about the matters described in the notice known to the organization or reasonably available to it and must consent to testify on behalf of the organization.

The Task Force considered whether there should be some preference expressed, if not in the Rule, but in the Note, for the production of a witness with first-hand knowledge if such person is available. (The Report separately addresses below the situation where there exists no one at the organization with any knowledge or reasonably available to it on the designated subjects.) Such a preference might mitigate the problem presented in *Sciarretta v. Lincoln Nat'l Life Ins.*, 778 F.3d 1205 (11th Cir. 2015), where an outside expert was spoon-fed one side of the story and could not answer any sensitive questions that the organization wished to avoid answering. We concluded that despite such potential problems, which in that case were appropriately addressed with sanctions, maximum flexibility should remain with the entity's

choice of witnesses since it will be bound by that testimony. It may choose to designate a witness who has knowledge on 5 of 6 topics and educate that witness on the 6th so that the deposition can be efficiently concluded. It may wish to designate a mid-level officer who is educated on the topics for the deposition to protect privileged communications that could be at risk by producing a more senior officer with more direct first-hand knowledge, who also has access to privileged communications. It may also choose to produce a person who will make a better witness. Since the organization will be bound by the witness's testimony, it should retain maximum flexibility as to who it may choose to designate.

B. <u>Objections</u>.

Presently, the Rule contains no procedure to object to a Rule 30(b)(6) deposition notice. There is no procedure to object to the scope or breadth of the topics (which are required to be described with "reasonable particularity"), to the number of topics, or to whether a witness should be produced at all. The cases make clear that the only procedure recognized by the courts to object for any of the above reasons is to move for a protective order. *See, e.g.*, *Lykins v. Certainteed Corp.*, 555 Fed. Appx. 791, 796-98 (10th Cir. 2014); *Pioche Mines Consol. Inc. v. Dolman*, 333 F.2d 257, 269 (9th Cir. 1964); *Bearch Mart, Inc. v. L&L Wings, Inc.*, 302 F.R.D. 396, 406 (E.D.N.C. 2014); *International Brotherhood of Teamsters v. Frontier Airlines, Inc.*, No. 11-cv-02007-MSK-KLM, 2013 U.S. Dist. LEXIS 22986, at *19 (D. Colo. Feb. 19, 2013); *Fernandez v. Penske Truck Leasing Co.*, No. 2:12-cv-00295-JCM-GWF, 2013 U.S. Dist. LEXIS 14786, at *6 (D. Nev. Feb. 1, 2013). *EEOC v. Thurston Motor Lines, Inc.*, 124 F.R.D. 110, 114 (M.D.N.C. 1989). Some courts even require a protective order to be obtained before the date scheduled for the deposition to excuse appearing, *Pioche Mines Consol. Inc.*, 333 F.2d at 269, unless the district court has a local rule staying the deposition until the motion can be decided.

Id., See, e.g., *Peterson v. DaimlerChrysler Corp.*, No. 06-cv-0108, 2007 WL 2391151, at *5 (D. Utah Aug. 17, 2007). The Committee on Federal Courts of the Association of the Bar of the City of New York suggested a remedy of a minimum notice period at least for 30(b)(6) depositions of non-parties, and an automatic stay upon the filing of a motion for a protective order. Letter from Marilyn C. Kunstler, Chair, Comm. On Fed. Courts Association of the Bar the City of New York, Sec'y, Comm. on Rules of Practice and Procedure (Apr. 3, 2013), *available at* http://www2.nycbar.org/pdf/report/uploads/20072455-LetteronProposedAmendmenttoRule45reSubpoenasforRule30b6Depos.pdf. We believe this proposed remedy does not go far enough.

While the burden on non-parties certainly needs to be appropriately addressed, we believe that an objection procedure, similar to that envisioned by Rule 45 with respect to documents, is appropriate for all Rule 30(b)(6) depositions. Lawyers may object to the number of topics, their relevance, whether they are set forth with reasonable particularity, to the place specified for the deposition, or for other reasons. After a meet and confer, the burden should be on the person seeking to take the deposition to justify the appropriateness of the notice and the topics by moving to compel.

In practice, our experience informs us that practitioners do in fact object to topics, their breadth and their particularity, and compromises are in fact sometimes reached. *See International Brotherhood of Teamsters v. Frontier Airlines, Inc.*, 2013 U.S. Dist. LEXIS at *20. But there is no uniformity in this approach, and neither the Rule nor the case law recognize such a procedure. *But see Fernandez*, 2013 U.S. Dist. LEXIS 14786, at *7 (excusing nonappearance on the ground that notice was not proper and an objection letter was sent in advance of return date).

A rule setting forth an objection procedure may wish to set a minimum time for noticing a 30(b)(6) deposition (28 days for example) with a required period for objections (14 days before the return date), of course subject to alteration by stipulation or court order. The procedure may also incorporate a requirement for the responding party to indicate who will be testifying on its behalf and on what topics, and how many witnesses it will designate.[3] The Rule could also set forth a meet and confer requirement and an award of costs and attorneys' fees if motion practice is then required.

C. Number of Topics.

Another area that is not addressed in the Rule and that has generated motion practice is in the number of topics specified for a Rule 30(b)(6) deposition. In *QBE Ins. Corp.*, a seminal case on Rule 30(b)(6) requirements, the court found nothing improper in the designation of 47 topics. 277 F.R.D. at 699. In *Heartland Surgical Specialty Hosp. v. Midwest Div., Inc.*, No. 05-2164-MLB-DWB, 2007 U.S. Dist. LEXIS 26552, at *6 (D. Kan. Apr. 9, 2007), the court upheld 55 separate topics. *Banks v. Office of the Senate Sergeant-At-Arms* approved a notice with 35 topics, but directed the parties to develop new topics because some were intrinsically overbroad. 222 F.R.D. 7, 18 (D.D.C. 2004). In *Collins v. Experian Info. Solutions Inc.*, No. 2:11-cv-938-AKK (N.D. Ala. May 9, 2012), the court addressed a motion for a protective order challenging 38 of 71 topics. The court reviewed each of the categories and sustained objections to 31.

A number of our Task Force members consider specifying a voluminous list of topics to be an abuse of the Rule. The organization has a duty to prepare a witness on each topic and if

[3] The New York Commercial Division recently revised its Rule 11-d and 11-f, effective December 1, 2015, to more closely model Fed. R. Civ. P. 30(b)(6). It requires the responding party to designate one or more persons not later than 10 days before the deposition. If subjects are set forth in the notice and a particular person is requested to testify on behalf of an entity on these subjects, the responding party may also designate a different witness if done so 10 days before the scheduled deposition.

the presumption is that a 30(b)(6) notice counts as one deposition, presumably to be completed in a 7-hour day (if a single witness is presented), it may seem hardly possible to address numerous, far-reaching and varied topics in the suggested time period. Some feel that a reasonable number of topics, set forth with "reasonable particularity" should not exceed 10 without court approval.

Others feel that setting forth topics with "reasonable particularity" requires a certain amount of precision and the greater the number of topics, the more directed the witness preparation can be. Another way to address the problem is to indicate that if more than 10 topics are designated, for each 10 topics, the notice should count as an additional deposition toward the presumptive limit of 10 depositions.

A number of cases focus on the duty to prepare witnesses for a 30(b)(6) deposition and the consequences that occur when the witness is not adequately prepared or responds "I don't know."[4] One thing clear from these cases is that there is a considerable duty to prepare witnesses that goes beyond that required for an ordinary fact witness. During these cost-sensitive times when many lawyers are required to strictly budget costs of each deposition, any litigation budget can be destroyed by the efforts required to properly prepare witnesses for 30(b)(6) depositions, particularly when there is a great number of topics specified. With the goal of the 2015 Rule revisions to reduce costs of discovery, some consideration should be given to the situation where an abusive number of topics is presented. A proposed solution in the next section may go a long way to control potential abuses.

D. <u>Number of Witnesses</u>.

The Advisory Committee Note, amended at two different times, suggests solutions for how the Rule 30(b)(6) notice counts toward the presumptive limit of 10 depositions and the 7-

[4] Later in this report we address the extent to which an "I don't know" answer can be later contradicted.

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hour single-day presumptive time limit. The Note adopted in 1993 suggests the notice counts as a single deposition no matter how many witnesses are needed, and the Note adopted in 2000 suggests that the questioner can have up to 7 hours for each witness designated. *Sabre v. First Dominion Capital, L.L.C.*, No. 01 CIV 2145 BSJ HBP, 2001 U.S. Dist. LEXIS 20637 (S.D.N.Y. Dec. 10, 2001) at *1. There appears something inconsistent and inadequate with those solutions.

The Task Force believes that solutions suggested by the Advisory Committee, at two different times in reaction to two different rule changes, may no longer be the fairest result. If a notice covers four topics, which can easily be covered in one 7-hour day, and three topics can be addressed by one witness and the fourth topic by a second, why does it make a difference how many witnesses are needed to cover the topics? Without exceptional circumstances, logic would dictate that the depositions of both witnesses be covered in a single day. Similarly, if multiple witnesses are needed on a multiplicity of topics, if each witness will be questioned for a seven-hour day, there seems to be no reason not to count each 7-hour deposition as a separate deposition. To the extent questioning of separate witnesses will be allowed to cover more than one day, each witness should be counted as a separate deposition.

Thus, we recommend that time be the governing factor in determining how many depositions are taken. Thus, if the topics can be addressed by one witness, a single deposition in a seven-hour day would be the norm. The same should be true if a second witness is needed for a minor topic that can also be addressed in a single day.[5] If multiple witnesses are needed for substantial areas, unless the parties agree otherwise, then generally there should be seven hours

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[5] The New York Commercial Rule 11-d, effective December 1, 2015, counts multiple witnesses as a single deposition, but requires the deposition to be completed in a single 7-hour day, unless the parties agree to extend it, or the Court grants an extension, which shall be freely granted.

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for each, with each seven-hour day counted as a separate deposition. Similarly, if a single witness is produced but so many topics are noticed that 7 hours does not suffice, and the parties agree to continue beyond the day, the continuation should count as an additional deposition. We would expect the parties to discuss and work out these issues after the witnesses are designated under the objection procedure followed by the meet and confer that we propose.

E. <u>Questioning Beyond the Topics</u>.

A related question that arises is whether a 30(b)(6) witness will be allowed to be questioned beyond the topics listed? If so, what is the binding impact of such testimony, and how will those questions count toward the seven-hour limit, and how many depositions are expended toward the 10 deposition limit?

Most courts will allow a 30(b)(6) witness to be questioned beyond the confines of the topics listed in the notice. *Am. Gen. Life Ins. Co. v. Billard*, No. C10-1012, 2010 U.S. Dist. LEXIS 114961, at *12 (N.D. Iowa Oct. 28, 2010); *Crawford*, 261 F.R.D. at 38; *Philbrick v. eNom Inc.*, 593 F. Supp. 2d 352, 363 (D.N.H. 2009); *Falchenberg v. NY State Dep't of Educ.*, 642 F. Supp. 2d 156, 164 (S.D.N.Y. 2008), *aff'd*, 338 Fed. Appx. 11 (2d Cir. 2009); *FCC v. Mizuho Medy Co.*, 257 F.R.D. 679, 682 (S.D. Cal. 2009); *Eng-Hatcher v. Sprint Nextel Corp.*, No. 07 Civ. 7350 (BSJ)(KNF), 2008 U.S. Dist. LEXIS 67052, at *14, *16 (S.D.N.Y. Aug. 28, 2008); *UniRAM Tech., Inc. v. Monolithic Sys. Tech., Inc.*, No. C 04-1268 VRW (MEJ), 2007 U.S. Dist. LEXIS 24869 (N.D. Cal. Mar. 23, 2007); *Bracco Diagnostics Inc. v. Amersham Health Inc.*, No. 03-6025 (SRC), 2005 U.S. Dist. LEXIS 26854, at *5-7 (D.N.J. 2005); *Cabot Corp. v. Yamulla Enters.*, 194 F.R.D. 499, 500 (M.D. Pa. 2000); *Detoy v. City & County of S.F.*, 196 F.R.D. 362, 366-67 (N.D. Cal. 2000); *Overseas Private Inv. Corp. v. Mandelbaum*, 185 F.R.D. 67, 68 (D.D.C. 1999); *Edison Corp. v. Secaucus Town*, 17 N.J. Tax 178, 182 (Tax Ct.

1998); *King v. Pratt & Whitney*, 161 F.R.D. 475, 476 (S.D. Fla. 1995). Several courts have said no. *Bilek v. Am. Home Mortg. Servicing*, No. 07 C 4147, 2010 U.S. Dist. LEXIS 80041, at *6 (N.D. Ill. Aug. 9, 2010); *Paparelli v. Prudential Ins. Co.*, 108 F.R.D. 727, 729-30 (D. Mass. 1985). Those that allow questioning beyond the notice appear to treat the answers not as binding on the organization, but as ordinary 30(b)(1) answers of any fact witness. *Falchenberg*, 642 F. Supp. 2d at 164; *King*, 161 F.R.D. at 476.

To the extent that an organizational witness is questioned beyond the list of topics, to what extent should an objection or notation on the record[6] that the questioning strayed beyond the specified topics be required so that the questioner can withdraw or revise the question if so desired, and if not, so that all parties will be aware that the answer will not bind the organization? In addition, how should those questions be counted toward the seven-hour and single deposition guideposts?

Our Task Force believes that a practical approach should be followed. Questioning should be permitted beyond the scope of the notice if it will avoid the need to recall the witness and the questioning can be completed in a single day. If there is a desire to take the witness's deposition on a different set of topics for which the answers are not binding on the organization, the witness should be able to be recalled as a fact witness with a separate notice but should be questioned on different subjects. The 30(b)(6) organizational witness versus 30(b)(1) fact witness distinction should not be used as an excuse to question a single witness on the organization topics for 14 hours without court permission.

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[6] Some suggest that noting on the record that the questioning strayed beyond the topics is not in fact an objection, for which the grounds are limited, because the person defending the deposition is not attempting to preclude the testimony but simply noting that the evidential impact is different.

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As to the need for objections or statement on the record when questions stray beyond the subjects listed in the notice, better practice seems to require that such objections or noting be made. *Whiting v. Hogan*, No. 12-CV-08039-PHX-GMS, 2013 U.S. Dist. LEXIS 35381, at *37 (D. Ariz. Mar. 14, 2013) (stating that deponent's counsel "may note on the record that answers to questions beyond the scope of the Rule 30(b)(6) designation are not intended as the answers of the designating party and do not bind the designating party"); *Detoy*, 196 F.R.D. at 367 ("If Defendants have objections to . . . questions outside the scope of the 30(b)(6) designation . . . counsel shall state the objection on the record and the witness shall answer the question, to the best of the witness's ability."). An objection or noting will enable the questioner to restate the question to fall within the scope of topics so that the transcript results in "binding" testimony, the parties may be able to resolve disputes as to whether the questions are within the scope, and all parties may be appropriately guided by the impact of the answers to such questions. But the real question is must an objection be made when the deposition rule only requires objections to the form of the question that can be corrected, not to the substance of the questions? Practitioners on the Task Force have different views on this question.

F. <u>Reasonable Particularity</u>.

We have found that there is much litigation over the detail needed in the required designation of topics. The Rule requires topics to be described with "reasonable particularity." Some courts have described the standard as "painstaking specificity." *Burke v. Glanz*, No. 11-CV-720-JED-PJC, 2013 U.S. Dist. LEXIS 120818, at *4 (N.D. Okla. Aug. 26, 2013); *Health Grades Inc. v. MDX Med. Inc.*, No. 11-cv-00520-PAB-BNB, 2013 U.S. Dist. LEXIS 59271, at *8-9 (D. Colo. Apr. 25, 2013); *Whiting*, 2013 U.S. Dist. LEXIS 35381, at *34; *Kelly v. Provident Life & Accident Ins. Co.*, No. 1:09-cv-00070-jgm, 2010 U.S. Dist. LEXIS 134623, at *5 (D. Vt.

Dec. 20, 2010); *McBride v. Medicalodges Inc.*, 250 F.R.D. 581, 584 (D. Kan. 2008); *EEOC v. Thorman & Wright Corp.*, 243 F.R.D. 421, 426 (D. Kan. 2007); *Sprint Commc'ns v. Theglobe.com Inc.*, 236 F.R.D. 524, 528 (D. Kan. 2006); *Prokosch v. Catalina Lighting Inc.*, 193 F.R.D. 633, 638 (D. Minn. 2000). Other courts have clarified that references to "painstaking specificity" do not alter or heighten the standard expressed in the rule – reasonable particularity. *Espy v. Information Techs, Inc.*, No. 08-2211-EFM-DWB, 2010 U.S. Dist. LEXIS 36594, at *4 (D. Kan. Apr. 13, 2010).

Courts have warned that an overly broad Rule 30(b)(6) notice "subjects the noticed party to an impossible task," because where it is not possible to "identify the outer limits of the areas of inquiry noticed, compliant designation is not feasible." *Reed v. Bennett*, 193 F.R.D. 689, 692 (D. Kan. 2000). Thus, "[l]isting several categories and stating that the inquiry may extend beyond the enumerated topics defeats the purpose of having any topics at all." *Tri-State Hosp. Supply Corp. v. United States*, 226 F.R.D. 118, 125 (D.D.C. 2005).[7]

We have considered whether a different standard of specificity should be set forth. The standard should result in topics that contain enough detail to guide the organization as the subjects for which witnesses must be prepared and to avoid being blindsided. We could not articulate a better standard and believe the "reasonable particularity" standard appears sufficient for the task.

G. <u>Contention Depositions</u>.

Can Rule 30(b)(6) depositions be used to obtain opinions and subjective beliefs of an organization or as contention depositions? Courts are split. *Compare Radian Asset Assurance*

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[7] Courts have rejected the use of catchall phrases such as "including but not limited", or "any other matters relevant to this case." *Alexander v. FBI*, 188 F.R.D. 111, 120-21 (D.D.C. 1998).

Inc. v. Coll. of the Christian Bros. of N.M., 273 F.R.D. 689, 691-92 (D.N.M. 2011) (contention depositions proper), *Great Am Ins. Co. of N.Y. v. Vegas Constr. Co.*, 251 F.R.D. 534, 539 (D. Nev. 2008) (deposition may explore corporation's position, beliefs and opinions), *and United States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996) (stating that Rule 30(b)(6) permits questioning on not only facts but subjective beliefs and opinions of the corporation), *with SEC v. Morelli*, 143 F.R.D. 42, 47 (S.D.N.Y. 1992) (rejecting 30(b)(6) contention topics on the ground that they are invasive of attorney work product doctrine). Courts have also found improper topics focusing on discovery responses, *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1329 (8th Cir. 1986); *Smithkline Beecham Corp. v. Apotex Corp.*, No. 98 C 3952, 2000 U.S. Dist. LEXIS 667, at *27-32 (N.D. Ill. Jan. 21, 2000); *McGarrah v. Bayfront Med. Ctr. Inc.*, 889 S. 2d 923, 926 (Fla. Dist. Ct. App. 2004), factual basis of defenses, *Krasney v. Nationwide Mut. Ins. Co.*, No. 3:06 CV 1164 (JBA), 2007 U.S. Dist. LEXIS 90876, at *9-10 (D. Conn. Dec. 11, 2007); *In re Indep. Serv. Orgs. Antitrust Litig.*, 168 F.R.D. 651, 654 (D. Kan. 1996) (stating that the company has a right to get the factual basis but not through a 30(b)(6) deposition); *Northup v. Acken*, 865 So. 2d 1267, 1272 (Fla. 2004), and information obtainable from other sources, such as a request for production of documents. *Smithkline Beecham Corp.*, 2000 U.S. Dist. LEXIS 6687, at *27-32 (denying a 30(b)(6) deposition on certain topics because the information could be obtained through less intrusive means).

The Task Force believes 30(b)(6) depositions should be confined to factual matters and not permitted to extend to contentions, defenses, opinions or legal interpretations. The purpose of such depositions is to establish facts available to the organization. We believe the purpose is undermined if witnesses are required to address legal theories, contentions, etc. Such questions have a great potential to invade the work product doctrine and constitute an abuse of the

purposes for which the rule was established. To the extent discovery of a party's contentions should be permitted at all, there are other discovery devices for this purpose.

H. Evidentiary Value – Contradicting Answers.

May an answer at a Rule 30(b)(6) deposition be contradicted by the organization at trial or on summary judgment, to what extent, and under what circumstances? Will such answers be treated like judicial admissions or like ordinary deposition testimony that may be theoretically (but not practically) subject to contradiction on summary judgment or trial?

The purpose of a Rule 30(b)(6) deposition "is to create testimony that will bind the corporation." *Sanders v. Circle & Corp.*, 137 F.R.D. 292, 294 (D. Ariz. 1991) (citing *GTE Products Corp. v. Gee*, 115 F.R.D. 67, 68 (D. Mass 1987)); *Resolution Trust Corp. v. Farmer*, 1994 U.S. Dist. LEXIS 8755, *5 (E.D. Pa. June 23, 1994). *See also Starlight Int'l, Inc. v. Herlihy*, 186 F.R.D. 626, 638 (D. Kan. 1999); *United States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C 1996). Although the testimony is binding, the majority view is that such testimony does not constitute a judicial admission – which is not only binding, but cannot be contradicted by the party at trial or on appeal of the same case. *Industrial Hard Chrome, Ltd. V. Hetran, Inc.*, 92 F. Supp. 2d 786, 791 (N.D. Ill. 2000). Instead such testimony "is evidence which, like any other deposition testimony, can be contradicted and used for impeachment purposes." *Id. See also State Farm. Mut. Auto. Ins. Co. v. New Horizon, Inc.*, No. 03-6516, 2008 U.S. Dist. LEXIS 37571 (E.D. Pa. May 7, 2008); *Weiss v. Union Cent. Life Ins. Co.*, 28 Fed. Appx. 87, 89 (2d Cir. N.Y. 2002); *A.I. Credit Corp. v. Legion Ins. Co.*, 265 F.3d 630, 637 (7th Cir. 2001); *R&B Appliance Parts, Inc. v. Amana Co.*, 258 F.3d 783, 786 (8th Cir. 2001); *Diamond Triumph Auto Glass, Inc. v. Safelite Glass Corp.*, 441 F. Supp. 2d 695, 723 n.17 (M.D. Pa. 2006); *A&E Prods. Group, L.P. v. Mainetti USA, Inc.*, No. 01 CV 10820, 2004 U.S. Dist. LEXIS 2904, at *19

(S.D.N.Y. Feb. 25, 2004); *Med. Serr. Grap., Inc. v. Lesso*, Inc., 45 F. Supp. 2d 1237, 1254 (D. Kan. 1999); *W.R. Grace & Co. v. Viscase Corp.*, No-90-5383, 1991 U.S. Dist. LEXIS 14651, at *4-*5 (N.D. Ill. Oct. 15, 1991). Some cases however do not permit contradiction. *See e.g.*, *Hyde v. Stanley Tools*, 107 F. Supp. 2d 992, 993 (E.D. La. 2000); *Rainey v. American Forest & Paper Ass'n.*, 26 F. Supp. 2d 82, 94-5 (D.D.C. 1998) (testimony is binding and no contraction may be subsequently introduced).[8]

Some on the Task Force believe that the majority rule is the appropriate one, and that Rule 30(b)(6) testimony should be treated like any other deposition testimony. While it is binding as an admission, it may be later explained or supplemented. If the purpose is to obtain the testimony of the organization, once obtained, it should be treated as an admission by the organization – the witness, like the testimony of any other witness. While failure to adequately

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[8] A related issue upon which courts are divided, but is not limited to Rule 30(b)(6) depositions, is the extent to which a witness can change a deposition answer substantively under Rule 30(e) giving a witness 30 days to review the transcript. Rule 30(e) also provides "if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them." This rule has been read somewhat narrowly by certain courts, which had held that Rule 30(e) does not:

> allow one to alter what was said under oath. If that were the case, one could merely answer the questions with no thought at all then return home and plan artful responses. Depositions differ from interrogatories in that regard. A deposition is not a take home examination.

Greenway v. Int'l Paper Co., 144 F.R.D. 322, 325 (W.D. La. 1992). Other courts, however, have construed Rule 30(e) as permitting substantive changes as long as the deponent timely provides an explanation for each change. *See, e.g., Innovative Mktg. & Tech. L.L.C. v. Norm Thompson Outfitters, Inc.*, 171 F.R.D. 203, 205 (W.D. Tex. 1997); *Podell v. Citicorp Diners Club, Inc.*, 914 F. Supp. 1025, 1034 (S.D.N.Y. 1996) (after plaintiff changed deposition testimony on material matter, ruling that Rule 30(e) allows deponent to make changes in deposition even if changes contradict the original answers and reasons for changes unconvincing). The Seventh Circuit has taken a middle-ground approach, allowing substantive changes provided that they do not contradict the original testimony. *Thorn v. Sundstrand Aerospace Corp.*, 207 F.3d 383, 389 (7th Cir. 2000).

prepare will not be a good explanation, there seems to be no good reason to give such testimony judicial admission status. But similar to fact witnesses trying to contradict deposition admissions in opposing summary judgment, we would expect courts to be very reluctant to permit subsequent explanations to defeat summary judgment sought based upon such admissions.

Others believe a higher standard should be required to contradict admissions made during a Rule 30(b)(6) deposition, and all envision participation by the court in its supervisory role so that all parties will be aware of how such efforts will be treated at trial. Some feel the higher standard should be akin to asking the court for permission to withdraw an admission made under Rule 36. These members believe that even if the court grants relief, the original testimony would of course be admissible along with the new testimony and the explanation of why it has changed.

I. Organizations Without Knowledge

Courts have struggled with the right approach to the situation where the organization has no present employee with knowledge of designated subjects or to which the information is not reasonably unavailable to it. As an initial matter, the fact that employees with the knowledge have left the organization will not relieve the organization of the obligation to prepare. Organizations are required to review prior deposition testimony, documents, deposition exhibits and interview former employees so it can be in a position to produce an educated witness to speak for the organization. *Harris v. New Jersey*, 259 F.R.D. 89, 92 (D.N.J. 2007); *Calzaturficio S.C.A.R.P.A., s.p.a. v. Fabiano Shoe Co.*, 201 F.R.D. 33, 38-39 (D. Mass. 2001); *Bank of New York v. Meridien Biao Bank Tanz.*, 171 F.R.D. 135, 151 (S.D.N.Y 1997); *United States v. Taylor*, 166 F.R.D. 356, 361-62 (M.D.N.C. 1996).

But the Rule contains a limitation. It requires the designated persons to testify about information "known or reasonably available to the organization." *Dravo Corp. v. Liberty Mut. Inc. Co.*, 164 F.R.D. 70, 76 (D. Neb. 1995).

Courts have struggled with situations when the information may not be reasonably available to the organization. The organization may have filed for bankruptcy protection and a trustee receives a notice when the company has no employees. Prior employees may not be willing to talk with the trustee or current counsel for the organization. There may be criminal investigations pending and all knowledgeable witnesses may have taken the Fifth Amendment. Or as in the case of *QBE Insurance Corp.*, an insurer subrogee who paid out a claim and was pursuing a recovery for what it paid, found itself in a position where its insured refused to cooperate with it and provide the needed information. Some courts have found that an organization cannot be subject to Rule 37 sanctions if it does not know the answer on a subject after diligent inquiry. *Black Horse Lane Assoc., LP v. Dow Chemical Corp.*, 228 F.3d 275 (3d Cir. 2000); *Resohlon Trust Corp. v. S. Union Co.*, 985 F.2d 196, 197-8 (5th Cir. 1993). Others have applied sanctions and addressed the issue as a failure to properly prepare, or when the information was not available applied "consequences," such as barring the presentation of any information at trial on the issue, not as a sanction but as a natural result of a failure to make the information available in discovery. *QBE Ins. Corp.*, 277 F.R.D at 681, 698-9.

The Task Force believes that the Rule should be amended to set forth a procedure to address the situation where a witness is truly not available to the organization on a given subject. Along with a procedure for setting forth objections, the Rule could provide an opportunity to state in writing in response to the Notice that there is no witness with knowledge of the information reasonably available to it, setting forth the circumstances, and stating why another

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witness cannot be sufficiently prepared. A requirement of the present Rule is that the witness designated by the organization must also "consent to testimony on its behalf." If there is not a knowledgeable person willing to testify on its behalf (usually a former employee) and not a current employee who can be educated, there should be in place a mechanism for the responding party to so state. As an alternative, the response could designate what documents or persons possess the relevant information and where the persons or documents may be found, if not reasonably available to the organization. By proceeding in this manner, a court may be able to address the situation in advance of a futile deposition leading to allegations of a failure to prepare, requests for sanctions, etc.

Consequences should appropriately flow from such an election but they should not be punitive. If a party identifies a knowledgeable witness who will not cooperate with it, or identifies a source of documents not within its custody or control, the organization should not be barred from subsequently presenting that witness testimony, or such documents, obtained through subsequent subpoena or other discovery. The problem however is a thorny one crying out for a mechanism to resolve it beyond case by case litigation.

J. Rule 30(b)(6) Depositions of Non-Parties by Subpoena under Rule 45

Rule 45 addressing subpoenas to non-parties recognizes that undue burden and expense should not be imposed on non-parties. The Rule, recently amended, continues to recognize the distinction between parties and non-parties. A witness may only be compelled to give testimony within the District in which the witness is served or within the 100 mile territorial limitation. Rule 45 contains a procedure for a non-party to object to the production of documents, placing the burden on the party seeking the documents to undergo the expense of a motion, if an accommodation cannot be reached. Non-parties, as stated, are protected against "undue burden."

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But the Rule does not similarly protect Rule 30(b)(6) depositions of the organization sought through subpoena.

Rule 30(b)(6) itself tersely addresses the organizational deposition of a non-party: "A subpoena must advise a nonparty organization of its duty to make this designation." While Rule 45 seeks to protect non-parties from "undue burden or expense" and a non-party may object to subpoenas to produce documents, the Rule contains no ability for the subpoenaed organization to object to topics or to the production of a witness at all.

What if the only knowledgeable witness is a person beyond the 100 mile limit? To what extent may a party circumvent the 100 mile limit by asking for the Rule 30(b)(6) deposition of a non-party organization by subpoena with knowledge that the only witness with knowledge is beyond the subpoena power? Must the organization interview that witness and prepare a witness within the territorial limit with the knowledge of the witness beyond the reach of a subpoena? At least one court, appropriately in our view, has said no. In *Wultz v. Bank of China*, 293 F.R.D. 677, 680 (S.D.N.Y. 2013), the court found that the subpoenaed party need not produce a witness located beyond the 100-mile territorial boundary and by extension, need not educate a witness on topics upon which only employees located outside that limit have knowledge.

The same court also found that there is not the same burden to prepare witnesses when the organization sought to be deposed is a non-party. The court found the Rule 45 requirement to protect non-parties from "undue burden" lessens the burden of preparation imposed upon parties. *Id.* at 680.

The Committee on Federal Courts of the Association of the Bar of the City of New York proposed in 2013 that greater protections for Rule 30(b)(6) should be a given to non-parties. It recommended a minimum notice period (21 days), an explanation of the need for the testimony,

and an automatic stay of such deposition if a motion for a protective order were filed by the non-party.

The Task Force believes these protections are warranted but not sufficient. We have already recommended a procedure for objections to apply to all requests for Rule 30(b)(6) depositions. At a minimum, such a procedure should apply to non-parties subjected to Rule 30(b)(6) organizational depositions by subpoena. Moreover, the burden of asking for an order compelling the deposition should be on the party seeking the deposition, rather than on the non-party to seek a protective order, in the same manner as Rule 45 requires with respect to the production of documents. In addition, protection for the 100-mile territorial limit should apply and be recognized in a rule tailored for Rule 30(b)(6) depositions through subpoena. Moreover, we agree that the burden to prepare witnesses should be consistent with the limitation to protect third parties from undue burden and expense. Thus, we recommend the Rule 45 also be amended to address the separate problems applicable to Rule 30(b)(6) deposition notices to non-parties through a Rule 45 subpoena.[9]

K. Multiple Organization Depositions

Since leave of court is required to take a second deposition of the same witness, is leave of court required if the examiner seeks to serve a second Rule 30(b)(6) notice on an organization

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[9] Members of the ABA Section of Litigation Council and its Federal Practice Task Force previously recommended that the amendments to Rule 45 include a recognition of a duty to inform adverse parties when documents are received pursuant to subpoena, in addition to the requirement to serve a copy of a subpoena for documents on all parties. Our experience indicated that the explicit requirement would avoid problems litigators experience when documents are produced weeks or months after a subpoena return date, a prevalent occurrence. For some inexplicable reason the Advisory Committee declined to incorporate that requirement (presumably on the assumption that such documents are routinely made available). That lack of such a requirement in the Rule continues to cause problems. *See* Petrie v. Elec. Game Card, Inc., 761 F.3d 959, 967 n. 9 (9th Cir. 2014). If Rule 45 is amended to address Rule 30(b)(6) depositions, and even if it is not, we strongly recommend that this deficiency be corrected.

on different topics? Again courts have not answered this question in the same way. First, as an initial matter, to proceed a second time on the same topics should certainly require leave of court. Some cases require leave of court even if the topics sought to be inquired into are different. *See, e.g., Ameristar Jet Charter Inc. v. Signal Composites Inc.*, 244 F.3d 189 (1st Cir. 2001); *Terry v. Unified Gov't of Wyandotte Co.*, 2011 U.S. Dist. LEXIS 20581, at *11 (D. Kan. 2011); *State Farm Mutual Auto. Ins. Co. v. New Horizon Inc.*, 254 F.R.D. 227 (E.D. Pa. 2008). At least one court says leave of court in that situation is not required. *See Quality Aero Tech. v. Telemetrie Elektronik*, 212 F.R.D. 313, 319 (E.D.N.C. 2002); *See* 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE §2104, at 14 (3d ed. 2010). *Wright and Miller* suggests a second deposition should be permitted (without leave of court) if the topics are different but it certainly would count as a second deposition. It also suggests a different result in the case of a subpoena upon a non-party, who should not be unduly burdened. *See* 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE §2104 (3d ed. 2010).

The Task Force believes court permission should not be required for a second deposition of the organization on different topics (if they are truly different topics and not efforts to redepose the witness on some areas previously covered), subject to the organization's right to move for a protective order to prevent abuse. The new discovery rules aimed at controlling costs and focusing on staged or iterative discovery make it appropriate in certain cases to limit topics to certain core issues, to be followed at a later time with more expansive questioning on other topics, if necessary. In these circumstances, each deposition would count as a separate deposition.

L. Discovery of Preparation

A frequent question that arises at all depositions is: "what did you do to prepare for this deposition?" It inevitably invokes a work product objection to the extent it seeks to explore conversations with counsel and even when it seeks to explore what documents were reviewed, particularly when the review was directed by counsel. Courts are split. *Compare Sporck v. Peil*, 759 F.2d 312 (3d Cir. 1985) (documents reviewed invokes work product when counsel selected documents for review by client); *with N. Natural Gas Co. v. Approximately 9117.53 Acres*, 289 F.R.D. 644 (D. Kan. 2013) (selection process not protected).

Since the extent of preparation of a 30(b)(6) witness is a proper area of inquiry, the Task Force believes that counsel should have some latitude to explore the extent to which a witness was properly prepared. Work product and privilege objections should still have a place when it comes to discussions with counsel, except when such discussions provide the basis for the education of the witness and the facts that are sought to be conveyed. We believe requiring a comprehensive listing of the documents reviewed in preparation for a deposition, particularly when the selection was made by counsel, does properly invoke protected work product. Nevertheless, a questioner who shows a witness particular documents can certainly inquire of the witness whether the witness is familiar with the document and when it was last reviewed.

CONCLUSION

It is clear that over the last 45 years, Rule 30(b)(6) practice has resulted in not only much confusion among practitioners as to what it requires, but also the development of many issues upon which courts have been divided. We recommend that the Advisory Committee on Civil Rules undertake a thorough review of the Rule and conflicting case law and resolve all issues

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upon which courts have divided on the interpretation of the Rule. Throughout this Report we have recommended solutions on areas where courts have been divided.

We have also recommended changes to the Rule that we believe will improve practice in taking organizational depositions. These recommendations will reduce overall litigation cost by providing mechanisms to resolve issues that frequently arise before time is needlessly spent posturing at the actual deposition with the witness present. These include mechanisms for (1) providing for an objection procedure to set forth objections to the number, scope and particularity of topics listed; (2) to identify the witness or witnesses to be produced; and (3) to address the situation when there is not a witness who has knowledge of the topics requested or who can be educated. The recommendations also include a specific provision to protect organization non-parties whose 30(b)(6) deposition is sought to be obtained by subpoena. The recommendations further seek to reconcile an apparent inconsistency in the Note that provides that the organizational deposition counts as one deposition toward the ten deposition limit regardless of how many topics are listed and how many witnesses are designated, but that each designated witness may be separately deposed for seven hours. By adopting these proposed improvements and resolving the numerous conflicts, we believe practice will be greatly improved, greater certainty will be achieved, and time and expense will be greatly reduced in deposing organizations.

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13-CV-E: Nonparty Rule 30(b)(6) Deposition

13-CV-E is a set of recommendations by the Committee on Federal Courts of the New York City Bar. The Bar Committee offers a reasonably clear picture of the problems they see with nonparty Rule 30(b)(6) depositions, although the discussion wanders into party depositions and at least two of the specific suggestions at the end address deposition subpoenas more generally. The problems are related to topics that were considered during the process of framing the recent amendments of Rule 45. It is easy to imagine that attempts to address them could generate greater problems than would be solved. These first notes provide a sketch. The proposals are described first. Then come the reasons for caution.

The Proposals

The problem clearly identified has to do with subpoenas for a nonparty Rule 30(b)(6) deposition. There may be not enough "notice" to give time to prepare adequately. Unlike an individual deponent, who can appear when demanded without advance preparation if that seems like the thing to do, an entity subject to a Rule 30(b)(6) deposition must provide one or more witnesses who can testify to information known or reasonably available to the entity. That takes time. And there may not even be enough time to make an orderly motion for a protective order. A pending motion, moreover, does not excuse compliance; it is only a court order that protects.

Two "common practices" are adopted in an attempt to mitigate these problems. The entity may "issue written objections to the scope of a Rule 30(b)(6) subpoena * * * and prepare their witness only to the extent the topics are not the subject of objections." Or it may seek a protective order and choose not to appear until the motion is decided. Neither tactic is authorized by the rules. Either may be met by sanctions imposed as a matter of inherent power.

The City Bar Committee has concluded that it would be overkill to expand the Rule 45(d)(2)(B) objection procedure to include oral depositions, whether under Rule 30(b)(6) or more generally. Recall that this procedure applies to a subpoena to produce. The person subject to the subpoena can object "before the earlier of the time specified for compliance or 14 days after the subpoena is served." The objection automatically suspends the subpoena; production is required only on court order, which must spare the nonparty from "significant expense resulting from noncompliance." Applying this procedure to a Rule 30(b)(6) subpoena "would shift the balance of power too far in favor of" the witness, resulting in unnecessary delays and disputes. The deposition is a discrete event, as compared to the often

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"rolling" nature of document and ESI productions. There is less time to negotiate a reasonable outcome.

The first suggestion, then, is "a minimum notice period for Rule 30(b)(6) depositions of non-parties." 21 calendar days would be reasonable. A specific location in the rules is not proposed. Presumably what counts is notice to the nonparty subject to the subpoena, not the notice given to other parties under Rule 30(b)(1). The parallel to a nonparty subpoena to produce under Rule 45 is no help, because the closest provision is Rule 45(d)(3)(A)(i), which directs that the court must quash or modify a subpoena that fails to allow a reasonable time to comply. That provision is there now, and applies to deposition subpoenas as well as subpoenas to produce. One approach would be to add a few words here:

(3) Quashing or Modifying a Subpoena.

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply, which must be at least 21 days if the subpoena is for a nonparty deposition under Rule 30(b)(6) [or 31(a)(4)[1]; * * *

This approach would avoid a question that was avoided deliberately in framing the recent Rule 45 amendments — whether a specific notice period should be provided for a subpoena to produce. And it could be justified by accepting the arguments advanced by the proponents.

The second suggestion is that "to avoid unnecessary disputes a Rule 30(b)(6) non-party subpoena should be required to contain an explanation of the party's need for the testimony being sought." This is illustrated by NY CPLR § 3101(a)(4), requiring notice to a nonparty "stating the circumstances or reasons such disclosure is sought or required." This suggestion could be incorporated in Rule 45(a)(1), either as a new item (iv) in (a)(1)(A) or perhaps better as a new subparagraph (B):

(a) IN GENERAL.

(1) *Form and Contents.* * * *

(B) *Nonparty Rule 30(b)(6) [or Rule 31)(a)(4)]*

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[1] The Bar Committee does not refer to Rule 31(a)(4). Presumably the subpoena should be the vehicle for informing the nonparty of the matters for examination. Whether depositions on written questions create problems similar to those described for depositions on oral examination remains to be determined.

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Deposition. A command that a nonparty attend a Rule 30(b)(6) [or Rule 31(a)(4)] deposition must [describe with reasonable particularity the matters for examination and][2] state the reasons for [seeking] discovery [of these matters].

This proposal raises serious questions about the value of the required statement and about the risk of inviting prolonged disputes. In addition, it could easily imply a substantive limit on the right to depose a nonparty entity. A nonparty entity could easily argue for something akin to a "good cause" standard.

The third proposal is at least framed as one that would apply to "any deposition." If a timely motion is made for a protective order, the deposition should be "suspended." This would supplement the provision in Rule 30(d)(3) for suspending a deposition after it has begun, see also Rule 30(c)(2) on instructing a deponent not to answer while presenting a motion under (d)(3). The motion would require certification that the movant has in good faith conferred, or attempted to confer, with the "relevant" parties. If this approach is to apply to all depositions, it likely would fit in Rule 30, with a parallel provision in Rule 31. Rather than squeeze it into an existing subdivision, it might become a new subdivision (b). The fourth proposal is likely to fit in the same place — it would require that the motion for protection be "made" "sufficiently in advance of the scheduled deposition."

(b) MOTION FOR PROTECTIVE ORDER. The time stated for the deposition [in the Rule 30(b)(1) notice] is voided by a motion [for a protective order] under Rule 26(c) or [a motion to quash or modify] under Rule 45(d)(3)(A)(i) if the motion is made no later than 14 days after service on the deponent of the notice or the subpoena, whichever is served earlier, and if the movant certifies that it has in good faith conferred or attempted to confer with the party who gave the notice. After the motion is decided, a new time may be set by order or by the party who noticed the deposition.

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[2] This is the direction of Rule 30(b)(6), which says that the notice of the deposition or the subpoena must do this. If we go down this road, it may be useful to have a reminder in Rule 45. Rule 30(b)(6) already provides that "[a] subpoena must advise a nonparty organization of its duty to make this designation" of persons who will "testify about information known or reasonably available to the organization."

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Reasons for Caution

One reason for caution is noted above. In framing the proposals that have become the recent amendments of Rule 45, the Discovery Subcommittee considered whether to add some specific minimum notice period. It decided not to. Recent consideration is itself reason to go slow.

More importantly, this proposal is the first inkling we have had that there may be a problem with deposition notices and subpoenas that do not allow a reasonable time for compliance by a nonparty Rule 30(b)(6) organization named as deponent. Professor Marcus attempts to read all reported discovery cases and has not found any that address this possible problem. It may be that the problem arises only in the peculiarities of local practice as encountered by the City Bar Committee. Lawyers around the rest of the country may be more sensitive to these matters in setting the time for a Rule 30(b)(6) deposition, whether the organization named as deponent is a party or is not. A great many cases struggle with claims that an organization has not honored the direction to provide witnesses who know, or who have been taught, the information known or reasonably available to the organization. The party noticing the deposition has every incentive to allow sufficient time to enable a fruitful deposition that actually produces the desired information. And if the time is not sufficient to the needs of a particular deposition, lawyers elsewhere may be better attuned to the need to negotiate a reasonable schedule. Rather than rush to make a national rule to address what may be a local problem, it is better to wait for better information about experience elsewhere.[3]

Many years ago a committee of the New York State Bar Association raised a different question about Rule 30(b)(6) depositions that may go more to depositions of an organization

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[3] The cases noted in the City Bar Committee recommendation bear on issues collateral to the question whether parties are attempting to force unreasonably short periods to prepare for nonparty Rule 30(b)(6) depositions. For example, one supports the proposition that a nonparty deponent cannot refuse to appear at the time stated in a subpoena simply because it has made a motion for a protective order. Only an actual protective order will do.

Judge John Koeltl reports that he has never encountered the problem identified by the City Bar Committee, and adds that local rules governing discovery motions in the Southern District should avoid any apparent need to appear for the deposition before obtaining a ruling on a motion for a protective order.

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that is a party than to nonparty depositions. One of the problems they saw was that the lawyer taking the deposition would badger, lure, or otherwise fool the witness designated by the organization to make statements about things the witness did not know and had not been taught by the organization. The answers then would be put to use as if the committed position of the organization. All of the questions raised by this report were considered seriously by the Civil Rules Committee and the Discovery Subcommittee, but no proposed solution commanded any confidence and Rule 30(b)(6) was put aside.[4]

The short of the matter is that Rule 30(b)(6) is not free of problems. Underpreparation of the organization's witnesses seems to recur with some frequency. Overreaching questioning may also be a persistent, if less prominent problem. It would be good to know whether there are enough signs of unreasonably abrupt nonparty deposition notices to justify adding these proposals to the log of Rule 30(b)(6) problems. The collective experience of Committee Members is likely to be the best basis for deciding whether to develop any of these topics further.

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[4] The report is 04-CV-B. It raised many challenging questions about the conduct and scope of Rule 30(b)(6) depositions. The focus was deliberately limited to depositions of a party, but with the observation that many of the problems occur with nonparty depositions as well. See pp. 15-17. It would be a shame to lose sight of this report in the Rules Committee archives. But there is no apparent reason to revisit these matters now.

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Rule 30(b)(6) Issues
May, 2006

At its October, 2005, meeting, the Committee discussed a number of issues concerning the operation of Rule 30(b)(6), including receiving a presentation from David Bernick, a past member of the Standing Committee. Thereafter a Rule 30(b)(6) Subcommittee was formed, and it has probed further into these issues. The question now before the Committee is whether the Subcommittee should attempt to draft amendment language to deal with the issues identified. This memorandum will introduce the work done since last October and the issues that emerged.

Survey of Bar Groups
and Subcommittee Reaction

The questions discussed last October were brought to the Committee's attention by a submission from the New York State Bar Association that was included in the agenda materials for the October meeting. After the meeting, the Subcommittee determined that additional input would be extremely useful and decided to send an inquiry about Rule 30(b)(6) practice to a number of bar groups. A copy of the inquiry is included with these agenda materials. It was sent to all bar groups that had submitted commentary on the E-Discovery amendment proposals. Thirteen comments were received in response. Many were obviously based on considerable work and surveying of bar group members. A summary of those comments was prepared and is included with these agenda materials. Any member who wishes to see individual comments, or all the comments, can obtain them from James Ishida of the Rules Committee Support Office ([202] 502-1820 or James_Ishida @ao.uscourts.gov).

After the survey was completed and the summary of the comments had been prepared, the Subcommittee met by conference call to consider next steps. A copy of the notes of that conference call is included in these agenda materials. This memorandum introduces the issues emerging from that discussion, and also mentions some topics that the Subcommittee decided need not be brought forward for discussion.

Objectives of Rule 30(b)(6)

A reminder of the objectives of Rule 30(b)(6) seems in order at the outset, before turning to present issues. Prior to 1970, there was much concern with "bandying," a label attached to the reported practice of some organizational litigants that imposed on their opponents the considerable task of locating a person who could actually speak about the issues of the case on behalf of the organization. That difficulty was portrayed as resulting

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sometimes from gamesmanship of the organization, but it is important to recognize that locating a person with knowledge could be quite difficult for the organization as well. Particularly with regard to events occurring in the distant past, the organization could find it extremely challenging to dredge up reliable information about what had happened. Corporate combinations, layoffs, etc., could present a similar problem even if the events had occurred somewhat recently.

One view of the rule, then, is that it presents a zero/sum situation in which there is an unavoidable clash of interests between the party seeking discovery and the party asked to provide it. The greater the reduction in the burden on the party seeking discovery, the greater the corresponding imposition of burden on the responding party. When the rule was introduced in 1970, the Advisory Committee seemed to regard the burden on the responding party as much less significant, for the Advisory Committee Note says that "[t]his burden is not essentially different form that of answering interrogatories under Rule 33, and is in any case lighter than that on the examining party ignorant of who in the corporation has knowledge." Given the free-ranging and spontaneous nature of a deposition, compared with answering an interrogatory, one could debate this proposition. But as recently three years ago, a magistrate judge wrote that "the underlying principle of the rule is to shift the burden of determine who is able to provide information from the requesting party to the corporation." Schenkier, Deposing Corporations and Other Fictive Persons: Some Thoughts on Rule 30(b)(6), 29 Litigation 20, 22 (Winter 2003).

The salience of this background is that an undercurrent of the following discussion is the concern among some bar groups that revisions of the rule might inappropriately shift the burden of obtaining information back onto the discovering party and revive a version of bandying.

Values of Rule 30(b)(6) practice
and concerns about changes to the rule

Many of the respondents emphasized the importance of Rule 30(b)(6) in providing needed information, and several were quite concerned about changes that might hobble it. Several of the groups submitting comments are made up of members who regularly use the rule, and they reported that their main difficulty had been in obtaining compliance with the rule's expectation (and the caselaw's requirement) that the responding party adequately prepare the designated person to testify. At the same time, among those lawyers who had to prepare witnesses for such depositions, there was recognition that this could involve a very considerable effort. Some who emphasized the burden of

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preparation also urged that sanctions be used vigorously when there is a failure to prepare adequately.

Some groups were rather vehement about their view that the rule should not be changed. See, e.g., Calif. Employ. Lawyers' Ass'n (saying that there does not appear to be any showing of problems that justify amendments); Consumer Att'ys of Calif. (urging the committee to reject proposals to amend the rule).[5] Other groups cited the need to amend the rule to address or provide guidance on specific matters. See, e.g., Amer. Coll. of Trial Lawyers (favoring a clarification whether questioning beyond the topics identified in the notice is allowed); N.Y. State Bar Ass'n (favoring an amendment forbidding preclusive effect for testimony of 30(b)(6)witnesses, another directing that only one 30(b)(6) deposition of a party be allowed unless there is a stipulation or court order for additional such depositions, and another limiting such depositions -- no matter how many representatives are designated -- to one day of seven hours).

Limiting the scope of Rule 30(b)(6) depositions to locating sources of proof

One idea that was discussed during the October meeting was to refocus the rule so that it would require a responding party only to identify sources of information. Such a change would permit the party seeking discovery then to use conventional discovery devices to obtain the information, and would excuse the organization from providing answers to "substantive" questions about the events underlying the case. This narrowing, in turn, could reduce the burden of preparing for a deposition and the risk of inappropriate foreclosure of proof by the organization regarding topics covered in the deposition.

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[5] The Federal Courts Committee of the Assoc. of the Bar of the City of New York observed as follows:

> While our members understand that Rule 30(b)(6) offers the potential for abuse, their experience suggests that abuse of this Rule is no more likely than that accompanying any other discovery device, and that the potential for abuse is suitably managed by the district court's supervision of the process. In addition, existing case law surrounding the Rule provides sufficient guidance about which practices are unlikely to meet with court approval in the event disputes arise. With this context, the Association does not believe an amendment would improve the effectiveness of Rule 30(b)(6) or provide any greater protection against attempted abuse.

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One question raised by this possibility was the degree to which it corresponded to what the Committee was trying to accomplish with the 1970 addition of Rule 30(b)(6). Research into the deliberations of the Committee during the 1960s indicated that the goal then was broader than requiring designation of sources of proof. A copy of the report on that research is included in the agenda book.

The inquiry to bar groups nonetheless asked about whether this sort of change would have a positive effect. Of the groups that discussed the idea, none supported it, and several criticized it vigorously. The Subcommittee decided not to proceed further with this idea. As explained in the notes to the Subcommittee's April 4 conference call, however, it did decide to bring forward six topics for discussion. These numbered topics are discussed below.

(1) Treating answers in a 30(b)(6) deposition as judicial admissions

The first issue that the Subcommittee decided to bring forward is the judicial admission concern. The issue is whether an answer given by the 30(b)(6) witness -- including "I don't know" -- is a "judicial admission" in the sense that the organization is forbidden to offer evidence at trial that contradicts the answer. It seemed to the Subcommittee that this issue devolved into two distinct topics -- whether the courts have been so treating such deposition answers, and if so whether and how that should be changed. This memorandum therefore turns first to the state of the caselaw on judicial admission treatment of Rule 30(b)(6) deposition responses.

Caselaw on judicial admissions

Several bar groups said that some courts have held that answers during 30(b)(6) depositions are judicial admissions, or that there is a split of authority on the subject. These discussions are covered in more detail in the attached summary of comments. See, e.g., ABA Section of Litigation (reporting that counsel who regularly represent corporations said that they had faced arguments for the preclusive effect of 30(b)(6) testimony, and that the risk of preclusion increased the burden of preparation); Amer. Coll. of Trial Lawyers (reporting that the rule can be, and has been, interpreted to provide for a binding effect); Federation of Def. & Corp. Counsel (reporting that "[m]any courts prohibit a party from submitting evidence that contradicts its deposition testimony"). Compare Assoc. of the Bar of the City of New York (reporting that none of the members of its Committee on Federal Courts said that the issue had played an important role in one of their cases, but noting that this

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could be due to the fact so few cases reach trial).

Some groups applauded giving binding effect to answers during a 30(b)(6) deposition. See, e.g., ATLA (asserting that a corporation should be bound because the buck must stop somewhere); Calif. Employ. Lawyers' Ass'n (asserting that if the answers did not bind the entity, the deposition would be of very little value). Other groups that seemingly wanted such answers to be preclusive, but reported that the courts did not so order. See, e.g., Nat. Employ Lawyers Ass'n (reporting that 30(b)(6) depositions are generally not given binding effect, but only used to impeach trial testimony).

We invited the groups to offer caselaw examples, and some of them did. A review of those examples does not show that reported decisions often result in judicial admission treatment of 30(b)(6) testimony in ways that are troubling. Our initial research indicated that it was unclear whether courts often treat the "binding" effect of Rule 30(b)(6) testimony to foreclose evidence from outside the organization supporting a different version. Decisions that appear to do so may at heart reflect the view that the organization did not adequately prepare its Rule 30(b)(6) witness, and that information available to the organization was not presented as a result. In these circumstances, courts may order that information not presented during the 30(b)(6) deposition, when it should have been presented, cannot be presented later either. This view consistent with Rule 37(c)(1).

Except as a sanction for failure to do proper preparation, however, it seems flatly wrong to say that the testimony of any party witness "binds" that party at trial and precludes it from offering otherwise admissible evidence that supports competing conclusions. See e.g., Guenther v. Armstrong Rubber Co., 406 F.2d 1315 (3d Cir. 1969) (even though plaintiff testified at trial that he was injured by the explosion of a "black wall" tire, he could introduce evidence from other witnesses that he was actually injured by the "white wall" tire that plaintiffs produced at trial as the offending item).

The magistrate judge's decision that is regularly cited as emblematic of overly broad application of preclusion under the rule stops short of treating the testimony as a judicial admission. See United States v. Taylor, 166 F.R.D. 356, 363 (M.D.N.C. 1996) ("answers given at a Rule 30(b)(6) deposition are not judicial admissions"). And the district court's affirmance of the magistrate judge's decision appears to regard it as premised on the preparation obligation:

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> The major thrust of UCC's appeal is its contention that it should not be held responsible for preparing its Rule 30(b)(6) deposition witnesses at the time of their depositions. Rather, it claims it should be allowed to continue their preparation after the depositions by being allowed to dribble in its final positions through Fed. R. Civ. P. 26(e) supplementations and Rule 26(a)(3) disclosures thirty days prior to trial, or else release them in a final deluge at trial. The impracticality of UCC's position is evident. The fact that this case involves events which occurred two or three decades ago does not alter the situation.

United States v. Taylor, 166 F.R.D. 367, 367-68 (M.D.N.C. 1996). Thus, this case is one of those later cited by the Seventh Circuit (which refused to follow the only aggressive decision favoring a judicial admissions treatment) as rejecting the judicial admissions approach.

At least two recent court of appeals decisions appear to recognize that the organization is not forbidden from offering evidence different from that provided in the testimony of its Rule 30(b)(6) witness:

> Although Amana is certainly bound by Mr. Schnack's testimony, it is no more bound than any witness is by his or her prior deposition testimony. A witness is free to testify differently from the way he or she testified in deposition, albeit at the risk of having his or her credibility impeached by the introduction of the deposition.

R & B Appliance Parts, Inc. v. Amana Co., 258 F.3d 783, 786 (8th Cir. 2001); see also A.I. Credit Corp. v. Legion Ins. Co., 265 F.3d 630, 637 (7th Cir. 2001) (rejecting the argument that Rule 30(b)(6) testimony constitutes a judicial admission).

Nonetheless, enthusiasts for use of 30(b)(6) remark that "The whole point of Rule 30(b)(6) is that it creates testimony that binds the corporate entity. * * * It is extraordinary that there is so little case law on developing Rule 30(b)(6) as an offensive weapon to bind entities to their deposition testimony and bar contrary trial testimony." Solovy & Byman, Rule 30(b)(6), Nat.L.J., Oct. 28, 1998, at B13. A similar notion is found in a leading treatise: "It should be kept in mind that a Rule 30(b)(6) designee testifies on behalf of the corporation, and binds the entity with its testimony." 7 Moore's Federal Practice § 30.25[3] at 30-56.3.

The caselaw cited by the responding bar groups provides some support for the judicial admission view. The strongest example

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is Rainey v. American Forest & Paper Ass'n, Inc., 26 F.Supp.2d 83 (D.D.C. 1998), and it bears description in some detail as the sole reported case strongly endorsing a judicial admission attitude. The court refused to permit defendant to rely in response to plaintiff's summary judgment motion on an affidavit from a former employee because the affidavit differed from the testimony given by defendant's 30(b)(6) witness. In this Fair Labor Standards Act case, plaintiff's 30(b)(6) notice specified that her duties while employed by defendant were a topic to be covered in the deposition. Despite that, the 30(b)(6) witness made no suggestion that plaintiff was exempt from the protections of that statute on the ground that she spent at least 50% of her time on managerial tasks. More generally, the court later found, this witness's testimony was deficient in details. See id. at 92-93. After plaintiff moved for summary judgment, defendant obtained and submitted an affidavit from plaintiff's former supervisor, who was one of its former employees. The affidavit said that the former employee had personal knowledge of plaintiff's day-to-day responsibilities, and that plaintiff had spent most of her time on managerial tasks.

The court held that the affidavit could not be considered. It emphasized that the corporation had a duty to prepare its designee "'to be able to give binding answers' on its behalf." Id. at 94.[6] "Unless it can prove that the information was not

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[6] The court quoted from Ierardi v. Lorillard, Inc., 1991 WL 158911 (E.D.Pa., Aug. 13, 1991). In that case, the court refused to grant defendant Hollingsworth & Vose Co. a protective order against having to prepare a witness to testify about its practices with regard to asbestos activities decades in the past, when it had manufactured the "Micronite" cigarette filter containing asbestos in the 1950s and 1960s. Defendant argued it would face an undue burden if required to prepare a witness. The judge disagreed: "Although this task may be somewhat difficult, it is clear that if a corporate employee familiar with the structure and organization of the corporation would find this task difficult, plaintiffs, who have no such familiarity, likely would find it impossible." Id. at *1. The court added:

> Defendant's suggested interpretation would permit defendants to profess ignorance of information the plaintiffs request during a 30(b)(6) deposition, but then allow H & V to present evidence on the same subject at trial. Defendant's interpretation, however, subverts the purpose of Rule 30(b)(6). Under Rule 30(b)(6), a defendant has an obligation to prepare its designee to be able to give binding answers on behalf of H & V. If the designee testifies that H & V does not know the answer to plaintiffs'

known or was inaccessible, a corporation cannot later proffer new or different allegations that could have been made at the time of the 30(b)(6) deposition." Id. Even though defendant had identified the affiant (Kurtz) as plaintiff's supervisor in other discovery. the court found that preclusion was required by the rule (id. at 95):

> This result is supported not just by the text of Rule 30(b)(6) but by the purposes underlying its promulgation. Foremost among those purposes, according to the Advisory Committee Notes, is to "curb the 'bandying' by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization and thereby to it." In other words, the Rule aims to prevent a corporate defendant from thwarting inquiries during discovery, then staging an ambush during a later phase of the case. * * * [I]t is clear that allowing it to introduce the Kurtz affidavit at this juncture would produce the very result that the Rule aims to forestall. If Ms. Kurtz was -- as her affidavit suggests -- so closely involved with the human resources department while plaintiff worked there, surely the information she has come forward with was equally well-known at the time plaintiff sought to depose as corporate representative. Defendant's failure to produce it then -- either by designated Ms. Kurtz as its representative or by preparing its designees to represent what Kurtz knew -- clearly violated Rule 30(b)(6).

It might be noted that this case seems to have involved a central and relatively simple issue -- whether plaintiff should be viewed as a managerial employee under the Act. But the court's reasoning is very broad. It has not, however, been broadly accepted. To the contrary, the Seventh Circuit had this to say about the Rainey decision while holding (as noted above) that 30(b)(6) answers are not judicial admissions:

> McPherson cites Rainey v. American Forest & Paper Ass'n, Inc., 26 F.Supp.2d 82, 94 (D.D.C. 1998), in support, but two other district courts have reached different conclusions and we think theirs is the sounder view. See Indus. Hard Chrome, Ltd. v. Hetran, Inc., 92 F.Supp.2d 786, 791 (N.D. Ill.) ("testimony given at a Rule 30(b)(6) deposition is

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> questions, H & V will not be allowed effectively to change its answer by introducing evidence during trial. The very purpose of discovery is "to avoid trial by ambush."

Id. at *3.

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> evidence which, like any other deposition testimony, can be contradicted and used for impeachment purposes"); United States v. Taylor, 166 F.R.D. 356, 362 n.6 (M.D.N.C. 1996 (testimony of Rule 30(b)(6) designee does not bind corporation in sense of judicial admission).

A.I. Credit Corp. v. Legion Ins. Co., 265 F.3d 630, 637 (7th Cir. 2001). In 2005, an Indiana appellate court, interpreting the analogous Indiana rule, quoted the Seventh Circuit view and concluded that "[w]e agree with the Seventh Circuit and conclude that the testimony of an Ind. Trial Rule 30(B)(6) designee does not bind a corporation in the sense of a judicial admission." Everage v. Northern Ind. Pub. Serv. Co., 825 N..E.2d 941, 950 (Ind.App. 2005).[7] Note also, as quoted above, that the Eighth Circuit ruled against the judicial admission approach in 2001. See R & B Appliance Parts, Inc. v. Amana Co., 258 F.3d 783, 786 (8th Cir. 2001).

The remainder of the cases cited in bar group submissions do not seem to raise significant concerns. The leading example is Hyde v. Stanley Tools, 107 F.R.D. 992 (E.D. La. 2000). This is the only case cited by the Moore treatise in support of the proposition that answers in a 30(b)(6) deposition are "binding," and was cited by two of the bar groups that submitted comments. In that case, defendant's 30(b)(6) witness testified in "no uncertain terms" that the hammer that caused plaintiff's injury was manufactured by defendant. He said that he reached this conclusion "after close inspection of the hammer, including microscopic inspection, and comparing the hammer to Stanley drawings and specifications. [The witness] further determined that the hammer was manufactured by Stanley between 1983 and 1986." Id. at 992. Plaintiff then moved for partial summary judgment on the basis of this identification testimony about six months after the 30(b)(6) deposition.

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[7] As noted by the Seventh Circuit, another district court decision rejects the judicial admission idea:

> While Hestran and Global are bound by the testimony given by their designated representative during the Rule 30(b)(6) deposition, such testimony is not a judicial admission that ultimately decides an issue. The testimony given at a Rule 30(b)(6) deposition is evidence which, like any other deposition testimony, can be contradicted and used for impeachment purposes.

Industrial Hard Chrome, Ltd. v. Hetran Inc., 92 F.Supp.2d 786, 791 (N.D. Ill. 2000).

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Defendant responded to the summary judgment motion with an affidavit from one of its engineers asserting that the hammer was not one of its products. This engineer had been present during the entire 30(b)(6) deposition but had not said anything when the designee gave his unequivocal testimony identifying the hammer as defendant's product. The court refused to allow the affidavit to be considered, citing sham affidavit cases. See id. at 993, citing Perma Research & Devel. Co. v. Singer Co., 410 F.2d 572, 578 (2d Cir. 1969) ("If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact."). Thus, the court was treating the 30(b)(6) deposition just like any party deposition. The court also recognized leeway for the corporate party (id. at 993):

> [C]ourts have allowed a contradictory or inconsistent affidavit to nonetheless be admitted if it is accompanied by a reasonable explanation. [But this is not available because there is no indication] that the expert report was based on newly discovered evidence or that [the 30(b)(6) witness] was somehow confused or made an honest mistake.

Other cases in bar group submissions also involve the sham affidavit doctrine.[8] In addition, several involve a failure to

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[8] The following are the additional cases of this sort cited by the groups that submitted citations:

International Gateway Exchange, LLC v. Western Union Finan. Serv., Inc., 335 F.Supp.2d 131 (S.D.N.Y. 2004): The issue was whether defendant's delay in processing credit card transactions breached the parties' agreement. Defendant took plaintiff's deposition pursuant to Rule 30(b)(6), and plaintiff's representative admitted during the deposition that plaintiff was not contending that certain delays constituted a breach of the agreement. After defendant moved for summary judgment, plaintiff tried to retract this admission. The court said that "IGE cannot retract that testimony in opposing Western Union's motion," but added that plaintiff submitted no evidence to support its assertion, and that its submissions also violated the court's local rules on submission of material on a summary judgment motion. See id. at 144-45.

Newport Electronics, Inc. v. Newport Corp., 157 F.Supp.2d 202 (D. Conn. 2001): In a service mark infringement action, plaintiff took defendant's deposition using Rule 30(b)(6) and then moved for summary judgment. In response to the motion,

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produce a witness prepared in the manner required by the rule.[9]

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defendant submitted an affidavit conflicting with the deposition testimony. Plaintiff argued that the court should strike the affidavit because the rule does not permit a party to contradict or alter his 30(b)(6) testimony. Id. at 219. Defendant responded that the rule "does not require a witness to be omniscient." The court granted the motion to strike the affidavit, invoking the sham affidavit doctrine and also finding a violation of the rule's requirement to prepare the witness (id. at 220):

> The settled law in the Second Circuit is that "a party may not create a material issue of fact by submitting an affidavit in opposition to a summary judgment motion that, by omission or addition, contradicts the affiant's previous deposition testimony." Rasking v. Wyatt Co., 125 F.3d 55, 63 (2d Cir. 1997). Here, Blake's affidavit contradicts statements in his deposition. Newport Corporation received notice of the topics on which Newport Electronics wished to depose a 30(b)(6) witness; Blake was not at liberty, therefore, to delay reviewing information on those topics until after the deposition and, thereby, submitting information in his affidavit which contradicts statements in his deposition regarding his lack of knowledge on various topics.

Also cited was Mack v. United States, 814 F.2d 120 (2d Cir. 1987): This case does not involve a 30(b)(6) deposition. Plaintiff sued after being terminated by the FBI for cocaine use. Among other things, he claimed that the FBI had violated the Fourth Amendment by asking him to submit to a urinalysis. He has signed a consent form acknowledging that he had no obligation to submit to the test, and during his deposition had said that he had not been forced to give a sample and had been "totally cooperative." But after defendants moved for summary judgment on this ground, plaintiff submitted an affidavit in opposition asserting that he had submitted to the test in fear of loss of his job, and that he was coerced. The appellate court held that it was proper to grant defendants' motion for summary judgment despite the filing of plaintiff's affidavit: "It is well settled in this circuit that a party's affidavit which contradicts his own prior deposition testimony should be disregarded on a motion for summary judgment." Id. at 124.

[9] As noted in the previous footnote, failure to prepare issues were present in some of the sham affidavit cases. Other cited cases seem principally to depend on failure to prepare:

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It does not seem that, except for the special preparation requirement in Rule 30(b)(6), these cases impose distinctive requirements.

In sum, a considerable effort to identify caselaw support for the reported problem produced limited grounds for uneasiness about courts treating 30(b)(6) answers as judicial admissions.

Possible amendment to address judicial admissions issue

Whatever the state of the caselaw, there remains some concern about inappropriate preclusion of evidence based on a judicial admission theory. It does not seem that any bar groups question the basic idea that if a corporation properly prepares a witness it should not be held to the answers given no matter what they are. At the same time, it also seems that orders foreclosing contradictory evidence have on a number of instances been used by courts that concluded they were appropriate to redress failure to comply with the rule's preparation requirement. Therefore, even though there seems little reason to amend the rule solely to put into it the accepted idea that there is a duty to prepare, it may well be important to add that statement as a predicate to any limitation on the court's authority to make preclusion orders. For purposes of discussion

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Reilly v. Natwest Markets Group, Inc., 181 F.3d 253 (2d Cir. 1999): The court ruled that defendant violated Rule 30(b)(6) by failing to produce two proposed witnesses as its representatives for the deposition, and that the trial court therefore properly barred them from testifying at trial. Although this might be at tension with the rule, which does not require the designation of any particular witness, the point for present purposes is that the decision was based on a violation of the rule. See id. at 268-69.

Audiotext Commun. Network v. US Telecom, 1995 WL 625962 (D. Kan., Oct. 5, 1995): This case is not about preclusion, but rather about requiring further testimony from plaintiff, who proffered a witness not able to answer questions during a 30(b)(6) deposition. Although the questions were within the scope of the deposition, the representative said that he could not answer them. The court emphasized that the corporation must "prepare [the 30(b)(6) witnesses] so that they may give complete, knowledgeable and binding answers on behalf of the corporation." Id. at *13, quoting Marker v. Union Fidelity Life Ins. Co., 125 F.R.D. 121, 126 (M.D.N.C. 1989). Concluding that this was a refusal or failure to answer deposition questions, the court ordered plaintiff to produce knowledgeable, prepared corporate representatives for a further deposition at plaintiff's expense.

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only, it may be useful to indicate how such an amendment might look:

> **(6) Notice or Subpoena Directed to an Organization.** It its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, or a governmental agency and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. <u>The responding organization must adequately prepare the person or persons designated to testify so that they can testify as to the information known or reasonably available to the organization. If such preparation is adequately done, the court may not treat answers given during the deposition as judicial admissions.</u> This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

Undoubtedly improvements can be made in the language regarding both the duty to prepare the witness and the restriction on the court's use of judicial admission treatment. It should also be noted that both ideas could be explored in greater detail in an accompanying Committee Note.

Whether such an amendment would be wise can certainly be debated. For one thing, the caselaw does not show a great need in reported cases for making such a change. But making the change could accomplish objectives favored by bar groups who submitted comments. Some favored adding an express requirement to prepare to the rule even though they acknowledged that it is well-recognized in the caselaw. But as the National Ass'n of Consumer Advocates points out, something of the sort is probably implicit in the rule already as it says that the organization must send a person to "testify" "on its behalf." And those worried about overuse of the rule might become uneasy about fortifying the statement of the duty to prepare.'

Adding a limitation on judicial admission treatment seems contrary to the views of several surveyed groups, although they don't appear to expect that the testimony will be more "binding" than with any other litigant. Some ask why anyone would conduct the depositions at all if the answers are not binding. See Calif. Employ. Lawyers' Ass'n. As compared with a supplementation approach (no. 2 below), this provision might be

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superior for responding parties because it would not carry with it the directive of Rule 37(c)(1) that material not provided through supplementation usually may not be used in the case. To the contrary, the thrust of this possible change is that -- so long as the witness is adequately prepared -- the material may be used. Nonetheless, it is also possible that the change might promote use of judicial admission sanctions when the court does find a failure to prepare.

It might also be objected that the adequate preparation predicate could impose on the court and the parties an onerous burden of determining whether such preparation has been adequate. But in all likelihood that would be an issue whether or not the rule were thus changed. As the caselaw review above noted, courts presently invoke their attitudes toward adequate preparation as a criterion in deciding whether to preclude organizational litigants from later submitting contradictory or inconsistent material.

2. Supplementation

If the goal of the rule is to get requested information to the party seeking it, a supplementation approach might be preferred to a judicial admission or preclusion approach. Supplementation would provide a recognized avenue for a party to provide additional information when it was not provided in the 30(b)(6) deposition. It would thus treat 30(b)(6) depositions differently from all other depositions (except depositions of expert witnesses).

An obvious starting concern is whether such a change might undercut the duty to prepare. As the American College of Trial Lawyers put it, "[a] supplementation procedure would take some of the burden and apprehension out of the preparation process, but it should not be allowed to serve as a substitute for adequate preparation; otherwise a 30(b)(6) deposition would become an exercise in which the answer to every question would be 'I will get back to you on that.' The right and duty to supplement should be just that -- a supplement." Other groups caution that such an addition would reduce incentives to prepare witnesses adequately. See, e.g., ATLA. Some say that it would have dramatic consequences. See, e.g., Calif. Employ. Lawyers' Ass'n (making such a change would result in trial by ambush); Nat. Employ. Lawyers' Ass'n (permitting supplementation would require retaking the 30(b)(6) deposition). To a considerable extent, Committee Note material on the duty to prepare the witness adequately could ameliorate such problems. In addition, it might be that adding an express requirement of preparation (as under no. 1 above) would be important in connection with this possible change as well.

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Whether the "right" to supplement would promote deficient preparation could be debated. Actually, a strong supplementation requirement was not inserted in the rules until 1993, and before then supplementation was required only in limited circumstances. So treating supplementation as a right that provides an escape hatch for the responding party, rather than as a duty imposed on the responding party, is not entirely in keeping with the way in which it has emerged. And in 1993 supplementation was linked to the new provisions of Rule 37(c)(1), which direct the court to deny parties that fail to supplement to use the material they should have provided through supplementation. Thus, adding supplementation could mandate preclusion in instances where it is not available today. Such an outcome would seem consistent with the concerns of bar groups (e.g., Nat. Employ. Lawyers' Ass'n) that lament that courts are not binding parties by their 30(b)(6) answers. In an important way, 37(c)(1) treatment would do so.

Among those favoring adding a supplementation provision, some bar groups are notably cautious about what it should include. The ABA Section of Litigation, for example, offered the following thoughts about the problem of "binding" effect:

> One possible idea would be to allow a party to "unbind" itself by giving timely notice that it has found new information that leads it to be believe that a previous 30(b)(6) piece of testimony needs to be modified. The court should retain the option of denying the "notice of change of testimony" if, for example, the notice was given after the discovery cut-off date or too close to trial or would require a continuance of the trial date. The burden of proving good faith preparation of the corporate representative would be on the party seeking the change, with the opposing party permitted reasonable discovery to test the good faith assertion and the resulting expenses paid by the party seeking the change in testimony. If a "notice of change of testimony" is permitted and depending on the circumstances, the party giving this notice may then be required to pay the additional expenses, including attorneys' fees, of the opposing side in proffering the corrected testimony. This would seem to even the playing field and prevent either side from taking unfair advantage of the 30(b)(6) mechanism. Another possibility (not mutually exclusive) would be to require the 30(b)(6) witness to appear in person at trial so that he or she could be questioned about the change in testimony.

Against that background, at least a starting point could be provided by the following possible amendment ideas, which are offered only for purposes of facilitating discussion of the issue whether this is a course to be pursued. The sensible place for

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such an amendment seems to be Rule 26(e), which has the other supplementation provisions, and which directly links to Rule 37(c)(1):

(e) Supplementing Disclosures and Responses

(1) In General. A party who has made a disclosure under Rule 26(a) -- or who has responded to an interrogatory, request for production, or request for admission[, or Rule 30(b)(6) deposition notice] -- must supplement or correct its disclosure or response to include later-acquired information.[10] The party must do so:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) Expert Witness. For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

{**(3) Rule 30(b)(6) Depositions.** A party that has produced a representative to testify under Rule 30(b)(6) must supplement or correct the testimony given [within --- days of the conclusion of the deposition] {no later than the time when the party's pretrial disclosures under Rule 26(a)(3) are due}. [The party that took the deposition may then retake the deposition of the representative with regard to the supplemental information {at the expense of the supplementing party}.]}

[10] Note that, in connection with the Style Project, there remains an open question about whether to include this phrase -- "later acquired information" -- in the restyled rule.

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The foregoing obviously offers two alternative approaches to providing a supplementation provision for Rule 30(b)(6) depositions. Surely there are others as well.[11] And the proposals raise many issues, including those introduced above.

One issue is whether to provide a special supplementation provision for Rule 30(b)(6) depositions, as with expert witness evidence. That is distinctive in the current rules because it is the only occasion on which there is a requirement to supplement deposition testimony. A new and separate (3) might therefore be more in keeping with the format of the treatment. In addition, using the 26(e)(2) approach seems well suited to providing specifics about timing and (if thought desirable) cost consequences.

Another issue is whether allowing supplementation of deposition testimony in this instance is inconsistent with the overall thrust of the rules. Rule 30 permits a witness to request the opportunity to read and correct deposition testimony. Presumably that applies to Rule 30(b)(6) depositions as to any others. So this opportunity might be viewed as "second" chance, and thus to provide a special opportunity to corporate parties. The time limitation suggested above might be a way of addressing that concern, but might also create difficulties that would undercut the value of supplementation. And it is worth noting again that the addition of such a provision would seem to magnify the likelihood of preclusion orders due to the role of Rule 37(c)(1).

3. Scope of Rule 30(b)(6) Depositions

<u>Limiting questioning to topics specified in notice</u>

The fundamental starting point for a Rule 30(b)(6) deposition is the listing of topics in the notice. The selection of a representative may depend heavily on what is on that list.

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[11] A more demanding one, along the lines suggested by the ABA Section of Litigation, might look like this:

> **(3) Rule 30(b)(6) Depositions.** A party that has produced a representative to testify under Rule 30(b)(6) may supplement the testimony only on demonstrating that it made a good faith effort to prepare its representative to testify during the deposition. If the court grants leave to supplement, the opposing party may retake the deposition of the representative at the expense of the supplementing party.

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The responding party can designate different representatives to address different topics on that list. The preparation obligation applies to what is on that list. And the questioning should be about the topics on that list.

Sometimes the representative may have no knowledge about anything except the topics on that list.[12] But with considerable frequency, the person designated has personal knowledge about other issues involved in the lawsuit besides those topics listed in the notice. Should this be permitted in the 30(b)(6) context? Here is the reaction of the American College of Trial Lawyers submission, which raises a number of issues:

> We believe that a clarification on this issue would be helpful. There are many instances with questioning that goes beyond the designated topics. What is the effect of an answer that is not within the proper scope? Is it an admission at all? It is a binding admission? Does it convert the 30(b)(6) deposition into an individual deposition under Rule 30(b)(1), counting as two depositions under the 10 deposition rule? What should be the process for objecting to questioning that exceeds the topics? While the trial bar can live with a clear rule either way, the better rule probably would be to limit the questions to the designated topics.

See also comments of Fed. of Defense & Corp. Counsel (urging that questioning be limited to topics listed).

Other groups oppose such a rule change. Some say that the courts are imposing such a limit already. See ATLA; Nat. Employ. Lawyers' Ass'n. Others point out that the matter is often easily resolved among counsel. If the choice is between having the witness answer the additional questions at the same time, or

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[12] For example, the Trial Lawyers for Public Justice comment includes the following:

> [O]ver the past decade, it has increasingly become the practice for organizations not to produce an officer, director or managing agent as its Rule 30(b)(6) deponent. More commonly, organizations choose wholesome looking, young people who, prior to receipt of the Rule 30(b)(6) deposition notice, had little, if any involvement in or knowledge of the issues which are the subject matter of the deposition. One corporate defendant even produced a document about this practice, referring to its designee -- who was chosen to testify precisely because he had no knowledge of the noticed topics -- as "the fall guy."

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requiring that the witness return on a different occasion to answer in an individual capacity on other topics, it may be much more expedient to proceed with all relevant information. Whether parties address the problem of counting depositions for purposes of the ten-deposition limitation in not clear. But it surely might happen that on occasion the responding party would take the position that the witness was only prepared for certain questions and that he or she is therefore not prepared to answer questions on other subjects. In the same vein, the questioning lawyer might insist on grounds of lack of preparation for other topics that questioning be limited to the listed topics even if the witness wanted to cover all at the same time.

For purposes of discussion, here is a possible way to implement such a rule provision:

> **(6) Notice or Subpoena Directed to an Organization.** It its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, or a governmental agency and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. <u>Questioning during the deposition must be limited to the matters for which the person was designated to testify.</u> This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

<u>Adding "factual" to limit the ambit of questioning</u>

The New York State Bar Association, whose comments spurred the initial inquiry into this rule, urges that the rule be amended as follows:

> **(6) Notice or Subpoena Directed to an Organization.** It its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, or a governmental agency and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify

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about factual information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

The objective of this change would be to confine the questioning and protect against overreaching concerning contentions or legal positions. At least the most obvious efforts to inquire into legal contentions could be curtailed by this amendment.

As set out in the materials circulated for the October 2005 meeting, the effectiveness of this change is uncertain. The change might do little to curtail many activities to which objection has been made. It could also re-introduce some difficult questions that were deliberately avoided in drafting the pleading rules in the original Civil Rules. By the early twentieth century, the dividing line between "facts" and "conclusions" was a hotly debated and litigated focus of pleading decisions. For example, it was long debated whether the allegation that defendant drove "negligently" was an allegation of fact or a mere conclusion. The framers of the rules intentionally defined the sufficiency of a claim without using the word "facts" to bury this past. See Form 9 (stating that an allegation that defendant drove "negligently" is sufficient). Restoring this distinction, but putting it into the discovery rules, is a dubious undertaking.

Moreover, making the change might well not solve most of the problems that have been cited. Questions about "all facts supporting plaintiff's allegations in paragraph 7 of the complaint" would seemingly not be affected by such a change. Efforts to force the organization to elect one of a number of different versions of the facts would not seem to be affected by such a change. In addition, this amendment would not seem to respond to the judicial admission concern that courts may preclude the organization from offering any evidence supporting a view different from the testimony of its witness, or prohibiting it from offering any evidence on subjects on which the witness said "I don't know."

4. Number/time limitations as applied to Rule 30(b)(6) depositions

Numerical and time limitations on discovery events inevitably raise strategic issues. All can be changed by agreement of the parties or court order (perhaps under Rule 16(b) based on the parties' Rule 26(f) discovery plan. Essentially there are three possible foci with regard to 30(b)(6) depositions. Two of them have received attention in the Committee Notes, and the third is the subject of some conflicting

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caselaw:

Ten-deposition limit: When the ten-deposition limit was added to Rule 30(a) in 1993, the Committee Note observed: "A deposition under Rule 30(b)(6) should, for purposes of this limit, be treated as a single deposition even though more than one person may be designated to testify."

One-day duration limit: When the "one day of seven hours" limit was added to Rule 30(d) in 2000, the Committee Note said: "For purposes of this durational limit, the deposition of each person designated under Rule 30(b)(6) should be considered a separate deposition."

Requirement of stipulation or leave of court for second deposition: When Rule 30(a)(2) was amended in 1993 to permit a person's deposition to be taken a second time only by stipulation or with leave of court, there was no reference to whether that rule would apply to a 30(b)(6) deposition. There seems to be little law on this question. A First Circuit decision takes the view that the prohibition on a second deposition applies to Rule 30(b)(6) depositions, as does one district court decision and the Moore's treatise;[13] one district court, declaring that "Rule

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[13] In Ameristar Jet Charter, Inc. v. Signal Compositers, Inc., 244 F.3d 189 (1st Cir. 2001), the court upheld an order quashing subpoenas for a second 30(b)(6) deposition of a nonparty corporation and also quashed subpoenas for the depositions of three individuals associated with that corporation. Regarding the 30(b)(6) notice, the court said that "[b]ecause this second Rule 30(b)(6) subpoena was issued . . . without leave of court, it was invalid." Id. at 192. The court emphasized, however, the narrowness of its review of a discovery order.

In In re Sulfuric Acid Antitrust Litigation, 2005 WL 1994105, 2005 U.S. Dist LEXIS 17420 (N.D. Ill., Aug. 19, 2005), the court followed the First Circuit decision on the ground that the plain meaning of Rule 30(a) forbids a second 30(b)(6) deposition without leave of court. Citing the 1993 Committee Note provision that, for purposes of the ten-deposition limit, the court found no ground for excluding 30(b)(6) depositions from the requirement imposed at the same time that there be court permission for a second deposition:

> The Advisory Committee's explanation of why Rule 30(b)(6) depositions were to be treated differently from individual depositions for "purposes of" the ten-deposition rule, is readily apparent. As the instant case demonstrates, Rule 30(b)(6) deposition notices routinely

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30(b)(6) depositions are different from depositions of individuals," had said that the limitation does not apply.[14]

Whatever the resolution of these issues, there seem to be strategic reactions that could be employed. Providing that the seven-hour limitation applies to each designated representative, for example, may deter corporations from designating more than one person. But a reverse rule could prompt them to designate

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> specify a number of topics of inquiry, which often necessitate the designation of multiple witnesses. The more complex the case, the greater the number of topics to be explored during the deposition and the greater number of witnesses. If each witness were counted separately, a party could easily exhaust the number of allowable depositions in one or two Rule 30(b)(6) depositions. The Advisory Committee Notes make clear that the drafters intended to avoid that problem by counting a 30(b)(6) deposition as a single deposition, regardless of how many individuals were required to be designated to comply with a 30(b)(6) notice.
>
> There is nothing in the text, history, or purpose of Rule 30 that supports the conclusion that "for purposes of" the prior judicial approval requirement for successive depositions, Rule 30(b)(6) depositions should be treated differently form depositions of individuals.

See also 7 Moore's Federal Practice § 30.05[1][c] at 30-30.3 ("Even though a party may be deposing a different corporate representative, it is still seeking a 'second' deposition of the entity"); Sunny Isle Shopping Center, Inc. v. Xtra Super food Centers, Inc., 2002 WL 32349792 (D.V.I., July 24, 2002) (stating that the Rule 30(a)(2) limitation "has been held applicable to corporate depositions noticed pursuant to Rule 30(b)(6)").

[14] Quality Aero Technology, Inc. v. Telemetrie Elecktronik, GMBH, 212 F.R.D. 313 (E.D.N.C. 2002). The court's reasoning was as follows (id. at 319):

> Rule 30(b)(6) depositions are different from depositions of individuals. That difference is confirmed by the Advisory Committee Notes to the 1993 amendments to the Federal Rules, which expressly state that for purposes of calculating the number of depositions in a case, a 30(b)(6) deposition is separately counted as a single deposition, regardless off the number of witnesses designated. Further, there is no aspect of the Rules which either restricts a party to a single 30(b)(6) deposition or restricts the allotted time for the taking of a 30(b)(6) deposition.

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many. Similarly, the ten-deposition rule could, if applied to each designated representative, similarly provide an incentive for an entity to designate many. The Committee Note admonitions quoted above prevent that sort of behavior, but they may undercut efficient designation of representatives if they unduly encourage that entities use only one.

The "second deposition" problem is more difficult to assess, and was not addressed in the Committee Note when that limitation was adopted. On the one hand, the burden of preparing a 30(b)(6) witness is considerable, and having to do it more than once may be worthy of the protection afforded by the rule. On the other hand, to say that all topics must be examined at this one deposition may place additional stress on the corporate party (and require designation of additional representatives), as well as taxing the corporation's adversary. In addition, the notion (in the background, at least, with regard to the E-Discovery amendments) that an early 30(b)(6) deposition of IT people may be important to facilitate discovery of electronically stored information) could be undercut if that were the one and only opportunity for a 30(b)(6) deposition absent court approval of another one. As noted above, a related question arises if questioning of the representative goes beyond the scope of the topics listed in the notice -- should that be considered a "second" deposition, of the individual rather than the organization.

It may be that the best the Committee can do is to leave things as they are. Presently, the majority view on one of these three subjects (the one-deposition rule) favors the organizational litigant, while the resolution on the other two favors the organization's adversary. Reasonable litigants should be able to resolve such matters without the need for court intervention, and it may make sense to have a situation in which the onus is on each side with regard to certain matters to seek court intervention when agreement is not reached. If that is so, however, the question may remain whether the present burden of proceeding is in the right place.

The bar group comments include differing reactions to these issues. The New York State Bar Ass'n favored applying the one-day limit to a 30(b)(6) deposition, no matter how many representatives were designated. The American College of Trial Lawyers Federal Courts Committee saw no problem with the Committee's position that all designees be treated as a single deposition for the ten-deposition rule, and favored using the one-deposition rule to protect the corporation so that "litigants would be required to exhaust all possible topics in their first (and perhaps only) 30(b)(6) deposition of an entity." Proponents of Rule 30(b)(6) depositions urge that limits on taking them be

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avoided. See, e.g., Consumer Att'ys of California (urging that limitations on the number of 30(b)(6) depositions would be counterproductive, and that one cannot properly limit the number of representatives designated); Nat. Employment Lawyers' Ass'n (asserting that limiting the number of 30(b)(6) depositions will only lead to motions for additional depositions); W. Va. Trial Lawyers Ass'n (contending that limiting the number of such depositions is not warranted).

It may be that there is no perfect solution, and that any default will afford some opportunities for gamesmanship. But some might wisely be avoided. For example, it would be passing strange to provide that an organizational litigant that had to supply numerous representatives because the first several were inadequately prepared thereby curtailed its opponent's ability to take non-30(b)(6) depositions under the ten-deposition rule. Nonetheless, for purposes of discussion, the following amendment ideas may be helpful. First, to deal with the number of depositions in the most restrictive way, one could make amendments to Rule 30(a)(2):

> **(2) With Leave.** A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2);
>
> > **(A)** if the parties have not stipulated to the deposition and:
> >
> > > **(i)** the deposition would result in more than 10 depositions<u>, including each person designated to testify under Rule 30(b)(6),</u> being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants;
> > >
> > > **(ii)** the deponent<u>, [including a person deposed under Rule 30(b)(6)] {except a person deposed under Rule 30(b)(6)},</u> has already been deposed in the case; or * * *

Second, to deal with the durational limitation, one could amend Rule 30(d)(1) as follows:

> **(1) Duration.** Unless otherwise stipulated or ordered by the court, a deposition<u>, including a Rule 30(b)(6) deposition,</u> is limited to 1 day of 7 hours. The court must allow additional time consistent with Rule 26(b)(2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

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5. Timing of Rule 30(b)(6) depositions

The question of timing is important in significant measure because of the bearing it has on other issues. Thus, the earlier in the litigation a 30(b)(6) deposition occurs, the greater the preparation burden for the responding party, particularly if there is a significant risk of judicial admission treatment, or if there is a supplementation requirement that requires that all additional responsive information be provided in a specified (and relatively short) period of time.

A number of bar groups opposed limitations on the timing of 30(b)(6) depositions. ATLA, for example, says that "30(b)(6) depositions should be taken when they need to be taken." It adds that generally this will be relatively early in the litigation, because delaying this foundational discovery would impede plaintiffs' ability to learn the corporate position. The Consumer Att'ys of Calif. says that usually its members take such depositions early, but that they need flexibility to take them at any time during the litigation. The Nat. Ass'n of Consumer Advocates says that the timing of such depositions depends on the condition of the circumstances of the individual case, but that it should occur early enough to allow time for follow-up discovery before dispositive motions or trial preparation. The Nat. Employ Lawyers' Ass'n says that 30(b)(6) depositions should be taken early to assist the parties to move efficiently to the central issues in the case.

It may be that developing suitable methods for addressing concerns about preparation burden, preclusion, and inquiry beyond the listed topics would alleviate concerns about timing of 30(b)(6) depositions. Moving beyond those concerns and addressing the timing of such depositions directly in the rules might present drafting difficulties. For purposes of discussion, the following are some ideas about how such drafting might be attempted.

One approach would be add to the specific listing of topics in the discovery plan provisions of Rule 26(f)(3):[15]

> **(3) Discovery Plan.** A discovery plan must state the parties' views and proposals on:
>
> > **(A)** what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a),

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[15] The following includes the restyled additions for the E-Discovery amendments that are before the Committee during the May meeting.

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including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including -- if the parties agree on a procedure to assert these claims after production -- whether to ask the court to include their agreement in an order;

(E) any issues about Rule 30(b)(6) depositions, including the timing of any such depositions;

(FE) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(GF) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

This approach may unduly emphasize 30(b)(6) depositions. One objection made to adding reference to discovery of electronically stored information and to privilege waiver to Rule 26(f) was that it unduly focused on these topics. It could well be that a more forceful objection of that sort would be made to an approach like the one above. Beyond that, it does not provide any specifics on when such depositions may be taken, but only tells the parties to discuss the topic. An additional provision could be added to Rule 16(b) to call the court's attention to the issue, but one could still object that it was be amorphous there as well.

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A more direct approach might be added to Rule 26(d)(1):

> **(1) Timing.** A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order. A party may notice a Rule 30(b)(6) deposition fewer than --- days after the court has entered a scheduling order only on stipulation or by court order.

Alternatively, one might add a timing provision to Rule 30(b)(6) itself:

> **(6) Notice or Subpoena Directed to an Organization.** It its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, or a governmental agency and must describe with reasonable particularity the matters for examination. A party may notice a Rule 30(b)(6) deposition fewer than --- days after the court has entered a scheduling order only on stipulation or by court order. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

Given the need in some cases to take an early 30(b)(6) deposition regarding a party's electronic information systems, this approach might be seen as too restrictive for some cases. But it could be that such a default provision would have a positive effect in prompting the parties to work out a schedule to accommodate such features of individual cases. Perhaps that effect would be amplified if a Rule 26(f) amendment like that mentioned above were also added. Again, however, it may be objected that 30(b)(6) depositions are not such important topics that they warrant such prominent treatment in the rules.

6. Witness preparation

Through much of the above discussion, the burden of witness preparation has been a regular concern. Several bar group comments stressed the burdens of preparing witnesses for Rule 30(b)(6) depositions. See, e.g., ABA Section of Litigation (reporting that the burden of preparing witnesses is substantial,

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particularly regarding events that occurred long in the past, and particularly when the 30(b)(6) deposition is taken early in the litigation); Assoc. of the Bar of the City of N.Y. (reporting that preparing a 30(b)(6) witness requires unusually extensive time from both the witness and the attorney, in part because the attorney must assure that organization gathers all responsive information from any sources); N.Y. State Bar Ass'n (saying that the caselaw is not clear on the extent of the preparation burden).

Other bar groups questioned the extent of the burden, or urged that it would have to be shouldered at some point in the litigation anyway. See, e.g., Consumer Atty's of California (stating that there is some burden on the corporation, but noting that the corporation knows best how to find the needed information and has the option to select the person to respond); Nat. Employ Lawyer's Ass'n (asserting that the entity will have to identify the relevant witnesses eventually, and that 30(b)(6) simply moves this process to an earlier stage); Trial Lawyers for Public Justice (asserting that the burden on the corporation is not great because the basis for the corporation's testimony is contained in the corporation's records and the lawyer for the entity will have to become familiar with those records, so that counsel will be well situated to direct the representative to the needed records).

Many of those groups who contend that preparation of witnesses is not unduly taxing also contend that witnesses are often underprepared. Thus, several urge that the rule be amended to specify that there is such a duty to prepare. See, e.g., Nat. Ass'n of Consumer Advocates; Trial Lawyers for Public Justice. But there is no shortage of caselaw on the need to prepare the witness adequately. And adding an affirmative statement of the duty to prepare to the rule (as suggested in relation to item no. 1 above) might actually worsen the problem of preparation for responding parties. To facilitate discussion, it is perhaps worth noting that one possibility of a rule change would be to alter the "known or reasonably available" language of the current rule:

> **(6) Notice or Subpoena Directed to an Organization.** It its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, or a governmental agency and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to

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make this designation. The persons designated must testify about information [known or reasonably] {readily} available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

It is doubtful whether this modification of the current rule would improve matters. The current phrase seems to have sufficient flexibility to permit reasonable calibration for individual circumstances. Taking out "known or reasonably" without a substitute could heighten the exposure of the organization to criticism for failure to provide information. Substituting the word "readily" or some similar word would seem to weaken the obligation of the responding party very significantly. It might be seen as inconsistent with the obligation of the organization to provide in response to a Rule 34 request all materials within its "possession, custody, or control," not only those readily available.

Other amendment ideas

Bar groups that submitted comments also suggested other amendments, but the Subcommittee did not decide to bring them forward for consideration by the full Committee. Mention of some of them in this memorandum may nonetheless be useful

Requiring that the organization designate the "most knowledgeable" person: California requires that the "most knowledgeable" person be designated. Some bar groups suggested that Rule 30(b)(6) should also. This might reduce the problem of lack of preparation of witnesses proffered under the rule. Nonetheless, it could generate significant problems. It may often not be clear which person is most knowledgeable, and disputes or litigation about that subject often would serve no useful purpose. In the first place, it would seem to override the requirement now in the rule that a representative other than an officer, director, or managing agent may be designated only with the representative's consent. With notices that designate many topics, moreover, inserting such a requirement would likely mean that multiple representatives would have to be designated. As to events that occurred in the distant past, there may be nobody with significant personal knowledge currently in the organization's employ. And those most knowledgeable on one topic may have personal knowledge on other topics, thereby heightening the problem of whether examination is permitted on subjects beyond those specified in the notice. The current rule permits the responding party great latitude to make its choice; so long as it is responsible for producing a properly prepared witness this additional requirement is not likely to be helpful and may provoke problems.

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Requiring the responding party to specify in advance the identity of the person or persons will be testifying on its behalf: Frequently the interrogating lawyer may have no idea what individual will appear for the deposition until it begins. It was suggested that a requirement of advance notice should built into the rule. Yet it is not clear what use could be made of that advance notice. Absent a requirement that the person designated be the "most knowledgeable," it is unclear why a party would have a ground for objecting in advance to such a designation. Even if organizations select fresh-faced young innocents who are to act on their behalf, the sufficiency of the designation is measured by the person's actual performance as a 30(b)(6) witness. The notion that the interrogating party could insist that the organization designate a specific spokesperson was rejected in the drafting of the rule in the 1960s, and the rule now requires that when the organization selects somebody who is not an officer, director, or managing agent that person must consent to do the job. Allowing the interrogating party an advance opportunity to object to a designation seems contrary to the thrust of the rule.

Mandatory sanctions: Some urged that there be a requirement that the court impose sanctions for failure to prepare, perhaps somewhat on the model of Rule 37(a)(4) regarding costs of discovery motions. But mandatory sanctions are a blunt instrument at best, and Rule 37(a)(4) has not proved particularly useful. And in this context there is considerable room for debate on what is sufficient preparation of a witness and a wide range of sanctions that a court might employ, making the "mandatory" nature of the sanctions potentially illusory.

Numerical limit on topics: It was also suggested that parties be limited to a specified number of topics in a Rule 30(b)(6) notice. Such a limit seemingly could not work if the rules require also that there be only one 30(b)(6) deposition per party. Beyond that, it would seem to suffer from the same sort of flaw that was true of the proposal some years ago that Rule 34 be amended to limit the number of document requests a party could make -- that would provide an incentive for broad rather than rifle shot requests. Rule 30(b)(6) provides that the matters for examination be specified with reasonable particularity. Placing a numerical limit on them could undermine that goal.

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SUMMARY OF RESPONSES
RULE 30(b)(6) INQUIRY
March, 2006

The following attempts to summarize the responses received to the January, 2006, inquiry from a subcommittee of the Advisory Committee on Civil Rules regarding Rule 30(b)(6). The comments are ordered alphabetically among bar groups. A seemingly individual comment is at the end.

Topically, the comments are arranged in the sequence of the questions in the inquiry (which are repeated before the comments received pertinent to those inquiries).

Overall

ABA Section of Lit.: Our comments should not be interpreted as urging changes to Rule 30(b)(6). More information and input would have to be gathered from our Section members before we would be in a position to recommend any changes on behalf of the Section. At a leadership meeting attended by Judge Rosenthal, however, the strong consensus of the group was that a study was appropriate.

Assoc. of the Bar of the City of N.Y.: Our Federal Courts Committee agreed that Rule 30(b)(6) serves an important purpose in streamlining the pretrial search for information held by organizational litigants. Although we understand that the rule offers the potential for abuse, our members' experience suggests that abuse of this rule is no more likely than with any other discovery device, and that the potential for abuse is suitably managed by the district court' supervision of the process. In addition, existing caselaw surrounding the rule provides sufficient guidance about which practices are unlikely to meet with court approval in the event disputes arise. Given this context, the Association does not believe an amendment would improve the effectiveness of the rule or provide any greater protection against attempted abuse.

Assoc. of Trial Lawyers of America: We start with first premises. We require human litigants to testify to all the topics that might be designated in a 30(b)(6) notice. Once they say, under oath, that X happened, or that my contention is Y, they can explain further, but we do not let them pretend that they never said X or Y. The same should be true for a corporation, testifying through a designated representative. We reject the conclusion asserted by others that corporate knowledge does not exist, and believe that Congress' recent adoption of the Sarbanes-Oxley Act shows that it also regards corporations as actors responsible for what they know. The buck needs to stop

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somewhere. The corporation's burden of being treated as a person under Rule 30(b)(6) is a concomitant obligation from the privilege of being able to use the corporate form to conduct business. The many advantages of the corporate form should not include privileged treatment by the federal rules.

Calif. Employ. Lawyers' Ass'n: There does not appear to be any showing of problems with Rule 30(b)(6) which would require the rule to be altered. Judges have been able to deal with any issues that arise under the current rule. Rule 30(b)(6) depositions allow parties to narrow issues and focus discovery, at a very early stage of the litigation. The rule has led to greater efficiency, and to better use of time and economic resources, than would be true if parties were not allowed to depose entities in this way.

Consumer Att'ys of Calif.: We urge the committee to reject suggestions that Rule 30(b)(6)be changed. The rule is a critically necessary discovery tool for parties litigating against corporations -- whether they be injured individuals or other businesses. Although it is not a complete solution, it goes far toward solving the problems of bandying. Making the rule friendlier to corporations would only serve to make it less effective. That would create greater litigation obstacles and would result in even more need for judicial intervention in the discovery process.

Fed. of Defense & Corp. Counsel: Rule 30(b)(6) is being used with greater frequency early in discovery to comprehensively -- and prematurely -- examine corporate representatives on issues that can be outcome determinative.

Nat. Ass'n of Consumer Advocates: NACA agrees with the fundamental premise of the rule, that the organization, like an individual litigant, can fairly be required to answer questions in a deposition about its knowledge regarding the events in issue. That is not an undue imposition on organizational litigants because, at some point in the litigation, they have to determine their knowledge regarding the events at issue. The only issue is when they have to do that. The rule properly pushes that point back so that all parties can learn the organizational entity's knowledge.

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Nat. Employ. Lawyers' Ass'n: The rule is critical to timely discovery. Although it puts a burden on the corporation to identify sources of information, it is the corporation that has the information. Our members have successfully used 30(b)(6) to avoid lengthy detailed interrogatories and unnecessary depositions. Early use of a 30(b)(6) deposition often obviates the need for other discovery, and thereby significantly reduces the costs of litigation for all parties. Rule 30(b)(6) is not a rule a that provokes significant contention. But because careful use of it has a dramatic impact in reducing discovery, changes to it are likely to cause an increase in those costs.

W. Va. Trial Lawyers Ass'n: The rule has served to provide a level playing field in litigation involving corporations. It plays a crucial role in assuring access to justice. Three perspectives show that the rule should not be changed, and that it is right to rely on the well-developed body of caselaw: (1) the risk of bandying; (2) the substantial body of caselaw now in existence; and (3) the unique perspective of the presiding trial judge in administering any disputes. The rule has been tried and tested over more than 30 years under myriad factual scenarios.

R. Graham Esdale, Jr.: Based on my experience over the last 12 years or so of litigating products liability cases, I do not believe the rule needs to be changed as suggested by the inquiry. If anything, it needs to be strengthened. It is a major tool for those suing corporations to get information. Defendants in products liability cases always want to get the plaintiff's deposition first in order to lock the plaintiff into the facts and claims being made. Often that happens before defendants have produced anything in the case. The plaintiff should be allowed to use 30(b)(6) to do somewhat the same thing. Yet corporations often produce a representative who knows little or nothing regarding the listed matters, and judges rarely impose sanctions when this happens. I have never had an occasion where a judge imposed a sanction or required the defendant to pay costs when it was necessary to take a second deposition because the first representative was unable to respond to all areas in the notice. If the corporation could change its answers at trial, that would cause confusion and devalue the 30(b)(6) deposition. Similarly, forbidding contention questions would deprive the plaintiff of an essential discovery opportunity. Answering about matters beyond the notice is rare, and not a problem. This is an attempt to enact tort reform through changing the rules of court.

(1) General: Have your members encountered difficulties in using or responding to Rule 30(b)(6) depositions? If so, have the difficulties become more acute in the last decade?

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Assoc. of Trial Lawyers of America: Our members do report difficulties using 30(b)(6) depositions, primarily with failure to produce suitably knowledgeable designees. This is viewed as willful. We don't know whether these problems have become more acute over the last decade.

Calif. Employ. Lawyers' Ass'n: From the perspective of our members, who notice such depositions, there are a number of problems. First, if the person who is most knowledgeable about the matter of interest is no longer employed by the entity, there seems to be nothing in the law which requires the entity to gather information from former employees. Second, the entity may claim that there is no one person most qualified to testify regarding a particular matter, which can require the propounding party to conduct numerous depositions; we would prefer that the responding entity have to designate the person "most knowledgeable" to testify about the particular matter stated in the notice. Another problem is that the responding entity may not do a sufficient investigation to determine whom to designate; often the department head will be designated, and it is only at the deposition that the lawyers find that this person is not really qualified to answer questions. There should be some consequence for such misconduct, but the rule does not need to be changed for that to happen. Judges have the means of correcting discovery problems such as this. Yet another problem comes from the ten-deposition limit, particularly if the entity does not produce the correct person, with the result that one of the propounding party's depositions has been wasted. A Rule 30(b)(6) deposition should count as only one deposition for purposes of the ten-deposition rule. It is also undesirable that there is no requirement that the responding party identify the individual who will testify in advance, so that the propounding party learns for the first time on the day of the deposition the identity of the individual. Requiring advance notice would be better. In addition, it often happens that counsel for the witness resists questions about the witness's possible bias, but such questions should be allowed, so it would be good if the rule said so explicitly. Finally, it often happens that the individual has discoverable information on topics not listed in the notice. A deposing attorney should be able to question on these matters, but the deposition should still count as only one toward the ten-deposition limit of Rule 30(a).

Consumer Att'ys of Calif.: The only difficulties under the rule are in obtaining full responses. It is still possible, despite the rule, for corporations to hide their wrongdoing. But with 30(b)(6) as a foundation, at least the adverse party has the ability to set the stage for a motion to compel.

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Nat. Ass'n of Consumer Advocates: A quotation from one of our members best summarizes NACA's experience with the rule: "In 26 years of practice, my impression has been that Rule 30(b)(6) generally works well. The major problem I have seen is the practice of some defense counsel producing witnesses with little or no real knowledge of the topics they have been designated to testify about." This response was echoed by lawyers from around the country.

Nat. Employ. Lawyers' Ass'n: The short answer is no. Like any other discovery tool, there are disputes as to scope of depositions and the deponents provided. These disputes are usually resolved by the parties and in circumstances where the parties are unable reach agreement, courts have proven quite adept at reaching a resolution.

Trial Lawyers for Public Justice: The largest problem is the failure of corporations to meet their obligation to provide knowledgeable representatives. Although corporate lawyers often claim that Rule 30(b)(6) places a great burden on the corporation, in our experience the opposite is true. The rule is vulnerable to circumvention by corporate defendants. The choice of the designee rests entirely with the corporation, and it is often to the advantage of the corporation to choose somebody who is not most knowledgeable. Increasingly, corporations choose wholesome looking, young people who, prior to receipt of the notice, had little, if any, involvement with the issues involved in the case. One corporate defendant even produced a document about this practice, which referred to its designee as "the fall guy." One problem that results is that the designee cannot fully address the topics listed in the notice. Often the designee will deny personal knowledge and suggest others who have such knowledge. Too often, entities seem to think that so long as they produce a witness, they have satisfied their obligations no matter how much the witness knows. And entities frequently try to evade discovery by asserting that the information is old, or that all knowledgeable employees have died or left. They thus ignore their obligation to provide a designee prepared to testify beyond his or her personal knowledge. In the experience of several of our members, corporations never seek information from former employees about designated topics. Designees often say they have never seen pertinent documents when presented with them during the deposition. Although the caselaw says that the corporation must prepare the witness, the rule does not; it should. A related problem is that corporations often disregard their duty to provide a substitute witness when the first one claims lack of knowledge. This problem becomes more acute in light of the ten-deposition limit, for corporate parties can exhaust the ten-deposition limit by failing to prepare their witnesses properly.

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W. Va. Trial Lawyers Ass'n: Before the rule went into effect in 1970, there must have been a great deal of difficulty caused by bandying. Under the rule, the risk of bandying has been reduced a great deal, although not eliminated. Because there is a body of caselaw on the obligations of the corporation, there is less risk of the corporation "pushing the envelope" to avoid revealing information. Rather than restrict the rule at the behest of those who gain by returning to the problems of bandying, the better route is to preserve the rule and to allow it to develop as it has.

(2) Burdens and benefits of Rule 30(b)(6) practice: Do your members find that the burden of preparing witnesses for Rule 30(b)(6) depositions outweighs the benefits of such depositions to the discovery process? If so, please explain why. If burden is a problem, is it more acute (or only important) with regard to events that occurred in the distant past or are otherwise obscure? Is there often difficulty determining what information is "reasonably available" to the organization?

ABA Section of Lit.: For large organizations, or with regard to topics that involve events that occurred many years ago, it is often difficult to gather all the information that may be requested by a 30(b)(6) deposition notice. This is particularly true early in discovery, when all the witnesses and documents may not have been located. It is also true when those most familiar with the facts are no longer employed by the organization. A corporation served with a 30(b)(6) notice has an obligation not only to designate and produce persons who will satisfy the requirements of the rule, but also to prepare its witnesses so that they can give complete and accurate information. But those goals, while easy to express, are hard to implement. Too often counsel conducting 30(b)(6) depositions are inclined to make the extent and nature of preparation for the deposition an issue in the litigation. Much of the deposition may focus on preparation rather than the underlying facts. Some counsel would like to see the Advisory Committee consider amendments to reduce the situations in which the rule creates an inappropriate burden on a litigant.

Amer. Coll. of Trial Lawyers: This issue has two faces -- the burden on the entity to provide a witness who can testify to its knowledge concerning enumerated subjects, and the degree to which the entity can "create" an expert who presents himself as a fact witness. A supplementation procedure would take some of the burden and apprehension out of the preparation process, but it should not be allowed to serve as a substitute for adequate preparation. Otherwise, a 30(b)(6) deposition would produce the

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same answer to every question -- "I will get back to you on that."

Assoc. of the Bar of the City of N.Y.: The consensus of our Committee members was that preparing a Rule 30(b)(6) witness for deposition requires unusually extensive time from both the witness and the attorney. Because the witness must testify about information not only known but also "reasonably available" to the organization, counsel must assure that the organization gathers responsive information from all sources. This is important because there is a risk that if the witness cannot properly testify the court may find that there has been a non-appearance, which might result in the inability to present additional evidence in the future. (The example cited involves failure to consult a former employee who had relevant information, with the result that the entity was barred from presenting subsequent contradictory evidence by that employee.) Notwithstanding these points, our members believe that witnesses can be effectively prepared and protected from overreaching during the deposition by giving careful attention to the scope of the examination specified in the notice, and challenging or negotiating items where necessary. Existing caselaw already provides significant guidance to aid witness preparation and informs the bases on which protection should be sought. (Several cases are cited.)

Assoc. of Trial Lawyers of America: Our members don't have to prepare such witnesses, but they are quick to note that corporate failure to prepare witnesses regularly leads to frustration and to further depositions. Even if proper preparation is burdensome, it is less burdensome than serial depositions.

Calif. Employ. Lawyers' Ass'n: We firmly believe that Rule 30(b)(6) depositions are enormously beneficial, and that they streamline the litigation and discovery process. Without such depositions, the time required for, and cost of, litigation would increase tremendously.

Consumer Att'ys of Calif.: Obviously, there is some burden on the corporation to respond. But it best knows how to find the needed information, and it has the option to select the person to answer questions. The general discovery process demands that the relevant information be found and produced. Fulfilling that obligation is no more burdensome in the 30(b)(6) situation than in any other. But the benefits of that process are extraordinary because it streamlines discovery for the adverse party, who is a distinct disadvantage in the discovery process. If it is a "burden" for a corporation to figure out who is the most knowledgeable person with respect to a particular issue, it is simply impossible for the adverse party to figure out how

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otherwise to get the needed information.

Nat. Employ. Lawyers' Ass'n: Eventually the entity will have to identify the relevant witnesses, either for trial or for a motion for summary judgment. Rule 30(b)(6) depositions simply move this process to an earlier stage of the litigation, making it more efficient. For a corporation that honestly seeks to represent its interests with candid discovery responses, 30(b)(6) depositions are really a boon. They become burdensome only when the corporation does not want to provide candid responses. That can result in substituting interrogatory answers that are carefully drafted by a lawyer that invariably lead to further discovery. There is no difference between depositions regarding recent events and older ones. To the contrary, when the corporation has difficulty identifying a suitable witness because of the length of time that has passed, it is forced to recognize the paucity of available evidence. That realization often leads to an early settlement.

N.Y. St. Bar Ass'n: We hope that consideration can continue of ways of narrowing or at least making clearer the scope of required preparation for a Rule 30(b)(6) witness. In complex litigation, that can be a thorny problem as to which there is no clear guidance in the Rule or the caselaw. At the same time, the Committee should consider whether more emphasis should be given to the imposition of meaningful sanctions for inadequate preparation of, or performance by, a Rule 30(b)(6) witness given the nominal sanctions in the reported cases. Courts should be encouraged to consider preclusive sanctions under Rule 37(c) where other parties have been prejudiced by failure to prepare the witness.

Trial Lawyers for Public Justice: These depositions are incredibly beneficial. They are among the most potent weapons in a litigant's arsenal. They can streamline litigation. They reduce discovery costs. Were the Committee to recommend substantial changes along the lines suggested in its inquiry, this would be tantamount to eliminating the chance of any meaningful discovery against organizational entities. The burden involved for the corporation is not great. The usual basis for testimony is the corporation's records. The lawyer for the entity will have to become familiar with those records, so counsel knows what sources should be used to prepare the witness. True, the party seeking discovery does not have any burden of preparing the witness. Although the corporation will always claim that the burden outweighs the benefit, that is very rarely true in this situation.

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(3) Adequacy of preparation of witnesses proffered by organizations: Is it clear what is required to prepare a witness to testify in a Rule 30(b)(6) deposition? Is it frequent that witnesses are not properly prepared? Under the current rule, have courts been able to handle arguments about whether witnesses were adequately prepared in an appropriate manner?

Assoc. of Trial Lawyers of America: Unprepared witnesses are a signal concern of our members. They find that judges are too reluctant to use the tools at their disposal to sanction misconduct.

Calif. Employ. Lawyers' Ass'n: Witnesses are often ill-prepared for their depositions. Sometimes they are unaware that they have been designated by the entity to testify on its behalf. They are often not prepared to testify fully regarding the areas designated. We believe that there should be a sanction for any waste of time involved due to an ill-prepared witness. Judges should be encouraged to impose such sanctions.

Consumer Att'ys of Calif.: Although Rule 30(b)(6) witnesses are often not adequately prepared, that is not the fault of the rule. Inadequate preparation results either from insufficiently-specific designations of the areas of testimony or from the corporate defendant's deliberate obfuscation. The former problem is typically resolved through objections and a meet-and-confer process. The latter problem requires resort to judicial intervention. Judges are very effective an assessing whether a witness is adequately prepared.

Nat. Ass'n of Consumer Advocates: The problems that do occur usually involve a witness repeatedly answering "I do not know" or identifying some other person that needs to be asked. Because judges vary in their application of the rules, the consequences of such answers also vary. One member who practices in the "Rocket Docket" in the E.D. Va. finds that the judges tolerate very little bandying, but another reports a judge seemingly impatient at the lawyer's persistence when 30(b)(6) witnesses insisted on testifying only about their personal knowledge. Currently, Rule 37 adequately provides a rule-based method of dealing with such issues, but there is a difference among judges in whether or how to respond to problems of lack of preparation. The basic problem is that some corporations don't appreciate or accept the fundamental fairness of revealing their facts to the other side during the deposition. How quickly the entity marshals these facts is normally a function of the amount of resources and effort expended to accomplish the task.

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Nat. Employ. Lawyers' Ass'n: Little preparation is really required of a 30(b)(6) witness. Either an individual has the information or he does not. Preparation really means identifying the proper individual and making sure this person is capable of answering questions. This is best done simply by reviewing the 30(b)(6) notice with the potential deponent. Problems develop only when attorneys do not properly use the rule. Examiners who poorly phrase their notices will lose the value of the deposition. When the notice is ambiguous, it falls to counsel to work together to reach an understanding. If the corporation fails to do its job in making the first designation, it should have to make another. Occasionally courts will deem the corporation to be without knowledge on a particular topic due to failure to respond. This again narrows discovery and decreases the cost of litigation.

Trial Lawyers for Public Justice: This is the largest problem under the rule. As one lawyer wrote, "Is it frequent that witnesses are not properly prepared? Answer: Without exception in my quarter century of experience using this rule."

W. Va. Trial Lawyers Ass'n: Instances of inadequate preparation do occur, but not due to any deficiency in the rule. That results, instead, from improper behavior by counsel or efforts by corporations to avoid revealing information. The courts have a settled body of caselaw to deal with these problems.

(4) Scope of examination and specification of issues: Are Rule 30(b)(6) notices typically sufficiently detailed and limited to permit adequate preparation of witnesses? Does examination often proceed on issues not identified in the notice if the witness also has knowledge about those additional issues? Has such examination on additional topics caused problems?

ABA Section of Lit.: Counsel may require in the notice that a large organization track down and prepare a witness to testify about every issue in the litigation, even if those topics are not appropriate for 30(b)(6) testimony. For tactical reasons, counsel may serve repeated 30(b)(6) notices with multiple categories, which makes it virtually impossible for one witness to be able to address all the issues.

Amer. Coll. of Trial Lawyers: The caselaw is not uniform on whether it is permissible to ask questions that go beyond the scope of the designated topic areas (citing a case that identifies two lines of cases). We believe that a clarification would be helpful.

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Assoc. of Trial Lawyers of America: Our members report following lines of questioning within the knowledge of the witness if that knowledge is otherwise discoverable. They view this as efficient.

Calif. Employ. Lawyers' Ass'n: We recommend that examination of the witness be allowed as to all relevant areas within the witness's knowledge. Otherwise, it is conceivable that a single person could be produced as a witness under Rule 30(b)(6) and then again as an individual. The inefficiency of that procedure is obvious. Moreover, that would count as two witnesses against the ten-deposition limit.

Consumer Att'ys of Calif.: As with every discovery device, the quality of 30(b)(6) designations is necessarily tied to the experience and skill of the lawyer drafting them. But when there are problems, it is relatively easy for opposing counsel to work them out in a meet-and-confer process. Regarding questioning about topics beyond the list, that depends on whether the parties think it preferable to wrap up everything in one session. If the responding party opts for a second deposition to cover the other area, so be it.

Nat. Ass'n of Consumer Advocates: In its training sessions, NACA takes the position that Rule 30(b)(6) notices must be sufficiently detailed. Given that our members are producing the notices, we have heard no complaints from them about the sufficiency of what they produce. Whether the examination goes beyond the notice is up to the counsel in the deposition. For efficiency reasons, it often happens that if the witness has pertinent knowledge that can be obtained later by having another deposition, counsel normally allow the witness to provide that testimony during the 30(b)(6) deposition.

Nat. Employ. Lawyers' Ass'n: The burden falls on the examiner to provide a clear and detailed notice. A good notice eases the way of discovery. If a notice is poor, the corporation can respond by working with the examiner to clarify what is needed, or simply provide the best witness it can. In our experience, courts are generally not inclined to reopen depositions, forcing counsel to do their job carefully in the first instance. Because the examiner is prepared on the issues in the notice, he is generally not prepared to ask questions beyond the notice. The 30(b)(6) deposition has specific goals and going beyond the notice is often worthless. Objections to questions which go beyond the scope are invariably sustained by the court and examiners who do so typically find that they have wasted time. But if it turns out that the witness has a wealth of other information, that usually saves time on other depositions, as the testimony of this witness is used instead.

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Trial Lawyers for Public Justice: The party seeking discovery knows that its effort will be hopeless unless the subject matter is specified in great detail. But the organization often objects to the scope of the notice. Defendants may object for tactical reasons, essentially extorting plaintiffs into abandoning requests for relevant information as the price for going forward on other topics. When the witness has personal knowledge about matters beyond the scope of the notice, it would be a waste of time to require a second deposition to pursue those matters.

(5) Timing and number: Should Rule 30(b)(6) depositions usually be taken early or late in the discovery process? If they are taken early, should there be an opportunity to supplement? Should there be any limitation on the number of Rule 30(b)(6) depositions a party can take?

Amer. Coll. of Trial Lawyers: Our committee is not aware of any problems that have arisen from the Committee Note suggestion to treat all individuals designated in response to a 30(b)(6) notice as a single deposition for purposes of the number of depositions, but to treat each individual as subject to the seven-hour day limitation for his or her deposition. We agree with a magistrate judge's ruling that a 30(b)(6) deposition is the deposition of the entity, and that a second deposition of that same entity can only be done by agreement or order. That would mean that litigants would be required to exhaust all possible topics in their first 30(b)(6) deposition. We note that many district courts have local rules limiting the number of interrogatories, and suggest that there could be a limit on the number of topics included in a 30(b)(6) notice.

Assoc. of Trial Lawyers of America: Inadequacy of witness preparation raises concerns about how depositions or designees should be counted. As the deposition of the corporation, the 30(b)(6) deposition should count as one deposition, regardless of how many persons are designated. In terms of timing, it is impossible to declare what is the right time for all cases; "30(b)(6) depositions should be taken when they need to be taken." Generally, this will be relatively early in the litigation. Delaying testimony would prevent plaintiffs from discovering the corporate position. We see no reason, however, to address the timing or number by rule. Judges can handle these things on a case-specific basis.

Calif. Employ. Lawyers' Ass'n: We believe that there should be no opportunity to supplement. Particularly in the late stages of litigation, supplementation might result in a completely different factual scenario than that for which the parties have

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been preparing. It would required reopening discovery in many cases, resulting in tremendous inefficiency.

Consumer Att'ys of Calif.: Our members normally take 30(b)(6) depositions early in the discovery process, but litigants need flexibility to take them at any time during the litigation. Limitations on the number of 30(b)(6) depositions would be counterproductive. Crafting one would also be difficult. You can't limit the number of individuals designated. If one tried to limit the number of topics designated, all that would result is that litigants would delineate broader, less specific and less effective topics to cover more with fewer. Propounding lawyers don't want corporations to spend more time than is necessary to get the information they need to litigate their cases. The simple reality is that most attorneys use 30(b)(6) depositions only as needed.

Nat. Ass'n of Consumer Advocates: These issues should be addressed and normally worked out during the Rule 26(f) conference. Regardless of the number of people designated by the corporation, a Rule 30(b)(6) should count as one deposition for purposes of the ten-deposition limit. The duration and timing of the deposition depends on the condition of the court's docket and the circumstances of the individual case. The 30(b)(6) deposition should occur early enough to allow for follow-up discovery before dispositive motions or trial preparation.

Nat. Employ. Lawyers' Ass'n: Rule 30(b)(6) depositions should be taken early in the discovery process, because they have a unique ability of helping the parties cut directly to the central issues and avoid wasted discovery efforts. If the witness is carefully selected, there should be no need to supplement a 30(b)(6) deposition. Supplementation would be necessary only in cases in which the witness is not able to answer the questions asked. It is unusual for more than one 30(b)(6) deposition to be noticed. When there is another, it is usually because the corporation has changed its position, or because amendments have been made in the pleadings. Limiting the number of 30(b)(6) depositions a party may take will only lead to motions for additional depositions. The rule should state that all depositions taken pursuant to this rule shall count as one deposition for purposes of the ten-deposition limit.

Trial Lawyers for Public Justice: There should be no restriction on the number or timing of Rule 30(b)(6) depositions. They are useful on a broad array of topics. Interrogatories, by way of contrast, have proven a poor discovery tool. Rule 30(b)(6) depositions provide a way to pierce the objections, evasions, non-information and non-responsive features of interrogatory answers.

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W. Va. Trial Lawyers Ass'n: Some counsel take these depositions "up front" to get the position of the institutional litigant on the record. Others prefer to utilize them further into, or even at the end of, the discovery process. Like other discovery tools, these matters are best left to the lawyers. Changing the rule to limit the number of such depositions is not warranted; the trial judge is well-situated to deal with such issues.

(6) Possible impact on work product protection: Do Rule 30(b)(6) depositions pose greater threats to work product protection than other depositions? Are contention questions used in Rule 30(b)(6) depositions in ways that intrude into protected areas? Are Rule 30(b)(6) depositions used to compel organizations to take positions on contested issues too early in the litigation?

Amer. Coll. of Trial Lawyers: It is not clear that Fed. R. Evid. 612(2) should apply to a 30(b)(6) deposition. Does the document really refresh the witness's memory? Or does it "create" a memory brought into being for purposes of the deposition? Depending on how the court resolves that issue, it might insist that any documents used to prepare the witness be turned over to the other side.

Assoc. of the Bar of the City of N.Y.: Our members reported that this sort of problem does not usually arise, and they were confident that it could be successfully addressed by a court on a motion for a protective order. One of our members, however, was concerned that such a deposition could invade work-product immunity when the notice requests the witness to testify about all documents and information supporting the organization's claims or defenses. Because it is reasonable to assume that counsel is involved in gathering that information and analyzing documents that support claims, the attorney's thought processes may well be revealed.

Calif. Employ. Lawyers' Ass'n: We have found that contention questions are not being asked in these depositions. The rule does not explicitly invade or violate the work product protection. Rule 30(b)(6) depositions pose no greater threat to work product than do any other types of deposition. Contention questions, if they are asked at all, do not endanger the attorney work product immunity any more gravely than if they are posed to individual parties.

Consumer Att'ys of Calif.: We have not found that 30(b)(6) depositions have any greater impact on work product issues than any other type of depositions. Nor is it our experience that

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contention-type issues arise in the 30(b)(6) context. Generally, the depositions focus on obtaining information about the corporation's structure, departments, organization, document retention and access policies, and other general informational facts, not contentions or positions.

Nat. Ass'n of Consumer Advocates: The deponent has the most control over how much work product is involved in its own investigation. If it chooses to have its lawyer perform its investigation, then it will have work product that must be disclosed. If it instead has non-lawyers interview its employees and examine documents and records, it will avoid most work-product issues. (Note: Rule 26(b)(3) provides protection for trial preparation work done by nonlawyer agents of the party.) NACA has heard no complaints from its members about the contention question issue raised by the Committee's request for comments.

Nat. Employ. Lawyers' Ass'n: Rule 30(b)(6) depositions pose no greater threat to work product protection than interrogatories or document requests. Indeed, in a sense there is less threat because the topics are specified in advance. Contention questions don't pose a problem. There should be nothing protected about contentions. Often contention questions cut to the heart of the matter much faster and save discovery and litigation costs. Rule 30(b)(6) depositions are often used to compel organizations to take positions on contested issues early in litigation. That is one of the great benefits of such depositions, because they save the other side from doing much additional discovery to get to the same place. Particularly in an era of early discovery deadlines, this is important. A corporation should no more be permitted to avoid taking positions than an individual.

Trial Lawyers for Public Justice: Often, having chosen a "fall guy" to represent the corporation, counsel educate the witness for the deposition and try to thwart discovery about the basis for the testimony by interposing work product objections. This is improper, since work product protection does not apply to facts learned in preparation for litigation. It does not matter that this particular witness has learned some or all of this factual information from the lawyer.

(7) "Binding" effect of answers: Are Rule 30(b)(6) deposition answers being given an unduly binding effect at trial? Are organizations being unfairly prevented from providing evidence that contradicts or supplements what was said in the deposition?

ABA Section of Lit.: Counsel who regularly represent

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corporations believe that treating Rule 30(b)(6) testimony as a judicial admission is too harsh. "Most had faced arguments for the preclusive nature of testimony; some reported that a court had issued preclusion rulings. All reported that the potential for a preclusion ruling increased the burden of producing a properly prepared 30(b)(6) designee." Even the best intentioned counsel and their clients face a risk of careless or wrong answers during such a deposition. Some opportunity for supplementation should be considered. This is not to suggest that it is never appropriate to preclude an organization from contradicting the testimony, or lack of testimony, on a particular topic. It is important that counsel and parties take seriously the obligation to prepare thoroughly for a 30(b)(6) deposition. When there has been undue prejudice to the examining party, or to litigants who rely on original testimony, preclusive sanctions may be warranted.

Amer. Coll. of Trial Lawyers: The rule can be, and has been, interpreted to provide for a binding effect. A substantial and persuasive argument can be made that a 30(b)(6) deposition ought to be no different than the deposition of an individual. Beyond that, even allowing impeachment of the entity that provided the deposition answers might be questioned. "When an individual says different things on different occasions under oath, the impeachment value is real. But when two different individuals who are spokespersons for the same entity say two different things, the effect if far different, far less substantial." "If 30(b)(6) depositions are not binding, what is the point of taking them? . . . Yet if they are binding, how does one avoid the potential for unfairness?" One answer may be a supplementation process. That is allowed for interrogatory answers, even though by their nature they allow for reflection and dissemination within the entity that is not true of 30(b)(6) answers. "Parties should have a right to binding answers from corporate entities; corporate entities should have a right not to be led into binding themselves by blindside testimony." If one decides that a 30(b)(6) deposition should be treated the same as any other deposition -- that the witness is free to give contrary trial testimony subject to impeachment -- then perhaps there should be some provision to make the impeachment as effective as in individual depositions. Although many courts already make a practice of explaining to juries what a representative deposition is, perhaps that explanation could be required by the rules.

Assoc. of the Bar of the City of N.Y.: None of our members had found that the binding effect issue played an important role in one of their cases. This may be because few cases reach trial, where the admissibility and effect of deposition testimony becomes important. But although the decisions on this issue approach it from slightly differing points of view, none appears

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to preclude additional testimony when the facts suggest it would not be fair to do so. (The letter cites cases.) The Association expects this body of law to continue to develop and to narrow, if not eliminate, uncertainty about the binding effect of Rule 30(b)(6) testimony.

Assoc. of Trial Lawyers of America: We mean for a corporation to be bound in a 30(b)(6) deposition in the same way a human litigant is bound by a deposition. There is no unfairness in requiring a corporation to present its knowledge. It chooses the person through whom to do it and prepares the agent to testify. The buck must stop somewhere.

Calif. Employ. Lawyers' Ass'n: We wonder, if deposition answers are not being given a binding effect at trial, why one would conduct the depositions at all. All depositions are intended to be given a binding effect at trial; if a party wishes to contradict its testimony the trier of fact is entrusted with the obligation of determining the facts and giving the deposition answers proper weight. Requiring deposition answers to be given binding effect guarantees fairness and prevents "trial by ambush."

Consumer Att'ys of Calif.: Rule 30(b)(6) depositions are no different than any other discovery devices -- if a change or supplement is required, it can be made. Obviously, like every other change or alternation, such changes can be commented on at trial.

Nat. Ass'n of Consumer Advocates: The rule requires the entity to send a person to "testify" "on its behalf." The use of the word "testify" implies that the information is sworn to be true. The phrase "on its behalf," in turn, means that the answers be truthful on behalf of the entity. The inherent nature of any testimony -- that it can be used against the deponent -- is not a problem for those entities who complete a suitable investigation of their own facts prior to the deposition.

Trial Lawyers for Public Justice: The courts are split on whether a Rule 30(b)(6) transcript is binding on the organization. If the deposition is not binding, there is no reason for the rule.

Nat. Employ. Lawyers' Ass'n: Unfortunately, the contrary is true; depositions are generally not given binding effect at trial. Rather, they are used to impeach witnesses who testify differently than they did in their deposition. This is a very effective technique against individuals, but when a corporation presents someone at trial to provide testimony contrary to that provided by the person who gave the 30(b)(6) deposition, the fact that the deposition was of a different individual makes its use

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as a tool of impeachment very weak. The result is that corporations use this technique to defeat the purpose of Rule 30(b)(6). A corporation should not be allowed to contradict its own testimony free of consequence any more than an individual.

(8) Conflicting decisions under current rule: Have your members found that conflicting rulings are emerging in the application of current Rule 30(b)(6)? If so, we would appreciate being apprised about those decisions.

ABA Section of Lit.: Courts have taken two opposing positions on the "binding" nature of Rule 30(b)(6) deposition testimony. In some jurisdictions, the testimony is taken as a judicial admission, and the organization is precluded from taking any position inconsistent with its 30(b)(6) testimony. In others, the organization is bound to the same extent as any other witness, but it may contradict its position, with a credibility price to pay.

Amer. Coll. of Trial Lawyers: The current caselaw is in conflict regarding whether and to what extent a 30(b)(6) deposition binds the entity that designated the witness. The caselaw is neither definitive nor uniform. We believe that the practicing bar would benefit from knowing what the rule really means, one way of the other. There is also a conflict about whether questioning can go beyond the scope of the notice.

Assoc. of Trial Lawyers of America: We are not aware of significant conflicting authority.

Calif. Employ. Lawyers' Ass'n: We are not aware of conflicting rulings, and have found that judges are able to manage this discovery very well under the current rule.

Consumer Att'ys of Calif.: At least in California, no conflicts or problems have emerged.

Fed. of Defense & Corp. Counsel: Many courts prohibit a party from submitting evidence that contradicts its deposition testimony. Greater leeway is given in other jurisdictions, which allow an organization to present evidence that contradicts or rebuts the testimony of its own 30(b)(6) witness. (The letter cites cases.)

Nat. Ass'n of Consumer Advocates: There are differences among judges and among courts in their attitude toward the failure of parties to prepare their witnesses adequately.

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Nat. Employ. Lawyers' Ass'n: Courts have managed to resolve the rare 30(b)(6) disputes with great facility. Rule 30(b)(6) is really far easier to police than regular depositions because the notice is provided in advance. We have seen no conflicting rulings on this issue.

Trial Lawyers for Public Justice: The courts are split on whether a Rule 30(b)(6) transcript is binding on the organization.

(9) Resolve problems though caselaw? Until there is a good understanding of the gravity and nature of any current problem with practice under Rule 30(b)(6), there can be no serious consideration of whether a rule amendment might be desirable. Can any problems your members have encountered with practice under Rule 30(b)(6) be addressed through litigation under the current rule, or would a rule change be a better way to address such problems?

Amer. Coll. of Trial Lawyers: Our Federal Rules of Civil Procedure Committee believes that the rule leaves substantial open questions in its current form. We believe further that those question are better answered by amending and clarifying the rule than by the development of caselaw, which to some extent already has produced and likely will continue to produce inconsistent results. At the same time, we believe that the rule can be a very important and valuable litigation tool.

Assoc. of Trial Lawyers of America: ATLA is a strong believer in the mechanisms of the common law. We do not perceive problems that can be addressed better through rulemaking than through the judicial application of principles to fact.

Consumer Att'ys of Calif.: Our members have not experienced problems with this rule. It is the use of the tool by some parties -- often responding parties -- that has created difficulties. Legislating more changes will not solve that problem; it will just change the issues courts will have to resolve.

Nat. Ass'n of Consumer Advocates: NACA requests that the Committee allow any problems that exist to be addressed through caselaw.

Nat. Employ. Lawyers' Ass'n: Generally, rule changes make litigation less certain and increase the costs to the parties. Although changes may be appropriate in certain circumstances, such as dealing with E-Discovery, this is not an area where changing the rules would be helpful. Rule 30(b)(6) is a rule

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more easily managed by the courts than many others.

Trial Lawyers for Public Justice: Generally, we think that it is better to let courts resolve issues relating to Rule 30(b)(6) through specific decisions with specific facts rather than attempting to craft general rules in response to pressures from interested groups.

- Limiting Rule 30(b)(6) discovery to identifying the location of discoverable information within the custody or control of the organization: This approach would limit Rule 30(b)(6) depositions to providing a precursor to other discovery and would preclude their use to generate admissible evidence for trial. That would seem likely to reduce burdens on organizations preparing witnesses. But for organizations that wanted to designate a single representative to present their positions, this would perhaps be a negative change. And it could also significantly erode the value of Rule 30(b)(6), which now permits the organization's opponent to discern the organization's position through a deposition.

Assoc. of Trial Lawyers of America: This proposal would recreate the very problems that the rule was designed to solve.

Calif. Employ. Lawyers' Ass'n: this change would render the depositions pointless. Although this would reduce the burdens on organizations, the result would be testimony by witnesses who cannot testify confidently, resulting in further motions and further discovery. This would also give the entity an advantage in litigation.

Nat. Employ. Lawyers' Ass'n: Such a limitation would effectively eliminate the primary value of the rule. The result would inevitably be to return to the "bandying" that the rule was created to eliminate. Currently, Rule 30(b)(6) depositions can dramatically decrease the cost of litigation, but if such a deposition cannot be used to obtain a corporation's position on a matter or to obtain specific information, parties will often find themselves in need of more depositions and extensions on discovery.

N.Y. St. Bar Ass'n: We oppose this suggestion. Rule 30(b)(6) depositions have an important role in developing the factual record in appropriate cases involving organizations, particularly when the institution has an advantage in collecting information or employee knowledge that is relevant to the case

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and perhaps difficult to integrate or widely dispersed within it. It would be better to limit examination to "factual" matters.

- Providing by rule that the witness's testimony is not a "judicial admission": A rule amendment might deal with the effect of testimony in the deposition, perhaps by affirmatively preserving the organization's right to offer evidence in support of different versions of the facts. But such a change might significantly reduce the utility of Rule 30(b)(6) and might encourage bandying.

Assoc. of Trial Lawyers of America: This would clarify existing law. Caselaw already says that testimony is not a judicial admission, and that it may be explained or contradicted. An organization is bound by a designee's testimony in the same way that any other individual would be.

Calif. Employ. Lawyers' Ass'n: If the answers did not bind the entity, the deposition would be of very little value. Making such a change would encourage bandying.

Fed. of Defense & Corp. Counsel: We urge that the rule be amended to confirm a party's right to provide evidence that contradicts or explains the testimony of 30(b)(6) deponents.

Nat. Employ. Lawyers' Ass'n: Our membership does not see courts treating 30(b)(6) testimony as a judicial admission. Rather, parties use depositions to impeach witnesses at trial who contradict their depositions. Corporations have an unfair advantage because they can simply send a different person to testify at trial. To remove this unfair disparity, the rule should probably be amended to require that the testimony of a 30(b)(6) witness be treated as a judicial admission.

- Providing for supplementation of a Rule 30(b)(6) deposition: If it is a problem that the rule currently freezes the organization's version of events to that presented in an early Rule 30(b)(6) deposition, that might be solved by providing for supplementation in Rule 26(e)(1), which presently makes no provision for such supplementation. But such a change would, under Rule 37(c)(1), seem to strengthen arguments that the organization is not allowed to proffer competing evidence unless it has provided a timely supplementation.

12b-001816

ABA Section of Lit.: A change to allow supplementation or amendment to answers given at 30(b)(6) depositions, at least under limited circumstances, may be appropriate. Rule 26(e)(2) allows and requires such supplementation with respect to both interrogatories, documents production requests, and requests for admissions.

Amer. Coll. of Trial Lawyers: The potentially unfair burden of binding effect can be ameliorated by having clear procedures in place for the entity to reflect and amend. With an interrogatory answer, a party that learns its answer was wrong has a duty and right to correct or supplement it. One possibility would be amending Rule 26(e), Rule 30(b)(6), or both to make it clear that the entity has some period of time to amend or supplement its answers before the answers become binding. Of course, when there is newly discovered information that was not reasonably known at the time of the deposition or supplementation period, that new information could provide an acceptable basis to supplement. But the supplementation right should not be a substitute for adequate preparation of the witness in the first instance; it should be only a right to supplement, not to substitute a promise to provide more information later.

Assoc. of Trial Lawyers of America: This would lessen incentives to prepare thoroughly and invite delay.

Calif. Employ. Lawyers' Ass'n: Making such a change would result in trial by ambush. It would also make problems for a court ruling on a summary judgment motion if the entity were not bound by statements made in the deposition, and could contradict them with affidavits prepared after service of the motion.

Nat. Employ. Lawyers' Ass'n: Permitting supplementation would basically require retaking the 30(b)(6) deposition and probably impact on other discovery as well because 30(b)(6) depositions are commonly used to identify the necessary parameters of discovery. Supplementation is a sign that the corporation did not do a proper job of preparing the witness in the first place.

Trial Lawyers for Public Justice: Like any party's deposition, Rule 26(e) provides a process that permits the deponent to amend or supplement an answer. Why should parties who are corporations receive more protections than individuals? They should not.

- Forbidding "contention" questions during 30(b)(6) depositions: If efforts to require the organization to commit to certain positions during

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the deposition are unfair, perhaps a prohibition on contention questions during a deposition could be fashioned. Defining what is forbidden might prove difficult, however, and disputes about whether certain questions are of the forbidden type could complicate Rule 30(b)(6) depositions.

ABA Section of Lit.: Several counsel expressed concern about using 30(b)(6) depositions to ask questions about legal arguments, contentions, or positions. They noted that interrogatories are better vehicles for eliciting the other side's contentions and positions, and that few, if any, lay litigants are competent to testify on those matters in any event. Several suggest that if there are contention depositions, then the depositions should occur later in discovery, a sequence specifically recognized for contention interrogatories.

Assoc. of Trial Lawyers of America: The suggestion that interrogatories would be a better tool for getting at contentions is wrong. If a corporation wants counsel to answer questions (as would be true for interrogatories), it can designate counsel to testify at the deposition. A deposition, with opportunities for clarifying questions and for significantly narrowing issues, can reveal more than edited and calculated writing, and can do it more quickly. Limiting deposition questions by forbidding contention questions would hinder, not assist, the search for truth.

Calif. Employ. Lawyers' Ass'n: We are not aware that such questions are being asked during deposition. The typical practice in state court in California is that contention questions may be asked in interrogatories but not in depositions.[16]

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[16] The comment cites Rifkind v. Superior Court, 27 Cal.Rptr. 822 (Cal. Ct. App. 1994), which held that contention questions were improper in the deposition of a party who was a lawyer. The court explained (id. at 826-27):

> [L]egal contention questions require the party interrogated to make a "law to fact application that is beyond the competence of most lay persons." (1 Hogan, Modern California Discovery (4th ed. 1988) § 5.9, p. 252.) Even if such questions may be characterized as not calling for a legal opinion or as presenting a mixed question of law and fact, their basic vice when used at a deposition is that they are unfair. They call upon the deponent to sort out the factual material in the case according to specific legal contentions, and to do this by memory and on the spot.

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Fed. of Defense & Corp. Counsel: We urge that the rule be reformed to eliminate or curtail a party's ability to take binding "contention" depositions of 30(b)(6) witnesses in the early stages of the case.

Nat. Employ. Lawyers' Ass'n: Although forbidding contention questions would not eviscerate the rule as much as limiting the deposition to the location of discoverable information, it would greatly reduce the usefulness of these depositions in identifying the parameters of discovery. Without that tool, many litigants would be forced to use wider discovery requests.

- Limiting questioning to those matters identified in the notice, or for which the witness was designated: If questioning about matters not identified in the notice of deposition is a serious problem, the Rule 30(b)(6) deposition could be limited to those matters. That change would seem consistent with the provision now in the rule that, if it designates more than one person to testify, the organization may specify the matters on which each such witness will testify on its behalf.

Amer. Coll. of Trial Lawyers: We believe that a clarification on this subject would be useful. There are issues raised by questioning beyond the scope of the notice. What is the effect of an answer? Is it an admission of the organization at all? Is it binding? Does venturing beyond the scope convert a 30(b)(6) deposition into one under Rule 30(b)(1), counting as two depositions under the ten-deposition rule? What should be the process for objecting to questions that exceed the topics listed. Although the trial bar can live with a clear rule either way, the better rule probably would be to limit the questions to the designated topics.

> There is no legitimate reason to put the deponent to that exercise. If the deposing party wants to know facts, it can ask for facts; if it wants to know what the adverse party is contending, or how it rationalizes the facts as supporting a contention, it may ask that question in an interrogatory. The party answering the interrogatory may then, with aid of counsel, apply the legal reasoning involved in marshaling the facts relied upon for each of its contentions. . . . So used, the interrogatory becomes an instrument for forcing one's opponent (or, more realistically, the opponent's attorney) to engage in a rather sophisticated process of legal reasoning.

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Assoc. of Trial Lawyers of America: Caselaw holds parties to the matters identified in the discovering party's notice (citing S.D.N.Y. case). We do not see any need to amend.

Calif. Employ. Lawyers' Ass'n: We believe that it should be permissible to ask the witness about any discoverable information, whether or not on a topic listed in the notice. The party doing discovery should not be required to notice a second deposition of the witness (perhaps counted as another deposition against the ten-deposition limit). Moreover, to the extent there is a need for relief on this issue, judges can make sensible decisions without a rule change.

Fed. of Defense & Corp. Counsel: We urge that the rule be amended to clarify that a party's right to interrogate a 30(b)(6) witness is limited to those categories specified with reasonable particularity in the deposition notice.

Nat. Employ. Lawyers' Ass'n: Typically, courts are already enforcing this limitation. Where questions go beyond the scope, courts usually sustain objections. But sometimes examination on additional topics is allowed, and that provides benefits. The alternative is a second deposition of the witness.

Other ideas

ABA Section of Lit.: One possible idea to deal with the "binding" effect problem would be to allow a party to "unbind" itself by giving timely notice that it has found new information that leads it to believe that a previous 30(b)(6) piece of testimony needs to be modified. The burden of proving good faith preparation of the witness would be on the party seeking the change, and the opposing party would be permitted reasonable discovery to test the assertion at the expense of the party seeking the change in testimony. The party seeking the change might also be required, if the change is permitted, to pay the additional expenses, including attorney fees, resulting to the other side from the change in testimony. Another possible idea would be to require the 30(b)(6) witness to appear in person at trial so that he or she could be questioned about the change in testimony.

Amer. Coll. of Trial Lawyers: There are a number of issues about the use of the 30(b)(6) witness at trial. Should personal knowledge or hearsay issues be approached differently from ordinary witnesses? Ordinarily personal knowledge is not a prerequisite for admissibility of statements or testimony by a party, which would seem to include the testimony of a 30(b)(6)

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witness. The lack of personal knowledge of the individual who testified should not be controlling. Indeed, the obligation to prepare the witness to testify underscores the impropriety of treating that witness's lack of knowledge as a ground for excluding at trial the deposition testimony. But if the testimony is offered by the entity itself, a different attitude may be proper. Otherwise, the entity is allowed to get in evidence that does not satisfy Fed. R. Evid. 602. The caselaw is not uniform, however. In a similar vein, are there any limits on using the deposition testimony to impeach a witness called by the entity at trial? Even if it's the same individual, at trial he or she may be testifying in an individual rather than representative capacity. How should the rule of completeness be handled with regard to hearsay if the entity insists on admission of additional parts of the deposition in addition to those used by its opponent? There are also questions about how the comparable procedure under Rule 45 should operate. Can a party subpoena a nonparty entity and require it to designate and prepare a witness at trial knowledgeable on specified topics? The commentators have not yet addressed that question, but there is nothing in Rule 45 that prohibits it.

Fed. of Defense & Corp. Counsel: We urge that the rule be amended to limit the number of categories that can be designated under the rule.

Nat. Ass'n of Consumer Advocates: If the rule is to be changed, it should be strengthened, as follows:

(1) The rule does not presently say explicitly that an entity will be bound by the testimony absent a good cause showing of changed circumstances. To help deponents understand how the rule works, this could be made explicit.

(2) Unlike Cal. Civ. Proc. § 2025.230, the federal rule does not require the deponent to produce the "most qualified" or "most knowledgeable" person. The entity may thus have a tendency to offer the least qualified individuals in an effort to prevent plaintiffs from developing evidence.

(3) The rule does not require that an organizational entity "immediately" or "promptly" designate an additional witness in the event the person first designated cannot answer a question on a matter designated in the notice. This encourages defendants to draw out discovery.

N.Y. St. Bar Ass'n: We think that the Committee should consider the following specific proposals that were included in our 2004 submission (which prompted the Committee's interest in this subject):

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Our proposal (1): All 30(b)(6) depositions of a party should be treated as one deposition with a presumptive cumulative limit of seven hours in total.

Our proposal (3): Although an examining party should be permitted to direct attention in the deposition notice to specific testimony about, or documents concerning, the organization's conduct, the obligation of the testifying witness in preparation should not generally extend to the review of testimony or documents form other parties or nonparties, unless these are present or former employees or agents of the organization.

Our proposal (5): Rule 30(b)(6) should be amended to insert the word "factual" before "matters" in the fourth sentence to establish that such depositions should not be a vehicle for seeking discovery of legal arguments, contentions or positions that are not simply factual statements or evaluations of the legal significance of facts.

Our proposal (8): Testimony under Rule 30(b)(6) should not be treated as preclusive, but merely as probative.

Trial Lawyers for Public Justice: The rule does not currently say that the entity must adequately prepare the witness, although the caselaw does so state. The rule should say so. There are three ways of doing this: (1) the rule could require that the organization provide the "most knowledgeable person" rather then leaving it free to choose whomever it wishes; (2) the rule could be amended to specify clearly the organization's responsibility to prepare the witness; and (3) the rule could mandate monetary sanctions for failure to provide a prepared witness.

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TAB 5C

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126-001824

C. 15-CV-A: Rule 81(c)(3)(A): Jury Demand on Removal

This submission was on the November agenda but was carried forward without an opportunity for consideration. It addresses a single word in Rule 81(c)(3)(A), altered in the Style Project. The specific problem is narrow; it will be identified after setting out the full text of Rule 81(c)(3). Examination of the specific problem in the setting of the full rule suggests more serious questions. It seems worthwhile to identify the questions, even if the most likely outcome will be to put all of them aside to defer to more pressing work. Apart from this one submission, there is little reason to believe that significant problems are arising in practice.

RULE 81. APPLICABILITY OF THE RULES IN GENERAL; REMOVED ACTIONS

(c) Removed Actions.

(1) *Applicability.* These rules apply to a civil action after it is removed from a state court. * * *

(3) *Demand for a Jury Trial.*

(A) *As Affected by State Law.* A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal. If the state law ~~does~~ did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time. The court must so order at a party's request and may so order on its own. A party who fails to make a demand when so ordered waives a jury trial.

(B) *Under Rule 38.* If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38 must be given one if the party serves a demand within 14 days after:

(i) it files a notice of removal; or

(ii) it is served with a notice of removal filed by another party.

[The Style Project rewording challenged by 15-CV-A is shown by overlining the pre-2007 word, "does," and underlining the substitute, "did."]

The specific suggestion focuses narrowly on the change from "does" to "did." The suggestion is that the change has created a trap for the unwary. So long as the rule said "does," it was clear that an express demand for jury trial must be made unless state law allows a jury trial without making an express request at any time. Saying "did" may lead some to believe that they need not make an express demand for jury trial after removal if state law, although requiring a demand at some point, allowed the demand to be made later than the time the case was removed to federal court. Cases are cited to show that federal courts

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continue to interpret the rule as if it says "does;" an appendix includes a decision granting a motion to strike a jury demand made by the lawyer who made the submission. The opinion relies on the 2007 Committee Note stating that the changes were intended to be stylistic only.

Initial research into the change from "does" to "did" has explored Civil Rules Committee agenda books, Committee Minutes, and a substantial number of memoranda prepared for the Style Subcommittees. They show that "did" appeared in the style draft at least as early as September 30, 2004, but do not show any discussion of this specific change. They also show an intriguing hint in a note recognizing that "Joe Spaniol is right" that there is a gap in the rule, but suggesting that it cannot be fixed — if fixing is needed — in the Style Project. One question is whether there is a gap that is worth filling. A broader question is whether the whole rule is unnecessarily complicated. The complication can be illustrated by looking for the gap.

At least these situations can be imagined:

(1) A jury trial was "expressly demanded * * * in accordance with state law" before removal. It makes sense to carry the demand forward after removal.

(2) Rule 81(c)(3)(B): All necessary pleadings have been served at the time of removal, but no express demand for jury trial was made. The rule applies the same principle as Rule 38(b)(1), adjusting the time for the circumstance of removal — a demand must be served, not "14 days after the last pleading directed to the issue is served," but 14 days after removing or being served with the notice of removal. This provides the advantages sought by Rule 38(b): the parties and the court know whether this is to be a jury case early in the proceedings.

(3) All necessary pleadings have not been served at the time of removal. Here the principle of Rule 81(c)(1) seems to do the job — Rule 38 applies of its own force after removal. The most sensible reading of the rule text is that an exception is made for cases where state law does not require a demand for jury trial.

(4) State law does not require a demand for jury trial at any point. The Rule was amended in 1963 to say that a demand need not be made after removal. The Committee Note said this is "to avoid unintended waivers of jury trial." But the amendment went on to provide, as the rule still does, that the court may order that a demand be made; failure to comply waives the right to jury trial. The Committee Note added the suggestion that "a district court may find it convenient to establish a routine practice of giving these directions to the parties in appropriate cases." Professor Kaplan, Reporter for the Committee, elaborated on the Note in a law review article quoted in 9 Federal Practice & Procedure: Civil 3d, § 2319, p, 230, n. 12. He suggested that it

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might be useful to adopt a local rule "under which the direction is to be given routinely." But he further suggested that it is important to give the parties notice in each case, since relying on a local rule alone "would recreate the difficulty which the amendment seeks to meet." These observations may address the question why it would not be better to complement subparagraph (B) by providing that if all necessary pleadings have not been served at the time of removal, Rule 38(b) applies. The apparent concern is that people will not pay attention to the Federal Rules after removal when they are habituated to a state procedure that provides jury trial without requiring an express demand at any point. That explanation seems to fit with the observation in § 2319 that "a number of courts have held that this provision is applicable only if the case automatically would have been set for jury trial in the state court * * * without the necessity of any action on the part of the party desiring jury trial."

(5) State law does require an express demand for jury trial, but the time for the demand is set at a point after the time when the case is removed. The Nevada rule involved in the docket suggestion, for example, allows a demand to be made not later than entry of the order first setting the case for trial. This is the circumstance in which the change from "does" to "did" may create some uncertainty. One possible reading is that the change reflects concern that state law may have changed after removal: it did not require an express demand at any time in the progress of the case, but has been revised after removal to require an express demand. That is a fine-grained explanation. Another possible reading is that no demand need be made after removal so long as the state-court deadline had not been reached before removal. That reading can be resisted on at least two grounds. One is that the change was made in the Style Project, and thus must be read to carry forward the meaning of the rule as it was. A second is that the result is unfortunate: although both state and federal systems require an express demand, none need be made because of the differences in the deadlines. There is little reason to suppose that a party who wishes a jury trial should believe that removal provides relief from the demand requirement. Anyone who actually reads the rules should at least recognize the uncertainty and make a demand. It makes little sense to read the rule in a way that is most likely to make a difference only when a party belatedly decides to opt for a jury trial.

The immediate question is whether the style choice should be reversed to promote clarity. "Does" took on an apparently established and quite limited meaning. It is possible to read "did" in the Style Rule to have a different meaning. But the Committee has been reluctant to revisit choices made in the Style Project, particularly when the courts — no matter what may be the experience of particular lawyers — seem to be getting it right. If that were all that might be considered, the case for amending the rule may not be strong.

126-001827

But it is worth asking whether it makes sense to perpetuate the exception for cases removed from courts in however many states there be that do not require a demand for jury trial at all. One example would be a state that does not provide for jury trial in a particular case — but that does not offer much reason to excuse a demand requirement after removal. Perhaps the rule has been too eager to protect those who refuse to read Rule 81(c) to find out that federal procedure governs after removal. There is a strong federal interest in the early demand requirement of Rule 38(b). All parties and the court know from the outset whether they are moving toward a jury trial, however likely it is that the case will ever get there. The risk that a party may decide to opt for a jury trial only because the judge does not seem sufficiently sympathetic is reduced. Rule 39(b) protects the opportunity to reclaim a jury trial after failing to make a timely demand.

Rule 81(c) would be much simpler, a not inconsiderable virtue in this setting, if it were recast to read something like this:

(3) *Demand for a Jury Trial.* Rule 38(b) governs a demand for jury trial unless, before removal, a party expressly demanded a jury trial in accordance with state law. If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38 must be given one[1] if the party serves a demand within 14 days after:

(A) it files a notice of removal, or

(B) it is served with a notice of removal filed by another party.

With all of this, the two most likely choices are these: Do nothing, or undertake a thorough reexamination of Rule 81(c). Matters can be resolved reasonably without changing "did" back to "does." But the complex and incomplete structure of Rule 81(c), built on sympathy for those who refuse to consult the rules, might benefit from significant simplification.

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[1] This version simply tracks the current rule. It might be shortened: "If all necessary pleadings have been served at the time of removal, a demand must be served within 14 days after * * *."

126-001828

From: Mark Wray <mwray@markwraylaw.com>
To: "Rules_Support@ao.uscourts.gov" <Rules_Support@ao.uscourts.gov>
Date: 01/17/2015 06:51 PM
Subject: Change to Rule 81

As for the body of people that apparently is meeting April 9-10 in Wash., D.C., to discuss the civil rules, please consider the following:

I propose that Fed. R. Civ. P. 81 be amended by adding words to clarify that in a case removed from state to federal court, if the state law requires a jury demand to be filed, and one was not required to be filed before the removal under the applicable state law, a jury demand does not have to be filed following removal until the federal judge orders it to be filed.

I actually think the rule already reads the way I stated it in the previous sentence, but in the Ninth Circuit, relying on an old case that predates the 2007 rule changes, the judges have uniformly denied jury demands for allegedly being untimely, using an interpretation of the rule that frankly is contrary to the way the rule actually reads. I have attached a brief and a court order to prove my point. I am not alone on this issue. There are dozens of cases from across the country that have dealt with it.

One would think that of all the things that should be protected by a simple rule, it is the ability to have a jury trial. Under Rule 81, however, that fundamental right is easily lost, due to the botched "style" changes of 2007.

As my reason for this rule change, I submit that Rule 81 as amended by this Committee in 2007 during the so-called "style" changes has created a trap for the unwary by changing the present tense to the past tense, and yet courts continue interpreting the rule in the present tense, to make jury demands untimely, as occurred in my case. If what I just said is unclear, please read the attached brief, which I hope will make the problem clearer. In short, the rule itself needs to be clarified, so that the courts will apply it according to the way it is actually written.

Many of the contributors to the process of the 2007 "style" changes objected repeatedly that the "style" changes would lead to costs to parties that were not acceptable. They included the group from the Eastern District of New York and others. I don't know why their cogent and compelling input was ignored, but it was ignored.

Somehow, some sub-committee of persons operating under the auspices of the full committee (the administrative office of the courts repelled my efforts to get the actual records to find out who, and why, and where, and how) approved Rule 81 language that changed the present tense to past tense, and the overall rules committee then pronounced that draft acceptable.

The big committee has minutes stating that the big committee felt that whatever "costs" may be borne by those of us subject to the substantive and unintended consequences of "style" changes, those costs are "acceptable".

I respectfully disagree. Enough people, like my client, have paid the "costs", and the "costs" are unacceptable. This is an unfairly tricky rule that can be easily clarified, and needs to be fixed. Please do so. Thanks.

Regards,

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TOM GONZALES

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

TOM GONZALES,

Plaintiff,

vs.

SHOTGUN NEVADA INVESTMENTS, LLC, a Nevada limited liability company; SHOTGUN CREEK LAS VEGAS, LLC, a Nevada limited liability company; SHOTGUN CREEK INVESTMENTS, LLC, a Washington State limited liability company; and WAYNE PERRY, an individual,

Defendants.
_____/

Case No. 2:13-cv-00931-RCJ-VPC

(Eighth Judicial District Court Case No. A-13-679826)

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO STRIKE JURY DEMAND

In this action removed from the District Court in and for Clark County, Nevada, Plaintiff filed a jury demand September 18, 2014, two days after this Court denied the Defendants' motion for summary judgment. With summary judgment having been denied, Plaintiff believed it was appropriate to consolidate

this action with the Desert Lands case (3:11-cv-00613-RCJ-VPC), file demands for jury in both cases, and prepare for trial. *See Wray Decl., attached.*

According to the applicable rule for jury demands in actions removed from state court, Plaintiff believes his jury demand was timely. Fed. R. Civ. P. 81(c)(3)(A) states:

> (3) *Demand for a Jury Trial.*
>
> (A) *As Affected by State Law.* A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal. If the state law did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time. The court must so order at a party's request and may so order on its own. A party who fails to make a demand when so ordered waives a jury trial.

This case was removed from a state court in Nevada. Under Nevada law, "[a]ny party may demand a trial by jury of any issue triable of right by a jury by serving as required by Rule 5(b) upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than the time of the entry of the order first setting the case for trial." Nev. R. Civ. P. 38(b). Thus, jury demands are not required to be filed in Nevada state court until the time of the entry of the order first setting the case for trial.

Defendants removed this action within 30 days of being served with the Summons and Complaint and before even filing their Answer to the Complaint. *ECF No. 1, 4.* Obviously, at that point in time, a jury demand was not required by Nevada law. In such a situation, the second sentence of Rule 81(c)(3)(A) states: "If the state law did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time." The Court still has not ordered the parties to file a jury demand

within a specified time, and thus the Plaintiff's jury demand filed September 18, 2014 was timely under the rule.

Defendants now bring this Motion to Strike Plaintiff's Jury Demand (*ECF No. 69*), objecting that the second sentence of Fed. R. Civ. P. 81(c)(3)(A) is inapplicable because "the second sentence applies where State Law *does not require an express demand for jury trial* and Nevada law, NRCivP Rule 38, does require an express demand for a jury trial." *Motion, ECF No. 69, p. 8:5-7* (*emphasis* in original).

The Defendants' argument incorporates a subtle, yet significant, anachronism that leads to a faulty interpretation of Rule 81(c)(3)(A). The Defendants argue that Rule 81(c)(3)(A) applies when state law "**does** not require an express demand for jury trial," thus using the present tense of the verb. The second sentence of the rule actually is written in the past tense: "If the state law **did** not require an express demand for jury trial . . .". The shift from present to past tense results in a change in the meaning of the rule that is significant to deciding this motion.

Using the present tense, as the Defendants choose to do, the meaning is that if the state law does not require an express demand for jury trial; i.e., if no express demand for jury trial is required by state law *at any time*, then the Court must order the parties to file a demand. Stated alternatively, using the present tense, if *at any time* the state law requires an express demand for jury trial, then Rule 81(c)(3)(A) does not apply, and a jury demand must be filed with 14 days of filing of the last pleading directed to the issue. *See Fed. R. Civ. P. 38(b)(1).*

On the other hand, using the past tense, which is how the rule is written, of course, the meaning is that if the state law did not require an express demand for jury trial; i.e., if the Plaintiff did not have to make a jury demand under state law *before the case was removed*, then the Plaintiff need not make a jury demand until

ordered to do so. Reading Rule 81(c)(3)(A) as it is written, therefore, Plaintiff filed a timely jury demand on September 18, 2014.

The use of the present tense is an anachronism because prior to 2007, the rule was written in the present tense -- "does not" -- and starting in 2007, the rule was changed to the past tense -- "did not". The Defendants' motion disregards this distinction, but in fairness, court decisions have overlooked it as well.

A leading case on Rule 81(c) in the Ninth Circuit is *Lewis v. Time, Inc.*, 710 F.2d 549, 556 (9th Cir. 1983), which has been cited by courts in the Ninth Circuit at least 27 times for its interpretation of the rule. When *Lewis* was decided in 1983, Rule 81(c) was written in the present tense, and stated, in pertinent part: "If state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they need not make demands after removal unless the court directs that they do so. . . ". *Id.* The court held in *Lewis* that California law does require an express demand when the trial is set. *Id.* Lewis had not requested a trial before his case was removed from California state court. *Id.* "Therefore, F.R. Civ. P. 38(d), made applicable by Rule 81(c), required Lewis to file a demand 'not later than 10 days after the service of the last pleading directed to such issue [to be tried].' Failure to file within the time provided constituted a waiver of the right to trial by jury. Rule 38(d)." *Id.* (The 10-day deadline subsequently was extended to 14 days by other rule amendments.)

This holding from *Lewis* continues to be followed, uncritically, by district courts in the Ninth Circuit. *See, e.g., Ortega v. Home Depot U.S.A., Inc.*, 2012 U.S. Dist. LEXIS 2787 (E.D.Cal. 2012) (following *Lewis* as to its interpretation of Rule 81(c)(3)(A)); *Nascimento v. Wells Fargo Bank*, 2011 U.S. Dist. LEXIS 111019 (D.Nev. 2011) (applying the *Lewis* holdings to an action removed from Nevada state court); *Kaldor v. Skolnik*, 2010 U.S. Dist. LEXIS 137109 (D.Nev. 2010) (finding that under *Lewis*, Rule 81(c)(3)(A) is inapplicable if state law

requires an express demand for jury trial, "regardless of when the demand is required").

With due respect for these district court decisions, it is questionable that they would follow the holding in *Lewis* today, as a matter of *stare decisis*, given the intervening changes in Rule 81(c). For *Lewis* to supply the rule of decision, it would seem that one must discount the change from the present to the past tense – from "does not" to "did not" -- as having no effect on the meaning of the second sentence of Rule 81(c)(3)(A). Disregarding differences in words runs counter to well-established rules of statutory construction. *See Boise Cascade Corp. v. United States EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991) ("Under accepted canons of statutory interpretation, we must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous."); *In re Transcon Lines*, 58 F.3d 1432, 1437 (9th Cir. 1995) (the cardinal principle is that the plain meaning of a statute controls).

Furthermore, taking the view that the change from "does not " to "did not" makes no difference to the meaning of the second sentence then begs the question as to why rule-makers made the change at all.

The Notes of the Advisory Committee on 2007 Amendments state: "The language of Rule 81 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only."

The problem with the Advisory Committee's note is that a change in "style" can also affect meaning, and therefore affect substance. A practitioner can read the amended Rule 81(c)(3)(A) to mean exactly what it says, and can reasonably believe that a jury trial demand that state law did not require to be filed before removal is not required to filed in federal court unless and until ordered by the federal judge. The problem with the note of the Advisory Committee is that in the

case of Rule 81(c)(3)(A), the effect of "style" changes is a critical change in meaning; if that meaning is not applied and the result is the loss of the right to trial by jury, the rule has become a trap for the unwary.

Many district courts in the Ninth Circuit have acknowledged that Rule 81 suffers from poor drafting and tricky wording, but have applied *Lewis* regardless. In *Rump v. Lifeline,* 2009 U.S. Dist. LEXIS 98506 (N.D.Cal. 2009), the court said:

> The Court recognizes that the federal rules governing jury demands after removal, in conjunction with California's rules permitting a plaintiff to make a jury demand up until the time of trial, creates ambiguity and a trap for the unwary. However, *Lewis* addressed the interplay between California's rules and Rules 38 and 81, and held that a jury demand must be made within 10 days of removal. Accordingly, ***because the Court is bound by Lewis***, the Court GRANTS defendants' motion and STRIKES plaintiff's jury demand.

Id., emphasis added; see also: Gilmore v. O'Daniel Motor Ctr., Inc., 2010 U.S. Dist. LEXIS 57792 (D.Neb. 2010); *Cross v. Monumental Life Ins. Co.,* 2008 U.S. Dist. LEXIS 109235 (D.Ariz. 2008) ("[T]he needless complexity of the removal rule, Rule 81(c), sometimes creates a trap for the unwary.")

Indeed, if Rule 81(c)(3)(A) cannot be relied upon to mean what it says, it is not only a trap for the unwary, it is an *unfair* trap for the unwary.

The problem with altering the "style" of any rule is that it requires changes in language, and changes in language alter meaning, which is a principle that was recognized by the people who changed the rules in 2007. The Judicial Conference Committee on Rules of Practice and Procedure keeps online records of its proceedings through the Administrative Office of the U.S. Courts in Washington, D.C. The online archives[1] contain the minutes and reports of various rules committee meetings. Attached as Exhibit 1 to this Opposition are copies of

[1] http://www.uscourts.gov/rulesandpolicies/rules/archives.aspx

excerpts from the June 2, 2006 report of the Civil Rules Advisory Committee on the subject of "style" changes, with portions highlighted for purpose of emphasis. The report refers to various contributors to the process who were highly critical of the "style" changes, including the Committee on Civil Litigation of the U.S. District Court for the Eastern District of New York, whose members wrote:

> The unanimous judgment of every member of the Committee who expressed a view was that the costs and other disadvantages of the style revision project outweigh its benefits. First, there is the risk of unintended consequences. After finding a number of ambiguities and apparent substantive changes, review of the Burbank-Joseph report found they had uncovered many more – and there was almost no overlap, suggesting that there remain a significant number of unintended consequences that neither we nor they have spotted. Second, any style revisions will bring disruptions. The sheer magnitude of the rewording and subdivision of rules that have become familiar to the courts and the profession in their present form will complicate research and reasoning about the rules for many years to come.

See Exhibit 1, attached. The words of the committee from the Eastern District of New York are amazingly prescient in anticipating the current situation with the Plaintiff.

In its "Overall Evaluation", the rules committee asked Profession Stephen B. Burbank and Gregory P. Joseph, Esq. (the "Burbank-Joseph" group) to comment on their working group's view of the wisdom of the style project. Burbank-Joseph reported that 14 members participated in the final conference call. "Of them, nine believed that the project should not be carried to a conclusion, while five believed that the advantages of adopting the Style Rules outweigh the costs that will be entailed." *See Exhibit 1, attached.*

The rules committee spoke of "costs that will be entailed", which in this case, is the cost of losing the right to a jury trial. Forfeiting that Constitutional

right because of a tricky rule, which cannot be relied upon to mean what it says, is not a cost that can or should be borne by the Plaintiff or any other litigant.

Nor is the situation in the Plaintiff's case in any way unique. Dozens of cases are reported from U.S. District Courts across the country where a party was deprived of a right to a jury trial in a case removed from state court based on an interpretation of Rule 81(c)(3)(A). This means attorneys across the land are losing the right to jury trials for their clients in cases that are removed from state court to federal court because the rule is not being interpreted the way it reads.

To Plaintiff's knowledge, only one of the many reported decisions on this issue explicitly discusses the change from the present to past tense, and is the only case that squarely addresses the issue raised by this Opposition. In *Kay Beer Distrib. v. Energy Brands, Inc.*, 2009 U.S. Dist. LEXIS 49792 (E.D. Wisc. 2009), the district judge analyzed and decided the issue as follows:

> The language of the current Rule 81 is ambiguous. At least one court has observed that the Rule is "poorly crafted." Cross v. Monumental Life Ins. Co., 2008 U.S. Dist. LEXIS 109235, 2008 WL 2705134, *1 (D. Ariz. July 8, 2008). This court agrees. The use of the past tense -- "If state law did not require an express demand" -- without any qualification, makes it unclear whether the exception is intended to apply to cases in which a demand for a jury under state law was not yet due when the case was removed, or to cases in which a demand is not required at all. Kay's interpretation of Rule 81(c)(3)(A) thus has some merit. But ultimately, I conclude that Energy's interpretation is correct. Rule 81(c)(3)(A) only applies when the applicable state law does not require a jury demand at all. It has no application when, as in this case, the applicable state law requires an express demand, but the time for making the demand has not yet expired when the case is removed.
>
> This is apparent from the language of the Rule prior to its amendment in 2007. Prior to the 2007 amendment to Rule 81, it read:
>
> If state law applicable in the court from which the case is removed *does not* require the parties to make express demands after removal in

order to claim trial by jury, they need not make demands after removal unless the court directs that they do so within a specified time if they desire to claim trial by jury.

Fed. Rule Civ. P. 81(c) (2006) (amended 2007) (italics added).

The Advisory Committee Notes for the 2007 Amendments to Rule 81 state that the language of the Rule was amended "as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules." The note states that the changes were intended to be "stylistic only."

The earlier version of Rule 81(c) was the result of the 1963 amendment to the Rules which added the exception in the first place. The Advisory Committee Notes relating to the 1963 Amendment state that the change was meant to avoid unintended waivers of a party's right to a jury trial in cases that are removed to federal court from state courts in which no demand is required. To achieve this purpose, "the amendment provides that where by State law applicable in the court from which the case is removed a party is entitled to jury trial without making an express demand, he need not make a demand after removal." Fed. R. Civ. P. 81 Advisory Committee Note, 1963 Amendment. See also 9 Wright & Miller, Federal Practice and Procedure (hereafter Wright & Miller) § 2319 at 228-29 (3d ed. 2008). It therefore follows that the exception in Rule 81(c)(3)(A), which relieves a party in a removed case from the obligation to demand a jury trial, applies only where the applicable state law does not require an express demand for a jury trial. Since Wisconsin law does require a jury demand, Rule 81(c)(3)(A)'s exception does not apply.

Kay cites Williams v. J.F.K. Int'l Carting Co., 164 F.R.D. 340 (S.D.N.Y. 1996) and Marvel Entm't Group, Inc. v. Arp Films, Inc., 116 F.R.D. 86 (S.D.N.Y. 1987), in support of its interpretation of Rule 81, but both dealt with actions removed from New York courts. Cases removed from New York court provide little guidance because "the practice in New York falls within a gray area not covered by Rule 81(c)." Cascone v. Ortho Pharm. Corp., 702 F.2d 389, 391 (2d Cir. 1983); see also 9 Wright & Miller § 2319 at 231 ("Many cases

> removed from New York state courts pose a unique situation."). Wisconsin law unequivocally requires a demand in order to preserve one's right to a jury trial. I therefore conclude that Rule 81(c)(3)(A) is inapplicable and Kay's demand for a jury trial was untimely under Rule 38(b).

Plaintiff respectfully urges that this Court *not* adopt the reasoning of *Kay Beer*. The court in *Kay Beer* did not apply the language of the rule as it reads today, and instead reverted to the former version of the rule. The court stated: "Rule 81(c)(3)(A) only applies when the applicable state law **does not** require a jury demand at all." (Emphasis added). The only rationale offered by the court in *Kay Beer* for applying the former version of the rule instead of the current rule is that the Notes of the Advisory Committee state that the 2007 changes to the rules were intended to be "stylistic only". Respectfully, changes that may have been intended to be "stylistic only" can in fact be substantive. The people that adopted the rules openly debated the effect that the "stylistic" changes would have on the substantive law, and ultimately, the rules committee adopted the rules knowing that certain "costs" would be borne by litigants and the court system, including "costs" in the form of substantive rule changes that may not have been intended. The rules committee nonetheless deemed these costs to be acceptable in adopting the new rules. *See Exhibit 1, attached.* When a "stylistic" change alters the meaning of a rule, this is deemed an acceptable cost, and the Court should apply the rule as it is written. Practitioners also should be able to rely on the rules as written.

As an additional consideration, the court in *Kay Beer* only followed the rationale that the general purpose of the 2007 changes was to effect changes in style and not substance. The court in *Kay Beer* had no apparent knowledge as to the specific reasons why the change was made from "does not" to "did not". One would have to access the minutes and reports of the style subcommittee of the Civil Rules Advisory Committee to obtain that knowledge. The minutes and reports of the style subcommittee do not appear to be available online or in any

readily available alternative source, however, and Plaintiff is unable to provide them to the Court. *See Wray Decl., attached.*

In the absence of the subcommittee minutes and reports, the proper approach is to apply ordinary rules of statutory construction and construe the rule as it is written. By applying the plain language of the rule, one must reasonably conclude that in cases removed from state to federal court, when the applicable state law requires an express jury demand, but the time for making the demand has not yet expired when the case is removed, the time for making a jury demand is to be set by the court.

Accordingly, the jury demand filed September 18, 2014 in this action is timely. It respectfully requested that the Defendants' Motion to Strike Plaintiff's Jury Demand be denied.

DATED: October 16, 2014 LAW OFFICES OF MARK WRAY

By __/s/ Mark Wray_____
MARK WRAY
Attorneys for Plaintiff TOM GONZALES

DECLARATION OF MARK WRAY IN SUPPORT OF OPPOSITION TO STRIKE JURY DEMAND

I, Mark Wray, declare:

1. My name is Mark Wray. I substituted in as attorney for Plaintiff Tom Gonzales in this action on June 11, 2014. I know the following facts of my personal knowledge and could, if asked, competently testify to the truth of the same under oath.

2. On September 16, 2014, the Court denied the Defendants' motion for summary judgment. *ECF No. 65.*

3. Upon receiving the order, I reviewed Fed. R. Civ. P. 81(c)(3)(A) and prepared a jury demand which I filed with the Court on September 18, 2014. I also called Defendants' counsel, Mr. Schwartzer, and asked if he would inquire about obtaining his clients' permission to consolidate the trial of the two related actions.

4. On September 26, 2014, Mr. Schwartzer advised me that his clients would not agree to consolidation and that he would be filing a motion to strike the jury demand.

5. After receiving the Defendants' motion and re-reading Rule 81(c)(3)(A), I reviewed minutes and reports of the Judicial Conference Committee on Rules of Practice and Procedure for the years 2003 through 2007. I also contacted the support staff of the committee in Washington, D.C. I learned there are six members of the support staff, headed by their chief, Jonathan Rose, and they are busy with six different committees. Over a period of days and follow-up phone calls, I attempted to find out whether anyone on the support staff has access to any minutes and reports of the style subcommittee of the Advisory Committee on Civil Rules during the years leading up to the 2007 rule changes. I spoke to Mr. Rose specifically about this subject, explaining my interest in knowing the genesis of the change from "does not" to "did not". Although I followed up several times

seeking to obtain this information from Mr. Rose or his staff, I did not receive a response from them before having to prepare and file this Opposition.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration was executed on October 16, 2014 at Reno, Nevada.

/s/ Mark Wray
MARK WRAY

CERTIFICATE OF SERVICE

The undersigned employee of the Law Offices of Mark Wray hereby certifies that a true copy of the foregoing document was sealed in an envelope with first-class postage prepaid thereon and deposited in the U.S. Mail at Reno, Nevada on October 16, 2014 addressed as follows:

Lenard E. Schwartzer
Schwartzer & McPherson Law Firm
2850 S. Jones Blvd., Suite 1
Las Vegas, NV 89146

_____/s/ Theresa Moore_____

EXHIBIT INDEX

Exhibit 1 Excerpts of Minutes of the Civil Rules Advisory Committee

EXHIBIT 1

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

DAVID F. LEVI
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

CARL E. STEWART
APPELLATE RULES

THOMAS S. ZILLY
BANKRUPTCY RULES

LEE H. ROSENTHAL
CIVIL RULES

SUSAN C. BUCKLEW
CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

To: **Honorable David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure**

From: **Honorable Lee H. Rosenthal, Chair, Advisory Committee on Federal Rules of Civil Procedure**

Date: **June 2, 2006**

Re: **Report of the Civil Rules Advisory Committee**

Introduction

The Civil Rules Advisory Committee met in Washington, D.C., on May 22-23, 2006. Draft minutes of the meeting are attached.

Part I of this report presents action items. Subpart A recommends approval for adoption of two sets of proposals. The first is Civil Rule 5.2, the Civil Rules version of the E-Government Rules developed under direction by the Standing Committee Subcommittee on the E-Government Act. The second is the package of Style amendments — Style Rules 1-86; Style-Substance amendments to Rules 4(k), 9(h), 11(a),14(b),16(c)(1), 26(g)(1), 30(b), 31, 40, 71.1, and 78; Style Forms; and the Style versions of the amended rules on electronic discovery now pending in Congress and scheduled to take effect on December 1, 2006 (Rules 16, 26, 33, 34, 37, and 45).

Subpart I B recommends approval for publication of new Rule 62.1 on indicative rulings and amendments to Rules 13(f), 15(a)(amended pleadings), and 48 (jury polling). The recommendation is to publish these proposals — along with the modest amendment of Rule 8(c) approved for publication at the January meeting — at a later date, presumably August, 2007, when they can be included in a package with other proposals.

Part II of this report presents information items describing the projects that are being developed for further consideration.

(b) Scire Facias and Mandamus. The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules.	**(b) Scire Facias and Mandamus.** The writs of scire facias and mandamus are abolished. Relief previously available through them may be obtained by appropriate action or motion under these rules.
(c) Removed Actions. These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal.	**(c) Removed Actions.** **(1)** ***Applicability.*** These rules apply to a civil action after it is removed from a state court.
Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest. If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if the party's demand therefor is served within 10 days after the petition for removal is filed if the party is the petitioner, or if not the petitioner within 10 days after service on the party of the notice of filing the petition.	**(2)** ***Further Pleading.*** After removal, repleading is unnecessary unless the court orders it. A defendant who did not answer before removal must answer or present other defenses or objections under these rules within the longest of these periods: **(A)** 20 days after receiving — through service or otherwise — a copy of the initial pleading stating the claim for relief; **(B)** 20 days after being served with the summons for an initial pleading on file at the time of service; or **(C)** 5 days after the notice of removal is filed.
A party who, prior to removal, has made an express demand for trial by jury in accordance with state law, need not make a demand after removal. If state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they need not make demands after removal unless the court directs that they do so within a specified time if they desire to claim trial by jury. The court may make this direction on its own motion and shall do so as a matter of course at the request of any party. The failure of a party to make demand as directed constitutes a waiver by that party of trial by jury.	**(3)** ***Demand for a Jury Trial.*** **(A)** *As Affected by State Law.* A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal. If the state law did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time. The court must so order at a party's request and may so order on its own. A party who fails to make a demand when so ordered waives a jury trial. **(B)** *Under Rule 38.* If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38 must be given one if the party serves a demand within 10 days after: **(i)** it files a notice of removal; or **(ii)** it is served with a notice of removal filed by another party.

Summary of Comments

The written comments on Style Rules 1-86, the Style-Substance Rules, and the Style Forms, are described in the Summary of Comments. The hearing on November 18, 2005, and discussion at the Committee meeting that followed, are described in the Notes on the meeting.

SUMMARY OF COMMENTS: STYLE RULES

(Two of the most detailed sets of comments are identified without repeating the full CV designation each time. One set, 05-CV-22, was submitted by Professor Stephen B. Burbank and Gregory P. Joseph, Esq., on the basis of work done by a 21-person working group, is identified simply as "Burbank-Joseph." Similarly, 05-CV-008, submitted by the Committee on Civil Litigation of the United States District Court for the Eastern District of New York, is identified as "EDNY.")

The summaries are at times embroidered by responses. Although this approach is new to the task of summarizing comments, the Style Project presents some issues that may benefit from counterpoint.

Overall Project

Hon. W. Eugene Davis, 05-CV-007: Judge Davis chaired the Criminal Rules Advisory Committee during the style revision project. He opposed the project while the decision to go ahead was deliberated, fearing that "we would make inadvertent, substantive changes or create ambiguities that would result in wasteful, satellite litigation." But the fears "turned out to be almost totally unfounded. We have experienced minimal litigation over the meaning of the style changes. Judge Will Garwood, who was Chair of the Appellate Rules Committee during their style revision project, also tells me that satellite litigation over the meaning of the changes to those rules has not been a problem." "I have every reason to believe that the concern about significant satellite litigation over the meaning of the changes to the Civil Rules will turn out to be just as unfounded as it was with the Criminal Rules."

EDNY: Review of the Burbank-Joseph comments led to an independent consideration of the costs of the style enterprise. "[T]he unanimous judgment of every member of the Committee who expressed a view" was that "the costs and other disadvantages of the style revision project outweigh its benefits." First, there is the risk of unintended consequences. After finding a number of ambiguities and apparent substantive changes, review of the Burbank-Joseph report found that they had uncovered many more — and that there was almost no overlap, suggesting that "there remain a significant number of unintended consequences that neither we nor [they] have spotted." Second, any style revision will bring "disruptions." "[T]he sheer magnitude of the rewording and subdivision of rules that have become familiar to the courts and the profession in their present form will complicate research and reasoning about the rules for many years to come." Third, courts and the profession will be so occupied "in digesting the style revisions" that it will be more difficult to accomplish desirable substantive rules revisions. It would be better to implement style revisions of particular rules or groups of rules "as the need for substantive changes in those rules or groups of rules becomes apparent."

Prof. Bradley Scott Shannon, 05-CV-009: "The non-substantive problems associated with the Federal Rules of Civil Procedure are sufficiently great so as to warrant revision. Overall, the Advisory Committee has done a fine job in this regard, and the restyled rules as proposed, whatever their flaws, are superior to the Rules as they currently exist."

Plain Language Action and Information Network (PLAIN), 05-CV-010: "This draft is a tremendous improvement over the current version. It will be easier to use, and thus should save time and effort, and achieve a higher degree of conformance with the procedures it outlines."

Hon. Peter D. Keisler, Assistant Attorney General, 05-CV-011: In the judgment of the United States Department of Justice "the revisions should help simplify and clarify the text of many of the Rules so that practitioners can better understand and apply them." Attorneys in the Criminal Division and in the Civil Division's appellate staff have found that the style changes in the Criminal Rules and Appellate Rules "have been positive and beneficial. the Department strongly supports the current initiative to restyle the Civil Rules * * *."

Susan Kleimann, President Kleimann Communications Group, 05-CV-012: The style amendments "will make it easier for judges, lawyers, and the public to find the information they need, understand what they find, and be able to use that information effectively."

Lawyers for Civil Justice, 05-CV-014: "Plain language is critical to clear understanding and our reading of the Style Revisions convinces us that lawyers and litigants will save lots of time and trouble in reading and interpreting these rules, if they are adopted. * * * Increased clarity will bring about easier and faster understanding of the Rules and dealings among lawyers will be simplified and facilitated." LCJ disagrees with those who believe the changes are not worth the effort. "Similar claims were made about the re-styling of the Criminal and Appellate Rules, but those have been on the books for some time and appear to have worked well in practice."

John Beisner, Esq. 05-CV-015: The restyled rules attempt to minimize the frequent debates about the meanings of even familiar Civil Rules, "to ensure that our federal judicial rules provide a clear roadmap to litigating in our federal courts — rather than construct a trap for the unwary." Simplifying the rules "will also increase attorney efficiency and even has the potential to reduce ever-escalating attorneys' fees. One study conducted in Australia found that on average, lawyers are able to arrive at a solution 30 percent faster when they consult plain versions of legislation versus traditionally styled legislation. See Law Reform Comm'n of Victoria, Plain English and the Law 69-70 (1987)." "[T]he restyling * * * reflects a broadly-based, overdue realization by public and private entities that simpler is better."

Some comments suggest that the Style Project will interfere with the more important need "to rewrite the rules for 21st Century legal practice. * * * I believe that these concerns are ill-founded." There is no apparent present plan to convene a "Constitutional convention" to rewrite the Civil Rules from scratch. The wisdom of any such project is questionable. Some of the rules are controversial, but gradational change is better than wholesale change. And in any event, a sweeping revision of the whole system would take many years, if not decades. "It makes no sense to force attorneys to litigate under potentially confusing rules for several years simply because a more ambitious project is being planned that could easily take many years to implement." Indeed, by making the rules clearer the style project will save attorneys time, not waste their time by forcing them to relearn a new set of rules and then put aside the new learning for a still newer set of rules.

Hon. Thomas S. Zilly, Advisory Committee on Bankruptcy Rules, 05-CV-016: "The restyling significantly improves the Civil Rules both as to their clarity and readability."

Donald P. Byrne, Esq., 05-CV-017: After a career writing FAA regulations as Assistant Chief Counsel for Regulations, finds the revised rules "a great improvement in communication, especially for lawyers like me who refer to the Civil Rules only occasionally. They're easier to read, digest, and remember." It was a challenge to get through the original rules. "The proposed style revisions make the ride much smoother and the road map much clearer."

ABA Section of Litigation, 05-CV-018: The Litigation Section Council has not taken a position on the Style Rules, but notes the honor and privilege of enjoying the opportunity to participate in the style process through two members assigned to assist in the project and through the Section's liaison to the Advisory Committee. The Committee responded to countless questions raised by these Section representatives.

Committee on United States Courts, State Bar of Michigan, 05-CV-019: "The amendments will enhance the readability, internal consistency and organization of the Federal Rules."

Hon. Bill Wilson, 05-CV-020: Writes in response to the doubts expressed by the EDNY committee. Judge Wilson was a member of the Style Subcommittee when the restyling of the Criminal Rules began. The same objections to restyling were voiced then. "The legal profession has traditionally been very conservative about changes (style or substantive) to any rules with which members of the profession have worked. I am satisfied that plain, simple language is to be preferred." "We need rules so plain that practicing lawyers can understand them. In fact, we ought to make them so plain that even judges can understand them. I urge full steam ahead on this restyling project and others."

Patricia Lee Refo, Esq., and Scott J. Atlas, Esq., 05-CV-021: Scott Atlas and Patricia Refo are past chairs of the ABA Section of Litigation and both were members of the Burbank-Joseph Committee. "In our view, the potential benefits outweigh any conceivable transaction costs. The revised rules represent a significant improvement over the existing rules in terms of resolving ambiguities to conform to clear case law and using plain English so that younger and less experienced federal court practitioners can more easily comprehend the text. We have long thought that the language used in the original rules has outlived its usefulness and that practitioners would be better served by a more straightforward text. The Restyling Project accomplishes this goal."

Burbank-Joseph: "[A] number of members favored continuing the effort." They thought the restyling of other sets of rules had been successful. They agreed that there will be some unintended changes in meaning, but noted that this Committee's comments and others will reduce the number. They conclude that such disadvantages are outweighed by the advantages in greater accessibility of the restyled rules, "particularly to younger and less experienced practitioners." But "[a] greater number of participants were either mildly or strongly negative." The Committee found a number of serious problems, and there may be many more that have not been identified. Whatever benefits may be realized "will pale in comparison with the transaction costs, not just those engendered by uncertainty about a change in meaning, but those generated by the need to learn the new rules (and pay for the new treatises), together with the additional transaction costs that will follow when local rules and standing orders are changed to conform to the restyled rules." Beyond these costs, restyling "might retard or make more difficult the more important task of determining whether we have an appropriate set of rules for litigation in the twenty-first century." It would be better to include restyling as one component of the substantive enterprise — "the bar would not tolerate having to relearn the rules more than once in a generation." Finally, Burbank and Joseph themselves are concerned with problems that "have negative implications for access to court (e.g., Rule 68) and/or for the protection of individual rights (e.g., Rule 65) * * *."

Federal Magistrate Judges Assn., 05-CV-024: "The FMJA supports the proposed restyling of the Civil Rules. The proposed style revisions improve the Civil Rules both as to their clarity and readability."

Rather than revert to the present rule, which refers only to stenographic reporting, there would be no harm in simply dropping Rule 80. Others suggested that perhaps Rule 80 should be retained, to be reconsidered in the context of a broader project to review the Civil Rules provisions on evidence for better integration with the Evidence Rules. It was further noted that Rule 80 should not be confused with possible evidentiary uses of deposition testimony — it addresses only testimony "at a trial or hearing." That might include an administrative hearing, or a state-court trial or hearing. The problems of various recording methods may not be as acute as they would be if deposition testimony were included. At the end, Mr. Joseph suggested that Style Rule 80 would be appropriate if it refers only to stenographically recorded testimony.

Rules 72, 73: Professor Burbank noted that Professor Linda Silberman, who was involved in drafting the original versions of Rules 72 and 73, was directed to follow the language of the magistrate-judge statute, and still thinks that is a good idea. Perhaps style conventions should not trump fealty to the statutory language here. To be sure, it was a new statute at the time, and one purpose of adhering to the statutory language may have been to serve a "teaching" purpose. They may have wanted to be sure they were not changing anything. That purpose may not be as important now. If we can be sure that there are no possible changes of meaning, and no significant transaction costs arising from transitional confusion or efforts to create confusion, the Style changes may be appropriate. So, it was noted, the Criminal Rules have adhered to the Civil Style drafts.

Rule 36(b): Professor Burbank noted that the Style-Substance proposal to amend Rule 36(b) presents a problem. The present rule permits amendment of an admission "[s]ubject to the provisions of Rule 16 governing amendment of a pre-trial order." Present Rule 16(e) states two different things about amending a pretrial order. First it provides generally that an order reciting the action taken at a Rule 16 conference "shall control the subsequent course of the action unless modified by a subsequent order." That provision does not establish any standard for modification; it simply recognizes that modification may occur. The second provision is that an order following a final pretrial conference "shall be modified only to prevent manifest injustice." The Style Rules divide these two provisions between Style Rule 16(d) and (e). The Style-Substance proposal is to limit Rule 36(b) to an order permitting withdrawal or amendment of an admission "that has not been incorporated in a pretrial order." The result is that there is no standard for withdrawal or amendment of an admission that has been incorporated in a pretrial order before the final pretrial order. The appropriate rule instead should be that the Rule 36(b) standard governs withdrawal or amendment except as to an admission that has been incorporated in a final pretrial order. Withdrawal or amendment of an admission incorporated in a final pretrial order should be governed by the more demanding standard of Style Rule 16(e).

Overall Evaluation: A Committee Member asked Professor Burbank and Mr. Joseph to comment on their written summary of the working group's views on the wisdom of undertaking the Style Project. Professor Burbank replied that the group was divided. Fourteen members participated in the final conference call. Of them, nine believed that the project should not be carried to a conclusion, while five believed that the advantages of adopting the Style Rules outweigh the costs that will be entailed. The strength of their convictions varied. Some thought the goals of the project are admirable, but were concerned that there are not insignificant problems even in light of the perception that the Styled Appellate Rules and Criminal Rules work. The problems that can be identified now can be fixed now. But there will be other problems that are not identified. And there will be transaction costs as lawyers attempt to bend the Style Rules by arguing for unintended changes of meaning. In addition, there is an opportunity cost in losing the occasion for addressing the entire corpus of rules by asking whether the present Federal Rules of Civil Procedure embody the right procedure for the 21st Century.

November 22 draft

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

TOM GONZALES, Plaintiff, vs. SHOTGUN NEVADA INVESTMENTS, LLC et al., Defendants.	)	2:13-cv-00931-RCJ-VPC **ORDER**

This case arises out of the alleged breach of a settlement agreement that was part of a confirmation plan in a Chapter 11 bankruptcy action. Pending before the Court are a Motion to Reconsider (ECF No. 68) and a Motion to Strike Jury Demand (ECF No. 69). For the reasons given herein, the Court denies the motion to reconsider and grants the motion to strike jury demand.

I. FACTS AND PROCEDURAL HISTORY

This is the second action in this Court by Plaintiff Tom Gonzales concerning his entitlement to a fee under a Confirmation Order the undersigned entered over ten years ago while sitting as a bankruptcy judge.

A. The Previous Case

On December 7, 2000, Plaintiff loaned $41.5 million to Desert Land, LLC and Desert

Oasis Apartments, LLC to finance their acquisition and/or development of land ("Parcel A") in Las Vegas, Nevada. The loan was secured by a deed of trust. On May 31, 2002, Desert Land and Desert Oasis Apartments, as well as Desert Ranch, LLC (collectively, the "Desert Entities"), each filed for bankruptcy, and the undersigned jointly administered those three bankruptcies while sitting as a bankruptcy judge. The court confirmed the second amended plan, and the Confirmation Order included a finding that a settlement had been reached under which Gonzales would extinguish his note and reconvey his deed of trust, Gonzales and another party would convey their fractional interests in Parcel A to Desert Land so that Desert Land would own 100% of Parcel A, Gonzales would receive Desert Ranch's 65% in interest in another property, and Gonzales would receive $10 million if Parcel A were sold or transferred after 90 days (the "Parcel Transfer Fee"). Gonzales appealed the Confirmation Order, and the Bankruptcy Appellate Panel affirmed, except as to a provision subordinating Gonzales's interest in the Parcel Transfer Fee to up to $45 million in financing obtained by the Desert Entities.

In 2011, Gonzales sued Desert Land, Desert Oasis Apartments, Desert Oasis Investments, LLC, Specialty Trust, Specialty Strategic Financing Fund, LP, Eagle Mortgage Co., and Wells Fargo (as trustee for a mortgage-backed security) in state court for: (1) declaratory judgment that a transfer of Parcel A had occurred entitling him to the Parcel Transfer Fee; (2) declaratory judgment that the lender defendants in that action knew of the bankruptcy proceedings and the requirement of the Parcel Transfer Fee; (3) breach of contract (for breach of the Confirmation Order); (4) breach of the implied covenant of good faith and fair dealing (same); (5) judicial foreclosure against Parcel A under Nevada law; and (6) injunctive relief. Defendants removed that case to the Bankruptcy Court. The Bankruptcy Court recommended moving to withdraw the reference, because the undersigned issued the underlying Confirmation Order while sitting as a bankruptcy judge. One or more parties so moved, and the Court granted the motion. The Court dismissed the second and fifth causes of action and later granted certain defendants' counter-

motion for summary judgment as against the remaining claims. Plaintiff asked the Court to reconsider and to clarify which, if any, of its claims remained, and defendants asked the Court to certify its summary judgment order under Rule 54(b) and to enter judgment in their favor on all claims. The Court denied the motion to reconsider, clarified that it had intended to rule on all claims, and certified the summary judgment order for immediate appeal. The Court of Appeals affirmed, ruling that the Parcel Transfer Fee had not been triggered based on the allegations in that case, and that Plaintiff had no lien against Parcel A.

B. The Present Case

In the present case, also removed from state court, Plaintiff recounts the Confirmation Order and the Parcel Transfer Fee. (*See* Compl. ¶¶ 10–14, Apr. 10, 2013, ECF No. 1, at 11). Plaintiff also recounts the history of the '613 Case. (*See id.* ¶¶ 17–21). Plaintiff alleges that Defendant Shotgun Nevada Investments, LLC ("Shotgun") began making loans to Desert Entities for the development of Parcel A between 2012 and January 2013 despite its awareness of the Confirmation Order and Parcel A transfer fee provision therein. (*See id.* ¶¶ 22–23). Plaintiff sued Shotgun, Shotgun Creek Las Vegas, LLC, Shotgun Creek Investments, LLC, and Wayne M. Perry for intentional interference with contract, intentional interference with prospective economic advantage, and unjust enrichment based upon their having provided financing to the Desert Entities to develop Parcel A. Defendants removed and moved for summary judgment, arguing that the preclusion of certain issues decided in the '613 Case necessarily prevented Plaintiffs from prevailing in the present case. The Court granted that motion as a motion to dismiss, with leave to amend.

Plaintiff filed the Amended Complaint ("AC"). (*See* Am. Compl., Aug. 20, 2013, ECF No. 28). Plaintiff alleges that the Confirmation Order permitted Parcel A to be used as collateral for up to $25,000,000 in mortgages of Parcel A itself or as collateral for a mortgage securing the purchase of real property subject to the FLT Option if the proceeds were used only for the

purchase of that real property, but that any encumbrance of Parcel A outside of these parameters would trigger the Parcel Transfer Fee. (*See id.* ¶¶ 15–16). Various Shotgun entities made additional loans to the Desert Entities in 2012 and 2013 "related to the development of Parcel A." (*Id.* ¶¶ 25–26). Multiple Shotgun entities have also invested in SkyVue Las Vegas, LLC ("SkyVue"), the company that owns the entities that own Parcel A. (*Id.* ¶ 27). Plaintiff alleges that the reason Perry, the principal of the Shotgun entities, did not document his $10 million investment was to "avoid evidence of a transfer," and thus the triggering of the Parcel Transfer Fee. (*See id.* ¶ 29).

Defendants moved for summary judgment, and Plaintiff moved to compel discovery under Rule 56(d). The Court struck the conspiracy and declaratory judgment claims from the AC, because Plaintiff had no leave to add them. The Court otherwise denied the motion for summary judgment and granted the motion to compel discovery, although the Court noted that the intentional interference with prospective economic advantage claim (but not the intentional interference with contractual relations claim) was legally insufficient. Defendants again moved for summary judgment after further discovery and filed a motion in limine asking the Court to exclude any testimony of witnesses or documents not disclosed in discovery. The Court denied the motion for summary judgment because the allegations in the AC concerned events subsequent to the events alleged in the '613 Case, and Plaintiff had submitted evidence sufficient to create a genuine issue of material fact for trial as to the sole remaining claim for intentional interference with contractual relations. The Court denied the motion in limine because it identified no particular evidence to exclude but simply asked the Court to enforce the evidence rules at trial as a general matter.

Defendants have asked the Court to reconsider their latest motion for summary judgment and to strike Plaintiff's recently filed jury demand.

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II. DISCUSSION

A. Motion to Reconsider

Defendants argue that the Court noted no timely reply had been filed, but that they in fact filed a reply that was timely under a stipulation to extend time. The Court has examined the reply, and it does not negate the genuine issue of material fact Plaintiff showed in his response.

B. Motion to Strike Jury Demand

Plaintiff did not demand a jury trial in the Complaint, (*see* Compl., ECF No. 1, at 11), or in the AC, (*see* Am. Compl., ECF No. 28). Defendants did not demand a jury trial in the Answer to the Complaint, (*see* Answer, ECF No. 4), or in the Answer to the AC, (*see* Answer, ECF No. 30). A jury must be demanded by serving the other parties with a written demand no later than fourteen days after service of the last pleading directed to the issue for which a jury trial is demanded. Fed. R. Civ. P. 38(b)(1). The last such pleading in this case was the Answer to the AC, which was served upon Plaintiff via ECF on September 3, 2013. (*See* Cert. Service, ECF No. 30, at 8). The deadline for any party to demand a jury trial was therefore Tuesday, September 17, 2013. The Jury Demand at ECF No. 67 was served upon Defendants via ECF on September 18, 2014, over a year after the deadline. (*See* Cert. Service, ECF No. 67, at 3). Defendants are therefore correct that the demand is untimely and should be stricken.

In response, Plaintiff notes that in removal cases such as the present one, an express jury demand made before removal that is sufficient under state law need not be renewed after removal, and that where state law requires no express jury demand, a party need not make such a demand after removal unless specially ordered to do so by the court within a specified time. *See* Fed. R. Civ. P. 81(c)(3)(A). Plaintiff argues that Nevada law requires a jury demand "not later than the time of the entry of the order first setting the case for trial." Nev. R. Civ. P. 38(b). Plaintiff argues that because a jury demand was not yet due under state law at the time the case was removed, he need not make such a demand after removal unless ordered to do so by the

court within a specified time, and the Court has not issued such an order in this case.

Rule 81 waives the requirements of Rule 38 where an express jury demand has been made under state law before removal. Plaintiff does not claim to have made any express jury demand before removal, however. It is also true that where state law does not require an express jury demand, none need be made after removal. The questions here are whether and when a party must make a jury demand in federal court after removal in cases where state law does in fact require a jury demand, but where it was not yet due under state law at the time of removal. In such cases, is the jury demand requirement under Rule 38 negated, as is the case where state law requires no demand at all?

Plaintiff candidly admits that the Court of Appeals has ruled that in such cases a jury demand must be made in accordance with Rule 38, and that district courts typically follow that rule. *See Lewis v. Time, Inc.*, 710 F.2d 549, 556 (9th Cir. 1983). However, Plaintiff also notes that the rule at the time of *Lewis* read, "If state law applicable in the court from which the case is removed *does* not require the parties to make express demands in order to claim trial by jury . . . ." *See id.* (quoting Fed. R. Civ. P. 81(c) (1983)) (emphasis added). Plaintiff argues that the result should be different today, because the rule was amended in relevant part in 2007 to read, "If the state law *did* not require an express demand for a jury trial . . . ." Fed. R. Civ. P. 81(c)(3)(A) (emphasis added). Plaintiff argues that because the current rule uses the past tense as to the requirement to make a jury demand under state law when viewed from the point of removal, that there is no requirement to make a jury demand in federal court if none was yet due under state law at the time of removal. Plaintiff admits that the 2007 amendments to the rules were "intended to be stylistic only," *see* Fed. R. Civ. P. 81 advisory committee's note, but argues that the stylistic change is an "unfair trap for the unwary."

The Court agrees with the district courts that continue to enforce the *Lewis* rule. Rule 81 is not a trap for the unwary. Even if that had been a fair argument when Rule 81 was newly

amended, as Plaintiff notes, district courts, including those in this district, have consistently enforced the *Lewis* rule under Rule 81 as amended. *See Nascimento v. Wells Fargo Bank*, No. 2:11-cv-1049, 2011 WL 4500410, at *2 (D. Nev. Sept. 27, 2011) (Mahan, J.); *Kaldor v. Skolnik*, No. 3:10-cv-529, 2010 WL 5441999, at *2 (D. Nev. Dec. 28, 2010) (Hicks, J.). And the new language of the rule is not particularly confusing. The Rule 38 demand is required unless the state law "did not require an express demand," not only if the state law "did not *yet* require an express demand *to have been served at the time of removal*." The latter reading of the rule is improbable. The committee's notes make clear that such a meaning was not intended, as the amendment was only for style. The authors of the rule surely knew how to distinguish the concepts of whether and when, and they did not add any language reasonably invoking the concept of timing into the amendment of Rule 81(c)(3)(A).

Moreover, Plaintiff's own Case Management Report of July 30, 2013 notes that "A jury trial has not been requested" under paragraph VIII, entitled "JURY TRIAL." (*See* Case Mgmt. Report 6, July 30, 2013, ECF No. 25). If Plaintiff had truly been under the impression that the right to a jury trial had been preserved under Rule 81(c)(3)(A) because no jury demand was yet due at the time of removal, he surely would have noted his expectation of a jury trial and/or explained his position that no jury demand was necessary; he would not have simply noted that no jury trial had been requested and left it at that. Plaintiff's "unfair trap for the unwary" argument in this case is therefore not made in good faith, even if the argument could avail a litigant in an appropriate case.

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CONCLUSION

IT IS HEREBY ORDERED that the Motion to Reconsider (ECF No. 68) is DENIED.

IT IS FURTHER ORDERED that the Motion to Strike Jury Demand (ECF No. 69) is GRANTED.

IT IS SO ORDERED.

Dated this 23rd day of October, 2014.

ROBERT C. JONES
United States District Judge

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D. 15-CV-EE: Pro se e-Filing and More

This submission addresses four topics. Some of them affect the Appellate, Bankruptcy, Civil, and Criminal Rules. They were initially considered at the November 2015 meeting, and put over to await reactions from the other advisory committees. The question of e-filing by pro se litigants is addressed with the e-filing and notice discussion earlier in these materials. It appears likely that the other advisory committees will agree that the other suggestions do not warrant rule amendments now.

Social Security Numbers: The first proposal is to amend Civil Rule 5.2(a)(1) to forbid including any part of a social security or taxpayer identification number. The underlying concern is that if the place and date of birth are known, the last four digits "effectively give[] away all of the private information" because only the last four digits are random for numbers issued before "a recent change by the SSA." This concern was considered carefully when Rule 5.2 was first adopted. The risk was recognized then, but the several committees decided that the value of having the information overcame the risks. The Bankruptcy Rules Committee found particular needs for full numbers in some settings. Preliminary exchanges suggest that they continue to recognize these needs. This question should be resolved in coordination with the other advisory committees. The Reporters for the Appellate, Bankruptcy, and Criminal Rules Committees join in recommending that each Committee take no action on this proposal. At the same time they suggest that it may be appropriate to ask the Court Administration and Case Management Committee whether it wishes to consider the question.

In forma pauperis Affidavits: The second proposal is to add a new subdivision to Rule 5.2 to address "any affidavit made in support of a motion under 28 U.S.C. § 1915." The rule would provide that the affidavit must be filed under seal and reviewed ex parte. For good cause, the court may order that the affidavit be disclosed to other parties under an appropriate protective order, or be unsealed in appropriately redacted form. The submission directs attention to an unsuccessful petition for certiorari regarding this issue. (The proposal includes affidavits under 18 U.S.C. § 3006A, which directs each district court to create a plan for furnishing representation for any person "financially eligible." It is not apparent that much would be accomplished by addressing representation of criminal defendants in a Civil Rule.)

Section 1915(a)(1) enables a court to

> authorize commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the

12b-001863

nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

The privacy interests affected by the affidavit are manifest. Whether a rule is required to deal with them is not so clear. Preliminary discussion at the November 2015 meeting suggested concern that sealing imposes a substantial burden on the court, and doubts whether the privacy interests affected by the affidavit are so great as to justify the burden. If the proposal is to be pursued, current practice should be reviewed, beginning with the Federal Judicial Center study of sealing practices in general.

This proposal affects the other advisory committees. Coordination will be required if any committee decides to move toward consideration of new rule text.

New Rule 7.2 — Copies of Unpublished Authorities: This proposal is to adopt a new Rule 7.2 that would address the needs of pro se litigants created by citation by counsel of cases or other authorities "that are unpublished or reported exclusively on computerized databases." Counsel would be required to provide the pro se litigant with copies. In addition, counsel, upon request, must provide copies of such cases and authorities that are cited in a decision of the court if they were not previously cited by any party. The proposal tracks verbatim Local Rule 7.2, E.D. & S.D.N.Y.

Something like this is also to be found in Appellate Rule 32.1(b): "If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited." This rule is part of the rule on citing non-precedential opinions added in 2007. As compared to 2007, it seems likely that most, if not all, federal-court orders are now available from the court's own site. However that may be, this rule applies only on appeal, and does not reach decisions by state courts or courts in other countries.

This proposal raises the familiar question whether this level of detail should be fixed in the national rules, or is better left to local practice, and perhaps reflected in a local rule.

e-Filing by Pro Se Litigants: This proposal is that pro se litigants should be permitted, but not required, to file by paper. They must be permitted to qualify for CM/ECF access to avoid imposing burdens not borne by other parties who have such access.

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This topic is addressed by the current e-filing proposals pending before all advisory committees other than the Evidence Rules Committee. This proposal will be considered in the final development of those proposals.

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Re: Proposed rule changes for fairness to pro se and IFP litigants
Sai to: Rules_Support 09/07/2015 10:36 AM

History: This message has been forwarded.

Dear Committee on Rules of Practice and Procedure -

I further request parallel changes to the non-civil rules, and defer to the Committee on how to mirror them appropriately, as I am only familiar with the civil rules.

In particular, I note an error in my draft below for proposal #2: 18 U.S.C. 3006A (the Criminal Justice Act) would of course come under the FRCrP, not the FRCvP, so the FRCvP rule should refer only to 28 U.S.C. 1915 (the IFP statute).

Sincerely,
Sai

On Mon, Sep 7, 2015 at 10:02 AM, Sai <dccc@s.ai> wrote:
> Dear Committee on Rules of Practice and Procedure -
>
> I hereby propose the following four changes to the Federal Rules of
> Civil Procedure.
>
>
> 1. FRCP 5.2: amend (a)(1) to read as follows:
> (1) any part of the social-security number and taxpayer-identification
number
>
> The last four digits of an SSN, prior to a recent change by the SSA,
> is the only part that is random. The first digits can be strongly
> derived from knowing the person's place and date of birth.
>
> Disclosure of the last four digits of an SSN effectively gives away
> all of the private information, serves no public purpose in
> understanding the litigation, and should therefore be sealed by
> default (absent a court order to the contrary, as already provided for
> by FRCP 5.2).
>
> See, e.g.:
> Alessandro Acquisti and Ralph Gross, Predicting Social Security
> numbers from public data, DOI 10.1073/pnas.0904891106, PNAS July 7,
> 2009 vol. 106 no. 27 10975-10980 and supplement
> https://www.pnas.org/content/106/27/10975.full.pdf
> http://www.heinz.cmu.edu/~acquisti/ssnstudy/
>
> EPIC: Social Security Numbers (Nov. 13, 2014)
> https://epic.org/privacy/ssn/
>
> Latanya Sweeney, SSNwatch, Harvard Data Privacy Lab; see also demo
> http://latanyasweeney.org/work/ssnwatch.html
> http://dataprivacylab.org/dataprivacy/projects/ssnwatch/index.html
>
>
> 2. FRCP 5.2: add a new paragraph, to read as follows:
>
> (i) Any affidavit made in support of a motion under 28 U.S.C. 1915 or

> 18 U.S.C. 3006A shall be filed under seal and reviewed ex parte. Upon
> a motion showing good cause, notice to the affiant and all others
> whose information is to be disclosed, and opportunity for the same to
> contest the motion, the court may order that such affidavits be
> (1) disclosed to other parties under an appropriate protective order; or
> (2) unsealed in appropriately redacted form.
>
> For extensive argument, please see the petition and amicus briefs in
> my petition for certiorari regarding this issue: http://s.ai/ifp
>
>
> 3. Add new rule 7.2, matching that of S.D. & E.D. NY:
>
> Rule 7.2. Authorities to Be Provided to Pro Se Litigants
> In cases involving a pro se litigant, counsel shall, when serving a
> memorandum of law (or other submissions to the Court), provide the pro
> se litigant (but not other counsel or the Court) with copies of cases
> and other authorities cited therein that are unpublished or reported
> exclusively on computerized databases. Upon request, counsel shall
> provide the pro se litigant with copies of such unpublished cases and
> other authorities as are cited in a decision of the Court and were not
> previously cited by any party.
>
> See:
> Local Civil Rule of the Southern and Eastern Districts of New York 7.2
> Lebron v. Sanders, 557 F.3d 76 (2d Cir. 2009)
>
>
> 4. Add new subparagraph to rule 5(d)(3):
> (1) A court may not require a pro se litigant to file any paper by
> non-electronic means solely because of the litigant's pro se status.
>
> Pro se litigants should still be permitted (not required) to file by
> paper, to ensure that those without access to CM/ECF or familiarity
> with adequate technology have access to the courts.
>
> Pro se litigants may of course be required to register with CM/ECF in
> the same manner as an attorney, including signing appropriate
> declarations or passing the same CM/ECF training or testing required
> of attorneys.
>
> However, courts should not prohibit pro se litigants from having
> CM/ECF access where represented parties would have it. Doing so
> imposes a disparate burden of time, expense, effort, processing
> delays, reduction in the visual quality of papers due to printing and
> scanning, removal of hyperlinks in papers, and reduction in ADA /
> Rehab Act accessibility.
>
>
>
> I request to be notified by email of any progress related to the four
> changes I have proposed above.
>
> Respectfully submitted,
> /s/ Sai

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TAB 5E

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E. 15-CV-GG: Pleading Rules and Forms

Sai suggests that Rule 8(a)(2) and the appendix of forms "are so misleading as to be plain error." A litigant pleading under Rule 8(a)(2) or the forms is likely to be dismissed for failure to state a claim.

The Appendix of Forms was abrogated on December 1, 2015.

The question whether to amend the pleading rules to reflect accumulating experience with evolving pleading standards has been on the agenda since 2007. It has subsided into the background. It may be that practice is gradually maturing into identifiable patterns. The first question is whether the time has come to attempt an overall assessment of current pleading standards and practices. When the time has come, the next question will be whether current standards are desirable, too demanding, or too lenient. Whatever the answer to that question may be, the final question will be whether it is feasible to revise rule texts in ways that will capture or improve on current practice.

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Proposed rules & forms change: Iqbal / Twombly

Sai to: Rules_Support 09/28/2015 07:07 AM

History: This message has been forwarded.

Dear Committee on Rules of Practice and Procedure -

Currently, the federal rules, and the forms, reflect pre-Iqbal/Twombly notice pleading standards.

However, post-Iqbal/Twombly, FRCP 8(a)(2) and forms 10-21 (for instance) are so misleading as to be plain error. A litigant narrowly obeying the rule as stated, or using the forms, would be likely to have their suit dismissed on an Iqbal challenge.

This is unfair to litigants attempting to understand the rules by reading their plain meaning.

I therefore request that the Committee update all federal rules and forms to reflect the current state of the law.

In particular, the Committee should ensure that an otherwise reasonable litigant, who is unfamiliar with case law such as Iqbal, and narrowly reads the plain language of the rules or uses the forms provided, does not do so to their detriment.

I do not know to what extent Iqbal applies outside of civil procedure, nor what similar issues may exist due to other developments in case law. I defer to the Committee to examine what rules and forms need to be updated.

The goal should be simply to ensure that they are an accurate guide to current law and reasonable to rely upon.

Respectfully submitted,
/s/ Sai

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F. 15-CV-HH: Rule 6(d), "Making" Disclosures

Amy Reverdy raises a question about the application of Rule 6(d) to the time for making disclosure of rebuttal expert trial witness testimony and for serving objections to pretrial disclosures.

Rule 6(d) allows additional time "[w]hen a party may or must act within a specified time after service and service is made under Rule 5(b)(2)(C), (D), (E), or (F)." [A pending recommendation would amend Rule 6(d) to delete electronic service, (E), from this list.] Rule 26(a)(2)(D)(2) directs that disclosure of a rebuttal expert be "made" within 30 days after the other party's disclosure. Rule 26(a)(3)(B) directs that a party serve a list of objections "[w]ithin 14 days after" pretrial disclosures are made. The set of relevant provisions is completed by Rule 26(a)(4), which directs that all disclosures under Rule 26(a) "be in writing, signed, and served."

Although the initial expert witness disclosures and trial disclosures must be served, the operative language of the rules sets the time for disclosing rebuttal experts and making objections to run from the time the underlying disclosures are "made." The submission recognizes the apparent meaning of the rule language, and notes that practice seems to be that Rule 6(d) does not provide extra time. But it suggests clarification: either direct that the underlying disclosures be "served," not simply "made," or add a sentence to Rule 26(a)(4) [or elsewhere] pointing out that the time is set for making, not serving, the underlying disclosures.

The question is whether the potential for confusion is so great as to warrant amending the rules. Probably not.

12b-001877

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126-001878

Federal Rules of Civil Procedure 26(a) / Additional Days for Service? 15-CV-HH

Amy Reverdy
to:
Rules_Support
10/14/2015 11:45 AM
Hide Details
From: Amy Reverdy <areverdy@gmail.com>
To: Rules_Support@ao.uscourts.gov

Dear Rules Committee,

I'm writing regarding Rule 26(a) of the Federal Rules of Civil Procedure and to inquire whether additional days should be added for service under Rule 6(d).

Subsection (a)(2)(D)(ii) of Rule 26 states that absent stipulation or court order parties must make their rebuttal expert witness disclosures "within 30 days after the other party's disclosure" and subsection (a)(3)(B) states that parties should file and serve objections to pretrial disclosures "[w] ithin 14 days after they are made."

Subsection (a)(4) of Rule 26 requires that disclosures be "served" and Rule 6(d) provides that "[w] hen a party may or must act within a specified time after service and service is made under Rule 5 (b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under Rule 6 (a)."

As expert witness disclosures and pretrial disclosures must be served and the opposing party may or must act within a specific time, e.g., 30 days and 14 days, respectively, it seems that the rebutting/objecting party should receive additional time in which to respond if service is made as outlined in Rule 6(d). Though in practice, this does not seem to be the case.

The argument for not adding additional days for service is placed on the terms "disclose" in subsection (a)(2)(D)(ii) and "made" in subsection (a)(3)(B). The date the expert witnesses are disclosed and the date the pretrial disclosures are made are considered to be the triggers from which the deadlines run. However, if these disclosures must be served, then it would seem the date that they are disclosed or made is the service date. Otherwise, it's not clear how the disclosure and made dates are determined for purposes of responding.

If the Committee's intent was to have the additional time for service apply, I suggest that subsection (a)(2)(D)(ii) be amended to provide that rebuttal witnesses must be served 30 days after the other party's disclosure is served, and that (a)(3)(B) be amended to read that objections must be filed and served within 14 days after the pretrial disclosures are served.

Conversely, if the Committee intended that additional time for service not apply to the rebuttal and objection deadlines, perhaps a sentence could be added to subsection (a)(4), or elsewhere, indicating as such.

Thank you for your consideration.

Sincerely,

Amy Reverdy

CA Bar No. 203678

TAB 5G

126-001881

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126-001882

G. 15-CV-JJ: Pro-se e-Filing

Robert M. Miller, Ph.D., urges that pro se litigants be permitted to file by electronic means. He offers his own experience with the burdens of filing on paper while other parties are allowed to e-file: "I must submit documents through the mail at great expense or drop the documents at the court house in person, taking time off work and dealing with heavy traffic and scarce parking."

This topic is addressed with the proposal to publish for comment amendments to the e-filing and e-service provisions of Rule 5.

126-001883

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126-001884

Suggested Rule Change - ECF for Pro Se Litigants
Rob Miller
to:
Rules_Support
10/26/2015 02:26 PM
Hide Details
From: "Rob Miller" <robmiller44@hotmail.com>
To: <Rules_Support@ao.uscourts.gov>

15-AP-H
15-CV-JJ
15-CR-E

To whom it may concern:

I have been a pro se litigant in one district court and two US Courts of Appeals. In the U.S. District Court for Northern California and the U.S. Court of Appeals for the Ninth Circuit, I was permitted to use Electronic Case Filing for my lawsuit and appeal.

In a recent appeal to the U.S. Court of Appeals for the Federal Circuit, I discovered that pro se litigants are not permitted to e-file. Since I discovered this rule the day before my Notice of Appeal was due in Washington, DC, I forfeited my right to appeal.

I discovered today that I am not entitled to file using ECF in an appeal to the U.S. District Court for the Eastern District of Virginia. The rule was not prominent in the local rules or the pro se handbook, and I only learned about it by calling the Clerk's office. Later, I found one line in the rules regarding this restriction that was difficult to see. Oddly, this court allows pro se litigants to receive service of documents through PACER.

Whether or not the courts have reasons from experience to believe pro se litigants have difficulty with electronic filing, litigants such as myself have been unjustly burdened relative to our legal adversaries based not on our own failures, but with failures by other pro se litigants. The US Courts could look to the Ninth Circuit's experiment in permitting all litigants to e-file to see what the results are. In any case, clerks in the Ninth Circuit have informed me that even experienced attorneys and paralegals make errors in ECF. Pro se litigants should not be held to a higher standard than professional litigants, but have their errors excused or unexcused consistent with the courts' approach to professional litigants.

These rules have an adverse impact on pro se litigants relative to their adversaries. While the defendants, government officials, can use ECF from the convenience of their home or office right up until a midnight deadline, I must submit documents through the mail at great expense or drop the documents at the court house in person, taking time off work and dealing with heavy traffic and scarce parking.

The rules of the courts must ensure that no party is disadvantaged relative to another. Pro se litigants already suffer from a lack of experience and resources. These rules only further compound the disadvantage.

Sincerely,

Robert M. Miller, Ph.D.
4094 Majestic Lane
#278
Fairfax, VA 22033

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126-001886

TAB 5H

126-001887

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126-001888

H. 15-CV-KK: Third Party Litigation Financing

This submission by John Beisner is on behalf of the U.S. Chamber Institute for Legal Reform. It follows an earlier proposal for an amendment that would require disclosure of third-party litigation financing arrangements. (The submission uses a variant phrase, "third-party litigation funding.)

The immediate purpose is to inform the Committee of "noteworthy developments" that have emerged since the Committee considered the earlier proposal and decided not to take immediate action, but to continue monitoring third-party litigation financing arrangements. The conclusion: "We look forward to continuing discussion of this important issue, and we urge the Committee to take steps soon to achieve greater transparency about the growing use of TPLF in federal court litigation."

The developments described in the exhibits begin with letters sent to three third-party litigation financing companies by Senator Charles E. Grassley, Chairman of the United States Senate Judiciary, and Senator John Cornyn, Chairman of the Subcommittee on the Constitution. The letters seek extensive information about the business and practices of these firms. Responses were requested by September 18, 2015. The additional exhibits include several articles about third-party litigation financing.

This topic remains open on the agenda. The information provided by this submission will be added to the agenda file.

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125-001890

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TOKYO
TORONTO

15-CV-KK

October 30, 2015

Via E-Mail

Ms. Rebecca A. Womeldorf
Secretary of the Committee on Rules of Practice and Procedure of the Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

RE: Update on Third-Party Litigation Funding

Dear Ms. Womeldorf:

I am writing on behalf of the U.S. Chamber Institute for Legal Reform ("ILR") to update the Advisory Committee on Civil Rules ("the Committee") on several important developments in the area of third-party litigation funding ("TPLF"). Last year, ILR and certain other organizations submitted a proposal to the Advisory Committee that would have amended the Federal Rules of Civil Procedure to require the disclosure of TPLF arrangements in any civil action filed in federal court. While the Committee ultimately elected not to proceed with formal consideration of that proposal, it indicated it would continue monitoring TPLF and its usage in the federal courts. Since that time, there have been several noteworthy developments in the TPLF arena, including the announcement of an investigation into TPLF usage and practices by Senate Judiciary Committee Chairman Chuck Grassley and Senator John Cornyn (R. Texas), chairman of the Judiciary Committee's Subcommittee on the Constitution. This development and others are explored in greater detail below.

Senate investigation into TPLF. Perhaps the most notable development on the issue of TPLF is a probe into the practice that was recently launched by Senators Grassley and Cornyn. According to a press release issued by Senator Grassley on August 27th, the two senators are "examining the impact third party litigation financing is having on civil litigation in the United States."[1] To that end, the Senators sent letters to Burford Capital, Bentham IMF and Juridica Investments Ltd., three of the largest commercial litigation funders, requesting various information regarding their TPLF activities in the United States. Copies of these documents are attached collectively as Exhibit 1. In particular, the letters seek information regarding the cases they finance, the structure and terms of the agreements they have executed and their returns on investment. The letters also seek information on the firms' general practices, including whether their financing arrangements were disclosed to other parties in the litigation.

As Senator Grassley explained in announcing the TPLF inquiry, "[l]itigation speculation is expanding at an alarming rate. And yet, because the existence and terms of these agreements lack transparency, the impact they are having on our civil justice system is not fully known. The information we requested today will help us better understand this industry. It's vitally important to our civil justice system that litigation decisions aren't unduly influenced by third parties."[2] Senator Cornyn similarly remarked that "[t]hird party litigation financing pumps millions of dollars into our justice system, and the current lack of oversight makes it difficult to track this money's influence on the actions of litigants and the outcomes of litigation. These letters will give us insight into where this money is going and will help us craft effective protection to keep the civil justice system honorable and fair."[3]

Expansion of TPLF in the United States. Over the last several months, more data have also emerged about the expansion of TPLF in the United States.[4] Indeed, according to a March 2015 article from The Lawyer, Burford Capital has reported a 35 percent increase in income for 2014, up to $82 million from $60.7

---

[1] *Grassley, Cornyn Seek Details on Obscure Third Party Litigation Financing Agreements*, Aug. 27, 2015, http://www.grassley.senate.gov/news/news-releases/grassley-cornyn-seek-details-obscure-third-party-litigation-financing-agreements.

[2] *Id.*

[3] *Id.*

[4] *See, e.g.*, Mattathias Schwartz, *Should You be Allowed to Invest in a Lawsuit*, N.Y. Times Magazine, Oct. 22, 2015, http://www.nytimes.com/2015/10/25/magazine/should-you-be-allowed-to-invest-in-a-lawsuit.html?_r=1. A copy of this document is attached as Exhibit 2.

million, of which nearly 60 percent (or $47.9 million) comes from litigation investment activities.[5] In addition to expanding TPLF activities by Burford and other companies like it, the TPLF industry is also seeing a proliferation of new TPLF entities that are raising money from investors to buy interests in U.S. litigation matters. For example, the Wall Street Journal reported in March 2014 that the hedge fund EJF Capital (based in Arlington, Va.) has raised hundreds of millions of dollars to invest in mass tort lawsuits, including transvaginal mesh and Risperdal litigation.[6] The hedge fund is targeting "class-action injury lawsuits" at "hefty interest rates," with the loans to be repaid by law firms "as they earn fees from settlements and judgments."[7] EJF Capital's announcement is one indication of the rapid expansion of TPLF in the United States.

TPLF's foray into the mass-tort arena is illustrated in a breach-of-contract complaint recently filed in Texas state court by a disgruntled former plaintiffs' firm employee who was hired to secure third-party litigation funding for television ads and the direct purchase of mass-tort lawsuits from other plaintiffs' lawyers.[8] According to the complaint, the plaintiff helped the Texas law firm of AkinMears secure over $93 million from Gerchen Keller Capital ("GKC") to acquire thousands of transvaginal mesh cases that could yield the law firm fees of "$130 million on the low side, and $200 million on the high."[9] The complaint goes on to summarize the business model employed by the law firm:

> (i) borrow as much money as possible; (ii) buy as many television ads and/or faceless clients as possible; (iii) wait on real lawyers somewhere to establish liability against somebody for something; (iv) use those faceless clients to borrow even more money or buy even more cases; (v) hire attorneys to settle the cases for whatever they can get; (vi) take a plump 40% of the settlement from the thousands and

---

5 Richard Simmons, *Revenue at Litigation Funder Burford Capital Booms by 35 Percent to $82m*, The Lawyer, Mar. 18, 2015.

6 *See* Rob Copeland, *Hedge-Fund Manager's Next Frontier: Lawsuits*, Wall Street Journal, Mar. 9, 2014, http://www.wsj.com/articles/hedge-fund-managers-next-frontier-lawsuits-1425940706.

7 *Id.*

8 *See Shenaq v. Akin*, No. 2015-57942 (Dist. Ct. Harris County, Tex., filed Sept. 29, 2015).

9 *Id.* ¶ 40.

12b-001893

> thousands of people its lawyers never met or had any interest in meeting; and (vii) lather, rinse, and repeat.[10]

This lawsuit, which has already been reported on in the press,[11] is worthy of close attention because it may provide new information about the way in which TPLF is being used to fund and expand mass torts litigation.

Changes in funding methods. TPLF companies are also expanding the ways in which they invest in litigation. The usual course has been for TPLF entities to collect money from investors that they would in turn use to buy interests in a collection of cases of the fund's choosing. LexShares Inc., a recent entrant to the market, however, plans on attracting investors, commercial plaintiffs, and plaintiffs' firms to its online marketplace. Accredited investors are able to shop among individual cases and contribute as little as $2,500 in the hopes of reaping an eventual profit when a matter settles or produces a favorable judgment.[12] Unlike traditional third-party litigation finance firms, LexShares solicits investments using a crowdfunding model, which allows ordinary accredited investors to choose among cases vetted though LexShares' due diligence. Another TPLF company, Invest4Justice, has joined the crowdfunding fray.[13] As of April 2015, the company had 18 campaigns, with almost $3 million funded. In light of a recent repeal of prohibitions against general solicitation, these companies can advertise their cadre of lawsuits and offer shares in the cases as securities.

* * *

---

[10] *Id.* ¶ 76.

[11] *See* Daniel Fisher, *Lawsuit Details How Law Firms Borrow And Pay Millions To Get Mass Tort Cases*, Forbes, Oct. 20, 2015, http://www.forbes.com/sites/danielfisher/2015/10/20/lawsuit-details-how-law-firms-borrow-and-pay-millions/; Paul Barrett, *Inside Massive Injury Lawsuits, Clients Get Traded Like Commodities for Big Money*, Bloomberg, Oct. 22, 2015, http://www.bloomberg.com/news/articles/2015-10-22/inside-massive-injury-lawsuits-clients-get-traded-like-commodities-for-big-money; Brenda Sapino Jeffreys, *Ex-Employee of AkinMears Sues Firm, Alleges Millions Owed*, Texas Lawyer, Oct. 20, 2015, http://www.texaslawyer.com/id=1202739910841/ExEmployee-of-AkinMears-Sues-Firm-Alleges-Millions-Owed?slreturn=20150930140928. Copies of these documents are attached collectively as Exhibit 3.

[12] *See* David Bario, *Litigation Finance Meets Crowdfunding With New Wall Street Startup*, The Am Law Litigation Daily, Nov. 19, 2014, http://www.litigationdaily.com/id=1202676828979/Litigation-Finance-Meets-Crowdfunding-With-New-Wall-Street-Startup#ixzz3VrxxITaI.

[13] Brian S. Kabateck & Tsolik Kazandjian, *Should you Crowdfund your Case?*, New Jersey Law Journal, June 15, 2015.

We hope the information summarized above will aid the Committee in further assessing TPLF. We look forward to continuing discussion of this important issue, and we urge the Committee to take steps soon to achieve greater transparency about the growing use of TPLF in federal court litigation.

Sincerely,

John H. Beisner

Enc.

EXHIBIT 1

126-001896

CHARLES E. GRASSLEY, IOWA, CHAIRMAN

ORRIN G. HATCH, UTAH
JEFF SESSIONS, ALABAMA
LINDSEY O. GRAHAM, SOUTH CAROLINA
JOHN CORNYN, TEXAS
MICHAEL S. LEE, UTAH
TED CRUZ, TEXAS
JEFF FLAKE, ARIZONA
DAVID VITTER, LOUISIANA
DAVID A. PERDUE, GEORGIA
THOM TILLIS, NORTH CAROLINA

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CHARLES E. SCHUMER, NEW YORK
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SHELDON WHITEHOUSE, RHODE ISLAND
AMY KLOBUCHAR, MINNESOTA
AL FRANKEN, MINNESOTA
CHRISTOPHER A. COONS, DELAWARE
RICHARD BLUMENTHAL, CONNECTICUT

KOLAN L. DAVIS, *Chief Counsel and Staff Director*
KRISTINE J. LUCIUS, *Democratic Chief Counsel and Staff Director*

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

August 27, 2015

VIA ELECTRONIC TRANSMISSION

Charlie Gollow
Managing Director, Bentham IMF
885 Third Avenue, 19th Floor
New York, NY 10022

Director Gollow,

Over the last several years, a growing number of reports have raised concerns about what impact the rapid expansion of third party litigation financing (TPLF) is having on our civil justice system. We write you, Managing Director of one of the most prominent TPLF funders, seeking information related to those concerns.

In 2011, the New York City Bar Association estimated that more than $1 billion was committed to litigation financing in the United States. By some estimates, that amount has tripled in just the last few years. While three of the largest firms involved in commercial litigation lending—Burford Capital ("Burford"), Bentham IMF ("Bentham"), and Juridica Investments Ltd. ("Juridica")—are all publicly traded on foreign exchanges, each invests heavily in the United States civil justice system.[1] For instance, while your firm is based in Australia, it recently announced it was funding 10 additional lawsuits within the United States, and reported a gross revenue of $31 million in the United States.[2] Likewise, in January, Burford Capital announced a 300 percent increase in its capital commitment, including an additional $62 million in 2014 alone. A majority of this capital is committed to "U.S. litigation and arbitration."[3] Finally, Juridica earned $73.9 million in net proceeds in 2014, and brought its total gross proceeds to over $241 million from litigation, $178 million of which is net profit. According to Juridica, its investments "have been made predominately in the United States."[4]

[1] Both Burford and Juridica are incorporated in Guernsey and publicly traded on the London Stock Exchange's Alternative Investment Market. Bentham Capital LLC is the wholly owned subsidiary of IMF Bentham Ltd. IMF Bentham Ltd is incorporated and domiciled in Australia and publicly traded on the Australian Securities Exchange.
[2] Bentham's chief investment officer observed that "[t]he pace and volume of new funding opportunities have grown sharply in the past year." *Id.*
[3] Burford Capital, *Annual Report 2014*, (March 17, 2015) at 8.
[4] Juridica Investments Ltd, *Annual Report 2014*, (April 10, 2015), at 15.

Your burgeoning industry is largely unregulated and operates with no licensing or oversight. Lending agreements between plaintiffs and commercial funders are confidential and generally not disclosed to the courts, the opposing party, or the public unless the terms of the agreement itself are the subject of subsequent litigation. And while commercial litigation lenders maintain that plaintiffs retain control over litigation and settlement decisions, the terms and fundamental structure of agreements that are publicly available call into question these assertions.[5]

We are concerned about the nature of commercial financing agreements and the impact they have on our civil justice system. Accordingly, please provide answers to the following questions:

1. For each year from 2009 to 2014, please identify the matters (by case name and docket number) being litigated or arbitrated in the United States, where you have entered into a financing agreement, or similar arrangement.

2. For each matter being litigated or arbitrated in the United States, please identify the lawyers or law firms, or other persons, with whom you have entered into financing agreements, or similar agreements.

3. For each matter being litigated or arbitrated in the United States, please summarize the subject of the dispute, whether it resolved and how much money was paid to (i) the plaintiffs; and (ii) your firm.

4. For each year from 2009 to 2014, please provide the total amount of capital committed to matters being litigated or arbitrated in the United States. Please provide these figures both in absolute terms, and as a percentage of the overall capital committed on a worldwide basis, for each calendar year.

5. Please describe your returns on investment for each matter for the years 2009-2014.

6. Please identify any referral agreements, either formal or informal, you, your firm (including any subsidiaries) or any representatives thereof have entered into with any lawyers or law firms in the United States. If you, your firm (including any subsidiaries) or any representatives thereof have entered into any such agreements, please provide copies, as well as a description of the terms. In your answer, please also provide the number of referrals made, the number of cases financed, and the final resolution of those financed cases.

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[5] *See*, e.g., *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 384 (S.D.N.Y. 2014).

12b-001898

7. Have you been a party to any litigation or arbitration arising out of the terms or provisions of the financing agreements you have entered into? If so, please identify the matter, as well as the forum and current status.

8. Do any of your agreements include either: (a) a provision or language that vary the interest collected on the amount funded depending on the amount recovered by the plaintiff, or (b) language that provides that if plaintiffs settle the matter for an amount below a contractually provided figure, the net recoveries will be calculated by reference to an amount other than the actual recovery? Please provide copies of any such agreements, and identify the relevant provisions.

9. Do your financing agreements typically include arbitration clauses? If so, do those clauses cover disputes between you and the plaintiff over whether or not to enter into a settlement with the defendant?

10. In any matters where class treatment was sought under FRCP Rule 23 (or similar state rule of civil procedure), have you disclosed the existence or terms of the financing arrangement to the court or other interested parties?

11. Regardless of your answer to number 10, under what circumstances, if any, do you disclose the existence and/or terms of your financing agreements to other interested parties (including but not limited to the court and opposing parties)?

12. Does your firm or any of its affiliates make any investments other than in litigation? If so, please identify these investments and the amount of capital – absolute and relative, as described in question 4 – committed to those investments?

Thank you in advance for your cooperation with this request. We would appreciate a response by September 18, 2015. If you have questions, please contact Ted Lehman or Noah Phillips from our respective Committee staffs at (202) 224-5225.

Sincerely,

Charles E. Grassley
Chairman
United States Senate Judiciary Committee

John Cornyn
Chairman
Subcommittee on the Constitution

CHARLES E. GRASSLEY, IOWA, CHAIRMAN

ORRIN G. HATCH, UTAH
JEFF SESSIONS, ALABAMA
LINDSEY O. GRAHAM, SOUTH CAROLINA
JOHN CORNYN, TEXAS
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AMY KLOBUCHAR, MINNESOTA
AL FRANKEN, MINNESOTA
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RICHARD BLUMENTHAL, CONNECTICUT

KOLAN L. DAVIS, *Chief Counsel and Staff Director*
KRISTINE J. LUCIUS, *Democratic Chief Counsel and Staff Director*

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

August 27, 2015

VIA ELECTRONIC TRANSMISSION

Sir Peter Middleton GCB
Chairman, Burford Capital
292 Madison Avenue, 23rd Floor
New York, NY 10017

Sir Peter,

Over the last several years, a growing number of reports have raised concerns about what impact the rapid expansion of third party litigation financing (TPLF) is having on our civil justice system. We write you, Chairman of one of the most prominent TPLF funders, seeking information related to those concerns.

In 2011, the New York City Bar Association estimated that more than $1 billion was committed to litigation financing in the United States. By some estimates, that amount has tripled in just the last few years. While three of the largest firms involved in commercial litigation lending—Burford Capital ("Burford"), Bentham IMF ("Bentham"), and Juridica Investments Ltd. ("Juridica")—are all publicly traded on foreign exchanges, each invests heavily in the United States civil justice system.[1] In January, for instance, your firm announced a 300 percent increase in its capital commitment, including an additional $62 million in 2014 alone. A majority of this capital is committed to "U.S. litigation and arbitration."[2] Likewise, while Bentham is based in Australia, it recently announced it was funding 10 additional lawsuits within the United States, and reported a gross revenue of $31 million in the United States.[3] Finally, Juridica earned $73.9 million in net proceeds in 2014, and brought its total gross proceeds to over $241 million from litigation, $178 million of which is net profit. According to Juridica, its investments "have been made predominately in the United States."[4]

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[2] Burford Capital, *Annual Report 2014*, (March 17, 2015) at 8.
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[4] Juridica Investments Ltd, *Annual Report 2014*, (April 10, 2015), at 15.

Your burgeoning industry is largely unregulated and operates with no licensing or oversight. Lending agreements between plaintiffs and commercial funders are confidential and generally not disclosed to the courts, the opposing party, or the public unless the terms of the agreement itself are the subject of subsequent litigation. And while commercial litigation lenders maintain that plaintiffs retain control over litigation and settlement decisions, the terms and fundamental structure of agreements that are publicly available call into question these assertions.[5]

We are concerned about the nature of commercial financing agreements and the impact they have on our civil justice system. Accordingly, please provide answers to the following questions:

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2. For each matter being litigated or arbitrated in the United States, please identify the lawyers or law firms, or other persons, with whom you have entered into financing agreements, or similar agreements.

3. For each matter being litigated or arbitrated in the United States, please summarize the subject of the dispute, whether it resolved and how much money was paid to (i) the plaintiffs; and (ii) your firm.

4. For each year from 2009 to 2014, please provide the total amount of capital committed to matters being litigated or arbitrated in the United States. Please provide these figures both in absolute terms, and as a percentage of the overall capital committed on a worldwide basis, for each calendar year.

5. Please describe your returns on investment for each matter for the years 2009-2014.

6. Please identify any referral agreements, either formal or informal, you, your firm (including any subsidiaries) or any representatives thereof have entered into with any lawyers or law firms in the United States. If you, your firm (including any subsidiaries) or any representatives thereof have entered into any such agreements, please provide copies, as well as a description of the terms. In your answer, please also provide the number of referrals made, the number of cases financed, and the final resolution of those financed cases.

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[5] *See*, e.g., *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 384 (S.D.N.Y. 2014).

12b-001901

7. Have you been a party to any litigation or arbitration arising out of the terms or provisions of the financing agreements you have entered into? If so, please identify the matter, as well as the forum and current status.

8. Do any of your agreements include either: (a) a provision or language that vary the interest collected on the amount funded depending on the amount recovered by the plaintiff, or (b) language that provides that if plaintiffs settle the matter for an amount below a contractually provided figure, the net recoveries will be calculated by reference to an amount other than the actual recovery? Please provide copies of any such agreements, and identify the relevant provisions.

9. Do your financing agreements typically include arbitration clauses? If so, do those clauses cover disputes between you and the plaintiff over whether or not to enter into a settlement with the defendant?

10. In any matters where class treatment was sought under FRCP Rule 23 (or similar state rule of civil procedure), have you disclosed the existence or terms of the financing arrangement to the court or other interested parties?

11. Regardless of your answer to number 10, under what circumstances, if any, do you disclose the existence and/or terms of your financing agreements to other interested parties (including but not limited to the court and opposing parties)?

12. Does your firm or any of its affiliates make any investments other than in litigation? If so, please identify these investments and the amount of capital – absolute and relative, as described in question 4 – committed to those investments?

Thank you in advance for your cooperation with this request. We would appreciate a response by September 18, 2015. If you have questions, please contact Ted Lehman or Noah Phillips from our respective Committee staffs at (202) 224-5225.

Sincerely,

Charles E. Grassley
Chairman
United States Senate Judiciary Committee

John Cornyn
Chairman
Subcommittee on the Constitution

12b-001902

CHARLES E. GRASSLEY, IOWA, CHAIRMAN

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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510–6275

August 27, 2015

VIA ELECTRONIC TRANSMISSION

Lord Daniel Brennan
Chairman, Juridica Investments Ltd.
11 New Street , St. Peter Port
Guernsey, GY13EG

Lord Brennan,

Over the last several years, a growing number of reports have raised concerns about what impact the rapid expansion of third party litigation financing (TPLF) is having on our civil justice system. We write you, Chairman of one of the most prominent TPLF funders, seeking information related to those concerns.

In 2011, the New York City Bar Association estimated that more than $1 billion was committed to litigation financing in the United States. By some estimates, that amount has tripled in just the last few years. While three of the largest firms involved in commercial litigation lending—Burford Capital ("Burford"), Bentham IMF ("Bentham"), and Juridica Investments Ltd. ("Juridica")—are all publicly traded on foreign exchanges, each invests heavily in the United States civil justice system.[1] Your firm, Juridica, earned $73.9 million in net proceeds in 2014, and brought its total gross proceeds to over $241 million from litigation, $178 million of which is net profit. According to your annual report, your firm's investments "have been made predominately in the United States."[2] Likewise, while Bentham is based in Australia, it recently announced it was funding 10 additional lawsuits within the United States, and reported a gross revenue of $31 million in the United States.[3] Finally, in January, Burford Capital announced a 300 percent increase in its capital commitment, including an additional $62 million in 2014 alone. A majority of this capital is committed to "U.S. litigation and arbitration."[4]

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[1] Both Burford and Juridica are incorporated in Guernsey and publicly traded on the London Stock Exchange's Alternative Investment Market. Bentham Capital LLC is the wholly owned subsidiary of IMF Bentham Ltd. IMF Bentham Ltd is incorporated and domiciled in Australia and publicly traded on the Australian Securities Exchange.
[2] Juridica Investments Ltd, *Annual Report 2014*, (April 10, 2015), at 15.
[3] Bentham's chief investment officer observed that "[t]he pace and volume of new funding opportunities have grown sharply in the past year." *Id.*
[4] Burford Capital, *Annual Report 2014*, (March 17, 2015) at 8.

Your burgeoning industry is largely unregulated and operates with no licensing or oversight. Lending agreements between plaintiffs and commercial funders are confidential and generally not disclosed to the courts, the opposing party, or the public unless the terms of the agreement itself are the subject of subsequent litigation. And while commercial litigation lenders maintain that plaintiffs retain control over litigation and settlement decisions, the terms and fundamental structure of agreements that are publicly available call into question these assertions.[5]

We are concerned about the nature of commercial financing agreements and the impact they have on our civil justice system. Accordingly, please provide answers to the following questions:

1. For each year from 2009 to 2014, please identify the matters (by case name and docket number) being litigated or arbitrated in the United States, where you have entered into a financing agreement, or similar arrangement.

2. For each matter being litigated or arbitrated in the United States, please identify the lawyers or law firms, or other persons, with whom you have entered into financing agreements, or similar agreements.

3. For each matter being litigated or arbitrated in the United States, please summarize the subject of the dispute, whether it resolved and how much money was paid to (i) the plaintiffs; and (ii) your firm.

4. For each year from 2009 to 2014, please provide the total amount of capital committed to matters being litigated or arbitrated in the United States. Please provide these figures both in absolute terms, and as a percentage of the overall capital committed on a worldwide basis, for each calendar year.

5. Please describe your returns on investment for each matter for the years 2009-2014.

6. Please identify any referral agreements, either formal or informal, you, your firm (including any subsidiaries) or any representatives thereof have entered into with any lawyers or law firms in the United States. If you, your firm (including any subsidiaries) or any representatives thereof have entered into any such agreements, please provide copies, as well as a description of the terms. In your answer, please also provide the number of referrals made, the number of cases financed, and the final resolution of those financed cases.

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[5] *See*, e.g., *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 384 (S.D.N.Y. 2014).

12b-001904

7. Have you been a party to any litigation or arbitration arising out of the terms or provisions of the financing agreements you have entered into? If so, please identify the matter, as well as the forum and current status.

8. Do any of your agreements include either: (a) a provision or language that vary the interest collected on the amount funded depending on the amount recovered by the plaintiff, or (b) language that provides that if plaintiffs settle the matter for an amount below a contractually provided figure, the net recoveries will be calculated by reference to an amount other than the actual recovery? Please provide copies of any such agreements, and identify the relevant provisions.

9. Do your financing agreements typically include arbitration clauses? If so, do those clauses cover disputes between you and the plaintiff over whether or not to enter into a settlement with the defendant?

10. In any matters where class treatment was sought under FRCP Rule 23 (or similar state rule of civil procedure), have you disclosed the existence or terms of the financing arrangement to the court or other interested parties?

11. Regardless of your answer to number 10, under what circumstances, if any, do you disclose the existence and/or terms of your financing agreements to other interested parties (including but not limited to the court and opposing parties)?

12. Does your firm or any of its affiliates make any investments other than in litigation? If so, please identify these investments and the amount of capital – absolute and relative, as described in question 4 – committed to those investments?

Thank you in advance for your cooperation with this request. We would appreciate a response by September 18, 2015. If you have questions, please contact Ted Lehman or Noah Phillips from our respective Committee staffs at (202) 224-5225.

Sincerely,

Charles E. Grassley
Chairman
United States Senate Judiciary Committee

John Cornyn
Chairman
Subcommittee on the Constitution

12b-001905

EXHIBIT 2

126-001906

BROOKLYN
NOVEMBER 4
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The New York Times Magazine | http://nyti.ms/1NVIdoN

Should You Be Allowed to Invest in a Lawsuit?

In recent years, investors have started buying shares in other people's litigation proceedings. Are they warping the legal system in the process?

By MATTATHIAS SCHWARTZ OCT. 22, 2015

The Miller quick coupler comes in a few different sizes. The one I tried out has the proportions of a laundry bin and weighs nearly 700 pounds. It allows the operators of hydraulic digging machines to switch buckets without ever leaving the cab. Two flanges rise from its sides, supplying it with the Volkswagen-like curves that inspired its nickname, the Bug. The flanges are drilled clean through with four holes set inside four bosses; beneath the front pair of holes are two upturned latches, like the open ends of two wrenches. Other than its poppy-red color, the device appears to be an ordinary specimen from the menagerie of heavy-duty construction equipment.

But in a Chicago courtroom on Oct. 26, the Bug will star in a multimillion-dollar dispute that represents a new frontier in the march of global capitalism. The nominal occasion is a paternity feud between two of the Bug's corporate parents, Miller UK, the equipment manufacturer based in Cramlington, England, and Caterpillar, the American construction-equipment giant that was once Miller's biggest customer. The themes of Miller UK v. Caterpillar are classics of the intellectual-property genre: greed, betrayal, bloodlines. But Miller's method of funding its side of the production is something new. Rather than paying its lawyers out of pocket, Miller has turned to a private firm to front the money for its legal costs: the Illinois-based Arena Consulting, which is headed by two brothers, Herbert and Douglas Lichtman. If Miller loses, Arena gets nothing. If it wins, Arena will get a share of the proceeds, which could run well into the tens of millions of dollars.

This new form of lawsuit funding is called litigation finance. It lies at the crossroads of two Anglo-American tendencies. The first is our litigious side, in which we celebrate our equality before the law by dragging those who have wronged us before a judge. The second is our ingenious mercantilism, as demonstrated by our penchant for turning everything from church raffles to mortgages into marketable securities to be chopped up, bundled and resold. Like the celebrity bonds backed by royalties and popularized by David Bowie during the 1990s, litigation finance represents the expansion of securitization into hitherto virgin territory. Those involved in the practice argue that it allows smaller companies like Miller to afford a day in court. Detractors worry that it could give rise to a litigation arms race, with speculative money aggravating the already high costs of the American legal system.

While the amount of litigation funded by outside financiers is still relatively small, the industry — which barely existed outside personal-injury cases until the mid-2000s — is growing rapidly, driven by increasingly permissive laws, the promise of high returns and hourly billing rates that run $500 or more for the largest and most sophisticated law firms. Between 2013 and 2014, Burford Capital, a public company traded in Britain, increased its lawsuit investments from $150 million to $500 million. During the same period, its profits rose by 89 percent, with a 61 percent net profit margin. The two-year-old Gerchen Keller, one of the industry's youngest funds, manages more than $840 million. With investor-backed war chests, plaintiffs are crossing borders to find the most favorable jurisdictions, and sometimes enlisting the help of foreign governments. Like equities and mortgages, lawsuits are making a transition from a private arrangement to a fully monetized asset class. The "portfolio" held by IMF Bentham, an Australia-based funder, consists of 39 cases, which the firm values at just over $2 billion. United States lawmakers are beginning to ask questions. In August, two senators from the Judiciary Committee sent letters to major funders asking them for the names of the cases they had invested in and many details of their business dealings. The letter called litigation finance a "burgeoning industry" that was "largely unregulated and operates with no licensing or oversight."

Larger companies, even those with their own in-house counsel, are selling off pieces of lawsuits to smooth out cash flow and offload risk. Juridica Investments, a Miami-based fund with $650 million under management, specializes in working

with Fortune 500 companies, which make up 80 to 85 percent of its investments, according to Richard Fields, its chief executive, who says that outside funding helps align the interests of plaintiffs' lawyers with those of their clients. "You want the largest recovery, in the shortest time, with the least uncertainty," he says. Smaller companies can use litigation financing to finance growth, by using their future award as a credit line.

Over the last century, many have come to see lawsuits as a means of expression, a political weapon and a powerful deterrent against those who might do wrong. And yet creating lawsuits is not the same as creating something like the Bug. Litigation is a zero-sum industry — every dollar in damages taken home by the winner, minus fees, must be wrung out of the loser. Litigation also helps shape legal precedent, defining the terms under which civil justice may be sought. It's hard to imagine how billions in outside capital won't wind up changing the justice system. The only question is how.

To help me understand what a quick coupler does, David Ridley, a straw-haired Miller mechanic in a jumpsuit, arranged a demonstration. Beside a chain-link fence near the Miller UK factory, he had set up a yellow Komatsu digging machine, of the scale favored by demolition crews and construction-minded toddlers. Attached to the end of its hydraulic arm was a digging bucket. Ridley picked up a sledgehammer and tapped a wrist-like joint, then slid out one of the two cylindrical pins holding the bucket in place. The pin's chrome surface was coated with grease. He hoisted it onto his shoulder. It weighed about 100 pounds.

"How many people want to be changing that all day?" Ridley asked.

Ridley then tapped out the other pin, climbed up into the Komatsu's cab and revved the diesel engine up to a gentle hum. He swung the yellow arm over to the Bug and positioned it within the flanges so the four holes aligned. He connected some hydraulic hoses to deliver power to the Bug's innards and tapped the two pins back in. Then, using the Bug-enhanced Komatsu, Ridley picked the bucket back up. Thanks to the Bug, it was an idiotproof process. A bright yellow safety latch tightened neatly over one of the pins. It took less than 10 seconds.

Before quick couplers, operators would waste 30 minutes or more each time they wanted to switch out a bucket or other tool. Miller's first quick coupler, nicknamed the Magnificent Seven, came to market in the early 1990s, reducing that time to seven seconds. They also solved another problem. Previously, a construction company with three kinds of machines would need to buy three lines of buckets to match. Quick couplers soon created universal compatibility among product lines: A Komatsu bucket, for example, could now be slapped onto a Volvo machine.

Caterpillar soon took notice. Compared with Miller, Cat is a leviathan: It's one of the 200 largest corporations in the world, with more than 100,000 employees. In 1997, according to legal filings from Miller, Cat approached a Miller executive at a trade show in Germany. The two companies began to talk about having Miller contract to supply Cat with a fully automatic coupler that the companies ultimately brought to market as the Pin Grabber Plus. Over the years, Cat (by Miller's count) bought about 27,000 of these units for resale to its own customers, generating upward of $100 million in revenue. Each generation of couplers had to mesh perfectly with the specifications of Cat's machines, so the companies' engineers exchanged technical drawings, and their executives hobnobbed over dinners in Northumberland and Illinois. By 2006, Caterpillar was ordering about 10,000 Miller couplers a year. According to Miller, Caterpillar orders accounted for as much as 28 percent of its business and a larger share of its profits.

Then, in the midst of the 2008 downturn, Cat, according to Miller's version of events, abruptly told Miller that its couplers would no longer be needed. Cat had designed its own coupler in-house. (Cat's filings deny that its coupler used Miller's proprietary technology and say that it was allowed to terminate its contract with Miller at any time.) Keith Miller, the company's founder, was gutted. With the loss of his largest customer, Miller earnings swung from an eight-million-pound profit to a million-pound loss. Miller took on debt and dismissed more than half of its employees.

A year after Cat broke the news, Keith Miller saw its competing coupler for the first time. "It wasn't just similar," he told me. "It was a replica of ours." Miller felt certain that the new Cat couplers made use of his company's know-how. He sued Caterpillar for breach of contract, fraud and misappropriating trade secrets. But he

quickly learned what it means to sue a company as large as Cat. Caterpillar's lawyers made dozens of preliminary filings. They claimed that Miller had delivered "substandard" couplers and failed to address "continuity of supply" issues that it had repeatedly raised.

Miller's lawyers quickly went through millions of pounds. To make it through the discovery phase of the suit would require millions more. Keith and his two siblings, who own the company together, mortgaged their houses and signed personal guarantees on the company's debt. But still they didn't have enough money to see their case through to court. So a contact in London introduced them to Reed Oslan, a Chicago lawyer who specializes in litigation finance.

In the legal world, the Miller lawsuit is what is known as a "David and Goliath" case, in which a plaintiff is so outgunned financially that it wouldn't be able to have its day in court without a lawyer willing to work on contingency or an infusion of investor cash. The Davids come in a variety of guises. Patricia Cohen, ex-wife of the billionaire hedge fund manager Steven A. Cohen, got a reported $1.2 million war chest from a firm called Balance Point, which specializes in funding divorce cases like hers. In 2006, 16 years after their divorce, Patricia saw a "60 Minutes" report on her ex-husband's business, which led her to file a lawsuit accusing Cohen of racketeering and fraud, claiming that he concealed $5.5 million during their legal proceedings. In 2014, after a string of findings and appeals, a federal judge dismissed the racketeering portion of Patricia's claim, noting that the only difference between it and other family disputes was "the seemingly inexhaustible resources that each side has brought to bear," but he allowed Patricia to continue her case against Steven for fraud and other claims. The litigious aftermath of the Cohen divorce, he noted, had persisted for twice as long as the Cohen marriage. Gerald Lefcourt, Patricia Cohen's lawyer, said that outside financing was necessary for Patricia to challenge someone with the resources of her ex-husband. "The average person who has a good job making $100,000 a year is middle class, but totally shut out of the legal system," he said. "You can't fight a big case. How do you do it?"

Terms of the deal between Miller UK and its funders have not been disclosed, but funders typically acquire the rights to 20 to 60 percent of all damages in hopes of recouping two or three times their original investment, sometimes more. This

month, when Miller UK Ltd. v. Caterpillar Inc. is scheduled to reach trial in a federal court in Chicago, Miller's lawyers will ask a jury to award Miller more than $100 million. "As the boss, I have to find a way forward," Keith Miller said. "We're just a little business from the northeast of England. Without litigation finance, we couldn't take them on."

Despite the hypercapitalist spirit of its rise, litigation finance actually has its roots in antiquity. According to Max Radin, a historian of ancient city-states, members of Athenian political clubs would back each other in lawsuits against their rivals. Apollodorus, a wealthy banker's son, bought shares of lawsuits and hired professional orators — some of the earliest lawyers in Western history — to write his court speeches. The Romans tolerated the practice in some cases until the sixth century, when it was banned by Emperor Anastasius. The Roman taboo on litigation finance, Radin writes, sprang from the idea that "a controversy properly concerned only the persons actually involved in the original transaction," not self-interested meddlers. In medieval England, litigants could hire "champions" to represent them in "trial by battle." By the late 13th century, these strongmen were being compared to prostitutes, and their prevalence hastened the movement of dispute resolution to the courtroom. During the Middle Ages, this concept of "champerty" — assisting another person's lawsuit in exchange for a share of the proceeds — emerged as part of the larger ecclesiastical taboo against usury. Though the word was associated with feudal land grabs, Radin notes that in practice, champerty was used by rich lawyers "on behalf of propertied defendants." In 1787, Jeremy Bentham, the political philosopher, mocked prohibitions on champerty as a holdover from feudal days, where courts were beholden to "the sword of a baron, stalking into court with a rabble of retainers at his heels."

Nevertheless, a vestigial squeamishness about investing in lawsuits made its way across the Atlantic. The first such disputes, early in the 20th century, were over contingency fees, the practice, now common, of lawyers taking on a case in exchange for a percentage of future damages. Unlike England, which still caps fees for winning solicitors, America was open to this kind of payment structure, in keeping with its frontier ethic toward credit and speculation. Twenty-eight states now explicitly permit champerty, as long as funders do not act out of malice, back frivolous lawsuits or exert too much control over trial strategy.

Hedge funds, banks and insurance companies have long been quietly funding the occasional lawsuit, but no major United States investment outfit in the commercial arena specialized in the practice until Juridica was founded in 2007. The industry's early growth was driven in part by the recession, which made lawyers at big companies eager to hand off risk and also increased the demand among investors for opportunities that could pay off no matter what was happening in the world's markets. Today the industry seems to have become a permanent part of the financial landscape, with shares of prominent funders trading every day on stock exchanges in London and Sydney.

Anthony Sebok, a professor at Cardozo Law who advises Burford, says he sees the practice as part of a broader trend toward the financialization of the law. "Why can't I promise a stranger some piece of the game?" he asked me, paraphrasing Bentham's writings. "Is there something icky about it, like I'm commodifying my rights? Bentham says these legal rights are our property. Why shouldn't we be able to sell them?" Jonathan Molot, a professor at Georgetown Law who serves as Burford's chief investment officer, has written that stock offerings by law firms could improve morale, lower rates and help lawyers focus on maximizing long-term profits. Like lawsuits, the firm itself should evolve into an asset. "It's a mistake for lawyers to hunker down and say we're different, we're excluded, we're not part of the economy," he said.

But the interests of financiers and plaintiffs are not always so well aligned. Depending on the structure of the deal and the ultimate payout, plaintiffs sometimes walk away with a few crumbs after the funders and lawyers take their share. One such outcome happened in 2007, when Altitude Capital, a funder, invested $8 million in an intellectual-property suit filed by DeepNines, a small network security company, against McAfee, a much larger competitor. The case was settled for $25 million, but after expenses ($2.1 million), lawyers' fees (roughly $11 million) and Altitude's cut ($10 million), DeepNines took home $800,000, a little over 3 percent of its settlement. Then, Altitude questioned DeepNines' math, arguing that the company shouldn't have deducted its own expenses before calculating contingency fees. It sued its former partner for $5 million more, eventually dropping the suit in 2011.

This kind of falling out is unusual, but it shows the fundamental conflict that can occur. When it's time to divvy up the prizes, allies can turn into competitors, and smaller, inexperienced plaintiffs can find themselves facing down a second Goliath — their former champion.

The Institute for Legal Reform, a Washington-based lobby affiliated with the Chamber of Commerce, argues that litigation finance will prompt courts to award damages so large that they hurt American businesses. Executives from Johnson & Johnson, FedEx, Dow Chemical and many other large companies have sat on its board. "We support the position taken by the Institute for Legal Reform," said a spokeswoman for Caterpillar, who said she could not comment further on the Miller case because of the pending lawsuit.

Lisa Rickard, the institute's president, calls litigation finance "the biggest single threat to the integrity of our justice system." As evidence, she put me in touch with Howard Schrader, a lawyer for Ace Limited, a $35 billion insurance company engaged in a multifront legal battle over a grievance dating back to the Liberian Civil War of 1991. At its root was the question of whether a Liberian company run by Lebanese nationals was due an insurance settlement over a looted supermarket, or whether the damage fell under a war-risk exclusion in its insurance policy that ruled out "insurrection." The plaintiff was a Liberian official, represented by a lawyer from the British Virgin Islands, who had found outside investors and sued in a Cayman Islands court to enforce a Liberian judgment. Schrader spent more than an hour speaking with me by phone, dutifully walking me through the case and peeling back mind-numbing layers of acquisitions, indemnity agreements, receiverships and jurisdictional disputes. To Rickard, the Ace Limited case was an example of buccaneering funders tracking down far-flung plaintiffs to pick at old wounds. I wasn't so sure. On one hand, a giant Swiss insurance company felt it was being shaken down. On the other, a small business felt it was due something for paying years of premiums. I had trouble feeling too sorry for either.

In another long-running legal battle, which began in Ecuador and has since spread to several other jurisdictions, Steven Donziger, a Harvard Law School-educated lawyer, has pursued Chevron with an Ahab-like single-mindedness. He has donned the hats of advocate, adviser and ad hoc fund-raiser for some 30,000

indigenous Ecuadorians who live around the Lago Agrio area and claim that Texaco, which Chevron acquired, left contaminated waste pits around old oil-drilling sites on their land. In 2010, after the case had gone on for 19 years and Donziger's team had gone through $7 million, Burford bought in. They invested $4 million, with another $11 million planned. In exchange for its support, Burford would receive 5.5 percent of the settlement, which could work out to a 100-to-1 jackpot should Chevron pay $27 billion in damages, an ambitious sum calculated by a court-appointed expert.

Chevron went on offense, digging up outtakes from a documentary in which Donziger extols the suit as an act of "brute force" and the purpose of plaintiffs' law as "to make [expletive] money." (Donziger has said that these excerpts are "grossly misleading or lacking in context.")

In September 2011, Burford sent Donziger a letter ending their relationship. They accused his team of "fraudulent conduct" and "deception," citing Donziger's communications with the supposedly impartial expert who had come up with the $27 billion settlement figure. Burford said that consultants working with Donziger's team had "ghost written" the expert's report and "worked very hard to cover that up." Donziger, meanwhile, has continued his crusade against Chevron in Canada, Argentina and Brazil. "You cannot sustain this kind of case without money, and a lot of money," Donziger said in 2010. You can imagine Chevron's being more inclined to settle had Donziger taken a less ambitious approach. Considering that scenario, it's arguable that Burford's investment could have been part of what has kept those 30,000 Ecuadorians — Donziger's clients — from receiving one penny in damages, more than 20 years after Texaco left their area. In 2014, a federal judge ruled that Donziger could not continue to pursue Chevron in the United States. Donziger has appealed and continues his foreign lawsuits. Chevron calls the case against the company "the legal fraud of the century."

Not long ago I had breakfast with Christopher Bogart, Burford's C.E.O. He is in early middle age, and his well-tended appearance and subtly asymmetric eyeglasses signal prosperity. "We've done more than 100 deals," he said, speaking of the Chevron case. "We haven't had another one that's gone that way." Burford, Bogart told me, never anticipated a $27 billion payout. "We believed that Chevron would

settle for much less than that," he said, perhaps $1 billion, a more modest 3-to-1 or 4-to-1 win.

"The case illustrates something that I think all lawyers know," he continued. "You don't always get all of the facts from your client." His tone was somewhere between resignation and remorse, like a banker who had made a bad bet.

Of course, the transformation of legal disputes into deals didn't begin with litigation finance. For years, observers of the legal profession have criticized how the market economy erodes its ethical obligations, pushing private advantage over public good and billable hours above all. Only the truly rich can afford to hire a professional who will zealously and exhaustively defend their interests. When litigation financiers talk about expanding access to justice and standing up for the little guy, they generally mean helping millionaires pursue claims against billionaires. In some ways, the rise of litigation finance is a symptom of what the American civil-justice system has become — a slow, expensive and complicated system for mediating corporate breakups. The judges in this system might talk like referees, but their function is moving toward that of accountants.

Keith Miller sometimes imagines his lawsuit as a movie, the heavy-equipment version of "Erin Brockovich." For years, he claims, Caterpillar denied rumors that it was building its own version of the Bug, reassuring Miller of the prospects for their ongoing relationship up to the moment that Cat terminated the contract. Emails turned up during discovery by Miller's legal team show Caterpillar employees' strategizing about what to do if the information somehow leaked. To Keith Miller, the dispute over the quick coupler's origin is about more than money.

"All we want to do is set the record straight about what happened and why," he told me.

An initial skirmish in Miller v. Caterpillar involved a major question for litigation finance as a whole — should plaintiffs be forced to disclose their funding arrangements, or are they entitled to keep these deals confidential? Lisa Rickard, from the Institute for Legal Reform, argues in favor of disclosure. "That helps the judge and the defendant understand who's pulling the strings," she told me.

Judge Jeffrey Cole, who is presiding over the Miller case, disagreed. He called champerty "a hoary doctrine" that time had "narrowed to a filament." Many of the particulars of Miller's financial dealings with its backers, Cole found, are irrelevant, as they "have nothing to do with the claims or defenses in the case." Miller could keep the specifics of how it was financing its lawsuit confidential.

If Cole's ruling is any indication, the day is approaching when lawsuits are something like the Bug itself — complicated, expensive and eminently transferable commodities. More and more lawyers will find themselves being paid by people whose interest in the outcome is speculative, not personal. Somewhat like mortgage banking, lawyering will involve serving as a buffer between the people who care and the people who manage the probabilities.

Like most entrepreneurs, Keith Miller is a bit of both. His feelings about Caterpillar's treatment of the Bug haven't stopped him from continuing to sell the company some of Miller's smaller products. "We're hand-to-mouth each month," he says. "Quite frankly, we're not in a position to turn anything down." Could he ever imagine repairing Miller's relationship with Cat? "I'd be delighted to do that," he said. "So long as we're reimbursed for our losses."

Correction: October 23, 2015

An earlier version of this article misstated the amount of money managed by the firm Gerchen Keller. It has more than $840 million under management, not $475 million in private capital.

Mattathias Schwartz is a contributing writer for the magazine. His last article was about the meaning of the word "relevant" in the USA Patriot Act.

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A version of this article appears in print on October 25, 2015, on page MM55 of the Sunday Magazine with the headline: Trial by Money.

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EXHIBIT 3

126-001918

Forbes http://onforb.es/1NSuOxH

Tax Notes - Federal
Easily Search over 11,000 Documents and Find the News You Need to Know!

Daniel Fisher Forbes Staff
I cover finance, the law, and how the two interact.

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Lawsuit Details How Law Firms Borrow And Pay Millions To Get Mass Tort Cases

A former employee of a Houston law firm offers a revealing look at the world of mass torts in a lawsuit detailing how the firm borrowed millions of dollars at near-usurious rates to buy control of thousands of cases that it hoped to turn into as much as $200 million in fees.

In the lawsuit, former Wells Fargo leveraged-finance executive Amir Shenaq says he was lured to AkinMears, a high-volume Houston law firm, by the promise of millions in dollars in fees for himself if he could obtain needed financing. Shenaq claims he earned $1.4 million during his four-and-a-half-month stint at AkinMears but is owed another $4.2 million for arranging some $90 million in loans, part of which was used to buy some 14,000 lawsuits from other firms.

The claims, if true, paint an unflattering portrait of a business where law firms use television and Internet ads to recruit clients, whom they then trade with other firms in exchange for a piece of the contingency fees that often run to 40%. This division of labor may make economic sense, but can run afoul of ethics rules that prohibit lawyers from splitting fees unless they perform meaningful legal work for their clients.

AkinMears lists four partners and three attorneys "of counsel" on its website including name partners Truett Akin IV and Michelle Mears. A lawyer for the firm said they would have no comment. Shenaq's lawyer, Kenneth S. Wall, didn't respond to a request for comment. Houston Judge Randy Wilson issued an order sealing the case on Oct. 7, with the agreement of both sides, because of the potential for "immediate and irreparable injury" to AkinMears. The suit was first reported in a Texas Lawyer article last week.

In a filing that reads more like a potboiler detective novel, Wall explains how the then-29-year-old banker moved to Houston in 2014 to set up a leveraged finance office for Wells Fargo. He began talking to his neighbor, Truett Akin IV, and the two

quickly began discussing a job. AkinMears owed $40 million to a local litigation-finance firm that was charging it 24% interest, Shenaq claims, yet it was down to its last $2 million in cash because of heavy spending on television ads to recruit new clients.

"AkinMears is not run like a traditional plaintiff's law office, and the Firm's lawyers do not do the types of things that regular trial lawyers do," like meet clients, file pleadings and motions, attend depositions "or, heaven forbid, try a lawsuit," Shenaq claims in his suit. "Despite the fact that AkinMears' lawyers do not have to dirty their hands with the mundane chores that come with actually practicing law," the firm charges a 40% contingency fee "which is then divided in some fashion among the participants in its ever-shifting syndicate."

Akin told Shenaq he wanted to change the firm's strategy from finding clients through advertising to buying cases from other firms. Shenaq says Akin had a goal of buying $100 million worth of cases by the end of 2015. He was hired in March 2015, the lawsuit says. Shenaq says he "hit the ground running" and immediately arranged a meeting with Gerchen Keller Capital, a Chicago firm that is one of the biggest in litigation finance.

Hedge funds and firms like Gerchen Keller have long loaned money to plaintiff lawyers, often at high rates, because litigation finance is an attractive investment that is uncorrelated with anything else. In his suit, Shenaq says he lowered AkinMears' rate from 24% to 16%. With some of the proceeds, he says, Akin bought a fifth interest in a Phenom 300 corporate jet for $1.5 million. GKC didn't immediately respond to a request for comment.

At the same time as he was arranging the new loan, Shenaq says he negotiated transactions with Houston lawyer Fletch Trammel and Dallas lawyer Mazin Sbaiti, who he says was affiliated with four firms that called themselves Alpha Law. They ultimately agreed AkinMears would pay $40 million for 13,837 mesh cases. Shenaq estimated AkinMears could reap $130 milllion to $200 million in fees from the 14,000 cases, at $14,000 to $16,000 per case.

Transvaginal mesh litigation has surged over claims the products made by Johnson & Johnson, C.R. Bard, Boston Scientific and others can lead to infections, incontinence and other conditions. Manufacturers have paid out billions in settlements so far. On its website, AkinMears says it also represents clients in other mass torts including mesothelioma, Risperdal, power morcellators, testosterone therapy, Xarelto, Lipitor and the Mirena intrauterine device.

Shenaq says he was operating under an 18-month contract that promised him $30,000 a month plus commissions, with the goal of raising $20 million in capital from new sources. He claims he was to be paid 3% up front, or $1.5 million on $50 million, plus a back-end fee that could amount to 2% of the fees AkinMears earned on the cases he helped finance. He also claims he was promised 7.5% of any investment deals he brought to the firm on the front end, plus 5% of resulting fees on the back end. (Texas ethics rules say "a lawyer or law firm shall not share or promise

Less than 20 seats left

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to share legal fees with a non-lawyer," although a person with Shenaq's name is a graduate of Emory Law School and member of the State Bar of Georgia.)

Before leaving on a family vacation in July, Shenaq says he sent Akin an e-mail specifying the commissions he was owed. Akin replied "let's discuss when you return."

"Uh-oh. You know where this is headed," the lawsuit states.

In a meeting after he returned, Akin launched into a what he called "a big boy talk" about his work on the deal. Akin claimed another lawyer active in transvaginal mesh litigation originated the deal, and Shenaq hadn't raised any capital. By the weekend he learned his health insurance had been cancelled. When he went to pick up his belongings, he learned from the firm's lawyer that he'd been fired on July 31 for self-dealing and conflicts of interest.

The firm didn't specify what those were, and if it was his help arranging loans for other lawyers in the syndicate, Shenaq says, Akin suggested them both. "Akin and Mears didn't pay Shenaq for one reason and one reason only: They didn't pay him because they didn't feel like it," he says.

The lawsuit is dated Sept. 29 and soon after it was filed AkinMears moved to seal it. "This information would be valuable to any competitor by, for example, assisting the competitor in creating a business plan or financial model maximizing efficiency similar to that of AkinMears and otherwise allowing a competitor to gain an unfair advantage in financing deals similar to those to which AkinMears was a party by knowing AkinMears' financial data," Texas Lawyer reported the firm said in its motion to seal the case.

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America's Most Dangerous Cities 2015

Microsoft Makes Windows 10 Upgrades Automatic For Windows 7 And Windows 8

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BloombergBusiness

Inside Massive Injury Lawsuits, Clients Get Traded Like Commodities for Big Money

A disgruntled former law firm employee spills secrets on a mass tort factory.

Paul Barrett

October 22, 2015 — 2:05 PM EDT For all the black robes and ceremony, the American legal system often operates more like a factory assembly line than a citadel of individualized justice. Ninety-five percent of criminal prosecutions end in plea deals. Many defective-product claims settle in mass pacts that benefit attorneys more than putative victims. Now a legal dispute within a plaintiffs' law firm that organizes massive torts is threatening to pull back the curtain on the mechanics of high-volume litigation.

It's not a pretty picture.

Amir Shenaq, a 30-year-old financier, sued his former employer, the Houston law firm AkinMears, over $4.2 million in allegedly unpaid commissions. To earn those fees, Shenaq says he raised nearly $100 million used to purchase thousands of injury claims from other lawyers. The suit portrays a claim-brokering marketplace that normally operates in secret, with clients recruited en masse through TV and Internet advertising who are then bundled and traded among attorneys like so many securitized mortgages.

AkinMears "is not run like a traditional plaintiffs' law office, and the firm's lawyers do not do the types of things that regular trial lawyers do," according to the Shenaq suit, which was filed in Texas state court in late September by another Houston firm, Oaks, Hartline & Daly. AkinMears doesn't do "things like meet their clients, get to know their clients, file pleadings/motions, attend depositions/hearings, or, heaven forbid, try a lawsuit," Shenaq alleges. Rather, AkinMears "is nothing more than a glorified claims-processing center, where the numbers are huge, the clients commodities, and the paydays, when they come, stratospheric."

AkinMears's outside attorney, Allan Neighbors IV of Houston, declined to comment or make the firm's name partners, Truett Akin IV and Michelle Mears, available for interviews. In court filings, AkinMears denied wrongdoing and said Shenaq had been fired last July 31 for unspecified reasons. Shenaq, a former Wells Fargo Securities leveraged-finance banker, alleges Akin fired him to avoid paying the multimillion-dollar commissions.

AkinMears asked the trial judge to seal Shenaq's suit, saying his disclosures "will cause immediate and irreparable harm to the continued nature of financial and other information belonging to AkinMears and those with whom it does business under terms of confidentiality." Judge Randy Wilson granted the gag order earlier this month, but only after the original filing had been disseminated online. Shenaq and the Oaks firm did not respond to requests for comment.

While it primarily concerns Shenaq's attempt to get paid commissions he says he's owed, the employment suit illuminates the now-common practices of litigation finance and claim aggregation. Shenaq alleges that in 2014, five-attorney AkinMears switched strategies away from "buying non-stop advertisements and acquiring clients in a random, unpredictable manner." Instead, the firm's principals decided "to start making direct investments in ongoing mass tort litigation" over such products as hip implants, Viagra, and Lipitor.

To finance those investments, AkinMears asked Shenaq to raise tens of millions of dollars from outside investors. The former banker says he did that primarily by obtaining nearly $100 million from the Chicago-based hedge fund Gerchen Keller Capital. The fund specializes in betting on other people's lawsuits—a form of alternative investing known as litigation finance.

With the Gerchen capital, according to the Shenaq suit, AkinMears purchased some 14,000 defective-product claims, most of them concerning so-called transvaginal mesh, a type of implant designed to bolster sagging organs. Some women have complained that once implanted, the devices also cause injury and severe pain. By Shenaq's calculations, the mesh cases cost AkinMears between $2,500 and $3,125 apiece and yielded attorneys' fees of $15,000 each.

It isn't clear from the court filings how much the plaintiffs stood to gain from settlement of their claims or where the AkinMears-owned cases stand. It also isn't clear which companies AkinMears sued with the client information it acquired. Among the defendants that have been sued in connection with transvaginal mesh implants are C.R. Bard, Boston Scientific, and Johnson & Johnson.

Gerchen Keller managing director Travis Lenkner declined to comment, citing client confidentiality, but the hedge fund has been highly visible in the burgeoning litigation finance field. The firm announced a new $475 million fund in February for investments such as the AkinMears financings. Taken all together, Gerchen Keller says it manages some $800 million in assets for pension funds, endowments, foundations, and financial institutions—enough to make it one of the largest players in litigation finance.

In some instances, Gerchen Keller invests in litigation in exchange for a cut of any recovery. The investments with AkinMears, however, were essentially loans extended at an interest rate of "slightly below 16 percent," according to the Shenaq suit.

The U.S. Chamber of Commerce has condemned both claim aggregation and litigation finance as likely to encourage frivolous and abusive lawsuits. "The allegation that a law firm used hedge fund money to buy and sell thousands of personal injury lawsuits shows plaintiffs have become little more than commodities," says Lisa Rickard, president of the Chamber's Institute for Legal Reform. "This case appears to be a new example of how litigation financing perverts the justice system and puts the interests of lawyers and financiers ahead of actual plaintiffs."

More about the plumbing of mass lawsuits could become public if the Shenaq case defies the odds and proceeds to a public trial. And even the information available so far has helped to underscore that the life of a plaintiffs' attorney isn't necessarily what's taught in law school. "Despite the fact that AkinMears's lawyers do not have to dirty their hands with the mundane chores that come with actually practicing law," the suit alleges, "the firm nonetheless charges a robust 40 percent contingency fee for its efforts (which is then divided in some fashion among the various participants in its ever-shifting syndicate)." Lucrative work, if you can swing it.

TEXAS LAWYER

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Ex-Employee of AkinMears Sues Firm, Alleges Millions Owed

Brenda Sapino Jeffreys, Texas Lawyer

October 20, 2015

A Harris County judge has temporarily sealed a petition filed by a former employee of Houston mass tort firm AkinMears who alleges that the plaintiffs firm fired him in July because it didn't want to pay him millions in unpaid commissions and fees for his work raising capital for firm.

In that Sept. 29 petition, Amir Shenaq alleges that when his employment was terminated on July 31, the firm owed him $4.2 million in unpaid commissions and fees for raising nearly $100 million for the firm in four months. Shenaq alleges in the petition that he not only met the goal set in his employment contract, but "shattered" it, since he was asked to raise $20 million in capital from new sources or $40 million from all sources.

Shenaq alleges that after he sent the firm an email requesting payment of the compensation due him, partner Truett Akin IV told him the request was "insulting" and demanded to know why Shenaq should be paid before him or partner Michelle Mears.

Shenaq alleges in the petition that AkinMears may have planned all along to find a way to not pay him all that he's due.

"And looking back at how it all went down, it is now clear that the question wasn't if AkinMears was going to screw Shenaq. The only question was when," Shenaq alleges in the petition.

Defendants Akin and Mears did not return telephone messages seeking a comment. Neither did defense attorney Allan H. Neighbors IV, a shareholder in Littler Mendelson in Houston.

Defendants AkinMears, Akin and Mears have not filed an answer to the allegations in Shenaq v. Akin. However, AkinMears filed a motion on Oct. 1 seeking temporary and permanent orders to seal the court record on the ground that Shenaq breached a confidentiality agreement with the firm by disclosing "large and varied types of confidential, proprietary, and trade secret information about AkinMears, its business partners and clients.

"This disclosure was certainly no accident and serves no purpose other than to financially harm AkinMears and those with whom it does business."

AkinMears alleges that it fired Shenaq for cause on July 31, and that in the petition he filed on Sept. 29, Shenaq disclosed confidential and proprietary information that is valuable because it gives the firm a competitive advantage and could give competitors an unfair advantage.

"This information would be valuable to any competitor by, for example, assisting the competitor in creating a business plan or financial model maximizing efficiency similar to that of AkinMears and otherwise allowing a competitor to gain an unfair advantage in financing deals similar to those to which AkinMears was a party by knowing AkinMears' financial data," the firm alleges in the motion.

It alleges that Texas Rule of Civil Procedure 76a allows court records to be sealed.

On Oct. 6, plaintiff Shenaq and defendant AkinMears filed an agreed temporary order sealing the original petition and request for disclosure filed on Sept. 29. On Oct. 7, 157th District Judge Randy Wilson signed an order temporarily sealing the petition and setting a hearing in November on AkinMears' motion to seal a court record.

In a notice of oral hearing on AkinMears' motion to seal, filed on Oct. 7, the firm alleges that Shenaq sued the firm and partners Akin and Mears for claims arising from his employment and for compensation. Shenaq brings breach of contract, quantum meruit, accounting and constructive trust causes of action against the defendants.

AkinMears alleges in the notice of oral hearing that Shenaq discloses confidential information in the petition, including information "concerning the source and identity of AkinMears' financing; amounts of financing obtained by AkinMears; settlement values of cases in which AkinMears or its business associates have interest; AkinMears' borrowing costs and related financial impacts of such borrowing costs; actual and potential fees received by AkinMears; commissions paid to others; and confidential deal terms related to the purchase of litigation dockets, including the purchase price, number of cases and financing terms."

Plaintiffs attorney Kenneth Wall, of counsel with Oaks, Hartline & Daly in Houston, did not return a telephone message seeking a comment.

The Alleged Arrangement

In the petition, Shenaq alleges that he left a job in finance at Wells Fargo Securities to join AkinMears in March to help it raise money to "start making direct investments in mass tort litigation" and to get away from the business practice of securing clients through television advertisements. Shenaq alleges that he learned that the firm had borrowed more than $40 million from Virage Capital Management, but by mid-February, "the firm's cash position had withered below $2 million."

Shenaq alleges that he joined the firm on March 16 and signed an employment contract calling for a minimum of 18 months of employment and with a goal to raise at least $20

million in capital from new sources or $40 million from all sources. As for compensation, Shenaq alleges that he would receive a $30,000 monthly draw on a nonrecourse basis, and receive commission or fees for capital acquisition, deal origination and deal closing. He alleges that the firm put no limit on his potential compensation.

Shenaq alleges in the petition that he secured financing for the firm from Chicago-based Gerchen Keller Capital (GKC), including a $50 million commitment in April. He alleges that GKC wired half of the money to the firm and half to Virage to pay down its debt. He alleges that the firm paid him $1,430,765, a 3 percent commission, for raising that $50 million, and Akin "assured" him that he would be paid another $1 million in 18 months.

In addition to several smaller financings, Shenaq alleges that he also secured another $45 million commitment from GKC to fund the purchase of about 14,000 transvaginal mesh cases from a group of four law firms. Shenaq alleges that he estimated the value of fees from those cases at $130 million to $200 million, based on a net return of attorney fees of $14,000 to $16,000 per case. He alleges that final terms of the deal, which closed in July, called for AkinMears to pay $40 million for a docket of 13,837 mesh cases and 900 nonmesh cases, with GKC financing the purchase price and committing to provide an additional $6 million for case expenses.

Shenaq alleges that in late July, prior to going on a family vacation, he sent an email to Akin requesting payment of $4.2 million in compensation in commission and fees. He alleges that after he returned from vacation, he went to a meeting at the firm with Akin and Mears that was a "full-on assault" of him.

He alleges that Akin bullied him during the meeting, "intermittently screaming and doing his best to intimidate," and alleging that Shenaq did not originate the mesh case deal, but rather that it was originated by a lawyer who does business with the firm.

"It takes a very clever lawyer—or something—to argue with a straight face that GKC's transfer of over $43 million to the firm's account at the Post Oak Bank was not an acquisition of capital," Shenaq alleges in the petition, in reference to the $40 million funding the mesh case deal and another $3 million in funding for another group of cases.

Shenaq alleges that he received an email from Akin on Aug. 3 notifying him he had been terminated on July 31, and on Aug. 14 he received a letter from a lawyer for the firm stating that he had been terminated for cause on July 31, "due to insubordination, breaches of fiduciary duty, self-dealing and conflicts of interest, thus extinguishing any compensation, back-end interest or fees allegedly owed to you."

Shenaq alleges that neither the firm nor its lawyers explained exactly what he did that caused the insubordination, self-dealing or other allegations. He alleges that he did help two other lawyers arrange financing with GKC, but at Akin's request and with his knowledge.

"AkinMears' after-the-fact story is utter pretext, and its revisionist history would be comical if it wasn't so sinister. Akin and Mears didn't pay Shenaq for one reason and one reason only: They didn't pay him because they didn't feel like it," he alleges in the petition.

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126-001930

I. 15-CV-LL: Rule 4(e)(2) Service on U.S. Employees as Individuals

Robert M. Miller, Ph.D. writes of the difficulty of making service on United States employees sued in their individual capacities. Government agencies will not release employee addresses, making service under Rule 4(e)(2)(B) difficult. Some have permanent residences outside the District of Columbia, and reside only "temporarily" in the District. It is not clear whether they may be served at their place of work, nor whether the agency where they work is "an agent authorized by appointment or by law to receive service of process." He urges clarification of the rule, perhaps to authorize service by leaving the summons at the defendant's place of work or by requiring the agency to disclose a residence address.

He also suggests, indirectly, that "modern means of communication" would be better means of making service than the antique methods now enshrined in Rule 4.

Recent consideration of the ways to adapt practice to the realities of electronic communication has included the possibility of allowing e-service of the initial summons and complaint. The conclusion remains that it is too early to trust to this means of service. Perhaps some states will come to allow e-service, providing not only state-level experience but also experience when the state practice is absorbed through Rule 4(e)(1).

A rule requiring government agencies to reveal employee addresses, even if only for purposes of service, is likely beyond the reach of the Enabling Act, and could easily conflict with other laws.

Allowing service of the initial summons and complaint in the manner allowed for service of later papers by Rule 5(b)(2)(B)(i) may be risky. This means is leaving the paper "at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office."

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Amendment to rules for Service of Process
Rob Miller
to:
Rules_Support
10/26/2015 02:47 PM
Hide Details
From: "Rob Miller" <robmiller44@hotmail.com>
To: <Rules_Support@ao.uscourts.gov>
History: This message has been forwarded.

15-CV-LL

To whom it may concern:

I am a pro se litigant in a number of court cases.

One rule that has caused me great frustration, confusion, and expense has been the duty to serve documents to defendants at their usual place of residence. All of my cases thus far have involved suing government officials in their personal capacities. Their employers – government agencies – have not and will not release their home addresses for proper service.

As you know, failure to make proper service can have serious consequences in a case. As you also know, the average person works at their place of employment for most of the week. They may not even return home if they are frequently in a travel status. For example, two litigants in my cases are residing temporarily in the Washington, DC area but have permanent residences in other states. In most if not all cases, government employees are not permitted to waive service.

Rule 4(e)(2), Federal Rules of Civil Procedure, does not make it clear whether government officials may be served at their places of work, whether agencies must provide current addresses for service of process, or whether Rule 4 (e)(2)(C) provides for service to the agent authorized to accept service of process for the agency or agency officials in their official capacities.

In some cases, e.g. Bivens v. Six Unknown Named Federal Agents, the federal officers one is to serve might even unknown.

At the very least, I recommend that you clarify the rule so that litigants may know their obligations.

However, I urge the US Courts to consider whether the rule requiring service by an adult (not yourself) to the domicile of a litigant is obsolete and unnecessary given modern means of communication, the privacy rights of litigants to their home addresses, the regular place of work of litigants, and the difficulty and cost of obtaining addresses for service.

Sincerely,

Robert M. Miller, Ph.D.
4094 Majestic Lane
#278
Fairfax, VA 22033

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J. 15-CV-NN: Minidiscovery and Prompt Trial

Judge Michael Baylson, a former member of this Committee, proposes a new rule for "Mini Discovery and Prompt Trial." It includes elements familiar from the work that led to the 2010 Rule 56 amendments (Judge Baylson chaired the Rule 56 Subcommittee), long-ago "simplified procedure" work, enhanced initial discovery pilot-project proposals, and expedited trial pilot-project proposals. In some ways it could be seen as a rule that might emerge as a culmination of all that work.

Cases would fall into the new rule either on agreement of the parties or on the court's direction.

Relevant documents would be exchanged without request, along with a certification that a reasonable search had been conducted and that all documents within the scope of the issues framed by the pleadings had been produced or listed on a privilege log. Interrogatories would be permitted, but objections must be served in 7 days and responses in 14 days. Depositions among the parties would be limited to 4 per side, with a maximum duration of 4 hours. Third-party discovery would be allowed only on showing good cause. No more than 10 requests for admissions would be allowed. The period for discovery would be limited to 90 days; expert reports would have to be filed within the 90 days.

Motions for summary judgment would be permitted only for good cause, defined as potentially meritorious legal issues but not for insufficiency of the evidence. The idea is that often it is quicker and less expensive to try a case than to prepare a motion for summary judgment, and few motions are granted for insufficiency of the plaintiff's evidence. The issues often can be better determined by post-trial motions in any event. And a welcome consequence would be an increase in the number of jury trials.

These are good and familiar ideas. They can be considered in much of the Committee's ongoing work.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
3810 United States Courthouse
Sixth and Market Streets
Philadelphia, Pennsylvania 19106-1741
E-mail: Chambers_of_Judge__Michael_Baylson@paed.uscourts.gov

Chambers of
Michael M. Baylson
United States District Judge

Telephone (267) 299-7520
Fax (267) 299-5078

November 9, 2015

Honorable John D. Bates
United States District Court
District of Columbia
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Re: Proposed Amendment to the Rules of Civil Procedure

Dear John:

Congratulations on your becoming Chairman of the Advisory Committee on Civil Rules. As a former member of the Committee, I am sure that you will cherish and enjoy your tenure as Chair.

I request the Committee to consider a new rule which I have tentatively entitled 26.1 "Mini Discovery and Prompt Trial" ("MDPT"). This rule would allow the court, at the pretrial conference required by Rule 16, to designate relatively simple and non-complex cases as subject to a separate "mini discovery track" where the extensive discovery procedures allowed by Rules 30-36 would not apply.

After discovery, the Rule would provide for a prompt trial. Motions for summary judgment would not be permitted without good cause and leave of court.

Specifically, I propose that if the parties agreed, and/or the court concluded, that the case could proceed fairly with mini-discovery, the court could enter an order as follows:

1. Requiring exchange of relevant documents without a specific request, followed by a certification by the party and its counsel that it had conducted a reasonable search and produced all documents that were within the scope of issues, as alleged in the complaint and answer, and a privilege log of any documents withheld or redacted on account of privileges.

2. Interrogatories would be allowed but objections would be served within seven (7) days and responses served within fourteen (14) days.

3. Intra-party depositions would be limited to four (4) per side, of not more than four (4) hours each.

4. Third party discovery would be allowed only on a showing of good cause.

5. Requests for admissions would be limited to not more than ten (10), following depositions.

6. Any expert reports would be served within the time allowed for discovery.

7. Discovery would be limited to a period of ninety (90) days.

8. The court could modify the above deadlines at or following the Rule 16 Conference.

9. No motions for summary judgment would be permitted, unless specifically allowed by the court for good cause shown (such as a potentially meritorious "legal" defense under the statute of limitations, qualified immunity, etc., but not on grounds of insufficient evidence).

10. Promptly following the conclusion of discovery, the case would be listed for trial.

Although many cases filed in a district court do require the extensive procedures allowed by the current federal rules, the rules can be burdensome and expensive for the many relatively simple cases for which federal jurisdiction exists, such as single party employment discrimination cases, civil rights cases filed against police officers, prison guards, etc., and simple personal injury cases, etc.

I know my proposal that a motion for summary judgment be eliminated, unless the court specifically allows it, may be controversial. However, in some cases, the time necessary for parties to prepare and the court to review a motion for summary judgment is greater than it would take to prepare and try the case. Although some might think abrogating summary judgment motions is unfair to defendants, the fact of the matter is that few of these motions, when based on insufficiency of plaintiff's evidence, are granted. Overall, I think lawyer time, district court time, and appellate court time, would be saved if the legal issues often presented by motion for summary judgment were reserved for trial and could be better determined by post-trial motions in the event of a plaintiff's verdict, with the benefit of a trial transcript, with direct and cross of witnesses, review of exhibits admitted into evidence, and the court's jury charge.

I really do not see any substantial prejudice to defendants, since the court will be better prepared to decide the legal issues that would ordinarily be presented by a motion for summary judgment based on the trial record with introduction of direct and cross-examination introduction of exhibits, etc.

The other main advantage of my proposal is that it will shorten the length of time for pretrial proceedings in all of these cases, and will result in many more jury trials. Many lawyers and judges, myself included, have noted with alarm the disappearing jury trial. This proposal will help restore jury trials to their rightful place in our justice system and give young lawyers the opportunity to try cases.

I am sending a copy of this proposal to my colleague on your Committee, Gene Pratter. I would be happy to prepare more detailed suggestions or appear before the Committee.

Sincerely,

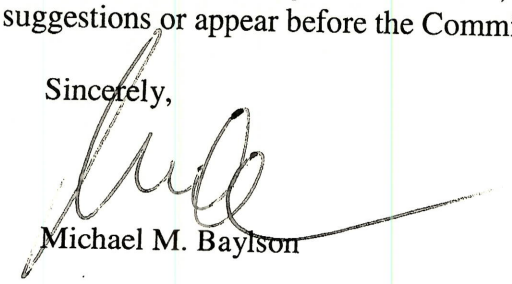

Michael M. Baylson

MMB:jb

cc: Honorable Gene E.K. Pratter
Professor Edward Cooper
Secretary, Rules Committee, Administrative Office, U.S. Courts

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K. 15-CV-OO: Time Stamps, Seals, Access for Visually Impaired

G. Modan Mohan advances three proposals:

(1) "There has to be a time stamp on all records (Its a digital world)"

(2) "For visually impaired to refer to portal for education or self use purpose is not possible today, please have some option enabled."

(3) "Every page must have seal, which is missing (it can be copied or misused, so please have some kind of evidence on each sheet)."

Access for the visually impaired is important. But it also is not subject to the Rules Enabling Act.

Time stamps and means of identifying pages in the record might be addressed through the Rules Enabling Act, but are better addressed by other groups within the Judicial Conference and the Administrative Office.

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126-001946

Suggestion for new rule
Madan GM to: Rules_Support 12/29/2015 11:14 AM

Dear Team,

I am proud to write this note to a great nation and to the best judicial system.

---Suggestions for new rule

1. There has to be a time stamp on all records (Its a digital world)

2. For visually impaired to refer the portal for education or self use purpose is not possible today, please have some option enabled. (There are millions of visual impaired people in America. Therefore, for working age adults reporting significant vision loss, only 40.2% were employed in 2013.) THEY NEED MORE SUPPORT OR ACCESS TO AMERICAN JUDICIAL SYSTEM

3. Every page must have seal, which is missing (it can be copied or misused, so please have some kind of evidence on each sheet).

I will be very thankful if this can be implemented at the earliest and they deserve access and freedom of knowing the right.

Kind Regards,

G. Madan Mohan
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Ph- +91 9845911291

"LoyalT - Trust & Transparency"

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L. Civil Rule 58: Judge Pratter

Judge Pratter has transmitted a question raised by one of her colleagues about the "separate document" requirement of Rule 58:

Rule 58. Entering Judgment

(a) **SEPARATE DOCUMENT.** Every judgment and amended judgment must be set out in a separate document * * *.

The separate-document requirement was added to Rule 58 in 1963. The Committee Note observed that "some difficulty has arisen, chiefly where the court has written an opinion or memorandum containing some apparently directive or dispositive words * * *." The difficulty was uncertainty as to the event that started the time to appeal. "The amended rule eliminates these uncertainties by requiring that there be a judgment set out on a separate document — distinct from any opinion or memorandum — which provides the basis for the entry of judgment."

Rule 58 was amended in 2002. The separate document requirement was retained, but Rule 58(c)(2) was added. Rule 58(c)(2)(B) provides that if a separate document is required, judgment is entered when it is entered on the civil docket "and the earlier of these events occurs: (A) it is set out in a separate document; or (B) 150 days have run from the entry in the civil docket." The Committee Note explained: "This simple separate document requirement has been ignored in many cases." One result was that the time for post-judgment motions never ended because it never began, but that did not seem to present serious problems. But another result was that appeal time also never started to run. The Note observed that "there have been many and horridly confused problems under Appellate Rule 4(a)." The 150-day fiction was adopted to ensure that appeal time would begin at that point, and conclude in due course. Appellate Rule 4 was revised in parallel with Rule 58.

The 2002 Committee Note added this:

> No attempt is made to sort through the confusion that some courts have found in addressing the elements of a separate document. It is easy to prepare a separate document that recites the terms of the judgment without offering additional explanation or citation of authority.

These amendments did not address all questions. Many of them arise from the provision in Rule 54(a) that defines "judgment" to "include[] a decree and any order from which an appeal lies." One example of the potential difficulties is provided by collateral-order finality. The most common examples of collateral-order appeals arise from interlocutory orders that refuse to accept an official-immunity defense, ordinarily by denying a motion to

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dismiss or for summary judgment. The 2002 Committee Note suggests that "[t]he new all-purpose definition of the entry of judgment must be applied with common sense to other questions that may turn on the time when judgment is entered." It seems unlikely that many judges bother to enter a Rule 58 separate document when denying an official-immunity motion for summary judgment. But it is better not to allow 150 days plus the ordinary appeal time to take the appeal.

The 2002 amendment resulted from long and hard work by the Civil Rules and Appellate Rules Committees acting jointly. Judge Schiltz, then Reporter for the Appellate Rules Committee, studied hundreds of cases dealing with the "time bombs" of never-beginning and thus never-ending appeal time created by failures to enter judgment on a separate document.

The Appellate Rules Committee returned to the separate document requirement in 2008. Professor Struve prepared two memoranda for two separate meetings. Their liaison to circuit clerks undertook a survey of circuit clerks to determine the frequency of failures to enter judgment on a separate document. Experiences varied among the circuits, but noncompliance ranged from not uncommon to rather common. One circuit judge discussed the problem at a meeting of judges, resulting in communications with district court clerks that produced a marked increase in compliance. Discussion came to focus on a particular problem that had not been much considered during the work that led to the 2002 amendments. Judgment is entered, but not on a separate document. A timely appeal is taken. After the appeal is taken a motion for post-judgment relief is made. Because there is no separate document, the motion can be timely up to 178 days after judgment is entered on the document (150 days to the constructive entry under Rule 58(c)(2)(B) plus 28 days under Rules 50, 52, or 59, or for a Rule 60 motion made at a time that suspends appeal time). The post-judgment motion suspends the appeal. The court of appeals may — or may not — be informed of the post-judgment motion. If it is not informed, it may continue to invest effort in a case that is no longer technically in the court. The Committee found that this problem does not arise frequently. It gave some thought to eliminating the separate-document requirement as a nuisance, but in the end, it concluded that it is better to leave the rules as they are. The discussion noted both the simplicity of the requirement and the value of retaining it as a clear signal that starts appeal time. District clerks should be reminded of the need to police the separate-document requirement. And perhaps the CM/ECF system can be used to include a suitable prompt. These conclusions were reported to the Standing Committee in January 2009. They were accepted, with a suggestion that education efforts could be coordinated with the Committee on Court Administration and Court Management.

The separate document requirement survived this intense study. But it seems not to have taken on a more active life in practice. Judge Pratter's submission is accompanied by a "Not

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Precedential" opinion. Bazargani v. Radel, No. 14-3110 (3d Cir., March 3, 2015). The Bazargani case found an appeal timely because the time began 150 days after "[t]he District Court's opinion [was] set forth in the footnotes to the dismissal order * * *." The footnotes meant there was no separate document.

Judge Pratter asks

> whether it makes sense for the Rules to build in tolerance for such a significant timing difference simply because order language is accompanied by reasoning.

And she notes that perhaps the question is interesting only

> to those of us whose local judicial drafting culture is typically to incorporate reasoning (at least briefly) in orders in matters that do not merit lengthy opinions or memoranda but where it seems appropriate to give the litigants at least a brief explanation.

These succinct observations frame the question perfectly. Judges understand that it is important to explain the grounds for a decision, and that often the grounds can be stated clearly and effectively by a brief statement that is readily understood by the parties to the case. They do that. And at the same time the formal requirement to enter a still more succinct "judgment" in a separate document is easily overlooked — the district court's work is done, and there is no obvious prompt to remind the court of the needs for timing post-judgment motions and appeals that are advanced by entering judgment on a separate document.

Doing nothing to take up these questions probably will mean that matters lurch along into the future as they have for the 13 years since Rule 58(a) was most recently amended, and the 52 years since the separate document requirement was first adopted. Taking these questions up again, on the other hand, will run the risk of recreating the difficulty and uncertainties lamented in the 1963 Committee Note. Perhaps the best outcome would be to find a system that automatically prompts judges and court staff to always remember the separate document requirement. Short of that, it may be better to adhere to the judgment reached in formulating the 2002 amendments, retaining the separate document requirement and living with the occasional 150-day inadvertent extensions of appeal and motions times.

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M E M O R A N D U M

To: Advisory Committee

From: Pilot Project Subcommittee

Date: March 18, 2016

As you know, one of the conclusions reached in the process of developing the rule amendments that became effective on December 1, 2015, was that additional innovations in civil litigation may be more likely if they are tested first in a series of pilot projects. To pursue the possible development of such pilot projects, a subcommittee was formed consisting of Jeff Sutton, John Bates, Paul Grimm, Neil Gorsuch, Amy St. Eve, John Barkett, Parker Folse, Virginia Seitz, Ed Cooper, and Dave Campbell. Judge Phil Martinez from the Judicial Conference Committee on Court Administration and Case Management (CACM) was added as a liaison to the subcommittee. The subcommittee's charge is to investigate pilot projects already completed in other locations and recommend possible pilot projects for federal courts.

The committee reported on its work at the November 2015 meeting. The subcommittee had made contact with the National Center for State Courts, the Institute for Advancement of the American Legal System (IAALS), the Conference of State Court Chief Justices, and various innovative federal courts, and had conducted reviews of pilot projects in ten states. Summaries of the subcommittee's findings were included in the November materials.

Since the November meeting, the subcommittee has held focus-group discussions with lawyers and judges from courts in Colorado, Arizona, and Canada which use enhanced initial disclosures. Summaries of the Colorado and Arizona discussions are included as Exhibits 1 and 2 to this memo. Exhibits 3-8 include other materials gathered or prepared since November, including a recently-proposed revision to Arizona's longstanding enhanced disclosure rule (Ex. 3); a recently-revised portion of a joint project by IAALS and the American College of Trial Lawyers recommending more robust initial disclosures (Ex. 4); a memo summarizing reactions to and comments on a 1993 proposed amendment to the Federal Rules of Civil Procedure to require enhanced initial disclosures (Ex. 5); a memo summarizing articles from a 1997 symposium concerning the initial disclosure efforts of the early 1990s (Ex. 6); a memo summarizing the robust initial disclosure rules used in various states (Ex. 7); and a recent FJC report titled "A Study of Civil Case Disposition Time in U.S. District Courts" (Ex. 8).

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The subcommittee has concluded that two pilot projects should be implemented in federal district courts, one focused on enhanced initial disclosures and the other on expedited case management. Descriptions of these proposed pilot projects are provided in sections A and B of this memo.

The subcommittee believes that more robust initial disclosure requirements could help reduce the cost and delay of civil litigation. This belief is based on several sources: (a) the employment protocol pilot project currently underway which requires more substantial initial disclosures in employment cases and, according to a study completed by the FJC and described at the November meeting, appears to be reducing discovery disputes; (b) the Colorado Civil Access Pilot Project which included more robust initial disclosures and was found, in a study by IAALS, to have reduced time to disposition of civil cases (the Colorado courts have now adopted the initial disclosures as part of their civil rules); (c) the Arizona enhanced disclosure rule which has been in place for more than 20 years and generally is preferred by Arizona lawyers over the federal rules; and (d) the rather obvious conclusion that civil litigation will be resolved more quickly and less expensively if relevant information is disclosed earlier and with less discovery practice.

The subcommittee also believes that expedited case management practices could help reduce the cost and delay of civil litigation. Many studies have found that cases are resolved more quickly and with less cost when judges intervene early, actively manage cases, set reasonable but efficient discovery schedules, set firm trial dates, and resolve disputes quickly. The purpose of the second pilot is to implement these practices in the pilot districts, with specific time goals and focused training for judges, measuring case disposition times and other relevant milestones as the pilot progresses. The pilot would test how effectively these proven case management practices can be implemented in various districts through specific time goals and focused training.

Authority to engage in these pilot projects is found in several places. Rule 16(b)(3) authorizes a district court to enter a scheduling order that sets deadlines for the litigation and can modify the timing of disclosures and the extent of discovery, provide for the disclosure of ESI, adopt procedures for prompt resolution of discovery disputes, and include "other appropriate matters." Rule 26(b)(2)(C) authorizes the court, on its own, to limit the frequency or extent of discovery, considering whether information can be obtained from other sources that are more convenient, less burdensome, or less expensive. And 28 U.S.C. § 331 authorizes the Judicial Conference to "carry on a continuous study of the operation and effect of the general rules of practice and procedure" used in the federal courts, and to recommend "[s]uch changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay[.]"

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A. Mandatory Initial Discovery Pilot Project.

1. Standing Order. This pilot project would be implemented through a standing order. Our current draft of the order is as follows:

> "The Court is participating in a pilot project that requires mandatory initial discovery in all civil cases other than cases exempted by Rule 26(a)(1)(B), patent cases governed by a local rule, and cases transferred for consolidated administration in the District by the Judicial Panel on Multidistrict Litigation. The discovery obligations addressed in this Standing Order encompass the disclosures required by Rule 26(a)(1) – separate disclosures under Rule 26(a)(1) therefore are not required – and are framed as court-ordered mandatory initial discovery pursuant to the Court's inherent authority to manage cases and Rule 16(b)(3)(B)(ii), (iii), and (vi). Unlike initial disclosures required by current Rule 26(a)(1)(A) & (C), this Standing Order does not allow the parties to opt out.
>
> A. Instructions to Parties.
>
> 1. The parties are ordered to respond to the following mandatory initial discovery requests before initiating any further discovery in this case. Further discovery will be as ordered by the Court. Each party's response must be based on the information then reasonably available to it. A party is not excused from providing its response because it has not fully investigated the case or because it challenges the sufficiency of another party's response or because another party has not provided a response. Responses must be signed under oath by the party certifying that it is complete and correct as of the time it was made, based on the party's knowledge, information, and belief formed after a reasonable inquiry, and signed under Rule 26(g) by the attorney.
>
> 2. The parties must provide the requested information as to facts that are relevant to the parties' claims and defenses, whether favorable or unfavorable, and regardless of whether they intend to use the information in presenting their claims or defenses. If a party limits the scope of its response on the basis of any claim of privilege or work product, the party must produce a privilege log as required by Rule 26(b)(5) unless the parties agree or the court orders otherwise. If a party limits its response on the basis of any other objection, it must explain with particularity the nature of the objection and its legal basis, and provide a fair description of the information being withheld.
>
> 3. All parties must file answers, counterclaims, crossclaims, and replies within the time set forth in Rule 12(a)(1)(A), (B), and (C) even if they have

filed or intend to file a motion to dismiss or other preliminary motion. Fed. R. Civ. P. 12(a)(4).

4. A party seeking affirmative relief must serve its responses to the mandatory initial discovery no later than 30 days after the filing of the first pleading made in response to its complaint, counterclaim, crossclaim, or third-party complaint. A party filing a responsive pleading, whether or not it also seeks affirmative relief, must serve its initial discovery responses no later than 30 days after it files its responsive pleading. However, (a) no initial discovery responses need be served if the Court approves a written stipulation by the parties that no discovery will be conducted in the case; and (b) initial discovery responses may be deferred, one time, for 30 days if the parties jointly certify to the Court that they are seeking to settle their dispute and have a good faith belief that the dispute will be resolved within 30 days of the due date for their responses.

5. Initial responses to these mandatory discovery requests shall be filed with the Court on the date when they are served; provided, that voluminous attachments need not be filed, nor are parties required to file documents that are produced in lieu of identification pursuant to paragraphs (B) (3), (5), or (6) below. Supplemental responses shall be filed with the Court if they are served prior to the scheduling conference held under Rule 16(b), but any later supplemental responses need not be filed, although the party serving the supplemental response shall file a notice with the Court that a supplemental response has been served.

6. The duty of mandatory initial discovery set forth in this Order is a continuing duty, and each party must serve supplemental responses when new or additional information is discovered or revealed. A party must serve such supplemental responses in a timely manner, but in any event no later than 30 days after the information is discovered by or revealed to the party. If new information is revealed in a written discovery response or a deposition in a manner that reasonably informs all parties of the information, the information need not be presented in a supplemental response.

7. The Court normally will set a deadline in its Rule 16(b) case management order for final supplementation of responses, and full and complete supplementation must occur by the deadline. In the absence of such a deadline, full and complete supplementation must occur no later than 90 days before trial.

8. During their Rule 26(f) conference, the parties must discuss the mandatory initial discovery responses and seek to resolve any limitations they have made or intend to make in their responses. The parties should include in the Rule 26(f) report to the Court a description of their discussions. The report should describe the resolution of any limitations invoked by either party in its response, as well as any unresolved limitations or other discovery issues.

9. Production of information under this Standing Order does not constitute an admission that information is relevant, authentic, or admissible.

10. Rule 37(c)(1) shall apply to mandatory discovery responses required by this Order.

B. Mandatory Initial Discovery Requests.

1. State the names and, if known, the addresses and telephone numbers of all persons whom you believe are likely to have discoverable information relevant to any party's claims or defenses, and provide a fair description of the nature of the information each such person is believed to possess.

2. State the names and, if known, the addresses and telephone numbers of all persons who you believe have given written or recorded statements relevant to any party's claims or defenses. Unless you assert a privilege or work product protection against disclosure under applicable law, attach a copy of each such statement if it is in your possession, custody, or control. If not in your possession, custody, or control, state the name and, if known, the address and telephone number of each person who you believe has custody of a copy.

3. List the documents, electronically stored information ("ESI"), tangible things, land, or other property known by you to exist, whether or not in your possession, custody or control, that you believe may be relevant to any party's claims or defenses. To the extent the volume of any such materials makes listing them individually impracticable, you may group similar documents or ESI into categories and describe the specific categories with particularity. Include in your response the names and, if known, the addresses and telephone numbers of the custodians of the documents, ESI, or tangible things, land, or other property that are not in your possession, custody, or control. For documents and tangible things in your possession, custody, or control, you may produce them with your response, or make them available for inspection on the date of the response, instead of listing them. Production of ESI will occur in accordance with paragraph (C)(2) below.

4. For each of your claims or defenses, state the facts relevant to it and the legal theories upon which it is based.

5. Provide a computation of each category of damages claimed by you, and a description of the documents or other evidentiary material on which it is based, including materials bearing on the nature and extent of the injuries suffered. You may produce the documents or other evidentiary materials with your response instead of describing them.

6. Specifically identify and describe any insurance or other agreement under which an insurance business or other person or entity may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse a party for payments made by the party to satisfy the judgment. You may produce a copy of the agreement with your response instead of describing it.

7. A party receiving the list described in Paragraph 3, the description of materials identified in Paragraph 5, or a description of agreements referred to in Paragraph 6 may request more detailed or thorough responses to these mandatory discovery requests if it believes the responses are deficient. When the court has authorized further discovery, a party may also serve requests pursuant to Rule 34 to inspect, copy, test, or sample any or all of the listed or described items to the extent not already produced in response to these mandatory discovery requests, or to enter onto designated land or other property identified or described.

C. Disclosure of Hard-Copy Documents and ESI.

1. Hard-Copy Documents. Hard-copy documents must be produced as they are kept in the usual course of business.

2. ESI.

a. Duty to Confer. When the existence of ESI is disclosed or discovered, the parties must promptly confer and attempt to agree on matters relating to its disclosure and production, including:

i. requirements and limits on the disclosure and production of ESI;

ii. appropriate ESI searches, including custodians and search terms, or other use of technology assisted review;

iii. the form in which the ESI will be produced.

b. Resolution of Disputes. If the parties are unable to resolve any dispute regarding ESI and seek resolution from the Court, they must present the dispute in a single joint motion or, if the Court directs, in a conference call with the Court. Any joint motion must include the parties' positions and the separate certification of counsel required under Rule 26(g).

c. Production of ESI. Unless the parties agree or the Court orders otherwise, a party must produce the ESI identified under paragraph (B)(3) within 40 days after serving its initial discovery response. Absent good cause, no party need produce ESI in more than one form.

d. Presumptive Form of Production. Unless the parties agree or the Court orders otherwise, a party must produce ESI in the form requested by the receiving party. If the receiving party does not specify a form, the producing party may produce the ESI in native form or in another reasonably usable form that will enable the receiving party to have the same ability to access, search, and display the ESI as the producing party."

2. User's Manual. The pilot project will require something of a "user's manual" for the pilot judges, The precise form of that manual has not been developed, but it would include the following kinds of instructions:

Pilot judges should hold initial case management conferences under Rule 16(b) within the time specified in Rule 16(b)(2). Judges should discuss with the parties their compliance with the mandatory discovery obligations set forth in the Standing Order, resolve any disputes, and set a date for full and complete supplementation of responses.

Judges may alter the time for mandatory initial discovery responses upon a showing of good cause, but this should not be a frequent event. Early discovery responses are critical to the purposes of this pilot project.

Judges should make themselves available for prompt resolution of discovery disputes. It is recommended that judges require parties to contact the Court for a pre-motion conference, as identified in Rule 16(b)(3)(B)(v), before filing discovery motions. If discovery motions are necessary, they should be resolved promptly.

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Courts should vigorously enforce mandatory discovery obligations. Experience in states with robust initial disclosure requirements has shown that diligent enforcement by judges is the key to an effective disclosure regime. Rule 37 governs sanctions.

3. Timing and Participation.

We propose that the initial disclosure pilot project be approved by the Civil Rules Committee at its April meeting. Additional details will need to be worked out, but our hope is to approve this concept for a pilot to be implemented in 2017. We then would seek approval by the Standing Committee in June, the agreement of CACM and the FJC, and approval by the Judicial Conference in September.

To participate in this pilot, district courts must be willing to make the pilot's requirements mandatory and all judges in the district must be willing to participate. We also think that at least three to five districts should participate. One small district has already volunteered.

B. Expedited Procedures Pilot.

1. Description of Pilot Project

The goal of the Civil Rules is to further the "just, speedy, and inexpensive determination of every action." Case resolution that is not speedy and inexpensive often will not be just. This pilot will involve all civil cases where discovery and trial are possible (it will not include cases decided on an administrative record with no trial). The pilot will include three parts:

(1) Each participating court will adopt the following practices: (a) prompt case management conferences in every case (within the time allowed by amended Rule 16(b)(2)); (b) firm caps on the amount of time allocated for discovery, to be set by the judge after conferring with the parties at the case management conference, and to be extended no more than once and only for good cause based on a showing of diligence by the parties; (c) prompt resolution of discovery disputes by telephone conferences; (d) decisions on all dispositive motions within 60 days of the reply brief being filed; and (e) setting and holding firm trial dates.

(2) Metrics will be as follows: (a) if we could measure it, the level of the pilot judges' compliance with the goals in (1) above; (b) trial dates in 90% of civil cases set within 14 months of case filing, trial dates in the remaining 10% set within 18 months, and all trial dates held firm; (c) 25% reduction in the number of categories of cases in the district "dashboard" that are decided slower than the national average (or some comparable measure that could use the new CACM dashboard tool).

(3) Training and collaboration: (a) the FJC will do an initial one-day training session for pilot judges and staff, followed by additional FJC training every six months (year?); (b) judges in the district will meet quarterly to discuss best practices, what is working and what is not working, and to refine their case management methods to meet the pilot goals; (c) one or two judges from outside the district will be available as resources during these quarterly conferences, with the same resource judges serving throughout the duration of the pilot; (d) the judges in the pilot district would have at least one bench-bar meeting per year to talk with lawyers in the district about how the pilot is working and to make appropriate adjustments; (e) the pilot would last three years.

Building on the work of several federal and state courts, this project seizes on the increased reasonableness associated with discovery that must be finished within a discrete time period. A similar dynamic is at play when trial judges allocate a set amount of time for each party to make its case at trial; redundancy is lessened and efficiency increases.

There are several premises of the pilot: (1) the longer a case takes to resolve, the more expensive it is for the parties; (2) the combination of tight timetables for discovery, prompt resolution of discovery and dispositive motions, and firm trial dates is more likely to prompt lawyers to be reasonable in their discovery requests and litigation behavior than any rule; (3) lawyer cooperation should increase when both parties must conduct discovery within a set period of time; and (4) prompt feedback about the impact of these practices will demonstrate their utility to the judges who use them.

2. Participants

   A. Civil Rules and Standing Committees.
   B. CACM.
   C. FJC.

3. Timetable

   A. April 2016—approval by Civil Rules Committee.
   B. June 2016—approval by Standing Committee, CACM, and FJC.
   C. September 2016—approval by Judicial Conference.
   D. Early 2017—initial implementation.
   E. End of 2020—completion.

4. Criteria for district courts to participate

   A. Court must be willing to make the pilot's requirements mandatory.
   B. All judges on the district court must be willing to participate.

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C. At least three to five district courts need to participate in each pilot.

C. Conclusion and Request for Input.

Because we hope to have these pilots well underway before our next civil rules committee meeting, we need your input now. We would appreciate your careful review of these pilots and your comments and suggestions.

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EX. 1

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RE: Discussion with Colorado Lawyers

Parker Folse to: David_Campbell@azd.uscourts.gov, Judge_Grimm@mdd.uscourts.gov 02/24/2016 11:31 AM

Cc: Edward Cooper, "coquille@law.harvard.edu" , "JBARKETT@shb.com", "Judge_Neil_Gorsuch@ca10.uscourts.gov" , "Jeffrey_Sutton@ca6.uscourts.gov"

From: Parker Folse <pfolse@SusmanGodfrey.com>

To: "David_Campbell@azd.uscourts.gov" <David_Campbell@azd.uscourts.gov>, "Judge_Grimm@mdd.uscourts.gov" <Judge_Grimm@mdd.uscourts.gov>

Cc: Edward Cooper <coopere@umich.edu>, "coquille@law.harvard.edu" <coquille@law.harvard.edu>, "JBARKETT@shb.com" <JBARKETT@shb.com>, "Judge_Neil_Gorsuch@ca10.uscourts.gov" <Judge_Neil_Gorsuch@ca10.uscourts.gov>,

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Thanks for this excellent summary. I'll add a few items.

Under the Colorado pilot project, defendants were required to file answers even if they also moved to dismiss, which seemed to be a practice that received support in the survey that Dave mentioned (perhaps in part because it helps identifies the issues in dispute and facilitates initial disclosures and early case management while the motion is pending), yet in adopting the new rules, the Colorado Supreme Court did not adopt this rule for reasons that were not explained.

I got the sense that there may not have been a lot of experience with large document cases involving significant ESI during the Colorado pilot project, but the comments indicated that in such cases the early disclosure requirements focused the parties' attention on ESI issues earlier than otherwise would have been the case and usually resulted in agreements for staged disclosures to allow time for handling ESI issues.

There seemed to be agreement among the Colorado lawyers and judges that early trial settings are meaningless (and can be inefficient) unless they really are firm. Yet it's impractical not to multi-track trial settings given the high rate of settlements. One judge said he had been lucky to have colleagues who were willing to pick up each other's trial settings to avoid continuances, but guessed that this could be a bigger problem in the federal system.

There certainly seemed to be uniform enthusiasm among the Colorado lawyers and judges for robust early disclosure and for requiring disclosure of all relevant information (harmful as well as helpful) as a means of reducing sideshow fights over what must be produced in discovery and focusing attention on the merits -- though as Dave reported, there seemed to be equally uniform agreement on the importance of early and active case management by judges to make such a system work.

Parker

Parker

From: David_Campbell@azd.uscourts.gov [David_Campbell@azd.uscourts.gov]
Sent: Wednesday, February 24, 2016 9:34 AM
To: Judge_Grimm@mdd.uscourts.gov
Cc: Edward Cooper; coquille@law.harvard.edu; JBARKETT@shb.com; Parker Folse; Judge_Neil_Gorsuch@ca10.uscourts.gov; Jeffrey_Sutton@ca6.uscourts.gov
Subject: Discussion with Colorado Lawyers

Everyone:

We had a discussion this morning with Colorado lawyers and judges who have worked under their new rules, which include expedited litigation and case management procedures as well as mandatory initial disclosures. This email will recount some of what was said. Parker, Ed, Dan, and Neil (who kindly arranged the call) can fill in any gaps.

One of the judges began by noting that he conducted a survey of lawyers after every case management conference during the early phases of the pilot program. In total, he received comments from 97 lawyers. He asked them to grade the new system on a scale of 1 to 10, with 1 being the most unfavorable and 10 the most favorable. The average grade was 3.9. He observed that this may have reflected the fact that lawyers do not like change. Becky Kourlis, who was on the call, noted that data from various states shows that it generally takes 2 to 3 years for initial resistance to subside. Colorado's pilot project has now become a formal set of rules. All of the lawyers and judges on the call seemed to like the new system.

It was observed that collection lawyers generally did not like the requirement of robust initial disclosures. Originally, those disclosures were required just 21 days into the case. Many collection cases default, and yet these lawyers found they were required to spend time and money collecting documents before they knew if the case would default. Interestingly, the initial disclosure requirements appear to have reduced the number of defaults that occur in cases. Becky said the same phenomenon has been observed in other states. To avoid this problem, the current rule does not require disclosures until after an answer has been filed.

Those on the phone observes that lawyers in complex cases tend to like the new rules the most.

We asked how e-discovery was handled in initial disclosures. One lawyer commented that the pilot program asked the parties whether there were e-discovery issues in the case, a question which prompted lawyers to engage in a discussion about e-discovery. The parties generally worked out an agreement on the issue.

One lawyer observed that the requirement to disclose good and bad information has not really increase the amount of work done at the beginning of a case because lawyers would review the bad information while searching for the good information in any event. Thus, the amount of review is essentially the same.

Folks explained that the new rules were intended to produce a culture change, from hide-the-ball to getting all information on the table. They seemed to believe that the culture change is taking hold. They noted that initial disclosure issues are often raised at the first case management conference, but that the parties virtually always work them out. One judge said that he sets the hearing one week later to address the unresolved disclosure issues and that he has never had to actually hold such a hearing because the parties always reach agreement. Another judge said that he is simply requires the parties to discuss a solution, and they have always found a solution to the disclosure issues.

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The Colorado system apparently includes a form that requires the parties to indicate whether they believe the initial disclosures have been adequate. The form is provided to the court before the initial case management conference.

Folks on the call emphasized that an in-person case management conference with the judge is key to making the initial disclosures work. We should consider making this point in our pilot project proposal.

The pilot project included mandatory sanctions for disclosure violations. There was widespread unhappiness with this portion of the rule, and judges usually found ways not to apply it. It was not included in the final rule. Becky noted that the study of the Arizona disclosure rule revealed that its success turned heavily on the willingness of judges to enforce it.

The judges commented that the new rules have been successful, in part, because appellate courts have been willing to back-up trial judge decisions. Becky noted that the designers of the pilot project actually went to the Colorado appellate courts to educate them regarding the pilot and to encourage them to support it in there appellate decisions. We should consider doing the same thing with our pilot. If a district agrees to participate, but the circuit is antagonistic to the pilot, the effort may fail. We should consider an appellate education component to our pilots. (The chiefs of the circuits will hear about it ay the judicial conference, but other appellate judges will not.)

One medical malpractice lawyer expressed concern about procedures now being used by medical records and vendors. He said the vendors are deciding what is and is not a legal document, and lawyers representing defendants are able to get access only to legal documents within the system. The vendors won't disclose how they distinguish between nonlegal and legal documents, and this is causing great complexity in many states.

We talked about early trial dates. All of the lawyer say they favor them, but only when they are firm. It does no good to set an early trial date only to have it continued multiple times.

Dave

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John Barkett's Notes on Call with Arizona Judges and Lawyers on Rule 26.1 (March 1, 2016)

Arizona Rule 26.1	Comments During the Focus Group
The factual basis of the claim or defense. In the event of multiple claims or defenses, the factual basis for each claim or defense.	It is helpful as to affirmative defenses in particular. Duty to supplement is helpful here as facts are developed, new disclosures are made. If complaint is highly detailed, there is nothing more in the disclosure statement than in the complaint. But with bare bones complaints, there will be more factual detail provided. And in supplementation, if new facts are discovered, they are disclosed in a supplement.
The legal theory upon which each claim or defense is based including, where necessary for a reasonable understanding of the claim or defense, citations of pertinent legal or case authorities.	Duty to supplement is also helpful because parties generally develop new claims in litigation.
The names, addresses, and telephone numbers of any witnesses whom the disclosing party expects to call at trial with a fair description of the substance of each witness' expected testimony.	If a good disclosure statement, it will help decide who to depose. The disclosures are typically in summary form identifying the subject matter of the testimony. Sometimes there is more and the disclosure might be 2-3 paragraphs. A detailed script of what the witness knows or will say is not given. A proportionality determination has to be made. Could be lots of names on documents that will not be material to the case but may have some knowledge. And if dollar value is not large, that has to be taken into account in how much to say. Judge: problem is objection at trial comes very fast with jury sitting there. Was it "fairly described"? Will someone be prejudiced? These are inherent problems in a rule like this. "I don't think it can be better drafted." Unwritten rule: if you ask about a topic in a deposition, it is incorporated in the

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Arizona Rule 26.1	Comments During the Focus Group
	disclosure statement. Or some add, "Mr. Smith will also testify on topics covered in his deposition." Some now are engaging in tactic of not deposing and then arguing not disclosed. Or last minute submissions of depositions to supplement disclosures.
The names and addresses of all persons whom the party believes may have knowledge or information relevant to the events, transactions, or occurrences that gave rise to the action, and the nature of the knowledge or information each such individual is believed to possess.	The disclosures are typically in summary form identifying the subject matter of the testimony. Sometimes there is more and the disclosure might be 2-3 paragraphs. A detailed script of what the witness knows or will say is not given. Judge: The question she asks is whether the opposing side had fair notice of a general category of information possessed by a witness.
The names and addresses of all persons who have given statements, whether written or recorded, signed or unsigned, and the custodian of the copies of those statements.	
The name and address of each person whom the disclosing party expects to call as an expert witness at trial, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, the qualifications of the witness and the name and address of the custodian of copies of any reports prepared by the expert.	No one does this. It is okay to say this disclosure will be supplemented. By the time of final disclosure, you had better answer this but not needed initially.
A computation and the measure of damage alleged by the disclosing party and the documents or testimony on	This does not happen up front. It is okay to say this disclosure will be supplemented. By the time of final

12b-001976

Arizona Rule 26.1	Comments During the Focus Group
which such computation and measure are based and the names, addresses, and telephone numbers of all damage witnesses.	disclosure, you had better answer this but not needed initially. Judge: you want to be sure issues are raised fairly by the disclosure. One lawyer gave an example: witness who is asked about lost profits but the disclosure does not say lost profits would be covered by this witness.
The existence, location, custodian, and general description of any tangible evidence, relevant documents, or electronically stored information that the disclosing party plans to use at trial and relevant insurance agreements.	A proposed rule would require disclosure of indemnities and surety agreements. And if it is wasting insurance policy, one has to disclose in a supplement how much of the coverage is left. If indemnity is confidential? That topic was not discussed on AZ task force that proposed the change. But judges commonly enter protective orders where warranted.
A list of the documents or electronically stored information, or in the case of voluminous documentary information or electronically stored information, a list of the categories of documents or electronically stored information, known by a party to exist whether or not in the party's possession, custody or control and which that party believes may be relevant to the subject matter of the action, and those which appear reasonably calculated to lead to the discovery of admissible evidence, and the date(s) upon which those documents or electronically stored information will be made, or have been made, available for inspection, copying, testing or sampling. Unless good cause is stated for not doing so, a copy of the documents	Could be debate over relevance. I am sure some people don't comply, but the culture in Arizona is to turn over. However, it does not work for ESI since disclosures are due 40 days after an answer is filed. It does not happen. And it should not happen. Too costly. A proposed revised rule is currently pending before the Arizona Supreme Court. If adopted, there would be staggered disclosure. ESI is carved out. Parties required to confer and talk about formatting, searches, custodians, cost. Then go before the Judge to work out any differences. In commercial court, there is an ESI checklist and the Judge goes through the checklist at the case management conference to resolve any issues. Moving to more active case management. She supports Rule 26.1. She is very aggressive in enforcing the Rule. She tells parties that she enforces the disclosure rule strictly and will keep out evidence not disclosed. She sees fewer discovery disputes. She does not allow motions to compel. She gets parties on phone after receiving 1-page summary of dispute. Objections should not be made to discovery if the production is required by 26.1. One change proposed in Arizona is to eliminate "reasonably calculated" standard

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Arizona Rule 26.1	Comments During the Focus Group
and electronically stored information listed shall be served with the disclosure. If production is not made, the name and address of the custodian of the documents and electronically stored information shall be indicated. A party who produces documents for inspection shall produce them as they are kept in the usual course of business.	and leave it just as "relevance." The disclosure rule eliminates hiding the ball and if you do so, you are in serious trouble. The Federal Rules allow you to hide the ball if no one asks for it. In this individual's cases in state court, he almost never issues interrogatories. One downside: initial disclosures accelerate the cost of prosecuting or defending the case. But parties can agree to postpone the 40-day disclosure deadline if they are going to talk settlement. Another judge spoke up. Rule is designed to make litigation civil again and eliminate gamesmanship. But there is still gamesmanship. Does not eliminate need for depositions. Does eliminate need of interrogatories. Does eliminate arguments over notice pleadings when you have disclosure rules. "Yeah, they have not given you a lot of facts, but they will in 40 days, so dismissal motion is denied." We get motions to exclude evidence based on non-disclosure. They become "gotchas" for some lawyers, who should have just picked up the phone and called to ask for a supplement. One lawyer was trained under federal rules and then moved to Arizona and encountered Rule 26.1. This lawyer also practices against highly sophisticated lawyers. This lawyer said 26.1 has been positive. Saves money. Moves matters more quickly. Parties tend to adjust timing based on Rule 26.1 This lawyer has never seen a party prejudiced by following the disclosure rule but has seen lawyers who failed to comply face evidence exclusion by virtue of the failure. One plaintiff's lawyer believes that the disclosure rule has affected plaintiff's lawyers more than defense lawyers: it is more costly; this lawyer has to constantly review the 26.1 disclosure to be sure it is supplemented as facts develop so he does not face an exclusion request at trial. A plaintiff's personal injury lawyer felt that Rule 26.1 adds a layer of discovery.

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Arizona Rule 26.1	Comments During the Focus Group
	Statements are filed but then this lawyer still gets interrogatories and requests for production on a number of issues. This lawyer felt it would be great if all judges did what judge above does: no discovery motions—call the court instead. This lawyer suggested a discovery master could play a role in ferreting out those that comply and those that don't intentionally versus accidentally. Judge disagrees with use of discovery master. Had bad experience with it. Cost the parties too much and took too long. Court involvement can move a matter along more quickly. She would add to the Rule that a party must issue a litigation hold when a case is filed. As to ESI, she thinks the Maricopa County Superior Court model should be the one followed in the Rule. Judges need to get involved in ESI discovery immediately. This judge says rule has helped, but it has not eliminated sharp practices that judges have to police. When supplemental disclosures are produced, new information is typically bolded or in italics. Deadline for final disclosure? It is typically in the scheduling order under AZ Rule 16. Rule says 60 days before trial, but the Court can trump this deadline and make it earlier than that. Most judges do. 60 days before trial is too late. One lawyer said he could never remember seeing anything "startling" in a disclosure statement. This lawyer has gotten favorable documents from the other side, however. In a $25,000 or $50,000 case, it adds expense. Lawyers do press client for every potential relevant document to be sure you are complying with the disclosure statement. Clients do balk. The Rule then is invoked by the lawyers to support them with respect to documents when clients balk at production. Conceptually, though, it is harder to explain to some clients that AZ's rule

Arizona Rule 26.1	Comments During the Focus Group
	requires full disclosure. One has to think differently than when responding to a request for production. In that respect, it is more expensive. But on balance, this lawyer believes the disclosure rule saves money. Another lawyer: must think through your entire case, including its problems, because of what has to be disclosed. If there is a large amount of ESI, what is done? Disclosure would likely say: "we are negotiating an ESI protocol," or "we have agreed on an ESI protocol and this is what will happen…" If no discussion occurs, it might say: "We will make disclosure in due course after review." When data rich parties are against each other, they work things out. In asymmetrical cases, it is more difficult to work out. If data poor party tries to use ESI burden as leverage, then can be difficult. Judge: try to discuss with counsel and with the judge. One lawyer told story of NY lawyers dribbling out ESI and he is back to issuing requests for production. It will cost him quite a bit of money to engage in this iterative process. Should disclose sources of ESI at a minimum. If a "data dump," hard to argue something was not disclosed. Rule 26.1 is really drafted for small cases; sometimes with no lawyers involved. For larger cases, the proposed amendment on ESI will be make it self-executing versus now where lawyers have to avoid the rule in order to comply. Lawyers generally said they prefer the Arizona disclosures to federal court discovery practices.

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Arizona Rule 26.1	Comments During the Focus Group
	A plaintiffs' lawyer said he finds the disclosures of facts, legal theories, and documents to be helpful. He finds that judges generally enforce the disclosure rules. A judge said she thinks the disclosure rule, when enforced, makes cases move more quickly and reduces the amount of written discovery. A defense lawyer said the rule eliminates hiding the ball and makes litigation more cost-effective. He rarely serves interrogatories because they are not necessary in light of disclosures. If he thinks information is missing, he sends a letter to the opposing side requesting it. If it is not produced, the letter provides a basis for excluding it at trial. It does front-load costs, and can interfere with settlement of smaller cases. A judge agreed that the disclosure rule generally makes interrogatories unnecessary. On balance, he thinks the disclosure approach is better than the federal rules approach. A defense lawyer who learned to practice in Chicago before moving to Arizona said that she thinks the disclosure rules are extremely positive. They reduce costs and move cases more quickly. She has never seen a party unfairly prejudiced by the disclosure rule, but has seen partiers fairly prejudice when they failed to comply. A plaintiffs' lawyer said he thinks the document disclosure requirement is helpful, but the other disclosure obligations just increase cost. Some lawyers turn them into a "gotcha" tactic by arguing something obvious was not disclosed. A plaintiffs' lawyer said he thinks the disclosure rule would be more effective if other forms of discovery were limited. He still has to respond to much discovery, which means the disclosure obligation only adds another layer of cost.

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of Readiness, however, were not retained in that process. The Committee was of the view that this requirement had been rendered obsolete by the provisions of Rule 26.1, which requires the voluntary and seasonable disclosure of, *inter alia*, the identities of trial witnesses and exhibits. This necessitated the amendment of Rule 26(b)(5) to eliminate the former reference to Rule V(a) and to substitute in its place a reference to new Rule 38.1(b)(2) of the Arizona Rules of Civil Procedure.

Rule 26(b)(4) was amended to incorporate, as a new separate paragraph, the provisions of former Rule 1(D)(4) of the Uniform Rules of Practice for Medical Malpractice Cases. The Comment to that former Rule had observed that, if a medical malpractice case involved issues of nursing care, anesthesia, and general surgery, the plaintiff should be entitled to three standard-of- care experts and, similarly, if the hospital employed the nurse, anesthesiologist and surgeon and was the sole defendant, it would also be entitled to three standard-of-care experts. The addition of the phrase "except upon a showing of good cause" merely incorporates the standards of former Rule 43(g), which addressed the same subject and was abrogated as unnecessary. Finally, the provisions of Rule 26(e) were amended to reflect prior amendments to Rules 26.1 and 37 which require the disclosure of such information by no later than sixty (60) days prior to trial, without leave of court.

Comment

2002 Amendment to Rule 26(c)

The amendment to Rule 26(c) does not limit the discretion of trial judges to issue confidentiality orders in the appropriate case. Trial judges should look to federal case law to determine what factors, including the three listed in the rule, should be weighed in deciding whether to grant or modify a confidentiality order where parties contest the need for such an order. Trial judges also should look to federal case law to determine whether to permit nonparties to intervene and obtain access to information protected by such orders.

Rule 26.1. Prompt Disclosure of Information

~~**(a) Duty to Disclose; Disclosure Categories.** Within the times set forth in Rule 26.1(d) or~~ in a Scheduling Order or Case Management Order, each party must disclose in writing and serve on all other parties a disclosure statement setting forth:

(1) the factual basis of each of the disclosing party's claims or defenses;

(2) the legal theory on which each of the disclosing party's claims or defenses is based, including—if necessary for a reasonable understanding of the claim or defense—citations to relevant legal authorities;

(3) the name, address, and telephone number of each witness whom the disclosing party expects to call at trial, and a description of the substance—and not merely the subject matter—of the testimony sufficient to fairly inform the other parties of each witness' expected testimony;

(4) the name and address of each person whom the disclosing party believes may have knowledge or information relevant to the subject matter of the action, and a fair description of the nature of the knowledge or information each such person is believed to possess;

(5) the name and address of each person who has given a statement—as defined in Rule 26(b)(3)(C)(i) and (ii)—relevant to the subject matter of the action, and the custodian of each of those statements;

(6) the name and address of each person whom the disclosing party expects to call as an expert witness at trial, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, the expert's qualifications, and the name and address of the custodian of copies of any reports prepared by the expert;

(7) a computation and measure of each category of damages alleged by the disclosing party, the documents or testimony on which such computation and measure are based, and the name, address, and telephone number of each witness whom the disclosing party expects to call at trial to testify on damages;

(8) the existence, location, custodian, and general description of any tangible evidence, documents, or electronically stored information that the disclosing party plans to use at trial, including any material to be used for impeachment;

(9) the existence, location, custodian, and general description of any tangible evidence, documents, or electronically stored information that may be relevant to the subject matter of the action; and

(10) for any insurance policy, indemnity agreement, or suretyship agreement under which another person may be liable to satisfy part or all of a judgment entered in the action or to indemnify or reimburse for payments made to satisfy the judgment: (A) a copy—or if no copy is available, the existence and substance—of the insurance policy, indemnity agreement, or suretyship agreement; (B) a copy—or if no copy is available, the existence and basis—of any disclaimer, limitation, or denial of coverage or reservation of rights under the insurance policy, indemnity agreement, or suretyship agreement; and (C) the remaining dollar limits of coverage under the insurance policy, indemnity agreement, or suretyship agreement. A party need only supplement its disclosure regarding the

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remaining dollar limits of coverage upon another party's written request made within 30 days before a settlement conference or mediation or within 30 days before trial. Within 10 days after such a request is served, a party must supplement its disclosure of the remaining dollar limits of coverage. For purposes of this rule, an insurance policy means a contract of or agreement for or effecting insurance, or the certificate memorializing it—by whatever name it is called—and includes all clauses, riders, endorsements, and papers attached to, or a part of, it, but does not include an application for insurance. Information concerning an insurance policy, indemnity agreement, or suretyship agreement is not admissible in evidence merely because it is disclosed under this rule.

(b) Disclosure of Hard-Copy Documents and Electronically Stored Information.

(1) ***Hard-Copy Documents.*** Subject to the limits of Rule 26(b)(1)(B) or other good cause for not doing so, a party must serve with its disclosure a copy of any documents existing in hard copy that it has identified under Rule 26.1(a)(8), (9), and (10). If a party withholds any such hard-copy document from production, it must in its disclosure identify the document along with the name, telephone number, and address of the document's custodian. A party who produces hard-copy documents for inspection must produce them as they are kept in the usual course of business.

(2) ***Electronically Stored Information.***

(A) *Duty to Confer.* When the existence of electronically stored information is disclosed or discovered, the parties must promptly confer and attempt to agree on matters relating to its disclosure and production, including:

(i) requirements and limits on the disclosure and production of electronically stored information;

(ii) the form in which the information will be produced; and

(iii) if appropriate, sharing or shifting of costs incurred by the parties for disclosing and producing the information.

(B) *Resolution of Disputes.* If the parties are unable to satisfactorily resolve any dispute regarding electronically stored information and seek a resolution from the court, they must present the dispute in a single joint motion. The joint motion must include the parties' positions and the separate certification from all counsel required under Rule 26(g).

(C) *Production of Electronically Stored Information.* Unless the parties agree or the court orders otherwise, within 40 days after serving its initial disclosure

statement, a party must produce the electronically stored information identified under Rule 26.1(a)(8) and (9). Absent good cause, no party need produce the same electronically stored information in more than one form.

(D) *Presumptive Form of Production.* Unless the parties agree or the court orders otherwise, a party must produce electronically stored information in the form requested by the receiving party. If the receiving party does not specify a form, the producing party may produce the electronically stored information in native form or in another reasonably usable form that will enable the receiving party to have the same ability to access, search, and display the information as the producing party.

(E) *Limits on Disclosure of Electronically Stored Information.* Rule 26(b)(2) applies to the disclosure of electronically stored information.

(c) Purpose; Scope.

(1) ***Purpose.*** The purpose of the disclosure requirements of this Rule 26.1 is to ensure that all parties are fairly informed of the facts, legal theories, witnesses, documents, and other information relevant to the action.

(2) ***Scope.*** A party must include in its disclosures information and data in its possession, custody, and control as well as that which it can ascertain, learn, or acquire by reasonable inquiry and investigation.

(d) Time for Disclosure; Continuing Duty.

(1) ***Initial Disclosures.*** Unless the parties agree or the court orders otherwise, a party seeking affirmative relief must serve its initial disclosure of information under Rule 26.1(a) as fully as then reasonably possible no later than 40 days after the filing of the first responsive pleading to the complaint, counterclaim, crossclaim, or third-party complaint that sets forth the party's claim for affirmative relief. Unless the parties agree or the court orders otherwise, a party filing a responsive pleading must serve its initial disclosure of information under Rule 26.1(a) as fully as then reasonably possible no later than 40 days after it files its responsive pleading.

(2) ***Additional or Amended Disclosures.*** The duty of disclosure prescribed in Rule 26.1(a) is a continuing duty, and each party must serve additional or amended disclosures when new or additional information is discovered or revealed. A party must serve such additional or amended disclosures in a timely manner, but in no event more than 30 days after the information is revealed to or discovered by the disclosing party. If a party obtains or discovers information that it knows or reasonably should know is relevant to a hearing or deposition scheduled to occur in less than 30 days, the party must disclose such information reasonably in advance

of the hearing or deposition. If the information is disclosed in a written discovery response or a deposition in a manner that reasonably informs all parties of the information, the information need not be presented in a supplemental disclosure statement. A party seeking to use information that it first disclosed later than the deadline set in a Scheduling Order or Case Management Order—or in the absence of such a deadline, later than 60 days before trial—must obtain leave of court to extend the time for disclosure as provided in Rule 37(c)(4) or (5).

(e) Signature Under Oath. Each disclosure must be in writing and signed under oath by the disclosing party.

(f) Claims of Privilege or Protection of Work-Product Materials.

(1) ***Information Withheld.*** When a party withholds information, a document, or electronically stored information from disclosure on a claim that it is privileged or subject to protection as work product, the party must promptly comply with Rule 26(b)(6)(A).

(2) ***Inadvertent Production.*** If a party contends that a document or electronically stored information subject to a claim of privilege or protection as work-product material has been inadvertently disclosed, the producing and receiving parties must comply with Rule 26(b)(6)(B).

Rule 26.2. Exchange of Records and Discovery Limits in Medical Malpractice Actions

(a) Exchange of Medical Records.

(1) ***By Plaintiff.*** Within 5 days after a plaintiff notifies the court under Rule 16(e) that all served defendants have either answered or filed motions, the plaintiff must serve on defendants copies of all of the plaintiff's available medical records relevant to the condition that is the subject matter of the action.

(2) ***By Defendants.*** Within 10 days after the plaintiff serves medical records under Rule 26.2(a)(1), each defendant must serve on the plaintiff copies of all of the plaintiff's available medical records relevant to the condition that is the subject matter of the action.

(3) ***By Request.*** In place of serving copies of the above-described medical records, counsel may—before the deadline for service of the records—inquire of opposing counsel concerning the records that opposing counsel wishes produced and may then serve by the deadline copies of only those records specifically requested.

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(b) Discovery Limits Before Comprehensive Pretrial Conference.

(1) ***Generally.*** Unless the parties agree or the court orders otherwise for good cause, the parties are limited to the following discovery before the Comprehensive Pretrial Conference under Rule 16(e) is held:

(A) service of the uniform interrogatories set forth in Rule 84, Form 4;

(B) service of 10 additional nonuniform interrogatories under Rule 33, with any subpart to a nonuniform interrogatory counting as a separate interrogatory;

(C) service of a request for production of documents under Rule 34, limited to the following items:

(i) a party's wage information if relevant;

(ii) written or recorded statements by any party or witness, including reports or statements of experts;

(iii) any exhibits the party intends to use at trial; and

(iv) incident reports; and

(D) depositions of the parties and any known liability experts.

(2) ***Stipulations for Additional Discovery.*** A party may not unreasonably withhold a stipulation for additional discovery under Rule 26.2(b)(1). A party or counsel who unreasonably withholds a stipulation for additional discovery is subject to sanctions under Rule 26(f).

Rule 27. Discovery Before an Action Is Filed or During an Appeal

(a) Before an Action Is Filed.

(1) ***Petition.*** A person who wants to perpetuate testimony—including his or her own—or to obtain discovery to preserve evidence about any matter cognizable in any court within the United States may file a verified petition in the superior court in the county where any expected adverse party resides. The petition must be titled in the petitioner's name and must:

(A) show that the petitioner expects to be a party to an action cognizable in any court within the United States but cannot presently bring it or cause it to be brought;

(B) identify the subject matter of the expected action and the petitioner's interest;

(C) show the facts that the petitioner desires to establish by the proposed discovery and the reasons for perpetuating it in advance of the expected action;

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PRINCIPLE 15:

- **Shortly after the commencement of litigation, each party should produce all known and reasonably available non-privileged, non-work-product documents and things that support or contradict specifically pleaded factual allegations. The parties should retain the right in individual cases to make a showing to the court that this initial production may not be appropriate or may need to be modified.**

In 2008, the results of our Survey reflected that only 34 percent of the respondents thought that the current initial disclosure rules reduced discovery, and only 28 percent said they save the clients money. The national surveys that have followed further confirm that lawyers nationwide generally do not believe that Federal Rule of Civil Procedure 26(a)(1) initial disclosures reduce discovery, nor do they believe that such disclosures save their clients money.[25] The same surveys reflect that very high percentages report requiring additional discovery after initial disclosures. In contrast, in a study of Arizona's experience, where parties are required to make extensive initial disclosures, there is a consensus that such disclosures reveal pertinent facts early in the case, do not substantially increase satellite litigation, and do not raise litigation costs.[26] Our original Principle recognized that the initial disclosure rules need to be revised. This holds even truer today. It is time to make initial disclosures broader to ensure that they are truly effective.

This Principle is similar to Rule 26(a)(1)(ii) of the Federal Rules of Civil Procedure's requirement for initial disclosures, but it is broader in two ways. Whereas the current Rule permits description of documents by categories and location, we would require production. This Principle is also broader because it would require the production of all known and reasonably available documents and things that support or contradict specifically pleaded factual allegations.

The disclosures must be meaningful and robust. The rationale for this Principle is simple: each party should produce, without delay and without a formal request, documents that are known and reasonably available and that support or contradict specifically pleaded factual allegations. The goal of this Principle is to encourage the parties to bring the facts and issues to light at the earliest opportunity, thus allowing the litigation process to be shaped by the true nature of the dispute.

Our Principle does not require the parties to do an exhaustive search for or to produce all documents in the party's possession, custody or control that meet this definition at this early stage of the case. Initial production, as we envision it, is defined by what is then known and reasonably available. By including the requirement that the documents must be "known" and "reasonably available," we contemplate, as an example, the situation in which a party collects

[25] *See* AM. BAR ASS'N, ABA SECTION OF LITIGATION MEMBER SURVEY ON CIVIL PRACTICE: FULL REPORT 56-59 (2009); REBECCA M. HAMBURG & MATTHEW C. KOSKI, NAT'L EMP'T LAWYERS ASS'N, SUMMARY OR RESULTS OF FEDERAL JUDICIAL CENTER SURVEY OF NELA MEMBERS, FALL 2009 29 (2010).

[26] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., SURVEY OF THE ARIZONA BENCH & BAR ON THE ARIZONA RULES OF CIVIL PROCEDURE 19-26 (2010), *available at* http://iaals.du.edu/images/wygwam/documents/publications/Survey_Arizona_Bench_Bar2010.pdf.

documents for the purpose of supporting a factual allegation in a complaint or in a defense and runs across a document that contradicts a specifically pleaded factual allegation. Many current rules would require the production of the "supporting" document in the initial disclosures. We would now require the production of the "contradictory" document as well. Where responsive documents might be voluminous and entail a substantial and expensive burden to produce within the timeframe for initial disclosures, such documents may not be considered to be "reasonably available." We also acknowledge that the parties should retain the right in individual cases to make a showing to the court that initial production (i.e., production of documents and things before there is a "reasonably particular" request) may not be appropriate or may need to be modified.

While there should be an ongoing duty to supplement initial and subsequent productions, as there is now, we do not intend this Principle to replace the decades-old and well-understood rule that in discovery (as opposed to initial production), document requests must describe the documents to be produced with "reasonable particularity." To the extent that discovery is required after initial production (or in cases where there is no initial production), that definition should still be the test for document requests.

We note that the proportionality Principle (Principle 13) applies to initial production, just as it underlies all of our Principles on discovery. Under Principle 19, in appropriate cases, the court should consider staying initial production pending the decision on a dispositive motion. We also expect counsel to confer as soon as possible in order to reach an agreement as to what initial production is appropriate in a particular case and to reach an agreement as to the timing of any such production. Federal Rule of Civil Procedure 26(f) requires such a conference before there can be any initial disclosures or discovery. The Seventh Circuit Electronic Discovery Pilot Program also recognizes the importance of this early conference to discuss discovery and identify disputes for early resolution.

To those charged with applying such a Principle, we suggest that the plaintiff could be required to make the required initial production very shortly after the complaint is served and that the defendant, who, unlike the plaintiff, may not be presumed to have prepared for the litigation beforehand, be required to produce such documents within a somewhat longer period of time, say 30 days after the answer is served.

Our changes to this Principle are informed by the experiences around the country, including those in Colorado and Arizona, both of which require early robust disclosure of relevant documents, whether supportive or harmful. In neither jurisdiction has there been a backlash against the more robust disclosures. In fact, in Arizona, lawyers who have experience with both state and federal systems prefer the Arizona scheme to the federal rules.[27] One takeaway from both jurisdictions is that enforcement is essential. Thus, it is critical that there be consequences related to the lack of initial disclosures or inadequate disclosures. A sanction for a bad faith failure to comply absent cause or excusable neglect could be included in the rules implementing this Principle. Examples include an order precluding use of such evidence at trial, or a denial of

[27] *See id.*

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the right to object to the admissibility of the evidence at trial, although we urge caution about creating a scheme that would encourage "discovery about discovery" or unwarranted sanctions litigation.

We also urge the specialty bars to develop specific initial disclosure rules for certain types of cases that could supplement or even replace this Principle.[28]

By requiring early, meaningful initial production, the goal of this Principle is to limit gamesmanship throughout the pre-trial process, to decrease the current concentration of resources on the litigation of discovery disputes, and to increase the opportunity for meritorious trials. This change represents a dramatic shift in litigation practice, but business as usual is not working for clients and it is certainly not ideal for legal professionals. It is our hope that this Principle will lead to significant cultural change. The civil pre-trial process should not be a game of "hide the ball," with the outcome decided by attrition. Rather, the arguments should be about the merits, with the outcome decided by the evidence (whether at trial or through settlement).

PRINCIPLE 16:

- **Discovery in general, and document discovery in particular, should be limited to documents or information that would enable a party to prove or disprove a claim or defense or enable a party to impeach a witness.**

The current Federal Rules permit discovery of all documents and information relevant to a claim or defense of any party, and the proposed amendments add the requirement of proportionality to that definition. It is not uncommon to see discovery requests that begin with the words "all documents relating or referring to . . . ." Such requests are far too broad and are subject to abuse. They should not be permitted, and we are hopeful that the addition of a proportionality requirement will eliminate such requests.

Especially when combined with notice pleading, discovery is very expensive and time consuming, and easily permits substantial abuse. We recommend changing the scope of discovery to allow only such limited discovery as will enable a party to prove or disprove a claim or defense, or to impeach a witness.

Until 1946, document discovery in the federal system was limited to things "which constitute or contain evidence material to any matter involved in the action," and then only upon motion showing good cause. The scope of discovery was changed for depositions in 1946 to the "subject matter of the action." It was not until 1970 that the requirement for a motion showing good cause was eliminated for document discovery. According to the Advisory Committee Notes, the "good cause" requirement was eliminated "because it has furnished an uncertain and erratic protection to the parties from whom production [of documents] is sought . . . ." The change also was

[28] *See, e.g.,* FED. JUDICIAL CTR., PILOT PROJECT REGARDING INITIAL DISCOVERY PROTOCOLS FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION (2011), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/DiscEmpl.pdf/$file/DiscEmpl.pdf.

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EX. 5

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126-001998

MEMORANDUM

To: Judge David Campbell, Chair Pilot Project Subcommittee
From: Derek Webb
Subject: Rule 26(a) Disclosure Reform History: A Canvas of the Arguments in Favor of Reform and a Brief History of the Reform Effort
Date: February 10, 2016

Ten Arguments Made on Behalf of the 1993 Discovery Reform

Below are 10 of the most prominent arguments made on behalf of initial mandatory disclosure.

1) To realize the original purposes of 1938 discovery reform – ascertainment of truth[1]
    a. Purpose of 1938 amendments: To take game/sporting element out of discovery – to secure complete disclosure of all relevant evidentiary information – to have the sides lay their cards on the table in advance.[2]
        i. Expected litigators to undertake more elevated, less competitive, and less adversarial, self-protective stylistic approach.[3]
        ii. "The clear policy of the rules is toward full disclosure."[4]
        iii. Edson R. Sunderland, the University of Michigan Law School professor credited with drafting the discovery components of the 1938 Federal Rules, wrote that the new procedural rules "mark the highest point so far reached in the English speaking world in the elimination of secrecy in the preparation for trial. Each party may in effect be called upon by his adversary or by the judge to lay all his cards upon the table, the important consideration being who has the stronger hand, not who can play the cleverer game."[5]
        iv. The new Federal Rules of Civil Procedure "effectively carried out the basic concept that the purpose of litigation is not to conduct a contest or to oversee a game of skill but to do justice as between the parties and to

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[1] Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 Vanderbilt Law Review 1295, 1298 (1978).
[2] *Id*. at 1300. See also William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 University of Pittsburgh Law Review 703 (1989).
[3] Brazil, *supra* note 1, at 1302.
[4] *Id*. at 1298.
[5] *Id*. at 1299, quoting Edson Sunderland, *Discovery Before Trial under the New Federal Rules*, 15 TENN. L. REV. 737 (1939).

decide controversies on their merits. For this purpose the courts are entitled to have laid before them all available and pertinent materials."[6]

v. As the Supreme Court put it, the Federal Rules of Civil Procedure had been adopted to make trials "less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."[7]

b. Adversarial legal culture as it developed in the mid-1970's and 1980's undermined these original goals.
   i. Rather than discourage the "sporting or game theory of justice" discovery expanded both the scope and the complexity of the sport.[8]
   ii. While the adversarial legal culture helped in the promotion of truth at the trial stage, it did not help during the pre-trial discovery stage – rather, it permitted a no-stone left unturned philosophy of discovery that imposed costs and was used to harass opponents.[9] According to one study at the time, between 80 and 92% of attorneys imposed financial burdens on their opponents in an attempt to force settlement.[10]
   iii. Lawyers came to see themselves principally as agents of their clients rather than officers of the court.[11]
   iv. Instead of diminishing the adversarial nature of pre-trial litigation, discovery had enhanced this competitive culture.
      1. And it did so at a stage of litigation in which court supervision was minimal.[12]
      2. "Discovery had made judges of lawyers and bystanders of judges."

c. Purpose of 1993 amendment: To address the incentive structure in the legal profession that had undermined the purposes of the 1938 amendments
   i. Mandatory discovery would alter the incentives of the marketplace and the legal profession and would help encourage lawyers to see themselves as officers of the court as well as partisan advocates for their clients.[13]
   ii. Private lawyers would have the same obligation to truth and the integrity of the system in the civil context as government lawyers do in the criminal context under *Brady*.[14]

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[6] *Id*. at 1300-01, quoting Alexander Holtzhoff, The Elimination of Surprise in Federal Practice, 7 Vand. L. Rev. 576 (1954).
[7] *U.S. v. Procter & Gamble*, 356 U.S. 677, 682 (1958).
[8] Brazil, *supra* note 1, at 1304.
[9] Judge Ralph Winter, In Defense of Discovery Reform, 58 BROOKLYN LAW REVIEW 263, 263-64 (1992); see also Schwarzer, *supra* note 2, at 713-14.
[10] Angela R. Lang, *Mandatory Disclosure Can Improve the Discovery System*, 70 Indiana Law Journal 657, 666 (1995).
[11] Schwarzer, *supra* note 2, at 719-20.
[12] Brazil, *supra* note 1, at 1304.
[13] Brazil, *supra* note 1, at 1311-15, 1332, 1349.

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iii. Would allow some court supervision of the discovery phase.[15]

2) To encourage settlement
   a. With all the cards laid on the table up front, this would allow parties to speed up their evaluation of the case, improve their chances of predicting the outcome, and thereby promote earlier settlements.[16]
   b. Thus, while there will be some new burdens for judges under the disclosure system, these will be offset by savings in the system as a whole – fewer cases will enter and fewer that do will require judicial supervision at trial.[17]
   c. "Of especial importance was the required disclosure of damage computations and insurance agreements; the frequent failure of counsel early in litigation to address damage claims and the capacity of a party to satisfy a judgment leads to disproportionate litigation activity, especially discovery, and neglect of settlement opportunities."[18]
3) To make discovery and trials more efficient
   a. Allow parties to be better informed at discovery conferences, so they may better define and narrow issues and plan needed discovery.[19]
   b. Make the limits on the number and length of depositions and on the number of interrogatories feasible thus reducing cost and delay in litigation.[20]
4) To save costs
   a. With more settlement and fewer depositions and interrogatories – the cost and time of trial should go down.
   b. Disclosure may encourage parties to place greater reliance on available investigatory resources and techniques and less on the more costly methods of adversary discovery.[21]
   c. And while costs may be increased up front, the savings overall through less prolonged litigation will compensate for these front-end expenses.[22]
5) To increase access to justice
   a. With lower costs, lower and middle income people would be in a better position to litigate

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[14] Frankel, *The Search for Truth Continued: More Disclosure, Less Privilege*, 54 UNIVERSITY OF COLORADO LAW REVIEW 51, 53-56 (1982); Wright and Miller, FEDERAL PRACTICE & PROCEDURE § 2053 (3d ed. 2010) (drawing an analogy between disclosure requirements in criminal law and the civil discovery system.)
[15] Brazil, *supra* note 1, at 1357.
[16] William W. Schwarzer, *Slaying the Monsters of Cost and Delay: Would Disclosure Be More Effective than Discovery?* 74 JUDICATURE 178, 182 (1991).
[17] *Id*. *See also* Brazil, 1302.
[18] William Schwarzer, *New Discoveries for the Discovery Process: The Thought of Voluntarily Exchanging Sensitive Documents with an Opposing Party and Putting a Lid on Depositions and Interrogatories may Sound Like Heresy to Many Litigators but They Could Get Used to It – And the Trial Process Would Benefit*, LEGAL TIMES, November 25, 1991.
[19] Schwarzer, *supra* note 16, at 183.
[20] *Id*.
[21] Schwarzer, *supra* note 18.
[22] Brazil, *supra* note 1, at 1357-58.

b. Prior to the reform, litigating a case in a metropolitan federal court typically cost at least $100,000.[23]

6) Empirical studies indicate that mandatory disclosure regimes were effective.
   a. Mandatory disclosure already used in three federal districts: Southern District of Florida, Central District of California, and Guam.[24]
   b. This was also tested in Arizona pursuant to AZ Supreme Court decision. A pilot project was conducted on the effects of the "Zlaket rule" in Arizona.[25]
      i. Cases terminated two months earlier than non-Zlaket Rule cases.[26]
      ii. In non-complex cases, there were fewer depositions, fewer interrogatories, fewer requests for production of documents.[27]
      iii. Fewer discovery motions.[28]
      iv. Discovery was completed in a shorter period of time.[29]
      v. 8000 cases – 3300 were arbitrated 8 months sooner than under old rules, 3000 were settled or abandoned by parties, discovery motions reduced by 90%.[30]
7) International experience indicate that mandatory disclosure regimes were effective
   a. UK and Canada.[31]
8) The rule would not damage the adversary system
   a. As the Advisory Committee note indicated, the disclosing party has the right to object to production based on privilege or work product protection.[32]
   b. Retain right to withhold information if not relevant.[33]
   c. Disclosure rule only applies to "core" information – which certain to be subject of formal discovery requests in most cases
   d. The disclosure amendments are merely the functional equivalent of standing interrogatories which no lawyer could ordinarily ignore anyway.[34]
9) The rule would not impose excessive burdens on parties
   a. As the Advisory Committee note indicated, the duty of disclosure is directly tied to the level of specificity and particularity in the case pleadings. So if the

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[23] Schwarzer, *supra* note 16, at 179.
[24] Lang, *supra* note 10, at 673. Linda Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 NORTH CAROLINA LAW REVIEW 795, 813-22 (1991).
[25] Peggy E. Bruggman, Reducing the Costs of Civil Litigation: Discovery Reform, PUBLIC LAW RESEARCH INSTITUTE 1 (1995).
[26] *Id*.
[27] *Id*.
[28] *Id*.
[29] *Id*.
[30] Lang, *supra* note 10, at 674-75.
[31] Paul D. Carrington, Learning from the Rule 26 Brouhaha: Our Courts Need Real Friends, 156 F.R.D. 295, 305, 308, September 1994; *see also* Advisory Committee Note rule 26(a).
[32] Winter, *supra* note 9, at 268; *see also* Lang, supra note 10, at 672-73.
[33] Lang, *supra* note 10, at 672-73.
[34] Schwarzer, *supra* note 16, at 183.

complaint is very general, or provides little or no detail, the level of required disclosure is also reduced.[35]

10) The rule would enhance the level of professionalism among attorneys
    a. Eliminate the undesirable excesses of the adversary process that occurs in discovery – overdiscovery, harassment, evasion, and game playing.[36]
    b. "Once it becomes routine and counsel become more generally aware of their professional obligations as officers of the court, disclosure should reduce the burdensome and unproductive adversariness that now often characterizes discovery."[37]
    c. "The courtroom is our special bailiwick and responsibility. It is the primary arena in which our professional and moral leadership should be exerted. We are not commissioned, after all, as agents of general uplift. We are commissioned to pursue justice and to deal uprightly in the courts."[38]

Key Works by Proponents of Mandatory Initial Disclosure

Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VANDERBILT LAW REVIEW 1295 (1978).

Marvin E. Frankel, *The Search for Truth Continued: More Disclosure, Less Privilege*, 54 UNIVERSITY OF COLORADO LAW REVIEW 51 (1982).

William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 UNIVERSITY OF PITTSBURGH LAW REVIEW 703 (1989).

William W. Schwarzer, *Slaying the Monsters of Cost and Delay: Would Disclosure be More Effective than Discovery?* 74 JUDICATURE 178 (1991).

Ralph K. Winter, *In Defense of Discovery Reform*, 58 BROOKLYN LAW REVIEW 263 (1992).

Paul D. Carrington, *Learning from the Rule 26 Brouhaha: Our Courts Need Real Friends*, 156 F.R.D. 295 (1994).

Angela R. Lang, *Mandatory Disclosure Can Improve the Discovery System*, 70 INDIANA LAW JOURNAL 657 (1995)

[35] Lang, *supra* note 10, at 671-72.
[36] *Id*.
[37] Schwarzer, *supra* note 18.
[38] Frankel, *supra* note 14, at 63.

Key Dates in Rule 26(a)(1) Reform

Drafting of the Rule

Summer 1989

Preliminary discussion about the rule between Judge John F. Brady, then Chair of the Advisory Committee on Civil Rules, James Powers, and Wayne Brazil. In August 1989, Judge Grady requested that the Federal Judicial Center conduct preliminary research into local informal discovery rules then in existence in several federal and state courts.[1]

November 1989

Advisory Committee on Civil Rules first discussed proposed rule change and authorized the reporter to draft a proposed Rule 25.1 that required mandatory disclosure.[2]

August 1991

Advisory Committee, under the leadership of Judge Sam C. Pointer, modified the proposal and moved it into Rule 26. The rule required plaintiffs and defendants to disclose information which was "likely to bear significantly on any claim or defense." [3]

The preliminary draft proposal was published and sent out for public comment.

August 1991 – February 1992

Public comment period

251 of 264 written comments submitted to the Rules Committee during the public comment period were negative.[4]

70 people appeared at two public hearings in Los Angeles (November 1991) and Atlanta (February 1992) to testify against disclosure on behalf of businesses, bar associations, and public-interest groups.[5]

According to the Reporter's summary, criticisms came from judges, law firms, insurance companies, bar associations, legal scholars, public interest groups, corporations,

[1] Linda Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 NORTH CAROLINA LAW REVIEW 795, 808 (1991).
[2] Lisa Trembly, *Mandatory Disclosure: A Historical Review of the Adoption of Rule 26 and an Examination of the Events that have Transpired Since its Adoption*, 21 SETON HALL LEGISLATIVE JOURNAL 425 (1993).
[3] *Id*.
[4] Alfred W. Cortese and Kathleen L. Blaner, *A Change in the Rules Draws Fire: Litigators Fight to Stop Mandatory Disclosure*, NATIONAL LAW JOURNAL, October 18, 1993.
[5] *Id*.

plaintiff's trial attorneys' associations, and defense attorneys' associations. According to a memorandum from Dean Erwin Griswold to the Supreme Court, 49 bar associations, business associations and government agencies, 66 corporations, and more than 150 law firms individual attorneys and judges filed formal complaints.[6] This group included the American Bar Association, the American Corporate Counsel Association, Public Citizen Litigation Group, the American Civil Liberties Union, the American Institute of Certified Public Accountants, American Trial Attorneys, the NAACP Legal Defense Fund, the Defense Research Institute, and the Product Liability Advisory Council, for example, all opposed the amendment.[7]

Despite the criticism, over 20 district courts adopted the draft proposal in their Cost and Delay Reduction Plans.[8]

February 1992

In light of critical comments made at the Atlanta hearing and the fact that several district courts in PA and NY were adopting experimental local rules, the Advisory Committee decided to delay action on voluntary disclosure.[9]

March 1992

Advisory Committee issued new proposed rules which eliminated automatic disclosure.

The proposed advisory committee note suggested that further local experimentation was needed: "It is appropriate that any national standard prescribing the type, form and timing of required disclosures not be adopted until some experience has been gained under these various local plans."[10]

April 1992

Reversing its March decision, the Advisory Committee voted unanimously to endorse the reform.

Judge Ralph Winter initiated reconsideration of the vote along with Judge J. Dickson Phillips Jr., Wayne Brazil, Dennis Linder, and Mark Nordenberg.

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[6] Eric F. Spade, *A Mandatory Disclosure and Civil Justice Reform Proposal Based on the Civil Justice Reform Act Experiments*, 43 CLEVELAND STATE LAW REVIEW 147, 158 (1995).
[7] Griffin B. Bell, Chilton Davis Vaner, and Hugh Q. Gottschalk, *Automatic Disclosure in Discovery – The Rush to Reform*, 27 GEORGIA LAW REVIEW 1, 28 (1992).
[8] Paul D. Carrington, *Learning from the Rule 26 Brouhaha: Our Courts Need Real Friends*, 156 F.R.D. 295, September 1994.
[9] Ann Pelham, *Judges Make Quite a Discovery; Litigators Erupt, Kill Plan to Reform Federal Civil Rules*, Legal Times, March 16, 1992.
[10] Bell, *supra* note 7, at 35.

As Judge Phillips put it, delaying this would "put the whole of the national amendment process back to 1998."

The Advisory Committee abandoned the earlier, broader formulation that called for disclosure of anything that bears significantly on a claim and replaced it with a requirement that the parties disclose information "relevant to disputed facts alleged with particularity in the pleadings."[11] This language was taken from Rule 9(b) and had a body of caselaw defining it, which the Advisory Committee regarded as helpful.[12]

May 1, 1992

Advisory Committee on Civil Rules submitted rule proposal to Standing Committee.[13]

June 20, 1992

Standing Committee approved the proposal and submitted it to the Judicial Conference.

Judges Wright, Sloviter, and Stotler wanted the issue of automatic disclosure resubmitted for public discussion.[14]

Judge Easterbrook suggested that "some action needed to be taken to solve discovery problems" and expressed the prevailing sentiment of the Standing Committee to recommend it to the Judicial Conference.[15]

September 22, 1992

Judicial Conference approved the proposed rule change.[16]

November 27, 1992

Judicial Conference transmitted rule proposal to Supreme Court.[17]

Supreme Court

April 22, 1993

Supreme Court approved the rule.

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[11] Ann Pelham, *Panel Flips, OKs Discovery Reform*, LEGAL TIMES, April 20, 1992. See also Gerald MacDonald, *Hesiod, Agesilaus and Rule 26: A Proposal for a More Effective Mandatory Initial Disclosure Procedure*, 28 WAKE FOREST LAW REVIEW 819, 834 (1993).
[12] Judge Ralph Winter, *In Defense of Discovery Reform*, 58 BROOKLYN LAW REVIEW 263, 268 (1992).
[13] Trembly, *supra* note 2, at 444.
[14] Bell, *supra* note 7, at 39.
[15] *Id*.
[16] Trembly supra note 2, at 444.
[17] *Id*.

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Chief Justice Rehnquist wrote a transmittal letter to Rep. Tom Foley, the Speaker of the House of Representatives

> "While the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted."[18]

Justice White Concurring Statement:

Statement of Justice White. 28 U. S. C. § 2072 empowers the Supreme Court to prescribe general rules of practice and procedure and rules of evidence for cases in the federal courts, including proceedings before magistrates and courts of appeals.1 But the Court does not itself draft and initially propose these rules. Section 2073 directs the Judicial Conference to prescribe the procedures for proposing the rules mentioned in § 2072. The Conference is authorized to appoint committees to propose such rules. These rules advisory committees are to be made up of members of the professional bar and trial and appellate judges. The Conference is also to appoint a standing committee on rules of practice and evidence to review the recommendations of the advisory committees and to recommend to the Conference such rules and amendments to those rules "as may be necessary to maintain consistency and otherwise promote the interest of justice." § 2073(b). Any rules approved by the Conference are transmitted to the Supreme Court, which in turn transmits any rules "prescribed" pursuant to § 2072 to the Congress. Except as provided in § 2074(b), such rules become effective at a specified time unless Congress otherwise provides.

The members of the advisory and standing committees are carefully named by The Chief Justice, and I am *502 quite sure that these experienced judges and lawyers take their work very seriously. It is also quite evident that neither the standing committee nor the Judicial Conference merely rubber stamps the proposals recommended to it. It is not at all rare that advisory committee proposals are returned to the originating committee for further study.

During my 31 years on the Court, the number of advisory committees has grown as necessitated by statutory changes. During that time, by my count at least, on some 64 occasions we have "prescribed" and transmitted to Congress a new set of rules or amendments to certain rules. Some of the transmissions have been minor, but many of them have been extensive. Over this time, Justices Black and Douglas, either together or separately, dissented 13 times on the ground that it was inappropriate for the Court to pass on the merits of the rules before it.2 Aside from those two Justices, Justices Powell, Stewart and then-Justice Rehnquist dissented on one occasion and Justice O'Connor on another as to the substance of proposed rules. 446 U. S. 995, 997 (1980) (Powell, J., dissenting); 461 U. S. 1117, 1119 (1983) (O'Connor, J., dissenting). Only once in my memory did the Court refuse to transmit some of the rule changes proposed by the Judicial Conference. 500 U. S. ___ (1991).

[18] Carl Tobias, *The Transmittal Letter Translated*, 46 FLORIDA LAW REVIEW 127 (1994).

That the Justices have hardly ever refused to transmit the rules submitted by the Judicial Conference and the *503 fact that, aside from Justices Black and Douglas, it has been quite rare for any Justice to dissent from transmitting any such rule, suggest that a sizable majority of the 21 Justices who sat during this period concluded that Congress intended them to have a rather limited role in the rulemaking process. The vast majority (including myself) obviously have not explicitly subscribed to the Black-Douglas view that many of the rules proposed dealt with substantive matters that the Constitution reserved to Congress and that in any event were prohibited by § 2072's injunction against abridging, enlarging or modifying substantive rights.

Some of us, however, have silently shared Justice Black's and Justice Douglas' suggestion that the enabling statutes be amended

“to place the responsibility upon the Judicial Conference rather than upon this Court. Since the statute was first enacted in 1934, 48 Stat. 1064, the Judicial Conference has been enlarged and improved and is now very active in its surveillance of the work of the federal courts and in recommending appropriate legislation to Congress. The present rules produced under 28 U. S. C. § 2072 are not prepared by us but by Committees of the Judicial Conference designated by The Chief Justice, and before coming to us they are approved by the Judicial Conference pursuant to 28 U. S. C. § 331. The Committees and the Conference are composed of able and distinguished members and they render a high public service. It is they, however, who do the work, not we, and the rules have only our imprimatur. The only contribution that we actually make is an occasional exercise of a veto power. If the rule-making for Federal District Courts is to continue under the present plan, we believe that the Supreme Court should not have any part in the task; rather, the statute should be amended to substitute the Judicial Conference. The Judicial Conference can participate *504 more actively in fashioning the rules and affirmatively contribute to their content and design better than we can. Transfer of the function to the Judicial Conference would relieve us of the embarrassment of having to sit in judgment on the constitutionality of rules which we have approved and which as applied in given situations might have to be declared invalid.” 374 U. S. 865, 869-870 (1963) (footnote omitted).

Despite the repeated protestations of both or one of those Justices, Congress did not eliminate our participation in the rulemaking process. Indeed, our statutory role was continued as the coverage of §2072 was extended to the rules of evidence and to proceedings before magistrates. Congress clearly continued to direct us to “prescribe” specified rules. But most of us concluded that for at least two reasons Congress could not have intended us to provide another layer of review equivalent to that of the standing committee and the Judicial Conference. First, to perform such a function would take an inordinate amount of time, the expenditure of which would be inconsistent with the demands of a growing caseload. Second, some us, and I remain of this view, were quite sure that the Judicial Conference and its committees, “being in large part judges of the lower courts and attorneys who are using the Rules day in and day out, are in a far better position to make a practical judgment upon their utility or inutility than we.” 383 U. S. 1089, 1090 (1966) (Douglas, J., dissenting).

I did my share of litigating when in practice and once served on the Advisory Committee for the Civil Rules, but the trial practice is a dynamic profession, and the longer one is away from it the less likely it is that he or she should presume to second-guess the careful work of the active professionals manning the rulemaking committees, work that the Judicial Conference has approved. At the very least, we should not perform a de novo review and should defer to the Judicial Conference and its committees *505 as long as they have some rational basis for their proposed amendments.

Hence, as I have seen the Court's role over the years, it is to transmit the Judicial Conference's recommendations without change and without careful study, as long as there is no suggestion that the committee system has not operated with integrity. If it has not, such a fact, or even such a claim, about a body so open to public inspection would inevitably surface. This has been my practice, even though on several occasions, based perhaps on out-of-date conceptions, I had serious questions about the wisdom of particular proposals to amend certain rules.

In connection with the proposed rule changes now before us, there is no suggestion that the rulemaking process has failed to function properly. No doubt the proposed changes do not please everyone, as letters I have received indicate. But I assume that such opposing views have been before the committees and have been rejected on the merits. That is enough for me.

Justice Douglas thought that the Court should be taken out of the rulemaking process entirely, but as long as Congress insisted on our “prescribing” rules, he refused to be a mere conduit and would dissent to forwarding rule changes with which he disagreed. I note that Justice Scalia seems to follow that example. But I also note that as time went on, Justice Douglas confessed to insufficient familiarity with the context in which new rules would operate to pass judgment on their merits.3

*506 In conclusion, I suggest that it would be a mistake for the bench, the bar, or the Congress to assume that we are duplicating the function performed by the standing committee or the Judicial Conference with respect to changes in the various rules which come to us for transmittal. As I have said, over the years our role has been a much more limited one.

Justice Scalia, joined by Justices Thomas and Souter, dissented:

Justice Scalia, with whom Justice Thomas joins, and with whom Justice Souter joins as to Part II, filed a dissenting statement.

I dissent from the Court’s adoption of the amendments to Federal Rules of Civil Procedure 11 (relating to sanctions for frivolous litigation), and 26, 30, 31, 33, and 37 (relating to discovery). In my view, the sanctions proposal will eliminate a significant and necessary deterrent to frivolous litigation; and the discovery proposal will increase litigation costs, burden the district courts, and, perhaps worst of all, introduce into the trial process an element that is contrary to the nature of our adversary system.

…

II
Discovery Rules

The proposed radical reforms to the discovery process are potentially disastrous and certainly premature—particularly the imposition on litigants of a continuing duty to disclose to opposing counsel, without awaiting any request, various information "relevant to disputed facts alleged with particularity." See Proposed Rule 26(a)(1)(A), (a)(1)(B), (e)(1). This proposal is promoted as a means of reducing the unnecessary expense and delay that occur in the present discovery regime. But the duty-to-disclose regime does not replace the current, much-criticized discovery process; rather, it *adds a further layer of discovery*. It will likely *increase* the discovery burdens on district judges, as parties litigate about what is "relevant" to "disputed facts," whether those facts have been alleged with sufficient particularity, whether the opposing side has adequately disclosed the required information, and whether it has fulfilled its continuing obligation to supplement the initial disclosure. Documents will be produced that turn out to be irrelevant to the litigation, because of the early inception of the duty to disclose and the severe penalties on a party who fails to disgorge in a manner consistent with the duty. See Proposed Rule 37(c) (prohibiting, ***511** in some circumstances, use of witnesses or information not voluntarily disclosed pursuant to the disclosure duty, and authorizing divulgement to the jury of the failure to disclose).

The proposed new regime does not fit comfortably within the American judicial system, which relies on adversarial litigation to develop the facts before a neutral decisionmaker. By placing upon lawyers the obligation to disclose information damaging to their clients—on their own initiative, and in a context where the lines between what must be disclosed and what need not be disclosed are not clear but require the exercise of considerable judgment—the new Rule would place intolerable strain upon lawyers' ethical duty to represent their clients and not to assist the opposing side. Requiring a lawyer to make a judgment as to what information is "relevant to disputed facts" plainly requires him to use his professional skills in the service of the adversary. See Advisory Committee Notes to Proposed Rule 26, p. 96.

It seems to me most imprudent to embrace such a radical alteration that has not, as the advisory committee notes, see *id.*, at 94, been subjected to any significant testing on a local level. Two early proponents of the duty-to-disclose regime (both of whom had substantial roles in the development of the proposed rule—one as Director of the Federal Judicial Center and one as a member of the advisory committee) at one time noted the need for such study prior to adoption of a national rule. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. Pitt. L. Rev. 703, 723 (1989); Brazil, The Adversary Character of Civil Discovery: A

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Critique and Proposals for Change, 31 Vand. L. Rev. 1295, 1361 (1978). More importantly, Congress itself reached the same conclusion that local experiments to reduce discovery costs and abuse are essential *before* major revision, and in the Civil Justice Reform Act of 1990, Pub. L. 101-650, §§ 104, 105, 104 Stat. 5097-5098, mandated an extensive pilot program for district courts. See also 28 U. S. C. §§471, 473(a)(2)(C). Under that legislation, short-term experiments ***512** relating to discovery and case management are to last at least three years, and the Judicial Conference is to report the results of these experiments to Congress, along with recommendations, by the end of 1995. Pub. L. 101-650, § 105, 104 Stat. 5097-5098. Apparently, the advisory committee considered this timetable schedule too prolonged, see Advisory Committee Notes to Proposed Rule 26, p. 95, preferring instead to subject the entire federal judicial system at once to an extreme, costly, and essentially untested revision of a major component of civil litigation. That seems to me unwise. Any major reform of the discovery rules should await completion of the pilot programs authorized by Congress, especially since courts already have substantial discretion to control discovery.[2] See Fed. Rule Civ. Proc. 26.
I am also concerned that this revision has been recommended in the face of nearly universal criticism from every conceivable sector of our judicial system, including judges, practitioners, litigants, academics, public interest groups, and national, state and local bar and professional associations. See generally Bell, Varner, & Gottschalk, Automatic Disclosure in Discovery—The Rush to Reform, 27 Ga. L. Rev. 1, 28-32, and nn. 107-121 (1992). Indeed, after the proposed rule in essentially its present form was published to comply with the notice-and-comment requirement of 28 U. S. C. §2071(b), public criticism was so severe that the advisory committee announced abandonment of its duty-to-disclose regime (in favor of limited pilot experiments), but then, without further public comment or explanation, decided six weeks later to recommend the rule. 27 Ga. L. Rev., at 35.

*** * ***

Constant reform of the federal rules to correct emerging ***513** problems is essential. Justice White observes that Justice Douglas, who in earlier years on the Court had been wont to note his disagreements with proposed changes, generally abstained from doing so later on, acknowledging that his expertise had grown stale. *Ante*, at 5. Never having specialized in trial practice, I began at the level of expertise (and of acquiescence in others' proposals) with which Justice Douglas ended. Both categories of revision on which I remark today, however, seem to me not matters of expert detail, but rise to the level of principle and purpose that even Justice Douglas in his later years continued to address. It takes no expert to know that a measure which eliminates rather than strengthens a deterrent to frivolous litigation is not what the times demand; and that a breathtakingly novel revision of discovery practice should not be adopted nationwide without a trial run.

In the respects described, I dissent from the Court's order.

Congressional Reaction

April 22, 1993

Supreme Court transmitted to Congress the proposed amendment.

Up until this time, Congress had only rejected Court-approved rules twice – once in the early 1970's when the new Federal Rules of Evidence were proposed, and in the early 1980's when a change to Rule 4 dealing with service of process was proposed. [19]

June 16, 1993

House Judiciary Committee's Subcommittee on Intellectual Property and Court Administration held hearings on the proposed rule change.

Many who had criticized the rule before the Advisory Committee now made the same criticisms before Congress.[20]

American Bar Association urged Congress to defer implementation of the disclosure rule until after the CJRA experiments had concluded.[21]

Department of Justice, in a reversal of its earlier position under the Bush administration, suggested that a rule mandating disclosure was not prudent or in the best interest of the United States and that proposed Rule 26(a)(1) should be deleted from the pending amendments.[22]

July 28, 1993

Senate Judiciary Subcommittee on Courts and Administrative Practice held a hearing

Witnesses who testified were very similar to those who testified at the June 16 House hearing.[23]

July 30, 1993

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[19] William J. Hughes, *Congressional Reaction to the 1993 Amendments to the Federal Rules of Civil Procedure*, 18 SETON HALL LEGISLATIVE JOURNAL 1 (1993).
[20] Linda Mullenix, *Should Congress Decide Civil Rules?; No, Not a Subject to Wheel 'N Deal,* NATIONAL LAW JOURNAL, November 22, 1993.
[21] Letter from Michael McWilliams, president, American Bar Association to Sen. Howell T. Heflin, D-Ala., chairman, Subcommittee on Courts and Administrative Practice, Senate Committee on the Judiciary (June 23, 1993).
[22] Letter from Associate Attorney General Webster L. Hubbell, to Rep. William J. Hughes, chairman, Subcommittee on Intellectual Property and Judicial Administration of the House Judiciary Committee, (June 25, 1993).
[23] Hughes, supra note 19, at 9.

Reps. William J. Hughes, D-NJ, and Carlos J. Moorehead, R-Calif, co-sponsored the introduction of H.R. 2814 to modify the pending amendments to the federal rules by deleting the mandatory disclosure rule of Rule 26(a)(1).[24]

August 5, 1993

Subcommittee on Intellectual Property and Judicial Administration of the House Judiciary Committee favorably reported H.R. 2814 by unanimous vote, without amendment.[25]

October 6, 1993

House Judiciary Committee unanimously approved H.R. 2814 and ordered it favorably reported without amendment to the full House of Representatives.[26]

November 3, 1993

The House of Representatives passed H.R. 2814 on a voice vote.[27]

November 20, 1993

At least partly in response to plaintiffs and civil rights attorneys who encouraged the Senate to amend H.R. 2814 by adding a provision that would cancel the presumptive limits on depositions and interrogatories in the proposed rules, Senator Howard Metzenbaum, D-Ohio, blocked Senate action on H.R. 2814.[28]

November 24, 1993

Senate adjourned.

December 1, 1993

Rule 26(a)(1) as originally proposed went into effect.

The Advisory Committee Note that went along with the 1993 rule read as follows:

"A major purpose of the revision is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information, and the rule should be applied in a manner to achieve those objectives. The concepts of imposing a duty of disclosure were set forth in Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 *Vand. L. Rev*. 1348 (1978), and Schwarzer, *The*

[24] Cortese, *supra* note 4.
[25] Trembly, *supra* note 2, at 445.
[26] Cortese, *supra* note 4.
[27] Randall Samborn, *Bill to Stop Change Dies; New Discovery Rules Take Effect*, NATIONAL LAW JOURNAL, December 6, 1993.
[28] *Id*.; *see also* Hughes, supra note 19, at 10; and Carrington, supra note 8, at 309.

Federal Rules, the Adversary Process, and Discovery Reform, 50 *U. Pitt. L. Rev*. 703, 721–23 (1989).

The rule is based upon the experience of district courts that have required disclosure of some of this information through local rules, court-approved standard interrogatories, and standing orders. Most have required pretrial disclosure of the kind of information described in Rule 26(a)(3). Many have required written reports from experts containing information like that specified in Rule 26(a)(2)(B). While far more limited, the experience of the few state and federal courts that have required pre-discovery exchange of core information such as is contemplated in Rule 26(a)(1) indicates that savings in time and expense can be achieved, particularly if the litigants meet and discuss the issues in the case as a predicate for this exchange and if a judge supports the process, as by using the results to guide further proceedings in the case. Courts in Canada and the United Kingdom have for many years required disclosure of certain information without awaiting a request from an adversary."

District Court Opt-Outs

March 30, 1998

By this date, 45 out of 94 district courts had opted out of 26(a)(1). 3 of these district courts, however, had similar initial disclosure rules under local rule or the CJRA, and 18 permitted the judge to order initial disclosure in a specific case.[29]

Abandonment of Rule

June 19, 1998

Standing Committee approved for public comment amendment to Rule 26(a)(1) which removed the mandatory disclosure requirement.

December 1, 2000

The revised Rule 26(a)(1) without the 1993 mandatory initial disclosure requirement went into effect.

[29] Donna Stienstra, *Implementation of Disclosure in United States District Courts, With Specific Attention to Courts' Responses to Selected Amendments to Federal Rule of Civil Procedure 26* (Federal Judicial Center, March 30, 1998).

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EX. 6

126-002015

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MEMORANDUM

To: Pilot Project Subcommittee

From: Paul W. Grimm

Re: Surveys on Initial Disclosures and Articles from 1997 Boston College Discovery Meeting

BACKGROUND

In 1996, Judge Paul Niemeyer, Chair of the Civil Rules Advisory Committee ("Committee''), decided that a comprehensive examination of the civil discovery rules was needed. He created the discovery subcommittee, and Judge (now Dean) David Levi was appointed chair of the subcommittee, Professor Rick Marcus became its reporter. The Discovery subcommittee organized a meeting at Boston College Law School in September, 1997 to receive "data opinions, ideas and proposals in preparation for the Committee's reexamination."[1]

Part of the examination included assessing various reforms and rule changes adopted following the passage of the Civil Justice Reform Act ("CJRA") in 1990. One of the discovery reforms adopted was the use of Initial Disclosures in advance of formal discovery. Specifically, Pilot Districts were created in the wake of the CJRA to try various methods of reducing discovery cost and burden, and Initial Disclosures were used in these Pilot Districts. Many modeled their Initial Disclosures on proposed amendments to the civil rules published by the Committee in 1991[2]. Those proposed Initial Disclosures required "initial disclosure of the identity of any witness or document with information 'that bears significantly on any claim or defense', and all other discovery was precluded until the disclosure was made.[3] The reaction to the Committee's 1991 proposed Initial Disclosure rule was a "flood of objections unprecedented in fifty plus years of rule-making."[4] The Committee's response was to propose (and adopt in 1993) a revised approach to Initial Disclosures. "It permitted any district to opt out, and permitted the parties to stipulate not to disclose. Additionally, although disclosure would apply to the full scope of discovery, it would only apply as to disputed facts alleged with particularity, thereby reducing the burden resulting from vague complaints."[5]

Papers that were submitted to the Committee in connection with the Boston College Law School discovery conference were published in the Boston College Law Review. Papers were submitted by the RAND Corporation regarding its study of CJRA reforms[6], as well as by the FJC examining the Initial Disclosures adopted by the 1993 changes to the civil rules.[7] Paradoxically, the RAND and FJC reports appeared to reach diametrically opposite conclusions on the value of Initial Disclosures to reduce discovery delay and expense, which may be explained by the fact that "the FJC and RAND projects investigated the mandatory disclosure rule as it had been developed and used in two different time periods. Thus, RAND studied the use of this procedure in federal courts under the authority of CJRA plans, beginning in 1991, while the FJC studied the use of the rule after the 1993 federal rule amendment."[8]

THE RAND STUDY

The RAND study focused on 5222 cases filed from 1992-1993 in twenty federal districts. Surveys were sent to the judges and lawyers involved in the cases, and their responses used to analyze the effectiveness of various CJRA remedial proposals.[9] The RAND study excluded cases typically requiring little management (prisoner cases, Social Security appeals, bankruptcy appeals, foreclosure cases, forfeiture and penalty cases, and debt recovery cases).[10] The FJC study analyzed 1000 closed cases in the last quarter of 1996, and surveys were sent to 2000 lawyers identified from the cases. The FJC study also excluded cases that involved little or no discovery (Social Security appeals, student loan collections, foreclosures, default judgments, and cases terminated within sixty days of filing).[11]

With respect to Initial Disclosures, RAND concluded

> "[o]ur data and analyses do not support strongly the policy of mandatory early disclosure as a means of significantly reducing lawyer work hours and thereby reducing the costs of litigation, or as a means of reducing time to disposition. We find that cases in districts with some type of *mandatory disclosure policy* had lawyer work hours and time to disposition that are not significantly different from cases in districts without any type of mandatory disclosure policy. Regardless of whether or not early disclosure actually occurs, cases from districts with mandatory early disclosure policies tend to have similar estimated lawyer work hours as cases from districts without a mandatory disclosure policy that had no early disclosure."[12]

Further, the study found that when subsets of cases were analyzed based on "stakes, complexity and discovery difficulty" "no strong evidence [was found] that a policy of early mandatory disclosure reduced lawyer work time or time to disposition on any of the subsets of cases examined."[13]

RAND did note that their disappointing findings regarding the effectiveness of Initial Disclosures did not apply for one particular type of Initial Disclosure, observing

> "[i]t should be noted, however, that in our main evaluation report we found that attorney work hours were significantly lower for the three districts that had a particular type of mandatory disclosure: *early mandatory disclosure of information bearing on both sides of the dispute*. With only three districts using this particular type of mandatory disclosure policy however, it is difficult to generalize this statistical finding."[14]

THE FJC STUDY

In contrast, the findings in the FJC study regarding Initial Disclosures were considerably more encouraging. It concluded

> "[i]n general, initial disclosure appears to be having its intended effects. Among those attorneys who believed there was an impact, the effects were most often of the type intended by the drafters of the 1993 amendments. Far more attorneys reported that initial disclosure decreased litigation expense, time from filing to disposition, the amount of discovery, and the number of discovery disputes than said it increased them."[15]

Further, the FJC Study stated "[w]e found a statistically significant difference in the disposition time of cases with disclosure compared to cases without disclosure. Holding all variables constant, those with disclosure terminated more quickly. This finding corroborates attorneys' evaluations of the effects of initial disclosure on case duration."[16]

Not all findings in the FJC Study were rosy, however. It cautioned

> "[a]lthough attorneys' assessment of initial disclosure was mostly positive, more than a third of the attorneys . . . who participated in initial disclosure identified one or more problems with the process . . . . The most frequently identified problem was too brief or incomplete disclosure . . . . Relatively few attorneys reported that disclosure requirements led to motions to compel, motions for sanctions, or other satellite litigation. **Problems in initial disclosure arose more frequently in cases involving large stakes and high expenses or that were characterized as complex or contentious.**"[17]

Why did Rand and the FJC draw such different conclusions about the effectiveness of Initial Disclosures? The answer may lie in the fact that the RAND study examined Initial Disclosures patterned after the 1991 (much criticized) draft Initial Disclosure rule proposed, but later abandoned, by the Committee. Further, the cases analyzed were filed in 1992-93, when lawyer experience with Initial Disclosures was minimal. Finally, as noted, only three of the twenty courts that had adopted Initial Disclosures had versions that required disclosures on "both sides" of the litigation (i.e. "hurtful" as well as "helpful"), and for those that did, the conclusions drawn were closer to those of the FJC study.

FOOD FOR THOUGHT

As we draw insight from the efforts of those who preceded us in the efforts to adopt meaningful Initial Disclosures, we should keep in mind an important question. Should Initial Disclosures be required for all cases, or only certain cases? Both the RAND and FJC studies eliminated categories of cases that comprise a significant number of the cases filed in federal court, and current Rule 26(a)(1)(B) excludes nine categories of cases from Initial Disclosures. In determining the types of cases to include in an Initial Disclosure pilot project, we should bear in mind that

> "[f]ormal discovery actually occurs in fewer cases than uninformed observers might estimate. In the 1978 Federal Judicial Center . . . study of more than 3000 federal civil cases sampled from six metropolitan districts . . . [the researchers] found that 72% of the cases had no more than two discovery events, with no formal discovery at all in 52% of the cases. In the Civil Litigation Research Project . . . which included state and federal cases . . . [the researchers] found recorded discovery events in slightly fewer than one-half of cases. More recent evidence from state courts suggests that this pattern continues to hold: a 1998 National Center for State Courts. . . study found that no formal discovery occurred in 42% of . . . cases sampled from five general jurisdiction courts in four states."[18]

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Similarly, "[t]he following statistics have remained true, no matter how much or in what manner the rulemakers have tinkered with the rules. First, there is no discovery in anywhere from 38% (RAND) to approximately 50% (FJC) of civil cases. No discovery. The RAND data here is especially interesting. For fully half of their survey cases—cases that 'close' within nine months—the median time lawyers report spending on discovery is only three hours".[19] Another article submitted for the 1997 Boston College conference observed

> "[t]he recent studies of civil discovery by the RAND Institute . . . and the Federal Judicial Center . . . establish beyond any reasonable doubt that we have two very distinct worlds of civil discovery. These worlds involve different kinds of cases, financial stakes, contentiousness, complexity and . . . probably even lawyers. The ordinary cases, which represent the overwhelming number, pass through the courts relatively cheaply with few discovery problems. The high-stakes, high conflict cases, in contrast, raise many more problems and involve much higher stakes. It is therefore essential to understand the distinction and to try to explain why it operates."[20]

Moreover, "[over] half of the RAND sample—which excluded 'minimal management cases' . . . involved little or no discovery on the way to some kind of resolution. Overall, as the report states, 'lawyer work hours are zero for 38 percent of general civil cases, and low for the majority of cases.'"[21] If 38-50% of all general civil cases filed in federal court (not counting the kinds of cases that already are exempt from initial disclosure) resolve with no discovery at all, will we impose discovery costs by requiring disclosures that otherwise would not be incurred? And, if we limit Initial Disclosures to the more "high-stakes" and contentious cases, what will be gained from doing so if, as the FJC study concluded "[p]roblems in initial disclosure arose more frequently in cases involving large stakes and high expenses or that were characterized as complex or contentious"?[22] We need to have a clear idea what we gain from Initial Disclosures by thinking through how they would apply in a variety of hypothetical (but realistic) cases to see what we gain by requiring them. Only then are we able to design a pilot that will yield helpful information.

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[1] Niemeyer, *Here We Go Again: Are the Federal Discovery Rules Really in Need of Amendment*? 39 B.C. L. Rev. 517, 521 (1998)
[2] Marcus, *Discovery Containment Redux*, 39 B.C. L. Rev. 747 (1998)
[3] Id. at 767.
[4] Id.
[5] Id. at 767.
[6] Kakalik, et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. Rev. 613 (1998) (hereinafter the "RAND Study").
[7] Willging, et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. Rev. 525 (1998) (hereinafter, the "FJC Study").
[8] Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. Rev. 683 (1998).
[9] Garth, *Two Worlds of Civil Discovery: From Studies of Cost and Delay to the Markets in Legal Services and Legal Reform*, 39. B.C. L. Rev. 597, 599 (1998).
[10] Id.

[11] Id.
[12] RAND Study, supra, note vi at 677 (emphasis in original text).
[13] Id. at 678.
[14] Id. at 679 (emphasis in original text).
[15] FJC Study, supra note vii at 534-5.
[16] Id. at 535.
[17] Id. at 535 (emphasis added).
[18] McKenna, et al., *Empirical Research on Civil Discovery*, 39 B.C. L. Rev. 785, 790 (1998).
[19] Supra, note viii at 684.
[20] Supra, note ix at 597.
[21] Id. at 600.
[22] Supra, note xvii.

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EX. 7

126-002023

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126-002024

To: Judge Campbell

Cc: Rebecca Womeldorf

From: Amelia Yowell, Supreme Court Fellow

Date: December 13, 2015

RE: State Initial Disclosure Models

The Pilot Projects Subcommittee asked me to compile information about states with robust initial disclosure rules. I found seven states with initial disclosure rules that I thought would be helpful to the Subcommittee as it drafts a possible pilot program (Alaska, Arizona, Colorado, Nevada, New Hampshire, Texas, and Utah). I have provided a summary of these states' initial disclosure rules in the attached table, which I hope will provide a quick and easy way to compare the rules. Because I have simplified the rules for space and ease of comparison, I have linked each section of the table to the text of the relevant state rule.[1] If the Subcommittee thinks it would be helpful, I am happy to do additional research or analysis.

[1] You can access the text of the rule by clicking anywhere on a state's section in the table. The links are invisible. To get back to the main table, go to the bookmark bar on the left side of the PDF and click on "AGY Table."

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TABLE COMPARING SELECTED STATE INITIAL DISCLOSURE RULES

	Scope of Disclosure	List or Summary re Individuals	Produce or Identify Docs, ESI, data compilations, tangible things	Damages	Insurance Agreements
Federal **Fed. R. Civ. P. 26(a)(1)**	Helpful information (but not impeachment information)	Name, address, and telephone number and subject	A copy or description by category and location, limited to possession, custody, or control	A computation of each category and documents/material must be available for inspection or copying	Inspection and copying
New Hampshire **N.H. Superior Court Civ. R. 22(a)**	Helpful information (but not impeachment information)	Name, address, and telephone number and summary (unless the information is in a produced document)	A copy, limited to possession, custody, or control	A computation of each category and a copy of documents/materials	Inspection and copying
Nevada **Nev. R. Civ. P. 16.1(a)(1), 26(b)(1)**	Helpful and hurtful information, including impeachment *"Relevant to the subject matter"*	Name, address, and telephone number and subject	A copy or description by category and location, limited to possession, custody or control	A computation of any category and documents/materials must be available for inspection and copying	Inspection and copying
Alaska **Alaska R. Civ. P. 26(a)(1)**	The factual basis for each claim or defense Helpful and hurtful information	Name, address, and telephone number and subject	For relevant documents, a copy or a description by category and a copy of any un-privileged	List categories of damages and a computation of each category of special damages and	Produce a copy

	"Relevant to disputed facts alleged with particularity in the pleadings"		statements or the name, address, and telephone number of the custodian of the statement and photos, diagrams, and videotapes	documents/materials must be available for inspection or copying	
Colorado **Colo. R. Civ. P. 26(a)(1)**	Helpful and hurtful information *Relevant to the claims and defenses of any party"*	Name, address, and telephone number and "brief description"	A listing and a copy or description by category and location, limited to possession, custody, or control and make available for inspection and copying	A description of the categories and a computation of economic damages and relevant documents/materials must be available for inspection or copying	Inspection and copying
Utah **Utah R. Civ. P. 26(a)(1)**	For individuals: helpful information (but not impeachment information) and each fact witness the party may call in its case-in-chief For documents: any referred to in the pleadings and any the party may offer in its case-in-chief (but not charts, summaries,	Name, address, and telephone number and subject and, if an expected fact witness, a summary	A copy, limited to possession or control of the party	A computation of any damages claimed and a copy of documents/materials	Produce a copy

	and demonstrative exhibits)				
Arizona **Ariz. R. Civ. P. 26.1(a)**	The factual basis and legal theory for each claim or defense For individuals: helpful and hurtful information (*knowledge or information relevant to the events, transactions, or occurrences*) and witnesses the party intends to call at trial and all persons who have given statements (written, recorded, signed, or unsigned) and anticipated expert witnesses For documents, etc.: any the party plans to use at trial and helpful and hurtful documents (*relevant to the subject matter*), and those reasonably calculated to lead to the discovery of admissible evidence	Names, address, and telephone number and nature and, for witnesses expected at trial, a fair description of the substance of the testimony and, for witnesses who have given a statement, the identity of the custodian of the copies and, for expert witnesses, the subject matter, the facts and opinions, a summary of the grounds for the opinions, the expert's qualification, and the name and address of the custodian of the expert's reports	For documents expected to be used at trial, "the existence, location, custodian, and general description," and for relevant documents, a list or, in the case of voluminous information, a list of the categories known to exist (no possession, custody, or control limitation) and unless good cause, a copy	A computation of damages and a copy of the documents/materials and the names, addresses, and telephone numbers of all damage witnesses	List existence, location, custodian, and general description

Texas **Tex. R. Civ. P. 194.2** **(NOT MANDATORY)**	Factual basis and legal theories for claims or defenses (but not all evidence that may be offered at trial) Helpful and hurtful information "*Relevant facts*"	Name, address, and telephone number and a brief statement of connection and for expert witnesses, the subject matter, general substance of impressions and opinions, brief summary of the basis, or documents reflecting the information (if not subject to the control of the party)	A copy of any witness statements and for experts controlled by the party, a copy of everything provided to, reviewed by, or prepared by or for the expert and the expert's current resume and bibliography	The amount and method of calculating economic damages and, if physical or mental injury, all medical records and bills reasonably related or authorization permitting disclosure	A copy

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title V. Disclosures and Discovery (Refs & Annos)

Federal Rules of Civil Procedure Rule 26

Rule 26. Duty to Disclose; General Provisions Governing Discovery

Currentness

<Notes of Decisions for 28 USCA Federal Rules of Civil Procedure Rule 26 are displayed in two separate documents. Notes of Decisions for subdivisions I to III are contained in this document. For Notes of Decisions for subdivisions IV to end, see second document for 28 USCA Federal Rules of Civil Procedure Rule 26.>

(a) Required Disclosures.

(1) ***Initial Disclosure.***

(A) *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information--along with the subjects of that information--that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy--or a description by category and location--of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party--who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(B) *Proceedings Exempt from Initial Disclosure.* The following proceedings are exempt from initial disclosure:

(i) an action for review on an administrative record;

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(ii) a forfeiture action in rem arising from a federal statute;

(iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

(iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(v) an action to enforce or quash an administrative summons or subpoena;

(vi) an action by the United States to recover benefit payments;

(vii) an action by the United States to collect on a student loan guaranteed by the United States;

(viii) a proceeding ancillary to a proceeding in another court; and

(ix) an action to enforce an arbitration award.

(C) *Time for Initial Disclosures--In General.* A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(D) *Time for Initial Disclosures--For Parties Served or Joined Later.* A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(E) *Basis for Initial Disclosure; Unacceptable Excuses.* A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) ***Disclosure of Expert Testimony.***

(A) *In General*. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) *Witnesses Who Must Provide a Written Report*. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report--prepared and signed by the witness--if the witness is one retained or specially

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employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) *Witnesses Who Do Not Provide a Written Report*. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) *Time to Disclose Expert Testimony*. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) *Supplementing the Disclosure*. The parties must supplement these disclosures when required under Rule 26(e).

(3) ***Pretrial Disclosures.***

(A) *In General*. In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

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(i) the name and, if not previously provided, the address and telephone number of each witness--separately identifying those the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence--separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) *Time for Pretrial Disclosures; Objections.* Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made--except for one under Federal Rule of Evidence 402 or 403--is waived unless excused by the court for good cause.

(4) ***Form of Disclosures.*** Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

(b) Discovery Scope and Limits.

(1) ***Scope in General.*** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

(2) ***Limitations on Frequency and Extent.***

(A) *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) *Specific Limitations on Electronically Stored Information.* A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

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(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

(3) ***Trial Preparation: Materials.***

(A) *Documents and Tangible Things*. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection Against Disclosure*. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) *Previous Statement*. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording--or a transcription of it--that recites substantially verbatim the person's oral statement.

(4) ***Trial Preparation: Experts.***

(A) *Deposition of an Expert Who May Testify*. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

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(B) *Trial-Preparation Protection for Draft Reports or Disclosures*. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses*. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(D) *Expert Employed Only for Trial Preparation*. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) *Payment*. Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and

(ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) ***Claiming Privilege or Protecting Trial-Preparation Materials.***

(A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

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(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed--and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) *Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) Protective Orders.

(1) ***In General.*** A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending -- or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) ***Ordering Discovery.*** If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

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(3) ***Awarding Expenses.*** Rule 37(a)(5) applies to the award of expenses.

(d) Timing and Sequence of Discovery.

(1) ***Timing.*** A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) ***Early Rule 34 Requests.***

(A) Time to Deliver. More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:

(i) to that party by any other party, and

(ii) by that party to any plaintiff or to any other party that has been served.

(B) ***When Considered Served***. The request is considered to have been served at the first Rule 26(f) conference.

(3) ***Sequence.*** Unless the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

(e) Supplementing Disclosures and Responses.

(1) ***In General.*** A party who has made a disclosure under Rule 26(a)--or who has responded to an interrogatory, request for production, or request for admission--must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

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(2) ***Expert Witness.*** For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

(f) Conference of the Parties; Planning for Discovery.

(1) ***Conference Timing.*** Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable--and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).

(2) ***Conference Content; Parties' Responsibilities.*** In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) ***Discovery Plan.*** A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including -- if the parties agree on a procedure to assert these claims after production -- whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

(4) ***Expedited Schedule.*** If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule:

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(A) require the parties' conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b); and

(B) require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

(1) ***Signature Required; Effect of Signature.*** Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name--or by the party personally, if unrepresented--and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) ***Failure to Sign.*** Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) ***Sanction for Improper Certification.*** If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; January 21, 1963, effective July 1, 1963; February 28, 1966, effective July 1, 1966; March 30, 1970, effective July 1, 1970; April 29, 1980, effective August 1, 1980; April 28, 1983, effective August 1, 1983; March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; April 17, 2000, effective

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December 1, 2000; April 12, 2006, effective December 1, 2006; April 30, 2007, effective December 1, 2007; April 28, 2010, effective December 1, 2010; April 29, 2015, effective December 1, 2015.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Note to Subdivision (a). This rule freely authorizes the taking of depositions under the same circumstances and by the same methods whether for the purpose of discovery or for the purpose of obtaining evidence. Many states have adopted this practice on account of its simplicity and effectiveness, safeguarding it by imposing such restrictions upon the subsequent use of the deposition at the trial or hearing as are deemed advisable. See Ark.Civ.Code (Crawford, 1934) §§ 606 to 607; Calif.Code Civ.Proc. (Deering, 1937) § 2021; 1 Colo.Stat.Ann. (1935) Code Civ.Proc. § 376; Idaho Code Ann. (1932) § 16-906; Ill.Rules of Pract.Rule 19 (Smith-Hurd Ill.Stats. c. 110, § 259.19); Smith-Hurd Ill.Stats. c. 51, § 24; 2 Ind.Stat.Ann. (Burns, 1933) §§ 2-1501, 2-1506; Ky.Codes (Carroll, 1932) Civ.Pract. § 557; 1 Mo.Rev.Stat. (1929) § 1753; 4 Mont.Rev.Codes Ann. (1935) § 10645; Neb.Comp.Stat. (1929) ch. 20, §§ 1246-7; 4 Nev.Comp.Laws (Hillyer, 1929) § 9001; 2 N.H.Pub.Laws (1926) ch. 337, § 1; N.C.Code Ann. (1935) § 1809; 2 N.D.Comp.Laws Ann. (1913) §§ 7889 to 7897; 2 Ohio Gen.Code Ann. (Page, 1926) §§ 11525-6; 1 Ore.Code Ann. (1930) Tit. 9, § 1503; 1 S.D.Comp.Laws (1929) §§ 2713-16; Vernon's Ann.Civ.Stats.Tex. arts. 3738, 3752, 3769; Utah Rev.Stat.Ann. (1933) § 104-51-7; Wash.Rules of Practice adopted by the Supreme Ct., Rule 8, 2 Wash.Rev.Stat.Ann. (Remington, 1932) § 308-8; W.Va.Code (1931) ch. 57, art. 4, § 1. Compare [former] Equity Rules 47 (Depositions--To be Taken in Exceptional Instances); 54 (Depositions Under Revised Statutes, §§ 863, 865, 866, 867--Cross Examination); 58 (Discovery--Interrogatories--Inspection and Production of Documents--Admission of Execution or Genuineness).

This and subsequent rules incorporate, modify, and broaden the provisions for depositions under U.S.C., Title 28, [former] §§ 639 (Depositions *de bene esse;* when and where taken; notice), 640 (Same; mode of taking), 641 (Same; transmission to court), 644 (Depositions under *dedimus potestatem* and *in perpetuam*), 646 (Deposition under *dedimus potestatem*; how taken). These statutes are superseded in so far as they differ from this and subsequent rules. U.S.C. Title 28, [former] § 643 (Depositions; taken in mode prescribed by State laws) is superseded by the third sentence of Subdivision (a).

While a number of states permit discovery only from parties or their agents, others either make no distinction between parties or agents of parties and ordinary witnesses, or authorize the taking of ordinary depositions, without restriction, from any persons who have knowledge of relevant facts. See Ark.Civ.Code (Crawford, 1934) §§ 606 to 607; 1 Idaho Code Ann. (1932) § 16-906; Ill.Rules of Pract., Rule 19 (Smith-Hurd Ill.Stats. c. 110, § 259.19); Smith-Hurd Ill.Stats. c. 51, § 24; 2 Ind.Stat.Ann. (Burns, 1933) § 2-1501; Ky.Codes (Carroll, 1932) Civ.Pract. §§ 554 to 558; 2 Md.Ann.Code (Bagby, 1924) Art. 35, § 21; 2 Minn.Stat. (Mason, 1927) § 9820; Mo.St.Ann. §§ 1753, 1759, pp. 4023, 4026; Neb.Comp.Stat. (1929) ch. 20, §§ 1246-7; 2 N.H.Pub.Laws (1926) ch. 337, § 1; 2 N.D.Comp.Laws Ann. (1913) § 7897; 2 Ohio Gen.Code Ann. (Page, 1926) §§ 11525-6; 1 S.D.Comp.Laws (1929) §§ 2713-16; Vernon's Ann.Civil Stats.Tex. arts. 3738, 3752, 3769; Utah Rev.Stat.Ann. (1933) § 104-51-7; Wash.Rules of Practice adopted by Supreme Ct., Rule 8, 2 Wash.Rev.Stat.Ann. (Remington, 1932) § 308-8; W.Va.Code (1931) ch. 57, art. 4, § 1.

The more common practice in the United States is to take depositions on notice by the party desiring them, without any order from the court, and this has been followed in these rules. See Calif.Code Civ.Proc. (Deering, 1937) § 2031; 2 Fla.Comp.Gen.Laws Ann. (1927) §§ 4405-7; 1 Idaho Code Ann. (1932) § 16-902; Ill.Rules of Pract., Rule 19 (Smith-Hurd Ill.Stats. c. 110, § 259.19); Smith-Hurd Ill.Stats. c. 51, § 24; 2 Ind.Stat.Ann. (Burns, 1933) § 2-1502; Kan.Gen.Stat.Ann. (1935) § 60-2827; Ky.Codes (Carroll, 1932) Civ.Pract. § 565; 2 Minn.Stat. (Mason, 1927) § 9820; Mo.St.Ann. § 1761, p. 4029; 4 Mont.Rev.Codes Ann. (1935) § 10651; Nev.Comp.Laws (Hillyer, 1929) § 9002; N.C.Code Ann. (1935) § 1809; 2 N.D.Comp.Laws Ann. (1913) § 7895; Utah Rev.Stat.Ann. (1933) § 104-51-8.

Note to Subdivision (b). While the old chancery practice limited discovery to facts supporting the case of the party seeking it, this limitation has been largely abandoned by modern legislation. See Ala.Code Ann. (Michie, 1928) §§ 7764 to 7773; 2

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Ind.Stat.Ann. (Burns, 1933) §§ 2-1028, 2-1506, 2-1728-2-1732; Iowa Code (1935) § 11185; Ky.Codes (Carroll, 1932) Civ.Pract. §§ 557, 606(8); La.Code Pract. (Dart, 1932) arts. 347-356; 2 Mass.Gen.Laws (Ter.Ed., 1932) ch. 231, §§ 61 to 67; Mo.St.Ann. §§ 1753, 1759, pp. 4023, 4026; Neb.Comp.Stat. (1929) §§ 20-1246, 20-1247; 2 N.H.Pub.Laws (1926) ch. 337, § 1; 2 Ohio Gen.Code Ann. (Page, 1926) §§ 11497, 11526; Vernon's Ann.Civ.Stats.Tex. arts. 3738, 3753, 3769; Wis.Stat. (1935) § 326.12; Ontario Consol.Rules of Pract. (1928) Rules 237-347; Quebec Code of Civ.Proc. (Curran, 1922) §§ 286 to 290.

Note to Subdivisions (d), (e), and (f). The restrictions here placed upon the use of depositions at the trial or hearing are substantially the same as those provided in U.S.C., Title 28, [former] § 641, for depositions taken, *de bene esse*, with the additional provision that any deposition may be used when the court finds the existence of exceptional circumstances. Compare English Rules Under the Judicature Act (The Annual Practice, 1937) O. 37, r. 18 (with additional provision permitting use of deposition by consent of the parties). See also [former] Equity Rule 64 (Former Depositions, Etc. May be Used Before Master); and 2 Minn.Stat. (Mason, 1927) § 9835 (Use in a subsequent action of a deposition filed in a previously dismissed action between the same parties and involving the same subject matter).

1946 Amendment

Note. Subdivision (a). The amendment eliminates the requirement of leave of court for the taking of a deposition except where a plaintiff seeks to take a deposition within 20 days after the commencement of the action. The retention of the requirement where a deposition is sought by a plaintiff within 20 days of the commencement of the action protects a defendant who has not had an opportunity to retain counsel and inform himself as to the nature of the suit; the plaintiff, of course, needs no such protection. The present rule forbids the plaintiff to take a deposition, without leave of court, before the answer is served. Sometimes the defendant delays the serving of an answer for more than 20 days, but as 20 days are sufficient time for him to obtain a lawyer, there is no reason to forbid the plaintiff to take a deposition without leave merely because the answer has not been served. In all cases, Rule 30(a) empowers the court, for cause shown, to alter the time of the taking of a deposition, and Rule 30(b) contains provisions giving ample protection to persons who are unreasonably pressed. The modified practice here adopted is along the line of that followed in various states. See e.g., 8 Mo.Rev.Stat.Ann.1939, § 1917; 2 Burns' Ind.Stat.Ann.1933, § 2-1506.

Subdivision (b). The amendments to subdivision (b) make clear the broad scope of examination and that it may cover not only evidence for use at the trial but also inquiry into matters in themselves inadmissible as evidence but which will lead to the discovery of such evidence. The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case. *Engl v. Aetna Life Ins. Co.*, C.C.A.2, 1943, 139 F.2d 469; *Mahler v. Pennsylvania R. Co.*, E.D.N.Y.1945, 8 Fed.Rules Serv. 33.351, Case 1. In such a preliminary inquiry admissibility at trial should not be the test as to whether the information sought is within the scope of proper examination. Such a standard unnecessarily curtails the utility of discovery practice. Of course, matters entirely without bearing either as direct evidence or as leads to evidence are not within the scope of inquiry, but to the extent that the examination develops useful information, it functions successfully as an instrument of discovery, even if it produces no testimony directly admissible. *Lewis v. United Air Lines Transportation Corp.*, D.Conn.1939, 27 F.Supp. 946; *Engl v. Aetna Life Ins. Co.*, supra; *Mahler v. Pennsylvania R. Co.*, supra; *Bloomer v. Sirian Lamp Co.*, D.Del.1944, 8 Fed.Rules Serv. 26b.31, Case 3; *Rosseau v. Langley*, N.Y.1945, 9 Fed.Rules Serv. 34.41, Case 1 (Rule 26 contemplates "examinations not merely for the narrow purpose of adducing testimony which may be offered in evidence but also for the broad discovery of information which may be useful in preparation for trial."); *Olson Transportation Co. v. Socony-Vacuum Co.*, E.D.Wis.1944, 8 Fed.Rules Serv. 34.41, Case 2 (". . . the Rules . . . permit 'fishing' for evidence as they should."); Note, 1945, 45 Col.L.Rev. 482. Thus hearsay, while inadmissible itself, may suggest testimony which properly may be proved. Under Rule 26(b) several cases, however, have erroneously limited discovery on the basis of admissibility, holding that the word "relevant" in effect meant "material and competent under the rules of evidence". *Poppino v. Jones Store Co.*, W.D.Mo.1940, 1 F.R.D. 215, 3 Fed.Rules Serv. 26b.5, Case 1; *Benevento v. A. & P. Food Stores, Inc.*, E.D.N.Y.1939, 26 F.Supp. 424. Thus it has been said that inquiry might not be made into statements or other matters which, when disclosed, amounted only to hearsay. *See Maryland for use of Montvila v. Pan-American Bus Lines, Inc.*, D.Md.1940, 1 F.R.D. 213, 3 Fed.Rules Serv. 26b.211, Case 3; *Gitto v. "Italia," Societa Anonima Di Navigazione*, E.D.N.Y.1940, 31 F.Supp. 567; *Rose Silk Mills, Inc. v. Insurance Co. of North America*, S.D.N.Y.1939, 29 F.Supp. 504; *Colpak*

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v. Hetterick, E.D.N.Y.1941, 40 F.Supp. 350; *Matthies v. Peter F. Connolly Co.,* E.D.N.Y.1941, 6 Fed.Rules Serv. 30a.22, Case 1, 2 F.R.D. 277; *Matter of Examination of Citizens Casualty Co. of New York,* S.D.N.Y.1942, 3 F.R.D. 171, 7 Fed.Rules Serv. 26b.211, Case 1; *United States v. Silliman,* D.C.N.J.1944, 8 Fed.Rules Serv. 26b.52, Case 1. The contrary and better view, however, has often been stated. See, e.g., *Engl v. Aetna Life Ins. Co.,* supra; *Stevenson v. Melady,* S.D.N.Y.1940, 3 Fed.Rules Serv. 26b.31, Case 1, 1 F.R.D. 329; *Lewis v. United Air Lines Transport Corp.,* supra; *Application of Zenith Radio Corp.,* E.D.Pa.1941, 4 Fed.Rules Serv. 30b.21, Case 1, 1 F.R.D. 627; *Steingut v. Guaranty Trust Co. of New York,* S.D.N.Y.1941, 1 F.R.D. 723, 4 Fed.Rules Serv. 26b.5, Case 2; *DeSeversky v. Republic Aviation Corp.,* E.D.N.Y.1941, 2 F.R.D. 183, 5 Fed.Rules Serv. 26b.31, Case 5; *Moore v. George A. Hormel & Co.,* S.D.N.Y.1942, 6 Fed.Rules Serv. 30b.41, Case 1, 2 F.R.D. 340; *Hercules Powder Co. v. Rohm & Haas Co.,* D.Del.1943, 7 Fed.Rules Serv. 45b.311, Case 2, 3 F.R.D. 302; *Bloomer v. Sirian Lamp Co.,* supra; *Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc.,* D.Mass.1944, 8 Fed.Rules Serv. 26b.31, Case 1; *Patterson Oil Terminals, Inc. v. Charles Kurz & Co., Inc.,* E.D.Pa.1945, 9 Fed.Rules Serv. 33.321, Case 2; *Pueblo Trading Co. v. Reclamation Dist. No. 1500,* N.D.Cal.1945, 9 Fed.Rules Serv. 33.321, Case 4, 4 F.R.D. 471. See also discussion as to the broad scope of discovery in *Hoffman v. Palmer,* C.C.A.2, 1942, 129 F.2d 976, 995-997, affirmed 63 S.Ct. 477, 318 U.S. 109, 87 L.Ed. 645; Note, 1945, 45 Col.L.Rev. 482.

1963 Amendment

This amendment conforms to the amendment of Rule 28(b). See the next-to-last paragraph of the Advisory Committee's Note to that amendment.

1966 Amendment

The requirement that the plaintiff obtain leave of court in order to serve notice of taking of a deposition within 20 days after commencement of the action gives rise to difficulties when the prospective deponent is about to become unavailable for examination. The problem is not confined to admiralty, but has been of special concern in that context because of the mobility of vessels and their personnel. When Rule 26 was adopted as Admiralty Rule 30A in 1961, the problem was alleviated by permitting depositions *de bene esse,* for which leave of court is not required. See Advisory Committee's Note to Admiralty Rule 30A (1961).

A continuing study is being made in the effort to devise a modification of the 20-day rule appropriate to both the civil and admiralty practice to the end that Rule 26(a) shall state a uniform rule applicable alike to what are now civil actions and suits in admiralty. Meanwhile, the exigencies of maritime litigation require preservation, for the time being at least, of the traditional *de bene esse* procedure for the post-unification counterpart of the present suit in admiralty. Accordingly, the amendment provides for continued availability of that procedure in admiralty and maritime claims within the meaning of Rule 9(h).

1970 Amendment

A limited rearrangement of the discovery rules is made, whereby certain rule provisions are transferred, as follows: Existing Rule 26(a) is transferred to Rules 30(a) and 31(a). Existing Rule 26(c) is transferred to Rule 30(c). Existing Rules 26(d), (e), and (f) are transferred to Rule 32. Revisions of the transferred provisions, if any, are discussed in the notes appended to Rules 30, 31, and 32. In addition, Rule 30(b) is transferred to Rule 26(c). The purpose of this rearrangement is to establish Rule 26 as a rule governing discovery in general. (The reasons are set out in the Advisory Committee's explanatory statement.)

Subdivision (a)--Discovery Devices. This is a new subdivision listing all of the discovery devices provided in the discovery rules and establishing the relationship between the general provisions of Rule 26 and the specific rules for particular discovery devices. The provision that the frequency of use of these methods is not limited confirms existing law. It incorporates in general form a provision now found in Rule 33.

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Subdivision (b)--Scope of Discovery. This subdivision is recast to cover the scope of discovery generally. It regulates the discovery obtainable through any of the discovery devices listed in Rule 26(a).

All provisions as to scope of discovery are subject to the initial qualification that the court may limit discovery in accordance with these rules. Rule 26(c) (transferred from 30(b)) confers broad powers on the courts to regulate or prevent discovery even though the materials sought are within the scope of 26(b), and these powers have always been freely exercised. For example, a party's income tax return is generally held not privileged, 2A Barron & Holtzoff, *Federal Practice and Procedure,* § 651.2 (Wright ed. 1961), and yet courts have recognized that interests in privacy may call for a measure of extra protection. E.g., *Wiesenberger v. W. E. Hutton & Co.,* 35 F.R.D. 556 (S.D.N.Y.1964). Similarly, the courts have in appropriate circumstances protected materials that are primarily of an impeaching character. These two types of materials merely illustrate the many situations, not capable of governance by precise rule, in which courts must exercise judgment. The new subsections in Rule 26(b) do not change existing law with respect to such situations.

Subdivision (b)(1)--In General. The language is changed to provide for the scope of discovery in general terms. The existing subdivision, although in terms applicable only to depositions, is incorporated by reference in existing Rules 33 and 34. Since decisions as to relevance to the subject matter of the action are made for discovery purposes well in advance of trial, a flexible treatment of relevance is required and the making of discovery, whether voluntary or under court order, is not a concession or determination of relevance for purposes of trial. *Cf.* 4 *Moore's Federal Practice* ¶26-16[1] (2d ed. 1966).

Subdivision (b)(2)--Insurance Policies. Both the cases and commentators are sharply in conflict on the question whether defendant's liability insurance coverage is subject to discovery in the usual situation when the insurance coverage is not itself admissible and does not bear on another issue in the case. Examples of Federal cases requiring disclosure and supporting comments: *Cook v. Welty,* 253 F.Supp. 875 (D.D.C.1966) (cases cited); *Johanek v. Aberle,* 27 F.R.D. 272 (D.Mont.1961); Williams, *Discovery of Dollar Limits in Liability Policies in Automobile Tort Cases,* 10 Ala.L.Rev. 355 (1958); Thode, *Some Reflections on the 1957 Amendments to the Texas Rules,* 37 Tex.L.Rev. 33, 40-42 (1958). Examples of Federal cases refusing disclosure and supporting comments: *Bisserier v. Manning,* 207 F.Supp. 476 (D.N.J.1962); *Cooper v. Stender,* 30 F.R.D. 389 (E.D.Tenn.1962); Frank, *Discovery and Insurance, Coverage,* 1959 Ins.L.J. 281; Fournier, *Pre-trial Discovery of Insurance Coverage and Limits,* 28 Ford.L.Rev. 215 (1959).

The division in reported cases is close. State decisions based on provisions similar to the federal rules are similarly divided. See cases collected in 2A Barron & Holtzoff, *Federal Practice and Procedure* § 647.1, nn. 45.5, 45.6 (Wright ed. 1961). It appears to be difficult if not impossible to obtain appellate review of the issue. Resolution by rule amendment is indicated. The question is essentially procedural in that it bears upon preparation for trial and settlement before trial, and courts confronting the question, however they have decided it, have generally treated it as procedural and governed by the rules.

The amendment resolves this issue in favor of disclosure. Most of the decisions denying discovery, some explicitly, reason from the text of Rule 26(b) that it permits discovery only of matters which will be admissible in evidence or appear reasonably calculated to lead to such evidence; they avoid considerations of policy, regarding them as foreclosed. See *Bisserier v. Manning, supra.* Some note also that facts about a defendant's financial status are not discoverable as such, prior to judgment with execution unsatisfied, and fear that, if courts hold insurance coverage discoverable, they must extend the principle to other aspects of the defendant's financial status. The cases favoring disclosure rely heavily on the practical significance of insurance in the decisions lawyers make about settlement and trial preparation. In *Clauss v. Danker,* 264 F.Supp. 246 (S.D.N.Y.1967), the court held that the rules forbid disclosure but called for an amendment to permit it.

Disclosure of insurance coverage will enable counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation. It will conduce to settlement and avoid protracted litigation in some cases, though in others it may have an opposite effect. The amendment is limited to insurance coverage, which should be distinguished from any other facts concerning defendant's financial status (1) because insurance is an asset created specifically to satisfy the claim; (2) because the insurance company ordinarily controls the litigation; (3) because information

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about coverage is available only from defendant or his insurer; and (4) because disclosure does not involve a significant invasion of privacy.

Disclosure is required when the insurer "may be liable" on part or all of the judgment. Thus, an insurance company must disclose even when it contests liability under the policy, and such disclosure does not constitute a waiver of its claim. It is immaterial whether the liability is to satisfy the judgment directly or merely to indemnify or reimburse another after he pays the judgment.

The provision applies only to persons "carrying on an insurance business" and thus covers insurance companies and not the ordinary business concern that enters into a contract of indemnification. *Cf.* N.Y.Ins.Law § 41. Thus, the provision makes no change in existing law on discovery of indemnity agreements other than insurance agreements by persons carrying on an insurance business. Similarly, the provision does not cover the business concern that creates a reserve fund for purposes of self-insurance.

For some purposes other than discovery, an application for insurance is treated as a part of the insurance agreement. The provision makes clear that, for discovery purposes, the application is not to be so treated. The insurance application may contain personal and financial information concerning the insured, discovery of which is beyond the purpose of this provision.

In no instance does disclosure make the facts concerning insurance coverage admissible in evidence.

Subdivision (b)(3)--Trial Preparation: Materials. Some of the most controversial and vexing problems to emerge from the discovery rules have arisen out of requests for the production of documents or things prepared in anticipation of litigation or for trial. The existing rules make no explicit provision for such materials. Yet, two verbally distinct doctrines have developed, each conferring a qualified immunity on these materials--the "good cause" requirement in Rule 34 (now generally held applicable to discovery of documents via deposition under Rule 45 and interrogatories under Rule 33) and the work-product doctrine of *Hickman v. Taylor,* 329 U.S. 495 (1947). Both demand a showing of justification before production can be had, the one of "good cause" and the other variously described in the *Hickman* case: "necessity or justification," "denial * * * would unduly prejudice the preparation of petitioner's case," or "cause hardship or injustice" 329 U.S. at 509-510.

In deciding the *Hickman* case, the Supreme Court appears to have expressed a preference in 1947 for an approach to the problem of trial preparation materials by judicial decision rather than by rule. Sufficient experience has accumulated, however, with lower court applications of the *Hickman* decision to warrant a reappraisal.

The major difficulties visible in the existing case law are (1) confusion and disagreement as to whether "good cause" is made out by a showing of relevance and lack of privilege, or requires an additional showing of necessity, (2) confusion and disagreement as to the scope of the *Hickman* work-product doctrine, particularly whether it extends beyond work actually performed by lawyers, and (3) the resulting difficulty of relating the "good cause" required by Rule 34 and the "necessity or justification" of the work-product doctrine, so that their respective roles and the distinctions between them are understood.

Basic Standard.--Since Rule 34 in terms requires a showing of "good cause" for the production of all documents and things, whether or not trial preparation is involved, courts have felt that a single formula is called for and have differed over whether a showing of relevance and lack of privilege is enough or whether more must be shown. When the facts of the cases are studied, however, a distinction emerges based upon the type of materials. With respect to documents not obtained or prepared with an eye to litigation, the decisions, while not uniform, reflect a strong and increasing tendency to relate "good cause" to a showing that the documents are relevant to the subject matter of the action. *E.g.,* *Connecticut Mutual Life Ins. Co. v. Shields,* 17 F.R.D. 273 (S.D.N.Y.1959), with cases cited; *Houdry Process Corp. v. Commonwealth Oil Refining Co.,* 24 F.R.D. 58 (S.D.N.Y.1955); see *Bell v. Commercial Ins. Co.,* 280 F.2d 514, 517 (3d Cir. 1960). When the party whose documents are sought shows that the request for production is unduly burdensome or oppressive, courts have denied discovery for lack of "good cause", although they might just as easily have based their decision on the protective provisions of existing Rule 30(b) (new Rule 26(c)). *E.g.,* *Lauer v. Tankrederi,* 39 F.R.D. 334 (E.D.Pa.1966).

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As to trial-preparation materials, however, the courts are increasingly interpreting "good cause" as requiring more than relevance. When lawyers have prepared or obtained the materials for trial, all courts require more than relevance; so much is clearly commanded by *Hickman*. But even as to the preparatory work of nonlawyers, while some courts ignore work-product and equate "good cause" with relevance, *e.g.*, *Brown v. New York, N.H. & H.R.R.*, 17 F.R.D. 324 (S.D.N.Y.1955), the more recent trend is to read "good cause" as requiring inquiry into the importance of and need for the materials as well as into alternative sources for securing the same information. In *Guilford Nat'l Bank v. Southern Ry.*, 297 F.2d 921 (4th Cir. 1962), statements of witnesses obtained by claim agents were held not discoverable because both parties had had equal access to the witnesses at about the same time, shortly after the collision in question. The decision was based solely on Rule 34 and "good cause"; the court declined to rule on whether the statements were work-products. The court's treatment of "good cause" is quoted at length and with approval in *Schlagenhauf v. Holder*, 379 U.S. 104, 117-118 (1964). See also *Mitchell v. Bass*, 252 F.2d 513 (8th Cir. 1958); *Hauger v. Chicago, R.I. & Pac. R.R.*, 216 F.2d 501 (7th Cir. 1954); *Burke v. United States*, 32 F.R.D. 213 (E.D.N.Y.1963). While the opinions dealing with "good cause" do not often draw an explicit distinction between trial preparation materials and other materials, in fact an overwhelming proportion of the cases in which a special showing is required are cases involving trial preparation materials.

The rules are amended by eliminating the general requirement of "good cause" from Rule 34 but retaining a requirement of a special showing for trial preparation materials in this subdivision. The required showing is expressed, not in terms of "good cause" whose generality has tended to encourage confusion and controversy, but in terms of the elements of the special showing to be made: substantial need of the materials in the preparation of the case and inability without undue hardship to obtain the substantial equivalent of the materials by other means.

These changes conform to the holdings of the cases, when viewed in light of their facts. Apart from trial preparation, the fact that the materials sought are documentary does not in and of itself require a special showing beyond relevance and absence of privilege. The protective provisions are of course available, and if the party from whom production is sought raises a special issue of privacy (as with respect to income tax returns or grand jury minutes) or points to evidence primarily impeaching, or can show serious burden or expense, the court will exercise its traditional power to decide whether to issue a protective order. On the other hand, the requirement of a special showing for discovery of trial preparation materials reflects the view that each side's informal evaluation of its case should be protected, that each side should be encouraged to prepare independently, and that one side should not automatically have the benefit of the detailed preparatory work of the other side. See Field and McKusick, *Maine Civil Practice* 264 (1959).

Elimination of a "good cause" requirement from Rule 34 and the establishment of a requirement of a special showing in this subdivision will eliminate the confusion caused by having two verbally distinct requirements of justification that the courts have been unable to distinguish clearly. Moreover, the language of the subdivision suggests the factors which the courts should consider in determining whether the requisite showing has been made. The importance of the materials sought to the party seeking them in preparation of his case and the difficulty he will have obtaining them by other means are factors noted in the *Hickman* case. The courts should also consider the likelihood that the party, even if he obtains the information by independent means, will not have the substantial equivalent of the documents the production of which he seeks.

Consideration of these factors may well lead the court to distinguish between witness statements taken by an investigator, on the one hand, and other parts of the investigative file, on the other. The court in *Southern Ry. v. Lanham*, 403 F.2d 119 (5th Cir. 1968), while it naturally addressed itself to the "good cause" requirements of Rule 34, set forth as controlling considerations the factors contained in the language of this subdivision. The analysis of the court suggests circumstances under which witness statements will be discoverable. The witness may have given a fresh and contemporaneous account in a written statement while he is available to the party seeking discovery only a substantial time thereafter. *Lanham, supra* at 127-128; *Guilford, supra* at 926. Or he may be reluctant or hostile. *Lanham, supra* at 128-129; *Brookshire v. Pennsylvania RR*, 14 F.R.D. 154 (N.D.Ohio 1953); *Diamond v. Mohawk Rubber Co.*, 33 F.R.D. 264 (D.Colo.1963). Or he may have a lapse of memory. *Tannenbaum v. Walker*, 16 F.R.D. 570 (E.D.Pa.1954). Or he may probably be deviating from his prior statement. *Cf. Hauger v. Chicago, R.I.*

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& Pac. RR, 216 F.2d 501 (7th Cir. 1954). On the other hand, a much stronger showing is needed to obtain evaluative materials in an investigator's reports. *Lanham, supra* at 131-133; *Pickett v. L. R. Ryan, Inc.,* 237 F.Supp. 198 (E.D.S.C.1965).

Materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity provided by this subdivision. *Goosman v. A. Duie Pyle, Inc.,* 320 F.2d 45 (4th Cir. 1963); cf. *United States v. New York Foreign Trade Zone Operators, Inc.,* 304 F.2d 792 (2d Cir. 1962). No change is made in the existing doctrine, noted in the *Hickman* case, that one party may discover relevant facts known or available to the other party, even though such facts are contained in a document which is not itself discoverable.

Treatment of Lawyers; Special Protection of Mental Impressions, Conclusions, Opinions, and Legal Theories Concerning the Litigation.--The courts are divided as to whether the work-product doctrine extends to the preparatory work only of lawyers. The *Hickman* case left this issue open since the statements in that case were taken by a lawyer. As to courts of appeals compare *Alltmont v. United States,* 177 F.2d 971, 976 (3d Cir. 1949), cert. denied, 339 U.S. 967 (1950) (*Hickman* applied to statements obtained by FBI agents on theory it should apply to "all statements of prospective witnesses which a party has obtained for his trial counsel's use"), with *Southern Ry. v. Campbell,* 309 F.2d 569 (5th Cir. 1962) (Statements taken by claim agents not work-product), and *Guilford Nat'l Bank v. Southern Ry.,* 297 F.2d 921 (4th Cir. 1962) (avoiding issue of work-product as to claim agents, deciding case instead under Rule 34 "good cause"). Similarly, the district courts are divided on statements obtained by claim agents, compare, e.g., *Brown v. New York, N.H. & H.R.R.,* 17 F.R.D. 324 (S.D.N.Y.1955) with *Hanke v. Milwaukee Electric Ry. & Transp. Co.,* 7 F.R.D. 540 (E.D.Wis.1947); investigators, compare *Burke v. United States,* 32 F.R.D. 213 (E.D.N.Y.1963) with *Snyder v. United States,* 20 F.R.D. 7 (E.D.N.Y.1956); and insurers, compare *Gottlieb v. Bresler,* 24 F.R.D. 371 (D.D.C.1959) with *Burns v. Mulder,* 20 F.R.D. 605 (E.D.Pa.1957). See 4 Moore's *Federal Practice* ¶26.23[8.1] (2d ed. 1966); 2A Barron & Holtzoff, *Federal Practice and Procedure* § 652.2 (Wright ed. 1961).

A complication is introduced by the use made by courts of the "good cause" requirement of Rule 34, as described above. A court may conclude that trial preparation materials are not work-product because not the result of lawyer's work and yet hold that they are not producible because "good cause" has not been shown. *Cf. Guilford Nat'l Bank v. Southern Ry.,* 297 F.2d 921 (4th Cir. 1962), cited and described above. When the decisions on "good cause" are taken into account, the weight of authority affords protection of the preparatory work of both lawyers and nonlawyers (though not necessarily to the same extent) by requiring more than a showing of relevance to secure production.

Subdivision (b)(3) reflects the trend of the cases by requiring a special showing, not merely as to materials prepared by an attorney, but also as to materials prepared in anticipation of litigation or preparation for trial by or for a party or any representative acting on his behalf. The subdivision then goes on to protect against disclosure the mental impressions, conclusions, opinions, or legal theories concerning the litigation of an attorney or other representative of a party. The *Hickman* opinion drew special attention to the need for protecting an attorney against discovery of memoranda prepared from recollection of oral interviews. The courts have steadfastly safeguarded against disclosure of lawyers' mental impressions and legal theories, as well as mental impressions and subjective evaluations of investigators and claim-agents. In enforcing this provision of the subdivision, the courts will sometimes find it necessary to order disclosure of a document but with portions deleted.

Rules 33 and 36 have been revised in order to permit discovery calling for opinions, contentions, and admissions relating not only to fact but also to the application of law to fact. Under those rules, a party and his attorney or other representative may be required to disclose, to some extent, mental impressions, opinions, or conclusions. But documents or parts of documents containing these matters are protected against discovery by this subdivision. Even though a party may ultimately have to disclose in response to interrogatories or requests to admit, he is entitled to keep confidential documents containing such matters prepared for internal use.

Party's Right to Own Statement--An exception to the requirement of this subdivision enables a party to secure production of his own statement without any special showing. The cases are divided. Compare, *e.g.,* *Safeway Stores, Inc. v. Reynolds,* 176

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F.2d 476 (D.C. Cir.1949); *Shupe v. Pennsylvania R.R.,* 19 F.R.D. 144 (W.D.Pa.1956); with *e.g., New York Central R.R. v. Carr,* 251 F.2d 433 (4th Cir. 1957); *Belback v. Wilson Freight Forwarding Co.,* 40 F.R.D. 16 (W.D.Pa.1966).

Courts which treat a party's statement as though it were that of any witness overlook the fact that the party's statement is, without more, admissible in evidence. Ordinarily, a party gives a statement without insisting on a copy because he does not yet have a lawyer and does not understand the legal consequences of his actions. Thus, the statement is given at a time when he functions at a disadvantage. Discrepancies between his trial testimony and earlier statement may result from lapse of memory or ordinary inaccuracy; a written statement produced for the first time at trial may give such discrepancies a prominence which they do not deserve. In appropriate cases the court may order a party to be deposed before his statement is produced. *E.g., Smith v. Central Linen Service Co.,* 39 F.R.D. 15 (D.Md.1966); *McCoy v. General Motors Corp.,* 33 F.R.D. 354 (W.D.Pa.1963).

Commentators strongly support the view that a party be able to secure his statement without a showing. 4 *Moore's Federal Practice* ¶26.23[8.4] (2d ed. 1966); 2A Barron & Holtzoff, *Federal Practice and Procedure* § 652.3 (Wright ed. 1961); see also Note, *Developments in the Law--Discovery,* 74 Harv.L.Rev. 940, 1039 (1961). The following states have by statute or rule taken the same position: *Statutes:* Fla.Stat.Ann. § 92.33; Ga.Code Ann. § 38-2109(b); La.Stat.Ann.R.S. 13:3732; Mass.Gen.Laws Ann. c. 271, § 44; Minn.Stat.Ann. § 602.01; N.Y.C.P.L.R. § 3101(e); *Rules:* Mo.R.C.P. 56.01(a); N.Dak.R.C.P. 34(b); Wyo.R.C.P. 34(b); *cf.* Mich.G.C.R. 306.2.

In order to clarify and tighten the provision on statements by a party, the term “statement” is defined. The definition is adapted from 18 U.S.C. § 3500(e) (Jencks Act). The statement of a party may of course be that of plaintiff or defendant, and it may be that of an individual or of a corporation or other organization.

Witness' Right to Own Statement.--A second exception to the requirement of this subdivision permits a non-party witness to obtain a copy of his own statement without any special showing. Many, though not all, of the considerations supporting a party's right to obtain his statement apply also to the non-party witness. Insurance companies are increasingly recognizing that a witness is entitled to a copy of his statement and are modifying their regular practice accordingly.

Subdivision (b)(4)--Trial Preparation: Experts. This is a new provision dealing with discovery of information (including facts and opinions) obtained by a party from an expert retained by that party in relation to litigation or obtained by the expert and not yet transmitted to the party. The subdivision deals separately with those experts whom the party expects to call as trial witnesses and with those experts who have been retained or specially employed by the party but who are not expected to be witnesses. It should be noted that the subdivision does not address itself to the expert whose information was not acquired in preparation for trial but rather because he was an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit. Such an expert should be treated as an ordinary witness.

Subsection (b)(4)(A) deals with discovery of information obtained by or through experts who will be called as witnesses at trial. The provision is responsive to problems suggested by a relatively recent line of authorities. Many of these cases present intricate and difficult issues as to which expert testimony is likely to be determinative. Prominent among them are food and drug, patent, and condemnation cases. See, *e.g., United States v. Nysco Laboratories, Inc.,* 26 F.R.D. 159, 162 (E.D.N.Y.1960) (food and drug); *E. I. du Pont de Nemours & Co. v. Phillips Petroleum Co.,* 24 F.R.D. 416, 421 (D.Del.1959) (patent); *Cold Metal Process Co. v. Aluminum Co. of America,* 7 F.R.D. 425 (N.D.Ohio 1947), aff'd, *Sachs v. Aluminum Co. of America,* 167 F.2d 570 (6th Cir. 1948) (same); *United States v. 50.34 Acres of Land,* 13 F.R.D. 19 (E.D.N.Y.1952) (condemnation).

In cases of this character, a prohibition against discovery of information held by expert witnesses produces in acute form the very evils that discovery has been created to prevent. Effective cross-examination of an expert witness requires advance preparation. The lawyer even with the help of his own experts frequently cannot anticipate the particular approach his adversary's expert will take or the data on which he will base his judgment on the stand. McGlothlin, *Some Practical Problems in Proof of Economic, Scientific, and Technical Facts,* 23 F.R.D. 467, 478 (1958). A California study of discovery and pretrial in condemnation cases notes that the only substitute for discovery of experts' valuation materials is “lengthy--and often fruitless--cross-examination

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during trial," and recommends pretrial exchange of such material. Calif.Law Rev.Comm'n, Discovery in Eminent Domain Proceedings 707-710 (Jan. 1963). Similarly, effective rebuttal requires advance knowledge of the line of testimony of the other side. If the latter is foreclosed by a rule against discovery, then the narrowing of issues and elimination of surprise which discovery normally produces are frustrated.

These considerations appear to account for the broadening of discovery against experts in the cases cited where expert testimony was central to the case. In some instances, the opinions are explicit in relating expanded discovery to improved cross-examination and rebuttal at trial. *Franks v. National Dairy Products Corp.,* 41 F.R.D. 234 (W.D.Tex.1966); *United States v. 23.76 Acres,* 32 F.R.D. 593 (D.Md.1963); see also an unpublished opinion of Judge Hincks, quoted in *United States v. 48 Jars, etc.,* 23 F.R.D. 192, 198 (D.D.C.1958). On the other hand, the need for a new provision is shown by the many cases in which discovery of expert trial witnesses is needed for effective cross-examination and rebuttal, and yet courts apply the traditional doctrine and refuse disclosure. *E.g., United States v. Certain Parcels of Land,* 25 F.R.D. 192 (N.D.Cal.1959); *United States v. Certain Acres,* 18 F.R.D. 98 (M.D.Ga.1955).

Although the trial problems flowing from lack of discovery of expert witnesses are most acute and noteworthy when the case turns largely on experts, the same problems are encountered when a single expert testifies. Thus, subdivision (b)(4)(A) draws no line between complex and simple cases, or between cases with many experts and those with but one. It establishes by rule substantially the procedure adopted by decision of the court in *Knighton v. Villian & Fassio,* 39 F.R.D. 11 (D.Md.1965). For a full analysis of the problem and strong recommendations to the same effect, see Friedenthal, *Discovery and Use of an Adverse Party's Expert Information,* 14 Stan.L.Rev. 455, 485-488 (1962); Long, *Discovery and Experts under the Federal Rules of Civil Procedure,* 38 F.R.D. 111 (1965).

Past judicial restrictions on discovery of an adversary's expert, particularly as to his opinions, reflect the fear that one side will benefit unduly from the other's better preparation. The procedure established in subsection (b)(4)(A) holds the risk to a minimum. Discovery is limited to trial witnesses, and may be obtained only at a time when the parties know who their expert witnesses will be. A party must as a practical matter prepare his own case in advance of that time, for he can hardly hope to build his case out of his opponent's experts.

Subdivision (b)(4)(A) provides for discovery of an expert who is to testify at the trial. A party can require one who intends to use the expert to state the substance of the testimony that the expert is expected to give. The court may order further discovery, and it has ample power to regulate its timing and scope and to prevent abuse. Ordinarily, the order for further discovery shall compensate the expert for his time, and may compensate the party who intends to use the expert for past expenses reasonably incurred in obtaining facts or opinions from the expert. Those provisions are likely to discourage abusive practices.

Subdivision (b)(4)(B) deals with an expert who has been retained or specially employed by the party in anticipation of litigation or preparation for trial (thus excluding an expert who is simply a general employee of the party not specially employed on the case), but who is not expected to be called as a witness. Under its provisions, a party may discover facts known or opinions held by such an expert only on a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

Subdivision (b)(4)(B) is concerned only with experts retained or specially consulted in relation to trial preparation. Thus the subdivision precludes discovery against experts who were informally consulted in preparation for trial, but not retained or specially employed. As an ancillary procedure, a party may on a proper showing require the other party to name experts retained or specially employed, but not those informally consulted.

These new provisions of subdivision (b)(4) repudiate the few decisions that have held an expert's information privileged simply because of his status as an expert, *e.g., American Oil Co. v. Pennsylvania Petroleum Products Co.,* 23 F.R.D. 680, 685-686 (D.R.I.1959). See *Louisell, Modern California Discovery* 315-316 (1963). They also reject as ill-considered the decisions which have sought to bring expert information within the work-product doctrine. See *United States v. McKay,* 372 F.2d 174, 176-177

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(5th Cir. 1967). The provisions adopt a form of the more recently developed doctrine of "unfairness". See *e.g.*, *United States v. 23.76 Acres of Land*, 32 F.R.D. 593, 597 (D.Md.1963); Louisell, *supra*, at 317-318; 4 *Moore's Federal Practice* 26.24 (2d ed. 1966).

Under subdivision (b)(4)(C), the court is directed or authorized to issue protective orders, including an order that the expert be paid a reasonable fee for time spent in responding to discovery, and that the party whose expert is made subject to discovery be paid a fair portion of the fees and expenses that the party incurred in obtaining information from the expert. The court may issue the latter order as a condition of discovery, or it may delay the order until after discovery is completed. These provisions for fees and expenses meet the objection that it is unfair to permit one side to obtain without cost the benefit of an expert's work for which the other side has paid, often a substantial sum. E.g., *Lewis v. United Air Lines Transp. Corp.*, 32 F.Supp. 21 (W.D.Pa.1940); *Walsh v. Reynolds Metal Co.*, 15 F.R.D. 376 (D.N.J.1954). On the other hand, a party may not obtain discovery simply by offering to pay fees and expenses. Cf. *Boynton v. R. J. Reynolds Tobacco Co.*, 36 F.Supp. 593 (D.Mass.1941).

In instances of discovery under subdivision (b)(4)(B), the court is directed to award fees and expenses to the other party, since the information is of direct value to the discovering party's preparation of his case. In ordering discovery under (b)(4)(A)(ii), the court has discretion whether to award fees and expenses to the other party; its decision should depend upon whether the discovering party is simply learning about the other party's case or is going beyond this to develop his own case. Even in cases where the court is directed to issue a protective order, it may decline to do so if it finds that manifest injustice would result. Thus, the court can protect, when necessary and appropriate, the interests of an indigent party.

Subdivision (c)--Protective Orders. The provisions of existing Rule 30(b) are transferred to this subdivision (c), as part of the rearrangement of Rule 26. The language has been changed to give it application to discovery generally. The subdivision recognizes the power of the court in the district where a deposition is being taken to make protective orders. Such power is needed when the deposition is being taken far from the court where the action is pending. The court in the district where the deposition is being taken may, and frequently will, remit the deponent or party to the court where the action is pending.

In addition, drafting changes are made to carry out and clarify the sense of the rule. Insertions are made to avoid any possible implication that a protective order does not extend to "time" as well as to "place" or may not safeguard against "undue burden or expense."

The new reference to trade secrets and other confidential commercial information reflects existing law. The courts have not given trade secrets automatic and complete immunity against disclosure, but have in each case weighed their claim to privacy against the need for disclosure. Frequently, they have been afforded a limited protection. See, *e.g.*, *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993 (10th Cir. 1965); *Julius M. Ames Co. v. Bostitch, Inc.*, 235 F.Supp. 856 (S.D.N.Y.1964).

The subdivision contains new matter relating to sanctions. When a motion for a protective order is made and the court is disposed to deny it, the court may go a step further and issue an order to provide or permit discovery. This will bring the sanctions of Rule 37(b) directly into play. Since the court has heard the contentions of all interested persons, an affirmative order is justified. See *Rosenberg*, *Sanctions to Effectuate Pretrial Discovery*, 58 Col.L.Rev. 480, 492-493 (1958). In addition, the court may require the payment of expenses incurred in relation to the motion.

Subdivision (d)--Sequence and Priority. This new provision is concerned with the sequence in which parties may proceed with discovery and with related problems of timing. The principal effects of the new provision are first, to eliminate any fixed priority in the sequence of discovery, and second, to make clear and explicit the court's power to establish priority by an order issued in a particular case.

A priority rule developed by some courts, which confers priority on the party who first serves notice of taking a deposition, is unsatisfactory in several important respects:

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First, this priority rule permits a party to establish a priority running to all depositions as to which he has given earlier notice. Since he can on a given day serve notice of taking many depositions he is in a position to delay his adversary's taking of depositions for an inordinate time. Some courts have ruled that deposition priority also permits a party to delay his answers to interrogatories and production of documents. *E.g.*, *E. I. du Pont de Nemours & Co. v. Phillips Petroleum Co.,* 23 F.R.D. 237 (D.Del.1959); *but cf. Sturdevant v. Sears, Roebuck & Co.,* 32 F.R.D. 426 (W.D.Mo.1963).

Second, since notice is the key to priority, if both parties wish to take depositions first a race results. See *Caldwell-Clements, Inc. v. McGraw-Hill Pub. Co.,* 11 F.R.D. 156 (S.D.N.Y.1951) (description of tactics used by parties). But the existing rules on notice of deposition create a race with runners starting from different positions. The plaintiff may not give notice without leave of court until 20 days after commencement of the action, whereas the defendant may serve notice at any time after commencement. Thus, a careful and prompt defendant can almost always secure priority. This advantage of defendants is fortuitous, because the purpose of requiring plaintiff to wait 20 days is to afford defendant an opportunity to obtain counsel, not to confer priority.

Third, although courts have ordered a change in the normal sequence of discovery on a number of occasions, *e.g.*, *Kaeppler v. James H. Matthews & Co.,* 200 F.Supp. 229 (E.D.Pa.1961); *Park & Tilford Distillers Corp. v. Distillers Co.,* 19 F.R.D. 169 (S.D.N.Y.1956), and have at all times avowed discretion to vary the usual priority, most commentators are agreed that courts in fact grant relief only for "the most obviously compelling reasons." 2A Barron & Holtzoff, *Federal Practice and Procedure* 44-47 (Wright ed. 1961); see also Younger, *Priority of Pretrial Examination in the Federal Courts--A Comment,* 34 N.Y.U.L.Rev. 1271 (1959); Freund, *The Pleading and Pretrial of an Antitrust Claim,* 46 Corn.L.Q. 555, 564 (1964). Discontent with the fairness of actual practice has been evinced by other observers. Comments, 59 Yale L.J. 117, 134-136 (1949); Yudkin, *Some Refinements in Federal Discovery Procedure,* 11 Fed.B.J. 289, 296-297 (1951); *Developments in the Law-Discovery,* 74 Harv.L.Rev. 940, 954-958 (1961).

Despite these difficulties, some courts have adhered to the priority rule, presumably because it provides a test which is easily understood and applied by the parties without much court intervention. It thus permits deposition discovery to function extrajudicially, which the rules provide for and the courts desire. For these same reasons, courts are reluctant to make numerous exceptions to the rule.

The Columbia Survey makes clear that the problem of priority does not affect litigants generally. It found that most litigants do not move quickly to obtain discovery. In over half of the cases, both parties waited at least 50 days. During the first 20 days after commencement of the action--the period when defendant might assure his priority by noticing depositions--16 percent of the defendants acted to obtain discovery. A race could not have occurred in more than 16 percent of the cases and it undoubtedly occurred in fewer. On the other hand, five times as many defendants as plaintiffs served notice of deposition during the first 19 days. To the same effect, see Comment, *Tactical Use and Abuse of Depositions Under the Federal Rules,* 59 Yale L.J. 117, 134 (1949).

These findings do not mean, however, that the priority rule is satisfactory or that a problem of priority does not exist. The court decisions show that parties do battle on this issue and carry their disputes to court. The statistics show that these court cases are not typical. By the same token, they reveal that more extensive exercise of judicial discretion to vary the priority will not bring a flood of litigation, and that a change in the priority rule will in fact affect only a small fraction of the cases.

It is contended by some that there is no need to alter the existing priority practice. In support, it is urged that there is no evidence that injustices in fact result from present practice and that, in any event, the courts can and do promulgate local rules, as in New York, to deal with local situations and issue orders to avoid possible injustice in particular cases.

Subdivision (d) is based on the contrary view that the rule of priority based on notice is unsatisfactory and unfair in its operation. Subdivision (d) follows an approach adapted from Civil Rule 4 of the District Court for the Southern District of New York. That rule provides that starting 40 days after commencement of the action, unless otherwise ordered by the court, the fact that one party is taking a deposition shall not prevent another party from doing so "concurrently." In practice, the depositions are

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not usually taken simultaneously; rather, the parties work out arrangements for alternation in the taking of depositions. One party may take a complete deposition and then the other, or, if the depositions are extensive, one party deposes for a set time, and then the other. See *Caldwell-Clements, Inc. v. McCraw-Hill Pub. Co.,* 11 F.R.D. 156 (S.D.N.Y.1951).

In principle, one party's initiation of discovery should not wait upon the other's completion, unless delay is dictated by special considerations. Clearly the principle is feasible with respect to all methods of discovery other than depositions. And the experience of the Southern District of New York shows that the principle can be applied to depositions as well. The courts have not had an increase in motion business on this matter. Once it is clear to lawyers that they bargain on an equal footing, they are usually able to arrange for an orderly succession of depositions without judicial intervention. Professor Moore has called attention to Civil Rule 4 and suggested that it may usefully be extended to other areas. 4 *Moore's Federal Practice* 1154 (2d ed. 1966).

The court may upon motion and by order grant priority in a particular case. But a local court rule purporting to confer priority in certain classes of cases would be inconsistent with this subdivision and thus void.

Subdivision (e)--Supplementation of Responses. The rules do not now state whether interrogatories (and questions at deposition as well as requests for inspection and admissions) impose a "continuing burden" on the responding party to supplement his answers if he obtains new information. The issue is acute when new information renders substantially incomplete or inaccurate an answer which was complete and accurate when made. It is essential that the rules provide an answer to this question. The parties can adjust to a rule either way, once they know what it is. See 4 *Moore's Federal Practice* ¶33.25[4] (2d ed. 1966).

Arguments can be made both ways. Imposition of a continuing burden reduces the proliferation of additional sets of interrogatories. Some courts have adopted local rules establishing such a burden. *E.g.,* E.D.Pa.R. 20(f), quoted in *Taggart v. Vermont Transp. Co.,* 32 F.R.D. 587 (E.D.Pa.1963); D.Me.R. 15(c). Others have imposed the burden by decision. *E.g., Chenault v. Nebraska Farm Products, Inc.,* 9 F.R.D. 529, 533 (D.Nebr.1949). On the other hand, there are serious objections to the burden, especially in protracted cases. Although the party signs the answers, it is his lawyer who understands their significance and bears the responsibility to bring answers up to date. In a complex case all sorts of information reaches the party, who little understands its bearing on answers previously given to interrogatories. In practice, therefore, the lawyer under a continuing burden must periodically recheck all interrogatories and canvass all new information. But a full set of new answers may no longer be needed by the interrogating party. Some issues will have been dropped from the case, some questions are now seen as unimportant, and other questions must in any event be reformulated. See *Novick v. Pennsylvania R.R.,* 18 F.R.D. 296, 298 (W.D.Pa.1955).

Subdivision (e) provides that a party is not under a continuing burden except as expressly provided. Cf. Note, 68 Harv.L.Rev. 673, 677 (1955). An exception is made as to the identity of persons having knowledge of discoverable matters, because of the obvious importance to each side of knowing all witnesses and because information about witnesses routinely comes to each lawyer's attention. Many of the decisions on the issue of a continuing burden have in fact concerned the identity of witnesses. An exception is also made as to expert trial witnesses in order to carry out the provisions of Rule 26(b)(4). See *Diversified Products Corp. v. Sports Center Co.,* 42 F.R.D. 3 (D.Md.1967).

Another exception is made for the situation in which a party, or more frequently his lawyer, obtains actual knowledge that a prior response is incorrect. This exception does not impose a duty to check the accuracy of prior responses, but it prevents knowing concealment by a party or attorney. Finally, a duty to supplement may be imposed by order of the court in a particular case (including an order resulting from a pretrial conference) or by agreement of the parties. A party may of course make a new discovery request which requires supplementation of prior responses.

The duty will normally be enforced, in those limited instances where it is imposed, through sanctions imposed by the trial court, including exclusion of evidence, continuance, or other action, as the court may deem appropriate.

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1980 Amendment

Subdivision (f). This subdivision is new. There has been widespread criticism of abuse of discovery. The Committee has considered a number of proposals to eliminate abuse, including a change in Rule 26(b)(1) with respect to the scope of discovery and a change in Rule 33(a) to limit the number of questions that can be asked by interrogatories to parties.

The Committee believes that abuse of discovery, while very serious in certain cases, is not so general as to require such basic changes in the rules that govern discovery in all cases. A very recent study of discovery in selected metropolitan districts tends to support its belief. P. Connolly, E. Holleman, & M. Kuhlman, *Judicial Controls and the Civil Litigative Process: Discovery* (Federal Judicial Center, 1978). In the judgment of the Committee abuse can best be prevented by intervention by the court as soon as abuse is threatened.

To this end this subdivision provides that counsel who has attempted without success to effect with opposing counsel a reasonable program or plan for discovery is entitled to the assistance of the court.

It is not contemplated that requests for discovery conferences will be made routinely. A relatively narrow discovery dispute should be resolved by resort to Rules 26(c) or 37(a), and if it appears that a request for a conference is in fact grounded in such a dispute, the court may refer counsel to those rules. If the court is persuaded that a request is frivolous or vexatious, it can strike it. See Rules 11 and 7(b)(2).

A number of courts routinely consider discovery matters in preliminary pretrial conferences held shortly after the pleadings are closed. This subdivision does not interfere with such a practice. It authorizes the court to combine a discovery conference with a pretrial conference under Rule 16 if a pretrial conference is held sufficiently early to prevent or curb abuse.

1983 Amendment

Excessive discovery and evasion or resistance to reasonable discovery requests pose significant problems. Recent studies have made some attempt to determine the sources and extent of the difficulties. See Brazil, *Civil Discovery: Lawyers' Views of its Effectiveness, Principal Problems and Abuses,* American Bar Foundation (1980); Connolly, Holleman & Kuhlman, *Judicial Controls and the Civil Litigative Process: Discovery,* Federal Judicial Center (1978); Ellington, *A Study of Sanctions for Discovery Abuse,* Department of Justice (1979); Schroeder & Frank, *The Proposed Changes in the Discovery Rules,* 1978 Ariz.St.L.J. 475.

The purpose of discovery is to provide a mechanism for making relevant information available to the litigants. "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Hickman v. Taylor,* 329 U.S. 495, 507 (1947). Thus the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by overuse of discovery or unnecessary use of defensive weapons or evasive responses. All of this results in excessively costly and time-consuming activities that are disproportionate to the nature of the case, the amount involved, or the issues or values at stake.

Given our adversary tradition and the current discovery rules, it is not surprising that there are many opportunities, if not incentives, for attorneys to engage in discovery that, although authorized by the broad, permissive terms of the rules, nevertheless results in delay. See Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change,* 31 Vand.L.Rev. 1259 (1978). As a result, it has been said that the rules have "not infrequently [been] exploited to the disadvantage of justice." *Herbert v. Lando,* 441 U.S. 153, 179 (1979) (Powell, J., concurring). These practices impose costs on an already overburdened system and impede the fundamental goal of the "just, speedy, and inexpensive determination of every action." Fed.R.Civ.P. 1.

Subdivision (a); Discovery Methods. The deletion of the last sentence of Rule 26(a)(1), which provided that unless the court ordered otherwise under Rule 26(c) "the frequency of use" of the various discovery methods was not to be limited, is an attempt

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to address the problem of duplicative, redundant, and excessive discovery and to reduce it. The amendment, in conjunction with the changes in Rule 26(b)(1), is designed to encourage district judges to identify instances of needless discovery and to limit the use of the various discovery devices accordingly. The question may be raised by one of the parties, typically on a motion for a protective order, or by the court on its own initiative. It is entirely appropriate to consider a limitation on the frequency of use of discovery at a discovery conference under Rule 26(f) or at any other pretrial conference authorized by these rules. In considering the discovery needs of a particular case, the court should consider the factors described in Rule 26(b)(1).

Subdivision (b); Discovery Scope and Limits. Rule 26(b)(1) has been amended to add a sentence to deal with the problem of over-discovery. The objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry. The new sentence is intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse. The grounds mentioned in the amended rule for limiting discovery reflect the existing practice of many courts in issuing protective orders under Rule 26(c). See, e.g., *Carlson Cos. v. Sperry & Hutchinson Co.,* 374 F.Supp. 1080 (D.Minn.1974); *Dolgow v. Anderson,* 53 F.R.D. 661 (E.D.N.Y.1971); *Mitchell v. American Tobacco Co.,* 33 F.R.D. 262 (M.D.Pa.1963); *Welty v. Clute,* 1 F.R.D. 446 (W.D.N.Y.1941). On the whole, however, district judges have been reluctant to limit the use of the discovery devices. See, *e.g.*, *Apco Oil Co. v. Certified Transp., Inc.,* 46 F.R.D. 428 (W.D.Mo.1969). See generally 8 Wright & Miller, *Federal Practice and Procedure: Civil* §§ 2036, 2037, 2039, 2040 (1970).

The first element of the standard, Rule 26(b)(1)(i), is designed to minimize redundancy in discovery and encourage attorneys to be sensitive to the comparative costs of different methods of securing information. Subdivision (b)(1)(ii) also seeks to reduce repetitiveness and to oblige lawyers to think through their discovery activities in advance so that full utilization is made of each deposition, document request, or set of interrogatories. The elements of Rule 26(b)(1)(iii) address the problem of discovery that is disproportionate to the individual lawsuit as measured by such matters as its nature and complexity, the importance of the issues at stake in a case seeking damages, the limitations on a financially weak litigant to withstand extensive opposition to a discovery program or to respond to discovery requests, and the significance of the substantive issues, as measured in philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved. The court must apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent.

The rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis. See Connolly, Holleman & Kuhlman, *Judicial Controls and the Civil Litigative Process: Discovery* 77, Federal Judicial Center (1978). In an appropriate case the court could restrict the number of depositions, interrogatories, or the scope of a production request. But the court must be careful not to deprive a party of discovery that is reasonably necessary to afford a fair opportunity to develop and prepare the case.

The court may act on motion, or its own initiative. It is entirely appropriate to resort to the amended rule in conjunction with a discovery conference under Rule 26(f) or one of the other pretrial conferences authorized by the rules.

Subdivision (g); Signing of Discovery Requests, Responses, and Objections. Rule 26(g) imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37. In addition, Rule 26(g) is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions. The subdivision provides a deterrent to both excessive discovery and evasion by imposing a certification requirement that obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection. The term “response” includes answers to interrogatories and to requests to admit as well as responses to production requests.

If primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obliged to act responsibly and avoid abuse. With this in mind, Rule 26(g), which parallels the amendments to Rule 11, requires an attorney or unrepresented party to sign each discovery request, response, or objection. Motions relating to discovery are governed by Rule 11. However,

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since a discovery request, response, or objection usually deals with more specific subject matter than motions or papers, the elements that must be certified in connection with the former are spelled out more completely. The signature is a certification of the elements set forth in Rule 26(g).

Although the certification duty requires the lawyer to pause and consider the reasonableness of his request, response, or objection, it is not meant to discourage or restrict necessary and legitimate discovery. The rule simply requires that the attorney make a reasonable inquiry into the factual basis of his response, request, or objection.

The duty to make a "reasonable inquiry" is satisfied if the investigation undertaken by the attorney and the conclusions drawn therefrom are reasonable under the circumstances. It is an objective standard similar to the one imposed by Rule 11. See the Advisory Committee Note to Rule 11. See also *Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n,* 365 F.Supp. 975 (E.D.Pa.1973). In making the inquiry, the attorney may rely on assertions by the client and on communications with other counsel in the case as long as that reliance is appropriate under the circumstances. Ultimately, what is reasonable is a matter for the court to decide on the totality of the circumstances.

Rule 26(g) does not require the signing attorney to certify the truthfulness of the client's factual responses to a discovery request. Rather, the signature certifies that the lawyer has made a reasonable effort to assure that the client has provided all the information and documents available to him that are responsive to the discovery demand. Thus, the lawyer's certification under Rule 26(g) should be distinguished from other signature requirements in the rules, such as those in Rules 30(e) and 33.

Nor does the rule require a party or an attorney to disclose privileged communications or work product in order to show that a discovery request, response, or objection is substantially justified. The provisions of Rule 26(c), including appropriate orders after *in camera* inspection by the court, remain available to protect a party claiming privilege or work product protection.

The signing requirement means that every discovery request, response, or objection should be grounded on a theory that is reasonable under the precedents or a good faith belief as to what should be the law. This standard is heavily dependent on the circumstances of each case. The certification speaks as of the time it is made. The duty to supplement discovery responses continues to be governed by Rule 26(e).

Concern about discovery abuse has led to widespread recognition that there is a need for more aggressive judicial control and supervision. *ACF Industries, Inc. v. EEOC,* 439 U.S. 1081 (1979) (certiorari denied) (Powell, J., dissenting). Sanctions to deter discovery abuse would be more effective if they were diligently applied "not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." *National Hockey League v. Metropolitan Hockey Club,* 427 U.S. 639, 643 (1976). See also Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions,* 91 Harv.L.Rev. 1033 (1978). Thus the premise of Rule 26(g) is that imposing sanctions on attorneys who fail to meet the rule's standards will significantly reduce abuse by imposing disadvantages therefor.

Because of the asserted reluctance to impose sanctions on attorneys who abuse the discovery rules, see Brazil, *Civil Discovery: Lawyers' Views of its Effectiveness, Principal Problems and Abuses,* American Bar Foundation (1980); Ellington, *A Study of Sanctions for Discovery Abuse,* Department of Justice (1979), Rule 26(g) makes explicit the authority judges now have to impose appropriate sanctions and requires them to use it. This authority derives from Rule 37, 28 U.S.C. § 1927, and the court's inherent power. See *Roadway Express, Inc. v. Piper,* 447 U.S. 752 (1980); *Martin v. Bell Helicopter Co.,* 85 F.R.D. 654, 661-62 (D.Col.1980); Note, *Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process,* 44 U.Chi.L.Rev. 619 (1977). The new rule mandates that sanctions be imposed on attorneys who fail to meet the standards established in the first portion of Rule 26(g). The nature of the sanction is a matter of judicial discretion to be exercised in light of the particular circumstances. The court may take into account any failure by the party seeking sanctions to invoke protection under Rule 26(c) at an early stage in the litigation.

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The sanctioning process must comport with due process requirements. The kind of notice and hearing required will depend on the facts of the case and the severity of the sanction being considered. To prevent the proliferation of the sanction procedure and to avoid multiple hearings, discovery in any sanction proceeding normally should be permitted only when it is clearly required by the interests of justice. In most cases the court will be aware of the circumstances and only a brief hearing should be necessary.

1987 Amendment

The amendments are technical. No substantive change is intended.

1993 Amendment

Subdivision (a). Through the addition of paragraphs (1)-(4), this subdivision imposes on parties a duty to disclose, without awaiting formal discovery requests, certain basic information that is needed in most cases to prepare for trial or make an informed decision about settlement. The rule requires all parties (1) early in the case to exchange information regarding potential witnesses, documentary evidence, damages, and insurance, (2) at an appropriate time during the discovery period to identify expert witnesses and provide a detailed written statement of the testimony that may be offered at trial through specially retained experts, and (3) as the trial date approaches to identify the particular evidence that may be offered at trial. The enumeration in Rule 26(a) of items to be disclosed does not prevent a court from requiring by order or local rule that the parties disclose additional information without a discovery request. Nor are parties precluded from using traditional discovery methods to obtain further information regarding these matters, as for example asking an expert during a deposition about testimony given in other litigation beyond the four-year period specified in Rule 26(a)(2)(B).

A major purpose of the revision is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information, and the rule should be applied in a manner to achieve those objectives. The concepts of imposing a duty of disclosure were set forth in Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 *Vand.L.Rev.* 1348 (1978), and Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform,* 50 *U.Pitt.L.Rev. 703, 721-23 (1989).*

The rule is based upon the experience of district courts that have required disclosure of some of this information through local rules, court-approved standard interrogatories, and standing orders. Most have required pretrial disclosure of the kind of information described in Rule 26(a)(3). Many have required written reports from experts containing information like that specified in Rule 26(a)(2)(B). While far more limited, the experience of the few state and federal courts that have required pre-discovery exchange of core information such as is contemplated in Rule 26(a)(1) indicates that savings in time and expense can be achieved, particularly if the litigants meet and discuss the issues in the case as a predicate for this exchange and if a judge supports the process, as by using the results to guide further proceedings in the case. Courts in Canada and the United Kingdom have for many years required disclosure of certain information without awaiting a request from an adversary.

Paragraph (1). As the functional equivalent of court-ordered interrogatories, this paragraph requires early disclosure, without need for any request, of four types of information that have been customarily secured early in litigation through formal discovery. The introductory clause permits the court, by local rule, to exempt all or particular types of cases from these disclosure requirement *[sic]* or to modify the nature of the information to be disclosed. It is expected that courts would, for example, exempt cases like Social Security reviews and government collection cases in which discovery would not be appropriate or would be unlikely. By order the court may eliminate or modify the disclosure requirements in a particular case, and similarly the parties, unless precluded by order or local rule, can stipulate to elimination or modification of the requirements for that case. The disclosure obligations specified in paragraph (1) will not be appropriate for all cases, and it is expected that changes in these obligations will be made by the court or parties when the circumstances warrant.

Authorization of these local variations is, in large measure, included in order to accommodate the Civil Justice Reform Act of 1990, which implicitly directs districts to experiment during the study period with differing procedures to reduce the time and

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expense of civil litigation. The civil justice delay and expense reduction plans adopted by the courts under the Act differ as to the type, form, and timing of disclosures required. Section 105(c)(1) of the Act calls for a report by the Judicial Conference to Congress by December 31, 1995, comparing experience in twenty of these courts; and section 105(c)(2)(B) contemplates that some changes in the Rules may then be needed. While these studies may indicate the desirability of further changes in Rule 26(a)(1), these changes probably could not become effective before December 1998 at the earliest. In the meantime, the present revision puts in place a series of disclosure obligations that, unless a court acts affirmatively to impose other requirements or indeed to reject all such requirements for the present, are designed to eliminate certain discovery, help focus the discovery that is needed, and facilitate preparation for trial or settlement.

Subparagraph (A) requires identification of all persons who, based on the investigation conducted thus far, are likely to have discoverable information relevant to the factual disputes between the parties. All persons with such information should be disclosed, whether or not their testimony will be supportive of the position of the disclosing party. As officers of the court, counsel are expected to disclose the identity of those persons who may be used by them as witnesses or who, if their potential testimony were known, might reasonably be expected to be deposed or called as a witness by any of the other parties. Indicating briefly the general topics on which such persons have information should not be burdensome, and will assist other parties in deciding which depositions will actually be needed.

Subparagraph (B) is included as a substitute for the inquiries routinely made about the existence and location of documents and other tangible things in the possession, custody, or control of the disclosing party. Although, unlike subdivision (a)(3)(C), an itemized listing of each exhibit is not required, the disclosure should describe and categorize, to the extent identified during the initial investigation, the nature and location of potentially relevant documents and records, including computerized data and other electronically-recorded information, sufficiently to enable opposing parties (1) to make an informed decision concerning which documents might need to be examined, at least initially, and (2) to frame their document requests in a manner likely to avoid squabbles resulting from the wording of the requests. As with potential witnesses, the requirement for disclosure of documents applies to all potentially relevant items then known to the party, whether or not supportive of its contentions in the case.

Unlike subparagraphs (C) and (D), subparagraph (B) does not require production of any documents. Of course, in cases involving few documents a disclosing party may prefer to provide copies of the documents rather than describe them, and the rule is written to afford this option to the disclosing party. If, as will be more typical, only the description is provided, the other parties are expected to obtain the documents desired by proceeding under Rule 34 or through informal requests. The disclosing party does not, by describing documents under subparagraph (B), waive its right to object to production on the basis of privilege or work product protection, or to assert that the documents are not sufficiently relevant to justify the burden or expense of production.

The initial disclosure requirements of subparagraphs (A) and (B) are limited to identification of potential evidence “relevant to disputed facts alleged with particularity in the pleadings.” There is no need for a party to identify potential evidence with respect to allegations that are admitted. Broad, vague, and conclusory allegations sometimes tolerated in notice pleading--for example, the assertion that a product with many component parts is defective in some unspecified manner--should not impose upon responding parties the obligation at that point to search for and identify all persons possibly involved in, or all documents affecting, the design, manufacture, and assembly of the product. The greater the specificity and clarity of the allegations in the pleadings, the more complete should be the listing of potential witnesses and types of documentary evidence. Although paragraphs (1)(A) and (1)(B) by their terms refer to the factual disputes defined in the pleadings, the rule contemplates that these issues would be informally refined and clarified during the meeting of the parties under subdivision (f) and that the disclosure obligations would be adjusted in the light of these discussions. The disclosure requirements should, in short, be applied with common sense in light of the principles of Rule 1, keeping in mind the salutary purposes that the rule is intended to accomplish. The litigants should not indulge in gamesmanship with respect to the disclosure obligations.

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Subparagraph (C) imposes a burden of disclosure that includes the functional equivalent of a standing Request for Production under Rule 34. A party claiming damages or other monetary relief must, in addition to disclosing the calculation of such damages, make available the supporting documents for inspection and copying as if a request for such materials had been made under Rule 34. This obligation applies only with respect to documents then reasonably available to it and not privileged or protected as work product. Likewise, a party would not be expected to provide a calculation of damages which, as in many patent infringement actions, depends on information in the possession of another party or person.

Subparagraph (D) replaces subdivision (b)(2) of Rule 26, and provides that liability insurance policies be made available for inspection and copying. The last two sentences of that subdivision have been omitted as unnecessary, not to signify any change of law. The disclosure of insurance information does not thereby render such information admissible in evidence. See Rule 411, Federal Rules of Evidence. Nor does subparagraph (D) require disclosure of applications for insurance, though in particular cases such information may be discoverable in accordance with revised subdivision (a)(5).

Unless the court directs a different time, the disclosures required by subdivision (a)(1) are to be made at or within 10 days after the meeting of the parties under subdivision (f). One of the purposes of this meeting is to refine the factual disputes with respect to which disclosures should be made under paragraphs (1)(A) and (1)(B), particularly if an answer has not been filed by a defendant, or, indeed, to afford the parties an opportunity to modify by stipulation the timing or scope of these obligations. The time of this meeting is generally left to the parties provided it is held at least 14 days before a scheduling conference is held or before a scheduling order is due under Rule 16(b). In cases in which no scheduling conference is held, this will mean that the meeting must ordinarily be held within 75 days after a defendant has first appeared in the case and hence that the initial disclosures would be due no later than 85 days after the first appearance of a defendant.

Before making its disclosures, a party has the obligation under subdivision (g)(1) to make a reasonable inquiry into the facts of the case. The rule does not demand an exhaustive investigation at this stage of the case, but one that is reasonable under the circumstances, focusing on the facts that are alleged with particularity in the pleadings. The type of investigation that can be expected at this point will vary based upon such factors as the number and complexity of the issues; the location, nature, number, and availability of potentially relevant witnesses and documents; the extent of past working relationships between the attorney and the client, particularly in handling related or similar litigation; and of course how long the party has to conduct an investigation, either before or after filing of the case. As provided in the last sentence of subdivision (a)(1), a party is not excused from the duty of disclosure merely because its investigation is incomplete. The party should make its initial disclosures based on the pleadings and the information then reasonably available to it. As its investigation continues and as the issues in the pleadings are clarified, it should supplement its disclosures as required by subdivision (e)(1). A party is not relieved from its obligation of disclosure merely because another party has not made its disclosures or has made an inadequate disclosure.

It will often be desirable, particularly if the claims made in the complaint are broadly stated, for the parties to have their Rule 26(f) meeting early in the case, perhaps before a defendant has answered the complaint or had time to conduct other than a cursory investigation. In such circumstances, in order to facilitate more meaningful and useful initial disclosures, they can and should stipulate to a period of more than 10 days after the meeting in which to make these disclosures, at least for defendants who had no advance notice of the potential litigation. A stipulation at an early meeting affording such a defendant at least 60 days after receiving the complaint in which to make its disclosures under subdivision (a)(1)--a period that is two weeks longer than the time formerly specified for responding to interrogatories served with a complaint--should be adequate and appropriate in most cases.

Paragraph (2). This paragraph imposes an additional duty to disclose information regarding expert testimony sufficiently in advance of trial that opposing parties have a reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses. Normally the court should prescribe a time for these disclosures in a scheduling order under Rule 16(b), and in most cases the party with the burden of proof on an issue should disclose its expert testimony on that issue before other parties are required to make their disclosures with respect to that issue. In the absence of such a direction, the disclosures are to be made by all parties at least 90 days before the trial date or the date by which the case

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is to be ready for trial, except that an additional 30 days is allowed (unless the court specifies another time) for disclosure of expert testimony to be used solely to contradict or rebut the testimony that may be presented by another party's expert. For a discussion of procedures that have been used to enhance the reliability of expert testimony, see M. Graham, *Expert Witness Testimony and the Federal Rules of Evidence: Insuring Adequate Assurance of Trustworthiness,* 1986 U.Ill.L.Rev. 90.

Paragraph (2)(B) requires that persons retained or specially employed to provide expert testimony, or whose duties as an employee of the party regularly involve the giving of expert testimony, must prepare a detailed and complete written report, stating the testimony the witness is expected to present during direct examination, together with the reasons therefor. The information disclosed under the former rule in answering interrogatories about the "substance" of expert testimony was frequently so sketchy and vague that it rarely dispensed with the need to depose the expert and often was even of little help in preparing for a deposition of the witness. Revised Rule 37(c)(1) provides an incentive for full disclosure; namely, that a party will not ordinarily be permitted to use on direct examination any expert testimony not so disclosed. Rule 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports, and indeed, with experts such as automobile mechanics, this assistance may be needed. Nevertheless, the report, which is intended to set forth the substance of the direct examination, should be written in a manner that reflects the testimony to be given by the witness and it must be signed by the witness.

The report is to disclose the data and other information considered by the expert and any exhibits or charts that summarize or support the expert's opinions. Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions--whether or not ultimately relied upon by the expert--are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

Revised subdivision (b)(4)(A) authorizes the deposition of expert witnesses. Since depositions of experts required to prepare a written report may be taken only after the report has been served, the length of the deposition of such experts should be reduced, and in many cases the report may eliminate the need for a deposition. Revised subdivision (e)(1) requires disclosure of any material changes made in the opinions of an expert from whom a report is required, whether the changes are in the written report or in testimony given at a deposition.

For convenience, this rule and revised Rule 30 continue to use the term "expert" to refer to those persons who will testify under Rule 702 of the Federal Rules of Evidence with respect to scientific, technical, and other specialized matters. The requirement of a written report in paragraph (2)(B), however, applies only to those experts who are retained or specially employed to provide such testimony in the case or whose duties as an employee of a party regularly involve the giving of such testimony. A treating physician, for example, can be deposed or called to testify at trial without any requirement for a written report. By local rule, order, or written stipulation, the requirement of a written report may be waived for particular experts or imposed upon additional persons who will provide opinions under Rule 702.

Paragraph (3). This paragraph imposes an additional duty to disclose, without any request, information customarily needed in final preparation for trial. These disclosures are to be made in accordance with schedules adopted by the court under Rule 16(b) or by special order. If no such schedule is directed by the court, the disclosures are to be made at least 30 days before commencement of the trial. By its terms, rule 26(a)(3) does not require disclosure of evidence to be used solely for impeachment purposes; however, disclosure of such evidence--as well as other items relating to conduct of trial--may be required by local rule or a pretrial order.

Subparagraph (A) requires the parties to designate the persons whose testimony they may present as substantive evidence at trial, whether in person or by deposition. Those who will probably be called as witnesses should be listed separately from those who are not likely to be called but who are being listed in order to preserve the right to do so if needed because of developments during trial. Revised Rule 37(c)(1) provides that only persons so listed may be used at trial to present substantive evidence. This restriction does not apply unless the omission was "without substantial justification" and hence would not bar

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an unlisted witness if the need for such testimony is based upon developments during trial that could not reasonably have been anticipated--*e.g.*, a change of testimony.

Listing a witness does not obligate the party to secure the attendance of the person at trial, but should preclude the party from objecting if the person is called to testify by another party who did not list the person as a witness.

Subparagraph (B) requires the party to indicate which of these potential witnesses will be presented by deposition at trial. A party expecting to use at trial a deposition not recorded by stenographic means is required by revised Rule 32 to provide the court with a transcript of the pertinent portions of such depositions. This rule requires that copies of the transcript of a nonstenographic deposition be provided to other parties in advance of trial for verification, an obvious concern since counsel often utilize their own personnel to prepare transcripts from audio or video tapes. By order or local rule, the court may require that parties designate the particular portions of stenographic depositions to be used at trial.

Subparagraph (C) requires disclosure of exhibits, including summaries (whether to be offered in lieu of other documentary evidence or to be used as an aid in understanding such evidence), that may be offered as substantive evidence. The rule requires a separate listing of each such exhibit, though it should permit voluminous items of a similar or standardized character to be described by meaningful categories. For example, unless the court has otherwise directed, a series of vouchers might be shown collectively as a single exhibit with their starting and ending dates. As with witnesses, the exhibits that will probably be offered are to be listed separately from those which are unlikely to be offered but which are listed in order to preserve the right to do so if needed because of developments during trial. Under revised Rule 37(c)(1) the court can permit use of unlisted documents the need for which could not reasonably have been anticipated in advance of trial.

Upon receipt of these final pretrial disclosures, other parties have 14 days (unless a different time is specified by the court) to disclose any objections they wish to preserve to the usability of the deposition testimony or to the admissibility of the documentary evidence (other than under Rules 402 and 403 of the Federal Rules of Evidence). Similar provisions have become commonplace either in pretrial orders or by local rules, and significantly expedite the presentation of evidence at trial, as well as eliminate the need to have available witnesses to provide “foundation” testimony for most items of documentary evidence. The listing of a potential objection does not constitute the making of that objection or require the court to rule on the objection; rather, it preserves the right of the party to make the objection when and as appropriate during trial. The court may, however, elect to treat the listing as a motion “in limine” and rule upon the objections in advance of trial to the extent appropriate.

The time specified in the rule for the final pretrial disclosures is relatively close to the trial date. The objective is to eliminate the time and expense in making these disclosures of evidence and objections in those cases that settle shortly before trial, while affording a reasonable time for final preparation for trial in those cases that do not settle. In many cases, it will be desirable for the court in a scheduling or pretrial order to set an earlier time for disclosures of evidence and provide more time for disclosing potential objections.

Paragraph (4). This paragraph prescribes the form of disclosures. A signed written statement is required, reminding the parties and counsel of the solemnity of the obligations imposed; and the signature on the initial or pretrial disclosure is a certification under subdivision (g)(1) that it is complete and correct as of the time when made. Consistent with Rule 5(d), these disclosures are to be filed with the court unless otherwise directed. It is anticipated that many courts will direct that expert reports required under paragraph (2)(B) not be filed until needed in connection with a motion or for trial.

Paragraph (5). This paragraph is revised to take note of the availability of revised Rule 45 for inspection from non-parties of documents and premises without the need for a deposition.

Subdivision (b). This subdivision is revised in several respects. First, former paragraph (1) is subdivided into two paragraphs for ease of reference and to avoid renumbering of paragraphs (3) and (4). Textual changes are then made in new paragraph (2) to enable the court to keep tighter rein on the extent of discovery. The information explosion of recent decades has greatly

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increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression. Amendments to Rules 30, 31, and 33 place presumptive limits on the number of depositions and interrogatories, subject to leave of court to pursue additional discovery. The revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery and to authorize courts that develop case tracking systems based on the complexity of cases to increase or decrease by local rule the presumptive number of depositions and interrogatories allowed in particular types or classifications of cases. The revision also dispels any doubt as to the power of the court to impose limitations on the length of depositions under Rule 30 or on the number of requests for admission under Rule 36.

Second, former paragraph (2), relating to insurance, has been relocated as part of the required initial disclosures under subdivision (a)(1)(D), and revised to provide for disclosure of the policy itself.

Third, paragraph (4)(A) is revised to provide that experts who are expected to be witnesses will be subject to deposition prior to trial, conforming the norm stated in the rule to the actual practice followed in most courts, in which depositions of experts have become standard. Concerns regarding the expense of such depositions should be mitigated by the fact that the expert's fees for the deposition will ordinarily be borne by the party taking the deposition. The requirement under subdivision (a)(2)(B) of a complete and detailed report of the expected testimony of certain forensic experts may, moreover, eliminate the need for some such depositions or at least reduce the length of the depositions. Accordingly, the deposition of an expert required by subdivision (a)(2)(B) to provide a written report may be taken only after the report has been served.

Paragraph (4)(C), bearing on compensation of experts, is revised to take account of the changes in paragraph (4)(A).

Paragraph (5) is a new provision. A party must notify other parties if it is withholding materials otherwise subject to disclosure under the rule or pursuant to a discovery request because it is asserting a claim of privilege or work product protection. To withhold materials without such notice is contrary to the rule, subjects the party to sanctions under Rule 37(b)(2), and may be viewed as a waiver of the privilege or protection.

The party must also provide sufficient information to enable other parties to evaluate the applicability of the claimed privilege or protection. Although the person from whom the discovery is sought decides whether to claim a privilege or protection, the court ultimately decides whether, if this claim is challenged, the privilege or protection applies. Providing information pertinent to the applicability of the privilege or protection should reduce the need for in camera examination of the documents.

The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories. A party can seek relief through a protective order under subdivision (c) if compliance with the requirement for providing this information would be an unreasonable burden. In rare circumstances some of the pertinent information affecting applicability of the claim, such as the identity of the client, may itself be privileged; the rule provides that such information need not be disclosed.

The obligation to provide pertinent information concerning withheld privileged materials applies only to items “otherwise discoverable.” If a broad discovery request is made--for example, for all documents of a particular type during a twenty year period--and the responding party believes in good faith that production of documents for more than the past three years would be unduly burdensome, it should make its objection to the breadth of the request and, with respect to the documents generated in that three year period, produce the unprivileged documents and describe those withheld under the claim of privilege. If the court later rules that documents for a seven year period are properly discoverable, the documents for the additional four years should then be either produced (if not privileged) or described (if claimed to be privileged).

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Subdivision (c). The revision requires that before filing a motion for a protective order the movant must confer--either in person or by telephone--with the other affected parties in a good faith effort to resolve the discovery dispute without the need for court intervention. If the movant is unable to get opposing parties even to discuss the matter, the efforts in attempting to arrange such a conference should be indicated in the certificate.

Subdivision (d). This subdivision is revised to provide that formal discovery--as distinguished from interviews of potential witnesses and other informal discovery--not commence until the parties have met and conferred as required by subdivision (f). Discovery can begin earlier if authorized under Rule 30(a)(2)(C) (deposition of person about to leave the country) or by local rule, order, or stipulation. This will be appropriate in some cases, such as those involving requests for a preliminary injunction or motions challenging personal jurisdiction. If a local rule exempts any types of cases in which discovery may be needed from the requirement of a meeting under Rule 26(f), it should specify when discovery may commence in those cases.

The meeting of counsel is to take place as soon as practicable and in any event at least 14 days before the date of the scheduling conference under Rule 16(b) or the date a scheduling order is due under Rule 16(b). The court can assure that discovery is not unduly delayed either by entering a special order or by setting the case for a scheduling conference.

Subdivision (e). This subdivision is revised to provide that the requirement for supplementation applies to all disclosures required by subdivisions (a)(1)-(3). Like the former rule, the duty, while imposed on a “party,” applies whether the corrective information is learned by the client or by the attorney. Supplementations need not be made as each new item of information is learned but should be made at appropriate intervals during the discovery period, and with special promptness as the trial date approaches. It may be useful for the scheduling order to specify the time or times when supplementations should be made.

The revision also clarifies that the obligation to supplement responses to formal discovery requests applies to interrogatories, requests for production, and requests for admissions, but not ordinarily to deposition testimony. However, with respect to experts from whom a written report is required under subdivision (a)(2)(B), changes in the opinions expressed by the expert whether in the report or at a subsequent deposition are subject to a duty of supplemental disclosure under subdivision (e)(1).

The obligation to supplement disclosures and discovery responses applies whenever a party learns that its prior disclosures or responses are in some material respect incomplete or incorrect. There is, however, no obligation to provide supplemental or corrective information that has been otherwise made known to the parties in writing or during the discovery process, as when a witness not previously disclosed is identified during the taking of a deposition or when an expert during a deposition corrects information contained in an earlier report.

Subdivision (f). This subdivision was added in 1980 to provide a party threatened with abusive discovery with a special means for obtaining judicial intervention other than through discrete motions under Rules 26(c) and 37(a). The amendment envisioned a two-step process: first, the parties would attempt to frame a mutually agreeable plan; second, the court would hold a “discovery conference” and then enter an order establishing a schedule and limitations for the conduct of discovery. It was contemplated that the procedure, an elective one triggered on request of a party, would be used in special cases rather than as a routine matter. As expected, the device has been used only sparingly in most courts, and judicial controls over the discovery process have ordinarily been imposed through scheduling orders under Rule 16(b) or through rulings on discovery motions.

The provisions relating to a conference with the court are removed from subdivision (f). This change does not signal any lessening of the importance of judicial supervision. Indeed, there is a greater need for early judicial involvement to consider the scope and timing of the disclosure requirements of Rule 26(a) and the presumptive limits on discovery imposed under these rules or by local rules. Rather, the change is made because the provisions addressing the use of conferences with the court to control discovery are more properly included in Rule 16, which is being revised to highlight the court's powers regarding the discovery process.

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The desirability of some judicial control of discovery can hardly be doubted. Rule 16, as revised, requires that the court set a time for completion of discovery and authorizes various other orders affecting the scope, timing, and extent of discovery and disclosures. Before entering such orders, the court should consider the views of the parties, preferably by means of a conference, but at the least through written submissions. Moreover, it is desirable that the parties' proposals regarding discovery be developed through a process where they meet in person, informally explore the nature and basis of the issues, and discuss how discovery can be conducted most efficiently and economically.

As noted above, former subdivision (f) envisioned the development of proposed discovery plans as an optional procedure to be used in relatively few cases. The revised rule directs that in all cases not exempted by local rule or special order the litigants must meet in person and plan for discovery. Following this meeting, the parties submit to the court their proposals for a discovery plan and can begin formal discovery. Their report will assist the court in seeing that the timing and scope of disclosures under revised Rule 26(a) and the limitations on the extent of discovery under these rules and local rules are tailored to the circumstances of the particular case.

To assure that the court has the litigants' proposals before deciding on a scheduling order and that the commencement of discovery is not delayed unduly, the rule provides that the meeting of the parties take place as soon as practicable and in any event at least 14 days before a scheduling conference is held or before a scheduling order is due under Rule 16(b). (Rule 16(b) requires that a scheduling order be entered within 90 days after the first appearance of a defendant or, if earlier, within 120 days after the complaint has been served on any defendant.) The obligation to participate in the planning process is imposed on all parties that have appeared in the case, including defendants who, because of a pending Rule 12 motion, may not have yet filed an answer in the case. Each such party should attend the meeting, either through one of its attorneys or in person if unrepresented. If more parties are joined or appear after the initial meeting, an additional meeting may be desirable.

Subdivision (f) describes certain matters that should be accomplished at the meeting and included in the proposed discovery plan. This listing does not exclude consideration of other subjects, such as the time when any dispositive motions should be filed and when the case should be ready for trial.

The parties are directed under subdivision (a)(1) to make the disclosures required by that subdivision at or within 10 days after this meeting. In many cases the parties should use the meeting to exchange, discuss, and clarify their respective disclosures. In other cases, it may be more useful if the disclosures are delayed until after the parties have discussed at the meeting the claims and defenses in order to define the issues with respect to which the initial disclosures should be made. As discussed in the Notes to subdivision (a)(1), the parties may also need to consider whether a stipulation extending this 10-day period would be appropriate, as when a defendant would otherwise have less than 60 days after being served in which to make its initial disclosure. The parties should also discuss at the meeting what additional information, although not subject to the disclosure requirements, can be made available informally without the necessity for formal discovery requests.

The report is to be submitted to the court within 10 days after the meeting and should not be difficult to prepare. In most cases counsel should be able to agree that one of them will be responsible for its preparation and submission to the court. Form 35 has been added in the Appendix to the Rules, both to illustrate the type of report that is contemplated and to serve as a checklist for the meeting.

The litigants are expected to attempt in good faith to agree on the contents of the proposed discovery plan. If they cannot agree on all aspects of the plan, their report to the court should indicate the competing proposals of the parties on those items, as well as the matters on which they agree. Unfortunately, there may be cases in which, because of disagreements about time or place or for other reasons, the meeting is not attended by all parties or, indeed, no meeting takes place. In such situations, the report--or reports--should describe the circumstances and the court may need to consider sanctions under Rule 37(g).

By local rule or special order, the court can exempt particular cases or types of cases from the meet-and-confer requirement of subdivision (f). In general this should include any types of cases which are exempted by local rule from the requirement for

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a scheduling order under Rule 16(b), such as cases in which there will be no discovery (*e.g.*, bankruptcy appeals and reviews of social security determinations). In addition, the court may want to exempt cases in which discovery is rarely needed (*e.g.*, government collection cases and proceedings to enforce administrative summonses) or in which a meeting of the parties might be impracticable (*e.g.*, actions by unrepresented prisoners). Note that if a court exempts from the requirements for a meeting any types of cases in which discovery may be needed, it should indicate when discovery may commence in those cases.

Subdivision (g). Paragraph (1) is added to require signatures on disclosures, a requirement that parallels the provisions of paragraph (2) with respect to discovery requests, responses, and objections. The provisions of paragraph (3) have been modified to be consistent with Rules 37(a)(4) and 37(c)(1); in combination, these rules establish sanctions for violation of the rules regarding disclosures and discovery matters. Amended Rule 11 no longer applies to such violations.

2000 Amendment

Purposes of amendments. The Rule 26(a)(1) initial disclosure provisions are amended to establish a nationally uniform practice. The scope of the disclosure obligation is narrowed to cover only information that the disclosing party may use to support its position. In addition, the rule exempts specified categories of proceedings from initial disclosure, and permits a party who contends that disclosure is not appropriate in the circumstances of the case to present its objections to the court, which must then determine whether disclosure should be made. Related changes are made in Rules 26(d) and (f).

The initial disclosure requirements added by the 1993 amendments permitted local rules directing that disclosure would not be required or altering its operation. The inclusion of the “opt out” provision reflected the strong opposition to initial disclosure felt in some districts, and permitted experimentation with differing disclosure rules in those districts that were favorable to disclosure. The local option also recognized that--partly in response to the first publication in 1991 of a proposed disclosure rule--many districts had adopted a variety of disclosure programs under the aegis of the Civil Justice Reform Act. It was hoped that developing experience under a variety of disclosure systems would support eventual refinement of a uniform national disclosure practice. In addition, there was hope that local experience could identify categories of actions in which disclosure is not useful.

A striking array of local regimes in fact emerged for disclosure and related features introduced in 1993. *See* D. Stienstra, *Implementation of Disclosure in United States District Courts, With Specific Attention to Courts' Responses to Selected Amendments to Federal Rule of Civil Procedure 26* (Federal Judicial Center, March 30, 1998) (describing and categorizing local regimes). In its final report to Congress on the CJRA experience, the Judicial Conference recommended reexamination of the need for national uniformity, particularly in regard to initial disclosure. Judicial Conference, *Alternative Proposals for Reduction of Cost and Delay: Assessment of Principles, Guidelines and Techniques,* 175 F.R.D. 62, 98 (1997).

At the Committee's request, the Federal Judicial Center undertook a survey in 1997 to develop information on current disclosure and discovery practices. *See* T. Willging, J. Shapard, D. Stienstra & D. Miletich, *Discovery and Disclosure Practice, Problems, and Proposals for Change* (Federal Judicial Center, 1997). In addition, the Committee convened two conferences on discovery involving lawyers from around the country and received reports and recommendations on possible discovery amendments from a number of bar groups. Papers and other proceedings from the second conference are published in 39 Boston Col. L. Rev. 517-840 (1998).

The Committee has discerned widespread support for national uniformity. Many lawyers have experienced difficulty in coping with divergent disclosure and other practices as they move from one district to another. Lawyers surveyed by the Federal Judicial Center ranked adoption of a uniform national disclosure rule second among proposed rule changes (behind increased availability of judges to resolve discovery disputes) as a means to reduce litigation expenses without interfering with fair outcomes. *Discovery and Disclosure Practice, supra*, at 44-45. National uniformity is also a central purpose of the Rules Enabling Act of 1934, as amended, 28 U.S.C. §§ 2072-2077.

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These amendments restore national uniformity to disclosure practice. Uniformity is also restored to other aspects of discovery by deleting most of the provisions authorizing local rules that vary the number of permitted discovery events or the length of depositions. Local rule options are also deleted from Rules 26(d) and (f).

Subdivision (a)(1). The amendments remove the authority to alter or opt out of the national disclosure requirements by local rule, invalidating not only formal local rules but also informal "standing" orders of an individual judge or court that purport to create exemptions from--or limit or expand--the disclosure provided under the national rule. *See* Rule 83. Case-specific orders remain proper, however, and are expressly required if a party objects that initial disclosure is not appropriate in the circumstances of the action. Specified categories of proceedings are excluded from initial disclosure under subdivision (a)(1)(E). In addition, the parties can stipulate to forgo disclosure, as was true before. But even in a case excluded by subdivision (a)(1)(E) or in which the parties stipulate to bypass disclosure, the court can order exchange of similar information in managing the action under Rule 16.

The initial disclosure obligation of subdivisions (a)(1)(A) and (B) has been narrowed to identification of witnesses and documents that the disclosing party may use to support its claims or defenses. "Use" includes any use at a pretrial conference, to support a motion, or at trial. The disclosure obligation is also triggered by intended use in discovery, apart from use to respond to a discovery request; use of a document to question a witness during a deposition is a common example. The disclosure obligation attaches both to witnesses and documents a party intends to use and also to witnesses and to documents the party intends to use if--in the language of Rule 26(a)(3)--"the need arises."

A party is no longer obligated to disclose witnesses or documents, whether favorable or unfavorable, that it does not intend to use. The obligation to disclose information the party may use connects directly to the exclusion sanction of Rule 37(c)(1). Because the disclosure obligation is limited to material that the party may use, it is no longer tied to particularized allegations in the pleadings. Subdivision (e)(1), which is unchanged, requires supplementation if information later acquired would have been subject to the disclosure requirement. As case preparation continues, a party must supplement its disclosures when it determines that it may use a witness or document that it did not previously intend to use.

The disclosure obligation applies to "claims and defenses," and therefore requires a party to disclose information it may use to support its denial or rebuttal of the allegations, claim, or defense of another party. It thereby bolsters the requirements of Rule 11(b)(4), which authorizes denials "warranted on the evidence," and disclosure should include the identity of any witness or document that the disclosing party may use to support such denials.

Subdivision (a)(3) presently excuses pretrial disclosure of information solely for impeachment. Impeachment information is similarly excluded from the initial disclosure requirement.

Subdivisions (a)(1)(C) and (D) are not changed. Should a case be exempted from initial disclosure by Rule 26(a)(1)(E) or by agreement or order, the insurance information described by subparagraph (D) should be subject to discovery, as it would have been under the principles of former Rule 26(b)(2), which was added in 1970 and deleted in 1993 as redundant in light of the new initial disclosure obligation.

New subdivision (a)(1)(E) excludes eight specified categories of proceedings from initial disclosure. The objective of this listing is to identify cases in which there is likely to be little or no discovery, or in which initial disclosure appears unlikely to contribute to the effective development of the case. The list was developed after a review of the categories excluded by local rules in various districts from the operation of Rule 16(b) and the conference requirements of subdivision (f). Subdivision (a)(1)(E) refers to categories of "proceedings" rather than categories of "actions" because some might not properly be labeled "actions." Case designations made by the parties or the clerk's office at the time of filing do not control application of the exemptions. The descriptions in the rule are generic and are intended to be administered by the parties--and, when needed, the courts--with the flexibility needed to adapt to gradual evolution in the types of proceedings that fall within these general categories. The exclusion of an action for review on an administrative record, for example, is intended to reach a proceeding that is framed as

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an “appeal” based solely on an administrative record. The exclusion should not apply to a proceeding in a form that commonly permits admission of new evidence to supplement the record. Item (vii), excluding a proceeding ancillary to proceedings in other courts, does not refer to bankruptcy proceedings; application of the Civil Rules to bankruptcy proceedings is determined by the Bankruptcy Rules.

Subdivision (a)(1)(E) is likely to exempt a substantial proportion of the cases in most districts from the initial disclosure requirement. Based on 1996 and 1997 case filing statistics, Federal Judicial Center staff estimate that, nationwide, these categories total approximately one-third of all civil filings.

The categories of proceedings listed in subdivision (a)(1)(E) are also exempted from the subdivision (f) conference requirement and from the subdivision (d) moratorium on discovery. Although there is no restriction on commencement of discovery in these cases, it is not expected that this opportunity will often lead to abuse since there is likely to be little or no discovery in most such cases. Should a defendant need more time to respond to discovery requests filed at the beginning of an exempted action, it can seek relief by motion under Rule 26(c) if the plaintiff is unwilling to defer the due date by agreement.

Subdivision (a)(1)(E)'s enumeration of exempt categories is exclusive. Although a case-specific order can alter or excuse initial disclosure, local rules or “standing” orders that purport to create general exemptions are invalid. *See* Rule 83.

The time for initial disclosure is extended to 14 days after the subdivision (f) conference unless the court orders otherwise. This change is integrated with corresponding changes requiring that the subdivision (f) conference be held 21 days before the Rule 16(b) scheduling conference or scheduling order, and that the report on the subdivision (f) conference be submitted to the court 14 days after the meeting. These changes provide a more orderly opportunity for the parties to review the disclosures, and for the court to consider the report. In many instances, the subdivision (f) conference and the effective preparation of the case would benefit from disclosure before the conference, and earlier disclosure is encouraged.

The presumptive disclosure date does not apply if a party objects to initial disclosure during the subdivision (f) conference and states its objection in the subdivision (f) discovery plan. The right to object to initial disclosure is not intended to afford parties an opportunity to “opt out” of disclosure unilaterally. It does provide an opportunity for an objecting party to present to the court its position that disclosure would be “inappropriate in the circumstances of the action.” Making the objection permits the objecting party to present the question to the judge before any party is required to make disclosure. The court must then rule on the objection and determine what disclosures--if any--should be made. Ordinarily, this determination would be included in the Rule 16(b) scheduling order, but the court could handle the matter in a different fashion. Even when circumstances warrant suspending some disclosure obligations, others--such as the damages and insurance information called for by subdivisions (a)(1)(C) and (D)--may continue to be appropriate.

The presumptive disclosure date is also inapplicable to a party who is “first served or otherwise joined” after the subdivision (f) conference. This phrase refers to the date of service of a claim on a party in a defensive posture (such as a defendant or third-party defendant), and the date of joinder of a party added as a claimant or an intervenor. Absent court order or stipulation, a new party has 30 days in which to make its initial disclosures. But it is expected that later-added parties will ordinarily be treated the same as the original parties when the original parties have stipulated to forgo initial disclosure, or the court has ordered disclosure in a modified form.

Subdivision (a)(3). The amendment to Rule 5(d) forbids filing disclosures under subdivisions (a)(1) and (a)(2) until they are used in the proceeding, and this change is reflected in an amendment to subdivision (a)(4). Disclosures under subdivision (a)(3), however, may be important to the court in connection with the final pretrial conference or otherwise in preparing for trial. The requirement that objections to certain matters be filed points up the court's need to be provided with these materials. Accordingly, the requirement that subdivision (a)(3) materials be filed has been moved from subdivision (a)(4) to subdivision (a)(3), and it has also been made clear that they--and any objections--should be filed “promptly.”

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Subdivision (a)(4). The filing requirement has been removed from this subdivision. Rule 5(d) has been amended to provide that disclosures under subdivisions (a)(1) and (a)(2) must not be filed until used in the proceeding. Subdivision (a)(3) has been amended to require that the disclosures it directs, and objections to them, be filed promptly. Subdivision (a)(4) continues to require that all disclosures under subdivisions (a)(1), (a)(2), and (a)(3) be in writing, signed, and served.

"Shall" is replaced by "must" under the program to conform amended rules to current style conventions when there is no ambiguity.

GAP Report

The Advisory Committee recommends that the amendments to Rules 26(a)(1)(A) and (B) be changed so that initial disclosure applies to information the disclosing party "may use to support" its claims or defenses. It also recommends changes in the Committee Note to explain that disclosure requirement. In addition, it recommends inclusion in the Note of further explanatory matter regarding the exclusion from initial disclosure provided in new Rule 26(a)(1)(E) for actions for review on an administrative record and the impact of these exclusions on bankruptcy proceedings. Minor wording improvements in the Note are also proposed.

Subdivision (b)(1). In 1978, the Committee published for comment a proposed amendment, suggested by the Section of Litigation of the American Bar Association, to refine the scope of discovery by deleting the "subject matter" language. This proposal was withdrawn, and the Committee has since then made other changes in the discovery rules to address concerns about overbroad discovery. Concerns about costs and delay of discovery have persisted nonetheless, and other bar groups have repeatedly renewed similar proposals for amendment to this subdivision to delete the "subject matter" language. Nearly one-third of the lawyers surveyed in 1997 by the Federal Judicial Center endorsed narrowing the scope of discovery as a means of reducing litigation expense without interfering with fair case resolutions. *Discovery and Disclosure Practice, supra*, at 44-45 (1997). The Committee has heard that in some instances, particularly cases involving large quantities of discovery, parties seek to justify discovery requests that sweep far beyond the claims and defenses of the parties on the ground that they nevertheless have a bearing on the "subject matter" involved in the action.

The amendments proposed for subdivision (b)(1) include one element of these earlier proposals but also differ from these proposals in significant ways. The similarity is that the amendments describe the scope of party-controlled discovery in terms of matter relevant to the claim or defense of any party. The court, however, retains authority to order discovery of any matter relevant to the subject matter involved in the action for good cause. The amendment is designed to involve the court more actively in regulating the breadth of sweeping or contentious discovery. The Committee has been informed repeatedly by lawyers that involvement of the court in managing discovery is an important method of controlling problems of inappropriately broad discovery. Increasing the availability of judicial officers to resolve discovery disputes and increasing court management of discovery were both strongly endorsed by the attorneys surveyed by the Federal Judicial Center. *See Discovery and Disclosure Practice, supra*, at 44. Under the amended provisions, if there is an objection that discovery goes beyond material relevant to the parties' claims or defenses, the court would become involved to determine whether the discovery is relevant to the claims or defenses and, if not, whether good cause exists for authorizing it so long as it is relevant to the subject matter of the action. The good-cause standard warranting broader discovery is meant to be flexible.

The Committee intends that the parties and the court focus on the actual claims and defenses involved in the action. The dividing line between information relevant to the claims and defenses and that relevant only to the subject matter of the action cannot be defined with precision. A variety of types of information not directly pertinent to the incident in suit could be relevant to the claims or defenses raised in a given action. For example, other incidents of the same type, or involving the same product, could be properly discoverable under the revised standard. Information about organizational arrangements or filing systems of a party could be discoverable if likely to yield or lead to the discovery of admissible information. Similarly, information that could be used to impeach a likely witness, although not otherwise relevant to the claims or defenses, might be properly discoverable.

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In each instance, the determination whether such information is discoverable because it is relevant to the claims or defenses depends on the circumstances of the pending action.

The rule change signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings. In general, it is hoped that reasonable lawyers can cooperate to manage discovery without the need for judicial intervention. When judicial intervention is invoked, the actual scope of discovery should be determined according to the reasonable needs of the action. The court may permit broader discovery in a particular case depending on the circumstances of the case, the nature of the claims and defenses, and the scope of the discovery requested.

The amendments also modify the provision regarding discovery of information not admissible in evidence. As added in 1946, this sentence was designed to make clear that otherwise relevant material could not be withheld because it was hearsay or otherwise inadmissible. The Committee was concerned that the "reasonably calculated to lead to the discovery of admissible evidence" standard set forth in this sentence might swallow any other limitation on the scope of discovery. Accordingly, this sentence has been amended to clarify that information must be relevant to be discoverable, even though inadmissible, and that discovery of such material is permitted if reasonably calculated to lead to the discovery of admissible evidence. As used here, "relevant" means within the scope of discovery as defined in this subdivision, and it would include information relevant to the subject matter involved in the action if the court has ordered discovery to that limit based on a showing of good cause.

Finally, a sentence has been added calling attention to the limitations of subdivision (b)(2)(i), (ii), and (iii). These limitations apply to discovery that is otherwise within the scope of subdivision (b)(1). The Committee has been told repeatedly that courts have not implemented these limitations with the vigor that was contemplated. *See 8 Federal Practice & Procedure* § 2008.1 at 121. This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery. *Cf. Crawford-El v. Britton*, 118 S.Ct. 1584, 1597 (1998) (quoting Rule 26(b)(2)(iii) and stating that "Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly").

GAP Report

The Advisory Committee recommends changing the rule to authorize the court to expand discovery to any "matter"--not "information"--relevant to the subject matter involved in the action. In addition, it recommends additional clarifying material in the Committee Note about the impact of the change on some commonly disputed discovery topics, the relationship between cost-bearing under Rule 26(b)(2) and expansion of the scope of discovery on a showing of good cause, and the meaning of "relevant" in the revision to the last sentence of current subdivision (b)(1). In addition, some minor clarifications of language changes have been proposed for the Committee Note.

Subdivision (b)(2). Rules 30, 31, and 33 establish presumptive national limits on the numbers of depositions and interrogatories. New Rule 30(d)(2) establishes a presumptive limit on the length of depositions. Subdivision (b)(2) is amended to remove the previous permission for local rules that establish different presumptive limits on these discovery activities. There is no reason to believe that unique circumstances justify varying these nationally-applicable presumptive limits in certain districts. The limits can be modified by court order or agreement in an individual action, but "standing" orders imposing different presumptive limits are not authorized. Because there is no national rule limiting the number of Rule 36 requests for admissions, the rule continues to authorize local rules that impose numerical limits on them. This change is not intended to interfere with differentiated case management in districts that use this technique by case-specific order as part of their Rule 16 process.

Subdivision (d). The amendments remove the prior authority to exempt cases by local rule from the moratorium on discovery before the subdivision (f) conference, but the categories of proceedings exempted from initial disclosure under subdivision (a)(1)(E) are excluded from subdivision (d). The parties may agree to disregard the moratorium where it applies, and the court may so order in a case, but "standing" orders altering the moratorium are not authorized.

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Subdivision (f). As in subdivision (d), the amendments remove the prior authority to exempt cases by local rule from the conference requirement. The Committee has been informed that the addition of the conference was one of the most successful changes made in the 1993 amendments, and it therefore has determined to apply the conference requirement nationwide. The categories of proceedings exempted from initial disclosure under subdivision (a)(1)(E) are exempted from the conference requirement for the reasons that warrant exclusion from initial disclosure. The court may order that the conference need not occur in a case where otherwise required, or that it occur in a case otherwise exempted by subdivision (a)(1)(E). "Standing" orders altering the conference requirement for categories of cases are not authorized.

The rule is amended to require only a "conference" of the parties, rather than a "meeting." There are important benefits to face-to-face discussion of the topics to be covered in the conference, and those benefits may be lost if other means of conferring were routinely used when face-to-face meetings would not impose burdens. Nevertheless, geographic conditions in some districts may exact costs far out of proportion to these benefits. The amendment allows the court by case-specific order to require a face-to-face meeting, but "standing" orders so requiring are not authorized.

As noted concerning the amendments to subdivision (a)(1), the time for the conference has been changed to at least 21 days before the Rule 16 scheduling conference, and the time for the report is changed to no more than 14 days after the Rule 26(f) conference. This should ensure that the court will have the report well in advance of the scheduling conference or the entry of the scheduling order.

Since Rule 16 was amended in 1983 to mandate some case management activities in all courts, it has included deadlines for Completing these tasks to ensure that all courts do so within a reasonable time. Rule 26(f) was fit into this scheme when it was adopted in 1993. It was never intended, however, that the national requirements that certain activities be completed by a certain time should delay case management in districts that move much faster than the national rules direct, and the rule is therefore amended to permit such a court to adopt a local rule that shortens the period specified for the completion of these tasks.

"Shall" is replaced by "must," "does," or an active verb under the program to conform amended rules to current style conventions when there is no ambiguity.

GAP Report

The Advisory Committee recommends adding a sentence to the published amendments to Rule 26(f) authorizing local rules shortening the time between the attorney conference and the court's action under Rule 16(b), and addition to the Committee Note of explanatory material about this change to the rule. This addition can be made without republication in response to public comments.

2006 Amendment

Subdivision (a). Rule 26(a)(1)(B) is amended to parallel Rule 34(a) by recognizing that a party must disclose electronically stored information as well as documents that it may use to support its claims or defenses. The term "electronically stored information" has the same broad meaning in Rule 26(a)(1) as in Rule 34(a). This amendment is consistent with the 1993 addition of Rule 26(a)(1)(B). The term "data compilations" is deleted as unnecessary because it is a subset of both documents and electronically stored information.

[Subdivision (a)(1)(E).] Civil forfeiture actions are added to the list of exemptions from Rule 26(a)(1) disclosure requirements. These actions are governed by new Supplemental Rule G. Disclosure is not likely to be useful.

Subdivision (b)(2). The amendment to Rule 26(b)(2) is designed to address issues raised by difficulties in locating, retrieving, and providing discovery of some electronically stored information. Electronic storage systems often make it easier to locate and retrieve information. These advantages are properly taken into account in determining the reasonable scope of discovery in

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a particular case. But some sources of electronically stored information can be accessed only with substantial burden and cost. In a particular case, these burdens and costs may make the information on such sources not reasonably accessible.

It is not possible to define in a rule the different types of technological features that may affect the burdens and costs of accessing electronically stored information. Information systems are designed to provide ready access to information used in regular ongoing activities. They also may be designed so as to provide ready access to information that is not regularly used. But a system may retain information on sources that are accessible only by incurring substantial burdens or costs. Subparagraph (B) is added to regulate discovery from such sources.

Under this rule, a responding party should produce electronically stored information that is relevant, not privileged, and reasonably accessible, subject to the (b)(2)(C) limitations that apply to all discovery. The responding party must also identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing. The identification should, to the extent possible, provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources.

A party's identification of sources of electronically stored information as not reasonably accessible does not relieve the party of its common-law or statutory duties to preserve evidence. Whether a responding party is required to preserve unsearched sources of potentially responsive information that it believes are not reasonably accessible depends on the circumstances of each case. It is often useful for the parties to discuss this issue early in discovery.

The volume of -- and the ability to search -- much electronically stored information means that in many cases the responding party will be able to produce information from reasonably accessible sources that will fully satisfy the parties' discovery needs. In many circumstances the requesting party should obtain and evaluate the information from such sources before insisting that the responding party search and produce information contained on sources that are not reasonably accessible. If the requesting party continues to seek discovery of information from sources identified as not reasonably accessible, the parties should discuss the burdens and costs of accessing and retrieving the information, the needs that may establish good cause for requiring all or part of the requested discovery even if the information sought is not reasonably accessible, and conditions on obtaining and producing the information that may be appropriate.

If the parties cannot agree whether, or on what terms, sources identified as not reasonably accessible should be searched and discoverable information produced, the issue may be raised either by a motion to compel discovery or by a motion for a protective order. The parties must confer before bringing either motion. If the parties do not resolve the issue and the court must decide, the responding party must show that the identified sources of information are not reasonably accessible because of undue burden or cost. The requesting party may need discovery to test this assertion. Such discovery might take the form of requiring the responding party to conduct a sampling of information contained on the sources identified as not reasonably accessible; allowing some form of inspection of such sources; or taking depositions of witnesses knowledgeable about the responding party's information systems.

Once it is shown that a source of electronically stored information is not reasonably accessible, the requesting party may still obtain discovery by showing good cause, considering the limitations of Rule 26(b)(2)(C) that balance the costs and potential benefits of discovery. The decision whether to require a responding party to search for and produce information that is not reasonably accessible depends not only on the burdens and costs of doing so, but also on whether those burdens and costs can be justified in the circumstances of the case. Appropriate considerations may include: (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.

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The responding party has the burden as to one aspect of the inquiry -- whether the identified sources are not reasonably accessible in light of the burdens and costs required to search for, retrieve, and produce whatever responsive information may be found. The requesting party has the burden of showing that its need for the discovery outweighs the burdens and costs of locating, retrieving, and producing the information. In some cases, the court will be able to determine whether the identified sources are not reasonably accessible and whether the requesting party has shown good cause for some or all of the discovery, consistent with the limitations of Rule 26(b)(2)(C), through a single proceeding or presentation. The good-cause determination, however, may be complicated because the court and parties may know little about what information the sources identified as not reasonably accessible might contain, whether it is relevant, or how valuable it may be to the litigation. In such cases, the parties may need some focused discovery, which may include sampling of the sources, to learn more about what burdens and costs are involved in accessing the information, what the information consists of, and how valuable it is for the litigation in light of information that can be obtained by exhausting other opportunities for discovery.

The good-cause inquiry and consideration of the Rule 26(b)(2)(C) limitations are coupled with the authority to set conditions for discovery. The conditions may take the form of limits on the amount, type, or sources of information required to be accessed and produced. The conditions may also include payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible. A requesting party's willingness to share or bear the access costs may be weighed by the court in determining whether there is good cause. But the producing party's burdens in reviewing the information for relevance and privilege may weigh against permitting the requested discovery.

The limitations of Rule 26(b)(2)(C) continue to apply to all discovery of electronically stored information, including that stored on reasonably accessible electronic sources.

Subdivision (b)(5). The Committee has repeatedly been advised that the risk of privilege waiver, and the work necessary to avoid it, add to the costs and delay of discovery. When the review is of electronically stored information, the risk of waiver, and the time and effort required to avoid it, can increase substantially because of the volume of electronically stored information and the difficulty in ensuring that all information to be produced has in fact been reviewed. Rule 26(b)(5)(A) provides a procedure for a party that has withheld information on the basis of privilege or protection as trial-preparation material to make the claim so that the requesting party can decide whether to contest the claim and the court can resolve the dispute. Rule 26(b)(5)(B) is added to provide a procedure for a party to assert a claim of privilege or trial-preparation material protection after information is produced in discovery in the action and, if the claim is contested, permit any party that received the information to present the matter to the court for resolution.

Rule 26(b)(5)(B) does not address whether the privilege or protection that is asserted after production was waived by the production. The courts have developed principles to determine whether, and under what circumstances, waiver results from inadvertent production of privileged or protected information. Rule 26(b)(5)(B) provides a procedure for presenting and addressing these issues. Rule 26(b)(5)(B) works in tandem with Rule 26(f), which is amended to direct the parties to discuss privilege issues in preparing their discovery plan, and which, with amended Rule 16(b), allows the parties to ask the court to include in an order any agreements the parties reach regarding issues of privilege or trial-preparation material protection. Agreements reached under Rule 26(f)(4) and orders including such agreements entered under Rule 16(b)(6) may be considered when a court determines whether a waiver has occurred. Such agreements and orders ordinarily control if they adopt procedures different from those in Rule 26(b)(5)(B).

A party asserting a claim of privilege or protection after production must give notice to the receiving party. That notice should be in writing unless the circumstances preclude it. Such circumstances could include the assertion of the claim during a deposition. The notice should be as specific as possible in identifying the information and stating the basis for the claim. Because the receiving party must decide whether to challenge the claim and may sequester the information and submit it to the court for a ruling on whether the claimed privilege or protection applies and whether it has been waived, the notice should be sufficiently detailed so as to enable the receiving party and the court to understand the basis for the claim and to determine whether waiver

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has occurred. Courts will continue to examine whether a claim of privilege or protection was made at a reasonable time when delay is part of the waiver determination under the governing law.

After receiving notice, each party that received the information must promptly return, sequester, or destroy the information and any copies it has. The option of sequestering or destroying the information is included in part because the receiving party may have incorporated the information in protected trial-preparation materials. No receiving party may use or disclose the information pending resolution of the privilege claim. The receiving party may present to the court the questions whether the information is privileged or protected as trial-preparation material, and whether the privilege or protection has been waived. If it does so, it must provide the court with the grounds for the privilege or protection specified in the producing party's notice, and serve all parties. In presenting the question, the party may use the content of the information only to the extent permitted by the applicable law of privilege, protection for trial-preparation material, and professional responsibility.

If a party disclosed the information to nonparties before receiving notice of a claim of privilege or protection as trial-preparation material, it must take reasonable steps to retrieve the information and to return it, sequester it until the claim is resolved, or destroy it.

Whether the information is returned or not, the producing party must preserve the information pending the court's ruling on whether the claim of privilege or of protection is properly asserted and whether it was waived. As with claims made under Rule 26(b)(5)(A), there may be no ruling if the other parties do not contest the claim.

Subdivision (f). Rule 26(f) is amended to direct the parties to discuss discovery of electronically stored information during their discovery-planning conference. The rule focuses on "issues relating to disclosure or discovery of electronically stored information"; the discussion is not required in cases not involving electronic discovery, and the amendment imposes no additional requirements in those cases. When the parties do anticipate disclosure or discovery of electronically stored information, discussion at the outset may avoid later difficulties or ease their resolution.

When a case involves discovery of electronically stored information, the issues to be addressed during the Rule 26(f) conference depend on the nature and extent of the contemplated discovery and of the parties' information systems. It may be important for the parties to discuss those systems, and accordingly important for counsel to become familiar with those systems before the conference. With that information, the parties can develop a discovery plan that takes into account the capabilities of their computer systems. In appropriate cases identification of, and early discovery from, individuals with special knowledge of a party's computer systems may be helpful.

The particular issues regarding electronically stored information that deserve attention during the discovery planning stage depend on the specifics of the given case. *See Manual for Complex Litigation* (4th) § 40.25(2) (listing topics for discussion in a proposed order regarding meet-and-confer sessions). For example, the parties may specify the topics for such discovery and the time period for which discovery will be sought. They may identify the various sources of such information within a party's control that should be searched for electronically stored information. They may discuss whether the information is reasonably accessible to the party that has it, including the burden or cost of retrieving and reviewing the information. *See* Rule 26(b)(2)(B). Rule 26(f)(3) explicitly directs the parties to discuss the form or forms in which electronically stored information might be produced. The parties may be able to reach agreement on the forms of production, making discovery more efficient. Rule 34(b) is amended to permit a requesting party to specify the form or forms in which it wants electronically stored information produced. If the requesting party does not specify a form, Rule 34(b) directs the responding party to state the forms it intends to use in the production. Early discussion of the forms of production may facilitate the application of Rule 34(b) by allowing the parties to determine what forms of production will meet both parties' needs. Early identification of disputes over the forms of production may help avoid the expense and delay of searches or productions using inappropriate forms.

Rule 26(f) is also amended to direct the parties to discuss any issues regarding preservation of discoverable information during their conference as they develop a discovery plan. This provision applies to all sorts of discoverable information, but can be

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particularly important with regard to electronically stored information. The volume and dynamic nature of electronically stored information may complicate preservation obligations. The ordinary operation of computers involves both the automatic creation and the automatic deletion or overwriting of certain information. Failure to address preservation issues early in the litigation increases uncertainty and raises a risk of disputes.

The parties' discussion should pay particular attention to the balance between the competing needs to preserve relevant evidence and to continue routine operations critical to ongoing activities. Complete or broad cessation of a party's routine computer operations could paralyze the party's activities. *Cf. Manual for Complex Litigation* (4th) § 11.422 ("A blanket preservation order may be prohibitively expensive and unduly burdensome for parties dependent on computer systems for their day-to-day operations.") The parties should take account of these considerations in their discussions, with the goal of agreeing on reasonable preservation steps.

The requirement that the parties discuss preservation does not imply that courts should routinely enter preservation orders. A preservation order entered over objections should be narrowly tailored. Ex parte preservation orders should issue only in exceptional circumstances.

Rule 26(f) is also amended to provide that the parties should discuss any issues relating to assertions of privilege or of protection as trial-preparation materials, including whether the parties can facilitate discovery by agreeing on procedures for asserting claims of privilege or protection after production and whether to ask the court to enter an order that includes any agreement the parties reach. The Committee has repeatedly been advised about the discovery difficulties that can result from efforts to guard against waiver of privilege and work-product protection. Frequently parties find it necessary to spend large amounts of time reviewing materials requested through discovery to avoid waiving privilege. These efforts are necessary because materials subject to a claim of privilege or protection are often difficult to identify. A failure to withhold even one such item may result in an argument that there has been a waiver of privilege as to all other privileged materials on that subject matter. Efforts to avoid the risk of waiver can impose substantial costs on the party producing the material and the time required for the privilege review can substantially delay access for the party seeking discovery.

These problems often become more acute when discovery of electronically stored information is sought. The volume of such data, and the informality that attends use of e-mail and some other types of electronically stored information, may make privilege determinations more difficult, and privilege review correspondingly more expensive and time consuming. Other aspects of electronically stored information pose particular difficulties for privilege review. For example, production may be sought of information automatically included in electronic files but not apparent to the creator or to readers. Computer programs may retain draft language, editorial comments, and other deleted matter (sometimes referred to as "embedded data" or "embedded edits") in an electronic file but not make them apparent to the reader. Information describing the history, tracking, or management of an electronic file (sometimes called "metadata") is usually not apparent to the reader viewing a hard copy or a screen image. Whether this information should be produced may be among the topics discussed in the Rule 26(f) conference. If it is, it may need to be reviewed to ensure that no privileged information is included, further complicating the task of privilege review.

Parties may attempt to minimize these costs and delays by agreeing to protocols that minimize the risk of waiver. They may agree that the responding party will provide certain requested materials for initial examination without waiving any privilege or protection -- sometimes known as a "quick peek." The requesting party then designates the documents it wishes to have actually produced. This designation is the Rule 34 request. The responding party then responds in the usual course, screening only those documents actually requested for formal production and asserting privilege claims as provided in Rule 26(b)(5)(A). On other occasions, parties enter agreements -- sometimes called "clawback agreements"-- that production without intent to waive privilege or protection should not be a waiver so long as the responding party identifies the documents mistakenly produced, and that the documents should be returned under those circumstances. Other voluntary arrangements may be appropriate depending on the circumstances of each litigation. In most circumstances, a party who receives information under such an arrangement cannot assert that production of the information waived a claim of privilege or of protection as trial-preparation material.

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Although these agreements may not be appropriate for all cases, in certain cases they can facilitate prompt and economical discovery by reducing delay before the discovering party obtains access to documents, and by reducing the cost and burden of review by the producing party. A case-management or other order including such agreements may further facilitate the discovery process. Form 35 is amended to include a report to the court about any agreement regarding protections against inadvertent forfeiture or waiver of privilege or protection that the parties have reached, and Rule 16(b) is amended to recognize that the court may include such an agreement in a case-management or other order. If the parties agree to entry of such an order, their proposal should be included in the report to the court.

Rule 26(b)(5)(B) is added to establish a parallel procedure to assert privilege or protection as trial-preparation material after production, leaving the question of waiver to later determination by the court.

2007 Amendment

The language of Rule 26 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 26(a)(5) served as an index of the discovery methods provided by later rules. It was deleted as redundant. Deletion does not affect the right to pursue discovery in addition to disclosure.

Former Rule 26(b)(1) began with a general statement of the scope of discovery that appeared to function as a preface to each of the five numbered paragraphs that followed. This preface has been shifted to the text of paragraph (1) because it does not accurately reflect the limits embodied in paragraphs (2), (3), or (4), and because paragraph (5) does not address the scope of discovery.

The reference to discovery of “books” in former Rule 26(b)(1) was deleted to achieve consistent expression throughout the discovery rules. Books remain a proper subject of discovery.

Amended Rule 26(b)(3) states that a party may obtain a copy of the party's own previous statement “on request.” Former Rule 26(b)(3) expressly made the request procedure available to a nonparty witness, but did not describe the procedure to be used by a party. This apparent gap is closed by adopting the request procedure, which ensures that a party need not invoke Rule 34 to obtain a copy of the party's own statement.

Rule 26(e) stated the duty to supplement or correct a disclosure or discovery response “to include information thereafter acquired.” This apparent limit is not reflected in practice; parties recognize the duty to supplement or correct by providing information that was not originally provided although it was available at the time of the initial disclosure or response. These words are deleted to reflect the actual meaning of the present rule.

Former Rule 26(e) used different phrases to describe the time to supplement or correct a disclosure or discovery response. Disclosures were to be supplemented “at appropriate intervals.” A prior discovery response must be “seasonably * * * amend[ed].” The fine distinction between these phrases has not been observed in practice. Amended Rule 26(e)(1)(A) uses the same phrase for disclosures and discovery responses. The party must supplement or correct “in a timely manner.”

Former Rule 26(g)(1) did not call for striking an unsigned disclosure. The omission was an obvious drafting oversight. Amended Rule 26(g)(2) includes disclosures in the list of matters that the court must strike unless a signature is provided “promptly * * * after being called to the attorney's or party's attention.”

Former Rule 26(b)(2)(A) referred to a “good faith” argument to extend existing law. Amended Rule 26(b)(1)(B)(i) changes this reference to a “nonfrivolous” argument to achieve consistency with Rule 11(b)(2).

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As with the Rule 11 signature on a pleading, written motion, or other paper, disclosure and discovery signatures should include not only a postal address but also a telephone number and electronic-mail address. A signer who lacks one or more of those addresses need not supply a nonexistent item.

Rule 11(b)(2) recognizes that it is legitimate to argue for establishing new law. An argument to establish new law is equally legitimate in conducting discovery.

2010 Amendment

Rule 26. Rules 26(a)(2) and (b)(4) are amended to address concerns about expert discovery. The amendments to Rule 26(a)(2) require disclosure regarding expected expert testimony of those expert witnesses not required to provide expert reports and limit the expert report to facts or data (rather than "data or other information," as in the current rule) considered by the witness. Rule 26(b)(4) is amended to provide work-product protection against discovery regarding draft expert disclosures or reports and--with three specific exceptions--communications between expert witnesses and counsel.

In 1993, Rule 26(b)(4)(A) was revised to authorize expert depositions and Rule 26(a)(2) was added to provide disclosure, including--for many experts--an extensive report. Many courts read the disclosure provision to authorize discovery of all communications between counsel and expert witnesses and all draft reports. The Committee has been told repeatedly that routine discovery into attorney-expert communications and draft reports has had undesirable effects. Costs have risen. Attorneys may employ two sets of experts--one for purposes of consultation and another to testify at trial--because disclosure of their collaborative interactions with expert consultants would reveal their most sensitive and confidential case analyses. At the same time, attorneys often feel compelled to adopt a guarded attitude toward their interaction with testifying experts that impedes effective communication, and experts adopt strategies that protect against discovery but also interfere with their work.

Subdivision (a)(2)(B). Rule 26(a)(2)(B)(ii) is amended to provide that disclosure include all "facts or data considered by the witness in forming" the opinions to be offered, rather than the "data or other information" disclosure prescribed in 1993. This amendment is intended to alter the outcome in cases that have relied on the 1993 formulation in requiring disclosure of all attorney-expert communications and draft reports. The amendments to Rule 26(b)(4) make this change explicit by providing work-product protection against discovery regarding draft reports and disclosures or attorney-expert communications.

The refocus of disclosure on "facts or data" is meant to limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel. At the same time, the intention is that "facts or data" be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients. The disclosure obligation extends to any facts or data "considered" by the expert in forming the opinions to be expressed, not only those relied upon by the expert.

Subdivision (a)(2)(C). Rule 26(a)(2)(C) is added to mandate summary disclosures of the opinions to be offered by expert witnesses who are not required to provide reports under Rule 26(a)(2)(B) and of the facts supporting those opinions. This disclosure is considerably less extensive than the report required by Rule 26(a)(2)(B). Courts must take care against requiring undue detail, keeping in mind that these witnesses have not been specially retained and may not be as responsive to counsel as those who have.

This amendment resolves a tension that has sometimes prompted courts to require reports under Rule 26(a)(2)(B) even from witnesses exempted from the report requirement. An (a)(2)(B) report is required only from an expert described in (a)(2)(B).

A witness who is not required to provide a report under Rule 26(a)(2)(B) may both testify as a fact witness and also provide expert testimony under Evidence Rule 702, 703, or 705. Frequent examples include physicians or other health care professionals and employees of a party who do not regularly provide expert testimony. Parties must identify such witnesses under Rule 26(a)

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(2)(A) and provide the disclosure required under Rule 26(a)(2)(C). The (a)(2)(C) disclosure obligation does not include facts unrelated to the expert opinions the witness will present.

Subdivision (a)(2)(D). This provision (formerly Rule 26(a)(2)(C)) is amended slightly to specify that the time limits for disclosure of contradictory or rebuttal evidence apply with regard to disclosures under new Rule 26(a)(2)(C), just as they do with regard to reports under Rule 26(a)(2)(B).

Subdivision (b)(4). Rule 26(b)(4)(B) is added to provide work-product protection under Rule 26(b)(3)(A) and (B) for drafts of expert reports or disclosures. This protection applies to all witnesses identified under Rule 26(a)(2)(A), whether they are required to provide reports under Rule 26(a)(2)(B) or are the subject of disclosure under Rule 26(a)(2)(C). It applies regardless of the form in which the draft is recorded, whether written, electronic, or otherwise. It also applies to drafts of any supplementation under Rule 26(e); *see* Rule 26(a)(2)(E).

Rule 26(b)(4)(C) is added to provide work-product protection for attorney-expert communications regardless of the form of the communications, whether oral, written, electronic, or otherwise. The addition of Rule 26(b)(4)(C) is designed to protect counsel's work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery. The protection is limited to communications between an expert witness required to provide a report under Rule 26(a)(2)(B) and the attorney for the party on whose behalf the witness will be testifying, including any “preliminary” expert opinions. Protected “communications” include those between the party's attorney and assistants of the expert witness. The rule does not itself protect communications between counsel and other expert witnesses, such as those for whom disclosure is required under Rule 26(a)(2)(C). The rule does not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrine.

The most frequent method for discovering the work of expert witnesses is by deposition, but Rules 26(b)(4)(B) and (C) apply to all forms of discovery.

Rules 26(b)(4)(B) and (C) do not impede discovery about the opinions to be offered by the expert or the development, foundation, or basis of those opinions. For example, the expert's testing of material involved in litigation, and notes of any such testing, would not be exempted from discovery by this rule. Similarly, inquiry about communications the expert had with anyone other than the party's counsel about the opinions expressed is unaffected by the rule. Counsel are also free to question expert witnesses about alternative analyses, testing methods, or approaches to the issues on which they are testifying, whether or not the expert considered them in forming the opinions expressed. These discovery changes therefore do not affect the gatekeeping functions called for by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and related cases.

The protection for communications between the retained expert and “the party's attorney” should be applied in a realistic manner, and often would not be limited to communications with a single lawyer or a single law firm. For example, a party may be involved in a number of suits about a given product or service, and may retain a particular expert witness to testify on that party's behalf in several of the cases. In such a situation, the protection applies to communications between the expert witness and the attorneys representing the party in any of those cases. Similarly, communications with in-house counsel for the party would often be regarded as protected even if the in-house attorney is not counsel of record in the action. Other situations may also justify a pragmatic application of the “party's attorney” concept.

Although attorney-expert communications are generally protected by Rule 26(b)(4)(C), the protection does not apply to the extent the lawyer and the expert communicate about matters that fall within three exceptions. But the discovery authorized by the exceptions does not extend beyond those specific topics. Lawyer-expert communications may cover many topics and, even when the excepted topics are included among those involved in a given communication, the protection applies to all other aspects of the communication beyond the excepted topics.

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First, under Rule 26(b)(4)(C)(i) attorney-expert communications regarding compensation for the expert's study or testimony may be the subject of discovery. In some cases, this discovery may go beyond the disclosure requirement in Rule 26(a)(2)(B)(vi). It is not limited to compensation for work forming the opinions to be expressed, but extends to all compensation for the study and testimony provided in relation to the action. Any communications about additional benefits to the expert, such as further work in the event of a successful result in the present case, would be included. This exception includes compensation for work done by a person or organization associated with the expert. The objective is to permit full inquiry into such potential sources of bias.

Second, under Rule 26(b)(4)(C)(ii) discovery is permitted to identify facts or data the party's attorney provided to the expert and that the expert considered in forming the opinions to be expressed. The exception applies only to communications “identifying” the facts or data provided by counsel; further communications about the potential relevance of the facts or data are protected.

Third, under Rule 26(b)(4)(C)(iii) discovery regarding attorney-expert communications is permitted to identify any assumptions that counsel provided to the expert and that the expert relied upon in forming the opinions to be expressed. For example, the party's attorney may tell the expert to assume the truth of certain testimony or evidence, or the correctness of another expert's conclusions. This exception is limited to those assumptions that the expert actually did rely on in forming the opinions to be expressed. More general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts, are outside this exception.

Under the amended rule, discovery regarding attorney-expert communications on subjects outside the three exceptions in Rule 26(b)(4)(C), or regarding draft expert reports or disclosures, is permitted only in limited circumstances and by court order. A party seeking such discovery must make the showing specified in Rule 26(b)(3)(A)(ii)--that the party has a substantial need for the discovery and cannot obtain the substantial equivalent without undue hardship. It will be rare for a party to be able to make such a showing given the broad disclosure and discovery otherwise allowed regarding the expert's testimony. A party's failure to provide required disclosure or discovery does not show the need and hardship required by Rule 26(b)(3)(A); remedies are provided by Rule 37.

In the rare case in which a party does make this showing, the court must protect against disclosure of the attorney's mental impressions, conclusions, opinions, or legal theories under Rule 26(b)(3)(B). But this protection does not extend to the expert's own development of the opinions to be presented; those are subject to probing in deposition or at trial.

Former Rules 26(b)(4)(B) and (C) have been renumbered (D) and (E), and a slight revision has been made in (E) to take account of the renumbering of former (B).

2015 Amendment

Rule 26(b)(1) is changed in several ways.

Information is discoverable under revised Rule 26(b)(1) if it is relevant to any party's claim or defense and is proportional to the needs of the case. The considerations that bear on proportionality are moved from present Rule 26(b)(2)(C)(iii), slightly rearranged and with one addition.

Most of what now appears in Rule 26(b)(2)(C)(iii) was first adopted in 1983. The 1983 provision was explicitly adopted as part of the scope of discovery defined by Rule 26(b)(1). Rule 26(b)(1) directed the court to limit the frequency or extent of use of discovery if it determined that “the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.” At the same time, Rule 26(g) was added. Rule 26(g) provided that signing a discovery request, response, or objection certified that the request, response, or objection was “not unreasonable or unduly burdensome or expensive, given the needs of the case, the

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discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation." The parties thus shared the responsibility to honor these limits on the scope of discovery.

The 1983 Committee Note stated that the new provisions were added "to deal with the problem of over-discovery. The objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry. The new sentence is intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse. The grounds mentioned in the amended rule for limiting discovery reflect the existing practice of many courts in issuing protective orders under Rule 26(c) ... On the whole, however, district judges have been reluctant to limit the use of the discovery devices."

The clear focus of the 1983 provisions may have been softened, although inadvertently, by the amendments made in 1993. The 1993 Committee Note explained: "[F]ormer paragraph (b)(1) [was] subdivided into two paragraphs for ease of reference and to avoid renumbering of paragraphs (3) and (4). Subdividing the paragraphs, however, was done in a way that could be read to separate the proportionality provisions as "limitations", no longer an integral part of the (b)(1) scope provisions. That appearance was immediately offset by the next statement in the Note: "Textual changes are then made in new paragraph (2) to enable the court to keep tighter rein on the extent of discovery."

The 1993 amendments added two factors to the considerations that bear on limiting discovery: whether "the burden or expense of the proposed discovery outweighs its likely benefit," and "the importance of the proposed discovery in resolving the issues." Addressing these and other limitations added by the 1993 discovery amendments, the Committee Note stated that [t]he revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery ...'

The relationship between Rule 26(b)(1) and (2) was further addressed by an amendment made in 2000 that added a new sentence at the end of (b)(1): "All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii)[now Rule 26(b)(2)(C)]." The Committee Note recognized that "[t]hese limitations apply to discovery that is otherwise within the scope of subdivision (b)(1)." It explained that the Committee had been told repeatedly that courts were not using these limitations as originally intended. "This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery."

The present amendment restores the proportionality factors to their original place in defining the scope of discovery. This change reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses, or objections.

Restoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations.

Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional. The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.

The parties may begin discovery without a full appreciation of the factors that bear on proportionality. A party requesting discovery, for example, may have little information about the burden or expense of responding. A party requested to provide discovery may have little information about the importance of the discovery in resolving the issues as understood by the requesting party. Many of these uncertainties should be addressed and reduced in the parties' Rule 26(f) conference and in scheduling and pretrial conferences with the court. But if the parties continue to disagree, the discovery dispute could be brought before the court and the parties' responsibilities would remain as they have been since 1983. A party claiming undue burden or expense ordinarily has far better information -- perhaps the only information -- with respect to that part of the determination.

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A party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them. The court's responsibility, using all the information provided by the parties, is to consider these and all the other factors in reaching a case-specific determination of the appropriate scope of discovery.

The direction to consider the parties' relative access to relevant information adds new text to provide explicit focus on considerations already implicit in present Rule 26(b)(2)(C)(iii). Some cases involve what often is called “information asymmetry.” One party -- often an individual plaintiff -- may have very little discoverable information. The other party may have vast amounts of information, including information that can be readily retrieved and information that is more difficult to retrieve. In practice these circumstances often mean that the burden of responding to discovery lies heavier on the party who has more information, and properly so.

Restoring proportionality as an express component of the scope of discovery warrants repetition of parts of the 1983 and 1993 Committee Notes that must not be lost from sight. The 1983 Committee Note explained that “[t]he rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis.” The 1993 Committee Note further observed that “[t]he information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression.” What seemed an explosion in 1993 has been exacerbated by the advent of e-discovery. The present amendment again reflects the need for continuing and close judicial involvement in the cases that do not yield readily to the ideal of effective party management. It is expected that discovery will be effectively managed by the parties in many cases. But there will be important occasions for judicial management, both when the parties are legitimately unable to resolve important differences and when the parties fall short of effective, cooperative management on their own.

It also is important to repeat the caution that the monetary stakes are only one factor, to be balanced against other factors. The 1983 Committee Note recognized “the significance of the substantive issues, as measured in philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved.” Many other substantive areas also may involve litigation that seeks relatively small amounts of money, or no money at all, but that seeks to vindicate vitally important personal or public values.

So too, consideration of the parties' resources does not foreclose discovery requests addressed to an impecunious party, nor justify unlimited discovery requests addressed to a wealthy party. The 1983 Committee Note cautioned that “[t]he court must apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent.”

The burden or expense of proposed discovery should be determined in a realistic way. This includes the burden or expense of producing electronically stored information. Computer-based methods of searching such information continue to develop, particularly for cases involving large volumes of electronically stored information. Courts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery as reliable means of searching electronically stored information become available.

A portion of present Rule 26(b)(1) is omitted from the proposed revision. After allowing discovery of any matter relevant to any party's claim or defense, the present rule adds: “including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter.” Discovery of such matters is so deeply entrenched in practice that it is no longer necessary to clutter the long text of Rule 26 with these examples. The discovery identified in these examples should still be permitted under the revised rule when relevant and proportional to the needs of the case. Framing intelligent requests for electronically stored information, for example, may require detailed information about another party's information systems and other information resources.

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The amendment deletes the former provision authorizing the court, for good cause, to order discovery of any matter relevant to the subject matter involved in the action. The Committee has been informed that this language is rarely invoked. Proportional discovery relevant to any party's claim or defense suffices, given a proper understanding of what is relevant to a claim or defense. The distinction between matter relevant to a claim or defense and matter relevant to the subject matter was introduced in 2000. The 2000 Note offered three examples of information that, suitably focused, would be relevant to the parties' claims or defenses. The examples were “other incidents of the same type, or involving the same product”; “information about organizational arrangements or filing systems”; and “information that could be used to impeach a likely witness.” Such discovery is not foreclosed by the amendments. Discovery that is relevant to the parties' claims or defenses may also support amendment of the pleadings to add a new claim or defense that affects the scope of discovery.

The former provision for discovery of relevant but inadmissible information that appears “reasonably calculated to lead to the discovery of admissible evidence” is also deleted. The phrase has been used by some, incorrectly, to define the scope of discovery. As the Committee Note to the 2000 amendments observed, use of the “reasonably calculated” phrase to define the scope of discovery “might swallow any other limitation on the scope of discovery.” The 2000 amendments sought to prevent such misuse by adding the word “Relevant” at the beginning of the sentence, making clear that “‘relevant’ means within the scope of discovery as defined in this subdivision ...” The “reasonably calculated” phrase has continued to create problems, however, and is removed by these amendments. It is replaced by the direct statement that “Information within this scope of discovery need not be admissible in evidence to be discoverable.” Discovery of nonprivileged information not admissible in evidence remains available so long as it is otherwise within the scope of discovery.

Rule 26(b)(2)(C)(iii) is amended to reflect the transfer of the considerations that bear on proportionality to Rule 26(b)(1). The court still must limit the frequency or extent of proposed discovery, on motion or on its own, if it is outside the scope permitted by Rule 26(b)(1).

Rule 26(c)(1)(B) is amended to include an express recognition of protective orders that allocate expenses for disclosure or discovery. Authority to enter such orders is included in the present rule, and courts already exercise this authority. Explicit recognition will forestall the temptation some parties may feel to contest this authority. Recognizing the authority does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding.

Rule 26(d)(2) is added to allow a party to deliver Rule 34 requests to another party more than 21 days after that party has been served even though the parties have not yet had a required Rule 26(f) conference. Delivery may be made by any party to the party that has been served, and by that party to any plaintiff and any other party that has been served. Delivery does not count as service; the requests are considered to be served at the first Rule 26(f) conference. Under Rule 34(b)(2)(A) the time to respond runs from service. This relaxation of the discovery moratorium is designed to facilitate focused discussion during the Rule 26(f) conference. Discussion at the conference may produce changes in the requests. The opportunity for advance scrutiny of requests delivered before the Rule 26(f) conference should not affect a decision whether to allow additional time to respond.

Rule 26(d)(3) is renumbered and amended to recognize that the parties may stipulate to case-specific sequences of discovery.

Rule 26(f)(3) is amended in parallel with Rule 16(b)(3) to add two items to the discovery plan -- issues about preserving electronically stored information and court orders under Evidence Rule 502.

Notes of Decisions (1465)

Fed. Rules Civ. Proc. Rule 26, 28 U.S.C.A., FRCP Rule 26
Including Amendments Received Through 12-1-15

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Revised Statutes Annotated of the State of New Hampshire
New Hampshire Court Rules
Rules of the Superior Court of the State of New Hampshire Applicable in Civil Actions (Refs & Annos)
A. Civil Rules
V. Discovery

NH Superior Court Civil Rule 22

RULE 22. AUTOMATIC DISCLOSURES

Currentness

(a) Materials that Must Be Disclosed. Except as may be otherwise ordered by the court for good cause shown, a party must without awaiting a discovery request, provide to the other parties:

(1) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support his or her claims or defenses, unless the use would be solely for impeachment, and, unless such information is contained in a document provided pursuant to Rule 22 (a)(2), a summary of the information believed by the disclosing party to be possessed by each such person;

(2) a copy of all documents, electronically stored information, and tangible things that the disclosing party has in his or her possession, custody or control and may use to support his or her claims or defenses, unless the use would be solely for impeachment;

(3) a computation of each category of damages claimed by the disclosing party together with all documents or other evidentiary materials on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(4) for inspection and copying, any insurance agreement or policy under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(b) Time for Disclosure. Unless the court orders otherwise, the disclosures required by Rule 22(a) shall be made as follows:

(1) by the plaintiff, not later than 30 days after the defendant to whom the disclosure is being made has filed his or her Answer to the Complaint; and

(2) by the defendant, not later than 60 days after the defendant making the disclosure has filed his or her Answer to the Complaint.

(c) Duty to Supplement. Each party has a duty to supplement that party's initial disclosures promptly upon becoming aware of the supplemental information.

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(d) Sanctions for Failure to Comply. A party who fails to timely make the disclosures required by this rule may be sanctioned as provided in Rule 21.

Credits

[Adopted May 22, 2013, effective October 1, 2013. Comment amended July 24, 2014, effective September 1, 2014.]

Editors' Notes

COMMENT

This rule, formerly PAD Rule 3, accomplishes a major change from prior New Hampshire practice in that it requires both the plaintiff and the defendant to make automatic initial disclosures of certain information without the need for a discovery request from the opposing party. Although there was a similar but not identical requirement in the so-called "fast-track" section of former Superior Court Rule 62(II), the rule was used very little and therefore does not provide a significant base of experience for this rule. Nonetheless, such a base of experience can be found in federal court practice, where an automatic disclosure regimen in some form has been in existence since 1993, and appears to have worked reasonably well. Requiring parties to make prompt and automatic disclosures of information concerning the witnesses and evidence they will use to prove their claims or defenses at trial will help reduce "gamesmanship" in the conduct of litigation, reduce the time spent by lawyers and courts in resolving discovery issues and disputes, and promote the prompt and just resolution of cases.

Section (a) of Rule 22 is taken largely from Rule 26(a)(1) of the Federal Rules of Civil Procedure. It differs from the federal rule, however, in that, unlike the federal rule, this rule does not permit the disclosing party to merely provide "the subjects" of the discoverable information known to individuals likely to have such information, Fed. R. Civ. P. 26(a)(1)(A)(i), and "a description by category and location" of the discoverable materials in the possession, custody or control of the disclosing party, Fed. R. Civ. P. 26(a)(1)(A)(ii). Rather, the rule requires that the disclosing party actually turn over to the opposing party a copy of all such discoverable materials, Rule 22(a)(2), and also requires that the disclosing party provide a summary of the information known to each individual identified under Rule 22(a)(1) unless that information is contained in the materials disclosed under Rule 22(a)(2). This more comprehensive discovery obligation does not impose an undue burden on either plaintiffs or defendants and will help to insure that information and witnesses that will be used by each party to support its case will be disclosed to opposing parties shortly after the issues have been joined.

Subsection (a)(3) of the rule also differs somewhat from the language of comparable Fed. R. Civ. P. 26(a)(1)(A)(iii), in that the rule eliminates reference to "privileged or protected from disclosure" information as being excepted from the disclosure obligation imposed by the subsection. By so doing, the intention is not to eliminate the ability of a party to object on privilege or other proper grounds to the disclosures relating to the computation of damages or the information on which such computations are based. However, genuine claims of privilege as a basis for avoiding disclosure of information pertinent to the computation of damages will be rare and, to the extent such claims do exist, the ability to assert the privilege is preserved elsewhere in the rules. Therefore, there is no need to make a specific reference to privileged or otherwise protected materials in this rule.

The time limits established in section (b) of the rule are reasonable and will promote the orderly and expeditious progress of litigation. The proposed rule differs from the initial disclosure proposal embodied in the Pilot Project Rules of the American College of Trial Lawyers (ACTL) and the Institute for the Advancement of the American Legal System (IAALS), in that, unlike ACTL/IAALS Rule 5.2, the rule does not require the plaintiff to make its initial disclosures before the time when the defendant is required to file its Answer. The plaintiff should have the benefit of the defendant's Answer before making its initial disclosure since the Answer will in all likelihood inform what facts are in dispute and therefore will need to be proved by the plaintiff.

Section (c) of the rule is taken directly from ACTL/IAALS Pilot Project Rule 5.4 and its substance is generally consistent with Federal Rule 26(e) and Rule 21(g). It should be noted, however, that this rule differs from Rule 21(g). Rule 21(g) sets forth

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the general rule governing discovery and contains introductory language stating that there is no duty to supplement responses and then sets forth very broad categories of exceptions from this general rule. Section (c) of this rule, relating only to materials that must be disclosed pursuant to the automatic disclosure requirements of Rule 22, is worded in positive terms to require supplementation of responses whenever the producing party becomes aware of supplemental information covered by the rule's initial disclosure requirements.

Section (d) of the rule references Rule 21 and permits the court to impose any of the sanctions specified in that rule if a party fails to make the disclosures required of it by this rule in a timely fashion.

NH Superior Court Civil Actions Rule 22, NH R SUPER CT CIV Rule 22
The state court rules are current with amendments received through August 15, 2015.

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West's Nevada Revised Statutes Annotated
Rules of Civil Procedure for the Nevada District Courts
III Pleadings and Motions

Rules of Civil Procedure, Rule 16.1
Formerly cited as NV ST Rule 16.1

RULE 16.1. MANDATORY PRE-TRIAL DISCOVERY REQUIREMENTS

Currentness

<Text of rule effective for all civil proceedings except proceedings in the Family Division of the Second and Eighth Judicial District Courts and in all domestic relations cases in the judicial districts without a family division as of February 1, 2006. For text of rule applicable to proceedings in the Family Division of the Second and Eighth Judicial District Courts and all domestic relations cases in judicial districts without a family division effective February 1, 2006, see following version of Rule 16.1.>

(a) Required Disclosures.

(1) Initial Disclosures. Except in proceedings exempted or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:

(A) The name and, if known, the address and telephone number of each individual likely to have information discoverable under Rule 26(b), including for impeachment or rebuttal, identifying the subjects of the information;

(B) A copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and which are discoverable under Rule 26(b);

(C) A computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary matter, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) For inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment and any disclaimer or limitation of coverage or reservation of rights under any such insurance agreement.

These disclosures must be made at or within 14 days after the Rule 16.1(b) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in the circumstances of the action and states the objection in the Rule 16.1(c) case conference report. In ruling on the objection, the court must determine what disclosures--if any--are to be made, and set the time for disclosure. Any party first served or otherwise joined after the Rule 16.1(b) conference must make these disclosures within 30 days after being served or joined unless a different time is set by stipulation or court order. A party must make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed

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its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under NRS 50.275, 50.285 and 50.305.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The court, upon good cause shown or by stipulation of the parties, may relieve a party of the duty to prepare a written report in an appropriate case. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding 10 years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

Unless otherwise stipulated or ordered by the Court, if the witness is not required to provide a written report, the initial disclosure must state the subject matter on which the witness is expected to present evidence under NRS 50.275, 50.285 and 50.305; a summary of the facts and opinions to which the witness is expected to testify; the qualifications of that witness to present evidence under NRS 50.275, 50.285 and 50.305, which may be satisfied by the production of a resume or curriculum vitae; and the compensation of the witness for providing testimony at deposition and trial, which is satisfied by production of a fee schedule.

(C) These disclosures shall be made at the times and in the sequence directed by the court.

(i) In the absence of extraordinary circumstances, and except as otherwise provided in subdivision (2), the court shall direct that the disclosures shall be made at least 90 days before the discovery cut-off date.

(ii) If the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), the disclosures shall be made within 30 days after the disclosure made by the other party. This later disclosure deadline does not apply to any party's witness whose purpose is to contradict a portion of another party's case in chief that should have been expected and anticipated by the disclosing party, or to present any opinions outside of the scope of another party's disclosure.

(D) The parties must supplement these disclosures when required under Rule 26(e)(1).

(3) Pretrial Disclosures. In addition to the disclosures required by Rule 16.1(a)(1) and (2), a party must provide to other parties the following information regarding the evidence that it may present at trial, including impeachment and rebuttal evidence:

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(A) The name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present, those witnesses who have been subpoenaed for trial, and those whom the party may call if the need arises;

(B) The designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) An appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise directed by the court, these disclosures must be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B), and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under NRS 48.025 and 48.035, shall be deemed waived unless excused by the court for good cause shown.

(4) Form of Disclosures. Unless the court orders otherwise, all disclosures under Rules 16.1(a)(1) through (3) must be made in writing, signed, and served.

(b) Meet and Confer Requirements.

(1) Attendance at Early Case Conference. Unless the case is in the court annexed arbitration program or short trial program, within 30 days after filing of an answer by the first answering defendant, and thereafter, if requested by a subsequent appearing party, the parties shall meet in person to confer and consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by subdivision (a)(1) of this rule and to develop a discovery plan pursuant to subdivision (b)(2). The attorney for the plaintiff shall designate the time and place of each meeting which must be held in the county where the action was filed, unless the parties agree upon a different location. The attorneys may agree to continue the time for the case conference for an additional period of not more than 90 days. The court, in its discretion and for good cause shown, may also continue the time for the conference. Absent compelling and extraordinary circumstances, neither the court nor the parties may extend the time to a day more than 180 days after an appearance is served by the defendant in question.

Unless otherwise ordered by the court or the discovery commissioner, parties to any case wherein a timely trial de novo request has been filed subsequent to an arbitration, need not hold a further in person conference, but must file a joint case conference report pursuant to subdivision (c) of this rule within 60 days from the date of the de novo filing, said report to be prepared by the party requesting the trial de novo.

(2) Planning for Discovery. The parties shall develop a discovery plan which shall indicate the parties' views and proposals concerning:

(A) What changes should be made in the timing, form, or requirement for disclosures under Rule 16.1(a), including a statement as to when disclosures under Rule 16.1(a)(1) were made or will be made;

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(B) The subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(C) What changes should be made in the limitations on discovery imposed under these rules and what other limitations should be imposed;

(D) Any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c); and

(E) An estimated time for trial.

(c) Case Conference Report. Within 30 days after each case conference, the parties must file a joint case conference report or, if the parties are unable to agree upon the contents of a joint report, each party must serve and file a case conference report which, either as a joint or individual report, must contain:

(1) A brief description of the nature of the action and each claim for relief or defense;

(2) A proposed plan and schedule of any additional discovery pursuant to subdivision (b)(2) of this rule;

(3) A written list of names exchanged pursuant to subdivision (a)(1)(A) of this rule;

(4) A written list of all documents provided at or as a result of the case conference pursuant to subdivision (a)(1)(B) of this rule;

(5) A calendar date on which discovery will close;

(6) A calendar date, not later than 90 days before the close of discovery, beyond which the parties shall be precluded from filing motions to amend the pleadings or to add parties unless by court order;

(7) A calendar date by which the parties will make expert disclosures pursuant to subdivision (a)(2), with initial disclosures to be made not later than 90 days before the discovery cut-off date and rebuttal disclosures to be made not later than 30 days after the initial disclosure of experts;

(8) A calendar date, not later than 30 days after the discovery cut-off date, by which dispositive motions must be filed;

(9) An estimate of the time required for trial; and

(10) A statement as to whether or not a jury demand has been filed.

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After any subsequent case conference, the parties must supplement, but need not repeat, the contents of prior reports. Within 7 days after service of any case conference report, any other party may file a response thereto objecting to all or a portion of the report or adding any other matter which is necessary to properly reflect the proceedings occurring at the case conference.

(d) Discovery Disputes.

(1) Where available or unless otherwise ordered by the court, all discovery disputes (except those presented at the pretrial conference or trial) must first be heard by the discovery commissioner.

(2) Following each discovery motion before a discovery commissioner, the commissioner must prepare and file a report with the commissioner's recommendations for a resolution of each unresolved dispute. The commissioner may direct counsel to prepare the report. The clerk of the court shall forthwith serve a copy of the report on all parties. Within 5 days after being served with a copy, any party may serve and file written objections to the recommendations. Written authorities may be filed with an objection, but are not mandatory.

(3) Upon receipt of a discovery commissioner's report and any objections thereto, the court may affirm, reverse or modify the commissioner's ruling, set the matter for a hearing, or remand the matter to the commissioner for further action, if necessary.

(e) Failure or Refusal to Participate in Pretrial Discovery; Sanctions.

(1) If the conference described in Rule 16.1(b) is not held within 180 days after an appearance by a defendant, the case may be dismissed as to that defendant upon motion or on the court's own initiative, without prejudice, unless there are compelling and extraordinary circumstances for a continuance beyond this period.

(2) If the plaintiff does not file a case conference report within 240 days after an appearance by a defendant, the case may be dismissed as to that defendant upon motion or on the court's own initiative, without prejudice.

(3) If an attorney fails to reasonably comply with any provision of this rule, or if an attorney or a party fails to comply with an order entered pursuant to subsection (d) of this rule, the court, upon motion or upon its own initiative, shall impose upon a party or a party's attorney, or both, appropriate sanctions in regard to the failure(s) as are just, including the following:

(A) Any of the sanctions available pursuant to Rule 37(b)(2) and Rule 37(f);

(B) An order prohibiting the use of any witness, document or tangible thing which should have been disclosed, produced, exhibited, or exchanged pursuant to Rule 16.1(a).

(f) Complex Litigation. In a potentially difficult or protracted action that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems, the court may, upon motion and for good cause shown, waive any or all of the requirements of this rule. If the court waives all the requirements of this rule, it shall also order a conference pursuant to Rule 16 to be conducted by the court or the discovery commissioner.

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(g) Proper Person Litigants. When a party is not represented by an attorney, the party must comply with this rule.

Credits

Added, eff. Jan. 1, 1988. As amended, eff. Jan. 1, 2005; Jan. 1, 2013.

Editors' Notes

DRAFTER'S NOTE 2004 AMENDMENT

Subdivision (a) is amended to conform to the 1993 and 2000 amendments to Rule 26(a) of the federal rules, with some notable exceptions. Consistent with the federal rule, the revised rule imposes an affirmative duty to disclose certain basic information without a formal discovery request.

Subdivision (a)(1) incorporates the federal rule but adopts the "subject matter" standard for the scope of discovery that is retained in revised Rule 26(b) of the Nevada rules. Paragraph (1) also retains the Nevada requirement that impeachment witnesses and documents be disclosed, whereas the federal rule exempts impeachment evidence. Paragraph (1)(C) is intended to apply to special damages, not general or other intangible damages. Paragraph (1)(D) expands on the federal rule by requiring disclosure and production of liability policy denials, limitations or reservations of rights.

Subdivision (a)(2) imposes an additional duty to disclose information regarding expert testimony and requires that certain experts must prepare a detailed and complete written report. But unlike its federal counterpart, subdivision (a)(2)(B) allows the court to relieve a party of this duty upon a showing of good cause. The requirement of a written report applies only to an expert who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony. Given this limitation, a treating physician could be deposed or called to testify without any requirement for a written report. See Fed. R. Civ. P. 26(a) advisory committee note (2000). The expert witness disclosures and written reports are not part of the initial disclosure under paragraph (1). Instead, subdivision (a)(2)(C) contemplates that the court will set the time for such disclosures but that they must be made at least 90 days before the discovery cut-off date absent extraordinary circumstances. This provision differs from its federal counterpart, which allows the disclosures to be made at least 90 days before the trial date or the date the case is to be ready for trial.

Subdivision (a)(3) retains the Nevada requirement for pretrial disclosure of impeachment and rebuttal evidence and the names of witnesses who have been subpoenaed for trial. Unlike the federal rule, there is no requirement that the information disclosed be filed with the court.

Subdivision (b) is repealed in its entirety. New subdivision (b)(1) incorporates the requirement under former Rule 16.1(a) of attendance at an early case conference. It is based on Rule 26(f) of the federal rules, but is tailored to practice in state court and, unlike the federal rule, it requires the parties to meet in person. The rule also retains deadlines that are unique to Nevada. Subdivision (b)(2) incorporates provisions of Rule 26(f) of the federal rules regarding planning for discovery. But the Nevada provision expands the subjects to be discussed at the early case conference beyond those listed in the federal rule to include an estimated time for trial.

Subdivision (c) is amended to reflect the new disclosure provisions of subdivision (a). The requirements for a case conference report are more detailed and extensive than those in Rule 26(f) of the federal rules and include specific time periods for the close of discovery, filing of motions to amend pleadings or add parties, expert disclosures, and filing of dispositive motions.

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Subdivision (d) retains the Nevada provisions on discovery disputes with some revisions.

DRAFTER'S NOTE 2012 AMENDMENT

Subdivision (a)(2)(B) specifies the information that must be included in a disclosure of expert witnesses who are not otherwise required to provide detailed written reports. A treating physician is not a retained expert merely because the patient was referred to the physician by an attorney for treatment. These comments may be applied to other types of non-retained experts by analogy. In the context of a treating physician, appropriate disclosure may include that the witness will testify in accordance with his or her medical chart, even if some records contained therein were prepared by another healthcare provider. A treating physician is not a retained expert merely because the witness will opine about diagnosis, prognosis, or causation of the patient's injuries, or because the witness reviews documents outside his or her medical chart in the course of providing treatment or defending that treatment. However, any opinions and any facts or documents supporting those opinions must be disclosed in accordance with subdivision (a)(2)(B).

Notes of Decisions (22)

Civ. Proc. Rules, Rule 16.1, NV ST RCP Rule 16.1
Current with amendments received through 11/15/15

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West's Nevada Revised Statutes Annotated
Rules of Civil Procedure for the Nevada District Courts
V Depositions and Discovery

Rules of Civil Procedure, Rule 26
Formerly cited as NV ST Rule 26

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY

Currentness

(a) Discovery Methods. At any time after the filing of a joint case conference report, or not sooner than 10 days after a party has filed a separate case conference report, or upon order by the court or discovery commissioner, any party who has complied with Rule 16.1(a)(1) may obtain discovery by one or more of the following additional methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or Rule 45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admission.

As amended, eff. Jan. 1, 1988; Jan. 1, 2005.

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).

(2) Limitations. By order, the court may alter the limits in these rules or set limits on the number of depositions and interrogatories, the length of depositions under Rule 30 or the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c) of this rule.

(3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of

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the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial Preparation: Experts.

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under Rule 16.1(a)(2)(B) or 16.2(a)(3), the deposition shall not be conducted until after the report is provided.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule, the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

As amended, eff. Jan. 1, 1988; Jan. 1, 2005.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with the other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the discovery not be had;

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(2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition after being sealed be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way;

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

As amended, eff. Jan. 1, 1988; Jan. 1, 2005.

(d) Sequence and Timing of Discovery. After compliance with subdivision (a) of this rule, unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, does not operate to delay any other party's discovery.

As amended, eff. Sept. 27, 1971; Jan. 1, 2005.

(e) Supplementation of Disclosures and Responses. A party who has made a disclosure under Rule 16.1 or 16.2 or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired, if ordered by the court or in the following circumstances:

(1) A party is under a duty to supplement at appropriate intervals its disclosures under Rule 16.1(a) or 16.2(a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under Rule 16.1(a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 16.1(a)(3) are due.

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(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production or request for admission, if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

As amended, eff. Jan. 1, 1988; Jan. 1, 2005.

(f) Form of responses. Answers and objections to interrogatories or requests for production shall identify and quote each interrogatory or request for production in full immediately preceding the statement of any answer or objections thereto. Answers, denials, and objections to requests for admission shall identify and quote each request for admission in full immediately preceding the statement of any answer, denial, or objection thereto.

Added, eff. Feb. 11, 1986; Jan. 1, 2005.

(g) Signing of Disclosures, Discovery Requests, Responses, and Objections.

(1) Every disclosure and report made pursuant to Rules 16.1(a)(1), 16.1(a)(3), 16.1(c), 16.2(a)(2), 16.2(a)(4), and 16.2(d) shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(2) Every discovery request, response or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection, is:

(A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(B) not interposed for any improper purpose, such as to harass, obscure, equivocate or to cause unnecessary delay or needless increase in the cost of litigation; and

(C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response or objection and a party shall not be obligated to take any action with respect to it until it is signed.

(3) If without substantial justification a certification is made in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the disclosure, request,

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response, or objection was made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

Added, eff. Jan. 1, 1988; Jan. 1, 2005.

(h) Demand for Prior Discovery. Whenever a party makes a written demand for discovery which took place prior to the time the party became a party to the action, each party who has previously made discovery disclosures, responded to a request for admission or production or answered interrogatories shall make available to the demanding party the document(s) in which the discovery disclosures and responses in question are contained for inspection and copying or furnish to the demanding party a list identifying each such document by title and upon further demand shall furnish to the demanding party, at the expense of the demanding party, a copy of any listed discovery disclosure or response specified in the demand or, in the case of document disclosure or request for production, shall make available for inspection by the demanding party all documents and things previously produced. Further, each party who has taken a deposition shall make a copy of the transcript thereof available to the demanding party at the latter's expense.

Added, eff. Feb. 11, 1986. As amended, eff. Jan. 1, 2005.

Credits

As amended, eff. Sept. 27, 1971; Jan. 1, 2005; July 1, 2008.

Editors' Notes

DRAFTER'S NOTE 2004 AMENDMENT

The initial-disclosure provisions in Rule 26(a) of the federal rules, as amended in 2000, are adopted as modified in Rule 16.1(a) of the Nevada rules; only other discovery methods are retained as part of Rule 26(a) of the Nevada rules.

Subdivision (b) retains the Nevada rule as to the scope of discovery--“any matter, not privileged, which is relevant to the subject matter involved in the pending action.” Thus, the Nevada rule does not conform to the 2000 amendments to its federal counterpart which limits the scope of discovery to “any matter, not privileged, that is relevant to the claim or defense of any party,” except upon a showing of “good cause.”

The insurance discovery provisions in subdivision (b)(2) of the former rule have been amended and moved to Rule 16.1(a)(1)(D).

Subdivision (b)(2)(iii) does not incorporate the weighing provisions that were added to the federal rule in 1993 but instead retains the language in the Nevada rule, which was based on the federal provision as it was adopted in 1983.

Expert discovery under subdivision (b)(4) is modified consistent with expert disclosure under revised Rule 16.1(a)(2). The provisions of former subdivision (b)(5) regarding demands for expert witness lists and the exchange of reports and writings, are repealed as unnecessary under the new expert disclosure provisions in Rule 16.1. New subdivision (b)(5) conforms to the federal rule.

Subdivision (c) is amended to conform to the 1993 amendment to subdivision (c) of the federal rule. The amendment requires that the parties meet and confer in an effort to resolve discovery disputes before seeking a protective order from the court. The party filing a motion for a protective order must include a certificate stating that the parties met and conferred, or, if the moving party is unable to get opposing parties to meet and confer regarding the dispute, indicating the moving party's efforts in attempting to arrange such a meeting.

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Subdivision (d) is amended to clarify that once the parties have complied with the provisions of subdivision (a) of the rule, the parties may use any method of formal discovery provided in the rules in any sequence unless the court orders otherwise. The provision is similar to subdivision (d) of the federal rule, but it does not include the first sentence of the federal rule, which provides that with certain exceptions, the parties may not commence formal discovery until after they have met and conferred as required by subdivision (f) of the federal rule (cf. NRCP 16.1(b)). The parties must comply with subdivision (a) of the Nevada rule.

Subdivision (e) is amended to conform to the 1993 amendments to subdivision (e) of the federal rule. The rule is amended to provide that the requirement for supplementation applies to disclosures required by Rule 16.1(a). Paragraph (1) is amended to address when a party must supplement disclosures made under Rule 16.1(a) and to require supplementation of expert reports and depositions. Paragraph (2) is amended to address the duty to supplement responses to formal discovery requests including interrogatories, requests for production and requests for admissions. Like its federal counterpart, paragraph (2) does not include deposition testimony. However, under paragraph (1), a party must supplement information provided through a deposition of an expert from whom a report is required under Rule 16.1(a)(2)(B). Paragraphs (3) and (4) of the former rule are repealed.

Subdivision (f) of the former rule is repealed as duplicative of provisions in Rules 16 and 16.1. To avoid redesignating the remaining subdivisions, former subdivision (f) is replaced with the language from former subdivision (j) regarding the form of responses to discovery requests. There is no federal counterpart to this provision.

Subdivision (g) is amended to conform to the 1993 amendments to subdivision (g) of the federal rule. Paragraph (1) is added to require signatures on certain disclosures required by Rule 16.1. Paragraph (2) retains language from the former rule for signatures on discovery requests, responses, and objections with some revisions to conform to the 1993 amendments to the federal rule. Paragraph (3) retains language from the former rule regarding sanctions if a certification is made in violation of the rule with modifications to make it consistent with Rules 37(a)(4) and 37(c)(1)--in combination, these rules provide sanctions for violation of the rules regarding disclosures and discovery matters.

Subdivision (h) is amended to address technical issues. It has no federal counterpart. The provision is retained because it clarifies responsibilities to exchange discovery with new parties.

Subdivision (i) of the former rule is repealed in favor of a strong scheduling order under Rule 16 that will set discovery deadlines.

ADVISORY COMMITTEE'S NOTE

Revised in 1971 in accordance with the federal amendments, effective July 1, 1970, but with subsection (f) added.

Notes of Decisions (62)

Civ. Proc. Rules, Rule 26, NV ST RCP Rule 26
Current with amendments received through 11/15/15

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West's Alaska Statutes Annotated
Alaska Court Rules
Rules of Civil Procedure
Part V. Depositions and Discovery

Rules of Civil Procedure, Rule 26

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

Currentness

(a) Required Disclosures; Methods to Discover Additional Matter. Disclosure under subparagraphs (a)(1), (2), and (3) of this rule is required in all civil actions, except those categories of cases exempted from the requirement of scheduling conferences and scheduling orders under Civil Rule 16(g), adoption proceedings, and prisoner litigation against the state under AS 09.19.

(1) *Initial Disclosures.* Except to the extent otherwise directed by order or rule, a party shall, without awaiting a discovery request, provide to other parties:

(A) the factual basis of each of its claims or defenses;

(B) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information and whether the attorney-client privilege applies;

(C) the name and, if known, the address and telephone number of each individual who has made a written or recorded statement and, unless the statement is privileged or otherwise protected from disclosure, either a copy of the statement or the name and, if known, the address and telephone number of the custodian;

(D) subject to the provisions of Civil Rule 26(b)(3), a copy of, or a description by category and location of, all documents, electronically stored information, data compilations, and tangible things that are relevant to disputed facts alleged with particularity in the pleadings;

(E) subject to the provisions of Civil Rule 26(b)(3), all photographs, diagrams, and videotapes of persons, objects, scenes and occurrences that are relevant to disputed facts alleged with particularity in the pleadings;

(F) each insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment;

(G) all categories of damages claimed by the disclosing party, and a computation of each category of special damages, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such claims are based, including materials bearing on the nature and extent of injuries suffered; and

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(H) the identity, with as much specificity as may be known at the time, of all potentially responsible persons within the meaning of AS 09.17.080, and whether the party will choose to seek to allocate fault against each identified potentially responsible person.

Unless otherwise directed by the court, these disclosures shall be made at or within 10 days after the meeting of the parties under subsection (f). A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) *Disclosure of Expert Testimony.*

(A) In addition to the disclosures required by subparagraph (a)(1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Evidence Rules 702, 703, or 705.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. The parties shall supplement these disclosures when required under subparagraph (e)(1).

(D) No more than three independent expert witness may testify for each side as to the same issue in any given case. For purposes of this rule, an independent expert is an expert from whom a report is required under section (a)(2)(B). The court, upon the showing of good cause, may increase or decrease the number of independent experts to be called.

(3) *Pretrial Disclosures.* In addition to the disclosures required in the preceding paragraphs, a party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment purposes:

(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

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These disclosures shall be made at the times and in the sequence directed by the court. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B), and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

(4) *Form of Disclosures.* Unless otherwise directed by the court, all disclosures under subparagraphs (a)(1) and (2) shall be made in writing, signed, and served in accordance with Rule 5.

(5) *Methods to Discover Additional Matter.* Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) *Limitations.*

(A) The court may alter the limits in these rules on the number of depositions and interrogatories, the length of depositions under Rule 30, and the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under paragraph (c).

(B) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

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(3) *Trial Preparation: Materials.* Subject to the provisions of subparagraph (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subparagraph (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) *Trial Preparation: Experts.*

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under section (a)(2)(B), the deposition shall not be conducted until after the report is provided.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subparagraph; and (ii) with respect to discovery obtained under section (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) *Claims of Privilege or Protection of Trial Preparation Materials.* When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the judicial district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the disclosure or discovery not be had; (2) that the disclosure or discovery may be had only on specified

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terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition, after being sealed, be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Timing and Sequence of Discovery.

(1) *Timing of Discovery--Non-Exempted Actions.* In an action in which disclosure is required under Rule 26(a), a party may serve up to ten of the thirty interrogatories allowed under Rule 33(a) at the times allowed by section (d)(2)(C) of this rule. Otherwise, except by order of the court or agreement of the parties, a party may not seek discovery from any source before the parties have met and conferred as required by paragraph (f).

(2) *Timing of Discovery--Exempted Actions.* In actions exempted from disclosure under Rule 26(a), discovery may take place as follows:

(A) For depositions upon oral examination under Civil Rule 30, a defendant may take depositions at any time after commencement of the action. The plaintiff must obtain leave of court if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service under Rule 4(e) if authorized, except that leave is not required (i) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (ii) the plaintiff seeks to take the deposition under Civil Rule 30(a)(2)(C).

(B) For depositions upon written questions under Civil Rule 31, a party may serve questions at any time after commencement of the action.

(C) For interrogatories, requests for production, and requests for admission under Civil Rules 33, 34, and 36, discovery requests may be served upon the plaintiff at any time after the commencement of the action, and upon any other party with or after service of the summons and complaint upon that party.

(3) *Sequence of Discovery.* Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of Disclosures and Responses. A party who has made a disclosure under paragraph (a) or Civil Rule 26.1(b) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:

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(1) A party is under a duty to supplement at appropriate intervals its disclosures under paragraph (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(f) Meeting of Parties; Planning for Discovery and Alternative Dispute Resolution. Except when otherwise ordered and except in actions exempted from disclosure under Rule 26(a), the parties shall, as soon as practicable and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, including whether an alternative dispute resolution procedure is appropriate, to make or arrange for the disclosures required by subparagraph (a)(1), and to develop a proposed discovery plan and a proposed alternative dispute resolution plan. The plan shall indicate the parties' views and proposals concerning:

(1) what changes should be made in the timing or form of disclosures under paragraph (a), including a statement as to when the disclosures under subparagraph (a)(1) were made or will be made and what are appropriate intervals for supplementation of disclosure under Rule 26(e)(1);

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(4) what changes should be made in the limitations on discovery imposed under these rules and what other limitations should be imposed;

(5) the plan for alternative dispute resolution, including its timing, the method of selecting a mediator, early neutral evaluator, or arbitrator, or an explanation of why alternative dispute resolution is inappropriate;

(6) whether a scheduling conference is unnecessary; and

(7) any other orders that should be entered by the court under paragraph (c) or under Rule 16(b) and (c).

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging and being present or represented at the meeting, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 10 days after the meeting a written report outlining the plan.

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(g) [Applicable to cases filed on or after August 7, 1997.] Limited Discovery; Expedited Calendaring. In a civil action for personal injury or property damage involving less than $100,000 in claims, the parties shall limit discovery to that allowed under District Court Civil Rule 1(a)(1) and shall avail themselves of the expedited calendaring procedures allowed under District Court Civil Rule 4.

Credits

[Amended effective July 15, 1990; July 15, 1994; July 15, 1995; July 15, 1997; August 7, 1997; August 7, 1997; July 15, 1998; October 15, 2005; April 15, 2009; October 15, 2014.]

Editors' Notes

NOTE

Note to SCO 1281: Paragraph (g) of this rule was added by ch. 26, § 40, SLA 1997. According to § 55 of the Act, the amendment to Civil Rule 26 applies "to all causes of action accruing on or after the effective date of this Act." The amendment to Rule 26 adopted by paragraph 1 of this order applies to all cases filed on or after August 7, 1997. See paragraph 17 of this order. The change is adopted for the sole reason that the legislature has mandated the amendment.

Ch. 26, § 10, SLA 1997 repeals and reenacts AS 09.17.020 concerning punitive damages. New AS 09.17.020(e) prohibits parties from conducting discovery relevant to the amount of punitive damages until after the fact finder has determined that an award of punitive damages is allowed. This provision applies to causes of action accruing on or after August 7, 1997. See ch. 26, § 55, SLA 1997. According to § 48 of the Act, new AS 09.17.020(e) has the effect of amending Civil Rule 26 by limiting discovery in certain actions.

Section 2 of chapter 95 SLA 1998 amends AS 09.19.050 to state that the automatic disclosure provisions of Civil Rule 26 do not apply in prisoner litigation against the state. According to section 13 of the act, this amendment has the effect of changing Civil Rule 26 "by providing that the automatic disclosure provisions of the rule do not apply to litigation against the state brought by prisoners."

Note to SCO 1647: The supreme court has approved certain procedures for Anchorage cases that vary from those specified in this rule. Civil Rule 26(a)(1) sets out a procedure to be used "[e]xcept to the extent otherwise directed by order or rule," and sets a timeline for disclosures "[u]nless otherwise directed by the court." Civil Rule 26(f) also sets out a procedure to be used "except when otherwise ordered." In Anchorage, Administrative Order 3AO-03-04 (Amended) applies to modify the procedures set out in subdivisions (a)(1) and (f). That Order, commonly referred to as the Anchorage Uniform Pretrial Order, was issued and adopted according to the provisions of Administrative Rule 46, and is available on the court system's website at http:/ /www.courts.alaska.gov/orders-cr16-26.htm.

Rules Civ. Proc., Rule 26, AK R RCP Rule 26
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West's Colorado Revised Statutes Annotated
West's Colorado Court Rules Annotated
Colorado Rules of Civil Procedure
Chapter 4. Disclosure and Discovery

C.R.C.P. Rule 26

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY; DUTY OF DISCLOSURE

Currentness

(a) Required Disclosures. Unless otherwise ordered by the court or stipulated by the parties, provisions of this Rule shall not apply to domestic relations, juvenile, mental health, probate, water law, forcible entry and detainer, C.R.C.P. 120, or other expedited proceedings.

(1) **Disclosures.** Except to the extent otherwise directed by the court, a party shall, without awaiting a discovery request, provide to other parties the following information, whether or not supportive of the disclosing party's claims or defenses:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to the claims and defenses of any party and a brief description of the specific information that each such individual is known or believed to possess;

(B) a listing, together with a copy of, or a description by category, of the subject matter and location of all documents, data compilations, and tangible things in the possession, custody or control of the party that are relevant to the claims and defenses of any party, making available for inspection and copying such documents and other evidentiary material, not privileged or protected from disclosure, as though a request for production of those documents had been served pursuant to C.R.C.P. 34;

(C) a description of the categories of damages sought and a computation of any category of economic damages claimed by the disclosing party, making available for inspection and copying pursuant to C.R.C.P. 34 the documents or other evidentiary material relevant to the damages sought, not privileged or protected from disclosure, as though a request for production of those documents had been served pursuant to C.R.C.P. 34; and

(D) any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment, making such agreement available for inspection and copying pursuant to C.R.C.P. 34.

Disclosures shall be served within 28 days after the case is at issue as defined in C.R.C.P. 16(b)(1). A party shall make the required disclosures based on the information then known and reasonably available to the party and is not excused from making such disclosures because the party has not completed investigation of the case or because the party challenges the sufficiency of another party's disclosure or because another party has not made the required disclosures. Parties shall make these disclosures in good faith and may not object to the adequacy of the disclosures until the case management conference pursuant to C.R.C.P. 16(d).

(2) **Disclosure of Expert Testimony.**

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(A) In addition to the disclosures required by subsection (a)(1) of this Rule, a party shall disclose to other parties the identity of any person who may present evidence at trial, pursuant to Rules 702, 703, or 705 of the Colorado Rules of Evidence together with an identification of the person's fields of expertise.

(B) Except as otherwise stipulated or directed by the court:

(I) Retained Experts. With respect to a witness who is retained or specially employed to provide expert testimony, or whose duties as an employee of the party regularly involve giving expert testimony, the disclosure shall be made by a written report signed by the witness. The report shall include:

(a) a complete statement of all opinions to be expressed and the basis and reasons therefor;

(b) a list of the data or other information considered by the witness in forming the opinions;

(c) references to literature that may be used during the witness's testimony;

(d) copies of any exhibits to be used as a summary of or support for the opinions;

(e) the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years;

(f) the fee agreement or schedule for the study, preparation and testimony;

(g) an itemization of the fees incurred and the time spent on the case, which shall be supplemented 14 days prior to the first day of trial; and

(h) a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

The witness's direct testimony shall be limited to matters disclosed in detail in the report.

(II) Other Experts. With respect to a party or witness who may be called to provide expert testimony but is not retained or specially employed within the description contained in subsection (a)(2)(B)(I) above, the disclosure shall be made by a written report or statement that shall include:

(a) a complete description of all opinions to be expressed and the basis and reasons therefor;

(b) a list of the qualifications of the witness; and

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(c) copies of any exhibits to be used as a summary of or support for the opinions. If the report has been prepared by the witness, it shall be signed by the witness.

If the witness does not prepare a written report, the party's lawyer or the party, if self-represented, may prepare a statement and shall sign it. The witness's direct testimony expressing an expert opinion shall be limited to matters disclosed in detail in the report or statement.

(C) Unless otherwise provided in the Case Management Order, the timing of the disclosures shall be as follows:

(I) The disclosure by a claiming party under a complaint, counterclaim, cross-claim, or third-party claim shall be made at least 126 days (18 weeks) before the trial date.

(II) The disclosure by a defending party shall be made within 28 days after service of the claiming party's disclosure, provided, however, that if the claiming party serves its disclosure earlier than required under subparagraph 26(a)(2)(C)(I), the defending party is not required to serve its disclosures until 98 days (14 weeks) before the trial date.

(III) If the evidence is intended to contradict or rebut evidence on the same subject matter identified by another party under subparagraph (a)(2)(C)(II) of this Rule, such disclosure shall be made no later than 77 days (11 weeks) before the trial date.

(3) [There is no Colorado Rule--see instead C.R.C.P. 16(c).]

(4) **Form of Disclosures; Filing.** All disclosures pursuant to subparagraphs (a)(1) and (a)(2) of this Rule shall be made in writing, in a form pursuant to C.R.C.P. 10, signed pursuant to C.R.C.P. 26(g)(1), and served upon all other parties. Disclosures shall not be filed with the court unless requested by the court or necessary for consideration of a particular issue.

(5) **Methods to Discover Additional Matters.** Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, pursuant to C.R.C.P. 34; physical and mental examinations; and requests for admission. Discovery at a place within a country having a treaty with the United States applicable to the discovery must be conducted by methods authorized by the treaty except that, if the court determines that those methods are inadequate or inequitable, it may authorize other discovery methods not prohibited by the treaty.

(b) Discovery Scope and Limits. Unless otherwise modified by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) **In General.** Subject to the limitations and considerations contained in subsection (b)(2) of this Rule, parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within the scope of discovery need not be admissible in evidence to be discoverable.

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(2) **Limitations.** Except upon order for good cause shown and subject to the proportionality factors in subsection (b)(1) of this Rule, discovery shall be limited as follows:

(A) A party may take one deposition of each adverse party and of two other persons, exclusive of persons expected to give expert testimony disclosed pursuant to subsection 26(a)(2). The scope and manner of proceeding by way of deposition and the use thereof shall otherwise be governed by C.R.C.P. 26, 28, 29, 30, 31, 32, and 45.

(B) A party may serve on each adverse party 30 written interrogatories, each of which shall consist of a single question. The scope and manner of proceeding by means of written interrogatories and the use thereof shall otherwise be governed by C.R.C.P. 26 and 33.

(C) A party may obtain a physical or mental examination (including blood group) of a party or of a person in the custody or under the legal control of a party pursuant to C.R.C.P. 35.

(D) A party may serve each adverse party requests for production of documents or tangible things or for entry, inspection or testing of land or property pursuant to C.R.C.P. 34, except such requests for production shall be limited to 20 in number, each of which shall consist of a single request.

(E) A party may serve on each adverse party 20 requests for admission, each of which shall consist of a single request. A party may also serve requests for admission of the genuineness of up to 50 separate documents that the party intends to offer into evidence at trial. The scope and manner of proceeding by means of requests for admission and the use thereof shall otherwise be governed by C.R.C.P. 36.

(F) In determining good cause to modify the limitations of this subsection (b)(2), the court shall consider the following:

(I) whether the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(II) whether the party seeking discovery has had ample opportunity by disclosure or discovery in the action to obtain the information sought;

(III) whether the proposed discovery is outside the scope permitted by C.R.C.P. 26(b)(1); and

(IV) whether because of the number of parties and their alignment with respect to the underlying claims and defenses, the proposed discovery is reasonable.

(3) **Trial Preparation: Materials.** Subject to the provisions of subsection (b)(4) of this Rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this Rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials

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in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of C.R.C.P. 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is:

(A) a written statement signed or otherwise adopted or approved by the person making it, or

(B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) **Trial Preparation: Experts.**

(A) A party may depose any person who has been identified as an expert disclosed pursuant to subsection 26(a)(2)(B)(I) of this Rule whose opinions may be presented at trial. Each deposition shall not exceed 6 hours. On the application of any party, the court may decrease or increase the time permitted after considering the proportionality criteria in subsection (b)(1) of this Rule. Except to the extent otherwise stipulated by the parties or ordered by the court, no discovery, including depositions, concerning either the identity or the opinion of experts shall be conducted until after the disclosures required by subsection (a)(2) of this Rule.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial, and who is not expected to be called as a witness at trial only as provided by C.R.C.P. 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subsection (b)(4); and (ii) with respect to discovery obtained pursuant to subsection (b)(4)(B) of this Rule, the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(D) Rule 26(b)(3) protects from disclosure and discovery drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded, and protects communications between the party's attorney and any witness disclosed under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(I) relate to the compensation for the expert's study, preparation, or testimony;

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(II) identify facts or data that the party's attorney provided and which the expert considered in forming the opinions to be expressed; or

(III) identify the assumptions that the party's attorney provided and that the expert relied on in forming opinions to be expressed.

(5)(A) **Claims of Privilege or Protection of Trial Preparation Materials.** When a party withholds information required to be disclosed or provided in discovery by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(B) If information produced in disclosures or discovery is subject to a claim of privilege or of protection as trial-preparation material the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must not review, use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and shall give notice to the party making the claim within 14 days if it contests the claim. If the claim is not contested within the 14-day period, or is timely contested but resolved in favor of the party claiming privilege or protection of trial-preparation material, then the receiving party must also promptly return, sequester, or destroy the specified information and any copies that the receiving party has. If the claim is contested, the party making the claim shall present the information to the court under seal for a determination of the claim within 14 days after receiving such notice, or the claim is waived. The producing party must preserve the information until the claim is resolved, and bears the burden of proving the basis of the claim and that the claim was not waived. All notices under this Rule shall be in writing.

(c) Protective Orders. Upon motion by a party or by the person from whom disclosure is due or discovery is sought, accompanied by a certificate that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the disclosure or discovery not be had;

(2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place or the allocation of expenses;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

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(6) that a deposition, after being sealed, be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

(d) Timing and Sequence of Discovery. Except when authorized by these Rules, by order, or by agreement of the parties, a party may not seek discovery from any source before service of the Case Management Order pursuant to C.R.C.P. 16(b)(18). Any discovery conducted prior to issuance of the Case Management Order shall not exceed the limitations established by C.R.C.P. 26(b)(2). Unless the parties stipulate or the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of Disclosures, Responses, and Expert Reports and Statements. A party is under a duty to supplement its disclosures under section (a) of this Rule when the party learns that the information disclosed is incomplete or incorrect in some material respect and if the additional or corrective information has not otherwise been made known to the other parties during the disclosure or discovery process, including information relating to anticipated rebuttal but not including information to be used solely for impeachment of a witness. A party is under a duty to amend a prior response to an interrogatory, request for production or request for admission when the party learns that the prior response is incomplete or incorrect in some material respect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process. With respect to experts, the duty to supplement or correct extends both to information contained in the expert's report or statement disclosed pursuant to section (a)(2)(B) of this Rule and to information provided through any deposition of the expert. If a party intends to offer expert testimony on direct examination that has not been disclosed pursuant to section (a)(2)(B) of this Rule on the basis that the expert provided the information through a deposition, the report or statement previously provided shall be supplemented to include a specific description of the deposition testimony relied on. Nothing in this section requires the court to permit an expert to testify as to opinions other than those disclosed in detail in the initial expert report or statement except that if the opinions and bases and reasons therefor are disclosed during the deposition of the expert by the adverse party, the court must permit the testimony at trial unless the court finds that the opposing party has been unfairly prejudiced by the failure to make disclosure in the initial expert report. Supplementation shall be performed in a timely manner.

(f) [No Colorado Rule--See C.R.C.P. 16].

(g) Signing of Disclosures, Discovery Requests, Responses, and Objections.

(1) Every disclosure made pursuant to subsections (a)(1) or (a)(2) of this Rule shall be signed by at least one attorney of record in the attorney's individual name. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(2) Every discovery request, or response, or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name. An unrepresented party shall sign the request, response, or objection

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and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information and belief, formed after a reasonable inquiry, the request, response or objection is:

(A) Consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(B) Not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(C) Not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

If a request, response or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

(3) If without substantial justification a certification is made in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who made the certification, the party on whose behalf the disclosure, request, response or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including reasonable attorney fees.

Credits

Repealed and Adopted eff. Jan. 1, 1995. Amended eff. Jan. 9, 1995, for all cases filed on or after that date; Jan. 1, 1998; July 1, 2001; Jan. 1, 2002; amended Oct. 20, 2005, eff. Jan. 1, 2006; Jan. 1, 2012; Sept. 18, 2014; effective July 1, 2015 for cases filed on or after July 1, 2015.

Editors' Notes

COMMENTS

1995

SCOPE

[1] Because of its timing and interrelationship with C.R.C.P. 16, C.R.C.P. 26 does not apply to domestic relations, mental health, water law, forcible entry and detainer, C.R.C.P. 120, or other expedited proceedings. However, the Court in those proceedings may use C.R.C.P. 26 and C.R.C.P. 16 to the extent helpful to the case. In most instances, only the timing will need to be modified.

COLORADO DIFFERENCES

[2] Revised C.R.C.P. 26 is patterned largely after Fed.R.Civ.P. 26 as amended in 1993 and 2000 and uses substantially the same numbering. There are differences, however. The differences are to fit disclosure/discovery requirements of Colorado's case/trial management system set forth in C.R.C.P. 16, which is very different from its Federal Rule

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counterpart. The interrelationship between C.R.C.P. 26 and C.R.C.P. 16 is described in the Committee Comment to C.R.C.P. 16.

[3] The Colorado differences from the Fed.R.Civ.P. are: (1) timing and scope of mandatory automatic disclosures is different (C.R.C.P. 16(b)); (2) the two types of experts in the Federal Rule are clarified by the State Rule (C.R.C.P. 26(a)(2)(B)), and disclosure of expert opinions is made at a more realistic time in the proceedings (C.R.C.P. 26(a)(2)(C)); (3) sequenced disclosure of expert opinions is prescribed in C.R.C.P. 26(a)(2)(C) to avoid proliferation of experts and related expenses; (4) the parties may use a summary of an expert's testimony in lieu of a report prepared by the expert to reduce expenses (C.R.C.P. 26(a)(2)(B)); (5) claiming privilege/protection of work product (C.R.C.P. 26(b)(5)) and supplementation/correction provisions (C.R.C.P. 26(e)) are relocated in the State Rules to clarify that they apply to both disclosures and discovery; (6) a Motion for Protective Order stays a deposition under the State Rules (C.R.C.P. 121 § 1-12) but not the Federal Rule (Fed.R.Civ.P. 26(c)); (7) presumptive limitations on discovery as contemplated by C.R.C.P. 16(b)(1)(VI) are built into the rule (see C.R.C.P. 26(b)(2)); (8) counsel must certify that they have informed their clients of the expense of the discovery they schedule (C.R.C.P. 16(b)(1)(IV)); (9) the parties cannot stipulate out of the C.R.C.P. 26(b)(2) presumptive discovery limitations (C.R.C.P. 29); and (10) pretrial endorsements governed by Fed.R.Civ.P. 26(a)(3) are part of Colorado's trial management system established by C.R.C.P. 16(c) and C.R.C.P. 16(d).

[4] As with the Federal Rule, the extent of disclosure is dependent upon the specificity of disputed facts in the opposing party's pleading (facilitated by the requirement in C.R.C.P. 16(b) that lead counsel confer about the nature and basis of the claims and defenses before making the required disclosures). If a party expects full disclosure, that party needs to set forth the nature of the claim or defense with reasonable specificity. Specificity is not inconsistent with the requirement in C.R.C.P. 8 for a “short, plain statement” of a party's claims or defenses. Obviously, to the extent there is disclosure, discovery is unnecessary. Discovery is limited under this system.

FEDERAL COMMITTEE NOTES

[5] Federal “Committee Notes” to the December 1, 1993 and December 1, 2000 amendments of Fed.R.Civ.P. 26 are incorporated by reference and where applicable should be used for interpretive guidance.

[6] The most dramatic change in C.R.C.P. 26 is the addition of a disclosure system. Parties are required to disclose specified information without awaiting a discovery demand. Such disclosure is, however, tied to the nature and basis of the claims and defenses of the case as set forth in the parties' pleadings facilitated by the requirement that lead counsel confer about such matters before making the required disclosures.

[7] Subparagraphs (a)(1)(A) and (a)(1)(B) of C.R.C.P. 26 require disclosure of persons, documents and things likely to provide discoverable information relative to disputed facts alleged with particularity in the pleadings. Disclosure relates to disputed facts, not admitted facts. The reference to particularity in the pleadings (coupled with the requirement that lead counsel confer) responds to the concern that notice pleading suggests a scope of disclosure out of proportion to any real need or use. To the contrary, the greater the specificity and clarity of the pleadings facilitated by communication through the C.R.C.P. 16(b) conference, the more complete and focused should be the listing of witnesses, documents, and things so that the parties can tailor the scope of disclosure to the actual needs of the case.

[8] It should also be noted that two types of experts are contemplated by Fed.R.Civ.P. and C.R.C.P. 26(a)(2). The experts contemplated in subsection (a)(2)(B)(II) are persons such as treating physicians, police officers, or others who may testify as expert witnesses and whose opinions are formed as a part of their occupational duties (except when the person is an employee of the party calling the witness). This more limited disclosure has been incorporated into the State Rule because it was deemed inappropriate and unduly burdensome to require all of the information required by C.R.C.P. 26(a)(2)(B)(I) for C.R.C.P. 26(a)(2)(B)(II) type experts.

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2001 COLORADO CHANGES

[9] The change to C.R.C.P. 26(a)(2)(C)(II) effective July 1, 2001, is intended to prevent a plaintiff, who may have had a year or more to prepare his or her case, from filing an expert report early in the case in order to force a defendant to prepare a virtually immediate response. That change clarifies that the defendant's expert report will not be due until 90 days prior to trial.

[10] The change to C.R.C.P. 26(b)(2)(A) effective July 1, 2001 was made to clarify that the number of depositions limitation does not apply to persons expected to give expert testimony disclosed pursuant to subsection 26(a)(2).

[11] The special and limited form of request for admission in C.R.C.P. 26(b)(2)(E) effective July 1, 2001, allows a party to seek admissions as to authenticity of documents to be offered at trial without having to wait until preparation of the Trial Management Order to discover whether the opponent challenges the foundation of certain documents. Thus, a party can be prepared to call witnesses to authenticate documents if the other party refuses to admit their authenticity.

[12] The amendment of C.R.C.P. 26(b)(1) effective January 1, 2002 is patterned after the December, 2000 amendment of the corresponding Federal rule. The amendment should not prevent a party from conducting discovery to seek impeachment evidence or evidence concerning prior acts.

2015

[13] Rule 26 sets the basis for discovery of information by: (1) defining the scope of discovery (26(b)(1)); (2) requiring certain initial disclosures prior to discovery (26(a)(1)); (3) placing presumptive limits on the types of permitted discovery (26(b)(2)); and (4) describing expert disclosure and discovery (26(a)(2) and 26(b)(4)).

[14] Scope of discovery.

Perhaps the most significant 2015 amendments are in Rule 26(b)(1). This language is taken directly from the proposed Fed. R. Civ. P. 26(b)(1). (For a more complete statement of the changes and their rationales, one can read the extensive commentary proposed for the Federal Rule.) First, the slightly reworded concept of proportionality is moved from its former hiding place in C.R.C.P. 26(b)(2)(F)(iii) into the very definition of what information is discoverable. Second, discovery is limited to matters relevant to the specific claims or defenses of any party and is no longer permitted simply because it is relevant to the "subject matter involved in the action." Third, it is made clear that while evidence need not be admissible to be discoverable, this does not permit broadening the basic scope of discovery. In short, the concept is to allow discovery of what a party/lawyer *needs* to prove its case, but not what a party/lawyer *wants* to know about the subject of a case.

[15] Proportionality analysis.

C.R.C.P. 26(b)(1) requires courts to apply the principle of proportionality in determining the extent of discovery that will be permitted. The Rule lists a number of non-exclusive factors that should be considered. Not every factor will apply in every case. The nature of the particular case may make some factors predominant and other factors insignificant. For example, the amount in controversy may not be an important consideration when fundamental or constitutional rights are implicated, or where the public interest demands a resolution of the issue, irrespective of the economic consequences. In certain types of litigation, such as employment or professional liability cases, the parties' relative access to relevant information may be the most important factor. These examples show that the factors cannot be applied as a mathematical formula. Rather, trial judges have and must exercise discretion, on a case-by-

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case basis, to effectuate the purposes of these rules, and, in particular, abide by the overarching command that the rules "shall be liberally construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action." C.R.C.P. 1.

[16] Limitations on discovery.

The presumptive limitations on discovery in Rule 26(b)(2)-- *e.g.*, a deposition of an adverse party and two other persons, only 30 interrogatories, etc.--have not been changed from the prior rule. They may, however, be reduced or increased by stipulation of the parties with court approval, consistent with the requirement of proportionality.

[17] Initial disclosures.

Amendments to Rule 26(a)(1) concerning initial disclosures are not as significant as those to Rule 26(b)(1). Nonetheless, it is intended that disclosures should be quite complete and that, therefore, further discovery should not be as necessary as it has been historically. In this regard, the amendment to section (a)(1) adds to the requirement of disclosing four categories of information and that the disclosure include information "whether or not supportive" of the disclosing party's case. This should not be a significant change from prior practice. In 2000, Fed. R. Civ. P. 26(a)(1) was changed to narrow the initial disclosure requirements to information a party might use to support its position. The Colorado Supreme Court has not adopted that limitation, and continues to require identification of persons and documents that are relevant to disputed facts alleged with particularity in the pleadings. Thus, it was intended that disclosures were to include matter that might be harmful as well as supportive. (Limiting disclosure to supportive information likely would only encourage initial interrogatories and document requests that would require disclosure of harmful information.)

Changes to subsections (A) (persons with information) and (B) (documents) of Rule 26(a)(1) require information related to claims for relief and defenses (consistent with the scope of discovery in Rule 26(b)(1)). Also the identification of persons with relevant information calls for a "brief *description* of the *specific* information that each individual is known or believed to possess." Under the prior rule, disclosures of persons with discoverable information identifying "the subjects of information" tended to identify numerous persons with the identification of "X is expected to have information about and may testify relating to the facts of this case." The change is designed to avoid that practice and obtain some better idea of which witnesses might actually have genuinely significant information.

[18] Expert disclosures.

Retained experts must sign written reports much as before except with more disclosure of their fees. The option of submitting a "summary" of expert opinions is eliminated. Their testimony is limited to what is disclosed in detail in their report. Rule 26(a)(2)(B)(I).

"Other" (non-retained) experts must make disclosures that are less detailed. Many times a lawyer has no control over a non-retained expert, such as a treating physician or police officer, and thus the option of a "statement" must be preserved with respect to this type of expert, which, if necessary, may be prepared by the lawyers. In either event, the expert testimony is to be limited to what is disclosed in detail in the disclosure. Rule 26(a)(2)(B)(II).

[19] Retained or non-retained experts.

Non-retained experts are persons whose opinions are formed or reasonably derived from or based on their occupational duties.

[20] Expert discovery.

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The prohibition of depositions of experts was perhaps the most controversial aspect of CAPP. Many lawyers, particularly those involved in professional liability cases, argued that a blanket prohibition of depositions of experts would impair lawyers' ability to evaluate cases and thus frustrate settlement of cases. The 2015 amendment permits limited depositions of experts. Retained experts may be deposed for up to 6 hours, unless changed by the court, which must consider proportionality. Rule 26(b)(4)(A).

The 2015 amendment also requires that, if a deposition reveals additional opinions, previous expert disclosures must be supplemented before trial if the witness is to be allowed to express these new opinions at trial. Rule 26(e). This change addresses, and prohibits, the fairly frequent and abusive practice of lawyers simply saying that the expert report is supplemented by the "deposition." However, even with the required supplementation, the trial court is not required to allow the new opinions in evidence. *Id.*

The 2015 amendments to Rule 26, like the current and proposed version of Fed. R. Civ. P. 26, emphasize the application of the concept of proportionality to disclosure and discovery, with robust disclosure followed by limited discovery.

[21] Sufficiency of disclosure of expert opinions and the bases therefor.

This rule requires detailed disclosures of "all opinions to be expressed [by the expert] and the basis and reasons therefor." Such disclosures ensure that the parties know, well in advance of trial, the substance of all expert opinions that may be offered at trial. Detailed disclosures facilitate the trial, avoid delays, and enhance the prospect for settlement. At the same time, courts and parties must "liberally construe, administer and employ" these rules "to secure the just, speedy, and inexpensive determination of every action." C.R.C.P. 1. Rule 26(a)(2) does not prohibit disclosures that incorporate by specific page reference previously disclosed records of the designated expert (including non-retained experts), provided that the designated pages set forth the opinions to be expressed, along with the reasons and basis therefor. This Rule does not require that disclosures match, verbatim, the testimony at trial. Reasonableness and the overarching goal of a fair resolution of disputes are the touchstones. If an expert's opinions and facts supporting the opinions are disclosed in a manner that gives the opposing party reasonable notice of the specific opinions and supporting facts, the purpose of the rule is accomplished. In the absence of substantial prejudice to the opposing party, this rule does not require exclusion of testimony merely because of technical defects in disclosure.

Notes of Decisions (393)

Rules Civ. Proc., Rule 26, CO ST RCP Rule 26
Current with amendments received through August 15, 2015

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West's Utah Code Annotated
State Court Rules
Utah Rules of Civil Procedure (Refs & Annos)
Part V. Depositions and Discovery

Utah Rules of Civil Procedure, Rule 26

RULE 26. GENERAL PROVISIONS GOVERNING DISCLOSURE AND DISCOVERY

Currentness

(a) Disclosure. This rule applies unless changed or supplemented by a rule governing disclosure and discovery in a practice area.

(a)(1) *Initial disclosures.* Except in cases exempt under paragraph (a)(3), a party shall, without waiting for a discovery request, serve on the other parties:

(a)(1)(A) the name and, if known, the address and telephone number of:

(a)(1)(A)(i) each individual likely to have discoverable information supporting its claims or defenses, unless solely for impeachment, identifying the subjects of the information; and

(a)(1)(A)(ii) each fact witness the party may call in its case-in-chief and, except for an adverse party, a summary of the expected testimony;

(a)(1)(B) a copy of all documents, data compilations, electronically stored information, and tangible things in the possession or control of the party that the party may offer in its case-in-chief, except charts, summaries and demonstrative exhibits that have not yet been prepared and must be disclosed in accordance with paragraph (a)(5);

(a)(1)(C) a computation of any damages claimed and a copy of all discoverable documents or evidentiary material on which such computation is based, including materials about the nature and extent of injuries suffered;

(a)(1)(D) a copy of any agreement under which any person may be liable to satisfy part or all of a judgment or to indemnify or reimburse for payments made to satisfy the judgment; and

(a)(1)(E) a copy of all documents to which a party refers in its pleadings.

(a)(2) *Timing of initial disclosures.* The disclosures required by paragraph (a)(1) shall be served on the other parties:

(a)(2)(A) by the plaintiff within 14 days after filing of the first answer to the complaint; and

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(a)(2)(B) by the defendant within 42 days after filing of the first answer to the complaint or within 28 days after that defendant's appearance, whichever is later.

(a)(3) *Exemptions.*

(a)(3)(A) Unless otherwise ordered by the court or agreed to by the parties, the requirements of paragraph (a)(1) do not apply to actions:

(a)(3)(A)(i) for judicial review of adjudicative proceedings or rule making proceedings of an administrative agency;

(a)(3)(A)(ii) governed by Rule 65B or Rule 65C;

(a)(3)(A)(iii) to enforce an arbitration award;

(a)(3)(A)(iv) for water rights general adjudication under Title 73, Chapter 4, Determination of Water Rights.

(a)(3)(B) In an exempt action, the matters subject to disclosure under paragraph (a)(1) are subject to discovery under paragraph (b).

(a)(4) *Expert testimony.*

(a)(4)(A) Disclosure of expert testimony. A party shall, without waiting for a discovery request, serve on the other parties the following information regarding any person who may be used at trial to present evidence under Rule 702 of the **Utah** Rules of Evidence and who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony: (i) the expert's name and qualifications, including a list of all publications authored within the preceding 10 years, and a list of any other cases in which the expert has testified as an expert at trial or by deposition within the preceding four years, (ii) a brief summary of the opinions to which the witness is expected to testify, (iii) all data and other information that will be relied upon by the witness in forming those opinions, and (iv) the compensation to be paid for the witness's study and testimony.

(a)(4)(B) Limits on expert discovery. Further discovery may be obtained from an expert witness either by deposition or by written report. A deposition shall not exceed four hours and the party taking the deposition shall pay the expert's reasonable hourly fees for attendance at the deposition. A report shall be signed by the expert and shall contain a complete statement of all opinions the expert will offer at trial and the basis and reasons for them. Such an expert may not testify in a party's case-in-chief concerning any matter not fairly disclosed in the report. The party offering the expert shall pay the costs for the report.

(a)(4)(C) Timing for expert discovery.

(a)(4)(C)(i) The party who bears the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the close of fact discovery. Within seven days

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thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(C)(ii) The party who does not bear the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the later of (A) the date on which the election under paragraph (a)(4)(C)(i) is due, or (B) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(i). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(C)(iii) If the party who bears the burden of proof on an issue wants to designate rebuttal expert witnesses it shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the later of (A) the date on which the election under paragraph (a)(4)(C)(ii) is due, or (B) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(ii). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(D) Multiparty actions. In multiparty actions, all parties opposing the expert must agree on either a report or a deposition. If all parties opposing the expert do not agree, then further discovery of the expert may be obtained only by deposition pursuant to paragraph (a)(4)(B) and Rule 30.

(a)(4)(E) Summary of non-retained expert testimony. If a party intends to present evidence at trial under Rule 702 of the **Utah** Rules of Evidence from any person other than an expert witness who is retained or specially employed to provide testimony in the case or a person whose duties as an employee of the party regularly involve giving expert testimony, that party must serve on the other parties a written summary of the facts and opinions to which the witness is expected to testify in accordance with the deadlines set forth in paragraph (a)(4)(C). A deposition of such a witness may not exceed four hours.

(a)(5) *Pretrial disclosures.*

(a)(5)(A) A party shall, without waiting for a discovery request, serve on the other parties:

(a)(5)(A)(i) the name and, if not previously provided, the address and telephone number of each witness, unless solely for impeachment, separately identifying witnesses the party will call and witnesses the party may call;

(a)(5)(A)(ii) the name of witnesses whose testimony is expected to be presented by transcript of a deposition and a copy of the transcript with the proposed testimony designated; and

(a)(5)(A)(iii) a copy of each exhibit, including charts, summaries and demonstrative exhibits, unless solely for impeachment, separately identifying those which the party will offer and those which the party may offer.

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(a)(5)(B) Disclosure required by paragraph (a)(5) shall be served on the other parties at least 28 days before trial. At least 14 days before trial, a party shall serve and file counter designations of deposition testimony, objections and grounds for the objections to the use of a deposition and to the admissibility of exhibits. Other than objections under Rules 402 and 403 of the **Utah** Rules of Evidence, objections not listed are waived unless excused by the court for good cause.

(b) Discovery scope.

(b)(1) *In general.* Parties may discover any matter, not privileged, which is relevant to the claim or defense of any party if the discovery satisfies the standards of proportionality set forth below. Privileged matters that are not discoverable or admissible in any proceeding of any kind or character include all information in any form provided during and created specifically as part of a request for an investigation, the investigation, findings, or conclusions of peer review, care review, or quality assurance processes of any organization of health care providers as defined in the **Utah** Health Care Malpractice Act for the purpose of evaluating care provided to reduce morbidity and mortality or to improve the quality of medical care, or for the purpose of peer review of the ethics, competence, or professional conduct of any health care provider.

(b)(2) *Proportionality.* Discovery and discovery requests are proportional if:

(b)(2)(A) the discovery is reasonable, considering the needs of the case, the amount in controversy, the complexity of the case, the parties' resources, the importance of the issues, and the importance of the discovery in resolving the issues;

(b)(2)(B) the likely benefits of the proposed discovery outweigh the burden or expense;

(b)(2)(C) the discovery is consistent with the overall case management and will further the just, speedy and inexpensive determination of the case;

(b)(2)(D) the discovery is not unreasonably cumulative or duplicative;

(b)(2)(E) the information cannot be obtained from another source that is more convenient, less burdensome or less expensive; and

(b)(2)(F) the party seeking discovery has not had sufficient opportunity to obtain the information by discovery or otherwise, taking into account the parties' relative access to the information.

(b)(3) *Burden.* The party seeking discovery always has the burden of showing proportionality and relevance. To ensure proportionality, the court may enter orders under Rule 37.

(b)(4) *Electronically stored information.* A party claiming that electronically stored information is not reasonably accessible because of undue burden or cost shall describe the source of the electronically stored information, the nature and extent of the burden, the nature of the information not provided, and any other information that will enable other parties to evaluate the claim.

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(b)(5) *Trial preparation materials.* A party may obtain otherwise discoverable documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials and that the party is unable without undue hardship to obtain substantially equivalent materials by other means. In ordering discovery of such materials, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.

(b)(6) *Statement previously made about the action.* A party may obtain without the showing required in paragraph (b)(5) a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement about the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order under Rule 37. A statement previously made is (A) a written statement signed or approved by the person making it, or (B) a stenographic, mechanical, electronic, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(b)(7) *Trial preparation; experts.*

(b)(7)(A) Trial-preparation protection for draft reports or disclosures. Paragraph (b)(5) protects drafts of any report or disclosure required under paragraph (a)(4), regardless of the form in which the draft is recorded.

(b)(7)(B) Trial-preparation protection for communications between a party's attorney and expert witnesses. Paragraph (b)(5) protects communications between the party's attorney and any witness required to provide disclosures under paragraph (a)(4), regardless of the form of the communications, except to the extent that the communications:

(b)(7)(B)(i) relate to compensation for the expert's study or testimony;

(b)(7)(B)(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(b)(7)(B)(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(b)(7)(C) Expert employed only for trial preparation. Ordinarily, a party may not, by interrogatories or otherwise, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. A party may do so only:

(b)(7)(C)(i) as provided in Rule 35(b); or

(b)(7)(C)(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(b)(8) *Claims of privilege or protection of trial preparation materials.*

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(b)(8)(A) Information withheld. If a party withholds discoverable information by claiming that it is privileged or prepared in anticipation of litigation or for trial, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced in a manner that, without revealing the information itself, will enable other parties to evaluate the claim.

(b)(8)(B) Information produced. If a party produces information that the party claims is privileged or prepared in anticipation of litigation or for trial, the producing party may notify any receiving party of the claim and the basis for it. After being notified, a receiving party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

(c) Methods, sequence and timing of discovery; tiers; limits on standard discovery; extraordinary discovery.

(c)(1) *Methods of discovery.* Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; requests for admission; and subpoenas other than for a court hearing or trial.

(c)(2) *Sequence and timing of discovery.* Methods of discovery may be used in any sequence, and the fact that a party is conducting discovery shall not delay any other party's discovery. Except for cases exempt under paragraph (a)(3), a party may not seek discovery from any source before that party's initial disclosure obligations are satisfied.

(c)(3) *Definition of tiers for standard discovery.* Actions claiming $50,000 or less in damages are permitted standard discovery as described for Tier 1. Actions claiming more than $50,000 and less than $300,000 in damages are permitted standard discovery as described for Tier 2. Actions claiming $300,000 or more in damages are permitted standard discovery as described for Tier 3. Absent an accompanying damage claim for more than $300,000, actions claiming non-monetary relief are permitted standard discovery as described for Tier 2.

(c)(4) *Definition of damages.* For purposes of determining standard discovery, the amount of damages includes the total of all monetary damages sought (without duplication for alternative theories) by all parties in all claims for relief in the original pleadings.

(c)(5) *Limits on standard fact discovery.* Standard fact discovery per side (plaintiffs collectively, defendants collectively, and third-party defendants collectively) in each tier is as follows. The days to complete standard fact discovery are calculated from the date the first defendant's first disclosure is due and do not include expert discovery under paragraphs(a)(4)(C) and (D).

Tier	Amount of Damages	Total Fact Deposition Hours	Rule 33 Interrogatories including all discrete subparts	Rule 34 Requests for Production	Rule 36 Requests for Admission	Days to Complete Standard Fact Discovery

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1	$50,000 or less	3	0	5	5	120
2	More than $50,000 and less than $300,000 or non-monetary relief	15	10	10	10	180
3	$300,000 or more	30	20	20	20	210

(c)(6) *Extraordinary discovery.* To obtain discovery beyond the limits established in paragraph (c)(5), a party shall file:

(c)(6)(A) before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a stipulated statement that extraordinary discovery is necessary and proportional under paragraph (b)(2) and that each party has reviewed and approved a discovery budget; or

(c)(6)(B) before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a request for extraordinary discovery under Rule 37(a).

(d) Requirements for disclosure or response; disclosure or response by an organization; failure to disclose; initial and supplemental disclosures and responses.

(d)(1) A party shall make disclosures and responses to discovery based on the information then known or reasonably available to the party.

(d)(2) If the party providing disclosure or responding to discovery is a corporation, partnership, association, or governmental agency, the party shall act through one or more officers, directors, managing agents, or other persons, who shall make disclosures and responses to discovery based on the information then known or reasonably available to the party.

(d)(3) A party is not excused from making disclosures or responses because the party has not completed investigating the case or because the party challenges the sufficiency of another party's disclosures or responses or because another party has not made disclosures or responses.

(d)(4) If a party fails to disclose or to supplement timely a disclosure or response to discovery, that party may not use the undisclosed witness, document or material at any hearing or trial unless the failure is harmless or the party shows good cause for the failure.

(d)(5) If a party learns that a disclosure or response is incomplete or incorrect in some important way, the party must timely serve on the other parties the additional or correct information if it has not been made known to the other parties. The supplemental disclosure or response must state why the additional or correct information was not previously provided.

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(e) Signing discovery requests, responses, and objections. Every disclosure, request for discovery, response to a request for discovery and objection to a request for discovery shall be in writing and signed by at least one attorney of record or by the party if the party is not represented. The signature of the attorney or party is a certification under Rule 11. If a request or response is not signed, the receiving party does not need to take any action with respect to it. If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, may take any action authorized by Rule 11 or Rule 37(b).

(f) Filing. Except as required by these rules or ordered by the court, a party shall not file with the court a disclosure, a request for discovery or a response to a request for discovery, but shall file only the certificate of service stating that the disclosure, request for discovery or response has been served on the other parties and the date of service.

Credits

[Effective May 2, 2005; amended effective November 1, 2007; November 1, 2008; November 1, 2011; March 6, 2012; April 1, 2013; May 1, 2015.]

Editors' Notes

ADVISORY COMMITTEE NOTES

Disclosure requirements and timing. Rule 26(a)(1). The 2011 amendments seek to reduce discovery costs by requiring each party to produce, at an early stage in the case, and without a discovery request, all of the documents and physical evidence the party may offer in its case-in-chief and the names of witnesses the party may call in its case-in-chief, with a description of their expected testimony. In this respect, the amendments build on the initial disclosure requirements of the prior rules. In addition to the disclosures required by the prior version of Rule 26(a)(1), a party must disclose each fact witness the party may call in its case-in-chief and a summary of the witness's expected testimony, a copy of all documents the party may offer in its case-in-chief, and all documents to which a party refers in its pleadings.

Not all information will be known at the outset of a case. If discovery is serving its proper purpose, additional witnesses, documents, and other information will be identified. The scope and the level of detail required in the initial Rule 26(a)(1) disclosures should be viewed in light of this reality. A party is not required to interview every witness it ultimately may call at trial in order to provide a summary of the witness's expected testimony. As the information becomes known, it should be disclosed. No summaries are required for adverse parties, including management level employees of business entities, because opposing lawyers are unable to interview them and their testimony is available to their own counsel. For uncooperative or hostile witnesses any summary of expected testimony would necessarily be limited to the subject areas the witness is reasonably expected to testify about. For example, defense counsel may be unable to interview a treating physician, so the initial summary may only disclose that the witness will be questioned concerning the plaintiff's diagnosis, treatment and prognosis. After medical records have been obtained, the summary may be expanded or refined.

Subject to the foregoing qualifications, the summary of the witness's expected testimony should be just that--a summary. The rule does not require prefiled testimony or detailed descriptions of everything a witness might say at trial. On the other hand, it requires more than the broad, conclusory statements that often were made under the prior version of Rule 26(a)(1)(e.g., “The witness will testify about the events in question” or “The witness will testify on causation.”). The intent of this requirement is to give the other side basic information concerning the subjects about which the witness is expected to testify at trial, so that the other side may determine the witness's relative importance in the case, whether the witness should be interviewed or deposed, and whether additional documents or information concerning the witness should be sought. This information is important because of the other discovery limits contained in the 2011 amendments, particularly the limits on depositions.

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Likewise, the documents that should be provided as part of the Rule 26(a)(1) disclosures are those that a party reasonably believes it may use at trial, understanding that not all documents will be available at the outset of a case. In this regard, it is important to remember that the duty to provide documents and witness information is a continuing one, and disclosures must be promptly supplemented as new evidence and witnesses become known as the case progresses.

The amendments also require parties to provide more information about damages early in the case. Too often, the subject of damages is deferred until late in the case. Early disclosure of damages information is important. Among other things, it is a critical factor in determining proportionality. The committee recognizes that damages often require additional discovery, and typically are the subject of expert testimony. The Rule is not intended to require expert disclosures at the outset of a case. At the same time, the subject of damages should not simply be deferred until expert discovery. Parties should make a good faith attempt to compute damages to the extent it is possible to do so and must in any event provide all discoverable information on the subject, including materials related to the nature and extent of the damages.

The penalty for failing to make timely disclosures is that the evidence may not be used in the party's case-in-chief. To make the disclosure requirement meaningful, and to discourage sandbagging, parties must know that if they fail to disclose important information that is helpful to their case, they will not be able to use that information at trial. The courts will be expected to enforce them unless the failure is harmless or the party shows good cause for the failure.

The 2011 amendments also change the time for making these required disclosures. Because the plaintiff controls when it brings the action, plaintiffs must make their disclosures within 14 days after service of the first answer. A defendant is required to make its disclosures within 28 days after the plaintiff's first disclosure or after that defendant's appearance, whichever is later. The purpose of early disclosure is to have all parties present the evidence they expect to use to prove their claims or defenses, thereby giving the opposing party the ability to better evaluate the case and determine what additional discovery is necessary and proportional.

The time periods for making Rule 26(a)(1) disclosures, and the presumptive deadlines for completing fact discovery, are keyed to the filing of an answer. If a defendant files a motion to dismiss or other Rule 12(b) motion in lieu of an answer, these time periods normally would be not begin to run until that motion is resolved.

Finally, the 2011 amendments eliminate two categories of actions that previously were exempt from the mandatory disclosure requirements. Specifically, the amendments eliminate the prior exemption for contract actions in which the amount claimed is $20,000 or less, and actions in which any party is proceeding pro se. In the committee's view, these types of actions will benefit from the early disclosure requirements and the overall reduced cost of discovery.

Expert disclosures and timing. Rule 26(a)(3). Expert discovery has become an ever-increasing component of discovery cost. The prior rules sought to eliminate some of these costs by requiring the written disclosure of the expert's opinions and other background information. However, because the expert was not required to sign these disclosures, and because experts often were allowed to deviate from the opinions disclosed, attorneys typically would take the expert's deposition to ensure the expert would not offer “surprise” testimony at trial, thereby increasing rather than decreasing the overall cost. The amendments seek to remedy this and other costs associated with expert discovery by, among other things, allowing the opponent to choose either a deposition of the expert or a written report, but not both; in the case of written reports, requiring more comprehensive disclosures, signed by the expert, and making clear that experts will not be allowed to testify beyond what is fairly disclosed in a report, all with the goal of making reports a reliable substitute for depositions; and incorporating a rule that protects from discovery most communications between an attorney and retained expert. Discovery of expert opinions and testimony is automatic under Rule 26(a)(3) and parties are not required to serve interrogatories or use other discovery devices to obtain this information.

Disclosures of expert testimony are made in sequence, with the party who bears the burden of proof on the issue for which expert testimony will be offered going first. Within seven days after the close of fact discovery, that party must disclose: (i) the expert's curriculum vitae identifying the expert's qualifications, publications, and prior testimony; (ii) compensation information; (iii)

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a brief summary of the opinions the expert will offer; and (iv) a complete copy of the expert's file for the case. The file should include all of the facts and data that the expert has relied upon in forming the expert's opinions. If the expert has prepared summaries of data, spreadsheets, charts, tables, or similar materials, they should be included. If the expert has used software programs to make calculations or otherwise summarize or organize data, that information and underlying formulas should be provided in native form so it can be analyzed and understood. To the extent the expert is relying on depositions or materials produced in discovery, then a list of the specific materials relied upon is sufficient. The committee recognizes that experts frequently will prepare demonstrative exhibits or other aids to illustrate the expert's testimony at trial, and the costs for preparing these materials can be substantial. For that reason, these types of demonstrative aids may be prepared and disclosed later, as part of the Rule 26(a)(4) pretrial disclosures when trial is imminent.

Within seven days after this disclosure, the party opposing the retained expert may elect either a deposition or a written report from the expert. A deposition is limited to four hours, which is not included in the deposition hours under Rule 26(c)(5), and the party taking it must pay the expert's hourly fee for attending the deposition. If a party elects a written report, the expert must provide a signed report containing a complete statement of all opinions the expert will express and the basis and reasons for them. The intent is not to require a verbatim transcript of exactly what the expert will say at trial; instead the expert must fairly disclose the substance of and basis for each opinion the expert will offer. The expert may not testify in a party's case in chief concerning any matter that is not fairly disclosed in the report. To achieve the goal of making reports a reliable substitute for depositions, courts are expected to enforce this requirement. If a party elects a deposition, rather than a report, it is up to the party to ask the necessary questions to “lock in” the expert's testimony. But the expert is expected to be fully prepared on all aspects of his/her trial testimony at the time of the deposition and may not leave the door open for additional testimony by qualifying answers to deposition questions.

The report or deposition must be completed within 28 days after the election is made. After this, the party who does not bear the burden of proof on the issue for which expert testimony is offered must make its corresponding disclosures and the opposing party may then elect either a deposition or a written report. Under the deadlines contained in the rules, expert discovery should take less than three months to complete. However, as with the other discovery rules, these deadlines can be altered by stipulation of the parties or order of the court.

The amendments also address the issue of testimony from non-retained experts, such as treating physicians, police officers, or employees with special expertise, who are not retained or specially employed to provide expert testimony, or whose duties as an employee do not regularly involve giving expert testimony. This issue was addressed by the Supreme Court in Drew v. Lee, 2011 UT 15, wherein the court held that reports under the prior version of Rule 26(a)(3) are not required for treating physicians.

There are a number of difficulties inherent in disclosing expert testimony that may be offered from fact witnesses. First, there is often not a clear line between fact and expert testimony. Many fact witnesses have scientific, technical or other specialized knowledge, and their testimony about the events in question often will cross into the area of expert testimony. The rules are not intended to erect artificial barriers to the admissibility of such testimony. Second, many of these fact witnesses will not be within the control of the party who plans to call them at trial. These witnesses may not be cooperative, and may not be willing to discuss opinions they have with counsel. Where this is the case, disclosures will necessarily be more limited. On the other hand, consistent with the overall purpose of the 2011 amendments, a party should receive advance notice if their opponent will solicit expert opinions from a particular witness so they can plan their case accordingly. In an effort to strike an appropriate balance, the rules require that such witnesses be identified and the information about their anticipated testimony should include that which is required under Rule 26(a)(1)(A)(ii), which should include any opinion testimony that a party expects to elicit from them at trial. If a party has disclosed possible opinion testimony in its Rule 26(a)(1)(A)(ii) disclosures, that party is not required to prepare a separate Rule 26(a)(4)(E) disclosure for the witness. And if that disclosure is made in advance of the witness's deposition, those opinions should be explored in the deposition and not in a separate expert deposition. Otherwise, the timing for disclosure e of non-retained expert opinions is the same as that for retained experts under Rule 26(a)(4)(C) and depends on whether the party has the burden of proof or is responding to another expert. Rules 26(a)(4)(E) and 26(a)(1)(A)(ii) are not intended to elevate form over substance--all they require is that a party fairly inform its opponent that opinion testimony may

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be offered from a particular witness. And because a party who expects to offer this testimony normally cannot compel such a witness to prepare a written report, further discovery must be done by interview or by deposition.

Finally, the amendments include a new Rule 26(b)(7) that protects from discovery draft expert reports and, with limited exception, communications between an attorney and an expert. These changes are modeled after the recent changes to the Federal Rules of Civil Procedure and are intended to address the unnecessary and costly procedures that often were employed in order to protect such information from discovery, and to reduce "satellite litigation" over such issues.

Scope of discovery--Proportionality. Rule 26(b). Proportionality is the principle governing the scope of discovery. Simply stated, it means that the cost of discovery should be proportional to what is at stake in the litigation.

In the past, the scope of discovery was governed by "relevance" or the "likelihood to lead to discovery of admissible evidence." These broad standards may have secured just results by allowing a party to discover all facts relevant to the litigation. However, they did little to advance two equally important objectives of the rules of civil procedure--the speedy and inexpensive resolution of every action. Accordingly, the former standards governing the scope of discovery have been replaced with the proportionality standards in subpart (b)(1).

The concept of proportionality is not new. The prior rule permitted the Court to limit discovery methods if it determined that "the discovery was unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." The Federal Rules of Civil Procedure contains a similar provision. See Fed. R. Civ. P. 26(b)(2)(C). This method of limiting discovery, however, was rarely invoked either under the Utah rules or federal rules.

Under the prior rule, the party objecting to the discovery request had the burden of proving that a discovery request was not proportional. The new rule changes the burden of proof. Today, the party seeking discovery beyond the scope of "standard" discovery has the burden of showing that the request is "relevant to the claim or defense of any party" and that the request satisfies the standards of proportionality. As before, ultimate admissibility is not an appropriate objection to a discovery request so long as the proportionality standard and other requirements are met.

The 2011 amendments establish three tiers of standard discovery in Rule 26(c). Ideally, rules of procedure should be crafted to promote predictability for litigants. Rules should limit the need to resort to judicial oversight. Tiered standard discovery seeks to achieve these ends. The "one-size-fits-all" system is rejected. Tiered discovery signals to judges, attorneys, and parties the amount of discovery which by rule is deemed proportional for cases with different amounts in controversy.

Any system of rules which permits the facts and circumstances of each case to inform procedure cannot eliminate uncertainty. Ultimately, the trial court has broad discretion in deciding whether a discovery request is proportional. The proportionality standards in subpart (b)(2) and the discovery tiers in subpart (c) mitigate uncertainty by guiding that discretion. The proper application of the proportionality standards will be defined over time by trial and appellate courts.

Standard and extraordinary discovery. Rule 26(c). As a counterpart to requiring more detailed disclosures under Rule 26(a), the 2011 amendments place new limitations on additional discovery the parties may conduct. Because the committee expects the enhanced disclosure requirements will automatically permit each party to learn the witnesses and evidence the opposing side will offer in its case-in-chief, additional discovery should serve the more limited function of permitting parties to find witnesses, documents, and other evidentiary materials that are harmful, rather than helpful, to the opponent's case.

Rule 26(c) provides for three separate "tiers" of limited, "standard" discovery that are presumed to be proportional to the amount and issues in controversy in the action, and that the parties may conduct as a matter of right. An aggregation of all damages sought by all parties in an action dictates the applicable tier of standard discovery, whether such damages are sought by way of a complaint, counterclaim, or otherwise. The tiers of standard discovery are set forth in a chart that is embedded in the body of the

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rule itself. "Tier 1" describes a minimal amount of standard discovery that is presumed proportional for cases involving damages of $50,000 or less. "Tier 2" sets forth larger limits on standard discovery that are applicable in cases involving damages above $50,000 but less than $300,000. Finally, "Tier 3" prescribes still greater standard discovery for actions involving damages in excess of $300,000. Deposition hours are charged to a side for the time spent asking questions of the witness. In a particular deposition, one side may use two hours while the other side uses only 30 minutes. The tiers also provide presumptive limitations on the time within which standard discovery should be completed, which limitations similarly increase with the amount of damages at issue. A statement of discovery issues will not toll the period. Parties are expected to be reasonable and accomplish as much as they can during standard discovery. A statement of discovery issues may result in additional discovery and sanctions at the expense of a party who unreasonably fails to respond or otherwise frustrates discovery. After the expiration of the applicable time limitation, a case is presumed to be ready for trial. Actions for non-monetary relief, such as injunctive relief, are subject to the standard discovery limitations of Tier 2, absent an accompanying monetary claim of $300,000 or more, in which case Tier 3 applies. The committee determined these standard discovery limitations based on the expectation that for the majority of cases filed in the **Utah** State Courts, the magnitude of available discovery and applicable time parameters available under the three-tiered system should be sufficient for cases involving the respective amounts of damages.

Despite the expectation that standard discovery according to the applicable tier should be adequate in the typical case, the 2011 amendments contemplate there will be some cases for which standard discovery is not sufficient or appropriate. In such cases, parties may conduct additional discovery that is shown to be consistent with the principle of proportionality. There are two ways to obtain such additional discovery. The first is by stipulation. If the parties can agree additional discovery is necessary, they may stipulate to as much additional discovery as they desire, provided they stipulate the additional discovery is proportional to what is at stake in the litigation and counsel for each party certifies that the party has reviewed and approved a budget for additional discovery. Such a stipulation should be filed before the close of the standard discovery time limit, but only after reaching the limits for that type of standard discovery available under the rule. If these conditions are met, the Court will not second-guess the parties and their counsel and must approve the stipulation.

The second method to obtain additional discovery is by a statement of discovery issues. The committee recognizes there will be some cases in which additional discovery is appropriate, but the parties cannot agree to the scope of such additional discovery. These may include, among other categories, large and factually complex cases and cases in which there is a significant disparity in the parties' access to information, such that one party legitimately has a greater need than the other party for additional discovery in order to prepare properly for trial. To prevent a party from taking advantage of this situation, the 2011 amendments allow any party to request additional discovery. As with stipulations for extraordinary discovery, a party requesting extraordinary discovery should do so before the close of the standard discovery time limit, but only after the party has reached the limits for that type of standard discovery available to it under the rule. By taking advantage of this discovery, counsel should be better equipped to articulate for the court what additional discovery is needed and why. The requesting party must demonstrate that the additional discovery is proportional and certify that the party has reviewed and approved a discovery budget. The burden to show the need for additional discovery, and to demonstrate relevance and proportionality, always falls on the party seeking additional discovery. However, cases in which such additional discovery is appropriate do exist, and it is important for courts to recognize they can and should permit additional discovery in appropriate cases, commensurate with the complexity and magnitude of the dispute.

Protective order language moved to Rule 37. The 2011 amendments delete in its entirety the prior language of Rule **26**(c) governing motions for protective orders. The substance of that language is now found in Rule 37. The committee determined it was preferable to cover requests for an order to compel, for a protective order, and sanctions in a single rule, rather than two separate rules.

Consequences of failure to disclose. Rule **26**(d). If a party fails to disclose or to supplement timely its discovery responses, that party cannot use the undisclosed witness, document, or material at any hearing or trial, absent proof that non-disclosure was harmless or justified by good cause. More complete disclosures increase the likelihood that the case will be resolved justly, speedily, and inexpensively. Not being able to use evidence that a party fails properly to disclose provides a powerful incentive

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to make complete disclosures. This is true only if trial courts hold parties to this standard. Accordingly, although a trial court retains discretion to determine how properly to address this issue in a given case, the usual and expected result should be exclusion of the evidence.

LEGISLATIVE NOTE

(1) The amended language in paragraph (b)(1) is intended to incorporate long-standing protections against discovery and admission into evidence of privileged matters connected to medical care review and peer review into the **Utah** Rules of Civil Procedure. These privileges, found in both **Utah** common law and statute, include Sections **26**-25-3, 58-13-4, and 58-13-5, UCA, 1953. The language is intended to ensure the confidentiality of peer review, care review, and quality assurance processes and to ensure that the privilege is limited only to documents and information created specifically as part of the processes. It does not extend to knowledge gained or documents created outside or independent of the processes. The language is not intended to limit the court's existing ability, if it chooses, to review contested documents in camera in order to determine whether the documents fall within the privilege. The language is not intended to alter any existing law, rule, or regulation relating to the confidentiality, admissibility, or disclosure of proceedings before the **Utah** Division of Occupational and Professional Licensing. The Legislature intends that these privileges apply to all pending and future proceedings governed by court rules, including administrative proceedings regarding licensing and reimbursement.

(2) The Legislature does not intend that the amendments to this rule be construed to change or alter a final order concerning discovery matters entered on or before the effective date of this amendment.

(3) The Legislature intends to give the greatest effect to its amendment, as legally permissible, in matters that are pending on or may arise after the effective date of this amendment, without regard to when the case was filed.

LAW REVIEW AND JOURNAL COMMENTARIES

Appellate highlights. Rodney R. Parker and Julianne P. Blanch, 28-FEB **Utah** B.J. 38 (January/February, 2015).
Are medical records now off limits? An examination of Sorenson v. Barbuto. S. Grace Acosta, 22 **Utah** B.J. 17 (May/June, 2009).
Case Law Developments: The Work-Product Doctrine. Lauder, 1996 **Utah** L. Rev. 265 (1996).
Case Law Developments: Work Product Protection for an Insurer's Claim File. Smith, 1997 **Utah** L. Rev. 137 (1997).
AN EXPERT FOR ALL SEASONS: EXPERT TESTIMONY USUALLY REQUIRED, AND UNUSUALLY SPECIFIC. TANNER LENART, 27-APR **UTAH** B.J. 61 (2014).
How to Take an Out-of-State Deposition. Bushnell, 14 **Utah** B.J. 28 (Jan./Feb. 2001).
Standard 19. Donald J. Winder and Lance F. Sorenson, 20 **Utah** B.J. 41 (January/February 2007).
Talkin' 'bout a revolution?: **Utah** overhauls its rules of civil discovery. Marc Therriern, 2011 **Utah** L. Rev. 669 (2011).

UNITED STATES CODE ANNOTATED

In general, see FRCP Rule **26** et seq.

Relevant Notes of Decisions (163)

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Notes of Decisions listed below contain your search terms.

In general

Trial court mooted for appeal purported creditor's argument that court erred in dismissing his debt collection claims for failure to comply with rules of civil procedure by not arranging for scheduling conference, in debtor's motion to dismiss for failure to prosecute, where court acknowledged that rule requiring a scheduling conference did not apply because some of the defendants were not represented by counsel, and court determined that the change in its analysis did not affect its original conclusion to

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dismiss for failure to prosecute. Velander v. LOL of Utah, LLC, 2015, 2015 UT App 171, 2015 WL 4130505. Appeal and Error 781(4)

Injured driver's failure to designate his witness as expert precluded consideration of witness' proposed opinion testimony regarding proper inspection and repair of tie rods on all terrain vehicle, in driver's action against mechanic for negligent inspection and repair of tie rods. Warenski v. Advanced RV Supply, 2011, 257 P.3d 1096, 685 Utah Adv. Rep. 50, 2011 UT App 197, certiorari denied 268 P.3d 192. Pretrial Procedure 45

An attorney has a responsibility to use the available discovery procedures to diligently represent her client, and in civil matters, Rules of Civil Procedure provide the means to do this. Rules of Prof.Conduct, Rule 1.3. Brown v. Glover, 2000, 16 P.3d 540, 408 Utah Adv. Rep. 12, 2000 UT 89, on remand 2001 UT App 52, 2001 WL 298577. Attorney And Client 112; Pretrial Procedure 11; Pretrial Procedure 24

Where wife filed divorce complaint and, before service of summons and without notice to husband, a hearing was held in which wife testified and thereafter an order for service of summons by publication was obtained and default of husband was entered upon his failure to answer and divorce was granted on basis of testimony which had been given by wife previously, court had no legal evidence before it upon which to grant divorce and exceeded its jurisdiction when it attempted to grant a divorce without first having taken legal evidence. U.C.A.1953, 30-3-4; Rules of Civil Procedure, rule 26 et seq. Treutle v. District Court of Salt Lake County, 1958, 7 Utah 2d 155, 320 P.2d 666. Divorce 146

Under Rules of Civil Procedure, pleadings are restricted to the task of general notice-giving, and the deposition-discovery process is invested with the vital role in the preparations of trial. Rules of Civil Procedure, rule 8(a). Blackham v. Snelgrove, 1955, 3 Utah 2d 157, 280 P.2d 453. Pleading 1; Pretrial Procedure 16; Pretrial Procedure 61

Construction and application

Rule with respect to discovery must be applied with common sense and within reasonable bounds consistent with its objective. Rules of Civil Procedure, rules 1(a), 30(b), 33. State By and Through Road Commission v. Petty, 1966, 17 Utah 2d 382, 412 P.2d 914. Pretrial Procedure 13

Nature and purpose of discovery

Rules authorizing discovery sanctions are aimed at encouraging good faith compliance with the discovery obligations imposed under the rules of civil procedure, and provide the court with the authority to sanction those who fail to live up to the requirements of those rules. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 Utah Adv. Rep. 22, 2012 UT App 61. Pretrial Procedure 44.1

Purpose of discovery rules is to facilitate fair trials with full disclosure of all relevant testimony and evidence. Roundy v. Staley, 1999, 984 P.2d 404, 374 Utah Adv. Rep. 15, 1999 UT App 229, certiorari denied 994 P.2d 1271. Pretrial Procedure 14.1

Discovery rules were intended to make procedure as simple and efficient as possible by eliminating any useless ritual, undue rigidities or technicalities and to remove elements of surprise or trickery, and accordingly rules should be liberally construed. Rules of Civil Procedure, rules 1(a), 26(b), 33. Ellis v. Gilbert, 1967, 19 Utah 2d 189, 429 P.2d 39. Pretrial Procedure 15

The objects and purposes of the Rules of Civil Procedure concerning discovery are to develop the truth and prevent surprise. Rules of Civil Procedure, rules 26(b), 30(b), 34. Mower v. McCarthy, 1952, 122 Utah 1, 245 P.2d 224. Pretrial Procedure 15

Because the courts at common law allowed parties to conceal from each other up to the time of trial the evidence on which they meant to rely, and would not compel either of them to supply the other with any evidence, the equitable remedy of bills

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for discovery to assist the prosecution or defense of an action pending in a court at law arose. Larson v. Salt Lake City, 1908, 34 Utah 318, 97 P. 483. Pretrial Procedure 14.1

Actions and proceedings in which discovery is available

Discovery is to be liberally permitted in condemnation cases. Utah Dept. of Transp. v. Rayco Corp., 1979, 599 P.2d 481. Pretrial Procedure 21

Right to discovery and grounds for allowance or refusal, generally

Former client violated discovery deadline by serving discovery on attorney in legal malpractice action on the last day for discovery, because attorney did not have time in which to respond. Dahl v. Harrison, 2011, 265 P.3d 139, 695 Utah Adv. Rep. 4, 2011 UT App 389, certiorari denied 275 P.3d 1019. Pretrial Procedure 25

Insofar as discovery will aid in eliminating noncontroversial matters and in identifying, narrowing and clarifying issues on which contest may prove to be necessary, it should be liberally permitted. Rules of Civil Procedure, rules 1(a), 30(b), 33. State By and Through Road Commission v. Petty, 1966, 17 Utah 2d 382, 412 P.2d 914. Pretrial Procedure 17.1; Pretrial Procedure 335

The fact that a party having peculiar knowledge of a matter fails to bring it forward does not furnish any basis for the court to make an order requiring such party to divulge his knowledge before trial to the adverse party, or to supply him with the means of obtaining it. Larson v. Salt Lake City, 1908, 34 Utah 318, 97 P. 483. Pretrial Procedure 17.1

Discretion of court

The trial court's failure to grant motorist's wife's request to extend the discovery deadlines so she could amend her expert designation list was not an abuse of discretion; the depositions of highway patrol officers occurred before wife's expert disclosures and reports were due, and wife admitted that she learned during the depositions which officer was most knowledgeable about the highway patrol diagram she desired to admit into evidence at trial, and thus which officer should be designated as an expert. Solis v. Burningham Enterprises Inc., 2015, 2015 UT App 11, 778 Utah Adv. Rep. 44, 2015 WL 178249. Pretrial Procedure 25

A trial court must exclude an expert witness disclosed after expiration of the established deadline unless the court chooses to exercise its equitable discretion. Callister v. Snowbird Corp., 2014, 2014 UT App 243, 771 Utah Adv. Rep. 43, 2014 WL 5305967. Pretrial Procedure 45

An abuse of discretion in the amount of a discovery sanction award may be demonstrated by showing that the district court relied on an erroneous conclusion of law or that there was no evidentiary basis for the trial court's ruling. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 Utah Adv. Rep. 22, 2012 UT App 61. Appeal and Error 961

To show that a trial court abused its discretion in choosing which discovery sanction to impose, a party must show either that the sanction is based on an erroneous conclusion of law or that the sanction lacks an evidentiary basis. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 Utah Adv. Rep. 22, 2012 UT App 61. Appeal and Error 961

Trial court did not abuse its discretion by awarding seller attorney fees incurred on seller's second motion for discovery sanctions, in purchaser's declaratory judgment action against seller of construction cranes and associate goodwill seeking to rescind its obligation to pay for goodwill and recover payments previously made, where information that seller had sought in discovery was pertinent to seller's defense, and purchaser's eventual admission, that crane trailer purchaser touted in a bank application was never built, should have been disclosed much earlier in the discovery process. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 Utah Adv. Rep. 22, 2012 UT App 61. Pretrial Procedure 44.1

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Trial courts have broad discretion regarding discovery matters, including protective orders. Smith v. Smith, 1999, 995 P.2d 14, 384 Utah Adv. Rep. 30, 1999 UT App 370, rehearing denied, certiorari denied 4 P.3d 1289. Pretrial Procedure 19; Pretrial Procedure 41

Generally, trial court is granted broad latitude in handling discovery matters. R & R Energies v. Mother Earth Industries, Inc., 1997, 936 P.2d 1068, 313 Utah Adv. Rep. 33, rehearing denied. Pretrial Procedure 19

Time, place, and manner requirements relating to discovery are committed to the discretion of the tribunal. Bennion v. Utah State Bd. of Oil, Gas & Min., 1983, 675 P.2d 1135. Pretrial Procedure 19

Tribunal has sufficient discretion to require discovery practices that are fair and effective in circumstances of pending controversy. Bennion v. Utah State Bd. of Oil, Gas & Min., 1983, 675 P.2d 1135. Pretrial Procedure 11

Wide latitude of discretion is vested in trial judge in determining whether good cause exists for requiring production of documents. Rules of Civil Procedure, rule 34. Jackson v. Kennecott Copper Corp., 1972, 27 Utah 2d 310, 495 P.2d 1254. Pretrial Procedure 336

Discovery methods and procedure

Burden is on the discovering party to be diligent in using the available procedures to obtain discovery, and to notify the court when a problem in doing so arises. Rules Civ.Proc., Rule 37. Brown v. Glover, 2000, 16 P.3d 540, 408 Utah Adv. Rep. 12, 2000 UT 89, on remand 2001 UT App 52, 2001 WL 298577. Pretrial Procedure 24

Sequence, timing, and condition of cause

The failure of third-party plaintiff property owners to take any steps in pursuit of their claim against title company between the time they purchased the cause of action back from bankruptcy trustee and the expert disclosure deadline was unjustified, and thus, the trial court did not abuse its discretion by declining to relieve the property owners of the automatic exclusion of their expert for their failure to disclose; even if the property owners were confused about their role in the case when the bankruptcy trustee was substituted, any doubt regarding their authority and responsibility to pursue their claim should have been resolved after they bought back the cause of action at auction. R.O.A. General, Inc. v. Chung Ji Dai, 2014, 2014 UT App 124, 761 Utah Adv. Rep. 10, 2014 WL 2441850. Pretrial Procedure 45

A discovery request must be served early enough that the responding party will have a full thirty days in which to respond before the discovery deadline. Dahl v. Harrison, 2011, 265 P.3d 139, 695 Utah Adv. Rep. 4, 2011 UT App 389, certiorari denied 275 P.3d 1019. Pretrial Procedure 25

Trial court properly granted protective order prohibiting any further discovery against county, in connection with action in which landowners challenged county's approval of construction of railroad loading facility, on basis that all of plaintiffs' substantive claims against county had been resolved when plaintiffs had earlier been granted partial summary judgment. Harper v. Summit County, 1998, 963 P.2d 768, 348 Utah Adv. Rep. 7, certiorari granted 982 P.2d 87, affirmed in part, reversed in part 26 P.3d 193, 414 Utah Adv. Rep. 21, 2001 UT 10, rehearing denied. Pretrial Procedure 25

Trial court did not err in striking student's motions to compel discovery after motion disposing of the case had been granted, since student could have preserved his right to discovery by seeking continuance of hearing on his first motion and, in view of dismissal, no purpose would be served by defendants' responding to outstanding request for discovery. Reece v. Board of Regents of State of Utah, 1987, 745 P.2d 457. Pretrial Procedure 25

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Scope of discovery--In general

Trial court acted within its discretion in granting protective order to limit plaintiff's discovery in action seeking recognition of an unsolemnized marriage, where plaintiff's counsel failed to meet with defendant's counsel or schedule a meeting, and order was granted two weeks before trial, after plaintiff had submitted certificate of readiness for trial one year earlier. Richards v. Brown, 2009, 222 P.3d 69, 642 Utah Adv. Rep. 25, 2009 UT App 315, certiorari granted 225 P.3d 880, affirmed on other grounds 274 P.3d 911, 704 Utah Adv. Rep. 39, 2012 UT 14. Pretrial Procedure 41

"Rebuttal evidence," which party need not disclose pursuant to discovery request, is that which a party may or may not use, depending on the testimony elicited at trial. (Per Greenwood, Associate P.J., with one Judge concurring in result.) Roundy v. Staley, 1999, 984 P.2d 404, 374 Utah Adv. Rep. 15, 1999 UT App 229, certiorari denied 994 P.2d 1271. Pretrial Procedure 38

Use of discovery should not be extended to permit ferreting unduly into detail, nor to have effect of cross-examining opposing party or his witnesses nor should it be distorted into fishing expedition in hope that something may be uncovered, but should be confined within proper limits of enabling parties to find out essential facts for legitimate objectives. Rules of Civil Procedure, rules 1(a), 30(b), 33. State By and Through Road Commission v. Petty, 1966, 17 Utah 2d 382, 412 P.2d 914. Pretrial Procedure 28

One means of accomplishing objectives of new Rules of Civil Procedure is to permit discovery of information which will aid in eliminating noncontroversial matters and identifying, narrowing and clarifying the issues on which contest may prove to be necessary. Rules of Civil Procedure, rules 1(a), 30(b), 33. State By and Through Road Commission v. Petty, 1966, 17 Utah 2d 382, 412 P.2d 914. Pretrial Procedure 27.1

---- Relevancy and materiality, scope of discovery

Ultimate objective of lawsuit is determination of dispute, and whatever helps attain that objective is "relevant" to lawsuit, within discovery rule. Rules of Civil Procedure, rule 26(b). Ellis v. Gilbert, 1967, 19 Utah 2d 189, 429 P.2d 39. Pretrial Procedure 31

---- Probable admissibility at trial, scope of discovery

Report written by former engineer for truck manufacturer was not sufficiently connected to testimony of manufacturer's door latch expert to justify its admission in products liability action brought against truck manufacturer in order to impeach its expert; manufacturer's expert could not properly lay the foundation for the engineer's report because he was not involved in its preparations, and when questioned about his reliance on the engineer's report, expert stated that he had read the engineer's report, eliminated it from the possibilities, and did his own work. Clayton v. Ford Motor Co., 2009, 214 P.3d 865, 632 Utah Adv. Rep. 12, 2009 UT App 154, certiorari denied 221 P.3d 837. Evidence 560

Provision of discovery rule authorizing discovery of testimony even though it would not be admissible is not a restriction on inquiry allowed into any matter which is relevant to subject matter of action. Rules of Civil Procedure, rule 26(b). Ellis v. Gilbert, 1967, 19 Utah 2d 189, 429 P.2d 39. Pretrial Procedure 32

---- Witnesses, scope of discovery

No expert report is required where the expert is the party's treating physician. Brussow v. Webster, 2011, 258 P.3d 615, 684 Utah Adv. Rep. 44, 2008 UT 6, 2011 UT App 193, certiorari denied 268 P.3d 192. Pretrial Procedure 39

In judicially imposing a deadline for the disclosure of witness lists in a civil case, a court must explicitly, either orally or in writing, impose a month and day deadline. Rules Civ.Proc., Rule 37(b)(2). Rehn v. Rehn, 1999, 974 P.2d 306, 363 Utah Adv. Rep. 8, 1999 UT App 41. Pretrial Procedure 40

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Requiring condemnor to answer as to what it contended was fair market value of property taken was proper, in condemnation proceeding, even though condemnor may have based his claim as to such value upon advice it had received from expert witnesses. Rules of Civil Procedure, rule 33. State By and Through Road Commission v. Petty, 1966, 17 Utah 2d 382, 412 P.2d 914. Pretrial Procedure 39

Requiring condemnor to state names and addresses of its witnesses in condemnation case was not improper particularly where they were supposed to be experts and credence to be given their testimony depended to large extent upon their qualifications. Rules of Civil Procedure, rule 33. State By and Through Road Commission v. Petty, 1966, 17 Utah 2d 382, 412 P.2d 914. Pretrial Procedure 40

Railroad's records of conclusions stated by its experts as to cause of railroad accident in which plaintiff's husband was killed were not discoverable even though denial of discovery would cause prejudice, hardship or injustice. Rules of Civil Procedure, rules 26(b), 30(b), 34. Mower v. McCarthy, 1952, 122 Utah 1, 245 P.2d 224. Pretrial Procedure 379

Under Rules of Civil Procedure, writing which reflects the conclusions of an expert based on assumed facts, but not containing evidence of events, conditions, circumstances and similar matters, is not discoverable. Rules of Civil Procedure, rules 26(b), 30(b), 34. Mower v. McCarthy, 1952, 122 Utah 1, 245 P.2d 224. Pretrial Procedure 379

---- Insurance, generally, scope of discovery

A showing of breach of express contract by insurer is not a condition precedent to an insured seeking discovery in connection with ongoing litigation of a bad faith claim. Christiansen v. Farmers Ins. Exchange, 2005, 116 P.3d 259, 523 Utah Adv. Rep. 12, 2005 UT 21, rehearing denied, on remand 2005 WL 4709726. Pretrial Procedure 37

Information underlying vehicle valuation comparison (VVC) completed by defendant motorist's insurer was irrelevant to automobile accident case brought by plaintiff truck owners, where defendant's stipulation in open court that she would not use the VVC at trial removed any need plaintiffs had for information to impeach the VVC and where plaintiffs had never suggested they would rely on the VVC at trial, and thus, information underlying the VVC was not subject to discovery. Rules Civ.Proc., Rule 26(b)(1); Rules of Evid., Rule 401. Major v. Hills, 1999, 980 P.2d 683, 369 Utah Adv. Rep. 24, 1999 UT 44. Pretrial Procedure 36.1

Information in possession of uninsured motorist (UM) carrier on similar accidents and injuries, its internal policies and procedures for handling UM claims, and internal aspects of processing of insured's claim were irrelevant in insured's tort suit in which carrier had intervened to dispute uninsured motorist's liability and damages, and, thus, information sought in interrogatories was not subject to discovery; information about other accidents and injuries would not assist in determining degree of negligence or dollar value of insured's injuries, and information on internal policies and procedures would be related only to hypothetical bad faith claim. Rules Civ.Proc., Rule 26(b)(1). Chatterton v. Walker, 1997, 938 P.2d 255, 312 Utah Adv. Rep. 3, rehearing denied. Pretrial Procedure 283

Copy of automobile liability policy of defendant motorist should be produced for plaintiff upon proper demand, but information regarding insurance should not be disclosed to jury. Rules of Civil Procedure, rules 26(b), 33. Young v. Barney, 1967, 20 Utah 2d 108, 433 P.2d 846. Pretrial Procedure 381

Defendant in automobile accident case must answer in discovery procedure whether she was insured, name of insurer, and amount of coverage. Rules of Civil Procedure, rules 1(a), 16, 26(b), 33. Ellis v. Gilbert, 1967, 19 Utah 2d 189, 429 P.2d 39. Pretrial Procedure 180

Privileged matters--In general

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Materials which are subject of protective order under Utah Rule of Civil Procedure governing protection from discovery for trade secret or other confidential research, development, or commercial information are not privileged for purposes of Freedom of Information Act trade secret exemption; rather, determination of whether documents contain trade secrets under Freedom of Information Act exemption is to be made solely by applying express exemption for trade secrets and confidential commercial or financial information found in exemption itself. 5 U.S.C.A. § 552(b)(4, 5); Utah Rules Civ.Proc., Rule 26(c)(7). Anderson v. Department of Health and Human Services, 1990, 907 F.2d 936. Records 59

The burden is on the party asserting a privilege to establish that the material sought is protected from discovery. Allred v. Saunders, 2014, 2014 UT 43, 2014 WL 5334034. Privileged Communications and Confidentiality 26

Trial court did not abuse its discretion by entering protective order prohibiting ethanol plant builder from obtaining discovery from city, which purchased electricity generated using energy from geothermal energy producer, of information that was allegedly secret, proprietary, and confidential, in builder's action against producer, claiming that producer had underpaid builder under settlement agreement requiring producer to pay builder amount based on percentage of producer's gross geothermal energy sales revenues; producer submitted affidavits demonstrating that builder was competitor of producer, and information was clearly outside realm of relevant information and was highly sensitive information that might have given builder competitive edge against producer in future energy ventures. Rules Civ.Proc., Rule 26(c). R & R Energies v. Mother Earth Industries, Inc., 1997, 936 P.2d 1068, 313 Utah Adv. Rep. 33, rehearing denied. Pretrial Procedure 41; Privileged Communications And Confidentiality 402

When statutory confidential information privilege or the common-law executive privilege is asserted in opposition to request for discovery, trial court must make an independent determination of extent to which the privilege applies to the material sought to be discovered; such determination is a result of the ad hoc balancing of the interests in the disclosure of the materials, and the government's interests in their confidentiality. U.C.A.1953, 78-24-8; Rules Civ.Proc., Rule 26(b)(1). Madsen v. United Television, Inc., 1990, 801 P.2d 912. Privileged Communications And Confidentiality 354

Where transcript of testimony given by railroad employees in railroad's own investigation of railroad accident did not constitute the reports of railroad accidents required by Federal statutes, discovery of transcript under Rules of Civil Procedure was not prohibited by those Federal statutes. Rules of Civil Procedure, rules 26(b), 30(b), 34; 45 U.S.C.A. §§ 38, 40, 41. Mower v. McCarthy, 1952, 122 Utah 1, 245 P.2d 224. Pretrial Procedure 389

---- Work product, privileged matters

Any material that would not have been generated but for the pendency or imminence of litigation receives attorney work product protection; by contrast, documents produced in the ordinary course of business or created pursuant to routine procedures or public requirements unrelated to litigation do not qualify as attorney work product. Schroeder v. Utah Attorney General's Office, 2015, 2015 UT 77, 794 Utah Adv. Rep. 109, 2015 WL 5037832. Pretrial Procedure 359

Documents created as part of a government actor's official duties receive no protection from disclosure under work product doctrine even if the documents are likely to be the subject of later litigation. Schroeder v. Utah Attorney General's Office, 2015, 2015 UT 77, 794 Utah Adv. Rep. 109, 2015 WL 5037832. Pretrial Procedure 359

Opinion work product, which includes mental impressions, conclusions, opinions or legal theories of an attorney or party, is afforded higher protection than fact work product; however, to utilize the opinion work product privilege, the party asserting it has the burden to establish that it is applicable. Southern Utah Wilderness Alliance v. Automated Geographic Reference Center, Division of Information Technology, 2008, 200 P.3d 643, 620 Utah Adv. Rep. 8, 2008 UT 88. Pretrial Procedure 35

Acts performed by a public employee in the performance of his official duties are not prepared in anticipation of litigation or for trial merely by virtue of the fact that they are likely to be the subject of later litigation; instead they are performed in the ordinary course of business and are not protected from disclosure under the work product doctrine. Southern Utah Wilderness

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Alliance v. Automated Geographic Reference Center, Division of Information Technology, 2008, 200 P.3d 643, 620 Utah Adv. Rep. 8, 2008 UT 88. Pretrial Procedure 36.1

Trial court could not order that death-sentenced defendant produce all documents relating to defendant's communications with appointed post-conviction counsel and pro-bono attorneys who originally represented defendant, for purposes of State's response to defendant's claim that he received ineffective assistance of post-conviction counsel, in motion to set aside default judgment dismissing post-conviction petition, until State first made showing that it had substantial need for documents which it could not, without undue hardship, obtain by other means, that communications were at issue, and that documents had been edited to prevent unnecessary disclosure of irrelevant information. Menzies v. Galetka, 2006, 150 P.3d 480, 567 Utah Adv. Rep. 15, 2006 UT 81. Criminal Law 1590

There is a sense in which an attorney's mental impressions, conclusions, and opinions of an attorney constitute the facts of the case and therefore may be discoverable; however, this exception must be applied very carefully in ineffective assistance of counsel cases because a discovery policy whereby counsel's files can be freely accessed in subsequent proceedings has the potential to significantly impair the trial preparation process. Menzies v. Galetka, 2006, 150 P.3d 480, 567 Utah Adv. Rep. 15, 2006 UT 81. Criminal Law 1590

Certain materials otherwise subject to discovery are, upon appropriate objection, protected from disclosure and introduction into evidence because of their creation by an attorney in preparation for litigation. Rules Civ.Proc., Rule 26(b)(3). Featherstone v. Schaerrer, 2001, 34 P.3d 194, 432 Utah Adv. Rep. 6, 2001 UT 86, rehearing denied. Pretrial Procedure 359

“Peace letter” in which insurer of both passenger who was injured in head-on collision, and driver of oncoming vehicle, had allegedly made unconditional promise to pay any judgment rendered against driver in action arising from collision, was prepared in anticipation of litigation, and thus was protected from discovery by attorney work-product privilege, even though letter was not prepared by an attorney. Rules Civ.Proc., Rule 26(b)(3). Green v. Louder, 2001, 29 P.3d 638, 426 Utah Adv. Rep. 25, 2001 UT 62. Pretrial Procedure 359

Therapy records of husband, wife, and children which independent custody evaluator relied on in recommending that wife's visitation be supervised were not prepared in anticipation of litigation, as required for discovery of documents prepared in anticipation of litigation. Rules Civ.Proc., Rule 26(b)(3). Smith v. Smith, 1999, 995 P.2d 14, 384 Utah Adv. Rep. 30, 1999 UT App 370, rehearing denied, certiorari denied 4 P.3d 1289. Divorce 85

Surveillance videotape of plaintiff was not protected from disclosure as attorney work-product in automobile negligence action, where videotape was prepared in anticipation of introduction at trial. (Per Greenwood, Associate P.J., with one Judge concurring in result.) Rules Civ.Proc., Rule 26(b)(1). Roundy v. Staley, 1999, 984 P.2d 404, 374 Utah Adv. Rep. 15, 1999 UT App 229, certiorari denied 994 P.2d 1271. Pretrial Procedure 383

While procedural rule mandates that protection against discovery of attorney's or representative's mental impressions, conclusions, opinions or legal theories be provided, such protections would not screen information directly at issue. Rules Civ.Proc., Rule 26(b)(3). Salt Lake Legal Defender Ass'n v. Uno, 1997, 932 P.2d 589, 309 Utah Adv. Rep. 11. Criminal Law 627.5(6)

In prisoner's action for postconviction relief based on claim of ineffective assistance of trial counsel, “at issue” exception to work product immunity did not apply across the board to documents and files in possession of legal defense association which had employed prisoner's trial counsel, but would only apply upon special showing by state for specific document; client's adversary was seeking access to files rather than client, at issue was performance of counsel during preparation and trial rather than solely counsel's internal processes in compiling file, and ineffective assistance of counsel was in significant part question of behavior observable from record and ascertainable from counsel's testimony. U.S.C.A. Const.Amend. 6; Rules Civ.Proc., Rule 26(b)(3). Salt Lake Legal Defender Ass'n v. Uno, 1997, 932 P.2d 589, 309 Utah Adv. Rep. 11. Criminal Law 1590

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Documents in insurance claim file may qualify for work-product protection if there is sufficient evidence to show that documents were prepared in anticipation of litigation. Rules Civ.Proc., Rule 26(b)(3). Askew v. Hardman, 1996, 918 P.2d 469. Pretrial Procedure 381

Documents in liability insurer's claim file, including insured horse owner's statement to adjuster following motor vehicle collision with horse, could be found to be protected as work product in tort action by injured passenger against owner; owner informed police of fear of suit for his animal causing the accident, insurer investigated pursuant to attorney's instructions for potential legal claims, and evidence thus indicated that documents were prepared in anticipation of litigation. Rules Civ.Proc., Rule 26(b)(3). Askew v. Hardman, 1996, 918 P.2d 469. Pretrial Procedure 381

Whether document prepared by insurer is prepared in anticipation of litigation and is protected work product is question of fact to be determined by trial court on basis of evidence before it. Rules Civ.Proc., Rule 26(b)(3). Askew v. Hardman, 1996, 918 P.2d 469. Pretrial Procedure 381

Court of Appeals erroneously concluded that document generated in investigation of accident involving insured and third party is generally discoverable; rather, documents in insurance claim file may be protected as work product. Rules Civ.Proc., Rule 26(b)(3). Askew v. Hardman, 1996, 918 P.2d 469. Pretrial Procedure 381

Case-by-case approach applies to determining whether documents in insurance claim file are protected work product prepared in anticipation of litigation; trial court should consider nature of requested documents, reason for preparation of documents, relationship between preparer of document and party seeking its protection from discovery, relationship between litigating parties, and any other facts relevant to the issue. Rules Civ.Proc., Rule 26(b)(3). Askew v. Hardman, 1996, 918 P.2d 469. Pretrial Procedure 381

Attorney need not be involved for document in insurance claim file to be deemed work product prepared in anticipation of litigation. Rules Civ.Proc., Rule 26(b)(3). Askew v. Hardman, 1996, 918 P.2d 469. Pretrial Procedure 381

Report prepared by insurance adjuster was not entitled to work-product protection; fact that no attorney was involved in preparation of claim file suggested that it was prepared in ordinary course of business, and not in anticipation of litigation. Rules Civ.Proc., Rule 26(b)(3). Askew v. Hardman, 1994, 884 P.2d 1258, certiorari granted 892 P.2d 13, reversed 918 P.2d 469. Pretrial Procedure 381

Documents which convey mental impressions, conclusions, opinions, or legal theories of attorney or party will be afforded heightened protection under work-product privilege as “opinion work product.” Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 359

Attorney involvement is only one factor to be weighed in reaching conclusion of whether documents sought in discovery are protected by work-product privilege; plain language of rule does not require that attorney be involved in preparation of material. Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 359

Fact that no attorney was involved may suggest that document was prepared in ordinary course of business and not in anticipation of litigation, so that work-product privilege would not apply. Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 359

Inquiry to determine whether document was prepared in anticipation of litigation for purposes of work-product privilege should focus on primary motivating purpose behind creation of document; if primary purpose behind creation of document is not to

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assist in pending or impending litigation, then work-product protection is not justified. Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 359

Inaction and delay of one year in filing motion for protective order constituted independent waiver of right to work product privilege over mining company memoranda discussing claim by mining partner of contractual requirement for independent feasibility study. Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 373

Mining company waived work-product privilege for memoranda discussing mining partner's claim regarding contract requirement for independent feasibility study where mining company allowed memoranda to become part of general reading file circulated among its employees without much regard for confidentiality and, as a result, employee obtained copies of memoranda and turned them over to mining partner; work-product protection was waived when disclosure substantially increased opportunity for potential adversaries to obtain information. Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 373

Inadvertent disclosure by mining company of memoranda discussing results of internal investigation resulted in waiver of work-product privilege regarding memoranda where mining company voluntarily produced memoranda in response to demand for production of documents, memoranda were used during five different depositions, and mining company did not file motion for protective order until full year after it knew that opponent had memoranda and until three months after their last use. Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 373

Letter whose tone is threatening but which does not state intent to pursue litigation is insufficient to allow party to invoke work-product protection to protect in-house report prompted by letter. Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 373

Mere possibility that litigation may occur, even mere fact that litigation does eventually ensue, is insufficient to cloak materials with mantle of work-product protection. Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 35

For written materials to fall under work-product protection, three criteria must be met: material must be documents and tangible things otherwise discoverable, prepared in anticipation of litigation or for trial, by or for another party or for or by that party's representative; even if these requirements are met, however, privilege does not apply if party seeking discovery can show need for information and that it cannot be obtained without substantial hardship. Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 35; Pretrial Procedure 359

Memoranda of mining company in response to letter from mining partner stating that mining company had not provided independent feasibility study as required by agreement were not written to assist in pending or impending litigation so that work-product privilege would not apply, even though mining partner filed lawsuit two and one-half years after letter, where letter addressed wrongs perceived by partner but did not threaten litigation, letter expressed partner's interest in purchasing mine from mining company, and memoranda were apparently written in ordinary course of business as part of mining company investigation to determine whether feasibility study had been performed. Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 373

Document must have been either created for use in pending or impending litigation or intended to generate ideas for use in such litigation to meet “prepared in anticipation of litigation or for trial” element of work product doctrine. Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 801 P.2d 909. Pretrial Procedure 359

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There are three essential requirements for materials to be protected by work product doctrine: material must consist of documents or tangible things; material must be prepared in anticipation of litigation or for trial; and material must be prepared by or for another party or by or for that party's representative. Rules Civ.Proc., Rule **26**(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 801 P.2d 909. Pretrial Procedure 35; Pretrial Procedure 359

Letter to attorney outlining retainer agreement and setting plan for allocating costs and burdens among clients in event they should be involved in litigation was not protected by work product doctrine; although letter was prepared because of threatened suit against clients, its primary purpose was not to assist in pending or impending litigation. Rules Civ.Proc., Rule **26**(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 801 P.2d 909. Pretrial Procedure 371

Condemnor's witness' appraisal report did not lie within protection of attorney's work product immunity from discovery, and refusal to order production of report for use in condemnee's cross-examination of such witness in eminent domain proceeding was prejudicial error. Rules of Civil Procedure, rules 1(a), **26**(b)(4)(A); Const. art. 1, § 22. **Utah** Dept. of Transp. v. Rayco Corp., 1979, 599 P.2d 481. Eminent Domain 262(5); Pretrial Procedure 379

Record of emissions from defendant's smelter facilities, which plaintiffs suing for damage to their motor vehicles allegedly caused by emissions sought to examine, and which had been forwarded to defendant's legal counsel allegedly in anticipation of litigation, did not qualify as a "privileged communication." Jackson v. Kennecott Copper Corp., 1972, 27 **Utah** 2d 310, 495 P.2d 1254. Pretrial Procedure 359; Privileged Communications And Confidentiality 142

In Rules of Civil Procedure which allow discovery of various documents but which prohibit discovery of "any part of the writing" which is attorney's work product, use of the words "the writing" was proper and correct to refer to the writing of which discovery is sought, the reference being to a definite writing, and prohibition would be so construed to be in harmony with the purpose of protecting the work product of the attorney. Rules of Civil Procedure, rules **26**(b), 30(b), 34. Mower v. McCarthy, 1952, 122 **Utah** 1, 245 P.2d 224. Pretrial Procedure 359

Where denial of discovery of document would have caused prejudice, hardship and injustice, document was discoverable without regard to whether it was prepared in anticipation of litigation or in preparation for trial. Rules of Civil Procedure, rules **26**(b), 30(b), 34. Mower v. McCarthy, 1952, 122 **Utah** 1, 245 P.2d 224. Pretrial Procedure 359

Proceedings to secure production of documents and things--In general

Trial court did not abuse its discretion in excluding, as a discovery sanction, evidence of attorney fees incurred by assignee of deed of trust beneficiary after discovery cutoff date, and denying its request for additional attorney fees, in action against purchasers to foreclose on property purchasers acquired at a sheriff's sale, where purchasers requested that beneficiary produce "copies of all documents or other items" that it intended to introduce into evidence, and assignee's response stated that it had not yet designated documents for trial; under amended version of rule on a party's duty to supplement discovery responses, assignee had a duty seasonably to amend its prior response. Rules Civ.Proc., Rule **26**(e). American Interstate Mortg. Corp. v. Edwards, 2002, 41 P.3d 1142, 439 **Utah** Adv. Rep. 20, 2002 UT App 16. Pretrial Procedure 403; Pretrial Procedure 434

Even if unamended version of rule requiring parties to supplement discovery responses applied, trial court did not abuse its discretion in imposing discovery sanctions excluding evidence of attorney fees incurred by assignee of deed of trust beneficiary after discovery cutoff, and denying assignee's request for additional attorney fees, in assignee's foreclosure action; assignee's responses to discovery requests were varied and contradictory, and responses did not identify what documents purchasers were entitled to inspect. Rules Civ.Proc., Rule **26**(e). American Interstate Mortg. Corp. v. Edwards, 2002, 41 P.3d 1142, 439 **Utah** Adv. Rep. 20, 2002 UT App 16. Pretrial Procedure 403; Pretrial Procedure 434

Order compelling plaintiff to produce documents she alleged had been altered by defendants was essentially one demanding a response to discovery, not requiring document production only, and thus, even though plaintiff alleged that no altered documents

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existed, she was required to state so in written response. Rules Civ.Proc., Rules 26(c), 34(b), 37(b)(2)(C). Hales v. Oldroyd, 2000, 999 P.2d 588, 391 Utah Adv. Rep. 6, 2000 UT App 75, certiorari denied 4 P.3d 1289. Pretrial Procedure 403

---- Affidavits and showing, proceedings to secure production of documents and things

Good cause for production of documents is shown where the full, accurate disclosure of facts, which it is the purpose of the discovery process to secure, could not be accomplished through other means. Rules of Civil Procedure, rule 34. Jackson v. Kennecott Copper Corp., 1972, 27 Utah 2d 310, 495 P.2d 1254. Pretrial Procedure 405

Party moving for order compelling production of documents must make showing not only that the documents are relevant and are in the possession of the other party, but that the documents sought are necessary for proof of the case and either cannot be obtained in any other way or that obtaining them another way would involve extraordinary expense that the moving party should not in fairness be expected to bear. Rules of Civil Procedure, rule 34. Jackson v. Kennecott Copper Corp., 1972, 27 Utah 2d 310, 495 P.2d 1254. Pretrial Procedure 404.1

Determination that showing of good cause had been made to compel corporation operating smelter facilities to produce records of emissions for examination by plaintiffs who claimed their motor vehicles were damaged by acid or other harmful substances flowing into air about the smelter facilities was not an abuse of discretion. Rules of Civil Procedure, rule 34. Jackson v. Kennecott Copper Corp., 1972, 27 Utah 2d 310, 495 P.2d 1254. Pretrial Procedure 405

Defendant corporation asserting that record of emissions from smelter facilities which had been forwarded to legal counsel was not subject to discovery had burden of proving that the record was a privileged communication. Rules of Civil Procedure, rule 34. Jackson v. Kennecott Copper Corp., 1972, 27 Utah 2d 310, 495 P.2d 1254. Privileged Communications And Confidentiality 173

Elements of prejudice, hardship, or injustice necessary to the discovery of documents prepared in anticipation of litigation or in preparation for trial are sufficiently shown where party seeking discovery is with due diligence, unable to obtain evidence of some material facts, events, conditions and circumstances which the discovery will probably reveal, and where, because of this situation, the party is unable to adequately prepare the case for trial. Rules of Civil Procedure, rules 26(b), 30(b), 34. Mower v. McCarthy, 1952, 122 Utah 1, 245 P.2d 224. Pretrial Procedure 404.1

On motion for production of transcript of testimony by railroad employees given in railroad's investigation of 1944 accident, although plaintiff's showing on motion was only that her case was weak and was not necessarily that she had been unable to obtain evidence of the cause of the accident, in view of fact that witnesses who knew facts were employed by defendant and that until recently many of them were unknown to plaintiff and that facilities and equipment involved in the accident had at all times been under control of defendant and had not been available to plaintiff for inspection, showing was sufficient for granting of motion. Rules of Civil Procedure, rules 26(b), 30(b), 34. Mower v. McCarthy, 1952, 122 Utah 1, 245 P.2d 224. Pretrial Procedure 404.1

---- Determination, proceedings to secure production of documents and things

Trial court was required, under the new evidence exception to the law of the case doctrine, to reconsider previous order denying seller discovery sanctions on seller's first motion for sanctions, when trial court awarded seller sanctions on seller's second motion for discovery sanctions in declaratory judgment action purchaser brought against seller of construction cranes and associate goodwill seeking to rescind its obligation to pay for goodwill, where both sanction motions involved seller's discovery requests seeking information on purchaser's asserted collaboration with a crane broker on a custom designed crane trailer, purchaser's prior responses implied that the information existed though purchaser asserted that seller's requests were overbroad, and by the time that seller made second motion for sanctions purchaser had admitted that the trailer was never built. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 Utah Adv. Rep. 22, 2012 UT App 61. Courts 99(6)

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When official confidence privilege is claimed, trial court must balance competing interests through an in camera examination of the materials for which the privilege is claimed; such review enables trial court to allow or disallow discovery as to individual items for which the privilege is claimed, or to excise or edit from individual items those matters which it determines to come within the scope of the privilege, or to take other protective measures pursuant to civil procedure rule. Rules Civ.Proc., Rule 26(c); U.C.A.1953, 78-24-8. Madsen v. United Television, Inc., 1990, 801 P.2d 912. Privileged Communications And Confidentiality 351

Although ability of movant seeking order for production of documents to obtain the desired information by other means is relevant in determining existence of good cause, the real question is whether the movant can obtain the facts without production of the documents. Rules of Civil Procedure, rule 34. Jackson v. Kennecott Copper Corp., 1972, 27 Utah 2d 310, 495 P.2d 1254. Pretrial Procedure 411

Question whether portions of writings sought by discovery come within prohibitions protecting attorney's work product and expert's conclusions should be determined without permitting opposing counsel to see the questioned matter and, to do this, the parts of the transcript which it is claimed are not discoverable should be submitted to the court for it to decide. Rules of Civil Procedure, rules 26(b), 30(b), 34. Mower v. McCarthy, 1952, 122 Utah 1, 245 P.2d 224. Pretrial Procedure 411

Objections and protective orders

Patient waived her objection to hospital's use as trial exhibit a Computed Tomography (CT) scan that was not specifically identified during pretrial discovery process, in medical malpractice action, as patient specifically designated the CT scan as a trial exhibit and then used select images from it at trial, and patient failed to object to the listing of all of patient's medical records when she submitted her other objections to the hospital's trial exhibits. Turner v. University of Utah Hosp., 2011, 271 P.3d 156, 698 Utah Adv. Rep. 51, 2011 UT App 431, certiorari granted 280 P.3d 421, reversed 310 P.3d 1212, 741 Utah Adv. Rep. 51, 2013 UT 52. Pretrial Procedure 413.1

Insurer failed to show good cause for a protective order against discovery in insureds' bad faith suit, even though they had not yet established breach of contract; the claims of breach of express contract and bad faith were premised on distinct duties that gave rise to divergent and severable causes of action. Christiansen v. Farmers Ins. Exchange, 2005, 116 P.3d 259, 523 Utah Adv. Rep. 12, 2005 UT 21, rehearing denied, on remand 2005 WL 4709726. Pretrial Procedure 41

A party seeking a protective order has the burden of showing that good cause exists for issuance of that order. Christiansen v. Farmers Ins. Exchange, 2005, 116 P.3d 259, 523 Utah Adv. Rep. 12, 2005 UT 21, rehearing denied, on remand 2005 WL 4709726. Pretrial Procedure 41

District court is entrusted with broad discretion in dealing with discovery matters, including protective orders. In re Discipline of Pendleton, 2000, 11 P.3d 284, 405 Utah Adv. Rep. 3, 2000 UT 77. Pretrial Procedure 41

The failure to respond in writing to a discovery request is not excused on the basis that the discovery is objectionable, absent a written objection or motion for a protective order. Rules Civ.Proc., Rules 26(c), 34(b). Hales v. Oldroyd, 2000, 999 P.2d 588, 391 Utah Adv. Rep. 6, 2000 UT App 75, certiorari denied 4 P.3d 1289. Pretrial Procedure 41

Trial court did not abuse its discretion in issuing protective order preventing wife from discovering therapy records of husband, wife, and children which independent custody evaluator relied on in recommending that wife's visitation be supervised, where affidavits of child therapist and guardian ad litem stated release of records could be damaging to the children and the protective order was less restrictive of discovery than a similar protective order wife later requested. Rules Civ.Proc., Rule 26(c)(4). Smith v. Smith, 1999, 995 P.2d 14, 384 Utah Adv. Rep. 30, 1999 UT App 370, rehearing denied, certiorari denied 4 P.3d 1289. Divorce 86

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Rule of civil procedure providing for protective orders upon showing of good cause applies to public records, including judicial records, under the Public and Private Writings Act; the Act is intended to apply to documents filed in court in the absence of a specific order of court to the contrary. U.C.A.1953, 78-**26**-1 to 78-**26**-8; Rules Civ.Proc., Rules **26**, **26**(c), Const. Art. 8, § 4. Carter v. **Utah** Power & Light Co., 1990, 800 P.2d 1095. Records 32; Records 34

Pretrial depositions filed with clerk of court but not used by the litigants in court are "judicial records" and thus "public writing" subject to public access under the Public and Private Writings Act, absent a showing of good cause necessary to secure a protective order from the court; rule providing for sealing of such depositions is not a mandate for secrecy but is intended to safeguard the integrity of the depositions. U.C.A.1953, 78-**26**-1 to 78-**26**-8; Rules Civ.Proc., Rules 5(d), **26**(c), 30(f)(1); Judicial Administration Rules 4-202, 4-502(4); Const. Art. 8, § 12. Carter v. **Utah** Power & Light Co., 1990, 800 P.2d 1095. Records 32

Sanctions for failure to disclose--In general

When reviewing the imposition of discovery sanctions, appellate courts first consider whether the district court has made a factual finding that the party's behavior merits sanctions, and any such finding will be upheld unless it is clearly erroneous. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 **Utah** Adv. Rep. 22, 2012 UT App 61. Appeal and Error 1024.3

District court made a factual finding that purchaser's behavior merited a discovery sanction, in purchaser's declaratory judgment action against seller of construction cranes and associate goodwill seeking to rescind its obligation to pay for goodwill and recover payments previously made, though the district court's finding stated that purchaser's positions in response to seller's discovery motions were inconsistent, where the court's imposition of a not insignificant sanction demonstrated that the court did not accept purchaser's explanations for the inconsistencies. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 **Utah** Adv. Rep. 22, 2012 UT App 61. Pretrial Procedure 44.1

Though a district court must find on the part of the noncomplying party willfulness, bad faith, fault, or persistent dilatory tactics frustrating the judicial process, prior to entering discovery sanctions, a trial court need not specifically state that willfulness, bad faith, fault, or persistent dilatory tactics are present to impose sanctions. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 **Utah** Adv. Rep. 22, 2012 UT App 61. Pretrial Procedure 44.1

Trial court was within its discretion in striking all but two of gym member's experts as sanction for member's failure to comply with discovery, in member's action for injuries sustained in trip and fall in gym parking lot; member filed expert designation well after deadline had passed, failed to include expert reports, identified one expert by first name only, and after a stipulated extension, only provided a report from only one of five designated experts. Johnson v. Gold's Gym, 2009, 206 P.3d 302, 626 **Utah** Adv. Rep. 6, 2009 UT App 76, certiorari denied 215 P.3d 161. Pretrial Procedure 45

Necessary prerequisite to imposition of sanction for party's failure to cooperate in discovery is order that brings the offender squarely within possible contempt of court. Rules Civ.Proc., Rules **26**(f), 37(b)(2). Berrett v. Denver and Rio Grande Western R. Co., Inc., 1992, 830 P.2d 291, certiorari denied 836 P.2d 1383. Pretrial Procedure 44.1

---- Dismissal or striking of pleading, sanctions for failure to disclose

Trial court did not abuse its discretion in dismissing plaintiff's complaint as discovery sanction, where plaintiff failed to respond in any way to court order compelling her to produce documents she alleged had been altered, and record indicated that plaintiff had repeatedly delayed in responding to discovery, failed to timely file pleadings, and failed to timely provide specific witness lists. Rules Civ.Proc., Rules **26**(c), 34(b), 37(b)(2)(C). Hales v. Oldroyd, 2000, 999 P.2d 588, 391 **Utah** Adv. Rep. 6, 2000 UT App 75, certiorari denied 4 P.3d 1289. Pretrial Procedure 46; Pretrial Procedure 435

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---- Preclusion of evidence or witnesses, sanctions for failure to disclose

Expert report which contained three new damages theories not disclosed during discovery was inadmissible in secondary lender's action against borrower and bank for unjust enrichment, fraud, and other tort claims; secondary lender disclosed during initial discovery period that its damages "constitute the funds advanced, together with interest at the legal rate, less the payment received" from primary lender and clarified in response to request for admission that he sought interest at the legal rate as provided by statute, report included three new damages theories, including the benefit of the bargain rule, the modified benefit of the bargain rule, and the comparable rate of return theory, secondary lender's citation to statute was insufficient to constitute disclosure of the "computation of any category of damages claimed by the disclosing party," and borrower and bank were prejudiced by the late disclosure due to their inability to discover asserted essential facts such at secondary lender's loan history and ability to lend money to others in lieu of loan which ultimately went to borrower. Bodell Const. Co. v. Robbins, 2009, 215 P.3d 933, 636 **Utah** Adv. Rep. 3, 2009 UT 52. Pretrial Procedure 45

Plaintiff's attorney should have anticipated that his failure to comply with defendant's discovery requests would result in sanctions of not allowing one witness to testify and limiting the testimony of another witness at negligence trial, and thus, relief from judgment on grounds that attorney was "surprised" by the sanctions was not warranted, even though attorney claimed he notified defense counsel orally of his intent to call a number of witnesses at trial, where attorney did not produce documents and expert reports in response to discovery requests and failed to supplement interrogatories, and attorney failed to identify witnesses in writing with required disclosures for expert witnesses. Rukavina v. Sprague, 2007, 170 P.3d 1138, 588 **Utah** Adv. Rep. 18, 2007 UT App 331. Pretrial Procedure 45; Pretrial Procedure 313; Pretrial Procedure 434

Trial court did not abuse its discretion in excluding independent medical examiner's testimony that it was nearly impossible that fall in parking lot caused plaintiff's back injury as discovery sanction for defendant's failure to supplement its responses to interrogatories asking defendant to articulate its affirmative defenses, where defendant did not provide examiner's causation opinion until three days before trial. Rules Civ.Proc., Rules **26**, 37(b)(2). Stevenett v. Wal-Mart Stores, Inc., 1999, 977 P.2d 508, 365 **Utah** Adv. Rep. 10, 1999 UT App 80. Pretrial Procedure 312

Trial court did not abuse its discretion in limiting independent medical examiner's testimony that it was nearly impossible that fall in parking lot caused plaintiff's back injury as discovery sanction for defendant's failure to give complete answer in its interrogatories regarding affirmative defenses it would assert, where defendant did not provide examiner's causation opinion until three days before trial. Rules Civ.Proc., Rules **26**, 37(b)(2). Stevenett v. Wal-Mart Stores, Inc., 1999, 977 P.2d 508, 365 **Utah** Adv. Rep. 10, 1999 UT App 80. Pretrial Procedure 312

Expert witnesses

Evidence supported finding that motorist's wife failed to timely disclose her intent to rely on highway patrol officer as an expert witness, in negligence action against defendant driver and others following fatal automobile accident; motorist's wife disclosed that officer would be a trial witness, but failed to designate officer as an expert. Solis v. Burningham Enterprises Inc., 2015, 2015 UT App 11, 778 **Utah** Adv. Rep. 44, 2015 WL 178249. Pretrial Procedure 39

The expert disclosure discovery rule contemplates that all persons who may provide opinion testimony based on experience or training will be identified, but that only retained or specially employed experts are required to also provide an expert report. Hansen v. Harper Excavating, Inc., 2014, 2014 UT App 180, 766 **Utah** Adv. Rep. 13, 2014 WL 3747546. Pretrial Procedure 40

Treating physicians do not fall into the category of "retained or specially employed" expert witnesses, and expert reports as mentioned in the expert disclosure discovery rule are not required for treating physicians who will testify as experts. Hansen v. Harper Excavating, Inc., 2014, 2014 UT App 180, 766 **Utah** Adv. Rep. 13, 2014 WL 3747546. Pretrial Procedure 39; Pretrial Procedure 40

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Treating physicians must be disclosed as expert witnesses under the expert disclosure discovery rule if they will provide opinion testimony based on their experience or training. Hansen v. Harper Excavating, Inc., 2014, 2014 UT App 180, 766 Utah Adv. Rep. 13, 2014 WL 3747546. Pretrial Procedure 40

Plaintiff's disclosure of his intent to call treating physicians as fact witnesses was not sufficient to allow the admission of their expert opinions on causation in negligence action; treating physicians were required to be designated as experts if they were to provide expert testimony. Hansen v. Harper Excavating, Inc., 2014, 2014 UT App 180, 766 Utah Adv. Rep. 13, 2014 WL 3747546. Pretrial Procedure 45

Third-party plaintiff property owners' challenge to the trial court's dismissal of their claim against title company for failure to prosecute, after they purchased their cause of action back from bankruptcy trustee, was moot, given their inability to establish damages after the automatic exclusion of their expert report for failing to comply with the discovery rules regarding disclosure of expert witnesses. R.O.A. General, Inc. v. Chung Ji Dai, 2014, 2014 UT App 124, 761 Utah Adv. Rep. 10, 2014 WL 2441850. Pretrial Procedure 587

Court of Appeals reviews district court's exclusion of expert for abuse of discretion. Townhomes at Pointe Meadows Owners Ass'n v. Pointe Meadows Townhomes, LLC, 2014, 755 Utah Adv. Rep. 49, 2014 UT App 52, 2014 WL 868707. Appeal and Error 961

Any error in district court's permitting psychiatric physician to testify as an expert was invited by Office of Professional Conduct (OPC) in attorney disciplinary proceeding, so that OPC could not take advantage of the alleged error on appeal; OPC asked physician on cross-examination to opine on causation of attorney's misconduct, thus “opening the door” to the very kind of expert testimony of which OPC complained on appeal. In re Discipline of Corey, 2012, 274 P.3d 972, 705 Utah Adv. Rep. 40, 2012 UT 21. Attorney And Client 57

An expert report in pretrial discovery in divorce proceedings is required only if not otherwise stipulated by the parties or ordered by the court. Liston v. Liston, 2011, 269 P.3d 169, 698 Utah Adv. Rep. 24, 2011 UT App 433. Divorce 85

Former client's expert disclosures in legal malpractice case were not timely, because they were clearly inadequate. Dahl v. Harrison, 2011, 265 P.3d 139, 695 Utah Adv. Rep. 4, 2011 UT App 389, certiorari denied 275 P.3d 1019. Pretrial Procedure 44.1

Formal disclosure of experts is not pointless; knowing the identity of the opponent's expert witnesses allows a party to properly prepare for trial, including attempting to disqualify the expert testimony, retaining rebuttal experts, and holding additional depositions to retrieve the information not available because of the absence of a report. Brussow v. Webster, 2011, 258 P.3d 615, 684 Utah Adv. Rep. 44, 2008 UT 6, 2011 UT App 193, certiorari denied 268 P.3d 192. Pretrial Procedure 40

Whether the cost rule allows recovery for expert preparation time is a question of law, and the trial court's legal conclusions are reviewed for correctness. Moore v. Smith, 2007, 158 P.3d 562, 2007 UT App 101, 574 Utah Adv. Rep. 15. Appeal and Error 842(2); Costs 208

Fees for expert time spent preparing for depositions are recoverable, as long as the fees are reasonable. Moore v. Smith, 2007, 158 P.3d 562, 2007 UT App 101, 574 Utah Adv. Rep. 15. Costs 187

When determining reasonableness of expert fees for time spent preparing for depositions, factors that can but are not required to be considered include the number of hours spent preparing for the deposition, the amount of material needing to be reviewed, the scope of the deposition, and the time between the expert's preparation of the report and the taking of the deposition. Moore v. Smith, 2007, 158 P.3d 562, 2007 UT App 101, 574 Utah Adv. Rep. 15. Costs 187

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Expert testimony changed

Changes to expert's deposition after again reviewing patient's records and reading a deposition of another expert were new testimony, rather than change or supplementation, and, therefore, were properly struck in medical malpractice action; the changes did not revise incorrect information and were not minor. Daniels v. Gamma West Brachytherapy, LLC, 2009, 221 P.3d 256, 640 Utah Adv. Rep. 8, 2009 UT 66, rehearing denied. Pretrial Procedure 202

Written expert report

Good cause did not exist for townhome association's failure to comply with deadline for submitting expert report specified in amended case management order in construction defect action, such that trial court did not abuse its discretion in excluding association's expert, despite argument that association had agreement with developer to modify order to extend deadline; third-party defendants had also agreed to be bound by order, and reliance on agreement with only some defendants was unreasonable and did not justify extension of discovery deadline. Townhomes at Pointe Meadows Owners Ass'n v. Pointe Meadows Townhomes, LLC, 2014, 755 Utah Adv. Rep. 49, 2014 UT App 52, 2014 WL 868707. Pretrial Procedure 45

Townhome association's failure to timely disclose its expert in construction defect action was not harmless, such that trial court did not abuse its discretion in excluding expert, despite contention that association's final expert report would be “largely identical” to its preliminary report; preliminary report failed to properly identify association's expert in such a way as to enable developer and subcontractors to depose expert, attempt to disqualify expert, or retain rebuttal experts, report did not address scope of claimed damages, and substantial discovery would need to be revisited or performed to respond to disclosure. Townhomes at Pointe Meadows Owners Ass'n v. Pointe Meadows Townhomes, LLC, 2014, 755 Utah Adv. Rep. 49, 2014 UT App 52, 2014 WL 868707. Pretrial Procedure 45

Treating physician who planned to testify at trial was not retained or specially employed to testify, and therefore was not required to file written expert report pursuant to rule governing production of written expert reports in action by motorcyclist against driver of automobile arising from automobile accident; plain language of rule suggested that a “retained or specially employed” expert was a person a party hired and paid to express a particular expert opinion for the purposes of litigation, and the substance, sources, or scope of the physician's proposed testimony was irrelevant, as the court simply looked to the status of the individual as a treating physician. Drew v. Lee, 2011, 250 P.3d 48, 678 Utah Adv. Rep. 4, 2011 UT 15. Pretrial Procedure 379

Jurisdiction

Trial courts may determine jurisdiction on affidavits alone, permit discovery, or hold an evidentiary hearing. (Per Durham, J., with one Justice concurring and two Justices concurring in the result.) Phone Directories Co., Inc. v. Henderson, 2000, 8 P.3d 256, 402 Utah Adv. Rep. 7, 2000 UT 64. Courts 39; Pretrial Procedure 24

Admissibility of evidence

Plaintiff's untimely designation of expert witnesses prejudiced defendant in negligence action arising out of automobile accident, and therefore trial court properly excluded testimony of witnesses, where untimely disclosure impaired defendant's ability to defend against plaintiff's claims because defendant did not have opportunity to depose expert witnesses, and fact witnesses' memories could have faded due to protracted nature of the litigation. Brussow v. Webster, 2011, 258 P.3d 615, 684 Utah Adv. Rep. 44, 2008 UT 6, 2011 UT App 193, certiorari denied 268 P.3d 192. Pretrial Procedure 45

Sufficiency of evidence

Evidence was sufficient to establish that purchaser of construction cranes and associated goodwill engaged in actions that warranted the imposition of discovery sanctions, in purchaser's declaratory judgment action against seller seeking to rescind its obligation to pay for goodwill and recover payments previously made; there was evidence that purchaser was aware at hearing on seller's second motion to compel that seller was seeking information regarding the time frame of purchaser's asserted

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collaboration with a crane broker on a custom designed crane trailer, that purchaser's responses implied that the subject matter of the requests was extant though purchaser objected that the requests were overbroad, that seller was thus encouraged to pursue the information through additional discovery and judicial resources, and that purchaser through reasonable inquiry could have determined that the trailer was never built. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 **Utah** Adv. Rep. 22, 2012 UT App 61. Pretrial Procedure 44.1

Summary judgment

Purpose of discovery and of summary judgment procedures is to furnish method of searching out and facilitating resolution of issues which are not in dispute, and of settling rights of parties without time, trouble and expense of trial, and it is indispensable to carrying out of that purpose that parties furnish essential information when it is requested in conformity with rules of procedure. Rules of Civil Procedure, rules 31, 33, 37, 56(c). Transamerica Title Ins. Co. v. United Resources, Inc., 1970, 24 **Utah** 2d 346, 471 P.2d 165. Judgment 178; Pretrial Procedure 14.1; Pretrial Procedure 15

New trial

There was no error in denial of new trial on theory of surprise testimony where pretrial statement of officer who investigated accident, stating that plaintiff had said that he could not get out of way of automobile before it struck him, was not necessarily inconsistent with officer's trial testimony that plaintiff said he had “sprinted” across the road, and since the “surprise” claimed could not be so categorized since it could have been easily guarded against by the utilization of available discovery procedures. Rules of Civil Procedure, rules **26** et seq., 59, 59(a)(3). Anderson v. Bradley, 1979, 590 P.2d 339. New Trial 90; New Trial 95

Plaintiff in automobile accident case was not entitled to a new trial on the ground that he was surprised by testimony of defendant's expert witness regarding the cause of plaintiff's transient ischemic attacks, since plaintiff failed to timely object to the witness' testimony; in view of the fact that defendant, in answer to an interrogatory, had stated in substance that she would call the witness to testify concerning Raynaud's disease, an objection by plaintiff should have been immediately made when the witness at trial mentioned transient ischemic attacks and added “which I imagine, would be pertinent to address here.” Rules of Civil Procedure, rules **26**(e)(1), 59(a)(3). Jensen v. Thomas, 1977, 570 P.2d 695. New Trial 97

Costs

In order to support award of prevailing costs for copies of depositions of patient and her husband, and members of patient's family, copies had to be essential to prevailing hospital's defense of malpractice case; finding that costs were “reasonable and necessary” was insufficient by itself, even if plaintiff's deposition was included in trial record and several depositions were used for impeachment. Young v. State, 2000, 16 P.3d 549, 409 **Utah** Adv. Rep. 3, 2000 UT 91. Costs 154; Costs 208

Absent showing that deposition of patient's expert was necessary to develop hospital's defense to malpractice claim, prevailing hospital would not be entitled to award of costs for deposition, notwithstanding fact that expert's opinion was necessary for patient to make her case. Young v. State, 2000, 16 P.3d 549, 409 **Utah** Adv. Rep. 3, 2000 UT 91. Costs 154

Prevailing party may recover deposition costs as long as the trial court is persuaded that the depositions were taken in good faith and, in the light of the circumstances, appeared to be essential for the development and presentation of the case. Young v. State, 2000, 16 P.3d 549, 409 **Utah** Adv. Rep. 3, 2000 UT 91. Costs 154

Costs of depositions not used at trial may be recovered if the trial court determines, in addition to finding that deposition was taken in good faith, that the deposition was essential to the case, either because the deposition was used in some meaningful way at trial or because the development of the case was of such a complex nature that the information provided by the deposition could not have been obtained through less expensive means of discovery. Young v. State, 2000, 16 P.3d 549, 409 **Utah** Adv. Rep. 3, 2000 UT 91. Costs 154

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Copies of patient's depositions of hospital's doctors were not essential to hospital's defense of malpractice claim, as would permit hospital to recover cost of copies as prevailing party in suit, where depositions were of hospital's own employees, were used only by plaintiff in her case in chief, and hospital had other methods of acquiring information contained in depositions. Young v. State, 2000, 16 P.3d 549, 409 **Utah** Adv. Rep. 3, 2000 UT 91. Costs 154

Witness fee of $1,000 paid by hospital to secure attendance of patient's expert at his deposition, to extent it exceeded witness fee allowed by statute, was not recoverable by hospital as part of prevailing party costs. U.C.A.1953, 21-5-4; Rules Civ.Proc., Rule 30(a). Young v. State, 2000, 16 P.3d 549, 409 **Utah** Adv. Rep. 3, 2000 UT 91. Costs 187

Review--In general

If a finding that a party's conduct merits discovery sanctions has been made and upheld on appeal, an appellate court will not disturb the amount of the sanction unless abuse of discretion is clearly shown. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 **Utah** Adv. Rep. 22, 2012 UT App 61. Appeal and Error 961

Denial of motion for a protective order is reviewed for an abuse of discretion, but to extent that the denial is based on the district court's interpretation of binding case law, it is reviewed for correctness. Christiansen v. Farmers Ins. Exchange, 2005, 116 P.3d 259, 523 **Utah** Adv. Rep. 12, 2005 UT 21, rehearing denied, on remand 2005 WL 4709726. Appeal And Error 840(4); Appeal And Error 961

Generally, the trial court is granted broad latitude in handling discovery matters, and appellate courts will not find abuse of discretion absent an erroneous conclusion of law or where there is no evidentiary basis for the trial court's rulings. Thurston v. Workers Compensation Fund of **Utah**, 2003, 83 P.3d 391, 490 **Utah** Adv. Rep. 9, 2003 UT App 438. Appeal And Error 961; Pretrial Procedure 19

Trial court's grant of protective discovery order and order disqualifying counsel are reviewed for an abuse of discretion. Rules Civ.Proc., Rule **26**. Spratley v. State Farm Mut. Auto. Ins. Co., 2003, 78 P.3d 603, 2003 UT 39, rehearing denied. Appeal And Error 949; Appeal And Error 961

Assignee of deed of trust beneficiary did not preserve for appellate review claim that trial court improperly applied the amended version of rule on a party's duty to supplement discovery responses, instead of the unamended version, in action to foreclose on property acquired by purchasers at a sheriff's sale; assignee did not raise that issue at trial, and argued it for the first time in his appellate brief. Rules Civ.Proc., Rule **26**(e). American Interstate Mortg. Corp. v. Edwards, 2002, 41 P.3d 1142, 439 **Utah** Adv. Rep. 20, 2002 UT App 16. Appeal And Error 199

Trial courts have broad discretion in matters of discovery, and their determinations regarding such matters are reviewed for abuse of discretion. Green v. Louder, 2001, 29 P.3d 638, 426 **Utah** Adv. Rep. 25, 2001 UT 62. Appeal And Error 961; Pretrial Procedure 19

Failure to require defendant in automobile negligence action to disclose surveillance videotape of plaintiff and the identity of its preparer was harmful error in action in which videotape and preparer's testimony were admitted to show plaintiff's injuries were less severe than she alleged; while jury did not reach damages issue because it found plaintiff more than 50 percent at fault in accident, the determination of liability hinged on parties' credibility, and plaintiff's credibility was directly undermined by evidence in question. (Per Greenwood, Associate P.J., with one Judge concurring in result.) Rules Civ.Proc., Rule **26**(b)(1). Roundy v. Staley, 1999, 984 P.2d 404, 374 **Utah** Adv. Rep. 15, 1999 UT App 229, certiorari denied 994 P.2d 1271. Appeal And Error 1043(6)

Trial court committed prejudicial error in denying tort plaintiff's discovery request for report prepared by defendant's insurance adjuster where defendant did not demonstrate that denial of discovery request was not prejudicial. Rules Civ.Proc., Rule **26**(b)

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(3). Askew v. Hardman, 1994, 884 P.2d 1258, certiorari granted 892 P.2d 13, reversed 918 P.2d 469. Appeal And Error 1043(6); Pretrial Procedure 381

Allegedly erroneous admission of testimony of defense expert who was identified for plaintiff 12 days before trial did not prejudice plaintiff; expert was one of five defense experts in response to testimony of plaintiff's 15 experts; and plaintiff thoroughly cross-examined expert. Rules Civ.Proc., Rules **26**(e)(1), 61; U.C.A.1953, 41-6-46(1)(1981). Onyeabor v. Pro Roofing, Inc., 1990, 787 P.2d 525. Appeal And Error 1043(1)

Refusal of court to permit defendant in special statutory action to remove city commissioner from malfeasance in office from taking depositions of witnesses, was error, but did not result in any prejudice to commissioner who had examined testimony which witnesses had given before grand jury, received answers to interrogatories submitted to district attorney and had procured substantially all discoverable information in action. U.C.A.1953, 77-7-1, 77-7-2, 77-7-11; Rules of Civil Procedure, rules 1, 61, 81. State v. Geurts, 1961, 11 **Utah** 2d 345, 359 P.2d 12. Appeal And Error 1170.6; Pretrial Procedure 61

---- Standard of review, review

In reviewing the imposition of discovery sanctions, an appellate court applies a two-part approach: (1) the court considers whether the district court was justified in ordering sanctions, and (2) the court then reviews the type and amount of sanctions for abuse of discretion. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 **Utah** Adv. Rep. 22, 2012 UT App 61. Appeal and Error 840(4); Appeal and Error 961

An appellate court will affirm an award of discovery sanctions so long as the findings appear in the lower court's opinion or elsewhere to sufficiently indicate the factual basis for the ultimate conclusion, or where there is evidence in the record to support the award. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 **Utah** Adv. Rep. 22, 2012 UT App 61. Appeal and Error 1024.3

Rules **Civ**. Proc., Rule **26**, UT R RCP Rule **26**
current with amendments received through December 1, 2015.

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Arizona Revised Statutes Annotated
Rules of Civil Procedure for the Superior Courts of Arizona (Refs & Annos)
V. Depositions and Discovery (Refs & Annos)

16 A.R.S. Rules of Civil Procedure, Rule 26.1

Rule 26.1. Prompt disclosure of information

Currentness

(a) Duty to Disclose, Scope. Within the times set forth in subdivision (b), each party shall disclose in writing to every other party:

(1) The factual basis of the claim or defense. In the event of multiple claims or defenses, the factual basis for each claim or defense.

(2) The legal theory upon which each claim or defense is based including, where necessary for a reasonable understanding of the claim or defense, citations of pertinent legal or case authorities.

(3) The names, addresses, and telephone numbers of any witnesses whom the disclosing party expects to call at trial with a fair description of the substance of each witness' expected testimony.

(4) The names and addresses of all persons whom the party believes may have knowledge or information relevant to the events, transactions, or occurrences that gave rise to the action, and the nature of the knowledge or information each such individual is believed to possess.

(5) The names and addresses of all persons who have given statements, whether written or recorded, signed or unsigned, and the custodian of the copies of those statements.

(6) The name and address of each person whom the disclosing party expects to call as an expert witness at trial, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, the qualifications of the witness and the name and address of the custodian of copies of any reports prepared by the expert.

(7) A computation and the measure of damage alleged by the disclosing party and the documents or testimony on which such computation and measure are based and the names, addresses, and telephone numbers of all damage witnesses.

(8) The existence, location, custodian, and general description of any tangible evidence, relevant documents, or electronically stored information that the disclosing party plans to use at trial and relevant insurance agreements.

(9) A list of the documents or electronically stored information, or in the case of voluminous documentary information or electronically stored information, a list of the categories of documents or electronically stored information, known by a party

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to exist whether or not in the party's possession, custody or control and which that party believes may be relevant to the subject matter of the action, and those which appear reasonably calculated to lead to the discovery of admissible evidence, and the date(s) upon which those documents or electronically stored information will be made, or have been made, available for inspection, copying, testing or sampling. Unless good cause is stated for not doing so, a copy of the documents and electronically stored information listed shall be served with the disclosure. If production is not made, the name and address of the custodian of the documents and electronically stored information shall be indicated. A party who produces documents for inspection shall produce them as they are kept in the usual course of business.

COURT COMMENT TO 1991 AMENDMENT

In March, 1990 the Supreme Court, in conjunction with the State Bar of Arizona, appointed the Special Bar Committee to Study Civil Litigation Abuse, Cost and Delay, which was specifically charged with the task of studying problems pertaining to abuse and delay in civil litigation and the cost of civil litigation.

Following extensive study, the Committee concluded that the American system of civil litigation was employing methods which were causing undue expense and delay and threatening to make the courts inaccessible to the average citizen. The Committee further concluded that certain adjustments in the system and the Arizona Rules of Civil Procedure were necessary to reduce expense, delay and abuse while preserving the traditional jury trial system as a means of resolution of civil disputes.

In September, 1990 the Committee proposed a comprehensive set of rule revisions, designed to make the judicial system in Arizona more efficient, more expeditious, less expensive, and more accessible to the people. It was the goal of the Committee to provide a framework which would allow sufficient discovery of facts and information to avoid “litigation by ambush.” At the same time, the Committee wished to promote greater professionalism among counsel, with the ultimate goal of increasing voluntary cooperation and exchange of information. The intent of the amendments was to limit the adversarial nature of proceedings to those areas where there is a true and legitimate dispute between the parties, and to preclude hostile, unprofessional, and unnecessarily adversarial conduct on the part of counsel. It was also the intent of the rules that the trial courts deal in a strong and forthright fashion with discovery abuse and discovery abusers.

After a period of public comment and experimental implementation in four divisions of the Superior Court in Maricopa County, the rule changes proposed by the Committee were promulgated by the Court on December 18, 1991, effective July 1, 1992.

COMMITTEE COMMENT TO 1991 AMENDMENT

This addition to the rules is intended to require cooperation between counsel in the handling of civil litigation. The Committee has endeavored to set forth those items of information and evidence which should be promptly disclosed early in the course of litigation in order to avoid unnecessary and protracted discovery as well as to encourage early evaluation, assessment and possible disposition of the litigation between the parties.

It is the intent of the Committee that there be a reasonable and fair disclosure of the items set forth in Rule 26.1 and that the disclosure of that information be reasonably prompt. The intent of the Committee is to have newly discovered information exchanged with reasonable promptness and to preclude those attorneys and parties who intentionally withhold such information from offering it later in the course of litigation.

The Committee originally considered including in Rule 26.1(a)(5) a requirement for disclosure of all cases in which an expert had testified within the prior five (5) years. The Committee recognized in its deliberations that information as to such cases might be important in certain types of litigation and not in others. On balance, it was decided that it would be burdensome to require this information in all cases.

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COMMITTEE COMMENT TO 1996 AMENDMENT

Rule 26.1(a)(3). With regard to the degree of specificity required for disclosing witness testimony, it is the intent of the rule that parties must disclose the substance of the witness' expected testimony. The disclosure must fairly apprise the parties of the information and opinion known by that person. It is not sufficient to simply describe the subject matter upon which the witness will testify.

Rule 26.1(a)(5) was not intended to require automatic production of statements. Production of statements remains subject to the provisions of Rule 26(b)(3).

Rule 26.1(a)(6). A specially retained expert as described in Rule 26(b)(4)(B) is not required to be disclosed under Rule 26.1.

(b) Time for Disclosure; a Continuing Duty.

(1) The parties shall make the initial disclosure required by subdivision (a) as fully as then possible within forty (40) days after the filing of a responsive pleading to the Complaint, Counterclaim, Crossclaim or Third Party Complaint unless the parties otherwise agree, or the Court shortens or extends the time for good cause. If feasible, counsel shall meet to exchange disclosures; otherwise, the disclosures shall be served as provided by Rule 5. In domestic relations cases involving children whose custody is at issue, the parties shall make disclosure regarding custody issues no later than 30 days after mediation of the custody dispute by the conciliation court or a third party results in written notice acknowledging that mediation has failed to settle the issues, or at some other time set by court order.

(2) The duty prescribed in subdivision (a) shall be a continuing duty, and each party shall make additional or amended disclosures whenever new or additional information is discovered or revealed. Such additional or amended disclosures shall be made seasonably, but in no event more than thirty (30) days after the information is revealed to or discovered by the disclosing party. A party seeking to use information which that party first disclosed later than (A) the deadline set in a Scheduling Order, or (B) in the absence of such deadline, sixty (60) days before trial, must seek leave of court to extend the time for disclosure as provided in Rule 37(c)(2) or (c)(3).

(3) All disclosures shall include information and data in the possession, custody and control of the parties as well as that which can be ascertained, learned or acquired by reasonable inquiry and investigation.

COMMITTEE COMMENT TO 1991 AMENDMENT

The Committee does not intend to affect in any way, any party's right to amend or move to amend or supplement pleadings as provided in Rule 15.

COURT COMMENT TO 1991 AMENDMENT

The above rule change was part of a comprehensive set of rule revisions proposed by the Special Bar Committee to Study Civil Litigation Abuse, Cost and Delay, which was specifically charged in March, 1990 with the task of proposing rules to reduce discovery abuse and to make the judicial system in Arizona more efficient, expeditious, and accessible to the people.

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For more complete background information on the rule changes proposed by the Committee, see Court Comment to Rule 26.1(a).

(c) Deleted effective Dec. 1, 1996.

(d) Signed Disclosure. Each disclosure shall be made in writing under oath, signed by the party making the disclosure.

(e) Deleted effective Dec. 1, 1996.

COMMITTEE COMMENT TO 1991 AMENDMENT

Rule 26.1(e) is intended specifically to deal with the party and/or attorney who makes intentionally inaccurate or misleading responses to discovery.

COURT COMMENT TO 1991 AMENDMENT

The above rule change was part of a comprehensive set of rule revisions proposed by the Special Bar Committee to Study Civil Litigation Abuse, Cost and Delay, which was specifically charged in March, 1990 with the task of proposing rules to reduce discovery abuse and to make the judicial system in Arizona more efficient, expeditious, and accessible to the people.

For more complete background information on the rule changes proposed by the Committee, see Court Comment to Rule 26.1(a).

(f) Claims of Privilege or Protection of Trial Preparation Materials.

(1) *Information Withheld*. When information is withheld from disclosure or discovery on a claim that it is privileged or subject to protection as trial-preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced or disclosed that is sufficient to enable other parties to contest the claim.

(2) *Information Produced*. If a party contends that information subject to a claim of privilege or of protection as trial-preparation material has been inadvertently disclosed or produced in discovery, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has made and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

STATE BAR COMMITTEE NOTE
2008 Amendment

As with its federal counterpart, the amendment is intended merely to place a “hold” on further use or dissemination of an inadvertently produced document that is subject to a privilege claim until a court resolves its status or the parties agree to an appropriate disposition. The amendment, however, “does not address whether the privilege or protection

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that is asserted after production was waived by the production." Fed. R. Civ. P. 26(b)(5)(B), Advisory Committee Notes on 2006 Amendment.

(g) Deleted effective Dec. 1, 1996.

Credits

Added Dec. 20, 1991, effective July 1, 1992. Amended May 30, 1996, effective Dec. 1, 1996; Nov. 22, 1996, effective March 1, 1997; Sept. 5, 2007, effective Jan. 1, 2008; Dec. 20, 1991, effective July 1, 1992; July 31, 2014, effective July 31, 2014, subject to the applicability provisions of Arizona Supreme Court Order No. R-13-0017.

Editors' Notes

GUIDELINES FOR RULE 26.1 [WITHDRAWN]

Court Note

Rule 26.1 Guidelines have been withdrawn because of rule changes and court opinions that have been adopted or issued since the Guidelines were adopted.

APPLICATION

<Order R-05-0008 dated October 10, 2005, effective January 1, 2006, provided, "with respect to family law cases pending as of January 1, 2006, that if disclosure was previously made pursuant to Rule 26.1, Arizona Rules of Civil Procedure, further disclosure shall not be required under Rule 49 or 50 of the Arizona Rules of Family Law Procedure, except for the duty to seasonably supplement the earlier disclosure.">

<The text of this rule which is effective March 1, 1997 is inapplicable to cases which are set for trial between March 1 and April 30, 1997.>

Notes of Decisions (90)

16 A. R. S. Rules Civ. Proc., Rule 26.1, AZ ST RCP Rule 26.1
Arizona State court rules are current with amendments received through 10/15/15

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Vernon's Texas Rules Annotated
Texas Rules of Civil Procedure
Part II. Rules of Practice in District and County Courts
Section 9. Evidence and Discovery (Refs & Annos)
B. Discovery
Rule 194. Requests for Disclosure (Refs & Annos)

TX Rules of Civil Procedure, Rule 194.2

194.2. Content

Currentness

A party may request disclosure of any or all of the following:

(a) the correct names of the parties to the lawsuit;

(b) the name, address, and telephone number of any potential parties;

(c) the legal theories and, in general, the factual bases of the responding party's claims or defenses (the responding party need not marshal all evidence that may be offered at trial);

(d) the amount and any method of calculating economic damages;

(e) the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case;

(f) for any testifying expert:

(1) the expert's name, address, and telephone number;

(2) the subject matter on which the expert will testify;

(3) the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting such information;

(4) if the expert is retained by, employed by, or otherwise subject to the control of the responding party:

(A) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony; and

(B) the expert's current resume and bibliography;

(g) any indemnity and insuring agreements described in Rule 192.3(f);

(h) any settlement agreements described in Rule 192.3(g);

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(i) any witness statements described in Rule 192.3(h);

(j) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills that are reasonably related to the injuries or damages asserted or, in lieu thereof, an authorization permitting the disclosure of such medical records and bills;

(k) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills obtained by the responding party by virtue of an authorization furnished by the requesting party;

(l) the name, address, and telephone number of any person who may be designated as a responsible third party.

Credits
Aug. 5, 1998, Nov. 9, 1998 and Dec. 31, 1998, eff. Jan. 1, 1999. Amended by order of March 3, 2004, eff. March 3, 2004.

Notes of Decisions (50)

Vernon's Ann. Texas Rules Civ. Proc., Rule 194.2, TX R RCP Rule 194.2
Rules of Civil Procedure, Rules of Evidence, and Rules of Appellate Procedure are current with amendments received through September 1, 2015. Bar Rules, Rules of Disciplinary Procedure, Code of Judicial Conduct, and Rules of Judicial Administration are current with amendments received through September 1, 2015. Other state court rules and selected county rules are current with rules verified through June 1, 2015.

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EX. 8

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A Study of Civil Case Disposition Time in U.S. District Courts

Donna Stienstra

Federal Judicial Center

May 2015

This Federal Judicial Center publication was undertaken in furtherance of the Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. While the Center regards the content as responsible and valuable, this publication does not reflect policy or recommendations of the Board of the Federal Judicial Center.

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Introduction

This report summarizes the Federal Judicial Center's research for the Court Administration and Case Management Committee on the Most Congested Courts (MCC) Project.[1] The Center submitted an earlier memorandum to the Committee on courts that dispose of their cases most slowly.[2] The present report is a full and final report to the Committee on the Center's development of a new type of caseload analysis, use of that analysis to identify courts with slower and faster disposition times, and the findings from interviews with selected districts with slower and faster disposition times.

Overall, during this project, the Center:

- developed a new method for identifying districts that are not keeping up with their caseloads, as measured by case disposition time;
- developed an analysis of case disposition time, by nature of suit, for each of the ninety-four district courts;
- identified seven districts that have particularly long disposition times on a significant number of different case types (the "most congested courts");
- in summer 2013, provided the caseload analyses to and conducted interviews with the chief judge and clerk of court in the seven districts with slower case disposition times to determine the sources of delay;
- in November 2013, submitted to the Committee's Case Management Subcommittee a confidential memo on the districts with delayed civil case disposition times, which presented findings from the interviews with these districts;
- identified seven districts that have particularly short disposition times for a significant portion of their caseload (the "expedited courts"); and
- in fall 2014, provided the caseload profiles to and conducted interviews with the chief judge and clerk of court in the seven districts with faster disposition times to determine the procedures these districts use to expedite their caseloads.

To complete the project, we are providing this final report, which presents a history of the MCC Project, an overview of the Center's development of a new method of caseload analysis, and the findings from the interviews with the fourteen districts selected for the study.

---

1. We had valuable assistance and guidance from the Case Management Subcommittee at key stages of the project and thank the members for their help: Judge Richard Arcara (chair), Judge Roger Titus, Judge Dan Hovland, Judge Marcia Crone, Judge Sean McLaughlin, Judge Charles Coody, Larry Baerman, clerk of court representative to the committee, and Jane MacCracken, staff to the committee. I especially appreciate the participation of Judge Arcara, Larry Baerman, and Jane MacCracken in the interview process. Their participation was invaluable in conducting the interviews and interpreting the information obtained. And I am very grateful to my colleague Margaret Williams for the caseload analysis on which the Most Congested Courts Project relies.

2. The Center submitted its report on the courts with delayed civil case disposition times on November 20, 2013. Given the confidential nature of some of the court-specific findings, the report is not a public document.

Although the close examination of specific districts is completed with this report, there is one important respect in which the Most Congested Courts Project will continue indefinitely. Periodically the Center will update the caseload analysis for each of the ninety-four district courts and will provide each district with its analysis. The Committee approved this distribution at its December 2014 meeting because the analyses have been well received by and helpful to the districts that have received them. Each of the ninety-four districts has received the first transmission of its own caseload analysis, in the form of a case disposition time dashboard prepared by the Center and reviewed by the Case Management Subcommittee. The long-term goal is for the districts to access their caseload analyses at an intranet website. In the meantime, the Center will provide the analyses individually to each district.

MCC Project Origin and Goals

Before presenting findings from interviews with the courts, we briefly recap the purpose and methodology of the Most Congested Courts Project.

In 2001, the Judicial Conference asked the Court Administration and Case Management Committee to monitor the caseloads of the district courts, identify districts with significant caseload delay, and offer assistance to those districts. The Administrative Office (AO) developed a composite measure of caseload delay, ranked the ninety-four district courts on this measure, and identified the most delayed 25% as the "most congested courts" ("MCCs"). Approximately once every two years, the Committee then sent a letter to the chief judge of each MCC to alert the court to its ranking and to suggest a variety of remedies, including such actions as use of visiting judges, attendance at workshops, and consideration of case-management practices recommended in guides and manuals.

Some districts responded with explanations for their status, others with polite thanks, and some not at all. Over the first ten years of the Committee's efforts, it became clear that membership on the list of MCCs changed little and that the Committee's letters had limited effect. The Committee decided that it needed a new approach to the problem of courts with caseload delays and asked the Center to develop a new method for identifying and assisting courts where civil case disposition times are lengthy.

The New Analysis for Identifying District Courts with Delayed Civil Case Disposition Times

The Committee wanted the new method to provide the Committee and courts with better information about caseload delay so assistance could be more targeted. If the problem lies in habeas cases, for example, a quite different remedy might be needed than if the problem lies in patent cases. Working with the Committee's Case Management Subcommittee, the Center developed a method that examines district caseloads at the case type level—that is,

an analysis that gives a district information about the status of each case type, or nature of suit (NOS), in its civil caseload.[3]

The new method compares the average disposition time for each case type within a district to the average disposition time for each case type nationally. To develop the measure, the Center first calculated a national average disposition time for each of the nearly 100 nature of suit codes across all ninety-four districts combined. The Center then calculated the average disposition time for each nature-of-suit code for each district for the past three years.[4] In the final step of the analysis, the Center compared each district's average disposition time for each nature-of-suit code to the national historical average.

To help districts understand the analysis, the Center developed a graphic presentation that relies on colors to show a district which cases it is disposing of faster or slower than the national average—deep red for very slow, pink for slow, yellow for near the national average, light green for fast, and deep green for very fast. The Center used tables and bar charts to present the results of the analysis (see Attachment 1[5]). Because of the graphic presentation—the colors in particular—districts quickly understand where they are having problems disposing of cases and where they are doing well. More recently, the Center has developed a case disposition dashboard for presenting the results of the analysis. The dashboard also provides disposition times graphically and relies on the same color scheme, but uses a simpler graphic and also presents more information by providing the specific cases included in each NOS group (see Attachment 2 for a description of the dashboard).

Using either approach, the new analysis tells the Committee which districts have fallen seriously behind the national average in disposing of their civil caseloads, which districts are doing much better than the national average, and exactly which types of cases are most seriously delayed in the districts with delayed civil case disposition times. The new analysis does not, however, provide a single score or a method for ranking districts. Rather, it requires examination of each district to see whether a district has either a large number of case types that take more than 15% longer to dispose of than the national average or a smaller number of case types that take much, much longer (e.g., 100% longer) than the national average to terminate. If a district meets these criteria, it merits attention by the Committee.

The new analyses of case disposition time have proven to be very helpful to the courts and have been well received by the fourteen districts selected by the Committee for further discussions (see descriptions below of interviews conducted with these courts). These districts unanimously expressed their intent to use the new analyses for serious, district-

3. The analysis and the graphics produced by the analysis were developed by Margaret Williams, Senior Research Associate, of the Center's Research Division.

4. To reduce risk that a year of unusual activity would skew averages, the Center chose a three-year time frame. Longer or shorter time frames could be used, as could other comparisons, such as averages for courts of the same size.

5. The initial version of the analysis grouped the civil natures of suit into four categories (or "quartiles")—faster, fast, slow, and slower natures of suit—and included an average disposition time for criminal felony cases as well. A second generation presentation—a case disposition dashboard—does not group the natures of suit nor include the criminal felony caseload.

specific, and data-driven assessments of case-management practices. Several districts said they had, in fact, already made significant changes in case-management practices after reviewing the new caseload analyses.

Interviews: A New Approach to Assisting Districts with Delayed Civil Case Disposition Times

Based on a recommendation from the Center, the Committee agreed that the better approach to assisting courts with caseload delays would be to interview them rather than sending letters. The Committee also agreed that each district should receive its own caseload analysis, since the Committee members themselves had found the graphics exceptionally helpful in understanding their own court's caseload. Working with the new case disposition analysis and the Case Management Subcommittee, the Center identified districts that differed from the national average in either having a high number of civil case types that were delayed or in having extreme delay, even if in a smaller number of civil case types. Of the initial set of fourteen districts that met these criteria, the Subcommittee selected seven that were seriously delayed. Then-chair of the Committee, Judge Julie Robinson, sent these districts the Center's new case disposition analysis and an invitation to be interviewed, which all seven districts accepted.[6]

Because the issue of delay was potentially sensitive, the Committee agreed that it would be helpful to the Center's research staff to have a judge member of the Committee participate in the interviews. In the end, each interview was conducted by a judge member, the clerk of court representative to the Committee, a member of the Committee staff, and myself.[7] In each district, we interviewed the chief judge and clerk of court to try to understand more fully why their civil caseloads had become delayed and what kinds of targeted assistance might help them dispose of civil cases more quickly.[8] Because the seven districts were geographically disbursed, we conducted most of the interviews by telephone.

Typically each chief judge opened the discussion with an explanation of the district's caseload challenges and steps the district had taken or was planning to take to address caseload delays. Most of the districts had prepared "talking points"—and, in some districts, documentary material—for the interview. The interview team had not asked the districts to make such preparations, but they clearly were well prepared for the interview and wanted to open by providing information they felt was important for the Committee to know.[9]

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6. Because the report on the most congested courts is confidential but this report on the expedited districts very likely will be a public report, we do not identify the most congested districts.

7. The Committee member was Judge Richard Arcara, who also chairs the Case Management Subcommittee; the clerk of court representative was Larry Baerman; and the Committee staff member was Jane MacCracken.

8. The interviews took place between March and September 2013. In several districts, additional judges or court staff joined the chief judge and clerk for the interview.

9. Attachment 3 provides an example email showing the information sent to a district before the interview to help the chief judge and clerk of court understand the nature of the interview. The graphics sent for

Then, if the chief judge and clerk had not already addressed the case types that were both seriously delayed and accounted for a sizable portion of the district's caseload, the interview team asked the chief judge to talk about how these cases are handled by the court and why they might be delayed. This invitation usually generated considerable additional discussion.

The interviews generally lasted at least an hour and provided abundant information about problems encountered and actions taken by the seven selected districts. The chief judges and clerk of court were welcoming to the interviewers and generous in the information they provided. Without exception, they found the caseload analysis very helpful, particularly in identifying problems at the detailed level of individual case types. Several said the tables had opened up a dialogue in their court about how the court handles its cases, not only cases that were delayed but other cases as well, and had already led to some changes in procedure. Also without exception, the chief judges said they appreciated the Committee's inquiry and offers to help.

Challenges Identified in Districts with Delayed Civil Case Disposition Times

We relied on two sources of information for understanding civil case disposition delays in the seven courts selected for the study: the Center's caseload analyses and information the chief judge and clerk of court provided during the interviews. In reviewing the caseload analyses and talking with the courts, we focused on the case types that were both the most delayed and included the greatest number of cases. Because of their numbers, these case types have a larger impact on a district's overall disposition time, and, more importantly, delay in these cases affects a larger number of litigants.

The caseload analyses revealed how seriously delayed each district's caseload was and the case types that accounted for delay. Delays were very substantial in each district, even in case types that are typically disposed of quickly nationwide—for example, in one district the faster case types were disposed of eighty-one percent more slowly than the national average and in another these case types were disposed of seventy-two percent more slowly. In addition, the caseloads were delayed across many different case types.

From the caseload analysis, we could see a pattern across the seven districts. The most commonly delayed case types—i.e., found in five or more districts—were prisoner petitions to vacate a sentence or for habeas corpus, along with employment civil rights, ERISA, insurance, and "other" contract cases. Prisoner civil rights, foreclosure, and "other" statutory actions were delayed in four of the seven. Districts also had delayed disposition times in case types with large numbers of cases specific to that district—for example, marine personal injury cases in a district on a harbor; medical malpractice cases in a major medical center; copyright, patent, trademark, and antitrust cases in districts that are economic centers; and Social Security and consumer credit cases in districts that had experienced rapid increases in these case types. The two central points from this analysis were that in the courts with delayed case disposition times (1) delay was found across a large number of

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these interviews were the initial type prepared by the Center—i.e., the bar graphs and tables shown in Attachment 1—and not the more recently developed electronic dashboard shown in Attachment 2.

case types and was not limited to a few case types, and (2) several case types, involving large numbers of litigants—for example, prisoner cases, employment civil rights cases, and ERISA cases—were delayed in a majority of the seven districts.

From the interviews, we learned not only the districts' assessments of their problems but also that they were aware of their court's caseload delay before being contacted by the Committee and had been taking steps to resolve it. With regard to the specific reasons for delay, each district offered a number of explanations, some that had caused problems generally for the district and some that had caused problems for specific case types. Although there were idiosyncratic explanations and conditions in some districts, the reasons cited can be grouped into several categories—keeping in mind that these are perceived, and not quantitatively measured, causes.[10]

Criminal caseload

Four of the seven districts said their criminal caseloads were particularly demanding, because of either the sheer number of cases or case complexity (e.g., terrorism or death-eligible cases).

Circuit law

Circuit law required several districts to be deferential to the pleadings filed by pro se litigants. This deferential treatment of pleadings results in the courts having to deal with more amended complaints and, often, substantial motion practice and discovery disputes that do not occur in districts where circuit law is less deferential to the pleadings of pro se litigants.

Number and/or complexity of civil filings

In several districts, specialized litigation had emerged from economic activity in the district—e.g., litigation involving patents, financial and medical institutions, and contracts—and had given rise to voluminous and complex motions. In several others, specialized law firms had developed to litigate Social Security, ERISA, and consumer credit cases and, as a consequence, more such cases were being filed.

Resources

Three of the seven districts with delayed civil disposition times had long-term vacancies and several had no or few senior judges. Altogether, the seven courts with delayed disposition times had sixty-four judgeships and 434 vacant judgeship months for the five-year period 2010–2014 compared to seven courts with fast disposition times (see below), which had seventy-nine judgeships and 303 vacant judgeship months.[11] Most of the districts also

10. Although the districts provided explanations for some of their delayed case types, they also were sometimes unsure why a case type might have a longer-than-average disposition time. This was generally true, for example, for ERISA and FLSA cases.

11. Numbers are from the Federal Court Management Statistics, which can be found at http://www.uscourts.gov/statistics-reports/analysis-reports/federal-court-management-statistics. During the same years, the two groups of courts did not differ, on the whole, in the number of weighted filings. Three of the courts with delayed civil case disposition times had weighted filings averaging 500 to 600 cases per judge,

identified too few staff as a cause of delay, particularly too few pro se or staff law clerks who could help with voluminous complex motions or with prisoner litigation. Although the districts have looked for and often benefitted from outside help, they had found it difficult to get help for the most voluminous parts of their caseloads because of limits on the number of staff law clerks allocated to the courts and the reluctance of visiting judges to take a caseload consisting of motions and/or prisoner cases.

Human resource quality and organization

Four of the seven districts had had problems with the quality or organization of human resources, including law clerk problems in chambers, poor organization and lack of oversight of pro se law clerks, poor quality of pro se law clerks, and an underperforming judge.

Case-management practices

Two districts described case-management practices that delayed civil cases—in one, a tradition of judicial deference to lawyers, including lax enforcement of case schedules, and in another the liberal granting, until recently, of continuances.

Steps Taken by the Districts to Reduce Delayed Civil Case Disposition Times

Each of the seven districts had taken steps to try to solve the problem of civil caseload delay. These efforts fall into several categories.

Efforts to reorganize or reallocate work

Three districts with significant delays in prisoner litigation tried to improve the service provided by their pro se law clerks, experimenting with time limits, reallocating work between pro se clerks and chambers staff, and reassigning oversight responsibility for the pro se law clerks. One district, for example, had used the pro se law clerks to make sure pleadings in pro se cases were in order and to screen for IFP compliance under the PLRA. When the court transferred this screening to the clerk's office, it reduced the screening stage from four-to-five months to four-to-five days. This district also moved responsibility for non-prisoner pro se cases from the pro se law clerks to the magistrate judges. This district realized no improvement in civil disposition times, however, by putting magistrate judges on the civil case assignment wheel. In another effort to improve judicial resources, one district changed the assignment system for senior judges to make assignments more predictable; as a result, the senior judges took more cases.

Efforts to enhance resources

The districts with delayed disposition time have used a number of approaches to increase their staff and judge resources. Three districts have secured additional law clerks to work on motions, pro se cases, and Social Security cases. One district reported reducing its habeas backlog 39% by devoting two pro se clerks to these cases. In another approach to resolv-

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for example, but three of the courts with fast civil disposition times had weighted filings averaging over 600 cases per judge (Federal Court Management Statistics).

ing prisoner cases, a district had started working with a local law school clinic, which gave law students legal experience through work on pro se cases. One district turned to recalled magistrate judges, two others relied heavily on their own magistrate judges, and another benefitted from a large number of senior judges. Another strategy, relied on by three districts, was the use of visiting judges. Most of the districts, however, noted the reluctance of visiting judges to do the work that most needs to be done—i.e., deciding motions. One district had been able to secure visiting judge help with motions only by giving visiting judges full control of the cases through trial.

Efforts to change or enhance case-management procedures

The districts with delayed disposition time had also adopted a number of case-management practices they hoped would improve civil case processing. One had recently adopted a package of new case-management practices that included standardized discovery, standardized dates, and mandatory mediation for some types of cases; case management orientation and appointment of a mentor judge for new judges; and early conferences with lawyers and thus early identification of difficult issues in complex cases. Several districts in the same circuit had adopted electronic service to the U.S. Attorney's Office and the Department of Corrections in state habeas cases; one of these districts reported a sixty-day reduction in the time to serve. Four of the districts had mediation programs for civil cases, and one had recently started a differentiated case-tracking program. This district had also realized a reduction in case delay since ending the routine granting of continuances.

Efforts to provide assistance to pro se litigants

Two districts had made particular efforts to provide assistance to pro se litigants to help resolve these cases more quickly. One had established a mediation program at the court for pro se litigants and also provides a grant each year, from its attorney admissions fund, to support the local federal bar association's pro se clinic. A second provides mediation for pro se litigants in employment cases through collaboration with a local law school. This district has also established an outreach program to the bar and provides a day of training, involving the district's most respected judges, for attorneys who volunteer pro bono for pro se cases. The court reported that this program has greatly expanded the pro bono attorney pool, and over 100 cases have been provided full representation, saving considerable judge and staff time. This district coordinates its pro se assistance through a pro se office established by the court.

Future Assistance Suggested by Districts with Delayed Civil Case Disposition Times

In addition to efforts already made, the districts with delayed civil disposition times made suggestions for further actions that might help them dispose of their civil cases more quickly. These suggestions fall into two broad categories.

Resources

Most of the districts noted, first, the need for more judgeships and/or the need to fill vacancies. All recognized the limited prospects for such help, particularly new judgeships, and went on to identify other types of useful resources. All seven districts called for more law clerks. In some districts, additional law clerks would provide help with voluminous motions. In others, additional law clerks would help meet the demand of pro se cases. Districts with temporary law clerks called for a change in how these law clerks are funded and allocated. They specifically suggested that the appointment should be significantly longer than the current one-year term, which permits barely enough time for a law clerk to become familiar with the work. Another district suggested a visiting law clerk program. Two districts also called for more assistance from visiting judges but with an emphasis on visiting judges who are willing to handle motions.

Guidance and information on best practices

The districts had several suggestions for assistance or guidance that might be provided to courts with problems of caseload delay, as well as to courts generally. The Administrative Office and/or Federal Judicial Center might provide guidance, through a website or resource center, on how to use pro se law clerks more effectively, including position descriptions, advice on oversight and supervision, and options for organizing the pro se law clerk function and allocating pro se cases. The AO and Center might give the courts guidance on judicial case management practices, with particular emphasis on the methods used by judges who dispose of cases quickly. The AO and Center might also develop electronic tools that would help courts pull more information out of caseload data. The courts also suggested development of guidance on using mediation and setting up electronic service for prisoner pro se cases. When asked how best to disseminate information, a chief judge suggested that judges and clerks are more likely to pick up information at workshops—such as new judge training, the annual district and magistrate judge workshops, and the annual clerk of court conference—than to go online to search for information.

Interviews in Districts with Fast Civil Case Disposition Times

The Committee had been inclined to conduct interviews in the fastest—or "most expedited"—districts in addition to the delayed—or "most congested"—districts, and the interviews in the districts with delayed case disposition times confirmed the importance of doing so. First, the courts with delay had asked for information about practices used in districts with fast disposition times, but also, under its responsibility to identify and disseminate "best practices," the Committee wished to collect and publicize steps the courts were taking to resolve civil cases expeditiously.

Using the caseload analyses and working with the Case Management Subcommittee, the Center identified a set of districts that dispose of their civil cases very quickly. The Subcommittee selected seven of these districts for interviews. These districts, which are representative of large, medium, and small districts and were distributed across the country and circuits, were the following:

Central District of California	Northern District of Texas
Southern District of Florida	Western District of Washington
District of Maine	Eastern District of Wisconsin
Western District of Missouri	

Then-chair of the Committee, Judge Julie Robinson, sent a letter to the chief judges in these districts, inviting the chief judges to participate in the Most Congested Courts Project as examples of districts that were able to dispose of civil cases quickly. The letter included the Center's caseload analysis for that district. Each chief judge responded positively to the invitation. The same team of four interviewers then spoke by telephone with the chief judge and clerk of court in each district, this time focusing on steps the districts had taken to dispose of civil cases quickly.[12]

As in the courts with delayed civil case disposition times, typically each chief judge opened the interview, but in these districts the focus was on practices and rules used to move civil cases expeditiously. The chief judges and clerks were well prepared for the interviews and most proceeded through a list of practices and rules they thought might explain why their civil case disposition time was fast relative to the national average. The interview team was particularly interested in fast disposition times in case types that had long disposition times in most of the courts with delay and, if a chief judge or clerk did not address those case types, the interview team asked about practices that might explain the fast disposition times.

The interviews generally lasted at least an hour and provided a great deal of information about case-management practices and rules in the seven districts. The chief judges and clerk of court were very responsive in providing information and offered to be of further assistance if needed.

Procedures and Practices in Districts with Fast Civil Case Disposition Times

As in the districts with delayed disposition times, we relied on the Center's caseload analysis and our interviews to develop an understanding of courts that dispose of their civil cases quickly. The caseload graph and tables showed that the districts were not only expeditious overall but were expeditious across most types of cases. In fact, one of the districts disposed of every type of civil case, except four, near or faster than the national average. What explains the fast disposition times in these districts?

12. The interviews took place in October and November 2014. In one or two districts, additional judges or court staff joined the chief judge and clerk for the interview. Attachment 4 provides an example of information sent to each district shortly before the interview to inform them of the nature of the interview.

We looked for common case-management and case-assignment practices across all seven districts, thinking there might be specific practices, used by all, that could become concrete guidance for other courts—for example, having a uniform case-management order used by all judges; having magistrate judges on the civil case assignment wheel (or not); using R&Rs (or not); or providing mediation through a court-based process. We did not find that kind of uniformity across all, or even some, of the districts with fast civil disposition times or even across all judges in some districts. Although we did not find a single set of procedures or a package that, if adopted, would be the key to expeditious civil case dispositions, we did identify common characteristics across the courts with fast civil disposition times—most importantly, sufficient judicial resources, but also a commitment to and culture of early case disposition. This commitment and culture were manifest in several ways—early and active judicial case management, a court-wide approach to managing cases and solving problems, and extensive use of magistrate judges and staff law clerks. In the discussion below, keep in mind, as in the districts with delayed civil case disposition times, that we are presenting the courts' perceptions, and not a quantitative analysis, of the causes of fast civil case disposition times in these districts.

Sufficient judicial resources

In all but one of the districts, the chief judges pointed to an essential factor in their fast civil disposition times—sufficient judicial resources. Several chief judges noted this factor right at the outset of the interview. Not only were the districts fortunate to have had few vacant judgeship months, but they also had either a long-term, experienced bench or senior judges who still took a significant caseload, or both. In one district, where judicial resources were not as substantial because of a long-term need for additional judgeships, the court had maintained its fast civil disposition times through exceptionally long hours by judges and staff (but with the negative consequences of ill health and early judicial retirements).

Culture of early case disposition

In addition to sufficient judicial resources, all of the chief judges in the courts with fast civil disposition times were emphatic about their culture of early case disposition. Most of the courts were intentional about this culture—i.e., they pursued it deliberately, were committed to maintaining it, and spoke of it as central to the identity of the court. This commitment is expressed through fairly standard case-management practices—early judicial involvement in the case; early setting of a schedule; early identification of cases that can be disposed of by removal, remand, or dispositive motion; prompt decisions on motions so, as one chief judge said, "the lawyers can do their work"; and no continuances, which is generally achieved by requiring counsel to submit a proposed case schedule and then holding them to it. Above all, as described by the chief judges, their districts emphasized very early judicial involvement and control and very firm respect for the schedule.

Institutional approach to case disposition

The courts with fast civil disposition times have a number of court-wide practices and rules in place that support early judicial case management and enforcement of deadlines. But, significantly, most of these courts are not characterized by uniform practices across all

judges, which some might expect to be a hallmark of a court that disposes of its civil cases quickly. One chief judge described the court's bench as "highly individualistic" and another chief judge said the court was marked by "fierce individualism." Only two of the chief judges pointed to uniform time frames and uniform case-management orders as part of their courts' approach to civil litigation. Otherwise the courts' practices, and those of individual judges within any given court, vary considerably—for example, whether or not they hold Rule 16 scheduling conferences or in-person hearings on motions. But in these districts several other factors that support expeditious civil case processing are shared court-wide:

- The local rules emphasize early case management.
- The judges are committed to joint responsibility for the court's caseload. "If someone falls behind," said one chief judge, "we help each other out." "We're a team," said another. In one of the districts, a court-wide committee reviews the caseload and, if bottlenecks are seen, makes adjustments in case allocations.
- The courts assertively use reports on the status of the caseload to monitor individual judge and court-wide performance. These reports are detailed, and in most districts the court's own internal reports, not only the CJRA reports, identify the judges by name. The reports are issued frequently and are discussed at court meetings or individually between the chief judge and each other judge. The purpose, and effect, of the reports is to provide a case management tool and to encourage judges to keep their own caseloads within the court's norms.
- The courts have a history and culture of problem solving—or, as one chief judge said, "always wanting to improve." The caseload reports are an example of tools used by the courts to routinely examine how they are doing, but these reports are only one example of the kind of constant review used by these courts. Most of the chief judges described study groups and task forces that had taken on one or another issue—for example, delays in Social Security cases, problems of attorney access to prisoners located in distant prisons, and frequent appellate court reversal of prisoner cases involving medical malpractice—and had developed solutions for the problems. Many of these courts have also developed innovative approaches to such perennial issues as discovery disputes and voluminous summary judgment motions (see below for examples).

Extensive and effective role for magistrate judges

The role of magistrate judges varies greatly across the seven courts with fast civil disposition times—for example, in several districts they are on the wheel for assignment of a portion of the civil caseload, and in others they are not; in some they handle all civil pretrial matters, and in others they do not; in some they are responsible for the prisoner and/or Social Security caseloads, and in others they are not. Regardless of the specific duties of the magistrate judges, the chief judges noted their courts' determination to use that resource to the fullest possible extent and described the magistrate judges, in the words of one judge, as "an integral part of the team." They also emphasized the high level of respect accorded the magistrate judges by judges and attorneys, as well as efforts made to increase that respect—for example, by giving the magistrate judges work that puts them in the courtroom to heighten

their visibility and enhance their authority. Magistrate judges also participate in court governance, including, in one district, the critical committee that monitors case flow. Whatever a court's approach may be, according to the chief judges, full integration of the magistrate judges is central to expeditious case disposition.

Experienced and highly skilled staff law clerks

Many of the courts with fast civil disposition times also benefit from long term, highly experienced staff law clerks. They typically handle the court's pro se and prisoner caseloads and over time have developed efficient systems for screening these cases and moving them toward disposition. These systems vary from district to district, but the staff law clerks were typically described as being very good at "triaging" this caseload and keeping it current.

In addition to these characteristics that are common across the courts, the judges told us of a number of practices they believe have helped their court reduce delay in civil cases or solve a particular problem, such as a sudden rise in Social Security cases. We briefly describe these district-specific practices, along with several procedures adopted to more efficiently handle some of the types of cases that are often delayed in the districts with delayed civil case disposition times.

Calendars and scheduling

In the Southern District of Florida, the majority of judges follow a term calendar—i.e., the year is divided into twenty-six two-week terms. Immediately on case filing, the judge reviews the case, then brings the attorneys in two-to-four weeks after answer is filed to set a schedule for the case. The trial date is set for a specific two-week period, with most trial dates set within one year of case filing. Approximately twelve to fifteen cases are set for each two- week trial term.

The judges in the District of Maine assign all civil cases to one of seven tracks, each with its own timelines and distinct, uniform scheduling order.

The Western District of Missouri designates two weeks of each month for criminal trials to ensure compliance with the Speedy Trial Act.

In the Western District of Washington, civil trials are conducted on a clock. At a pretrial conference ten to fourteen days before trial, the judge and attorneys determine the number of days and hours for trial. A clock starts when trial begins; each morning the judge announces the number of minutes left to each side. Side bars are assessed against the losing side. The process not only streamlines trials but also provides predictability for jurors and attorneys and prompts greater cooperation among attorneys to avoid being docked time.

Discovery

To control discovery, the District of Maine gives cases on the standard track four months to complete both fact and expert discovery. In all cases, attorneys must attempt to resolve discovery disputes on their own and, if they cannot, must talk with a magistrate judge, who attempts to mediate the conflict. Only with the magistrate judge's consent may they file a discovery motion.

In the Western District of Missouri, Local Rule 37.1 prohibits the filing of discovery motions, which is intended to prompt attorneys to resolve discovery disputes on their own. If attorneys determine that they must file a discovery motion, they must include a justification for the motion. A teleconference is then scheduled by the judge.

Under a set of guidelines issued by the court, the Western District of Washington encourages attorneys to use the court-promulgated "Model Agreement Regarding Discovery of Electronically Stored Information." The model agreement is in the form of an order that can be issued by the assigned judge and includes general principles and specific guidance on electronic discovery, with an attachment that includes additional provisions for complex cases.

The Western District of Washington developed guidelines for "Best Practices for Electronic Discovery in Criminal Cases," which provide a general set of best practices, as well as guidelines for multi-defendant cases and an e-discovery checklist.

Summary judgment

Under District of Maine Local Rule 56, unless attorneys in standard track cases file a joint agreement on core matters related to summary judgment, they may not file summary judgment motions without a prefiling conference with the judge, which at minimum narrows issues and sometimes bypasses the need for a summary judgment motion altogether.

In the Northern District of Texas, Local Rule 56.2 permits only one motion for summary judgment per party unless otherwise directed by the presiding judge or permitted by law.

In an experimental procedure being used by one judge in the Eastern District of Wisconsin, attorneys may opt for a streamlined summary judgment process—the "Fast Track Summary Judgment" (FTSJ) process—to reach an early dispositive decision. In this process, the judge tolls unrelated discovery and parties must comply with a number of limits, including page limits on affidavits.

Motions generally

Under Local Civil Rule 7, judges in the Western District of Washington must rule on motions within thirty days of filing. At forty-five days, attorneys may remind the judge to rule. This practice ensures that cases with no merit are seen and decided quickly.

Mediation

The Central District of California provides three forms of settlement assistance to civil litigants: referral to a magistrate judge or district judge for a settlement conference (in practice, most referrals are to magistrate judges); selection of a mediator from the extensive private mediation market; or selection of a mediator from the court's panel of approved mediators. Except for a few exempt case types, all civil litigants are expected to select one of these forms of settlement assistance and to file their selection with the assigned judge prior to the Rule 16 scheduling conference. The local rules set a default deadline for the scheduling conference, subject to changes ordered by the judge after consultation with counsel. The judge issues a referral order at or soon after the Rule 16 conference.

The Mediation and Assessment Program (MAP) in the Western District of Missouri randomly assigns all civil cases, excluding a limited number of case types, to one of three

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types of mediation providers: the court's magistrate judges, the MAP director, or a mediator in the private sector. Parties are required to mediate their case within seventy-five days of the "meet and greet" meeting required by Federal Rule of Civil Procedure 26(f). Parties may ask to opt out of the mediation process or may ask to use a different form of ADR through a written request to the MAP director.

Other

The Central District of California relies on a number of committees to govern the court. The Case Management and Assignment Committee is one of the most important. Each of the district's divisions is represented on the committee, which is composed of district judges, magistrate judges, and court staff. The committee, which has four scheduled meetings a year (and more as needed), watches the caseload and keeps it in balance, using caseload reports from the clerk and concerns brought to the committee by judges to diagnose problems and develop solutions.

The District of Maine has for many years assigned a single case manager to each case for the lifetime of the case. The case manager works closely with the judge and monitors case progress, calls attorneys if deadlines are not met, and manages all paperwork, notices, docketing, and any other matters for the case.

To ensure efficient practice by attorneys on the CJA panel, the Western District of Washington appointed a task force made up of judges, court staff, and representatives from the U.S. Attorney's Office and CJA panel, which led to adoption of "Basic Technology Requirements" for CJA panel attorneys. The requirements state the minimum technology standards CJA attorneys must meet, including requirements regarding computer equipment and software.

To ensure that all issues are ready for immediate decision, the Western District of Washington requires that all attorney filings be joint.

ADA cases

Some judges in the Southern District of Florida hold an early half-day hearing in ADA cases and issue an injunction while the defendant takes care of the problem (e.g., measuring the width of a door, which does not require experts). Cases generally settle promptly after this step.

ERISA cases

In the Central District of California, many district judges require joint briefs. The court also sets an early deadline for submission of the administrative record.

The District of Maine has an ERISA track with a very specific schedule. The magistrate judges' expertise in these cases helps to expedite them.

FLSA cases

A majority of the judges in the Southern District of Florida use a form order for FLSA cases. The order sets an early deadline for a statement of the claim.

Prisoner cases

In Maine, the U.S. Attorney's Office is added to the docket for habeas cases to ensure that that office automatically receives all notices. The court has an agreement with the Maine Attorney General's office for more efficient filing of prisoner cases.

The Western District of Missouri court has a memorandum of understanding with the Department of Corrections that prisoners may file habeas cases electronically, using equipment provided by the court.

The Northern District of Texas serves the state electronically in state habeas cases.

By agreement with the state prisons, prisoners may file electronically in the Eastern District of Wisconsin. The court also has an agreement with the prisons for more efficient service. And the court screens cases early and dictates orders of dismissal.

In the Eastern District of Wisconsin, the court is moving to electronic filing of all prisoner pleadings. Four prisons are included so far. The Wisconsin Department of Justice and one of the larger counties also have Memorandums of Understanding under which the Department or county accept service electronically on behalf of defendants, rather than requiring personal service or paperwork for a waiver. Some judges also screen prisoner cases in chambers, rather than send them to pro se law clerks because they have found it is often faster to dictate a screening order as they review the case activity. The same can be done on motions for extensions, discovery, protective orders, and other matters that arise in these cases.

Social Security cases

To keep Social Security cases on track, the Central District of California uses tight deadlines, permits no discovery or summary judgment motions without leave of court, and requires mandatory settlement conferences. In their management of these cases, most of the magistrate judges also require joint briefing.

In the District of Maine, the magistrate judges handle all Social Security cases and have developed a high level of expertise. When the court needed a solution because disposition times were close to exceeding CJRA requirements, the magistrate judge convened a task force of the Social Security bar. To shorten disposition times, the bar recommended an earlier deadline for remand motions and a decrease in the time permitted to attorneys to submit briefs. The magistrate judges also try to issue their reports and recommendations within thirty days of oral argument to enable the district judges to resolve appeals before the CJRA reporting deadlines.

In the Western District of Missouri, the magistrate judges are on the civil case assignment wheel and decide many of the Social Security cases on consent.

To meet a goal of six months to disposition in Social Security cases, the Northern District of Texas sets tight and firm briefing deadlines and permits no oral argument.

When Social Security case filings increased rapidly and the court started falling behind, the Western District of Washington took several steps to speed up the cases. First, it borrowed law clerks from the senior judges, had a full-day education program for them, and assigned them exclusively Social Security cases. The court also requested and received a re-

called magistrate judge. Third, a judge prepared statistics on the Social Security caseload, and the court then held a retreat to develop solutions. The court also created a bench/bar committee to obtain attorney input, which produced guidance on how judges could write more helpful opinions and altered the rules on length of briefs. Finally, the court held a full-day CLE workshop on Social Security cases for the bar. The court was able to catch up on the Social Security caseload in a year.

The Eastern District of Wisconsin focused on Social Security cases last year because a high reversal rate was causing significant cost and delay. After a meeting to discuss the problem with staff from the Social Security Administration, U.S. Attorneys' Office, and claimants' attorneys, a working group was formed that created a protocol for handling Social Security cases. The procedures include a form complaint, rules on service, and a briefing schedule. Most significantly in the court's view, the protocol also encourages claimants' attorneys to consult with the attorney for the government before filing the initial brief to explore whether a voluntary remand might be in order. A significant number of cases have been voluntarily remanded since the protocol became effective. The special procedures for Social Security cases are set out at the court's website under the tab "Efiling Procedures."

The Characteristics of Courts with Fast Civil Case Disposition Times

The information from our interviews with chief judges in the courts with fast civil case disposition times suggests they are fast for two primary reasons. First, the courts have sufficient judicial resources. Second, they are committed as a court to a core set of principles and practices—early judicial involvement in the case, setting deadlines and adhering to them, using magistrate judges to the fullest possible extent, effectively using staff law clerks, working as a team, actively using caseload reports to monitor court-wide and personal performance, and watching for and solving problems. These principles and practices are put into effect in diverse ways across the districts and across judges within a district—only two of the seven districts have uniform time frames and case-management orders, and many practices, such as the specific methods for setting case schedules and the role of magistrate judges, vary from district to district—but each court has procedures for, and a culture that supports, setting deadlines early and then monitoring and enforcing them. It is important to keep in mind, however, that this study is limited to review of disposition times and interviews in a small number of courts with only two—though very informed—respondents in each court. Additional understanding of disposition times in the trial courts would very likely be obtained through a more expansive study that includes quantitative measurement of the many practices and conditions that affect the management and disposition of civil and criminal cases

The Future of the Most Congested Courts Project

Perhaps one of the more interesting questions asked during the interviews was the question of benchmarks. As most of the chief judges and clerks understood, in an analysis based on

averages there will always be courts that fall above and below the average. Should courts below the average forever be labeled "most congested," even as both these courts and the average are improving? One of the judges suggested that the Committee consider developing benchmarks, which would provide fixed, not relative, measures against which courts could measure their performance.

Several chief judges also asked whether it was appropriate or informative to compare their district against the national average rather than against, for example, an average based on districts the same size or districts that had a similar number of vacant judgeships or a similar level of pro se filings. These chief judges suggested that a future stage of the project might consider developing additional analyses based on court size or other court characteristics.

The chief judges and clerks in the courts with delayed civil case disposition times also asked about the future of the Most Congested Courts Project. Regarding their own status, they were not concerned about the label but about their very real need for assistance. They wanted to know whether the Committee would stay involved with their courts and whether there would be any follow-on efforts. They understood that at a time of budget constraints they might not get additional resources, but they were concerned about the fairness of current resource allocations. They spoke of their desire for any information or guidance that would help them do their job better and be more efficient. And they genuinely appreciated the Committee's inquiry and desire to be helpful.

The courts with faster civil disposition times appreciated the Committee's interest, too, and the opportunity to discuss their practices. They also appreciated the opportunity for self-examination provided by the caseload analysis, and most had distributed them to other members of the court. One chief judge said, "This is a really healthy thing to do. Whether we're doing well or poorly in a couple of years, call us so we can go through this review again." More generally, across all the districts, the chief judges and clerks found the caseload analyses very helpful and many had sent the tables and graphs to other members of the court to prompt further discussion and to spur additional efforts to move the civil caseload quickly.

The interviews underscored several key points regarding the Committee's Most Congested Courts Project: (1) the courts appreciated the opportunity to be heard; (2) the courts with delayed civil disposition times would appreciate help accessing more re- sources, whether those resources are information, judges, or legal staff; (3) all the courts would like to learn more about rules and procedures that expedite civil cases; and (4) the caseload analysis was very helpful to the courts and prompted self-examination and change without need for a "dunning" letter from the Committee.

Given that the Committee's assignment from the Judicial Conference—to monitor district court caseloads—is a long-term assignment, the interviews suggest at least the following actions on the part of the Committee:

1. Disseminate more information to the courts about best practices, including best practices involving judicial case management, the organization and use of staff law clerks, and the use of visiting judges to supplement judicial resources that are missing in the courts with delayed civil case disposition times.

2. Update the caseload analysis at least yearly, make it easily available to all district courts (as already done and will be done on a continuing basis), and expand it to permit districts to compare themselves to other groupings, such as courts of their size or courts with similar caseloads.
3. Work with other Judicial Conference committees and the Administrative Office to explore whether more visiting judges can be provided, whether more staff law clerks can be provided, and whether temporary law clerks can be appointed for at least two years.

One additional step the Committee might consider is to ask the Center for a quantitative study that would take the understanding of case disposition time beyond the qualitative examination provided by the current study. Such a study would look at the effect on case disposition time of any practice or condition that can be readily measured—for example, judicial vacancies, the types (i.e., weightiness) of civil and criminal filings, the number of motions filed, the number of extensions granted, and the time between stages in a case. Such a study might help the Committee identify specific practices, beyond the general principles and approaches described by the present study, that support or impede expeditious civil case disposition time.

Attachment 1

Example of Graphic and Tables Showing District Court Average Time to Disposition Compared to National Average Time to Disposition, by Civil Nature of Suit Code

Graphic and Tables Developed By
Margaret Williams
Federal Judicial Center

District A: 2010–2012

Average Disposition Time for the District Relative to the Average Disposition Time Nationwide

For Criminal Felony Cases and Civil Cases in Quartiles by Faster to Slower Groupings of Natures of Suit*

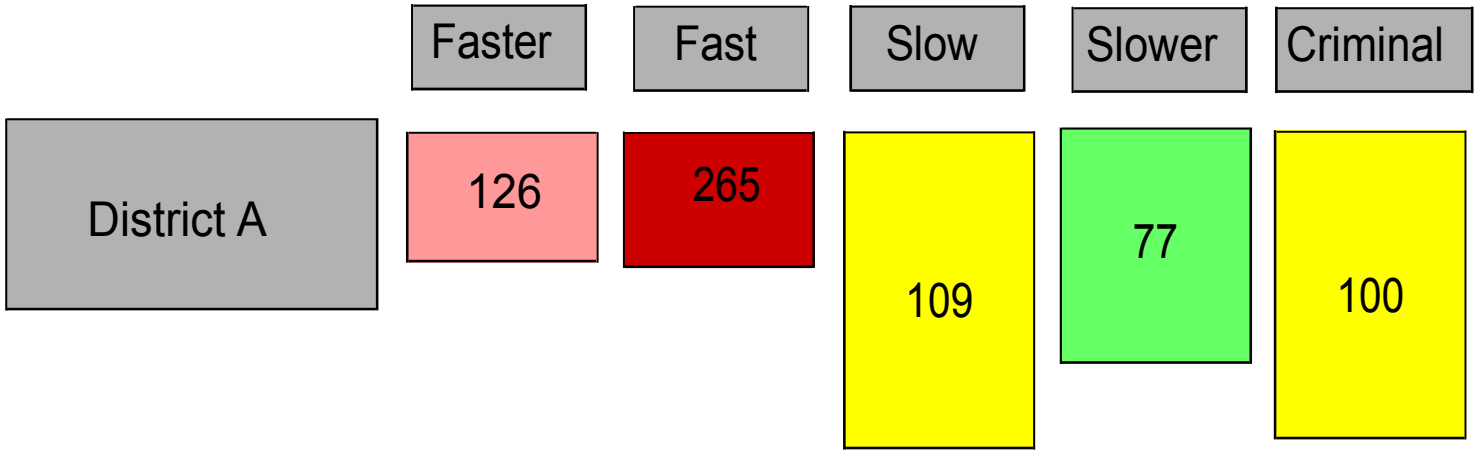

* Analysis and graphics developed by Margaret Williams, Senior Research Associate, Federal Judicial Center

District A: 2010–2012
Faster Quartile Cases
Ranked by Time*

Nature of Suit	Avg. Days to Termination	Number of Cases in District	Time Relative to National Average	Percentage of Cases in Quartile	Percentage of Cases in Docket
BANKS AND BANKING	2.00	1	1	0.61	0.10
PRISONER - PRISON CONDITION	7.00	1	3	0.61	0.10
CONSUMER CREDIT	87.50	2	51	1.21	0.20
BANKRUPTCY APPEALS RULE 28 USC 158	132.92	13	66	7.88	1.31
CONTRACT FRANCHISE	196.00	1	68	0.61	0.10
TRADEMARK	198.33	6	72	3.64	0.61
PRISONER - CIVIL RIGHTS	235.38	29	83	17.58	2.93
CIVIL RIGHTS ADA OTHER	237.00	3	88	1.82	0.30
COPYRIGHT	299.11	9	98	5.45	0.91
NATURALIZATION APPLICATION	200.00	2	120	1.21	0.20
EMPLOYEE RETIREMENT INCOME SECURITY ACT	318.95	41	120	24.85	4.14
LABOR/MANAGEMENT RELATIONS ACT	291.20	5	122	3.03	0.50
MARINE CONTRACT ACTIONS	414.15	33	137	20.00	3.33
INTERSTATE COMMERCE	427.00	1	146	0.61	0.10
FORECLOSURE	294.60	5	159	3.03	0.50
RENT, LEASE, EJECTMENT	350.50	2	257	1.21	0.20
AIRLINE REGULATIONS	387.00	1	271	0.61	0.10
RECOVERY OF DEFAULTED STUDENT LOANS	568.00	10	399	6.06	1.01
TOTAL	258.15	165	126		

Faster					Slower

*Analysis and tables developed by Margaret Williams, Senior Research Associate, Federal Judicial Center

District A: 2010–2012
Fast Quartile Cases
Ranked by Time

Nature of Suit	Avg. Days to Termination	Number of Cases in District	Time Relative to National Average	Percentage of Cases in Quartile	Percentage of Cases in Docket
PRISONER PETITIONS -VACATE SENTENCE	239.85	61	75	26.29	6.16
CIVIL RIGHTS ACCOMMODATIONS	308.00	4	94	1.72	0.40
CONSTITUTIONALITY OF STATE STATUTES	287.00	1	99	0.43	0.10
PRISONER PETITIONS - HABEAS CORPUS	414.89	70	124	30.17	7.06
OTHER PERSONAL PROPERTY DAMAGE	576.17	6	142	2.59	0.61
DRUG RELATED SEIZURE OF PROPERTY	468.76	21	150	9.05	2.12
ASSAULT, LIBEL, AND SLANDER	523.00	5	178	2.16	0.50
OTHER REAL PROPERTY ACTIONS	477.18	11	189	4.74	1.11
OTHER STATUTORY ACTIONS	691.20	49	227	21.12	4.94
FAIR LABOR STANDARDS ACT	1278.67	3	358	1.29	0.30
ASBESTOS PERSONAL INJURY - PROD.LIAB.	4116.00	1	1280	0.43	0.10
TOTAL	852.79	232	265		

Faster					Slower

District A: 2010–2012
Slow Quartile Cases
Ranked by Time

Nature of Suit	Avg. Days to Termination	Number of Cases in District	Time Relative to National Average	Percentage of Cases in Quartile	Percentage of Cases in Docket
OTHER FORFEITURE AND PENALTY SUITS	197.53	15	59	5.15	1.51
D.I.W.C./D.I.W.W.	258.93	40	71	13.75	4.04
CIVIL RIGHTS VOTING	195.50	6	77	2.06	0.61
CIVIL RIGHTS ADA EMPLOYMENT	277.60	5	78	1.72	0.50
S.S.I.D.	281.08	25	80	8.59	2.52
MILLER ACT	287.79	14	100	4.81	1.41
OTHER LABOR LITIGATION	342.38	8	101	2.75	0.81
MARINE PERSONAL INJURY	400.00	23	104	7.90	2.32
INSURANCE	372.77	53	116	18.21	5.35
MOTOR VEHICLE PERSONAL INJURY	417.96	23	118	7.90	2.32
OTHER FRAUD	432.25	4	193	1.37	0.40
OTHER CONTRACT ACTIONS	663.42	66	212	22.68	6.66
TAX SUITS	754.67	9	109	3.09	0.91
TOTAL	375.53	291			

Faster					Slower

District A: 2010–2012
Slower Quartile Cases
Ranked by Time

Nature of Suit	Avg. Days to Termination	Number of Cases in District	Time Relative to National Average	Percentage of Cases in Quartile	Percentage of Cases in Docket
CIVIL (RICO)	9.33	3	2	0.99	0.30
SECURITIES, COMMODITIES, EXCHANGE	56.00	1	7	0.33	0.10
PERSONAL INJURY - PRODUCT LIABILITY	284.09	23	34	7.59	2.32
PATENT	153.00	1	58	0.33	0.10
OTHER PERSONAL INJURY	417.06	66	58	21.78	6.66
PROPERTY DAMAGE -PRODUCT LIABILTY	252.67	6	63	1.98	0.61
ENVIRONMENTAL MATTERS	328.79	29	64	9.57	2.93
AIRPLANE PERSONAL INJURY	296.75	4	64	1.32	0.40
OTHER CIVIL RIGHTS	235.45	88	81	29.04	8.88
OVERPAYMENTS UNDER THE MEDICARE ACT	303.00	2	92	0.66	0.20
LAND CONDEMNATION	618.50	2		0.66	0.20
FEDERAL EMPLOYERS' LIABILITY	425.00	1	94	0.33	0.10
CIVIL RIGHTS JOBS	403.33	21	151	6.93	2.12
TORTS TO LAND	673.25	4	158	1.32	0.40
MEDICAL MALPRACTICE	658.71	49	159	16.17	4.94
BANKRUPTCY WITHDRAWAL 28 USC 157	441.33	3	77	0.99	0.30
TOTAL	347.27	303			

Faster					Slower

Attachment 2

Explanation of the Civil Case Disposition Time Dashboard

Margaret Williams
Federal Judicial Center

Civil Case Disposition Dashboard for U.S. District Courts

Courts often want to know how slowly or quickly they dispose of particular types of cases, relative to the national average. To that end, the Federal Judicial Center has compiled statistics on civil case terminations for each district and has placed the information in an electronic case termination dashboard. The dashboard allows a court to see its disposition time on each nature of suit, relative to the national average, and then drill down to the underlying case information. This drill down capability allows a court to see any problem areas where additional resources may be needed to help cases terminate more quickly. By looking at cases that terminated slowly in the past, courts can learn to better manage cases in the future.

Understanding the Dashboard – Case Terminations

The basic idea behind a dashboard is to allow a court to see at a glance which nature of suit (NOS) codes it disposes of slowly and which NOS codes it disposes of quickly. This information is displayed in a treemap (see the example below for hypothetical District 12). The overall graphic represents the total terminated civil caseload in District 12 for calendar years 2012–2014. Each of the individual boxes is the proportion of the court's terminated civil caseload represented by each NOS code. Larger boxes mean the NOS code is a larger proportion of the civil caseload.

In treemaps, the color of the boxes is meaningful as well. Red boxes show NOS codes District 12 terminates slower than the national average: the dark red boxes are the slowest cases (more than 50% slower than the national average) and the light red boxes are slow but not as slow (16%–50% slower). Green boxes are the NOS codes the court terminates faster than the national average: again, the dark green boxes are the fastest cases (more than 50% faster), and the light green boxes are fast but not as fast (16%–50% faster). Boxes in beige show an NOS code disposed of in approximately the same time as the national average (within 15% of the national average).

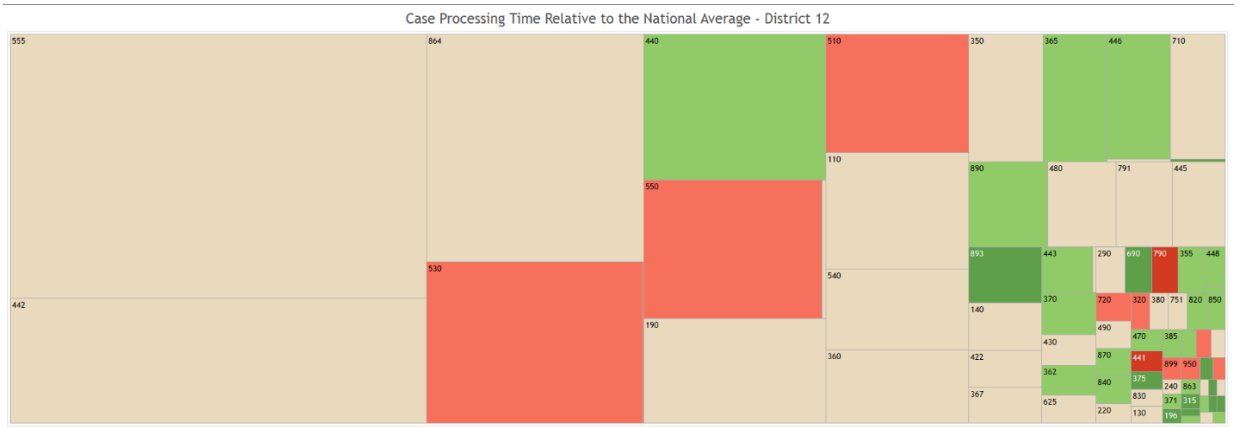

As the user hovers over the boxes, a tooltip appears that provides the specific NOS description, the court's average case disposition time, the national average disposition time, the court's overall disposition score relative to the national average, and the number of cases the court terminated in this time period. In the example below, we can see that District 12 terminated NOS 530, Prisoner Petitions – Habeas Corpus, on average, in 418 days, which is 31.75% slower than the national average of 317 days. This NOS code is a relatively large proportion of the docket (it is the largest red box in the treemap above), with 255 cases terminated between 2012 and 2014.

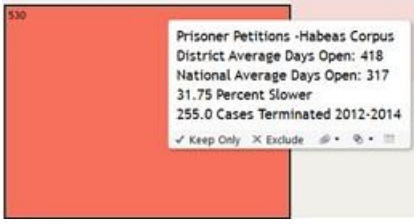

At the bottom of the dashboard, the user can see the cases used to calculate the district's average disposition times, organized by nature of suit and docket number (see below). Also listed are the plaintiffs and defendants for each case and the total number of days, from filing to termination, that the case was open.

Cases Terminated 2012-2014

NOS Code	Natureofsuit	Docket	Plaintiff	Defendant	Days
110	Insurance	05-00831	SMITH	SMITH	66
		08-00019	MAPP	GEORGIA DEPARTMENT OF C, ET AL	760
		09-00169	CULVER, ET AL	UNITED STATES OF AMERICA	94
		09-00375	HOLTCAMP	GLOBAL MEDICAL SAFETY DIVISION	822
		09-00574	NINO	MACY'S RETAIL HOLDINGS, INC.	383
		09-00713	BATISTE	LAWRENCE	380
		09-00780	ELLIS	JACKSON NATIONAL LIFE I, ET AL	324
		09-01055	BROOKS FARMS, INC.	AGRICOMMODITIES, INC., ET AL	564
		10-00222	JOHNSON	KEITH, ET AL	167
		10-00242	FRAZIER	HAYNES	748
		10-00502	GOMEZ	COLVIN	153
		10-00531	PERRY	FORT WAYNE CITY OF, IN, ET AL	70
		10-00611	BELL	MCCANN, ET AL	55
		10-00842	SHAKIR	DONAHOE, ET AL	64
		10-00858	SELLERS	SOCIAL SECURITY ADMINISTRATION	322
		10-00969	BAILEY	WALGREEN CO., ET AL	166

As the user clicks on each box in the treemap, the list of cases will filter to show only the cases within the selected nature of suit (see example on next page). To remove the filter, the user clicks on the selected box again and the screen reverts to the complete treemap.

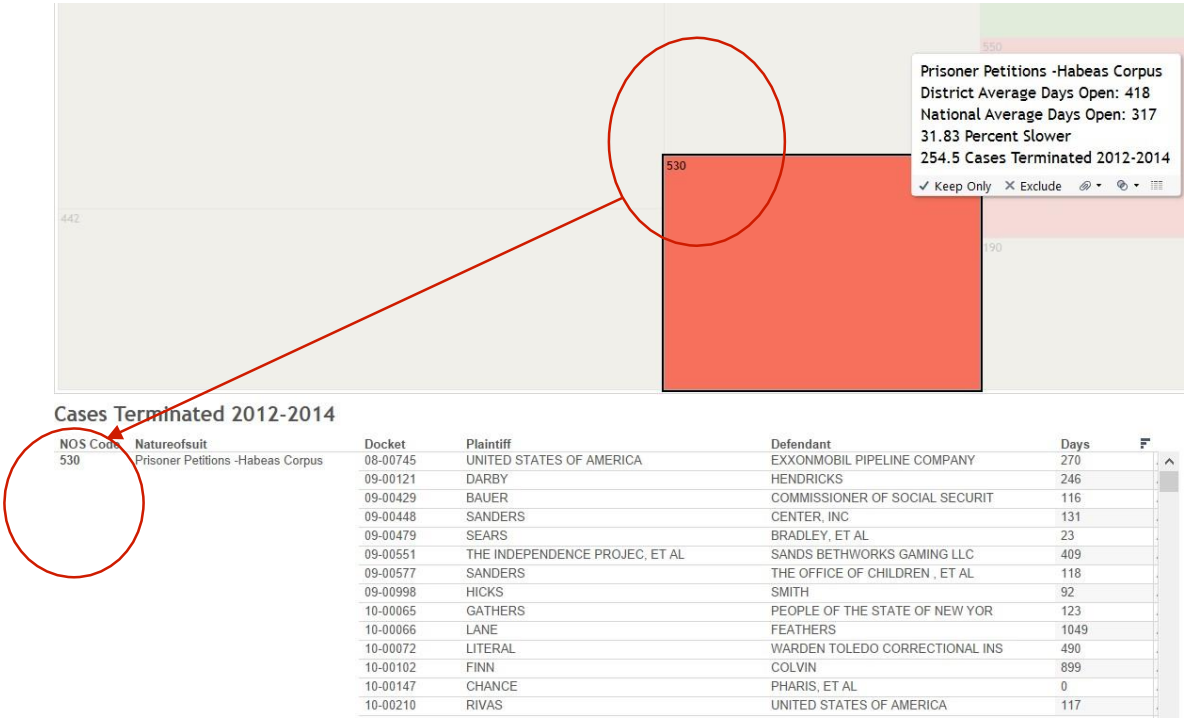

NOS Code	Natureofsuit	Docket	Plaintiff	Defendant	Days
530	Prisoner Petitions -Habeas Corpus	08-00745	UNITED STATES OF AMERICA	EXXONMOBIL PIPELINE COMPANY	270
		09-00121	DARBY	HENDRICKS	246
		09-00429	BAUER	COMMISSIONER OF SOCIAL SECURIT	116
		09-00448	SANDERS	CENTER, INC	131
		09-00479	SEARS	BRADLEY, ET AL	23
		09-00551	THE INDEPENDENCE PROJEC, ET AL	SANDS BETHWORKS GAMING LLC	409
		09-00577	SANDERS	THE OFFICE OF CHILDREN , ET AL	118
		09-00998	HICKS	SMITH	92
		10-00065	GATHERS	PEOPLE OF THE STATE OF NEW YOR	123
		10-00066	LANE	FEATHERS	1049
		10-00072	LITERAL	WARDEN TOLEDO CORRECTIONAL INS	490
		10-00102	FINN	COLVIN	899
		10-00147	CHANCE	PHARIS, ET AL	0
		10-00210	RIVAS	UNITED STATES OF AMERICA	117

If a court would like to know which cases were used to estimate their case disposition time for all NOS codes, they can download it directly from the software, or contact the FJC and we will provide it.

Understanding the Dashboard – National NOS Disposition Time

The second tab of the dashboard shows the average time to case disposition by NOS code, from the slowest to the fastest nationally, as well as a district's average time on each nature of suit. This tab presents the same basic information as the treemap (showing where a district is slower or faster than the national average) but in a different way. The bar is the district's average disposition time, and the black dash is the national average disposition time.

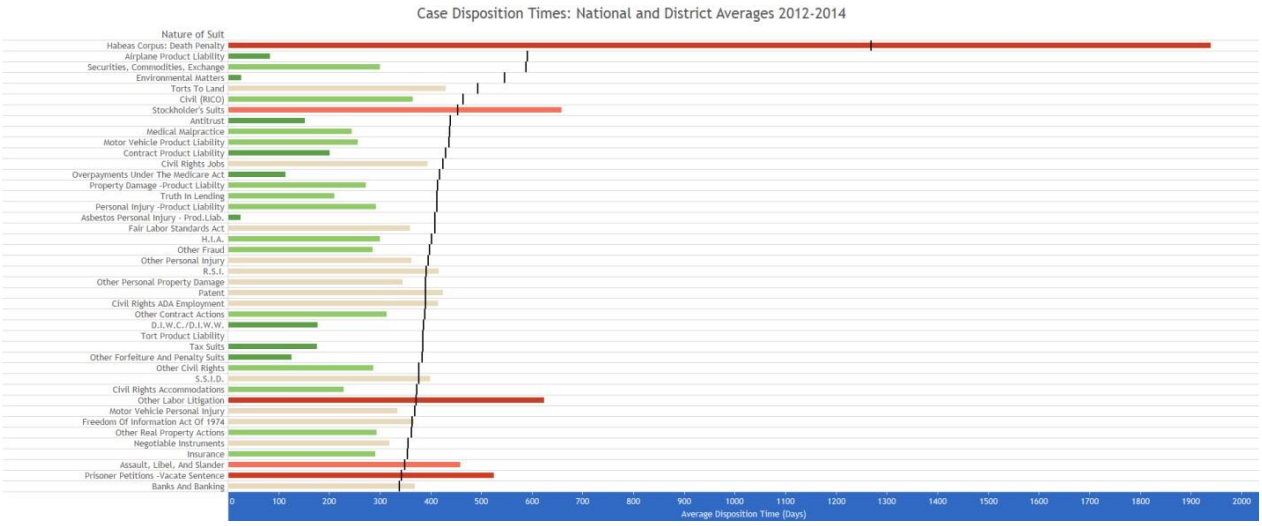

If a district is slower than the national average, the bar runs past the dash and is colored accordingly (dark red >50% slower, light red 16%–50% slower than the national average). If a district is faster than the national average, the bar stops before the black dash and is colored according to the time (dark green >50% faster, light green 16%–50% faster than the national average). District times within 15% of the national average are colored beige.

The sorting of the chart provides a different piece of information than the treemap: which cases take a long time, on average, for all districts to terminate and which ones are terminated, on average, much more quickly. While a court may know from experience that Habeas Corpus: Death Penalty cases are slow to terminate, seeing that they take, on average, twice as long nationwide as airplane product liability cases may be surprising. If courts are looking for a benchmark for case disposition time, the range of 400 and 500 days to termination is a good benchmark to keep in mind, as most civil case termination times fall into this range.

Who to Contact

Users with questions about how to use the dashboard or what other avenues might be explored may contact Margie Williams, Senior Research Associate, at the Federal Judicial Center (mwilliams@fjc.gov , 202-502-4080).

Attachment 3

Example Email Sent to Chief Judge and Clerk of Court in "Most Congested" Districts in Preparation for Telephone Interview

From: Donna Stienstra/DCA/FJC/USCOURTS
To: Chief Judge _____
Cc: Clerk of Court_____, Richard Arcara/NYWD/02/USCOURTS@USCOURTS, Larry Baerman/NYND/02/USCOURTS@USCOURTS, Jane MacCracken/DCA/AO/USCOURTS@USCOURTS
Date: _____
Subject: Preparation for conference call

Dear Chief Judge_:

As you know, Judge Arcara, Larry Baerman, Jane MacCracken, and I will be talking with you and [clerk's name] on_____about the caseload of your district. The conversation is part of an initiative of the Court Administration and Case Management Committee (CACM), which was asked some years ago by the Judicial Conference Executive Committee to monitor district court caseloads.

Our conversation will be based on a set of tables you received several weeks ago. During the call we would like to talk with you about the types of cases that both (1) make up a substantial portion of your civil caseload and (2) are disposed of significantly more slowly than the national average for all district courts. The point of the discussion is to determine whether the court would want assistance in resolving the slower cases and what kind of assistance might be helpful.

We know your district's prisoner cases fit the description of large caseloads that are significantly slower than national averages in disposition time. For example, if you look at the table titled "Faster Quartile Cases", you can see that your district disposed of 633 prisoner civil rights cases in the years 2010-2012 and took, on average, 865 days to dispose of these cases -- or 205% longer than the national average. Habeas corpus cases, which are in the table labeled "Fast Quartile Cases", are another example, with 551 cases taking, on average, 680 days to dispose of, or 104% longer than the national average.

Below I list several additional case types we might discuss with you. You can find the information about these case types in the tables you received (which I have enclosed again below, along with information about how to interpret the tables). These case types accounted for a substantial number of the cases disposed of by your court in 2010-2012 and took substantially longer to dispose of than these case types did nationwide.

Faster Quartile	Consumer Credit	895 cases, 213 days to disposition	23% longer than the national ave.
	Foreclosure	114 cases, 264 days to disposition	43% longer than the national ave.
	ERISA	132 cases, 575 days to disposition	117% longer than the national ave.
Fast Quartile	Other Stat. Actions	162 cases, 400 days to disposition	31% longer than the national ave.
	FSLA	47 cases, 1029 days to disposition	188% longer than the national ave.
Slow Quartile	Insurance	66 cases, 518 days to disposition	58% longer than the national ave.
	Oth. Contr.Actions	200 cases, 574 days to disposition	67% longer than the national ave.
	Motor Vehicle PI	84 cases, 625 days to disposition	74% longer than the national ave.
Slower Quartile	Civil Rights Jobs	387 cases, 694 days to disposition	77% longer than the national ave.
	Other Civil Right	393 cases, 715 days to disposition	94% longer than the national ave.

During our conversation on_____, we'll be interested in your thoughts about the longer-than-average disposition times for the case types listed above, particularly what might explain the longer disposition times --- for example, characteristics of the cases themselves, relevant features of the bench or bar, or other conditions in the district. And if there are other case types or other features of the district you would like to discuss, we welcome your thoughts on those as well.

In the meantime, if you have any questions, please don't hesitate to call me. We look forward to talking with you.

Sincerely,

Donna Stienstra

Federal Judicial Center
Washington, DC
202-502-4081

Attachment: "Caseload Tables, [District Name], March 2013.pdf"

Attachment 4

Example Email Sent to Chief Judge and Clerk of Court in "Expedited" Districts in Preparation for Telephone Interview

125-002193

From: Donna Stienstra/DCA/FJC/USCOURTS
To: Chief Judge _____
Cc: Clerk of Court_____, Richard Arcara/NYWD/02/USCOURTS@USCOURTS, Larry Baerman/NYND/02/USCOURTS@USCOURTS, Jane MacCracken/DCA/AO/USCOURTS@USCOURTS
Date: _____
Subject: Preparation for conference call

Dear Chief Judge_:

I'm writing on behalf of Judge Richard Arcara, Larry Baerman, Jane MacCracken, and myself with regard to the conversation scheduled with you and {clerk of court name] next week. That conversation, which will focus on your district's civil caseload, is part of an initiative of the Court Administration and Case Management Committee (CACM), which was asked some years ago by the Judicial Conference Executive Committee to monitor district court caseloads. Last fall we talked with seven district courts that terminate their civil caseloads more slowly than the national average. This fall we're talking with seven courts that terminate their caseloads more quickly than the national average.

The call with you and [clerk's name] is scheduled for_____at_____. The call-in number is 888-398-2342# and the access code is 3487491#.

Our conversation will be based on a set of tables you received with a letter from Judge Julie Robinson, CACM Committee chair, August 15, 2014 (attached below). As you know from the letter, the CACM Committee selected your court for an interview because you dispose of your civil caseload expeditiously compared to average disposition times nationally.

The purpose of the call is to understand how caseloads move and to identify any procedures, best practices, judicial or staff habits, etc. that could be adopted by other courts to expedite their civil caseloads. During the call we would like to talk with you about practices your court uses that foster expedited disposition times for civil cases. These practices might include judicial case management procedures, methods for tracking the caseload and identifying bottlenecks, pilot projects used to expedite specific types of cases, use of clerk's office and chambers staff, role of the magistrate judges, articulation of goals for the court, relevant features of the bench or bar, or any other conditions in the district.

In addition to the general discussion outlined above, we're interested in several specific questions:

1. We'd like to know whether your court has had slow disposition times for some types of civil cases and has overcome those slow disposition times. If so, what did the court do to bring disposition times under control?

2. Your court has disposition times near or better than the national average for some types of cases that are very slow in courts with backlogged civil caseloads--e.g., ERISA cases, consumer credit cases, prisoner civil rights cases, habeas petitions, Social Security cases, and employment civil rights cases. What does your court do to keep these case types moving quickly to disposition?

3. Given your court's expeditious processing of most of its caseload, the occasional very slow case type stands out. What is the nature of the court's "Civil rights ADA other" cases, for example, that makes them

considerably slower than the national average in disposition time?

We look forward to talking with you and, later in the project, using your experience and best practices to assist other courts. Thank you for being willing to assist the Committee with this project.

If you have any questions before we talk next week, please don't hesitate to call me.

Sincerely,

Donna Stienstra

Federal Judicial Center
Washington, DC
202-502-4081

See attached file: “Civil Caseload Analysis, [district name].pdf”

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126-002196

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

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CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

TO: Hon. Jeffrey S. Sutton, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. John D. Bates, Chair
Advisory Committee on Civil Rules

RE: Report of the Advisory Committee on Civil Rules

DATE: May 12, 2016

Introduction

The Civil Rules Advisory Committee met in Palm Beach, Florida, on April 14, 2016. Draft Minutes of this meeting are attached.

Part I of this Report presents recommendations to approve publication this summer of proposed amendments to Civil Rules 5 (e-filing and e-service); 23 (class actions); and 62 (stays of execution of judgment).

Part II presents a recommendation to approve submission to the Judicial Conference of the United States two proposed pilot projects. One project would test a system of mandatory initial discovery requests to be adopted in each participating court. The second would test the effectiveness of court-wide adoption of practices that, under the current rules, have proved effective in reducing cost and delay. The Committee on Court Administration and Court Management has participated in the work that shaped these projects. It is understood on all sides that the projects will evolve as they move along the path to implementation, both in the interlude before presentation to the Judicial Conference and, if approved, in the actual implementation period thereafter.

Part III describes other work. The first segment describes proposals under active consideration for eventual publication and adoption. These proposals include a new subdivision in Rule 5.2 that would establish a procedure for redacting information that was improperly included in a court filing; a renewal of the extensive work that was done ten years ago to evaluate concerns about the operation of Rule 30(b)(6)(deposition of an entity); and consideration of the Rule 81(c) provisions for demanding a jury trial after a case is removed from state court. The second segment briefly notes action on a number of suggestions that were submitted to the Committee through the public submission process.

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I. RECOMMENDATIONS FOR PUBLICATION

A. RULE 23

The Civil Rules Advisory Committee recommends publication of the following preliminary draft of amendments to Rule 23.

Rule 23. Class Actions

* * * * *

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

* * * * *

(2) ***Notice.***

* * * * *

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by United States mail, electronic means, or other appropriate means.
* * * * *

* * * * *

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) ***Notice to the Class.***

(A) *Information That Parties Must Provide to the Court.* The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) *Grounds for a Decision to Give Notice.* The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(e)(2); and

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43
44 **(ii)** certify the class for purposes of judgment on the proposal.
45
46 **(2)** ***Approval of the Proposal.*** If the proposal would bind class members under
47 Rule 23(c)(3), the court may approve it only after a hearing and only on
48 finding that it is fair, reasonable, and adequate after considering whether:~~.~~
49
50 **(A)** the class representatives and class counsel have adequately
51 represented the class;
52
53 **(B)** the proposal was negotiated at arm's length;
54
55 **(C)** the relief provided for the class is adequate, taking into account:
56
57 **(i)** the costs, risks, and delay of trial and appeal;
58
59 **(ii)** the effectiveness of the proposed method of distributing relief
60 to the class, including the method of processing class-member
61 claims, if required;
62
63 **(iii)** the terms of any proposed award of attorney's fees, including
64 timing of payment; and
65
66 **(iv)** any agreement required to be identified under Rule 23(e)(3);
67 and
68
69 **(D)** class members are treated equitably relative to each other.
70
71 **(3)** ***Identification of Side Agreements.*** The parties seeking approval must file
72 a statement identifying any agreement made in connection with the proposal.
73
74 **(4)** ***New Opportunity to Be Excluded.*** If the class was previously certified under
75 Rule 23(b)(3), the court may refuse to approve a settlement unless it affords
76 a new opportunity to request exclusion to individual class members who had
77 an earlier opportunity to request exclusion but did not do so.
78
79 **(5)** ***Class-Member Objections.***
80
81 **(A)** *In General.* Any class member may object to the proposal if it
82 requires court approval under this subdivision (e)~~; the objection may~~
83 ~~be withdrawn only with the court's approval~~. The objection must
84 state whether it applies only to the objector, to a specific subset of the
85 class, or to the entire class, and also state with specificity the grounds
86 for the objection.
87
88 **(B)** *Court Approval Required For Payment to an Objector or Objector's*
89 *Counsel.* Unless approved by the court after a hearing, no payment
90 or other consideration may be provided to an objector or objector's
91 counsel in connection with:
92
93 **(i)** forgoing or withdrawing an objection, or

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(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) *Procedure For Approval After an Appeal.* If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

* * * * *

(f) **Appeals.** A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). ~~if a petition for to appeal is filed~~ A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered, or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Committee Note

Rule 23 is amended mainly to address issues related to settlement, and also to take account of issues that have emerged since the rule was last amended in 2003.

Subdivision (c)(2). As amended, Rule 23(e)(1) provides that the court must direct notice to the class regarding a proposed class-action settlement only after determining that the prospect of class certification and approval of the proposed settlement justifies giving notice. This decision is sometimes inaccurately called "preliminary approval" of the proposed class certification in Rule 23(b)(3) actions, and it is common to send notice to the class simultaneously under both Rule 23(e)(1) and Rule 23(c)(2)(B), including a provision for class members to decide by a certain date whether to opt out. This amendment recognizes the propriety of this notice practice. Requiring repeat notices to the class can be wasteful and confusing to class members, and costly as well.

Subdivision (c)(2) is also amended to recognize contemporary methods of giving notice to class members. Since *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), interpreted the individual notice requirement for class members in Rule 23(b)(3) class actions, many courts read the rule to require notice by first class mail in every case. But technological change since 1974 has meant that other forms of communication are more reliable and important to many. Courts and counsel have begun to employ new technology to make notice more effective, and sometimes less costly. Because there is no reason to expect that technological change will halt soon, courts giving notice under this rule should consider existing technology, including class members' likely access to such technology, when selecting a method of giving notice.

Rule 23(c)(2)(B) is amended to take account of these changes, and to call attention to them. The rule continues to call for giving class members "the best notice that is practicable." It does not specify any particular means as preferred. Although it may often be true that electronic methods of notice, for example by email, are the most promising, it is important to keep in mind that a significant portion of class members in certain cases may have limited or no access to email or the Internet. Instead of preferring any one means of notice, therefore, courts and counsel should focus on the means most likely to be effective in the case before the court. The amended rule emphasizes

that the court must exercise its discretion to select appropriate means of giving notice. Courts should take account not only of anticipated actual delivery rates, but also of the extent to which members of a particular class are likely to pay attention to messages delivered by different means. In providing the court with sufficient information to enable it to decide whether to give notice to the class of a proposed class-action settlement under Rule 23(e)(1), it may often be important to include a report about the proposed method of giving notice to the class.

In determining whether the proposed means of giving notice is appropriate, the court should give careful attention to the content and format of the notice and, if this notice is given under Rule 23(e)(1) as well as Rule 23(c)(2)(B), any claim form class members must submit to obtain relief. Particularly if the notice is by electronic means, care is necessary regarding access to online resources, the manner of presentation, and any response expected of class members. As the rule directs, the means should be the "best * * * that is practicable" in the given case. The ultimate goal of giving notice is to enable class members to make informed decisions about whether to opt out or, in instances where a proposed settlement is involved, to object or to make claims. Means, format, and content that would be appropriate for class members likely to be sophisticated, for example in a securities fraud class action, might not be appropriate for a class made up in significant part of members likely to be less sophisticated. As with the method of notice, the form of notice should be tailored to the class members' anticipated understanding and capabilities. The court and counsel may wish to consider the use of class notice experts or professional claims administrators.

Attention should focus also on the method of opting out provided in the notice. The proposed method should be as convenient as possible, while protecting against unauthorized opt-out notices. The process of opting out should not be unduly difficult or cumbersome. As with other aspects of the notice process, there is no single method that is suitable for all cases.

Subdivision (e). The introductory paragraph of Rule 23(e) is amended to make explicit that its procedural requirements apply in instances in which the court has not certified a class at the time that a proposed settlement is presented to the court. The notice required under Rule 23(e)(1) then should also satisfy the notice requirements of amended Rule 23(c)(2)(B) for a class to be certified under Rule 23(b)(3), and trigger the class members' time to request exclusion. Information about the opt-out rate could then be available to the court at the time that it considers final approval of the proposed settlement.

Subdivision (e)(1). The decision to give notice of a proposed settlement to the class is an important event. It should be based on a solid record supporting the conclusion that the proposed settlement will likely earn final approval after notice and an opportunity to object. The amended rule makes clear that the parties must provide the court with information sufficient to enable it to decide whether notice should be sent. At the time they seek notice to the class, the proponents of the settlement should ordinarily provide the court with all available materials they intend to submit in support of approval under Rule 23(e)(2). That would give the court a full picture and make this information available to the members of the class. The amended rule also specifies the standard the court should use in deciding whether to send notice—that notice is justified by the parties' showing regarding the likely approval of the proposal. The prospect of final approval should be measured under amended Rule 23(e)(2), which provides criteria for the final settlement review.

If the court has not previously certified a class, this showing should also provide a basis for the court to conclude that it likely will be able to certify a class for purposes of settlement. Although the order to send notice is often inaccurately called "preliminary approval" of class certification, it is not appealable under Rule 23(f). It is, however, sufficient to require notice under Rule 23(c)(2)(B) calling for class members in Rule 23(b)(3) classes to decide whether to opt out.

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There are many types of class actions and class-action settlements. As a consequence, no single list of topics to be addressed in the submission to the court would apply to each case. Instead, the subjects to be addressed depend on the specifics of the particular class action and proposed settlement. But some general observations can be made.

One key element is class certification. If the court has already certified a class, the only information ordinarily necessary in regard to a proposed settlement is whether the proposal calls for any change in the class certified, or of the claims, defenses, or issues regarding which certification was granted. But if a class has not been certified, the parties must ensure that the court has a basis for concluding that it likely will be able, after the final hearing, to certify the class. Although the standards for certification differ for settlement and litigation purposes, the court cannot make the decision regarding the prospects for certification without a suitable basis in the record. The decision to certify the class for purposes of settlement cannot be made until the hearing on final approval of the proposed settlement. If the settlement is not approved and certification for purposes of litigation is later sought, the parties' earlier submissions in regard to the proposed certification for settlement should not be considered in deciding on certification.

Regarding the proposed settlement, a great variety of types of information might appropriately be included in the submission to the court. A basic focus is the extent and type of benefits that the settlement will confer on the members of the class. Depending on the nature of the proposed relief, that showing may include details of the claims process that is contemplated and the anticipated rate of claims by class members. If the notice to the class calls for submission of claims before the court decides whether to approve the proposal under Rule 23(e)(2), it may be important to provide that the parties will report back to the court on the actual claims experience. And because some funds are frequently left unclaimed, it is often important for the settlement agreement to address the use of those funds. Many courts have found guidance on this subject in § 3.07 of the American Law Institute, Principles of Aggregate Litigation (2010).

It is important for the parties to supply the court with information about the likely range of litigated outcomes, and about the risks that might attend full litigation. In that connection, information about the extent of discovery completed in the litigation or in parallel actions may often be important. In addition, as suggested by Rule 23(b)(3)(A), information about the existence of other pending or anticipated litigation on behalf of class members involving claims that would be released under the proposal—including the breadth of any such release—may be important.

The proposed handling of an award of attorney's fees under Rule 23(h) is another topic that ordinarily should be addressed in the parties' submission to the court. In some cases, it will be important to relate the amount of an award of attorney's fees to the expected benefits to the class, and to take account of the likely claims rate. One method of addressing this issue is to defer some or all of the award of attorney's fees until the court is advised of the actual claims rate and results. Another topic that normally should be considered is any agreement that must be identified under Rule 23(e)(3).

The parties may supply information to the court on any other topic that they regard as pertinent to the determination whether the proposal is fair, reasonable, and adequate. The court may direct the parties to supply further information about the topics they do address, or to supply information on topics they do not address. It must not direct notice to the class until the parties' submissions show it is likely that the court will have a basis to approve the proposal after notice to the class and a final approval hearing.

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117 **Subdivision (e)(2).** The central concern in reviewing a proposed class-action settlement is
118 that it be fair, reasonable, and adequate. This standard emerged from case law implementing
119 Rule 23(e)'s requirement of court approval for class-action settlements. It was formally recognized
120 in the rule through the 2003 amendments. By then, courts had generated lists of factors to shed light
121 on this central concern. Overall, these factors focused on comparable considerations, but each circuit
122 developed its own vocabulary for expressing these concerns. In some circuits, these lists have
123 remained essentially unchanged for thirty or forty years. The goal of this amendment is not to
124 displace any of these factors, but rather to focus the court and the lawyers on the core concerns of
125 procedure and substance that should guide the decision whether to approve the proposal.

126 One reason for this amendment is that a lengthy list of factors can take on an independent
127 life, potentially distracting attention from the central concerns that inform the settlement-review
128 process. A circuit's list might include a dozen or more separately articulated factors. Some of those
129 factors—perhaps many—may not be relevant to a particular case or settlement proposal. Those that
130 are relevant may be more or less important to the particular case. Yet counsel and courts may feel
131 it necessary to address every single factor on a given circuit's list in every case. The sheer number
132 of factors can distract both the court and the parties from the central concerns that bear on review
133 under Rule 23(e)(2).

134 This amendment therefore directs the parties to present the settlement to the court in terms
135 of a shorter list of core concerns, by focusing on the primary procedural considerations and
136 substantive qualities that should always matter to the decision whether to approve the proposal.

137 Approval under Rule 23(e)(2) is required only when class members would be bound under
138 Rule 23(c)(3). Accordingly, in addition to evaluating the proposal itself, the court must determine
139 whether it can certify the class under the standards of Rule 23(a) and (b) for purposes of judgment
140 based on the proposal.

141 **Paragraphs (A) and (B).** These paragraphs identify matters that might be described as
142 "procedural" concerns, looking to the conduct of the litigation and of the negotiations leading up to
143 the proposed settlement. Attention to these matters is an important foundation for scrutinizing the
144 specifics of the proposed settlement. If the court has appointed class counsel or interim class
145 counsel, it will have made an initial evaluation of counsel's capacities and experience. But the focus
146 at this point is on the actual performance of counsel acting on behalf of the class.

147 The information submitted under Rule 23(e)(1) may provide a useful starting point in
148 assessing these topics. For example, the nature and amount of discovery in this or other cases, or
149 the actual outcomes of other cases, may indicate whether counsel negotiating on behalf of the class
150 had an adequate information base. The pendency of other litigation about the same general subject
151 on behalf of class members may also be pertinent. The conduct of the negotiations may be important
152 as well. For example, the involvement of a neutral or court-affiliated mediator or facilitator in those
153 negotiations may bear on whether they were conducted in a manner that would protect and further
154 the class interests.

155 In undertaking this analysis, the court may also refer to Rule 23(g)'s criteria for appointment
156 of class counsel; the concern is whether the actual conduct of counsel has been consistent with what
157 Rule 23(g) seeks to ensure. Particular attention might focus on the treatment of any award of
158 attorney's fees, with respect to both the manner of negotiating the fee award and its terms.

159 **Paragraphs (C) and (D).** These paragraphs focus on what might be called a "substantive"
160 review of the terms of the proposed settlement. The relief that the settlement is expected to provide

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161 to class members is a central concern. Measuring the proposed relief may require evaluation of the
162 proposed claims process and a prediction of how many claims will be made; if the notice to the class
163 calls for pre-approval submission of claims, actual claims experience may be important. The
164 contents of any agreement identified under Rule 23(e)(3) may also bear on the adequacy of the
165 proposed relief, particularly regarding the equitable treatment of all members of the class.

166 Another central concern will relate to the cost and risk involved in pursuing a litigated
167 outcome. Often, courts may need to forecast what the likely range of possible classwide recoveries
168 might be and the likelihood of success in obtaining such results. That forecast cannot be done with
169 arithmetic accuracy, but it can provide a benchmark for comparison with the settlement figure.

170 If the class has not yet been certified for trial, the court may consider whether certification
171 for litigation would be granted were the settlement not approved.

172 Examination of the attorney-fee provisions may also be important to assessing the fairness
173 of the proposed settlement. Ultimately, any award of attorney's fees must be evaluated under Rule
174 23(h), and no rigid limits exist for such awards. Nonetheless, the relief actually delivered to the class
175 can be an important factor in determining the appropriate fee award. Provisions for reporting back
176 to the court about actual claims experience, and deferring a portion of the fee award until the claims
177 experience is known, may bear on the fairness of the overall proposed settlement.

178 Often it will be important for the court to scrutinize the method of claims processing to
179 ensure that it facilitates filing legitimate claims. A claims processing method should deter or defeat
180 unjustified claims, but unduly demanding claims procedures can impede legitimate claims.
181 Particularly if some or all of any funds remaining at the end of the claims process must be returned
182 to the defendant, the court must be alert to whether the claims process is unduly demanding.

183 Paragraph (D) calls attention to a concern that may apply to some class action settlements—
184 inequitable treatment of some class members vis-a-vis others. Matters of concern could include
185 whether the apportionment of relief among class members takes appropriate account of differences
186 among their claims, and whether the scope of the release may affect class members in different ways
187 that affect the apportionment of relief.

188 **Subdivision (e)(3).** A heading is added to subdivision (e)(3) in accord with style
189 conventions. This addition is intended to be stylistic only.

190 **Subdivision (e)(4).** A heading is added to subdivision (e)(4) in accord with style
191 conventions. This addition is intended to be stylistic only.

192 **Subdivision (e)(5).** Objecting class members can play a critical role in the settlement-
193 approval process under Rule 23(e). Class members have the right under Rule 23(e)(5) to submit
194 objections to the proposal. The submissions required by Rule 23(e)(1) may provide information
195 important to decisions whether to object or opt out. Objections can provide the court with important
196 information bearing on its determination under Rule 23(e)(2) whether to approve the proposal.

197 **Subdivision (e)(5)(A).** The rule is amended to remove the requirement of court approval for
198 every withdrawal of an objection. An objector should be free to withdraw on concluding that an
199 objection is not justified. But Rule 23(e)(5)(B)(i) requires court approval of any payment or other
200 consideration in connection with withdrawing the objection.

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201 The rule is also amended to clarify that objections must provide sufficient specifics to enable
202 the parties to respond to them and the court to evaluate them. One feature required of objections is
203 specification whether the objection asserts interests of only the objector, or of some subset of the
204 class, or of all class members. Beyond that, the rule directs that the objection state its grounds "with
205 specificity." Failure to provide needed specificity may be a basis for rejecting an objection. Courts
206 should take care, however, to avoid unduly burdening class members who wish to object, and to
207 recognize that a class member who is not represented by counsel may not present objections that
208 adhere to technical legal standards.

209 **Subdivision (e)(5)(B).** Good-faith objections can assist the court in evaluating a proposal
210 under Rule 23(e)(2). It is legitimate for an objector to seek payment for providing such assistance
211 under Rule 23(h). As recognized in the 2003 Committee Note to Rule 23(h): "In some situations,
212 there may be a basis for making an award to other counsel whose work produced a beneficial result
213 for the class, such as * * * attorneys who represented objectors to a proposed settlement under
214 Rule 23(e)."

215 But some objectors may be seeking only personal gain, and using objections to obtain
216 benefits for themselves rather than assisting in the settlement-review process. At least in some
217 instances, it seems that objectors—or their counsel—have sought to extract tribute to withdraw their
218 objections or dismiss appeals from judgments approving class settlements. And class counsel
219 sometimes may feel that avoiding the delay produced by an appeal justifies providing payment or
220 other consideration to these objectors.

221 The court-approval requirement currently in Rule 23(e)(5) partly addresses this concern.
222 Because the concern only applies when consideration is given in connection with withdrawal of an
223 objection, however, the amendment requires approval under Rule 23(e)(5)(i) only when
224 consideration is involved. The term "consideration" should be broadly interpreted, particularly when
225 the withdrawal includes some arrangements beneficial to objector counsel. If the consideration
226 involves a payment to counsel for an objector, the proper procedure is by motion under Rule 23(h)
227 for an award of fees; the court may approve the fee if the objection assisted the court in
228 understanding and evaluating the settlement even though the settlement was approved as proposed.

229 Rule 23(e)(5)(B)(ii) applies to consideration in connection with forgoing, dismissing, or
230 abandoning an appeal from a judgment approving the proposal. Because an appeal by a class-action
231 objector may produce much longer delay than an objection before the district court, it is important
232 to extend the court-approval requirement to apply in the appellate context. The district court is best
233 positioned to determine whether to approve such arrangements; hence, the rule requires that the
234 motion seeking approval be made to the district court.

235 Until the appeal is docketed by the circuit clerk, the district court may dismiss the appeal on
236 stipulation of the parties. See Fed. R. App. P. 42(a). Thereafter, the court of appeals has authority
237 to decide whether to dismiss the appeal. This rule's requirement of district court approval of any
238 consideration in connection with such dismissal by the court of appeals has no effect on the authority
239 of the court of appeals over the appeal. It is, instead, a requirement that applies only to providing
240 consideration in connection with forgoing, dismissing, or abandoning an appeal. A party dissatisfied
241 with the district court's order under Rule 23(e)(5)(B) may appeal the order.

242 **Subdivision (e)(5)(C).** Because the court of appeals has jurisdiction over an objector's
243 appeal from the time that it is docketed in the court of appeals, the procedure of Rule 62.1 applies.
244 That procedure does not apply after the court of appeals' mandate returns the case to the district
245 court.

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246 **Subdivision (f).** As amended, Rule 23(e)(1) provides that the court should direct notice to
247 the class regarding a proposed class-action settlement in cases in which class certification has not
248 yet been granted only after determining that the prospect of eventual class certification justifies
249 giving notice. This decision is sometimes inaccurately characterized as "preliminary approval" of
250 the proposed class certification. But it does not grant or deny class certification, and review under
251 Rule 23(f) would be premature. This amendment makes it clear that an appeal under this rule is not
252 permitted until the district court decides whether to certify the class.

253 The rule is also amended to extend the time to file a petition for review of a class-action
254 certification order to 45 days whenever a party is the United States, one of its agencies, or a United
255 States officer or employee sued for an act or omission occurring in connection with duties performed
256 on the United States' behalf. In such a case, the extension applies to a petition for permission to
257 appeal by any party. The extension of time recognizes—as under Rules 4(i) and 12(a) and Appellate
258 Rules 4(a)(1)(B) and 40(a)(1)—that the United States has a special need for additional time in regard
259 to these matters. The extension applies whether the officer or employee is sued in an official
260 capacity or an individual capacity; the defense is usually conducted by the United States even though
261 the action asserts claims against the officer or employee in an individual capacity. An action against
262 a former officer or employee of the United States is covered by this provision in the same way as an
263 action against a present officer or employee. Termination of the relationship between the individual
defendant and the United States does not reduce the need for additional time.

Report on Topics Still Under Study

After the Rule 23 Subcommittee gave careful attention to a range of topics not specifically included in the above preliminary draft of proposed amendments to Rule 23, it decided not to proceed with several of them. It also recommended that two additional topics remain under study, and the Advisory Committee approved that decision. Below is a brief summary of those two topics.

Pick-off issues: In recent years, there have been a number of instances in which defendants in putative class actions have sought to "pick off" the named class representative by offering all the individual relief he or she could obtain and moving to dismiss on grounds of mootness. In *Campbell-Ewald Co. v. Gomez*, 136 S.Ct. 663 (2016), the Supreme Court held that such an offer does not moot a case because "an unaccepted settlement offer has no force." The decision left open the possibility, however, that the outcome could be different if the defendant deposited the money in court and consented to entry of judgment against it in favor of the putative class representative. The Rule 23 Subcommittee has been monitoring activity in the lower courts since the Supreme Court's decision. If pick-off issues continue to be important, it may return to considering these issues.

This recent discussion has also caused the Subcommittee to focus on the possibility of specifying in Rule 23 that the court must or may afford counsel time to find a replacement class representative if the initial proposed representative proves unable to continue in that role.

Ascertainability: The lower courts have, in recent years, fairly frequently addressed arguments about whether the membership in a proposed class was sufficiently ascertainable to support certification. The extent to which the lower courts' views differ on this subject remains uncertain. In two cases (from the Sixth and Seventh Circuits), the Supreme Court has denied certiorari this year. Given the evolving state of this doctrine in the lower courts, and the initial difficulties the Rule 23 Subcommittee encountered in drafting possible amendments to address this

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issue, no proposal for amendment was brought forward. Nonetheless, the issue seemed to have sufficient currency and importance to be retained on the Subcommittee's agenda.

B. RULE 62

The Rule 62 provisions for staying execution were brought to the Committee and to the Appellate Rules Committee by independent and distinct questions. This Committee was asked about an apparent "gap" between the 14-day automatic stay provided by Rule 62(a) and the authority to issue a stay "pending disposition of" a post-judgment motion that might not be made until a time after expiration of the automatic stay. The Appellate Rules Committee was asked about authority to post security in a form other than a bond, and about authority to post a single security in a form that lasts through post-judgment proceedings in the district court and the conclusion of all proceedings on appeal. The Committee recommends approval of the following amendments for publication. They address all three of the questions that prompted the inquiry.

The groundwork has been laid by a subcommittee that includes representatives of the Appellate and Civil Rules Committees. Judge Scott Matheson chaired the subcommittee. The subcommittee began work on the three topics that launched the project, but also developed complicated drafts that sought to address several questions not treated in Rule 62. Many of the complications proved too difficult to address with any confidence. The drafts were then simplified. These simpler drafts were discussed both in the advisory committees and in the Standing Committee. These discussions continued to prune away provisions that directly recognized open-ended district-court authority to grant, amend, or deny stays, with or without security. In the end, the proposal is limited to address only the three questions that started the work. It eliminates the "gap" at the end of the automatic stay by extending the stay from 14 days to 30 days, and qualifies the automatic stay by allowing the court to order otherwise. Security can be posted by bond or in other forms; as in the present rule, the court must approve either the bond or a different form of security. And the security can be posted on terms that continue from the time it is approved to the time specified in the bond or security.

Subdivisions (a) through (d) of present Rule 62 are rearranged to bring related provisions closer together, easing the reader's path through the rule. The remaining subdivisions, (e) through (h), are left unchanged. They were thoroughly explored in a memorandum prepared by Professor Struve as Reporter for the Appellate Rules Committee, and were considered by the subcommittee. In the end, it seemed better to leave them as they are.

The rearrangement of subdivisions (a) through (d) is so thorough that presentation in the traditional over- and underline form can be hard to follow. That version is left to the end. First comes the clean text of the rule as proposed for publication, including the Committee Note. The Committee Note provides a deliberately spare explanation of the underlying purposes. A somewhat more elaborate explanation follows, and it is then followed by the over- and underline version that illustrates the changes and rearrangement of the rule text.

Rule 62 Proposed for Publication

1 **Rule 62. Stay of Proceedings to Enforce a Judgment.**

2 **(a) Automatic Stay.** Except as provided in Rule 62(c) and (d), execution on a judgment and
3 proceedings to enforce it are stayed for 30 days after its entry, unless the court orders
4 otherwise.

5 **(b) Stay by Bond or Other Security.** At any time after judgment is entered, a party may obtain a
6 stay by providing a bond or other security. The stay takes effect when the court approves the
7 bond or other security and remains in effect for the time specified in the bond or security.

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(c) No Automatic Stay of an Injunction, Receivership, or Patent-Accounting Order. Unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

(1) an interlocutory or final judgment in an action for an injunction or a receivership; or
(2) a judgment or order that directs an accounting in an action for patent infringement.

(d) Injunction Pending an Appeal. While an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:

(1) by that court sitting in open session; or
(2) by the assent of all its judges, as evidenced by their signatures.

* * * * *

Committee Note

Subdivisions (a), (b), (c), and (d) of former Rule 62 are reorganized and the provisions for staying a judgment are revised.

The provisions for staying an injunction, receivership, or order for a patent accounting are reorganized by consolidating them in new subdivisions (c) and (d). There is no change in meaning. The language is revised to include all of the words used in 28 U.S.C. § 1292(a)(1) to describe the right to appeal from interlocutory actions with respect to an injunction, but subdivisions (c) and (d) apply both to interlocutory injunction orders and to final judgments that grant, refuse, or otherwise deal with an injunction.

New Rule 62(a) extends the period of the automatic stay to 30 days. Former Rule 62(a) set the period at 14 days, while former Rule 62(b) provided for a court-ordered stay "pending disposition of" motions under Rules 50, 52, 59, and 60. The time for making motions under Rules 50, 52, and 59, however, was later extended to 28 days, leaving an apparent gap between expiration of the automatic stay and any of those motions (or a Rule 60 motion) made more than 14 days after entry of judgment. The revised rule eliminates any need to rely on inherent power to issue a stay during this period. Setting the period at 30 days coincides with the time for filing most appeals in civil actions, providing a would-be appellant the full period of appeal time to arrange a stay by other means. A thirty-day automatic stay also suffices in cases governed by a 60-day appeal period.

Amended Rule 62(a) expressly recognizes the court's authority to dissolve the automatic stay or supersede it by a court-ordered stay. One reason for dissolving the automatic stay may be a risk that the judgment debtor's assets will be dissipated. Similarly, it may be important to allow immediate execution of a judgment that does not involve a payment of money. The court may address the risks of immediate execution by ordering dissolution of the stay only on condition that security be posted by the judgment creditor. Rather than dissolve the stay, the court may choose to supersede it by ordering a stay that lasts longer or requires security.

Subdivision 62(b) carries forward in modified form the supersedeas bond provisions of former Rule 62(d). A stay may be obtained under subdivision (b) at any time after judgment is entered. Thus a stay may be obtained before the automatic stay has expired, or after the automatic

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28 stay has been lifted by the court. The new rule's text makes explicit the opportunity to post security
29 in a form other than a bond. The stay takes effect when the court approves the bond or other security
30 and remains in effect for the time specified in the bond or security—a party may find it convenient
31 to arrange a single bond or other security that persists through completion of post-judgment
32 proceedings in the trial court and on through completion of all proceedings on appeal by issuance
33 of the appellate mandate. This provision does not supersede the opportunity for a stay under 28
34 U.S.C. § 2101(f) pending review by the Supreme Court on certiorari. Finally, subdivision (b)
35 changes the provision in former subdivision (d) that "an appellant" may obtain a stay. Under new
36 subdivision (b), "a party" may obtain a stay. For example, a party may wish to secure a stay pending
37 disposition of post-judgment proceedings after expiration of the automatic stay, not yet knowing
38 whether it will want to appeal.

Further Discussion

The Appellate Rules Committee took up Rule 62 at the suggestion of a member who was interested in making it clear that a judgment debtor can secure a stay by posting continuing security, whether as a bond or by other means, that will last from termination of the automatic stay through completion of all acts by the court of appeals. This beginning led to a comprehensive report by Professor Struve, Reporter for the Committee, examining many different aspects of Rule 62 stays.

The Civil Rules Committee first looked at Rule 62 in response to a question raised by a district judge. The question grew from a complication in the relationship between automatic stays and the authority to order a stay pending disposition of a post-judgment motion. The complication arose from the Time Computation Project that led each of the several advisory committees to reset many of the time periods set in the various sets of rules. Before the Time Project changes, Civil Rules 50, 52, and 59 set the time for motions at 10 days after entry of judgment. Rule 62(a) extinguished the automatic stay 10 days after entry of judgment. Rule 62(b) recognized authority to issue a stay pending disposition of a motion under Rules 50, 52, 59, or 60. The Time Project reset the time for motions under Rules 50, 52, or 59 at 28 days. It also reset expiration of the automatic stay at 14 days after entry of judgment. The result was that the automatic stay expired half-way through the time allowed to make a post-judgment motion. Rule 62(b), however, continued to authorize a stay "pending disposition of any of" these motions. The judge submitted a suggestion that Rule 62 should be amended to make it clear that a stay could be issued before a post-judgment motion is made. The Committee decided against any immediate action. It believed that there is inherent authority to issue a stay as part of the court's necessary control over its own judgment. It concluded that the usual conservative approach made it sensible to wait to see whether actual problems might emerge in practice.

Consultation through the joint subcommittee led to consideration of many other questions.

The "gap" between expiration of the automatic stay and the later time allowed to make a post-trial motion was addressed from the beginning. The simplest adjustment would be to rewrite the rule to allow the court to enter a stay at any time. Several successive drafts included such a provision. It was abandoned, however, as unnecessarily broad. Instead, reliance was placed on a parallel amendment of Rule 62(a) that has carried through from the beginning of the subcommittee's work. The amendment extends the time of the automatic stay to 30 days. That time allows two days beyond the time for making a post-trial motion, an advantage that could become important in cases in which decisions whether to appeal may be affected by the absence of any post-trial motion. It also provides a brief window to arrange security for a court-ordered stay.

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The possible disadvantage of extending the automatic stay is the risk that it will become easier to take steps to defeat any execution. That risk is addressed at the end of proposed Rule 62(a): the automatic stay takes hold "unless the court orders otherwise." The court may dissolve the stay, perhaps on condition that the judgment creditor post security for injuries caused by execution of a judgment that is later modified, set aside, or reversed. Or the court may supersede the automatic stay by ordering a stay on different terms, most likely by including some form of security to protect the judgment creditor.

The single-security question turned attention to present Rule 62(d)'s provisions for a stay by supersedeas bond. An attempt to post a single bond to cover a stay both during post-judgment proceedings and during an appeal might run afoul of the present rule language that recognizes this procedure "If an appeal is taken," and directs that "[t]he bond may be given upon or after filing the notice of appeal." Proposed Rule 62(b) allows a single bond or other security by enabling a party to obtain a stay by providing a bond "[a]t any time after judgment is entered." Proposed Rule 62(b) also explicitly recognizes "a bond or other security."

Consideration of the stay by supersedeas bond raised the question whether there is an absolute right to a stay. Practitioners report a belief that this provision establishes a right to stay execution on posting a satisfactory bond. This belief may be supported by the rule text: "the appellant may obtain a stay by supersedeas bond * * *." There may be some offsetting implication in the further provision that the stay takes effect when the court approves the bond, although approval may be limited to considering the amount of the security, the form of the bond, and the assurance that the bond can be made good. This question was discussed at length. Successive proposed drafts recognized authority to refuse a stay for good cause even if adequate security is tendered. But in the end, ongoing practice and understanding prevailed. Proposed Rule 62(b) carries forward the critical language of present Rule 62(d): "The stay takes effect when the court approves the bond" or other security. This course means that present practice carries forward, including whatever measure of discretion the cases recognize to allow a stay on less than full security in exceptional circumstances.

The final major decision was to reorganize and carry forward the provisions in present Rule 62(a) and (c) for stays of judgments in an action for an injunction or a receivership, or judgments directing an accounting in an action for patent infringement. They are joined in proposed subdivision (d). One change is proposed. Present Rule 62(c) incorporates some, but not all, of the words used in the interlocutory injunction appeal statute, 28 U.S.C. § 1292(a)(1). The Rule refers to "an interlocutory order or final judgment that grants, dissolves, or denies an injunction." The formula in § 1292(a)(1) is more elaborate. Although the Committee is not aware of any difficulties arising from the differences, it has seemed wise to forestall any arguments about appeals from orders that "continue" or "modify" an injunction.

Over- and Underline Rule 62(a) through (d)

Rule 62. Stay of Proceedings to Enforce a Judgment

(a) Automatic Stay.~~; Exceptions for Injunctions, Receiverships, and Patent Accountings.~~ Except as provided in Rule 62(c) and (d), ~~stated in this rule, no~~ execution ~~may issue~~ on a judgment~~, nor may~~ and proceedings ~~be taken~~ to enforce it~~,~~ are stayed for 30 days ~~until 14 days have passed~~ after its entry, unless the court orders otherwise. ~~But unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:~~

~~**(1)** an interlocutory or final judgment in an action for an injunction or a receivership; or~~

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~~**(2)** a judgment or order that directs an accounting in an action for patent infringement.~~

~~**(b)Stay Pending the Disposition of a Motion.** On appropriate terms for the opposing party's security, the court may stay the execution of a judgment — or any proceedings to enforce it — pending disposition of any of the following motions:~~

~~**(1)** under Rule 50, for judgment as a matter of law;~~
~~**(2)** under Rule 52(b), to amend the findings or for additional findings;~~
~~**(3)** under Rule 59, for a new trial or to alter or amend a judgment; or~~
~~**(4)** under Rule 60, for relief from a judgment or order.~~

(b) Stay by Bond or Other Security. At any time after judgment is entered, a party may obtain a stay by providing a bond or other security. The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or security.

(c) No Automatic Stay of an Injunction, Receivership, or Patent-Accounting Order. Unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

(1) an interlocutory or final judgment in an action for an injunction or receivership; or
(2) a judgment or order that directs an accounting in an action for patent infringement.

(d~~c~~) Injunction Pending an Appeal. While an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or ~~denies~~ refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:

(1) by that court sitting in open session; or
(2) by the assent of all its judges, as evidenced by their signatures.

~~**(d) Stay with Bond on Appeal**. If an appeal is taken, the appellant may obtain a stay by supersedeas bond, except in an action described in Rule 62(a)(1) or (2). The bond may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court approves the bond.~~

12b-002212

C. RULE 5: E-SERVICE AND E-FILING

The Standing Committee Subcommittee on matters electronic has suspended operations. The several advisory committees, however, have cooperated in carrying forward consideration of the ways in which the several sets of rules should be revised to reflect the increasing dominance of electronic means of preserving and communicating information. For the Civil Rules, the Advisory Committee initially worked through to recommendations to publish three rules amendments for comment in August 2015: Rule 5(d)(3) on electronic filing; Rule 5(b)(2)(E) on electronic service, with the corresponding abrogation of Rule 5(b)(3) on using the court's transmission facilities ((b)(2)(E) would supersede it); and Rule 5(d)(1) on using the Notice of Electronic Filing as a certificate of service. But continuing exchanges with the other advisory committees showed that further work was needed to achieve as much uniformity as possible in language, and at times in meaning. Much of the work has involved the Criminal Rules Committee. Criminal Rule 49 now invokes the Civil Rules on filing and service. The Criminal Rules Committee has worked long and hard to create a new and self-contained Rule 49 that will be independent of the Civil Rules. They have welcomed close collaboration with the Civil Rules e-representatives in their Subcommittee deliberations. The result has been great progress that has improved the earlier Civil Rules drafts.

There are powerful reasons to make Civil Rule 5 and Criminal Rule 49 as nearly identical as possible, recognizing that the different circumstances of criminal prosecutions may at times warrant differences in substance and that the different structural and linguistic context of the full sets of rules may at times warrant differences in expression. The value of uniform expression extends beyond the Civil and Criminal Rules to include the Appellate and Bankruptcy Rules as well. But it has not seemed useful to attempt to restructure the Appellate, Bankruptcy, and Civil Rules to emulate the structure of the all-new Criminal Rule 49. All four advisory committees have cooperated in achieving what all believe to be the fullest desirable level of uniformity.

Before turning to the present proposals, it may be useful to provide a brief reminder of broader possibilities that have been put aside.

Earlier work considered an open-ended rule that would equate electrons with paper in two ways. The first provision would state that a reference to information in written form includes electronically stored information. The second provision would state that any action that can or must be completed by filing or sending paper may also be accomplished by electronic means. Each provision would be qualified by an "unless otherwise provided" clause. Reviewing these proposals against the full set of Civil Rules showed that it is still too early to attempt to adopt them as a general approach, even with exceptions—determining what exceptions to make would be difficult, and there were likely to be many of them.

A subset of these questions was considered again in preparing the present proposal. The Rules were scanned for words that direct one party to communicate with another party by means that might, or might not, embrace e-communication. There are several of these words, and they appear in many places. The most obvious example is "mail." Other familiar words include deliver (delivery); send; and notify (notice). Somewhat less familiar words include "provide"; "return[, sequester, or destroy]"; "supplement or correct"; and "furnish." Other words seem to imply tangible embodiment in paper, most commonly "written" and "writing." Taking on all of these provisions now would needlessly delay completion of the present e-filing and e-service proposals. Practice is adjusting comfortably to the electronic era. There will be time enough for a separate project to consider which circumstances justify, or perhaps even require, communicating or acting by electronic means.

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A related general question involves electronic signatures. Many local rules address this question now, often drawing from a Model Rule. A proposal to amend the Bankruptcy Rules to address electronic signatures was published and then withdrawn. There did not seem to be much difficulty with treating an electronic filing by an authorized user of the court's e-filing system as the filer's signature. But difficulty was encountered in dealing with papers signed by someone other than the authorized filer. Affidavits and declarations are common examples, as are many forms of discovery responses. The several advisory committees share the view that it is too early to take on e-signatures in a general way. Draft Rule 5(d)(3) does provide that the user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.

Rule 5(d)(3): Electronic Filing

The Rule 5(d)(3) amendment would establish a uniform national rule that makes e-filing mandatory except for filings made by a person not represented by an attorney, and with a further exception that paper filing must be allowed for good cause and may be required or allowed for other reasons by local rule. A person not represented by an attorney may file electronically only if allowed by court order or local rule, and can be required to do so only by court order or by a local rule that includes reasonable exceptions. And the user name and password of an attorney of record, along with the attorney's name on a signature block, serves as the attorney's signature.

This proposal rests on the advantages that e-filing brings to the court and the parties. Local rules in most districts already require attorneys to file electronically. The risks of mistakes have been reduced by growing familiarity with, and competence in, electronic communication. At the same time, deliberation in consultation with other advisory committees showed that the general mandate should not extend to pro se parties. Although pro se parties are thus generally exempted from the requirement, the proposal allows them access to e-filing by local rule or court order. This treatment recognizes that some pro se parties have already experienced success with e-filing, and reflects an expectation that the required skills and access to electronic systems will expand. The court and other parties will share the benefits when pro se litigants can manage e-filing. Finally, the proposal allows a court to require e-filing by an unrepresented party. This provision is designed to support existing programs that direct e-filing in collateral proceedings brought by prison inmates. But e-filing can be required only by court order or by a local rule that includes reasonable exceptions. The language that a local rule must include reasonable exceptions is taken almost verbatim from present Rule 5(d)(3). It will protect against local-rule requirements that might impede access to courts, a concern that had troubled the Criminal Rules Committee with respect to habeas corpus and § 2255 proceedings.

1 **Rule 5. Serving and Filing Pleadings and Other Papers**

2 **(d) Filing** * * *

3 **(2)** ***Nonelectronic Filing*** ~~***How Filing is Made—In General***~~***.*** A paper <u>not filed electronically</u> is
4 filed by delivering it:

5 **(A)** to the clerk; or
6 **(B)** to a judge who agrees to accept it for filing, and who must then note the filing date on
7 the paper and promptly send it to the clerk.

8 **(3)** ***Electronic Filing and Signing*** ~~***, or Verification***~~***.***

12b-002214

(A) *By a Represented Person—Generally Required; Exceptions.* ~~A court may, by local rule, allow papers to be filed, signed, or verified~~ A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule. ~~by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States~~.

(B) *By an Unrepresented Person—When Allowed or Required.* A person not represented by an attorney:

(i) may file electronically only if allowed by court order or by local rule; and

(ii) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(C) *Signing.* The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.

(D) *Same as a Written Paper.* A paper filed electronically ~~in compliance with a local rule~~ is a written paper for purposes of these rules.

Committee Note

Electronic filing has matured. Most districts have adopted local rules that require electronic filing, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it generally mandatory in all districts for a person represented by an attorney. But exceptions continue to be available. Nonelectronic filing must be allowed for good cause. And a local rule may allow or require nonelectronic filing for other reasons.

Filings by a person not represented by an attorney are treated separately. It is not yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing. Encounters with the court's system may prove overwhelming to some. Attempts to work within the system may generate substantial burdens on a pro se party, on other parties, and on the court. Rather than mandate electronic filing, filing by pro se litigants is left for governing by local rules or court order. Efficiently handled electronic filing works to the advantage of all parties and the court. Many courts now allow electronic filing by pro se litigants with the court's permission. Such approaches may expand with growing experience in these and other courts, along with the growing availability of the systems required for electronic filing and the increasing familiarity of most people with electronic communication. Room is also left for a court to require electronic filing by a pro se litigant by court order or by local rule. Care should be taken to ensure that an order to file electronically does not impede access to the court, and reasonable exceptions must be included in a local rule that requires electronic filing by a pro se litigant. In the beginning, this authority is likely to be exercised only to support special programs, such as one requiring e-filing in collateral proceedings by pro se prisoners.

The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.

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Clean Rule Text

Rule 5. Serving and Filing Pleadings and Other Papers

(d) FILING. * * *

(2) ***Nonelectronic Filing.*** A paper not filed electronically is filed by delivering it:

(A) to the clerk; or

(B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(3) ***Electronic Filing and Signing.***

(A) *By a Represented Person—Generally Required; Exceptions.* A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(B) *By an Unrepresented Person—When Allowed or Required.* A person not represented by an attorney:

(i) may file electronically only if allowed by court order or by local rule; and

(ii) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(C) *Signing.* The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.

(D) *Same as a Written Paper.* A paper filed electronically is a written paper for purposes of these rules.

Rule 5(b)(2)(E): e-Service

Present Rule 5(b)(2)(E) allows service by electronic means only if the person to be served consented in writing. It is complemented by Rule 5(b)(3), which provides that a party may use the court's transmission facilities to make electronic service "[i]f a local rule so authorizes." The proposal deletes the requirement of consent when service is made through the court's transmission facilities on a registered user. It also abrogates Rule 5(b)(3) as no longer necessary.

Consent continues to be required for electronic service in other circumstances, whether the person served is a registered user or not. A registered user might consent to service by other electronic means for papers that are not filed with the court. In civil litigation, a common example is provided by discovery materials that must not be filed until they are used in the action or until the court orders filing. A pro se litigant who is not a registered user—and very few now are—is protected by the consent requirement. In either setting, consent may be important to ensure effective service. The terms of consent can specify an appropriate address and format, and perhaps other matters as well.

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Rule 5. Serving and Filing Pleadings and Other Papers

(b) Service: How Made. * * *

(2) *Service in General.* A paper is served under this rule by:

(A) handing it to the person * * *

(E) sending it to a registered user by filing it with the court's electronic-filing system or sending it by other electronic means ~~if~~ that the person consented to in writing—in either of which events service is complete upon ~~transmission~~ filing or sending, but is not effective if the serving party learns that it did not reach the person to be served; or * * *

Committee Note

Provision for electronic service was first made when electronic communication was not as widespread or as fully reliable as it is now. Consent of the person served to receive service by electronic means was required as a safeguard. Those concerns have substantially diminished, but have not disappeared entirely, particularly as to persons proceeding without an attorney.

The amended rule recognizes electronic service on a registered user by filing with the court's electronic-filing system. A court may choose to allow registration only with the court's permission. But a party who registers will be subject to service by filing with the court's system unless the court provides otherwise. With the consent of the person served, electronic service also may be made by means that do not use the court's system. Consent can be limited to service at a prescribed address or in a specified form, and may be limited by other conditions.

Because Rule 5(b)(2)(E) now authorizes service by filing with the court's electronic-filing system as a uniform national practice, Rule 5(b)(3) is abrogated. It is no longer necessary to rely on local rules to authorize such service.

Clean Rule Text

Rule 5. Serving and Filing Pleadings and Other Papers

(b) Service: How Made. * * *

(2) ***Service in General***. A paper is served under this rule by:

(A) handing it to the person * * *

(E) sending it to a registered user by filing it with the court's electronic-filing system or sending it by other electronic means that the person consented to in writing—in either of which events service is complete upon filing or sending, but is not effective if the serving party learns that it did not reach the person to be served; or * * *

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Permission to Use Court's Facilities: Abrogating Rule 5(b)(3)

This package includes a proposal to abrogate Rule 5(b)(3) to reflect the amendment of Rule 5(b)(2)(E) that allows service on a registered user by filing with the court's electronic-filing system without requiring consent. Rule 5(b)(3) reads:

> **(3)** ***Using Court Facilities.*** If a local rule so authorizes, a party may use the court's transmission facilities to make service under Rule 5(b)(2)(E).

The basic reason to abrogate (b)(3) is to avoid the seeming inconsistency of authorizing service by filing with the court's system in (b)(2)(E) and then requiring authorization by a local rule as well. Probably there is no danger that a local rule might opt out of the national rule, but eliminating (b)(3) would ensure that none will. It remains important to ensure that a court can refuse to allow a particular person to become a registered user. It may be safe to rely on the Committee Note to (b)(2)(E), with added support in a Committee Note explaining the abrogation of (b)(3).

The published proposal would look like this:

> ~~(3) *Using Court Facilities.* If a local rule so authorizes, a party may use the court's transmission facilities to make service under Rule 5(b)(2)(E).~~

Committee Note

Rule 5(b)(3) is abrogated. As amended, Rule 5(b)(2)(E) directly authorizes service on a registered user by filing with the court's electronic-filing system. Local rule authority is no longer necessary. The court retains inherent authority to deny registration or to qualify a registered user's participation in service through the court's facilities.

Notice of Electronic Filing as Proof of Service

Rule 5(d)(1) was amended in 1991 to require a certificate of service. It did not specify any particular form. Many lawyers include a certificate of service at the end of any paper filed in the court's electronic filing system and served through the court's transmission facilities. This practice can be made automatic by amending Rule 5(d)(1) to provide that a Notice of Electronic Filing constitutes a certificate of service on any party served by the court's electronic-filing system. The draft amendment does that, retaining the requirement for a certificate of service following service by other means.

Treating the Notice of Electronic Filing as the certificate of service will not save many electrons. The certificates generally included in documents electronically filed and served through the court's facilities are brief. It may be that cautious lawyers will continue to include them. But there is an opportunity for some saving, and protection for those who would forget to add the certificate to the original document, whether the protection is against the burden of generating and filing a separate document or against forgetting to file a certificate at all. Other parties will be spared the need to check court files to determine who was served, particularly in cases in which all parties participate in electronic filing and service.

The Notice of Electronic Filing automatically identifies the means, time, and e-address where service was made and also identifies the parties who were not authorized users of the court's electronic-filing system, thus flagging the need for service by other means. There might be some value in amending Rule 5(d)(1) further to require that the certificate for service by other means

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specify the date and manner of service; the names of the persons served; and the address where service was made. Still more detail might be required. The Committee considered this possibility but decided that there is no need to add this much detail to rule text. Lawyers seem to be managing nicely without it.

The draft considered by the Committee included, as a subject for discussion, a further provision that the Notice of Electronic Filing is not a certificate of service if "the serving party learns that it did not reach the person to be served." That formula appears in Rule 5(b)(2)(E), both now and in the proposed revision. The Committee concluded that this caution need not be duplicated in Rule 5(d)(1). Learning that the attempted e-service did not work means there is no service. No service, no certificate of service.

Rule 5. Serving and Filing Pleadings and Other Papers

(d) FILING.

(1) ***Required Filings: Certificate of Service.***

(A) *Papers after the Complaint.* Any paper after the complaint that is required to be served ~~— together with a certificate of service —~~ must be filed within a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed * * *.

(B) *Certificate.* A certificate of service must be filed within a reasonable time after service, but a notice of electronic filing constitutes a certificate of service on any person served by the court's electronic-filing system.

Committee Note

The amendment provides that a notice of electronic filing generated by the court's CM/ECF system is a certificate of service on any person served by the court's electronic-filing system. But if the serving party learns that the paper did not reach the party to be served, there is no service under Rule 5(b)(2)(E) and there is no certificate of the (nonexistent) service.

When service is not made by filing with the court's electronic filing system, a certificate of service must be filed and should specify the date as well as the manner of service.

Clean Rule Text

(d) FILING.

(1) ***Required Filings: Certificate of Service.***

(A) *Papers after the Complaint.* Any paper after the complaint that is required to be served must be filed within a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed * * *.

(B) *Certificate.* A certificate of service must be filed within a reasonable time after service, but a notice of electronic filing constitutes a certificate of service on any person served by the court's electronic-filing system.

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Clean Rule Text

Rule 5. Serving and Filing Pleadings and Other Papers

* * *

(b) Service: How Made. * * *

(2) ***Service in General.*** A paper is served under this rule by:

(A) handing it to the person * * *

(E) sending it to a registered user by filing it with the court's electronic-filing system or sending it by other electronic means that the person consented to in writing—in either of which events service is complete upon filing or sending, but is not effective if the serving party learns that it did not reach the person to be served; or * * *

(d) Filing * * *

(1) ***Required Filings: Certificate of Service.***

(A) *Papers after the Complaint.* Any paper after the complaint that is required to be served must be filed within a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed * * *.

(B) *Certificate.* A certificate of service must be filed within a reasonable time after service, but a notice of electronic filing constitutes a certificate of service on any person served by the court's electronic filing system.

(2) ***Nonelectronic Filing.*** A paper not filed electronically is filed by delivering it:

(A) to the clerk; or

(B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(3) ***Electronic Filing and Signing.***

(A) *By a Represented Person—Generally Required; Exceptions.* A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(B) *By an Unrepresented Person—When Allowed or Required.* A person not represented by an attorney:

(i) may file electronically only if allowed by court order or by local rule, and

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(ii) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(C) *Signing.* The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.

(D) *Same as Written Paper.* A paper filed electronically is a written paper for purposes of these rules.

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II. RECOMMENDATION FOR APPROVAL: PILOT PROJECTS

One of the conclusions reached in the process of developing the rule amendments that became effective on December 1, 2015, was that additional innovations in civil litigation may be more likely if they are tested first in a series of pilot projects. To pursue the possible development of such pilot projects, a subcommittee was formed consisting of Jeff Sutton, John Bates, Paul Grimm, Neil Gorsuch, Amy St. Eve, John Barkett, Parker Folse, Virginia Seitz, Ed Cooper, and Dave Campbell. Judge Phil Martinez from the Judicial Conference Committee on Court Administration and Case Management (CACM) was added as a liaison to the subcommittee. The subcommittee's charge is to investigate pilot projects already completed in other locations and recommend possible pilot projects for federal courts.

The subcommittee reported on its work at the January 2016 Standing Committee meeting. At that time, the subcommittee had made contact with the National Center for State Courts, the Institute for Advancement of the American Legal System (IAALS), the Conference of State Court Chief Justices, and various innovative federal courts, and had conducted reviews of pilot projects in ten states. Summaries of the subcommittee's findings were included in the January materials.

Since the January meeting, the subcommittee has held focus-group discussions with lawyers and judges from courts in Colorado, Arizona, and Canada, which all use enhanced initial disclosures. Summaries of the Colorado and Arizona discussions are included as Exhibits 1 and 2 to this report. The subcommittee has also collected and reviewed much additional information, including a recently-proposed revision to Arizona's longstanding enhanced disclosure rule, a recently-revised portion of a joint project by IAALS and the American College of Trial Lawyers recommending more robust initial disclosures, reactions to and comments on a 1993 proposed amendment to the Federal Rules of Civil Procedure to require enhanced initial disclosures, articles from a 1997 symposium concerning the initial disclosure efforts of the early 1990s, the robust initial disclosure rules used in various states (Ex. 3), and a recent FJC report titled "A Study of Civil Case Disposition Time in U.S. District Courts" (Ex. 4).

The subcommittee has concluded that two specific pilot projects should be implemented in federal district courts, one focused on enhanced initial disclosures and the other on expedited case management. Descriptions of these proposed pilot programs are provided below. The Civil Rules committee concurred in the pursuit of these pilot projects at its April 2016 meeting.

The subcommittee believes that more robust initial disclosure requirements could help reduce the cost and delay of civil litigation. This belief is based on several sources: (a) the employment protocol pilot project currently underway, which requires more substantial initial disclosures in employment cases and, according to a study completed by the FJC and described at the January meeting, appears to be reducing discovery disputes; (b) the Colorado Civil Access Pilot Project, which included more robust initial disclosures and was found, in a study by IAALS, to have reduced time to disposition of civil cases (the Colorado courts have now adopted the initial disclosures as part

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of their civil rules); (c) the Arizona enhanced disclosure rule, which has been in place for more than twenty years and generally is preferred by Arizona lawyers over the federal rules; and (d) the rather obvious conclusion that civil litigation will be resolved more quickly and less expensively if relevant information is disclosed earlier and with less discovery practice.

The subcommittee also believes that expedited case management practices could help reduce the cost and delay of civil litigation. Many studies have found that cases are resolved more quickly and with less cost when judges intervene early, actively manage cases, set reasonable but efficient discovery schedules, set firm trial dates, and resolve disputes quickly. The purpose of the second pilot is to implement these practices in the pilot districts, with specific time goals and focused training for judges, measuring case disposition times and other relevant milestones as the pilot progresses. The pilot would test how effectively these proven case management practices can be implemented in various districts through specific time goals and focused training.

Authority to engage in these pilot projects is found in several places. Civil Rule 16(b)(3) authorizes a district court to enter a scheduling order that addresses several relevant subjects: deadlines for the litigation, the timing of disclosures and the extent of discovery, the disclosure of ESI, procedures for prompt resolution of discovery disputes, and "other appropriate matters." Rule 26(b)(2)(C) authorizes the court, on its own, to limit the frequency or extent of discovery, considering whether information can be obtained from other sources that are more convenient, less burdensome, or less expensive. And 28 U.S.C. § 331 authorizes the Judicial Conference to "carry on a continuous study of the operation and effect of the general rules of practice and procedure" used in the federal courts, and to recommend "[s]uch changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay[.]"

A. MANDATORY INITIAL DISCOVERY PILOT PROJECT

1. Standing Order. This pilot project would be implemented through a standing order issued in each of the pilot districts. Our current draft of the order, which includes comments received during the Civil Rules committee meeting in April, is as follows:

> "The Court is participating in a pilot project that requires mandatory initial discovery in all civil cases other than cases exempted by Rule 26(a)(1)(B), patent cases governed by a local rule, and cases transferred for consolidated administration in the District by the Judicial Panel on Multidistrict Litigation. The discovery obligations addressed in this Standing Order encompass the disclosures required by Rule 26(a)(1) – separate disclosures under Rule 26(a)(1) therefore are not required – and are framed as court-ordered mandatory initial discovery pursuant to the Court's inherent authority to manage cases and Rule 16(b)(3)(B)(ii), (iii), and (vi). Unlike initial disclosures required by current Rule 26(a)(1)(A) & (C), this Standing Order does not allow the parties to opt out.

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A. Instructions to Parties.

1. The parties are ordered to respond to the following mandatory initial discovery requests before initiating any further discovery in this case. Further discovery will be as ordered by the Court. Each party's response must be based on the information then reasonably available to it. A party is not excused from providing its response because it has not fully investigated the case or because it challenges the sufficiency of another party's response or because another party has not provided a response. Responses must be signed under oath by the party certifying that it is complete and correct as of the time it was made, based on the party's knowledge, information, and belief formed after a reasonable inquiry, and signed under Rule 26(g) by the attorney.

2. The parties must provide the requested information as to facts that are relevant to the parties' claims and defenses, whether favorable or unfavorable, and regardless of whether they intend to use the information in presenting their claims or defenses. If a party limits the scope of its response on the basis of any claim of privilege or work product, the party must produce a privilege log as required by Rule 26(b)(5) unless the parties agree or the court orders otherwise. If a party limits its response on the basis of any other objection, it must explain with particularity the nature of the objection and its legal basis, and provide a fair description of the information being withheld.

3. All parties must file answers, counterclaims, crossclaims, and replies within the time set forth in Rule 12(a)(1)(A), (B), and (C) even if they have filed or intend to file a motion to dismiss or other preliminary motion. Fed. R. Civ. P. 12(a)(4). But the court may [for good cause] defer the time to answer, counterclaim, crossclaim, or reply while it considers a motion to dismiss [for lack of subject-matter jurisdiction, personal jurisdiction, sovereign immunity, or absolute immunity of a public official]. The time can be set by the court at any time no later than the time set by paragraph 4, measured from entry of the order that decides the motion. [If the court does not set a time, it is set by paragraph 4 as measured from entry of the order that decides the motion].

4. A party seeking affirmative relief must serve its responses to the mandatory initial discovery no later than 30 days after the filing of the first pleading made in response to its complaint, counterclaim, crossclaim, or third-party complaint. A party filing a responsive pleading, whether or not it also seeks affirmative relief, must serve its initial discovery responses no later than 30 days after it files its responsive pleading. However, (a) no initial discovery responses need be served if the Court approves a written stipulation by the

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parties that no discovery will be conducted in the case; and (b) initial discovery responses may be deferred, one time, for 30 days if the parties jointly certify to the Court that they are seeking to settle their dispute and have a good faith belief that the dispute will be resolved within 30 days of the due date for their responses.

5. Initial responses to these mandatory discovery requests shall be filed with the Court on the date when they are served; provided, that voluminous attachments need not be filed, nor are parties required to file documents that are produced in lieu of identification pursuant to paragraphs (B)(3), (5), or (6) below. Supplemental responses shall be filed with the Court if they are served prior to the scheduling conference held under Rule 16(b), but any later supplemental responses need not be filed, although the party serving the supplemental response shall file a notice with the Court that a supplemental response has been served.

6. The duty of mandatory initial discovery set forth in this Order is a continuing duty, and each party must serve supplemental responses when new or additional information is discovered or revealed. A party must serve such supplemental responses in a timely manner, but in any event no later than 30 days after the information is discovered by or revealed to the party. If new information is revealed in a written discovery response or a deposition in a manner that reasonably informs all parties of the information, the information need not be presented in a supplemental response.

7. The Court normally will set a deadline in its Rule 16(b) case management order for final supplementation of responses, and full and complete supplementation must occur by the deadline. In the absence of such a deadline, full and complete supplementation must occur no later than 90 days before the final pre-trial conference.

8. During their Rule 26(f) conference, the parties must discuss the mandatory initial discovery responses and seek to resolve any limitations they have made or intend to make in their responses. The parties should include in the Rule 26(f) report to the Court a description of their discussions. The report should describe the resolution of any limitations invoked by either party in its response, as well as any unresolved limitations or other discovery issues.

9. Production of information under this Standing Order does not constitute an admission that information is relevant, authentic, or admissible.

10. Rule 37(c)(1) shall apply to mandatory discovery responses required by this Order.

B. Mandatory Initial Discovery Requests.

1. State the names and, if known, the addresses and telephone numbers of all persons whom you believe are likely to have discoverable information relevant to any party's claims or defenses, and provide a fair description of the nature of the information each such person is believed to possess.

2. State the names and, if known, the addresses and telephone numbers of all persons whom you believe have given written or recorded statements relevant to any party's claims or defenses. Unless you assert a privilege or work product protection against disclosure under applicable law, attach a copy of each such statement if it is in your possession, custody, or control. If not in your possession, custody, or control, state the name and, if known, the address and telephone number of each person whom you believe has custody of a copy.

3. List the documents, electronically stored information ("ESI"), tangible things, land, or other property known by you to exist, whether or not in your possession, custody or control, that you believe may be relevant to any party's claims or defenses. To the extent the volume of any such materials makes listing them individually impracticable, you may group similar documents or ESI into categories and describe the specific categories with particularity. Include in your response the names and, if known, the addresses and telephone numbers of the custodians of the documents, ESI, or tangible things, land, or other property that are not in your possession, custody, or control. For documents and tangible things in your possession, custody, or control, you may produce them with your response, or make them available for inspection on the date of the response, instead of listing them. Production of ESI will occur in accordance with paragraph (C)(2) below.

4. For each of your claims or defenses, state the facts relevant to it and the legal theories upon which it is based.

5. Provide a computation of each category of damages claimed by you, and a description of the documents or other evidentiary material on which it is based, including materials bearing on the nature and extent of the injuries suffered. You may produce the documents or other evidentiary materials with your response instead of describing them.

6. Specifically identify and describe any insurance or other agreement under which an insurance business or other person or entity may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse a party for payments made by the party to satisfy the judgment. You may produce a copy of the agreement with your response instead of describing it.

7. A party receiving the list described in Paragraph 3, the description of materials identified in Paragraph 5, or a description of agreements referred to in Paragraph 6 may request more detailed or thorough responses to these mandatory discovery requests if it believes the responses are deficient. When the court has authorized further discovery, a party may also serve requests pursuant to Rule 34 to inspect, copy, test, or sample any or all of the listed or described items to the extent not already produced in response to these mandatory discovery requests, or to enter onto designated land or other property identified or described.

C. Disclosure of Hard-Copy Documents and ESI.

1. Hard-Copy Documents. Hard-copy documents must be produced as they are kept in the usual course of business.

2. ESI.

a. Duty to Confer. When the existence of ESI is disclosed or discovered, the parties must promptly confer and attempt to agree on matters relating to its disclosure and production, including:

i. requirements and limits on the preservation, disclosure and production of ESI;

ii. appropriate ESI searches, including custodians and search terms, or other use of technology-assisted review;

iii. the form in which the ESI will be produced.

b. Resolution of Disputes. If the parties are unable to resolve any dispute regarding ESI and seek resolution from the Court, they must present the dispute in a single joint motion or, if the Court directs, in a conference call with the Court. Any joint motion must include the parties' positions and the separate certification of counsel required under Rule 26(g).

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c. Production of ESI. Unless the parties agree or the Court orders otherwise, a party must produce the ESI identified under paragraph (B)(3) within 40 days after serving its initial discovery response. Absent good cause, no party need produce ESI in more than one form.

d. Presumptive Form of Production. Unless the parties agree or the Court orders otherwise, a party must produce ESI in the form requested by the receiving party. If the receiving party does not specify a form, the producing party may produce the ESI in any reasonably usable form that will enable the receiving party to have the same ability to access, search, and display the ESI as the producing party."

2. User's Manual. The pilot project will require something of a "user's manual" for the pilot judges, The precise form of that manual has not been developed, but it would include the following kinds of instructions:

Pilot judges should hold initial case management conferences under Rule 16(b) within the time specified in Rule 16(b)(2). Judges should discuss with the parties their compliance with the mandatory discovery obligations set forth in the Standing Order, resolve any disputes, and set a date for full and complete supplementation of responses.

Judges may alter the time for mandatory initial discovery responses upon a showing of good cause, but this should not be a frequent event. Early discovery responses are critical to the purposes of this pilot program.

Judges should make themselves available for prompt resolution of discovery disputes. It is recommended that judges require parties to contact the Court for a pre-motion conference, as identified in Rule 16(b)(3)(B)(v), before filing discovery motions. If discovery motions are necessary, they should be resolved promptly.

Courts should vigorously enforce mandatory discovery obligations. Experience in states with robust initial disclosure requirements has shown that diligent enforcement by judges is the key to an effective disclosure regime. Rule 37 governs sanctions.

3. Timing, Participation, and Other Issues.

We propose that the initial disclosure pilot project be approved by the Standing Committee at its June meeting. Additional details will need to be worked out, but our hope is that this pilot can be launched in 2017. We will seek the agreement of CACM and the FJC, and approval by the Judicial Conference in September.

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We think that at least three to five districts should participate. One small district has already volunteered.

To participate in this pilot, district courts must be willing to make the pilot's requirements mandatory. We have debated whether to require that all judges in the pilot districts be willing to participate. On one hand, complete participation would avoid skewing the results of the pilot through self-selection by judges, and would present a better prospect of culture change – one of the goals of the pilot. On the other hand, requiring participation by all judges might mean that larger districts do not participate. We would appreciate your thoughts on this issue.

One other issue was discussed at the civil rules committee meeting. The subcommittee's original draft required that answers be filed and mandatory disclosures be made in every case, even when motions to dismiss have been filed. Some expressed the view that exceptions should be allowed for motions raising jurisdictional or immunity issues, and language has been added to paragraph 1(A)(3) of the standing order to reflect this possibility. The counter-argument is that permitting any exceptions for motions to dismiss will only encourage such motions and delay the disclosures required by the pilot, defeating in part the purpose of prompt and complete disclosures early in every case. We would appreciate your thoughts on this issue as well.

B. EXPEDITED PROCEDURES PILOT

1. Description of Pilot Project

The goal of the Civil Rules is to further the "just, speedy, and inexpensive determination of every action." Case resolution that is not speedy and inexpensive often will not be just. This pilot will involve all civil cases where discovery and trial are possible (it will not include cases decided on an administrative record with no trial). The pilot will include three parts:

(1) Each participating court will adopt the following practices: (a) prompt case management conferences in every case (within the time allowed by amended Rule 16(b)(2)); (b) firm caps on the amount of time allocated for discovery, to be set by the judge after conferring with the parties at the case management conference, and to be extended no more than once and only for good cause based on a showing of diligence by the parties; (c) prompt resolution of discovery disputes by telephone conferences; (d) decisions on all dispositive motions within 60 days of the reply brief being filed; and (e) setting and holding firm trial dates.

(2) Metrics will be as follows: (a) if we could measure it, the level of the pilot judges' compliance with the goals in (1) above; (b) trial dates in 90% of civil cases set within 14 months of case filing, trial dates in the remaining 10% set within 18 months, and all trial dates held firm; (c) 25% reduction in the number of categories of cases in the district "dashboard" that are decided

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slower than the national average (or some comparable measure that could use the new CACM dashboard tool).

(3) Training and collaboration: (a) the FJC will do an initial one-day training session for pilot judges and staff, followed by additional FJC training every six months or year; (b) judges in the district will meet quarterly to discuss best practices and what is working and not working, and to refine their case management methods to meet the pilot goals; (c) one or two judges from outside the district will be available as resources during these quarterly conferences, with the same resource judges serving throughout the duration of the pilot; (d) the judges in the pilot district would have at least one bench-bar meeting per year to talk with lawyers in the district about how the pilot is working and to make appropriate adjustments; (e) the pilot would last three years.

Building on the work of several federal and state courts, this project seizes on the increased reasonableness associated with discovery that must be finished within a discrete time period. A similar dynamic is at play when trial judges allocate a set amount of time for each party to make its case at trial; redundancy is lessened and efficiency increases.

There are several premises of the pilot: (1) the longer a case takes to resolve, the more expensive it is for the parties; (2) the combination of tight timetables for discovery, prompt resolution of discovery and dispositive motions, and firm trial dates is more likely to prompt lawyers to be reasonable in their discovery requests and litigation behavior than any rule; (3) lawyer cooperation should increase when both parties must conduct discovery within a set period of time; and (4) prompt feedback about the impact of these practices will demonstrate their utility to the judges who use them.

2. Participants

A. Civil Rules and Standing Committees
B. CACM
C. FJC

3. Timetable

A. April 2016—approval by Civil Rules Committee
B. June 2016—approval by Standing Committee, CACM, and FJC
C. September 2016—approval by the Judicial Conference
D. Early 2017—initial implementation
E. End of 2020—completion

4. Criteria for district courts to participate

A. Court must be willing to make the pilot's requirements mandatory.

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B. All judges on the district court must be willing to participate.
C. At least three to five district courts need to participate.

This pilot project is less refined that the mandatory disclosures pilot and will require significant work over the next several months. Because of the schedule we hope to follow, we need your input now. We would appreciate your careful review and your comments and suggestions.

III. REPORT ON PROJECTS

A. ONGOING PROJECTS

1. RULE 5:2: MOTION TO REDACT

The Bankruptcy Rules Committee is considering the addition of a new subdivision (h) to Bankruptcy Rule 9037, the Bankruptcy Rules equivalent of Civil Rule 5.2. The draft would create an explicit procedure for deleting information protected by Rule 9037(a) but mistakenly included in a filed document. The Bankruptcy Rules Committee took up this subject in response to concerns raised by the Committee on Court Administration and Case Management.

Although Rule 9037(h) has been developed to a point that would support a recommendation for publication, the Bankruptcy Rules Committee has decided that it is better to defer publication while the Appellate, Civil, and Criminal Rules Committees explore parallel amendments to the rules that parallel Rule 9037. There has been some hope that the courts' electronic filing system might be developed to effect automatic redaction of personal identifying information improperly included in court filings. Nonetheless, it is useful to move ahead with work that can be put aside if a reliable technological solution can be found.

This report of progress on a possible Civil Rule 5.2(i) is offered for two purposes. The first is the intrinsic purpose of exploring the need for a new rule and the best shape it might take.

The second purpose is to reflect on the unavoidable growing pains that commonly attend efforts to achieve the maximum level of appropriate uniformity when several different committees approach the same topic. The Standing Committee is responsible for all rules that it recommends to the Judicial Conference and, through the Conference, to the Supreme Court and Congress. When two or more rules are intended to mean the same thing, they should say it in the same way. But there are many possible ways of saying something, and minds both disciplined and creative may disagree on the most accurate way of saying it. Intellectual commitments can be hard to reconcile, even if professional detachment succeeds in putting aside any element of pride of authorship. The early draft Civil Rule 5.2(i) is presented below with footnotes that identify several styling choices. There are many reasons to avoid discussion of them by the Standing Committee itself. The advisory committees are responsible for reaching consensus on their own. But it may be useful to have this simple illustration of the process in the mid-stream evolution of a very modest rule.

Appellate Rule 25(a)(5), Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule 49.1 were adopted in a coordinated process that sought to achieve as much uniformity as possible. Appellate Rule 25(a)(5) adopts the other rules for appeals in cases that they governed in the district court, invokes Criminal Rule 49.1 when an extraordinary writ is sought in a criminal case, and adopts Civil Rule 5.2 for all other proceedings. Criminal Rule 49.1 largely parallels Civil Rule 5.2, but also limits home addresses to identifying the city and state and expands the list of exemptions to include several matters peculiar to criminal proceedings. Bankruptcy Rule 9037 hews close to Civil Rule 5.2, with an additional exception and without Rule 5.2(c) (limitations on remote access).

This common origin adds extra weight to the growing tradition that parallel rules addressing the same problems should be as nearly identical as possible. Differences can be warranted by the different circumstances that confront different sets of rules. But care should be taken in assessing the need for differences.

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There is good reason to take seriously the prospect that Civil Rule 5.2 should be amended by adding a new subdivision (i) that essentially tracks Bankruptcy Rule 9037(h) if the Bankruptcy Rules Committee goes forward with the proposed amendment.

It is possible that the circumstances of civil practice differ from those that confront bankruptcy practice. The Committee on Court Administration and Case Management referred the question to the Bankruptcy Rules Committee, reacting to reports that bankruptcy courts are receiving creditors' requests to redact previously filed documents, sometimes involving thousands of documents in numerous courts. Bankruptcy courts are, of necessity, dealing with these requests now. CACM believes it is important to establish a uniform procedure. And it may be concerned that the pressures of bankruptcy practice make it more difficult to rely on parties and courts to act to accomplish required redactions in ways that restore protection as promptly as possible.

The problem may arise more frequently in bankruptcy practice, but surely it arises in civil and criminal practice as well. The need for uniform practice across different courts also may be more pressing in bankruptcy if an improper filing can involve thousands of documents in numerous courts. That circumstance is less likely to arise in civil and criminal practice. And it is nice to believe that courts and parties should be able to manage to act effectively without need for explicit prompting in Rule 5.2.

The prospect that there is little need to add a new Rule 5.2(i), on the other hand, is offset by the prospect that little harm will be done, apart from adding to the Civil Rules word-count. The Bankruptcy Rules Committee has led the way with a carefully considered draft. And although there may be little risk that adoption of a new Bankruptcy Rule 9037(h) would mislead courts if Rule 5.2(i) is not added in parallel, uniformity is reassuring. That is particularly so if the Criminal Rules Committee believes it useful to add a parallel provision to Criminal Rule 49.1.

A draft Rule 5.2(i) is set out below. Some style differences from the Bankruptcy Rule are unavoidable. Others are a matter to be worked out when all committees have reached their own conclusions. This question has come up late enough in the winter cycle that it has not been feasible to ask all four of the advisory committees responsible for these rules to decide on recommendations in time to publish Bankruptcy Rule 9037(h) this summer. But the work will continue, subject only to the bare possibility that a technological solution may be found that will accomplish everything that might be accomplished by new rules.

1 **Rule 5.2. Privacy Protection for Filings Made with the Court**

2 * * * * *
3
4 **(i) Motion to Redact a Previously Filed Document.**

5 **(1)** ***Content of the Motion***. Unless the court orders otherwise, a person[1] that seeks
6 to redact from a previously filed document information that is protected under

[1] Draft Bankruptcy Rule 9037(h) uses "entity" because the Bankruptcy Code definition of "person" does not include a governmental unit. "Entity" does. But "entity" is a poor fit for a natural person. "Person" as used in the Civil Rules regularly includes all sorts of entities.

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7 Rule 5.2(a)[2] must file a motion under seal. The motion must:

8 **(A)** include[3] an identical[4] copy of the original document showing the
9 proposed redactions;
10 **(B)** include the docket number of the original document; and
11 **(C)** be served on all parties[5] and any person whose identifying information[6]
12 is to be redacted.

13 **(2)** ***Restricting Public Access to an Unredacted Document.*** The court must:
14 **(A)** [promptly][7] restrict [deny][8] public access to the motion and the

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[2] The Bankruptcy draft is: "information that is subject to privacy protection under," which seems longer than necessary.

[3] The Bankruptcy Draft reads: "attach a copy." That works in their draft. This version consolidates the various requirements for the motion in a series of subparagraphs. It is clearer that way: "The motion must * * *." "Include" works with that formula. It may be argued that "attach" treats the copy of the paper as an exhibit, while "include" makes it part of the motion. It is a copy either way. Although it applies only to pleadings, Civil Rule 10(c) suggests the mood: "A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes."

[4] "[I]dentical" is carried forward for uniformity with draft Rule 9037(h). But the 9037(h) Committee Note introduces an ambiguity. It explicitly states that the "identical" copy is identical to the unredacted document "except for the redaction." The intended meaning is "identical to the unredacted document except for the redactions." It seems better to delete "identical," relying on the sense of "copy" to prevent surreptitious deletion of information beyond that protected—or at least arguably protected—by Rule 5.2(a).

[5] The Bankruptcy Rule includes a long list of bankruptcy characters that do not fit the Civil Rules context.

[6] The Bankruptcy Rule is: "any individual whose personal identifying information is to be redacted." For the Civil Rule, "person" seems to fit better with a financial-account number that should have been redacted, at least assuming that an entity other than an individual can have a protected financial-account number.

[7] The Bankruptcy Rule begins: "Upon receipt of the motion, the court shall promptly restrict public access." The direction to act promptly reflects a concern that the motion itself may point out the existence and public availability of the unredacted document in the court file.

Rendered in Civil Rules language, this approach would substitute "must" for "shall," and "receiving" for "receipt of." But "filed" may be better than "receiving": "When the motion is filed, the court must promptly restrict public access * * *."

But during the Style Project the Civil Rules Committee was continually reminded that directions that a court must act promptly, or immediately, or whatever, begin to seem like the often conflicting docket priority directions of earlier and unlamented days. Perhaps it is enough to rely on the movant to request prompt action to deny access, omitting the bracketed "[promptly]."

[8] "Deny" likely is better than restrict. No public access.

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15 unredacted document:
16 (i) pending its ruling on the motion, and
17 (ii) if the motion is granted, until the court amends or vacates the
18 order; and
(B) restore public access if the motion is denied.[9]

Committee Note

1 Subdivision (i) is new. It is adopted to reflect the parallel adoption of new Bankruptcy
2 Rule 9037(h). Subdivision (i) differs from Rule 9037(h) in some details that reflect differences from
3 the circumstances that may arise in bankruptcy filings.

4 Any person may file a motion to redact a filed document to delete information protected by
5 Rule 5.2(a).

6 The motion must include a copy that is identical to the filed document except for the
7 redactions. It must identify the location of the unredacted document in the docket.

8 A single motion may relate to one or more unredacted documents. But if the proposed
9 redactions involve different documents it may be better to file separate motions, particularly if
10 different types of protected information are involved.

11 The motion should request immediate action to deny public access to [the motion and][10] the
12 unredacted document pending the court's ruling on the motion. Because the motion itself may call
13 attention to the unredacted document, the court should act as promptly as possible to deny public
14 access pending its ruling. The movant may assist the court by invoking whatever means are
15 compatible with the court's electronic and paper filing procedures.

16 If the motion is granted, the redacted document should be placed on the docket, and public
17 access to [the motion and] the unredacted document should remain restricted. If the court denies the

---

[9] The Bankruptcy Rule includes a final sentence: "If the motion is denied, the restrictions shall be lifted, unless the court orders otherwise." It may not be necessary to add the provision for denial of the motion. Under (A), the document is protected pending the ruling, and that's all. The restriction dissolves unless the ruling grants the motion. But there may be some risk that the restriction will carry forward by sheer inertia—that seems to be the fate of a fair share of sealed documents.

This draft shows one way to include a direction to lift the restrictions if the motion is denied. Better drafting can be crafted if the provision seems useful—if the Bankruptcy Rules Committee wishes to retain it, the gain in uniformity is worthwhile.

Uniformity also may require that "unless the court orders otherwise" be added to the rule text. But it is difficult to believe that a court will deny the motion without further opportunity to seek redaction if the unredacted document in fact includes protected information.

[10] Once the unredacted document in the file is protected, is there any need to deny access to the motion? On the other hand, will there be any circumstances in which there is a public interest in access to the motion, so long as all parties have access to the motion?

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18 motion, generally the restriction on public access to [the motion and] the document should be lifted.

19 This procedure does not affect any remedies that a person whose personal identifiers are
20 exposed may have against the person that filed the unredacted document.

126-002236

2. RULE 30(b)(6): DEPOSING AN ENTITY

Rule 30(b)(6), which allows a party to name an entity as a deponent, was added in 1970. In rough terms, the purpose was to enable a party to discover "information known or reasonably available to the organization" more effectively than had proved possible through written interrogatories or an endless trek through named individual deponents who claim not to be the ones who know what the organization knows.

Implementation of Rule 30(b)(6) has encountered problems. In 2006, the Committee undertook an extensive study at the prompting of a submission by a committee of the New York State Bar Association. Genuine problems were identified, but it was not thought likely that effective solutions could be found in revised rule text. The question came back in 2013 in a set of proposals made by the New York City Bar. Consulting the efforts made seven years earlier, the Committee again decided to put the question aside.

Now those questions and others have been renewed in a proposal submitted by "members of the Council and Federal Task Force of the ABA Section of Litigation, in our individual capacities." The submission repeats many of the challenges made by earlier submissions. It offers views on some of them, but not all. The broad request is that the Committee "undertake a review of the Rule and the case law developed under it with the goal of resolving conflicts among the courts, reducing litigation on its requirements, and improving practice under the Rule, particularly in light of the purposes and text of the 2015 amendments to the Federal Rules."

The Committee concluded that these questions should be taken up again. The reasons are expressed in a statement by one member quoted in the Draft Minutes: These problems arise "constantly, all over the country, and even in sister cases. The Rule is constantly a source of controversy. Proper preparation issues will never go away." It will be difficult to find rule text that will encourage reasonable practice. But the Committee should at least try.

A Rule 30(b)(6) Subcommittee has been appointed. Its work is just beginning. It does not seem likely that any proposed rule amendments can be developed in time for a recommendation to publish as early as August 2017.

3. RULE 81(c)(3)(A): JURY DEMAND ON REMOVAL

This submission to the Civil Rules Committee addresses a single word in Rule 81(c)(3)(A), altered in the Style Project. The specific problem is narrow; it will be identified after setting out the full text of Rule 81(c)(3). Examination of the specific problem in the setting of the full rule suggests more serious questions, however.

This topic is presented now to seek advice on two questions. The first is whether the Style Project erred in changing "does" to "did," as explained below, and whether the change should be undone if indeed it was unfortunate. The second is whether Rule 81(c)(3) strikes the right balance in protecting against forfeiture of the right to jury trial by assigning to the court and the party who removes a case from state court responsibility to initiate the Rule 38 demand process.

RULE 81. APPLICABILITY OF THE RULES IN GENERAL; REMOVED ACTIONS

(c) Removed Actions.

(1) ***Applicability.*** These rules apply to a civil action after it is removed from a state court.
* * *

(3) ***Demand for a Jury Trial.***

(A) *As Affected by State Law.* A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal. If the state law ~~does~~ did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time. The court must so order at a party's request and may so order on its own. A party who fails to make a demand when so ordered waives a jury trial.

(B) *Under Rule 38.* If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38 must be given one if the party serves a demand within 14 days after:
(i) it files a notice of removal; or
(ii) it is served with a notice of removal filed by another party.

[The Style Project rewording challenged by 15-CV-A is shown by overlining the pre-2007 word, "does," and underlining the substitute, "did."]

The specific suggestion focuses narrowly on the change from "does" to "did." The suggestion is that the change has created a trap for the unwary. So long as the rule said "does," it was clear that an express demand for jury trial must be made unless state law allows a jury trial without making an express request at any time. Saying "did" may lead some to believe that they need not make an express demand for jury trial after removal if state law, although requiring a demand at some point, allowed the demand to be made later than the time the case was removed to federal court. Cases are cited to show that federal courts continue to interpret the rule as if it says "does"; an appendix includes a decision granting a motion to strike a jury demand made by the lawyer who made the submission. The opinion relies on the 2007 Committee Note stating that the changes were intended to be stylistic only.

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Initial research into the change from "does" to "did" has explored Civil Rules Committee agenda books, Committee Minutes, and a substantial number of memoranda prepared for the Style Subcommittees. They show that "did" appeared in the style draft at least as early as September 30, 2004, but do not show any discussion of this specific change. They also show an intriguing hint in a note recognizing that "Joe Spaniol is right" that there is a gap in the rule, but suggesting that it cannot be fixed—if fixing is needed—in the Style Project. One question is whether there is a gap that is worth filling. A broader question is whether the whole rule is unnecessarily complicated. The complication can be illustrated by looking for the gap.

At least these situations can be imagined:

(1) A jury trial was "expressly demanded * * * in accordance with state law" before removal. It makes sense to carry the demand forward after removal. Rule 81(c)(3)(A) does that.

(2) Rule 81(c)(3)(B): All necessary pleadings have been served at the time of removal, but no express demand for jury trial was made. The rule applies the same principle as Rule 38(b)(1), adjusting the time for the circumstance of removal—a demand must be served, not "14 days after the last pleading directed to the issue is served," (the Rule 38(b)(1) timing,) but 14 days after removing or being served with the notice of removal. This provides the advantages sought by Rule 38(b): the parties and the court know whether this is to be a jury case early in the proceedings.

(3) All necessary pleadings have not been served at the time of removal. Here the principle of Rule 81(c)(1) seems to do the job—Rule 38 applies of its own force after removal. The most sensible reading of the rule text is that an exception is made for cases where state law does not require a demand for jury trial.

(4) State law does not require a demand for jury trial at any point. The Rule was amended in 1963 to say that a demand need not be made after removal. The Committee Note said this is "to avoid unintended waivers of jury trial." But the amendment went on to provide, as the rule still does, that the court may order that a demand be made; failure to comply waives the right to jury trial. The Committee Note added the suggestion that "a district court may find it convenient to establish a routine practice of giving these directions to the parties in appropriate cases." Professor Kaplan, Reporter for the Committee, elaborated on the Note in a law review article quoted in 9 Federal Practice & Procedure: Civil 3d, § 2319, p, 230, n. 12. He suggested that it might be useful to adopt a local rule "under which the direction is to be given routinely." But he further suggested that it is important to give the parties notice in each case, since relying on a local rule alone "would recreate the difficulty which the amendment seeks to meet." These observations may address the question why it would not be better to complement subparagraph (B) by providing that if all necessary pleadings have not been served at the time of removal, Rule 38(b) applies. That would require a written demand no later than 14 days after the last pleading addressed to the issue is served. The apparent concern is that people will not pay attention to the Federal Rules after removal when they are habituated to a state procedure that provides jury trial without requiring an express demand at any point. That explanation seems to fit with the observation in § 2319 that "a number of courts have held that this provision is applicable only if the case automatically would have been set for jury trial in the state court * * * without the necessity of any action on the part of the party desiring jury trial."

(5) State law does require an express demand for jury trial, but the time for the demand is set at a point after the time when the case is removed. The Nevada rule involved in the docket suggestion, for example, allows a demand to be made not later than entry of the order first setting the case for trial. This is the circumstance in which the change from "does" to "did" may create

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some uncertainty. One possible reading is that the change reflects concern that state law may have changed after removal: at the time of removal, it did not require an express demand at any point in the progress of the case to trial, but after removal it was changed to require an express demand. That is a fine-grained explanation. Another possible reading is that no demand need be made after removal so long as the state-court deadline had not been reached before removal. That reading can be resisted on at least two grounds. One is that the change was made in the Style Project, and thus must be read to carry forward the meaning of the rule as it was. A second is that the result is unfortunate: although both state and federal systems require an express demand, none need be made because of the differences in the deadlines. There is little reason to suppose that a party who wishes a jury trial should believe that removal provides relief from the demand requirement. Anyone who actually reads the rules should at least recognize the uncertainty and make a demand. It makes little sense to read the rule in a way that is most likely to make a difference only when a party belatedly decides to opt for a jury trial.

The immediate question is whether the style choice should be reversed to promote clarity. "Does" took on an apparently established and quite limited meaning. It is possible to read "did" in the Style Rule to have a different meaning. But the Committee has been reluctant to revisit choices made in the Style Project, particularly when the courts—no matter what may be the experience of particular lawyers—seem to be getting it right. If that were all that might be considered, the case for amending the rule may not be strong.

But it is worth asking whether it makes sense to perpetuate the exception for cases removed from courts in however many states there be that do not require a demand for jury trial at all. One example would be a state that does not provide for jury trial in a particular case—but that does not offer much reason to excuse a demand requirement after removal. Perhaps the rule has been too eager to protect those who refuse to read Rule 81(c) to find out that federal procedure governs after removal. There is a strong federal interest in the early demand requirement of Rule 38(b). All parties and the court know from the outset whether they are moving toward a jury trial, however likely it is that the case will ever get there. The risk that a party may decide to opt for a jury trial late in the case only because the judge does not seem sufficiently sympathetic is reduced. And if there is some reason for excusing failure to make a timely demand, Rule 39(b) protects the opportunity to reclaim a jury trial.

Rule 81(c) would be much simpler, a not inconsiderable virtue in this setting, if it were recast to read something like this:

> **(3)** ***Demand for a Jury Trial.*** Rule 38(b) governs a demand for jury trial unless, before removal, a party expressly demanded a jury trial in accordance with state law. If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38 must be given one[11] if the party serves a demand within 14 days after:
>
> (A) it files a notice of removal, or
> (B) it is served with a notice of removal filed by another party.

With all of this, the two most likely choices are these: Do nothing or undertake a thorough

[11] This version simply tracks the current rule. It might be shortened: "If all necessary pleadings have been served at the time of removal, a demand must be served within 14 days after * * *."

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reexamination of Rule 81(c). Matters can be resolved reasonably without changing "did" back to "does." But the complex and incomplete structure of Rule 81(c), built on sympathy for those who refuse to consult the rules, might benefit from significant simplification. The Committee will consider this choice at its November 2016 meeting.

B. ISSUES RESOLVED

A number of suggestions for rules amendments have been removed from the agenda. Only brief identifications are provided here. Further discussion is provided in the Draft Minutes.

A judge suggested adoption of a rule that would enhance initial disclosure, reduce discovery, and limit motions for summary judgment. The suggestion advances specific approaches to questions that have been constantly on the agenda. It was put aside now because it overlaps in many ways with the proposed pilot projects on initial mandatory disclosure and expedited procedures.

Another judge noted frustration with the "separate document" requirement of Rule 58. The problem arises when a judge offers a brief explanation of reasons in a document that is intended to be the final judgment in the case. The precise line may waver a bit in application, but it is clear that anything more than a completely minimal explanation disqualifies the document as "separate." The result under Rule 58(c)(2) is a 150-day delay before time limits start to run for post-judgment motions and appeal. These questions were explored extensively in the process of amending Rule 58 in 2002. The Appellate Rules Committee explored them again in 2008. Each time the conclusion was that the separate document requirement should be retained. It serves a valuable function in setting a clear line that begins the time for post-judgment motions and appeal. Compliance is easy. Only absent-mindedness gets in the way. The Committee concluded that renewed education, with particular attention to deputy courtroom clerks, is better than a rule amendment.

One submission offered four suggestions. The first relates to e-filing by pro se litigants; that subject is addressed in the proposed Rule 5 amendments discussed above. The other three were:

(1) To amend Rule 5.2 to forbid filing even the last four digits of a social security number. The Committee understands that the last four digits are important in bankruptcy practice and preferred to maintain uniformity with the Bankruptcy rule.

(2) To require sealing of affidavits stating the assets of a party seeking to proceed *in forma pauperis*. The Committee concluded that protection of financial privacy in this setting is outweighed by the value of public access to information about decisions to allow free filing and by the administrative burdens of sealing.

(3) To require counsel to provide a pro se party with copies of cases or other authorities cited by court or counsel "that are unpublished or reported exclusively on computerized data bases." Some courts require this by local rule now. Although it may be a desirable practice, it seems better left to local practice than enshrined in a national rule.

Another submission suggested that the pleading standard articulated in Rule 8(a)(2) has, by virtue of Supreme Court reinterpretations, become "so misleading as to be plain error." In recent years the Committee has deliberately deferred any project that would attempt to rearticulate, and perhaps to redefine, the pleading standards that have emerged in the wake of the *Twombly* and *Iqbal* decisions. The time has not yet come for such a project.

Still other suggestions deal with a wide range of issues:

(1) A potential confusion about adding additional time to respond when a time period starts from the day when a disclosure is "made," rather than "served." The Committee concluded the rules are clear on careful reading.

(2) The need for continued monitoring of the time when it may be desirable to consider mandatory disclosure of third-party litigation financing arrangements. The Committee retains this question in its agenda, but believes that present action would be premature because these arrangements are evolving rapidly.

(3) Finding means to facilitate personal service on United States employees as defendants. The Committee concluded a court rule probably cannot direct government agencies to reveal employee home addresses, and that service by leaving the summons and complaint at the employee's office would not be desirable.

(4) Addressing "time stamps" and facilitating access to court resources by the visually impaired—a topic not appropriate for solution by a national rule of procedure, but deserving of attention by court administrators.

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TAB 4B

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EX. 1

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RE: Discussion with Colorado Lawyers

Parker Folse to: David_Campbell@azd.uscourts.gov, Judge_Grimm@mdd.uscourts.gov 02/24/2016 11:31 AM

Cc: Edward Cooper, "coquille@law.harvard.edu" , "JBARKETT@shb.com", "Judge_Neil_Gorsuch@ca10.uscourts.gov" , "Jeffrey_Sutton@ca6.uscourts.gov"

From: Parker Folse <pfolse@SusmanGodfrey.com>

To: "David_Campbell@azd.uscourts.gov" <David_Campbell@azd.uscourts.gov>, "Judge_Grimm@mdd.uscourts.gov" <Judge_Grimm@mdd.uscourts.gov>

Cc: Edward Cooper <coopere@umich.edu>, "coquille@law.harvard.edu" <coquille@law.harvard.edu>, "JBARKETT@shb.com" <JBARKETT@shb.com>, "Judge_Neil_Gorsuch@ca10.uscourts.gov" <Judge_Neil_Gorsuch@ca10.uscourts.gov>,

History: This message has been forwarded.

1 attachment

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Thanks for this excellent summary. I'll add a few items.

Under the Colorado pilot project, defendants were required to file answers even if they also moved to dismiss, which seemed to be a practice that received support in the survey that Dave mentioned (perhaps in part because it helps identifies the issues in dispute and facilitates initial disclosures and early case management while the motion is pending), yet in adopting the new rules, the Colorado Supreme Court did not adopt this rule for reasons that were not explained.

I got the sense that there may not have been a lot of experience with large document cases involving significant ESI during the Colorado pilot project, but the comments indicated that in such cases the early disclosure requirements focused the parties' attention on ESI issues earlier than otherwise would have been the case and usually resulted in agreements for staged disclosures to allow time for handling ESI issues.

There seemed to be agreement among the Colorado lawyers and judges that early trial settings are meaningless (and can be inefficient) unless they really are firm. Yet it's impractical not to multi-track trial settings given the high rate of settlements. One judge said he had been lucky to have colleagues who were willing to pick up each other's trial settings to avoid continuances, but guessed that this could be a bigger problem in the federal system.

There certainly seemed to be uniform enthusiasm among the Colorado lawyers and judges for robust early disclosure and for requiring disclosure of all relevant information (harmful as well as helpful) as a means of reducing sideshow fights over what must be produced in discovery and focusing attention on the merits -- though as Dave reported, there seemed to be equally uniform agreement on the importance of early and active case management by judges to make such a system work.

Parker

Parker

From: David_Campbell@azd.uscourts.gov [David_Campbell@azd.uscourts.gov]
Sent: Wednesday, February 24, 2016 9:34 AM
To: Judge_Grimm@mdd.uscourts.gov
Cc: Edward Cooper; coquille@law.harvard.edu; JBARKETT@shb.com; Parker Folse; Judge_Neil_Gorsuch@ca10.uscourts.gov; Jeffrey_Sutton@ca6.uscourts.gov
Subject: Discussion with Colorado Lawyers

Everyone:

We had a discussion this morning with Colorado lawyers and judges who have worked under their new rules, which include expedited litigation and case management procedures as well as mandatory initial disclosures. This email will recount some of what was said. Parker, Ed, Dan, and Neil (who kindly arranged the call) can fill in any gaps.

One of the judges began by noting that he conducted a survey of lawyers after every case management conference during the early phases of the pilot program. In total, he received comments from 97 lawyers. He asked them to grade the new system on a scale of 1 to 10, with 1 being the most unfavorable and 10 the most favorable. The average grade was 3.9. He observed that this may have reflected the fact that lawyers do not like change. Becky Kourlis, who was on the call, noted that data from various states shows that it generally takes 2 to 3 years for initial resistance to subside. Colorado's pilot project has now become a formal set of rules. All of the lawyers and judges on the call seemed to like the new system.

It was observed that collection lawyers generally did not like the requirement of robust initial disclosures. Originally, those disclosures were required just 21 days into the case. Many collection cases default, and yet these lawyers found they were required to spend time and money collecting documents before they knew if the case would default. Interestingly, the initial disclosure requirements appear to have reduced the number of defaults that occur in cases. Becky said the same phenomenon has been observed in other states. To avoid this problem, the current rule does not require disclosures until after an answer has been filed.

Those on the phone observes that lawyers in complex cases tend to like the new rules the most.

We asked how e-discovery was handled in initial disclosures. One lawyer commented that the pilot program asked the parties whether there were e-discovery issues in the case, a question which prompted lawyers to engage in a discussion about e-discovery. The parties generally worked out an agreement on the issue.

One lawyer observed that the requirement to disclose good and bad information has not really increase the amount of work done at the beginning of a case because lawyers would review the bad information while searching for the good information in any event. Thus, the amount of review is essentially the same.

Folks explained that the new rules were intended to produce a culture change, from hide-the-ball to getting all information on the table. They seemed to believe that the culture change is taking hold. They noted that initial disclosure issues are often raised at the first case management conference, but that the parties virtually always work them out. One judge said that he sets the hearing one week later to address the unresolved disclosure issues and that he has never had to actually hold such a hearing because the parties always reach agreement. Another judge said that he is simply requires the parties to discuss a solution, and they have always found a solution to the disclosure issues.

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The Colorado system apparently includes a form that requires the parties to indicate whether they believe the initial disclosures have been adequate. The form is provided to the court before the initial case management conference.

Folks on the call emphasized that an in-person case management conference with the judge is key to making the initial disclosures work. We should consider making this point in our pilot project proposal.

The pilot project included mandatory sanctions for disclosure violations. There was widespread unhappiness with this portion of the rule, and judges usually found ways not to apply it. It was not included in the final rule. Becky noted that the study of the Arizona disclosure rule revealed that its success turned heavily on the willingness of judges to enforce it.

The judges commented that the new rules have been successful, in part, because appellate courts have been willing to back-up trial judge decisions. Becky noted that the designers of the pilot project actually went to the Colorado appellate courts to educate them regarding the pilot and to encourage them to support it in there appellate decisions. We should consider doing the same thing with our pilot. If a district agrees to participate, but the circuit is antagonistic to the pilot, the effort may fail. We should consider an appellate education component to our pilots. (The chiefs of the circuits will hear about it ay the judicial conference, but other appellate judges will not.)

One medical malpractice lawyer expressed concern about procedures now being used by medical records and vendors. He said the vendors are deciding what is and is not a legal document, and lawyers representing defendants are able to get access only to legal documents within the system. The vendors won't disclose how they distinguish between nonlegal and legal documents, and this is causing great complexity in many states.

We talked about early trial dates. All of the lawyer say they favor them, but only when they are firm. It does no good to set an early trial date only to have it continued multiple times.

Dave

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John Barkett's Notes on Call with Arizona Judges and Lawyers on Rule 26.1 (March 1, 2016)

Arizona Rule 26.1	Comments During the Focus Group
The factual basis of the claim or defense. In the event of multiple claims or defenses, the factual basis for each claim or defense.	It is helpful as to affirmative defenses in particular. Duty to supplement is helpful here as facts are developed, new disclosures are made. If complaint is highly detailed, there is nothing more in the disclosure statement than in the complaint. But with bare bones complaints, there will be more factual detail provided. And in supplementation, if new facts are discovered, they are disclosed in a supplement.
The legal theory upon which each claim or defense is based including, where necessary for a reasonable understanding of the claim or defense, citations of pertinent legal or case authorities.	Duty to supplement is also helpful because parties generally develop new claims in litigation.
The names, addresses, and telephone numbers of any witnesses whom the disclosing party expects to call at trial with a fair description of the substance of each witness' expected testimony.	If a good disclosure statement, it will help decide who to depose. The disclosures are typically in summary form identifying the subject matter of the testimony. Sometimes there is more and the disclosure might be 2-3 paragraphs. A detailed script of what the witness knows or will say is not given. A proportionality determination has to be made. Could be lots of names on documents that will not be material to the case but may have some knowledge. And if dollar value is not large, that has to be taken into account in how much to say. Judge: problem is objection at trial comes very fast with jury sitting there. Was it "fairly described"? Will someone be prejudiced? These are inherent problems in a rule like this. "I don't think it can be better drafted." Unwritten rule: if you ask about a topic in a deposition, it is incorporated in the

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Arizona Rule 26.1	Comments During the Focus Group
	disclosure statement. Or some add, "Mr. Smith will also testify on topics covered in his deposition." Some now are engaging in tactic of not deposing and then arguing not disclosed. Or last minute submissions of depositions to supplement disclosures.
The names and addresses of all persons whom the party believes may have knowledge or information relevant to the events, transactions, or occurrences that gave rise to the action, and the nature of the knowledge or information each such individual is believed to possess.	The disclosures are typically in summary form identifying the subject matter of the testimony. Sometimes there is more and the disclosure might be 2-3 paragraphs. A detailed script of what the witness knows or will say is not given. Judge: The question she asks is whether the opposing side had fair notice of a general category of information possessed by a witness.
The names and addresses of all persons who have given statements, whether written or recorded, signed or unsigned, and the custodian of the copies of those statements.	
The name and address of each person whom the disclosing party expects to call as an expert witness at trial, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, the qualifications of the witness and the name and address of the custodian of copies of any reports prepared by the expert.	No one does this. It is okay to say this disclosure will be supplemented. By the time of final disclosure, you had better answer this but not needed initially.
A computation and the measure of damage alleged by the disclosing party and the documents or testimony on	This does not happen up front. It is okay to say this disclosure will be supplemented. By the time of final

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Arizona Rule 26.1	Comments During the Focus Group
which such computation and measure are based and the names, addresses, and telephone numbers of all damage witnesses.	disclosure, you had better answer this but not needed initially. Judge: you want to be sure issues are raised fairly by the disclosure. One lawyer gave an example: witness who is asked about lost profits but the disclosure does not say lost profits would be covered by this witness.
The existence, location, custodian, and general description of any tangible evidence, relevant documents, or electronically stored information that the disclosing party plans to use at trial and relevant insurance agreements.	A proposed rule would require disclosure of indemnities and surety agreements. And if it is wasting insurance policy, one has to disclose in a supplement how much of the coverage is left. If indemnity is confidential? That topic was not discussed on AZ task force that proposed the change. But judges commonly enter protective orders where warranted.
A list of the documents or electronically stored information, or in the case of voluminous documentary information or electronically stored information, a list of the categories of documents or electronically stored information, known by a party to exist whether or not in the party's possession, custody or control and which that party believes may be relevant to the subject matter of the action, and those which appear reasonably calculated to lead to the discovery of admissible evidence, and the date(s) upon which those documents or electronically stored information will be made, or have been made, available for inspection, copying, testing or sampling. Unless good cause is stated for not doing so, a copy of the documents	Could be debate over relevance. I am sure some people don't comply, but the culture in Arizona is to turn over. However, it does not work for ESI since disclosures are due 40 days after an answer is filed. It does not happen. And it should not happen. Too costly. A proposed revised rule is currently pending before the Arizona Supreme Court. If adopted, there would be staggered disclosure. ESI is carved out. Parties required to confer and talk about formatting, searches, custodians, cost. Then go before the Judge to work out any differences. In commercial court, there is an ESI checklist and the Judge goes through the checklist at the case management conference to resolve any issues. Moving to more active case management. She supports Rule 26.1. She is very aggressive in enforcing the Rule. She tells parties that she enforces the disclosure rule strictly and will keep out evidence not disclosed. She sees fewer discovery disputes. She does not allow motions to compel. She gets parties on phone after receiving 1-page summary of dispute. Objections should not be made to discovery if the production is required by 26.1. One change proposed in Arizona is to eliminate "reasonably calculated" standard

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Arizona Rule 26.1	Comments During the Focus Group
and electronically stored information listed shall be served with the disclosure. If production is not made, the name and address of the custodian of the documents and electronically stored information shall be indicated. A party who produces documents for inspection shall produce them as they are kept in the usual course of business.	and leave it just as "relevance." The disclosure rule eliminates hiding the ball and if you do so, you are in serious trouble. The Federal Rules allow you to hide the ball if no one asks for it. In this individual's cases in state court, he almost never issues interrogatories. One downside: initial disclosures accelerate the cost of prosecuting or defending the case. But parties can agree to postpone the 40-day disclosure deadline if they are going to talk settlement. Another judge spoke up. Rule is designed to make litigation civil again and eliminate gamesmanship. But there is still gamesmanship. Does not eliminate need for depositions. Does eliminate need of interrogatories. Does eliminate arguments over notice pleadings when you have disclosure rules. "Yeah, they have not given you a lot of facts, but they will in 40 days, so dismissal motion is denied." We get motions to exclude evidence based on non-disclosure. They become "gotchas" for some lawyers, who should have just picked up the phone and called to ask for a supplement. One lawyer was trained under federal rules and then moved to Arizona and encountered Rule 26.1. This lawyer also practices against highly sophisticated lawyers. This lawyer said 26.1 has been positive. Saves money. Moves matters more quickly. Parties tend to adjust timing based on Rule 26.1 This lawyer has never seen a party prejudiced by following the disclosure rule but has seen lawyers who failed to comply face evidence exclusion by virtue of the failure. One plaintiff's lawyer believes that the disclosure rule has affected plaintiff's lawyers more than defense lawyers: it is more costly; this lawyer has to constantly review the 26.1 disclosure to be sure it is supplemented as facts develop so he does not face an exclusion request at trial. A plaintiff's personal injury lawyer felt that Rule 26.1 adds a layer of discovery.

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Arizona Rule 26.1	Comments During the Focus Group
	Statements are filed but then this lawyer still gets interrogatories and requests for production on a number of issues. This lawyer felt it would be great if all judges did what judge above does: no discovery motions—call the court instead. This lawyer suggested a discovery master could play a role in ferreting out those that comply and those that don't intentionally versus accidentally. Judge disagrees with use of discovery master. Had bad experience with it. Cost the parties too much and took too long. Court involvement can move a matter along more quickly. She would add to the Rule that a party must issue a litigation hold when a case is filed. As to ESI, she thinks the Maricopa County Superior Court model should be the one followed in the Rule. Judges need to get involved in ESI discovery immediately. This judge says rule has helped, but it has not eliminated sharp practices that judges have to police. When supplemental disclosures are produced, new information is typically bolded or in italics. Deadline for final disclosure? It is typically in the scheduling order under AZ Rule 16. Rule says 60 days before trial, but the Court can trump this deadline and make it earlier than that. Most judges do. 60 days before trial is too late. One lawyer said he could never remember seeing anything "startling" in a disclosure statement. This lawyer has gotten favorable documents from the other side, however. In a $25,000 or $50,000 case, it adds expense. Lawyers do press client for every potential relevant document to be sure you are complying with the disclosure statement. Clients do balk. The Rule then is invoked by the lawyers to support them with respect to documents when clients balk at production. Conceptually, though, it is harder to explain to some clients that AZ's rule

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Arizona Rule 26.1	Comments During the Focus Group
	requires full disclosure. One has to think differently than when responding to a request for production. In that respect, it is more expensive. But on balance, this lawyer believes the disclosure rule saves money. Another lawyer: must think through your entire case, including its problems, because of what has to be disclosed. If there is a large amount of ESI, what is done? Disclosure would likely say: "we are negotiating an ESI protocol," or "we have agreed on an ESI protocol and this is what will happen…" If no discussion occurs, it might say: "We will make disclosure in due course after review." When data rich parties are against each other, they work things out. In asymmetrical cases, it is more difficult to work out. If data poor party tries to use ESI burden as leverage, then can be difficult. Judge: try to discuss with counsel and with the judge. One lawyer told story of NY lawyers dribbling out ESI and he is back to issuing requests for production. It will cost him quite a bit of money to engage in this iterative process. Should disclose sources of ESI at a minimum. If a "data dump," hard to argue something was not disclosed. Rule 26.1 is really drafted for small cases; sometimes with no lawyers involved. For larger cases, the proposed amendment on ESI will be make it self-executing versus now where lawyers have to avoid the rule in order to comply. Lawyers generally said they prefer the Arizona disclosures to federal court discovery practices.

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Arizona Rule 26.1	Comments During the Focus Group
	A plaintiffs' lawyer said he finds the disclosures of facts, legal theories, and documents to be helpful. He finds that judges generally enforce the disclosure rules. A judge said she thinks the disclosure rule, when enforced, makes cases move more quickly and reduces the amount of written discovery. A defense lawyer said the rule eliminates hiding the ball and makes litigation more cost-effective. He rarely serves interrogatories because they are not necessary in light of disclosures. If he thinks information is missing, he sends a letter to the opposing side requesting it. If it is not produced, the letter provides a basis for excluding it at trial. It does front-load costs, and can interfere with settlement of smaller cases. A judge agreed that the disclosure rule generally makes interrogatories unnecessary. On balance, he thinks the disclosure approach is better than the federal rules approach. A defense lawyer who learned to practice in Chicago before moving to Arizona said that she thinks the disclosure rules are extremely positive. They reduce costs and move cases more quickly. She has never seen a party unfairly prejudiced by the disclosure rule, but has seen partiers fairly prejudice when they failed to comply. A plaintiffs' lawyer said he thinks the document disclosure requirement is helpful, but the other disclosure obligations just increase cost. Some lawyers turn them into a "gotcha" tactic by arguing something obvious was not disclosed. A plaintiffs' lawyer said he thinks the disclosure rule would be more effective if other forms of discovery were limited. He still has to respond to much discovery, which means the disclosure obligation only adds another layer of cost.

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EX. 3

126-002261

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To: Judge Campbell

Cc: Rebecca Womeldorf

From: Amelia Yowell, Supreme Court Fellow

Date: December 13, 2015

RE: State Initial Disclosure Models

The Pilot Projects Subcommittee asked me to compile information about states with robust initial disclosure rules. I found seven states with initial disclosure rules that I thought would be helpful to the Subcommittee as it drafts a possible pilot program (Alaska, Arizona, Colorado, Nevada, New Hampshire, Texas, and Utah). I have provided a summary of these states' initial disclosure rules in the attached table, which I hope will provide a quick and easy way to compare the rules. Because I have simplified the rules for space and ease of comparison, I have linked each section of the table to the text of the relevant state rule.[1] If the Subcommittee thinks it would be helpful, I am happy to do additional research or analysis.

[1] You can access the text of the rule by clicking anywhere on a state's section in the table. The links are invisible. To get back to the main table, go to the bookmark bar on the left side of the PDF and click on "AGY Table."

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TABLE COMPARING SELECTED STATE INITIAL DISCLOSURE RULES

	Scope of Disclosure	List or Summary re Individuals	Produce or Identify Docs, ESI, data compilations, tangible things	Damages	Insurance Agreements
Federal **Fed. R. Civ. P. 26(a)(1)**	Helpful information (but not impeachment information)	Name, address, and telephone number and subject	A copy or description by category and location, limited to possession, custody, or control	A computation of each category and documents/material must be available for inspection or copying	Inspection and copying
New Hampshire **N.H. Superior Court Civ. R. 22(a)**	Helpful information (but not impeachment information)	Name, address, and telephone number and summary (unless the information is in a produced document)	A copy, limited to possession, custody, or control	A computation of each category and a copy of documents/materials	Inspection and copying
Nevada **Nev. R. Civ. P. 16.1(a)(1), 26(b)(1)**	Helpful and hurtful information, including impeachment *"Relevant to the subject matter"*	Name, address, and telephone number and subject	A copy or description by category and location, limited to possession, custody or control	A computation of any category and documents/materials must be available for inspection and copying	Inspection and copying
Alaska **Alaska R. Civ. P. 26(a)(1)**	The factual basis for each claim or defense Helpful and hurtful information	Name, address, and telephone number and subject	For relevant documents, a copy or a description by category and a copy of any un-privileged	List categories of damages and a computation of each category of special damages and	Produce a copy

	"Relevant to disputed facts alleged with particularity in the pleadings"		statements or the name, address, and telephone number of the custodian of the statement and photos, diagrams, and videotapes	documents/materials must be available for inspection or copying	
Colorado **Colo. R. Civ. P. 26(a)(1)**	Helpful and hurtful information *Relevant to the claims and defenses of any party"*	Name, address, and telephone number and "brief description"	A listing and a copy or description by category and location, limited to possession, custody, or control and make available for inspection and copying	A description of the categories and a computation of economic damages and relevant documents/materials must be available for inspection or copying	Inspection and copying
Utah **Utah R. Civ. P. 26(a)(1)**	For individuals: helpful information (but not impeachment information) and each fact witness the party may call in its case-in-chief For documents: any referred to in the pleadings and any the party may offer in its case-in-chief (but not charts, summaries,	Name, address, and telephone number and subject and, if an expected fact witness, a summary	A copy, limited to possession or control of the party	A computation of any damages claimed and a copy of documents/materials	Produce a copy

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	and demonstrative exhibits)				
Arizona **Ariz. R. Civ. P. 26.1(a)**	The factual basis and legal theory for each claim or defense For individuals: helpful and hurtful information (*knowledge or information relevant to the events, transactions, or occurrences*) and witnesses the party intends to call at trial and all persons who have given statements (written, recorded, signed, or unsigned) and anticipated expert witnesses For documents, etc.: any the party plans to use at trial and helpful and hurtful documents (*relevant to the subject matter*), and those reasonably calculated to lead to the discovery of admissible evidence	Names, address, and telephone number and nature and, for witnesses expected at trial, a fair description of the substance of the testimony and, for witnesses who have given a statement, the identity of the custodian of the copies and, for expert witnesses, the subject matter, the facts and opinions, a summary of the grounds for the opinions, the expert's qualification, and the name and address of the custodian of the expert's reports	For documents expected to be used at trial, "the existence, location, custodian, and general description," and for relevant documents, a list or, in the case of voluminous information, a list of the categories known to exist (no possession, custody, or control limitation) and unless good cause, a copy	A computation of damages and a copy of the documents/materials and the names, addresses, and telephone numbers of all damage witnesses	List existence, location, custodian, and general description

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Texas **Tex. R. Civ. P. 194.2** **(NOT MANDATORY)**	Factual basis and legal theories for claims or defenses (but not all evidence that may be offered at trial) Helpful and hurtful information "*Relevant facts*"	Name, address, and telephone number and a brief statement of connection and for expert witnesses, the subject matter, general substance of impressions and opinions, brief summary of the basis, or documents reflecting the information (if not subject to the control of the party)	A copy of any witness statements and for experts controlled by the party, a copy of everything provided to, reviewed by, or prepared by or for the expert and the expert's current resume and bibliography	The amount and method of calculating economic damages and, if physical or mental injury, all medical records and bills reasonably related or authorization permitting disclosure	A copy

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Advisory Committee on Civil Rules
Exhibit 3

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title V. Disclosures and Discovery (Refs & Annos)

Federal Rules of Civil Procedure Rule 26

Rule 26. Duty to Disclose; General Provisions Governing Discovery

Currentness

<Notes of Decisions for 28 USCA Federal Rules of Civil Procedure Rule 26 are displayed in two separate documents. Notes of Decisions for subdivisions I to III are contained in this document. For Notes of Decisions for subdivisions IV to end, see second document for 28 USCA Federal Rules of Civil Procedure Rule 26.>

(a) Required Disclosures.

(1) ***Initial Disclosure.***

(A) *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information--along with the subjects of that information--that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy--or a description by category and location--of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party--who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(B) *Proceedings Exempt from Initial Disclosure.* The following proceedings are exempt from initial disclosure:

(i) an action for review on an administrative record;

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(ii) a forfeiture action in rem arising from a federal statute;

(iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

(iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(v) an action to enforce or quash an administrative summons or subpoena;

(vi) an action by the United States to recover benefit payments;

(vii) an action by the United States to collect on a student loan guaranteed by the United States;

(viii) a proceeding ancillary to a proceeding in another court; and

(ix) an action to enforce an arbitration award.

(C) *Time for Initial Disclosures--In General.* A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(D) *Time for Initial Disclosures--For Parties Served or Joined Later.* A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(E) *Basis for Initial Disclosure; Unacceptable Excuses.* A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) ***Disclosure of Expert Testimony.***

(A) *In General*. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) *Witnesses Who Must Provide a Written Report*. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report--prepared and signed by the witness--if the witness is one retained or specially

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employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) *Witnesses Who Do Not Provide a Written Report*. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) *Time to Disclose Expert Testimony*. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) *Supplementing the Disclosure*. The parties must supplement these disclosures when required under Rule 26(e).

(3) ***Pretrial Disclosures.***

(A) *In General*. In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

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(i) the name and, if not previously provided, the address and telephone number of each witness--separately identifying those the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence--separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) *Time for Pretrial Disclosures; Objections.* Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made--except for one under Federal Rule of Evidence 402 or 403--is waived unless excused by the court for good cause.

(4) ***Form of Disclosures.*** Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

(b) Discovery Scope and Limits.

(1) ***Scope in General.*** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

(2) ***Limitations on Frequency and Extent.***

(A) *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) *Specific Limitations on Electronically Stored Information.* A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

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(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

(3) ***Trial Preparation: Materials.***

(A) *Documents and Tangible Things*. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection Against Disclosure*. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) *Previous Statement*. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording--or a transcription of it--that recites substantially verbatim the person's oral statement.

(4) ***Trial Preparation: Experts.***

(A) *Deposition of an Expert Who May Testify*. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

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(B) *Trial-Preparation Protection for Draft Reports or Disclosures*. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses*. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(D) *Expert Employed Only for Trial Preparation*. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) *Payment*. Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and

(ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) ***Claiming Privilege or Protecting Trial-Preparation Materials.***

(A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

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(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed--and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) *Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) Protective Orders.

(1) ***In General.*** A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending -- or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) ***Ordering Discovery.*** If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

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(3) ***Awarding Expenses.*** Rule 37(a)(5) applies to the award of expenses.

(d) Timing and Sequence of Discovery.

(1) ***Timing.*** A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) ***Early Rule 34 Requests.***

(A) Time to Deliver. More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:

(i) to that party by any other party, and

(ii) by that party to any plaintiff or to any other party that has been served.

(B) ***When Considered Served***. The request is considered to have been served at the first Rule 26(f) conference.

(3) ***Sequence.*** Unless the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

(e) Supplementing Disclosures and Responses.

(1) ***In General.*** A party who has made a disclosure under Rule 26(a)--or who has responded to an interrogatory, request for production, or request for admission--must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

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(2) ***Expert Witness.*** For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

(f) Conference of the Parties; Planning for Discovery.

(1) ***Conference Timing.*** Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable--and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).

(2) ***Conference Content; Parties' Responsibilities.*** In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) ***Discovery Plan.*** A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including -- if the parties agree on a procedure to assert these claims after production -- whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

(4) ***Expedited Schedule.*** If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule:

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(A) require the parties' conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b); and

(B) require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

(1) ***Signature Required; Effect of Signature.*** Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name--or by the party personally, if unrepresented--and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) ***Failure to Sign.*** Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) ***Sanction for Improper Certification.*** If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; January 21, 1963, effective July 1, 1963; February 28, 1966, effective July 1, 1966; March 30, 1970, effective July 1, 1970; April 29, 1980, effective August 1, 1980; April 28, 1983, effective August 1, 1983; March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; April 17, 2000, effective

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December 1, 2000; April 12, 2006, effective December 1, 2006; April 30, 2007, effective December 1, 2007; April 28, 2010, effective December 1, 2010; April 29, 2015, effective December 1, 2015.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Note to Subdivision (a). This rule freely authorizes the taking of depositions under the same circumstances and by the same methods whether for the purpose of discovery or for the purpose of obtaining evidence. Many states have adopted this practice on account of its simplicity and effectiveness, safeguarding it by imposing such restrictions upon the subsequent use of the deposition at the trial or hearing as are deemed advisable. See Ark.Civ.Code (Crawford, 1934) §§ 606 to 607; Calif.Code Civ.Proc. (Deering, 1937) § 2021; 1 Colo.Stat.Ann. (1935) Code Civ.Proc. § 376; Idaho Code Ann. (1932) § 16-906; Ill.Rules of Pract.Rule 19 (Smith-Hurd Ill.Stats. c. 110, § 259.19); Smith-Hurd Ill.Stats. c. 51, § 24; 2 Ind.Stat.Ann. (Burns, 1933) §§ 2-1501, 2-1506; Ky.Codes (Carroll, 1932) Civ.Pract. § 557; 1 Mo.Rev.Stat. (1929) § 1753; 4 Mont.Rev.Codes Ann. (1935) § 10645; Neb.Comp.Stat. (1929) ch. 20, §§ 1246-7; 4 Nev.Comp.Laws (Hillyer, 1929) § 9001; 2 N.H.Pub.Laws (1926) ch. 337, § 1; N.C.Code Ann. (1935) § 1809; 2 N.D.Comp.Laws Ann. (1913) §§ 7889 to 7897; 2 Ohio Gen.Code Ann. (Page, 1926) §§ 11525-6; 1 Ore.Code Ann. (1930) Tit. 9, § 1503; 1 S.D.Comp.Laws (1929) §§ 2713-16; Vernon's Ann.Civ.Stats.Tex. arts. 3738, 3752, 3769; Utah Rev.Stat.Ann. (1933) § 104-51-7; Wash.Rules of Practice adopted by the Supreme Ct., Rule 8, 2 Wash.Rev.Stat.Ann. (Remington, 1932) § 308-8; W.Va.Code (1931) ch. 57, art. 4, § 1. Compare [former] Equity Rules 47 (Depositions--To be Taken in Exceptional Instances); 54 (Depositions Under Revised Statutes, §§ 863, 865, 866, 867--Cross Examination); 58 (Discovery--Interrogatories--Inspection and Production of Documents--Admission of Execution or Genuineness).

This and subsequent rules incorporate, modify, and broaden the provisions for depositions under U.S.C., Title 28, [former] §§ 639 (Depositions *de bene esse;* when and where taken; notice), 640 (Same; mode of taking), 641 (Same; transmission to court), 644 (Depositions under *dedimus potestatem* and *in perpetuam*), 646 (Deposition under *dedimus potestatem*; how taken). These statutes are superseded in so far as they differ from this and subsequent rules. U.S.C. Title 28, [former] § 643 (Depositions; taken in mode prescribed by State laws) is superseded by the third sentence of Subdivision (a).

While a number of states permit discovery only from parties or their agents, others either make no distinction between parties or agents of parties and ordinary witnesses, or authorize the taking of ordinary depositions, without restriction, from any persons who have knowledge of relevant facts. See Ark.Civ.Code (Crawford, 1934) §§ 606 to 607; 1 Idaho Code Ann. (1932) § 16-906; Ill.Rules of Pract., Rule 19 (Smith-Hurd Ill.Stats. c. 110, § 259.19); Smith-Hurd Ill.Stats. c. 51, § 24; 2 Ind.Stat.Ann. (Burns, 1933) § 2-1501; Ky.Codes (Carroll, 1932) Civ.Pract. §§ 554 to 558; 2 Md.Ann.Code (Bagby, 1924) Art. 35, § 21; 2 Minn.Stat. (Mason, 1927) § 9820; Mo.St.Ann. §§ 1753, 1759, pp. 4023, 4026; Neb.Comp.Stat. (1929) ch. 20, §§ 1246-7; 2 N.H.Pub.Laws (1926) ch. 337, § 1; 2 N.D.Comp.Laws Ann. (1913) § 7897; 2 Ohio Gen.Code Ann. (Page, 1926) §§ 11525-6; 1 S.D.Comp.Laws (1929) §§ 2713-16; Vernon's Ann.Civil Stats.Tex. arts. 3738, 3752, 3769; Utah Rev.Stat.Ann. (1933) § 104-51-7; Wash.Rules of Practice adopted by Supreme Ct., Rule 8, 2 Wash.Rev.Stat.Ann. (Remington, 1932) § 308-8; W.Va.Code (1931) ch. 57, art. 4, § 1.

The more common practice in the United States is to take depositions on notice by the party desiring them, without any order from the court, and this has been followed in these rules. See Calif.Code Civ.Proc. (Deering, 1937) § 2031; 2 Fla.Comp.Gen.Laws Ann. (1927) §§ 4405-7; 1 Idaho Code Ann. (1932) § 16-902; Ill.Rules of Pract., Rule 19 (Smith-Hurd Ill.Stats. c. 110, § 259.19); Smith-Hurd Ill.Stats. c. 51, § 24; 2 Ind.Stat.Ann. (Burns, 1933) § 2-1502; Kan.Gen.Stat.Ann. (1935) § 60-2827; Ky.Codes (Carroll, 1932) Civ.Pract. § 565; 2 Minn.Stat. (Mason, 1927) § 9820; Mo.St.Ann. § 1761, p. 4029; 4 Mont.Rev.Codes Ann. (1935) § 10651; Nev.Comp.Laws (Hillyer, 1929) § 9002; N.C.Code Ann. (1935) § 1809; 2 N.D.Comp.Laws Ann. (1913) § 7895; Utah Rev.Stat.Ann. (1933) § 104-51-8.

Note to Subdivision (b). While the old chancery practice limited discovery to facts supporting the case of the party seeking it, this limitation has been largely abandoned by modern legislation. See Ala.Code Ann. (Michie, 1928) §§ 7764 to 7773; 2

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Ind.Stat.Ann. (Burns, 1933) §§ 2-1028, 2-1506, 2-1728-2-1732; Iowa Code (1935) § 11185; Ky.Codes (Carroll, 1932) Civ.Pract. §§ 557, 606(8); La.Code Pract. (Dart, 1932) arts. 347-356; 2 Mass.Gen.Laws (Ter.Ed., 1932) ch. 231, §§ 61 to 67; Mo.St.Ann. §§ 1753, 1759, pp. 4023, 4026; Neb.Comp.Stat. (1929) §§ 20-1246, 20-1247; 2 N.H.Pub.Laws (1926) ch. 337, § 1; 2 Ohio Gen.Code Ann. (Page, 1926) §§ 11497, 11526; Vernon's Ann.Civ.Stats.Tex. arts. 3738, 3753, 3769; Wis.Stat. (1935) § 326.12; Ontario Consol.Rules of Pract. (1928) Rules 237-347; Quebec Code of Civ.Proc. (Curran, 1922) §§ 286 to 290.

Note to Subdivisions (d), (e), and (f). The restrictions here placed upon the use of depositions at the trial or hearing are substantially the same as those provided in U.S.C., Title 28, [former] § 641, for depositions taken, *de bene esse*, with the additional provision that any deposition may be used when the court finds the existence of exceptional circumstances. Compare English Rules Under the Judicature Act (The Annual Practice, 1937) O. 37, r. 18 (with additional provision permitting use of deposition by consent of the parties). See also [former] Equity Rule 64 (Former Depositions, Etc. May be Used Before Master); and 2 Minn.Stat. (Mason, 1927) § 9835 (Use in a subsequent action of a deposition filed in a previously dismissed action between the same parties and involving the same subject matter).

1946 Amendment

Note. Subdivision (a). The amendment eliminates the requirement of leave of court for the taking of a deposition except where a plaintiff seeks to take a deposition within 20 days after the commencement of the action. The retention of the requirement where a deposition is sought by a plaintiff within 20 days of the commencement of the action protects a defendant who has not had an opportunity to retain counsel and inform himself as to the nature of the suit; the plaintiff, of course, needs no such protection. The present rule forbids the plaintiff to take a deposition, without leave of court, before the answer is served. Sometimes the defendant delays the serving of an answer for more than 20 days, but as 20 days are sufficient time for him to obtain a lawyer, there is no reason to forbid the plaintiff to take a deposition without leave merely because the answer has not been served. In all cases, Rule 30(a) empowers the court, for cause shown, to alter the time of the taking of a deposition, and Rule 30(b) contains provisions giving ample protection to persons who are unreasonably pressed. The modified practice here adopted is along the line of that followed in various states. See e.g., 8 Mo.Rev.Stat.Ann.1939, § 1917; 2 Burns' Ind.Stat.Ann.1933, § 2-1506.

Subdivision (b). The amendments to subdivision (b) make clear the broad scope of examination and that it may cover not only evidence for use at the trial but also inquiry into matters in themselves inadmissible as evidence but which will lead to the discovery of such evidence. The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case. *Engl v. Aetna Life Ins. Co.*, C.C.A.2, 1943, 139 F.2d 469; *Mahler v. Pennsylvania R. Co.*, E.D.N.Y.1945, 8 Fed.Rules Serv. 33.351, Case 1. In such a preliminary inquiry admissibility at trial should not be the test as to whether the information sought is within the scope of proper examination. Such a standard unnecessarily curtails the utility of discovery practice. Of course, matters entirely without bearing either as direct evidence or as leads to evidence are not within the scope of inquiry, but to the extent that the examination develops useful information, it functions successfully as an instrument of discovery, even if it produces no testimony directly admissible. *Lewis v. United Air Lines Transportation Corp.*, D.Conn.1939, 27 F.Supp. 946; *Engl v. Aetna Life Ins. Co.*, supra; *Mahler v. Pennsylvania R. Co.*, supra; *Bloomer v. Sirian Lamp Co.*, D.Del.1944, 8 Fed.Rules Serv. 26b.31, Case 3; *Rosseau v. Langley*, N.Y.1945, 9 Fed.Rules Serv. 34.41, Case 1 (Rule 26 contemplates "examinations not merely for the narrow purpose of adducing testimony which may be offered in evidence but also for the broad discovery of information which may be useful in preparation for trial."); *Olson Transportation Co. v. Socony-Vacuum Co.*, E.D.Wis.1944, 8 Fed.Rules Serv. 34.41, Case 2 (". . . the Rules . . . permit 'fishing' for evidence as they should."); Note, 1945, 45 Col.L.Rev. 482. Thus hearsay, while inadmissible itself, may suggest testimony which properly may be proved. Under Rule 26(b) several cases, however, have erroneously limited discovery on the basis of admissibility, holding that the word "relevant" in effect meant "material and competent under the rules of evidence". *Poppino v. Jones Store Co.*, W.D.Mo.1940, 1 F.R.D. 215, 3 Fed.Rules Serv. 26b.5, Case 1; *Benevento v. A. & P. Food Stores, Inc.*, E.D.N.Y.1939, 26 F.Supp. 424. Thus it has been said that inquiry might not be made into statements or other matters which, when disclosed, amounted only to hearsay. *See Maryland for use of Montvila v. Pan-American Bus Lines, Inc.*, D.Md.1940, 1 F.R.D. 213, 3 Fed.Rules Serv. 26b.211, Case 3; *Gitto v. "Italia," Societa Anonima Di Navigazione*, E.D.N.Y.1940, 31 F.Supp. 567; *Rose Silk Mills, Inc. v. Insurance Co. of North America*, S.D.N.Y.1939, 29 F.Supp. 504; *Colpak*

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v. Hetterick, E.D.N.Y.1941, 40 F.Supp. 350; *Matthies v. Peter F. Connolly Co.,* E.D.N.Y.1941, 6 Fed.Rules Serv. 30a.22, Case 1, 2 F.R.D. 277; *Matter of Examination of Citizens Casualty Co. of New York,* S.D.N.Y.1942, 3 F.R.D. 171, 7 Fed.Rules Serv. 26b.211, Case 1; *United States v. Silliman,* D.C.N.J.1944, 8 Fed.Rules Serv. 26b.52, Case 1. The contrary and better view, however, has often been stated. See, e.g., *Engl v. Aetna Life Ins. Co.,* supra; *Stevenson v. Melady,* S.D.N.Y.1940, 3 Fed.Rules Serv. 26b.31, Case 1, 1 F.R.D. 329; *Lewis v. United Air Lines Transport Corp.,* supra; *Application of Zenith Radio Corp.,* E.D.Pa.1941, 4 Fed.Rules Serv. 30b.21, Case 1, 1 F.R.D. 627; *Steingut v. Guaranty Trust Co. of New York,* S.D.N.Y.1941, 1 F.R.D. 723, 4 Fed.Rules Serv. 26b.5, Case 2; *DeSeversky v. Republic Aviation Corp.,* E.D.N.Y.1941, 2 F.R.D. 183, 5 Fed.Rules Serv. 26b.31, Case 5; *Moore v. George A. Hormel & Co.,* S.D.N.Y.1942, 6 Fed.Rules Serv. 30b.41, Case 1, 2 F.R.D. 340; *Hercules Powder Co. v. Rohm & Haas Co.,* D.Del.1943, 7 Fed.Rules Serv. 45b.311, Case 2, 3 F.R.D. 302; *Bloomer v. Sirian Lamp Co.,* supra; *Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc.,* D.Mass.1944, 8 Fed.Rules Serv. 26b.31, Case 1; *Patterson Oil Terminals, Inc. v. Charles Kurz & Co., Inc.,* E.D.Pa.1945, 9 Fed.Rules Serv. 33.321, Case 2; *Pueblo Trading Co. v. Reclamation Dist. No. 1500,* N.D.Cal.1945, 9 Fed.Rules Serv. 33.321, Case 4, 4 F.R.D. 471. See also discussion as to the broad scope of discovery in *Hoffman v. Palmer,* C.C.A.2, 1942, 129 F.2d 976, 995-997, affirmed 63 S.Ct. 477, 318 U.S. 109, 87 L.Ed. 645; Note, 1945, 45 Col.L.Rev. 482.

1963 Amendment

This amendment conforms to the amendment of Rule 28(b). See the next-to-last paragraph of the Advisory Committee's Note to that amendment.

1966 Amendment

The requirement that the plaintiff obtain leave of court in order to serve notice of taking of a deposition within 20 days after commencement of the action gives rise to difficulties when the prospective deponent is about to become unavailable for examination. The problem is not confined to admiralty, but has been of special concern in that context because of the mobility of vessels and their personnel. When Rule 26 was adopted as Admiralty Rule 30A in 1961, the problem was alleviated by permitting depositions *de bene esse,* for which leave of court is not required. See Advisory Committee's Note to Admiralty Rule 30A (1961).

A continuing study is being made in the effort to devise a modification of the 20-day rule appropriate to both the civil and admiralty practice to the end that Rule 26(a) shall state a uniform rule applicable alike to what are now civil actions and suits in admiralty. Meanwhile, the exigencies of maritime litigation require preservation, for the time being at least, of the traditional *de bene esse* procedure for the post-unification counterpart of the present suit in admiralty. Accordingly, the amendment provides for continued availability of that procedure in admiralty and maritime claims within the meaning of Rule 9(h).

1970 Amendment

A limited rearrangement of the discovery rules is made, whereby certain rule provisions are transferred, as follows: Existing Rule 26(a) is transferred to Rules 30(a) and 31(a). Existing Rule 26(c) is transferred to Rule 30(c). Existing Rules 26(d), (e), and (f) are transferred to Rule 32. Revisions of the transferred provisions, if any, are discussed in the notes appended to Rules 30, 31, and 32. In addition, Rule 30(b) is transferred to Rule 26(c). The purpose of this rearrangement is to establish Rule 26 as a rule governing discovery in general. (The reasons are set out in the Advisory Committee's explanatory statement.)

Subdivision (a)--Discovery Devices. This is a new subdivision listing all of the discovery devices provided in the discovery rules and establishing the relationship between the general provisions of Rule 26 and the specific rules for particular discovery devices. The provision that the frequency of use of these methods is not limited confirms existing law. It incorporates in general form a provision now found in Rule 33.

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Subdivision (b)--Scope of Discovery. This subdivision is recast to cover the scope of discovery generally. It regulates the discovery obtainable through any of the discovery devices listed in Rule 26(a).

All provisions as to scope of discovery are subject to the initial qualification that the court may limit discovery in accordance with these rules. Rule 26(c) (transferred from 30(b)) confers broad powers on the courts to regulate or prevent discovery even though the materials sought are within the scope of 26(b), and these powers have always been freely exercised. For example, a party's income tax return is generally held not privileged, 2A Barron & Holtzoff, *Federal Practice and Procedure,* § 651.2 (Wright ed. 1961), and yet courts have recognized that interests in privacy may call for a measure of extra protection. E.g., *Wiesenberger v. W. E. Hutton & Co.,* 35 F.R.D. 556 (S.D.N.Y.1964). Similarly, the courts have in appropriate circumstances protected materials that are primarily of an impeaching character. These two types of materials merely illustrate the many situations, not capable of governance by precise rule, in which courts must exercise judgment. The new subsections in Rule 26(b) do not change existing law with respect to such situations.

Subdivision (b)(1)--In General. The language is changed to provide for the scope of discovery in general terms. The existing subdivision, although in terms applicable only to depositions, is incorporated by reference in existing Rules 33 and 34. Since decisions as to relevance to the subject matter of the action are made for discovery purposes well in advance of trial, a flexible treatment of relevance is required and the making of discovery, whether voluntary or under court order, is not a concession or determination of relevance for purposes of trial. *Cf.* 4 *Moore's Federal Practice* ¶26-16[1] (2d ed. 1966).

Subdivision (b)(2)--Insurance Policies. Both the cases and commentators are sharply in conflict on the question whether defendant's liability insurance coverage is subject to discovery in the usual situation when the insurance coverage is not itself admissible and does not bear on another issue in the case. Examples of Federal cases requiring disclosure and supporting comments: *Cook v. Welty,* 253 F.Supp. 875 (D.D.C.1966) (cases cited); *Johanek v. Aberle,* 27 F.R.D. 272 (D.Mont.1961); Williams, *Discovery of Dollar Limits in Liability Policies in Automobile Tort Cases,* 10 Ala.L.Rev. 355 (1958); Thode, *Some Reflections on the 1957 Amendments to the Texas Rules,* 37 Tex.L.Rev. 33, 40-42 (1958). Examples of Federal cases refusing disclosure and supporting comments: *Bisserier v. Manning,* 207 F.Supp. 476 (D.N.J.1962); *Cooper v. Stender,* 30 F.R.D. 389 (E.D.Tenn.1962); Frank, *Discovery and Insurance, Coverage,* 1959 Ins.L.J. 281; Fournier, *Pre-trial Discovery of Insurance Coverage and Limits,* 28 Ford.L.Rev. 215 (1959).

The division in reported cases is close. State decisions based on provisions similar to the federal rules are similarly divided. See cases collected in 2A Barron & Holtzoff, *Federal Practice and Procedure* § 647.1, nn. 45.5, 45.6 (Wright ed. 1961). It appears to be difficult if not impossible to obtain appellate review of the issue. Resolution by rule amendment is indicated. The question is essentially procedural in that it bears upon preparation for trial and settlement before trial, and courts confronting the question, however they have decided it, have generally treated it as procedural and governed by the rules.

The amendment resolves this issue in favor of disclosure. Most of the decisions denying discovery, some explicitly, reason from the text of Rule 26(b) that it permits discovery only of matters which will be admissible in evidence or appear reasonably calculated to lead to such evidence; they avoid considerations of policy, regarding them as foreclosed. See *Bisserier v. Manning, supra.* Some note also that facts about a defendant's financial status are not discoverable as such, prior to judgment with execution unsatisfied, and fear that, if courts hold insurance coverage discoverable, they must extend the principle to other aspects of the defendant's financial status. The cases favoring disclosure rely heavily on the practical significance of insurance in the decisions lawyers make about settlement and trial preparation. In *Clauss v. Danker,* 264 F.Supp. 246 (S.D.N.Y.1967), the court held that the rules forbid disclosure but called for an amendment to permit it.

Disclosure of insurance coverage will enable counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation. It will conduce to settlement and avoid protracted litigation in some cases, though in others it may have an opposite effect. The amendment is limited to insurance coverage, which should be distinguished from any other facts concerning defendant's financial status (1) because insurance is an asset created specifically to satisfy the claim; (2) because the insurance company ordinarily controls the litigation; (3) because information

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about coverage is available only from defendant or his insurer; and (4) because disclosure does not involve a significant invasion of privacy.

Disclosure is required when the insurer "may be liable" on part or all of the judgment. Thus, an insurance company must disclose even when it contests liability under the policy, and such disclosure does not constitute a waiver of its claim. It is immaterial whether the liability is to satisfy the judgment directly or merely to indemnify or reimburse another after he pays the judgment.

The provision applies only to persons "carrying on an insurance business" and thus covers insurance companies and not the ordinary business concern that enters into a contract of indemnification. *Cf.* N.Y.Ins.Law § 41. Thus, the provision makes no change in existing law on discovery of indemnity agreements other than insurance agreements by persons carrying on an insurance business. Similarly, the provision does not cover the business concern that creates a reserve fund for purposes of self-insurance.

For some purposes other than discovery, an application for insurance is treated as a part of the insurance agreement. The provision makes clear that, for discovery purposes, the application is not to be so treated. The insurance application may contain personal and financial information concerning the insured, discovery of which is beyond the purpose of this provision.

In no instance does disclosure make the facts concerning insurance coverage admissible in evidence.

Subdivision (b)(3)--Trial Preparation: Materials. Some of the most controversial and vexing problems to emerge from the discovery rules have arisen out of requests for the production of documents or things prepared in anticipation of litigation or for trial. The existing rules make no explicit provision for such materials. Yet, two verbally distinct doctrines have developed, each conferring a qualified immunity on these materials--the "good cause" requirement in Rule 34 (now generally held applicable to discovery of documents via deposition under Rule 45 and interrogatories under Rule 33) and the work-product doctrine of *Hickman v. Taylor,* 329 U.S. 495 (1947). Both demand a showing of justification before production can be had, the one of "good cause" and the other variously described in the *Hickman* case: "necessity or justification," "denial * * * would unduly prejudice the preparation of petitioner's case," or "cause hardship or injustice" 329 U.S. at 509-510.

In deciding the *Hickman* case, the Supreme Court appears to have expressed a preference in 1947 for an approach to the problem of trial preparation materials by judicial decision rather than by rule. Sufficient experience has accumulated, however, with lower court applications of the *Hickman* decision to warrant a reappraisal.

The major difficulties visible in the existing case law are (1) confusion and disagreement as to whether "good cause" is made out by a showing of relevance and lack of privilege, or requires an additional showing of necessity, (2) confusion and disagreement as to the scope of the *Hickman* work-product doctrine, particularly whether it extends beyond work actually performed by lawyers, and (3) the resulting difficulty of relating the "good cause" required by Rule 34 and the "necessity or justification" of the work-product doctrine, so that their respective roles and the distinctions between them are understood.

Basic Standard.--Since Rule 34 in terms requires a showing of "good cause" for the production of all documents and things, whether or not trial preparation is involved, courts have felt that a single formula is called for and have differed over whether a showing of relevance and lack of privilege is enough or whether more must be shown. When the facts of the cases are studied, however, a distinction emerges based upon the type of materials. With respect to documents not obtained or prepared with an eye to litigation, the decisions, while not uniform, reflect a strong and increasing tendency to relate "good cause" to a showing that the documents are relevant to the subject matter of the action. *E.g.,* *Connecticut Mutual Life Ins. Co. v. Shields,* 17 F.R.D. 273 (S.D.N.Y.1959), with cases cited; *Houdry Process Corp. v. Commonwealth Oil Refining Co.,* 24 F.R.D. 58 (S.D.N.Y.1955); see *Bell v. Commercial Ins. Co.,* 280 F.2d 514, 517 (3d Cir. 1960). When the party whose documents are sought shows that the request for production is unduly burdensome or oppressive, courts have denied discovery for lack of "good cause", although they might just as easily have based their decision on the protective provisions of existing Rule 30(b) (new Rule 26(c)). *E.g.,* *Lauer v. Tankrederi,* 39 F.R.D. 334 (E.D.Pa.1966).

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As to trial-preparation materials, however, the courts are increasingly interpreting "good cause" as requiring more than relevance. When lawyers have prepared or obtained the materials for trial, all courts require more than relevance; so much is clearly commanded by *Hickman*. But even as to the preparatory work of nonlawyers, while some courts ignore work-product and equate "good cause" with relevance, *e.g.*, *Brown v. New York, N.H. & H.R.R.*, 17 F.R.D. 324 (S.D.N.Y.1955), the more recent trend is to read "good cause" as requiring inquiry into the importance of and need for the materials as well as into alternative sources for securing the same information. In *Guilford Nat'l Bank v. Southern Ry.*, 297 F.2d 921 (4th Cir. 1962), statements of witnesses obtained by claim agents were held not discoverable because both parties had had equal access to the witnesses at about the same time, shortly after the collision in question. The decision was based solely on Rule 34 and "good cause"; the court declined to rule on whether the statements were work-products. The court's treatment of "good cause" is quoted at length and with approval in *Schlagenhauf v. Holder*, 379 U.S. 104, 117-118 (1964). See also *Mitchell v. Bass*, 252 F.2d 513 (8th Cir. 1958); *Hauger v. Chicago, R.I. & Pac. R.R.*, 216 F.2d 501 (7th Cir. 1954); *Burke v. United States*, 32 F.R.D. 213 (E.D.N.Y.1963). While the opinions dealing with "good cause" do not often draw an explicit distinction between trial preparation materials and other materials, in fact an overwhelming proportion of the cases in which a special showing is required are cases involving trial preparation materials.

The rules are amended by eliminating the general requirement of "good cause" from Rule 34 but retaining a requirement of a special showing for trial preparation materials in this subdivision. The required showing is expressed, not in terms of "good cause" whose generality has tended to encourage confusion and controversy, but in terms of the elements of the special showing to be made: substantial need of the materials in the preparation of the case and inability without undue hardship to obtain the substantial equivalent of the materials by other means.

These changes conform to the holdings of the cases, when viewed in light of their facts. Apart from trial preparation, the fact that the materials sought are documentary does not in and of itself require a special showing beyond relevance and absence of privilege. The protective provisions are of course available, and if the party from whom production is sought raises a special issue of privacy (as with respect to income tax returns or grand jury minutes) or points to evidence primarily impeaching, or can show serious burden or expense, the court will exercise its traditional power to decide whether to issue a protective order. On the other hand, the requirement of a special showing for discovery of trial preparation materials reflects the view that each side's informal evaluation of its case should be protected, that each side should be encouraged to prepare independently, and that one side should not automatically have the benefit of the detailed preparatory work of the other side. See Field and McKusick, *Maine Civil Practice* 264 (1959).

Elimination of a "good cause" requirement from Rule 34 and the establishment of a requirement of a special showing in this subdivision will eliminate the confusion caused by having two verbally distinct requirements of justification that the courts have been unable to distinguish clearly. Moreover, the language of the subdivision suggests the factors which the courts should consider in determining whether the requisite showing has been made. The importance of the materials sought to the party seeking them in preparation of his case and the difficulty he will have obtaining them by other means are factors noted in the *Hickman* case. The courts should also consider the likelihood that the party, even if he obtains the information by independent means, will not have the substantial equivalent of the documents the production of which he seeks.

Consideration of these factors may well lead the court to distinguish between witness statements taken by an investigator, on the one hand, and other parts of the investigative file, on the other. The court in *Southern Ry. v. Lanham*, 403 F.2d 119 (5th Cir. 1968), while it naturally addressed itself to the "good cause" requirements of Rule 34, set forth as controlling considerations the factors contained in the language of this subdivision. The analysis of the court suggests circumstances under which witness statements will be discoverable. The witness may have given a fresh and contemporaneous account in a written statement while he is available to the party seeking discovery only a substantial time thereafter. *Lanham, supra* at 127-128; *Guilford, supra* at 926. Or he may be reluctant or hostile. *Lanham, supra* at 128-129; *Brookshire v. Pennsylvania RR*, 14 F.R.D. 154 (N.D.Ohio 1953); *Diamond v. Mohawk Rubber Co.*, 33 F.R.D. 264 (D.Colo.1963). Or he may have a lapse of memory. *Tannenbaum v. Walker*, 16 F.R.D. 570 (E.D.Pa.1954). Or he may probably be deviating from his prior statement. *Cf. Hauger v. Chicago, R.I.*

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& Pac. RR, 216 F.2d 501 (7th Cir. 1954). On the other hand, a much stronger showing is needed to obtain evaluative materials in an investigator's reports. *Lanham, supra* at 131-133; *Pickett v. L. R. Ryan, Inc.,* 237 F.Supp. 198 (E.D.S.C.1965).

Materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity provided by this subdivision. *Goosman v. A. Duie Pyle, Inc.,* 320 F.2d 45 (4th Cir. 1963); cf. *United States v. New York Foreign Trade Zone Operators, Inc.,* 304 F.2d 792 (2d Cir. 1962). No change is made in the existing doctrine, noted in the *Hickman* case, that one party may discover relevant facts known or available to the other party, even though such facts are contained in a document which is not itself discoverable.

Treatment of Lawyers; Special Protection of Mental Impressions, Conclusions, Opinions, and Legal Theories Concerning the Litigation.--The courts are divided as to whether the work-product doctrine extends to the preparatory work only of lawyers. The *Hickman* case left this issue open since the statements in that case were taken by a lawyer. As to courts of appeals compare *Alltmont v. United States,* 177 F.2d 971, 976 (3d Cir. 1949), cert. denied, 339 U.S. 967 (1950) (*Hickman* applied to statements obtained by FBI agents on theory it should apply to "all statements of prospective witnesses which a party has obtained for his trial counsel's use"), with *Southern Ry. v. Campbell,* 309 F.2d 569 (5th Cir. 1962) (Statements taken by claim agents not work-product), and *Guilford Nat'l Bank v. Southern Ry.,* 297 F.2d 921 (4th Cir. 1962) (avoiding issue of work-product as to claim agents, deciding case instead under Rule 34 "good cause"). Similarly, the district courts are divided on statements obtained by claim agents, compare, e.g., *Brown v. New York, N.H. & H.R.R.,* 17 F.R.D. 324 (S.D.N.Y.1955) with *Hanke v. Milwaukee Electric Ry. & Transp. Co.,* 7 F.R.D. 540 (E.D.Wis.1947); investigators, compare *Burke v. United States,* 32 F.R.D. 213 (E.D.N.Y.1963) with *Snyder v. United States,* 20 F.R.D. 7 (E.D.N.Y.1956); and insurers, compare *Gottlieb v. Bresler,* 24 F.R.D. 371 (D.D.C.1959) with *Burns v. Mulder,* 20 F.R.D. 605 (E.D.Pa.1957). See 4 Moore's *Federal Practice* ¶26.23[8.1] (2d ed. 1966); 2A Barron & Holtzoff, *Federal Practice and Procedure* § 652.2 (Wright ed. 1961).

A complication is introduced by the use made by courts of the "good cause" requirement of Rule 34, as described above. A court may conclude that trial preparation materials are not work-product because not the result of lawyer's work and yet hold that they are not producible because "good cause" has not been shown. *Cf. Guilford Nat'l Bank v. Southern Ry.,* 297 F.2d 921 (4th Cir. 1962), cited and described above. When the decisions on "good cause" are taken into account, the weight of authority affords protection of the preparatory work of both lawyers and nonlawyers (though not necessarily to the same extent) by requiring more than a showing of relevance to secure production.

Subdivision (b)(3) reflects the trend of the cases by requiring a special showing, not merely as to materials prepared by an attorney, but also as to materials prepared in anticipation of litigation or preparation for trial by or for a party or any representative acting on his behalf. The subdivision then goes on to protect against disclosure the mental impressions, conclusions, opinions, or legal theories concerning the litigation of an attorney or other representative of a party. The *Hickman* opinion drew special attention to the need for protecting an attorney against discovery of memoranda prepared from recollection of oral interviews. The courts have steadfastly safeguarded against disclosure of lawyers' mental impressions and legal theories, as well as mental impressions and subjective evaluations of investigators and claim-agents. In enforcing this provision of the subdivision, the courts will sometimes find it necessary to order disclosure of a document but with portions deleted.

Rules 33 and 36 have been revised in order to permit discovery calling for opinions, contentions, and admissions relating not only to fact but also to the application of law to fact. Under those rules, a party and his attorney or other representative may be required to disclose, to some extent, mental impressions, opinions, or conclusions. But documents or parts of documents containing these matters are protected against discovery by this subdivision. Even though a party may ultimately have to disclose in response to interrogatories or requests to admit, he is entitled to keep confidential documents containing such matters prepared for internal use.

Party's Right to Own Statement--An exception to the requirement of this subdivision enables a party to secure production of his own statement without any special showing. The cases are divided. Compare, *e.g.,* *Safeway Stores, Inc. v. Reynolds,* 176

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F.2d 476 (D.C. Cir.1949); *Shupe v. Pennsylvania R.R.,* 19 F.R.D. 144 (W.D.Pa.1956); with *e.g., New York Central R.R. v. Carr,* 251 F.2d 433 (4th Cir. 1957); *Belback v. Wilson Freight Forwarding Co.,* 40 F.R.D. 16 (W.D.Pa.1966).

Courts which treat a party's statement as though it were that of any witness overlook the fact that the party's statement is, without more, admissible in evidence. Ordinarily, a party gives a statement without insisting on a copy because he does not yet have a lawyer and does not understand the legal consequences of his actions. Thus, the statement is given at a time when he functions at a disadvantage. Discrepancies between his trial testimony and earlier statement may result from lapse of memory or ordinary inaccuracy; a written statement produced for the first time at trial may give such discrepancies a prominence which they do not deserve. In appropriate cases the court may order a party to be deposed before his statement is produced. *E.g., Smith v. Central Linen Service Co.,* 39 F.R.D. 15 (D.Md.1966); *McCoy v. General Motors Corp.,* 33 F.R.D. 354 (W.D.Pa.1963).

Commentators strongly support the view that a party be able to secure his statement without a showing. 4 *Moore's Federal Practice* ¶26.23[8.4] (2d ed. 1966); 2A Barron & Holtzoff, *Federal Practice and Procedure* § 652.3 (Wright ed. 1961); see also Note, *Developments in the Law--Discovery,* 74 Harv.L.Rev. 940, 1039 (1961). The following states have by statute or rule taken the same position: *Statutes:* Fla.Stat.Ann. § 92.33; Ga.Code Ann. § 38-2109(b); La.Stat.Ann.R.S. 13:3732; Mass.Gen.Laws Ann. c. 271, § 44; Minn.Stat.Ann. § 602.01; N.Y.C.P.L.R. § 3101(e); *Rules:* Mo.R.C.P. 56.01(a); N.Dak.R.C.P. 34(b); Wyo.R.C.P. 34(b); *cf.* Mich.G.C.R. 306.2.

In order to clarify and tighten the provision on statements by a party, the term “statement” is defined. The definition is adapted from 18 U.S.C. § 3500(e) (Jencks Act). The statement of a party may of course be that of plaintiff or defendant, and it may be that of an individual or of a corporation or other organization.

Witness' Right to Own Statement.--A second exception to the requirement of this subdivision permits a non-party witness to obtain a copy of his own statement without any special showing. Many, though not all, of the considerations supporting a party's right to obtain his statement apply also to the non-party witness. Insurance companies are increasingly recognizing that a witness is entitled to a copy of his statement and are modifying their regular practice accordingly.

Subdivision (b)(4)--Trial Preparation: Experts. This is a new provision dealing with discovery of information (including facts and opinions) obtained by a party from an expert retained by that party in relation to litigation or obtained by the expert and not yet transmitted to the party. The subdivision deals separately with those experts whom the party expects to call as trial witnesses and with those experts who have been retained or specially employed by the party but who are not expected to be witnesses. It should be noted that the subdivision does not address itself to the expert whose information was not acquired in preparation for trial but rather because he was an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit. Such an expert should be treated as an ordinary witness.

Subsection (b)(4)(A) deals with discovery of information obtained by or through experts who will be called as witnesses at trial. The provision is responsive to problems suggested by a relatively recent line of authorities. Many of these cases present intricate and difficult issues as to which expert testimony is likely to be determinative. Prominent among them are food and drug, patent, and condemnation cases. See, *e.g., United States v. Nysco Laboratories, Inc.,* 26 F.R.D. 159, 162 (E.D.N.Y.1960) (food and drug); *E. I. du Pont de Nemours & Co. v. Phillips Petroleum Co.,* 24 F.R.D. 416, 421 (D.Del.1959) (patent); *Cold Metal Process Co. v. Aluminum Co. of America,* 7 F.R.D. 425 (N.D.Ohio 1947), aff'd, *Sachs v. Aluminum Co. of America,* 167 F.2d 570 (6th Cir. 1948) (same); *United States v. 50.34 Acres of Land,* 13 F.R.D. 19 (E.D.N.Y.1952) (condemnation).

In cases of this character, a prohibition against discovery of information held by expert witnesses produces in acute form the very evils that discovery has been created to prevent. Effective cross-examination of an expert witness requires advance preparation. The lawyer even with the help of his own experts frequently cannot anticipate the particular approach his adversary's expert will take or the data on which he will base his judgment on the stand. McGlothlin, *Some Practical Problems in Proof of Economic, Scientific, and Technical Facts,* 23 F.R.D. 467, 478 (1958). A California study of discovery and pretrial in condemnation cases notes that the only substitute for discovery of experts' valuation materials is “lengthy--and often fruitless--cross-examination

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during trial," and recommends pretrial exchange of such material. Calif.Law Rev.Comm'n, Discovery in Eminent Domain Proceedings 707-710 (Jan. 1963). Similarly, effective rebuttal requires advance knowledge of the line of testimony of the other side. If the latter is foreclosed by a rule against discovery, then the narrowing of issues and elimination of surprise which discovery normally produces are frustrated.

These considerations appear to account for the broadening of discovery against experts in the cases cited where expert testimony was central to the case. In some instances, the opinions are explicit in relating expanded discovery to improved cross-examination and rebuttal at trial. *Franks v. National Dairy Products Corp.,* 41 F.R.D. 234 (W.D.Tex.1966); *United States v. 23.76 Acres,* 32 F.R.D. 593 (D.Md.1963); see also an unpublished opinion of Judge Hincks, quoted in *United States v. 48 Jars, etc.,* 23 F.R.D. 192, 198 (D.D.C.1958). On the other hand, the need for a new provision is shown by the many cases in which discovery of expert trial witnesses is needed for effective cross-examination and rebuttal, and yet courts apply the traditional doctrine and refuse disclosure. *E.g., United States v. Certain Parcels of Land,* 25 F.R.D. 192 (N.D.Cal.1959); *United States v. Certain Acres,* 18 F.R.D. 98 (M.D.Ga.1955).

Although the trial problems flowing from lack of discovery of expert witnesses are most acute and noteworthy when the case turns largely on experts, the same problems are encountered when a single expert testifies. Thus, subdivision (b)(4)(A) draws no line between complex and simple cases, or between cases with many experts and those with but one. It establishes by rule substantially the procedure adopted by decision of the court in *Knighton v. Villian & Fassio,* 39 F.R.D. 11 (D.Md.1965). For a full analysis of the problem and strong recommendations to the same effect, see Friedenthal, *Discovery and Use of an Adverse Party's Expert Information,* 14 Stan.L.Rev. 455, 485-488 (1962); Long, *Discovery and Experts under the Federal Rules of Civil Procedure,* 38 F.R.D. 111 (1965).

Past judicial restrictions on discovery of an adversary's expert, particularly as to his opinions, reflect the fear that one side will benefit unduly from the other's better preparation. The procedure established in subsection (b)(4)(A) holds the risk to a minimum. Discovery is limited to trial witnesses, and may be obtained only at a time when the parties know who their expert witnesses will be. A party must as a practical matter prepare his own case in advance of that time, for he can hardly hope to build his case out of his opponent's experts.

Subdivision (b)(4)(A) provides for discovery of an expert who is to testify at the trial. A party can require one who intends to use the expert to state the substance of the testimony that the expert is expected to give. The court may order further discovery, and it has ample power to regulate its timing and scope and to prevent abuse. Ordinarily, the order for further discovery shall compensate the expert for his time, and may compensate the party who intends to use the expert for past expenses reasonably incurred in obtaining facts or opinions from the expert. Those provisions are likely to discourage abusive practices.

Subdivision (b)(4)(B) deals with an expert who has been retained or specially employed by the party in anticipation of litigation or preparation for trial (thus excluding an expert who is simply a general employee of the party not specially employed on the case), but who is not expected to be called as a witness. Under its provisions, a party may discover facts known or opinions held by such an expert only on a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

Subdivision (b)(4)(B) is concerned only with experts retained or specially consulted in relation to trial preparation. Thus the subdivision precludes discovery against experts who were informally consulted in preparation for trial, but not retained or specially employed. As an ancillary procedure, a party may on a proper showing require the other party to name experts retained or specially employed, but not those informally consulted.

These new provisions of subdivision (b)(4) repudiate the few decisions that have held an expert's information privileged simply because of his status as an expert, *e.g., American Oil Co. v. Pennsylvania Petroleum Products Co.,* 23 F.R.D. 680, 685-686 (D.R.I.1959). See *Louisell, Modern California Discovery* 315-316 (1963). They also reject as ill-considered the decisions which have sought to bring expert information within the work-product doctrine. See *United States v. McKay,* 372 F.2d 174, 176-177

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(5th Cir. 1967). The provisions adopt a form of the more recently developed doctrine of "unfairness". See *e.g.*, *United States v. 23.76 Acres of Land*, 32 F.R.D. 593, 597 (D.Md.1963); Louisell, *supra*, at 317-318; 4 *Moore's Federal Practice* 26.24 (2d ed. 1966).

Under subdivision (b)(4)(C), the court is directed or authorized to issue protective orders, including an order that the expert be paid a reasonable fee for time spent in responding to discovery, and that the party whose expert is made subject to discovery be paid a fair portion of the fees and expenses that the party incurred in obtaining information from the expert. The court may issue the latter order as a condition of discovery, or it may delay the order until after discovery is completed. These provisions for fees and expenses meet the objection that it is unfair to permit one side to obtain without cost the benefit of an expert's work for which the other side has paid, often a substantial sum. E.g., *Lewis v. United Air Lines Transp. Corp.*, 32 F.Supp. 21 (W.D.Pa.1940); *Walsh v. Reynolds Metal Co.*, 15 F.R.D. 376 (D.N.J.1954). On the other hand, a party may not obtain discovery simply by offering to pay fees and expenses. Cf. *Boynton v. R. J. Reynolds Tobacco Co.*, 36 F.Supp. 593 (D.Mass.1941).

In instances of discovery under subdivision (b)(4)(B), the court is directed to award fees and expenses to the other party, since the information is of direct value to the discovering party's preparation of his case. In ordering discovery under (b)(4)(A)(ii), the court has discretion whether to award fees and expenses to the other party; its decision should depend upon whether the discovering party is simply learning about the other party's case or is going beyond this to develop his own case. Even in cases where the court is directed to issue a protective order, it may decline to do so if it finds that manifest injustice would result. Thus, the court can protect, when necessary and appropriate, the interests of an indigent party.

Subdivision (c)--Protective Orders. The provisions of existing Rule 30(b) are transferred to this subdivision (c), as part of the rearrangement of Rule 26. The language has been changed to give it application to discovery generally. The subdivision recognizes the power of the court in the district where a deposition is being taken to make protective orders. Such power is needed when the deposition is being taken far from the court where the action is pending. The court in the district where the deposition is being taken may, and frequently will, remit the deponent or party to the court where the action is pending.

In addition, drafting changes are made to carry out and clarify the sense of the rule. Insertions are made to avoid any possible implication that a protective order does not extend to "time" as well as to "place" or may not safeguard against "undue burden or expense."

The new reference to trade secrets and other confidential commercial information reflects existing law. The courts have not given trade secrets automatic and complete immunity against disclosure, but have in each case weighed their claim to privacy against the need for disclosure. Frequently, they have been afforded a limited protection. See, *e.g.*, *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993 (10th Cir. 1965); *Julius M. Ames Co. v. Bostitch, Inc.*, 235 F.Supp. 856 (S.D.N.Y.1964).

The subdivision contains new matter relating to sanctions. When a motion for a protective order is made and the court is disposed to deny it, the court may go a step further and issue an order to provide or permit discovery. This will bring the sanctions of Rule 37(b) directly into play. Since the court has heard the contentions of all interested persons, an affirmative order is justified. See *Rosenberg*, *Sanctions to Effectuate Pretrial Discovery*, 58 Col.L.Rev. 480, 492-493 (1958). In addition, the court may require the payment of expenses incurred in relation to the motion.

Subdivision (d)--Sequence and Priority. This new provision is concerned with the sequence in which parties may proceed with discovery and with related problems of timing. The principal effects of the new provision are first, to eliminate any fixed priority in the sequence of discovery, and second, to make clear and explicit the court's power to establish priority by an order issued in a particular case.

A priority rule developed by some courts, which confers priority on the party who first serves notice of taking a deposition, is unsatisfactory in several important respects:

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First, this priority rule permits a party to establish a priority running to all depositions as to which he has given earlier notice. Since he can on a given day serve notice of taking many depositions he is in a position to delay his adversary's taking of depositions for an inordinate time. Some courts have ruled that deposition priority also permits a party to delay his answers to interrogatories and production of documents. *E.g.*, *E. I. du Pont de Nemours & Co. v. Phillips Petroleum Co.,* 23 F.R.D. 237 (D.Del.1959); *but cf. Sturdevant v. Sears, Roebuck & Co.,* 32 F.R.D. 426 (W.D.Mo.1963).

Second, since notice is the key to priority, if both parties wish to take depositions first a race results. See *Caldwell-Clements, Inc. v. McGraw-Hill Pub. Co.,* 11 F.R.D. 156 (S.D.N.Y.1951) (description of tactics used by parties). But the existing rules on notice of deposition create a race with runners starting from different positions. The plaintiff may not give notice without leave of court until 20 days after commencement of the action, whereas the defendant may serve notice at any time after commencement. Thus, a careful and prompt defendant can almost always secure priority. This advantage of defendants is fortuitous, because the purpose of requiring plaintiff to wait 20 days is to afford defendant an opportunity to obtain counsel, not to confer priority.

Third, although courts have ordered a change in the normal sequence of discovery on a number of occasions, *e.g.*, *Kaeppler v. James H. Matthews & Co.,* 200 F.Supp. 229 (E.D.Pa.1961); *Park & Tilford Distillers Corp. v. Distillers Co.,* 19 F.R.D. 169 (S.D.N.Y.1956), and have at all times avowed discretion to vary the usual priority, most commentators are agreed that courts in fact grant relief only for "the most obviously compelling reasons." 2A Barron & Holtzoff, *Federal Practice and Procedure* 44-47 (Wright ed. 1961); see also Younger, *Priority of Pretrial Examination in the Federal Courts--A Comment,* 34 N.Y.U.L.Rev. 1271 (1959); Freund, *The Pleading and Pretrial of an Antitrust Claim,* 46 Corn.L.Q. 555, 564 (1964). Discontent with the fairness of actual practice has been evinced by other observers. Comments, 59 Yale L.J. 117, 134-136 (1949); Yudkin, *Some Refinements in Federal Discovery Procedure,* 11 Fed.B.J. 289, 296-297 (1951); *Developments in the Law-Discovery,* 74 Harv.L.Rev. 940, 954-958 (1961).

Despite these difficulties, some courts have adhered to the priority rule, presumably because it provides a test which is easily understood and applied by the parties without much court intervention. It thus permits deposition discovery to function extrajudicially, which the rules provide for and the courts desire. For these same reasons, courts are reluctant to make numerous exceptions to the rule.

The Columbia Survey makes clear that the problem of priority does not affect litigants generally. It found that most litigants do not move quickly to obtain discovery. In over half of the cases, both parties waited at least 50 days. During the first 20 days after commencement of the action--the period when defendant might assure his priority by noticing depositions--16 percent of the defendants acted to obtain discovery. A race could not have occurred in more than 16 percent of the cases and it undoubtedly occurred in fewer. On the other hand, five times as many defendants as plaintiffs served notice of deposition during the first 19 days. To the same effect, see Comment, *Tactical Use and Abuse of Depositions Under the Federal Rules,* 59 Yale L.J. 117, 134 (1949).

These findings do not mean, however, that the priority rule is satisfactory or that a problem of priority does not exist. The court decisions show that parties do battle on this issue and carry their disputes to court. The statistics show that these court cases are not typical. By the same token, they reveal that more extensive exercise of judicial discretion to vary the priority will not bring a flood of litigation, and that a change in the priority rule will in fact affect only a small fraction of the cases.

It is contended by some that there is no need to alter the existing priority practice. In support, it is urged that there is no evidence that injustices in fact result from present practice and that, in any event, the courts can and do promulgate local rules, as in New York, to deal with local situations and issue orders to avoid possible injustice in particular cases.

Subdivision (d) is based on the contrary view that the rule of priority based on notice is unsatisfactory and unfair in its operation. Subdivision (d) follows an approach adapted from Civil Rule 4 of the District Court for the Southern District of New York. That rule provides that starting 40 days after commencement of the action, unless otherwise ordered by the court, the fact that one party is taking a deposition shall not prevent another party from doing so "concurrently." In practice, the depositions are

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not usually taken simultaneously; rather, the parties work out arrangements for alternation in the taking of depositions. One party may take a complete deposition and then the other, or, if the depositions are extensive, one party deposes for a set time, and then the other. See *Caldwell-Clements, Inc. v. McCraw-Hill Pub. Co.,* 11 F.R.D. 156 (S.D.N.Y.1951).

In principle, one party's initiation of discovery should not wait upon the other's completion, unless delay is dictated by special considerations. Clearly the principle is feasible with respect to all methods of discovery other than depositions. And the experience of the Southern District of New York shows that the principle can be applied to depositions as well. The courts have not had an increase in motion business on this matter. Once it is clear to lawyers that they bargain on an equal footing, they are usually able to arrange for an orderly succession of depositions without judicial intervention. Professor Moore has called attention to Civil Rule 4 and suggested that it may usefully be extended to other areas. 4 *Moore's Federal Practice* 1154 (2d ed. 1966).

The court may upon motion and by order grant priority in a particular case. But a local court rule purporting to confer priority in certain classes of cases would be inconsistent with this subdivision and thus void.

Subdivision (e)--Supplementation of Responses. The rules do not now state whether interrogatories (and questions at deposition as well as requests for inspection and admissions) impose a "continuing burden" on the responding party to supplement his answers if he obtains new information. The issue is acute when new information renders substantially incomplete or inaccurate an answer which was complete and accurate when made. It is essential that the rules provide an answer to this question. The parties can adjust to a rule either way, once they know what it is. See 4 *Moore's Federal Practice* ¶33.25[4] (2d ed. 1966).

Arguments can be made both ways. Imposition of a continuing burden reduces the proliferation of additional sets of interrogatories. Some courts have adopted local rules establishing such a burden. *E.g.,* E.D.Pa.R. 20(f), quoted in *Taggart v. Vermont Transp. Co.,* 32 F.R.D. 587 (E.D.Pa.1963); D.Me.R. 15(c). Others have imposed the burden by decision. *E.g., Chenault v. Nebraska Farm Products, Inc.,* 9 F.R.D. 529, 533 (D.Nebr.1949). On the other hand, there are serious objections to the burden, especially in protracted cases. Although the party signs the answers, it is his lawyer who understands their significance and bears the responsibility to bring answers up to date. In a complex case all sorts of information reaches the party, who little understands its bearing on answers previously given to interrogatories. In practice, therefore, the lawyer under a continuing burden must periodically recheck all interrogatories and canvass all new information. But a full set of new answers may no longer be needed by the interrogating party. Some issues will have been dropped from the case, some questions are now seen as unimportant, and other questions must in any event be reformulated. See *Novick v. Pennsylvania R.R.,* 18 F.R.D. 296, 298 (W.D.Pa.1955).

Subdivision (e) provides that a party is not under a continuing burden except as expressly provided. Cf. Note, 68 Harv.L.Rev. 673, 677 (1955). An exception is made as to the identity of persons having knowledge of discoverable matters, because of the obvious importance to each side of knowing all witnesses and because information about witnesses routinely comes to each lawyer's attention. Many of the decisions on the issue of a continuing burden have in fact concerned the identity of witnesses. An exception is also made as to expert trial witnesses in order to carry out the provisions of Rule 26(b)(4). See *Diversified Products Corp. v. Sports Center Co.,* 42 F.R.D. 3 (D.Md.1967).

Another exception is made for the situation in which a party, or more frequently his lawyer, obtains actual knowledge that a prior response is incorrect. This exception does not impose a duty to check the accuracy of prior responses, but it prevents knowing concealment by a party or attorney. Finally, a duty to supplement may be imposed by order of the court in a particular case (including an order resulting from a pretrial conference) or by agreement of the parties. A party may of course make a new discovery request which requires supplementation of prior responses.

The duty will normally be enforced, in those limited instances where it is imposed, through sanctions imposed by the trial court, including exclusion of evidence, continuance, or other action, as the court may deem appropriate.

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1980 Amendment

Subdivision (f). This subdivision is new. There has been widespread criticism of abuse of discovery. The Committee has considered a number of proposals to eliminate abuse, including a change in Rule 26(b)(1) with respect to the scope of discovery and a change in Rule 33(a) to limit the number of questions that can be asked by interrogatories to parties.

The Committee believes that abuse of discovery, while very serious in certain cases, is not so general as to require such basic changes in the rules that govern discovery in all cases. A very recent study of discovery in selected metropolitan districts tends to support its belief. P. Connolly, E. Holleman, & M. Kuhlman, *Judicial Controls and the Civil Litigative Process: Discovery* (Federal Judicial Center, 1978). In the judgment of the Committee abuse can best be prevented by intervention by the court as soon as abuse is threatened.

To this end this subdivision provides that counsel who has attempted without success to effect with opposing counsel a reasonable program or plan for discovery is entitled to the assistance of the court.

It is not contemplated that requests for discovery conferences will be made routinely. A relatively narrow discovery dispute should be resolved by resort to Rules 26(c) or 37(a), and if it appears that a request for a conference is in fact grounded in such a dispute, the court may refer counsel to those rules. If the court is persuaded that a request is frivolous or vexatious, it can strike it. See Rules 11 and 7(b)(2).

A number of courts routinely consider discovery matters in preliminary pretrial conferences held shortly after the pleadings are closed. This subdivision does not interfere with such a practice. It authorizes the court to combine a discovery conference with a pretrial conference under Rule 16 if a pretrial conference is held sufficiently early to prevent or curb abuse.

1983 Amendment

Excessive discovery and evasion or resistance to reasonable discovery requests pose significant problems. Recent studies have made some attempt to determine the sources and extent of the difficulties. See Brazil, *Civil Discovery: Lawyers' Views of its Effectiveness, Principal Problems and Abuses,* American Bar Foundation (1980); Connolly, Holleman & Kuhlman, *Judicial Controls and the Civil Litigative Process: Discovery,* Federal Judicial Center (1978); Ellington, *A Study of Sanctions for Discovery Abuse,* Department of Justice (1979); Schroeder & Frank, *The Proposed Changes in the Discovery Rules,* 1978 Ariz.St.L.J. 475.

The purpose of discovery is to provide a mechanism for making relevant information available to the litigants. "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Hickman v. Taylor,* 329 U.S. 495, 507 (1947). Thus the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by overuse of discovery or unnecessary use of defensive weapons or evasive responses. All of this results in excessively costly and time-consuming activities that are disproportionate to the nature of the case, the amount involved, or the issues or values at stake.

Given our adversary tradition and the current discovery rules, it is not surprising that there are many opportunities, if not incentives, for attorneys to engage in discovery that, although authorized by the broad, permissive terms of the rules, nevertheless results in delay. See Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change,* 31 Vand.L.Rev. 1259 (1978). As a result, it has been said that the rules have "not infrequently [been] exploited to the disadvantage of justice." *Herbert v. Lando,* 441 U.S. 153, 179 (1979) (Powell, J., concurring). These practices impose costs on an already overburdened system and impede the fundamental goal of the "just, speedy, and inexpensive determination of every action." Fed.R.Civ.P. 1.

Subdivision (a); Discovery Methods. The deletion of the last sentence of Rule 26(a)(1), which provided that unless the court ordered otherwise under Rule 26(c) "the frequency of use" of the various discovery methods was not to be limited, is an attempt

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to address the problem of duplicative, redundant, and excessive discovery and to reduce it. The amendment, in conjunction with the changes in Rule 26(b)(1), is designed to encourage district judges to identify instances of needless discovery and to limit the use of the various discovery devices accordingly. The question may be raised by one of the parties, typically on a motion for a protective order, or by the court on its own initiative. It is entirely appropriate to consider a limitation on the frequency of use of discovery at a discovery conference under Rule 26(f) or at any other pretrial conference authorized by these rules. In considering the discovery needs of a particular case, the court should consider the factors described in Rule 26(b)(1).

Subdivision (b); Discovery Scope and Limits. Rule 26(b)(1) has been amended to add a sentence to deal with the problem of over-discovery. The objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry. The new sentence is intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse. The grounds mentioned in the amended rule for limiting discovery reflect the existing practice of many courts in issuing protective orders under Rule 26(c). See, e.g., *Carlson Cos. v. Sperry & Hutchinson Co.,* 374 F.Supp. 1080 (D.Minn.1974); *Dolgow v. Anderson,* 53 F.R.D. 661 (E.D.N.Y.1971); *Mitchell v. American Tobacco Co.,* 33 F.R.D. 262 (M.D.Pa.1963); *Welty v. Clute,* 1 F.R.D. 446 (W.D.N.Y.1941). On the whole, however, district judges have been reluctant to limit the use of the discovery devices. See, *e.g.*, *Apco Oil Co. v. Certified Transp., Inc.,* 46 F.R.D. 428 (W.D.Mo.1969). See generally 8 Wright & Miller, *Federal Practice and Procedure: Civil* §§ 2036, 2037, 2039, 2040 (1970).

The first element of the standard, Rule 26(b)(1)(i), is designed to minimize redundancy in discovery and encourage attorneys to be sensitive to the comparative costs of different methods of securing information. Subdivision (b)(1)(ii) also seeks to reduce repetitiveness and to oblige lawyers to think through their discovery activities in advance so that full utilization is made of each deposition, document request, or set of interrogatories. The elements of Rule 26(b)(1)(iii) address the problem of discovery that is disproportionate to the individual lawsuit as measured by such matters as its nature and complexity, the importance of the issues at stake in a case seeking damages, the limitations on a financially weak litigant to withstand extensive opposition to a discovery program or to respond to discovery requests, and the significance of the substantive issues, as measured in philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved. The court must apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent.

The rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis. See Connolly, Holleman & Kuhlman, *Judicial Controls and the Civil Litigative Process: Discovery* 77, Federal Judicial Center (1978). In an appropriate case the court could restrict the number of depositions, interrogatories, or the scope of a production request. But the court must be careful not to deprive a party of discovery that is reasonably necessary to afford a fair opportunity to develop and prepare the case.

The court may act on motion, or its own initiative. It is entirely appropriate to resort to the amended rule in conjunction with a discovery conference under Rule 26(f) or one of the other pretrial conferences authorized by the rules.

Subdivision (g); Signing of Discovery Requests, Responses, and Objections. Rule 26(g) imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37. In addition, Rule 26(g) is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions. The subdivision provides a deterrent to both excessive discovery and evasion by imposing a certification requirement that obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection. The term “response” includes answers to interrogatories and to requests to admit as well as responses to production requests.

If primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obliged to act responsibly and avoid abuse. With this in mind, Rule 26(g), which parallels the amendments to Rule 11, requires an attorney or unrepresented party to sign each discovery request, response, or objection. Motions relating to discovery are governed by Rule 11. However,

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since a discovery request, response, or objection usually deals with more specific subject matter than motions or papers, the elements that must be certified in connection with the former are spelled out more completely. The signature is a certification of the elements set forth in Rule 26(g).

Although the certification duty requires the lawyer to pause and consider the reasonableness of his request, response, or objection, it is not meant to discourage or restrict necessary and legitimate discovery. The rule simply requires that the attorney make a reasonable inquiry into the factual basis of his response, request, or objection.

The duty to make a "reasonable inquiry" is satisfied if the investigation undertaken by the attorney and the conclusions drawn therefrom are reasonable under the circumstances. It is an objective standard similar to the one imposed by Rule 11. See the Advisory Committee Note to Rule 11. See also *Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n,* 365 F.Supp. 975 (E.D.Pa.1973). In making the inquiry, the attorney may rely on assertions by the client and on communications with other counsel in the case as long as that reliance is appropriate under the circumstances. Ultimately, what is reasonable is a matter for the court to decide on the totality of the circumstances.

Rule 26(g) does not require the signing attorney to certify the truthfulness of the client's factual responses to a discovery request. Rather, the signature certifies that the lawyer has made a reasonable effort to assure that the client has provided all the information and documents available to him that are responsive to the discovery demand. Thus, the lawyer's certification under Rule 26(g) should be distinguished from other signature requirements in the rules, such as those in Rules 30(e) and 33.

Nor does the rule require a party or an attorney to disclose privileged communications or work product in order to show that a discovery request, response, or objection is substantially justified. The provisions of Rule 26(c), including appropriate orders after *in camera* inspection by the court, remain available to protect a party claiming privilege or work product protection.

The signing requirement means that every discovery request, response, or objection should be grounded on a theory that is reasonable under the precedents or a good faith belief as to what should be the law. This standard is heavily dependent on the circumstances of each case. The certification speaks as of the time it is made. The duty to supplement discovery responses continues to be governed by Rule 26(e).

Concern about discovery abuse has led to widespread recognition that there is a need for more aggressive judicial control and supervision. *ACF Industries, Inc. v. EEOC,* 439 U.S. 1081 (1979) (certiorari denied) (Powell, J., dissenting). Sanctions to deter discovery abuse would be more effective if they were diligently applied "not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." *National Hockey League v. Metropolitan Hockey Club,* 427 U.S. 639, 643 (1976). See also Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions,* 91 Harv.L.Rev. 1033 (1978). Thus the premise of Rule 26(g) is that imposing sanctions on attorneys who fail to meet the rule's standards will significantly reduce abuse by imposing disadvantages therefor.

Because of the asserted reluctance to impose sanctions on attorneys who abuse the discovery rules, see Brazil, *Civil Discovery: Lawyers' Views of its Effectiveness, Principal Problems and Abuses,* American Bar Foundation (1980); Ellington, *A Study of Sanctions for Discovery Abuse,* Department of Justice (1979), Rule 26(g) makes explicit the authority judges now have to impose appropriate sanctions and requires them to use it. This authority derives from Rule 37, 28 U.S.C. § 1927, and the court's inherent power. See *Roadway Express, Inc. v. Piper,* 447 U.S. 752 (1980); *Martin v. Bell Helicopter Co.,* 85 F.R.D. 654, 661-62 (D.Col.1980); Note, *Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process,* 44 U.Chi.L.Rev. 619 (1977). The new rule mandates that sanctions be imposed on attorneys who fail to meet the standards established in the first portion of Rule 26(g). The nature of the sanction is a matter of judicial discretion to be exercised in light of the particular circumstances. The court may take into account any failure by the party seeking sanctions to invoke protection under Rule 26(c) at an early stage in the litigation.

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The sanctioning process must comport with due process requirements. The kind of notice and hearing required will depend on the facts of the case and the severity of the sanction being considered. To prevent the proliferation of the sanction procedure and to avoid multiple hearings, discovery in any sanction proceeding normally should be permitted only when it is clearly required by the interests of justice. In most cases the court will be aware of the circumstances and only a brief hearing should be necessary.

1987 Amendment

The amendments are technical. No substantive change is intended.

1993 Amendment

Subdivision (a). Through the addition of paragraphs (1)-(4), this subdivision imposes on parties a duty to disclose, without awaiting formal discovery requests, certain basic information that is needed in most cases to prepare for trial or make an informed decision about settlement. The rule requires all parties (1) early in the case to exchange information regarding potential witnesses, documentary evidence, damages, and insurance, (2) at an appropriate time during the discovery period to identify expert witnesses and provide a detailed written statement of the testimony that may be offered at trial through specially retained experts, and (3) as the trial date approaches to identify the particular evidence that may be offered at trial. The enumeration in Rule 26(a) of items to be disclosed does not prevent a court from requiring by order or local rule that the parties disclose additional information without a discovery request. Nor are parties precluded from using traditional discovery methods to obtain further information regarding these matters, as for example asking an expert during a deposition about testimony given in other litigation beyond the four-year period specified in Rule 26(a)(2)(B).

A major purpose of the revision is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information, and the rule should be applied in a manner to achieve those objectives. The concepts of imposing a duty of disclosure were set forth in Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 *Vand.L.Rev.* 1348 (1978), and Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform,* 50 *U.Pitt.L.Rev. 703, 721-23 (1989).*

The rule is based upon the experience of district courts that have required disclosure of some of this information through local rules, court-approved standard interrogatories, and standing orders. Most have required pretrial disclosure of the kind of information described in Rule 26(a)(3). Many have required written reports from experts containing information like that specified in Rule 26(a)(2)(B). While far more limited, the experience of the few state and federal courts that have required pre-discovery exchange of core information such as is contemplated in Rule 26(a)(1) indicates that savings in time and expense can be achieved, particularly if the litigants meet and discuss the issues in the case as a predicate for this exchange and if a judge supports the process, as by using the results to guide further proceedings in the case. Courts in Canada and the United Kingdom have for many years required disclosure of certain information without awaiting a request from an adversary.

Paragraph (1). As the functional equivalent of court-ordered interrogatories, this paragraph requires early disclosure, without need for any request, of four types of information that have been customarily secured early in litigation through formal discovery. The introductory clause permits the court, by local rule, to exempt all or particular types of cases from these disclosure requirement *[sic]* or to modify the nature of the information to be disclosed. It is expected that courts would, for example, exempt cases like Social Security reviews and government collection cases in which discovery would not be appropriate or would be unlikely. By order the court may eliminate or modify the disclosure requirements in a particular case, and similarly the parties, unless precluded by order or local rule, can stipulate to elimination or modification of the requirements for that case. The disclosure obligations specified in paragraph (1) will not be appropriate for all cases, and it is expected that changes in these obligations will be made by the court or parties when the circumstances warrant.

Authorization of these local variations is, in large measure, included in order to accommodate the Civil Justice Reform Act of 1990, which implicitly directs districts to experiment during the study period with differing procedures to reduce the time and

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expense of civil litigation. The civil justice delay and expense reduction plans adopted by the courts under the Act differ as to the type, form, and timing of disclosures required. Section 105(c)(1) of the Act calls for a report by the Judicial Conference to Congress by December 31, 1995, comparing experience in twenty of these courts; and section 105(c)(2)(B) contemplates that some changes in the Rules may then be needed. While these studies may indicate the desirability of further changes in Rule 26(a)(1), these changes probably could not become effective before December 1998 at the earliest. In the meantime, the present revision puts in place a series of disclosure obligations that, unless a court acts affirmatively to impose other requirements or indeed to reject all such requirements for the present, are designed to eliminate certain discovery, help focus the discovery that is needed, and facilitate preparation for trial or settlement.

Subparagraph (A) requires identification of all persons who, based on the investigation conducted thus far, are likely to have discoverable information relevant to the factual disputes between the parties. All persons with such information should be disclosed, whether or not their testimony will be supportive of the position of the disclosing party. As officers of the court, counsel are expected to disclose the identity of those persons who may be used by them as witnesses or who, if their potential testimony were known, might reasonably be expected to be deposed or called as a witness by any of the other parties. Indicating briefly the general topics on which such persons have information should not be burdensome, and will assist other parties in deciding which depositions will actually be needed.

Subparagraph (B) is included as a substitute for the inquiries routinely made about the existence and location of documents and other tangible things in the possession, custody, or control of the disclosing party. Although, unlike subdivision (a)(3)(C), an itemized listing of each exhibit is not required, the disclosure should describe and categorize, to the extent identified during the initial investigation, the nature and location of potentially relevant documents and records, including computerized data and other electronically-recorded information, sufficiently to enable opposing parties (1) to make an informed decision concerning which documents might need to be examined, at least initially, and (2) to frame their document requests in a manner likely to avoid squabbles resulting from the wording of the requests. As with potential witnesses, the requirement for disclosure of documents applies to all potentially relevant items then known to the party, whether or not supportive of its contentions in the case.

Unlike subparagraphs (C) and (D), subparagraph (B) does not require production of any documents. Of course, in cases involving few documents a disclosing party may prefer to provide copies of the documents rather than describe them, and the rule is written to afford this option to the disclosing party. If, as will be more typical, only the description is provided, the other parties are expected to obtain the documents desired by proceeding under Rule 34 or through informal requests. The disclosing party does not, by describing documents under subparagraph (B), waive its right to object to production on the basis of privilege or work product protection, or to assert that the documents are not sufficiently relevant to justify the burden or expense of production.

The initial disclosure requirements of subparagraphs (A) and (B) are limited to identification of potential evidence “relevant to disputed facts alleged with particularity in the pleadings.” There is no need for a party to identify potential evidence with respect to allegations that are admitted. Broad, vague, and conclusory allegations sometimes tolerated in notice pleading--for example, the assertion that a product with many component parts is defective in some unspecified manner--should not impose upon responding parties the obligation at that point to search for and identify all persons possibly involved in, or all documents affecting, the design, manufacture, and assembly of the product. The greater the specificity and clarity of the allegations in the pleadings, the more complete should be the listing of potential witnesses and types of documentary evidence. Although paragraphs (1)(A) and (1)(B) by their terms refer to the factual disputes defined in the pleadings, the rule contemplates that these issues would be informally refined and clarified during the meeting of the parties under subdivision (f) and that the disclosure obligations would be adjusted in the light of these discussions. The disclosure requirements should, in short, be applied with common sense in light of the principles of Rule 1, keeping in mind the salutary purposes that the rule is intended to accomplish. The litigants should not indulge in gamesmanship with respect to the disclosure obligations.

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Subparagraph (C) imposes a burden of disclosure that includes the functional equivalent of a standing Request for Production under Rule 34. A party claiming damages or other monetary relief must, in addition to disclosing the calculation of such damages, make available the supporting documents for inspection and copying as if a request for such materials had been made under Rule 34. This obligation applies only with respect to documents then reasonably available to it and not privileged or protected as work product. Likewise, a party would not be expected to provide a calculation of damages which, as in many patent infringement actions, depends on information in the possession of another party or person.

Subparagraph (D) replaces subdivision (b)(2) of Rule 26, and provides that liability insurance policies be made available for inspection and copying. The last two sentences of that subdivision have been omitted as unnecessary, not to signify any change of law. The disclosure of insurance information does not thereby render such information admissible in evidence. See Rule 411, Federal Rules of Evidence. Nor does subparagraph (D) require disclosure of applications for insurance, though in particular cases such information may be discoverable in accordance with revised subdivision (a)(5).

Unless the court directs a different time, the disclosures required by subdivision (a)(1) are to be made at or within 10 days after the meeting of the parties under subdivision (f). One of the purposes of this meeting is to refine the factual disputes with respect to which disclosures should be made under paragraphs (1)(A) and (1)(B), particularly if an answer has not been filed by a defendant, or, indeed, to afford the parties an opportunity to modify by stipulation the timing or scope of these obligations. The time of this meeting is generally left to the parties provided it is held at least 14 days before a scheduling conference is held or before a scheduling order is due under Rule 16(b). In cases in which no scheduling conference is held, this will mean that the meeting must ordinarily be held within 75 days after a defendant has first appeared in the case and hence that the initial disclosures would be due no later than 85 days after the first appearance of a defendant.

Before making its disclosures, a party has the obligation under subdivision (g)(1) to make a reasonable inquiry into the facts of the case. The rule does not demand an exhaustive investigation at this stage of the case, but one that is reasonable under the circumstances, focusing on the facts that are alleged with particularity in the pleadings. The type of investigation that can be expected at this point will vary based upon such factors as the number and complexity of the issues; the location, nature, number, and availability of potentially relevant witnesses and documents; the extent of past working relationships between the attorney and the client, particularly in handling related or similar litigation; and of course how long the party has to conduct an investigation, either before or after filing of the case. As provided in the last sentence of subdivision (a)(1), a party is not excused from the duty of disclosure merely because its investigation is incomplete. The party should make its initial disclosures based on the pleadings and the information then reasonably available to it. As its investigation continues and as the issues in the pleadings are clarified, it should supplement its disclosures as required by subdivision (e)(1). A party is not relieved from its obligation of disclosure merely because another party has not made its disclosures or has made an inadequate disclosure.

It will often be desirable, particularly if the claims made in the complaint are broadly stated, for the parties to have their Rule 26(f) meeting early in the case, perhaps before a defendant has answered the complaint or had time to conduct other than a cursory investigation. In such circumstances, in order to facilitate more meaningful and useful initial disclosures, they can and should stipulate to a period of more than 10 days after the meeting in which to make these disclosures, at least for defendants who had no advance notice of the potential litigation. A stipulation at an early meeting affording such a defendant at least 60 days after receiving the complaint in which to make its disclosures under subdivision (a)(1)--a period that is two weeks longer than the time formerly specified for responding to interrogatories served with a complaint--should be adequate and appropriate in most cases.

Paragraph (2). This paragraph imposes an additional duty to disclose information regarding expert testimony sufficiently in advance of trial that opposing parties have a reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses. Normally the court should prescribe a time for these disclosures in a scheduling order under Rule 16(b), and in most cases the party with the burden of proof on an issue should disclose its expert testimony on that issue before other parties are required to make their disclosures with respect to that issue. In the absence of such a direction, the disclosures are to be made by all parties at least 90 days before the trial date or the date by which the case

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is to be ready for trial, except that an additional 30 days is allowed (unless the court specifies another time) for disclosure of expert testimony to be used solely to contradict or rebut the testimony that may be presented by another party's expert. For a discussion of procedures that have been used to enhance the reliability of expert testimony, see M. Graham, *Expert Witness Testimony and the Federal Rules of Evidence: Insuring Adequate Assurance of Trustworthiness,* 1986 U.Ill.L.Rev. 90.

Paragraph (2)(B) requires that persons retained or specially employed to provide expert testimony, or whose duties as an employee of the party regularly involve the giving of expert testimony, must prepare a detailed and complete written report, stating the testimony the witness is expected to present during direct examination, together with the reasons therefor. The information disclosed under the former rule in answering interrogatories about the "substance" of expert testimony was frequently so sketchy and vague that it rarely dispensed with the need to depose the expert and often was even of little help in preparing for a deposition of the witness. Revised Rule 37(c)(1) provides an incentive for full disclosure; namely, that a party will not ordinarily be permitted to use on direct examination any expert testimony not so disclosed. Rule 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports, and indeed, with experts such as automobile mechanics, this assistance may be needed. Nevertheless, the report, which is intended to set forth the substance of the direct examination, should be written in a manner that reflects the testimony to be given by the witness and it must be signed by the witness.

The report is to disclose the data and other information considered by the expert and any exhibits or charts that summarize or support the expert's opinions. Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions--whether or not ultimately relied upon by the expert--are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

Revised subdivision (b)(4)(A) authorizes the deposition of expert witnesses. Since depositions of experts required to prepare a written report may be taken only after the report has been served, the length of the deposition of such experts should be reduced, and in many cases the report may eliminate the need for a deposition. Revised subdivision (e)(1) requires disclosure of any material changes made in the opinions of an expert from whom a report is required, whether the changes are in the written report or in testimony given at a deposition.

For convenience, this rule and revised Rule 30 continue to use the term "expert" to refer to those persons who will testify under Rule 702 of the Federal Rules of Evidence with respect to scientific, technical, and other specialized matters. The requirement of a written report in paragraph (2)(B), however, applies only to those experts who are retained or specially employed to provide such testimony in the case or whose duties as an employee of a party regularly involve the giving of such testimony. A treating physician, for example, can be deposed or called to testify at trial without any requirement for a written report. By local rule, order, or written stipulation, the requirement of a written report may be waived for particular experts or imposed upon additional persons who will provide opinions under Rule 702.

Paragraph (3). This paragraph imposes an additional duty to disclose, without any request, information customarily needed in final preparation for trial. These disclosures are to be made in accordance with schedules adopted by the court under Rule 16(b) or by special order. If no such schedule is directed by the court, the disclosures are to be made at least 30 days before commencement of the trial. By its terms, rule 26(a)(3) does not require disclosure of evidence to be used solely for impeachment purposes; however, disclosure of such evidence--as well as other items relating to conduct of trial--may be required by local rule or a pretrial order.

Subparagraph (A) requires the parties to designate the persons whose testimony they may present as substantive evidence at trial, whether in person or by deposition. Those who will probably be called as witnesses should be listed separately from those who are not likely to be called but who are being listed in order to preserve the right to do so if needed because of developments during trial. Revised Rule 37(c)(1) provides that only persons so listed may be used at trial to present substantive evidence. This restriction does not apply unless the omission was "without substantial justification" and hence would not bar

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an unlisted witness if the need for such testimony is based upon developments during trial that could not reasonably have been anticipated--*e.g.*, a change of testimony.

Listing a witness does not obligate the party to secure the attendance of the person at trial, but should preclude the party from objecting if the person is called to testify by another party who did not list the person as a witness.

Subparagraph (B) requires the party to indicate which of these potential witnesses will be presented by deposition at trial. A party expecting to use at trial a deposition not recorded by stenographic means is required by revised Rule 32 to provide the court with a transcript of the pertinent portions of such depositions. This rule requires that copies of the transcript of a nonstenographic deposition be provided to other parties in advance of trial for verification, an obvious concern since counsel often utilize their own personnel to prepare transcripts from audio or video tapes. By order or local rule, the court may require that parties designate the particular portions of stenographic depositions to be used at trial.

Subparagraph (C) requires disclosure of exhibits, including summaries (whether to be offered in lieu of other documentary evidence or to be used as an aid in understanding such evidence), that may be offered as substantive evidence. The rule requires a separate listing of each such exhibit, though it should permit voluminous items of a similar or standardized character to be described by meaningful categories. For example, unless the court has otherwise directed, a series of vouchers might be shown collectively as a single exhibit with their starting and ending dates. As with witnesses, the exhibits that will probably be offered are to be listed separately from those which are unlikely to be offered but which are listed in order to preserve the right to do so if needed because of developments during trial. Under revised Rule 37(c)(1) the court can permit use of unlisted documents the need for which could not reasonably have been anticipated in advance of trial.

Upon receipt of these final pretrial disclosures, other parties have 14 days (unless a different time is specified by the court) to disclose any objections they wish to preserve to the usability of the deposition testimony or to the admissibility of the documentary evidence (other than under Rules 402 and 403 of the Federal Rules of Evidence). Similar provisions have become commonplace either in pretrial orders or by local rules, and significantly expedite the presentation of evidence at trial, as well as eliminate the need to have available witnesses to provide “foundation” testimony for most items of documentary evidence. The listing of a potential objection does not constitute the making of that objection or require the court to rule on the objection; rather, it preserves the right of the party to make the objection when and as appropriate during trial. The court may, however, elect to treat the listing as a motion “in limine” and rule upon the objections in advance of trial to the extent appropriate.

The time specified in the rule for the final pretrial disclosures is relatively close to the trial date. The objective is to eliminate the time and expense in making these disclosures of evidence and objections in those cases that settle shortly before trial, while affording a reasonable time for final preparation for trial in those cases that do not settle. In many cases, it will be desirable for the court in a scheduling or pretrial order to set an earlier time for disclosures of evidence and provide more time for disclosing potential objections.

Paragraph (4). This paragraph prescribes the form of disclosures. A signed written statement is required, reminding the parties and counsel of the solemnity of the obligations imposed; and the signature on the initial or pretrial disclosure is a certification under subdivision (g)(1) that it is complete and correct as of the time when made. Consistent with Rule 5(d), these disclosures are to be filed with the court unless otherwise directed. It is anticipated that many courts will direct that expert reports required under paragraph (2)(B) not be filed until needed in connection with a motion or for trial.

Paragraph (5). This paragraph is revised to take note of the availability of revised Rule 45 for inspection from non-parties of documents and premises without the need for a deposition.

Subdivision (b). This subdivision is revised in several respects. First, former paragraph (1) is subdivided into two paragraphs for ease of reference and to avoid renumbering of paragraphs (3) and (4). Textual changes are then made in new paragraph (2) to enable the court to keep tighter rein on the extent of discovery. The information explosion of recent decades has greatly

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increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression. Amendments to Rules 30, 31, and 33 place presumptive limits on the number of depositions and interrogatories, subject to leave of court to pursue additional discovery. The revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery and to authorize courts that develop case tracking systems based on the complexity of cases to increase or decrease by local rule the presumptive number of depositions and interrogatories allowed in particular types or classifications of cases. The revision also dispels any doubt as to the power of the court to impose limitations on the length of depositions under Rule 30 or on the number of requests for admission under Rule 36.

Second, former paragraph (2), relating to insurance, has been relocated as part of the required initial disclosures under subdivision (a)(1)(D), and revised to provide for disclosure of the policy itself.

Third, paragraph (4)(A) is revised to provide that experts who are expected to be witnesses will be subject to deposition prior to trial, conforming the norm stated in the rule to the actual practice followed in most courts, in which depositions of experts have become standard. Concerns regarding the expense of such depositions should be mitigated by the fact that the expert's fees for the deposition will ordinarily be borne by the party taking the deposition. The requirement under subdivision (a)(2)(B) of a complete and detailed report of the expected testimony of certain forensic experts may, moreover, eliminate the need for some such depositions or at least reduce the length of the depositions. Accordingly, the deposition of an expert required by subdivision (a)(2)(B) to provide a written report may be taken only after the report has been served.

Paragraph (4)(C), bearing on compensation of experts, is revised to take account of the changes in paragraph (4)(A).

Paragraph (5) is a new provision. A party must notify other parties if it is withholding materials otherwise subject to disclosure under the rule or pursuant to a discovery request because it is asserting a claim of privilege or work product protection. To withhold materials without such notice is contrary to the rule, subjects the party to sanctions under Rule 37(b)(2), and may be viewed as a waiver of the privilege or protection.

The party must also provide sufficient information to enable other parties to evaluate the applicability of the claimed privilege or protection. Although the person from whom the discovery is sought decides whether to claim a privilege or protection, the court ultimately decides whether, if this claim is challenged, the privilege or protection applies. Providing information pertinent to the applicability of the privilege or protection should reduce the need for in camera examination of the documents.

The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories. A party can seek relief through a protective order under subdivision (c) if compliance with the requirement for providing this information would be an unreasonable burden. In rare circumstances some of the pertinent information affecting applicability of the claim, such as the identity of the client, may itself be privileged; the rule provides that such information need not be disclosed.

The obligation to provide pertinent information concerning withheld privileged materials applies only to items “otherwise discoverable.” If a broad discovery request is made--for example, for all documents of a particular type during a twenty year period--and the responding party believes in good faith that production of documents for more than the past three years would be unduly burdensome, it should make its objection to the breadth of the request and, with respect to the documents generated in that three year period, produce the unprivileged documents and describe those withheld under the claim of privilege. If the court later rules that documents for a seven year period are properly discoverable, the documents for the additional four years should then be either produced (if not privileged) or described (if claimed to be privileged).

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Subdivision (c). The revision requires that before filing a motion for a protective order the movant must confer--either in person or by telephone--with the other affected parties in a good faith effort to resolve the discovery dispute without the need for court intervention. If the movant is unable to get opposing parties even to discuss the matter, the efforts in attempting to arrange such a conference should be indicated in the certificate.

Subdivision (d). This subdivision is revised to provide that formal discovery--as distinguished from interviews of potential witnesses and other informal discovery--not commence until the parties have met and conferred as required by subdivision (f). Discovery can begin earlier if authorized under Rule 30(a)(2)(C) (deposition of person about to leave the country) or by local rule, order, or stipulation. This will be appropriate in some cases, such as those involving requests for a preliminary injunction or motions challenging personal jurisdiction. If a local rule exempts any types of cases in which discovery may be needed from the requirement of a meeting under Rule 26(f), it should specify when discovery may commence in those cases.

The meeting of counsel is to take place as soon as practicable and in any event at least 14 days before the date of the scheduling conference under Rule 16(b) or the date a scheduling order is due under Rule 16(b). The court can assure that discovery is not unduly delayed either by entering a special order or by setting the case for a scheduling conference.

Subdivision (e). This subdivision is revised to provide that the requirement for supplementation applies to all disclosures required by subdivisions (a)(1)-(3). Like the former rule, the duty, while imposed on a “party,” applies whether the corrective information is learned by the client or by the attorney. Supplementations need not be made as each new item of information is learned but should be made at appropriate intervals during the discovery period, and with special promptness as the trial date approaches. It may be useful for the scheduling order to specify the time or times when supplementations should be made.

The revision also clarifies that the obligation to supplement responses to formal discovery requests applies to interrogatories, requests for production, and requests for admissions, but not ordinarily to deposition testimony. However, with respect to experts from whom a written report is required under subdivision (a)(2)(B), changes in the opinions expressed by the expert whether in the report or at a subsequent deposition are subject to a duty of supplemental disclosure under subdivision (e)(1).

The obligation to supplement disclosures and discovery responses applies whenever a party learns that its prior disclosures or responses are in some material respect incomplete or incorrect. There is, however, no obligation to provide supplemental or corrective information that has been otherwise made known to the parties in writing or during the discovery process, as when a witness not previously disclosed is identified during the taking of a deposition or when an expert during a deposition corrects information contained in an earlier report.

Subdivision (f). This subdivision was added in 1980 to provide a party threatened with abusive discovery with a special means for obtaining judicial intervention other than through discrete motions under Rules 26(c) and 37(a). The amendment envisioned a two-step process: first, the parties would attempt to frame a mutually agreeable plan; second, the court would hold a “discovery conference” and then enter an order establishing a schedule and limitations for the conduct of discovery. It was contemplated that the procedure, an elective one triggered on request of a party, would be used in special cases rather than as a routine matter. As expected, the device has been used only sparingly in most courts, and judicial controls over the discovery process have ordinarily been imposed through scheduling orders under Rule 16(b) or through rulings on discovery motions.

The provisions relating to a conference with the court are removed from subdivision (f). This change does not signal any lessening of the importance of judicial supervision. Indeed, there is a greater need for early judicial involvement to consider the scope and timing of the disclosure requirements of Rule 26(a) and the presumptive limits on discovery imposed under these rules or by local rules. Rather, the change is made because the provisions addressing the use of conferences with the court to control discovery are more properly included in Rule 16, which is being revised to highlight the court's powers regarding the discovery process.

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The desirability of some judicial control of discovery can hardly be doubted. Rule 16, as revised, requires that the court set a time for completion of discovery and authorizes various other orders affecting the scope, timing, and extent of discovery and disclosures. Before entering such orders, the court should consider the views of the parties, preferably by means of a conference, but at the least through written submissions. Moreover, it is desirable that the parties' proposals regarding discovery be developed through a process where they meet in person, informally explore the nature and basis of the issues, and discuss how discovery can be conducted most efficiently and economically.

As noted above, former subdivision (f) envisioned the development of proposed discovery plans as an optional procedure to be used in relatively few cases. The revised rule directs that in all cases not exempted by local rule or special order the litigants must meet in person and plan for discovery. Following this meeting, the parties submit to the court their proposals for a discovery plan and can begin formal discovery. Their report will assist the court in seeing that the timing and scope of disclosures under revised Rule 26(a) and the limitations on the extent of discovery under these rules and local rules are tailored to the circumstances of the particular case.

To assure that the court has the litigants' proposals before deciding on a scheduling order and that the commencement of discovery is not delayed unduly, the rule provides that the meeting of the parties take place as soon as practicable and in any event at least 14 days before a scheduling conference is held or before a scheduling order is due under Rule 16(b). (Rule 16(b) requires that a scheduling order be entered within 90 days after the first appearance of a defendant or, if earlier, within 120 days after the complaint has been served on any defendant.) The obligation to participate in the planning process is imposed on all parties that have appeared in the case, including defendants who, because of a pending Rule 12 motion, may not have yet filed an answer in the case. Each such party should attend the meeting, either through one of its attorneys or in person if unrepresented. If more parties are joined or appear after the initial meeting, an additional meeting may be desirable.

Subdivision (f) describes certain matters that should be accomplished at the meeting and included in the proposed discovery plan. This listing does not exclude consideration of other subjects, such as the time when any dispositive motions should be filed and when the case should be ready for trial.

The parties are directed under subdivision (a)(1) to make the disclosures required by that subdivision at or within 10 days after this meeting. In many cases the parties should use the meeting to exchange, discuss, and clarify their respective disclosures. In other cases, it may be more useful if the disclosures are delayed until after the parties have discussed at the meeting the claims and defenses in order to define the issues with respect to which the initial disclosures should be made. As discussed in the Notes to subdivision (a)(1), the parties may also need to consider whether a stipulation extending this 10-day period would be appropriate, as when a defendant would otherwise have less than 60 days after being served in which to make its initial disclosure. The parties should also discuss at the meeting what additional information, although not subject to the disclosure requirements, can be made available informally without the necessity for formal discovery requests.

The report is to be submitted to the court within 10 days after the meeting and should not be difficult to prepare. In most cases counsel should be able to agree that one of them will be responsible for its preparation and submission to the court. Form 35 has been added in the Appendix to the Rules, both to illustrate the type of report that is contemplated and to serve as a checklist for the meeting.

The litigants are expected to attempt in good faith to agree on the contents of the proposed discovery plan. If they cannot agree on all aspects of the plan, their report to the court should indicate the competing proposals of the parties on those items, as well as the matters on which they agree. Unfortunately, there may be cases in which, because of disagreements about time or place or for other reasons, the meeting is not attended by all parties or, indeed, no meeting takes place. In such situations, the report--or reports--should describe the circumstances and the court may need to consider sanctions under Rule 37(g).

By local rule or special order, the court can exempt particular cases or types of cases from the meet-and-confer requirement of subdivision (f). In general this should include any types of cases which are exempted by local rule from the requirement for

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a scheduling order under Rule 16(b), such as cases in which there will be no discovery (*e.g.*, bankruptcy appeals and reviews of social security determinations). In addition, the court may want to exempt cases in which discovery is rarely needed (*e.g.*, government collection cases and proceedings to enforce administrative summonses) or in which a meeting of the parties might be impracticable (*e.g.*, actions by unrepresented prisoners). Note that if a court exempts from the requirements for a meeting any types of cases in which discovery may be needed, it should indicate when discovery may commence in those cases.

Subdivision (g). Paragraph (1) is added to require signatures on disclosures, a requirement that parallels the provisions of paragraph (2) with respect to discovery requests, responses, and objections. The provisions of paragraph (3) have been modified to be consistent with Rules 37(a)(4) and 37(c)(1); in combination, these rules establish sanctions for violation of the rules regarding disclosures and discovery matters. Amended Rule 11 no longer applies to such violations.

2000 Amendment

Purposes of amendments. The Rule 26(a)(1) initial disclosure provisions are amended to establish a nationally uniform practice. The scope of the disclosure obligation is narrowed to cover only information that the disclosing party may use to support its position. In addition, the rule exempts specified categories of proceedings from initial disclosure, and permits a party who contends that disclosure is not appropriate in the circumstances of the case to present its objections to the court, which must then determine whether disclosure should be made. Related changes are made in Rules 26(d) and (f).

The initial disclosure requirements added by the 1993 amendments permitted local rules directing that disclosure would not be required or altering its operation. The inclusion of the “opt out” provision reflected the strong opposition to initial disclosure felt in some districts, and permitted experimentation with differing disclosure rules in those districts that were favorable to disclosure. The local option also recognized that--partly in response to the first publication in 1991 of a proposed disclosure rule--many districts had adopted a variety of disclosure programs under the aegis of the Civil Justice Reform Act. It was hoped that developing experience under a variety of disclosure systems would support eventual refinement of a uniform national disclosure practice. In addition, there was hope that local experience could identify categories of actions in which disclosure is not useful.

A striking array of local regimes in fact emerged for disclosure and related features introduced in 1993. *See* D. Stienstra, *Implementation of Disclosure in United States District Courts, With Specific Attention to Courts' Responses to Selected Amendments to Federal Rule of Civil Procedure 26* (Federal Judicial Center, March 30, 1998) (describing and categorizing local regimes). In its final report to Congress on the CJRA experience, the Judicial Conference recommended reexamination of the need for national uniformity, particularly in regard to initial disclosure. Judicial Conference, *Alternative Proposals for Reduction of Cost and Delay: Assessment of Principles, Guidelines and Techniques,* 175 F.R.D. 62, 98 (1997).

At the Committee's request, the Federal Judicial Center undertook a survey in 1997 to develop information on current disclosure and discovery practices. *See* T. Willging, J. Shapard, D. Stienstra & D. Miletich, *Discovery and Disclosure Practice, Problems, and Proposals for Change* (Federal Judicial Center, 1997). In addition, the Committee convened two conferences on discovery involving lawyers from around the country and received reports and recommendations on possible discovery amendments from a number of bar groups. Papers and other proceedings from the second conference are published in 39 Boston Col. L. Rev. 517-840 (1998).

The Committee has discerned widespread support for national uniformity. Many lawyers have experienced difficulty in coping with divergent disclosure and other practices as they move from one district to another. Lawyers surveyed by the Federal Judicial Center ranked adoption of a uniform national disclosure rule second among proposed rule changes (behind increased availability of judges to resolve discovery disputes) as a means to reduce litigation expenses without interfering with fair outcomes. *Discovery and Disclosure Practice, supra*, at 44-45. National uniformity is also a central purpose of the Rules Enabling Act of 1934, as amended, 28 U.S.C. §§ 2072-2077.

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These amendments restore national uniformity to disclosure practice. Uniformity is also restored to other aspects of discovery by deleting most of the provisions authorizing local rules that vary the number of permitted discovery events or the length of depositions. Local rule options are also deleted from Rules 26(d) and (f).

Subdivision (a)(1). The amendments remove the authority to alter or opt out of the national disclosure requirements by local rule, invalidating not only formal local rules but also informal "standing" orders of an individual judge or court that purport to create exemptions from--or limit or expand--the disclosure provided under the national rule. *See* Rule 83. Case-specific orders remain proper, however, and are expressly required if a party objects that initial disclosure is not appropriate in the circumstances of the action. Specified categories of proceedings are excluded from initial disclosure under subdivision (a)(1)(E). In addition, the parties can stipulate to forgo disclosure, as was true before. But even in a case excluded by subdivision (a)(1)(E) or in which the parties stipulate to bypass disclosure, the court can order exchange of similar information in managing the action under Rule 16.

The initial disclosure obligation of subdivisions (a)(1)(A) and (B) has been narrowed to identification of witnesses and documents that the disclosing party may use to support its claims or defenses. "Use" includes any use at a pretrial conference, to support a motion, or at trial. The disclosure obligation is also triggered by intended use in discovery, apart from use to respond to a discovery request; use of a document to question a witness during a deposition is a common example. The disclosure obligation attaches both to witnesses and documents a party intends to use and also to witnesses and to documents the party intends to use if--in the language of Rule 26(a)(3)--"the need arises."

A party is no longer obligated to disclose witnesses or documents, whether favorable or unfavorable, that it does not intend to use. The obligation to disclose information the party may use connects directly to the exclusion sanction of Rule 37(c)(1). Because the disclosure obligation is limited to material that the party may use, it is no longer tied to particularized allegations in the pleadings. Subdivision (e)(1), which is unchanged, requires supplementation if information later acquired would have been subject to the disclosure requirement. As case preparation continues, a party must supplement its disclosures when it determines that it may use a witness or document that it did not previously intend to use.

The disclosure obligation applies to "claims and defenses," and therefore requires a party to disclose information it may use to support its denial or rebuttal of the allegations, claim, or defense of another party. It thereby bolsters the requirements of Rule 11(b)(4), which authorizes denials "warranted on the evidence," and disclosure should include the identity of any witness or document that the disclosing party may use to support such denials.

Subdivision (a)(3) presently excuses pretrial disclosure of information solely for impeachment. Impeachment information is similarly excluded from the initial disclosure requirement.

Subdivisions (a)(1)(C) and (D) are not changed. Should a case be exempted from initial disclosure by Rule 26(a)(1)(E) or by agreement or order, the insurance information described by subparagraph (D) should be subject to discovery, as it would have been under the principles of former Rule 26(b)(2), which was added in 1970 and deleted in 1993 as redundant in light of the new initial disclosure obligation.

New subdivision (a)(1)(E) excludes eight specified categories of proceedings from initial disclosure. The objective of this listing is to identify cases in which there is likely to be little or no discovery, or in which initial disclosure appears unlikely to contribute to the effective development of the case. The list was developed after a review of the categories excluded by local rules in various districts from the operation of Rule 16(b) and the conference requirements of subdivision (f). Subdivision (a)(1)(E) refers to categories of "proceedings" rather than categories of "actions" because some might not properly be labeled "actions." Case designations made by the parties or the clerk's office at the time of filing do not control application of the exemptions. The descriptions in the rule are generic and are intended to be administered by the parties--and, when needed, the courts--with the flexibility needed to adapt to gradual evolution in the types of proceedings that fall within these general categories. The exclusion of an action for review on an administrative record, for example, is intended to reach a proceeding that is framed as

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an "appeal" based solely on an administrative record. The exclusion should not apply to a proceeding in a form that commonly permits admission of new evidence to supplement the record. Item (vii), excluding a proceeding ancillary to proceedings in other courts, does not refer to bankruptcy proceedings; application of the Civil Rules to bankruptcy proceedings is determined by the Bankruptcy Rules.

Subdivision (a)(1)(E) is likely to exempt a substantial proportion of the cases in most districts from the initial disclosure requirement. Based on 1996 and 1997 case filing statistics, Federal Judicial Center staff estimate that, nationwide, these categories total approximately one-third of all civil filings.

The categories of proceedings listed in subdivision (a)(1)(E) are also exempted from the subdivision (f) conference requirement and from the subdivision (d) moratorium on discovery. Although there is no restriction on commencement of discovery in these cases, it is not expected that this opportunity will often lead to abuse since there is likely to be little or no discovery in most such cases. Should a defendant need more time to respond to discovery requests filed at the beginning of an exempted action, it can seek relief by motion under Rule 26(c) if the plaintiff is unwilling to defer the due date by agreement.

Subdivision (a)(1)(E)'s enumeration of exempt categories is exclusive. Although a case-specific order can alter or excuse initial disclosure, local rules or "standing" orders that purport to create general exemptions are invalid. *See* Rule 83.

The time for initial disclosure is extended to 14 days after the subdivision (f) conference unless the court orders otherwise. This change is integrated with corresponding changes requiring that the subdivision (f) conference be held 21 days before the Rule 16(b) scheduling conference or scheduling order, and that the report on the subdivision (f) conference be submitted to the court 14 days after the meeting. These changes provide a more orderly opportunity for the parties to review the disclosures, and for the court to consider the report. In many instances, the subdivision (f) conference and the effective preparation of the case would benefit from disclosure before the conference, and earlier disclosure is encouraged.

The presumptive disclosure date does not apply if a party objects to initial disclosure during the subdivision (f) conference and states its objection in the subdivision (f) discovery plan. The right to object to initial disclosure is not intended to afford parties an opportunity to "opt out" of disclosure unilaterally. It does provide an opportunity for an objecting party to present to the court its position that disclosure would be "inappropriate in the circumstances of the action." Making the objection permits the objecting party to present the question to the judge before any party is required to make disclosure. The court must then rule on the objection and determine what disclosures--if any--should be made. Ordinarily, this determination would be included in the Rule 16(b) scheduling order, but the court could handle the matter in a different fashion. Even when circumstances warrant suspending some disclosure obligations, others--such as the damages and insurance information called for by subdivisions (a)(1)(C) and (D)--may continue to be appropriate.

The presumptive disclosure date is also inapplicable to a party who is "first served or otherwise joined" after the subdivision (f) conference. This phrase refers to the date of service of a claim on a party in a defensive posture (such as a defendant or third-party defendant), and the date of joinder of a party added as a claimant or an intervenor. Absent court order or stipulation, a new party has 30 days in which to make its initial disclosures. But it is expected that later-added parties will ordinarily be treated the same as the original parties when the original parties have stipulated to forgo initial disclosure, or the court has ordered disclosure in a modified form.

Subdivision (a)(3). The amendment to Rule 5(d) forbids filing disclosures under subdivisions (a)(1) and (a)(2) until they are used in the proceeding, and this change is reflected in an amendment to subdivision (a)(4). Disclosures under subdivision (a)(3), however, may be important to the court in connection with the final pretrial conference or otherwise in preparing for trial. The requirement that objections to certain matters be filed points up the court's need to be provided with these materials. Accordingly, the requirement that subdivision (a)(3) materials be filed has been moved from subdivision (a)(4) to subdivision (a)(3), and it has also been made clear that they--and any objections--should be filed "promptly."

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Subdivision (a)(4). The filing requirement has been removed from this subdivision. Rule 5(d) has been amended to provide that disclosures under subdivisions (a)(1) and (a)(2) must not be filed until used in the proceeding. Subdivision (a)(3) has been amended to require that the disclosures it directs, and objections to them, be filed promptly. Subdivision (a)(4) continues to require that all disclosures under subdivisions (a)(1), (a)(2), and (a)(3) be in writing, signed, and served.

"Shall" is replaced by "must" under the program to conform amended rules to current style conventions when there is no ambiguity.

GAP Report

The Advisory Committee recommends that the amendments to Rules 26(a)(1)(A) and (B) be changed so that initial disclosure applies to information the disclosing party "may use to support" its claims or defenses. It also recommends changes in the Committee Note to explain that disclosure requirement. In addition, it recommends inclusion in the Note of further explanatory matter regarding the exclusion from initial disclosure provided in new Rule 26(a)(1)(E) for actions for review on an administrative record and the impact of these exclusions on bankruptcy proceedings. Minor wording improvements in the Note are also proposed.

Subdivision (b)(1). In 1978, the Committee published for comment a proposed amendment, suggested by the Section of Litigation of the American Bar Association, to refine the scope of discovery by deleting the "subject matter" language. This proposal was withdrawn, and the Committee has since then made other changes in the discovery rules to address concerns about overbroad discovery. Concerns about costs and delay of discovery have persisted nonetheless, and other bar groups have repeatedly renewed similar proposals for amendment to this subdivision to delete the "subject matter" language. Nearly one-third of the lawyers surveyed in 1997 by the Federal Judicial Center endorsed narrowing the scope of discovery as a means of reducing litigation expense without interfering with fair case resolutions. *Discovery and Disclosure Practice, supra*, at 44-45 (1997). The Committee has heard that in some instances, particularly cases involving large quantities of discovery, parties seek to justify discovery requests that sweep far beyond the claims and defenses of the parties on the ground that they nevertheless have a bearing on the "subject matter" involved in the action.

The amendments proposed for subdivision (b)(1) include one element of these earlier proposals but also differ from these proposals in significant ways. The similarity is that the amendments describe the scope of party-controlled discovery in terms of matter relevant to the claim or defense of any party. The court, however, retains authority to order discovery of any matter relevant to the subject matter involved in the action for good cause. The amendment is designed to involve the court more actively in regulating the breadth of sweeping or contentious discovery. The Committee has been informed repeatedly by lawyers that involvement of the court in managing discovery is an important method of controlling problems of inappropriately broad discovery. Increasing the availability of judicial officers to resolve discovery disputes and increasing court management of discovery were both strongly endorsed by the attorneys surveyed by the Federal Judicial Center. *See Discovery and Disclosure Practice, supra*, at 44. Under the amended provisions, if there is an objection that discovery goes beyond material relevant to the parties' claims or defenses, the court would become involved to determine whether the discovery is relevant to the claims or defenses and, if not, whether good cause exists for authorizing it so long as it is relevant to the subject matter of the action. The good-cause standard warranting broader discovery is meant to be flexible.

The Committee intends that the parties and the court focus on the actual claims and defenses involved in the action. The dividing line between information relevant to the claims and defenses and that relevant only to the subject matter of the action cannot be defined with precision. A variety of types of information not directly pertinent to the incident in suit could be relevant to the claims or defenses raised in a given action. For example, other incidents of the same type, or involving the same product, could be properly discoverable under the revised standard. Information about organizational arrangements or filing systems of a party could be discoverable if likely to yield or lead to the discovery of admissible information. Similarly, information that could be used to impeach a likely witness, although not otherwise relevant to the claims or defenses, might be properly discoverable.

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In each instance, the determination whether such information is discoverable because it is relevant to the claims or defenses depends on the circumstances of the pending action.

The rule change signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings. In general, it is hoped that reasonable lawyers can cooperate to manage discovery without the need for judicial intervention. When judicial intervention is invoked, the actual scope of discovery should be determined according to the reasonable needs of the action. The court may permit broader discovery in a particular case depending on the circumstances of the case, the nature of the claims and defenses, and the scope of the discovery requested.

The amendments also modify the provision regarding discovery of information not admissible in evidence. As added in 1946, this sentence was designed to make clear that otherwise relevant material could not be withheld because it was hearsay or otherwise inadmissible. The Committee was concerned that the "reasonably calculated to lead to the discovery of admissible evidence" standard set forth in this sentence might swallow any other limitation on the scope of discovery. Accordingly, this sentence has been amended to clarify that information must be relevant to be discoverable, even though inadmissible, and that discovery of such material is permitted if reasonably calculated to lead to the discovery of admissible evidence. As used here, "relevant" means within the scope of discovery as defined in this subdivision, and it would include information relevant to the subject matter involved in the action if the court has ordered discovery to that limit based on a showing of good cause.

Finally, a sentence has been added calling attention to the limitations of subdivision (b)(2)(i), (ii), and (iii). These limitations apply to discovery that is otherwise within the scope of subdivision (b)(1). The Committee has been told repeatedly that courts have not implemented these limitations with the vigor that was contemplated. *See 8 Federal Practice & Procedure* § 2008.1 at 121. This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery. *Cf. Crawford-El v. Britton*, 118 S.Ct. 1584, 1597 (1998) (quoting Rule 26(b)(2)(iii) and stating that "Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly").

GAP Report

The Advisory Committee recommends changing the rule to authorize the court to expand discovery to any "matter"--not "information"--relevant to the subject matter involved in the action. In addition, it recommends additional clarifying material in the Committee Note about the impact of the change on some commonly disputed discovery topics, the relationship between cost-bearing under Rule 26(b)(2) and expansion of the scope of discovery on a showing of good cause, and the meaning of "relevant" in the revision to the last sentence of current subdivision (b)(1). In addition, some minor clarifications of language changes have been proposed for the Committee Note.

Subdivision (b)(2). Rules 30, 31, and 33 establish presumptive national limits on the numbers of depositions and interrogatories. New Rule 30(d)(2) establishes a presumptive limit on the length of depositions. Subdivision (b)(2) is amended to remove the previous permission for local rules that establish different presumptive limits on these discovery activities. There is no reason to believe that unique circumstances justify varying these nationally-applicable presumptive limits in certain districts. The limits can be modified by court order or agreement in an individual action, but "standing" orders imposing different presumptive limits are not authorized. Because there is no national rule limiting the number of Rule 36 requests for admissions, the rule continues to authorize local rules that impose numerical limits on them. This change is not intended to interfere with differentiated case management in districts that use this technique by case-specific order as part of their Rule 16 process.

Subdivision (d). The amendments remove the prior authority to exempt cases by local rule from the moratorium on discovery before the subdivision (f) conference, but the categories of proceedings exempted from initial disclosure under subdivision (a)(1)(E) are excluded from subdivision (d). The parties may agree to disregard the moratorium where it applies, and the court may so order in a case, but "standing" orders altering the moratorium are not authorized.

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Subdivision (f). As in subdivision (d), the amendments remove the prior authority to exempt cases by local rule from the conference requirement. The Committee has been informed that the addition of the conference was one of the most successful changes made in the 1993 amendments, and it therefore has determined to apply the conference requirement nationwide. The categories of proceedings exempted from initial disclosure under subdivision (a)(1)(E) are exempted from the conference requirement for the reasons that warrant exclusion from initial disclosure. The court may order that the conference need not occur in a case where otherwise required, or that it occur in a case otherwise exempted by subdivision (a)(1)(E). "Standing" orders altering the conference requirement for categories of cases are not authorized.

The rule is amended to require only a "conference" of the parties, rather than a "meeting." There are important benefits to face-to-face discussion of the topics to be covered in the conference, and those benefits may be lost if other means of conferring were routinely used when face-to-face meetings would not impose burdens. Nevertheless, geographic conditions in some districts may exact costs far out of proportion to these benefits. The amendment allows the court by case-specific order to require a face-to-face meeting, but "standing" orders so requiring are not authorized.

As noted concerning the amendments to subdivision (a)(1), the time for the conference has been changed to at least 21 days before the Rule 16 scheduling conference, and the time for the report is changed to no more than 14 days after the Rule 26(f) conference. This should ensure that the court will have the report well in advance of the scheduling conference or the entry of the scheduling order.

Since Rule 16 was amended in 1983 to mandate some case management activities in all courts, it has included deadlines for Completing these tasks to ensure that all courts do so within a reasonable time. Rule 26(f) was fit into this scheme when it was adopted in 1993. It was never intended, however, that the national requirements that certain activities be completed by a certain time should delay case management in districts that move much faster than the national rules direct, and the rule is therefore amended to permit such a court to adopt a local rule that shortens the period specified for the completion of these tasks.

"Shall" is replaced by "must," "does," or an active verb under the program to conform amended rules to current style conventions when there is no ambiguity.

GAP Report

The Advisory Committee recommends adding a sentence to the published amendments to Rule 26(f) authorizing local rules shortening the time between the attorney conference and the court's action under Rule 16(b), and addition to the Committee Note of explanatory material about this change to the rule. This addition can be made without republication in response to public comments.

2006 Amendment

Subdivision (a). Rule 26(a)(1)(B) is amended to parallel Rule 34(a) by recognizing that a party must disclose electronically stored information as well as documents that it may use to support its claims or defenses. The term "electronically stored information" has the same broad meaning in Rule 26(a)(1) as in Rule 34(a). This amendment is consistent with the 1993 addition of Rule 26(a)(1)(B). The term "data compilations" is deleted as unnecessary because it is a subset of both documents and electronically stored information.

[Subdivision (a)(1)(E).] Civil forfeiture actions are added to the list of exemptions from Rule 26(a)(1) disclosure requirements. These actions are governed by new Supplemental Rule G. Disclosure is not likely to be useful.

Subdivision (b)(2). The amendment to Rule 26(b)(2) is designed to address issues raised by difficulties in locating, retrieving, and providing discovery of some electronically stored information. Electronic storage systems often make it easier to locate and retrieve information. These advantages are properly taken into account in determining the reasonable scope of discovery in

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a particular case. But some sources of electronically stored information can be accessed only with substantial burden and cost. In a particular case, these burdens and costs may make the information on such sources not reasonably accessible.

It is not possible to define in a rule the different types of technological features that may affect the burdens and costs of accessing electronically stored information. Information systems are designed to provide ready access to information used in regular ongoing activities. They also may be designed so as to provide ready access to information that is not regularly used. But a system may retain information on sources that are accessible only by incurring substantial burdens or costs. Subparagraph (B) is added to regulate discovery from such sources.

Under this rule, a responding party should produce electronically stored information that is relevant, not privileged, and reasonably accessible, subject to the (b)(2)(C) limitations that apply to all discovery. The responding party must also identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing. The identification should, to the extent possible, provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources.

A party's identification of sources of electronically stored information as not reasonably accessible does not relieve the party of its common-law or statutory duties to preserve evidence. Whether a responding party is required to preserve unsearched sources of potentially responsive information that it believes are not reasonably accessible depends on the circumstances of each case. It is often useful for the parties to discuss this issue early in discovery.

The volume of -- and the ability to search -- much electronically stored information means that in many cases the responding party will be able to produce information from reasonably accessible sources that will fully satisfy the parties' discovery needs. In many circumstances the requesting party should obtain and evaluate the information from such sources before insisting that the responding party search and produce information contained on sources that are not reasonably accessible. If the requesting party continues to seek discovery of information from sources identified as not reasonably accessible, the parties should discuss the burdens and costs of accessing and retrieving the information, the needs that may establish good cause for requiring all or part of the requested discovery even if the information sought is not reasonably accessible, and conditions on obtaining and producing the information that may be appropriate.

If the parties cannot agree whether, or on what terms, sources identified as not reasonably accessible should be searched and discoverable information produced, the issue may be raised either by a motion to compel discovery or by a motion for a protective order. The parties must confer before bringing either motion. If the parties do not resolve the issue and the court must decide, the responding party must show that the identified sources of information are not reasonably accessible because of undue burden or cost. The requesting party may need discovery to test this assertion. Such discovery might take the form of requiring the responding party to conduct a sampling of information contained on the sources identified as not reasonably accessible; allowing some form of inspection of such sources; or taking depositions of witnesses knowledgeable about the responding party's information systems.

Once it is shown that a source of electronically stored information is not reasonably accessible, the requesting party may still obtain discovery by showing good cause, considering the limitations of Rule 26(b)(2)(C) that balance the costs and potential benefits of discovery. The decision whether to require a responding party to search for and produce information that is not reasonably accessible depends not only on the burdens and costs of doing so, but also on whether those burdens and costs can be justified in the circumstances of the case. Appropriate considerations may include: (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.

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The responding party has the burden as to one aspect of the inquiry -- whether the identified sources are not reasonably accessible in light of the burdens and costs required to search for, retrieve, and produce whatever responsive information may be found. The requesting party has the burden of showing that its need for the discovery outweighs the burdens and costs of locating, retrieving, and producing the information. In some cases, the court will be able to determine whether the identified sources are not reasonably accessible and whether the requesting party has shown good cause for some or all of the discovery, consistent with the limitations of Rule 26(b)(2)(C), through a single proceeding or presentation. The good-cause determination, however, may be complicated because the court and parties may know little about what information the sources identified as not reasonably accessible might contain, whether it is relevant, or how valuable it may be to the litigation. In such cases, the parties may need some focused discovery, which may include sampling of the sources, to learn more about what burdens and costs are involved in accessing the information, what the information consists of, and how valuable it is for the litigation in light of information that can be obtained by exhausting other opportunities for discovery.

The good-cause inquiry and consideration of the Rule 26(b)(2)(C) limitations are coupled with the authority to set conditions for discovery. The conditions may take the form of limits on the amount, type, or sources of information required to be accessed and produced. The conditions may also include payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible. A requesting party's willingness to share or bear the access costs may be weighed by the court in determining whether there is good cause. But the producing party's burdens in reviewing the information for relevance and privilege may weigh against permitting the requested discovery.

The limitations of Rule 26(b)(2)(C) continue to apply to all discovery of electronically stored information, including that stored on reasonably accessible electronic sources.

Subdivision (b)(5). The Committee has repeatedly been advised that the risk of privilege waiver, and the work necessary to avoid it, add to the costs and delay of discovery. When the review is of electronically stored information, the risk of waiver, and the time and effort required to avoid it, can increase substantially because of the volume of electronically stored information and the difficulty in ensuring that all information to be produced has in fact been reviewed. Rule 26(b)(5)(A) provides a procedure for a party that has withheld information on the basis of privilege or protection as trial-preparation material to make the claim so that the requesting party can decide whether to contest the claim and the court can resolve the dispute. Rule 26(b)(5)(B) is added to provide a procedure for a party to assert a claim of privilege or trial-preparation material protection after information is produced in discovery in the action and, if the claim is contested, permit any party that received the information to present the matter to the court for resolution.

Rule 26(b)(5)(B) does not address whether the privilege or protection that is asserted after production was waived by the production. The courts have developed principles to determine whether, and under what circumstances, waiver results from inadvertent production of privileged or protected information. Rule 26(b)(5)(B) provides a procedure for presenting and addressing these issues. Rule 26(b)(5)(B) works in tandem with Rule 26(f), which is amended to direct the parties to discuss privilege issues in preparing their discovery plan, and which, with amended Rule 16(b), allows the parties to ask the court to include in an order any agreements the parties reach regarding issues of privilege or trial-preparation material protection. Agreements reached under Rule 26(f)(4) and orders including such agreements entered under Rule 16(b)(6) may be considered when a court determines whether a waiver has occurred. Such agreements and orders ordinarily control if they adopt procedures different from those in Rule 26(b)(5)(B).

A party asserting a claim of privilege or protection after production must give notice to the receiving party. That notice should be in writing unless the circumstances preclude it. Such circumstances could include the assertion of the claim during a deposition. The notice should be as specific as possible in identifying the information and stating the basis for the claim. Because the receiving party must decide whether to challenge the claim and may sequester the information and submit it to the court for a ruling on whether the claimed privilege or protection applies and whether it has been waived, the notice should be sufficiently detailed so as to enable the receiving party and the court to understand the basis for the claim and to determine whether waiver

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has occurred. Courts will continue to examine whether a claim of privilege or protection was made at a reasonable time when delay is part of the waiver determination under the governing law.

After receiving notice, each party that received the information must promptly return, sequester, or destroy the information and any copies it has. The option of sequestering or destroying the information is included in part because the receiving party may have incorporated the information in protected trial-preparation materials. No receiving party may use or disclose the information pending resolution of the privilege claim. The receiving party may present to the court the questions whether the information is privileged or protected as trial-preparation material, and whether the privilege or protection has been waived. If it does so, it must provide the court with the grounds for the privilege or protection specified in the producing party's notice, and serve all parties. In presenting the question, the party may use the content of the information only to the extent permitted by the applicable law of privilege, protection for trial-preparation material, and professional responsibility.

If a party disclosed the information to nonparties before receiving notice of a claim of privilege or protection as trial-preparation material, it must take reasonable steps to retrieve the information and to return it, sequester it until the claim is resolved, or destroy it.

Whether the information is returned or not, the producing party must preserve the information pending the court's ruling on whether the claim of privilege or of protection is properly asserted and whether it was waived. As with claims made under Rule 26(b)(5)(A), there may be no ruling if the other parties do not contest the claim.

Subdivision (f). Rule 26(f) is amended to direct the parties to discuss discovery of electronically stored information during their discovery-planning conference. The rule focuses on "issues relating to disclosure or discovery of electronically stored information"; the discussion is not required in cases not involving electronic discovery, and the amendment imposes no additional requirements in those cases. When the parties do anticipate disclosure or discovery of electronically stored information, discussion at the outset may avoid later difficulties or ease their resolution.

When a case involves discovery of electronically stored information, the issues to be addressed during the Rule 26(f) conference depend on the nature and extent of the contemplated discovery and of the parties' information systems. It may be important for the parties to discuss those systems, and accordingly important for counsel to become familiar with those systems before the conference. With that information, the parties can develop a discovery plan that takes into account the capabilities of their computer systems. In appropriate cases identification of, and early discovery from, individuals with special knowledge of a party's computer systems may be helpful.

The particular issues regarding electronically stored information that deserve attention during the discovery planning stage depend on the specifics of the given case. *See Manual for Complex Litigation* (4th) § 40.25(2) (listing topics for discussion in a proposed order regarding meet-and-confer sessions). For example, the parties may specify the topics for such discovery and the time period for which discovery will be sought. They may identify the various sources of such information within a party's control that should be searched for electronically stored information. They may discuss whether the information is reasonably accessible to the party that has it, including the burden or cost of retrieving and reviewing the information. *See* Rule 26(b)(2)(B). Rule 26(f)(3) explicitly directs the parties to discuss the form or forms in which electronically stored information might be produced. The parties may be able to reach agreement on the forms of production, making discovery more efficient. Rule 34(b) is amended to permit a requesting party to specify the form or forms in which it wants electronically stored information produced. If the requesting party does not specify a form, Rule 34(b) directs the responding party to state the forms it intends to use in the production. Early discussion of the forms of production may facilitate the application of Rule 34(b) by allowing the parties to determine what forms of production will meet both parties' needs. Early identification of disputes over the forms of production may help avoid the expense and delay of searches or productions using inappropriate forms.

Rule 26(f) is also amended to direct the parties to discuss any issues regarding preservation of discoverable information during their conference as they develop a discovery plan. This provision applies to all sorts of discoverable information, but can be

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particularly important with regard to electronically stored information. The volume and dynamic nature of electronically stored information may complicate preservation obligations. The ordinary operation of computers involves both the automatic creation and the automatic deletion or overwriting of certain information. Failure to address preservation issues early in the litigation increases uncertainty and raises a risk of disputes.

The parties' discussion should pay particular attention to the balance between the competing needs to preserve relevant evidence and to continue routine operations critical to ongoing activities. Complete or broad cessation of a party's routine computer operations could paralyze the party's activities. *Cf. Manual for Complex Litigation* (4th) § 11.422 ("A blanket preservation order may be prohibitively expensive and unduly burdensome for parties dependent on computer systems for their day-to-day operations.") The parties should take account of these considerations in their discussions, with the goal of agreeing on reasonable preservation steps.

The requirement that the parties discuss preservation does not imply that courts should routinely enter preservation orders. A preservation order entered over objections should be narrowly tailored. Ex parte preservation orders should issue only in exceptional circumstances.

Rule 26(f) is also amended to provide that the parties should discuss any issues relating to assertions of privilege or of protection as trial-preparation materials, including whether the parties can facilitate discovery by agreeing on procedures for asserting claims of privilege or protection after production and whether to ask the court to enter an order that includes any agreement the parties reach. The Committee has repeatedly been advised about the discovery difficulties that can result from efforts to guard against waiver of privilege and work-product protection. Frequently parties find it necessary to spend large amounts of time reviewing materials requested through discovery to avoid waiving privilege. These efforts are necessary because materials subject to a claim of privilege or protection are often difficult to identify. A failure to withhold even one such item may result in an argument that there has been a waiver of privilege as to all other privileged materials on that subject matter. Efforts to avoid the risk of waiver can impose substantial costs on the party producing the material and the time required for the privilege review can substantially delay access for the party seeking discovery.

These problems often become more acute when discovery of electronically stored information is sought. The volume of such data, and the informality that attends use of e-mail and some other types of electronically stored information, may make privilege determinations more difficult, and privilege review correspondingly more expensive and time consuming. Other aspects of electronically stored information pose particular difficulties for privilege review. For example, production may be sought of information automatically included in electronic files but not apparent to the creator or to readers. Computer programs may retain draft language, editorial comments, and other deleted matter (sometimes referred to as "embedded data" or "embedded edits") in an electronic file but not make them apparent to the reader. Information describing the history, tracking, or management of an electronic file (sometimes called "metadata") is usually not apparent to the reader viewing a hard copy or a screen image. Whether this information should be produced may be among the topics discussed in the Rule 26(f) conference. If it is, it may need to be reviewed to ensure that no privileged information is included, further complicating the task of privilege review.

Parties may attempt to minimize these costs and delays by agreeing to protocols that minimize the risk of waiver. They may agree that the responding party will provide certain requested materials for initial examination without waiving any privilege or protection -- sometimes known as a "quick peek." The requesting party then designates the documents it wishes to have actually produced. This designation is the Rule 34 request. The responding party then responds in the usual course, screening only those documents actually requested for formal production and asserting privilege claims as provided in Rule 26(b)(5)(A). On other occasions, parties enter agreements -- sometimes called "clawback agreements"-- that production without intent to waive privilege or protection should not be a waiver so long as the responding party identifies the documents mistakenly produced, and that the documents should be returned under those circumstances. Other voluntary arrangements may be appropriate depending on the circumstances of each litigation. In most circumstances, a party who receives information under such an arrangement cannot assert that production of the information waived a claim of privilege or of protection as trial-preparation material.

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Although these agreements may not be appropriate for all cases, in certain cases they can facilitate prompt and economical discovery by reducing delay before the discovering party obtains access to documents, and by reducing the cost and burden of review by the producing party. A case-management or other order including such agreements may further facilitate the discovery process. Form 35 is amended to include a report to the court about any agreement regarding protections against inadvertent forfeiture or waiver of privilege or protection that the parties have reached, and Rule 16(b) is amended to recognize that the court may include such an agreement in a case-management or other order. If the parties agree to entry of such an order, their proposal should be included in the report to the court.

Rule 26(b)(5)(B) is added to establish a parallel procedure to assert privilege or protection as trial-preparation material after production, leaving the question of waiver to later determination by the court.

2007 Amendment

The language of Rule 26 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 26(a)(5) served as an index of the discovery methods provided by later rules. It was deleted as redundant. Deletion does not affect the right to pursue discovery in addition to disclosure.

Former Rule 26(b)(1) began with a general statement of the scope of discovery that appeared to function as a preface to each of the five numbered paragraphs that followed. This preface has been shifted to the text of paragraph (1) because it does not accurately reflect the limits embodied in paragraphs (2), (3), or (4), and because paragraph (5) does not address the scope of discovery.

The reference to discovery of “books” in former Rule 26(b)(1) was deleted to achieve consistent expression throughout the discovery rules. Books remain a proper subject of discovery.

Amended Rule 26(b)(3) states that a party may obtain a copy of the party's own previous statement “on request.” Former Rule 26(b)(3) expressly made the request procedure available to a nonparty witness, but did not describe the procedure to be used by a party. This apparent gap is closed by adopting the request procedure, which ensures that a party need not invoke Rule 34 to obtain a copy of the party's own statement.

Rule 26(e) stated the duty to supplement or correct a disclosure or discovery response “to include information thereafter acquired.” This apparent limit is not reflected in practice; parties recognize the duty to supplement or correct by providing information that was not originally provided although it was available at the time of the initial disclosure or response. These words are deleted to reflect the actual meaning of the present rule.

Former Rule 26(e) used different phrases to describe the time to supplement or correct a disclosure or discovery response. Disclosures were to be supplemented “at appropriate intervals.” A prior discovery response must be “seasonably * * * amend[ed].” The fine distinction between these phrases has not been observed in practice. Amended Rule 26(e)(1)(A) uses the same phrase for disclosures and discovery responses. The party must supplement or correct “in a timely manner.”

Former Rule 26(g)(1) did not call for striking an unsigned disclosure. The omission was an obvious drafting oversight. Amended Rule 26(g)(2) includes disclosures in the list of matters that the court must strike unless a signature is provided “promptly * * * after being called to the attorney's or party's attention.”

Former Rule 26(b)(2)(A) referred to a “good faith” argument to extend existing law. Amended Rule 26(b)(1)(B)(i) changes this reference to a “nonfrivolous” argument to achieve consistency with Rule 11(b)(2).

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As with the Rule 11 signature on a pleading, written motion, or other paper, disclosure and discovery signatures should include not only a postal address but also a telephone number and electronic-mail address. A signer who lacks one or more of those addresses need not supply a nonexistent item.

Rule 11(b)(2) recognizes that it is legitimate to argue for establishing new law. An argument to establish new law is equally legitimate in conducting discovery.

2010 Amendment

Rule 26. Rules 26(a)(2) and (b)(4) are amended to address concerns about expert discovery. The amendments to Rule 26(a)(2) require disclosure regarding expected expert testimony of those expert witnesses not required to provide expert reports and limit the expert report to facts or data (rather than "data or other information," as in the current rule) considered by the witness. Rule 26(b)(4) is amended to provide work-product protection against discovery regarding draft expert disclosures or reports and--with three specific exceptions--communications between expert witnesses and counsel.

In 1993, Rule 26(b)(4)(A) was revised to authorize expert depositions and Rule 26(a)(2) was added to provide disclosure, including--for many experts--an extensive report. Many courts read the disclosure provision to authorize discovery of all communications between counsel and expert witnesses and all draft reports. The Committee has been told repeatedly that routine discovery into attorney-expert communications and draft reports has had undesirable effects. Costs have risen. Attorneys may employ two sets of experts--one for purposes of consultation and another to testify at trial--because disclosure of their collaborative interactions with expert consultants would reveal their most sensitive and confidential case analyses. At the same time, attorneys often feel compelled to adopt a guarded attitude toward their interaction with testifying experts that impedes effective communication, and experts adopt strategies that protect against discovery but also interfere with their work.

Subdivision (a)(2)(B). Rule 26(a)(2)(B)(ii) is amended to provide that disclosure include all "facts or data considered by the witness in forming" the opinions to be offered, rather than the "data or other information" disclosure prescribed in 1993. This amendment is intended to alter the outcome in cases that have relied on the 1993 formulation in requiring disclosure of all attorney-expert communications and draft reports. The amendments to Rule 26(b)(4) make this change explicit by providing work-product protection against discovery regarding draft reports and disclosures or attorney-expert communications.

The refocus of disclosure on "facts or data" is meant to limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel. At the same time, the intention is that "facts or data" be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients. The disclosure obligation extends to any facts or data "considered" by the expert in forming the opinions to be expressed, not only those relied upon by the expert.

Subdivision (a)(2)(C). Rule 26(a)(2)(C) is added to mandate summary disclosures of the opinions to be offered by expert witnesses who are not required to provide reports under Rule 26(a)(2)(B) and of the facts supporting those opinions. This disclosure is considerably less extensive than the report required by Rule 26(a)(2)(B). Courts must take care against requiring undue detail, keeping in mind that these witnesses have not been specially retained and may not be as responsive to counsel as those who have.

This amendment resolves a tension that has sometimes prompted courts to require reports under Rule 26(a)(2)(B) even from witnesses exempted from the report requirement. An (a)(2)(B) report is required only from an expert described in (a)(2)(B).

A witness who is not required to provide a report under Rule 26(a)(2)(B) may both testify as a fact witness and also provide expert testimony under Evidence Rule 702, 703, or 705. Frequent examples include physicians or other health care professionals and employees of a party who do not regularly provide expert testimony. Parties must identify such witnesses under Rule 26(a)

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(2)(A) and provide the disclosure required under Rule 26(a)(2)(C). The (a)(2)(C) disclosure obligation does not include facts unrelated to the expert opinions the witness will present.

Subdivision (a)(2)(D). This provision (formerly Rule 26(a)(2)(C)) is amended slightly to specify that the time limits for disclosure of contradictory or rebuttal evidence apply with regard to disclosures under new Rule 26(a)(2)(C), just as they do with regard to reports under Rule 26(a)(2)(B).

Subdivision (b)(4). Rule 26(b)(4)(B) is added to provide work-product protection under Rule 26(b)(3)(A) and (B) for drafts of expert reports or disclosures. This protection applies to all witnesses identified under Rule 26(a)(2)(A), whether they are required to provide reports under Rule 26(a)(2)(B) or are the subject of disclosure under Rule 26(a)(2)(C). It applies regardless of the form in which the draft is recorded, whether written, electronic, or otherwise. It also applies to drafts of any supplementation under Rule 26(e); *see* Rule 26(a)(2)(E).

Rule 26(b)(4)(C) is added to provide work-product protection for attorney-expert communications regardless of the form of the communications, whether oral, written, electronic, or otherwise. The addition of Rule 26(b)(4)(C) is designed to protect counsel's work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery. The protection is limited to communications between an expert witness required to provide a report under Rule 26(a)(2)(B) and the attorney for the party on whose behalf the witness will be testifying, including any “preliminary” expert opinions. Protected “communications” include those between the party's attorney and assistants of the expert witness. The rule does not itself protect communications between counsel and other expert witnesses, such as those for whom disclosure is required under Rule 26(a)(2)(C). The rule does not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrine.

The most frequent method for discovering the work of expert witnesses is by deposition, but Rules 26(b)(4)(B) and (C) apply to all forms of discovery.

Rules 26(b)(4)(B) and (C) do not impede discovery about the opinions to be offered by the expert or the development, foundation, or basis of those opinions. For example, the expert's testing of material involved in litigation, and notes of any such testing, would not be exempted from discovery by this rule. Similarly, inquiry about communications the expert had with anyone other than the party's counsel about the opinions expressed is unaffected by the rule. Counsel are also free to question expert witnesses about alternative analyses, testing methods, or approaches to the issues on which they are testifying, whether or not the expert considered them in forming the opinions expressed. These discovery changes therefore do not affect the gatekeeping functions called for by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and related cases.

The protection for communications between the retained expert and “the party's attorney” should be applied in a realistic manner, and often would not be limited to communications with a single lawyer or a single law firm. For example, a party may be involved in a number of suits about a given product or service, and may retain a particular expert witness to testify on that party's behalf in several of the cases. In such a situation, the protection applies to communications between the expert witness and the attorneys representing the party in any of those cases. Similarly, communications with in-house counsel for the party would often be regarded as protected even if the in-house attorney is not counsel of record in the action. Other situations may also justify a pragmatic application of the “party's attorney” concept.

Although attorney-expert communications are generally protected by Rule 26(b)(4)(C), the protection does not apply to the extent the lawyer and the expert communicate about matters that fall within three exceptions. But the discovery authorized by the exceptions does not extend beyond those specific topics. Lawyer-expert communications may cover many topics and, even when the excepted topics are included among those involved in a given communication, the protection applies to all other aspects of the communication beyond the excepted topics.

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First, under Rule 26(b)(4)(C)(i) attorney-expert communications regarding compensation for the expert's study or testimony may be the subject of discovery. In some cases, this discovery may go beyond the disclosure requirement in Rule 26(a)(2)(B)(vi). It is not limited to compensation for work forming the opinions to be expressed, but extends to all compensation for the study and testimony provided in relation to the action. Any communications about additional benefits to the expert, such as further work in the event of a successful result in the present case, would be included. This exception includes compensation for work done by a person or organization associated with the expert. The objective is to permit full inquiry into such potential sources of bias.

Second, under Rule 26(b)(4)(C)(ii) discovery is permitted to identify facts or data the party's attorney provided to the expert and that the expert considered in forming the opinions to be expressed. The exception applies only to communications “identifying” the facts or data provided by counsel; further communications about the potential relevance of the facts or data are protected.

Third, under Rule 26(b)(4)(C)(iii) discovery regarding attorney-expert communications is permitted to identify any assumptions that counsel provided to the expert and that the expert relied upon in forming the opinions to be expressed. For example, the party's attorney may tell the expert to assume the truth of certain testimony or evidence, or the correctness of another expert's conclusions. This exception is limited to those assumptions that the expert actually did rely on in forming the opinions to be expressed. More general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts, are outside this exception.

Under the amended rule, discovery regarding attorney-expert communications on subjects outside the three exceptions in Rule 26(b)(4)(C), or regarding draft expert reports or disclosures, is permitted only in limited circumstances and by court order. A party seeking such discovery must make the showing specified in Rule 26(b)(3)(A)(ii)--that the party has a substantial need for the discovery and cannot obtain the substantial equivalent without undue hardship. It will be rare for a party to be able to make such a showing given the broad disclosure and discovery otherwise allowed regarding the expert's testimony. A party's failure to provide required disclosure or discovery does not show the need and hardship required by Rule 26(b)(3)(A); remedies are provided by Rule 37.

In the rare case in which a party does make this showing, the court must protect against disclosure of the attorney's mental impressions, conclusions, opinions, or legal theories under Rule 26(b)(3)(B). But this protection does not extend to the expert's own development of the opinions to be presented; those are subject to probing in deposition or at trial.

Former Rules 26(b)(4)(B) and (C) have been renumbered (D) and (E), and a slight revision has been made in (E) to take account of the renumbering of former (B).

2015 Amendment

Rule 26(b)(1) is changed in several ways.

Information is discoverable under revised Rule 26(b)(1) if it is relevant to any party's claim or defense and is proportional to the needs of the case. The considerations that bear on proportionality are moved from present Rule 26(b)(2)(C)(iii), slightly rearranged and with one addition.

Most of what now appears in Rule 26(b)(2)(C)(iii) was first adopted in 1983. The 1983 provision was explicitly adopted as part of the scope of discovery defined by Rule 26(b)(1). Rule 26(b)(1) directed the court to limit the frequency or extent of use of discovery if it determined that “the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.” At the same time, Rule 26(g) was added. Rule 26(g) provided that signing a discovery request, response, or objection certified that the request, response, or objection was “not unreasonable or unduly burdensome or expensive, given the needs of the case, the

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discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation." The parties thus shared the responsibility to honor these limits on the scope of discovery.

The 1983 Committee Note stated that the new provisions were added "to deal with the problem of over-discovery. The objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry. The new sentence is intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse. The grounds mentioned in the amended rule for limiting discovery reflect the existing practice of many courts in issuing protective orders under Rule 26(c) ... On the whole, however, district judges have been reluctant to limit the use of the discovery devices."

The clear focus of the 1983 provisions may have been softened, although inadvertently, by the amendments made in 1993. The 1993 Committee Note explained: "[F]ormer paragraph (b)(1) [was] subdivided into two paragraphs for ease of reference and to avoid renumbering of paragraphs (3) and (4). Subdividing the paragraphs, however, was done in a way that could be read to separate the proportionality provisions as "limitations", no longer an integral part of the (b)(1) scope provisions. That appearance was immediately offset by the next statement in the Note: "Textual changes are then made in new paragraph (2) to enable the court to keep tighter rein on the extent of discovery."

The 1993 amendments added two factors to the considerations that bear on limiting discovery: whether "the burden or expense of the proposed discovery outweighs its likely benefit," and "the importance of the proposed discovery in resolving the issues." Addressing these and other limitations added by the 1993 discovery amendments, the Committee Note stated that [t]he revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery ...'

The relationship between Rule 26(b)(1) and (2) was further addressed by an amendment made in 2000 that added a new sentence at the end of (b)(1): "All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii)[now Rule 26(b)(2)(C)]." The Committee Note recognized that "[t]hese limitations apply to discovery that is otherwise within the scope of subdivision (b)(1)." It explained that the Committee had been told repeatedly that courts were not using these limitations as originally intended. "This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery."

The present amendment restores the proportionality factors to their original place in defining the scope of discovery. This change reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses, or objections.

Restoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations.

Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional. The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.

The parties may begin discovery without a full appreciation of the factors that bear on proportionality. A party requesting discovery, for example, may have little information about the burden or expense of responding. A party requested to provide discovery may have little information about the importance of the discovery in resolving the issues as understood by the requesting party. Many of these uncertainties should be addressed and reduced in the parties' Rule 26(f) conference and in scheduling and pretrial conferences with the court. But if the parties continue to disagree, the discovery dispute could be brought before the court and the parties' responsibilities would remain as they have been since 1983. A party claiming undue burden or expense ordinarily has far better information -- perhaps the only information -- with respect to that part of the determination.

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A party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them. The court's responsibility, using all the information provided by the parties, is to consider these and all the other factors in reaching a case-specific determination of the appropriate scope of discovery.

The direction to consider the parties' relative access to relevant information adds new text to provide explicit focus on considerations already implicit in present Rule 26(b)(2)(C)(iii). Some cases involve what often is called “information asymmetry.” One party -- often an individual plaintiff -- may have very little discoverable information. The other party may have vast amounts of information, including information that can be readily retrieved and information that is more difficult to retrieve. In practice these circumstances often mean that the burden of responding to discovery lies heavier on the party who has more information, and properly so.

Restoring proportionality as an express component of the scope of discovery warrants repetition of parts of the 1983 and 1993 Committee Notes that must not be lost from sight. The 1983 Committee Note explained that “[t]he rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis.” The 1993 Committee Note further observed that “[t]he information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression.” What seemed an explosion in 1993 has been exacerbated by the advent of e-discovery. The present amendment again reflects the need for continuing and close judicial involvement in the cases that do not yield readily to the ideal of effective party management. It is expected that discovery will be effectively managed by the parties in many cases. But there will be important occasions for judicial management, both when the parties are legitimately unable to resolve important differences and when the parties fall short of effective, cooperative management on their own.

It also is important to repeat the caution that the monetary stakes are only one factor, to be balanced against other factors. The 1983 Committee Note recognized “the significance of the substantive issues, as measured in philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved.” Many other substantive areas also may involve litigation that seeks relatively small amounts of money, or no money at all, but that seeks to vindicate vitally important personal or public values.

So too, consideration of the parties' resources does not foreclose discovery requests addressed to an impecunious party, nor justify unlimited discovery requests addressed to a wealthy party. The 1983 Committee Note cautioned that “[t]he court must apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent.”

The burden or expense of proposed discovery should be determined in a realistic way. This includes the burden or expense of producing electronically stored information. Computer-based methods of searching such information continue to develop, particularly for cases involving large volumes of electronically stored information. Courts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery as reliable means of searching electronically stored information become available.

A portion of present Rule 26(b)(1) is omitted from the proposed revision. After allowing discovery of any matter relevant to any party's claim or defense, the present rule adds: “including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter.” Discovery of such matters is so deeply entrenched in practice that it is no longer necessary to clutter the long text of Rule 26 with these examples. The discovery identified in these examples should still be permitted under the revised rule when relevant and proportional to the needs of the case. Framing intelligent requests for electronically stored information, for example, may require detailed information about another party's information systems and other information resources.

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The amendment deletes the former provision authorizing the court, for good cause, to order discovery of any matter relevant to the subject matter involved in the action. The Committee has been informed that this language is rarely invoked. Proportional discovery relevant to any party's claim or defense suffices, given a proper understanding of what is relevant to a claim or defense. The distinction between matter relevant to a claim or defense and matter relevant to the subject matter was introduced in 2000. The 2000 Note offered three examples of information that, suitably focused, would be relevant to the parties' claims or defenses. The examples were “other incidents of the same type, or involving the same product”; “information about organizational arrangements or filing systems”; and “information that could be used to impeach a likely witness.” Such discovery is not foreclosed by the amendments. Discovery that is relevant to the parties' claims or defenses may also support amendment of the pleadings to add a new claim or defense that affects the scope of discovery.

The former provision for discovery of relevant but inadmissible information that appears “reasonably calculated to lead to the discovery of admissible evidence” is also deleted. The phrase has been used by some, incorrectly, to define the scope of discovery. As the Committee Note to the 2000 amendments observed, use of the “reasonably calculated” phrase to define the scope of discovery “might swallow any other limitation on the scope of discovery.” The 2000 amendments sought to prevent such misuse by adding the word “Relevant” at the beginning of the sentence, making clear that “‘relevant’ means within the scope of discovery as defined in this subdivision ...” The “reasonably calculated” phrase has continued to create problems, however, and is removed by these amendments. It is replaced by the direct statement that “Information within this scope of discovery need not be admissible in evidence to be discoverable.” Discovery of nonprivileged information not admissible in evidence remains available so long as it is otherwise within the scope of discovery.

Rule 26(b)(2)(C)(iii) is amended to reflect the transfer of the considerations that bear on proportionality to Rule 26(b)(1). The court still must limit the frequency or extent of proposed discovery, on motion or on its own, if it is outside the scope permitted by Rule 26(b)(1).

Rule 26(c)(1)(B) is amended to include an express recognition of protective orders that allocate expenses for disclosure or discovery. Authority to enter such orders is included in the present rule, and courts already exercise this authority. Explicit recognition will forestall the temptation some parties may feel to contest this authority. Recognizing the authority does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding.

Rule 26(d)(2) is added to allow a party to deliver Rule 34 requests to another party more than 21 days after that party has been served even though the parties have not yet had a required Rule 26(f) conference. Delivery may be made by any party to the party that has been served, and by that party to any plaintiff and any other party that has been served. Delivery does not count as service; the requests are considered to be served at the first Rule 26(f) conference. Under Rule 34(b)(2)(A) the time to respond runs from service. This relaxation of the discovery moratorium is designed to facilitate focused discussion during the Rule 26(f) conference. Discussion at the conference may produce changes in the requests. The opportunity for advance scrutiny of requests delivered before the Rule 26(f) conference should not affect a decision whether to allow additional time to respond.

Rule 26(d)(3) is renumbered and amended to recognize that the parties may stipulate to case-specific sequences of discovery.

Rule 26(f)(3) is amended in parallel with Rule 16(b)(3) to add two items to the discovery plan -- issues about preserving electronically stored information and court orders under Evidence Rule 502.

Notes of Decisions (1465)

Fed. Rules Civ. Proc. Rule 26, 28 U.S.C.A., FRCP Rule 26
Including Amendments Received Through 12-1-15

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NH Superior Court Civil Rule 22

RULE 22. AUTOMATIC DISCLOSURES

Currentness

(a) Materials that Must Be Disclosed. Except as may be otherwise ordered by the court for good cause shown, a party must without awaiting a discovery request, provide to the other parties:

(1) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support his or her claims or defenses, unless the use would be solely for impeachment, and, unless such information is contained in a document provided pursuant to Rule 22 (a)(2), a summary of the information believed by the disclosing party to be possessed by each such person;

(2) a copy of all documents, electronically stored information, and tangible things that the disclosing party has in his or her possession, custody or control and may use to support his or her claims or defenses, unless the use would be solely for impeachment;

(3) a computation of each category of damages claimed by the disclosing party together with all documents or other evidentiary materials on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(4) for inspection and copying, any insurance agreement or policy under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(b) Time for Disclosure. Unless the court orders otherwise, the disclosures required by Rule 22(a) shall be made as follows:

(1) by the plaintiff, not later than 30 days after the defendant to whom the disclosure is being made has filed his or her Answer to the Complaint; and

(2) by the defendant, not later than 60 days after the defendant making the disclosure has filed his or her Answer to the Complaint.

(c) Duty to Supplement. Each party has a duty to supplement that party's initial disclosures promptly upon becoming aware of the supplemental information.

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(d) Sanctions for Failure to Comply. A party who fails to timely make the disclosures required by this rule may be sanctioned as provided in Rule 21.

Credits

[Adopted May 22, 2013, effective October 1, 2013. Comment amended July 24, 2014, effective September 1, 2014.]

Editors' Notes

COMMENT

This rule, formerly PAD Rule 3, accomplishes a major change from prior New Hampshire practice in that it requires both the plaintiff and the defendant to make automatic initial disclosures of certain information without the need for a discovery request from the opposing party. Although there was a similar but not identical requirement in the so-called "fast-track" section of former Superior Court Rule 62(II), the rule was used very little and therefore does not provide a significant base of experience for this rule. Nonetheless, such a base of experience can be found in federal court practice, where an automatic disclosure regimen in some form has been in existence since 1993, and appears to have worked reasonably well. Requiring parties to make prompt and automatic disclosures of information concerning the witnesses and evidence they will use to prove their claims or defenses at trial will help reduce "gamesmanship" in the conduct of litigation, reduce the time spent by lawyers and courts in resolving discovery issues and disputes, and promote the prompt and just resolution of cases.

Section (a) of Rule 22 is taken largely from Rule 26(a)(1) of the Federal Rules of Civil Procedure. It differs from the federal rule, however, in that, unlike the federal rule, this rule does not permit the disclosing party to merely provide "the subjects" of the discoverable information known to individuals likely to have such information, Fed. R. Civ. P. 26(a)(1)(A)(i), and "a description by category and location" of the discoverable materials in the possession, custody or control of the disclosing party, Fed. R. Civ. P. 26(a)(1)(A)(ii). Rather, the rule requires that the disclosing party actually turn over to the opposing party a copy of all such discoverable materials, Rule 22(a)(2), and also requires that the disclosing party provide a summary of the information known to each individual identified under Rule 22(a)(1) unless that information is contained in the materials disclosed under Rule 22(a)(2). This more comprehensive discovery obligation does not impose an undue burden on either plaintiffs or defendants and will help to insure that information and witnesses that will be used by each party to support its case will be disclosed to opposing parties shortly after the issues have been joined.

Subsection (a)(3) of the rule also differs somewhat from the language of comparable Fed. R. Civ. P. 26(a)(1)(A)(iii), in that the rule eliminates reference to "privileged or protected from disclosure" information as being excepted from the disclosure obligation imposed by the subsection. By so doing, the intention is not to eliminate the ability of a party to object on privilege or other proper grounds to the disclosures relating to the computation of damages or the information on which such computations are based. However, genuine claims of privilege as a basis for avoiding disclosure of information pertinent to the computation of damages will be rare and, to the extent such claims do exist, the ability to assert the privilege is preserved elsewhere in the rules. Therefore, there is no need to make a specific reference to privileged or otherwise protected materials in this rule.

The time limits established in section (b) of the rule are reasonable and will promote the orderly and expeditious progress of litigation. The proposed rule differs from the initial disclosure proposal embodied in the Pilot Project Rules of the American College of Trial Lawyers (ACTL) and the Institute for the Advancement of the American Legal System (IAALS), in that, unlike ACTL/IAALS Rule 5.2, the rule does not require the plaintiff to make its initial disclosures before the time when the defendant is required to file its Answer. The plaintiff should have the benefit of the defendant's Answer before making its initial disclosure since the Answer will in all likelihood inform what facts are in dispute and therefore will need to be proved by the plaintiff.

Section (c) of the rule is taken directly from ACTL/IAALS Pilot Project Rule 5.4 and its substance is generally consistent with Federal Rule 26(e) and Rule 21(g). It should be noted, however, that this rule differs from Rule 21(g). Rule 21(g) sets forth

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the general rule governing discovery and contains introductory language stating that there is no duty to supplement responses and then sets forth very broad categories of exceptions from this general rule. Section (c) of this rule, relating only to materials that must be disclosed pursuant to the automatic disclosure requirements of Rule 22, is worded in positive terms to require supplementation of responses whenever the producing party becomes aware of supplemental information covered by the rule's initial disclosure requirements.

Section (d) of the rule references Rule 21 and permits the court to impose any of the sanctions specified in that rule if a party fails to make the disclosures required of it by this rule in a timely fashion.

NH Superior Court Civil Actions Rule 22, NH R SUPER CT CIV Rule 22
The state court rules are current with amendments received through August 15, 2015.

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Advisory Committee on Civil Rules
Exhibit 3

West's Nevada Revised Statutes Annotated
Rules of Civil Procedure for the Nevada District Courts
III Pleadings and Motions

Rules of Civil Procedure, Rule 16.1
Formerly cited as NV ST Rule 16.1

RULE 16.1. MANDATORY PRE-TRIAL DISCOVERY REQUIREMENTS

Currentness

<Text of rule effective for all civil proceedings except proceedings in the Family Division of the Second and Eighth Judicial District Courts and in all domestic relations cases in the judicial districts without a family division as of February 1, 2006. For text of rule applicable to proceedings in the Family Division of the Second and Eighth Judicial District Courts and all domestic relations cases in judicial districts without a family division effective February 1, 2006, see following version of Rule 16.1.>

(a) Required Disclosures.

(1) Initial Disclosures. Except in proceedings exempted or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:

(A) The name and, if known, the address and telephone number of each individual likely to have information discoverable under Rule 26(b), including for impeachment or rebuttal, identifying the subjects of the information;

(B) A copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and which are discoverable under Rule 26(b);

(C) A computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary matter, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) For inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment and any disclaimer or limitation of coverage or reservation of rights under any such insurance agreement.

These disclosures must be made at or within 14 days after the Rule 16.1(b) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in the circumstances of the action and states the objection in the Rule 16.1(c) case conference report. In ruling on the objection, the court must determine what disclosures--if any--are to be made, and set the time for disclosure. Any party first served or otherwise joined after the Rule 16.1(b) conference must make these disclosures within 30 days after being served or joined unless a different time is set by stipulation or court order. A party must make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed

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its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under NRS 50.275, 50.285 and 50.305.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The court, upon good cause shown or by stipulation of the parties, may relieve a party of the duty to prepare a written report in an appropriate case. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding 10 years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

Unless otherwise stipulated or ordered by the Court, if the witness is not required to provide a written report, the initial disclosure must state the subject matter on which the witness is expected to present evidence under NRS 50.275, 50.285 and 50.305; a summary of the facts and opinions to which the witness is expected to testify; the qualifications of that witness to present evidence under NRS 50.275, 50.285 and 50.305, which may be satisfied by the production of a resume or curriculum vitae; and the compensation of the witness for providing testimony at deposition and trial, which is satisfied by production of a fee schedule.

(C) These disclosures shall be made at the times and in the sequence directed by the court.

(i) In the absence of extraordinary circumstances, and except as otherwise provided in subdivision (2), the court shall direct that the disclosures shall be made at least 90 days before the discovery cut-off date.

(ii) If the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), the disclosures shall be made within 30 days after the disclosure made by the other party. This later disclosure deadline does not apply to any party's witness whose purpose is to contradict a portion of another party's case in chief that should have been expected and anticipated by the disclosing party, or to present any opinions outside of the scope of another party's disclosure.

(D) The parties must supplement these disclosures when required under Rule 26(e)(1).

(3) Pretrial Disclosures. In addition to the disclosures required by Rule 16.1(a)(1) and (2), a party must provide to other parties the following information regarding the evidence that it may present at trial, including impeachment and rebuttal evidence:

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(A) The name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present, those witnesses who have been subpoenaed for trial, and those whom the party may call if the need arises;

(B) The designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) An appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise directed by the court, these disclosures must be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B), and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under NRS 48.025 and 48.035, shall be deemed waived unless excused by the court for good cause shown.

(4) Form of Disclosures. Unless the court orders otherwise, all disclosures under Rules 16.1(a)(1) through (3) must be made in writing, signed, and served.

(b) Meet and Confer Requirements.

(1) Attendance at Early Case Conference. Unless the case is in the court annexed arbitration program or short trial program, within 30 days after filing of an answer by the first answering defendant, and thereafter, if requested by a subsequent appearing party, the parties shall meet in person to confer and consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by subdivision (a)(1) of this rule and to develop a discovery plan pursuant to subdivision (b)(2). The attorney for the plaintiff shall designate the time and place of each meeting which must be held in the county where the action was filed, unless the parties agree upon a different location. The attorneys may agree to continue the time for the case conference for an additional period of not more than 90 days. The court, in its discretion and for good cause shown, may also continue the time for the conference. Absent compelling and extraordinary circumstances, neither the court nor the parties may extend the time to a day more than 180 days after an appearance is served by the defendant in question.

Unless otherwise ordered by the court or the discovery commissioner, parties to any case wherein a timely trial de novo request has been filed subsequent to an arbitration, need not hold a further in person conference, but must file a joint case conference report pursuant to subdivision (c) of this rule within 60 days from the date of the de novo filing, said report to be prepared by the party requesting the trial de novo.

(2) Planning for Discovery. The parties shall develop a discovery plan which shall indicate the parties' views and proposals concerning:

(A) What changes should be made in the timing, form, or requirement for disclosures under Rule 16.1(a), including a statement as to when disclosures under Rule 16.1(a)(1) were made or will be made;

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(B) The subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(C) What changes should be made in the limitations on discovery imposed under these rules and what other limitations should be imposed;

(D) Any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c); and

(E) An estimated time for trial.

(c) Case Conference Report. Within 30 days after each case conference, the parties must file a joint case conference report or, if the parties are unable to agree upon the contents of a joint report, each party must serve and file a case conference report which, either as a joint or individual report, must contain:

(1) A brief description of the nature of the action and each claim for relief or defense;

(2) A proposed plan and schedule of any additional discovery pursuant to subdivision (b)(2) of this rule;

(3) A written list of names exchanged pursuant to subdivision (a)(1)(A) of this rule;

(4) A written list of all documents provided at or as a result of the case conference pursuant to subdivision (a)(1)(B) of this rule;

(5) A calendar date on which discovery will close;

(6) A calendar date, not later than 90 days before the close of discovery, beyond which the parties shall be precluded from filing motions to amend the pleadings or to add parties unless by court order;

(7) A calendar date by which the parties will make expert disclosures pursuant to subdivision (a)(2), with initial disclosures to be made not later than 90 days before the discovery cut-off date and rebuttal disclosures to be made not later than 30 days after the initial disclosure of experts;

(8) A calendar date, not later than 30 days after the discovery cut-off date, by which dispositive motions must be filed;

(9) An estimate of the time required for trial; and

(10) A statement as to whether or not a jury demand has been filed.

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After any subsequent case conference, the parties must supplement, but need not repeat, the contents of prior reports. Within 7 days after service of any case conference report, any other party may file a response thereto objecting to all or a portion of the report or adding any other matter which is necessary to properly reflect the proceedings occurring at the case conference.

(d) Discovery Disputes.

(1) Where available or unless otherwise ordered by the court, all discovery disputes (except those presented at the pretrial conference or trial) must first be heard by the discovery commissioner.

(2) Following each discovery motion before a discovery commissioner, the commissioner must prepare and file a report with the commissioner's recommendations for a resolution of each unresolved dispute. The commissioner may direct counsel to prepare the report. The clerk of the court shall forthwith serve a copy of the report on all parties. Within 5 days after being served with a copy, any party may serve and file written objections to the recommendations. Written authorities may be filed with an objection, but are not mandatory.

(3) Upon receipt of a discovery commissioner's report and any objections thereto, the court may affirm, reverse or modify the commissioner's ruling, set the matter for a hearing, or remand the matter to the commissioner for further action, if necessary.

(e) Failure or Refusal to Participate in Pretrial Discovery; Sanctions.

(1) If the conference described in Rule 16.1(b) is not held within 180 days after an appearance by a defendant, the case may be dismissed as to that defendant upon motion or on the court's own initiative, without prejudice, unless there are compelling and extraordinary circumstances for a continuance beyond this period.

(2) If the plaintiff does not file a case conference report within 240 days after an appearance by a defendant, the case may be dismissed as to that defendant upon motion or on the court's own initiative, without prejudice.

(3) If an attorney fails to reasonably comply with any provision of this rule, or if an attorney or a party fails to comply with an order entered pursuant to subsection (d) of this rule, the court, upon motion or upon its own initiative, shall impose upon a party or a party's attorney, or both, appropriate sanctions in regard to the failure(s) as are just, including the following:

(A) Any of the sanctions available pursuant to Rule 37(b)(2) and Rule 37(f);

(B) An order prohibiting the use of any witness, document or tangible thing which should have been disclosed, produced, exhibited, or exchanged pursuant to Rule 16.1(a).

(f) Complex Litigation. In a potentially difficult or protracted action that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems, the court may, upon motion and for good cause shown, waive any or all of the requirements of this rule. If the court waives all the requirements of this rule, it shall also order a conference pursuant to Rule 16 to be conducted by the court or the discovery commissioner.

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(g) Proper Person Litigants. When a party is not represented by an attorney, the party must comply with this rule.

Credits

Added, eff. Jan. 1, 1988. As amended, eff. Jan. 1, 2005; Jan. 1, 2013.

Editors' Notes

DRAFTER'S NOTE 2004 AMENDMENT

Subdivision (a) is amended to conform to the 1993 and 2000 amendments to Rule 26(a) of the federal rules, with some notable exceptions. Consistent with the federal rule, the revised rule imposes an affirmative duty to disclose certain basic information without a formal discovery request.

Subdivision (a)(1) incorporates the federal rule but adopts the "subject matter" standard for the scope of discovery that is retained in revised Rule 26(b) of the Nevada rules. Paragraph (1) also retains the Nevada requirement that impeachment witnesses and documents be disclosed, whereas the federal rule exempts impeachment evidence. Paragraph (1)(C) is intended to apply to special damages, not general or other intangible damages. Paragraph (1)(D) expands on the federal rule by requiring disclosure and production of liability policy denials, limitations or reservations of rights.

Subdivision (a)(2) imposes an additional duty to disclose information regarding expert testimony and requires that certain experts must prepare a detailed and complete written report. But unlike its federal counterpart, subdivision (a)(2)(B) allows the court to relieve a party of this duty upon a showing of good cause. The requirement of a written report applies only to an expert who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony. Given this limitation, a treating physician could be deposed or called to testify without any requirement for a written report. See Fed. R. Civ. P. 26(a) advisory committee note (2000). The expert witness disclosures and written reports are not part of the initial disclosure under paragraph (1). Instead, subdivision (a)(2)(C) contemplates that the court will set the time for such disclosures but that they must be made at least 90 days before the discovery cut-off date absent extraordinary circumstances. This provision differs from its federal counterpart, which allows the disclosures to be made at least 90 days before the trial date or the date the case is to be ready for trial.

Subdivision (a)(3) retains the Nevada requirement for pretrial disclosure of impeachment and rebuttal evidence and the names of witnesses who have been subpoenaed for trial. Unlike the federal rule, there is no requirement that the information disclosed be filed with the court.

Subdivision (b) is repealed in its entirety. New subdivision (b)(1) incorporates the requirement under former Rule 16.1(a) of attendance at an early case conference. It is based on Rule 26(f) of the federal rules, but is tailored to practice in state court and, unlike the federal rule, it requires the parties to meet in person. The rule also retains deadlines that are unique to Nevada. Subdivision (b)(2) incorporates provisions of Rule 26(f) of the federal rules regarding planning for discovery. But the Nevada provision expands the subjects to be discussed at the early case conference beyond those listed in the federal rule to include an estimated time for trial.

Subdivision (c) is amended to reflect the new disclosure provisions of subdivision (a). The requirements for a case conference report are more detailed and extensive than those in Rule 26(f) of the federal rules and include specific time periods for the close of discovery, filing of motions to amend pleadings or add parties, expert disclosures, and filing of dispositive motions.

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Subdivision (d) retains the Nevada provisions on discovery disputes with some revisions.

DRAFTER'S NOTE 2012 AMENDMENT

Subdivision (a)(2)(B) specifies the information that must be included in a disclosure of expert witnesses who are not otherwise required to provide detailed written reports. A treating physician is not a retained expert merely because the patient was referred to the physician by an attorney for treatment. These comments may be applied to other types of non-retained experts by analogy. In the context of a treating physician, appropriate disclosure may include that the witness will testify in accordance with his or her medical chart, even if some records contained therein were prepared by another healthcare provider. A treating physician is not a retained expert merely because the witness will opine about diagnosis, prognosis, or causation of the patient's injuries, or because the witness reviews documents outside his or her medical chart in the course of providing treatment or defending that treatment. However, any opinions and any facts or documents supporting those opinions must be disclosed in accordance with subdivision (a)(2)(B).

Notes of Decisions (22)

Civ. Proc. Rules, Rule 16.1, NV ST RCP Rule 16.1
Current with amendments received through 11/15/15

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Rules of Civil Procedure, Rule 26
Formerly cited as NV ST Rule 26

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY

Currentness

(a) Discovery Methods. At any time after the filing of a joint case conference report, or not sooner than 10 days after a party has filed a separate case conference report, or upon order by the court or discovery commissioner, any party who has complied with Rule 16.1(a)(1) may obtain discovery by one or more of the following additional methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or Rule 45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admission.

As amended, eff. Jan. 1, 1988; Jan. 1, 2005.

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).

(2) Limitations. By order, the court may alter the limits in these rules or set limits on the number of depositions and interrogatories, the length of depositions under Rule 30 or the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c) of this rule.

(3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of

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the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial Preparation: Experts.

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under Rule 16.1(a)(2)(B) or 16.2(a)(3), the deposition shall not be conducted until after the report is provided.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule, the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

As amended, eff. Jan. 1, 1988; Jan. 1, 2005.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with the other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the discovery not be had;

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(2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition after being sealed be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way;

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

As amended, eff. Jan. 1, 1988; Jan. 1, 2005.

(d) Sequence and Timing of Discovery. After compliance with subdivision (a) of this rule, unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, does not operate to delay any other party's discovery.

As amended, eff. Sept. 27, 1971; Jan. 1, 2005.

(e) Supplementation of Disclosures and Responses. A party who has made a disclosure under Rule 16.1 or 16.2 or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired, if ordered by the court or in the following circumstances:

(1) A party is under a duty to supplement at appropriate intervals its disclosures under Rule 16.1(a) or 16.2(a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under Rule 16.1(a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 16.1(a)(3) are due.

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(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production or request for admission, if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

As amended, eff. Jan. 1, 1988; Jan. 1, 2005.

(f) Form of responses. Answers and objections to interrogatories or requests for production shall identify and quote each interrogatory or request for production in full immediately preceding the statement of any answer or objections thereto. Answers, denials, and objections to requests for admission shall identify and quote each request for admission in full immediately preceding the statement of any answer, denial, or objection thereto.

Added, eff. Feb. 11, 1986; Jan. 1, 2005.

(g) Signing of Disclosures, Discovery Requests, Responses, and Objections.

(1) Every disclosure and report made pursuant to Rules 16.1(a)(1), 16.1(a)(3), 16.1(c), 16.2(a)(2), 16.2(a)(4), and 16.2(d) shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(2) Every discovery request, response or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection, is:

(A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(B) not interposed for any improper purpose, such as to harass, obscure, equivocate or to cause unnecessary delay or needless increase in the cost of litigation; and

(C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response or objection and a party shall not be obligated to take any action with respect to it until it is signed.

(3) If without substantial justification a certification is made in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the disclosure, request,

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response, or objection was made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

Added, eff. Jan. 1, 1988; Jan. 1, 2005.

(h) Demand for Prior Discovery. Whenever a party makes a written demand for discovery which took place prior to the time the party became a party to the action, each party who has previously made discovery disclosures, responded to a request for admission or production or answered interrogatories shall make available to the demanding party the document(s) in which the discovery disclosures and responses in question are contained for inspection and copying or furnish to the demanding party a list identifying each such document by title and upon further demand shall furnish to the demanding party, at the expense of the demanding party, a copy of any listed discovery disclosure or response specified in the demand or, in the case of document disclosure or request for production, shall make available for inspection by the demanding party all documents and things previously produced. Further, each party who has taken a deposition shall make a copy of the transcript thereof available to the demanding party at the latter's expense.

Added, eff. Feb. 11, 1986. As amended, eff. Jan. 1, 2005.

Credits

As amended, eff. Sept. 27, 1971; Jan. 1, 2005; July 1, 2008.

Editors' Notes

DRAFTER'S NOTE 2004 AMENDMENT

The initial-disclosure provisions in Rule 26(a) of the federal rules, as amended in 2000, are adopted as modified in Rule 16.1(a) of the Nevada rules; only other discovery methods are retained as part of Rule 26(a) of the Nevada rules.

Subdivision (b) retains the Nevada rule as to the scope of discovery--“any matter, not privileged, which is relevant to the subject matter involved in the pending action.” Thus, the Nevada rule does not conform to the 2000 amendments to its federal counterpart which limits the scope of discovery to “any matter, not privileged, that is relevant to the claim or defense of any party,” except upon a showing of “good cause.”

The insurance discovery provisions in subdivision (b)(2) of the former rule have been amended and moved to Rule 16.1(a)(1)(D).

Subdivision (b)(2)(iii) does not incorporate the weighing provisions that were added to the federal rule in 1993 but instead retains the language in the Nevada rule, which was based on the federal provision as it was adopted in 1983.

Expert discovery under subdivision (b)(4) is modified consistent with expert disclosure under revised Rule 16.1(a)(2). The provisions of former subdivision (b)(5) regarding demands for expert witness lists and the exchange of reports and writings, are repealed as unnecessary under the new expert disclosure provisions in Rule 16.1. New subdivision (b)(5) conforms to the federal rule.

Subdivision (c) is amended to conform to the 1993 amendment to subdivision (c) of the federal rule. The amendment requires that the parties meet and confer in an effort to resolve discovery disputes before seeking a protective order from the court. The party filing a motion for a protective order must include a certificate stating that the parties met and conferred, or, if the moving party is unable to get opposing parties to meet and confer regarding the dispute, indicating the moving party's efforts in attempting to arrange such a meeting.

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Subdivision (d) is amended to clarify that once the parties have complied with the provisions of subdivision (a) of the rule, the parties may use any method of formal discovery provided in the rules in any sequence unless the court orders otherwise. The provision is similar to subdivision (d) of the federal rule, but it does not include the first sentence of the federal rule, which provides that with certain exceptions, the parties may not commence formal discovery until after they have met and conferred as required by subdivision (f) of the federal rule (cf. NRCP 16.1(b)). The parties must comply with subdivision (a) of the Nevada rule.

Subdivision (e) is amended to conform to the 1993 amendments to subdivision (e) of the federal rule. The rule is amended to provide that the requirement for supplementation applies to disclosures required by Rule 16.1(a). Paragraph (1) is amended to address when a party must supplement disclosures made under Rule 16.1(a) and to require supplementation of expert reports and depositions. Paragraph (2) is amended to address the duty to supplement responses to formal discovery requests including interrogatories, requests for production and requests for admissions. Like its federal counterpart, paragraph (2) does not include deposition testimony. However, under paragraph (1), a party must supplement information provided through a deposition of an expert from whom a report is required under Rule 16.1(a)(2)(B). Paragraphs (3) and (4) of the former rule are repealed.

Subdivision (f) of the former rule is repealed as duplicative of provisions in Rules 16 and 16.1. To avoid redesignating the remaining subdivisions, former subdivision (f) is replaced with the language from former subdivision (j) regarding the form of responses to discovery requests. There is no federal counterpart to this provision.

Subdivision (g) is amended to conform to the 1993 amendments to subdivision (g) of the federal rule. Paragraph (1) is added to require signatures on certain disclosures required by Rule 16.1. Paragraph (2) retains language from the former rule for signatures on discovery requests, responses, and objections with some revisions to conform to the 1993 amendments to the federal rule. Paragraph (3) retains language from the former rule regarding sanctions if a certification is made in violation of the rule with modifications to make it consistent with Rules 37(a)(4) and 37(c)(1)--in combination, these rules provide sanctions for violation of the rules regarding disclosures and discovery matters.

Subdivision (h) is amended to address technical issues. It has no federal counterpart. The provision is retained because it clarifies responsibilities to exchange discovery with new parties.

Subdivision (i) of the former rule is repealed in favor of a strong scheduling order under Rule 16 that will set discovery deadlines.

ADVISORY COMMITTEE'S NOTE

Revised in 1971 in accordance with the federal amendments, effective July 1, 1970, but with subsection (f) added.

Notes of Decisions (62)

Civ. Proc. Rules, Rule 26, NV ST RCP Rule 26
Current with amendments received through 11/15/15

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West's Alaska Statutes Annotated
Alaska Court Rules
Rules of Civil Procedure
Part V. Depositions and Discovery

Rules of Civil Procedure, Rule 26

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

Currentness

(a) Required Disclosures; Methods to Discover Additional Matter. Disclosure under subparagraphs (a)(1), (2), and (3) of this rule is required in all civil actions, except those categories of cases exempted from the requirement of scheduling conferences and scheduling orders under Civil Rule 16(g), adoption proceedings, and prisoner litigation against the state under AS 09.19.

(1) *Initial Disclosures.* Except to the extent otherwise directed by order or rule, a party shall, without awaiting a discovery request, provide to other parties:

(A) the factual basis of each of its claims or defenses;

(B) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information and whether the attorney-client privilege applies;

(C) the name and, if known, the address and telephone number of each individual who has made a written or recorded statement and, unless the statement is privileged or otherwise protected from disclosure, either a copy of the statement or the name and, if known, the address and telephone number of the custodian;

(D) subject to the provisions of Civil Rule 26(b)(3), a copy of, or a description by category and location of, all documents, electronically stored information, data compilations, and tangible things that are relevant to disputed facts alleged with particularity in the pleadings;

(E) subject to the provisions of Civil Rule 26(b)(3), all photographs, diagrams, and videotapes of persons, objects, scenes and occurrences that are relevant to disputed facts alleged with particularity in the pleadings;

(F) each insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment;

(G) all categories of damages claimed by the disclosing party, and a computation of each category of special damages, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such claims are based, including materials bearing on the nature and extent of injuries suffered; and

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(H) the identity, with as much specificity as may be known at the time, of all potentially responsible persons within the meaning of AS 09.17.080, and whether the party will choose to seek to allocate fault against each identified potentially responsible person.

Unless otherwise directed by the court, these disclosures shall be made at or within 10 days after the meeting of the parties under subsection (f). A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) *Disclosure of Expert Testimony.*

(A) In addition to the disclosures required by subparagraph (a)(1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Evidence Rules 702, 703, or 705.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. The parties shall supplement these disclosures when required under subparagraph (e)(1).

(D) No more than three independent expert witness may testify for each side as to the same issue in any given case. For purposes of this rule, an independent expert is an expert from whom a report is required under section (a)(2)(B). The court, upon the showing of good cause, may increase or decrease the number of independent experts to be called.

(3) *Pretrial Disclosures.* In addition to the disclosures required in the preceding paragraphs, a party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment purposes:

(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

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These disclosures shall be made at the times and in the sequence directed by the court. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B), and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

(4) *Form of Disclosures.* Unless otherwise directed by the court, all disclosures under subparagraphs (a)(1) and (2) shall be made in writing, signed, and served in accordance with Rule 5.

(5) *Methods to Discover Additional Matter.* Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) *Limitations.*

(A) The court may alter the limits in these rules on the number of depositions and interrogatories, the length of depositions under Rule 30, and the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under paragraph (c).

(B) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

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(3) *Trial Preparation: Materials.* Subject to the provisions of subparagraph (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subparagraph (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) *Trial Preparation: Experts.*

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under section (a)(2)(B), the deposition shall not be conducted until after the report is provided.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subparagraph; and (ii) with respect to discovery obtained under section (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) *Claims of Privilege or Protection of Trial Preparation Materials.* When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the judicial district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the disclosure or discovery not be had; (2) that the disclosure or discovery may be had only on specified

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terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition, after being sealed, be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Timing and Sequence of Discovery.

(1) *Timing of Discovery--Non-Exempted Actions.* In an action in which disclosure is required under Rule 26(a), a party may serve up to ten of the thirty interrogatories allowed under Rule 33(a) at the times allowed by section (d)(2)(C) of this rule. Otherwise, except by order of the court or agreement of the parties, a party may not seek discovery from any source before the parties have met and conferred as required by paragraph (f).

(2) *Timing of Discovery--Exempted Actions.* In actions exempted from disclosure under Rule 26(a), discovery may take place as follows:

(A) For depositions upon oral examination under Civil Rule 30, a defendant may take depositions at any time after commencement of the action. The plaintiff must obtain leave of court if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service under Rule 4(e) if authorized, except that leave is not required (i) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (ii) the plaintiff seeks to take the deposition under Civil Rule 30(a)(2)(C).

(B) For depositions upon written questions under Civil Rule 31, a party may serve questions at any time after commencement of the action.

(C) For interrogatories, requests for production, and requests for admission under Civil Rules 33, 34, and 36, discovery requests may be served upon the plaintiff at any time after the commencement of the action, and upon any other party with or after service of the summons and complaint upon that party.

(3) *Sequence of Discovery.* Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of Disclosures and Responses. A party who has made a disclosure under paragraph (a) or Civil Rule 26.1(b) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:

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(1) A party is under a duty to supplement at appropriate intervals its disclosures under paragraph (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(f) Meeting of Parties; Planning for Discovery and Alternative Dispute Resolution. Except when otherwise ordered and except in actions exempted from disclosure under Rule 26(a), the parties shall, as soon as practicable and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, including whether an alternative dispute resolution procedure is appropriate, to make or arrange for the disclosures required by subparagraph (a)(1), and to develop a proposed discovery plan and a proposed alternative dispute resolution plan. The plan shall indicate the parties' views and proposals concerning:

(1) what changes should be made in the timing or form of disclosures under paragraph (a), including a statement as to when the disclosures under subparagraph (a)(1) were made or will be made and what are appropriate intervals for supplementation of disclosure under Rule 26(e)(1);

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(4) what changes should be made in the limitations on discovery imposed under these rules and what other limitations should be imposed;

(5) the plan for alternative dispute resolution, including its timing, the method of selecting a mediator, early neutral evaluator, or arbitrator, or an explanation of why alternative dispute resolution is inappropriate;

(6) whether a scheduling conference is unnecessary; and

(7) any other orders that should be entered by the court under paragraph (c) or under Rule 16(b) and (c).

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging and being present or represented at the meeting, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 10 days after the meeting a written report outlining the plan.

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(g) [Applicable to cases filed on or after August 7, 1997.] Limited Discovery; Expedited Calendaring. In a civil action for personal injury or property damage involving less than $100,000 in claims, the parties shall limit discovery to that allowed under District Court Civil Rule 1(a)(1) and shall avail themselves of the expedited calendaring procedures allowed under District Court Civil Rule 4.

Credits

[Amended effective July 15, 1990; July 15, 1994; July 15, 1995; July 15, 1997; August 7, 1997; August 7, 1997; July 15, 1998; October 15, 2005; April 15, 2009; October 15, 2014.]

Editors' Notes

NOTE

Note to SCO 1281: Paragraph (g) of this rule was added by ch. 26, § 40, SLA 1997. According to § 55 of the Act, the amendment to Civil Rule 26 applies "to all causes of action accruing on or after the effective date of this Act." The amendment to Rule 26 adopted by paragraph 1 of this order applies to all cases filed on or after August 7, 1997. See paragraph 17 of this order. The change is adopted for the sole reason that the legislature has mandated the amendment.

Ch. 26, § 10, SLA 1997 repeals and reenacts AS 09.17.020 concerning punitive damages. New AS 09.17.020(e) prohibits parties from conducting discovery relevant to the amount of punitive damages until after the fact finder has determined that an award of punitive damages is allowed. This provision applies to causes of action accruing on or after August 7, 1997. See ch. 26, § 55, SLA 1997. According to § 48 of the Act, new AS 09.17.020(e) has the effect of amending Civil Rule 26 by limiting discovery in certain actions.

Section 2 of chapter 95 SLA 1998 amends AS 09.19.050 to state that the automatic disclosure provisions of Civil Rule 26 do not apply in prisoner litigation against the state. According to section 13 of the act, this amendment has the effect of changing Civil Rule 26 "by providing that the automatic disclosure provisions of the rule do not apply to litigation against the state brought by prisoners."

Note to SCO 1647: The supreme court has approved certain procedures for Anchorage cases that vary from those specified in this rule. Civil Rule 26(a)(1) sets out a procedure to be used "[e]xcept to the extent otherwise directed by order or rule," and sets a timeline for disclosures "[u]nless otherwise directed by the court." Civil Rule 26(f) also sets out a procedure to be used "except when otherwise ordered." In Anchorage, Administrative Order 3AO-03-04 (Amended) applies to modify the procedures set out in subdivisions (a)(1) and (f). That Order, commonly referred to as the Anchorage Uniform Pretrial Order, was issued and adopted according to the provisions of Administrative Rule 46, and is available on the court system's website at http:/ /www.courts.alaska.gov/orders-cr16-26.htm.

Rules Civ. Proc., Rule 26, AK R RCP Rule 26
Current with amendments received through October 15, 2015

End of Document

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Advisory Committee on Civil Rules
Exhibit 3

West's Colorado Revised Statutes Annotated
West's Colorado Court Rules Annotated
Colorado Rules of Civil Procedure
Chapter 4. Disclosure and Discovery

C.R.C.P. Rule 26

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY; DUTY OF DISCLOSURE

Currentness

(a) Required Disclosures. Unless otherwise ordered by the court or stipulated by the parties, provisions of this Rule shall not apply to domestic relations, juvenile, mental health, probate, water law, forcible entry and detainer, C.R.C.P. 120, or other expedited proceedings.

(1) **Disclosures.** Except to the extent otherwise directed by the court, a party shall, without awaiting a discovery request, provide to other parties the following information, whether or not supportive of the disclosing party's claims or defenses:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to the claims and defenses of any party and a brief description of the specific information that each such individual is known or believed to possess;

(B) a listing, together with a copy of, or a description by category, of the subject matter and location of all documents, data compilations, and tangible things in the possession, custody or control of the party that are relevant to the claims and defenses of any party, making available for inspection and copying such documents and other evidentiary material, not privileged or protected from disclosure, as though a request for production of those documents had been served pursuant to C.R.C.P. 34;

(C) a description of the categories of damages sought and a computation of any category of economic damages claimed by the disclosing party, making available for inspection and copying pursuant to C.R.C.P. 34 the documents or other evidentiary material relevant to the damages sought, not privileged or protected from disclosure, as though a request for production of those documents had been served pursuant to C.R.C.P. 34; and

(D) any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment, making such agreement available for inspection and copying pursuant to C.R.C.P. 34.

Disclosures shall be served within 28 days after the case is at issue as defined in C.R.C.P. 16(b)(1). A party shall make the required disclosures based on the information then known and reasonably available to the party and is not excused from making such disclosures because the party has not completed investigation of the case or because the party challenges the sufficiency of another party's disclosure or because another party has not made the required disclosures. Parties shall make these disclosures in good faith and may not object to the adequacy of the disclosures until the case management conference pursuant to C.R.C.P. 16(d).

(2) **Disclosure of Expert Testimony.**

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(A) In addition to the disclosures required by subsection (a)(1) of this Rule, a party shall disclose to other parties the identity of any person who may present evidence at trial, pursuant to Rules 702, 703, or 705 of the Colorado Rules of Evidence together with an identification of the person's fields of expertise.

(B) Except as otherwise stipulated or directed by the court:

(I) Retained Experts. With respect to a witness who is retained or specially employed to provide expert testimony, or whose duties as an employee of the party regularly involve giving expert testimony, the disclosure shall be made by a written report signed by the witness. The report shall include:

(a) a complete statement of all opinions to be expressed and the basis and reasons therefor;

(b) a list of the data or other information considered by the witness in forming the opinions;

(c) references to literature that may be used during the witness's testimony;

(d) copies of any exhibits to be used as a summary of or support for the opinions;

(e) the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years;

(f) the fee agreement or schedule for the study, preparation and testimony;

(g) an itemization of the fees incurred and the time spent on the case, which shall be supplemented 14 days prior to the first day of trial; and

(h) a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

The witness's direct testimony shall be limited to matters disclosed in detail in the report.

(II) Other Experts. With respect to a party or witness who may be called to provide expert testimony but is not retained or specially employed within the description contained in subsection (a)(2)(B)(I) above, the disclosure shall be made by a written report or statement that shall include:

(a) a complete description of all opinions to be expressed and the basis and reasons therefor;

(b) a list of the qualifications of the witness; and

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(c) copies of any exhibits to be used as a summary of or support for the opinions. If the report has been prepared by the witness, it shall be signed by the witness.

If the witness does not prepare a written report, the party's lawyer or the party, if self-represented, may prepare a statement and shall sign it. The witness's direct testimony expressing an expert opinion shall be limited to matters disclosed in detail in the report or statement.

(C) Unless otherwise provided in the Case Management Order, the timing of the disclosures shall be as follows:

(I) The disclosure by a claiming party under a complaint, counterclaim, cross-claim, or third-party claim shall be made at least 126 days (18 weeks) before the trial date.

(II) The disclosure by a defending party shall be made within 28 days after service of the claiming party's disclosure, provided, however, that if the claiming party serves its disclosure earlier than required under subparagraph 26(a)(2)(C)(I), the defending party is not required to serve its disclosures until 98 days (14 weeks) before the trial date.

(III) If the evidence is intended to contradict or rebut evidence on the same subject matter identified by another party under subparagraph (a)(2)(C)(II) of this Rule, such disclosure shall be made no later than 77 days (11 weeks) before the trial date.

(3) [There is no Colorado Rule--see instead C.R.C.P. 16(c).]

(4) **Form of Disclosures; Filing.** All disclosures pursuant to subparagraphs (a)(1) and (a)(2) of this Rule shall be made in writing, in a form pursuant to C.R.C.P. 10, signed pursuant to C.R.C.P. 26(g)(1), and served upon all other parties. Disclosures shall not be filed with the court unless requested by the court or necessary for consideration of a particular issue.

(5) **Methods to Discover Additional Matters.** Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, pursuant to C.R.C.P. 34; physical and mental examinations; and requests for admission. Discovery at a place within a country having a treaty with the United States applicable to the discovery must be conducted by methods authorized by the treaty except that, if the court determines that those methods are inadequate or inequitable, it may authorize other discovery methods not prohibited by the treaty.

(b) Discovery Scope and Limits. Unless otherwise modified by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) **In General.** Subject to the limitations and considerations contained in subsection (b)(2) of this Rule, parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within the scope of discovery need not be admissible in evidence to be discoverable.

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(2) **Limitations.** Except upon order for good cause shown and subject to the proportionality factors in subsection (b)(1) of this Rule, discovery shall be limited as follows:

(A) A party may take one deposition of each adverse party and of two other persons, exclusive of persons expected to give expert testimony disclosed pursuant to subsection 26(a)(2). The scope and manner of proceeding by way of deposition and the use thereof shall otherwise be governed by C.R.C.P. 26, 28, 29, 30, 31, 32, and 45.

(B) A party may serve on each adverse party 30 written interrogatories, each of which shall consist of a single question. The scope and manner of proceeding by means of written interrogatories and the use thereof shall otherwise be governed by C.R.C.P. 26 and 33.

(C) A party may obtain a physical or mental examination (including blood group) of a party or of a person in the custody or under the legal control of a party pursuant to C.R.C.P. 35.

(D) A party may serve each adverse party requests for production of documents or tangible things or for entry, inspection or testing of land or property pursuant to C.R.C.P. 34, except such requests for production shall be limited to 20 in number, each of which shall consist of a single request.

(E) A party may serve on each adverse party 20 requests for admission, each of which shall consist of a single request. A party may also serve requests for admission of the genuineness of up to 50 separate documents that the party intends to offer into evidence at trial. The scope and manner of proceeding by means of requests for admission and the use thereof shall otherwise be governed by C.R.C.P. 36.

(F) In determining good cause to modify the limitations of this subsection (b)(2), the court shall consider the following:

(I) whether the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(II) whether the party seeking discovery has had ample opportunity by disclosure or discovery in the action to obtain the information sought;

(III) whether the proposed discovery is outside the scope permitted by C.R.C.P. 26(b)(1); and

(IV) whether because of the number of parties and their alignment with respect to the underlying claims and defenses, the proposed discovery is reasonable.

(3) **Trial Preparation: Materials.** Subject to the provisions of subsection (b)(4) of this Rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this Rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials

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in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of C.R.C.P. 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is:

(A) a written statement signed or otherwise adopted or approved by the person making it, or

(B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) **Trial Preparation: Experts.**

(A) A party may depose any person who has been identified as an expert disclosed pursuant to subsection 26(a)(2)(B)(I) of this Rule whose opinions may be presented at trial. Each deposition shall not exceed 6 hours. On the application of any party, the court may decrease or increase the time permitted after considering the proportionality criteria in subsection (b)(1) of this Rule. Except to the extent otherwise stipulated by the parties or ordered by the court, no discovery, including depositions, concerning either the identity or the opinion of experts shall be conducted until after the disclosures required by subsection (a)(2) of this Rule.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial, and who is not expected to be called as a witness at trial only as provided by C.R.C.P. 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subsection (b)(4); and (ii) with respect to discovery obtained pursuant to subsection (b)(4)(B) of this Rule, the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(D) Rule 26(b)(3) protects from disclosure and discovery drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded, and protects communications between the party's attorney and any witness disclosed under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(I) relate to the compensation for the expert's study, preparation, or testimony;

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(II) identify facts or data that the party's attorney provided and which the expert considered in forming the opinions to be expressed; or

(III) identify the assumptions that the party's attorney provided and that the expert relied on in forming opinions to be expressed.

(5)(A) **Claims of Privilege or Protection of Trial Preparation Materials.** When a party withholds information required to be disclosed or provided in discovery by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(B) If information produced in disclosures or discovery is subject to a claim of privilege or of protection as trial-preparation material the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must not review, use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and shall give notice to the party making the claim within 14 days if it contests the claim. If the claim is not contested within the 14-day period, or is timely contested but resolved in favor of the party claiming privilege or protection of trial-preparation material, then the receiving party must also promptly return, sequester, or destroy the specified information and any copies that the receiving party has. If the claim is contested, the party making the claim shall present the information to the court under seal for a determination of the claim within 14 days after receiving such notice, or the claim is waived. The producing party must preserve the information until the claim is resolved, and bears the burden of proving the basis of the claim and that the claim was not waived. All notices under this Rule shall be in writing.

(c) Protective Orders. Upon motion by a party or by the person from whom disclosure is due or discovery is sought, accompanied by a certificate that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the disclosure or discovery not be had;

(2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place or the allocation of expenses;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

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(6) that a deposition, after being sealed, be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

(d) Timing and Sequence of Discovery. Except when authorized by these Rules, by order, or by agreement of the parties, a party may not seek discovery from any source before service of the Case Management Order pursuant to C.R.C.P. 16(b)(18). Any discovery conducted prior to issuance of the Case Management Order shall not exceed the limitations established by C.R.C.P. 26(b)(2). Unless the parties stipulate or the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of Disclosures, Responses, and Expert Reports and Statements. A party is under a duty to supplement its disclosures under section (a) of this Rule when the party learns that the information disclosed is incomplete or incorrect in some material respect and if the additional or corrective information has not otherwise been made known to the other parties during the disclosure or discovery process, including information relating to anticipated rebuttal but not including information to be used solely for impeachment of a witness. A party is under a duty to amend a prior response to an interrogatory, request for production or request for admission when the party learns that the prior response is incomplete or incorrect in some material respect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process. With respect to experts, the duty to supplement or correct extends both to information contained in the expert's report or statement disclosed pursuant to section (a)(2)(B) of this Rule and to information provided through any deposition of the expert. If a party intends to offer expert testimony on direct examination that has not been disclosed pursuant to section (a)(2)(B) of this Rule on the basis that the expert provided the information through a deposition, the report or statement previously provided shall be supplemented to include a specific description of the deposition testimony relied on. Nothing in this section requires the court to permit an expert to testify as to opinions other than those disclosed in detail in the initial expert report or statement except that if the opinions and bases and reasons therefor are disclosed during the deposition of the expert by the adverse party, the court must permit the testimony at trial unless the court finds that the opposing party has been unfairly prejudiced by the failure to make disclosure in the initial expert report. Supplementation shall be performed in a timely manner.

(f) [No Colorado Rule--See C.R.C.P. 16].

(g) Signing of Disclosures, Discovery Requests, Responses, and Objections.

(1) Every disclosure made pursuant to subsections (a)(1) or (a)(2) of this Rule shall be signed by at least one attorney of record in the attorney's individual name. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(2) Every discovery request, or response, or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name. An unrepresented party shall sign the request, response, or objection

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and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information and belief, formed after a reasonable inquiry, the request, response or objection is:

(A) Consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(B) Not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(C) Not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

If a request, response or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

(3) If without substantial justification a certification is made in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who made the certification, the party on whose behalf the disclosure, request, response or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including reasonable attorney fees.

Credits

Repealed and Adopted eff. Jan. 1, 1995. Amended eff. Jan. 9, 1995, for all cases filed on or after that date; Jan. 1, 1998; July 1, 2001; Jan. 1, 2002; amended Oct. 20, 2005, eff. Jan. 1, 2006; Jan. 1, 2012; Sept. 18, 2014; effective July 1, 2015 for cases filed on or after July 1, 2015.

Editors' Notes

COMMENTS

1995

SCOPE

[1] Because of its timing and interrelationship with C.R.C.P. 16, C.R.C.P. 26 does not apply to domestic relations, mental health, water law, forcible entry and detainer, C.R.C.P. 120, or other expedited proceedings. However, the Court in those proceedings may use C.R.C.P. 26 and C.R.C.P. 16 to the extent helpful to the case. In most instances, only the timing will need to be modified.

COLORADO DIFFERENCES

[2] Revised C.R.C.P. 26 is patterned largely after Fed.R.Civ.P. 26 as amended in 1993 and 2000 and uses substantially the same numbering. There are differences, however. The differences are to fit disclosure/discovery requirements of Colorado's case/trial management system set forth in C.R.C.P. 16, which is very different from its Federal Rule

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counterpart. The interrelationship between C.R.C.P. 26 and C.R.C.P. 16 is described in the Committee Comment to C.R.C.P. 16.

[3] The Colorado differences from the Fed.R.Civ.P. are: (1) timing and scope of mandatory automatic disclosures is different (C.R.C.P. 16(b)); (2) the two types of experts in the Federal Rule are clarified by the State Rule (C.R.C.P. 26(a)(2)(B)), and disclosure of expert opinions is made at a more realistic time in the proceedings (C.R.C.P. 26(a)(2)(C)); (3) sequenced disclosure of expert opinions is prescribed in C.R.C.P. 26(a)(2)(C) to avoid proliferation of experts and related expenses; (4) the parties may use a summary of an expert's testimony in lieu of a report prepared by the expert to reduce expenses (C.R.C.P. 26(a)(2)(B)); (5) claiming privilege/protection of work product (C.R.C.P. 26(b)(5)) and supplementation/correction provisions (C.R.C.P. 26(e)) are relocated in the State Rules to clarify that they apply to both disclosures and discovery; (6) a Motion for Protective Order stays a deposition under the State Rules (C.R.C.P. 121 § 1-12) but not the Federal Rule (Fed.R.Civ.P. 26(c)); (7) presumptive limitations on discovery as contemplated by C.R.C.P. 16(b)(1)(VI) are built into the rule (see C.R.C.P. 26(b)(2)); (8) counsel must certify that they have informed their clients of the expense of the discovery they schedule (C.R.C.P. 16(b)(1)(IV)); (9) the parties cannot stipulate out of the C.R.C.P. 26(b)(2) presumptive discovery limitations (C.R.C.P. 29); and (10) pretrial endorsements governed by Fed.R.Civ.P. 26(a)(3) are part of Colorado's trial management system established by C.R.C.P. 16(c) and C.R.C.P. 16(d).

[4] As with the Federal Rule, the extent of disclosure is dependent upon the specificity of disputed facts in the opposing party's pleading (facilitated by the requirement in C.R.C.P. 16(b) that lead counsel confer about the nature and basis of the claims and defenses before making the required disclosures). If a party expects full disclosure, that party needs to set forth the nature of the claim or defense with reasonable specificity. Specificity is not inconsistent with the requirement in C.R.C.P. 8 for a “short, plain statement” of a party's claims or defenses. Obviously, to the extent there is disclosure, discovery is unnecessary. Discovery is limited under this system.

FEDERAL COMMITTEE NOTES

[5] Federal “Committee Notes” to the December 1, 1993 and December 1, 2000 amendments of Fed.R.Civ.P. 26 are incorporated by reference and where applicable should be used for interpretive guidance.

[6] The most dramatic change in C.R.C.P. 26 is the addition of a disclosure system. Parties are required to disclose specified information without awaiting a discovery demand. Such disclosure is, however, tied to the nature and basis of the claims and defenses of the case as set forth in the parties' pleadings facilitated by the requirement that lead counsel confer about such matters before making the required disclosures.

[7] Subparagraphs (a)(1)(A) and (a)(1)(B) of C.R.C.P. 26 require disclosure of persons, documents and things likely to provide discoverable information relative to disputed facts alleged with particularity in the pleadings. Disclosure relates to disputed facts, not admitted facts. The reference to particularity in the pleadings (coupled with the requirement that lead counsel confer) responds to the concern that notice pleading suggests a scope of disclosure out of proportion to any real need or use. To the contrary, the greater the specificity and clarity of the pleadings facilitated by communication through the C.R.C.P. 16(b) conference, the more complete and focused should be the listing of witnesses, documents, and things so that the parties can tailor the scope of disclosure to the actual needs of the case.

[8] It should also be noted that two types of experts are contemplated by Fed.R.Civ.P. and C.R.C.P. 26(a)(2). The experts contemplated in subsection (a)(2)(B)(II) are persons such as treating physicians, police officers, or others who may testify as expert witnesses and whose opinions are formed as a part of their occupational duties (except when the person is an employee of the party calling the witness). This more limited disclosure has been incorporated into the State Rule because it was deemed inappropriate and unduly burdensome to require all of the information required by C.R.C.P. 26(a)(2)(B)(I) for C.R.C.P. 26(a)(2)(B)(II) type experts.

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2001 COLORADO CHANGES

[9] The change to C.R.C.P. 26(a)(2)(C)(II) effective July 1, 2001, is intended to prevent a plaintiff, who may have had a year or more to prepare his or her case, from filing an expert report early in the case in order to force a defendant to prepare a virtually immediate response. That change clarifies that the defendant's expert report will not be due until 90 days prior to trial.

[10] The change to C.R.C.P. 26(b)(2)(A) effective July 1, 2001 was made to clarify that the number of depositions limitation does not apply to persons expected to give expert testimony disclosed pursuant to subsection 26(a)(2).

[11] The special and limited form of request for admission in C.R.C.P. 26(b)(2)(E) effective July 1, 2001, allows a party to seek admissions as to authenticity of documents to be offered at trial without having to wait until preparation of the Trial Management Order to discover whether the opponent challenges the foundation of certain documents. Thus, a party can be prepared to call witnesses to authenticate documents if the other party refuses to admit their authenticity.

[12] The amendment of C.R.C.P. 26(b)(1) effective January 1, 2002 is patterned after the December, 2000 amendment of the corresponding Federal rule. The amendment should not prevent a party from conducting discovery to seek impeachment evidence or evidence concerning prior acts.

2015

[13] Rule 26 sets the basis for discovery of information by: (1) defining the scope of discovery (26(b)(1)); (2) requiring certain initial disclosures prior to discovery (26(a)(1)); (3) placing presumptive limits on the types of permitted discovery (26(b)(2)); and (4) describing expert disclosure and discovery (26(a)(2) and 26(b)(4)).

[14] Scope of discovery.

Perhaps the most significant 2015 amendments are in Rule 26(b)(1). This language is taken directly from the proposed Fed. R. Civ. P. 26(b)(1). (For a more complete statement of the changes and their rationales, one can read the extensive commentary proposed for the Federal Rule.) First, the slightly reworded concept of proportionality is moved from its former hiding place in C.R.C.P. 26(b)(2)(F)(iii) into the very definition of what information is discoverable. Second, discovery is limited to matters relevant to the specific claims or defenses of any party and is no longer permitted simply because it is relevant to the "subject matter involved in the action." Third, it is made clear that while evidence need not be admissible to be discoverable, this does not permit broadening the basic scope of discovery. In short, the concept is to allow discovery of what a party/lawyer *needs* to prove its case, but not what a party/lawyer *wants* to know about the subject of a case.

[15] Proportionality analysis.

C.R.C.P. 26(b)(1) requires courts to apply the principle of proportionality in determining the extent of discovery that will be permitted. The Rule lists a number of non-exclusive factors that should be considered. Not every factor will apply in every case. The nature of the particular case may make some factors predominant and other factors insignificant. For example, the amount in controversy may not be an important consideration when fundamental or constitutional rights are implicated, or where the public interest demands a resolution of the issue, irrespective of the economic consequences. In certain types of litigation, such as employment or professional liability cases, the parties' relative access to relevant information may be the most important factor. These examples show that the factors cannot be applied as a mathematical formula. Rather, trial judges have and must exercise discretion, on a case-by-

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case basis, to effectuate the purposes of these rules, and, in particular, abide by the overarching command that the rules "shall be liberally construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action." C.R.C.P. 1.

[16] Limitations on discovery.

The presumptive limitations on discovery in Rule 26(b)(2)-- *e.g.*, a deposition of an adverse party and two other persons, only 30 interrogatories, etc.--have not been changed from the prior rule. They may, however, be reduced or increased by stipulation of the parties with court approval, consistent with the requirement of proportionality.

[17] Initial disclosures.

Amendments to Rule 26(a)(1) concerning initial disclosures are not as significant as those to Rule 26(b)(1). Nonetheless, it is intended that disclosures should be quite complete and that, therefore, further discovery should not be as necessary as it has been historically. In this regard, the amendment to section (a)(1) adds to the requirement of disclosing four categories of information and that the disclosure include information "whether or not supportive" of the disclosing party's case. This should not be a significant change from prior practice. In 2000, Fed. R. Civ. P. 26(a)(1) was changed to narrow the initial disclosure requirements to information a party might use to support its position. The Colorado Supreme Court has not adopted that limitation, and continues to require identification of persons and documents that are relevant to disputed facts alleged with particularity in the pleadings. Thus, it was intended that disclosures were to include matter that might be harmful as well as supportive. (Limiting disclosure to supportive information likely would only encourage initial interrogatories and document requests that would require disclosure of harmful information.)

Changes to subsections (A) (persons with information) and (B) (documents) of Rule 26(a)(1) require information related to claims for relief and defenses (consistent with the scope of discovery in Rule 26(b)(1)). Also the identification of persons with relevant information calls for a "brief *description* of the *specific* information that each individual is known or believed to possess." Under the prior rule, disclosures of persons with discoverable information identifying "the subjects of information" tended to identify numerous persons with the identification of "X is expected to have information about and may testify relating to the facts of this case." The change is designed to avoid that practice and obtain some better idea of which witnesses might actually have genuinely significant information.

[18] Expert disclosures.

Retained experts must sign written reports much as before except with more disclosure of their fees. The option of submitting a "summary" of expert opinions is eliminated. Their testimony is limited to what is disclosed in detail in their report. Rule 26(a)(2)(B)(I).

"Other" (non-retained) experts must make disclosures that are less detailed. Many times a lawyer has no control over a non-retained expert, such as a treating physician or police officer, and thus the option of a "statement" must be preserved with respect to this type of expert, which, if necessary, may be prepared by the lawyers. In either event, the expert testimony is to be limited to what is disclosed in detail in the disclosure. Rule 26(a)(2)(B)(II).

[19] Retained or non-retained experts.

Non-retained experts are persons whose opinions are formed or reasonably derived from or based on their occupational duties.

[20] Expert discovery.

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The prohibition of depositions of experts was perhaps the most controversial aspect of CAPP. Many lawyers, particularly those involved in professional liability cases, argued that a blanket prohibition of depositions of experts would impair lawyers' ability to evaluate cases and thus frustrate settlement of cases. The 2015 amendment permits limited depositions of experts. Retained experts may be deposed for up to 6 hours, unless changed by the court, which must consider proportionality. Rule 26(b)(4)(A).

The 2015 amendment also requires that, if a deposition reveals additional opinions, previous expert disclosures must be supplemented before trial if the witness is to be allowed to express these new opinions at trial. Rule 26(e). This change addresses, and prohibits, the fairly frequent and abusive practice of lawyers simply saying that the expert report is supplemented by the "deposition." However, even with the required supplementation, the trial court is not required to allow the new opinions in evidence. *Id.*

The 2015 amendments to Rule 26, like the current and proposed version of Fed. R. Civ. P. 26, emphasize the application of the concept of proportionality to disclosure and discovery, with robust disclosure followed by limited discovery.

[21] Sufficiency of disclosure of expert opinions and the bases therefor.

This rule requires detailed disclosures of "all opinions to be expressed [by the expert] and the basis and reasons therefor." Such disclosures ensure that the parties know, well in advance of trial, the substance of all expert opinions that may be offered at trial. Detailed disclosures facilitate the trial, avoid delays, and enhance the prospect for settlement. At the same time, courts and parties must "liberally construe, administer and employ" these rules "to secure the just, speedy, and inexpensive determination of every action." C.R.C.P. 1. Rule 26(a)(2) does not prohibit disclosures that incorporate by specific page reference previously disclosed records of the designated expert (including non-retained experts), provided that the designated pages set forth the opinions to be expressed, along with the reasons and basis therefor. This Rule does not require that disclosures match, verbatim, the testimony at trial. Reasonableness and the overarching goal of a fair resolution of disputes are the touchstones. If an expert's opinions and facts supporting the opinions are disclosed in a manner that gives the opposing party reasonable notice of the specific opinions and supporting facts, the purpose of the rule is accomplished. In the absence of substantial prejudice to the opposing party, this rule does not require exclusion of testimony merely because of technical defects in disclosure.

Notes of Decisions (393)

Rules Civ. Proc., Rule 26, CO ST RCP Rule 26
Current with amendments received through August 15, 2015

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Utah Rules of Civil Procedure, Rule 26

RULE 26. GENERAL PROVISIONS GOVERNING DISCLOSURE AND DISCOVERY

Currentness

(a) Disclosure. This rule applies unless changed or supplemented by a rule governing disclosure and discovery in a practice area.

(a)(1) *Initial disclosures.* Except in cases exempt under paragraph (a)(3), a party shall, without waiting for a discovery request, serve on the other parties:

(a)(1)(A) the name and, if known, the address and telephone number of:

(a)(1)(A)(i) each individual likely to have discoverable information supporting its claims or defenses, unless solely for impeachment, identifying the subjects of the information; and

(a)(1)(A)(ii) each fact witness the party may call in its case-in-chief and, except for an adverse party, a summary of the expected testimony;

(a)(1)(B) a copy of all documents, data compilations, electronically stored information, and tangible things in the possession or control of the party that the party may offer in its case-in-chief, except charts, summaries and demonstrative exhibits that have not yet been prepared and must be disclosed in accordance with paragraph (a)(5);

(a)(1)(C) a computation of any damages claimed and a copy of all discoverable documents or evidentiary material on which such computation is based, including materials about the nature and extent of injuries suffered;

(a)(1)(D) a copy of any agreement under which any person may be liable to satisfy part or all of a judgment or to indemnify or reimburse for payments made to satisfy the judgment; and

(a)(1)(E) a copy of all documents to which a party refers in its pleadings.

(a)(2) *Timing of initial disclosures.* The disclosures required by paragraph (a)(1) shall be served on the other parties:

(a)(2)(A) by the plaintiff within 14 days after filing of the first answer to the complaint; and

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(a)(2)(B) by the defendant within 42 days after filing of the first answer to the complaint or within 28 days after that defendant's appearance, whichever is later.

(a)(3) *Exemptions.*

(a)(3)(A) Unless otherwise ordered by the court or agreed to by the parties, the requirements of paragraph (a)(1) do not apply to actions:

(a)(3)(A)(i) for judicial review of adjudicative proceedings or rule making proceedings of an administrative agency;

(a)(3)(A)(ii) governed by Rule 65B or Rule 65C;

(a)(3)(A)(iii) to enforce an arbitration award;

(a)(3)(A)(iv) for water rights general adjudication under Title 73, Chapter 4, Determination of Water Rights.

(a)(3)(B) In an exempt action, the matters subject to disclosure under paragraph (a)(1) are subject to discovery under paragraph (b).

(a)(4) *Expert testimony.*

(a)(4)(A) Disclosure of expert testimony. A party shall, without waiting for a discovery request, serve on the other parties the following information regarding any person who may be used at trial to present evidence under Rule 702 of the **Utah** Rules of Evidence and who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony: (i) the expert's name and qualifications, including a list of all publications authored within the preceding 10 years, and a list of any other cases in which the expert has testified as an expert at trial or by deposition within the preceding four years, (ii) a brief summary of the opinions to which the witness is expected to testify, (iii) all data and other information that will be relied upon by the witness in forming those opinions, and (iv) the compensation to be paid for the witness's study and testimony.

(a)(4)(B) Limits on expert discovery. Further discovery may be obtained from an expert witness either by deposition or by written report. A deposition shall not exceed four hours and the party taking the deposition shall pay the expert's reasonable hourly fees for attendance at the deposition. A report shall be signed by the expert and shall contain a complete statement of all opinions the expert will offer at trial and the basis and reasons for them. Such an expert may not testify in a party's case-in-chief concerning any matter not fairly disclosed in the report. The party offering the expert shall pay the costs for the report.

(a)(4)(C) Timing for expert discovery.

(a)(4)(C)(i) The party who bears the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the close of fact discovery. Within seven days

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thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(C)(ii) The party who does not bear the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the later of (A) the date on which the election under paragraph (a)(4)(C)(i) is due, or (B) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(i). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(C)(iii) If the party who bears the burden of proof on an issue wants to designate rebuttal expert witnesses it shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the later of (A) the date on which the election under paragraph (a)(4)(C)(ii) is due, or (B) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(ii). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(D) Multiparty actions. In multiparty actions, all parties opposing the expert must agree on either a report or a deposition. If all parties opposing the expert do not agree, then further discovery of the expert may be obtained only by deposition pursuant to paragraph (a)(4)(B) and Rule 30.

(a)(4)(E) Summary of non-retained expert testimony. If a party intends to present evidence at trial under Rule 702 of the **Utah** Rules of Evidence from any person other than an expert witness who is retained or specially employed to provide testimony in the case or a person whose duties as an employee of the party regularly involve giving expert testimony, that party must serve on the other parties a written summary of the facts and opinions to which the witness is expected to testify in accordance with the deadlines set forth in paragraph (a)(4)(C). A deposition of such a witness may not exceed four hours.

(a)(5) *Pretrial disclosures.*

(a)(5)(A) A party shall, without waiting for a discovery request, serve on the other parties:

(a)(5)(A)(i) the name and, if not previously provided, the address and telephone number of each witness, unless solely for impeachment, separately identifying witnesses the party will call and witnesses the party may call;

(a)(5)(A)(ii) the name of witnesses whose testimony is expected to be presented by transcript of a deposition and a copy of the transcript with the proposed testimony designated; and

(a)(5)(A)(iii) a copy of each exhibit, including charts, summaries and demonstrative exhibits, unless solely for impeachment, separately identifying those which the party will offer and those which the party may offer.

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(a)(5)(B) Disclosure required by paragraph (a)(5) shall be served on the other parties at least 28 days before trial. At least 14 days before trial, a party shall serve and file counter designations of deposition testimony, objections and grounds for the objections to the use of a deposition and to the admissibility of exhibits. Other than objections under Rules 402 and 403 of the **Utah** Rules of Evidence, objections not listed are waived unless excused by the court for good cause.

(b) Discovery scope.

(b)(1) *In general.* Parties may discover any matter, not privileged, which is relevant to the claim or defense of any party if the discovery satisfies the standards of proportionality set forth below. Privileged matters that are not discoverable or admissible in any proceeding of any kind or character include all information in any form provided during and created specifically as part of a request for an investigation, the investigation, findings, or conclusions of peer review, care review, or quality assurance processes of any organization of health care providers as defined in the **Utah** Health Care Malpractice Act for the purpose of evaluating care provided to reduce morbidity and mortality or to improve the quality of medical care, or for the purpose of peer review of the ethics, competence, or professional conduct of any health care provider.

(b)(2) *Proportionality.* Discovery and discovery requests are proportional if:

(b)(2)(A) the discovery is reasonable, considering the needs of the case, the amount in controversy, the complexity of the case, the parties' resources, the importance of the issues, and the importance of the discovery in resolving the issues;

(b)(2)(B) the likely benefits of the proposed discovery outweigh the burden or expense;

(b)(2)(C) the discovery is consistent with the overall case management and will further the just, speedy and inexpensive determination of the case;

(b)(2)(D) the discovery is not unreasonably cumulative or duplicative;

(b)(2)(E) the information cannot be obtained from another source that is more convenient, less burdensome or less expensive; and

(b)(2)(F) the party seeking discovery has not had sufficient opportunity to obtain the information by discovery or otherwise, taking into account the parties' relative access to the information.

(b)(3) *Burden.* The party seeking discovery always has the burden of showing proportionality and relevance. To ensure proportionality, the court may enter orders under Rule 37.

(b)(4) *Electronically stored information.* A party claiming that electronically stored information is not reasonably accessible because of undue burden or cost shall describe the source of the electronically stored information, the nature and extent of the burden, the nature of the information not provided, and any other information that will enable other parties to evaluate the claim.

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(b)(5) *Trial preparation materials.* A party may obtain otherwise discoverable documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials and that the party is unable without undue hardship to obtain substantially equivalent materials by other means. In ordering discovery of such materials, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.

(b)(6) *Statement previously made about the action.* A party may obtain without the showing required in paragraph (b)(5) a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement about the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order under Rule 37. A statement previously made is (A) a written statement signed or approved by the person making it, or (B) a stenographic, mechanical, electronic, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(b)(7) *Trial preparation; experts.*

(b)(7)(A) Trial-preparation protection for draft reports or disclosures. Paragraph (b)(5) protects drafts of any report or disclosure required under paragraph (a)(4), regardless of the form in which the draft is recorded.

(b)(7)(B) Trial-preparation protection for communications between a party's attorney and expert witnesses. Paragraph (b)(5) protects communications between the party's attorney and any witness required to provide disclosures under paragraph (a)(4), regardless of the form of the communications, except to the extent that the communications:

(b)(7)(B)(i) relate to compensation for the expert's study or testimony;

(b)(7)(B)(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(b)(7)(B)(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(b)(7)(C) Expert employed only for trial preparation. Ordinarily, a party may not, by interrogatories or otherwise, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. A party may do so only:

(b)(7)(C)(i) as provided in Rule 35(b); or

(b)(7)(C)(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(b)(8) *Claims of privilege or protection of trial preparation materials.*

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(b)(8)(A) Information withheld. If a party withholds discoverable information by claiming that it is privileged or prepared in anticipation of litigation or for trial, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced in a manner that, without revealing the information itself, will enable other parties to evaluate the claim.

(b)(8)(B) Information produced. If a party produces information that the party claims is privileged or prepared in anticipation of litigation or for trial, the producing party may notify any receiving party of the claim and the basis for it. After being notified, a receiving party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

(c) Methods, sequence and timing of discovery; tiers; limits on standard discovery; extraordinary discovery.

(c)(1) *Methods of discovery.* Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; requests for admission; and subpoenas other than for a court hearing or trial.

(c)(2) *Sequence and timing of discovery.* Methods of discovery may be used in any sequence, and the fact that a party is conducting discovery shall not delay any other party's discovery. Except for cases exempt under paragraph (a)(3), a party may not seek discovery from any source before that party's initial disclosure obligations are satisfied.

(c)(3) *Definition of tiers for standard discovery.* Actions claiming $50,000 or less in damages are permitted standard discovery as described for Tier 1. Actions claiming more than $50,000 and less than $300,000 in damages are permitted standard discovery as described for Tier 2. Actions claiming $300,000 or more in damages are permitted standard discovery as described for Tier 3. Absent an accompanying damage claim for more than $300,000, actions claiming non-monetary relief are permitted standard discovery as described for Tier 2.

(c)(4) *Definition of damages.* For purposes of determining standard discovery, the amount of damages includes the total of all monetary damages sought (without duplication for alternative theories) by all parties in all claims for relief in the original pleadings.

(c)(5) *Limits on standard fact discovery.* Standard fact discovery per side (plaintiffs collectively, defendants collectively, and third-party defendants collectively) in each tier is as follows. The days to complete standard fact discovery are calculated from the date the first defendant's first disclosure is due and do not include expert discovery under paragraphs(a)(4)(C) and (D).

Tier	Amount of Damages	Total Fact Deposition Hours	Rule 33 Interrogatories including all discrete subparts	Rule 34 Requests for Production	Rule 36 Requests for Admission	Days to Complete Standard Fact Discovery

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1	$50,000 or less	3	0	5	5	120
2	More than $50,000 and less than $300,000 or non-monetary relief	15	10	10	10	180
3	$300,000 or more	30	20	20	20	210

(c)(6) *Extraordinary discovery.* To obtain discovery beyond the limits established in paragraph (c)(5), a party shall file:

(c)(6)(A) before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a stipulated statement that extraordinary discovery is necessary and proportional under paragraph (b)(2) and that each party has reviewed and approved a discovery budget; or

(c)(6)(B) before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a request for extraordinary discovery under Rule 37(a).

(d) Requirements for disclosure or response; disclosure or response by an organization; failure to disclose; initial and supplemental disclosures and responses.

(d)(1) A party shall make disclosures and responses to discovery based on the information then known or reasonably available to the party.

(d)(2) If the party providing disclosure or responding to discovery is a corporation, partnership, association, or governmental agency, the party shall act through one or more officers, directors, managing agents, or other persons, who shall make disclosures and responses to discovery based on the information then known or reasonably available to the party.

(d)(3) A party is not excused from making disclosures or responses because the party has not completed investigating the case or because the party challenges the sufficiency of another party's disclosures or responses or because another party has not made disclosures or responses.

(d)(4) If a party fails to disclose or to supplement timely a disclosure or response to discovery, that party may not use the undisclosed witness, document or material at any hearing or trial unless the failure is harmless or the party shows good cause for the failure.

(d)(5) If a party learns that a disclosure or response is incomplete or incorrect in some important way, the party must timely serve on the other parties the additional or correct information if it has not been made known to the other parties. The supplemental disclosure or response must state why the additional or correct information was not previously provided.

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(e) Signing discovery requests, responses, and objections. Every disclosure, request for discovery, response to a request for discovery and objection to a request for discovery shall be in writing and signed by at least one attorney of record or by the party if the party is not represented. The signature of the attorney or party is a certification under Rule 11. If a request or response is not signed, the receiving party does not need to take any action with respect to it. If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, may take any action authorized by Rule 11 or Rule 37(b).

(f) Filing. Except as required by these rules or ordered by the court, a party shall not file with the court a disclosure, a request for discovery or a response to a request for discovery, but shall file only the certificate of service stating that the disclosure, request for discovery or response has been served on the other parties and the date of service.

Credits

[Effective May 2, 2005; amended effective November 1, 2007; November 1, 2008; November 1, 2011; March 6, 2012; April 1, 2013; May 1, 2015.]

Editors' Notes

ADVISORY COMMITTEE NOTES

Disclosure requirements and timing. Rule 26(a)(1). The 2011 amendments seek to reduce discovery costs by requiring each party to produce, at an early stage in the case, and without a discovery request, all of the documents and physical evidence the party may offer in its case-in-chief and the names of witnesses the party may call in its case-in-chief, with a description of their expected testimony. In this respect, the amendments build on the initial disclosure requirements of the prior rules. In addition to the disclosures required by the prior version of Rule 26(a)(1), a party must disclose each fact witness the party may call in its case-in-chief and a summary of the witness's expected testimony, a copy of all documents the party may offer in its case-in-chief, and all documents to which a party refers in its pleadings.

Not all information will be known at the outset of a case. If discovery is serving its proper purpose, additional witnesses, documents, and other information will be identified. The scope and the level of detail required in the initial Rule 26(a)(1) disclosures should be viewed in light of this reality. A party is not required to interview every witness it ultimately may call at trial in order to provide a summary of the witness's expected testimony. As the information becomes known, it should be disclosed. No summaries are required for adverse parties, including management level employees of business entities, because opposing lawyers are unable to interview them and their testimony is available to their own counsel. For uncooperative or hostile witnesses any summary of expected testimony would necessarily be limited to the subject areas the witness is reasonably expected to testify about. For example, defense counsel may be unable to interview a treating physician, so the initial summary may only disclose that the witness will be questioned concerning the plaintiff's diagnosis, treatment and prognosis. After medical records have been obtained, the summary may be expanded or refined.

Subject to the foregoing qualifications, the summary of the witness's expected testimony should be just that--a summary. The rule does not require prefiled testimony or detailed descriptions of everything a witness might say at trial. On the other hand, it requires more than the broad, conclusory statements that often were made under the prior version of Rule 26(a)(1)(e.g., “The witness will testify about the events in question” or “The witness will testify on causation.”). The intent of this requirement is to give the other side basic information concerning the subjects about which the witness is expected to testify at trial, so that the other side may determine the witness's relative importance in the case, whether the witness should be interviewed or deposed, and whether additional documents or information concerning the witness should be sought. This information is important because of the other discovery limits contained in the 2011 amendments, particularly the limits on depositions.

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Likewise, the documents that should be provided as part of the Rule 26(a)(1) disclosures are those that a party reasonably believes it may use at trial, understanding that not all documents will be available at the outset of a case. In this regard, it is important to remember that the duty to provide documents and witness information is a continuing one, and disclosures must be promptly supplemented as new evidence and witnesses become known as the case progresses.

The amendments also require parties to provide more information about damages early in the case. Too often, the subject of damages is deferred until late in the case. Early disclosure of damages information is important. Among other things, it is a critical factor in determining proportionality. The committee recognizes that damages often require additional discovery, and typically are the subject of expert testimony. The Rule is not intended to require expert disclosures at the outset of a case. At the same time, the subject of damages should not simply be deferred until expert discovery. Parties should make a good faith attempt to compute damages to the extent it is possible to do so and must in any event provide all discoverable information on the subject, including materials related to the nature and extent of the damages.

The penalty for failing to make timely disclosures is that the evidence may not be used in the party's case-in-chief. To make the disclosure requirement meaningful, and to discourage sandbagging, parties must know that if they fail to disclose important information that is helpful to their case, they will not be able to use that information at trial. The courts will be expected to enforce them unless the failure is harmless or the party shows good cause for the failure.

The 2011 amendments also change the time for making these required disclosures. Because the plaintiff controls when it brings the action, plaintiffs must make their disclosures within 14 days after service of the first answer. A defendant is required to make its disclosures within 28 days after the plaintiff's first disclosure or after that defendant's appearance, whichever is later. The purpose of early disclosure is to have all parties present the evidence they expect to use to prove their claims or defenses, thereby giving the opposing party the ability to better evaluate the case and determine what additional discovery is necessary and proportional.

The time periods for making Rule 26(a)(1) disclosures, and the presumptive deadlines for completing fact discovery, are keyed to the filing of an answer. If a defendant files a motion to dismiss or other Rule 12(b) motion in lieu of an answer, these time periods normally would be not begin to run until that motion is resolved.

Finally, the 2011 amendments eliminate two categories of actions that previously were exempt from the mandatory disclosure requirements. Specifically, the amendments eliminate the prior exemption for contract actions in which the amount claimed is $20,000 or less, and actions in which any party is proceeding pro se. In the committee's view, these types of actions will benefit from the early disclosure requirements and the overall reduced cost of discovery.

Expert disclosures and timing. Rule 26(a)(3). Expert discovery has become an ever-increasing component of discovery cost. The prior rules sought to eliminate some of these costs by requiring the written disclosure of the expert's opinions and other background information. However, because the expert was not required to sign these disclosures, and because experts often were allowed to deviate from the opinions disclosed, attorneys typically would take the expert's deposition to ensure the expert would not offer “surprise” testimony at trial, thereby increasing rather than decreasing the overall cost. The amendments seek to remedy this and other costs associated with expert discovery by, among other things, allowing the opponent to choose either a deposition of the expert or a written report, but not both; in the case of written reports, requiring more comprehensive disclosures, signed by the expert, and making clear that experts will not be allowed to testify beyond what is fairly disclosed in a report, all with the goal of making reports a reliable substitute for depositions; and incorporating a rule that protects from discovery most communications between an attorney and retained expert. Discovery of expert opinions and testimony is automatic under Rule 26(a)(3) and parties are not required to serve interrogatories or use other discovery devices to obtain this information.

Disclosures of expert testimony are made in sequence, with the party who bears the burden of proof on the issue for which expert testimony will be offered going first. Within seven days after the close of fact discovery, that party must disclose: (i) the expert's curriculum vitae identifying the expert's qualifications, publications, and prior testimony; (ii) compensation information; (iii)

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a brief summary of the opinions the expert will offer; and (iv) a complete copy of the expert's file for the case. The file should include all of the facts and data that the expert has relied upon in forming the expert's opinions. If the expert has prepared summaries of data, spreadsheets, charts, tables, or similar materials, they should be included. If the expert has used software programs to make calculations or otherwise summarize or organize data, that information and underlying formulas should be provided in native form so it can be analyzed and understood. To the extent the expert is relying on depositions or materials produced in discovery, then a list of the specific materials relied upon is sufficient. The committee recognizes that experts frequently will prepare demonstrative exhibits or other aids to illustrate the expert's testimony at trial, and the costs for preparing these materials can be substantial. For that reason, these types of demonstrative aids may be prepared and disclosed later, as part of the Rule 26(a)(4) pretrial disclosures when trial is imminent.

Within seven days after this disclosure, the party opposing the retained expert may elect either a deposition or a written report from the expert. A deposition is limited to four hours, which is not included in the deposition hours under Rule 26(c)(5), and the party taking it must pay the expert's hourly fee for attending the deposition. If a party elects a written report, the expert must provide a signed report containing a complete statement of all opinions the expert will express and the basis and reasons for them. The intent is not to require a verbatim transcript of exactly what the expert will say at trial; instead the expert must fairly disclose the substance of and basis for each opinion the expert will offer. The expert may not testify in a party's case in chief concerning any matter that is not fairly disclosed in the report. To achieve the goal of making reports a reliable substitute for depositions, courts are expected to enforce this requirement. If a party elects a deposition, rather than a report, it is up to the party to ask the necessary questions to “lock in” the expert's testimony. But the expert is expected to be fully prepared on all aspects of his/her trial testimony at the time of the deposition and may not leave the door open for additional testimony by qualifying answers to deposition questions.

The report or deposition must be completed within 28 days after the election is made. After this, the party who does not bear the burden of proof on the issue for which expert testimony is offered must make its corresponding disclosures and the opposing party may then elect either a deposition or a written report. Under the deadlines contained in the rules, expert discovery should take less than three months to complete. However, as with the other discovery rules, these deadlines can be altered by stipulation of the parties or order of the court.

The amendments also address the issue of testimony from non-retained experts, such as treating physicians, police officers, or employees with special expertise, who are not retained or specially employed to provide expert testimony, or whose duties as an employee do not regularly involve giving expert testimony. This issue was addressed by the Supreme Court in Drew v. Lee, 2011 UT 15, wherein the court held that reports under the prior version of Rule 26(a)(3) are not required for treating physicians.

There are a number of difficulties inherent in disclosing expert testimony that may be offered from fact witnesses. First, there is often not a clear line between fact and expert testimony. Many fact witnesses have scientific, technical or other specialized knowledge, and their testimony about the events in question often will cross into the area of expert testimony. The rules are not intended to erect artificial barriers to the admissibility of such testimony. Second, many of these fact witnesses will not be within the control of the party who plans to call them at trial. These witnesses may not be cooperative, and may not be willing to discuss opinions they have with counsel. Where this is the case, disclosures will necessarily be more limited. On the other hand, consistent with the overall purpose of the 2011 amendments, a party should receive advance notice if their opponent will solicit expert opinions from a particular witness so they can plan their case accordingly. In an effort to strike an appropriate balance, the rules require that such witnesses be identified and the information about their anticipated testimony should include that which is required under Rule 26(a)(1)(A)(ii), which should include any opinion testimony that a party expects to elicit from them at trial. If a party has disclosed possible opinion testimony in its Rule 26(a)(1)(A)(ii) disclosures, that party is not required to prepare a separate Rule 26(a)(4)(E) disclosure for the witness. And if that disclosure is made in advance of the witness's deposition, those opinions should be explored in the deposition and not in a separate expert deposition. Otherwise, the timing for disclosure e of non-retained expert opinions is the same as that for retained experts under Rule 26(a)(4)(C) and depends on whether the party has the burden of proof or is responding to another expert. Rules 26(a)(4)(E) and 26(a)(1)(A)(ii) are not intended to elevate form over substance--all they require is that a party fairly inform its opponent that opinion testimony may

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be offered from a particular witness. And because a party who expects to offer this testimony normally cannot compel such a witness to prepare a written report, further discovery must be done by interview or by deposition.

Finally, the amendments include a new Rule 26(b)(7) that protects from discovery draft expert reports and, with limited exception, communications between an attorney and an expert. These changes are modeled after the recent changes to the Federal Rules of Civil Procedure and are intended to address the unnecessary and costly procedures that often were employed in order to protect such information from discovery, and to reduce "satellite litigation" over such issues.

Scope of discovery--Proportionality. Rule 26(b). Proportionality is the principle governing the scope of discovery. Simply stated, it means that the cost of discovery should be proportional to what is at stake in the litigation.

In the past, the scope of discovery was governed by "relevance" or the "likelihood to lead to discovery of admissible evidence." These broad standards may have secured just results by allowing a party to discover all facts relevant to the litigation. However, they did little to advance two equally important objectives of the rules of civil procedure--the speedy and inexpensive resolution of every action. Accordingly, the former standards governing the scope of discovery have been replaced with the proportionality standards in subpart (b)(1).

The concept of proportionality is not new. The prior rule permitted the Court to limit discovery methods if it determined that "the discovery was unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." The Federal Rules of Civil Procedure contains a similar provision. See Fed. R. Civ. P. 26(b)(2)(C). This method of limiting discovery, however, was rarely invoked either under the Utah rules or federal rules.

Under the prior rule, the party objecting to the discovery request had the burden of proving that a discovery request was not proportional. The new rule changes the burden of proof. Today, the party seeking discovery beyond the scope of "standard" discovery has the burden of showing that the request is "relevant to the claim or defense of any party" and that the request satisfies the standards of proportionality. As before, ultimate admissibility is not an appropriate objection to a discovery request so long as the proportionality standard and other requirements are met.

The 2011 amendments establish three tiers of standard discovery in Rule 26(c). Ideally, rules of procedure should be crafted to promote predictability for litigants. Rules should limit the need to resort to judicial oversight. Tiered standard discovery seeks to achieve these ends. The "one-size-fits-all" system is rejected. Tiered discovery signals to judges, attorneys, and parties the amount of discovery which by rule is deemed proportional for cases with different amounts in controversy.

Any system of rules which permits the facts and circumstances of each case to inform procedure cannot eliminate uncertainty. Ultimately, the trial court has broad discretion in deciding whether a discovery request is proportional. The proportionality standards in subpart (b)(2) and the discovery tiers in subpart (c) mitigate uncertainty by guiding that discretion. The proper application of the proportionality standards will be defined over time by trial and appellate courts.

Standard and extraordinary discovery. Rule 26(c). As a counterpart to requiring more detailed disclosures under Rule 26(a), the 2011 amendments place new limitations on additional discovery the parties may conduct. Because the committee expects the enhanced disclosure requirements will automatically permit each party to learn the witnesses and evidence the opposing side will offer in its case-in-chief, additional discovery should serve the more limited function of permitting parties to find witnesses, documents, and other evidentiary materials that are harmful, rather than helpful, to the opponent's case.

Rule 26(c) provides for three separate "tiers" of limited, "standard" discovery that are presumed to be proportional to the amount and issues in controversy in the action, and that the parties may conduct as a matter of right. An aggregation of all damages sought by all parties in an action dictates the applicable tier of standard discovery, whether such damages are sought by way of a complaint, counterclaim, or otherwise. The tiers of standard discovery are set forth in a chart that is embedded in the body of the

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rule itself. "Tier 1" describes a minimal amount of standard discovery that is presumed proportional for cases involving damages of $50,000 or less. "Tier 2" sets forth larger limits on standard discovery that are applicable in cases involving damages above $50,000 but less than $300,000. Finally, "Tier 3" prescribes still greater standard discovery for actions involving damages in excess of $300,000. Deposition hours are charged to a side for the time spent asking questions of the witness. In a particular deposition, one side may use two hours while the other side uses only 30 minutes. The tiers also provide presumptive limitations on the time within which standard discovery should be completed, which limitations similarly increase with the amount of damages at issue. A statement of discovery issues will not toll the period. Parties are expected to be reasonable and accomplish as much as they can during standard discovery. A statement of discovery issues may result in additional discovery and sanctions at the expense of a party who unreasonably fails to respond or otherwise frustrates discovery. After the expiration of the applicable time limitation, a case is presumed to be ready for trial. Actions for non-monetary relief, such as injunctive relief, are subject to the standard discovery limitations of Tier 2, absent an accompanying monetary claim of $300,000 or more, in which case Tier 3 applies. The committee determined these standard discovery limitations based on the expectation that for the majority of cases filed in the **Utah** State Courts, the magnitude of available discovery and applicable time parameters available under the three-tiered system should be sufficient for cases involving the respective amounts of damages.

Despite the expectation that standard discovery according to the applicable tier should be adequate in the typical case, the 2011 amendments contemplate there will be some cases for which standard discovery is not sufficient or appropriate. In such cases, parties may conduct additional discovery that is shown to be consistent with the principle of proportionality. There are two ways to obtain such additional discovery. The first is by stipulation. If the parties can agree additional discovery is necessary, they may stipulate to as much additional discovery as they desire, provided they stipulate the additional discovery is proportional to what is at stake in the litigation and counsel for each party certifies that the party has reviewed and approved a budget for additional discovery. Such a stipulation should be filed before the close of the standard discovery time limit, but only after reaching the limits for that type of standard discovery available under the rule. If these conditions are met, the Court will not second-guess the parties and their counsel and must approve the stipulation.

The second method to obtain additional discovery is by a statement of discovery issues. The committee recognizes there will be some cases in which additional discovery is appropriate, but the parties cannot agree to the scope of such additional discovery. These may include, among other categories, large and factually complex cases and cases in which there is a significant disparity in the parties' access to information, such that one party legitimately has a greater need than the other party for additional discovery in order to prepare properly for trial. To prevent a party from taking advantage of this situation, the 2011 amendments allow any party to request additional discovery. As with stipulations for extraordinary discovery, a party requesting extraordinary discovery should do so before the close of the standard discovery time limit, but only after the party has reached the limits for that type of standard discovery available to it under the rule. By taking advantage of this discovery, counsel should be better equipped to articulate for the court what additional discovery is needed and why. The requesting party must demonstrate that the additional discovery is proportional and certify that the party has reviewed and approved a discovery budget. The burden to show the need for additional discovery, and to demonstrate relevance and proportionality, always falls on the party seeking additional discovery. However, cases in which such additional discovery is appropriate do exist, and it is important for courts to recognize they can and should permit additional discovery in appropriate cases, commensurate with the complexity and magnitude of the dispute.

Protective order language moved to Rule 37. The 2011 amendments delete in its entirety the prior language of Rule **26**(c) governing motions for protective orders. The substance of that language is now found in Rule 37. The committee determined it was preferable to cover requests for an order to compel, for a protective order, and sanctions in a single rule, rather than two separate rules.

Consequences of failure to disclose. Rule **26**(d). If a party fails to disclose or to supplement timely its discovery responses, that party cannot use the undisclosed witness, document, or material at any hearing or trial, absent proof that non-disclosure was harmless or justified by good cause. More complete disclosures increase the likelihood that the case will be resolved justly, speedily, and inexpensively. Not being able to use evidence that a party fails properly to disclose provides a powerful incentive

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to make complete disclosures. This is true only if trial courts hold parties to this standard. Accordingly, although a trial court retains discretion to determine how properly to address this issue in a given case, the usual and expected result should be exclusion of the evidence.

LEGISLATIVE NOTE

(1) The amended language in paragraph (b)(1) is intended to incorporate long-standing protections against discovery and admission into evidence of privileged matters connected to medical care review and peer review into the **Utah** Rules of Civil Procedure. These privileges, found in both **Utah** common law and statute, include Sections **26**-25-3, 58-13-4, and 58-13-5, UCA, 1953. The language is intended to ensure the confidentiality of peer review, care review, and quality assurance processes and to ensure that the privilege is limited only to documents and information created specifically as part of the processes. It does not extend to knowledge gained or documents created outside or independent of the processes. The language is not intended to limit the court's existing ability, if it chooses, to review contested documents in camera in order to determine whether the documents fall within the privilege. The language is not intended to alter any existing law, rule, or regulation relating to the confidentiality, admissibility, or disclosure of proceedings before the **Utah** Division of Occupational and Professional Licensing. The Legislature intends that these privileges apply to all pending and future proceedings governed by court rules, including administrative proceedings regarding licensing and reimbursement.

(2) The Legislature does not intend that the amendments to this rule be construed to change or alter a final order concerning discovery matters entered on or before the effective date of this amendment.

(3) The Legislature intends to give the greatest effect to its amendment, as legally permissible, in matters that are pending on or may arise after the effective date of this amendment, without regard to when the case was filed.

LAW REVIEW AND JOURNAL COMMENTARIES

Appellate highlights. Rodney R. Parker and Julianne P. Blanch, 28-FEB **Utah** B.J. 38 (January/February, 2015).
Are medical records now off limits? An examination of Sorenson v. Barbuto. S. Grace Acosta, 22 **Utah** B.J. 17 (May/June, 2009).
Case Law Developments: The Work-Product Doctrine. Lauder, 1996 **Utah** L. Rev. 265 (1996).
Case Law Developments: Work Product Protection for an Insurer's Claim File. Smith, 1997 **Utah** L. Rev. 137 (1997).
AN EXPERT FOR ALL SEASONS: EXPERT TESTIMONY USUALLY REQUIRED, AND UNUSUALLY SPECIFIC. TANNER LENART, 27-APR **UTAH** B.J. 61 (2014).
How to Take an Out-of-State Deposition. Bushnell, 14 **Utah** B.J. 28 (Jan./Feb. 2001).
Standard 19. Donald J. Winder and Lance F. Sorenson, 20 **Utah** B.J. 41 (January/February 2007).
Talkin' ‘bout a revolution?: **Utah** overhauls its rules of civil discovery. Marc Therriern, 2011 **Utah** L. Rev. 669 (2011).

UNITED STATES CODE ANNOTATED

In general, see FRCP Rule **26** et seq.

Relevant Notes of Decisions (163)

View all 202

Notes of Decisions listed below contain your search terms.

In general

Trial court mooted for appeal purported creditor's argument that court erred in dismissing his debt collection claims for failure to comply with rules of civil procedure by not arranging for scheduling conference, in debtor's motion to dismiss for failure to prosecute, where court acknowledged that rule requiring a scheduling conference did not apply because some of the defendants were not represented by counsel, and court determined that the change in its analysis did not affect its original conclusion to

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dismiss for failure to prosecute. Velander v. LOL of Utah, LLC, 2015, 2015 UT App 171, 2015 WL 4130505. Appeal and Error 781(4)

Injured driver's failure to designate his witness as expert precluded consideration of witness' proposed opinion testimony regarding proper inspection and repair of tie rods on all terrain vehicle, in driver's action against mechanic for negligent inspection and repair of tie rods. Warenski v. Advanced RV Supply, 2011, 257 P.3d 1096, 685 Utah Adv. Rep. 50, 2011 UT App 197, certiorari denied 268 P.3d 192. Pretrial Procedure 45

An attorney has a responsibility to use the available discovery procedures to diligently represent her client, and in civil matters, Rules of Civil Procedure provide the means to do this. Rules of Prof.Conduct, Rule 1.3. Brown v. Glover, 2000, 16 P.3d 540, 408 Utah Adv. Rep. 12, 2000 UT 89, on remand 2001 UT App 52, 2001 WL 298577. Attorney And Client 112; Pretrial Procedure 11; Pretrial Procedure 24

Where wife filed divorce complaint and, before service of summons and without notice to husband, a hearing was held in which wife testified and thereafter an order for service of summons by publication was obtained and default of husband was entered upon his failure to answer and divorce was granted on basis of testimony which had been given by wife previously, court had no legal evidence before it upon which to grant divorce and exceeded its jurisdiction when it attempted to grant a divorce without first having taken legal evidence. U.C.A.1953, 30-3-4; Rules of Civil Procedure, rule 26 et seq. Treutle v. District Court of Salt Lake County, 1958, 7 Utah 2d 155, 320 P.2d 666. Divorce 146

Under Rules of Civil Procedure, pleadings are restricted to the task of general notice-giving, and the deposition-discovery process is invested with the vital role in the preparations of trial. Rules of Civil Procedure, rule 8(a). Blackham v. Snelgrove, 1955, 3 Utah 2d 157, 280 P.2d 453. Pleading 1; Pretrial Procedure 16; Pretrial Procedure 61

Construction and application

Rule with respect to discovery must be applied with common sense and within reasonable bounds consistent with its objective. Rules of Civil Procedure, rules 1(a), 30(b), 33. State By and Through Road Commission v. Petty, 1966, 17 Utah 2d 382, 412 P.2d 914. Pretrial Procedure 13

Nature and purpose of discovery

Rules authorizing discovery sanctions are aimed at encouraging good faith compliance with the discovery obligations imposed under the rules of civil procedure, and provide the court with the authority to sanction those who fail to live up to the requirements of those rules. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 Utah Adv. Rep. 22, 2012 UT App 61. Pretrial Procedure 44.1

Purpose of discovery rules is to facilitate fair trials with full disclosure of all relevant testimony and evidence. Roundy v. Staley, 1999, 984 P.2d 404, 374 Utah Adv. Rep. 15, 1999 UT App 229, certiorari denied 994 P.2d 1271. Pretrial Procedure 14.1

Discovery rules were intended to make procedure as simple and efficient as possible by eliminating any useless ritual, undue rigidities or technicalities and to remove elements of surprise or trickery, and accordingly rules should be liberally construed. Rules of Civil Procedure, rules 1(a), 26(b), 33. Ellis v. Gilbert, 1967, 19 Utah 2d 189, 429 P.2d 39. Pretrial Procedure 15

The objects and purposes of the Rules of Civil Procedure concerning discovery are to develop the truth and prevent surprise. Rules of Civil Procedure, rules 26(b), 30(b), 34. Mower v. McCarthy, 1952, 122 Utah 1, 245 P.2d 224. Pretrial Procedure 15

Because the courts at common law allowed parties to conceal from each other up to the time of trial the evidence on which they meant to rely, and would not compel either of them to supply the other with any evidence, the equitable remedy of bills

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for discovery to assist the prosecution or defense of an action pending in a court at law arose. Larson v. Salt Lake City, 1908, 34 Utah 318, 97 P. 483. Pretrial Procedure 14.1

Actions and proceedings in which discovery is available

Discovery is to be liberally permitted in condemnation cases. Utah Dept. of Transp. v. Rayco Corp., 1979, 599 P.2d 481. Pretrial Procedure 21

Right to discovery and grounds for allowance or refusal, generally

Former client violated discovery deadline by serving discovery on attorney in legal malpractice action on the last day for discovery, because attorney did not have time in which to respond. Dahl v. Harrison, 2011, 265 P.3d 139, 695 Utah Adv. Rep. 4, 2011 UT App 389, certiorari denied 275 P.3d 1019. Pretrial Procedure 25

Insofar as discovery will aid in eliminating noncontroversial matters and in identifying, narrowing and clarifying issues on which contest may prove to be necessary, it should be liberally permitted. Rules of Civil Procedure, rules 1(a), 30(b), 33. State By and Through Road Commission v. Petty, 1966, 17 Utah 2d 382, 412 P.2d 914. Pretrial Procedure 17.1; Pretrial Procedure 335

The fact that a party having peculiar knowledge of a matter fails to bring it forward does not furnish any basis for the court to make an order requiring such party to divulge his knowledge before trial to the adverse party, or to supply him with the means of obtaining it. Larson v. Salt Lake City, 1908, 34 Utah 318, 97 P. 483. Pretrial Procedure 17.1

Discretion of court

The trial court's failure to grant motorist's wife's request to extend the discovery deadlines so she could amend her expert designation list was not an abuse of discretion; the depositions of highway patrol officers occurred before wife's expert disclosures and reports were due, and wife admitted that she learned during the depositions which officer was most knowledgeable about the highway patrol diagram she desired to admit into evidence at trial, and thus which officer should be designated as an expert. Solis v. Burningham Enterprises Inc., 2015, 2015 UT App 11, 778 Utah Adv. Rep. 44, 2015 WL 178249. Pretrial Procedure 25

A trial court must exclude an expert witness disclosed after expiration of the established deadline unless the court chooses to exercise its equitable discretion. Callister v. Snowbird Corp., 2014, 2014 UT App 243, 771 Utah Adv. Rep. 43, 2014 WL 5305967. Pretrial Procedure 45

An abuse of discretion in the amount of a discovery sanction award may be demonstrated by showing that the district court relied on an erroneous conclusion of law or that there was no evidentiary basis for the trial court's ruling. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 Utah Adv. Rep. 22, 2012 UT App 61. Appeal and Error 961

To show that a trial court abused its discretion in choosing which discovery sanction to impose, a party must show either that the sanction is based on an erroneous conclusion of law or that the sanction lacks an evidentiary basis. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 Utah Adv. Rep. 22, 2012 UT App 61. Appeal and Error 961

Trial court did not abuse its discretion by awarding seller attorney fees incurred on seller's second motion for discovery sanctions, in purchaser's declaratory judgment action against seller of construction cranes and associate goodwill seeking to rescind its obligation to pay for goodwill and recover payments previously made, where information that seller had sought in discovery was pertinent to seller's defense, and purchaser's eventual admission, that crane trailer purchaser touted in a bank application was never built, should have been disclosed much earlier in the discovery process. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 Utah Adv. Rep. 22, 2012 UT App 61. Pretrial Procedure 44.1

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Trial courts have broad discretion regarding discovery matters, including protective orders. Smith v. Smith, 1999, 995 P.2d 14, 384 Utah Adv. Rep. 30, 1999 UT App 370, rehearing denied, certiorari denied 4 P.3d 1289. Pretrial Procedure 19; Pretrial Procedure 41

Generally, trial court is granted broad latitude in handling discovery matters. R & R Energies v. Mother Earth Industries, Inc., 1997, 936 P.2d 1068, 313 Utah Adv. Rep. 33, rehearing denied. Pretrial Procedure 19

Time, place, and manner requirements relating to discovery are committed to the discretion of the tribunal. Bennion v. Utah State Bd. of Oil, Gas & Min., 1983, 675 P.2d 1135. Pretrial Procedure 19

Tribunal has sufficient discretion to require discovery practices that are fair and effective in circumstances of pending controversy. Bennion v. Utah State Bd. of Oil, Gas & Min., 1983, 675 P.2d 1135. Pretrial Procedure 11

Wide latitude of discretion is vested in trial judge in determining whether good cause exists for requiring production of documents. Rules of Civil Procedure, rule 34. Jackson v. Kennecott Copper Corp., 1972, 27 Utah 2d 310, 495 P.2d 1254. Pretrial Procedure 336

Discovery methods and procedure

Burden is on the discovering party to be diligent in using the available procedures to obtain discovery, and to notify the court when a problem in doing so arises. Rules Civ.Proc., Rule 37. Brown v. Glover, 2000, 16 P.3d 540, 408 Utah Adv. Rep. 12, 2000 UT 89, on remand 2001 UT App 52, 2001 WL 298577. Pretrial Procedure 24

Sequence, timing, and condition of cause

The failure of third-party plaintiff property owners to take any steps in pursuit of their claim against title company between the time they purchased the cause of action back from bankruptcy trustee and the expert disclosure deadline was unjustified, and thus, the trial court did not abuse its discretion by declining to relieve the property owners of the automatic exclusion of their expert for their failure to disclose; even if the property owners were confused about their role in the case when the bankruptcy trustee was substituted, any doubt regarding their authority and responsibility to pursue their claim should have been resolved after they bought back the cause of action at auction. R.O.A. General, Inc. v. Chung Ji Dai, 2014, 2014 UT App 124, 761 Utah Adv. Rep. 10, 2014 WL 2441850. Pretrial Procedure 45

A discovery request must be served early enough that the responding party will have a full thirty days in which to respond before the discovery deadline. Dahl v. Harrison, 2011, 265 P.3d 139, 695 Utah Adv. Rep. 4, 2011 UT App 389, certiorari denied 275 P.3d 1019. Pretrial Procedure 25

Trial court properly granted protective order prohibiting any further discovery against county, in connection with action in which landowners challenged county's approval of construction of railroad loading facility, on basis that all of plaintiffs' substantive claims against county had been resolved when plaintiffs had earlier been granted partial summary judgment. Harper v. Summit County, 1998, 963 P.2d 768, 348 Utah Adv. Rep. 7, certiorari granted 982 P.2d 87, affirmed in part, reversed in part 26 P.3d 193, 414 Utah Adv. Rep. 21, 2001 UT 10, rehearing denied. Pretrial Procedure 25

Trial court did not err in striking student's motions to compel discovery after motion disposing of the case had been granted, since student could have preserved his right to discovery by seeking continuance of hearing on his first motion and, in view of dismissal, no purpose would be served by defendants' responding to outstanding request for discovery. Reece v. Board of Regents of State of Utah, 1987, 745 P.2d 457. Pretrial Procedure 25

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Scope of discovery--In general

Trial court acted within its discretion in granting protective order to limit plaintiff's discovery in action seeking recognition of an unsolemnized marriage, where plaintiff's counsel failed to meet with defendant's counsel or schedule a meeting, and order was granted two weeks before trial, after plaintiff had submitted certificate of readiness for trial one year earlier. Richards v. Brown, 2009, 222 P.3d 69, 642 **Utah** Adv. Rep. 25, 2009 UT App 315, certiorari granted 225 P.3d 880, affirmed on other grounds 274 P.3d 911, 704 **Utah** Adv. Rep. 39, 2012 UT 14. Pretrial Procedure 41

"Rebuttal evidence," which party need not disclose pursuant to discovery request, is that which a party may or may not use, depending on the testimony elicited at trial. (Per Greenwood, Associate P.J., with one Judge concurring in result.) Roundy v. Staley, 1999, 984 P.2d 404, 374 **Utah** Adv. Rep. 15, 1999 UT App 229, certiorari denied 994 P.2d 1271. Pretrial Procedure 38

Use of discovery should not be extended to permit ferreting unduly into detail, nor to have effect of cross-examining opposing party or his witnesses nor should it be distorted into fishing expedition in hope that something may be uncovered, but should be confined within proper limits of enabling parties to find out essential facts for legitimate objectives. Rules of Civil Procedure, rules 1(a), 30(b), 33. State By and Through Road Commission v. Petty, 1966, 17 **Utah** 2d 382, 412 P.2d 914. Pretrial Procedure 28

One means of accomplishing objectives of new Rules of Civil Procedure is to permit discovery of information which will aid in eliminating noncontroversial matters and identifying, narrowing and clarifying the issues on which contest may prove to be necessary. Rules of Civil Procedure, rules 1(a), 30(b), 33. State By and Through Road Commission v. Petty, 1966, 17 **Utah** 2d 382, 412 P.2d 914. Pretrial Procedure 27.1

---- Relevancy and materiality, scope of discovery

Ultimate objective of lawsuit is determination of dispute, and whatever helps attain that objective is "relevant" to lawsuit, within discovery rule. Rules of Civil Procedure, rule **26**(b). Ellis v. Gilbert, 1967, 19 **Utah** 2d 189, 429 P.2d 39. Pretrial Procedure 31

---- Probable admissibility at trial, scope of discovery

Report written by former engineer for truck manufacturer was not sufficiently connected to testimony of manufacturer's door latch expert to justify its admission in products liability action brought against truck manufacturer in order to impeach its expert; manufacturer's expert could not properly lay the foundation for the engineer's report because he was not involved in its preparations, and when questioned about his reliance on the engineer's report, expert stated that he had read the engineer's report, eliminated it from the possibilities, and did his own work. Clayton v. Ford Motor Co., 2009, 214 P.3d 865, 632 **Utah** Adv. Rep. 12, 2009 UT App 154, certiorari denied 221 P.3d 837. Evidence 560

Provision of discovery rule authorizing discovery of testimony even though it would not be admissible is not a restriction on inquiry allowed into any matter which is relevant to subject matter of action. Rules of Civil Procedure, rule **26**(b). Ellis v. Gilbert, 1967, 19 **Utah** 2d 189, 429 P.2d 39. Pretrial Procedure 32

---- Witnesses, scope of discovery

No expert report is required where the expert is the party's treating physician. Brussow v. Webster, 2011, 258 P.3d 615, 684 **Utah** Adv. Rep. 44, 2008 UT 6, 2011 UT App 193, certiorari denied 268 P.3d 192. Pretrial Procedure 39

In judicially imposing a deadline for the disclosure of witness lists in a civil case, a court must explicitly, either orally or in writing, impose a month and day deadline. Rules Civ.Proc., Rule 37(b)(2). Rehn v. Rehn, 1999, 974 P.2d 306, 363 **Utah** Adv. Rep. 8, 1999 UT App 41. Pretrial Procedure 40

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Requiring condemnor to answer as to what it contended was fair market value of property taken was proper, in condemnation proceeding, even though condemnor may have based his claim as to such value upon advice it had received from expert witnesses. Rules of Civil Procedure, rule 33. State By and Through Road Commission v. Petty, 1966, 17 Utah 2d 382, 412 P.2d 914. Pretrial Procedure 39

Requiring condemnor to state names and addresses of its witnesses in condemnation case was not improper particularly where they were supposed to be experts and credence to be given their testimony depended to large extent upon their qualifications. Rules of Civil Procedure, rule 33. State By and Through Road Commission v. Petty, 1966, 17 Utah 2d 382, 412 P.2d 914. Pretrial Procedure 40

Railroad's records of conclusions stated by its experts as to cause of railroad accident in which plaintiff's husband was killed were not discoverable even though denial of discovery would cause prejudice, hardship or injustice. Rules of Civil Procedure, rules 26(b), 30(b), 34. Mower v. McCarthy, 1952, 122 Utah 1, 245 P.2d 224. Pretrial Procedure 379

Under Rules of Civil Procedure, writing which reflects the conclusions of an expert based on assumed facts, but not containing evidence of events, conditions, circumstances and similar matters, is not discoverable. Rules of Civil Procedure, rules 26(b), 30(b), 34. Mower v. McCarthy, 1952, 122 Utah 1, 245 P.2d 224. Pretrial Procedure 379

---- Insurance, generally, scope of discovery

A showing of breach of express contract by insurer is not a condition precedent to an insured seeking discovery in connection with ongoing litigation of a bad faith claim. Christiansen v. Farmers Ins. Exchange, 2005, 116 P.3d 259, 523 Utah Adv. Rep. 12, 2005 UT 21, rehearing denied, on remand 2005 WL 4709726. Pretrial Procedure 37

Information underlying vehicle valuation comparison (VVC) completed by defendant motorist's insurer was irrelevant to automobile accident case brought by plaintiff truck owners, where defendant's stipulation in open court that she would not use the VVC at trial removed any need plaintiffs had for information to impeach the VVC and where plaintiffs had never suggested they would rely on the VVC at trial, and thus, information underlying the VVC was not subject to discovery. Rules Civ.Proc., Rule 26(b)(1); Rules of Evid., Rule 401. Major v. Hills, 1999, 980 P.2d 683, 369 Utah Adv. Rep. 24, 1999 UT 44. Pretrial Procedure 36.1

Information in possession of uninsured motorist (UM) carrier on similar accidents and injuries, its internal policies and procedures for handling UM claims, and internal aspects of processing of insured's claim were irrelevant in insured's tort suit in which carrier had intervened to dispute uninsured motorist's liability and damages, and, thus, information sought in interrogatories was not subject to discovery; information about other accidents and injuries would not assist in determining degree of negligence or dollar value of insured's injuries, and information on internal policies and procedures would be related only to hypothetical bad faith claim. Rules Civ.Proc., Rule 26(b)(1). Chatterton v. Walker, 1997, 938 P.2d 255, 312 Utah Adv. Rep. 3, rehearing denied. Pretrial Procedure 283

Copy of automobile liability policy of defendant motorist should be produced for plaintiff upon proper demand, but information regarding insurance should not be disclosed to jury. Rules of Civil Procedure, rules 26(b), 33. Young v. Barney, 1967, 20 Utah 2d 108, 433 P.2d 846. Pretrial Procedure 381

Defendant in automobile accident case must answer in discovery procedure whether she was insured, name of insurer, and amount of coverage. Rules of Civil Procedure, rules 1(a), 16, 26(b), 33. Ellis v. Gilbert, 1967, 19 Utah 2d 189, 429 P.2d 39. Pretrial Procedure 180

Privileged matters--In general

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Materials which are subject of protective order under Utah Rule of Civil Procedure governing protection from discovery for trade secret or other confidential research, development, or commercial information are not privileged for purposes of Freedom of Information Act trade secret exemption; rather, determination of whether documents contain trade secrets under Freedom of Information Act exemption is to be made solely by applying express exemption for trade secrets and confidential commercial or financial information found in exemption itself. 5 U.S.C.A. § 552(b)(4, 5); Utah Rules Civ.Proc., Rule 26(c)(7). Anderson v. Department of Health and Human Services, 1990, 907 F.2d 936. Records 59

The burden is on the party asserting a privilege to establish that the material sought is protected from discovery. Allred v. Saunders, 2014, 2014 UT 43, 2014 WL 5334034. Privileged Communications and Confidentiality 26

Trial court did not abuse its discretion by entering protective order prohibiting ethanol plant builder from obtaining discovery from city, which purchased electricity generated using energy from geothermal energy producer, of information that was allegedly secret, proprietary, and confidential, in builder's action against producer, claiming that producer had underpaid builder under settlement agreement requiring producer to pay builder amount based on percentage of producer's gross geothermal energy sales revenues; producer submitted affidavits demonstrating that builder was competitor of producer, and information was clearly outside realm of relevant information and was highly sensitive information that might have given builder competitive edge against producer in future energy ventures. Rules Civ.Proc., Rule 26(c). R & R Energies v. Mother Earth Industries, Inc., 1997, 936 P.2d 1068, 313 Utah Adv. Rep. 33, rehearing denied. Pretrial Procedure 41; Privileged Communications And Confidentiality 402

When statutory confidential information privilege or the common-law executive privilege is asserted in opposition to request for discovery, trial court must make an independent determination of extent to which the privilege applies to the material sought to be discovered; such determination is a result of the ad hoc balancing of the interests in the disclosure of the materials, and the government's interests in their confidentiality. U.C.A.1953, 78-24-8; Rules Civ.Proc., Rule 26(b)(1). Madsen v. United Television, Inc., 1990, 801 P.2d 912. Privileged Communications And Confidentiality 354

Where transcript of testimony given by railroad employees in railroad's own investigation of railroad accident did not constitute the reports of railroad accidents required by Federal statutes, discovery of transcript under Rules of Civil Procedure was not prohibited by those Federal statutes. Rules of Civil Procedure, rules 26(b), 30(b), 34; 45 U.S.C.A. §§ 38, 40, 41. Mower v. McCarthy, 1952, 122 Utah 1, 245 P.2d 224. Pretrial Procedure 389

---- Work product, privileged matters

Any material that would not have been generated but for the pendency or imminence of litigation receives attorney work product protection; by contrast, documents produced in the ordinary course of business or created pursuant to routine procedures or public requirements unrelated to litigation do not qualify as attorney work product. Schroeder v. Utah Attorney General's Office, 2015, 2015 UT 77, 794 Utah Adv. Rep. 109, 2015 WL 5037832. Pretrial Procedure 359

Documents created as part of a government actor's official duties receive no protection from disclosure under work product doctrine even if the documents are likely to be the subject of later litigation. Schroeder v. Utah Attorney General's Office, 2015, 2015 UT 77, 794 Utah Adv. Rep. 109, 2015 WL 5037832. Pretrial Procedure 359

Opinion work product, which includes mental impressions, conclusions, opinions or legal theories of an attorney or party, is afforded higher protection than fact work product; however, to utilize the opinion work product privilege, the party asserting it has the burden to establish that it is applicable. Southern Utah Wilderness Alliance v. Automated Geographic Reference Center, Division of Information Technology, 2008, 200 P.3d 643, 620 Utah Adv. Rep. 8, 2008 UT 88. Pretrial Procedure 35

Acts performed by a public employee in the performance of his official duties are not prepared in anticipation of litigation or for trial merely by virtue of the fact that they are likely to be the subject of later litigation; instead they are performed in the ordinary course of business and are not protected from disclosure under the work product doctrine. Southern Utah Wilderness

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Alliance v. Automated Geographic Reference Center, Division of Information Technology, 2008, 200 P.3d 643, 620 Utah Adv. Rep. 8, 2008 UT 88. Pretrial Procedure 36.1

Trial court could not order that death-sentenced defendant produce all documents relating to defendant's communications with appointed post-conviction counsel and pro-bono attorneys who originally represented defendant, for purposes of State's response to defendant's claim that he received ineffective assistance of post-conviction counsel, in motion to set aside default judgment dismissing post-conviction petition, until State first made showing that it had substantial need for documents which it could not, without undue hardship, obtain by other means, that communications were at issue, and that documents had been edited to prevent unnecessary disclosure of irrelevant information. Menzies v. Galetka, 2006, 150 P.3d 480, 567 Utah Adv. Rep. 15, 2006 UT 81. Criminal Law 1590

There is a sense in which an attorney's mental impressions, conclusions, and opinions of an attorney constitute the facts of the case and therefore may be discoverable; however, this exception must be applied very carefully in ineffective assistance of counsel cases because a discovery policy whereby counsel's files can be freely accessed in subsequent proceedings has the potential to significantly impair the trial preparation process. Menzies v. Galetka, 2006, 150 P.3d 480, 567 Utah Adv. Rep. 15, 2006 UT 81. Criminal Law 1590

Certain materials otherwise subject to discovery are, upon appropriate objection, protected from disclosure and introduction into evidence because of their creation by an attorney in preparation for litigation. Rules Civ.Proc., Rule 26(b)(3). Featherstone v. Schaerrer, 2001, 34 P.3d 194, 432 Utah Adv. Rep. 6, 2001 UT 86, rehearing denied. Pretrial Procedure 359

“Peace letter” in which insurer of both passenger who was injured in head-on collision, and driver of oncoming vehicle, had allegedly made unconditional promise to pay any judgment rendered against driver in action arising from collision, was prepared in anticipation of litigation, and thus was protected from discovery by attorney work-product privilege, even though letter was not prepared by an attorney. Rules Civ.Proc., Rule 26(b)(3). Green v. Louder, 2001, 29 P.3d 638, 426 Utah Adv. Rep. 25, 2001 UT 62. Pretrial Procedure 359

Therapy records of husband, wife, and children which independent custody evaluator relied on in recommending that wife's visitation be supervised were not prepared in anticipation of litigation, as required for discovery of documents prepared in anticipation of litigation. Rules Civ.Proc., Rule 26(b)(3). Smith v. Smith, 1999, 995 P.2d 14, 384 Utah Adv. Rep. 30, 1999 UT App 370, rehearing denied, certiorari denied 4 P.3d 1289. Divorce 85

Surveillance videotape of plaintiff was not protected from disclosure as attorney work-product in automobile negligence action, where videotape was prepared in anticipation of introduction at trial. (Per Greenwood, Associate P.J., with one Judge concurring in result.) Rules Civ.Proc., Rule 26(b)(1). Roundy v. Staley, 1999, 984 P.2d 404, 374 Utah Adv. Rep. 15, 1999 UT App 229, certiorari denied 994 P.2d 1271. Pretrial Procedure 383

While procedural rule mandates that protection against discovery of attorney's or representative's mental impressions, conclusions, opinions or legal theories be provided, such protections would not screen information directly at issue. Rules Civ.Proc., Rule 26(b)(3). Salt Lake Legal Defender Ass'n v. Uno, 1997, 932 P.2d 589, 309 Utah Adv. Rep. 11. Criminal Law 627.5(6)

In prisoner's action for postconviction relief based on claim of ineffective assistance of trial counsel, “at issue” exception to work product immunity did not apply across the board to documents and files in possession of legal defense association which had employed prisoner's trial counsel, but would only apply upon special showing by state for specific document; client's adversary was seeking access to files rather than client, at issue was performance of counsel during preparation and trial rather than solely counsel's internal processes in compiling file, and ineffective assistance of counsel was in significant part question of behavior observable from record and ascertainable from counsel's testimony. U.S.C.A. Const.Amend. 6; Rules Civ.Proc., Rule 26(b)(3). Salt Lake Legal Defender Ass'n v. Uno, 1997, 932 P.2d 589, 309 Utah Adv. Rep. 11. Criminal Law 1590

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Documents in insurance claim file may qualify for work-product protection if there is sufficient evidence to show that documents were prepared in anticipation of litigation. Rules Civ.Proc., Rule 26(b)(3). Askew v. Hardman, 1996, 918 P.2d 469. Pretrial Procedure 381

Documents in liability insurer's claim file, including insured horse owner's statement to adjuster following motor vehicle collision with horse, could be found to be protected as work product in tort action by injured passenger against owner; owner informed police of fear of suit for his animal causing the accident, insurer investigated pursuant to attorney's instructions for potential legal claims, and evidence thus indicated that documents were prepared in anticipation of litigation. Rules Civ.Proc., Rule 26(b)(3). Askew v. Hardman, 1996, 918 P.2d 469. Pretrial Procedure 381

Whether document prepared by insurer is prepared in anticipation of litigation and is protected work product is question of fact to be determined by trial court on basis of evidence before it. Rules Civ.Proc., Rule 26(b)(3). Askew v. Hardman, 1996, 918 P.2d 469. Pretrial Procedure 381

Court of Appeals erroneously concluded that document generated in investigation of accident involving insured and third party is generally discoverable; rather, documents in insurance claim file may be protected as work product. Rules Civ.Proc., Rule 26(b)(3). Askew v. Hardman, 1996, 918 P.2d 469. Pretrial Procedure 381

Case-by-case approach applies to determining whether documents in insurance claim file are protected work product prepared in anticipation of litigation; trial court should consider nature of requested documents, reason for preparation of documents, relationship between preparer of document and party seeking its protection from discovery, relationship between litigating parties, and any other facts relevant to the issue. Rules Civ.Proc., Rule 26(b)(3). Askew v. Hardman, 1996, 918 P.2d 469. Pretrial Procedure 381

Attorney need not be involved for document in insurance claim file to be deemed work product prepared in anticipation of litigation. Rules Civ.Proc., Rule 26(b)(3). Askew v. Hardman, 1996, 918 P.2d 469. Pretrial Procedure 381

Report prepared by insurance adjuster was not entitled to work-product protection; fact that no attorney was involved in preparation of claim file suggested that it was prepared in ordinary course of business, and not in anticipation of litigation. Rules Civ.Proc., Rule 26(b)(3). Askew v. Hardman, 1994, 884 P.2d 1258, certiorari granted 892 P.2d 13, reversed 918 P.2d 469. Pretrial Procedure 381

Documents which convey mental impressions, conclusions, opinions, or legal theories of attorney or party will be afforded heightened protection under work-product privilege as “opinion work product.” Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 359

Attorney involvement is only one factor to be weighed in reaching conclusion of whether documents sought in discovery are protected by work-product privilege; plain language of rule does not require that attorney be involved in preparation of material. Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 359

Fact that no attorney was involved may suggest that document was prepared in ordinary course of business and not in anticipation of litigation, so that work-product privilege would not apply. Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 359

Inquiry to determine whether document was prepared in anticipation of litigation for purposes of work-product privilege should focus on primary motivating purpose behind creation of document; if primary purpose behind creation of document is not to

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assist in pending or impending litigation, then work-product protection is not justified. Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 359

Inaction and delay of one year in filing motion for protective order constituted independent waiver of right to work product privilege over mining company memoranda discussing claim by mining partner of contractual requirement for independent feasibility study. Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 373

Mining company waived work-product privilege for memoranda discussing mining partner's claim regarding contract requirement for independent feasibility study where mining company allowed memoranda to become part of general reading file circulated among its employees without much regard for confidentiality and, as a result, employee obtained copies of memoranda and turned them over to mining partner; work-product protection was waived when disclosure substantially increased opportunity for potential adversaries to obtain information. Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 373

Inadvertent disclosure by mining company of memoranda discussing results of internal investigation resulted in waiver of work-product privilege regarding memoranda where mining company voluntarily produced memoranda in response to demand for production of documents, memoranda were used during five different depositions, and mining company did not file motion for protective order until full year after it knew that opponent had memoranda and until three months after their last use. Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 373

Letter whose tone is threatening but which does not state intent to pursue litigation is insufficient to allow party to invoke work-product protection to protect in-house report prompted by letter. Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 373

Mere possibility that litigation may occur, even mere fact that litigation does eventually ensue, is insufficient to cloak materials with mantle of work-product protection. Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 35

For written materials to fall under work-product protection, three criteria must be met: material must be documents and tangible things otherwise discoverable, prepared in anticipation of litigation or for trial, by or for another party or for or by that party's representative; even if these requirements are met, however, privilege does not apply if party seeking discovery can show need for information and that it cannot be obtained without substantial hardship. Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 35; Pretrial Procedure 359

Memoranda of mining company in response to letter from mining partner stating that mining company had not provided independent feasibility study as required by agreement were not written to assist in pending or impending litigation so that work-product privilege would not apply, even though mining partner filed lawsuit two and one-half years after letter, where letter addressed wrongs perceived by partner but did not threaten litigation, letter expressed partner's interest in purchasing mine from mining company, and memoranda were apparently written in ordinary course of business as part of mining company investigation to determine whether feasibility study had been performed. Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 373

Document must have been either created for use in pending or impending litigation or intended to generate ideas for use in such litigation to meet “prepared in anticipation of litigation or for trial” element of work product doctrine. Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 801 P.2d 909. Pretrial Procedure 359

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There are three essential requirements for materials to be protected by work product doctrine: material must consist of documents or tangible things; material must be prepared in anticipation of litigation or for trial; and material must be prepared by or for another party or by or for that party's representative. Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 801 P.2d 909. Pretrial Procedure 35; Pretrial Procedure 359

Letter to attorney outlining retainer agreement and setting plan for allocating costs and burdens among clients in event they should be involved in litigation was not protected by work product doctrine; although letter was prepared because of threatened suit against clients, its primary purpose was not to assist in pending or impending litigation. Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 801 P.2d 909. Pretrial Procedure 371

Condemnor's witness' appraisal report did not lie within protection of attorney's work product immunity from discovery, and refusal to order production of report for use in condemnee's cross-examination of such witness in eminent domain proceeding was prejudicial error. Rules of Civil Procedure, rules 1(a), 26(b)(4)(A); Const. art. 1, § 22. Utah Dept. of Transp. v. Rayco Corp., 1979, 599 P.2d 481. Eminent Domain 262(5); Pretrial Procedure 379

Record of emissions from defendant's smelter facilities, which plaintiffs suing for damage to their motor vehicles allegedly caused by emissions sought to examine, and which had been forwarded to defendant's legal counsel allegedly in anticipation of litigation, did not qualify as a "privileged communication." Jackson v. Kennecott Copper Corp., 1972, 27 Utah 2d 310, 495 P.2d 1254. Pretrial Procedure 359; Privileged Communications And Confidentiality 142

In Rules of Civil Procedure which allow discovery of various documents but which prohibit discovery of "any part of the writing" which is attorney's work product, use of the words "the writing" was proper and correct to refer to the writing of which discovery is sought, the reference being to a definite writing, and prohibition would be so construed to be in harmony with the purpose of protecting the work product of the attorney. Rules of Civil Procedure, rules 26(b), 30(b), 34. Mower v. McCarthy, 1952, 122 Utah 1, 245 P.2d 224. Pretrial Procedure 359

Where denial of discovery of document would have caused prejudice, hardship and injustice, document was discoverable without regard to whether it was prepared in anticipation of litigation or in preparation for trial. Rules of Civil Procedure, rules 26(b), 30(b), 34. Mower v. McCarthy, 1952, 122 Utah 1, 245 P.2d 224. Pretrial Procedure 359

Proceedings to secure production of documents and things--In general

Trial court did not abuse its discretion in excluding, as a discovery sanction, evidence of attorney fees incurred by assignee of deed of trust beneficiary after discovery cutoff date, and denying its request for additional attorney fees, in action against purchasers to foreclose on property purchasers acquired at a sheriff's sale, where purchasers requested that beneficiary produce "copies of all documents or other items" that it intended to introduce into evidence, and assignee's response stated that it had not yet designated documents for trial; under amended version of rule on a party's duty to supplement discovery responses, assignee had a duty seasonably to amend its prior response. Rules Civ.Proc., Rule 26(e). American Interstate Mortg. Corp. v. Edwards, 2002, 41 P.3d 1142, 439 Utah Adv. Rep. 20, 2002 UT App 16. Pretrial Procedure 403; Pretrial Procedure 434

Even if unamended version of rule requiring parties to supplement discovery responses applied, trial court did not abuse its discretion in imposing discovery sanctions excluding evidence of attorney fees incurred by assignee of deed of trust beneficiary after discovery cutoff, and denying assignee's request for additional attorney fees, in assignee's foreclosure action; assignee's responses to discovery requests were varied and contradictory, and responses did not identify what documents purchasers were entitled to inspect. Rules Civ.Proc., Rule 26(e). American Interstate Mortg. Corp. v. Edwards, 2002, 41 P.3d 1142, 439 Utah Adv. Rep. 20, 2002 UT App 16. Pretrial Procedure 403; Pretrial Procedure 434

Order compelling plaintiff to produce documents she alleged had been altered by defendants was essentially one demanding a response to discovery, not requiring document production only, and thus, even though plaintiff alleged that no altered documents

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existed, she was required to state so in written response. Rules Civ.Proc., Rules 26(c), 34(b), 37(b)(2)(C). Hales v. Oldroyd, 2000, 999 P.2d 588, 391 Utah Adv. Rep. 6, 2000 UT App 75, certiorari denied 4 P.3d 1289. Pretrial Procedure 403

---- Affidavits and showing, proceedings to secure production of documents and things

Good cause for production of documents is shown where the full, accurate disclosure of facts, which it is the purpose of the discovery process to secure, could not be accomplished through other means. Rules of Civil Procedure, rule 34. Jackson v. Kennecott Copper Corp., 1972, 27 Utah 2d 310, 495 P.2d 1254. Pretrial Procedure 405

Party moving for order compelling production of documents must make showing not only that the documents are relevant and are in the possession of the other party, but that the documents sought are necessary for proof of the case and either cannot be obtained in any other way or that obtaining them another way would involve extraordinary expense that the moving party should not in fairness be expected to bear. Rules of Civil Procedure, rule 34. Jackson v. Kennecott Copper Corp., 1972, 27 Utah 2d 310, 495 P.2d 1254. Pretrial Procedure 404.1

Determination that showing of good cause had been made to compel corporation operating smelter facilities to produce records of emissions for examination by plaintiffs who claimed their motor vehicles were damaged by acid or other harmful substances flowing into air about the smelter facilities was not an abuse of discretion. Rules of Civil Procedure, rule 34. Jackson v. Kennecott Copper Corp., 1972, 27 Utah 2d 310, 495 P.2d 1254. Pretrial Procedure 405

Defendant corporation asserting that record of emissions from smelter facilities which had been forwarded to legal counsel was not subject to discovery had burden of proving that the record was a privileged communication. Rules of Civil Procedure, rule 34. Jackson v. Kennecott Copper Corp., 1972, 27 Utah 2d 310, 495 P.2d 1254. Privileged Communications And Confidentiality 173

Elements of prejudice, hardship, or injustice necessary to the discovery of documents prepared in anticipation of litigation or in preparation for trial are sufficiently shown where party seeking discovery is with due diligence, unable to obtain evidence of some material facts, events, conditions and circumstances which the discovery will probably reveal, and where, because of this situation, the party is unable to adequately prepare the case for trial. Rules of Civil Procedure, rules 26(b), 30(b), 34. Mower v. McCarthy, 1952, 122 Utah 1, 245 P.2d 224. Pretrial Procedure 404.1

On motion for production of transcript of testimony by railroad employees given in railroad's investigation of 1944 accident, although plaintiff's showing on motion was only that her case was weak and was not necessarily that she had been unable to obtain evidence of the cause of the accident, in view of fact that witnesses who knew facts were employed by defendant and that until recently many of them were unknown to plaintiff and that facilities and equipment involved in the accident had at all times been under control of defendant and had not been available to plaintiff for inspection, showing was sufficient for granting of motion. Rules of Civil Procedure, rules 26(b), 30(b), 34. Mower v. McCarthy, 1952, 122 Utah 1, 245 P.2d 224. Pretrial Procedure 404.1

---- Determination, proceedings to secure production of documents and things

Trial court was required, under the new evidence exception to the law of the case doctrine, to reconsider previous order denying seller discovery sanctions on seller's first motion for sanctions, when trial court awarded seller sanctions on seller's second motion for discovery sanctions in declaratory judgment action purchaser brought against seller of construction cranes and associate goodwill seeking to rescind its obligation to pay for goodwill, where both sanction motions involved seller's discovery requests seeking information on purchaser's asserted collaboration with a crane broker on a custom designed crane trailer, purchaser's prior responses implied that the information existed though purchaser asserted that seller's requests were overbroad, and by the time that seller made second motion for sanctions purchaser had admitted that the trailer was never built. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 Utah Adv. Rep. 22, 2012 UT App 61. Courts 99(6)

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When official confidence privilege is claimed, trial court must balance competing interests through an in camera examination of the materials for which the privilege is claimed; such review enables trial court to allow or disallow discovery as to individual items for which the privilege is claimed, or to excise or edit from individual items those matters which it determines to come within the scope of the privilege, or to take other protective measures pursuant to civil procedure rule. Rules Civ.Proc., Rule 26(c); U.C.A.1953, 78-24-8. Madsen v. United Television, Inc., 1990, 801 P.2d 912. Privileged Communications And Confidentiality 351

Although ability of movant seeking order for production of documents to obtain the desired information by other means is relevant in determining existence of good cause, the real question is whether the movant can obtain the facts without production of the documents. Rules of Civil Procedure, rule 34. Jackson v. Kennecott Copper Corp., 1972, 27 Utah 2d 310, 495 P.2d 1254. Pretrial Procedure 411

Question whether portions of writings sought by discovery come within prohibitions protecting attorney's work product and expert's conclusions should be determined without permitting opposing counsel to see the questioned matter and, to do this, the parts of the transcript which it is claimed are not discoverable should be submitted to the court for it to decide. Rules of Civil Procedure, rules 26(b), 30(b), 34. Mower v. McCarthy, 1952, 122 Utah 1, 245 P.2d 224. Pretrial Procedure 411

Objections and protective orders

Patient waived her objection to hospital's use as trial exhibit a Computed Tomography (CT) scan that was not specifically identified during pretrial discovery process, in medical malpractice action, as patient specifically designated the CT scan as a trial exhibit and then used select images from it at trial, and patient failed to object to the listing of all of patient's medical records when she submitted her other objections to the hospital's trial exhibits. Turner v. University of Utah Hosp., 2011, 271 P.3d 156, 698 Utah Adv. Rep. 51, 2011 UT App 431, certiorari granted 280 P.3d 421, reversed 310 P.3d 1212, 741 Utah Adv. Rep. 51, 2013 UT 52. Pretrial Procedure 413.1

Insurer failed to show good cause for a protective order against discovery in insureds' bad faith suit, even though they had not yet established breach of contract; the claims of breach of express contract and bad faith were premised on distinct duties that gave rise to divergent and severable causes of action. Christiansen v. Farmers Ins. Exchange, 2005, 116 P.3d 259, 523 Utah Adv. Rep. 12, 2005 UT 21, rehearing denied, on remand 2005 WL 4709726. Pretrial Procedure 41

A party seeking a protective order has the burden of showing that good cause exists for issuance of that order. Christiansen v. Farmers Ins. Exchange, 2005, 116 P.3d 259, 523 Utah Adv. Rep. 12, 2005 UT 21, rehearing denied, on remand 2005 WL 4709726. Pretrial Procedure 41

District court is entrusted with broad discretion in dealing with discovery matters, including protective orders. In re Discipline of Pendleton, 2000, 11 P.3d 284, 405 Utah Adv. Rep. 3, 2000 UT 77. Pretrial Procedure 41

The failure to respond in writing to a discovery request is not excused on the basis that the discovery is objectionable, absent a written objection or motion for a protective order. Rules Civ.Proc., Rules 26(c), 34(b). Hales v. Oldroyd, 2000, 999 P.2d 588, 391 Utah Adv. Rep. 6, 2000 UT App 75, certiorari denied 4 P.3d 1289. Pretrial Procedure 41

Trial court did not abuse its discretion in issuing protective order preventing wife from discovering therapy records of husband, wife, and children which independent custody evaluator relied on in recommending that wife's visitation be supervised, where affidavits of child therapist and guardian ad litem stated release of records could be damaging to the children and the protective order was less restrictive of discovery than a similar protective order wife later requested. Rules Civ.Proc., Rule 26(c)(4). Smith v. Smith, 1999, 995 P.2d 14, 384 Utah Adv. Rep. 30, 1999 UT App 370, rehearing denied, certiorari denied 4 P.3d 1289. Divorce 86

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Rule of civil procedure providing for protective orders upon showing of good cause applies to public records, including judicial records, under the Public and Private Writings Act; the Act is intended to apply to documents filed in court in the absence of a specific order of court to the contrary. U.C.A.1953, 78-26-1 to 78-26-8; Rules Civ.Proc., Rules 26, 26(c), Const. Art. 8, § 4. Carter v. Utah Power & Light Co., 1990, 800 P.2d 1095. Records 32; Records 34

Pretrial depositions filed with clerk of court but not used by the litigants in court are "judicial records" and thus "public writing" subject to public access under the Public and Private Writings Act, absent a showing of good cause necessary to secure a protective order from the court; rule providing for sealing of such depositions is not a mandate for secrecy but is intended to safeguard the integrity of the depositions. U.C.A.1953, 78-26-1 to 78-26-8; Rules Civ.Proc., Rules 5(d), 26(c), 30(f)(1); Judicial Administration Rules 4-202, 4-502(4); Const. Art. 8, § 12. Carter v. Utah Power & Light Co., 1990, 800 P.2d 1095. Records 32

Sanctions for failure to disclose--In general

When reviewing the imposition of discovery sanctions, appellate courts first consider whether the district court has made a factual finding that the party's behavior merits sanctions, and any such finding will be upheld unless it is clearly erroneous. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 Utah Adv. Rep. 22, 2012 UT App 61. Appeal and Error 1024.3

District court made a factual finding that purchaser's behavior merited a discovery sanction, in purchaser's declaratory judgment action against seller of construction cranes and associate goodwill seeking to rescind its obligation to pay for goodwill and recover payments previously made, though the district court's finding stated that purchaser's positions in response to seller's discovery motions were inconsistent, where the court's imposition of a not insignificant sanction demonstrated that the court did not accept purchaser's explanations for the inconsistencies. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 Utah Adv. Rep. 22, 2012 UT App 61. Pretrial Procedure 44.1

Though a district court must find on the part of the noncomplying party willfulness, bad faith, fault, or persistent dilatory tactics frustrating the judicial process, prior to entering discovery sanctions, a trial court need not specifically state that willfulness, bad faith, fault, or persistent dilatory tactics are present to impose sanctions. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 Utah Adv. Rep. 22, 2012 UT App 61. Pretrial Procedure 44.1

Trial court was within its discretion in striking all but two of gym member's experts as sanction for member's failure to comply with discovery, in member's action for injuries sustained in trip and fall in gym parking lot; member filed expert designation well after deadline had passed, failed to include expert reports, identified one expert by first name only, and after a stipulated extension, only provided a report from only one of five designated experts. Johnson v. Gold's Gym, 2009, 206 P.3d 302, 626 Utah Adv. Rep. 6, 2009 UT App 76, certiorari denied 215 P.3d 161. Pretrial Procedure 45

Necessary prerequisite to imposition of sanction for party's failure to cooperate in discovery is order that brings the offender squarely within possible contempt of court. Rules Civ.Proc., Rules 26(f), 37(b)(2). Berrett v. Denver and Rio Grande Western R. Co., Inc., 1992, 830 P.2d 291, certiorari denied 836 P.2d 1383. Pretrial Procedure 44.1

---- Dismissal or striking of pleading, sanctions for failure to disclose

Trial court did not abuse its discretion in dismissing plaintiff's complaint as discovery sanction, where plaintiff failed to respond in any way to court order compelling her to produce documents she alleged had been altered, and record indicated that plaintiff had repeatedly delayed in responding to discovery, failed to timely file pleadings, and failed to timely provide specific witness lists. Rules Civ.Proc., Rules 26(c), 34(b), 37(b)(2)(C). Hales v. Oldroyd, 2000, 999 P.2d 588, 391 Utah Adv. Rep. 6, 2000 UT App 75, certiorari denied 4 P.3d 1289. Pretrial Procedure 46; Pretrial Procedure 435

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---- Preclusion of evidence or witnesses, sanctions for failure to disclose

Expert report which contained three new damages theories not disclosed during discovery was inadmissible in secondary lender's action against borrower and bank for unjust enrichment, fraud, and other tort claims; secondary lender disclosed during initial discovery period that its damages "constitute the funds advanced, together with interest at the legal rate, less the payment received" from primary lender and clarified in response to request for admission that he sought interest at the legal rate as provided by statute, report included three new damages theories, including the benefit of the bargain rule, the modified benefit of the bargain rule, and the comparable rate of return theory, secondary lender's citation to statute was insufficient to constitute disclosure of the "computation of any category of damages claimed by the disclosing party," and borrower and bank were prejudiced by the late disclosure due to their inability to discover asserted essential facts such at secondary lender's loan history and ability to lend money to others in lieu of loan which ultimately went to borrower. Bodell Const. Co. v. Robbins, 2009, 215 P.3d 933, 636 **Utah** Adv. Rep. 3, 2009 UT 52. Pretrial Procedure 45

Plaintiff's attorney should have anticipated that his failure to comply with defendant's discovery requests would result in sanctions of not allowing one witness to testify and limiting the testimony of another witness at negligence trial, and thus, relief from judgment on grounds that attorney was "surprised" by the sanctions was not warranted, even though attorney claimed he notified defense counsel orally of his intent to call a number of witnesses at trial, where attorney did not produce documents and expert reports in response to discovery requests and failed to supplement interrogatories, and attorney failed to identify witnesses in writing with required disclosures for expert witnesses. Rukavina v. Sprague, 2007, 170 P.3d 1138, 588 **Utah** Adv. Rep. 18, 2007 UT App 331. Pretrial Procedure 45; Pretrial Procedure 313; Pretrial Procedure 434

Trial court did not abuse its discretion in excluding independent medical examiner's testimony that it was nearly impossible that fall in parking lot caused plaintiff's back injury as discovery sanction for defendant's failure to supplement its responses to interrogatories asking defendant to articulate its affirmative defenses, where defendant did not provide examiner's causation opinion until three days before trial. Rules Civ.Proc., Rules **26**, 37(b)(2). Stevenett v. Wal-Mart Stores, Inc., 1999, 977 P.2d 508, 365 **Utah** Adv. Rep. 10, 1999 UT App 80. Pretrial Procedure 312

Trial court did not abuse its discretion in limiting independent medical examiner's testimony that it was nearly impossible that fall in parking lot caused plaintiff's back injury as discovery sanction for defendant's failure to give complete answer in its interrogatories regarding affirmative defenses it would assert, where defendant did not provide examiner's causation opinion until three days before trial. Rules Civ.Proc., Rules **26**, 37(b)(2). Stevenett v. Wal-Mart Stores, Inc., 1999, 977 P.2d 508, 365 **Utah** Adv. Rep. 10, 1999 UT App 80. Pretrial Procedure 312

Expert witnesses

Evidence supported finding that motorist's wife failed to timely disclose her intent to rely on highway patrol officer as an expert witness, in negligence action against defendant driver and others following fatal automobile accident; motorist's wife disclosed that officer would be a trial witness, but failed to designate officer as an expert. Solis v. Burningham Enterprises Inc., 2015, 2015 UT App 11, 778 **Utah** Adv. Rep. 44, 2015 WL 178249. Pretrial Procedure 39

The expert disclosure discovery rule contemplates that all persons who may provide opinion testimony based on experience or training will be identified, but that only retained or specially employed experts are required to also provide an expert report. Hansen v. Harper Excavating, Inc., 2014, 2014 UT App 180, 766 **Utah** Adv. Rep. 13, 2014 WL 3747546. Pretrial Procedure 40

Treating physicians do not fall into the category of "retained or specially employed" expert witnesses, and expert reports as mentioned in the expert disclosure discovery rule are not required for treating physicians who will testify as experts. Hansen v. Harper Excavating, Inc., 2014, 2014 UT App 180, 766 **Utah** Adv. Rep. 13, 2014 WL 3747546. Pretrial Procedure 39; Pretrial Procedure 40

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Treating physicians must be disclosed as expert witnesses under the expert disclosure discovery rule if they will provide opinion testimony based on their experience or training. Hansen v. Harper Excavating, Inc., 2014, 2014 UT App 180, 766 Utah Adv. Rep. 13, 2014 WL 3747546. Pretrial Procedure 40

Plaintiff's disclosure of his intent to call treating physicians as fact witnesses was not sufficient to allow the admission of their expert opinions on causation in negligence action; treating physicians were required to be designated as experts if they were to provide expert testimony. Hansen v. Harper Excavating, Inc., 2014, 2014 UT App 180, 766 Utah Adv. Rep. 13, 2014 WL 3747546. Pretrial Procedure 45

Third-party plaintiff property owners' challenge to the trial court's dismissal of their claim against title company for failure to prosecute, after they purchased their cause of action back from bankruptcy trustee, was moot, given their inability to establish damages after the automatic exclusion of their expert report for failing to comply with the discovery rules regarding disclosure of expert witnesses. R.O.A. General, Inc. v. Chung Ji Dai, 2014, 2014 UT App 124, 761 Utah Adv. Rep. 10, 2014 WL 2441850. Pretrial Procedure 587

Court of Appeals reviews district court's exclusion of expert for abuse of discretion. Townhomes at Pointe Meadows Owners Ass'n v. Pointe Meadows Townhomes, LLC, 2014, 755 Utah Adv. Rep. 49, 2014 UT App 52, 2014 WL 868707. Appeal and Error 961

Any error in district court's permitting psychiatric physician to testify as an expert was invited by Office of Professional Conduct (OPC) in attorney disciplinary proceeding, so that OPC could not take advantage of the alleged error on appeal; OPC asked physician on cross-examination to opine on causation of attorney's misconduct, thus "opening the door" to the very kind of expert testimony of which OPC complained on appeal. In re Discipline of Corey, 2012, 274 P.3d 972, 705 Utah Adv. Rep. 40, 2012 UT 21. Attorney And Client 57

An expert report in pretrial discovery in divorce proceedings is required only if not otherwise stipulated by the parties or ordered by the court. Liston v. Liston, 2011, 269 P.3d 169, 698 Utah Adv. Rep. 24, 2011 UT App 433. Divorce 85

Former client's expert disclosures in legal malpractice case were not timely, because they were clearly inadequate. Dahl v. Harrison, 2011, 265 P.3d 139, 695 Utah Adv. Rep. 4, 2011 UT App 389, certiorari denied 275 P.3d 1019. Pretrial Procedure 44.1

Formal disclosure of experts is not pointless; knowing the identity of the opponent's expert witnesses allows a party to properly prepare for trial, including attempting to disqualify the expert testimony, retaining rebuttal experts, and holding additional depositions to retrieve the information not available because of the absence of a report. Brussow v. Webster, 2011, 258 P.3d 615, 684 Utah Adv. Rep. 44, 2008 UT 6, 2011 UT App 193, certiorari denied 268 P.3d 192. Pretrial Procedure 40

Whether the cost rule allows recovery for expert preparation time is a question of law, and the trial court's legal conclusions are reviewed for correctness. Moore v. Smith, 2007, 158 P.3d 562, 2007 UT App 101, 574 Utah Adv. Rep. 15. Appeal and Error 842(2); Costs 208

Fees for expert time spent preparing for depositions are recoverable, as long as the fees are reasonable. Moore v. Smith, 2007, 158 P.3d 562, 2007 UT App 101, 574 Utah Adv. Rep. 15. Costs 187

When determining reasonableness of expert fees for time spent preparing for depositions, factors that can but are not required to be considered include the number of hours spent preparing for the deposition, the amount of material needing to be reviewed, the scope of the deposition, and the time between the expert's preparation of the report and the taking of the deposition. Moore v. Smith, 2007, 158 P.3d 562, 2007 UT App 101, 574 Utah Adv. Rep. 15. Costs 187

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Expert testimony changed

Changes to expert's deposition after again reviewing patient's records and reading a deposition of another expert were new testimony, rather than change or supplementation, and, therefore, were properly struck in medical malpractice action; the changes did not revise incorrect information and were not minor. Daniels v. Gamma West Brachytherapy, LLC, 2009, 221 P.3d 256, 640 **Utah** Adv. Rep. 8, 2009 UT 66, rehearing denied. Pretrial Procedure 202

Written expert report

Good cause did not exist for townhome association's failure to comply with deadline for submitting expert report specified in amended case management order in construction defect action, such that trial court did not abuse its discretion in excluding association's expert, despite argument that association had agreement with developer to modify order to extend deadline; third-party defendants had also agreed to be bound by order, and reliance on agreement with only some defendants was unreasonable and did not justify extension of discovery deadline. Townhomes at Pointe Meadows Owners Ass'n v. Pointe Meadows Townhomes, LLC, 2014, 755 **Utah** Adv. Rep. 49, 2014 UT App 52, 2014 WL 868707. Pretrial Procedure 45

Townhome association's failure to timely disclose its expert in construction defect action was not harmless, such that trial court did not abuse its discretion in excluding expert, despite contention that association's final expert report would be “largely identical” to its preliminary report; preliminary report failed to properly identify association's expert in such a way as to enable developer and subcontractors to depose expert, attempt to disqualify expert, or retain rebuttal experts, report did not address scope of claimed damages, and substantial discovery would need to be revisited or performed to respond to disclosure. Townhomes at Pointe Meadows Owners Ass'n v. Pointe Meadows Townhomes, LLC, 2014, 755 **Utah** Adv. Rep. 49, 2014 UT App 52, 2014 WL 868707. Pretrial Procedure 45

Treating physician who planned to testify at trial was not retained or specially employed to testify, and therefore was not required to file written expert report pursuant to rule governing production of written expert reports in action by motorcyclist against driver of automobile arising from automobile accident; plain language of rule suggested that a “retained or specially employed” expert was a person a party hired and paid to express a particular expert opinion for the purposes of litigation, and the substance, sources, or scope of the physician's proposed testimony was irrelevant, as the court simply looked to the status of the individual as a treating physician. Drew v. Lee, 2011, 250 P.3d 48, 678 **Utah** Adv. Rep. 4, 2011 UT 15. Pretrial Procedure 379

Jurisdiction

Trial courts may determine jurisdiction on affidavits alone, permit discovery, or hold an evidentiary hearing. (Per Durham, J., with one Justice concurring and two Justices concurring in the result.) Phone Directories Co., Inc. v. Henderson, 2000, 8 P.3d 256, 402 **Utah** Adv. Rep. 7, 2000 UT 64. Courts 39; Pretrial Procedure 24

Admissibility of evidence

Plaintiff's untimely designation of expert witnesses prejudiced defendant in negligence action arising out of automobile accident, and therefore trial court properly excluded testimony of witnesses, where untimely disclosure impaired defendant's ability to defend against plaintiff's claims because defendant did not have opportunity to depose expert witnesses, and fact witnesses' memories could have faded due to protracted nature of the litigation. Brussow v. Webster, 2011, 258 P.3d 615, 684 **Utah** Adv. Rep. 44, 2008 UT 6, 2011 UT App 193, certiorari denied 268 P.3d 192. Pretrial Procedure 45

Sufficiency of evidence

Evidence was sufficient to establish that purchaser of construction cranes and associated goodwill engaged in actions that warranted the imposition of discovery sanctions, in purchaser's declaratory judgment action against seller seeking to rescind its obligation to pay for goodwill and recover payments previously made; there was evidence that purchaser was aware at hearing on seller's second motion to compel that seller was seeking information regarding the time frame of purchaser's asserted

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collaboration with a crane broker on a custom designed crane trailer, that purchaser's responses implied that the subject matter of the requests was extant though purchaser objected that the requests were overbroad, that seller was thus encouraged to pursue the information through additional discovery and judicial resources, and that purchaser through reasonable inquiry could have determined that the trailer was never built. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 Utah Adv. Rep. 22, 2012 UT App 61. Pretrial Procedure 44.1

Summary judgment

Purpose of discovery and of summary judgment procedures is to furnish method of searching out and facilitating resolution of issues which are not in dispute, and of settling rights of parties without time, trouble and expense of trial, and it is indispensable to carrying out of that purpose that parties furnish essential information when it is requested in conformity with rules of procedure. Rules of Civil Procedure, rules 31, 33, 37, 56(c). Transamerica Title Ins. Co. v. United Resources, Inc., 1970, 24 Utah 2d 346, 471 P.2d 165. Judgment 178; Pretrial Procedure 14.1; Pretrial Procedure 15

New trial

There was no error in denial of new trial on theory of surprise testimony where pretrial statement of officer who investigated accident, stating that plaintiff had said that he could not get out of way of automobile before it struck him, was not necessarily inconsistent with officer's trial testimony that plaintiff said he had “sprinted” across the road, and since the “surprise” claimed could not be so categorized since it could have been easily guarded against by the utilization of available discovery procedures. Rules of Civil Procedure, rules 26 et seq., 59, 59(a)(3). Anderson v. Bradley, 1979, 590 P.2d 339. New Trial 90; New Trial 95

Plaintiff in automobile accident case was not entitled to a new trial on the ground that he was surprised by testimony of defendant's expert witness regarding the cause of plaintiff's transient ischemic attacks, since plaintiff failed to timely object to the witness' testimony; in view of the fact that defendant, in answer to an interrogatory, had stated in substance that she would call the witness to testify concerning Raynaud's disease, an objection by plaintiff should have been immediately made when the witness at trial mentioned transient ischemic attacks and added “which I imagine, would be pertinent to address here.” Rules of Civil Procedure, rules 26(e)(1), 59(a)(3). Jensen v. Thomas, 1977, 570 P.2d 695. New Trial 97

Costs

In order to support award of prevailing costs for copies of depositions of patient and her husband, and members of patient's family, copies had to be essential to prevailing hospital's defense of malpractice case; finding that costs were “reasonable and necessary” was insufficient by itself, even if plaintiff's deposition was included in trial record and several depositions were used for impeachment. Young v. State, 2000, 16 P.3d 549, 409 Utah Adv. Rep. 3, 2000 UT 91. Costs 154; Costs 208

Absent showing that deposition of patient's expert was necessary to develop hospital's defense to malpractice claim, prevailing hospital would not be entitled to award of costs for deposition, notwithstanding fact that expert's opinion was necessary for patient to make her case. Young v. State, 2000, 16 P.3d 549, 409 Utah Adv. Rep. 3, 2000 UT 91. Costs 154

Prevailing party may recover deposition costs as long as the trial court is persuaded that the depositions were taken in good faith and, in the light of the circumstances, appeared to be essential for the development and presentation of the case. Young v. State, 2000, 16 P.3d 549, 409 Utah Adv. Rep. 3, 2000 UT 91. Costs 154

Costs of depositions not used at trial may be recovered if the trial court determines, in addition to finding that deposition was taken in good faith, that the deposition was essential to the case, either because the deposition was used in some meaningful way at trial or because the development of the case was of such a complex nature that the information provided by the deposition could not have been obtained through less expensive means of discovery. Young v. State, 2000, 16 P.3d 549, 409 Utah Adv. Rep. 3, 2000 UT 91. Costs 154

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Copies of patient's depositions of hospital's doctors were not essential to hospital's defense of malpractice claim, as would permit hospital to recover cost of copies as prevailing party in suit, where depositions were of hospital's own employees, were used only by plaintiff in her case in chief, and hospital had other methods of acquiring information contained in depositions. Young v. State, 2000, 16 P.3d 549, 409 **Utah** Adv. Rep. 3, 2000 UT 91. Costs 154

Witness fee of $1,000 paid by hospital to secure attendance of patient's expert at his deposition, to extent it exceeded witness fee allowed by statute, was not recoverable by hospital as part of prevailing party costs. U.C.A.1953, 21-5-4; Rules Civ.Proc., Rule 30(a). Young v. State, 2000, 16 P.3d 549, 409 **Utah** Adv. Rep. 3, 2000 UT 91. Costs 187

Review--In general

If a finding that a party's conduct merits discovery sanctions has been made and upheld on appeal, an appellate court will not disturb the amount of the sanction unless abuse of discretion is clearly shown. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 **Utah** Adv. Rep. 22, 2012 UT App 61. Appeal and Error 961

Denial of motion for a protective order is reviewed for an abuse of discretion, but to extent that the denial is based on the district court's interpretation of binding case law, it is reviewed for correctness. Christiansen v. Farmers Ins. Exchange, 2005, 116 P.3d 259, 523 **Utah** Adv. Rep. 12, 2005 UT 21, rehearing denied, on remand 2005 WL 4709726. Appeal And Error 840(4); Appeal And Error 961

Generally, the trial court is granted broad latitude in handling discovery matters, and appellate courts will not find abuse of discretion absent an erroneous conclusion of law or where there is no evidentiary basis for the trial court's rulings. Thurston v. Workers Compensation Fund of **Utah**, 2003, 83 P.3d 391, 490 **Utah** Adv. Rep. 9, 2003 UT App 438. Appeal And Error 961; Pretrial Procedure 19

Trial court's grant of protective discovery order and order disqualifying counsel are reviewed for an abuse of discretion. Rules Civ.Proc., Rule **26**. Spratley v. State Farm Mut. Auto. Ins. Co., 2003, 78 P.3d 603, 2003 UT 39, rehearing denied. Appeal And Error 949; Appeal And Error 961

Assignee of deed of trust beneficiary did not preserve for appellate review claim that trial court improperly applied the amended version of rule on a party's duty to supplement discovery responses, instead of the unamended version, in action to foreclose on property acquired by purchasers at a sheriff's sale; assignee did not raise that issue at trial, and argued it for the first time in his appellate brief. Rules Civ.Proc., Rule **26**(e). American Interstate Mortg. Corp. v. Edwards, 2002, 41 P.3d 1142, 439 **Utah** Adv. Rep. 20, 2002 UT App 16. Appeal And Error 199

Trial courts have broad discretion in matters of discovery, and their determinations regarding such matters are reviewed for abuse of discretion. Green v. Louder, 2001, 29 P.3d 638, 426 **Utah** Adv. Rep. 25, 2001 UT 62. Appeal And Error 961; Pretrial Procedure 19

Failure to require defendant in automobile negligence action to disclose surveillance videotape of plaintiff and the identity of its preparer was harmful error in action in which videotape and preparer's testimony were admitted to show plaintiff's injuries were less severe than she alleged; while jury did not reach damages issue because it found plaintiff more than 50 percent at fault in accident, the determination of liability hinged on parties' credibility, and plaintiff's credibility was directly undermined by evidence in question. (Per Greenwood, Associate P.J., with one Judge concurring in result.) Rules Civ.Proc., Rule **26**(b)(1). Roundy v. Staley, 1999, 984 P.2d 404, 374 **Utah** Adv. Rep. 15, 1999 UT App 229, certiorari denied 994 P.2d 1271. Appeal And Error 1043(6)

Trial court committed prejudicial error in denying tort plaintiff's discovery request for report prepared by defendant's insurance adjuster where defendant did not demonstrate that denial of discovery request was not prejudicial. Rules Civ.Proc., Rule **26**(b)

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(3). Askew v. Hardman, 1994, 884 P.2d 1258, certiorari granted 892 P.2d 13, reversed 918 P.2d 469. Appeal And Error 1043(6); Pretrial Procedure 381

Allegedly erroneous admission of testimony of defense expert who was identified for plaintiff 12 days before trial did not prejudice plaintiff; expert was one of five defense experts in response to testimony of plaintiff's 15 experts; and plaintiff thoroughly cross-examined expert. Rules Civ.Proc., Rules **26**(e)(1), 61; U.C.A.1953, 41-6-46(1)(1981). Onyeabor v. Pro Roofing, Inc., 1990, 787 P.2d 525. Appeal And Error 1043(1)

Refusal of court to permit defendant in special statutory action to remove city commissioner from malfeasance in office from taking depositions of witnesses, was error, but did not result in any prejudice to commissioner who had examined testimony which witnesses had given before grand jury, received answers to interrogatories submitted to district attorney and had procured substantially all discoverable information in action. U.C.A.1953, 77-7-1, 77-7-2, 77-7-11; Rules of Civil Procedure, rules 1, 61, 81. State v. Geurts, 1961, 11 **Utah** 2d 345, 359 P.2d 12. Appeal And Error 1170.6; Pretrial Procedure 61

---- Standard of review, review

In reviewing the imposition of discovery sanctions, an appellate court applies a two-part approach: (1) the court considers whether the district court was justified in ordering sanctions, and (2) the court then reviews the type and amount of sanctions for abuse of discretion. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 **Utah** Adv. Rep. 22, 2012 UT App 61. Appeal and Error 840(4); Appeal and Error 961

An appellate court will affirm an award of discovery sanctions so long as the findings appear in the lower court's opinion or elsewhere to sufficiently indicate the factual basis for the ultimate conclusion, or where there is evidence in the record to support the award. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 **Utah** Adv. Rep. 22, 2012 UT App 61. Appeal and Error 1024.3

Rules **Civ**. Proc., Rule **26**, UT R RCP Rule **26**
current with amendments received through December 1, 2015.

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Arizona Revised Statutes Annotated
Rules of Civil Procedure for the Superior Courts of Arizona (Refs & Annos)
V. Depositions and Discovery (Refs & Annos)

16 A.R.S. Rules of Civil Procedure, Rule 26.1

Rule 26.1. Prompt disclosure of information

Currentness

(a) Duty to Disclose, Scope. Within the times set forth in subdivision (b), each party shall disclose in writing to every other party:

(1) The factual basis of the claim or defense. In the event of multiple claims or defenses, the factual basis for each claim or defense.

(2) The legal theory upon which each claim or defense is based including, where necessary for a reasonable understanding of the claim or defense, citations of pertinent legal or case authorities.

(3) The names, addresses, and telephone numbers of any witnesses whom the disclosing party expects to call at trial with a fair description of the substance of each witness' expected testimony.

(4) The names and addresses of all persons whom the party believes may have knowledge or information relevant to the events, transactions, or occurrences that gave rise to the action, and the nature of the knowledge or information each such individual is believed to possess.

(5) The names and addresses of all persons who have given statements, whether written or recorded, signed or unsigned, and the custodian of the copies of those statements.

(6) The name and address of each person whom the disclosing party expects to call as an expert witness at trial, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, the qualifications of the witness and the name and address of the custodian of copies of any reports prepared by the expert.

(7) A computation and the measure of damage alleged by the disclosing party and the documents or testimony on which such computation and measure are based and the names, addresses, and telephone numbers of all damage witnesses.

(8) The existence, location, custodian, and general description of any tangible evidence, relevant documents, or electronically stored information that the disclosing party plans to use at trial and relevant insurance agreements.

(9) A list of the documents or electronically stored information, or in the case of voluminous documentary information or electronically stored information, a list of the categories of documents or electronically stored information, known by a party

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to exist whether or not in the party's possession, custody or control and which that party believes may be relevant to the subject matter of the action, and those which appear reasonably calculated to lead to the discovery of admissible evidence, and the date(s) upon which those documents or electronically stored information will be made, or have been made, available for inspection, copying, testing or sampling. Unless good cause is stated for not doing so, a copy of the documents and electronically stored information listed shall be served with the disclosure. If production is not made, the name and address of the custodian of the documents and electronically stored information shall be indicated. A party who produces documents for inspection shall produce them as they are kept in the usual course of business.

COURT COMMENT TO 1991 AMENDMENT

In March, 1990 the Supreme Court, in conjunction with the State Bar of Arizona, appointed the Special Bar Committee to Study Civil Litigation Abuse, Cost and Delay, which was specifically charged with the task of studying problems pertaining to abuse and delay in civil litigation and the cost of civil litigation.

Following extensive study, the Committee concluded that the American system of civil litigation was employing methods which were causing undue expense and delay and threatening to make the courts inaccessible to the average citizen. The Committee further concluded that certain adjustments in the system and the Arizona Rules of Civil Procedure were necessary to reduce expense, delay and abuse while preserving the traditional jury trial system as a means of resolution of civil disputes.

In September, 1990 the Committee proposed a comprehensive set of rule revisions, designed to make the judicial system in Arizona more efficient, more expeditious, less expensive, and more accessible to the people. It was the goal of the Committee to provide a framework which would allow sufficient discovery of facts and information to avoid “litigation by ambush.” At the same time, the Committee wished to promote greater professionalism among counsel, with the ultimate goal of increasing voluntary cooperation and exchange of information. The intent of the amendments was to limit the adversarial nature of proceedings to those areas where there is a true and legitimate dispute between the parties, and to preclude hostile, unprofessional, and unnecessarily adversarial conduct on the part of counsel. It was also the intent of the rules that the trial courts deal in a strong and forthright fashion with discovery abuse and discovery abusers.

After a period of public comment and experimental implementation in four divisions of the Superior Court in Maricopa County, the rule changes proposed by the Committee were promulgated by the Court on December 18, 1991, effective July 1, 1992.

COMMITTEE COMMENT TO 1991 AMENDMENT

This addition to the rules is intended to require cooperation between counsel in the handling of civil litigation. The Committee has endeavored to set forth those items of information and evidence which should be promptly disclosed early in the course of litigation in order to avoid unnecessary and protracted discovery as well as to encourage early evaluation, assessment and possible disposition of the litigation between the parties.

It is the intent of the Committee that there be a reasonable and fair disclosure of the items set forth in Rule 26.1 and that the disclosure of that information be reasonably prompt. The intent of the Committee is to have newly discovered information exchanged with reasonable promptness and to preclude those attorneys and parties who intentionally withhold such information from offering it later in the course of litigation.

The Committee originally considered including in Rule 26.1(a)(5) a requirement for disclosure of all cases in which an expert had testified within the prior five (5) years. The Committee recognized in its deliberations that information as to such cases might be important in certain types of litigation and not in others. On balance, it was decided that it would be burdensome to require this information in all cases.

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COMMITTEE COMMENT TO 1996 AMENDMENT

Rule 26.1(a)(3). With regard to the degree of specificity required for disclosing witness testimony, it is the intent of the rule that parties must disclose the substance of the witness' expected testimony. The disclosure must fairly apprise the parties of the information and opinion known by that person. It is not sufficient to simply describe the subject matter upon which the witness will testify.

Rule 26.1(a)(5) was not intended to require automatic production of statements. Production of statements remains subject to the provisions of Rule 26(b)(3).

Rule 26.1(a)(6). A specially retained expert as described in Rule 26(b)(4)(B) is not required to be disclosed under Rule 26.1.

(b) Time for Disclosure; a Continuing Duty.

(1) The parties shall make the initial disclosure required by subdivision (a) as fully as then possible within forty (40) days after the filing of a responsive pleading to the Complaint, Counterclaim, Crossclaim or Third Party Complaint unless the parties otherwise agree, or the Court shortens or extends the time for good cause. If feasible, counsel shall meet to exchange disclosures; otherwise, the disclosures shall be served as provided by Rule 5. In domestic relations cases involving children whose custody is at issue, the parties shall make disclosure regarding custody issues no later than 30 days after mediation of the custody dispute by the conciliation court or a third party results in written notice acknowledging that mediation has failed to settle the issues, or at some other time set by court order.

(2) The duty prescribed in subdivision (a) shall be a continuing duty, and each party shall make additional or amended disclosures whenever new or additional information is discovered or revealed. Such additional or amended disclosures shall be made seasonably, but in no event more than thirty (30) days after the information is revealed to or discovered by the disclosing party. A party seeking to use information which that party first disclosed later than (A) the deadline set in a Scheduling Order, or (B) in the absence of such deadline, sixty (60) days before trial, must seek leave of court to extend the time for disclosure as provided in Rule 37(c)(2) or (c)(3).

(3) All disclosures shall include information and data in the possession, custody and control of the parties as well as that which can be ascertained, learned or acquired by reasonable inquiry and investigation.

COMMITTEE COMMENT TO 1991 AMENDMENT

The Committee does not intend to affect in any way, any party's right to amend or move to amend or supplement pleadings as provided in Rule 15.

COURT COMMENT TO 1991 AMENDMENT

The above rule change was part of a comprehensive set of rule revisions proposed by the Special Bar Committee to Study Civil Litigation Abuse, Cost and Delay, which was specifically charged in March, 1990 with the task of proposing rules to reduce discovery abuse and to make the judicial system in Arizona more efficient, expeditious, and accessible to the people.

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For more complete background information on the rule changes proposed by the Committee, see Court Comment to Rule 26.1(a).

(c) Deleted effective Dec. 1, 1996.

(d) Signed Disclosure. Each disclosure shall be made in writing under oath, signed by the party making the disclosure.

(e) Deleted effective Dec. 1, 1996.

COMMITTEE COMMENT TO 1991 AMENDMENT

Rule 26.1(e) is intended specifically to deal with the party and/or attorney who makes intentionally inaccurate or misleading responses to discovery.

COURT COMMENT TO 1991 AMENDMENT

The above rule change was part of a comprehensive set of rule revisions proposed by the Special Bar Committee to Study Civil Litigation Abuse, Cost and Delay, which was specifically charged in March, 1990 with the task of proposing rules to reduce discovery abuse and to make the judicial system in Arizona more efficient, expeditious, and accessible to the people.

For more complete background information on the rule changes proposed by the Committee, see Court Comment to Rule 26.1(a).

(f) Claims of Privilege or Protection of Trial Preparation Materials.

(1) *Information Withheld*. When information is withheld from disclosure or discovery on a claim that it is privileged or subject to protection as trial-preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced or disclosed that is sufficient to enable other parties to contest the claim.

(2) *Information Produced*. If a party contends that information subject to a claim of privilege or of protection as trial-preparation material has been inadvertently disclosed or produced in discovery, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has made and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

STATE BAR COMMITTEE NOTE
2008 Amendment

As with its federal counterpart, the amendment is intended merely to place a “hold” on further use or dissemination of an inadvertently produced document that is subject to a privilege claim until a court resolves its status or the parties agree to an appropriate disposition. The amendment, however, “does not address whether the privilege or protection

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that is asserted after production was waived by the production." Fed. R. Civ. P. 26(b)(5)(B), Advisory Committee Notes on 2006 Amendment.

(g) Deleted effective Dec. 1, 1996.

Credits

Added Dec. 20, 1991, effective July 1, 1992. Amended May 30, 1996, effective Dec. 1, 1996; Nov. 22, 1996, effective March 1, 1997; Sept. 5, 2007, effective Jan. 1, 2008; Dec. 20, 1991, effective July 1, 1992; July 31, 2014, effective July 31, 2014, subject to the applicability provisions of Arizona Supreme Court Order No. R-13-0017.

Editors' Notes

GUIDELINES FOR RULE 26.1 [WITHDRAWN]

Court Note

Rule 26.1 Guidelines have been withdrawn because of rule changes and court opinions that have been adopted or issued since the Guidelines were adopted.

APPLICATION

<Order R-05-0008 dated October 10, 2005, effective January 1, 2006, provided, "with respect to family law cases pending as of January 1, 2006, that if disclosure was previously made pursuant to Rule 26.1, Arizona Rules of Civil Procedure, further disclosure shall not be required under Rule 49 or 50 of the Arizona Rules of Family Law Procedure, except for the duty to seasonably supplement the earlier disclosure.">

<The text of this rule which is effective March 1, 1997 is inapplicable to cases which are set for trial between March 1 and April 30, 1997.>

Notes of Decisions (90)

16 A. R. S. Rules Civ. Proc., Rule 26.1, AZ ST RCP Rule 26.1
Arizona State court rules are current with amendments received through 10/15/15

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TX Rules of Civil Procedure, Rule 194.2

194.2. Content

Currentness

A party may request disclosure of any or all of the following:

(a) the correct names of the parties to the lawsuit;

(b) the name, address, and telephone number of any potential parties;

(c) the legal theories and, in general, the factual bases of the responding party's claims or defenses (the responding party need not marshal all evidence that may be offered at trial);

(d) the amount and any method of calculating economic damages;

(e) the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case;

(f) for any testifying expert:

(1) the expert's name, address, and telephone number;

(2) the subject matter on which the expert will testify;

(3) the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting such information;

(4) if the expert is retained by, employed by, or otherwise subject to the control of the responding party:

(A) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony; and

(B) the expert's current resume and bibliography;

(g) any indemnity and insuring agreements described in Rule 192.3(f);

(h) any settlement agreements described in Rule 192.3(g);

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(i) any witness statements described in Rule 192.3(h);

(j) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills that are reasonably related to the injuries or damages asserted or, in lieu thereof, an authorization permitting the disclosure of such medical records and bills;

(k) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills obtained by the responding party by virtue of an authorization furnished by the requesting party;

(l) the name, address, and telephone number of any person who may be designated as a responsible third party.

Credits

Aug. 5, 1998, Nov. 9, 1998 and Dec. 31, 1998, eff. Jan. 1, 1999. Amended by order of March 3, 2004, eff. March 3, 2004.

Notes of Decisions (50)

Vernon's Ann. Texas Rules Civ. Proc., Rule 194.2, TX R RCP Rule 194.2

Rules of Civil Procedure, Rules of Evidence, and Rules of Appellate Procedure are current with amendments received through September 1, 2015. Bar Rules, Rules of Disciplinary Procedure, Code of Judicial Conduct, and Rules of Judicial Administration are current with amendments received through September 1, 2015. Other state court rules and selected county rules are current with rules verified through June 1, 2015.

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EX. 4

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126-002394

A Study of Civil Case Disposition Time in U.S. District Courts

Donna Stienstra

Federal Judicial Center

May 2015

This Federal Judicial Center publication was undertaken in furtherance of the Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. While the Center regards the content as responsible and valuable, this publication does not reflect policy or recommendations of the Board of the Federal Judicial Center.

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Introduction

This report summarizes the Federal Judicial Center's research for the Court Administration and Case Management Committee on the Most Congested Courts (MCC) Project.[1] The Center submitted an earlier memorandum to the Committee on courts that dispose of their cases most slowly.[2] The present report is a full and final report to the Committee on the Center's development of a new type of caseload analysis, use of that analysis to identify courts with slower and faster disposition times, and the findings from interviews with selected districts with slower and faster disposition times.

Overall, during this project, the Center:

- developed a new method for identifying districts that are not keeping up with their caseloads, as measured by case disposition time;
- developed an analysis of case disposition time, by nature of suit, for each of the ninety-four district courts;
- identified seven districts that have particularly long disposition times on a significant number of different case types (the "most congested courts");
- in summer 2013, provided the caseload analyses to and conducted interviews with the chief judge and clerk of court in the seven districts with slower case disposition times to determine the sources of delay;
- in November 2013, submitted to the Committee's Case Management Subcommittee a confidential memo on the districts with delayed civil case disposition times, which presented findings from the interviews with these districts;
- identified seven districts that have particularly short disposition times for a significant portion of their caseload (the "expedited courts"); and
- in fall 2014, provided the caseload profiles to and conducted interviews with the chief judge and clerk of court in the seven districts with faster disposition times to determine the procedures these districts use to expedite their caseloads.

To complete the project, we are providing this final report, which presents a history of the MCC Project, an overview of the Center's development of a new method of caseload analysis, and the findings from the interviews with the fourteen districts selected for the study.

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1. We had valuable assistance and guidance from the Case Management Subcommittee at key stages of the project and thank the members for their help: Judge Richard Arcara (chair), Judge Roger Titus, Judge Dan Hovland, Judge Marcia Crone, Judge Sean McLaughlin, Judge Charles Coody, Larry Baerman, clerk of court representative to the committee, and Jane MacCracken, staff to the committee. I especially appreciate the participation of Judge Arcara, Larry Baerman, and Jane MacCracken in the interview process. Their participation was invaluable in conducting the interviews and interpreting the information obtained. And I am very grateful to my colleague Margaret Williams for the caseload analysis on which the Most Congested Courts Project relies.

2. The Center submitted its report on the courts with delayed civil case disposition times on November 20, 2013. Given the confidential nature of some of the court-specific findings, the report is not a public document.

Although the close examination of specific districts is completed with this report, there is one important respect in which the Most Congested Courts Project will continue indefinitely. Periodically the Center will update the caseload analysis for each of the ninety-four district courts and will provide each district with its analysis. The Committee approved this distribution at its December 2014 meeting because the analyses have been well received by and helpful to the districts that have received them. Each of the ninety-four districts has received the first transmission of its own caseload analysis, in the form of a case disposition time dashboard prepared by the Center and reviewed by the Case Management Subcommittee. The long-term goal is for the districts to access their caseload analyses at an intranet website. In the meantime, the Center will provide the analyses individually to each district.

MCC Project Origin and Goals

Before presenting findings from interviews with the courts, we briefly recap the purpose and methodology of the Most Congested Courts Project.

In 2001, the Judicial Conference asked the Court Administration and Case Management Committee to monitor the caseloads of the district courts, identify districts with significant caseload delay, and offer assistance to those districts. The Administrative Office (AO) developed a composite measure of caseload delay, ranked the ninety-four district courts on this measure, and identified the most delayed 25% as the "most congested courts" ("MCCs"). Approximately once every two years, the Committee then sent a letter to the chief judge of each MCC to alert the court to its ranking and to suggest a variety of remedies, including such actions as use of visiting judges, attendance at workshops, and consideration of case-management practices recommended in guides and manuals.

Some districts responded with explanations for their status, others with polite thanks, and some not at all. Over the first ten years of the Committee's efforts, it became clear that membership on the list of MCCs changed little and that the Committee's letters had limited effect. The Committee decided that it needed a new approach to the problem of courts with caseload delays and asked the Center to develop a new method for identifying and assisting courts where civil case disposition times are lengthy.

The New Analysis for Identifying District Courts with Delayed Civil Case Disposition Times

The Committee wanted the new method to provide the Committee and courts with better information about caseload delay so assistance could be more targeted. If the problem lies in habeas cases, for example, a quite different remedy might be needed than if the problem lies in patent cases. Working with the Committee's Case Management Subcommittee, the Center developed a method that examines district caseloads at the case type level—that is,

an analysis that gives a district information about the status of each case type, or nature of suit (NOS), in its civil caseload.[3]

The new method compares the average disposition time for each case type within a district to the average disposition time for each case type nationally. To develop the measure, the Center first calculated a national average disposition time for each of the nearly 100 nature of suit codes across all ninety-four districts combined. The Center then calculated the average disposition time for each nature-of-suit code for each district for the past three years.[4] In the final step of the analysis, the Center compared each district's average disposition time for each nature-of-suit code to the national historical average.

To help districts understand the analysis, the Center developed a graphic presentation that relies on colors to show a district which cases it is disposing of faster or slower than the national average—deep red for very slow, pink for slow, yellow for near the national average, light green for fast, and deep green for very fast. The Center used tables and bar charts to present the results of the analysis (see Attachment 1[5]). Because of the graphic presentation—the colors in particular—districts quickly understand where they are having problems disposing of cases and where they are doing well. More recently, the Center has developed a case disposition dashboard for presenting the results of the analysis. The dashboard also provides disposition times graphically and relies on the same color scheme, but uses a simpler graphic and also presents more information by providing the specific cases included in each NOS group (see Attachment 2 for a description of the dashboard).

Using either approach, the new analysis tells the Committee which districts have fallen seriously behind the national average in disposing of their civil caseloads, which districts are doing much better than the national average, and exactly which types of cases are most seriously delayed in the districts with delayed civil case disposition times. The new analysis does not, however, provide a single score or a method for ranking districts. Rather, it requires examination of each district to see whether a district has either a large number of case types that take more than 15% longer to dispose of than the national average or a smaller number of case types that take much, much longer (e.g., 100% longer) than the national average to terminate. If a district meets these criteria, it merits attention by the Committee.

The new analyses of case disposition time have proven to be very helpful to the courts and have been well received by the fourteen districts selected by the Committee for further discussions (see descriptions below of interviews conducted with these courts). These districts unanimously expressed their intent to use the new analyses for serious, district-

3. The analysis and the graphics produced by the analysis were developed by Margaret Williams, Senior Research Associate, of the Center's Research Division.

4. To reduce risk that a year of unusual activity would skew averages, the Center chose a three-year time frame. Longer or shorter time frames could be used, as could other comparisons, such as averages for courts of the same size.

5. The initial version of the analysis grouped the civil natures of suit into four categories (or "quartiles")—faster, fast, slow, and slower natures of suit—and included an average disposition time for criminal felony cases as well. A second generation presentation—a case disposition dashboard—does not group the natures of suit nor include the criminal felony caseload.

specific, and data-driven assessments of case-management practices. Several districts said they had, in fact, already made significant changes in case-management practices after reviewing the new caseload analyses.

Interviews: A New Approach to Assisting Districts with Delayed Civil Case Disposition Times

Based on a recommendation from the Center, the Committee agreed that the better approach to assisting courts with caseload delays would be to interview them rather than sending letters. The Committee also agreed that each district should receive its own caseload analysis, since the Committee members themselves had found the graphics exceptionally helpful in understanding their own court's caseload. Working with the new case disposition analysis and the Case Management Subcommittee, the Center identified districts that differed from the national average in either having a high number of civil case types that were delayed or in having extreme delay, even if in a smaller number of civil case types. Of the initial set of fourteen districts that met these criteria, the Subcommittee selected seven that were seriously delayed. Then-chair of the Committee, Judge Julie Robinson, sent these districts the Center's new case disposition analysis and an invitation to be interviewed, which all seven districts accepted.[6]

Because the issue of delay was potentially sensitive, the Committee agreed that it would be helpful to the Center's research staff to have a judge member of the Committee participate in the interviews. In the end, each interview was conducted by a judge member, the clerk of court representative to the Committee, a member of the Committee staff, and myself.[7] In each district, we interviewed the chief judge and clerk of court to try to understand more fully why their civil caseloads had become delayed and what kinds of targeted assistance might help them dispose of civil cases more quickly.[8] Because the seven districts were geographically disbursed, we conducted most of the interviews by telephone.

Typically each chief judge opened the discussion with an explanation of the district's caseload challenges and steps the district had taken or was planning to take to address caseload delays. Most of the districts had prepared "talking points"—and, in some districts, documentary material—for the interview. The interview team had not asked the districts to make such preparations, but they clearly were well prepared for the interview and wanted to open by providing information they felt was important for the Committee to know.[9]

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6. Because the report on the most congested courts is confidential but this report on the expedited districts very likely will be a public report, we do not identify the most congested districts.

7. The Committee member was Judge Richard Arcara, who also chairs the Case Management Subcommittee; the clerk of court representative was Larry Baerman; and the Committee staff member was Jane MacCracken.

8. The interviews took place between March and September 2013. In several districts, additional judges or court staff joined the chief judge and clerk for the interview.

9. Attachment 3 provides an example email showing the information sent to a district before the interview to help the chief judge and clerk of court understand the nature of the interview. The graphics sent for

Then, if the chief judge and clerk had not already addressed the case types that were both seriously delayed and accounted for a sizable portion of the district's caseload, the interview team asked the chief judge to talk about how these cases are handled by the court and why they might be delayed. This invitation usually generated considerable additional discussion.

The interviews generally lasted at least an hour and provided abundant information about problems encountered and actions taken by the seven selected districts. The chief judges and clerk of court were welcoming to the interviewers and generous in the information they provided. Without exception, they found the caseload analysis very helpful, particularly in identifying problems at the detailed level of individual case types. Several said the tables had opened up a dialogue in their court about how the court handles its cases, not only cases that were delayed but other cases as well, and had already led to some changes in procedure. Also without exception, the chief judges said they appreciated the Committee's inquiry and offers to help.

Challenges Identified in Districts with Delayed Civil Case Disposition Times

We relied on two sources of information for understanding civil case disposition delays in the seven courts selected for the study: the Center's caseload analyses and information the chief judge and clerk of court provided during the interviews. In reviewing the caseload analyses and talking with the courts, we focused on the case types that were both the most delayed and included the greatest number of cases. Because of their numbers, these case types have a larger impact on a district's overall disposition time, and, more importantly, delay in these cases affects a larger number of litigants.

The caseload analyses revealed how seriously delayed each district's caseload was and the case types that accounted for delay. Delays were very substantial in each district, even in case types that are typically disposed of quickly nationwide—for example, in one district the faster case types were disposed of eighty-one percent more slowly than the national average and in another these case types were disposed of seventy-two percent more slowly. In addition, the caseloads were delayed across many different case types.

From the caseload analysis, we could see a pattern across the seven districts. The most commonly delayed case types—i.e., found in five or more districts—were prisoner petitions to vacate a sentence or for habeas corpus, along with employment civil rights, ERISA, insurance, and "other" contract cases. Prisoner civil rights, foreclosure, and "other" statutory actions were delayed in four of the seven. Districts also had delayed disposition times in case types with large numbers of cases specific to that district—for example, marine personal injury cases in a district on a harbor; medical malpractice cases in a major medical center; copyright, patent, trademark, and antitrust cases in districts that are economic centers; and Social Security and consumer credit cases in districts that had experienced rapid increases in these case types. The two central points from this analysis were that in the courts with delayed case disposition times (1) delay was found across a large number of

these interviews were the initial type prepared by the Center—i.e., the bar graphs and tables shown in Attachment 1—and not the more recently developed electronic dashboard shown in Attachment 2.

case types and was not limited to a few case types, and (2) several case types, involving large numbers of litigants—for example, prisoner cases, employment civil rights cases, and ERISA cases—were delayed in a majority of the seven districts.

From the interviews, we learned not only the districts' assessments of their problems but also that they were aware of their court's caseload delay before being contacted by the Committee and had been taking steps to resolve it. With regard to the specific reasons for delay, each district offered a number of explanations, some that had caused problems generally for the district and some that had caused problems for specific case types. Although there were idiosyncratic explanations and conditions in some districts, the reasons cited can be grouped into several categories—keeping in mind that these are perceived, and not quantitatively measured, causes.[10]

Criminal caseload

Four of the seven districts said their criminal caseloads were particularly demanding, because of either the sheer number of cases or case complexity (e.g., terrorism or death-eligible cases).

Circuit law

Circuit law required several districts to be deferential to the pleadings filed by pro se litigants. This deferential treatment of pleadings results in the courts having to deal with more amended complaints and, often, substantial motion practice and discovery disputes that do not occur in districts where circuit law is less deferential to the pleadings of pro se litigants.

Number and/or complexity of civil filings

In several districts, specialized litigation had emerged from economic activity in the district—e.g., litigation involving patents, financial and medical institutions, and contracts—and had given rise to voluminous and complex motions. In several others, specialized law firms had developed to litigate Social Security, ERISA, and consumer credit cases and, as a consequence, more such cases were being filed.

Resources

Three of the seven districts with delayed civil disposition times had long-term vacancies and several had no or few senior judges. Altogether, the seven courts with delayed disposition times had sixty-four judgeships and 434 vacant judgeship months for the five-year period 2010–2014 compared to seven courts with fast disposition times (see below), which had seventy-nine judgeships and 303 vacant judgeship months.[11] Most of the districts also

10. Although the districts provided explanations for some of their delayed case types, they also were sometimes unsure why a case type might have a longer-than-average disposition time. This was generally true, for example, for ERISA and FLSA cases.

11. Numbers are from the Federal Court Management Statistics, which can be found at http://www.uscourts.gov/statistics-reports/analysis-reports/federal-court-management-statistics. During the same years, the two groups of courts did not differ, on the whole, in the number of weighted filings. Three of the courts with delayed civil case disposition times had weighted filings averaging 500 to 600 cases per judge,

identified too few staff as a cause of delay, particularly too few pro se or staff law clerks who could help with voluminous complex motions or with prisoner litigation. Although the districts have looked for and often benefitted from outside help, they had found it difficult to get help for the most voluminous parts of their caseloads because of limits on the number of staff law clerks allocated to the courts and the reluctance of visiting judges to take a caseload consisting of motions and/or prisoner cases.

Human resource quality and organization

Four of the seven districts had had problems with the quality or organization of human resources, including law clerk problems in chambers, poor organization and lack of oversight of pro se law clerks, poor quality of pro se law clerks, and an underperforming judge.

Case-management practices

Two districts described case-management practices that delayed civil cases—in one, a tradition of judicial deference to lawyers, including lax enforcement of case schedules, and in another the liberal granting, until recently, of continuances.

Steps Taken by the Districts to Reduce Delayed Civil Case Disposition Times

Each of the seven districts had taken steps to try to solve the problem of civil caseload delay. These efforts fall into several categories.

Efforts to reorganize or reallocate work

Three districts with significant delays in prisoner litigation tried to improve the service provided by their pro se law clerks, experimenting with time limits, reallocating work between pro se clerks and chambers staff, and reassigning oversight responsibility for the pro se law clerks. One district, for example, had used the pro se law clerks to make sure pleadings in pro se cases were in order and to screen for IFP compliance under the PLRA. When the court transferred this screening to the clerk's office, it reduced the screening stage from four-to-five months to four-to-five days. This district also moved responsibility for non-prisoner pro se cases from the pro se law clerks to the magistrate judges. This district realized no improvement in civil disposition times, however, by putting magistrate judges on the civil case assignment wheel. In another effort to improve judicial resources, one district changed the assignment system for senior judges to make assignments more predictable; as a result, the senior judges took more cases.

Efforts to enhance resources

The districts with delayed disposition time have used a number of approaches to increase their staff and judge resources. Three districts have secured additional law clerks to work on motions, pro se cases, and Social Security cases. One district reported reducing its habeas backlog 39% by devoting two pro se clerks to these cases. In another approach to resolv-

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for example, but three of the courts with fast civil disposition times had weighted filings averaging over 600 cases per judge (Federal Court Management Statistics).

ing prisoner cases, a district had started working with a local law school clinic, which gave law students legal experience through work on pro se cases. One district turned to recalled magistrate judges, two others relied heavily on their own magistrate judges, and another benefitted from a large number of senior judges. Another strategy, relied on by three districts, was the use of visiting judges. Most of the districts, however, noted the reluctance of visiting judges to do the work that most needs to be done—i.e., deciding motions. One district had been able to secure visiting judge help with motions only by giving visiting judges full control of the cases through trial.

Efforts to change or enhance case-management procedures

The districts with delayed disposition time had also adopted a number of case-management practices they hoped would improve civil case processing. One had recently adopted a package of new case-management practices that included standardized discovery, standardized dates, and mandatory mediation for some types of cases; case management orientation and appointment of a mentor judge for new judges; and early conferences with lawyers and thus early identification of difficult issues in complex cases. Several districts in the same circuit had adopted electronic service to the U.S. Attorney's Office and the Department of Corrections in state habeas cases; one of these districts reported a sixty-day reduction in the time to serve. Four of the districts had mediation programs for civil cases, and one had recently started a differentiated case-tracking program. This district had also realized a reduction in case delay since ending the routine granting of continuances.

Efforts to provide assistance to pro se litigants

Two districts had made particular efforts to provide assistance to pro se litigants to help resolve these cases more quickly. One had established a mediation program at the court for pro se litigants and also provides a grant each year, from its attorney admissions fund, to support the local federal bar association's pro se clinic. A second provides mediation for pro se litigants in employment cases through collaboration with a local law school. This district has also established an outreach program to the bar and provides a day of training, involving the district's most respected judges, for attorneys who volunteer pro bono for pro se cases. The court reported that this program has greatly expanded the pro bono attorney pool, and over 100 cases have been provided full representation, saving considerable judge and staff time. This district coordinates its pro se assistance through a pro se office established by the court.

Future Assistance Suggested by Districts with Delayed Civil Case Disposition Times

In addition to efforts already made, the districts with delayed civil disposition times made suggestions for further actions that might help them dispose of their civil cases more quickly. These suggestions fall into two broad categories.

Resources

Most of the districts noted, first, the need for more judgeships and/or the need to fill vacancies. All recognized the limited prospects for such help, particularly new judgeships, and went on to identify other types of useful resources. All seven districts called for more law clerks. In some districts, additional law clerks would provide help with voluminous motions. In others, additional law clerks would help meet the demand of pro se cases. Districts with temporary law clerks called for a change in how these law clerks are funded and allocated. They specifically suggested that the appointment should be significantly longer than the current one-year term, which permits barely enough time for a law clerk to become familiar with the work. Another district suggested a visiting law clerk program. Two districts also called for more assistance from visiting judges but with an emphasis on visiting judges who are willing to handle motions.

Guidance and information on best practices

The districts had several suggestions for assistance or guidance that might be provided to courts with problems of caseload delay, as well as to courts generally. The Administrative Office and/or Federal Judicial Center might provide guidance, through a website or resource center, on how to use pro se law clerks more effectively, including position descriptions, advice on oversight and supervision, and options for organizing the pro se law clerk function and allocating pro se cases. The AO and Center might give the courts guidance on judicial case management practices, with particular emphasis on the methods used by judges who dispose of cases quickly. The AO and Center might also develop electronic tools that would help courts pull more information out of caseload data. The courts also suggested development of guidance on using mediation and setting up electronic service for prisoner pro se cases. When asked how best to disseminate information, a chief judge suggested that judges and clerks are more likely to pick up information at workshops—such as new judge training, the annual district and magistrate judge workshops, and the annual clerk of court conference—than to go online to search for information.

Interviews in Districts with Fast Civil Case Disposition Times

The Committee had been inclined to conduct interviews in the fastest—or "most expedited"—districts in addition to the delayed—or "most congested"—districts, and the interviews in the districts with delayed case disposition times confirmed the importance of doing so. First, the courts with delay had asked for information about practices used in districts with fast disposition times, but also, under its responsibility to identify and disseminate "best practices," the Committee wished to collect and publicize steps the courts were taking to resolve civil cases expeditiously.

Using the caseload analyses and working with the Case Management Subcommittee, the Center identified a set of districts that dispose of their civil cases very quickly. The Subcommittee selected seven of these districts for interviews. These districts, which are representative of large, medium, and small districts and were distributed across the country and circuits, were the following:

Central District of California	Northern District of Texas
Southern District of Florida	Western District of Washington
District of Maine	Eastern District of Wisconsin
Western District of Missouri	

Then-chair of the Committee, Judge Julie Robinson, sent a letter to the chief judges in these districts, inviting the chief judges to participate in the Most Congested Courts Project as examples of districts that were able to dispose of civil cases quickly. The letter included the Center's caseload analysis for that district. Each chief judge responded positively to the invitation. The same team of four interviewers then spoke by telephone with the chief judge and clerk of court in each district, this time focusing on steps the districts had taken to dispose of civil cases quickly.[12]

As in the courts with delayed civil case disposition times, typically each chief judge opened the interview, but in these districts the focus was on practices and rules used to move civil cases expeditiously. The chief judges and clerks were well prepared for the interviews and most proceeded through a list of practices and rules they thought might explain why their civil case disposition time was fast relative to the national average. The interview team was particularly interested in fast disposition times in case types that had long disposition times in most of the courts with delay and, if a chief judge or clerk did not address those case types, the interview team asked about practices that might explain the fast disposition times.

The interviews generally lasted at least an hour and provided a great deal of information about case-management practices and rules in the seven districts. The chief judges and clerk of court were very responsive in providing information and offered to be of further assistance if needed.

Procedures and Practices in Districts with Fast Civil Case Disposition Times

As in the districts with delayed disposition times, we relied on the Center's caseload analysis and our interviews to develop an understanding of courts that dispose of their civil cases quickly. The caseload graph and tables showed that the districts were not only expeditious overall but were expeditious across most types of cases. In fact, one of the districts disposed of every type of civil case, except four, near or faster than the national average. What explains the fast disposition times in these districts?

12. The interviews took place in October and November 2014. In one or two districts, additional judges or court staff joined the chief judge and clerk for the interview. Attachment 4 provides an example of information sent to each district shortly before the interview to inform them of the nature of the interview.

We looked for common case-management and case-assignment practices across all seven districts, thinking there might be specific practices, used by all, that could become concrete guidance for other courts—for example, having a uniform case-management order used by all judges; having magistrate judges on the civil case assignment wheel (or not); using R&Rs (or not); or providing mediation through a court-based process. We did not find that kind of uniformity across all, or even some, of the districts with fast civil disposition times or even across all judges in some districts. Although we did not find a single set of procedures or a package that, if adopted, would be the key to expeditious civil case dispositions, we did identify common characteristics across the courts with fast civil disposition times—most importantly, sufficient judicial resources, but also a commitment to and culture of early case disposition. This commitment and culture were manifest in several ways—early and active judicial case management, a court-wide approach to managing cases and solving problems, and extensive use of magistrate judges and staff law clerks. In the discussion below, keep in mind, as in the districts with delayed civil case disposition times, that we are presenting the courts' perceptions, and not a quantitative analysis, of the causes of fast civil case disposition times in these districts.

Sufficient judicial resources

In all but one of the districts, the chief judges pointed to an essential factor in their fast civil disposition times—sufficient judicial resources. Several chief judges noted this factor right at the outset of the interview. Not only were the districts fortunate to have had few vacant judgeship months, but they also had either a long-term, experienced bench or senior judges who still took a significant caseload, or both. In one district, where judicial resources were not as substantial because of a long-term need for additional judgeships, the court had maintained its fast civil disposition times through exceptionally long hours by judges and staff (but with the negative consequences of ill health and early judicial retirements).

Culture of early case disposition

In addition to sufficient judicial resources, all of the chief judges in the courts with fast civil disposition times were emphatic about their culture of early case disposition. Most of the courts were intentional about this culture—i.e., they pursued it deliberately, were committed to maintaining it, and spoke of it as central to the identity of the court. This commitment is expressed through fairly standard case-management practices—early judicial involvement in the case; early setting of a schedule; early identification of cases that can be disposed of by removal, remand, or dispositive motion; prompt decisions on motions so, as one chief judge said, "the lawyers can do their work"; and no continuances, which is generally achieved by requiring counsel to submit a proposed case schedule and then holding them to it. Above all, as described by the chief judges, their districts emphasized very early judicial involvement and control and very firm respect for the schedule.

Institutional approach to case disposition

The courts with fast civil disposition times have a number of court-wide practices and rules in place that support early judicial case management and enforcement of deadlines. But, significantly, most of these courts are not characterized by uniform practices across all

judges, which some might expect to be a hallmark of a court that disposes of its civil cases quickly. One chief judge described the court's bench as "highly individualistic" and another chief judge said the court was marked by "fierce individualism." Only two of the chief judges pointed to uniform time frames and uniform case-management orders as part of their courts' approach to civil litigation. Otherwise the courts' practices, and those of individual judges within any given court, vary considerably—for example, whether or not they hold Rule 16 scheduling conferences or in-person hearings on motions. But in these districts several other factors that support expeditious civil case processing are shared court-wide:

- The local rules emphasize early case management.
- The judges are committed to joint responsibility for the court's caseload. "If someone falls behind," said one chief judge, "we help each other out." "We're a team," said another. In one of the districts, a court-wide committee reviews the caseload and, if bottlenecks are seen, makes adjustments in case allocations.
- The courts assertively use reports on the status of the caseload to monitor individual judge and court-wide performance. These reports are detailed, and in most districts the court's own internal reports, not only the CJRA reports, identify the judges by name. The reports are issued frequently and are discussed at court meetings or individually between the chief judge and each other judge. The purpose, and effect, of the reports is to provide a case management tool and to encourage judges to keep their own caseloads within the court's norms.
- The courts have a history and culture of problem solving—or, as one chief judge said, "always wanting to improve." The caseload reports are an example of tools used by the courts to routinely examine how they are doing, but these reports are only one example of the kind of constant review used by these courts. Most of the chief judges described study groups and task forces that had taken on one or another issue—for example, delays in Social Security cases, problems of attorney access to prisoners located in distant prisons, and frequent appellate court reversal of prisoner cases involving medical malpractice—and had developed solutions for the problems. Many of these courts have also developed innovative approaches to such perennial issues as discovery disputes and voluminous summary judgment motions (see below for examples).

Extensive and effective role for magistrate judges

The role of magistrate judges varies greatly across the seven courts with fast civil disposition times—for example, in several districts they are on the wheel for assignment of a portion of the civil caseload, and in others they are not; in some they handle all civil pretrial matters, and in others they do not; in some they are responsible for the prisoner and/or Social Security caseloads, and in others they are not. Regardless of the specific duties of the magistrate judges, the chief judges noted their courts' determination to use that resource to the fullest possible extent and described the magistrate judges, in the words of one judge, as "an integral part of the team." They also emphasized the high level of respect accorded the magistrate judges by judges and attorneys, as well as efforts made to increase that respect—for example, by giving the magistrate judges work that puts them in the courtroom to heighten

their visibility and enhance their authority. Magistrate judges also participate in court governance, including, in one district, the critical committee that monitors case flow. Whatever a court's approach may be, according to the chief judges, full integration of the magistrate judges is central to expeditious case disposition.

Experienced and highly skilled staff law clerks

Many of the courts with fast civil disposition times also benefit from long term, highly experienced staff law clerks. They typically handle the court's pro se and prisoner caseloads and over time have developed efficient systems for screening these cases and moving them toward disposition. These systems vary from district to district, but the staff law clerks were typically described as being very good at "triaging" this caseload and keeping it current.

In addition to these characteristics that are common across the courts, the judges told us of a number of practices they believe have helped their court reduce delay in civil cases or solve a particular problem, such as a sudden rise in Social Security cases. We briefly describe these district-specific practices, along with several procedures adopted to more efficiently handle some of the types of cases that are often delayed in the districts with delayed civil case disposition times.

Calendars and scheduling

In the Southern District of Florida, the majority of judges follow a term calendar—i.e., the year is divided into twenty-six two-week terms. Immediately on case filing, the judge reviews the case, then brings the attorneys in two-to-four weeks after answer is filed to set a schedule for the case. The trial date is set for a specific two-week period, with most trial dates set within one year of case filing. Approximately twelve to fifteen cases are set for each two- week trial term.

The judges in the District of Maine assign all civil cases to one of seven tracks, each with its own timelines and distinct, uniform scheduling order.

The Western District of Missouri designates two weeks of each month for criminal trials to ensure compliance with the Speedy Trial Act.

In the Western District of Washington, civil trials are conducted on a clock. At a pretrial conference ten to fourteen days before trial, the judge and attorneys determine the number of days and hours for trial. A clock starts when trial begins; each morning the judge announces the number of minutes left to each side. Side bars are assessed against the losing side. The process not only streamlines trials but also provides predictability for jurors and attorneys and prompts greater cooperation among attorneys to avoid being docked time.

Discovery

To control discovery, the District of Maine gives cases on the standard track four months to complete both fact and expert discovery. In all cases, attorneys must attempt to resolve discovery disputes on their own and, if they cannot, must talk with a magistrate judge, who attempts to mediate the conflict. Only with the magistrate judge's consent may they file a discovery motion.

In the Western District of Missouri, Local Rule 37.1 prohibits the filing of discovery motions, which is intended to prompt attorneys to resolve discovery disputes on their own. If attorneys determine that they must file a discovery motion, they must include a justification for the motion. A teleconference is then scheduled by the judge.

Under a set of guidelines issued by the court, the Western District of Washington encourages attorneys to use the court-promulgated "Model Agreement Regarding Discovery of Electronically Stored Information." The model agreement is in the form of an order that can be issued by the assigned judge and includes general principles and specific guidance on electronic discovery, with an attachment that includes additional provisions for complex cases.

The Western District of Washington developed guidelines for "Best Practices for Electronic Discovery in Criminal Cases," which provide a general set of best practices, as well as guidelines for multi-defendant cases and an e-discovery checklist.

Summary judgment

Under District of Maine Local Rule 56, unless attorneys in standard track cases file a joint agreement on core matters related to summary judgment, they may not file summary judgment motions without a prefiling conference with the judge, which at minimum narrows issues and sometimes bypasses the need for a summary judgment motion altogether.

In the Northern District of Texas, Local Rule 56.2 permits only one motion for summary judgment per party unless otherwise directed by the presiding judge or permitted by law.

In an experimental procedure being used by one judge in the Eastern District of Wisconsin, attorneys may opt for a streamlined summary judgment process—the "Fast Track Summary Judgment" (FTSJ) process—to reach an early dispositive decision. In this process, the judge tolls unrelated discovery and parties must comply with a number of limits, including page limits on affidavits.

Motions generally

Under Local Civil Rule 7, judges in the Western District of Washington must rule on motions within thirty days of filing. At forty-five days, attorneys may remind the judge to rule. This practice ensures that cases with no merit are seen and decided quickly.

Mediation

The Central District of California provides three forms of settlement assistance to civil litigants: referral to a magistrate judge or district judge for a settlement conference (in practice, most referrals are to magistrate judges); selection of a mediator from the extensive private mediation market; or selection of a mediator from the court's panel of approved mediators. Except for a few exempt case types, all civil litigants are expected to select one of these forms of settlement assistance and to file their selection with the assigned judge prior to the Rule 16 scheduling conference. The local rules set a default deadline for the scheduling conference, subject to changes ordered by the judge after consultation with counsel. The judge issues a referral order at or soon after the Rule 16 conference.

The Mediation and Assessment Program (MAP) in the Western District of Missouri randomly assigns all civil cases, excluding a limited number of case types, to one of three

types of mediation providers: the court's magistrate judges, the MAP director, or a mediator in the private sector. Parties are required to mediate their case within seventy-five days of the "meet and greet" meeting required by Federal Rule of Civil Procedure 26(f). Parties may ask to opt out of the mediation process or may ask to use a different form of ADR through a written request to the MAP director.

Other

The Central District of California relies on a number of committees to govern the court. The Case Management and Assignment Committee is one of the most important. Each of the district's divisions is represented on the committee, which is composed of district judges, magistrate judges, and court staff. The committee, which has four scheduled meetings a year (and more as needed), watches the caseload and keeps it in balance, using caseload reports from the clerk and concerns brought to the committee by judges to diagnose problems and develop solutions.

The District of Maine has for many years assigned a single case manager to each case for the lifetime of the case. The case manager works closely with the judge and monitors case progress, calls attorneys if deadlines are not met, and manages all paperwork, notices, docketing, and any other matters for the case.

To ensure efficient practice by attorneys on the CJA panel, the Western District of Washington appointed a task force made up of judges, court staff, and representatives from the U.S. Attorney's Office and CJA panel, which led to adoption of "Basic Technology Requirements" for CJA panel attorneys. The requirements state the minimum technology standards CJA attorneys must meet, including requirements regarding computer equipment and software.

To ensure that all issues are ready for immediate decision, the Western District of Washington requires that all attorney filings be joint.

ADA cases

Some judges in the Southern District of Florida hold an early half-day hearing in ADA cases and issue an injunction while the defendant takes care of the problem (e.g., measuring the width of a door, which does not require experts). Cases generally settle promptly after this step.

ERISA cases

In the Central District of California, many district judges require joint briefs. The court also sets an early deadline for submission of the administrative record.

The District of Maine has an ERISA track with a very specific schedule. The magistrate judges' expertise in these cases helps to expedite them.

FLSA cases

A majority of the judges in the Southern District of Florida use a form order for FLSA cases. The order sets an early deadline for a statement of the claim.

Prisoner cases

In Maine, the U.S. Attorney's Office is added to the docket for habeas cases to ensure that that office automatically receives all notices. The court has an agreement with the Maine Attorney General's office for more efficient filing of prisoner cases.

The Western District of Missouri court has a memorandum of understanding with the Department of Corrections that prisoners may file habeas cases electronically, using equipment provided by the court.

The Northern District of Texas serves the state electronically in state habeas cases.

By agreement with the state prisons, prisoners may file electronically in the Eastern District of Wisconsin. The court also has an agreement with the prisons for more efficient service. And the court screens cases early and dictates orders of dismissal.

In the Eastern District of Wisconsin, the court is moving to electronic filing of all prisoner pleadings. Four prisons are included so far. The Wisconsin Department of Justice and one of the larger counties also have Memorandums of Understanding under which the Department or county accept service electronically on behalf of defendants, rather than requiring personal service or paperwork for a waiver. Some judges also screen prisoner cases in chambers, rather than send them to pro se law clerks because they have found it is often faster to dictate a screening order as they review the case activity. The same can be done on motions for extensions, discovery, protective orders, and other matters that arise in these cases.

Social Security cases

To keep Social Security cases on track, the Central District of California uses tight deadlines, permits no discovery or summary judgment motions without leave of court, and requires mandatory settlement conferences. In their management of these cases, most of the magistrate judges also require joint briefing.

In the District of Maine, the magistrate judges handle all Social Security cases and have developed a high level of expertise. When the court needed a solution because disposition times were close to exceeding CJRA requirements, the magistrate judge convened a task force of the Social Security bar. To shorten disposition times, the bar recommended an earlier deadline for remand motions and a decrease in the time permitted to attorneys to submit briefs. The magistrate judges also try to issue their reports and recommendations within thirty days of oral argument to enable the district judges to resolve appeals before the CJRA reporting deadlines.

In the Western District of Missouri, the magistrate judges are on the civil case assignment wheel and decide many of the Social Security cases on consent.

To meet a goal of six months to disposition in Social Security cases, the Northern District of Texas sets tight and firm briefing deadlines and permits no oral argument.

When Social Security case filings increased rapidly and the court started falling behind, the Western District of Washington took several steps to speed up the cases. First, it borrowed law clerks from the senior judges, had a full-day education program for them, and assigned them exclusively Social Security cases. The court also requested and received a re-

called magistrate judge. Third, a judge prepared statistics on the Social Security caseload, and the court then held a retreat to develop solutions. The court also created a bench/bar committee to obtain attorney input, which produced guidance on how judges could write more helpful opinions and altered the rules on length of briefs. Finally, the court held a full-day CLE workshop on Social Security cases for the bar. The court was able to catch up on the Social Security caseload in a year.

The Eastern District of Wisconsin focused on Social Security cases last year because a high reversal rate was causing significant cost and delay. After a meeting to discuss the problem with staff from the Social Security Administration, U.S. Attorneys' Office, and claimants' attorneys, a working group was formed that created a protocol for handling Social Security cases. The procedures include a form complaint, rules on service, and a briefing schedule. Most significantly in the court's view, the protocol also encourages claimants' attorneys to consult with the attorney for the government before filing the initial brief to explore whether a voluntary remand might be in order. A significant number of cases have been voluntarily remanded since the protocol became effective. The special procedures for Social Security cases are set out at the court's website under the tab "Efiling Procedures."

The Characteristics of Courts with Fast Civil Case Disposition Times

The information from our interviews with chief judges in the courts with fast civil case disposition times suggests they are fast for two primary reasons. First, the courts have sufficient judicial resources. Second, they are committed as a court to a core set of principles and practices—early judicial involvement in the case, setting deadlines and adhering to them, using magistrate judges to the fullest possible extent, effectively using staff law clerks, working as a team, actively using caseload reports to monitor court-wide and personal performance, and watching for and solving problems. These principles and practices are put into effect in diverse ways across the districts and across judges within a district—only two of the seven districts have uniform time frames and case-management orders, and many practices, such as the specific methods for setting case schedules and the role of magistrate judges, vary from district to district—but each court has procedures for, and a culture that supports, setting deadlines early and then monitoring and enforcing them. It is important to keep in mind, however, that this study is limited to review of disposition times and interviews in a small number of courts with only two—though very informed—respondents in each court. Additional understanding of disposition times in the trial courts would very likely be obtained through a more expansive study that includes quantitative measurement of the many practices and conditions that affect the management and disposition of civil and criminal cases

The Future of the Most Congested Courts Project

Perhaps one of the more interesting questions asked during the interviews was the question of benchmarks. As most of the chief judges and clerks understood, in an analysis based on

averages there will always be courts that fall above and below the average. Should courts below the average forever be labeled "most congested," even as both these courts and the average are improving? One of the judges suggested that the Committee consider developing benchmarks, which would provide fixed, not relative, measures against which courts could measure their performance.

Several chief judges also asked whether it was appropriate or informative to compare their district against the national average rather than against, for example, an average based on districts the same size or districts that had a similar number of vacant judgeships or a similar level of pro se filings. These chief judges suggested that a future stage of the project might consider developing additional analyses based on court size or other court characteristics.

The chief judges and clerks in the courts with delayed civil case disposition times also asked about the future of the Most Congested Courts Project. Regarding their own status, they were not concerned about the label but about their very real need for assistance. They wanted to know whether the Committee would stay involved with their courts and whether there would be any follow-on efforts. They understood that at a time of budget constraints they might not get additional resources, but they were concerned about the fairness of current resource allocations. They spoke of their desire for any information or guidance that would help them do their job better and be more efficient. And they genuinely appreciated the Committee's inquiry and desire to be helpful.

The courts with faster civil disposition times appreciated the Committee's interest, too, and the opportunity to discuss their practices. They also appreciated the opportunity for self-examination provided by the caseload analysis, and most had distributed them to other members of the court. One chief judge said, "This is a really healthy thing to do. Whether we're doing well or poorly in a couple of years, call us so we can go through this review again." More generally, across all the districts, the chief judges and clerks found the caseload analyses very helpful and many had sent the tables and graphs to other members of the court to prompt further discussion and to spur additional efforts to move the civil caseload quickly.

The interviews underscored several key points regarding the Committee's Most Congested Courts Project: (1) the courts appreciated the opportunity to be heard; (2) the courts with delayed civil disposition times would appreciate help accessing more re- sources, whether those resources are information, judges, or legal staff; (3) all the courts would like to learn more about rules and procedures that expedite civil cases; and (4) the caseload analysis was very helpful to the courts and prompted self-examination and change without need for a "dunning" letter from the Committee.

Given that the Committee's assignment from the Judicial Conference—to monitor district court caseloads—is a long-term assignment, the interviews suggest at least the following actions on the part of the Committee:

1. Disseminate more information to the courts about best practices, including best practices involving judicial case management, the organization and use of staff law clerks, and the use of visiting judges to supplement judicial resources that are missing in the courts with delayed civil case disposition times.

2. Update the caseload analysis at least yearly, make it easily available to all district courts (as already done and will be done on a continuing basis), and expand it to permit districts to compare themselves to other groupings, such as courts of their size or courts with similar caseloads.
3. Work with other Judicial Conference committees and the Administrative Office to explore whether more visiting judges can be provided, whether more staff law clerks can be provided, and whether temporary law clerks can be appointed for at least two years.

One additional step the Committee might consider is to ask the Center for a quantitative study that would take the understanding of case disposition time beyond the qualitative examination provided by the current study. Such a study would look at the effect on case disposition time of any practice or condition that can be readily measured—for example, judicial vacancies, the types (i.e., weightiness) of civil and criminal filings, the number of motions filed, the number of extensions granted, and the time between stages in a case. Such a study might help the Committee identify specific practices, beyond the general principles and approaches described by the present study, that support or impede expeditious civil case disposition time.

Attachment 1

Example of Graphic and Tables Showing District Court Average Time to Disposition Compared to National Average Time to Disposition, by Civil Nature of Suit Code

Graphic and Tables Developed By
Margaret Williams
Federal Judicial Center

District A: 2010–2012

Average Disposition Time for the District Relative to the Average Disposition Time Nationwide

For Criminal Felony Cases and Civil Cases in Quartiles by Faster to Slower Groupings of Natures of Suit*

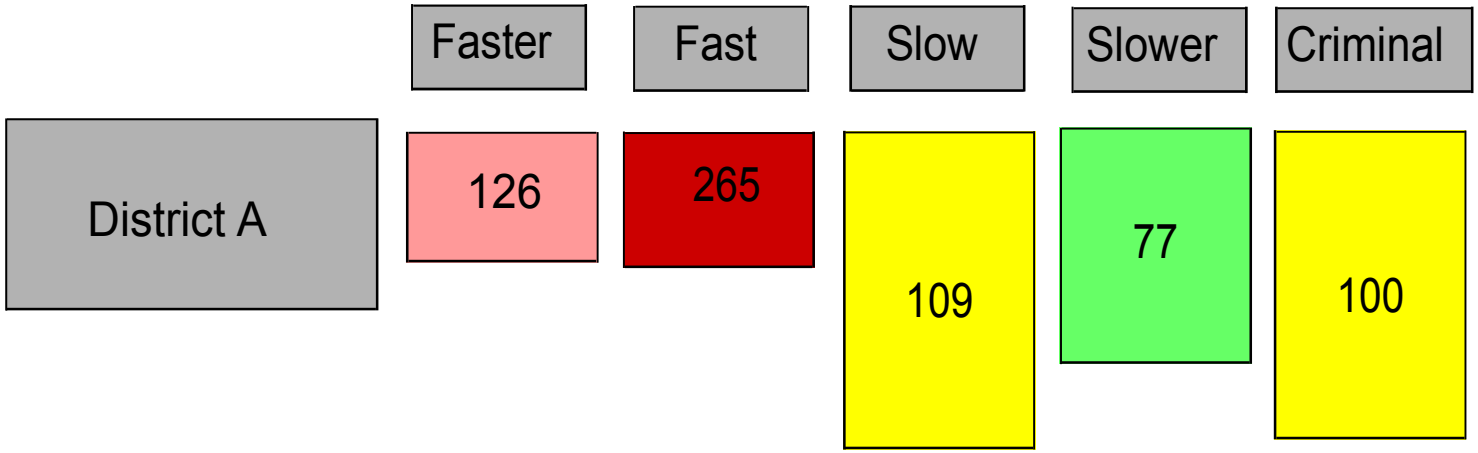

* Analysis and graphics developed by Margaret Williams, Senior Research Associate, Federal Judicial Center

District A: 2010–2012
Faster Quartile Cases
Ranked by Time*

Nature of Suit	Avg. Days to Termination	Number of Cases in District	Time Relative to National Average	Percentage of Cases in Quartile	Percentage of Cases in Docket
BANKS AND BANKING	2.00	1	1	0.61	0.10
PRISONER - PRISON CONDITION	7.00	1	3	0.61	0.10
CONSUMER CREDIT	87.50	2	51	1.21	0.20
BANKRUPTCY APPEALS RULE 28 USC 158	132.92	13	66	7.88	1.31
CONTRACT FRANCHISE	196.00	1	68	0.61	0.10
TRADEMARK	198.33	6	72	3.64	0.61
PRISONER - CIVIL RIGHTS	235.38	29	83	17.58	2.93
CIVIL RIGHTS ADA OTHER	237.00	3	88	1.82	0.30
COPYRIGHT	299.11	9	98	5.45	0.91
NATURALIZATION APPLICATION	200.00	2	120	1.21	0.20
EMPLOYEE RETIREMENT INCOME SECURITY ACT	318.95	41	120	24.85	4.14
LABOR/MANAGEMENT RELATIONS ACT	291.20	5	122	3.03	0.50
MARINE CONTRACT ACTIONS	414.15	33	137	20.00	3.33
INTERSTATE COMMERCE	427.00	1	146	0.61	0.10
FORECLOSURE	294.60	5	159	3.03	0.50
RENT, LEASE, EJECTMENT	350.50	2	257	1.21	0.20
AIRLINE REGULATIONS	387.00	1	271	0.61	0.10
RECOVERY OF DEFAULTED STUDENT LOANS	568.00	10	399	6.06	1.01
TOTAL	258.15	165	126		

Faster					Slower

*Analysis and tables developed by Margaret Williams, Senior Research Associate, Federal Judicial Center

District A: 2010–2012
Fast Quartile Cases
Ranked by Time

Nature of Suit	Avg. Days to Termination	Number of Cases in District	Time Relative to National Average	Percentage of Cases in Quartile	Percentage of Cases in Docket
PRISONER PETITIONS -VACATE SENTENCE	239.85	61	75	26.29	6.16
CIVIL RIGHTS ACCOMMODATIONS	308.00	4	94	1.72	0.40
CONSTITUTIONALITY OF STATE STATUTES	287.00	1	99	0.43	0.10
PRISONER PETITIONS - HABEAS CORPUS	414.89	70	124	30.17	7.06
OTHER PERSONAL PROPERTY DAMAGE	576.17	6	142	2.59	0.61
DRUG RELATED SEIZURE OF PROPERTY	468.76	21	150	9.05	2.12
ASSAULT, LIBEL, AND SLANDER	523.00	5	178	2.16	0.50
OTHER REAL PROPERTY ACTIONS	477.18	11	189	4.74	1.11
OTHER STATUTORY ACTIONS	691.20	49	227	21.12	4.94
FAIR LABOR STANDARDS ACT	1278.67	3	358	1.29	0.30
ASBESTOS PERSONAL INJURY - PROD.LIAB.	4116.00	1	1280	0.43	0.10
TOTAL	852.79	232	265		

Faster					Slower

District A: 2010–2012
Slow Quartile Cases
Ranked by Time

Nature of Suit	Avg. Days to Termination	Number of Cases in District	Time Relative to National Average	Percentage of Cases in Quartile	Percentage of Cases in Docket
OTHER FORFEITURE AND PENALTY SUITS	197.53	15	59	5.15	1.51
D.I.W.C./D.I.W.W.	258.93	40	71	13.75	4.04
CIVIL RIGHTS VOTING	195.50	6	77	2.06	0.61
CIVIL RIGHTS ADA EMPLOYMENT	277.60	5	78	1.72	0.50
S.S.I.D.	281.08	25	80	8.59	2.52
MILLER ACT	287.79	14	100	4.81	1.41
OTHER LABOR LITIGATION	342.38	8	101	2.75	0.81
MARINE PERSONAL INJURY	400.00	23	104	7.90	2.32
INSURANCE	372.77	53	116	18.21	5.35
MOTOR VEHICLE PERSONAL INJURY	417.96	23	118	7.90	2.32
OTHER FRAUD	432.25	4	193	1.37	0.40
OTHER CONTRACT ACTIONS	663.42	66	212	22.68	6.66
TAX SUITS	754.67	9	109	3.09	0.91
TOTAL	375.53	291			

Faster					Slower

District A: 2010–2012
Slower Quartile Cases
Ranked by Time

Nature of Suit	Avg. Days to Termination	Number of Cases in District	Time Relative to National Average	Percentage of Cases in Quartile	Percentage of Cases in Docket
CIVIL (RICO)	9.33	3	2	0.99	0.30
SECURITIES, COMMODITIES, EXCHANGE	56.00	1	7	0.33	0.10
PERSONAL INJURY - PRODUCT LIABILITY	284.09	23	34	7.59	2.32
PATENT	153.00	1	58	0.33	0.10
OTHER PERSONAL INJURY	417.06	66	58	21.78	6.66
PROPERTY DAMAGE -PRODUCT LIABILTY	252.67	6	63	1.98	0.61
ENVIRONMENTAL MATTERS	328.79	29	64	9.57	2.93
AIRPLANE PERSONAL INJURY	296.75	4	64	1.32	0.40
OTHER CIVIL RIGHTS	235.45	88	81	29.04	8.88
OVERPAYMENTS UNDER THE MEDICARE ACT	303.00	2	92	0.66	0.20
LAND CONDEMNATION	618.50	2		0.66	0.20
FEDERAL EMPLOYERS' LIABILITY	425.00	1	94	0.33	0.10
CIVIL RIGHTS JOBS	403.33	21	151	6.93	2.12
TORTS TO LAND	673.25	4	158	1.32	0.40
MEDICAL MALPRACTICE	658.71	49	159	16.17	4.94
BANKRUPTCY WITHDRAWAL 28 USC 157	441.33	3	77	0.99	0.30
TOTAL	347.27	303			

Faster					Slower

Attachment 2

Explanation of the Civil Case Disposition Time Dashboard

Margaret Williams
Federal Judicial Center

Civil Case Disposition Dashboard for U.S. District Courts

Courts often want to know how slowly or quickly they dispose of particular types of cases, relative to the national average. To that end, the Federal Judicial Center has compiled statistics on civil case terminations for each district and has placed the information in an electronic case termination dashboard. The dashboard allows a court to see its disposition time on each nature of suit, relative to the national average, and then drill down to the underlying case information. This drill down capability allows a court to see any problem areas where additional resources may be needed to help cases terminate more quickly. By looking at cases that terminated slowly in the past, courts can learn to better manage cases in the future.

Understanding the Dashboard – Case Terminations

The basic idea behind a dashboard is to allow a court to see at a glance which nature of suit (NOS) codes it disposes of slowly and which NOS codes it disposes of quickly. This information is displayed in a treemap (see the example below for hypothetical District 12). The overall graphic represents the total terminated civil caseload in District 12 for calendar years 2012–2014. Each of the individual boxes is the proportion of the court's terminated civil caseload represented by each NOS code. Larger boxes mean the NOS code is a larger proportion of the civil caseload.

In treemaps, the color of the boxes is meaningful as well. Red boxes show NOS codes District 12 terminates slower than the national average: the dark red boxes are the slowest cases (more than 50% slower than the national average) and the light red boxes are slow but not as slow (16%–50% slower). Green boxes are the NOS codes the court terminates faster than the national average: again, the dark green boxes are the fastest cases (more than 50% faster), and the light green boxes are fast but not as fast (16%–50% faster). Boxes in beige show an NOS code disposed of in approximately the same time as the national average (within 15% of the national average).

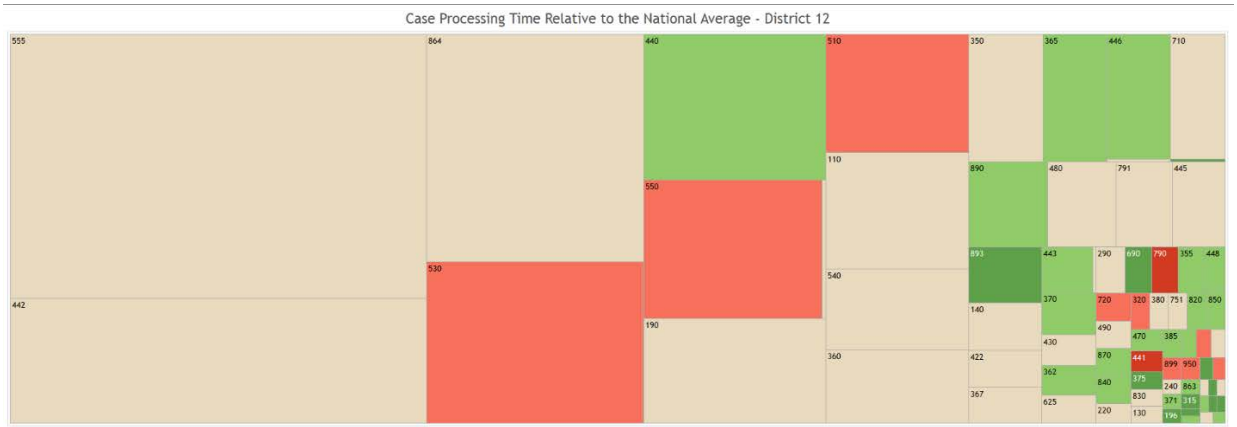

As the user hovers over the boxes, a tooltip appears that provides the specific NOS description, the court's average case disposition time, the national average disposition time, the court's overall disposition score relative to the national average, and the number of cases the court terminated in this time period. In the example below, we can see that District 12 terminated NOS 530, Prisoner Petitions – Habeas Corpus, on average, in 418 days, which is 31.75% slower than the national average of 317 days. This NOS code is a relatively large proportion of the docket (it is the largest red box in the treemap above), with 255 cases terminated between 2012 and 2014.

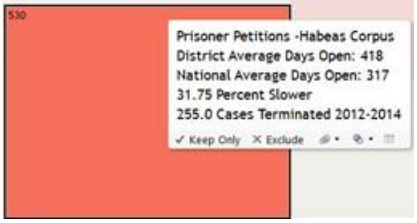

At the bottom of the dashboard, the user can see the cases used to calculate the district's average disposition times, organized by nature of suit and docket number (see below). Also listed are the plaintiffs and defendants for each case and the total number of days, from filing to termination, that the case was open.

Cases Terminated 2012-2014

NOS Code	Natureofsuit	Docket	Plaintiff	Defendant	Days
110	Insurance	05-00831	SMITH	SMITH	66
		08-00019	MAPP	GEORGIA DEPARTMENT OF C, ET AL	760
		09-00169	CULVER, ET AL	UNITED STATES OF AMERICA	94
		09-00375	HOLTCAMP	GLOBAL MEDICAL SAFETY DIVISION	822
		09-00574	NINO	MACY'S RETAIL HOLDINGS, INC.	383
		09-00713	BATISTE	LAWRENCE	380
		09-00780	ELLIS	JACKSON NATIONAL LIFE I, ET AL	324
		09-01055	BROOKS FARMS, INC.	AGRICOMMODITIES, INC., ET AL	564
		10-00222	JOHNSON	KEITH, ET AL	167
		10-00242	FRAZIER	HAYNES	748
		10-00502	GOMEZ	COLVIN	153
		10-00531	PERRY	FORT WAYNE CITY OF, IN, ET AL	70
		10-00611	BELL	MCCANN, ET AL	55
		10-00842	SHAKIR	DONAHOE, ET AL	64
		10-00858	SELLERS	SOCIAL SECURITY ADMINISTRATION	322
		10-00969	BAILEY	WALGREEN CO., ET AL	166

As the user clicks on each box in the treemap, the list of cases will filter to show only the cases within the selected nature of suit (see example on next page). To remove the filter, the user clicks on the selected box again and the screen reverts to the complete treemap.

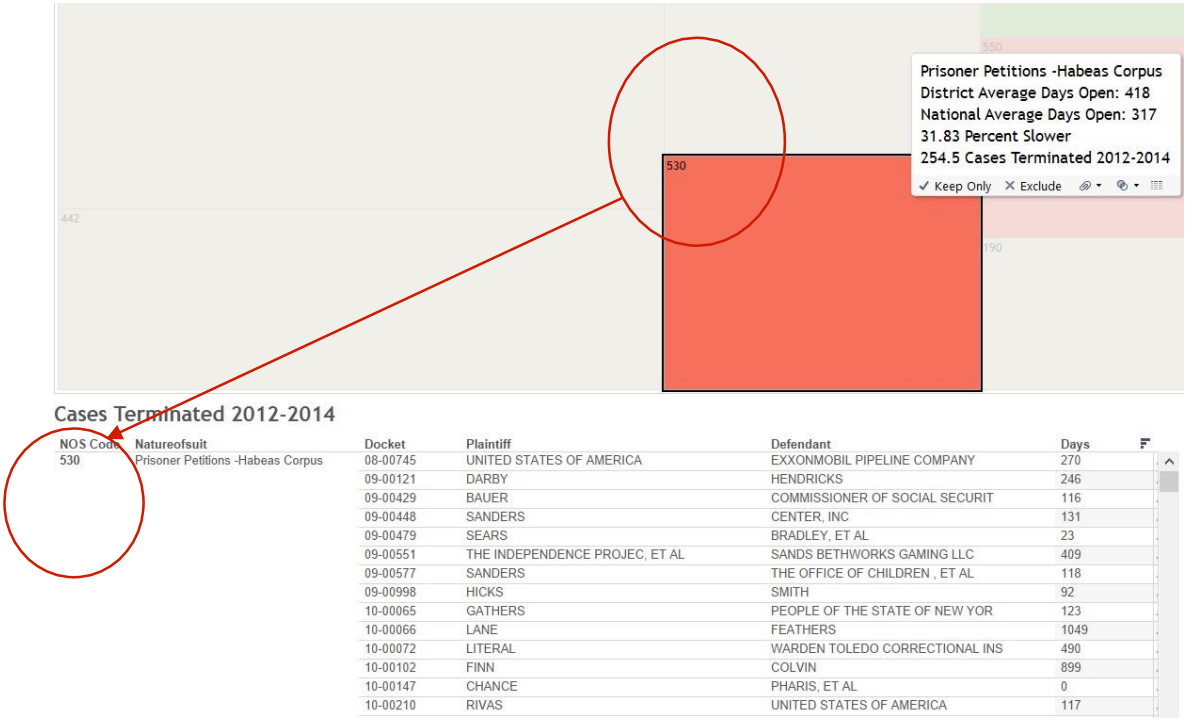

NOS Code	Natureofsuit	Docket	Plaintiff	Defendant	Days
530	Prisoner Petitions -Habeas Corpus	08-00745	UNITED STATES OF AMERICA	EXXONMOBIL PIPELINE COMPANY	270
		09-00121	DARBY	HENDRICKS	246
		09-00429	BAUER	COMMISSIONER OF SOCIAL SECURIT	116
		09-00448	SANDERS	CENTER, INC	131
		09-00479	SEARS	BRADLEY, ET AL	23
		09-00551	THE INDEPENDENCE PROJEC, ET AL	SANDS BETHWORKS GAMING LLC	409
		09-00577	SANDERS	THE OFFICE OF CHILDREN , ET AL	118
		09-00998	HICKS	SMITH	92
		10-00065	GATHERS	PEOPLE OF THE STATE OF NEW YOR	123
		10-00066	LANE	FEATHERS	1049
		10-00072	LITERAL	WARDEN TOLEDO CORRECTIONAL INS	490
		10-00102	FINN	COLVIN	899
		10-00147	CHANCE	PHARIS, ET AL	0
		10-00210	RIVAS	UNITED STATES OF AMERICA	117

If a court would like to know which cases were used to estimate their case disposition time for all NOS codes, they can download it directly from the software, or contact the FJC and we will provide it.

Understanding the Dashboard – National NOS Disposition Time

The second tab of the dashboard shows the average time to case disposition by NOS code, from the slowest to the fastest nationally, as well as a district's average time on each nature of suit. This tab presents the same basic information as the treemap (showing where a district is slower or faster than the national average) but in a different way. The bar is the district's average disposition time, and the black dash is the national average disposition time.

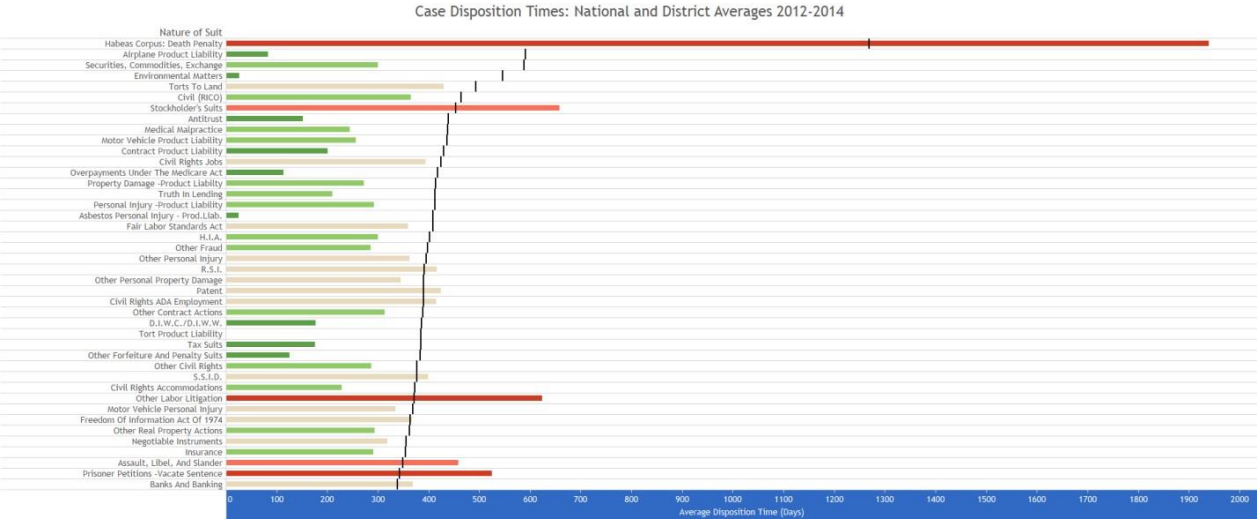

If a district is slower than the national average, the bar runs past the dash and is colored accordingly (dark red >50% slower, light red 16%–50% slower than the national average). If a district is faster than the national average, the bar stops before the black dash and is colored according to the time (dark green >50% faster, light green 16%–50% faster than the national average). District times within 15% of the national average are colored beige.

The sorting of the chart provides a different piece of information than the treemap: which cases take a long time, on average, for all districts to terminate and which ones are terminated, on average, much more quickly. While a court may know from experience that Habeas Corpus: Death Penalty cases are slow to terminate, seeing that they take, on average, twice as long nationwide as airplane product liability cases may be surprising. If courts are looking for a benchmark for case disposition time, the range of 400 and 500 days to termination is a good benchmark to keep in mind, as most civil case termination times fall into this range.

Who to Contact

Users with questions about how to use the dashboard or what other avenues might be explored may contact Margie Williams, Senior Research Associate, at the Federal Judicial Center (mwilliams@fjc.gov , 202-502-4080).

Attachment 3

Example Email Sent to Chief Judge and Clerk of Court in "Most Congested" Districts in Preparation for Telephone Interview

125-002427

From: Donna Stienstra/DCA/FJC/USCOURTS
To: Chief Judge _____
Cc: Clerk of Court_____, Richard Arcara/NYWD/02/USCOURTS@USCOURTS, Larry Baerman/NYND/02/USCOURTS@USCOURTS, Jane MacCracken/DCA/AO/USCOURTS@USCOURTS
Date: _____
Subject: Preparation for conference call

Dear Chief Judge_:

As you know, Judge Arcara, Larry Baerman, Jane MacCracken, and I will be talking with you and [clerk's name] on_____about the caseload of your district. The conversation is part of an initiative of the Court Administration and Case Management Committee (CACM), which was asked some years ago by the Judicial Conference Executive Committee to monitor district court caseloads.

Our conversation will be based on a set of tables you received several weeks ago. During the call we would like to talk with you about the types of cases that both (1) make up a substantial portion of your civil caseload and (2) are disposed of significantly more slowly than the national average for all district courts. The point of the discussion is to determine whether the court would want assistance in resolving the slower cases and what kind of assistance might be helpful.

We know your district's prisoner cases fit the description of large caseloads that are significantly slower than national averages in disposition time. For example, if you look at the table titled "Faster Quartile Cases", you can see that your district disposed of 633 prisoner civil rights cases in the years 2010-2012 and took, on average, 865 days to dispose of these cases -- or 205% longer than the national average. Habeas corpus cases, which are in the table labeled "Fast Quartile Cases", are another example, with 551 cases taking, on average, 680 days to dispose of, or 104% longer than the national average.

Below I list several additional case types we might discuss with you. You can find the information about these case types in the tables you received (which I have enclosed again below, along with information about how to interpret the tables). These case types accounted for a substantial number of the cases disposed of by your court in 2010-2012 and took substantially longer to dispose of than these case types did nationwide.

Faster Quartile	Consumer Credit	895 cases, 213 days to disposition	23% longer than the national ave.
	Foreclosure	114 cases, 264 days to disposition	43% longer than the national ave.
	ERISA	132 cases, 575 days to disposition	117% longer than the national ave.
Fast Quartile	Other Stat. Actions	162 cases, 400 days to disposition	31% longer than the national ave.
	FSLA	47 cases, 1029 days to disposition	188% longer than the national ave.
Slow Quartile	Insurance	66 cases, 518 days to disposition	58% longer than the national ave.
	Oth. Contr.Actions	200 cases, 574 days to disposition	67% longer than the national ave.
	Motor Vehicle PI	84 cases, 625 days to disposition	74% longer than the national ave.
Slower Quartile	Civil Rights Jobs	387 cases, 694 days to disposition	77% longer than the national ave.
	Other Civil Right	393 cases, 715 days to disposition	94% longer than the national ave.

During our conversation on_____, we'll be interested in your thoughts about the longer-than-average disposition times for the case types listed above, particularly what might explain the longer disposition times -- for example, characteristics of the cases themselves, relevant features of the bench or bar, or other conditions in the district. And if there are other case types or other features of the district you would like to discuss, we welcome your thoughts on those as well.

In the meantime, if you have any questions, please don't hesitate to call me. We look forward to talking with you.

Sincerely,

Donna Stienstra

Federal Judicial Center
Washington, DC
202-502-4081

Attachment: "Caseload Tables, [District Name], March 2013.pdf"

Attachment 4

Example Email Sent to Chief Judge and Clerk of Court in "Expedited" Districts in Preparation for Telephone Interview

126-002430

From: Donna Stienstra/DCA/FJC/USCOURTS
To: Chief Judge _____
Cc: Clerk of Court_____, Richard Arcara/NYWD/02/USCOURTS@USCOURTS, Larry Baerman/NYND/02/USCOURTS@USCOURTS, Jane MacCracken/DCA/AO/USCOURTS@USCOURTS
Date: _____
Subject: Preparation for conference call

Dear Chief Judge_:

I'm writing on behalf of Judge Richard Arcara, Larry Baerman, Jane MacCracken, and myself with regard to the conversation scheduled with you and {clerk of court name] next week. That conversation, which will focus on your district's civil caseload, is part of an initiative of the Court Administration and Case Management Committee (CACM), which was asked some years ago by the Judicial Conference Executive Committee to monitor district court caseloads. Last fall we talked with seven district courts that terminate their civil caseloads more slowly than the national average. This fall we're talking with seven courts that terminate their caseloads more quickly than the national average.

The call with you and [clerk's name] is scheduled for_____at______. The call-in number is 888-398-2342# and the access code is 3487491#.

Our conversation will be based on a set of tables you received with a letter from Judge Julie Robinson, CACM Committee chair, August 15, 2014 (attached below). As you know from the letter, the CACM Committee selected your court for an interview because you dispose of your civil caseload expeditiously compared to average disposition times nationally.

The purpose of the call is to understand how caseloads move and to identify any procedures, best practices, judicial or staff habits, etc. that could be adopted by other courts to expedite their civil caseloads. During the call we would like to talk with you about practices your court uses that foster expedited disposition times for civil cases. These practices might include judicial case management procedures, methods for tracking the caseload and identifying bottlenecks, pilot projects used to expedite specific types of cases, use of clerk's office and chambers staff, role of the magistrate judges, articulation of goals for the court, relevant features of the bench or bar, or any other conditions in the district.

In addition to the general discussion outlined above, we're interested in several specific questions:

1. We'd like to know whether your court has had slow disposition times for some types of civil cases and has overcome those slow disposition times. If so, what did the court do to bring disposition times under control?

2. Your court has disposition times near or better than the national average for some types of cases that are very slow in courts with backlogged civil caseloads--e.g., ERISA cases, consumer credit cases, prisoner civil rights cases, habeas petitions, Social Security cases, and employment civil rights cases. What does your court do to keep these case types moving quickly to disposition?

3. Given your court's expeditious processing of most of its caseload, the occasional very slow case type stands out. What is the nature of the court's "Civil rights ADA other" cases, for example, that makes them

considerably slower than the national average in disposition time?

We look forward to talking with you and, later in the project, using your experience and best practices to assist other courts. Thank you for being willing to assist the Committee with this project.

If you have any questions before we talk next week, please don't hesitate to call me.

Sincerely,

Donna Stienstra

Federal Judicial Center
Washington, DC
202-502-4081

See attached file: “Civil Caseload Analysis, [district name].pdf”

TAB 4C

126-002433

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126-002434

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

APRIL 14, 2016

The Civil Rules Advisory Committee met at the Tideline Hotel in Palm Beach, Florida, on April 14, 2016. (The meeting was scheduled to carry over to April 15, but all business was concluded by the end of the day on April 14.) Participants included Judge John D. Bates, Committee Chair, and Committee members John M. Barkett, Esq.; Elizabeth Cabraser, Esq.; Judge Robert Michael Dow, Jr.; Judge Joan M. Ericksen; Parker C. Folse, Esq. (by telephone); Professor Robert H. Klonoff; Judge Scott M. Matheson, Jr.; Hon. Benjamin C. Mizer; Judge Brian Morris; Judge Solomon Oliver, Jr.; Judge Gene E.K. Pratter; Virginia A. Seitz, Esq.; and Judge Craig B. Shaffer. Former Committee Chair Judge David G. Campbell and former member Judge Paul W. Grimm also participated by telephone. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Judge Jeffrey S. Sutton, Chair, Judge Neil M. Gorsuch, liaison (by telephone), and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge Arthur I. Harris participated as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., the court-clerk representative, also participated. The Department of Justice was further represented by Joshua Gardner, Esq.. Rebecca A. Womeldorf,Esq., Derek Webb, Esq., and Julie Wilson, Esq., represented the Administrative Office. Judge Jeremy Fogel and Emery G. Lee, Esq., attended for the Federal Judicial Center. Observers included Henry D. Fellows, Jr. (American College of Trial Lawyers); Joseph D. Garrison, Esq. (National Employment Lawyers Association); Alex Dahl, Esq.(Lawyers for Civil Justice); John K. Rabiej, Esq. (Duke Center for Judicial Studies); Natalia Sorgente (American Association for Justice); John Vail, Esq.; Valerie M. Nannery, Esq.; Henry Kelsen, Esq.; and Benjamin Robinson, Esq.

Judge Bates opened the meeting by welcoming everyone. He noted that Judge Pratter and Elizabeth Cabraser have completed serving their second terms and are due to rotate off the Committee. "We will miss you, but hope to see you frequently in the future." Judge Sutton also is completing his term as Chair of the Standing Committee, and Judge Harris is concluding his term with the Bankruptcy Rules Committee. They too will be missed.

Benjamin Mizer introduced Joshua Gardner, who will succeed Ted Hirt as a Department of Justice representative to the Committee. Gardner is a highly valued member of the Department, and makes time to teach civil procedure classes as an adjunct professor.

Judge Bates noted that the proposed amendments to Civil Rules 4, 6, and 82 remain pending in the Supreme Court. On this front, "no news is good news." The Minutes for the January meeting of the Standing Committee are in the agenda book for this meeting. The package of six proposed amendments to Rule 23 that had advanced at

12b-002435

the November meeting of this Committee was discussed. The Rule 23 discussion also described the decision to defer action on the growing number of decisions grappling with "ascertainability" as a criterion for class certification and with the questions raised by different forms of "pick-off" strategies that defendants use in attempts to moot individual class representatives and thus defeat class certification. The Rule 62 stay-of-execution proposal also was discussed. Apart from specific rules proposals, the ongoing efforts to educate bench and bar on the December 1, 2015 package of amendments were described. These efforts are "important, essential." Discussion also included the continuing efforts to develop pilot projects to test reforms that do not yet seem ready to be adopted as national rules.

November 2015 Minutes

The draft minutes of the November 2015 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

Legislative Report

Rebecca Womeldorf reported that, apart from the bills noted at the November meeting, there appear to be no new legislative activities the Committee should be tracking.

Rule 5

The history of the Committee’s work on the e-filing and e-service provisions of Rule 5 was recounted. A year ago the Committee voted to recommend publication of amendments to reflect the growing maturity of electronic filing and service. Moving in parallel, the Criminal Rules Committee began a more ambitious project. Criminal Rule 49 has invoked the Civil Rules provisions for filing and service. The Criminal Rules Committee began to consider the possibility of adopting a complete and independent rule of their own. This development counseled delay in the Civil Rules proposals. The e-filing and e-service provisions in the Appellate, Bankruptcy, Civil, and Criminal Rules were developed together. The value of adopting identical provisions in each set of rules is particularly high with respect to filing and service, although it is recognized that differences in the rules may be justified by differences in the characteristics of the cases covered by each set of rules. The plan to recommend publication in 2015 was deferred.

The Criminal Rules Committee developed an independent Rule 49. The Subcommittee that developed the rule welcomed participation in their work and conference calls by representatives of the Civil Rules Committee. The Civil Rules provisions proposed now were substantially improved as a result of these discussions. The

125-002436

differences from the proposals developed a year ago are discussed with the description of the current proposals.

Although filing is covered by Rule 5(d), which comes after the service provisions of Rule 5(b) in the sequence of subdivisions, it is easier to begin discussion with filing, which is the act that leads to service.

Present Rule 5(d)(3) allows e-filing when allowed by local rule, and also provides that a local rule may require e-filing "only if reasonable exceptions are allowed." Almost all districts have responded to the great advantages of e-filing by making it mandatory by requiring consent in registering as a user of the court's system. Reflecting this reality and wisdom, proposed Rule 5(d)(3) makes e-filing mandatory, except for filings "made by a person proceeding without an attorney."

Pro se litigants have presented more difficulty. Last year's draft also required e-filing by persons proceeding without an attorney, but directed that exceptions must be allowed for good cause and could be made by local rule. Work with the Criminal Rules Subcommittee led to a revision. The underlying concern is that many pro se litigants, particularly criminal defendants, may find it difficult or impossible to work successfully with the court's system. The current proposal allows e-filing by a person proceeding without an attorney "only if allowed by court order or by local rule." A further question is whether a pro se party may be required to engage in e-filing. Some courts have developed successful programs that require e-filing by prisoners. The programs work because staff at the prison convert the prisoners' papers into proper form and actually accomplish the filing. This provides real benefits to all parties, including the prisoners. The Criminal Rules Subcommittee, however, has been concerned that permitting a court to require e-filing might at times have the effect of denying access to court. Their concern with the potential provisions for Rule 5 arises from application of Rule 5 in proceedings governed by the Rules for habeas corpus and for § 2255 proceedings. Discussion of these issues led to agreement on a provision in proposed Rule 5(b)(3)(B) that would allow the court to require e-filing by a pro se litigant only by order, "or by a local rule that allows reasonable exceptions."

e-Service is governed by present Rule 5(b)(2)(E) and (3). (b)(2)(E) allows service by electronic means "that the person consented to in writing." (b)(3) allows a party to "use" the court's electronic facilities if authorized by local rule. Most courts now exact consent as part of registering to use the court's system. Proposed Rule 5(b)(2)(E) reflects this practice by eliminating the requirement for consent as to service through the court's facilities. One of the benefits of consulting with the Criminal Rules Subcommittee has been to change the reference to

125-002437

137 "use" of the court's system. The filing party does not take any
138 further steps to accomplish service — the system does that on its
139 own. So the rule now provides for serving a paper by sending to a
140 registered user "by filing it with the court's electronic filing
141 system." Other means of e-service continue to require consent of
142 the person to be served. The proposal advanced last year eliminated
143 the requirement that the consent be in writing. The idea was that
144 consent often is given, appropriately enough, by electronic
145 communications. The Criminal Rules Subcommittee was uncomfortable
146 with this relaxation. The current proposal carries forward the
147 requirement that consent to e-service be in writing for all
148 circumstances other than service by filing with the court.

149 The direct provision for service by e-filing with the court in
150 proposed Rule 5(b)(2)(E) makes present Rule 5(b)(3) superfluous.
151 The national rule will obviate any need for local rules authorizing
152 service through the court's system. The proposals include
153 abrogation of Rule 5(b)(3).

154 Finally, the recommendations carry forward the proposal to
155 allow a Notice of Electronic Filing to serve as a certificate of
156 service. Present Rule 5(d)(1) would be carried forward as
157 subparagraph (A), which would direct filing without the present
158 "together with a certificate of service." A new subparagraph (B)
159 would require a certificate of service, but also provide that a
160 Notice of Electronic Filing constitutes a certificate of service on
161 any person served by filing with the court's electronic-filing
162 system. It does not seem necessary to add to this provision a
163 provision that would defeat reliance on a Notice of Electronic
164 Filing if the serving party learns that the paper did not reach the
165 person to be served. If it did not reach the person, there is no
166 service to be covered by a certificate of service.

167 Discussion noted the continuing uncertainties about amending
168 the provisions for e-filing and e-service without addressing the
169 many parallel provisions that call for acts that are not filing or
170 service. Many rules call for such as acts as mailing, or
171 delivering, or sending, or notifying. Similar words that appear
172 less frequently include made, provide, transmit[ted] return,
173 sequester, destroy, supplement, correct, and furnish. Rules also
174 refer to things written or to writing, affidavit, declaration,
175 document, deposit, application, and publication (together with
176 newspaper). On reflection, it appears that the question of
177 refitting these various provisions for the electronic era need not
178 be confronted in conjunction with the Rule 5 proposals. Rule 5
179 provides a general directive for the many rules provisions that
180 speak to serving and filing. It can safely be amended without
181 interfering with the rules that govern acts that are similar but do
182 not of themselves involve serving or filing.

183 It was noted that the parallel consideration of e-filing and

12b-002438

e-service rules in the several advisory committees means that some work remains to be done in achieving as nearly identical drafting as possible, consistent with the differences in context that may justify some variations in substance. What appear to be style differences may in fact be differences in substance. It was agreed that the Committee Chair has authority to approve wording changes that resolve style differences as the several committees work to generate proposals to present to the Standing Committee in June. If some changes in substance seem called for, they likely will be of a sort that can be resolved by e-mail vote.

Rule 62: Stays of Execution

Judge Bates introduced the Rule 62 proposals by noting that this project has been developed as a joint effort with the Appellate Rules Committee. A Rule 62 Subcommittee chaired by Judge Matheson has developed earlier versions and the current proposal.

Judge Matheson noted that earlier Rule 62 proposals were discussed at the April 2015 and November 2015 meetings. The Subcommittee worked to revise and simplify the proposal in response to the concerns expressed at the November meeting. The Subcommittee reached consensus on the three changes that provided the initial impetus for taking on Rule 62. The proposal: (1) extends the automatic stay from 14 days to 30 days, and eliminates the "gap" between expiration of the stay on the 14th day and the express authority in Rule 62(b) to order a stay pending disposition of Rule 50, 52, 56, or 60 motions made as late as 28 days after judgment is entered; (2) expressly recognizes that a single security can be posted to cover the period between expiration of the automatic stay and completion of all proceedings on appeal; and (3) expressly recognizes forms of security other than a bond.

Discussion in the Standing Committee in January focused on only one question: why is the automatic stay extended to 30 days rather than 28? The answer seemed to be accepted — it may be 28 days before the parties know whether a motion that suspends appeal time will be made, and if appeal time is not suspended 30 days allows a brief interval to arrange security before expiration of the 30-day appeal time that governs most cases.

After the Standing Committee meeting, the Subcommittee made one change in the proposed rule text, eliminating these words from proposed (b)(1): " * * * a stay that remains in effect until a designated time[~~, which may be as late as issuance of the mandate on appeal,~~] * * *." The Subcommittee concluded that it may be desirable to continue the stay beyond issuance of the mandate. There may be a petition for rehearing, or a petition for certiorari, or post-mandate proceedings in the court of appeals. And the Committee Note was shortened by nearly forty percent.

126-002439

Discussion began with a question about proposed Rule 62(b)(1): "The court may at any time order a stay that remains in effect until a designated time, and may set appropriate terms for security or deny security." Present Rule 62 "does not mention a stay without a bond. It happens, but ordinarily only in extraordinary circumstances." If there is no intent to change present practice, something should be said to indicate that a stay without security is disfavored. And it might help to transpose proposed paragraph (2) with (1), so that the nearly automatic right to a stay on posting bond comes first. That would emphasize the importance of security.

Judge Matheson noted that earlier drafts had expressly recognized the court's authority to deny a stay for good cause, and to dissolve a previously issued stay. Those provisions were deleted, but that was because they would have enabled the court to defeat what has been seen as a nearly automatic right to obtain a stay on posting security. Proposed (b)(1) is all that remains. In a sense it carries over from the Committee's first recent encounter with Rule 62. Before the Time Project, the automatic stay lasted for 10 days and the post-judgment motions that may suspend appeal time had to be made within 10 days. The Time Project created the "gap" in present Rule 62 by extending the automatic stay only to 14 days, while extending the time for motions under Rules 50, 52, and 59 to 28 days. A judge asked the Committee whether the court can order a stay after 14 days but before a post-judgment motion is made. The Committee concluded at the time that the court always has inherent power to control its own judgment, including authority to enter a stay during the "gap" without concern about any negative implications from the express authority to enter a stay pending disposition of a motion once the motion is actually made. The Subcommittee thought that proposed (b)(1) is a useful reflection of abiding inherent authority.

This observation was met by a counter-observation: Is the proposed rule simply an attempt to codify existing practice? If so, should it recognize the cases that say that only extraordinary circumstances justify a stay without security? The need to be clear about the relationship with present practice was pointed out from a different perspective. The Committee Note says that proposed subdivisions (c) and (d) consolidate the present provisions for stays in actions for an injunction or receivership, and for a judgment or order that directs an accounting in an action for patent infringement. Does that imply that some changes in present practice are embodied in proposed subdivision (b), as they are in proposed subdivision (a)? The response was that proposed subdivision (b)(2) clearly incorporates several changes over practice under the supersedeas bond provisions of present Rule 62(d). Under the proposed rule, a party may obtain a stay by bond at any time after judgment enters, without waiting for an appeal to be taken. The new rule would expressly recognize a single security

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for the duration of post-judgment proceedings in the district court and all proceedings on appeal. It would expressly recognize forms of security other than a bond. So too, the automatic stay is extended, and the court is given express power to "order otherwise." The decision not to change the meaning of the present provisions that would be consolidated in proposed Rule 62(c) and (d) does not carry any implications, either way, as to proposed Rule 62(b)(1).

Judge Matheson asked whether, if a standard for denying a stay is to be written into rule text, it should be "good cause" or "extraordinary circumstances." Some uncertainty was expressed about what standard might be written in. "Extraordinary circumstances" may be too narrow.

A Committee member asked what experience the district-judge members have with these questions. The answers were that judges seldom encounter questions about stays of execution. One judge suggested that because questions seldom arise, judges will read the rule text carefully when a question does arise. It is important that the rule text say exactly what the rule means. A similar suggestion was that it would be better to resist any temptation to supplement rule text with more focused advice in the Committee Note. The Committee should decide on the proper approach and embody it in the rule text.

Proposed Rule 62(b)(1) will be further considered by the Subcommittee, consulting with Judge Gorsuch as liaison from the Standing Committee, with the purpose of reaching consensus on a proposal that can be advanced to the Standing Committee in June as a recommendation for publication. If changes are made that require approval by this Committee, Committee approval will be sought by electronic discussion and vote.

Rule 23

Judge Dow introduced the Rule 23 Subcommittee report. The Subcommittee continued to work hard on the package of six proposals that was presented for consideration at the November Committee meeting. Much of the work focused on the approach to objectors, and particularly on paying objectors to forgo or abandon appeals. Working in consultation with representatives of the Appellate Rules Committee, the drafts that would have included amendments of Appellate Rule 42 have been abandoned. The current proposal would amend only Civil Rule 23(e). In addition, a seventh proposal has been added. This proposal would revise the Rule 23(f) amendment to include a 45-day period to seek permission for an interlocutory appeal when the United States is a party. It was developed with the Department of Justice, and had not advanced far enough to be presented at the November meeting.

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The rule texts shown in the agenda materials, pp. 96-99, have been reviewed by the style consultants. Only a few differences of opinion remain.

Notice. Two of the proposed amendments involve Rule 23(c)(2)(B). The first reflects a common practice that, without the amendment, may seem to be unauthorized. When a class has not yet been certified, it has become routine to address a proposal to certify a class and approve a settlement by giving "preliminary" certification and sending out a notice that, in a (b)(3) class, includes a deadline for requesting exclusion, as well as notice of the right to appear and to object. The so-called preliminary certification is not really certification. Certification occurs only on final approval of the settlement and the class covered by the settlement. This amendment would expand the notice provision to include an order "ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)." That makes it clear that an opt-out deadline is properly set by this notice. Generally, settlement agreements call for an opt-out period that expires before actual certification with final approval of the settlement.

The second change in Rule 23(b)(2)(B) is to address the means of notice. The Subcommittee worked diligently in negotiating the words and sequence of words. The Note explains that the choice of means of notice is a holistic, flexible concept. Different sorts of class members may react differently to different media. A rough illustration is provided by the quip that a class of people who are of an age to need hearing aids respond by reading first-class mail, and trashing e-mail. A class of younger people who wear ear buds, not hearing aids, trash postal mail and read e-mail. The Note emphasizes that no one form of notice is given primacy over other forms. The Note further emphasizes the need for care in developing the form and content of the notice.

Discussion began by expressing discomfort with the direction that notice "must" include individual notice to all members who can be identified through reasonable effort. **[does anyone recall the specific example Judge Ericksen gave? I did not hear it.]** The proposal carries forward the language of the present rule, but there is a continuing tension between "must" and the softer requirement that notice only be the best that is practicable under the circumstances. A determination of practicability entails a measure of discretion. Part of the tension arises from the insistence of the style consultants that the single sentence drafted by the Subcommittee was too long: "the best notice that is practicable under the circumstances, — by United States mail, electronic means, or other appropriate means — including individual notice to all members who can be identified through reasonable effort."

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370 Further discussion reflected widespread agreement that "the
371 best notice that is practicable under the circumstances" and
372 "reasonable effort" establish a measure of discretion that may be
373 thwarted by the two-sentence structure that, in a second stand-
374 alone sentence, says that "the notice must include individual
375 notice to all members who can be identified through reasonable
376 effort." The style change seems to approach a substantive change.
377 It will be better to draft with only one "must," so as to emphasize
378 what is the best practicable notice. That approach will avoid any
379 unintended intrusion on the process by which courts elaborate on
380 the meaning of "practicable" and "reasonable."

381 One suggested remedy was to delete from rule text the
382 references to examples of means — "United States mail, electronic
383 means, or other appropriate means." The examples could be left to
384 the Committee Note. But that would strain the practice that bars
385 Note advice that is not supported by a change in rule text.

386 As to the choice of means, it was noted that some comments
387 have suggested that careful analysis of actual responses in many
388 cases show that postal mail usually works better than electronic
389 notice. The Committee Note may benefit from some revision. But e-
390 mail notice is happening now, and it may help to provide official
391 authority for it.

392 The drafting question was resolved by adopting this
393 suggestion:

394 * * * the court must direct to class members the best
395 notice that is practicable under the circumstances,
396 including individual notice to all members who can be
397 identified through reasonable effort. <u>The notice may be</u>
398 <u>by United States mail, electronic means[,] or other</u>
399 <u>appropriate means.</u>

400 As revised, the Committee approved recommendation of this
401 proposal for Standing Committee approval to publish this summer.

402 <u>Frontloading</u>. Proposed Rule 23(e)(1)(A) focuses on ensuring that
403 the court is provided ample information to support the
404 determination whether to send out notice of a proposed settlement
405 to a proposed class. The underlying concern is that the parties to
406 a proposed settlement may join in seeking what has been
407 inaccurately called preliminary certification and notice without
408 providing the court much of the information that bears on final
409 review and approval of the settlement. If important information
410 comes to light only after the notice stage and at the final-
411 approval stage, there is a risk that the settlement will not
412 withstand close scrutiny. The results are costly, including a
413 second round of notice to a perhaps disillusioned class if the
414 action persists through a second attempt to settle and certify.

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415 Early drafting efforts included a long list of categories of
416 information the proponents of settlement must provide to the court.
417 The list has been shortened to more general comments in the
418 Committee Note. The rule text also has been changed to clarify that
419 it is not the court's responsibility to elicit the required
420 information from the parties, rather it is the parties that have
421 the duty to provide the information to the court.

422 The idea is transparency and efficiency. The information,
423 initially required to support the court's determination whether to
424 send notice, also supports the functions of the notice itself. It
425 enables members to make better-informed decisions whether to opt
426 out, and whether to object. Good information may show there is no
427 reason to object. Or it may show that there is reason to object,
428 and provide the support necessary to make a cogent objection.

429 The Subcommittee discussed at length the question whether the
430 rule text should direct the parties to submit all information that
431 will bear on the ultimate decision whether to certify the class
432 proposed by the settlement and approve the settlement. The
433 difficulty is that the objection process may identify a need for
434 more information. And in any event, the parties may not appreciate
435 the potential value of some of the information they have. It would
436 be too rigid to prohibit submission at the final-approval stage of
437 any information the parties had at the time of seeking approval of
438 notice to the class. But at the same time, it is important that the
439 parties not hold back useful information that they have. Alan
440 Morrison has suggested that the Note should say something like
441 this: "Ordinarily, the proponents of the settlement should provide
442 the court with all the available supporting materials they intend
443 to submit at the time they seek notice to the class, which would
444 make this information available to class members." The Committee
445 agreed that the Subcommittee should consider this suggestion and,
446 if it is adopted, determine the final wording.

447 An important difference remains between the Subcommittee and
448 the style consultants. The information required by (e)(1)(A) is to
449 support a determination, not findings, that notice should be given
450 to the class. The Subcommittee draft requires "sufficient"
451 information to enable these determinations. The style consultants
452 prefer "enough" information. If they are right that "enough" and
453 "sufficient" carry exactly the same meaning, why worry about the
454 choice? But, it was quipped, "we think 'enough' is insufficient."

455 "Sufficient" found broad support. A quick Google search found
456 British authority for different meanings for "enough" and
457 "sufficient." It was suggested that "sufficient" is qualitative,
458 while "enough" is quantitative. "Sufficiency," moreover, is a
459 concept used widely in the law, particularly in addressing such
460 matters as the sufficiency of evidence.

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461 The outcome was to transpose the two words: "~~sufficient~~
462 information sufficient to enable" the court's determination whether
463 to send notice. This form better underscores the link between
464 information and determination, and creates a structure that will
465 not work with "enough." The Committee believes that this question
466 goes to the substance of the provision, not style alone.

467 A different question was raised. Proposed Rule 23 (e)(1)(B)
468 speaks of showing that the court will likely be able to approve the
469 proposed settlement "under Rule 23(e)(2)," and "certify the class
470 for purposes of judgment on the proposal." (e)(2) does not say
471 anything about certification beyond the beginning: "If the proposal
472 would bind class members * * *." That might be read to authorize
473 creation of a settlement class that does not meet the tests of
474 subdivision (b)(1), (2), or (3). The proposed Committee Note, at p.
475 102, line 131, repeats the focus on the likelihood the court will
476 be able to certify a class, but does not pin it down.

477 The Subcommittee agreed that, having discussed the possibility
478 of recommending a new "(b)(4)" category of class action, it had
479 decided not to pursue that possibility. One possibility would be to
480 amend the Committee Note to amplify the reference to certifying a
481 class: "likely will be able, after the final hearing, to certify
482 the class under the standards of Rule 23(a) and (b)." That leaves
483 the question whether this approach relies on the Note to clarify
484 something that should be expressed in rule text. Perhaps something
485 could be done in (e)(1)(B)(ii), though it is not clear what —
486 "certify the class under Rule 23(a) and (b) for purposes of
487 judgment on the proposal" might do it.

488 It was pointed out that the provision for notice of a proposed
489 settlement applies not only when a class has not yet been certified
490 but also when a class has been certified before a settlement
491 proposal is submitted. This dual character is reflected in
492 (e)(1)(B)(ii)'s reference to the likely prospect that the court
493 will, at the end of the notice and objection period, be able to
494 certify a class not yet certified. The purpose of the proposal is
495 to ensure the legitimacy of the common practice of sending out
496 notice before a class is certified. There are two steps. Settlement
497 cannot happen without certifying a class. But the common habit has
498 been to refer to the act that launches notice and, in a (b)(3)
499 class, the opt-out period, as preliminary certification. That led
500 to attempts to win permission for interlocutory appeal under Rule
501 23(f), most prominently seen in the NFL concussion litigation.
502 Perhaps the Committee Note should say something, but there is no
503 apparent problem in the rule language.

504 One possible remedy might be to expand the tag line for Rule
505 23(e)(2): "Approval of the proposal and certification of the class
506 [for settlement purposes]." But that might be misleading, since
507 (e)(2) does not refer to certification criteria.

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508 It was observed again that when a class has not already been
509 certified, the court does not certify a class in approving notice
510 under (e)(1). Certification comes only as part of approving the
511 settlement after considering the criteria established by (e)(2).
512 Certification of the class and approval of the settlement are
513 interdependent. The settlement defines the class. The court
514 approves both or neither; it cannot redefine the class and then
515 approve a settlement developed for a different class. Not, at
516 least, without acceptance by the proponents and repeating the
517 notice process for the newly defined class.

518 A resolution was proposed: Add a reference to Rule 23(c)(3) to
519 (e)(2): "If the proposal would bind class members <u>under Rule</u>
520 <u>23(c)(3)</u>, the court may approve it only * * *." This was approved,
521 with "latitude to adjust" if the Subcommittee finds adjustment
522 advisable. Corresponding language in the Committee Note might read
523 something like this, adding on p. 103, somewhere around line 122:
524 "Approval under Rule 23(e)(2) is required only when class members
525 would be bound under Rule 23(c)(3). Accordingly, in addition to
526 evaluating the proposal itself, the court must determine whether
527 the class may be certified under the standards of Rule 23(a) and
528 (b)."

529 The proposed Rule 23(e)(2) criteria for approving a proposed
530 settlement were discussed briefly. They are essentially the same as
531 the draft discussed at the November meeting. They seek to distill
532 the many factors expressed in varying terms by the circuits, often
533 carrying forward with lists established thirty years ago, or even
534 earlier. Tag lines have been added for the paragraphs at the
535 suggestion of the style consultants.

536 The Committee approved a recommendation that the Standing
537 Committee approve proposed Rule 23(e)(1) and (2) for publication
538 this summer.

539 <u>Objectors.</u> In all the many encounters with bar groups and at the
540 miniconference last fall, there was virtually unanimous agreement
541 that something should be done to address the problem of "bad"
542 objectors. The problem is posed by the objector who files an open-
543 ended objection, often copied verbatim from routine objections
544 filed in other cases, then "lies low," saying almost nothing, and
545 — after the objection is denied — files a notice of appeal. The
546 business model is to create, at low cost, an opportunity to seek
547 advantage, commonly payment, by exploiting the cost and delay
548 generated by an appeal.

549 Part of the Rule 23(e)(5) proposal addresses the problem of
550 routine objections by requiring that the objection state whether it
551 applies only to the objector, to a specific subset of the class, or
552 to the entire class. It also directs that the objection state with
553 specificity the grounds for the objection. The Committee Note says

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554 that failure to meet these requirements supports denial of the
555 objection.

556 Another part of the proposal deletes the requirement in
557 present Rule 23(e)(5) that the court approve withdrawal of an
558 objection. There are many good-faith withdrawals. Objections often
559 are made without a full understanding of the terms of the
560 settlement, much less the conflicting pressures that drove the
561 parties to their proposed agreement. Requiring court approval in
562 such common circumstances is unnecessary.

563 At the same time, proposed Rule 23(e)(5)(B) deals with payment
564 "in connection with" forgoing or withdrawing an objection, or
565 forgoing, dismissing, or abandoning an appeal from a judgment
566 approving the proposed settlement. No payment or other
567 consideration may be provided unless the court approves. The
568 expectation is that this approach will destroy the "business model"
569 of making unsupported objections, followed by a threat to appeal
570 the inevitable denial. A court is not likely to approve payment
571 simply for forgoing or withdrawing an appeal. Imagine a request to
572 be paid to withdraw an appeal because it is frivolous and risks
573 sanctions for a frivolous appeal. Or a contrasting request to
574 approve payment to the objector, not to the class, for withdrawing
575 a forceful objection that has a strong prospect of winning reversal
576 for the class or a subclass. Approval will be warranted only for
577 other reasons that connect to withdrawal of the objection. An
578 agreement with the proponents of the settlement and judgment to
579 modify the settlement for the benefit of the class, for example,
580 will require court approval of the new settlement and judgment and
581 may well justify payment to the now successful objector. Or an
582 objector or objector's counsel may, as the Committee Note observes,
583 deserve payment for even an unsuccessful objection that illuminates
584 the competing concerns that bear on the settlement and makes the
585 court confident in its judgment that the settlement can be
586 approved.

587 The requirement that the district court approve any payment or
588 compensation for forgoing, dismissing, or abandoning an appeal
589 raises obvious questions about the allocation of authority between
590 district court and court of appeals if an appeal is actually taken.
591 Before a notice of appeal is filed, the district court has clear
592 jurisdiction to consider and rule on a motion for approval. If it
593 rules before an appeal is taken, its ruling can be reviewed as part
594 of a single appeal. The Subcommittee has decided not to attempt to
595 resolve the question whether a pre-appeal motion suspends the time
596 to appeal. Something may well turn on the nature of the motion. If
597 it is framed as a motion for attorney fees, it fits into a well-
598 established model. If it is for payment to the objector, matters
599 may be more uncertain — it may be something as simple as an
600 argument that the objector should be fit into one subclass rather
601 than another, or that the objector's proofs of injury have been

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602 dealt with improperly.

603 After the agenda materials were prepared, the Subcommittee
604 continued to work on the relationship between the district court
605 and the court of appeals. It continued to put aside the question of
606 appeal time. But it did develop a new proposed Rule 23(e)(5)(C) to
607 address the potential for overlapping jurisdiction when a motion to
608 approve payment is not made, or is made but not resolved, before an
609 appeal is docketed. The proposal is designed to be self-contained,
610 operating without any need to amend the dismissal provisions in
611 Appellate Rule 42. "The question is who has the case." The
612 proposal, as it evolved in the Subcommittee, reads:

613 (C) *Procedure for Approval After Appeal*. If approval
614 under Rule 23(e)(5)(B) has not been obtained before
615 an appeal is docketed in the court of appeals, the
616 procedure of Rule 62.1 applies while the appeal
617 remains pending.

618 Invoking the indicative ruling procedure of Rule 62.1 facilitates
619 communication between the courts. The district court retains
620 authority to deny the motion without seeking a remand. It is
621 expected that very few motions will be made simply "for" approval
622 of payment, and that denial will be the almost inevitable fate of
623 any motion actually made. But if the motion raises grounds that
624 would lead the district court either to grant the motion or to want
625 more time to consider the motion if that fits with the progress of
626 the case on appeal, the court of appeals has authority to remand
627 for that purpose.

628 Representatives of the Appellate Rules Committee have endorsed
629 this approach in preference to the more elaborate earlier drafts
630 that would amend Appellate Rule 42.

631 The first comment was that it is extraordinary that it took so
632 long to reach such a sensible resolution.

633 The next reaction asked how this proposal relates to waiver.
634 If an objector fails to make an objection with the specificity
635 required by proposed Rule 23(e)(5)(A), for example, can the appeal
636 request permission to amend the objection? Isn't this governed by
637 the usual rule that you must stand by the record made in the
638 district court? And to be characterized as procedural forfeiture,
639 not intentional waiver? The purpose of (e)(5)(A) is to get a useful
640 objection; an objection without explanation does not help the
641 court's evaluation of the proposed settlement. Pro se objectors
642 often fail to make helpful objections. So a simple objection that
643 the settlement "is not fair" is little help if it does not explain
644 the unfairness. At the same time, the proposed Committee Note
645 recognizes the need to understand that an objector proceeding
646 without counsel cannot be expected to adhere to technical legal

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647 standards. The Note also states something that was considered for
648 rule text, but withdrawn as not necessary: failure to state an
649 objection with specificity can be a basis for denying the
650 objection. That, and forfeiture of the opportunity to supply
651 specificity on appeal, is a standard consequence of failure to
652 comply with a "must" procedural requirement. The courts of appeals
653 can work through these questions as they routinely do with
654 procedural forfeiture. Forfeiture, after all, can be forgiven, most
655 likely for clear error. It is not the same as intentional waiver.

656 The Committee approved a recommendation that the Standing
657 Committee approve publication of proposed Rule 23(e)(5) this
658 summer.

659 Interlocutory appeals. The proposals would amend Rule 23(f) in two
660 ways.

661 The first amendment adds language making it clear that a court
662 of appeals may not permit appeal "from an order under Rule
663 23(e)(1)." This question was discussed earlier. The Rule 23(e)(1)
664 provisions regulating notice to the class of a proposed settlement
665 and class certification are only that — approval, or refusal to
666 approve, notice to the class. Despite the common practice that has
667 called this notice procedure preliminary certification, it is not
668 certification. There is no sufficient reason to allow even
669 discretionary appeal at this point.

670 The Committee accepted this feature without further
671 discussion.

672 The second amendment of Rule 23(f) extends the time to file a
673 petition for permission to appeal to 45 days "if any party is the
674 United States" or variously described agencies or officers or
675 employees. The expanded appeal time is available to all parties,
676 not only the United States. This provision was suggested by the
677 Department of Justice. As with other provisions in the rules that
678 allow the United States more time to act than other parties are
679 allowed, this provision recognizes the painstaking process that the
680 Department follows in deciding whether to appeal, a process that
681 includes consultation with other government agencies that often
682 have their own elaborate internal review procedures.

683 Justice Nahmias reacted to this proposal by a message to Judge
684 Dow asking whether state governments should be accorded the same
685 favorable treatment. Often state attorneys general follow similarly
686 elaborate procedures in deciding whether to appeal. A participant
687 noted that he had been a state solicitor general, and that indeed
688 his state has elaborate internal procedures. At the same time, he
689 noted that the state procedures were not as time-consuming as the
690 Department of Justice procedures.

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691 This question prompted the suggestion that perhaps states
692 should receive the same advantages as the United States. But this
693 question arises at several points in the rules, often in provisions
694 allowing extra time for action by the United States. The appeal
695 time provisions in Appellate Rule 4 are a familiar example, as well
696 as the added time to answer in Rule 12. And at least on occasion,
697 the states are accorded the same favorable treatment as the United
698 States. Appellate Rule 29 allows both the United States and a state
699 to file an amicus brief without first winning permission. It may be
700 that these questions of parity deserve consideration as a separate
701 project. There might be some issues of line drawing. If states get
702 favorable treatment, what of state subdivisions? Actions against
703 state or local officials asserting individual liability? Should
704 large private organizations be allowed to claim equally complex
705 internal procedures — and if so, how large?

706 The concluding observation was that extending favorable
707 treatment to the United States will leave states where they are
708 now. The amendment will not disadvantage them; it only fails to
709 provide a new advantage. Nor need it be decided whether the time
710 set by a court rule, such as Rule 23(f), is subject to extension in
711 a way that a statute-based time period cannot be.

712 A separate question was framed by a sentence appearing in
713 brackets in the draft Committee Note at p. 107, lines 408-409 of
714 the agenda book. This sentence suggested that the 45-day time
715 should apply as well in "an action involving a United States
716 corporation." There are not many "United States corporation[s]."
717 Brief comments for the Department of Justice led to the conclusion
718 that this sentence should be deleted.

719 The Class Action Fairness Act came into the discussion with a
720 question whether any of the Rule 23 proposals might run afoul of
721 statutory requirements. CAFA provides an independent set of rules
722 that must be satisfied. It has provisions relating to settlement,
723 including notice to state officials of proposed settlements. But
724 nothing in the proposed amendments is incompatible with CAFA.
725 Courts can fully comply with statutory requirements in implementing
726 Rule 23.

727 The Committee voted to recommend proposed Rule 23(f) to the
728 Standing Committee to approve for publication this summer.

729 <u>Ongoing Questions.</u> The Subcommittee has put aside for the time
730 being some of the proposals it has studied, often at length.

731 "Pick-off" offers raise one set of questions, addressed by a
732 number of drafts that illustrate different possible approaches. The
733 questions arise as defendants seek to defeat class certification by
734 acting to moot the claims of individual would-be representatives.
735 The problem commonly arises before class certification, and often

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before a motion for certification. One reason for deferring action was anticipation of the Supreme Court's decision in the Campbell-Ewald case. The decision has been made, and the Subcommittee has been tracking early reactions in the courts. It is more difficult to track responses by defendants. One recent district-court opinion deals with an effort to moot a class representative by attempting to make a Rule 67 deposit in court of full individual relief. The attempt was rejected as outside the purposes of Rule 67. Other attempts are being made to bring mooting money into court, responding to the part of the Campbell-Ewald opinion that left this question open, and to the separate opinions suggesting that mootness might be manufactured in this way. The question whether to propose Rule 23 amendments remains under consideration.

Consideration of offers that seek to moot individual representatives has led also to discussion of the possibility that Rule 23 should be amended by adopting explicit provisions for substituting new representatives when the original representatives fail. The rule could be narrow. One example of a narrow rule would be one that addresses only the effects of involuntary mooting by defense acts that afford complete relief. A broad rule could reach all circumstances in which loss of one or more representatives make it desirable or necessary to find replacements.

Discussion of substitute representatives began with the observation that it can be prejudicial to the defendant when class representatives pull out late in the game. An illustration was offered of a case in which a former employee sought injunctive relief on behalf of a class. He retired. He could not benefit from injunctive relief that would benefit only current employees. The plaintiffs sought to amend the complaint to substitute a new representative. But they acted after expiration of the time for amendments allowed by the scheduling order. And they had not been diligent, since the impending retirement was well known. "It would have been different if the representative had been hit by a bus," an unforeseeable event that could justify amending the scheduling order.

A different anecdote was offered by a judge who asked about the size of a proposed payment for services by the representative plaintiff. The response was that the representative deserved extra because he had rejected a pick-off offer.

It was asked whether judges understand now that they have authority to allow substitution of representatives. An observer suggested that it would be good to adopt an explicit substitution rule. A representative seeks to assume a trust duty to act on behalf of others. And after a class is certified, a set of trust beneficiaries is established. It would help to have an affirmative statement in the rule that recognizes substitution of trustees.

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782 The Committee agreed that the Subcommittee should continue to
783 consider the advantages of adopting an express rule to confirm, and
784 perhaps regularize, existing practices for substituting
785 representatives.

786 Finally, the Subcommittee continues to consider the questions
787 raised by the growing number of decisions that grapple with the
788 question whether "ascertainability" is a useful concept in deciding
789 whether to certify a class. The decisions remain in some disarray.
790 But the question is being actively developed by the courts.
791 Continuing development may show either that the courts have reached
792 something like consensus, or that problems remain that can be
793 profitably addressed by new rule provisions.

794 The Committee thanked the Subcommittee for its long, devoted,
795 and successful work.

796 *Pilot Projects*

797 Judge Bates introduced the work on pilot projects by noting
798 that the work is being advanced by a Subcommittee that includes
799 both present and former members of this Committee and the Standing
800 Committee. Judge Campbell, former chair of this Committee, chairs
801 the Subcommittee. Other members include Judge Sutton, Judge Bates,
802 Judge Grimm (a former member of this Committee), Judge Gorsuch,
803 Judge St. Eve, John Barkett, Parker Folse, Virginia Seitz, and
804 Edward Cooper. Judge Martinez has joined the Subcommittee work as
805 liaison from the Committee on Court Administration and Case
806 Management.

807 Judge Campbell began presenting the Subcommittee's work by
808 noting that the purpose of pilot projects is to advance
809 improvements in civil litigation by testing proposals that, without
810 successful implementation in actual practice, seem too
811 adventuresome to adopt all at once in the national rules.

812 The Subcommittee has held a number of conference calls since
813 this Committee discussed pilot projects last November. Two projects
814 have come to occupy the Subcommittee: Expanded initial disclosures
815 in the form of mandatory early discovery requests, and expedited
816 procedures.

817 Mandatory Initial Discovery. The mandatory early discovery project
818 draws support from many sources, including innovative federal
819 courts and pilot projects in ten states. The Subcommittee held
820 focus-group discussions by telephone with groups of lawyers and
821 judges from Arizona and Colorado, states that have developed
822 enhanced initial disclosures. Another conference call was held with
823 lawyers from Ontario and British Columbia to learn about initial
824 disclosures in Canada. "People who work under these disclosure
825 systems like them better than the Federal Rules of Civil

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826 Procedure."

827 The draft presented in the agenda materials has been
828 considered by the Case Management Subcommittee of the Committee on
829 Court Administration and Case Management. They have reflected on
830 the draft in a thoughtful letter that will be considered as the
831 work goes forward.

832 Judge Grimm took the lead in drafting the initial discovery
833 rule.

834 Mandatory initial discovery would be implemented by standing
835 order in a participating court. The order would make participation
836 mandatory, excepting for cases exempted from initial disclosures by
837 Rule 26(a)(1)(B), patent cases governed by local rule, and
838 multidistrict litigation cases. Because the initial discovery
839 requests defined by the order include all the information covered
840 by Rule 26(a)(1), separate disclosures under Rule 26(a)(1) are not
841 required.

842 The Standing Order includes Instructions to the Parties.
843 Responses are required within the times set by the order, even if
844 a party has not fully investigated the case. But reasonable inquiry
845 is required, the party itself must sign the responses under oath,
846 and the attorney must sign under Rule 26(g).

847 The discovery responses must include facts relevant to the
848 parties' claims or defenses, whether favorable or unfavorable. This
849 goes well beyond initial disclosures under Rule 26(a)(1), which go
850 only to witnesses and documents a party "may use." The Committee on
851 Court Administration and Case Management may raise the question
852 whether the requirement to respond with unfavorable information
853 will discourage lawyers from making careful inquiries. Experience
854 in Arizona, Colorado, and Canada suggests lawyers will not be
855 discouraged.

856 The time for filing answers, counterclaims, crossclaims, and
857 replies is not tolled by a pending motion to dismiss or other
858 preliminary motion. This provision provoked extensive discussion
859 within the Subcommittee. An answer is needed to frame the issues.
860 Suspending the time to answer would either defer the time to
861 respond to the discovery requests or lead to responses that might
862 be too narrow, broader than needed for the case, or both. The
863 Subcommittee will consider whether to add a provision that allows
864 the court to suspend the time to respond, whether for "good cause"
865 or on a more focused basis.

866 The times to respond are subject to two exceptions. If the
867 parties agree that no party will undertake any discovery, no
868 initial discovery responses need be filed. And initial responses
869 may be deferred, one time, for 30 days if the parties certify that

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870 they are seeking to settle and have a good-faith belief that the
871 dispute will be resolved within 30 days of the due date for their
872 responses.

873 Responses, and supplemental responses, must be filed with the
874 court. The purpose of this requirement is to enable the court to
875 review the responses before the initial conference.

876 The initial requests impose a continuing duty to supplement
877 the initial responses in a timely manner, with a final deadline.
878 The draft sets the time at 90 days before trial. The Court
879 Administration and Case Management Committee has suggested that it
880 may be better to tie the deadline to the final pretrial conference.
881 Later discussion recognized that the final pretrial conference may
882 indeed be the better time to choose.

883 The parties are directed to discuss the mandatory initial
884 discovery responses at the Rule 26(f) conference, to seek to
885 resolve any limitations they have made or will make, to report to
886 the court, and to include in the report the resolution of
887 limitations invoked by either party and unresolved limitations or
888 other discovery issues.

889 As a safeguard, the instructions provide that responses do not
890 constitute an admission that information is relevant, authentic, or
891 admissible.

892 Rule 37(c)(1) sanctions are invoked.

893 The mandatory initial discovery requests themselves follow
894 these instructions in the Standing Order.

895 The first category describes all persons who have discoverable
896 information, and a fair description of the nature of the
897 information.

898 The second category describes all persons who have given
899 written or recorded statements, attaching a copy of the statement
900 when possible, but recognizing that production is not required if
901 the party asserts privilege or work-product protection.

902 The third category requires a list of documents, ESI, and
903 tangible things or land, "whether or not in your possession,
904 custody, or control, that you believe may be relevant to any
905 party's claims or defenses." If the volume of materials makes
906 individual listing impracticable, similar documents or ESI may be
907 grouped into specific categories that are described with
908 particularity. A responding party "may" produce the documents, or
909 make them available for inspection, instead of listing them.

910 The fourth category requires a statement of the facts relevant

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911 to each of the responding party's claims or defenses, and of the
912 legal theories on which each claim or defense is based.

913 The fifth category requires a computation of each category of
914 damages, and a description or production of underlying documents or
915 other evidentiary material.

916 The sixth category requires a description of "any insurance or
917 other agreement under which an insurance business or other person
918 or entity may be liable to satisfy all or part of a possible
919 judgment in the action or to indemnify or reimburse a party."

920 The seventh provision authorizes a party who believes that
921 responses in categories three, five, or six are deficient to
922 request more detailed or thorough responses.

923 The Standing Order has separate provisions governing the means
924 of providing hard-copy documents and ESI.

925 Hard-copy documents must be produced as they are kept in the
926 ordinary course of business.

927 When ESI comes into play, the parties must promptly confer and
928 attempt to agree on such matters as requirements and limits on
929 production, disclosure, and production; appropriate searches,
930 including custodians and search terms "or other use of technology
931 assisted review"; and the form for production. Disputes must be
932 presented to the court in a single joint motion, or, if the court
933 directs, a conference call with the court. The motion must include
934 the parties' positions and separate certifications by counsel under
935 Rule 26(g). Absent agreement of the parties or court order, ESI
936 identified in the initial discovery responses must be produced
937 within 40 days after serving the response. Absent agreement,
938 production must be in the form requested by the receiving party; if
939 no form is requested, production may be in a reasonably usable form
940 that will enable the receiving party to have the same ability as
941 the producing party to access, search, and display the ESI.

942 Finally, the Subcommittee has begun work on a User's Manual to
943 help pilot judges implement the project. It will cover such
944 familiar practices as early initial case-management conferences,
945 reluctance to extend the times for initial discovery responses, and
946 prompt resolution of discovery disputes.

947 Judge Grimm added that the Subcommittee also had considered an
948 extensive amount of information about experience with initial
949 disclosures under the Civil Justice Reform Act. It also reviewed
950 experience with the initial disclosure requirement first adopted in
951 1993, a more extensive form than the watered-down version adopted
952 in 2000. Further help was found in the 1997 conference at Boston
953 College Law School with lawyers, judges, and professors. In

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954 addition to Arizona and Colorado, a number of other state
955 disclosure provisions were studied. "This was a comprehensive
956 approach to what can be found."

957 Judge Sutton asked what the Standing Committee will be asked
958 to approve. This proposal is more developed than the proposals for
959 earlier pilot projects have been. But there will have to be
960 refinements along the way to implementation. That is the ordinary
961 course of development. The goal will be to ask the Standing
962 Committee to approve the pilot conceptually, while presenting as
963 many of the details as can be managed. Judge Bates agreed that
964 "refinements are inevitable."

965 Discussion began with a practicing lawyer's observation that
966 he had been skeptical about the ability of lawyers to find ways to
967 avoid the requirement in the 1993 rule that unfavorable information
968 be disclosed. But this pilot is worth doing. "Let's 'go big' with
969 something that has a potential to make major changes in the speed
970 and efficiency of federal litigation." The discussions with the
971 groups in Arizona and Colorado, and the lawyers in Canada, provided
972 persuasive evidence that this can work. "They live and work with
973 many of these ideas. And they find the ideas not only workable, but
974 welcome." The proposal results from intense effort to learn from
975 actual experience. The effort will continue through the time of
976 seeking approval from the Judicial Conference in September, and on
977 to the stage of actual implementation.

978 This view was seconded by "a veteran of 1993." The 1993 rule
979 failed because the Committee did not work closely enough with the
980 bar, and was not able to provide persuasive evidence that the
981 required disclosures could work. A pilot will provide the data to
982 support broader disclosure innovations.

983 An initial question observed that much of the conversation
984 refers to this project as involving initial disclosure. But the
985 standing order refers to "requests": does the duty to respond
986 depend on having a party promulgate actual discovery requests? The
987 answer is that the pilot's standing order adopts a set of mandatory
988 initial discovery requests. The requests are addressed to all
989 parties, and must be responded to in the same way as ordinary
990 discovery requests under Rules 33 and 34.

991 Thinking about implementation of the pilot project has assumed
992 that it should be adopted only in districts that can ensure
993 participation by all judges in the district. That may make it
994 impossible to launch the project in any large district, but it
995 seems important to involve a large district or two. Discussion of
996 this question began with the observation that the pilot project
997 embodies great ideas, but that it will be easier to "sell" them if
998 they can be tested in large districts. At the same time, it is not
999 realistic to expect that all judges in a large district will be

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1000 willing to sign on, even in the face of significant peer pressure
1001 from other judges. A separate question asked whether there might be
1002 some advantage of being able to compare outcomes in cases assigned
1003 to participating and nonparticipating judges in the ordinary
1004 random-assignment practices of the district. Emery Lee responded
1005 that there could be an advantage, but that the balance between
1006 advantage and disadvantage would depend on the judges in the two
1007 pools. This prompted the observation that there is reason to be
1008 concerned about self-selection into or out of pilot projects. A
1009 judge suggested that participation in the pilot "should not be
1010 terribly onerous." It may be better to leave the program as one
1011 that expects unanimity, understanding that a pilot district might
1012 allow a judge to opt out for individual reasons. Another judge
1013 thought that his court could achieve near-unanimity: "Judges on my
1014 court take pride in what they do." Several members agreed that the
1015 project should not be changed by, for example, adopting an explicit
1016 80% threshold. Perhaps it is better to leave it as a preference for
1017 districts in which all judges participate in the pilot, recognizing
1018 that the need to enlist one or more large districts may lead to
1019 negotiation. One approach would be to design the project to say
1020 that all judges "should," not "must" participate. A judge noted
1021 that success will depend on willingness and eagerness to
1022 participate. In his relatively small district, "our senior judges
1023 are not eager."

1024 A more difficult question is raised by recognition of the
1025 possibility that some sort of exception should be adopted that
1026 allows a court to suspend the time to answer when there is a motion
1027 to dismiss. "In my district we get many well-considered motions to
1028 dismiss." They can pretty much be identified on filing. A lot of
1029 them are government cases. Another big set involve "200-page" pro
1030 se complaints that will require much work to answer. This
1031 observation was supported by the Department of Justice. The goal of
1032 speedy development of the case is important, but many motions to
1033 dismiss address cases that should not be in court at all. If the
1034 case is subject to dismissal on sovereign-immunity grounds, for
1035 instance, the government should be spared the work of answering and
1036 disclosing. In other cases, the claim may challenge a statute on
1037 its face, pretermitting any occasion for disclosure or discovery —
1038 why not invoke the ordinary rule that suspends the time to answer?
1039 A judge offered a different example: "Many cases have meritorious
1040 but flexible motions to dismiss." A diversity complaint, for
1041 example, may allege only the principal place of business of an LLC
1042 party. The citizenship of the LLC members needs to be identified to
1043 determine whether there is diversity jurisdiction. Further time is
1044 needed to decide the motion. Yet another judge observed that
1045 setting the time to respond to the initial mandatory requests at 30
1046 days after the answer can enable action on the motion to dismiss.

1047 A further suggestion was that there are solid arguments on
1048 both sides of the question whether a pleading answer should be

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1049 required before the court acts on a motion to dismiss. "The
1050 usefulness of responses turns to a significant degree on the
1051 parties' ability to understand the issues." But if the time to
1052 answer is deferred pending disposition of a motion to dismiss, it
1053 may be difficult to devise a suitable trigger for the duty to
1054 respond to the initial mandatory requests. And if the duty to
1055 respond is always deferred until after a ruling on a motion to
1056 dismiss, the result may be to encourage motions to dismiss.

1057 A judge agreed that further thought is needed, particularly
1058 for jurisdictional motions and cases in which the government is a
1059 party. But he noted that he has conferences that focus both on
1060 motions and the merits. "If there is too much possibility of
1061 deferring the time to answer, we may suffer."

1062 A lawyer member suggested that the line could be drawn at
1063 motions arguing that the defendant cannot be called on to respond
1064 in this court. These motions would go to questions like personal
1065 jurisdiction and subject-matter jurisdiction. They would not
1066 include motions that go to the substance of the claim.

1067 Another troubling example was offered: a claim of official
1068 immunity may be raised by motion to dismiss. Elaborate practices
1069 have grown up from the perception that one function of the immunity
1070 is to protect the individual defendant from the burdens of
1071 discovery as well as the burden of trial.

1072 An analogy was suggested in the variable practices that have
1073 grown up around the question whether discovery should be allowed to
1074 proceed while a motion to dismiss remains under consideration.

1075 A judge offered "total support" for the project, recognizing
1076 that further refinements are inevitable. One part of the issues
1077 raised by motions to dismiss might be addressed through the timing
1078 of ESI production, which may be the most onerous part of the
1079 initial mandatory discovery responses. The draft recognizes that
1080 ESI production can be deferred by the court or party agreement.

1081 Judge Campbell agreed that this question deserves further
1082 thought.

1083 Model orders provided another subject for discussion. A judge
1084 suggested that some judges, including open-minded innovators, would
1085 resist model orders because they think their own procedures work
1086 better. They may hesitate to buy into a full set of model orders.
1087 But Emery Lee said that model orders will be needed for research
1088 purposes. And Judge Campbell thought that the good idea of
1089 developing model orders could be pursued by looking for standard
1090 practices in Arizona and other states with expansive pretrial
1091 disclosures.

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1092 The Committee approved a motion to carry the initial mandatory
1093 discovery pilot project program forward to the Standing Committee
1094 for approval for submission to the Judicial Conference in
1095 September. The Committee recognizes that the Subcommittee will
1096 continue its deliberations and make further refinements in its
1097 recommendations.

1098 Expedited Procedures. Judge Campbell introduced the expedited
1099 procedures pilot project by observing that it rests on principles
1100 that have been proved in many courts, by many judges, and in many
1101 cases. The project is designed not to test new procedures, but to
1102 change judicial culture.

1103 The project has three parts: The procedural components; means
1104 of measuring progress in pilot courts; and training.

1105 These practices provide the components of the pilot: (1)
1106 prompt case-management conferences in every case; (2) firm caps on
1107 the time allocated for discovery, to be set by the court at the
1108 conference and to be extended no more than once, and only for good
1109 cause and on a showing of diligence by the parties; (3) prompt
1110 resolution of discovery disputes by telephone conferences; (4)
1111 decisions on all dispositive motions within 60 days after the reply
1112 brief is filed; and (5) setting and holding firm trial dates.

1113 The metrics to be measured are these: (1) if it can be
1114 measured, the level of compliance with the practices embodied in
1115 the pilot; (2) trial dates in 90% of civil cases set within 14
1116 months of case filing, and within 18 months in the remaining 10% of
1117 cases; and (3) a 25% reduction in the number of categories of cases
1118 in the district "dashboard" that are decided slower than the
1119 national average, bringing the court closer to the norm. (The
1120 "dashboard" is a tool developed for use by the Committee on Court
1121 Administration and Case Management. It measures disposition times
1122 in all 94 districts across many different categories of cases. Each
1123 district's experience in each category is compared to the national
1124 average. The dashboard is described in the article by Donna
1125 Stienstra set out as an exhibit to the Pilot Projects report. The
1126 chief judge of each district got a copy of that district's
1127 dashboard last September.)

1128 Training and collaboration will have these components: (1) an
1129 initial one-day training session by the FJC, followed by additional
1130 FJC training every six months, or possibly every year; (2)
1131 quarterly meetings by judges in the pilot district to discuss best
1132 practices, what is working and what is not working, leading to
1133 refinements of case-processing methods to meet the pilot goals; (3)
1134 making judges from outside the district available as resources
1135 during the quarterly district conferences; (4) at least one bench-
1136 bar conference a year to talk with lawyers about how well the pilot
1137 is working; and (5) a 3-year period for the pilot.

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1138 This pilot "has a lot of moving parts, but not as many as the
1139 mandatory initial disclosure pilot."

1140 Judge Fogel and Emery Lee responded to a question about the
1141 likely reaction of pilot-district judges to exploring individual
1142 disposition times. They answered that in many settings researchers
1143 are wary of compiling individual-judge statistics because many
1144 judges are sensitive to these matters. But the problem is reduced
1145 in a pilot project because the districts volunteer. They also
1146 pointed out that it will be necessary to compile a lot of pre-pilot
1147 data to compare to experience under the pilot. "The CACM-FJC model
1148 helps." At the same, the question whether individual judges'
1149 "dashboards" would become part of the public data must be
1150 approached with caution and sensitivity.

1151 Judge Fogel also noted that it is important to avoid the
1152 problem of eager volunteers. The FJC has a very positive reaction
1153 to the pilot. It will be useful to engage in a project designed to
1154 see what happens with a training program.

1155 It was noted that Judge Walton, writing for the CACM Case
1156 Management Subcommittee, raised questions regarding the deadline
1157 for decisions on dispositive motions. "[T]here are some practical
1158 considerations that may make compliance" difficult. Individual
1159 calendar and trial schedules may interfere. Supplemental briefing
1160 may be required after the reply brief. And added time may be
1161 required in cases that deserve extensive written decisions because
1162 of novel or unsettled issues of law or extensive summary-judgment
1163 records. The deadline might be extended to 90 days. Or it could be
1164 framed as a target time for disposing of a designated fraction of
1165 dispositive motions in all cases. Or it could be framed in
1166 aspirational terms, as "should" rather than "must."

1167 The trial-date target also was questioned. Perhaps it is not
1168 ambitious enough — even today, a large proportion of all cases are
1169 resolved in 14 months or less.

1170 The Committee adopted a recommendation that the Standing
1171 Committee approve the Expedited Procedures pilot project for
1172 submission to the Judicial Conference in September. As with the
1173 initial mandatory discovery pilot, it will be recognized that
1174 approval of the concept will entail further work by the
1175 Subcommittee, at times in conjunction with the FJC, the Committee
1176 on Court Administration and Case Management, and perhaps others.

1177 *Other Proposals*

1178 Several other proposals are presented by the agenda materials.
1179 Some have carried over from earlier meetings. Others respond to new
1180 suggestions for study. Each came on for discussion.

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1181 RULE 5.2: REDACTING PROTECTED INFORMATION

1182 Rule 5.2 requires redaction from paper and electronic filings
1183 of specified items of private information. It was initially adopted
1184 in conjunction with Appellate Rule 25(a)(5), Bankruptcy Rule 9037,
1185 and Criminal Rule 49.1. It has seemed important to achieve as much
1186 uniformity among these four rules as proves compatible with the
1187 different settings in which each operates.

1188 The Committee on Court Administration and Case Management
1189 referred to the Bankruptcy Rules Committee a problem that seems to
1190 arise with special frequency in bankruptcy filings. Bankruptcy
1191 courts are receiving creditors' requests to redact previously filed
1192 documents that include material that the privacy rules forbid.
1193 These requests may involve thousands of documents filed in numerous
1194 courts. The immediate question was whether Bankruptcy Rule 9037
1195 should be amended to include an express procedure for moving to
1196 redact previously filed documents. The prospect that different
1197 bankruptcy courts may become involved with the same questions
1198 arising from simultaneous filings suggests a particular need for a
1199 nationally uniform procedure, even if satisfactory but variable
1200 procedures might be crafted by each court acting alone.

1201 The Bankruptcy Rules Committee has responded by creating a
1202 draft Rule 9037(h) that would establish a specific procedure for a
1203 motion to redact. The central feature of the procedure is a copy of
1204 the filing that is identical to the paper on file with the court
1205 except that it redacts the protected information. The court would
1206 be required to "promptly" restrict public access both to the motion
1207 and the paper on file. The restriction would last until the ruling
1208 on the motion, and beyond if the motion is granted. Public access
1209 would be restored if the motion is denied.

1210 Judge Harris explained that bankruptcy courts receive hundreds
1211 of thousands of proofs of claim. "The volume is great." Redaction
1212 of information filed in violation of the rules is not as good as
1213 initial compliance. But there is good reason to have a uniform
1214 redaction procedure. If the court cannot restrict access until
1215 redaction is actually accomplished, the motion to redact may itself
1216 draw searches for the private information. The proposed Rule
1217 9037(h) relies on the assumption that the CM/ECF system can
1218 immediately restrict access when a motion to redact is filed. If
1219 not, the motion just makes things worse.

1220 Judge Sutton asked whether the Bankruptcy Rules Committee "is
1221 in a rush to publish." Judge Harris answered that the Committee is
1222 ready to wait so that all advisory committees can come together on
1223 uniform language.

1224 Clerk-liaison Briggs noted that "we get a lot of improper
1225 failures to comply with Rule 5.2. We have an established procedure

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1226 that immediately denies access."

1227 Further discussion confirmed the wisdom of the Bankruptcy
1228 Rules Committee's willingness to defer publication of their draft
1229 Rule 9037(h) pending work in the other committees. "One train is
1230 pretty far ahead of the others." Waiting for parallel development
1231 and publication will provide a better opportunity for uniformity.

1232 One possible outcome might be that the Administrative Office
1233 and other bodies could develop procedures that automatically
1234 respond to the filing of a motion to redact by closing off public
1235 access to the paper addressed by the motion. If that could be done,
1236 there might be no need for a new set of rules provisions. But the
1237 work should continue, recognizing that this happy outcome may not
1238 come to pass.

1239 RULE 30(b)(6): 16-CV-A

1240 Members of the council and Federal Practice Task Force of the
1241 ABA Section of Litigation, acting in their individual capacities,
1242 submitted a lengthy examination of problems encountered in practice
1243 under Rule 30(b)(6). Rule 30(b)(6) allows a party to depose an
1244 entity, whether a party or not a party, on topics designated in the
1245 notice. The entity is required to designate one or more witnesses
1246 to testify on its behalf, providing "information known or
1247 reasonably available to the organization."

1248 The idea that there are problems in implementing Rule 30(b)(6)
1249 is not new to the Committee. Extensive work was done in 2006 in
1250 response to proposals made by a Committee of the New York State Bar
1251 Association. The topic was considered again in 2013 in response to
1252 proposals made by the New York City Bar. Each time, the Committee
1253 concluded that there is little opportunity to adopt new rule text
1254 that would provide effective remedies for problems that are often
1255 case-specific and that often reflect deliberate efforts to subvert
1256 or misuse the Rule 30(b)(6) process.

1257 Many of the present proposals involve issues that were
1258 considered in the earlier work. One example is that Rule 30(b)(6)
1259 does not require the entity to designate as a witness the "most
1260 knowledgeable person." Another example is questions that go beyond
1261 the topics listed in the notice. Questions addressing a party's
1262 contentions in the litigation are yet another example.

1263 The question is whether the Committee should take up these
1264 questions in response to this third expression of anguish from a
1265 third respected bar group. The request, rather than urge specific
1266 answers, is that the Committee "undertake a review of the Rule and
1267 the case law developed under it with the goal of resolving
1268 conflicts among the courts, reducing litigation on its
1269 requirements, and improving practice * * *." It is clear that Rule

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1270 30(b)(6) "continues to be a source of unhappiness." On the other
1271 hand, to paraphrase Justice Jackson, there is a risk that pulling
1272 one misshapen stone out of the grotesque structure may disrupt a
1273 careful balance. So "many litigants find Rule 30(b)(6) an extremely
1274 important tool to discover important information. Others find it an
1275 enormous pain."

1276 Discussion began by noting that three important groups have
1277 now suggested the need to attempt improvements.

1278 Committee members could not, on the spot, identify any clear
1279 circuit splits on the meaning or administration of Rule 30(b)(6).
1280 It may be helpful to explore this question.

1281 It was noted that it is difficult to impose sanctions for not
1282 providing the most knowledgeable person.

1283 It also was noted that there is an acute problem of producing
1284 witnesses who are not prepared.

1285 So it was observed that the rule should be enforceable, and
1286 adding complications will make enforcement more difficult.

1287 A lawyer member said that he confronts problems with Rule
1288 30(b)(6) "constantly, all over the country, and even in sister
1289 cases. The Rule is constantly a source of controversy. Proper
1290 preparation issues will never go away." The recurring issues of
1291 interpretation and application show that as hard as it may be to
1292 make the Rule better, we should feel an obligation to address these
1293 issues. The problems are not going away. Another look would be
1294 useful.

1295 Full agreement was expressed with this view.

1296 A judge observed that the 2015 discovery amendments raise the
1297 prospect that proportionality may become a factor in administering
1298 Rule 30(b)(6). It might help to confront this integration head-on
1299 as part of a Rule 30(b)(6) project.

1300 It was agreed that Rule 30(b)(6) should move to the active
1301 agenda. Judge Bates will appoint a subcommittee to deal with the
1302 problems.

1303 RULE 81(c)(3): 15-CV-A

1304 This item was carried forward from the agenda for the November
1305 2015 meeting.

1306 The question was framed by 15-CV-A as a potential misstep in
1307 the 2007 Style Project. The question is best understood in the full
1308 frame of Rule 81(c).

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1309 Rule 81(c) begins with (c)(1): "These rules apply to a civil
1310 action after it is removed from a state court." Applying the rules
1311 is important — a federal court could not function well with state
1312 procedure, it would be awkward to attempt to blend state procedure
1313 with federal procedure, and the very purpose of removal may be to
1314 seek application of federal procedure.

1315 Rule 81(c)(3) provides special treatment for the procedure for
1316 demanding jury trial. It begins with a clear proposition in (3)(A):
1317 a party who expressly demanded a jury trial before removal in
1318 accordance with state procedure need not renew the demand after
1319 removal.

1320 A second clear step is provided by Rule 81(c)(3)(B): if all
1321 necessary pleadings have been served at the time of removal, a jury
1322 trial demand must be served within 14 days, measured for the
1323 removing party from the time of filing the notice of removal and
1324 measured for any other party from the time it is served with a
1325 notice of removal. This provision avoids the problem that otherwise
1326 would arise in applying the requirement of Rule 38(b)(1) that a
1327 jury demand be served no later than 14 days after serving the last
1328 pleading directed to the issue.

1329 The third obvious circumstance departs from the premise of
1330 Rule 81(c)(3)(B): All necessary pleadings have not been served at
1331 the time of removal. Subject to the remaining two variations, it
1332 seems safe to rely on Rule 81(c)(1): Rule 38 applies after removal.

1333 The fourth circumstance arises when state law does not require
1334 a demand for jury trial at any time. Up to the time of the Style
1335 Project, this circumstance was clearly addressed by Rule
1336 81(c)(3)(A): "If the state law **does** not require an express demand
1337 for jury trial, a party need not make one after removal unless the
1338 court orders the parties to do so within a specified time. The
1339 court must so order at a party's request and may so order on its
1340 own." The direction was clear. The underlying policy is to balance
1341 competing interests. There is a fear that a party may rely after
1342 removal on familiar state procedure — absent this excuse, the right
1343 to jury trial could be lost for failure to file a timely demand
1344 under Rule 38 after removal. At the same time, the importance of
1345 establishing whether the case is to be set for jury trial reflected
1346 in Rule 38 is recognized by providing that the court can protect
1347 itself by an order setting a time to demand a jury trial, and by
1348 further providing that a party can protect its interest by a
1349 request that the court must honor by setting a time for a demand.

1350 The Style Project changed "does," the word highlighted above,
1351 to "did." That change opens the possibility of a new meaning for
1352 this fifth circumstance: "[D]id not require an express demand"
1353 could be read to excuse any need to demand a jury trial when state
1354 law does require an express demand, but sets the time for the

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1355 demand at a point after the time the case was removed. The question
1356 was raised by a lawyer in a case that was removed from a court in
1357 a state that allows a demand to be made not later than entry of the
1358 order first setting the case for trial. The court ruled, in keeping
1359 with the Style Project direction, that the change from "does" to
1360 "did" was intended to be purely stylistic. The exception that
1361 excuses any demand applies only if state law does not require an
1362 express demand for jury trial at any point.

1363 The question put by 15-CV-A can be stated in narrow terms:
1364 Should the Style Project change be undone, changing "did" back to
1365 "does"? That would avoid the risk that "did" will be read by others
1366 to mean that a jury demand is not required after removal if,
1367 although state procedure does require an express demand, the time
1368 set for the demand in state court occurs at a point after removal.
1369 There is at least some ground to expect that the ambiguous "did"
1370 may cause some other lawyers to misunderstand what apparently was
1371 intended to be a mere style improvement.

1372 A broader question is whether a party should be excused from
1373 making a jury demand if, although a demand is required both by Rule
1374 38 and by state procedure, state procedure sets the time for making
1375 the demand after the time the case is removed. It is difficult to
1376 find persuasive reasons for dispensing with the demand in such
1377 circumstances. And there is much to be said for applying Rule 38 in
1378 the federal court rather than invoking state practice.

1379 A still broader question is whether it is time to reconsider
1380 the provision that excuses the need for any jury demand when a case
1381 is removed from a state that does not require a demand. Both the
1382 court and the other parties find it important to know early in the
1383 case whether it is to be tried to a jury. Present Rule 81(c)(3)(A)
1384 recognizes this value in the provision that allows the court to
1385 require a demand, and that directs that the court must require a
1386 demand if a party asks it to do so. In effect this rule transfers
1387 the burden of establishing whether the case is to be tried to a
1388 jury from a party who wants jury trial to the court and the other
1389 parties. The evident purpose is to protect against loss of jury
1390 trial by a party who does not familiarize itself with federal
1391 procedure even after a case is removed to federal court. It may be
1392 that the time has come to insist on compliance with Rule 38 after
1393 removal, just as the other rules apply after removal.

1394 Discussion began with the question whether it would be useful
1395 to change "did" back to "does" now, holding open for later work the
1396 question whether to reconsider this provision. Two judges responded
1397 that it is important to know, as early as possible, whether a case
1398 is to be tried to a jury. Rather than approach the question in two
1399 phases, it will better to consider it all at once.

1400 The Committee agreed to study the sketch of a simplified Rule

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1401 81(c)(3) presented in the agenda materials:

1402 (3) *Demand for a Jury Trial.* Rule 38(b) governs a demand for
1403 jury trial unless, before removal, a party expressly
1404 demanded a jury trial in accordance with state law. If
1405 all necessary pleadings have been served at the time of
1406 removal, a party entitled to a jury trial under Rule 38
1407 must be given one[1] if the party serves a demand within 14
1408 days after:
1409 (A) it files a notice of removal, or
1410 (B) it is served with a notice of removal filed by
1411 another party.
1412 [1] This version simply tracks the current rule. It might
1413 be shortened: "If all necessary pleadings have been
1414 served at the time of removal, a demand must be
1415 served within 14 days after the party * * *."

1416 If there is some discomfort with the 14-day deadline, it could
1417 be set at 21 days.

1418 15-CV-EE: FOUR SUGGESTIONS

1419 Social Security Numbers: Rule 5.2 allows a filing to include the
1420 last four digits of a social security number. The suggestion is
1421 that the last four digits can be used to reconstruct a full number
1422 for any number issued before the last few years. This risk was
1423 known at the time Rule 5.2 and the parallel provisions in other
1424 rules were adopted. The decision to allow the last four digits to
1425 be filed was made deliberately in response to the special need to
1426 have the last four digits in bankruptcy filings and the desire to
1427 have parallel provisions in all the rules. The Committee concluded
1428 that Rule 5.2 should not be amended unless another advisory
1429 committee believes the question should be studied further.

1430 Forma pauperis affidavits: This suggestion is that an affidavit
1431 stating a person's assets filed to support an application to
1432 proceed in forma pauperis should be protected by requiring filing
1433 under seal and ex parte review. Other parties could be allowed
1434 access for good cause and subject to a protective order. Unsealing
1435 could be allowed in redacted form. The purpose is to protect
1436 privacy. Committee discussion recognized the privacy interest, but
1437 concluded that the proposal should be put aside. Ex parte
1438 consideration would make difficult problems for institutional
1439 defendants that confront a party who frequently files forma
1440 pauperis actions. Requiring long-term preservation of sealed papers
1441 is not desirable. Sealing is itself a nuisance. Recognizing forma
1442 pauperis status expends a public resource, conferring a public
1443 benefit. And the interest in privacy concern may be lessened by the
1444 experience that "no one has any interest" in most i.f.p. filings.
1445 The Committee voted to close consideration of this suggestion.

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1446 Copies of Unpublished Authorities: This proposal is drawn verbatim
1447 from Local Rule 7.2, E.D. & S.D.N.Y. The rule, in some detail,
1448 requires a lawyer to provide a pro se party with a copy of cases
1449 and other authorities cited by the lawyer or by the court if the
1450 authority is unpublished or is reported exclusively on computerized
1451 databases. Discussion reflected agreement that this practice can be
1452 a good thing. Some judges do it without benefit of a local rule.
1453 But not all do, and it cannot be assumed that all lawyers do it. A
1454 lawyer will supply the court with a truly inaccessible authority,
1455 and that may entail providing it to other parties. And even large
1456 institutions may not have ready access to everything that is out
1457 there. The committee agreed that although this local rule is an
1458 attractive idea, it is not an idea that should be embodied in a
1459 national rule. The practice might prove worthy of a place on the
1460 agendas of judicial training programs.

1461 Pro se e-filing: This suggestion is addressed by the proposals for
1462 e-filing and e-service discussed earlier in the meeting.

1463 PLEADING STANDARDS: 15-CV-GG

1464 This suggestion is that Rule 8(a)(2) and the appendix of forms
1465 that was abrogated on December 1, 2015 "are so misleading as to be
1466 plain error." The underlying proposition is that although the
1467 Supreme Court wrote its Twombly and Iqbal opinions as
1468 interpretations of Rule 8(a)(2), anyone who relies on the rule text
1469 will be grievously misled as to contemporary federal pleading
1470 standards. The question thus is whether the time has come to take
1471 on a project to consider whether the pleading standards that have
1472 evolved in the last nine years should be addressed by more explicit
1473 rule language. The project would attempt to discern whether there
1474 is any standard that can be articulated in rule language, and make
1475 one of at least three broad choices: confirm present practice;
1476 heighten pleading standards beyond what courts have developed in
1477 response to the Supreme Court's opinions; or reduce pleading
1478 standards to establish some more forgiving form of "notice
1479 pleading." The Committee has considered this question repeatedly.
1480 Brief discussion concluded that it is not yet time to undertake a
1481 project on general pleading standards.

1482 RULE 6(d) AND "MAKING" DISCLOSURES

1483 This suggestion arises from the need to read carefully through
1484 the provisions of Rules 26(a)(2)(D)(2) and 26(a)(3)(B) in relation
1485 to Rule 6(d). Rule 6(d) provides an additional three days to act
1486 after service is made by specified means when the time to act is
1487 set "after service" ["after being served" as the rule may soon be
1488 amended]. The provisions in Rule 26 direct that disclosure of a
1489 rebuttal expert be "made" within 30 days after the other party's
1490 disclosure, and that objections to pretrial disclosures be made
1491 within 14 days after the disclosures "are made." The concern is

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1492 that although these provisions set times that run from the time a
1493 disclosure is "made," not the time it is served, some unwary
1494 readers may overlook the distinction and rely on Rule 6(d). The
1495 Committee concluded that this suggestion should be closed.

1496 15-CV-JJ: PRO SE E-FILING

1497 This suggestion urges that pro se litigants be allowed to use
1498 e-filing. As with 15-CV-EE, noted above, this topic is addressed by
1499 the pending proposals to amend Rule 5.

1500 THIRD-PARTY LITIGATION FINANCING: 15-CV-KK

1501 This suggestion follows up an earlier submission that the
1502 Committee should act to require disclosure of third-party financing
1503 arrangements. It provides additional information about developments
1504 in this area, including materials reflecting interest in Congress.
1505 But it does not urge immediate action. Instead, it urges the
1506 Committee "to take steps soon to achieve greater transparency about
1507 the growing use of TPLF in federal court litigation." Discussion
1508 noted that "this is a hot topic in the MDL world." It was noted
1509 that third-party funding raises difficult questions of professional
1510 responsibility. The Committee decided, as it had earlier, that this
1511 topic should remain open on the agenda without seeking to develop
1512 any proposed rules now.

1513 RULE 4: SERVICE ON INDIVIDUAL FEDERAL EMPLOYEES: 15-CV-LL

1514 This suggestion says that it can prove difficult to effect
1515 service on a federal employee who is made an individual defendant.
1516 Locating a home address can be hard, particularly as to those whose
1517 permanent address is outside the District of Columbia. It is not
1518 clear whether service can be made by leaving a copy of the summons
1519 and complaint at the defendant's place of federal work, in the
1520 manner authorized by Rule 5(b)(2)(B)(i) for service of papers after
1521 the summons and complaint. Two amendments are suggested:
1522 authorizing service by leaving the summons and complaint at the
1523 defendant's place of work, or requiring the agency that employs the
1524 defendant to disclose a residence address. Discussion began by
1525 observing that the Enabling Act may not authorize a rule directing
1526 a federal agency to disclose an employee's address. It also was
1527 noted that similar problems can arise in attempting to serve state
1528 and local government employees. The Department of Justice thinks
1529 that service by leaving at the defendant's place of work is a bad
1530 idea. The Committee concluded that although there may be real
1531 problems in making service in some circumstances, they cannot be
1532 profitably addressed by amending Rule 4. This suggestion is closed.

1533 15-CV-NN: MINIDISCOVERY AND PROMPT TRIAL

1534 This suggestion by Judge Michael Baylson, a former Committee

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1535 member, proposes a new rule for "Mini Discovery and Prompt Trial."
1536 The rule would expand initial disclosure of documents, require
1537 responses to interrogatories within 14 days, limit depositions
1538 among the parties to 4 per side at no more than 4 hours each, allow
1539 third-party discovery only on showing good cause, allow no more
1540 than 10 requests for admissions, and set the period for discovery
1541 (including expert reports) at 90 days. Motions for summary judgment
1542 would be permitted only for good cause, defined as potentially
1543 meritorious legal issues, and not for insufficiency of the
1544 evidence. Discussion noted that a rule amendment would be required
1545 to authorize a court to forbid filing a motion for summary
1546 judgment, although a court can require a pre-motion conference to
1547 discuss the matter. Judge Pratter observed that Judge Baylson is a
1548 persuasive advocate for this proposal. It was suggested that judges
1549 should be encouraged to experiment along these lines. But it was
1550 concluded that it would be premature to consider rulemaking now.
1551 There is a big overlap between this proposal and the practices that
1552 will be explored in the two pilot projects approved by the
1553 Committee in earlier actions.

1554 15-CV-00: TIME STAMPS, SEALS, ACCESS FOR VISUALLY IMPAIRED

1555 This set of suggestions addresses several issues that do not
1556 lend themselves to resolution by court rule. The concern that
1557 improvements are needed in access to courts for the visually
1558 impaired is particularly sympathetic. Emery Lee will investigate
1559 whether PACER is accessible.

1560 RULE 58: SEPARATE DOCUMENT

1561 Judge Pratter brought to the Committee's attention a Third
1562 Circuit decision that found an appeal timely only because judgment
1563 had not been entered on a separate document. The catch was that the
1564 dismissal order included a footnote that set out the district
1565 court's "opinion." The ruling that the appeal was timely reflects
1566 many other applications of Rule 58. The separate document
1567 requirement was added to Rule 58 to establish a bright-line point
1568 to start the running of appeal time. It has been interpreted to
1569 deny separate-document status to very brief orders that provide
1570 even minimal explanation in addition to a direction for judgment.
1571 For many years the result was that appeal time — and the time for
1572 post-judgment motions — never began to run in cases that were
1573 finally resolved without entry of judgment on an appropriately
1574 "separate" document. This problem was resolved by amendments made
1575 to Rule 58 in 2002. Rule 58(c) now provides that when entry of
1576 judgment on a separate document is required, judgment is entered on
1577 the later of two events: when it is set out in a separate document,
1578 or 150 days after it is entered in the civil docket.

1579 Judge Pratter said that judges on her court have the desirable
1580 practice of providing brief explanations for judgments that do not

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1581 warrant formal opinions. But that means that if a judge
1582 inadvertently fails to enter a still briefer separate document,
1583 appeal time expands from 30 days to 180 days (150 days plus 30
1584 days). Is this desirable? The summary of the work done in 2002, and
1585 repeated by the Appellate Rules Committee in 2008, shows deliberate
1586 choices carefully made in creating and maintaining the present
1587 structure. Rather than reconsider these choices now, perhaps the
1588 Committee can find a mechanism that will foster compliance with the
1589 separate-document requirement.

1590 Discussion suggested that the problem is not in the rule. "We
1591 simply need to do it better." The courtroom deputy clerk should be
1592 educated in the responsibility to ensure entry of judgment on a
1593 separate document whenever the court intends a final judgment. Some
1594 circuits have managed educational efforts that have been
1595 successful, at least in immediate effect.

1596 This agenda item was closed.

Respectfully Submitted

Edward H. Cooper
Reporter

DRAFT

12b-002470

MEMORANDUM

TO: Judges Jeffrey Sutton, David Campbell, and John D. Bates

FROM: Judges Neil Gorsuch and Susan Graber

DATE: June 13, 2016

RE: Jury Trials in Civil Cases

We write to suggest that the Advisory Committee on the Rules of Civil Procedure consider a significant revision to the rules concerning demands for a jury trial. This proposal would affect, at a minimum, Rules 38, 39, and 81. We have not drafted proposed text; our suggestion is conceptual, though we would be happy to work on this issue further.

The idea is simple: As is true for criminal cases, a jury trial would be the default in civil cases. That is, if a party is entitled to a jury trial on a claim (whether under the Seventh Amendment, a statute, or otherwise), that claim will be tried by a jury unless the party waives a jury, in writing, as to that claim or any subsidiary issue.

Several reasons animate our proposal. First, we should be encouraging jury trials, and we think that this change would result in more jury trials. Second, simplicity is a virtue. The present system, especially with regard to removed cases, can be a trap for the unwary. Third, such a rule would produce greater certainty. Fourth, a jury-trial default honors the Seventh Amendment more fully.

Finally, many states do not require a specific demand. Although we have not looked for empirical studies, we do not know of negative experiences in those jurisdictions.

We recognize that this would be a huge change, and we also recognize that problems could result, especially in pro se cases. Nevertheless, we encourage the advisory committee to discuss our idea. Thank you.

Commission on the Legal Profession
Minutes of Meeting
May 5, 2011

The meeting began with everyone introducing themselves. Chief Justice Bender specifically recognized the newest members of the Commission and the liaison members from various specialty bar associations.

Chief Justice Bender described a minor change to the new attorney swearing-in ceremony resulting from Commission discussions. The new attorneys will all sit together to take the oath.

As the representative of the chairs of the working groups, Judge Carparelli introduced the topics and chairs of the four working groups. He then noted the various organizations that have defined ethics and professionalism for attorneys and presented a draft of the concepts developed by the working groups. So far the groups have defined the core attributes of professionalism as: service, competence, trustworthiness, ethics, diligence and civility and respect. The report of the chairs of the working group is attached. One member suggested that "expertise" be added to this list. Another member focused on the lack of economic realities in the report.

Chief Justice Bender commended the reports of the working groups but wants to see expanded acknowledgement of the historical role of lawyers and how lawyers have been the impetus for significant social change.

The working group chairs then gave the reports and findings from their working group meetings. These reports are attached to these minutes.

Lorenzo Trujillo, chair of working group A. "Development of professional identity, social responsibility, and practice skills in law school and involvement of judges and leaders of the bar in law school" presented his working group report. One item that the working group particularly recommended was that we should start talking about identity and social responsibility from the first day of law school.

Dean Getches noted that the law schools have many ongoing efforts to address many of the issues and concerns of the Commission. He promised to inventory and to describe for the Commission these efforts. Assistant Dean Fred Cheever of University of Denver law school also agreed to present such a report.

Judge Neil Gorsuch wondered if the Commission should think "bigger" and not deal with just the symptoms of a dysfunctional system. He noted that we are dealing with dissatisfied lawyers, judges, clients and community that mentoring will not solve. He suggested that we have a conversation about radically re-inventing the civil justice system and to rethink the ethics rules. He also expressed concern about the possibility that we have too many lawyers who cannot get jobs.

Mark Fogg, chair of working group B. "Development of professional identity and social responsibility for new attorneys and thereafter" presented his working group report. He specifically presented information on e-mentoring and training, and veterans help program for Colorado. The later would be a Colorado Bar Association initiative, implemented by the local bar associations, for Colorado lawyers to provide pro bono assistance to Colorado veterans. The Commission gave approval for the working group to move forward on those proposals. Fogg reported that his group was gathering information from other states regarding mentor programs and that the group would have a report and recommendation regarding mentoring at the next Commission meeting.

Judge Russ Carparelli, chair of working group C. "Communication and professionalism between and among judges and attorneys" presented his working group report. He noted that his group currently is discussing ideals and core principles with practical problems and solutions to follow.

David Stark, chair of working group D. "Relationship between the legal profession (judiciary, bar, legal academies) and the community—access to justice, delivery of justice, and education of the public" presented his working group report. He noted that his group wants to stress pro bono work as less of an obligation and more of an expectation. He also discussed the problem that small cases are not heard and that most cases are not decided on the merits, but rather are won or lost on the mistakes of the attorneys.

The next Commission meetings are scheduled as follows:
September 22, 2011 at 3:00 pm
December 1, 2011 at 3:00 pm

Submitted by Andrea Bloom, May 10, 2011

COLORADO SUPREME COURT
CHIEF JUSTICE COMMISSION ON THE LEGAL PROFESSION

September 22, 2011
3:00–5:00 PM
101 West Colfax Avenue
Fifth Floor Conference Room
Denver, Colorado

Agenda

I. Welcome from Chief Justice Bender (3:00 PM)

II. Review of Survey Results (3:05 PM — Handout)

III. Reports from and Discussion with Working Groups

A. Development of professional identity, social responsibility, and practice skills in law school and involvement of judges and leaders of the bar in law school.

Lorenzo Trujillo, Chair (3:15 PM — pp. 1–3)

- Report on DU and CU 2011 orientations (pp. 4–10)
- Report on inventories from DU and CU (pp. 11–35)
  - Report on August 2011 ABA resolution (pp. 36–47)
- Presentation of issues raised in *New York Times* article and blogs questioning the value of a legal education (3:20 PM — Handout)
- Explanation and discussion of possible modification to CLE rules and regulations to allow lawyers to receive credit for teaching and mentoring law students (3:25 PM — pp. 48–62 —Sarah Clark)

B. Development of professional identity and social responsibility for new attorneys and thereafter.

Mark Fogg, Chair (3:30 PM — pp. 63–68)

- Follow up regarding Colorado Lawyers for Colorado Veterans (p. 64)
- Explanation and discussion of proposed mentoring pilot program (3:35 PM —pp. 65–89 — Margrit Lent Parker)

C. Communication and professionalism between and among judges and attorneys.
Judge Russell Carparelli, Chair

D. Relationship between the legal profession (judiciary, bar, legal academies) and the community—access to justice, delivery of justice, and education of the public.
David Stark, Chair

Working Groups C and D presenting together (3:55 PM)

- Ideas discussion (pp. 90–98)

IV. Information about *Make History*, a new and novel *pro bono* marketing effort.
Charles Garcia (4:45 PM)

- Informational presentation and questions (pp. 99–101)

V. Next Steps (4:55 PM)

VI. Adjourn (5:00 PM)

REPORT TO THE CHIEF JUSTICE COMMISSION ON THE LEGAL PROFESSION WORKING GROUP A

SEPTEMBER 22, 2011

MEMBERS: ASSOC. DEAN FRED CHEEVER, SARAH CLARK, PROF. ROBERTO CORRADA, CHARLES GARCIA, JUDGE NEIL GORSUCH, DEAN MARTIN KATZ, JUDGE MARCIA KRIEGER, DEAN WHITING LEARY, PROF. MICHAEL MASSEY, JUDGE JOHN MCGAHEY, JOHN MOSBY, JUDGE GILBERT ROMAN, PROF. ELI WALD, DEAN PHIL WEISER, PROF. MARIANNE WESSON, LORENZO TRUJILLO, CHAIR.

REPORT AGENDA:

1.	ORIENTATION 2011	CU & DU	
2.	INVENTORY OF LAW SCHOOL ACTIVITIES	CU & DU	
3.	THE NEW YORK TIMES AND OTHER BLOGS		
	THE CASE AGAINST A LEGAL EDUCATION		ACTION ITEM
4.	CLE CREDIT FOR ATTORNEYS WHO TEACH LAW STUDENTS		ACTION ITEM

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1. ORIENTATION 2011

BOTH COLORADO LAW SCHOOLS INITIATED PROGRAMS ADDRESSING: PROFESSIONALISM, CIVILITY, INCLUSIVENESS, AND PRESENTATIONS ABOUT THE PRACTICE OF LAW, AS DISCUSSED BY THE COMMISSION. THESE PROGRAMS WILL BE FURTHER DEVELOPED FOR THE NEXT INCOMING CLASS BY A SUBCOMMITTEE OF WORKING GROUP A.

UNIVERSITY OF COLORADO LAW SCHOOL

►Chief Justice Bender addressed incoming students on "Being A Lawyer" and administered the Lawyer's Oath.

►Dr. Thomas Walker gave a presentation, "Remarks on Inclusive Community"

►Judge Russell Carparelli gave an introduction to the practice of law, "This We Believe"

►Mark Fogg hosted vignette presentations on professionalism and ethics as part Of the "This We Believe"

►Andy Hartman addressed students about the Public Service Pledge for all students.

STURM COLLEGE OF LAW

►Judge Krieger, Judge Carparelli, Judge Arguello, Justice Rice and members of the Bar presented sessions on "Becoming A Professional"

►Justice Rice administered the Lawyer's Oath

►DU's Public Service Requirement

►Professionalism and Practical Challenges

PLAN OF ACTION:
1) Prepare a unified curriculum to address the overall concept embodied in "This We Believe and the Practice of Law. The curriculum will be personal and address real life matters addressing those aspects that distinguish our profession as lawyers. There will be a focus on professionalism and civility.
2) The curriculum will be proposed as mandatory for all incoming students at CU and DU.
3) The curriculum will be presented after the initial nuts and bolts orientations – preferably in a time period of 30 days after classes start.
4) The curriculum may be presented to new students at both schools on the same day, bringing the students together and establishing a common culture.
5) Students who fully participate will be awarded a certificate of completion.
6) The curriculum will be presented to the faculty of both law schools for approval.

Tentative Agenda:

Morning: Overview of the "Practice of Law" and concepts from the "This We Believe Program."
Afternoon: Breakout of students to visit judges in the courthouses.
Evening: All participants in a social networking activity with judges and members of the Bar.

REQUEST: COMMISSION ENDORSEMENT OF THE PLAN OF ACTION PROPOSAL

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2. INVENTORY OF LAW SCHOOL ACTIVITIES (SEE ATTACHED REPORTS)

UNIVERSITY OF COLORADO LAW SCHOOL

STURM COLLEGE OF LAW

(SEE ATTACHED ABA RESOLUTION 10B ADDRESSING THE TEACHING OF PRACTICE-READY LAWYERS)

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3. THE NEW YORK TIMES AND OTHER BLOGS: THE CASE AGAINST A LEGAL EDUCATION

A proliferation of articles and blogs have been written questioning the value of a legal education. Working Group A reviewed and discussed these writings. The issues that are argued fall into three areas: (1) Reporting by Law Schools; Consumers are getting

poor information; (2) Law School Recruiting and Economics: If there were less ABE rules and regulations, then there would be more low cost law schools; and (3) Jobs and the Economy: Calling for regulation and limitation of the number of law schools and law students.

PLAN OF ACTION:
CLE: ***Re-engineering the Transition from Law School to the Profession***

To be presented by members of the law school faculties addressing the issues of transparency and other identified criticisms.

REQUEST: COMMISSION ENDORSEMENT OF THE CLE PROPOSAL

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4. CLE CREDIT FOR ATTORNEYS WHO TEACH LAW STUDENTS

TEACHING AND MENTORING LAW STUDENTS

Sarah Clark will present draft language for the new CLE rule.

REQUEST: COMMISSION ENDORSEMENT OF THE CLE CREDIT PROPOSAL TO BE PRESENTED TO THE SUPREME COURT FOR APPROVAL

[1]

[1] Attachments:
Law School Orientation Agendas
Law School Inventories of Activities
ABA Resolution 10 B
CLE Credit Rule Proposal

University of Denver - Sturm College of Law
Orientation 2011
Day Division Schedule – Section 1

Tuesday, August 9th — DU Law Forum

8:30-9:30 a.m.	Check-In and Continental Breakfast – Sponsored by Themis Bar Review. Stop by to pick up your complimentary gift bag and learn about our totally FREE (no strings attached) Law School Essentials courses – entirely online.
9:30-9:50 a.m.	Welcome *Martin Katz, Dean of the Sturm College of Law* *Casey Leier, President of the Student Bar Association*
9:50-10:05 a.m.	Introduction to Student Affairs *Daniel Vigil, Assistant Dean of Student Affairs* *Katie Vilders, Manager of Student Affairs*
10:05-10:15 a.m.	Denver Partnership with Community Day *Chelsea Peterson, Co-Chair*
10:15-10:25 a.m.	Understanding the Honor Board *Tim Hurley, Honor Board Advisor*
10:25-10:35 a.m.	Introduction to Law School *Fred Cheever, Associate Dean of the Sturm College of Law*
10:35-10:45 a.m.	Break
10:45-10:55 a.m.	Campus Safety *Sgt. Steve Banet, Crime Prevention Officer*
10:55-11:15 a.m.	Health and Counseling Center *Jeremiah Mashore, Assistant Director of Operations* *Scott Cypers, Assistant Director of Counseling Services*
11:15-11:30 a.m.	Public Service Requirement *Lindsey Webb, Director of Public Interest*
11:30-12:00 p.m.	Building Tour with Current Students

12:00-1:15 p.m. Barbeque Lunch with Faculty and Staff (Driscoll Lawn) – Sponsored by BARBRI. Stop by the BARBRI table to pick up law school study materials and enter to win an iPod and other prizes! BARBRI is the nation's leading bar exam preparation program. With over 40 years experience and one million students, BARBRI is the #1 provider of bar review courses and law school support. From your first day of law school until the bar exam, BARBRI is with you every step of the way and provides everything you need to succeed. There's a reason why the majority of law students nationwide chose BARBRI to prepare for the most important exam of their career- BARBRI helps you pass!

Room 165

1:15-1:45 p.m. Registrar's Office
Julie Gordon, Registrar
Heather McLeod Larralde, Assistant Registrar

1:45-2:15 p.m. Financial Management
Kasia Palm, Director of Student Financial Management
Jennifer Quinn, Assistant Director of Graduate Student Aid

2:15-2:45 p.m. Passport to Career Success: Advice for the Path Ahead
Eric Bono, Assistant Dean for Career Opportunities
Gayle Keahey, Associate Director
John McKee, Career and Office Coordinator
Andrea Montague, Career/Student Development Consultant

2:45-6:00 p.m. Administrative Tasks (see Administrative Task Checklist in packet)

Wednesday, August 10th — DU Law Forum

9:00-9:30 a.m. Continental Breakfast

9:30-10:30 a.m. Federal District Court Judge Christine Arguello

10:30-11:30 a.m. Center for Multicultural Excellence
Thomas Walker, Program Director

11:30-12:45 p.m. Boxed Lunch (sandwiches, chips, pasta salad, soda) – Lunch sponsored by Kaplan Bar Review. Please visit the Kaplan Bar Review table in the forum to pick up some helpful materials and to enter the 1L raffle to win study guides, prizes, or a backpack full of DU gear and school supplies!

Room 165

12:45-1:15 p.m. Library Resources
Stacey Bowers, Outreach & Instructional Services Coordinator
Jeff Brandimarte, Westlaw Academic Account Manager
Katherine Sparks, LexisNexis Representative

1:15-1:45 p.m.	Externship Program *Ann Vessels, Director of the Legal Externship Program*
1:45-2:00 p.m.	Break
2:00-3:00 p.m.	Ask Anything Panel with Current Students
3:00-6:00 p.m.	Administrative Tasks (see Administrative Task Checklist in packet)
4:00-5:15 p.m.	Optional: Centers of Excellence Presentation – Room 180 *Stefanie Carroll, Administrative Director of Academic Programs* *Fred Cheever, Associate Dean of the Sturm College of Law* *Karlyn Shorb, Administrative Director, The Ved Nanda Center for International and Comparative Law* *Randy Wagner, Administrative Director of Academic Programs*

Thursday, August 11th — Room 165

9:30-10:30 a.m.	Academic Achievement Program **(you must have your laptop)** *Professor Rashmi Goel* *Patty Powell, Academic Achievement Program Lecturer* *Mary Steefel, Director of the Academic Achievement Program*
10:30-10:40 a.m.	Break
10:40-12:00 p.m.	LP writing Diagnostic **(you must have your laptop)** *Kate Stoker, Writing Clinic*
12:00-1:30 p.m.	Lunch off campus (see flyer with lunch specials in packet)
1:30-2:30 p.m.	Information Sessions (see information session schedule on reverse)
2:30-6:00 p.m.	Administrative Tasks (see Administrative Task Checklist in packet)
7:00-8:00 p.m.	Spouses & Significant Others Panel – Room 155 *(The Spouses & Significant Others Panel is not designed for law students. Please invite your spouse or significant other to attend.)*

Friday, August 12th — DU Law Forum

9:30-10:30 a.m.	Colorado Supreme Court Justice Nancy Rice

10:30-11:30 p.m.	Becoming a Professional *The Honorable Russell Carparelli, Colorado Court of Appeals* *The Honorable Marcia Krieger, United States District Court for the District of Colorado*
11:30-12:30 p.m.	Lunch (Pasquini's pizza and salad)
12:30-2:10 p.m.	Professionalism: Practical Challenges
2:15-2:30 p.m.	Colorado Lawyers Helping Lawyers *Barbara Ezyk*
2:30-2:40 p.m.	Alumni Council Presentation *Carolynne White, Chair*
2:40-2:55 p.m.	Alumni Office *Ricki Kelly, Director of Development*
2:55-3:15 p.m.	Professional Mentoring Program *Kyler Burgi, Mentor Advisory Board Member and current 2L student* *Andy Frohardt, Program Coordinator and 2010 Graduate* *Armin Sarabi, Mentor Advisory Board Member and 2009 Graduate*

Friday, August 19th

4:30-5:30 p.m.	Optional: Peer Mentor Program Meet and Greet – Boettcher Foundation Community Room at Craig Hall (23 on your campus map) *Come meet your mentor for the first time, enjoy refreshments, and get to know your classmates.*
6:40 p.m.	Optional: Colorado Rockies vs. Los Angeles Dodgers at Coors Field 6:40 p.m. *Tickets are FREE and available on a first come first serve basis. See an SBA member to get your ticket or stop by the SBA table during the information table fair on Thursday, August 11th. Sponsored by the SBA Senate.*

2011 NEW STUDENT ORIENTATION
SCHEDULE AS OF 07/28/11 – INTERNAL/WORKING COPY

THEMES (in addition to "nuts and bolts" sessions with information students need to know):

- Legal Professionalism (LP) – you are a professional, and as such you have obligations (and opportunities?)
- Career Development (CD) – you are responsible for identifying, developing, and pursuing your career goals (and how we will help)
- Intellectual Community (IC) – you are part of a supportive, inclusive intellectual community and part of your role is exploring ideas (engagement with faculty)

TIME (THEME)	SESSION/TOPIC	PRESENTERS	LOCATION
TUESDAY, AUG. 16			
8:30-9:00	Coffee	Women's Law Caucus	Foyer
9:00-9:05	Greeting	Asst. Dean Kristine Jackson	Courtroom
9:05-9:45 (LP)	Remarks: "Being a Lawyer"	Chief Justice Michael Bender, Colorado Supreme Court	Courtroom
9:45-10:05 (ALL)	Dean's Welcome	Dean Phil Weiser	Courtroom
10:05-10:20	Break		
10:20-11:20 (ALL)	Making a Smooth Transition to Law School – Panel Discussion	Dean Phil Weiser, Moderator Panelists: Judge Ann Frick Prof. Al Canner Hiwot Covell, alumna Prof. Paul Ohm	Courtroom
11:20-12:00 (IC, LP)	Remarks: "Jaron Lanier Says You Are Not a Gadget; We Say You Are Not (Just) a Consumer."	Prof. Marianne Wesson	Courtroom
12:00-12:05	Student Affairs Group; Overview of Afternoon Schedule	Sr. Asst. Dean Whiting Dimock Leary	Courtroom
12:05-1:35 (IC)	BBQ Lunch & Student/Community Organization Tables		Courtyard
1:35-2:50 (IC)	Legal Writing – 1st class meeting	Legal Writing Faculty	Various classrooms

TIME (THEME)	SESSION/TOPIC	PRESENTERS	LOCATION
3:00-5:00	Self-directed Stations	Various necessary tasks (e.g., books, photos)	Café
WEDNESDAY, AUG. 17			
8:30-9:00	Coffee		
9:00-9:05 (IC)	Diversity & Inclusive Excellence; Speaker Introduction	Susani Harris	Courtroom
9:05-10:20 (IC)	Remarks on Inclusive Community	Thomas Walker	Courtroom
10:20-10:35	Break		
10:35-11:15 (IC)	Remarks: "Cognitive Bias and its Potential Implications"	Prof. Helen Norton	Courtroom
11:15-11:35	Pick Up Box Lunch; Move to Classrooms		Courtyard
11:35-12:25 (IC)	Discussion Groups (and Lunch)	Dean's Committee for Diversity	Various Classrooms
12:25-1:00	Library	Susan Nevelow Mart and Library Staff	Courtroom
1:00-1:20	Registrar	Cindy Gibbons	
1:20-1:25	Financial Aid	Alan Schieve	
1:25-1:35 (LP)	Honor Council and Code	[Incoming Student Chair]	
1:35-1:45	SBA	Lisa Fischer, SBA President	
1:45-3:05	Legal Writing – 2nd class		
3:15-5:00	Self-directed Stations, as on Tuesday		
[6:00-9:00?]	SBA Happy Hour?	Lisa Fischer	
THURSDAY, AUG. 18			
8:30-9:00	Coffee		
9:00-9:30 (LP)	"This We Believe" Orientation; Civility in the Profession	Judge Russell Carparelli, Colorado Court of Appeals	Courtroom
9:30-11:00 (LP)	"This We Believe" Orientation Continued; Legal Professionalism	Mark Fogg, CBA President; Members of the Bar and Judiciary	Courtroom, then Classrooms
11:00-12:15	Legal Writing – 3rd class		Various

TIME (THEME)	SESSION/TOPIC	PRESENTERS	LOCATION
			classrooms
12:15-1:20	Lunch		Café
1:20-1:30	Barrister's Council and Public Service Pledge	Prof. Ann England (tentative) Andy Hartman	Courtroom
1:30-1:45 (CD)	Career Development	Asst. Dean Todd Rogers Asst. Dean Mike Spivey Directors Alexia McCaskill, Karen Trojanowski, and Jennifer Winslow	Courtroom
1:45-2:05 (CD)	Introduction of Feature Film, *Big Fish*	Dean Phil Weiser Prof. Scott Peppet	Courtroom
2:05-4:15	Screening: *Big Fish*		Courtroom
4:15-4:30	Break		
4:30-5:30	Discussion Groups	Dean Phil Weiser Prof. Al Canner Alexia McCaskill [add others]	Various classrooms
5:30-7:00	Reception for Students, Faculty & Staff		Courtyard and Boettcher

MEMORANDUM

To: Colorado Supreme Court Chief Justice's Commission on the Legal Profession
From: University of Denver Sturm College of Law
Date: September 5, 2011
Re: Professional Identity, Social Responsibility, and Practice Skills Inventory

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Per your request, below please find a description of our current work in the areas of professional identity, social responsibility and practice skills.

I. Modern Learning Initiative at DU Sturm College of Law

In December 2009, the University of Denver Sturm College of Law (SCOL) faculty approved a new strategic plan that included a modern learning initiative. The modern learning initiative springs from the 2007 Carnegie Report, *Educating Lawyers.* The Carnegie Report identifies three apprenticeships in law: analytical, skills, and professional ethics/identity. The Carnegie Report suggests that these apprenticeships in law school are neither balanced in most schools, nor integrated. The SCOL seeks to address these two things—balance and integration. The modern learning initiative is based on insights and contains prescriptions that are also at the core of solutions identified by Working Group A of the Colorado Supreme Court Committee on the Legal Profession in 2011. For example, the Working Group A report mentions increasing experiential opportunities for law students while also enhancing student sense of social responsibility and professional identity. According to the DU SCOL Strategic Plan,

> "Our plan is informed by the extensive modern research on legal education, including the Carnegie Report of 2007 entitled *Educating Lawyers: Preparation for the Profession of Law*. While we are not tied to its conclusions, we find the Carnegie Report's three "apprenticeships" helpful for identifying components that are central to effective legal education:
>
> 1) The cognitive apprenticeship – variously described in the report as understanding, sets of abilities, legal knowledge, conceptual knowledge, and thinking;
>
> 2) The skills apprenticeship – variously described in the report as know-how, practical knowledge, skillful practice, and performing;
>
> 3) The professional identity apprenticeship – variously described in the report as intention, professionalism/ethics/social responsibility, and professional identity.

> We believe that effective legal education requires a *balanced* curriculum – one that offers exposure to each of the Carnegie apprenticeships described above. We are committed to providing such a balanced curriculum.
>
> Our plan is also informed by changes in the market for legal services and practice. In today's legal market, it makes sense to graduate students who are "practice-ready," rather than students who will need to learn essential skills on the job. By a "practice-ready" student, we mean a student who has attained entry level proficiency in a significant number of important professional skills. There are some skills lawyers must learn on the job, but there are many skills that can be taught in law school."

DU Sturm College of Law Strategic Plan, December, 2009, at pp. 6-7.

Along with the Strategic Plan, the faculty began a process in 2008 of identifying specific law school goals to more fully inform actions taken to improve the mission of the law school, its values, and the strategic plan. In May, 2011, the faculty, after a three year process, approved the following initial Student Learning Outcomes centered around the three Carnegie apprenticeships:

UNIVERSITY OF DENVER STURM COLLEGE OF LAW STUDENT LEARNING GOALS AND OUTCOMES

PURPOSE

These student learning goals in the areas of analysis/cognition, professionalism/ethics, and expert practice, agreed upon by faculty consensus, are aspirational in nature. The idea is not that they can be achieved perfectly, but that they are what we are aiming for as an institution. They are to be used to aid the faculty in improving teaching and learning directed at our law students. The intent is for this document to be iterative, that is, to serve as a living guide subject to improvement as more is learned about actual student learning outcomes and changing teaching and learning goals in law school. Going forward, the law faculty will determine which of these goals are measurable, will attempt to measure those, and will suggest changes to outcomes or programs based on recommendations developed from measurement and experience. Finally, this process is not intended to be used in any way for teacher evaluation.

NON-LEGAL CONTEXTS

In addition to the following goals and outcomes for our law education program, the SCOL recognizes that, to be successful, today's practice-ready lawyers must have a fundamental understanding of the larger world in which our legal system is situated. Accordingly, in addition to teaching and learning about the law, the SCOL seeks to

facilitate students' awareness of contexts traditionally viewed as external to the study of law. Specifically, the SCOL will endeavor to offer courses focused on the business, social, and global contexts of legal practice. Thus for example, in addition to attaining literacy in core legal skills, graduates should be able to read a balance sheet, deal appropriately with individuals from diverse backgrounds, and consider the implications of international events if called to do so in the course of representing a client. The study of business, social, and global contexts will allow our students to respond to the variety of challenges lawyers face in today's practice environment.

ANALYSIS/COGNITION

Graduates can:

- Think rigorously about legal issues, including:
  - Use language with facility
  - Read texts carefully
  - Reason, analyze and argue
  - Solve problems in novel and recurring contexts
  - Exercise critical thinking – critique / anticipate critiques
  - Understand and apply historical and social context

- Apply "core knowledge" in at least the following substantive areas:
  - Administrative Law
  - Civil Procedure
  - Constitutional Law
  - Contracts
  - Criminal Law
  - Evidence
  - Professional Ethics
  - Property
  - Torts

PROFESSIONALISM/ETHICS

Graduates can:

- Conduct Themselves in a Professional and Ethical Manner
  - Embody integrity and fairness
  - Deal sensitively and effectively with diverse clients, colleagues, adversaries and courts
  - Be consistently truthful and candid
  - Use good judgment and common sense
  - Be sensitive to multicultural perspectives
  - Display a sense of empathy (to see the world through the eyes of others), and share a commitment to community service

- Maintain an Appropriate Balance Between Personal and Professional Identity
- Understand their roles, boundaries, and limitations
- Understand and respect the rules of professional conduct for lawyers
- Demonstrate an awareness of conflicts and obligations beyond those of the rules
- Develop professional identity (a sense of self as a professional)
- Deal with stress in a productive way and understand the risks of practice

- Manage practice effectively
  - Manage time, meet deadlines, respond promptly to clients, and otherwise treat clients with respect
  - Possess media and digital media literacy
  - Possess the skills necessary to understand and to run a small law firm practice
  - Understand the importance of client development

EXPERT PRACTICE/SKILLS

Graduates can:

- Read, write and argue effectively:
  - Persuade as advocates
  - Draft appropriate legal documents, including contracts and other agreements, memoranda, letters, briefs, pleadings, and legislation

- Solve problems:
  - Choose the appropriate legal and non-legal tools for each situation
  - Understand both the legal and non-legal contexts (litigation, negotiation, collaboration) in which disputes arise
  - Mediate among diverse interests (multi-party negotiation / dispute resolution)
  - Recognize and strategize around factual and legal uncertainty

- Obtain information and convey it clearly to others:
  - Question and interview clients and others
  - Counsel clients
  - Conduct legal research, discovery, and fact investigation
  - Work effectively with experts and other non-lawyers
  - Present factual evidence

- Work well independently and collectively
  - Show curiosity, initiative, and creativity
  - Negotiate effectively

- Solve problems collaboratively
- Take and give criticism effectively

To carry out the mandates of the strategic plan and to forward emerging consensus on student learning outcomes, Dean Marty Katz appointed two committees: First, a Skills Implementation Committee, chaired by Professor David Thomson, tasked with, among other things, exploring the possibility of a 3rd semester of lawyering process (our legal writing program in the first year) with an expansive mandate of exploring simulation courses that would teach advanced legal writing in a doctrinal context, and other lawyering skills as well. The original plan was that these courses would be taught by lawyering process faculty. Next, Dean Katz appointed a Modern Learning Chair, Professor Roberto Corrada, in the summer of 2010. The Modern Learning Chair is to: "coordinate and encourage integrated and experiential learning throughout the law school, and also engage in outreach to other law schools to learn of their efforts and other units at the University to explore potential synergies. The Chair will also be responsible for assessment of modern learning initiatives at the SCOL."

After these steps, Dean Katz, in consultation with the other committees, combined the Skills Implementation/3rd Semester Lawyering Process Committee into one Modern Learning Committee, facilitated by the Modern Learning Chair. That committee was given a beginning mandate by the Dean, "[the Committee's] initial tasks will be to (1) inventory and coordinate our skills offerings (along with [Associate Dean] Fred [Cheever]), (2) develop an inventory of integrated learning opportunities (combining doctrine, skills, and/or professional identity), (3) search for and create additional opportunities for integration, and make recommendations on how to incentivize and support such efforts, and (4) develop a proposal for a pilot program for extending writing opportunities into the 2nd year." The Committee is composed of faculty and staff representatives from each program or entity that has anything to do with the direct teaching of DU law students. The initial Committee Members included: Roberto Corrada (classroom), Christine Cimini (student law office/clinical), David Thomson (legal writing), Teresa Bruce (upper level legal writing), David Schott (advocacy programs), Ann Vessels (internship/externship), and Mary Steefel (academic achievement).

The Committee met throughout the Spring 2011 Semester to consider whether to add an additional curricular requirement focused on skills training for our law students. In addition, the Committee sponsored these faculty programs related to integrating skills into the law school classroom:

- Mr. Mark Caldwell, Esq., Program Director, National Institute for Trial Advocacy (NITA), *The Union Between Substantive and Skills Training: Making an Unlikely Marriage Work*, University of Denver Sturm College of Law, January 24, 2011.

- Professor Roberto Corrada, DU Sturm College of Law Chair in Modern Learning, *Experiential Learning in the Doctrinal/Traditional Law Classroom: The Potential in Whole-Course Simulations,* University of Denver Sturm College of Law, February 14, 2011.

- Professors David Thomson & Nantiya Ruan, DU SCOL Lawyering Process Program, *Providing feedback and Evaluating Legal Writing across the Curriculum,* University of Denver Sturm College of Law, February 25, 2011.

- Professors Deborah Zalesne & David Nadvorney, CUNY School of Law, *Rethinking the Syllabus in Core Courses: Dismantling the Hierarchy between Theory and Skills,* University of Denver Sturm College of Law, March 25, 2011.

- Professor David Schwartz, University of Wisconsin Law School & DU SCOL Visiting Professor, *Did Your Students Get to Feel like Lawyers Today? A Pragmatic Approach to Skills Exercises in Doctrinal Law Courses,* University of Denver Sturm College of Law, April 15, 2011.

The Committee ultimately conceived of developing a series of fully integrated (all three apprenticeships) courses that could be undertaken in every program represented on the Committee and in the law school. We termed these, "Carnegie Integrated Courses (CICs)." The requirements for such courses are the following:

DU Sturm College of Law
"Carnegie Integrated Course" (CIC) Requirements

This series of courses will be conducted primarily in a simulated or practice-oriented learning environment in the context of substantive law:

I. Major ("Substantial and Regular") Component Requirements:

A. At least two (2) of the following practice contexts:

Litigation
Contract/Agreement drafting
Negotiation
Client and/or Witness Interviewing
Client Counseling
Alternative Dispute Resolution
Legislative Drafting
Oral Presentation

B. Writing and Research Skills

1. Students will write several legal documents, and
2. Students will write a variety of documents (including, e.g., briefs, reports, legislation, internal memos, reflection papers, etc.), and
3. Students will write at least one major document of 10 pages or more, with a requirement of a rewrite after feedback is provided, and
4. Students will research at least one legal topic posed by, and related to, the simulation or practice context of the course.

[These requirements meet the upper level writing requirement]

II. Minor ("At Least One Exercise") Component Requirements:

A. Professional Identity, Ethics, and Values:

In addition to exhibiting appropriate professional behaviors throughout the course as well as in simulated practice settings (including, e.g., collaborative groups), students will be required to submit at least one graded assignment concerning ethical and/or professional identity issues posed by, and related to, the simulation or practice context of the course.

B. Oral Presentation/Advocacy:

In addition to regular participation in the class, students will be required to prepare at least one graded oral presentation on an issue or issues posed by, and related to, the simulation or practice context of the course.

After agreeing on the fundamental requirements for the CICs, the Modern Learning Committee endeavored to discover how many courses currently offered at the SCOL met or were close to meeting these requirements. A survey of law professors revealed a number of courses that qualified.[1]

This year, the Modern Learning Committee (newly re-appointed in June, 2011) will include several new members, all interested in exploring the CIC requirements as a model for some law school courses, and, perhaps, develop them as a proposal for a series of required upper class courses at DU SCOL. In addition to last year's members, (Laura Rovner, the new director of the Student Law Office replaces Christine Cimini, the outgoing director), the new committee includes: Mark Caldwell (NITA Program Director), Judge Robert McGahey (trial advocacy adjunct professor), Richard Laugesen (insurance law adjunct professor), Deborah Zalesne (visiting professor, CUNY Queens School of Law), David Schwartz (visiting professor, University of Wisconsin Law School). The Committee charge for this year is to meet regularly to talk about the "nuts & bolts" of CICs, comparing notes as well as talking with other professors teaching similar courses to determine the feasibility of a CIC requirement at the SCOL. In addition, the Committee will sponsor programming at SCOL focused in the fall on teaching professional ethics/identity and in the spring focused on workshops related to CICs and the issue of effective integration of Carnegie apprenticeships into SCOL courses. Meanwhile, the SCOL Assessment Committee, now in its second year and chaired by Professor Roberto Corrada, is moving to determine how best to measure the student learning outcomes endorsed by the SCOL faculty in May. In the future, that Committee will also work with the Modern Learning Committee to determine how best to assess any CIC initiative.

II. Clinical Education Program

The Student Law Office (SLO) is the in-house clinical program of the Sturm College of Law. Founded as the "Legal Aid Dispensary" in 1904, the SLO is believed to be one of the oldest law school clinics in the United States.

The SLO is comprised of six in-house clinics, including: criminal defense, civil litigation, civil rights, community economic development, environmental, and mediation and arbitration. This range of clinical offerings provides students opportunities to develop a variety of professional skills, including interviewing and counseling clients, development of case theory, fact investigation, discovery practice, negotiation, mediation, oral and written motions practice, contract and corporate document

[1] In addition to many trial advocacy and virtually all clinical courses, our survey revealed some 25 courses that already meet or are close to meeting the CIC requirement. At least ½ of these are taught by adjunct faculty and a future requirement that our students take at least one CIC before graduation will serve to meet the Working Group A recommendation that the law school and our students benefit more from interaction with experienced practitioners and judges. The Modern Learning Committee will spend the 2011-12 academic year investigating the feasibility of a CIC requirement.

drafting, and trial skills. Clinic students learn these skills in context – that is, in the real world of clients who face a variety of issues for which they might not otherwise have access to legal counsel. And they do so under the supervision of clinic faculty who work to ensure that all students obtain valuable educational experiences.

The various clinics in the SLO are taught by ten tenured/tenure-track faculty members and three Clinical Teaching Fellows. The teacher-student ratio in the SLO (not including the fellows) is typically 1:8. A more detailed description of the work of each clinic is below:

The Civil Litigation Clinic

Students in the Civil Litigation Clinic address pressing community legal problems through individual and group representation as well as projects designed to tackle systemic issues. Students represent victims of domestic abuse in civil protection order cases; tenants in low income housing who are being evicted, threatened with the loss of their subsidies or discriminated against; and immigrant day laborers in wage claims, contract disputes or injury claims. The wide array of substantive areas, and the different courts in which matters are heard, provide students exposure to many different experiences including cases at the administrative hearing level, cases in both state and federal court and cases on behalf of individuals and groups of clients.

Clinic work also provides students exposure to a broad skill set including interviewing, counseling, negotiation, trial advocacy, appellate advocacy and research and writing. Because students work in teams and with community partners, they also improve their collaboration skills. Through the community projects, students are exposed to a broad vision of what lawyers can do to address systemic problems identified by disadvantaged communities and groups that advocate on their behalf. In this project-based work, students have successfully passed a state law designed to increase the penalty for non-payment of wages and successfully passed a city ordinance making it illegal to fail to pay wages. Students also engaged in advocacy designed to enhance the effectiveness of administrative remedies for the non-payment of wages and created and taught classes on the legal rights and remedies of immigrant day laborers.

The Civil Rights Clinic

The year-long Civil Rights Clinic (CRC) is an intensive 12-credit program in which students provide legal services to clients who have been unable to secure representation elsewhere in civil rights matters. CRC students represent clients in situations involving a broad range of civil rights issues, though the focus of the CRC in the past several years has been on prisoners' rights cases, given the significant community need for those services and the rich learning opportunities these cases offer to our students. CRC students are responsible for their clients and cases, and handle all

aspects of litigation: development of case strategy; interviewing and counseling clients; drafting pleadings; briefing and arguing district court motions; conducting discovery, including taking and defending depositions; negotiating settlements; conducting trials; and briefing and arguing appeals.

In addition to their client representation, CRC students also participate in a clinic seminar, the purpose of which is to assist the students in developing the lawyering skills and professional values necessary to represent their clients effectively. The seminar sessions include discussions of substantive civil rights law as well as topics such as professional responsibility and professionalism, control in the lawyer-client relationship, diversity, client values and goals, the role of lawyers in social change work, and other questions related to civil rights lawyering.

The Community Economic Development Clinic

The newest addition to the SLO is the Community Economic Development (CED) Clinic, which will begin operation in the 2011-12 academic year. The CED clinic teaches transactional practice skills to students through the representation of nonprofit corporations, community-based associations and enterprises, and small businesses. The clinic provides both challenging client work and a rigorous classroom component to expose students to substantive legal concepts related to community economic development and business law. Client work may include drafting corporate formation documents; assisting nonprofit organizations with tax-exempt applications and maintenance of tax-exempt status; drafting and negotiating contracts; acting as general counsel to nonprofit corporations and small businesses; working with state and local government agencies; and assisting with community-oriented real estate transactions and other transactions related to economic development and redevelopment projects. In addition, students may research issues related to public policies that affect clinic clients and provide community education workshops on substantive law issues pertinent to the clinic's practice areas. Students also learn practice skills, including client counseling, negotiation, research and planning, drafting, advocacy, and understanding the role of culture and group dynamics. Through both client work and the seminar component, students are exposed to a variety of social systems that impact their clients and are encouraged to think reflectively about the nature of transactional advocacy in the public's interest.

The Criminal Defense Clinic

The Criminal Defense Clinic offers law students the opportunity to represent indigent clients charged with misdemeanor state and municipal ordinance violations in certain metropolitan Denver county and municipal courts. The cases may involve charges of DUI, assault, theft, drug possession, criminal mischief, disorderly conduct and a variety of other violations. The students learn lawyering skills such as interviewing, counseling, investigation, research, negotiation and a full range of oral, written, and trial

advocacy skills in a context of values and professional responsibility. The students, who are responsible for all stages of their clients' cases, are supervised by experienced clinical faculty as they develop strategies and apply the skills they are learning. Students learn to analyze the issues in the cases, perform the necessary research and investigation and use oral and written advocacy skills to help clients attain their goals. Case planning, decision making, time management, and quality of life are emphasized throughout the semester so that students can learn to balance their work in the clinic with other responsibilities, while maintaining their own health and well-being. The students represent clients at arraignments, pre-trial conferences, motion hearings, trials and sentencing hearings. In preparation for these appearances, students and their faculty advisors may use role-play and simulation exercises that increase the students' confidence and enable them to provide effective representation for their clients.

In addition to representing clients, students are assigned tasks that enable them to learn about the criminal justice system and its role in society. They visit a detention facility to observe in-custody advisements, participate in ride-along programs with the police, and learn to work with foreign language interpreters. The Criminal Defense Clinic also participates in outreach events with area agencies that provide services for homeless persons.

The Environmental Law Clinic

Students in the Environmental Law Clinic (ELC) provide representation to national, regional and local environmental advocacy organizations. ELC students represent their clients in court proceedings, in administrative hearings and before legislatures. Since its conception in the 1990s, students in the ELC have worked with clients to advance sound environmental policies and to protect important natural resources and wildlife throughout the U.S. and abroad. As this work continues, the clinic is also moving forward to protect public health among the growing population in the Rocky Mountain interior, with a focus on cases that seek to abate regional air and water pollution. In selecting clients, the ELC seeks cases that will best provide students the opportunity to be directly involved in all aspects of the representation. It is through this hands-on approach to representation of clients, combined with individualized supervision and instruction, that clinic students are trained to be the next generation of environmental lawyers and advocates. In addition to developing the strong advocacy skills necessary to succeed as a lawyer, ELC students learn to identify and pursue policy issues that will shape the future of environmental protection.

The Mediation & Arbitration Clinic

The Mediation & Arbitration Clinic was established as a part of the University of Denver College of Law Clinical Programs in 1988. Student mediators are trained in mediation and conflict assessment. They mediate a variety of disputes ranging from landlord/tenant disputes and breach of contract claims to neighbor noise violations and

misdemeanor criminal charges. Students schedule and conduct mediations at the Student Law Office, and also participate in onsite mediation at the Denver County Court. Student mediation teams are assigned to a clinical faculty member who advises students and monitors each mediation.

In addition to actual mediations, Mediation & Arbitration Clinic students participate in a seminar that focuses on lawyering skills, mediations skills and ethics. The class takes place once a week and is a crucial element to the clinical experience, as it provides an educational environment for the students to develop a theoretical perspective of the techniques they will utilize in mediating actual conflicts. The skills of negotiation, communication and problem-solving developed in the Mediation clinic will hold students in good stead in whatever area of law they ultimately choose to practice.

III. Legal Writing Program

Background on the first year Legal Writing Program

The Lawyering Process (LP) Program is a first-year legal writing, research, and skills course that simulates practice in a law firm or similar legal environment. In 2010, the LP Program celebrated its 20th Anniversary year. In the first 10 years the program was taught by adjunct professors, but for the last decade, it has been taught by nine full-time members of the faculty, one of which serves as Director of the program. Collectively, the LP Faculty had over 50 years of practice experience before switching to full-time teaching, and it has collectively over 45 years of teaching experience (either full-time or in an adjunct role). In 2009, the SCOL faculty voted overwhelmingly to extend long-term contracts with governance rights (sometimes called “405(c) status”) to its legal writing faculty.

In LP, Students learn the fundamental tools of lawyering to analyze and solve legal problems and communicate the results in clear and appropriate legal form. Other school-wide resources for students include upper-class teaching assistants, practitioners, and law librarians. These supplemental teachers work under the direction of the LP Faculty member to assist in the administration of the course. The Legal Writing Clinic and the Academic Achievement Program also play an important role in helping first year students to learn and master the fundamental skills necessary for success in law school, and these are also fundamental to the success of students in the LP Program.

Students in LP learn by assuming the role of lawyers giving legal advice to clients in realistic fact situations. They perform hands-on legal research under the guidance of the Reference Librarians, and they draft complex legal documents. In the first semester, students are introduced to legal research and to objective legal writing by preparing an office memorandum. In spring, students research and write a persuasive appellate brief. Students further enhance their skills by presenting their argument orally to a panel of

judges at the end of the term. Throughout the course, students receive extensive, individualized feedback from both the practitioners and our Lawyering Process faculty.

LP is a six-credit first-year program that has a student-faculty class ratio of roughly 20 to 1. This is the only two-semester course in the students' first year. There are currently nine full time lawyering process professors, all with strong backgrounds in law practice and the teaching of writing skills, although two will be visiting lawyering process professors in AY 2011-12.

The LP Program coordinates with the Legal Writing Clinic to provide focused writing assistance for all students on mechanics, analysis, style, and organization. The Writing Clinic is staffed by a Writing Specialist, Kate Stoker, who has over 10 years of practice experience with a major Denver law firm, and who graduated from the University of Virginia law school in 1985. The Writing Specialist meets with students throughout the year to review draft assignments in LP, mostly on their own initiative, but occasionally by referral. In the last two years, the Writing Specialist has held between 550 and 600 student conferences. In addition to this substantial workload, on a weekly basis the Writing Specialist sends emails to all first year students with specific writing tips that are keyed into the legal writing style textbook used by all LP Professors.

Beginning in 2004, all first year students have taken a web-based grammar diagnostic test during orientation to help gauge their strengths and weaknesses in basic writing skills. The test focuses on helping students to identify areas of concern and to help them prepare for a required grammar proficiency test later in the fall. These two tests are managed and overseen by the Writing Specialist, and results are transmitted to the LP Professors for each student. In the fall semester, the Writing Specialist hosts workshops for students as they prepare for the proficiency test.

Student Learning Outcomes

On an annual basis, the LP Faculty meet for a day-long off campus retreat at the end of the spring semester. Over the last three years, we have worked on developing a comprehensive approach to outcomes assessment for the program, and employed an expert in assessment to facilitate these discussions. The first step, accomplished in 2009, was to articulate our Program Goals and Measurable Student Learning Outcomes.

Our student learning outcomes for the LP Program are:

Legal Analysis

Students can identify the essential components of a case.
Students can outline a legal rule.
Students can identify hierarchy of legal authority.
Students can build analogies (or make distinctions) between cases and client facts.
Students can synthesize multiple legal authorities into a coherent rule.
Students can classify and weigh client facts by legal relevance as applied to the rules.
Students can predict a client outcome through application of legal rules.

Legal Communication

Students can write a document that provides an objective legal analysis.
Students can write a document that provides a persuasive legal analysis.
Students can tailor their writing to audiences that include clients, courts, and other legal professionals.
Students can present a legal analysis in oral form to different legal audiences.

Legal Research

Students can identify the major forms of primary and secondary legal resources both in print and online.
Students can design and implement a research strategy that appropriately supports the requirements of a client problem.
Students can organize the outcome of their legal research in a form that supports their legal analysis.

Values of the legal profession

Students exhibit appropriate professional behaviors in the course.
Students exhibit appropriate professional behaviors in collaborative groups.
Students exhibit professionalism in their written communication.

Assessment Methods

In our retreat work, since articulating the learning outcomes, we have moved on to examining the evidence we collect on how our students are doing in meeting those outcomes. That effort has lead to significant revisions and improvements to our rubrics and feedback process for each major student assignment through the year.

Assessment is a critical part of the LP program, because the process of learning how to “think and act” like a lawyer requires an iterative learning methodology. We expect our students to make mistakes early on, and we encourage them to do so, and then give them extensive feedback. As a result, most of our assessments are formative in design, so that students can “learn as they go” through the course. The final

assignment in the fall semester and the final assignment in the spring semester are both summative assessments by design, and the majority (between 60% and 70%) of the grade hinges on these summative assessments.

Students submit approximately eight writing assignments each semester. These vary in length and difficulty, and students receive feedback such as oral critiques, peer edits, in-class workshops, as well as extensive review by their LP Professor. Early assignments carry less weight so students can receive feedback on their analysis without as much concern that it will negatively impact their final grade.

On most of these assignments, students are given an assignment "cover sheet" that explains the details and objectives of the assignment, and they are also provided with the rubric under which their assignment submission will be evaluated. Some of the early assignments they prepare in collaborative teams of two (sometimes three) students, and at the end of each collaboration, they evaluate the professionalism with which they – and their partners – approached and worked in the collaborative team.

After students have participated in several low pressure/high value assignments and reviews, they prepare both initial and revised versions of all major assignments. To help with revisions, LP professors provide comments on content, organization, style and mechanics. Each major assignment also includes an overall assessment so students can gain perspective on their work and prioritize what they can do to improve.

The program requires at least two individual or small group conferences with the LP Professor each semester, both before assignments are due and between revisions when students are focused on putting the critique to immediate use.

Oral communication is often as critical to an attorney's practice as written communication. Each semester, LP students are provided with opportunities to discuss and present their analysis orally, including:

- A one-on-one oral report to an experienced practitioner
- A videotaped practice argument
- A final oral argument before a panel of practicing attorneys and judges in the courtrooms of the Colorado and Tenth Circuit Courts of Appeals.

Program-wide assessment

Program-wide assessment is a more difficult goal than individual student assessment, but it is a goal we are moving intentionally towards achieving. A year ago, we gathered student evaluation data over a five-year period (2005 – 2010) to see how we were doing from a student point of view. This study focused on the key questions in our school-wide student evaluation that related most directly to LP, and we looked only at measures of dissatisfaction – neutral, disagree, and strongly disagree ratings. Over that five-year period, sixteen sections per semester, and over a dozen different LP

Professors, we noted a significant drop in measurements of dissatisfaction across the program. While this data is encouraging, it is limited by the nature of the instrument (the student evaluation form), and amounts to only a rough measurement of the overall quality of the program.

The learning outcomes work we have been doing over the last three years is designed to be a better measurement of the success of the program. Starting with articulating learning outcomes, then redesigning our rubrics to align with those rubrics, then selecting measurements within those rubrics, and finally collecting data from the rubrics as applied to student work (a project we are currently working on), we should soon have detailed data that will show how we are doing at achieving our specific learning outcomes.

IV. Legal Externship Program

The Legal Externship Program at Denver Law provides monitored work experiences where law students establish intentional learning goals and reflect actively on what is learned throughout their externship. Denver Law students are able to engage in the practice of law by developing not only research and writing skills, but also improve communication and advocacy skills, among others. In accordance with the goals of ABA Standard 305, Denver Law's Legal Externship Program aims to assist students in developing professional lawyering skills, gaining insight into various aspects of the legal system and profession, and cultivating a sense of professional responsibility. All students are required to attend a seminar, as a first-time extern, which is designed to enhance the process of experiential learning.

Denver Law students can earn academic credit for an externship in the Fall, Spring, and Summer semesters, after completing 30 credit hours.

Students may earn 2 – 6 credits[2] each semester for substantive legal work, under the supervision of a licensed attorney or judge with at minimum five years of practice experience. Students may do externship at the following organizations and types of organizations:

a. Attorney General
b. Business/Corporate
c. County/City Agency
d. State Agency
e. Federal Agency
f. Human Rights
g. Judicial (all levels)
h. Legislative/Public Policy/Executive
i. Natural Resources and Environmental

[2] Students must receive approval from the Externship Faculty to earn 5 or 6 credits.

j. Private Firm
h. Prosecutor
i. Public Defender and Criminal Defense

For every 50 hours of work students can earn 1 academic credit, in conjunction with program requirements.

AY2011 statistics

a. Summer 2010

i. 211 students
ii. 729 credit hours
iii. 44070 hours worked

b. Fall 2010

i. 90 students
ii. 264 credit hours
iii. 14762 hours worked

c. Spring 2011

i. 146 students
ii. 433 credit hours
iii. 23685 work hours

d. Total externship AY2011

i. 447 students[3]
ii. 1426 credits
iii. 82517 hours worked

V. Public Service Requirement

Overview of the Public Service Requirement

In 2004, the faculty of Denver Law School established a Public Service Requirement as one of the prerequisites that students must fulfill in order to graduate with a Juris Doctorate.

To ensure that the College of Law remains in the forefront of public service, every Juris Doctor student is required to perform a minimum of 50 hours of supervised, uncompensated, law-related public service work during his or her law

[3] This number includes students who complete multiple externships for credit.

school career as a prerequisite to graduation.[4]

Every student who graduates from Denver Law therefore completes at least fifty hours of pro bono, public interest work.

How Students May Fulfill the Public Service Requirement

The Public Service Requirement can be met in a variety of ways, including:

- enrollment in one of the six Student Law Office clinics;
- enrollment in a public interest externship[5] under the auspices of our Legal Externship Program;[6]
- enrollment in our Public Interest Practicum program, in which students undertake short-term legal projects for a variety of legal organizations;[7]
- or enrollment in a variety of other courses with an experiential public interest component, such as the International Criminal Law Practicum or the Wills Lab.[8]

Faculty and Staff

Director of Public Interest

Denver Law has a Director of Public Interest on its faculty. The Director of Public Interest is responsible for supervising all students enrolled in public interest externships, as well as for the oversight, management, and academic integrity of the Public Interest Practicum program, in which students undertake 50 hours of work

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[4] http://law.du.edu/index.php/public-service-requirement

[5] A "public interest" externship is defined as a for-credit externship with a government agency; judicial clerkship; a nonprofit organization; or in a private law firm doing 50 hours of pro bono work.

[6] The vast majority of externship placements are in public service settings. In 2010, for example, of the 436 total externship placements, 358 (or 82%) were in public service sites. 107 students had externships in judicial placements, 170 were with government agencies, and 81 were in non-profit organizations. First time externs take an accompanying subject-specific externship seminar, focused on areas such as prosecution, criminal defense, judicial, and non-profit practice.

[7] In 2010, over one hundred students did 50 hours of pro bono work with a variety of public interest organizations through our Public Interest Practicum program, which is housed in the Legal Externship office. Over one hundred students are typically enrolled in the Public Interest Practicum program each year.

[8] http://law.du.edu/index.php/public-service-requirement/how-to-satisfy-the-psr. These courses include an Asylum Practicum, in which students represent an asylum-seeker in the affirmative asylum process; Wills Lab, in which students assist indigent clients in the drafting of documents such as wills, living wills, and medical or financial powers of attorney; International Criminal Law Practicum, which affords students the opportunity to get practical experiences on an international tribunal case involving genocide, war crimes or crimes against humanity; and a Child Advocacy Practicum, where students work on dependency and neglect, delinquency, and protection order cases under the supervision of Rocky Mountain Children's Law Center attorneys.

for a qualifying public interest organization. The director also manages the Public Service Requirement at the law school, serves as a faculty advisor to public interest student groups, and works with adjunct faculty who teach practicum courses in the public interest, including an Asylum Practicum and Child Advocacy Practicum.

Public Interest Coordinator

The Public Interest Coordinator assists the Director of Public Interest in the management of the Public Service Requirement and the Public Interest Practicum.

VI. Advocacy Programs

Overview

A. The Advocacy Department (TAD) at SCOL was established in September 2008.

B. Its mission is to improve *professional skills* education for law school students; to better prepare them for entry into the profession. Professional Skills are defined as: Applied Critical Thinking; Persuasive Writing; Oral Advocacy; Client Representation.

C. The department furthers the development of these professional skills in the four essential areas of advocacy:

Client Advocacy

Pre-Trial Advocacy Trial Advocacy Appellate Advocacy

D. TAD is situated in the "simulation" stage of the *"Indoctrination-Simulation-Application"* construct of professional skills education. The advantage of education in a simulated milieu is, variables can be controlled and manipulated to further the educational mission.

Specific Areas of Operation & Management

The Department oversees and manages the following areas:

- New course development within the department
- 45 professional skills course sections
- 24 Adjunct Faculty members
- 19 members and 3 Adjunct Instructors of the National Trial Team; 25 students and 6 coaches of the 7 national moot court teams
- Oversight and management of the student-run Moot Court Board, seven intra-school competitions, and the annual Hoffman Cup
- Development within the community to further interest in the profession of high school students

- Development of educational materials and tools focused on professional skills

Enrollment

Approximately 492 students enroll in Advocacy Department courses per year, totaling approximately 1,497 credit hours. (This does *not* include the students who participate in the tournaments/competitions per year offered at SCOL.)

Instructional Faculty

The instructional faculty if predominantly comprised of attorneys and judges currently engaged in the active practice of law.

Courses Offered

A. The Department offers four (4) different levels of courses:

1. Trial Practice I
    a. Basic Courtroom Skills (15 sections/year; 12 students/section; 3 credits)
2. Trial Practice II
    a. Advanced Courtroom Skills (5 sections/year; 12 students/section; 3 credits)
    b. Motions Practice (2 sections/year; 12 students/section; 3 credits)
    c. Voir Dire (2 sections/year; 12 students/section; 3 credits)
    d. Litigation Technology (1 section/year; 12 students/section; 3 credits)
    e. Discovery Practicum (1 section/year; 12 students/section; 3 credits)
3. Trial Practice III
    a. National Trial Team Course (8 sections/yr; 19 students; 3 credits)
    b. Mentors Practicum (2 sections/yr; 13 students; 3 credits)
4. Day 1 Practice Labs
    a. Civil Practice Lab (2 sections/year; 12 students/section; 3 credits)
    b. Criminal Practice Lab (2 sections/year; 12 students/section; 3 credits)
    c. Domestic Practice Lab (1 section/year; 12 students/section;3

credits)

Major Departmental Highlights of the Academic Year

1. **Professional Skills.** Introduction of the *Day One Lab Course Series*, which includes the Civil Practice, Criminal Practice, and Domestic Practice labs. These courses focus on students learning each of the pre-trial litigation stages. The course takes the students from the initial client interview, through every major stage of litigation to the eve of trial. For example, in the Day 1 Civil Practice Lab, students research, draft and e-file, twenty (20) pre-trial/litigation documents: *Complaint; Answer; Jury Instructions; Retainer Agreement; ColTAF Account; Interrogatories; Subpoena Duces Tecum; Deposition Outline; Mediation Memorandum; Settlement Agreement;* just to name a few.

2. **Community Involvement.** Now entering its fourth year, the department is promoting diversity through its continued management and growth of the pipeline course, *Trial Practice III – The Mentors Practicum*. The Mentors Practicum is a full-year course for thirteen, professor-approved, law school students. These students (Mentors) mentor Denver-area, at-risk high school students on a weekly basis for a continual ten-month period, on the four (4) major "life skills". Simultaneously, the Mentors receive weekly classroom education focused on improving their trial practice proficiency, evidentiary knowledge and application, case analysis, and client counseling skills.

3. **National Identity.** For the first time in over a decade, the National Trial Team was the Regional Champion and advanced to National Trial Championships in 2010 and repeated the accomplishment in 2011. The Team also advanced the past two falls to the medal rounds at the National Trial Advocacy Competition in 2009 (Quarterfinals) and in 2010 (Championship Finals), as well attending the national Top Gun Tournament.

MEMORANDUM

To: Colorado Supreme Court Chief Justice's Commission on the Legal Profession

From: University of Colorado School of Law

Date: August 15, 2011

Re: Professional Identity, Social Responsibility, and Practice Skills Inventory

As you requested, below please find a brief description of our current work in the areas described above (most of these are cross-cutting – and also include substantial involvement from members of the bench and bar -- so defy easy categorization):

A. Public Service Pledge Program

1. Overview of the Model Project
   a. Public service is an integral part of a lawyer's professional obligation and an essential ingredient in a legal career. The law school's voluntary public service program provides law students with skills and values, such as legal research and writing, client interviewing, and legal argument development. These skills prove valuable early in legal careers and promote a lifetime commitment to law-related community service.
   b. By signing the Colorado Law Public Service Pledge, students commit to 50 hours of law-related public service work, not for credit or other compensation, during their time at the Law School. Students who fulfill their pledge will be recognized at graduation, and their public service will be reflected on their transcripts

2. Evaluation
   a. Public service pledge. The program continues to expand *with over 90% of 1Ls signing the pledge*, as compared to 25% overall enrollment at the end of FY 2010.
   b. Since inception of the program in late 2008, our students have contributed over 28,000 volunteer hours to the community, equaling 14 years of work at 2000 hours per year.

3. Participation Data
   a. Total Pledge hours since inception (September 1 2008 – April 20, 2011): **28,694**
   b. Breakdown by class:
      i. Class of 2011: **10134**
      ii. Class of 2012: **3470**
      iii. Class of 2013: **350**
   c. Total number of students who have signed the Pledge since the program began: **353**
      i. Class 2011: **68**
      ii. Class 2012: **48**
      iii. Class 2013: **175**
   d. Total number of students who have completed the 50 hour Pledge:
      i. Class 2011: **51**

ii. Class of 2012: **17**
iii. Class of 2013: **1**

B. Externship Program

1. Externships at Colorado Law are opportunities to gain academic credit for doing substantive legal work with a government agency, private non-profit or public interest institution, or other private sector employer such as a law firm. In accordance with the goals of ABA Standard 305 and Law School Miscellaneous Rules and Decisions of the Faculty 24, Colorado Law's Externship Program aims to help students develop professional lawyering skills, gain insight into various aspects of the legal system and profession, and cultivate a sense of professional responsibility. The mandatory externship class also gives students the opportunity to learn from and reflect on their field experiences

2. Colorado Law runs an externships program for 2L and 3L students Fall, Spring and Summer terms

3. Students may extern for 1 to 4[1] credits under the supervision of a lawyer[2], judge or professor[3] at an organization involved in legal services, e.g.,
   a. Trial, appellate and administrative courts
   b. US Attorney, district attorney and city attorney offices
   c. Public defenders and legal aid
   d. State and federal government administrative, legislative and executive agencies and bodies
   e. Public interest/advocacy groups
   f. Educational organizations
   g. Private legal and in house practices
   h. Arts, civic and other not for profits

4. Students earn 1 credit for each 50 hours of work, in addition to other educational requirements

5. AY2011 statistics
   a. Summer 2010
      i. **34** students
      ii. **107** credit hours
      iii. **5370** work hours
   b. Fall 2010
      i. **74** students
      ii. **182** credit hours
      iii. **9100** work hours
   c. Spring 2011
      i. **106** students
      ii. **259** credit hours

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1 Students may petition for up to 7 externship credits.

2 The school defines lawyer as a lawyer actively licensed in any state or the District of Columbia.

3 Professors cannot use externs as research assistants, but rather as part of their legal work.

iii. **12950** work hours

d. Total externship AY2011

i. Total students[4]: **214**

ii. Total credit hours: **548**

iii. Total work hours: **27420**

C. Clinical Education Program

1. Overview: The Clinical Education Program (Clinical Program) provides students with an intensive lawyering practicum. Students take the lead on live-client cases or legal projects under the supervision of clinical faculty members who are licensed attorneys.
   a. The Clinical Program includes eight separate clinics. The Clinical Program operates as a unified public interest law firm in which each individual clinic is like a department within the firm.
   b. The substantive legal areas covered by the Clinical Program include:
      i. American Indian Law, both as it relates to tribes and tribal governance and as it relates to individual clients;
      ii. Civil practice, with exposure to family law, Social Security disability appeals, and immigration asylum cases;
      iii. Criminal defense with an emphasis on collateral immigration matters;
      iv. Criminal defense with an emphasis on post-conviction innocence claims;
      v. Entrepreneurial law, focused on business formation and related early business issues like intellectual property plans;
      vi. Family law, working on both initial cases of dissolution and allocation of parental rights, and on post-decree matters including modifications of child support and parenting time;
      vii. Juvenile law, including representation of youth as their guardians ad litem, representation of parents responding to abuse and neglect charges, and representation of school districts related to truancy;
      viii. Natural Resources and Environmental law, including matters related to federal lands, endangered species and energy development.
   c. There is also one further clinic which sits outside the Clinical Program and is an appellate advocacy simulation. Students essentially shadow a pending complex criminal appeal and assist counsel in reviewing the record and preparing the brief.

2. Enrollment:
   a. In general, each clinic caps its enrollment at twelve students to ensure that students have extensive time with their clinical faculty member.
   b. Some of the clinics run for the full academic year, while a few last for a semester.
   c. The Clinical Program enrolls approximately 120 students per year in its clinics. Most students earn four units of credit for each semester of clinical work.

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[4] There is some double counting as some students take externships two out of three terms.

3. Structure of Learning Environment: Each clinic is structured so that students participate in three primary arenas. First, in the clinic seminar in which all students meet with their faculty member in a classroom setting. Next, in student supervision in which students meet individually with their clinical faculty member for tailored feedback and reflection. Finally, in live legal practice settings in which student attorneys take the lead in performing the required legal services, under the supervision of their clinical faculty member.

D.Practice Requirement:

CU Law's graduation requirements include the completion of a "practice requirement," in which the student completes "a course in which participation in actual or simulated applications of practical legal skills are a substantial part of students' work." This can be fulfilled by taking one of the clinics, or by taking one of a range of trial advocacy courses (e.g., Trial Advocacy, Advanced Trial Advocacy, Advanced Appellate Advocacy, and Motions Advocacy) as well as transactional and other courses (e.g., Law Practice Management, Business Planning, Estate Planning, Litigation Drafting, Contract Drafting). These courses are taught not only by full-time faculty, but also by a wide range of adjunct faculty that include judges and members of the practicing bar.

E. Ethics and Professionalism:

In addition to the 3-credit course on Legal Ethics and Professionalism required for graduation (which is taught not only by full-time faculty but also by distinguished adjunct faculty that include judges and members of the practicing bar), a team of current full-time faculty are now engaged in an experimental offering (called the TELOS project) available to first-year students on a voluntary, not-for-credit basis that seeks to engage them in conversation throughout their 1l year about the experience of law school, their purposes as law students in acquiring legal training, and the moral and ethical dimensions of the transformation in self they may be witnessing. Our orientation schedule for incoming students also includes a heavy emphasis on professional identity issues, with presentations not only from full-time faculty, but also leaders of the bench and bar (E.g., Justice Bender, Judge Carparelli, and Mark Fogg).

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

AUGUST 8-9, 2011

RESOLUTION

RESOLVED, That the American Bar Association take steps to assure that law schools, law firms, CLE providers and others concerned with professional development provide the knowledge, skills, and values, that are required of the successful modern lawyer.

FURTHER RESOLVED, That the American Bar Association urges legal education providers to implement curricular programs intended to develop practice-ready lawyers including, but not limited to, enhanced capstone and clinical courses that include client meetings and court appearances.

REPORT

Earlier this year, the New York State Bar Association approved the report of a Task Force created by former President Stephen Younger that considered the future of the legal profession. It examined in depth such issues as technology, alternative billing and work life balance. One of the major subjects it studied was legal education. Because the American Bar Association plays such an important role in educational matters, the State Bar Association is presenting this resolution based on the findings and conclusions of its Task Force. The following is taken from the Task Force report.

Just as the practice of law is undergoing a "sea change" created by the confluence of factors such as client needs and attitudes, the technological transformation of daily life, the increasing globalization of what used to be national, regional or local concerns, and recent challenging economic conditions, so too has the business of educating and forming new lawyers.

The current educational and structural model for preparing law students and forming new legal professionals is under fire on many fronts. Educational experts criticize law school teaching for its reliance on passive learning in the classroom, its focus on appellate cases and its failure to prepare law students for the real-life experience of representing clients and practicing law. Critics also point to legal education's failure to focus on "learning outcomes" (evaluating what students can *do* as a result of instruction) and "lawyer competencies"(knowledge, skills, values, habits and traits that make for successful lawyers), as well as the absence of appropriate assessment and evaluative tools to measure such outcomes and competencies. In addition to pedagogical critiques, consumer advocates complain that entering law students do not have a realistic understanding of what a career in the law truly entails, including a realistic perspective on work-life demands and the financial burdens and benefits which come with a legal education and career.

Meanwhile, structural critics of law schools forecast the end of the current business model of law schools.[1] That forecast is based on a combination of economic factors that include the pervasiveness of *U.S. News & World Report* rankings and the need to create scholarly output valued by *U.S. News* reviewers, the tension between directing curriculum at state bar licensing requirements and fully preparing students to represent real clients, and the inconsistency between legal employer hiring criteria and the demand for "practice-ready" lawyers.

Post-law school professional development also is often deficient. Employer-created training programs remain rare and extremely costly, while state CLE transitional programs are often inadequate to bridge the gap between law school and practice. Although mentorship is often cited as a mechanism for providing corrective formation, modeling and support, it remains unclear whether voluntary or mandatory programs are more effective, how to certify such programs, and how to integrate them with previously existing CLE requirements.

We used to think that being a good lawyer simply meant knowing the law. Today, we are more likely to think that good lawyers know how to *do* useful things with the law

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[1]WILLIAM M. SULLIVAN, ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 129 (2007). Rachel J. Littman, *Training Lawyers for the Real World: Part 1*, 82 N.Y. ST. B. ASS'N J. 7, 20–24 (Sept. 2010); Richard A. Matasar, *Does the Current Economic Model of Legal Education Work for Law Schools, Law Firms (Or Anyone Else)?*, 82 N.Y. ST. B. ASS'N J. 9, 20–26 (Nov. 2010), *available at*http://www.nysba.org/AM/Template.cfm?Section=Bar_i_Journal_i_&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=43636.

to help solve client problems. Society has shifted from a static understanding of professional competence as memorized knowledge to a dynamic conception of lawyers adding value through judgment and their ability to manage and solve complex problems. This dynamic conception of lawyering is both promising and demanding. More is expected of lawyers today, and these heightened expectations are particularly stressful for young lawyers. Too many law students and recent graduates are not as well prepared for the profession as they might be. Law schools, bar examiners, the judiciary and the bar owe more to our young colleagues in these difficult times.

We have not, of course, ignored these problems. Legal education and post-graduate training have changed significantly in the past thirty years. Most law school faculty now include significant numbers of clinical teachers and faculty who combine law degrees with other academic credentials. Mandatory CLE is now common, and many large firms and institutional practice settings have devoted significant resources to training and management of their lawyers' capital. Courses in transactional law, mediation, and arbitration are now mainstays of the law school curriculum. We have become much more intentional and strategic in our efforts to prepare lawyers for practice and to help them continue to develop throughout their careers.

Yet there is much more we can do. Interesting and useful suggestions have been made recently in the related areas of understanding, assessing and certifying lawyers' readiness to meet the demands of contemporary practice. The basic impulse is two-fold: to sharpen both our understanding of the competencies, skills, knowledge, practices and values of a good lawyer and our ability to measure progress toward those goals. If we can align systemic incentives of the bar exam with the practices best aimed at achieving our goals, then we will improve our system for launching the careers of young lawyers. Several different organizations recently have begun or proposed significant initiatives in each of these areas.

For example, the Model Competencies Project recommended by the recent ALI-ABA ACLEA Critical Issues Summit is an opportunity to continue important work which was pioneered by the MacCrate Commission and which continues today.[2] As contemporary practice grows more complex and demanding, law schools, law firms, law examiners, CLE providers and others concerned with the continued professional development of lawyers have ever greater needs for a deeper and more useful understanding of the knowledge, skills, values, habits and traits that make up the successful modern lawyer. It is not enough to say a lawyer must know the law and seek justice. Those in the business of developing professionals need more precise assessment tools that reflect our best current understanding of the skills, aptitudes, values and habits a contemporary lawyer should optimally possess.

The model of the lawyer as an expert problem solver began to emerge in the legal academic literature in the 1980s.[3] Academics and others began to conceptualize professional development as a complex process involving an ongoing cycle of abstract learning and engagement with professional practice. That cycle permits each professional to develop individualized cognitive structures which enable the rapid problem solving that characterizes

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[2] ALI-ABA, *Equipping Our Lawyers: Law School Education, Continuing Legal Education, and Legal Practice in the 21st Century—Final Report* (Charles C. Bingaman, ed. 2009), http://www.equippingourlawyers.org/documents/final_report.pdf.

[3] *See* DAVID BINDER, ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH (1991) (noting that lawyers solve clients' problems in the world using the law); Anthony G. Amsterdam, *Clinical Legal Education: A 21st Century Perspective*, 34 J. LEGAL EDUC. 612 (1984) (invoking the language and models of Newell & Simon).

expertise. Experts do not just know more than novices—they are able to *do more* with the knowledge they possess.[4]

As this conceptual framework began to emerge, lawyers both inside and outside the academy began to ask about the particular nature of lawyers' expertise. Although it has long been clear that the lawyers who are admired by most members of the profession know something much more than just the law as a body of doctrine,[5] the emergence of the professional expertise model, along with the profession's renewed commitment to ethics in the aftermath of the Watergate scandal, fueled the drive to understand better what it is that lawyers know and the distinctive things they can or should be able to do with that knowledge.

Developing useful assessment tools in connection with this new paradigm is a similarly complex matter. Understanding the process of developing and exercising judgment has challenged thinkers since Aristotle.[6] We have learned that aspiring lawyers develop expert judgment by acquiring knowledge and skills as they join a community of practice that is distinguished by its shared commitments to a set of values, traditions and practices. Those shared commitments are often contested at the margins and may sometimes be quite diffuse, but they have a well recognized core. While learning the law is indispensable, the process of becoming an American lawyer requires something more complex than just learning to recite rules. The process of developing judgment is individualized, difficult and time consuming. Contemporary research suggests that, although the development of expertise has a steep initial learning curve, lawyers and other professionals continue to develop as experts for as many as ten years.[7]

The key contemporary effort to describe what a lawyer should know and be able to do was the ABA's groundbreaking Statement of Skills and Values by the MacCrate Commission in 1992.[8] The MacCrate Report was important in many ways and focused all of

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[4] One of the best and earliest applications of the general model to lawyering is Gary Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 318 (1995). For a more theoretical application, see Ian Weinstein, *Lawyering in the State of Nature: Instinct and Automaticity in Legal Problem Solving*, 23 VT. L. REV. 1 (1998). For other work on lawyering as judgment, *see* Alex Scherr, *Lawyers and Decisions: A Model of Practical Judgment*, 47 VILL. L. REV. 161 (2002).

[5] A number of works can be understood as efforts to capture how lawyers add value and solve problems by doing something more than just applying legal doctrine and resolving legal disputes. *See, e.g.*, L. BRANDEIS, *Business—A Profession in* BUSINESS—A PROFESSION (1914); L. BRANDEIS, *The Opportunity in the Law ,in* BUSINESS—A PROFESSION (1914); KARL LLEWELYN, THE BRAMBLE BUSH: ON LAW AND ITS STUDY (1960); ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993).

[6] Mark Neal Aaronson, *We Ask You to Consider: Learning about Practical Judgment in Lawyering*, 4 CLINICAL L. REV. 247, 258–61 (1998).

[7] The modern conception of the professional as expert grows from the groundbreaking work of Allen Newell and Nobel Prize-winning economist Herbert A. Simon. ALLEN NEWELL & HERBERT A. SIMON, HUMAN PROBLEM SOLVING (1972). Another important voice is DONALD A. SCHON, THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION (1983). For work in the process and length of time to develop expertise, *see* THE CAMBRIDGE HANDBOOK OF EXPERTISE AND EXPERT PERFORMANCE (K. Anders Ercisson, et al., eds., 2006). Perhaps the best-known contemporary popular treatment of these issues is MALCOLM GLADWELL,BLINK: THE POWER OF THINKING WITHOUT THINKING (2007).

[8] ABA SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR, *Legal Educ. and Profession Dev.—An Educational Cotinuum Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* (Jul. 1992) [hereinafter "MacCrate Report"].

us—the profession, the academy, the bench and all lawyers—on the ways lawyering requires the integration of multiple dimensions of knowledge and skills, a process that begins in law school and continues throughout one's professional life. Lawyers need substantive knowledge. They must be able to use that substantive knowledge, and they must be able to communicate, persuade, advise, draft and collaborate, all the while keeping track of their ethical obligations to clients, others and society.[9] It is a complex process. But it is one that American lawyers have accomplished, with more or less success, since they laid the foundations for our extraordinary nation.

The MacCrate Report's Statement of Skills and Values had real and important impact on law schools, lawyers and our understanding of the process of professional development. While many other thinkers contributed, it is safe to say that the MacCrate Report played a key role in moving law schools[10] to act on the new conception of what lawyers need to know, taking us from a more static view of lawyers as repositories of legal knowledge to a contemporary dynamic view of lawyers as skillful agents who exercise judgment in several related realms to get things done. Indeed, in contemporary society, many have easy access to information that used to be expensive and almost impossible to gain by nonprofessionals. So lawyers must do something more than state what the law is if they are to add value for clients and society.

The effort to understand what lawyers should know and be able to do did not end with the MacCrate Report. Within the academy, others continued to refine the picture.[11] Two recent documents—the "Carnegie Report" and "Best Practices"—have transformed the current conversation within law schools. Meanwhile, many law firms have developed their own inventories of competencies, seeking to understand better how they can maximize value for clients and best develop their human capital.[12] Some of the most significant current efforts to refine our understanding of what lawyers know and do are occurring as part of the ongoing review of the ABA Accreditation Standards for Law Schools.[13]

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[9] For an intriguing recent discussion of the range of lawyering competencies, see Marjorie M. Shultz and Sheldon Zedeck, *Final Report—Identification, Development and Validation of Predictors for Successful Lawyering*, Shultz & Zadek, September 2008, available at http://ssrn.com/abstract=1353554 (last visited Feb. 11, 2011).

[10] The MacCrate Report contemplates a continuum of life-long learning and urged continued focus on professional growth through enhanced CLE and other measures. The Report seems to have had more impact among law schools than among others involved in professional development.

[11] *See, e.g.*, ROY STUCKEY, ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP 176–78 (2007). To combat these critiques, some law schools have redesigned their curricula. Posting of Justin Myers, *Golden Gate University's New 1L Curriculum* to BEST PRACTICES FOR LEGAL EDUC. L. BLOG (Dec. 18, 2009), http://bestpracticeslegaled.albanylawblogs.org/2009/12/18/golden-gate-universitys-new-1l-curriculum/; posting of Justin Myers, *Washington & Lee's New 3rd Year Curriculum*, BEST PRACTICES FOR LEGAL EDUC. L. BLOG (Dec. 21, 2009), http://bestpracticeslegaled .albanylawblogs.org/2009/12/21/washington-lees-new-3rd-year-curriculum;Scherr, *supra* note 16; Aaronson, *supra* note 13.

[12]ROY STUCKEY, ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP 176–78 (2007); WILLIAM M. SULLIVAN, ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) [hereinafter THE CARNEGIE REPORT].

[12]HEATHER BOCK & ROBERT RUYACK, CONSTRUCTING CORE COMPETENCIES: USING COMPETENCY MODELS TO MANAGE FIRM TALENT (ABA-CLE Career Resource Center 2007).

[13] The Special Report on Outcome Measures and the ongoing work of the Outcome Measures Subcommittee of the Standards Review Committee of the ABA Section on Legal Education are two important efforts in this area.

The recent ALI-ABA Critical Issues Summit issued a call for a collaborative effort among representatives from law schools, the practicing bar, legal employers, bar associations, bar admissions boards, MCLE regulators, CLE providers and in-house professional development specialists to design a model approach to lawyer competencies. This important initiative, in many ways, continues the valuable work of the MacCrate Commission, building upon that foundation to refine further our understanding of what lawyers need to know and be able to do. Developing a more broadly shared understanding of competencies would be a key step toward strengthening the continuum of legal education and professional development. That stronger system, in turn, would help law students and lawyers better meet the evolving challenges of our profession and our society.

How we understand the relationships among different realms is a complex question. Are skills and values separate or must skills always be understood within the context of values? Are the affective and social components of lawyering to be treated independently or as subparts of skills such as communication and collaboration? Is abstract knowledge more important or just another of many co-equal ingredients? Level of specificity, organization and what to leave out are always difficult questions in a mission like this. Yet it is clear that prior efforts to answer these questions have yielded real and important gains. If we do not know what we are trying to accomplish, we cannot plan intelligently. Nor can we measure our successes and failures.

These complex questions also pose more practical ones about both the approach and the process of moving forward. What is "practice-ready" in a profession where there is a myriad of practice types in the law firm setting and an apparent preference in the legal marketplace for specialist practitioners? What will be needed to bring together academicians and the practitioners who are in the business of teaching, training and employing lawyers and encourage agreement on the values, skills and knowledge that make a lawyer "practice-ready? What is the role of law schools, employers, and CLE providers in preparing attorneys for practice in an era of change? What are the sources that will provide exposure to project management skills; training in evolving information technologies; and training in efficient work processes? What will be needed to develop an integrated plan to educate, train and develop lawyers who can practice effectively and with a measurable standard of excellence that is based on a model competencies approach? What will be needed to reach agreement on how the education and training responsibilities should be allocated among the schools, firms, CLE providers, and bar associations?

Once students graduate from law school, the picture does not improve. The bar exam does not claim to assess readiness for practice, and CLE providers are quite ill positioned to provide meaningful, useful feedback. There is much that should be done to improve assessment so that law students and young lawyers better prepare themselves to be lifelong learners and ever improving professionals.

Catherine L. Carpenter, et al., *Report of the Outcome Measures Committee*, ABA SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR (2008), *available at* http://www.abanet.org /legaled/committees/subcomm/Outcome%20Measures%20Final%20Report.pdf; ABA, *Standards Review Committee*, http://www.abanet.org/legaled/committees/comstandards.html (last visited Nov. 17, 2010).

Of course assessment, even when done well cannot address all the challenges of professional development.[14] And we must be careful to find efficient, valid modes of assessment. Not everything that is important can be measured, and not everything that can be measured is important. But law schools, bar examiners, CLE providers and others concerned with professional development have already begun to experiment with new modes of assessment.[15]

Accreditation rules should emphasize how to apply theory and doctrine to actual practice, as well as encourage the process of developing professional judgment. These are critical skills that all newly admitted lawyers should have as they embark on their legal careers.

This is not to suggest abandonment of the traditional classroom or a return to the apprenticeship model but rather a more sophisticated model. For example, as a matter of policy, law schools should avoid providing academic credit to students used as unpaid labor by for-profit entities with no serious feedback, assessment and/or training on lawyering skills. There should be carefully crafted rules to provide for expanded clinical programs and rigorous certification processes for supervisors in clinic or field-placement programs, analogous to what is done in social work programs. The over-arching goal is to encourage students to participate in clinical and other courses that will provide them with the necessary skills to apply their knowledge in practical settings.

In addition to clinical experiences, capstone courses should be encouraged. Capstone courses are designed to reflect real-world scenarios that integrate doctrine, skills, and theory into legal education. They "build on previous learning, require students to be responsible for their learning, and encourage reflection on legal ethics, professionalism, and what they learned."[16]Capstone curricula "require students to produce manifestations of their learning, including written briefs, contracts, papers, or a videotaped trial or negotiation"[17] and allow students many opportunities to receive individual assessment and feedback. They also require students to manage more complex tasks than those presented in the classroom.

In capstone classes, "[s]tudents will develop an expertise as a result of a systematic and progressively sophisticated study of a discrete area of practice . . . . Substance and method can be taught and learned in a thoroughly harmonious and complimentary fashion. Capstone courses with significant writing, clinics and other practical exercise will ease the student's transition to practice."[18]These courses are used in the third year of law school as a culmination of legal education and to provide a new attorney with the skills to "self-direct" his or her learning in the future.[19] Required capstones in the third year will ensure maximization of learning as law students transition into novice professionals.

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[14] For a spirited discussion of the national debate on the role of assessment in education see, DIANE RAVITCH, THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION (2010).

[15]*See, e.g.*, Clark D. Cunningham, *Legal Education After Law School: Lessons from Scotland and England*, 33 FORDHAM URB. L.J. 193, 196–99 (describing Scottish advances in assessing readiness for practice).

[16] John O. Sonsteng, *A Legal Education Renaissance: A Practical Approach for the Twenty-First Century*, 34 WILLIAM MITCHELL L. REV. 1, 104 (2007).

[17]*Id.*

[18] Jeffrey E. Lewis, *"Advanced" Legal Education in the Twenty-First Century, A Prediction of Change*, 31 U. TOL. L. REV. 655, 658–59 (2000).

[19]Sonsteng, *supra* n. 55 at pg. 103.

The resolution presented by the New York State Bar Association is intended to give the House of Delegates the opportunity to formally speak to the issues raised by its Task force on the Future of the Legal Profession and advance legal education in a manner recommended by the Task Force.

Respectfully submitted,
Vincent E. Doyle III, President
New York State Bar Association

GENERAL INFORMATION FORM

Submitting Entity: New York State Bar Association

Submitted By: Vincent E. Doyle III, President

1. Summary of Recommendation(s).
   The Resolution calls for the American Bar Association and its constituent bodies that deal with legal education to promote and support the education and training of future lawyers and young lawyers by providing them with the knowledge, skills, values, habits and traits that make up the successful modern lawyer; and that legal education providers make these lawyers practice ready by enhancing clinical work and certain supervised activities, as well as through development of capstone courses.

2. Approval by Submitting Entity.
   The New York State Bar Association has approved this resolution.

3. Has this or a similar resolution been submitted to the House or Board previously?
   This resolution updates ABA policies on legal education.

4. What existing Association policies are relevant to this resolution and how would they be affected by its adoption?
   This resolution updates the long standing policies of the ABA regarding modern legal education, which were first raised by the groundbreaking report of the MacCrate Commission in 1992. More recently, these issues were the focus of attention in the Model Competencies Project recommended by the ALI-ABA Critical Issues Summit.

5. What urgency exists which requires action at this meeting of the House?
   No urgency, but legal education is undergoing significant change, and this resolution is intended to give policy direction to those involved.

6. Status of Legislation. (If applicable.)
   N/A

7. Cost to the Association. (Both direct and indirect costs.)
   The resolution does not impose any costs on the Association, although it would require future actions on the part of various constituent bodies of the Association.

8. Disclosure of Interest. (If applicable.)
   No individual associated with the resolution will benefit personally from adoption of the resolution.

9. Referrals.
   None, as the resolution was only recently submitted.

10. Contact Person. (Prior to the meeting.)

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11. Contact Person. (Who will present the report to the House)

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EXECUTIVE SUMMARY

SUMMARY OF THE RESOLUTION

The Resolution calls for the American Bar Association and its constituent bodies that deal with legal education to promote and support the education and training of future lawyers and young lawyers by providing them with the knowledge, skills, values, habits and traits that make up the successful modern lawyer; and that legal education providers make these lawyers practice ready by enhancing clinical work and certain supervised activities, as well as through development of capstone courses.

SUMMARY OF THE ISSUE WHICH THE RESOLUTION ADDRESSES

The Resolution would guide those, both within the ABA and outside the Association who are involved in educating future lawyers and young lawyers as they examine, consider and, to the extent possible, resolve questions such as the following: What is "practice-ready" in a profession where there is a myriad of practice types in the law firm setting and an apparent preference in the legal marketplace for specialist practitioners? What will be needed to bring together academicians and the practitioners who are in the business of teaching, training and employing lawyers and encourage agreement on the values, skills and knowledge that make a lawyer "practice-ready? What is the role of law schools, employers, and CLE providers in preparing attorneys for practice in an era of change? What are the sources that will provide exposure to project management skills; training in evolving information technologies; and training in efficient work processes? What will be needed to develop an integrated plan to educate, train and develop lawyers who can practice effectively and with a measurable standard of excellence that is based on a model competencies approach? What will be needed to reach agreement on how the education and training responsibilities should be allocated among the schools, firms, CLE providers, and bar associations?

EXPLANATION OF HOW THE PROPOSED POLICY POSITION WILL ADDRESS THE ISSUE

We used to think that being a good lawyer simply meant knowing the law. Today, we are more likely to think that good lawyers know how to do useful things with the law to help solve client problems. Society has shifted from a static understanding of professional competence as memorized knowledge to a dynamic conception of lawyers adding value through judgment and their ability to manage and solve complex problems. This dynamic conception of lawyering is both promising and demanding. More is expected of lawyers today, and these heightened expectations are particularly stressful for young lawyers. Too many law students and recent graduates are not as well prepared for the profession as they might be. Law schools, bar examiners, the judiciary and the bar owe more to our young colleagues in these difficult times.

This Resolution is intended to cause those involved in legal education to address these issues, find solutions and revise legal education to meet these needs.

SUMMARY OF ANY MINORITY VIEWS OR OPPOSITION WHICH HAVE BEEN INDENTIFIED

The New York State Bar Association is not aware of any objection to the resolution, although it admittedly is a late addition to the agenda and has not been circulated.

CHIEF'S COMMISSION ON THE LEGAL PROFESSION

WORKING GROUP A

Working Group A seeks to promote law students' understanding of the legal profession, especially to foster an appreciation of and personal connection to the important role lawyers have historically played and continue to play in society. Working Group A also seeks to improve law students' transition from law school to practice.

Working Group A believes an increased presence of practicing attorneys and judges in the law schools to teach courses and to share stories about what being a lawyer means to them will help to accomplish these goals by promoting a broader sense of who belongs to the Colorado legal community. Further, Working Group A believes robust law school mentoring programs will help to improve the transition from law school to practice.

To this end, Working Group A proposes revising the current rules and regulations that govern continuing legal education to allow lawyers and judges to receive CLE credit for teaching and speaking at the law schools and for mentoring both law students and newly admitted lawyers.

The proposed changes to the current rules and regulations are marked by underline. Revisions to Form 5 will have to be made to allow lawyers to apply for credit for teaching and speaking activities in the law schools. In addition, a new rule (Rule 260.9) has been proposed to allow lawyers to apply for credit for mentoring law students and newly admitted lawyers. A new accompanying application for credit form (Form 9) will have to be drafted in conjunction with the new Rule 260.9.

PROPOSED REVISIONS

Rule 260.4: ACCREDITATION

(3) The educational activity required by these rules will be in addition to teaching on a regular basis in which particular registered attorneys or judges may engage, though practicing attorneys and judges may apply for credit for teaching activities in Colorado law schools a provided in these rules and regulations. Pursuant to Paragraph (6) below, the Board will determine whether a registered attorney's or judge's teaching qualifies for accreditation.

Rule 260.9: MENTORING LAW STUDENTS AND NEWLY ADMITTED LAWYERS

(1) A lawyer may be awarded a maximum of twelve (12) units of general credit during each three-year compliance period for providing uncompensated mentoring to a law student attending either of Colorado's law schools or to a newly admitted Colorado lawyer. For the purpose of this Rule, a law student is an individual who is enrolled in one of Colorado's law schools, or who has graduated from one of Colorado's law schools within the last twelve (12) months but who has not yet been admitted to practice. For the purpose of this Rule, a newly admitted lawyer is a lawyer who has been admitted to practice law in Colorado for five (5) years or less.

(2) To be eligible for units of general credit, a lawyer must enroll to be a mentor through a law school mentoring program in the case of law students, or through a program approved by the Office of Attorney Regulation in the case of newly admitted lawyers. A lawyer who acts as a mentor to a law student or to a newly admitted lawyer shall follow the guidelines established by the mentoring program in which the mentor is enrolled. For the purposes of receiving general credit, a lawyer will be permitted to mentor only one law student or newly admitted lawyer at any given time.

(3) Subject to the reporting and review requirements specified herein, a lawyer who acts as a mentor to a law student or newly admitted lawyer shall be awarded four (4) units of credit per completed year of mentoring. A lawyer will not be eligible to receive more than four (4) units of general credit during any one year, and will not be eligible to receive more than twelve (12) units of general credit during any three-year compliance period via any combination of law student or newly admitted lawyer mentoring.

(4) A lawyer wishing to receive general credit units under this Rule shall submit to the mentoring program a completed Form 9. Upon receipt of a Form 9, the mentoring program shall in turn report to the Board the number of general CLE units that it recommends be awarded to the reporting lawyer under the provisions of this Rule. The mentoring program shall recommend an award of the full number of units for which the lawyer is eligible under the provisions of this Rule, unless it determines after review that such an award is not appropriate due to the lawyer's lack of diligence or competence, in which case it shall recommend awarding less than the full number of units or no units. Lack of participation on the part of the law student or newly admitted lawyer shall not result in any presumption that the lawyer's mentoring was not diligent or competent. The Board shall have final authority to issue or decline to issue units of credit to the lawyer for mentoring, subject to the other provisions of these Rules and Regulations, including without limitation the hearing provisions of Regulation 108.

Regulation 103: STANDARDS FOR ACCREDITATION

Continuing legal education must be educational activity which has as its primary objective the increase of professional competence of registered attorneys and judges and law students enrolled at Colorado's law schools. The activity must be an organized activity dealing with subject matter directly related to the practice of law or the performance of judicial duties.

(c) Courses and other activities will not be accredited if attendance is limited to the members of a particular law firm, corporation or other business entity. This requirement will not apply, however, to professional associations, or activities sponsored by an agency for the benefit of registered attorneys or judges who are employees of a local, state or federal governmental unit. Nor will this requirement apply in the case of a lawyer's participation in a mentoring program administered by one of Colorado's law school or approved by the Office of Attorney Regulation, as set forth in Rule 260.9(2).

(g) The Board shall accredit teaching activities of registered attorneys and judges, upon written application by individuals engaged in such activities, provided the activity contributes to the continuing legal education of the applicant and other attorneys or judges. The Board may also accredit teaching and speaking activities of registered attorneys and judges, upon written application by individuals engaged in such activities, provided the activity is conducted in one of Colorado's law schools to an audience comprised primarily of law students, and provided the activity's purpose furthers the law students' coursework, fosters the law students' connection to the legal profession's historical significance in society, promotes the law students' relationship with the Colorado legal community, and/or assists in the law students' transition from law school to practice. In addition, the Board may accredit educational activity of attorneys and judges who present programs to a public audience, provided the program's primary purpose is to inform the individuals in that audience about the workings of the Colorado judiciary and the functions of judges and courts.

Regulation 104: CREDITS; COMPUTATION

(d) Credit will not be given for time spent for introductory remarks, coffee and luncheon breaks, keynote speeches, business meetings, or question and answer periods following a presentation.

(f) In awarding credit for teaching, the Board shall take into account the following factors: (1) teaching content and level; (2) teaching methodology; (3) personal preparation by the individual applicant, including time spent; (4) originality of preparation with the individual applicant; and (5) supplemental course materials personally prepared by the individual applicant. The Board shall also take these factors into account in awarding credit for teaching and speaking activities conducted in the law schools pursuant to Regulation 103(g).

STATE OF COLORADO
SUPREME COURT
BOARD OF CONTINUING LEGAL AND JUDICIAL EDUCATION
1560 Broadway, Suite 1820
Denver, Colorado 80202
(303) 866-6500

RULES AND REGULATIONS GOVERNING MANDATORY CONTINUING LEGAL AND JUDICIAL EDUCATION FOR THE STATE OF COLORADO

(As adopted by the Colorado Supreme Court, August 14, 1978
and amended through February 17, 2011)

RULE 260: MANDATORY CONTINUING LEGAL AND JUDICIAL EDUCATION

PREAMBLE: STATEMENT OF PURPOSE

As society becomes more complex, the delivery of legal services likewise becomes more complex. The public rightly expects that practicing attorneys, in their practice of law, and judges, in the performance of their duties, will continue their legal and judicial education throughout the period of their service to society. It is the purpose of these rules to make mandatory a minimum amount of continuing legal education for practicing attorneys and judges in order to foster and promote competence and professionalism in the practice of law and the administration of justice.

RULE 260.1: DEFINITIONS

(1) The "Board" is the Board of Continuing Legal and Judicial Education.

(2) "Continuing legal education" is any legal, judicial or other educational activity accredited by the Board.

(3) An attorney in "inactive status" is one who has elected such status pursuant to Rule 227A.

(4) "Registered attorney" is an attorney who has paid the registration fee required by Rule 227A for the current year and who is not on inactive status or suspended by the Supreme Court from the practice of law.

(5) "Judge" is a judge who is subject to the jurisdiction of the Commission on Judicial Qualifications or the Denver County Court Judicial Qualifications Commission.

(6) "These rules" refer to rules numbered 260.1 through 260.7 of the Rules of Civil Procedure.

(7) A "unit" of continuing legal education is a measurement factor combining time and quality assigned by the Board to all or part of a particular continuing legal educational activity.

RULE 260.2: MINIMUM EDUCATIONAL REQUIREMENTS

(1) Every registered attorney and every judge shall complete 45 units of continuing legal education during each applicable three-year compliance period as provided in these rules.

(2) At least seven of the 45 units will be devoted to continuing legal education specifically addressed to legal or judicial ethics.

(3) All registered attorneys admitted after January 1, 1979 shall become subject to the minimal educational requirements set forth in these rules on the date of their initial admission to the bar of the State of Colorado. Their first compliance period shall begin on that date and end on December 31 of the third full calendar year following the year of admission.

(4) This subsection 4 is repealed and replaced by 201.14(3).

(5) Upon being reinstated pursuant to Paragraphs (3) or (8) of Rule 227A, any registered attorney who has been suspended under Paragraph (2) of Rule 227A, shall become subject to the minimal educational requirements set forth in these rules on the date of reinstatement. The first compliance period shall begin on that date and end on December 31 of the third full calendar year following the year of reinstatement, provided the date of reinstatement is more than one year after the date of suspension or transfer to inactive status. Otherwise, the compliance period shall be the same as it would have been absent the suspension or transfer.

(6) Units of continuing legal education completed after the adoption of this rule by the Supreme Court and prior to January 1, 1979 may be used to meet the minimum educational requirement for the first applicable compliance period. Units of continuing legal education completed in excess of the required units of continuing legal education in any applicable compliance period may not be used to meet the minimum educational requirements in any succeeding compliance period.

RULE 260.3: BOARD OF CONTINUING LEGAL AND JUDICIAL EDUCATION

(1) There is established a Board of Continuing Legal and Judicial Education which shall consist of nine members appointed by the Supreme Court. Six of the members shall be registered attorneys, at least one of whom shall also be a judge, and three of the members shall be non-attorneys. At least one of the registered attorneys shall be under the age of 35 when he or she is appointed. Members shall serve three-year terms; except that of the members initially appointed, three shall serve for one year, three shall serve for two years, and three shall serve for three years. The Supreme Court shall appoint one of the members to serve as chairperson at its pleasure. In the event of a vacancy, a successor shall be appointed for the unexpired term of the member whose office is vacated. Membership on the Board may be terminated as to any member by the Supreme Court at its pleasure. The members shall be entitled to reimbursement for reasonable travel, lodging and other expenses incurred in the performance of official duties.

(2) The Board shall employ an Executive Director and such other staff as may be necessary to assist it in performing its functions and shall pay all expenses reasonably and necessarily incurred by it under a budget approved by the Supreme Court.

(3) The Board shall administer the program of mandatory continuing legal education established by these rules. It may formulate rules and regulations and prepare forms not inconsistent with these rules pertaining to its functions and modify or amend the same from time to time. All such rules, regulations and forms and any modifications or amendments thereto shall be submitted to the Supreme Court and shall be made known to all registered attorneys and judges. Those rules, regulations and forms shall automatically become effective on the 30th day following submission unless they have been suspended by the Supreme Court prior to that date.

RULE 260.4: ACCREDITATION

(1) Continuing legal education must be educational activity which has as its primary objective the increase of professional competence of registered attorneys and judges. The activity must be an organized activity dealing with subject matter directly related to the practice of law or the performance of judicial duties. The Board shall accredit a broad variety of educational activities which meet these requirements.

(2) Formal classroom instruction or educational seminars which meet the requirements of Paragraph (1) above lend themselves very well to the fulfillment of the educational requirement imposed by these rules and will be readily accredited by the Board. However, it is not intended that compliance with these rules will impose any undue hardship upon any registered attorney or judge by virtue of the fact that he or she may find it difficult because of age or other reasons to attend such activities. Consequently, in addition to accrediting classroom activities and seminars at centralized locations, the Board shall attempt to promote and accredit such educational activities as video tape and audio tape presentations; preparation of articles, papers, books, and other such written materials; self-administered courses and testing; and other meritorious learning experiences. The Board shall to the extent possible make all educational activities reasonably available throughout Colorado. In cases of incapacity because of poor health, the Board may defer the requirements set forth in these rules for individual attorneys. Deferral does not constitute a waiver.

(3) The educational activity required by these rules will be in addition to teaching on a regular basis in which particular registered attorneys or judges may engage. Pursuant to Paragraph (6) below, the Board will determine whether a registered attorney's or judge's teaching qualifies for accreditation.

(4) The Board shall assign an appropriate number of units of credit to each educational activity it shall accredit. Generally, a unit of credit shall be the equivalent to attending 50 minutes of a formal classroom lecture with accompanying textual material.

(5) The Board may accredit as a sponsoring agency any organization which offers continuing legal education activities. All of the activities sponsored by such agency which conform to the requirements of these rules and such additional rules and regulations as the Board may adopt from time to time shall be accredited. Accreditation extended by the Board to any sponsoring agency shall be reviewed by the Board at least annually.

(6) The Board shall develop criteria for the accreditation of individual educational activities and shall in appropriate cases accredit qualifying activities of such nature. Although such accreditation will generally be given before the occurrence of the educational activity, the Board may in appropriate cases extend accreditation to qualified activities which have already occurred.

(7) The Board shall make available a list of all educational activities accredited by it, together with the units of credit assigned to each activity, which may be undertaken by registered attorneys or judges.

(8) In furtherance of the purposes and objectives of this Rule to promote competence and professionalism in the practice of law and the administration of justice, the Board shall consider, in accrediting programs and educational activities, the contribution the program will make to the competent and professional practice of law by lawyers in this state or to the competent and professional administration of justice. To this end, the Board may review course content, presentation, advertising, and promotion to ascertain that the highest standards of competence and professionalism are being promoted. The Board may withhold accreditation for any program that does not meet these standards, or the contents or promotion of which would be scandalous or unprofessional.

RULE 260.5: EXEMPTIONS

Any registered attorney shall be exempt from the minimum educational requirements set forth in these rules for the years following the year of the attorney's 65th birthday.

RULE 260.6: COMPLIANCE

(1) The mandatory continuing legal education requirement imposed by these rules shall take effect January 1, 1979. To aid administrative implementation of the requirement, the Board shall divide all registered attorneys into three groups of approximately equal numbers. The first group shall be required to complete 15 units of continuing legal education during the first year, and thereafter all registered attorneys in the first group shall complete 45 units of continuing legal education during each subsequent three-year compliance period. The second group shall be required to complete 30 units of continuing legal education during the first two years, and thereafter all registered attorneys in the second group shall complete 45 units of continuing legal education during each subsequent three-year compliance period. The third group shall be required to complete 45 units of continuing legal education during the first three years, and thereafter all registered attorneys and judges in the third group shall complete 45 units of continuing legal education during each subsequent three-year compliance period. All registered attorneys admitted to the bar within the two calendar years preceding January 1, 1979 and all judges shall be placed in the third group.

(2) Commencing with the date set forth in Paragraph (1) above, the Board shall send to each registered attorney and judge an Affidavit for the reporting of compliance with these rules. It shall be in such form as will allow the reporting of progress towards fulfilling the units required during each applicable compliance period, as such units are earned.

(3) At the time of payment of the registration fee required by Rule 227A or Rule 227B, each registered attorney and each judge shall submit an Affidavit showing the units of continuing legal education completed since the date such registered attorney or judge became subject to these rules or the date an Affidavit was last filed, whichever shall be later.

(4) No later than January 31st following the end of each applicable compliance period, each registered attorney and each judge shall submit a final Affidavit showing the total units of continuing legal education completed during such period, if the Board's records do not show that the attorney or judge has completed the requirements for that compliance period.

(5) In the event a registered attorney or judge shall fail to complete the required units at the end of each applicable compliance period, the final Affidavit may be accompanied by a specific plan for making up the deficiency of units necessary within 120 days after the date of the final affidavit. WHEN FILED, THE PLAN SHALL BE ACCOMPANIED BY A MAKE-UP PLAN FILING FEE, THE AMOUNT OF WHICH SHALL BE DETERMINED BY THE BOARD ANNUALLY AND WHICH SHALL BE USED TO COVER THE COSTS OF PROCESSING THE PLAN. Such plan shall be deemed accepted by the Board unless within 15 days after the receipt of such final affidavit the Board notifies the affiant to the contrary. Full completion of the affiant's plan shall be reported by affidavit to the Board not later than 15 days following such 120-day period. Failure of the affiant to complete the plan within such 120-day period shall invoke the sanctions set forth in Paragraph (6).

(6) In the event that any registered attorney or judge shall fail to comply with these rules in any respect, the Board shall promptly notify such registered attorney or judge of the nature of the noncompliance by a statement of noncompliance. The statement shall advise the registered attorney or judge that within 15 days either the noncompliance must be corrected or a request for a hearing before the Board must be made, and that upon failure to do either, the statement of noncompliance shall be filed with the Supreme Court.

(7) If the noncompliance is not corrected within 15 days, or if a hearing is not requested within 15 days, the Board shall promptly forward the statement of noncompliance to the Supreme Court which may impose the sanctions set forth in Paragraph (10).

(8) If a hearing before the Board is requested, such hearing shall be held within 30 days after the request by the full Board or one or more of the members of the Board as it shall designate, provided that the presiding member at the hearing must be a registered attorney or judge. Notice of the time and place of the hearing shall be given to the registered attorney or judge at least ten days prior thereto. The registered attorney or judge may be represented by counsel. Witnesses shall be sworn; and, if requested by the registered attorney or judge, a complete electronic record shall be made of all proceedings had and testimony taken. The presiding member shall have authority to rule on all motions, objections and other matters presented in connection with the hearing. The hearing shall be conducted in conformity with the Colorado Rules of Civil Procedure, and the practice in the trial of civil cases, except the registered attorney or judge involved may not be required to testify over his or her objection. The chairman of the Board shall have the power to compel, by subpoena issued out of the Supreme Court, the attendance of witnesses and the production of books, papers, correspondence, memoranda and other records deemed necessary as evidence in the hearing.

(9) At the conclusion of the hearing, the member or members of the Board who conducted the hearing shall make findings of fact and shall determine whether the registered attorney or judge involved has complied with the requirements of these rules and, if it determines there was noncompliance, whether there was reasonable cause for noncompliance. A copy of such findings and determination shall be sent to the registered attorney or judge, involved. If it is determined that compliance has occurred, the matter shall be dismissed; and the Board's records shall be made to reflect such compliance. If it is determined that compliance has not occurred, the Board shall proceed as follows:

(a) If the Board determines that there was reasonable cause for noncompliance, the registered attorney or judge shall be allowed 15 days within which to file with the Board a specific plan for correcting the noncompliance within 120 days. Such plan shall be deemed accepted by the Board unless within 15 days after its receipt the Board notifies the registered attorney or judge to the contrary. Full completion of the plan shall be reported by Affidavit to the Board not later than 15 days following such 120-day period. If the registered attorney or judge shall fail to file an acceptable plan, or shall fail to complete and certify completion of the plan within such 120-day period, the Board shall proceed as set forth in paragraph (b) as though it had determined that there was not reasonable cause for noncompliance.

(b) If the Board determines that there was not reasonable cause for noncompliance, a record of the matter, which must include a copy of the findings and determination, shall be promptly filed with the Supreme Court. If requested by the Board, registered attorney or judge, the record shall include a transcript of the hearing prepared at the expense of the requesting party.

(10) Upon receipt of a statement of noncompliance upon which a hearing was not requested or upon receipt of the record of a Board hearing, the Supreme Court shall enter such order as it shall deem appropriate, which may include an order of summary suspension from the practice of law until the further order of the Court in the case of registered attorneys or referral of the matter to the Commission on Judicial Qualifications or the Denver County Court Judicial Qualifications Commission in the case of judges.

(11) Any registered attorney who has been suspended pursuant to Paragraph (2) of Rule 227A, or who has elected to transfer to inactive status pursuant to Paragraph (7) of Rule 227A, shall be relieved thereby from the requirements of these rules. Upon being reinstated pursuant to Paragraphs (3) or (7) of Rule 227A, the compliance period for such registered attorney shall commence on the date of reinstatement and end on December 31 of the third full calendar year following the year of reinstatement, provided the date of reinstatement is more than one year after the date of suspension or transfer to inactive status, or such lesser period as the Board may determine. Otherwise, the compliance period shall be the same as it would have been absent the suspension or transfer. No registered attorney or judge shall be permitted to transfer from active status to inactive status and vice versa or to become suspended and then reinstated to circumvent the requirements of these rules.

(12) All notices given pursuant to these rules shall be sent by certified mail, return receipt requested, to the registered address of the registered attorney or judge maintained by the Clerk of the Supreme Court pursuant to Rule 227A or Rule 227B.

(13) Any attorney who has been suspended for noncompliance pursuant to Rule 260.6(10) may be reinstated by order of the Court upon a showing that the attorney's current continuing legal education deficiency has been made up. The attorney shall file with the Board three (3) copies of a petition seeking reinstatement, addressed to the Supreme Court. The petition shall state with particularity the accredited programs of continuing legal education which the attorney has already completed, including dates of their completion, by which activity the attorney earned sufficient units of credit to make up the deficiency which was the cause of the attorney's suspension. The petition shall be accompanied by a reinstatement filing fee, the amount of which shall be determined by the Board annually and which shall be used to cover the costs associated with noncompliance. The Board shall file a properly completed petition, accompanied by the Board's recommendation, with the Clerk of the Supreme Court within ten (10) days after receipt.

RULE 260.7: CONFIDENTIALITY

The files, records and proceedings of the Board, as they relate to the compliance or noncompliance of any registered attorney or judge with the requirements of these rules, shall be confidential and shall not be disclosed except upon written request or consent of the registered attorney or judge affected or as directed by the Supreme Court.

RULE 260.8: DIRECT REPRESENTATION AND MENTORING IN PRO BONO CIVIL LEGAL MATTERS

(1) A lawyer may be awarded a maximum of nine (9) units of general credit during each three-year compliance period for providing uncompensated pro bono legal representation to an indigent or near-indigent client or clients in a civil legal matter, or mentoring another lawyer or a law student providing such representation.

(2) To be eligible for units of general credit, the civil pro bono legal matter in which a lawyer provides representation must have been assigned to the lawyer by: a court; a bar association or Access to Justice Committee-sponsored program; an organized non-profit entity, such as Colorado Legal Services, Metro Volunteer Lawyers, or Colorado Lawyers Committee whose purpose is or includes the provision of pro bono representation to indigent or near-indigent persons in civil legal matters; or a law school. Prior to assigning the matter, the assigning court, program, entity, or law school shall determine that the client is financially eligible for pro bono legal representation because (a) the client qualifies for participation in programs funded by the Legal Services Corporation, or (b) the client's income and financial resources are slightly above the guidelines utilized by such programs, but the client nevertheless cannot afford counsel.

(3) Subject to the reporting and review requirements specified herein, (a) a lawyer providing uncompensated, pro bono legal representation shall receive one (1) unit of general credit for every five (5) billable-equivalent hours of representation provided to the indigent client; (b) a lawyer who acts as a mentor to another lawyer as specified in this Rule shall be awarded one (1) unit of general credit per completed matter; and (c) a lawyer who acts as a mentor to a law student shall be awarded two (2) units of general credit per completed matter. A lawyer will not be eligible to receive more than nine (9) units of general credit during any three-year compliance period via any combination of pro bono representation and mentoring.

(4) A lawyer wishing to receive general credit units under this Rule shall submit to the assigning court, program, or law school a completed Form 8. As to mentoring, the lawyer shall submit Form 8 only once, when the matter is fully completed. As to pro bono representation, if the representation will be concluded during a single three-year compliance period, then the lawyer shall complete and submit Form 8 only once, when the representation is fully completed. If the representation will continue into another three-year compliance period, then the applying lawyer may submit an interim Form 8 seeking such credit as the lawyer may be eligible to receive during the three-year compliance period that is coming to an end. Upon receipt of an interim or final Form 8, the assigning court, program, entity, or law school shall in turn report to the Board the number of general CLE units that it recommends be awarded to the reporting lawyer under the provisions of this Rule. It shall recommend an award of the full number of units for which the lawyer is eligible under the provisions of this Rule, unless it determines after review that such an award is not appropriate due to the lawyer's lack of diligence or competence, in which case it shall recommend awarding less than the full number of units or no units. An outcome in the matter adverse to the client's objectives or interests shall not result in any presumption that the lawyer's representation or mentoring was not diligent or competent. The Board shall have final authority to issue or decline to issue units of credit to the lawyer providing representation or mentoring, subject to the other provisions of these Rules and Regulations, including without limitation the hearing provisions of Regulation 108.

(5) A lawyer who acts as a mentor to another lawyer providing representation shall be available to the lawyer providing representation for information and advice on all aspects of the legal matter, but will not be required to file or otherwise enter an appearance on behalf of the indigent client in any court. Mentors shall not be members of the same firm or in association with the lawyer providing representation to the indigent client.

(6) A lawyer who acts as a mentor to a law student who is eligible to practice law under C.R.S. §§ 12-5-116 to -116.5 shall be assigned to the law student at the time of the assignment of the legal matter with the consent of the mentor, the law student, and the law school. The matter shall be assigned to the law student by a court, a program or entity as described in Rule 260.8(2), or an organized student law office program administered by his or her law school, after such court, program, entity, or student law office determines that the client is eligible for pro bono representation in accordance Rule 260.8(2). The mentor shall be available to the law student for information and advice on all aspects of the matter, and shall directly and actively supervise the law student while allowing the law student to provide representation to the client. The mentor shall file or enter an appearance along with the law student in any legal matter pursued or defended for the client in any court. Mentors may be acting as full-time or adjunct professors at the law student's law school at the same time they serve as mentors, so long as it is not a primary, paid responsibility of that professor to administer the student law office and supervise its law-student participants.

REGULATIONS OF THE COLORADO BOARD OF CONTINUING LEGAL AND JUDICIAL EDUCATION

REGULATION 101. PREAMBLE

These regulations are adopted pursuant to Rule 260 of the Colorado Rules of Civil Procedure. They provide a framework for accrediting a wide variety of continuing legal education activities. It is the intent of these regulations that each Colorado attorney and judge has ample opportunity to participate in educational activities that fit individual professional needs.

REGULATION 102. CONTINUING LEGAL EDUCATION REQUIREMENT

(a) For registered attorneys in groups 1 and 2 (see Rule 260.6), units of continuing legal education in excess of the required 15 units for 1979 or 30 for 1979-80, respectively, may not be used to satisfy the requirements of the first full three-year compliance period. Similarly for registered attorneys in groups 1 and 2, units of continuing legal education completed between August 14, 1978, when Rule 260 was adopted by the Supreme Court, and January 1, 1979, when the Rule is effective, may be used to satisfy only the requirements for 1979 or 1979-80, respectively.

(b) For registered attorneys in groups 1 and 2, the requirement regarding continuing legal education specifically addressed to legal or judicial ethics will not be effective until the start of the first full three-year compliance period.

(c) The requirements of Rule 260 and these Regulations will not be applied to lawyers from other jurisdictions who are admitted for a case or proceeding.

REGULATION 103. STANDARDS FOR ACCREDITATION

Continuing legal education must be educational activity which has as its primary objective the increase of professional competence of registered attorneys and judges. The activity must be an organized activity dealing with subject matter directly related to the practice of law or the performance of judicial duties.

(a) The Board shall accredit formal and individualized course work and teaching and research activity applying the standards set forth below. Individual attorneys, judges or sponsors seeking accreditation of other types of educational activity should apply, in writing, to the Board, for accreditation, before undertaking such activities. Before making a final determination concerning the accreditation of activity other than those enumerated above, the Board shall formulate standards and promulgate rules in a manner consistent with the provisions of Rule 260.3(3).

(b) Courses will be accredited only if they are offered by a sponsor recognized as eligible. In order to be recognized, a sponsor must have either (1) substantial, recent experience in offering continuing legal education, or (2) demonstrated ability to organize and present effectively continuing legal education. Demonstrated ability arises partly from the extent to which individuals with legal training or educational experience are involved in the planning, instruction, or supervision of continuing legal education activities.

(c) Courses and other activities will not be accredited if attendance is limited to the members of a particular law firm, corporation or other business entity. This requirement will not apply, however, to professional associations, or activities sponsored by an agency for the benefit of registered attorneys or judges who are employees of a local, state or federal governmental unit.

(d) Each faculty member must be qualified by practical or academic experience to teach the subject he or she covers.

(e) Thorough, high quality written materials must be distributed to all attendees at or before the time the course is presented. A mere agenda will not be sufficient.

(f) Formal courses must be conducted in a setting physically suitable to the educational activity of the program. A suitable writing surface should be provided where feasible.

(g) The Board shall accredit teaching activities of registered attorneys and judges, upon written application by individuals engaged in such activities, provided the activity contributes to the continuing legal education of the applicant and other attorneys or judges. In addition, the Board may accredit educational activity of attorneys and judges who present programs to a public audience, provided the program's primary purpose is to inform the individuals in that audience about the workings of the Colorado judiciary and the functions of judges and courts.

(h) The Board shall accredit research activities of registered attorneys and judges, upon written application by individuals engaged in such activities, provided the activity (1) has produced published findings in the form of articles, chapters, monographs or books, personally authored, in whole or part, by the applicant; (2) contributes substantially to the continuing legal education of the applicant and other attorneys or judges; and (3) is not done in the ordinary course of the practice of law, the performance of judicial duties, or other regular employment.

(i) The Board shall accredit committee research activities of registered attorneys and judges, upon written application by individuals engaged in such activities, provided the activity (1) has produced written materials, personally authored, in whole or part, by the applicant on behalf of a committee, qualified under this regulation; (2) contributes substantially to the continuing legal education of the applicant and other attorneys and judges; and (3) is not done in the ordinary course of the practice of law, the performance of judicial duties, or other regular employment. In order to be qualified under this regulation, a committee must be recognized as such by the Board and have as its primary purpose and effect activity which has substantial educational value to attorneys and judges outside the committee.

(j) In addition to formal courses, conducted in a class or seminar setting, the Board shall accredit individualized continuing legal education activity, provided the activity (1) is a structured course of study, (2) is organized by a sponsor recognized as eligible, (3) includes the use of thorough, high-quality written materials, available to any registered attorney or judge completing the course, and (4) incorporates some other educational medium, such as video or audio tapes, correspondence work, testing, or individual conferences, as deemed appropriate by the Board, (in order to receive accreditation for its individualized educational programs, a sponsor shall agree to maintain and supply the Board with a record of persons obtaining such programs from the sponsor) or (5) is a self-administered course of study. Anyone requesting credit for this type of activity shall submit a written proposal on the Board's Form 7 detailing the nature of the activity at least forty-five days before commencing such activity. The course of study must involve substantial active participation in an educational endeavor which is beneficial to the applicant's practice and is not part of the applicant's ordinary practice of law. A written work product evidencing the learning experience will ordinarily be required from the person seeking credit. The maximum credit available for this type of activity is nine hours during any one compliance period.

(k) Formal, classroom type programs will be accredited only if a completed application for accreditation is filed with the Board at least fifteen days before the program's starting date. A non-refundable fee of ten dollars shall accompany each application sent by a sponsoring agency. This fee need only be submitted once, though the same program may be presented multiple times during the calendar year. Upon a showing of good cause, the Board may extend accreditation even if the timely filing requirement is not met, but up to a twenty five dollar fee may be charged to sponsors who fail to comply with this requirement.

(l) The Sponsor of a formal, classroom type program, offered in Colorado and accredited by the Board, shall distribute at the program, to each Colorado attorney and judge in attendance, a copy of the Board's official Notice of Accreditation of the program. In cases where the Notice includes provisions for Colorado attorneys and judges to report their CLE credits earned at the program to the Board, the sponsor shall

(1) provide a means at the program for individuals to submit a completed Notice and Report to the sponsor,
(2) transmit, by a secure means, all completed Notices and Reports to the Board, within (10) ten days after the program.

REGULATION 104. CREDITS; COMPUTATION

(a) Credit will be given only for completion of continuing legal education activities that have (1) been previously accredited by the Board, or (2) been afforded retroactive credit by the Board.

(b) Generally, credit for formal course work shall be awarded on the basis of one (1) unit for each fifty (50) minutes actually spent in attendance at an accredited activity after August 14, 1978. Credit will not be allowed for any program which in its entirety lasts less than 50 minutes exclusive of question and answer periods.

(c) The units of credit assigned to a course merely reflect the maximum that may be earned through attendance. Only actual attendance by the registered attorney or judge earns credit.

(d) Credit will not be given for time spent for introductory remarks, coffee and luncheon breaks, keynote speeches, business meetings, or question and answer periods following a presentation.

(e) Credit will not be given for any course attended in preparation for admission to practice law in any jurisdiction.

(f) In awarding credit for teaching, the Board shall take into account the following factors: (1) teaching content and level; (2) teaching methodology; (3) personal preparation by the individual applicant, including time spent; (4) originality of preparation with the individual applicant; and (5) supplemental course materials personally prepared by the individual applicant.

(g) In awarding credit for research activity, under Regulations 103(h) and 103(i), the Board shall consider the following factors: (1) the content, level and length of the published findings or committee papers; (2) the originality of the published findings or committee papers with the individual applicant; and (3) the nature of the publication in which they appear, if any.

(h) In awarding credit for individualized educational activities, under Regulation 103(j), the Board shall consider the following factors: (1) the nature of the structured, individualized activities comprising the course of study; (2) the time normally required to complete those activities; and (3) the extent to which the individual educational activity of a registered attorney or judge, completing the program, is evaluated by the sponsor. Generally, if the structured activity consists of listening to or watching the electronic replay of a lecture, the Board shall award credit in the same manner as for attendance at a live lecture. In order to claim credit for individualized educational activity, an attorney shall engage in such activity in a physical setting conducive to intellectual concentration and effective study.

REGULATION 105. Deleted by court action - year 1984.

REGULATION 106. PROCEDURE FOR ACCREDITATION

(a) In order to apply for accreditation of a continuing legal education activity, a registered attorney, judge or sponsoring agency shall submit to the Board all information called for by the appropriate form (See Appendix).

(1) Application for accreditation of a formal course shall be made on Form 1.
(2) Application for recognition of a sponsor as eligible shall be made on Form 2.
(3) Application for accreditation of a filmed or electronic replay of a formal course that has already been accredited shall be made on Form 3.
(4) Application for accreditation of an individualized continuing legal educational activity shall be made on Form 4.
(5) Application for accreditation of teaching activity shall be made on Form 5.
(6) Application for accreditation of research activity shall be made on Form 6.

(b) Accreditation shall be granted or denied in accordance with the provisions of Regulation 108 herein.

(c) As to a course that has been accredited, the sponsoring agency may announce in informational brochures or registration materials: "This course has been accredited by the Colorado Board of Continuing Legal and Judicial Education for a maximum of ____ units of credit".

REGULATION 107. DELEGATION

(a) To facilitate the orderly and prompt administration of Rule 260 and these Regulations, and to expedite the processes of course approval and the interpretation of these Regulations, the Executive Director may act on behalf of the Board under Rule 260 and these Regulations.

(b) The Chairman of the Board may act on behalf of the Board under Rule 260 and these Regulations.

REGULATION 108. EXECUTIVE DIRECTOR'S DETERMINATIONS AND REVIEW

(a) Pursuant to guidelines established by the Board, the Executive Director shall, in response to written requests for accreditation of courses or interpretations of these Regulations, make a written response describing the action taken. The Executive Director may seek a determination of the Board before making such response.

(b) Any adverse determination and all questions of interpretation of these Regulations or Rule 260 by the Executive Director shall be subject to review by the Board upon written application by the person adversely affected. The registered attorney, judge or sponsoring agency affected may present information to the Board in writing or in person or both. If the Board finds that the Executive Director has incorrectly interpreted the facts, the provisions of Rule 260, or the provisions of these Regulations, it may take such action as may be appropriate. The Board shall advise the registered attorney, judge or sponsoring agency affected of its findings and any action taken.

REGULATION 109. MAKE-UP PLANS

(a) Any plan for making up a deficiency filed after December 31, pursuant to Rule 260.6(5), shall include only activities which have already been accredited by the Board at the time such plan is filed.

(b) The plan shall be specific and include the names and locations of such accredited activities, the number and type of credits that will be earned, and the dates on which such credits will be earned.

(c) The number and type of credits to be earned shall be sufficient to make-up the deficiency,

(d) The credits shall be earned not later than May 31 of the year following the end of the compliance period.

(e) The plan shall be accompanied, at the time of filing, by a check or money order, payable to the Supreme Court CLE Board, in the amount of fifty ($50) dollars, pursuant to Rule 260.6(5).

(f) Any make-up plan filed in accordance with these criteria shall be deemed accepted by the Board.

REGULATION 110. Deleted by court action - year 1986.

REGULATION 111. FEES

(a) Any registered attorney or judge who fails to comply with Rule 260.6(4) shall be subjected to a fifty dollar ($50) late reporting fee.

(b) Petitions for reinstatement from suspension for failure to comply with Rule 260 shall be accompanied by a check or money order in the amount of one hundred dollars ($100).

APPENDIX: ACCREDITATION FORMS TO BE USED IN CONJUNCTION WITH REGULATION 106(a)

FORM 1, and the supporting documents filed with it, provide basic information about formal class-room type programs. The Board needs this information to determine whether a program should be accredited and how much credit, if any, it should be awarded.

(a) Program sponsors should file a Form 1 for each program attended by Colorado attorneys or judges. The Board encourages sponsors to do this but cannot make them. Attorneys seeking credit for attending such programs should also encourage sponsors to file. Attorneys, for whom attendance is conditioned upon program accreditation, should make their views clear to sponsors, even to the extent of telling the sponsor that they will not attend unless the sponsor obtains accreditation before the program takes place. This is especially important with regard to programs held IN Colorado (see Regulation 103(k) and 103(l)).

(b) If the sponsor fails to file Form 1, and an individual wishes to claim credit for attendance, the only practical alternative is for the attorney or judge to file Form 1. If accreditation is critical to the individual, and if the sponsor is unlikely to file, the attorney or judge should file Form 1 at least 15 days before the program takes place (see Regulation 103(k)).

(c) A separate Form 1 must be filed for each program seeking accreditation.

(d) Form 1 must be accompanied by a brochure or other printed description of the program. The document must include: a statement of the faculty's qualifications; a clear outline of the program's content; and a detailed schedule of events indicating how time segments are spent and clearly distinguishing between breaks, meal times and substantive educational sessions.

FORM 2 need be filed only on behalf of sponsors who have not yet been "recognized" by Colorado as a qualified sponsor of continuing legal education. "Recognition" is a pre-requisite to accreditation of individual programs. The Board has recognized over 500 sponsors. Many are not yet recognized. To determine if a sponsor has been recognized, contact the Board. An unrecognized sponsor should file Form 2 on its own behalf. If it does not, where feasible, an individual attorney or judge should do so.

FORM 3 is used to apply for accreditation of an electronic replay of a live program, where the live program has already been accredited. Form 3 should only be used where the replay is conducted by a recognized sponsor, in a formal seminar setting, open to all attorneys or judges, where written materials are distributed. Form 3 should not be used to apply for accreditation of individualized, home study programs.

FORM 4 is used to apply for accreditation of individualized or home-study programs. Form 4 must be filed by the sponsors of the program. If a Colorado attorney or judge wishes to claim credit for a particular home-study program that has not been accredited, the individual should encourage the sponsor to apply for Colorado accreditation by providing the sponsor with a copy of Form 4.

FORM 5 must be filed by an individual attorney or judge, who wishes to claim credit for teaching activity which contributes to the continuing legal education of both the applicant and other attorneys or judges.

(a) Upon receipt of Form 5, the Board awards credit for teaching, which meets the accreditation standards, on the basis of at least 2 units of credit for each hour of lecture time. To claim this minimal credit, completion of the front of Form 5 is all that is required.

(b) If the teaching activity does not consist of lecturing, or if the applicant wishes to apply for additional credit beyond the minimal standard, completion of Form 5 on both sides is required.

(c) The Board provides applicants with written notice of the disposition of teaching accreditation requests. If you as an applicant do not receive notice within 30 days after application, contact the Board.

(d) Individuals may claim credit for teaching only to the extent that they have received notice of the Board's accreditation of their individual activity.

FORM 6 must be filed by an individual attorney or judge who wishes to claim credit for research activity that has resulted in "publication". Form 6A must be filed by an individual attorney or judge who wishes to claim credit for Committee research. The research must contribute to the continuing legal education of both the applicant and other attorneys or judges.

(a) Form 6 or 6A must be accompanied by the written work-product of the research, i.e. a copy of either the publication or the committee paper.

(b) Those seeking credit for committee research should first check with the Board or the committee chairperson to determine if the committee has been "qualified" by the Board.

(c) The Board provides applicants with written notice of the disposition of research accreditation requests. If you, as an applicant, do not receive notice within 30 days after application, contact the Board.

(d) Individuals may not claim credit for research if they have not received written notice of the Board's accreditation of their individual activity.

Chief Justice Commission on the Legal Profession

Working Group B

The development of professional identity and social responsibility for new attorneys and thereafter

Colorado Lawyers for Colorado Veterans

- **Kickoff on November 11, 2011 8:30-4:30**
  - Denver: Matthews Center, 3030 Downing
  - Challenge America
  - United Veterans Committee of Colorado
- **Logistics**
  - Two triage tables
  - Ten lawyer and law student tables
  - Legal aid consults
  - VA administrator consults
  - Resource books (CBA)
  - Training October 15
- **Coordination**
  - Colorado Springs
  - Fort Collins

Colorado New Lawyer Mentoring Program

- **Foundation and Objectives**
  - Broad support and consensus
- **Mandatory or Voluntary**
  - CLE credit
  - Other incentives?
- **Who may participate?**
  - New lawyers/clerks (3 years?)
  - Lawyers admitted on motion
  - Mentors

- **Centralized or Decentralized program**
  - Participating organizations
  - Role of facilitator – incentives?
  - Need for executive director?
    - Costs
  - Alternative paths to enter the program
- **Mentor plan content**
  - Allow for variations?
  - Monitoring
- **Pilot Program**
  - Which jurisdictions or organizations?
- **Implementation issues**
- **Evaluation issues**

Action Items

- Recommend the Supreme Court adopt the Mentoring Program for the purpose of implementing the Pilot Program

- Recommend the Supreme Court allow CLE credit for the Pilot as provided in the program

- Recommend that a Commission standing committee be established for promoting, evaluating and monitoring

- Recommend the Supreme Court expand the existing Practicing with Professionalism course curriculum to include mentoring

Process to preparing and participating in the Mentoring Program

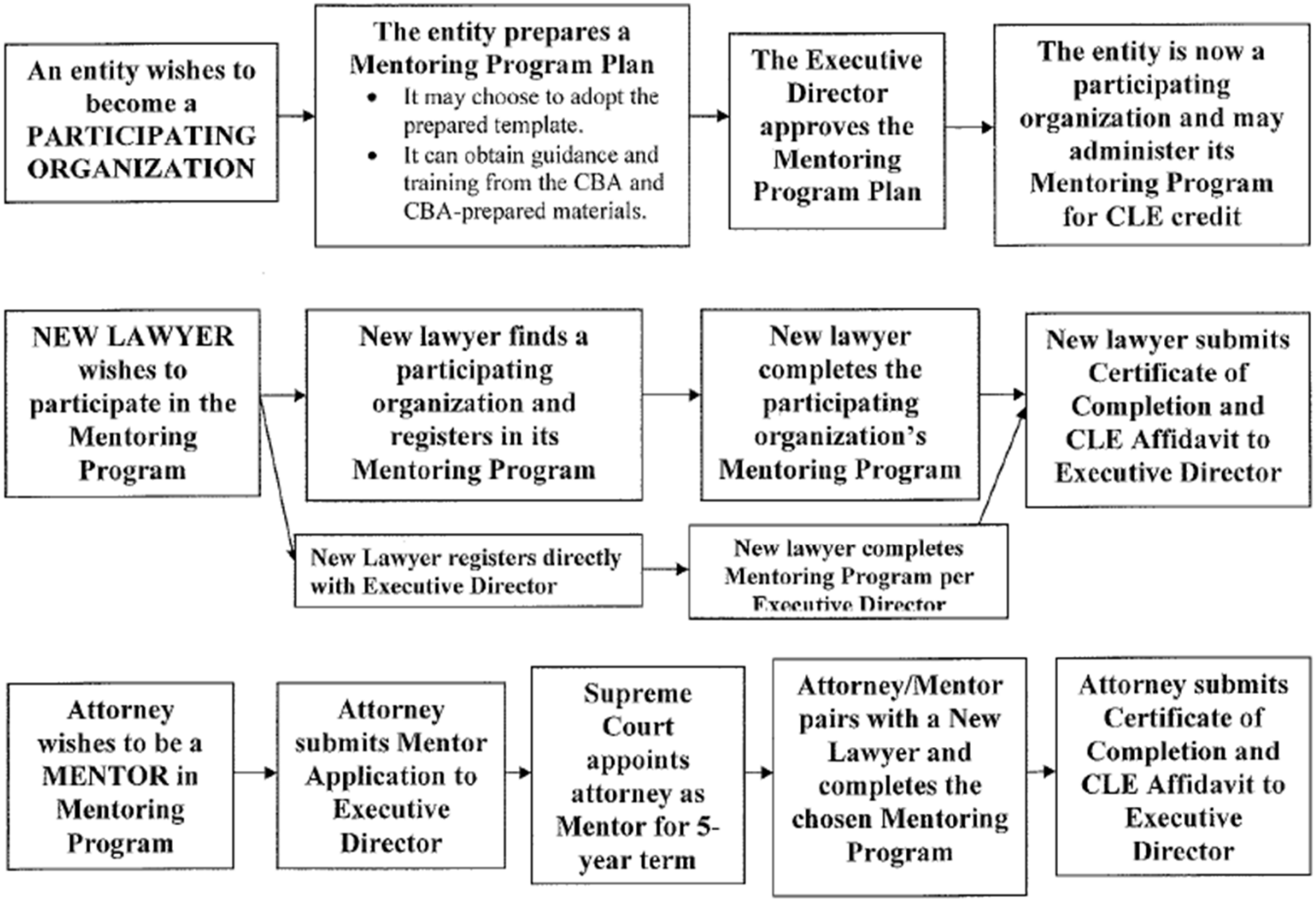

To: Commission on the Legal Profession
From: Working Group B
Date: September 22, 2011
Subject: Proposal for Mentoring Program

Proposal for New Lawyer Mentoring Program in Colorado[1]

The Working Group proposes that the Commission:

(1) Recommend that the Supreme Court adopt the attached Mentoring Program for the purposes of implementing a Pilot Mentoring Program.

(2) Recommend that the Supreme Court allow CLE credit for participation in the Pilot Mentoring Program, as provided for in the Mentoring Program Guidelines.

(3) Recommend that a standing committee of the Commission be established for the purposes of promoting, monitoring, and evaluating the Mentoring Program.

(4) Recommend that the Supreme Court expand the existing Practicing with Professionalism course curriculum to include a presentation on mentoring and the value of building strong professional relationships.

Colorado Mentoring Program

I. Preamble: It is recognized that, to implement and sustain a successful and valuable mentoring program, there must be a unified effort among the bench and bar to promote and be involved in the program. The continued success of this program depends upon the participation of members of the profession to advance the shared goals set forth in the Objectives.

II. Objectives

a. The objectives of the Program can be viewed broadly as promoting pride in the profession; excellence in service; and strong relationships with the bar, clients, and the public, through teaching (1) the core values and ideals of the legal profession and (2) the best practices for meeting those ideals.[2] More specifically, the objectives[3] are:

i. Promote excellence in the practice of law.

ii. Promote professionalism and collegiality among members of the bar through exercise of ethical and civil behavior.

iii. Inclusion and involvement of attorneys in the Colorado legal community, including teaching the value of networking and developing mentor relationships.

iv. Promote high standards for client representation through early instruction regarding competency and the exercise of sound and reasoned judgment.

v. Promote high standards for client representation through early instruction about best practices, including law office management and legal customs learned from practical experience.

vi. Promote public service as an indispensable component of professionalism, and instill pride in the profession and the role lawyers have played and continue to play in shaping and preserving our nation's values.

vii. Raise the consciousness and sensitivity of the members of the bar to the importance and the role of effective mentoring in promoting the above values and best practices.

b. While the Program has components that include group activities, an emphasis is placed on the one-on-one professional relationship between the trained lawyer and the new lawyer because this is one of the best ways to pass on the values, ideals, and best practices of the profession.

c. This program is structured intentionally to be decentralized, so that individual groups and organizations, with designated facilitators, can carry out the program on a local level in a manner that fits the needs of the attorneys they serve. Furthermore, it is hoped that by encouraging the development of "grassroots" efforts to conduct mentoring programs, new attorneys will achieve more successful integration with their organization, local bar, or region. Accordingly,

although provision is made for mentor pairs to participate in the program independent of an organization, this should be the exception rather than the rule.

III. Definitions:

a. New Lawyer: Lawyer recently licensed to practice law in Colorado, as further defined in Part IV.

b. Mentor: Experienced lawyer appointed to serve as a mentor, as further defined in Part V.

c. Colorado Mentoring Program: This set of guidelines governing the development and implementation of Mentoring Programs, through which participants may obtain CLE credit.

d. Participating Organization: Entity who has developed an approved Mentoring Program, as described in Part X.

e. Mentoring Program: The program developed by the Participating Organization to implement the Colorado Mentoring Program, as described in Part X.

f. Mentoring Plan: The individual plan which the New Lawyer-Mentor pair will complete in accordance with a Participating Organization's Mentoring Program, as described in Part X.

g. Facilitator: A volunteer within the Participating Organization who will serve as the liaison between the Participating Organization and the Executive Director, as described in Part X.f.ii.

h. Executive Director: Employee of the Supreme Court who will conduct the administrative tasks of the Colorado Mentoring Program, as described in Part XIII.

i. Commission Standing Committee: Committee of the Commission on the Legal Profession which will provide oversight to the Colorado Mentoring Program, as described in Part XIV.

IV. New Lawyers[4]

a. Who may participate

i. Licensed, active Colorado lawyers within their first three years following admission to practice law in Colorado, who are either practicing or intending to practice law in Colorado, although the program must be completed prior to the end of the attorney's third year of practice.[5]

ii. If a lawyer serves as a judicial law clerk immediately following licensure, the lawyer may participate in a Mentoring Program within two years of completing the clerkship(s). A lawyer serving as a judicial law clerk is not precluded from participating in a Mentoring Program while a judicial law clerk, although due to ethical restrictions, the law clerk's Mentor must be a judge on the same court as the law clerk's judge.[6]

iii. Lawyers admitted on motion to the Colorado Bar who have been in practice three or more years in another jurisdiction may elect to participate in a modified Mentoring Program in the attorney's first year of practice in Colorado.[7]

iv. Lawyers not otherwise within the parameters above may petition the Executive Director for permission to participate in the program.[8]

b. Registration

i. To enroll, a New Lawyer must submit a registration form to the organization through which the New Lawyer wishes complete the Program. The New Lawyer must refer to the individual organization's deadlines and guidelines to ensure that the individual program's requirements are met.

V. Mentors - Experienced Colorado lawyers[9]

a. Qualifications[10]

i. Colorado attorney or judge, with an active license, in good standing, and engaged in the practice of law; or retired Colorado attorney or judge, who retired from the practice in good standing.[11]

ii. Admitted to practice law in Colorado for not less than five years.

iii. No suspensions or disbarments from the practice of law from any jurisdiction, nor surrender of license to practice law for purpose of disposing of pending disciplinary proceeding in any jurisdiction.[12]

iv. No sanction by a governing authority in the five years preceding application as a Mentor.

v. No formal disciplinary complaint pending before Attorney Regulation pursuant to C.R.C.P. 251.12, or current participation in a diversion program pursuant to C.R.C.P. 251.13. An attorney is not disqualified from serving as a Mentor if an investigation was conducted or if there was previous successful completion of participation in a diversion program, and no formal complaint was filed.[13]

VI. Credit for Participation[14]

a. Mentors and New Lawyers who satisfactorily complete the one-year Program will receive 15 CLE credits, 2 of which will count toward the ethics requirement of C.R.C.P. 260.2.

b. Mentors and New Lawyers (on-motion attorneys) who participate in the six-month Program will receive 7 CLE credits, 1 of which will count toward ethics requirement of C.R.C.P. 260.2.

c. The New Lawyer or Mentor who fails to complete the program will not receive the CLE credit otherwise awarded.

d. New Lawyers may participate only once in the Program.

e. Mentors may participate in this Program—one mentor relationship at a time—as often as they wish, but may receive the available credit only once per compliance period.[15]

f. The award of CLE credits will apply to the compliance period in which the Program is completed.[16]

g. Mentors and New Lawyers who participate together in pro bono representation during or as a part of this program may not also receive CLE credit under C.R.C.P. 260.8.

VII. Mentor Appointment[17]

a. To serve as a Mentor, an attorney must complete a Mentor Application and submit it to the Executive Director, who screens the attorney for the qualifications set forth in these rules, and forwards the attorney's name to the Colorado Supreme Court for appointment consideration.

b. The Colorado Supreme Court will review the names forwarded by the Executive Director, and, if the qualifications are met, will appoint the Mentor for a five-year term, to begin on the date of appointment.

c. Appointment as a Mentor is valid for five years. After five years, the attorney must resubmit an updated Mentor Application to participate again in the program.

d. The appointed Mentor has a duty to notify the Executive Director of any change which affects the attorney's qualifications to serve as a Mentor as set forth in paragraph III.a. Upon review of the changed circumstances, if the Executive Director believes that the appointment should be terminated, the Executive Director shall recommend to the Colorado Supreme Court that it terminate the appointment. After reviewing the Executive Director's recommendation, the Supreme Court may terminate the appointment.

VIII. Matching of Mentors and New Lawyers

a. A New Lawyer who has independently identified a willing Mentor already appointed by the Supreme Court simply need identify the Mentor selection on the registration form.

b. A New Lawyer who has independently identified a willing mentor not already appointed by the Supreme Court must identify the mentor and attach the mentor's pending Mentor Application to the registration form.

c. A New Lawyer who has not identified a willing mentor may request assistance in finding a suitable mentor match from the organization through which he or she wishes to participate in the Program. It is within the organization's discretion how best to facilitate the matching.

IX. Express limitations to the mentoring relationship where the attorneys are not within the same firm or office[18]

a. The mentoring relationship is a professional relationship, and must be limited to the extent that client confidences are not shared when inappropriate to do so.

b. The mentoring relationship is not intended to constitute the provision of legal or professional advice to the New Lawyer or his or her clients.

c. The mentoring relationship does not create a confidential relationship between the mentor and New Lawyer.

d. The Mentor does not assume liability or responsibility regarding any legal matter of the New Lawyer's clients.

X. Administration and implementation of Mentoring Program and Mentoring Plan through Participating Organizations

a. Participating Organizations are the vital component to implementing this Colorado Mentoring Program. It is through these ground level organizations that a Mentor and New Lawyer will obtain the greatest value from the program because their needs and interests can be tailored in a way not possible through a centralized program operated exclusively by the Supreme Court. The ground level organization knows its community, and is in the best position to successfully carry out the tasks associated with a Mentoring Program, e.g. matching mentors with new lawyers, promotion of the program, developing useful programming, and resolving problems.

b. Organizations which may administer a preapproved Mentoring Program:

i. Law firms

ii. Law schools (e.g., for alumni)

iii. Bar groups and other lawyer organizations (to include Inns of Court)

iv. Federal, state, county, and local government agencies

v. Federal and state courts in Colorado[19]

c. To administer a Mentoring Program through which Mentors and New Lawyers may obtain CLE credit, an organization must develop and submit its Mentoring Program plan for preapproval by the Executive Director. The organization need not utilize the template that has been provided with these guidelines so long as the organization's program plan meets the minimum requirements set forth below.[20]

d. Following preapproval, a Participating Organization's Mentoring Program shall remain qualified under this Colorado Mentoring Program for 5 years. To remain qualified without interruption, the Participating Organization must resubmit its Mentoring Program plan and be reapproved prior to the completion of the fifth year. The Participating Organization must report to the Executive Director any substantial, material changes affecting the Organization's ability to implement its

Mentoring Program, at which time the Executive Director will consider whether the Organization should no longer be a Participating Organization.

e. The Participating Organization need not limit its program to members or lawyers otherwise affiliated with the organization. The Participating Organization should not charge a specific fee for participation in the program.

f. Minimum Requirements for preapproval of an organization's Mentoring Program

   i. Conduct the program at least once per year.

   ii. Designate a volunteer Facilitator to serve as the liaison between the organization and the Executive Director, to communicate with and submit all documentation to the Executive Director as necessary. Provide the Executive Director, and update when necessary, current contact information for the Facilitator.

      1. It is suggested, but not required, that the Facilitator serve as the primary person to implement the organization's program. The organization may find that a committee run by the Facilitator is necessary to implement the Program.

   iii. The organization's Mentoring Program must include provisions to:

      1. Collect New Lawyer registrations.

      2. Facilitate matching of appointed Mentors with New Lawyers.

      3. Ensure that prospective mentors not previously appointed timely submit applications to the Executive Director.

      4. Organize orientation for Mentors and New Lawyers, and other organized activities the organization may wish to implement as a part of its Mentoring Program. A group orientation is preferred where possible.

      5. Collect documentation where required.

      6. Where extenuating circumstances prevent either lawyer from completing the program, or if the mentoring relationship is not working, carry out the procedures for reassignment of Mentors and New Lawyers which are set forth in the organization's preapproved Program. In the event that a mentoring pair does not complete the mentoring term and the New Lawyer cannot be matched with a new Mentor to complete the term, the Facilitator may, in appropriate circumstances, sign off on a Certificate of Partial Completion and recommend to the Executive Director that the Mentor or New Lawyer be approved for the appropriate number of CLE credits.

      7. Maintain a record of participants and program completion dates for three years.

iv. Content:

1. Orientation: The orientation must take place within the first month of the mentoring term.[21]
2. Mentoring Plan: The organization must develop a Mentoring Plan Template from which each mentor pair can construct a customized Mentoring Plan which provides the topics for the required in-person meetings. A sample template is provided with these rules as a guide, not as the required template, although an organization may choose simply to adopt the sample. The Mentoring Plan curricula must cover each of the following listed core subject areas:[22]
    a. 12-month program
        i. Initial Planning Meeting
        ii. Personal and Professional Development [23]
        iii. The Colorado Bar and Legal Community (may include group activity)
        iv. History and Importance of the Legal Profession (may include group activity)
        v. Colorado Rules of Professional Conduct, Professionalism, and Civility
        vi. Litigation and Transaction Experiences (Colorado courts and procedures)
        vii. Law Office Management and In-Office Procedures[24]
        viii. Working With Clients
        ix. Public Service (may include group activity)
    b. 6-month program (for on-motion attorneys):
        i. Initial Planning Meeting
        ii. The Colorado Bar and Legal Community (may include group activity)
        iii. Colorado Rules of Professional Conduct, Professionalism, and Civility
        iv. Litigation and Transaction Experiences (Colorado courts and procedures)
        v. Public Service (may include group activity)

v. Mentor and New Lawyer responsibilities

1. Attendance at Orientation

2. Timely submission of signed Mentoring Agreement. It is the New Lawyer's responsibility to submit the Mentoring Agreement.
3. Timely completion of signed Mentoring Plan. It is the New Lawyer's responsibility to submit the Mentoring Plan.
4. Completion of the Mentoring Plan during the mentoring term.[25]
    a. 12-month term: The mentoring pair must meet in person a minimum of 8 times, with a minimum of 20 hours of in-person contact.[26]
    b. 6-month term: The mentoring pair must meet in person a minimum of 4 times, with a minimum of 10 hours of in-person contact.

vi. Proposed term of the program

1. Program requirements must be completed in one year, but it is encouraged that the relationship continue informally after the term has ended.
2. Sample/suggested timeline:[27]

Deadline **T = January 1, first day of the mentoring Term, subtract or add accordingly**	**Example date**	**Action required**
T – 1.5 months	November 15	Deadline for New Lawyer to register with the participating organization
T – 1 month	November 30	Deadline for mentor to submit Mentor Application to the Executive Director if mentor not already appointed
T – .5 months	December 15	Deadline for Supreme Court to appoint Mentor
T	**January 1**	**Mentoring term begins**
T + 1 month (end of 1st month)	January 31	Deadline for New Lawyer to submit the Mentoring Plan and Mentoring Agreement to organization
T + 6 months (end of 6th month)	June 30	Deadline for New Lawyer to submit an interim report to organization regarding progress of program completion (the organization may choose not to include this step)

T +12 months (end of 12th month) or T + 6 months (end of 6th month, for 6-month program)	December 31 June 30	Deadline for New Lawyer and Mentor to submit Certificates of Completion and CLE Affidavit to the Executive Director
T + 13 months (end of 13th month) or T + 7 months (end of 7th month, for 6-month program)	January 31[28] July 31	Deadline for Executive Director (1) to notify New Lawyer and Mentor of approval and (2) to transmit CLE Affidavits and Certificates of Completion to Board of CLE

XI. Administration and implementation of the Colorado Mentoring Program other than through a local Participating Organization[29]

a. There may be instances in which a New Lawyer wishes to but is unable to participate in a Mentoring Program through a local Participating Organization, whether because the lawyer is not a member of the organization, or the local organization does not have an approved program.

b. In the event that there is no local Participating Organization available to the New Lawyer, the CBA may serve as the New Lawyer's Participating Organization and facilitate the New Lawyer's completion of its Mentoring Program.

c. If the New Lawyer is not a member of the CBA, the New Lawyer may directly register with the Executive Director to participate independently in the Colorado Mentoring Program. In this instance, there is a fee to the New Lawyer of $100.[30]

XII. Role of the Colorado Bar Association

a. The CBA may serve as a Participating Organization, particularly for individuals who may not have a local participating organization, e.g. New Lawyers in rural Colorado. [31]

b. It is envisioned that the Colorado Bar Association could assist with

i. Development of a Program Guide for organizations, a Template Mentoring Plan for organizations, and worksheets for Mentors and New Lawyers that correlate to the mentoring activities.[32]

ii. Training of Mentors.

XIII. Role of the Executive Director

a. Promote the Colorado Mentoring Program and encourage organizations to develop approved mentoring programs for the benefit of their members and the bar.

b. Prepare and have approved by the Commission all requisite forms and agreements for administration of this program.

c. Receive, review, and approve where appropriate organizations' submissions of mentoring programs for preapproval.

d. Review and decide on petitions to participate from New Lawyers not otherwise eligible to participate in the Program.

e. Receive, screen, and recommend mentor applicants to the Supreme Court for appointment.

f. Receive Mentoring Plans and Mentoring Agreements.

g. Receive, review, approve where appropriate, and transmit to the Board of CLE the Certificates of Completion (and Partial Completion) and CLE Affidavits.

h. Maintain all records for the program for each New Lawyer participant and for each Mentor.

i. Assist the Commission with monitoring and measurement of the effectiveness of the Program.

j. Conduct all other tasks necessary to facilitate administration of the Program.

XIV. Role of the Commission on the Legal Profession

a. Continue to monitor and evaluate the effectiveness of the Program.

b. Retain the authority to modify the minimum requirements and the administrative process of the Mentor Program.

c. Establish a Standing Committee to promote, monitor, and evaluate the Colorado Mentoring Program, and to report to the Commission regarding the Program. .

XV. Role of the Board of Continuing Legal Education

a. Accept CLE Affidavits accompanied by Certificates of Completion approved by the Executive Director.

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[1] Potential names for the program include (these are names of other states' programs): Lawyer to Lawyer Mentoring Program; New Lawyer Mentoring Program; New Lawyer Training Program; and Transition Into Law Practice Program.

[2] If we define the core areas a lawyer must strive to excel in as (1) doctrine, (2) skills, and (3) values, this program is designed to facilitate the teaching of skills and values to new lawyers, with an additional focus on Colorado practice.

[3] These objectives were developed from a review and synthesis of the stated purposes in Ohio, Georgia, Utah, and Illinois, with consideration given to the ongoing discussions within the working group and the Commission at large.

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[4] Because this draft program outline is structured as a voluntary program, there are no provisions for requests for deferrals or exemptions in special circumstances. For an example of deferrals, see Utah Rule 14-808(c) (New lawyer training program), *available at* http://www.utcourts.gov/resources/rules/ucja/ch14/08%20Special%20Practice/USB14-808.html.

[5] Allowing more than just the newly admitted lawyer to participate addresses concerns about the unemployed lawyer, the law clerk, or any other lawyer who may wish to participate but does not find it doable in the first year. Additionally, this permits completion any time during the first three-year CLE compliance period. The three-year window is borrowed from the Illinois program.

[6] This is new, and not from any existing program. Furthermore, if the judge is willing, it would be a good opportunity to have the judge serve as the clerk's mentor in completing the program. For the law practice management component of the program or other components better handled by a practicing attorney, the judge could connect the clerk to another attorney to complete that aspect, e.g. touring a law office and learning about how the attorney operates his or her practice.

Whether active judges may serve as mentors is an open question that requires discussion. Illinois permits only retired judges to be mentors in this program. Ill. Lawyer-to-Lawyer Mentoring Program Guide, at 8, *available at* http://ilsccp.org/word_docs/L2L_Mentoring_Program_Guide.doc. In speaking with Thomas Sumner, retired judge and Program Coordinator for the Illinois Commission on Professionalism, he provided two primary reasons for the prohibition: (1) the program is designed to incentivize active lawyers to get involved in mentoring, and, moreover, Illinois judges have a different educational requirement and could not earn the credit offered (note, in Colorado, judges appear to be subject to the same CLE requirements as lawyers); (2) there may be some instances where appearance of impropriety may arise, for example if the new lawyer or the new lawyer's firm appears before that judge in a case. If we do wish judges to participate as mentors, we may need to limit or define whom the judge may mentor, and we will need to address whether and what kind of educational credit the judge can receive.

[7] This would address the concern that has been raised of lawyers coming from other jurisdictions who are not familiar with the jurisdiction, giving them an opportunity to learn about Colorado-specific aspects of practice. This perhaps could be a shorter, 6-month track with fewer new-lawyer tasks, focusing more on introduction to the community, education about the Colorado legal system, Colorado Attorney Regulation, Colorado RPC, etc. Utah exempts on-motion attorneys entirely from its program, which is mandatory for new lawyers. See Utah 2011 Manual at 15, *available at* http://www.utahbar.org/nltp/assets/Manual_2011.pdf. Note, currently in Colorado, on-motion attorneys, defined at C.R.C.P. 201.3, are also required to take the Practicing with Professionalism Course, C.R.C.P. 201.14.

[8] This is to allow for unique circumstances that may arise. For example, an attorney who became licensed three years ago, but only just is starting to practice, for whatever reason, personal or professional.

[9] The Working Group may need to discuss further the need and means for training mentors, and how that might be accomplished. Mentor training might be a good subject for a recorded, available on demand, web delivered program.

[10] Adapted from Ohio Implementation plan at 4–5, *available at* http://www.supremecourt.ohio.gov/AttySvcs/mentoring/MentoringOrientationManual.pdf.

[11] After discussion, the Working Group thought it best to include as mentors judges, practicing lawyers, and those who have practiced law, i.e. those who have retired from the practice.

[12] The language regarding suspensions, disbarments, sanctions, and formal complaints was adapted generally from the Ohio Implementation Plan and may need to be tailored to the Colorado attorney discipline process.

[13] An attorney may be directed to diversion under C.R.C.P. 251.13 as an alternative to a formal complaint.

[14] Whether CLE credit should be granted may deserve further discussion. Some concern has been raised that granting CLE credit for participation in this program grants CLE credit for activities which do not further the purpose of the CLE requirement in that much of the subject matter does not fit within the traditional courses of CLE study. The contrary argument, however, is that this program does serve the purposes of the CLE compliance requirement. Under C.R.C.P. 260.4(1), CLE is defined as "educational activity which has as its primary objective the increase of professional competence of registered attorneys and judges. The activity must be an organized activity dealing with subject matter directly related to the practice of law . . . ." Increased competence is a key objective of this Program, and the mentoring pair must study and discuss subject matters directly related to the practice of law. Furthermore, the rules already demonstrate an interest in granting attorneys alternatives to traditional coursework for obtaining CLE credit. Moreover, for the time spent (20 hours of face-time required under

this proposal), an attorney is receiving only 15 hours of CLE credit, far less than the equivalent coursework generally necessary to receive 15 CLE credit hours. Finally, without some kind of incentive, there is concern that not enough attorneys will volunteer to mentor new lawyers.

[15] The frequency with which a mentor may participate is an open question.

[16] This generally will be applicable only to mentors, as the current framework requires new lawyers and on-motion attorneys to complete their mentoring term prior to the end of the first compliance period.

[17] Designating a mentor through a Supreme Court appointment may be one way to reward and recognize the efforts of mentors, especially given that this program requires more effort than simply taking CLE courses for the equivalent number of credits. Establishing this as a Supreme Court appointment is borrowed from the Georgia model.

[18] Mentoring a new lawyer not within one's own firm raises the question of exposure to liability to the new lawyer's clients. State programs resolve this by requiring the mentoring pair to sign a "Mentoring Agreement" at the outset of the mentoring term expressly stating these limitations. The "internal" Lawyer Mentoring Agreement obviously is much shorter and need not address the listed concerns, while the "external" agreement does. *See, e.g.*, Ill. Lawyer-to-Lawyer Mentoring Program Guide, at 17–18, *available at* http://ilsccp.org/word_docs/L2L_Mentoring_Program_Guide.doc.

[19] The Working Group felt it important to include federal courts and agencies.

[20] The Executive Director may be given the authority to approve an organization's mentoring plan, but it may be instead that the Commission wishes to maintain oversight over this aspect of the Program as a whole, in part to ensure it has an ongoing role in the Program.

[21] Although a group orientation is preferred, the Working Group recognizes this is not always possible in all circumstances, such as with small local bars in rural areas may find this difficult to implement.

[22] Some states' programs permit new lawyers to complete some of the required tasks while in law school. We have not addressed this possibility yet. It should be noted that DU Law School (and soon CU Law School) has a significant mentoring program in place for law students. If this Program is voluntary, the students who have gone through a couple of years of mentoring may simply choose to not sign up for this voluntary/CLE credit Mentoring Program. If these students do sign up, then we will have to determine if some of the experience they received in law school would "count" towards this one. It has been suggested that the mentoring experience they received in law school should not count toward the CLE credits; the new lawyer and the mentor would still have to put in the real time for that, or a portion.

[23] The Personal and Professional Development piece does not expressly correlate to the objectives initially set forth in this outline, but it is something that has been raised as a necessary discussion piece. This discussion could occur within the initial meeting where the pair discusses the mentoring plan, but we could leave it to the individual organization to decide how it will organize completion of the various topics.

[24] Other state programs often say this subject does not apply to non-private practice attorneys, but there are still law office management best practices that must be learned in *any* office setting, whether public, private, or in-house, and that can affect the quality of representation.

[25] In instances where the mentor determines that he or she is not qualified to mentor a new lawyer with a particular subject, provision probably should be made to allow the new lawyer to complete that activity with another lawyer. We have not addressed yet how this would work, but it may be that that the "second" mentor should also be an approved mentor and should be eligible for some CLE credit for the willingness to mentor. This idea is contained in some of the programs we have studied.

[26] Illinois requires at least 8 in-person meetings during the year. Ill. Lawyer-to-Lawyer Mentoring Program Guide, at 9, *available at* http://ilsccp.org/word_docs/L2L_Mentoring_Program_Guide.doc.

[27] This timeline is an attempt to put procedures in place for a program to begin January 1 immediately following the swearing in of new lawyers in October. Because this draft plan proposes a more decentralized framework of program administration, however, our initial thought is not to limit the individual organizations as to when their programs must start or finish. The only administrative tasks for the Executive Director and Supreme Court would be to complete the appointment process two weeks before the mentoring term begins (to permit for the possibility that a change in mentor is necessary), and for the Executive Director to timely transmit the CLE Affidavits and Certificates of Completion to the Board of CLE.

[28] This deadline is added primarily to ensure that for mentoring terms completed by December 31 of a CLE compliance period, CLE affidavits are submitted to the Board of CLE no later than January 31following the end of a compliance period, pursuant to C.R.C.P. 260.6(4).
[29] This Part was added to acknowledge that lawyers in rural areas without a Participating Organization or who are not members of a bar association should have an alternative route to participating in the program. Effort was made to incentivize membership in a bar association, but nevertheless to permit participation directly through the Executive Director.
[30] It costs a new lawyer a minimum of $120 to join the CBA ($100 CBA membership + $20 for the cheapest local bar membership). The idea is to incentivize participation in bar associations, but not prevent participation in the mentoring program simply because a person is not a member of a bar association or other participating organization. If a person chooses not to become a bar member, charging a fee (less than the cost to join the CBA) acknowledges the increased administrative burden on the Executive Director and perhaps will provide an incentive just to join the bar instead.
[31] The CBA may be in the best position to fill the potential need for administering this program in rural, less populated areas of Colorado. While it is the Illinois Commission's hope that the local Illinois courts would administer their program in rural areas, this may not be a reasonable expectation of Colorado courts with the current workload and budget.
[32] For examples of worksheets, see Illinois' Mentoring Plan, http://ilsccp.org/word_docs/L2L_Mentoring_Plan.doc.

Template Mentoring Plan Curriculum[33]

1. Initial Planning Meeting, Personal and Professional Development (complete all)

	Worksheet	Action	Completion Date
		Meet at the mentor's office (where practicable) to prepare the customized mentoring plan based on the new lawyer's needs and interests. Discuss best communication methods for each attorney, and consider scheduling all remaining meetings/activities for the mentoring term.	
		In tailoring the mentoring plan to the new lawyer's interests, discuss long-term career goals and identify ways to achieve them.	
		The mentor should introduce the new lawyer to the firm's attorneys and staff (if not already done).	
		Include in the meeting a day-in-the-life discussion, including discussion about work-life balance, mental health and substance abuse issues facing lawyers, and the services available to attorneys regarding these health issues.	

2. The Colorado Bar and Legal Community (choose at least one)

Elected	Worksheet	Action	Completion Date
		Attend a meeting of an organized bar association or other attorney networking event together. Introduce the new lawyer to other attorneys in attendance. Discuss the advantages of bar association involvement and discuss the many local, state, and national associations available, including any in the new lawyers specific practice area.	
		Meet at the local courthouse(s), particularly the one in which the new lawyer may be appearing, and make introductions to members of the judiciary, court personnel, and clerks of court. Discuss customary rules of civility or etiquette in court and among lawyers and judges in the community.	
		Attend a Term Day (or similar activity) which involves a gathering of the judges and attorneys of the local bar at the courthouse.	

3. History and Importance of the Legal Profession[34]

It is envisioned that this component of the Mentoring Plan should be creatively tailored for the Participating Organization's Mentoring Program or the individual Mentoring Plan (if not connected to a Participating Organization).

4. Colorado Rules of Professional Conduct, Professionalism, and Civility

Election	Worksheet	Action	Completion Date
		Required (to be completed with the activity elected from list below)	
X		The pair should discuss the distinction between the Colorado RPC and professionalism; the attorney's obligations to the court, the client, and opposing counsel; common ethical issues and resources for how to resolve difficult ethical questions; common grievance and malpractice "traps" and how to avoid them; the benefits of carrying malpractice insurance and the ramifications for failing to do so.	
		Choose at least one	
		Discuss how to screen for, recognize, and avoid conflicts of interest.	
		Discuss the responsibilities of the client and the lawyer in decision-making, the best ways to involve a client in their case. Discuss client communications generally, e.g., how to say no to a client, billing issues, etc.	
		Discuss preparation and proper behavior during discovery.	
		Discuss how to prepare for negotiation of a legal matter, when and how negotiation is initiated, how to involve the client, ethical and professionalism obligations of negotiators, skills needed to be an effective negotiator and how to acquire them.	
		Discuss appropriate ways to handle situations where a lawyer believes another lawyer has committed an ethical violation or otherwise acted unprofessionally or uncivilly; the obligation to report misconduct; and the appropriate way to handle a situation where the new lawyer is asked by a senior member of the firm/organization to do something that is unethical or unprofessional.	
		Discuss the grievance process and a lawyer's duty to cooperate with a disciplinary investigation.	
		Discuss client development and marketing, appropriate procedures and ethical implications.	

5. Litigation and Transaction Experiences (choose at least one)

Election	Worksheet	Action	Completion Date
		Discuss types of alternative dispute resolution (ADR) such as mediation, arbitration, early neutral evaluation, summary jury trials, collaborative law practice.	
		New lawyer attends one of the ADR proceedings listed above. The pair discusses and evaluates what was observed.	
		New lawyer attends or participates in a deposition. The pair discusses and evaluates what was observed.	
		New lawyer attends or participates in a trial, whether, civil or criminal, bench or jury, state or federal. The pair discusses and evaluates what was observed.	
		New lawyer attends or participates in an appellate oral argument before the Colorado Supreme Court, Colorado Court of Appeals, or the Tenth Circuit Court of Appeals. The pair discusses and evaluates what was observed.	
		New lawyer attends or participates in a judicial-type hearing conducted by a state or local administrative body (e.g. local zoning board, tax equalization board hearing; state licensing or regulatory body). The pair discusses and evaluates what was observed.	
		New lawyer observes a real estate closing or other business transaction or financial closing. The pair discusses and evaluates what was observed.	
		New lawyer attends meeting to execute estate planning documents. The pair discusses and evaluates what was observed.	
		New lawyer attends or participates in a planning/strategy meeting with client and other advisors (e.g. tax advisor, insurance provider) regarding a business transaction or estate planning. The pair discusses and evaluates what was observed.	
		New lawyer attends or participates in meeting, hearing, or other proceeding specific to his or her practice area. The pair discusses and evaluates what was observed.	

6. Law Office Management and In-Office Procedures

Election	Worksheet	Action	Completion Date
		Required **(to be completed with the activity elected from list below)**	
X		Discuss law office management best practices (preferably including a tour of the mentor's office), and the importance of maintaining organized procedures: • Time records. • Records of client-related expenses. • Billing system. • Client retainer and/or payment schedules, types of fee agreements. • Escrow and trust account, establishing an IOLTA, accounting, auditing, use of interest proceeds, proper procedures for handling client funds and other property. • Filing system and procedures. • Document retention plan. • Calendar reminder systems. • Information technology systems. • Library and research systems. • Other resources (publications, seminars, equipment).	
		Choose at least one	
		Discuss role and responsibilities of paralegals, secretaries and other office personnel, and how to establish good working relationships with others in the same office who are support staff, colleagues or senior partners. Discuss the "care and feeding" of support staff.	
		Discuss practices to maintain client confidentiality.	
		Discuss good time management skills and techniques.	
		Discuss how to screen for, recognize, and avoid conflicts.	
		Discuss how to prevent issues of unauthorized practice of law with staff.	
		Discuss office politics, including appropriate networking, socializing and personal behaviors.	
		Discuss the importance of planning ahead for handling the practice in the event of retirement, disability, or death.	
		Discuss the issues surrounding leaving a firm, such as how to protect oneself, advising clients, and withdrawing from cases.	
		Discuss evaluation and compensation procedures, and professional advancement within a firm.	

7. Working With Clients (choose at least one)

Election	Worksheet	Action	Completion Date
		Meet at the local detention facility where the new lawyer is likely to have clients, explain the procedure for jailhouse visits, and provide advice on working with criminal defendant clients.	
		Discuss importance of client communication, how to maintain appropriate ongoing communication (returning telephone calls, email) to keep clients informed, including use of fee agreements, timeliness, written communication, etc. Discuss how to deal with a "difficult" client. Discuss dealing with clients with respect to the business aspects of the relationship, including billing and other business procedures.	
		Discuss proper legal counseling, including the duties and responsibilities of advising clients and the respective responsibilities of the client and the lawyer in decision-making. Discuss how to deal with a "difficult" client.	
		Discuss the initial meeting and interaction with a potential client, tips for gathering information about a legal matter, appraising the credibility and trust of the potential client, evaluating whether to accept the representation, how to decline representation. Discuss making and accepting referrals.	
		Discuss the termination of the attorney-client relationship, issues with terminating mid-representation, necessary steps and documentation.	
		Participate or observe a client interview or client counseling session (only where appropriate)	

8. Public Service (choose at least one)

Election	Worksheet	Action	Completion Date
		Acquaint the new lawyer with legal aid programs, local pro bono programs, and other opportunities for engaging in pro bono activities and civic and charitable work. Discuss the reasons for making time to engage in volunteer legal service to the public and any impediments to undertaking such work.	
		New lawyer attends a civic club of which the mentor is a member or some other community service activity in which the mentor participates. Discuss the reasons for making time to engage in volunteer legal service to the public.	
		The pair participates in a bar-sponsored or other volunteer program aimed at delivering legal services to the public. Discuss the reasons for making time to engage in volunteer legal service to the public.	

[33] This template demonstrates the concept of what might be developed as a Mentoring Plan, possibly with the help of the CBA. Preparing this plan presents a challenge in identifying which components should be required and which should be optional (in part because of the finite time available to conduct mentoring), and raises the question of how flexible and customizable the plan can be. Studying other states' plans demonstrates varying degrees of mandatory versus optional activities.

[34] This is a new subject area not drawn from the other state programs. It is incorporated based on the Commission and Working Group discussions that demonstrated a desire to instill greater pride in the profession and greater understanding of the profession's role in history.

Process to preparing and participating in the Mentoring Program

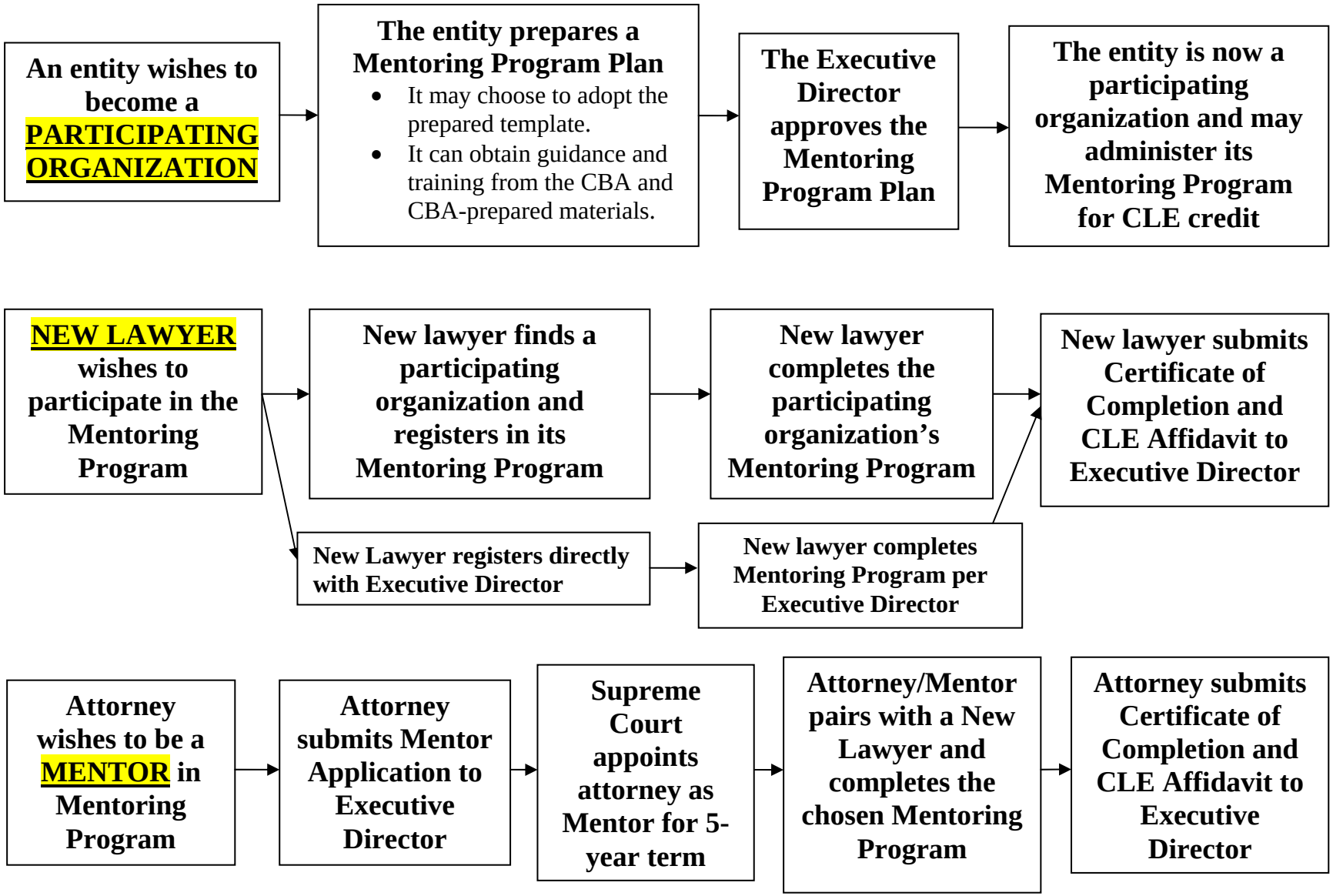

Chief Justice's Commission on the Legal profession

September 22, 2011

Working Group C

Resources

Challenges

Strategy

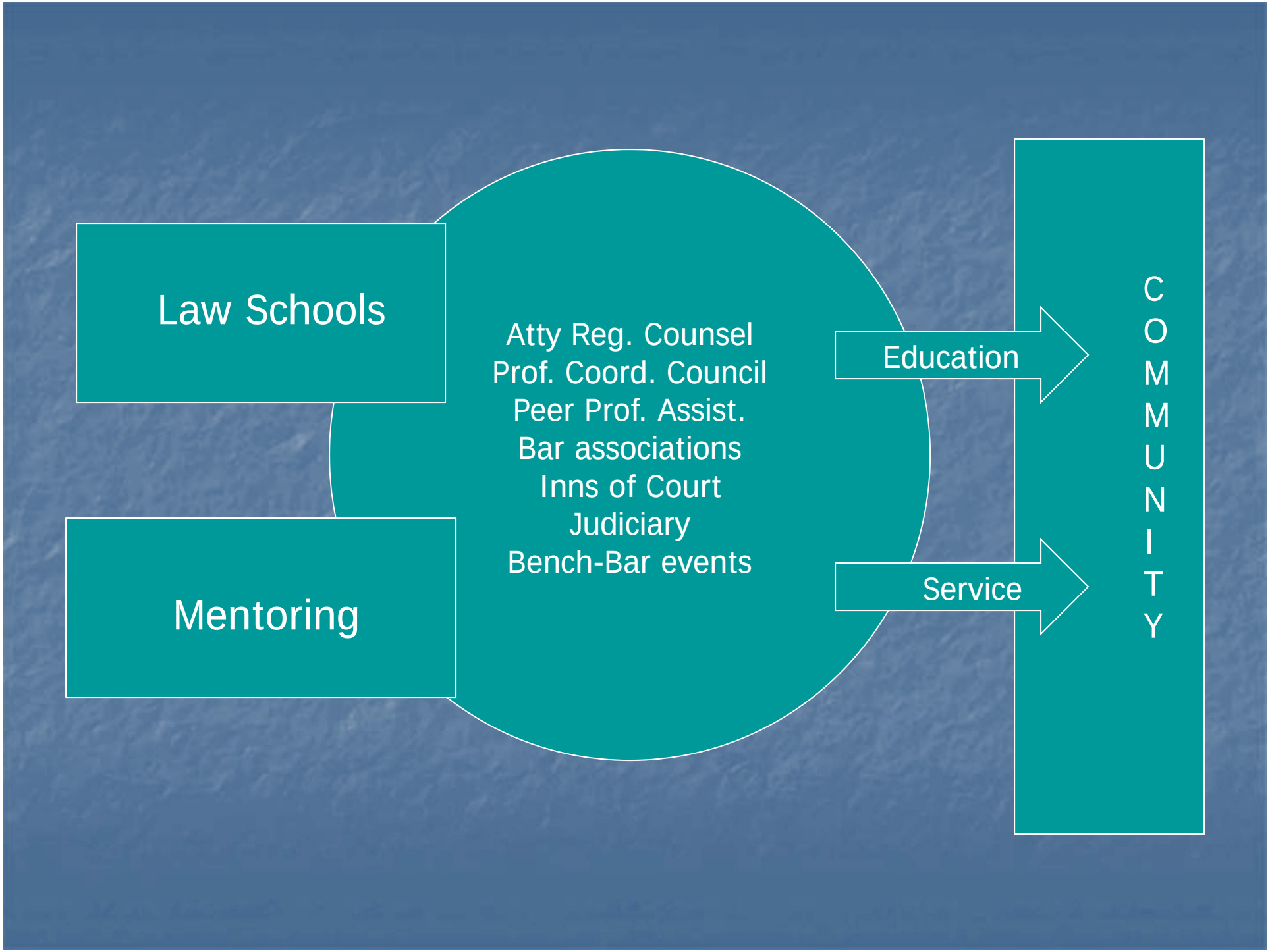
Law Schools
Mentoring
Atty Reg. Counsel
Prof. Coord. Council
Peer Prof. Assist.
Bar associations
Inns of Court
Judiciary
Bench-Bar events
Education
Service
COMMUNITY

Working Group C

First Efforts

Discussion Questions

Working Group D

- Mission
- Resources
- Issues and Questions
  - Why – PR or Teaching?
  - Who – Lawyers and Judges?
  - How – Pilots, Audience, Existing programs?
  - Pro bono Service?
  - Success?

Chief Justice's Commission on the Legal Profession

Memorandum

FROM: Working Group C

DATE: Thursday, September 15, 2011

Working Group C's mission and challenge. How to foster communication and professionalism between and among judges and attorneys?

Existing resources.

- Commission on the Legal Profession
- Atty Regulation Counsel
- CBA/DBA Professionalism Coordinating Council
- CBA/DBA Peer Professionalism Assistance Group
- Other geographic, specialty, and minority bar association professional and social activities
- Inns of Court
- Bench-Bar conferences

Challenges.

- Actual and perceived impediments to judicial participation.
- Lack of awareness of activities
- Costs of participation
- Interesting and useful professionalism content

Strategy.

- Mobilize and coordinate existing resources.
- Remove obstacles to participation.
- Foster collaboration among existing resources.
- Develop and disseminate interesting and useful professionalism content.
- Foster participation in Commission law school, mentoring, and public education and public service initiatives.

First efforts.

- Met with Chief Judges of each of the state judicial districts regarding:
    - Bench-Bar conferences
    - Courts, Commissioners & Coffee

- Met with representatives of five of Colorado's eight Inns of Court regarding:
    - Supporting the vitality of existing Inns;
    - Remove obstacles to judicial participation
    - Creating additional Inns

Discussion questions.

1. What can the Commission do to support the vitality of existing Inns, and remove obstacles to participation.

2. Should the Commission support the creation of additional Inns? If so, how?

3. How can the Commission foster communication and professionalism between and among judges and attorneys?

4. How to foster

CHIEF JUSTICE'S COMMISSION ON THE LEGAL PROFESSION

WORKING GROUP D

Our Mission:

Working Group D focuses on the relationship between the legal profession and the community, as well as access to justice, delivery of justice and the education of the public. The public's perception of the activities and value of lawyers and judges has been skewed by our failure to reach out to the community for purposes of education and service.

Our Resources:

Our Courts program

Judicially Speaking program

CBA/DBA Professionalism Coordinating Council

Mock Trial Competitions

Hate Violence Task Force

Colorado Lawyers Committee

Various pro bono service organizations

Issues and questions:

1. Education

   Why should we do this?

   For better public relations?

   To teach the value of the Rule of Law?

To teach the role of judges and lawyers in society?

The existing programs are excellent, but how can we do more?

Who should do this?

How do we convince judges to get involved?

Everybody cannot and will not participate, but how do we increase the size of the circle?

Should lawyers and judges present together as a team?

How do we begin?

Start small with one or two pilot programs?

Who is our initial audience? What is our scope of coverage?

Does it make sense to use existing programs or should we build our own?

Operational structure?

2. Service to the community?

A mile wide and an inch deep

Expand definition of pro bono work

Encourage use of your legal expertise

Clearing house for all types of pro bono service

3. How do we define success?

Statewide Programs

Asian Pacific Development Center
The Asian Pacific Development Center provides a variety of human services to the Asian Pacific population in Colorado. They need volunteer attorneys who can assist clients with the following types of legal matters: Domestic Violence, Divorce , Child Custody, Immigration Issues (visas, removal issues, etc.), Civil Disputes (traffic accidents, violations, etc.), Work Injury and Worker's Compensation Benefits, Social Security Benefits (SSI or SSDI related issues), Housing Discrimination, and Criminal Defense. For more information, call (303) 365-2959.

Colorado Asian Health Education and Promotion
CAHEP focuses on providing health care services to members of Colorado's Asian community. Often these groups involve low income, elderly people from a variety of ethnic groups. CAHEP is seeking volunteer attorneys who may be able to assist clients in securing benefits. Call (303) 954-0058, or visit website www.cahep.org.

Colorado Lawyers Committee
CLC is a nonprofit, nonpartisan consortium of 50 Denver-area law firms that do high impact *pro bono* work. The Committee needs attorneys to advocate, negotiate and litigate for children, indigent, and other disadvantaged communities. To volunteer, visit www.coloradolawyerscommittee.org or e-mail info@coloradolawyerscommittee.org.

Colorado Lawyers for the Arts
CoLA's mission is to help artists and arts organizations succeed on their own creative abilities so that success or failure does not hinge on legal pitfalls. For more information email info@coloradolawyersforthearts.org or visit www.coloradolawyersforthearts.org.

Colorado Legal Services
CLS provides legal advice and representation to low income eligible persons and seniors in civil matters throughout the state. Visit www.ColoradoLegalServices.org or call one of the satellite offices.

- Alamosa (Alamosa, Conejos, Costilla, Mineral, Rio Grande, Saguache) (719) 589-4993
- Boulder (303) 449-7575
- Colorado Springs (719) 471-0380
- Denver (Adams, Arapahoe, Broomfield, Denver, Douglas, Elbert, Jefferson, Clear Creek, Gilpin) (303) 837-1313
- Durango (Archuleta, Dolores, Hinsdale, La Plata, Montezuma, Ouray, San Juan, San Miguel) (888) 298-8483
- Fort Collins (Larimer, Logan, Phillips, Sedgwick) (970) 493-2891
- Frisco (Pitkin, Summit) (800) 521-6968
- Grand Junction (Delta, Garfield, Mesa, Montrose) (970) 243-7817
- Greeley (Morgan, Washington, Weld, Yuma) (970) 353-7554
- Hayden (Grand, Jackson, Moffat, Rio Blanco, Routt) (800) 521-6968
- La Junta (Baca, Bent, Cheyenne, Crowley, Huerfano, Kiowa, Kit Carson, Las Animas, Otero, Prowers) (888) 805-5152
- Leadville (Eagle, Lake) (800) 521-6968
- Pueblo (Pueblo, Custer, Fremont) (719) 545-6708
- Salida (Chafee, Custer, Fremont, Park) (719) 539-4251
- Migrant Farm Worker Division (all counties) (800) 864-4330

Colorado Nonprofit *Pro Bono* Legal Group
The Legal Group hopes to create a mechanism for lawyers (primarily transactional lawyers) to provide *pro bono* assistance to Colorado nonprofits which require *pro bono* legal assistance. For more information email the Chair of the Planning Committee, Peter Schwartz at Davis Graham & Stubbs, peter.schwartz@dgslaw.com, or call (303) 892-7381.

Colorado Organization for Victims' Assistance
COVA has a new legal program that will offer *pro bono* assistance to enforce victims' rights. COVA will train attorneys who want to be involved in this type of work. The cases will provide opportunities to litigate new legal questions because there is not much case law in Colorado pertaining to victim's rights. For more information call 303) 861-1160. www.coloradocrimevictims.org.

The Legal Center for People with Disabilities and Older People
The Legal Center's primary goal is to open up the legal system to those who would otherwise be unable to voice their needs because of the complexity of the service bureaucracy, their disability or because they are unable to act on their own behalf. Call (303) 722-0300 or www.thelegalcenter.org.

Local Access to Justice Committees
Judicial Districts have formed Local Access to Justice Committees to provide targeted legal assistance to its residents. To view *pro bono* opportunities coordinated by these local committees, see www.coloradojustice.org, then click on Local ATJ Committees.

Longmont Ending Domestic Violence Initiative
LEVI is a coalition of 23 agencies in the Longmont and Boulder area that deals with domestic violence issues. LEVI puts volunteer attorneys in touch with indigent clients who need legal representation. For more information call (303) 774-4534 or visit www.longmontdomesticviolence.org.

Rocky Mountain Immigrant Advocacy Network
RMIAN is a nonprofit organization dedicated to providing legal information and representation to non-citizens detained by the Department of Homeland Security and lacking access to legal counsel. RMIAN seeks volunteer attorneys to represent non-citizen men, women, and children in immigration removal proceedings. Each volunteer attorney will be provided with an experienced immigration practitioner to serve as a mentor for the case. For more information please call (303) 433-2812 or visit www.rmian.org.

Seniors Inc.
This group is looking for attorneys to serve as volunteer coaches. A Coach is an expert in an area of interest to seniors, such as reverse mortgages, financial planning, estate planning, long-term care, etc. Seniors Inc. has a particular need for volunteer attorneys who could advise clients, 95% of whom are low income, with estate planning issues such as writing wills, POAs, or other legal issues such as tenant rights, property rights and fraud. Call (303) 300-6900 or visit www.seniorsinc.org.

Pro Bono Opportunities

make history
Only you can.

www.MakeHistoryColorado.org

CBA
COLORADO BAR ASSOCIATION
Established in 1897

Denver Metro Area

Denver Bar Association Clinics
For more information,
contact *cgravit@cobar.org*.

Legal Night at Mi Casa
(303) 573-1302
www.micasadenver.org
360 Acoma
Third Tuesday
5:30–7 p.m.
Attorneys needed to provide information, and make referrals to appropriate agencies, in areas of immigration, credit, housing, landlord/tenant issues, employment and family law. Spanish interpreters are available.

El Centro de San Juan Diego
(303) 295-9470
2830 Lawrence St.
First Wednesday
5:30–7 p.m.
Volunteer attorneys provide information and advice in credit, housing, landlord tenant, employment and family law. Attorneys provide referrals to appropriate agencies.

Bankruptcy Clinic
(303) 860-1115
U.S. Bankruptcy Court
721 19th St., Rm. 125
Second Tuesday and Fourth Wednesday
1:30–3 p.m.
Attorneys review bankruptcy process and forms, including how bankruptcy can eliminate debts, difference between Chapter 7 and Chapter 13, effect on credit ratings, and forms required for filing; also address issues relating to creditor harassment and contacts by collection agents.

Small Claims Clinic
(303) 860-1115
City and County Building
1437 Bannck St., Room 117
Third Tuesday
11 a.m. –1 p.m.
Informational clinics on filing small claims cases and collecting on judgments.

Collections Clinic
(303) 860-1115
City and County Building
1437 Bannck St., Room 117
Third Thursday
11 a.m.–1 p.m.
Informational clinics on filing small claims cases and collecting on judgments.

Doing Your Own Divorce Clinics
(303) 860-1115
City and County Building
1437 Bannock St.
Third Wednesday
Noon–1:30 p.m.

Jefferson County
100 Jefferson County Pkwy, Golden
Second Wednesday
Noon–1:30 p.m.

Family Law Legal Clinic
(303) 860-1115
Division of Workforce Development
1200 Federal Blvd, Rm. 1018
Third Tuesday
5:30–7 p.m.
Informational clinics providing overview of divorce process, including procedures and forms, child custody, child support, maintenance and property division.

Other Metro Area Opportunities

Lawline 9 at KUSA-TV Channel 9
(303) 860-1115
500 Speer Blvd.
Wednesdays
4–5:15 p.m. and 5:15–6:30 p.m.
Call-in program. Answer general legal questions and provide legal information and referrals to other community legal resources. Weekly Topics vary and legal resource information provided.

El Centro Humanitario
ECH seeks attorneys for its wage claim program, Denver's first day laborer organization that protects the rights of vulnerable day laborer populations through an employment program, a legal program, and other educational programs. For more information call (303) 292-4115.

Family Tree Women in Crisis
Family Tree serves victims of domestic violence, sexual assault, and stalking. This organization needs attorneys for its free legal clinic in Wheat Ridge, which is held the first and third Wednesday of every month at 7p.m. for about 2.5 hours. The clinic deals with do-it-yourself divorce as well as custody issues. Family Tree is also looking for volunteer attorneys to take individual cases often involving post-decree issues. Call (303) 420-0412 or visit www.thefamilytree.org.

First Judicial District Bar Association Legal Assistance Program
This program provides free and low-cost legal information, advice, and representation to senior citizens 55 and older residing in Jefferson and Gilpin counties. Call (303) 216-0851 for more information.

Metro Volunteer Lawyers
MVL needs attorneys to assist low income residents in a seven county metropolitan Denver area. Cases include domestic relations, divorce, parental rights, bankruptcy, landlord-tenant. MVL also conducts family law and pro se divorce workshops. For more information call (303) 866-9378 or visit www.metrovolunteerlawyers.org.

Project Safeguard
Project Safeguard needs family law attorneys for domestic violence victims seeking permanent civil protection orders and dissolution of marriage or allocation of parental responsibilities. Project Safeguard provides all the appropriate forms. For more information call (303) 863-¬7416, or email clientservices@projectsafeguard.org, or visit psafeguard.qwestoffice.net.

Rocky Mountain Survivors' Center
RMSC is a non-profit organization that works with survivors of torture and war trauma. The group needs volunteer attorneys to work with refugees seeking asylum. RMSC recruits, trains and mentors volunteer attorneys and law students. For more information, call (303) 321-3221.

Colorado Outside Denver Metro Area

Alpine Legal Services, Inc. *Pro Bono* Program
ALS is a full service legal aid office providing information and referrals, *pro bono* attorneys, legal information rights, do-it-yourself divorce class, landlord-tenant, elder law, and emergency assistance for victims of domestic violence. ALS serves Garfield, Pitkin and Eagle counties. Call (970) 945-8858, (970) 920-2828, or visit www.alpinelegalservices.com.

Alternative Horizons
Alternative Horizons needs attorneys in the Durango area to provide legal representation to people experiencing domestic violence in divorce, child custody, and post decree cases. We offer a 24 hour hotline to support domestic violence survivors, protection orders, pro se divorce clinics, court advocacy for victims involved in criminal cases, support groups in English and Spanish. Visit www.alternativehorizons.org or call (970) 247-4374.

Catholic Charities
Catholic Charities is in need of volunteer attorneys to represent indigent clients on immigration matters in Eagle, Vail, Garfield and Pitkin counties. For more information, call (970) 384-2060.

Delta County Bar Association *Pro Bono* Clinic
The Delta County Bar Association *Pro Bono* clinic assists indigent applicants with civil legal needs through referral to volunteer attorneys. For more information or to volunteer, call (970) 874-2101.

El Paso County *Pro Bono* Project
The *pro bono* project is a nonprofit organization that assists indigent applicants with civil legal needs through referral to volunteer attorneys. Volunteer attorneys provide access to justice by advising or representing qualified residents in civil cases, and assisting with clinics and workshops. Call (719) 471-0380, ext 121.

Larimer County Bar Association *Pro Bono* Program
The *Pro Bono* program needs attorneys to assist low income individuals who are financially over-qualified for Colorado Legal Aid, but who are still within the federal poverty guidelines and unable to afford legal representation. For more information call (970) 402-2075 or visit www.cobar.org/index.cfm/ID/1596/larime/Pro-Bono-Program.

Mesa County *Pro Bono* Project
The Mesa County *Pro Bono* Project is a non-profit organization that assists indigent applicants with civil legal needs through referral to volunteer attorneys. Volunteer attorneys provide equal access to justice by advising or representing qualified residents in civil cases, and assisting with clinics and workshops. For more information call (970) 243-7940, ext. 108.

Northwest Colorado Legal Services
NWCLS has several state offices. Please contact the office nearest your location to inquire about *pro bono* opportunities:
- Frisco, counties served, Clear Creek, Pitkin, Summit, contact Patricia Craig, PO Box 2694, Frisco (970) 668-9612 or (800) 521-6968
- Gunnison, county served, Gunnison, contact Candace Sparks, PO Box 963, Gunnison (970) 641-3023 or (800) 521-6968
- Hayden, counties served, Grand, Jackson, Moffat, Rio Blanco, Routt, contact Sherri Ferree, PO Box 1555, Hayden (970) 276-2161 or (800) 521-6968
- Leadville, counties served, Eagle, Lake, contact Lea Ann Martinez, PO Box 1904, Leadville (970) 486-3238 or (800) 521-6968

Pueblo County Bar *Pro Bono* Project
Volunteer attorneys participate in Lawyer Night, Ask-A-Lawyer, Clinics, and Radio-TV presentations on legal issues. Actual cases are referred to Colorado Legal Services. For more information call (719) 553-2553.

San Luis Valley *Pro Bono* Project
The *Pro Bono* project assists indigent applicants with civil legal needs through referral to volunteer attorneys. The *pro bono* project serves Alamosa, Conejos, Costilla, Mineral, Rio Grande, and Saguache counties. Volunteer attorneys provide equal access to justice by advising or representing qualified residents in civil cases. For more information, call (719) 589-6534.

Southwest Bar Volunteer Legal Aid, Inc.
SWBVLA is located in the Durango office of Colorado Legal Services (CLS). There is an ongoing need for attorneys to provide advisory and direct client services in the areas of family, employment, consumer, housing, elder, public benefits and probate law. SWBVLA serves La Plata, San Juan, and Archuleta counties as well as Southern Ute, and Ute Mountain Ute reservations. Call (888) 298-8483.

Uncompahgre Volunteer Legal Aid
UVLA refers *pro bono* cases in Montrose, Ouray, and San Miguel counties, as well as referring *pro bono* for senior citizens in Delta, Gunnison and Hinsdale counties. It needs attorneys to provide ongoing consultations, representations, and mediations in civil matters for low income eligible individuals. UVLA also conducts a free legal advice night the second Thursday of each month at the Montrose County Justice Center. Call (970) 249-7202.

Weld County Legal Services
Volunteer attorneys provide equal access to justice by representing qualified residents in civil cases at no charge, teaching monthly do-it-yourself divorce clinics, and staffing the Call-A-Lawyer hotline. 915 10th Street, Greeley. For more information, call (970) 351.7300, ext. 4514

Before
we talk
Business,

Sophisticated Country Lawyer
Takes Case That Changed How
Faith and Science are Taught.
And, He Did It *Pro Bono*.

let's talk
history

A Colorado *pro bono* campaign.

make history
Only you can.

www.MakeHistoryColorado.org

CHIEF'S COMMISSION ON THE LEGAL PROFESSION
COMMISSION PRIORITY SURVEY RESULTS

- **Overwhelming Support**
  - Increasing experiential educational opportunities for law students (Working Group A)
  - Increasing the presence of lawyers and judges in the law schools (Working Group A)
  - Developing a series of case studies to instill law students with a sense of professional identity (Working Group A)
  - Designing a mentorship program for law students (Working Groups A and B)
  - Modifying CLE rules to allow lawyers to receive credit for teaching and mentoring law students (Working Groups A and B)
  - Examining the viability of a meaningful mentoring program (Working Group B)
  - Add a history of the law component to the Office of Attorney Regulation new lawyer ethics requirement (Working Group B)
  - Increase judge-initiated communication with lawyers and law students (Working Group C)
  - Increase *pro bono* participation (Working Group D)

- **Strong Support**
  - Developing curriculum for a story-based orientation program (Working Group A)
  - Modifying CLE rules to allow lawyers to receive credit for mentoring new lawyers (Working Group B)

HANDOUT A

- Increasing young lawyer involvement in the CBA and local bar associations (Working Group B and C)
- Educate judges and lawyers about ethical issues surrounding communication outside of the courtroom (Working Group C)
- Increasing the number of judicial district annual bench-bar retreats (Working Group C)
- Enhance self-help programs administered by the branch and local districts (Working Group D)
- Encourage education efforts and participation in community outreach programs regarding the history and rule of law such as *Our Courts* and *Judicially Speaking* (Working Group D)
- Redefining the definition of *pro bono* (Working Group D)
- Develop electronic training videos (All Working Groups)

- **Less support**
  - Creating a program for law students addressing the evolving history of law in Colorado and its lawyers (Working Group A)
  - Increasing judge and lawyer involvement in organizations such as the Inns of Court (Working Group C)

CHIEF'S COMMISSION ON THE LEGAL PROFESSION
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My Surveys Address Book My Account Plans & Pricing

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Response Summary

Total Started Survey: 24
Total Completed Survey: 23 (95.8%)

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« #2. »

PAGE: 2

1. Please rank the importance of the following issues related to Working Group A.

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	very important	somewhat important	somewhat not important	not important	Rating Average	Response Count
Develop curriculum for the "This We Believe Orientation Program	**38.1% (8)**	**38.1% (8)**	9.5% (2)	14.3% (3)	2.00	21
Increase experiential educational opportunities for law students	**73.9% (17)**	13.0% (3)	8.7% (2)	4.3% (1)	1.43	23
Create a program for students at CU and DU addressing: "The Evolving History of Colorado Law and Its Lawyers"	17.4% (4)	17.4% (4)	**47.8% (11)**	17.4% (4)	2.65	23
Increase the presence of lawyers and judges in the law school	**60.9% (14)**	34.8% (8)	4.3% (1)	0.0% (0)	1.43	23
Design a mentorship program for law students and develop criteria for awarding CLE credit to lawyers who mentor law students	**69.6% (16)**	17.4% (4)	4.3% (1)	8.7% (2)	1.52	23
Develop a series of "case studies" to instill in students a sense of professional identity and educate them in context about the meaning of social responsibility and practice skills	39.1% (9)	**43.5% (10)**	17.4% (4)	0.0% (0)	1.78	23

answered question **23**

skipped question **1**

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Response Summary

Total Started Survey: 24
Total Completed Survey: 23 (95.8%)

Select a page to view below or view all pages:

« #3. »

PAGE: 3

2. Please rank the importance of the following issues related to Working Group B. Create Chart Download

	very important	somewhat important	somewhat not important	not important	Rating Average	Response Count
Add a "History of the Law" component to the mandatory new lawyer ethics class	8.7% (2)	**43.5% (10)**	39.1% (9)	8.7% (2)	2.48	23
Provide CLE credit to lawyers who mentor young lawyers	**52.2% (12)**	30.4% (7)	8.7% (2)	8.7% (2)	1.74	23
Develop electronic training videos	12.5% (3)	**50.0% (12)**	25.0% (6)	12.5% (3)	2.38	24
Examine the viability of a meaningful mentoring program	**75.0% (18)**	20.8% (5)	0.0% (0)	4.2% (1)	1.33	24
Increase young lawyers' involvement in the CBA	33.3% (8)	**54.2% (13)**	12.5% (3)	0.0% (0)	1.79	24
				answered question		**24**
				skipped question		**0**

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Response Summary

Total Started Survey: 24
Total Completed Survey: 23 (95.8%)

Select a page to view below or view all pages:

« #4. »

PAGE: 4

3. Please rank the importance of the following issues related to Working Group C. Create Chart Download

	very important	somewhat important	somewhat not important	not important	Rating Average	Response Count
Provide guidance to judges regarding the ethics of communication outside the courtroom	40.9% (9)	**45.5% (10)**	13.6% (3)	0.0% (0)	1.73	22
Educate lawyers regarding opportunities to communicate with judges and other lawyers	43.5% (10)	**47.8% (11)**	8.7% (2)	0.0% (0)	1.65	23
Increase judicial-initiated communication with other judges and lawyers and law students	**52.2% (12)**	34.8% (8)	13.0% (3)	0.0% (0)	1.61	23
Increase the number of judicial district annual bench-bar roundtable CLEs	30.4% (7)	**52.2% (12)**	13.0% (3)	4.3% (1)	1.91	23
Increase lawyer involvement in organizations such as Inns of Court	30.4% (7)	**34.8% (8)**	17.4% (4)	17.4% (4)	2.22	23
					answered question	**23**
					skipped question	**1**

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« #4. »

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Response Summary

Total Started Survey: 24
Total Completed Survey: 23 (95.8%)

Select a page to view below or view all pages:

« #5. »

PAGE: 5

4. Please rank the importance of the following issues related to Working Group D. Create Chart Download

	very important	somewhat important	somewhat not important	not important	Rating Average	Response Count
Increase lawyer and judge participation in programs such as "Our Courts"	**47.8% (11)**	39.1% (9)	13.0% (3)	0.0% (0)	1.65	23
Redefine definition of "pro bono"	31.8% (7)	**40.9% (9)**	22.7% (5)	4.5% (1)	2.00	22
Increase the number of attorneys doing pro bono work	**60.9% (14)**	30.4% (7)	8.7% (2)	0.0% (0)	1.48	23
Enhance self-help programs administered by the branch and local districts	26.1% (6)	**52.2% (12)**	13.0% (3)	8.7% (2)	2.04	23
Encourage education efforts regarding the local history of courts and the rule of law	26.1% (6)	**43.5% (10)**	21.7% (5)	8.7% (2)	2.13	23
				answered question		**23**
				skipped question		**1**

Select a page to view below or view all pages:

« #5. »

Colorado Supreme Court
Chief Justice Commission on the Legal Profession
Working Group A

"This I Believe" Title (Registered Trademark held by Dan Gediman)

Judge Krieger	"This We Profess"
Judge McGahey	"Professio" Latin "to stand for something"
Judge Carparelli	"This We Profess" "Professing The Law" Becoming A Professional" "The *Profess*ion of Law"
Prof. Wald	"This We Profess" "Becoming a Professional" (Two Day Program with Separate Titles)
Dean Katz	Request the rights to use "This I Believe" Secondarily "This I Profess"

HANDOUT B

RECENT ARTICLES AND BLOG POSTS CONCERNING THE VALUE OF A LEGAL EDUCATION

New York Times Room for Debate Blog, "The Case Against Law School" (Jul. 21, 2011), available at: http://www.nytimes.com/roomfordebate/2011/07/21/the-case-against-law-school.

- David Van Zandt, "Reduce Credit Requirements," available at: http://www.nytimes.com/roomfordebate/2011/07/21/the-case-against-law-school/reduce-credit-requirements-for-law-school (updated Jul. 25, 2011).
- George Leef, "Allow Anyone to Take the Bar," available at: http://www.nytimes.com/roomfordebate/2011/07/21/the-case-against-law-school/allow-anyone-to-take-the-bar-exam (updated Jul. 25, 2011).
- Kevin Noble Maillard, "It's Not a Trade School," available at: http://www.nytimes.com/roomfordebate/2011/07/21/the-case-against-law-school/the-right-preparation-for-lawyer-citizens (updated Sept. 13, 2011).
- Rose Cuison Villazor, "Improving Not Overhauling," available at: http://www.nytimes.com/roomfordebate/2011/07/21/the-case-against-law-school/enhance-dont-change-the-law-school-model (updated Sept. 13, 2011).
- David Lat, "Bring Back Apprenticeships," available at: http://www.nytimes.com/roomfordebate/2011/07/21/the-case-against-law-school/bring-back-apprenticeships-in-legal-education (updated Jul. 25, 2011)
- Geoffrey R. Stone, "Learning to Think Like a Lawyer," available at: http://www.nytimes.com/roomfordebate/2011/07/21/the-case-against-law-school/the-importance-of-law-school (updated Jul. 25, 2011)
- Linda Greene, "A Priceless Degree," available at: http://www.nytimes.com/roomfordebate/2011/07/21/the-case-against-law-school/a-law-degree-is-priceless (updated Jul. 25, 2011)

HANDOUT C

- Bryan A. Garner, "Three Years, Better Spent," available at: http://www.nytimes.com/roomfordebate/2011/07/21/the-case-against-law-school/three-years-in-law-school-spent-better (updated Jul. 25, 2011)

David Segal, "Law School Economics: Ka-Ching!," *New York Times* (Jul. 16, 2011), available at: http://www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakens-tuition-rises.html?_r=1#.

- Richard A. Matasar, "Law School Cost, Educational Outcomes, and a Reformer's Agenda," New York Law School Website (Jul. 19, 2011), available at: http://www.nyls.edu/news_and_events/matasars_response_to_nytimes.

- Elie Mystal, "Law Schools Head to the Bunker to Avoid New York Times Fallout," Above the Law Blog (Jul. 19, 2011), available at: http://abovethelaw.com/2011/07/law-schools-head-to-the-bunker-to-avoid-new-york-times-fallout/#more-83524.

David Lat, "The Tenured Law Prof Turned 'Scamblogger' Reveals Himself," Above the Law Blog (Aug. 22, 2011), available at: http://abovethelaw.com/2011/08/the-tenured-law-professor-turned-scamblogger-reveals-himself/.

- David Lat, "A Tenured Top-Tier Law Professor Joins the Ranks of the 'Scambloggers,'" Above the Law Blog (Aug. 11, 2011), available at: http://abovethelaw.com/2011/08/a-tenured-top-tier-law-professor-joins-the-ranks-of-the-scambloggers/.

- Paul Campos, "Welcome to My Nightmare," Inside the Law School Scam Blog (Aug. 7, 2011), available at: http://insidethelawschoolscam.blogspot.com/2011/08/welcome-to-my-nightmare.html.

CHIEF'S COMMISSION ON THE LEGAL PROFESSION

MINUTES OF MEETING

December 1, 2011 **101 W. Colfax Ave., 5th Floor** **3:00–5:00 PM**

ATTENDEES	Chief Justice Michael L. Bender, John T. Baker, Chief Judge Roxanne Bailin, Judge Russell E. Carparelli, Associate Dean Fred Cheever, Roger E. Clark, Sarah M. Clark, Professor Roberto Corrada, John A. Eckstein, Mechelle Y. Faulk, Mark A. Fogg, Judge Richard L. Gabriel, Charles Garcia, Ed Gassman, John S. Gleason, Professor Melissa Hart, Diego G. Hunt, Chief Judge John Kuenhold, Assistant Dean Whiting Dimock Leary, William Leone, Michael G. Massey, David C. Little, John E. Mosby, Chief Judge Michael A. O'Hara III, Margrit Lent Parker, David W. Stark, Chief Judge William B. Sylvester, Lorenzo Trujillo, Mimi E. Tsankov, Charles Turner, Kara Vietch, Daniel A. Vigil, U.S. Attorney John Walsh, and Dean Philip J. Weiser were in attendance.
ATTACHMENTS	The meeting agenda and materials are attached to these minutes.
NEXT MEETING	February 23, 2012 at 3:00 PM

AGENDA ITEMS

WELCOME	**CHIEF JUSTICE BENDER**

Chief Justice Bender observed a common theme emerging from the Working Groups: service to others. He explained that serving others is a steadfast value that ties together the members of the legal profession. He remarked that serving others has been the underlying goal of many of the Commission's proposals and projects: such as Working Group B's Colorado Lawyers for Colorado Veterans initiative and Working Group D's focus on access to justice. He concluded that reinvigorating the legal profession's common regard for serving others certainly supports and furthers the Commission's objectives.

Chief Justice Bender also introduced several new Commission members: U.S. Attorney John Walsh; Hon. William B. Sylvester; Chief Judge 18th Judicial District; Whiting Dimock Leary, University of Colorado Law School Senior Assistant Dean for Students; Daniel A. Vigil, University of Denver Sturm College of Law Assistant Dean of Students Affairs; Melissa Hart, University of Colorado Law School Associate Professor of Law and Executive Director of the Byron R. White Center; David C. Little, Montgomery Little & Soran, P.C. and Chair of Colorado Supreme Court Board of Continuing Legal and Judicial Education.

WORKING GROUP D	DAVID STARK
David Stark, Chair of Working Group D—development of the relationship between the legal profession and the community to enhance access to justice, delivery of justice, and education of the public—presented the Working Group's report and led discussion. Working Group D's report is included in the meeting materials attached to these minutes (Materials Pages 1–2).	
ACCESS TO JUSTICE INITIATIVES	
David Stark discussed Working Group D's focus on access to justice and explained that the Working Group has been gathering information about two distinct access-to-justice issues: (1) the quantity and type of *pro bono* services available for unrepresented parties, and (2) the kind and quality of resources available for *pro se* parties. Two memos detailing the information gathered so far are attached to these minutes (Materials Pages 3–67). Based on the information gathered, Working Group D has observed that there are more in need than lawyers available, that funding is insufficient and dropping, and that there may be opportunities to coordinate national, state, and local efforts. Building on the Welcome comments delivered by Chief Justice Bender, David Stark emphasized the importance of creating and fostering a culture of service within the legal profession based on lawyers' duties to clients, the community, the justice system, and the profession. David Stark indicated Working Group D's next steps are to meet and coordinate with the Colorado Access to Justice Commission, and to gather information about the self-help clinics that have been set up by local access to justice commissions in some judicial districts.	
MAKE HISTORY COLORADO	
David Stark and Charles Garcia then presented information about a new pro bono marketing campaign called "Make History Colorado," which was recently launched by the Colorado Bar Association and the Colorado Access to Justice Commission. The purposes of the campaign are to educate lawyers about the benefits of pro bono work and to direct them to the resources and opportunities they need to provide pro bono legal services. The campaign's resources brochure and promotional posters are included in the meeting materials attached to these minutes (Materials Pages 63–67).	
DISCUSSION	Judge Russell Carparelli observed a need for lawyers to be made aware of opportunities for pro bono work that is not "conflict based." Judge Richard Gabriel suggested the need to address impediments that prevent more lawyers, especially those at large law firms, from doing more pro bono work. He noted that a minority of people seem to do the majority of the pro bono work. To identify the impediments, Judge Gabriel urged meaningful discussion with those who are not champions of pro bono.

	Professor Roberto Corrada explained that lawyers are more likely to develop a regular pro bono practice if they are introduced to pro bono work from their first day of work. Dean Phil Weiser noted that Professor Melissa Hart was awarded the CU's Clifford Calhoun Public Service Award for her success with the school's Public Service Pledge Project, which has a commitment from 90% of CU's law students to complete 50 hours of law-related public service work during law school. Associate Dean Fred Cheever noted DU's law students are required to perform 50 hours of law-related public service work during law school. Chief Justice Bender commended the positive attitude and efforts of the faculties at both CU and DU toward public service and pro bono. John Eckstein commented that the legal profession's commitment to pro bono work stems from and must be rooted in the admissions oath. Chief Justice Bender commented that it's difficult to get lawyers thinking in a different way about pro bono work, but that it is necessary to change the current mentality. David Little asked David Stark whether Working Group D had gathered any information about why lawyers are reluctant to accept pro bono work. David Stark explained that lawyers often comment that they are too busy to take a case pro bono and that they do not want to take a case that is outside their practice area. He also suggested creating a Colorado Supreme Court pro bono recognition "seal" for law firms to put on their websites. Mark Fogg suggested a need to address whether the work being done by lawyers is serving clients or sitting on committees, as both forms of public service are encouraged by Rule 6.1 of the Colorado Rules of Professional Conduct, though service to clients is supposed to comprise a substantial majority of a lawyer's public service work. He also suggested that there may be opportunities to educate law firms about the Colorado Supreme Court's Pro Bono Initiative and the meaning of Rule 6.1. Chief Justice Bender explained the Colorado Supreme Court's Pro Bono Initiative asks law firms and in-house practice groups to commit to an annual goal of 50 hours of pro bono legal service by each lawyer. He further explained that the Court hosts ceremonies throughout the state to recognize both the firms that commit to the

	initiative and those that achieve the 50-hour per lawyer goal.
ADDITIONAL INFORMATION	Make History Colorado's promotional video and resources brochure can be found at: http://makehistorycolorado.org/. The law firms, solo practitioners, and in-house practice groups who have committed to and achieved Colorado Supreme Court's Pro Bono Legal Service Commitment can be found at: http://www.courts.state.co.us/Courts/Supreme_Court/Pro_Bono.cfm

WORKING GROUP A	**LORENZO TRUJILLO**
Lorenzo Trujillo, Chair of Working Group A—development of professional identity, social responsibility, and practice skills in law school, and involvement of judges and leaders of the bar in law school—presented the Working Group's report and led discussion. Working Group A's report is included in the meeting materials attached to these minutes (Materials Page 68).	
FOR THIS WE STAND: 1L JOINT FALL 2012 ORIENTATION	
Lorenzo Trujillo introduced Dean Whiting Dimock Leary and Dean Dan Vigil as the co-chairs of Working Group A's For This We Stand Subcommittee. He then presented the draft curriculum, agenda, and budget that the Subcommittee and Working Group have put together and which are included in the meeting materials attached to these minutes (Materials Pages 69–74). He also announced the proposed date of the orientation: Saturday, September 22, 2012.	
DISCUSSION	Chief Justice Bender asked about the rationale of holding the event in late September. Professor Roberto Corrada explained that late September is an ideal time to intervene with concepts about professionalism because it's about the time that 1Ls start to believe that anything can be won by the best argument. He added that any later and the 1Ls will be consumed by midterms and exams. Mark Fogg sought clarification about whether there were plans to follow up on the one-day event with additional programs on professionalism. Lorenzo Trujillo explained that the joint 1L orientation is but one piece of the For This We Stand curriculum, and that the goal is to develop other events for students to participate in throughout law school, and indicated that Working Group A still needs to discuss these ideas but that one thought is that students could earn a "professionalism certification" of some kind upon graduation. Dean Whiting Dimock Leary noted that one idea that has been discussed is a speaker series featuring practitioners discussing their personal experiences in the legal profession and their transitions

	from law school to practice. Dean Fred Cheever and Professor Melissa Hart each noted that the one-day joint 1L orientation fits into a pattern of what the law schools are already doing in terms of integrating a culture of civility and professionalism into the law school experience. They noted that this is being accomplished though clinics, externships, and other courses and activitites. Judge Russell Carparelli asked whether invitations to lawyers and judges have been sent out yet, and Lorenzo Trujillo replied that Working Group A is not at that stage yet. Sarah Clark explained the budget numbers and inquired as to whether the Commission believed the project would be worth pursuing given the cost and, if so, whether the Commission would endorse Working Group A's pursuit of funding.
ACTION TAKEN	The Commission approved the For This We Stand: 1L Joint Fall 2012 Orientation proposal and the pursuit of funding.
WORKING GROUP C	**JUDGE CARPARELLI**
Judge Russell Carparelli, Chair of Working Group C—development of communication and professionalism between and among judges and attorneys—presented the Working Group's report and led discussion. Working Group C's report is included in the meeting materials attached to these minutes (Materials Pages 75–76).	
INNS OF COURT COORDINATING COUNCIL	
Judge Carparelli presented Working Group C's proposal to organize a Coordinating Council for Colorado's Inns of Court. Judge Carparelli explained that Working Group C held two meetings with representatives from the Inns of Court and learned that there are opportunities for new Inns of Court, as well as opportunities to support existing Inns of Court. Working Group C believes a Coordinating Council will help the Inns of Court accomplish these goals.	
ACTION TAKEN	The Commission supported the idea of organizing a Coordinating Council for Colorado's Inns of Court.
SURVEY RESULTS: BENCH-INITIATED BAR ACTIVITIES	
Judge Carparelli presented the preliminary results of a survey of bench-initiated bar activities. These results are included in the meeting materials attached to these minutes (Materials Pages 77–83). He explained that the key to successful bench/bar activities is the involvement of judicial officers and that the most successful bench/bar activities are those that are organized by judicial officers. He further explained that the purpose of the survey is to determine the elements of the most successful bench/bar events and to then figure out how to create those events with more frequency throughout the state. He	

noted that Working Group C will follow up with the judicial districts who did not initially respond to the survey, and that the next steps are to reach out to the specialty bard and organizations to determine what bench/bar activities they offer. Judge Carparelli also indicated that Working Group C would like to compile a list of judges who are willing to speak to lawyer groups and organizations.	
IMPEDIMENTS TO BENCH/BAR INTERACTION	
Judge Carparelli explained that one impediment to the bench/bar relationship is judges and lawyers uncertainty about what is and what is not appropriate to talk about during bench/bar events, and that Working Group C would like to develop a curriculum to educate lawyers and judges about that topic.	
PROFESSIONALISM AND DECORUM IN THE COURTROOM	
Judge Carparelli then suggested that Working Group C has identified professionalism and decorum in the courtroom as an area that needs to be improved and as an area that falls within Working Group C's charge because it concerns the relationship and communication between the bench and the bar.	
DISCUSSION	Judge Carparelli informed the Commission that he has conducted training sessions for judges on how to deal with courtroom issues and uncivil behavior. Chief Justice Bender noted that lack of dignity and respect in the courtroom erodes the public's respect for the rule of law, and commented that it's not just uncivil behavior that's the problem, but rather it's also the little things like standing when speaking to the judges and not bringing food into the courtroom. John Baker informed the Commission that the Peer Professionalism Assistance group is a conciliation panel whose best referrals come from judges, and that the PPA would like to get the word out to judges about their services in dealing with uncivil and unprofessional conduct. David Stark indicated that the PPA can be helpful in situations where the lawyers might not want to call the judge or magistrate to handle a conflict about discovery or some other issue.
ADDITIONAL INFORMATION	The Peer Professionalism Assistance group's website is: http://www.cobar.org/index.cfm/ID/20980.
WORKING GROUP B	**MARK FOGG**
Mark Fogg, Chair of Working Group B—development of professional identity and social responsibility for new attorneys and thereafter—presented the Working Group's report and led discussion. Working Group B's report is included in the meeting materials attached to these minutes (Materials Pages 84–85).	

COLORADO LAWYERS FOR COLORADO VETERANS	
Mark Fogg first reported on the highlights of Colorado Lawyers for Colorado Veterans, a project that the Commission recommended pursuing at its May 5, 2011 meeting. He informed the Commission that the project kicked-off on November in Denver, Colorado Springs, and Fort Collins. An email from John Vaught, one of the program's chairs is included in the meeting materials attached to these minutes (Materials Pages 86–87). Several articles and press releases about the project are also included in the meeting materials attached to these minutes (Materials Pages 88–95). He explained that in preparation for the events they solicited lawyers who would get the word out about the clinic, who would staff the clinic, and/or who would take referrals from the clinic, and also brought in law students from CU and DU to help at the clinics. He indicated that the project is considering hosting clinics in March, July, and September, and that the vision remains to have decentralized veterans' clinics throughout the state on a regular basis.	
DISCUSSION	John Mobsy asked whether brochures were put at the V.A. hospitals, and Mark Fogg replied that approximately half of the clinic attendees were from the V.A. hospital. Professor Melissa Hart agreed that more frequent clinics might be more helpful than an annual event. She also commented that four of her students participated in the clinic and that their involvement was a huge success. Mark Fogg added that involvement of the law students goes hand-in-hand with the efforts being pursued by Working Group A in terms of bridging law students to the legal profession. Kara Vietch suggested contacting the committee that deals with homelessness and veterans' issues as well as politicians who have served in the military. John Eckstein commented on the role that could be played by the V.A.
ADDITIONAL INFORMATION	A website created by two DU law students to connect veterans with legal resources that can help them can be found at: http://www.veteranslegalservicesofdenver.org/.
STATEWIDE MENTORING PILOT PROGRAM	
Mark Fogg then reported on the status of the statewide mentoring pilot program, a project that the Commission recommended pursuing at its September 22, 2011 meeting. He reported that the CLE Board approved the CLE credit proposal advanced by the Commission, and that approximately 70 applications from newly admitted lawyers had been received for the Denver Bar Association's program. Chuck Turner indicated that they have been in contact with DU's graduate school of social work to determine the best evaluative tools, which should include mechanical and objective as well as subjective	

components. He also indicated the mentor application is not time consuming and can be found on the Denver Bar Association's website.	
ADDITIONAL INFORMATION	The Denver Bar Association's mentoring program mentor application can be found on the Denver Bar Association's website, at: http://www.cobar.org/index.cfm/ID/21197/DBA/Mentoring-Program/.
2012 COMMISSION MEETING DATES	**CHIEF JUSTICE BENDER**
Chief Justice Bender announced the Commission's 2012 meeting dates: • February 23, 2012 • May 24, 2012 • September 13, 2012 • December 6, 2012 All meetings are on Thursday afternoons from 3:00–5:00 PM in the 5th Floor Conference Room at 101 W. Colfax Ave., Denver, Colorado 80202.	
ADJOURN	

Minutes of Meeting submitted by Sarah Clark, December 23, 2011

COLORADO SUPREME COURT
CHIEF JUSTICE COMMISSION ON THE LEGAL PROFESSION

December 1, 2011
3:00–5:00 PM
101 West Colfax Avenue
5th Floor Conference Room
Denver, Colorado

Agenda

I. Welcome from Chief Justice Bender (3:00 PM — Handout)

- Introduction of new Commission Members:
  - U.S. Attorney John Walsh
  - Hon. William B. Sylvester, Chief Judge 18th Judicial District
  - Whiting Dimock Leary, University of Colorado Senior Assistant Dean for Students
  - Daniel A. Vigil, University of Denver Assistant Dean of Student Affairs
  - Melissa Hart, University of Colorado Associate Professor of Law and Executive Director of the Byron R. White Center
  - David C. Little, Montgomery Little & Soran, P.C. and Chair of Board of Continuing Legal Education

II. Reports from and Discussion with Working Groups

- Working Group D — David Stark (3:10 PM — pp. 1–2)
  - Access to Justice Initiatives (pp. 3–62)
  - *Make History Colorado* (pp. 63–67)
- Working Group A — Dean Trujillo (3:30 PM — p. 68)
  - 2012 Joint Orientation: *For This We Stand* (pp. 69–74)
- Working Group C — Judge Carparelli (4:00 PM — pp. 75–76)
  - Inns of Court Collaboration and Communication (p. 75)
  - Survey Results of Bench-Initiated Bar Activities (pp. 77–83)
  - Professionalism and Decorum in the Courtroom (p. 76)
  - Impediments to Interaction between Judges and Lawyers (p. 76)
- Working Group B — Mark Fogg (4:20 PM — pp. 84–85)
  - Colorado Lawyers for Colorado Veterans (pp. 86–95)
  - Statewide Mentoring Program (p. 85)

III. 2012 Commission Meeting Dates (4:55 PM — Handout)

- All meetings are on Thursday afternoons from 3:00–5:00 PM
  - February 23, 2012
  - May 24, 2012
  - September 13, 2012
  - December 6, 2012

IV. Adjourn (5:00 PM)

MEMORANDUM

To: Chief's Commission on the Legal Profession

From: Working Group D

Date: November 25, 2011

Subject: Projects for Improving Access to Justice

Working Group D has focused its efforts on access to justice, **with the aim of improving both *pro bono* services and *pro se* resources**. These projects, explained more fully below, are:

1. Seeking opportunities to promote CBA's *Make History Colorado* campaign
2. Contributing to the access to justice efforts of Colorado Legal Services, the Colorado Access to Justice Commission, the CBA's Access to Justice Local Support Committee, and others

Promoting CBA's *Make History Colorado* Campaign

Working Group D received a presentation about the *Make History Colorado* campaign, which was launched in October by the Colorado Bar Association and the Colorado Access to Justice Commission. The program's goal is to highlight *pro bono* opportunities throughout the state and to link lawyers to those opportunities. The program also seeks to educate lawyers about historically significant cases that were done *pro bono*, and to encourage lawyers to take a *pro bono* case and make history themselves. A short video about the campaign can be found at www.makehistorycolorado.org, and will be shown at the Commission meeting.

Working Group D believes the *Make History Colorado* campaign is worthwhile for several reasons:

- It appeals to lawyers' ideals about *pro bono* services and furthers the Commission's goals of encouraging lawyers to do more *pro bono* and enhancing the public's perception of lawyers and the legal system;.
- It offers resources to help lawyers integrate *pro bono* services into their practice, such as links to Colo. R. Prof. Conduct Rule 6.1, to sample *pro bono* policies for law firms, to the Colorado Supreme Court *pro bono* initiative, and to the application for CLE credit for *pro bono* work;
- It provides a single online location for information about *pro bono* opportunities throughout the state; and
- It has the organizational support of the Colorado Bar Association, and the institutional support of the Colorado Access to Justice Commission.

For these reasons, Working Group D would like to pursue opportunities to promote the *Make History Colorado* campaign, such as sharing information about the campaign with the Commission and with the other Working Groups. In this regard, David Stark would like to meet with members of the Colorado Access to Justice Commission and would like to designate a member of Working Group D to directly assist the *Make History Colorado* campaign in its efforts.

Contributing to the Access to Justice Efforts of Well-Established Organizations

Working Group D has gathered information from Colorado Legal Services and the CBA's Access to Justice Local Support Committee about their efforts in the area of access to justice. As part of these efforts, Mimi Tsankov met with Jonathan Asher, Executive Director of Colorado Legal Services. Judge Tsankov then prepared and provided Working Group D with a memorandum detailing her research and findings. That memorandum is attached here. Much of this information concerns *pro bono* opportunities available to lawyers, and thus overlaps with the information gathered on the *Make History Colorado* website.

Judge Tsankov also participated in a telephone conference with the CBA's Access to Justice Local Support Committee. That telephone conference concerned the online resources available on the CBA's website. Through Judge Tsankov's investigation, Working Group D has learned that local access to justice committees are concerned with the availability of not only *pro bono* legal services but also developing those resources for *pro se* parties. Working Group D is particularly interested in efforts such as the development of self-help resource centers in the courthouses and efforts to train public library staff about the self-help forms available on the Colorado Supreme Court website.

Next Steps to Improving Both *Pro Bono* Services and *Pro Se* Resources

Working Group D is just beginning its involvement with *Making History Colorado* and these access to justice organizations, and its next steps include meeting with members of the Colorado Access to Justice Committee and several local access to justice committees to improve both *pro bono* services and *pro se* resources.

MEMORANDUM

TO: David Stark, Chair, Working Group D
Commission on the Legal Profession

FROM: Mimi E. Tsankov, Member Working Group D
Federal Bar Association Liaison Member
Commission on the Legal Profession

DATE: October 25, 2011

RE: Working Group D Background Research – Access to Justice

This memorandum will serve three purposes. First, it will provide context for the Working Group's decision to schedule a meeting with Jonathan D. Asher, Executive Director, Colorado Legal Services ("CLS"), and present notes of that meeting. The stated purpose of the meeting was to gain further clarification about the nature of the Access to Justice ("ATJ") programs currently in place, and to receive suggestions about formulating recommendations about how to improve ATJ programs. Second, it will forward background materials submitted by CLS, to the Working Group. Third, it will provide some general background information about ATJ programs in the State of Colorado, which was assembled in preparation for the meeting with Mr. Asher, and is being submitted here to provide context within which to understand his comments and suggestions.

I. Colorado Legal Services Meeting Notes

The State of Colorado, under the auspices of the Colorado Access to Justice Commission, has been actively studying the issue of ATJ. The Colorado Access to Justice Commission is an independent entity formed in 2003 with the support of the Colorado Supreme Court, the Colorado Bar Association and the Statewide Legal Services Group. It is comprised of twenty members. Staff assistance for the Access to Justice Commission is provided by the Colorado Bar Association. The group's mission is to develop, coordinate and implement policy initiatives to expand access to and enhance the quality of justice in civil legal matters for persons who encounter barriers in gaining access to Colorado's civil justice system.[1]

In January 2008, it released a comprehensive report entitled, "The Justice Crisis in Colorado: A Report on the Civil Legal Needs of the Indigent in Colorado."[2] That study reflects the following:

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[1]Colorado Bar Association, available at http://www.cobar.org/page.cfm/ID/20129.

[2] Colorado Access to Justice Commission, "The Justice Crisis in Colorado: A Report on the Civil Legal Needs of the Indigent in Colorado," January 2008, available at http://www.cobar.org/repository/Access%20to%20Justice/08ATJ_FULLReport.pdf, and attached hereto (without Exhibits), as Attachment A.

> Colorado faces a serious crisis in civil legal representation of the indigent. Many Coloradans who need legal assistance to secure and maintain health care, housing, custody or other necessities do not receive help because there are too few lawyers at Colorado Legal Services ("CLS"), Colorado's statewide legal aid program.[3]

CLS provides civil legal services for the indigent. The report explains that CLS' annual funding levels are determined by the Colorado General Assembly. Recent funding levels reflect decreasing financial support being provided to Colorado Legal Services.

The report reflects that state funding levels are well below the national average, and have not reflected increases since 2002. The report documents a state-wide growing and, as of yet, unmet need for civil legal assistance. It documents an ever-shrinking pool of assistance capacity, financial support, amid a growing population. Moreover, it reflects a "widening gap between the need for legal services and the resources available to meet that need."

On October 13, 2011, Jonathan D. Asher, Executive Director, Colorado Legal Services, and I met to discuss CLS and Colorado ATJ programs, in general. Following is a summary of our discussion.

A. CLS' mission "is to provide meaningful access to high quality, civil legal services in the pursuit of justice for as many low-income persons and members of vulnerable populations throughout Colorado as possible." He stated that funding for the program is through the Family Violence Victim Fund. Funding levels in 2009 were about $900,000. In 2011, funding levels were reduced to about $600,000. He explained that public funds provided for Pro Bono Services are somewhat limited when compared to those allocated in other states. For example, in the State of New Mexico, funding levels for similar services are at about $2,000,000.

B. He stated that one approach to evaluating programs would be to discern the impact that the programs have in terms of meeting the unmet needs of the Colorado indigent population. For example, he recommended contacting the following individuals and organizations with special interest in certain needy populations:

1. Ilene Blume, Esq., President of the Denver Bar Association – This organization focuses on working with needy children.

2. Stephanie Villafuerte, Esq., Rocky Mountain Children's Law Center – This program focuses on guardian ad litem work.

3. Diane Van Voorhees, Esq., Executive Director, Metro Volunteer Lawyers – This organization focuses on the regular needs of the poor, such as eviction, uninsured motorist claims, wage claims,

[3] Id. at 5.

and housing court. This program addresses about 1000 – 1200 cases per year.

4. Connie Talmage, Esq., Executive Director, Colorado Lawyers Committee - The focus of this organization is on high-profile matters handled by large law firms.

5. Kathleen M. Schoen, Director, Local Bar Relations & Access to Justice, Colorado Bar Association - The department supports the CBA's Availability of Legal Services Committee as well as local efforts. Ms. Schoen is responsible for coordinating programs throughout the state.

6. The Honorable Daniel Taubman, Chair, Access to Justice Commission. There are local Access to Justice Commissions in every judicial district.

C. He recommended joining the conference calls of these organizations to get an idea about the issues with which they are grappling.

D. He suggested that we review some of the scholarly works of Professor Deborah L. Rhode Director, Stanford Center on the Legal Profession. Professor Rhode is a leading scholar in the fields of legal ethics and public policy. He states that she has written some thoughtful books about ATJ efforts nationally.

E. He suggested that an effective program could be one that incorporates national, state, and local efforts. I asked his view about the American Bar Association's ("ABA") national programs. I mentioned that recently, the ABA Standing Committee on Pro Bono has partnered with Kids In Need of Defense ("KIND") to serve the unmet immigration legal needs of migrant children nationally. This is a well-funded national service program that provides mentorship opportunities to attorneys that wish to undertake a pro bono immigration case. He suggested that the Working Group consider the size of the population that this group serves in determining whether further consideration is warranted.

F. He noted the difference between mentoring of young attorneys and the concept of legal work supervision. He suggested that the best mentoring programs aren't those that are formed artificially, but rather are those that form naturally when mentors are invested in an individual's success.

II. Colorado Legal Services Documents Submitted

Mr. Asher presented to the Working Group four documents to assist in our research.

A. Two-Page Spreadsheet reflecting Coordinators for various Pro Bono programs throughout Colorado, attached hereto as Attachment B;

B. Colorado Legal Services, Private Attorney, Involvement Plan 2010, attached hereto as Attachment C;

C. Denver Bar Association, Law Related Volunteer Opportunities Pamphlet; attached hereto as Attachment D; and

D. Colorado Legal Services Brochure describing terms of assistance, attached hereto as Attachment E.

III. Colorado Access to Justice Programs

In preparation for the meeting with Mr. Asher, I assembled the following list of organizations and programs that reflects a cursory review of various ATJ programs currently in place in Colorado.

The central repository of information related to ATJ programs in the state resides with the Colorado Access to Justice Commission. Following is a cursory review of these programs.

A. Denver Metro Area Access to Justice Programs[4]

1. Bar Association Clinics
   a. Legal Night at Mi Casa - Attorneys provide information, and make referrals to appropriate agencies, in areas of immigration, credit, housing, landlord/tenant issues, employment and family law.
   b. El Centro de San Juan Diego - Volunteer attorneys provide information and advice in credit, housing, landlord tenant, employment and family law. Attorneys provide referrals to appropriate agencies.
   c. Bankruptcy Clinic, Bankruptcy Court - Attorneys review bankruptcy process and forms, including how bankruptcy can eliminate debts, difference between Chapter 7 and Chapter 13, effect on credit ratings, and forms required for filing; also address issues relating to creditor harassment and contacts by collection agents.
   d. Small Claims Clinic, Denver County Court, Civil Division - Informational clinics on filing small claims cases and collecting on judgments are offered at various County courts.
   e. Doing Your Own Divorce Clinics - County Informational clinics providing overview of divorce process, including procedures and forms, child custody, child support, maintenance and property division.

[4] This list is maintained by the Colorado Access to Justice Commission and is available at http://www.cobar.org/repository/Access%20to%20Justice/ProBonoOpps2009v.2.pdf.

2. Pro Bono Opportunities for Lawyers

a. Lawline 9 - KUSA-TV Channel 9 provides a community call-in program. Over 200 attorneys volunteer to staff this event every Wednesday evening, and on special occasions, additional early morning.

b. El Centro Humanitario - Denver's first day laborer organization that protects the rights of vulnerable day laborer populations through an employment program, a legal program, and other educational programs.

c. Family Tree Women in Crisis – This organization serves victims of domestic violence, sexual assault, and stalking.

d. First Judicial District Bar Association Legal Assistance Program - This program provides free and low-cost legal information, advice, and representation to senior citizen residing in Jefferson and Gilpin counties.

e. Longmont Ending Domestic Violence Initiative (LEVI) - This is a coalition of 23 agencies in the Longmont and Boulder area that deals with domestic violence issues.

f. Metro Volunteer Lawyers - This organization uses attorneys to assist low income residents of the seven county metropolitan Denver area including Adams, Arapahoe, Broomfield, Denver, Douglas, Elbert counties and the First Judicial District. MVL accepts only civil cases that are not fee-generating. Cases include domestic relations, divorce, parental rights, bankruptcy, landlord-tenant. MVL also conducts family law and pro-se divorce workshops.

g. Project Safeguard - Family law attorneys provide assistant to domestic violence victims seeking permanent civil protection orders and dissolution of marriage or allocation of parental responsibilities.

h. Rocky Mountain Children's Law Center - RMCLC provides legal representation for children, primarily abused and neglected children, in dependency and neglect cases in juvenile court. The Center operates in partnership with the Denver Department of Human Services. The Law Center trains and supports attorneys who provide legal representation for cutting edge programs that serve and support children and families at risk. RMCLC offers a domestic violence program, foster parent program, and legal clinic for homeless youth.

i. Rocky Mountain Survivors' Center - RMSC is a non-profit organization that works with survivors of torture and war trauma.

B. Colorado Access to Justice Programs serving specific communities

a. Alpine Legal Services, Inc. - This organization provides information and referral, pro bono attorneys, legal information rights, do-it-yourself divorce class, landlord-tenant, elder law, and emergency assistance for victims of domestic violence. ALS serves Garfield, Pitkin and Eagle counties.

b. Alternative Horizons - Serving the Durango community, this organization provides legal representation to people experiencing domestic violence in divorce, child custody, and post decree cases.

c. Catholic Charities - This organization represents indigent clients on immigration matters in Eagle, Vail, Garfield and Pitkin counties.

d. Delta County Bar Association Pro Bono Program - This organization assists indigent applicants with civil legal needs through referral to volunteer attorneys.

e. El Paso County Pro Bono Project - This program assists indigent applicants with civil legal needs through referral to volunteer attorneys.

f. Heart of the Rockies Bar Association Pro Bono Program - This program assists indigent applicants with civil legal needs through referral to volunteer attorneys.

g. Larimer County Bar Association Pro Bono Program - This program assists low income individuals who are financially over-qualified for Colorado Legal Aid, but who are still within the federal poverty guidelines and unable to afford legal representation.

h. Mesa County Pro Bono Project - This program assists indigent applicants with civil legal needs through referral to volunteer attorneys.

i. Northeast Colorado Legal Services, Inc. (NECLS) Pro Bono Program - This organization assists applicants with preparation of court documents to foster understanding of the legal process. It serves Kit Carson, Logan, Morgan, Phillips, Sedgwick, Washington and Yuma counties.

j. Northwest Colorado Legal Services – NWCLS has state offices as follows, and provides legal services within their areas of responsibility:

    i. Frisco, Colorado, counties served, Clear Creek, Pitkin, Summit

    ii. Gunnison, Colorado, county served, Gunnison, contact Candace Sparks

    iii. Hayden, Colorado, counties served, Grand, Jackson, Moffat, Rio Blanco, Routt

    iv. Leadville, Colorado, counties served, Eagle, Lake,

k. Pueblo County Bar Pro Bono Project – This program involves participation in Lawyer Night, Ask-A-Lawyer, Clinics, and Radio-

TV presentations on legal issues. Actual cases are referred to Colorado Legal Services.

l. San Luis Valley Pro Bono Project - This program assists indigent applicants with civil legal needs through referral to volunteer attorneys, and serves Alamosa, Conejos, Costilla, Mineral, Rio Grande, and Saguache counties.

m. Southwest Bar Volunteer Legal Aid, Inc. - SWBVLA provides advisory and direct client services in the areas of family, employment, consumer, housing, elder, public benefits and probate law. SWBVLA serves La Plata, San Juan, and Archuleta counties as well as Southern Ute, and Ute Mountain.

n. Uncompahgre Volunteer Legal Aid - UVLA refers civil pro bono cases in Montrose, Ouray, and San Miguel counties, as well as referring pro bono for senior citizens in Delta, Gunnison and Hinsdale counties.

o. Weld County Legal Services- This program represents qualified residents in civil cases at no charge.

C. State-wide Access to Justice Programs

a. Asian Pacific Development Center - This organization provides a variety of human services to the Asian/Pacific population in Colorado.

b. Colorado Lawyers Committee - This is a consortium of 50 Denver-area law firms that do high impact pro bono work, and serves children, indigent, and other disadvantaged communities.

c. Colorado Asian Health Education and Promotion - This organization focuses on providing health care services to members of Colorado's Asian community. The group provides volunteer attorneys who may be able to assist clients in securing benefits.

d. Colorado Legal Services - This organization provides legal advice and representation to low income eligible persons and seniors in civil matters throughout the state. There are 15 offices throughout Colorado.

e. Colorado Organization for Victims' Assistance - This program offers *pro bono* assistance to enforce victims' rights.

f. Holocaust Survivors' Reparations Program - Volunteer attorneys identify survivors and help people get their share of the available German government compensation.

g. The Legal Center for People with Disabilities and Older People - This program opens up the legal system to those who would otherwise be unable to voice their needs because of the complexity of the service bureaucracy, their disability or because they are unable to act on their own behalf.

h. Local Access to Justice Committees - Judicial Districts have formed Local Access to Justice Committees to provide targeted legal assistance to its residents.

i. Nonprofit Legal Assistance Planning Committee - This organization provides a mechanism for transactional lawyers to provide pro bono assistance to Colorado nonprofits which require pro bono legal assistance.

j. Rocky Mountain Immigrant Advocacy Network - This is a nonprofit organization dedicated to providing legal information and representation to non-citizens detained by the Department of Homeland Security and lacking access to legal counsel.

k. Seniors Inc. - This group serves as volunteer expert in an area of interest to seniors, such as reverse mortgages, financial planning, estate planning, long-term care.

IV. American Bar Association, Center for Pro Bono

The American Bar Association, Center for Pro Bono, provides technical assistance on promoting and developing pro bono to the legal profession, including individual attorneys, law firms, law schools, bar associations, and nonprofit organizations providing pro bono legal services. An example of the type of partnership that they pursue is their recent selection of Kids in Need of Defense ("KIND") for their primary national focus for the next couple of years. KIND was founded by the Microsoft Corporation and actress and humanitarian Angelina Jolie to create a pro bono movement of law firms, corporate law departments, NGOs and volunteers committed to providing fair, competent and compassionate legal counsel to unaccompanied immigrant children in the U.S.

Attachment A

Colorado Access to Justice Commission

The Justice Crisis in Colorado

A Report on the Civil Legal Needs of the Indigent in Colorado

January 2008

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Acknowledgements

This report and the statewide hearings described in this report were the result of amazing work by a number of dedicated individuals. A most sincere thank you to all members of the Colorado Access to Justice Commission and its subcommittees who spent many hours planning and attending the hearings and drafting and editing this report. The local Access to Justice Committees were essential to the planning of the hearings and to reviewing drafts of the reports on the hearings in their districts. A special thanks to everyone who attended the hearings and to those who testified and shared their experiences and knowledge with us. We are particularly grateful to the clients and those who unsuccessfully applied to be clients of the legal services and pro bono programs and to all those who have worked and continue to work to ensure access to civil legal services for those who can not afford it.

Manual Ramos, Director of Advocacy, Colorado Legal Services testifies to Boulder hearing panel: Justice Michael Bender, ATJ Commission Chair Constance Talmage, 20th Judicial District Court Chief Judge Roxanne Bailin.

We were ably assisted at all stages of this effort by four University of Denver Sturm College of Law students: Adam Barnhurst, Christopher Kelly and Greg LeBouton attended all the hearings and prepared the first draft of the reports on the hearings; Amber Schrandt helped with editing the final report.

Finally, neither the hearings nor the report would have been possible without the tremendous support of the Colorado Bar Association, particularly the tireless and most talented assistance of Kathleen Schoen and Michael Valdez.

Thank you all.

Frederick Baumann, Access to Justice Commission Vice Chair, opens the Colorado Springs hearing, with panelist Senator John Morse, Richard Skorman, U.S. Senator Ken Salazar's Office, Representative Bob Gardner.

David Butler, ATJ Commissioner, testifies in Durango.

Diane Postell, SafeHouse Denver, testifies at Denver hearing.

Kathleen Bolte, Grand Junction Managing Attorney, Colorado Legal Services, testifies at Grand Junction hearing.

Connie Talmage, Chair of Access to Justice Commission, welcomes panelist and witnesses to Denver hearing.

Sequya Stevens testifies at Colorado Springs hearing.

Executive Summary

Colorado faces a serious crisis in civil legal representation of the indigent. Many Coloradans who need legal assistance to secure and maintain health care, housing, custody or other necessities do not receive help because there are too few lawyers at Colorado Legal Services, Colorado's statewide legal aid program. The Colorado General Assembly's annual funding for civil legal services for the poor is limited to a $500,000 appropriation to provide legal services to victims of family violence. Not only is this level of state funding well below the national average, it has not increased since 2002.

During 2007, the Colorado Access to Justice Commission held ten hearings throughout the state to assess the civil legal needs of the indigent in Colorado. Hearings were held in Delta, Durango, Grand Junction, Colorado Springs, Pueblo, Fort Collins, Greeley, Breckenridge, Boulder, and Denver. Invited panelist who participated in the hearings included members of the Legislature, representatives of other elected officials, Colorado Supreme Court justices, Colorado Court of Appeals judges, District and County Court judges, Bar Association leaders, and members of the statewide Access to Justice Commission and local Access to Justice committees. Testimony was provided by legal services clients, low income individuals with legal needs who did not receive legal assistance, attorneys who provide civil legal services to the poor, judges, and employees of organizations that serve the indigent.

The most significant findings from the hearings include:

- **Lack of access to legal services**. Low income individuals do not automatically have access to free legal assistance in civil matters, as they do in virtually all serious criminal matters in Colorado.

- **Lack of Legal Aid attorneys.** Most civil legal assistance for the indigent is provided by Colorado Legal Services (CLS). Over the last 20+ years, the number of CLS lawyers has been cut in half, while the number of low income people has increased by almost 75%. In 1980, there was one legal service attorney for every 4,839 eligible clients. Today there is one CLS attorney for every 16,890 eligible individuals. As a result, most low income individuals in Colorado are unable to obtain civil legal assistance when they need it. It is estimated that only one indigent person in five who needs civil legal help will receive some legal assistance.

- **Colorado funding is inadequate to meet the need**. Colorado's only state funding for civil legal services is a $500,000 appropriation to provide civil legal services to victims of family violence. The amount of this funding has not increased since July 1, 2002. Colorado ranks 40th in state funding for civil legal services for the indigent, and would need to provide another $1.82 million in state funding to reach the national average.

- **Burdens on the court**. Individuals who do not have lawyers present a special challenge for judges and make it difficult for them to administer justice. Judges cannot represent parties, and often do not get all the information from unrepresented parties that they need to make a correct and just decision. The situation is exacerbated when one of the parties is represented by an attorney and the other is not.

- **Volunteer attorneys cannot meet the need.** The Colorado Supreme Court has made great efforts to encourage participation by private attorneys in meeting the legal needs of the poor and has implemented programs designed to assist parties who do not have lawyers. The private bar also plays a significant role in providing legal services for low income individuals. However, assistance by volunteer lawyers is no substitute for an adequately funded system necessary to provide civil legal services to the indigent.

- **Attorney representation is crucial for many domestic violence victims and their children.** The impact of not having a lawyer can be devastating. For example, it has been documented that the availability of a lawyer is one of the most important factors in determining whether a victim of domestic violence and her children will return to an abusive relationship. Access to legal services can prevent more severe and costly legal and societal problems, saving lives and money in the long run.

This report includes a summary of each of the ten hearings (see Appendices C through L) and provides detailed information on the civil legal needs of the indigent in Colorado. The Colorado Access to Justice Commission urges the Colorado Legislature, the Governor, and the Colorado Supreme Court to take immediate action to address the justice crisis outlined in this report.

Recommendations

1. **Establish a plan to provide civil legal services for the indigent.** First and foremost, the State of Colorado should establish a four-year plan to substantially increase funding for Colorado Legal Services. The goal should be, at a minimum, to place Colorado at the average level of state funding for civil legal services programs for the poor. Beyond that, however, the goal should be to provide sufficient funding so that the civil legal needs of Colorado's indigent throughout the state can be met. Colorado must provide assistance to address legal issues involving the basic human needs of housing, health care, safety, sustenance, and child custody, through a network of CLS attorneys and pro bono programs.

2. **Increase salaries and benefits of Legal Services Attorneys to make them comparable to other public sector lawyers.** The increased funding should bring salaries and benefits for CLS employees to the same level as other public sector law offices (Public Defender's Office, District Attorney's Offices, or the Colorado Attorney General's Office). This funding will enable CLS to attract and retain lawyers who can provide high quality legal services in civil cases involving Colorado's low income citizens.

3. **Promote participation by the private bar in pro bono legal services**. The Colorado Access to Justice Commission should continue to work with the Colorado Supreme Court, the Colorado Bar Association, local bar associations, and other entities to promote and encourage increased pro bono service by private attorneys throughout the state. Such additional pro bono services will supplement the legal assistance provided to low income Coloradans through CLS.

4. **Improve services for pro se litigants.** The Colorado Supreme Court, along with the Colorado Access to Justice Commission, should continue to improve services for unrepresented litigants, including increasing the number of family facilitators and pro se offices, which are necessary to ensure effective access to the legal system.

5. **Improve access to the legal system.** The Colorado Supreme Court, along with the Colorado Access to Justice Commission, should continue to improve access to the courts for all litigants and assure that the provision of legal services is more user friendly, particularly for people with disabilities, people who are not fluent in English, and people unfamiliar with computers and other forms of modern technology.

The Justice Crisis in Colorado

A Report on the Civil Legal Needs of the Indigent in Colorado

January 2008

Equal justice under law is not merely a caption on the façade of the Supreme Court building. It is perhaps the most inspiring ideal of our society . . . it is fundamental that justice should be the same, in substance and availability, without regard to economic status.

U.S. Supreme Court Justice Lewis Powell, Jr.

Introduction

"Without the civil legal assistance program, there would be virtually no access to civil justice for low income persons in the United States, and the goal of equal justice for all would be only a distant dream."[1] Colorado Legal Services (CLS) provides free high quality civil legal advice and representation to low-income persons throughout the state of Colorado. Approximately 692,000 (15%) Coloradans are financially eligible for free legal services from CLS.[2] Low-income households may experience three or more legal problems per year,[3] and most of their legal issues involve basic human needs: **housing, health care, safety, sustenance, and child custody**.[4] Due to a lack of available resources and limited awareness of the legal nature of problems, only one in five legal issues experienced by poor people is addressed with the assistance of a legal services lawyer or a pro bono private lawyer.[5] In many cases, lawyers can identify and resolve legal issues without going to court or can resolve court cases more efficiently and fairly than persons representing themselves. The provision of legal services helps stabilize families, saves taxpayers money, reduces the number of cases clogging the courts, and helps people move toward self-sufficiency and full participation in society.

Compared to 1 lawyer for every 525 in general population, there is only 1 legal aid lawyer for every 16,890 qualified Coloradans.

While the number of poor people is increasing, the capacity of civil legal assistance programs to assist those in need is shrinking. "(T)here is only one legal aid lawyer per 6,861 poor people in the United States compared to one lawyer providing civil legal services for every 525 people in the general population."[6] The statistics in Colorado are even more discouraging. In 1978 there were 82 lawyers employed in the Colorado legal aid system.[7] Today, CLS employs 41 lawyers, a total of one lawyer for every 16,890 individuals who qualify.[8] During that period, Colorado's eligible population (persons who earn less than 125% of poverty level) has skyrocketed from 396,775 in 1980 to 692,505 in 2005, a 74.5% increase.[9] There is a widening gap between the need for legal services and the resources available to meet that need.

To assess the extent of the met and unmet legal needs of the poor in Colorado, the Colorado Access to Justice Commission[10] (ATJ Commission), in cooperation with the Local Access to Justice Committees[11] (Local ATJ committees), conducted hearings throughout the state. In October and November 2007, ten hearings were held.[12] Hearing panelists included State Legislators, Colorado Supreme Court Justices and Court of Appeals Judges, District and County Court Judges, Bar Association leaders, and members of the ATJ Commission. Testimony was provided by judges, clients, individuals who could not obtain legal services, lawyers and representatives of nonprofits that serve the indigent. In addition to providing information about the met and unmet legal needs of low income people in Colorado, testimony addressed the specific needs of individual communities and areas of the state.

Among the themes that emerged from the testimony presented at the ten Access to Justice hearings throughout the state was the tremendous unmet need for legal services for poor people. Even in those areas in which CLS has an office, one of every two prospective clients is turned away because of lack of resources. At safehouses to assist victims of domestic violence, many women are unable to obtain legal representation, and sometimes return to abusive relationships. While private attorneys performing pro bono service have helped to fill the gap, they are increasingly unable to do so.

Access to legal services is a major factor in the ability of a domestic violence victim to leave an abusive relationship.

"Explaining the Recent Decline in Domestic Violence" (see endnote 13)

Delta attorney Aaron Clay testified that, "While the number of attorneys in the Seventh Judicial District has remained fairly constant, the number of poor people needing legal assistance has increased significantly."

Another theme that became apparent during the hearings is that efforts to use technology to expand the scope of limited resources have had only partial success. Many poor people are less educated, unfamiliar with the legal system and legal jargon, do not own a computer, and do not know how to use one. Thus, witnesses throughout the state emphasized the need for having an attorney or a neutral person, similar to a family court facilitator, who could help poor people navigate the barriers they encounter in the legal system. Additionally, many witnesses testified about the close relationship between civil and criminal legal problems, and that solving civil problems could save the state and other entities hundreds of thousands of dollars. For example, one witness testified that when a husband is incarcerated on charges of domestic violence, his wife, as a result of lost family income, may face eviction. The effect can be homelessness, and a dependency and neglect proceeding that could result in the termination of the wife's parental rights. Legal representation in this situation may assist the wife in obtaining an alternative to returning to an abusive relationship, as well as help to stabilize the family.

The hearings also emphasized the impact on the judicial system of inadequate legal representation in civil cases. County and District Court judges testified of the difficulties in presiding over cases when one or both parties are pro se litigants. In such circumstances, the judges must be impartial, but do not always believe that they are presented with all relevant information on which to decide cases before them.

This report documents the findings from the ATJ hearings. We hope it will help Colorado's policy makers understand the extent of the justice crisis in Colorado and develop initiatives to better meet the need for civil legal services for Colorado's poor and vulnerable populations.

Judge Martha Minot, County Court, La Plata County, testifies at Durango hearing.

Legal Needs of Low Income People

The civil legal issues and needs of low income people most often involve basic human needs: assistance with safety from abusive relationships, access to health care, habitable and safe housing, and income maintenance [child support, food stamps, Social Security, Temporary Assistance to Needy Families (TANF)]. These basic human needs are the foundation for becoming a fully participating member of society. For instance, "(b)ecause legal services help (victims of domestic violence) with practical matters such as protective orders, custody, and child support they . . . actually present women with real, long-term alternatives to their (abusive) relationship."[13] This was echoed by domestic violence victims and service providers in every hearing. Judge Jonathan Walker, an El Paso County Court Judge, noted that as a public defender he saw hundreds of domestic violence cases. For every domestic violence conviction there is a victim, and often children, who need civil legal assistance with safety and survival issues (housing and income maintenance).

For pro se litigants, court can be overwhelming and intimidating, and they are often too scared to ask any questions. Because the pace of the county court is very fast, it is an environment where pro se litigants tend to lose.

Judge Martha Minot, La Plata County Judge, at Durango hearing.

Ft. Collins: *Annie wants out of a domestic violence relationship. She was initially turned down CLS because she does not meet the poverty guidelines. Her husband drained their joint bank account and her options are limited. 27 years in an abusive relationship is enough. She could file as a pro se litigant . . . but she fears for her safety. She will try to file on her own, but knows that without representation, she is leaving herself in a potentially very dangerous and violent situation. If additional funding is approved, perhaps more women like her will be helped.*

When the legal need of a low-income person is not addressed, a host of other legal problems often result. For example, inability to obtain proper health care can result in loss of employment, loss of housing, or the loss of custody of children. Critical issues in Colorado affecting the provision of legal services include rapid population growth, a high rate of foreclosures, inadequate and unaffordable low-income housing, high minority drop-out rates in high schools, a limited Medicaid program and lack of available health care in some rural areas.[14] These issues are even more grave for many of Colorado's vulnerable populations, including people with disabilities, those with mental illnesses, AIDS victims, and the elderly. According to Victoria Lutz, executive director of the Crossroads Safehouse of Fort Collins, "With legal representation, more women could cost the state less down the line. For example, they would go off welfare and food stamps. There is also a huge medical cost associated with domestic violence, and legal

help will cut down that cost as well."[15] The price children pay who are involved in these situations is too high as well. They have poor health, untapped potential, and the cycle repeats if there is no legal help.

There is a large gap between the number of low income people needing civil legal services and the availability of that service. Alice Willis, a homeless shelter case manager in Pueblo, testified that only one in ten people she refers to CLS actually will receive help from CLS. At the Breckenridge hearing, Pat Craig from the Northwest Colorado Legal Services Project testified that more than 90% of those who apply for assistance are unable to be helped by the program because of insufficient resources. Similarly, Art Jacobs, CLS Managing Attorney in Durango, testified that his office now has two attorneys but would need ten to meet the civil legal needs of low income people in the Sixth Judicial District.[16] This inability to keep up with the demand was echoed by local bar association leaders. Mike Hockersmith, Board Chair of Uncompahgre Volunteer Legal Services (Seventh Judicial District Bar Association sponsored pro bono program), stated that the program can no longer keep up with the number of low income people needing assistance. He testified that local private lawyers are struggling to provide pro bono assistance necessary to meet the needs of low income clients, while trying to maintain their private practices.

"What does justice mean? There is a limit on what judges can do. Often, indigent litigants depend on what their neighbors or friends advise rather than rules of evidence."

Judge Robert Lowenbach, District Court Judge, 19th Judicial District, at Greeley hearing.

Many other factors serve to deny poor people access to justice. Every low income person who testified at the hearings discussed the complexity of the law and the court system, legal paperwork, and legal procedures that made it difficult or impossible for them to resolve their legal problems. Judges testified that working with unrepresented litigants demands more judicial time. Even more importantly, judges noted that unrepresented litigants often do not present the court with adequate and proper evidence for the court to rule in the best interests of the parties.[17] For example, Judge Roxanne Bailin, Chief District Court Judge, Twentieth Judicial District (Boulder), testified that, at the end of an apparently amicable dissolution of marriage hearing the wife raised her hand and asked, "Does it matter that he beats the children?" Without the wife having asked that question, the judge's ruling would have put the children in danger. Judges are conflicted by the need to remain impartial and not help either party, while also serving the ends of justice.

Denver: *Ms. Rozhon is a CLS client, who received notice of a lien on her home. Years before that she had been financially struggling when a credit card company obtained a judgment against her. With the resulting interest and penalties, she owed $20,000. The credit card company was demanding that she make payments that exceeded her income. She asked the credit card company to postpone her payments until she finished school and completed her accounting degree. The credit card company refused. Colorado Legal Services helped her file Chapter 13 bankruptcy. She has now completed her Chapter 13 debt payment plan and is back on track. She believes she could not have accomplished this without the help of Colorado Legal Services.*

Provision of Legal Services

Over the last forty years, efforts have been made to create an integrated and comprehensive civil legal services system. Nationally, the federally funded Legal Services Corporation is the largest funder of civil legal services to the poor. In Colorado, the Legal Services Corporation-funded program is Colorado Legal Services (CLS) and its efforts are supplemented by a multitude of court and private programs.

Eligibility for Legal Services

To be eligible for assistance from CLS and most other similar programs, a person's income, with few exceptions, must be less than 125% of the federal poverty level and the legal problem must fall within the type of legal issues handled by CLS.[18] Under current federal standards, an individual's gross annual income must be less than $12,763 per year (or less than $7/hour for 7 hours per day/5 days per week). The gross annual income for a family of four must be less than $25,813.[19] This compares to self-sufficiency incomes[20] of $48,065 needed by two adults with two children (one in preschool and one in school) to live in Denver without public or private assistance; or the $35,463 needed in Alamosa; or the $44,762 needed in Eagle County.

As of 2005, 692,505 citizens are eligible for legal services in Colorado.

CLS Eligibility

CLS applicants must be income-eligible:

- Gross family income within 125% of federal poverty guidelines (200% with exceptions).
- For an individual, $12,763 annually.
- For a family of four, gross annual income cannot exceed $25,813 on an annual basis.

Example

- Person works 7 hours/day at $7 per hour = eligible for services.
- Person earns more than $49/day = not eligible (above government-set income eligibility guidelines).

Due to lack of funding and limitations imposed by Congress, CLS may represent clients in only certain types of cases. CLS limits the cases it accepts to: allocation of parental responsibilities and dissolution of marriage cases where there is domestic violence (not involving post-decree matters[21]), consumer law, income maintenance, public housing and foreclosure matters, access to health care, and some other limited types of cases. However, CLS is still not able to handle all the cases involving these issues and turns away at least one person for every case it accepts.[22] Even though the need is great, CLS is unable to provide representation to low income Coloradans in the following types of cases: most private evictions, divorces or custody actions not involving violence, child support and adoptions/guardianships, and consumer cases (identity theft, sales fraud, and defective goods).

Congress has added additional prohibitions on federally funded legal services, including CLS. CLS is prohibited from providing representation in fee-generating cases, class-action suits, cases on behalf of undocumented people (except where the person is a victim of a crime and is seeking protection), and most legislative and administrative advocacy.[23] Even with local pro bono programs trying to handle some of the cases that CLS can not, many low income people are not able to obtain legal assistance.

Colorado Legal Services

To provide meaningful access to high quality civil legal services in the pursuit of justice for as many low income persons and members of vulnerable populations throughout Colorado as possible.

Mission statement for Colorado Legal Services

Persons served by CLS are disadvantaged not only financially, but in terms of negotiating the legal system. . . . These are the persons most at risk of losing basic needs.

Kim Shropshere, Colorado Legal Services

CLS was formed in 1999 with the merger of Colorado's then existing legal aid programs: the Legal Aid Society of Metropolitan Denver, Colorado Rural Legal Services, and Pikes Peak-Arkansas River Legal Aid. Forty-four percent of legal services provided by CLS involve family law issues (dissolution of marriage, child support, and parenting issues). Consumer law and housing represent 19% and 18% of CLS cases. Another 11% involve income maintenance (food stamps, Social Security, and Temporary Assistance to Needy Families). In 2006, CLS provided legal assistance to 6,632 eligible clients. Of those 5,011 were provided legal advice and brief services. CLS supplied full legal representation in extended actions to 1,621 poor and vulnerable Coloradans.[24]

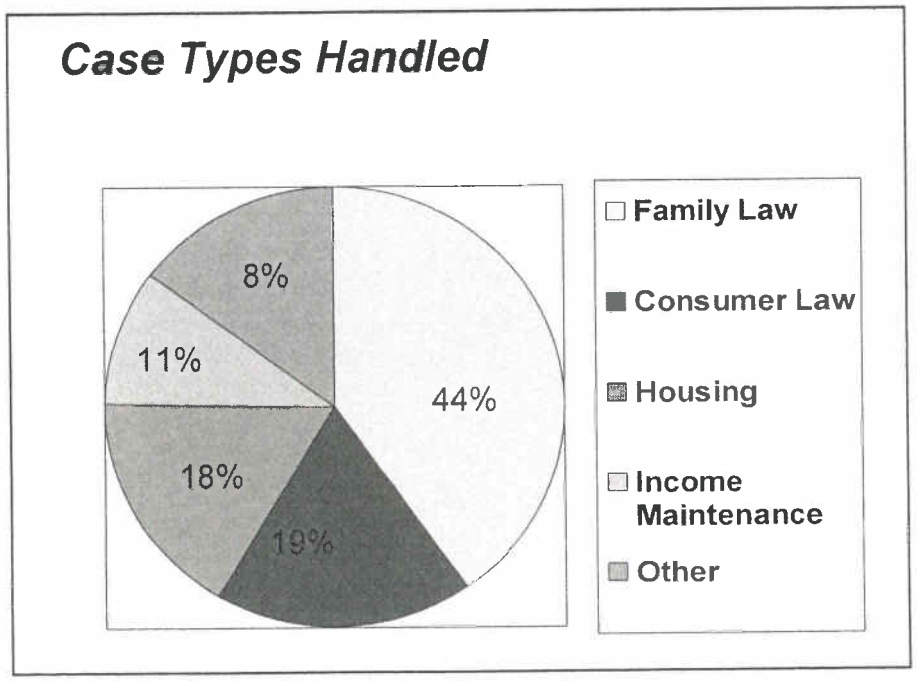

Several current and former legal service lawyers testified that in the late 1970s and the early 1980s there were twice as many lawyers serving Colorado's poor population, compared to the number of legal services lawyers helping the poor today. For instance, in 1972, there were 11 lawyers in the Colorado Springs office. That office now has only three lawyers. Due to budget cuts, eight CLS offices in the state (Trinidad, Montrose, Fort Morgan, Jefferson County, Arapahoe County, Adams County and two in Denver) have been closed and the number of lawyers has been reduced in the remaining offices, often resulting in one or two lawyers covering several counties.[25]

CLS Offices

1 – Alamosa
2 – Boulder
3 – Colorado Springs
4 – Denver (includes Migrant)
5 – Durango
6 – Fort Collins
7 – Grand Junction
8 – Greeley
9 – La Junta
10 – Frisco
11 – Gunnison
12 – Hayden
13 – Leadville
14 – Pueblo
15 - Salida

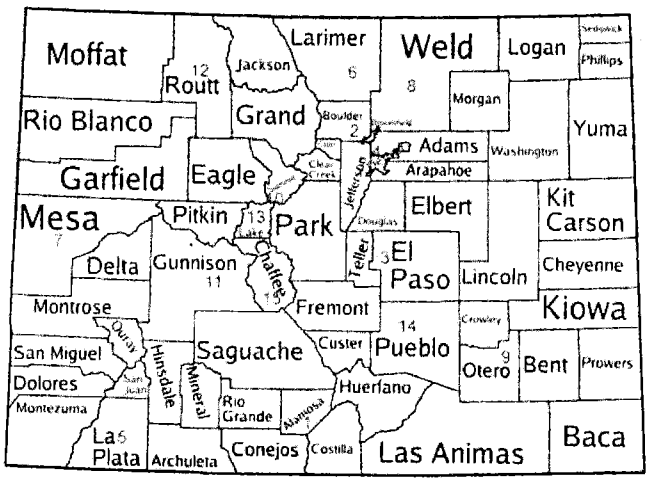

"In 1980's we had 5 legal aid lawyers in Trinidad. Today the office is closed."

Roxanne Bailin, Chief Judge, 20th Judicial District

Not only are there fewer legal services lawyers, but those lawyers' salaries are far below other public interest legal positions. A beginning CLS lawyer's salary is $33,180, compared to $47,436, the starting salary of the Colorado Public Defender's Office (43% difference) or $52,394, the starting salary of the Colorado Attorney General's Office (58% difference). Further, CLS lawyers (and other employees) do not have a pension from the Public Employees Retirement Association (PERA) as do employees of the Public Defender's Office and the Attorney General's Office. Nor do they have any other type of employer paid pension. Consequently, the salary gap is even more severe. Because of theses low salaries, many new lawyers, with college and law school debt approaching or exceeding $100,000, cannot afford to accept a CLS position.

Other Legal Service Programs and Efforts

In Colorado, other legal service programs and efforts fill some of the gaps but cannot avert the justice crisis. The Colorado Supreme Court has made great efforts to encourage participation by private attorneys in meeting the legal needs of the poor. The Court has authorized continuing legal education credit for attorneys[26] who perform pro bono work and has adopted rules "unbundling" legal serv-

ices (permitting limited legal representation).[27] More recently, the Court adopted a rule making it easier for inactive and retired attorneys to represent the indigent (Second Season of Service)[28] and adopted a Model Pro Bono Policy for law firms and individuals[29] and actively recognized their contributions (the Supreme Court Pro Bono Initiative).[30] The Court has also implemented, but only on a limited basis, several programs, including pro se offices and family court facilitators,[31] designed to assist parties who do not have lawyers.

The private bar plays a significant role in providing legal services for low income individuals. Colorado lawyers are among the most generous in the country and contribute more than $1.6 million annually to civil legal services.[32] In addition, lawyers donate thousands of hours to assist indigent clients with essential legal needs. By one estimate, the annual value of these contributed hours exceeds $10 million.[33] In addition, local bar associations and access to justice committees provide legal assistance to as many people as they can,[34] the law schools offer legal clinics,[35] and there are a number of self-help programs[36] as well as private legal service programs that serve specific populations, such as children in the foster care system,[37] people with disabilities and the elderly.[38]

Without the help of a lawyer, homeowners do not know defenses or alternatives to losing their home in foreclosure.

Roberto Silva, Colorado Legal Services, Pueblo, Colorado

While these programs serve an important role, assistance provided by volunteer lawyers is no substitute for an adequately funded system necessary to provide civil legal services to the indigent. As numerous witnesses testified during the hearings, volunteer programs simply do not meet the civil legal needs of the poor.[39]

> *Many of the problems that plague our society, such as abusive relationships and landlord-tenant issues, could be lessened if we could provide civil legal representation to larger numbers of people who otherwise do not have access to it, in the same manner as criminal defense. The best pro bono program in the world is unable to fill the legal justice gap that exists, and additional funding is the only way to fill that gap.*
>
> Ed Nugent, Private Attorney, Grand Junction

Use of Technology

In an attempt to provide as much help to as many low income people as possible, CLS, the courts, and local bar associations have employed technology to provide legal information,[40] self-help kiosks,[41] and video-conferencing to some rural Colorado locations.[42] CLS has been working with public libraries across the state to inform librarians about the legal information that can be accessed on the Internet.[43] However, testimony at the hearings revealed that technology has limited use since many low income persons are not familiar with computers, and are therefore, reluctant or unable to access information in this format.

Financial Resources[44]

The total funding in Colorado for civil legal services for the indigent is approximately $9.5 million, which amounts to $24.32 per poor person. In terms of dollars per poor person, Colorado ranks 28th in the nation in overall funding.[45]

Only a very small percentage of Colorado's funding for civil legal services for the indigent is provided through state funds. Since July 1, 1999, the State of Colorado has provided a general fund appropriation through the Family Violence Justice Fund for civil legal services to victims of family violence. The initial state appropriation was increased to $500,000 on July 1, 2002 and has not increased since.[46] As a result Colorado now ranks 40th in the nation in the amount of state funding for legal services, measured in terms of dollars per poor person. In contrast, Colorado is the eighth highest state in the country in per capita income.[47] For Colorado to become average in state funding, the state would need to increase its funding by $1.82 million.

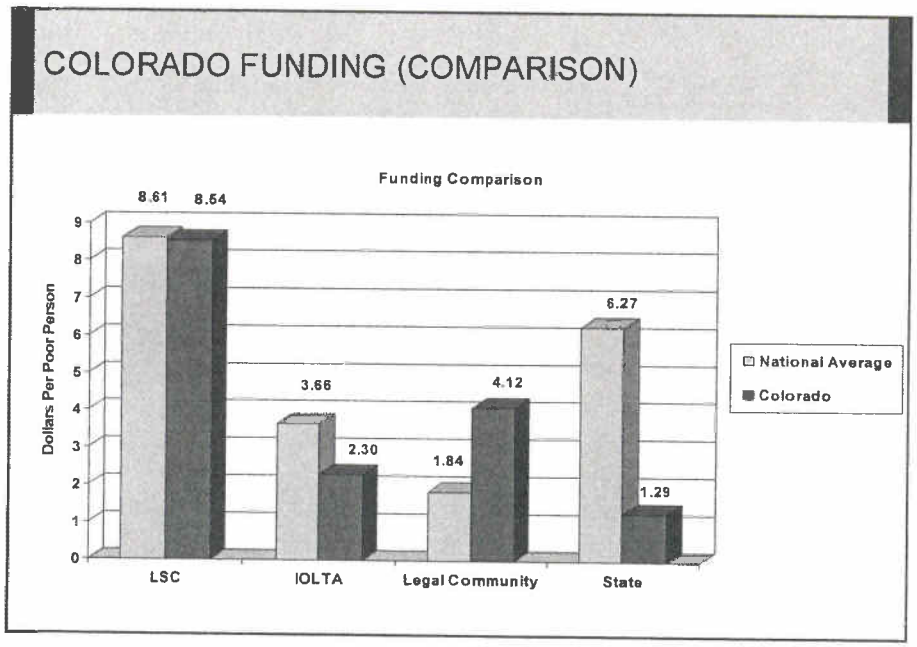

Colorado appropriates $1.29 per poor person for civil legal services, ranking 40th in the United States. The average state appropriation is $6.27.

Conclusion

The justice crisis in Colorado is evident. There is one Colorado Legal Services lawyer for every 16,890 eligible low-income individuals. Colorado has half as many legal services attorneys as it did in 1980. The State of Colorado currently spends only $1.29 per poor person on civil legal services. The salaries of legal services lawyers are well below those of Colorado Public Defenders and attorneys employed by the Colorado Attorney General, and the courts have had the resources to implement only limited programs to provide assistance to litigants who cannot afford a lawyer.

Ignoring the civil legal needs of the indigent in Colorado will not make them go away. Indeed, unmet legal needs increasingly burden our courts, result in greater homelessness, add to foreclosure rates, interrupt children's education, and exacerbate medical problems.

Addressing these legal needs will save significant costs for society. Legal services will stabilize families, reduce the number of cases clogging our courts, and help people move toward self-sufficiency and full participation in society.

Colorado needs a long-term plan to address this justice crisis. The elements of such a long term plan are contained in the following recommendations.

If someone is turned away because there are no resources to help them, there are many ramifications such as homelessness, children being taken away, foster homes, and housing issues. There is a ripple effect socially.

Molly Ryan, Colorado Legal Services

Recommendations

1. **Establish a plan to provide civil legal services for the indigent.** First and foremost, the State of Colorado should establish a four-year plan to substantially increase funding for Colorado Legal Services. The goal should be, at a minimum, to place Colorado at the average level of state funding for civil legal services programs for the poor. Beyond that, however, the goal should be to provide sufficient funding so that the civil legal needs of Colorado's indigent throughout the state can be met. Colorado must provide assistance to address legal issues involving the basic human needs of housing, health care, safety, sustenance, and child custody, through a network of CLS attorneys and pro bono programs.

2. **Increase salaries and benefits of Legal Services Attorneys to make them comparable to other public sector lawyers.** The increased funding should bring salaries and benefits for CLS employees to the same level as other public sector law offices (Public Defender's Office, District Attorney's Offices, or the Colorado Attorney General's Office). This funding will enable CLS to attract and retain lawyers who can provide high quality legal services in civil cases involving Colorado's low income citizens.

3. **Promote participation by the private bar in pro bono legal services.** The Colorado Access to Justice Commission should continue to work with the Colorado Supreme Court, the Colorado Bar Association, local bar associations, and other entities to promote and encourage increased pro bono service by private attorneys throughout the state. Such additional pro bono services will supplement the legal assistance provided to low income Coloradans through CLS.

4. **Improve services for pro se litigants.** The Colorado Supreme Court, along with the Colorado Access to Justice Commission, should continue to improve services for unrepresented litigants, including increasing the number of family facilitators and pro se offices, which are necessary to ensure effective access to the legal system.

5. **Improve access to the legal system.** The Colorado Supreme Court, along with the Colorado Access to Justice Commission, should continue to improve access to the courts for all litigants and assure that the provision of legal services is more user friendly, particularly for people with disabilities, people who are not fluent in English, and people unfamiliar with computers and other forms of modern technology.

Endnotes

1. Houseman and Perle, "Securing Equal Justice for All: A Brief History of Civil Legal Assistance in the United States." Center of Law Social Policy, Washington, D.C., 2007, at p. 1.

2.These figures are based on 2005 estimates of the U.S. Census Bureau. See Appendix A for presentation by Colorado Legal Services at hearings. Eligibility for services by CLS is based on the Federal Poverty Guidelines which are determined by U.S. Department of Health and Human Services under the guidance of the Office of Management and Budget. The guidelines were established in 1963 and updated by a cost living index each year. The guidelines are based on the cost of food for a low-income family in 1955, with the assumption that families spend one-third of their income on food. The food budget is multiplied by three to come up with the level of poverty. Houseman, "Civil Legal Aid in the United States: An Update for 2007," Center for Law and Social Policy, August 2007, footnote 17, found at http://www.clasp.org/publications/civil_legal_aid_2007.pdf.

3. Documenting the Justice Gap, Legal Services Corporation, Washington, DC, September 2005, p.9.

4. In 2006, the American Bar Association unanimously approved a resolution urging state and federal governments to provide "legal counsel as a matter of right at public expense" to low-income persons in adversarial proceedings in five areas "where basic human needs are at stake." American Bar Association (ABA), "Report to the House of Delegates No. 112A" (2006), available at http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf, (ABA Report) at 9.

5. Documenting the Justice Gap, Legal Services Corporation, Washington, DC, September 2005, p. 4.

6. Documenting the Justice Gap, Legal Services Corporation, Washington, DC, September 2005, p. 15.

7. Legal Service Corporation, "Narrative Program Directory," Washington, DC, July 1978.

8. Statement of Jonathan Asher, Executive Director, Colorado Legal Services.

9. Presentation by Colorado Legal Services at hearings. See Appendix A.

10. Formed in 2003, the Colorado Access to Justice Commission is composed of appointees from the Colorado Supreme Court, Colorado Bar Association, Colorado Governor, the President of the Colorado Senate, the Colorado Speaker of the House, the Colorado Lawyer Trust Account Foundation, the Colorado Legal Aid Foundation, and Colorado Legal Services. The mission of the Commission is to develop, coordinate and implement policy initiatives to expand access to and enhance the quality of justice in civil legal matters for persons who encounter barriers in gaining access to Colorado's civil justice system. See Appendix M for additional information.

11. Judicial districts statewide have formed local access to justice committees to address the legal needs of the low income people in their district. There are currently 11 active committees (some encompassing several judicial districts) and 3 that are in the formation stage.

12. Hearings were held in Boulder (20th JD), Breckenridge (9th JD), Colorado Springs (4th JD), Delta (7th JD), Denver (2nd JD), Durango (6th JD), Fort Collins (8th JD), Greeley (19th JD), Grand Junction (21st JD), and Pueblo (10th JD).

13. Farmer and Tiefenthaler, "Explaining the Recent Decline in Domestic Violence," Contemporary Economic Policy, 21: 2, April 2003, pp. 158-172.

14. Presentation by Colorado Legal Services at hearings. See Appendix A.

15. Testimony of Victoria Lutz at Ft. Collins hearing. See Appendix I.

16. See Appendices for witness testimony.

17. As several judges testified, they must be neutral and cannot advocate for either party. They are bound to rule according to the evidence presented by the litigants.

18. *See* note 2.

19. Presentation by Colorado Legal Services at hearings. See Appendix A.

20. "Self-sufficiency . . . measures how much income is needed for a family of a given composition in a given place to adequately meet their basic needs without public or private assistance. (emphasis deleted)" Pierce, Diana, "The Self-Sufficiency Standard for Colorado 2004: A Family Needs Budget," Colorado Fiscal Policy Institute, April 2004, p. 1, 9-13.

21. Post decree cases are those involving the parties after the divorce decree has been issued by the court. These often involve the failure of one party to comply with the divorce decree with regard to paying child support, parenting time, or relocation of one parent.

22. Testimony of Jonathan Asher, Executive Director, Colorado Legal Services.

23. Presentation by Colorado Legal Services at hearings. See Appendix A.

24. Presentation by Colorado Legal Services at hearings. See Appendix A.

25. Testimony of Jonathan Asher, Executive Director, Colorado Legal Services. For instance, there are 1.75 lawyers in Durango, whose service area includes both Indian Reservations and the counties of La Plata, San Miguel, Archuleta, Dolores, and Montezuma.

26. Colorado Rules of Civil Procedure, Rule 260.8.

27. Colorado Rules of Professional Conduct, Rule 1.2(c).

28. Colorado Rules of Civil Procedure, Rule 223.

29. Colorado Rules of Professional Conduct, Rule 6.1.

30. 36 *The Colorado Lawyer* 98 (Sept. 2007), Colorado Supreme Court Pro Bono Legal Services Recognition Program.

31. Colorado Rules of Civil Procedure, Rule 16.2(c)(2)(C).

32. The legal community donates money for the provision of legal services to Colorado's low income population through direct contributions to the Legal Aid Foundation of Colorado, other legal services providers, and local bar association pro bono projects. For instance, each member of the Delta Bar Association contributes $275 to the Association's pro bono project. Metro Volunteer Lawyers, the $250,000 Denver metropolitan area pro bono project, is funded through the dues and fund raising efforts of the Denver, Arapahoe, Adams, First Judicial (Jefferson/Gilpin counties) and Douglas/Elbert Bar Associations. The funds contributed by lawyers for pro bono projects pay for the coordination and logistics of providing pro bono services. In addition, lawyers contributed $1 million in 2005-2006 to the Legal Aid Foundation of Colorado, the funds going exclusively to CLS.

33. For instance, the Colorado Supreme Court sponsors a pro bono initiative whereby law firms and solo practitioners pledge 50 hours of pro bono work per attorney per year. It was estimated that $10 million of pro bono legal service was provided by the 35 law firms who reported they had met their pledge in 2006. This represents a small percentage of the pro bono work provided by Colorado lawyers.

34. See Appendices C through L for a description of the current programs of the local access to justice committees. CLS and local bar associations fund pro bono programs to coordinate private attorneys handling cases for low income persons. For instance the Denver Bar Association funds Metro Volunteer Lawyers with a full-time director and 3 staff to provide pro bono referral and clinics. In addition, the Denver Access to Justice Committee coordinates clinics and "ask a lawyer" programs, including LawLine9, Legal Night at El Centro de San Juan Diego, Legal Night at Mi Casa, a Bankruptcy Clinic, a Child Support Enforcement Clinic, a Collections Clinic, and a Do Your Own Divorce Clinic. Other bar associations with similar programs include Delta Bar Association, Pueblo Bar Association, Mesa County Bar Association, Weld County Bar Association, and El Paso County Bar Association.

35. University of Denver Sturm School of Law and University of Colorado Law School offer clinics to assist low income people.

36. Colorado courts, local bar associations, and Colorado Legal Services offer legal information and forms on their websites, clinics, and ask-a-lawyer programs.

37. Rocky Mountain Children's Law Center is one such organization.

38. The Legal Center for People with Disabilities and the Elderly is one such organization.

39. Testimony: Patricia Craig (Breckenridge Hearing) and Aaron Clay (Delta Hearing).

40. Colorado Legal Services provides a website (www.coloradolegalservices.org) with information for self represented litigants. The Colorado Judicial Branch provides self-help information on its webpage. (www.courts.state. co.us). Several local bar associations include information on their websites for self represented litigants (Denver – www.denbar.org).

41. Colorado Legal Services piloted a program in four counties where self service kiosks were installed in the courthouse. These kiosks were designed to help self-represented litigants prepare their own court forms. The kiosks have had mixed success because litigants have had difficulty understanding the law and are therefore unable to properly fill out the forms. In addition, many self-represented litigants are unfamiliar with the use of technology, such as computers.

42. Colorado Legal Services is piloting a project in the northeast part of Colorado that allows a lawyer to use video conferencing to interview clients who live miles from the closest CLS office. This allows a legal service lawyer to spend more time in the office working on cases than in the car traveling long distances to interview clients.

43. Testimony of Aaron Clay, Delta Hearing.

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44. The information about the amount of funding and comparisons to other states was calculated by the American Bar Association's Access to Justice Support Committee and is based primarily on year 2005 funding, the last year where a comparison can be made for all states. www.abanet.org/legalservices/sclaid/atjresourcecenter/home.html.

45. For a complete description of all funding in Colorado for civil legal services for the indigent, see Appendix B .

46. No funds were appropriated in FY2005 (July 1, 2004 to June 30, 2005).

47. See www.census.gov/compendia/statab/tables/08s0659.xls#Data!A1. IN 1979, Colorado ranked 14th in per capita income. In 2006, Colorado ranked 8th.

Attachment B

Colorado Legal Services

- CLS won't talk about you or your case to anyone who doesn't work for us, unless you give us permission to do so. If you threaten to commit a crime, including hurting yourself or another person, we will have to report that.
- You will not have to pay for the help that you get from CLS if you meet certain limits of income. CLS looks at your wages and your assets (including bank accounts, etc.) in order see if you qualify to be accepted for help by our program. We also look at the type of legal problem you are having and whether or not we have the resources available to help you.
- CLS helps seniors who are 60 and over regardless of income, but only if the individual problem falls within CLS Priorities, and if the office has the resources to provide this assistance at the times needed.
- When you contact us, we will ask you questions to help us figure out if we can help you. The questions will be about your income, your assets and your legal problem.

- What kinds of cases can we help with?
    - Family law: domestic violence, divorce, custody, guardianship and others;
    - Consumer/debt problems, including bankruptcy, garnishment, collection, repossession and others;
    - Housing law, including foreclosures, evictions, landlord/tenant issues and others;.
    - Issues for seniors, including living wills, medical durable powers of attorney, and more;
    - Problems with programs like Social Security, Medicare, Medicaid, SSI, and other government benefits;
    - Other civil (not criminal or traffic) problems; and
    - Immigration: We can help citizens and those who are (1) present in the U.S. and (2) have an acceptable "category" of immigration. These categories are complicated and assessed on a case by case basis, but include Lawful Permanent Residents and Asylees, among other categories.
- What can we do to help you?
    - We may offer you advice from an attorney about your problem;
    - We may help you file your own case in court;
    - We may refer you to a legal aid clinic, or to another program or agency that can help you
    - A paralegal in one of our offices may help you;
    - A staff attorney in one of our offices may help you; and/or
    - An attorney who takes cases from us and works for free may help you.
- What if we can't help you?
    - If your problem involves a criminal charge or traffic ticket, contact the Public Defender's office

- Check out the other resources on our website
- If you want to know how to find an attorney

Getting Help from the Courts

The Colorado Judicial Branch (Colorado courts) website has a self-help center online, with legal forms and instructions available to download and print out. Go to their website for more information.

Help from Other Organizations

This website has a list of organizations that can help you with other types of issues. Go to the client information of this website, choose the type of problem you are having in general, choose a more specific problem, enter in your location then click on 'Where to Get Other Help'.

Attachment C

Pro Bono Coordinator or Local ATJ	First Name	Last Name	Organization	Judicial District	Street Address	City
PBC	William	Alexander	Pueblo Municipal Courts	10th	200 S Main St	Pueblo
PBC	Jeanna	Baitlon	Colorado Legal Services	11th	1604 H St Ste 201	Salida
PBC	Patty	Bennett	Uncompahgre Volunteer Legal Aid	7th	300 N Cascade Ave Ste U2	Montrose
ATJ	Ilene	Bloom	Ilene Lin Bloom PC	2nd	2427 Williams St	Denver
ATJ	Loren	Brown	Donelson Ciancio & Goodwin PC	17th	8001 Arista Pl Ste 400	Broomfield
ATJ	Leslie	Castro	Leslie J Castro PC	21st	101 S 3rd St Ste 300	Grand Junction
ATJ	Natalie	Chase		18th	23204 Bay Oaks Ave	Parker
ATJ	Catherine	Cheroutes	The Cheroutes Law Firm PC	5th	130 Ski Hill Rd Ste 235	Breckenridge
ATJ	Aaron	Clay	Clay & Dodson PC	7th	415 Palmer St	Delta
PBC	Mary Ann	Corey	El Paso Cty Pro Bono Project	4th	617 S Nevada Ave	Colorado Springs
PBC	Patricia	Craig	Northwest Colorado Legal Services	14th and 5th	PO Box 2694	Frisco
PBC	Alison	Daniels	Legal Center for People with Disabilities and Old	5th	455 Sherman St Ste 130	Denver
PBC	Larry	Daves	La Junta CLS	16th	PO Box 1026	La Junta
PBC	Karen	Detmers	Pro Bono Project of Mesa County	21st	200 N 6th St Ste 203	Grand Junction
PBC	Sherri	Ferree	NWCLS-Hayden Office	14th	PO Box 1555	Hayden
ATJ	Stephen	Flynn	Colorado Legal Services	4th	617 S Nevada	Colorado Springs
ATJ	Charles	Garcia		2nd	911 Monroe St	Denver
ATJ	Tammy	Greene		1st	100 Jefferson County Pkwy	Golden
PBC	Cindi	Hendrix	Larimer Cty Bar Pro Bono Program	8th	PO Box 781	Fort Collins
PBC	Manuela	Heredia	San Luis Valley Pro Bono Project	12th	PO Box 22	Alamosa
ATJ	Barbara	Hughes	4th Judicial District	4th	PO Box 2980	Colorado Springs
ATJ	Christine	Hylbert	Boulder County Bar Association	20th	1942 Broadway Ste 205	Boulder
PBC	Andrea	Koppenhofer		19th	6809 Pumpkin Ridge Dr	Windsor
ATJ	Jennifer	Levin	The Legal Center	2nd	455 Sherman St Ste 130	Denver
ATJ	John	Livingston	1st Judicial District	1st	100 Jefferson County Pkwy	Golden
ATJ	Vicki	Lutz	Crossroads Safehouse	8th	1644 Forbrook Way	Fort Collins
PBC	Kara	Martin	Rocky Mountain Children's Law Center	2nd	1325 S Colorado Blvd Ste 701	Denver
ATJ	Anthony	Martinez	Law Ofc Anthony L Martinez Pc	11th	P O Box 767	Salida
PBC	Erika	Martinez	Boulder County Legal Services	20th	315 W S Boulder Rd Ste 295	Louisville
PBC	Lea Ann	Martinez	NWCLS-Leadville Office	20th	P. O. Box 1904	Leadville
ATJ	H	Mendenhall	Mendenhall & Malouff	16th	805 Chestnut Ave	Rocky Ford
ATJ	Sandra	Miller	Delta County Court	7th	501 Palmer St Rm 338	Delta
PBC	Sara	Nab	NE Co Legal Svcs	13th	P. O. Box 334/106 W. Larimer St.	Fleming
PBC	Kyla	Norcross	SW Bar Volunteer Legal Aid Inc	6th	1474 Main Ave Ste 200	Durango
ATJ	James	Peters		18th	6834 S University Blvd Unit 128	Centennial
ATJ	Erin	Pickering	Colorado Legal Services	16th	PO Box 1026	La Junta
	Diana	Poole	Legal Aid Foundation	2nd	1900 Grant St Ste 1112	Denver
ATJ	Daniel	Powell		12th	609 Main St Ste 109	Alamosa

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ATJ	Jennifer	Rice	Rice Law Office PC	8th	19 Old Town Square Ste 238	Fort Collins
PBC	Gail	Rodosevich	Pueblo CO Pro Bono Project	10th	1000 W 6th St Ste I	Pueblo
ATJ	Michael	Schiferl	District Judge	16th	13 W 3rd St Rm 207	La Junta
ATJ&PBC	Jonathan	Shamis	Alpine Legal Services	9th	PO Box 1890	Glenwood Springs
ATJ	Lynne	Sholler	Law Office of Lynne Sholler PC	6th	1099 Main Ave Ste 409	Durango
ATJ	Kay	Snider	Kay Snider PC	21st	446 Main St	Grand Junction
ATJ	Claire	Sollars	Solo-Practitioner	14th	PO Box 881302	Steamboat Springs
ATJ	Elizabeth	Strobel	19th Judicial District	19th	915 10th St	Greeley
ATJ	Constance	Talmage	Colorado Lawyers Committee	2nd	1801 California St Ste 4900	Denver
ATJ	Daniel	Taubman	Colorado Court of Appeals	2nd	101 W Colfax Ave Ste 800	Denver
ATJ&PBC	Dianne	Van Voorhees	Metro Volunteer Lawyers	2nd, 1st, 17th, 18th	1905 Sherman St Ste 400	Denver
ATJ	JoAnn	Vogt	Colorado Court of Appeals	1st	3854 S Valley Dr	Evergreen
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Attachment D

COLORADO LEGAL SERVICES

PRIVATE ATTORNEY INVOLVEMENT PLAN

2010

COLORADO LEGAL SERVICES

PRIVATE ATTORNEY INVOLVEMENT PLAN

2010

Introduction

The mission of Colorado Legal Services (CLS) is to provide meaningful access to high quality, civil legal services in the pursuit of justice for as many low-income persons and members of vulnerable populations throughout Colorado as possible.

To that end, CLS relies upon staff and private attorneys to serve Colorado's poverty population. According to the U.S. Census Bureau, Colorado was home to 388,952 poor persons at the time of the 2000 Census. According to the 2005-2007 American Community Survey of the U.S. Census Bureau, Colorado had at that time a poverty population of approximately 552,436 persons. Approximately 736,344 Colorado residents had incomes at or below 125% of the federal poverty level, and approximately 1,305,563 persons had incomes at or below 200% of the federal poverty level.

CLS supports its work on behalf of poor people through a mix of federal, state and local funding. The Legal Services Corporation, the State of Colorado, the Colorado Lawyer Trust Account Foundation, the Legal Aid Foundation, various United Ways, foundations, county and local governments, bar associations, grants and private donations all contribute to CLS in furtherance of its goals and programs. Several of these grants specifically target Private Attorney Involvement (PAI) activities.

CLS offers legal assistance to low-income persons in a variety of non-fee generating civil matters. The program's main office is located in Denver, with specialty units focusing on Family and Children, Health and Elder Law, and Housing Rights and Homelessness Prevention Issues. Other offices are located in Alamosa, Boulder, Colorado Springs, Durango, Fort Collins, Frisco, Grand Junction, Greeley, Gunnison, Hayden, La Junta, Leadville, Pueblo, and Salida. The Migrant Farmworker Division is headquartered in the Denver office. The Durango office serves Native Americans living on the Ute Mountain Ute and Southern Ute tribal lands.

All offices support a Private Attorney Involvement component, which is either an internal component of the office, a separate pro bono program housed in a CLS office, or a partnership with an independent pro bono program. An additional internal program has been initiated in the Pueblo office in the past twelve months.

Private Attorney Involvement Models

CLS is committed to the effective involvement of private attorneys in providing high quality legal representation to the program's low-income clients. The models developed in each office reflect the resources, needs, and socioeconomic characteristics of the varying areas of the state—which range from the eastern plains with scattered communities and limited attorney resources, to metropolitan areas with highly concentrated poverty populations and higher attorney ratios, to alpine regions connected by mountain passes with attorney resources concentrated in regional centers. CLS is continually re-evaluating its pro bono models to respond to changing client needs and available local resources. This evaluation process now includes an analysis of program resources and activities in light of LSC Program Letter 07-2, as discussed below.

PAI as an Internal Component of a CLS Office

This model incorporates PAI functions into the operation of the CLS office. Office staff include personnel dedicated either full-time or part-time to PAI activities. Client intake is performed by CLS staff who then direct cases to either CLS staff attorneys or to PAI attorneys on a panel maintained by office staff. Case disposition is determined by the needs of the client, taking into consideration the skills and resources of staff and volunteer attorneys. PAI staff recruit volunteer attorneys, assign cases to the PAI panel, track panel cases, recognize and reward participating attorneys, raise funds for PAI activities, and coordinate clinics and other PAI functions. Staff attorneys are available to mentor and assist volunteer attorneys as needed.

PAI expenses are allocated based upon contemporaneous time records of PAI personnel. Fees are paid to a limited number of private attorneys for services provided on behalf of individual clients with legal emergencies or complex cases, or in counties with limited resources. The reimbursement rates for contract services are less than 50% of the attorney's normal hourly rate and are paid by the program on the basis of a pre-approved billing statement from the attorney. Average attorney hourly rates are determined by a survey of attorneys in the service area. The hourly rate paid to contract attorneys is based upon the rate paid by the State of Colorado to Court appointed counsel.

Non-personnel costs, including telephone, supplies, equipment, etc., of the Northwest Colorado Legal Services Project (NCLSP), which is entirely a PAI program, are attributed to PAI expenses. In other offices, the cost per square foot for space actually used in conducting PAI activities is allocated to the program's PAI expenses. Personnel, travel and training costs in other offices are also computed using actual expenditures. Other costs are computed on a percentage basis in offices other than NCLSP.

Offices employing the internal PAI model are:

1. Boulder
2. Durango
3. La Junta
4. Pueblo
5. The four offices of the Northwest Colorado Legal Services Project

PAI as a Separate Pro Bono Program Housed in a CLS Office

This model maintains separate legal structures, but supports the local Pro Bono Program by providing office space, mentoring and other support. This enhances communication and coordination of efforts between the two programs. Intake is generally consolidated. Clients access all available civil legal options at one location; coordination with other human service agencies is also enhanced by this consolidation of resources. Program personnel work together to determine case disposition, taking into account client needs and the strengths and resources of each program. The Pro Bono Program handles attorney recruitment and retention activities, client referral and follow-up, and fundraising for PAI activities. CLS staff are available to mentor and assist PAI attorneys as needed.

Non-personnel costs allocated to the PAI program include space, telephone, supplies, equipment, etc. The cost per square foot for space actually used in conducting PAI activities is allocated to the program's PAI expenses. Personnel, travel and training costs are also computed using actual expenditures. Other costs are computed on a percentage basis.

Offices housing a separate Pro Bono Program are:

1. Colorado Springs, which houses the El Paso County Bar Pro Bono Program
2. Denver, which houses Metro Volunteer Lawyers
3. Grand Junction, which houses the Mesa County Bar Pro Bono Project

PAI as a Partnership with an Independent Pro Bono Program

This model maintains separate legal structures and locations. Programs may coordinate intake. Cases are referred between programs based upon each program's strengths and resources. CLS staff provide mentoring, training and other support for pro bono staff and volunteers. Pro Bono program staff assign cases to volunteer attorneys and monitor case outcomes. CLS Supervising Attorneys generally take the lead in coordinating the work of their office with the independent pro bono program in the area.

Personnel, travel and training costs are computed using actual expenditures. Other costs allocated to the PAI program are computed on a percentage basis.

Offices working in partnership with an independent pro bono program are:

1. Alamosa, partnering with the San Luis Valley Bar Pro Bono Project
2. Fort Collins, partnering with the Larimer County Bar Association Legal Aid Program and the Loveland Pro Bono Program
3. Grand Junction, partnering with Uncompahgre Volunteer Legal Aid, the Delta County Bar Association Pro Bono Program, and Alpine Legal Services
4. Greeley, partnering with Weld County Legal Services
5. Salida, partnering with the Heart of the Rockies Bar Association

Program Activities in Support of Pro Bono

CLS maintains close relationships with the Colorado Bar Association, local Bar Associations, and specialty Bar Associations such as the Colorado Women's Bar Association, the Colorado Hispanic Bar Association, the Sam Cary Bar Association, the Colorado Indian Bar Association, and the Asian Pacific American Bar Association of Colorado. CLS offices have established relationships with the 27 local Bar Associations, and several CLS staff members have served as officers of local Bar Associations. These relationships enhance the participation of Bar members in pro bono efforts and also provide a venue to offer training and support to pro bono participants.

Volunteer attorneys have access to all CLS training events, as well as materials and mentoring. The CLS website, www.coloradolegalservices.org, offers volunteer attorneys and staff of pro bono programs the opportunity to join its online advocates forum. The forum provides free access to materials and resources for advocates who provide civil legal aid to low-income persons. A link to local pro bono programs is provided to guide attorneys to local volunteer opportunities. A "Job Opportunities" link allows independent pro bono programs to post openings in their programs for statewide dissemination. A "Volunteer" link provides potential volunteer attorneys with information on program needs and contact information for all pro bono programs. A 'New Cases" posting allows attorneys to view case summaries, choose the type of case they have the expertise to handle, and offer volunteer assistance through the website. "Webcasts" on family law, healthcare, identity theft, unemployment hearings, and other topics are available. A "Calendar" provides information on upcoming trainings and events. Attorneys who join the advocates website are automatically emailed information about events and trainings to support them in their efforts to assist low-income clients. The "News" section contains links to up-to-date articles regarding poverty law and other social issues. The "Library" section provides links to available resources online and to actual sample documents such as pleadings, briefs, reports and other legal materials. A listserv fosters discussion of legal issues and strategies among CLS staff attorneys, paralegals, pro bono attorneys and volunteers. Access to additional listservs focusing on specific topics such as domestic violence, disability, and predatory lending is available through the site.

CLS has sponsored a number of Continuing Legal Education (CLE) seminars for pro bono attorneys, often in cooperation with local Bar Associations. Topics are selected by the local Bar or pro bono program, and are chosen to enhance recruitment by offering a free CLE in exchange for acceptance of a case, and to increase attorney expertise in legal topics where help is needed. CLS provides speakers and secures accreditation for these seminars.

CLS has developed a Private Attorney Involvement "Best Practices Manual" for use by staff in all CLS offices. This manual provides direction on PAI procedures, contract attorney systems, time keeping requirements, and case closing and record-keeping components. LSC regulations regarding private attorney involvement and the CLS PAI Plan are incorporated as reference materials. The manual also contains sample forms and materials related to client referrals, attorney recruitment and volunteer recognition. The PAI Manual will support CLS efforts to expand and standardize PAI activities throughout the program.

In September 2007, CLS conducted a staff training on "Basic Requirements of PAI Programs". Supervising attorneys and other PAI personnel attended this half day training in the Denver CLS office. Speakers included Alberto Lopez-Silvero (Program Analyst, LSC Office of Compliance and Enforcement). Topics covered were PAI documentation and timekeeping, quality control, contract attorney programs, litigation expenses, and other LSC rules and regulations regarding PAI activities.

The Administrator of the Northwest Colorado Legal Services Project serves as Chair of pro bono teleconferences sponsored by the Colorado Bar Association. These bi-monthly meetings are open to CLS and independent pro bono program staff. In addition to the networking and problem sharing opportunities provided by the teleconferences, pro bono personnel are also offered trainings on program management and legal topics. The NCLSP Administrator prepares the agenda, arranges speakers and moderates the teleconferences.

Summary of 2007-2008 Pro Bono Services Provided

CLS reports pro bono case information for cases closed by offices with internal PAI components. For 2007 and 2008, 941 clients received help through the program's internal PAI model. Of these clients, 62% received brief services, and 38% received extended services including representation in negotiations, administrative hearings, or court proceedings. Most cases involved family law matters (69%), housing issues (10%), or consumer or debt/bankruptcy law (8.5%). Other legal problems involved income maintenance (4%), health issues (.2%), employment (.6%) individual rights (.5%), and miscellaneous legal issues (7%). These figures do not include cases closed by independent pro bono programs with which CLS partners.

Removing Barriers to Advocacy

Since Colorado is home to a diverse and growing population of minority individuals, CLS devotes considerable effort to removing linguistic and cultural barriers to effective client advocacy. Improvements in client intake procedures, designed to increase access for minority clients, are reflected in PAI client numbers. In 2007 and 2008, 25.7% of PAI clients were of Hispanic origin. Census estimates from the 2002-2007 American Community Survey indicate that Colorado's Hispanic population reached 19.6% of its total population in those years. Native Americans totaled 1.7% of PAI clients in 2007 and 2008, versus a state population (according to Census estimates) of .9%. Black or African American clients totaled 2% of PAI clients in 2007 and 2008; Census estimates a statewide population of 3.8%. And clients of Asian descent totaled 1.7% of PAI clients in 2007 and 2008; Census estimates a statewide population of 2.7%. CLS continues to expand its efforts to serve minority clients in all its offices and programs, including its PAI elements.

Market Value

In 2007 and 2008, CLS expenditures and support for private attorney involvement in the delivery of legal services to eligible clients totaled $1,082,921.00. Pro bono attorney donations of time, in offices with internal PAI components, were valued at $3,247,790.00. Thus for every dollar allocated to PAI activities, almost $3.00 in attorney time was donated. This does not include the value of pro bono services provided to clients by the independent pro bono programs who do not report case information to CLS.

Economic Pressures on Pro Bono Programs

No discussion of current trends for pro bono programs can ignore the recession currently gripping the national and global economies. The repercussions of the economic downturn reach into every state, with consequences for businesses and nonprofits alike. Pro bono programs have seen client requests for assistance increase dramatically, while the private attorney volunteers upon whom these programs rely have experienced economic pressures which have frequently resulted in a diminished capacity for pro bono and/or financial contributions. Other funding sources have cut their distributions in response to the economic pressures they have encountered. These circumstances require pro bono programs to refocus their efforts in order to maximize client services in a radically different economic reality.

One positive outcome for pro bono programs may be a shift in case priorities away from an area traditionally more prevalent yet at the same time more problematic in terms of attorney resources: family law. Legal matters involving divorce and custody, and other related family law issues, have been readily identified by clients as matters requiring attorney assistance and therefore were more often presented to legal services programs by clients. Unfortunately, family law cases have always overwhelmed the limited number of family law attorneys volunteering to assist with them. And the focus on meeting this need often preoccupied pro bono programs to the disadvantage of other pressing legal matters experienced by low-income clients. In the present economic climate, while family law cases remain high in number, other types of cases are now presenting themselves in greater frequency: foreclosures, evictions, bankruptcy, unemployment compensation cases, debt collection cases, etc. This presents pro bono programs with the opportunity to recruit attorney volunteers in a variety of legal fields, expanding the pool of participating attorneys while also expanding the pro bono program's reputation in the client community as a source of assistance for much more than a divorce case. If programs work to actively inform their low-income clients of their availability to assist with other types of legal matters, the long term results for pro bono programs could be an expanded and energized volunteer attorney pool along with a more informed client population aware of legal alternatives for many different legal situations.

However, the economic pressures on volunteer attorneys must also be addressed. Programs must work creatively to maximize program efficiency in the referral process. Unbundling of legal services can serve to make pro bono work more attractive to economically stressed attorneys and firms. Limited representation, pro se clinics, advice clinics, forms clinics, and other mechanisms for maximizing services with limited attorney resources can help programs to address increasing client needs. Attorneys who feel that their contributions are helping to meet significant client needs may be more motivated to continue their volunteer work in tough times. Programs which work to package client cases to minimize attorney demands may improve case acceptance. (For instance, completing basic court documents prior to referral may enable attorneys to focus on case resolution and reduce demands on attorneys' staffs.) In addition, it will be more important to support attorney contributions by offering Continuing Legal Education courses for the types of cases and areas of law recently added or expanded in the pro bono programs' priorities. Attorneys may also appreciate even more when they are offered CLE credit for their direct pro bono work with clients—a benefit available in Colorado.

Response to LSC Program Letter 07-2: Guidance to LSC Programs for the Development of Enhanced Private Attorney Involvement

CLS has engaged in a thoughtful and thorough consideration of the recommendations contained in LSC Program Letter 07-2. Each recommendation presents both potential benefits and challenges in its implementation. Each is discussed below in terms of activities which CLS has already undertaken, and future directions that CLS can address in its planning process. CLS is working to include these recommendations as appropriate in each service area.

A. Using Large Law Firms, Corporate, and Government Attorneys

Large law firms exist in the Denver Metropolitan Area, and to a lesser extent in other large cities in Colorado (Colorado Springs and Fort Collins along the Front Range, and Grand Junction in western Colorado). Similarly, corporate attorneys are also generally concentrated in these large metropolitan areas.

Colorado's rural and mountain communities lack large pools of corporate and government attorneys, who may be retained on a part-time basis in smaller communities (and may already volunteer with PAI programs in their part-time private practices). Law firms in rural and mountain areas tend to consist of at most four or five attorneys (partners and associates).

1. Develop Sustained Relationships

CLS works closely with the Legal Aid Foundation, a charitable foundation dedicated to supporting civil legal services for low-income people in Colorado. The CLS Executive Director serves on the Board of the Legal Aid Foundation. The Foundation raises funds primarily through its annual Campaign for Justice. For the last few years, this annual Campaign has raised over $1 million for legal aid. Crucial to the Foundation's success each year is strong law firm giving, with many firms, large and small, giving at the Foundation's target-giving level, which for the last five years has been $300 per lawyer in the firm. Several large law firms have exceeded—some even doubling—this target donation. However, 2009 contributions have decreased as firms experience the impact of the national recession.

Independent of its work with the Legal Aid Foundation, CLS has also developed strong and sustained relationships with the major law firms in the Denver metropolitan area. Law firms have co-counseled individual cases with CLS attorneys, have undertaken client representation in cases involving significant issues for indigent clients—such as state identification requirements for public benefits programs—and have dedicated associate attorney time to *pro bono* activities through the independent PAI program, Metro Volunteer Lawyers. Other independent PAI programs in major urban areas have also enlisted local law firms as participants in *pro bono* work.

CLS and Metro Volunteer Lawyers worked with Qwest Communications Corp. to establish an attorney panel to assist with the large volume of family law cases in the Denver metropolitan area. This pilot program has provided valuable experience which will be useful in the development of future projects of this nature.

The challenge for CLS will be to transfer the knowledge and experience which has been gained in the metropolitan areas, to the rural and mountain areas of the state. CLS offices in outlying areas have focused on individual recruitment efforts, and have not often viewed their PAI efforts in terms of developing sustained relationships with corporate or government legal departments.

2. Look Beyond Geographical Boundaries

CLS has worked with branch offices of national law firms, which are often located in the Denver Metropolitan Area. In addition, CLS has worked with the Colorado Bar Association to recruit attorneys from large urban areas to assist with rural projects. (For instance, Northeast Colorado Legal Services, an independent PAI program, for several years utilized volunteer attorneys from the Colorado Bar Association in "Flying Squads" to staff family law clinics on a regular basis.) As a statewide program, CLS can focus PAI attorney resources on regional efforts such as bankruptcy clinics located near federal bankruptcy court branch offices, and CLS is developing such efforts at present. CLS has recently worked with the Colorado Bar Association to initiate a pro bono Foreclosure Project, offering training to local volunteer attorneys who agree to accept cases.

3. Provide Training, Research and Technical Assistance

A major resource for PAI attorneys is the CLS advocates website, which PAI attorneys are encouraged to join. The website provides access to sample pleadings, information on available resources, and direction on basic issues such as court indigency rules. The website is described in more detail in the section, "Program Activities in Support of Pro Bono", above, which also details other technical and training assistance provided by CLS to PAI attorneys and programs.

Trainings provided to PAI attorneys and programs have been offered on an ad hoc, case-by-case basis through local CLS offices. CLS will include in its planning process the development of

program-wide goals and strategies for future PAI training and support projects, and will use the results of its current Legal Needs Survey in its development of such goals and strategies.

4. Develop Signature Projects

As described above, CLS partnered with Metro Volunteer Lawyers to develop a family law panel comprised of corporate attorneys. Other thematic projects have included a response to new state identification laws and procedures which impacted low-income clients seeking to obtain or retain public benefits, with PAI attorneys acting as counsel for clients challenging the new state policies. These projects, while concentrated in the Denver Metropolitan Area, have often been of benefit to low-income clients statewide. CLS will continue and expand its efforts to involve PAI attorneys in signature projects, encouraging local CLS offices to partner with law firms and corporate or government attorneys on such signature issues whenever appropriate. CLS recently worked with the Colorado Bar Association to initiate a Foreclosure Project statewide.

5. Pursue Transactional Legal Work

CLS lists as one of its Program Priorities: "Maintain and Enhance Economic Stability". CLS will review responses to its current Legal Needs Survey to evaluate the need for transactional work on behalf of its clients, and identify potential resources to respond to the identified need, including partners such as the Colorado Bar Association, the Access to Justice Commission, law schools, law firms, and corporate and government attorneys.

6. Collaborate and Co-Counsel

As stated above, CLS has co-counseled with PAI attorneys on individual client cases. CLS will continue to seek opportunities to collaborate with individual attorneys, law firms or PAI programs as appropriate.

7. Involve Government Attorneys

CLS has in the past worked with attorneys from the office of the Colorado Attorney General. However, CLS has not invested significant resources in the development of volunteer opportunities for government attorneys. CLS will include government attorneys in its consideration of its response to the current Legal Needs Survey.

B. Using Small Firms, Solo Practitioners, and Judicare Attorneys

CLS makes extensive use of the PAI contributions of small firms and solo practitioners throughout Colorado. Numbers of attorneys may be limited in rural and mountain areas of the state, however. In particular, economically-depressed areas of the state, such as southeastern and northeastern Colorado, support few private attorneys. Low population numbers also result in smaller attorney panels in other rural and geographically isolated areas. Rural attorneys tend to be concentrated in county seats and other regional centers.

1. Provide Support for Practitioners

CLS provides secondary malpractice insurance coverage to attorneys participating in internal PAI programs. The CLS Executive Director can approve the extension of primary malpractice insurance coverage to retired or corporate attorneys on a case-by-case basis. Internal PAI programs often employ mentors for new or inexperienced volunteers; mentors may be other PAI attorneys or CLS staff attorneys. The CLS website is available to all practitioners regardless of firm size or location. CLS has provided numerous training opportunities for all PAI attorneys. Training may consist of a Continuing Legal Education seminar focused on an area of the law which is either a significant legal need for the local low-income client population,

or a legal topic of interest to local attorneys which is offered as a recruitment incentive. CLS will investigate the opportunities provided by new technology including video casting and web casting to provide training to attorneys in isolated rural communities on a cost-effective basis.

2. Provide Screening of Cases

CLS offices pre-screen all clients who are referred to internal PAI programs, and many offices working with independent PAI programs also perform screening activities for those programs. (In fact, some CLS offices conduct joint case review with staff of independent PAI programs, which facilitates case referral to those programs.) Referral packets prepared for PAI attorneys typically include client intake and eligibility information as well as case facts; retainer forms and information on CLS policies are also provided.

3. Encourage Recruitment Incentives

CLS has collaborated with the Colorado Access to Justice Commission to promote PAI recruitment. Successful collaborations resulted in the adoption by the Colorado Supreme Court of initiatives to offer Continuing Legal Education credits to attorneys handling *pro bono* cases, and the establishment of a Court program to recognize law firms and individual attorneys who fulfill the annual Pro Bono Legal Services Commitment (50 hours of *pro bono* legal service by each attorney). In addition, in 2007, Colorado Court Rules governing admission to the Bar were amended to allow retired or inactive attorneys to participate in representation of low-income clients through nonprofit PAI programs.

4. Use Retired and Inactive Attorneys

The 2007 amendment to Colorado Court Rules, allowing retired or inactive attorneys to participate in representation of low-income clients through nonprofit PAI programs, opened the door to increased participation by these attorneys. CLS will monitor the effectiveness of this rule change in encouraging increased participation by retired or inactive attorneys. CLS Volunteer Administrators are also monitoring the anticipated volunteer contributions by "baby boomers" who are now beginning to reach retirement age; it is anticipated that this population, which has affected social trends throughout its lifetime, will similarly impact volunteer efforts and volunteer programs at this stage.

C. Involving Law Schools and Law Students

Colorado has two law schools: The University of Denver Sturm College of Law, and the School of Law of the University of Colorado at Boulder. Both universities encourage public service work by their law students. Both have a history of participation in issues impacting the civil legal needs of low-income persons.

1. Involve Legal Clinics

Law students in Denver have participated in legal clinics for over 100 years. The Civil Litigation Clinic has engaged students in several projects developed in cooperation with Colorado Legal Services. For instance, the Welfare Litigation Task Force has addressed issues including lack of adequate notices to recipients of public benefits. Task Force members include students and *pro bono* attorneys from local law firms. Boulder law students participate in a civil clinic as part of the Legal Aid and Defender Program, which began in 1948.

2. Instill Support for the Future

CLS works collaboratively with Metro Volunteer Lawyers to encourage *pro bono* and public service commitments among law students. CLS staff often serve as presenters on topics related to poverty law and public service careers. CLS and Metro Volunteer Lawyers conduct a recruitment drive among recently admitted attorneys at swearing-in ceremonies conducted by the Colorado Supreme Court.

3. Develop Research and Training Resources

Law students have participated in research and representation as described above. Law students are currently offering research services to PAI attorneys in Colorado.

4. Collaborate and Partner

The two law schools have been included in the statewide partnership of legal services programs, Bar Associations, courts, law firms, and poverty law programs which work to improve access to justice for low-income Coloradans.

D. Involving the Judiciary, Bar Associations, Access to Justice Commissions, Community Organizations and Others

1. Obtain the Support of the Judiciary

As stated above, Colorado is fortunate to have a supportive judiciary. The Colorado Supreme Court has adopted several initiatives designed to encourage PAI participation by attorneys and law firms. Judges and magistrates from appellate and district courts serve on the statewide Access to Justice Commission as well as local Access to Justice Committees.

2. Encourage Bar Association Participation

The Colorado Bar Association and many local Bar Associations are active participants and collaborative partners with CLS in activities to support access to justice. The CBA's Local Bar Relations and Access to Justice division provides staff assistance to the statewide Access to Justice Commission, and staff assistance to local PAI programs. The CLS Executive Director served as 2007-2008 Chair of the CBA's Availability of Legal Services Committee. Many local Bar Associations provide financial support to their PAI programs and encourage member participation in *pro bono* activities.

3. Seek Support from State Access to Justice Entities

Colorado's Access to Justice Commission has been an active partner with CLS in efforts to expand and encourage *pro bono* participation. The Executive Director of CLS serves as a Commissioner on the statewide Access to Justice Commission. Many initiatives, described above, have been successfully introduced through this collaboration. In addition, statewide Access to Justice conferences have encouraged local efforts by regional Committees.

4. Partner with Community Organizations

CLS offices have often partnered with community organizations in addressing client needs. CLS encourages its local offices to investigate and collaborate with local programs that support clients' nonlegal needs.

5. Integrate Technology

CLS is currently supporting several technology initiatives, most notably the CLS website, which serves both clients and advocates (including PAI attorneys) with extensive listings of information and resources. CLS is also encouraging its offices to develop other technology, including video conferencing, web casts, and online conferencing, and is now developing a coordinated intake system. Internal PAI programs have been included in these efforts.

E. Recognition

CLS works with the Colorado Bar Association to recognize PAI contributions by attorneys, law firms, and organizations. The CBA offers several annual awards. The "Donald W. Hoagland Award" honors outstanding leadership in the development, support and ongoing efforts of *pro bono* representation of low-income persons. The "Jacob V. Schaetzel Award" honors attorneys or non-attorneys whose commitment, energy and innovative approaches to the delivery of legal services serve as models for others in the community. The "Marilyn T. Meadoff Award" honors attorneys or non-attorneys (including legal services employees) who have made significant contributions to the representation or advancement of representation of Colorado citizens. The "Jack Donahue Award" honors attorneys or non-attorneys (including legal services employees) who have made significant contributions to the development of innovative programs or approaches to serving the unmet legal needs of Colorado citizens. And the "*Pro Bono* Coordinator of the Year Award" honors the *pro bono* coordinator in Colorado who, in the past year, contributed the most to providing civil legal services to the disadvantages through a local bar or law firm sponsored *pro bono* project or other law related *pro bono* project. (Both the Meadoff Award and the Donahue Award are named in honor of former employees of legal services programs in Colorado.) In addition, the CBA provides "100 Hour Club" certificates for PAI attorneys who contribute 100 hours in one year to the representation of low-income *pro bono* clients. CLS offices with internal PAI programs also offer attorney recognition activities for *pro bono* attorneys on their panels. For instance, in the Northwest Colorado Legal Services Project, all attorneys who participate in client representation receive annual certificates in recognition of their work. Boulder County Legal Services presents its awards at an annual *Pro Bono* Lunch.

Individual Office Reports

Alamosa office. The Alamosa office works with an independent pro bono program, the San Luis Valley Pro Bono Project. This program shares the same six-county territory—and similar case guidelines—with the Alamosa office. The pro bono program conducts a monthly clinic, Thursday Night Bar (TNB). CLS refers some consumer, family and housing cases, as well as conflict cases, to TNB. The pro bono program also refers clients to CLS, especially in specialized poverty law cases. CLS has hosted CLE programs for San Luis Valley attorneys who volunteer with the pro bono program.

The six-county 12th Judicial District served by the Alamosa office is an area of high poverty in south central Colorado. The poverty population of 9,067 persons was 19.6% of the total population in 2000. The median household income in 2000 was $27,650 (compared to the state median of $47,203). This largely rural, agricultural area supports few private attorneys, who are concentrated in Alamosa and Monte Vista. Since local attorney numbers are limited, and private attorneys have a client base with relatively moderate incomes, CLS makes use of contract funds to enable attorneys to accept referrals from the CLS office without jeopardizing their ability to remain in practice. CLS has recruited contract attorneys to handle protective orders and other family law cases, and will continue to explore ways to make efficient and effective use of PAI resources. The rate of contract payment is less than half of the local prevailing market rate for similar attorney services.

Boulder office. The Boulder office maintains an internal PAI component. This CLS program is known locally as Boulder County Legal Services (BCLS), the name under which the program began over 40 years ago. It has a long history of providing pro bono legal services hand-in-hand with its staff attorney services; over 50% of cases are handled by the pro bono panel. The office partners with the Boulder County Bar Association to support a wide range of PAI activities, including the Pro Se Assistance Program, contract referrals of emergency cases, and a large pro bono panel accepting a wide range of civil legal matters for advice and representation. Funding is provided by CLS, the local Bar Association, and a variety of other local funders.

Boulder County, the 20th Judicial District, is a largely urban area with a suburban fringe. It mirrors the state poverty rate, although the 2000 median household income of the area exceeded the state figure ($55,816 in Boulder County versus $47,203 for Colorado). It had a poverty population in 2000 of 26,818 persons. The office is able to serve this population with one attorney and one paralegal due to the contributions of the private attorney panel.

Boulder has a non-attorney volunteer intake program which conducts client interviews at the main office in Louisville as well as an intake site in Longmont. Clients confined to nursing homes, their own homes or other facilities are interviewed at their residences. BCLS staff review all intakes and determine the appropriate disposition for each. Cases are referred to the PAI component when resources and expertise are available for the civil legal problem involved.

The supervising attorney of the Boulder County office reviews cases prior to referral and determines which cases are appropriate for the PAI panel. A pro bono coordinator devotes at least half of her time to the referral and oversight of PAI cases, as well as attorney recruitment and retention. All cases are monitored closely. Both clients and attorneys are asked to complete case closure and survey forms which record case outcome and client satisfaction. Conflict checks are completed by the office prior to acceptance of a case, and by each volunteer attorney prior to the referral of each case.

The Pro Se Assistance Program is a one-on-one session where eligible clients receive assistance from pro bono attorneys in completing their family law cases. Clients may return for additional assistance as often as needed. A volunteer mediator program pairs clients with both attorney and non-attorney mediators.

The Availability of Legal Services Committee of the Boulder County Bar Association meets monthly to offer support and direction to the BCLS office. Each year, the Committee sponsors a CLE presentation for PAI attorneys on a legal topic that affects program clients. The Committee also submits a yearly article to the Boulder Bar newsletter on an issue related to PAI efforts.

An annual pro bono awards lunch recognizes attorney volunteer efforts. BCLS presents certificates recognizing attorney donations of time and participation by law firms. A special award, the John Marshall Award, recognizes an outstanding volunteer attorney. The luncheon also offers CLE credit to attendees through presentations related to pro bono ethical obligations.

An active Access to Justice Committee has as its main purpose the improvement of justice to all citizens in the Twentieth Judicial District (Boulder County). The BCLS Pro Bono Coordinator participates in this Committee, which has nine members and three ex-oficio members, including three Judges and one Magistrate. The Committee's focus remains the facilitation of access for limited English-speaking persons through programs for diversity training, interpreters, and translation of court documents. The Committee supports a program, "De Puerta a Puerta" ("From Door to Door"), which uses bilingual volunteers to assist monolingual speakers who have contact with the courts in accessing other agency services.

Colorado Springs office. The Colorado Springs office houses an independent pro bono program, the El Paso County Bar Pro Bono Program. CLS provides office space and other in-kind support. Since August 2004, a Pro Bono Coordinator hired by the Bar Association has been working to refer cases to the Bar's pro bono panel.

Colorado Springs is primarily responsible for El Paso, Lincoln and Teller Counties and shares responsibility for Fremont, Park, Chaffee and Custer Counties with other CLS offices. El Paso, the population center, is a largely urban area. Lincoln County to the east is a suburban/rural mix; Teller County to the west is a mountain/rural area with new housing developments occupied by higher income commuters to city jobs. The median household income in 2000 was about $5,500 below the state figure, with the exception of Teller County, where the new bedroom communities raised the median household income to $50,165. The 2000 poverty population of 42,004 was 7.7% of the total population. Attorneys are concentrated in El Paso County, as are the majority of the poverty population.

Intake is performed by CLS staff, who complete an internal conflict of interest determination. The CLS supervising attorney determines appropriate case disposition. Cases are referred to the pro bono panel when resources and expertise are available for the civil legal problem involved. Conflict checks are performed before cases are accepted by volunteer attorneys. The Pro Bono Coordinator monitors case progress, and is also responsible for recruitment of panel attorneys.

CLS conducts a pro se divorce clinic; private attorneys volunteer at a follow-up session once each month to answer individual client questions in a one-on-one setting. The attorneys at the follow-up session also meet with other people who have post decree issues or need advice on how to enforce their court orders (through actions such as contempt filings). Finally, the office is working with a panel of private attorneys to respond to the high number of foreclosures in El Paso County.

A private attorney works with CLS staff to prepare wills for eligible seniors. The attorney conducts group seminars and then follows up with individual seniors to complete their wills. This service was added in 2006 and helped 25 to 30 seniors in its first year of operation.

The CLS managing attorney meets monthly with the Pro Bono Coordinator to consult and update one another. Through their joint efforts, a recruitment drive began in early 2007 to expand the volunteer attorney panel.

A member of the CLS staff serves on the Access to Justice Committee of the Fourth Judicial District, which was instrumental in securing Bar funding for the Pro Bono Coordinator position. The partnership between CLS and the Bar program has strengthened pro bono efforts. Attorney recruitment has expanded, and more cases are being referred to the pro bono panel. CLS provides attorney training, consultation and mentoring for pro bono attorneys, in addition to its support of the Pro Bono Coordinator.

Denver office. The Denver office houses an independent pro bono program, Metro Volunteer Lawyers (MVL). MVL, a department of the Denver Bar Association, is funded by its five local Bar Associations, the Colorado Lawyer Trust Account Foundation, and other local funders. CLS provides office space and other in-kind support.

The metropolitan Denver region served by this office (along with nearby Gilpin County in the mountains) contain the largest concentration of poor persons in the state—129,345 according to the 2000 Census. The poverty population was 7.9% of this area's total population in 2000. The median household income of $56,440 was above the state median. Most of the state's attorneys practice in this metropolitan area.

Intake is conducted by CLS staff using a non-attorney volunteer intake model. The supervising attorney of the CLS Intake Unit determines appropriate disposition of each case. Prior to case acceptance, an internal conflict of interest determination is completed. Appropriate cases are then forwarded to MVL. Cases which are referred to MVL are then reviewed by MVL staff who determine if the case is appropriate for referral and if resources are available to refer the case to the pro bono attorney panel. Private attorneys complete their own conflict of interest determination prior to accepting a case from MVL.

The majority of MVL cases referred involve domestic relations. Other cases include consumer, bankruptcy, landlord-tenant, real estate, wills/powers of attorney, guardianship/conservatorships, probate, and tax issues. The program has a special panel of attorneys who assist persons with immigration cases.

MVL also coordinates a panel, originally developed by CLS staff, which accepts referrals of Social Security and SSI cases related to disability determinations. The CLS Health and Elder Law Unit developed this private attorney panel to leverage attorney resources for both fee-generating and non-fee-generating cases. Attorneys accept cases in blocks of three, which include two fee-generating and one non-fee-generating matter. Cases involving initial claims often result in lump sum payments to clients, from which clients can pay their attorneys. Cases involving Continuing Disability Reviews, situations in which clients are being re-evaluated to document their continuing eligibility for disability payments, do not often result in lump sum payments which could be used to pay attorneys. By combining the cases in each block referral to an attorney, MVL staff are able to ensure assistance to clients without the means to pay their attorneys, while maintaining the attorney panel by offering them fee-generating cases which enable them to continue serving these clients.

The CLS Health and Elder Law Unit also maintains an informal panel of attorneys who assist clients with Medicaid estate planning on a reduced-fee or pro bono basis.

Cases may also be referred to MVL's Family Law Court Program. MVL coordinates monthly Family Law Court Program clinics in Douglas, Denver, Adams, Arapahoe, and Jefferson Counties. THE FLCP assists clients with relatively uncomplicated, uncontested divorce or custody matters where the other party is not represented by an attorney. Each District Court in the metropolitan area has set aside specific dates on which FLCP cases are scheduled. Volunteer attorneys and paralegals, recruited by MVL, are available to assist the clients through the court process. Clients meet with MVL staff or volunteer attorneys or paralegals to draft court pleadings to file a pro se action. MVL staff file the paperwork and arrange service of process. Clients then meet again with a volunteer attorney or paralegal to complete discovery paperwork and prepare for their court hearings. Volunteer attorneys meet with clients on the day of their hearings, enter an appearance and obtain final orders, and then withdraw from the case. If the case is not resolved at court, MVL may set the case for a subsequent court date or assist the client in obtaining individual representation. MVL also coordinates post-decree clinics for domestic relations cases in Adams, Arapahoe, Denver, Douglas, and Jefferson Counties.

The staff of MVL have access to CLS staff attorneys who specialize in poverty law issues. Substantive and skills training is provided for attorneys who accept pro bono cases from MVL in the areas of bankruptcy, divorce and family law, housing issues, legal issues of the elderly, Medicaid eligibility and public benefits. MVL partners with the Denver Bar Association and with the Colorado Bar Association's Family Law Section to pair less-experienced attorneys with more experienced mentors. Informal advice, technical assistance and support are provided on an individual basis as needed.

MVL monitors case progress and obtains attorney case closure reports and client satisfaction surveys upon the completion of cases.

Access to Justice Committees in the First, Second and Seventeenth Judicial Districts work with CLS and MVL to expand clinics in underserved areas. The Committees are also assisting in attorney recruitment efforts.

Durango office. The Durango office partners with the Southwest Bar Association to sponsor Southwest Bar Volunteer Legal Aid, Inc. A CLS paralegal serves as part-time pro bono coordinator for this internal PAI program. Funding is provided by CLS, the Bar Association, and other local funders. The supervising attorney of the CLS Durango office served as President of the local Bar Association in 2006, and received the 2006 Southwestern Colorado Bar Association's Professionalism Award.

The counties served by this office overlap three Judicial Districts in the southwestern corner of the state. This is an area of high poverty (11,292 persons, or 12.3% of the population, in 2000), with a median household income in 2000 of $37,614. One attorney and one paralegal (along with grant attorneys when available) serve this 9,474 square foot region, which includes two tribal lands (the Ute Mountain Ute and Southern Ute). This rural, agricultural area supports few private attorneys, who are concentrated in Durango and Cortez. The Durango office has utilized contract funds to enable private attorneys to accept referrals without jeopardizing their ability to remain in private practice. The rate of contract payment is less than half of the local prevailing market rate for similar attorney services.

The coordinator screens and refers eligible clients to the pro bono panel after consultation with the supervising attorney and pro bono attorney advisors. Cases are referred to the PAI component when resources and expertise are available for the civil legal problem involved. CLS also refers Title III senior cases to pro bono attorneys. The coordinator runs pro se dissolution clinics in cooperation with the Women's Bar Association, and CLS dissolution manuals are provided to financially qualified clinic participants. Pro bono attorneys have been recruited to present senior legal workshops on topics such as living wills and powers of attorney. The pro bono coordinator monitors all PAI cases. Both clients and attorneys are asked to complete case closure and survey forms which record case outcome and client satisfaction. Conflict checks are completed prior to the acceptance and referral of each case.

An active Access to Justice Committee meets every two months, and has tackled local issues such as court fee waivers and expanding access to minority clients. The Access to Justice Committee has created a Spanish-language video explaining a defendant's rights in criminal proceedings, through a grant from the Colorado Bar Foundation. Other projects include a Spanish-language video for pro se litigants, and assistance

to construction subcontractors seeking payment of wages. The Durango supervising attorney serves on the Board of Directors of this Committee. Eleven other Committee members include a local Judge and Magistrate.

Fort Collins office. The Fort Collins office refers its conflict cases and non-priority cases to an independent pro bono program, Larimer County Bar Association Pro Bono Program, located in Loveland and Fort Collins. This program handles many of the same cases as the CLS office. The pro bono program holds screening clinics weekly; clients are either accepted for representation or given advice on how to proceed pro se. The CLS office also assists the pro bono programs with self-help clinics on family law issues.

The Fort Collins office serves Larimer County, an urban/rural mix with a median household income above the state median. Its 22,600 poor persons were 8.9% of the total population in 2000. It also serves Logan, Phillips, and Sedgwick Counties. These counties, part of the 13th Judicial District in the northeastern area of the state, are largely rural/agricultural, and had a poverty rate of 10.9% according to the 2000 Census.

Grand Junction office. The Grand Junction office covers a wide territory, and employs different PAI models in different judicial districts. In Mesa County, the office houses an independent pro bono program, the Mesa County Bar Pro Bono Project. In the Ninth Judicial District, it partners with an independent program, Alpine Legal Services. And in the Seventh Judicial District, it partners with two independent programs, Uncompahgre Volunteer Legal Aid and the Delta County Bar Association Pro Bono Program.

The four counties served by this office include Mesa County, a rapidly growing area of west central Colorado, where the Grand Junction office is located. Garfield County, to the north of Mesa County, is an urban/rural mix (with urbanization spreading from the eastern side of the county westward). Montrose and Delta Counties, to the east and south of Mesa County, are rural areas which have seen substantially increasing in-migrations of second homeowners and transplants from more expensive areas of the state and nation. The median household income of the area (with the exception of Garfield County) is below the state median. The poverty population of 22,199 persons was 10% of the local populations in 2000. This 9,656 square–mile area is served by the staff of the Grand Junction CLS office. The office's cooperative relationship with the pro bono programs in its area enables it to more effectively serve this large region.

The Director of the Mesa County Bar Pro Bono Project works out of the Grand Junction CLS office. CLS provides office space and other in-kind support. CLS conducts joint client intake for both staff and pro bono cases. CLS has broadened its intake to include cases suitable for referral to pro bono attorneys, enabling the pro bono Director to increase the size of the attorney panel by offering a wider variety of cases. The CLS supervising attorney makes the final determination regarding case disposition. Cases are referred to the pro bono program for cases that fall within their priorities and for which expertise is available. Conflict checks are completed prior to acceptance of a case by the CLS office. Conflict cases are always referred to the pro bono program for consideration. Each volunteer attorney also conducts his or her own conflict check prior to accepting a referral from the pro bono program.

CLS staff and the Pro Bono Director assisted in the creation of a Young Lawyers Division of the local Bar Association, and are working with this new Bar program to encourage pro bono participation. Staff and pro bono personnel have also worked together to create community clinics to assist clients with pro se divorce and custody matters. CLS and the pro bono program work cooperatively to serve victims of domestic violence needing protection orders. The Pro Bono Director generally assists victims with the initial paperwork to obtain a temporary protection order, which must be served upon the abuser, who then has a right to a hearing before the order is made permanent. CLS staff attorneys or occasionally pro bono attorneys attend the hearing to help the victim obtain the permanent protection order. Clinics are also offered to seniors on a variety of elder law topics, as a joint project of CLS and the pro bono program.

The partnership between the two civil legal aid programs has grown significantly since CLS began housing the independent pro bono program in 2003. The programs have an excellent working relationship, sharing office space and client workload, and provide clients with a seamless service that avoids duplication of effort and simplifies access to services.

The Grand Junction CLS office accepts referrals of Garfield County cases from Alpine Legal Services. CLS offers training to and shares expertise and materials with the pro bono program, and is negotiating the development of cooperative guidelines between the two programs.

Uncompahgre Volunteer Legal Aid conducts joint intake for itself and the Grand Junction CLS office in Montrose County. A CLS staff attorney conducts regular pro se family law clinics on divorce and custody issues for the pro bono program. The CLS attorney also responds to individual client questions following the clinic, and provides advice and direction to the pro bono program coordinator on pending cases. In addition, the CLS attorney now provides regular bankruptcy clinics, which are group sessions accompanied by individualized attention to each client.

The Delta County Bar Association Pro Bono Program provides referrals to CLS in conjunction with the pro bono and law referral services it performs in Delta County by agreement with the Delta County Bar Association. In addition, CLS and the Delta County program coordinate community clinics including a foreclosure clinic that was offered in August 2008.

A CLS staff attorney, the Uncompahgre Volunteer Legal Aid pro bono program coordinator, representatives from the Delta County Bar Association Pro Bono Program, and the Coordinator of the Gunnison office of Northwest Colorado Legal Services Project participate in the Seventh Judicial District Access to Justice Committee. This Committee meets quarterly through video-conferencing, and has developed monthly advice clinics and workshops, and has sponsored fundraisers to support local pro bono programs.

Greeley office. The Greeley office works with an independent pro bono program, Weld County Legal Services. This office also serves Morgan, Washington, and Yuma Counties in northeastern Colorado, a rural/agricultural area with a 12% poverty rate according to the 2000 Census.

Weld County has the majority of the poverty population, which in 2000 totaled 22,019 or 12% of the population. Weld County is an urban/rural mix with a largely agricultural economy supplemented by animal processing plants in Greeley. Most attorneys practice in Greeley, the population center. The median household income for the county was $42,321 in 2000.

CLS staff conduct intake, complete conflict checks, and refer clients to Weld County Legal Services. The pro bono program maintains a panel of volunteer attorneys who accept both CLS clients and clients who apply directly to the program. Most clients receive a thirty-minute consultation with an attorney. Each attorney completes his or her own conflict check prior to acceptance of a case. A staff attorney of the Greeley CLS office is a member of the Board of Directors of Weld County Legal Services, which has recently merged with the local Access to Justice Committee. Weld County Legal Services conducts its Call a Lawyer program out of the CLS offices, as well as some of its legal clinics. WCLS offers multiple clinics covering a variety of legal topics.

La Junta office. The La Junta office has developed a contract attorney program as an internal component of the office. Intake is conducted by CLS office staff, with the attorney Administrator of the Southeast Colorado Legal Services Project making the final determination regarding case referral. The Administrator has developed a panel of attorneys willing to accept case referrals on a contract basis. Clients are matched with contract attorneys for representation in cases meeting office priorities. Cases are referred to the PAI component when resources and expertise are available for the civil legal problem involved. Office staff monitor the progress of each case and record case outcomes. Conflict checks are completed prior to the referral of each case to a contract attorney.

The contract attorney model was developed in response to the economic profile of the ten counties served by the CLS La Junta office. Southeastern Colorado is an area of high poverty and limited resources. The La Junta CLS office serves an area of 19,838 square miles, with a poverty population (in 2000) equal to 16.4% of the total population (compared to 10.2% for Colorado in 2000). The median household income in 2000 was $27,513 (compared to the state median of $47,203). The CLS office is staffed by one full-time attorney, one half-time attorney, and one paralegal. Use of private attorneys enables this office to more effectively serve its large geographic territory. Local attorney numbers are limited, however, and the few attorneys in the area are also called upon to accept a significant number of court appointments in criminal and

some civil matters (such as dependency and neglect cases). They also have a client base with relatively moderate incomes. The availability of contract funds enables private attorneys to accept multiple referrals from the CLS office without jeopardizing their ability to remain in practice. The rate of contract payment is less than half of the local prevailing market rate for similar attorney services.

In 2008, a grant paralegal was added in the Pueblo office, to serve both the Pueblo and La Junta PAI programs. This half-time paralegal position supports the La Junta contract referral program and assists with community education, and has established Family Law Court Programs (modeled on the Denver program) in Walsenburg and Trinidad. The paralegal will also seek local funds to support continuation of this position beyond the initial grant period.

Northwest Colorado Legal Services Project. The Northwest Colorado Legal Services Project (NCLSP) is entirely a PAI program. Its four offices (in Frisco, Gunnison, Hayden and Leadville) are staffed by pro bono coordinators who work with local pro bono attorney advisors to determine the disposition of cases. Well over half of NCLSP's funds are provided from the Legal Services Corporation grant to CLS. The rest of the project's funds are raised locally by CLS from various United Ways, Bar Associations, local governments, foundations and agencies. The Gunnison coordinator position is currently vacant, and CLS management plans to work with the local Bar Association, volunteer attorneys, and other service agencies and local supporters to evaluate anticipated service demands and potential delivery mechanisms for this one-county area.

The eleven counties served by NCLSP contain mountain resort communities and rural enclaves in a 21,056 square mile area of northwestern Colorado. There are no large population centers, although several counties are experiencing population booms as retirees and second homeowners are attracted to the scenic mountain communities. Resultant cost of living issues have driven low income residents to concentrate in the remaining affordable areas. The median household income varies widely among the eleven counties, with Clear Creek, Eagle, Grand, Pitkin, Routt and Summit Counties exceeding the state median income, and Gunnison, Jackson, Lake, Moffat, and Rio Blanco Counties falling below the state median income. Attorneys are concentrated in the higher income areas, but are often willing to travel to serve low income clients in nearby poorer counties.

Supervision is provided by local attorney advisors and by CLS management. The coordinators are responsible for conflict of interest checks, interviewing and screening potential clients, recruiting volunteer attorneys, assigning cases to participating attorneys, and monitoring case progress. Both clients and attorneys are asked to complete case closure and survey forms which record case outcome and client satisfaction. Nearly all of the actual legal services are provided to clients by attorneys on a pro bono basis. In several communities emergency cases or complex legal matters are referred to a small panel of attorneys who contract with NCLSP to provide services at a greatly reduced rate.

A toll-free legal information hotline serves the eleven counties of NCLSP from the Leadville office, acting as access point for most initial client contact, providing information and referral services, performing basic screening of applicants, and serving as a contact point for volunteers. NCLSP works closely with local libraries to provide legal information materials and CLS application packets, as well as community education seminars, at the libraries. Local pro bono attorneys staff advice clinics in Eagle, Gunnison, Moffat, Routt and Summit Counties. Title III senior legal services are provided by volunteer attorneys in eight NCLSP counties.

NCLSP staff have joined local Access to Justice Committees in the Seventh Judicial District and the Fifth Judicial District. The Committee in the Seventh Judicial District has initiated advice-only panels and is working on a criminal advice-only panel to advise defendants regarding plea deals. The Committee in the Fifth Judicial District has developed a resource list and is working on landlord-tenant and employment law videos. NCLSP staff also participate in local Bar Association activities and meetings. A "Volunteer Attorney of the Year" is selected annually from NCLSP's eleven-county area, and all volunteer attorneys receive annual certificates of appreciation, acknowledging their contributions to clients.

Pueblo office. The Pueblo office has initiated an internal pro bono program, staffed by a half-time Pro Bono Coordinator. The supervising attorney of the office serves on the Pro Bono Committee of the Bar, and is the local Bar representative to the Colorado Bar Association Board of Governors, and past President of the local

Bar. Staff attorneys participate on the local Bar's domestic violence task force, and offer presentations on senior legal issues to employees of health care organizations serving senior citizens.

Pueblo County is an industrial/rural combination, with populations concentrated in the city of Pueblo, in the south-central area of Colorado. This county comprises the 10th Judicial District, with a poverty population of 20,449 persons (14.4% of the total population) in 2000. The median household income was $32,775 in 2000. Attorneys are concentrated in the city of Pueblo, and serve a clientele with moderate incomes.

In 2008, a grant paralegal was added in the Pueblo office, to serve both the Pueblo and La Junta PAI programs. This half-time pro bono paralegal screens and refers clients to volunteer attorneys. Clients are matched with contract attorneys for representation in cases meeting office priorities. Cases are referred to the PAI component when resources and expertise are available for the civil legal problem involved. Office staff monitor the progress of each case and record case outcomes. Conflict checks are completed prior to the referral of each case to a contract attorney. The paralegal assists with and expands community education such as "Call A Lawyer" programs as well as PAI attorney support activities such as Continuing Legal Education seminars. The paralegal has initiated a Family Law Court Program based upon the Denver model in Pueblo County. The paralegal will also seek local funds to support continuation of this position beyond the initial grant period.

Salida office. The Salida office (formerly the Buena Vista office) partners with an independent pro bono program run by the Heart of the Rockies Bar Association. This office serves a three-county area, part of the 11th Judicial District, in mountainous central Colorado. The 2000 poverty population of 3,000 persons was 8.8% of the total population. The median household income was $40,333 in 2000. (Only Park County, which contains bedroom communities for commuters to Front Range jobs, exceeded the median household income in 2000.) Few attorneys practice in these communities.

Intake is conducted by the CLS office, which performs a conflict of interest check and determines case disposition. The CLS office refers cases which meet CLS financial and case acceptance guidelines to pro bono attorneys. CLS conflict cases, and cases served under a Title III grant, may also be referred for pro bono assistance. The President of the Bar Association assists with case placement and recruiting of attorneys for the panel. Individual attorneys perform their own conflict of interest checks prior to accepting cases.

The half-time PAI Paralegal grant position in the Pueblo office may assist with development of PAI activities in the Salida area.

Summary

Despite a difficult economic climate, CLS has expanded and strengthened its PAI activities. An additional internal PAI program has been added in the Pueblo office, and efforts are expanding in the southeastern area of the state. PAI models are structured to take advantage of available community resources and to address the legal needs of eligible clients as reflected in CLS priorities. The effectiveness of PAI programs is demonstrated by the donation of almost $3.00 of attorney time for each $1.00 allocated to PAI activities. The Statewide Access to Justice Commission has worked with the Colorado Supreme Court to institute several programs supporting pro bono efforts. Access to Justice Committees in several jurisdictions are increasing private Bar efforts and enhancing cooperation between CLS and the private Bar. New technology has been implemented with the needs of volunteer attorneys as well as office staff in mind.

Attachment E

Denver Bar Association

Law-Related Volunteer Opportunities

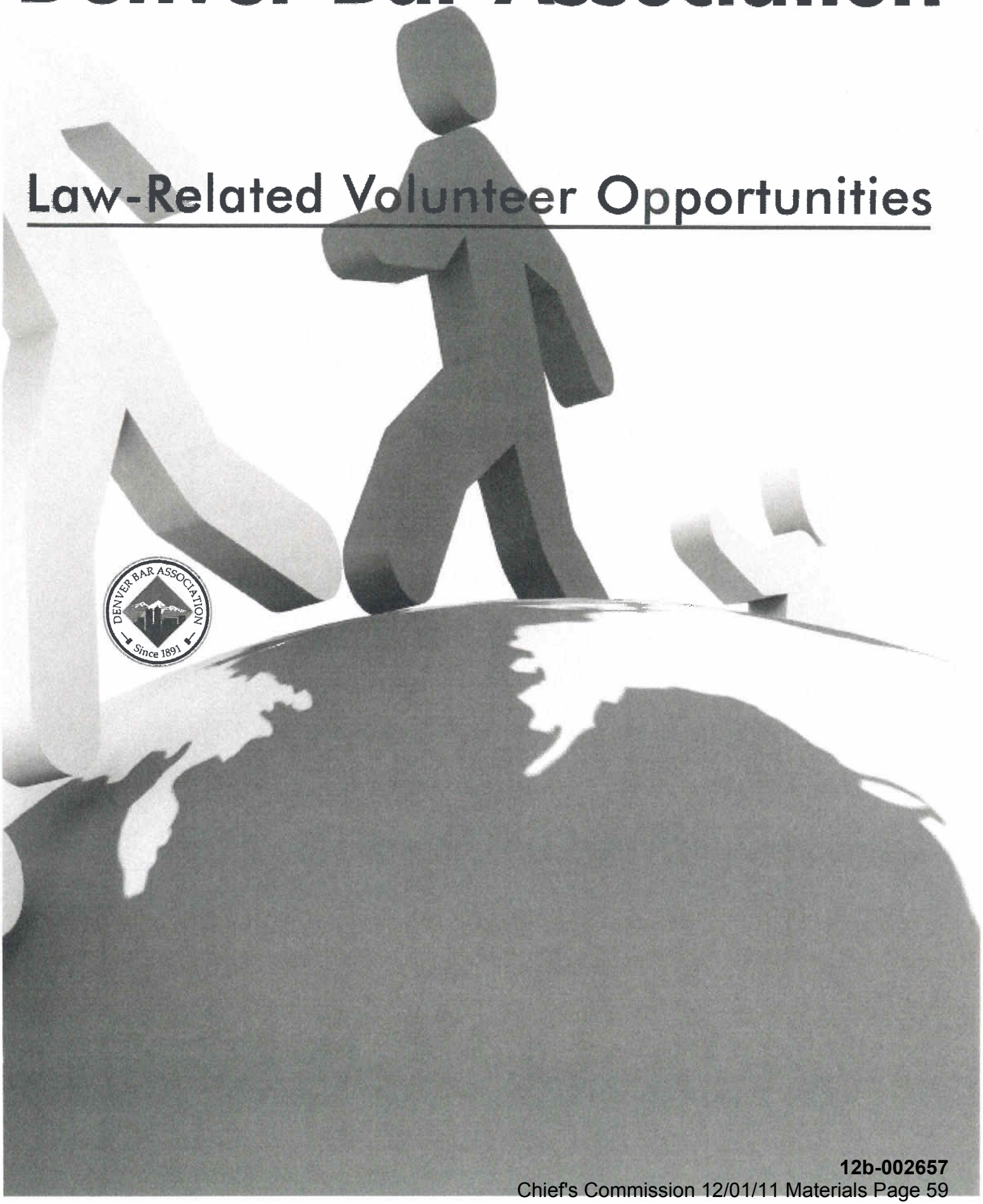

Community Based Projects

Program name	Program description	Contact	Time committment	Timing
Lawline 9	Staff a Lawline 9 call-in program. Answer general legal questions and provide legal information and referrals to other community legal resources. Weekly topics vary and legal resource information provided.	ple@cobar.org	1½ hour shifts	Year-round every Wednesday (4:00–5:15 p.m. and/or 5:15–6:30 p.m.)
Morning Lawline 9	Staff a Lawline 9 Call-in program. Answer general legal questions and provide legal information and referrals to other community legal resources.	ple@cobar.org	2 hour shifts once a month	Second Thursday morning from 5:30–7:30 a.m. every month
The People's Fair	Staff the DBA booth to answer legal questions and offer legal information and referrals to other community legal resources to Fair attendees. Legal resource information provided.	ple@cobar.org	2 hour shifts	June
Veterans' Stand Down	Assist homeless vets by answering legal questions and offering legal information and referrals to other community legal resources. Legal Resource Information provided.	ple@cobar.org	2 hour shifts	November
Metro Volunteer Lawyers	Provide *pro bono* legal services to eligible MVL clients. Services include bankruptcy, probate, taxes, wills, family law, etc. Go to www.metrovolunteerlawyers.org for more info on other *pro bono* opportunities.	Dianne Van Voorhees at diannev@denbar.org	Varies Free CLE credit for training	Ongoing during year, depending upon client eligibility
Community Action Network (CAN)	Assist with CAN projects like school supply and food drives, the Children's Hospital Courage Classic, and fund raising events for the community.	Heather Clark at hclark@cobar.org	unlimited	Ongoing during the year
Court Annexed Mediation Program (CAMP)	Co-mediate cases in Denver County Court's Civil Division. Must have 40 hours minimum basic mediation training.	Deb Sperlak at 303-824-5377	3–4 hours per session	Ongoing during the year; mediators in court daily; volunteer when available
Pro Se Clinics	Conduct a *pro se* legal clinic for the community. Call Carolyn Gravit for topics and availability, or if you have a clinic you'd like to offer. Topics include: Collections, Small Claims, Divorce and Bankruptcy.	Carolyn Gravit at cgravit@cobar.org	2 hours + prep time	Ongoing during the year, once a month
DBA Committees & Activities	Volunteer to serve on a DBA Committee. For more information about these opportunities, visit www.denbar.org.	Melissa Nicoletti at melissan@cobar.org	Varies	Ongoing during the year, monthly meeting
Legal Night at Mi Casa	Volunteer attorneys will provide information on a variety of legal topics and how they may relate to immigration issues. The clinics are informational only and legal advice or counsel will not be provided.	ple@cobar.org	2 hours	3rd Tuesday of each month at 5:30–7:00 p.m.
Legal Night at El Centro San Juan Diego	Volunteer attorneys will provide information on a variety of legal topics and how they may relate to immigration issues. The clinics are informational only and legal advice or counsel will not be provided.	ple@cobar.org	2 hours	1st Wednesday of each month at 6 p.m.

School Based Projects

Program name	Program description	Grade level	Time committment	Timing
Speakers	Speak to a class on any one of a variety of topics.	All Levels	1–3 hours	Ongoing during school year, depending on school requests
Court Tours	Take classes on tour of the local City/County Courthouse; training/ orientation provided. Non-litigators welcomed!	All Levels	2–3 hours	Ongoing during school year, depending on school requests
Career Days	Speak about the legal professions to a classroom, or at a CBA/DBA sponsored booth.	All Levels	3 hours	Ongoing during school year, depending upon school requests
Law Week	Law Week Volunteers: Implement curricula and programs in classrooms during first week of May; includes dialogue formats and in-class activities.	Middle and High School	1–3 hours	First week in May
	Law Week Planning Committee: Work with DBA committees to develop and implement a Law Week project(s) for schools and/or Denver community.		Approximately 5–15 hours	January–May
Law Day Art Contest	Visit a school to discuss Law Day and what it is. Pass out information and explain details of the contest. Help judge the art work by the students. This is for K-5 students.	K–5	2 hours	January–March
In-Class Mock Trials	Visit a classroom to help implement and explain what a mock trial is and how it works. Teachers work with students in advance. Mock trial scripts are available for elementary, middle and high school classes.	All Levels	1–3 hours	Ongoing during school year, depending upon school requests
In Class Law-Related Activities	Implement miscellaneous law-related activities in the classroom. Materials are provided for use by attorney and teacher.	All grade levels	2–4 hours	Ongoing during school year, depending on school requests
Colorado Mock Trial Program	Attorney Coaches: Partner with teachers to coach students about mock trial elements and prepare a case problem for regional/ state mock trial competition.	Middle and High School	Varies	Mid-December–mid-March Can extend to mid-May if team advances to National
	Assistant Attorney Coaches: Assist primary attorney coaches with preparation of mock trial teams.	Middle and High School	Varies	Varies for each school
	Scoring Panelists: Adjudicate mock trial rounds at the regional/ state tournament. An orientation and Bench Brief provided in advance.		3–4 hours	February and March Friday afternoon Saturday
	Courtroom Monitors: Monitor courtroom(s) and rounds during mock trial tournament. An orientation and checklist provided.		6–9 hours	February and March Friday afternoon or Saturday
Constitution Day	Speak to a class about the constitution. Paralegals and law students are welcome.	All grade levels	1–3 hours	On September 17th or week of.
We the People DPS Program	Visit a DPS school and help judge a congressional hearing performed by elementary, middle and high school students.	All grade levels	2–3 hours	Ongoing during the school year, depending upon school requests

Please contact Public legal education department at ple@cobar.org.

The Denver Bar Association encourages members to engage in volunteer opportunities that positively affect metro-Denver communities and the Association itself. These Bar programs are designed to provide public legal education and legal services to the public, and professional development and networking opportunities to its members.

Volunteering with any one of these programs combines an attorney's creativity and expertise to make a difference within the community. With many options available for the busy attorney, the Bar works to fit members into the right volunteer opportunity.

Anyone from the community can benefit from one or more of these programs. For more information about these law-related educational or legal services programs, please contact the Denver Bar Association at 303-860-1115.

Volunteer Contact Quick Reference

Metro Volunteer Lawyers
Dianne Van Voorhees, 303-830-8210 or diannev@denbar.org

Community Action Network
Heather Clark, 303-824-5350 or hclark@cobar.org

Court Annexed Action Program (CAMP)
Deb Sperlak, 303-824-5377

Denver Bar Association Committees
Melissa Nicoletti, 303-824-5321 or melissan@cobar.org

All Other Volunteer Opportunities
ple@cobar.org

Denver Bar Association
1900 Grant Street, Suite 900
Denver, CO 80203
303-860-1115

Statewide Programs

Asian Pacific Development Center
The Asian Pacific Development Center provides a variety of human services to the Asian Pacific population in Colorado. They need volunteer attorneys who can assist clients with the following types of legal matters: Domestic Violence, Divorce , Child Custody, Immigration Issues (visas, removal issues, etc.), Civil Disputes (traffic accidents, violations, etc.), Work Injury and Worker's Compensation Benefits, Social Security Benefits (SSI or SSDI related issues), Housing Discrimination, and Criminal Defense. For more information, call (303) 365-2959.

Colorado Asian Health Education and Promotion
CAHEP focuses on providing health care services to members of Colorado's Asian community. Often these groups involve low income, elderly people from a variety of ethnic groups. CAHEP is seeking volunteer attorneys who may be able to assist clients in securing benefits. Call (303) 954-0058, or visit website www.cahep.org.

Colorado Lawyers Committee
CLC is a nonprofit, nonpartisan consortium of 50 Denver-area law firms that do high impact *pro bono* work. The Committee needs attorneys to advocate, negotiate and litigate for children, indigent, and other disadvantaged communities. To volunteer, visit www.coloradolawyerscommittee.org or e-mail info@coloradolawyerscommittee.org.

Colorado Lawyers for the Arts
CoLA's mission is to help artists and arts organizations succeed on their own creative abilities so that success or failure does not hinge on legal pitfalls. For more information email info@coloradolawyersforthearts.org or visit www.coloradolawyersforthearts.org.

Colorado Legal Services
CLS provides legal advice and representation to low income eligible persons and seniors in civil matters throughout the state. Visit www.ColoradoLegalServices.org or call one of the satellite offices.

- Alamosa (Alamosa, Conejos, Costilla, Mineral, Rio Grande, Saguache) (719) 589-4993
- Boulder (303) 449-7575
- Colorado Springs (719) 471-0380
- Denver (Adams, Arapahoe, Broomfield, Denver, Douglas, Elbert, Jefferson, Clear Creek, Gilpin) (303) 837-1313
- Durango (Archuleta, Dolores, Hinsdale, La Plata, Montezuma, Ouray, San Juan, San Miguel) (888) 298-8483
- Fort Collins (Larimer, Logan, Phillips, Sedgwick) (970) 493-2891
- Frisco (Pitkin, Summit) (800) 521-6968
- Grand Junction (Delta, Garfield, Mesa, Montrose) (970) 243-7817
- Greeley (Morgan, Washington, Weld, Yuma) (970) 353-7554
- Hayden (Grand, Jackson, Moffat, Rio Blanco, Routt) (800) 521-6968
- La Junta (Baca, Bent, Cheyenne, Crowley, Huerfano, Kiowa, Kit Carson, Las Animas, Otero, Prowers) (888) 805-5152
- Leadville (Eagle, Lake) (800) 521-6968
- Pueblo (Pueblo, Custer, Fremont) (719) 545-6708
- Salida (Chafee, Custer, Fremont, Park) (719) 539-4251
- Migrant Farm Worker Division (all counties) (800) 864-4330

Colorado Nonprofit *Pro Bono* Legal Group
The Legal Group hopes to create a mechanism for lawyers (primarily transactional lawyers) to provide *pro bono* assistance to Colorado nonprofits which require *pro bono* legal assistance. For more information email the Chair of the Planning Committee, Peter Schwartz at Davis Graham & Stubbs, peter.schwartz@dgslaw.com, or call (303) 892-7381.

Colorado Organization for Victims' Assistance
COVA has a new legal program that will offer *pro bono* assistance to enforce victims' rights. COVA will train attorneys who want to be involved in this type of work. The cases will provide opportunities to litigate new legal questions because there is not much case law in Colorado pertaining to victim's rights. For more information call 303) 861-1160. www.coloradocrimevictims.org.

The Legal Center for People with Disabilities and Older People
The Legal Center's primary goal is to open up the legal system to those who would otherwise be unable to voice their needs because of the complexity of the service bureaucracy, their disability or because they are unable to act on their own behalf. Call (303) 722-0300 or www.thelegalcenter.org.

Local Access to Justice Committees
Judicial Districts have formed Local Access to Justice Committees to provide targeted legal assistance to its residents. To view *pro bono* opportunities coordinated by these local committees, see www.coloradojustice.org, then click on Local ATJ Committees.

Longmont Ending Domestic Violence Initiative
LEVI is a coalition of 23 agencies in the Longmont and Boulder area that deals with domestic violence issues. LEVI puts volunteer attorneys in touch with indigent clients who need legal representation. For more information call (303) 774-4534 or visit www.longmontdomesticviolence.org.

Rocky Mountain Immigrant Advocacy Network
RMIAN is a nonprofit organization dedicated to providing legal information and representation to non-citizens detained by the Department of Homeland Security and lacking access to legal counsel. RMIAN seeks volunteer attorneys to represent non-citizen men, women, and children in immigration removal proceedings. Each volunteer attorney will be provided with an experienced immigration practitioner to serve as a mentor for the case. For more information please call (303) 433-2812 or visit www.rmian.org.

Seniors Inc.
This group is looking for attorneys to serve as volunteer coaches. A Coach is an expert in an area of interest to seniors, such as reverse mortgages, financial planning, estate planning, long-term care, etc. Seniors Inc. has a particular need for volunteer attorneys who could advise clients, 95% of whom are low income, with estate planning issues such as writing wills, POAs, or other legal issues such as tenant rights, property rights and fraud. Call (303) 300-6900 or visit www.seniorsinc.org.

Pro Bono Opportunities

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CBA COLORADO BAR ASSOCIATION Established in 1897

Make History Colorado is a *pro bono* campaign led by the Colorado Bar Association and the Colorado Access to Justice Commission. Make History Colorado works to educate and link attorneys to resources and opportunities to provide *pro bono* legal services.

Denver Metro Area

Denver Bar Association Clinics
For more information,
contact *cgravit@cobar.org.*

Legal Night at Mi Casa
(303) 573-1302
www.micasadenver.org
360 Acoma
Third Tuesday
5:30–7 p.m.
Attorneys needed to provide information, and make referrals to appropriate agencies, in areas of immigration, credit, housing, landlord/tenant issues, employment and family law. Spanish interpreters are available.

El Centro de San Juan Diego
(303) 295-9470
2830 Lawrence St.
First Wednesday
5:30–7 p.m.
Volunteer attorneys provide information and advice in credit, housing, landlord tenant, employment and family law. Attorneys provide referrals to appropriate agencies.

Bankruptcy Clinic
(303) 860-1115
U.S. Bankruptcy Court
721 19th St., Rm. 125
Second Tuesday and Fourth Wednesday
1:30–3 p.m.
Attorneys review bankruptcy process and forms, including how bankruptcy can eliminate debts, difference between Chapter 7 and Chapter 13, effect on credit ratings, and forms required for filing; also address issues relating to creditor harassment and contacts by collection agents.

Small Claims Clinic
(303) 860-1115
City and County Building
1437 Bannck St., Room 117
Third Tuesday
11 a.m. –1 p.m.
Informational clinics on filing small claims cases and collecting on judgments.

Collections Clinic
(303) 860-1115
City and County Building
1437 Bannck St., Room 117
Third Thursday
11 a.m.–1 p.m.
Informational clinics on filing small claims cases and collecting on judgments.

Doing Your Own Divorce Clinics
(303) 860-1115
City and County Building
1437 Bannock St.
Third Wednesday
Noon–1:30 p.m.

Jefferson County
100 Jefferson County Pkwy, Golden
Second Wednesday
Noon–1:30 p.m.

Family Law Legal Clinic
(303) 860-1115
Division of Workforce Development
1200 Federal Blvd, Rm. 1018
Third Tuesday
5:30–7 p.m.
Informational clinics providing overview of divorce process, including procedures and forms, child custody, child support, maintenance and property division.

Other Metro Area Opportunities

Lawline 9 at KUSA-TV Channel 9
(303) 860-1115
500 Speer Blvd.
Wednesdays
4–5:15 p.m. and 5:15–6:30 p.m.
Call-in program. Answer general legal questions and provide legal information and referrals to other community legal resources. Weekly Topics vary and legal resource information provided.

El Centro Humanitario
ECH seeks attorneys for its wage claim program, Denver's first day laborer organization that protects the rights of vulnerable day laborer populations through an employment program, a legal program, and other educational programs. For more information call (303) 292-4115.

Family Tree Women in Crisis
Family Tree serves victims of domestic violence, sexual assault, and stalking. This organization needs attorneys for its free legal clinic in Wheat Ridge, which is held the first and third Wednesday of every month at 7p.m. for about 2.5 hours. The clinic deals with do-it-yourself divorce as well as custody issues. Family Tree is also looking for volunteer attorneys to take individual cases often involving post-decree issues. Call (303) 420-0412 or visit www.thefamilytree.org.

First Judicial District Bar Association Legal Assistance Program
This program provides free and low-cost legal information, advice, and representation to senior citizens 55 and older residing in Jefferson and Gilpin counties. Call (303) 216-0851 for more information.

Metro Volunteer Lawyers
MVL needs attorneys to assist low income residents in a seven county metropolitan Denver area. Cases include domestic relations, divorce, parental rights, bankruptcy, landlord-tenant. MVL also conducts family law and pro se divorce workshops. For more information call (303) 866-9378 or visit www.metrovolunteerlawyers.org.

Project Safeguard
Project Safeguard needs family law attorneys for domestic violence victims seeking permanent civil protection orders and dissolution of marriage or allocation of parental responsibilities. Project Safeguard provides all the appropriate forms. For more information call (303) 863-¬7416, or email clientservices@projectsafeguard.org, or visit psafeguard.qwestoffice.net.

Rocky Mountain Survivors' Center
RMSC is a non-profit organization that works with survivors of torture and war trauma. The group needs volunteer attorneys to work with refugees seeking asylum. RMSC recruits, trains and mentors volunteer attorneys and law students. For more information, call (303) 321-3221.

Colorado Outside Denver Metro Area

Alpine Legal Services, Inc. *Pro Bono* Program
ALS is a full service legal aid office providing information and referrals, *pro bono* attorneys, legal information rights, do-it-yourself divorce class, landlord-tenant, elder law, and emergency assistance for victims of domestic violence. ALS serves Garfield, Pitkin and Eagle counties. Call (970) 945-8858, (970) 920-2828, or visit www.alpinelegalservices.com.

Alternative Horizons
Alternative Horizons needs attorneys in the Durango area to provide legal representation to people experiencing domestic violence in divorce, child custody, and post decree cases. We offer a 24 hour hotline to support domestic violence survivors, protection orders, pro se divorce clinics, court advocacy for victims involved in criminal cases, support groups in English and Spanish. Visit www.alternativehorizons.org or call (970) 247-4374.

Catholic Charities
Catholic Charities is in need of volunteer attorneys to represent indigent clients on immigration matters in Eagle, Vail, Garfield and Pitkin counties. For more information, call (970) 384-2060.

Delta County Bar Association *Pro Bono* Clinic
The Delta County Bar Association *Pro Bono* clinic assists indigent applicants with civil legal needs through referral to volunteer attorneys. For more information or to volunteer, call (970) 874-2101.

El Paso County *Pro Bono* Project
The *pro bono* project is a nonprofit organization that assists indigent applicants with civil legal needs through referral to volunteer attorneys. Volunteer attorneys provide access to justice by advising or representing qualified residents in civil cases, and assisting with clinics and workshops. Call (719) 471-0380, ext 121.

Larimer County Bar Association *Pro Bono* Program
The *Pro Bono* program needs attorneys to assist low income individuals who are financially over-qualified for Colorado Legal Aid, but who are still within the federal poverty guidelines and unable to afford legal representation. For more information call (970) 402-2075 or visit www.cobar.org/index.cfm/ID/1596/larime/Pro-Bono-Program.

Mesa County *Pro Bono* Project
The Mesa County *Pro Bono* Project is a non-profit organization that assists indigent applicants with civil legal needs through referral to volunteer attorneys. Volunteer attorneys provide equal access to justice by advising or representing qualified residents in civil cases, and assisting with clinics and workshops. For more information call (970) 243-7940, ext. 108.

Northwest Colorado Legal Services
NWCLS has several state offices. Please contact the office nearest your location to inquire about *pro bono* opportunities:
- Frisco, counties served, Clear Creek, Pitkin, Summit, contact Patricia Craig, PO Box 2694, Frisco (970) 668-9612 or (800) 521-6968
- Gunnison, county served, Gunnison, contact Candace Sparks, PO Box 963, Gunnison (970) 641-3023 or (800) 521-6968
- Hayden, counties served, Grand, Jackson, Moffat, Rio Blanco, Routt, contact Sherri Ferree, PO Box 1555, Hayden (970) 276-2161 or (800) 521-6968
- Leadville, counties served, Eagle, Lake, contact Lea Ann Martinez, PO Box 1904, Leadville (970) 486-3238 or (800) 521-6968

Pueblo County Bar *Pro Bono* Project
Volunteer attorneys participate in Lawyer Night, Ask-A-Lawyer, Clinics, and Radio-TV presentations on legal issues. Actual cases are referred to Colorado Legal Services. For more information call (719) 553-2553.

San Luis Valley *Pro Bono* Project
The *Pro Bono* project assists indigent applicants with civil legal needs through referral to volunteer attorneys. The *pro bono* project serves Alamosa, Conejos, Costilla, Mineral, Rio Grande, and Saguache counties. Volunteer attorneys provide equal access to justice by advising or representing qualified residents in civil cases. For more information, call (719) 589-6534.

Southwest Bar Volunteer Legal Aid, Inc.
SWBVLA is located in the Durango office of Colorado Legal Services (CLS). There is an ongoing need for attorneys to provide advisory and direct client services in the areas of family, employment, consumer, housing, elder, public benefits and probate law. SWBVLA serves La Plata, San Juan, and Archuleta counties as well as Southern Ute, and Ute Mountain Ute reservations. Call (888) 298-8483.

Uncompahgre Volunteer Legal Aid
UVLA refers *pro bono* cases in Montrose, Ouray, and San Miguel counties, as well as referring *pro bono* for senior citizens in Delta, Gunnison and Hinsdale counties. It needs attorneys to provide ongoing consultations, representations, and mediations in civil matters for low income eligible individuals. UVLA also conducts a free legal advice night the second Thursday of each month at the Montrose County Justice Center. Call (970) 249-7202.

Weld County Legal Services
Volunteer attorneys provide equal access to justice by representing qualified residents in civil cases at no charge, teaching monthly do-it-yourself divorce clinics, and staffing the Call-A-Lawyer hotline. 915 10th Street, Greeley. For more information, call (970) 351.7300, ext. 4514

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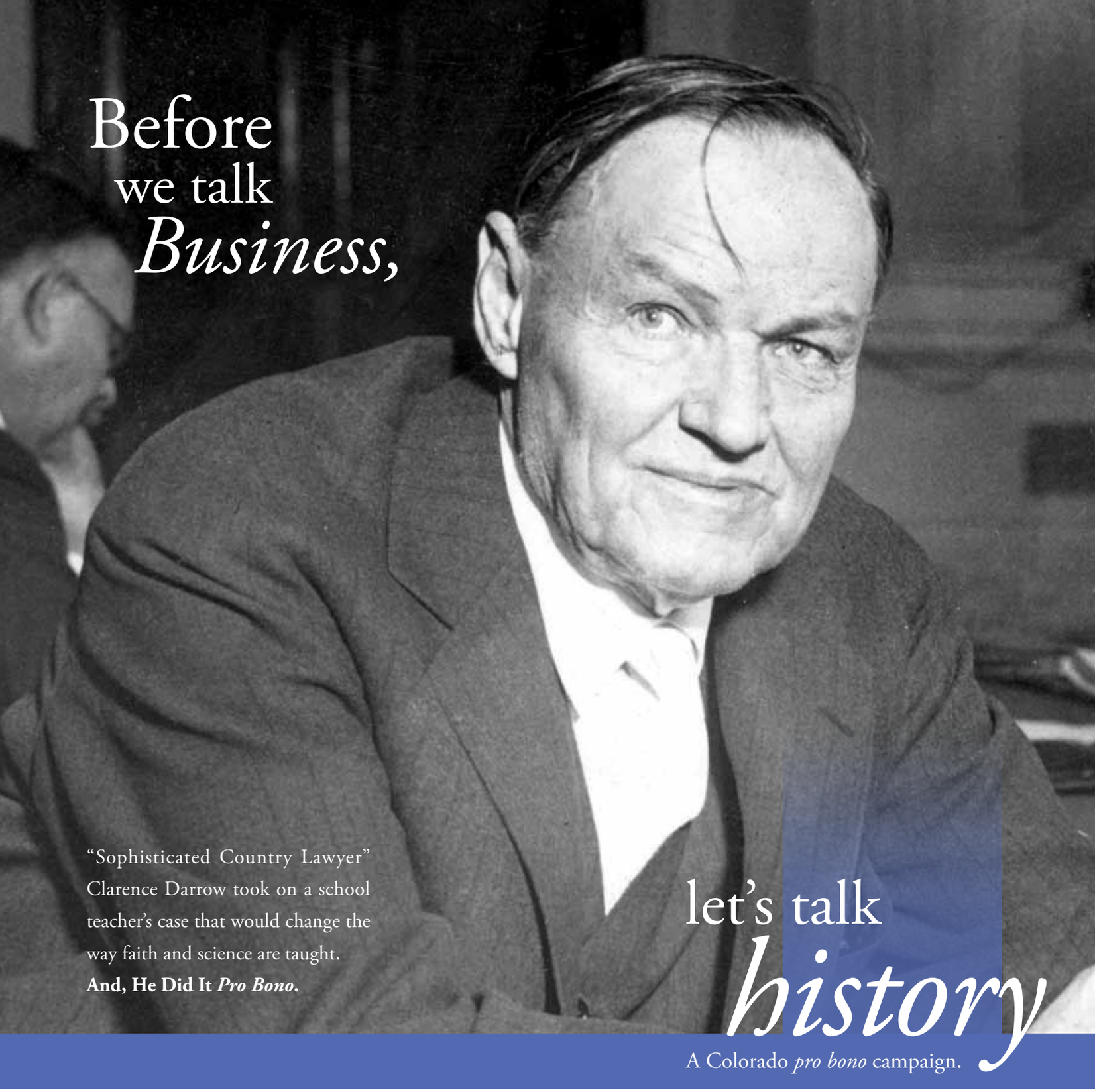

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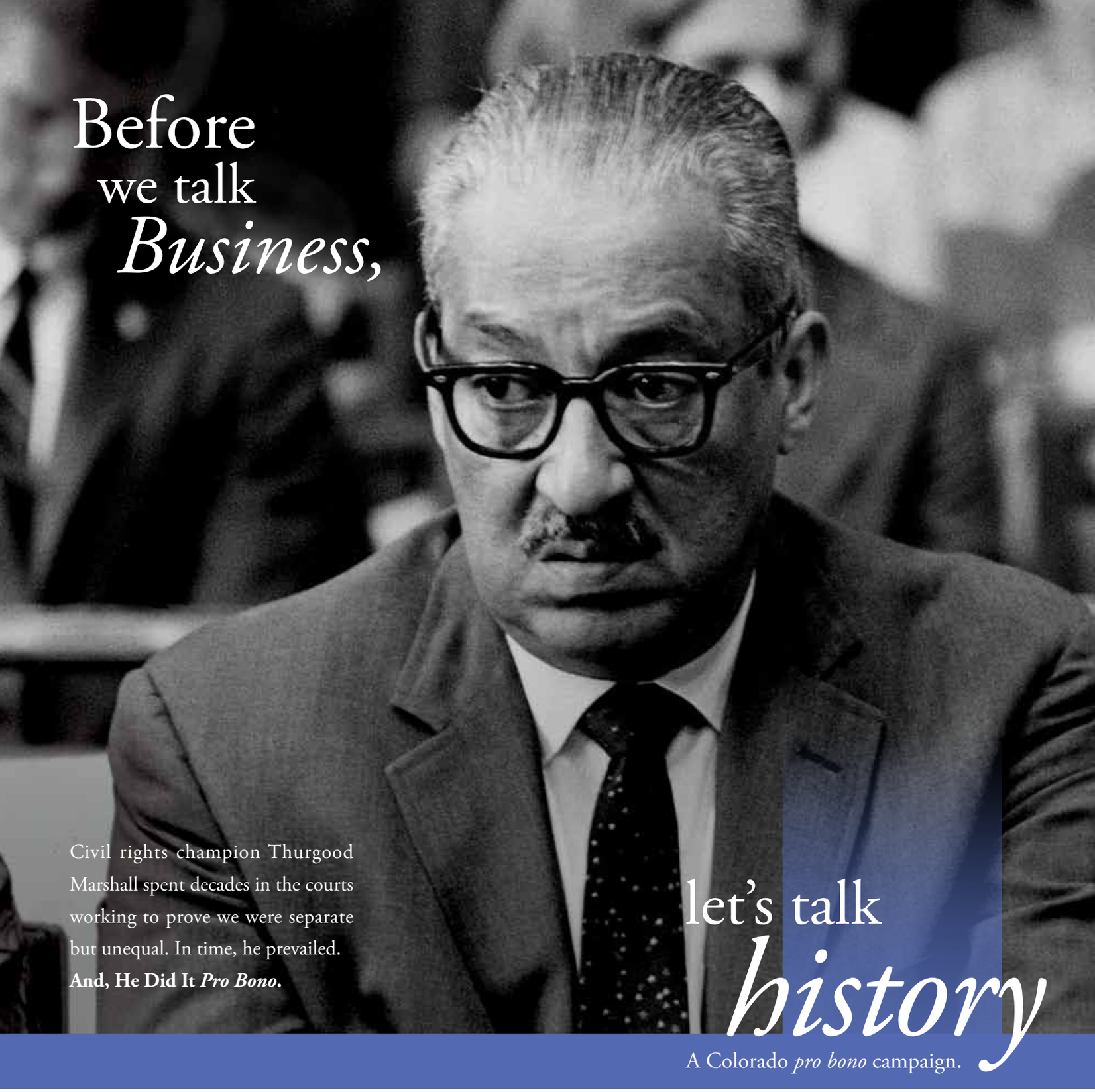

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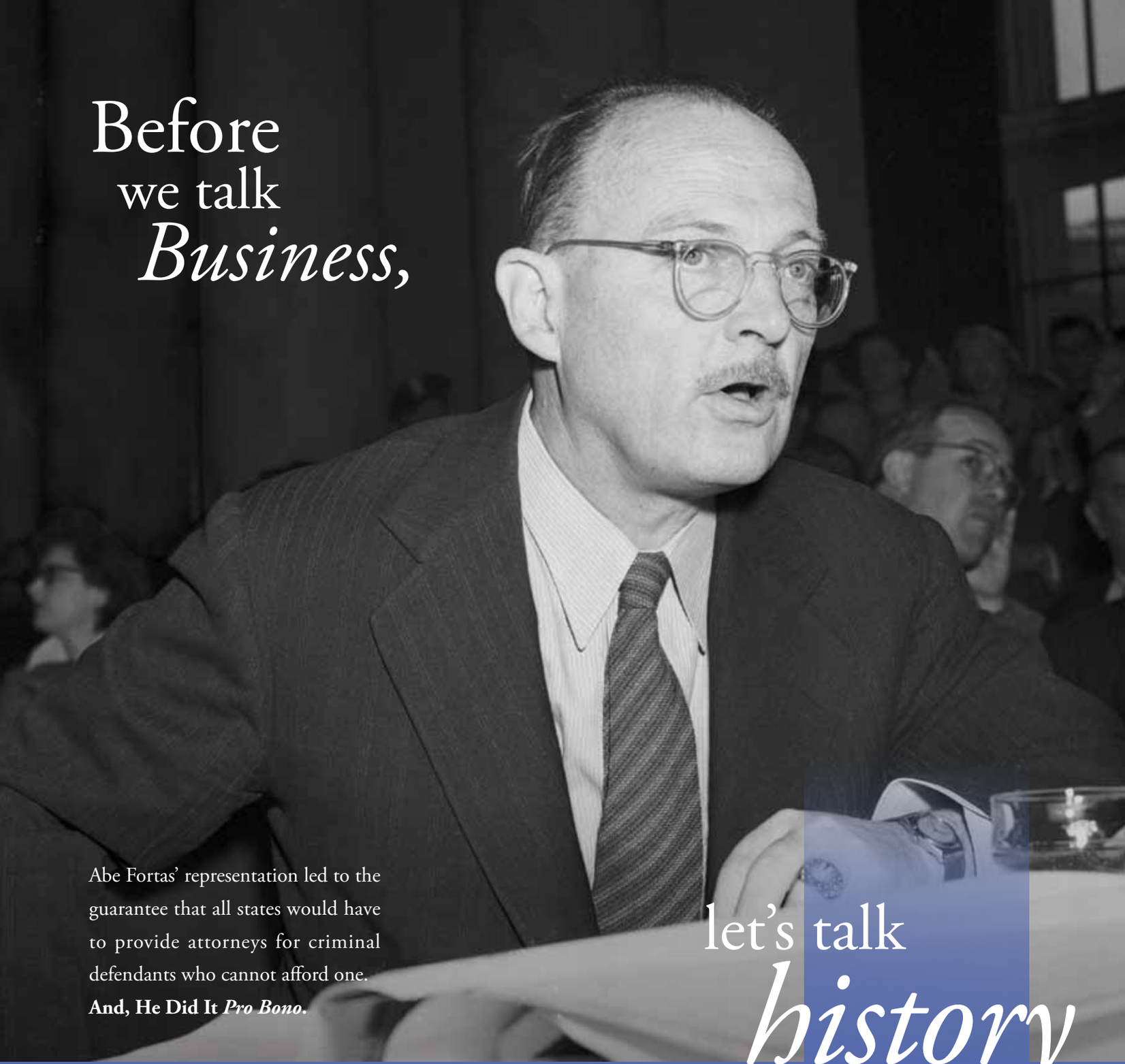

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CHIEF JUSTICE COMMISSION ON THE LEGAL PROFESSION
WORKING GROUP A

DECEMBER 1, 2011

MEMBERS: ASSOC. DEAN FRED CHEEVER, SARAH CLARK, PROF. ROBERTO CORRADA, CHARLES GARCIA, JUDGE NEIL GORSUCH, DEAN MARTIN KATZ, JUDGE MARCIA KRIEGER, DEAN WHITING LEARY, PROF. MICHAEL MASSEY, JUDGE JOHN MCGAHEY, JOHN MOSBY, JUDGE GILBERT ROMAN, PROF. ELI WALD, DEAN PHIL WEISER, PROF. MARIANNE WESSON, DEAN DANIEL VIGIL, DEAN WHITING LEARY, PROF. MELISSA HART,

LORENZO TRUJILLO, CHAIR.

REPORT AGENDA:
1. ORIENTATION 2012 ***FOR THIS WE STAND*** CU & DU

BACKGROUND:
NOV. 9 – ***FOR THIS WE STAND*** SUBCOMMITTEE MEETING TO PREPARE DETAILS, INCLUDING CONFIRMATION OF THE DATE OF SEPTEMBER 22, 2012 FOR THE JOINT LAW SCHOOL ORIENTATION.

NOV. 11 – MEETING WITH DEAN WEISER, DEAN LEARY, PROF. HART, DEAN VIGIL, AND TRUJILLO REGARDING DETAILS OF THE JOINT ORIENTATION.

NOV. 16 – WORKING GROUP A COMMITTEE MEETING TO FINALIZE DETAILS OF THE JOINT LAW SCHOOL ORIENTATION AND TO REVIEW THE STATUS OF CLE CREDIT FOR ATTORNEYS WHO TEACH LAW STUDENTS.

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1. FALL 2012 JOINT LAW SCHOOL ORIENTATION

PURPOSE: TO PROVIDE NEW LAW STUDENTS WITH A FOUNDATION ADDRESSING THE FOLLOWING TOPIC AREAS: HISTORY OF THE PROFESSION, VALUES OF THE PROFESSION, THE RULE OF LAW, PROFESSIONALISM AND ETHICS AS A LAWYER, SERVICE, HONESTY, CIVILITY, AMONG OTHERS.

DATE:	SEPTEMBER 22, 2012
LOCATION:	SEWALL BALLROOM AT THE DENVER CENTER FOR THE PERFORMING ARTS & FEDERAL AND STATE COURTHOUSES
PROPOSED AGENDA:	DEAN DAN VIGIL
PROPOSED BUDGET:	SARAH CLARK

ACTION: REQUEST APPROVAL TO SEEK FUNDING AND IMPLEMENT THE FALL 2012 ORIENTATION AS PRESENTED

For This We Stand
Orientation for All First Year Law Students in Colorado
September 22, 2012

Proposed Orientation Schedule as of November 16, 2011

9:00 a.m. – 10:15 a.m. Remarks by:

Chief Justice Michael Bender (45 minutes)

Dean Katz (10 minutes)

Dean Weiser (10 minutes)

Mark Fogg, CBA President (10 minutes)

10:15 a.m. – 10:25 a.m. Break

10:25 a.m. – 11:25 a.m. Professionalism and Ethics Session – New content to be prepared by Professor Hart, Professor Wald, and representatives of the Bar (Will consult with Mark Fogg on who will represent bar in this effort; suggestion was made that a lawyer with a relatively small number of years of experience be included)

11:25 a.m. – 12:05 p.m. Judges Krieger and Carparelli (40 minutes)

12:05 p.m. – 1:05 p.m. Lunch (Tables of 10, 8 students, 1 judge and 1 lawyer)

1:05 p.m. – 1:35 p.m. Travel Time

1:35 p.m. – 2:35 p.m. Visit courts (students in groups of approximately 25, grouped with judge and lawyer facilitators; each student to visit one court, but with one federal and one state judge at each court)

2:35 p.m. Program ends

DRAFT BUDGET 11-28-11

September 22, 2012 Joint Orientation - For This We Stand			
DENVER CENTER FOR PERFORMING ARTS			
ITEM	**QTY or HOURS**	**UNIT PRICE**	**EXTENDED PRICE**
Seawell Grand Ballroom Rental (8 AM to 1 PM)	1	$4,900.00	$4,900.00
Back Wall Draping (Black or White)	1	$400.00	$400.00
Video Package (projectors/screens)	2	$700.00	$1,400.00
IMAG Camera	1	$200.00	$200.00
Lectern with Microphone	1	$45.00	$45.00
Microphone	1	$45.00	$45.00
Video Switcher	1	$250.00	$250.00
Ballroom Technician Hours (Rigging, Sound, Lighting and Video)	27	$45.00	$1,215.00
Event Manager	6	$26.00	$156.00
Maintenance Fee (Event set up, strike and cleaning)	1	$150.00	$150.00
		DISCOUNT	($3,000.00)
		SUBTOTAL	**$5,761.00**

DRAFT BUDGET 11-28-11

September 22, 2012 Joint Orientation - For This We Stand			
EVENT RENTS			
ITEM	**QTY or HOURS**	**UNIT PRICE**	**EXTENDED PRICE**
Tables	50	$10.00	$500.00
Chairs	500	$2.00	$1,000.00
Linens	60	$8.00	$480.00
Staging	1	$500.00	$500.00
		SUBTOTAL	**$2,480.00**

DRAFT BUDGET 11-28-11

September 22, 2012 Joint Orientation - For This We Stand			
EPICURIAN CATERING			
ITEM	QTY or HOURS	UNIT PRICE	EXTENDED PRICE
Coffee Stations	500	$5.00	$2,500.00
Box Lunches	500	$11.95	$5,975.00
		SUBTOTAL	**$8,475.00**

DRAFT BUDGET 11-28-11

September 22, 2012 Joint Orientation - For This We Stand	
TOTAL COSTS	
DENVER CENTER FOR PERFORMING ARTS	$5,761.00
EVENT RENTS	$2,480.00
EPICURIAN CATERING	$8,475.00
TOTAL	$16,716.00

DRAFT BUDGET 11-28-11

September 22, 2012 Joint Orientation - For This We Stand
OTHER POSSIBLE COSTS
Parking: $8-$20 per car (paid for by attendees)
Courthouse Security - State: None anticipated
Courthouse Security - Federal: Unknown

MEMORANDUM

To: Chief's Commission on the Legal Profession

From: Working Group C

Date: November 28, 2011

Subject: December 1, 2011 Commission Meeting

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1. Inns of Court

On October 31, 2011, Working Group C met with representatives from Colorado's Inns of Court. The purpose of the meeting was to connect the Inns representatives in a formal way to foster collaboration and conversation about the continued vitality of Colorado's Inns.

On October 19 and November 16, 2011, Randy Bramer of the Doyle Inn hosted two new lawyer training sessions—first concerned depositions and the second, mediation. Information about the trainings was circulated to all the Inns of Court through the Inn representatives that had previously met with Working Group C, and about 25 lawyers attended each training session. Law clerks from the Court of Appeals law clerks were also invited and attended the training sessions. The next session will be held in January.

Next Steps: Working Group C hopes to facilitate the creation of an Inns of Court Executive Council to continue the conversation and collaboration among the Inns that has been started by Working Group C.

2. Bench-Initiated Bar Activities

Working Group C conducted a preliminary survey of current bench/bar activities that are initiated by judicial officers. The results of the survey are attached.

Next Steps: Working Group C will continue to solicit and collect responses concerning these activities.

3. Future Direction

Working Group C anticipates continued investigation and future action in the following areas:

- Identify and address impediments to judicial officer involvement in bar and community activities
- Consider issues surrounding professionalism and decorum in the courtroom
- Contact representatives from practice area entities and specialty bars

RESPONSES RECEIVED FROM CHIEF JUDGES
BENCH/BAR ACTIVITY

INTERACTION WITH ATTORNEYS

In response to an inquiry about their judicial district's interaction with attorneys, eight chief judges provided Working Group C with the following information:

Annual bench/bar conferences: The most common way judges interact with attorneys is through an annual bench/bar conference, roundtable, or CLE event.

1st J.D. There, the judges and the local bar association hold a "Judges' Roundtable" each fall, with tables set up for Civil, Criminal, Juvenile, and Probate/Mental Health. CLE credit is approved, and the meeting is packed.

2nd J.D. The judges and the local bar association hold an annual "bench/bar retreat," which is planned by both the judges and members of the bar. The event is somewhat successful, with reasonably good attendance from the judges and attendance from the most active bar members.

4th J.D. The local bar association hosts an annual bench/bar conference, and the topics generally involve what can be done to make the system work better. There is good judicial attendance, but limited lawyer turnout.

7th J.D. There are two bar associations in the 7th, the Delta Bar and the 7th J.D. Bar. The 7th J.D. Bar uses a significant share of its funds to host an "Inn of Court" CLE and dinner that is offered free of charge to attendees. The Delta Bar puts on a similar

educational and social program. The judges often participate in these programs.

12th J.D. Although there is no annual bench/bar CLE event, at times the judges in the 12th J.D. either arrange or prepare and present a CLE program for local attorneys. The judges coordinate with the local bar association to send out invitations, usually by email. The turnout is usually good.

19th J.D. Recently, the chief judge arranged for and presented a CLE aimed at the local district attorneys and public defenders. The CLE was held during one of the local bar association meetings and about 75 lawyers attended, including 12-15 lawyers from the DA's and PD's office.

Monthly or ad hoc lunches or other events: Another way judges interact with attorneys is by hosting monthly or ad hoc lunches or other events.

4th J.D. Lunches with members of the bar are held every other month.

7th J.D. All of the judges in the 7th J.D. host ad hoc "brown bag" lunches with members of the bar on a variety of topics such as rule modifications, and including administrative items such as changes in the division of the district court caseload. Attendance ranges from a handful of attorneys to a room full of them if the topic is of enough interest.

8th J.D. The 8th J.D. has a nearly two decade tradition of quarterly lunchtime bench/bar meetings, which are held in a conference room at the justice center. Lunch (pizza, sandwiches, etc.) is provided and alternately paid for by the bench and bar. There are usually 25-30 judges and lawyers in attendance and a wide variety of topics are discussed. In addition,

updates are provided by the chief judge and the bar president.

12th J.D. The judges in the 12th J.D. host ad hoc bench/bar meetings to discuss district issues such as changes to the district court calendar, electronic filing, the transition to paperless files, and changes to specific docket types.

21st J.D. In the 21st J.D., the judges meet periodically with the lawyers they see most often in their courtrooms—usually the district attorneys and the public defenders. Additionally, the judges occasionally meet with the lawyers in a particular area of practice, such as domestic, dependency and neglect, or civil to discuss any procedural changes or just to touch base.

Judicial membership and participation in local bar association: In many judicial districts the judges are members of the local bar association and participate in bar events.

1st J.D. Our judges are also routinely called upon to present CLE for Bar sponsored training.

19th J.D. Most of the judges in the 19th J.D. belong to the Weld County Bar Association and several judges serve or have served in leadership roles. The bar association's monthly meetings are held in the jury assembly room at the courthouse and typically attract 20 to 40 lawyers. Because the majority of local district attorneys and public defenders are not members of the bar association, the judges make other arrangements to meet regularly with those lawyers.

Email communications: Several chief judges remarked that invitations to bench/bar events are sent to attorneys via email. One judicial district—the 19th—uses email to communicate

regularly with different segments of the bar, such as the water lawyers, the district attorneys, the public defenders, and the newly admitted lawyers.

19th J.D. The chief judge has created and maintained email list serves for the bar as a whole, as well as different segments of the bar, such as the water lawyers, the district attorneys, the public defenders, and the newly admitted lawyers. The chief judge uses these list serves to send public announcements and administrative orders from the district's chief judge, from the Chief Justice, and from the State Court Administrator. For example, the chief judge recently announced openings on judicial nominating commissions.

Social events (Term Day, Annual Dinner, etc.): Judges throughout Colorado also interact more informally at professional social events such as Term Day and annual bar association dinners.

8th J.D. The 8th J.D. has Term Day twice a year, one in March and one in September. All judicial officers and members of the bar are invited to these all day Friday events, and nearly all of the judges attend and about 150 lawyers attend. The day begins with donuts and coffee, followed by a "state of the judiciary" speech from the chief judge and a bar association business meeting. The newly admitted lawyers are then introduced in an amusing fashion. In the spring, members from the state bar association attend and speak to the group. The afternoon is filled with social activities such as biking and bowling, followed by either cocktails and appetizers or dinner, on an alternating basis. The local bar association does all the planning and publicizing of the 8th J.D.'s Term Days.

19th J.D. The local bar association hosts an annual dinner that is always well attended by both the attorneys and judicial officers. Often there is a social activity along with the dinner, such as golf tournament or a play. The local bar association also sponsors trips to Rockies games and to Central City by chartered bus, and many of the attorneys and judicial officers take part in these activities as well.

BENCH/BAR ACTIVITY					
Judicial District	**Annual Bench/Bar Conference**	**Monthly or Ad Hoc Lunches or Other Events**	**Email Communications**	**Judicial Membership and Participation in Local Bar Association**	**Social Events (e.g., Term Day, Annual Dinner, etc.)**
1st	X				
2nd	X				
3rd					
4th	X	X			
5th					
6th					
7th	X	X			
8th		X			X
9th					
10th					
11th					
12th	X	X			
13th					
14th					

BENCH/BAR ACTIVITY					
Judicial District	**Annual Bench/Bar Conference**	**Monthly or Ad Hoc Lunches or Other Events**	**Email Communications**	**Judicial Membership and Participation in Local Bar Association**	**Social Events (e.g., Term Day, Annual Dinner, etc.)**
15th					
16th					
17th					
18th					
19th	X	X	X	X	X
20th					
21st		X			
22nd					

MEMORANDUM

To: Chief's Commission on the Legal Profession

From: Working Group B

Date: November 28, 2011

Subject: December 1, 2011 Commission Meeting

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1. Colorado Lawyers for Colorado Veterans

John Vaught and Ben Currier are co-chairs of the Colorado Lawyers for Colorado Veterans program, which held clinics in Ft. Collins, Colorado Springs, and Denver on November 10–11, 2011.

Highlights from the Denver clinic:

- Held 8:30 am to 5:00 pm at the Matthews Center, 3030 Downing Street, a community center in Five Points that principally serves homeless vets.
- Had approximately 56 lawyer and student-volunteers in two shifts. Notably, approximately twice that number have volunteered for future clinics.
- Met in teams of one/two lawyers and one law student with approximately 55 veterans. Some meetings lasted over an hour.
- Legal problems were as anticipated, including divorce, child-custody, evictions, criminal matters, etc.
- Approximately eighteen matters will require follow-up via referrals to lawyers in the community or to government agencies, or involved matters where the interviewing lawyer agreed to take the case. Two matters resulted in immediate court appearances on behalf of veterans. In the future, the program anticipates working more closely with the Veteran's Court in Denver.
- Senator Michael Bennet, Major General Paul Martin of the Colorado National Guard, and a representative of Congressman Perlmutter visited the Denver clinic.
- We had on-site news coverage by 9News, Fox News, and the Denver Post. Each news outlet also provided pre-clinic community service announcements about the clinics.

Highlights from the Colorado Springs and Fort Collins clinics:

- Colorado Springs served 15 veterans with 11 volunteer lawyers and 1 bar staff member.

- Fort Collins served 19 veterans with 2 general practice lawyers and 2 Colorado Legal Services lawyers.

Colorado Lawyers for Colorado Veterans plans to host clinics in Denver in March, July, and November. The program may expand to include clinics in Grand Junction, Durango, and possibly Pueblo.

2. Statewide Mentoring Program

The CLE Board unanimously approved the Commission's proposal to award CLE credit to lawyers who participate in the Statewide Mentoring Program. The CLE Board added the following language to Regulation 103(g):

> The Board may also accredit the participation by judges and lawyers in any mentoring program approved and overseen by the Supreme Court, with the maximum credit for this type of activity being fifteen credits during any one compliance period.

The pilot phase of the Statewide Mentoring Program kicks off with the Denver Bar Association orientation on January 5, 2012. The DBA—which is the primary participating organization—has received approximately 60 mentee applications. It is anticipated that the other participating organizations will get started thereafter.

From: Vaught, John
Sent: Thursday, November 17, 2011 12:12 PM
To: Bender, Michael
Subject: Colorado Lawyers for Colorado Veterans

Dear Chief Justice Bender:

You asked me to provide you a memo regarding some of the background and highlights of this year's veterans' clinics held in conjunction with Veteran's Day 2011. As you are aware, under your strategic direction, preparation for development of the program and this year's clinics in Ft. Collins, Colorado Springs and in Denver began about six months ago. Mark Fogg approached me to co-chair this program, in conjunction with Ben Currier, Chair of the DBA Young Lawyer's Division. We approached the assignment by focusing on three major tasks. First, identifying, locating and communicating with veterans who need *pro bono* legal services. Second, determining what resources are available in the national and local communities to help veterans, in that legal assistance is often closely associated with other veteran services, such as VA benefits, loans and grants and other veteran-specific programs. Third we set out to identify lawyers in the community who would be willing to screen veterans at local clinics and who would be willing to take referrals, where oral advice at the clinics did not conclude a legal matter.

To accomplish the first task, we frequently met with United Veteran's Committee (UVC), an organization of approximately 167 veteran's groups (VFWs, legislative liaisons, the Organization of Purple Heart Recipients, DU, CU, CSU and Metro State Veteran organizations, etc.). We also worked with various governmental agencies in Denver and in state and national governments, including the VA.

On the second issue, we worked with Challenge America and Warrior Gateway, two organizations that we met through the UVC, that have developed searchable databases of veteran services/benefits in the US. They estimate that 400,000 such services are available, although their databases are currently limited to about 40,000 services; nonetheless a substantial start. We also worked with a grant-funded program at DU, the VA and other organizations to learn more about VA benefits and related matters.

Third, we approached the Colorado Bar Association and DU and CU law students to serve as volunteers to screen veterans and to provide long-term legal services, where necessary. Ben Currier was instrumental in securing volunteers, particularly young lawyers. Mark Fogg worked closely with DU and CU for student volunteers. We developed a training program that provided CLE credit to educate volunteer-lawyers in areas of the law where veterans would most likely need help (family law, eviction, divorce, criminal, bankruptcy, etc.). We also created a website linked to the CBA website regarding the November clinics. Chuck Turner, Executive Director of the CBA, and his assistant, Carolyn Gravit, were instrumental in developing the website and the training program. Our initial CLE/training was conducted on November 5, 2011.

Associated with a VA "Stand-Down" in Ft. Collins, our first clinic opened on November 10th. The Denver and Colorado Springs clinics operated on November 11th. While I am still awaiting reports on the Ft. Collins and Colorado Springs clinics, highlights of the Denver clinic include:

- Held 8:30 am to 5:00 pm at the Matthews Center, 3030 Downing Street, a community center in Five Points that principally serves homeless vets.
- We had approximately 56 lawyer and student-volunteers in two shifts. Approximately twice that number have volunteered for future clinics.
- We met in teams of one/two lawyers and one law student with approximately 55 veterans. Some meetings lasted over an hour.
- Legal problems were as anticipated, including divorce, child-custody, evictions, criminal matters, etc.
- Approximately eighteen matters will require follow-up via referrals to lawyers in the community or to government agencies, or involved matters where the interviewing lawyer agreed to take the case. Two matters resulted in immediate court appearances on behalf of veterans. In the future, we want to work more closely with the Veteran's Court in Denver.
- Senator Michael Bennet, Major General Paul Martin of the Colorado National Guard, and a representative of Congressman Perlmutter, visited the Denver clinic.
- We had on-site news coverage by 9News, Fox News and the Denver Post. Each had also provided pre-clinic community service announcements about the clinics.

Going forward, Mark Fogg, Chuck Turner, Ben Currier, Carolyn Gravit and I are meeting Monday, November 21, 2011, to review the program and to discuss lessons learned. Following that meeting, we will begin to focus on expanding the program to include clinics in Grand Junction, Durango and possibly Pueblo, for a total of six clinics. We anticipate the second series of clinics will occur in conjunction with Memorial Day, 2012.

Hopefully I have not missed the mark on what you needed, but if I can provide any additional information, please contact me at your convenience.

Best regards,

John M. Vaught

The Docket November 2011

Colorado Lawyers Step Up for Colorado Veterans
by Benjamin Currier, John Vaught

Colorado Lawyers Step Up for Colorado Veterans

Currier

Vaught

Access to justice for all Americans is an issue that is constantly evolving in an effort to meet the needs of those who cannot afford traditional legal services. With governmental budgets and outreach programs being pared, the communities that most rely on *pro bono* legal services are compelled to turn to individuals and to private initiatives to meet their ever-expanding need. Some groups have enjoyed success and are gaining access to justice through innovative means, but many have not. Among this latter group are our military veterans, active duty military personnel, and their families.

In an attempt to meet the needs of Colorado veterans and service members, the Colorado Bar Association is developing a statewide *pro bono* legal services initiative to provide legal service to Colorado veterans, some active duty service members, and their families— Colorado Lawyers for Colorado Veterans. This program is structured to provide free legal advice through clinics held around the state and also provide *pro bono* and low fee legal services to individuals who require further help.

Colorado Lawyers for Colorado Veterans will begin the first of many free clinics on Nov. 11 in Denver and Colorado Springs, and on Nov. 10 in Fort Collins.

It is estimated that one-third of the adult homeless population are veterans, and a vast number of other veterans also are in need of legal help but unable to afford and receive the assistance they desperately require. Many national reserve, retired, or otherwise discharged veterans do not have access to legal services. Active duty service members receive some assistance from the Judge Advocate General's Corps; however, many still have legal issues and problems that are not met by the current active duty legal services and do not have the resources to afford legal services to solve their problems. Because of this, Colorado attorneys and the CBA are reaching out to help veterans with their legal needs and problems.

This program is consistent with the recommendations made by the Chief Justice Michael Bender, as part of the Chief Justice's Commission on the Legal Profession. Modeled after a similar program in Texas, it is being led by a joint

collaboration between the Commission, CBA President-elect Mark Fogg, John Vaught, CBA Young Lawyers Division Chair Benjamin Currier, CBA Executive Director Chuck Turner, and staff members of the DBA and CBA, including Carolyn Gravit, Heather Clark, and Denise Lynch.

The Denver event is scheduled to be held at the Bo Matthews Center, at 3030 Downing St., from 8:30 a.m. to 4:30 p.m. This initial Denver event will be staffed by law students, young lawyers, and other Colorado attorneys. In addition to these volunteers, a Colorado-based service organization called Challenge America will be present to help guide veterans through the maze of other benefits available to them. This highly anticipated event is the first of many steps to try to serve the needs of Colorado veterans, one veteran at a time. **D**

We are currently searching for volunteers to assist for future clinics across the state. We also are looking for individuals who are willing to take on pro bono *and low fee cases to help veterans in need. If you are interested in helping, please contact Carolyn Gravit at cgravit@cobar.org. We look forward to seeing you and helping with this new and exciting effort to provide* pro bono *legal services to Colorado veterans and service members.*

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Colorado Lawyers for Colorado Veterans

COLORADO LAWYERS *for* COLORADO VETERANS
The legal community helping veterans in need

The Colorado Bar Association and the CBA Young Lawyers Division will be offering free legal clinics for veterans.

MEET WITH AN ATTORNEY FREE OF CHARGE and get information on topics such as Veterans resources, benefits, taxes, housing and family law.

The clinics assist in understanding the legal processes and forms. They do not provide direct legal advice nor will they be able to directly assist in completing forms.

Free veterans legal clinic will be in DENVER, COLORADO SPRINGS and FT. COLLINS.

FT. COLLINS—THURSDAY, Nov. 10
As part of the 5th Annual Northern Colorado Veterans Stand Down
9 a.m.–1 p.m.
Catholic Charities Northern - the Mission
460 Linden Center Drive
Fort Collins, CO

DENVER—FRIDAY, Nov. 11
8:30 a.m.–4:30 p.m.
Matthews Center
3030 Downing St., Denver
Free parking
Public Transportaion RTD Route 12 Downing and 30th Station D Line
Click here for a Denver flyer/map.

COLORADO SPRINGS—FRIDAY, Nov. 11
Hosted by the El Paso County Bar Association
11 a.m.–1 p.m.
Citadel Mall
750 Citadel Drive East
Colorado Springs, CO 80909
The clinic will be located on the upper level of the food court area near guest services.
We will handle family law, bankruptcy, eviction, foreclosure, consumer, and veterans benefits at this clinic.

Click here contact us to volunteer for clinics or learn more about volunteer attorney training.

Click here for training materials.

Veterans' Legal Clinics to Start in November; New Website for Legal Services in Denver

September 21, 2011 By CBA-CLE Staff 3 Comments

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The Colorado Bar Association is beginning a statewide effort to establish free legal clinics for veterans. The first clinics will be held in Denver and Colorado Springs on Veteran's Day, November 11, and Fort Collins on November 10. Lawyers who are interested in volunteering to staff the "legal advice" clinics are needed for those locations, as well as others to be established in the future.

Additionally, lawyers will be needed to assist in taking on *pro bono* cases for those veterans needing representation. If you are interested in helping our veterans, please contact Heather Clark at hclark@cobar.org.

Also, a new website has been created to connect local veterans with the people who want to help them resolve their legal issues. Veterans Legal Services of Denver was founded by combat veterans and University of Denver Sturm College of Law students Dustin Charapata and Sean Marsh.

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Print PDF

Filed Under: Community Tagged With: CBA, event, military law, pro bono, University of Denver, veterans, veterans affairs, volunteer opportunities

1-Hour CLE Programs
Short & Timely - Hot Topics

Compliance Bundles
45 General Credits and 7 Ethics Credits to Fulfill All Your CLE Requirements

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CBA CLE Legal Connection is published by Colorado Bar Association CLE (also known as CLE in Colorado, Inc.). It is focused on delivering timely resources, updates and continuing legal

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CBA COLORADO BAR ASSOCIATION
Established in 1897

FOR IMMEDIATE RELEASE
Nov. 2, 2011

Contact: Sara Crocker, (303) 824-5347

Free Legal Assistance Program for Veterans Unveiled Statewide by Colorado Bar Association

DENVER—Recently, an Air Force veteran, disabled as a result of his service in the Gulf and Iraq wars, had lost his VA benefits. He depends on those benefits for living and education expenses. Though he is appealing the loss of benefits, he was unable to pay rent on the apartment he had leased for the last seven years and was facing eviction.

Through the help of John Vaught, an attorney volunteer with the Colorado Bar Association's Colorado Lawyers for Colorado Veterans, he obtained an extension of the eviction order, giving him time to wait to receive financial aid that would be able to help him with his expenses. Today, he remains in his apartment and is able to continue his education.

This is just one example of the kind of help available to veterans, service members and their families at free legal assistance programs, or clinics, that will be launched Nov. 10 and 11 by the Colorado Bar Association and its Young Lawyers Division.

Those veterans and family who attend a clinic will be able to meet with an attorney and receive information on topics such as veterans' resources, benefits, taxes, housing and family law. Also, for those who require further assistance, free and low-cost legal services may be available.

"As a veteran myself, I'm glad I can offer my time to help my brothers and sisters in arms," said Vaught, an attorney with Wheeler Trigg O'Donnell. "We hope that these clinics, aimed at the issues veterans face at home, will help us serve these men and women who have already done so much for our country."

Clinics will launch in Colorado Springs, Denver and Fort Collins on Thursday, Nov. 10, and Friday, Nov. 11:

- In Fort Collins, 9 a.m. to 1 p.m. Thursday, Nov. 10, at Catholic Charities Northern, 460 Linden Center Drive, as part of the 5th Annual Northern Colorado Veterans Stand Down.
- In Denver, 8:30 a.m. to 4:30 p.m. Friday, Nov. 11, at the Matthews Center, 3030 Downing St.
- In Colorado Springs, 11 a.m. to 1 p.m. Friday, Nov. 11 at Citadel Mall on the upper level of the food court area near guest services, 750 Citadel Drive East. Hosted by the El Paso Bar Association.

For more information about these clinics, click here.

About the Colorado Bar Association
The Colorado Bar Association is a voluntary bar association with nearly 18,000 members—almost three-quarters of all attorneys in the state—founded in 1897. The bar provides opportunities for continuing education, volunteering and networking for those in the legal profession while upholding the standards of the bar. The bar likewise works to secure the efficient administration of justice, encourage the adoption of proper legislation and perpetuate the history of the profession and the memory of its members. For more information visit www.cobar.org.

###

Colorado Lawyers for Colorado Veterans Established to Offer Free Legal Advice to Military Veterans

11.08.2011

Colorado Lawyers for Colorado Veterans will offer free legal advice at the first of many clinics in Denver on Veteran's Day 2011.

The Colorado Bar Association developed Colorado Lawyers for Colorado Veterans to provide *pro bono* legal service to Colorado veterans, some active duty service members, and their families. The program will provide free legal advice through clinics held around the state and through no-cost or low-fee legal services to individuals who require further help.

The first free Denver legal services clinic will be held on Friday, November 11, from 8:30 a.m. to 4:30 p.m. at the Bo Matthews Center, 3030 Downing Street. There will also be free clinics in Colorado Springs on November 11 and in Fort Collins on November 10.

The initial Denver event will be staffed by law students and Colorado attorneys. Challenge America, a Colorado-based service organization, will also be there to help guide veterans through other benefits available to them.

The program follows recommendations made by Chief Justice Michael Bender as part of the Chief Justice's Commission on the Legal Profession. Modeled after a similar program in Texas, it is being led by a joint collaboration between the Commission, CBA President-elect Mark Fogg, Wheeler Trigg O'Donnell partner John Vaught, CBA Young Lawyers Division Chair Benjamin Currier, CBA Executive Director Chuck Turner, and staff members of the Denver and Colorado bar associations.

Colorado Lawyers for Colorado Veterans is looking for volunteers to assist at future clinics across the state and attorneys to handle no-fee and low-fee cases to help veterans in need on an ongoing basis. If interested, please contact Carolyn Gravit.

Wheeler Trigg O'Donnell is proud to have eight lawyers and several staff members who are veterans of the United States Army, Air Force, Navy and Marines. Among them are two Iraqi War veterans, two Vietnam veterans, four service academy graduates, a Rhodes Scholar and a Marine with the Bronze Star for Valor. It is in their honor and in service to all United States military veterans that WTO partner and Vietnam veteran John Vaught has dedicated time and energy to help establish Colorado Lawyers for Colorado Veterans.

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THE DENVER POST
Denver and the West

Movable courts uphold homeless veterans at Denver's Stand Down event

By Jessica Fender

http://www.denverpost.com/news/ci_19261417#ixzz1f10tEP7h

Posted: 11/04/2011 01:00:00 AM MDT
Updated: 11/04/2011 05:18:39 AM MDT

Military veteran Darren Trujillo, 46, is three months sober and has lined up a paid gig ringing a donation bell for the Salvation Army.

But an old trespassing ticket that turned into a warrant after he failed to appear in court meant he wasn't eligible for the job—until Thursday.

Denver lawyers and judges for the first time brought a courtroom to homeless veterans, joining a Department of Veterans Affairs-sponsored event aimed at getting struggling vets such essentials as haircuts and eye exams.

"I was going to turn myself in today. I got lucky. I just came here for a sleeping bag," Trujillo said. "Now I don't have to go to jail. I can do community service."

It can be daunting for homeless veterans to clear their records of the types of minor infractions—park-curfew fines, trespassing, public intoxication—that often go hand in hand with living on the streets, said Denver County Magistrate Beth Faragher.

Army veteran George Seals, right, pleads his legal case to a Denver County judge Thursday morning as lawyer Roger Billotte listens in at Denver's Veterans Stand Down event. (Photos by Andy Cross, The Denver Post)

The temporary court focused on clearing the tickets and warrants related to misdemeanor, nonviolent violations. In most cases, defendants got community service rather than jail time.

"It's a really good thing," said Faragher, who sits on the Denver Access to Justice Commission. "It also helps the court if we can get our cases resolved."

Faragher, the Denver Bar Association and the county court system organized the temporary court, where they hoped to help up to 80 people untangle their legal problems.

The larger event, the 21st annual Veterans Stand Down, drew 486 of the estimated 700 homeless vets living in Denver, including Army vet Lance Rivera, 51, who made an appearance Thursday in the temporary courtroom.

Denver County Court Judge Raymond Satter approved Rivera's furlough from jail so he could attend the annual event and pick up the boots, clothes and sleeping bags available to the vets. On Sunday, he heads back to jail.

"I feel I was blessed," Rivera said.

Army vet George Seals, 62, said he arrived at Denver's National Guard Armory and headed straight to the courtroom as soon as he heard he could take care of a light-rail ticket and related warrant.

"I skipped all the other stations," Seals said. "I always had to watch over my back. This here was worth it just by itself."

Colorado's legal community has zeroed in on veterans' issues in the past few years.

The 4th Judicial District, which includes Colorado Springs, opened a court for vets in the fall of 2009. In September, Denver's drug court followed suit.

Supreme Court Justice Michael Bender lauded the legal community for coming together to help a troubled population.

"The general public and legal community are beginning to realize a large number of vets are in need of a lot of legal services," Bender said. "They deserve it."

Next week, the Colorado Bar Association plans clinics in Denver, Fort Collins and Colorado Springs, where vets can get advice on obtaining benefits, domestic issues and other legal questions.

Satter runs Denver's homeless court docket one Friday a month and oversaw Thursday's court.

"These guys lack the acuity to just take care of simple stuff," Satter said. "We're just trying to help them."

CHIEF'S COMMISSION ON THE LEGAL PROFESSION

MINUTES OF MEETING

May 24, 2012 **101 W. Colfax Ave., 5th Floor** **3:00–5:00 PM**

ATTENDEES	Chief Justice Michael L. Bender, John T. Baker, Chief Judge Roxanne Bailin, Kevin Bemis, Gillian Bidgood, Judge Russell E. Carparelli, Fred Cheever, Sarah M. Clark, Benjamin E. Currier, Chief Judge Wiley Daniel, A. M. Dominguez, Katayoun A. Donnelly, John A. Eckstein, Jacob Eisenstein, Mark A. Fogg, Judge Richard L. Gabriel, Charles Garcia, Ed Gassman, John S. Gleason, Judge Neil Gorsuch, Judge Christina Habas, Carol Haller, Dale R. Harris, Melissa Hart, Justice Gregory J. Hobbs, Judge Barbara Hughes, Chief Judge Robert S. Hyatt, Bruce A. James, Patty Jarzobski, Kenzo Kawanabe, Judge John Kuenhold, David C. Little, Cynthia Mares, James O'Connor, Margrit Parker, Justice Nancy E. Rice, David W. Stark, Chief Judge William Sylvester, Judge Daniel M. Taubman, Lorenzo Trujillo, Charles Turner, Kara Veitch, and Dean Phil Weiser were in attendance.
ATTACHMENTS	The meeting agenda and materials are attached to these minutes.
NEXT MEETING	September 13, 2012 at 3:00 PM

AGENDA ITEMS

WELCOME **CHIEF JUSTICE BENDER**

Chief Justice Bender welcomed Kenzo Kawanabe, James O'Connor, Kevin Bemis, Jacob Eisenstein, and Patricia Jarzobski to the Commission. Chief Justice Bender then distributed the Commission's first Annual Report, highlighting the Commission's accomplishments since its inception in early 2011.

Next, Chief Justice Bender outlined his vision for improving procedural fairness in Colorado's system of justice. He relayed that a large majority of the public believes personal and political beliefs influence judicial decisions and explained that this belief underlies the public's growing lack of confidence in the judiciary. He further explained that the public's lack of confidence in the judiciary is also tied to the lack of funding for courts and probation. He noted that the Colorado Judicial Branch receives just 3.44% of the state's General Fund, and that nearly a quarter of the Judicial Branch budget comes from fines and fees paid on traffic tickets.

Chief Justice Bender described several court programs and initiatives that are already in place and that seek to provide more individual attention in individual cases. Those programs and initiatives include the Civil Access Pilot Program and problem-solving courts. These types of programs and initiatives, Chief

Justice Bender explained, create trust in the judicial system because they enable parties to be heard by the judge and leave the parties feeling like they were treated more equally and fairly. Chief Justice Bender outlined the current research on procedural fairness, which shows that the public's perception of the justice system depends more on whether the process is perceived as fair and less on whether the outcome is perceived as fair. This is in contrast to lawyers and judges, who tend to emphasize outcome over process. Whether the judicial process is perceived as fair depends on whether those who are part of the process feel as though they have an opportunity to be heard and that they are understood.

Chief Justice Bender also indicated that a focus on procedural fairness provides an opportunity to educate the public—parties, jurors, witnesses, friends and family, etc.—about the judicial system in a way that they will remember. He suggested that although we should continue our public outreach and education efforts, we should also place more emphasis on educating everyone who walks through our courthouse doors.

Finally, Chief Justice Bender specified that the Judicial Branch is developing a five-year blueprint tied to procedural fairness.

ADDITIONAL INFORMATION	The Commission's 2011 Annual Report can be found at: http://www.courts.state.co.us/Courts/Supreme_Court/Committees/Committee.cfm?Committee_ID=35 Additional information about procedural fairness can be found at: http://www.proceduralfairness.org/

SPECIAL PRESENTATION **JOHN GLEASON**

John Gleason, Colorado's Attorney Regulation Counsel, presented on his special prosecution of the Maricopa County, Arizona, case *In the Matter of Thomas et al.*, one of the country's most important and unprecedented attorney discipline cases (Materials Pages 1–9).

ADDITIONAL INFORMATION	John Gleason's CBA-CLE program is available for purchase and download at: http://cbaclelegalconnection.com/2012/06/abuse-power-arizona-the-colorado-attorneys-who-successfully-prosecuted-largest-attorney-ethics-case-history/

WORKING GROUP D **DAVID STARK**

David Stark, Chair of Working Group D—development of the relationship between the legal profession and the community to enhance access to justice, delivery of justice, and education of the public—summarized the Working Group's recent efforts concerning pro bono and pro se resources. Working Group D's report is attached to these minutes (Handout A).

He explained that a common theme of professionalism and pro bono *publico* is emerging in the work of all the Working Groups. Concerning pro bono, he noted that the Colorado Lawyers Committee, at its annual dinner, estimated that Colorado lawyers contributed approximately 23,000 hours of pro bono work and recognized Larry Treece with the Outstanding Sustained Contribution Award, David Graham &

Stubbs LLP as the Law Firm of the Year, and the *Lobato* Litigation Team as the Team of the Year. He also noted the dates of the local receptions for the Colorado Supreme Court's Pro Bono Commitment and Recognition Program, supported by the Colorado Access to Justice Commission and the Colorado Bar Association (Materials Pages 10–13).

He outlined Working Group D's short-term goal to increase the number of law firms and lawyers participating in the Supreme Court's Pro Bono Initiative by talking individually with managing partners. David then introduced Commission Member Bruce James who discussed Brownstein's successful effort to achieve the Supreme Court's challenge for firms to average over 50 hours of pro bono work per lawyer per year. Bruce identified several factors that helped Brownstein's transformation, including: (1) strong senior leadership; (2) participation of transactional lawyers; (3) providing credit to lawyers for time spent on pro bono matters; (4) developing pro bono projects with clients; (5) identifying and undertaking large pro bono projects; (6) recognizing pro bono work with an annual award; and (7) eventually creating a full- or part-time pro bono partner position to support the firm's program.

David also updated the Commission on Working Group D's efforts to increase the number of government attorneys participating in pro bono work, to support the work of the Colorado Access to Justice Commission, and to help facilitate the Judicial Branch with its plan to enhance the resources available to pro se parties. David introduced Sarah Clark who outlined the Judicial Branch plan and explained how the 12 new pro bono coordinators would be allocated throughout the state by soliciting proposals from all of the state's judicial districts, which will encourage the local districts to partner with their local bar associations, local access to justice committees, and local legal services offices to best leverage these new resources.

Mark Fogg informed the Commission that the Colorado Bar Association has committed to supporting the local bar associations' pro bono efforts by allowing each of the CBA's sections to contribute some of their funds to the local bar associations. The CBA will match these funds up to a certain point in an effort to further support local pro bono activities.

ADDITIONAL INFORMATION	Information regarding the Colorado Supreme Court Pro Bono Legal Service Commitment and Recognition Program can be found at: http://www.courts.state.co.us/Courts/Supreme_Court/Pro_Bono.cfm Information about the Colorado Lawyers Committee, including its work and annual awards dinner can be found at: http://www.coloradolawyerscommittee.org/

WORKING GROUP A **LORENZO TRUJILLO**

Lorenzo Trujillo, Chair of Working Group A—development of professional identity, social responsibility, and practice skills in law school, and involvement of judges and leaders of the bar in law school—presented the Working Group's report and led discussion. Working Group A's report was included in the meeting materials and is attached to these minutes (Materials Page 14).

Dean Trujillo reported on Working Group A's continued work on the For This We Stand Joint First-Year Law Student Professionalism Orientation Event (Materials Page 14), which has been rescheduled for Saturday, September 15, 2012, due to a conflict with the Denver Rock 'n' Roll Marathon and

Half-Marathon event. He described the event's agenda and explained the event's two components. First, the law students will gather in the Denver Athletic Club's Grand Ballroom for presentations from Chief Justice Bender, Judge Krieger, Judge Carparelli, and Mark Fogg. Then, the law students will go to an assigned courtroom in the Denver City and County Building for a small-group breakout session with a judge, two lawyers, and a former client.

He explained that the event's curriculum will center on two concepts of professionalism that first-semester 1Ls can understand: (1) that the work lawyers do in the courtroom and in their offices is important to clients and to society, and (2) that the keys to a successful career are reputation and relationships. He described that the overall goal of the event is for these 1Ls to have a transformational experience. He noted that the next steps will be to determine how to extend the event into the 2L and 3L experience.

Dean Weiser noted that the professionalism theme of the orientation event will spill over into CU's Bench/Bar Conference, which will be a gathering of both state and federal lawyers and judges and which will take place at CU from September 19 to September 21, 2012. Dean Weiser invited the Commission Members to attend the conference.

WORKING GROUP B **MARK FOGG**

Mark Fogg, Chair of Working Group B—development of professional identity and social responsibility for new attorneys and thereafter—updated the Commission on the Working Group's most recent meetings.

Mark Fogg first reported on the status of the statewide mentoring pilot program, indicating that the program is still looking for Western Slope participation and is now moving into the evaluative phase. He congratulated the Colorado Lawyers for Colorado Veterans program and the work of John Vaught and Ben Currier in running the program. Mark noted the State Legislature's joint resolution also applauding the effort (Materials Pages 15–17).

WORKING GROUP C **JUDGE CARPARELLI**

Judge Russell Carparelli, Chair of Working Group C—development of communication and professionalism between and among judges and attorneys—presented the Working Group's most recent project, October Legal Professionalism Month.

Judge Carparelli reported on the Working Group's progress in establishing an Inns of Court roundtable, communicating with the state's Chief Judges, and involving the state's geographic, diversity, and specialty bar associations, as well as the Professionalism Coordinating Council.

Judge Carparelli then presented the Chief Justice and President of the CBA's joint proclamation declaring October 2012 to be Legal Professionalism Month (Materials Page 18). He detailed that October would feature a multitude of local events and activities, as well as the October 29 Assembly of Lawyers. He explained that the Assembly of Lawyers would consist first of a free one-hour CLE presentation at Boettcher Concert Hall immediately followed by the October swearing-in ceremony. He noted that the meeting he held with the leaders of the geographic, diversity, and specialty bars, as well as the Inns of Court, was well-received and generated much enthusiasm for the effort.

Last, Judge Carparelli reminded the Commission of the "SECRET" to attorney professionalism as an

easy-to-remember way to think about the professionalism, and highlighted professionalism's connection to pro bono *publico*. The acronym stands for: Service to clients, profession, and community; Excellence in knowledge, skill, and judgment; Commitment to preserving the rule of law; Respect and civility in all interactions; Ethical in all dealings; and Trustworthy in all words and deeds.

ANNOUNCEMENTS AND FURTHER DISCUSSION

Al Dominguez echoed Chief Justice Bender's comment that our public education efforts are good, but that it is crucial for the public to have positive experiences in court and in lawyers' offices.

REMAINING 2012 COMMISSION MEETING DATES **CHIEF JUSTICE BENDER**

Chief Justice Bender announced the Commission's remaining 2012 meeting dates:

- September 13, 2012
- December 6, 2012

All meetings are on Thursday afternoons from 3:00–5:00 PM in the 5th Floor Conference Room at 101 W. Colfax Ave., Denver, Colorado 80202.

ADJOURN

Minutes of Meeting submitted by Sarah Clark, July 24, 2012

MEMORANDUM

TO: Chief Justice's Commission on the Legal Profession

FROM: Working Group D

DATE: May 23, 2013

SUBJECT: Working Group D Report

I. Our Mission − To foster the relationship between the legal profession and the community through Access to Justice, Delivery of Justice, and Education of the Public.

II. Our Actions

1. We continue to work to foster a culture of service and professionalism through our commitments to the community and the Rule of Law.
2. Increasing pro bono participation for law firms, in-house counsel, and government lawyers is vital.
3. Self-help centers will help to bridge the gap and provide opportunities for pro bono work.

III. Reports

A. In-House Counsel Pro Bono

1. Association of Corporate Counsel through the efforts of Carmel Gill
   a. Meetings with Chief Justice Bender and Justice Hobbs
   b. Potential additions to Rule 6.1
   c. Special recognition ceremonies for in-house lawyers
   d. Joining the pro bono coordinators group

B. Government Lawyers

1. Judge Tsankov has completed her vetting of pro bono providers in connection with the Colorado Federal Government Pro Bono Program.
   a. Meetings with Chief Justice Bender and Justice Hobbs
   b. Potential additions to Rule 6.1
   c. Special recognition ceremonies for government lawyers
   d. Coordination with 10th Circuit and U.S. District Court

2. Kelly Dunnaway is working on a plan to encourage County Commissioners and County Attorneys to participate in pro bono.

C. Law Firms

1. Justice Hobbs, Judge Miller, Judge Gabriel, and I have finished our second round of visits to law firms.
2. We now have over 270 firms and organizations committed to the Court's aspirational goal. This is a 40% increase since we began our visits in August 2012.
3. Roger Clark is working to schedule visits with firms in Northern Colorado.
4. We continue to work closely with the Access to Justice Commission to promote pro bono participation and self-help centers.

D. U.S. District Court Pilot Project to Implement Civil Pro Bono Panel

1. New project
2. Comments submitted
3. Implementation soon

E. Pro Bono Recognition Ceremony Held by Colorado Supreme Court

1. April 8, 2013

F. Pro Bono Coordinators

1. Meet quarterly
2. Share information
3. Match up lawyers with opportunities

G. Self-Help Centers

1. Bryan Cave HRO and Century Link will provide on-call attorney support to the pro se self-help center in Adams County.
2. We are hoping other firms and clients will adopt other centers to provide the same support in other districts.

H. We have met our short term goals and plan to continue our efforts.

1. Increase participation by private bar, government lawyers, and in-house counsel.

2. Improve services for pro se litigants through self-help clinics, forms, and triage.

3. Foster the relationship between the profession and the community.

I. Future Plans

1. Integrate inclusiveness and professional development into our activities and goals

2. Teamwork with firms, government, law schools, clients, and judges

Lorenzo A. Trujillo Working Group A Chair, Counsel to the Chief Sarah Clark, Sr. Asst. Dean Whiting Leary, Asst. Dean Dan Vigil, Asst. Dean Patti Powell, Prof. Eli Wald, Prof. Melissa Hart, Andrew Frohardt, Chief Judge Robert Hyatt, Mike Massey, John Baker, John Mosby, Katy Donnelly, Judge Gilbert Roman, James Coyle, Assoc. Dean Fred Cheever, Judge Neil Gorsuch, Chief Judge Marcia S Krieger, Prof. Roberto Corrada, Mark Fogg, David Little.

I. Background

The second annual joint law school orientation: ***For This We Stand*** is scheduled on **September 21, 2013**. Students, Deans, representative faculty from the three law schools, attorneys from the Colorado Bar, Judges, and former clients will participate in a half-day Professionalism Orientation for First Year Law Students from the University of Colorado Law School and the Sturm College of Law. This year 1L students from the University of Wyoming will also participate (12-14 students confirmed with some additional possibilities from 2L & 3L).[1]

On March 13 and May 8, the planning sub-committee met to review last year's event and to discuss on-going progress toward implementation of this year's event.

[1] Excerpt from James Coyle communication to add Univ. of Wyoming 1L Law students:

I am following up on my suggestion that the Working Group consider inviting University of Wyoming law students to the *For this We Stand* fall program. Here are the stats I promised you:

- In May 2012, the University of Wyoming's School of Law had 74 graduates. We had 41 of those graduates apply for the July 2012 bar exam.
- In February 2013, 5 University of Wyoming Law School graduates took the February 2013 bar.

In addition, Wyoming just became a Uniform Bar Exam state. Thus, an individual who successfully completes the Wyoming bar can take her or his bar exam score and apply for admission to practice law in Colorado, using the Wyoming bar exam test score. The applicant has to meet Colorado's slightly higher passing grade (274) and must also pass our office's character and fitness determination, but can then become admitted to the Colorado bar. I expect Colorado will see more UBE applicants from Wyoming than from most other states.

Also, Wyoming just became a reciprocal admission state. Thus, Wyoming attorneys can become members of the Colorado bar by applying on motion and meeting Colorado's year-of-practice requirement (active practice for 5 of the last 7 years). Getting to them while in law school can only have long-term benefits for the Colorado bar.

Thus, I ask you to consider incorporating this group of law students into the great program you have established for potential Colorado attorney applicants.

Agenda:

9 – 10 a.m.	**Atrium of The Ralph L. Carr Judicial Complex** **Student Registration and Breakfast for Students**
	Opening Statements from Chief Justice Bender and Dean Weiser, Dean Katz, Dean Easton
10 – 10:45	**Walk to Denver Courthouse**
10:45 – 12:00	**Small Group Discussions**
12 – 12:30	**Final Social of Students, Judges, Attorneys, and Former Clients**

II. PLANNING AGENDA PRIORITIES

1. 2014 **For This We Stand** date: **September 21, 2013**

2. Event Sub-Committee Co-Chairs: Asst. Deans Whiting Leary, Patti Powell; Melissa Hart and Eli Wald, Curriculum.

3. Budget:
   a. Committed Grant Support:

i.	Sturm College of Law	$ 1,000
ii.	Univ. of Colo. School of Law	$ 1,000
iii.	Colo. Bar Assn. (Chuck Turner/Mark Fogg)	$ 1,500
iv.	Federal Bar Assn. (Judge Mimi Tsankov)	$ 1,500
v.	Colo. Office of Attny. Regulation (Jim Coyle)	$ 1,500
vi.	Univ. of Wyoming Law School	$ 250
	Total	$ 6,750

(Last year's budget was $4,000 but did not include food, a priority for students.)

Expenses: Food, AV equipment, Tables/Podium/Equipment Rentals, Security, Printing.
Tentative to date: Food $5,591; Equipment (tables, podium, etc.) $1,952;
In Progress for costs: Security, Printing, AV equipment. NOTE: We will balance the budget and hold our costs to the actual amount received.

4. TasksTo Be Done:

Joint 1L Professionalism Orientation Event
Checklist –

- ☐ Identify participating judges, lawyers, and clients
- ☐ Email participant packet to all judges, lawyers, and clients
- ☐ Divide up law school classes into 25 groups, mixing CU, DU and UW Law students
- ☐ Match up judge, lawyer, client teams
- ☐ Generate a distribution list for each small group
- ☐ Assign each small group to a courtroom
- ☐ Collect judge and lawyer bios, as well as summary of each client's story
- ☐ Email bios and story to each small group
- ☐ Create and print event program
- ☐ Create and print walking directions from The Ralph L. Carr Judicial Complex to Denver City and County Building
- ☐ Email program and walking directions to each small group
- ☐ Create and print name tags with courtroom assignments
- ☐ Coordinate security and courtroom assignment with Chief Judge Hyatt
- ☐ Finalize payments for audio rental, food, and security
- ☐ Determine staffing at the check-in tables
- ☐ Plan for assisting law students in walking to City and County Building
- ☐ Plan to provide crowd control and direction for security screening
- ☐ Communicate with speakers about remarks
- ☐ Coordinate breakfast
- ☐ Other tasks as determined

5. Small Group Discussion – Talking Points

For This We Stand
Joint 1L Professionalism Orientation Event
Saturday, September 21, 2013
Ralph Carr Judicial Center/Denver City and County Building

Small Group Discussion – Talking Points

A set of talking points, labeled for the judges, lawyers, and clients follows. These talking points need not be adhered to rigidly or even used at all. Their purpose is to assist in preparation and to prompt discussion if needed.

Clients:

1. Did you feel like you had a voice in the legal process? Were you able to express your viewpoint? Did you feel like you were listened to? Did you feel like your concerns were advocated through the system?
2. Did you feel as though the process was neutral and fair? Was the judge unbiased? Were the parties treated equally? Did you understand why the decision was reached?
3. Were you treated with respect and dignity throughout the legal process? Were your rights protected?
4. Did you feel like the lawyers and judge were sincerely trying to help the parties? Did the judge explain the decision in a way that you could understand? Did you understand the legal issues and the process going on in your case?
5. If you could change one thing about the legal system, what would it be?

Judges:

1. What is the rule of law? Why is it important to democracy?
2. How are principles of diversity and inclusiveness central to the legal profession's ethical commitments?
3. How do/should lawyers and judges strive for broadly inclusive access to justice?
4. Why is it important that a client understand not only the outcome of the case but also why and how that outcome was reached?

Lawyers:

1. Who do you ask when you have questions or need advice?
2. How does mentoring/being mentored fit into your concept of professional responsibility and professional identity?
3. How does community involvement and pro bono *publico* relate to professionalism?
4. How do you see diversity of experience, background, and perspective as strengthening the legal profession/legal community? How are principles of inclusiveness central to the legal profession's ethical commitments?
5. If you could go back to law school, what is the one thing that you would do that you did not do or vice-versa.

Report to the Commission, Submitted by:
Lorenzo A. Trujillo, Working Group A Chair
May 23, 2013

Chief Justice Commission on the Legal Profession
Working Group B
Meeting, April 24, 2013 2:00PM
CBA Offices

Minutes

In attendance
Al Dominguez (by phone)
Gillian Bidgood (by phone)
Mark Fogg
J. Gabriel
J. Campbell
Sarah Clark
Melissa Nicoletti
Margrit Parker
John Baker

1. Review of November 8, 2012 minutes

2. Colorado Attorney Mentor Program (CAMP)
    a. John Baker, Executive Director (brought a handout)
        i. Template for the program: more decentralized, e.g., similar to Ohio
            1. Went to Ohio, met with Lori Keating who runs Ohio's program, v. centralized, everything runs thru Columbus.
            2. They have a very good website, used for marketing, recruiting mentors, registration of mentees, has an e-dating type of system for mentees to select mentors.
            3. Going to Illinois, their program is similar to ours, run through the local orgs, with a central support.
        ii. Definition of mentee
            1. Requests for waiver of 0-3 year limitation, ARC believes this should be opened up as well, to have more than just a "beginning" program, mid-level/transitioning lawyers.
            2. We likely need to go this route because there is a backlog of people who need a mentor who are more than 3 years out.
            3. In Ohio and Illinois, they are also 0-3, but they have people begging to waive the rule, they wish they had a different rule.
        iii. Training/materials
            1. We need a website, going to be significant project.
            2. Envision it as standalone, does not need the confidentiality like the COLAP program
            3. Considering working with CLE Colorado to set up a mentor training program, need to look into public/private partnership aspect of this.
        iv. Mentoring and role of judges
            1. Will need to address what judges can do in mentoring.
            2. Rule that says law clerk can only have mentor from that court?
        v. Met with both law schools

            1. DU is finding it easier to set up mentoring than CU, CU wants to do it but bigger challenge
        vi. New groups
            1. Douglas/Elbert interested, met with them.
    b. Interplay with Commission,Working Group B, and Mentoring Committee
        i. Chief wants Commission to emphasize diversity concepts.
        ii. How can Grp B help/work with John – as advisory board.
        iii. By April or May 2014 – Grp B will have new chair, Jan 7, 2014 Bender retiring – some transition
        iv. Still want mentoring to be a core focus of this group – can be an official purpose of this group to be a sounding board/ideas focused/sounding board.
        v. John is looking for an unofficial resource group to provide info, provide additional thought on programs – will present this to SC Advisory Committee.
3. Members of Working Group B – there is a core of 10
    a. Continuation – Mark will contact members to gauge interest in continuing; then recruit 5-6 lawyers, e.g. young lawyers with an interest in working their way onto the Commission
    b. Commission
    c. Diversify
    d. Transfer of leadership

4. Projects for 2013
    a. Results of February 21, 2013 break-out discussion groups.
        i. Gender issues, status of progress, better in courts and government than in private sector.
        ii. Women don't promote themselves as much as men.
        iii. What is the role of this group in understanding or solving these types of problems?
    b. Theme of diversity
    c. Working Group B 2013 projects – agreed not to decide on a specific program but rather bring in people from outside for input.
        i. Concept of sponsorship, diff from mentoring, more networking, promoting the new lawyer, theory: not a lot of older women playing this role – perhaps as a complement to CAMP, find concrete ways to develop a sponsorship program, but is it sponsorship generally, or sponsorship for increasing diversity
            1. This may be too difficult a concept, and may detract from CAMP, make idea of sponsorship a part of training in mentoring.
        ii. Addressing recruitment and retention – design a presentation for purpose of convincing firms that diversification is in the interest of their bottom line.
        iii. Bringing in specialty bars to talk with us about what they are doing to attract and train new lawyers.

Colorado Attorney Mentoring Program (CAMP)

Ralph L. Carr Judicial Center
1300 Broadway, Suite 230
Denver, CO 80203

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F: (303)501-1143
E-Mail: j.baker@csc.state.co.us

Memorandum

TO: Chief Justice's Commission on the Legal Profession

FROM: John Baker, CAMP Director

DATE: May 22, 2013

SUBJECT: Colorado Attorney Mentoring Program ("CAMP") Status Report

SUMMARY OF CAMP VISION & GOALS

Since my brief report on February 21, 2013 to this Commission the broad goal for Colorado Attorney Mentoring Program ("CAMP") remains simple. Colorado lawyers, judges, and law teachers will foster mentoring for all lawyers in Colorado to make those lawyers professional, ethical and competent members of the legal profession.

Specific goals of CAMP include without any intent to limit the following:

1. Assist and support all members of the Colorado legal profession, including the private law firms, the law schools, the government agencies, the courts, the bar associations, the inns of courts, and any other legal organizations to provide quality and lasting mentoring relationships to all lawyers, whether new to law practice or transitioning from one type of law practice to another in Colorado. This mentoring will need to start early in the education of the lawyer and last throughout their career.
2. Assist and support all members of the Colorado legal profession, including the private law firms, the law schools, the government agencies, the courts, the bar associations, the inns of courts, and any other legal organizations to provide skills training for mentors through training programs, literature, materials, and other resources.
3. Assist and support all members of the Colorado legal profession, including the private law firms, the law schools, the government agencies, the courts, the bar associations, the inns of courts, and any other legal organization to create an effective state-wide plan and structure for establishing, maintaining, and evaluating program models that can be modified to work in all localities. We will accomplish this by learning from all of those that came before CAMP, the "trailblazing pilot mentoring programs" of the Denver Bar Association, the Minori Yasuii Inn of Court, and others.

4. Assist and support all members of the Colorado legal profession, including the private law firms, the law schools, the government agencies, the courts, the bar associations, the inns of courts, and any other legal organizations to shape CAMP as a model for the nation, similar to how the Office of Attorney Regulation Counsel is the "gold standard" in that arena.

After three months on the job, I can see some progress towards achieving these goals due to the support of the welcoming Colorado Judicial Department and the Colorado Judiciary. Jim Coyle, Chip Mortimer, Mark Fogg, Margrit Parker, Melissa Nicoletti, and Sarah Clark have been keys to my personal "CAMP orientation." All have been gracious to share their ideas and work product. The volume of information that I have gleaned from these fine "mentors" has been a bit like trying to get a drink out of a fire hydrant. I appreciate their help.

WORK IN PROGRESS

A. REVIEW OF NATIONAL PROGRAM MODELS AND RELATED MENTORING RESOURCES:

Even before my appointment as director, I was looking for national models for CAMP. At the suggestion of Mark Fogg and others, I looked at programs in Illinois, Ohio, Georgia, South Carolina, and Washington State. Illinois and Utah offered the most detailed information, materials, and forms. I have chosen face-to-face meetings with the directors of the Illinois program and the Ohio program. To date I have succeeded in completing the following:

1. I met with the officials of Supreme Court of Ohio Commission on Professionalism Lawyer to Lawyer Mentoring Program at their offices in Columbus, Ohio in early April. The Ohio program is a highly centralized program where every aspect of mentoring is run from Columbus. Local Bar Associations, law firms play limited roles other than supplying the participants. The key to the program is the sophisticated website, where all mentors are certified, all mentees are recruited, all pairs are matched (almost like *E-Harmony*), all programs are registered, and all CLE credits are certified. (See http://www.supremecourt.ohio.gov/AttySvcs/mentoring/default.asp.)
2. I met in Chicago with Executive Director Jayne Reardon and her mentoring staff at the Illinois Supreme Court Commission on Professionalism. Unlike the Ohio the ISCCP They gave me a unique opportunity to attend the annual meeting of their local program administrators. Unlike Ohio the ISCCP programs are actually run by law firms, bar associations, government agencies, Inns of Court, and other legal organizations. The administrators shared with me the good and the bad in their individual programs. I have concluded that the ISCCP Model will likely work best in our geographically diverse state. The ISCCP mentoring website is http://ilsccp.org/mentoring/mentoring_index.htm.
3. I have joined the National Legal Mentoring Consortium, based at the University of South Carolina and plan to participate actively. I am collecting and reading mentoring and professionalism literature. The consortium director has asked me to share my bibliography of literature. The website is http://legalmentoring.org.

4. I am working with author Ida Abbott to create mentor training materials. Ms. Abbott has written the legal mentoring "bible, entitled," *The Lawyers' Guide to Mentoring* and has been active in mentoring training and promotion for 30 years. She is willing to work with CAMP to create a mentoring resource center for CAMP. Ms. Abbott's website is http://www.idaabbott.com.
5. During these times of the economic evolution of the legal profession career development issues are intertwined with legal mentoring. I am consulting with James G. Leipold of NALP on the economic plight of newly admitted lawyers, newly displaced lawyers, and law students. The depressing data on the career picture in the legal profession for these groups can be found at the NALP website at http://www.nalp.org/research.
6. I am consulting with Arin Reeves, J.D., Ph.D. of Nextions a nationally recognized leadership organization, focusing on leadership &diversity and inclusiveness. She has agreed to work with CAMP on the nexus between mentoring and professional inclusiveness. Nextions website is http://www.nextions.com.

B. CAMP RULE DRAFTING:

The CAMP Rule 255 CRCP has been approved by the Colorado Supreme Court Advisory Committee (CSCAC) and was reviewed and approved with revisions by the by the Colorado Supreme Court. The rule was drafted to provide flexibility on both the definition of "mentee" and on the role of CAMP.

C. EVALUATION OF COLORADO PILOT PROGRAMS:

Thanks to the mentoring pairs from the various pilot programs, who have shared their insights and suggestions in face-to-face debriefings, I have some anecdotal data about the pilot project programs. I will continue to meet with mentors and mentees of the 2012 pilot project programs at the Denver Bar Association, at the Minori Yasui Inn of Court and in the District Attorney's Office in the 17th Judicial District. I am learning what worked and what did not. Both the DBA and the Yasuii in have started their 2013 programs, which I will follow, also.

D. INITIATE CONTACTS WITH THE STURM COLLEGE OF LAW AT THE UNIVERSITY OF DENVER & WITH THE UNIVERSITY OF COLORADO SCHOOL OF LAW

In early March I met with Professor Mike Massey and Andy Frohardt to discuss the Sturm College of Law mentoring programs. We have exchanged materials and will meet in the future about collaboration between CAMP and their programs. I have met with Senior Assistant Dean Whiting Leary about CAMP collaboration or support at the University of Colorado, School of Law. Future meetings will be planned to identify mutual areas of collaboration.

E. INITIATE CONTACTS FOR NEW CAMP PROGRAMS AND COLORADO SUPPORT

In early April I started fielding requests from organization about the prospects of starting local CAMP programs. Requests have come from, the Doyle Inn of Court, the Douglas Elbert Bar Association, and the Colorado Women's Bar Association, the 1st Judicial District Access to Justice Committee, and the

Thompson Marsh Inn of Court. Other programs initiated by Mark Fogg are now in operation at the Colorado Defense Lawyers Association and with the Larimer County Bar Association. I plan to support and assist these programs, also.

Requests for presentations are snowballing. During the months of May and June I have made or will make presentations to the Gunnison Bar Association, the Chief Judges Council, the *En Banc* Meeting of Judges for the 17th Judicial District, the Colorado Women's Bar Association, the 1st Judicial District Access to Justice Committee and the Colorado Bar Association Board of Governors. CBA President Elect Judge Terry Ruckriegle has graciously offered to coordinate his local bar visits with my travels around the state this summer.

I have re-established my work with the CBA/DBA Professionalism Councils. At the request of the chairs, I will be an active member of Working Groups A, B, and C of the Chief's Commission on the Legal Profession.

FUTURE CAMP PROJECTS & NEEDS

To assist the development of CAMP throughout Colorado the following resources will be developed for the balance of 2013:

1. CAMP Website – Priority needs to be given to the construction of a CAMP website that will allow the collection of information, the dissemination of information, and serve as resource site.
2. Mentor Training Program & Materials – Two of the current CAMP programs being developed have requested mentor training.
3. Time Commitment for Follow-up with Volunteers for CAMP – At least six experienced lawyers have volunteered to be mentors or help recruit mentors. Some will help train mentors. I have been offered an intern or two from DU to help with the collection of data on mentors, mentoring and mentee needs. I need to make it a priority to take advantage of the volunteers.
4. Mentoring Resource Center -- In the long term CAMP needs to develop a mentor resource center to help train mentors in both face-to-face and online settings. Recently two mentoring program prospects asked CAMP to develop a mentoring skills training program this summer which will fast track the development of a training curriculum. I have collected relevant literature on mentoring, lawyering, professionalism for the center. Mentoring *Guru* Ida Abbott has agreed to explore this resource center concept with CAMP.

LEGAL EDUCATION

Law Schools Join To Launch New Program

By **Tony Flesor**
LAW WEEK COLORADO

COLORADO LAW SCHOOLS are taking a page from the medical playbook for a new legal residency program.

The program, which is modeled loosely after medical residencies, is an unusual joint program between the University of Denver Sturm College of Law and the University of Colorado School of Law. The program is in its infancy, but with a handful of commitments from law firms and in-house law departments already, the first year should provide useful lessons for moving forward.

Through the new program, graduates are given an opportunity to work with a local firm or corporation under a fixed-length contract for 12 to 18 months while getting a paycheck, job experience and professional connections.

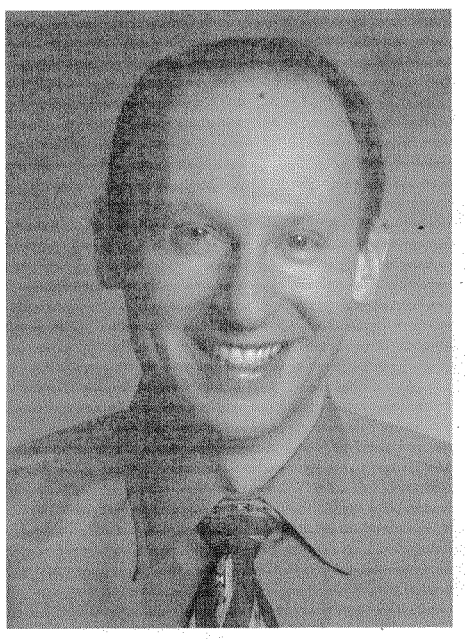

MARTIN KATZ

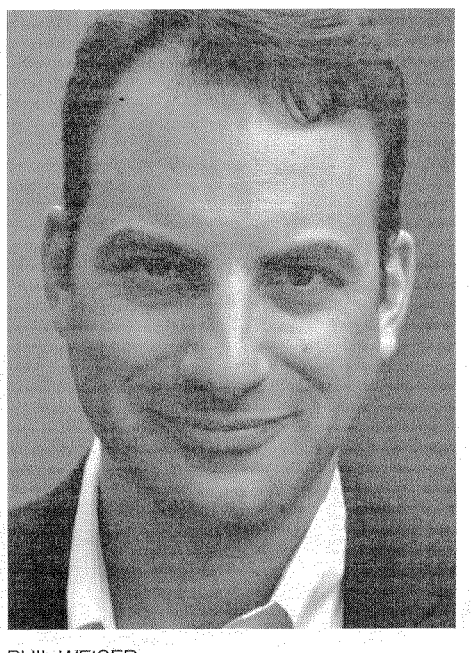

PHIL WEISER

The med school model

The idea came as another way to offer job experience before law students start their careers. "Like med school, people weren't proficient or as marketable in their first year out of law school," CU Law School Dean Phil Weiser said. "There's the need to be a resident or apprentice for a while."

Participants in the program must graduate law school and pass the bar. From there, they are entered into a recruitment pool, which connects them with corporate offices and law firms. This is where the legal residency deviates from the medical model. The program isn't set up to match graduates with employers, it merely provides the connection between them.

"We didn't want the overhead," Weiser said. "We just want to provide a valuable opportunity."

Once residents go to work, they will receive pay, as recent medical graduates do in residency. DU Sturm College of Law Dean Katz said the pay won't be as much as their associate counterparts, but the residents are working for continued education as well as money.

That educational aspect is another similarity with medical residencies. Residents will take part in learning plans while working. The schools will provide learning models so mentors can teach legal skills that match externships the schools offer students. These are designed to be experiences where the resident gets to watch others do tasks and then participate.

"In medical school, it's watch, do, get feedback," Katz said. "That's a model that works, and that's what we'll do as well."

Ideally, the graduates will be given the opportunity to learn skills in the area in which they hope to practice. Katz said a litigation-focused firm might offer learning plans that build skills for interviewing, pleadings, discovery work and depositions.

Aside from the optional learning plans, the school's involvement is planned to primarily be support for the employers. The individual experiences, and the pay, are left to the employer to figure out. The goal of the program was simply to find another route for recent graduates to start their careers. A perk for firms is that the program allows them to manage their expectations.

Weiser said many employers are still hiring in traditional ways where they're looking for a long-term relationship or not at all. Thus, it was important to create more flexibility for how employers hire.

"The traditional model has been a shrinking pipeline," he said. "The challenge is how to provide pathways to train the next generation of lawyers."

Partners from the start

The program has been a partnership

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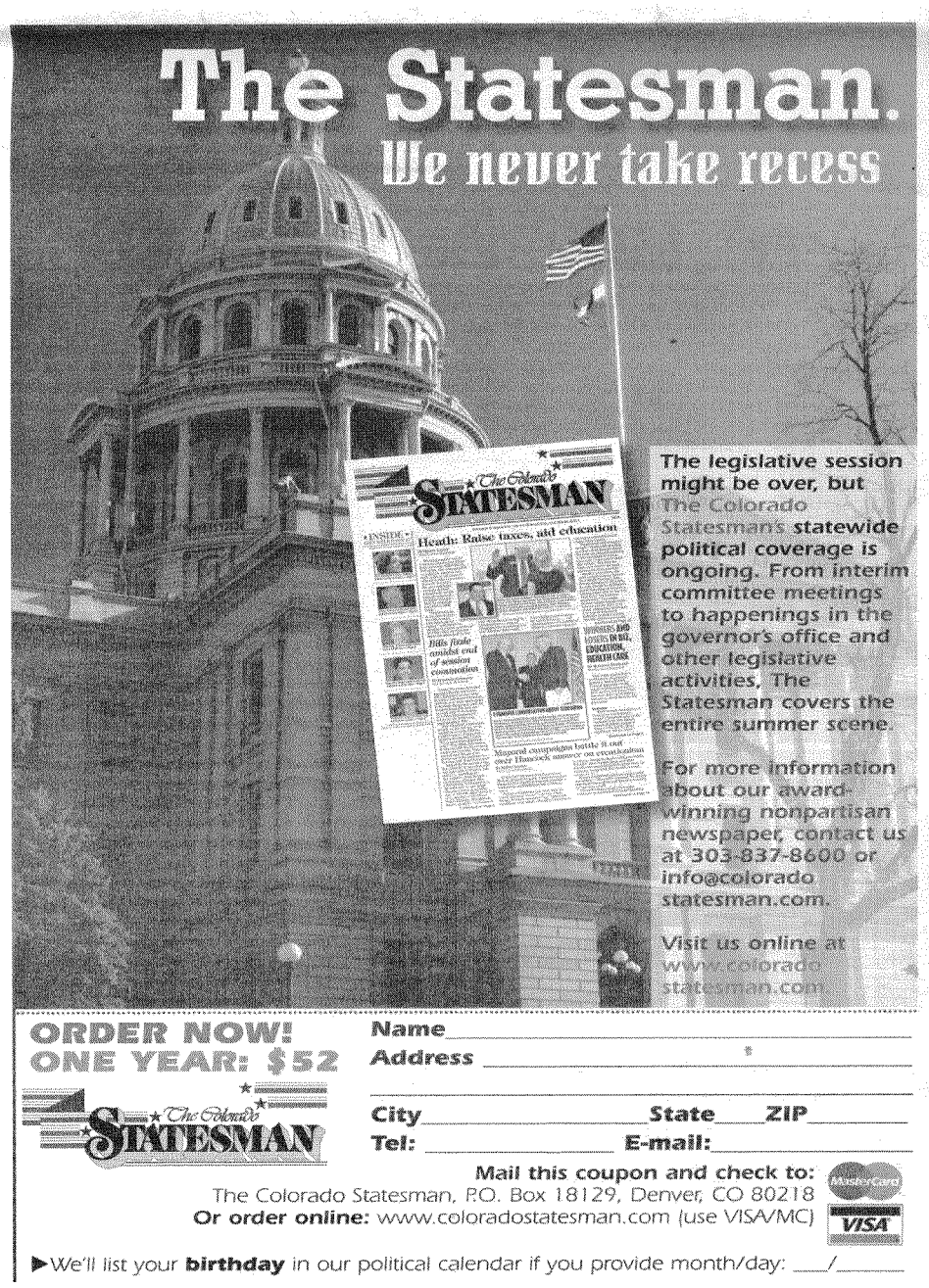

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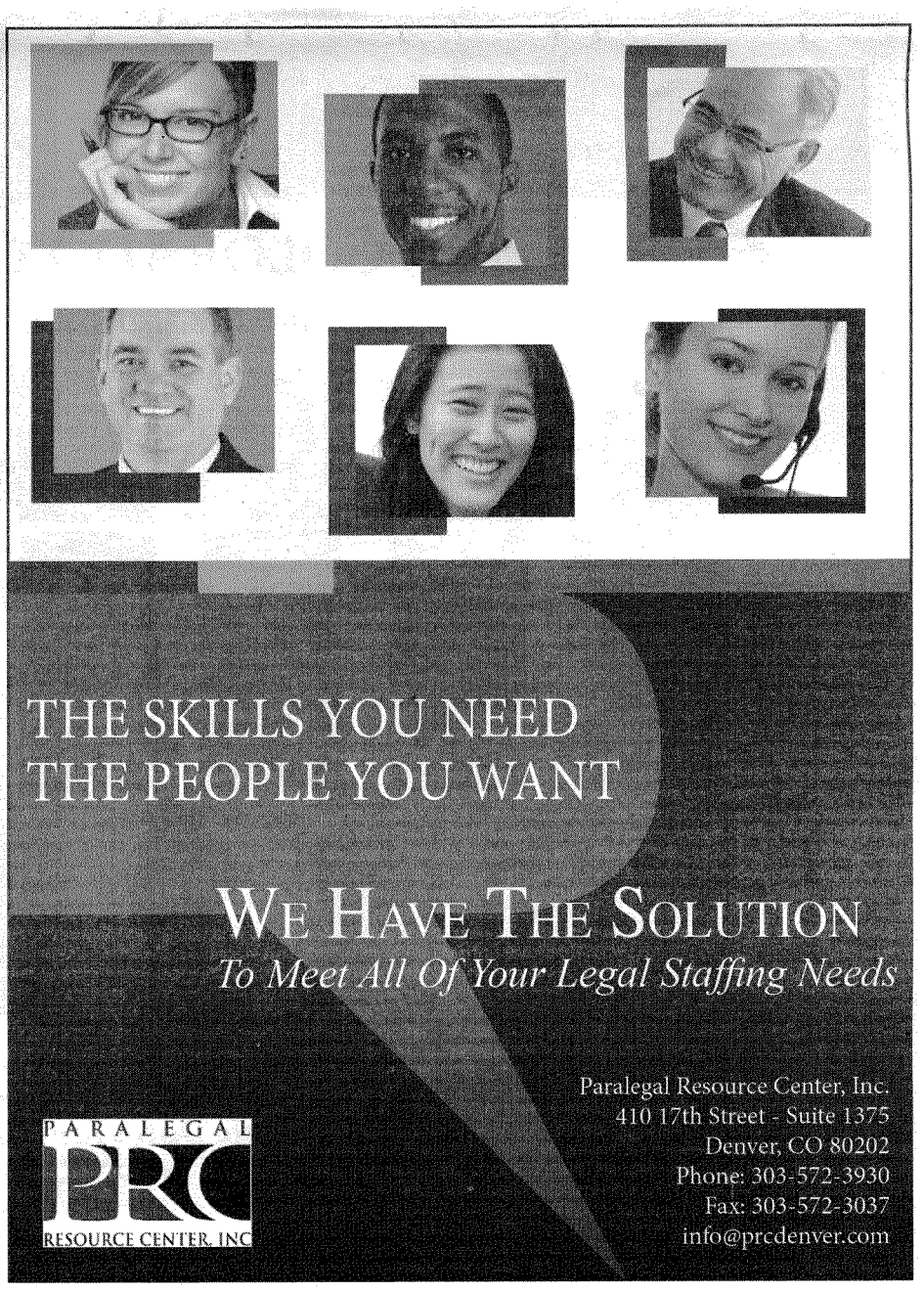

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LEGAL EDUCATION

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between DU and CU since its conception. Weiser said that he and Katz have been looking for shared initiatives between the schools. Katz said this was an easy choice because it benefits both schools' interests, as well as the Colorado legal community.

Things happened quickly after the idea first came up in late spring. The goal was to have the program ready by the end of summer, and that deadline has kept everyone's feet to the fire, Katz said. The schools held an event on Aug. 7 at Reilly Pozner intended to get others in the community on board and to gain commitments from law firms and legal partners. Katz said the event was a success.

The program has six partners thus far including Burg Simpson, Wheeler Trigg O'Donnell, Lathrop & Gage, Inman Flynn and Molson Coors. In addition to partnerships, the program has the support of the Colorado and Denver bar associations.

Molson Coors has taken an active involvement in the program so far. According to Katz, representatives from the company came to the Aug. 7 event with ideas for how to make the program work for the residents as well as the company. In addition, the representatives said they preferred the resident model to working with outside staffing companies for short-term hires. Coors will also offer a rotation for residents to compare practice areas.

Finding the right fit

Although the residency program has pitfalls for some students, such as potentially low wages and the relatively short contract period, it addresses systemic issues for law graduates. They have the opportunity to gain experience, and more importantly, to find work right out of law school.

"Frankly, if for some reason you're struggling to find a job, it's a no brainer," Katz said.

For others, however, the decision is a little harder. Graduates who must choose between an associate job and a residency might turn down an associate job for some of the benefits residency provides. In residency, Katz said, graduates increase their marketability, continue to receive an education, and are given an opportunity to work at what could be a dream job for them.

"It's going to be a very personal decision, but it might still make sense for people to trade a higher salary and job security for a training opportunity."

Though the program is only beginning to get off the ground, there are already ideas for expanding it, such as a "low bono" firm that could provide access to justice. The program is continuing to add new partnerships, and the first batch of residents is expected to begin the program officially after the bar exam results are returned in October.

Weiser said the initial response for the program has been encouraging so far, but they're playing a long game.

"It's a big change, and we didn't think it was one that would be immediately embraced," he said. "We're planting seeds and will prove ourselves over time." •

— Tony Flesor, TFlesor@CircuitMedia.com

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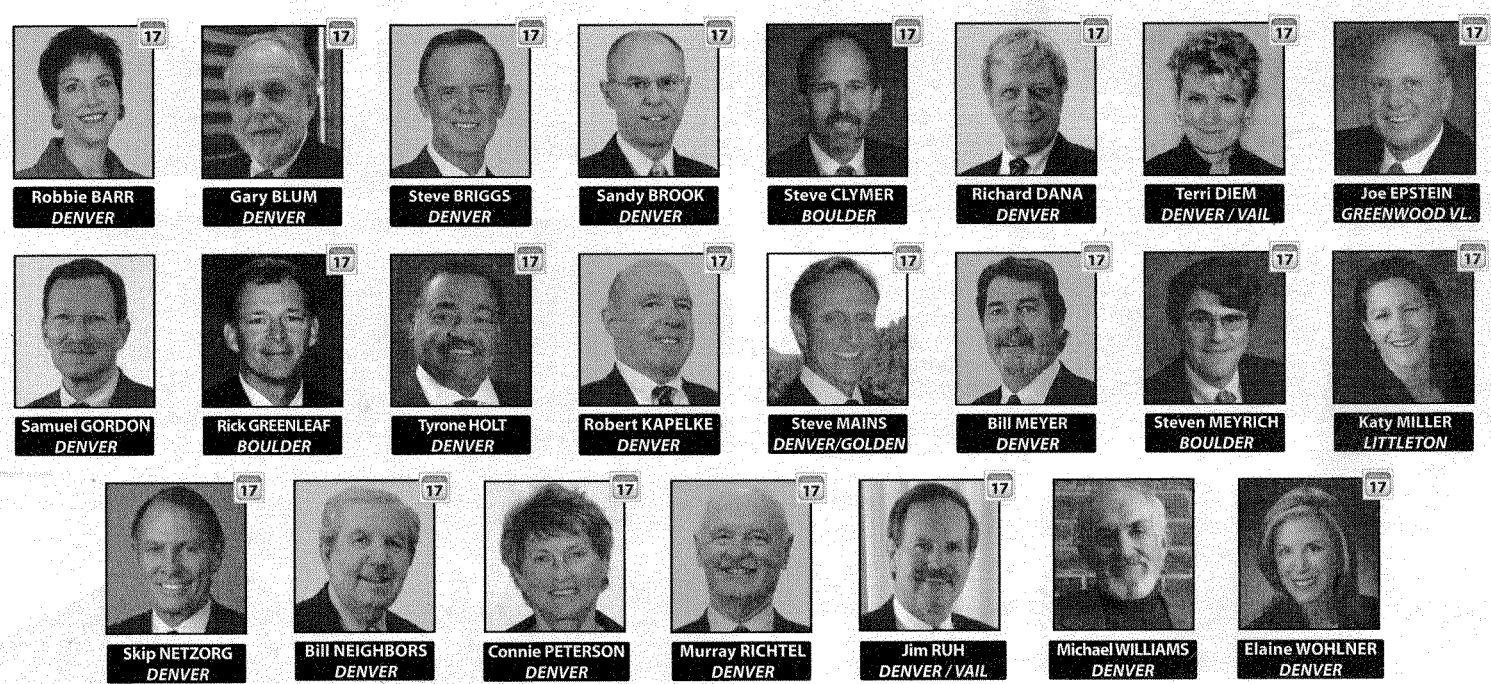

Wednesday 17

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Meeting, Working Group B

August 19, 2013, CBA offices

In attendance:

Kyle Velte
Sarah Clark
Ben Currier
Judge Campbell
Judge Gabriel
Chuck Turner
Melissa Nicoletti
John Baker
Shannon Stevenson
David Masters (phone)
Vicki Lovato
Mark Fogg

- Introductions
- History of the Commission and Working Group B
    - Commission started in 2010-2011 to facilitate communications between the law schools, the bar and the judiciary.
    - 4 working groups.
        - A - Development of students in law schools.
        - B – Ethical and professional development of new lawyers.
        - C – Lawyer to lawyer relations, lawyer to judge relations and professionalism.
        - D – Relationship between lawyers and the public and *probono.*
    - Mentoring program is one of the focuses of this group.
    - Colorado Lawyers for Colorado Veterans program was another focus of this group.
    - Modest Means project through the CBA.
    - Justice Rice will continue the work of the Commission and the working groups.
    - Christine Burke will be taking over Sara Clark's position.

- Work still to be done on projects that Working Group B started.
    - Mentoring
        - John is working on getting additional local and specialty bars started on their own individual mentoring programs.
        - Working on developing a Mentoring Resource Center.
        - Training of Mentors- develop curriculum for training mentors and mentees.
            - October TCL article.
            - Need mentor trainers.
            - To include diversity training for mentors and mentees.
            - Working Group B to help develop a curriculum for the training of mentors. (CAMP has a small advisory group working on this, especially diversity and inclusiveness) and the work product will be brought back to Working Group B).
        - Mentoring Program specifics can be found at:http://www.cobar.org/page.cfm/ID/21965/

        - John needs help approaching some of the government offices.
- Chief Justice would like the working groups to work on diversity and inclusiveness.
    - What can we do to bring diversity to the surface – training mentors and mentees about the unspoken issues, how to recognize and deal with the issues.
        - Important to train the mentees both in diversity and in how to be willing to ask for help.
        - Mentor/mentee relationships need to be fluid.
        - What are the markers of success.
        - Train on a systemic basis – within the institutions – convincing the leaders that mentoring is important.
        - How to provide constructive critiques each way.
        - How to not come across as sexist or racist when giving criticism.
        - Unwritten play book (Kathleen Naulty training).
        - Different roles of mentoring.
    - How can we help the specialty bar associations?
        - GLTB - would like to move from social to a more structured organization. With CLE programs, etc. (May come to the group with ideas that we can help with).
        - Promote these organizations to the anglo lawyers.
        - Cross pollinate mentoring through the specialty bars.
        - Institutionalize quarterly meetings with the specialty bars.
        -
    - Pipeline programs.
        - Constitution Day, attorneys serving as guest teachers in DPS as examples.
    - 6-7 year transition for women in the law.
        - For minorities as well
        - Diversity is a profession and cultural problem.
    - Broadened across different spectrums – not only in firms but all settings. Possible facilitated discussions with the leaders of firms and legal offices.
    - All of these need to keep in mind the changing future of the law firm and legal profession model.
    - Important to put in a personal touch when considering all of these ideas. Not just statistical information. Use personal examples and folks who have had personal experiences as trainers.
    - Sponsoring young diverse attorneys.
    - 9-10 year attorneys coming in as mentors, and not knowing what to do and how to do it.
        - Can we get some of these younger attorneys to start performing as mentors earlier?
    - Just calling to say we are going to talk about diversity can put folks off – build the training into the mentor/mentee training can help solve.
        - Use some "higher ups" to get our foot in the door. Start with a conversation, not a lecture. Small setting and confidential.
- Next meeting – September 24 or 25, if possible.
    - On the agenda-to do list.
        - Mentor training curriculum (to have a pilot ready for November- Douglas/Elbert, possibly Boulder). John Baker to provide skeletal structure at next meeting.
        - Fogg/Gabriel /Parker article.
        - Helping specialty bars-lists to be prepared for the next meeting on the different ways we can help with inclusiveness with the specialty bars.
        - Pipeline programs.

Meeting, Working Group B

September 24, 2013, CBA offices

In attendance:

Mark Fogg
John Baker
Melissa Nicoletti
Gillian Bidgood
David Masters (phone)
Margrit Parker (phone)
Vicki Lovato (phone)
Chuck Turner
Kyle Velte
Sarah Clark

- Introductions
- CAMP Update
    - Inclusiveness and Diversity
        - Advisory group will work on inclusiveness and diversity training.
        - Need to intertwine this training with the mentor/mentee training.
    - Mentor/Mentee training
        - (See report from John Baker)
        - Advisory Group would like to continue. Will draw from the resources of Working Group B to put together a training program. John will chair a subcommittee of Working Group B that will include individuals from the Advisory Group to CAMP. This will be the CAMP training subcommittee.
        - Kyle Velte, David Masters, Gillian Bidgood, 3L's from both law schools, a recent mentee, and Vicki Lovato would like to join the subcommittee.
    - Develop a group of Mentor/Mentee Trainers
        - Trainers also needed to go out and train other trainers.
        - Will need specialization.
    - Group of mentors that can go out and recruit and follow up with the organizations and mentors as well as trainers.
        - Mark Fogg and Vicki Lovato will head up recruitment of trainers for now.

- Fogg/Gabriel /Parker TCL article on mentoring
    - Article was sent to members of the Working Group.

- How can we help the specialty bars
    - Create a specialty bar liaison position for each specialty bar on the commission and on Working Group B. (Possibly could be the vice-chair/president of each bar.) – Sara will extend the invitation from the Chief.
        - Working Group B can provide the specialty bars a platform to be able to keep connected with what is going on in the profession as a whole and what other groups are doing.
        - Will also help there to be a more natural engagement between the bars.
        - Allows us to crystallize the issues facing specialty bars vs. the bar as a whole.

- Create a Bar Leadership Conference (similar to the ABA) for the specialty bar associations.
- Sponsorship
  - Cross cultural sponsorships if we can raise membership.
- Membership
  - Should we be promoting all lawyers to join and be active in specialty bars?
  - How to build membership with allies.
- Events
  - Possibly having diverse programs for law students.
  - Help put together events that are community building between the specialty bar associations. (Possibly a half day summit on all issues facing specialty bar associations)
  - Specialty bars need space for meetings and CLE's.
- Fundraising
  - How can we help them fund raise?

- Pipeline programs

- New Information

  - John Baker will work with Mark to become the successor to chair Working Group B.

- Next meeting
  - CMAP Training Subcommittee report
  - Specialty bars inclusion report
  - CBA/DBA Diversity Committee - How can we use them to help with these issues?

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MEMORANDUM

TO: Chief Justice Commission on the Legal Profession

FROM: John Baker, CAMP Director

DATE: September 24, 2013

SUBJECT: Colorado Attorney Mentoring Program ("CAMP") Status Report

I am sorry that I will be unable to present the CAMP Report in person on October 3, 2013. I will be away for a long planned family trip. Please accept this memorandum as the CAMP Report to the Colorado Supreme Court Chief Justice Commission on the Legal Profession. In addition, Sarah Clark and the Honorable Rich Gabriel, and Working Group B Chair Mark Fogg will be present to answer questions.

PROGRAMS

CURRENT CAMP PROGRAMS

- **DBA** – 70 Mentor/Mentee Pairings (Continuation of Pilot Programs from 2011 and 2012)
- **Minori Yasui Inn of Court** -- 6 Mentor/Mentee Pairings (Continuation of Pilot Program from 2012)
- **Larimer County Bar Association** – 3 Mentor/Mentee Pairings
- **District Attorney's Office 17th Judicial District** – 2 Mentor/Mentee Pairings (Continuation of Pilot Program from 2012)
- **Colorado Defense Lawyer's Association** – 6 Mentor/Mentee Pairings

NEW CAMP PROGRAMS FOR 2014 IN THE WORKS:

- **Adams Broomfield Bar Association** – Presentations to ABBA Board and to En Banc Judges–Mentoring Committee formed –2014 Program Planned -Mariana Vielma
- **Ben Wendelken Inn of Court, El Paso County** – Presentation made to chair and vice-chair -- Committee Formed – Hon. Tim Schultz
- **Douglas Elbert Bar Association** -- CAMP presentation – Committee formed and meeting – 2014 Program planned– Want Mentor Training --Bernie Greenberg
- **El Paso County Bar Association** – CAMP presentation – Committee formed – Hon. Will Bain and Yolanda Fennick, President Elect EPCBA
- **Gunnison Bar Association/Gunnison Inn of Court** -- CAMP presentation – Committee planned – Hon. Steven Patrick
- **1st Judicial District Access to Justice Program** -- CAMP presentation – Committee planned – Robyn McDonald

- **1st Judicial District Bar Association --** CAMP presentation – Committee planned – Carolyn Sada
- **17th Judicial District – District Attorney's Office** – District Attorney Dave Young attended the CAMP presentation at ABBA and asked to meet for a new program.
- **Boulder County Bar Association** – Meeting with Christine Hylbert – BCBA Board to consider – Mentee already recruited – Want Mentor Training—Christine Hylbert, E.D. BCBA
- **Mesa County Bar Association** – Committee formed for 2014 Program – Requested Presentation by CAMP this fall – Barbara Butler, Chair
- **Sam Cary Bar Association** – Meeting with Terrance Carroll and Jereme Baker – want a triad – mentor/mentee/ law student – forming a Committee
- **Colorado Hispanic Bar Association** – Met with Cynthia Mares, Liz Krupa, Roberto Ramirez – want a triad – mentor/mentee/ law student – Program in conjunction with the White Center at CU and with Sturm College of Law – Committee Formed

CONCEPTUAL MENTORING REQUESTS

- **CBA Modest Means Task Force-** Presentation and task force meetings for mentoring needs for young lawyers taking on modest means cases. Task Force will push mentoring in coming year as a component of judicial district develop of modest means lawyer lists and self-help centers.
- **Low Bono Young Lawyer Mentoring Co-op –** Blair Kanis Kutak Rock LLP – mentoring component request for a young lawyer co-op for collaboration on low bono cases – met and discussed waiting for follow-up.
- **LawBank Mentoring Collaboration** – Jay Kamlet, Lathrop & Gage – collaboration request for mentoring component for LawBank.
- **Edward Gassman Residency Institute Proposal** – Edward Gassman, Esq. from Fort Collins – mentoring component for "residency concept" for new lawyers to work within an Institute on low bono or modest means client cases – planning to send proposal and set up meetings with Chief Justice Bender.

LAW SCHOOL COLLABORATION

PROFESSIONAL MENTORING PROGRAM UNIVERSITY OF DENVER STURM COLLEGE OF LAW
Professor Mike Massey and Professional Mentoring Program and Senior Program Coordinator Andy Frohardt are collaborating with CAMP on three potential proposals:

- Coordination of Sturm Mentoring with CAMP, so when the Law Student graduates they enter a CAMP young lawyer mentoring program. Question: will the mentor "graduate" to CAMP, also?
- Participation in a Colorado Hispanic Bar Association "mentor triad" program, partnering a law student with a mentoring pair.
- Explore CLE Credit for attorneys mentoring law students.

EXISTING MENTORING PROGRAMS AT THE UNIVERSITY OF COLORADO SCHOOL OF LAW

I have met with Senior Assistant Dean Whiting Leary about CAMP collaboration or support at the University of Colorado School of Law. Future meetings will be planned to identify mutual areas of collaboration.

In addition, CAMP is working with Melissa Hart of White Center at CU on a Colorado Hispanic Bar Association "triad mentoring" program partnering a law student with a mentoring pair.

CAMP MENTORING RESOURCE CENTER (MRC)

MENTOR/MENTEE TRAINING & RESOURCE CENTER

The development of a Mentoring Resource Center ("MRC") for online and face-to-face skills training programs and electronic materials for training mentors has begun. The following has been accomplished:

PHASE I (95% Complete)

- Collection of professional and popular press readings on mentoring, professionalism, ethics, challenges for young lawyers, inclusiveness and diversity, etc. has been on-going since March, 2013.
- Creation of a searchable bibliography of the collected materials.
- Upload materials and bibliography to CAMP Website
- Construction of MRC on CAMP Website.
- Launch Website MRC

PHASE II (Conceptual Only)

- Recruiting of "talent" for video "mentoring stories" and mentoring tips.
- Creating Content for training videos
- Create "mentoring stories" from mentors and mentees.
- Launch on CAMP Website

CONSTRUCTION OF CAMP WEBSITE

During July, August, and September, 2013 true construction of the CAMP website started. CAMP Part-time Administrative Assistant Lauren Eisenbach and I reviewed websites for a model for the CAMP website. We found the IAALS website and the CLE Colorado Website, both of which are simple, interesting, yet professional, and user-friendly. See the IAALS website at http://iaals.du.edu/ and the CLE Colorado site is at http://cle.cobar.org/.

We interviewed the developers and web masters of both sites. Evan Brown of CLE Colorado agreed to "consult cheap!" Brown has constructed a beta structure for the CAMP site using inexpensive, but flexible and robust web software, known as "Word Press." We are currently adding content forms, etc.

We plan to go live before October 15, 2013 to establish the CAMP presence, and then continue adding content and features as time goes by. Stay tuned!

INCLUSIVENESS AND DIVERSITY COMPONENT FOR CAMP

At the May meeting of the Chief Justice's Commission on the Legal Profession, the 2013-14 established "inclusiveness and diversity" as the major focus for its four working groups. CAMP recruited an informal advisory group to develop a concrete task for CAMP to tackle over the coming year. Relying heavily on resources and people

at the Center for Legal Inclusiveness, the group was selected for diversity in experience, in gender, in ethnicity and in opinions held. The members include:

Honorable Michael L. Bender
Chief Justice
Colorado Supreme Court

Sarah Clark
Legal Counsel to the Chief Justice
Colorado Supreme Court

Katayoun A. Donnelly
Azizpour Donnelly LLC
Private Practice

Margaret Funk
Erika Holmes
Colorado Supreme Court

Hon. Richard Gabriel
Colorado Court of Appeals
Co-Chair of Working Group B on Mentoring

SuSaNi Harris
Senior Director for Diversity and Inclusive Excellence
University of Colorado School of Law

Karen Hester
New Executive Director
Center on Legal Inclusiveness

Jim Pinto
Brownstein Hyatt Farber Scheck
Chair CLI Board

Carolyn Powell
Association of Corporate Counsel Board
General Counsel/Vice President MVG Development

Patty Powell
Associate for Dean for Student Affairs
Sturm College of Law

Honorable Nancy E. Rice
Chief Justice Designate
Colorado Supreme Court

Mariana Vielma
Assistant Adams County Attorney
ABBA President
Public Sector Attorney

The Advisory Group met for brainstorming sessions on June 28, 2013 and on August 26, 2013. During the first two meetings and through e-mail interchanges the group achieved the following:

1) Determined that CAMP should establish training curriculum and present training programs to improve mentoring generally and to facilitate inclusiveness and diversity in the legal profession through such mentoring;
2) Identified the various roles played by mentors in mentoring relationships, generally, and in mentoring across diversity;
3) Identified the various qualities/skills possessed by mentors in mentoring relationships, generally, and in mentoring across diversity;
4) Of these identified qualities/skills determined, it has been decided which are teachable and should be included in a CAMP training curriculum to improve mentoring generally and to facilitate inclusiveness and diversity in the legal profession; and
5) Determined that the training should, whenever possible, be a joint training for both mentors and mentees to improve mentoring generally and to facilitate inclusiveness and diversity in the legal profession through such mentoring, specifically.

During a third meeting on September 18, 2013 the Advisory Group confirmed and refined the list of teachable skills, so curriculum and programming planning can begin. The mentoring skills to be included in the mentoring training curriculum should include the following:

SKILL	COMPONENTS	POTENTIAL RESOURCES
Communication Skills	Ability to actively listen, to deliver constructive advice or critique, to request needs be met, to create a learning setting, to create a trusting environment, to encourage discussion, etc.	Colorado State Probation, NITA, Nan Joesten, Center for Legal Inclusiveness (CLI), Leadership Training, Vignettes, Videos, Ann Roan and the Colorado Public Defender Boot Camp.
Cultural Awareness and Respect	Implicit Bias training, Affinity Bias training, Inclusiveness training,	CLI, Arin Reeve, Specialty Bars https://implicit.harvard.edu/implicit/demo/
Discretion/Recognition of Boundaries & Privacy	Recognition of boundaries of mentoring relationship and avoiding crossing the line	Human resource materials, employment law materials, Specialty Bars
Ethical Conduct	Lecture, vignettes or movie clips, interactive discussions, etc.	OARC, CBA Ethics Committee
Professional Behavior or Professionalism	Civility	CBA/DBA Professionalism Vignettes, Judge Carparelli's Civility Skills Training, Professionalism Coordinating Councils, Peer Professionalism Advisory Group
Self-awareness	Myers/Briggs like resource for self-assessment as to strength and weaknesses, personality type, socialization type, etc.	https://implicit.harvard.edu/implicit/demo/ http://www.myersbriggs.org/my-mbti-personality-type/
Resourcefulness or Resource Centers	This may be taken care of with a "resource" guide like the ones they provide "Law Line 9" volunteers. Likely CAMP will need to develop one for entire state NOT just front range.	Professionalism - Prof. Coordinating Councils -- PPAG http://www.cobar.org/index.cfm/ID/20979/CLPE/Professionalism-Resources Law Practice--Reba Nance and the Law office practice resources http://www.cobar.org/index.cfm/ID/20124/DPLPM/Practice-Management/Volunteer/Pro Bono – CBA Public Education pages – Carolyn Gravit. http://makehistorycolorado.org/opportunities/ http://coloradocivics.com/ CTLA CDLA

On September 24, 2013 Working Group B of the Chief Justice's Commission on the Legal Profession and the CAMP Advisory Group merged the efforts on this mentor/mentee training. The Advisory Group will become a working sub-committee of the Working Group to complete this project.

Memorandum

TO: Chief Justice's Commission on the Legal Profession

FROM: Judge Russell Carparelli

DATE: Monday, September 30, 2013

RE: Working Group C Report
October 3, 2013 Commission Meeting

Overview

1. Collaboration with DBA/CBA Professionalism Coordinating Council
3. October Professionalism Month
4. Plans for November 2013 Swearing-in
5. Discussion of new activities

1. DBA/CBA Professionalism Coordinating Council

The DBA/CBA Professionalism Coordinating Council (PCC) has become an important collaborator in Working Group C efforts. PCC co-chairs, Peter Goldstein and John Tatlock have become members of Working Group C. They are coordinating the October 2013 Colorado Lawyer edition on Professionalism. John Tatlock is organizing greeters for the May 2013 Swearing-in as discussed below. Members of the PCC will be among the greeters.

3. October Professionalism Month

This year's Proclamation was signed on May 20, 2013. The Chief Justice decided that, in keeping with the Commission's mission to bring the bench, bar and legal academy together, the deans of our two law schools should co-sign the Proclamation. A copy of this year's Proclamation is attached.

An important addition to the Proclamation is encouragement to foster diversity and inclusion. Consistent with this addition, diversity and inclusion will be emphasized in this year's activities.

The October edition of The Colorado Lawyer will be dedicated to professionalism and will include the following articles:

- Forward
- A Ten-Year Retrospective on Professionalism
- Fifteen Years Since the Change…
- A Twenty-First Century Ethos…
- Teaching Professional identity…
- The Role of Mentoring…
- Professionalism Means Pro Bono
- Civility: It's a Skills Thing
- Learning Professionalism…
- Young Lawyer's Perspective

Efforts to promote Professionalism Month activities began with a meeting of all the geographic and specialty bar leaders and a full list of activities is attached.

4. November 4, 2013 Swearing-in

The fall swearing-in will again be at Boettcher Concert Hall.

Plans for the Assembly of Lawyers are in the works with the Karen Hester, Executive Director of the Center for Legal Inclusiveness, Working Group C, and leaders of the specialty bars.

We will support the law schools' post-swearing-in receptions for new admittees and will work with the law school leadership to determine how we can help.

5. Discussion of new activities

Working Group C intends to develop additional approaches to promoting communication and professionalism between and

among the bench and bar. The primary topics of discussion at this time are:

- Promoting court "Term Day" & Bench-Bar Retreats
- Continuing to promote the Inns of Court
- Determining how the ABOTA Teachers Law Academy can foster legal professionalism
- Legal Legends (formerly "The Tower Project")

Proclamation

Michael L. Bender
Chief Justice
Colorado Supreme Court

Philip J. Weiser
Dean
University of Colorado
Law School

Martin J. Katz
Dean
University of Denver
Sturm College of Law

Mark A. Fogg
President
Colorado Bar Association

Declaring October 2013 Legal Professionalism Month in the State of Colorado

***WHEREAS**, the Supreme diversity and inclusiveness Court of Colorado is vested with the authority and responsibility to determine who is possessed of the moral and ethical character, knowledge, and skill to represent clients and serve as an officer of the court; and*

***WHEREAS**, law schools teach such knowledge and skill and foster the formation of professional identity; and*

***WHEREAS**, members of the legal profession are public citizens having special responsibility for the quality of justice, the improvement of the law, the access to the legal system, the administration of justice, and the quality of service rendered by the legal profession; and*

***WHEREAS**, members of the legal profession in Colorado have established the Colorado Bar Association; and*

***WHEREAS**, the objectives of the Colorado Bar Association include advancing the science of jurisprudence, securing more efficient administration of justice, advocating thorough and continuing legal education, upholding the honor and integrity of the bar, cultivating cordial relations among the lawyers of Colorado, and perpetuating the history of the profession and the memory of its members; and*

***WHEREAS**, the Chief Justice of the Supreme Court of Colorado has established the Commission on the Legal Profession to foster among members of the legal profession a commitment to service, excellence, respect, ethics, and trustworthiness, as well as commitment to the preservation of the rule of law;*

***NOW THEREFORE**, the Chief Justice of the Supreme Court of Colorado, the President of the Colorado Bar Association, the Chief Justice's Commission on the Legal Profession, and the Deans of the University of Colorado School of Law and the University of Denver Sturm College of Law do hereby declare and proclaim October 2013 to be **Legal Professionalism Month in the State of Colorado**;*

***AND IN FURTHERANCE THEREOF**, encourage*

- ***Members of the Legal Profession** to rededicate themselves to demonstrating the highest standards of professionalism and integrity, and promoting public trust in the rule of law;*
- ***Professional Entities**, including law firms, corporate and public law offices, bar organizations, and Inns of Court, to promote legal professionalism and public confidence in the profession; and*
- ***Judicial Officers and Court Staff** to promote public confidence in the courts, our system of justice, and the professionalism of the bench and bar;*
- ***All Members of the Legal Profession** to foster diversity and inclusion within the profession;*

***AND IN COMMEMORATION THEREOF, invite** all judicial officers and members of the legal profession to attend **The Second Annual Assembly of Lawyers** at the Boettcher Concert Hall on November 4, 2013, at a time to be announced;*

***AND IMMEDIATELY THEREAFTER, TO REMAIN AND ATTEND a Special Session of the Supreme Court of Colorado** to welcome to the legal profession those who then will be admitted to the practice of law.*

***Declared and Proclaimed** this 20th day of May 2013.*

Michael L. Bender
Chief Justice
Colorado Supreme Court

Philip J. Weiser
Dean
University of Colorado
Law School

Martin J. Katz
Dean
University of Denver
Sturm College of Law

Mark A. Fogg
President
Colorado Bar Association

Chief Justice's Commission on the Legal Profession
Ralph L. Carr Judicial Center
2 East 14th Avenue, Denver, CO

Meeting of Bar Leaders
October 2013 Professionalism Month
Supreme Court 4th Floor Conference Room
July 17, 2013

AGENDA

1. Goals of the meeting

2. Roll Call

3. October Professionalism Month

   A. General goals
   B. 2013 Theme – Diversity & Inclusiveness

4. The Assembly of Lawyers

5. Introduction of Center for Legal Inclusiveness

6. Discussion – How to support bar efforts related to Professionalism Month

   A. How to encourage October 2013 bar activities
   B. How to support activities related to Diversity & Inclusiveness
   C. How to support activities related to Professionalism generally
   D. How to promote planned activities

7. Meeting summary

   A. Concepts
   B. Decisions
   C. Tasks

8. Another meeting? of everyone? of smaller groups?

Legal Professionalism Month

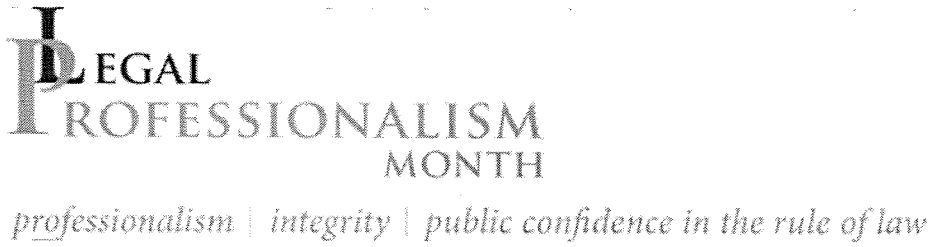

The Colorado Supreme Court Chief Justice Michael Bender, with the support of the Colorado Bar Association, declared October as Legal Professionalism Month in Colorado. The aim of the month is to encourage members of the legal profession, professional entities, and judicial officers and staff to rededicate themselves to demonstrating the highest standards of professionalism and integrity and promote public confidence in the profession and the court system. Click here to read the official Proclamation.

Click here to read the Chief Justice's article from the May 2012 edition of *The Colorado Lawyer* introducing the new commission and proclaiming October Legal Professionalism Month. The October 2013 issue of *The Colorado Lawyer* is a theme issue on the topic of Professionalism. Click here for the list of topics.

Below is a listing of events occurring across the state in conjunction with Legal Professionalism Month. Please contact Heather Clark at hclark@cobar.org or 303-824-5350 if your event is not listed.

Friday, October 4

Professionalism Seminar

Lunch: 11:30 a.m.

Presentation: 12 p.m.

Cost: $20

One Ethics CLE Credit

Larimer County Justice Center, in the Jury Assembly Room

RSVP to ricelawjr@earthlink.net.

Sponsored by the Larimer County Bar Association.

Five Most Misunderstood Federal Rules of Evidence

Brown Bag CLE program

Noon–1:30 p.m.

Presenters: Judge Blackburn

Sponsored by the Faculty of Federal Advocates. Additional details to follow.

Denver's Access to Justice Hearing

5:30–7:30 p.m.

Ralph Carr Judicial Center, Colorado Supreme Court Courtroom 4th Floor, 2 E. 14th

Ave., Denver, CO 80203

Sponsored by the Denver Bar Association's Access to Justice committee. Light appetizers will be served starting at 4:30 p.m.

Sam Cary Scholarship Endowment Fund 42nd Annual Gala

Time TBA

Westin Downtown Denver, 1672 Lawrence St., Denver, CO 80202

Sponsored by the Sam Cary Bar Association. For more information contact Floyd Jones at fjones@calslawfirm.com or 303-996-0010.

Thursday, October 10

Minoru Yasui Inn of Court October Meeting

6–9 p.m. (dinner at 7 p.m.)

The University Club, 1673 Sherman St., Denver, CO 80203

For more information and to RSVP, click here.

This meeting will feature a presentation by Jim Pinto, Chair, and Karen Hester, executive director, of the Center for Legal Inclusiveness. They will present on Diversity and Inclusiveness in the Legal Profession.

Sponsored by the Minoru Yasui Inn of Court.

Friday, October 11

Larimer County Bar Association Coffee & Doughnut Social

8–9 a.m.

Lathrop Law Office, 123 North College Avenue, Suite 330, Fort Collins

Fridays this October the Larimer County Bar Association and sponsoring law firms will host "Coffee & Doughnut Socials" from 8:00 a.m. to 9:00 a.m. at locations around the county. Hosting firms will offer light breakfasts and morning beverages in a casual venue where attorneys can socialize and build friendly, professional relationships. Please attend one or more!

Wednesday, October 16

Legal Boot CAMP for Mentors and Mentees

4–7 p.m. (includes a reception)

Ralph Carr Judicial Center, Colorado Supreme Court Courtroom, 2 E. 14th Ave., Denver, CO 80203

RSVP to Leisenbach@csc.state.co.us.

Optional tours of the Judicial Center will be offered prior to the event from 3 -4 p.m.

Sponsored by the Colorado Attorney Mentoring Program (CAMP) and the Denver Bar Association.

Thursday, October 17

Spinning CLE at the Denver Athletic Club with Judge Russell Carparelli

7:15–8:15 a.m.

Denver Athletic Club, 1325 Glenarm, Denver, CO

RSVP by clicking here.

Sponsored by the Denver Bar Association Fit to Practice Task Force.

Friday, October 18

Larimer County Bar Association Coffee & Doughnut Social

8–9 a.m.

Gertrude Scott Room in the Loveland Library, 300 N. Adams St., Loveland

Hosted by John Duval— Loveland City Attorney; Sponsored by The Busch Law Firm, Clark, Williams, & Matsunaka, and Starr and Westbrook

Fridays this October the Larimer County Bar Association and sponsoring law firms will host "Coffee & Doughnut Socials" from 8:00 a.m. to 9:00 a.m. at locations around the county. Hosting firms will offer light breakfasts and morning beverages in a casual venue where attorneys can socialize and build friendly, professional relationships. Please attend one or more!

Saturday, October 19

Federal District Court Bench Bar Roundtable

8:30 a.m.–noon

Sponsored by the Faculty of Federal Advocates. Additional details to follow.

Friday, October 24

Ethics of Rhetoric CLE

9 a.m. - 12 p.m.

CBA-CLE, 1900 Grant St, 3rd Floor, Denver, CO 80203

Learn skills for becoming a more formidalble and credible advocate from the Honorable Russell Carparelli. Click here for more information and to register.

Professionalism Matters - Ethics CLE and Dinner

5 p.m. Social

6:15 p.m. Dinner

7 p.m. CLE

Doubletree by Hilton DTC, 7801 East Orchard Rd, Greenwood Village, CO 80111

For more information and to RSVP click here.

Sponsored by the Arapahoe County Bar Association.

Friday, October 25

Federal District Court Bench Bar Roundtable

1–5 p.m.

Sponsored by the Faculty of Federal Advocates. Additional details to follow.

Larimer County Bar Association Coffee & Doughnut Social

8–9 a.m.

VanMeveren Law Group, PC, 2038 Caribou Drive, Suite 101, Fort Collins

Fridays this October the Larimer County Bar Association and sponsoring law firms will host "Coffee & Doughnut Socials" from 8:00 a.m. to 9:00 a.m. at locations around the county. Hosting firms will offer light breakfasts and morning beverages in a casual venue where attorneys can socialize and build friendly, professional relationships. Please attend one or more!

Miscellaneous

***Pro Bono* Paralegal of the Year Award**

Sponsored by the Paralegal Committee of the CBA, honors a paralegal in Colorado who, in the past year, contributed the most to providing civil legal services to the disadvantaged through a local ba,r or law firm, sponsored pro bono project or other law related *pro bono* project. Nomination Deadline: Feb. 15 For more information contact Reba Nance.

Sponsored by CBA Paralegal Committee.

1st Wednesday of each month

Legal Night Clinic

Meet with an attorney free of charge and get information in the areas of Immigration, credit, housing, landlord/tenant, employment and family Law. Attorneys provide referrals to appropriate agencies. Spanish interpreters will be available.

El Centro de San Juan Diego, Denver

5:30–7 p.m.

Sponsored by the Colorado Lawyers Committee and co-sponsors the

Denver Bar Association Young Lawyers Division and the Denver Access to Justice Committee.

3rd Tuesday of each month

Legal Night Clinic

Meet with an attorney free of charge and get information in the areas of Immigration, credit, housing, landlord/tenant, employment and family Law. Attorneys provide referrals to appropriate agencies. Spanish interpreters will be available.

Mi Casa, Denver

5:30–7 p.m.

Sponsored by the Colorado Lawyers Committee and co-sponsors the Denver Bar Association Young Lawyers Division and the Denver Access to Justice Committee.

Lorenzo A. Trujillo Working Group A Chair, Counsel to the Chief Sarah Clark, Sr. Asst. Dean Whiting Leary, Asst. Dean Dan Vigil, Assoc. Dean Patti Powell, Prof. Eli Wald, Prof. Melissa Hart, Andrew Frohardt, Chief Judge Robert Hyatt, Mike Massey, John Mosby, John Baker, Katy Donnelly, Judge Gilbert Roman, James Coyle, Assoc. Dean Fred Cheever, Judge Neil Gorsuch, Chief Judge Marcia S Krieger, Prof. Roberto Corrada, Mark Fogg, David Little, Barbara Ezyk.

I. Background

The second annual joint law school orientation: ***For This We Stand*** occurred on **September 21, 2013**. Students, Deans, representative faculty from three law schools, attorneys from the Colorado Bar, Judges, and former clients participated in a half-day Professionalism Orientation for First Year Law Students from the University of Colorado Law School, the Sturm College of Law and the University of Wyoming School of Law.

Event Sub-Committee Co-Chairs: Asst. Dean Whiting Leary and Assoc. Dean Patti Powell; Asst. Dean Dan Vigil; Professor Melissa Hart and Professor Eli Wald, Curriculum.

II. Agenda

8:45 – 9:30 a.m.	**Atrium of The Ralph L. Carr Judicial Complex** **Student Registration and Breakfast for Students**
9:30 – 10:00	**Opening Statements from Chief Justice Bender and Dean Weiser, and Dean Katz**
10:00 – 10:30	**Walk to Denver Courthouse**
10:30 – 12:00	**Small Group Discussions**

Event Sub-Committee Co-Chairs: Asst. Deans Whiting Leary and Patti Powell;
Melissa Hart and Eli Wald, Curriculum.

III. Budget

a. Committed Grant Support:

i.	Sturm College of Law	$ 1,000
ii.	Univ. of Colo. School of Law	$ 1,000
iii.	Colo. Bar Assn. (Chuck Turner/Mark Fogg)	$ 1,500
iv.	Federal Bar Assn. (Judge Mimi Tsankov)	$ 1,500
v.	Colo. Office of Attny. Regulation (Jim Coyle)	$ 1,500
vi.	Univ. of Wyoming Law School	$ 250
	Total	$ 6,750

(Last year's budget was $4,000 but did not include food, a priority for students.)

IV. Evaluation

There will be an evaluation of this year's event completed and reported at the December meeting.

Based on preliminary anecdotal feedback, the orientation was very successful. The program revisions, based on last year's evaluations, greatly enhanced the event. Food was provided, speeches were cut down to bare basics, courthouse security was relaxed, and more student socialization time was provided.

One major indicator of success is that students did not leave immediately after the small group breakouts. They stayed in the courthouse lobby talking and networking.

Also worthy of note, Judge Mimi Tsankov informed the Commission that the FBA Colorado Chapter was awarded the FBA National Presidential Excellence Award for its work in connection with the Commission's 1st Year Orientation Program. The award was conferred in late September in Puerto Rico at the FBA national conference.

V. Law School for High School Students

As reported at our last meeting, a subcommittee is investigating the development of a week-long program to establish a Youth Law Camp. The subcommittee chair is Christina Habas. A plan and report on progress will be forthcoming at our December 5th meeting.

Report to the Commission, Submitted by:
Lorenzo A. Trujillo, Working Group A Chair
October 3, 2013

LAW WEEK COLORADO

A Compassionate Plea
September 30, 2013 | Print Edition

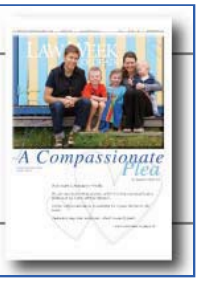

An Early Focus On Professionalism

Posted on 30 September 2013.

Like Be the first of your friends to like this.

By Meg Satrom, Esq., LAW WEEK COLORADO

Last week, nearly 500 law students from three area law schools — the University of Colorado, the University of Denver and the University of Wyoming — met at the Ralph Carr Judicial Center for the second annual Joint Professionalism Orientation for first-year students. The event, which included a tour of the new judicial complex and small group sessions where students could meet one another and members of the Colorado bar, was aimed at teaching law students early on about the importance of professionalism in the practice.

It's a program of the Chief Justice's Commission on the Legal Profession, and it recently received national attention from the Federal Bar Association, which gave the Colorado chapter its Presidential Excellence Award for the program.

"Bringing together all the first-year law students from Colorado and Wyoming for this event provides a unique opportunity for the law students — within their first couple months of law school — to begin to see themselves not only as part of the Colorado legal community but also as the lawyers they are becoming," Chief Justice **Michael Bender** said.

After enjoying Santiago's breakfast burritos; exploring the courtrooms, library, and learning center in the Ralph Carr Colorado Judicial Center; and hearing from the CU and DU law school deans (Dean **Stephen Easton** from Wyoming couldn't be there) and the Chief Justice, the students then walked across Civic Center Park to the City and County Building. The students were assigned to one of 16 groups and met in a district court courtroom for discussions with a judge, two attorneys and a former client.

Members of the judiciary included Judges **Mimi Tsankov** of the U.S. Immigration Court, **Christine Arguello** of the District Court of Colorado and the chief judges of the 15th and 19th judicial district, **Stan Brinkley** and **Jim Hartmann**, respectively.

The event was also the first of a series of events that will transpire in October for the second annual legal professionalism month. Check with your local bar association for details on any events happening in your area.

FAEGRE BAKER DANIELS

MEMORANDUM

TO: Chief Justice's Commission on the Legal Profession

FROM: Working Group D

DATE: October 3, 2013

SUBJECT: Working Group D Report

I. Our Mission – To foster the relationship between the legal profession and the community through Access to Justice, Delivery of Justice, and Education of the Public.

II. Our Actions

1. We continue to work to foster a culture of service and professionalism through our commitments to the community and the Rule of Law.
2. Increasing pro bono participation for law firms, in-house counsel, and government lawyers is vital.
3. Self-help centers will help to bridge the gap and provide opportunities for pro bono work. We will look for additional firms and organizations to support the centers throughout the state.

III. Reports

A. In-House Counsel Pro Bono

1. Association of Corporate Counsel through the efforts of Carmel Gill
   a. Completed drafting Recommended Model Pro Bono Policy for Colorado In-House Legal Departments as an additional comment to Rule 6.1 of the Colorado Rules of Professional Conduct.
      i. To be submitted to the Standing Committee on the Rules of Professional Conduct.
   b. Participation in the pro bono coordinators group.
   c. Carolyn Powell is taking over as pro bono coordinator for ACC and will attend Working Group D meetings.

B. Government Lawyers

1. Judge Tsankov has announced the formation of the Colorado Federal Government Pro Bono Program.
2. The program will launch next month at an event held at noon on Monday, October 28, 2013, at the Byron G. Rogers Federal Building located at 1961 Stout Street, 2nd Floor. U.S. Attorney John Walsh will be the keynote speaker. Following his address, a panel of speakers from local organizations who will serve as partner organizations with the program will discuss pro bono opportunities for government lawyers and how they can volunteer.
3. Completed drafting Recommended Model Pro Bono Policy for Governmental Agencies as an additional comment to Rule 6.1 of the Colorado Rules of Professional Conduct.
    a. To be submitted to the Standing Committee on the Rules of Professional Conduct.
4. FBA Colorado Chapter is being awarded the FBA National Presidential Excellence Award for its work in connection with the Commission's 1st Year Law School Orientation Program.

C. County Attorneys

1. Kelly Dunnaway is working on a plan to encourage county commissioners and county attorneys to participate in pro bono.

D. Law Firms

1. Roger Clark is working to schedule visits with firms in northern Colorado.
2. We continue to work closely with the Access to Justice Commission to promote pro bono participation and self-help centers.
3. We are looking for additional firms to serve self-help centers around the state.

E. U.S. District Court Pilot Project to Implement Civil Pro Bono Panel

1. The project is up and running.
2. Cases are being assigned.

F. Pro Bono Coordinators

1. Meet quarterly.
2. Share information.
3. Match up lawyers with opportunities.

G. Self-Help Centers

1. Bryan Cave and CenturyLink will provide on-call attorney support to the pro se self-help center in Adams County.
2. We are hoping other firms and clients will adopt other centers to provide the same support in other districts.

H. We have met our short term goals and plan to continue our efforts.

1. Increase participation by private bar, government lawyers, and in-house counsel.
2. Improve services for pro se litigants through self-help clinics, forms, and triage.
3. Foster the relationship between the profession and the community.

I. Future Plans

1. Integrate inclusiveness and professional development into our activities and goals.
2. Teamwork with firms, in-house lawyers, and government lawyers and agencies, law schools, clients, and judges.

AGENDA

Working Group D

Chief Justice's Commission on the Legal Profession

November 14, 2013

I. Introduction of New Members

a. Ellen Wakeman, Jefferson County Attorney and incoming President of the County Attorney Association

b. Troy Rackham, CDLA Board Member

c. Michael Rosenberg, CTLA Officer

II. Next meeting of Chief's Commission

a. December 5, 2013

b. Reception honoring Chief Justice Bender

III. Government Lawyers

a. Draft Pro Bono Policy for Governmental Agencies

i. Draft sent to Standing Committee on the Rules of Professional Conduct

b. Colorado Federal Pro Bono Program

i. Mimi Tsankov

1. Kick-off event December 9, 2013

IV. Federal Pilot Project to Implement Civil Pro Bono Panel

a. CLEs at several locations

b. Promoting participation by firms as opposed to individual lawyers

V. County Attorneys

a. Ellen Wakeman

VI. In-House Lawyers

a. Carolyn Powell

b. Corporate Legal Departments

c. Draft Pro Bono Policy for In-House Lawyers

i. Draft sent to Standing Committee on the Rules of Professional Conduct

VII. Law Firms

VIII. Other targets?

a. Wheeler Trigg O'Donnell

b. Fairfield & Woods

c. Patton Boggs

d. Spencer Fane & Grimshaw

e. Burleson LLP (McGloin Davenport & Severson)

f. Criminal defense bar?

IX. Self-Help Centers

a. Court Services is tracking data.

X. Diversity and Inclusiveness

a. Commission's focus

b. Working Group C's efforts

c. October was Professionalism Month

i. Congratulations to Judge Carparelli and his working group.

ii. How do diversity and inclusiveness fit in with professionalism?

d. Use pro bono model to develop talking points for meetings with decision-makers in firms, in-house departments, and governmental agencies.

e. Focus on more participation by diverse lawyers to apply for judicial nominating commissions and judicial performance committees.

i. Reach out to minority and specialty bars.

ii. Gather and disseminate information on the judicial selection and nomination process.

f. Growing the pipeline

i. Schools

ii. Mock trials

iii. Mentoring

g. Identify government jobs that new lawyers, especially diverse lawyers, might be overlooking.

XI. New Business

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COLORADO RULES OF CIVIL PROCEDURE

APPENDIX TO CHAPTERS 18 TO 20
COLORADO RULES OF PROFESSIONAL CONDUCT

Rule 6.1. Voluntary Pro Bono Public Service

This Comment, **Model Pro Bono Policy for Colorado In-House Legal Departments,** is to be added to the Existing Comment in Rule 6.1. Voluntary Pro Bono Public Service.

Recommended Model Pro Bono Policy for Colorado In-House Legal Departments

Preface. Providing pro bono legal services to persons of limited means and organizations serving persons of limited means is a core value of Colorado licensed attorneys enunciated in Colorado Rule of Professional Conduct 6.1. Colorado lawyers who work in in-house legal departments have, historically, been an untapped source of pro bono volunteers. Rule 6.1 applies equally to in-house lawyers; however, the Court recognizes that the work environment for in-house lawyers is distinct from that of lawyers in private law firms, and may limit the amount of pro bono work lawyers can accomplish while working in-house.

To encourage Colorado in-house lawyers to commit to providing pro bono legal services to persons and organizations of limited means, the Court has adopted rules to overcome some of the barriers impeding in-house counsel from performing pro bono legal work. For example, an in-house attorney who is not licensed to practice in Colorado may obtain a license to perform pro bono legal work, as a "pro bono/emeritus attorney" under Rule 223 of Chapter 18, the Colorado Court Rules Governing Admission to the Bar. The attorney must pay a one-time fee of $50, and must act under the auspices of a Colorado nonprofit entity whose purpose is or includes the provision of pro bono legal representation to persons of limited means. .

The following Model Pro Bono Policy can be modified to meet the needs of individual in-house legal departments. Adoption of such a policy is entirely voluntary. The model policy below is designed to serve as a starting point for in-house legal departments within Colorado that would like to put in place a structured program to encourage their lawyers to engage in pro bono service. The model policy should be adapted as needed to reflect the culture and values of the company or organization and legal department. No formal pro bono policy is needed to launch an in-house pro bono program (indeed, many of the most successful in-

house pro bono programs have no policy at all); however, the model below reflects some of the issues that an in-house legal department may wish to consider before launching a program. In a few instances below alternative language is suggested. Additional resources and model policies are available from the Pro Bono Institute, Corporate Pro Bono Project: http://www.probonoinst.org/projects/corporate-pro-bono.html.

Recommended Model Pro Bono Policy for Colorado In-House Legal Departments

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I. Introduction

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III. Pro Bono Service Defined

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XI. Conflict of Interest

References

A. Preamble to the Colorado Rules of Professional Conduct

B. Colorado Rule of Professional Conduct 6.1

C. Chief Justice Directive 98-01, Costs for Indigent Persons Civil Matters

D. Colorado Rule of Civil Procedure, Chapter 18, Rule 223

I. Introduction

Company recognizes the importance of good corporate citizenship, and supporting the communities in which it does business. Performing pro bono services benefits both the professionals who undertake the work as well as the individuals and organizations served. Pro bono work allows legal professionals to sharpen their existing skills, learn new areas of the law, connect more fully with their communities, and achieve a measure of personal fulfillment.

Rule 6.1 of the Colorado Rules of Professional Conduct sets forth an aspirational goal that each lawyer render at least 50 hours of pro bono public legal services per year, with a substantial majority of those hours without fee to (1) persons of limited means or (2) governmental or non-profit organization matters designed primarily to address the needs of persons of limited means.

[Insert statement about Company's existing or planned community service work]

Company encourages every member of the Legal Department to assist in providing pro bono legal services. Company aspires to attain the goal of each Company attorney devoting a minimum of 50 hours per year to pro bono legal services, or a proportional amount of pro bono hours by attorneys on alternative work schedules.

II. Mission Statement

Through its pro bono program, the Legal Department intends to serve Company's communities by providing pro bono legal services to individuals and organizations that otherwise might not have access to them. In addition, the Legal Department seeks to provide opportunities for rewarding and satisfying work, to spotlight Company's position as a good corporate citizen, for Legal Department professional skills and career development, and for collaboration and teamwork across Company's Legal Department and within the community in general for our attorneys and other professionals.

III. Pro Bono Service Defined

Pro bono service is the rendering of professional legal services to persons or organizations with limited means, without the expectation of compensation, regardless of whether such services are performed during regular work hours or at other times. It is this provision of volunteer legal services that is covered by this pro bono policy. Because the following activities, while meritorious, do not involve direct provision of

legal services to the poor, they are not pro bono services under this policy: participation in a non-legal capacity in a community or volunteer organization; services to non-profit organizations with sufficient funds to pay for legal services as part of their normal expenses; non-legal service on the board of directors of a community or volunteer organization; services provided to a political campaign; and legal work for family members, friends, or Company employees who are not eligible to be pro bono clients under an approved pro bono project.

IV. Pro Bono Service Participation

Every member of Company Legal Department is encouraged to provide pro bono legal services. The pro bono legal services should not interfere with regular work assignments and must be approved by the Pro Bono Committee/Coordinator. No attorney will be adversely affected by a decision to participate in the program; conversely, no attorney will be penalized for not participating in the program.

Optional language: The Legal Department encourages each member to devote up to 50 hours of regular work time per year toward providing pro bono services. Legal Department members may need to use paid time off for any pro bono services provided in excess of 50 hours per year. *[Insert language for process of tracking those hours.]*

V. Pro Bono Committee/Coordinator

To support Company's efforts to provide pro bono services, Company Legal Department has established a Pro Bono Coordinator/Committee. The Committee/Coordinator oversees the pro bono program, supervises and approves all pro bono matters, ensures that conflicts are identified and processes are followed, and ensures that all pro bono matters are adequately supervised. The Pro Bono Coordinator/Committee encourages all employees within the Legal Department to bring to the Coordinator's/Committee's attention any pro bono projects of interest.

VI. Pro Bono Projects

All pro bono projects must be pre-approved by the Pro Bono Coordinator/Committee. Individuals may not begin their pro bono representations in a particular matter until Coordinator/Committee approval is received. Individuals must obtain the approval of their supervisors to perform pro bono services during scheduled work hours.

The Pro Bono Coordinator/Committee plans to offer, from time to time, group projects that have already been approved. In addition, members of

the Legal Department may seek approval for a new project by submitting to the Coordinator/Committee a project approval request that contains: the name of the proposed client, the name of the opposing parties and other entities (e.g. opposing attorney or law firm) involved, a description of the project including the scope of work to be done, the names of the Law Department members who would work on the project, an estimate of the time required from each person, an estimate of any anticipated costs associated with the project, anticipated schedule of the project and/or deadlines; supervision or training needs, whether malpractice coverage is provided by the project sponsor, and any other relevant information.

VII. Insurance Coverage

Company's insurance carrier provides insurance coverage for employees in the Legal Department for work performed on approved pro bono projects. Members of the Legal Department must advise the Pro Bono Coordinator/Committee immediately should they learn that a complaint or disciplinary complaint may be filed concerning a pro bono matter.

OR

Company does not have malpractice insurance to cover pro bono work of its Legal Department members; however, many of the organizations that sponsor pre-approved pro bono projects carry malpractice insurance for their volunteer attorneys. The Pro Bono Coordinator/Committee will reject any project that does not provide malpractice coverage for the legal services provided. Members of the Legal Department must advise the Pro Bono Coordinator/Committee immediately should they learn that a complaint or disciplinary complaint may be filed concerning a pro bono matter.

[Note: The Pro Bono Institute has outlined additional options, such as self-insurance through the purchase of a policy from NLADA, in a paper available here: http://www.cpbo.org/wp-content/uploads/2012/09/Insurance-Paper.pdf]

VIII. Expenses and Resources

As with any other Company work assignment, individuals doing pro bono work may engage Legal Department legal assistants, paralegals and other support staff in a manner consistent with their job responsibilities. Legal Department members may use Company facilities, such as telephones, copiers, computers, printers, library materials, research materials, and mail, as appropriate to carry out pro bono work; however, in accordance with the section entitled "Company Affiliation" below, use of Company resources should not convey the impression that Company is providing

the pro bono services. Ordinary expenses (e.g., parking, mileage, etc.) may be submitted for reimbursement. Expenses exceeding $250 should be submitted to the Pro Bono Coordinator/Committee for prior approval. Legal Department members should make every effort to control expenses related to pro bono work just as they would for any other legal matter.

IX. Expertise

Legal Department members providing pro bono services should exercise their best judgment regarding their qualifications to handle the issues necessary to provide pro bono services. Those providing pro bono services should obtain training on the legal issues they will handle. Training is available through various pro bono organizations, bar associations, law firms, and CLE offerings.

OR

Because pro bono work may require Legal Department members to work outside of their areas of expertise and skill, the Legal Department will make available to all pro bono volunteers substantive support services, if requested on an approved project, to enable them to provide effective and efficient representation in pro bono matters.

X. Company Affiliation

Although Company strongly endorses participation in the pro bono program, participants are not acting as Company representatives or employees with respect to the matters they undertake, and Company does not necessarily endorse positions taken on behalf of pro bono clients. Therefore, Company Legal Department members participating in such activities do so individually and not as representatives of Company. Individuals who take on pro bono matters must identify themselves to their clients as volunteers for the non-profit organization and not as attorneys for Company.

Individuals providing pro bono services should not use Company's stationery for pro bono activities or otherwise engage in any other acts that may convey the impression that Company is providing legal services. Individuals should use the stationery provided by the pro bono referral organization, or if no stationery is provided, blank stationery (i.e. no Company letterhead). Similarly Company business cards must not be distributed to pro bono clients.

Optional Language: Most client interviews or other meetings should take place at the offices of a partner organization. If this is not suitable, members of the Legal Department may host pro bono client meetings at a

Company location with the prior approval of the Coordinator/Committee. The Company attorney hosting the meeting should take care to remind the pro bono client that, although the meeting is taking place at a Company location, the client is represented by the attorney and not the Company.

XI. Conflict of Interest

Legal Department members may not engage in the provision of any pro bono service which would create a conflict of interest or give the appearance of a conflict of interest. This includes, but is not limited to, direct conflicts, business/public relations conflicts, and politically sensitive issues. Conflicts analysis must be ongoing throughout the course of any representation as an issue raising a conflict may present itself at any time during the course of representation. The Pro Bono Coordinator/Committee will review and resolve any potential conflict issues.

COLORADO RULES OF CIVIL PROCEDURE

APPENDIX TO CHAPTERS 18 TO 20
COLORADO RULES OF PROFESSIONAL CONDUCT

This Comment, **Recommended Model Pro Bono Policy for Governmental Agencies**, is to be added to the Existing Comment in Rule 6.1. Voluntary Pro Bono Public Service.

Recommended Model Pro Bono Policy for Governmental Agencies

Preface. Providing pro bono legal services to indigent persons and organizations serving persons of limited means is a core value of Colorado licensed attorneys enunciated in Colorado Rule of Professional Conduct 6.1. Adoption of a pro bono policy will commit the governmental agency to this professional value and assure attorneys that their pro bono work is valued in their advancement within the respective entity. Nevertheless, the Court recognizes that the work environment for government attorneys is distinct from that of lawyers in private law firms, and may limit the type and amount of pro bono services that government lawyers can perform. In particular, the Court recognizes that government attorneys face concerns about conflicts of interest, which differ from those facing private attorneys, and, unlike private attorneys, government attorneys will be limited in performing pro bono service during regular hours, using office resources, and, possibly by statutory or regulatory provisions.

At the same time, the Court recognizes that efforts of the Colorado Bar Association and the American Bar Association to encourage pro bono service by government lawyers and believes that their policies and materials provide useful guidance for government lawyers to enable them to perform pro bono service. *See* "CBA Voluntary Pro Bono Public Service by Government Attorneys: Provision of Direct Representation to Indigent Persons," 29 Colo. Lawyer 79 (July 2000); "Pro Bono Project Development: A Deskbook for Government and Public Sector Lawyers," American Bar Association 1998, available at apps.americanbar.org/legal services/pro bono/government_attorneys.html.

The Colorado Supreme Court has adopted the following recommended Model Pro Bono Policy, which can readily be modified to meet the needs of individual governmental agencies. References are made to provisions that may not apply in a federal or other governmental agency setting, depending on each agency's governing statutes, regulations, and internal policies. Adoption of such a policy is entirely voluntary.

At the least, a pro bono policy would:

(1.) Clearly set forth an aspirational goal for attorneys (the attached model policy uses the figure of at least 50 hours per attorney per year, which mirrors the aspirational goal set out in Rule 6.1 of the Colorado Rules of Professional Conduct;

(2.) Demonstrate that pro bono service will be positively considered in evaluation; and

(3.) Include a description of the processes that will be used to match attorneys with projects and monitor pro bono service, including tracking pro bono hours spent by lawyers and others in the respective entity.

The Colorado Supreme Court will recognize those governmental agencies that make a strong commitment to pro bono work by adopting a policy that includes:

(1.) An annual goal of performing 50 hours of pro bono legal service by each Colorado licensed attorney pro-rated for part-time attorneys, primarily for persons of limited means and/or organizations serving persons of limited means consistent with the definition of pro bono services as set forth in the Colorado Supreme Court's Model Pro Bono Policy, and

(2.) A statement that the agency will value at least 50 hours of such pro bono service per year by each Colorado licensed attorney, for all purposes of attorney evaluation and advancement.

The Colorado Supreme Court will also recognize on an annual basis those governmental agencies that voluntarily advise the Court by February 15 of each year that their attorneys, on average, during the previous calendar year, performed 50 hours of pro bono legal service, primarily for persons of limited means or organizations serving persons of limited means, consistent with the definition of pro bono services as set forth in this Model Pro Bono Policy.

Federal Government Lawyers.

Federal government lawyers also have a professional responsibility to provide legal services to persons of limited means and should strive to perform at least 50 hours of pro bono legal work annually. To make this possible, the Court strongly urges all federal agencies in Colorado to encourage and support pro bono activity by their lawyers by developing programs which assist their lawyers in finding appropriate pro bono opportunities, by welcoming requests by their lawyers to engage in pro bono activity, and by granting approval of

such requests in a timely manner. Recognizing that federal government lawyers face unique restrictions when engaging in pro bono activity, the Colorado Supreme Court urges federal government lawyers to seek out opportunities which are consistent with the statutes and regulations governing such outside professional activities. Federal government lawyers in Colorado are encouraged to abide by their agencies' pro bono policies, which will provide guidance in this area.

Recommended Model Pro Bono Policy for Government Lawyers and Governmental Agencies

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D. Attorneys Fees in Pro Bono Matters

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A. Amount of CLE Credit

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References

A. Preamble to the Colorado Rules of Professional Conduct

B. Colorado Rule of Professional Conduct 6.1

C. Chief Justice Directive 98-01, Costs for Indigent Persons Civil Matters

D. Colorado Rule of Civil Procedure 260.8

E. Colorado Rule of Civil Procedure 260.8, Form 8

I. Introduction

The governmental agency recognizes that the legal community has a unique responsibility to ensure that all citizens have access to a fair and just legal system. In recognizing this responsibility, the governmental agency encourages each of its attorneys to actively participate in some form of pro bono legal representation.

This commitment mirrors the core principles enunciated in the Colorado Rules of Professional Conduct:

> A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest. . . . A lawyer should strive to attain the highest level of skill, to improve the law and the legal professional and to exemplify the legal profession's ideals of public service. (Preamble, Colorado Rules of Professional Conduct).

In addition, Colo. RPC 6.1 provides in pertinent part, "Where constitutional, statutes or regulatory restrictions prohibit government and public sector lawyers . . . from performing the pro bono services outlined in paragraphs (a) (1) and (2) [representation of persons of limited means or organizations addressing their needs], those individuals should fulfill their pro bono publico responsibility by performing services or participating in activities outlined in paragraph (b)." Paragraph (b) lists alternative means of providing pro bono service.

The governmental agency understands that there are various ways to provide pro bono legal services in our community. In selecting among the various pro bono opportunities, the governmental agency encourages and expects that attorneys will devote a minimum of fifty (50) hours each year to pro bono legal services, or a proportional amount of pro bono hours by attorneys on alternative work schedules. In fulfilling this responsibility, attorneys, when

possible, should provide a substantial majority of the fifty (50) hours of pro bono legal services to (1) persons of limited means, or (2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means. (Colorado Rule of Professional Conduct 6.1). The governmental agency strongly believes that this level of participation lets our attorneys make a meaningful contribution to our legal community, and provides important opportunities to further their professional development.

II. Pro Bono Committee/Coordinator.

The governmental agency has designated a Pro Bono Coordinator or Committee responsible for implementing and administering the pro bono policies and procedures. The Pro Bono Coordinator or Committee has the following principal responsibilities:

1. Encouraging and supporting pro bono legal endeavors;

2. Reviewing, accepting and/or rejecting pro bono legal projects;

3. Coordinating and monitoring pro bono legal projects, ensuring, among other things, that appropriate assistance, supervision, and resources are available;

4. Providing periodic reports on the agency's pro bono activities; and

5. Creating and maintaining a pro bono matter tracking system.

Attorneys are encouraged to seek out pro bono matters that are of interest to them.

III. Pro Bono Services Defined.

The foremost objective of the pro bono policy is to provide legal services to members of the community with limited means and the nonprofit organizations that assist them, in accordance with Rule 6.1 of the Colorado Rules of Professional Conduct. The governmental agency recognizes that there are a variety of ways in which its attorneys and paralegals can provide pro bono legal services in the community. The following, while not intended to be an exhaustive list, reflects the types of pro bono legal services governmental agency credits in adopting this policy.

(As noted above, where constitutional, statutory or regulatory restrictions prohibit government and public sector lawyers from performing the pro bono services outlined in paragraphs (a)(1) and (2), those individuals should fulfill

their pro bono responsibility by performing services or participating in activities outlined in paragraph (b).)

A. Representation of Low Income Persons.

Representation of individuals of limited means who cannot afford legal services in civil or criminal matters of importance to a client;

B. Civil Rights and Public Rights Law.

Representation or advocacy on behalf of individuals or organizations seeking to vindicate rights with broad societal implications (class action suits or suits involving constitutional or civil rights) where it is inappropriate to charge legal fees;

C. Representation of Charitable Organizations.

Representation or counseling to charitable, religious, civic, governmental, educational, or similar organizations in matters where the payment of standard legal fees would significantly diminish the resources of the organization, with an emphasis on service to organizations designed primarily to meet the needs of persons of limited income or improve the administration of justice;

D. Community Economic Development.

Representation of or counseling to micro-entrepreneurs and businesses for community economic development purposes, recognizing that business development plays a critical role in low income community development and provides a vehicle to help low income individuals to escape poverty;

E. Administration of Justice in the Court System.

Judicial assignments, whether as pro bono counsel, or a neutral arbiter, or other such assignment, which attorneys receive from courts on a mandatory basis by virtue of their membership in a trial bar;

F. Law-related Education.

Legal education activities designed to assist individuals who are low-income, at risk, or vulnerable to particular legal concerns or designed to prevent social or civil injustice;

G. Mentoring of Law Students and Lawyers on Pro Bono Matters.

Colorado Supreme Court Rule 260.8 provides that an attorney who acts as a mentor may earn two (2) units of general credit per completed matter in which he/she mentors a law student. An attorney who acts as a mentor may earn one (1) unit of general credit per completed matter in which he/she mentors another lawyer. However, mentors shall not be members of the same entity or in association with the lawyer providing representation to the indigent client.

The following activities, while meritorious, do not involve direct provision of legal services to the poor. Therefore, they cannot be counted toward fulfillment of the attorney's or the agency's goal to provide pro bono legal services to indigent persons or to nonprofits that serve such persons' needs: participation in a non-legal capacity in a community or volunteer organization; services to non-profit organizations with sufficient funds to pay for legal services as part of their normal expenses; client development work; non-legal service on the board of directors of a community or volunteer organization; bar association activities; and non-billable legal work for family members, friends, or other individuals who are not eligible to be pro bono clients under the above criteria.

IV. Recognition of Pro Bono Service.

The governmental agency recognizes that the commitment to pro bono work involves a personal expenditure of time. In acknowledgment of this commitment, an attorney's efforts to meet this expectation will be considered in measuring various aspects of the attorney's performance, such as yearly evaluations, where applicable.

V. Administration of Pro Bono Service.

A. Approval of Pro Bono Matters.

The Pro Bono Coordinator or Committee will review all proposed pro bono legal matters to ensure that:

1. There is no client or issue conflict or concern;

2. The legal issue raised is not frivolous or untenable;

3. The client does not have adequate funds to retain an attorney; and

4. The matter is otherwise appropriate for pro bono representation.

All persons seeking approval of a pro bono project must: (1) submit a request identifying the client and other entity involved; (2) describe the nature of the work to be done; and (3) identify who will be working on the matter.

B. Pro Bono Engagement Letter.

After a matter has received initial approval, the attorney on a pro bono legal matter must send an engagement letter to the pro bono client. Typically, the engagement letter should be sent after the initial client meeting during which the nature and terms of the engagement are discussed.

C. Professional Liability Insurance.

Attorneys may provide legal assistance through those pro bono organizations that provide professional liability insurance for their volunteers. Before undertaking any pro bono legal commitment, the professional liability implications should be reviewed with the Pro Bono Coordinator or Committee.

D. Attorney Fees in Pro Bono Matters.

Attorneys are encouraged to seek and obtain attorney fees in pro bono legal matters where possible. In the event of a recovery of attorney fees, the attorney is encouraged to donate these fees to an organized nonprofit entity whose purpose is or includes the provision of pro bono representation to indigent or near-indigent persons.

VI. CLE Credit for Pro Bono Work.

Colorado Rule of Civil Procedure 260.8 provides that attorneys may be awarded up to nine (9) hours of CLE credit per three-year reporting period for (1) performing uncompensated pro bono legal representation on behalf of persons of limited means in a civil legal matter, or (2) mentoring another lawyer or law student providing such representation.

A. Amount of CLE Credit.

Attorneys may earn one (1) CLE credit hour for every five (5) billable-equivalent hours of pro bono representation provided to the person of limited means. An attorney who acts as a mentor may earn one (1) unit of general credit per completed matter in which he/she mentors another lawyer. Mentors shall not be members of the same governmental agency or in association with the lawyer providing representation to the indigent client. An attorney who acts as a mentor may earn two (2) units of general credit per completed matter in which he/she mentors a law student.

B. How to Obtain CLE Credit.

An attorney who seeks CLE credit under CRCP 260.8 for work on an eligible matter must submit the completed Form 8 to the assigning court, program, or law school. The assigning entity must then report to the Colorado Board of Continuing Legal and Judicial Education its recommendation as to the number of general CLE credits the reporting pro bono attorney should receive.

Chief Justice's Commission on the Legal Profession
Working Group A
Report to the Commission: December 5, 2013

Lorenzo A. Trujillo Working Group A Chair, Counsel to the Chief Sarah Clark, Sr. Asst. Dean Whiting Leary, Asst. Dean Dan Vigil, Assoc. Dean Patti Powell, Prof. Eli Wald, Prof. Melissa Hart, Andrew Frohardt, Chief Judge Robert Hyatt, Mike Massey, John Mosby, John Baker, Katy Donnelly, Judge Gilbert Roman, James Coyle, Assoc. Dean Fred Cheever, Judge Neil Gorsuch, Chief Judge Marcia S Krieger, Prof. Roberto Corrada, Mark Fogg, David Little, Barbara Ezyk, John Baker, Jessica Mendoza..

Report Topics:

1. 2013 For This We Stand
    a. Budget
    b. Survey Results
    c. Next Year's For This We Stand
2. Pipeline Efforts
    a. Stakeholders Meeting
    b. Future Study

1. 2013 FOR THIS WE STAND

I. 2013 For This We Stand - Background

The second annual joint law school orientation: ***For This We Stand*** occurred on **September 21, 2013**. Students, Deans, representative faculty from three law schools, attorneys from the Colorado Bar, Judges, and former clients participated in a half-day Professionalism Orientation for First Year Law Students from the University of Colorado Law School, the Sturm College of Law and the University of Wyoming School of Law.

Event Sub-Committee Co-Chairs: Asst. Dean Whiting Leary and Assoc. Dean Patti Powell; Asst. Dean Dan Vigil; Professor Melissa Hart and Professor Eli Wald, Curriculum.

II. Agenda

8:45 – 9:30 a.m.	Atrium of The Ralph L. Carr Judicial Complex Student Registration and Breakfast for Students
9:30 – 10:00	Opening Statements from Chief Justice Bender and Dean Weiser, and Dean Katz
10:00 – 10:30	Walk to Denver Courthouse
10:30 – 12:00	Small Group Discussions

Event Sub-Committee Curriculum Co-Chairs: Asst. Deans Whiting Leary and Patti Powell; Melissa Hart and Eli Wald.

III. Budget

Expenses

Item	Cost
Santiago's Catering	$1600.00
Butler Rents	$549.27
City and County Facilities	$302.24
City and County Security	$458.08
Supplies (Water & Floorplans)	$80.08
TOTAL	**$2,989.67**

Supporting Grants

Organization	Support
DU Sturm College of Law	$1,000.00
CU Law School	$1,000.00
Wyoming Law School	$250.00
Federal Bar Ass'n – Colorado	$1,500.00
Colorado Bar Ass'n	$1,500.00
Office of Atty Reg. Counsel	$1,500.00
TOTAL	**$6,750.00**

Applying the FBA's entire $1,500.00 support to the costs, we're left with the following proportional cost allocations and surpluses:

Organization	Support	Cost Allocation	Surplus
DU Sturm College of Law	$1,000.00	$283.04	$716.96
CU Law School	$1,000.00	$283.04	$716.96
Wyoming Law School	$250.00	$74.48	$175.52
Federal Bar Ass'n – Colorado	$1,500.00	$1500.00	$0
Colorado Bar Ass'n	$1,500.00	$424.55	$1,075.45
Office of Atty Reg. Counsel	$1,500.00	$424.55	$1,075.45
TOTAL	**$6.750.00**	**$2,989.67**	**$3,760.34**

CU and DU and the Office of Attorney Regulation Counsel have agreed to allow the For This We Stand account to retain the surplus, as shown. The surplus will be retained to support the 2014 For This We Stand event. I will communicate with the Colorado Bar Association and the Wyoming Law School to determine if the same can occur with their surplus.

(Last year's budget was $4,000 but did not include food, a priority for students.)

IV. Evaluation

After the orientation, we distributed two surveys to elicit feedback from the students, judges, attorneys, and former clients about their experiences at the event. The first survey was sent to the

judges, attorneys and former clients who participated in the group discussions, and the second survey was sent to all of the Colorado and Wyoming students who attended.

Complete survey response documents are available upon request.

Summary of Survey Results

Judges/Attorneys/Clients Survey

Sixteen of the judges, attorneys, and clients completed the survey. All 16 of the respondents felt that the orientation was either "Extremely successful" (31%) or "Very successful" (69%).

Most and Least Helpful Portions of the Group Discussions

When asked what was the most helpful or most meaningful portion of the group discussions, the respondents overwhelmingly cited the client stories and student questions. One respondent said, "The client story was very beneficial to the students. She shared in great detail her experience of being charged with a serious felony traffic offenses involving alcohol use, the relationship she formed with her attorney, and her impressions of the legal system in general." Another responded noted that s/he "[l]iked the client interaction and questions by the students."

When asked what was the least helpful or least meaningful portion of the group discussions, the respondents' comments varied. A couple of people thought the "war stories told by attorneys" were least helpful. Others felt that the discussion groups could have benefitted from an actual structure or format. "[W]e did not follow the script at all and I think doing so would be a better plan," said one respondent. In contrast, a number of respondents stated that all portions of the group discussions were helpful. For example, one respondent stated, "It was all useful. But more so when the students were engaged and what we said was in response to their questions than when we just talked at them."

Suggestions for Improvement

When asked how we could improve the event, we received 13 responses. These responses varied greatly. One respondent felt that the orientation was an "excellent program" as is. Another suggested having "a young lawyer/recent law graduate in every group." Others thought it would be beneficial to "[l]et the students direct the initial focus of the conversation" and to "limit lawyers discussion times and then have more time for questions and after discussion informal sessions."

Notably, a number of respondents echoed the need for more structure. For example, one person stated, "I like this event. I do think it should have clear deliverables and expectations . . . If the idea is to promote professionalism, there should be some clear themes that are expected." Another respondent suggested we "script or format the presentations for all of the groups."

Students Survey

Out of all the first-year students that attended the orientation, 77 completed the survey. When asked to rate how worthwhile the event was, most students said the event was either "Extremely worthwhile" (10%) or "Very worthwhile" (25%). Another 27% of students said the event was

"Moderately worthwhile, and 30% said the event was "Somewhat worthwhile." Only 8%[1] of students said the event was "Not at all worthwhile." It is worthy to note that last year, in 2012, 19% of students responded that the event was "Not at all worthwhile."

The students were also asked whether the event was successful in achieving its goal to "give you a sense of the core values of the legal profession." Twenty-five percent of students said the event was "Very successful," while the majority (34%) responded that it was "Moderately successful."

Most and Least Helpful Portions of the Orientation

When asked what was the most helpful or most meaningful portion of the group discussions, many students commented on how much they enjoyed meeting and interacting with judges. For example, one student said, "It was valuable getting to hear straight from a judge. As we are learning the basics, judges seem like big scary people. Seeing that they are just people too and getting a glimpse of the immense knowledge they have was very helpful." Other students enjoyed touring the Ralph L. Carr Colorado Judicial Center and the Denver City & County Building, noting that the "most meaningful portion of the event was just being able to see the Courthouse and become familiar with the building." Other comments included, "It was great to interact with working professionals—the Supreme Court Judge and attorneys we met with provided really great direction" and "I found the actual discussion on professionalism to be insightful."

When asked what was the least helpful or least meaningful portion of the group discussions, again, the responses varied. The majority of students cited the introductory remarks, noting that they were "similar to [law school] orientation" and were "[a] bit too long." In contrast, a number of students responded that they thought "[e]verything was very worthwhile" and the event was "all great."

Suggestions for Improvement

Many students suggested having a "clear goal" as the event "felt a little jumbled and not focused on any particular topic." Other students requested more interaction time with judges and expressed interest in seeing the students from the different schools mingle more. In addition, a few students commented that they wished the event was not on a Saturday. Finally, some students noted that they did not like having to "arrive at 8:30 only to tell us the event would not start until 9:45" and "[w]aiting an hour before anything started."

Note: Federal Bar Association National Presidential Excellence Award

Worthy of note, Judge Mimi Tsankov informed the Commission that the FBA Colorado Chapter was awarded the FBA National Presidential Excellence Award for its work in connection with the Commission's 1st Year Orientation Program. The award was conferred in late September in Puerto Rico at the FBA national conference.

V. Next Year's Plan For This We Stand

Outline of based on Feedback:

1. **Schedule next year's For This We Stand to occur in January of 2015**
2. **Opening large group**

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a. **Continue large group breakfast**
b. **Continue opening statements by Chief Judge**
c. **Establish structured activities in the Carr Courthouse**
    i. **Develop curriculum for stations conversations in the Learning Center, Court of Appeals, and Supreme Court**
    ii. **Created mingling and interactive questions curriculum for station conversations**

3. **Small Group Conversations**
    a. **Plan a pre-session Faculty Meeting to provide them with a review of the curriculum expectations to better prepare them**
    b. **Inform the Judge that s/he is in charge of the small group session**

4. **Inform supporting organizations with sufficient time to allow them to budget this event of the request for funding.**

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2. PIPELINE EFFORTS

I. Background

Working Group A has engaged in conversations with the Colorado legal community regarding current efforts and new ideas and strategies to address inclusion and diversity in the profession due to pipeline issues.

II. Issues and Concerns

Members identified that there is an on-going concern and a need for focused improvement in addressing the lack of inclusiveness and diversity in the pipeline and in the profession and sought more information about current programs in the community.

The Working Group learned that significant efforts are in place at both the University of Colorado Law School and the University of Denver Sturm College of Law to encourage the pursuit of a legal career among students from diverse backgrounds. The Working Group also discussed new ideas and strategies to address this issue.

III. Plan of Action

Working Group A is willing to continue looking into how best to address the needs identified.

Recommendation

Members of Working Group A stated that they would like for the incoming Chief to consider directing Working Group A to continue with its efforts.

Report to the Commission, Submitted by:
Lorenzo A. Trujillo, Working Group A Chair
December 5, 2013

Oath of Admission

I DO SOLEMNLY SWEAR by the Everliving God (OR AFFIRM) that:

I will support the Constitution of the United States and the Constitution of the State of Colorado;

I will maintain the respect due to Courts and judicial officers;

I will employ only such means as are consistent with truth and honor;

I will treat all persons whom I encounter through my practice of law with fairness, courtesy, respect and honesty;

I will use my knowledge of the law for the betterment of society and the improvement of the legal system;

I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed;

I will at all times faithfully and diligently adhere to the Colorado Rules of Professional Conduct.

ASSEMBLY OF LAWYERS

November 4, 2013
2:15 — 4:15 PM

Boettcher Concert Hall
1000 14th Street
Denver, CO 80202

2013 ASSEMBLY OF LAWYERS PROFILES IN PROFESSIONALISM AND INCLUSION

2:15 Welcome and Introductory Remarks
Hon. Russell E. Carparelli, Colorado Court of Appeals
Chief Justice's Commission on the Legal Profession
Karen H. Hester, Executive Director
Center for Legal Inclusiveness

2:25 Question and Answer Group Discussion
Daniel Cordalis, Esq.
Ph.D. Candidate, Environmental Studies, University of Colorado
Colorado Indian Bar Association
Hubert A. Farbes, Jr., Esq.
Brownstein Hyatt Farber Schreck, LLP
Sam Cary Bar Association
Surbhi Garg, Esq.
Kissinger & Fellman, P.C.
South Asian Bar Association of Colorado
Anna N. Martinez, Esq.
Ogborn & Mihm LLP
Colorado Women's Bar Association
Byeongsook Seo, Esq.
Gordon & Rees LLP
Asian Pacific American Bar Association of Colorado
Ralph G. Torres, Esq.
The Law Office of Ralph G. Torres
Colorado Hispanic Bar Association
Kyle C. Velte, Esq.
University of Denver Sturm College of Law
Colorado GLBT Bar Association

2:55 Takeaways and Closing Remarks
Judge Carparelli and Karen Hester

2013 ADMISSION CEREMONY

3:30 Welcome Remarks and Introduction of Colorado Supreme Court and Honored Guests
Hon. Michael L. Bender, Chief Justice
Colorado Supreme Court

3:45 Welcome from the United States District Court
Hon. Marcia S. Krieger, Chief Judge
United States District Court for the District of Colorado

3:50 Welcome from the Colorado Bar Association
Hon. W. Terry Ruckriegle, Senior Judge
Colorado State Judicial Branch
President, Colorado Bar Association

3:55 Keynote Address
Hon. Alex J. Martinez, Justice (Ret.)
Colorado Supreme Court
General Counsel, Denver Public Schools

4:10 Administration of Oath of Admission
Chief Justice Bender

4:15 Adjourn

John Baker
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MEMORANDUM

TO: Chief Justice Commission on the Legal Profession
Colorado Supreme Court Advisory Committee

FROM: John Baker, CAMP Director

DATE: November 27, 2013

SUBJECT: Colorado Attorney Mentoring Program ("CAMP") Status Report

Please accept this memorandum as a joint CAMP Status Report to the Colorado Supreme Court Chief Justice Commission on the Legal Profession and to the Colorado Supreme Court Advisory Committee.

PROGRAMS

CURRENT ONGOING CAMP PROGRAMS FOR 2013:

- **DBA** – 64 Mentor/Mentee Pairings (Continuation of Pilot Programs from 2011 and 2012)
- **Minori Yasui Inn of Court** – 6 Mentor/Mentee Pairings (Continuation of Pilot Program from 2012)
- **Larimer County Bar Association** – 3 Mentor/Mentee Pairings
- **District Attorney's Office 17th Judicial District** – 2 Mentor/Mentee Pairings (Continuation of Pilot Program from 2012)
- **Colorado Defense Lawyer's Association** – 6 Mentor/Mentee Pairings

CAMP PROGRAMS FOR 2014:

- **Ben Wendelken Inn of Court, El Paso County** – Kick-off January/February 2014 to run calendar year
- **Colorado Defense Lawyer's Association 2013** – 6 Mentor/Mentee Pairings continuing until April 30, 2013
- **Colorado Hispanic Bar Association** – Kick-off January/February 2014 a triad program (mentor/mentee/law student – Program in conjunction with the White Center at CU and with Sturm College of Law – Liz Krupa CHBA President
- **Continental Divide Bar Association (CDBA) –** Kick-off January 2014 to run calendar year
- **DBA 2013 --** 64 Mentor/Mentee Pairings continuing until April 30, 2013
- **DBA 2014 –** Kick-off January 2014 to run calendar year
- **Douglas Elbert Bar Association (DEBA) –** Kick-off January 2014 to run calendar year
- **Minori Yasui Inn of Court 2013** – 6 Mentor/Mentee Pairings continuing until April 30, 2013
- **Sam Cary Bar Association** – Kick-off January/February 2014 program triad program – mentor/mentee/law student – Jereme Baker, SCBA YLD Chair

OTHER MENTORING PROGRAMS FOR 2014:

- **Boulder County Bar Association** – 10 mentor pairings – CAMP Mentee already recruited – Christine Hylbert, E.D. BCBA – No formal CAMP connection, but CAMP MRC resources being used, perhaps mentor training.

NEW CAMP POTENTIAL PROGRAMS FOR 2014 IN THE WORKS:

- **Adams Broomfield Bar Association** – Presentations to ABBA Board and to En Banc Judges – Mentoring Committee formed – 2014 Program Planned – Mariana Vielma
- **Colorado Trial Lawyers Association –** Presentation and discussion of offering CAMP structured program as a component of existing mentoring program on December 5, 2013 – John Sadwith, CTLA Executive Director
- **El Paso County Bar Association** – CAMP presentation – Committee formed – Hon. William Bain and Yolanda Fennick, President Elect EPCBA
- **Gunnison Bar Association/Gunnison Inn of Court** – CAMP presentation – Committee planned – Hon. Steven Patrick
- **Four Corners Bar Association –** January 8, 2014 CAMP Presentation scheduled for SWCBA board and membership meeting – Jeremy Botkins, FCBA President
- **1st Judicial District Access to Justice Program** – CAMP presentation – Committee planned – Robyn McDonald
- **1st Judicial District Bar Association** – CAMP presentation – Committee planned – Carolyn Sada
- **17th Judicial District – District Attorney's Office** – District Attorney Dave Young attended the CAMP presentation at ABBA and asked to meet for a new program.
- **Mesa County Bar Association** – Committee formed for 2014 Program – Requested Presentation by CAMP in 2014 – Barbara Butler, Chair
- **Southwestern Colorado Bar Association –** January 7, 2014 CAMP Presentation scheduled for SWCBA board and membership meeting – Honorable Martha Minot and SWCBA President

CONCEPTUAL MENTORING REQUESTS

- **CBA Modest Means Task Force** – Presentation and task force meetings for mentoring needs for young lawyers taking on modest means cases. Task Force will push mentoring in coming year as a component of judicial district development of modest means lawyer lists and self-help centers.
- **Low Bono Young Lawyer Mentoring Co-op –** Blair Kanis Kutak Rock LLP – mentoring component request for a young lawyer co-op for collaboration on low bono cases – met and discussed, waiting for follow-up.
- **LawBank Mentoring Collaboration** – Jay Kamlet, Lathrop & Gage – collaboration request for mentoring component for LawBank.
- **Edward Gassman Residency Institute Proposal** – Edward Gassman, Esq. from Fort Collins – mentoring component for "residency concept" for new lawyers to work within an Institute on low bono or modest means client cases – planning to send proposal and set up meetings with Chief Justice Bender.

(NOTE: See **Attachment A** for all Colorado Judicial District Programs)

LAW SCHOOL COLLABORATION

PROFESSIONAL MENTORING PROGRAM – UNIVERSITY OF DENVER STURM COLLEGE OF LAW

Professor Mike Massey and Professional Mentoring Program and Senior Program Coordinator Andy Frohardt are collaborating with CAMP on three potential proposals:

- Coordination of Sturm Mentoring with CAMP, so when the Law Student graduates they enter a CAMP young lawyer mentoring program. Question: will the mentor "graduate" to CAMP, also?
- Participation in a Colorado Hispanic Bar Association "mentor triad" program, partnering a law student with a mentoring pair.
- Explore CLE Credit for attorneys mentoring law students.

EXISTING MENTORING PROGRAMS AT THE UNIVERSITY OF COLORADO SCHOOL OF LAW

I have met with Senior Assistant Dean Whiting Leary about CAMP collaboration or support at the University of Colorado, School of Law. Future meetings will be planned to identify mutual areas of collaboration.

Discussions and planned discussions about projects for CAMP with CU Career Development Directors, including Karen Trojanowski and Alexia McCaskill.

In addition, CAMP is working with Melissa Hart of White Center at CU on a Colorado Hispanic Bar Association "triad mentoring" program partnering a law student with a mentoring pair.

CAMP MENTORING RESOURCE CENTER

MENTOR/MENTEE TRAINING & RESOURCE CENTER

The development of a Mentoring Resource Center ("MRC") for online and face-to-face skills training programs and electronic materials for training mentors has begun. The following has been accomplished:

PHASE I (95% Complete)

- Collection of professional and popular press readings on mentoring, professionalism, ethics, and challenges for young lawyers, inclusiveness and diversity, etc. has been on-going since March, 2013.
- Creation of a searchable bibliography of the collected materials
- Upload materials and bibliography to CAMP Website
- Construction of MRC on CAMP Website
- Launched Website MRC

PHASE II (Planning and Securing Resources 40% Complete)

- Recruiting of "talent" for video "mentoring stories" and mentoring tips
- Creating Content for training videos (See Working Group B Sub-Committee Section below)
- Create "mentoring stories" from mentors and mentees
- Create "mentoring tips" from mentors and mentees
- Securing resources and equipment for videoing from Colorado State Judicial Educator, Jennifer Mendoza
- Securing technical assistance from Colorado State Judicial, CLE in Colorado, and the National Institute for Trial Advocacy

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LAUNCH OF CAMP WEBSITE

Good news, the CAMP Website launched on October 1, 2013. Construction and additions are continuing, but please review the site at: http://coloradomentoring.org.

Additional Website refinements planned for December, 2013 and for January through March, 2014 include the following:

1) Expansion of Pre-Approved Colorado Supreme Court Mentor Registry to include photographs, information on type of law practice, information on law firm or agency size, and listing of bar association affiliations. This information will assist pairing of mentors and mentees by CAMP and sponsoring organizations. Brief bios and law firm links will be allowed, if consistent with the Colorado Rules of Professional conduct;
2) Launching of mentor and mentee stories;
3) Launching of mentoring orientation materials and videos under Mentoring Resources Center; and
4) Launching of mentor and mentee training videos and materials under Mentoring Resources Center.

MAKING MENTORS & MENTEES EFFECTIVE AND AN INCLUSIVENESS AND DIVERSITY COMPONENT FOR CAMP

On September 24, 2013 Working Group B of the Chief Justice's Commission on the Legal Profession and the CAMP Advisory Group on Inclusiveness and Diversity merged efforts on mentor/mentee effectiveness, become a working sub-committee of the Working Group to complete this project. (See attached as **Attachment B**, the CAMP Advisory Group on Inclusiveness and Diversity working list of Mentor skills and qualities.)

The new Working Group B Sub-Committee on Mentoring Effectiveness to begin its work on November 18, 2013. The membership of the sub-committee includes:

Gillian Bidgood, Polsinelli Shughart, PC
Kristen Burke, Legal Counsel to the Chief Justice Designee, Colorado Supreme Court
Sarah Clark, Legal Counsel to the Chief Justice, Colorado Supreme Court
Katayoun A. Donnelly, Azizpour Donnelly LLC
Margaret Funk, Office of Attorney Regulation
Honorable Richard Gabriel, Colorado Court of Appeals
SuSaNi Harris, Senior Director for Diversity and Inclusive Excellence, University of Colorado School of Law
Karen Hester, Executive Director, Center on Legal Inclusiveness
Erika Holmes, Office of Attorney Regulation
Marianne LaBorde, Montgomery Kolodny, Amatuzio & Dusbabek, LLP
David Masters, Masters & Sellars, P.C.
Jim Pinto, Brownstein Hyatt Farber Scheck
Carolyn Powell, General Counsel/Vice President MVG Development
Patty Powell, Associate Dean for Student Affairs, Sturm College of Law
Kyle Velte, Legal Externships, Sturm College of Law
Mariana Vielma, Assistant Adams County Attorney

The Mentoring Effectiveness Sub-Committee will concentrate on two important initial tasks:

- The subcommittee will need to review and revise the existing "Making Mentors and Mentees Effective at Mentoring" document that currently serves as the outline of resources and materials for mentors and mentees in Colorado. (**DEADLINE: December 16, 2013**)
- The sub-committee will review and devise methods for the "delivery" of these materials to mentors and mentees throughout Colorado. (**DEADLINE: TBA**)

John Baker proposes development of multipurpose training delivery methods for the Mentoring Effectiveness Resource Materials as follows:

1) The written "Making Mentors and Mentees Effective at Mentoring" resource that the sub-committee is revising and writing. This can be distributed in both hardcopy and electronic format, it can be uploaded to the CAMP website, and it can be uploaded to sponsoring organization websites;
2) Face-to-face Boot CAMPS for face-to-face presentation on topics to include:
    - Mentoring Orientation
    - Different Mentor Roles
    - Importance of First Meeting – managing expectations and explaining motivations
    - Importance of Developing the mentoring plan
    - Tips for Mentors
    - Tips for Mentees
    - Listening & Communication skills
    - Mentoring Topics and Activities
    - Etc.
3) Online Boot CAMP for website consisting of short (2-3 minute – similar to the CBA 5-Minute Mentors) small bite segments featuring diverse (generational, ethnicity, gender, etc.) presenters to cover topics as in the David Masters' video;
4) Mentor/Mentee "Train the Trainers" program to train local sponsoring organizations to put on their own Boot CAMPS;
5) Work with CBA/DBA Professionalism Vignettes on Mentoring

DE-BRIEF ON OCTOBER "BOOT CAMP"

Evaluations of the October 16 Boot CAMP. All evaluations were positive on the speed dating format. Some evaluators would like longer discussion times and suggested new topics. The Boot CAMP faculty all garnered Rave Reviews. (See attached as **Attachment C**, the October 16, 2013 ***Boot CAMP*** Agenda.)

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ATTACHMENT A

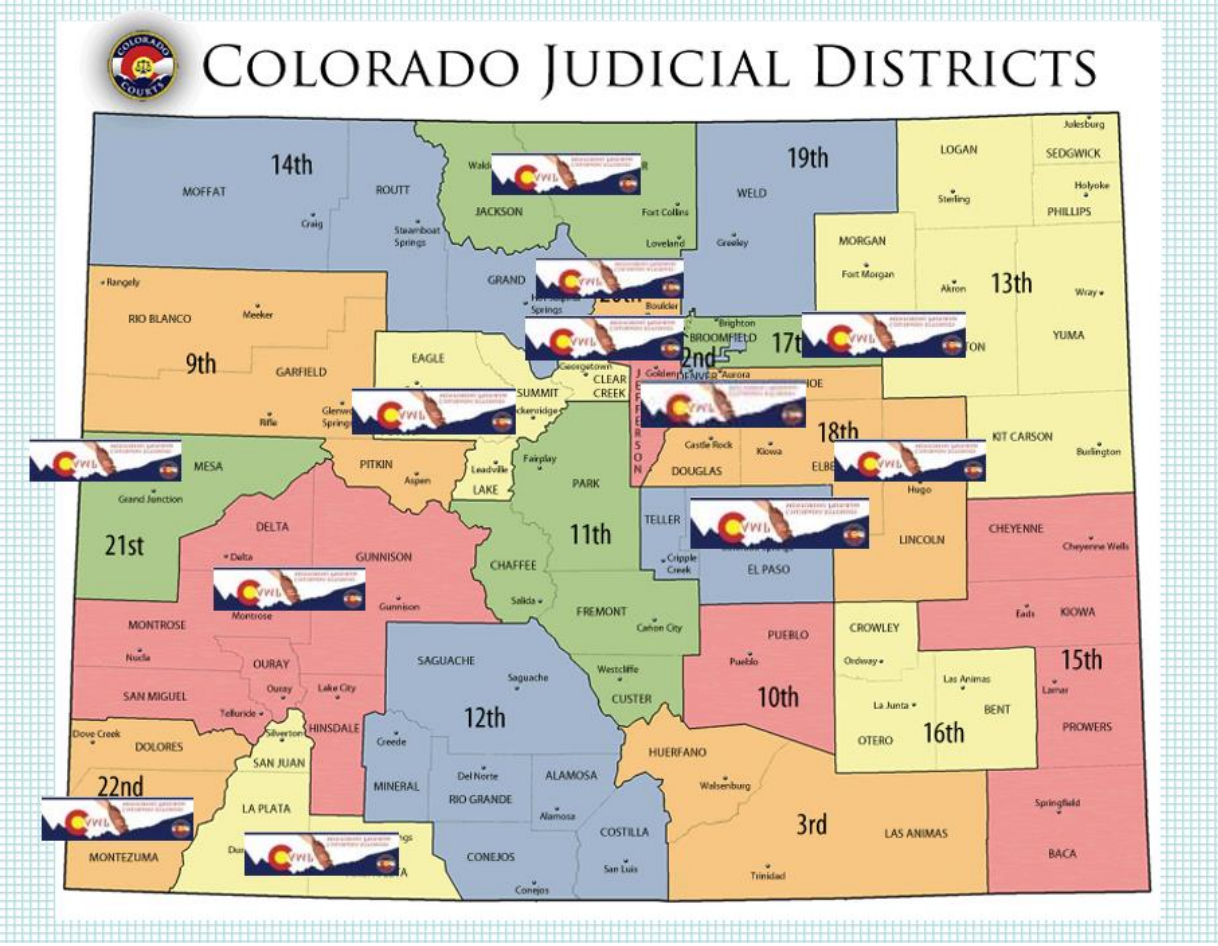

CAMP JD Planning:

1st (0+2)
2nd (3+4)
4th (0+2)
5th (0+1)
6th (0+1)
7th (0+1)
8th (1+0)
17th (1+2)
18th (0+1)
20th (0+2)
21st (0+1)
22nd (0+1)

Individual Pairings = 11

ATTACHMENT B

SKILL	COMPONENTS	POTENTIAL RESOURCES
Communication Skills	Ability to actively listen, to deliver constructive advice or critique, to request needs be met, to create a learning setting, to create a trusting environment, to encourage discussion, etc.	Colorado State Probation, NITA, Nan Joesten, Center for Legal Inclusiveness (CLI), Leadership Training, Vignettes, Videos, Ann Roan and the Colorado Public Defender Boot Camp.
Cultural Awareness and Respect	Implicit Bias training, Affinity Bias training, Inclusiveness training,	CLI, Arin Reeve, Specialty Bars https://implicit.harvard.edu/implicit/demo/
Discretion/Recognition of Boundaries & Privacy	Recognition of boundaries of mentoring relationship and avoiding crossing the line	Human resource materials, employment law materials, Specialty Bars
Ethical Conduct	Lecture, vignettes or movie clips, interactive discussions, etc.	OARC, CBA Ethics Committee
Professional Behavior or Professionalism	Civility	CBA/DBA Professionalism Vignettes, Judge Carparelli's Civility Skills Training, Professionalism Coordinating Councils, Peer Professionalism Advisory Group
Self-awareness	Myers/Briggs like resource for self-assessment as to strength and weaknesses, personality type, socialization type, etc.	https://implicit.harvard.edu/implicit/demo/ http://www.myersbriggs.org/my-mbti-personality-type/
Resourcefulness or Resource Centers	This may be taken care of with a "resource" guide like the ones they provide "Law Line 9" volunteers. Likely CAMP will need to develop one for entire state NOT just front range	Professionalism – Prof. Coordinating Councils – PPAG http://www.cobar.org/index.cfm/ID/20979/CLPE/Professionalism-Resources Law Practice – Reba Nance and the Law practice management resources http://www.cobar.org/index.cfm/ID/20124/DPLPM/Practice-Management/ Volunteer/Pro Bono – CBA Public Education pages – Carolyn Gravit http://makehistorycolorado.org/opportunities/ http://coloradocivics.com/ CTLA CDLA Family Law Section

ATTACHMENT C

The Colorado Attorney Mentoring Program (CAMP) and the Denver Bar Association (DBA) are pleased to announce

Legal Boot CAMP for Mentors and Mentees

Please Join Us on Wednesday, October 16
Place: Ralph Carr Judicial Center, Colorado Supreme Court Courtroom
Time: 4:00 pm -7:00 pm (includes a reception)

NOTE:*Optional tours of the Ralph Carr Judicial Center will be offered prior to the event from 3-4 pm*

Mentors and Mentees will get to "speed date" their way through four interactive, multi-generational, small group discussions on current provocative topics facing the 21st Century legal profession.The topics include:

1. **Professionalism – *"Why Be Civil: Rambo or Atticus Finch as Role Model?"***
   Leaders: Fran Fontana, Peer Professionalism Advisory Group
   Peter Goldstein, CBA/DBA Professionalism Councils
2. **Ethics – Competence and Economics – *"What Do You Mean I have to be Competent? I Need to Pay my Law School Loans!"***
   Leaders: Nancy Cohen, Miletich Cohen PC
   Adam Espinosa, Colorado Supreme Court Office of Attorney Regulation
3. **Wellness & Work/Life Balance–*"Get a Life & Be a Lawyer"***
   Leaders: Barbara Ezyk, Colorado Lawyer Assistance Program
4. ***Pro Bono* and Community Involvement – *What Do I Get Back from Giving Back?***
   Leaders: Charlie Garcia, President-Elect Colorado Bar Association
   Hon. Gale Miller, Colorado Court of Appeals

Then "kick back" at a reception for socializing, networking, and fun!

IMPORTANT: Please RSVP to CAMP Administrative Assistant, Lauren Eisenbach at l.eisenbach@csc.state.co.us by Monday, October 14th at 5:00 pm. RSVPs are mandatory so that the Supreme Court can issue each individual a temporary badge to move around the courthouse. If you are interested in a tour of the courthouse, please let Lauren know at the time of the RSVP so that she can arrange for a tour guide.

COMMITTEE ON RULES
OF
PRACTICE AND PROCEDURE

San Francisco, CA
January 6-7, 2011

AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JANUARY 6-7, 2011

1. Opening Remarks of the Chair

   A. Introduction; new members
   B. Report on the September 2010 Judicial Conference session
   C. Transmission of Judicial Conference-approved proposed rules amendments to Supreme Court

2. **ACTION** – Approving minutes of the June 2010 committee meeting

3. Report of the Administrative Office

4. Report of the Federal Judicial Center

5. Report of the Civil Rules Committee

   A. Rule 45
   B. Discovery
   C. Pleading
   D. Preservation and sanctions; panel presentation on proposals for rule amendments and other steps to provide better guidance on preservation obligations and more clarity on sanctions for spoliation
   E. Other work relating to the 2010 Duke Conference
   F. Minutes and other informational items

6. Report of the Appellate Rules Committee

   A. **ACTION** – Approving publishing for public comment proposed amendments to Appellate Rules 13, 14, and 24
   B. Minutes and other informational items

7. Report of the Criminal Rules Committee

   A. **ACTION** – Approving publishing for public comment proposed amendments to Criminal Rules 11, 12, and 34
   B. Minutes and other informational items

8. Report of the Evidence Rules Committee

   A. Possible rules amendments in light of *Melendez-Diaz v. Massachusetts*
   B. Minutes and other informational items

9. Report of the Bankruptcy Rules Committee

   A. Minutes
   B. Report on revisions to Part VIII of the Bankruptcy Rules and issues relating to those revisions

10. **ACTION** – Approving and transmitting to the Judicial Conference revised *Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure*

11. **ACTION** – Approving recommendations proposed by the Subcommittee on Privacy (Appendices A-E below contained in separate volume II)

    A. Administrative Office report on unredacted social security numbers identified by PublicResource.org
    B. Federal Judicial Center report on frequency of unredacted social security numbers in federal court filings
    C. Administrative Office report on redaction of personal-identifier information in local rules
    D. Federal Judicial Center survey of judges, clerks, and practitioners on managing personal-identifier information in court filings
    E. Fordham Law School Conference on the operation of the federal privacy rules

12. Long-Range Planning Report

13. Next Meeting: June 2-3, 2011

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
CHAIRS and REPORTERS

Honorable Lee H. Rosenthal United States District Judge United States District Court 11535 Bob Casey U.S. Courthouse 515 Rusk Avenue Houston, TX 77002-2600	Professor Daniel R. Coquillette Boston College Law School 885 Centre Street Newton Centre, MA 02459
Honorable Jeffrey S. Sutton United States Circuit Judge United States Court of Appeals 260 Joseph P. Kinneary United States Courthouse 85 Marconi Boulevard Columbus, OH 43215	Professor Catherine T. Struve University of Pennsylvania Law School 3400 Chestnut Street Philadelphia, PA 19104
Honorable Eugene R. Wedoff United States Bankruptcy Court Everett McKinley Dirksen United States Courthouse 219 South Dearborn Street Chicago, IL 60604	Professor S. Elizabeth Gibson Burton Craige Professor of Law 5073 Van Hecke-Wettach Hall University of North Carolina at Chapel Hill C.B. #3380 Chapel Hill, NC 27599-3380
Honorable Mark R. Kravitz United States District Judge United States District Court Richard C. Lee United States Courthouse 141 Church Street New Haven, CT 06510	Professor Edward H. Cooper University of Michigan Law School 312 Hutchins Hall Ann Arbor, MI 48109-1215
Honorable Richard C. Tallman United States Circuit Judge 902 William Kenzo Nakamura U.S. Courthouse – 1010 Fifth Avenue Seattle, WA 98104-1195	Professor Sara Sun Beale Duke University School of Law Science Drive & Towerview Road Box 90360 Durham, NC 27708-0360
Honorable Sidney A. Fitzwater Chief Judge United States District Court Earle Cabell Federal Building and United States Courthouse 1100 Commerce Street, Room 1528 Dallas, TX 75242-1310	Professor Daniel J. Capra Fordham University School of Law 140 West 62nd Street New York, NY 10023

Revised: December 10, 2010 (**EFFECTIVE OCTOBER 1, 2010**)

12-002777

Secretary:

Peter G. McCabe
Secretary, Committee on Rules of Practice & Procedure
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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
(Standing Committee)

Chair:	**Reporter:**
Honorable Lee H. Rosenthal United States District Judge United States District Court 11535 Bob Casey U.S. Courthouse 515 Rusk Avenue Houston, TX 77002-2600	Professor Daniel R. Coquillette Boston College Law School 885 Centre Street Newton Centre, MA 02459
Members:	
Dean C. Colson, Esquire Colson Hicks Eidson 255 Alhambra Circle Penthouse Coral Gables, FL 33134	Douglas R. Cox, Esquire Gibson, Dunn & Crutcher LLP 1050 Connecticut Avenue, N.W. Washington, DC 20036-5306
Roy Englert, Esquire Robbins Russell Englert Orseck Untereiner & Sauber, LLP 801 K Street, NW - Suite 411-L Washington, DC 20006	Honorable Gary G. Grindler Acting Deputy Attorney General (ex officio) U.S. Department of Justice 950 Pennsylvania Ave., N.W., Room 4111 Washington, DC 20530
Honorable Neil M. Gorsuch United States Court of Appeals Byron White United States Courthouse 1823 Stout Street, 4th Floor Denver, CO 80257-1823	Honorable Marilyn L. Huff United States District Court Edward J. Schwartz U. S. Courthouse Suite 5135 940 Front Street San Diego, CA 92101
Honorable Wallace Jefferson Supreme Court of Texas Supreme Court Building 201 W. 14th Street, Room 104 Austin, Texas 78701	David F. Levi Duke Law School Science Drive and Towerview Road Room 2012 Durham, NC 27708
William J. Maledon, Esquire Osborn Maledon, P.A. 2929 North Central Avenue, Suite 2100 Phoenix, AZ 85012-2794	Honorable Reena Raggi United States Court of Appeals 704S United States Courthouse 225 Cadman Plaza East Brooklyn, NY 11201-1818
Honorable Patrick J. Schiltz United States District Court United States Courthouse 300 South Fourth Street – Suite 14E Minneapolis, MN 55415	Honorable James A. Teilborg United States District Court 523 Sandra Day O'Connor 401 West Washington Street Phoenix, AZ 85003-2146

Revised: December 10, 2010 **(EFFECTIVE OCTOBER 1, 2010)**

12-002779

	Advisors and Consultants:
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Professor R. Joseph Kimble Thomas M. Cooley Law School 300 South Capitol Avenue Lansing, MI 48933	Joseph F. Spaniol, Jr., Esquire 5602 Ontario Circle Bethesda, MD 20816-2461

LIAISON MEMBERS

Appellate:	
Dean C. Colson	(Standing Committee)
Bankruptcy:	
Judge James A. Teilborg	(Standing Committee)
Civil:	
	(Bankruptcy Rules Committee)
Judge Diane P. Wood	(Standing Committee)
Criminal:	
Judge Reena Raggi	(Standing Committee)
Evidence:	
Judge Judith H. Wizmur	(Bankruptcy Rules Committee)
Judge Paul S. Diamond	(Civil Rules Committee)
Judge John F. Keenan	(Criminal Committee)
Judge Marilyn Huff	(Standing Committee)

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

John K. Rabiej Senior Attorney-Advisor Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544
James N. Ishida Senior Attorney-Advisor Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544
Jeffrey N. Barr Attorney-Advisor Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544
James H. Wannamaker III Senior Attorney Bankruptcy Judges Division Administrative Office of the U.S. Courts Washington, DC 20544
Scott Myers Attorney Advisor Bankruptcy Judges Division Administrative Office of the U. S. Courts Washington, DC 20544
Ms. Gale B. Mitchell Administrative Specialist Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544
Ms. Denise London Administrative Officer Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544

Revised: December 10, 2010 **(EFFECTIVE OCTOBER 1, 2010)**

Ms. Chianti D. Butler Staff Assistant Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544
Rasheedah Henry Program Assistant Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544

FEDERAL JUDICIAL CENTER

Joe Cecil (Rules of Practice & Procedure) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Marie Leary (Appellate Rules Committee) Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003
Molly T. Johnson (Bankruptcy Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Emery G. Lee (Civil Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003
Laural L. Hooper (Criminal Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Tim Reagan (Evidence Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

To carry on a continuous study of the operation and effect of the general rules of practice and procedure.

Members	Position	District/ Circuit	Start Date	End Date
Lee H. Rosenthal, Chair	D	Texas (Southern)	Chair: 2007	2011
Dean C. Colson	ESQ	Florida	2010	2013
Douglas R. Cox	ESQ	Washington, DC	2005	2011
Neil M. Gorsuch	D	Tenth Circuit	2010	2013
Marilyn L Huff	D	California (Southern)	2007	2010
Patrick J. Schiltz	D	Eighth Circuit	2010	2013
Roy Englert	ESQ	Washington, DC	2010	2013
David F. Levi	ACAD	North Carolina	2009	2012
Wallace Jefferson	C JUST	Texas	2010	2013
William J. Maledon	ESQ	Arizona	2005	2011
Gary Grindler Acting	DOJ	Washington, DC	2010	----
Reena Raggi	C	Second Circuit	2007	2010
James A. Teilborg	D	Arizona	2006	2012
Diane Wood	C	Seventh Circuit	2007	2010
Daniel Coquillette, Reporter	ACAD	Massachusetts	1985	Open
Principal Staff:				
Peter G. McCabe		(202) 502-1800		

TAB
1-A-C

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

PRELIMINARY REPORT
JUDICIAL CONFERENCE ACTIONS
September 14, 2010
****

All the following matters requiring the expenditure of funds were approved by the Judicial Conference *subject to the availability of funds* and to whatever priorities the Conference might establish for the use of available resources.

****

At its September 14, 2010 session, the Judicial Conference of the United States —

EXECUTIVE COMMITTEE

Approved a resolution in recognition of the substantial contributions made by the Judicial Conference committee chairs whose terms of service end in 2010.

Approved the *Strategic Plan for the Federal Judiciary.*

Approved the following with regard to a planning process for the Judicial Conference and its committees:

a. The Executive Committee chair may designate for a two-year renewable term an active or senior judge, who will report to that Committee, to serve as the judiciary planning coordinator. The planning coordinator will have responsibility to facilitate and coordinate the strategic planning efforts of the Judicial Conference and its committees.

b. With suggestions from Judicial Conference committees and others, and the input of the judiciary planning coordinator, the Executive Committee will identify issues, strategies, or goals to receive priority attention over the next two years.

c. The committees of the Judicial Conference will integrate the *Strategic Plan for the Federal Judiciary* into committee planning and policy development activities.

d. For every goal in the *Strategic Plan*, a mechanism to measure or assess the judiciary's progress will be developed.

e. Any substantive changes to the *Strategic Plan* will require the approval of the Judicial Conference, but the Executive Committee will have the authority, as needed, to approve technical and non-controversial changes to the *Strategic Plan*. A review of the *Strategic Plan* will take place every five years.

f. The new *Strategic Plan for the Federal Judiciary* will supersede the December 1995 *Long Range Plan for the Federal Courts* as a planning instrument to guide future policy-making and administrative actions within the scope of Conference authority. This action, however, should not be interpreted as an across-the-board rescission of the individual Conference policies articulated in the recommendations and implementation strategies of the earlier plan.

COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM

With regard to continuing need for bankruptcy judgeships:

a. Agreed to recommend to Congress that no existing bankruptcy judgeship be statutorily eliminated; and

b. Agreed to advise the Eighth and Ninth Circuit Judicial Councils, respectively, to consider not filling vacancies in the District of South Dakota, the Northern District of Iowa, and the District of Alaska that currently exist or may occur by reason of resignation, retirement, removal, or death, until there is a demonstrated need to do so.

With regard to evaluating the need for bankruptcy judgeships:

a. Approved a revised Judicial Conference policy statement that sets forth standards and factors for evaluating requests for additional bankruptcy judgeships and the conversion of temporary bankruptcy judgeships to permanent status, and for evaluating the continued need for existing bankruptcy judgeships; and

b. Approved new case weights for determining bankruptcy judgeship weighted caseloads per authorized judgeship.

With regard to bankruptcy official duty stations:

a. Authorized the designation of Santa Ana as the duty station in the Central District of California for two of the district's vacant bankruptcy judgeships and the designation of Riverside as the duty station for the four bankruptcy judges currently serving there; and

b. Authorized the designation of Burlington as the duty station for the bankruptcy judgeship in the District of Vermont.

Approved revised Regulations of the Judicial Conference of the United States Governing the Bankruptcy Administrator Program.

COMMITTEE ON THE BUDGET

Approved the Budget Committee's budget request for fiscal year 2012, subject to amendments necessary as a result of (a) new legislation, (b) actions of the Judicial Conference, or (c) any other reason the Executive Committee considers necessary and appropriate.

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT

Authorized a pilot project to evaluate the effect of cameras in district court courtrooms, video recordings of proceedings therein, and publication of such video recordings. The pilot project will proceed in accordance with the tenets outlined below, and is subject to definition and review by the Court Administration and Case Management Committee. In addition, the Committee will request that a study of the pilot be conducted by the Federal Judicial Center.

a. The pilot will be national in scope and consist of up to 150 individual judges from districts chosen to participate by the FJC, in consultation with the Court Administration and Case Management Committee. The pilot project should include a national survey of all district judges, whether or not they participate in the pilot, to determine their views on cameras in the courtroom.

b. The pilot will last up to three years, with interim reports prepared by the Federal Judicial Center after the first and second years.

c. The pilot will be limited to civil cases only.

d. Courts participating in the pilot will record proceedings, and recordings by other entities or persons will not be allowed.

e. Parties in a trial must consent to participating in the pilot.

f. Recording of members of a jury will not be permitted at any time.

g. Courts participating in the pilot should – if necessary – amend their local rules (providing adequate public notice and opportunity to comment) to provide an exception for judges participating in the Judicial Conference-authorized pilot project.

h. The Court Administration and Case Management Committee is authorized to issue and amend guidelines to assist the pilot participants.

i. The Administrative Office is authorized to provide funding to the courts with participating judges – if needed – for equipment and training necessary to participate in the pilot.

With regard to PACER filings in certain bankruptcy cases:

a. Amended the policy on privacy and public access to electronic case files to restrict public access through PACER to documents in bankruptcy cases that were filed before December 1, 2003, and have been closed for more than one year, with the following conditions:

   (1) The docket sheet and docket information will remain available to the general public via PACER.

   (2) Any party who has filed a notice of appearance in an individual case will have CM/ECF or PACER access to all filings in that case.

   (3) All filings in such cases will remain accessible at the clerks' offices, except those under seal.

   (4) Access to documents in bankruptcy case appeals filed in the district courts, bankruptcy appellate panels, or courts of appeals, for bankruptcy cases filed before December 1, 2003, will be similarly restricted.

b. Delegated to the Court Administration and Case Management Committee the authority to develop implementation guidance for the courts to effectuate this policy. This guidance will include encouraging courts to establish a method to accept requests for copies of documents in these cases.

Endorsed the approach of providing courts with redacted and unredacted versions of the Central Violations Bureau (CVB) violation notice, with participant access to the unredacted version, and public access through PACER to the redacted version.

Approved a revised district court records disposition schedule for civil case files.

Approved the establishment of a program involving the Government Printing Office, the American Association of Law Libraries, and the Administrative Office, that will provide training and education to the public about the PACER service and exempts from billing the first $50 of quarterly usage by a library participating in the program.

Agreed to take the following actions with regard to library collections:

a. Ask that the Court Administration and Case Management Committee establish guidelines to discourage maintaining subscriptions to regional reporters, state case law reporters, and specialty reporters in libraries. Advise circuit librarians to consider significantly reducing the number of subscriptions to the federal reporters in staffed libraries, especially West's Federal Supplement. If there is a concern that legal research services for the public/litigants or bar would be hindered if case law reporters are not available in the library, the local court(s) should consider using attorney admission funds to maintain the subscriptions.

b. Request that the circuit librarians conduct and lead a comprehensive assessment of usage and need in the headquarters library and each satellite library or shared collection. The assessment should involve local judges, legal researchers, and any relevant circuit library committees; consider if infrequently used categories of materials identified by the library survey results could be eliminated; and include an analysis of duplication. A summary of the assessment should be reported to the Court Administration and Case Management Committee.

c. Ask that the Court Administration and Case Management Committee establish guidelines discouraging subscriptions to case law reporters for newly appointed and existing judges.

Agreed to request the circuit judicial councils, working with circuit librarians, library committees, and relevant judges, to review satellite libraries to assess the continuing need for each library. In addition, they should review more closely libraries that serve fewer than 10 judges and report to the Court Administration and Case Management Committee whether those libraries will remain open or are targeted either for closure or reduction in size and collection. Consideration should be given to the circuit library program as a whole and the impact of closure of any satellite on the remaining libraries and the judges and others served.

Endorsed the concepts contained in the proposal by the Court of Federal Claims to amend the National Childhood Vaccine Injury Act except for concept two, which would rename vaccine special masters as vaccine judges.

Declined to approve a motion to recommit an information item regarding the translation of court forms for voluntary use by district courts in civil cases.

COMMITTEE ON CRIMINAL LAW

With regard to searches and seizures by probation officers:

a. Agreed to adopt new Search and Seizure Guidelines for United States Probation Officers in the Supervision of Offenders on Supervised Release or Probation to replace the 1993 model search and seizure guidelines.

b. Approved revisions to the use of force policy to allow officers to manage searches as permitted by the new search and seizure guidelines.

Approved revisions to Monograph 111, *The Supervision of Federal Defendants.*

COMMITTEE ON DEFENDER SERVICES

Approved (a) a Model Code of Conduct for Federal Community Defender Employees and a new paragraph to be added to the community defender organization (CDO) grant and conditions document requiring CDOs to adopt the code, absent an approved variance from the AO; and (b) a delegation to the Committee on Defender Services to make future adjustments to the Code that are substantially in accord with the Code of Conduct applicable to federal public defenders.

Approved revisions to the *Guide to Judiciary Policy*, Volume 7A (Criminal Justice Act Guidelines) § 320.70.40 (and the corresponding sample model order) regarding acquisition of computer hardware/software for use in Criminal Justice Act (CJA) representations by CJA panel attorneys.

COMMITTEE ON INFORMATION TECHNOLOGY

Approved the fiscal year 2011 update to the *Long Range Plan for Information Technology in the Federal Judiciary.*

COMMITTEE ON THE JUDICIAL BRANCH

Approved an amendment to section 220.30.10(g) of the Travel Regulations for United States Justices and Judges to provide that a chief district judge, with the concurrence of the circuit judicial council, may authorize a senior district judge who lives within the territorial boundaries of the court to which the judge was originally commissioned, reimbursement for enhanced transportation, lodging, and subsistence expenses (e.g., airfare, lodging, and three meals per day) when it is in the interest of the administration of justice (e.g., due to a shortage of judge power or case backlog).

COMMITTEE ON JUDICIAL RESOURCES

Affirmed the interpretation and application of the Judiciary Salary Plan (JSP) non-chambers pay-setting flexibility that would allow an applicant for a court unit executive or second-in-command (e.g., Type II chief deputy/deputy chief) JSP position to be appointed at step 1 or above in a grade lower than the highest grade for which the individual is qualified, subject to the following policy provisions:

a. The salary for the higher step may not exceed the corresponding salary for step 1 of the higher grade for which the individual is qualified;

b. If such an employee is subsequently promoted in less than one year from the individual's appointment date, the promotion may not result in the individual's salary exceeding the highest grade and step for which the individual was initially eligible;

c. For individuals appointed using this flexibility, the two-step increase JSP promotion rule may not be applied until the employee has worked at the grade and step to which the individual is appointed for one year; and

d. The position must be announced at all possible grades that the appointing officer is considering for the appointment.

Approved the addition of court reporter duties to the judicial assistant position in the chambers of Judge Roberto A. Lange in the District of South Dakota based on the circumstances presented by the court and that it is "in the public interest." Approval is limited to the present incumbent judicial assistant in Judge Lange's chambers. The judicial assistant-court reporter is required to follow all statutory requirements and Judicial Conference policies related to court reporting, as well as the Code of Conduct for Judicial Employees, when providing court reporting services to the court and the litigants.

With regard to additional staff court interpreter positions:

a. Authorized one additional Spanish staff court interpreter position each for the Southern District of California and the District of New Mexico, and two additional Spanish staff court interpreter positions for the Western District of Texas, for fiscal year 2012, based on the Spanish language interpreting workload in these courts; and

b. Authorized accelerated funding in fiscal year 2011 for the one additional Spanish staff court interpreter position recommended for the District of New Mexico and the two additional Spanish staff court interpreter positions recommended for the Western District of Texas.

Approved the following revisions to the current telework policy for courts and federal public defender organizations:

a. Define "official duty station" as the telework site for an employee who is not required to report to the employing court or federal public defender organization at least twice each biweekly pay period on a regular and recurring basis (other than during temporary telework, e.g., during a medical recovery period), and as the site of the employing court or organization for any employee who reports to the court or organization at least twice each biweekly pay period on a regular and recurring basis;

b. Provide that a court or federal public defender organization should establish in its telework policy generally and in each telework agreement specifically, what, if any, travel reimbursement is authorized when an employee travels to the employing court or organization; and

c. Clarify that relocation expenses are not authorized when the official duty station changes as a result of the initiation of full-time telework, or modification or termination of a telework agreement.

Adopted the following policy statement with regard to a judge's role when presiding in an employment dispute resolution (EDR) proceeding:

a. Employment dispute resolution proceedings are strictly administrative and are not "cases and controversies" under Article III of the Constitution;

b. Judges presiding in EDR matters are functioning in an administrative rather than judicial capacity;

c. Judges' decisions in EDR matters must be in conformance with all statutes and regulations that apply to the judiciary, and that judges in the EDR context have no authority to declare such statutes or regulations unconstitutional or invalid; and

d. Judges presiding in EDR matters may not compel the participation of or impose remedies upon agencies or entities other than the employing office which is the respondent in such matters

COMMITTEE ON THE ADMINISTRATION OF THE MAGISTRATE JUDGES SYSTEM

Approved the recommendations regarding specific magistrate judge positions to authorize four new full-time magistrate judge positions.

Designated the new full-time magistrate judge positions at Indianapolis in the Southern District of Indiana; Minneapolis or St. Paul in the District of Minnesota; Santa Ana or Riverside in the Central District of California; and Las Vegas in the District of Nevada for accelerated funding effective April 1, 2011.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

With regard to appellate rules:

a. Approved proposed amendments to Appellate Rules 4 and 40 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

b. Agreed to seek legislation amending 28 U.S.C. § 2107, consistent with the proposed amendments to Appellate Rule 4, to clarify the treatment of the time to appeal in a case in which a United States officer or employee is a party.

With regard to bankruptcy rules:

a. Approved proposed amendments to Bankruptcy Rules 2003, 2019, 3001, 4004, and 6003, and new Rules 1004.2 and 3002.1, and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

b. Approved proposed revisions of Bankruptcy Official Forms 9A, 9C, 9I, 20A, 20B, 22A, 22B, and 22C, to take effect on December 1, 2010.

Approved proposed amendments to Criminal Rules 1, 3, 4, 6, 9, 32, 40, 41, 43, and 49, and new Rule 4.1, and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Evidence Rules 101 through 1103 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

COMMITTEE ON SPACE AND FACILITIES

Endorsed the concept of a Capital Security Program to assist courts at locations with security deficiencies.

Approved the *Five-Year Courthouse Project Plan for Fiscal Years 2012-2016.*

Approved feasibility studies for the following locations: Hartford, Connecticut; Winston-Salem/Greensboro, North Carolina; and Clarksburg, West Virginia.

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 14-15, 2010
Washington, DC
Draft Minutes

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C., on Monday and Tuesday, June 14 and 15, 2010. All the members were present:

Judge Lee H. Rosenthal, Chair
Dean C. Colson, Esquire
Douglas R. Cox, Esquire
Judge Harris L Hartz
Judge Marilyn L. Huff
Chief Justice Wallace Jefferson
John G. Kester, Esquire
Dean David F. Levi
William J. Maledon, Esquire
Judge Reena Raggi
Judge James A. Teilborg
Judge Diane P. Wood

The Department of Justice was represented on the committee by Lisa O. Monaco, Principal Associate Deputy Attorney General. Other attendees from the Department included Karyn Temple Claggett, Elizabeth Shapiro, Kathleen Felton, J. Christopher Kohn, and Ted Hirt.

Professor R. Joseph Kimble, the committee's style consultant, participated throughout the meeting, and Judge Barbara Jacobs Rothstein, Director of the Federal Judicial Center, participated in part of the meeting.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Peter G. McCabe	The committee's secretary
John K. Rabiej	Chief, Rules Committee Support Office
James N. Ishida	Senior attorney, Administrative Office
Jeffrey N. Barr	Senior attorney, Administrative Office
Henry Wigglesworth	Senior attorney, Administrative Office
Joe Cecil	Research Division, Federal Judicial Center
Emery G. Lee III	Research Division, Federal Judicial Center
Tim Reagan	Research Division, Federal Judicial Center
Andrea Kuperman	Judge Rosenthal's rules law clerk

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
- Judge Jeffrey S. Sutton, Chair
- Professor Catherine T. Struve, Reporter

Advisory Committee on Bankruptcy Rules —
- Judge Laura Taylor Swain, Chair
- Professor S. Elizabeth Gibson, Reporter

Advisory Committee on Civil Rules —
- Judge Mark R. Kravitz, Chair
- Professor Edward H. Cooper, Reporter
- Professor Richard L. Marcus, Associate Reporter

Advisory Committee on Criminal Rules —
- Judge Richard C. Tallman, Chair
- Professor Sara Sun Beale, Reporter
- Professor Nancy J. King, Associate Reporter

Advisory Committee on Evidence Rules —
- Judge Robert L. Hinkle, Chair
- Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Rosenthal reported that the Supreme Court had transmitted to Congress all the rule amendments approved by the Judicial Conference in September 2009, except the proposed amendment to FED. R. CRIM. P. 15 (depositions). That proposal would have authorized taking the deposition of a witness in a foreign country outside the presence of the defendant if the presiding judge were to make several special findings of fact. The Court remitted the amendment to the committee without comment, but some further explanation of the action is anticipated. She noted that the advisory committee had crafted the rule carefully to deal with delicate Confrontation Clause issues, and it appears that it may have further work to do.

Judge Rosenthal reflected that the rules committees had accomplished an enormous amount of work since the last Standing Committee meeting in January 2010. First, she said, the Advisory Committee on Evidence Rules had completed the restyling of the entire Federal Rules of Evidence and was now presenting them for final approval. The evidence rules, she noted, are the fourth set of federal rules to be restyled, and the final product is truly impressive.

Second, she said, final approval was being sought for important changes in the appellate and bankruptcy rules and for a package of amendments to the criminal rules that would allow courts and law enforcement authorities to take greater advantage of technological developments. Third, she pointed to the recent work of the sealing and privacy subcommittees and the Federal Judicial Center's major report on sealed cases in the federal courts.

Finally, she emphasized that the civil rules conference held at Duke Law School in May 2010 had been an unqualified success. She noted that the conference proceedings and the many studies and articles produced for the event should be viewed as just the beginning of a major rules project that will continue for years. All in all, she said, it had been a truly productive year for the rules committees, and the year was still not half over.

Judge Rosenthal introduced the committee's newest member, Chief Justice Wallace Jefferson of Texas. She noted that he is extremely well regarded across the entire legal community and recently received more votes than any other candidate for state office in Texas. She described some of his many accomplishments and honors, and she noted that he will be the next presiding officer of the Conference of Chief Justices.

With regret, she reported that several rules committee chairs and members were attending their last Standing Committee meeting because their terms would expire on October 1, 2010. She thanked Judge Swain and Judge Hinkle for their leadership and enormous contributions as advisory committee chairs for the past three years.

She pointed out that Judge Swain, as chair of the Advisory Committee on Bankruptcy Rules, had embarked on new projects to modernize the official bankruptcy forms and update the bankruptcy appellate rules, and had guided the committee through controversial rules amendments that were necessary to respond to economic developments. She emphasized that the work had been extremely complicated, timely, and meticulous.

Judge Hinkle's many accomplishments as chair of the Advisory Committee on Evidence Rules, she said, included the major, and very difficult, project of restyling the Federal Rules of Evidence. The new rules, she said, are outstanding and are an appropriate monument to his leadership as chair.

Judge Rosenthal said that the terms of two members of the Standing Committee were also about to end – Judge Hartz and Mr. Kester. She noted that Judge Hartz had come perfectly prepared to serve on the committee, having been a private practitioner, a prosecutor, a law professor, and a state judge. She thanked him for his incisive work as chair of the sealing subcommittee, for his amazing attention to detail, and for his willingness to do more than his share of hard preparatory work.

She said that Mr. Kester had been a wonderful member, bringing to the committee invaluable insights and wisdom as a distinguished lawyer. She detailed some of his background as a partner at a major Washington law firm, a law clerk to Justice Hugo Black, a former president of Harvard Law Review, a former high-level official at the Department of Defense, and a member of many public and civic bodies. She noted that he always shows great respect and appreciation for the work of judges and has written articles on law clerks and how they affect the work of judges.

Judge Rosenthal pointed out that two of the committee's consultants – Professor Geoffrey C. Hazard, Jr. and Joseph F. Spaniol, Jr. – had been unable to attend the meeting and would be greatly missed. She noted that Mr. Spaniol had been part of the federal rules process for more than 50 years.

Judge Rosenthal reported that Tom Willging was about to retire from his senior position with the Research Division of the Federal Judicial Center. She noted that Dr. Willging had worked closely with the Advisory Committee on Civil Rules for more than 20 years and had directed many of the most important research projects for that committee. She thanked him for his many valuable contributions to the rules committees and emphasized his hard work, innovative approach, and completely honest assessments.

Judge Rosenthal also thanked the staff of the Administrative Office for their uniformly excellent work in supporting the rules committees, noting in particular that they coped successfully with the recent upsurge in rules committee activities and contributed mightily to the success of the May 2010 civil rules conference at Duke Law School.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of the last meeting, held on January 7-8, 2010.

LEGISLATIVE REPORT

Civil Pleading

Judge Rosenthal reported that legislation had been introduced in 2009 in each house of Congress attempting to restore pleading standards in civil cases to those in effect before the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007), and *Ashcroft v. Iqbal,* 556 U.S. ___, 129 S. Ct. 1937 (2009). Three hearings had been held on the bills, but none since January 2010.

In May 2010, she said, a discussion draft had been circulated of new legislation that would take a somewhat different approach from the two earlier bills. She added that Congressional markup of some sort of pleading legislation had been anticipated by May, but had been postponed indefinitely. Another markup session, she said, may be scheduled before the summer Congressional recess, but there is still a good deal of uncertainty over what action the legislature will take.

Judge Rosenthal pointed out that the judiciary's primary emphasis has been to promote the integrity of the rulemaking process and to urge Congress to use that process, rather than legislation, to address pleading issues. She noted that the rules committees have been: (1) monitoring pleading developments since *Twombly* and *Iqbal;* (2) memorializing the extensive case law developed since those decisions; and (3) drawing on the Administrative Office and the Federal Judicial Center to gather statistics and other empirical information on civil cases before and after *Twombly* and *Iqbal.* That information, she said, had been given to Congress and posted on the judiciary's website. In addition, she, Judge Kravitz, and Administrative Office Director Duff had written letters to Congress emphasizing the importance of respecting and deferring to the Rules Enabling Act process, especially in such a delicate and technical legal area as pleading standards.

Sunshine in Litigation

Judge Rosenthal reported that the committee was continuing to monitor proposed "sunshine in litigation" legislation that would impose restrictions on judges issuing protective orders during discovery in cases where the information to be protected by the order might affect public health or safety. She noted that a new bill had recently been introduced by Representative Nadler that is narrower than earlier legislation. But, she

said, it too would require a judge to make specific findings of fact regarding any potential danger to public health and safety before issuing a protective order. As a practical matter, she explained, the legislation would be disruptive to the civil discovery process and require a judge to make important findings of fact without the assistance of counsel and before any discovery has taken place in a case.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Sutton and Professor Struve presented the report of the advisory committee, as set forth in Judge Sutton's memorandum and attachments of May 28, 2010 (Agenda Item 11).

Amendments for Final Approval

FED. R. APP. P. 4(a)(1) and 40(a) and PROPOSED STATUTORY AMENDMENT TO 28 U.S.C. § 2107

Judge Sutton reported that the proposed changes to Rule 4 (time to appeal) and Rule 40 (petition for panel rehearing) had been published for comment in 2007. The current rules, he explained, provide additional time to all parties to file a notice of appeal under Rule 4 (60 days, rather than 30) or to seek a panel rehearing under Rule 40 (45 days, rather than 14) in civil cases in which one of the parties in the case is a federal government officer or employee sued in an *official* capacity. The proposed amendments, he said, would clarify the law by specifying that additional time is also provided in cases where one of the parties is a federal government officer or employee sued in an *individual* capacity for an act or omission occurring in connection with duties performed on the government's behalf.

He noted, by way of analogy, that both FED. R. CIV. P. 4(i)(3) (serving a summons) and FED. R. CIV. P. 12(a)(3) (serving a responsive pleading) refer to a government officer or employee sued "in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf." The same concept was being imported from the civil rules to the appellate rules.

Judge Sutton pointed out that the advisory committee had encountered a complication when the Supreme Court held in *Bowles v. Russell*, 551 U.S. 205 (2007), that an appeal time period reflected in a statute is jurisdictional in nature. In light of that opinion, the advisory committee questioned the advisability of making the change in Rule 4 without also securing a similar statutory amendment to 28 U.S.C. § 2107.

The advisory committee, he said, had considered dropping the proposed amendment to Rule 4 and proceeding with just the amendment to Rule 40 – which has no statutory counterpart. But the committee was uncomfortable with making the change in one rule but not the other because the two deal with similar issues and use identical language. Accordingly, after further discussion, the committee decided to pursue both the Rule 4 and Rule 40 amendments, together with a proposed statutory change to 28 U.S.C. § 2107. Amending all three will bring uniformity and clarity in all civil cases in which a federal officer or employee is a party.

Judge Sutton reported that the advisory committee had made a change in the proposed amendments following publication to specify that the rules apply to both current and former government employees.

He also explained that the advisory committee had debated whether to set forth specific safe harbors in the text of the rule to ensure that the longer time periods apply in certain situations. All committee members, he said, agreed to include two safe harbors in the rule. They would cover cases where the United States: (1) represents the officer or employee at the time the relevant judgment is entered; or (2) files the appeal or rehearing petition for the officer or employee.

Judge Sutton explained that two committee members had wanted to add a third safe harbor, to cover cases where the United States pays for private representation for the government officer or employee. There was no opposition to the third safe harbor on the merits, but a seven-member majority of the committee pointed to practical problems that cautioned against its inclusion. For example, neither the clerk's office nor other parties in a case will know whether additional time is provided because they will not be able to tell from the pleadings and the record whether the United States is in fact financing private counsel. The rule, moreover, had proven quite complicated to draft, and adding another safe harbor would make it more difficult to read.

In short, he said, the advisory committee concluded that the third safe harbor was simply not appropriate for inclusion in the text of the rule. He suggested, though, that some language addressing it could be included in the committee note, even though it would be unusual to specify a safe harbor in the note that is not set forth in the rule itself.

A participant inquired as to how often the situation arises where the government funds an appeal but does not provide the representation directly. Judge Sutton responded that the advisory committee had been informed that it arises rather infrequently, in about 30 to 50 cases a year.

A member suggested that the committee either add the third safe harbor to the text of the rules or not include any safe harbors in the rules at all. For example, the text of the two rules could be made simpler and a non-exclusive list added to the committee notes.

Judge Sutton explained that the advisory committee had originally drafted the rule using the words, "including, but not limited to . . . ." The style subcommittee, however, did not accept that formulation because it was not consistent with general usage elsewhere in the rules. He suggested, therefore, that two options appeared appropriate: (1) returning to the original language proposed by the advisory committee, *i.e.,* "including but not limited to . . ."; or (2) retaining the current language of the rule with two safe harbors, but adding language to the note referring to the third safe harbor as part of a non-exclusive list. Professor Struve offered to draft note language to accomplish the latter result.

A member moved to adopt the second option, using the language drafted by Professor Struve, with a minor modification.

The committee without objection by voice vote approved the proposed amendments to Rules 4 and 40, including the additional language for the committee notes, for approval by the Judicial Conference. Without objection by voice vote, it also approved the proposed corresponding statutory amendment to 28 U.S.C. § 2107.

Informational Items

Judge Sutton reported that the advisory committee was considering proposals to amend FED. R. APP. P. 13 (review of Tax Court decisions) and FED. R. APP. P 14 (applicability of other rules to review of Tax Court decisions) to address interlocutory appeals from the Tax Court. He noted that the committee would probably ask the Standing Committee to authorize publication of the proposed amendments at its January 2011 meeting.

He reported that the advisory committee was continuing to study whether federally recognized Indian tribes should be given the same status as states under FED. R. APP. P. 29 (amicus briefs), thereby allowing them to file amicus briefs without party consent or court permission. He said that he would consult on the matter with the chief judges of the Eighth, Ninth, and Tenth Circuits, where most tribal amicus filings occur. One possibility, he suggested, would be for those circuits to amend their local rules to take care of any practical problems. This course might avoid the need to amend the national rules. Otherwise, he said, the advisory committee would consider amending Rule 29. In addition, he noted that the Supreme Court does not give tribes the right to file amicus briefs without permission, but it does allow municipalities to do so.

He also reported that the advisory committee was considering some long-term projects, including possible rule amendments in light of the recent Supreme Court decision in *Mohawk Industries, Inc. v. Carpenter,* 130 S. Ct. 599 (2009), which held that a ruling by a district court on attorney-client privilege did not qualify for an immediate appeal under the "collateral order" doctrine. Another long-term project, he said, involved studying the case law on premature notices of appeal. He noted that there are splits

among the circuits regarding the status of appeals filed prior to the entry of an appealable final judgment.

Finally, Judge Sutton noted that the advisory committee was considering whether to modify the requirements in FED. R. APP. P. 28(a)(6) and (7) (briefs) that briefs contain separate statements of the case and of the facts. He suggested that the requirements prevent lawyers from telling their side of the case in chronological order. Several members agreed with that assessment and encouraged the advisory committee to proceed.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Swain and Professor Gibson presented the report of the advisory committee, as set out in Judge Swain's memorandum and attachment of May 27, 2010 (Agenda Item 10).

Amendments for Final Approval

FED. R. BANKR. P. 1004.2

Judge Swain reported that proposed new Rule 1004.2 (chapter 15 petition) would require a chapter 15 petition – which seeks recognition of a foreign proceeding – to designate the country in which the debtor has "its center of main interests." The proposal, originally published in 2008, had been criticized in the public comments for allowing too much time for a party to file a motion challenging the designation. As a result, the advisory committee republished the rule in 2009 to reduce the time for filing an objection from 60 days after notice of the petition is given to 7 days before the date set for the hearing on the petition.

She noted that no comments had been submitted on the revised proposal, and only stylistic changes had been made after publication.

The committee without objection by voice vote approved the proposed new rule for approval by the Judicial Conference.

FED. R. BANKR. P. 2003

Professor Gibson explained that under current law the officer presiding at the first meeting of creditors or equity security holders, normally the trustee, may defer completion of the meeting to a later date without further notice. The proposed amendment to Rule 2003 (meeting of creditors or equity security holders) would require the officer to file a statement specifying the date and time to which the meeting is

adjourned. This procedure will make it clear on the record for those parties not attending whether the meeting was actually concluded or adjourned to another day.

She noted that § 1308 of the Bankruptcy Code requires chapter 13 debtors to file their tax returns for the last four taxable periods before the scheduled date of the meeting. If, however, a debtor has not filed the returns by that date, § 1308(b)(1) permits the trustee to "hold open" the meeting for up to 120 days to allow the debtor additional time to file.

Under FED. R. BANKR. P. 3002(c) (filing a proof of claim or interest), taxing authorities have 60 days to file their proofs of claim after the debtor files the returns. If the debtor fails to file them within the time period provided by § 1308, the failure is a basis under § 1307 of the Code for mandatory dismissal of the case or conversion to chapter 7.

Professor Gibson pointed out that the purpose of the proposed amendment to Rule 2003 was to give clear notice to all parties as to whether a meeting of creditors has been concluded or adjourned and, if adjourned, for how long. It will let them know whether the trustee has extended the debtor's time to file tax returns as required for continuation of a chapter 13 case, since adjourning the meeting functions as "holding open" the meeting for purposes of the tax return filing provision.

She noted that eight of the nine public comments on the rule had been favorable. The Internal Revenue Service, however, recommended that the rule be revised to require the presiding officer to specify whether the meeting of creditors is being: (1) "held open" explicitly under § 1308 of the Code to give a taxpayer additional time to file returns; or (2) adjourned for some other purpose.

She reported that the advisory committee had debated the matter, and the majority voted to approve the rule as published for three reasons. First, no court has required a presiding officer to state specifically that the meeting is being "held open" or to cite § 1308. Rather, courts distinguish only between whether the meeting is concluded or continued. Second, the advisory committee believed that "holding open" and "adjourning" are truly equivalent terms, even though Congress used the inartful term "hold open" in § 1308. Third, the advisory committee was persuaded that the consequences of a presiding officer not specifically using the term "hold open" would be sufficiently severe for the debtor – conversion or dismissal of the case – that use of the exact words should not be required. Moreover, the taxing authorities are not prejudiced because they still have 60 days to file their proofs of claim.

Professor Gibson reported that the only change made since publication was the addition of a sentence to the committee note stating that adjourning is the same as holding

open. The modification was made to address the concerns expressed by the Internal Revenue Service.

Ms. Claggett and Mr. Kohn stated that the Department of Justice appreciated the advisory committee's concerns for the Internal Revenue Service's position, but wanted to reiterate the position for the record. Mr. Kohn explained that making a distinction in the rule between adjourning a meeting for any possible reason and holding it open for the narrow purpose of § 1308 is fully consistent with § 1308. The meeting, he said, can be "held open" for only one purpose. Congress, he said, had used the term deliberately, and it should be carried over to the rule.

The Department, he said, agreed that § 1308 had been designed to help taxing authorities prod debtors into filing returns and promptly providing information early in a case. The Department, he said, was concerned that there will be confusion if the distinction between holding open and adjourning a meeting is blurred. Moreover, the sanctions that may be imposed for failing to file in a timely fashion may be compromised.

The committee by voice vote with one objection (the Department of Justice) approved the proposed amendment for approval by the Judicial Conference.

FED. R. BANKR. P. 2019

Judge Swain reported that the advisory committee was recommending a substantial revision of Rule 2019 (disclosure of interests) to expand both the coverage of the rule and the content of its disclosure requirements. The rule, she said, provides the courts and parties with needed insight into the interests and potentially competing motivations of groups participating in a case. It attracted little attention over the years until buyers of distressed debt began to participate actively in chapter 11 cases.

The revised rule would require official and unofficial committees, groups, or entities that consist of, or represent, more than one creditor or equity security holder to disclose their "disclosable economic interests." That term is defined broadly in the revised rule to include not only a claim, but any other economic right or interest that could be affected by the treatment of a claim or interest in the case.

Among other things, she said, there has been strategic use of the current rule, especially to force hedge funds and other distressed-debt investors to reveal their holdings when they act as ad hoc committees of creditors or equity security holders. As a result, a hedge fund association suggested that the rule be repealed in its entirety. Other groups, however, including the National Bankruptcy Conference and the American Bar Association, recommended that the rule be retained and broadened.

Judge Swain pointed out that the proposal had drawn considerable attention, including 14 written comments and testimony from seven witnesses at the advisory committee's public hearing. In the end, she said, all but one commentator acknowledged the need for disclosure and supported expansion of the current rule.

Three sets of objections were voiced to the proposal as published. First, distressed-debt buyers objected to the proposed requirement to divulge the date that each disclosable economic interest was acquired and the amount paid for it. That information, the industry said, would compromise critical business secrets, such as trading strategies, seriously damage their operations, and undercut the bankruptcy process. Second, objections were raised to applying the disclosure requirements to entities acting in certain institutional roles, such as entities acting in a purely fiduciary capacity. Third, there were objections to applying the rule to "groups" that are really composed of a single affiliated set of actors, or to law firms or other entities that are only passively involved in a case.

On the other hand, she said, there had been many public comments in support of the rule. The supporters, however, agreed that the rule would still be effective even if narrowed to address some of the objections. Accordingly, after publication, the committee made a number of changes to narrow the disclosure requirements and the sanctions provision.

She said that republication would not be necessary because all the subject matter included in the revised rule had been included in the broader published rule, and the advisory committee had added no new restrictions or requirements. Republication, moreover, would delay the rule by a year, and it is important to have it take effect as soon as possible to avoid further litigation over the scope and meaning of the current rule and strategic invocation of the current rule to gain leverage in disputes.

The committee without objection by voice vote approved the proposed amendments for approval by the Judicial Conference.

FED. R. BANKR. P. 3001

Professor Gibson reported that the proposed amendments to Rule 3001 (proof of claim) and new Rule 3002.1 (notice of fees, charges and payment amount changes imposed during the life of a chapter 13 case in connection with claims secured by a security interest in the debtor's principal residence) were designed to address problems encountered in the bankruptcy courts with inadequate claims documentation in consumer cases. First, she said, proofs of claims are frequently filed without the documentation currently required by the rules and Official Form 10, especially by bulk purchasers of consumer claims. Second, problems arise in chapter 13 cases as a result of inadequate notice of various fees and penalties assessed on home mortgages. Debtors who

successfully complete their plan payments may be faced with deficiency or foreclosure notices soon after they emerge from bankruptcy with a discharge.

Professor Gibson explained that current Rule 3001(c) lays down the basic requirement that whenever a claim is based on a writing, the original or a duplicate of the writing must be filed with the proof of claim. The published amendments to Rule 3001(c)(1) would have added a requirement that a copy of the debtor's last account statement be attached to open-end or revolving credit-card account claims. The statement would let the debtor and trustee know who the most recent holder of the claim was, how old the claim is and whether it may be barred by the statute of limitations. Because accounting mistakes occur and creditors change periodically, it would also help debtors to match up the claim with the specific debt.

She reported that the two rules had attracted a good deal of attention, including more than a hundred written comments and several witnesses at the advisory committee's public hearing. Comments from buyers of consumer debt objected because the last account statements, they said, are often no longer available. Federal law, for example, requires that they be kept for only two years. In addition, industry representatives stated that some of the loan information required by the amendments is not readily available to current creditors and cannot be broken out as specified in the proposed rules. Some commentators also argued that a copy of the last statement would unnecessarily reveal private information as to the nature and specifics of the credit card purchases of the debtor.

Professor Gibson reported that as a result of the public comments and testimony, the advisory committee had decided to withdraw the proposed revolving and open-end credit related amendments, redraft them, and republish them for further comment as a proposed new paragraph (c)(3). See *infra*, page 18.

The advisory committee, therefore, was seeking final approval at this point of only the proposed changes in Rule 3001(c)(2). They would require that additional information be filed with a proof of claim in cases in which the debtor is an individual, including: (1) itemized interest charges and fees; and (2) a statement of the amount necessary to cure any pre-petition default and bring the debt current. In addition, a home mortgage creditor with an escrow account would have to file an escrow statement in the form normally required outside bankruptcy.

To standardize the new requirements of paragraph (c)(2) and supersede the many local forms already imposing similar requirements, the advisory committee was also seeking approval to publish for comment a proposed new standard national form – Official Form 10, Attachment A. See *infra,* page 20. The form would take effect on December 1, 2011, the same date as the proposed amendments to Rule 3001(c)(2).

Professor Gibson added that some public comments had recommended requiring a creditor to provide additional information on fees and calculations, while others argued for less information. The advisory committee, she said, had tried to strike the correct balance between obtaining additional disclosures needed for the debtor and trustee to understand the claim amounts and avoiding imposing undue burdens on creditors.

Professor Gibson pointed out that proposed new subparagraph (c)(2)(D) sets forth sanctions that a court may impose if a creditor fails to provide any of the information specified in Rule 3001(c). Modeled after FED. R. CIV. P. 37(c)(1), it specifies that if the holder of a claim fails to provide the required information, the court may preclude its use as evidence or award other appropriate relief.

She reported that the provision had attracted several comments. After publication, the advisory committee revised the rule and committee note to emphasize that: (1) a court has flexibility to decide what sanction to apply and whether to apply a sanction at all; (2) the rule does not create a new ground to disallow a claim, beyond the grounds specified in § 502 of the Code; and (3) a court has discretion to allow a holder of the claim to file amendments to the claim. The proposed rule, she said, is a clear rejection of the concept that creditors may routinely ignore the documentation requirements of the rule and force debtors to go to the court to obtain necessary information.

The committee without objection by voice vote approved the proposed amendments for approval by the Judicial Conference.

FED. R. BANKR. P. 3002.1

Professor Gibson explained that proposed new Rule 3002.1 (notice related to post-petition changes in payment amounts, and fees and charges, during a chapter 13 case in connection with claims secured by a security interest in the debtor's principal residence) implements § 1322(b)(5) of the Bankruptcy Code. It would provide a procedure for debtors to cure any pre-petition default, maintain payments, and emerge current on their home mortgage at the conclusion of their chapter 13 plan. For the option to work, she explained, the chapter 13 trustee needs to know the required payment amounts, and the debtor should face no surprises at the end of the case.

She noted that subdivision (b) of the new rule would require the secured creditor to provide notice to the debtor, debtor's counsel, and the trustee of any post-petition changes in the monthly mortgage payment amount, including changes in the interest rate or escrow account adjustments. As published, the rule would have required a creditor to provide the notice 30 days in advance of a change. Public comments pointed out, though, that only 25 days is sometimes required by non-bankruptcy law. Accordingly, the advisory committee modified the rule after publication to require 21 days' advance notice of changes.

She added that the advisory committee had drafted a new form to implement subdivision (b) (Official Form 10, Supplement 1, Notice of Mortgage Payment Change). It would be published for comment in August 2010 and take effect on December 1, 2011, the same time as the proposed new rule. See *infra,* page 20.

Professor Gibson reported that subdivision (c) would require the creditor to provide notice to the debtor, debtor's counsel, and the trustee of any post-petition fees, expenses, and charges within 180 days after they are imposed. She explained that debtors are often unaware of the different kinds of charges that creditors assess, some of which may not be warranted or appropriate under the mortgage agreement or applicable non-bankruptcy law. The proposed amendments would give the debtor or trustee the chance to object to any claimed fee, expense, or charge within one year of service of the notice. She added that the advisory committee had worked hard to strike the right balance between providing fair notice to debtors and avoiding imposing unnecessary burdens on creditors.

She noted that the advisory committee had drafted a new form to implement subdivision (c) (Official Form 10, Supplement 2, Notice of Postpetition Mortgage Fees, Expenses, and Charges). It would be published for comment in August 2010 and take effect on December 1, 2011, the same time as the proposed new rule. See *infra,* page 20.

Professor Gibson explained that subdivisions (f) through (h) deal with final-cure payments and end-of-case proceedings. They will permit debtors to obtain a determination as to whether they are emerging from bankruptcy current on their mortgage. The amendments recognize that in some districts, debtors make mortgage payments directly, and in others they are paid by the chapter 13 trustee. In all districts, the trustee makes the default payments.

Within 30 days of the debtor's completion of all payments under the plan, the trustee would be required by the rule to provide notice to the debtor, debtor's counsel, and the holder of the mortgage claim that the debtor has cured any default. The holder of the claim would be required to file a response indicating whether it agrees that the debtor has cured any default and also indicating whether the debtor is current on all payments.

She pointed out that subdivision (i) contains a sanction provision for failure to provide the information required under the rule, similar to the sanction provision proposed in Rule 3001, *supra* page 14.

The committee without objection by voice vote approved the proposed new rule for approval by the Judicial Conference.

FED. R. BANKR. P. 4004

Professor Gibson explained that the proposed amendments to Rule 4004 (grant or denial of discharge) would resolve a problem identified by the 7th Circuit in *Zedan v. Habash,* 529 F.3d 398 (2008). They would permit a party in specific, limited circumstances to seek an extension of the time to object to the debtor's discharge after the time for objecting has expired. The proposal would address the unusual situation in which there is a significant gap in time between the deadline in Rule 4004(a) for a party to object to the discharge (60 days after the first date set for the meeting of creditors) and the date that the court actually enters the discharge order.

During such a gap, a party – normally a creditor or the trustee – may learn of facts that may provide grounds to revoke the debtor's discharge under § 727(a) of the Code, such as fraud committed by the debtor. But it is too late at that point to file an objection. The party, moreover, cannot seek revocation because § 727(d) of the Code specifies that revocation is not permitted if a party learns of fraud *before* the discharge is granted. The party, therefore, may be left without appropriate recourse.

The proposed amendments would allow a party to file a motion to extend the time to object to discharge after the objection deadline has expired and before the discharge is granted. The motion must show that: (1) the objection is based on facts that, if learned after the discharge was entered, would provide a basis for revocation under § 727(d); and (2) the party did not know of those facts in time to file an objection to discharge. The motion, moreover, must be filed promptly upon discovery of the facts.

The committee without objection by voice vote approved the proposed amendments for approval by the Judicial Conference.

FED. R. BANKR. P. 6003

Judge Swain reported that Rule 6003 (relief immediately after commencement of a chapter 11 case) generally prohibits a court from issuing certain orders during the first 21 days of a chapter 11 case, such as approving the employment of counsel, the sale of property, or the assumption of an executory contract or unexpired lease. The proposed rule amendment would make it clear that the waiting period does not prevent a court from later issuing an order with retroactive effect, relating back, for example, to the date that the application or motion was filed. Thus, professionals can be paid for work undertaken while their application is pending.

The amendment would also clarify that the court is only prevented from granting the relief specifically identified in the rule. A court, for example, could approve the procedures for a sale during the 21-day waiting period, but not the actual sale of estate property itself.

The committee without objection by voice vote approved the proposed amendment for approval by the Judicial Conference.

OFFICIAL FORMS 22A, 22B, and 22C

Judge Swain reported that the proposed amendments to the "means-test" forms, Official Forms 22A (chapter 7), 22B (chapter 11), and 22C (chapter 13), would replace in several instances the terms "household" and "household size" with "number of persons" or "family size." The revised terminology more closely reflects § 707(b) of the Code and IRS standards. Section 707(b)(2)(A)(ii)(I) of the Code specifies that the debtor's means-test deductions for various monthly expenses may be taken in the amounts specified in the IRS National and Local Standards. The national standards, she said, are based on numbers of persons, rather than household size. The local standards are based on family size, rather than household size.

In addition, she said, an instruction would be added to each form explaining that only one joint filer should report household expenses regularly paid by a third person. Instructions would also be added directing debtors to file separate forms if only one joint debtor is entitled to an exemption under Part I (report of income) and they believe that filing separate forms is required by § 707(b)(2)(C) of the Code. The statutory provisions, she said, are ambiguous on means-testing exclusions. Therefore, the form does not impose a particular interpretation, and the instructions allow debtors to take positions consistent with their interpretations of the ambiguous exemption provisions.

The revisions, she said, would become effective on December 1, 2010.

The committee without objection by voice vote approved the proposed amendments to the forms for approval by the Judicial Conference.

Amendments for Final Approval, Without Publication

OFFICIAL FORMS 20A AND 20B

Judge Swain reported that the proposed changes to Official Forms 20A (notice of motion or objection) and 20B (notice of objection to claim) were technical in nature and did not require publication. They would conform the forms to: (1) the 2005 amendment to § 727(a)(8) of the Code, which extends the time during which a debtor is barred from receiving successive discharges from 6 years to 8 years; and (2) the 2007 addition of FED. R. BANKR. R. 9037, which directs filers to provide only the last four digits of any social security number or individual taxpayer-identification number.

The revisions, she said, would become effective on December 1, 2010.

The committee without objection by voice vote approved the proposed amendments to the forms for approval by the Judicial Conference without publication.

Amendments for Publication

FED. R. BANKR. P. 3001

As noted above on pages 12-14, the proposed amendments to Rule 3001(c)(1) (proof of claim) published in August 2009 would have required a creditor with a proof of claim based on an open-end or revolving consumer credit agreement to file the debtor's last account statement with the proof of claim. The main problem that the rule was designed to address is that credit-card debt purchased in bulk claims may be stale.

Professor Gibson explained that the advisory committee had withdrawn the published proposal in light of many comments from creditors that they could not effectively produce the account statements, especially since claims for credit-card debt may be sold one or more times before the debtor's bankruptcy. Some recommended that pertinent information be required instead.

Professor Gibson explained that the advisory committee would replace the proposal with a substitute new paragraph 3001(c)(3). In lieu of requiring that a copy of the debtor's last account statement be attached, the revised proposal would require the holder of a claim to file with the proof of claim a statement that sets forth several specific names and dates relevant to a consumer-credit account. Those details, she said, are important for a debtor or trustee to be able to associate the claim with a known account and to determine whether the claim is timely or stale.

Although the creditor would not have to attach the underlying writing on which the claim is based, a party, on written request, could require the creditor to provide the writing. In certain cases, the debtor needs the information to assert an objection.

The committee without objection by voice vote approved the proposed amendments for publication.

FED. R. BANKR. P. 7054

Judge Swain reported that the proposed amendment to Rule 7054 (judgment and costs) would conform the rule to FED. R. CIV. P. 54 and increase the time for a party to respond to the prevailing party's bill of costs from one day to 14 days. The current period, she said, is an unrealistically short amount of time for a party to prepare a response. In addition, the time for serving a motion for court review of the clerk's action

in taxing costs would be extended from 5 to 7 days, consistent with the 2009 time-computation rules that changed most 5-day deadlines to 7 days.

The committee without objection by voice vote approved the proposed amendments for publication.

FED. R. BANKR. P. 7056

Judge Swain explained that Rule 7056 (summary judgment) incorporates FED. R. CIV. P. 56 in adversary proceedings. Rule 56 is also incorporated in contested matters through FED. R. BANKR. P. 9014(c).

She reported that the proposed amendment to Rule 7056 would alter the rule's default deadline for filing a summary judgment motion in bankruptcy cases. She explained that the deadline in civil cases – 30 days after the close of discovery – may not work well in fast-moving bankruptcy contested matters, where hearings often occur shortly after the close of discovery. Therefore, the advisory committee decided to set the deadline for filing a summary judgment motion in bankruptcy at 30 days before the initial date set for an evidentiary hearing on the issue for which summary judgment is sought. As with FED. R. CIV. P. 56(c)(1), she noted, the deadline may be altered by local rule or court order.

A member suggested that the proposed language of the amendment was a bit awkward and recommended moving the authorization for local rule variation to the end of the sentence. Judge Swain agreed to make the change.

The committee without objection by voice vote approved the proposed amendment, as amended, for publication.

OFFICIAL FORM 10
and
ATTACHMENT A, SUPPLEMENT 1, AND SUPPLEMENT 2

Judge Swain reported that the advisory committee was recommending several changes in Official Form 10 (proof of claim). The holder of a secured claim would be required to specify the annual interest rate on the debt at the time of filing and whether the rate is fixed or variable. In addition, an ambiguity on the current form would be eliminated to make it clear that the holder of a claim must attach the documents that support a claim, and not just a summary of the documents.

To emphasize the duty of accuracy imposed on a party filing a proof of claim, the signature box would be amended to include a certification that the information submitted on the form meets the requirements of FED. R. BANKR. P. 9011(b) (representations to the

court), *i.e.*, that the claim is "true and correct to the best of the signer's knowledge, information, and reasonable belief." This is particularly important, she said, because a proof of claim is prima facie evidence of the validity of a claim. In addition, a new space would be provided on the form for optional use of a "uniform claim identifier," a system implemented by some creditors and chapter 13 trustees to facilitate making and crediting plan payments by electronic funds transfer.

Professor Gibson reported that three new claim-attachment forms had been drafted to implement the mortgage claims provisions of proposed Rules 3001(c)(2) and 3002.1. They would prescribe a uniform format for providing additional information on claims involving a security interest in a debtor's principal residence.

Attachment A to Official Form 10 would implement proposed Rule 3001(c)(2) and provide a uniform format for the required itemization of pre-petition interest, fees, expenses, and charges included in the home-mortgage claim amount. It would also require a statement of the amount needed to cure any default as of the petition date. If the mortgage installment payments include an escrow deposit, an escrow account statement would have to be attached, as required by proposed Rule 3001(c)(2)(C).

Supplement 1 to Official Form 10 would implement proposed Rule 3002.1(b) and require the home-mortgage creditor in a chapter 13 case to provide notice of changes in the mortgage installment payment amounts.

Supplement 2 to Official Form 10 would implement proposed Rule 3002.1(c) and provide a uniform format for the home-mortgage creditor to list post-petition fees, expenses, and charges incurred during the course of a chapter 13 case.

Judge Swain noted that, following publication, the proposed form changes would become effective on December 1, 2011.

The committee without objection by voice vote approved the proposed amendments to Form 10 and the new Attachment A and Supplements 1 and 2 to the form for publication.

OFFICIAL FORM 25A

Judge Swain reported that Official Form 25A is a model plan of reorganization for a small business. It would be amended to reflect the recent increase of the appeal period in bankruptcy from 10 to 14 days in the 2009 time-computation rule amendments. The effective date of the plan would become the first business day following 14 days after entry of the court's order of confirmation.

The committee without objection by voice vote approved the proposed amendments to the form for publication.

Informational Items

Professor Gibson reported that the advisory committee was continuing to make progress on its two major ongoing projects – revising the bankruptcy appellate rules and modernizing the bankruptcy forms. She noted that the committee would begin considering a draft of a completely revised Part VIII of the Bankruptcy Rules at its fall 2010 meeting. In addition, it would try to hold its spring 2011 meeting in conjunction with the meeting of the Advisory Committee on Appellate Rules in order to have the two committees consider the proposed revisions together.

Judge Swain reported that the forms modernization project, under the leadership of Judge Elizabeth L. Perris, had made significant progress in reformatting and rephrasing the many forms filed at the outset of a individual bankruptcy case. She noted that the project had obtained invaluable support from Carolyn Bagin, a nationally renowned forms-design expert, and it was continuing to reach out to users of the forms to solicit their feedback through surveys and questionnaires. In addition, the project was working closely with the groups designing the next generation replacement for CM/ECF to make sure that the new system includes the ability to extract and store data from the forms and to retrieve the data for user-specified reports.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Kravitz and Professor Cooper presented the report of the advisory committee, as set out in Judge Kravitz's memorandum and attachment of May 17, 2010 (Agenda Item 5). The advisory committee had no action items to present.

Informational Items

FED. R. CIV. P. 45

Judge Kravitz reported that the advisory committee, aided by a subcommittee chaired by Judge David G. Campbell, was exploring potential improvements to Rule 45 (subpoenas). Professor Marcus, he noted, was serving as the subcommittee's reporter.

Judge Kravitz said that substantial progress had been made in addressing some of the problems most often cited with the current rule. The subcommittee's efforts have included: (1) reworking the division of responsibility between the court where the main action is pending and the ancillary discovery court; (2) enhancing notice to all parties before serving document subpoenas; and (3) simplifying the overly complex rule. The

subcommittee, he noted, had drafted three models to illustrate different approaches to simplification, including one that would separate discovery subpoenas from trial subpoenas.

Judge Kravitz reported that the committee would convene a Rule 45 mini-conference with members of the bench and bar in Dallas in October 2010. The conference, he said, should be helpful in informing the advisory committee on what approach to take at its fall 2010 and spring 2011 meetings. Rule amendments might be presented to the Standing Committee in June 2011.

PLEADING

Judge Kravitz reported that the advisory committee was continuing to monitor dismissal-motion statistics and case-law developments in light of the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007) and *Ashcroft v. Iqbal,* 129 S. Ct. 1937 (2009). The committee, he said, was focusing in particular on whether the decisions have had an impact on motions to dismiss and rates of dismissal.

Dr. Cecil explained that the Federal Judicial Center was collecting and coding court orders disposing of Rule 12(b)(6) motions in about 20 district courts and comparing outcomes in 2006 with those in 2010 to see whether there are any differences. In addition, the Center was examining court records to determine whether judges in granting dismissal motions allow leave to amend and whether the plaintiffs in fact file amended complaints.

Judge Kravitz noted that a division of opinion had been voiced at the May 2010 Duke conference on the practical impact of *Twombly* and *Iqbal*. One prominent judge, for example, urged the participants to focus on the actual holdings in the two cases, and not on the language of the opinions. Other judges concurred and argued that the two cases had not changed the law materially and were being implemented very sensibly by the lower courts. On the other hand, two prominent professors argued that the two Supreme Court decisions would cause great harm, were cause for alarm, and would effectively diminish access to justice.

Judge Kravitz emphasized that stability matters. He suggested that the advisory committee's intense research efforts demonstrated that the law of pleading in the federal courts was clearly settling down, and the evolutionary process of common-law development was working well. For that reason, he said, it would make no sense to enact legislation or change pleading standards at this point. He noted that the advisory committee's reporters were considering different ways to respond to the cases by rule, but they were awaiting the outcome of further research efforts by the Federal Judicial Center.

He pointed out that the advisory committee was looking carefully at the frequently cited problem of "information asymmetry." To that end, it was considering permitting some pre-dismissal, focused discovery to elicit information needed specifically for pleading. Another approach, he said, might be to amend FED. R. CIV. P. 9 (pleading special matters) to enlarge the types of claims that require more specific pleading. In addition, there may be a need for more detailed pleading requirements regarding affirmative defenses.

In short, he said, the advisory committee was looking at several different approaches and focusing on special, limited discovery for pleading purposes. He added that true "notice pleading" is actually quite rare in the federal courts. To the contrary, he said, when plaintiffs know the facts, they usually set them forth in the pleadings. The problem seems to be that some plaintiffs at the time of filing simply lack access to certain information that they need in order to plead adequately.

Judge Kravitz added that pleading issues should occupy a good deal of the advisory committee's time at its November 2010 meeting. The committee, he said, should have a report available in January 2011, but it may not have concrete proposals ready until later.

MAY 2010 CIVIL LITIGATION REVIEW CONFERENCE

Judge Kravitz thanked Dean Levi for making the facilities at Duke Law School available for the May 2010 conference. He said that the event had been a resounding success, thanks largely to the efforts of the conference organizer, Judge John G. Koeltl. He pointed out that Judge Koeltl had done an extraordinary job in creating an excellent substantive agenda, assembling an impressive array of speakers, and soliciting a wealth of valuable articles and empirical data.

Several members who had attended the conference agreed that the program had been outstanding. They described the panel discussions as extremely substantive and valuable.

Specific Suggestions Made at the Conference

Judge Kravitz noted that a few recommendations had been made at the conference for major rule changes, such as: (1) moving away from "trans-substantivity" towards different rules for different kinds of cases; (2) abandoning notice pleading; (3) limiting discovery; and (4) recasting the basic goals enunciated in Rule 1. Nevertheless, he emphasized, most of the speakers and participants at the conference did not advocate radical changes in the structure of the rules. Essentially, the consensus at the conference was that the civil process should continue to operate within the broad 1938 outline.

Judge Kravitz noted that the topics discussed at the conference were largely matters that the advisory committee has been considering in one form or another for years. He added that much of the discussion and many of the papers presented dealt with discovery issues, and he proceeded to describe some of the suggestions.

The initial disclosures required by Rule 26(a), he said, came under attack from two sides. Some speakers recommended eliminating them entirely, while others urged that they be expanded and revitalized.

Some support was voiced for imposing presumptive limits on discovery. In particular, it was suggested that the current presumptive ceiling on the number of depositions and the length of depositions might be reduced.

Judge Kravitz reported that strong support was voiced by many participants for increased judicial involvement at the pretrial stage of civil cases. Lawyers at the conference all cited a need for more actual face-to-face time with judges in the discovery process. Judges, they said, need to be personally available to provide direction to the litigants and resolve disputes quickly. Nevertheless, he suggested, it would be difficult to mandate appropriate judicial attention through a national rule change. Other approaches, such as judicial education, may be more effective in achieving this objective.

Support was offered for developing form interrogatories and form document requests specifically tailored to different categories of cases, such as employment discrimination or securities cases. The models could be drafted collectively by lawyers for all sides and established as the discovery norm for various kinds of cases.

A concept voiced repeatedly was the need for greater cooperation among lawyers. Judge Kravitz pointed out that data from the recent Federal Judicial Center's discovery study had demonstrated a direct correlation between lawyer cooperation and reduced discovery requests and costs. He noted that a panelist at the conference emphasized that the discovery process is considerably more coordinated and disciplined in criminal cases (where the defendant's freedom is at stake) than in civil cases (where money is normally the issue). He observed that lawyers in criminal cases focus on the eventual trial and outcome, while civil lawyers focus mostly on the discovery phase itself. There are, moreover, more guidelines and limits in criminal discovery, due to the specific language of FED. R. CRIM. P. 16 and the Jencks Act. In addition, there are no economic incentives for the attorneys to prolong the discovery phase in criminal cases.

Judge Kravitz reported that many participants who represent defendants in civil cases complained about discovery costs. Among other things, they stated that the costs of reviewing discovery documents before turning them over to the other side continue to be huge, despite the recent enactment of FED. R. EVID. 502 (limitations on waiver of attorney-client privilege and work product). He observed that lawyers are naturally

reluctant to let their opponents see their clients' documents, even if the rule now gives them adequate legal protection.

Professor Cooper noted that plaintiffs' lawyers, on the other hand, argued that the emphasis that defendants place on their discovery burdens and costs is misplaced. They suggested, to the contrary, that the greatest problem with discovery is stonewalling on the part of defendants.

Judge Kravitz noted that support was also voiced at the conference for adopting simplified procedures, improving the Rule 16 and Rule 26 conferences, fashioning sensible discovery plans, and providing for greater cost shifting.

He reported that electronic discovery was a major topic at the conference. The lawyers, he said, were in agreement on two points. First, they recommended amending the civil rules to specify with greater precision what materials must be preserved at the outset of a case, and even before a federal case is filed. Second, they urged revision of the current sanctions regime in Rule 37(e) and argued that the rule's safe harbor is too shallow and ineffective.

Judge Kravitz said that current law provides clear triggers for the obligation to preserve potential litigation materials, but they are not specified in the federal rules. Preservation obligations, moreover, vary among the states and among the federal circuits. He said that the advisory committee was examining potential rule amendments to address both the preservation and sanctions problems. But, he cautioned, it will be very difficult to accomplish the changes that the bar clearly wants through the national rules.

He pointed out that the Rules Enabling Act limits the rules committees to matters of procedure, not substance. That statutory limitation is a serious impediment to regulating pre-lawsuit preservation obligations. Yet, once a case is actually filed in a federal court, the rules may address preservation and sanctions issues. Thus, despite the difficulty of drafting a rule to accomplish what the participants recommend, the advisory committee will move forward on the matter.

Professor Cooper agreed that the bar was promoting the laudatory goal of having clear and precise rules on what they must preserve and how they must preserve it. But the task of crafting a national preservation rule will involve complex drafting problems, as well as jurisdictional problems, and it just may not be possible.

Professor Coquillette added that state attorney-conduct rules addressing spoliation have been incorporated in a number of federal district-court rules. He explained that the Standing Committee had considered adopting national rules on attorney conduct a few years ago, but it eventually backed away from doing so because it involved many competing interests and difficult state-law issues.

Judge Kravitz reported that an excellent presentation was made at the conference on a promising pilot project in the Northern District of Illinois that focuses on electronic discovery. It emphasizes educating the bar about electronic discovery, promoting cooperation among the lawyers, and having the parties name information liaisons for discovery.

Judge Kravitz observed that, overall, the bar sees the 2006 electronic-discovery rule amendments as a success. They have worked well despite continuing concerns about preservation and sanctions. He suggested that the rules may well need further refining, but they were, in retrospect, both timely and effective.

Judge Kravitz referred to a panel discussion at the conference that focused on trials and settlement. He noted that substantial angst was expressed by some participants over diminution in the number of trials generally. Nevertheless, no changes to that phenomenon appear in sight. One professor, he noted, argued that since all civil cases are eventually bound for settlement, the rules should focus on settlement, rather than trial. On the other hand, an attorney panelist countered that maintaining the current focus of the rules on the trial facilitates good results before trial.

Perceptions of the Current System

Judge Kravitz reported that several written proposals had been submitted to the conference by bar groups, and a good deal of survey data had been gathered. One clear conclusion to be drawn from the conference, he said, is that a large gap exists between the perceptions of plaintiffs' lawyers and those of defendants' lawyers. Those differences, he said, will be difficult to reconcile. Nevertheless, the advisory committee may be able to take some meaningful steps toward achieving workable consensus.

The general consensus, he said, is that the civil rules are generally working well. At the same time, though, frustration experienced by certain litigants leads them to believe that the system is not in fact working. The two competing perceptions, he said, are reconcilable. The reality appears to be that the process works well in most cases, but not in certain kinds of cases, particularly complex cases with high stakes. The various empirical studies, he said, show that the stakes in cases clearly matter, and complex cases with more money at stake tend to have more discovery problems and greater discovery costs. The goal in each federal civil case, he suggested, should be to agree on a sensible and proportionate discovery plan that relates to the stakes of the litigation.

Dr. Lee described and compared the various studies presented at the conference. He said that two different kinds of surveys had been conducted – those that asked lawyers for their general perceptions and those that were empirically based on actual experiences in specific cases.

The two approaches, he said, produce different results. For example, the responses from lawyers in a perception study showed that they believe that about 70% of litigation costs are associated with discovery. The empirical studies, on the other hand, demonstrate that discovery costs were actually much lower, ranging between 20% and 40%. By way of further example, a recent perception-study showed that 80% or 90% of lawyers agree that litigation is too expensive. Yet the Federal Judicial Center studies demonstrate empirically that costs in the average federal case were only about $15,000 to $20,000.

The difference between the two results, he suggested, is due to cognitive biases. Respondents focus naturally on extreme cases and cases that stand out in their memory, and not on all their other cases. Perceptions, understandably, are not always accurate.

Judge Kravitz added that the empirical studies show that the vast majority of civil cases in the federal courts actually have little discovery. Nevertheless, discovery in complex civil cases can be enormous and extremely costly. Lawyers at the conference, he said, emphasized that it is the complex cases that judges should spend their time on.

Dr. Lee added that the empirical studies show that discovery costs clearly increase in complex cases. The stakes in litigation, he said, are the best predictor of costs, and they alone explain about 40-50% of the variations in costs shown in the studies. The economics of law practice, he said, also affects costs. Large firms, for example, have higher costs, and hourly billing increases costs for plaintiffs. He concluded that most of the factors shown in the studies to affect costs – such as complexity, litigation stakes, and law practice economics – are not driven by the rules themselves, but by other causes. Therefore, changing the rules alone may only have a marginal impact on the problems.

Future Committee Action

Judge Kravitz suggested that a handful of common themes had emerged at the conference. (1) There was universal agreement that cooperation among the attorneys in a case has a beneficial impact on limiting cost and delay. (2) There was universal agreement that active judicial involvement in a case, especially a case that has potential discovery problems, is essential. (3) There was little enthusiasm for retaining the Rule 26(a) mandatory disclosures in their current format. (4) Discovery costs in some cases are very high, and they may drive parties to settlement in some cases. (5) Certain types of cases are more prone to high discovery costs than others.

He noted that the advisory committee would address each of these issues, and it may also form a subcommittee to explore how judicial education and pilot projects might contribute to improvements, especially if the pilots are carefully crafted and channeled through the Federal Judicial Center to assure that they generate useful data to inform

future policy choices. The bottom line, he said, is that the advisory committee will be digesting and working on these issues for a long time.

A member suggested that the conference discussions on electronic discovery were particularly meaningful and asked the advisory committee to place its greatest priority on addressing the electronic discovery issues – preservation and sanctions. He said that most of the other problems referred to at the conference can be resolved by lawyers working cooperatively, but rules changes will be needed to address the electronic discovery problems.

Other members agreed, but they questioned whether changes in the electronic discovery rules to address preservation obligations can be promulgated under the Rules Enabling Act. Judge Kravitz pointed out that the advisory committee was very sensitive to the limits on its authority. He said that the committee might be able to rework the sanction provisions, make them clearer, and specify the applicable conduct standards more precisely. On the other hand, preservation obligations are normally addressed in state laws and ethics rules. There are also federal laws on the subject, such as Sarbanes-Oxley. He said that the advisory committee would explore preservation issues closely, and it might be able to make the preservation triggers clearer. Ultimately, though, legislation may be required, as with the 2008 enactment of FED. R. EVID. 502 (attorney-client privilege and work product; limitations on waiver).

A member pointed out that general counsels from several corporations participated actively in the conference. He noted that they did not generally criticize the way that the rules are working and recommended only minor tweaks in the rules. On the other hand, they argued unanimously and strongly for greater judicial involvement in the discovery process, especially early in cases. They tended to be critical of their own lawyers for contributing to increased costs and saw the courts as the best way to drive down costs. He acknowledged that mandating effective early judicial involvement is hard to accomplish formally by a rule, but it should be underscored as an essential ingredient of the civil process.

A judge added that many suggestions raised at the conference are not easily addressed in rules, but might be promoted through best-practices initiatives, handbooks, websites, workshops, and other educational efforts. She added that controlled pilot projects could also be helpful to ascertain what practices work well and produce positive results.

A member noted that he had heard a good deal of criticism of judges at the conference, especially about their lack of sufficient focus on resolving discovery matters. He noted that magistrate judges handle discovery extremely well and can provide the intense focus on discovery that is needed, especially with regard to electronic discovery. The system, though, may not be working effectively in some districts because the

magistrate judges have been assigned by the courts to other types of duties and do not focus on discovery.

A participant cautioned, though, that for every theme raised at the conference, there was a counter theme. Several lawyers suggested, for example, that there should be a single judge in a case. Yet every court has its own culture and different available resources. Essentially, each believes that its own way of doing things is the best approach.

Judge Rosenthal pointed out that a report of the conference and an executive summary would be prepared. She added that the advisory committee and the Standing Committee were resolved to take full advantage of what had transpired at the conference, and the proceedings will be the subject of considerable committee work in the future.

RULE 26(C) PROTECTIVE ORDERS

Judge Kravitz reported that the advisory committee had brought Rule 26(c) (protective orders) back to its agenda for further study in light of continuing legislative efforts to impose restrictions on the use of protective orders. He noted that the chair and reporter had worked on a possible revision of Rule 26(c), working from Ms. Kuperman's thorough analysis of the case law on protective orders in every circuit.

He noted that draft amendments to Rule 26(c) had been circulated at the advisory committee's spring 2010 meeting. They would incorporate into the rule a number of well-established court practices not currently explicit in the rule itself and add a provision on protecting personal privacy.

The committee, he said, was of the view that the federal courts are doing well in applying the protective-order rule in its current form. Nevertheless, it decided to keep the proposed revisions on its agenda for additional consideration. He noted, too, that none of the participants at the May 2010 conference had cited protective orders as a matter of concern to them. That fact, he suggested, was an implicit indication that the current rule is working well.

OTHER MATTERS

Judge Kravitz referred briefly to a number of other matters pending on the advisory committee's agenda, including the future of the illustrative forms issued under Rule 84 and the committee's interplay with the Advisory Committee on Appellate Rules on a number of issues that intersect both sets of rules.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Tallman and Professor Beale presented the report of the advisory committee, as set forth in Judge Tallman's memorandum and attachments of May 19, 2010 (Agenda Item 6).

Amendments for Final Approval

TECHNOLOGY AMENDMENTS

Judge Tallman reported that the package of proposed technology changes would make it easier and more efficient for law enforcement officers to obtain process, typically early in a criminal case. It includes the following rules:

FED. R. CRIM. P. 1	Scope and definitions
FED. R. CRIM. P. 3	Complaint
FED. R. CRIM. P. 4	Arrest warrant or summons
FED. R. CRIM. P. 4.1 (new)	Issuing process by telephone or other reliable electronic means
FED. R. CRIM. P. 6	Grand jury
FED. R. CRIM. P. 9	Arrest warrant or summons on an indictment or information
FED. R. CRIM. P. 40	Arrest for failing to appear or violating release conditions in another district
FED. R. CRIM. P. 41	Search and seizure
FED. R. CRIM. P. 43	Defendant's presence
FED. R. CRIM. P. 49	Serving and filing papers

Judge Tallman commended the leadership of Judge Anthony Battaglia of the Southern District of California, who chaired the subcommittee that produced the technology package. The project, he said, was a major effort that had required substantial consultation, analysis, and drafting. He also thanked Professors Beale and King, the committee's hard-working reporters, for their contributions to the project.

He noted that the proposed amendments are intended to authorize all forms of reliable technology for communicating information for a judge to consider in reviewing a complaint and affidavits or deciding whether to issue a warrant or summons. Among other things, the term "telephone" would be redefined to include any form of technology for transmitting live electronic voice communications, including cell phones and new technologies that cannot yet be foreseen.

The amendments retain and emphasize the central constitutional safeguard that issuance of process must be made at the direction of a neutral and detached magistrate. They are designed to reduce the number of occasions when law enforcement officers must act without obtaining prior judicial authorization. Since a magistrate judge will normally be available to handle emergencies electronically, the amendments should eliminate most situations where an officer cannot appear before a federal judge for prompt process.

The heart of the technology package, he said, is new Rule 4.1. It prescribes in one place how information is presented electronically to a judge. It requires a live conversation between the applicant and the judge for the purpose of swearing the officer, who serves as the affiant. A record must be made of that affirmation process.

Rule 4.1 also reinforces and expands the concept of a "duplicate original warrant" now found in Rule 41 and extends it to other kinds of documents. In the normal course, he said, the signed warrant will be transmitted back to the applicant, but there will also be occasions in which the judge will authorize the applicant to make changes on the spot to a duplicate original.

He noted that new Rule 4.1 preserves the procedures of current Rule 41 and adds improvements. Like Rule 41, Rule 4.1 permits only a federal judge, not a state judge, to handle electronic proceedings.

Judge Tallman pointed out that the proposed amendments carry the strong endorsement of the Federal Magistrate Judges Association. Helpful comments were also received from individual magistrate judges, federal defenders, and the California state bar. The advisory committee, he said, had amended the published rules in light of those comments.

The advisory committee, he explained, had withdrawn a proposed amendment to FED. R. CRIM. P. 32.1 (revoking or modifying probation or supervised release) that would have allowed video teleconferencing to be used in revocation proceedings. He noted that there is strong societal value in having defendants appear face-to-face before a judge, and many observers fear that embracing technology may diminish the use of courtrooms and undercut the dignity of the court. Revocation proceedings, he said, are in the nature of a sentencing, and they clearly may affect the determination of innocence or guilt. For that reason, the advisory committee concluded that while video teleconferencing is appropriate for certain criminal proceedings, it should not be used for revocation proceedings.

FED. R. CRIM. P. 1

Judge Tallman reported that the proposed amendment to Rule 1 (scope and definition) would expand the term "telephone," now found in Rule 41 to allow new kinds of technology.

A member asked whether the term "electronic" is appropriate since other kinds of non-electronic communications may become common in the future. Judge Rosenthal explained that the same issue had arisen with the 2006 "electronic discovery" amendments to the Federal Rules of Civil Procedure. She said that after considerable consultation with many experts, the civil advisory committee chose to adopt the term "electronically stored information." She added that if new, non-electronic means of communication are developed, it may well be necessary to amend the rules in the future to include those alternatives, but at this point "electronic" appears to be the best term to use in the rule.

The committee without objection by voice vote approved the proposed amendment for approval by the Judicial Conference.

FED. R. CRIM. P. 3

Judge Tallman explained that the proposed amendment to Rule 3 (complaint) refers to new Rule 4.1 and authorizes using the protocol of that rule in submitting complaints and supporting materials to a judge by telephone or other reliable electronic means.

The committee without objection by voice vote approved the proposed amendment for approval by the Judicial Conference.

FED. R. CRIM. P. 4

Judge Tallman reported that the proposed amendments to Rule 4 (arrest warrant or summons on a complaint) also refer to new Rule 4.1 and authorizes using that rule to issue an arrest warrant or summons.

The committee without objection by voice vote approved the proposed amendments for approval by the Judicial Conference.

FED. R. CRIM. P. 4.1

Judge Tallman pointed out that proposed new Rule 4.1 (complaint, warrant, or summons by telephone or other reliable electronic means) is the heart of the technology amendments. He emphasized that a judge's use of the rule is purely discretionary. A judge does not have to permit the use of technology and may insist that paper process be issued in the traditional manner through written documents and personal appearances.

He noted that if the protocol of Rule 4.1 is used, the supporting documents will normally be submitted electronically to the judge in advance. A phone call will then be made, the applicant law enforcement officer will be placed under oath, and a record will be made of the conversation. If the applicant does no more than attest to the contents of the

written affidavit submitted electronically, the record will be limited to the officer's swearing to the accuracy of the documents before the judge. The judge will normally acknowledge the jurat on the face of the warrant. If, however, the judge takes additional testimony or exhibits, the testimony must be recorded verbatim, transcribed, and filed.

The judge may authorize the applicant to prepare a duplicate original of the complaint, warrant, or summons. The duplicate will not be needed, though, if the judge transmits the process back to the applicant.

The judge may modify the complaint, warrant, or summons. If modifications are required, the judge must either transmit the modified version of the document back to the applicant or file the modified original document and direct the applicant to modify the duplicate original document. In addition, Rule 4.1(a) adopts the language in existing Rule 41(d) specifying that, absent a finding of bad faith, evidence obtained from a warrant issued under the rule is not subject to suppression on the grounds that issuing the warrant under the protocol of the rule was unreasonable under the circumstances.

A member noted that the proposed rule expands the requirement in current Rule 41(d) that testimony be recorded and filed. Yet, he said, there is no requirement in either the current or revised rule that the warrant and affidavits themselves be filed. He pointed out that record-keeping processes among the courts are inconsistent, and the advisory committee should explore how documents are being filed and preserved in the courts, especially in the current electronic environment.

Judge Tallman agreed and noted that the advisory committee was aware of the inconsistencies. Some districts, for example, assign a magistrate-judge docket number to warrant applications and file the written documents in a sealed file without converting them to electronic form. Other courts digitize the documents and transfer them to the district court's criminal case file when an indictment is returned and a criminal case number assigned. He said that preserving a record of warrant proceedings is very important to defense lawyers, and the advisory committee will look further into the matter.

Mr. Rabiej reported that one of the working groups designing the next generation CM/ECF system is addressing how best to handle criminal process and other court documents that generally do not appear in the official public case file. Dr. Reagan explained that as part of the Federal Judicial Center's recent study of sealed cases, he had looked at all cases filed in the federal courts in 2006. Typically, he said, a warrant application is assigned a magistrate-judge electronic docket number. Although the records may still be retained in paper form in the magistrate judge's chambers in one or more districts, most courts incorporate them into the files of the clerk's office.

A member suggested that Rule 4.1 may be mandating more requirements than necessary. Judge Tallman pointed out, though, that the requirements had largely been

carried over from the current Rule 41. He said that the rule needs to be broadly drafted because there are so many different situations that may arise in the federal courts. An officer, he said, may be on the telephone speaking with the magistrate judge, writing out the application, and taking down what the judge is saying. More typically, though, an officer will call the U.S. attorney's office and have a prosecutor draft the application.

A member said that the rule assumes that the applicant will wind up with an official piece of paper in hand. Yet in the current age of rapid technological development, perhaps an electronic version of the document should suffice. By way of example, electronic boarding passes are now accepted at airports, and police officers use laptop computers and hand-held devices in their patrol cars.

Judge Tallman explained, though, that Rule 41(f) requires the officer to leave a copy of a search warrant and a receipt for the property taken with the person whose property is being searched. Professor Beale added that Rule 4.1 may need to be changed in the future to take account of electronic substitutes for paper documents. Nevertheless, the rule as currently proposed will help a great deal now because it will make electronic process more widely available and reduce the number of situations where officers act without prior judicial authorization. Ms. Monaco added that the Department of Justice believes that the new rule will be of great help to its personnel, and it plans to provide the U.S. attorneys with guidance on how to implement it.

The committee without objection by voice vote approved the proposed amendments for approval by the Judicial Conference.

FED. R. CRIM. P. 6

Judge Tallman reported that the proposed amendment to Rule 6 (grand jury) would allow a judge to take a grand jury return by video teleconference. He noted that there are places in the federal system where the nearest judge is located a substantial distance from the courthouse in which the grand jury sits. The rule states explicitly that it is designed to avoid unnecessary cost and delay. The rule would also preserve the judge's time and safety.

The committee without objection by voice vote approved the proposed amendment for approval by the Judicial Conference.

FED. R. CRIM. P. 9

Judge Tallman reported that the proposed amendment would authorize the protocol of Rule 4.1 in considering an arrest warrant or summons on an indictment or information.

The committee without objection by voice vote approved the proposed amendment for approval by the Judicial Conference.

FED. R. CRIM. P. 40

Judge Tallman reported that the proposed amendment to Rule 40 (arrest for failing to appear or violating conditions of release in another district) would allow using video teleconferencing for an initial appearance, with the defendant's consent. It will be helpful to some defendants, as, for example, when a defendant faces a long transfer to another district and hopes that the judge might quash the warrant or order release if he or she is able to present a good reason for not having appeared in the other district.

Professor Beale added that Rule 40 currently states that a magistrate judge should proceed with an initial appearance under Rule 5(c)(3), as applicable. The advisory committee, she said, had some concern whether current Rule 5(f), allowing video teleconferencing of initial appearances on consent, would clearly be applicable to Rule 40 situations. So, as a matter of caution, it recommended adding a specific provision in Rule 40 to make the matter clear.

A member cautioned that the committee should not encourage a reduction in the use of courtrooms, and he asked where the participants will be located physically for the Rule 40 video teleconferencing. Judge Tallman suggested that the judge and the defendant normally will both be in a courtroom for the proceedings.

He added that the potential benefits accruing to a defendant who consents to video conferencing under Rule 40 outweigh the general policy concerns about diminishing the use of courtrooms. Professor Beale pointed out that Rule 5 already authorizes video teleconferencing in all initial appearances if the defendant consents. Moreover, the role of lawyers and the use of court interpreters will not change. The proposed amendment merely extends the current provision to the Rule 40 subset of initial appearances.

The committee without objection by voice vote approved the proposed amendment for approval by the Judicial Conference.

FED. R. CRIM. P. 41

Judge Tallman said that the proposed amendments to Rule 41 (search and seizure) are largely conforming in nature. Most of the current text in Rule 41 governing the protocol for using reliable electronic means for process would be moved to the new Rule 4.1. In addition, revised Rule 41(f) would explicitly authorize the return of search warrants and warrants for tracking devices to be made by reliable electronic means.

The committee without objection by voice vote approved the proposed amendments for approval by the Judicial Conference.

FED. R. CRIM. P. 43

Judge Tallman reported that, after considering the public comments, the advisory committee withdrew a proposed amendment to Rule 32.1 (revoking or modifying probation or supervised release) and a proposed conforming cross-reference to Rule 32.1 in Rule 43(a) (defendant's presence). The withdrawn provisions would have authorized a defendant, on consent, to participate in a revocation proceeding by video teleconference.

The remaining Rule 43 amendment would authorize video teleconferencing in misdemeanor or petty offense proceedings with the defendant's written consent. He noted that Rule 43 currently permits arraignment, plea, trial, and sentencing in misdemeanor or petty offense cases in the absence of the defendant. The procedure, he noted, is used mainly in minor offenses occurring on government reservations such as national parks because requiring a defendant to return to the park for court proceedings may impose personal hardship. He emphasized, though, that the presiding judge may always require the defendant's presence and does not have to permit either video teleconferencing or trial in absentia.

A member agreed that there are practical problems with misdemeanors in national parks, but lamented the trend away from courtroom proceedings. The dignity of the courtroom and the courthouse, he said, are very important and have positive societal value. The physical courtroom, moreover, affects personal conduct. In essence, steps that reduce the need for courtroom proceedings should only be taken with the utmost caution and concern.

Judge Tallman agreed and explained that the advisory committee had withdrawn the proposed amendment to Rule 32.1 for just that reason. Several members concurred that substitutes to a physical courtroom should be the exception and never become routine. One member noted, though, that courts are being driven to using video teleconferencing by the convenience demands of others, including law enforcement personnel, lawyers, and parties. A member added that the only practical alternative to video teleconferencing for a defendant in a misdemeanor case now is for the defendant not to show up and to pay a fine.

Members suggested that language be added to the committee note to emphasize that the use of video teleconferencing for misdemeanor or petty offense proceedings should be the exception, not the rule, and that judges should think carefully before allowing video trials or sentencing. They suggested that the advisory committee draft appropriate language to that effect for the committee note. Judge Tallman pointed out that the committee note to the current Rule 5 contains appropriate language that could be

adapted for the Rule 43 note. After a break, the additional language was presented to the committee and approved.

The committee without objection by voice vote approved the proposed amendment, including the additional note language, for approval by the Judicial Conference.

FED. R. CRIM. P. 49

Judge Tallman reported that the proposed amendment to Rule 49 (serving and filing papers) would bring the criminal rules into conformity with the civil rules on electronic filing. Based on FED. R. CIV. P. 5(d)(3), it would authorize the courts by local rule to allow papers to be filed, signed, or verified by reliable electronic means, consistent with any technical standards of the Judicial Conference.

The committee without objection by voice vote approved the proposed amendment for approval by the Judicial Conference.

Technical Amendments for Final Approval without Publication

FED. R. CRIM. P. 32

Judge Tallman reported that the proposed amendments to Rule 32(d)(2)(F) and (G) (sentencing and judgment) had been recommended by the committee's style consultant. They would remedy two technical drafting problems created by the recent package of criminal forfeiture rules.

The committee without objection by voice vote approved the proposed amendments for approval by the Judicial Conference without publication.

FED. R. CRIM. P. 41

Judge Tallman reported that the proposed amendments to Rule 41 (search and seizure) were also technical and conforming in nature. The rule currently gives a law enforcement officer 10 "calendar" days after use of a tracking device has ended to return the warrant to the judge and serve a copy on the person tracked. The proposed amendments would delete the unnecessary word "calendar" from the rule because all days are now counted the same under the 2009 time computation amendments' "days are days" approach.

Judge Rosenthal suggested that when the rule is sent to the Judicial Conference for approval, the committee's communication should explain why as a matter of policy it

chose the shorter period of 10 days, rather than 14 days, since the 10-day periods in most other rules had been changed to 14 days as part of the time computation project.

The committee without objection by voice vote approved the proposed amendments for approval by the Judicial Conference without publication.

Amendments for Publication

FED. R. CRIM. P. 37

Judge Tallman reported that the proposed new Rule 37 (indicative rulings) would authorize indicative rulings in criminal cases, in conformance with the new civil and appellate rules that formalize a procedure for such rulings – FED. R. CIV. P. 62.1 and FED. R. APP. P. 12.1. Professor Beale pointed out that the criminal advisory committee had benefitted greatly from the work of the civil and appellate committees in this matter. She added that the advisory committee would also delete the first sentence of the second paragraph of the proposed committee note.

The committee without objection by voice vote approved the proposed new rule for publication.

FED. R. CRIM. P. 5 and 58

Judge Tallman reported that the proposed amendments to Rule 5 (initial appearance) and Rule 58 (petty offenses and other misdemeanors) had been suggested by the Department of Justice and would implement the government's notice obligations under applicable statutes and treaties.

He noted that the proposed amendment to Rule 5(c)(4) would require that the initial appearance of an extradited foreign defendant take place in the district where the defendant is charged, rather than in the district where the defendant first arrives in the United States. The intent of the amendment is to eliminate logistical delays. A member voiced concern, though, over potential delay of the initial appearance if the defendant no longer receives an initial appearance as soon as he or she arrives in the United States.

A member suggested adding language to the rule requiring that the initial appearance be held promptly. Professor Beale and Judge Tallman pointed out that Rule 5(a)(1)(B) already states explicitly that the initial appearance must be held "without unnecessary delay." The member suggested that it would be helpful to include a reference in the committee note to the language of Rule 5(a)(1)(B). After a break, Judge Tallman presented note language to accomplish that result.

Judge Tallman explained that the other proposed amendments to Rules 5 and 58 would carry out treaty obligations of the United States to notify a consular officer from the defendant's country of nationality that the defendant has been arrested, if the defendant requests. A member recommended removing the first sentence of the committee note for each rule, which refers to the government's concerns. Professor Beale agreed that the sentences could be removed, but she noted that the rule and note had been carefully negotiated with the Department of Justice. Judge Tallman suggested rephrasing the first sentence of each note to state simply that the proposed rule facilitates compliance with treaty obligations, without specifically mentioning the government's motivation.

The committee without objection by voice vote approved the proposed amendments, including the additional note language, for publication.

Informational Items

FED. R. CRIM. P. 16

Judge Tallman noted that at the January 2010 Standing Committee meeting, he had presented a report on the advisory committee's study of proposals to broaden FED. R. CRIM. P. 16 (discovery and inspection) and incorporate the government's obligation to provide exculpatory evidence to the defendant under *Brady v. Maryland,* 373 U.S. 83 (1963) and later cases. He noted that the advisory committee had convened a productive meeting on the subject in February with judges, prosecutors, law enforcement authorities, defense attorneys, and law professors. The participants, he said, had been very candid and non-confrontational, and the meeting provided the committee with important input on the advisability of broadening discovery in criminal cases.

He reported that the Federal Judicial Center had just sent a survey to judges, prosecutors, and defense lawyers on the matter, and the responses have been prompt and massive, with comments received already from 260 judges and nearly 2,000 lawyers. He added that the records of the Department of Justice's Office of Professional Responsibility showed that over the last nine years an average of only two complaints a year had been sustained against prosecutors for misconduct. But, he added, lawyers may be reluctant to file formal complaints with the Department. The current survey, he noted, was intended in part to identify any types of situations that have not been reported.

FED. R. CRIM. P. 12

Judge Tallman noted that in June 2009 the Standing Committee recommitted to the advisory committee a proposed amendment to Rule 12 (pleadings and pretrial motions) that would have required a defendant to raise before trial any claims that an indictment fails to state an offense. The advisory committee was also asked to explore the advisability of using the term "forfeiture," rather than "waiver," in the proposed rule.

He reported that the pertinent Rule 12 issues are complex. Therefore, the committee was considering a more fundamental, broader revision of the rule that might clarify which motions and claims must be raised before trial, distinguish forfeited claims from waived claims, and clarify the relationship between these claims and FED. R. CRIM. P.52 (harmless and plain error).

FED. R. CRIM. P. 11

Judge Tallman reported that the recent Supreme Court decision in *Padilla v. Kentucky,* 130 S. Ct. 1473 (March 31, 2010) had demonstrated the importance of informing an alien defendant of the immigration consequences of a guilty plea. As a result, he said, the advisory committee had appointed a subcommittee to examine whether immigration and citizenship consequences should be added to the list of matters that a judge must include in the courtroom colloquy with a defendant in taking a guilty plea under FED. R. CRIM. P. 11 (pleas).

CRIME VICTIMS' RIGHTS

Judge Tallman reported that the advisory committee was continuing to monitor implementation of the Crime Victims' Rights Act. Among other things, he said, the committee had discovered an instance of an unintended barrier to court access by crime victims. An attorney representing victims had been unable to file a motion asserting the victim's rights because the district court's electronic filing system only authorized motions to be filed by parties in the case. On behalf of the advisory committee, he said, he had brought the matter to the attention of the chair of the Judicial Conference committee having jurisdiction over development of the CM/ECF electronic system.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Hinkle and Professor Capra presented the report of the advisory committee, as set forth in Judge Hinkle's memorandum and attachments of May 10, 2010 (Agenda Item 7).

Amendments for Final Approval

RESTYLED EVIDENCE RULES 101-1103

Judge Hinkle reported that the restyling of the Federal Rules of Evidence was the only action matter on the agenda. He noted that the project had been a joint undertaking on the part of the advisory committee and the Standing Committee's Style Subcommittee, comprised of Judge Teilborg (chair), Judge Huff, and Mr. Maledon.

He noted that the project to restyle the federal rules had originated in the early 1990s under the sponsorship of the Standing Committee chair at the time, Judge Robert Keeton, who set out to bring greater consistency and readability to the rules. Judge Keeton had appointed Professor Charles Alan Wright as the first chair of the Standing Committee's new Style Subcommittee and Bryan Garner as the committee's first style consultant. Judge Hinkle pointed out that Mr. Garner had authored the pamphlet setting out the style conventions followed by the subcommittee – *Guidelines for Drafting and Editing Court Rules.*

Judge Hinkle explained that the restyled appellate rules took effect in 1998, the restyled criminal rules in 2002, and the restyled civil rules in 2007. With each restyling effort, he said, there had been doubters who said that restyling was not worth the effort and that the potential disruption would outweigh the benefits. Each time, he said, the doubters had been proven wrong. He pointed out, for example, that a professor who had opposed restyling changes later wrote an article proclaiming that they were indeed an improvement.

He added that whatever disruption there may be initially will evaporate rather quickly because the committee worked intensively to avoid any changes in substance. He pointed out, though, that there are indeed differences between the evidence rules and the other sets of federal rules because the evidence rules are used in courtrooms every day, and lawyers need to know them intimately and instinctively.

Judge Hinkle reported that Professor Kimble had assumed the duties of style consultant near the end of the criminal rules restyling project and had been an indispensable part of both the civil and evidence restyling efforts. He pointed out that the restyled civil rules had proven so successful that they had been awarded the Burton Award for Reform in Law, probably the nation's most prestigious prize for excellence in legal writing.

Judge Hinkle explained that the process used by the advisory committee to restyle the rules had involved several steps. It started with Professor Kimble drafting a first cut of the restyled rules. That product was reviewed by Professor Capra, the committee's reporter, who examined the revisions carefully to make sure that they were technically correct and did not affect substance. Then the rules were reviewed again by the two professors and by members of the advisory committee. They were next sent to the Style Subcommittee for comment. After the subcommittee's input, they were reviewed by the full advisory committee.

The advisory committee members reviewed the revised rules in advance of the committee meeting and again at the meeting. He added that the committee had also been assisted throughout the project by Professor Kenneth S. Broun, consultant and former member of the committee, by Professor Stephen A. Saltzburg, representing the American Bar Association (and former reporter to the criminal advisory committee), and by several other prominent advisors. He explained that the rules were all published for comment at

the same time, even though they had been reviewed and approved for publication by the Standing Committee in three batches at three different meetings.

Judge Hinkle reported that if the advisory committee decided that any change in the language of a rule impacted substance, it made the final call on the revised language. If, however, a change was seen as purely stylistic, the advisory committee noted that it was not a matter of substance, and the Style Subcommittee made the final decision on language.

Judge Hinkle reported that the public comments had been very positive. The American College of Trial Lawyers, for example, assigned the rules to a special committee, which commented favorably many times on the product. The Litigation Section of the American Bar Association also praised the revised rules and stated that they are clearly better written than the current rules. The only doubt raised in the comments was whether the restyling was worth the potential disruption. Nevertheless, only one negative written public comment to that effect had been received.

At its last meeting, the advisory committee considered the comments and took a fresh look at the rules. In addition, Professors Capra and Kimble completed another top-to-bottom review of the rules. The Style Subcommittee also reviewed them carefully and conducted many meetings by conference call.

Finally, the advisory committee received helpful comments from members of the Standing Committee in advance of the current meeting. The comments of Judges Raggi and Hartz were reviewed carefully and described in a recent memorandum from Professor Capra. Dean Levi also suggested changes just before the meeting that Judge Hinkle presented orally to the committee.

A motion was made to approve the package of restyled evidence rules, including the recent changes incorporated in Professor Capra's memo and those described by Judge Hinkle.

A member stated that she would vote for the restyled rules, but expressed ambivalence about the project. She applauded the extraordinary efforts of the committee in producing the restyled rules, but questioned whether they represent a sufficient improvement over the existing rules to justify the transactional costs of the changes.

She also expressed concern over the need to revise the language of all the rules since the evidence rules are so familiar to lawyers as to make them practically iconic. They are cited and relied on everyday in courtroom proceedings. Any changes in language, she said, will inevitably be used by lawyers in future arguments that changes in substance were in fact made.

She noted that some of the changes clearly improve the rules, such as adding headings, breakouts, numbers, and letters that judges and lawyers will find very helpful. Nevertheless, every single federal rule of evidence was changed in the effort, and some of the changes were not improvements. She asked whether it was really necessary to change each rule of evidence, especially because the rules were drafted carefully over the years, and many of them have been interpreted extensively in the case law.

She recited examples of specific restyled rules that may not have been improved and suggested that some of them were actually made worse solely for the sake of stylistic consistency. In short, she concluded, the new rules represent a solution in search of a problem. Nevertheless, despite those reservations, she stated that she would not cast the only negative vote against the revised rules and would vote to approve the package, but with serious doubts.

A member suggested that those comments were the most thoughtful and intelligent criticisms he had ever heard about the restyling project. Yet, he had simply not been persuaded.

Another member also expressed great appreciation for those well-reasoned views, but pointed out that the great bulk of lawyers and organizations having reviewed the revised rules support them enthusiastically. She explained that the new rules eliminate wordiness and outdated terms in the existing rules. They also improve consistency within the body of evidence rules and with the other federal rules. Moreover, the restyling retains the familiar structure and numbering of the existing evidence rules, even though the style conventions might have called for renumbering or other reformatting. In the final analysis, she suggested, the restyled evidence rules are significantly better and lawyers will easily adapt to the changes.

A member agreed and said that, as a practicing lawyer, he had been skeptical when the project had first started. He pointed out, though, that the committee had made extraordinary efforts to avoid any changes in substance or numbering that could potentially disrupt lawyers. This attempt to preserve continuity, he said, had been a cardinal principle of the effort and had been followed meticulously.

On behalf of the Style Subcommittee, Judge Teilborg offered a special tribute to Judge Hinkle for his outstanding leadership of the project, as well as his great scholarship and technical knowledge. The end product, he said, was superlative and could only have been achieved through an enormous amount of work and cooperation. He also thanked Judge Huff and Mr. Maledon for their time and devotion to the Style Subcommittee's efforts, especially for giving up so many of their lunch hours for conference calls.

Judge Teilborg added that it had been a joy to observe the intense interplay between Professors Capra and Kimble, truly experts in their respective fields. He pointed out that Professor Kimble had left his hospital bed after surgery to return quickly to the

project. He also thanked Jeffrey Barr of the Administrative Office for his great work as scribe in keeping the minutes and preparing the drafts. Finally, he thanked Dean Levi and Judges Raggi and Hartz for offering helpful changes in the final days of the project.

A member suggested that one of the great benefits of the restyling process is that the reviewers uncover unintended ambiguities in the rules. He pointed out that Professor Capra was keeping track of all the ambiguities in the evidence rules, so they may be addressed in due course as matters of substance on a separate track. He also remarked that the committee's style conventions are not well known to the public and suggested that they be made available to bench and bar to help them understand the process.

The committee without objection by voice vote approved the proposed amendments for approval by the Judicial Conference.

REPORT OF THE SEALING SUBCOMMITTEE

Judge Hartz, chair of the Sealing Subcommittee, reported that the subcommittee had been charged with examining the sealing of entire cases in the federal courts. The assignment had been generated by a request to the Judicial Conference from the chief judge of the Seventh Circuit.

Judge Hartz noted that the bulk of the subcommittee's work in examining current court practices had been assigned to the Federal Judicial Center. Dr. Reagan of the Center, he said, had reviewed every sealed case filed in the federal courts in 2006.

He pointed out that there are very good reasons for courts to seal cases – such as matters involving juveniles, grand juries, fugitives, and unexecuted warrants. The study, he added, revealed that many of the sealed "cases" docketed by the courts were not entire cases, but miscellaneous proceedings that carry miscellaneous docket numbers.

He noted that the Center's report had been exhaustive, and the subcommittee felt comfortable that virtually all the sealing decisions made by the courts had been supported by appropriate justification. On the other hand, it was also apparent from the study that court sealing processes could be improved. In some cases, for example, lesser measures than sealing an entire case might have sufficed, such as sealing particular documents. Moreover, the study found that in practice many sealed matters are not timely unsealed after the reason for sealing has expired.

In the end, the subcommittee decided that there is no need for new federal rules on sealing. The standards for sealing, he said, are quite clear in the case law of every circuit, and the courts appear to be acting properly in sealing matters. Nevertheless, there does appear to be a need for Judicial Conference guidelines and some practical education on sealing.

Professor Marcus said that it is worth emphasizing that when the matter was first assigned to the rules committee, the focus was on whether new national rules are needed. He added that there is a general misperception that many cases are sealed in the courts. The Federal Judicial Center study, though, showed that there are in fact very few sealed cases, and many of those are sealed in light of a specific statute or rule, such as in qui tam cases and grand jury proceedings. As for dealing with public perceptions, he said, the committee should emphasize that the standards for sealing are clear and that judges are acting appropriately. Nevertheless, some practical steps should be taken to improve sealing practices in the courts.

He noted that the subcommittee's report does not recommend any changes in the national rules. Its recommendations, rather, are addressed to the Judicial Conference's Court Administration and Case Management Committee. The report recommends consideration of a national policy statement on sealing that includes three criteria.

> First, an entire case should be sealed only when authorized by statute or rule or justified by a showing of exceptional circumstances and when there is no lesser alternative to sealing the whole case, such as sealing only certain documents.
>
> Second, the decision to seal should be made only by a judge. Instances arise when another person, such as the clerk of court, may seal initially, but that decision should be reviewed promptly by a judge.
>
> Third, once the reason for sealing has passed, the sealing should be lifted. He noted that the most common problem identified during the study was that courts often neglect to unseal documents promptly.

Professor Marcus explained that the subcommittee was also recommending that the Court Administration and Case Management Committee consider exploring the following steps to promote compliance with the proposed national policy statement:

(1) judicial education to make sure that judges are aware of the proper criteria for sealing, including the lesser alternatives;
(2) education for judges and clerks to ensure that sealing is ordered only by a judge or reviewed promptly by a judge;
(3) a study to identify when a clerk may seal a matter temporarily and to establish procedures to ensure prompt review by a judge;
(4) judicial education to ensure that judges know of the need to unseal matters promptly and to set expiration dates for sealing;
(5) programming CM/ECF to generate notices to courts and parties that a sealing order must be reviewed after a certain time period;
(6) programming CM/ECF to generate periodic reports of sealed cases to facilitate more effective and efficient review of them; and

(7) administrative measures that the courts might take to improve handling requests for sealing.

The committee endorsed the subcommittee report and recommendations and voted to refer them to the Court Administration and Case Management Committee for appropriate action.

REPORT OF THE PRIVACY SUBCOMMITTEE

Judge Raggi, chair of the Privacy Subcommittee, reported that the subcommittee's assignment was to consider whether the current privacy rules are adequate to protect privacy interests. At the same time, she noted, it is also important to emphasize the need to protect the core value of providing maximum public access to court proceedings.

She noted that the subcommittee included three representatives from the Court Administration and Case Management Committee, whose contributions have been invaluable. In addition, she said, Judge John R. Tunheim, former chair of the Court Administration and Case Management Committee, and Judge Hinkle were serving as advisors to the subcommittee.

In short, the subcommittee was reviewing: (1) whether the new rules are being followed; and (2) whether they are adequate. To address those questions, she explained, the subcommittee had started its efforts with extensive surveys by the Administrative Office and the Federal Judicial Center. It then conducted a major program at Fordham Law School, organized by Professor Capra, to which more than 30 knowledgeable individuals with particular interests in privacy matters were invited. The invitees included judges, members of the press, representatives from non-government organizations, an historian, government lawyers, criminal defense lawyers, and lawyers active in civil, commercial, and immigration cases. With the benefit of all the information and views accumulated at the conference, the subcommittee will spend the summer drafting its report for the January 2011 Standing Committee meeting.

Judge Raggi noted that, like the sealing subcommittee, her subcommittee's report will likely not include any recommendations for changes in the federal rules. Rather, it will provide relevant information on current practices in the courts and on the effectiveness of the new privacy rules. Professor Capra added that the Federal Judicial Center had prepared an excellent report on the use of social security numbers in case filings that will be a part of the subcommittee report.

LONG RANGE PLANNING

It was noted that the April 2010 version of the proposed *Draft Strategic Plan for the Federal Judiciary* had been included in the committee's agenda materials, and several of the plan's strategies and goals relate to the work of the rules committees. It was also pointed out that a separate chart had been included in the materials setting out the specific matters in the proposed plan that have potential rules implications.

NEXT MEETING

The members agreed to hold the next committee meeting on January 6-7, 2011, in San Francisco.

Respectfully submitted,

Peter G. McCabe,
Secretary

TAB
3

JAMES C. DUFF
Director

JILL C. SAYENGA
Deputy Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

PETER G. McCABE
Assistant Director

Office of Judges Programs

December 8, 2010

MEMORANDUM TO THE STANDING COMMITTEE

SUBJECT: *Report of the Administrative Actions Taken by the Rules Committee Support Office*

The following report briefly describes administrative actions and some major initiatives undertaken by the office to improve its support service to the rules committees.

Federal Rulemaking Website

Earlier this year, the judiciary's Federal Rulemaking website was completely redesigned, making it easier to use, navigate, and search for rules-related records. The redesigned website also includes new content and new functionality. Some of the new content includes a section called "Quick Links," which collects in one place all of the most frequently used links. This makes searching for and retrieving information much simpler and easier.

We also posted on the web site comments and requests to testify submitted on the proposed rules amendments published for comment in August 2010. The information is posted at http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/PublishedRules.aspx

Committee and Subcommittee Meetings

For the period from June 2010 to December 2010, the office staffed numerous rules-related meetings, including one Standing Committee meeting, five advisory rules committee meetings, a mini-conference on Civil Rule 45, a meeting of the Bankruptcy Forms Modernization Working Group, and a meeting of the informal working group on mass torts. We also arranged and participated in numerous conference calls involving rules subcommittees.

Miscellaneous

Rules Effective December 1, 2010. Congress took no action on the amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, and the Federal Rules of Evidence, approved by the Supreme Court on April 28, 2010. Accordingly, the following amendments to the rules took effect on December 1, 2010:

- Appellate Rules 1, 4, and 29, and Appellate Form 4;
- Bankruptcy Rules 1007, 1014, 1015, 1018, 1019, 4001, 4004, 5009, 7001, and 9001, and new Rule 5012;
- Civil Rules 8, 26, and 56, and Illustrative Civil Form 52;
- Criminal Rules 12.3, 21, and 32.1; and
- Evidence Rule 804.

James N. Ishida

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

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RICHARD C. TALLMAN
CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

July 22, 2010

Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Honorable Steve Cohen
Chairman, Subcommittee on
Commercial and Administrative Law
United States House of Representatives
Washington, DC 20515

Re: The Proposed Amendments to Bankruptcy Rule 3001 and New Rule 3002.1

Dear Chairman Conyers and Representative Cohen:

This letter is to inform you of the actions taken by the Judicial Conference Advisory Committee on the Bankruptcy Rules with respect to proposed amendments to Bankruptcy Rule 3001(c) and proposed new Rule 3002.1. Your March 10, 2010, letter supported these proposals. As explained in the March 25, 2010, letter to you from Peter G. McCabe, Secretary to the Judicial Conference's Committee on Rules of Practice and Procedure (Standing Committee), your letter was sent to the Advisory Committee, which carefully considered your comments.

The Advisory Committee had before it the results of a six-month public comment period, during which the proposed rule changes were widely circulated pursuant to the Rules Enabling Act process. The Advisory Committee received over 150 written comments and held a public hearing at which individuals desiring to testify did so. The comments and testimony were from the broad range of interests potentially affected by the proposals, including creditors, debtors, and trustees. After a lengthy and careful examination, the Advisory Committee recommended that revised versions of the proposed amendments to Rule 3001(c) and of new Rule 3002.1 be approved and transmitted to the Standing Committee for its consideration. The revisions took into account the major themes of the comments submitted during the Rules Enabling Act process, retaining the main

components of the proposed amendments and new rule, with one exception.

All but one of these proposals will be forwarded to the Judicial Conference for consideration at its September 14, 2010, session. One modified proposal will be published for public comment in August 2010. A copy of the proposed revised rules is enclosed. The proposed revised rules are posted at the court's federal rulemaking website at http://www.uscourts.gov/RulesAndPolicies.aspx. For your convenience, the proposals and relevant revisions are summarized below, with an explanation of how the revisions address the comments that were submitted.

1. The Proposed Amendments to Rule 3001(c)

Existing Rule 3001 requires creditors filing a proof of claim to include the "original or duplicate" of a writing on which the claim is based. This requirement is essential to ensure the legitimacy of claims filed in bankruptcy. Under the Bankruptcy Code, a proof of claim is presumed valid unless a party objects. The system does not work unless debtors and trustees have the necessary information to evaluate, and challenge if appropriate, the validity of a claim. To challenge a claim, the debtor or trustee must file an objection and present information supporting the objection. During the lengthy rulemaking process, the Advisory Committee received extensive comments and testimony that the Code's reliance on debtors and trustees to police invalid claims has proven ineffective under the existing rule. Creditors often present bare proofs of claim, which make it virtually impossible for debtors and trustees to determine how the claims were calculated and whether they are valid. Debtors' lawyers have little incentive to expend time and resources to ascertain the validity of claims submitted with inadequate documentation. The lawyers generally receive no compensation for the effort and any money derived from such efforts is usually paid to other unsecured creditors. As a result, despite the lack of supporting documentation, many insufficient or invalid claims are simply not challenged.

To address this problem, the proposed amendments enhance the disclosure requirements and require – as the official form long has – that a creditor in an individual debtor case provide an itemized statement of the interest, fees, expenses and other charges assessed in connection with its claim before the petition is filed. The proposed amendments also include special disclosure requirements for claims secured by a security interest in the individual debtor's property. In such a case, a statement of the amount necessary to cure any prepetition default and, for home mortgages, a statement of any escrow account must be provided.

The initial proposed amendments to Rule 3001 also responded to a need to strengthen the consequences of failing to comply with the documentation requirements. The proposed amendments provided for mandatory sanctions, including prohibiting a creditor who failed to provide the required information with proofs of claim in an individual debtor case from presenting any of the omitted information as evidence in a subsequent proceeding in the case, unless the court determined that the failure was substantially justified or harmless. The public comments led the Advisory Committee to conclude that the proposed mandatory sanction provision was harsher than necessary to achieve

the purpose of the proposals. The Advisory Committee revised the proposed amendments to: authorize the exclusionary sanction only if the failure to provide the required information was not substantially justified or harmless; eliminate the mandatory nature of the sanction; and make it clear that notice and hearing is required before a sanction is imposed. The revised sanction provision is modeled on Civil Rule 37, which prohibits a party from using information "to supply evidence on a motion, at a hearing, or at trial" that it failed to disclose as part of its initial disclosure or discovery obligations. Both the Civil Rule and the Bankruptcy Rule are grounded in courts' well-established authority to control the presentation of evidence used in court proceedings. The revised proposed amendments give effect to the Bankruptcy Code by continuing to place the burden on the debtor and the trustee to challenge an invalid claim while requiring the creditor to provide information essential to evaluate the claim. The Standing Committee approved the revised proposal for transmittal to the Judicial Conference at its September 2010 meeting.

The initial proposed amendments also required creditors with a claim based on an open-end or revolving consumer credit agreement to submit the last account statement sent to the debtor before the filing of the bankruptcy petition. During the public comment period, however, the Advisory Committee heard that copies of the last credit card statement are often unavailable or impractical to obtain. The Advisory Committee concluded that this proposal was an unnecessarily burdensome approach to the problem of inadequate information. The requirement that a creditor submit the last account statement was withdrawn. The Advisory Committee concluded that less burdensome means should be used to provide debtors and trustees with the necessary information to challenge invalid claims. The Advisory Committee recommended that the Standing Committee approve a modified proposed amendment to publish for public comment. This new proposal requires specific information from creditors relevant to the determination of the age, prior holder, and other salient features of the claim, but allows flexibility in how it is provided. The modified proposed rule also relieves claimants to which it applies from the general requirement that all documentation underlying the claim be filed in every instance, providing instead that such documentation regarding an open-end or revolving consumer credit claim is to be disclosed on request of a party in interest. The Standing Committee approved the recommendation and the proposal will be circulated for public comment in August 2010.

2. Proposed New Rule 3002.1

Proposed new Rule 3002.1 implements § 1322(b)(5) of the Bankruptcy Code, which permits a chapter 13 debtor to cure a default on a home mortgage by making certain payments during the bankruptcy. The proposed new rule requires the mortgage holder to provide a debtor with sufficient information to enable the debtor to determine the exact amount needed to cure the default, including all fees, charges, and other expenses. Absent this information, a debtor cannot know how much to pay to cure the default under the Code and cannot challenge the validity of the fees, charges, or expenses. The proposed new rule requires that the mortgage holder provide this information and give notice to the debtor, the debtor's counsel, and the trustee of any postpetition changes in the mortgage payment amount. Both before and during the public comment period, the Advisory

Committee heard many complaints that debtors may learn only after completing their payment plan that they still owe fees, charges, or expenses to a mortgage lender and, despite a successful emergence from bankruptcy, still face foreclosure. The proposed new rule is intended to ameliorate this problem.

During the public comment period, the Advisory Committee also heard from creditors' organizations that it was unclear how the proposed rule provision requiring at least 30 days' notice of any postpetition changes in the mortgage payment amount would apply to loan payments that adjust frequently. The Advisory Committee revised the proposed rule. As revised, the proposed new rule requires a creditor to provide the required information no later than 21 days before the next payment is due. In addition, the sanctions provision was revised in the same manner as the sanctions provision of Rule 3001(c). The revised proposed new rule was approved by the Standing Committee for transmittal to the Judicial Conference.

The revised rules proposals that have been approved by the Standing Committee will be presented to the Judicial Conference at its September 2010 meeting. The proposal that the Standing Committee approved for publication for public comment will be circulated in August 2010. If you or your staff have any questions about these rules or other proposals, please feel free to call Lee Rosenthal, Chair of the Standing Committee, at (713) 250-5980 or John K. Rabiej, Chief, Rules Committee Support Office, at (202) 502-1820. As always, we appreciate your comments and the opportunity to work with you on improving the rules that are essential to our justice system.

Sincerely,

Lee H. Rosenthal
United States District Judge
Southern District of Texas
Chair, Committee on Rules
f Practice and Procedure

Laura Taylor Swain
United States District Judge
Southern District of New York
Chair, Advisory Committee
on Bankruptcy Rules

Enclosure

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March 10, 2010

Mr. Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, DC 20544

Dear Mr. McCabe:

We write to share our views regarding the amendments proposed by the Judicial Conference's Advisory Committee on Bankruptcy Rules to Federal Rule of Bankruptcy Procedure 3001, pertaining to proofs of claim, and the newly proposed Federal Rule of Bankruptcy Procedure 3002.1, pertaining to claims secured by a security interest in the debtor's principal residence.

As you are probably well-aware, the filing and documentation requirements exponentially increased for consumer debtors as a result of the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act.[1] Pursuant to these amendments, consumer debtors and their attorneys must file extensively detailed statements and provide supporting documentation, including payment advices and tax returns at the risk of having the bankruptcy case dismissed. At a hearing held before the Subcommittee on Commercial and Administrative Law on May 1, 2007, Henry J. Sommer, President of the National Association of Consumer Bankruptcy Attorneys, testified:

> Bankruptcy has gone from being a relatively low-priced proceeding that can be handled quickly and efficiently to being an expensive minefield of new requirements, tricks and traps that can catch the innocent and unsuspecting debtor.
>
> . . .
>
> Every consumer debtor must obtain all payment advices for the 60 days before the bankruptcy is filed, a tax return or a tax transcript for the most recent year and sometimes additional years. They must provide an attorney with information detailing every penny

[1] Pub. L. 109-8 (2005).

12b-002852

> of their income for the 6 months before the petition is filed; they must provide bank statements to the trustee and evidence of current income. . . .
>
> Attorneys must complete numerous additional forms, including a 6-page means test form that requires arcane calculations about which there are many different legal interpretations, and this is on top of the 20 or 30 pages of forms that were already required in every bankruptcy case. . . .
>
> And if a consumer debtor is subject to an audit they have to provide even more, including 6 months worth of income documentation, 6 months of bank statements and an explanation of each and every deposit and withdrawal from any account over those 6 months.[2]

And, as observed both by the Judiciary[3] and Appropriations[4] Committees of the House of Representatives, the United States Trustee Program has enforced these requirements with particular exuberance.

With respect to policing creditor abuses in consumer bankruptcy cases, however, we believe there is a need for more enforcement tools. In the last Congress, the Subcommittee on Commercial and Administrative Law held a hearing at which it received testimony about creditor

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[2]*Second Anniversary of the Enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: Are Consumers Really Being Protected Under the Act?: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 110th Cong. 19-20 (2007) (prepared testimony of Henry Sommer, Pres., National Association of Consumer Bankruptcy Attorneys).

[3]*See, e.g., United States Trustee Program: Watchdog or Attack Dog?: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 110th Cong. (2007).

[4]*See, e.g.*, H. Rep. No. 110-240, at 49 (2008). The House Appropriations Committee observed:

> The Committee is concerned that excessive resources are being expended on efforts by the United States Trustee Program to dismiss cases for insignificant filing defects (thereby creating added burdens on the court and debtors associated with refilings); on the unnecessary use of U.S. Trustee personnel to participate in creditors' meetings that are already handled and conducted by private trustees; and on making burdensome requests of debtors to provide documentation that has no material effect on the outcome of bankruptcy cases. Such actions by the U.S. Trustee Program are making the bankruptcy process more costly and therefore less available for those who need it. The Committee directs the U.S. Trustees to immediately examine these problems and report back two months after enactment of this Act on efforts to remedy them as soon as possible.

Id.

abuses in consumer bankruptcy cases.[5] Specifically with respect to proofs of claim, a witness testified:

> Courts have found creditors regularly filing false proofs of claim, and even bogus affidavits in connections [sic] with motions for relief from stay, types of fraud that have caused many families to lose their homes.[6]

Some courts have likewise expressed similar concerns about this problem particularly with respect to bulk debt purchasers.[7] In addition, a recent academic study found substantial discrepancies between mortgage debt scheduled by debtors and creditors' proofs of claim.[8]

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[5] *United States Trustee Program: Watchdog or Attack Dog?: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 110th Cong. 117 (2007) (prepared testimony of Paul Uyehara, Community Legal Services of Philadelphia)

[6] *Id.*

[7] *See, e.g., In re* Hess, 404 B.R. 747, 751 (Bankr. S.D.N.Y. 2009) (noting "a larger problem for this and other bankruptcy courts across the country" in that two of the three claims at issue in this cases were filed by "LVNV, one of numerous bulk-claims purchasers that regularly file stale claims in bankruptcy courts"); *In re* Andrews, 394 B.R. 384, 387 (Bankr. E.D.N.C. 2008) ("The phenomena of bulk debt purchasing has proliferated and the uncontrolled practice of filing claims with minimal or no review is a new development that presents a challenge for the bankruptcy system.").

[8] Katherine Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 TEX. L. REV. 121, 123-24 (2008). Based on data collected from 1,700 chapter 13 cases, the author concluded:

> [M]ortgagees' behavior significantly threatens bankruptcy's purpose of helping families save their homes. Despite unambiguous federal rules designed to protect homeowners and ensure the integrity of the bankruptcy process, 4 mortgage companies frequently fail to comply with the laws that govern bankruptcy claims. A majority of mortgage companies' proofs of claim lack the documentation necessary to establish a valid debt. Fees and charges on bankruptcy claims often are identified poorly and sometimes do not appear to be legally permissible. On an aggregate level, mortgage creditors assert that bankrupt families owe them at least $ 1 billion more than the families who file bankruptcy believe they owe. 5 Although infractions are frequent and irregularities are sometimes egregious, the bankruptcy system routinely processes mortgage claims that do not comply with legal procedures. Far from serving as a significant check against mistake or misbehavior, the bankruptcy system routinely processes mortgage claims that cannot be validated and are not, in fact, lawful.

Id. (footnotes omitted).

In response to some of these concerns, we have sponsored legislation in the last Congress[9] as well as in the present Congress[10] that, in pertinent part, would require greater disclosure and court review of claims secured by a chapter 13 debtor's principal residence. H.R. 1106, "Helping Families Save Their Homes in Bankruptcy Act of 2009," which we introduced last year, provides that neither the debtor nor the debtor's house would be liable for a fee, cost, or charge incurred while the chapter 13 case is pending unless the holder of the claim complies with certain filing and disclosure requirements.[11]

Section 502(a) of title 11 of the United States Code ("Code") provides that a proof of claim is "deemed allowed, unless a party in interest . . . objects." Federal Rule of Bankruptcy Procedure 3001(f) further provides that a proof of claim executed and filed in accordance with the bankruptcy rules "shall constitute prima facie evidence of the validity and the amount of the claim." Section 502(b), in turn, sets forth various grounds for which a claim may be disallowed. In pertinent part, section 502(b)(1) provides as a basis of objection that a claim may be disallowed if it "is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured."

In our view, the proposed amendments to Federal Rule of Bankruptcy Procedure 3001 and new Rule 3001.2 impose necessary and proper procedural requirements with respect to a creditor seeking payment from a bankruptcy estate. Indeed, the requirement that a proof of claim be supported by written documentation (or an explanation why such documentation does not exist) for a claim based on writing has long been an inherent part of bankruptcy procedure, antedating the enactment of the Bankruptcy Reform Act of 1978.[12] The proposed amendments appear to be intended to "secure the just, speedy, and inexpensive determination of every case and proceeding."[13]

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[9] *See, e.g.*, H.R. 3609, 110th Cong. § 2 (2007).

[10] *See, e.g.*, H.R. 200, 111th Cong. § 5 (2009).

[11] H. Rep. No. 111-19, 111th Cong., at 37 (2009).

[12] Alan N. Resnick & Henry J. Sommer, COLLIER ON BANKRUPTCY ¶3001.RH[1] n. 2 (15th ed. rev'd 2009) (noting that former Bankruptcy Rule 302© "was substantially identical to the provisions of Rule 3001©); Fed. R. Bankr. P. 3001 Advisory Committee Note (1984) (noting that Fed. R. Bankr. P. 3001© "is similar to former Bankruptcy Rule 302© and continues the requirement for the filing of any written security agreement and provides that the filing of a duplicate of a writing underlying a claim authenticates the claim within the same effect as the filing of the original writing").

[13] Fed. R. Bankr. P. 1001.

The proposed amendment to Rule 3001(c)(1) – requiring the last account statement sent to the debtor prior to the filing of the bankruptcy petition be filed with the proof of claim – appears to be a logical amplification of current Rule 3001. It is "intended to assist debtors and trustees in gauging whether such claims are untimely under an applicable statute of limitations."[14] As such, it would help facilitate analysis under Code section 502(b)(1).

Similarly, new Rule 3002.1 that, in pertinent part, requires an itemized statement of interest, fees, expenses and charges to be filed with the proof of claim. This requirement appears to be intended to ensure that the claim is appropriately documented, which is a goal that we support as evidenced by legislation that we have sponsored as described earlier in this letter.

In sum, we consider these proposed amendments to be intended to protect the integrity of the bankruptcy claims process and thereby support them generally.

We appreciate your attention to our comments.

Sincerely,

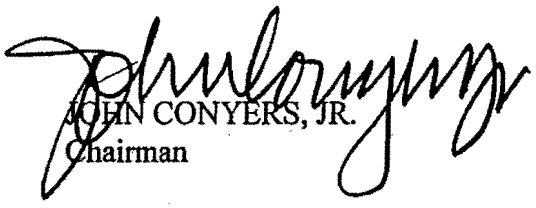

JOHN CONYERS, JR.
Chairman

STEVE COHEN
Chairman, Subcommittee on Commercial and Administrative Law

cc: The Honorable Lamar Smith
The Honorable Trent Franks

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[14]Eugene Wedoff, *Proposed New Bankruptcy Rules on Creditor Disclosure and Court Enforcement of the Disclosures – Open for Comment*, 83 AM. BANKR. L. J. 579, 583 (2009).

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
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WASHINGTON, D.C. 20544

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ROBERT L. HINKLE
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July 22, 2010

Honorable Lamar S. Smith
Ranking Member
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Re: The Proposed Amendments to Bankruptcy Rule 3001 and New Rule 3002.1

Dear Representative Smith:

This letter is to inform you of the actions taken by the Judicial Conference Advisory Committee on Bankruptcy Rules with respect to proposed amendments to Bankruptcy Rule 3001(c) and proposed new Rule 3002.1. Your February 16, 2010, letter expressed concerns about these proposals. As explained in the February 24, 2010, letter to you from Peter G. McCabe, Secretary to the Judicial Conference's Committee on Rules of Practice and Procedure (Standing Committee), your letter was sent to the Advisory Committee, which carefully considered the concerns you expressed.

The Advisory Committee had before it the results of a six-month public comment period, during which the proposed rule changes were widely circulated pursuant to the Rules Enabling Act process. The Advisory Committee received over 150 written comments and held a public hearing at which individuals desiring to testify did so. The comments and testimony were from the broad range of interests potentially affected by the proposals, including creditors, debtors, and trustees. After a lengthy and careful examination, the Advisory Committee recommended that revised versions of the proposed amendments to Rule 3001(c) and of new Rule 3002.1 be approved and transmitted to the Standing Committee for its consideration. The proposed amendments and new rule were revised to address the major concerns raised by you and others during the Rules Enabling Act process. They include revisions that: (1) mitigate the proposed sanctions provisions under Rule 3001; (2) withdraw the proposed requirement under Rule 3001 that a creditor with a claim based on an open-end or revolving consumer credit agreement submit the last account statement sent to a

debtor; and (3) provide additional time to creditors to submit required information under new Rule 3002.1.

All but one of these proposals will be forwarded to the Judicial Conference for consideration at its September 14, 2010, session. One modified proposal will be published for public comment in August 2010. A copy of the proposed revised rules is enclosed. The proposed revised rules are posted at the court's federal rulemaking website at http://www.uscourts.gov/RulesAndPolicies.aspx. For your convenience, the proposals and relevant revisions are summarized below, with an explanation of how the revisions address the concerns expressed by you as well as by others who submitted comments.

1. The Proposed Amendments to Rule 3001(c)

Existing Rule 3001 requires creditors filing a proof of claim to include the "original or duplicate" of a writing on which the claim is based. This requirement is essential to ensure the legitimacy of claims filed in bankruptcy. Under the Bankruptcy Code, a proof of claim is presumed valid unless a party objects. The system does not work unless debtors and trustees have the necessary information to evaluate, and challenge if appropriate, the validity of a claim. To challenge a claim, the debtor or trustee must file an objection and present information supporting the objection. During the lengthy rulemaking process, the Advisory Committee received extensive comments and testimony that the Code's reliance on debtors and trustees to police invalid claims has proven ineffective under the existing rule. Creditors often present bare proofs of claim, which make it virtually impossible for debtors and trustees to determine how the claims were calculated and whether they are valid. Debtors' lawyers have little incentive to expend time and resources to ascertain the validity of claims submitted with inadequate documentation. The lawyers generally receive no compensation for the effort and any money derived from such efforts is usually paid to other unsecured creditors. As a result, despite the lack of supporting documentation, many insufficient or invalid claims are simply not challenged.

To address this problem, the proposed amendments enhance the disclosure requirements and require – as the official form long has – that a creditor in an individual debtor case provide an itemized statement of the interest, fees, expenses and other charges assessed in connection with its claim before the petition is filed. During the public comment period, representatives of bulk claims purchasers pointed out that some credit agreements provide for the consolidation of interest and fees with principal on an ongoing basis. The disclosure provision is not inconsistent with any such contractual provision; it simply requires disclosure of the amounts in the way they are classified under the agreement. The proposed amendments also include special disclosure requirements for claims secured by a security interest in the individual debtor's property. In such a case, a statement of the amount necessary to cure any prepetition default and, for home mortgages, a statement of any escrow account must be provided.

The initial proposed amendments to Rule 3001 also responded to a need to strengthen the consequences of failing to comply with the documentation requirements. The proposed amendment

provided for mandatory sanctions, including prohibiting a creditor who failed to provide the required information with proofs of claim in an individual debtor case from presenting any of the omitted information as evidence in a subsequent proceeding in the case, unless the court determined that the failure was substantially justified or harmless. The public comments, including your letter, led the Advisory Committee to conclude that the proposed mandatory sanction provision was too harsh. The Advisory Committee revised the proposed amendments to: authorize the exclusionary sanction only if the failure to provide the required information was not substantially justified or harmless; eliminate the mandatory nature of the sanction; and make it clear that notice and hearing is required before a sanction is imposed. The revised sanction provision is modeled on Civil Rule 37, which prohibits a party from using information "to supply evidence on a motion, at a hearing, or at trial" that it failed to disclose as part of its initial disclosure or discovery obligations. Both the Civil Rule and the Bankruptcy Rule are grounded in courts' well-established authority to control the presentation of evidence used in court proceedings.

A creditor's failure to provide the required information under the revised proposed amendments to Rule 3001(c) is not a basis for disallowance of the claim; a claim can be disallowed only if a party objects and proves a statutory ground for disallowance. The revised proposed amendments give effect to the Bankruptcy Code by continuing to place the burden on the debtor and the trustee to challenge an invalid claim while requiring the creditor to provide information essential to evaluate the claim. The Standing Committee approved the revised proposal for transmittal to the Judicial Conference at its September 2010 meeting.

The initial proposed amendments also required creditors with a claim based on an open-end or revolving consumer credit agreement to submit the last account statement sent to the debtor before the filing of the bankruptcy petition. During the public comment period, however, the Advisory Committee heard that copies of the last credit card statement are often unavailable or impractical to obtain. The Advisory Committee concluded that this proposal was an unnecessarily burdensome approach to the problem of inadequate information. The requirement that a creditor submit the last account statement was withdrawn. The Advisory Committee concluded that less burdensome means should be used to provide debtors and trustees with the necessary information to challenge invalid claims. The Advisory Committee recommended that the Standing Committee approve a modified proposed amendment to publish for public comment. This new proposal requires specific information from creditors relevant to the determination of the age, prior holder, and other salient features of the claim, but allows flexibility in how it is provided. The modified proposed rule also relieves claimants to which it applies from the general requirement that all documentation underlying the claim be filed in every instance, providing instead that such documentation regarding an open-end or revolving consumer credit claim is to be disclosed on request of a party in interest. The Standing Committee approved the recommendation and the proposal will be circulated for public comment in August 2010.

2. Proposed New Rule 3002.1

Proposed new Rule 3002.1 implements § 1322(b)(5) of the Bankruptcy Code, which permits a chapter 13 debtor to cure a default on a home mortgage by making certain payments during the bankruptcy. The proposed new rule requires the mortgage holder to provide a debtor with sufficient information to enable the debtor to determine the exact amount needed to cure the default, including all fees, charges, and other expenses. Absent this information, a debtor cannot know how much to pay to cure the default under the Code and cannot challenge the validity of the fees, charges, or expenses. The proposed new rule requires that the mortgage holder provide this information and give notice to the debtor, the debtor's counsel, and the trustee of any postpetition changes in the mortgage payment amount. Both before and during the public comment period, the Advisory Committee heard many complaints that debtors may learn only after completing their payment plan that they still owe fees, charges, or expenses to a mortgage lender and, despite a successful emergence from bankruptcy, still face foreclosure. The proposed new rule is intended to ameliorate this problem.

During the public comment period, the Advisory Committee also heard from creditors' organizations that it was unclear how the proposed rule provision requiring at least 30 days' notice of any postpetition changes in the mortgage payment amount would apply to loan payments that adjust frequently. The Advisory Committee revised the proposed rule. As revised, the proposed new rule requires a creditor to provide the required information no later than 21 days before the next payment is due. In addition, the sanctions provision was revised in the same manner as the sanctions provision of Rule 3001(c). The revised proposed new rule was approved by the Standing Committee for transmittal to the Judicial Conference.

The revised rules proposals that have been approved by the Standing Committee will be presented to the Judicial Conference at its September 2010 meeting. The proposal that the Standing Committee approved for publication for public comment will be circulated in August 2010. If you or your staff have any questions about these rules or other proposals, please feel free to call Lee Rosenthal, Chair of the Standing Committee, at (713) 250-5980 or John K. Rabiej, Chief, Rules Committee Support Office, at (202) 502-1820. As always, we appreciate the opportunity to work with you on improving the rules that are essential to our justice system.

Sincerely,

Lee H. Rosenthal
United States District Judge
Southern District of Texas
Chair, Committee on Rules
of Practice and Procedure

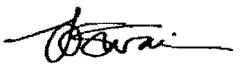

Laura Taylor Swain
United States District Judge
Southern District of New York
Chair, Advisory Committee
on Bankruptcy Rules

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February 16, 2010

Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, DC 20544

Re: Advisory Committee on Bankruptcy Rules – Proposed Amendments to the Federal Rules of Bankruptcy Procedure (3001 and 3002.1)

Dear Members of the Advisory Committee on Bankruptcy Rules,

I write to share my views about proposed amendments to the Federal Rules of Bankruptcy Procedure currently under the Advisory Committee's consideration (*Proposed Amendments to the Federal Rules of Bankruptcy Procedure* (August 2009) ("Proposed Amendments"). Specifically, I am concerned about proposed new provisions of Rule 3001 (Proposed Amendments at 16-18, ll. 1-40) and new Rule 3002.1 (Proposed Amendments at 20-24, ll. 1-80), which will govern proof of claims and their filing. I believe the proposed changes are likely to impose additional but unnecessary burdens on unsecured creditors in consumer bankruptcy cases. These added burdens may discourage or impair the ability of legitimate parties to participate in the claims process. In addition, the changes are likely to increase litigation and its attendant costs, imposing further burdens on bankruptcy judges and trustees at a time at which the bankruptcy system is already overtaxed.

The proposed amendments make several important changes to Rule 3001(c). First, they require creditors to attach the last billing statement sent to the debtor before the filing of the bankruptcy petition (3001(c)(1)). Second, they require creditors to include in their proof of claim a statement itemizing interest, expenses or charges if the debtor is an individual (3001(c)(2)(A)). Third, they permit a court to impose sanctions on a creditor who fails to provide the information these amendments require when the debtor is an individual. Finally, they bar creditors from using the omitted information in any adversary proceeding or other contested matter without court approval (3001(c)(2)(D)). The proposed new Rule 3002.1, meanwhile, adds additional hurdles to the proof of a chapter 13 claim based on a principal-residence mortgage and incorporates the same new sanctions regime proposed for Rule 3001.

I question whether there is any evidence, beyond a few anecdotes, to indicate that there is a widespread problem – inadequately addressed by existing rules and procedures – of creditors who file unsupportable claims in consumer cases. To my knowledge, no substantial evidence of such a problem has been presented to Congress. In any case, creditors, like other parties, already are restrained by Rule 11 and are subject to Federal criminal penalties if they file fraudulent claims. Indeed, it was a case involving false bankruptcy claims that led Congress to make the 1996 revisions to 18 U.S.C. sec. 1001. It is my understanding that the proofs of claims filed in the overwhelming majority of cases are valid claims that substantially match the debtor's schedule of debts filed – under penalty of perjury – with the petition. The Rules of Procedure already allow for an orderly process by which a debtor can object to a particular proof of claim and thereby put the burden of proof on the creditor. Absent strong evidence of a widespread problem that the current rules and safeguards are ill-equipped to meet, the Advisory Committee should not adopt the proposed amendments to Rule 3001(c).

For similar reasons, the Advisory Committee should also evaluate the proposed amendments in light of the directive that bankruptcy rules be construed to secure the "just, speedy, and inexpensive determination of every case and proceeding." The proposed amendments will impose new requirements for all unsecured claims and for claims based upon principal-residence mortgages. As a result, they will open up the potential for litigation over compliance and the imposition of new sanctions and attorney's fees for failure to abide by the requirements. To the extent that the new rules will affect valid claims or increase the time or cost of determining the validity of claims, they will work against the speedy and inexpensive determination of claims. They will also increase the burdens upon bankruptcy judges and trustees as they work with limited resources to administer increasingly high caseloads. The Committee should therefore carefully examine not only whether there is a need for the proposed amendments but also the effects those rules will have overall on the processing of unsecured claims.

Further, even were there a widespread problem of unsupported claims, the proposed amendments may still not represent the appropriate solution. The Rules Enabling Act provides that rules of procedure shall not be drafted in a manner that affects substantive rights. *See* 28 U.S.C. sec. 2075 (rules shall "not abridge, enlarge, or modify any substantive right"). Through Bankruptcy Code section 502(a), Congress has provided that a proof of claim shall be "deemed allowed" unless a party in interest objects. Further, in Code section 502(b), Congress has specifically delineated the substantive bases upon which a Bankruptcy Court may disallow a proof of claim. The effect of the proposed amendments, however, will be to permit courts to disallow claims for reasons stated in the Rules of Procedure but not listed in Section 502(b).

For these reasons, the question arises whether the proposed amendments exceed the Committee's authority under the Rules Enabling Act. I do not at this time take a position on this question. Were the amendments, in fact, to affect any substantive right, it would be an *ultra vires* act for the Judicial Conference to adopt them. The Committee should therefore evaluate with care the question of whether the proposed amendments fall within the ambit of the Rules Enabling Act.

Finally, I am concerned that the proposed amendments will intrude on consumers' privacy interests. To require that creditors always file debtors' billing statements, thereby making them publicly available, will unnecessarily expose the private details of each consumer's activities, such as purchases from a particular store, even if personally identifiable information such as home address information is removed. I hope that the Advisory Committee will consider this important issue as well.

Thank you again for your consideration.

Sincerely,

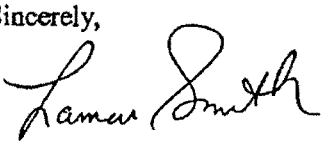

Lamar Smith
Ranking Member

JAMES C. DUFF
Director

JILL C. SAYENGA
Deputy Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

August 3, 2010

TO: ANDREW S. GINSBURG

FROM: JOHN K. RABIEJ

SUBJECT: H.R. 5419

On behalf of Judge Lee H. Rosenthal, chair of the Judicial Conference's Committee on Rules of Practice and Procedure ("Standing Rules Committee"), and Judge Mark R. Kravitz, chair of its Advisory Committee on Civil Rules ("Civil Rules Committee"), I want to thank you for the request for comments on the "Sunshine in Litigation Act of 2010," (H.R. 5419), which was introduced on May 26, 2010. The extensive work done to address in H.R. 5419 some of the concerns expressed in the past about similar bills is very much appreciated. However, H.R. 5419 continues to present difficult and unnecessary problems that would make civil litigation more expensive, more burdensome, and more time-consuming, and that would make it more difficult to protect important privacy interests. The proposed new language in H.R. 5419 will not avoid the many problems that lawyers, litigants, and judges would face in complying with the legislation and the resulting burdens on the administration of justice.

This memo addresses specific provisions of H.R. 5419, focusing on its differences from, and similarities to, prior bills. Judge Rosenthal, Judge Kravitz, and I would be pleased to meet in person or to set up a telephone call to discuss these issues further.

1. Overview

H.R. 5419 would change Rule 26(c) of the Federal Rules of Civil Procedure by requiring a judge presiding over a case who is asked to enter a protective order restricting the dissemination of information obtained in discovery to first make "independent findings of fact" that the order would not restrict the disclosure of information "which is relevant to the protection of public health or safety" or, if it is relevant, that "the public interest in the disclosure of potential health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information" and that the protective order requested is "no broader than necessary to protect the confidentiality interest asserted." The same "independent findings of fact" must be made before a judge may issue an order approving a settlement agreement that would restrict the disclosure of information "which is relevant to the protection of public health or safety" or an order restricting

access to "court records." As you know, we have consistently opposed the similar protective-order bills regularly introduced since 1991. One reason for the opposition has been that the legislation is inconsistent with the Rules Enabling Act, 28 U.S.C. §§ 2071–2077. H.R. 5419 is similar to the earlier bills in this respect.

2. Section 1660(a)(1): The Scope of H.R. 5419

H.R. 5419 is narrower than earlier protective-order bills because it is limited to cases in which the pleadings "state facts that are relevant to the protection of public health or safety." The narrower application recognizes that most cases in the federal courts do not implicate public health or safety and should not be affected by the added requirements H.R. 5419 would impose. But the provisions defining the scope of H.R. 5419 are problematic. In many cases, it would not be possible for the court to determine by reviewing the pleadings whether H.R. 5419 applies. What does it mean to "state facts that are relevant to the protection of public health or safety"? Would an antitrust claim involving allegations that a drug patent owner had entered into agreements to suppress competition in the development of new drugs qualify? Would a discrimination claim alleging sexual harassment in the workplace qualify? What about a securities action involving a pharmaceutical manufacturer? Or a claim of sexual discrimination involving the refusal to promote highly qualified women working in a pharmaceutical company? These are but a few examples of how difficult it would be for a court to determine if a case was covered by H.R. 5419. The standard of "facts that are relevant to the protection of public health or safety" is so broad and indefinite that it will either sweep up many cases having little to do with public health or safety and impose on all these cases the costly and time-consuming requirements of H.R. 5419, or require the parties and court to spend extensive time and resources litigating whether the statute applies.

The criterion that the pleadings "state facts that are relevant to the protection of public health or safety" raises other concerns as well. How specifically must the facts be stated? Is it sufficient for a party simply to allege that a case involves public health or safety to invoke H.R. 5419 and thereby make it more difficult, time-consuming, and expensive for the opposing party to protect private information from public dissemination? If more specificity in pleading facts "relevant to the protection of public health or safety" is required, how much more? Does the bill require heightened pleading of such facts under Rule 9(b)? Or does the pleading standard of Rule 8 apply? If the answer is that Rule 8 applies but specific facts are required, that would make H.R. 5419 appear inconsistent with Rule 8, creating confusion and uncertainty.

3. Section 1660(a)(1)(A) and (B): The Procedure for Entering a Discovery Protective Order

Once an action is identified as one that based on the pleadings falls under H.R. 5419, the requirement that the court make independent findings of fact before issuing a protective order in discovery is triggered. This requirement is very similar to prior protective-order bills. The Committees have consistently opposed those bills because the procedure they require would delay

discovery, increase motions practice, and impose significant and unworkable new burdens on lawyers, litigants, and judges. H.R. 5419 raises the same concerns.

In many cases, parties are unwilling to begin exchanging information in discovery until an enforceable protective order is entered. The vital role protective orders play in effective discovery management is well recognized.[1] The information the parties exchange in discovery often includes

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[1] *See, e.g.*, *SEC v. Merrill Scott & Assoc. Ltd.*, 600 F.3d 1262, 1272 (10th Cir. 2010) ("Protective orders serve the vital function of 'secur[ing] the just, speedy, and inexpensive determination of civil disputes by encouraging full disclosure of all evidence that might conceivably be relevant.'" (alteration in original) (quoting *Martindell v. Int'l Tel. & Tel. Corp.*, 594 F.2d 291, 295 (2d Cir. 1979) (quotation and citation omitted))); *SEC v. TheStreet.com*, 273 F.3d 222, 229 (2d Cir. 2001) ("Without an ability to restrict public dissemination of certain discovery materials that are never introduced at trial, litigants would be subject to needless 'annoyance, embarrassment, oppression, or undue burden or expense.'" (quoting FED. R. CIV. P. 26(c))); *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1316 (11th Cir. 2001) (Black, J., concurring) ("'If it were otherwise and discovery information and discovery orders were readily available to the public and the press, the consequences to the smooth functioning of the discovery process would be severe. Not only would voluntary discovery be chilled, but whatever discovery and court encouragement that would take place would be oral, which is undesirable to the extent that it creates misunderstanding and surprise for the litigants and the trial judge.'" (quoting *United States v. Anderson*, 799 F.2d 1438, 1441 (11th Cir. 1986))); *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 535 (1st Cir. 1993) ("Judges have found in many cases that effective discovery, with a minimum of disputes, is achieved by affording relatively generous protection to discovery material. Impairing this process has immediate costs, including the delay of discovery and the cost to the parties and the court of resolving objections that would not be made if a protective order were allowed."); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) ("[P]rotective orders are becoming standard practice in complex cases. They allow the parties to make full disclosure in discovery without fear of public access to sensitive information and without the expense and delay of protracted disputes over every item of sensitive information, thereby promoting the overriding goal of the Federal Rules of Civil Procedure, 'to secure the just, speedy, and inexpensive determination of every action.'" (internal citation omitted)); *In re Courier-Journal v. Marshall*, 828 F.2d 361, 364 (6th Cir. 1987) ("'[T]he unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders' . . . ." (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984))); Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 446 (1991) ("[T]he protective order is a tool particularly well-adapted to minimize discovery abuse. The dissemination of private or valuable information generated during discovery may produce serious harm, both to society and to litigants. A fear of that harm may chill a claimant's willingness to resort to the courts or encourage either party to settle for reasons and on terms unrelated to the merits of the underlying claim. The protective order guards against these harms without impairing the flow of information to the litigants." (footnote omitted)); *id.* at 483 ("If litigants know that compliance with a discovery request could lead to uncontrolled dissemination of private or commercially valuable information, many can be expected to contest discovery requests with increasing frequency and tenacity to prevent disclosure. The discretion courts currently have in granting protective orders has allowed them to develop one of the most significant management tools for guiding litigants through the pretrial process with a minimum of motion practice and needless friction." (footnote omitted)).

highly sensitive personal and private information or extremely valuable confidential information. Plaintiffs as well as defendants have discoverable information that must be protected from public dissemination. And discoverable private or confidential information is often not just in the parties' hands, but may also be held by nonparties such as witnesses, coworkers, patients, customers, and many others. The internet has made it much more difficult to protect private and confidential information and has increased the importance of protective orders.

Protective orders avoid delay and cost by allowing the parties to exchange information in discovery that they would not exchange otherwise without objection or motion, hearing, and court order. The requesting party's chief interest is to get discovery produced as quickly and with as little expense and burden as possible. Protective orders serve that interest by allowing the parties to exchange information—with electronic discovery, in volumes that are often huge—without time-consuming, costly, and burdensome pre-production motions and hearings. H.R. 5419 would frustrate the role of protective orders and would make discovery more burdensome, time-consuming, and expensive than it already is.

Under H.R. 5419, as with similar prior bills, no protective order can issue unless and until: (1) the party seeking the order designates all the information that would be produced in discovery subject to restrictions on disclosure; (2) the judge reviews all this information to determine whether any of it is relevant to the protection of public health or safety; (3) if any of the information is determined to be relevant to the protection of public health or safety, the judge determines whether any of the information is subject to a specific and substantial interest in maintaining its confidentiality; (4) the judge then determines whether the public interest in the disclosure of any information about public health or safety hazards is outweighed by that interest; and (5) the judge then decides whether the requested order is no broader than necessary to protect that confidentiality interest. The judge's review would often occur relatively early in the litigation, when the judge—who knows less about the case than the parties—is the least informed about the case. Information sought in discovery does not come labeled "impacts public health or safety" or "raises specific and substantial interest in confidentiality." The judge will often simply be unable to tell whether the information she is reviewing is relevant to public health or safety. The judge also will not be able to tell whether there are "specific and substantial" privacy or confidentiality interests or how they should be weighed.

Even in cases in which the pleadings state facts relevant to public health or safety, much of the information sought and produced in discovery will not implicate public health or safety. Indeed, much of the information will not be important or even relevant to the case and will not be used by the parties in litigating the case. But there may be significant amounts of private or confidential information that should be protected from public disclosure. Under H.R. 5419, a lawyer representing a client, plaintiff or defendant, could not seek a protective order without first doing the expensive and time-consuming work of identifying specific information to be obtained through discovery that would be subject to disclosure restrictions. The judge could not issue a protective order to restrict the dissemination of any information obtained through discovery without making the independent

findings of fact as to all that information. The effect would be delay, increased motions, and a reduction in timely, cost-effective access to justice.

In addition to causing delay and increased costs in the cases in which protective orders are sought, the procedure in H.R. 5419 would cause delays in access to the federal court system in all cases. If judges have to look through every document produced in discovery in cases in which a protective order is sought, that will take time away from other pressing court business that litigants expect judges to take care of in a timely manner.

Comparing the procedure under H.R. 5419 with the protective-order practice followed under current law in the federal courts further illustrates problems the legislation would create. Under current law, when the parties ask the court to enter a protective order before discovery begins, the language of Rule 26(c) and the case law require the court to find good cause for entering such an order, even if the parties agree on the terms. In most cases in which a discovery protective order is sought, the court makes the good-cause determination by examining the nature of the case and the types or categories of information that are likely to be exchanged in discovery. Neither the parties nor the court is required to conduct a time-consuming and burdensome pre-discovery review of all the information that will be produced.

The protective order typically sets up a procedure for the parties to designate documents exchanged in discovery—as opposed to filed with the court—as confidential, restricting their dissemination. Most protective orders include "challenge provisions" under which the receiving party or third parties may dispute the designation of a particular document or categories of documents as confidential. Even without such challenge provisions, the case law provides this right. Once the requesting party—who knows the case much better than the judge—gets the documents in discovery and can review them, that party may ask the court to permit the dissemination of documents designated as confidential, to modify the terms of the protective order, or to dissolve the protective order. Among the reasons for modification can be the relevance of the documents to protecting public health or safety and the need to bring them to the appropriate regulatory agency, or the desire to use the documents in related litigation. The court can effectively and efficiently consider such requests because they are focused on specific documents or information. With this focus, the court is able to resolve the requests by applying the factors the case law establishes, including the protection of public health or safety.

The procedures followed under current law meet the goals of H.R. 5419, including in the relatively small number of cases filed in federal courts that implicate public health or safety, without the grave additional burdens, costs, and delays H.R. 5419 would impose. In contrast, the procedure established under H.R. 5419 is ineffective to meet its purpose and would create severe problems in discovery.

4. Section 1660(a)(1): The Application to Orders Restricting Access to Court Records

Section 1660(a)(1) imposes the same requirements on court orders that would restrict public access to court records that apply to orders restricting public access to information exchanged in discovery. This provision weakens the standard federal courts apply under current law for ensuring public access to documents that are filed with the federal court. Under current law, if the parties want to take the material exchanged in discovery and file it with the court, either with a motion or in an evidentiary hearing or at trial, a standard different and higher than the discovery protective-order standard applies before a court can seal it from public view. Courts recognize a general right of public access to all materials filed with the court that bear on the merits of a dispute. This presumption of access usually can be overcome only for compelling reasons; access is granted without the need to show a threat to public health or safety or any other particular justification unless a powerful need for confidentiality is shown. A lower good-cause standard applies to an order restricting disclosure of information exchanged in discovery but not filed with the court.

This distinction between the standard for protecting the confidentiality of information exchanged in discovery and the standard for filing under seal is critical. It reflects the longstanding recognition that while there is no right of public access to information exchanged between litigants in discovery, there is a presumptive right of public access to information that is filed in court and used in deciding cases. Courts require a much more stringent showing to seal documents filed in court than to limit dissemination of documents exchanged in discovery but never filed with the court.

Section 1660(a)(1) reduces the standard necessary to seal documents filed in court and collapses it into the standard necessary to restrict public dissemination of documents exchanged in discovery. As a result, H.R. 5419 weakens the right of public access to court documents, a change in the law that is unnecessary and inconsistent with the bill's purpose. Indeed, § 1660(a)(1) directly conflicts with section (2)(c)(1) of H.R. 5419, which states that the bill may not be construed to "weaken or to limit—(1) existing common law or constitutional standards for information access . . . ."

5. Section 1660(a)(2): Discovery Protective Orders After the Entry of Final Judgment

Section 1660(a)(2) would make a discovery protective order unenforceable after final judgment unless the judge made separate findings of fact that each of the requirements of (a)(1)(A) and (B) were met. The burden of proof provision in (a)(3) requires that the need for continuing protection be demonstrated as to all the information obtained in discovery subject to the protective order. Under current practice, the protective order often continues in effect, subject to requests made by either parties or nonparties to release documents or information. Once a party or third party identifies documents or information for which disclosure is sought, the burden of proof is much clearer and efficiently applied. The court is able to effectively and efficiently determine whether the protective order should be modified or lifted because the focus is on specifically identified documents or information. This current practice is adequate to meet the purpose of H.R. 5419 without the added burdens, delays, and costs the bill would add.

Section 1660(a)(2) would greatly add to the costs and burdens of conducting discovery because parties could not be confident that even the most sensitive information they produced would remain subject to the protective order provisions when the case ended. The great importance of limiting access to such highly confidential private information is evidenced by the frequent use in protective orders of "attorneys' eyes only" provisions, which preclude a receiving attorney from sharing certain information received in discovery even with her clients. Such provisions are frequently used in litigation involving complex technology. The parties involved in such litigation often require the return or destruction of their highly confidential and proprietary materials at the conclusion of litigation, to ensure that materials so confidential that they could not even be shared with the receiving attorney's client during the litigation remain confidential when the litigation ends. Such provisions are also used in many other cases in which highly sensitive and private information about both parties and nonparties is obtained in discovery. It is essential to the effective and efficient operation of discovery that litigants be able to rely on the continuing confidentiality of information produced, including after the case ends, subject to the right of others to ask the court to permit broader dissemination of specific information for reasons that could include relevance to public health or safety. H.R. 5419 destroys the reliability that makes protective orders effective, with no evidence that such a step is needed.

6. Some Confusing Provisions in the Bill

Section 1660(a)(4)(A) states that "[t]his section" applies "even if an order under paragraph (1) is requested—(A) by motion pursuant to rule 26(c) of the Federal Rules of Civil Procedure . . . ." Yet section 1660(a)(1) states that a court "shall not enter an order under rule 26(c) of the Federal Rules of Civil Procedure" without complying with the requirements set forth. The result is confusion.

Section 1660(a)(5)(A) states that the "provisions of this section shall not constitute grounds for the withholding of information in discovery that is otherwise discoverable under rule 26 of the Federal Rules of Civil Procedure." It is unclear what this section contributes or means. Does this mean that a protective order cannot protect a party against the burden of producing any information within the scope of Rule 26—that an order can only restrict the use of information once produced? That directly conflicts with Rule 26(b)(2) and (c), which authorize a court to limit discovery for important purposes. Under Rule 26(b)(2)(C)(iii), a court must limit discovery if "the burden or expense of the proposed discovery outweighs its likely benefit . . . ." This proportionality principle has been a vital part of the rules since 1983. How does the court reconcile the conflict between the language stating that H.R. 5419 precludes withholding information in discovery that is otherwise discoverable under Rule 26 and the proportionality provisions of Rule 26? H.R. 5419 would support arguments that it bestows a right to obtain marginally relevant information even if it is at a cost and burden that is disproportionate to the reasonable needs of the case.

A similar problem is present in § 1660(a)(5)(B), which forbids a party from requesting a stipulation to an order that "would violate this section" as a condition for the production of

discovery. How does one know that at the time of the request? Can a party request a stipulation to an order that the party believes does not violate § 1660(a)(1), or to an order in a case that the party believes is not subject to the section because the pleadings do not allege the necessary facts? What is the enforcement mechanism for this provision? The purpose of prohibiting a request for a stipulation is unclear; the other party can refuse and the court may not enter a protective order unless it makes the required "independent findings of fact." The impact will likely be collateral disputes over the propriety of the request, further contributing to the increase in the costs and delays of discovery.

Section 1660(d) creates a "rebuttable presumption" relating to personal privacy. What is necessary to rebut the presumption? What kind of personal information is included? The bill says that it is "information relating to financial, health, or other similar information." Similar to what?

Section (2)(c) of the bill—which, confusingly, is not codified as part of section 1660—states that the bill may not be "construed to weaken or to limit . . . (2) confidentiality protections as a basis for a protective order." The entire point of § 1660(a) is to weaken or limit confidentiality protections as a basis for a protective order.

These are only a few of the unclear and confusing provisions relating to discovery protective orders under H.R. 5419. The unclear meaning and impact of these and other provisions highlight the importance of the thorough, transparent, and careful Rules Enabling Act process in drafting language that would so directly affect the federal rules.

7. The Provisions Relating to Orders Approving Settlement Agreements

Section 1660(a)(1) would prohibit a court from entering an order approving a settlement agreement that restricts the disclosure of information obtained through discovery, in a case in which the pleadings state facts that are relevant to the protection of public health or safety, unless the court makes the specified independent findings of fact. Section 1660(c)(1) would preclude a court from enforcing any provision of a settlement agreement in a case with such pleadings that restricts a party from disclosing the fact of settlement or the terms of the settlement that involve matters relevant to the protection of public health or safety, other than the amount of money paid; or that restricts a party from "discussing the civil action, or evidence produced in the civil action, that involves matters relating to public health or safety," unless the court makes the specified independent findings of fact.

There are very few federal court orders approving settlement agreements. Settlements are generally a matter of private contract. Settlement agreements usually are only brought to a court for approval if the applicable law requires it, as in settlements on behalf of minors, or of absent class members. Similarly, federal courts are rarely called on to enforce settlement agreements. Unless the agreement specifically invokes a court's continuing jurisdiction or an independent basis for jurisdiction applies, enforcement actions are generally brought in state courts. The settlement provisions in H.R. 5419 will rarely apply and are therefore unlikely to be effective.

The Standing and Civil Rules Committees have previously provided the House Judiciary Committee with the extensive empirical study done by the Federal Judicial Center on court orders that limit the disclosure of settlement agreements filed in the federal courts. That study showed no need for legislation such as H.R. 5419. The FJC study and a follow-up study showed that in the few cases in which a potential public health or safety hazard might be involved and in which a settlement agreement was sealed by court order, the complaint and other documents remained in the court's file, fully accessible to the public. In these cases, the complaints identified the three most critical pieces of information about possible public health or safety risks: the risk itself, the source of that risk, and the harm that allegedly ensued. In many cases, the complaints went considerably further. The complaints, as well as other documents, provided the public with access to information about the alleged wrongdoers and wrongdoings, without the need to also examine the settlement agreement.

Based on the relatively small number of cases involving any sealed settlement agreement and the availability of other sources to inform the public of potential hazards in these few cases, the Rules Committees concluded that a statute restricting confidentiality provisions in settlement agreements is unnecessary and unlikely to be effective. The primary effect of H.R. 5419 is likely to be an added barrier to access to the federal courts by making it more difficult and cumbersome to resolve disputes. The result is to send more disputes to private mediation or other avenues where there is no public access to information at all.

8. The Civil Rules Committee's Continued Work

In May 2010, the Civil Rules Committee sponsored an important conference on civil litigation at Duke University Law School. That conference addressed problems of costs, delays, and barriers to access at every stage ranging from pre-litigation to pleadings, motions, discovery, case-management, and trial. It is worth noting that in all the studies conducted, the papers submitted, and the criticisms of and suggestions for improving the present system, no one raised problems with protective orders or orders limiting access to settlement agreements filed with the federal courts. This further underscores the lack of any need for legislation.

The Civil and Standing Rules Committees are deeply committed to identifying problems with the federal civil justice system that can be addressed by changes to the Federal Rules of Civil Procedure, and to making those changes through the process Congress established—the Rules Enabling Act. As part of that process, the Civil Rules Committee is continuing to monitor the case law under Rule 26(c) to ensure that it is not operating to prevent public access to important information about public health or safety. The Committee is examining revisions to Rule 26(c) to, among other things, incorporate express provisions on challenging, modifying, or dissolving protective orders. The Advisory Committee will certainly keep you apprised on this work.

Last year, the Committees provided the House Judiciary Committee with a memo on the case law in every circuit on entering protective orders, modifying protective orders, and entering sealing orders. The case law set out in the memo shows that courts are attuned to the public interest and that

courts have developed procedures for addressing the need to produce discovery materials to other litigants and agencies. The Advisory Committee continues to monitor the case law. The memo on protective order case law was recently updated and is publicly available online at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Caselaw_Study_of_Discovery_Protective_Orders.pdf. A copy is attached for your convenience.

Thank you again for the opportunity to comment on H.R. 5419. As I said, Judge Rosenthal, Judge Kravitz, and I are available to meet in person or to set up a telephone call to discuss these issues. I can be reached at 202-502-1820.

cc: Christal Sheppard, Esquire
Blaine Merritt, Esquire

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

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ROBERT L. HINKLE
EVIDENCE RULES

June 28, 2010

Honorable Nancy Pelosi
Speaker
United States House of Representatives
Washington, DC 20515

Dear Madam Speaker:

We write on behalf of the Judicial Conference Committee on the Rules of Practice and Procedure and the Advisory Committee on the Federal Rules of Civil Procedure to express our significant concerns about Section 6 of the proposed legislation relating to certain civil actions arising from maritime incidents, H.R. 5503. Section 6, entitled "Unenforceability of Certain Secrecy Agreements," as amended by the Maritime Liability/Secrecy Agreement Revision, would cause severe problems and is inconsistent with, and unnecessary to, the purpose of the legislation. We urge you to remove this section. This letter outlines some of our most pressing concerns.

Section 6 would make court orders restricting the dissemination of broad categories of information void and unenforceable in any legal proceeding, with a very limited exception. The only exception is for court (or government agency) orders that the party seeking enforcement proves by clear and convincing evidence are necessary to protect public health or safety, if the judge makes factual findings and conclusions of law relating to that enforcement. These provisions in effect rewrite Rule 26(c) of the Federal Rules of Civil Procedure for the cases covered by the legislation. Rule 26(c) explicitly authorizes courts to issue orders in pretrial discovery to protect important rights and interests. Not only does Section 6 circumvent the process for amending the Federal Rules of Civil Procedure that Congress established in the Rules Enabling Act, 28 U.S.C. §§ 2072-2077, it threatens litigants' rights and interests and creates an unworkable procedure for the cases covered by H.R. 5503.

The provisions in Section 6 would prohibit a court from enforcing a protective or confidentiality order that is necessary to protect vital privacy rights. For example, a court could not enforce an order limiting the dissemination of intimate health or other highly sensitive personal information about a plaintiff or any other person whose information is sought in discovery. Nor could a court enforce an order limiting the dissemination of highly sensitive trade secret information about proprietary technology or financial information about any party or other person or entity. Such a restriction is inconsistent with well-established case law in every circuit recognizing the importance of protective orders issued under Rule 26(c), based on a good-cause showing, to protect private and confidential information exchanged in pretrial discovery from being broadcast on the internet and otherwise made public. This section of H.R. 5503 is unnecessary to achieve the bill's purposes and has the potential to do great harm to those already struggling with the effects of the oil spill.

Section 6 of H.R. 5503 also provides an unworkable procedure that would delay and complicate discovery in the very cases that should be handled with expedition and efficiency to provide needed relief to those affected by the spill. The vital role protective orders play in enabling parties to exchange information in discovery efficiently, without the delay caused by requiring detailed involvement by a court, is well recognized. Section 6 would frustrate that role. Parties are usually unwilling to begin discovery unless there is an enforceable protective order in place. Under the provisions of H.R. 5503, a court could not enforce a protective order unless the proponent first proved by "clear and convincing evidence that such enforcement is permitted under subsection (c)," which in turn requires that the enforcement is necessary to public health or safety, and unless the court stated factual findings and conclusions of law relating to that enforcement on the record. Under this procedure, no discovery would occur until after the proponent of a protective order showed by clear and convincing evidence that the order was needed for the documents in question and the court made the findings and conclusions. This procedure would greatly delay discovery. It is also unworkable because it requires the court to rule on the adequacy of the showing and to make the findings and conclusions before the party seeking the documents has been able to obtain them. That means that the court is ruling without the benefit of informed input from all sides, which makes it more difficult for the court to rule efficiently and fairly, further complicating and delaying discovery and further delaying the litigation. Ordinarily, it is the party seeking the documents that is in the best position to inform the court whether the documents subject to the protective order are properly designated as subject to the order. Under Section 6, the court will not have that vital input.

In addition, this section of H.R. 5503 is unnecessary to prevent undue restrictions on documents and information that should be publicly available. Under Rule 26(c), federal courts enter a protective order for materials to be produced in pretrial discovery based on a good-cause showing. The case law makes it clear that courts consider a number of factors, including whether the information at issue is important to public health or safety, whether the litigation involves issues important to the public, the importance of a protective order to the fair and efficient conduct of discovery, and the confidentiality interests of the parties or nonparties. Once a protective order issues and discovery is able to proceed, there are recognized procedures for allowing parties, or third parties, to challenge the application of the protective order to particular documents or categories of documents, or to move to modify the order. In deciding such motions, courts consider whether the information at issue is important to public health or safety as well as other factors specific to each case. The procedure under Rule 26, with the case law in each circuit, allows discovery to be conducted subject to the court's oversight to ensure that protective orders do not improperly prevent the public from learning information that should be available to protect public health or safety. The protective order provisions in H.R. 5503 are unnecessary and would instead create severe problems.

The views in this letter are limited to the provisions in H.R. 5503 that affect the Federal Rules of Civil Procedure and do not address other parts of the legislation. We appreciate your consideration of these views and look forward to continuing to work with you on these vital matters.

Sincerely,

Lee H. Rosenthal
United States District Judge
Southern District of Texas
Chair, Standing Committee on Rules
of Practice and Procedure

Mark R. Kravitz
United States District Judge
District of Connecticut
Chair, Advisory Committee on the
Federal Rules of Civil Procedure

Identical letters sent to: Honorable Steny Hoyer
Honorable John Boehner
Honorable John Conyers
Honorable Lamar Smith

cc: Members of the House Judiciary Committee

TAB
4

Agenda Item
Committee on Rules of
Practice and Procedure
Januar y 2011
Informational

SUBJECT: Federal Judicial Center Activities

The Federal Judicial Center is pleased to provide this report on education and research activities that may be of interest to the Committee on the Rules of Practice and Procedure.

I. Education

A. Update

From June through December 2010, the Center conducted the following programs for judges and court staff:

- 46 travel-based programs for 2,428 participants
- 65 in-court programs for 2,256 for participants
- 26 technology-based programs for 1,457 participants

In addition, the Center provided ongoing production of on-line and printed programs and resources. Detailed information on recent and upcoming Center programs, products, and resources can be found on FJC Online at http://cwn.fjc.dcn/.

B. Highlights

The Center is developing a new two-day program for prospective and new chief district judges on performing their management and leadership responsibilities, to be offered in April 2011. Other new seminars in 2011 will cover case management, handling capital habeas cases, and jury administration and utilization.

Since June 2010, the Center released three new e-learning courses for court staff. (1) The *Interactive Bankruptcy Online Tutorial*, which is a self-paced program on bankruptcy rules and procedures. (2) The *Interactive Orientation Seminar for Federal Judicial Law Clerks*

to help new law clerks understand their responsibilities and the resources available to them. (3) *Understanding the Dynamics of Domestic Violence,* a self-paced course that teaches probation and pretrial services officers and managers how to work effectively with victims and offenders who encounter domestic violence issues.

The Center is involved in training efforts on the Implementation of Evidence-Based Practices (EBP), also noted in the Research update below. In November 2010, five research districts participating in the Center's experimental study of federal district reentry programs received training. Additional EBP programs will be offered in 2011.

Programs conducted in collaboration with the Administrative Office include: two Judges Information Technology training-for-trainers, to assist court staff in teaching judges how to use information technology to perform judicial functions more efficiently; 13 Performance Management workshops and webinars that are associated with the Court Compensation Study Implementation; training presentations at the District and Bankruptcy Court Operational Practices forums; and onsite support for Space and Security training requests for circuit-based in-person programs for unit executives and staff members with space and facilities responsibilities.

Center staff also made presentations on a range of topics at 48 conferences, associations and court events, attended by 3,400 judges and court staff. Of those 48 presentations, 28 were specifically requested on Judicial Security, Web 2.0, and Emerging Technology. These presentations heighten awareness regarding privacy and security risks associated with the use of social media such as social networking, blogs, and wikis.

II. Research

Since the Center's last report to the Committee, the Center completed work on nine major projects, commenced work on four new major projects, and continued work on 47 others. Most are projects requested by Judicial Conference committees. A full listing of Center research projects and activities is available at http://cwn.fjc.dcn/fjconline/home.nsf/pages/967.01. Below are brief descriptions of projects that may be of special interest to the members of the Committee.

Surveys Regarding Disclosure of Brady v. Maryland Material in the United States District Courts. At the request of the Advisory Committee on the Criminal Rules, the Center conducted a survey of all federal district and magistrate judges, as well as all United States Attorney offices, Federal Defenders, and more than 15,000 defense attorneys of record in a sample of recently closed federal criminal cases. The survey was conducted to help inform the Criminal Rules Committee's deliberations about the operation of Rule 16 of the Federal Rules of Criminal Procedure and about variations in pretrial disclosure practices in the federal district courts. Overall, the survey results indicate that there are sharp disagreements between prosecutors and defense counsel, with district judges more or less evenly divided on the need to amend Rule 16.

Case Budgeting Pilot Project Evaluation. At the request of the Committee on Defender Services, the Center evaluated the experiences of the three circuits (2nd, 6th, and 9th) that participated in a pilot of budgeting and case management procedures in capital and non-capital mega cases. The findings will be presented to this Committee at its upcoming

December 2010 meeting. The evaluation determined that pilot programs saved money and achieved high quality defense representation, while providing case budgeting advice to judges and attorneys.

Study of Rule 12 of the Federal Rules of Civil Procedure: Motions for More Definite Statement and Motions to Dismiss. The Advisory Committee on Civil Rules has asked the Center to study Rule 12(b)(6) activity in the district courts, in light of the Supreme Court's decision in *Ashcroft v. Iqbal* interpreting the pleading standards that were set out in *Bell Atlantic Corp. v. Twombly.* The Center is continuing its efforts to identify the outcome of orders responding to motions to dismiss for failure to state a claim under Rule 12(b)(6).

Federal Offender Reentry Programs. In earlier reports, the Center noted it was asked by the Committee on Criminal Law to conduct a multi-year study of federal reentry programs. Five districts have committed to participate in a three-year experimental study that aims to empirically assess the impact of a new policy governing federal reentry programs developed by the Administrative Office's Office of Probation and Pretrial Services. Center education staff and Administrative Office staff designed and conducted a rigorous training program for the study districts prior to the commencement of the study. The Center also conducted a follow-up to its 2008 survey of the 36 districts with already-established federal reentry programs.

Surveys of District and Bankruptcy Courts' Efforts to Assist Pro se Litigants. At the request of the chair of the Committee on the Administration of the Bankruptcy System and with the concurrence of the Bankruptcy Judges' Advisory Group of the Administrative Office, the Center developed and conducted a survey to identify programs and procedures used across the districts to manage filings that involve pro se debtors and creditors. The Center also conducted a

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similar survey requested by the Committee on Court Administration and Case Management of the district courts regarding pro se litigants.

Circuit Practices with Awarding Costs Under FRAP Rule 39(a)(3). The Advisory Committee on the Appellate Rules has asked the FJC to conduct research into the current practices in the circuits for awarding costs under FRAP 39(a)(3). The Committee is especially interested in knowing how often Rule 39 costs have been assessed against an appellee under FRAP 39(a)(3) when the district court's judgment has been reversed, the typical or average cost awarded, and what items were included in the costs consist (i.e., copying costs). The study's findings will be presented at the Committee's spring 2011 meeting.

Bankruptcy Case Weighting Project. At its September 2010 meeting, the Judicial Conference approved new case weights developed by the Center for determining bankruptcy-weighted caseloads per authorized judgeship.

Bankruptcy Courtroom Use Study. As noted in previous reports, as a follow-on to the Center's research and report on the scheduling and use of courtrooms in the district courts, the Center was asked by Court Administration and Case Management Committee to undertake a similar study of courtroom use in the bankruptcy courts. The study is on schedule, with the final study report scheduled to be delivered to this Committee at its December 2010 meeting.

III. Federal Judicial History and International Rule of Law Functions

The Center provides assistance to federal courts and others in developing information, and teaching about, the history of the federal judiciary. The Center's website contains ten units of the Center's Teaching Judicial History project, with materials related to notable federal trials and great debates. The Center recently posted suggestions for judges who want to use the

materials in partnerships with teachers. The guide to research in federal judicial history will be published by the Center later this year.

The Center's Office of International Judicial Relations coordinates its exchanges with the judiciaries of other nations. From April 1 through October 15, 2010, Center staff met with judges and court officials representing over 50 countries, including the Chief Justices of Iraq, Malaysia, and Rwanda, the Minister of Justice from the United Arab Emirates, and a delegation of judicial officials from Libya. The Center also hosted Visiting Foreign Judicial Fellows from China, Korea, Laos, the Philippines, and Turkey.

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TAB
5-A-B

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

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CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

To: Honorable Lee H. Rosenthal, Chair, Standing Committee on Rules of Practice and Procedure

From: Honorable Mark R. Kravitz, Chair, Advisory Committee on Federal Rules of Civil Procedure

Date: December 6, 2010

Re: Report of the Civil Rules Advisory Committee

Introduction

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts on November 15 and 16, 2010. Draft Minutes of this meeting are attached.

The Committee presents no items for action at this meeting. Several matters on the Committee agenda are presented for information and discussion. These projects raise many intriguing and at times difficult — even very difficult — questions. Advance discussion and guidance will help in working toward the best answers.

Discovery: Rule 45

The Discovery Subcommittee, prompted by a series of suggestions from bar groups and other lawyers, began two years ago to study the Rule 45 provisions for trial and discovery subpoenas. A list of seventeen possible revisions was prepared, and gradually winnowed down to the four that have come under the most intense scrutiny. The work has been developed through several conference calls, presentations to the full Advisory Committee, and a "miniconference" with lawyers and judges in Dallas on October 4, 2010. Earlier reports to this Committee have traced this development. The Subcommittee expects to present a draft in April looking toward a recommendation for publication. The four developing proposals address notice to all parties before a subpoena to produce documents is served; transfer of enforcement proceedings; compelling a party to appear as a trial witness; and simplification of Rule 45. A late-revived question asks whether the time allowed to object to a Rule 45 document subpoena should be extended. This question will be studied further, but it remains unclear whether any change will be recommended.

Notice to other parties: The last sentence of Rule 45(b)(1) directs that before a subpoena to produce documents is served, "notice must be served on each party." Advance notice enables the parties to object, to suggest that the subpoena be expanded, and to monitor compliance to ensure access to whatever is produced. The problem lies not in the rule but in the observance. Many lawyers, from many callings, complain that they often do not get notice.

The proposed amendment addresses this problem by moving the notice provision out of subdivision (b)(1) and into a new subdivision (a)(4). The hope is that making the requirement more prominent in the rule will enhance compliance. Those who lack the energy to read through to the end of (b)(1) may at least persist through to the end of (a).

In addition, the proposed amendment directs that a copy of the subpoena be served with the notice. That will advance the purposes of requiring notice and simplify the other parties' responses.

The Subcommittee also considered a further possible change. Notice could be required not only before the subpoena is served, but also after materials are produced in response. In the end, the Subcommittee has concluded that the potential advantages are outweighed by potential disadvantages. A second notice requirement provides one more opportunity to go astray, and to produce corresponding disputes. Nor need it be only one opportunity to go astray — responsive materials often may be produced sequentially, raising questions as to just when and how often notice is required. Disputes could multiply. Disputes lead to questions about sanctions. In the end, the Subcommittee concluded that it is better to leave the other parties with the responsibility for periodically following up to determine what has been produced.

Transferring enforcement proceedings. Rule 45 directs that a subpoena issue from the court where the witness is located. Often the subpoena issues from a court that is not the court where the action is pending. Questions about enforcement against a nonparty go to the court that issued the subpoena. But many circumstances arise in which it would be better to resolve enforcement disputes in the court where the action is pending. Although nothing in Rule 45 seems to authorize transfer, some issuing courts have managed to transfer the enforcement dispute. And there are hints that it is rather common for the issuing court to consult informally with the action court. This proposal would explicitly authorize transfer.

The transfer question relates in some part to the features that may make Rule 45 ripe for some simplification. Posit an action pending in the federal court in Seattle and a witness in Miami. A Seattle lawyer can issue a subpoena in the name of the federal court in Miami, directing a Miami nonparty witness to produce documents or testify at a deposition. If all goes well, the Miami court knows nothing of this event, or of the witness's compliance. But if the witness objects or simply fails to comply, enforcement must be sought in Miami. The Miami court may be, and often is, the better court to resolve the enforcement issues. Many issues are truly local, turning on the circumstances of the witness. Any transfer rule must account for these concerns.

Even issues that seem local, however, may be intertwined with overall management of the action pending in Seattle. The witness may object that the discovery is too burdensome. Whether the "burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case," and so on through the Rule 26(b)(2)(C)(iii) factors, requires close familiarity with the underlying action. (The Rule 45(c)(2)(B)(ii) direction to protect the nonparty against significant expense in responding to a document subpoena does not automatically resolve this question.) The Seattle court may have a case management plan that requires centralized disposition of this and many other discovery issues.

Other circumstances present still more compelling needs for disposition in the court where the action is pending. In a complex action, discovery subpoenas may be served through several different courts. The same question may be raised in two, three, or even more courts. Far better to have a single, consistent decision than to present the same question seriatim to several courts and perhaps to receive different answers.

A discovery issue, for another example, may be still more tightly tied to the merits of the underlying claim. A clear illustration is provided by a recent action brought in a federal court in California complaining of defamation by anonymous internet bloggers. The plaintiff sought to compel an internet service provider in Arizona to identify the bloggers. Similar subpoenas were served on other providers in other federal courts. The First Amendment is thought to provide a right to anonymous blogging, but the right of anonymity can be overcome by showing a prima facie claim. Disposition of the discovery question is bound up with the merits. Resolution by the court where the action is pending seems important.

A successful transfer provision must seek to express the balance between these concerns, mediated by an additional pragmatic concern. The disputes that are primarily local should be resolved by the local court. The disputes that tie to the merits of the action — and on some views, most disputes do — and those that bear on overall coherent case management, often should be transferred. And, for good measure, some observers believe that the rule should guard against the temptation some local courts will feel to use transfer to get rid of problems that do not seem their own.

The formula tentatively adopted to express the standard for transfer is "in the interest of justice." That formula is familiar — it is part of the formula for transferring venue under 28 U.S.C. § 1404(a): "for the convenience of parties and witnesses, in the interest of justice." One question is whether it is wise to adopt only part of the formula. There is always a risk that adopting verbatim a set of words used in another context will lead to a mistaken conclusion that the considerations for transferring a discovery dispute are the same as those for transferring venue. But the convenience of parties and witnesses does bear on the transfer decision. A variety of other possibilities have been suggested. The choice of words will turn in part on the choice whether to imply a preference for or against transfer. If it seems desirable to prefer local decision, "compelling reason" could be required. The familiar "good cause" would suggest a weaker preference. "[W]hen appropriate" might seem neutral.

An alternative to a general standard might be to identify specific factors in rule language. But no list could capture more than a few of the more obvious circumstances, much less express a formula for balancing competing concerns. This alternative is not likely to be pursued.

The Subcommittee also continues to consider the authority to adopt a rule giving a federal court in Seattle power to rule on questions raised by a nonparty witness in Miami. Can a court rule create this limited form of "jurisdiction"? Once the ruling is made in Seattle, how is it enforced? The Subcommittee believes that there is authority to adopt a transfer rule, and that enforcement of the Seattle court's ruling by the court in Miami is appropriate and efficient. It also believes that common sense will readily resolve any issues as to the right of the Miami lawyer for the nonparty Miami witness to address the court in Seattle, the logistics of filing and argument, and any other details that would cause difficulty only to an obstructionist.

Distant party as trial witness: This question was made prominent by the ruling in In re Vioxx Products Liability Litigation, 438 F.Supp.2d 664 (E.D.La.2006). The court found a negative implication in Rule 45(c)(3)(A)(ii) that a subpoena may compel a party or a party's officer to appear as a witness at trial without regard to the Rule 45(b)(2) limits on the place of service. Other district courts have responded to this ruling, some adopting it and others rejecting it. The issue is important, and it deserves a uniform rule. Strong arguments can be made both ways.

The Subcommittee intends to recommend a rule amendment that undoes the Vioxx ruling. Subcommittee members agree unanimously that the Vioxx court mistook the intent of the Rule 45 amendments made in 1991. That conclusion does not dictate a revision that restores the original intent. It remains to be decided whether a court should have power to compel a party to appear as a trial witness. The Subcommittee recognizes the strength of the arguments for recognizing some such power, and intends to present an alternative draft that embodies it. But its recommendation is

expected to restore the rule that a party can be required to attend trial by traveling only from any place where the party resides, is employed, or regularly transacts business in person within the state where trial is held.[1]

The intended recommendation rests on the belief that in-person testimony ordinarily is not especially important in the trial process. Video depositions, or live testimony by contemporary transmission from a different place under Rule 43(a), provide satisfactory substitutes. It also rests on a fear that a broad power to drag party witnesses around the country may be — and has been — misused for strategic purposes. The danger is that top-level persons within a public or private organization will be subpoenaed, despite being less useful witnesses than other people within the organization, in order to impose burdens that conduce to settlement.

Work is well advanced on an alternative draft that would recognize and regulate authority to compel trial testimony by a party or party agents who are not present in the state. The central feature of the draft is that it requires a court order; a party-issued subpoena is not available. The party requesting the order must show a persuasive reason for compelling the testimony, including reasons why other witnesses will not do. (The initial formula expressing these factors borrows the "substantial need" and "undue hardship" terms from Rule 26(b)(3), but there is some concern that transporting the work-product formula to this quite different setting may engender confusion.) The court also must consider the alternatives of relying on a video deposition or t estimony by transmission under Rule 43(a). Further work remains to be done to identify the persons within a party organization who, although not "officers," may be reached by the order. But in any event the order is directed to the party, not the officer or other agent, and sanctions for failure to produce the witness are imposed only on the party.

The question of authority to establish nationwide subpoena practice is similar to the questions raised by the transfer recommendation discussed above and the simplification recommendation discussed below. In all three settings, and most directly in the trial-witness setting, some comfort may be found in Criminal Rule 17(e)(1), which authorizes service "at any place within the United States" of a subpoena requiring a witness to attend a hearing or trial.

The most likely recommendation will be to publish the alternative draft for comment, but in a format and with a transmission letter that make clear the preference for restoring the state-limits reach of a trial subpoena. The ambition is to present an alternative draft so well polished that if public comment and testimony establish the superiority of the alternative approach, the draft may be so close to the mark that it can be recommended for adoption with no more changes than are consistent with adoption without a renewed round of public comment.

Simplifying Rule 45: Rule 45 is long. Some of its provisions are near-verbatim repetitions of provisions appearing in the core sequence of discovery rules, Rules 26 through 37. The failure to understand a provision so simple and so clear as the prior notice provision in Rule 45(b)(1), discussed above, illustrates a broader complaint: many lawyers, particularly those who do not often engage in federal litigation, get lost in attempting to navigate Rule 45's complexities. And a witness confronted with the task of unraveling subdivisions (c) and (d), which under Rule 45(a)(1)(A)(iv) must be included in every subpoena, generally must surrender or consult a lawyer. Even judges and lawyers who encounter Rule 45 problems with some regularity confess that they often have to reread the text carefully to recreate the hard-won understanding produced by earlier readings.

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[1] The 1991 version includes a potential limit on even this reach. Rule 45(c)(3)(A)(iv) provides that on timely motion the court must quash or modify a subpoena that "subjects a person to undue burden." The 1991 Committee Note illustrates this provision: "[I]t might be unduly burdensome to compel an adversary to attend trial as a witness if the adversary is known to have no personal knowledge of matters in dispute, especially so if the adversary would be required to incur substantial travel burdens."

Several approaches to simplification have been considered. One would operate only on Rule 45 itself, dramatically shortening it by eliminating many of the detailed provisions and by governing many questions through simple cross-reference to Rules 26 through 37. This approach, although developed with care through several revisions, was found too risky. Many of the detailed provisions in Rule 45 were added to resolve specific problems that had arisen in practice and that had eluded consistent or satisfactory resolution. Eliminating those provisions would throw litigants and courts back into the same wells of uncertainty, requiring new attempts to emerge. And unadorned cross-reference to the rest of the discovery rules may prove confoundingly opaque. A different approach sought to transfer part or all of the discovery provisions in Rule 45 back to the discovery rules. The final version of this approach transferred the document-production provisions to Rule 34, adding a new subdivision to govern requests addressed to nonparties. The Rule 34 approach is consistent with carrying forward all of the provisions, and occasional obscurities, of present Rule 45. But it also invites revisions for such issues as the time to object or respond, the place of production, enforcement procedure, and the like. It can reduce the total volume of words in Rules 34 and 45 combined by a significant measure. But this approach also was put aside. Practicing lawyers at the miniconference thought the possible advantages would be outweighed by the problems of transition and the inevitable risk of unintended consequences.

The approach to simplification that has survived focuses on what the Subcommittee has come to identify as the "three-ring circus" aspect of Rule 45. Three problems have to be addressed: what is the reach of a subpoena, and what court issues it within those limits; where is performance required; and where what court enforces it. These problems can be simplified by providing that all subpoenas issue from the court where the action is pending. The places of performance provided in present Rule 45 can be carried forward unchanged, although the current draft does add a provision defining the place for producing electronically stored information. Designation of the court responsible for enforcing the subpoena also can remain unchanged, although it is expected that any recommended draft would integrate the transfer provisions described above.

Eliminating the formality that directs that the subpoena issue from the court in the place for performance raises again the questions about nationwide reach addressed with the proposed transfer provision. The Subcommittee believes these questions are not troubling, but continues its research.

Time to object: One of the questions the Subcommittee considered and put aside addresses the provision in Rule 45(c)(2)(B) that requires an objection to a document subpoena to be served "before the earlier of the time specified for compliance or 14 days after the subpoena is served." The question has been renewed, and will be considered further. The more obvious variations would be to set a minimum time allowed for compliance, although that might create separate problems; to allow an objection within the time set for compliance if that is longer than 14 days; or, at least for discovery subpoenas, to treat nonparties in the same way as parties are treated for Rule 34 document requests — the time to object or to respond by stating that production will occur is 30 days. Additional practical advice on these questions will be welcome.

Preservation and Spoliation

The 2006 amendments adding express provisions for discovering electronically stored information were adopted in fear that they might be made obsolete by evolving technology before they could even take effect, and in recognition that inevitably they must be revisited with continuing developments in the hard- and software of computer-based information. Four years after the effective date, the 2006 rules seem to be contributing to effective discovery practices, particularly when employed in a spirit of party cooperation and effective judicial management. That positive conclusion does not belie the need for continuing study and preparation for eventual general revision. For the moment, however, attention has focused on the problems raised by the duty to preserve information for discovery and trial and the penalty of spoliation sanctions for failing to preserve. Those duties existed, and exist still, in a world of paper documents. But destruction is the natural course of life for much electronically stored information. Programs are designed to discard unused

information. Dynamic data bases are irretrievably changed simply by using them. Temporary backup systems are scheduled for regular, often short-term recycling. Merely turning on a computer can write over information that was released from protection by a "delete" command but retained in storage subject to overwriting. Manifold other means of loss abound.

Uncertainties as to the duty to preserve and fear of spoliation sanctions have generated great concern in large organizations that process huge volumes of information. Some of these concerns are now reflected in the design of computer systems not only to meet the organization's operating needs but also to address the needs of litigation. However carefully the systems may be designed, human decisions still must be made to determine when a litigation-oriented duty to preserve arises and to respond by tailor-made preservation responses. Many voices have proclaimed that uncertainty leads to vastly expensive over-preservation. And occasionally a voice is heard observing that the same duties and uncertainties apply to individuals; the difference is that an ordinary personal injury victim, employment discrimination plaintiff, home mortgage foreclosure target, and others, have not the slightest idea of their potential obligations.

Of the many excellent panel presentations at the Duke Conference last May, the panel on preservation and spoliation was the only one to present a consensus recommendation. Although many details went beyond possible consensus, the panel presented a chart of the elements that might be incorporated in a preservation rule. They urged that adoption of a directing and protecting preservation and spoliation sanctions rule is the most important task the rules committees can undertake. Recognizing that the duty to preserve often arises before litigation is actually filed, and understanding the doubts whether a general rule of practice and procedure for the federal courts can properly address conduct before an action is filed in a federal court, they urged that the urgency of the need commands bold action. Their suggestion of elements for a rule is attached.

Additional information is needed. Andrea Kuperman, Judge Rosenthal's rules clerk, has researched the case law on preservation obligations in all the federal circuits. The law is consistent on some issues, particularly the abstract definition of the circumstances that raise a duty to preserve. It is inconsistent on other issues, particularly the degrees of culpability and prejudice appropriate to calibrating spoliation sanctions. Katherine David, rules clerk locum tenens, has worked on an outline of other laws that impose preservation requirements. Emery Lee has begun a project to determine the actual incidence of spoliation litigation and sanctions. The results are still preliminary, but strongly suggest that spoliation issues are actually litigated in only a tiny fraction of all federal actions, while sanctions are still rarer. The slides prepared for his presentation to the Advisory Committee in November are attached. Earlier FJC work done to support the Duke Conference suggests that spoliation issues arise rather more frequently, perhaps in 2% to 3% of all federal actions, but without often leading to motions and dispositions. Many other organizations are pursuing empirical work that should shed further light, not only on experience in litigation but on the all-important questions of pre-litigation behavior. It will be very difficult to separate out overall information preservation costs incurred by large organizations from the marginal costs incurred in redesigning information systems to anticipate the general needs of litigation and in implementing preservation programs when circumstances trigger a specific duty to preserve. But sophisticated efforts are under way, and there is reason to hope for valuable insights.

The Subcommittee has begun work on preservation and spoliation issues. It is not clear whether it will be possible to develop rules provisions that will be of any real use. Nor is it entirely clear whether there is authority to adopt a good rule if — as seems highly likely — a rule will be useful only if it addresses the duty to preserve before any action has been filed. The question of authority, however, may depend on the nature of the rules that are developed. As difficult as these questions are, the importance of the problems justifies intense effort. Reports abound that large organizations are terrified by litigation preservation obligations. The fear of case-altering sanctions is said to induce disproportionately extensive and expensive preservation efforts. Lawyers agree that fear of sanctions drives behavior, but may add that good behavior is much encouraged by reminding

clients that a good case can be destroyed by preservation missteps. Without knowing whether any rules can be crafted that will warrant a recommendation for publication, the effort will be made.

Faced with these difficulties, the most that can be done now is to sketch the most obvious issues that might be addressed. Many of the issues can be gathered in three main groups: what triggers an obligation to preserve? What is the scope of the obligation once it arises? And what sanctions are appropriate for what types of failure to preserve information that must be preserved?

The federal decisions are unanimous on one point. A duty to preserve information for litigation can arise before an action is filed. The general test is that the duty arises when there is a reasonable expectation of litigation, or probable litigation. One challenge will be to determine whether a rule could be any more specific than this general test. The best reason to address this issue may be as part of provisions on sanctions. Most particularly, it may be possible to frame expanded "safe harbor" provisions that, among other considerations, take account of an organization's overall compliance strategies. Good-faith implementation of a reasonably designed compliance program could be an important element in the sanctions calculus.

Identification of the circumstances that trigger a duty to preserve is closely tied to the scope of the ensuing preservation. The difficulties encountered by a large organization are noted below. But it is important also to remember the challenges that face individual litigants. One example suffices. A personal-injury victim may exchange e-mail messages, text messages, and social-network-site postings with a variety of friends and acquaintances about the events giving rise to the injury, the nature of the injuries, the progress of recovery, and so on. The thought of litigation may have been present during all of these exchanges. The thought of an obligation to preserve may not have occurred. One question is whether it is feasible or desirable to adopt rules that distinguish between more and less sophisticated parties, or at least between large-scale complex litigation and more routine actions.

The scope of the duty to preserve presents the most difficult questions during the period before an action is filed. After filing, ample tools exist for agreeing on preservation reasonably proportional to the needs of the action. The most direct provision appears in Rule 26(f)(2), directing the parties to "discuss any issues about preserving discoverable information." Additional provisions appear in addressing scheduling orders, Rule 16(b)(3)(B)(iii), pretrial conferences, Rule 16(c)(2), and protective orders, Rule 26(c). At this stage, the most important element may well be reasonable cooperation of the parties, encouraged by hands-on case management. Many participants in the Duke Conference repeatedly emphasized the importance of these elements, while lamenting that they are not always encountered.

Before an action is actually filed, the first uncertainty as to the scope of preservation arises from indefiniteness of the subject of whatever action — if any — is eventually filed. Suppose an automobile manufacturer receives a complaint that one of its automobiles left the road, rolled over, and caused injuries. What aspects of design, manufacture, distribution, marketing, and post-sale behavior might it reasonably expect to be involved? Whatever complaints may be made about the guidance provided by notice pleading once an action is filed, this sort of "notice" may be singularly unhelpful. And as an actual filing becomes more imminent, it may be that more precise information about the nature of the claims becomes available. Does the scope of the duty to preserve shift and perhaps expand?

A more general question would attempt to tie the scope of preservation duties to the scope of discovery. It is natural to begin by invoking the broad scope of discovery defined in Rule 26(b)(1), including the discovery relevant to the subject matter of the action that may be ordered for good cause. But the burdens of preservation may suggest that account also should be taken of the proportionality concerns reflected in Rule 26(b)(2). A narrow example would ask whether there is a duty to preserve electronically stored information that is not reasonably accessible because of

undue burden or cost, Rule 26(b)(2)(B). The more general question asks whether a party can safely rely on its own interpretation of the cost-benefit calculus mandated by rule 26(b)(2)(C)(iii).

Whatever the subject of the information that should be preserved, what sources should be investigated? Discussions often are framed in terms of identifying "key custodians," those people whose files and computer systems are most likely to contain relevant information. Pleas have been made for a rule that sets a specific number of key custodians that need be identified and directed to preserve, but the variety of circumstances weakens that hope dramatically.

Once the subject and sources are identified, how far back in time should the preservation obligation extend? The design of just one component of the automobile involved in an accident, such as the braking system, may have evolved over a long series of gradual changes. And for how long must the information be preserved — is it enough to make a guess as to the limitations periods that would govern the claims, as affected by the substantive theories and the choice of law as affected by the choice of court?

Sanctions for failing to preserve, whenever the duty arose and whatever its scope, are affected by the clarity of the duty, the intent and degree of care exercised, and the consequences for litigation by parties whose discovery and trial evidence have been thwarted. This interdependence is, perhaps paradoxically, the source of suggestions that perhaps the most promising prospect for adopting useful rules is to focus on sanctions. Defining the circumstances that warrant sanctions defines the duty to preserve by backward implication, and focuses directly on the fears that are so often expressed about preservation obligations.

The first step in thinking about sanctions is to remember the need for care in defining what is a "sanction." A failure to preserve may be met, for example, by an order extending the time for discovery. Or the order may award the costs incurred by the requesting party in attempting to reconstruct the lost information from other sources. Are these orders sanctions? Or are they simply remedies that should be available no matter how innocent the loss?

The next step is to address the central issues identified in the cases — the degree of fault in failing to preserve, and the extent of the prejudice caused to other parties. This is the area in which the cases show dramatic differences, primarily in determining what sanctions are appropriately imposed for what degrees of culpability.

The first step, identifying the degree of prejudice, is inevitably frustrating. Measuring the importance of information that is unknowable because it is unavailable is chancy. One indication may be the degree of fault — intentional destruction supports a relatively sturdy inference that the information was not only unfavorable but also important. But measuring the degree of care may be affected by obvious importance, even in the face of innocent intent. Suppose the automobile was owned by the driver, who allowed it to be compacted as junk. It cannot be known whether examination of the wreck would have provided valuable information as to the cause of the accident. But the need to preserve the opportunity to examine should be apparent. Sanctions might be measured accordingly — and distinctions drawn between the owner and a passenger.

The degree of fault may be approached almost separately, apart from the degree of prejudice. Intentional destruction may deserve severe sanctions. The most severe are "case terminating" by dismissal or default. Some form of spoliation instruction, either stating a presumption or permitting an inference of relevance and importance, seems less severe, but many lawyers view the effect as close to conclusive. There may be some uncertainty in drawing inferences of intent in some cases, but once intent is found severe sanctions seem warranted. There is little disagreement on that score.

Disagreement about sanctions arises at the next step. Suppose a party failed to exercise reasonable care in preservation? Or failed to exercise the level of care that a normally careless person would exercise — was grossly negligent? And what sort of conduct counts in these assessments — some case law finds that failure to initiate a prompt litigation hold is, without more, gross

negligence. Whether conduct is grossly negligent or only negligent, what sanctions are appropriate? Should that depend on the perhaps uncertain estimate of the degree of prejudice?

Sanctions could be addressed through Rule 37(e), and perhaps other rules. For example, a rule could provide that reasonable preservation conduct does not warrant sanctions even if discoverable information was lost, and that intentional destruction or failure to preserve does warrant sanctions. To be safe, it might also recognize the ambiguity of sanction decisions in the intermediate zones of negligence and serious negligence. A rule expressed in these terms would not directly establish rules of conduct for pre-filing preservation. It might be, however, that it would provide an important degree of comfort to those litigants who are sophisticated enough to worry about preservation obligations. Uniform federal standards might influence state-court standards, enhancing the benefits.

These questions will not soon become the subject of recommended rules. But progress toward determining whether to recommend new rule provisions, and what they might be, will be advanced by any suggestions that can be provided.

Rule 26(c)

The protective-order provisions of Rule 26(c) have been considered at periodic intervals since the conclusion of a years-long effort in the mid-1990s that included two rounds of public comment and concluded with a decision that no revisions were needed. Current research and reconsideration have led to a similar conclusion. The case law is remarkably uniform across the circuits, and seems to express proper rules on all of the subjects that have come up for consideration. It would be possible to express these rules more directly in the text of Rule 26(c). But the possible advantages are offset by the risk of unintended consequences, both in adopting new rule text and in the changes in rule text that might be made as a proposal passes through all stages of the Enabling Act process, concluding with action or inaction by Congress. Although continuing practice will be carefully monitored to ensure that practice is not veering toward excessive — or inadequate — protection, no proposals are anticipated in the near future.

Pleading

Beginning with the Twombly decision in 2007, and spurred further by the Iqbal decision in 2009, pleading standards have been moved from a continuing but inactive status on the agenda to active consideration. Active consideration does not imply a plan for imminent rules proposals. To the contrary, it is better to wait patiently while lower courts work through the ways in which pleading practice should be adjusted to meet the concerns expressed by the Supreme Court. Filtering through the fine sieve of thousands of pleading decisions may well produce better results than could be achieved by attempting to formulate and express revised standards in rule language. Absent some external shock, the Advisory Committee prefers to examine developing practice carefully for some time to come. If experience shows the value of new rules, the revisions will be better supported than any that could be achieved by immediately starting the process with specific proposals.

One sign that appellate courts will contribute to refining pleading standards at a steady pace is provided by revised Second Circuit Local Rule 31.2(b), taking effect on December 15, 2010. This rule provides an expedited appeals calendar for appeals from "threshold dismissals," including — among others — an order dismissing a complaint solely for failure to state a claim upon which relief can be granted. The appellant's brief is due 35 days from notification the case has been placed on the expedited calendar, the appellee's brief is due within 35 days after that, and a reply brief may be submitted within 14 days after that. It seems likely that expedited decision will often follow expedited briefing, expanding the lessons to be contributed to any effort to revise the rules.

The most important question is whether the preference for vigilant delay is well founded.

Two major bodies of work support the ongoing survey of developing practice. Andrea Kuperman continues to update her extensive review of evolving case law, focusing primarily on the

courts of appeals. The Federal Judicial Center is well along with a rigorous empirical evaluation of experience with Rule 12(b)(6) motions to dismiss for failure to state a claim. The project is designed to measure the frequency of motions to dismiss in periods immediately before the Twombly decision and shortly after the Iqbal decision. The rate of granting the motions is included, as well as the frequency of granting leave to amend, actual amendments, and — when the information is available — the fate of the amended pleadings. The work is painstaking, but will provide invaluable information when it is completed. It should be particularly useful in separating orders that dismiss an entire action on the pleadings from orders that dismiss only parts of an action. Dismissal of only some claims — or even some parties — leaves room to restore the parts that have been dismissed if further proceedings on the parts that remain support a sufficient complaint.

Whatever the outcome of the FJC project and other empirical projects, the critics of the Twombly and Iqbal decisions are not likely to be satisfied. Measuring the impact on actions actually filed does not reveal whether other potential and worthy actions were not filed for fear of dismissal on the pleadings. Nor, if there is any increase in the rate of dismissals, will the data speak to the value-laden questions whether the dismissed plaintiffs should have had access to discovery to garner information needed to plead what may be valid claims.

Champions of elevated pleading thresholds can frame similar challenges. If the data show that motions to dismiss are made more often and that a higher proportion of the motions are granted, that may be seen as only a beginning. It can be urged that too many actions still slip through into discovery, imposing unwarranted costs. Serious proposals have been made that at least as articulated, the Twombly and Iqbal decisions do not raise the threshold high enough.

The central question is not one of pleading etiquette alone. The intense debate focuses on how much information a plaintiff must have to be entitled to invoke a court's assistance. The only reflection on this question in the present rules appears in Rule 11(b)(3): the signature on a pleading certifies that "the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." Is this the right standard? How far can administration of this standard, or a revised standard, account for categories of cases in which defendants typically control access to critical information — cases often characterized by "information asymmetry"? Can the appropriate standard for initiating (or defending) litigation be better expressed in the rules that focus more directly on pleading standards, Rules 8 and 9?

Deliberations of these questions are reflected in several sketches created to illustrate some of the most obvious alternatives. A memorandum describing the sketches is attached.

Looking first to Rule 8(a)(2), the sketches recognize that all choices should remain under consideration. The range of possibilities is broad. At one end, a rule could be devised to express the literal meaning that never was given to the "no set of facts" dictum in Conley v. Gibson. At the other end, rules could be devised to require greater — even far greater — fact detail than seems to be required by the Twombly and Iqbal opinions or by the legions of cases interpreting them. Choosing among these alternatives, if a choice must be made, will affect the fundamental role of private adversary litigation in protecting individual rights and in enforcing public values that public enforcers may lack the resources to enforce fully. Expressing the choice in a revised Rule 8(a)(2) will be difficult, and inevitably would be followed by a period of renewed uncertainty.

An alternative to modifying the general standard expressed in Rule 8(a)(2) might be to expand the categories of substantive claims that are subject to specific pleading requirements. Most of the focus is on adding new categories of claims to Rule 9(b), which directs that "a party must state with particularity the circumstances constituting fraud or mistake." Prominent candidates include cases involving official immunity or conspiracy, the subjects of the Iqbal and Twombly decisions. The possibility of requiring "heightened pleading" in this fashion has been considered intermittently since the Leatherman decision rejected heightened pleading in 1993. The possibility remains under

consideration, but has encountered at two least two concerns. One concern is that singling out categories of claims by substantive theories strains the limits of a process that is not to abridge, enlarge, or modify substantive rights. The other concern is that it will be difficult to determine which substantive claims might be listed, and whether a single level of particularity is appropriate to each. The list, moreover, could grow long.

A contrary approach also might be considered, identifying categories of substantive claims that are favored by pleading standards less rigorous than ordinary standards. This approach is subject to the same difficulties as attend attempts to single out specific categories for heightened pleading obligations. It may be subject to additional objections. It has not yet received serious consideration.

A still different approach to particularized pleading might be to develop a rule depending on case-specific judicial control. The particularized statement procedure of Rule 12(e) could be expanded beyond its present narrow limits to become a tool that allows a judge to direct pleading in sufficient detail to enable effective case management. This approach was studied a few years ago and put aside for fear that ill-founded motions would become a routine practice. It may deserve further consideration.

Other approaches focus more directly on one of the animating concerns underlying the Twombly and Iqbal decisions, the integration of pleading with discovery. The Court was clearly concerned that lax pleading standards may enable plaintiffs to inflict disproportionate discovery burdens in pursuing unfounded claims. This concern must be weighed against the prospect that well-founded claims may rest on facts known only to the defendant. It may be possible to devise rules that support tightly focused discovery designed to support a relatively detailed complaint without imposing severe burdens on the intended defendant. Many variations are possible. Some states provide for discovery to aid in framing a complaint before an action is filed. This possibility was considered and rejected twice before the Twombly and Iqbal decisions, but may deserve renewed consideration. Or a plaintiff might be allowed to file an initial complaint that identifies facts it is unable to plead without discovery — access to discovery as to those facts might be available as a matter of right, or only with court permission. Or "pleading discovery" might be deferred until there is a motion to dismiss; discovery could be integrated with the motion either by directing the movant to specify what facts need to be pleaded in greater detail or by leaving it to the plaintiff to respond by listing facts it wants to discover in aid of an amended complaint. Yet other possibilities might be devised.

Pleading: Legislative Proposals

Twombly-Iqbal Bills: A year has passed since the last report that bills have been introduced in Congress to supersede the pleading decisions in the Twombly and Iqbal cases. Revisions and new bills have been introduced since then. The central features of the bills are similar. In one way or another, the purpose is to restore pleading practice to what it was on May 20, 2007, the day before the Twombly decision. And the role of the Enabling Act process is expressly recognized by providing that the reestablished pleading practice will terminate upon adoption of new pleading standards through the Enabling Act. The Rules Committees' response embraces the recognition of the Enabling Act process, but also urges that legislation appears unnecessary and very risky. The lower courts are working their way toward an understanding of what the Twombly and Iqbal decisions mean; there is little sign of problems that might warrant rushing to respond by means faster than the designedly deliberate pace of the Enabling Act. And the courts' progress toward the next thoughtful step would be disrupted by the doubts and uncertainties that must inevitably follow any available legislative formulation.

Other Pleading Bills: Other bills address pleading standards or closely related procedures in specific kinds of cases. Two recent bills are attached.

The first, S. 3728, 111th Cong. 2d Sess., amends the design-protection statute, 17 U.S.C. § 1301 et seq., primarily to establish protection for fashion designs. Section 2(g) amends § 1321 by

adding a new subsection (e) requiring a claimant in an action for infringement to "plead with particularity facts establishing" design protection, infringement, and availability of the design "in such location or locations, in such a manner, and for such duration that it can be reasonably inferred from the totality of the surrounding facts and circumstances that the defendant saw or otherwise had knowledge of the protected design." The court is directed to consider the totality of the circumstances in considering whether a claim for infringement has been adequately pleaded.

The second bill, S.____, is inspired by the "anti-SLAPP" statutes adopted in several states. "Strategic Lawsuits Against Public Participation" are the target. The fear is that litigation is brought to stifle the exercise of free-speech rights. Section 4 is broad and brief enough to be quoted in full: "Any act in furtherance of the constitutional right of petition or free speech shall be entitled to the procedural protections provided in this Act." Section 5 provides a "special motion to dismiss." The movant must make "a prima facie showing that the claim at issue arises from an act in furtherance of the constitutional right of petition or free speech." If the movant carries this burden, the responding party has the burden "to demonstrate that the claim is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment." Filing the special motion stays discovery proceedings unless the court orders specified discovery. The court is directed to provide an expedited hearing, and to issue a ruling as soon as practicable. Perhaps in an effort to clarify the "prima facie showing" language, this subsection provides that "[t]he parties may submit the pleadings and affidavits stating the facts upon which the liability or defense is based." Dismissal "shall be with prejudice." The movant has a right of immediate appeal from an order denying the special motion in whole or in part. (There is also a special motion to quash discovery, request, or subpoena for "personally identifying information" sought in connection with an action arising from an act in furtherance of the constitutional right of petition or free speech. One apparent application would be to deny discovery aimed at identifying an anonymous blogger.)

The pleading procedure provided by the fashion-design statute is substance-specific, as part of the original legislation creating the new right. The anti-SLAPP bill presents somewhat different questions, but again the tie between new procedures and substance is unmistakable. The special motion to dismiss includes elements that are familiar from other legislation, such as the automatic stay of discovery. Provisions that establish docket priorities and direct prompt decision are familiar from past bills and not a few laws. But there also are manifest ambiguities that would be ironed out — if at all — only after a considerable period of uncertainty. What is a "prima facie showing"? Just what blend of pleading and summary-judgment practice is contemplated? What is the standard of decision — the court is directed to explain the reasons for granting or denying the motion, but that does not explain what reasons are appropriate. Does the provision that dismissal shall be with prejudice imply that leave to amend cannot be granted?

These issues are similar to those presented by many bills. Most of them do not become law. Some do. The Rules Committees are often asked for comment. It may be useful for the Rules Committees to develop a general response that describes and gives examples of the problems created by legislatively imposed pleading standards, both in Rules 8 and 12 and in specific categories of cases, such as anti-SLAPP suits. It may not be satisfying to say continually that Congress should not enact rules of procedure, that it should honor its longstanding deferral to the resources and wisdom of the Enabling Act process. And even if Congress defers, what are the Rules Committees to do if they are uncertain whether specific substantive rights deserve or require departures from the "general rules of practice and procedure" contemplated by § 2072(a)? For that matter, how well will this approach work, for how long, if the Committees regularly conclude that it is better to stick with the general transsubstantive rules? And at what point in the legislative process should the Committees ask for deference — so they can consider every procedure proposed in every bill, no matter how uncertain the prospects for enactment? Only after enactment? At some indeterminate point in between?

An alternative to considering each proposal in the Enabling Act process would be to attempt to provide help to Congress in drafting the best possible legislation. But how is that to be done? It

would hardly do to pursue the complete process through consideration by the Supreme Court and submission to Congress, not as adopted rule but as legislative advice. At what point would the process be cut short? Is it even feasible, or desirable, to ask a full Advisory Committee to make recommendations? If not — and "not" seems the better answer — how is the advice to be framed? What are the means of offering or pressing it? How can the Committees be protected against political efforts to gain support by proclaiming Committee approval for provisions the Committees would never approve?

Clear-cut answers to these and a host of related questions may not be possible. But it may be useful to engage in an open discussion of these problems, now and into the future. Any guidance that can be provided, however general, will be useful.

Duke Conference Subcommittee

A Subcommittee chaired by Judge John Koeltl has been formed to carry through the impetus for further work developed at the Duke Conference last May. The welter of ideas generated at the Conference suggest four major paths to follow. Many ideas fit easily within present rules, and focus on the need for fostering best practices by education of the bench and bar, development of manuals and pocket guides, and similar efforts. Other ideas may provide a foundation for pilot projects. Others may provide a focus for further empirical research. And still others may provide an impetus for revising the Civil Rules.

The Subcommittee began its deliberations by asking whether the time has come to abandon the basic framework established when the Civil Rules were first created in 1938. Participants at the conference provided general and rather strong support for carrying forward the basic elements of notice pleading, searching discovery, and summary judgment. It is always important to ask whether general acceptance rests on familiarity, on the need to believe that what we do as lawyers and judges is worth doing and is done well, and on the difficulty of suggesting worthy alternatives. But it does not seem the time has yet come for the next major revolution in civil procedure.

The Federal Judicial Center is hard at work on education programs for judges. It is revising pocket guides to reflect developing best practices. And it has had a hand, in cooperation with the Committee on Court Administration and Case Management, in developing the newly released Second Edition of the Civil Litigation Management Manual. The Manual is maintained in an on-line version, and it may prove possible to incorporate some of the good ideas generated at the Duke Conference into the Manual on an ongoing basis. Initiatives are under way to determine how best to offer ideas to CACM for its consideration.

Pilot projects can be useful in testing new procedures before adopting them for general use. It is important that a pilot project be planned in ways that facilitate careful empirical evaluation of the results, so that evaluation does not depend on the general impressions of those most immediately involved. Here too the Federal Judicial Center can provide great support in aid of rigorous design and evaluation. The quest for possible subjects is under way.

Empirical projects are being pursued by independent groups. Several are sponsored by the Institute for the Advancement of the American Legal System, whose earlier projects provided support for many ideas presented at the Duke Conference. Their work in examining state-court procedures and comparing them with federal procedures has been an important source of information and will continue to provide important information. The RAND Institute and other groups also have contributed valuable information and will continue to do so. Still other groups, some of them bar groups, also will help.

The number of rules proposals is broad. Many of them focus on pleading and discovery. Some of the discovery questions are being considered by the Discovery Subcommittee chaired by Judge David Campbell, as described above. Others will be studied in the future. Many other proposals addressed pleading standards, presenting questions that in part are independent of

discovery practice but also are in part interdependent with the role of discovery. The modes of pursuing pleading questions and the variety of discovery questions will likely involve subcommittees, most obviously the Discovery Subcommittee and the Duke Conference Subcommittee.

Many other rules are touched by suggestions made at the Conference, beginning with Rule 1. A "menu" of the more workable suggestions is attached to illustrate the range of possibilities, including many of the more specific discovery proposals. The list is not complete; worthy candidates for inclusion will be welcome.

Pattern Discovery

One of the ideas presented at the Duke Conference was that discovery practices would benefit from development of standard interrogatories and document requests that are available for routine and presumptively proper use in specific categories of litigation. A team formed by the National Employment Lawyers Association, including strong representation of both plaintiff and defense lawyers, has begun work on drafting models for individual employment claims. If models acceptable to both sides can be developed — and they have high expectations of success — they may provide an occasion for a pilot project. Other means of implementation may be found. And success may well spur similar efforts by lawyers who specialize in other areas of litigation. It is not clear whether or when this work will lead to revisions in the Civil Rules, but the Advisory Committee is paying close attention to the work.

Civil-Appellate Rules Issues

The Appellate Rules Committee and the Civil Rules Committee have formed a joint subcommittee to study questions that overlap these sets of rules. Two proposals are under consideration.

The first proposal involves Appellate Rule 4, addressing possible uncertainties as to appeal time when a court enters an order granting a post-judgment motion that has suspended appeal time but the order contemplates action that may not be completed before appeal time has run out if the order granting the motion restarts appeal time. It may be that an eventual recommendation as to Rule 4 will suggest parallel revisions of Civil Rule 58. These questions may be resolved soon.

The other proposal addresses the question of "manufactured finality." A party may wish to appeal an important ruling that does not lead to a final judgment and that does not lead to appealability under such familiar means as a partial final judgment under Civil Rule 54(b) or interlocutory appeal by permission under 28 U.S.C. § 1292(b). It seems to be generally accepted that an appealable final judgment can be "manufactured" by securing dismissal with prejudice of every claim presented by every party to the action. Most courts refuse to allow a would-be appellant to manufacture finality by dismissing other claims without prejudice. The middle ground that remains under study involves the question of "conditional prejudice." Should a party be able to establish appealability by dismissing all claims with prejudice, so that affirmance will conclusively end the action, but on terms that allow the dismissed claims to be revived on reversal of the ruling that spurred the appeal? This question is intriguing and difficult. It is being actively pursued.

TAB
5-C

Pleading-Discovery Approaches

This memorandum provides an incomplete and preliminary overview of some of the approaches that might be considered in reacting to the continuing expressions of concern about the development of pleading practices in response to the Twombly and Iqbal decisions. Incomplete both for want of imagination and for fear of unseemly proliferation. Preliminary because practice continues to evolve, and more importantly because even the first rigorous efforts to evaluate practice are still under way.

The Federal Judicial Center remains hard at work on its project. Tentative evaluations may be available in time for the November meeting, but final analysis will require more time.

Andrea Kuperman's massive survey of lower-court decisions, focusing primarily on the courts of appeals, continues to grow. Many will find it — at least in large part — reassuring. But not even scores of appellate opinions can provide clear evidence of what is happening in law offices and in the district courts. It is easily possible that in the end the cases will seem to have done as good a job of integrating the Supreme Court's pronouncements into working practice as could be done by amending any Civil Rule. But it is important to continue to focus on these questions so as to be ready to propose rule amendments if the need appears.

PLEADING: CLAIM

An obvious place to begin is with Rule 8(a)(2). Even if some need appears to propose rule amendments, Rule 8 must be approached carefully. No matter what words might be chosen, the message would be ambiguous in ways that a Committee Note could not cure. Even if it were announced that the new language was intended to enshrine exactly the meaning of the Twombly and Iqbal opinions as elaborated by the lower courts, disputes would remain as to just what that meaning might be. If instead the purpose were to redirect in some way the paths taken by the lower courts, greater uncertainty — and likely some real confusion — would follow. The manifest vulnerabilities of almost any Rule 8 proposal would support cogent protests by any group that feared adverse effects, and there might be many such groups. Still, Rule 8 must hold a high place on any agenda for addressing pleading standards.

Restore What Never Was: Some of the reactions to the Twombly decision seem to ask for restoration of the dictum in Conley v. Gibson that a complaint may be dismissed for failure to state claim only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." The plea for restoration in turn seems to ask that these words be taken literally. Most courts, at least, did not take the literal meaning. But Rule 8 might be redrafted in an attempt to restore a standard that never was: "a short and plain statement giving notice of the claim."

Restore What Was: A more realistic approach might attempt to restore pleading practice as it was on May 20, 2007, the day before the Twombly decision. This approach is more realistic only if it is accepted that there can be no precise definition of the practice in place at the time Twombly was decided. The idea would be to "go back to doing whatever it was you were doing, and continue to develop pleading practice without regard to anything in the Twombly or Iqbal decisions that might point you in a different direction." Even then it is difficult to believe that lower courts, recalling the Twombly and Iqbal opinions, could in fact recreate whatever they would have done had those cases never gone to the Supreme Court. But the attempt could be made. Two simple drafting possibilities are:

Republish present Rule 8(a)(2), with a Committee Note disavowing plausibility, context, judicial experience, and common sense. Explaining that it was messy, all those things counted, but it doesn't do to say so.

"a short and plain statement of the claim, showing that the pleader ~~is~~ may be entitled to relief."

"Notice plus": The ABA Section of Litigation paper, "Civil Procedure in the 21st Century" proposes this as a mid-ground between their perception of Twombly-Iqbal standards and the notice pleading practice that prevailed on May 20, 2007:

"A complaint shall allege facts based on knowledge or on information and belief that, along with reasonable inferences from those factual allegations, taken as true, set forth the elements necessary to sustain recovery."

Twombly-Iqbal in Rule Speak: Another approach would reflect basic agreement that the time had come to raise pleading standards to some extent — that the Court was right to make the attempt, and also right to express the new approach in capacious language leaving the way open for lower-court improvisation on the way to hammering out new standards through a common-law process. Although the opinions are written as opinions, not in an attempt to mimic rule language, some of the key words could be absorbed into Rule 8. These are among the possibilities:

"a short and plain statement showing a plausible claim for relief."

"a short and plain statement of facts and context showing the pleader is entitled to relief"

"a statement of non-conclusional facts, direct or inferential, showing the pleader is entitled to relief"

"a short and plain nonconclusory statement showing the pleader is entitled to relief"

"a short and plain statement of a transaction or occurrence showing * * *."[1]

"a short and plain statement of acts or events showing * * *"

"a short and plain nonconclusory statement of grounds sufficient to provide notice of (a) the claim and (b) the relief sought"[2]

"a short and plain statement, made with particularity, of all material facts known to the pleading party that support the claim creating a reasonable inference that the pleader is plausibly entitled to relief," defining "material fact" as "one that is necessary to the claim and without which it could not be supported."[3]

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[1] An early draft of Rule 8(a)(2) required a "statement of the acts and occurrences upon which the plaintiff bases his claim or claims for relief." Without "showing that the pleader is entitled to relief," this would be quite relaxed.

[2] This is the proposal of the New York State Bar Association Special Committee on Pleading Standards in Federal Litigation; see letter of July 13, 2010, Samuel F. Abernethy, Esq., to Judge Mark R. Kravitz. Bringing "notice" into rule text is evocative, perhaps too evocative — it may imply a more general relaxation of pleading standards than actually existed before Twombly and Iqbal.

[3] This is the proposal of Lawyers for Civil Justice, DRI, the Federation of Defense & Corporate Counsel, and the International Association of Defense Counsel.

More than Twombly-Iqbal: "The party that bears the burden of proof with respect to any claim or affirmative defense must plead with particularity all material facts that are known to that party that support that claim or affirmative defense and each remedy sought, including any known monetary damages. A material fact is one that is essential to the claim or defense and without which it could not be supported. As to facts that are pleaded on information and belief, the pleading party must set forth in detail the basis for the information and belief."[4]

Variations on Facts: Although the label is likely to prove controversial, Rule 8 could be pushed in the direction of something that could be called "fact pleading." The second of the three variations shown here approaches Code pleading; the first and third are designed to make it easier to disclaim any intent to revive indeterminate distinctions between "fact," "ultimate fact," and "evidence."

"a short and plain statement of facts showing that the pleader is entitled to relief."

"a short and plain statement of facts constituting the claim"

"a short and plain statement of the claim, including facts showing that the pleader is entitled to relief"

Elements Pleading: Occasionally it is suggested that a pleader should be required to plead the elements of the claim: "a short and plain statement of the elements of the claim."

Pre-filing pleading: Alan Morrison's Duke Conference paper proposes an approach to situations in which the defendant has control of fact information required to state a claim. Iqbal as would-be plaintiff, for example, could submit a letter or draft complaint to the defendant alleging that they ordered the challenged practices. If the defendants do not supply information in their control showing how the policies were established, they would be barred from challenging the complaint for failure to allege specifically facts connecting them to the orders. A mere blanket denial would not do, because there is likely to be a paper or e-mail trail. But if the defendants present evidence countering the claims, then the plaintiff must present "some basis * * * to avoid dismissal, rather like a mini summary judgment."

Reverse Pleading Burdens: Professor Miller suggests that if the plaintiff alleges the inaccessibility of critical information and "articulates a reasonable basis for the information's existence and the defendant's control over it," "it might be reasonable to reverse the pleading burden and require the defendant to make the needed material available to the plaintiff along with whatever explanation it thinks appropriate." The court could allow further discovery. 60 Duke L.J. 1 at 110.

Appellate Review: Professor Miller asks whether the "subjective appraisals" that inhere in "judicial experience and common sense" will lead to diluted appellate review. Need the rules be amended to ensure continued de novo review of dismissals for failure to state a claim?

RULE 9(B)

From time to time thought has been given to adopting "heightened pleading" standards for specific kinds of claims, expanding the Rule 9(b) requirement that "fraud or mistake" be stated "with particularity." (Rule 9(c) also requires that a party denying that "a condition precedent has occurred or been performed * * * must do so with particularity.") One reason to hesitate has been concern that picking out specific claims might seem to imply substantive choices. Requiring greater fact information to allow a claim past the Rule 12(b)(6) threshold into the heavenly fields of discovery

[4] This is ACTL/IAALS Pilot Project Rule 2.1.

might seem to reflect a judgment about the relative desirability of enforcing that kind of claim. Although this concern must be taken seriously, there are powerful arguments that the purpose is as much procedural as the purpose of original Rule 9(b). (The original procedural purpose of Rule 9(b) may not be entirely clear, but any obscurity may bolster the argument that some blend of real-world procedural concern with substantive concerns is proper under the Enabling Act.)

Greater difficulty might arise in deciding just which claims to embrace in heightened pleading standards. Broad informal consultation might establish a tentative list. Actual choices for development might be supported by miniconferences or a general request for public comment before any specific rule or set of rules is proposed.

Implementation by drafting would be influenced by the direction taken. If the revised rule simply expanded the categories of claims that must be stated "with particularity," the main challenge would be finding a way to identify the claims. Would it suffice to list "antitrust" claims, or should a more specific list of statutes be adopted? Some categories might be relatively easy to specify — civil RICO would be an example. But what of "environmental" claims — statutory, common-law (e.g., nuisance), or perhaps administrative? "Institutional reform"? Even the familiar example of claims likely to encounter an immunity defense could prove tricky; qualified or absolute official immunity to federal-law claims might be clear enough, but what of parallel immunities to state-law claims? Sovereign immunity, domestic or foreign? More exotic immunities?

Finally, a quite different Rule 9(b) question may be found in the Iqbal opinion. Rule 9(b) provides that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." The Court rejected the argument that this provision makes adequate a bare allegation of "intent." "'[G]enerally' is a relative term. * * * It does not give * * * license to evade the less rigid — though still operative — strictures of Rule 8." The task of pleading greater supporting detail for an allegation of intent is daunting, and is encountered frequently. Discrimination claims provide a common example. This question may deserve close attention.

REVERSE RULE 9(B): SPECIAL RELAXED PLEADING RULES

Rather than expand the categories of claims that must be pleaded with particularity, whether in Rule 9(b) or in new rules, a reverse approach might be taken. Pleading standards could be raised for most claims, retaining relaxed notice pleading for specified claims. Individual discrimination (at least in employment: what of "class-of-one" equal-protection claims?), intent to discriminate, "civil rights," claims based on facts inferred from circumstance, and others could be listed. One problem will be finding categories that can be kept within meaningful bounds — "civil rights" is a pretty loose concept. It would be difficult to draft in terms that focus directly on information asymmetry, on "favored" claims, or "real people" claims. It would be possible to adopt an express pro se rule — but that might tempt lawyers to suggest a limited advising role at the beginning, to be followed by explicit representation later on. And past discussions have generally concluded that it is better to hold pro se parties to some semblance of the general pleading rules, perhaps with help from local forms and often with help from sympathetic judges.

OFFICIAL IMMUNITY

The recurring problem of official immunity pleading is difficult to address by focusing on the complaint. Perhaps the most feasible approach would be to require pleading with particularity whenever an individual-capacity claim is brought against a "public officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on a public employer's behalf."

An alternative approach would call for a reply, in the practice made famous by the Fifth Circuit. The rule might be framed as a Rule 9(b)(2), or as a Rule 7(a)(8), or something still different. The major difficulty with the Rule 7(a)(8) approach might be that plaintiffs would often overlook it. But it would be easy to draft if the reply is optional: "(8) a reply to an official immunity defense." If the reply is mandatory, there would be a cross-reference in Rule 7(a)(7), and a new Rule 9(b)(2): "(2) *Reply to [Official] Immunity Defense*. If a defense of [official] immunity is made [to a claim], the claimant must respond by a reply that states with particularity the circumstances that defeat immunity." "Official" is placed in brackets to indicate one of the drafting dilemmas — what sorts of immunity should be covered? Should the rule be framed explicitly in terms of an individual-capacity claim against a public officer or employee, etc.? "Official" itself would lead to such questions as Eleventh Amendment "immunity," claims against foreign sovereigns, and various immunities under state law. Without "official," all sorts of questions would arise: workers' compensation immunity? Charitable immunity if it exists anywhere? Family immunities, if they exist anywhere? Even such things as immunity from attachment or the like?

RULE 12(D)

Rule 12(d) might serve better than Rule 56 as the location for a rule allowing a party opposing a claim to make what in effect is a preliminary motion for summary judgment. The motion would rely on matters outside the pleadings to challenge facts poorly pleaded, facts omitted, and perhaps facts "well pleaded." The pleader would have an opportunity for discovery similar to that provided by Rule 56 before responding to the motion. A rough draft:

> **(d) Preliminary Summary Judgment.** A party [opposing a claim] may combine a motion under Rule 12(b)(6) or 12(c) with a preliminary motion for summary judgment under Rule 56. The movant may show there is no genuine dispute as to material facts that are required to support the claim or that defeat the claim. The court must allow the nonmovant a reasonable opportunity for discovery on the facts asserted by the movant before ruling on the motion.

(It would be possible to carry forward some version of present Rule 12(d), which gives the court the choice between treating the pleadings motion as one for summary judgment by undertaking to consider the "matters outside the pleading." Or discretion to refuse to allow a premature Rule 56 motion could be expressed directly. The advantage of treating it as a Rule 56 motion is to pick up the full Rule 56 procedure from the beginning. Less elliptical drafting also may be desirable, but might encounter the reluctance to refer directly to the Rule 56 moving burdens that shaped new Rule 56.)

RULE 12(E)

We might consider reviving earlier Rule 12(e) proposals. The rule could focus on directing a more definite statement for the purpose of facilitating pretrial management, including initially limited discovery to support more precise pleading. Professor Miller describes this as a "Motion to Particularize a Claim for Relief," allowing a plaintiff to anticipate a motion to dismiss by moving for "plausibility discovery." 60 Duke L.J. 1, 112-113.

RULE 12(B): TIED TO DISCOVERY

A great part of the dismay engendered by the Twombly and Iqbal decisions arises from concerns about "information asymmetry." The concerns tend to focus on categories of claims — product liability, some forms of employment discrimination, and so on. Plaintiffs, it is argued, typically lack access to information controlled by defendants and necessary to satisfy higher pleading standards. The need to support adequate pleading by discovery to elicit information controlled by

the defendant might be built into Rule 12. The provision could focus only on 12(b)(6). Discovery may be needed to respond to other 12(b) motions, but it may be better to leave that to present practice. Discovery also may be needed to respond to a motion under Rule 12(c) or (f). The idea would be to allow — probably not require — the court to permit discovery for the purpose of improving the pleading before ruling on the motion.

Placing this approach in Rule 12 will prove awkward. The enumeration of Rule 12(b) motions as (1) through (7) is more a list than a sequence of paragraphs. The best approach might be to add a new subdivision after Rule 12(f) — subdivisions (g) and (h) do not have the same sacred identification as 12(b)(6) or even 12(c), and subdivision (i) was created in 2007 by the Style Project. So a new Rule 12(g) might look something like this: "(g) *Discovery in Aid of Pleading.* Before ruling on a motion under Rule 12(b),(c), or (f), the court may allow discovery [under Rules 26 through 37] to aid [more detailed pleading][amendment of the pleading]."

RULE 27.1 DISCOVERY IN AID OF PLEADING

Discovery in aid of pleading might be fit into Rule 26, but Rule 26 is already too long. It could be fit into present Rule 27, but perpetuation of testimony is a distinct problem and drafting would likely be more complicated. A new Rule 27.1 may be the simplest approach.

The first question will be whether to provide for discovery before filing an action. There are several state-law models. In addition, the ACTL/IAALS Pilot Project Rules include a detailed provision, set out in the Appendix, that provides a helpful illustration. The most persuasive reason to move in this direction may be the plaintiff who does not know the identity of the defendant — which officer in a large police department shot the plaintiff's decedent? Which company made the exploding dynamite cap? Discovery could be limited by requiring showings that the plaintiff has exhausted reasonable alternatives for finding the information, the plaintiff can state all elements of a claim apart from identifying the defendant, and there are good reasons to impose the burdens of discovery on the person asked for the information. This possibility has been twice suggested during earlier rounds of discovery work, and was quickly rejected each time. It may not prove any more popular now, but reconsideration may be appropriate if elevated pleading requirements create a risk that valid claims will frequently be defeated for lack of access to information controlled by the defendant. (The ABA 21st Century Proposals would allow pre-complaint discovery only to determine the identify of the defendant.)

An alternative is to provide discovery in aid of framing a claim after an action is commenced by filing a complaint. Discovery might be made available by allowing the plaintiff to file an incomplete complaint, specifically designating items on which discovery will be sought to support better-informed pleading. The defendant could respond by providing information without waiting for discovery, by agreeing to discovery, or by opposing discovery for stated reasons. Or discovery might be provided only after a motion challenging the claim (or defense). This approach comes closest to something that might be fit into Rule 26, perhaps with a cross-reference in Rule 12: the point would be to emphasize the authority to limit discovery to specific matters needed to support "better" pleading.

The ABA proposals include: "The court may permit focused post-complaint discovery in those limited cases where, because of the nature of the case, the plaintiff does not have access to sufficient i nformation to satisfy the" pleading standard." Examples are antitrust cases and discrimination cases where intent is an element of the claim.

INITIAL DISCLOSURE

Pleading and discovery may overlap in a different way. Early disclosure of facts might be accomplished immediately after the papers that are called "pleadings," by obligations of unitateral disclosure. This approach might address the concerns that underlie the Twombly and Iqbal decisions by providing a secure foundation for guiding or eliminating discovery, while reducing fears that evaluation of "plausibility" in light of "judicial experience and common sense" will devolve into poorly supported speculation about the "facts" that have been pleaded and the inferences that can be drawn from them.

PLEADING IN RESPONSE

It will be difficult to improve on the drafting of Rule 8(b) to meet the frequent complaints that defendants deny too much, too casually. Rule 8(b)(2) requires that a denial fairly respond to the substance of the allegation. (3) requires that a party that does not intend to deny all allegations "must either specifically deny designated allegations or generally deny all except those specifically admitted." (4) requires that a party admit the part of an allegation that is true and deny the rest. If a true fact is pleaded with characterizations, adverbs, or adjectives, the answer must admit the fact even while denying the characterization, adverbs, or adjectives. Rule 11 enforces this duty; indeed the safe-harbor provision, 11(c)(2), specifically includes defenses and denials. The safe harbor may make it difficult to make much use of Rule 11 in this context, but amendment of Rule 11 may not be a satisfactory approach.

Defendants defend their practices by arguing that plaintiffs cause the problem by overpleading and by violating the separate-statement requirement of Rule 10(b). In effect, they assert it is unfair to impose on defendants the work of picking through the mess made by sloppy pleading. Again, it will be difficult to draft a satisfactory rule to promote clearer pleading. Anything done to perpetuate the Twombly and Iqbal decisions may actually make this problem more difficult.

So: Is there anything reasonable to be done? One comment in the ABA survey suggested whatever Rule 8(a) requires, good fact pleading could be useful as a request for admissions, and laments that defendants do not respond as Rule 8(b) requires. That sounds good. But is it possible to get there?

PLEADING AFFIRMATIVE DEFENSES

Plaintiffs complain that defendants thoughtlessly add long lists of affirmative defenses to their answers, providing nothing more than the words that identify the theory. Something more could be required.

Two examples from present Rule 8(c) illustrate the range of pleading possibilities. A defendant may plead comparative negligence — is there any reason to require greater detail than we require of a plaintiff pleading negligence? Or a defendant may plead laches — should it not have to plead something to support the elements of unreasonable delay and actual prejudice in defending?

The range of desirable pleading practices may not be as broad as it is for complaints, but it is not much narrower. If anything is to be done, it may be better to avoid any attempt to provide specific pleading directions for specific affirmative defenses. There are far too many affirmative defenses, most of them not listed in Rule 8(c).

One illustration can invoke all of the possible variations in [re]drafting Rule 8(a)(2): "In responding to a pleading, a party must ~~affirmatively~~ state <u>in short and plain terms</u> any avoidance or affirmative defense * * *."

APPENDIX

ACTL/IAALS Pilot Project Rule

3.1 On motion by a proposed plaintiff with notice to the proposed defendant and opportunity to be heard, a proposed plaintiff may obtain precomplaint discovery upon the court's determination, after hearing, that: (a) the moving party cannot prepare a legally sufficient complaint in the absence of the information sought by discovery; (b) the moving party has probable cause to believe that the information sought by discovery will enable preparation of a legally sufficient complaint; (c) the moving party has probable cause to believe that the information sought is in the possession of the person or entity from which it is sought; (d) the proposed discovery is narrowly tailored to minimize expense and inconvenience; and (e) the moving party's need for the discovery outweighs the burden and expense on other persons and entities.

3.1 The court may grant a motion for precomplaint discovery directed to a nonparty pursuant to PPR ___.

3.2 Advance notice to the nonparty is not required, but the nonparty's ability to file a motion to quash shall be preserved.

3.3 If the court grants a motion for precomplaint discovery, the court may impose limitations and conditions, including provisions for the allocation of costs and attorneys' fees, on the scope and other terms of discovery.

Pleading Standard
Section 5(b) of H.R. 4364

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111TH CONGRESS
1ST SESSION

H. R. 4364

To protect first amendment rights of petition and free speech by preventing States and the United States from allowing meritless lawsuits arising from acts in furtherance of those rights, commonly called "SLAPPs", and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

DECEMBER 16, 2009

Mr. COHEN introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To protect first amendment rights of petition and free speech by preventing States and the United States from allowing meritless lawsuits arising from acts in furtherance of those rights, commonly called "SLAPPs", and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Citizen Participation Act of 2009".

SEC. 2. FINDINGS.

The Congress finds and declares that—

1 (1) the framers of our Constitution, recognizing
2 participation in government and freedom of speech
3 as inalienable rights essential to the survival of de-
4 mocracy, secured their protection through the First
5 Amendment to the United States Constitution;
6 (2) the communications, information, opinions,
7 reports, testimony, claims and arguments that indi-
8 viduals, organizations and businesses provide to the
9 government are essential to wise government deci-
10 sions and public policy, the public health, safety, and
11 welfare, effective law enforcement, the efficient oper-
12 ation of government programs, the credibility and
13 trust afforded government, and the continuation of
14 America's representative democracy;
15 (3) civil lawsuits and counterclaims, often
16 claiming millions of dollars in damages, have been
17 and are being filed against thousands of individuals,
18 organizations, and businesses based upon their valid
19 exercise of the rights to petition or free speech, in-
20 cluding seeking relief, influencing action, informing,
21 communicating, and otherwise participating with
22 government, the electorate, or in matters of public
23 interest;
24 (4) such lawsuits, called Strategic Lawsuits
25 Against Public Participation or SLAPPs, are often

1 ultimately dismissed as groundless or unconstitu-
2 tional, but not before the defendants are put to
3 great expense, harassment, and interruption of their
4 productive activities;

5 (5) it is in the public interest for individuals,
6 organizations and businesses to participate in mat-
7 ters of public concern and provide information to
8 public entities and other citizens on public issues
9 that affect them without fear of reprisal through
10 abuse of the judicial process;

11 (6) the threat of financial liability, litigation
12 costs, destruction of one's business, loss of one's
13 home, and other personal losses from groundless
14 lawsuits seriously impacts government, interstate
15 commerce, and individual rights by significantly
16 chilling public participation in government, public
17 issues, and in voluntary service;

18 (7) SLAPPs are an abuse of the judicial proc-
19 ess that waste judicial resources and clog the al-
20 ready over-burdened court dockets;

21 (8) while some courts and State legislatures
22 have recognized and discouraged SLAPPs, protec-
23 tion against SLAPPs has not been uniform or com-
24 prehensive; and

1 (9) some SLAPP victims are deprived of the re-
2 lief to which they are entitled because the current
3 bankruptcy law allows for the discharge of fees,
4 costs and damages awarded against a party for
5 maintaining a SLAPP.

6 **SEC. 3. IMMUNITY FOR PETITION ACTIVITY.**

7 (a) IMMUNITY.—Any act of petitioning the govern-
8 ment made without knowledge of falsity or reckless dis-
9 regard of falsity shall be immune from civil liability.

10 (b) BURDEN AND STANDARD OF PROOF.—A plaintiff
11 must prove knowledge of falsity or reckless disregard of
12 falsity by clear and convincing evidence.

13 **SEC. 4. PROTECTION FOR PETITION AND SPEECH ACTIV-**
14 **ITY.**

15 Any act in furtherance of the constitutional right of
16 petition or free speech shall be entitled to the procedural
17 protections provided in this Act.

18 **SEC. 5. SPECIAL MOTION TO DISMISS.**

19 (a) IN GENERAL.—A party may file a special motion
20 to dismiss any claim arising from an act or alleged act
21 in furtherance of the constitutional right of petition or free
22 speech within 45 days after service of the claim if the
23 claim was filed in Federal court or, if the claim was re-
24 moved to Federal court pursuant to section 6 of this Act,
25 within 15 days after removal.

1 (b) BURDENS OF THE PARTIES.—A party filing a
2 special motion to dismiss under this Act has the initial
3 burden of making a prima facie showing that the claim
4 at issue arises from an act in furtherance of the constitu-
5 tional right of petition or free speech. If the moving party
6 meets this burden, the burden shifts to the responding
7 party to demonstrate that the claim is both legally suffi-
8 cient and supported by a sufficient prima facie showing
9 of facts to sustain a favorable judgment.

10 (c) STAY OF DISCOVERY.—Upon the filing of a spe-
11 cial motion to dismiss, discovery proceedings in the action
12 shall be stayed until notice of entry of an order disposing
13 of the motion, except that the court, on noticed motion
14 and for good cause shown, may order that specified dis-
15 covery be conducted.

16 (d) EXPEDITED HEARING.—The court shall hold an
17 expedited hearing on the special motion to dismiss, and
18 issue a ruling as soon as practicable after the hearing. The
19 parties may submit the pleadings and affidavits stating
20 the facts upon which the liability or defense is based. The
21 court shall explain the reasons for its grant or denial of
22 the motion in a statement for the record. If the special
23 motion to dismiss is granted, dismissal shall be with preju-
24 dice.

1 (e) IMMEDIATE APPEAL.—The defendant shall have
2 a right of immediate appeal from a district court order
3 denying a special motion to dismiss in whole or in part.

4 **SEC. 6. FEDERAL REMOVAL JURISDICTION.**

5 (a) IN GENERAL.—A civil action commenced in a
6 State court against any person who asserts as a defense
7 the immunity provided for in section 3 of this Act, or as-
8 serts that the action arises from an act in furtherance of
9 the constitutional right of petition or free speech, may be
10 removed by the defendant to the district court of the
11 United States for the district and division embracing the
12 place wherein it is pending.

13 (b) REMAND OF REMAINING CLAIMS.—A court exer-
14 cising jurisdiction under this section shall remand any
15 claims against which the special motion to dismiss has
16 been denied, as well as any remaining claims against
17 which a special motion to dismiss was not brought, to the
18 State court from which it was removed.

19 (c) TIMING.—A court exercising jurisdiction under
20 this section shall remand an action if a special motion to
21 dismiss is not filed within 15 days after removal.

22 **SEC. 7. SPECIAL MOTION TO QUASH.**

23 (a) IN GENERAL.—A person whose personally identi-
24 fying information is sought in connection with an action
25 pending in Federal court arising from an act in further-

1 ance of the constitutional right of petition or free speech
2 may make a special motion to quash the discovery order,
3 request or subpoena.

4 (b) BURDENS OF THE PARTIES.—The person bring-
5 ing a special motion to quash under this section must
6 make a prima facie showing that the underlying claim
7 arises from an act in furtherance of the constitutional
8 right of petition or free speech. If this burden is met, the
9 burden shifts to the plaintiff in the underlying action to
10 demonstrate that the underlying claim is both legally suffi-
11 cient and supported by a sufficient prima facie showing
12 of facts to sustain a favorable judgment. This standard
13 shall apply only to a special motion to quash brought
14 under this section.

15 **SEC. 8. FEES AND COSTS.**

16 (a) ATTORNEY'S FEES.—The court shall award a
17 moving party who prevails on a special motion to dismiss
18 or quash the costs of litigation, including a reasonable at-
19 torney's fee.

20 (b) FRIVOLOUS MOTIONS AND REMOVAL.—If the
21 court finds that a special motion to dismiss, special motion
22 to quash, or the removal of a claim under this Act is frivo-
23 lous or is solely intended to cause unnecessary delay, the
24 court may award a reasonable attorney's fees and costs
25 to the responding party.

1 (c) GOVERNMENT ENTITIES.—A government entity
2 may not recover fees pursuant to this section.

3 **SEC. 9. BANKRUPTCY NONDISCHARGABILITY OF FEES AND**
4 **COSTS.**

5 Fees or costs awarded against a party by a court for
6 the prosecution of any claim finally dismissed pursuant
7 to this Act, or any subpoena or discovery order quashed
8 pursuant to this Act, or any claim finally dismissed pursu-
9 ant to a State anti-SLAPP law, shall not be dischargeable
10 in bankruptcy under section 1328 or section 523 of title
11 11, United States Code.

12 **SEC. 10. EXEMPTIONS.**

13 (a) PUBLIC ENFORCEMENT.—Sections 4 through 8
14 of this Act shall not be available in any action brought
15 solely on behalf of the public or solely to enforce an impor-
16 tant right affecting the public interest.

17 (b) COMMERCIAL SPEECH.—This Act shall not apply
18 to any claim for relief brought against a person primarily
19 engaged in the business of selling or leasing goods or serv-
20 ices, if the statement or conduct from which the claim
21 arises is a representation of fact made for the purpose of
22 promoting, securing or completing sales or leases of, or
23 commercial transactions in, the person's goods or services,
24 and the intended audience is an actual or potential buyer
25 or customer.

1 (c) "SLAPP-BACK" SUITS.—This Act shall not be
2 available to dismiss any action or claim arising from a
3 claim that has been dismissed pursuant to this Act or to
4 a State anti-SLAPP law.

5 **SEC. 11. DEFINITIONS.**

6 In this Act:

7 (1) ACT IN FURTHERANCE OF THE RIGHT OF
8 FREE SPEECH.—The term "act in furtherance of the
9 right of free speech" includes but is not limited to—

10 (A) any written or oral statement made in
11 connection with an issue under consideration or
12 review by a legislative, executive, or judicial
13 body, or any other official proceeding author-
14 ized by law;

15 (B) any written or oral statement made in
16 a place open to the public or a public forum in
17 connection with an issue of public interest; or

18 (C) any other conduct in furtherance of
19 the exercise of the constitutional right of peti-
20 tion or the constitutional right of free speech in
21 connection with an issue of public interest.

22 (2) ACT OF PETITIONING THE GOVERNMENT.—
23 The term "act of petitioning the government" in-
24 cludes but is not limited to any written or oral state-
25 ment—

1 (A) made or submitted before a legislative,
2 executive, or judicial body, or any other official
3 proceeding authorized by law; or
4 (B) any written or oral statement encour-
5 aging a statement before a legislative, executive,
6 or judicial body, or any other official proceeding
7 authorized by law.
8 (3) CLAIM.—The term "claim" includes any
9 civil lawsuit, claim, complaint, cause of action, cross-
10 claim, counterclaim, or other judicial pleading or fil-
11 ing requesting relief.
12 (4) GOVERNMENT ENTITY.—The term "govern-
13 ment entity" includes the United States, a branch,
14 department, agency, State, or subdivision of a State,
15 or other public authority.
16 (5) ISSUE OF PUBLIC INTEREST.—The term
17 "issue of public interest" includes an issue related to
18 health or safety; environmental, economic or commu-
19 nity well-being; the government; a public figure; or
20 a good, product or service in the market place.
21 "Issue of public interest" shall not be construed to
22 include private interests, such as statements directed
23 primarily toward protecting the speaker's business
24 interests rather than toward commenting on or shar-

1 ing information about a matter of public signifi-
2 cance.

3 (6) PERSONALLY IDENTIFYING INFORMA-
4 TION.—The term "personally identifying informa-
5 tion" means first and last name or last name only;
6 home or other physical address including temporary
7 shelter or housing and including a street name or
8 ZIP Code; full date of birth; email address or other
9 online contact information; telephone number; social
10 security number; Internet protocol address or host
11 name that identifies an individual, or any other in-
12 formation that would serve to identify an individual.

13 (7) STATE.—The term "State" means each of
14 the several States, the District of Columbia, and any
15 commonwealth, territory, or possession of the United
16 States.

17 **SEC. 12. CONSTRUCTION.**

18 This Act shall be liberally construed to effectuate its
19 findings and purposes fully, except that the exemptions
20 shall be construed narrowly.

21 **SEC. 13. RELATIONSHIP TO OTHER LAWS.**

22 Nothing in this Act shall preempt or supersede any
23 Federal, State, constitutional, case or common law that
24 provides the equivalent or greater protection for persons

1 engaging in activities in furtherance of the rights of peti-
2 tion or free speech.

3 **SEC. 14. SEVERABILITY.**

4 If any provision of this Act or the application of any
5 provision of this Act to any person or circumstance is held
6 invalid, the application of such provision to other persons
7 or circumstances and the remainder of this Act shall not
8 be affected thereby.

9 **SEC. 15. EFFECTIVE DATE.**

10 This Act shall become effective upon enactment.

○

Pleading Standard
Section 2(g)(2) of H.R. 3728, adding 17 U.S.C. § 1321(e)

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111TH CONGRESS
2D SESSION

S. 3728

To amend title 17, United States Code, to extend protection to fashion design, and for other purposes.

IN THE SENATE OF THE UNITED STATES

AUGUST 5, 2010

Mr. SCHUMER (for himself, Mr. HATCH, Mr. GRAHAM, Mr. WHITEHOUSE, Mrs. GILLIBRAND, Ms. SNOWE, Mrs. BOXER, Mrs. FEINSTEIN, Mr. CARDIN, Mr. KOHL, and Mrs. HUTCHISON) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend title 17, United States Code, to extend protection to fashion design, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Innovative Design Protection and Piracy Prevention Act".

SEC. 2. AMENDMENTS TO TITLE 17, UNITED STATES CODE.

(a) DESIGNS PROTECTED.—Section 1301 of title 17, United States Code, is amended—

12b-002927

1 (1) in subsection (a), by adding at the end the
2 following:
3 "(4) FASHION DESIGN.—A fashion design is
4 subject to protection under this chapter.";
5 (2) in subsection (b)—
6 (A) in paragraph (2), by inserting ", or an
7 article of apparel," after "plug or mold"; and
8 (B) by adding at the end the following:
9 "(7) A 'fashion design'—
10 "(A) is the appearance as a whole of an
11 article of apparel, including its ornamentation;
12 and
13 "(B) includes original elements of the arti-
14 cle of apparel or the original arrangement or
15 placement of original or non-original elements
16 as incorporated in the overall appearance of the
17 article of apparel that—
18 "(i) are the result of a designer's own
19 creative endeavor; and
20 "(ii) provide a unique, distinguishable,
21 non-trivial and non-utilitarian variation
22 over prior designs for similar types of arti-
23 cles.

"(8) The term 'design' includes fashion design, except to the extent expressly limited to the design of a vessel.

"(9) The term 'apparel' means—

"(A) an article of men's, women's, or children's clothing, including undergarments, outerwear, gloves, footwear, and headgear;

"(B) handbags, purses, wallets, duffel bags, suitcases, tote bags, and belts; and

"(C) eyeglass frames.

"(10) In the case of a fashion design, the term 'substantially identical' means an article of apparel which is so similar in appearance as to be likely to be mistaken for the protected design, and contains only those differences in construction or design which are merely trivial."; and

(3) by adding at the end the following:

"(c) RULE OF CONSTRUCTION.—In the case of a fashion design under this chapter, those differences or variations which are considered non-trivial for the purposes of establishing that a design is subject to protection under subsection (b)(7) shall be considered non-trivial for the purposes of establishing that a defendant's design is not substantially identical under subsection (b)(10) and section 1309(e).".

1 (b) DESIGNS NOT SUBJECT TO PROTECTION.—Sec-
2 tion 1302(5) of title 17, United States Code, is amend-
3 ed—
4 (1) by striking "(5)" and inserting "(5)(A) in
5 the case of a design of a vessel hull,";
6 (2) by striking the period and inserting "; or";
7 and
8 (3) by adding at the end the following:
9 "(B) in the case of a fashion design, embodied
10 in a useful article that was made public by the de-
11 signer or owner in the United States or a foreign
12 country before the date of enactment of this chapter
13 or more than 3 years before the date upon which
14 protection of the design is asserted under this chap-
15 ter.".
16 (c) REVISIONS, ADAPTATIONS, AND REARRANGE-
17 MENTS.—Section 1303 of title 17, United States Code, is
18 amended by adding at the end the following: "The pres-
19 ence or absence of a particular color or colors or of a pic-
20 torial or graphic work imprinted on fabric shall not be con-
21 sidered in determining the protection of a fashion design
22 under section 1301 or 1302 or in determining infringe-
23 ment under section 1309.".
24 (d) TERM OF PROTECTION.—Section 1305(a) of title
25 17, United States Code, is amended to read as follows:

1 "(a) IN GENERAL.—Subject to subsection (b), the
2 protection provided under this chapter—
3 "(1) for a design of a vessel hull, shall continue
4 for a term of 10 years beginning on the date of the
5 commencement of protection under section 1304;
6 and
7 "(2) for a fashion design, shall continue for a
8 term of 3 years beginning on the date of the com-
9 mencement of protection under section 1304.".
10 (e) INFRINGEMENT.—Section 1309 of title 17,
11 United States Code, is amended—
12 (1) in subsection (c)—
13 (A) by inserting "offer for sale, advertise,"
14 after "sell,"; and
15 (B) by inserting "either actual or reason-
16 ably inferred from the totality of the cir-
17 cumstances," after "created without knowl-
18 edge";
19 (2) by amending subsection (e) to read as fol-
20 lows:
21 "(e) INFRINGING ARTICLE DEFINED.—
22 "(1) IN GENERAL.—As used in this section, an
23 'infringing article' is any article the design of which
24 has been copied from a design protected under this
25 chapter, or from an image thereof, without the con-

1 sent of the owner of the protected design. An in-
2 fringing article is not an illustration or picture of a
3 protected design in an advertisement, book, peri-
4 odical, newspaper, photograph, broadcast, motion
5 picture, or similar medium.

6 "(2) VESSEL HULL DESIGN.—In the case of a
7 design of a vessel hull, a design shall not be deemed
8 to have been copied from a protected design if it is
9 original and not substantially similar in appearance
10 to a protected design.

11 "(3) FASHION DESIGN.—In the case of a fash-
12 ion design, a design shall not be deemed to have
13 been copied from a protected design if that design—

14 "(A) is not substantially identical in overall
15 visual appearance to and as to the original ele-
16 ments of a protected design; or

17 "(B) is the result of independent cre-
18 ation."; and

19 (3) by adding at the end the following:

20 "(h) SECONDARY LIABILITY.—The doctrines of sec-
21 ondary infringement or secondary liability that are applied
22 in actions under chapter 5 of this title apply to the same
23 extent to actions under this chapter. Any person who is
24 liable under either such doctrine under this chapter is sub-
25 ject to all the remedies provided under this chapter, in-

1 cluding those attributable to any underlying or resulting
2 infringement.
3 "(i) HOME SEWING EXCEPTION.—
4 "(1) IN GENERAL.—It is not an infringement of
5 the exclusive rights of a design owner for a person
6 to produce a single copy of a protected design for
7 personal use or for the use of an immediate family
8 member, if that copy is not offered for sale or use
9 in trade during the period of protection.
10 "(2) RULE OF CONSTRUCTION.—Nothing in
11 this subsection shall be construed to permit the pub-
12 lication or distribution of instructions or patterns for
13 the copying of a protected design.".
14 (f) APPLICATION FOR REGISTRATION.—Section
15 1310(a) of title 17, United States Code, is amended—
16 (1) by striking "Protection under this chapter"
17 and inserting "In the case of a design of a vessel
18 hull, protection under this chapter"; and
19 (2) by adding "Registration shall not apply to
20 fashion designs." after "first made public.".
21 (g) REMEDY FOR INFRINGEMENT.—Section 1321 of
22 title 17, United States Code, is amended—
23 (1) by striking subsection (a) and inserting the
24 following:
25 "(a) IN GENERAL.—

1 "(1) VESSEL HULL.—In the case of a vessel
2 hull, the owner of a design is entitled, after issuance
3 of a certificate of registration of the design under
4 this chapter, to institute an action for any infringe-
5 ment of the design.
6 "(2) FASHION DESIGN.—In the case of a fash-
7 ion design, the owner of a design is entitled to insti-
8 tute an action for any infringement of the design
9 after the design is made public under the terms of
10 section 1310(b) of this chapter."; and
11 (2) by adding at the end the following:
12 "(e) PLEADING REQUIREMENT FOR FASHION DE-
13 SIGNS.—
14 "(1) IN GENERAL.—In the case of a fashion de-
15 sign, a claimant in an action for infringement shall
16 plead with particularity facts establishing that—
17 "(A) the design of the claimant is pro-
18 tected under this chapter;
19 "(B) the design of the defendant infringes
20 upon the protected design as described under
21 section 1309(e); and
22 "(C) the protected design or an image
23 thereof was available in such location or loca-
24 tions, in such a manner, and for such duration
25 that it can be reasonably inferred from the to-

1 tality of the surrounding facts and cir-
2 cumstances that the defendant saw or otherwise
3 had knowledge of the protected design.
4 "(2) CONSIDERATIONS.—In considering wheth-
5 er a claim for infringement has been adequately
6 pleaded, the court shall consider the totality of the
7 circumstances.".
8 (h) PENALTY FOR FALSE REPRESENTATION.—Sec-
9 tion 1327 of title 17, United States Code, is amended—
10 (1) by inserting "or for purposes of obtaining
11 recovery based on a claim of infringement under this
12 chapter" after "registration of a design under this
13 chapter";
14 (2) by striking "$500" and inserting "5,000";
15 and
16 (3) by striking "$1,000" and inserting
17 "$10,000".
18 (i) NONAPPLICABILITY OF ENFORCEMENT BY
19 TREASURY AND POSTAL SERVICE.—Section 1328 of title
20 17, United States Code, is amended—
21 (1) in subsection (a), in the first sentence, by
22 striking "The Secretary" and inserting "In the case
23 of designs of vessel hulls protected under this chap-
24 ter, the Secretary";

1 (2) in subsection (b), in the first sentence, by
2 striking "Articles" and inserting "In the case of de-
3 signs of vessel hulls protected under this chapter, ar-
4 ticles"; and
5 (3) by adding at the end the following:
6 "(c) NONAPPLICABILITY.—This section shall not
7 apply to fashion designs protected under this chapter.".
8 (j) COMMON LAW AND OTHER RIGHTS UNAF-
9 FECTED.—Section 1330 of title 17, United States Code,
10 is amended—
11 (1) in paragraph (1), by striking "or" after the
12 semicolon;
13 (2) in paragraph (2), by striking the period and
14 inserting "; or"; and
15 (3) by adding at the end the following:
16 "(3) any rights that may exist under provisions
17 of this title other than this chapter.".
18 **SEC. 3. EFFECTIVE DATE.**
19 This Act and the amendments made by this Act shall
20 take effect on the date of enactment of this Act.

○

TAB
5-D

ELEMENTS OF A PRESERVATION RULE

Introductory Note: The E-Discovery Panel, composed of Judges Scheindlin and Facciola, and Messrs. Allman, Barkett, Garrison, Joseph and Willoughby, holds the consensus view that a rule addressing preservation (spoliation) would be a valuable addition to the Federal Rules of Civil Procedure. All members of the Panel agree that such a rule should apply once an action has been commenced. (Panel members disagree as to whether such a rule can or should apply, along the lines of Rule 27, prior to the commencement of an action.)

The Panel members also agree that the rules in general, and a preservation rule in particular, should treat differently huge cases, with enormous discovery, and all others.

While not every member of the Panel concurs in every word that follows, the Panel members are in general agreement that it would behoove the Advisory Committee on Civil Rules to draft a preservation rule that takes into account the following elements.

1. **Trigger. The rule should specify the point in time when the obligation to preserve information, including electronically stored information, accrues. Potential triggers:**

   a. **A general trigger restating the common law (pending or reasonably foreseeable litigation) standard and/or**

   b. **Specific triggers (which could appear in the text or Advisory Committee Note):**

      i. **Written request or notice to preserve delivered to that person (perhaps in a prescribed form).**

      ii. **Service on, or delivery to, that person of a**

         A. **Complaint or other pleading,**

         B. **Notice of claim,**

         C. **Subpoena, CID or similar instrument.**

      iii. **Actual notice of complaint or other pleading, or a notice of claim, asserting a claim against, or defense involving that person or an affiliate of that person.**

      iv. **Statutory, regulatory, contractual duty to preserve.**

      v. **Steps taken in anticipation of asserting or defending a potential claim (*e.g.*, preparation of incident report, hiring expert, drafting/filing claim with regulator, drafting/sending prelitigation notice, drafting complaint, hiring counsel, destructive testing).**

2. **Scope. The rule should specify with as much precision as possible the scope of the duty to preserve, including, *e.g.*:**

a. Subject matter of the information to be preserved.

b. Relevant time frame.

c. That a person whose duty has been triggered must act reasonably in the circumstances.

d. Types of data or tangible things to be preserved.

e. Sources on which data are stored or found.

f. Specify the form in which the information should be preserved (*e.g.*, native).

g. Consider whether to impose presumptive limits on the types of data or sources that must be searched.

h. Consider whether to impose presumptive limits on the number of key custodians whose information must be preserved.

i. Consider whether the duty should be different for parties (or prospective parties) and non-parties.

3. Duration. The rule should specify how long the information or tangible things must be preserved, but should explicitly provide that the rule does not supersede any statute or regulation.

4. Ongoing Duty. The rule should specify whether the duty to preserve extends to information generated after the duty has accrued.

5. Litigation Hold. The rule should provide that if an organization whose duty has been triggered prepares and disseminates a litigation hold notice, that is evidence of due care on the part of the organization. If the rule requires issuance of a litigation hold, it should include an out like that in Rule 37(c)(1) excusing (for sanctions purposes) a failure that was substantially justified or is harmless.

6. Work Product. The rule should specify whether, or to what extent, actions taken in furtherance of the preservation duty are protected by work product (or privilege).

7. Consequences/Procedures. The rule should set forth the consequences of failing to fulfill the responsibilities it mandates, and the obligations of the complainant/failing party.

   a. Sanctions for noncompliance resulting in prejudice to the requesting party should be specified (*e.g.*, Fed.R.Civ.P. 37).

      i. The rule should apply different sanctions depending on the state of mind of the offender. (The state of mind necessary to warrant each identified sanction should be specified.)

ii. Certain conduct that presumptively satisfies the requisite state of mind should be specified (*e.g.*, failure to issue a litigation hold = negligence or gross negligence)

b. A model jury instruction for adverse inference or other jury-specific sanctions should be drafted.

c. Compliance with the rule should insulate a responding party from sanctions for failure to preserve.

d. The complainant should be obliged to raise the failure with a judicial officer promptly after it has learned of the alleged spoliation and has assessed the prejudice it has suffered as a result.

e. Identify the elements that the complainant must specify, such as:

i. The information or tangible things lost.

ii. Its relevance (specifying the standard (*e.g.*, 401, 26(b)(1), admissibility, discoverability)).

iii. The prejudice suffered.

f. The rule should address burden of proof issues.

8. Judicial Determination. It should provide access to a judicial officer, following a meet and confer, to

a. Resolve disputes

b. Apply Rule 26(c)/proportionality

c. Consider the potential for cost allocation

d. Impose sanctions (*e.g.*, of the sort provided for by Rule 37).

Spoliation Motions
November 2010

Presentation by
FJC Research Division
Emery G. Lee III
Advisory Committee on Civil Rules
Washington, D.C.

Research Design

- Text based search of CM/ECF
- Cases filed in 2007 or 2008
- 19 study districts
- Focus on motions for sanctions
- Total of 209 “true positives”

How often is spoliation *raised*?

12b-002945

Comparison to civil cases 2007-2008

Sanctions cases

- N= 209
- Disposition time, 649 days (mean), or about 1.8 years
- Time to motion, 513 days (mean)
- 16.5% trial

Civil cases

- N=131,992
- Disposition time, 253 days (mean), or about 0.7 years
- 0.6% trial

$$209 / 131{,}992 = 0.0015$$

147
12b-002947

$$209 / 131{,}992 = 0.0015$$

$$0.0015 * 100 = 0.15\%$$

148
12b-002948

$$209 / 131{,}992 = 0.0015$$
$$0.0015 * 100 = 0.15\%$$
$$0.15\% * 10 = 1.5\%$$

12b-002949
149

Frequency of spoliation motions compared to other motions

Type of motion (Source)	Frequency
Rule 12(b)(6) **decided** (FJC 2009)	11.0-13.2%
Rule 12 **filed** (IAALS 2008)	23.3%
Rule 12/MTD **granted** (AO 2010)	14% (?)
Rule 56 **decided** (FJC 2009)	25.1-27.7%
Rule 56 **filed** (FJC 2008)	17%
Rule 56 **filed** (IAALS 2008)	16.6%
Discovery motions **filed** (IAALS 2008)	26.7%
Motions to compel **decided** (FJC 2009)	13.4-15.9%
Motions for sanctions **granted** (FJC 2009)	2.3-2.2%
Motions for sanctions **granted** (IAALS 2008)	0.8%

IAALS Case Processing report (at 46):

"As a discrete category, discovery sanctions were sought rarely and granted even more rarely. The study recorded only 3.19 motions seeking discovery sanctions per 100 cases, with a high of 5.08 such motions per 100 cases in Western Wisconsin and a low of 0.49 such motions per 100 cases in Idaho. Slightly less than 26% of sanction motions were granted in all or part."

FJC 2009 Closed-case report (p. 23)

"Did any of the following occur . . . One or more claims of spoliation of [ESI]?"

7.7% of plaintiff attorneys in ESI cases

5% of defendant attorneys in ESI cases

Frequency and importance

- No “hard” estimate of frequency
- No ability to account for trends
- FJC 2010: Disputes over ESI increase costs 10%, even after controlling for other costs (including stakes)
- Fear of sanctions may drive behavior, even if sanctions motions are relatively rare

Motions Findings
Type of Evidence

12b-002954
154

12b-002955

Type of evidence

Type	N	%
Electronically stored information (ESI) only	83	40%
ESI plus another type	27	13%
ESI plus ESI and other	*110*	*53%*
Tangible	43	21%
Paper	38	18%
Could not determine	18	9%

Types of cases (all spoliation)

Nature of suit category	N	%
Torts	65	31%
Contracts (includes insurance)	62	30%
Civil rights	45	22%
Intellectual property	13	6%
Labor	9	4%
Other	15	7%

12b-002957

Types of cases (ESI cases)

Nature of suit category	N	%
Contracts (includes insurance)	40	36%
Civil rights	29	26%
Torts	15	14%
Intellectual property	12	11%
Labor	4	4%
Other	10	9%

Parties

158
12b-002958

12b-002959

Moving party

Moving party	N	%
Plaintiff	134	64%
Defendant	66	32%
Both sides	4	2%
Other	5	2%

Plaintiffs as moving parties

Plaintiff (by type)	N	%
Individual, including putative class representative	94	68%
Business entity	43	31%
Other (Municipality)	1	1%
All	138	100%

12b-002961

Plaintiffs as moving parties

Non-moving parties	N	%
Business entity	102	74%
Governmental entity	29	21%
Individual	5	4%
Other (Private school)	2	1%
All	138	100%

12b-002962 162

Defendants as moving parties

Defendant by type	N	%
Business entity	62	89%
Governmental entity	5	7%
Other	3	4%
All	70	100%

12b-002963

Defendants as moving parties

Non-moving party	N	%
Individual, including putative class representative	39	56%
Business entity	29	41%
Other	2	3%
All	70	100%

Orders

164
12b-002964

12b-002965

Rulings on Motions (all)

Court action	N	%
Granted	27	18%
Denied	68	44%
Pending	12	8%
No action	46	30%
All	153	100%

12b-002966

Rulings on Motions (all)
Rulings only

Court action	N	%
Granted	27	28%
Denied	68	72%
All	95	100%

12b-002967

Rulings on Motions (ESI)

Court action	N	%
Granted	20	23%
Denied	38	44%
Pending	5	6%
No action	24	28%
All	87	100%

12b-002968

Rulings on Motions (ESI)
Rulings only

Court action	N	%
Granted	20	34%
Denied	38	66%
All	58	100%

169
12b-002969

Rulings on Motions (reported cases)

Court action	N	%
Granted	31	60%
Denied	21	40%
All	52	100%

Types of 'sanctions' (all)

Type	N	%
Adverse inference/instruction	14	44%
Precluded evidence/testimony	6	19%
Costs only (includes denial with costs)	6	19%
Reopening discovery	5	16%
Monetary only	2	6%
Strike part of answer	1	3%
Dismissal/default	1	3%

Types of 'sanctions' (ESI)

Type	N	%
Adverse inference/instruction	13	57%
Precluded evidence/testimony	3	13%
Costs only (includes denial with costs)	4	17%
Reopening discovery	4	17%
Monetary only	2	9%
Strike part of answer	1	4%

12b-002972

Types of 'sanctions' (reported cases)

Type	N	%
Adverse inference/instruction	14	45%
Precluded evidence/testimony	15	48%
Dismissal/default (includes permanent inj.)	7	23%
Civil contempt	1	3%

Not much to go on, but . . .

- Pre- or post-litigation spoliation sanctioned?
  - Mostly post (if you add in 'both')
  - Pre-litigation conduct only, about 1 in 4 sanctions cases
- Legal basis for imposing sanctions?
  - Often hard to tell
  - Inherent authority, Rule 37 raised about equally in sanctioned cases, often raised together, but "not clear" in many sanctions cases

TAB
5-E

SUBCOMMITTEE MENU: RULES PROPOSALS

INTRODUCTION

This memorandum compiles some of the suggestions made at the Duke Conference for amending the Civil Rules. Many of the suggestions addressed discovery and pleading. Most of those suggestions are omitted here. The Discovery Subcommittee is working on preservation and spoliation issues, and may take up other discovery issues. But some discovery issues are noted here because it may become useful for this Subcommittee to address them. Any allocation between the Discovery Subcommittee and this Subcommittee will turn on the overall volume of discovery issues taken on for prompt attention and on the severability of some issues from the ongoing work of the Discovery Subcommittee. Pleading issues are being addressed separately for the time being; this Subcommittee or some new Subcommittee may be asked to address them when the time for action comes close.

The mass of Conference materials is great. A few proposals have been omitted deliberately because they do not seem likely prospects for present consideration. Others may have been overlooked. Subcommittee members should add any proposal that seems to merit consideration, drawing not only from explicit Conference proposals but also from ideas inspired by the Conference.

Descriptions of the proposals are generally brief. The purpose is to identify topics that deserve prompt development, not to provide full-blown evaluation.

The proposals are organized roughly in the order of Rule number, recognizing that some proposals affect two or more Rules and that others do not fit well within any present rule.

Some proposals present issues that might be addressed by rules amendments, but also might be addressed by other means, often working within the framework of a present rule. These proposals are described separately, choosing those that seem plausible candidates for consideration in the rulemaking process.

I RULES PROPOSALS

The Duke Conference deliberately and successfully sought out participants representing the full spectrum of experience with, and perspectives on, contemporary practice under the Civil Rules. As hoped, they generated proposals that reflect the diversity of their experiences and perspectives. Conflicting proposals may indicate that present practice has it just about right, but must be evaluated to make that diagnosis. So too, the absence of conflict does not mean that a proposal is worthy of further consideration.

General

One ABA respondent thinks the Civil Rules "include too much detailed preparation and filing."

Rule 1

Many participants drew support from the lofty goals of Rule 1 — the "just, speedy, and inexpensive determination of every action and proceeding." Some of the discussion suggested, or at least implied, that Rule 1 might be revised to provide greater direction on better realizing these related aspirations.

The need to set reasonable time limits for processing an action, and for holding litigants to the time limits, might be expressed.

The need for proportionality, reasonably tailoring the level of litigation activity to the needs of each action, might be expressed in Rule 1, not merely in the discovery rules.

Lawyers, not only the courts, might be made responsible for working toward the Rule 1 goals.

Various arguments were made that tradeoffs must be made between the Rule 1 goals. Speedy and inexpensive determinations may in some sense reduce the total quality of justice produced by the system across all cases, but they are intrinsically important. This concern is in part another argument for expressing the need for proportionality. Essentially the same conclusion can be reached from an opposite direction: justice is not sacrificed but achieved by increasing speed and reducing expense in order to maintain a system that is reasonably available to determine disputes. Alan Morrison's paper observes: "The good news is that courts and parties rarely rely on Rule 1"; "to be accurate, Rule 1 should be recast to require the courts to provide a 'just determination of every action,' and to do so with 'appropriate speed and without undue expense' under the circumstances."

ACTL/IAALS pilot project rules would add these words to Rule 1: "just, <u>timely, efficient, and cost-effective</u> determination * * *." In addition, whether as part of Rule 1 or perhaps as a new Rule 1.1, the rules would direct the court and the parties to "assure that the process and the costs are proportionate to the amount in controversy and the complexity and importance of the issue. The factors to be considered by the court * * * include, without limitation: needs of the case, amount in controversy, parties' resources, and complexity and importance of the issues at stake in the litigation." The Center for Constitutional Litigation responds that "[m]andating cost/benefit analysis is neither desirable nor practical." The attempt in Rule 26(b)(2) to require proportionality in discovery "is difficult to apply, leads to inconsistent results, and has precluded discovery in meritorious cases." It should not be extended.

The most ambitious Rule 1 proposal is advanced in Bone, Improving Rule 1: A Master Rule for the Federal Rules. 87 Denver U.L. Rev. 287 (2010), presented as a conference paper. A brief summary would be misleading. Essentially he argues that Rule 1 reflects the values of 1938: procedure is separate from substance, it is instrumental, it works best when judges are free from any technical rules but can exercise discretion to proceed in ways that achieve the best result in each particular case. A different view is required today. "[T]he most sensible goal for procedure is distributional. * * * [A]n optimal error risk for a given case is that which results from distributing error risk optimally across different cases and litigants. * * * Adjudication has a public purpose," to enforce substantive law. "[O]utcome error should be measured in terms of how well litigation outcomes further these public goals, not in terms of how well they satisfy the preferences of parties to a suit." Different substantive rights invoke different levels of importance — "if the substantive law protects moral rights, the procedures offered to adjudicate lawsuits involving those rights should take account of their moral weight." There is more. Rethinking the purposes of procedure does not lead to specific rules proposals, but it could be a place to begin.

Rule 2: One Form of [Transsubstantive] Action

Skepticism about the attempt to squeeze all varieties of litigation into a single "transsubstantive" set of rules was expressed frequently. Much of the attention focused on pleading and discovery, but the questions are more general. Reform could be sought by different strategies. One would carry forward the general character of the rules, making special provision only for "complex" cases or categories of cases that in practice have proved to fare poorly in the general rules. Another would be to create a "simplified" system that reduces the opportunities for extensive litigation. Pleading and discovery are likely to hold center stage in exploring these matters. But the

purpose of the inquiry may be sufficiently separate from the base-line pleading and discovery questions to justify independent consideration.

The IAALS "areas of convergence" paper, p. 8, suggests adhering to transsubstantivity in general, but with flexibility to create different sets of rules for certain types of cases. It found "some support" for experimenting with simplified procedure.

The ABA 21st Century proposals were "open to the idea that different standard timelines might be applied depending on the nature or size of the matter," pointing to a 4-track system in New Jersey. Don L. Davis pointed to the three-level Discovery Control Plans under Tex.R.Civ.P. 192.4.

Vice Chief Justice Hurwitz describes special Arizona procedures for medical malpractice actions, including three sets of uniform interrogatories — plaintiff to individual health-care provider, plaintiff to institutional provider, and defendants to plaintiff. There also is a complex case court project, governed by separate pretrial rules.

Professor Gensler writes at length on case management, exploring alternatives that include more particularized, less discretion-dependent rules for all cases; abandoning trans-substantivity, in whole or in part, by adopting substance-specific rules tailored to different categories of litigation; "track" systems more formalized than general case-management authority; and "simplified rules" for some — presumably simpler — types of cases.

One ABA respondent pointed to California Code of Civil Procedure §§ 90-100 as a model of Economic Litigation for Limited Civil Cases.

Rule 4

Professor Carrington urges that the Committee consider amending Rule 4(d) waiver-of-service provisions by extending the payment of expenses of service to defendants who are not located in the United States, see Rule 4(d)(2).

Rule 7

The ABA would require that every motion be accompanied by a certificate that counsel have conferred in good faith, or attempted to confer, to resolve or narrow the issues in dispute. Only stipulated motions and those for summary judgment would be excepted. Some ABA respondents, however, suggested that "meet and confer" is a waste of time — no one gives up anything anyway. A somewhat different criticism is that the requirement encourages unreasonable behavior: the lawyer can always back off before the court learns of it by a motion.

There was criticism of local rules read to require "permission" to file a motion. But several respondents in the NELA survey urged such a requirement for summary judgment, at least in employment cases.

Rule 8(b)

Quite apart from pleadings that state a claim, answers also came in for substantial criticism. The ABA proposals reflect a fear that "responsive pleading has become an expensive game." "[A]n answer is often an opaque, uninformative document." It would be cheaper to allow a simple general denial along with any affirmative defenses, but this alternative seems unattractive, particularly if pleading obligations are raised for claims. Plaintiffs could help themselves by making fact

allegations "in short factual sentences." This is not a proposal to revise Rule 8(b). Earlier versions may suggest the reason — Rule 8(b) is just fine as written; the problem is widespread disregard.

Many NELA respondents expressed great dissatisfaction with answers that flout Rule 8(b) requirements.

Rule 11

Professor Miller suggests it might help to partially reinstate compensation and punishment as legitimate objectives "to promote efficiency and compliance." In addition, it may be possible to "see if standards of lawyer behavior can be further articulated to produce a sophisticated and nuanced regime that will minimize litigation misconduct, whatever its form, but at the same time recognize the need to protect adversarial-system values." 60 Duke L.J. 1, 126.

One ABA respondent suggested a deadline to abandon claims or defenses. If a claim or defense is not in fact pursued after the deadline, the adversary should be awarded the fees and expenses incurred in preparing to contest it.

Rule 12

The ABA suggests adding a requirement that except in complex cases, the court rule promptly on a motion to dismiss, and must rule within 60 days after full briefing.

Rule 16

Most of the proposals aimed at pretrial conferences recommend stronger case management by more vigorous use of present Rule 16. But the New York City Bar recommendation is this: "Strong and consistent judicial management will * * * be enhanced by requiring that the Rule 16(a) initial pre-trial conference be mandatory, rather than discretionary as it is now." A defendant that intends to file a Rule 12(b) motion or a motion for summary adjudication should inform the court so that the initial pretrial conference can be scheduled before the motion is filed. ACTL/IAALS Rule 8.1 similarly requires a pretrial conference "as soon as practicable after appearance of all parties." Rule 8.2 requires the judge to set a trial date as soon as possible after the initial conference. Rule 9.4 independently requires that a trial date be set at the earliest practicable time, and forbids change "absent extraordinary circumstances."

In addressing case management, Professor Miller emphasizes the need for training, education, and other work outside the rules. But he adds: "It may be that recent thinking about management matters has been too static and that Rule 16 and the Manual are not yet sufficiently delineated and textured to meet the challenges of the more difficult aspects of contemporary litigation." 60 Duke L.J. 1, 117-118.

Rule 23

The Center for Constitutional Litigation takes issue with "common impact" rulings by some courts that are described as allowing certification of a class only if each and every class member is harmed in the same way. The proposal would amend Rule 23(b)(3) so that the predominance of common questions is determined "solely based on issues presented at trial," and so that the fact or quantity of individual injury "need not be proven at trial." A new rule 23(c)(6) would support this provision by permitting an award of aggregate class damages, to be allocated after trial by statistical or sampling methods, or some other reasonable method.

Rule 48

Judge Higginbotham's paper reflects continuing interest in restoring the 12-person civil jury, adding a casual footnote suggesting a 10-2 majority verdict rule. (An effort to restore 12-person juries was defeated in the mid-1990s.) Paul Carrington's paper also focuses on the 12-person jury.

Rule 56: Summary Judgment

Summary adjudication: The New York City Bar proposes a new procedure that blends disposition on the pleadings with summary judgment as we know it. The proposal is well fleshed out, warranting description of the details. A defendant can make a conventional motion to dismiss for failure to state a claim, and is entitled to a stay of all discovery pending resolution of the motion. Instead, the defendant may answer — including any affirmative defenses and counterclaims — and move for summary adjudication. Summary adjudication requires enhanced initial disclosures that include 14 hours of deposition "of each side," and other disclosures within a scope determined by the court. Decision is governed by the summary-judgment standard, but may not be deferred for further discovery. Any issue resolved by summary adjudication becomes the law of the case. A plaintiff may move for summary adjudication if the defendant moves for it, and also if the defendant unsuccessfully seeks a conventional Rule 12(b) dismissal or files an answer. The theory is that motions on the pleadings fail too often, in part because leave to replead is commonly given, while summary judgment is available only after costly discovery. Summary adjudication of some issues will control the scope of discovery, even if it does not resolve any claim, counterclaim, or other claim. Determination of the scope of the mandatory disclosure would be shaped by the issues that commonly prove important in the particular type of litigation, and often would be limited to easily available documents and the like.

The New York County Lawyers' Association explicitly disagrees with the City Bar. Issues that are properly decided without discovery can be resolved under Rule 12. Rule 56 can be used to focus summary judgment on specific issues, with authority to stage discovery as appropriate to those issues. The motion for summary adjudication may be used deliberately to delay discovery. And if summary adjudication is granted on some issues, the attempt to deny discovery on those issues might undesirably curtail discovery. And adhering to the summary adjudication would be unfair if subsequent discovery showed it was wrong. (Note: it is unclear how the "law of the case" phrase in the City Bar proposal is intended. Standard law-of-the-case doctrine permits a district court to depart from its own earlier rulings in a case when error appears.)

Stueve & Keenan propose to allow depositions of nonparties only by agreement or order. In part because of this limit they would allow parties to oppose summary judgment by a declaration, "based on substantial facts, of what they reasonably project that a non-party trial witness' testimony will demonstrate. This declaration should also show why receiving the witness's direct testimony through affidavit is not feasible." Sanctions may be imposed for making a representation "that proves false at trial."

Accelerated disposition: The ACTL/IAALS proposals include consideration of an "application" procedure adopted in some Provinces of Canada. The details are sketchy. But the idea is that a plaintiff may commence an action with what is in effect a motion for summary judgment, supplying supporting materials — documents and affidavits — at the outset. Depositions are limited to what is in the affidavits. The court may combine the procedure for decision on the record as it develops with a trial on some particular points.

(The 2010 version of Rule 56 allows a party to move for summary judgment at any time until 30 days after the close of all discovery. The Committee Note observes that a plaintiff can move for

summary judgment at the beginning of the action. This procedure may be useful in collection cases, bringing summary judgment back close to its origins. In addition, needs for prompt specific relief can often be addressed by injunction, see Rule 65. Declaratory relief may be suitable for expeditious handling in situations that do not call for much discovery. These opportunities, the newly emphasized availability of partial summary judgment, and the general authority to manage an action probably suffice.)

Prompt Ruling: Complaints heard during the hearings on Rule 56 amendments were repeated at the conference: some courts take too long to rule on summary-judgment motions, and at times fail to rule at all. The ABA advances an expectation that courts are expected to rule promptly, and always within 90 days after full briefing; it is not clear whether this is proposed as a rule amendment.

Permission to File: Several of the NELA respondents suggested that abuses of Rule 56 in employment cases justify imposing a requirement that a party get court permission to file the motion.

Inefficiency: During the Rule 56 review there were several suggestions that deciding a motion for summary judgment often is more work for the judge than a trial. One NELA respondent offered a similar thought: "[I]t has become less time consuming and costly to try a case to a jury than to go through the summary judgment process. So, the rules should do more to encourage trials and also more to discourage summary judgment." Others voiced the same thought.

Self-Serving Self-Contradiction: An NELA respondent suggests: "Allow clients to change and clarify answers to depositions not only in the transcript verification but later in affidavits and at trial, subject to impeachment." This addresses the common practice of refusing to consider self-serving, self-contradicting affidavits.

Disposition on an Administrative Record: Proceedings for review on an administrative record often are resolved without discovery. That is the reason why "an action for review on an administrative record" is excluded from initial disclosure by Rule 26(a)(1)(B)(i). The full routine of Rule 56 summary judgment may be more procedure than these cases need. For that matter, the standard for review is different from the summary-judgment standard. It would be possible to adopt a new and streamlined rule specifically for prompt disposition. But there is good reason to believe that courts generally manage to achieve disposition on the administrative record without undue complication or confusion of the parties. Little need appears to pursue this subject.

Rule 68: Settlement

Conference participants addressed settlement from a variety of perspectives. Professor Nagareda's paper frames the question: "how to regulate the distortive effect that our modern civil process might exert upon the pricing of claims in a world dominated by settlement, not trial." Current pretrial procedures focus on whether trial should occur, but trials rarely occur. And discovery imposes great costs in moving from motions on the pleadings to summary judgment. Perhaps procedures should be developed to help the parties price the settlement value of the claim. One possibility is a "preliminary judgment," provided by the court at an early stage; the judgment could be rejected by any party, but would provide a valuable anchor for converging on settlement value.

Rule 68 has hovered somewhere in the back cupboards of the Committee agenda for several years. Informal suggestions, and occasional formal requests, would invigorate Rule 68 by various means. Stiffer sanctions — fee shifting — are the most common element. There has been considerable resistance to taking up this thorny topic in the wake of unsatisfactory attempts in the 1980s and 1990s. But the time may come again.

Initial Disclosures

Rule 26(a)(1) initial disclosures were questioned by many participants. The subject may be sufficiently distinctive to be considered independently of other discovery topics.

The questions were almost mutually offsetting. Some suggest that the initial disclosures are nearly useless because they do not do enough — all of the same materials will be sought again by discovery demands that embrace them within requests that seek all information relevant to the same issues, not merely the information the disclosing party may use to support its own positions. Others suggest that the initial disclosures are unnecessary because they do too much, forcing the parties to work to disclose materials that the other parties would not bother to seek in discovery.

There is a plausible argument that initial disclosures should either be broadened so as to support a meaningful reduction in subsequent discovery, replaced by some other form of automatic discovery, or abandoned.

Abandonment is easy to accomplish. The ABA proposes both to broaden and to narrow initial disclosures. Disclosure of witnesses would be broadened to cover "each individual likely to have significant discoverable information about facts alleged in the pleadings, identifying the subject of the information for each individual." It would be narrowed by deleting any initial disclosure requirement as to documents. The parties would be expected to discuss and attempt to agree on exchange of documents before the initial pretrial conference.

Replacement might take a variety of forms of automatic discovery. Initial efforts to develop form interrogatories are under way. A relatively modest approach might amend Rule 33 to allow serving interrogatories, of a sort perhaps vaguely defined,
with the complaint and with the answer. The interrogatories could address the topics now covered by Rule 26(a)(1), or go further. They might include a request to produce all documents identified in the response, or perhaps some subset of the identified documents.

Expanded disclosure obligations can be easily imagined. Arizona Rule 26.1 establishes sweeping disclosure obligations that could be used as a model. (The IAALS survey of Arizona lawyers paints a rather mixed picture on experience under Rule 26.1, but supports the conclusion that this approach merits consideration.) The Center for Constitutional Litigation would require that, in a civil equivalent of *Brady* requirements for prosecutors, defendants produce materials that support the plaintiff's allegations. Judge Baylson suggests a "civil Brady" rule in broader terms: concepts of professional responsibility should oblige attorneys to disclose all materially unfavorable information (also rendered as information favorable to the other side), and parties should be likewise required to disclose; rules of professional confidentiality and privilege should not restrict this duty.

In addition to scope, timing also might be addressed. The ABA proposes that the plaintiff's disclosures be made within 30 days from filing the complaint, and the defendant's within 30 days from filing an answer.

There was one particular rule suggestion. An NELA respondent said that defendants almost always identify the address and phone number of witnesses as "c/o the attorney." The rule should be clear that the actual address and phone number are required.

Discovery: Detailed Changes

Allocation of discovery work between this Subcommittee and the Discovery Subcommittee will be an ad hoc accommodation of the agendas and interests of each. Often enough it will make

sense to assign detailed proposals to the Discovery Subcommittee. But coordination requires initial consideration — it may be useful for this Subcommittee to open up proposals that seem worthy, whether the result is to develop them fully or instead is to commend them for full development by the Discovery Subcommittee.

Scope: The ABA 21st Century proposals reflect a division among Special Committee members — some would eliminate discovery on the "subject matter" of the action. The final ACTL/IAALS proposals suggest consideration of a narrower scope — perhaps by changing the definition of relevance.

Cost Shifting: A proposal by Lawyers for Civil Justice illustrates the kinds of topics that are so important as to be readily separated from more detailed discovery work. This proposal is captured in the first sentence of the suggested rule: "A party submitting a request for discovery is required to pay the reasonable costs incurred by a party responding to a discovery request propounded under these Rules." (A similar protection for nonparties appears later.) The ACTL/IAALS final report suggests considering cost-shifting or co-pay rules.

Professor Nagareda suggests that a plaintiff should pay the defendant's discovery costs if the defendant wins on summary judgment. How about partial summary judgment? Affecting the tactical uses of Rule 56 motions?

Controlled Access: Judge Higginbotham's proposal is a good (and brief) example of a generic possibility: Require the parties to file statements of "likely controlling issues of fact and law." The court then asserts early case control over access to discovery in two steps: First, a hearing on access; then a hearing on access with a "'peek at the merits.' The latter being an effort to reinforce a determination that a claim has been stated and if there is a reasonable basis for accessing further discovery."

Judge Baylson makes a related suggestion that might be cast in rule form: mid-way during discovery, each party files a statement of contentions "in limited, numbered paragraphs with record support, with the opposing party making a substantive response." See the Manual for Complex Litigation (Fourth), § 11.473. This can help the parties adjust their discovery efforts.

Girard Proposals: Three specific proposals by Daniel Girard provide a good illustration of possible small-scale revisions that might accomplish quit a bit. They are advanced in Girard & Espinosa, "Limiting Evasive Discovery: A Proposal for Three Cost-Saving Amendments to the Federal Rules," 87 Denver U.L. Rev. ___ (2010):

(1) Evasive responses: This proposal draws from concern that discovery responses often are evasive, and the process often transforms from the intended "request-response" sequence to "an iterative, multi-step ordeal" in which the pre-motion conference requirement itself serves as an invitation to overbroad requests that anticipate over-narrow responses, negotiation, and eventual responses that may or may not be evasive. Rule 26(g) implicitly forbids evasive responses, but it should be made explicit by adding just two words to Rule 26(g)(1)(B)(i): signing a discovery request, response, or objection certifies that it is "not evasive, consistent with these rules and * * *."

(2) Rule 34: Production added to Inspection: Rule 34(a)(1) refers to a request "to produce and permit the requesting party * * * to inspect, copy * * * " documents. Rule 34(b)(1)(B) directs that the request "specify a reasonable time, place, and manner for the inspection and for performing the related acts." 34(b)(2)(B) directs that for each item or category, the response must "state that inspection and related activities will be permitted as requested," or object. "Producing" enters only in (b)(2)(D), referring to electronically stored information, and then again in (b)(2)(E), specifying

procedures for "producing documents or electronically stored information." Rule 34(c) invokes Rule 45 as the means of compelling a nonparty to "produce documents and tangible things." Girard observes that the common practice is simply to produce, rather than make documents available for inspection and copying. This leaves gaps in the language of the rules. Rule 37(a)(3)(B)(iv) should be amended to include "fails to produce documents" — a motion to compel may be made if "a party fails to produce documents or fails to respond that inspection will be permitted — or fails to permit inspection — as requested under Rule 34." In addition, a new provision should be added to Rule 34(b)(2)(B): "If the responding party elects to produce copies of documents or electronically stored information in lieu of permitting inspection, the response must state that copies will be produced and the production must be completed no later than the date for inspection stated in the request."

(3) Rule 34: General Objections: The underlying behavior is a tendency of responding parties to begin a response with a boilerplate list of general objections, and often to repeat the same objections in responding to each individual request, and at the same time to produce documents in a way that leaves the requesting party guessing whether responsive documents have been withheld under cover of the general objections. The proposed cure is to add this sentence to Rule 34(b)(2)(C): "Each objection to a request or part thereof must specify whether any responsive documents are being withheld on the basis of that objection." (Judge Baylson makes a related suggestion, observing that "[s]ome parties serve objections routinely and maintain them * * *, preferencing every response as 'subject to objections.' This tactic delays discovery and may obfuscate the search for facts." Absent party agreement otherwise, "objections not specifically sustained by the court in a certain time frame should be deemed overruled; the discovery shall be provided as if an objection had never been made.")

Start Discovery Sooner: Delaying discovery until after the Rule 26(f) conference is a bad idea, or so it is argued by a respondent to the ABA survey.

Stay Discovery Pending Motions: Various suggestions were made about staying discovery pending disposition of a motion to dismiss. The ABA proposal is that the court has discretion whether to stay discovery, but adds that the court should promptly rule on the motion — the ruling should not take more than 60 days in cases that are not "complex." The ACTL/IAALS Pilot Program Rule 6.1 similarly relies on discretion. The New York City Bar proposal would stay discovery pending disposition of a motion to dismiss or for summary adjudication, unless the court finds good cause to allow discovery. In order to deter strategic use of the motions, discovery should proceed on an expedited basis if a motion is made and denied. Lawyers for Civil Justice propose a stay unless the court finds that particularized discovery is necessary to preserve evidence or prevent undue prejudice.

Exchange Initial Discovery Requests: The New York City Bar recommends that parties be required to exchange actual discovery requests at the Rule 26(f) conference and a Rule 16(b) conference so that the reasonableness of the discovery can be discussed with the court.

Place of Depositions: More than one NELA respondent would require "corporate deponents" to travel to the district where litigation is conducted. Cf. present Rule 37(d)(1).

Word-Processing Format: A suggestion that pops up at intervals over the years is renewed: Rule 33, 34, and 36 discovery requests should be in an electronic form that allows responses directly in the form.

Number of Interrogatories: An NELA respondent suggests that the limit on the number of interrogatories should be deleted. A larger number of simpler, subject-specific interrogatories can be drafted and answered with less time and expense.

Contention Interrogatories: The ABA finds that contention interrogatories "have become a tool of oppression and undue cost"; they should be prohibited absent agreement of the parties or court order. The New York City Bar believes that contention interrogatories "to elicit contentions and narrow areas of disagreement can be effective, but typically not until later in the discovery process."

Limit Rule 34: Lawyers for Civil Justice and allies propose limits to 25 requests, to 10 custodial or information sources, and to two years prior to the complaint. Others propose comparable limits; Arizona limits requests to 10 distinct items or categories of items.

Requests to Admit: The ABA again finds oppression, and recommends a limit of 35 requests. (The FJC survey, p. 10, found requests used in 25% to 30% of the closed cases; plaintiffs and defendants reported different medians and means, but the means were always well above the medians — indicating that means, mostly hovering just above 20, are influenced by numbers at least veering toward 35 in quite a few cases.) The ACTL/IAALS invokes the general principle of proportionality, interpreting it to mean that contention interrogatories and requests to admit should be used sparingly, if at all.

Other Limits: The ACTL/IAALS final proposals include limiting the persons from whom discovery can be sought (Arizona allows depositions of parties, expert witnesses, and document custodians; court permission or stipulation is required for others); limiting the time available for discovery; limits on the amount of money a party can spend, or force its opponent to spend on discovery; discovery budgets approved by the clients and the court. Stueve & Keenan would limit depositions to parties, requiring agreement or order to depose expert witnesses and nonparties; in return, they would establish nationwide subpoenas to compel trial testimony.

Sanctions: There are many laments that sanctions are rarely imposed, generating reflex refusals to provide discovery designed to provoke a motion to compel. One NELA respondent spoke to the other side: "[T]he presumption of sanctions in Rule 37 makes it too risky for many individual parties to challenge the discovery responses of well-financed adversaries."

Definitions: An NELA respondent: "Add a definitions section to FRCP to reduce wrangling about, for example, whether questions containing 'respecting,' or 'relevant to' or 'related to' must be answered, and if so, what these words include."

Expert Witnesses

The broader proposals for restricting expert-witness practice are better suited to the Evidence Rules than to the Civil Rules. The ACTL/IAALS pilot program rule 11 would require that a Rule 702 expert's testimony be "strictly limited to the contents of the report" furnished in writing. That could be accomplished in Rule 26(a)(2)(B). In addition, the rule would allow only one expert witness per party to testify on "any given issue." (Arizona allows only one witness per side on an issue; if coparties cannot agree, the court chooses.) Their final report suggests that depositions of experts be eliminated if the testimony is limited to the contents of the report.

II NONRULES PROPOSALS

As noted above, some suggestions for reform could be implemented either by rule amendments or by other means of encouraging best practices. In addition, some proposals may fit within the Rules Enabling Act framework without looking toward actual rule amendments. Only a few of these suggestions are noted here.

Enforce Rules

There were many comments, often in different contexts, that much could be accomplished by simply enforcing present rules. One example recurred through the NELA responses — many NELA members believe courts do not honor the discovery rules in ERISA litigation. Apparently the courts treat ERISA claims as review on an "administrative" record that is not to be supplemented..

Summary Judgment

The NELA respondents produced staggering numbers of responses bewailing delay in ruling on summary judgment until the eve of trial. A related and also frequently expressed concern is the practice of holding a final pretrial conference before ruling on summary judgment. And there are requests for oral argument. A variation suggests oral argument before the nonmovant has to file a brief. None of these seems particularly amenable to rule text provisions.

Local Rules

"Local rules projects" have been pursued under the aegis of the Standing Committee. Continuing dissatisfaction with local rules was expressed in several of the surveys. There was widespread feeling that local rules are not always consistent with the national rules. In addition, implementation of the local rules themselves may not be consistent — some individual judges depart from both national and local rules.

Local rules also were praised by some of the ABA answers. One virtue is that they give notice of practices that will be followed whether or not expressed in a formal rule — better that all lawyers have access, not just the knowing insiders. Another is that they may be useful means of trying out ideas that may be proved to warrant general adoption. Yet another may be flexibility: generating sets of model local rules for specific types of litigation may be a way to respond to the shortcomings of transsubstantive procedure. Patent litigation rules are offered as an example.

The National Employment Lawyers Association found a consensus that local rules are not consistently applied within the district. It recommends that the judges of each district meet periodically to discuss their variations on local practice. (This does not seem a likely subject for Rule 83.)

Miscellaneous

Require attorneys to disclose to their own clients an expected budget of the costs of the case from beginning to end, including attorney fees; this should include aggregate data from other cases, and "how they are resolved, on average."

Go Slow

One ABA response echoed a theme that sounds periodically in rules discussions: "Please stop monkeying with the Civil Rules every year or so. Stability and predictability are important * * * . Trying to fix every new problem with a new civil rule is making our system more complex, expensive, and Canonical."

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

September 10, 2010

MEMORANDUM

To: The Chief Justice

From: James C. Duff

RE: RULES COMMITTEES' REPORT ON THE 2010 CONFERENCE ON CIVIL LITIGATION

On behalf of the Advisory Committee on Civil Rules and the Committee on Rules of Practice and Procedure, I am transmitting the attached report on the 2010 Conference on Civil Litigation held at Duke University School of Law on May 10-11, 2010.

Attachment

cc: Honorable Lee H. Rosenthal
Honorable Mark R. Kravitz
Jeffrey Minear, Esq.

Report to the Chief Justice of the United States on the 2010 Conference on Civil Litigation

Submitted by the Judicial Conference Advisory Committee on Civil Rules and the Committee on Rules of Practice and Procedure

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INTRODUCTION[1]

The Civil Rules Advisory Committee hosted the 2010 Conference on Civil Litigation at the Duke University School of Law on May 10 and 11. The Conference was designed as a disciplined identification of litigation problems and exploration of the most promising opportunities to improve federal civil litigation. More than seventy judges, lawyers, and academics presented and discussed empirical information, analytical papers, pilot projects, and various approaches used by both federal and state judges, in considering ways to address the problems of costs and delays in the federal civil justice system. Over 200 invited participants selected to ensure diverse views, expertise, and experience filled all the space available at the Law School and engaged in two days of panel presentations followed by extensive audience discussion. The result is a large amount of empirical information and a rich array of possible approaches to improving how the federal courts serve civil litigants.

I. THE BACKGROUND AND PURPOSE OF THE CONFERENCE

For many years, the Judicial Conference Rules Committees have heard complaints about the costs, delays, and burdens of civil litigation in the federal courts. And for many years, the Rules Committees have worked to address these complaints. That work is reflected in the fact that the Civil Rules, particularly the discovery rules, have been amended more frequently than any others. The more recent changes have been preceded by efforts to obtain reliable empirical information to identify how the rules are operating and the likely effect of proposed changes. Despite these recent rule changes, complaints about costs, delays, and burdens in civil litigation have persisted. Many of the complaints are inconsistent and conflicting. The Rules Committees concluded that a more comprehensive and holistic approach was called for in its empirical work. The 2010 Conference was built on an unprecedented array of empirical studies and data, surveys of thousands of lawyers, data from corporations on the actual costs spent on discovery, and white papers issued by national organizations and groups and by prominent lawyers. In addition, the Conference relied on data gathered in earlier rules-related work.

In 1997, the Civil Rules Committee hosted a conference at the Boston College Law School to explore whether the persistent complaints should be the basis for changes to the Federal Rules of Civil Procedure governing discovery. That conference was also preceded by empirical studies conducted by the Federal Judicial Center (FJC). After that conference, changes were proposed to the discovery rules, including a narrowing of the definition of the scope of discovery in Rule 26(b)(1). That change was enacted in 2000. Since then, however, the litigation landscape has changed with astonishing rapidity, largely reflecting the revolution in information technology. The advent and wide use of electronic discovery renewed and amplified the complaints that the existing rules and practices are inadequate to achieve the promise of Rule 1: a just, speedy, and inexpensive resolution to every civil action in the federal courts.

The discovery rules were amended again in 2006 to recognize distinct features of electronic discovery and provide better tools for managing it. The 2007 style project simplified and clarified all the rules, the 2008 enactment of Federal Rule of Evidence 502 reduced the risks of inadvertent privilege waiver in discovery, and the 2009 time-computation project made the calculation of

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[1] There are many people and entities to thank and acknowledge for their support of, and work on, the Conference. A complete list is beyond this report. Particular thanks, however, must be extended to the Duke University School of Law and Dean David F. Levi; the Federal Judicial Center and Judge Barbara Rothstein and Dr. Emery Lee; the Administrative Office and Director James Duff; the Judicial Conference of the United States; and each of the Conference panel moderators.

deadlines easier. With these internal changes in place, and with external changes continuing to occur, the Advisory Committee determined that it was time again to step back, to take a hard look at how well the Civil Rules are working, and to analyze feasible and effective ways to reduce costs and delays.

Some of the same information-technology changes that gave rise to electronic discovery also provided the promise of improved access to empirical information about the costs and burdens imposed in civil lawsuits in federal courts. A great amount of empirical data was assembled in preparation for the 2010 Conference. The Rules Committees asked the FJC to study federal civil cases that terminated in the last quarter of 2008, the most recent quarter that could be studied in time for the Conference. The study included detailed surveys of the lawyers about their experience in the cases. The FJC also administered surveys for the Litigation Section of the American Bar Association (ABA) and for the National Employment Lawyers Association (NELA). The Institute for the Advancement of the American Legal System (IAALS) conducted a detailed study of the members of the American College of Trial Lawyers (American College). The Searle Institute at Northwestern Law School and a consortium of large corporations also provided empirical information designed to measure in ways not previously available the actual costs of conducting electronic and other discovery. The rich and detailed data generated by all this work provided an important anchor for the Conference discussion and will be a basis for further assessment of the federal civil justice system for years to come.

The many judges, lawyers with diverse practices, consumers of legal services, and academic critics of legal institutions and processes provided an important range of perspectives. Lawyers representing plaintiffs, defendants, or both, and from big and small firms as well as public interest practice, were recruited. Clients were represented by corporate counsel for businesses ranging from very large multinational entities to much smaller companies, as well as by government lawyers. Empirical work was presented by FJC staff, private and public interest research entities, bar associations, and academics. The academic participants also provided historical and jurisprudential grounding. Experience with state-court practices was explored to show the range of possibilities working within the framework of the American adversary system. Different litigation bar groups were represented. The mix of these participants in the organized panels and in the subsequent discussions resulted in consensus on some issues and divergence on others. The diversity of views and experience helped identify the areas in which disagreements tracked the familiar plaintiff-defendant divide and areas in which both disagreements and consensus transcended that line.

Assembling the panels and commissioning, coordinating, and reviewing the empirical studies and papers occupied the planning committee, and particularly its chair, Judge John Koeltl, for a year. The empirical information, papers, and reports from the Conference are available at the following website: http://civilconference.uscourts.gov, and the Duke Law Review will publish many of the papers. The Conference was streamed live by the FJC. Attachments to this report include the agenda, which lists the panel topics and panelists; a separate list of the panelists, sorted by panel; and a list of the titles and authors of the papers, sorted by panel. While many of the empirical studies, pilot projects, and proposals for rule changes will continue and may be expanded, the materials presented and discussed at the Conference will provide the inspiration and foundation for years of future work.

II. Preliminary Results of the Empirical and Other Studies

A full accounting of the empirical studies and findings is beyond the scope of this report. But a brief summary of some of the preliminary results demonstrates the important role they will play in determining the most promising avenues for improving federal civil litigation.

The FJC conducted a closed-case study of 3,550 cases drawn from the total of all cases that terminated in federal district courts for the last quarter of 2008. The sample was constructed to eliminate categories of cases in which discovery is seldom used and to insure the inclusion of cases likely to encounter the range of litigation issues. The study included every case that had lasted for at least four years and every case that was actually tried, a design likely to capture the cases involving significant discovery. The study showed that plaintiffs reported $15,000 as the median total costs in cases that had at least some discovery. The figure for defendants was $20,000. In the top 5% of this sample, however, the reported costs were much higher. The most expensive cases were those in which both the plaintiff and the defendant requested discovery of electronic information; the 95th percentile was $850,000 for plaintiffs and $991,900 for defendants.

The results closely parallel the findings of the 1997 closed-case survey the FJC did for the Advisory Committee in connection with the work that led to the Boston College Law School Discovery Conference. Both FJC studies showed that in many cases filed in the federal courts, the lawyers handling the cases viewed the discovery as reasonably proportional to the needs of the cases and the Civil Rules as working well. The FJC studies support the conclusion that the cases raising concerns are a relatively small percentage of those filed in the federal courts, but the numbers and the nature of these cases deserve close attention. It would be a mistake to equate the relatively small percentage of such cases with a lack of importance. The most costly cases tend to be the ones that are more complicated and difficult, in which the stakes for the parties, financial or otherwise, are large. One set of issues is whether the cases with the higher costs in the FJC studies are problematic, that is, whether the costs are disproportionate to the stakes. Higher costs may not be problematic if they are justified by the amounts or issues at stake in the litigation; lower costs may still be problematic if they are burdensome because they are the result of excessive discovery that is not justified by what is at stake in the litigation or if the costs are low only because, for example, a defendant agreed to settle a meritless case to avoid high discovery costs.

Several other surveys supplemented the FJC work. The IAALS worked with the American College on a survey that was sent to every Fellow of the American College. With some modifications, that survey was also administered by the FJC for the Litigation Section of the ABA and for NELA. The responses varied considerably among the different groups.[2] The American College respondents—who have more years of experience in the profession and are selected from a small fraction of the bar—reflected greater general dissatisfaction with current civil procedure than the other groups. The ABA Section of Litigation survey responses did not indicate the same degree of dissatisfaction with the rules' ability to meet the goals of Rule 1 as the American College responses, but still reflected a greater degree of dissatisfaction with the operation of the Civil Rules than the FJC survey results.

The survey responses by the members of the plaintiff-oriented NELA were generally that the Civil Rules are not conducive to securing a "just, speedy, and inexpensive determination of every action," but most remained hopeful that current problems could be remedied by minimal reforms. Among the concerns raised by NELA respondents were that the rules are not applied as written and are applied inconsistently; that local rules often conflict with the Federal Rules; that initial disclosures are not useful in reducing discovery or saving money; that discovery is often abused but

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[2] The 1997 and the 2009 FJC surveys asked lawyers about their actual experiences in litigating specific cases and followed up with additional questions for a sample of those cases. This study design has an important advantage over surveys asking for general impressions about how the system is working. Responses to such questions about general impressions tend to be less grounded in actual case experience. Indeed, there was sometimes a striking difference between lawyers' responses about the proportionality of discovery that they experienced in specific cases and general statements about excessive discovery.

sanctions are rarely used (although more than half of the respondents found that in the majority of cases, counsel agree on the scope and timing of discovery); that litigation is too costly; that discovery is too expensive; and that delays increase costs.

On the defense-oriented side, the Lawyers for Civil Justice, the Civil Justice Reform Group, and the U.S. Chamber Institute for Legal Reform surveyed corporate counsel of Fortune 200 companies and reported that the survey respondents viewed litigation costs as too high. The participating corporations reported that outside litigation costs account for about 1 in every 300 dollars of U.S. revenue for corporations not in insurance or health care. The respondents also reported that the average discovery costs per major case represent about 30% of the average outside legal fees. The report drafted by the groups conducting the survey concluded that litigation costs continue to rise and are consuming an increasing percentage of corporate revenue; that the U.S. litigation system imposes a much greater cost burden on companies than systems outside the United States; that inefficient and expensive discovery does not aid the fact finder; that companies spend a significant amount every year on litigation transaction costs; and that large organizations often face disproportionately burdensome discovery costs, particularly with respect to e-discovery.

The surveys showed as major perceived difficulties on the defense side that contested issues are not identified early enough to forestall needlessly extensive and expensive discovery; that discovery may impose disproportionate burdens on the parties and at times on nonparties, made worse by the difficulties of discovering electronically stored information; and that adversaries with little information to be discovered have the ability to impose enormous expense on large data producers—not only in legal fees but also in disruption of ongoing business—with no responsibility under the American Rule to reimburse the costs. The surveys showed as major perceived difficulties on the plaintiffs' side that much of the cost of discovery arises from efforts to evade and "stonewall" clear and legitimate requests, that motions are filed to impose costs rather than to advance the litigation, and that the existing rules are not as effective as they should be in controlling such tactics. One area of consensus in the various surveys, however, was that district or magistrate judges must be considerably more involved in managing each case from the outset, to tailor the motions practice and shape the discovery to the reasonable needs of that case. The challenge is to achieve this on a consistent, institutional basis without interfering with the independence and creativity of each judge and district responding to the specific mix of cases and docket conditions, and without interfering with the effective handling of many cases under existing rules and practices.

Another area of consensus was that making changes to the Federal Rules of Civil Procedure is not sufficient to make meaningful improvements. While there was disagreement over whether and to what extent specific rules should be changed, there was agreement that there is a limit to what rule changes alone can accomplish. Rule changes will be ineffective if they are not accompanied by judicial education, legal education, and support provided by the development of materials to facilitate implementing more efficient and effective procedures. What is needed can be described in two words—cooperation and proportionality—and one phrase—sustained, active, hands-on judicial case management. These goals can be advanced by several means, including improved formal ongoing education programs for lawyers and judges, the development and use of "best practices" guides and protocols, and other means of encouraging cost-effective litigation practices consistent with vigorous advocacy.

The Conference generated specific and general suggestions for changing both rules and litigation practices. The suggestions fall into the categories identified above: changes to the rules; changes to judicial and legal education; the development of protocols, guidelines, and projects to test and refine continued improvements; and the development of materials to support these efforts.

III. RULEMAKING

Two points of consensus on rulemaking emerged from the Conference. First, while rule changes alone cannot address the problems, there are opportunities for useful and important changes. Second, there is no general sense that the 1938 rules structure has failed. While there is need for improvement, the time has not come to abandon the system and start over.

One recurring question is the extent to which new or amended rules are needed as opposed to more frequent and effective use of the existing rules. Conference participants repeatedly observed that the existing rules provide many tools, clear authority, and ample flexibility for lawyers, litigants, and the courts to control cost and delay. Conference participants noted that many of the problems that exist could be substantially reduced by using the existing rules more often and more effectively. It is important to understand the reasons that existing rules are not invoked or enforced more reliably and the extent to which changes in judicial and lawyer education can respond to those reasons. It is also important to understand the extent to which the problems of costs, delays, and unfairness can be addressed by enforcing the procedural rules. Economic and other incentives that drive how lawyers and litigants conduct litigation are certainly important. One judge with many years of experience both in the district court and on the court of appeals put it succinctly: "what we're seeing is the limits of rules." And it is important to distinguish between costs, delays, and burdens created by such causes as strains placed on federal judges by competing demands on their time on the one hand, and difficulties that arise from any weakness of the existing Civil Rules on the other.

Although rule amendments are not the only answer, the Conference did identify some candidates for amendment that attracted strong support and others that deserve close analysis. Some of these suggestions are already the subject of the Advisory Committee's work. Others draw on existing best practices, case law direction, state-court experience, or the results of pilot projects. Yet other ideas are less well-developed but may prove promising.

A general question is whether a basic premise of the existing rules, that each rule applies to all the cases in the federal system, should continue to govern. Over the years, there have been specific, well-identified departures from the so-called transubstantivity principle. Examples within the rules include Rule 9(b) and the categories of cases excluded from Rule 26(a)'s initial disclosure requirements. Although no one suggested a wholesale departure from transubstantivity, several Conference papers and participants raised the possibility of increasing the rule-based exceptions to it. Two general categories of exceptions were raised: exceptions by subject matter, such as a case raising official immunity issues; and exceptions by complexity or amount at issue in a case, such as a system that would channel cases into specific tracks.

Pleading and discovery dominated Conference suggestions for rule amendments. Some longstanding topics were conspicuous for lack of attention. Although there was substantial interest in exploring the phenomena of settlement and the "vanishing trial," the Rule 68 provisions on offer of judgment received no more than a collateral glance. And the protective-order provisions of Rule 26(c) drew no comment or attention at all, other than suggestions for standardizing protective orders for categories of litigation, such as employment cases, to expedite their use.

A. Pleading

The 1938 Civil Rules diminished the role of pleadings and greatly expanded the role of discovery. Discovery has been continually on the Advisory Committee's docket since the substantial revisions accomplished by the 1970 amendments. Pleading has been considered at intervals since 1993, when the decision in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), suggested that adoption of "heightened" pleading is a subject for the

Enabling Act process, not judicial decision. At that time, however, the Advisory Committee found no broad support or need for amendments to pleading rules.

The decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), brought pleading to the forefront of attention and debate. The academy in particular reacted in force to these decisions. A speaker at the Association of American Law Schools Civil Procedure Workshop in June 2010 counted eighty-seven law review articles on these cases, a count that continues to grow. Some members of Congress have proposed variations of bills intended to "roll back" the pleading standard, seeming to assume a fixed status quo of practice that did not exist. The lower courts have, over time, begun to provide the detail and nuance necessary to understand the specific impacts of these most recent Supreme Court interpretations of the familiar words of Rule 8. Well before the 2010 Conference, the Advisory Committee had begun a detailed study of the effects of *Twombly* and *Iqbal* on practice, to determine whether any rule amendments should be proposed and, if so, what direction they should take. That work continues, now informed by the addition of the materials and discussion presented at the Conference. As part of that work, the FJC was asked to provide data on the number and disposition of motions to dismiss in the wake of *Twombly* and *Iqbal*. That study is ongoing, but initial results are expected to be released this fall.

The Conference covered a full spectrum of pleading amendment possibilities, with disagreements that largely corresponded to the plaintiff-defendant divide over whether the current pleading standard provides timely and adequate identification of the issues to be decided and of those cases that cannot succeed and should be dismissed without further expenditure of time and resources. Some speakers presented the view that although the final answer should be adopted through the Enabling Act process, there is an emergency in pleading practice that should be cured by legislation enacted by Congress that would establish a rule that should endure until the Enabling Act process can work through its always deliberate procedures. Others expressed the view that the common-law process of case-law interpretation has smoothed out some of the statements in, and responded to the concerns raised by, *Twombly* and *Iqbal*, and will continue to do so. Yet others argued that although the Court only interpreted the language of Rule 8(a)(2), that rule should be amended to express more clearly the guidance provided by the *Twombly* and *Iqbal* opinions. Some recommended moving still further in the direction of "fact" pleading; these recommendations ranged from less factual detail than Code pleading, to "facts constituting the cause of action," to "notice plus pleading" that explicitly requires a court to consider not only factual allegations but also reasonable inferences from those allegations.

Another set of possibilities, apart from the general Rule 8(a) pleading standard, is to expand on the categories of claims flagged for "heightened pleading" by Rule 9(b). Two of the categories often mentioned for distinctively demanding pleading standards are claims of conspiracy and actions that involve official immunity.

Yet another set of possibilities is to focus on the Rule 12(b)(6) motion to dismiss rather than on the Rule 8(a) standard for sufficient pleading. Much of the debate about pleading standards focuses on cases in which plaintiffs lack access to information necessary to plead sufficiently because that information is solely in the hands of the defendants and not available through public resources or informal investigation. "Information asymmetry" has become the descriptive phrase for cases in which only formal discovery is able to provide plaintiffs with information necessary to plead adequately. The Conference participants provided substantial encouragement for rule amendments that would explicitly integrate pleading with limited initial discovery in such cases. Various forms will be considered. A plaintiff might identify in the complaint fact matters as to which discovery is needed to support an amended complaint and seek focused discovery under judicial supervision. Or one response to a motion to dismiss under Rule 12(b)(6) might be for the plaintiff to make a preliminary showing of "information asymmetry" and to seek focused, supervised

discovery before a response to the motion is required. Another approach might be to require the court asked to decide a motion to dismiss to consider the need for discovery in light of probable differences in access to information. Alternatively, there might be some opportunity for prefiling discovery in aid of framing a complaint, drawing from models adopted in several states.

Yet other approaches to pleading have been explored in the past and continue to be open for further work. One would expand the Rule 12(e) motion for a more definite statement to focus on an order to plead in a way that will facilitate case management by the court and parties. Another would expand the use of replies, drawing on approaches used in official-immunity cases as one example.

Pleading problems are of course not limited to complaints. Plaintiffs' attorneys assert that defendants frequently fail to adhere to the response requirements built into Rule 8(b). The Conference, however, did not produce suggestions for revising this rule. The difficulty here seems to lie not in the rule but in its observance, another illustration of the limited capacity of rulemaking to achieve desirable ends. By contrast, a number of Conference participants did make the specific suggestion that the standard for pleading an affirmative defense should parallel the standard for pleading a claim. That question can be addressed by new rule text, and that possibility will be considered by the Advisory Committee.

B. Discovery

Empirical studies conducted over the course of more than forty years have shown that the discovery rules work well in most cases. But examining the cases in which discovery has been problematic because, for example, it was disproportionate or abusive, requires continuing work. Discovery disputes, the burdens discovery imposes, the time discovery consumes, and the costs associated with discovery increase with the stakes in the litigation, both financial and legal; with the complexity of the issues; and with the volume of materials involved in discovery. The Conference produced some specific areas of agreement on the need for some additional rule changes and better enforcement of existing rules, along with areas of disagreement on whether a more significant overhaul of the discovery rules is needed. This was also the area in which the recognition that rule changes alone are inadequate to produce meaningful improvements in litigation behavior or significantly reduce the costs and delays of discovery had the greatest force. Rules alone cannot educate lawyers (or their clients) in the distinction between zealous advocacy and hyper-advocacy.

The Conference discussions of discovery problems extended beyond the costs, delays, and abuses imposed by overbroad discovery demands to include those imposed by discovery responses that do not comply with reasonable obligations. While the defense-side lawyers reported routine use of overbroad and excessive discovery demands, plaintiff-side lawyers reported practices such as "stonewalling" and the paper and electronic versions of "document dumps," accompanied by long delays, overly narrow interpretations of discovery requests, and motions that require expensive responses from opposing parties and that create delay while the court rules.

Privilege logs were identified as both a cause of unnecessary expense and delay and a symptom of the dysfunction that can produce these problems. Privilege logs are expensive and time-consuming to generate, more so since electronic discovery increased the volume of materials that must be reviewed. Defense-side lawyers reported that after all the work and expense, the logs are rarely important in many cases. Plaintiff-side lawyers reported that many logs are designed to hide helpful documents behind privilege claims that, if tested, are shown to be implausible. While Rule 26(g) already addresses this abuse of privilege logs, it may be that Rule 26(g) is too obscure in its location or insufficiently forceful in its expression and should be improved. Or it may be that Rule 26(g) is an example of an existing rule that judges and lawyers can be shown ways to use more

effectively. Others suggested that the Civil Rules should explicitly permit more flexible approaches to presenting privilege logs and to testing their validity, combined with judicial and legal education about useful approaches. An example of such an approach would be to have a judge supervise sampling techniques that select log documents for a determination of whether the privilege claims are valid. Federal Rule of Evidence Rule 502, enacted in 2008, provides helpful support for further work in this area.

In 2000, the basic scope of discovery defined in Rule 26(b)(1) was amended to require a court order finding good cause for discovery going beyond the parties' claims or defenses to include the subject matter involved in the action. The extent of the actual change effected by this amendment continues to be debated. But there was no demand at the Conference for a change to the rule language; there is no clear case for present reform. There is continuing concern that the proportionality provisions of Rule 26(b)(2), added in 1983, have not accomplished what was intended. Again, however, there was no suggestion that this rule language should be changed. Rather, the discussion focused on proposals to make the proportionality limit more effective and at the same time to address the need to control both over-demanding discovery requests and under-inclusive discovery responses.

There was significant support across plaintiff and defense lines for more precise guidance in the rules on the obligation to preserve information relevant to litigation and the consequences of failing to do so. Large data producers, whether public or private, for profit or otherwise, made clear a sense of bewilderment about the scope of their obligations to preserve information for litigation and the importance of clear rules that will give assurance that compliance will avert severe sanctions for what in an electronic world are inevitable losses of information. The uncertainty leads to inefficient, wasteful, expensive, and time-consuming information management and discovery, which in turn adds to costs and delays in litigation. Clear guidance should be provided if it can be.

A Conference panel produced a proposal for "Elements of a Preservation Rule" that achieved a consensus on the panel. The proposal exemplifies many of the complexities that led the Advisory and Standing Rules Committees in developing the 2006 electronic discovery rules to at least defer enacting a rule to address them. One question is whether a rule can helpfully define the event that triggers a duty to preserve. Many cases find a duty to preserve before a lawsuit is filed, triggered by events that give "reasonable notice" that litigation is likely. It is unclear that a rule drafted in such general terms would provide the guidance asked for. Careful consideration must be given to whether it is proper to frame a rule addressing preservation before any federal action is filed. Careful consideration must also be given to whether a rule can specify the topics on which information must be preserved in terms more helpful than the open-ended scope of discovery allowed by Rule 26(b)(1), or can helpfully specify the categories of persons or data sources subject to preservation duties. While all acknowledge the challenge, preservation obligations are so important that the Advisory Committee is committed to exploring the possibilities for rulemaking. The Discovery Subcommittee is already at work on these issues.

Spoliation sanctions are directly related to preservation obligations, but the sanctions questions raised at the Conference are more easily defined. Sanctions cover a wide range, from those that directly terminate a case to those that simply award the costs of providing proof by alternative means. An instruction that adverse inferences may be drawn from the destruction of evidence is somewhere in the middle as a matter of formal description, but many lawyers view it as close to the "case-terminating" pole. The circuits divide on the degrees of culpability required for various sanctions. Some allow the most severe sanctions only on finding deliberate intent to suppress evidence. Others allow an adverse inference instruction on finding simple negligence. Conference participants asked for a rule establishing uniform standards of culpability for different sanctions. These issues are also important and will be explored. Depending on the direction taken, it may prove

desirable to enlist the Evidence Rules Advisory Committee in the effort. The Discovery Subcommittee is already at work on possible solutions to the lack of uniformity in sanctions decisions.

The initial disclosure obligations imposed by Rule 26(a)(1) were also the subject of Conference attention. The 1993 version of the initial disclosure rule required identification of witnesses and documents with favorable and unfavorable information relevant to disputed facts alleged with particularity in the pleadings. It also expressly allowed districts to opt out of the initial disclosure requirement by local rule. Many courts opted out. The rule was amended in 2000 to require national uniformity, but reduced the information that had to be disclosed to what was helpful to the disclosing party. A number of Conference participants argued that the result is a rule that is unnecessary for many cases, in which the parties already know much of the information and expect to do little or no discovery, and inappropriate or unhelpful for more heavily discovered cases, in which discovery will of necessity ask for identification of all witnesses and all documents. Some responded that a more robust disclosure obligation is the proper approach, pointing to the experience in the Arizona state courts. Others argued for entirely or largely abandoning the initial disclosure requirement.

Another category of discovery rule proposals continued the strategy of setting presumptive limits on the number of discovery events. This strategy has proven successful in limiting the length of depositions and the number of interrogatories. Many suggested limiting the number of document requests and the number of requests for admission. Other suggestions were to limit the use of requests for admission to authenticating documents, and to prohibit or defer contention interrogatories. Some of these suggestions build on state-court experience and should be studied carefully.

Other discovery proposals are more ambitious. One, building on the model of the Private Securities Litigation Reform Act, would require that discovery be suspended when a motion to dismiss is filed. Another, more sweeping still, would impose the costs of responding to discovery on the requesting party. More limited versions of a requester-pays rule would result in cost sharing at least when discovery demands prove overbroad and disproportionate or the requesting party loses on the merits. Such proposals are a greater departure from the existing system and would require careful study of their likely impact beyond the discovery process itself. An assessment of the need for such departures depends in part on whether the types of rule changes sketched above, together with other changes to provide more effective enforcement of the rules, will produce the desired improvements, or whether a more thorough shift is required.

C. Case Management

The empirical findings that the current rules work well in most cases bear on the question of whether "simplified rules" should be adopted to facilitate disposition of the many actions that involve relatively small amounts of money. A draft set of "simplified rules" designed to produce a shorter time to trial, with less discovery and fewer motions, for simpler cases with smaller stakes, was prepared several years ago. It was put aside for lack of support. One reason was the response—supported by the experience in federal courts that adopted "case-tracking" by local rule, and in some state courts using "case-tracking"—that few lawyers would opt for a simplified track and that many would seek to opt out if initially assigned to it. Another reason was that the existing case-management rules, including Rule 16, allow a court to tailor the extent of discovery and motions to the stakes and needs of each case. There was widespread support at the Conference for reinvigorating the case-management tools that already exist in the rules. The question is whether there should be changes in those rules or whether what is needed are changes in how judges and lawyers are educated and trained to invoke, implement, and enforce those rules.

Pleas for universalized and invigorated case management achieved strong consensus at the Conference. Many participants agreed that each case should be managed by a single judge. Others championed the use of magistrate judges to handle pretrial work. There was consensus that the first Rule 16 conference should be a serious exchange, requiring careful planning by the lawyers and often attended by the parties. Firm deadlines should be set, at least for all events other than trial; there was some disagreement over the plausibility of setting firm trial dates at the beginning of an action. Conference participants underscored that judicial case-management must be ongoing. A judge who is available for prompt resolution of pretrial disputes saves the parties time and money. Discovery management is often critical to achieving the proportionality limits of Rule 26. A judge who offers prompt assistance in resolving disputes without exchanges of motions and responses is much better able to keep a case on track, keep the discovery demands within the proportionality limits, and avoid overly narrow responses to proper discovery demands.

Several suggestions were made for rule changes that would make ongoing and detailed judicial case-management more often sought and more consistently provided. One suggestion was to require judges to hold in-person Rule 16 conferences in cases involving represented parties, to enable a meaningful and detailed discussion about tailoring discovery and motions to the specific cases. Other suggestions sought to reduce the delays encountered in judicial rulings on discovery disputes, which add to costs and overall delays, by making it easier and more efficient for judges to understand the substance of the dispute and to resolve it. One example would be having a rule-based system for a prompt hearing on a dispute—a premotion conference—before a district or magistrate judge, before the parties begin exchanging rounds of discovery motions and briefs, to try to avoid the need for such motions or at least narrow the issues they address.

Other Conference suggestions expressed wide frustration in overall delays by judges in ruling on motions. This problem extends to the amount and distribution of judicial resources, which are well beyond the scope of rule amendments. But some of these problems may be susceptible to improvement by changes in judicial and lawyer training.

IV. The Need for Strategies in Addition to Rule Amendments

A. Judicial and Legal Education

The many possibilities for improving the administration of the present rules can be summarized in shorthand terms: cooperation; proportionality; and sustained, active, hands-on judicial case management. Many of the strategies for pursuing these possibilities lie outside the rulemaking process. The Rules Committees do not train judges or lawyers, write manuals, draft practice pointers, or develop "best practices" guides. But the Rules Committees are eager to work with those responsible for such efforts and to ensure that the rules, the training, and the supporting materials all reinforce each other.

The FJC was deeply involved in the Conference and has already begun planning for judicial education to implement some of the lessons learned about the additional work judges must do to work towards cooperation, proportionality, and effective case management. The FJC is exploring changes in how both newly appointed and experienced judges are trained in effective methods for managing electronic discovery and in how recent changes in the practice can best be met by corresponding changes in case management.

These efforts will be supported by the development of effective and readily available materials for lawyers, litigants, and judges to use in a variety of cases. Such materials can include pattern interrogatories and production requests for specific categories of litigation. Such pattern discovery requests would be presumptively unobjectionable and could save both sides time and

money, and spare the court some of the skirmishing that now occurs. Promising work developing pattern interrogatory requests for employment discrimination actions is already underway as a result of the Conference. This work involves both plaintiff and defense lawyers cooperating to ensure that the form discovery requests reflect the views of both sides. Other categories of litigation would benefit from similar efforts. Similarly, standard protective orders that have been tested in practice could be a more time- and cost-effective alternative to each firm or lawyer inventing different forms of orders that in turn can generate litigation.

Bar organizations and legal research groups have also expressed a willingness to work on educating and training lawyers and clients in methods to promote cooperation consistent with vigorous advocacy and changes in litigation practice and behavior necessary to achieve proportionality in discovery. The existing rules provide many opportunities and incentives to cooperate, including the Rule 26(f) party conference, the Rule 16 scheduling orders and pretrial conferences, and the "meet and confer" obligations for many motions. While many lawyers honor and seize these opportunities, others do not, whether because of mistaken notions of the duties of "zealous advocacy," clients who dictate "scorched earth" practices, self-serving desires to expand their own work, or lack of training and experience. Professional bar organizations have tried to address these problems by adopting standards of cooperation. It will be important to encourage widespread recognition and implementation of these standards. In addition, groups such as the Sedona Conference, which was an early leader in identifying the need to adapt basic litigation strategies to manage electronic information, and the IAALS, are committed to continuing to develop and improve standards that are specifically responsive to continuing changes in technology and business that profoundly affect litigation.

The education and training must include not only lawyers, but also clients. In this respect, one area many have noted as important is the lack of preparation by even large and sophisticated data producers for electronic discovery, which has in turn contributed to the problems lawyers and judges have encountered. Bar and other organizations specifically representing clients will have an important role in such efforts.

B. Pilot Projects and Other Empirical Research

One form of empirical research will be pilot projects to test new ideas. An example of a promising project is the Seventh Circuit Electronic Discovery Pilot Program, which has convened large numbers of lawyers and judges to educate the bench and the bar on the problems of discovering electronically stored information and to devise improved practices. That pilot program developed and tested Principles Relating to the Discovery of Electronically Stored Information.[3] The FJC will study this pilot program and the accompanying principles to identify successful strategies that can be adopted elsewhere, to develop useful materials for judges and lawyers, and to improve judicial and legal education on managing electronic discovery.

The state courts are an important source of information about experience with different rules and approaches. The Conference included detailed research on practices in Arizona and Oregon.

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[3] The committee overseeing the pilot program has released a report on phase one of the program, which explains the process and reasoning behind the development of the principles and provides preliminary results of information gathered on the application of the principles in cases during phase one of the pilot program. *See* SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM COMMITTEE, SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM REPORT ON PHASE ONE (2010), *available at* http://civilconference.uscourts.gov (follow "Library" hyperlink; then follow "Seventh Circuit Electronic Discovery Pilot Program" hyperlink on page 4) (last visited September 1, 2010).

For example, Arizona goes far beyond federal practice by requiring highly detailed initial disclosures. Oregon continues to have fact pleading. Continued study of state practice will be important.

V. SPECIFIC IMPLEMENTATION STEPS

The 2010 Conference has provided more than could have been expected or even hoped for. The immediate task for the Rules Committees is to prioritize the many issues identified in the Conference for further study. The Conference highlighted two particular areas that merit the Rules Committees' prompt attention: (1) discovery in complex or highly contested cases, including preservation and spoliation of electronically stored information; and (2) review of pleading standards in light of the recent Supreme Court cases. The Advisory Committee has initiated work in these areas. The Discovery Subcommittee chaired by Judge David Campbell has begun considering rules to provide better guidance on preservation and spoliation of evidence, particularly with respect to electronically stored information. The Chair and Reporter of the Advisory Committee have begun exploring rule responses that might be developed as current pleading issues become better focused. On a broader basis, a new subcommittee chaired by Judge John Koeltl has begun to study the many different kinds of projects needed to capitalize on the insights gained from the Conference.

Some aspects of the work, such as judicial education, the development of supporting materials, and the development and implementation of pilot projects will be coordinated with the FJC. The FJC has also already begun working to implement some of the insights and lessons the Conference provided. Education programs, best practices guides, and different kinds of supporting materials for the bench and the bar will help achieve better use of present court rules. Research, empirical data, and pilot projects, such as the Seventh Circuit Electronic Discovery Pilot Program, will continue to provide the foundation for sound rule amendments and for changes in judicial education.

Bar and legal research organizations are already at work on developing their own training and supporting materials for lawyers and litigants to promote some of the lessons learned. As one example, NELA and the American College, with the IAALS, are working to develop pattern discovery requests for employment cases.

All of this will require continuing hard work by the Rules Committees to carry forward the momentum provided by the broad-based and carefully considered observations and proposals. The agenda for the Advisory Committee is demanding. But the goals are as old as the Federal Rules of Civil Procedure. They are the goals of Rule 1: to secure the just, speedy, and inexpensive determination of every civil action and proceeding in the federal courts.

Agenda
2010 Litigation Review Conference
Duke Law School
May 10-11, 2010

Monday, May 10, 2010

7:30-8:30 Continental Breakfast

8:30-8:45 **Welcome and Introduction:** Judges Lee Rosenthal, Mark Kravitz , and John Koeltl

8:45-10:15 **The Empirical Research: Overview of Satisfaction or Dissatisfaction with the Current System, and Suggestions for Change Raised by the Data**

Moderator: Judge Barbara Rothstein

A. The FJC Data: Judge Barbara Rothstein, Dr. Emery Lee, and Tom Willging

B. The Litigation Section Data: Lorna Schofield, Dr. Emery Lee, and Tom Willging

C. The NELA Data: Rebecca Hamburg

D. Follow Up Lawyer Interviews: Dr. Emery Lee, Tom Willging

10:15-10:30 BREAK

10:30-11:45 **The Empirical Research: Continued**

Moderator: Justice Rebecca Kourlis

E. Vanishing Jury Trial Data: Prof. Marc Galanter

F. The ACTL/IAALS Data: Justice Rebecca Kourlis, Paul Saunders

G. LJC Cost Data: Alexander Dimitrief

H. RAND Data: Nicholas Pace

I. Commentary on the Presented Research: Prof. Marc Galanter, Prof. Theodore Eisenberg, Jordan Singer

11:45-1:00 **Pleadings and Dispositive Motions: Fact Based Pleading, Twombly, Iqbal, Efforts to Decide Cases on the Papers Either at the Beginning of the Process or at the End of the Process**

Moderator: Prof. Arthur Miller

Participants: Judge Jon Newman, Prof. Adam Pritchard, Prof. Geoffrey Hazard, Daniel Girard, Sheila Birnbaum, Jocelyn Larkin

1:00-2:00 LUNCH

2:00-2:30 Speaker: Former Deputy Attorney General David Ogden

2:30-3:45 **Issues with the Current State of Discovery: Is There Really Excessive Discovery, and if so, What are the Possible Solutions?**

Moderator: Elizabeth Cabraser

Participants: Judge David Campbell, Magistrate Judge J. Paul Grimm, Jason Baron, Patrick Stueve, Stephen Susman, Prof. Catherine Struve

3:45-5:00 **Judicial Management of the Litigation Process: Is the Solution to Excessive Cost and Delay Greater Judicial Involvement?**

Moderator: Judge Patrick Higginbotham

Participants: Judge Michael Baylson, Magistrate Judge J. David Waxse, Jeffery Greenbaum, Prof. Judith Resnik, William Butterfield, Paul Bland

Tuesday, May 11, 2010

7:30-8:30 Continental Breakfast

8:30-9:45 **E-Discovery: Discussion of the Cost Benefit Analysis of E-Discovery and the Degree to Which the New Rules are Working or Not**

Moderator: Gregory Joseph

Participants: Judge Shira Scheindlin, Magistrate Judge J. James Bredar, John Barkett, Thomas Allman, Joseph Garrison, Daniel Willoughby, Jr.

9:45-10:30 **Settlement: Is the Litigation Process Structured for Settlement Rather than Trial and Should it Be? Should the Answers Depend on the Complexity of the Case including Whether the Action is a Class Action?**

Moderator: Judge Brock Hornby

Participants: Judge Paul Friedman, Prof. Richard Nagareda, Prof. Robert Bone, James Batson, Loren Kieve

10:30-10:45 BREAK

10:45-11:45 **Perspectives from the Users of the System: Corporate General Counsel, Outside Lawyers, Public, and Governmental Lawyers**

Moderator: Judge John Koeltl

Participants: Alan Morrison, Amy Schulman, Thomas Gottschalk, Ariana Tadler, Anthony West, Joseph Sellers

11:45-1:00 **Perspectives from the States: Different Solutions for Common Problems and their Relative Effectiveness; IAALS Pilot Results**

Moderator: Justice Andrew Hurwitz

Participants: Justice Kourlis, Paula Hannaford-Agor, Prof. Seymour Moskowitz, William, Judge Henry Kantor

1:00-1:30	LUNCH
1:30-2:00	Speaker: Chief Judge James Holderman
2:00- 3:15	**The Bar Association Proposals: ACTL, ABA Litigation Section, NYCBA, AAJ, LCJ, DRI** Moderator: Lorna Schofield Participants: Lorna Schofield, David Beck, Wendy Schwartz, Bruce Parker, John Vail
3:15-4:30	**Observations from Those Involved in the Rule Making Process over the Years** Moderator: Dean David Levi Participants: Judge Anthony Scirica, Judge Patrick Higginbotham, Prof. Paul Carrington, Prof. Daniel Coquillette, Prof. Arthur Miller
4:30-5:00	**Summary and Conclusions:** Judge Lee Rosenthal, Judge Mark Kravitz, Prof. Edward Cooper, Prof. Rick Marcus

Conference Panelists, By Panel
2010 Litigation Review Conference
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Welcome and Introduction:

- Judge Lee Rosenthal (United States District Court Judge from S.D. Tex.; Current Chair of the Committee on Rules of Practice and Procedure; Former Chair of the Advisory Committee on Civil Rules)
- Judge Mark Kravitz (United States District Court Judge from D. Conn.; Current Chair of the Advisory Committee on Civil Rules)
- Judge John Koeltl (United States District Court Judge from S.D.N.Y. ; Current member of the Advisory Committee on Civil Rules)

Empirical Research Panel #1:

- Judge Barbara Jacobs Rothstein (Director of the Federal Judicial Center; United States District Court Judge from W.D. Wash.)
- Dr. Emery Lee III (Senior researcher in the Federal Judicial Center)
- Tom Willging (Senior researcher in the Federal Judicial Center)
- Lorna Schofield (Partner at Debevoise & Plimpton; Current Chair of the ABA Litigation Section)
- Rebecca Hamburg (Program Director of the National Employment Lawyers Association)

Empirical Research Panel #2:

- Justice Rebecca Kourlis (Executive Director of the Institute for the Advancement of the American Legal System; Former Justice on the Colorado Supreme Court)
- Professor Marc Galanter (Professor of Law at University of Wisconsin-Madison and the London School of Economics and Political Science)
- Paul Saunders (Partner at Cravath, Swain & Moore LLP)
- Alexander Dimitrief (Vice President and Senior Counsel for Litigation and Legal Policy at General Electric)
- Nicholas Pace (Staff member of RAND Institute for Civil Justice)
- Professor Theodore Eisenberg (Professor of Law at Cornell Law School)
- Jordan Singer (Director of Research at the Institute for the Advancement of the American Legal System)

Pleadings and Dispositive Motions Panel:

- Professor Arthur Miller (Professor of Law at the New York University School of Law; Former Reporter to the Advisory Committee on Civil Rules)
- Judge Jon Newman (United States Court of Appeals Judge for the Second Circuit)
- Professor Adam Pritchard (Professor of Law at University of Michigan Law School)
- Professor Geoffrey Hazard (Professor of Law at Hastings College of Law)
- Daniel Girard (Managing partner of Girard Gibbs LLP; Current member of the Advisory Committee on Civil Rules)
- Sheila Birnbaum (Co-head of Skadden Arps Complex Tort and Insurance Group; Former member of the Advisory Committee on Civil Rules)
- Jocelyn Larkin (Deputy Executive Director of the Impact Fund)

Current State of Discovery Panel:

- Elizabeth Cabraser (Founding partner at Lieff, Cabraser, Heimann & Bernstein, LLP)
- Judge David Campbell (United States District Court Judge from D. Ariz.; Current member of the Advisory Committee on Civil Rules)
- Magistrate Judge J. Paul Grimm (United States Magistrate Judge from D. Md.; Current member of the Advisory Committee on Civil Rules)
- Jason Baron (Director of Litigation for the National Archives and Records Administration)
- Patrick Stueve (Founding partner of Stueve Siegel Hanson LLP)
- Stephen Susman (Founding partner of Susman Godfrey)
- Professor Catherine Struve (Professor of Law at University of Pennsylvania School of Law)

Judicial Management Panel:

- Judge Patrick Higginbotham (United States Court of Appeals Judge for the Fifth Circuit; Former Chair of the Advisory Committee on Civil Rules)
- Judge Michael Baylson (United States District Court Judge for E.D. Pa.; Current member of the Advisory Committee on Civil Rules)
- Magistrate Judge J. David Waxse (United States Magistrate Judge for D. Kan.)
- Jeffery Greenbaum (Partner at Sills Cummis & Gross P.C.)
- Professor Judith Resnik (Professor of Law at Yale Law School)
- William Butterfield (Partner at Hausfeld LLP)
- Paul Bland (Staff attorney at Public Justice)

E-Discovery Panel:

- Gregory Joseph (Principal of Greg P. Joseph Law Offices, LLC; President Elect of the American College of Trial Lawyers; Former member of the Advisory Committee on Evidence Rules)
- Judge Shira Scheindlin (United States District Court Judge from S.D.N.Y.; Former member of the Advisory Committee on Civil Rules)
- Magistrate Judge J. James Bredar (United States Magistrate Judge from D. Md.)
- John Barkett (Partner at Shook, Hardy & Bacon L.L.P.)
- Thomas Allman (Former General Counsel of BASF Corporation)
- Joseph Garrison (Founding partner of Garrison, Levin-Epstein, Chimes, Richardson & Fitzgerald, P.C.)
- Daniel Willoughby, Jr. (Partner at King & Spalding)

Settlement Panel:

- Judge Brock Hornby (United States District Court Judge from D. Me.)
- Judge Paul Friedman (United States District Court Judge from D.D.C.; Former member of the Advisory Committee on Criminal Rules)
- Professor Richard Nagareda (Professor of Law at Vanderbilt University School of Law)
- Professor Robert Bone (Professor of Law at the University of Texas School of Law)
- James Batson (Partner at Liddle & Robinson, L.L.P.)
- Loren Kieve (Founding partner of Kieve Law Offices)

Users of the System Panel:

- Alan Morrison (Dean for Public Interest & Public Service at the George Washington University Law School)
- Amy Schulman (Senior Vice President and General Counsel of Pfizer Corporation)
- Thomas Gottschalk (Of counsel to Kirkland & Ellis; Former General Counsel at General Motors Company)
- Ariana Tadler (Partner at Milberg LLP)
- Anthony West (Assistant Attorney General, Civil Division, Department of Justice)
- Joseph Sellers (Partner at Cohen Millstein Sellers & Toll PLLC)

Perspectives from the States Panel:

- Justice Andrew Hurwitz (Justice on the Arizona Supreme Court; Current member of the Advisory Committee on Evidence Rules)
- Justice Rebecca Kourlis (Executive Director of the Institute for the Advancement of the American Legal System; Former Justice on the Colorado Supreme Court)

- Paula Hannaford-Agor (Director of the Center for Jury Studies, National Center for State Courts)
- Professor Seymour Moskowitz (Professor of Law at Valparaiso University School of Law)
- William Maledon (Partner at Osborn Maledon, P.A.; Current member of the Committee on Rules of Practice and Procedure)
- Judge Henry Kantor (Judge of the Circuit Court of the State of Oregon)

Bar Association Proposals Panel:

- Lorna Schofield (Partner at Debevoise & Plimpton; Current Chair of the ABA Litigation Section)
- David Beck (Founding partner of Beck, Redden & Secrest; Former member of the Committee on Rules of Practice and Procedure; Former President of the American College of Trial Lawyers)
- Wendy Schwartz (Partner at Reed Smith, LLP)
- Bruce Parker (Partner at Venable's Products Liability Practice Group)
- John Vail (Representative of American Association of Justice)

Rulemaking Panel:

- Dean David Levi (Dean of Duke University School of Law; Former United States District Judge from E.D. Cal.; Former Chair of the Committee on Rules of Practice and Procedure and the Advisory Committee on Civil Rules)
- Judge Anthony Scirica (United States Court of Appeals Judge for the Third Circuit; Former Chair of the Committee on Rules of Practice)
- Judge Patrick Higginbotham (United States Court of Appeals Judge for the Fifth Circuit; Former Chair of the Advisory Committee on Civil Rules)
- Professor Paul Carrington (Professor of Law at Duke University School of Law; Former Reporter to the Advisory Committee on Civil Rules)
- Professor Daniel Coquillette (Professor of Law at Harvard Law School and Boston College of Law; Reporter to the Committee on Rules of Practice and Procedure)
- Professor Arthur Miller (Professor of Law at the New York University School of Law; Former Reporter to the Advisory Committee on Civil Rules)

Summary and Conclusions:

- Judge Lee Rosenthal (United States District Court Judge from S.D. Tex.; Current Chair of the Committee on Rules of Practice and Procedure; Former Chair of the Advisory Committee on Civil Rules)
- Judge Mark Kravitz (United States District Court Judge from D. Conn.; Current Chair of the Advisory Committee on Civil Rules)

- Professor Edward Cooper (Professor of Law at University of Michigan School of Law; Reporter to the Advisory Committee on Civil Rules)
- Professor Rick Marcus (Professor of Law at Hastings College of Law; Associate Reporter to the Advisory Committee on Civil Rules)

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DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

NOVEMBER 15-16, 2010

1 The Civil Rules Advisory Committee met at the Administrative Office of the United States
2 Courts on November 15 and 16, 2010. The meeting was attended by Judge Mark R. Kravitz, Chair;
3 Judge Michael M. Baylson; Judge David G. Campbell; Judge Steven M. Colloton; Professor Steven
4 S. Gensler; Judge Paul W. Grimm; Daniel C. Girard, Esq.; Peter D. Keisler, Esq.; Judge John G.
5 Koeltl; Judge Gene E.K. Pratter; Chief Justice Randall T. Shepard; Anton R. Valukas, Esq.; Judge
6 Vaughn R. Walker; and Hon. Tony West. Professor Edward H. Cooper was present as Reporter, and
7 Professor Richard L. Marcus was present as Associate Reporter. Judge Lee H. Rosenthal, Chair, and
8 Judge Diane P. Wood represented the Standing Committee, along with Professor Daniel R.
9 Coquillette, Reporter. Judge Eugene R. Wedoff attended as liaison from the Bankruptcy Rules
10 Committee. Laura A. Briggs, Esq., was the court-clerk representative. Peter G. McCabe, John K.
11 Rabiej, James Ishida, and Jeffrey Barr represented the Administrative Office. Judge Barbara
12 Rothstein, Emery Lee, and Joe Cecil represented the Federal Judicial Center. Ted Hirt, Esq., and
13 Allison Stanton, Esq., Department of Justice, were present. Katherine David, interim Rules Clerk
14 for Judge Rosenthal, attended. Observers included Alfred W. Cortese, Jr., Esq.; Joseph Garrison,
15 Esq. (National Employment Lawyers Association liaison); John Barkett, Esq. (ABA Litigation
16 Section liaison); Chris Kitchel, Esq. (American College of Trial Lawyers liaison); John Vail, Esq.
17 (American Association for Justice); Tom Allman, Esq.; Edward Pickle, Esq.; and Jonathan
18 Redgrave, Esq.

19 Judge Kravitz opened the meeting with a general welcome to all present. He congratulated
20 Andrea Kuperman, Judge Rosenthal's Rules Clerk, on the birth of Abigail Rose — "another job well
21 done." He noted that "the Chief Justice has been good to us" — Judge Colloton and Judge Koeltl
22 have been reappointed for second terms. And Judge Pratter has been appointed "to maintain our
23 Eastern District of Pennsylvania contingent."

24 Judge Baylson elaborated on the introduction of Judge Pratter, observing that she and he had
25 been partners in private practice before becoming colleagues on the bench. She is an outstanding
26 judge. Judge Kravitz noted that when the appointment was announced, Judge Baylson had sent an
27 e-mail message reporting that Judge Pratter is brilliant, creative, scholarly, and witty. All joined in
28 welcoming her to the Committee.

29 Judge Kravitz noted with sadness the death of Professor Richard Nagareda. Professor
30 Nagareda presented an excellent paper at the Duke Conference, suggesting that procedure should be
31 revised to focus in part on devices that will enable the parties to price the claims for settlement. He
32 was one of the most luminous of the rising stars in the procedure heavens. Beyond his prolific
33 writing, including service as one of the Reporters for the American Law Institute Principles of
34 Aggregate Litigation, he was an active innovator in developing new curricular offerings to combine
35 rigorous theory with the practical side of litigation.

36 Judge Kravitz also noted that Judge Baylson has concluded the allotted two terms as
37 Committee member. He was deeply involved in all aspects of Committee work, serving on a Style
38 Subcommittee and chairing Subcommittees on Rule 15, Rule 56, and time computation. He
39 displayed consummate leadership skills in steering the Rule 56 project to completion, achieving
40 success in a task that earlier efforts had left unfinished. He also collaborated actively in the Rule 45
41 work of the Discovery Subcommittee. He will be missed.

42 Two other Committee members also have completed their second terms. Chilton Varner and
43 Daniel Girard were enormously productive members. They worked tirelessly on discovery, including
44 Rule 26, e-discovery, and the quirks of Rule 45. They bring different perspectives to Committee
45 work, born of different practice backgrounds, but they have left their clients at the door and worked
46 harmoniously to forge the best rules that can be shaped for the benefit of litigants on all sides of an

47 action. They too will be missed. New practitioner members have not yet been designated to replace
48 them. They have generously agreed to continue to work with the Discovery Subcommittee as it
49 refines the Rule 45 proposals and plunges deeper into its work on preservation and spoliation. The
50 Committee is in their debt.

51 Judge Wedoff has contributed valuable insights on general procedural problems in his role
52 as liaison from the Bankruptcy Rules Committee. He has been designated chair of that Committee,
53 so will be succeeded by another liaison. His successor will have to work hard to take his place.

54 In a different direction, Judge Kravitz noted that Judge Walker has decided to retire from the
55 bench as of February 28, 2011. His most prominent recent work on the bench was his decision in
56 the case challenging California Proposition 8. Different observers react differently to the decision,
57 but it has garnered high praise in many quarters. He handled this momentous trial with all the skill
58 and imagination evidenced in his work with the Committee. One example of his Committee work
59 was his steadfast but good-humored position that the "point-counterpoint" proposal for summary-
60 judgment practice was a mistake. His court had adopted this procedure, followed it for a while, and
61 abandoned it. In the end, his view prevailed. It will be interesting to follow the paths his career
62 takes next.

63 *Standing Committee*

64 Judge Kravitz reported that the Duke Conference was discussed at the June meeting of the
65 Standing Committee. Several Standing Committee members attended the Conference and reported
66 highly favorable reactions. Other members had become familiar with the conference papers and
67 reports on the panel discussions. They too were very favorably impressed.

68 *Report to Chief Justice*

69 Judge Kravitz congratulated Judge Rosenthal on crafting an excellent report to Chief Justice
70 Roberts on the Duke Conference. The Report emphasizes the great value of the work done for the
71 Conference, and emphasizes above all the importance of carrying forward on many fronts to ensure
72 the work continues without losing momentum. The Duke Conference Subcommittee will report on
73 this work later during this meeting.

74 *Judicial Conference*

75 This Committee did not have any proposals requiring action at the September meeting of the
76 Judicial Conference.

77 *New Rules*

78 The expert trial-witness revisions of Rule 26 and the rewritten Rule 56 remain pending in
79 Congress. There is every reason to expect that Congress will, by inaction, allow them to become
80 effective as scheduled on December 1.

81 *March 2010 Minutes*

82 The draft minutes of the March 2010 Committee meeting were approved without dissent,
83 subject to correction of typographical and similar errors.

84 *Working Agenda*

85 Judge Kravitz noted that the agenda does not include any proposals for action. The purpose
86 of this meeting is to gather advice from the full Committee on the work being developed by
87 subcommittees or more informally. Some truly difficult problems are being addressed. Deliberate
88 action will be required to address them, often in multiple stages.

89 *Rule 45*

90 Judge Campbell, chair of the Discovery Subcommittee, introduced the Rule 45 work by
91 observing that the Subcommittee is working toward making recommendations next April for
92 publishing proposed Rule 45 amendments.

93 The Rule 45 work began two years ago by making a broad survey of Rule 45 issues in
94 response to a variety of suggestions for revision. An initial list of 17 possible issues was winnowed
95 down to the four issues still under consideration. The work was carried on through telephone
96 conference calls. A miniconference was held in Dallas at the beginning of October, bringing
97 together a good cross section of lawyers and judges. Their contributions were very helpful in
98 advancing the work.

99 One of the four proposals is easy to grasp. The last sentence of Rule 45(b)(1) explicitly states
100 that notice must be served on each party before a party serves a subpoena to produce documents.
101 Just as explicitly, lawyers complain that frequently they do not receive the required notice. When
102 the complaint is registered with a court, it is remarkable that the party who served the subpoena
103 frequently responds that notice is not required. This proposal seeks to give greater prominence to
104 the notice requirement by moving it up to become a new Rule 45(a)(4). In addition, the proposal
105 requires that a copy of the subpoena be served with the notice. The Subcommittee also considered
106 proposals that would require the party who served the subpoena to give notice to other parties when
107 documents are produced in response. The Subcommittee concluded that adding to the notice
108 requirements would generate additional fractious disputes. In addition, materials are often received
109 in batches — multiple notices often would be required. It seems better to rely on the initial notice
110 of service, leaving the other parties responsible to follow up by inquiry as to materials received.

111 The second proposal provides for transfer of enforcement disputes when a subpoena issues
112 from a court apart from the court where the action is pending. Participants in the miniconference
113 agreed that transfer to the court where the action is pending can be a good idea. At the same time,
114 it is important to set a standard that discourages routine transfer simply to get rid of the dispute.

115 The third proposal deals with a question made prominent by the ruling in In re Vioxx
116 Products Liability Litigation, 438 F.Supp.2d 664 (E.D.La.2006). The Vioxx court ruled that by
117 negative implication, Rule 45(c)(3)(A)(ii) authorizes nationwide subpoenas that direct a party or a
118 party's officer to appear as a trial witness. Other courts have disagreed; there is a "pretty even split
119 of authority" in the reported cases. It seems clear that the Vioxx ruling defies the intent of Rule 45
120 as revised in 1991. The Subcommittee expects to recommend that Vioxx be undone. Nonetheless,
121 powerful arguments have been made for recognizing some expanded power to compel appearance
122 of a party at trial. The Subcommittee expects to recommend publication of a version that will
123 incorporate its judgment on the best way to go beyond Vioxx, so as to prompt comments and
124 testimony on which approach is better.

125 Finally, the Subcommittee has studied multiple methods of restructuring Rule 45. Many
126 comments urge that Rule 45 is complex. If it is well understood by a few who work with it regularly,
127 it is difficult for others to work through it. One approach, suggested by Judge Baylson, would
128 dramatically shorten Rule 45, in part by relying on cross-reference to the body of discovery rules set
129 out from Rule 26 through Rule 37. This approach runs the risk of forcing courts to recreate answers
130 to questions that caused trouble in earlier days and were addressed by rule text to provide readily
131 available solutions. Another approach would move part or all of the discovery subpoena provisions
132 directly into the discovery rules. Subpoenas to produce documents, for example, could be
133 incorporated with the document-request provisions of Rule 34. This approach drew some support,
134 but many participants at the miniconference thought it would not reduce the overall complexity of
135 the rules. Unless there is a clear and strong advantage, further, it is better to avoid proposals that
136 inevitably generate a risk of unanticipated consequences. A more modest approach is being actively
137 pursued. This approach seeks to eliminate the "three-ring circus" aspect of present practice that
138 provides multiple definitions of the issuing court, of the place of service, and of the place of
139 performance. All subpoenas would issue from the court where the action is pending. The place of
140 performance can — and probably will — be kept as it is in the present rules. And enforcement can
141 be provided in the place of performance, subject to adding the transfer provisions that will be
142 proposed quite apart from the restructuring proposal.

143 Professor Marcus developed these themes.

144 Notice. The notice question has been extensively discussed at earlier meetings. Adding a
145 requirement that the notice include a copy of the subpoena serves the purpose of the notice
146 requirement. As obvious examples, it will provide other parties an opportunity to object or to
147 propose that the subpoena be expanded to include additional materials. A minor drafting issue also
148 is presented — "then" was added in restyling present Rule 45(b)(1), but it is not clear whether it
149 serves a desirable purpose. One issue is whether the Committee Note should say anything about the
150 consequences of failing to give the required notice. The Subcommittee concluded that it is better
151 not to add sanction provisions to rule text; it may be better to avoid the question in the Note as well.
152 And the prospect of requiring additional notices each time materials are produced in response to a
153 subpoena was abandoned as too complicated.

154 The notice proposal elicited brief discussion. Two judges voted in favor of retaining "then."
155 Two other judges agreed that complaints that notice has not been provided are made so frequently
156 that it will be good to see whether some gain may be achieved by moving the requirement to a more
157 prominent place in the rule.

158 Transfer. Transfer issues arise because a discovery subpoena ordinarily issues from the court for the
159 district where performance is required. The court may have no other connection to the action. For
160 that matter, it does not know that the subpoena has issued, even though nominally the subpoena is
161 issued in its name. Enforcement at the place of performance is nonetheless appropriate in many
162 circumstances because the performance issues bear only on local events. On the other hand,
163 performance issues may have important ramifications for the action. It may be that the issue has
164 already been ruled upon by the action court, and is tendered to the issuing court in hopes of winning
165 a conflicting ruling. Or a complex action may lead to issuance of similar subpoenas from several
166 different courts around the country, creating the opportunity for inconsistent rulings. Decision of
167 many performance issues may turn on a firm grasp of the substantive issues in the action, and in any
168 event may affect case management by the action court. These concerns have led some courts to
169 transfer enforcement issues to the action court, despite the apparent lack of authority in present rules.

170 Judge Campbell offered examples of the problems that can be ameliorated by transfer. In one
171 case expert witnesses testified at a TRO hearing in a court on the east coast. The plaintiff then
172 subpoenaed the experts in the courts where the experts were located, seeking their full reports and
173 all relevant materials. One of the experts was in the District of Arizona. The defendant moved to
174 quash the subpoena, arguing that it was not clear whether the expert would be a trial-witness expert
175 and that discovery must be barred until that was decided. A magistrate judge in the court where the
176 action was pending was considering the question whether the limits on consulting expert discovery
177 were waived by using the expert to testify at the TRO hearing. The same issue was raised in a
178 district court in Texas and in yet another court. It makes no sense to require all these courts to rule,
179 perhaps inconsistently, on the same question as presented in the same action.

180 Another case was brought by a Los Angeles plaintiff against "Doe defendants" for
181 anonymous on-line defamation. The plaintiff then subpoenaed an internet service provider in
182 Arizona to compel disclosure of the names of the bloggers who posted the challenged statements.
183 The First Amendment protection of anonymous blogging can be defeated by showing a prima facie
184 claim. The discovery ruling would be dispositive. And the same question would be presented to
185 other courts where other internet service providers are located. It would be much better to have the
186 ruling on the prima facie case issue made by the court where the action is pending.

187 In a third example, a tight schedule was established to move toward determination of a
188 motion for class certification. The parties subpoenaed records in two federal courts in the midwest.
189 Those courts still had not ruled after four months. The orderly management of the class-certification
190 issue would have been much advanced by enabling the class-action court to rule on the subpoena
191 issues. This example prompted an observation that ancillary discovery motions are treated as
192 miscellaneous motions that do not show up on the six-month list. There is no external pressure for
193 timely disposition. So the lawyers at the miniconference protested that it is difficult to "get the
194 attention" of the ancillary discovery court.

195 These persuasive examples are offset by the concern that some judges will have a reflexive
196 knee-jerk tendency to transfer all disputes in ancillary discovery proceedings to the court where the
197 action is pending. Nonparty witnesses may have a strong interest in achieving local resolution of the
198 issues.

199 The draft transfer provision invokes the "interest of justice" standard that is part of the
200 formula guiding venue-transfer decisions under 28 U.S.C. § 1404(a). It was suggested that these
201 words do not give much guidance. Should the rule at least add the "convenience of parties and
202 witnesses"? Or perhaps refer directly to the convenience of the person commanded to provide
203 discovery? Or require "compelling reason" to transfer? The draft Committee Note discusses these
204 issues. One variation may be that it is a party, not the witness, who wants a decision in the ancillary
205 court — perhaps because it fears an adverse ruling by the court where the action is pending.
206 Examples could be given -- resistance based on a witness's medical condition is a good reason to
207 resolve the issue where the witness is located.

208 The draft rule does not speak of a motion, whether to compel or for a protective order. It
209 addresses the court: "the issuing court may * * * transfer." The Note says the burden is on the party
210 seeking transfer to make the case for transfer, but often it may be the judge who initiates the transfer
211 question. Rather than refer to burdens on parties and witnesses, would it be better to frame a
212 presumption? And perhaps to include it in the rule text?

213 Another possible transfer standard would be "when appropriate." "Appropriate" does not
214 much provide much guidance; as the stylists observe, it is awkward to frame a rule that does no more
215 than guard against inappropriate rulings. But "appropriate" is used to express standards in some
216 rules. And it avoids the difficulty of articulating a useful standard.

217 "The interests of justice" standard was defended as "striking the right note. It is familiar from
218 § 1404(a). Judges behave responsibly." They take account of where issues were first raised, of who
219 it is that first seeks transfer or chooses a court by applying for an order. If anything, the presumption
220 should be for transfer to the action court. The issues are tied to the pending action — the importance
221 of the discovery must be weighed, and that must be measured by its place in the overall litigation.
222 The ancillary court should be asked to rule only on clearly local interests of a local witness, and even
223 then the interest in a local ruling may not be great. The burden of securing a ruling in the action
224 court may be no greater, given modern communications technology. Overall, it is important to add
225 a transfer provision to Rule 45. Ordinarily the parties agree to submit disputes to the action court,
226 but at times someone refuses.

227 One potential difficulty arises if an action court in Seattle directs a nonparty witness in Miami
228 to provide discovery. How is the order enforced? In the ancillary court in Miami? Suppose the
229 issue is contempt — do we want to drag the witness across the country?

230 An alternative may be to attempt to provide greater precision in the rule itself. For example,
231 it could provide for transfer to the action court if the dispute is between the parties, rather than one
232 initiated by the nonparty witness. Transfer also would be provided if the dispute substantially affects
233 the merits of the action, or if the same issues will arise in other courts, or if there are other
234 compelling reasons. As often happens, the desire for guiding detail fights with the desire to avoid
235 further complicating the rule text — Rule 45 is already complex, and the wish for specific guidance
236 confronts the value of supporting discretion to deal with circumstances that cannot be anticipated
237 in rule text. The basic idea may be one that is awkward to frame in rule-speak: "really good reason"
238 for transfer.

239 This discussion was summarized as leaving it still uncertain whether, "all else being equal,"
240 disputes should be resolved by the ancillary court. The draft Note seems to make this "the locus of
241 inertia." Perhaps it would be better to be completely neutral.

242 The suggestion that the rule should refer to the burden on the nonparty witness was repeated.
243 This was elaborated: transfer should be strongly discouraged if the nonparty witness can show that
244 transfer would impose an unfair burden. The problem that the ancillary court may take too long to

245 decide, interfering with progress in the action court, could be addressed by establishing a firm
246 deadline to decide — perhaps 30 days. But "I know this would be unpopular."

247 The time-to-ruling problem was addressed from a different perspective. Issue the subpoena.
248 Eventually you will get the documents. If you want to get them promptly by getting a ruling from
249 the action court, the party issuing the subpoena should be required to show why the dispute should
250 be transferred. The Committee Note can cover the problem. So for the case where the action is
251 pending in Seattle, the witness is in Miami, and the witness has no interest in the parties' dispute.
252 The burden should be on the party to justify dragging the nonparty before the distant action court.

253 A third member spoke in favor of focusing on the nature of the dispute. Transfer seems
254 appropriate when the issues are not peculiar to the nonparty witness, or when some form of forum
255 shopping is going on. Frequently the "nonparty" witness is related in interest to a party, and may be
256 raising issues at the party's behest rather than from any particular interest of its own. "Most issues
257 really belong in the action court." Questions of the scope of discovery often have been decided in
258 the action court before the issue arises in the ancillary court.

259 A judge observed that the lawyers' discussion was helpful. But it is also useful to think of
260 the impact on the judge in the ancillary court. Often an ancillary-court judge will pick up the phone
261 and talk with the judge presiding over the action. That opportunity should remain available even
262 when there is a rule providing for transfer. The judges can reflect on "what is really driving the
263 dispute," and their conversation may enable coordination that facilitates a sound ruling by the
264 ancillary court without the need to transfer.

265 Another judge agreed that when acting as the ancillary court, "I call the presiding judge."
266 Perhaps the rule could distinguish between "local" issues and those that are more tied to the merits.

267 Turning back to the draft rule and Note, it was observed that they seem to express a mild
268 weight in favor of retaining the dispute in the ancillary court. "But the range of circumstances is
269 broad." Often the nonparty local witness is aligned with a party who wants to defeat the discovery,
270 or to make it as difficult as possible. But it may be difficult to draft rule text that usefully
271 distinguishes between local disputes and those that tie more directly to the action court. And the
272 discussion has not produced any consensus as to the choice between transfer and no transfer "when
273 the arrow points 55/45." Some comments seem to prefer transfer to the action court, others to prefer
274 retaining the dispute in the ancillary court. And there is a risk that the longer the rule is — the
275 greater detail it provides to "guide" a transfer decision — the greater will be the tendency just to
276 decide the motion without wading through the elements of a transfer order.

277 The difficulty of framing detailed rule text led to another suggestion that the details should
278 be addressed in the Note. And it may be better to avoid any reference to a burden or presumption.
279 "Once the obvious cases are sorted out, perhaps there should not be a burden." In the same vein, it
280 was suggested that the balance will be different in different cases. Perhaps the Note could be limited
281 to making that point, without suggesting any presumption.

282 "Jurisdiction" over the nonparty witness came back for more detailed discussion. Referring
283 back to the example of an action pending in Seattle and a nonparty witness in Miami, it has been
284 protested that the court in Seattle does not have jurisdiction over the nonparty in Miami. Related
285 questions were raised at the miniconference. Can the Florida lawyer appear in the Seattle court?
286 Many courts, for example, allow e-filing only by a lawyer who is admitted to practice in that court.
287 The Subcommittee believes there is no real jurisdiction problem. And it believes that often transfer
288 will generate few practical problems or burdens. Briefing of the transfer motion in the ancillary
289 court often will address the merits of the dispute so thoroughly that there is no need for extensive
290 additional briefing in the action court after transfer. The briefs are easily transmitted. Argument can
291 be made by telephone. Enforcement of an action court's order against a distant witness "will be
292 worked out in practice."

293 Support for this view was voiced by suggesting that the judge in Seattle is not at all likely to
294 require the Florida lawyer to associate local counsel. "This should get worked out."

295 The jurisdiction question was further addressed by observing that Rule 45 now allows the
296 lawyer in Seattle to issue a subpoena in the name of the Florida court. Although the rules do not now
297 provide transfer authority, and many courts conclude that transfer is not possible, other courts have
298 made transfers without creating apparent issues of jurisdiction.

299 Time to object. The discussion of transfer orders led to discussion of the time allowed to object to
300 a subpoena. Rule 45(c)(2)(B), addressed only to document subpoenas, provides for an objection that
301 suspends operation of the subpoena until the serving party moves for an order compelling inspection
302 or production. The objection "must be served before the earlier of the time specified for compliance
303 or 14 days after the subpoena is served." It has been protested that this time is very short, and some
304 lawyers who consult Rule 45 only occasionally have been known to misread it as saying that 14 days
305 is always the outer limit. There is a reason for the 14-day limit. The requesting party may "be in a
306 hurry." But Rule 34 allows a party 30 days to object; why is a nonparty given less time? So it was
307 suggested that 14 days is a very short time for people truly not connected to the action. A witness
308 who knows nothing of the litigation needs to wade through the subpoena, consider whether to get
309 a lawyer, and prompt the lawyer into action. Why not set the limit at the time to comply, just as Rule
310 34 sets a single period to respond by stating that inspection and related activities will be permitted,
311 or by objecting?

312 It was noted that lower courts have divided on the question whether failure to object in 14
313 days results in waiver. And those that find a waiver then generally excuse the waiver.

314 So, it was asked, what happens if the witness gets a couple of extensions of the time to
315 comply without registering an objection, and then objects?

316 A judge observed that the problem is similar to the common encounters with motions to
317 extend the time to file a brief made on the day before the brief is due, or a similarly late motion to
318 file an over-long brief. "We need to be able to say no." "It's easier if there's a deadline."

319 It was agreed that these problems should be considered further. A nonparty subpoena can
320 be for simple things, easily identified and produced. An objection under Rule 45(c)(2)(B) is a potent
321 thing because it stops all compliance automatically. And it is better to avoid a situation in which
322 some material is produced promptly, while other material is held up.

323 The internal puzzle of Rule 45 was expanded. Rule 45(c)(3) addresses all subpoenas, not just
324 document subpoenas. Subparagraph (A) begins by stating that the court must quash or modify a
325 subpoena "on timely motion." Although arguments can be made either way, this seems to be
326 independent of the time to make an "objection" under (c)(2)(B) — remember that an objection is
327 made without a motion, and that the burden of making a motion is made on the party who seeks to
328 compel production. (c)(3)(B) says the court may quash in other circumstances "on motion," without
329 specifying that the motion must be timely. Nothing in (c)(2)(B) suggests waiver, unless it be by
330 implication that the peculiar right to suspend the effect of the subpoena can be claimed only by a
331 timely objection. Courts have not been able to figure out a uniform answer to the waiver question,
332 although those that find waiver generally excuse the waiver. This should be straightened out.

333 An observer noted that the ABA Litigation Section is considering the waiver problem. Most
334 courts do find waiver if the time to object is not met. But if the subpoena is really overbroad, "courts
335 cut a break." One recent case rejected objections made after 14 days, but when compliance was due.
336 This problem should be solved.

337 A Committee member agreed that as a practical matter, the 14-day limit does create a
338 problem. But this is balanced out by negotiating over protection against compliance costs. "There
339 is more balance in a practical sense." Another member agreed that there is little practical difficulty:
340 "I've never had a judge find a waiver. These things are negotiated. Objections typically are made
341 in a brief two-paragraph letter. Phone calls follow."

342 The Subcommittee included these questions in its initial list of 17 Rule 45 questions.
343 Lawyers said it is not a problem and it was dropped. But then it came up again in the miniconference.
344 The Subcommittee will consider it once more.

345 Party as trial witness. As noted in the introduction, the Vioxx decision has become famous,
346 attracting followers and also stimulating disagreement. The Subcommittee proposes to restore what
347 it believes was the intent of the 1991 amendments. Rule 45(b)(2) service requirements limit the
348 reach of all subpoenas. Neither a party nor a party's officer can be compelled to appear at trial unless
349 the trial is held at a place where service could be made under Rule 45(b)(2). The preface of (b)(2),
350 "[s]ubject to Rule 45(c)(3)(A)(ii)," is meant to incorporate the restrictions of (c)(3)(A)(ii), not to
351 expand the reach of (b)(2). The provision in (c)(3)(A)(ii) that directs the court to quash a subpoena
352 that requires a person who is neither a party nor a party's officer to travel more than 100 miles, but
353 allows the person to be commanded to attend trial by travel within the state where trial is held, does
354 not imply that a party or a party's officer may be commanded to attend trial no matter where the
355 subpoena is served.

356 Although the Subcommittee is clear on the original intent of these rule provisions, there are
357 plausible arguments that the rule should be changed. Some of the courts that disagree with the
358 Vioxx decision rest on faithful reading of the rule text, but reflect a wish that the court could
359 command a party and some persons identified with a party to appear as witnesses at trial no matter
360 where served. A number of lawyers at the miniconference thought this would be a good idea when
361 there are strong reasons to want trial testimony, not deposition testimony. Many lawyers agree that
362 when good reasons appear, judges often "jawbone" an agreement to produce the party as trial
363 witness.

364 An alternative that would expand authority to compel appearance as a trial witness is
365 presented in the agenda materials. The draft does not rely on a party-issued subpoena. Instead it
366 requires a court order based on showing "a substantial need that cannot otherwise be met without
367 undue hardship." The order is always directed to a party. The order may direct the party to appear
368 to testify at a trial or hearing, or may direct the party to produce a person employed by the party. The
369 direction to produce a party's employee is subject to further limitations. One version would require
370 that the employee be subject to the party's "legal control." An alternative version would be limited
371 to a person who is an officer, director, or managing agent of a party. The draft rule also directs the
372 court to consider substitutes for appearance at trial — audiovisual deposition under Rule 30, or
373 contemporaneous transmission of testimony from a different location under Rule 43(a). Reasonable
374 compensation may be ordered. Rule 37(b) sanctions may be imposed for disobedience, but only on
375 the party. This alternative is not the Subcommittee's recommendation, but it has seemed important
376 to develop a workable alternative if further work or public comment make the case that a trial court's
377 reach should be expanded.

378 The first question was why the draft refers to testimony at trial or hearing. Most cases seem
379 to involve appearance at trial. But Rule 45(a)(2) describes a subpoena for attendance at a hearing
380 or trial, issued by the court where the hearing or trial is to be held. Testimony may be important at
381 some hearings that are not yet trials. A Rule 65 hearing on a preliminary injunction is an illustration,
382 whenever the hearing is not combined with the trial on the merits.

383 The second question was whether courts actually have authority now to compel a party to
384 appear. Rule 16(c)(1) recognizes that a court may require that a party or its representative be present
385 or reasonably available by other means to consider possible settlement. More broadly, the court has
386 jurisdiction over the parties by virtue of their party status. But these analogies do not extend to a
387 person who is not a party, but only a party's officer — the witness in the Vioxx case was not a party.
388 Jurisdiction to enter an in personam judgment, further, need not automatically extend to authority
389 to compel appearance as a trial witness; even if the authority exists absent some limit, the
390 Subcommittee view of Rule 45 is that the rule is designed to limit this authority. And as for Rule
391 16, the authority to compel a party to be "present or reasonably available" — although not a limit on
392 inherent authority — emphasizes the need for flexibility. It seems better to determine what the trial
393 court's authority over a "party" witness should be and to express it in rule language.

394 Opposition to extending authority to compel a party's appearance as a trial witness commonly
395 rests on the fact that trial subpoenas may impose severe burdens on high-level officials within many
396 organizations. Often the best witnesses with the greatest knowledge of the issues in suit are lower-

397 level employees more directly involved with the underlying events. Some lawyers seem unable to
398 resist the temptation to subpoena higher-level officials for strategic advantage in settlement
399 negotiations.

400 Alongside the fear of strategic misuse lies the perception that the advantages of live trial
401 testimony are often exaggerated. Video depositions have become routine. No study has shown that
402 live trial testimony provides a better foundation for challenging the testimony and evaluating
403 credibility. Contemporary jurors are accustomed to receiving information "through a flat screen."
404 "It is a myth that you need the company president before the jury."

405 So too, it was observed that "these issues get worked out." If a particular officer or employee
406 is in fact an important witness, it is in the party's interest to produce that witness. Failure to produce
407 the witness may look bad.

408 A related thought was that the logic of identifying an organization as a party can be carried
409 too far when it extends to identifying the organization's agents as if parties. Officers and agents are
410 human beings. They deserve protection as individuals.

411 It was agreed that the Subcommittee should develop an alternative draft that in some way
412 adopts the Vioxx view that there should be a means to compel party witnesses to appear at trial when
413 that is important. That led to considering the means of presenting the alternative for public comment
414 and testimony. Different modes can be used to present alternatives for public comment. One is to
415 present them as equals, with the Committee undecided which seems better. Or one can be presented
416 as preferred, but asking for comments on the alternative. If the alternative is presented in fully
417 developed form, it may be possible to respond to the comments by recommending the alternative for
418 adoption without a second round of publication. It will be important that the alternative presentation
419 reflect the seriousness of the issue — rather than a lengthy footnote, it would be better to present it
420 in text form. The letter soliciting comments can explain the Committee's preference and explore
421 the most likely arguments on all sides.

422 A few detailed drafting issues were also discussed. The question whether the order to appear
423 should apply to a "hearing" as well as a trial was renewed. The discussion has repeatedly referred
424 to the value many lawyers place on presenting a live witness to a jury. Juries do not hold hearings.
425 This led to the suggestion that perhaps the authority should extend only to "a jury trial." But it may
426 be that a trial judge would prefer to see the witness in a bench trial. And it may be better to retain
427 the authority for a hearing as well. A judge is not likely to order an appearance unless there are
428 strong reasons.

429 It also was asked whether it is wise to track the "substantial need and undue hardship"
430 formula of Rule 26(b)(3) in this setting. Use of the same formula may imply to some courts that the
431 tests are the same. The questions are quite different, essentially unrelated. Perhaps some better
432 formula can be found to avoid confusion. "Cause," "substantial cause," or the like are familiar
433 alternatives. The direction to consider such alternatives as a video deposition or testimony by
434 contemporaneous transmission will help to give meaning and direction to whatever words are
435 chosen. The Note can explore these matters further.

436 The discussion concluded by reaffirming the Subcommittee recommendation that the Vioxx
437 rule be overruled. At the same time, an alternative that embodies some part of the Vioxx approach
438 will be prepared for publication. But the alternative will be clearly billed as a less-preferred
439 approach.

440 Simplifying Rule 45. The agenda materials include a draft that adopts the least "aggressive" of the
441 several approaches that have been considered for simplifying Rule 45. The idea is to reduce the
442 number of combinations of authority the present rule provides for action court, issuing court, and
443 place of performance. All subpoenas would issue from the court where the action is pending.
444 Among other advantages, this will eliminate the prospect of service "within" the state by tagging a
445 passenger in an airplane flying over the state. Separate provisions in Rule 45(c) would address the
446 place where performance is required. Some drafting accommodations will be required — references
447 to the "issuing court," for example, must be reconsidered. Transfer authority will be worked into the

448 draft. The result will not significantly reduce the word count of Rule 45, but it will simplify its
449 operation.

450 Judge Campbell underscored the value of simplification by stating that for years he has
451 regularly found it necessary to read through the rule to identify the place of compliance, visiting
452 subdivisions (a), (b), and (c) to identify the issuing court, the place of service, and limits on who is
453 required to do what, where. The complexity can be reduced even if there is no change at all in the
454 places where performance is required. And there is value in doing so. Quite recently a big Arizona
455 firm issued a subpoena for a nonparty in Los Angeles from the District of Arizona; it was necessary
456 to explain the ruling refusing to enforce the subpoena because it must issue from the district court
457 in California. Even the sophisticated firms may misread the present rule.

458 This proposal has met the same questions about "jurisdiction" as the transfer proposal. But
459 in a real sense we have the same jurisdiction now, albeit in indirect form. A lawyer who has an
460 action pending in Arizona can issue a subpoena from any federal court in the country. The court in
461 the Southern District of Florida, for example, does not even know that a subpoena has been issued
462 in its name. Filling in its name is a fiction. The functional question is where disputes about
463 performance should be resolved. That is the same question raised by transfer.

464 Criminal Rule 17(e)(1) provides for service of a subpoena anywhere in the United States.
465 It suggests that such provisions can be adopted under the Rules Enabling Act. Committee members
466 were uncertain, however, whether the Criminal Rule rests on statutory authorization. (Brief research
467 after the meeting showed that the advisory committee said that Rule 17 "continues existing law, 28
468 U.S.C. 654." Section 654 has since been repealed, and in any event Rule 17 went further than the
469 statute by disregarding limits on a subpoena issued at the request of an indigent defendant. See 2
470 Wright & Henning, Federal Practice & Procedure: Criminal 4th, § 277.) It will be desirable to
471 develop further the explanation of the reasons for finding Enabling Act authority to support
472 nationwide subpoenas. The draft Committee Note for the transfer provisions addresses the question,
473 and can be developed further. But it may prove better to set out this explanation in the letter
474 transmitting a final proposal for publication and comment, rather than enshrine it for posterity in the
475 Note.

476 The most significant reason to hesitate over simplification is the fear of unintended
477 consequences. There should be little risk on this score if the job is done carefully.

478 A Committee member suggested that this approach sounds like a style project. What is the
479 intended long-term benefit?

480 A court official immediately responded that there are many lawyers who do not practice
481 regularly in federal court and who simply do not understand Rule 45. A judge agreed. Many lawyers
482 in small bankruptcy cases, for example, are not sophisticated in federal practice. Revising Rule 45
483 can help them. Another judge observed that the draft is a real improvement. "Even a small dose of
484 simplification is welcome."

485 A countering suggestion was that sophisticated lawyers will rejoin: "We know how it works.
486 Why take a chance"?

487 The place of performance provisions, drawn from present Rule 45(c)(3), prompted a
488 suggestion that perhaps the idea of "substantial expense" should be incorporated as a limit on the
489 transfer provision.

490 A deeper question was whether the simplified rule should simply carry forward the present
491 limits on place of performance. Whatever the conclusion, it is assumed that the court for the place
492 where performance is required can quash or modify a subpoena. It also is assumed that an order
493 made by the court where the action is pending can be enforced by the court where performance is
494 required. The local court in the place of performance will, just as now, open a miscellaneous docket
495 number. And it seems fair to understand that a subpoena addressed to a nonparty in Los Angeles is
496 performed in Los Angeles, even if the subpoena directs that documents be mailed to Phoenix. The
497 present draft does make adjustments in the present rule by providing that a subpoena to produce

498 electronically stored information can direct production "at any location reasonably convenient for
499 the producing person." That may create some ambiguity about the place of performance. And it
500 raises the question whether it is desirable to allow the party serving the subpoena to determine the
501 place of performance. We do not want to enable manipulation.

502 A detailed question asked why draft Rule 45(c)(1)(B) provides only for a nonparty subpoena
503 to attend a trial, not also a hearing. The answer was that this provision simply carries forward the
504 provision of present Rule 45(c)(3)(B)(iii).

505 Judge Campbell concluded by observing that the discussion will greatly help the
506 Subcommittee in preparing a Rule 45 proposal for the April meeting.

507 *Preservation and Spoliation*

508 Judge Kravitz recalled the groundswell of ideas at the Duke Conference and the strong
509 support for undertaking rules amendments to deal with the duty to preserve evidence and with
510 corresponding sanctions for spoliation. The Discovery Subcommittee has agreed to consider these
511 questions, recognizing that it is not clear whether it will prove possible to craft useful rules. It has
512 begun work through telephone conferences and a meeting in Dallas on the eve of the Rule 45
513 miniconference.

514 The Subcommittee has put aside for the moment a nagging question about the authority to
515 make rules addressing conduct before an action is filed in a federal court. The federal courts clearly
516 recognize that the duty to preserve potential evidence arises when there is reason to anticipate
517 litigation that has not yet been filed. How far does the Rules Enabling Act authorize rules that
518 address preservation conduct before any action has been filed, and that will become relevant only
519 if an action is in fact filed and is filed in a federal court? There are strong reasons to believe that
520 there is authority to frame such rules, but the question of authority may depend in part on the nature
521 of the rule. It has seemed better to work at developing the best rule possible before confronting the
522 question of authority head-on.

523 Judge Campbell described the initial work. The Subcommittee has held four telephone
524 conferences and one meeting. That has sufficed to make it through the issues one time. The purpose
525 of reviewing the issues today is to gather reactions to the tentative beginnings, not to decide
526 anything.

527 The Duke Conference panel on these issues was very strong. It was the only panel at the
528 Conference to make a strong and unanimous recommendation. It even provided a detailed sketch
529 of the issues that should be addressed by a comprehensive set of rules. Spurred by this help, the
530 Subcommittee has decided that there should be rules to address these issues if good rules can be
531 drafted and put forward with confidence.

532 The setting is familiar. The volume of electronically stored information has exploded. Much
533 of it may be relevant in litigation. It is easily destroyed, and that leads to destruction. Business and
534 government systems often are designed to delete information automatically during routine ongoing
535 operations. Deletion also occurs as a matter of conscious choice. All of this leads to spoliation
536 problems. Many potential litigants are deeply concerned about the consequences. But it will be
537 difficult to draft an effective rule. The circumstances that arise across the spectrum of litigation are
538 too varied to be captured in precise guidelines. It may be that rules directing "reasonable" behavior
539 would provide little help or protection.

540 Despite these concerns, judges in many large districts report that they do not encounter these
541 issues very often. Adopting express rules may create more discovery disputes than they eliminate.

542 Case-by-case development of the law may prove wiser than an attempt to adopt explicit rules.
543 Nonetheless, the Subcommittee is committed to the attempt. Although the problems have been
544 expressed in relation to electronically stored information, it seems likely that any rules will be more
545 general. At least everything within the scope of Rule 34 and the corresponding provisions of Rule
546 45 is likely to be covered.

547 It is important to continue to gather information. Emery Lee is conducting an FJC study to
548 determine how often preservation and spoliation issues arise. Andrea Kuperman has searched the
549 case law for decisions on each element on the Duke Panel's list; the law seems to be consistent on
550 some issues, but inconsistent on others. Katherine David is helping to develop a general description
551 of other laws that impose duties to preserve information. A complete catalogue will not be possible,
552 but the general landscape can be sketched.

553 The question whether a rule can regulate conduct before an action is filed in federal court is
554 serious, but the Subcommittee has decided to undertake the drafting project without reaching a firm
555 conclusion. If in the end it seems possible to create a good rule, but significant doubts about
556 Enabling Act authority persist, it may be appropriate to ask Congress to clarify the Committees'
557 authority.

558 It also will be important to attempt to find out what happens in corporations and other
559 institutional litigants before litigation is filed. There are many complaints that vast amounts are
560 spent on preservation in the shadow of uncertainty. Some information has been available from
561 RAND, the Sedona Conference, and IAALS studies, but more information will be useful.

562 Emery Lee then presented the state of his research as of November 16. He emphasized
563 repeatedly that the work is still preliminary, and is in a stage that represents only his own efforts, not
564 anything the Federal Judicial Center can endorse. These cautions were expressed several times as
565 the presentation went on.

566 The study was based on a text search of CM/ECF records looking for specific words and rule
567 numbers. It extended to cases filed in 2007 or 2008 in 19 districts. The districts were chosen
568 primarily by looking for big districts; they do not constitute a representative sample. The focus is
569 on motions for spoliation sanctions. Of 131,992 cases, the issue was located in 209. That is 0.15%
570 of the total cases. The issue tended to come up late in the course of the litigation.

571 These are "very odd cases." Typically they are cases in which the parties had a hard time
572 agreeing on the price of the claims. For the cases that have reached disposition, the average
573 disposition time is 649 days — 1.8 years; that compares to 253 days for all cases in the districts. The
574 mean time to the motion for sanctions is 513 days. Of the cases that terminated, 16.5% went to trial;
575 that compares to 0.6% for all other cases in the sample, although it seems likely that as time goes on
576 the other cases that progress to a conclusion will rise to a trial rate somewhere in the typical range
577 of 1% to 2%.

578 Of the 209 cases, 153 rose on motions for sanctions. The others involved sanctions requests
579 in conjunction with motions for summary judgment, requests for jury instructions, or motions in
580 limine looking toward an impending trial.

581 Remembering again that the research is in a preliminary phase, a variety of things can be
582 counted. The slides summarizing the figures are attached to these Minutes as an appendix. Among
583 other things, they compare the frequency of spoliation motions to other types of motions as counted
584 by recent surveys. The IAALS surveys found that all types of discovery sanctions are rarely sought,
585 and are even more rarely granted. The FJC 2009 closed-case survey did not ask about motions. It
586 did ask whether spoliation claims were raised in cases that had any discovery. Plaintiffs said such
587 claims were raised in 8% of the cases, and defendants said 5%. Including cases in which there is no
588 discovery, spoliation claims would be made in 2% to 3% of all.

589 This snapshot study cannot account for trends, whether spoliation issues are arising more or
590 less often over the years. The Willoughby and Jones paper at the Duke Conference did find an
591 increase in reported decisions over time.

592 It may help to remember that the closed-case survey showed that each dispute about
593 discovery of electronically stored information, whatever the type of dispute, increased case costs by
594 10%.

595 And lawyers repeatedly report that fear of sanctions drives behavior even if sanctions are
596 rarely imposed.

597 Of litigated spoliation disputes, 40% involve only electronically stored information, 13%
598 involve electronically stored and other information, 21% — in many ways the most interesting —
599 involve tangible property, 18% involve paper documents only, and 9% involved materials that could
600 not be identified (inability to identify the materials arose from sealed motions, motions that did not
601 clearly identify the materials thought to have been lost, and the difficulty of categorizing such items
602 as photographs).

603 The cases can be broken down by case types for all types of materials; for electronically
604 stored materials only; by the moving party; by types of moving plaintiffs and nonmovants; by types
605 of moving defendants and nonmoving defendants; by grant, denial, pending, or no action or
606 mootness, and so on. For comparison, the dispositions in the reported cases gathered in Andrea
607 Kuperman's memorandum were counted — they showed a far higher rate of motions granted, at
608 60%; looking only to reported cases gives a distorted picture. The most common sanction was a
609 spoliation instruction; precluding evidence and cost awards came next; reopening discovery was
610 fourth.

611 Comparing claims of spoliation before an action was filed with spoliation after filing, 25%
612 of the cases surveyed involved only pre-filing claims.

613 Often the motions do not cite a legal basis for imposing sanctions, or cite only a decision in
614 another case. Rule 37 and inherent authority are invoked with nearly equal frequency.

615 The study could, with enough time, be expanded to count more courts, and to track the cases
616 over a longer period.

617 The preliminary data must be audited to see whether anything has been missed the first time
618 through.

619 The motions and files do not give any sense that local rules of attorney conduct were invoked.
620 Nor do they give any hint whether there were collateral state professional-conduct complaints.

621 Judge Campbell summarized the presentation as suggesting that sanctions motions are very
622 rare; that they are even more rare in cases involving electronically stored information; that sanctions
623 are still rarer. It is interesting that lawyers report so earnestly that the fear of sanctions drives
624 behavior. Perhaps that is because the selective basis for reporting decisions creates an impression
625 worse than the reality. And caution was expressed about reading too much into the reported cases.

626 Another Committee member responded that "the consequences are so horrific you don't want
627 to go even close." The fear may be important in deterring misconduct. It can help when talking to
628 clients to tell them that they can destroy a good case by spoliation.

629 It was observed that the category of spoliation instructions is itself variable. The court may
630 decide on an instruction that directs the jury to presume the lost information was harmful to the
631 spoliator or helpful to the would-be discoverer. Or it may leave it to the jury to make that
632 determination as an open-ended inference.

633 The Committee expressed great thanks to Dr. Lee for excellent work and a lively
634 presentation.

635 Discussion was opened on the general questions: is it desirable to attempt to draft a rule?
636 How many of the elements described by the Duke Conference Panel should be included? The
637 elements are described in the agenda materials beginning at page 147.

638 The first question, tied to the problem of reaching pre-litigation conduct, is how to identify
639 the "trigger" that starts the duty to preserve. Is it at all helpful to rely on "a reasonable expectation
640 of probable litigation," and if helpful is that an accurate formulation? Should the trigger, or
641 application of a general reasonable expectation standard, depend on whether the litigant is a
642 sophisticated business enterprise or an individual?

643 And what is the scope of the duty to preserve once it is triggered? How far back in time
644 should materials be preserved, and on what subjects when there is only a vague general idea of the
645 events giving rise to the expectation of litigation? How long must the material be preserved going
646 into the future? The variation in circumstances is as enormous as the range of topics that can be
647 litigated in federal court. Uncertainty can increase cost, perhaps enormously. The concept of
648 proportionality is difficult to apply at this stage. And there is no court to ask for guidance

649 The fear of sanctions for failing to comply with the indeterminate duty seems to be the source
650 of collective angst. But the questions in framing a rule begin with determining what counts as a
651 "sanction." Is an order allowing further discovery as a response to spoliation a sanction, or is it
652 simply wise administration of the rules guiding proportional and reasonable discovery? Or what of
653 an award of the expenses of attempting to recreate the lost information by other means? Any rule
654 that limits or bars sanctions must be carefully drawn to preserve remedies designed to offset the
655 inability to discover the lost materials. As to orders that really are sanctions, is it possible to
656 calibrate in general terms the severity of the sanction with the culpability of the conduct and the
657 importance of the loss? Loss and prejudice are regularly balanced against each other in determining
658 spoliation sanctions, but framing meaningful guides, much less anything like "guidelines," will be
659 difficult.

660 A first observation was that spoliation is an area where prevention can be important.
661 Businesses have compliance programs to protect against violation of substantive law. Antitrust
662 compliance programs are a familiar example. Perhaps no compliance program can be effective
663 against all possible violations, but establishing a good and generally effective program can reduce
664 the wrath of enforcement authorities when a violation does slip through. There is a thriving business
665 in helping design compliance programs. The same approach may prove valuable in addressing
666 spoliation problems. If businesses can be encouraged to design and implement good preservation
667 systems, the sanctions for occasional failures may be reduced. And good behavior may be
668 significantly advanced.

669 The need for a rule was raised by observing that the statistics tend to suggest there is no need.
670 But the perceptions of the bar, and of their clients, suggest that perhaps it would be good to develop
671 a rule. It might help to go back to the Duke panel for further input, perhaps asking them to draft their
672 proposed elements in rule language. It is not likely that any precise matrix can be developed to
673 measure out sanctions. But some guidance is possible, perhaps beginning with emphasis on
674 proportionality measured by the degrees of culpability and prejudice. The more specifics that can
675 be put into the rule, the better. It is unfortunate that judges have had to develop responses without
676 the help of a rule.

677 The consequences of having no rule were emphasized by noting that different circuits have
678 quite different standards for tailoring sanctions to misconduct. A nationwide organization —
679 business, government, or other — has to tailor its conduct to the most severe, which may be the
680 Second Circuit.

681 The Department of Justice is perhaps the leading example of a firm that litigates all around
682 the country, appearing both in the service of the government as plaintiff and the government as
683 defendant. But given the FJC findings as to the infrequent imposition of sanctions or even sanction
684 requests, it may be wondered whether a rule is needed. The problems seem to be case- and fact-
685 specific. Crafting a traditional one-size-fits-all rule will be difficult. Would education of the
686 judiciary work better? Even if there is to be a rule, education may be important in the interim.

687 The idea that compliance programs should count in favor of a spoliator was translated into
688 the suggestion that it would be good to provide safe harbors so that organizations sufficiently
689 sophisticated to take advantage of the programs would know what their obligations are. But that will
690 be difficult to accomplish in face of the fact-specific nature of the questions.

691 The Northern District of California is developing model protective orders. The bar has
692 accepted the templates, and they have greatly reduced attorney work and disputes. So it may be that
693 for spoliation, the best idea is a template rather than a rule. But the effort to develop a rule is worthy.

694 The model would not distinguish between the government and other entities — if the government
695 is constantly in a state of preparing for litigation, so are many other organizations.

696 This discussion prompted the reminder that education programs and support materials are
697 being worked on. The pocket guide on e-discovery is being revised, and the revised version will
698 discuss sanctions.

699 It was further observed that the case law is approaching the idea of safe harbors for those who
700 make careful and good-faith efforts to comply with preservation obligations, but the approach is
701 incomplete. The approach could be that there is a safe harbor for complying with an established set
702 of expectations, while failure to comply would not establish a presumption of bad faith. This result
703 would depart from the cases that seem to suggest there is a real exposure to sanctions for failing to
704 do what a judge says a litigant should be doing.

705 John Vail, speaking for the American Association of Justice, said that the plaintiffs' bar
706 agrees that these are serious issues. But in some cases sanctions, such as adverse inferences, are a
707 matter to be governed by state law in diversity cases. There may be real Enabling Act questions,
708 similar to those raised by Evidence Rule 502. He further observed that the duty to preserve may be
709 triggered by private contract obligations. Most commercial insurance contracts impose on the
710 insured a duty to report likely litigation to the insurer. The contract language is not likely to be
711 changed no matter what rule might be adopted. Finally, the plaintiffs' bar "is waking up to the idea
712 that plaintiffs too have preservation obligations." It will be important to ensure that proportionality
713 concepts are invoked to regulate the obligations.

714 Alfred Cortese, speaking for defense groups, suggested there are several issues a rule should
715 address. Among them are defining the triggering event, defining the scope of the duty to preserve
716 once it is triggered, and the standard for imposing sanctions. It will be important to have specific
717 data on the costs of preserving information in deciding on these issues. An effort is under way to
718 get better data; all that can be said confidently at the moment is that the cost of preservation is
719 enormous. The Searle Institute study will be followed up; the study itself gathered information from
720 36 or 37 companies, each of which devoted what must have been several hundred thousand dollars
721 just to gather data on their own experience with preservation costs. It is hoped to show why
722 preservation costs are so high, and also to show how they relate to total enterprise profits. The
723 figures in hand now suggest that litigation costs run from 16% to 20% of total profits. It seems likely
724 that most of these costs are preservation costs, and mostly internal costs.

725 It was suggested that the information on preservation costs will be more useful if it covers
726 the costs of all preservation activities, without regard to whether they are incurred for litigation. It
727 also will be important to know what preservation costs would be if much-improved preservation
728 systems were prepared. But the overall cost of American litigation may present problems that the
729 Committee cannot do much about, whether through preservation and spoliation rules or otherwise.

730 Returning to the trigger question, it was asked what the standard should be: a reasonable
731 expectation of litigation? Knowing that litigation will be filed — a certainty? Guidance is
732 importance.

733 As to scope, it is important to define the duty to preserve. Scope links to discovery, and can
734 be addressed even if the discovery rules are not changed. It is important to remember that business
735 records are ordinarily maintained for business purposes, not for litigation.

736 And it was urged that the standard for sanctions should be intent. Data are produced and
737 destroyed every second. Non-intentional destruction should not be the occasion for sanctions.

738 The intent test was met by asking whether the same test should apply to destruction of
739 tangible things. Some kinds of potential evidence may be so important as to require a duty of care.
740 One of the cases described in the materials imposed sanctions for destroying an automobile before
741 the defendant could have an opportunity to inspect the allegedly defective airbag system. Mr.
742 Cortese responded that he had not thought about the standard for such problems, but that is important

743 to distinguish the loss of data. As compared to the automobile, often it is impossible to know
744 whether the supposedly lost data ever existed.

745 It was agreed that purposeful destruction is different, and clearly an appropriate subject for
746 sanctions.

747 An observer noted that it will take time to develop a rule, if it is possible to create one at all.
748 It is important to develop education programs now. The Committee should push others to do so.
749 The standard of culpability "is chaotic." The same problems are answered differently by different
750 courts. Directly contradictory results are often found.

751 The same observer suggested that the trigger issue also will be difficult. One example is the
752 question whether common knowledge throughout an industry that litigation has been brought against
753 one member should put all other members on notice that they too may be sued — even when one
754 them first becomes a defendant after the original action was filed. One court found there was a duty
755 to preserve. That is inappropriate. Everyone has to work to the most demanding standard. But
756 unsophisticated lawyers, and even plaintiffs who know when they start to think about filing an
757 action, remain unaware of the duty to preserve.

758 Continuing, this observer illustrated the costs of preservation by describing a big company
759 that is storing 135,000 backup tapes because of a government investigation. The storage costs alone
760 are $1,000,000 a year. "People preserve a lot because they're scared to death."

761 This discussion prompted a further question: should "big" cases — perhaps defined by the
762 volume of potentially preservable information — be addressed by adopting a two-part rule?

763 Thomas Allman, another observer, noted that Gregory Joseph did a wonderful job in leading
764 the Duke Conference panel to overall consensus on preservation issues. But differences remain on
765 what should be in a rule. The "front end" cannot be resolved by rule, but the "back end" can. The
766 standard of care for preservation should be good-faith, reasonable conduct proportional to the dispute
767 once litigation seems inevitable. The panel thought about developing processes that would define
768 the pre-litigation duty to preserve, but abandoned the effort in favor of relying on common sense.
769 Rule 37(e) is starting to come into its own; the cases are ruling that it means what it says. But Rule
770 37 should be amended to cover preservation as well as discovery — it is limited too narrowly by
771 applying only to "sanctions under these rules." The rules do not address preservation absent a prior
772 order. The question whether sanctions should be limited to cases of intentional destruction is
773 difficult; innocently destroying the wrecked automobile with the air bag presents a hard choice. The
774 rules in any case should be general, transsubstantive. The front-end problem, the trigger, will remain
775 a burden that attorneys and litigants have to carry. The Committee Note might explore the factors
776 that bear on defining the trigger.

777 A different observer said there is a huge difference between battles pitting large entities
778 against each other and battles that involve individuals. It has been asserted recently that tools are
779 now available to retrieve information from a backup tape for $500; the cost is in reviewing the
780 information once it is retrieved. The key to preservation obligations should be good faith in the
781 normal course of operations, retaining whatever is retained in the course of business. But technology
782 continues to change rapidly; enterprises planning preservation programs should keep abreast of the
783 changes. The cost of preservation for litigation declines drastically if the defendant negotiates and
784 acts transparently. The parties should agree on search terms. But cooperative conduct is rare. A
785 plaintiff in a small-stakes case who does not know much about a defendant's system cannot afford
786 to hire an information technology consultant. The people who complain about the costs of e-
787 discovery focus on the top 5% of the cases that cause 50% of the problems. It would be a mistake
788 to draft general rules for 5% of the cases. There should be a separate rule for the problem cases. The
789 problem cases may be identified in part by the amount of damages sought. In the problem cases it
790 would be really helpful to have an IT master who can mediate or arbitrate the disputes. The parties
791 would behave better if subject to such control. Paying for it should not be an unreasonable burden
792 in cases that involve a lot of money.

793 A member asked whether part of the problem is diffusion of information within an
794 organization — the more diffuse, the greater the difficulty? It was agreed that this can be part of the
795 problem of complexity. Another observer suggested that the problems can be reduced by taking
796 seriously the Rule 26(f) conference and the general proportionality principles of Rule 26.

797 Another member suggested that "different realities" are reflected in different settings. But
798 most complex cases do not need a special master. The small fraction of cases that lead to demands
799 for sanctions are those in which the defendant fundamentally does not believe it should be in court,
800 does not respect the court's authority. A new sanctions rule will trigger strategic motions. Most
801 defendants, on the other hand, take preservation obligations seriously. That lends support to the idea
802 of a safe harbor. "We can leave the bad actors out." Still, it is surprising how often people refuse
803 Rule 26(f) obligations to describe what is preserved, how systems work, how to frame search terms.
804 There should be a rule that "gives comfort to parties that they have done what is required, without
805 encouraging motions."

806 Still another member agreed with these observations. "The corporations I represent are
807 looking for rules and guidelines. They want to comply. Reputable companies have compliance
808 programs." But creating a new rule is not necessarily the answer. Aside from the triggering
809 problem, the parties are willing to consult once litigation begins. "No one expects to get everything."
810 "The rogues are the problem, but they are rare" and the problems they create can be resolved.
811 Lawyers also want to do it right, but do not know what is right. Protective order templates may be
812 an answer. New rules may not.

813 An observer noted that the adverse-inference instruction can be considered an evidence
814 problem, not merely a discovery sanction.

815 A judge member noted that the case that caused the greatest difficulties in her experience
816 involved one plaintiff. The plaintiff's entire business involved computers that he changed
817 continually. It would be difficult to write a rule that captures cases like that.

818 It also is important to remember the differences between lawyer and client. Rule 37 does
819 refer to lawyers as well as parties. The obligation on lawyers must be borne in mind.

820 Judge Campbell asked what is the greatest source of anxiety: Is it the sanctions decisions?
821 The standards of conduct? The intent required to impose sanctions? The case law seems to be pretty
822 consistent on the events that trigger an obligation to preserve, and on the scope of the obligation.
823 Would it be wise to address only Rule 37(e), providing that reasonable conduct does not warrant
824 sanctions, intentional conduct does warrant sanctions, and recognizing the ambiguity of conduct that
825 is perhaps not reasonable but also is not intentional?

826 One observer suggested that prompt revision of Rule 37(e) along these lines would do more
827 good than a long drawn-out project to develop more elaborate rules.

828 Another observer suggested that we do need a rule that recognizes the duty to preserve, and
829 defines it as a reasonable duty. That could be lodged in Rule 26 or in Rule 34.

830 Returning to Rule 37(e), it was asked whether it could be framed to define preservation duties
831 in terms of sanctions, and should then be made all-inclusive so as to preempt deviations in the name
832 of inherent authority? A response was that inherent authority is invoked now only in cases of
833 intentional misconduct. It is not a real problem. There are some "loose expressions" in some of the
834 cases, but they "do not portend much." But rules sanctions do oust inherent authority. To that
835 extent, revising Rule 37(e) could help.

836 An observer agreed that Chambers v. Nasco can arguably be read to impose a bad-faith
837 threshold for invoking inherent power. California and at least one other state have omitted "under
838 these rules" from their equivalents to Rule 37(e) for this reason.

839 Another observer suggested that this approach would be comforting only if the Second
840 Circuit could be persuaded to fix its Residential Funding decision.

841 Another observer noted that the Duke Conference panel on preservation was unable to agree
842 whether the standard of culpability should be negligence or wilfulness.

843 The history of the 2006 work on Rule 37(e) was recalled. The Committee added "under these
844 rules" in part from concern about Enabling Act limits. It knew that the 2006 e-discovery rules were
845 not likely to be the last word. Instead, the basic hope was that they would survive over a few years
846 of continual changes in technology, recognizing an obligation to monitor practice and to revisit the
847 questions when useful changes might become possible. The present discussion is exactly the process
848 that was contemplated. "As we come to understand more, we might be able to do more." It was not
849 only the Advisory Committee that took this view. The Standing Committee also recognized that the
850 2006 amendments "were a start." If we can find appropriate language for uniform national rules
851 changes, "we can affect conduct."

852 Jonathan Redgrave, an observer, noted that "divergent standards are the bane of corporate
853 programs." Probably it is better to have a single rule for all litigation, not a separate rule for a
854 subclass of cases that are somehow described as complex or likely to generate problems. Defining
855 the subclass would be difficult. But real help can be had. Rule 37(e)could be elaborated to
856 distinguish between case-altering sanctions and other orders that involve only money or other less
857 severe consequences. But, it was asked, how would "case-altering" be defined? The list of sanctions
858 in Rule 37(b) suggests a hierarchy, but how would it be separated for this purpose? Suppose the
859 sanction is that an expert is not allowed to discuss something that is not in the report or a
860 supplemental report? A money sanction of $10,000,000 — whether in a case involving
861 $100,000,000 or a case involving $1,000,000? Mr. Redgrave recognized the difficulty, but thought
862 a list of sanctions would do it: default, dismissal, adverse inferences would clearly be in the restricted
863 class. Some others also might be added. Part of the problem is that individual litigants often have
864 large amounts of information, and have no inkling of preservation obligations.

865 A Committee member observed that an adverse-inference instruction logically makes sense
866 only if there is intentional destruction. Would it help if a rule said that an adverse-inference
867 instruction is appropriate only if the spoliator was aware of, or appreciated, the harmful character
868 of the lost evidence? Mr. Redgrave said it would. The dialogue continued with the observation that
869 this ties to Rule 37(e)'s provision that routine good-faith operations are protected. There is no need
870 to change this language, but a Committee Note could give guidance on the limits of inherent
871 authority.

872 And perhaps some of this should be lodged in Rule 16, looking for discussion of the number
873 of custodians whose information must be preserved, and other elements of the time and scope of
874 preservation. The Rule 16 process forces courts to address these issues early. And Rule 26(c) also
875 can be used.

876 This discussion led back to Rule 26(f), which directs the parties to discuss preservation. Is
877 there a way to know whether that has made a difference? RAND found in a general way, before the
878 2006 amendments, that it could measure no difference from Rule 26(f). Mr. Redgrave said that
879 anecdotal evidence suggests that Rule 26(f) has made a difference when the conference is followed
880 by exchanging "day one" letters. There are no reported decisions, but parties who deal with the Rule
881 26(f) conference in good faith work it out. Too many parties, however, treat Rule 26(f) as a "drive-
882 by." "Judicial management to prevent parties from gaming the system is important."

883 So it was asked again whether a rule can deal with issues such as the number of custodians
884 whose information must be preserved, preserving backup tapes, types of sources — voicemail?
885 PDAs? And so on? The suggestion was that at least Rule 16 can give guidance as to the issues that
886 should be discussed: the types of media, numbers of custodians, and scope in subject and time. A
887 Note might observe that it is not really useful to make forensic images of hard drives. But beyond
888 that, it would be difficult to spell things out in the discovery rules themselves. Who and what is a
889 custodian? Technology can change even that. Real safe harbors in Rule 37(e) will help.

890 Emery Lee reported a statistically significant finding that parties are more likely to discuss
891 e-preservation since the 2006 revision of Rule 26(f).

892 Another observer noted that a large group of attorneys representing all sides of litigation,
893 house counsel and independent counsel, has found that Rule 26(f) conferences to discuss discovery
894 do help. There is much more discussion.

895 Judge Campbell concluded the discussion by observing that it had been very helpful.

896 Judge Kravitz concurred, adding that this is an ongoing process. It may be that the
897 Subcommittee can prepare some illustrative language on sanctions in time for the April meeting,
898 recognizing that sanctions provisions will affect conduct on the front end.

899 *Rule 26(c)*

900 The March meeting carried forward a perennial draft of Rule 26(c) protective-order revisions.
901 The draft has roots in the extensive work done in the mid-1990s. It is supported by continuing
902 revisions of the work Andrea Kuperman is doing on the law and practices in all of the circuits.

903 Consideration of Rule 26(c) has not been prompted by any sense that it is not working well.
904 The Committee has not found any significant problems, despite regular inquiries. Nothing at all was
905 said about Rule 26(c) in the Duke Conference studies of ways to improve the Civil Rules. The work
906 instead has been inspired by concerns reflected in bills that have been regularly introduced in
907 Congress since 1991. These bills reflect a fear that discovery protective orders are defeating
908 dissemination of information needed to protect public health and safety. Sealed settlements also are
909 included in the bills.

910 The Judicial Conference has continually opposed these bills, in part on the fundamental
911 ground that they are inconsistent with the Rules Enabling Act process that Congress created to
912 provide well-informed, disciplined, and painstakingly careful development of procedural reform.
913 One illustration of the advantages of the Enabling Act process is found in the FJC study of protective
914 orders undertaken at the Committee's request. The study found that most protective orders enter in
915 litigation that has no connection to concerns about public health or safety. Even when the litigation
916 does involve such issues — product liability actions are the examples most often cited by the
917 proponents of legislation — there is no basis to find that protective orders deprive the public of
918 information required to protect health or safety. Documents in the public court file, beginning with
919 the complaint, ordinarily include all the information needed for this purpose. And information can
920 be disseminated by many other means without violating a protective order. Beyond that concern,
921 the provisions of the bills also are inconsistent with a speedy and inexpensive discovery process.

922 Judge Kravitz testified against bills pending in 2009, and activity seemed to relax for awhile.
923 More recently a substitute bill has been introduced. The new bill is narrower than earlier versions.
924 It no longer applies to all civil actions, but only to actions with pleadings showing claims that impact
925 public health or safety. Product cases, environmental cases, and like cases would be familiar
926 examples. In these cases the court still would be required to find, before entering any protective
927 order, that the order would not affect the public health or safety, or that the order is the narrowest
928 order possible to protect interests in confidentiality that outweigh the possible impact on public
929 health or safety. Judge Kravitz and Judge Rosenthal have met with Congressional staff to discuss
930 the shortcomings in the revised bill. Representatives of the American Bar Association Section of
931 Litigation also have presented different but complementary negative reactions. They agree that there
932 is no problem that needs a solution, and that the proposed solution will create problems far worse
933 than the bill's proponents imagine.

934 The transparency of the world has increased greatly since 1991 when the bills were first
935 introduced. It is not clear that all information potentially affecting public health and safety is
936 available when every action that might involve such information is filed, but the means of
937 dissemination and the interest in dissemination are great. In many ways, the need to protect privacy
938 and confidentiality has increased.

939 Judge Kravitz noted that the staff member who talked with him and Judge Rosenthal asked
940 who has the burden of justifying protection if a confidentiality designation is challenged. The answer
941 was that the proponent of confidentiality has the burden, that this is well established in the cases, but

942 Rule 26(c) does not expressly say that. Another question was whether a nonparty can challenge the
943 order. The answer was that intervention is readily allowed, although that does not appear in Rule
944 26(c). Other good questions were asked, presenting a concern that although the case law may be
945 well established, it is case law, not part of the rule.

946 These staff concerns raise a familiar question. When should a rule be amended to incorporate
947 well-settled interpretations? Some parts of the rule, read in isolation, seem archaic. The enumerated
948 reasons for protection, for example, do not include the common and highly important need to protect
949 individual privacy. Protective orders are routinely entered to protect personal privacy in employment
950 litigation, in litigation involving physical or mental conditions, and so on. On the other hand, there
951 is a remarkable consistency in the law across all the circuits. There is no indication that important
952 interests are being ignored, whether they weigh for or against protection, and however they bear on
953 shaping protection that is granted.

954 Continued examination is warranted. Indeed, it is vital to continue monitoring the case law
955 and any signs that important interests are being slighted.

956 Discussion concluded with related observations. The importance of these problems will lead
957 the Committee to continue to pay careful attention to Congressional concerns and to monitor the case
958 law. Rule 26(c) will continue on the agenda.

959 *Pleading*

960 Judge Kravitz launched the discussion of pleading by observing that "All law professors
961 know what Twombly and Iqbal mean. Mere mortals do not." The agenda materials include three
962 recent appellate opinions that invoke the Twombly and Iqbal opinions. This small sample provides
963 some indication of what is going on as courts come to terms with the new pleading discourse. Two
964 of the opinions avoid the "plausibility" password that has figured so prominently in many opinions.
965 The Third Circuit has stated that the Court has not silently overruled its own decision in the
966 Swierkiewicz case. The general questions will continue to simmer in the lower courts. It is possible
967 that the Supreme Court will offer new guidance in the Al-Kidd case, but there is little point in
968 speculating about that possibility before the Court issues its decision.

969 Joe Cecil's research project is not finished. It would be unfair to ask for any premature
970 impressions. But the report should be ready in time for submission to the Standing Committee for
971 its January meeting; it will be sent to all Advisory Committee members at the same time. One of
972 the difficulties has been that it is difficult to track down what happens by way of amendments after
973 part or all of a complaint fails on a first motion to dismiss.

974 Andrea Kuperman continues to update her memorandum on the case law, focusing primarily
975 on the courts of appeals.

976 Joe Cecil spoke briefly of his ongoing project at the Federal Judicial Center. The plan is to
977 study all orders resolving orders to dismiss in 23 districts — for the most part, the districts are the
978 two largest districts in each circuit. The focus is on January 2010, a month when the district courts
979 had guidance from some post-Iqbal appellate decisions. The study includes orders that are not
980 published. If a motion to dismiss is granted, the first question is whether it dismissed only part of
981 a case or instead, standing alone, dismissed all of the case. Then it will be asked whether leave to
982 amend was granted. Preliminary study suggests that leave is very often granted. That makes it all
983 the more important to find out whether an amended complaint was allowed, whether it was met by
984 another motion to dismiss, and what happened after that.

985 Judge Kravitz noted that the Committee continues to reap great benefits from FJC research,
986 including the work done by Joe Cecil and Emery Lee.

987 The FJC focus, going beyond the reported docket descriptions, focuses on Rule 12(b)(6)
988 motions. To that extent the report will be more refined than the docket-based statistics being
989 collected by the Administrative Office. The Administrative Office figures include the rates of all
990 motions to dismiss. One common question is whether motions to dismiss are made more frequently

991 after the Twombly and Iqbal decisions. The sudden increase in the number of appellate opinions on
992 pleading is not of itself a good measure; it is to be expected that courts will write more opinions, and
993 longer opinions, as they work through the early years of teasing out the consequences of the Supreme
994 Court's new guidelines.

995 One specific appellate response to the prospect of more frequent pleadings appeals was
996 suggested by Judge Newman at the Duke Conference. Judge Newman has developed his suggestion
997 by drafting a Second Circuit rule for expedited disposition of appeals from case-ending rulings on
998 the pleadings. He also has asked the clerk's office to gather statistics. He believes that it is possible
999 — and desirable — to provide fast disposition of appeals that present only questions of law based
1000 on the pleadings alone.

1001 Beyond these general observations, the agenda materials sketch a number of possible
1002 approaches to pleading practice and related discovery practice. Surveying the field does not imply
1003 a suggestion that the time to act has come. To the contrary, it is important to allow time for lower
1004 courts to work through the Twombly and Iqbal invitation to reconsider pleading practices as they
1005 existed on May 20, 2007. These decisions have launched a common-law process of development
1006 that will mature only after some years yet. The end point may be little different than the rather
1007 uneven practices that prevailed before the Supreme Court expressed its uneasiness with the prospect
1008 that inadequate pleading thresholds make it too easy to impose heavy discovery burdens on
1009 defendants for little reason. Or it may be that pleading barriers are significantly raised. Whatever
1010 happens, it will be important to determine, as carefully as possible, whether the general run of
1011 decisions can be improved by amending the civil rules; whether amendments are desirable; and how
1012 to craft any amendments that may seem desirable.

1013 Looking first at pleading standards, the agenda sketches cover a wide range. At one end lie
1014 attempts to articulate "a standard that never was" — literal implementation of the "no set of facts"
1015 dictum in the Conley opinion that the Court retired in the Twombly opinion and that had not been
1016 taken literally by the lower courts. At the other end lie illustrations, several of them drawn from
1017 proposals by leading research and bar groups, that would raise the pleading threshold higher than
1018 anything that can fairly be found in the Twombly and Iqbal opinions. Many variations lie between
1019 these end points. Among them are proposals that, to the extent possible, would seek to restore
1020 pleading practice to whatever it was, with all its variability, as of May 20, 2007.

1021 Drafts focused on Rule 8(a)(2) are easily multiplied. But there are powerful reasons to
1022 hesitate before moving in this direction. The Twombly opinion is expressly framed as an
1023 interpretation of present Rule 8(a)(2), and the Iqbal opinion embraces Twombly. When Rule 8(a)(2)
1024 was written, the drafters understood the great difficulty of attempting to express in rule language the
1025 concept that, however accurately, has come to labeled as "notice pleading." As Judge Clark put it,
1026 the Forms annexed to the Rules were provided in part to overcome this difficulty, providing
1027 "pictures" to express ideas that are not readily captured either in rule text or in Committee Note. Any
1028 revised language in a Committee Note, however carefully explained (and perhaps inadvertently
1029 expanded), would face comparable difficulties. Certainly new rule language would create a new
1030 period of uncertainty, even if the Note said the language was intended only to confirm whatever
1031 range of practices had emerged by the time the new rule was adopted. Lower courts, moreover,
1032 would know that the Supreme Court would be providing the ultimate and authoritative interpretation
1033 of the amended rule. The Twombly and Iqbal opinions would continue to influence their reactions.

1034 Apart from Rule 8, other pleading approaches are possible. From the time of the Leatherman
1035 decision, the Committee has considered — and shied away from — the prospect of adding particular
1036 categories of claims to the Rule 9(b) list of matters that must be pleaded with particularity. A
1037 converse approach would be to list particular categories of claims that, most likely because of
1038 difficulty in acquiring fact information, can be pleaded more generally than most claims. Proposals
1039 of this sort would be seen to reflect an intent to favor, or disfavor, the substantive law underlying the
1040 specified claims.

1041 Still other pleading approaches are possible. Again, they can be taken up as growing
1042 experience may suggest the need.

1043 Beyond pleading, a variety of approaches could be taken to integrate pleading motions with
1044 discovery opportunities. Discovery in aid of framing a complaint might be provided before an action
1045 is filed. Or a preliminary complaint might be authorized in a form that identifies matters that the
1046 pleader cannot plead adequately without an opportunity for sharply focused discovery. Or an
1047 opportunity for court-directed discovery might be integrated with Rule 12 procedures on a motion
1048 to dismiss. The integration with discovery might extend to recognizing or expanding the opportunity
1049 for an early summary-judgment ruling that moves beyond the difficulty of pleading to the difficulty
1050 of proving the critical facts. These possibilities too may be better postponed while the courts
1051 continue to reshape pleading practice.

1052 An observer suggested that the great concern with Twombly, and more particularly the
1053 "judicial experience and common sense" phrase in Iqbal, is that they free trial judges to dismiss cases
1054 based on subjective views. It will be important to learn how district judges come to understand these
1055 words, and the more general "plausibility" standard.

1056 It was agreed that "plausible" may seem to suggest a subjective standard. It should not be
1057 read that way. It would help to find a way to make it clear that these are objective standards.

1058 An apparently important foundation of the Twombly and Iqbal opinions, moreover, is the
1059 Court's concern about the costs of discovery. The FJC data in the closed-case study suggest that for
1060 most cases, discovery costs are not as dramatic as the Court may have supposed.

1061 A Committee member asked whether there are data on the time it takes to get from filing the
1062 complaint to discovery. His experience has been that a court may avoid dismissing on the pleadings,
1063 but ask the plaintiff to state more facts in deference to the perceived new standard. This approach
1064 is accompanied by a stay of discovery. The delay in beginning discovery is a reason to go to state
1065 court. And the situation is made worse as defendants have come to ask certification for a § 1292(b)
1066 appeal from denial of a motion to dismiss. Certifications are not being granted, but the process adds
1067 to the delay.

1068 A judge responded: "I don't stay discovery." But the concern was repeated that in complex
1069 cases, discovery is effectively stayed "until you get through the motion to dismiss." "Time is the
1070 ultimate killer for the plaintiff's side." This problem is so urgent that the Committee should take up
1071 pleading amendments sooner, not later.

1072 A different response was that any change in the rules will generate new uncertainty that in
1073 turn will augment delay. But it was rejoined that establishing an objective standard will help. "We
1074 need to get the motions decided."

1075 The distinction between complex cases and ordinary cases also bears on the problem. There
1076 are a lot of straight-forward cases that do not involve much discovery. Discovery often is allowed
1077 to go forward while a motion to dismiss remains pending in these cases. Frequently there is a strong
1078 prospect that although the motion may be granted in part, it will not support dismissal of the entire
1079 action. Some of the six defendants and eighteen claims will be dismissed, but not all.

1080 Another judge suggested that some members of the bar are asking that Twombly standards
1081 be imposed on pleading affirmative defenses. "Do we want this"? A judge responded that "I do
1082 make defendants spell out an 'error' defense in FDCPA cases."

1083 More general questions were raised after a reminder that there were no proposals for action
1084 presented by the pleading agenda. Should the Committee consider further the possibility of adding
1085 to the categories specified by Rule 9(b) for particularized pleading? Or develop a rule on discovery
1086 in aid of pleading? If a plaintiff is being strangled for inability to plead facts controlled by the
1087 defendant, should there be a provision for targeted discovery in a short time frame?

1088 Although discovery in aid of pleading may seem desirable, a supporter observed that in some
1089 cases it may be difficult to establish effective discovery limits. Imagine a vehicle rollover case
1090 asserting a design defect. In a recent case targeted discovery on this issue has taken nearly a year,
1091 and only in the closing months was evidence discovered to show that there well may be a claim.

1092 This caution was supported by the observation that the same problem will emerge in many complex
1093 cases. Shaping "targeted" discovery on the conspiracy issue presented by the Twombly case would
1094 be difficult. And a comparison was drawn to the attempts to distinguish between "class" discovery
1095 and "merits" discovery at the certification stage of a class action; the attempted distinction often is
1096 not helpful. Any scheme of targeted discovery will depend on judge control.

1097 As for adding to Rule 9(b), conspiracy cases (Twombly) and official immunity cases (Iqbal)
1098 may seem likely candidates. Some observers believe that most of the force of the Supreme Court
1099 decisions will be spent on cases like these. But doubt was expressed whether the answer lies in
1100 expanding Rule 9(b). "It will be very hard to select additional categories for Rule 9(b)," at least if
1101 the list is not to become very long. Discovery may be the key. The focus might be on what you have
1102 to show to be entitled to discovery that will help in fashioning a pleading. Parallel amendments to
1103 Rule 8(a)(2) might be in order. The central question is how much information a plaintiff must have
1104 to be able to invoke a court's assistance. Courts now have discretion to permit discovery while a
1105 motion to dismiss is pending. The discretion can be exercised by listening to what the parties have
1106 to say.

1107 A lawyer said his experience has been that courts generally do not stay discovery pending
1108 disposition of a Rule 12(b)(6) motion. Twombly is not much of a problem. The problem is the cost
1109 of discovery. Settlements are often reached in order to avoid discovery. Courts do order expedited
1110 discovery on a crucial point. But the concept of "targeted" discovery is difficult to manage. It will
1111 add to the problem.

1112 A judge responded that one example of focused discovery arises from limitations defenses.
1113 It is very difficult to be confident that a limitations defense can be resolved on the pleadings. It
1114 works to allow discovery on the limitations issues alone, to be followed by a motion for summary
1115 judgment if the defendant thinks it appropriate.

1116 Another judge noted that in Pennsylvania an action can be commenced by filing a "summons"
1117 without a complaint, and that discovery can be had on the basis of the summons. "Lawyers try very
1118 hard to remove" to federal court. In the Eastern District of Pennsylvania, Twombly and Iqbal have
1119 made no difference. Although the language of the opinions "can be very disturbing," the Eastern
1120 District judges are not reading the opinions in the ways that cause alarm.

1121 The discussion of pleading concluded with several reminders. The FJC study will be
1122 completed soon. Andrea Kuperman will continue to update her fabulous memorandum of the
1123 emerging cases. A look at the briefs in the Al-Kidd case may give some hint whether the Supreme
1124 Court is likely to confront issues that will drag it once again into the fray. Meanwhile, all Committee
1125 members are urged to think further about pleading issues and to send their thoughts to Judge Kravitz
1126 and the reporter.

1127 *Duke Conference Subcommittee*

1128 Judge Kravitz noted that after the Duke Conference concluded he asked Judge Campbell to
1129 lead the Discovery Subcommittee into a study of preserving documents and e-files, and related
1130 spoliation issues. Those issues were prominent in the discussions. Pleading proposals will continue
1131 to evolve as more information comes in. As for everything else, he asked Judge Koeltl to chair a
1132 subcommittee charged with ensuring that the momentum imparted by the Conference does not wane.
1133 The empirical work done for the Conference, and the hosts of ideas presented, should not be allowed
1134 to waste away.

1135 Judge Koeltl listed Subcommittee members as Gensler, Grimm, Keisler, and Pratter. Judge
1136 Rothstein and Judge Wood are also participating.

1137 The Subcommittee goal is to build on the energy generated by the Conference, and to
1138 advance its goals. Many of the most prominent issues involve pleading and discovery, and those are
1139 being addressed outside this Subcommittee.

1140 The Subcommittee has had two phone conferences, and will meet at breakfast before the start
1141 of the Committee meeting on November 16.

1142 Some of the ideas advanced at the Conference might be addressed by rules amendments. A
1143 lengthy but incomplete list of possible rules proposals is presented by the "menu" in the agenda
1144 materials. Suggestions for added rules changes will be welcomed. Among the discovery proposals
1145 are several outside those now being considered by the Discovery Subcommittee. Specific rules
1146 changes might help make discovery quicker, less expensive, and more efficient. It might help to
1147 make the concept of proportionality more prominent. Judge Grimm has suggested changes that
1148 would codify the importance of cooperation. Daniel Girard suggested specific changes to deter
1149 obstructive discovery responses of the generalized sort often encountered — "overbroad, not
1150 calculated to lead to admissible evidence, irrelevant, immaterial, and otherwise objectionable." The
1151 generalized responses are then often copied into the answer to each question, which is made "subject
1152 to these objections."

1153 Other discovery suggestions would impose specific numerical limits on rules that do not now
1154 have them. One proposal, for example, is to allow only ten Rule 34 requests to produce. Others
1155 would limit the number of requests for admissions. Compared to these proposals is the interesting
1156 FJC finding that there is little discovery in most cases, and that most lawyers think the level of
1157 discovery is appropriate to the circumstances of the particular cases in the closed-case survey. The
1158 problems tend to concentrate in high-stakes cases, where lawyers tend to be more assertive.

1159 Related suggestions would require a meet-and-confer before making any motion, or would
1160 require lawyers to meet and confer before a pretrial conference — and would require that a pretrial
1161 conference be held in every case.

1162 The rules possibilities are long-term work, but it is important to begin now and to capture the
1163 enthusiasm generated by the conference.

1164 Apart from rules changes, there may be many ways to identify and foster best practices that
1165 work better and faster than rules changes. Many of the Conference suggestions could be included
1166 in the Civil Litigation Management Manual. The Second Edition of the Manual has just appeared.
1167 The Subcommittee would be glad to work with the Committee on Court Administration and Case
1168 Management to incorporate ideas from the Conference if CACM would welcome the collaboration.
1169 The Manual does refer to the Boston College discovery conference; the Duke Conference could
1170 readily fit in. Professor Gensler and Judges Grimm, Rosenthal, and Rothstein are reviewing the
1171 Manual to identify opportunities to add Conference-inspired material.

1172 The FJC is working on revising pocket guides. New best practices can be incorporated,
1173 drawing from the Conference.

1174 Pilot projects also may prove useful. The IAALS continues several projects. The Seventh
1175 Circuit e-discovery project is continuing, and the FJC is collaborating in it. The possibility of other
1176 pilot projects is being pursued. The Southern District of New York is anxious to do a pilot project.
1177 A Judicial Improvements Committee brought lawyers together to talk about motions practice and
1178 complex litigation. If a project is undertaken, it would be undertaken in conjunction with the FJC.
1179 Judge Grimm and the Sedona Conference are thinking about pilot projects on e-discovery. The
1180 National Employment Lawyers Association has started work on a set of form interrogatories for
1181 employment cases that would be presumptively proper; when the work is completed, a pilot project
1182 might be a good way to test the idea.

1183 Opportunities thus are presented for rules amendments, education programs and materials,
1184 and pilot projects. Questions remain as to which subjects should be developed by which means, and
1185 which should be addressed first.

1186 Abel Matos of the Administrative Office noted that the Civil Litigation Management Manual
1187 is available online. CACM hopes to keep updating it for new rules and the like. A panel chaired by
1188 Judge Leighton is charged with keeping the Manual current. Judge Koeltl added that the Manual is
1189 indeed an excellent resource.

1190 Judge Rothstein said the Manual is good because of a lot of hard work by CACM and the
1191 FJC and the Administrative Office. It is important to get it to work in judges' hands. The FJC is
1192 looking for ways to present it more effectively. The FJC e-discovery pocket guide needs updating,
1193 and work is being done. As to pilot projects, many districts are trying things. The FJC can try to
1194 tune in, finding ways to be helpful in designing the projects and reviewing the results so there is
1195 rigorous evaluation and learning. Many of the Conference ideas are great; ways must be found to
1196 get them into wider circulation. Improving the way things are done now, under the present rule
1197 structure, will help forestall more drastic proposals for change.

1198 Judge Koeltl added that the Manual grew up under the Civil Justice Reform Act. It is
1199 directed to judges as guidance, disclaiming to be "authority" or "law." With this focus, it is not
1200 distributed in bound form to lawyers, and lawyers are not in a position to cite it to judges as a guide
1201 to good practices. The original Manual was available on WestLaw; it may be that the Second
1202 Edition also will be available on line. The FJC, moreover, is working with the circuits in an attempt
1203 to persuade them to present serious programs on case management. The Manual could be showcased
1204 in these conferences.

1205 More general discussion began with a question drawn from the notes on the Subcommittee's
1206 September 10 conference call. The Subcommittee concluded then that the time has not come to
1207 undertake a fundamental reconsideration of the basic rule structure embodied in the 1938 rules.
1208 Substantial improvements may be possible in the package of notice pleading, broad discovery, and
1209 summary judgment, but the package should survive. The question was whether this conclusion is
1210 premature. A lot of dissatisfaction was expressed at the Conference. Arizona, with searching
1211 disclosure requirements, thinks its system is a real improvement. Oregon, with fact pleading, is
1212 similarly proud of its system. Some participants urged adoption of "civil Brady" disclosure
1213 requirements. Perhaps fundamental rethinking should have a place on the agenda.

1214 This challenge was met by observing that the Conference generated a consensus that the
1215 general structure of the rules should survive. It is too early to run the risks of throwing it out and
1216 starting anew. Even the panel on discovery, an area of great concern, emphasized the opportunities
1217 to find solutions in vigorous exercise of the authority and discretion conferred by the present rules.
1218 There was a division of views on pleading standards in the wake of the Twombly and Iqbal
1219 decisions. That topic will continue to be studied vigorously — for now, the Committee chair and
1220 reporter constitute the working group. There is continuing concern about cost and delay, as always.
1221 Whether cost and delay can be reduced by rethinking the structure of the rules remains uncertain.
1222 Fundamental changes also might be required in the culture of the lawyers and judges who enforce
1223 the rules.

1224 Professor Gensler has provided some thoughtful responses, including a package of changes
1225 that would be acceptable across a broad spectrum of the bar. It is important to think about the
1226 possibilities for a package that would be realistic and would receive broad support. It was
1227 encouraging to find lawyers agreeing on some changes at the Conference, but it also seems clear that
1228 lawyers and judges have to do a better job.

1229 A related response was that a three-year debate on reformulating the Federal Rules of Civil
1230 Procedure may be a good idea, but it is not clear that this Committee is the best group to do it. The
1231 Committee can propose useful changes. Pleading is under active consideration. The discovery rules
1232 are continually reconsidered and regularly changed. Summary judgment has just been studied at
1233 length and a new rule is on the verge of taking effect. "It is better to focus on things that can be done
1234 in our life time."

1235 This observation was supplemented by noting that "there are people out there pursuing
1236 broader projects. We can keep following them and inviting them to speak with us."

1237 Another Committee member returned to the question of basic structural reform by recalling
1238 the results of the FJC closed-case survey. A large number of the lawyers said that the cost of the
1239 case actually involved in the survey was appropriate. At the same time, they suggested that overall
1240 the system is too expensive, that litigants are being priced out of federal court. Trials may be

1241 vanishing because of the cost of getting to trial. The conference materials on the local practice in
1242 the Eastern District of Virginia were impressive. Perhaps the "rocket docket" should be studied
1243 further, as well as the practices in various states that depart significantly from the federal model.

1244 This contrast between the evaluation of experience with a specific case and overall
1245 impressions was probed further by noting that the results of the ACTL/IAALS survey, the ABA
1246 Litigation Section survey, and other surveys also yield impressionistic responses that the system is
1247 "too expensive." The FJC survey itself found very expensive litigation "at the high end." The
1248 problems of the most expensive cases may well deserve study and attempts to find remedies. But
1249 attempted reforms "should not mess up things that people are satisfied with." If additional
1250 requirements are imposed, they should not be imposed on the simpler cases that work well now.

1251 The sense of simpler cases was examined from a different angle. The $15,000 cost reported
1252 for median cases in the FJC survey seems relatively modest to many lawyers. But for many litigants
1253 it is prohibitive. Absent public subsidy, it does not seem possible to design procedures that will
1254 bring costs down to a level that can be managed by most potential litigants. It remains important to
1255 attempt to control costs as far as can be done.

1256 A different standard of evaluation is to compare costs in federal court with costs in state
1257 court. The survey asked about the relationship between these costs, on a scale that rated "4" as "just
1258 right." The majority — about three quarters — of the lawyers gave answers of 3, 4, or 5. "Too high"
1259 responses of 6 or 7 were limited to about 15% of the respondents, and those were in the cases with
1260 higher discovery costs.

1261 As to absolute costs, practitioners invariably report that litigation is too expensive. Arizona
1262 lawyers and Oregon lawyers, working in systems quite different from each other and also quite
1263 different from the federal model, say that litigation is too expensive. So we regularly hear that
1264 education is too expensive, health care is too expensive, national defense is too expensive, and so
1265 on. Responses at this level of generality are useful reminders that we have not achieved an ideal
1266 system and that reform work must continue.

1267 The surveys asked about the advantages of developing new limits on discovery. Both Arizona
1268 lawyers, with searching disclosure requirements, and Oregon lawyers, with fact pleading, say that
1269 their procedures limit the amount of discovery, and focus the discovery that does occur. But they
1270 split evenly on whether this reduces cost or delay, and even on whether their procedures reduce the
1271 pressure to settle.

1272 In a different direction, it was suggested that encouraging more basic research on what is
1273 really happening may be an important response to the Conference materials. One recent study sought
1274 to measure the effects of procedure on cost and delay by separating case factors from system factors.
1275 The conclusion found that case facts account for about 75% of the variations. Another study looks
1276 at factors that make settlement more likely; there is a lot of room to pursue these questions. We do
1277 not know much about the impacts of procedure on litigation of complex commercial transactions as
1278 compared to the cases that are priced out of court by costs of $15,000. There is a lot we do not know
1279 about the operation of the rules, and a lot to be learned. All of the Duke surveys were directed at
1280 lawyers; clients were represented only by surveys that include corporate counsel. And the
1281 information that general counsel think litigation is too expensive is hardly news. "We're talking to
1282 ourselves, not to the consumers."

1283 These questions prompted the observation that it is one thing to say the system is too
1284 expensive and quite another thing to solve the problem. The complexity of the rules could be
1285 trimmed drastically. Or an attempt should be made to require all judges to be actively involved in
1286 planning discovery. One-size-fits-all discovery rules can be made to work with active case
1287 management, and this approach may be better than imposing strict and narrow limits. The
1288 Committee can think about these things.

1289 A different summary of the same proposition suggested that "everyone is right. We will
1290 never be in a position to declare our work done." The Committee must not forget that everything
1291 that affects the courts' business continues to change. The need for dramatic revision may arise, and

1292 if the lessons of history are any guide the need will arise. It is important to continue improving the
1293 disciplined, empirical information that will support continual evaluation of the system. The
1294 Committee is "the only group involved with reform that is involved without hope for advantage."
1295 If we often wind up talking to ourselves, the Conference went far beyond that.

1296 The impact of a $15,000 cost figure came back with the observation that newspaper articles
1297 reporting that cost as a substantial barrier to access focus on the middle of the pyramid. Many people
1298 cannot afford an attorney at all. The Western District of Washington, as many courts, has a huge
1299 influx of foreclosure cases. The defendants cannot pay attorneys. "$15,000 can make the difference
1300 in losing your home." Committee discussions, and lawyer dissatisfaction, regularly focus on the top
1301 of the pyramid. "Federal court will always be a luxury court to the ordinary citizen. Revising the
1302 rules will not affect that problem."

1303 Nonetheless, there is a connection between the cases at the apex of the pyramid and those at
1304 the lower levels. Only aggregate litigation will bring many ordinary people to court. General
1305 counsel surveys do not reflect this reality.

1306 State courts were brought back by noting that Massachusetts courts are experimenting at both
1307 the low and high ends. They are providing a speedy path to trial in complex cases that is drawing
1308 cases away from the federal court. We must pay constant attention to state-court developments.

1309 All of this discussion will provide support for the further work of the Duke Conference
1310 Subcommittee.

1311 *Civil-Appellate Issues*

1312 Judge Colloton reported that the Civil-Appellate Subcommittee has two active items on its
1313 agenda. Each item originated with the Appellate Rules Committee.

1314 One problem arises at the intersection of Appellate Rule 4 with Civil Rule 58. The potential
1315 problem with Appellate Rule 4 arises when a post-judgment motion is decided on terms that require
1316 entry of an amended judgment but the precise terms of the judgment are not yet fixed. The running
1317 example is an order granting remittitur and allowing the plaintiff 40 days to decide whether to accept.
1318 It is not clear whether the 30-day appeal period begins to run on entry of the order, or is deferred
1319 until the plaintiff makes the choice. If Rule 4 is amended, it may be useful to amend the Rule 58
1320 provisions on entry of judgment in parallel. These issues have been described at earlier Committee
1321 meetings and will be brought back once the Appellate Rules Committee has decided the Rule 4
1322 question.

1323 "Manufactured finality" is the other issue. The core example is a case with one plaintiff, one
1324 defendant, and two or more claims. The court dismisses one claim while the other claim remains
1325 alive. If the plaintiff believes that the dismissed claim is the principal claim, and perhaps that the
1326 remaining claim is not worth litigating in isolation, the plaintiff may seek to achieve finality so as
1327 to appeal. Rule 54(b) is the primary source of authority, but it depends on persuading the court to
1328 enter a partial final judgment. If the court is not willing, or if it is uncertain whether the two "claims"
1329 are actually separate for purposes of Rule 54(b), the plaintiff may prefer to dismiss the remaining
1330 claim. Three basic variations can be identified.

1331 First, it is reasonably well established that finality can be established by dismissing all
1332 remaining claims with prejudice. Still, it may be useful to confirm this practice by express rule
1333 provisions.

1334 Second, the plaintiff may prefer to dismiss the remaining claims without prejudice, hoping
1335 that "cumulative finality" will support an appeal. Most of the circuits reject this ploy, although it has
1336 occasionally succeeded. The Subcommittee is inclined to think this is not a proper means of
1337 achieving finality. It would be possible to adopt a rule making that point clear.

1338 Third, the plaintiff may seek to dismiss the remaining claims with prejudice, subject to
1339 revival if the order dismissing the main claim is reversed. The Subcommittee refers to this tactic as

1340 "conditional prejudice." The courts of appeals have divided on this tactic; the clearest acceptance
1341 is in the Second Circuit.

1342 The central question is whether it would be helpful to adopt a rule, or perhaps rules,
1343 regulating manufactured finality. The Rules Enabling Act, § 2072(c), authorizes rules that define
1344 finality. It can be done.

1345 The agenda materials include sketches of various approaches to these issues, confined to
1346 relatively simple situations. Even with the simpler situations, there are concerns about the prospect
1347 of multiple appeals. Still, a rule could be framed that reaches the simple cases without undertaking
1348 to address all of the problems that can arise in cases that involve multiple claims among multiple
1349 parties. The Subcommittee believes these questions should be explored further. It will be useful,
1350 for example, to find out what can be made of experience in the Second Circuit. There is a fair
1351 amount of case law to consider, although it is drawn out over a period of fifteen or twenty years.

1352 A member asked whether these questions tend to arise after a district court has entered a
1353 partial final judgment under Rule 54(b), only to have the certification rejected by the court of
1354 appeals. Judge Colloton answered that the cases generally have not come up in this posture.

1355 Another member observed that interlocutory appeals by permission under § 1292(b) do not
1356 respond to all needs. And it is harsh to require dismissal of living claims that may well be valuable
1357 claims as the price of appealing a dismissed claim that is still more important.

1358 A judge seconded this observation by noting that the Seventh Circuit does not grant many
1359 of the infrequent petitions for leave to appeal under § 1292(b). On the other hand, it does accept
1360 most "good" Rule 54(b) judgments. There has been pressure to increase the availability of
1361 interlocutory appeals. That can impose real burdens on the court of appeals. But the burdens can
1362 be reduced to some extent by assigning successive appeals to the panel that heard the first appeal.

1363 The limits of Rule 54(b) were noted again. A party may wish to manufacture finality after
1364 a ruling that does not dispose even of a single claim, but that has a drastic effect in limiting what
1365 remains. A major theory of damages may be rejected, for example, leaving only a relatively minor
1366 amount available. In other cases it may be uncertain whether there are two claims, or two theories
1367 offered to support a single claim. And even when the technical requirements are satisfied, the rule
1368 was designed to make the district court the "dispatcher" of appeals; refusal to certify defeats finality.
1369 In one way, the question of manufactured finality is which — if any — of the alternative
1370 manufacturing methods compensates for the unavailability of appeal under Rule 54(b).

1371 Another judge observed that instinctively, "manufactured" sounds fishy. If the trial judge has
1372 rejected all alternative regular paths to appeal, appeal should be unavailable. But further reflection
1373 shows this is an interesting question. There will be an appeal on the principal claim in any event;
1374 the question is when. Immediate appeal may be to the advantage of the trial court, sparing it the need
1375 to work through the rest of the case before there can be an appeal that may change the game and
1376 require that everything be redone. Further work may result in a manufactured finality rule that does
1377 good things.

1378 Still another judge noted that one problem arises when the parties have completely resolved
1379 their claims. The present situation puts the burden on the parties to decide what is peripheral: why
1380 not force them to make the choice?

1381 An attorney member found reasons to favor conditional prejudice dismissals. Nothing
1382 happens further unless the plaintiff wins an appellate ruling that dismissal of the principal claim was
1383 wrong. If the plaintiff then believes that the peripheral claims are worth litigating along with the
1384 principal claim on remand, the full trial should be available. The more complex cases, however,
1385 present a problem. One approach would be to recognize a dismissal with conditional prejudice only
1386 if all parties consent, thus recognizing that the final-judgment rule protects the parties as well as the
1387 court system. But a consent requirement could open the way to gamesmanship, in which parties who
1388 have no real interest in the appeal seek to trade consent for some other concession. And if the trial
1389 court's consent is required, the result will be little more than creation of a new opportunity for

1390 interlocutory appeal. "The desire for a single definition of finality for all federal courts may not be
1391 enough" to justify new rules.

1392 A judge from the Second Circuit suggested that if the district court thinks an appeal would
1393 be meritorious, the judge can send it up. "If not, the parties should have to make the hard choices."
1394 An appellate judge noted that this happens regularly in the Seventh Circuit, which recognizes
1395 manufactured finality only by way of unconditional dismissal with prejudice of all that remains in
1396 the action.

1397 The Subcommittee will continue to work on these issues.

1398 *Pattern Discovery*

1399 Judge Kravitz introduced the pattern discovery project undertaken by the National
1400 Employment Lawyers Association. The idea was presented at the Duke Conference. The hope is
1401 to develop sets of interrogatories and document requests that are presumptively valid and can be used
1402 without objection in every case that comes within the set. The idea is promising, but it will work
1403 only if plaintiffs and defendants can agree on what is acceptable.

1404 Joseph Garrison and Chris Kitchel have headed the effort, and have helped form an advisory
1405 committee composed of richly and impressively experienced plaintiffs' and defense lawyers.

1406 Joseph Garrison introduced the first drafts, observing that if consensus can be achieved on
1407 pattern discovery, the goals of Rule 1 will be advanced. The Institute for the Advancement of the
1408 American Legal System is available to help the project. The committee hopes to develop a set of
1409 pattern interrogatories within a year, and perhaps to reach agreement on some items by next April.
1410 The first draft, prepared by the plaintiffs' lawyers, is likely to be sorted into three categories: requests
1411 that are acceptable on all sides; those that seem sufficiently promising to warrant further drafting
1412 efforts; and "nonstarters." The management subcommittee is reviewing the plaintiffs' draft, and will
1413 prepare their own proposals within the next two months.

1414 The committee will need some help. It may prove important to consult with some judges to
1415 determine what works from the judicial perspective.

1416 Chris Kitchel said that the group has talked about an effort to find what should be acceptable
1417 in all cases. The work must aim to identify the kinds of information that professional specialists
1418 should be willing to give over without a fight.

1419 Once agreement is reached, it will be important to think about the best means of introducing
1420 the pattern discovery questions in practice. It may be that the way to begin will be with local rules
1421 or standing orders. Perhaps the exercise should become a pilot project, so that it can be designed to
1422 provide rigorous information and review. In the longer term, it may be useful to ask whether the
1423 national rules should reflect the use of pattern discovery. Serving interrogatories and document
1424 requests with the complaint seems to run counter to Rule 26(d), unless there is a court order. That
1425 question may become ripe, however, only when several sets of pattern discovery requests have been
1426 developed for different areas of practice.

1427 The effort for employment cases may well come to prompt similar efforts in other fields.

1428 *Adjournment*

1429 The meeting adjourned. The next meeting will be on April 4 and 5, 2011, in Austin, Texas,
at the University of Texas Law School.

Respectfully submitted

Edward H. Cooper
Reporter

TAB
6

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

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CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

DATE: December 3, 2010

TO: Judge Lee H. Rosenthal, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Jeffrey S. Sutton, Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on October 7 and 8, 2010, in Boston, Massachusetts. The Committee approved for publication proposed amendments to Rules 13, 14, and 24, removed one item from its study agenda, and discussed a number of other items.

Part II of this report discusses the proposals for which the Committee seeks publication for comment: proposed amendments to Rules 13, 14, and 24. Part III covers other matters.

The Committee has scheduled its next meeting for April 6 and 7, 2011, in San Francisco, California; the second day of the meeting will overlap with the meeting of the Bankruptcy Rules Committee. The Committee will hold its fall 2011 meeting on October 13 and 14 in Atlanta, Georgia.

Detailed information about the Committee's activities can be found in the Reporter's draft of the minutes of the October meeting[1] and in the Committee's study agenda, both of which are attached to this report.

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[1] These minutes have not yet been approved by the Committee.

II. Action Item

The Committee is seeking approval to publish for comment proposed amendments to Rules 13, 14, and 24. The proposed amendments to Rules 13 and 14 revise those rules to address permissive interlocutory appeals from the United States Tax Court under 26 U.S.C. § 7482(a)(2). The Committee developed these proposals in consultation with the Tax Court and with the Tax Division of the Department of Justice. The proposed amendment to Rule 24 grows out of a suggestion by the Tax Court that Rule 24(b)'s reference to the Tax Court be revised to remove a possible source of confusion concerning the Tax Court's legal status.

A. Rule 13

The Committee recommends that the Standing Committee approve for publication the proposed amendment to Rule 13 as set out in the enclosure to this report. The amendment will add a new subdivision (b) providing that permissive appeals from the Tax Court are governed by Rule 5, and will make certain other changes.

In 1980, the Second Circuit held in *Shapiro v. C.I.R.*, 632 F.2d 170 (2d Cir. 1980), that 28 U.S.C. § 1292(b) does not authorize permissive interlocutory appeals from an order of the Tax Court. In 1986, Congress responded to *Shapiro* by enacting 26 U.S.C. § 7482(a)(2), which adopts for interlocutory appeals from the Tax Court a system similar to Section 1292(b)'s system for interlocutory appeals from the district courts. Section 7482(a)(2) provides that "[w]hen any judge of the Tax Court includes in an interlocutory order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation," the court of appeals "may, in its discretion, permit an appeal to be taken from such order, if application is made to it within 10 days after the entry of such order." When applying Section 7482(a)(2), the Tax Court has looked to caselaw interpreting Section 1292(b).

The adoption of Section 7482(a)(2) did not lead to any amendments of the Appellate Rules; thus, it is not entirely clear what rules govern an interlocutory appeal by permission under Section 7482(a)(2). Tax Court Rule 193(a) states in part: "For appeals from interlocutory orders generally, see rules 5 and 14 of the Federal Rules of Appellate Procedure." This reference is somewhat puzzling, because Rule 14 (with respect to appeals to which it applies) excludes the application of Rule 5.

The Committee proposes to add new Rule 13(b) to make clear that Appellate Rule 5 applies to interlocutory tax appeals under Section 7482(a)(2). The existing provisions of Rule 13 are placed in a renumbered Rule 13(a), are revised to make clear that they apply to appeals as of right, and are slightly restyled. The amendments delete current Rule 13(d)(1)'s definition of "district court" and "district clerk" to encompass the Tax Court and its clerk, because (as

discussed below) such a definition is placed in revised Rule 14. Current Rule 13(d)(1) becomes new Rule 13(a)(4)(A) and is revised to be consistent with the Tax Court's practice of obtaining a transcript for each proceeding and forwarding it to the court of appeals on request. The headings of Rules 13 and 14 and the heading of Title III are revised to reflect the new scope of Title III, which will encompass review of Tax Court orders as well as review of Tax Court decisions.

B. Rule 14

The Committee recommends that the Standing Committee approve for publication the proposed amendment to Rule 14 as set out in the enclosure to this report. The proposed amendment to Rule 14 complements the amendment to Rule 13.

Rule 14 is revised to delete its specific reference to Tax Court "decisions." Rule 14's list of Appellate Rules provisions that do not apply to appeals from the Tax Court is revised to omit Rule 5. A new global definition provides that references "in any applicable rule"[2] to the "district court" and "district clerk" encompass the Tax Court and its clerk. Omitted from this global definition is Rule 24(a), because that provision's treatment of applications to proceed in forma pauperis on appeal is not meant to apply to appeals from the Tax Court.

Assuming that the Standing Committee decides to approve this package of proposals for publication, it may be worthwhile to consider inviting specific comment on Appellate Rule 14's list of provisions that do not apply to appeals from the Tax Court. That list has not been amended since the adoption of the Appellate Rules, and it may be useful to obtain additional input on whether the list of exclusions accurately reflects the way in which the Appellate Rules provisions, as they stand today, should apply to appeals from the Tax Court.

C. Rule 24

The Committee recommends that the Standing Committee approve for publication the proposed amendment to Rule 24 as set out in the enclosure to this report. The proposed amendment to Rule 24 implements a proposal by the Tax Court that Rule 24(b) be revised to more accurately reflect the status of the Tax Court as a court.

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[2] In style comments prior to the meeting, Professor Kimble suggested deleting "applicable." The Committee carefully discussed this suggestion. Members stated that they prefer to include the word "applicable" for clarity and to emphasize that not all of the Appellate Rules apply to appeals from the Tax Court. On the basis of this discussion, the Committee decided to retain the word "applicable."

III. Information Items

The Committee expects to discuss at its spring 2011 meeting a proposal to amend Rule 4(a)(4) to adjust its treatment of the time to appeal after the disposition of a tolling motion. The Civil / Appellate Subcommittee has been working on this proposal, and has also been discussing the possibility of a proposal to address the doctrine of "manufactured finality." At the spring 2011 meeting, the Committee will also consider a proposal to streamline Questions 10 and 11 of Appellate Form 4 (concerning applications to proceed in forma pauperis on appeal); Questions 10 and 11, which request information concerning payments to attorneys and others in connection with the case, currently seek more information than seems necessary to the determination of i.f.p. applications.

The Committee is continuing to research issues relating to a proposal to treat federally recognized Native American tribes the same as states for the purpose of amicus filings. Under Rule 29(a), the federal and state governments can file amicus briefs as a matter of course, but tribal amici must seek party consent or court leave. (Moreover, absent contrary action by Congress, new Rule 29(c)(5) will take effect as of December 1, 2010. Rule 29(c)(5) will impose an authorship and funding disclosure requirement on amicus briefs but will exempt the federal and state government entities listed in Rule 29(a).) In addition to receiving input from the National Congress of American Indians and others, the Committee has considered empirical data gathered by the Federal Judicial Center, has considered the history of the Supreme Court's amicus-filing rule, and has consulted the Chief Judges of the Eighth, Ninth, and Tenth Circuits (where relatively many tribal amicus filings occur).

The Committee is considering whether to modify Rule 28(a)(6)'s requirement that briefs contain a separate "statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below." Preliminary discussions indicate substantial support for such a modification.

The Committee has begun to consider possible rulemaking responses to the Court's decision in *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599 (2009), which held that a district court's attorney-client privilege ruling did not qualify for an immediate appeal under the collateral order doctrine. Though some have proposed a relatively broad-ranging review of the collateral order doctrine, the Committee intends as an initial matter to focus its consideration on possible ways to provide for immediate appellate review of attorney-client privilege rulings, as well as possible mechanisms to control such appeals (such as certification requirements or expedited procedures). The Committee will coordinate its efforts with the Civil, Criminal, and Evidence Rules Committees.

The Committee has embarked on a review of the caselaw interpreting Rule 4(a)(2), which addresses premature notices of appeal in civil cases. Caselaw in this area addresses a range of different fact patterns, and the Committee plans to consider from a policy perspective whether

the Rule and the caselaw appropriately treat the common situations in which questions of prematurity tend to arise.

The Committee's upcoming joint spring meeting with the Bankruptcy Rules Committee will provide an opportunity for both Committees to discuss the proposed revisions to Part VIII of the Bankruptcy Rules (dealing with bankruptcy appeals).

The Committee has asked the Federal Judicial Center to research the amount of appellate costs that are typically awarded under Rule 39. This inquiry arises in response to concerns raised about the taxation of costs by the Fourth Circuit in the case of *Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 1737 (2010).

At the fall meeting, the Committee discussed issues raised by *Vanderwerf v. Smithkline Beecham Corp.*, 603 F.3d 842 (10th Cir. 2010), concerning the effect on appeal time of the withdrawal of a tolling motion. The Committee also discussed a suggestion that the Appellate Rules might usefully address the question of intervention on appeal. The Committee left these items on its agenda for the time being, though it is not clear that there is any consensus in favor of developing proposals on either topic. The Committee also considered issues raised by *Comer v. Murphy Oil USA*, 607 F.3d 1049 (5th Cir. 2010) (en banc), concerning the quorum requirement applicable to en banc courts; after discussion, the Committee removed this item from its study agenda.

Finally, the Committee discussed an inquiry from the Committee on Federal / State Jurisdiction concerning appellate review of remand orders. Members noted that this topic falls within the primary jurisdiction of the Federal / State Jurisdiction Committee, and expressed willingness to assist that Committee should it decide to move forward with a project on this topic.

TAB
6-A

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

TITLE III. ~~REVIEW OF A DECISION OF~~ APPEALS FROM THE UNITED STATES TAX COURT

Rule 13. ~~Review of a Decision of~~ Appeals from the Tax Court

1 **(a) ~~How Obtained; Time for Filing Notice of Appeal~~**
2 **Appeal as of Right.**
3 (1) **How Obtained; Time for Filing a Notice of**
4 **Appeal.**
5 ~~(1) Review of a decision of~~ (A) An appeal as of
6 right from the United States Tax Court is
7 commenced by filing a notice of appeal with
8 the Tax Court clerk within 90 days after the
9 entry of the Tax Court's decision. At the time
10 of filing, the appellant must furnish the clerk
11 with enough copies of the notice to enable the
12 clerk to comply with Rule 3(d). If one party
13 files a timely notice of appeal, any other party
14 may file a notice of appeal within 120 days
15 after the Tax Court's decision is entered.

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

16 ~~(2)~~ (B) If, under Tax Court rules, a party makes
17 a timely motion to vacate or revise the Tax
18 Court's decision, the time to file a notice of
19 appeal runs from the entry of the order
20 disposing of the motion or from the entry of
21 a new decision, whichever is later.

22 ~~(b)~~ (2) **Notice of Appeal; How Filed.** The notice of
23 appeal may be filed either at the Tax Court
24 clerk's office in the District of Columbia or
25 by mail addressed to the clerk. If sent by mail
26 the notice is considered filed on the postmark
27 date, subject to § 7502 of the Internal
28 Revenue Code, as amended, and the
29 applicable regulations.

30 ~~(c)~~ (3) **Contents of the Notice of Appeal; Service;**
31 **Effect of Filing and Service.** Rule 3
32 prescribes the contents of a notice of appeal,
33 the manner of service, and the effect of its
34 filing and service. Form 2 in the Appendix of
35 Forms is a suggested form of a notice of
36 appeal.

37 ~~(d)~~ (4) **The Record on Appeal; Forwarding;**
38 **Filing.**
39 ~~(1)~~ (A) Except as otherwise provided under
40 Tax Court rules for the transcript of
41 proceedings, the ~~An~~ appeal ~~from the~~
42 ~~Tax Court~~ is governed by the parts of
43 Rules 10, 11, and 12 regarding the
44 record on appeal from a district court,
45 the time and manner of forwarding and
46 filing, and the docketing in the court of
47 appeals. ~~References in those rules and~~
48 ~~in Rule 3 to the district court and~~
49 ~~district clerk are to be read as referring~~
50 ~~to the Tax Court and its clerk.~~
51 ~~(2)~~ (B) If an appeal ~~from a Tax Court~~
52 ~~decision~~ is taken to more than one court
53 of appeals, the original record must be
54 sent to the court named in the first
55 notice of appeal filed. In an appeal to
56 any other court of appeals, the appellant
57 must apply to that other court to make
58 provision for the record.

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59 (b) **Appeal by Permission.** An appeal by permission is

60 governed by Rule 5.

Committee Note

Rules 13 and 14 are amended to address the treatment of permissive interlocutory appeals from the Tax Court under 26 U.S.C. § 7482(a)(2). Rules 13 and 14 do not currently address such appeals; instead, those Rules address only appeals as of right from the Tax Court. The existing Rule 13 – governing appeals as of right – is revised and becomes Rule 13(a). New subdivision (b) provides that Rule 5 governs appeals by permission. The definition of district court and district clerk in current subdivision (d)(1) is deleted; definitions are now addressed in Rule 14. The caption of Title III is amended to reflect the broadened application of this Title.

Rule 14. Applicability of Other Rules to ~~the Review of a~~ Appeals from the Tax Court ~~Decision~~

1 All provisions of these rules, except Rules ~~4-9~~ 4, 6-9,

2 15-20, and 22-23, apply to ~~the review of a~~ appeals from the

3 Tax Court ~~decision~~. References in any applicable rule (other

4 than Rule 24(a)) to the district court and district clerk are to

be read as referring to the Tax Court and its clerk.

Committee Note

Rule 13 currently addresses appeals as of right from the Tax Court, and Rule 14 currently addresses the applicability of the Appellate Rules to such appeals. Rule 13 is amended to add a new subdivision (b) treating permissive interlocutory appeals from the Tax Court under 26 U.S.C. § 7482(a)(2). Rule 14 is amended to address the applicability of the Appellate Rules to both appeals as of right and appeals by permission. Because the latter are governed by Rule 5, that rule is deleted from Rule 14's list of inapplicable provisions. Rule 14 is amended to define the terms "district court" and "district clerk" in applicable rules (excluding Rule 24(a)) to include the Tax

Court and its clerk. Rule 24(a) is excluded from this definition because motions to appeal from the Tax Court in forma pauperis are governed by Rule 24(b), not Rule 24(a).

Rule 24. Proceeding in Forma Pauperis

1 **(a) Leave to Proceed in Forma Pauperis.**

2 (1) **Motion in the District Court.** Except as stated in
3 Rule 24(a)(3), a party to a district-court action who
4 desires to appeal in forma pauperis must file a
5 motion in the district court. The party must attach
6 an affidavit that:

7 (A) shows in the detail prescribed by Form 4 of
8 the Appendix of Forms the party's inability to
9 pay or to give security for fees and costs;

10 (B) claims an entitlement to redress; and

11 (C) states the issues that the party intends to
12 present on appeal.

13 (2) **Action on the Motion.** If the district court grants
14 the motion, the party may proceed on appeal
15 without prepaying or giving security for fees and
16 costs, unless a statute provides otherwise. If the
17 district court denies the motion, it must state its
18 reasons in writing.

19 (3) **Prior Approval.** A party who was permitted to
20 proceed in forma pauperis in the district-court
21 action, or who was determined to be financially
22 unable to obtain an adequate defense in a criminal
23 case, may proceed on appeal in forma pauperis
24 without further authorization, unless:
25 (A) the district court--before or after the notice of
26 appeal is filed--certifies that the appeal is not
27 taken in good faith or finds that the party is
28 not otherwise entitled to proceed in forma
29 pauperis and states in writing its reasons for
30 the certification or finding; or
31 (B) a statute provides otherwise.
32 (4) **Notice of District Court's Denial.** The district
33 clerk must immediately notify the parties and the
34 court of appeals when the district court does any of
35 the following:
36 (A) denies a motion to proceed on appeal in
37 forma pauperis;
38 (B) certifies that the appeal is not taken in good
39 faith; or

40 (C) finds that the party is not otherwise entitled to
41 proceed in forma pauperis.
42 (5) **Motion in the Court of Appeals.** A party may file
43 a motion to proceed on appeal in forma pauperis in
44 the court of appeals within 30 days after service of
45 the notice prescribed in Rule 24(a)(4). The motion
46 must include a copy of the affidavit filed in the
47 district court and the district court's statement of
48 reasons for its action. If no affidavit was filed in
49 the district court, the party must include the
50 affidavit prescribed by Rule 24(a)(1).
51 **(b) Leave to Proceed in Forma Pauperis on Appeal from**
52 **the United States Tax Court or on Appeal or Review**
53 **of an Administrative-Agency Proceeding.** ~~When an~~
54 ~~appeal or review of a proceeding before an~~
55 ~~administrative agency, board, commission, or officer~~
56 ~~(including for the purpose of this rule the United States~~
57 ~~Tax Court) proceeds directly in a court of appeals, a~~ A
58 party may file in the court of appeals a motion for leave
59 to proceed on appeal in forma pauperis with an affidavit
60 prescribed by Rule 24(a)(1):
61 (1) in an appeal from the United States Tax Court; and

62 (2) when an appeal or review of a proceeding before
63 an administrative agency, board, commission, or
64 officer proceeds directly in the court of appeals.

65 **(c) Leave to Use Original Record.** A party allowed to
66 proceed on appeal in forma pauperis may request that
67 the ap peal be heard on the original record without
68 reproducing any part.

Committee Note

Rule 24(b) currently refers to review of proceedings "before an administrative agency, board, commission, or officer (including for the purpose of this rule the United States Tax Court)." Experience suggests that Rule 24(b) contributes to confusion by fostering the impression that the Tax Court is an executive branch agency rather than a court. (As a general example of that confusion, appellate courts have returned Tax Court records to the Internal Revenue Service, believing the Tax Court to be part of that agency.) To remove this possible source of confusion, the quoted parenthetical is deleted from subdivision (b) and appeals from the Tax Court are separately listed in subdivision (b)'s heading and in new subdivision (b)(1).

TAB
6-B

DRAFT

Minutes of Fall 2010 Meeting of
Advisory Committee on Appellate Rules
October 7 and 8, 2010
Boston, Massachusetts

I. Introductions

Judge Jeffrey S. Sutton called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, October 7, 2010, at 8:30 a.m. at the Langham Hotel in Boston, Massachusetts. The following Advisory Committee members were present: Judge Kermit E. Bye, Judge Robert Michael Dow, Jr., Justice Allison Eid, Judge Peter T. Fay, Mr. James F. Bennett, Ms. Maureen E. Mahoney, and Mr. Richard G. Taranto. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice ("DOJ"), was present representing the Solicitor General. Former Committee members Justice Randy J. Holland[1] and Dean Stephen R. McAllister were present. Also present were Judge Lee H. Rosenthal, Chair of the Standing Committee; Professor Daniel R. Coquillette, Reporter for the Standing Committee;[2] Mr. Dean C. Colson, liaison from the Standing Committee; Mr. Peter G. McCabe, Secretary to the Standing Committee; Mr. Leonard Green, liaison from the appellate clerks; Mr. John K. Rabiej, Mr. James N. Ishida and Mr. Jeffrey N. Barr from the Administrative Office ("AO"); Ms. Holly Sellers, a Supreme Court Fellow assigned to the AO; and Ms. Marie Leary from the Federal Judicial Center ("FJC"). Prof. Catherine T. Struve, the Reporter, took the minutes.

Judge Sutton welcomed the meeting participants. He introduced two of the Committee's three new members, Justice Eid and Judge Dow. Judge Dow, of the United States District Court for the Northern District of Illinois, replaces Judge T.S. Ellis III as the district judge representative on the Committee. Judge Dow was educated at Yale, Oxford and Harvard and clerked for Judge Flaum on the Seventh Circuit. Judge Sutton noted that Judge Dow's experience with appellate work, prior to his appointment to the bench, would be an asset to the Committee. Justice Eid, a Justice on the Colorado Supreme Court, succeeds Justice Holland as the state high court representative on the Committee. Justice Eid attended Stanford and the University of Chicago and clerked for Judge Jerry Smith on the Fifth Circuit and then for Justice Thomas. She brings to the Committee not only her perspective as a member of Colorado's highest court but also her experience as an appellate practitioner, a law professor and Colorado's Solicitor General. Judge Sutton noted that the Committee's third new member, Professor Amy

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[1] Justice Holland joined the meeting after lunch on the 7th.

[2] Professor Coquillette was unable to attend the second day of the meeting.

Coney Barrett, replaces Dean McAllister. Professor Barrett was unable to be present in view of an impending due date and Judge Sutton stated that he looked forward to introducing her to the Committee at the spring 2011 meeting. Judge Sutton introduced Mr. Colson, who succeeds Judge Hartz as the liaison from the Standing Committee. Judge Sutton observed that Mr. Colson, whose law firm is located in Miami, graduated from Princeton and the University of Miami and clerked for Judge Fay and then-Justice Rehnquist. Judge Fay noted what a wonderful law clerk Mr. Colson had been.

During the meeting, Judge Sutton thanked Mr. McCabe, Mr. Rabiej, Mr. Ishida, Mr. Barr, and the AO staff for their expert work in preparing for the meeting. Judge Sutton also asked that the minutes reflect the warm toasts given – at the Committee's dinner – by Ms. Mahoney in honor of Justice Holland and by Mr. Bennett in honor of Dean McAllister.

II. Approval of Minutes of April 2010 Meeting

A motion was made and seconded to approve the minutes of the Committee's April 2010 meeting. The motion passed by voice vote without dissent.

III. Report on June 2010 Meeting of Standing Committee

Judge Sutton reported on the Standing Committee's June 2010 meeting. The Standing Committee gave final approval to the proposed amendments to Rules 4 and 40 that clarify the time to appeal or seek rehearing in cases where a United States officer or employee is a party. The amendments include two "safe harbors" that provide the longer appeal or rehearing periods when the United States represents the officer or employee at the time the relevant judgment is entered or when the United States files the appeal or petition for the officer or employee. The Appellate Rules Committee had considered adding a third safe harbor – for cases in which the United States does not represent the officer or employee but pays for his or her representation – but decided not to add that provision. The Standing Committee, after discussion, revised the Committee Notes to the proposals to provide – as an example of cases that fall within neither safe harbor but that qualify for the longer periods – individual-capacity suits in which the United States pays for private counsel for the officer or employee. The Standing Committee's approval of the proposed Rule 4 and 40 amendments is contingent on the coordinated adoption of a legislative amendment to 28 U.S.C. § 2107. Judge Rosenthal reported that the proposed amendment has been mentioned to legislators and staffers and was favorably received.

Judge Sutton noted that he also described to the Standing Committee the Appellate Rules Committee's consideration of possibilities for amending Appellate Rule 28's requirement that briefs contain a statement of the case. Members of the Standing Committee indicated that this issue is worth looking into.

IV. Other Information Items

Judge Sutton invited the Reporter to describe Chief Judge Rader's proposal, on behalf of the judges of the Federal Circuit, that 28 U.S.C. § 46(c) be amended. Chief Judge Rader has proposed that Section 46(c) be amended to include in an en banc court any senior circuit judge "who participated on the original panel, regardless of whether an opinion of the panel has formally issued." The statute currently provides that a senior judge may participate in an en banc court that is "reviewing a decision of a panel of which such judge was a member."

Section 46 was originally adopted as part of the 1948 Judicial Code. The original provision defined the en banc court to include "all active judges of the circuit." In 1963, Congress amended the statute to provide that a circuit judge who had retired could sit on the en banc court "in the rehearing of a case ... if he sat ... at the original hearing thereof." But in 1978 Congress struck this sentence from the statute. In 1982, Congress again amended the statute; the 1982 amendments provided for large circuits to choose to sit en banc with fewer than all their active judges, and also added the current language concerning participation of senior judges in the en banc court. The history of the 1982 legislation suggests that its drafters were concerned that the 1978 amendments had had the unintended effect of motivating some judges to delay taking senior status in order to be able to sit with the en banc court rehearing an appeal for which the judge participated in the panel decision.

Chief Judge Rader has identified a circuit split between circuits that permit a senior judge to participate in the en banc court when it rehears an appeal on which the judge participated in the initial panel hearing only if a panel decision actually issued, and other circuits that permit such participation on the en banc court even if no panel decision formally issued prior to the rehearing en banc. Chief Judge Rader's letter does not specify which circuits fall on which side of this split. Judging from relevant local rules, circuits requiring a decision to have issued might include the Third, Fourth, Fifth, Eighth, Ninth, Eleventh, and Federal Circuits, while circuits that apparently do not require a decision to have issued include the Second, Sixth, Seventh, Tenth and D.C. Circuits, and perhaps the First Circuit.

An attorney member queried whether the Federal Circuit's proposed language – "participated on the original panel" – would address instances when a case is assigned to a panel but then the court of appeals decides to hear the case en banc as an initial matter. An appellate judge member observed that the current statute's reference to the en banc court "reviewing a decision of a panel of which such judge was a member" is inaccurate because, technically, the en banc court rehears the appeal rather than reviewing the panel decision. An attorney member asked how the statute should treat instances when the senior judge sat (while still an active judge) on a motions panel that resolved a motion in an appeal that later was reheard en banc. An example would be an instance where the now-senior judge participated (as an active judge) on a motions panel that decided a motion to dismiss the appeal for lack of appellate jurisdiction. By consensus, the Committee agreed that it would share the minutes of its discussion of the Federal Circuit's proposal with the Judicial Conference Committee on Court Administration and Case

Management.

Judge Sutton invited the Reporter to describe to the Committee Judge Baylson's update concerning Item No. 08-AP-Q. This item concerns the possibility of allowing the use of digital audio recordings in place of written transcripts for purposes of the record on appeal. The Committee discussed this question at its April 2009 meeting, and decided by consensus to retain the suggestion on its study agenda. This summer, Judge Baylson forwarded to the Committee an opinion that he filed following a bench trial in a complex case concerning allegations of racial bias in school redistricting. The opinion points out that the post-trial briefing proceeded entirely on the basis of digital audiorecordings, without any written transcript. Further filings in the case underscore the cost savings that can result from such an approach. But Judge Baylson's opinion points out that in the event of an appeal, the Appellate Rules have no provision permitting the use of the digital audiorecordings instead of a transcript. An attorney member asked how one would cite the trial record if no transcript existed. The Reporter responded that one could cite particular times in the recordings.

Judge Sutton noted that the Committee is monitoring circuit splits concerning the Appellate Rules. He mentioned the excellent work done by Heather Williams in searching for such circuit splits in the recent caselaw. Although the Committee's role is not necessarily to resolve all circuit splits concerning the Appellate Rules, there sometimes are instances when the Committee can identify a simple fix – for example, an amendment that can remove ambiguity in a Rule.

After lunch on the 7th, Judge Sutton invited Professor Coquillette and the Reporter to make a presentation concerning the Rules Enabling Act and the rulemaking process. The Reporter briefly summarized the history of the Rules Enabling Act ("REA"). Professor Stephen Burbank, she noted, has described the history of that legislation in his seminal article on the topic. The REA was the product of years of work towards a system of uniform rules of procedure for the federal district courts. As enacted in 1934, the REA authorized rulemaking for civil actions in the federal district courts, and allowed for the merger of law and equity practice. The Civil Rules, which took effect in 1938, accomplished that merger. As Professor Stephen Subrin has argued, the Civil Rules can be seen as adopting many of the features of federal equity practice. The Reporter noted that the REA has evolved over time. The original REA identified only two decisionmakers – the Court (which had the task of promulgating the Rules) and Congress (which had the opportunity to prevent the Rules from taking effect). The original REA said little about the procedure for the Rules' promulgation, requiring only that the Rules be reported to Congress and that they not take effect until after the expiration of a waiting period. In 1958, Congress added another layer to the process; legislation enacted in that year required the Judicial Conference of the United States to carry on a continuous study of the Rules' operation and effect, and to recommend periodically amendments to "promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay." In 1988, Congress amended the Enabling Act framework to formally mandate the roles of the Standing Committee and the Advisory Committees, and to increase the

transparency and accessibility of the Rules Committees' activities. As initially adopted, the Civil Rules included only a small set of provisions – former Rules 72 to 76 – dealing with the topic of appeals. Work on the Appellate Rules began in the early 1960s, and those Rules took effect in 1968.

Professor Coquillette provided an erudite and illuminating overview of the history of local rulemaking in the federal courts. The First Circuit, he observed, adopted the earliest published set of local appellate rules, in the early nineteenth century. At the time, the Harvard Law School's faculty included Joseph Story and Simon Greenleaf. The latter was a pioneer in rulemaking. Greenleaf's theory of rulemaking, Professor Coquillette suggested, underpins the current efforts of the Rules Committees. Instead of ex post facto lawmaking, Greenleaf advocated prospective rulemaking. In 1638, Francis Bacon had said that one should make law from the bottom up: that is, one should articulate prospective rules based on what the courts actually do, and then one should test the resulting rules to see how they work in practice. (Members noted that Professor Coquillette has authored a volume on Francis Bacon's legal philosophy.) The Rules Committees, Professor Coquillette observed, are doing what Bacon recommended in 1638 and Greenleaf did with local rules in the 1830s. Turning his attention to the 20th century, Professor Coquillette shared with the Committee a photograph taken of the Civil Rules Committee at a time when the Committee's Chair was Dean Acheson and its Reporter was Benjamin Kaplan. The work of the Committee received great deference in those days. The dynamics of the rulemaking process have changed since then. Congress is very interested in the rulemaking process, and sometimes it will act in ways that affect that process – either by delegating particular responsibilities to the rulemakers or by enacting legislation that circumvents the REA process. Judge Sutton expressed his appreciation of Professor Coquillette's and the Reporter's presentations.

V. Action Items

A. For publication

1. Item No. 08-AP-M (interlocutory appeals in tax cases)

Judge Sutton invited Ms. Mahoney to introduce this item, which concerns interlocutory appeals from the Tax Court. The goal of the proposal is to amend the Appellate Rules to address this topic. In 1986, Congress enacted a statute, 26 U.S.C. § 7482(a)(2), authorizing interlocutory appeals from the Tax Court by permission. The Appellate Rules, however, were never amended to take account of this statute. Appellate Rule 5 would be the obvious candidate to govern court of appeals procedure in connection with such appeals, but Appellate Rule 14 provides that Appellate Rule 5 does not apply to the review of a Tax Court decision. The proposed amendments would make clear that Appellate Rule 5 governs appeals taken under Section 7482(a)(2). The Committee obtained helpful guidance on the proposals from the Tax Court and the DOJ. The Tax Court, in addition, suggested stylistic amendments to Appellate Rule 24(b)

(concerning requests to proceed on appeal in forma pauperis) that would reflect more accurately the nature of the Tax Court as a court rather than an agency.

Ms. Mahoney noted that the Tax Court had reviewed the latest proposals and had suggested two changes to them. The first of those changes concerns proposed Rule 13(a)(4)(A)'s treatment of the procedures governing the record on appeal. The Tax Court points out that its practice is to obtain a transcript of each hearing and to forward that transcript to the court of appeals on request. Thus, the Appellate Rules' provisions concerning the ordering and preparation of the transcript do not seem like a perfect fit for appeals from the Tax Court. The Tax Court suggests commencing proposed Rule 13(a)(4)(A) "Except as otherwise provided under Tax Court rules for the transcript of proceedings, [etc.]." The Tax Court's second suggestion concerns the Committee Note to the proposed amendment to Appellate Rule 24(b); that Note refers to the Tax Court as a "legislative court." The Tax Court suggests deleting "legislative" and referring to the Tax Court simply as a "court." Ms. Mahoney proposed that the Committee adopt both these suggestions.

Judge Sutton noted that the Committee had obtained Professor Kimble's guidance on questions of style. Committee members agreed to adopt Professor Kimble's simplification of the language of proposed Appellate Rules 13(a)(4)(A) and (B) and proposed Appellate Rule 24(b). Committee members discussed carefully Professor Kimble's suggestion that the word "applicable" be deleted from Appellate Rule 14's phrase "References in any applicable rule." An attorney member stated that he favored retaining "applicable" in Rule 14, as a way of underscoring the point that not all of the Appellate Rules apply to appeals from the Tax Court. Two other attorney members and an appellate judge member agreed with this point, noting that the word "applicable" provides a useful alert for readers and that the Rule is clearer with "applicable" than without. For this reason, participants indicated, they viewed this choice as more than one of mere style.

A motion was made to approve for publication the proposed amendments to Appellate Rules 13, 14, and 24, with the Tax Court's changes to proposed Rule 13(a)(4)(A) and the Committee Note to proposed Rule 24, and with Professor Kimble's style changes to proposed Rules 13(a)(4)(A) and (B) and proposed Rule 24(b). The motion was seconded and passed by voice vote without opposition.

2. Item No. 08-AP-D (FRAP 4(a)(4) – postjudgment motions)

Judge Sutton invited the Reporter to introduce this item, which grows out of Peder Batalden's observation that under Appellate Rule 4(a)(4)(B) the time to appeal from an amended judgment runs from the entry of the order disposing of the last remaining tolling motion. Mr. Batalden notes that in some cases there might be a delay between entry of the order disposing of the tolling motion and entry of the amended judgment that results from that disposition. One example would be an instance where the district court grants a motion for remittitur and gives the

plaintiff a long period of time within which to decide whether to accept the remitted amount or to reject the remitted amount and proceed to a new trial. In such an instance, a would-be appellant would need to decide whether to file a protective notice of appeal within 30 days after entry of the order disposing of the tolling motion, or seek an extension of the appeal time from the district judge, or simply wait to file the notice of appeal until after the plaintiff accepts the remitted award. The attractiveness of this third option would depend on whether a separate document is required for the order granting the motion for remittitur.

The Civil / Appellate Subcommittee considered this conundrum and determined that the best way to address it would be to amend Rule 4(a)(4) so that the new appeal time runs from the latest of entry of the order disposing of the last remaining tolling motion or, if a motion's disposition results in alteration or amendment of the judgment, entry of any altered or amended judgment. The Civil / Appellate Subcommittee also considered a possible change to Civil Rule 58(a). Professor Kimble has provided style comments on the proposals. Judge Sutton suggested that the Committee should first discuss the merits of the Rule 4(a)(4) proposal's substance, before proceeding to discuss Professor Kimble's style comments and the Civil Rule 58 proposal.

An appellate judge member voiced support for the proposed amendment to Rule 4(a)(4). An attorney member questioned whether it would be desirable for the rule to use the phrase "if a motion's disposition results in alteration or amendment of the judgment, entry of any altered or amended judgment." He suggested that there might be instances when a would-be appellant expects the motion's disposition to result in an altered judgment but no such judgment is ever entered. In such a case, the proposed amended rule might provide such a litigant with a false sense of security, and appeal rights might be lost through reliance on the prospect of an amended judgment that never materializes. The attorney member wondered whether it might be better to use the phrase "provides for" rather than the phrase "results in." A judge member wondered whether it would work to say, simply, "alters." The Reporter suggested that some dispositions of tolling motions will not themselves alter the judgment because any ensuing alteration of the judgment would be contingent on the occurrence of a future event.

The attorney member wondered what other types of fact patterns – beyond the remittitur example – would be affected by the proposed amendment. The Reporter suggested that one example could arise in connection with a request for complex injunctive relief. Suppose that the district court enters a judgment that includes an injunction. Suppose further that, in response to a timely tolling motion, the district court enters an order which grants the motion and directs the parties to attempt to agree on a proposed amended judgment embodying a less extensive grant of injunctive relief. And further suppose that it takes the parties longer than 30 days after the entry of the order to agree on the wording of the proposed amended judgment. A participant noted that this example would implicate Civil Rule 65. Another attorney member stated that he had encountered an example relating to attorney fees. Judgment was entered after a jury trial; subsequently, the judge ruled that there was a statutory entitlement to attorney fees (against a non-party attorney), fixed the amount of the fees, and awarded costs, but did not enter a judgment on a separate document or amend the existing judgment to memorialize these rulings. One of the

litigants asked the court to set out the fee and cost rulings in a separate document; though more than 30 days elapsed since the issuance of the fee and cost opinion, the court did not act on the request for entry of a judgment on a separate document reflecting the fee and cost awards. The opposing party filed a notice of appeal from the fee and cost opinion, without awaiting the entry of a judgment on a separate document.

Turning to Professor Kimble's style suggestions, the Reporter noted her agreement with Professor Kimble's proposal that the phrase "or, if a motion's disposition results in alteration or amendment of the judgment, entry of any altered or amended judgment" be replaced with "or entry of any altered or amended judgment resulting from such a motion." Beyond this change, Professor Kimble has raised broader concerns with the structure of Rule 4(a)(4). Professor Kimble suggests that the Rule should be revised so that it first defines the term "motion," for purposes of Rule 4(a)(4), to refer to the motions currently listed in Rule 4(a)(4)(A)(i) - (vi). With that definition in place, the remainder of the rule can then refer simply to a "motion" rather than to a "motion listed in Rule 4(a)(4)(A)." Professor Kimble would also prefer to substitute bullet points for the small roman numerals (i) through (vi) in Rule 4(a)(4)(A). Professor Kimble notes that Rule 4(a)(4) is difficult to follow, and he proposes that the Committee consider the possibility of devising a flow chart to illustrate how the Rule works.

The Reporter stated that she sympathizes with Professor Kimble's concerns about Rule 4(a)(4). The basic structure of that Rule, though, remains the same as when it was re-styled in 1998. And the Reporter argued that defining "motion" for purposes of the Rule carries the risk that a pro se litigant or a less careful lawyer might overlook the definition and simply read the Rule to give tolling effect to all sorts of motions. An attorney member asked whether it would be possible to use a shorthand term other than "motion" – perhaps "tolling motion" – to flag the fact that the reference is not to all motions. The Reporter responded that some courts have criticized the use of the term "tolling motion" because Rule 4(a)(4) re-starts the appeal period from scratch. "Tolling," as used in connection with statutes of limitations, typically refers to stopping the period and then providing only the remaining balance of the period when the time begins to run again.

Professor Coquillette noted that to the extent that Committee members disagree with a suggestion by Professor Kimble, the question will be whether the matter is one of style (in which case the Style Subcommittee has authority) or substance (in which case the substantive concern trumps matters of style).

Committee members voiced a preference for keeping the small roman numerals (i) through (vi) rather than substituting bullet points. It was observed that keeping the numerals facilitates references during oral argument. Committee members did not express enthusiasm for the idea of creating a flow chart to accompany Rule 4(a)(4).

The Committee members by voice vote tentatively approved the proposed amendment to Rule 4(a)(4) as shown in the agenda book memo, with the following style change: The phrase

"or, if a motion's disposition results in alteration or amendment of the judgment, entry of any altered or amended judgment" was replaced with "or entry of any altered or amended judgment resulting from such a motion." Some members expressed interest in pursuing further the question whether "resulting from such a motion" is the appropriate choice or whether that language would create a false sense of security in instances where an amended judgment might – but ultimately does not – result from a motion's disposition. The Committee decided to re-visit the language of the proposed amendment the next morning.

The Reporter next summarized the genesis of the proposed amendment to Civil Rule 58(a). This proposal arose from the fact that certain Seventh Circuit cases have read "disposes" in Civil Rule 58(a) to mean "denies," and from the observation that there can be orders that grant a tolling motion without leading to an amended judgment. The proposal would amend Civil Rule 58(a) to state (in substance) that a separate document is not required when an order – without altering or amending the judgment – disposes of one of the listed types of motions.

A judge member predicted that if the Rule 4(a)(4) amendment is adopted, it is likely to render the Civil Rule 58(a) issue less pressing. This member agreed, however, with the suggestion that it might make sense to consult the authors of the relevant Seventh Circuit opinions for their views on the Civil Rule 58(a) question. Judge Sutton undertook to raise this possibility with Judge Kravitz. The Committee concluded its discussion of the proposed amendments to Appellate Rule 4(a)(4) and Civil Rule 58(a) on the first day of the meeting by resolving to revisit these proposals on the following day.

The Committee took these proposals up again on the morning of the 8th. The Reporter distributed copies of the proposed amendment to Rule 4(a)(4) as it was tentatively approved by the Committee the day before, along with copies of a newer version of Professor Kimble's restyling of the proposal. This newer version, the Reporter observed, helpfully addresses some of the objections raised to the earlier restyling proposal.

Returning to the concern that the proposed Rule's reference to "resulting from such a motion" might create a false sense of security in instances where an amended judgment might – but ultimately does not – result from a motion's disposition, an attorney member conceded that he had had difficulty thinking of an instance in which this uncertainty would actually arise. Another attorney member noted that the Committee is concerned about the possibility that there could be an order that would trigger the time for appeal before the litigants know whether there will be an amended judgment or not. But, this member said, in most of the hypotheticals that she could think of, one may question whether the order in question actually "disposes of" the tolling motion. Suppose, for example, that a party moves for a new trial on the ground that the district court improperly excluded the testimony of the party's expert without holding a *Daubert* hearing, and the judge agrees to hold the *Daubert* hearing in order to determine whether the testimony was properly excluded and states that if it turns out that the testimony should have been admitted then a new trial will be granted. The member suggested that such an order would not really be an order *disposing of* the motion for a new trial because the grant of the new trial in that situation is

conditional. Another example is a motion for additional findings under Civil Rule 52(b); the court could grant the motion for additional findings without immediately making the additional findings. Until the court makes the additional findings, it may be unclear whether an amended judgment will result. The member suggested that such an order, standing alone, has not truly disposed of the motion. Participants also noted the habit of some judges of stating that a motion is granted and that an opinion will follow. Usually the opinion follows within days, but not always. If the rulemakers amend Rule 4(a)(4) to provide the entry of an amended judgment as a new starting point for the appeal time, might a litigant be lulled into awaiting an amended judgment that might not come?

The Reporter observed that the question of how to interpret the phrase "disposing of" is a question that also could arise under existing Appellate Rule 4(a)(4) and Civil Rule 58(a). But, participants noted, the question links to the concern about the proposed amendment to Rule 4(a)(4) because in the instances where the judge's ruling on a tolling motion is conditional or tentative, it may be particularly likely that the parties will be unsure whether an amended judgment will result.

Participants considered the possibility of addressing these concerns by including language in the Committee Note to advise litigants that to the extent they have any doubt as to whether there will in future be an amended judgment, they should assume that there will not be such an amendment and they should assume that the earlier possible starting point for appeal time under the proposed Rule 4(a)(4) – namely, entry of the order disposing of the last remaining tolling motion – is the relevant starting point. A participant expressed support for adding such cautionary language. An attorney member wondered whether this advice in the Committee Note would adequately address the situation in which the district judge responds to a Civil Rule 52(b) motion by stating "motion granted, opinion to follow." It might turn out that the judge makes additional findings but does not alter the judgment. Some participants suggested that the number of cases in which this question arises may be relatively small.

Another attorney member wondered whether the rule should peg the newly-started appeal time to the entry of a "newly entered judgment" resulting from a tolling motion rather than to the entry of "any altered or amended judgment" resulting from such a motion. Using the term "newly entered judgment," he suggested, would permit the district judge to protect a party in the sort of Civil Rule 52(b) scenario noted above – where the district judge ultimately renders a new set of findings but does not alter the judgment – by re-entering the judgment. The Reporter observed that this approach would run counter to the caselaw holding that a district court cannot re-start appeal time by re-entering an unchanged judgment. A participant responded, though, that the proposed language would alter such caselaw only in the limited instance where the newly-entered judgment results from a timely tolling motion.

Judge Sutton observed that he had initially thought these questions might be addressed in the Committee Note without altering the text of the proposal. However, given that Committee members had expressed the wish to think more about both the text and the Note, he entertained a

motion to withdraw the Committee's tentative approval of the Rule 4(a)(4) proposal in order to provide an opportunity to consider the proposal further. The motion was made and seconded and passed by voice vote without opposition.

VI. Discussion Items

A. Item No. 08-AP-G (substantive and stylistic changes to Form 4)

Judge Sutton provided an update on his inquiries concerning this item, which concerns the information currently requested by Form 4 from applicants seeking to proceed in forma pauperis on appeal. The current Form asks, among other things, whether the applicant has paid or will pay an attorney or other person for services in connection with the case and, if so, how much. Because the Supreme Court employs Form 4 in connection with i.f.p. requests by litigants before the Court, Committee members had expressed interest in learning whether the Supreme Court finds this information about payments to attorneys and others useful in evaluating i.f.p. requests. Judge Sutton reported that the Supreme Court Clerk's Office has indicated that this information is not necessary. This input confirms that it is worthwhile to consider amending Form 4 to request less information on these topics. The Committee will have a concrete proposal to consider and vote on at the spring 2011 meeting.

B. Item No. 08-AP-H (manufactured finality)

Judge Sutton invited Mr. Letter to introduce this item, which concerns the doctrines that govern a litigant's attempt to "manufacture" a final judgment – in order to appeal the disposition of one or more claims – by dismissing the remaining claims in a case. Mr. Letter – along with Judge Bye and Ms. Mahoney – represents the Appellate Rules Committee on the Civil / Appellate Subcommittee, which has been considering this item. Mr. Letter observed that this area of law would benefit from clarification but he noted that it is proving challenging to draft a proposal that accomplishes that clarification. The reason is that there are policy choices that must be made in order to proceed with the drafting process. Mr. Letter reviewed the existing law on manufactured finality. There is general consensus that if the remaining claims are dismissed with prejudice, a final appealable judgment results. The litigant might instead try to employ a "conditional dismissal with prejudice" – dismissing the remaining ("peripheral") claims with prejudice, but reserving the right to revive those claims if the litigant's appeal results in reversal of the dismissal of the non-peripheral claims. Such a conditional dismissal with prejudice produces a final appealable judgment in the Second Circuit but not in the Third and Ninth Circuits. There are further variations in the circuit caselaw concerning the dismissal of the peripheral claims under circumstances that prevent their reassertion, and concerning the dismissal of the peripheral claims without prejudice.

Mr. Letter suggested that the consensus view on dismissals with prejudice is sound:

dismissal of the peripheral claims with prejudice should produce a final, appealable judgment. He observed that, conversely, it is hard to make the case for recognizing a final, appealable judgment when the peripheral claims are dismissed without prejudice. Conditional dismissal with prejudice, he suggested, is a closer question: there are good arguments in favor of providing that such dismissals produce an appealable judgment, but there are counter-arguments. For example, some might ask why this situation cannot be dealt with under current Civil Rule 54(b). Mr. Letter observed that judges may well take the view that Civil Rule 54(b) adequately addresses this issue, while practitioners may argue in favor of recognizing conditional dismissal with prejudice as an alternative path to appeal. Practice under Civil Rule 54(b), he observed, can vary by circuit. Mr. Letter noted that the Subcommittee has expressed interest in learning more about the Second Circuit's experience with conditional dismissals with prejudice. He will canvass lawyers in the offices of the United States Attorneys for districts within the Second Circuit to learn their views on how that procedure functions; the Subcommittee also intends to seek the views of judges and clerks from within the Second Circuit on this question.

Mr. Letter observed that in addition to making policy judgments concerning which of these scenarios should result in a final, appealable judgment, it would be necessary to consider whether and how to address additional complexities. For example, should the proposal address scenarios involving counterclaims, or scenarios involving multiple parties, and, if so, how? Another question – as the discussion of Civil Rule 54(b) illustrates – is whether district court approval should be required in order for the dismissal of the peripheral claims to produce an appealable judgment, or whether the joint agreement of the parties should suffice.

Ms. Mahoney noted that the Subcommittee members were in agreement that a dismissal of the peripheral claims with prejudice should produce an appealable judgment, but that beyond that determination, there was as yet no consensus. An appellate judge member noted that it is usually preferable for practices to be nationally uniform; he wondered whether the topic of manufactured finality is one on which judges' views are likely to differ from one locale to another. Judge Rosenthal observed that the Committee might consider asking the Federal Judicial Center to study the impact, within the Second Circuit, of the circuit caselaw providing that conditional dismissals with prejudice produce an appealable judgment. An attorney member noted that practitioners might not wish to rely on this Second Circuit doctrine when practicing in that circuit, given that the Supreme Court (or the Second Circuit itself, sitting en banc) could overrule the relevant precedent. Another attorney member asked whether the manufactured finality doctrine is salient in criminal as well as civil cases. It was noted that the question does arise in criminal cases, and that the doctrine on the criminal side may be evolving.

C. Item No. 09-AP-B (definition of "state" and Indian tribes)

Judge Sutton reviewed the history of this item, which concerns a proposal that federally recognized Native American tribes be treated the same as states for purposes of the Appellate Rules. The sense of the Committee, he observed, has been that the consideration of this proposal

should focus on the treatment of tribes in Appellate Rule 29, which concerns amicus briefs. Proponents argue that tribes should be accorded the same dignity as states and the federal government, which can file amicus briefs without party consent or leave of court.

Judge Sutton observed that the Supreme Court's rule concerning amicus filings – Rule 37 – does not include tribes among the government entities that are permitted to file amicus briefs without party consent or court permission. Dean McAllister's research concerning the history of the Supreme Court's amicus-filing rule indicates that the omission of tribes from that listing may be a byproduct of the rule's history (and specifically of the fact that the Supreme Court first developed this rule at a time when amicus filings by tribes were rare).

As the Committee had requested at its spring 2010 meeting, Judge Sutton consulted the Chief Judges of the Eighth, Ninth, and Tenth Circuits for their views on the amicus-filing question. He asked each Chief Judge for input on two questions – first, how the circuit reacts to the proposal in general, and second, whether the circuit would consider amending its local rules to permit tribes to file amicus briefs without party consent or court permission. Chief Judge Riley has reported that the letter's distribution to three relevant committees elicited only three responses – two that support amending either the Appellate Rules or the circuit's local rules, and one that supports only amending the latter if appropriate. Judge Sutton reported that the other two circuits are in the process of responding to the inquiry. Mr. Letter observed that Chief Judge Kozinski has asked the Ninth Circuit's rules advisory committee to consider the matter.

Judge Sutton noted that the agenda materials included a resolution from the National Congress of American Indians ("NCAI") urging that the Appellate Rules be amended "to treat Indian Tribes in the same manner as states and territories," and a resolution from the Coalition of Bar Associations of Color to the same effect.

Judge Sutton invited Dean McAllister to discuss his research. Dean McAllister noted that he has published the research as an article (see 13 Green Bag 2d 289 (2010)). He reported that he had discussed tribal amicus participation with Supreme Court Deputy Clerk Chris Vasil, who had conferred with the Clerk of the Court, William K. Suter; neither recalled any requests to include tribal amici in the Supreme Court's rule.

It was noted that the question of treating tribes the same as states and the federal government for purposes of Appellate Rule 29(a) will also have implications for the new authorship and funding disclosure requirement that will take effect on December 1, 2010 (absent contrary action by Congress). That requirement – which will be placed in a new subdivision of Appellate Rule 29(c) – exempts entities that can file amicus briefs without party consent or court leave under Appellate Rule 29(a).

A participant suggested that it would be good to include tribes in Appellate Rule 29(a) as a matter of political symbolism, unless there are arguments that would outweigh that benefit. He stated that the arguments he has heard so far relate to the fact that municipalities are also not

included in Appellate Rule 29(a) and that there is a great variation in the size and other characteristics of federally recognized tribes. Mr. Letter stated that even if the question is viewed as merely symbolic, the field of federal-tribal relations is an area where – due to the history – symbolism can be important.

Mr. Letter stressed that the DOJ believes it is important for the tribes themselves to be consulted. An appellate judge member asked why that process of consultation could not be accomplished by the federal executive branch, independent of the Rules Committees. Mr. Letter responded that the Rules Committees, too, are governmental bodies. A participant asked whether it would be appropriate to view the Rules Enabling Act's notice and comment process as providing the framework for such consultation. Mr. Letter argued that it would be good for consultation to occur before the Appellate Rules Committee makes a recommendation. A participant suggested that the question before the Committee is one of policy. Another participant observed that the resolution passed by the NCAI provides a sense of the views of the NCAI's tribal and individual members. Yet another participant noted that one benefit of the notice and comment process is its transparency and the opportunity it provides for all interested commenters to hear others' views as well as expressing their own. Judge Rosenthal noted that should a proposal on this item go out for notice and comment, it would be good to make sure to advise any groups that have written to the Rules Committees about this proposal of any relevant hearing dates and of the deadline for submitting comments.

Judge Sutton noted that federal litigation can involve questions of the validity of tribal laws – questions on which the relevant tribe would wish to be heard as an amicus if the tribe is not a party. An attorney member asked why Rule 29(a) should be amended to include Native American tribes but not municipalities or foreign governments; for example, why should that Rule include a small Native American tribe but not New York City or the British government? Judge Sutton responded that the point about challenges to a law's validity could have more general application; for example, perhaps a proposal could encompass both Native American tribes and municipalities. Dean McAllister argued that the federal government's relations with Indian tribes differ from its relations with municipalities. There are only 564 federally recognized Native American tribes, while the number of municipal governments is far greater.

An attorney member stated opposition to changing Appellate Rule 29(a). Another attorney member argued that if the Rule is to be changed, the amendment should encompass municipalities as well as Native American tribes; this member argued that tribes are not similar to states and that if the amicus-filing rules are to change, the Supreme Court should take the lead. An appellate judge member expressed strong support for amending Rule 29(a) to include Native American tribes. This member reported that two large Native American tribes within the state of Colorado believe the issue to be a very important one. Tribes, this member observed, are sovereign entities; including tribes within Rule 29(a) would not create a slippery slope and, the member suggested, there is no downside to including them. An attorney member asked the appellate judge member whether the Colorado state rules permit Native American tribes to file amicus briefs without party consent or court leave; the member responded that the Colorado rules

require all would-be amici – even the United States – to seek permission. Another appellate judge member asked whether it is burdensome to rule on such motions for leave to file amicus briefs; the appellate judge member from Colorado responded that it is not burdensome to rule on the motions and that she views the question as purely one of sovereignty and dignity. Another appellate judge member expressed agreement with this view; he noted that his home state – North Dakota – has a lot of Indian reservations, and he predicted that including tribes among the entities listed in Rule 29(a) would not create an added burden for the courts of appeals.

An attorney member stated that he had not been able to think of any consequences that would result from including tribes within Rule 29(a); this member asked whether any of the Rules committees have tribal court representatives. A participant responded that the tradition has been not to have designated seats on the Rules Committees, apart from having representatives from the DOJ and from state supreme courts.

An appellate judge member expressed some ambivalence concerning the proposal; but he observed that his circuit – the Eleventh – has cases involving tribal law, and that he leans toward including tribes in Rule 29(a). A district judge member stated that tribes do have a special status. But, he argued, it is important to ensure that the proposed Rule encompasses all entities that have a legitimate claim to special treatment based on sovereign status. He noted that often the relevant government entity would be allowed to intervene. And he observed that appellate judges' views vary concerning the desirability of amicus filings. Some judges on the Seventh Circuit, for example, disfavor amicus filings. An attorney member asked whether that disfavor extends to amicus filings by governmental units; this member suggested that the Committee consider amending Rule 29(a) to encompass all domestic governmental units.

Judge Rosenthal observed that to the extent there was a lack of consensus concerning the proposal, it could be useful for Judge Sutton to present the matter for discussion at the January 2011 meeting of the Standing Committee. Judge Sutton agreed to do so.

D. Item No. 09-AP-C (Bankruptcy Rules Committee's project to revise Part VIII of the Bankruptcy Rules), and Item No. 08-AP-L (FRAP 6(b)(2)(A) / *Sorensen* issue)

Judge Sutton invited the Reporter to summarize the status of these items. The Bankruptcy Rules Committee is working on proposed amendments to Part VIII of the Bankruptcy Rules – governing appeals from the bankruptcy court – and currently plans to seek permission to publish those amendments for comment in summer 2011. The Part VIII project provides a good occasion to consider changes in the Appellate Rules' treatment of bankruptcy appeals. One possible set of amendments would revise Appellate Rule 6(b)(2) (concerning appeals from a district court or bankruptcy appellate panel exercising appellate jurisdiction in a bankruptcy case) to track recent and pending changes to Appellate Rule 4(a)(4). Another possible amendment would create a new Appellate Rule 6(c) to address direct appeals by

permission from a bankruptcy court to a court of appeals. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, which created the direct-appeal mechanism, also provided interim procedures to govern until the promulgation of rules for such appeals. Since 2008 Bankruptcy Rule 8001(f) has set a 30-day time limit for seeking the court of appeals' permission to take a direct appeal. A new Appellate Rule 6(c) could cover other aspects of the appeal process. The sketch provided in the agenda materials addresses what Appellate Rules would apply to such direct appeals; provides that references to the district court in such rules include the bankruptcy court and bankruptcy appellate panel; includes special provisions for the record on appeal (borrowing from the proposed Part VIII Rules' treatment of that topic); and contemplates the possible transmission of the record in electronic form. Publishing such proposals for comment in tandem with the Part VIII project would provide an opportunity to secure comment from the bankruptcy bench and bar. These matters are the subject of ongoing discussions with the Bankruptcy Rules Committee and its Subcommittee on Privacy, Public Access, and Appeals, and will be topics for discussion at the joint meeting that the Bankruptcy Rules Committee and the Appellate Rules Committee will hold in spring 2011.

Judge Rosenthal reported on the discussion at the Bankruptcy Rules Committee's fall meeting. One topic raised at that meeting concerns a fundamental choice: Should the Part VIII rules be self-contained, or should they incorporate by reference relevant provisions of the Appellate Rules? Mr. McCabe noted that Part VII of the Bankruptcy Rules (governing adversary proceedings) incorporates by reference a number of provisions in the Civil Rules. A participant suggested that if it is deemed necessary to have the text of certain Appellate Rules within the Bankruptcy Rules pamphlet for convenient reference, those provisions could be quoted. The relevant portion of the minutes of the Bankruptcy Rules Committee meeting will be shared with the Appellate Rules Committee when available.

E. Item No. 09-AP-D (implications of *Mohawk Industries, Inc. v. Carpenter*)

Judge Sutton noted that this item concerns a project to consider adjustments in the availability of immediate appellate review for certain types of district-court rulings. The item, he observed, was prompted by the Supreme Court's decision in *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599 (2009). Judge Sutton stated that the Committee needs to decide the scope of this project. Judge Rosenthal asked whether the DOJ had a view on the question of scope. Mr. Letter suggested that it could be useful to think broadly about appealability, and to encompass topics such as appeals from denials of motions to dismiss founded on official immunity or sovereign immunity. Under current doctrine, an order denying a motion by the United States to dismiss a claim on sovereign immunity grounds is not immediately appealable – though orders denying similar motions by states and foreign governments are immediately appealable.

An attorney member advocated starting with the question of orders rejecting claims of attorney-client privilege. Mr. Letter suggested that the topic of privilege be broadened to

encompass the state secrets privilege. Another attorney member suggested that a district court's denial of a claim of state secrets privilege would likely be reviewable either via a permissive appeal under 28 U.S.C. § 1292(b) or via mandamus. An appellate judge member suggested that to the extent that the *Mohawk Industries* Court invited rulemaking attention to this topic, the invitation seems to focus on attorney-client privilege. Mr. Letter agreed that it makes sense to start with the question of the appealability of privilege rulings, leaving the question of appeals from immunity rulings for treatment in the longer term.

By consensus, the Committee decided to commence by focusing on the question of appeals from privilege rulings, and to seek input on this topic from the Civil, Criminal and Evidence Rules Committees.

F. Item No. 10-AP-A (premature notices of appeal)

Judge Sutton invited the Reporter to introduce this item, which concerns the application of Appellate Rule 4(a)(2)'s provision concerning premature notices of appeal. The Supreme Court's decision in *FirsTier* provides general guidance concerning the interpretation of Rule 4(a)(2), but the circuits vary somewhat in their application of the Rule to a range of different factual scenarios. At one end of the spectrum are cases in which the notice of appeal is filed after a decision is announced but before the submission of proposed findings in support of that decision; that was the situation in *FirsTier*, and the case makes clear that such a notice relates forward. Similar to that scenario are cases in which the court announces a disposition contingent on a future event, the notice of appeal is filed, and the contingency later occurs; various circuits have held that such a notice relates forward, but there is contrary precedent from the Seventh Circuit. Then there are the cases in which a court disposes of fewer than all claims or parties, the notice of appeal is filed, and a Civil Rule 54(b) certification is later obtained; some seven circuits have found relation forward in this scenario, but there is contrary precedent in the Eleventh Circuit. In a variation on this theme, there are the cases in which the court disposes of fewer than all claims or parties, the notice of appeal is filed, and the court then disposes of all remaining claims as to all parties; some eight or nine circuits have found relation forward in this scenario, but the Eighth Circuit disagrees. There are other common patterns as well; as to a number of those patterns, there is some degree of consensus among the circuits, but contrary positions also exist.

Judge Sutton observed that if it is possible for the rulemakers to design an elegant solution to this set of problems, it would be worth doing. An attorney member wondered whether the current Rule 4(a)(2)'s treatment of relation forward might instill false confidence among practitioners who lack familiarity with the cases applying Rule 4(a)(2). A district judge member agreed that the current rule might be a trap for the unwary; this member recalled a similar set of issues arising under Illinois Supreme Court Rules 303 and 304. An attorney member expressed support for considering revisions to Rule 4(a)(2), and wondered whether this topic should be considered in tandem with the proposed revisions to Rule 4(a)(4). Another

attorney member suggested that it might be useful to consider whether the solution employed with respect to the Illinois Supreme Court rules might be instructive. By consensus, the Committee retained this item on its agenda with a view to considering a more concrete set of proposals at the spring 2011 meeting.

G. Item No. 10-AP-B (statement of the case)

Judge Sutton introduced this item, which concerns the possibility of revising Appellate Rule 28(a)'s requirement that a brief include separate statements of the case and of the facts. Some members of the Committee have observed that these requirements have given rise to confusion among practitioners and redundancy in briefs. The Committee discussed this item at its spring 2010 meeting. Judge Sutton, on behalf of the Committee, contacted the ABA Council of Appellate Lawyers and the American Academy of Appellate Lawyers to seek their views on the matter. Judge Sutton circulated to Committee members the response he received from Jerrold Ganzfried and Steven Finell on behalf of the ABA Council of Appellate Lawyers. Judge Sutton observed that the Council has offered to survey appellate practitioners for their views, and he reported that he has spoken with Donald Ayer, the President of the American Academy of Appellate Lawyers, and Mr. Ayer has undertaken to survey the Academy's members.

Judge Sutton noted that the Committee should consider whether to move forward with this item, and, if so, how best to alter Appellate Rule 28's requirements. One option would be to model the revised Rule 28 on the Supreme Court rule (Rule 24(g)) which provides for a single statement in which the lawyer can set forth the facts and procedural history chronologically. Another possibility would be to reverse the order of current Appellate Rules 28(a)(6) and (a)(7) and to delete from current Rule 28(a)(6) the reference to the "course of proceedings."

An attorney member stated that Rule 28(a)(7)'s requirements are straightforward; Rule 28(a)(6), he suggested, would be clearer if it called for a statement identifying the rulings being appealed and the procedural history. It is useful, he argued, to identify the rulings at issue before stating the facts. That allows the reader to know the posture of the case before reading the facts. For example, such a statement could say that the appeal is from the grant of summary judgment in a Title VII case. Mr. Letter noted that even if the Appellate Rules did not require it, he would be likely to include such a statement in his brief. Justice Holland noted that Delaware Supreme Court Rule 14 simply requires "[a] statement of the nature of the proceeding and the judgment or order sought to be reviewed"; such statements, he said, are usually about a page long.

Mr. Letter expressed support for pursuing the project, and suggested that following the Supreme Court's approach might be best. But he stressed that the judges are the audience for briefs, so the key question is what judges prefer. An attorney member agreed that the Committee should pursue the project. This member observed that the trouble with the current Rule is that it specifies the order in which the statements must be set forth and there is no logical place to discuss the opinion below; the logical place for such a discussion, she suggested, would be at the

end of the discussion of the facts and procedural history. This member expressed support for modeling the revisions on the Supreme Court's rule, but she agreed with Mr. Letter that it is important to discern what judges would prefer. Another attorney member noted that one difference between Supreme Court briefs and briefs filed in the courts of appeals is that Supreme Court briefs state, up front, the question presented. The statement of issues in a court of appeals brief, he observed, is often not informative. This member reiterated the importance of identifying the ruling that is being appealed.

An appellate judge member agreed that it is useful for the brief to state succinctly what ruling is being appealed. This member observed that Colorado Appellate Rule 28 does not require the brief to divide the statement of the case from the statement of the facts, but in practice litigants often divide the two. Another appellate judge member wondered whether it might make sense to reverse the order of the items required by Rule 28(a)(5) (statement of the issues) and Rule 28(a)(7) (statement of the facts). Another appellate judge member observed that the U.S. Supreme Court requires the questions presented to be the first item in the brief.

An attorney member stated that he likes the Supreme Court's approach because it allows the lawyer to present a more integrated story. In the Eighth Circuit, he noted, Local Rule 28A(i) requires lawyers to include a one-page summary of the case, which forces the advocate to briefly encapsulate his or her whole case. A district judge member expressed a preference for the approach taken by the Illinois state rules, which spell out what the brief must contain and which provide illustrative examples. This member suggested that it would be useful to consider examples of state rules concerning briefs, to see if any states have arrived at a better approach.

An appellate judge member queried whether the clerk's office typically scrutinizes a brief's statement of the case, for example to discern the nature of the rulings under appeal. Mr. Green responded that his office ordinarily focuses on the information provided in response to Rule 28(a)(4) (the jurisdictional statement). Knowing the nature of the ruling being appealed, he suggested, would not make a difference to the clerk's office unless the office is tracking appeals that concern certain types of issues. Ms. Sellers reported that in the Connecticut appellate courts the staff attorney's office uses information from the statement of the case for final judgment screening and when setting cases for oral argument. It was observed that federal appellate courts may also engage in issues tracking; in this connection, it was noted that the Second Circuit has published for comment a proposed local rule that would expedite appeals from certain types of orders.

Mr. Letter noted that a number of United States Attorneys – for example, those in the Second and Ninth Circuits – always include an introduction in their briefs. Though he did not advocate amending Rule 28 to require such an introduction, he suggested that it might be amended to permit one. Justice Holland noted that briefs submitted to the Delaware Supreme Court often include a "preliminary statement." An appellate judge member stated that judges might not want to make an introduction mandatory; an introduction written by a good lawyer would be useful, but one written by a poor lawyer would not. An attorney member noted that the

Rule could limit such an introductory statement to one page.

It was agreed that in preparation for the spring meeting, relevant local circuit rules and state briefing rules would be collected. The agenda materials for the spring meeting will offer a set of options for the Committee's consideration. One option would be modeled on the Supreme Court's rule. Another option would provide for an introductory statement capped at one page. Another approach would retain the requirement of a "statement" but require the brief to discuss within a single "statement" the facts, the proceedings below, and the ruling being appealed.

VII. Additional Old Business and New Business

A. Item No. 10-AP-D (taxing costs under FRAP 39)

Judge Sutton invited the Reporter to introduce this item, which concerns H.R. 5069, the "Fair Payment of Court Fees Act of 2010," a bill introduced by Representative Henry C. "Hank" Johnson, Jr. H.R. 5069 would amend Civil Rule 68 and Appellate Rule 39 in response to concerns raised about the taxation of costs by the Fourth Circuit in the case of *Snyder v. Phelps*. In September 2009, the court of appeals reversed a judgment in Albert Snyder's favor against the Westboro Baptist Church and its members. The judgment had awarded millions in damages on tort claims arising from, inter alia, the Church's "protest" near the funeral of Snyder's son Matthew (a Marine who died in Iraq). The court of appeals reversed the judgment on First Amendment grounds. The opinion and judgment stated nothing about costs; after a timely motion, the court of appeals awarded over $16,000 in costs to the Church. The court of appeals denied Snyder's objections to the bill of costs. Snyder's annual income is $ 43,000 and his counsel was working pro bono. H.R. 5069 would add a new Appellate Rule 39(f), which would provide that the court shall order a waiver of costs if the court determines that the interest of justice justifies such a waiver, and would provide that the "interest of justice" includes the establishment of constitutional or other important precedent. The Supreme Court granted certiorari in *Snyder v. Phelps*, and the case was argued on October 16, 2010.

The Reporter observed that Rule 39(a) sets default rules for the award of appellate costs, but that the court can order otherwise in a given case. The caselaw indicates that the courts of appeals have exercised this discretion, taking into account factors such as misconduct by the winner on appeal; the public importance of the case; the difficulty of the issues; and the limited means of the losing party. The Reporter stated her belief that the existing Rule afforded the court discretion to deny costs in a case such as *Snyder v. Phelps*.

An attorney member wondered whether the practice concerning costs varies by circuit. In the Federal Circuit, he noted, the court of appeals often denies appellate costs to the prevailing party. Another attorney member stated that he had never seen such a large bill for appellate costs. The Reporter responded that the apparent explanation for the size of the bill of costs in *Snyder* was the very large number of pages in the appendix.

By consensus, the Committee decided to study the matter further. It asked Ms. Leary to design a docket search that could provide data concerning the typical amount of appellate costs awarded under Appellate Rule 39.

B. Item No. 10-AP-E (effect of withdrawal of a timely-filed post-judgment motion on the time to appeal in a civil case)

Judge Sutton invited the Reporter to introduce this item, which arises from Howard Bashman's suggestion that the Committee consider issues raised by *Vanderwerf v. Smithkline Beecham Corp.*, 603 F.3d 842 (10th Cir. 2010). In *Vanderwerf*, the district court granted summary judgment dismissing the Vanderwerfs' claims. They timely filed a motion under Civil Rule 59(e). After almost seven months elapsed with no decision on the motion, the Vanderwerfs withdrew the motion and (on the same day) filed a notice of appeal. A divided panel of the court of appeals dismissed the appeal as untimely. The majority reasoned that Appellate Rule 4(a)(4) "requires entry of an 'order disposing of [the Rule 59] motion' to give the appealing party the benefit of Rule 4(a)(4)(A)(iv)," and that the Vanderwerfs' withdrawal of their motion "leaves the record as if they had never filed the motion in the first place." Judge Lucero dissented, arguing that "[b]ecause the district court did not rule on the motion to alter or amend the judgment, the thirty-day filing deadline has not begun to run."

The Reporter observed that this is, as far as she could determine, the first decision to deny tolling effect to a motion because it was withdrawn. The Second, Seventh and Ninth Circuits have instead reasoned that a motion had tolling effect even though it was withdrawn – though in the Second and Ninth Circuit cases, the district court had in some way assented to the withdrawal of the motion. In an unpublished decision, the Sixth Circuit construed a tolling motion as denied on the date of its withdrawal; in that case, though, the motion was by the appellee rather than the appellant.

The Reporter suggested that if one takes the policy behind Rule 4(a)(4) to be promoting an efficient division of labor between the trial and appellate courts, then one might argue that, in hindsight, this policy is not at issue when a motion is withdrawn – because in hindsight it is clear that the appeal could have proceeded without any impediment from the ultimately-withdrawn motion. But such an argument could also be made as to a motion that is denied, and no one suggests that a motion lacks tolling effect as a result of being denied on its merits. The Reporter acknowledged the *Vanderwerf* majority's concern with the possibility than an appellant might make and then withdraw a tolling motion simply to achieve a unilateral extension of appeal time. But she suggested that this concern could be addressed through means other than denying the motion tolling effect – such as recourse to Civil Rule 11 or to 28 U.S.C. § 1927. In addition, such a concern would suggest denying tolling effect to a withdrawn motion only when the motion was made by the would-be appellant, and not when the motion was made by the appellee – but the text of Rule 4(a)(4) does not indicate any basis for a distinction between motions based on the identity of the movant.

There is textual appeal, the Reporter suggested, to Judge Lucero's argument that under the text of Rule 4(a)(4) the Vanderwerfs' appeal time had not yet begun to run. However, such an interpretation of the Rule could present a different policy concern – namely, that in such instances the appeal time might never start to run. This concern is similar to that which arose prior to 2002 in instances where a judgment was required to be set forth in a separate document and the separate document was not provided. In 2002, the Rules were amended to set an outer limit at which the appeal time would begin to run even if the requisite separate document was never provided. One possible approach in the context of withdrawn motions is that taken by the Sixth Circuit's unpublished opinion – namely, deeming the motion denied as of the date it is withdrawn.

An attorney member stated that she agreed with the *Vanderwerf* majority's reading of Rule 4(a)(4). The Rule, she suggested, cannot reasonably be read to allow a party to give itself a unilateral extension; when the motion is withdrawn, there never is an "order disposing of" a tolling motion. The Reporter asked whether such a reading of Rule 4(a)(4) would also counsel denying tolling effect to a withdrawn motion when the would-be appellant is someone other than the movant. The member responded that in such a situation the would-be appellant could ask the court not to permit the movant to withdraw the motion. Another attorney member agreed that Rule 4(a)(4) might be read to imply the requirement that an order ultimately be entered with respect to a motion in order for the motion to have tolling effect; this member drew an analogy to the way the language of Civil Rule 50 has been read. An appellate judge member recalled a Georgia state statute that provided that an appeal not decided within six months was deemed denied; he suggested that an analogous approach might be considered for motions not ruled upon by the trial court. Possible formulations were noted – that a motion might be "deemed denied if withdrawn," or "deemed denied because disposed of." A member suggested the possibility of adopting a rule providing that no motion of the types described in Appellate Rule 4(a)(4) can be withdrawn without leave of court. It was noted that such a provision would be placed in the Civil Rules rather than the Appellate Rules.

An attorney member observed that cases raising this issue are likely to be rare. An appellate judge member agreed that there is no need for the Committee to take action with respect to this issue. Another attorney member agreed that there is no urgent need for Committee action, though he observed that under the *Vanderwerf* court's approach it is not clear what a non-movant should do if a movant withdraws a tolling motion. By consensus, the Committee decided to keep this item on the study agenda for the moment, in order to consider further how one might address the latter scenario in the light of the *Vanderwerf* decision.

C. Item No. 10-AP-F (*Comer v. Murphy Oil*, 607 F.3d 1049 (5th Cir. 2010) (en banc))

Judge Sutton invited Mr. Taranto to introduce this item, which concerns Mr. Taranto's suggestion that the Committee consider issues raised by *Comer v. Murphy Oil USA*, 607 F.3d

1049 (5th Cir. 2010) (en banc). Mr. Taranto described the matters at issue in this unusual case. 28 U.S.C. § 46(c) governs the number of votes needed for a court of appeals to decide to hear or rehear a case en banc. 28 U.S.C. § 46(d) governs the number of judges that constitute a quorum for the court of appeals to hear a case (including to hear or rehear a case en banc). In *Comer*, after the panel decision, a majority of the nonrecused active judges on the Fifth Circuit voted to rehear the case en banc, which – under the Circuit's local rules – automatically vacated the panel decision. Subsequently, one of the previously nonrecused active judges recused herself, leading a majority of the remaining nonrecused active judges to conclude that there was no longer a quorum under Section 46(d). That majority concluded that the lack of a quorum left no choice but to dismiss the appeal. The dissenting judges described a number of alternative possibilities. Mr. Taranto suggested an additional possibility unmentioned by any of the judges in *Comer*: Once the en banc court had lost its quorum, why not treat the appeal as if it had just been filed, and assign it to a panel?

Mr. Taranto noted that Appellate Rule 35(a) adopts the "case majority" approach to determining the number of votes needed for a court of appeals to decide to hear or rehear a case en banc; under this approach, disqualified judges are omitted when calculating the number of votes needed to provide a majority. The 2005 Committee Note to Rule 35(a), however, explicitly disclaims any intent to foreclose the possibility that Section 46(d) could be read to require that a majority of the court's active judges be nondisqualified in order for a quorum to exist for the en banc court.

Determining the best approach to a quorum requirement for the en banc court, Mr. Taranto observed, would require a policymaker to balance the risks of aberrant rulings for parties in a particular case against the risk of an aberrant en banc ruling (by an en banc court composed of only a small subset of the circuit's active judges). One question for the Committee, he suggested, is whether there is any interest in addressing through rulemaking the issue of case assignment – and in particular, the procedure to be followed when a case has been taken en banc and then an event deprives the en banc court of a quorum. Another question is whether any changes should be made in Section 46(d), perhaps by means of a legislative proposal. Mr. Taranto noted the Federal Circuit's proposal (discussed earlier in the meeting) for legislation amending Section 46(c).

The Reporter noted that as to the question of Section 46(d)'s quorum requirements, different sized circuits are likely to have differing views. A participant observed that some judges might be wary of any proposal for altering Section 46(d)'s quorum requirement. It was noted that in the Fifth Circuit, the frequency of ties to energy companies tends to lead to a lot of recusals. An attorney member asked whether judges could avoid some of those recusals by choosing to invest through mutual funds rather than directly in specific companies. A participant noted, however, that this expedient would not address all the possible reasons for such recusals.

By consensus, the Committee decided to remove this item from its agenda.

D. Item No. 10-AP-G (intervention on appeal)

Judge Sutton invited the Reporter to introduce this item, which arises from Mr. Letter's observation that the Appellate Rules lack a general provision governing intervention on appeal. As Mr. Letter has pointed out, Appellate Rule 15(d) addresses the topic of intervention in the context of court of appeals review of agency determinations, and Appellate Rule 44 addresses the topic in the context of constitutional challenges to federal or state statutes. But – apart from provisions setting the color of intervenors' briefs – the Appellate Rules contain no provision addressing intervention on appeal more generally. By contrast, Civil Rule 24 treats the question of intervention in the district court.

The Reporter observed that local circuit rules addressing the topic of intervention tend to govern the procedural incidents of intervention rather than providing guidance as to the circumstances under which a court will permit intervention on appeal. The caselaw concerning intervention on appeal tends to draw upon Civil Rule 24 and cases interpreting that Rule. The question of timeliness often looms large for those who seek to intervene on appeal, because a natural question is why the would-be intervenor did not seek intervention earlier when the matter was in the district court. Would-be intervenors must also be prepared to address why participation as an amicus would not suffice to protect their interests. The court of appeals is likely to consider whether existing parties would be prejudiced by intervention. And the court is likely to take care not to allow intervention to be used as an end-run around the time limits for taking an appeal or as a way of broadening the issues on appeal beyond those raised by existing parties. An Appellate Rule addressing intervention on appeal could cover a variety of topics, including the standards and timing requirements for permitting intervention (any such provision would need to be flexible); what entity (the clerk, a single judge or a panel) resolves requests to intervene; disclosure and briefing requirements for intervenors; argument time (if any) for intervenors; and the allocation of appellate costs. The Reporter noted that she had been unable to find any explanation for the Appellate Rules' omission of a general provision concerning intervention on appeal; she speculated that the omission might have arisen from a concern that treating the topic explicitly might encourage belated requests to intervene.

Mr. Letter reported that the question of intervention on appeal arises fairly often for the DOJ. For example, in the Intertanko litigation – which concerned the validity of Washington state tanker regulations – the United States did not intervene in the district court. That decision was typical for the United States: Often the government will decide not to intervene in the district court, although the case implicates federal interests, because the outcome in the district court may turn out to be satisfactory to the government even absent the government's intervention, and because the government has resource constraints. In the Intertanko case, after the district court upheld the state regulations, the United States intervened on appeal in order to argue that the district court's ruling gave insufficient consideration to the federal government's interest in foreign affairs. After the Ninth Circuit affirmed in large part, both Intertanko and the United States sought certiorari, and the Supreme Court granted review. Mr. Letter noted that in a more recent case, the United States moved to intervene both in the district court and in the court of

appeals.

An attorney member noted that a key question is where the would-be intervenor should seek permission to intervene – in the district court or the court of appeals? This member suggested that it might not make sense to have dual tracks for seeking intervention in both the district and appellate court. But she also stated that unless there are substantive variations among the circuits concerning the treatment of requests to intervene on appeal, the matter does not seem to require rulemaking.

A participant suggested that the United States is in a different position, with respect to intervention, than non-governmental parties are. Mr. Letter acknowledged this but also noted that private parties might not know about a case that is important to them until it reaches the appeal stage. An appellate judge member stated that if the Appellate Rules were amended to address intervention on appeal, the new rule should discourage belated intervention; he suggested that otherwise, judges might be concerned that the new rule would unduly increase the practice. Another appellate judge member suggested that the matter does not call for rulemaking. A third appellate judge member agreed that there is no need for rulemaking; he suggested that if a rule were to be adopted, he would favor one that directs the would-be intervenor to seek leave from the district court rather than the court of appeals. A district judge member observed that such a rule would capitalize on the district judge's knowledge of the case and the parties; but he also noted that when faced with similar sorts of requests concerning procedure for purposes of appeal, he always wonders what disposition the court of appeals would prefer.

The Committee's discussion did not produce any suggestions for moving forward with a rulemaking proposal on this item; on the other hand, the discussion did not explicitly result in the formal removal of the item from the Committee's agenda.

E. Item No. 10-AP-H (appellate review of remand orders)

Judge Sutton invited the Reporter to summarize this item, which arises from an inquiry by Karen Kremer of the AO on behalf of the Committee on Federal / State Jurisdiction. That Committee is interested to know whether any of the Rules Advisory Committees are looking at the issue of appealability of remand orders. The question of appellate review of remand orders falls within the primary jurisdiction of the Federal / State Jurisdiction Committee and is a matter concerning which Professor James Pfander (the Reporter for that Committee) is an expert. The question presents a number of doctrinal intricacies and could benefit from rationalization. Existing grants of rulemaking authority would provide authorization for addressing some, but not all, aspects of the problem. A comprehensive revision of this area of doctrine would entail legislation.

Participants expressed interest in reviewing any proposal that the Committee on Federal / State Jurisdiction generates on this topic and expressed willingness to help with such a project if

the Federal / State Jurisdiction Committee would be interested in such assistance.

VIII. Schedule Date and Location of Fall 2011 Meeting

The Committee had already scheduled its spring 2011 meeting for April 6 and 7, 2011, in San Francisco, California; the second day of the meeting will overlap with the meeting of the Bankruptcy Rules Committee. The Committee discussed possible dates for its fall 2011 meeting and decided to confer further about those possibilities by email.

IX. Adjournment

The Committee adjourned at 10:50 a.m. on October 8, 2010.

Respectfully submitted,

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Catherine T. Struve
Reporter

Advisory Committee on Appellate Rules
Table of Agenda Items — December 2010

FRAP Item	Proposal	Source	Current Status
03-09	Amend FRAP 4(a)(1)(B) & 40(a)(1) to clarify treatment of U.S. officer or employee sued in individual capacity.	Solicitor General	Discussed and retained on agenda 11/03; awaiting revised proposal from Department of Justice Tentative draft approved 04/04 Revised draft approved 11/04 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07 Discussed and retained on agenda 04/08 FRAP 40(a)(1) amendment approved 11/08 for submission to Standing Committee FRAP 40(a)(1) proposal remanded to Advisory Committee 06/09 Discussed and retained on agenda 11/09 Draft approved 05/10 for submission to Standing Committee Approved by Standing Committee 06/10 Approved by Judicial Conference 09/10
05-01	Amend FRAP 21 & 27(c) to conform to Justice for All Act of 2004.	Advisory Committee	Discussed and retained on agenda 04/05; awaiting proposal from Department of Justice Discussed and retained on agenda 04/06; Department of Justice will monitor practice under the Act
06-04	Amend FRAP 29 to require that amicus briefs indicate whether counsel for a party authored brief and to identify persons who contributed monetarily to preparation or submission of brief.	Hon. Paul R. Michel (C.J., Fed. Cir.) and Hon. Timothy B. Dyk (Fed. Cir.)	Discussed and retained on agenda 11/06 Draft approved 04/07 for submission to Standing Committee Remanded by Standing Committee for consideration of new developments, 06/07 Draft approved 11/07 for submission to Standing Committee Approved for publication by Standing Committee 01/08 Published for comment 08/08 Revised draft approved 04/09 for submission to Standing Committee Approved by Standing Committee 06/09 Approved by Judicial Conference 09/09 Approved by Supreme Court 04/10

FRAP Item	Proposal	Source	Current Status
07-AP-D	Amend FRAP to define the term "state."	Time-computation Subcommittee 3/07	Discussed and retained on agenda 04/07 Tentative draft approved 11/07 Drafts approved 04/08 for submission to Standing Committee Approved for publication by Standing Committee 06/08 Published for comment 08/08 Approved 04/09 for submission to Standing Committee Approved by Standing Committee 06/09 Approved by Judicial Conference 09/09 Approved by Supreme Court 04/10
07-AP-E	Consider possible FRAP amendments in response to Bowles v. Russell (2007).	Mark Levy, Esq.	Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10
07-AP-G	Amend FRAP Form 4 to conform to privacy requirements.	Forms Working Group, chaired by Hon. Harvey E. Schlesinger	Discussed and retained on agenda 11/07 Draft approved 04/08 for submission to Standing Committee Approved for publication by Standing Committee 06/08 Published for comment 08/08 Approved 04/09 for submission to Standing Committee Approved by Standing Committee 06/09 Approved by Judicial Conference 09/09 Approved by Supreme Court 04/10
07-AP-H	Consider issues raised by Warren v. American Bankers Insurance of Florida, 2007 WL 3151884 (10th Cir. 2007), concerning the operation of the separate document rule.	Appellate Rules Committee	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08
07-AP-I	Consider amending FRAP 4(c)(1) to clarify the effect of failure to prepay first-class postage.	Hon. Diane Wood	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08
08-AP-C	Abolish FRAP 26(c)'s three-day rule.	Hon. Frank H. Easterbrook	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09

FRAP Item	Proposal	Source	Current Status
08-AP-D	Delete reference to judgment's alteration or amendment from FRAP 4(a)(4)(B)(ii)	Peder K. Batalden, Esq.	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 10/10
08-AP-G	Consider substantive and style changes to FRAP Form 4	Appellate Rules Committee	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 10/10
08-AP-H	Consider issues of "manufactured finality" and appealability	Mark Levy, Esq.	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 10/10
08-AP-J	Consider FRAP implications of conflict screening	Committee on Codes of Conduct	Discussed and retained on agenda 11/08
08-AP-K	Consider privacy issues relating to alien registration numbers	Public.Resource.Org	Discussed and retained on agenda 11/08
08-AP-L	Amend FRAP 6(b)(2)(A)(ii) to remove ambiguity	Reporter	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09 Discussed and retained on agenda 10/10
08-AP-M	Consider FRAP implications of interlocutory appeals in tax cases	Reporter	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Draft approved 10/10 for submission to Standing Committee
08-AP-N	Amend FRAP 5 to allow parties to submit an appendix of key documents from the record along with petitions and answers	Peder K. Batalden, Esq.	Discussed and retained on agenda 04/09
08-AP-P	Amend FRAP 32 to change from double line-spacing to 1.5 line-spacing for briefs	Peder K. Batalden, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09
08-AP-Q	Consider amending FRAP 10(b) to permit the use of digital audio recordings in place of written transcripts	Hon. Michael M. Baylson	Discussed and retained on agenda 04/09 Discussed and retained on agenda 10/10

FRAP Item	Proposal	Source	Current Status
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09
09-AP-A	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	ABA Council of Appellate Lawyers	Discussed and retained on agenda 04/09
09-AP-B	Amend FRAP 1(b) to include federally recognized Indian tribes within the definition of "state"	Daniel I.S.J. Rey-Bear, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10
09-AP-C	Consider possible FRAP amendments in the light of project to revise Part VIII of the Bankruptcy Rules	Bankruptcy Rules Committee	Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10
09-AP-D	Consider implications of Mohawk Industries, Inc. v. Carpenter	John Kester, Esq.	Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10
10-AP-A	Consider treatment of premature notices of appeal under FRAP 4(a)(2)	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10
10-AP-B	Consider FRAP 28's treatment of statements of the case and of the facts	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10
10-AP-D	Consider factors to be taken into account when taxing costs under FRAP 39	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/10
10-AP-E	Consider effect of withdrawal of a timely-filed post-judgment motion on the time to appeal in a civil case	Howard J. Bashman, Esq.	Discussed and retained on agenda 10/10
10-AP-G	Consider amending FRAP to address intervention on appeal	Douglas Letter, Esq.	Discussed and retained on agenda 10/10
10-AP-H	Consider issues relating to appellate review of remand orders	Committee on Federal-State Jurisdiction	Discussed and retained on agenda 10/10

TAB
7

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

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JEFFREY S. SUTTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

TO: **Hon. Lee H. Rosenthal, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Hon. Richard C. Tallman, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

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

DATE: **December 8, 2010**

I. Introduction

The Advisory Committee on the Federal Rules of Criminal Procedure ("the Committee") met on September 27-28, 2010, in Boston, Massachusetts, and took action on a number of proposals. The Draft Minutes are attached.

Action items:

(1) approval to publish a proposed amendment to Rule 11 (advice concerning immigration consequences of a guilty plea); and

(2) approval to publish a proposed amendment to Rule 12 (motions which must be made before trial), and a conforming amendment to Rule 34.

II. Action Items—Recommendations to Publish Amendments to the Rules

1. ACTION ITEM—Rule 11

The Advisory Committee recommends publication of an amendment to expand the Rule 11 colloquy to advise a defendant who is pleading guilty or nolo contendere of possible immigration consequences.

As explained in the 1974 Committee Notes, the Rule 11 colloquy is designed to insure that a defendant who pleads guilty has made an informed plea. A criminal conviction can lead to a variety of other collateral consequences, and until now the rule did not require judges to discuss them with a defendant pleading guilty or nolo contendere. Despite the lack of a mandate in the rule, however, judges in many districts already include warnings about the collateral consequences of a criminal conviction as good practice.

In light of the Supreme Court's ineffective assistance of counsel decision in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), the Advisory Committee concluded that a warning regarding possible immigration consequences ought to be required as a uniform practice. *Padilla* held that a defense attorney's failure to advise the defendant concerning the risk of deportation fell below the objective standard of reasonable professional assistance guaranteed by the Sixth Amendment. The Court stated that in light of changes in immigration law "deportation is an integral part–indeed, sometimes the most important part–of the penalty that may be imposed on noncitizen defendants who plead guilty." 130 S.Ct. at 1480 (footnote omitted). It also noted that "because of its close connection to the criminal process," deportation as a consequence of conviction is "uniquely difficult to classify as either a direct or a collateral consequence" of a plea. *Id.* at 1482. The Committee concluded that the Supreme Court's decision provides an appropriate basis for adding advice concerning immigration consequences to the required colloquy under Rule 11, leaving the question whether to provide advice concerning other adverse collateral consequences to the discretion of the district courts.

Although the motion to adopt the language of the proposed amendment passed unanimously, the Committee was initially divided on the question whether to add further requirements to the already lengthy plea colloquy now required under Rule 11. *Padilla* was based solely on the constitutional duty of defense counsel, and it does not speak to the duty of judges. Members expressed concern that the list of matters that must be addressed in the plea colloquy is already lengthy, and adding immigration consequences would open the door to future amendments. This could eventually turn a plea colloquy into a minefield for a judge.

After discussion, the Committee concluded that deportation is qualitatively different than the other collateral consequences that may follow from a guilty plea, and it therefore warrants inclusion on the list of matters that must be discussed during a plea colloquy. Although *Padilla* speaks only to the duty of defense counsel to warn a defendant about immigration consequences, the Supreme Court's logic also supports requiring a judge to issue a similar warning. Recognizing the distinctive nature of immigration consequences would be consistent with the practice of the Department of

Justice, which now singles out immigration consequences for special treatment and advises prosecutors to include a discussion of those consequences in plea agreements. Similarly judges should warn a defendant who pleads guilty that the plea could implicate his or her right to remain in the United States or to become a U.S. citizen.

The proposed amendment mandates a generic warning, and does not require the judge to provide specific advice concerning the defendant's individual situation. The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without first attempting to determine the defendant's citizenship. In drafting its proposal, the Committee was cognizant of the complexity of immigration law, as well as the fact that there have been, and likely will be, legislative changes in the immigration laws. Accordingly, the Committee's proposal uses non-technical language that is designed to be understood by lay persons and will avoid the need to amend the rule if there are legislative changes altering more specific terms of art.

Following the meeting, the reporters prepared and circulated by e-mail a draft committee note and a proposed revision to the text of the rule as adopted at the meeting. Both were approved by an e-mail vote of the Advisory Committee. One member noted his dissent from the Committee's decision to recommend the amendment.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 11 be published for public comment.

TAB
7-A

1 **Rule 11. Pleas.**

2 * * * * *

3 **(b) Considering and Accepting a Guilty or Nolo**
4 **Contendere Plea.**

5 **(1) Advising and Questioning the Defendant.**
6 Before the court accepts a plea of guilty or
7 nolo contendere, the defendant may be placed
8 under oath, and the court must address the
9 defendant personally in open court. During
10 this address, the court must inform the
11 defendant of, and determine that the defendant
12 understands, the following:

13 * * * * *

14 (M) in determining a sentence, the court's
15 obligation to calculate the applicable
16 sentencing-guideline range and to
17 consider that range, possible
18 departures under the Sentencing
19 Guidelines, and other sentencing
20 factors under 18 U.S.C. § 3553(a); ~~and~~

21 (N) the terms of any plea-agreement
22 provision waiving the right to appeal
23 or to collaterally attack the sentence;
24 and~~.~~
25 (O) that, if convicted, a defendant who is
26 not a United States citizen may be
27 removed from the United States, denied
28 citizenship, and denied admission to
29 the United States in the future.

Committee Note

Subdivision (b)(1)(O). The amendment requires the court to include a general statement concerning the potential immigration consequences of conviction in the advice provided to the defendant before the court accepts a plea of guilty or nolo contendere.

For a defendant who is not a citizen of the United States, a criminal conviction may lead to removal, exclusion, and the inability to become a citizen. In *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), the Supreme Court held that a defense attorney's failure to advise the defendant concerning the risk of deportation fell below the objective standard of reasonable professional assistance guaranteed by the Sixth Amendment.

The amendment mandates a generic warning, and does not require the judge to provide specific advice concerning the defendant's individual situation. Judges in many districts already include a warning about immigration consequences in the plea colloquy, and the amendment adopts this practice as good policy. The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without first attempting to determine the defendant's citizenship.

2. ACTION ITEM—Rule 12

The Advisory Committee recommends publication of an amendment to Rule 12. One element of the present proposal – the treatment of claims that the indictment or information fails to state an offense – was presented to the Standing Committee in 2009 and returned to the Advisory Committee for further study. Following the remand, the Advisory Committee broadened its deliberations to include the application of the "waiver" concept in Rule 12 and its relationship to Rule 52.

Background

Subdivision (b) of Criminal Rule 12 designates which claims and objections must be raised before trial. Subdivision (e) specifies that a party "waives" any claim that should have been raised prior to trial under subdivision (b), and requires "good cause" before a court may grant relief from the waiver.

Although Rule 12 has from its inception used the term "waiver" to describe the failure to raise on time those specific claims addressed in the rule and the term "good cause" to describe the standard for relief, these terms as used in the Rule have a specific meaning that differs from the meaning that has come to be associated with these terms in some other contexts. In Rule 12 the label "waiver" is given to *any* failure to raise a designated claim, even though"waiver" elsewhere suggests only knowing and voluntary abandonments. Rule 12, in other words, has used the term "waiver" to describe all defaults, inadvertent forfeitures as well as fully informed and deliberate relinquishments. Also, the "good cause" test for relief from waiver of claims listed in Rule 12 is different than the test for relief that courts apply under Rule 52(b) for other claims that are not raised on time. The Supreme Court has interpreted the phrase "good cause" in Rule 12 to require a showing of "cause" and "prejudice," a standard well defined in the case law. *Davis v. United States,* 411 U.S. 233, 242 (1973); *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 363 (1963). By contrast, under Rule 52(b), relief for an untimely, forfeited claim is not conditioned upon "good cause." Instead, under Rule 52(b), claims not raised on time are reviewed for plain error under the now familiar four-part test first articulated by the Supreme Court in its decision in *United States v. Olano,* 507 U.S. 725 (1993). *See also Puckett v. United States,* 129 S.Ct. 1423 (2009) ("First, there must be an error or defect – some sort of "[d]eviation from a legal rule"– that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant. . . . Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. . . . Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it "affected the outcome of the district court proceedings." . . . Fourth and finally, if the above three prongs are satisfied, the court of appeals has the discretion to remedy the error-discretion which ought to be exercised only if the error " 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' ").

In 2009, the Advisory Committee recommended (with 4 dissenting votes) that the Standing Committee approve for publication an amendment to Rule 12. Rule 12(b) presently exempts from its timing requirements two specific claims: a claim that the charge fails to state an offense and a claim of lack of jurisdiction. These two claims may be raised at any time, even after conviction. In

2002, the Supreme Court made it clear that an indictment's failure to state an offense does not deprive the court of jurisdiction. *United States v. Cotton*, 535 U.S. 625, 629-31 (2002) (overruling *Ex parte Bain*, 121 U.S. 1 (1887), "[i]nsofar as it held that a defective indictment deprives a court of jurisdiction"). The Committee's 2009 proposal recommended adding to those claims "waived" under Rule 12(e) when not raised prior to trial the claim that a charge fails to state an offense. But rather than condition relief upon "good cause," as Rule 12(e) requires for other claims "waived" under the Rule, the Committee concluded that "cause" should not be required. Instead, the Committee's proposal recommended amended language providing that a judge could grant relief for the failure to state a claim either for good cause <u>or</u> when the error "prejudiced the substantial rights of the defendant." The proposal also included a conforming amendment to Rule 34.

In June of 2009, the Standing Committee remanded the proposed amendments to the Advisory Committee for further study of the relationship between the proposed "prejudice to substantial rights" standard, the"good cause" standard in Rule 12(e), and the standard for relief from forfeited claims under Rule 52. Additionally, the Standing Committee asked the Advisory Committee to consider whether some or all violations of Rule 12(b)(3) should be considered forfeited rather than waived.

The matter was once again considered by the Advisory Committee, which broadened its deliberations to include not only the appropriate treatment of a claim that the charge fails to state an offense, but also the application of the "waiver" concept in Rule 12 and its relationship to Rule 52. The result of these deliberations was a proposal that would make more extensive amendments to Rule 12, approved by the Advisory Committee at its September 2010 meeting by a vote of 8 to 4. Following the meeting, the reporters drafted a Committee Note, which was approved by an e-mail vote of the Advisory Committee.

The Proposed Amendment

The major features of the amendments to Rule 12 that the Committee now recommends the Standing Committee approve for publication are summarized in the paragraphs that follow. The most important changes are detailed in paragraphs 1, 4, and 6, below.

1. <u>Requiring Pretrial Objection Based on Failure to State an Offense</u>

Like the amendment recommended in 2009, the proposed amendment would eliminate the timing exemption for claims that the charge fails to state an offense and provide that this claim like other defects in the charge must be raised before trial.

2. <u>Deleting Existing (b)(2)</u>

Rule 12(b)(2) presently provides that "a party may raise by pretrial motion" "any defense, objection, or request that the court can determine without trial of the general issue." The 1944 Advisory Committee Note explains that the purpose of this provision was to make clear that pretrial motions could be used to raise matters previously raised "by demurrers, special pleas in bar and motions to quash." The use of motions is now so well established that it no longer requires explicit authorization. The language is not only unnecessary but also potentially misleading if read literally. As noted, (b)(2) says that any defense, objection, or request that is capable of being determined

before trial "may" be raised by pretrial motion. The permissive term "may" might be understood to indicate that each party has the option of bringing *or not bringing* all such motions before trial. This is in tension with (b)(3), which provides a list of motions that must be brought before trial. Since the language now found in (b)(2) is no longer needed and might create confusion, the Committee proposes that it should be deleted.

3. Relocating Provision on Jurisdictional Claim

The proposal would move to a separate subdivision the text that allows jurisdictional objections to be raised at "any time while the case is pending," rather than leaving it as an exception to the list of various defenses and claims subject to the timing requirements of Rule 12(b)(3). The amendment places this new subdivision in Rule 12(b)(2), replacing current (b)(2), which would be deleted, as discussed above. This avoids renumbering and relettering the most frequently cited and researched provisions in the Rule.

4. Requiring that Basis for Claim Be Available and Determination Possible Before Trial

As a general rule, the types of claims subject to Rule 12(b)(3) will be available before trial and they can – and should – be resolved then. But if the basis for a belated motion was not available to a party before trial, courts currently consider whether the circumstances constitute "good cause" such that the party can be excused for the failure to raise the claim before trial. The Committee agreed that the failure to raise a claim one could not have raised should never be considered waiver and that it would be desirable to make this point explicit in the rule. Defenses, objections and claims "must" be raised before trial only where "the basis for the motion is then reasonably available...."

In addition, parties should not be encouraged to raise (or punished for not raising) claims that depend on factual development at trial. Presently (b)(2) addresses this concern by noting that issues depending on a trial "of the general issue" may not be raised prior to trial. If amended as proposed, the Rule would make this point clear through the introductory language of (b)(3), which provides that only those issues that can be determined "without a trial on the merits" "must be raised by motion before trial." The Committee preferred the modern phrase "trial on the merits" over the more archaic phrase "trial of the general issue" now found in (b)(2). No change in meaning is intended.

Under the revised Rule, if a party raises an issue governed by Rule 12(b)(3) at any time after the trial has begun, the court would first determine whether (1) the basis for raising the issue was "reasonably available" before trial to the party who wishes to raise it, and, if so, (2) whether it would have been possible for the court to resolve the issue at that time, before trial. Only if both conditions are met would the court need to consider the consequences of the failure to raise the claim on time under subdivision (e).

5. Spelling Out Claims Required Before Trial

The proposal does not disturb the general approach followed in the current (b)(3) to describe those claims subject to waiver: it repeats the two general categories of claims (defects in "instituting the prosecution" and defects "in the indictment or information"), followed by the three specific categories of discovery, suppression, and severance. To add clarity and provide guidance to litigants,

however, the proposed revised Rule lists some of the more common claims that fall in each of the more general categories, while leaving in place the existing description of the general categories.

6. Consequences of Failure to Raise Claims or Defenses Before Trial

The proposal bifurcates subdivision (e). Subdivision (e)(1) applies to all but three of the claims that under (b) must be raised prior to trial, and it preserves the standards of the existing rule, providing that an untimely claim is "waived" and may not be considered unless there is a showing of both "cause and prejudice." The substitution of "cause and prejudice" for "good cause" is intended to clarify rather than modify the standard for relief that is already applied under the current Rule.

Subdivision (e)(2) is new, and provides that a different standard of relief applies to three specific untimely claims: the failure to state an offense, double jeopardy, and a violation of the statute of limitations. These three claims are "forfeited" if not raised in a timely fashion, not "waived," and if raised late are subject to review under Rule 52(b) for plain error. The Committee concluded that the "cause" showing required for excusing waiver of other sorts of claims is inappropriate for these claims. This new standard is also consistent with the Supreme Court's holding in *Cotton,* that a claim that an indictment failed to allege an essential element, raised for the first time after conviction, was forfeited and must meet "the plain-error test of Federal Rule of Criminal Procedure 52(b)." *Cotton*, 535 U.S. at 631.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 12, and the conforming change to Rule 34, be published for public comment.

Rule 12. Pleadings and Pretrial Motions *

1 * * * * *

2 **(b) Pretrial Motions.**

3 **(1)** ***In General.*** Rule 47 applies to a pretrial motion.

4 **(2)** ~~***Motions That May Be Made Before Trial.*** A party~~
5 ~~may raise by pretrial motion any defense,~~
6 ~~objection, or request that the court can determine~~
7 ~~without a trial of the general issue.~~ ***Motion That***
8 ***May Be Made at Any Time.*** A motion that the
9 court lacks jurisdiction may be made at any time
10 while the case is pending.

11 **(3)** ***Motions That Must Be Made Before Trial.*** The
12 following defenses, objections, and requests must
13 be raised by motion before trial if the basis for the
14 motion is then reasonably available and the motion
15 can be determined without a trial on the merits:

16 (A) ~~a motion alleging~~ a defect in instituting the
17 prosecution, including:

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

18 (i) improper venue;

19 (ii) preindictment delay;

20 (iii) a violation of the constitutional

21 right to a speedy trial;

22 (iv) double jeopardy;

23 (v) the statute of limitations;

24 (vi) selective or vindictive prosecution;

25 (vii) outrageous government conduct; and

26 (viii) an error in the grand jury proceeding or

27 preliminary hearing;

28 (B) ~~a motion alleging~~ a defect in the indictment

29 or information, including:

30 (i) joining two or more offenses in the

31 same count (duplicity);

32 (ii) charging the same offense in more than

33 one count (multiplicity);

34 (iii) lack of specificity;

35 (iv) improper joinder; and

36 (v) failure to state an offense;

37 ~~— but at any time while the case is pending, the~~
38 ~~court may hear a claim that the indictment or~~
39 ~~information fails to invoke the court's jurisdiction~~
40 ~~or to state an offense~~;

41 (C) ~~a motion to~~ suppression of evidence;

42 (D) ~~a Rule 14 motion to~~ severance of charges or
43 defendants under Rule 14; and

44 (E) ~~a Rule 16 motion for~~ discovery under Rule
45 16.

46 **(4)** ***Notice of the Government's Intent to Use***
47 ***Evidence.***

48 (A) *At the Government's Discretion.* At the
49 arraignment or as soon afterward as
50 practicable, the government may notify the
51 defendant of its intent to use specified
52 evidence at trial in order to afford the
53 defendant an opportunity to object before trial
54 under Rule 12(b)(3)(C).

55 (B) *At the Defendant's Request.* At the
56 arraignment or as soon afterward as
57 practicable, the defendant may, in order to
58 have an opportunity to move to suppress
59 evidence under Rule 12(b)(3)(C), request
60 notice of the government's intent to use (in
61 its evidence-in-chief at trial) any evidence
62 that the defendant may be entitled to discover
63 under Rule 16.

64 **(c) Motion Deadline.** The court may, at the arraignment or
65 as soon afterward as practicable, set a deadline for the
66 parties to make pretrial motions and may also schedule
67 a motion hearing.

68 **(d) Ruling on a Motion.** The court must decide every
69 pretrial motion before trial unless it finds good cause to
70 defer a ruling. The court must not defer ruling on a
71 pretrial motion if the deferral will adversely affect a
72 party's right to appeal. When factual issues are involved
73 in deciding a motion, the court must state its essential
74 findings on the record.

75 (e) ~~**Waiver of a Defense, Objection, or Request.**~~

76 **Consequence of Not Making a Motion Before Trial**

77 **as Required.**

78 (1) ***Waiver.*** A party waives any Rule 12(b)(3)

79 defense, objection, or request – other than failure

80 to state an offense , double jeopardy, or the statute

81 of limitations – not raised by the deadline the

82 court sets under Rule 12(c) or by any extension the

83 court provides. ~~For good cause~~ Upon a showing of

84 cause and prejudice, the court may grant relief

85 from the waiver. Otherwise, a party may not raise

86 the waived claim.

87 (2) ***Forfeiture.*** A party forfeits any claim based on the

88 failure to state an offense, double jeopardy, or the

89 statute of limitations, if the claim was not raised by

90 the deadline the court sets under Rule 12(c) or by

91 any extension the court provides. A forfeited

92 claim is not waived. Rule 52(b) governs relief for

93 forfeited claims..

Committee Note

Subdivision (b)(2). The amendment deletes the provision providing that "any defense, objection, or request that the court can determine without trial of the general issue" may be raised by motion before trial. This language was added in 1944 to make sure that matters previously raised by demurrers, special pleas, and motions to quash could be raised by pretrial motion. The Committee concluded that the use of pretrial motions is so well established that it no longer requires explicit authorization. Moreover, the Committee was concerned that the permissive language might be misleading, since Rule 12(b)(3) does not permit the parties to wait until after the trial begins to make certain motions that can be determined without a trial on the merits.

As revised, subdivision (b)(2) states that lack of jurisdiction may be raised at any time the case is pending. This provision was relocated from its previous placement at the end of subsection (b)(3)(B) and restyled. No change in meaning is intended.

Subdivision (b)(3). The amendment clarifies which motions must be raised before trial.

The introductory language includes two important limitations. The basis for the motion must be one that is "available" and the motion must be one that the court can determine "without trial on the merits." The types of claims subject to Rule 12(b)(3) generally will be available before trial and they can – and should – be resolved then. The Committee recognized, however, that in some cases, a party may not have access to the information needed to raise particular claims that fall within the general categories subject to Rule 12(b)(3) prior to trial. The "then reasonably available" language is intended to ensure that the failure to raise a claim a party could not have raised on time is not deemed to be "waiver" or "forfeiture" under the Rule. Cf. 28 U.S.C. § 1867(a) & (b) (requiring claims to be raised promptly after they were "discovered or could have been discovered by the exercise of due diligence"). Additionally, only those issues that can be determined "without a trial on the merits" need be raised by motion before trial. The more modern phrase "trial on the merits" is substituted for the more archaic phrase "trial of the general issue" that appeared in existing (now deleted) (b)(2). No change in meaning is intended.

The rule's command that motions alleging "a defect in instituting the prosecution" and "errors in the indictment or information" must be made before trial is unchanged. The amendment adds a nonexclusive list of commonly raised claims under each category to help ensure that such claims are not overlooked.

Rule 12(b)(3)(B) has also been amended to remove language that allowed the court at any time while the case is pending to hear a claim that the "indictment or information fails . . . to state an offense." This specific charging error was previously considered fatal whenever raised and was excluded from the general requirement that charging deficiencies be raised prior to trial. The Supreme Court abandoned any jurisdictional justification for the exception in *United States v. Cotton,* 535 U.S. 625, 629-31 (2002) (overruling *Ex parte Bain*, 121 U.S. 1 (1887), "[i]nsofar as it held that a defective indictment deprives a court of jurisdiction").

Subdivision (e). Rule 12(e) has also been amended to clarify when a court may grant relief for untimely claims that should have been raised prior to trial under Rule 12(b)(3). Rule 12(e) has been subdivided into two sections, each specifying a different standard of review for untimely claims of error.

Subdivision (e)(1) carries over the "waiver" standard of the existing rule, applying it to all untimely claims except for those that allege a violation of double jeopardy or the statute of limitations or that the charge fails to state an offense. The rule retains the language that provides a party "waives" all other challenges by not raising them on time as required by Rule 12(b)(3), as well as the language that relief is available only if the defendant makes a certain showing, previously described as "good cause." "Good cause" for securing relief for an untimely claim "waived" under Rule 12 has been interpreted by the Supreme Court as well as most lower courts to require two showings: (1) "cause" for the failure to raise the claim on time, and (2) "prejudice" resulting from the error. *Davis v. United States,* 411 U.S. 233, 242 (1973); *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 363 (1963). Each concept – "cause" and "prejudice" – is well-developed in case law applying Rule 12. To clarify this standard, with no change in meaning intended, the words "for good cause" in the existing rule have been replaced by "upon a showing of cause and prejudice."

Subdivision (e)(2) provides a different standard for three specific claims, those that allege a violation of double jeopardy, a violation of the statute of limitations, or that the charge fails to state an offense. The Committee concluded that the "cause" showing required for excusing waiver of other sorts of claims is inappropriate for these claims. The new subdivision provides that a court may grant relief for such a claim whenever the error amounts to plain error under Rule 52(b). This new standard is also consistent with the Court's holding in *Cotton,* that a claim that an indictment failed to allege an essential element, raised for the first time after conviction, was forfeited and must meet "the plain-error test of Federal Rule of Criminal Procedure 52(b)." *Cotton*, 535 U.S. at 631.

Rule 34. Arresting Judgment

(a) In General. Upon the defendant's motion or on its own, the court must arrest judgment <u>if the court does not have jurisdiction of the charged offense.</u> ~~if:~~

~~(1) the indictment or information does not charge an offense; or~~

~~(2) the court does not have jurisdiction of the charged offense.~~

* * * * *

Committee Note

This amendment conforms Rule 34 to Rule 12(b) which has been amended to remove language that the court at any time while the case is pending may hear a claim that the "indictment or information fails . . . to state an offense." The amended Rule 12 instead requires that such a defect be raised before trial.

TAB
7-B

III. Discussion Items

A. Rule 16 and Exculpatory Evidence

The Advisory Committee is continuing its consideration of the question whether Rule 16 should be amended to incorporate the government's constitutional obligation to provide exculpatory evidence to the defense or to create a broader pretrial disclosure obligation of potential impeachment information. To inform its deliberations, the Committee is gathering information on how the system is currently functioning and seeking wide input on the question whether an amendment to rules would be desirable.

The Committee received a presentation on the preliminary results of a Federal Judicial Center survey on Rule 16 conducted at the Committee's request. The survey was distributed to all district and magistrate judges and 14,000 defense attorneys (both federal public defenders and private defense attorneys). With the help of the Department of Justice, the survey was sent to all 94 U.S. Attorneys' Offices nationwide, but not to individual prosecutors. The response rate was very high for a survey of this type: 43% of the judges, 32% of the defense attorneys, and 91% of the U.S. Attorneys' Offices responded. In addition, respondents provided written comments that the Center estimated to be over 700 pages of text. In compiling the answers, the survey distinguished between districts that rely primarily on Rule 16 to guide discovery, and districts that supplement Rule 16 with local rules, standing orders, or other means, to impose broader disclosure requirements. The survey referred to the former districts as "traditional Rule 16 districts" and the latter districts as "broader disclosure districts."

The survey focused on the central issue whether Rule 16 should be amended to require pretrial disclosure of exculpatory and impeachment information. Since the minutes included in the Agenda Book provide a detailed description of these preliminary findings, this report highlights only a few key points. First, 51% of the judges and slightly more than 90% of the defense attorneys favor amending Rule 16, while the Department opposes any type of amendment. In the districts that already have local rules requiring broader disclosure 60% of the judges favor an amendment, but in traditional Rule 16 districts, only 45% favor an amendment.

Second, the survey provides information on the principal reasons for the support or opposition to an amendment. Judges most frequently cited two reasons for favoring an amendment: (1) to eliminate confusion surrounding the requirement of materiality as a measure of a prosecutor's pretrial disclosure obligations; and (2) to reduce variations that currently exist across circuits. Defense attorneys cited the first reason – eliminating confusion caused by the materiality requirement – as the primary justification for favoring an amendment. The reasons most commonly given by judges for opposing an amendment were that: (1) there is no demonstrated need for a change; and (2) the current remedies for prosecutorial misconduct are adequate. The Department added a third reason: recent reforms instituted by the Department will significantly reduce disclosure violations.

The survey provides information regarding the perceptions of judges, prosecutors, and defense lawyers regarding the frequency of (1) non-compliance with discovery obligations on the part of both prosecutors and defense lawyers; (2) threats or harm to witnesses due to disclosure of exculpatory or impeaching information; and (3) requests for protective orders. It also reports on their perceptions regarding the effect of the disclosure rules in the broader disclosure districts.

Since the survey gathered an enormous amount of data and the Federal Judicial Center has not yet completed its final report, the Committee's discussion was preliminary and general. In light of the sharp division of opinion regarding the need for an amendment, members expressed an interest in considering not only a possible amendment but also changes in the Federal Judicial Center's Judges' Benchbook that might serve either as an adjunct or an alternative to amending Rule 16. One option that might be included in either an amendment to Rule 16 or the Benchbook is a checklist that would focus the attention of both the prosecution and the defense on the kinds of information that should be disclosed. In addition, the Federal Judicial Center is considering publishing a guide to the "best practices" in criminal discovery. Some members expressed the view that supplementing the Benchbook or publishing such a guide could be effective and avoid the pitfalls of amending Rule 16.

The consideration of any proposed amendment was recommitted to the Rule 16 subcommittee, which Judge Tallman chairs.

B. Rule 15

Judge Rosenthal reported on the status of the proposed amendment to Rule 15, which would authorize the taking of depositions outside the presence of a defendant in special, limited circumstances, with the district judge's approval. The Judicial Conference had transmitted the proposed amendment to the Supreme Court, but the Court remanded it to the Committee for further consideration. One suggestion is to revise the proposed amended Rule 15 to emphasize that it does not predetermine whether depositions conducted outside the presence of the defendant are admissible at any subsequent trial. Rather, it is limited to providing assistance on pretrial discovery. Judge Tallman directed that the matter be recommitted to the Rule 15 subcommittee chaired by Judge John Keenan, which subsequently met by conference call to consider a proposal to amend the Committee Note.

ADVISORY COMMITTEE ON CRIMINAL RULES

DRAFT MINUTES

Sept. 27-28, 2010
Cambridge, Massachusetts

I. ATTENDANCE AND PRELIMINARY MATTERS

The Judicial Conference Advisory Committee on Criminal Rules (the "Committee") met in Cambridge, Massachusetts, on September 27-28, 2010. The following members participated:

Judge Richard C. Tallman, Chair
Rachel Brill, Esquire
Leo P. Cunningham, Esquire
Justice Robert H. Edmunds, Jr.
Judge Morrison C. England, Jr.
Judge John F. Keenan
Judge David M. Lawson
Professor Andrew D. Leipold
Thomas P. McNamara, Esquire
Judge Donald W. Molloy
Judge Timothy R. Rice
Judge James B. Zagel
Professor Sara Sun Beale, Reporter
Professor Nancy King, Assistant Reporter
Hon. Lanny A. Breuer, Assistant Attorney General,
Criminal Division, Department of Justice (ex officio)

Representing the Standing Committee were its Chair, Judge Lee H. Rosenthal, and liaison member, Judge Reena Raggi. Supporting the Committee were:

Peter G. McCabe, Committee Secretary
John K. Rabiej, Rules Committee Support Office
Jeffrey N. Barr, Senior Attorney, Administrative Office
Henry Wigglesworth, Attorney Advisor, Administrative Office
Laural L. Hooper, Senior Research Associate, Federal Judicial Center
David Rauma, Senior Research Associate, Federal Judicial Center

Also participating from the Department of Justice were Jonathan J. Wroblewski, Director of the Office of Policy and Legislation, and Kathleen Felton, Deputy Chief of the Appellate Section.

A. Chair's Remarks, Introductions, and Administrative Announcements

Judge Tallman welcomed everyone, particularly Mr. Thomas P. McNamara, who had missed the April 2010 meeting due to illness. Judge Tallman also welcomed two distinguished visitors: the Honorable Emmet G. Sullivan, United States District Judge for the District of Columbia, and the Honorable Mark L. Wolf, Chief United States District Judge for the District of Massachusetts.

B. Review and Approval of the Minutes

A motion was made to approve the draft minutes of the April 2010 meeting.

The Committee unanimously approved the minutes.

C. Status of Criminal Rules: Report of the Rules Committee Support Office

Mr. Rabiej reported that the various proposed rules amendments recently approved by the Supreme Court (listed below in Section II.A) were on track to take effect on December 1, 2010, unless Congress were to act to the contrary. Based on his communications with Congressional staff, Mr. Rabiej reported that, at present, no changes were foreseen.

Mr. Rabiej further reported that the Judicial Conference had recently approved the Committee's proposed rules amendments, including technology-related amendments, listed below in Section II.B. The Administrative Office will transmit the amendments to the Supreme Court shortly. Finally, Mr. Rabiej reported that additional proposed amendments had been approved by the Standing Committee for publication (listed below in Section II.C) and had been posted on the rulemaking Web site in August 2010. He expects pamphlets of these amendments to be ready soon for distribution. Hearings on the proposed amendments have been scheduled for January 5, 2011, in San Francisco and January 25, 2011, in Atlanta. (The hearings will not be held if there is insufficient interest in presenting oral testimony.)

Judge Rosenthal reported on the status of the proposed amendment to Rule 15, which would authorize the taking of depositions outside the presence of a defendant in special, limited circumstances, with the district judge's approval. The Judicial Conference had transmitted the proposed amendment to the Supreme Court, but the Court remanded it to the Committee for further consideration. One suggestion is to revise the proposed amended Rule 15 to emphasize that it does not predetermine whether depositions conducted outside the presence of the defendant are admissible at any subsequent trial. Rather, it is limited to providing assistance on

pretrial discovery. Accordingly, Judge Tallman directed that the matter be recommitted to the Rule 15 subcommittee chaired by Judge Keenan.

II. CRIMINAL RULES UNDER CONSIDERATION

A. Proposed Amendments Approved by the Supreme Court for Transmittal to Congress

Mr. Rabiej reported that the following proposed amendments had been approved by the Supreme Court for transmittal to Congress:

1. Rule 12.3. Notice of Public Authority Defense. The proposed amendment implements the Crime Victims' Rights Act.

2. Rule 21. Transfer for Trial. The proposed amendment implements the Crime Victims' Rights Act.

3. Rule 32.1. Revoking or Modifying Probation or Supervised Release. The proposed amendment clarifies the standard and burden of proof regarding the release or detention of a person on probation or supervised release.

B. Proposed Amendments Approved by the Judicial Conference for Transmittal to the Supreme Court

Mr. Rabiej further reported that the following proposed technology-related amendments had been approved by the Judicial Conference for transmittal to the Supreme Court:

1. Rule 1. Scope: Definitions. The proposed amendment broadens the definition of telephone.

2. Rule 3. The Complaint. The proposed amendment allows a complaint to be made by telephone or other reliable electronic means as provided by Rule 4.1.

3. Rule 4. Arrest Warrant or Summons on a Complaint. The proposed amendment adopts the concept of a "duplicate original" warrant from existing Rule 41 and allows returns to be transmitted by reliable electronic means, and authorizes issuance of arrest warrants by telephone or other reliable electronic means as provided by Rule 4.1.

4. Rule 4.1. Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means. The proposed amendment provides a comprehensive

procedure for issuing complaints, warrants, or summons by telephone or other reliable electronic means.

5. Rule 6. The Grand Jury. The proposed amendment authorizes grand jury returns to be taken by video teleconference.

6. Rule 9. Arrest Warrant or Summons. The proposed amendment authorizes issuing a warrant or summons by telephone or other reliable electronic means as provided by Rule 4.1.

7. Rule 32.1. Revoking or Modifying Probation or Supervised Release. The proposed amendment permits a defendant to participate by video teleconference.

8. Rule 40. Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District. The proposed amendment authorizes the use of video teleconferencing.

9. Rule 41. Search and Seizure. The proposed amendment authorizes requests for warrants, the return of warrants, and inventories to be made by telephone or other reliable electronic means as provided by Rule 4.1, and makes a technical and conforming amendment deleting obsolete references to calendar days.

10. Rule 43. Defendant's Presence. The proposed amendment authorizes a defendant to participate in misdemeanor proceedings by video teleconference.

11. Rule 49. Serving and Filing Papers. The proposed amendment authorizes papers to be filed, signed, and verified by electronic means.

C. Proposed Amendments Approved By the Standing Committee for Publication

Mr. Rabiej further reported that the following proposed amendments had been approved by the Standing Committee for publication:

1. Rule 5. Initial Appearance. The proposed amendment provides that an initial appearance for an extradited defendant must take place in the district in which the defendant was charged. In addition, a non-citizen defendant in U.S. custody must be informed that a consular official from the defendant's country of nationality will be notified upon the defendant's request, and that the government will make any other consular notification required by its international obligations.

2. Rule 37. Indicative Rulings. The proposed amendment authorizes a district court to make indicative rulings when it lacks authority to grant relief because an appeal has been docketed.

3. Rule 58. Initial Appearance. The proposed amendment provides that in petty offense and misdemeanor cases non-citizen defendants in U.S. custody must be informed that a consular official from the defendant's country of nationality will be notified upon the defendant's request, and that the government will make any other consular notification required by its international obligations.

III. CONTINUING AGENDA ITEMS

A. Rule 16 (Discovery and Inspection)

Judge Tallman asked Laural Hooper and David Rauma to describe the preliminary results of a Federal Judicial Center survey on Rule 16 conducted at the Committee's request. Judge Tallman noted that the survey had already garnered many compliments, which were reflected in the high response rate that it had generated.

Ms. Hooper presented the preliminary survey results. She began by describing how the survey had been distributed to all district and magistrate judges and 14,000 defense attorneys (both federal public defenders and private defense attorneys). With the help of the Department of Justice, the survey was sent to all 94 U.S. Attorney's Offices nationwide, but not to individual prosecutors.

The response rate was very high for a survey of this type: 43% of the judges, 32% of the defense attorneys, and 91% of the U.S. Attorney's Offices responded. In addition, respondents provided written comments that Ms. Hooper estimated would amount to over 700 pages of text.

David Rauma described the survey methodology in more detail. He noted that the list of defense attorneys had been collected from all criminal cases terminated in federal courts in 2009. He pointed out that the responses were personal opinions and estimates, and they should not be confused with actual case-related data. He also cautioned that the responses from the U.S. Attorney's Offices were aggregate responses – one response was submitted for all the federal prosecutors in that particular district, as opposed to individual responses by the line prosecutors themselves.

Ms. Hooper reported that the survey focused on the central issue of whether Rule 16 should be amended to require pretrial disclosure of exculpatory and impeachment information. It also asked many subsidiary questions, such as whether federal prosecutors and defense attorneys understand their disclosure obligations, whether they fulfill those obligations, how violations of Rule 16 are addressed by the courts, and whether the 2007 proposal to amend Rule 16 should be

reconsidered. In compiling the answers, the survey distinguished between districts that rely primarily on Rule 16 to guide discovery, and districts that supplement Rule 16 with local rules, standing orders, or other means, to impose broader disclosure requirements. The survey referred to the former districts as "traditional Rule 16 districts" and the latter districts as "broader disclosure districts."

Summarizing the survey results, Ms. Hooper reported that 51% of the judges and slightly more than 90% of the defense attorneys favor amending Rule 16, while the Department opposes any type of amendment. Breaking it down further, Ms. Hooper noted that in the broader disclosure districts, 60% of the judges favor an amendment while in the traditional Rule 16 districts, only 45% favor an amendment.

Regarding the frequency of non-compliance with discovery obligations, 61% of judges in the broader disclosure districts, and 74% of judges in the traditional districts, reported no violations by prosecutors within the past five years. Similarly, 64% of judges in the broader disclosure districts and 68% of judges in the traditional Rule 16 districts reported no violations by defense attorneys within the past five years.

Regarding overall satisfaction with prosecutors' compliance with discovery obligations, 90% of judges in both the broader disclosure districts and the traditional districts said they were either "very satisfied" or "satisfied" with the prosecutors' compliance. As to defense attorney compliance, almost 80% of judges in both types of districts expressed satisfaction.

Among the districts that have broader disclosure, some require prosecutors to disclose exculpatory or impeaching information without regard to the *Brady* "materiality" requirement. *See Strickler v. Greene*, 527 U.S. 281, 281-82 (1999) (defining "materiality" as creating a "reasonable probability that the suppressed evidence would have produced a different verdict.") The survey asked respondents in these districts whether elimination of the materiality requirement reduced discovery problems. Seventy-one percent of defense attorneys believed that elimination of the requirement lessened problems, while 60% of U.S. Attorney's Offices reported that removing the requirement made no difference.

Regarding harm to prosecution witnesses, 73% of judges reported no threats or harm to witnesses due to disclosure of exculpatory or impeaching information in the past five years. Approximately 40% of U.S. Attorney's Offices reported that in the past five years no protective orders had been requested to address security concerns.

In both the broader disclosure districts and the traditional Rule 16 districts, judges most frequently cited two reasons for favoring an amendment: (1) to eliminate confusion surrounding the use of materiality as a measure of a prosecutor's pretrial disclosure obligations; and (2) to reduce variations that currently exist across circuits. Defense attorneys cited the first reason –

eliminating confusion caused by the materiality requirement – as the primary justification for favoring an amendment.

The reasons most commonly given by judges for opposing an amendment were that: (1) there is no demonstrated need for a change; and (2) the current remedies for prosecutorial misconduct are adequate. The Department added a third reason: recent reforms instituted by the Department will significantly reduce disclosure violations.

The survey asked respondents for their view on the possible effects of a proposal to amend Rule 16 that the Committee advanced in 2007, which required the government to release all exculpatory and impeaching information no later than 14 days before trial. Overall, a majority of judges thought that such a proposal would have, or could have, negative consequences in witness security and privacy. Conversely, a majority of defense attorneys felt the opposite – that the 2007 amendment would have no adverse effect, or a minimal effect, on the safety and privacy of witnesses. The Department criticized the broad disclosure required by the 2007 amendment, arguing that it would in effect turn a witness's life into "a virtual open book."

Following Ms. Hooper and Mr. Rauma's presentation, members asked a number of questions and made several comments. One member questioned how the U.S. Attorney's Offices garnered information to respond to the survey. Mr. Wroblewski answered that the survey requested that the U.S. Attorney or a designee solicit the views of individual prosecutors in each district before responding on behalf of each U.S. Attorney's Office.

Ms. Felton asked whether the 43% response rate by judges fell into any sort of distribution pattern, *e.g.*, whether the responses predominately come from urban or rural districts. Mr. Rauma replied that he did not recall either type of district being dominant, but acknowledged that determining whether the distribution of responses to a survey is sufficiently representative is always difficult. However, he reassured members that at least one judge had responded to the Rule 16 survey from every district and that he saw no anomalies in the overall distribution.

A member observed that the frequency of Rule 16 problems is difficult to assess because attorneys often work out problems themselves without involving a judge. A judge member pointed out that the dimensions of the problem are unknowable because "you don't know what you don't know." Although he said that he does not see Rule 16 problems very often, the member added that when they do arise, they tend to be egregious.

Chief Judge Wolf thanked the chair for inviting him to the meeting and made several observations. He said he agreed that it is essentially impossible to measure the scope of discovery problems. Further, in his district, a broad disclosure district, problems continue to arise, even after the Department's recent efforts to emphasize compliance with *Brady* obligations, and his most common remedy is to compel disclosure. Judge Wolf noted that Rule 16 does not currently require disclosure of even "core *Brady* material."

Judge Sullivan also thanked the chair for inviting him and offered comments. He praised recent efforts by the Department to train prosecutors to better meet their discovery obligations. However, he worries that the strength of the Department's commitment relies too heavily on the support of certain officials, who may not be in charge in the future. Therefore, he favors the more permanent solution of amending Rule 16. He pointed out that a preponderance of judges favors an amendment and urged the Committee to act in the face of such strong support for change. He suggested that further study is not necessary because a well-crafted amendment would generate informative responses when published for comment. The Committee would subsequently have ample time to study the details of any proposal.

Assistant Attorney General Lanny Breuer offered his comments and an update on the Department's efforts. He said that even though statistics reveal that discovery violations by prosecutors are extremely rare, any misconduct by a federal prosecutor is unacceptable. The Department now requires training for all federal prosecutors and paralegals, and it recently hired a deputy to assist the National Coordinator for Criminal Discovery in these efforts. Furthermore, the Department is creating a discovery deskbook to provide guidance to prosecutors. General Breuer added that he is working with federal law enforcement agencies within the Department, including the Federal Bureau of Investigation and the Drug Enforcement Agency, and with key agencies outside the Department to address "data management problems" that currently complicate prosecutors' efforts to make sure they can meet their discovery obligations.

Responding to Judge Sullivan's comments, General Breuer submitted that the Department's current commitment to improving criminal discovery practices will be permanent. He added that the dangers of amending Rule 16 to broaden disclosure were great, particularly as to witnesses' security, and these dangers were most pronounced along the U.S. border with Mexico. He concluded by saying that the Department forcefully opposes any amendment to Rule 16.

Judge Tallman reminded the Committee that the Department's opposition to amending Rule 16 in 2007 had been a significant factor in the Standing Committee's decision not to approve the proposed amendment and to recommit the matter to the Criminal Rules Committee for further study. Essentially, the 2007 proposal was halted based on the Department's promise to address disclosure problems internally. The Department's reform efforts in 2007, Judge Tallman observed, were not nearly as extensive as its current efforts. Therefore, Judge Tallman said, the Department's continued opposition to changing Rule 16 is problematic for the future success of any proposed amendment.

Chief Judge Wolf said that amending Rule 16 would be in the Department's own best interest because an amendment would clarify a prosecutor's discovery obligations and make it easier to satisfy those obligations. Currently, he observed, Rule 16 does not even incorporate the constitutional mandates of *Brady* and *Giglio*. Further, Judge Wolf argued that dispensing with the *Brady* "materiality" requirement would benefit prosecutors because it would relieve them of

the impossible burden of trying to foresee all the defenses that might arise at trial. For these reasons, the Department should support amending Rule 16, and Judge Wolf said he hoped that the Committee would recommend an amendment for publication.

Professor Coquillette observed that any amendment to Rule 16 would be seeking to change attorney conduct, and he questioned whether modifying conduct can best be accomplished through a change in the rules.

A member questioned whether amending Rule 16 to broaden disclosure obligations might run afoul of the Jencks Act, 18 U.S.C. § 3500, which sets out strict parameters for disclosure of statements by government witnesses. Judge Tallman responded that in the event of a conflict between a rule and a statute, the supersession clause of the Rules Enabling Act, 28 U.S.C. § 2072, could resolve the conflict in favor of the rule. However, he pointed out that reliance on the supersession clause is a last resort and that it is Judicial Conference policy that such conflicts should be avoided if at all possible. Otherwise, Judge Tallman noted, Congress might focus on the conflict between a proposed change to Rule 16 and the Jencks Act, which could threaten the entire rulemaking process. These risks all underscore the importance of trying to get the Department to agree to support any amendment to Rule 16 that might ultimately be advanced by the Committee.

Judge Sullivan proposed that Rule 16 could be amended by adding a checklist, informing prosecutors of the type of material that must be disclosed. A member added that in addition to the checklist, a "safety valve" could be added that would allow prosecutors to refrain from disclosing certain material if disclosure posed a threat to a witness's safety. Professor Beale noted that some local rules in the broader disclosure districts already employ similar checklists, which could serve as models for a national rule.

A member voiced the view that the Committee was attempting to solve a problem that might be attributable in part to the large size of the federal government. He pointed out that due to the sheer number of federal agents involved in a case, a prosecutor might not even know about the existence of some exculpatory information. The Committee should defer acting on an amendment until the Department has had a chance to address these information-sharing problems, the member argued. The problem is amplified if local, state, or foreign law enforcement officers are involved in a multi-agency investigation.

Judge Tallman observed that the checklist proposed by Judge Sullivan could be placed in the Federal Judicial Center's Judges' Benchbook, as opposed to becoming part of Rule 16. In addition, the Federal Judicial Center might be interested in publishing a guide to the "best practices" in criminal discovery. Supplementing the Benchbook or publishing such a guide could be effective measures that would avoid the pitfalls of amending Rule 16. Judge Rosenthal added that the recent Civil Litigation Conference at Duke Law School had highlighted the

limitations of the rules process and had underscored the usefulness of alternative approaches to solving problems.

Chief Judge Wolf urged the Committee not to be deterred by the nearly even split among judges who responded to the survey. Publication of a proposed amendment would prompt judges to reconsider their views, he predicted, and the resulting debate about the amendment's pros and cons could lead to further support for the amendment.

Ms. Hooper asked Judge Tallman for guidance on how to disseminate the extensive comments that had been submitted in response to the survey. After some discussion, Judge Tallman requested that Ms. Hooper and her colleagues continue to categorize the comments and also to redact any information identifying the authors of the comments. Judge Tallman and members agreed that because respondents had been told that their comments would be confidential, the redacted version should be available only to Committee members. Ms. Hooper will circulate redacted materials when they are ready to be released to the Committee for further study.

Judge Tallman concluded the discussion on Rule 16 by recommitting consideration of any proposed amendment to the Rule 16 subcommittee.

B. Rule 12 (Pleadings and Pretrial Motions)

Judge England, Chair of the Rule 12 subcommittee, briefly summarized the history of the Committee's consideration of whether to amend Rule 12. In April 2009, the Committee voted to send to the Standing Committee, with a recommendation that it be published for comment, an amendment attempting to change Rule 12 in light of *United States v. Cotton*, 535 U.S. 625 (2002). The proposed amendment would have required defendants to raise a claim that an indictment fails to state an offense *before* trial, and it would have provided relief for failure to raise the defense in certain narrow circumstances. However, the Standing Committee declined to publish the proposed amendment and remanded it to the Committee to consider the implications of using the term "forfeiture" instead of "waiver" in the relief provision.

In response, Judge England reported that the Rule 12 subcommittee had drafted a new amendment (located on page 120 of the Agenda Book) that was more expansive than the original. Despite having produced a draft, Judge England pointed out that a minority of members of the subcommittee were against the concept embodied in the amendment, *i.e.*, requiring defendants to raise this claim before trial.

A member amplified these comments, explaining that he was against amending Rule 12 because: (1) there is no demonstrated need for the amendment; (2) the amendment creates a trap for unwary defense attorneys; and (3) it might unintentionally lead to prosecutors becoming lax in crafting indictments.

Another attorney member agreed that the amendment is not needed and also expressed dismay that after trial begins, a defendant would not be able to challenge whether he is charged with a crime, without overcoming procedural hurdles such as those contained in the proposed amendment. A judge member agreed.

Mr. Wroblewski said that the original idea for amending Rule 12 had come from the late Judge Edward Becker, Chief Judge of the United States Court of Appeals for the Third Circuit. The basis for the suggestion was to create a more orderly process for handling pretrial motions. Judge Rosenthal added that an amendment might help sort out the confusion among the courts over how to interpret Rule 12. Ms. Felton agreed that the justification for amending the rule is to clarify for litigants which motions must be raised before trial.

In light of the debate over whether an amendment to Rule 12 was advisable, Judge Tallman called for a vote on whether the Committee should proceed with consideration of the proposed amendment.

The Committee voted 8-4 in favor of proceeding with consideration of the proposed amendment.

Following this vote, discussion centered on seeking a compromise to satisfy the concerns of some members that the proposed amendment would pose an unfair burden to defendants. Chief among these concerns was the procedural barrier that a defendant would face by missing the pretrial deadline for filing a motion. Under the proposed amendment, a defendant who missed the deadline would be deemed to have waived the claim and must show "cause and prejudice" in order to receive relief from the waiver and bring the motion. The change was intended to reflect existing law.

To provide more leeway to a defendant who misses the pretrial deadline, a member noted that there is usually a short period between the pretrial motion deadline and the start of trial and suggested that if the defendant seeks to raise the claim during this period, a district judge should be permitted to consider it without regard to "cause and prejudice." A judge participant agreed, saying that a district judge's discretion to consider such a motion should be unfettered if the motion is filed before jeopardy attaches.

To incorporate this concept into the proposed amendment, a member moved to modify the proposed amendment by deleting in subdivision 12(e)(1) the sentence that reads: "Upon a showing of cause and prejudice, the court may grant relief from the waiver." (lines 91-93 on page 125 of Agenda Book), and inserting in its place the following language:

> The district court, in its discretion, may grant relief from the waiver any time before jeopardy attaches. Thereafter, the court may grant relief from waiver upon a showing of cause and prejudice.

A judge member expressed concern that the proposed modification would be read liberally by attorneys as condoning last-minute motions. He said he preferred the current rule's strict deadlines. Another judge member countered that he thought the amendment captured the current practice in federal court.

Judge England voiced misgivings over crafting a rule that seems solicitous of attorneys who miss an important deadline. Another judge said that he favored the modification because a district judge should have maximum discretion to correct errors when a person's liberty is at stake. A member added that many defense attorneys are inexperienced and make mistakes. They deserve to be helped by the rules.

Professor King pointed out that the proposed amendment already contains new language intended to help defense attorneys: In Rule 12(b)(3), the phrase "if the basis for the motion is then available" (line 15 on page 120 of Agenda Book) was added to allow defense lawyers to raise motions after the pretrial deadline, without a showing of cause and prejudice, if the grounds for the motion were not previously available.

The Committee voted 6-5 against the proposed modification to the proposed amendment to Rule 12(e)(1).

A member moved to insert the word "reasonably" before "available" in subdivision Rule 12(b)(3) (line 15 on page 120 of Agenda Book).

The motion was approved with two dissents.

Discussion turned to proposed Rule 12(e)(2), which would create a different standard of review for a class of specified untimely claims. Instead of requiring a showing of "cause and prejudice," this provision would permit review for plain error, as defined by Rule 52. A member suggested that in addition to an untimely claim that a charge failed to state an offense, untimely motions raising double jeopardy and limitation errors should also receive this more generous standard of review, and moved to insert "double jeopardy" and "statute of limitations" in the bracketed part of subdivision Rule 12(e)(2) (lines 97-98 on page 125 of Agenda Book). Professor Beale noted that the precise wording of this amendment would be subject to revision by the style consultant.

The motion was approved unanimously.

It was moved that the Committee approve the entire proposed amendment to Rule 12 and a conforming amendment to Rule 34 and send both the amendments to the Standing Committee for publication.

The Committee voted 8-4 to approve the proposed amendment to Rule 12, as modified, and a conforming amendment to Rule 34, and send the amendments to the Standing Committee for publication.

C. Rule 11 (Pleas)

Judge Rice, Chair of the Rule 11 subcommittee, reported that the subcommittee had prepared a draft amendment to Rule 11 (page 129 of Agenda Book). It would add a new item to the list of notifications a judge must give a defendant when taking a guilty plea. In response to the recent Supreme Court decision in *Padilla v. Kentucky*, __U.S.__ (No. 08-651; March 31, 2010), which held that defense counsel has a duty to inform a defendant whether a guilty plea carries a risk of deportation (formally known as "removal"), the proposed amendment would require a judge to inform a defendant that a guilty plea may have significant immigration consequences.

Judge Rice also reported that the subcommittee recommended that the Federal Judicial Center amend the Judges' Benchbook by adding the risk of deportation to the list of collateral consequences that a judge must address when taking a guilty plea from a defendant.

A judge member expressed his strong opposition to the proposed amendment. Adding to the list of matters that must be addressed during a plea colloquy was a "slippery slope," that would open the door to future amendments and eventually turn a plea colloquy into a minefield for a judge. In addition, he noted that *Padilla* is based solely on the constitutional duty of defense counsel and does not speak to the duty of judges. Finally, the member said he had no objection to amending the Benchbook, but urged the Committee not to make the additional warning mandatory by incorporating it into Rule 11.

Another judge member echoed the concern about adding to the already long list of warnings that are compulsory under Rule 11. He mentioned that in his home state, pleading guilty to certain crimes may cause the defendant to forfeit a state pension. He asked whether that consequence should now also be included in the plea colloquy.

A member spoke out in strong support of the amendment, arguing that it is necessary because immigration cases now comprise a huge portion of the federal caseload and because *Padilla* emphasized the importance of immigration consequences.

Ms. Felton pointed out that the Department has advised prosecutors to include a discussion of immigration consequences in plea agreements because of the significance of those consequences. Similarly, she believes that judges should warn a defendant who pleads guilty that the plea could implicate his or her right to remain in the United States or to become a U.S. citizen.

Several other members spoke in favor of the proposed amendment. One agreed that *Padilla* was limited to the duty of defense counsel to warn a defendant about immigration consequences, but argued that the Supreme Court's logic also supported requiring a judge to issue a similar warning. Addressing the "slippery slope" argument, a member pointed out that the Committee is not a judicial body and if it approved the addition of this new warning to Rule 11, the addition would not create binding precedent that would force the Committee to add more warnings in the future. Deportation, the member continued, is qualitatively different than the loss of other rights triggered by a guilty plea and therefore warrants inclusion on the list of matters that must be discussed during a plea colloquy.

In light of the debate over whether an amendment to Rule 11 should be considered at all, Judge Tallman called for a vote on whether the Committee should proceed with consideration of the proposed amendment.

The Committee voted 7-5 in favor of proceeding with consideration of the proposed amendment.

Following this vote, Judge Rice moved to adopt the actual language of the proposed amendment, which adds a new subparagraph to the list contained in Rule 11(b)(1). (Text of the amendment is located on page 129 of Agenda Book.) Following a brief discussion, it was moved that the proposed amendment be modified by deleting it and substituting the following:

> (O) that a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

The motion was approved unanimously.

The Committee acknowledged that the language would be subject to additional restyling by the style consultant.

Turning to the recommended amendment to the Judges' Benchbook (page 130 of Agenda Book), members debated whether it was advisable for a judge to ask a defendant directly if he or she is a United States citizen. Several suggested it was not advisable and recommended that a judge could preface any warning about immigration consequences with a phrase such as, "If you are not a U.S. citizen, then . . . ." However, it was agreed that the publisher of the Benchbook, the Federal Judicial Center, should resolve the issue.

It was moved that the Judges' Benchbook be amended by adding the language on page 130 of the Agenda Book. Judge Rosenthal asked that the Federal Judicial Center keep the Committee informed of any changes to the Benchbook in order to ensure consistency with the Committee's proposed change to Rule 11.

The motion was approved unanimously.

In light of the previous discussion that highlighted the Committee's reluctance to impose greater burdens on judges to give additional warnings under Rule 11, Judge Rice withdrew the proposed amendment dealing with sex offenses (located on page 130 of Agenda Book). He recommended, however, that the Judges' Benchbook be amended by adding the warning (located on page 131 of Agenda Book).

Several members argued that the proposed warning should include broader language to avoid unintentionally omitting any important consequences of pleading guilty to a sex offense, such as the possibility of civil commitment. Judge Rice agreed and requested that Professors Beale and King revise the proposed language accordingly and circulate a draft to members for approval by e-mail. Judge Tallman added that he would also circulate a proposed letter to the Federal Judicial Center recommending the Committee's proposed changes to the Benchbook.

IV. RULES AND PROJECTS PENDING BEFORE CONGRESS, JUDICIAL CONFERENCE, STANDING COMMITTEE, OR OTHER ADVISORY COMMITTEES

A. Status Report on Legislation Affecting Federal Rules of Criminal Procedure

Mr. Rabiej reported that it appeared that Congress would not consider any rules-related legislation before adjourning in October for the mid-term elections.

Mr. Wroblewski noted that the Crime Victims' Rights Act ("CVRA") is due to be reauthorized next year and he anticipates that the law might be revised slightly. He added that in furtherance of the Department's outreach program under the CVRA, the Department has increased its efforts to contact victims' rights groups and solicit their views.

B. Update on Work of the Sealing Subcommittee

Judge Zagel reported that the Standing Committee's Sealing Subcommittee had issued its report to the Standing Committee. It surveyed sealing practices in federal court and made several recommendations. The full report is available on page 136 of the Agenda Book.

C. Update on Work of the Privacy Subcommittee

Judge Raggi reported that the Standing Committee's Privacy Subcommittee had concluded its work and would issue its report in January 2011. It will recommend continued study of several problematic areas but will not suggest any specific changes to the rules.

A judge member voiced his concern about protecting the privacy of jurors. He said that he had recently concluded a high-profile trial after which some jurors had been harassed by the

press. He related how one juror was afraid to go home because her house was being monitored from the air by a helicopter deployed by the media. According to the member, this treatment of jurors highlights the need for a rule that would require the media to honor a juror's request not to be contacted after a trial. It was suggested that failure to honor the request would result in sanctions.

Judge Raggi agreed that juror privacy was of paramount concern, as the jury's critical role in the administration of justice deserves special consideration. While the Privacy Subcommittee will not make specific proposals to address the matter, she said that the issue will be monitored as the federal courts grapple with how best to resolve it.

D. Administrative Office Forms Regarding Appearance Bonds

Mr. McCabe briefed the Committee on revision of a national form, AO Form 98 (Appearance Bond), designed to ensure the appearance of a criminal defendant in federal court. The AO Forms Working Group of judges and clerks had studied the form and a subcommittee chaired by Magistrate Judge Boyd Boland (D. Colorado) had produced a draft. In addition, other related forms were also revised. (Drafts of the forms are located on pages 155-160 of the Agenda Book). The principal substantive change is to transfer a defendant's agreement to appear from another form to the face of the appearance bond itself. As Judge Boland explained in his memorandum to the Forms Working Group, "the agreement to appear is so fundamental to the purpose of the appearance bond . . . that it should be contained in the Appearance Bond itself." (Agenda Book at 149).

Mr. McCabe reported that he was working on several stylistic changes to the proposed new forms to make them more readable. He added that a style consultant would also be reviewing and revising the forms. Once these changes are made, the final forms will be forwarded to the Criminal Law Committee, which will review them before the forms are posted on the J-Net, the judiciary's intranet, for review and comment.

As an initial matter, Judge Tallman asked whether the Committee had any authority to make suggestions to change the forms, given that a different committee, the Criminal Law Committee, is charged with overseeing them. Mr. McCabe responded that the Director of the Administrative Office has ultimate authority over the forms, and the Forms Working Group would welcome any suggestions by the Committee.

Members then offered several suggestions. One suggested that the various promises listed in the first sentence of the Appearance Bond Form would be easier to follow if they were broken out and listed separately. Professor King suggested that the condition of release listed on Form 199B (Additional Conditions of Release) as subsection "r" (page 160 of Agenda Book) might be more appropriately listed as a condition of release on Form 199A (Order Setting Conditions of Release). Judge Tallman noted that Form 199A appeared to be missing a signature

line for the judge issuing the Order Setting Conditions of Release. Finally, Judge Rosenthal suggested that the word "execute" be changed to "sign" on the bottom of Form 199A.

V. DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETINGS

Judge Tallman reminded members that the next meeting would take place in Portland, Oregon, on Monday and Tuesday, April 11-12, 2011. He thanked all the members and guests for attending and adjourned the meeting.

Respectfully submitted,

Henry Wigglesworth
Attorney Advisor

TAB
8-A

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

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SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

TO: **Honorable Lee H. Rosenthal, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Sidney A. Fitzwater, Chair**
Advisory Committee on Evidence Rules

DATE: **November 3, 2010**

RE: **Report of the Advisory Committee on Evidence Rules**

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on October 12, 2010 in San Diego, California. Now that the restyled Evidence Rules has been approved by the Standing Committee and the Judicial Conference, the Committee is focusing primarily on possible rule changes necessitated by the Supreme Court's decision in *Crawford v. Washington* and its progeny, including the Court's decision in *Melendez-Diaz v. Massachusetts*. The Committee is not proposing any action items for the Standing Committee at its January 2011 meeting. But as explained below, the Committee may request approval at the June 2011 meeting of the Standing Committee to publish an amended Rule 803(10) for public comment.

II. Action Items

No action items.

III. Information Items

A. Possible Amendment to Evidence Rule 803(10) in Light of *Melendez-Diaz v. Massachusetts*

The Committee is considering whether, in light of the Supreme Court's June 2009 decision in *Melendez-Diaz v. Massachusetts*, Rule 803(10) should be amended. The Committee may request approval at the June 2011 meeting of the Standing Committee to publish a proposed amended Rule 803(10) for public comment.

The Court held in *Melendez-Diaz* that certificates reporting the results of forensic tests conducted by analysts are "testimonial" within the meaning of the Confrontation Clause, as construed in *Crawford v. Washington.* Consequently, admitting such certificates in lieu of in-court testimony violates the accused's right to confrontation. The Committee discussed whether *Melendez-Diaz* would also bar the admission of certificates offered to prove the absence of a public record under Rule 803(10). Like the certificates at issue in *Melendez-Diaz,* certificates proving the absence of public records are prepared with the sole motivation that they be used at trial as a substitute for live testimony. Lower courts after *Melendez-Diaz* have recognized that admitting certificates of the absence of public records under Rule 803(10) violates the accused's right to confrontation.

The Committee will consider at its April 2011 meeting whether to recommend that Rule 803(10) be amended and, if so, how it should be amended to eliminate any Confrontation Clause deficiencies. One option is to add a "notice-and-demand" procedure to the Rule. This would require that the person who prepared the certificate testify in person only if the defendant makes a pretrial demand for in-court testimony. In *Melendez-Diaz* the Court specifically approved a state version of a notice-and-demand procedure. The Committee has asked the Reporter to work with the Justice Department to review all the possible viable alternatives for a notice-and-demand procedure. The Committee has also requested that the Reporter consider an alternative draft that would prevent the use of Rule 803(10) when a record is offered by the government in a criminal case.

B. Evidence Rules That Do Not Appear to Require Amendment after *Melendez-Diaz v. Massachusetts*

The Committee also considered whether other Evidence Rules may require amending after *Melendez-Diaz.* It tentatively concluded (1) that records fitting within the business records exception are unlikely to be testimonial, and that any uncertainty about the admissibility of business records in certain unusual cases should await case law development; (2) records that are admissible under the public records exception are unlikely to be testimonial because, to be admissible under that exception, the record cannot be prepared with the primary motivation of use in a criminal prosecution; and (3) authenticating business and public records by certificate under various provisions in Rule 902 is unlikely to raise constitutional concerns because the Court in *Melendez-Diaz* held that certificates that merely authenticate documents are not testimonial, and addressing any uncertainty about the constitutionality of the Rule 902 provisions in criminal cases should await case law development.

C. *Crawford v. Washington* and the Hearsay Exceptions in the Evidence Rules

As previous reports have noted, the Committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*, in which the Court held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to confront and cross-examine the declarant.

The Committee reviewed a memorandum from the Reporter that contained a case digest of all federal circuit cases discussing *Crawford v. Washington* and its progeny. The Committee concluded that there is nothing in the case law that mandates amending the Evidence Rules (except Rule 803(10)) at this time. The Committee will continue to monitor important developments, including (1) the Court's consideration of *Michigan v. Bryant*, which may impact the admissibility of excited utterances under Rule 803(2); (2) the Court's consideration of *Bullcoming v. New Mexico*, which concerns whether certificates can be introduced by a witness other than the person who prepared them, and which may have an effect on the application of Rule 703; and (3) the case law allowing testimonial statements to be admitted not for their truth but for "background" or "context."

D. Evidence Rules 803(6)-(8)

The restyling project uncovered an ambiguity in Rules 803(6)-(8), the hearsay exceptions for business records, absence of business records, and public records. Under the Rules, records that meet specified requirements are admissible "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." The Rules do not specify who has the burden of showing trustworthiness or untrustworthiness.

During the restyling project it was proposed that this ambiguity be eliminated by placing the burden on the opponent to show lack of trustworthiness. But the Committee did not adopt this proposal as part of restyling because it concluded that the change would be substantive. When the Standing Committee approved the Restyled Rules, several members suggested that the Committee consider changing Rules 803(6)-(8) to clarify that the opponent has the burden of showing untrustworthiness. At its October 2010 meeting, the Committee discussed this question. It then requested that the Reporter consult with representatives of the ABA Litigation Section, the American College of Trial Lawyers, and other interested parties to determine whether it would be helpful to propose such an amendment. At its April 2011 meeting, the Committee will revisit the possibility of amending these Rules.

E. Circuit Conflict on Rule 804(b)(1)

A circuit split has developed in applying Rule 804(b)(1), which provides a hearsay exception for testimony offered against a party who, at the time it was made, had a motive and opportunity to develop it that was "similar" to the motive and opportunity it would have if the declarant could be produced for trial. A split has developed regarding the admissibility of grand jury testimony that is favorable to the accused. Some circuits have held that such favorable testimony is generally inadmissible against the government at trial because the prosecutor's motive to develop such testimony is ordinarily not similar to what it would be at trial, given the differing operative standards of proof before the grand jury and at trial. Other circuits have held that such testimony is admissible, noting that the respective motives need only be "similar" and not identical or equally intense.

The Committee determined that attempting to amend the Rule would not be beneficial. Although the issue is important, it is narrow. And drafting a solution may be controversial and extremely difficult. The Committee also noted that the Supreme Court has previously shown an interest in interpreting Rule 804(b)(1) as it applies to grand jury testimony, so it is possible that the Court will resolve the current circuit split. The Committee will continue to monitor this matter, but it will not propose an amendment to Rule 804(b)(1) at this time.

F. Other Rules Comments Considered

The Committee considered a public comment suggesting a change to the designation of hearsay statements admissible under Rule 801(d) as "not hearsay." Although statements that fall under Rule 801(d) — prior statements of testifying witnesses and statements of party-opponents — in fact fit the definition of hearsay, the Rule designates them as "not hearsay." Analytically, it would be better to designate these provisions "hearsay exceptions."

The Committee concluded that courts and litigants are familiar with Rule 801(d) as written and that it has not caused problems in practice. The disruption of amending the Rule would outweigh the marginal benefit of an amendment. The Committee will not propose an amendment to change the designation of Rule 801(d) statements.

During the restyling process, the American College of Trial Lawyers commented on the Restyled Rules. One set of comments addressed Rule 410. Because the comments were substantive, the Committee did not consider them until the restyling project was completed. The College proposes two basic changes: (1) clarify that the protections of Rule 410 apply only to a party in the case in which the evidence is offered, i.e., that a withdrawn guilty plea is admissible if the person who entered the plea is only a witness and not a party in the case; and (2) provide that the protection for "withdrawn" guilty pleas also extends to guilty pleas that are rejected or vacated by the court.

The Committee was advised that the case law, while sparse, uniformly holds that Rule 410 does not apply to withdrawn guilty pleas of testifying witnesses, and that all the major treatises conclude that Rule 410 does not apply to the withdrawn guilty pleas of testifying witnesses. Regarding vacated and rejected guilty pleas, the Committee was informed that the case law, while sparse, uniformly holds that Rule 410 does preclude admission of a vacated or rejected guilty plea of the defendant in the case. The DOJ and public defender committee members noted that they had surveyed others and found no problems in the operation of Rule 410. The Committee will not propose an amendment to Rule 410.

G. Privilege Project

Several years ago the Committee undertook a project to publish a pamphlet describing the federal common law on evidentiary privileges. The Committee determined that, although it would be inappropriate to propose to Congress a codification of the evidentiary privileges, it would be valuable to the Bench and Bar to set out in text and commentary the federal common law privileges. The Consultant to the Committee has prepared drafts of a number of privileges, but this project has been deferred until the restyling project was completed.

The Committee has asked the Consultant to resume the project and to report back with drafts and commentary at the April 2011 meeting.

IV. Minutes of the Fall 2010 Meeting

The Reporter's draft of the minutes of the Committee's October 2010 meeting is attached to this report. These minutes have not yet been approved by the Committee.

TAB
8-B

Advisory Committee on Evidence Rules

Minutes of the Meeting of October 12, 2010

San Diego, California

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on October 12, 2010 in San Diego, California.

The following members of the Committee were present:

Hon. Sidney A. Fitzwater, Chair
Hon. Joseph F. Anderson, Jr.
Hon. Brent R. Appel
Hon. Anita B. Brody
Hon. Joan N. Ericksen.
Marjorie A. Meyers, Esq.
Paul Shechtman, Esq.
Elizabeth J. Shapiro, Esq., Department of Justice

Also present were:

Hon. Lee H. Rosenthal, Chair of the Committee on Rules of Practice and Procedure ("Standing Committee")
Hon. Marilyn L. Huff, Liaison from the Committee on Rules of Practice and Procedure and member of the Standing Committee's Style Subcommittee
Hon. Robert L. Hinkle, former Chair of the Evidence Rules Committee
Hon. Paul S. Diamond, Liaison from the Civil Rules Committee
Hon. Karen Caldwell, Liaison from the Bankruptcy Rules Committee
William W. Taylor, III, Esq., former member of the Evidence Rules Committee
John K. Rabiej, Esq., Rules Committee Support Office
James N. Ishida, Esq., Rules Committee Support Office
Peter McCabe, Esq., Secretary to the Standing Committee
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee
Timothy Reagan, Esq., Federal Judicial Center
Jeffrey Barr, Esq., Rules Committee Support Office

I. Opening Business

Judge Fitzwater, the new chair of the Committee, welcomed the members and stated that he was honored to return to service on the Rules Committees.

The minutes of the Spring 2010 meeting were approved with two revisions.

Judge Fitzwater asked Judge Hinkle to speak about the departing members of the Committee. Judge Hinkle noted that Bill Taylor had provided stellar service to the Committee, most importantly from his perspective as a practitioner in high-level litigation. Bill Taylor then expressed his gratitude to the Committee members and praised the Committee's work. Judge Hinkle noted that Justice Hurwitz could not attend the meeting due to an accident. Committee members expressed their best wishes for Justice Hurwitz's quick recovery and noted that his brilliant contributions to the work of the Committee — especially in the effort to enact Rule 502 — would be sorely missed.

The Reporter then requested the opportunity to provide a tribute to Judge Hinkle. The Reporter noted that the recently completed restyling project could not have been accomplished without Judge Hinkle's brilliant efforts. Committee members lauded Judge Hinkle's wise counsel, his integrity, and his inspirational leadership.

The Chair then welcomed and introduced the new members of the Committee — Justice Brent Appel of the Iowa Supreme Court, and Paul Shechtman, a practicing lawyer and adjunct Evidence professor at Columbia Law School. The Chair also welcomed Judge Diamond as the new liaison from the Civil Rules Committee, and Judge Caldwell, who was substituting for Judge Wiznur, the Bankruptcy Rules Committee liaison.

At the Chair's request, Judge Hinkle reported on the June meeting of the Standing Committee. The Standing Committee unanimously approved the restyled Evidence Rules. That approval was the result of the hard work and cooperative efforts of the Style Subcommittee of the Standing Committee, the Evidence Committee, and Professor Kimble, the style consultant. The product was substantially improved by careful readings by three members of the Standing Committee before its June meeting — Judge Raggi, Judge Hartz, and Dean Levi. Judge Hinkle and the Reporter expressed their gratitude to Judges Raggi and Hartz and to Dean Levi for their time and outstanding effort.

Judge Rosenthal then reported on legislative developments. She noted that the Rules Committee had already contacted staff members of the House Judiciary Committee to provide background on the restyling project, and that staffers had responded affirmatively. The Rules Committee is continuing to monitor two pieces of proposed legislation: 1) a proposal to alter the *Twombley/Iqbal* construction of Civil Rule 8; and 2) the proposed Sunshine in Litigation Act, which if enacted would have an impact on orders issued under Evidence Rule 502. At this point, neither bill is near enactment, but the Rules Committee will continue to monitor developments.

II. Restyling Project

The Restyled Rules of Evidence have been approved by the Standing Committee and the Judicial Conference. After the Evidence Rules Committee completed its work on the project, some changes were made in response to comments and suggestions from Standing Committee members in advance of the Standing Committee's meeting. Those changes were approved by Judge Hinkle, the Reporter, Professor Kimble, and the members of the Style Subcommittee of the Standing Committee. At the Fall Committee meeting, the Reporter presented those changes for the Committee's information and review.

Examples of changes reviewed at the meeting included:

1) reinserting "wrongs" into Rule 404(b) to assure that all evidence currently covered by the Rule will remain so — the concern being that evidence of "crimes or other acts" as restyled might not cover a wrongful failure to act;

2) making a slight change to Restyled Rule 602 to clarify that when a witness testifies to both expert and lay matters, the witness must have personal knowledge as a foundation for the lay testimony;

3) reinserting the last sentence of Rule 704(b), to emphasize that the criminal defendant's mental state is a jury question; and

4) changing Rule 901(a) to clarify that authentication is a requirement for proffered evidence.

III. Possible Amendments to Federal Rules in Light of *Melendez-Diaz v. Massachusetts*

In *Melendez-Diaz v. Massachusetts,* the Supreme Court held that certificates reporting the results of forensic tests conducted by analysts were "testimonial" and therefore the admission of such a certificate (in lieu of testimony) violated the accused's right to confrontation. The Court reasoned that the certificates were prepared exclusively for use in a criminal trial, as substitutes for trial testimony, and so were testimonial within the meaning of the Confrontation Clause as construed by *Crawford v. Washington.*

The Reporter prepared a memorandum for the Committee on the effect of *Melendez-Diaz* on the constitutionality, as applied, of the hearsay exceptions that cover records in the Federal Rules of Evidence. The memorandum made the following tentative conclusions:

1) Records fitting within the business records exception are unlikely to be testimonial, and

addressing any uncertainty about the constitutional admissibility of business records in certain unusual cases should await more case law development.

2) Records admissible under the public records exception are unlikely to be testimonial, because to be admissible under that exception the record cannot be prepared with the primary motivation of use in a criminal prosecution.

3) Authenticating business and public records by certificate under various provisions in Rule 902 is unlikely to raise constitutional concerns, because the Court in *Melendez-Diaz* found an exception to testimoniality for certificates that did nothing but authenticate a document. Addressing any uncertainty about the constitutionality of the Rule 902 provisions in criminal cases should await more case law development.

4) *Melendez-Diaz* appears to bar the admission of certificates offered to prove the absence of a public record under Rule 803(10). Like the certificates at issue in *Melendez-Diaz,* a certificate proving up the absence of a public record is prepared with the sole motivation that it will be used at trial — as a substitute for live testimony. Lower courts after *Melendez-Diaz* have recognized that admitting a certificate of absence of public record under Rule 803(10) violates the accused's right to confrontation after *Melendez-Diaz.*

In light of the above, the Committee discussed the possibility of an amendment to Rule 803(10) that would correct the constitutional problem raised by *Melendez-Diaz.* It was suggested that the problem arises mostly in cases involving a) illegal reentry, in which the government must prove that the defendant did not have permission to re-enter, and b) firearms prosecutions, in which the government has to prove that a firearm was not properly licensed.

The possible fix suggested in the Reporter's memo was to add a "notice-and-demand" procedure to the Rule: requiring production of the person who prepared the certificate only if the defendant made a pretrial demand for that production. The Court in *Melendez-Diaz* specifically approved a state version of a notice-and-demand procedure, and the Reporter's draft added the language from that state version to the existing Rule 803(10).

Committee members were divided on whether to propose an amendment to Rule 803(10) that would add the basic notice-and-demand procedure used as an example in *Melendez-Diaz.* The public defender argued that *Melendez-Diaz* did not raise any substantial practical problems of compliance, because the parties could stipulate to the absence of a record, or the case agent could check for the record and then simply testify to its absence as part of that agent's overview testimony. She noted however that she had contacted other public defenders on the subject and found no objection to the addition of a notice-and-demand procedure to Rule 803(10).

Another member questioned whether a notice-and-demand procedure would be very helpful in alleviating the burden of producing a government witness. The member predicted that defendants would enter such demands pro forma, and then would simply stipulate to the record once the

government produced the witness. But others thought that a notice-and-demand procedure would be helpful for at least two reasons. First, not all defendants would engage in the gamesmanship of making the demand solely to impose a burden on the government. Second and more important, a notice-and-demand procedure would at least provide predictability, because a prosecutor would know that the witness must be produced. The alternative — a proffered stipulation to which the defendant may or may not respond — does not provide the same predictability.

Another member noted that whatever the value of a notice-and-demand procedure, the fundamental problem of Rule 803(10) is that it is unconstitutional as applied. And one of the primary goals of the Committee has been to propose amendments necessary to cure any constitutional defect in the Evidence Rules. While a notice-and-demand procedure may not have a profound practical impact, the fact is that it would cure the constitutional infirmity in Rule 803(10) after *Melendez-Diaz.*

The DOJ representative presented preliminary statistics indicating that *Melendez-Diaz* has imposed burdens on the government in presenting evidence of the absence of a public record. She stated that the Department would welcome a notice-and-demand provision, but wished to review the notice-and-demand procedures that do exist to determine which version might be optimal. The Department does not intend to propose the so-called "subpoena procedure," which would impose the burden of producing the witness on the accused rather than the government. Committee members recognized that the constitutionality of a subpoena procedure was doubtful after *Melendez-Diaz*, where the Court declared that the right to confrontation could not be satisfied by providing a right of compulsory process.

At the end of the discussion, the Committee unanimously resolved to consider a proposed amendment to Rule 803(10) at its next meeting. The Reporter was directed to work with the Justice Department to review all the possible viable alternatives for a notice-and-demand procedure, including ones that add procedural details such as providing for continuances. The Reporter was also asked to consider an alternative draft that would prevent the use of Rule 803(10) when a record is offered by the government in a criminal case.

IV. *Crawford* Developments

The Reporter provided the Committee with a case digest of all federal circuit cases discussing *Crawford v. Washington* and its progeny. The digest was grouped by subject matter. The goal of the digest is to allow the Committee to keep apprised of developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions.

The Committee reviewed the memo and noted that — with the possible exception of Rule 803(10), discussed supra — nothing in the developing case law mandated an amendment to the Evidence Rules at this time. The Committee resolved to continue to monitor a number of important developments, including: 1) the Supreme Court's consideration of *Michigan v. Bryant,* which may have an effect on the admissibility of excited utterances under Rule 803(2); 2) the Supreme Court's

consideration of *Bullcoming v. New Mexico,* which concerns whether certificates can be introduced by a witness other than the person who prepared it, and which may have an effect on the application of Rule 703; and 3) the case law allowing testimonial statements to be admitted not for their truth but for "background" or "context."

V. Proposed Amendment to Rule 410

During the restyling process, the American College of Trial Lawyers provided a number of detailed and helpful comments for improvement of the Restyled Rules as they were issued for public comment. One set of the College's comments was addressed to Rule 410, but the College noted that those comments called for substantive changes to the Rule. Accordingly the Committee's consideration of the suggested changes to Rule 410 was deferred until the restyling project was completed.

At the Fall 2010 meeting, the Committee considered a memorandum from Professor Broun and the Reporter that evaluated the changes proposed by the College. Two basic changes were proposed: 1) clarify that the protections of Rule 410 apply only to a party in the case in which the evidence is offered, i.e., that a withdrawn guilty plea is admissible if the person who entered the plea is only a witness and not a party in the case; and 2) provide that the protection for "withdrawn" guilty pleas also extends to guilty pleas that are rejected or vacated by the court. The most important suggestion was the one concerning guilty pleas of testifying witnesses — the College had suggested that many defense counsel do not ask for such information from the government because they do not believe the withdrawn guilty plea of a cooperating witness would be admissible under Rule 410.

The memorandum noted that there is some ambiguity in the text of Rule 410 as to whether it protects against admission of withdrawn guilty pleas of witnesses, as opposed to the defendant in the case. But the memorandum also noted that the case law, while sparse, has held uniformly that Rule 410 does not apply to withdrawn guilty pleas of testifying witnesses. Likewise, all of the major treatises state that Rule 410 does not apply to the withdrawn guilty pleas of testifying witnesses. As to vacated and rejected guilty pleas, the case law again is sparse, but it uniformly holds that Rule 410 does preclude admission of a vacated or rejected guilty plea of the defendant in the case. The reasoning is that the policy of protecting plea discussions is as applicable when the plea is rejected or vacated as it is when the plea is withdrawn.

In discussion, both the DOJ representative and the public defender noted that they had surveyed others in their respective departments and found no reports of any problem in the operation of Rule 410 — either in general or with respect to the two suggestions made by the College. Given the uniformity of case law and the lack of any problem in operation of the Rule, the Committee unanimously resolved not to propose any amendment to Rule 410.

VI. Proposed Amendment to Rules 803(6)-(8)

The restyling project uncovered an ambiguity in Rules 803(6)-(8), the hearsay exceptions for business records, absence of business records, and public records. Those exceptions in current form set forth admissibility requirements and then provide that a record meeting those requirements is admissible despite the fact it is hearsay "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." The rules do not specifically state which party has the burden of showing trustworthiness or untrustworthiness.

The restyling sought to clarify the ambiguity by providing that a record fitting the other admissibility requirements would satisfy the exception if "the opponent does not show that" the source of information, etc., indicate a lack of trustworthiness. But the Committee did not submit this proposal as part of restyling because research into the case law indicated that the change would be substantive. While most courts impose the burden of proving untrustworthiness on the opponent, a few courts require the proponent to prove that the record is trustworthy. Thus the proposal would have changed the law in at least one court, and so was substantive under the restyling protocol.

When the Standing Committee approved the Restyled Rules, several members suggested that the Evidence Rules Committee consider making the minor substantive change that would clarify what is implicit in Rules 803(6)-(8) — that the opponent has the burden of showing untrustworthiness. Those members believed that allocating the burden to the opponent made sense for a number of reasons, including: 1) the Rules' reference to a "lack of trustworthiness" suggests strongly that the burden is on the opponent, as it is the opponent who would want to prove the lack of trustworthiness; 2) almost all the case law imposes the burden on the opponent; and 3) if the other admissibility requirements are met, the qualifying record is entitled to a presumption of trustworthiness, and adding an additional requirement of proving trustworthiness would unduly limit these records-based exceptions.

In discussion, some members suggested that it was better to leave the rule fuzzy on who has the burden as to untrustworthiness. They suggested that the determination of trustworthiness might be a process and a court may decide that a record is untrustworthy even if the opponent does not provide any evidence or argument on that subject. Others suggested that imposing the burden on the opponent might impose difficulties on opponents who may not have an opportunity to discover and present evidence of untrustworthiness — although whatever difficulty exists is in fact already imposed by the predominant case law. Another member noted that there has to be a burden allocation; that allocation is only relevant when the evidence is in equipoise; and therefore that a clarification allocating the burden to the opponent in a narrow band of cases is well-justified. The DOJ representative noted that the Department was in favor of the change as a helpful clarification.

After discussion, the Committee directed the Reporter to check with representatives of the ABA Litigation Section, the American College of Trial Lawyers, and other interested parties to determine whether it would be helpful to propose an amendment that would clarify that the burden of showing untrustworthiness is on the opponent. The Committee determined that it would revisit

the question of a possible amendment at the next meeting. The Committee also determined that if an amendment were to be proposed to allocate the burden to the opponent, a statement should be included in the Committee note that the opponent, in meeting that burden, is not necessarily required to introduce affirmative evidence of untrustworthiness.

VII. Proposal to Amend Rule 801(d) "Not Hearsay" Designation

The Committee considered a public comment from Professor Sam Stonefield, suggesting a change to the designation of hearsay statements admissible under Rule 801(d) as "not hearsay." The problem is that the statements that fall under Rule 801(d) — prior statements of testifying witnesses and statements of party-opponents — do in fact fit the definition of hearsay and yet the Rule says that they are "not hearsay." Analytically, it would be better to call these provisions "hearsay exceptions" because that is what they are. (The categories were designated "not hearsay" because admissibility was not grounded on the kinds of circumstantial guarantees of reliability that supported the traditional hearsay exceptions. But this attempt to alleviate confusion has in fact caused confusion because something that is hearsay is called "not hearsay.").

The Reporter prepared a memo on the public comment, and set out the various drafting alternatives, from minimal to more radical reorganization of all the hearsay exceptions. In discussion, Committee members were unconvinced of the need for an amendment. They noted that there is no practical difference between a statement that is "not hearsay" under Rule 801(d) and one that is "hearsay but subject to an exception" under Rules 803, 804 and 807. When covered by any of these Rules, the statement is admissible for its truth despite the fact it is hearsay. Thus, the change would be a technical one. Committee members concluded that courts and litigants have become comfortable with referring to, e.g., statements of party-opponents as not hearsay, and therefore any marginal benefit in the proposed amendment would be outweighed by the disruption that such an amendment — that any amendment — would cause. The Committee determined unanimously that it would not propose an amendment to change the designation of Rule 801(d) statements.

VIII. Circuit Conflict on Rule 804(b)(1)

The Reporter provided a memo on a circuit split that has developed in the application of the hearsay exception for prior testimony, Rule 804(b)(1). That Rule provides a hearsay exception for testimony offered against a party who, at the time it was made, had a motive and opportunity to develop it that was "similar" to the motive and opportunity it would have if the declarant could be produced for trial. The split is over the admissibility of grand jury testimony that is favorable to the accused. Some circuits have held that such favorable testimony is generally inadmissible against the government at trial, because the prosecutor's motive to develop such testimony is ordinarily not similar to what it would be at trial, given the differing operative standards of proof at grand jury and trial. Other circuits have held that such testimony is admissible, noting that the respective motives need only be "similar" and not identical or equally intense.

The Committee determined that any attempt to amend the Rule would probably cause more problems than it would solve. The conflict in the cases concerns an important question, but it is a narrow one in the context of Rule 804(b)(1). Any attempt to amend the Rule would also have to take into account the consequences for admissibility of preliminary hearing testimony against the accused. And most importantly, resolving the question of admissibility one way or the other would surely be controversial. For example, the DOJ would certainly oppose any rule that made exculpatory grand jury testimony automatically admissible against the government, as such a rule would of necessity change grand jury practice by turning the questioning of every grand jury witness into a trial-like event. And the defense bar would correspondingly oppose any rule change that would bar the admission of exculpatory grand jury testimony in the circuits where that is the law. Finally, drafting a solution that would cover all the nuances of when exculpatory testimony might fairly be admissible against the government under a "similar motive" test would be extremely difficult.

Committee members also noted that the Supreme Court has previously shown an interest in interpreting Rule 804(b)(1) as it applies to grand jury testimony, so it is at least possible that the current circuit conflict will be resolved by the Court.

After discussion, the Committee resolved that it would continue to monitor the circuit split, but that it would not propose an amendment to Rule 804(b)(1) at this time.

IX. Privilege Project

Several years ago the Committee voted to undertake a project to publish a pamphlet that would describe the federal common law on evidentiary privileges. The Committee determined that it would not be appropriate to propose an actual codification of all the evidentiary privileges to Congress. But it concluded that it could perform a valuable service to the Bench and Bar by setting forth in text and commentary the privileges that exist under federal common law. Professor Broun had prepared drafts of a number of privileges, but the project was put on hold given the time and resources required for the restyling project.

At the meeting, Professor Broun reported on the status of the project and the Committee resolved that he should again take up the project and report back to the Committee with drafts and commentary in Spring 2011.

X. Next Meeting

The Spring 2011 meeting of the Committee is tentatively scheduled for April 1 in Philadelphia.

Respectfully submitted,

Daniel J. Capra
Reporter

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

LEE H. ROSENTHAL
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MEMORANDUM

TO: Honorable Lee H. Rosenthal, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Eugene R. Wedoff, Chair
Advisory Committee on Bankruptcy Rules

DATE: December 6, 2010

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on September 30 and October 1, 2010, in Santa Fe, New Mexico, to consider a number of proposed amendments to the Bankruptcy Rules and Official Forms. These proposals were suggested by members of the bench and bar or were responsive to recent Supreme Court decisions or to earlier rule changes. The draft minutes of that meeting are attached to this report as Appendix A.

The Advisory Committee is not submitting any action items to the Standing Committee at this meeting. At the Standing Committee's June meeting, the Advisory Committee anticipates submitting proposals for some rule and form amendments on which it is continuing to work, along with any rules and forms published for comment in August 2010 that the Advisory Committee approves at its spring meeting.

This report discusses several information items, including two continuing, multi-year projects of the Advisory Committee. These information items are the following:

a. the proposed rule and form amendments published for comment in August 2010;
b. a revision of the Part VIII (appellate) Bankruptcy Rules;
c. the Forms Modernization Project;
d. the impact of the Supreme Court's *Lanning* and *Schwab* decisions;
e. conforming amendment of Interim Rule 1007-I; and
f. communication to the courts about the reduction of a time limit in Rule 1007(a).

II. Information Items

A. Publication of Proposed Amendments to Bankruptcy Rules and Official Forms

At the June 2010 meeting, the Standing Committee authorized the publication of proposed amendments to Bankruptcy Rules 3001, 7054, and 7056, and amendments to Official Forms 10 and 25A. It also approved for publication three new Official Forms – Form 10 (Attachment A); Form 10 (Supplement 1); and Form 10 (Supplement 2) – which were proposed to implement pending rule amendments addressing home mortgage claims. The deadline for the submission of comments on these proposals is February 16, 2011. Thus far two comments have been submitted on the proposals. Public hearings on the proposals are scheduled for January 7, 2011, in San Francisco, and February 4, 2011, in Washington, D.C.

The Advisory Committee will consider all of the comments submitted on these proposals during its April 2011 meeting. The Advisory Committee anticipates that it will present these amendments, with any appropriate changes, to the Standing Committee at its June 2011 meeting for its approval and transmittal to the Judicial Conference.

B. Revision of the Bankruptcy Appellate Rules

At its fall meeting, the Advisory Committee reviewed a partial draft of a revision of Part VIII of the Bankruptcy Rules. This ongoing project seeks, among other things, to adopt a clearer and more accessible style for the bankruptcy appellate rules, bring them into closer alignment with the Federal Rules of Appellate Procedure ("FRAP"), and modernize them to take advantage of current and future technologies for filing, transmitting, and accessing court documents. The Advisory Committee discussed several issues presented by the current draft, including the following:

- a revision of the rules to require the prompt docketing of appeals in the appellate court upon its receipt of the notice of appeal, rather than, as under the current rules, upon its receipt of the completed record;
- the appropriate procedures for electing to have an appeal heard by a district court, rather than a bankruptcy appellate panel, and for resolving disputes over the validity of an election; and
- the advantages and disadvantages of having a self-contained set of bankruptcy appellate rules, as opposed to rules that incorporate by reference FRAP provisions (similar to Part VII's incorporation of the Federal Rules of Civil Procedure).

Discussion of the last issue revealed support by many members of the Advisory Committee for drafting Part VIII as a self-contained set of rules. Some members noted the complexity of incorporating FRAP by reference into the bankruptcy rules, since – unlike appeals

from a district court – there are sometimes two or three appellate courts to which an appeal may be taken from a bankruptcy court (district court, bankruptcy appellate panel, court of appeals). Other differences between bankruptcy and district court cases – such as the existence within a single bankruptcy case of multiple adversary proceedings, the sometimes voluminous bankruptcy case docket, and the parties' ability to elect an appellate forum in some cases – may also complicate the wholesale incorporation of FRAP provisions into the Bankruptcy Rules. Other Committee members expressed concern about requiring bankruptcy lawyers to consult, in addition to Part VIII, another set of rules with which many bankruptcy practitioners may be less familiar than with the Civil Rules that are incorporated by reference into Part VII. Finally, some members noted that one of the goals of the revision project, incorporating into the bankruptcy appellate process the use of electronic filing technology, necessitates a departure from the existing FRAP provisions.

Other Committee members voiced support for incorporating by reference in Part VIII existing FRAP provisions, with any necessary modifications stated. Among the other advantages of this approach that they pointed out are the reduction of the length and prolixity of Part VIII and the automatic revision of the bankruptcy appellate rules as FRAP is amended.

In order to illustrate both approaches, Appendix B contains two revisions of proposed Rule 8003. The first option is based on FRAP 3 and 12(a), and it restates in adapted form much of the content of the two appellate rules. The second option incorporates by reference most of FRAP 3 and 12(a) – subject to listed exceptions. Both versions rely on definitions of "appellate court" and "transmit" that are included in proposed Rule 8001.

In the spring the Advisory Committee will meet jointly with the Advisory Committee on Appellate Rules to obtain that committee's input on the proposed revision of Part VIII and to ensure that the revised bankruptcy rules and FRAP are compatible. Given the scope of the project and the need for careful review of both style and substance by both the Advisory Committee and Standing Committee, the most likely date for publication for comment of the proposed Part VIII revision is August 2012.

C. Forms Modernization Project

The Advisory Committee continues its multi-year Forms Modernization Project ("FMP"), which was initiated to develop recommendations both for making the bankruptcy forms more user-friendly and less error-prone and for taking better advantage of modern information technology.

Next spring the FMP will begin testing with various groups a bankruptcy filing package for individual debtors. Initial drafts of most of the forms in the filing package have been completed or will be completed by the end of 2010. The project's goal is to incorporate the feedback from the testing phase and to present parts of the filing package to the Advisory

Committee at its fall 2011 and spring 2012 meetings so that the package will be on track to be presented to the Standing Committee for its approval of an August 2012 publication date.

As part of the prepublication testing phase, the FMP will identify and solicit feedback from representatives of professional organizations, software providers, a group of career law clerks, a group of "occasional" attorney filers, and lay people. At the same time, the project will finish drafts of the remaining forms for individuals and will begin drafting forms for businesses so that a second group of forms may be considered for publication in August 2013.

The Advisory Committee's Subcommittee on Forms leads the project with assistance from representatives from the Advisory Committee, the Bankruptcy Judges Advisory Group, the Bankruptcy Clerks Advisory Group, the CM/ECF NextGen Project, the Federal Judicial Center, the United States Trustee Program, and bankruptcy administrators.

D. Impact of the Supreme Court's *Lanning* and *Schwab* Decisions

At its fall meeting, the Advisory Committee considered the impact of two Supreme Court decisions from last Term – *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010), and *Schwab v. Reilly*, 130 S. Ct. 2652 (2010).

Lanning concerned the calculation of a chapter 13 debtor's "projected disposable income," which under § 1325(b)(1) of the Bankruptcy Code the debtor's plan may be required to devote to payment of unsecured claims. The Court rejected a purely "mechanical" approach to the calculation that considers only the debtor's average monthly income for the six months before bankruptcy. The Court instead adopted a "forward-looking" approach that allows consideration of changes in the debtor's income and expenses that have occurred before confirmation or are virtually certain to occur afterward. Because Form 22C[1] calculates disposable income for above-median-income debtors – following the Code definition of "disposable income" – based only on information about the debtor's prebankruptcy average income and current expenses, the Advisory Committee considered whether the form should be amended.

The Committee tentatively approved adding a question to Form 22C in which above-median-income chapter 13 debtors would list any changes in the income and expenses reported on the form that have already occurred or are virtually certain to occur during the 12 months following the filing of the petition. The same time frame for reporting anticipated changes is set out in § 521(a)(1)(vi) of the Code and is included in Schedules I and J (Current Income and Current Expenditures of Individual Debtor(s)).

---

[1] Official Form 22C is the Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income.

In *Schwab* the Supreme Court held that an objection under § 522(*l*) of the Bankruptcy Code and Rule 4003 is not required in order for a trustee to limit the value of a debtor's exemption claim to the amount of the exemption stated by the debtor, even when the debtor values the exempted property at the same amount as the exemption. The Court reasoned that the debtor's listing of the claimed exemption and the value of the property in the same amount did not put the trustee on notice that the debtor was claiming as exempt the full fair market value of the property, whatever that value turned out to be. The Committee considered whether Official Form 6, Schedule C (Property Claimed as Exempt) should be revised as a result of *Schwab*.

The Advisory Committee tentatively agreed to amend Schedule C to permit the debtor to state an intention to exempt "the full fair market value of the property" in a manner that would put the trustee on notice of the need to object if the trustee believes the value of the property exceeds the allowed exemption amount. Subsequent to the fall meeting, the Consumer and Forms Subcommittees have considered draft language for the amendment.

If approved by the Advisory Committee at its spring meeting, the Standing Committee will be asked to approve the amendments to Form 22C and Schedule C for publication for comment in August 2011.

E. Conforming Amendment of Interim Rule 1007-I

In a memorandum dated December 5, 2008, the Director of the Administrative Office transmitted to district and bankruptcy courts the recommendation of the Executive Committee of the Judicial Conference that these courts adopt by local rule or standing order Interim Bankruptcy Rule 1007-I, which implemented the National Guard and Reservists Debt Relief Act of 2008. The Act excludes certain members of the National Guard and Reserves from means testing in chapter 7 bankruptcy cases. Because the Act took effect 60 days after enactment and applies only to bankruptcy cases that are begun in the three-year period beginning December 19, 2008, it was implemented by an interim rule, rather than by an amendment of Rule 1007.

Interim Rule 1007-I includes time deadlines contained in Bankruptcy Rule 1007. One of those deadlines was amended effective December 1, 2010. The amendment to Rule 1007(c) extended the time to file the statement of completion of a course in personal financial management in a chapter 7 case filed by an individual debtor from 45 days after the first date set for the meeting of creditors to 60 days after the first date set for the meeting. In response to this amendment, the chairs of the Standing Committee and the Advisory Committee sent a memorandum on November 4, 2010, advising courts that had adopted Interim Rule 1007-I of the need to revise the interim rule's deadline for filing the statement of completion, consistent with the December 1, 2010, change to that time period in Rule 1007. The same procedure was recommended when other deadlines in Rule 1007 were revised in 2009.

F. Communication to Bankruptcy Courts About Reduction of a Time Limit in Rule 1007(a)

On December 1, 2010, Rule 1007(a)(2) was amended to reduce from 14 to 7 days the time for a debtor in an involuntary case to file a list of creditors' names and addresses. During review of the amendment by Congress, House Judiciary Committee staff members expressed concern that some involuntary debtors might be unaware of this change. Although involuntary bankruptcy cases are extremely rare, the Administrative Office, in consultation with the chairs of the Standing and Advisory Committees, agreed to take action in response to the expressed concern. A communication to bankruptcy courts from the Director of the Administrative Office about the amendments that took effect on December 1 highlighted this timing change and pointed out the court's authority to extend the deadline for cause. The memorandum noted that a failure to meet the new deadline due to a lack of knowledge about the amendment might be an especially appropriate ground for an extension during the first six months after the effective date of the shorter time limit.

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

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
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CHAIRS OF ADVISORY COMMITTEES

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APPELLATE RULES

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BANKRUPTCY RULES

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CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

November 4, 2010

MEMORANDUM

To: Chief Judges, United States District Courts
Judges, United States Bankruptcy Courts

From: Judge Lee H. Rosenthal
Chair, Committee on Rules of Practice and Procedures

Judge Eugene R. Wedoff
Chair, Advisory Committee on Bankruptcy Rules

RE: AMENDMENT TO INTERIM BANKRUPTCY RULE 1007-I EFFECTIVE DECEMBER 1, 2010 **(IMPORTANT INFORMATION)**

In a memorandum dated December 5, 2008, the Director of the Administrative Office transmitted to you the recommendation of the Executive Committee, acting on behalf of the Judicial Conference, to adopt by local rule or standing order Interim Bankruptcy Rule 1007-I, which implemented the National Guard and Reservists Debt Relief Act of 2008. The Act excludes certain members of the National Guard and Reserves from means testing in chapter 7 bankruptcy cases that are begun in the three-year period beginning December 19, 2008.

Interim Rule 1007-I included time deadlines contained in Bankruptcy Rule 1007. One of those deadlines will be amended effective December 1, 2010 unless Congress acts to the contrary. The amendment will extend the time to file the statement of completion

of a course in personal financial management in a chapter 7 case filed by an individual debtor from 45 days after the first date set for the meeting of creditors to 60 days after the first date set for the meeting. If your district adopted Interim Rule 1007-I, the deadline for filing the statement of completion should be revised effective December 1, 2010, consistent with the change to the time in Rule 1007. The same procedure was recommended when other deadlines in Rule 1007 were revised last year.

A copy of revised Interim Rule 1007-I is distributed with this memorandum. Effective December 1, 2010, revised Interim Rule 1007-I will also be posted on the "Rules and Forms In Effect" page of the courts' public website at: http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulesAndForms.aspx.

If you have any questions about these amendments, please call or e-mail either of us or call Peter G. McCabe, Assistant Director for the Office of Judges Programs, at 202-502-1800 or Scott Myers, Attorney, Bankruptcy Judges Division, at 202-502-1900.

Attachment

cc: District Court Executives
Clerks, United States District Courts
Clerks, United States Bankruptcy Courts

Interim Rule 1007-I.[1] Lists, Schedules, Statements, and Other Documents; Time Limits; Expiration of Temporary Means Testing Exclusion[2]

1 * * * * *

2 (b) SCHEDULES, STATEMENTS, AND OTHER DOCUMENTS

3 REQUIRED.

4 * * * * *

5 (4) Unless either: (A) § 707(b)(2)(D)(i) applies, or (B) §

6 707(b)(2)(D)(ii) applies and the exclusion from means testing granted therein extends

7 beyond the period specified by Rule 1017(e),

8 an individual debtor in a chapter 7 case shall file a statement of current monthly

9 income prepared as prescribed by the appropriate Official Form, and, if the current

10 monthly income exceeds the median family income for the applicable state and

11 household size, the information, including calculations, required by § 707(b),

12 prepared as prescribed by the appropriate Official Form.

13 * * * * *

---

[1]Interim Rule 1007-I was adopted by the bankruptcy courts to implement the National Guard and Reservists Debt Relief Act of 2008, Public Law No: 110-438. The Act, which provides a temporary exclusion from the application of the means test for certain members of the National Guard and reserve components of the Armed Forces, applies to bankruptcy cases commenced in the three-year period beginning December 19, 2008.

[2] Incorporates (1) time amendments to Rule 1007 which took effect on December 1, 2009, and (2) an amendment, effective December 1, 2010, which extended the time to file the statement of completion of a course in personal financial management in a chapter 7 case filed by an individual debtor.

14 (c) TIME LIMITS. In a voluntary case, the schedules, statements, and other
15 documents required by subdivision (b)(1), (4), (5), and (6) shall be filed with the
16 petition or within 14 days thereafter, except as otherwise provided in subdivisions
17 (d), (e), (f), (h), and (n) of this rule. In an involuntary case, the list in subdivision
18 (a)(2), and the schedules, statements, and other documents required by subdivision
19 (b)(1) shall be filed by the debtor within 14 days of the entry of the order for relief.
20 In a voluntary case, the documents required by paragraphs (A), (C), and (D) of
21 subdivision (b)(3) shall be filed with the petition. Unless the court orders otherwise,
22 a debtor who has filed a statement under subdivision (b)(3)(B), shall file the
23 documents required by subdivision (b)(3)(A) within 14 days of the order for relief.
24 In a chapter 7 case, the debtor shall file the statement required by subdivision (b)(7)
25 within ~~45~~ 60 days after the first date set for the meeting of creditors under § 341 of
26 the Code, and in a chapter 11 or 13 case no later than the date when the last payment
27 was made by the debtor as required by the plan or the filing of a motion for a
28 discharge under § 1141(d)(5)(B) or § 1328(b) of the Code. The court may, at any
29 time and in its discretion, enlarge the time to file the statement required by
30 subdivision (b)(7). The debtor shall file the statement required by subdivision (b)(8)
31 no earlier than the date of the last payment made under the plan or the date of the
32 filing of a motion for a discharge under §§ 1141(d)(5)(B), 1228(b), or 1328(b) of the
33 Code. Lists, schedules, statements, and other documents filed prior to the conversion
34 of a case to another chapter shall be deemed filed in the converted case unless the
35 court directs otherwise. Except as provided in § 1116(3), any extension of time to

36 file schedules, statements, and other documents required under this rule may be
37 granted only on motion for cause shown and on notice to the United States trustee,
38 any committee elected under § 705 or appointed under § 1102 of the Code, trustee,
39 examiner, or other party as the court may direct. Notice of an extension shall be
40 given to the United States trustee and to any committee, trustee, or other party as the
41 court may direct.

42 * * * * *

43 (n) TIME LIMITS FOR, AND NOTICE TO, DEBTORS TEMPORARILY
44 EXCLUDED FROM MEANS TESTING.

45 (1) An individual debtor who is temporarily excluded from means testing
46 pursuant to § 707(b)(2)(D)(ii) of the Code shall file any statement and calculations
47 required by subdivision (b)(4) no later than14 days after the expiration of the
48 temporary exclusion if the expiration occurs within the time specified by Rule
49 1017(e) for filing a motion pursuant to § 707(b)(2).

50 (2) If the temporary exclusion from means testing under § 707(b)(2)(D)(ii)
51 terminates due to the circumstances specified in subdivision (n)(1), and if the debtor
52 has not previously filed a statement and calculations required by subdivision (b)(4),
53 the clerk shall promptly notify the debtor that the required statement and calculations
54 must be filed within the time specified in subdivision (n)(1).

COMMITTEE NOTE

This rule is amended to take account of the enactment of the National Guard and Reservists Debt Relief Act of 2008, which amended § 707(b)(2)(D) of the Code to provide a temporary exclusion from the application of the means test for certain members of the National Guard and reserve components of the Armed Forces. This exclusion applies to qualifying debtors while they remain on active duty or are performing a homeland defense activity, and for a period of 540 days thereafter. For some debtors initially covered by the exclusion, the protection from means testing will expire while their chapter 7 cases are pending, and at a point when a timely motion to dismiss under § 707(b)(2) can still be filed. Under the amended rule, these debtors are required to file the statement and calculations required by subdivision (b)(4) no later than14 days after the expiration of their exclusion.

Subdivisions (b)(4) and (c) are amended to relieve debtors qualifying for an exclusion under § 707(b)(2)(D)(ii) from the obligation to file a statement of current monthly income and required calculations within the time period specified in subdivision (c).

Subdivision (n)(1) is added to specify the time for filing of the information required by subdivision (b)(4) by a debtor who initially qualifies for the means test exclusion under § 707(b)(2)(D)(ii), but whose exclusion expires during the time that a motion to dismiss under § 707(b)(2) may still be made under Rule 1017(e). If, upon the expiration of the temporary exclusion, a debtor has not already filed the required statement and calculations, subdivision (n)(2) directs the clerk to provide prompt notice to the debtor of the time for filing as set forth in subdivision (n)(1).

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

November 29, 2010

MEMORANDUM

To: All United States Judges
Circuit Executives
Federal Public/Community Defenders
District Court Executives
Clerks, United States Courts
Chief Probation Officers
Chief Pretrial Services Officers
Senior Staff Attorneys
Chief Preargument/Conference Attorneys
Bankruptcy Administrators
Circuit Librarians

From: James C. Duff

RE: AMENDMENTS TO THE FEDERAL RULES OF PRACTICE AND PROCEDURE
(IMPORTANT INFORMATION)

Congress has taken no action on the amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, and the Federal Rules of Evidence, approved by the Supreme Court on April 28, 2010. Under the Rules Enabling Act, 28 U.S.C. § 2072, the following amendments to the rules will take effect on December 1, 2010:

- Appellate Rules 1, 4, and 29, and Appellate Form 4;
- Bankruptcy Rules 1007, 1014, 1015, 1018, 1019, 4001, 4004, 5009, 7001, and 9001, and new Rule 5012;
- Civil Rules 8, 26, and 56, and Illustrative Civil Form 52;
- Criminal Rules 12.3, 21, and 32.1; and
- Evidence Rule 804.

Under 28 U.S.C. § 2074(a) and the April 28, 2010, Supreme Court orders, the amendments will govern all proceedings commenced on or after December 1, 2010, and all proceedings then pending "insofar as just and practicable."

The text of the amended rules and extensive supporting documentation can be found on the Judiciary's Federal Rulemaking website at: http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Overview.aspx. The amendments were mailed to you earlier this year as part of House Documents 111-110, 111-111, 111-112, 111-113, and 111-114. In addition, pamphlets containing the rules as amended will be sent to you as soon as they become available from the Government Printing Office.

Please note that amendments to several Bankruptcy Rules affect filing time periods in ways unrelated to the 2009 time-computation amendments. These amended filing requirements appear in Rule 1007(c) (which adds time) and in Rules 1019(2)(B), 5009, and 5012 (which create new filing periods). Additionally, an amendment to Rule 1007(a)(2) reduces from 14 days to 7 days the time for a debtor in an involuntary case to file a list of creditors' names and addresses. A court may extend the time to file the list if a debtor shows cause, which may include a failure to meet the new deadline from lack of knowledge about the amendment, especially within the first six months after the shorter period becomes effective.

If you have any questions about the status of any of the amendments, please contact Peter G. McCabe, Assistant Director for Judges Programs, or James Ishida, Senior Attorney, Office of Judges Programs, at (202) 502-1800.

TAB
9-A

ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of September 30 – October 1, 2010
Santa Fe, New Mexico
(DRAFT MINUTES)

The following members attended the meeting:

District Judge Laura Taylor Swain, Chair
Circuit Judge Sandra Segal Ikuta
District Judge Karen Caldwell
District Judge David Coar
Bankruptcy Judge Arthur I. Harris
Bankruptcy Judge Elizabeth L. Perris
Bankruptcy Judge Eugene R. Wedoff
Bankruptcy Judge Judith H. Wizmur
Professor Edward R. Morrison
Dean Lawrence Ponoroff
Michael St. Patrick Baxter, Esquire
J. Christopher Kohn, Esquire
J. Michael Lamberth, Esquire
David A. Lander, Esquire
John Rao, Esquire

The following persons also attended the meeting:

Professor S. Elizabeth Gibson, reporter
District Judge Lee H. Rosenthal, chair of the Committee on Rules of Practice and Procedure (Standing Committee)
District Judge James A. Teilborg, liaison from the Standing Committee
District Judge Joan Humphrey Lefkow, liaison from the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee)
Professor Daniel Coquillette, reporter of the Standing Committee
Mark Redmiles, Deputy Director, Executive Office for U.S. Trustees (EOUST)
Lisa Tracy, Counsel to the Director, EOUST
James J. Waldron, Clerk, U.S. Bankruptcy Court for the District of New Jersey
John Rabiej, Administrative Office of the U.S. Courts (Administrative Office)
James Ishida, Administrative Office
James H. Wannamaker, Administrative Office
Stephen "Scott" Myers, Administrative Office
Molly Johnson, Federal Judicial Center
Elizabeth Wiggins, Federal Judicial Center
Philip S. Corwin, Butera & Andrews

The following summary of matters discussed at the meeting is written in the order of the meeting agenda unless otherwise specified, not necessarily in the order actually discussed. It should be read in conjunction with the agenda materials and other written materials referred to,

all of which are on file in the office of the Secretary of the Standing Committee.

An electronic copy of the agenda materials, other than materials distributed at the meeting after the agenda was published, is available at http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/Reports.aspx Votes and other action taken by the Committee and assignments by the Chair appear in **bold**.

Introductory Items

1. Greetings and Introduction of new chair, Judge Wedoff, new committee member, Professor Morrison, and new liaison, Judge Lefkow; acknowledgment of the service of Judge Coar, and Dean Ponoroff.

The Chair welcomed Judge Wedoff as the incoming chair and Professor Morrison as the Committee's newest member. She also welcomed new liaisons from the Bankruptcy Committee, Judge Joan Humphrey Lefkow, and from the FJC, Ms. Molly Johnson. She thanked outgoing members Judge David Coar and Dean Lawrence Ponoroff for their service.

The Chair also asked for a moment of silence to honor Francis Szczebak, former chief of the Bankruptcy Judges Division, who unexpectedly passed away on Saturday, September 18, 2010.

2. Approval of minutes of New Orleans meeting of April 29-30, 2010.

The New Orleans minutes were approved with minor changes noted by Judge Wedoff and Mr. Kohn.

3. Oral reports on meetings of other committees.

(A) June 2010 meeting of the Committee on Rules of Practice and Procedure.

The Reporter said that all recommendations from the Committee were accepted with a minor wording change to Rule 7056. The Chair added that so far only one comment has been received on the rules published for comment, and she noted that the hearing dates, if needed, would be January 7 in San Francisco and February 4 in Washington D.C.

(B) June 2010 meeting of the Committee on the Administration of the Bankruptcy System.

The Chair gave the report. She said the primary topic of interest for this Committee was the Bankruptcy Committee's support of the current judgeship bill. Based on the results of the last additional needs survey conducted in 2008, the judiciary submitted a request to Congress for 13 additional bankruptcy judgeships, conversion of 22 existing temporary judgeships to

permanent status, and extension of two temporary judgeships. She said that one bill incorporating the bankruptcy judgeship requests has passed the House, and has been reported favorably by the Senate Judiciary Committee. She said another judgeship bill, which included an Article III judgeship request as well as the bankruptcy judgeship request, has also been reported favorably by the Senate Judiciary Committee. The Chair said both bills await Senate floor action.

(C) Upcoming Meeting of the Advisory Committee on Civil Rules.

Judge Wedoff said that although the Civil Rules Committee has not met since this Committee's last meeting, it did hold its conference on the civil rules and the cost of litigation at Duke Law School in May, and that it would discuss that conference at its meeting this fall.

(D) Upcoming October 2010 meeting of the Advisory Committee on Evidence.

Judge Caldwell said that at its next meeting, the Evidence Committee will consider changes to its restyled rules suggested by the Standing Committee.

(E) Upcoming October 2010 meeting of the Advisory Committee on Appellate Rules.

The Reporter said that at its next meeting the Appellate Rules Committee will be considering Rule 6 and direct bankruptcy appeals to circuit courts. She said that this Committee will work closely with the Appellate Rules Committee concerning the proposed revisions to Part VIII Rules, and that the two Committees will overlap their meetings this spring in San Francisco.

(F) Bankruptcy CM/ECF Working Group and the CM/ECF NextGen Project.

Judge Perris reported on the work of the CM/ECF Working Group and the CM/ECF NextGen Project in the context of her report on the work of the Forms Modernization Project at Agenda Item 11.

(G) Progress report from the Sealing Committee.

The Reporter said that the Sealing Committee has completed its work. She said that the Committee found very few instances where entire cases are sealed and it concluded that there is no need for new national rules regarding sealing.

(H) Progress report from the Privacy Committee.

The Reporter said that the Privacy Committee has concluded that existing rules seem to adequately protect privacy and it does not plan to recommend any rule changes. She said that it did recommend, however, that the FJC conduct random annual reviews of files to check for party compliance with the rules and to make sure privacy identifiers are being redacted. It will also

recommend more education about the redaction rules to make sure parties are not unnecessarily seeking information that will later need to be redacted, and it will ask the AO to monitor technology advances that will assist in identifying information that should be redacted.

Subcommittee Reports and Other Action Items

4. Report by the Subcommittee on Consumer Issues.

(A) Recommendations concerning Suggestion (09-BK-H) by Judge Margaret Dee McGarity and Suggestion (09-BK-N) by Judge Michael E. Romero (both on behalf of the Bankruptcy Judges Advisory Group) to amend Rule 3007(a) to provide for disposition of objections to claims by negative notice and to clarify the proper method of serving objections to claims.

Judge Wedoff said that the Subcommittee supported Judge McGarity's suggestion to clarify that Rule 3007(a) allows a negative notice procedure for objections to proofs of claim. He said that the Subcommittee was prepared to recommend amending the rule (to allow for negative notice) at the last committee meeting, but withdrew its recommendation to consider Judge Romero's related observation that the rules are unclear as to whether Rule 3007 governs service of an objection to claim, or just notice of the objection and hearing date.

After discussing the suggestions, the Subcommittee recommended amending Rule 3007(a) as set forth in the materials to clarify that an objection may be granted after notice and an *opportunity* for a hearing (i.e., on negative notice). The Subcommittee also concluded that except for the federal government, service of an objection to claim should be allowed to be made on the name and address provided by the creditor on the proof of claim, and therefore recommended amending the rule as set forth in the materials to clarify that Rule 3007 governs both service and notice of objections to claim.

In discussing the Subcommittee's recommendation, one member pointed out that Rule 7004(h) contains detailed service requirements concerning insured depository institutions that are applicable in adversary proceedings and in contested matters. Because an objection to a claim is a contested matter, he thought either Rule 7004(h) would need a carve-out for claims objections, or that the proposed change to Rule 3007(a) would need a carve-out for objections to claims filed by insured depository institutions. The member said additional research might be needed before the Committee took a vote, however, because he thought that Rule 7004(h) was added by congress. Several members suggested that the Subcommittee research the issue to ensure that the proposed change would not make the rule inconsistent with any congressional enactment.

Two members questioned the Subcommittee's decision to shorten the response time from 30 to 21 days, and suggested that if a multiple of seven days is preferred that it be 28 days. Another member questioned why the rule allowed for local variation with respect to the shortened time period. Judge Wedoff responded that the Subcommittee thought that a default

period of 30 days (or 28) was longer than needed, but noted that the rule allowed for a longer period if necessary. He said that local variation was already widespread under the current rule and seemed to be working well. **After additional discussion, the Committee voted to approve the negative notice provision. It asked the Subcommittee to recommend in the spring whether a carve-out is needed for federal deposit institutions, and to consider further whether the response time period should be 21, 28 or 30 days.**

(B) Recommendation concerning Suggestion (09-BK-J) by Judge William F. Stone, Jr., to amend Rules 9013 and 9014 to require that the caption of a motion that initiates a contested matter set forth the name of every person whose interests would be directly affected by the relief sought.

Judge Wedoff said that the Subcommittee carefully considered Judge Stone's suggestion during its August 2 conference call, and that it recommends the Advisory Committee take no further action on the suggestion. He said that in the early 1980s many bankruptcy courts required (as Judge Stone suggests) that motions be captioned similar to Official Form 16B, requiring respondents' names as well as a motion number. The courts also organized the motions, responses, and subsequent papers in separate motions folders, rather than in the case file. The practice was largely abandoned as unnecessary and burdensome, however, after the courts' electronic docketing systems such as BANCAP and NIBS became sophisticated enough to link motions and related papers on the docket.

Given the widespread abandonment of this type of caption, the Subcommittee recommended that any decision to require naming the parties in the caption of certain motions be left to local courts. The Subcommittee also thought that Judge Stone's concerns were addressed in part by Official Form 20A, Notice of Motion or Objection. The form contains a clear warning in bold lettering that the recipient's rights are at risk and directs the recipient to talk with an attorney and file a response within a specified time period.

One member said that requiring the respondent's name in the caption could be helpful if that meant it would also be reflected in the docket. But Mr. Wannamaker said that the docket is not controlled by rule, and that motion captions are not necessarily reflected on the docket. He said there are standard dictionary events such as "objection to claim" but that it's up to the filing attorney to decide how much detail to add to the docket event. Another member said that the docket is meant to be transactional, and that too much detail would make the transactional information harder to find. **A motion to take no further action carried without objection.**

(C) Recommendation concerning Suggestion (09-BK-I) by Dana C. McWay (on behalf of the Next Generation Bankruptcy CM/ECF Clerk's Office Functional Requirements Group) to amend Rule 1007(b)(7) to allow providers of personal financial management courses to file statements of individual chapter 7 and chapter 13 debtors' completion of the course.

Judge Wedoff said that Dana McWay, the clerk of the Bankruptcy Court for the Eastern District of Missouri, submitted suggestion 09-BK-I on behalf of the NextGen Clerk's Office Functional Requirements Group ("FRG"). He said that the FRG proposes that approved providers of personal financial management courses be allowed to notify the court of the debtor's completion of the course, rather than requiring – as Rule 1007(b)(7) now does – the debtor to file Official Form 23. Judge Wedoff said that Subcommittee agreed with the suggestion for permissive filing by providers – so long as the debtor retained ultimate filing responsibility. The Subcommittee therefore recommended that Rule 1007(b)(7) and the preface and instructions to Form 23 be amended as set forth in the agenda materials.

In discussing the suggestion, one member recommended a change to the committee note, on page 103, so that the second sentence reads: "Course providers approved under § 111 of the Code may be permitted to file this notification ...". **The Committee approved the proposed change to Rule 1007(b)(7), as set forth on page 103 of the materials and with the proposed change to the committee note. It recommended that the rule change be published for comment in August 2011. It also approved the related changes to B23, to be published for comment in August 2012.**

(D) Recommendation concerning Comment (09-BK-032) by attorney William J. Neild that Official Forms 22A and 22C be revised to allow individual debtors to deduct expenses for telecommunication services to the extent they are necessary for the production of income and not reimbursed by the debtor's employer.

Judge Wedoff said that the Subcommittee agreed that the Forms 22A and 22C do not currently allow employed individuals to deduct business expenses. The Internal Revenue Manual, however, allows the deduction of extra telecommunication expenses if they are incurred for the production of income. The Subcommittee therefore recommends a change to line 32 of Form 22A and 37 of Form 22C, as shown on page 108 of the materials. Because the change is small, the Subcommittee recommends that the change be held in the bullpen until other changes to the forms are recommended. **The recommendation was approved without objection.** [Note, as a result of the recommendation at Agenda Item 5A below, the Committee recommended publishing the proposed telecommunication changes in August 2011].

5. Joint Report by the Subcommittee on Consumer Issues and the Subcommittee on Forms.

(A) Report on what changes, if any, should be made in Official Form 22C as a result of the Supreme Court's decision in *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010), in which the Court rejected a purely "mechanical" approach to the calculation of a chapter 13 debtor's projected disposable income under 11 U.S.C. § 1325(b)(1)

The Reporter said that under *Lanning*, the debtor's Current Monthly Income ("CMI") is

the presumptive starting point of calculating "Projected Disposable Income" (PDI), but that in unusual cases, the bankruptcy court can taking into account known or virtually-certain-to-occur changes to income and expenses.

The Reporter said that in considering *Lanning* the main concern of the Consumer and Forms Subcommittees (the Joint Subcommittee) was whether to change Official Form 22C, and/or Schedules I and J, to require the debtor to report changes in income (and by analogy expenses) that were likely to occur during the applicable commitment period of the chapter 13 plan. She said that a majority of the Joint Subcommittee supported the recommendation at page 116 of the materials, which added a new line 61 to Form 22C.

The Joint Subcommittee's recommended amendment to Form 22C would require above-median debtors to report any change in income that has occurred or is virtually certain to occur during the applicable commitment period (three to five years). The Reporter explained that in making its recommendation, the Joint Subcommittee had to resolve several issues that the *Lanning* decision does not clearly address: (1) whether all chapter 13 debtors, or just above-median debtors, should be required/allowed to report known or virtually-certain-to-occur changes to income; (2) whether a similar approach should be taken with respect to expenses; (3) given that above-median-income debtors report some expense deductions based on IRS standards rather than actual expenses, whether changes to actual expenses matter; (4) whether the form should provide some guidance regarding "known or virtually certain" changes by limiting requested disclosure to those changes likely to happen in limited time period after the form is completed, such as six months or a year; (5) if only above-median debtors – whose expenses are determined under IRS standards – are required to completed proposed line 61, should below-median debtors, whose actual income and expenses are used in computing disposable income, be required to provide similar information about projected changes on Schedules I and J.

(1) Should the proposed change to Form 22C be limited to above-median debtors?

Judge Wedoff explained that CMI has three roles in chapter 13: (i) determination of the applicable commitment period – five years for above median debtors and three years for below median debtors; (ii) how expenses are calculated – using IRS standards for above-median debtors, and judicially determined standards for below-median debtors; and (iii) to calculate disposable income for above-median debtors. He said the Joint Committee's proposal was limited to above-median debtors because as currently designed Form 22C only calculates disposable income for above-median debtors (by subtracting IRS standards from CMI). Calculating expenses for below-median debtors would complicate Form 22C, and he recommended that if the Committee determined that *Lanning* required form changes for below-median debtors, such changes be made to Schedules I and J.

(2) Should changes in expenses be addressed?

The Reporter explained that because the issue in *Lanning* concerned changes in income,

that the opinion's discussion of changes in expenses was *dicta*. The Joint Committee concluded, however, that it doesn't make sense to address known or virtually certain changes in income without also addressing similar changes in expenses.

(3) Given that IRS standards are used for many of the expenses reported by above-median debtors, how should reporting changes in actual expenses be handed?

The Subcommittee's recommended that the debtor list changes to the actual expenditures reported in Part IV that are virtually certain to occur during the applicable commitment period. With respect to the amounts reported in Part IV that are determined by the IRS national and local standards, only changed amounts that result from changed circumstances in the debtor's life – such as the addition of a family member or the surrender of a vehicle – should be reported.

(4) Over what time period should the forms request changes?

Without elaboration, *Lanning* considers changes that have happened by the time of confirmation or are virtually certain to happen. The Joint Subcommittee's recommended amendment would require reporting any change that is virtually certain to change during the commitment period, which for above-median debtors is generally five years. Some members were in favor of a shorter time period, while others thought that the phrase "virtually certain" is inherently self-limiting, and that putting a time limit in the form doesn't add any clarity. One member suggested a one-year forward-looking time frame because 11 U.S.C. § 521(a)(1)(vi) already requires the debtor to report changes in income and expenses that are reasonably anticipated to occur a year after the petition is filed.

(5) Should Schedules I and J be changed in addition to or instead of changing Form 22C to account for *Lanning*?

Some members thought changes to Form 22C could be avoided because Schedules I and J already require reporting actual income and expenses as of the petition date (which would pick up changes that "have occurred" as of the petition date), and also require the debtor to report any changes to income and expenses "reasonable anticipated to occur" within a year of the filing of the form. Other members said that even if anticipated changes are reported on Schedules I and J, that information would still need to be transferred to Form 22C to determine plan feasibility, because PDI for above-median debtors requires using IRS categories for some expenses. Also Form 22C does not include some categories of the debtor's income, such as social security income. **The Committee voted 6 to 4 in favor of addressing *Lanning* in Form 22C instead of Schedules I and J.**

After additional discussion, **the Committee voted without objection to require that only above-median debtors be required to disclose changes in income and expenses that have occurred or are "virtually certain to occur" within one year of the petition date. Thus the Committee voted to recommend publishing for comment in August 2011 the**

Subcommittee's proposed line 61, as set out at pages 114-15 of the materials, with the following change: the phrase "during your applicable commitment period" was replaced with "during the 12-month period following the date of the filing of your petition."

> (B) Report on what changes, if any, should be made in Schedule C (Official Form 6C) as a result of the Supreme Court's decision in *Schwab v. Reilly*, 130 S. Ct. 2652 (2010), in which the Court dealt with the extent of a claimed exemption.

The Reporter explained that in *Schwab* the Supreme Court held that an objection under § 522(*l*) of the Bankruptcy Code and Fed. R. Bankr. P. 4003 is not required in order for a trustee to challenge the debtor's valuation of exempt property and thereby permit the estate to recover any value exceeding the claimed exemption amount. She said that the Joint Subcommittee considered several possible changes to Schedule C in response to *Schwab* but had not reached a consensus. Instead, it settled on three alternatives for the Committee to consider.

Alternative A. No change is needed because the *Schwab* court has explained how to complete the form if the debtor intends to exempt her entire interest (by claiming as exempt "full fair market value (FMV)" or "100% of FMV"). Supporters of this approach said that instructions to the form could provide a road map for exempting the debtor's entire interest. Joint Subcommittee members opposed to this approach were concerned that not all debtors read the instructions, and that the form is not currently designed to prompt filers to put anything other than a dollar amount in the valuation column.

Alternative B. Change header of "value of claimed exemption" column to "extent of claimed exemption" and give the debtor two checkbox options: "Debtor's interest in the property limited to $___" or "Debtor's entire interest in the property, not limited in amount." Joint Subcommittee members opposed to this approach noted that it may create problems with capped exemptions and how wild card exemptions are being used.

Alternative C. Keep the valuation column, but add a column that indicates whether the debtor's entire interest is being exempted. Subcommittee members favoring this option thought it reflected the *Schwab* holding by giving the debtor an option to clearly exempt his entire interest in the property, while also requiring the listing of an exemption amount that would allow the trustee to understand how the debtor was attempting to allocate any wildcard exemption.

Joint Subcommittee members suggested that regardless of the alternative chosen, an instruction might be added informing the debtor that claiming the entire value is appropriate only if the exemption is not capped or claiming it is otherwise consistent with Rule 9011.

In discussing the alternatives, several members continued to support Alternative A (no change) because the Supreme Court has already explained how to fill out the existing version of the form. Supporters of this approach would, however, update the instructions to reflect the *Schwab* decision.

Several other members supported Alternatives B or C because those alternatives included – on the form – language making clear the debtor's intent to exempt his entire interest in the property. There was some dispute, however, about whether the phrase "debtor's entire interest in the property" would clearly convey the debtor's intent to exempt the property itself, or if the phrasing in *Schwab*, "Full fair market value of the property" should be used instead. Some members favored Alternative B over Alternative C because it forced the debtor to either claim his entire interest in the property, or a specific amount.

Supporters of Alternative C favored adding a column to deal with whether the debtor intended to exempt her entire interest in the property. Alternative C supporters said retaining a separate "value of claimed exemption" column was necessary to make clear how the debtor intended to allocate wildcard exemptions. Those opposed to Alternative C said that, as in *Schwab*, a problem would arise when the debtor's interest in property (i.e., the equity) turned out to be worth more than the dollar amount the debtor exempted in "value" column. The form doesn't tell the court or the trustee whether the value column or the "entire interest" column should control.

After additional discussion, the Committee took two votes. In the first vote, **the Committee eliminated Alternative B. In the second vote, the Committee recommended Alternative C, 8-4. The Joint Subcommittee was directed to revise Alternative C to determine which column controls when the "entire interest" column is checked, and the debtor's interest is greater than the dollar amount the debtor lists for the exemption.**

6. Report of the Subcommittee on Forms.

(A) Recommendation concerning amending Official Form 1 to implement proposed new Rule 1004.2 (Petition in Chapter 15 Cases).

Judge Perris said that new Rule 1004.2, scheduled to go into effect December 1, 2011, requires a chapter 15 petition to "state the country where the debtor has the center of its main interests ... [and] also identify each country in which a foreign proceeding by, regarding, or against the debtor is pending." She said the Subcommittee recommended the proposed version of Official Form 1 in the materials (pages 131-34) to accomplish this new requirement. The Subcommittee recommended approval without publication. **The Committee recommended that the revised Form 1 be approved without publication with an effective date to coincide with the scheduled effective date of proposed Rule 1004.2: December 1, 2011.**

(B) Recommendation concerning amending Official Forms 9A-I to reflect the proposed amendment of Rule 2003(e) (effective December 2011) and stylistic changes.

Judge Perris said the Subcommittee recommends one substantive change and a number of

stylistic changes to all versions of Official Form 9. She said that a pending amendment to Rule 2003(e), scheduled to go into effect December 1, 2011, will require the presiding official at a meeting of creditors who wishes to complete the meeting at a later date to file a statement specifying the date and time to which such a meeting is adjourned. She said all versions of Form 9, however, incorporate the current wording of Rule 2003(e), which states the meeting "may be adjourned ... by announcement at the meeting of the adjourned date and time without further written notice."

To conform Forms 9A – I to the pending change in Rule 2003(e), the Subcommittee recommends revising the explanation of "Meeting of Creditors" on the back of each form to state that the "meeting may be continued and concluded at a later date specified in a notice filed with the court." Because the proposed revision would simply conform the forms to revised Rule 2003(e), the Subcommittee concluded that publication for comment was unnecessary. She said that because all versions of the form need to be revised, the Subcommittee also recommends several stylistic changes described in the agenda materials. **After a short discussion, the Committee approved the forms as set forth in the agenda materials and recommended that the changes go into effect without publication on December 1, 2011.**

(C) Report by Mr. Myers on revision of Director's Form 200, to account for pending change to Bankruptcy Rule 1007(c). **(Oral addition to agenda)**

Mr. Myers said that on December 1, 2010, unless Congress acts to the contrary, a pending change to Bankruptcy Rule 1007(c) will increase the time a chapter 7 debtor has to file the statement of completion of financial management course (Official Form 23) from 45 to 60 days after the first day set for the meeting of creditors. He said this change requires an update to the last item on page one of Director's Form B200. He explained that the change was ministerial and was illustrated in a one page handout distributed at the meeting, which shows the change from 45 to 60 days. He said that because the change applies to a director's form, committee action is not required.

(D) Report by Mr. Wannamaker on need to update Interim Rule 1007-I to reflect the pending December changes to Rule 1007(c), and the need to correct a pending discrepancy between subparagraphs (a)(2) and (c). **(Oral addition to agenda)**

Mr. Wannamaker said that 45- to 60-day time period change in Rule 1007(c) described in Agenda Item 6(C), would also need to be incorporated into subsection (c) of Interim Rule 1007-I, a local rule adopted by courts to address temporary waivers of the presumption of abuse that apply to certain service members as a result of the National Guard and Reservists Debt Relief Act of 2008. He recommended informing the courts of the need to update Interim Rule 1007-I by memo, similar to what was done when the time-amendment changes in 2009 required changes Interim Rule 1007-I. **The Committee supported the recommendation.**

Mr. Wannamaker said that in reviewing Interim Rule 1007-I to conform it to Rule 1007, he discovered an unrelated oversight in the pending amendments to Rule 1007. In December, Rule 1007(a)(2) will shorten from 14 to seven days after the order for relief the time a debtor in an involuntary case has to file the mailing matrix (i.e., the list used by the clerk to provide notice of the Section 341 meeting of creditors and equity security holders). This 14-day deadline is repeated (but was not amended) in Rule 1007(c). Mr. Wannamaker said the discrepancy could be fixed by deleting the phrase "the list in subdivision (a)(2)" from subsection (c), but that the earliest this could occur through the regular rules process was December 2012. A temporary fix could be put into place immediately, however, by deleting the suggested language from subpart (c) of the interim rule.

The Committee approved removing the phrase "the list in subdivision (a)(2)" from subsection (c) as a technical amendment to Rule 1007, with a scheduled effective date of December 1, 2012. Initially, the Committee also approved removing the suggested language from subsection (c) of Interim Rule 1007-I, but that decision was reversed after the meeting because it would confuse the purpose of the interim rule, which is simply to provide a procedure to implement the National Guard and Reservists Debt Relief Act of 2008.

7. Report of the Subcommittee on Business Issues.

(A) Recommendation concerning Suggestion 09-BK-J by Judge William F. Stone, Jr., to provide rules and an Official Form to govern applications for the payment of administrative expenses.

Judge Wizmur said the Subcommittee considered Judge Stone's request and agreed that the Code and Rules provide very little detail about how to seek payment of administrative expenses. Generally, section 503 of the Code provides only that an entity may "file a request for payment of an administrative expense..." and that the administrative expense shall be allowed "after notice and a hearing." Although the legislative history for § 503(a) contemplates that the bankruptcy rules "will specify the time, the form, and the method of such a filing." S. REP. NO. 95-989, at 66 (1978), there has never been a national form or rule for filing administrative expenses requests.

Judge Wizmur said that the Subcommittee does not have a recommendation at this time, but proposes instead to survey court clerks about existing local rules, practices, and forms, and the scope of procedures that currently exist at the local level for the payment of administrative expenses. After considering the results of the survey, the Subcommittee proposes to report its recommendation to the Committee at the spring 2011 meeting. **Motion for the Subcommittee to gather further information and report at the spring 2011 meeting carried without opposition.**

(B) Recommendation concerning Suggestion 10-BK-D by Judge Raymond T. Lyons to delete Bankruptcy Rule 9006(d).

Judge Wizmur explained that Judge Lyons believes that Rule 9006(d), which provides default rules for serving motions, is superfluous, misplaced, and likely to create confusion. Judge Lyons suggested that the rule is superfluous because local rules have been developed and replace the defaults in most courts, and he thinks that the provision is misplaced because Rules 9013 and 9014 generally address motion practice. He suggests that the scheduling of motions and responses should be left to local practice and deleted from the national rule.

The Subcommittee considered the suggestion and concluded that Rule 9006(d) should be retained as a default, even given the existence of local rules and procedures governing motion practice, because some districts do not have their own rules specifying the time for filing motions and supporting and opposing affidavits. The Subcommittee agreed with Judge Lyons, however, that Rule 9006(d) and Rules 9013 and 9014 should have better cross-references.

The Subcommittee also concluded that, to better serve as a default rule for motion practice, the coverage of subdivision (d) should be expanded to address the timing of the service of any written response to a motion, not just opposing affidavits. The Subcommittee recommends changes to Rule 9006(d) and Rules 9013 and 9014 as set forth in the agenda materials at pages 170-72. **Motion to approve the Subcommittee's recommendation, and to publish for comment the proposed amendments to Rule 9006(d), and Rules 9013 and Rules 9014 in August 2011, approved with the following stylistic changes:** Rule 9006(d) – insert a period after "motion" on line 8, delete the word "and," and finish the sentence as "Except as otherwise provided in Rule 9023, ~~opposing affidavits~~ any written response may be served not later than one day before the hearing, unless the court ~~permits them to be served at some other time~~ orders otherwise; Rule 9013 – change "by" to "under" on line 7; and Rule 9014 – change "by" to "under" on line 3, "opposition" to "response" on line 5, and "period prescribed by" to "determined under" on line 6.

(C) Recommendation concerning suggestion by Deputy Clerk Debbie Lewis, a legal management advisor in the Southern District of Florida, to provide an official form or rule for corporate and partnership debtors filing schedules of current income and expenditures.

Judge Wizmur said that Debbie Lewis, the legal management advisor for the Bankruptcy Court for the Southern District of Florida, contacted staff at the Administrative Office concerning the need for corporations and partnerships to file schedules of current income and expenses under the Bankruptcy Code and Rules, and the consequences of their failure to do so. She questioned whether the clerk's office could overlook the failure of a corporation to file income and expense schedules, and suggested that the failure would be less likely if official income and expense forms were developed for non-individuals.

Judge Wizmur said that the Subcommittee carefully considered the applicable Code and rule sections. It concluded that, like an individual, a partnership or corporation is required to file

a schedule of current income and expenses. The consequence of the failure to file those schedules is different, however. If the debtor is an individual, the case will automatically be dismissed in 45 days. If a corporation or a partnership fails to file the schedules, however, the case cannot be dismissed unless a party in interest (in a chapter 11 case) or the U.S. trustee (in a chapter 7 case) seeks that relief, and then only after notice and a hearing. The Subcommittee concluded that these different consequences, and the need for a motion in a partnership or corporation case before court action can occur, explain why the deficiency notice is needed in an individual case but not in a partnership or corporation case.

The Subcommittee considered whether a rule or form amendment is needed to encourage compliance with this filing requirement by non-individual debtors. Mr. Redmiles said that U.S. trustees do not perceive this matter to present a problem because they already receive the income and expense information they need from the monthly operating reports filed by non-individual debtors.

The Subcommittee concluded that there is no need to take any further action on this issue. Because compliance with § 521(a) and Rule 1007(b) by non-individual debtors has not been identified as a problem needing a rule or form solution by U.S. trustees or creditors, the Subcommittee concluded that implementation of the filing requirement can continue to be left to local rules and practices. **A motion to take no further action was approved.**

8. Report of the Subcommittee on Privacy, Public Access, and Appeals.

Judge Pauley gave a brief overview of the Part VIII revision project. He explained that former member Eric Brunstad proposed a complete rewrite of Part VIII rules at the spring 2008 meeting so that they would more closely track the style and changes that have been made to the Federal Rules of Appellate Procedure (FRAP) over the years. Mr. Brunstad submitted an initial draft of the revised Part VIII rules at the fall 2008 meeting in Denver. To encourage comment from the bench and bar, the Subcommittee held two open subcommittee meetings in conjunction with the spring and fall 2009 Committee meetings in San Diego and Boston. Judge Pauley said that many of the comments received at the open subcommittee meetings have been incorporated into the draft.

At the spring 2010 meeting in New Orleans, the Committee asked the Subcommittee to proceed with its consideration of a comprehensive revision of the bankruptcy appellate rules and endorsed the following goals for the revision:

- Make the bankruptcy appellate rules easier to read and understand by adopting the clearer and more accessible style of the Federal Rules of Appellate Procedure (FRAP).
- Incorporate into the Part VIII rules useful FRAP provisions that currently are unavailable for bankruptcy appeals.

- Retain distinctive features of the Part VIII rules that address unique aspects of bankruptcy appeals or that have proven to be useful in that context.
- Clarify existing Part VIII rules that have caused uncertainty for courts or practitioners that have produced differing judicial interpretations.
- Modernize the Part VIII rules to reflect technological changes – such as the electronic filing and storage of documents – while also allowing for future technological advancements.

The Reporter said that over the summer she and the Subcommittee updated the draft revision with the Committee's goals in mind, and they are now asking for feedback on some of the drafting issues that arose, and on some of the new practices in the proposed rules. A copy of revised Rules 8001 - 8012, with draft committee notes, was distributed at the meeting.

The Reporter said that the current draft incorporates some overarching stylistic choices. For example, the term "appellate court" is defined in Rule 8001 to mean either the BAP or district court depending on which court the appeal went to, which makes it easier to talk about appellate courts in later rules. Whenever "clerk" is mentioned, however, it is prefaced with the relevant court – bankruptcy, BAP, district, or court of appeals – to avoid confusion.

The Reporter noted that Rule 8002 continues to deal with timing because the statute refers to the rule by number.

She said that Rules 8003(d) and 8004(c) change current practice by "docketing" the appeal in the appellate court as soon the notice of appeal is transmitted (rather than after the record is complete). In reviewing Rules 8003 and 8004, one member commented that in some instances the clerk is directed to "transmit" the notice of appeal and in other places "transmit a copy" of the notice of appeal. The suggestion was to use just "transmit."

The Reporter said that proposed Rule 8005(c) provides a new procedure for resolving disputes about whether an election to have an appeal heard by the district court is valid. Under the proposal, a party challenging the election would have to file a motion in the district court. The Reporter said that the committee note included language clarifying that the rule does not prevent the bankruptcy court or BAP from determining the validity of the motion on its own motion. Several members supported this approach.

One member questioned the need for a separate document under proposed Rule 8005 to elect to have an appeal heard by the district court, and suggested that the district court election could simply be included in the notice of appeal. He thought that the separate-document requirement could be a trap for the unwary. Another member argued that the separate-document requirement was to prevent appellants from inadvertently appealing to the district court in circuits that have BAPs. There was some discussion of how a separate document is defined in the electronic-filing age, and a member suggested that the rule could refer to a document filed separately from the notice of appeal.

The Reporter asked the Committee for thoughts on whether the Subcommittee should make further attempts to incorporate the appellate rules by reference (similar to the Civil Rules' incorporation in part VII of the Bankruptcy Rules) or whether they should continue the present process restating relevant appellate rule provisions. She said that one practical consideration in favor of the present process of restating the appellate rules was to account for technological changes that have not yet been addressed in the appellate rules – one of the goals of the revision project.

Some members were in favor of incorporation to the extent possible because it would make it less likely that the two sets of rules would diverge in the future. Other members favored repetition simply because it allows for refinement of the rules in the bankruptcy context, and because it would spare users from having to consult two sets of rules in order to understand bankruptcy appellate procedure. The Committee recommended that the Reporter solicit feedback from the Standing Committee in January. The Committee also agreed that it would be helpful to illustrate the differences in approach by presenting a side-by-side comparison of a rule revised according to each method.

The Reporter said that the next step would be to complete the draft. She explained that the Committee's spring meeting in San Francisco will overlap with the appellate rules committee meeting and that the two committees will meet jointly for half a day. She said that originally the goal had been to gain approval of the Standing Committee for an August 2011 publication. Given the scope of the project, however, and the significant time that will be required for the styling process and the Standing Committee's consideration of the rules, it is probably more realistic to aim for a projected publication date in August 2012. She noted that these timing and process issues can be discussed with the Standing Committee at its January 2011 meeting.

9. Oral Report of the Subcommittee on Technology and Cross Border Insolvency.

The Chair said that there would be no report because that there was no activity by the Subcommittee over the past term.

10. Oral Report of the Subcommittee on Attorney Conduct and Health Care.

The Chair said that there would be no report because that there was no activity by the Subcommittee over the past term.

11. Oral report on status of the Bankruptcy Forms Modernization Project [Includes report on CM/ECF Working Group and CM/ECF NextGen Project].

Judge Perris said that the CM/ECF Working Group continues to meet and consider modification requests for the current generation of CM/ECF. She said that version 4.1 will be rolling out next and that it will include "e-orders" and new reports.

Judge Perris said the CM/ECF NextGen is still in the requirements stage of the process, but that the project is on target to complete this phase by February 2011. She said that the next phase will be to prioritize implementation, and to write code.

Judge Perris said that since the Committee's spring meeting the FMP has made significant progress in reformatting and rephrasing the questions in an initial filing package of forms to be used by individual debtors in bankruptcy, and has now completed initial drafts of most of those forms. She said that at its summer meeting, the FMP approved a tentative project time line for completing and testing the individual-debtor filing package, drafting forms for individuals that will be used later in the case, and for beginning the business filing package.

Beth Wiggins and Molly Johnson spoke about the project timeline, noting that it projects testing of the individual-debtor filing package next year and sets a goal for publishing the package for comment in the fall of 2012. Ms. Wiggins and Ms. Johnson explained that this process would include a prepublication testing phase next year that would include soliciting feedback from representatives of professional organizations, software providers, a group of career law clerks, a group of "occasional" attorney filers, and lay people. They said that prepublication versions of the individual filing package would likely be presented to the Committee at the fall 2011 and spring 2012 meetings, with a request to approve formal publication for comment in the fall of 2012.

Judge Perris added that concurrent with the prepublication phase of the individual-filing package, that the FMP would continue revising individual debtor forms and would also begin drafting the entity-filing package.

Judge Perris said that the FMP also continues to work with the NextGen CM/ECF Project to promote functional requirements it believes should be included in the future version of CM/ECF. Those functional requirements include the ability to store information in data form and retrieve the data in user-specified reports. Significant numbers of judicial users have identified court needs for such capabilities. The requirements also include capacity to control users' access to data, to ensure that CM/ECF will continue to operate in conformity with Judicial Conference privacy and access policies.

Discussion Items

12. Oral report on the new Strategic Plan for the Federal Judiciary approved by the Judicial Conference at its meeting in September.

The Chair briefly reviewed the Strategic Plan for the Federal Judiciary that was approved by the Judicial Conference at its September meeting. She said the Strategic Plan was organized around seven issues that affect the judiciary's mission and core values. She said the issues of most interest to the Committee were probably Issue 1: Providing Justice; Issue 4: Harnessing

Technology's Potential; and Issue 5: Enhancing Accesses to the Judicial Process. She encouraged members to review the plan and keep its goals and strategies in mind as the Committee develops its work in the future.

Information Items

13. Report on the status of bankruptcy-related legislation.

Mr. Wannamaker updated the Committee on pending and recently enacted bankruptcy-related legislation.

14. Oral update on opinions interpreting section 521(i).

The Reporter said that the bankruptcy courts are still divided on whether "automatic" means automatic, but that the trend at the circuit level (First and Ninth) and recently in the Sixth Circuit BAP is that the bankruptcy court has discretion to retain the case after the 45th day. She said that so long as the courts seemed to breaking in favor of finding the that statute allows discretion, it would be hard to develop a rule to implement automatic dismissal.

15. ***Bull Pen.***

As a result of decisions at this meeting and prior meetings, the following proposed changes are in the bull pen: Proposed new Rule 8007.1 and the proposed amendment to Rule 9024 (indicative rulings), approved at September 2008 meeting. Until proposed publication in August, 2012, the Rule 1007-related changes to Form 23 discussed at Agenda Item 4C.

16. **Rules Docket.**

Mr. Wannamaker said the Rules Docket was in the materials and that it reflects that the Committee has been very busy. The Chair thanked Mr. Wannamaker for maintaining the Rules Docket so that it reflects the status of all the work the Committee has in play.

17. **Future meetings**:

Spring 2011 meeting, April 7-8, 2011, at the Fairmont Hotel in San Francisco, California. The Chair asked members to make suggestions for possible locations for the fall 2011 meeting to the incoming chair, Judge Wedoff.

18. **New business.**

Members thanked Judge Swain for her dedication, stewardship, and leadership as the Chair of this Committee over the past three years.

19. **Adjourn**.

Respectfully submitted,

Stephen "Scott" Myers

TAB
9-B

Appendix B

Option 1 – Self-contained Version

Rule 8003. Appeal as of Right – How Taken; Docketing of Appeal

1 (a) FILING THE NOTICE OF APPEAL.

2 (1) An appeal from a judgment, order, or decree of
3 a bankruptcy judge to a district court or a BAP as permitted by 28
4 U.S.C. § 158(a)(1) or (a)(2) may be taken only by filing a notice of
5 appeal with the bankruptcy clerk within the time allowed by Rule
6 8002.

7 (2) An appellant's failure to take any step other than
8 timely filing a notice of appeal does not affect the validity of the
9 appeal, but is ground for such action as the appellate court deems
10 appropriate, including dismissal of the appeal.

11 (3) The notice of appeal shall:

12 (A) conform substantially to the appropriate
13 Official Form;

14 (B) attach the judgment, order, or decree, or
15 part thereof, being appealed; and

16 (C) be accompanied by the prescribed fee.

17 (4) Upon request of the bankruptcy clerk, each
18 appellant shall file a sufficient number of copies of the notice of

19 appeal to enable the bankruptcy clerk to comply promptly with
20 Rule 8003(c).
21 (b) JOINT OR CONSOLIDATED APPEALS.
22 (1) When two or more parties are entitled to appeal
23 from a judgment, order, or decree of a bankruptcy judge and their
24 interests make joinder practicable, they may file a joint notice of
25 appeal. They may then proceed on appeal as a single appellant.
26 (2) When parties have separately filed timely
27 notices of appeal, the appeals may be joined or consolidated by the
28 appellate court.
29 (c) SERVING THE NOTICE OF APPEAL.
30 (1) The bankruptcy clerk shall serve the notice of
31 appeal by transmitting a copy to counsel of record for each party to
32 the appeal other than the appellant or, if a party is not represented
33 by counsel, to the party at its last known address.
34 (2) The bankruptcy clerk's failure to serve notice
35 does not affect the validity of the appeal.
36 (3) The bankruptcy clerk shall give to each party
37 served notice of the date of the filing of the notice of appeal and
38 shall note on the docket the names of the parties served and the
39 date and method of the transmission.

40 (4) The bankruptcy clerk shall promptly transmit to
41 the United States trustee a copy of the notice of appeal, but failure
42 to transmit notice to the United States trustee does not affect the
43 validity of the appeal.
44 (d) TRANSMITTING THE NOTICE OF APPEAL TO
45 THE BAP OR DISTRICT COURT; DOCKETING THE APPEAL.
46 (1) The bankruptcy clerk shall promptly transmit a
47 copy of the notice of appeal to the BAP clerk if a BAP has been
48 established for appeals from that district and the appellant has not
49 elected to have the appeal heard by the district court. Otherwise,
50 the bankruptcy clerk shall promptly transmit a copy of the notice of
51 appeal to the district clerk.
52 (2) Upon receiving the notice of appeal, the clerk of
53 the appellate court shall docket the appeal under the title of the
54 bankruptcy court action with the appellant identified – adding the
55 appellant's name if necessary – and promptly give notice of the
56 date on which the appeal was docketed to all parties to the
57 appealed judgment, order, or decree.

Option 2 – Incorporation-by-Reference Version

Rule 8003. Appeal as of Right – How Taken; Docketing of Appeal

1 (a) APPLICABILITY OF APPELLATE RULES. Rules 3
2 and 12(a) F.R.App.P. apply to an appeal permitted by 28 U.S.C.
3 § 158(a)(1) or (a)(2), subject to the following exceptions:
4 (1) References in the rules to the "district court,"
5 the "court of appeals," the "district clerk," and the "circuit clerk"
6 shall be read as referring respectively to the bankruptcy court, the
7 appellate court, the bankruptcy clerk, and the clerk of the appellate
8 court.
9 (2) The reference in Appellate Rule 3(a)(1) to Rule
10 4 shall be read as a reference to Bankruptcy Rule 8002.
11 (3) Subdivisions (a)(3), (a)(4), (c) of Rule 3 and the
12 second sentence of (d)(1) do not apply.
13 (4) The requirement stated in the last sentence of
14 Rule 3(a)(1) applies only upon request of the bankruptcy clerk.
15 (5) In Rule 3(d), the term "mailing" means
16 transmitting, as defined in Bankruptcy Rule 8001(e). The clerk
17 shall serve the notice of appeal only on parties to the appeal. The
18 requirement in Rule 3(d)(1) for prompt transmittal of a copy of the
19 docket entries does not apply.

20 (6) The reference in Rule 12(a) to "and the docket

21 entries" does not apply.

22 (b) CONTENTS OF THE NOTICE OF APPEAL. The

23 notice of appeal shall:

24 (1) conform substantially to the appropriate Official

25 Form; and

26 (2) attach the judgment, order, or decree, or part

27 thereof, being appealed.

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TAB
10

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

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JEFFREY S. SUTTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

December 6, 2010

MEMORANDUM TO STANDING RULES COMMITTEE

SUBJECT: *Recommendation to Approve Revised Judicial Conference Procedures Governing Work of Rules Committees*

FROM: Judge Lee H. Rosenthal

The *Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure* govern the work of the rules committees. The *Procedures* are routinely included in the broadly circulated brochures containing the proposed rule changes for public comment. It is recommended that these Procedures be revised and the revisions sent to the Judicial Conference with a recommendation for approval.

The Judicial Conference first promulgated the *Procedures* in June 1983. The Conference approved revisions to the *Procedures* in 1989 to implement the 1988 amendments to the Rules Enabling Act. These amendments required an increase in notice to the public of proposed rule changes and prescribed open meetings. The *Procedures* were also revised to make provisions requiring a follow-up notice to every individual who commented on a proposed rule more flexible.

The rules committees have worked under the same set of *Procedures* since 1989. During this time, the work of the committees has been significantly affected by a number of changes, including using the internet for recordkeeping and for circulating information to the public about proposed rules. In addition, experience with the rulemaking process has revealed some recurring practical difficulties with the *Procedures*. It is time to revise them again.

The attached revised *Procedures* account for the impact of the internet, address the practical difficulties in ways that make the process more efficient, and follow the style protocols followed in drafting the rules. A redlined version comparing them to the present version is also attached. The Committee is asked to review the revised *Procedures* and consider whether to submit them to the Judicial Conference with a recommendation that they be approved.

PROPOSED REVISED PROCEDURES
"CLEAN" VERSION

§ 440 Procedures for the Conduct of Business by the Judicial Conference's Committee On Rules of Practice and Procedure and its Advisory Rules Committees

§ 440.10 Overview

The Rules Enabling Act, 28 U.S.C. §§ 2071-2077, authorizes the Supreme Court to prescribe general rules of practice and procedure and rules of evidence for cases in the federal courts and authorizes the Judicial Conference to appoint committees to recommend rules to be prescribed. Section 2073 requires the Judicial Conference to publish the procedures that govern the work of the Committee on Rules of Practice and Procedure (the Standing Committee) and its Advisory Committees on the Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure and on the Evidence Rules in drafting and recommending rule changes. **See**: JCUS-SEP 83, pp. 65-67; 28 U.S.C. § 2073.

§ 440.20 Advisory Committees

§ 440.20.10 Functions

Each advisory committee is required to engage in "a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use" in its field, taking into consideration suggestions and recommendations received from any source, new statutes and court decisions affecting the rules, and legal commentary. **See:** 28 U.S.C. § 331.

§ 440.20.20 Suggestions and Recommendations

Suggestions and recommendations on the rules are submitted to the Secretary of the Committee on Rules of Practice and Procedure at the Administrative Office of the United States Courts, Washington, D.C. The secretary will acknowledge the suggestions or recommendations and refer them to the appropriate committee. If formal action on the suggestion or recommendation is taken, that action will be reflected in the minutes, which are posted on the judiciary's rulemaking website.

§ 440.20.30 Drafting Rules Changes

(a) Each advisory committee meets at the times and places that the chair designates. Advisory committee meetings are required to be open to the public, except when the committee – in open session and with a majority present – determines that it is in the public interest to have all or part of the meeting closed to the public and states the reason. Each meeting must be preceded by notice of the time and place, including publication in the Federal Register and on the judiciary's rulemaking web site sufficiently in advance to permit interested persons to attend.

(b) The reporter assigned to each advisory committee will prepare for the committee, under the direction of the committee or its chair, initial draft rule changes, committee notes explaining their purpose and intent, and copies or summaries of

written recommendations and suggestions received by the advisory committee.

(c) The advisory committee meets to consider draft proposed new rules and rules amendments together with committee notes, whether revisions should be made, and whether they should be submitted to the Standing Committee with a recommendation for approval for publication. Submission to the Standing Committee must be accompanied by a written report to the Committee or its chair explaining the advisory committee's action and any minority or other separate views.

§ 440.20.40 Publication and Public Hearings

(a) The Standing Committee must approve any publication. If publication is approved, the secretary arranges for printing and circulating the proposed rule changes to the bench, bar, and public. Publication should be as wide as practicable. The proposed rule changes must be published in the Federal Register and posted on the judiciary's rulemaking web site. The secretary must notify members of Congress, federal judges, and the chief justice of the highest court of each state of the proposed rule changes, with a link to the federal judiciary's rulemaking web site. Copies of the proposed changes are also provided to legal publishing firms with a request that the proposals be timely included in publications.

(b) A public comment period on the proposed rule changes must extend for at least six months after notice is published in the Federal Register, unless a shorter period is approved under subparagraph (d) of this paragraph.

(c) The advisory committee must conduct public hearings on proposed rule changes unless eliminating the hearings is approved under subparagraph (d) of this paragraph or fewer than five witnesses ask to testify. The hearings are held at the times and places that the advisory committee's chair determines. Notice of the time and place must be placed in the Federal Register and on the judiciary's rulemaking web site. The hearings must be recorded and the electronic record posted on the judiciary's rulemaking web site.

(d) The Standing Committee may shorten the public comment period or grant an exception to the requirement of public hearings only if the Committee determines that the administration of justice requires a proposed rule change to be expedited and that appropriate notice to the public can be provided and public comment obtained within a shortened comment period and with limited or no public hearings. The Standing Committee may eliminate the public notice and comment requirement for a technical or conforming amendment if the Committee determines that notice and comment are unnecessary. Whenever an exception is made, the Standing Committee chair will advise the Judicial Conference and provide the reasons.

§ 440.20.50 Procedures After the Comment Period

(a) When the public comment period ends, the reporter must prepare a summary of the written comments received and the testimony presented at public hearings. If the number of comments is very large, the reporter may aggregate similar individual comments in summary fashion, identifying the source of each comment. The advisory committee reviews the proposed rules changes in light of any comments and testimony. If the advisory committee makes extensive and substantial changes, the proposed rules are republished for an additional period of public comment unless the advisory committee determines that it would be neither necessary nor helpful.

(b) The advisory committee will submit the proposed rule changes and committee notes that it approves to the Standing Committee. Each submission must be accompanied by a separate report of the comments received and must explain the changes made after the original publication. The submission must also include minority views of advisory committee members who wish to have separate views recorded.

§ 440.20.60 Records

(a) The advisory committee's chair arranges the preparation of minutes of the committee meetings.

(b) The advisory committee's records will consist of:

(i) written suggestions received from the public;
(ii) written comments received on drafts of proposed rules;
(iii) the committee's responses to the suggestions and comments;
(iv) electronic recordings of public hearings;
(v) summaries prepared by the reporter;
(vi) correspondence relating to proposed rule changes;
(vii) agenda books and materials prepared for committee meetings;
(viii) minutes of committee meetings;
(ix) approved drafts of rule changes; and
(x) reports to the Standing Committee.

(c) The records must be posted on the judiciary's rulemaking web site, except for general correspondence relating to proposed rule changes. This correspondence is maintained by the Administrative Office of the United States Courts and is available for public inspection.

(d) Minutes that relate to a closed meeting may be made available to the public but with deletions necessary to avoid frustrating the purposes of closing the meeting, as provided in § 440.20.30(a).

§ 440.30 Standing Committee

§ 440.30.10 Functions

The Standing Committee coordinates the work of the advisory committees, suggests proposals for them to study, considers proposals they recommend for publication for public comment, and, for proposed rule changes that have completed that process, transmits the proposals with its own recommendation to the Judicial Conference or recommits them to the appropriate advisory committee for further study and consideration.

§ 440.30.20 Procedures

(a) The Standing Committee meets at the times and places that the chair authorizes. Committee meetings must be open to the public, except when the committee — in open session and with a majority present — determines that it is in the public interest to have all or part of the meeting closed to the public and states the reason. Each meeting must be preceded by notice of the time and place, published in the Federal Register and on the judiciary's rulemaking web site sufficiently in advance to permit interested persons to attend.

(b) The advisory committees' chairs and reporters will attend the Standing Committee meetings to present their committee's proposed rule changes and committee notes, to inform the Standing Committee on the status of ongoing work, and to participate in Standing Committee discussions.

(c) The Standing Committee may accept, reject, or modify a proposed rule change or committee note, or may return the proposal to the advisory committee with instructions or recommendations.

(d) The Standing Committee will transmit to the Judicial Conference the proposed rule changes and committee notes that it approves, together with the advisory committee report. The Standing Committee's report to the Judicial Conference includes its own recommendations and explains any changes that it has made.

§ 440.30.30 Records

(a) The secretary prepares minutes of Standing Committee meetings.

(b) The Standing Committee's records will consist of:

(i) the minutes of Standing and advisory committee meetings,
(ii) agenda books and materials prepared for Standing Committee meetings;
(iii) reports to the Judicial Conference, and
(iv) correspondence concerning rules changes including correspondence with advisory committee chairs.

(c) The records must be posted on the judiciary's rulemaking web site, except for general correspondence relating to rule changes. This correspondence is maintained by the Administrative Office of United States Courts and is available for public inspection.

PROPOSED REVISED PROCEDURES
"REDLINE" VERSION

~~PROCEDURES FOR THE CONDUCT OF BUSINESS BY THE JUDICIAL CONFERENCE COMMITTEES ON RULES OF PRACTICE AND PROCEDURE~~

~~Scope~~

~~These procedures govern the operations of~~**§ 440 Procedures for the Conduct of Business by the Judicial Conference's Committee On Rules of Practice and Procedure and its Advisory Rules Committees**

§ 440.10 Overview

The Rules Enabling Act, 28 U.S.C. §§ 2071-2077, authorizes the Supreme Court to prescribe general rules of practice and procedure and rules of evidence for cases in the federal courts and authorizes the Judicial Conference ~~Committee on Rules of Practice, Procedure, and Evidence (Standing Committee) and the various~~to appoint committees to recommend rules to be prescribed. Section 2073 requires the Judicial Conference ~~Advisory~~to publish the procedures that govern the work of the Committees on Rules of Practice and Procedure (the Standing Committee) and its Advisory Committees on the Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure and on the Evidence Rules in drafting and recommending ~~new rules of practice, procedure, and evidence and amendments to existing rules.~~

~~**Part I -**~~rule changes. **See**: JCUS-SEP 83, pp. 65-67; 28 U.S.C. § 2073.

§ 440.20 Advisory Committees

~~**1. Functions**~~

~~**Each Advisory Committee shall carry on "a**~~

§ 440.20.10 Functions

Each advisory committee is required to engage in "a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use" in its ~~particular~~ field, taking into consideration suggestions and recommendations received from any source, new statutes and court decisions affecting the rules, and legal commentary. **See:** 28 U.S.C. § 331.

§ 440.20.20 Suggestions and Recommendations

Suggestions and recommendations ~~with respect to~~on the rules ~~should be sent~~are submitted to the Secretary~~,~~ of the Committee on Rules of Practice and Procedure~~,~~ at the Administrative Office of the United States Courts, Washington, D.C. ~~20544, who shall, to the extent feasible, acknowledge in writing every written~~ The secretary will acknowledge the suggestions or recommendations and refer them to the appropriate committee. If formal action on the suggestion or recommendation ~~so received and shall refer all suggestions and~~

~~recommendations to the appropriate Advisory Committee. To the extent feasible, the Secretary, in consultation with the Chairman of the Advisory Committee, shall advise the person making a recommendation or suggestion of the action taken thereon by the Advisory Committee.~~

~~3.~~ is taken, that action will be reflected in the minutes, which are posted on the judiciary's rulemaking website.

§ 440.20.30 Drafting Rules Changes

(a~~.~~) ~~An A~~Each advisory ~~C~~committee ~~shall~~ meets at ~~such~~the times and places ~~as~~that the ~~Chairman may authorize~~chair designates. ~~All~~ Advisory ~~C~~committee meetings ~~shall~~are required to be open to the public, except when the committee ~~so meeting,~~ in open session and with a majority present~~,~~ determines that it is in the public interest ~~that~~to have all or part ~~of the remainder~~ of the meeting ~~on that day shall be~~ closed to the public and states the reason ~~for closing the meeting.~~. Each meeting ~~shall~~must be preceded by notice of the time and place ~~of the meeting~~, including publication in the Federal Register~~, sufficient~~ and on the judiciary's rulemaking web site sufficiently in advance to permit interested persons to attend.

(b~~.~~) The reporter assigned to each ~~A~~advisory ~~C~~committee ~~shall~~will prepare for the committee, under the direction of the ~~C~~committee or its ~~Chairman~~chair~~, prepare~~ initial draft rule~~s~~ changes, "~~C~~committee ~~N~~notes" explaining their purpose and intent, and copies or summaries of ~~all~~ written recommendations and suggestions received by the ~~Advisory Committee, and shall forward them to the Advisory Committee.~~

~~c. The Advisory Committee shall then meet to consider the~~advisory committee.

(c) The advisory committee meets to consider draft proposed new rules and rules amendments~~;~~ together with ~~C~~committee ~~N~~notes, ~~make~~whether revisions ~~therein, and submit them for approval of publication~~should be made, and whether they should be submitted to the Standing Committee with a recommendation for approval for publication. Submission to the Standing Committee~~, or its Chairman, with~~ must be accompanied by a written report to the Committee or its chair explaining the ~~Committee's~~advisory committee's action~~, including~~ and any minority or other separate views.

~~4~~**§ 440.~~ ~~20.40 Publication and Public Hearings**

(a~~.~~) ~~When~~The Standing Committee must approve any publication. If publication is approved ~~by the Standing Committee~~, the ~~S~~secretary ~~shall~~ arranges for ~~the~~ printing and ~~circulation of~~circulating the proposed rules changes to the bench ~~and~~, bar, and ~~to the~~ public ~~generally.~~. Publication ~~shall~~should be as wide as practicable. ~~Notice of t~~The proposed rule ~~shall~~changes must be published in the

Federal Register and ~~copies provided to appropriate legal publishing firms with a request that they be timely included in their publications. The Secretary shall also provide copies to~~posted on the judiciary's rulemaking web site. The secretary must notify members of Congress, federal judges, and the chief justice of the highest court of each state ~~and, insofar as is practicable, to all individuals and organizations that request them.~~

~~b. In order to provide full notice and opportunity for comment on~~of the proposed rule changes, ~~a period of~~with a link to the federal judiciary's rulemaking web site. Copies of the proposed changes are also provided to legal publishing firms with a request that the proposals be timely included in publications.

(b) A public comment period on the proposed rule changes must extend for at least six months ~~from the time of publication of~~after notice is published in the Federal Register ~~shall be permitted~~, unless a shorter period is approved under ~~the provisions of~~ subparagraph (d) of this paragraph.

(c~~.~~) ~~An A~~The advisory ~~C~~committee ~~shall~~must conduct public hearings on ~~all~~ proposed rules changes unless ~~elimination of such~~eliminating the hearings is approved under ~~the provisions of~~ subparagraph (d) of this paragraph or fewer than five witnesses ask to testify. The hearings ~~shall be~~are held at ~~such~~the times and places ~~as determined by the chairman of the Advisory Committee and shall be preceded by adequate notice, including publication~~that the advisory committee's chair determines. Notice of the time and place must be placed in the Federal Register and on the judiciary's rulemaking web site. ~~Proceedings shall~~ The hearings must be recorded and ~~a transcript prepared. Subject to the provisions of paragraph six, such transcript shall be available for public inspection.~~

~~d. Exceptions to the time period for public comment and the public hearing requirement may be granted by the~~the electronic record posted on the judiciary's rulemaking web site.

(d) The Standing Committee ~~or its chairman when the Standing Committee or its chairman~~ may shorten the public comment period or grant an exception to the requirement of public hearings only if the Committee determines that the administration of justice requires ~~that~~ a proposed rule change ~~should~~ to be expedited and that appropriate notice to the public ~~notice~~can be provided and public comment ~~may be achieved by~~obtained within a shortened comment period~~;~~ ~~without~~ and with limited or no public hearings~~, or both.~~. The Standing Committee may eliminate the public notice and comment requirement ~~if, in the case of~~for a technical or conforming amendment~~, it~~ if the Committee determines that notice and comment are ~~not appropriate or necessary~~unnecessary. Whenever ~~such~~ an exception is made, the Standing Committee ~~shall~~chair will advise the Judicial Conference ~~of the exception and the reasons for the exception.~~

~~5. Subsequent Procedures~~

~~a. At the conclusion of the~~and provide the reasons.

§ 440.20.50 Procedures After the Comment Period

(a) When the public comment period ends, the reporter ~~shall~~ must prepare a summary of the written comments received and the testimony presented at public hearings. If the number of comments is very large, the reporter may aggregate similar individual comments in summary fashion, identifying the source of each comment. The ~~A~~advisory ~~C~~committee ~~shall~~ reviews the proposed rules changes in ~~the~~ light of ~~the~~any comments and testimony. If the ~~A~~advisory ~~C~~committee makes extensive an~~y~~d substantial changes, the proposed rules are republished for an additional period ~~for public notice and comment may be provided.~~

~~b. The Advisory Committee shall submit proposed rules changes and Committee Notes, as finally agreed upon,~~of public comment unless the advisory committee determines that it would be neither necessary nor helpful.

(b) The advisory committee will submit the proposed rule changes and committee notes that it approves to the Standing Committee. Each submission ~~shall~~must be accompanied by a separate report of the comments received and ~~shall~~must explain ~~any~~the changes made ~~subsequent to~~after the original publication. The submission ~~shall~~must also include minority views of ~~A~~advisory ~~C~~committee members who wish to have separate views recorded.

§ 440.20.6~~.~~0 Records

(a~~.~~) The ~~Chairman of the Advisory Committee shall~~ advisory committee's chair arrange~~ for~~ s the preparation of minutes of ~~all Advisory C~~the committee meetings.

(b~~.~~) The advisory committee's records ~~of an Advisory Committee shall~~will consist of ~~the~~ :

(i) written suggestions received from the public; ~~the~~
(ii) written comments received on drafts of proposed rules~~, responses thereto, transcripts~~;
(iii) the committee's responses to the suggestions and comments;
(iv) electronic recordings of public hearings~~, and~~ ;
(v) summaries prepared by the reporter;~~ all~~
(vi) correspondence relating to proposed rule changes;
(vii) agenda books and materials prepared for committee meetings;
(viii) minutes of committee meetings;
(ix) approved drafts of rule changes; and
(x) reports to the Standing Committee.

(c) The records must be posted on the judiciary's rulemaking web site, except for

general correspondence relating to proposed rules changes~~; minutes of Advisory Committee meetings; approved drafts of rules changes; and reports to the Standing Committee. The records shall be maintained at~~. This correspondence is maintained by the Administrative Office of the United States Courts ~~for a minimum of two years~~ and ~~shall be~~is available for public inspection ~~during reasonable office hours. Thereafter the records may be transferred to a Government Records Center in accordance with applicable Government retention and disposition schedules.~~

~~c. Any portion of minutes, relating~~.

(d) Minutes that relate to a closed meeting ~~and~~may be made available to the public~~;~~ ~~may contain such~~ but with deletions ~~as may be~~ necessary to avoid frustrating the purposes of closing the meeting, as provided in ~~subparagraph 3a.~~

~~d. Copies of records shall be furnished to any person upon payment of a reasonable fee for the cost of reproduction.~~

~~**Part II -**~~ § 440.20.30(a).

§ 440.30 Standing Committee

~~7~~§ 440.~~—~~30.10 Functions

~~—~~The Standing Committee ~~shall~~ coordinates the work of the ~~several Advisory Committees, make suggestions of proposals to be studied by them, consider proposals recommended by the Advisory Committees, and transmit such~~advisory committees, suggests proposals for them to study, considers proposals they recommend for publication for public comment, and, for proposed rule changes that have completed that process, transmits the proposals with its own recommendation to the Judicial Conference~~;~~ or recommits them to the appropriate ~~A~~advisory ~~C~~committee for further study and consideration.

~~8~~§ 440.~~—~~30.20 Procedures

(a~~.~~) The Standing Committee ~~shall~~ meets at ~~such~~the times and places ~~as~~that the ~~Chairman may~~chair authorizes. ~~All~~ Committee meetings ~~shall~~must be open to the public, except when the committee ~~so meeting,~~ in open session and with a majority present~~;~~ determines that it is in the public interest ~~that~~to have all or part of the ~~remainder of the~~ meeting ~~on that day shall be~~ closed to the public and states the reason ~~for closing the meeting.~~. Each meeting ~~shall~~must be preceded by notice of the time and place ~~of the meeting, including publication~~ published in the Federal Register~~, sufficient~~ and on the judiciary's rulemaking web site sufficiently in advance to permit interested persons to attend.

~~b. When an Advisory Committee's final recommendations for rules changes have been submitted, the Chairman and Reporter of the Advisory Committee shall~~

(b) The advisory committees' chairs and reporters will attend the Standing Committee meetings to present ~~the~~their committee's proposed rules changes and ~~Committee Notes.~~

~~c.~~committee notes, to inform the Standing Committee on the status of ongoing work, and to participate in Standing Committee discussions.

(c) The Standing Committee may accept, reject, or modify a ~~proposal. If a modification effects a substantial change, the proposal will be returned to the Advisory Committee with appropriate instructions.~~

~~d.~~proposed rule change or committee note, or may return the proposal to the advisory committee with instructions or recommendations.

(d) The Standing Committee ~~shall~~will transmit to the Judicial Conference the proposed rules changes and ~~C~~committee ~~N~~notes ~~approved by it~~ that it approves, together with the ~~A~~advisory ~~C~~committee report. The Standing Committee~~'~~'s report to the Judicial Conference ~~shall~~ includes its own recommendations and explains any changes that it has made.

~~9~~§ 440. ~~30.30~~ Records

~~(a)~~ The ~~S~~secretary ~~shall~~ prepares minutes of ~~all~~ Standing Committee meetings.

~~(b)~~ The ~~records of the~~ Standing Committee ~~shall~~'s records will consist of:

(i) the minutes of Standing and ~~Advisory~~advisory committee meetings,
(ii) agenda books and materials prepared for Standing Committee meetings~~,~~;
(iii) reports to the Judicial Conference, and
(iv) correspondence concerning rules changes including correspondence with ~~A~~advisory ~~C~~committee ~~Chairmen~~chairs.

(c) The records ~~shall be maintained at~~must be posted on the judiciary's rulemaking web site, except for general correspondence relating to rule changes. This correspondence is maintained by the Administrative Office of ~~the~~ United States Courts ~~for a minimum of two years~~ and ~~shall be~~is available for public inspection ~~during reasonable office hours. Thereafter the records may be transferred to a Government Records Center in accordance with applicable Government retention and disposition schedules.~~

~~c. Copies of records shall be furnished to any person upon payment of a reasonable fee for the cost of reproduction.~~

PROCEDURES PRESENTLY IN EFFECT

PROCEDURES FOR THE CONDUCT OF BUSINESS BY THE JUDICIAL CONFERENCE COMMITTEES ON RULES OF PRACTICE AND PROCEDURE

Scope

These procedures govern the operations of the Judicial Conference Committee on Rules of Practice, Procedure, and Evidence (Standing Committee) and the various Judicial Conference Advisory Committees on Rules of Practice and Procedure in drafting and recommending new rules of practice, procedure, and evidence and amendments to existing rules.

Part I - Advisory Committees

1. Functions

   Each Advisory Committee shall carry on "a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use" in its particular field, taking into consideration suggestions and recommendations received from any source, new statutes and court decisions affecting the rules, and legal commentary.

2. Suggestions and Recommendations

   Suggestions and recommendations with respect to the rules should be sent to the Secretary, Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts, Washington, D.C. 20544, who shall, to the extent feasible, acknowledge in writing every written suggestion or recommendation so received and shall refer all suggestions and

recommendations to the appropriate Advisory Committee. To the extent feasible, the Secretary, in consultation with the Chairman of the Advisory Committee, shall advise the person making a recommendation or suggestion of the action taken thereon by the Advisory Committee.

3. Drafting Rules Changes

   a. An Advisory Committee shall meet at such times and places as the Chairman may authorize. All Advisory Committee meetings shall be open to the public, except when the committee so meeting, in open session and with a majority present, determines that it is in the public interest that all or part of the remainder of the meeting on that day shall be closed to the public and states the reason for closing the meeting. Each meeting shall be preceded by notice of the time and place of the meeting, including publication in the Federal Register, sufficient to permit interested persons to attend.

   b. The reporter assigned to each Advisory Committee shall, under the direction of the Committee or its Chairman, prepare initial draft rules changes, "Committee Notes" explaining their purpose and intent, copies or summaries of all written recommendations and suggestions received by the Advisory Committee, and shall forward them to the Advisory Committee.

   c. The Advisory Committee shall then meet to consider the draft proposed new rules and rules amendments, together with Committee Notes, make revisions therein, and submit them for approval of publication to the Standing Committee, or its Chairman, with a written report explaining the Committee's action, including any minority or other separate views.

4. Publication and Public Hearings

a. When publication is approved by the Standing Committee, the Secretary shall arrange for the printing and circulation of the proposed rules changes to the bench and bar, and to the public generally. Publication shall be as wide as practicable. Notice of the proposed rule shall be published in the Federal Register and copies provided to appropriate legal publishing firms with a request that they be timely included in their publications. The Secretary shall also provide copies to the chief justice of the highest court of each state and, insofar as is practicable, to all individuals and organizations that request them.

b. In order to provide full notice and opportunity for comment on proposed rule changes, a period of at least six months from the time of publication of notice in the Federal Register shall be permitted, unless a shorter period is approved under the provisions of subparagraph d of this paragraph.

c. An Advisory Committee shall conduct public hearings on all proposed rules changes unless elimination of such hearings is approved under the provisions of subparagraph d of this paragraph. The hearings shall be held at such times and places as determined by the chairman of the Advisory Committee and shall be preceded by adequate notice, including publication in the Federal Register. Proceedings shall be recorded and a transcript prepared. Subject to the provisions of paragraph six, such transcript shall be available for public inspection.

d. Exceptions to the time period for public comment and the public hearing requirement may be granted by the Standing Committee or its chairman when the Standing Committee or its chairman determines that the administration of justice requires that a proposed rule change should be expedited and that appropriate public notice and comment may be achieved by a shortened comment period, without public hearings, or both. The Standing Committee may eliminate the public notice and comment requirement if, in the case of a technical or conforming amendment, it determines that notice and comment are not appropriate or necessary. Whenever such an exception is made, the Standing Committee shall advise the Judicial Conference of the exception and the reasons for the exception.

5. Subsequent Procedures

a. At the conclusion of the comment period the reporter shall prepare a summary of the written comments received and the testimony presented at public hearings. The Advisory Committee shall review the proposed rules changes in the light of the comments and testimony. If the Advisory Committee makes any substantial change, an additional period for public notice and comment may be provided.

b. The Advisory Committee shall submit proposed rules changes and Committee Notes, as finally agreed upon, to the Standing Committee. Each submission shall be accompanied by a separate report of the comments received and shall explain any changes made subsequent to the original publication. The submission shall also include minority views of Advisory Committee members who wish to have separate views recorded.

6. Records

a. The Chairman of the Advisory Committee shall arrange for the preparation of minutes of all Advisory Committee meetings.

b. The records of an Advisory Committee shall consist of the written suggestions received from the public; the written comments received on drafts of proposed rules, responses thereto, transcripts of public hearings, and summaries prepared by the reporter; all correspondence relating to proposed rules changes; minutes of Advisory Committee meetings; approved drafts of rules changes; and reports to the Standing Committee. The records shall be maintained at the Administrative Office of the United States Courts for a minimum of two years and shall be available for public inspection during reasonable office hours. Thereafter the records may be transferred to a Government Records Center in accordance with applicable Government retention and disposition schedules.

c. Any portion of minutes, relating to a closed meeting and made available to the public, may contain such deletions as may be necessary to avoid frustrating the purposes of closing the meeting as provided in subparagraph 3a.

d. Copies of records shall be furnished to any person upon payment of a reasonable fee for the cost of reproduction.

Part II - Standing Committee

7. Functions

The Standing Committee shall coordinate the work of the several Advisory Committees, make suggestions of proposals to be studied by them, consider proposals recommended by the Advisory Committees, and transmit such proposals with its recommendation to the Judicial Conference, or recommit them to the appropriate Advisory Committee for further study and consideration.

8. Procedures

a. The Standing Committee shall meet at such times and places as the Chairman may authorize. All Committee meetings shall be open to the public, except when the committee so meeting, in open session and with a majority present, determines that it is in the public interest that all or part of the remainder of the meeting on that day shall be closed to the public and states the reason for closing the meeting. Each meeting shall be preceded by notice of the time and place of the meeting, including publication in the Federal Register, sufficient to permit interested persons to attend.

b. When an Advisory Committee's final recommendations for rules changes have been submitted, the Chairman and Reporter of the Advisory Committee shall attend the Standing Committee meeting to present the proposed rules changes and Committee Notes.

c. The Standing Committee may accept, reject, or modify a proposal. If a modification effects a substantial change,

the proposal will be returned to the Advisory Committee with appropriate instructions.

d. The Standing Committee shall transmit to the Judicial Conference the proposed rules changes and Committee Notes approved by it, together with the Advisory Committee report. The Standing Committee's report to the Judicial Conference shall include its recommendations and explain any changes it has made.

9. Records

a. The Secretary shall prepare minutes of all Standing Committee meetings.

b. The records of the Standing Committee shall consist of the minutes of Standing and Advisory Committee meetings, reports to the Judicial Conference, and correspondence concerning rules changes including correspondence with Advisory Committee Chairmen. The records shall be maintained at the Administrative Office of the United States Courts for a minimum of two years and shall be available for public inspection during reasonable office hours. Thereafter the records may be transferred to a Government Records Center in accordance with applicable Government retention and disposition schedules.

c. Copies of records shall be furnished to any person upon payment of a reasonable fee for the cost of reproduction.

TAB
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Operation of the Federal Privacy Rules

A Report to the Judicial Conference Standing Committee on the Rules of Practice and Procedure by the Subcommittee on Privacy

I. Introduction

A. The 2007 Adoption of the Privacy Rules

The E-Government Act of 2002 required the federal judiciary to formulate rules "to protect the privacy and security concerns relating to electronic filing of documents" in federal courts.[1] In response to this mandate, the Judicial Conference Committee on the Rules of Practice and Procedure (the "Standing Committee") established a Privacy Subcommittee, composed of a representative from each of the Advisory Rules Committees and representatives from the Committee on Court Administration and Case Management (CACM), to make rule recommendations. That Subcommittee's proposals for amendments to the Federal Rules of Civil Procedure,[2] Criminal Procedure,[3] Bankruptcy Procedure[4] and Appellate Procedure[5] (referred to collectively hereafter as "the "Privacy Rules") were adopted by the Standing Committee and went into effect on December 1, 2007. The Standing Committee recognized a likely need to review the operation of the Privacy Rules in the near future given the challenges of implementation, rapid technological advances, and ongoing concerns about the proper balance between public access to court proceedings and various claims to privacy.

B. Request for a Status Report on the Operation of the Privacy Rules

Since the Privacy Rules took effect, members of all three branches of government and of the public have raised questions about implementation and operation. Meanwhile, courts and litigants have gained practical experience in using the Privacy Rules in the context of expanding electronic access to court proceedings under CM/ECF and PACER. Thus, when in 2009, the Executive Committee of the Judicial Conference directed the Standing

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[1] Pub. L. 107-347, § 205(c)(3).

[2] Fed.R. Civ. P. 5.2.

[3] Fed.R. Crim. P. 49.1.

[4] Fed.R. Bkrtcy. P. 9037.

[5] Fed.R.App. P. 25(a)(5).

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Committee to report on the operation of the Privacy Rules, the Standing Committee revived its Privacy Subcommittee to conduct the necessary investigation. Once again, each Advisory Committee designated a member to serve on the Privacy Subcommittee, with the Advisory Committee Reporters serving as consultants. CACM also designated four members to serve on the Subcommittee, with former CACM Chair, Judge John Tunheim, serving as a member-at-large.

C. Principles Controlling Review

In undertaking its review, the Privacy Subcommittee recognized that its task was discrete. It was not charged with developing new policy, but only with assessing how the Privacy Rules operate consistent with existing policy established by the Judicial Conference (largely on the basis of extensive research and consideration by CACM). This policy generally favors making the same information that is available to the public at the courthouse available to the public electronically.[6]

In urging this "public is public" policy, CACM was mindful of an irony: that a system of public access that required a trip to the courthouse to see court filings, while outdated, may have afforded litigants, witnesses, and jurors more privacy – "practical obscurity" – than a system of easy electronic access. CACM further recognized that some persons availing themselves of electronic access might have illegitimate motives: identity theft, harassment, and even obstruction of justice. Nevertheless, CACM concluded that the judiciary's access policy should generally draw no distinction between materials available at the courthouse and online. This policy not only promotes long-standing principles of judicial transparency; it ensures against profiteering in information available only at the courthouse by entrepreneurs who could gather such information and market it over the Internet. CACM determined that privacy interests in electronically available information could be protected sufficiently by imposing redaction obligations on parties filing documents containing private information, specifically, social-security numbers, financial-account numbers, dates of birth, names of minor children, and, in criminal cases, home addresses.

The Standing Committee implemented these policy determinations in drafting the Privacy Rules. The Privacy Subcommittee's review of the operation of these rules is

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[6] The Judicial Conference's privacy policy incorporated several policies, including those adopted by the Conference in 2001 and 2003 regarding electronic public access to appellate, bankruptcy, civil, and criminal case files (JCUS-SEP/OCT 01, pp. 48-50; JCUS-SEP 03, pp. 15-16), as well as guidance with respect to criminal case files (JCUS-MAR 04, p. 10).

informed by the judiciary's continued adherence to the stated policy.[7]

II. Organization and Work of the Privacy Subcommittee

A. Subjects Addressed By Working Groups

The Privacy Subcommittee quickly identified four general subjects for consideration and constituted itself into corresponding working groups to address each matter.

1. Implementation of the Privacy Rules

Members of Congress and of the public have questioned how effectively the courts have implemented the Privacy Rules, with particular concern for the appearance of unredacted social-security numbers in some court filings. The Privacy Subcommittee has reviewed this matter. It has further reviewed the efforts of individual courts and the Administrative Office to educate attorneys about their redaction responsibilities. The Subcommittee has reviewed local court rules addressing privacy concerns to determine their compliance with the national Privacy Rules. Finally, the Subcommittee has considered other procedures that might be implemented better to protect private information in court files.

2. Privacy Concerns in Criminal Cases

In criminal cases, a particular privacy concern has arisen with respect to electronic access to plea and cooperation agreements, aggravated by the emergence of various websites publicizing such information, of which *whosarat.com* is simply one example. In response to a Department of Justice request for a judicial policy denying any electronic access to plea agreements, CACM issued a March 2008 report to the Judicial Conference recommending against such a policy because it would deny public access to all plea agreements, including those that did not disclose cooperation.[8] In so reporting, CACM noted that the district courts vary widely in affording public access to plea and cooperation agreements. Thus, the Privacy Subcommittee has reviewed and evaluated these approaches with a view toward facilitating any future consideration of a uniform policy or rule.

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[7] The Privacy Rules provide exceptions for Social Security cases and immigration cases. These cases are not subject to the redaction requirements, but non-parties can obtain access only at the courthouse. The Privacy Subcommittee reviewed the continuing viability of these exceptions, and its conclusions are stated later in this report.

[8] *See* Report of CACM to Judicial Conference, March 2008 at 9.

3. Electronic Access to Court Transcripts

Consistent with the E-Government Act, clerks of court are responsible for placing transcripts of court proceedings on PACER. The Judicial Conference has made clear that it is the parties, not the clerks, who are responsible for making necessary redactions from such transcripts. The Privacy Subcommittee has considered the operation of this division of labor in practice as well as the efforts made by courts and parties to minimize references to private information in records that will eventually be transcribed. Special attention has been given to *voir dire* transcripts containing private information about jurors.

4. Possible Amendments to the Privacy Rules

The Privacy Subcommittee was asked to consider whether the redaction requirements of the existing Privacy Rules needed to be expanded to include more information, such as alien registration numbers, driver's license numbers, mental health matters, etc. At the same time, the Subcommittee was asked to consider whether the Privacy Rules should be contracted to eliminate or modify two exceptions to the basic "public is public" policy for social security and certain immigration cases.

B. Information Obtained by the Privacy Subcommittee

In conducting its review, the Privacy Subcommittee made extensive efforts to obtain information about how the Privacy Rules were working and how they might be improved. In addition to considering existing sources of information, the Subcommittee conducted its own surveys of court filings and of persons experienced with the operation of the Privacy Rules. Finally, the Subcommittee conducted a conference at which it heard from over thirty persons – judges, court personnel, attorneys, legal scholars, and media representatives – who expressed diverse views on the issues of public access to court filings and the need to protect private information. The results of the Subcommittee's efforts, which should assist in the future development of policies and rules regulating access to private information in court filings, are detailed in multiple attachments to this report. The Subcommittee here briefly describes its research efforts.

1. Review of Existing Report on Court Filings by PublicResource.org

A report published at PublicResource.org indicates that social-security numbers remain unredacted in a number of publicly available court files. With the assistance of Henry Wigglesworth of the Administrative Office, the Subcommittee conducted an in-depth analysis of the data contained in the PublicResource.org report. That analysis is attached to this Report. As the attachment indicates, very few cases (relative to the large number of

court filings) in fact revealed unredacted social-security numbers. Most of the disclosures cited by PublicResource.org related to filings made before the Privacy Rules were enacted, while others reflected a common disclosure made multiple times in the same case.

2. Survey of Court Filings for Unredacted Social-Security Numbers

At the request of the Privacy Subcommittee, the Federal Judicial Center conducted its own survey of court filings from a two-month period in 2010 to determine the frequency with which unredacted social-security numbers appear in court filings. The FJC found roughly 2400 documents — out of 10 million documents searched — with unredacted social-security numbers that did not appear to be subject to the exceptions to redaction provided by the Privacy Rules. Joe Cecil, who conducted the principal research, concluded that while the number of unredacted documents should not be ignored, it was proportionally minimal and did not indicate a widespread failure in the implementation of the Privacy Rules.[9]

3. Review of Local Rules

With the assistance of Heather Williams of the Administrative Office, the Privacy Subcommittee collected and reviewed all local rules governing redaction of private information in court filings. The Subcommittee determined that most local rules are intended to educate attorneys about their redaction obligations consistent with the Privacy Rules. The Subcommittee identified only a few local rules that conflict with the Privacy Rules, generally by requiring more redactions than the national rules. Such conflicts are easily addressed by an appropriate communication from the Standing Committee to the district chief judge.

4. Survey of Practical Experience with Privacy Rules

The Subcommittee early determined a need to know how those who regularly work with the Privacy Rules view their operation. With the assistance of Joe Cecil and Meghan Dunn of the FJC, the Subcommittee prepared and sent out surveys to a large number of

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[9] Joe Cecil provides the following illustration:

> If those 2,400 documents were the equivalent of one sheet of paper, and those papers were piled on top of each other, the stack of 2,400 sheets of paper would be just over nine and a half inches high. That sounds like a lot, but keep in mind that if we stack up 10 million sheets of paper to represent the almost 10 million documents that we searched, the stack of 10 million sheets of paper would be well over twice the height of the Empire State Building.

randomly selected district judges, clerks of court, and attorneys with electronic filing experience. The survey sought experiential information and invited opinions on the need for any rules changes. The results of this survey – including a description of methodology — are attached to this report. The survey data indicates that the Privacy Rules are generally working well and do not require amendment, but that continuing education efforts are necessary to ensure compliance.

5. Fordham Conference

The Privacy Subcommittee asked its reporter, Fordham Professor Daniel Capra, to identify persons with diverse views on the four areas of identified interest and to secure their participation at an all-day conference at Fordham Law School on April 13, 2010. Thanks to Professor Capra's efforts and Fordham's hospitality, the Subcommittee heard panel discussions on

- the broad question of transparency and privacy relating to court filings by a judge and various legal scholars;
- the exemption of immigration cases from electronic filing by private and public attorneys, a legal scholar, a member of the media, and a court representative;
- the present implementation of the Privacy Rules by a judge, a legal scholar, a member of the media, an AO representative, and a clerk of court;
- electronic access to plea and cooperation agreements and the need for a uniform rule on this subject by a prosecutor, criminal defense lawyers, a legal scholar, and a Bureau of Prisons official;
- the same subject by judges from districts affording different degrees of public access to such information; and
- electronic access to transcripts, including *voir dire* transcripts by a judge, two United States Attorneys, a First Amendment lawyer, and a jury clerk.

A transcript of these proceedings is attached to this report and will be published in the Fordham Law Review. Insights gained at the the Fordham Conference inform all aspects of the findings and recommendations contained in this Subcommittee report.

III. Findings

A. Implementation of the Privacy Rules

1. Overview

The Privacy Subcommittee was charged with reviewing and reporting on the operation of the existing Privacy Rules throughout the federal courts, with particular attention to protection of the specified private identifier information in electronic filings available on PACER. The Subcommittee reports considerable success in the implementation of these Rules. At the same time, the Subcommittee identifies a continuing need for education efforts, monitoring, and study to ensure continued effective implementation.

2. Specific Findings

a. Administrative Office Efforts

The Privacy Subcommittee reports that the Administrative Office has made significant and effective efforts to implement the Privacy Rules' redaction requirements, while still providing the public with remote electronic access to court filings. For example:

- In 2003, the AO modified CM/ECF so that only the last four digits of a social security-number can be seen on the docket report in PACER. In the same vein, in May 2007 the AO's Forms Working Group, comprising judges and clerks of court, reviewed over 500 national forms to ensure that they did not require personal-identifier information. The Working Group identified only six forms that required personal identifier information, and those forms were revised or modified to delete those fields.

- In August 2009, the AO asked the courts to implement a new release of CM/ECF specifically designed to heighten a filer's awareness of redaction requirements. The CM/ECF log-in screen now contains a banner notice of redaction responsibility and provides links to the federal rules on privacy. CM/ECF users must check a box acknowledging their obligation to comply with the Privacy Rules redaction requirements in order to complete the log-in process. CM/ECF also displays another reminder to redact each and every time a document is filed.

- The Judicial Conference approval of a pilot project providing PACER access to audio files of court hearings raised concerns about audio disclosure of personal information. The eight courts participating in the pilot project employ various means

to discourage attorneys and litigants from introducing personal identifier information except where absolutely necessary. Lawyers and litigants are also warned that they could and should request that recorded proceedings containing information covered by the Privacy Rules or other sensitive matters not be posted, with the final decision made by the presiding judge. The AO has endeavored to ensure that courts and litigants are mindful of their redaction obligations as they participate in this project.

b. Efforts by the Courts

(1) Generally

All aspects of the Subcommittee's review confirm that federal courts throughout the country are undertaking vigorous and highly effective efforts to ensure compliance with the Privacy Rules generally and with the requirement that personal identifier information be redacted from or never included in court filings in particular. These efforts include:

- ECF training programs for both lawyers and non-attorney staff at law firms. The extension of training to staff is important because experience indicates that redaction failures, while infrequent, are frequently the result of filings made by staff who are unaware of the Rules requirements.

- ECF newsletters containing reminders about the redaction requirements.

- Making counsel aware of the Privacy Rules at the initial court conference and at evidentiary hearings, and also specifically advising counsel against unnecessary use of personal identifiers.

- Discouraging counsel from asking questions that would elicit testimony that would disclose private identifier information.

- Requiring redaction of exhibits containing personal identifier information as a condition of admissibility.

- Providing notices at counsel's table that describe the Rules' redaction requirements and that caution counsel not to put unredacted personal identifier information into the record.

- Reading a prepared statement to witnesses cautioning against disclosure of private identifier information.

- Assisting *pro se* filers, especially in bankruptcy cases, in redacting personal identifier information.

- Remedial action by clerks and courts when unredacted private identifiers are found, including consultation with filers who are repeat violators.[10]

(2) Social-Security Numbers in Court Filings

As discussed in an earlier section of this Report, surveys conducted by the AO and the FJC found only a small number of instances in which unredacted social-security numbers have been accessible online in violation of the Privacy Rules. Of the 10 million recently filed documents that the FJC researchers reviewed, less than .03 percent were found to contain unredacted social-security numbers. And of those, 17 percent appeared to be subject to some exception to redaction, such as waiver by the filing party.

The results indicate that such redaction failures as do occur are generally inadvertent. Some lawyers and staff remain unaware of the redaction policy. The results also indicate that the number of redaction failures is decreasing with time as courts continue and expand education efforts. The Privacy Subcommittee concludes that no redaction system can be error-free; nevertheless, continued education efforts should ensure that mistakes are rare and that almost all information subject to redaction is in fact removed from court filings.

(3) Implementation Challenges in Bankruptcy Cases

The Subcommittee's research indicates that most identified Privacy Rules violations occurred in bankruptcy cases. That is not surprising given the high number of first-time bankruptcy filers, the need for disclosure of substantial personal information in bankruptcy filings, and the probability that exhibits and proofs of claim will contain private identifiers. The Privacy Subcommittee reports that while the number of disclosures of unredacted personal identifiers is proportionately higher in bankruptcy cases, the actual number of

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[10] The Privacy Subcommittee unanimously agrees with the basic premise of the Privacy Rules — that the redaction obligation is on the parties, not clerks or judges. Nonetheless, the Subcommittee notes and applauds the efforts of clerks and courts in taking remedial action when a failure to redact has been discovered.

disclosures remains small.[11] This is a tribute to the court efforts described generally in the preceding subsection, which include efforts by the bankruptcy courts.[12] The Subcommittee is, therefore, confident that, as educational efforts continue and other initiatives are pursued, the instances of errors in filing unredacted personal identifier information in bankruptcy cases will be reduced even further.

(4) Use of Local Rules

The Privacy Subcommittee conducted a comprehensive review of local court rules intended to implement the national Privacy Rules. The Subcommittee recognizes that local rules can have some value in educating filers about their redaction obligations. But local rules cannot impose obligations inconsistent with national rules. *See, e.g.,* Fed.R.Civ.P. 83(a). The Privacy Subcommittee has identified a few local rules inconsistent with the national Privacy Rules, notably, local rules demanding the redaction of *more* information than required by the national rules. National rules are a product of a carefully considered policy that calibrates the balance between the judiciary's commitment to public access and its protection of personal privacy. Local rules requiring more information to be redacted alter that balance.

An attached report identifies local rules that the Privacy Subcommittee finds inconsistent with the Privacy Rules. It recommends that the procedure employed in the last local rules project be employed here: the Standing Committee should inform the chief judge of a district with an inconsistent rule, and the Standing Committee should work together with the chief judge to remedy the situation.

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[11] Notably, Bankruptcy Rule 1005, as amended in 2003, now provides that the petitioner disclose only the last four digits of the petitioner's social-security number. Other Bankruptcy Rules require disclosure of the full social-security number, but that information is not available to the public. See, e.g., Bankruptcy Rule 1007(f), which requires an individual debtor to "submit" to the clerk, rather than "file" a verified statement containing an unredacted social-security number. At this point, in a bankruptcy case as in any other, unredacted social-security numbers are not accessible to the public unless permitted by one of the exceptions to the Privacy Rules.

[12] A paper prepared by Hon. Elizabeth Stong and submitted for the Fordham Privacy Conference provides a helpful description of how the Privacy Rules are implemented in the Eastern District of New York Bankruptcy Court. That paper is attached to this Report.

3. Possible Future Initiatives

Given inevitable advances in technology, the Subcommittee suggests that future attention be given to two possible developments.

- Current technology permits detection of unredacted social-security numbers in court filings, as the Federal Judicial Center did in the attached report. Current technology does not permit a comparable search for other unredacted personal identifiers, such as names of minor children. Nevertheless, at the Fordham Conference, Professor Edward Felten predicted that future technological developments might well provide such capacity. The Privacy Subcommittee recommends that the AO continue to monitor the state of search technology.

- Technology might also make it easier for a filing party to search for material to redact in a transcript or in a document that the party is going to file. For example, a pdf document is obviously easier to search if it is in searchable format. More broadly, as stated above, software might be developed in the future that would make it easier to search exhibits, immigration records, or indeed any document. While it is not the obligation of the courts to redact filings for litigants, to the extent the courts are already engaged in extensive and highly effective educational efforts, they might be encouraged to include relevant technological advances in the information conveyed.

While such future initiatives should be pursued, the Privacy Subcommittee concludes that the most important means of ensuring effective implementation of the Privacy Rules is to continue the current efforts to educate filers and other court participants about the need (a) to redact private identifiers from documents that must be filed, and (b) to avoid disclosure of private identifiers except when absolutely necessary.

Finally, the Subcommittee suggests continued monitoring of the implementation of the Privacy Rules. Specifically, a study of court filings for unredacted personal identifiers, such as that conducted by the Federal Judicial Center for this report, should be conducted on a regular basis, possibly every other year.

B. Criminal Cases: Affording Electronic Access to Plea and Cooperation Agreements

1. Overview

The Privacy Subcommittee quickly identified electronic public access to plea and

cooperation agreements in criminal cases as an area warranting careful review. Survey information and the Fordham Conference indicate that easy electronic access to such information, coupled with Internet sites committed to its collection and dissemination, have heightened concerns about retaliation against cooperators and prosecutors' ability to secure cooperation.

The Privacy Subcommittee views the recruitment and protection of cooperators as matters generally committed to the executive branch. At the same time, it recognizes judicial responsibility to minimize opportunities for obstruction of justice. How to do so without compromising public access to court proceedings – especially proceedings that may be of particular public interest, including the treatment of defendants who cooperate with the prosecution – admits no easy answer.

The Subcommittee has identified varied approaches by the district courts to the public posting of plea and cooperation agreements and general court resistance to a uniform national rule. To the extent the Department of Justice, some defense attorneys, and legal scholars support a national rule, the Subcommittee has identified no consensus on what that rule should be. Nor can it presently identify a "best practice."

The Subcommittee suggests that CACM and the Standing Committee encourage district courts to continue the discussion begun at the Fordham Conference about the relative advantages of various practices in order to determine if a consensus emerges in favor of a particular practice or rule. It further suggests that courts might consider methods, where appropriate, to avoid permanent sealing of plea or cooperation agreements — possibly by providing for such orders to expire at a fixed time subject to extension by the court upon further review.

2. Specific Findings

a. Existing District Court Practices for Posting Plea and Cooperation Agreements

The Privacy Subcommittee identified various approaches by the district courts in publicly posting plea and cooperation agreements,[13] which are summarized here in

[13] A chart of the various approaches, prepared by Susan Del Monte of the Administrative Office, is attached to this Report.

descending order of accessibility:

- Full electronic access to plea and cooperation agreements, except when sealed on a case-by-case basis.

- No remote electronic access to plea or cooperation agreements, but with such agreements fully available at the courthouse unless sealed in an individual case.

- Full electronic access to plea agreements, but with a separate sealed document filed in every case indicating whether or not the defendant has entered into a cooperation agreement.[14]

- No public access to plea or cooperation agreements either electronically or at the courthouse, because these documents are not made part of the case file.

b. Concerns with the Identified District Court Practices

At the Fordham Conference, prosecutors, defense counsel, and legal scholars expressed concerns about the various district court approaches. Again, working from the least to most restrictive approach, these concerns are summarized as follows:

- Full remote access to plea agreements with sealing of cooperation information in individual cases means a sealing order effectively raises a red flag signaling cooperation.

- Prohibiting electronic access to plea and cooperation agreements but allowing courthouse access to such documents encourages the development of cottage industries to acquire and post such information (often for sale), the very concern that prompted the Judicial Conference to adopt the "public is public" policy.

- Posting plea agreements that say nothing about any cooperation, or posting documents that use the same boilerplate language whether a party is cooperating or not, result in misleading court documents and preclude public scrutiny of how the judicial system treats cooperating defendants.

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[14] This approach is intended to minimize the ability to identify a cooperating defendant from the presence on the public record of sealed document. The Subcommittee notes the possibility of such identification from other public record entries, such as delayed or frequently adjourned sentencing proceedings.

- Not posting plea or cooperation agreements at all hampers public scrutiny not only of the treatment of cooperators but of the process by which guilty pleas are obtained.

Some Conference participants also raised a general concern: that as defendants from different districts found themselves housed together in the federal prison system, some might misconstrue records from districts with which they were not familiar. For example, a prisoner from a district where individual sealing signaled likely cooperation might mistakenly infer that every prisoner with a sealed record entry was a cooperator without realizing that some districts made a sealed entry in every case to ensure no difference between the dockets of cooperators and non-cooperators.

c. Support for a Uniform Rule

While prosecutors, most defense attorneys, and legal scholars urged a uniform rule for posting plea and cooperation agreements, they did not agree as to the content of that rule. Some urged few, if any, limits on public access to such agreements, while others supported strict limitations.[15]

The Subcommittee has considered the uniform rule proposal recommended by Professor Caren Myers in her article, *Privacy, Accountability, and the Cooperating Defendant: Towards a new Role for Internet Access to Court Records,* 62 Vand. L. Rev. 921 (2009), a copy of which is attached to this Report. Professor Myers, a former federal prosecutor, urges a rule that would (1) generally deny public access to individual plea and cooperation agreements except where ordered by the court on a case-by-case basis; and (2) provide public access to plea and cooperation information in the aggregate, without identifying individual defendants. As Professor Myers explained at the Fordham Conference, she thinks that in most cooperation cases, the risk to a defendant from public disclosure of the defendant's cooperation far outweighs any public interest in knowing that the defendant decided to cooperate. To the extent there is a public interest in knowing what kinds of deals the government is making with cooperators and what kinds of benefits they are receiving from the courts, Professor Myers submits that information can be provided anonymously or in the aggregate.

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[15] Because the Department of Justice has historically supported a uniform rule with strict limitations, the Subcommittee, early in its work, invited DOJ to propose a draft rule as a basis for Subcommittee discussion. DOJ continues to work on the issue, including the viability of a national rule, but has not at this time submitted draft language.

Some participants at the Fordham Conference questioned the sweep of Professor Myers's proposal, which would severely limit public access to plea and cooperation agreements in individual cases. They also questioned the effectiveness of such a rule in protecting cooperators, given the ability to infer cooperation from delayed or adjourned sentences or from the sealing of sentencing minutes, in whole or in part.

d. Judicial Opposition to a Uniform National Rule

At the Fordham Conference, the Subcommittee also heard the views of judges drawn from districts pursuing each of the identified approaches. Their thoughtful responses to the concerns and suggestions of lawyers and legal scholars and their explanations for how and why their courts employed various approaches to posting plea and cooperation agreements were particularly informative. This discussion revealed that the various practices employed by courts with respect to plea and cooperation agreements were not casually developed. Rather, district courts have carefully considered the question of public access to such agreements, with individual courts soliciting the views of attorneys and other interested parties and engaging in substantial internal discussion before settling on an approach. The discussion further revealed that each district is strongly committed to its chosen approach, convinced that the approach satisfactorily balances the twin concerns of public access and cooperator safety, and resistant to the idea of a uniform national rule (particularly if it would differ from its own practice).

e. Subcommittee Conclusions

The Subcommittee concludes that no best practice has yet emerged supporting a uniform national rule with respect to granting public access to plea and cooperation agreements. The Subcommittee suggests that CACM and the Standing Committee encourage district courts to continue the discussion begun at the Fordham Conference as to the relative benefits of various practices, with a view toward determining if a consensus emerges in the coming years as to a best practice that might provide a basis for a uniform national rule.

At the same time, the Subcommittee is of the view that the rationale for limiting public access to such agreements – cooperator safety – does not necessarily support the permanent sealing of most cooperation agreements, much less plea agreements. Courts limiting access to such agreements might consider whether it is appropriate to include a "sunset" provision that allows sealing orders within a time prescribed either automatically for every case or specifically in individual cases with further sealing dependent on a court determination of a continued need.

C. Redacting Electronic Transcripts

1. Overview

Judicial Conference policy requires that court transcripts be posted on PACER within 90 days of delivery to the court clerk.[16] The Privacy Subcommittee has considered the judiciary's ability to comply with this policy while ensuring the redaction of personal identifier information as required by the Privacy Rules. The Subcommittee reports that the redaction of private information from transcripts on PACER is still a work in progress. Nevertheless, that work appears to be going well. Because the process relies on the vigilance and sensitivity of lawyers, judges, and court staff, continuing education is important to ensure these persons' awareness of the need to minimize record references to private identifier information and to redact such information when it appears in transcripts.

The Privacy Subcommittee has separately considered the privacy issues implicated by the electronic posting of *voir dire* transcripts, which may reveal personal information about potential jurors not required to be redacted by the Privacy Rules. Such information could be used to retaliate against jurors and could compromise the identification of prospective jurors able to serve without fear or favor. Because the Judicial Conference has recently provided the courts with guidance as to how to balance the competing interests in public access to *voir dire* and juror privacy, the Subcommittee suggests that the Standing Committee request CACM to monitor the operation of these guidelines to determine the need for any further policy action.

2. Specific Findings

a. The Redaction of Electronically Posted Transcripts

(1) Judicial Conference Policy for Electronic Filing

Consistent with the mandate of the E-Government Act to create a complete electronic file in the CM/ECF systems for every federal case, in 2003, the Judicial Conference, as stated above, adopted a policy requiring courts electronically to post transcripts of court proceedings within 90 days of their receipt by the clerk of court. In the 90-day period preceding electronic filing, each party's attorney (or each *pro se* party) must work with the

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[16] See JCUS Sep. 07 at 7. Extensive guidance on the implementation of the transcripts policy is found in a letter to clerks from Robert Lowney of the AO, dated January 30, 2008. See also Report of CACM to the Judicial Conference on Electronic Transcripts, June 2008.

court reporter according to a prescribed schedule to ensure that any electronically filed transcript is properly redacted of personal identifier information consistent with the requirements of the Privacy Rules.

(2) Survey Results Indicate General Compliance with Transcript Policy

The FJC survey reveals that, as of December 2009, all bankruptcy courts and all but a few district courts are posting trial transcripts on PACER, though most courts do not routinely post deposition transcripts. A majority of the surveyed courts have established local rules or policies to address privacy concerns arising from the electronic posting of trial transcripts. The number of clerks and judges who reported complaints about personal identifier information appearing in electronically filed transcripts is small.

The survey further revealed that clerks of court, judges, and lawyers are actively engaged in ensuring proper redaction of electronically filed transcripts. Specifically, a significant number of clerks reported that their courts require that transcripts be filed as text-searchable PDFs to facilitate redactions. Other clerks reported using software programs specifically developed to identify personal identifier information. Still more clerks expressed interest in the development of such programs.

The survey revealed that judges employ various means to educate counsel about their redaction obligations with respect to electronically filed transcripts. A common practice is to provide counsel with a card urging that personal identifier information not be elicited on the record and that any such information that appears in transcripts be redacted. Similar guidance is provided to counsel at the initial case conference, in formal written orders, and through communication with chambers staff. Judges also intervene to cut off a line of questions that appears to be eliciting personal identifier information. Judges report that they also rely on chambers staff and docket clerks to alert them to the appearance of personal identifier information in a transcript that will require redaction.

The survey confirms general attorney awareness of the Privacy Rules' redaction requirements. Two-thirds of attorneys responding reported that they redacted personal identifier information before transcripts were electronically filed. Half of attorneys surveyed reported that they actively sought to avoid eliciting personal identifier information on the record. Nevertheless, because 17% of responding attorneys reported that they made no effort to redact transcript before electronic filing, there is plainly a need for continuing education and monitoring in this area.

(3) The Fordham Conference

Participants at the Fordham Conference reinforced the conclusions drawn from the survey: (a) that courts and attorneys are striving to avoid disclosure of personal identifying information on the record, and (b) that the redaction procedure for electronic transcripts adopted by the Judicial Conference is generally working as intended.

Two United States Attorneys stated that although the redaction requirements were initially met with some displeasure by their Assistants, experience had shown that the required procedures were workable and not unduly burdensome. One of the United States Attorneys reported developing a standard form to facilitate the specification of pages and line numbers where personal identifier information needed to be redacted.

Both government and private attorneys stated that they generally sought to avoid eliciting personal identifier information in proceedings that could be transcribed. They agreed that there was rarely a need for such information, and that attorneys could usually avoid personal information coming into the record by applying some forethought to questions asked and documents introduced into evidence. The lawyers discussed the value of reaching advance agreements with opposing counsel to minimize the introduction of personal identifier information.

Some Conference participants identified concern that parties in civil cases were urging court reporters to redact from transcripts confidential information – such as proprietary information – not falling within the categories specified in Fed. R. Civ. P. 5.2(a). Parties and court reporters need to be made aware that redactions beyond those specified in Rule 5.2(a) require a court order pursuant to Rule 5.2 (e) and its counterparts.

b. The Electronic Filing of *Voir Dire* Transcripts

(1) Concerns Attending *Voir Dire* Transcripts

Electronic filing of *voir dire* transcripts raises unique concerns and, thus, was considered separately by the Privacy Subcommittee. *Voir dire* may elicit a range of personal, sensitive, or embarrassing information from a juror that need not be redacted under the Privacy Rules. The possibility of such information making its way from PACER access to broad disclosure on the Internet poses real risks for juror harassment or even retaliation. Many jurors may presently be unaware that *voir dire* transcripts will be electronically filed. With such awareness, courts may find it more difficult to identify potential jurors able to serve without fear or favor.

Because it is the court that summons persons for jury service, the judiciary's responsibility to safeguard jurors is arguably stronger than its responsibility to safeguard persons who enter into cooperation agreements with the executive branch. Nevertheless, some circuit precedent holds that *voir dire* proceedings should generally be open to public scrutiny. Further, if the transcript of an open *voir dire* proceeding is available at the courthouse, the judiciary's "public is public" policy suggests that it should also be electronically accessible.

(2) Judicial Conference Guidance for *Voir Dire*

Mindful of these competing concerns, the Judicial Conference, at its March 2009 session, provided courts with guidance on how to balance the public nature of jury selection with the protection of juror privacy.[17] Under the policy, Judges should inform jurors that they may approach the bench to share personal information in an on-the-record *in camera* conference with the attorneys, and should make efforts to limit references on the record to potential jurors' names by, for example, referring to them by their juror number. The policy further states that in deciding whether to release a *voir dire* transcript, a judge should balance the public's right of access with the jurors' right to privacy – consistent with applicable circuit precedent – and, only if appropriate, seal the transcript.[18]

Such guidance necessarily informs the Subcommittee's review of how courts and parties treat *voir dire* transcripts and juror privacy.

(3) Survey Results Respecting *Voir Dire* Transcripts

Courts presently vary widely in their policies on posting *voir dire* transcripts. Sixty percent of courts surveyed indicated that they did not place *voir dire* transcripts on PACER. Thirty-two percent indicated that they posted such transcripts in both civil and criminal cases.

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[17] JCUS-MAR 09, pp. 11-12.

[18] In the event the court seals the entire *voir dire* proceeding, the policy provides that the transcript should be docketed separately from the rest of the trial transcript. In the event the court seals only bench conferences with potential jurors, that part of the transcript should be docketed separately from the rest of the *voir dire* transcript. The parties should be required to seek permission of the court to use the *voir dire* transcript in any other proceeding.

Only a handful of clerks and judges reported problems or complaints about the proper redaction of personal identifier information in *voir dire* transcripts. The reason why few problems arise appears to be judicial vigilance. Over 70 percent of district and magistrate judges reported using one or more procedures to protect juror privacy during *voir dire* proceedings and in resulting transcripts. The most frequent procedure used is *in camera* conferences pursuant to the Judicial Conference policy. Judges also report the following procedures designed to protect juror privacy:

- sealing juror questionnaires or *voir dire* transcripts,

- referring to jurors by numbers rather than names,

- reminding court reporters that *voir dire* proceedings are to be transcribed only if the appropriate section of the transcript request form is completed, and

- limiting transcript accessibility to the courthouse.

Significantly, most judges reported that they considered the measures available to them adequate to protect juror privacy.

(4) The Fordham Conference

Participants at the Fordham Conference expressed some concern that posting *voir dire* transcripts could make it more difficult to select juries. They discussed various efforts to protect juror privacy, which generally tracked the methods reported by judges in the survey results, described above. Some additional procedures suggested included:

- using juror questionnaires to reduce courtroom questioning,

- providing for the automatic redaction of juror personal identification information from *voir dire* transcript by the court reporters,

- providing the names of persons selected for jury pools only upon request, with such a request denied if the court determines that the interests of justice require confidentiality, and

- withholding the names of jurors until the conclusion of trial and releasing them only on order of the court.

c. Subcommittee Conclusions

The Privacy Subcommittee concludes that the policies and practices for protecting personal identifier information in electronically filed transcripts are in place and, on the whole, being effectively applied by litigants and the courts. The Subcommittee suggests that CACM regularly review these policies and practices in light of constant technological advances. The Subcommittee also suggests continuing and expanding education efforts by the courts to raise attorneys' awareness of their redaction obligations with respect to electronically filed transcripts. Attorneys and court reporters also need to be made aware that the redaction of material not specified in subsection (a) of the Privacy Rules requires a court order.

With respect to *voir dire* transcripts, the Judicial Conference has recently provided guidance for courts in balancing the right of public access – including electronic access – to such transcripts with juror claims to privacy. The Subcommittee suggests that the Standing Committee request CACM to monitor whether this guidance is adequate to ensure the selection of fair and impartial jurors from a broad pool of persons and to safeguard against retaliation and harassment.

D. The Need For Rule Changes

1. Overview

Upon careful review of the survey data and the information provided at the Fordham Conference, the Privacy Subcommittee reports that, with the possible exception of the rules' treatment of immigration cases, there is no significant call by the bench or bar for changes to the Privacy Rules. Users of the rules generally agree that existing redaction requirements are manageable and provide necessary protection against identity theft and other threats to privacy presented by remote public access. Such complaints or suggestions as were heard derive from the necessary learning curve involved in recent implementation of the Privacy Rules. The Subcommittee thus concludes that the data collected do not support either expansion or contraction of the types of information subject to redaction requirements.

2. Areas Specifically Considered for Changes to the Rules

a. Alien Registration Numbers

In considering possible amendments to the Privacy Rules, the Subcommittee gave

particular attention to the need to redact alien registration numbers insofar as they might be analogized to social-security numbers. After extensive discussion and debate, including consideration at the Fordham Conference, the Subcommittee concludes that redaction of alien registration numbers is not warranted at this time.

Disclosure of an alien registration number, unlike a social-security number, poses no significant risk of identity theft. Moreover, the Subcommittee heard from a number of court clerks and Department of Justice officials, all of whom stressed that redacting alien registration numbers would make it extremely difficult for the courts to distinguish among large numbers of aliens with similar or identical names and to ensure that rulings were being entered with respect to the correct person. Redaction would create a particularly acute problem in the Second and Ninth Circuits, which have heavy immigration dockets. Given the lack of any expressed support for the redaction of alien registration numbers, the Privacy Subcommittee sees no reason to add them to the list of information subject to redaction under subdivision (a) of the Privacy Rules.

b. The Exemption for Social Security Cases

The Privacy Subcommittee considered the continued need for exempting Social Security cases from the redaction requirements of the Privacy Rules. The Subcommittee reports no call for a change to that exemption. Further, the reason for the exemption identified in 2007 pertains equally today: Social Security cases are rife with private information, individual cases hold little public interest, and redaction would impose unusually heavy burdens on filing parties.

c. The Exemption for Immigration Cases

The Privacy Subcommittee also considered the continued need for exempting immigration cases from the redaction requirements of the Privacy Rules.[19] Participants at the Fordham Conference vigorously argued both sides of the question. The argument for abrogating the exemption and affording remote public access to immigration case files was that the current system gives "elite access" to those with resources to go to a courthouse that,

[19] It should be noted that the Judicial Conference policy drafted by CACM provided an exemption from the redaction requirements for Social Security cases but not for immigration cases. During the process of drafting the Privacy Rules, the Department of Justice made arguments and provided data that persuaded the Privacy Subcommittee and eventually the Standing Committee that an exemption for immigration cases was warranted.

especially in transfer cases, might be hundreds of miles away from a party interested in the information. It was argued that limiting access to the courthouse was particularly burdensome for members of the media. Under the current rule, the media must often depend on the parties to get information about habeas petitions and complaints in an immigration matter. It was also suggested that the exemption is ineffectual in that certain information in immigration cases *is* available over PACER — including the docket, identity of the litigants, and the orders and decisions, which will frequently contain sensitive information about asylum applicants. Thus, the media argues that the current system of access impairs First Amendment interests without providing much privacy protection.

On the other hand, the Privacy Subcommittee also heard forceful arguments from DOJ and court personnel in favor of the current system of limiting remote public access to immigration cases. They note the explosion of immigration cases since 2002, particularly in the Second and Ninth Circuits, and argue that immigration cases, especially asylum cases, are replete with private information on a par with or greater than Social Security cases. That personal and private information is necessary to the court's disposition, so there is no way to keep it out of the record. Moreover, it is woven throughout the record, precluding easy redaction.[20] Further, the burden of redaction would inevitably fall on the government because many petitioners are unrepresented, and imposing redaction requirements on *pro bono* counsel could discourage such representation. DOJ represents that there is no simple technological means presently available to redact all personal information in all the immigration cases. It urges that any change to current limitations on remote public access be deferred until technological advances facilitate redaction.

A compromise solution emerged at the Fordham Conference: maintaining existing limitations on remote public access for immigration cases most likely to include sensitive information, such as cases seeking asylum or relief under Convention Against Torture, but removing the exemption for immigration cases involving transfer, detention, or deportation. The Privacy Subcommittee agrees that a more nuanced approach to exempting immigration cases from remote public access warrants further consideration. One area for investigation is the plausibility of segregating cases by subject. For example, removal cases often present claims for asylum. Another factor to be considered is a possible decline in the volume of immigration cases, or types of immigration cases, which could lessen the burdens of redaction. A third factor — referred to earlier in other sections of this Report – is the possibility that advances in technology will ease the burdens of redaction.

The Privacy Subcommittee urges further research and consultation with interested

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[20] A DOJ official estimated that one FOIA officer would have to spend an entire work day with one case to get the average asylum case moved to the Court of Appeals in redacted form.

parties before any decision is made to abrogate the exemption for immigration cases. But, mindful of the significant public interest in open access generally, and in immigration policy in particular, the Subcommittee suggests that the current approach to immigration cases be subject to future review and possible modification.

III. Summary of Findings and Recommendations

The Privacy Subcommittee summarizes its findings and recommendations as follows:

1. The Privacy Rules are in place and are generally being implemented effectively by courts and parties.

2. To ensure continued effective implementation, every other year the FJC should undertake a random review of court filings for unredacted personal identifier information.

3. Also to ensure continued effective implementation of the Privacy Rules, the courts should continue to educate their own staffs and members of the bar about (a) redaction obligations under the Privacy Rules, (b) steps that can be taken to minimize the appearance of private identifier information in court filings and transcripts, and (c) the need to secure a court order under Fed. R. Civ. P. 5.2(e) or its counterparts before redacting any information beyond that specifically identified in the Privacy Rules.

4. The AO should monitor technological developments and make courts and litigants aware of software that would make it easier to search documents, transcripts, and court records for unredacted personal indentifier information.

5. At present, no best practice can be identified to support a uniform national rule with respect to making plea and cooperation agreements publicly available. District courts should, however, be encouraged to continue discussing their different approaches, and the Standing Committee might request CACM to monitor these approaches to see if, at some future time, a best practice emerges warranting a uniform rule.

6. To the extent district courts seal plea or cooperation agreements, consideration might be given, where appropriate, to a "sunset provision" providing for their expiration unless sealing is extended after further review and order of the court.

7. There is no need to amend the Privacy Rules either to expand or to contract the type of information subject to redaction.

8. The exemption for Social Security cases should be retained in its current form.

9. The exemption for immigration cases should be retained in its current form. Nevertheless, this exemption should be subject to future review in light of possible changes in technology and case volumes that could ease the burden of redaction. Such review should also consider whether the exemption might be narrowed to particular types of immigration cases.

December, 2010

Judicial Conference Standing Committee on the Federal Rules
Subcommittee on Privacy

Hon. Reena Raggi, Chair

Hon. Robert L. Hinkle (Chair of Working Group on Rules Changes)

Hon. John G. Koeltl (Chair of Working Group on Transcripts)

Hon. Ronald B. Leighton (Chair of Working Group on Implementation)

Hon. Steven D. Merryday (Chair of Working Group on Criminal Cases)

Hon. David H. Coar

Hon. James B. Haines, Jr.

Hon. John R. Tunheim

James F. Bennett, Esq.

Leo P. Cunningham, Esq.

Elizabeth J. Shapiro, Esq., Department of Justice

Jonathan Wroblewski, Esq., Department of Justice

Professor Sara Sun Beale

Professor Edward H. Cooper

Professor S. Elizabeth Gibson

Professor Catherine T. Struve

Professor Daniel J. Capra, Reporter

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

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CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

DRAFT

MEMORANDUM TO: AD HOC ADVISORY COMMITTEE ON JUDICIARY PLANNING

The Ad Hoc Advisory Committee on Judiciary Planning has requested the Committee on Rules of Practice and Procedure (and all other Judicial Conference committees) (1) "to identify strategic initiatives it is pursuing," indicating the anticipated completion date and whether the initiative is being conducted in partnership with other Judicial Conference committees, and (2) to "[r]eview the *Strategic Plan for the Federal Judiciary* . . . and suggest which of its issues, strategies, or goals the Executive Committee should consider to be high priorities over the next two years." Although in a sense the work of the rules committees as contained in the Committee's entire agenda book describes a general response to this request, the Long Range Planning Committee defines "strategic initiative" in a more limited way: "A project, study or effort that has the potential to make a significant contribution to the accomplishment of a strategy or goal set forth in the Strategic Plan for the Federal Judiciary. The completion of a strategic initiative should result in a completed study or analysis, a new capability or service, a new policy, or the accomplishment of a measurable goal or objective." The following response is based on this definition.

Strategic Initiatives

A primary "strategic initiative" the Committee on Practice and Procedure is pursuing is to work with the Advisory Committee on Civil Rules in implementing the results of the May 2010 Conference held at the Duke University School of Law. At that Conference, more than seventy moderators, panelists, and speakers presented a wide array of views on litigation problems and

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exploration of the most promising opportunities to improve federal civil litigation. The conference generated specific and general suggestions for changing both rules and litigation practices. The suggestions included changes to the federal rules, changes to judicial and legal education; the development of protocols, guidelines, and projects to test and refine continued improvements; and the development of materials to support these efforts. The advisory committee has formed subcommittees to consider the suggestions raised at the conference and the ways to implement them. Some aspects of the work, such as judicial education, the development of supporting materials, and the development and implementation of pilot projects will be coordinated with the Federal Judicial Center and other Judicial Conference committees, including the Committee on Court Administration and Case Management. The advisory committee is focusing its immediate attention on two issues: (1) discovery in complex or highly contested cases: and (2) review of pleading standards in light of recent Supreme Court cases. The completion date for the entire initiative is unknown.

Another primary strategic initiative is to work with the Criminal Rules Committee on its ongoing analysis of whether the present rules and related materials adequately support the disclosure obligations on prosecutors. The FJC has conducted a major study and the committee is studying not only the possibility of rules changes but also whether the District Judges' Bench Book should be revised to give judges greater guidance in protecting defendants' right to obtain exculpatory and impeaching information. The completion date is unknown.

Judiciary Priorities

The strategy or goal that the Committee on Rules of Practice and Procedure recommends that the Executive Committee consider to be a high priority over the next two years is the following.

1. Strategy 6.1, "Develop and implement a comprehensive approach to enhancing relations between the judiciary and the Congress." Goal 6.1a, "Improve the early identification of legislative issues in order to improve the judiciary's ability to respond and communicate with Congress on issues affecting the administration of justice."

Committee on Rules of Practice and Procedure
January 6-7, 2011

SUBJECT: Judiciary Planning (Action)

This item reviews the strategies and goals in the *Strategic Plan for the Federal Judiciary* that relate to the work of the Committee on Rules of Practice and Procedure, and requests that the Committee identify strategic initiatives that it may be conducting, overseeing, or participating in that support the implementation of the *Strategic Plan's* goals and strategies. The item also seeks Committee suggestions about which issues, strategies or goals the Executive Committee should consider to be judiciary-wide priorities.

Background

On September 14, 2010, the Judicial Conference approved the *Strategic Plan for the Federal Judiciary,* which includes 13 strategies and 39 goals to address seven strategic issues. The plan, which is included in the Committee's materials, is intended to be a catalyst for actions that improve the accessibility, timeliness and efficiency of the judiciary. The plan also addresses how the judiciary can continue to attract the finest legal talent to judicial service, be an employer of choice for highly qualified executives and support staff, work effectively with the other branches of government, and enjoy the people's trust and confidence.

The Judicial Conference also approved an approach to strategic planning in which Conference committees assume a great deal of responsibility for the implementation of the *Strategic Plan.*[1] With the assistance of a judge who serves as the judiciary planning coordinator, the Executive Committee will facilitate and coordinate the implementation of the plan. Chief Judge David Bryan Sentelle (D.C. Cir.), chair of the Executive Committee, has designated Judge Charles R. Breyer (N.D. Cal.) to serve as the judiciary planning coordinator for a two-year term. The Executive Committee's planning responsibilities also include the identification of priorities:

> With suggestions from Judicial Conference committees and others, and the input of the judiciary planning coordinator, the Executive Committee will identify issues, strategies, or goals to receive priority attention over the next two years (JCUS-SEP 10, p.___).

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[1]See "Appendix: An Approach to Strategic Planning for the Judicial Conference of the United States and its Committees," *Strategic Plan for the Federal Judiciary*, September 14, 2010, p. 19.

At its June 2010 meeting, the Committee on the Committee on Rules of Practice and Procedure reviewed a draft of the *Strategic Plan*, including a list of strategies and goals that appeared to relate to its work. These strategies and goals are included as Attachment A.

Strategic Initiatives of the Committee on Rules of Practice and Procedure

Accomplishing the strategies and goals in the *Strategic Plan* will require substantial efforts from Conference committees. However, many committees are already engaged in efforts that have the potential to make great progress. A full compilation of these initiatives is needed in order to assess current efforts, ensure coordination, and determine next steps.

Each committee conducts critical business as part of its routine and ongoing work. The present effort, however, is limited to the compilation of *strategic initiatives* by the Committee on Rules of Practice and Procedure, based on the following definition:

> **Strategic Initiative.** A project, study or effort that has the potential to make a significant contribution to the accomplishment of a strategy or goal set forth in the *Strategic Plan for the Federal Judiciary*. The completion of a strategic initiative should result in a completed study or analysis, a new capability or service, a new policy, or the accomplishment of a measurable goal or objective.

ACTION REQUESTED: The Committee on Rules of Practice and Procedure is asked to identify strategic initiatives it is pursuing. For each initiative, please describe its purpose, desired outcome, and anticipated completion date. In addition, please indicate whether the initiative is being conducted in partnership with other Judicial Conference committees.

Judiciary Priorities

At its February 2011 meeting, the Executive Committee will be asked to identify which issues, strategies or goals in the *Strategic Plan* should be considered priorities over the next two years.

A summary of suggestions from Judicial Conference committees will be provided to the Executive Committee. Attachment B includes draft elements that could be included in that summary, based on suggestions from some committees' summer 2010 meetings.

Attachments

A. Strategies and Goals That May relate to the Work of the Committee on Rules of Practice and Procedure
B. Draft Summary of Committee Suggestions on Judiciary Priorities

12b-003251

NOTE: The following are draft elements of a summary that could be provided to the Executive Committee for its consideration as it identifies judiciary-wide priorities. Ideas and suggestions from other Judicial Conference committees will be incorporated into this paper.

IDENTIFYING JUDICIARY PRIORITIES: A SUMMARY FOR EXECUTIVE COMMITTEE CONSIDERATION

This draft was prepared to assist the Executive Committee in the identification of issues, strategies, or goals from the *Strategic Plan for the Federal Judiciary* that should receive priority attention over the next two years. Judicial Conference committees are asked to make recommendations to the Executive Committee, with some having offered suggestions already. After including the ideas of the remaining Conference committees, a revised version of this paper will be provided to the Executive Committee for consideration at its February 2011 meeting.

NEED FOR PRIORITIES

The *Planning Handbook for the Federal Courts* states that the essence of planning is setting priorities."[2] At the same time, given the decentralized nature of judiciary governance, priority setting occurs most often within a single organization or committee. Identifying judiciary-wide priorities can be a challenge.

Those providing advice to the Ad Hoc Advisory Committee on Judiciary Planning recognized this challenge. In January 2010, the Committee on Audits and Administrative Office Accountability (AAOA) suggested that priority setting is critical:

> Everything in the plan is important. But setting priorities among the numerous strategies and goals will enable the judiciary to focus near-term efforts on those issues that are the most vital to its future.

In addition, the AAOA Committee noted that priority setting is a function of leadership. Members of the Ad Hoc Advisory Committee agreed. During its deliberations, one member observed:

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[2]Administrative Office of the United States Courts, *Planning Handbook for the Federal Courts*, (2d ed. 1997), p. 77.

> A large organization cannot have too many priorities at once and succeed. If the Executive Committee does not limit the Judiciary to 3-4 priorities, [there won't be any] priorities. If they all get thrown into the mix, others will select their own priorities and there will be no power or success.

The Executive Committee also recognized the importance of priority-setting — and its role in identifying priorities — in developing an approach to strategic planning for the federal judiciary. Upon its recommendation, the Judicial Conference approved the following as part of the planning approach for the Conference and its committees:

> With suggestions from Judicial Conference Committees and others, and the input of the judiciary planning coordinator, the Executive Committee will identify issues, strategies, or goals to receive priority attention over the next two years.

JCUS-SEP 10, p.____.

JUDICIAL CONFERENCE COMMITTEE SUGGESTIONS ON PRIORITIES

Committees routinely prioritize issues and initiatives within their own areas of responsibility. For their summer 2010 meetings, committees were also asked to identify judiciary-wide priorities. To date, four committees have offered suggestions about issues, strategies and goals that should receive priority attention. Other committees reported that they will recommend priorities after consulting with their planning subcommittees or deliberating further.

It should be noted that, to date, the ideas about judiciary-wide priorities are based on April and May 2010 drafts of the *Strategic Plan for the Federal Judiciary*. Since then, goals calling for increased education and training on security (Goal 1.2b), and ethical conduct, integrity and accountability (Goal 7.1a) have been added to the plan. In addition, an issue and several goals were revised between May 2010 and the approval of the plan in September.[3]

Of the four responding committees, so far all have identified Issue 1, or a strategy or goal within Issue 1, as a priority. Three of the four committees have identified Issue 2 or Strategy 2.1 as a priority.

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[3]Issue 1 was changed from "Delivering Justice" to "Providing Justice," and a goal about attracting and retaining the most qualified staff (Goal 3.2a) was substantially revised. Other clarifying changes were made to goals relating to support for senior and recalled judges (Goal 3.1a); the handling of improperly raised and pro se claims (Goals 5.1c and 5.2c); and communication and collaboration with organizations outside the judicial branch (Goal 7.2b).

Committee on Audits and Administrative Office Accountability	
Strategy 2.1:	Allocate and manage resources more efficiently and effectively.
Strategy 1.3:	Secure resources that are sufficient to enable the judiciary to accomplish its mission in a manner consistent with judiciary core values.
Strategy 7.2:	Improve the accessibility of information about the judiciary in an appropriate manner that preserves the rights of participants in judicial proceedings.

Committee on Defender Services	
Goal 1.1c:	Ensure that persons represented by panel attorneys and federal defender organizations are afforded well qualified representation consistent with best practices for the representation of criminal defendants.
Strategy 4.1:	Harness the potential of technology to identify and meet the needs of court users for information, service, and access to the courts.
Strategy 6.1:	Develop and implement a comprehensive approach to enhancing relations between the judiciary and the Congress.
Goal 6.2a:	Develop ongoing communications with the executive branch about policies and solutions to address issues affecting the judiciary.

Committee on Judicial Resources

Issue 1. Providing Justice:
How can the judiciary provide justice in a more effective manner and meet new and increasing demands, while adhering to its core values? [NOTE: reflects current language.]
Issue 2. The Effective and Efficient Management of Public Resources:
How can the judiciary provide justice consistent with its core values while managing its resources and programs in a manner that reflects workload variances and funding realities?
Issue 3. The Judiciary Workforce for the Future:
How can the judiciary continue to attract, develop and retain a highly competent and diverse complement of judges and staff, while meeting future workforce requirements and accommodating changes in career expectations?

Committee on Space and Facilities	
Strategy 1.2:	Strengthen the protection of judges, court staff and the public at court facilities, and of judges and their families at other locations.
Strategy 1.3:	Secure resources that are sufficient to enable the judiciary to accomplish its mission in a manner consistent with judiciary core values.
Goal 1.3c:	Ensure that judiciary proceedings are conducted in court facilities that are secure, accessible, efficient, and properly equipped.
Strategy 2.1:	Allocate and manage resources more efficiently and effectively.
Strategy 6.1:	Develop and implement a comprehensive approach to enhancing relations between the judiciary and the Congress.

December 2011							February 2012							March 2012						
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18	19	20	21	22	23	24	19	20	21	22	23	24	25	18	19	20	21	22	23	24
25	26	27	28	29	30	31	26	27	28	29				25	26	27	28	29	30	31

January 2012

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
1 New Year's Day	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16 Martin Luther King Jr. Day	17	18	19	20	21
22	23	24	25	26	27	28
29	30	31				
						U.S. Federal Holidays are in Red.

May 2012						
S	M	T	W	T	F	S
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31		

July 2012						
S	M	T	W	T	F	S
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8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30	31				

August 2012						
S	M	T	W	T	F	S
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30	31	

June 2012

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17 **Father's Day**	18	19	20 **Summer Begins**	21	22	23
24	25	26	27	28	29	30
						U.S. Federal Holidays are in Red.

COMMITTEE ON RULES
OF
PRACTICE AND PROCEDURE

San Francisco, CA
January 6-7, 2011
(Vol. II)

AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JANUARY 6-7, 2011

1. Opening Remarks of the Chair

   A. Introduction; new members
   B. Report on the September 2010 Judicial Conference session
   C. Transmission of Judicial Conference-approved proposed rules amendments to Supreme Court

2. **ACTION** – Approving minutes of the June 2010 committee meeting

3. Report of the Administrative Office

4. Report of the Federal Judicial Center

5. Report of the Civil Rules Committee

   A. Rule 45
   B. Discovery
   C. Pleading
   D. Preservation and sanctions; panel presentation on proposals for rule amendments and other steps to provide better guidance on preservation obligations and more clarity on sanctions for spoliation
   E. Other work relating to the 2010 Duke Conference
   F. Minutes and other informational items

6. Report of the Appellate Rules Committee

   A. **ACTION** – Approving publishing for public comment proposed amendments to Appellate Rules 13, 14, and 24
   B. Minutes and other informational items

7. Report of the Criminal Rules Committee

   A. **ACTION** – Approving publishing for public comment proposed amendments to Criminal Rules 11, 12, and 34
   B. Minutes and other informational items

8. Report of the Evidence Rules Committee

   A. Possible rules amendments in light of *Melendez-Diaz v. Massachusetts*
   B. Minutes and other informational items

9. Report of the Bankruptcy Rules Committee

   A. Minutes
   B. Report on revisions to Part VIII of the Bankruptcy Rules and issues relating to those revisions

10. **ACTION** – Approving and transmitting to the Judicial Conference revised *Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure*

11. **ACTION** – Approving recommendations proposed by the Subcommittee on Privacy (Appendices A-E below contained in separate volume II)

    A. Administrative Office report on unredacted social security numbers identified by PublicResource.org
    B. Federal Judicial Center report on frequency of unredacted social security numbers in federal court filings
    C. Administrative Office report on redaction of personal-identifier information in local rules
    D. Federal Judicial Center survey of judges, clerks, and practitioners on managing personal-identifier information in court filings
    E. Fordham Law School Conference on the operation of the federal privacy rules

12. Long-Range Planning Report

13. Next Meeting: June 2-3, 2011

TAB
11 (Vol. II)

Operation of the Federal Privacy Rules

A Report to the Judicial Conference Standing Committee on the Rules of Practice and Procedure by the Subcommittee on Privacy

I. Introduction

A. The 2007 Adoption of the Privacy Rules

The E-Government Act of 2002 required the federal judiciary to formulate rules "to protect the privacy and security concerns relating to electronic filing of documents" in federal courts.[1] In response to this mandate, the Judicial Conference Committee on the Rules of Practice and Procedure (the "Standing Committee") established a Privacy Subcommittee, composed of a representative from each of the Advisory Rules Committees and representatives from the Committee on Court Administration and Case Management (CACM), to make rule recommendations. That Subcommittee's proposals for amendments to the Federal Rules of Civil Procedure,[2] Criminal Procedure,[3] Bankruptcy Procedure[4] and Appellate Procedure[5] (referred to collectively hereafter as "the "Privacy Rules") were adopted by the Standing Committee and went into effect on December 1, 2007. The Standing Committee recognized a likely need to review the operation of the Privacy Rules in the near future given the challenges of implementation, rapid technological advances, and ongoing concerns about the proper balance between public access to court proceedings and various claims to privacy.

B. Request for a Status Report on the Operation of the Privacy Rules

Since the Privacy Rules took effect, members of all three branches of government and of the public have raised questions about implementation and operation. Meanwhile, courts and litigants have gained practical experience in using the Privacy Rules in the context of expanding electronic access to court proceedings under CM/ECF and PACER. Thus, when in 2009, the Executive Committee of the Judicial Conference directed the Standing

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[1] Pub. L. 107-347, § 205(c)(3).

[2] Fed.R. Civ. P. 5.2.

[3] Fed.R. Crim. P. 49.1.

[4] Fed.R. Bkrtcy. P. 9037.

[5] Fed.R.App. P. 25(a)(5).

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Committee to report on the operation of the Privacy Rules, the Standing Committee revived its Privacy Subcommittee to conduct the necessary investigation. Once again, each Advisory Committee designated a member to serve on the Privacy Subcommittee, with the Advisory Committee Reporters serving as consultants. CACM also designated four members to serve on the Subcommittee, with former CACM Chair, Judge John Tunheim, serving as a member-at-large.

C. Principles Controlling Review

In undertaking its review, the Privacy Subcommittee recognized that its task was discrete. It was not charged with developing new policy, but only with assessing how the Privacy Rules operate consistent with existing policy established by the Judicial Conference (largely on the basis of extensive research and consideration by CACM). This policy generally favors making the same information that is available to the public at the courthouse available to the public electronically.[6]

In urging this "public is public" policy, CACM was mindful of an irony: that a system of public access that required a trip to the courthouse to see court filings, while outdated, may have afforded litigants, witnesses, and jurors more privacy – "practical obscurity" – than a system of easy electronic access. CACM further recognized that some persons availing themselves of electronic access might have illegitimate motives: identity theft, harassment, and even obstruction of justice. Nevertheless, CACM concluded that the judiciary's access policy should generally draw no distinction between materials available at the courthouse and online. This policy not only promotes long-standing principles of judicial transparency; it ensures against profiteering in information available only at the courthouse by entrepreneurs who could gather such information and market it over the Internet. CACM determined that privacy interests in electronically available information could be protected sufficiently by imposing redaction obligations on parties filing documents containing private information, specifically, social-security numbers, financial-account numbers, dates of birth, names of minor children, and, in criminal cases, home addresses.

The Standing Committee implemented these policy determinations in drafting the Privacy Rules. The Privacy Subcommittee's review of the operation of these rules is

[6] The Judicial Conference's privacy policy incorporated several policies, including those adopted by the Conference in 2001 and 2003 regarding electronic public access to appellate, bankruptcy, civil, and criminal case files (JCUS-SEP/OCT 01, pp. 48-50; JCUS-SEP 03, pp. 15-16), as well as guidance with respect to criminal case files (JCUS-MAR 04, p. 10).

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informed by the judiciary's continued adherence to the stated policy.[7]

II. Organization and Work of the Privacy Subcommittee

A. Subjects Addressed By Working Groups

The Privacy Subcommittee quickly identified four general subjects for consideration and constituted itself into corresponding working groups to address each matter.

1. Implementation of the Privacy Rules

Members of Congress and of the public have questioned how effectively the courts have implemented the Privacy Rules, with particular concern for the appearance of unredacted social-security numbers in some court filings. The Privacy Subcommittee has reviewed this matter. It has further reviewed the efforts of individual courts and the Administrative Office to educate attorneys about their redaction responsibilities. The Subcommittee has reviewed local court rules addressing privacy concerns to determine their compliance with the national Privacy Rules. Finally, the Subcommittee has considered other procedures that might be implemented better to protect private information in court files.

2. Privacy Concerns in Criminal Cases

In criminal cases, a particular privacy concern has arisen with respect to electronic access to plea and cooperation agreements, aggravated by the emergence of various websites publicizing such information, of which *whosarat.com* is simply one example. In response to a Department of Justice request for a judicial policy denying any electronic access to plea agreements, CACM issued a March 2008 report to the Judicial Conference recommending against such a policy because it would deny public access to all plea agreements, including those that did not disclose cooperation.[8] In so reporting, CACM noted that the district courts vary widely in affording public access to plea and cooperation agreements. Thus, the Privacy Subcommittee has reviewed and evaluated these approaches with a view toward facilitating any future consideration of a uniform policy or rule.

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[7] The Privacy Rules provide exceptions for Social Security cases and immigration cases. These cases are not subject to the redaction requirements, but non-parties can obtain access only at the courthouse. The Privacy Subcommittee reviewed the continuing viability of these exceptions, and its conclusions are stated later in this report.

[8] *See* Report of CACM to Judicial Conference, March 2008 at 9.

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3. Electronic Access to Court Transcripts

Consistent with the E-Government Act, clerks of court are responsible for placing transcripts of court proceedings on PACER. The Judicial Conference has made clear that it is the parties, not the clerks, who are responsible for making necessary redactions from such transcripts. The Privacy Subcommittee has considered the operation of this division of labor in practice as well as the efforts made by courts and parties to minimize references to private information in records that will eventually be transcribed. Special attention has been given to *voir dire* transcripts containing private information about jurors.

4. Possible Amendments to the Privacy Rules

The Privacy Subcommittee was asked to consider whether the redaction requirements of the existing Privacy Rules needed to be expanded to include more information, such as alien registration numbers, driver's license numbers, mental health matters, etc. At the same time, the Subcommittee was asked to consider whether the Privacy Rules should be contracted to eliminate or modify two exceptions to the basic "public is public" policy for social security and certain immigration cases.

B. Information Obtained by the Privacy Subcommittee

In conducting its review, the Privacy Subcommittee made extensive efforts to obtain information about how the Privacy Rules were working and how they might be improved. In addition to considering existing sources of information, the Subcommittee conducted its own surveys of court filings and of persons experienced with the operation of the Privacy Rules. Finally, the Subcommittee conducted a conference at which it heard from over thirty persons – judges, court personnel, attorneys, legal scholars, and media representatives – who expressed diverse views on the issues of public access to court filings and the need to protect private information. The results of the Subcommittee's efforts, which should assist in the future development of policies and rules regulating access to private information in court filings, are detailed in multiple attachments to this report. The Subcommittee here briefly describes its research efforts.

1. Review of Existing Report on Court Filings by PublicResource.org

A report published at PublicResource.org indicates that social-security numbers remain unredacted in a number of publicly available court files. With the assistance of Henry Wigglesworth of the Administrative Office, the Subcommittee conducted an in-depth analysis of the data contained in the PublicResource.org report. That analysis is attached to this Report. As the attachment indicates, very few cases (relative to the large number of

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court filings) in fact revealed unredacted social-security numbers. Most of the disclosures cited by PublicResource.org related to filings made before the Privacy Rules were enacted, while others reflected a common disclosure made multiple times in the same case.

2. Survey of Court Filings for Unredacted Social-Security Numbers

At the request of the Privacy Subcommittee, the Federal Judicial Center conducted its own survey of court filings from a two-month period in 2010 to determine the frequency with which unredacted social-security numbers appear in court filings. The FJC found roughly 2400 documents — out of 10 million documents searched — with unredacted social-security numbers that did not appear to be subject to the exceptions to redaction provided by the Privacy Rules. Joe Cecil, who conducted the principal research, concluded that while the number of unredacted documents should not be ignored, it was proportionally minimal and did not indicate a widespread failure in the implementation of the Privacy Rules.[9]

3. Review of Local Rules

With the assistance of Heather Williams of the Administrative Office, the Privacy Subcommittee collected and reviewed all local rules governing redaction of private information in court filings. The Subcommittee determined that most local rules are intended to educate attorneys about their redaction obligations consistent with the Privacy Rules. The Subcommittee identified only a few local rules that conflict with the Privacy Rules, generally by requiring more redactions than the national rules. Such conflicts are easily addressed by an appropriate communication from the Standing Committee to the district chief judge.

4. Survey of Practical Experience with Privacy Rules

The Subcommittee early determined a need to know how those who regularly work with the Privacy Rules view their operation. With the assistance of Joe Cecil and Meghan Dunn of the FJC, the Subcommittee prepared and sent out surveys to a large number of

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[9] Joe Cecil provides the following illustration:

> If those 2,400 documents were the equivalent of one sheet of paper, and those papers were piled on top of each other, the stack of 2,400 sheets of paper would be just over nine and a half inches high. That sounds like a lot, but keep in mind that if we stack up 10 million sheets of paper to represent the almost 10 million documents that we searched, the stack of 10 million sheets of paper would be well over twice the height of the Empire State Building.

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randomly selected district judges, clerks of court, and attorneys with electronic filing experience. The survey sought experiential information and invited opinions on the need for any rules changes. The results of this survey – including a description of methodology — are attached to this report. The survey data indicates that the Privacy Rules are generally working well and do not require amendment, but that continuing education efforts are necessary to ensure compliance.

5. Fordham Conference

The Privacy Subcommittee asked its reporter, Fordham Professor Daniel Capra, to identify persons with diverse views on the four areas of identified interest and to secure their participation at an all-day conference at Fordham Law School on April 13, 2010. Thanks to Professor Capra's efforts and Fordham's hospitality, the Subcommittee heard panel discussions on

- the broad question of transparency and privacy relating to court filings by a judge and various legal scholars;
- the exemption of immigration cases from electronic filing by private and public attorneys, a legal scholar, a member of the media, and a court representative;
- the present implementation of the Privacy Rules by a judge, a legal scholar, a member of the media, an AO representative, and a clerk of court;
- electronic access to plea and cooperation agreements and the need for a uniform rule on this subject by a prosecutor, criminal defense lawyers, a legal scholar, and a Bureau of Prisons official;
- the same subject by judges from districts affording different degrees of public access to such information; and
- electronic access to transcripts, including *voir dire* transcripts by a judge, two United States Attorneys, a First Amendment lawyer, and a jury clerk.

A transcript of these proceedings is attached to this report and will be published in the Fordham Law Review. Insights gained at the the Fordham Conference inform all aspects of the findings and recommendations contained in this Subcommittee report.

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(1) **Social Security Numbers:** if an individual's social security number must be included in a filing, use only the last four digits of that number.

(2) **Names of Minor Children:** if the involvement of a minor child must be mentioned, use only the child's initials.

(3) **Dates of Birth:** if an individual's date of birth must be included in a filing, use only the year.

(4) **Financial Account Numbers:** if financial account numbers are relevant, use only the last four digits of these numbers.

(5) **Home Address in Criminal Cases:** If a home address must be included in a document to be filed, include only the city and state.

(b) Redaction Policy: In compliance with the E-Government Act of 2002, a party wishing to file a document containing the personal data identifiers listed above must:

(1) File a redacted, unsealed version of the document along with a reference list under seal. The reference list shall contain the complete personal data identifier(s) and the redacted identifier(s) used in its (their) place in the filing. All references in the case to the redacted identifiers included in the reference list must refer to the corresponding complete personal data identifier. The reference list must be filed under seal, and may be amended as a right, or

(2) With approval of the Court, file an unredacted version of the document under seal. The Court may, however, still require the party to file a redacted copy for the public file. The unredacted version of the document or the reference list shall remain sealed and retained by the Court as part of the record.

(3) The responsibility for redacting these personal identifiers rests solely with counsel and the parties. The Clerk will not review each filing for compliance with this Local Rule.

(c) Transcripts of Hearings: If information listed in section (a) of this Rule is elicited during testimony or other court proceedings, it will become available to the public when the official transcript is filed at the courthouse unless, and until, it is redacted. The better practice is to avoid introducing this information into the record in the first place. If a restricted item is mentioned in court, any party or attorney may ask to have it stricken from the record or partially redacted to conform to the privacy policy, or the Court may do so on its own motion.

III. Findings

A. Implementation of the Privacy Rules

1. Overview

The Privacy Subcommittee was charged with reviewing and reporting on the operation of the existing Privacy Rules throughout the federal courts, with particular attention to protection of the specified private identifier information in electronic filings available on PACER. The Subcommittee reports considerable success in the implementation of these Rules. At the same time, the Subcommittee identifies a continuing need for education efforts, monitoring, and study to ensure continued effective implementation.

2. Specific Findings

a. Administrative Office Efforts

The Privacy Subcommittee reports that the Administrative Office has made significant and effective efforts to implement the Privacy Rules' redaction requirements, while still providing the public with remote electronic access to court filings. For example:

- In 2003, the AO modified CM/ECF so that only the last four digits of a social security-number can be seen on the docket report in PACER. In the same vein, in May 2007 the AO's Forms Working Group, comprising judges and clerks of court, reviewed over 500 national forms to ensure that they did not require personal-identifier information. The Working Group identified only six forms that required personal identifier information, and those forms were revised or modified to delete those fields.

- In August 2009, the AO asked the courts to implement a new release of CM/ECF specifically designed to heighten a filer's awareness of redaction requirements. The CM/ECF log-in screen now contains a banner notice of redaction responsibility and provides links to the federal rules on privacy. CM/ECF users must check a box acknowledging their obligation to comply with the Privacy Rules redaction requirements in order to complete the log-in process. CM/ECF also displays another reminder to redact each and every time a document is filed.

- The Judicial Conference approval of a pilot project providing PACER access to audio files of court hearings raised concerns about audio disclosure of personal information. The eight courts participating in the pilot project employ various means

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to discourage attorneys and litigants from introducing personal identifier information except where absolutely necessary. Lawyers and litigants are also warned that they could and should request that recorded proceedings containing information covered by the Privacy Rules or other sensitive matters not be posted, with the final decision made by the presiding judge. The AO has endeavored to ensure that courts and litigants are mindful of their redaction obligations as they participate in this project.

b. Efforts by the Courts

(1) Generally

All aspects of the Subcommittee's review confirm that federal courts throughout the country are undertaking vigorous and highly effective efforts to ensure compliance with the Privacy Rules generally and with the requirement that personal identifier information be redacted from or never included in court filings in particular. These efforts include:

- ECF training programs for both lawyers and non-attorney staff at law firms. The extension of training to staff is important because experience indicates that redaction failures, while infrequent, are frequently the result of filings made by staff who are unaware of the Rules requirements.

- ECF newsletters containing reminders about the redaction requirements.

- Making counsel aware of the Privacy Rules at the initial court conference and at evidentiary hearings, and also specifically advising counsel against unnecessary use of personal identifiers.

- Discouraging counsel from asking questions that would elicit testimony that would disclose private identifier information.

- Requiring redaction of exhibits containing personal identifier information as a condition of admissibility.

- Providing notices at counsel's table that describe the Rules' redaction requirements and that caution counsel not to put unredacted personal identifier information into the record.

- Reading a prepared statement to witnesses cautioning against disclosure of private identifier information.

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- Assisting *pro se* filers, especially in bankruptcy cases, in redacting personal identifier information.

- Remedial action by clerks and courts when unredacted private identifiers are found, including consultation with filers who are repeat violators.[10]

(2) Social-Security Numbers in Court Filings

As discussed in an earlier section of this Report, surveys conducted by the AO and the FJC found only a small number of instances in which unredacted social-security numbers have been accessible online in violation of the Privacy Rules. Of the 10 million recently filed documents that the FJC researchers reviewed, less than .03 percent were found to contain unredacted social-security numbers. And of those, 17 percent appeared to be subject to some exception to redaction, such as waiver by the filing party.

The results indicate that such redaction failures as do occur are generally inadvertent. Some lawyers and staff remain unaware of the redaction policy. The results also indicate that the number of redaction failures is decreasing with time as courts continue and expand education efforts. The Privacy Subcommittee concludes that no redaction system can be error-free; nevertheless, continued education efforts should ensure that mistakes are rare and that almost all information subject to redaction is in fact removed from court filings.

(3) Implementation Challenges in Bankruptcy Cases

The Subcommittee's research indicates that most identified Privacy Rules violations occurred in bankruptcy cases. That is not surprising given the high number of first-time bankruptcy filers, the need for disclosure of substantial personal information in bankruptcy filings, and the probability that exhibits and proofs of claim will contain private identifiers. The Privacy Subcommittee reports that while the number of disclosures of unredacted personal identifiers is proportionately higher in bankruptcy cases, the actual number of

[10] The Privacy Subcommittee unanimously agrees with the basic premise of the Privacy Rules — that the redaction obligation is on the parties, not clerks or judges. Nonetheless, the Subcommittee notes and applauds the efforts of clerks and courts in taking remedial action when a failure to redact has been discovered.

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disclosures remains small.[11] This is a tribute to the court efforts described generally in the preceding subsection, which include efforts by the bankruptcy courts.[12] The Subcommittee is, therefore, confident that, as educational efforts continue and other initiatives are pursued, the instances of errors in filing unredacted personal identifier information in bankruptcy cases will be reduced even further.

(4) Use of Local Rules

The Privacy Subcommittee conducted a comprehensive review of local court rules intended to implement the national Privacy Rules. The Subcommittee recognizes that local rules can have some value in educating filers about their redaction obligations. But local rules cannot impose obligations inconsistent with national rules. *See, e.g.,* Fed.R.Civ.P. 83(a). The Privacy Subcommittee has identified a few local rules inconsistent with the national Privacy Rules, notably, local rules demanding the redaction of *more* information than required by the national rules. National rules are a product of a carefully considered policy that calibrates the balance between the judiciary's commitment to public access and its protection of personal privacy. Local rules requiring more information to be redacted alter that balance.

An attached report identifies local rules that the Privacy Subcommittee finds inconsistent with the Privacy Rules. It recommends that the procedure employed in the last local rules project be employed here: the Standing Committee should inform the chief judge of a district with an inconsistent rule, and the Standing Committee should work together with the chief judge to remedy the situation.

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[11] Notably, Bankruptcy Rule 1005, as amended in 2003, now provides that the petitioner disclose only the last four digits of the petitioner's social-security number. Other Bankruptcy Rules require disclosure of the full social-security number, but that information is not available to the public. See, e.g., Bankruptcy Rule 1007(f), which requires an individual debtor to "submit" to the clerk, rather than "file" a verified statement containing an unredacted social-security number. At this point, in a bankruptcy case as in any other, unredacted social-security numbers are not accessible to the public unless permitted by one of the exceptions to the Privacy Rules.

[12] A paper prepared by Hon. Elizabeth Stong and submitted for the Fordham Privacy Conference provides a helpful description of how the Privacy Rules are implemented in the Eastern District of New York Bankruptcy Court. That paper is attached to this Report.

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3. Possible Future Initiatives

Given inevitable advances in technology, the Subcommittee suggests that future attention be given to two possible developments.

- Current technology permits detection of unredacted social-security numbers in court filings, as the Federal Judicial Center did in the attached report. Current technology does not permit a comparable search for other unredacted personal identifiers, such as names of minor children. Nevertheless, at the Fordham Conference, Professor Edward Felten predicted that future technological developments might well provide such capacity. The Privacy Subcommittee recommends that the AO continue to monitor the state of search technology.

- Technology might also make it easier for a filing party to search for material to redact in a transcript or in a document that the party is going to file. For example, a pdf document is obviously easier to search if it is in searchable format. More broadly, as stated above, software might be developed in the future that would make it easier to search exhibits, immigration records, or indeed any document. While it is not the obligation of the courts to redact filings for litigants, to the extent the courts are already engaged in extensive and highly effective educational efforts, they might be encouraged to include relevant technological advances in the information conveyed.

While such future initiatives should be pursued, the Privacy Subcommittee concludes that the most important means of ensuring effective implementation of the Privacy Rules is to continue the current efforts to educate filers and other court participants about the need (a) to redact private identifiers from documents that must be filed, and (b) to avoid disclosure of private identifiers except when absolutely necessary.

Finally, the Subcommittee suggests continued monitoring of the implementation of the Privacy Rules. Specifically, a study of court filings for unredacted personal identifiers, such as that conducted by the Federal Judicial Center for this report, should be conducted on a regular basis, possibly every other year.

B. Criminal Cases: Affording Electronic Access to Plea and Cooperation Agreements

1. Overview

The Privacy Subcommittee quickly identified electronic public access to plea and

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cooperation agreements in criminal cases as an area warranting careful review. Survey information and the Fordham Conference indicate that easy electronic access to such information, coupled with Internet sites committed to its collection and dissemination, have heightened concerns about retaliation against cooperators and prosecutors' ability to secure cooperation.

The Privacy Subcommittee views the recruitment and protection of cooperators as matters generally committed to the executive branch. At the same time, it recognizes judicial responsibility to minimize opportunities for obstruction of justice. How to do so without compromising public access to court proceedings – especially proceedings that may be of particular public interest, including the treatment of defendants who cooperate with the prosecution – admits no easy answer.

The Subcommittee has identified varied approaches by the district courts to the public posting of plea and cooperation agreements and general court resistance to a uniform national rule. To the extent the Department of Justice, some defense attorneys, and legal scholars support a national rule, the Subcommittee has identified no consensus on what that rule should be. Nor can it presently identify a "best practice."

The Subcommittee suggests that CACM and the Standing Committee encourage district courts to continue the discussion begun at the Fordham Conference about the relative advantages of various practices in order to determine if a consensus emerges in favor of a particular practice or rule. It further suggests that courts might consider methods, where appropriate, to avoid permanent sealing of plea or cooperation agreements — possibly by providing for such orders to expire at a fixed time subject to extension by the court upon further review.

2. Specific Findings

a. Existing District Court Practices for Posting Plea and Cooperation Agreements

The Privacy Subcommittee identified various approaches by the district courts in publicly posting plea and cooperation agreements,[13] which are summarized here in

[13] A chart of the various approaches, prepared by Susan Del Monte of the Administrative Office, is attached to this Report.

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descending order of accessibility:

- Full electronic access to plea and cooperation agreements, except when sealed on a case-by-case basis.

- No remote electronic access to plea or cooperation agreements, but with such agreements fully available at the courthouse unless sealed in an individual case.

- Full electronic access to plea agreements, but with a separate sealed document filed in every case indicating whether or not the defendant has entered into a cooperation agreement.[14]

- No public access to plea or cooperation agreements either electronically or at the courthouse, because these documents are not made part of the case file.

b. Concerns with the Identified District Court Practices

At the Fordham Conference, prosecutors, defense counsel, and legal scholars expressed concerns about the various district court approaches. Again, working from the least to most restrictive approach, these concerns are summarized as follows:

- Full remote access to plea agreements with sealing of cooperation information in individual cases means a sealing order effectively raises a red flag signaling cooperation.

- Prohibiting electronic access to plea and cooperation agreements but allowing courthouse access to such documents encourages the development of cottage industries to acquire and post such information (often for sale), the very concern that prompted the Judicial Conference to adopt the "public is public" policy.

- Posting plea agreements that say nothing about any cooperation, or posting documents that use the same boilerplate language whether a party is cooperating or not, result in misleading court documents and preclude public scrutiny of how the judicial system treats cooperating defendants.

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[14] This approach is intended to minimize the ability to identify a cooperating defendant from the presence on the public record of sealed document. The Subcommittee notes the possibility of such identification from other public record entries, such as delayed or frequently adjourned sentencing proceedings.

- Not posting plea or cooperation agreements at all hampers public scrutiny not only of the treatment of cooperators but of the process by which guilty pleas are obtained.

Some Conference participants also raised a general concern: that as defendants from different districts found themselves housed together in the federal prison system, some might misconstrue records from districts with which they were not familiar. For example, a prisoner from a district where individual sealing signaled likely cooperation might mistakenly infer that every prisoner with a sealed record entry was a cooperator without realizing that some districts made a sealed entry in every case to ensure no difference between the dockets of cooperators and non-cooperators.

c. Support for a Uniform Rule

While prosecutors, most defense attorneys, and legal scholars urged a uniform rule for posting plea and cooperation agreements, they did not agree as to the content of that rule. Some urged few, if any, limits on public access to such agreements, while others supported strict limitations.[15]

The Subcommittee has considered the uniform rule proposal recommended by Professor Caren Myers in her article, *Privacy, Accountability, and the Cooperating Defendant: Towards a new Role for Internet Access to Court Records,* 62 Vand. L. Rev. 921 (2009), a copy of which is attached to this Report. Professor Myers, a former federal prosecutor, urges a rule that would (1) generally deny public access to individual plea and cooperation agreements except where ordered by the court on a case-by-case basis; and (2) provide public access to plea and cooperation information in the aggregate, without identifying individual defendants. As Professor Myers explained at the Fordham Conference, she thinks that in most cooperation cases, the risk to a defendant from public disclosure of the defendant's cooperation far outweighs any public interest in knowing that the defendant decided to cooperate. To the extent there is a public interest in knowing what kinds of deals the government is making with cooperators and what kinds of benefits they are receiving from the courts, Professor Myers submits that information can be provided anonymously or in the aggregate.

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[15] Because the Department of Justice has historically supported a uniform rule with strict limitations, the Subcommittee, early in its work, invited DOJ to propose a draft rule as a basis for Subcommittee discussion. DOJ continues to work on the issue, including the viability of a national rule, but has not at this time submitted draft language.

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Some participants at the Fordham Conference questioned the sweep of Professor Myers's proposal, which would severely limit public access to plea and cooperation agreements in individual cases. They also questioned the effectiveness of such a rule in protecting cooperators, given the ability to infer cooperation from delayed or adjourned sentences or from the sealing of sentencing minutes, in whole or in part.

d. Judicial Opposition to a Uniform National Rule

At the Fordham Conference, the Subcommittee also heard the views of judges drawn from districts pursuing each of the identified approaches. Their thoughtful responses to the concerns and suggestions of lawyers and legal scholars and their explanations for how and why their courts employed various approaches to posting plea and cooperation agreements were particularly informative. This discussion revealed that the various practices employed by courts with respect to plea and cooperation agreements were not casually developed. Rather, district courts have carefully considered the question of public access to such agreements, with individual courts soliciting the views of attorneys and other interested parties and engaging in substantial internal discussion before settling on an approach. The discussion further revealed that each district is strongly committed to its chosen approach, convinced that the approach satisfactorily balances the twin concerns of public access and cooperator safety, and resistant to the idea of a uniform national rule (particularly if it would differ from its own practice).

e. Subcommittee Conclusions

The Subcommittee concludes that no best practice has yet emerged supporting a uniform national rule with respect to granting public access to plea and cooperation agreements. The Subcommittee suggests that CACM and the Standing Committee encourage district courts to continue the discussion begun at the Fordham Conference as to the relative benefits of various practices, with a view toward determining if a consensus emerges in the coming years as to a best practice that might provide a basis for a uniform national rule.

At the same time, the Subcommittee is of the view that the rationale for limiting public access to such agreements – cooperator safety – does not necessarily support the permanent sealing of most cooperation agreements, much less plea agreements. Courts limiting access to such agreements might consider whether it is appropriate to include a "sunset" provision that allows sealing orders within a time prescribed either automatically for every case or specifically in individual cases with further sealing dependent on a court determination of a continued need.

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C. Redacting Electronic Transcripts

1. Overview

Judicial Conference policy requires that court transcripts be posted on PACER within 90 days of delivery to the court clerk.[16] The Privacy Subcommittee has considered the judiciary's ability to comply with this policy while ensuring the redaction of personal identifier information as required by the Privacy Rules. The Subcommittee reports that the redaction of private information from transcripts on PACER is still a work in progress. Nevertheless, that work appears to be going well. Because the process relies on the vigilance and sensitivity of lawyers, judges, and court staff, continuing education is important to ensure these persons' awareness of the need to minimize record references to private identifier information and to redact such information when it appears in transcripts.

The Privacy Subcommittee has separately considered the privacy issues implicated by the electronic posting of *voir dire* transcripts, which may reveal personal information about potential jurors not required to be redacted by the Privacy Rules. Such information could be used to retaliate against jurors and could compromise the identification of prospective jurors able to serve without fear or favor. Because the Judicial Conference has recently provided the courts with guidance as to how to balance the competing interests in public access to *voir dire* and juror privacy, the Subcommittee suggests that the Standing Committee request CACM to monitor the operation of these guidelines to determine the need for any further policy action.

2. Specific Findings

a. The Redaction of Electronically Posted Transcripts

(1) Judicial Conference Policy for Electronic Filing

Consistent with the mandate of the E-Government Act to create a complete electronic file in the CM/ECF systems for every federal case, in 2003, the Judicial Conference, as stated above, adopted a policy requiring courts electronically to post transcripts of court proceedings within 90 days of their receipt by the clerk of court. In the 90-day period preceding electronic filing, each party's attorney (or each *pro se* party) must work with the

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[16] See JCUS Sep. 07 at 7. Extensive guidance on the implementation of the transcripts policy is found in a letter to clerks from Robert Lowney of the AO, dated January 30, 2008. See also Report of CACM to the Judicial Conference on Electronic Transcripts, June 2008.

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court reporter according to a prescribed schedule to ensure that any electronically filed transcript is properly redacted of personal identifier information consistent with the requirements of the Privacy Rules.

(2) Survey Results Indicate General Compliance with Transcript Policy

The FJC survey reveals that, as of December 2009, all bankruptcy courts and all but a few district courts are posting trial transcripts on PACER, though most courts do not routinely post deposition transcripts. A majority of the surveyed courts have established local rules or policies to address privacy concerns arising from the electronic posting of trial transcripts. The number of clerks and judges who reported complaints about personal identifier information appearing in electronically filed transcripts is small.

The survey further revealed that clerks of court, judges, and lawyers are actively engaged in ensuring proper redaction of electronically filed transcripts. Specifically, a significant number of clerks reported that their courts require that transcripts be filed as text-searchable PDFs to facilitate redactions. Other clerks reported using software programs specifically developed to identify personal identifier information. Still more clerks expressed interest in the development of such programs.

The survey revealed that judges employ various means to educate counsel about their redaction obligations with respect to electronically filed transcripts. A common practice is to provide counsel with a card urging that personal identifier information not be elicited on the record and that any such information that appears in transcripts be redacted. Similar guidance is provided to counsel at the initial case conference, in formal written orders, and through communication with chambers staff. Judges also intervene to cut off a line of questions that appears to be eliciting personal identifier information. Judges report that they also rely on chambers staff and docket clerks to alert them to the appearance of personal identifier information in a transcript that will require redaction.

The survey confirms general attorney awareness of the Privacy Rules' redaction requirements. Two-thirds of attorneys responding reported that they redacted personal identifier information before transcripts were electronically filed. Half of attorneys surveyed reported that they actively sought to avoid eliciting personal identifier information on the record. Nevertheless, because 17% of responding attorneys reported that they made no effort to redact transcript before electronic filing, there is plainly a need for continuing education and monitoring in this area.

(3) The Fordham Conference

Participants at the Fordham Conference reinforced the conclusions drawn from the survey: (a) that courts and attorneys are striving to avoid disclosure of personal identifying information on the record, and (b) that the redaction procedure for electronic transcripts adopted by the Judicial Conference is generally working as intended.

Two United States Attorneys stated that although the redaction requirements were initially met with some displeasure by their Assistants, experience had shown that the required procedures were workable and not unduly burdensome. One of the United States Attorneys reported developing a standard form to facilitate the specification of pages and line numbers where personal identifier information needed to be redacted.

Both government and private attorneys stated that they generally sought to avoid eliciting personal identifier information in proceedings that could be transcribed. They agreed that there was rarely a need for such information, and that attorneys could usually avoid personal information coming into the record by applying some forethought to questions asked and documents introduced into evidence. The lawyers discussed the value of reaching advance agreements with opposing counsel to minimize the introduction of personal identifier information.

Some Conference participants identified concern that parties in civil cases were urging court reporters to redact from transcripts confidential information – such as proprietary information – not falling within the categories specified in Fed. R. Civ. P. 5.2(a). Parties and court reporters need to be made aware that redactions beyond those specified in Rule 5.2(a) require a court order pursuant to Rule 5.2 (e) and its counterparts.

b. The Electronic Filing of *Voir Dire* Transcripts

(1) Concerns Attending *Voir Dire* Transcripts

Electronic filing of *voir dire* transcripts raises unique concerns and, thus, was considered separately by the Privacy Subcommittee. *Voir dire* may elicit a range of personal, sensitive, or embarrassing information from a juror that need not be redacted under the Privacy Rules. The possibility of such information making its way from PACER access to broad disclosure on the Internet poses real risks for juror harassment or even retaliation. Many jurors may presently be unaware that *voir dire* transcripts will be electronically filed. With such awareness, courts may find it more difficult to identify potential jurors able to serve without fear or favor.

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Because it is the court that summons persons for jury service, the judiciary's responsibility to safeguard jurors is arguably stronger than its responsibility to safeguard persons who enter into cooperation agreements with the executive branch. Nevertheless, some circuit precedent holds that *voir dire* proceedings should generally be open to public scrutiny. Further, if the transcript of an open *voir dire* proceeding is available at the courthouse, the judiciary's "public is public" policy suggests that it should also be electronically accessible.

(2) Judicial Conference Guidance for *Voir Dire*

Mindful of these competing concerns, the Judicial Conference, at its March 2009 session, provided courts with guidance on how to balance the public nature of jury selection with the protection of juror privacy.[17] Under the policy, Judges should inform jurors that they may approach the bench to share personal information in an on-the-record *in camera* conference with the attorneys, and should make efforts to limit references on the record to potential jurors' names by, for example, referring to them by their juror number. The policy further states that in deciding whether to release a *voir dire* transcript, a judge should balance the public's right of access with the jurors' right to privacy – consistent with applicable circuit precedent – and, only if appropriate, seal the transcript.[18]

Such guidance necessarily informs the Subcommittee's review of how courts and parties treat *voir dire* transcripts and juror privacy.

(3) Survey Results Respecting *Voir Dire* Transcripts

Courts presently vary widely in their policies on posting *voir dire* transcripts. Sixty percent of courts surveyed indicated that they did not place *voir dire* transcripts on PACER. Thirty-two percent indicated that they posted such transcripts in both civil and criminal cases.

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[17] JCUS-MAR 09, pp. 11-12.

[18] In the event the court seals the entire *voir dire* proceeding, the policy provides that the transcript should be docketed separately from the rest of the trial transcript. In the event the court seals only bench conferences with potential jurors, that part of the transcript should be docketed separately from the rest of the *voir dire* transcript. The parties should be required to seek permission of the court to use the *voir dire* transcript in any other proceeding.

Only a handful of clerks and judges reported problems or complaints about the proper redaction of personal identifier information in *voir dire* transcripts. The reason why few problems arise appears to be judicial vigilance. Over 70 percent of district and magistrate judges reported using one or more procedures to protect juror privacy during *voir dire* proceedings and in resulting transcripts. The most frequent procedure used is *in camera* conferences pursuant to the Judicial Conference policy. Judges also report the following procedures designed to protect juror privacy:

- sealing juror questionnaires or *voir dire* transcripts,

- referring to jurors by numbers rather than names,

- reminding court reporters that *voir dire* proceedings are to be transcribed only if the appropriate section of the transcript request form is completed, and

- limiting transcript accessibility to the courthouse.

Significantly, most judges reported that they considered the measures available to them adequate to protect juror privacy.

(4) The Fordham Conference

Participants at the Fordham Conference expressed some concern that posting *voir dire* transcripts could make it more difficult to select juries. They discussed various efforts to protect juror privacy, which generally tracked the methods reported by judges in the survey results, described above. Some additional procedures suggested included:

- using juror questionnaires to reduce courtroom questioning,

- providing for the automatic redaction of juror personal identification information from *voir dire* transcript by the court reporters,

- providing the names of persons selected for jury pools only upon request, with such a request denied if the court determines that the interests of justice require confidentiality, and

- withholding the names of jurors until the conclusion of trial and releasing them only on order of the court.

c. Subcommittee Conclusions

The Privacy Subcommittee concludes that the policies and practices for protecting personal identifier information in electronically filed transcripts are in place and, on the whole, being effectively applied by litigants and the courts. The Subcommittee suggests that CACM regularly review these policies and practices in light of constant technological advances. The Subcommittee also suggests continuing and expanding education efforts by the courts to raise attorneys' awareness of their redaction obligations with respect to electronically filed transcripts. Attorneys and court reporters also need to be made aware that the redaction of material not specified in subsection (a) of the Privacy Rules requires a court order.

With respect to *voir dire* transcripts, the Judicial Conference has recently provided guidance for courts in balancing the right of public access – including electronic access – to such transcripts with juror claims to privacy. The Subcommittee suggests that the Standing Committee request CACM to monitor whether this guidance is adequate to ensure the selection of fair and impartial jurors from a broad pool of persons and to safeguard against retaliation and harassment.

D. The Need For Rule Changes

1. Overview

Upon careful review of the survey data and the information provided at the Fordham Conference, the Privacy Subcommittee reports that, with the possible exception of the rules' treatment of immigration cases, there is no significant call by the bench or bar for changes to the Privacy Rules. Users of the rules generally agree that existing redaction requirements are manageable and provide necessary protection against identity theft and other threats to privacy presented by remote public access. Such complaints or suggestions as were heard derive from the necessary learning curve involved in recent implementation of the Privacy Rules. The Subcommittee thus concludes that the data collected do not support either expansion or contraction of the types of information subject to redaction requirements.

2. Areas Specifically Considered for Changes to the Rules

a. Alien Registration Numbers

In considering possible amendments to the Privacy Rules, the Subcommittee gave

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particular attention to the need to redact alien registration numbers insofar as they might be analogized to social-security numbers. After extensive discussion and debate, including consideration at the Fordham Conference, the Subcommittee concludes that redaction of alien registration numbers is not warranted at this time.

Disclosure of an alien registration number, unlike a social-security number, poses no significant risk of identity theft. Moreover, the Subcommittee heard from a number of court clerks and Department of Justice officials, all of whom stressed that redacting alien registration numbers would make it extremely difficult for the courts to distinguish among large numbers of aliens with similar or identical names and to ensure that rulings were being entered with respect to the correct person. Redaction would create a particularly acute problem in the Second and Ninth Circuits, which have heavy immigration dockets. Given the lack of any expressed support for the redaction of alien registration numbers, the Privacy Subcommittee sees no reason to add them to the list of information subject to redaction under subdivision (a) of the Privacy Rules.

b. The Exemption for Social Security Cases

The Privacy Subcommittee considered the continued need for exempting Social Security cases from the redaction requirements of the Privacy Rules. The Subcommittee reports no call for a change to that exemption. Further, the reason for the exemption identified in 2007 pertains equally today: Social Security cases are rife with private information, individual cases hold little public interest, and redaction would impose unusually heavy burdens on filing parties.

c. The Exemption for Immigration Cases

The Privacy Subcommittee also considered the continued need for exempting immigration cases from the redaction requirements of the Privacy Rules.[19] Participants at the Fordham Conference vigorously argued both sides of the question. The argument for abrogating the exemption and affording remote public access to immigration case files was that the current system gives "elite access" to those with resources to go to a courthouse that,

[19] It should be noted that the Judicial Conference policy drafted by CACM provided an exemption from the redaction requirements for Social Security cases but not for immigration cases. During the process of drafting the Privacy Rules, the Department of Justice made arguments and provided data that persuaded the Privacy Subcommittee and eventually the Standing Committee that an exemption for immigration cases was warranted.

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especially in transfer cases, might be hundreds of miles away from a party interested in the information. It was argued that limiting access to the courthouse was particularly burdensome for members of the media. Under the current rule, the media must often depend on the parties to get information about habeas petitions and complaints in an immigration matter. It was also suggested that the exemption is ineffectual in that certain information in immigration cases *is* available over PACER — including the docket, identity of the litigants, and the orders and decisions, which will frequently contain sensitive information about asylum applicants. Thus, the media argues that the current system of access impairs First Amendment interests without providing much privacy protection.

On the other hand, the Privacy Subcommittee also heard forceful arguments from DOJ and court personnel in favor of the current system of limiting remote public access to immigration cases. They note the explosion of immigration cases since 2002, particularly in the Second and Ninth Circuits, and argue that immigration cases, especially asylum cases, are replete with private information on a par with or greater than Social Security cases. That personal and private information is necessary to the court's disposition, so there is no way to keep it out of the record. Moreover, it is woven throughout the record, precluding easy redaction.[20] Further, the burden of redaction would inevitably fall on the government because many petitioners are unrepresented, and imposing redaction requirements on *pro bono* counsel could discourage such representation. DOJ represents that there is no simple technological means presently available to redact all personal information in all the immigration cases. It urges that any change to current limitations on remote public access be deferred until technological advances facilitate redaction.

A compromise solution emerged at the Fordham Conference: maintaining existing limitations on remote public access for immigration cases most likely to include sensitive information, such as cases seeking asylum or relief under Convention Against Torture, but removing the exemption for immigration cases involving transfer, detention, or deportation. The Privacy Subcommittee agrees that a more nuanced approach to exempting immigration cases from remote public access warrants further consideration. One area for investigation is the plausibility of segregating cases by subject. For example, removal cases often present claims for asylum. Another factor to be considered is a possible decline in the volume of immigration cases, or types of immigration cases, which could lessen the burdens of redaction. A third factor — referred to earlier in other sections of this Report – is the possibility that advances in technology will ease the burdens of redaction.

The Privacy Subcommittee urges further research and consultation with interested

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[20] A DOJ official estimated that one FOIA officer would have to spend an entire work day with one case to get the average asylum case moved to the Court of Appeals in redacted form.

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parties before any decision is made to abrogate the exemption for immigration cases. But, mindful of the significant public interest in open access generally, and in immigration policy in particular, the Subcommittee suggests that the current approach to immigration cases be subject to future review and possible modification.

III. Summary of Findings and Recommendations

The Privacy Subcommittee summarizes its findings and recommendations as follows:

1. The Privacy Rules are in place and are generally being implemented effectively by courts and parties.

2. To ensure continued effective implementation, every other year the FJC should undertake a random review of court filings for unredacted personal identifier information.

3. Also to ensure continued effective implementation of the Privacy Rules, the courts should continue to educate their own staffs and members of the bar about (a) redaction obligations under the Privacy Rules, (b) steps that can be taken to minimize the appearance of private identifier information in court filings and transcripts, and (c) the need to secure a court order under Fed. R. Civ. P. 5.2(e) or its counterparts before redacting any information beyond that specifically identified in the Privacy Rules.

4. The AO should monitor technological developments and make courts and litigants aware of software that would make it easier to search documents, transcripts, and court records for unredacted personal indentifier information.

5. At present, no best practice can be identified to support a uniform national rule with respect to making plea and cooperation agreements publicly available. District courts should, however, be encouraged to continue discussing their different approaches, and the Standing Committee might request CACM to monitor these approaches to see if, at some future time, a best practice emerges warranting a uniform rule.

6. To the extent district courts seal plea or cooperation agreements, consideration might be given, where appropriate, to a "sunset provision" providing for their expiration unless sealing is extended after further review and order of the court.

7. There is no need to amend the Privacy Rules either to expand or to contract the type of information subject to redaction.

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8. The exemption for Social Security cases should be retained in its current form.

9. The exemption for immigration cases should be retained in its current form. Nevertheless, this exemption should be subject to future review in light of possible changes in technology and case volumes that could ease the burden of redaction. Such review should also consider whether the exemption might be narrowed to particular types of immigration cases.

December, 2010

12b-003286

Judicial Conference Standing Committee on the Federal Rules
Subcommittee on Privacy

Hon. Reena Raggi, Chair

Hon. Robert L. Hinkle (Chair of Working Group on Rules Changes)

Hon. John G. Koeltl (Chair of Working Group on Transcripts)

Hon. Ronald B. Leighton (Chair of Working Group on Implementation)

Hon. Steven D. Merryday (Chair of Working Group on Criminal Cases)

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Professor Sara Sun Beale

Professor Edward H. Cooper

Professor S. Elizabeth Gibson

Professor Catherine T. Struve

Professor Daniel J. Capra, Reporter

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TAB
11-A

Attachment 1 to Privacy Subcommittee Report

Report by Administrative Office on Research into Unredacted Social Security Numbers Reported by PublicResource.org

JAMES C. DUFF
Director

JILL C. SAYENGA
Deputy Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

August 24, 2009

Via E-mail

MEMORANDUM TO: PRIVACY SUBCOMMITTEE

FROM: HENRY WIGGLESWORTH & HEATHER WILLIAMS

SUBJECT: SOCIAL SECURITY NUMBERS IN DISTRICT COURT CASE FILES

BACKGROUND

On December 1, 2007, Federal Rule of Criminal Procedure 49.1 and Federal Rule of Civil Procedure 5.2 ("the privacy rules") took effect, providing that any "electronic or paper filing" in district court that contains a social security number (SSN) must be redacted so that only the last four digits of the SSN appear in the filing. In October 2008, Carl Malamud, President of Public.Resource.Org, sent Judge Lee H. Rosenthal a letter concerning the appearance of unredacted SSN's in the electronic case files of federal district courts – publicly available through PACER – notwithstanding the redaction requirement of the privacy rules. Mr. Malamud referred in his letter to having found 2,282 "suspect documents" in the case files of 32 different districts. He provided a CD to Judge Rosenthal containing a spreadsheet of these 32 districts. A copy of Mr. Malamud's letter and spreadsheet are attached as **Appendix A**. This memorandum analyzes the post-2007 cases from Mr. Malamud's list.

RESULTS OF ANALYSIS

As shown in **Table A** below, we found 217 documents containing 368 SSN's filed after December 1, 2007. This number excludes 93 documents (30% of the 310 documents on Malamud's list), which were inaccessible either because they were illegible or had been sealed by the district court after the court had become aware that the document contained one or more SSN's. Table A also shows the number of SSN's that were either waived by the party filing it (91 SSN's) or exempted from the redaction requirement (23 SSN's). Please note that, for the purposes of this analysis, multiple filings of the same document containing the same SSN were counted only once.

Approximately 70% of the SSN's we found (260 out of 368)[1] did not fall into either the waiver or exemption categories. Two thirds of this amount (178) appear to have been filed by a handful of actors in eight districts. For example, in Alaska, 10 of the 11 unredacted SSN's appeared in applications for writs of garnishment filed by the U.S. Attorney; in Massachusetts, all 7 SSN's were filed by defendants in a single case who were seeking to obtain the criminal history of plaintiff's witnesses; and in the Southern District of California, 81 out of 85 SSN's were filed as part of a list of shareholders by a defendant corporation. This information is detailed in **Table B**, below.

As Table A further demonstrates, 24% of the SSN's we located (91 out of 368) were filed by the possessor of the SSN and therefore constituted a waiver under the privacy rules. Of this amount, one tenth (9 out of 91) were filed by a party proceeding pro se. In addition, about 6% of the total number of SSN's (23 out of 368) were exempt from the redaction requirement. These exemptions fell largely into categories related to law enforcement: records of other courts or agencies, arrest or search warrants, and official records of state-court proceedings.

The remaining SSN's that were neither exempt from the redaction requirement, nor waived, nor filed by one of the handful of actors mentioned above, thus constituted 22% of the total (82 out of 368). They fell into a variety of categories, from pleadings themselves to various medical, financial, employment, and law-enforcement records. A specific break-down of *all* the SSN's is provided in **Table C**.

Finally, seven of the 32 districts on Malamud's list – the Districts of Arizona, Oregon, Southern Texas, Eastern Louisiana, Southern Ohio, Middle Pennsylvania, and Puerto Rico – had no SSN's filed after December 1, 2007. In addition, one district – the Central District of Illinois – did not list dates of filings and therefore could not be analyzed. Another – the Eastern District of Pennsylvania – had only one case, but that case was unavailable on PACER.

METHODOLOGY

We analyzed the data from the 32 district courts submitted by Mr. Malamud using PACER to access the electronic case file for each case that appeared to have had a SSN posted after December 1, 2007, the effective date of the privacy rules. We examined the specific document and page number cited by Mr. Malamud where one or more SSN's supposedly appeared. Once we located a document that contained one or more SSN's, we printed the page where the SSN appeared and also the first page of the document in which it appeared. These print-outs are attached as **Appendix B** and are numbered, sequentially within each district. These numbers correspond to handwritten numbers in the left-hand margin of the list provided by Mr. Malamud.

After locating the documents, we analyzed each appearance of a SSN to determine whether it fell into an exemption to the privacy rules. Due to the volume of SSN's, this determination was made based upon a plain reading of the rule, rather than extensive research

[1] There is a discrepancy of six SSN's between this amount (260), as reflected in Table C, and the number of non-exempt, non-waived SSN's that can be derived from Table A (254).

into case law interpreting the rule. The privacy rules exempt the following documents from the redaction requirement:

(1) a financial account number or real property address that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;

(2) the record of an administrative or agency proceeding;

(3) the official record of a state-court proceeding;

(4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;

(5) a filing covered by Criminal Rule 49.1(d) ["Filings made Under Seal"] or Civil Rule 5.2(c) or (d) ["Social Security Appeals and Immigrations Cases"]

(6) a pro se filing in an action brought under 28 U.S.C. §§ 2241, 2254, or 2255;

(7) a court filing that is related to a criminal matter or investigation and that is prepared before the filing of a criminal charge or is not filed as part of any docketed criminal case;

(8) an arrest or search warrant; and

(9) a charging document and an affidavit filed in support of any charging document.

We also looked at each SSN to determine whether it fell under the waiver provision of the privacy rules, which provides that a person waives the protection of the rules as to that person's own information by filing it without redaction and not under seal. *See* Fed. Crim. P. 49.1(h); Fed. R. Civ. P. 5.2(h).

TABLE A: Incidence of SSN's in District Court Case Files

District Court	Documents on Malamud's List Filed After 12/01/07 That Contain SSN'S	Inaccessible Documents	Number of SSN's[2]	Waivers	Exemptions
M.D. Ala.	78	9	67	32	13
D. Alaska	11	0	11	0	0
N.D. Cal.	17	0	15	2	1
S.D. Cal.	14	0	93	7	1
D. Col.	2	0	2	2	0
D. Conn.	1	0	1	1	0
D. Del.	11	1	13	3	0
D.D.C.	25[3]	24	1	1	0
S.D. Fla.	1	0	2	0	0
D. Guam	5	1	4	0	0
D. Haw.	1	0	1	0	0
N.D. Ill.	19	0	71	6	1
D. Md.	2	0	2	2	0
D.N. Mar. I.	1	0	1	1	0
D. Mass.	14	11	7	0	0
D. Minn.	1	0	1	1	0
D. N.J.	3	0	3	2	0
S.D. N.Y.	41[4]	0	58	21	4
W.D. Pa.	4	1	2	0	2
D. R.I.	6	2	4	2	1
D. Vt.	1	1	N/A	N/A	N/A
E.D. Va.	9	0	9	8	0
Fed. Cl.	43	43	N/A	N/A	N/A
Total	**310**	**93**	**368**	**91**	**23**
% of Total	**100%**	**30%**	**100%**	**24%**	**6%**

[2] Approximately 24% (69) of these SSN's had been redacted by the court or parties. (Almost all redacted SSN's – 65 out of 69 -- were from the Middle District of Alabama).
[3] Two of the SSN's on Malamud's list appear to be hearing numbers, not SSN's, and were not counted.
[4] Several of the SSN's on Malamud's list appear to be inmate identification numbers and were not counted.

TABLE B: Multiple Filings of SSN's by Same Actor

District Court[5]	Number of SSN's Filed by One Actor Out of Total Number of Non-exempt, Non-waived SSN's Filed in This District	Type of Actor	Type of Filing
D. Alaska	10/11	United States Attorney	Applications for writ of garnishment
N.D. Cal.	6/12	Attorneys on both sides	Guaranty form as an exhibit to a variety of pleadings and motions
S.D. Cal.	81/85	Defendant corporation	Shareholder list
D. Del.	5/10	Represented plaintiff trustees of litigation trust	Creditor mailing list as an exhibit to an Affidavit of Mailing
D. Guam	3/4	United States Attorney	Exhibit Lists
N.D. Ill.	50/64	Two labor unions (two separate cases)	Exhibits to a variety of pleadings and motions
D. Mass.	7/7	Defendants in one case	Seeking to obtain the criminal history of plaintiff's witnesses
S.D. N.Y.	16/33	(1) Defendant company; (2) Attorney for defendant	(1) Payroll audit as an exhibit to a statement of damages; (2) Declarations of Service
Total	**178/226**	**N/A**	**N/A**

[5] This chart does not contain all district courts from Malamud's list. It contains only those courts whose records included multiple filings of SSN's by the same actor.

TABLE C: Types of Filings with SSN's

Type of Filing	Number of Such Documents Filed After 12/01/07 That Contain SSN's[6]	Number of SSN's in This Type of Document
Pleadings[7]	24	29
Declaration/Affidavit of Service	14	18
Payroll Information	9	48
Guaranty Waiver	8	13
Criminal Offender Information	8	16
Medical Records	6	6
Personnel Records	5	10
Declaration of IRS Agent	4	4
Plaintiff Profile Form	3	4
Employee Service Record	3	3
Exhibit List	3	3
Subpoena	3	3
Report of Investigation	3	3
Report and Recommendation	2	3
Sharehold List	2	87
Income Tax Return	2	2
Accident Report	1	2
Inventory of Procured Evidence	1	1
Curriculum Vitae	1	1
Record of Arrest	1	1
Military Records	1	1
Record of Judgment	1	1
Authorization for Interpreting Services	1	1
Total	**106**	**260**

[6] This column does not include documents that were sealed, waivers, or exemptions.
[7] This category includes all SSN's that were located in a pleading, rather than in an exhibit. Pleadings included writs of garnishment (10 documents, 11 SSN's), complaints (4 documents, 4 SSN's), replies to motions (4 documents, 5 SSN's), motions (3 documents and 3 SSN's), and one answer (1 document, 1 SSN).

TAB
11-B

Attachment 2 to Privacy Subcommittee Report

Report by Federal Judicial Center

On Infrequency of Unredacted Social Security Numbers in

Federal Court Filings

THE FEDERAL JUDICIAL CENTER
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April 5 2010

Memorandum

To: Hon. Reena Raggi, Chair, Privacy Protection Subcommittee

From: George Cort and Joe Cecil, Federal Judicial Center

Subject: SOCIAL SECURITY NUMBERS IN FEDERAL COURT DOCUMENTS

Summary of Findings: The Center identified 2,899 documents with one or more unredacted Social Security numbers among the almost ten million documents filed in federal district and bankruptcy courts in a recent two-month period. Seventeen percent of these documents appeared to qualify for an exemption from the redaction requirement under the relevant privacy rules. An unknown number of the remaining documents may qualify for a waiver of the privacy protection under the rules, but we could not determine whether such a waiver applied to the documents identified in this study.

Search Methodology: Your Subcommittee asked the Center to identify unredacted Social Security numbers in recently filed federal court documents.[1] We first identified almost ten million unsealed documents filed during November and December 2009, in all 94 district courts and 92 of the 94 bankruptcy courts.[2] We

[1] The Federal Rules of Civil, Criminal, Bankruptcy, and Appellate Procedure were amended in December 2007 to protect privacy of individuals identified in court documents by requiring redaction of Social Security numbers, taxpayer-identification numbers, birth dates, the names of minors, and financial-account numbers. Our study sought to identify only documents containing Social Security numbers, including Social Security numbers designated in the document as taxpayer identification numbers, employee identification numbers, and financial account numbers. Generally, the privacy rules include exceptions from the redaction requirement for filings made under seal; official records of a state court; administrative or agency proceedings; financial account numbers identifying property that may be subject to forfeiture; court records filed before December, 2007; *pro se* filings in actions seeking a writ of *habeas corpus* or to set aside a criminal sentence; and actions for Social Security or immigration benefits or detention. The criminal privacy rule includes additional exceptions for documents related to a criminal investigation prepared before filing of a criminal charge; charging documents and affidavits prepared in support of charging documents; and arrest or search warrants. The bankruptcy privacy rule includes an additional exception recognizing the statutory requirement that the Social Security number of a non-attorney bankruptcy petition preparer appear on the proper form. All of the privacy rules recognize that a filer waives the protection as to the filer's own information by filing it without redaction and not under seal. These rules appear in Appendix A. This study did not examine documents filed in appellate cases or documents filed in paper form.

[2] One bankruptcy court did not maintain its documents in a format that permitted an electronic search of the text. A second bankruptcy court was not included in the study because of a miscommunication in our office that delayed our access to the court's data.

identified documents to search by using a computer scripting language to query bankruptcy and district court electronic case management data in the courts' CM/ECF backup databases. The Structure Query Language (SQL) program identified all documents filed in the bankruptcy and district courts from November 1 through December 31 2009. We excluded all sealed records and other documents that were designated as unavailable on the courts' electronic public access systems (PACER).

We then ran a Practical Extraction and Report Language (PERL) program to identify text that corresponded to the distinct Social Security number format (e.g., 123-45-6789). The PERL program was unable to convert certain types of non-text documents, such as PDF documents stored as static images, and we were unable to detect Social Security numbers that might reside within such documents. We then reviewed the search output files and visually reviewed over 3,200 filed documents to determine if the string of characters appeared to be a valid Social Security number. Where multiple numbers appeared in a document, we examined each number in order until we located a valid Social Security number. If the number appeared to be a valid Social Security number, we then examined the context of the number within the document to make a preliminary determination of the basis for a possible exemption from the redaction requirement under the privacy rules.

Incidence of Unredacted Social Security Numbers: As indicated in Table 1 below, we found 2,899 documents with unredacted Social Security numbers, which is approximately one out of every 3,400 court documents examined. We found a greater number of documents containing Social Security numbers filed in bankruptcy courts, which proportionally have more documents filed than in district courts.

Table 1: Documents with Unredacted Social Security Numbers

DOCUMENTS	Total	Bankruptcy	Civil + Criminal
Examined	9,830,721	7,738,541	2,092,080
With SSN numbers	2,899	2,244	655
Ratio SSN/Examined	1 : 3,391	1 : 3,448	1 : 3,194

Included among the documents with Social Security numbers were 71 instances of unsuccessfully redacted Social Security numbers. Such unsuccessful attempts

included strikeovers, scratchouts, blackouts, and use of word processing applications that remove sections of text. These unsuccessful redaction efforts still allowed the Center's electronic text search program to detect the full Social Security number. Of particular concern is the apparent use of word processing redaction techniques that retain the Social Security number in the metadata that are retained when the documents is converted to a PDF format for filing in court.[3] The full Social Security number appeared when the apparently redacted text was cut and pasted into a word processing document.

Approximately 91% of the 2,899 documents (or 2,629 documents) contain entries that clearly appear to be Social Security numbers. Nine percent of the documents (or 270 documents) contain entries following the Social Security number format that were identified as taxpayer identification numbers, financial account numbers, or employee identification numbers. We believe these numbers are identical to the Social Security number of the person identified in the document.[4]

We counted only documents containing Social Security numbers and did not attempt to count the number of distinct Social Security numbers that appeared in the documents. Still, we were surprised by the prevalence of documents with Social Security numbers for more than one individual. We estimate that approximately 20% of the 2,899 documents included an unredacted Social Security number for more than one person, most often the Social Security number of a joint debtor. We also found numerous documents containing Social Security numbers for persons who were not part of the litigation. For example, some bankruptcy documents included the debtor's income tax return with the Social Security number of the tax preparer remaining unredacted. Some commercial bankruptcy documents listed the Social Security numbers of creditors, employees or investors in the bankrupt enterprise. One such bankruptcy document listed 122 Social Security numbers for creditors. The problem of Social Security numbers of third parties is not limited to bankruptcy documents. One document filed in an MDL product liability action, for example, listed unredacted Social Security numbers for over 300 of the claimants.

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[3] For a discussion of the problems of redacting metadata in electronically-filed court documents, see Guidance on Redacting Personal Data Identifiers in Electronically-Filed Documents (http://www.cadc.uscourts.gov/internet/home.nsf/Content/Guidance%20on%20Redacting%20Personal%20Data%20Identifiers%20in%20Electronically%20Filed%20Documents/$FILE/ECF%20Redaction%20Guide.pdf) and Effective Personal-Identity and Metadata Redaction Techniques for E-Filing (http://www.njd.uscourts.gov/cm-ecf/RedactTips.pdf).

[4] We also believe that our results underestimate the extent to which Social Security numbers may be deduced from the documents examined in this sample. We did not count among the documents with Social Security numbers those documents that identified the suspect number as a general account number, student identification number, and other identification number, even if the suspect number conformed to the Social Security number format. Many of the excluded documents with commercial and personal services account numbers and student identification numbers appeared to be based on Social Security numbers and often shared the last four digits of the redacted Social Security number.

We noticed that full Social Security numbers in bankruptcy documents often appeared in response to a request on official bankruptcy forms for only the last four digits of the Social Security number. For example, we estimate that approximately 450 of the 2,899 documents we identified as containing unredacted Social Security numbers were *Bankruptcy Form 7: Statement of [Debtor's] Financial Affairs*. The form requires debtors to list the names of businesses of the debtor and the Social Security number or tax ID number associated with the business. Even though the current version of the form asks for only the last four digits of the Social Security number, these documents reported the full Social Security number. (Some of these forms also appeared to be outdated and asked for the full Social Security number instead of just the last four digits.) Social Security numbers also frequently appeared on the debtor's employee pay stubs submitted as exhibits in bankruptcy filings.

We also found Social Security numbers appearing on 284 submissions of *Bankruptcy Form 21: Statement of Social Security Number or Individual Tax Identification Number*. This form requires the debtor to enter the unredacted Social Security number and is not supposed to be filed as part of the court record. When such documents do appear with unredacted Social Security numbers, they often are inserted among numerous other documents that had been combined into a single bankruptcy filing.

Unredacted Social Security numbers in civil and criminal cases tend to show up in exhibits, depositions, and interrogatories. In criminal cases, Social Security numbers often appear in judgment and sentencing orders. Social Security numbers also appear in habeas corpus petitions filed by US attorneys seeking custody of an inmate serving a sentence in a state or local facility.

Exemptions to the Redaction Requirement: As indicated in Table 2 below, approximately 17% of the 2,899 documents (or 491 documents) we identified as containing Social Security numbers appear to qualify for an exemption from the redaction requirement under the rules. We made only a preliminary assessment of the basis for an exemption since we were able to examine only the specific document containing the Social Security number and were not able to interpret the role of this document in the larger context of the litigation. For example, we were unable to identify the party filing the document and were, therefore, unable to identify documents filed by *pro se* litigants that might be exempt from the redaction requirement. (We do note in the table those instances where the document on its face indicates that it was obviously filed by a *pro se* litigant, which more accurately can be regarded as a waiver of the privacy protection.)

Table 2: Preliminary Assessment of Documents with Social Security Numbers that May Qualify as Exemptions to the Redaction Requirement[5]

DOCUMENTS	TOTAL	BANKRUPTCY	CIVIL	CRIMINAL
Possible Basis for Exemption				
State Court Proceeding	160	98	58	4
Non-Atty. Bankruptcy Preparer	125	125	0	0
Obviously Pro Se	86	9	68	9
Agency Proceeding	56	13	40	3
SSN of Filing Attorney	34	28	5	1
Charging Document/Affidavit	17	0	0	17
Filed before December, 2007	4	0	0	4
Arrest/Search Warrant	4	0	0	4
Criminal Investigation	3	0	0	3
Order Regarding SS Benefits	1	0	0	1
Forfeiture Account Number	1	0	1	0
SUBTOTAL	491	273	172	46
No Apparent Basis for Exemption or Waiver	2,408 (83%)	1,971 (87%)	352 (67%)	85 (65%)
TOTAL	2,899	2,244	524	131

[5] Although the privacy rules allow an exemption for an action for immigration benefits or detention, no such document was found.

The most common basis for an exemption was the filing of a record of a state court proceeding. In bankruptcy proceedings this occurred, for example, when a state court order resolving a previous dispute or granting a divorce was included among the filings. Criminal cases sometimes included state court records indicating state prosecution of previous criminal activity.

We found 125 documents that included the Social Security number for a non-attorney bankruptcy petition preparer. This number is required by statute to appear on the document in unredacted form.[6] In addition we found 34 documents where the filing attorney included his or her Social Security number with the filing, even though no Social Security number was requested. Often this was the result of some request for payment for services rendered or to be rendered.

An unknown number of the 2,408 documents that do not appear to meet the standards for an exemption may still involve a waiver of protection under the privacy rules. Such a waiver arises when a person files his or her own private information without redaction and not under seal.[7] As noted above, our search technique did not permit us to identify the party filing the document and accurately assess the likelihood of such a waiver. However, we did determine that among those documents containing Social Security numbers with no apparent basis for an exception to the redaction requirement were 248 documents from cases with one or more *pro se* litigants. (These are not included in the "obviously *pro se*" count in Table 2.) It is likely that some of these documents may involve a waiver of the redaction requirement.

[6] 11 U.S.C. § 110.

[7] A waiver also may arise when a party authorizes his or her attorney to file a document with the private information unredacted. We have no basis on which to assess whether such an explicit authorization was made in counseled cases.

Appendix A: Federal Procedural Rules Protecting Individual Privacy

Federal Rules of Civil Procedure

Rule 5.2. Privacy Protection for Filings Made with the Court

(a) Redacted Filings.

Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing may include only:

(1) the last four digits of the social-security number and taxpayer-identification number;

(2) the year of the individual's birth;

(3) the minor's initials; and

(4) the last four digits of the financial-account number.

(b) Exemptions from the Redaction Requirement.

The redaction requirement does not apply to the following:

(1) a financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;

(2) the record of an administrative or agency proceeding;

(3) the official record of a state-court proceeding;

(4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;

(5) a filing covered by Rule 5.2(c) or (d); and

(6) a pro se filing in an action brought under 28 U.S.C. §§ 2241, 2254, or 2255.

(c) Limitations on Remote Access to Electronic Files; Social-Security Appeals and Immigration Cases.

Unless the court orders otherwise, in an action for benefits under the Social Security Act, and in an action or proceeding relating to an order of removal, to relief from

removal, or to immigration benefits or detention, access to an electronic file is authorized as follows:

(1) the parties and their attorneys may have remote electronic access to any part of the case file, including the administrative record;

(2) any other person may have electronic access to the full record at the courthouse, but may have remote electronic access only to:

(A) the docket maintained by the court; and

(B) an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record.

(d) Filings Made Under Seal.

The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

(e) Protective Orders.

For good cause, the court may by order in a case:

(1) require redaction of additional information; or

(2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.

(f) Option for Additional Unredacted Filing Under Seal.

A person making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(g) Option for Filing a Reference List.

A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

(h) Waiver of Protection of Identifiers.

A person waives the protection of Rule 5.2(a) as to the person's own information by filing it without redaction and not under seal.

Federal Rules of Criminal Procedure
Rule 49.1. Privacy Protection For Filings Made with the Court

(a) Redacted Filings.

Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, a financial-account number, or the home address of an individual, a party or nonparty making the filing may include only:

(1) the last four digits of the social-security number and taxpayer-identification number;

(2) the year of the individual's birth;

(3) the minor's initials;

(4) the last four digits of the financial-account number; and

(5) the city and state of the home address.

(b) Exemptions from the Redaction Requirement.

The redaction requirement does not apply to the following:

(1) a financial-account number or real property address that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;

(2) the record of an administrative or agency proceeding;

(3) the official record of a state-court proceeding;

(4) the record of a court or tribunal, if that record as not subject to the redaction requirement when originally filed;

(5) a filing covered by Rule 49.1(d);

(6) a pro se filing in an action brought under 28 U.S.C. §§ 2241, 2254, or 2255;

(7) a court filing that is related to a criminal matter or investigation and that is prepared before the filing of a criminal charge or is not filed as part of any docketed criminal case;

(8) an arrest or search warrant; and

(9) a charging document and an affidavit filed in support of any charging document.

(c) Immigration Cases.

A filing in an action brought under 28 U.S.C. § 2241 that relates to the petitioner's immigration rights is governed by Federal Rule of Civil Procedure 5.2.

(d) Filings Made Under Seal.

The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

(e) Protective Orders.

For good cause, the court may by order in a case:

(1) require redaction of additional information; or

(2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.

(f) Option for Additional Unredacted Filing Under Seal.

A person making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(g) Option for Filing a Reference List.

A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

(h) Waiver of Protection of Identifiers.

A person waives the protection of Rule 49.1(a) as to the person's own information by filing it without redaction and not under seal.

Federal Rules of Bankruptcy Procedure

Rule 9037. Privacy Protection For Filings Made with the Court

(a) Redacted filings.

Unless the court orders otherwise, in an electronic or paper filing made with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual, other than the debtor, known to be and identified as a minor, or a financial-account number, a party or nonparty making the filing may include only:

(1) the last four digits of the social-security number and taxpayer-identification number;

(2) the year of the individual's birth;

(3) the minor's initials; and

(4) the last four digits of the financial-account number.

(b) Exemptions from the redaction requirement.

The redaction requirement does not apply to the following:

(1) a financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;

(2) the record of an administrative or agency proceeding unless filed with a proof of claim;

(3) the official record of a state-court proceeding;

(4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;

(5) a filing covered by subdivision (c) of this rule; and

(6) a filing that is subject to § 110 of the Code.

(c) Filings made under seal.

The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the entity that made the filing to file a redacted version for the public record.

(d) Protective orders.

For cause, the court may by order in a case under the Code:

(1) require redaction of additional information; or

(2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.

(e) Option for additional unredacted filing under seal.

An entity making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(f) Option for filing a reference list.

A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

(g) Waiver of protection of identifiers.

An entity waives the protection of subdivision (a) as to the entity's own information by filing it without redaction and not under seal.

TAB
11-C

Attachment 3 to Privacy Subcommittee Report

Report by Administrative Office on Local Rules

on Redaction of Private Information

TO: Privacy Subcommittee
DATE: September 1, 2010
FROM: Heather L. Williams, Administrative Office
RE: Local Privacy Rules

MEMORANDUM

1. BACKGROUND.

In September 2009, Professor Capra requested that I complete a comprehensive survey of the redaction requirements found in the local civil and criminal rules of the ninety-four district courts. This survey was designed to focus particularly on reporting those rules that: (1) add redaction requirements that do not exist in the federal privacy rules; (2) subtract redaction requirements that exist in the federal rules; (3) modify other requirements or standards set forth in the federal rules; and (4) purport to replicate the federal rule, but state the standard in a different way. My original survey (completed in 2009) has been updated to include the most recent local rule amendments, many of which were made in January and February 2010.

2. PRELIMINARY FINDINGS.

My survey of local redaction rules produced a variety of interesting results, each of which is detailed at length in the appendices to this memorandum. To begin, fifty-nine districts do not include a stand-alone redaction provision in their local rules. (*See* Appendix 1.A for a list of these fifty-nine districts. A "stand-alone" redaction provision is a rule provision in which standards relating to redaction are discussed at some length.) Thirty-five districts *do*, however, include a stand-alone redaction provision in their local rules. (*See* Appendix 1.B for this list.)

Of the thirty-five districts whose local rules contain a stand-alone redaction provision, thirty districts have rules that outline standards for redacting pleadings, but do not mention redacting transcripts. Three districts have rules that outline standards for redacting transcripts, but do not mention redacting pleadings. Two districts have rules that outline standards for redacting pleadings *and* transcripts. (*See* Appendix 2 for a complete list of these districts.) Because transcript redaction is not explicitly mentioned in the federal privacy rules, local rules that outline standards for transcript redaction are excluded from the remainder of this report. Instead, the report focuses on those rules that satisfy one or more of the criteria listed above.

3. RULES THAT ADD REQUIREMENTS TO THE FEDERAL RULES.

My survey focused, first, on locating local rules that add redaction requirements not found in the federal rules. (Districts whose local rules suggest or recommend additional redactions or include warnings to use additional caution when filing certain types of documents are not included in this category. Only those districts whose local rules impose a *mandatory*

additional redaction requirement are included here.) Of the thirty-five districts that have local redaction rules, ten districts' local rules add one or more redaction requirements that are not included in the federal rules. These requirement-adding rules fall into one of two categories.

First, nine districts' local redaction rule includes "home address" in the redaction requirements for civil cases. The redaction of home addresses is required by Fed. R. Crim. P. 49.1. It is *not* required under Fed. R. Civ. P. 5.2. Therefore, any inclusion of a home address in a civil rule's redaction requirements, or in a rule that does not specify its type, but presumably applies to both civil and criminal cases, was counted as adding a requirement not found in the federal rules. (*See* Appendix 3.A for a list of these districts and their relevant rules.)

Second, one district has a local redaction rule that contains a unique redaction requirement not found in either the federal civil or criminal privacy rules. The District Court for the Southern District of Illinois requires that drivers' license numbers be redacted (so that only the last four digits of the number are used in filings). This requirement is not found in either Fed. R. Civ. P. 5.2 or Fed. R. Crim. P. 49.1 and is therefore a unique local rule addition.

4. RULES THAT SUBTRACT REDACTION REQUIREMENTS FROM THE FEDERAL RULES.

Of the thirty-five districts that have local redaction rules, seven districts' rules subtract one or more of the redaction requirements included in the federal rules. These requirement-subtracting rules fall into one of two categories. First, six districts' local redaction rule does not include "home address" in the redaction requirements for criminal cases. Fed. R. Crim. P. 49.1 requires that home addresses be redacted in criminal cases. Therefore, the absence of a statement requiring that "home addresses" be redacted in a local criminal rule or in a rule that applies to both criminal and civil cases (prefaced, as many districts do, by a statement such as "in criminal cases only") was counted as subtracting a requirement from the federal rule. (*See* Appendix 4.A. for a list of districts whose rules subtracted this element from the federal rule.)

Second, one district has a local redaction rule that eliminates a redaction requirement other than "home address" found in the federal rule. The District Court for the Eastern District of North Carolina only requires that minors' names be redacted. Therefore, the local rule subtracts the following elements from the federal rule: (1) social security numbers or taxpayer-identification numbers; (2) birth dates; (3) financial account numbers; and (4) home addresses in criminal cases. (*See* Appendix 8 for the full text of the local redaction rule from this district.)

5. RULES THAT MODIFY OTHER REQUIREMENTS FOUND IN THE FEDERAL RULES.

Excluding the addition or subtraction of the redaction requirements discussed above, the local rules differ from the federal rules in a variety of ways. Many local rules do not include or address the requirements specified in the other subsections of the federal privacy rules. For example, of the thirty-five districts with local redaction rules, twenty-six do not mention the requirements set out in subsection (b) of the federal rules. (Subsection (b) provides a list of certain kinds of documents that are exempt from the redaction requirement.) Three districts outline exemptions to the redaction requirement, but do not include all of the exemptions

provided for in the federal rules. (*See* Appendix 5.A. for a list of these districts.) Appendix 5 provides a comprehensive list of those local redaction rules that do not include or reference one or more of the various requirements found in subsections (b) through (h) of the federal rules.

6. OTHER DIFFERENCES OF INTEREST AND STATING THE STANDARDS DIFFERENTLY.

In six districts, the local redaction rule incorporates "suggestions" for exercising additional caution when filing certain kinds of documents. (*See* Appendix 6.A.) In two districts (the Central District of California and the District of Idaho), the local redaction rule includes a list of documents that must be excluded from the public case file. (*See* Appendix 6.B.) Three districts have included unique requirements in their local rules that are not included in the federal rules. (A list and brief description of each of these rules is provided in Appendix 6.C.)

In one district, the amount of information that must be redacted differs from the amount required under the federal rules. The local rules for the Eastern District of California require filers to use a minor's initials in criminal actions. In civil actions, the local rule directs filers to use a minor's initials "when federal or state law requires the use of initials, or when the specific identity of the minor is not necessary to the case or individual document." The local rule also provides that the "the name or type of account and the financial institution where maintained" should be redacted, in addition to financial account numbers whenever the latter are included. (*See* Appendix 6.D. The full text of this rule (and all others) is available in Appendix 8.)

Twenty-five local rules explicitly state that lawyers are responsible for satisfying redaction requirements when filing documents. (*See* Appendix 6.E.) A statement of this nature is recommended by the "Proposed Guidelines for United States District Courts Addressing Judicial Conference Privacy Policy Regarding Public Access to Electronic Case Files," a copy of which is attached to this memorandum. Twenty local rules also include the additional language (typically stating that the rule is created "in compliance with the policy of the Judicial Conference) recommended by the "Proposed Guidelines" document. (*See* Appendix 6.F.).

Appendix 6 also lists those rules that either use a particularly unique format when stating their local redaction requirements, or follow a commonly-used format for local privacy rules. (Often, the formatting chosen affects the manner in which the redaction standard is stated.)

APPENDIX 1 – WHICH DISTRICTS HAVE LOCAL REDACTION RULES?

A. Districts Whose Local Rules Do *Not* Contain a Stand-Alone Redaction Provision:

1. Alabama Middle
2. Alabama Northern
3. Alabama Southern
4. Alaska
5. Arizona
6. Arkansas Eastern
7. Arkansas Western
8. California Northern
9. California Southern
10. Colorado
11. Delaware
12. Florida Middle
13. Florida Northern
14. Florida Southern
15. Georgia Northern
16. Guam
17. Hawaii
18. Central Illinois
19. Northern Illinois
20. Indiana Northern
21. Indiana Southern
22. Kansas
23. Kentucky Eastern
24. Kentucky Western
25. Maine
26. Maryland
27. Michigan Western
28. Missouri Eastern
29. Missouri Western
30. Montana
31. Nebraska
32. Nevada
33. New Hampshire
34. New Mexico
35. New York Eastern
36. New York Southern
37. New York Western
38. North Dakota
39. Ohio Southern
40. Oklahoma Eastern

41. Oregon
42. Pennsylvania Western
43. Rhode Island
44. South Carolina
45. South Dakota
46. Tennessee Eastern
47. Tennessee Middle
48. Tennessee Western
49. Texas Northern
50. Texas Southern
51. Texas Western
52. Federal Claims Court
53. Vermont
54. Virginia Eastern
55. Washington Eastern
56. Washington Western
57. West Virginia Southern
58. Wisconsin Eastern
59. Wisconsin Western

B. Districts Whose Local Rules Contain a Stand-Alone Redaction Provision:

1. California Central
2. California Eastern
3. Connecticut
4. District of Columbia
5. Georgia Middle
6. Georgia Southern
7. Idaho
8. Illinois Southern
9. Iowa Northern
10. Iowa Southern
11. Louisiana Eastern
12. Louisiana Middle
13. Louisiana Western
14. Massachusetts
15. Michigan Eastern
16. Minnesota
17. Mississippi Northern
18. Mississippi Southern
19. New Jersey
20. New York Northern
21. North Carolina Eastern
22. North Carolina Middle
23. North Carolina Western

24. Northern Mariana Islands
25. Ohio Northern
26. Oklahoma Northern
27. Oklahoma Western
28. Pennsylvania Eastern
29. Pennsylvania Middle
30. Puerto Rico
31. Texas Eastern
32. Utah
33. Virginia Western
34. Virgin Islands
35. West Virginia Northern

APPENDIX 2 – TOPICS COVERED BY THE LOCAL REDACTION RULES:

A. Districts Whose Redaction Rules Outline Standards for Redacting Pleadings:

1. California Central
2. California Eastern
3. Connecticut
4. District of Columbia
5. Georgia Middle
6. Georgia Southern
7. Idaho
8. Southern Illinois
9. Iowa Northern
10. Iowa Southern
11. Louisiana Eastern
12. Louisiana Middle
13. Louisiana Western
14. Massachusetts
15. Michigan Eastern
16. Mississippi Northern
17. Mississippi Southern
18. New Jersey
19. New York Northern
20. North Carolina Eastern
21. North Carolina Middle
22. North Carolina Western
23. Northern Mariana Islands
24. Ohio Northern
25. Oklahoma Northern
26. Pennsylvania Eastern
27. Pennsylvania Middle
28. Puerto Rico
29. Virginia Western
30. Virgin Islands

B. Districts Whose Redaction Rules Outline Standards for Redacting Transcripts:

1. Minnesota
2. Oklahoma Western
3. Texas Eastern

C. Districts Whose Redaction Rules Discuss Redacting Pleadings *and* Transcripts:

1. Utah

2. West Virginia Northern

APPENDIX 3 – ADDITIONAL REDACTION REQUIREMENTS:

A. Districts Whose Local Redaction Rule Includes "Home Address" in its Requirements for Redaction in Civil Cases:

1. California Central – ***L.R. 79-5.4***
2. Georgia Southern – **LR 8**
3. Idaho – **CIVIL RULE 5.5**
4. Louisiana Eastern – **LR 5.7.12W**
5. Louisiana Middle – **LR 5.7.12W**
6. Louisiana Western – **LR 5.7.12W**
7. New York Northern – **Rule 8.1**
8. Northern Mariana Islands – **LR 5.2**
9. Puerto Rico – **RULE 5.2**

B. Districts Whose Local Redaction Rule Includes a Unique Requirement for Redaction That Does Not Exist in Either the Federal Civil or Criminal Rules.

1. Southern Illinois – **Rule 5.1(d)**

APPENDIX 4 – SUBTRACTED REDACTION REQUIREMENTS:

A. Districts Whose Local Redaction Rule Does Not Include "Home Address" in the Redaction Requirements for Criminal Cases.

1. Iowa Northern – **LR 10**
2. Iowa Southern – **LR 10**
3. Massachusetts – **RULE 5.3**
4. North Carolina Middle – **LR 7.1**
5. North Carolina Western – **LCrR 5.2**
6. Virgin Islands – **Rule 5.4**

B. Districts Whose Local Redaction Rule Subtracts Other Redaction Requirements.

1. North Carolina Eastern – **Rule 17.1**

APPENDIX 5 – MODIFICATION OR OMISSION OF OTHER REQUIREMENTS:

A. **Districts Whose Local Redaction Rule Does Not Include the Requirements Set out in Subsection (b) of the Federal Rules.** Fed R. Civ. P. 5.2(b) and Fed. R. Crim. P. 5.2(b) provide a list of certain kinds of documents that are exempt from the redaction requirement. The federal civil and criminal rules do exempt different documents. Because by and large, the local rules do not include this requirement at all, I have not listed precisely which exemptions are missing from each local rule. Rules followed by an asterisk list *some* exemptions, but not all of the exemptions covered in the federal rules.

1. California Central – **L.R. 79-5.4**
2. California Eastern – **RULE 39-140***
3. Connecticut – **CIVIL RULE 5, CRIMINAL RULE 57**
4. District of Columbia – **LCvR 5.4**
5. Georgia Southern – **LR 8**
6. Idaho – **CIVIL RULE 5.5**
7. Southern Illinois – **RULE 5.1**
8. Iowa Northern – **LR 10**
9. Iowa Southern – **LR 10**
10. Louisiana Eastern – **LR 5.7.12W**
11. Louisiana Middle – **LR 5.7.12W**
12. Louisiana Western – **LR 5.7.12W**
13. Massachusetts – **Rule 5.3**
14. Mississippi Northern – **Rule 8.1**
15. Mississippi Southern – **Rule 8.1**
16. New Jersey – **ECF Policy 17.**
17. New York Northern – **Rule 8.1***
18. North Carolina Eastern – **Rule 17.1**
19. North Carolina Middle – **LR 7.1**
20. North Carolina Western – **LCrR 5.2**
21. Northern Mariana Islands – **LR 5.2**
22. Ohio Northern – **Local Civ Rule 8.1,* Crim Rule 49.1**
23. Oklahoma Northern – **L CvR 5.3**
24. Pennsylvania Eastern – **CRIMINAL RULE 53.2**
25. Pennsylvania Middle – **LR 5.2**
26. Puerto Rico – **RULE 5.2**
27. Virginia Western – **Rule 8**
28. Virgin Islands – **Rule 5.4**
29. West Virginia Northern – **LR Gen P 5.08**

B. **Districts Whose Local Redaction Rule Does Not Include the Requirements Set Out in Subsection (c) of the Federal Rules.** Fed. R. Civ. P. 5.2(c) provides information

about electronic files for immigration cases and social security appeal cases. Fed. R. Crim. P. 49.1(c) states that immigration-related filings are governed by Civil Rule 5.2(c).

1. California Central – **L.R. 79-5.4**
2. California Eastern – **RULE 39-140**
3. Connecticut – **CIVIL RULE 5, CRIMINAL RULE 57**
4. District of Columbia - **LCvR 5.4**
5. Georgia Middle – **Rule 5.4**
6. Georgia Southern – **LR 8**
7. Idaho – **CIVIL RULE 5.5**
8. Southern Illinois – **RULE 5.1**
9. Iowa Northern – **LR 10**
10. Iowa Southern – **LR 10**
11. Louisiana Eastern – **LR 5.7.12W**
12. Louisiana Middle – **LR 5.7.12W**
13. Louisiana Western – **LR 5.7.12W**
14. Massachusetts – **Rule 5.3**
15. Mississippi Northern – **Rule 8.1**
16. Mississippi Southern – **Rule 8.1**
17. New Jersey – **ECF Policy 17.**
18. New York Northern – **Rule 8.1**
19. North Carolina Eastern – **Rule 17.1**
20. North Carolina Middle – **LR 7.1**
21. North Carolina Western – **LCrR 5.2**
22. Northern Mariana Islands – **LR 5.2**
23. Ohio Northern – **Civ Rule 8.1, Crim Rule 49.1**
24. Oklahoma Northern – **L CvR 5.3**
25. Pennsylvania Eastern – **CRIMINAL RULE 53.2**
26. Pennsylvania Middle – **LR 5.2**
27. Puerto Rico – **RULE 5.2**
28. Virginia Western – **Rule 8**
29. Virgin Islands – **Rule 5.4**
30. West Virginia Northern – **LR Gen P 5.08**

C. **Districts Whose Local Redaction Rule Does Not Include the Requirements Set Out in Subsection (d) of the Federal Rules.** Fed R. Crim. P. 49.1(d) and Fed. R. Civ. P. 5.2(d) provide that the court may order a filing to be made under seal without redaction.

1. California Central – **L.R. 79-5.4**
2. Connecticut – **CIVIL RULE 5, CRIMINAL RULE 57**
3. Georgia Southern – **LR 8**
4. Idaho – **CIVIL RULE 5.5**
5. Southern Illinois – **RULE 5.1**
6. Louisiana Eastern – **LR 5.7.12W**
7. Louisiana Middle – **LR 5.7.12W**

8. Louisiana Western – **LR 5.7.12W**
9. Mississippi Northern – **Rule 8.1**
10. Mississippi Southern – **Rule 8.1**
11. New Jersey – **ECF Policy 17.**
12. New York Northern – **Rule 8.1**
13. North Carolina Eastern – **Rule 17.1**
14. North Carolina Middle – **LR 7.1**
15. North Carolina Western – **LCrR 5.2**
16. Northern Mariana Islands – **LR 5.2**
17. Ohio Northern – **Civ Rule 8.1, Crim Rule 49.1**
18. Pennsylvania Middle – **LR 5.2**
19. Puerto Rico – **RULE 5.2**
20. Virginia Western – **Rule 8**
21. Virgin Islands – **Rule 5.4**
22. West Virginia Northern – **LR Gen P 5.08**

D. Districts Whose Local Redaction Rule Does Not Include the Requirements Set Out in Subsection (e) of the Federal Rules. Fed R. Civ. P. 5.2(e) and Fed. R. Crim. P. 5.2(e) provide information relating to a court's authority to grant a protective order.

1. California Central – **L.R. 79-5.4**
2. Connecticut – **CIVIL RULE 5, CRIMINAL RULE 57**
3. District of Columbia - **LCvR 5.4**
4. Georgia Southern – **LR 8**
5. Idaho – **CIVIL RULE 5.5**
6. Southern Illinois – **RULE 5.1**
7. Iowa Northern – **LR 10**
8. Iowa Southern – **LR 10**
9. Louisiana Eastern – **LR 5.7.12W**
10. Louisiana Middle – **LR 5.7.12W**
11. Louisiana Western – **LR 5.7.12W**
12. Massachusetts – **Rule 5.3**
13. Mississippi Northern – **Rule 8.1**
14. Mississippi Southern – **Rule 8.1**
15. New Jersey – **ECF Policy 17.**
16. New York Northern – **Rule 8.1**
17. North Carolina Eastern – **Rule 17.1**
18. North Carolina Middle – **LR 7.1**
19. North Carolina Western – **LCrR 5.2**
20. Northern Mariana Islands – **LR 5.2**
21. Ohio Northern – **Civ Rule 8.1, Crim Rule 49.1**
22. Oklahoma Northern – **L CvR 5.3**
23. Pennsylvania Eastern – **CRIMINAL RULE 53.2**
24. Pennsylvania Middle – **LR 5.2**
25. Puerto Rico – **RULE 5.2**

26. Virgin Islands – **Rule 5.4**
27. Virginia Western – **Rule 8**
28. West Virginia Northern – **LR Gen P 5.08**

E. **Districts Whose Local Redaction Rule Does Not Include the Requirements Set Out in Subsection (f) of the Federal Rules**. Fed R. Civ. P. 5.2(f) and Fed. R. Crim. P. 5.2(f) provide that a filer making a redacted filing has the option of filing an unredacted copy under seal, which the court must retain as part of the record.

1. California Central – **L.R. 79-5.4**
2. Connecticut – **CIVIL RULE 5, CRIMINAL RULE 57**
3. District of Columbia - **LCvR 5.4**
4. Iowa Northern – **LR 10**
5. Iowa Southern – **LR 10**
6. Massachusetts – **Rule 5.3**
7. North Carolina Eastern – **Rule 17.1**
8. Virginia Western – **Rule 8**

F. **Districts Whose Local Redaction Rule Does Not Include the Requirements Set Out in Subsection (g) of the Federal Rules.** Fed R. Civ. P. 5.2(g) and Fed. R. Crim. P. 5.2(g) state that the filer has the option of filing a reference list along with a redacted filing.

1. California Eastern – **RULE 39-140**
2. Connecticut – **CIVIL RULE 5, CRIMINAL RULE 57**
3. District of Columbia - **LCvR 5.4**
4. Idaho – **CIVIL RULE 5.5**
5. Southern Illinois – **RULE 5.1**
6. Iowa Northern – **LR 10**
7. Iowa Southern – **LR 10**
8. Massachusetts – **Rule 5.3**
9. North Carolina Eastern – **Rule 17.1**
10. Northern Mariana Islands – **LR 5.2**
11. Pennsylvania Eastern – **CRIMINAL RULE 53.2**
12. Puerto Rico – **RULE 5.2**
13. Virginia Western – **Rule 8**

G. **Districts Whose Local Redaction Rule Does Not Include the Requirements Set Out in Subsection (h) of the Federal Rules.** Fed R. Civ. P. 5.2(h) and Fed. R. Crim. P. 5.2(h) provide information about the waiver of the protection of personal identifiers.

1. California Central – **L.R. 79-5.4**
2. California Eastern – **RULE 39-140**
3. Connecticut – **CIVIL RULE 5, CRIMINAL RULE 57**
4. District of Columbia - **LCvR 5.4**
5. Georgia Southern – **LR 8**

6. Idaho – **CIVIL RULE 5.5**
7. Southern Illinois – **RULE 5.1**
8. Iowa Northern – **LR 10**
9. Iowa Southern – **LR 10**
10. Louisiana Eastern – **LR 5.7.12W**
11. Louisiana Middle – **LR 5.7.12W**
12. Louisiana Western – **LR 5.7.12W**
13. Massachusetts – **Rule 5.3**
14. Mississippi Northern – **Rule 8.1**
15. Mississippi Southern – **Rule 8.1**
16. New Jersey – **ECF Policy 17.**
17. New York Northern – **Rule 8.1**
18. North Carolina Eastern District Court – **Rule 17.1**
19. North Carolina Middle District Court – **LR 7.1**
20. North Carolina Western District Court – **LCrR 5.2**
21. Northern Mariana Islands District Court – **LR 5.2**
22. Ohio Northern District Court – **Civ Rule 8.1, Crim Rule 49.1**
23. Oklahoma Northern District Court – **L CvR 5.3**
24. Pennsylvania Eastern District Court – **CRIMINAL RULE 53.2**
25. Pennsylvania Middle District Court – **LR 5.2**
26. Puerto Rico District Court – **RULE 5.2**
27. Virginia Western – **Rule 8**
28. Virgin Islands District Court – **Rule 5.4**
29. West Virginia Northern – **LR Gen P 5.08**

APPENDIX 6 – OTHER DIFFERENCES BETWEEN THE LOCAL FEDERAL RULES:

A. Districts Whose Local Redaction Rule Incorporates "Suggestions" For Exercising Additional Caution in Filing Certain Kinds of Documents.

1. Idaho – **CIVIL RULE 5.5**
2. Iowa Northern – **LR 10**
3. Iowa Southern – **LR 10**
4. New Jersey – **ECF Policy 17.**
5. New York Northern – **Rule 8.1**
6. Oklahoma Northern – **L CvR 5.3**

B. Districts Whose Local Redaction Rule Includes a List of Documents to Be Excluded From the Public Case File.

1. California Central – ***L.R. 79-5.4***
2. Idaho – **CIVIL RULE 5.5**

C. Districts Whose Local Redaction Rule Imposes Unique Requirements Not Found in the Federal Rules. *Note: Because these requirements may take a wide variety of forms, I have included the title of the specific section of the rule and a brief summary below.*

1. California Eastern – **RULE 39-140(e) – No Sua Sponte Sealing or Redaction** – stating that neither the Clerk nor the court is responsible for reviewing filed documents for compliance with the rule.

2. District of Columbia– **LCvR 5.4(f) – PRIVACY REQUIREMENTS** – the rule requires exclusion or redaction of personal identifiers "from all electronically filed documents." The national rule, however, requires redaction for all "electronic or paper filings."

3. Idaho– **CIVIL RULE 5.5(b)** – the rule states that "a party wishing to file a document containing [personal data identifiers ...] may file an unredacted document under seal only if the party believes maintenance of the unredacted material in the Court record is critical to the case." The national rule, however, does not require that the filing party have any such belief that "maintenance is critical;" it states only that "A person making a redacted filing may also file an unredacted copy under seal." (*See* Fed. R. Crim. P. 49.1(f) and Fed. R. Civ. P. 5.2(f)).

D. Districts Whose Local Redaction Rule Specifies Standards for Redaction That Are Different Than Those Specified in the National Rule.

1. California Eastern – **RULE 39-140**

E. Districts Whose Local Redaction Rule States That Lawyers Are Responsible For Ensuring That Their Filings Satisfy the Redaction Requirements.

1. California Central – ***L.R. 79-5.4***
2. Georgia Southern – **LR 8**
3. Idaho – **CIVIL RULE 5.5**
4. Southern Illinois – **RULE 5.1**
5. Iowa Northern – **LR 10**
6. Iowa Southern – **LR 10**
7. Louisiana Eastern – **LR 5.7.12W**
8. Louisiana Middle – **LR 5.7.12W**
9. Louisiana Western – **LR 5.7.12W**
10. Massachusetts – **RULE 5.3**
11. Mississippi Northern – **Rule 8.1**
12. Mississippi Southern – **Rule 8.1**
13. New Jersey – **ECF Policy 17.**
14. New York Northern – **Rule 8.1**
15. North Carolina Middle – **LR 7.1**
16. North Carolina Western – **LCrR 5.2**
17. Northern Mariana Islands – **LR 5.2**
18. Ohio Northern – **Civ Rule 8.1, Crim Rule 49.1**
19. Oklahoma Northern – **L CvR 5.3**
20. Pennsylvania Eastern – **CRIMINAL RULE 53.2**
21. Pennsylvania Middle – **LR 5.2**
22. Puerto Rico – **RULE 5.2**
23. Virginia Eastern – **Rule 8**
24. Virgin Islands – **Rule 5.4**
25. West Virginia Northern – **LR Gen P 5.08**

F. Districts Whose Local Redaction Rule Follows the Sample Format Provided in the "Proposed Guidelines" Document. A copy of the "Proposed Guidelines" is attached.

1. California Central – ***L.R. 79-5.4***
2. California Eastern – **RULE 39-140**
3. Georgia Southern – **LR 8**
4. Idaho – **CIVIL RULE 5.5**
5. Southern Illinois – **RULE 5.1**
6. Louisiana Eastern – **LR 5.7.12W**
7. Louisiana Middle – **LR 5.7.12W**
8. Louisiana Western – **LR 5.7.12W**
9. Massachusetts – **RULE 5.3**
10. Mississippi Northern – **Rule 8.1**
11. Mississippi Southern – **Rule 8.1**
12. New Jersey – **EFC Policy 17.**

13. New York Northern – **Rule 8.1**
14. North Carolina Middle – **LR 7.1**
15. North Carolina Western – **LCrR 5.2**
16. Ohio Northern – **Civ Rule 8.1, Crim Rule 49.1**
17. Oklahoma Northern – **L CvR 5.3**
18. Pennsylvania Eastern – **CRIMINAL RULE 53.2**
19. Puerto Rico – **RULE 5.2**
20. West Virginia Northern – **LR Gen P 5.08**

G. Districts Whose Local Redaction Rules Have Particularly Unique Formatting and Have Therefore Stated the Standards of the Federal Rules in a Unique Manner.

1. Connecticut – **CIVIL RULE 5, CRIMINAL RULE 57** – these two rules begin with the following phrase: "Except as otherwise provided by federal statute or the Federal Rules of Civil/Criminal Procedure…" Each rule then goes on to list redaction requirements. It contains no further information beyond this list of redaction requirements.

2. District of Columbia – **LCvR 5.4** – perhaps because this rule is found as a subsection of a larger rule, it does not contain as much information as some of the other local rules from other districts. It also addresses only electronically filed documents, which may be a feature of its falling under a larger rule titled "CASES ASSIGNED TO CASE MANAGEMENT/ELECTRONIC CASE FILING (CM/ECF) SYSTEM."

3. Michigan Eastern – **R20 E-Government Act of 2002** – this "rule" (found in an appendix to the local rules in this district) states only that: "Effective December 1, 2007, privacy protection for filings made with the Court is governed by Fed. R. Civ. P. 5.2 and Fed. R. Crim. P. 49.1. To supplement the federal rules, the Court has entered an administrative order (EXHIBIT E) which makes it clear that counsel and the parties are responsible for redacting filings with the Court. The Clerk's Office will not review papers for compliance with the federal rules."

4. North Carolina Eastern – **Rule 17.1** – this rule is titled "MINORS AND INCOMPETENTS AS PARTIES." Most likely for that reason, it only addresses redaction of minors' names. It is worth noting that this is the only redaction rule in the North Carolina Eastern District.

H. Districts Whose Local Rule Includes the Requirements of Fed. R. Civ. P. 5.2(f) and (g) and Fed. R. Crim. P. 49.1(f) and (g) in the Following Format:

"A party or person wishing to file a document containing the personal identifiers listed above may:

(a) file an unredacted version of the document under seal, or

(b) file a reference list under seal. [And then the rule typically goes on to describe the district's specific rules as to filing a sealed reference list.]"

Note: the exact language used in each of these rules is not always the same. However, all of the districts below use the format explained above, which combines the federal standards at subdivisions (f) and (g) into one section. This is fairly common, so I felt that it was worth noting this particular formatting choice.

1. Georgia Southern – **LR 8**
2. Louisiana Eastern – **LR 5.7.12W**
3. Louisiana Middle – **LR 5.7.12W**
4. Louisiana Western – **LR 5.7.12W**
5. New Jersey – **EFC Policy 17.**
6. New York Northern – **Rule 8.1**
7. Ohio Northern – **Civ Rule 8.1, Crim Rule 49.1**
8. Oklahoma Northern – **L CvR 5.3**
9. Pennsylvania Middle – **LR 5.2**
10. Virgin Islands – **Rule 5.4**
11. West Virginia Northern – **LR Gen P 5.08**

APPENDIX 7 – DISCREPANCIES BETWEEN THE LOCAL AND FEDERAL RULES, BY DISTRICT:

1. California Central District Court
    - Local rule includes "home address" in the redaction requirement for civil cases
    - Local rule does not include the requirements in subsection (b) of the national rules
    - Local rule does not include the requirements in subsection (c) of the national rules
    - Local rule does not include the requirements in subsection (d) of the national rules
    - Local rule does not include the requirements in subsection (e) of the national rules
    - Local rule does not include the requirements in subsection (f) of the national rules
    - Local rule does not include the requirements in subsection (h) of the national rules
    - Rule includes a specific list of documents to be excluded from the public case file
    - Rule mentions who bears the responsibility of ensuring redaction compliance
    - Rule follows the sample format provided in the Proposed Guidelines Memo

2. California Eastern District Court
    - Local rule does not include the requirements in subsection (b) of the national rules
    - Local rule does not include the requirements in subsection (c) of the national rules
    - Local rule does not include the requirements in subsection (g) of the national rules
    - Local rule does not include the requirements in subsection (h) of the national rules
    - Procedures specified for the redaction of minors names and financial account numbers are different than the redaction procedures specified in the national rule
    - Section (e) imposes a unique requirement (about sua sponte sealing/redaction)
    - Rule follows the sample format provided in the Proposed Guidelines Memo

3. Connecticut District Court
    - Local rule does not include the requirements in subsection (b) of the national rules
    - Local rule does not include the requirements in subsection (c) of the national rules
    - Local rule does not include the requirements in subsection (d) of the national rules
    - Local rule does not include the requirements in subsection (e) of the national rules
    - Local rule does not include the requirements in subsection (f) of the national rules
    - Local rule does not include the requirements in subsection (g) of the national rules
    - Local rule does not include the requirements in subsection (h) of the national rules
    - Rule has formatting particularly unique from national rule (please see full text)

4. District of Columbia District Court
    - Local rule does not include the requirements in subsection (b) of the national rules
    - Local rule does not include the requirements in subsection (c) of the national rules
    - Local rule does not include the requirements in subsection (e) of the national rules
    - Local rule does not include the requirements in subsection (f) of the national rules
    - Local rule does not include the requirements in subsection (g) of the national rules
    - Local rule does not include the requirements in subsection (h) of the national rules

- Section (f) implies that the rule applies only to electronic documents; the federal rule, however, specifically states that it applies to both electronic and paper filings
- Rule has formatting particularly unique from national rule (please see full text)

5. Georgia Middle District Court
    - Local rule does not include the requirements in subsection (c) of the national rules
    - Local rule uses the exact language and formatting found in the national rules

6. Georgia Southern District Court
    - Local rule includes "home address" in the redaction requirement for civil cases
    - Local rule does not include the requirements in subsection (b) of the national rules
    - Local rule does not include the requirements in subsection (c) of the national rules
    - Local rule does not include the requirements in subsection (d) of the national rules
    - Local rule does not include the requirements in subsection (e) of the national rules
    - Local rule does not include the requirements in subsection (h) of the national rules
    - Rule mentions who bears the responsibility of ensuring redaction compliance
    - Rule follows the sample format provided in the Proposed Guidelines Memo
    - Rule combines subsections (f) and (g) into one (fairly common) format

7. Idaho District Court
    - Local rule includes "home address" in the redaction requirement for civil cases
    - Local rule does not include the requirements in subsection (b) of the national rules
    - Local rule does not include the requirements in subsection (c) of the national rules
    - Local rule does not include the requirements in subsection (d) of the national rules
    - Local rule does not include the requirements in subsection (e) of the national rules
    - Local rule does not include the requirements in subsection (g) of the national rules
    - Local rule does not include the requirements in subsection (h) of the national rules
    - Rule incorporates suggestions for exercising caution in filing certain documents
    - Rule includes a specific list of documents to be excluded from the public case file
    - Section (b) imposes a unique requirement (relating to a party's ability to file a document under seal only if they believe so including it is critical to the case)
    - Rule mentions who bears the responsibility of ensuring redaction compliance
    - Rule follows the sample format provided in the Proposed Guidelines Memo

8. Southern Illinois District Court
    - Rule includes "drivers' license numbers" as an additional redaction requirement
    - Local rule does not include the requirements in subsection (b) of the national rules
    - Local rule does not include the requirements in subsection (c) of the national rules
    - Local rule does not include the requirements in subsection (d) of the national rules
    - Local rule does not include the requirements in subsection (e) of the national rules
    - Local rule does not include the requirements in subsection (g) of the national rules
    - Local rule does not include the requirements in subsection (h) of the national rules
    - Rule mentions who bears the responsibility of ensuring redaction compliance

- Rule follows the sample format provided in the Proposed Guidelines Memo

9. Iowa Northern District Court
    - Does not include "home address" in the redaction requirement for criminal cases
    - Local rule does not include the requirements in subsection (b) of the national rules
    - Local rule does not include the requirements in subsection (c) of the national rules
    - Local rule does not include the requirements in subsection (e) of the national rules
    - Local rule does not include the requirements in subsection (f) of the national rules
    - Local rule does not include the requirements in subsection (g) of the national rules
    - Local rule does not include the requirements in subsection (h) of the national rules
    - Rule incorporates suggestions for exercising caution in filing certain documents
    - Rule mentions who bears the responsibility of ensuring redaction compliance

10. Iowa Southern District Court
    - Does not include "home address" in the redaction requirement for criminal cases
    - Local rule does not include the requirements in subsection (b) of the national rules
    - Local rule does not include the requirements in subsection (c) of the national rules
    - Local rule does not include the requirements in subsection (e) of the national rules
    - Local rule does not include the requirements in subsection (f) of the national rules
    - Local rule does not include the requirements in subsection (g) of the national rules
    - Local rule does not include the requirements in subsection (h) of the national rules
    - Rule incorporates suggestions for exercising caution in filing certain documents
    - Rule mentions who bears the responsibility of ensuring redaction compliance

11. Louisiana Eastern District Court
    - Local rule includes "home address" in the redaction requirement for civil cases
    - Local rule does not include the requirements in subsection (b) of the national rules
    - Local rule does not include the requirements in subsection (c) of the national rules
    - Local rule does not include the requirements in subsection (d) of the national rules
    - Local rule does not include the requirements in subsection (e) of the national rules
    - Local rule does not include the requirements in subsection (h) of the national rules
    - Rule mentions who bears the responsibility of ensuring redaction compliance
    - Rule follows the sample format provided in the Proposed Guidelines Memo
    - Rule combines subsections (f) and (g) into one (fairly common) format

12. Louisiana Middle District Court
    - Local rule includes "home address" in the redaction requirement for civil cases
    - Local rule does not include the requirements in subsection (b) of the national rules
    - Local rule does not include the requirements in subsection (c) of the national rules
    - Local rule does not include the requirements in subsection (d) of the national rules
    - Local rule does not include the requirements in subsection (e) of the national rules
    - Local rule does not include the requirements in subsection (h) of the national rules
    - Rule mentions who bears the responsibility of ensuring redaction compliance

- Rule follows the sample format provided in the Proposed Guidelines Memo
- Rule combines subsections (f) and (g) into one (fairly common) format

13. Louisiana Western District Court
    - Local rule includes "home address" in the redaction requirement for civil cases
    - Local rule does not include the requirements in subsection (b) of the national rules
    - Local rule does not include the requirements in subsection (c) of the national rules
    - Local rule does not include the requirements in subsection (d) of the national rules
    - Local rule does not include the requirements in subsection (e) of the national rules
    - Local rule does not include the requirements in subsection (h) of the national rules
    - Rule mentions who bears the responsibility of ensuring redaction compliance
    - Rule follows the sample format provided in the Proposed Guidelines Memo
    - Rule combines subsections (f) and (g) into one (fairly common) format

14. Massachusetts District Court
    - Does not include "home address" in the redaction requirement for criminal cases
    - Local rule does not include the requirements in subsection (b) of the national rules
    - Local rule does not include the requirements in subsection (c) of the national rules
    - Local rule does not include the requirements in subsection (e) of the national rules
    - Local rule does not include the requirements in subsection (f) of the national rules
    - Local rule does not include the requirements in subsection (g) of the national rules
    - Local rule does not include the requirements in subsection (h) of the national rules
    - Rule mentions who bears the responsibility of ensuring redaction compliance
    - Rule follows the sample format provided in the Proposed Guidelines Memo

15. Michigan Eastern District Court
    - Rule has formatting particularly unique from national rule (please see full text)

16. Mississippi Northern District Court
    - Local rule does not include the requirements in subsection (b) of the national rules
    - Local rule does not include the requirements in subsection (c) of the national rules
    - Local rule does not include the requirements in subsection (d) of the national rules
    - Local rule does not include the requirements in subsection (e) of the national rules
    - Local rule does not include the requirements in subsection (h) of the national rules
    - Rule mentions who bears the responsibility of ensuring redaction compliance
    - Rule follows the sample format provided in the Proposed Guidelines Memo

17. Mississippi Southern District Court
    - Local rule does not include the requirements in subsection (b) of the national rules
    - Local rule does not include the requirements in subsection (c) of the national rules
    - Local rule does not include the requirements in subsection (d) of the national rules
    - Local rule does not include the requirements in subsection (e) of the national rules
    - Local rule does not include the requirements in subsection (h) of the national rules

- Rule mentions who bears the responsibility of ensuring redaction compliance
- Rule follows the sample format provided in the Proposed Guidelines Memo

18. New Jersey District Court
    - Local rule does not include the requirements in subsection (b) of the national rules
    - Local rule does not include the requirements in subsection (c) of the national rules
    - Local rule does not include the requirements in subsection (d) of the national rules
    - Local rule does not include the requirements in subsection (e) of the national rules
    - Local rule does not include the requirements in subsection (h) of the national rules
    - Rule incorporates suggestions for exercising caution in filing certain documents
    - Rule mentions who bears the responsibility of ensuring redaction compliance
    - Rule follows the sample format provided in the Proposed Guidelines Memo
    - Rule combines subsections (f) and (g) into one (fairly common) format

19. New York Northern District Court
    - Local rule includes "home address" in the redaction requirement for civil cases
    - Local rule does not include the requirements in subsection (b) of the national rules
    - Local rule does not include the requirements in subsection (c) of the national rules
    - Local rule does not include the requirements in subsection (d) of the national rules
    - Local rule does not include the requirements in subsection (e) of the national rules
    - Local rule does not include the requirements in subsection (h) of the national rules
    - Rule incorporates suggestions for exercising caution in filing certain documents
    - Rule mentions who bears the responsibility of ensuring redaction compliance
    - Rule follows the sample format provided in the Proposed Guidelines Memo
    - Rule combines subsections (f) and (g) into one (fairly common) format

20. North Carolina Eastern District Court
    - Rule does not include the following redaction requirements found in the national rule: (1) social security numbers or taxpayer-identification numbers in civil and criminal cases; (2) birth dates in civil and criminal cases; (3) financial account numbers in civil and criminal cases; and (4) home addresses in criminal cases
    - Local rule does not include the requirements in subsection (b) of the national rules
    - Local rule does not include the requirements in subsection (c) of the national rules
    - Local rule does not include the requirements in subsection (d) of the national rules
    - Local rule does not include the requirements in subsection (e) of the national rules
    - Local rule does not include the requirements in subsection (f) of the national rules
    - Local rule does not include the requirements in subsection (g) of the national rules
    - Local rule does not include the requirements in subsection (h) of the national rules
    - Rule has formatting particularly unique from national rule (please see full text)

21. North Carolina Middle District Court
    - Does not include "home address" in the redaction requirement for criminal cases
    - Local rule does not include the requirements in subsection (b) of the national rules

- Local rule does not include the requirements in subsection (c) of the national rules
- Local rule does not include the requirements in subsection (d) of the national rules
- Local rule does not include the requirements in subsection (e) of the national rules
- Local rule does not include the requirements in subsection (h) of the national rules
- Rule mentions who bears the responsibility of ensuring redaction compliance
- Rule follows the sample format provided in the Proposed Guidelines Memo

22. North Carolina Western District Court
    - Does not include "home address" in the redaction requirement for criminal cases
    - Local rule does not include the requirements in subsection (b) of the national rules
    - Local rule does not include the requirements in subsection (c) of the national rules
    - Local rule does not include the requirements in subsection (d) of the national rules
    - Local rule does not include the requirements in subsection (e) of the national rules
    - Local rule does not include the requirements in subsection (h) of the national rules
    - Rule mentions who bears the responsibility of ensuring redaction compliance
    - Rule follows the sample format provided in the Proposed Guidelines Memo

23. Northern Mariana Islands District Court
    - Local rule includes "home address" in the redaction requirement for civil cases
    - Local rule does not include the requirements in subsection (b) of the national rules
    - Local rule does not include the requirements in subsection (c) of the national rules
    - Local rule does not include the requirements in subsection (d) of the national rules
    - Local rule does not include the requirements in subsection (e) of the national rules
    - Local rule does not include the requirements in subsection (g) of the national rules
    - Local rule does not include the requirements in subsection (h) of the national rules
    - Rule mentions who bears the responsibility of ensuring redaction compliance

24. Ohio Northern District Court
    - Local rule does not include the requirements in subsection (b) of the national rules
    - Local rule does not include the requirements in subsection (c) of the national rules
    - Local rule does not include the requirements in subsection (d) of the national rules
    - Local rule does not include the requirements in subsection (e) of the national rules
    - Local rule does not include the requirements in subsection (h) of the national rules
    - Rule mentions who bears the responsibility of ensuring redaction compliance
    - Rule follows the sample format provided in the Proposed Guidelines Memo
    - Rule combines subsections (f) and (g) into one (fairly common) format

25. Oklahoma Northern District Court
    - Local rule does not include the requirements in subsection (b) of the national rules
    - Local rule does not include the requirements in subsection (c) of the national rules
    - Local rule does not include the requirements in subsection (e) of the national rules
    - Local rule does not include the requirements in subsection (h) of the national rules
    - Rule incorporates suggestions for exercising caution in filing certain documents

- Rule mentions who bears the responsibility of ensuring redaction compliance
- Rule follows the sample format provided in the Proposed Guidelines Memo
- Rule combines subsections (f) and (g) into one (fairly common) format

26. Pennsylvania Eastern District Court
    - Local rule does not include the requirements in subsection (b) of the national rules
    - Local rule does not include the requirements in subsection (c) of the national rules
    - Local rule does not include the requirements in subsection (e) of the national rules
    - Local rule does not include the requirements in subsection (g) of the national rules
    - Local rule does not include the requirements in subsection (h) of the national rules
    - Rule mentions who bears the responsibility of ensuring redaction compliance
    - Rule follows the sample format provided in the Proposed Guidelines Memo

27. Pennsylvania Middle District Court
    - Local rule does not include the requirements in subsection (b) of the national rules
    - Local rule does not include the requirements in subsection (c) of the national rules
    - Local rule does not include the requirements in subsection (d) of the national rules
    - Local rule does not include the requirements in subsection (e) of the national rules
    - Local rule does not include the requirements in subsection (h) of the national rules
    - Rule mentions who bears the responsibility of ensuring redaction compliance
    - Rule combines subsections (f) and (g) into one (fairly common) format

28. Puerto Rico District Court
    - Local rule includes "home address" in the redaction requirement for civil cases
    - Local rule does not include the requirements in subsection (b) of the national rules
    - Local rule does not include the requirements in subsection (c) of the national rules
    - Local rule does not include the requirements in subsection (d) of the national rules
    - Local rule does not include the requirements in subsection (e) of the national rules
    - Local rule does not include the requirements in subsection (g) of the national rules
    - Local rule does not include the requirements in subsection (h) of the national rules
    - Rule mentions who bears the responsibility of ensuring redaction compliance
    - Rule follows the sample format provided in the Proposed Guidelines Memo

29. Virgin Islands District Court
    - Does not include "home address" in the redaction requirement for criminal cases
    - Local rule does not include the requirements in subsection (b) of the national rules
    - Local rule does not include the requirements in subsection (c) of the national rules
    - Local rule does not include the requirements in subsection (d) of the national rules
    - Local rule does not include the requirements in subsection (e) of the national rules
    - Local rule does not include the requirements in subsection (h) of the national rules
    - Rule mentions who bears the responsibility of ensuring redaction compliance
    - Rule combines subsections (f) and (g) into one (fairly common) format

30. West Virginia Northern District Court

- Local rule does not include the requirements in subsection (b) of the national rules
- Local rule does not include the requirements in subsection (c) of the national rules
- Local rule does not include the requirements in subsection (d) of the national rules
- Local rule does not include the requirements in subsection (e) of the national rules
- Local rule does not include the requirements in subsection (h) of the national rules
- Rule mentions who bears the responsibility of ensuring redaction compliance
- Rule follows the sample format provided in the Proposed Guidelines Memo
- Rule combines subsections (f) and (g) into one (fairly common) format

APPENDIX 8 – FULL TEXT OF THE LOCAL REDACTION RULES:

California Central District Court:

L.R. 79-5.4 Responsibilities of Parties to Redact or Exclude Personal Identifiers. In compliance with the policy of the Judicial Conference of the United States and the E-Government Act of 2002 (as Amended), the parties shall refrain from including, and /or shall redact where inclusion is necessary, the following personal data identifiers from all documents, exhibits, and attachments filed with the Court, except as specifically excluded below.

(a) **Social Security Numbers:** If an individual's Social Security Number must be included in a document, only the last four digits of that number should be used;

(b) **Names of Minor Children:** If the involvement of a minor child must be mentioned, only the initials of that child should be used;

(c) **Dates of Birth:** If an individual's date of birth must be included in a document, only the year should be used;

(d) **Financial Account Numbers:** If financial account numbers are relevant, identify the name or type of account and the financial institution where maintained, and only indicate the last four digits of the account number;

(e) **Home Address:** If a home address must be included, only the city and state should be listed.

A party who must file a document containing the personal data identifiers as listed above shall: 1) file a redacted version of the document excluding the personal data identifiers; or 2) file a redacted version of the document with unique identifiers (e.g., 1, 2, 3 or A, B, C) used in place of the personal data identifiers, along with a reference list, filed under seal, indicating the complete personal data identifiers and unique identifiers used in their place.

Parties shall carefully examine the documents, exhibits or attachments to be filed with the Court in order to protect any sensitive and private information. The responsibility for redacting or placing under seal these personal data identifiers rests solely with counsel and the parties. The Clerk will not review any pleadings or documents for compliance.

Counsel and the parties are cautioned that failure to redact or place under seal these personal data identifiers may subject them to the full disciplinary power of the Court. If a redacted version of the document is filed, counsel shall maintain the unredacted document in their office pending further order of the Court or resolution of the action (including the appeal, if any) and shall, at the request of opposing counsel or parties, provide a copy of the complete document.

Documents to be excluded. In accordance with the policy of the Judicial Conference of the United States, the documents listed below are not to be included in the public case file. These documents and all social security cases are excluded from this Local Rule, redaction requirement.

(a) Unexecuted summonses or warrants, supporting applications, and affidavits;

(b) Pretrial bail reports;

(c) Presentence investigation reports;

(d) Statements of reasons in the judgment of conviction;

(e) Juvenile records;

(f) Documents containing identifying information about jurors or potential jurors;

(g) Financial affidavits filed in seeking representation pursuant to the Criminal Justice Act;

(h) Ex parte requests for authorization of investigative, expert or other services pursuant to the Criminal Justice Act; and

(i) Sealed documents.

California Eastern District Court:

RULE 39-140
PRIVACY CONCERNS AND REDACTION

(a) **Privacy in General.** Privacy In General. Except as set forth below, pursuant to the Judicial Conference Policy on Privacy and Electronic Access to Case Files, and the Egovernment Act of 2002, Pub. L. No. 107-347, effective April 16, 2003, when filing documents, counsel and the Court shall omit or, where reference is necessary, partially redact the following personal data identifiers from all pleadings, documents, and exhibits, whether filed electronically or on paper, unless the Court orders otherwise:

(i) Minors' names: In criminal actions, use the minors' initials; in civil actions use initials when federal or state law require the use of initials, or when the specific identity of the minor is not necessary to the case or individual document;

(ii) Financial account numbers: Identify the name or type of account and the financial institution where maintained, but use only the last four numbers of the account number;

(iii) Social Security numbers: Use only the last four numbers;

(iv) Dates of birth: Use only the year;

(v) Home addresses in criminal cases only; use only the city and state; and

(vi) All other circumstances: Redact when federal law requires redaction.

(b) **Order Required for Other Redactions.** No other redactions are permitted unless the Court has authorized the redaction. Counsel has the responsibility to be cognizant of federal privacy law and, when appropriate, state privacy law. Moreover, counsel should recognize proprietary or trade secret information that is protected from dissemination by law. When counsel seeks to submit protected information, a protective order or order authorizing redaction should be sought. A party that makes a redacted filing may also file an unredacted copy under seal if the Court so orders. The unredacted copy will be retained by the Court under seal as part of the record.

(c) **Reference List for Redacted Documents.** If the Court so orders, a filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item of redacted information listed. The reference list must be filed under seal and may be amended as of right. All references in the action to the identifiers included in the reference list will be construed to refer to the corresponding items of information.

(d) **Submission of Unredacted Documents.** Pursuant to the terms of a protective order or applicable law, counsel may seek to submit an unredacted document containing protected information for review by the Court. In such an event, counsel is required to file a motion to file the document under seal. See L.R. 39-141. If the Court grants the motion, counsel shall then submit the unredacted paper document to the Clerk's Office for review by the Court. The paper document must have a cover page with the caption and number of the action and a prominent designation stating the following: "Document filed under seal."

(e) **No Sua Sponte Sealing or Redaction.** Neither the Clerk's Office nor the Court will review filed documents for compliance with privacy or other protective law, nor will the Court as a matter of course seal on its own motion documents containing personal data identifiers, or redact documents, whether filed electronically or on paper. No procedure set forth herein will excuse a violation of privacy or other law by counsel or party.

(f) **Redaction Exceptions.** Filings of administrative transcripts, see L.R. 31-138(b), need not be redacted to comply with this Rule. Filings of official records of a state court proceeding in an action removed to federal court need not be redacted. In a civil or criminal forfeiture proceeding, financial account numbers that identify the property alleged to be subject to forfeiture need not be redacted.

Connecticut District Court:

CIVIL RULE 5 SERVING AND FILING PLEADINGS AND OTHER PAPERS

... 8. Except as otherwise provided by federal statute or the Federal Rules of Civil Procedure, the party filing any document that will or could become publicly available shall redact from that document:

(a) Social Security numbers to the last four digits;

(b) Financial account numbers to the last four digits;

(c) Dates of birth to the year; and

(d) Names of minor children to the initials.

CRIMINAL RULE 57 RULES BY DISTRICT COURTS

10. Except as otherwise provided by federal statute or the Federal Rules of Criminal Procedure, the party filing any document that will or could become publicly available shall redact from that document:

(a) Social Security numbers to the last four digits;

(b) Financial account numbers to the last four digits;

(c) Dates of birth to the year; and

(d) Names of minor children to the initials.

District of Columbia District Court:

LCvR 5.4

CASES ASSIGNED TO CASE MANAGEMENT/ELECTRONIC CASE FILING (CM/ECF) SYSTEM

... (f) PRIVACY REQUIREMENTS

The following personal identifiers shall be excluded, or redacted where inclusion is necessary, from all electronically filed documents unless otherwise ordered by the Court.

(1) Social Security numbers. If an individual's Social Security number must be included in a pleading, only the last four digits of that number should be used.

(2) Names of minor children. If the involvement of a minor child must be mentioned, only the initials of that child should be used.

(3) Dates of birth. If an individual's date of birth must be included in a pleading, only the year should be used.

(4) Financial account numbers. If a financial account number is relevant, only the last four digits should be used.

A party wishing to file a document containing unredacted personal identifiers listed in LCvR 5.4 (f) (1)-(4) may file an unredacted document under seal. This document shall be retained by the Court as part of the record.

Georgia Middle District Court:

5.4 PRIVACY PROTECTION FOR FILINGS MADE WITH THE COURT.

a. **Redacted Filings.** Unless the court orders otherwise in an electronic or paper filing with the court that contains an individual's social security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, or the home address of an individual, a party or nonparty making the filing may include only:

(1) The last four digits of the social security number and taxpayer-identification number;

(2) The year of the individual's birth;

(3) The minor's initials;

(4) The last four digits of the financial-account number; and

(5) The city and state of the home address. (This restriction applies only in criminal cases.)

b. Exemptions from the Redaction Requirement. The redaction requirement does not apply to the following:

(1) A financial account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;

(2) The record of an administrative or agency proceeding;

(3) The official record of a state-court proceeding;

(4) The record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;

(5) A filing covered by Rule 5.4(c);

(6) A pro se filing in an action brought under 28 U.S.C. §§ 2241, 2254, or 2255;

(7) A court filing that is related to a criminal matter or investigation and that is prepared before the filing of a criminal charge or is not filed as part of any docketed criminal case;

(8) An arrest or search warrant; and

(9) A crime charging document and an affidavit filed in support of any such charging document.

c. Filings Made Under Seal. The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing Social Security Appeals and Immigration cases are subject to the limitations set forth in Rule 5.2(c), Fed.R.Civ.P., effective December 1, 2007.

d. Protective Orders. For good cause, the court may by order in a case:

(1) Require redaction of additional information; or

(2) Limit or prohibit a nonparty's remote electronic access to a document filed with the court.

e. **Option for Additional Unredacted Filing Under Seal.** A person making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

f. **Option for Filing a Reference List.** A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as a right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

g. **Waiver of Protection of Identifiers.** A person waives the protection of Rule 5.4a or corresponding Local Criminal Rule 49.2 as to the person's own information by filing it without redaction and not under seal.

Georgia Southern District Court:

LR 8. In compliance with the policy of the Judicial Conference of the United States and the E-Government Act of 2002, as amended, and in order to promote electronic access to case files while also protecting personal privacy and other legitimate interests, any party or person filing pleadings or other documents with the Court shall refrain from including, or shall partially redact where inclusion is necessary, the following personal data identifiers from all such pleadings or documents, including exhibits thereto, whether filed electronically or conventionally in paper form, unless otherwise ordered by the Court:

a. **Social Security numbers.** If an individual's Social Security number must be included in a pleading or document, only the last four digits of that number should be used.

b. **Names of minor children.** If the involvement of a minor child must be mentioned, only the initials of that child should be used.

c. **Dates of birth.** If an individual's date of birth must be included, only the year should be used.

d. **Financial account numbers.** If financial account numbers are relevant, only the last four digits of these numbers should be used.

e. **Home addresses.** If a home address must be included, only the city and state should be listed.

A party or person wishing to file a document containing the personal data identifiers listed above may:

a. file an unredacted version of the document under seal, or

b. file a reference list under seal. The reference list shall contain the complete personal data identifier(s) and the redacted identifiers(s) used in its (their) place in the filing. All references in the case to the redacted identifiers included in the reference list will be construed to refer to the corresponding complete personal data identifier. The reference list must be filed under seal and may be amended as of right.

The unredacted version of the document or the reference list shall be retained by the Court as part of the record. A party or person filing under seal an unredacted document containing personal data identifiers shall file simultaneously a redacted copy of the document for the public file.

The responsibility for redacting these personal identifiers rests solely with counsel and the filing party or person. The Clerk will not review each pleading or document for compliance with this rule.

Idaho District Court:

CIVIL RULE 5.5 PROTECTION OF PERSONAL PRIVACY

(a) In compliance with the policy of the Judicial Conference of the United States, and the E-Government Act of 2002, and in order to promote electronic access to case files while also protecting personal privacy and other legitimate interests, parties shall refrain from including or shall partially redact, where inclusion is necessary, the following personal data identifiers from all pleadings filed with the Court, including exhibits thereto, whether filed electronically or in paper, unless otherwise ordered by the Court:

(1) **Social Security numbers.** If an individual's social security number must be included in a pleading, only the last four digits of that number should be used.

(2) **Names of minor children.** If the involvement of a minor child must be mentioned, only the initials of that child should be used.

(3) **Dates of birth.** If an individual's date of birth must be included in a pleading, only the year should be used.

(4) **Financial account numbers.** If financial account numbers are relevant, only the last four digits of these numbers should be used.

(5) **Home addresses**. Only the city and state shall be identified.

(b) In compliance with the E-Government Act of 2002, a party wishing to file a document containing the personal data identifiers listed above may file an unredacted document under seal only if the party believes maintenance of the unredacted material in the Court record is critical to the case. The document must contain the following heading in the document, "SEALED DOCUMENT PURSUANT TO E-GOVERNMENT ACT OF 2002". This document shall be retained by the Court as part of the record until further order of the Court. The party must also electronically file a redacted copy of this document for the official record.

(c) In order to comply with the Judicial Conference Policy, in addition to the items listed in section (a) above, the Court shall not provide public access to the following documents: unexecuted warrants of any kind; pretrial bail or presentence investigation reports; statement of reasons in the judgment of conviction; juvenile records, documents containing identifying information about jurors or potential jurors; financial affidavits filed in seeking representation pursuant to the Criminal Justice Act; ex parte requests for expert or investigative services at Court expense; and sealed documents.

(d) In addition to the redaction procedures outlined above, the Judicial Conference policy requires Counsel to redact the personal identifiers noted in (a), which are contained in any transcripts filed with the Court. Counsel should follow the transcript redaction procedures outlined on the Court's website at: http://www.id.uscourts.gov/CourtReporter/Transcripts.pdf

(e) You are advised to exercise caution when filing documents that contain the following:

(1) Personal identification number, such as driver's license number;

(2) Medical records, treatment and diagnosis;

(3) Employment history;

(4) Individual financial information;

(5) Proprietary or trade secret information;

(6) Information regarding an individual's cooperation with the government;

(7) Information regarding the victim of any criminal activity;

(8) National security information;

(9) Sensitive security information as described in 49 U.S.C. section 114(s).

(f) Counsel is strongly urged to share this information with all clients so that an informed decision about the inclusion of certain materials may be made. If a redacted document is filed, it is the sole responsibility of counsel and the parties to be sure that the redaction of personal identifiers is done. The clerk will not review each pleading for redaction.

Southern Illinois District Court:

RULE 5.1 SERVING AND FILING PLEADINGS AND OTHER PAPERS
(*See* FED. R. CIV. P. 5, 7.1, 11)

... (d) Privacy Policy

In order to protect personal privacy and other legitimate interests, parties shall refrain from including, or shall redact where inclusion is necessary, the following personal identifiers from all pleadings filed with the court, which includes exhibits attached thereto, unless otherwise ordered by the court.

(1) Social Security Numbers. If an individual's social security number must be included, only the last four digits of that number should be used.

(2) Names of Minor Children. If the involvement of a minor child must be mentioned, only the initials of that child should be used.

(3) Dates of Birth. If an individual's date of birth must be included in a document, only the year should be used.

(4) Drivers' License Numbers. If a driver's license number must be included, only the last four digits should be used.

(5) Financial Account Numbers. If financial account numbers are relevant, only the last four digits should be used.

(6) Home Addresses. If home addresses must be used, only the city and state should be used.

The responsibility for redacting these personal identifiers rests solely with counsel and the parties. The clerk will not review each pleading for compliance with this rule.

Counsel and the parties are cautioned that failure to redact these personal identifiers may subject them to the full disciplinary power of the court.

In compliance with the E-Government Act of 2002, a party wishing to file a document containing the personal data identifiers specified above may file an unredacted document under seal. This document shall be retained by the court as part of the record. The court may, however, still require the party to file a redacted copy for the public file.

Iowa Northern and Iowa Southern District Courts:

The Northern and Southern Districts of Iowa share a uniform set of local rules.

LR 10 FORM OF DOCUMENTS FILED WITH THE COURT; CITATIONS TO STATUTES; PERSONAL IDENTIFIERS

... h. Personal Data Identifiers. Unless otherwise permitted or required by law, a party filing a document containing personal data identifiers should, unless the document is filed under seal, modify or partially redact the document to prevent disclosure of the identifiers. (*See* Fed. R. Civ. P. 5.2(a).) Personal data identifiers include the following:

1. Social Security numbers;
2. Dates of birth
3. Names of minor children; and
4. Financial account numbers.

By way of example, and not limitation, if the Social Security number of an individual must be included in a document, only the last four digits of that number should be used. If an individual's date of birth is necessary, only the year should be used. If a minor child must be mentioned, only that child's initials should be used. If financial account numbers are relevant, only incomplete numbers should be recited in the document. In addition, parties should exercise caution when filing unsealed documents that contain the following information:

5. Other personal identifying numbers, such as driver's license numbers;
6. Information concerning medical treatment or diagnosis;
7. Employment history;
8. Personal financial information;
9. Proprietary or trade secret information;

10. Information concerning a person's cooperation with the government;

11. Information concerning crime victims;

12. Sensitive security information; and

13. Home addresses.

It is the responsibility of counsel and the parties to assure that appropriate redactions from documents have been made before they are filed; the Clerk of Court will not review filings to determine whether such redactions have been made.

Louisiana Eastern, Louisiana Middle and Louisiana Western District Courts:

The Eastern, Middle and Western Districts of Louisiana share a uniform set of local rules.

LR 5.7.12W Public Access

In compliance with the policy of the Judicial Conference of the United States, and the E-Government Act of 2002, and in order to promote electronic access to case files while also protecting personal privacy and other legitimate interests, parties shall refrain from including, or shall partially redact where inclusion is necessary, the following personal data identifiers from all pleadings filed with the court, including exhibits thereto, whether filed electronically or in paper, unless otherwise ordered by the Court.

a. **Social Security numbers.** If an individual's Social Security number must be included in a pleading, only the last four digits of that number should be used.

b. **Names of minor children.** If the involvement of a minor child must be mentioned, only the initials of that child should be used.

c. **Dates of birth.** If an individual's date of birth must be included in a pleading, only the year should be used.

d. **Financial account numbers.** If financial account numbers are relevant, only the last four digits of these numbers should be used.

e. **Home Addresses.** If home addresses are relevant, only the city and state should be used.

In compliance with the E-Government Act of 2002, a party wishing to file a document containing the personal data identifiers listed above may:

a. file an unredacted version of the document under seal, or

b. file a reference list under seal. The reference list shall contain the complete personal data identifier(s) and the redacted identifier(s) used in its (their) place in the filing. All references in the case to the redacted identifiers included in the reference list will be construed to refer to the corresponding complete personal data identifiers. The reference list must be under seal, and may be amended as of right.

The unredacted version of the filing or the reference list shall be retained by the Court. The Court may require the party to file a redacted copy for the public record.

The responsibility for redacting personal identifiers rests solely with counsel and the parties. The Clerk will not review filing for compliance with this rule. [Adopted April 21, 2005]

Massachusetts District Court:

RULE 5.3 PERSONAL DATA IDENTIFIERS

(a) Restrictions on Personal Identifiers in Filings

In compliance with the policy of the Judicial Conference of the United States, and the E-Government Act of 2002, and in order to promote electronic access to case files while also protecting personal privacy and other legitimate interests, parties shall refrain from including, or shall partially redact where inclusion is necessary, the following personal data identifiers from all filings submitted to the court, including exhibits thereto, whether filed electronically or in paper, unless otherwise ordered by the Court.

(1) *Social Security numbers*. If an individual's social security number must be included in a filing, only the last four digits of that number should be used.

(2) *Names of minor children*. If the involvement of a minor child must be mentioned, only the initials of that child should be used.

(3) *Dates of birth*. If an individual's date of birth must be included in a pleading, only the year should be used.

(4) *Financial account numbers*. If financial account numbers are relevant, only the last four digits of these numbers should be used.

(b) Non-Redacted Filings under Seal

In compliance with the E-Government Act of 2002, a party wishing to file a document containing the personal data identifiers listed above may file an unredacted document under seal, pursuant to Local Rule 7.2. This document shall be retained by the court as

part of the record. The court may, however, still require the party to file a redacted copy for the public file.

(c) Responsibility for Redaction

The responsibility for redacting these personal identifiers rests solely with counsel and the parties The Clerk will not review each pleading for compliance with this rule.

Michigan Eastern District Court:

The following is from the Electronic Filing Policies and Procedures Appendix to the local rules.

R20 E-Government Act of 2002

Effective December 1, 2007, privacy protection for filings made with the Court is governed by Fed.R.Civ.P. 5.2 and Fed.R.Crim.P. 49.1. To supplement the federal rules, the Court has entered an administrative order (EXHIBIT E) which makes it clear that counsel and the parties are responsible for redacting filings with the Court. The Clerk's Office will not review papers for compliance with the federal rules.

Minnesota District Court:

LR 5.5 Redaction of Transcripts

(a) **Review of Transcript for Personal Data Identifiers.** After a transcript of any Court proceeding has been filed under LR 80.1(a), the attorneys of record, including attorneys serving as "standby" counsel appointed to assist a pro se defendant in his or her defense in a criminal case, and unrepresented parties shall determine whether redaction of personal data identifiers in the transcript is necessary to comply with Fed. R. Crim. P. 49.1 or Fed. R. Civ. P. 5.2. Attorneys of record or unrepresented parties are responsible to request redaction of personal data identifiers in the following portions of the transcript, unless otherwise ordered by the Court:

(1) Statements by the party or made on the party's behalf;

(2) The testimony of any witness called by the party;

(3) Sentencing proceedings; and

(4) Any other portion of the transcript as ordered by the Court.

(b) **Notice of Intent to Request Redaction.** If any portion of the transcript reviewed in accordance with subsection (a) of this rule is required to be redacted to comply with Fed. R. Crim. P. 49.1 or Fed. R. Civ. P. 5.2, a Notice of Intent to Request Redaction shall be filed within seven (7) calendar days from the date the transcript was filed. The Court will assume redaction of personal data identifiers from the transcript is not necessary if a Notice of Intent to Request Redaction is not filed.

(c) **Statement of Redaction.** If a Notice of Intent to Request Redaction is filed, the party shall file a Statement of Redaction within 21 calendar days from the date the transcript was filed. The Statement of Redaction shall consist of the following information:

(1) Type of personal data identifier to be redacted, e.g., "social security number";

(2) Page number and line number of transcript on which the personal data identifier to be redacted is located; and

(3) How the transcript should read after redaction, e.g, "social security number to read as XXX-XX-1234."

The Statement of Redaction shall not disclose the personal data identifier to be redacted.

(d) **Redacted Transcript.** After the Statement of Redaction is filed, the court reporter has 31 calendar days from the date the original transcript was filed to file the redacted transcript. The court reporter shall not charge any fees for redaction services.

(e) **Extensions of Transcript Redaction Deadlines.** Any extensions of the redaction deadlines may be granted only by Court order. If an attorney of record or a party fails to timely file a Statement of Redaction after a timely Notice of Intent to Request Redaction was filed, the attorney or party shall:

(1) File a motion with the Court to request redaction; or

(2) Withdraw the Notice of Intent to Request Redaction.

The Court may issue an order to show cause as to why the attorney or party has not met the requirements of this rule.

Mississippi Northern and Mississippi Southern District Courts:

The Districts of Northern and Southern Mississippi share a uniform set of local rules.

Rule 5.2. PROTECTION OF PERSONAL AND SENSITIVE INFORMATION; PUBLIC ACCESS TO COURT FILES; REDACTED INFORMATION; SEALED INFORMATION.

Responsibilities of Counsel and Parties. Counsel should advise clients of the provisions of this rule and Fed.R.Civ.P. 5.2 so that an informed decision may be made about the inclusion of protected information.

(a) Counsel and parties must consider that the *E-Government Act of 2002* (as amended) and the policies of the Judicial Conference of the United States require federal courts eventually to make *all* pleadings, orders, judgments, and other filed documents available in electronic formats accessible over the Internet and the courts' PACER [Public Access to Court Electronic Records] systems. Consequently, personal and sensitive information and data that formerly were available only by a review of the court's physical case files will be available to the world, openly, publicly, and near-instantaneously.

(b) If a redacted document is filed, it is the sole responsibility of counsel and the parties to ensure that all pleadings conform to the redaction-related standards of this rule.

(c) Neither the court nor the clerk will review pleadings or other documents for compliance with this rule.

New Jersey District Court:

ELECTRONIC CASE FILING POLICIES AND PROCEDURES

... 17. Sensitive Information

As the public may access case information through the Court's ECF System, sensitive information should not be included in any document filed unless the Court orders otherwise. As required under Federal Rule of Civil Procedure 5.2(a) and Federal Rule of Criminal Procedure49.1(a), when making any electronic or Paper Filing with the Court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing may include only:

(1) the last four digits of the Social-Security number and tax-identification number;

(2) the last four digits of the financial account numbers;

(3) the minor's initials;

(4) the year of the individual's birth; and

(5) In criminal cases for home addresses, use only the city and state.

In compliance with the E-Government Act of 2002, a party wishing to file a document containing the personal data identifiers specified above may either:

(1) File an unredacted version of the document under seal, or;

(2) File a redacted version of the document and file a reference list under seal. The reference list shall contain the complete personal identifier(s) and the redacted identifier(s) used in its (their) place in the filing. All references in the case to the redacted identifiers included in the reference list will be construed to refer to the corresponding complete personal data identifier. The reference list may be amended as of right. The Court may still require the party to file a redacted copy for the public file.

In addition, caution must be exercised when filing documents that contain the following:

(1) Personal identifying numbers, such as a driver's license number;

(2) Medical records, treatment, and diagnoses;

(3) Employment history;

(4) Individual financial information; and

(5) Proprietary or trade secret information.

Additional items for criminal cases only:

(1) Information regarding an individual's cooperation with the government;

(2) Information regarding the victim of any criminal activity;

(3) National security information; and

(4) Sensitive security information as described in 49 U.S.C. § 114(s).

Counsel are strongly urged to share this information with all clients so that an informed decision about the inclusion of certain material may be made. If a redacted document is filed, it

is the sole responsibility of counsel and the parties to be sure that pleadings and other papers comply with the rules and orders of this Court requiring redaction of personal identifiers. The Clerk will **not** review each filing for redaction.

Counsel and the parties are cautioned that failure to redact personal identifiers and/or the inclusion of irrelevant personal information in a document filed with the Court may subject them to the full disciplinary and remedial power of the Court, including sanctions pursuant to Federal Rule of Civil Procedure 11.

New York Northern District Court:

8.1 Personal Privacy Protection

Parties shall refrain from including, or shall redact where inclusion is necessary, the following personal identifiers from all pleadings that they file with the Court, including exhibits thereto, whether filed electronically or in paper form, unless the Court orders otherwise.

1. **Social security numbers**. If an individual's social security number must be included in a document, use only the last four digits of that number.

2. **Names of minor children**. If the involvement of a minor child must be mentioned, use only the initials of that child.

3. **Dates of birth.** If an individual's date of birth must be included in a document, use only the year.

4. **Financial account numbers**. If financial account numbers are relevant, use only the last four digits of those numbers.

5. **Home Addresses**. If a home address must be used, use only the City and State.

In addition, caution shall be exercised when filing documents that contain the following:

1. personal identifying number, such as a driver's license number;

2. medical records, treatment and diagnosis;

3. employment history;

4. individual financial information; and

5. proprietary or trade secret information.

In compliance with the E-Government Act of 2002, a party wishing to file a document

containing the personal data identifiers listed above may

1. file an unredacted version of the document under seal, or

2. file a reference list under seal. The reference list shall contain the complete personal data identifier(s) and the redacted identifier(s) used in its (their) place in the filing. All references in the case to the redacted identifiers included in the reference list will be construed to refer to the corresponding complete personal data identifier. The reference list must be filed under seal and may be amended as of right.

Counsel is strongly urged to discuss this issue with all their clients so that they can make an informed decision about the inclusion of certain information. The responsibility for redacting these personal identifiers **rests solely with counsel and the parties.** The Clerk will not review each pleading for compliance with this Rule. Counsel and the parties are cautioned that failure to redact these personal identifiers may subject them to the Court's full disciplinary power.

Exception: Transcripts of the administrative record in social security proceedings and state court records relating to a *habeas corpus* petitions are exempt from this requirement.

North Carolina Eastern District Court:

Rule 17.1 MINORS AND INCOMPETENTS AS PARTIES

... **(d)** In compliance with the E-Government Act of 2002, and to promote electronic access to case files while also protecting personal privacy and other legitimate interest, all parties to any litigation in which minor is a party, with the exception of the paper administrative records in Social Security cases filed with the court, shall redact the minor child's name from all documents filed with the court. If the name of the minor must be included in a document, including the caption, only the initials of the child should be used.

North Carolina Middle District Court:

LR7.1 FORM OF PLEADINGS AND PAPERS

(b) **Personal Data Identifiers**. In compliance with the policy of the Judicial Conference of the United States, and the E-Government Act of 2002, and in order to promote electronic access to case files while also protecting personal privacy and other legitimate interests, parties shall refrain from including, or shall partially redact where inclusion is necessary, the following personal data identifiers from all pleadings filed with the court, including exhibits thereto, whether filed electronically or in paper, unless otherwise ordered by the court:

(1) **Social Security numbers.** If an individual's social security number must be included in a pleading, only the last four digits of that number should be used.

(2) **Names of minor children.** If the involvement of a minor child must be mentioned in a pleading, only the initials of that child should be used.

(3) **Dates of birth.** If an individual's date of birth must be included in a pleading, only the year should be used.

(4) **Financial account numbers.** If financial account numbers are relevant and must be included in a pleading, only the last four digits of the financial account number should be used.

In compliance with the E-Government Act of 2002, a party wishing to file a document containing the personal data identifiers listed above may file an unredacted version of the document under seal, or file a reference list under seal. The reference list shall contain the complete personal data identifier(s) and the redacted identifier(s) used in its(their) place in the filing. All references in the case to the redacted identifiers included in the reference list will be construed to refer to the corresponding complete personal data identifier. The reference list must be filed under seal, and may be amended as of right. The court may, however, still require a redacted copy for the public file. The redacted version of the document or the reference list shall be retained by the court as part of the record and disposed of in accordance with Local Rule 79.4.

Counsel who file personal identifier data under seal should be mindful that the confidentiality of sealed documents transferred to the General Services Administration for holding after the case is closed cannot be assured.

The responsibility for redacting these personal identifiers rests solely with counsel and parties. The Clerk will not review each pleading for compliance with this rule.

North Carolina Western District Court:

LCrR 5.2 FILING OF PAPERS, PRESENTING JUDGMENTS, ORDERS, AND COMMUNICATIONS TO JUDGE.

... **(E)** ***Filing of a Redacted Pleading is Permitted to Eliminate Personal Data Identifiers.*** In compliance with the Policy of the Judicial Conference of the United States and the E-Government Act of 2002, and in order to promote electronic access to case files while also protecting personal privacy and other legitimate interests, parties shall refrain from including, or shall redact where inclusion is necessary, the following personal data identifiers from all pleadings filed with the Court, including exhibits thereto, whether filed electronically or in paper form, unless otherwise ordered by the Court:

(1) ***Social Security Numbers.*** If the individual's Social Security number must be included in a pleading, only the last four digits of that number should be used.

(2) ***Names of Minor Children.*** If the involvement of a minor child must be mentioned in a pleading, only the initials of that child should be used.

(3) ***Dates of Birth.*** If the individual's date of birth must be included in a pleading, only the year should be used.

(4) ***Financial Account Numbers.*** If financial account numbers are relevant and must be included in a pleading, only the last four digits of the financial account number should be used.

(5) ***Other Identifying Information.*** Counsel may also redact any other personal identifier information which they deem appropriate.

This redacted document will be made available in electronic format to the public. A reference list containing the redacted personal information may be filed under seal. LCrR 55.1

The responsibility for redacting these personal identifiers rests solely with counsel and parties. The Clerk of Court will not review each pleading for compliance with this rule.

Northern Mariana Islands District Court:

LR 5.2 - General Format of Papers Presented for Filing.

... j. Information to be Redacted. The parties shall refrain from including, or shall partially redact where inclusion is necessary, the following personal data identifiers from all pleadings filed with the court, including exhibits thereto, whether filed electronically or on paper, unless otherwise ordered by the court:

1. Social Security Numbers. If an individual's social security number must be included in a pleading, only the last four digits of the number shall be used.

2. Names of Minor Children. If the involvement of a minor must be mentioned, only the initials of the child shall be used.

3. Dates of Birth. If an individual's date of birth must be included in a pleading, only the year shall be used.

4. Financial Account Numbers. If financial account numbers are relevant, only the last four digits of the numbers shall be used.

5. Home Addresses. If an individual's home address must be included in a pleading, only the city and state shall be given.

A party wishing to file a document containing the personal identifiers listed above may file an unredacted document under seal. This document shall be retained by the court as part of the record. The court may, however, still require the party to file a redacted copy of the public file. The responsibility for redacting these personal identifiers rests solely with counsel and the parties. The Clerk's Office will not review each pleading for compliance with this rule.

Ohio Northern District Court:

Local Civil Rule 8.1 General Rules of Pleading

(a) In compliance with the policy of the Judicial Conference of the United States, and the EGovernment Act of 2002, and in order to promote electronic access to case files while also protecting personal privacy and other legitimate interests, parties shall refrain from including, or shall partially redact where inclusion is necessary, the following personal data identifiers from all documents filed with the Court, including exhibits thereto, whether filed electronically or on paper, unless otherwise ordered by the Court.

(1) **Social Security numbers**. If an individual's Social Security number must be included in a document, only the last four digits of that number should be used.

(2) **Names of minor children**. If the involvement of a minor child must be mentioned, only the initials of that child should be used.

(3) **Dates of birth**. If an individual's date of birth must be included in a document, only the year should be used.

(4) **Financial account numbers**. If financial account numbers are relevant, only the last four digits of these numbers should be in the document used.

(b) In compliance with the E-Government Act of 2002, a party wishing to file a document containing the personal data identifiers listed above may

(1) file a redacted document in the public record and file a reference list under seal. The reference list shall contain the complete personal data identifier(s) and the redacted identifier(s) used in its(their) place in the

filing. All references in the case to the redacted identifiers included in the reference list will be construed to refer to the corresponding complete personal data identifier. The reference list must be filed under seal, and may be amended as of right, or

(2) file an unredacted version of the document under seal.

(c) The unredacted version of the document or the reference list shall be retained by the Court as part of the record. The Court may, however, still require the party to file a redacted copy for the public file. The responsibility for redacting these personal identifiers rests solely with counsel and the parties. The Clerk will not review each document for compliance with this rule.

(d) Exceptions: Transcripts of the administrative record in social security proceedings and state court records relating to habeas corpus petitions will be exempt from these redaction provisions because those documents will not be made available online.

Local Criminal Rule 49.1.1 General Rules of Pleading

(a) In compliance with the policy of the Judicial Conference of the United States, and the E-Government Act of 2002, and in order to promote electronic access to case files while also protecting personal privacy and other legitimate interests, parties shall refrain from including, or shall partially redact where inclusion is necessary, the following personal data identifiers from all documents filed with the Court, including exhibits thereto, whether filed electronically or on paper, unless otherwise ordered by the Court.

(1) **Social Security numbers**. If an individual's Social Security number must be included in a document, only the last four digits of that number should be used.

(2) **Names of minor children**. If the involvement of a minor child must be mentioned, only the initials of that child should be used.

(3) **Dates of birth**. If an individual's date of birth must be included in a document, only the year should be used.

(4) **Financial account numbers**. If financial account numbers are relevant, only the last four digits of these numbers should be used.

(5) **Home addresses**. If a home address must be included, only the city and state should be listed.

(b) In compliance with the E-Government Act of 2002, a party wishing to file a document containing the personal data identifiers listed above may

(1) file a redacted document in the public record and file a reference list under seal. The reference list shall contain the complete personal data identifier(s) and the redacted identifier(s) used in its(their) place in the filing. All references in the case to the redacted identifiers included in the reference list will be construed to refer to the corresponding complete personal data identifier. The reference list must be filed under seal, and may be amended as of right, or

(2) file an unredacted version of the document under seal.

(c) The unredacted version of the document or the reference list shall be retained by the Court as part of the record. The Court may, however, still require the party to file a redacted copy for the public file. The responsibility for redacting these personal identifiers rests solely with counsel and the parties. The Clerk will not review each document for compliance with this rule.

Oklahoma Northern District Court:

L CvR 5.3 Redaction of Personal Data Identifiers

(a) In compliance with the policy of the Judicial Conference of the United States and the EGovernment Act of 2002 (Pub. L. 107-347, which was enacted on December 17, 2002), and in order to promote electronic access to case files while also protecting personal privacy and other legitimate interests, parties shall refrain from including, or shall partially redact where inclusion is necessary, the following personal data identifiers from all pleadings filed with the Court, including exhibits thereto, whether filed electronically or in paper, unless otherwise ordered by the Court:

- **Social Security Numbers (in civil and criminal cases).** If an individual's Social Security number must be included in a pleading, only the last four digits of that number shall be used.

- **Names of Minor Children (in civil and criminal cases).** If the involvement of a minor child must be mentioned, only the initials of that child shall be used.

- **Dates of Birth (in civil and criminal cases).** If an individual's date of birth must be included in a pleading, only the year shall be used.

- **Financial Account Numbers (in civil and criminal cases).** If financial account numbers are relevant, only the last four digits of these numbers shall be used.

- **Home Addresses (in criminal cases only).** If a home address must be included, only the city and state shall be used.

The responsibility for redacting these personal data identifiers rests solely with counsel and the parties. The clerk will not review each pleading for compliance with this general rule.

In addition, parties should exercise caution when filing a document that contains any of the following information and should consider filing such document under seal, or may refrain from including, or may partially redact where inclusion is necessary: personal identifying numbers such as driver's license numbers; medical records, treatment and diagnosis; employment history; individual financial information; proprietary or trade secret information; information regarding an individual's cooperation with the government; information regarding the victim of any criminal activity; national security information; and sensitive security information as described in 49 U.S.C. § 114(s).

(b) In compliance with the E-Government Act of 2002, a party wishing to file a document containing the personal data identifiers or other confidential information listed above may:

- File an unredacted version of the document under seal, which shall be retained by the Court as part of the record; **or**

- File a reference list under seal. The reference list shall contain the complete personal data identifier(s) and the redacted identifier(s) used in its (their) place in the filing. All references in the case to the redacted identifiers included in the reference list will be construed to refer to the corresponding complete identifier. The reference list must be filed under seal, and may be amended as of right. The reference list shall be retained by the Court as part of the record. The Court may, however, still require the party to file a redacted copy of the document for the public file. The unredacted version of the document or the reference list shall be marked underneath the case number "SEALED UNREDACTED VERSION" or "SEALED REFERENCE LIST."

Oklahoma Western District Court:

L CvR5.2.1 Redaction of Official Transcripts Prior to Remote Electronic Availability

(a) **Responsibility for Identifying Personal Data Identifiers to be Redacted from Transcripts.** Once an official transcript is filed with the Court Clerk, the attorneys in the case and pro se parties are responsible for identifying the personal data identifiers that must be redacted from filings pursuant to Fed. R. Civ. P. 5.2. Unless otherwise ordered by the Court, the attorney for a party and each pro se party are responsible for identifying redactions required in the following portions of the transcript:

(1) opening and closing statements made on that party's behalf;

(2) statements of the party; and

(3) the testimony of any witnesses called by the party.

The Court may also direct that an attorney or pro se party be responsible for identifying redactions in other portions of an official transcript.

(b) **Redaction Request.** To request redaction of personal data identifiers from an official transcript, the attorney or pro se party must file a redaction request, using the form in Appendix VII, within 21 days of the filing of the transcript. The request shall identify the redactions to be made with respect to:

(1) social security numbers and taxpayer-identification numbers: use only the last four digits;

(2) financial account numbers: use only the last four digits;

(3) dates of birth: use only the year; and

(4) a minor's name: redact in the manner that most effectively shields the identity of the minor in the context of the proceeding.

(c) **Request for Additional Redactions.** For any redactions to a transcript other than the personal data identifiers listed above, a separate Motion for Redaction must be filed within 21 days of the filing of the transcript, unless otherwise ordered by the Court.

L CrR49.1.1 Redaction of Official Transcripts Prior to Remote Electronic Availability.

(a) **Responsibility for Identifying Personal Data Identifiers to be Redacted from Transcripts.** Once an official transcript is filed with the Court Clerk, the attorneys in the

case and pro se parties are responsible for identifying the personal data identifiers that must be redacted from filings pursuant to Fed. R. Crim. P. 49.1. Unless otherwise ordered by the Court, the attorney for a party and each pro se party are responsible for identifying redactions required in the following portions of the transcript:

(1) opening and closing statements made on that party's behalf;

(2) statements of the party;

(3) the testimony of any witnesses called by the party; and

(4) sentencing proceedings.

The Court may also direct that an attorney or pro se party be responsible for identifying redactions in other portions of an official transcript.

(b) **Redaction Request.** To request redaction of personal data identifiers from an official transcript, the attorney or pro se party must file a redaction request, using the form in Appendix VII, within 21 days of the filing of the transcript. The request shall identify the redactions to be made with respect to:

(1) social security numbers and taxpayer-identification numbers: use only the last four digits;

(2) financial account numbers: use only the last four digits;

(3) dates of birth: use only the year;

(4) a minor's name: redact in the manner that most effectively shields the identity of the minor in the context of the proceeding; and

(5) home address: use only the city and state.

(c) **Request for Additional Redactions.** For any redactions to a transcript other than the personal data identifiers listed above, a separate Motion for Redaction must be filed within 21 days of the filing of the transcript, unless otherwise ordered by the Court.

(d) **Stand-By Counsel.** An attorney appointed as "stand-by" counsel for a party is responsible for identifying and requesting on behalf of that party any redactions of personal data identifiers in the transcript, as required by this Rule.

Pennsylvania Eastern District Court:

CRIMINAL RULE 53.2 ELECTRONIC CASE FILE PRIVACY

In compliance with the policy of the Judicial Conference of the United States, and the E-Government Act of 2002, and in order to promote electronic access to documents in the criminal case files while also protecting personal privacy and other legitimate interests, parties shall refrain from including, or shall partially redact where inclusion is necessary, the following personal data identifiers from all documents filed with the court, including exhibits thereto, whether filed electronically or in paper, unless otherwise ordered by the court:

a. Social Security numbers. If an individual's Social Security number must be included, only the last four digits of that number should be used.

b. Names of minor children. If the involvement of a minor child must be mentioned, only the initials of the child should be used.

c. Dates of birth. If an individual's date of birth must be included, only the year should be used.

d. Financial account numbers. If financial account numbers are relevant, only the last four digits of the number should be used.

e. Home addresses. If a home address must be included, only the city and state should be listed.

In compliance with the E-Government Act of 2002, a party wishing to file a document containing the personal data identifiers listed above may file an unredacted document under seal. This document shall be retained by the court as part of the record. The court, may, however, still require the party to file a redacted copy for the public file. Trial exhibits may be safeguarded by means other than redaction, and the court may modify this rule to fit the requirements of particular cases.

The responsibility for redacting these personal identifiers rests solely with counsel and the parties. The Clerk need not review filings for compliance with this rule.

Pennsylvania Middle District Court:

LR 5.2 Documents to be Filed with the Clerk.

... (d) A filed document in a case (other than a social security case) shall not contain any of the personal data identifiers listed in this rule unless permitted by an order of

the court or unless redacted in conformity with this rule. The personal data identifiers covered by this rule and the required redactions are as follows:

1. **Social Security Numbers**. If an individual's Social Security Number must be included in a document, only the last four digits of that number shall be used;

2. **Names of minor children**. If the involvement of a minor child must be mentioned, only that child's initials shall be used;

3. **Dates of birth.** If an individual's date of birth must be included, only the year shall be used;

4. **Financial account numbers**. If financial account numbers must be included, only the last four digits shall be used.

Additional personal data identifier in a criminal case document only:

5. **Home addresses**. If a home address must be included, only the city and state shall be listed.

(e) A party wishing to file a document containing the personal data identifiers listed above may file in addition to the required redacted document:

1. a sealed and otherwise identical document containing the unredacted personal data identifiers, or

2. a reference list under seal. The reference list shall contain the complete personal data identifier(s) and the redacted identifier(s) used in its(their) place in the filing. All references in the case to the redacted identifiers included in the reference list will be construed to refer to the corresponding complete personal data identifier. The reference list must be filed under seal, and may be amended as of right. The sealed unredacted version of the document or the sealed reference list shall be retained by the court as a part of the record.

The responsibility for redacting these personal identifiers rests solely with counsel and the parties. The clerk will not review each document for redaction.

Puerto Rico District Court:

RULE 5.2 PERSONAL DATA IDENTIFIERS

(a) Restrictions on Personal Identifiers in Filings

In compliance with the policy of the Judicial Conference of the United States, and the E-Government Act of 2002, and in order to promote electronic access to case files while also protecting personal privacy and other legitimate interests, parties shall refrain from including, or shall partially redact where inclusion is necessary, the following personal data identifiers from all pleadings filed with the Court, including exhibits thereto, whether filed electronically or in paper, unless otherwise ordered by the Court:

(1) Social Security Numbers. If an individual's social security number must be included in a pleadings, only the last four digits of that number should be used.

(2) Names of Minor Children. If the involvement of a minor child must be mentioned, only the initials of that child should be used.

(3) Dates of Birth. If an individual's date of birth must be included in a pleading, only the year should be used.

(4) Financial Account Numbers. If financial account numbers are relevant, only the last four digits of these numbers should be used.

(5) Home address. Limited to city and state.

(b) Non-Redacted Filings Under Seal

In compliance with the E-Government Act of 2002, a party wishing to file a document containing the personal data identifiers listed above may file an unredacted document under seal. This document shall be retained by the Court as part of the record. The Court may, however, still require the party to file a redacted copy for the public file.

(c) Responsibility for Redaction

The responsibility for redacting these personal identifiers rests solely with counsel and the parties. The Clerk of Court will not review each pleading for compliance with this rule.

Texas Eastern District Court:

LOCAL RULE CV-5.2 Privacy Protections For Filings Made with the Court

... (b) **Availability of Transcripts of Court Proceedings.** Electronically-filed transcripts of court proceedings are subject to the following rules:

(1) A transcript provided to a court by a court reporter or transcriber will be available at the clerk's office for inspection for a period of 90 days after it is electronically filed with the clerk. During the 90-day inspection period, access to the transcript in CM/ECF is limited to the following users: (a) court staff; (b) public terminal users; (c) attorneys of record or parties who have purchased the transcript from the court reporter or transcriber; and (d) other persons as directed by the court. Court staff may not copy or print transcripts for a requester during the 90-day inspection period.

(2) During the 90-day period, a copy of the transcript may be obtained from the court reporter or transcriber at the rate established by the Judicial Conference. The transcript will also be available within the court for internal use, and an attorney who obtains the transcript from the court reporter or transcriber may obtain remote electronic access to the transcript through the court's CM/ECF system for purposes of creating hyperlinks to the transcript in court filings and for other purposes.

(3) Within seven business days of the filing of the transcript in CM/ECF, each party wishing to redact a transcript must inform the court, by filing the attached "Notice of Intent to Request Redaction," of the party's intent to redact personal data identifiers from the transcript as required by Fed.R.Civ.P 5.2, If no such notice is filed within the allotted time, the court will assume redaction of personal data identifiers from the transcript is not necessary.

(4) If redaction is requested, a party is to submit to the court reporter or transcriber and file with the court, within 21 calendar days of the transcript's delivery to the clerk, or longer if a court so orders, a statement indicating where the personal data identifiers to be redacted appear in the transcript. The court reporter or transcriber must redact the identifiers as directed by the party. These procedures are limited to the redaction of the specific personal identifiers listed in Fed.R.Civ.P. 5.2. If an attorney wishes to redact additional information, he or she may make a motion to the court. The transcript will not be remotely electronically available until the court has ruled on any such motion.

(5) The court reporter or transcriber must, within 31 calendar days of the filing of the transcript, or longer if the court so orders, perform the

requested redactions and file a redacted version of the transcript with the clerk of court. Redacted transcripts are subject to the same access restrictions as outlined above during the initial 90 days after the first transcript has been filed. The original unredacted electronic transcript shall be retained by the clerk of court as a restricted document.

(6) If, after the 90-day period has ended, there are no redaction documents or motions linked to the transcript, the clerk will remove the public access restrictions and make the unredacted transcript available for inspection and copying in the clerk's office and for download from the PACER system.

(7) If, after the 90-day period has ended, a redacted transcript has been filed with the court, the clerk will remove the access restrictions as appropriate and make the redacted transcript available for inspection and copying in the clerk's office and for download from the PACER system, or from the court reporter or transcriber.

LOCAL RULE CR-49.1 Privacy Protection for Filings Made With the Court

... (b) Availability of Transcripts of Court Proceedings. Electronically-filed transcripts of criminal court proceedings are subject to the following rules:

(1) A transcript provided to a court by a court reporter or transcriber will be available at the clerk's office for inspection for a period of 90 days after it is electronically filed with the clerk. During the 90-day inspection period, access to the transcript in CM/ECF is limited to the following users: (a) court staff; (b) public terminal users; (c) attorneys of record or parties who have purchased the transcript from the court reporter or transcriber; and (d) other persons as directed by the court. Court staff may not copy or print transcripts for a requester during the 90-day inspection period.

(2) During the 90-day period, a copy of the transcript may be obtained from the court reporter or transcriber at the rate established by the Judicial Conference. The transcript will also be available within the court for internal use, and an attorney who obtains the transcript from the court reporter or transcriber may obtain remote electronic access to the transcript through the court's CM/ECF system for purposes of creating hyperlinks to the transcript in court filings and for other purposes.

(3) Within seven business days of the filing of the transcript in CM/ECF, each party wishing to redact a transcript must inform the court, by filing the attached "Notice of Intent to Request Redaction," of the party's intent to redact personal data identifiers from the transcript as required by

Fed.R.Crim.P 49.1, If no such notice is filed within the allotted time, the court will assume redaction of personal data identifiers from the transcript is not necessary.

(4) If redaction is requested, a party is to submit to the court reporter or transcriber and file with the court, within 21 calendar days of the transcript's delivery to the clerk, or longer if a court so orders, a statement indicating where the personal data identifiers to be redacted appear in the transcript. The court reporter or transcriber must redact the identifiers as directed by the party. These procedures are limited to the redaction of the specific personal identifiers listed in Fed.R.Civ.P. 5.2. If an attorney wishes to redact additional information, he or she may make a motion to the court. The transcript will not be electronically available until the court has ruled on any such motion.

(5) The court reporter or transcriber must, within 31 calendar days of the filing of the transcript, or longer if the court so orders, perform the requested redactions and file a redacted version of the transcript with the clerk of court. The original unredacted electronic transcript shall be retained by the clerk of court as a restricted document.

(6) If, after the 90-day period has ended, there are no redaction documents or motions linked to the transcript, the clerk will remove the public access restrictions and make the unredacted transcript available for inspection and copying in the clerk's office and for download from the PACER system.

(7) If, after the 90-day period has ended, a redacted transcript has been filed with the court, the clerk will remove the access restrictions as appropriate and make the redacted transcript available for inspection and copying in the clerk's office and for download from the PACER system, or from the court reporter or transcriber.

Utah District Court:

DUCivR 5.2 - REDACTING PERSONAL IDENTIFIERS

(a) **Redacting Personal Identifiers in Pleadings**. The filer shall redact personal information in filings with the court, as required by Fed.R. Civ. P 5.2. The court may order redaction of additional personal identifiers by motion and order in a specific case or as to a specific document or documents. Any protective order under Fed.R. Civ.P 26 (c) may include redaction requirements for public filings.

(b) **Redacting Personal Identifiers in Transcripts**. Attorneys are responsible to review transcripts for personal information which is required to be redacted under Fed. R. Civ. P 5.2 and provide notice to the court reporter of the redactions which must be made before the transcript becomes available through PACER. Unless otherwise ordered by the court, the attorney must review the following portions of the transcript:

(1) opening and closing statements made on the party's behalf;

(2) statements of the party;

(3) the testimony of any witnesses called by the party; and

(4) any other portion of the transcript as ordered by the court.

Redaction responsibilities apply to the attorneys even if the requestor of the transcript is the court or a member of the public including the media.

(c) **Procedure for Reviewing and Redacting Transcripts**. Upon notice of the filing of a transcript with the court, the attorneys shall within seven (7) business days review the transcript and file, if necessary, a Notice of Intent to Request Redaction of the Transcript. Within twenty-one (21) calendar days of the filing of the transcript, the attorneys shall file a notice of redactions to be made. The redactions shall be made by the court reporter within thirty-one (31) calendar days of the filing of the transcript and a redacted copy of the transcript promptly be filed with the clerk. Transcripts which do not require redactions and redacted transcripts shall be electronically available on PACER ninety days (90) after filing of the original transcript by the court reporter.

DUCrimR 49.1 REDACTING PERSONAL IDENTIFIERS

(a) **Redacting Personal Identifiers in Pleadings.** The filer shall redact personal information in filings with the court, as required by Fed.R. Crim. P 49.1. The court may order redaction of additional personal identifiers by motion and order in a specific case or as to a specific document or documents.

(b) **Redacting Personal Identifiers in Transcripts.** Attorneys are responsible to review transcripts for personal information which is required to be redacted under Fed. R. Crim. P 49.1 and provide notice to the court reporter of the redactions which must be made before the transcript becomes available through PACER. Unless otherwise ordered by the court, the attorney must review the following portions of the transcript:

(1) opening and closing statements made on the party's behalf;

(2) statements of the party;

(3) the testimony of any witnesses called by the party; and

(4) any other portion of the transcript as ordered by the court.

Redaction responsibilities apply to the attorneys even if the requestor of the transcript is the court or a member of the public including the media.

(c) **Procedure for Reviewing and Redacting Transcripts.** Upon notice of the filing of a transcript with the court, the attorneys shall within seven (7) business days review the transcript and, if necessary, file a Notice of Intent to Request Redaction of the Transcript. Within twenty-one (21) calendar days of the filing of the transcript the attorneys shall file a notice of redactions to be made. The redactions shall be made by the court reporter within thirty-one (31) calendar days of the filing of the transcript and a redacted copy of the transcript promptly be filed with the clerk. Transcripts which do not require redactions and redacted transcripts shall be electronically available on PACER ninety (90) days after filing of the original transcript by the court reporter.

Virginia Western District Court:

Rule 8. Redaction of Personal Data Identifiers from Pleadings

The responsibility for redacting personal identifiers as required by the federal rules of procedure rests solely with counsel or with the pro se party. The Clerk will not review each pleading for compliance.

Virgin Islands District Court:

Rule 5.4 Electronic Filing

... (l) PUBLIC ACCESS

(1) Parties shall refrain from including, or shall partially redact where inclusion is necessary, the following personal data identifiers from all documents filed with the Court, including exhibits, whether filed electronically or on paper, unless otherwise ordered by the Court:

(A) Social Security numbers. If an individual's Social Security number must be included, only the last four digits of that number should be used.

(B) Names of minor children. If the involvement of a minor child must be mentioned, only the initials of that child should be used.

(C) Dates of birth. If an individual's date of birth must be included, only the year should be used.

(D) Financial account numbers. If financial account numbers are relevant, only the last four digits should be used.

(2) A party wishing to file a document containing the personal data identifiers listed above may:

(A) file an unredacted version of the document under seal, or

(B) file a reference list under seal. The reference list shall contain the complete personal data identifier(s) and the redacted identifier(s) used in its (their) place in the filing. All references in the case to the redacted identifiers included in the reference list shall be construed to refer to the corresponding complete personal data identifier. The reference list must be filed under seal and may be amended as of right.

(3) The unredacted version of the document or the reference list shall be retained by the Court as part of the record. The Court may, however, still require the party to file a redacted copy for the public file.

(4) The responsibility for redacting these personal identifiers rests solely with counsel and the parties. The Clerk will not review documents for compliance with this Rule.

West Virginia Northern District Court:

LR Gen P 5.08. E-Government Act.

(a) Documents: In compliance with the policy of the Judicial Conference of the United States and the E-Government Act of 2002, consistent with Fed.R.Cr.P. 49.1, and to promote electronic access to case files while also protecting personal privacy and other legitimate interests, parties shall refrain from including, or shall partially redact where inclusion is necessary, the following personal date identifiers from all documents filed with the Court, including exhibits thereto, whether filed electronically or in paper, unless otherwise ordered by the Court

TAB
11-D

Attachment 4 to Privacy Subcommittee Report

Federal Judicial Center Surveys of Judges, Clerks and Practitioners on Managing Private Information in Court Filings

Survey of Privacy Practices in Judicial Proceedings

1) What type of judge are you? (N = 424)

Chief district judge:	**37 (8.7%)**
Active district judge:	**118 (27.8%)**
Magistrate judge:	**138 (32.5%)**
Chief bankruptcy judge:	**48 (11.3%)**
Bankruptcy judge:	**83 (19.6%)**
District/Magistrate judges:	**293 (69.1%)**
Bankruptcy judges:	**131 (30.7%)**

2) In which district do you sit?

See Appendix A

3) How long have you been on the federal bench? (N = 424)

2 years or fewer:	**49 (11.6%)**
3-5 years:	**55 (13.0%)**
6-10 years:	**100 (23.5%)**
11-20 years:	**144 (34.0%)**
More than 20 years:	**76 (17.9%)**

REDACTION IN GENERAL

4) Have you received any complaints or requests for changes regarding private information appearing in transcripts generally? N = 424

Yes: **86 (20.3%)**
No: **338 (79.7%)**

What type of judge are you? * Have you received any complaints or requests for changes regarding private information appearing in transcripts generally?

			Have you received any complaints or requests for changes regarding private information appearing in transcripts generally?		
			No	Yes	Total
What type of judge are you?	Active district judge	Count	89	29	118
		% of Total	21.0%	6.8%	27.8%
	Bankruptcy judge	Count	60	23	83
		% of Total	14.2%	5.4%	19.6%
	Chief bankruptcy judge	Count	41	7	48
		% of Total	9.7%	1.7%	11.3%
	Chief district judge	Count	33	4	37
		% of Total	7.8%	.9%	8.7%
	Magistrate judge	Count	115	23	138
		% of Total	27.1%	5.4%	32.5%
Total		Count	338	86	424
		% of Total	79.7%	20.3%	100.0%

5) Do you keep a record of complaints and requested changes? N = 86

Yes: **11 (2.6%)**
No: **75 (17.7%)**

What type of judge are you? * Do you keep a record of complaints and requested changes?

			Do you keep a record of complaints and requested changes?			
				No	Yes	Total
What type of judge are you?	Active district judge	Count	89	28	1	118
		% of Total	21.0%	6.6%	.2%	27.8%
	Bankruptcy judge	Count	60	18	5	83
		% of Total	14.2%	4.2%	1.2%	19.6%
	Chief bankruptcy judge	Count	41	4	3	48
		% of Total	9.7%	.9%	.7%	11.3%
	Chief district judge	Count	33	4	0	37
		% of Total	7.8%	.9%	.0%	8.7%
	Magistrate judge	Count	115	21	2	138
		% of Total	27.1%	5.0%	.5%	32.5%
Total		Count	338	75	11	424
		% of Total	79.7%	17.7%	2.6%	100.0%

6) Was the private information available through PACER? N= 86

Yes: **63 (14.9%)**
No: **20 (4.7%)**

What type of judge are you? * Was the private information available through PACER?

			Was the private information available through PACER?			
				No	Yes	Total
What type of judge are you?	Active district judge	Count	92	11	15	118
		% of Total	21.7%	2.6%	3.5%	27.8%
	Bankruptcy judge	Count	60	2	21	83
		% of Total	14.2%	.5%	5.0%	19.6%
	Chief bankruptcy judge	Count	41	1	6	48
		% of Total	9.7%	.2%	1.4%	11.3%
	Chief district judge	Count	33	1	3	37
		% of Total	7.8%	.2%	.7%	8.7%
	Magistrate judge	Count	115	5	18	138
		% of Total	27.1%	1.2%	4.2%	32.5%
Total		Count	341	20	63	424
		% of Total	80.4%	4.7%	14.9%	100.0%

7) Do you do anything to ensure that personal identifier information is not raised unnecessarily in a proceeding, so that transcripts will not have to be redacted?
N = 424

Yes	**258 (60.8%)**
No	**149 (35.1%)**
Don't Know	**17 (4/0%)**

			Do you do anything to ensure that personal identifier information is not raised unnecessarily in a proceeding?			
			Don't Know	No	Yes	Total
What type of judge are you?	Active district judge	Count	5	36	77	118
		% of Total	1.2%	8.5%	18.2%	27.8%
	Bankruptcy judge	Count	1	37	45	83
		% of Total	.2%	8.7%	10.6%	19.6%
	Chief bankruptcy judge	Count	1	15	32	48
		% of Total	.2%	3.5%	7.5%	11.3%
	Chief district judge	Count	2	8	27	37
		% of Total	.5%	1.9%	6.4%	8.7%
	Magistrate judge	Count	8	53	77	138
		% of Total	1.9%	12.5%	18.2%	32.5%
Total		Count	17	149	258	424
		% of Total	4.0%	35.1%	60.8%	100.0%

8) You indicated that you do something to ensure that personal identifier information is not raised unnecessarily in a proceeding. Please describe the measure(s) you take.

See Appendix B

9) In your court, which documents containing personal identifier information about individual jurors -- including the juror's name or background information -- are made publicly available <u>through PACER</u>? Please check all that apply.

46 (10.8%)	Grand jury indictment (including foreman's signature)
10 (2.4%)	Jury panel list
50 (11.8%)	Transcripts of voir dire proceedings
20 (4.7%)	Strikes by parties of identifiable jurors
28 (6.6%)	Notes from jurors (either on a deliberating jury or not)
42 (9.9%)	Verdict forms with juror names
161 (38.0%)	No identifiable information about individual jurors available through PACER
103 (24.3%)	Other (please specify)

If you selected other, please specify
See Appendix C

10) Do you or your court offer instructions to counsel regarding redaction of personal identifier or other private information in transcripts? N = 424

Yes:	**240 (56.6%)**
No	**104 (24.5%)**
Don't Know	**77 (18.2%)**

What type of judge are you? * Offer instructions to counsel regarding redaction of private information in transcripts?

			Offer instructions to counsel regarding redaction of private information in transcripts?				Total
				Don't Know	No	Yes	
Type of judge	Active district judge	Count	2	17	29	70	118
		% of Total	.5%	4.0%	6.8%	16.5%	27.8%
	Bankruptcy judge	Count	0	21	29	33	83
		% of Total	.0%	5.0%	6.8%	7.8%	19.6%
	Chief bankruptcy judge	Count	0	6	15	27	48
		% of Total	.0%	1.4%	3.5%	6.4%	11.3%
	Chief district judge	Count	0	3	3	31	37
		% of Total	.0%	.7%	.7%	7.3%	8.7%
	Magistrate judge	Count	1	30	28	79	138
		% of Total	.2%	7.1%	6.6%	18.6%	32.5%
Total		Count	3	77	104	240	424
		% of Total	.7%	18.2%	24.5%	56.6%	100.0 %

11) You indicated that you or your court offer instructions to counsel regarding redactions of personal identifier or other private information in transcripts. Please describe or provide an example of those instructions.

See Appendix D

12) In your personal experience, does counsel generally attempt to redact personal identifier information from a transcript before it is posted on PACER? N = 424

Yes	**178 (42.0%)**
No	**70 (16.5%)**
Don't Know	**175 (41.3%)**

			Does counsel generally attempt to redact personal identifier information from a transcript before it is posted on PACER?				Total
				Don't Know	No	Yes	
Judge Type	Active district judge	Count	0	43	23	52	118
		% of Total	.0%	10.1%	5.4%	12.3%	27.8%
	Bankruptcy judge	Count	0	43	12	28	83
		% of Total	.0%	10.1%	2.8%	6.6%	19.6%
	Chief bankruptcy judge	Count	1	20	8	19	48
		% of Total	.2%	4.7%	1.9%	4.5%	11.3%
	Chief district judge	Count	0	13	3	21	37
		% of Total	.0%	3.1%	.7%	5.0%	8.7%
	Magistrate judge	Count	0	56	24	58	138
		% of Total	.0%	13.2%	5.7%	13.7%	32.5%
Total		Count	1	175	70	178	424
		% of Total	.2%	41.3%	16.5%	42.0%	100.0%

13) Have you had personal experience with counsel redacting transcripts to delete other than personal identifier information? N = 424

Yes	47 (11.1%)
No	340 (80.2%)
Don't know	33 (7.%)

What type of judge are you? * Have you had personal experience with counsel redacting transcripts to delete other than personal identifier information? Crosstabulation

			Have you had personal experience with counsel redacting transcripts to delete other than personal identifier information?				Total
				Don't know	No	Yes	
What type of judge are you?	Active district judge	Count	0	6	90	22	118
		% of Total	.0%	1.4%	21.2%	5.2%	27.8%
	Bankruptcy judge	Count	1	9	65	8	83
		% of Total	.2%	2.1%	15.3%	1.9%	19.6%
	Chief bankruptcy judge	Count	1	4	41	2	48
		% of Total	.2%	.9%	9.7%	.5%	11.3%
	Chief district judge	Count	1	2	32	2	37
		% of Total	.2%	.5%	7.5%	.5%	8.7%
	Magistrate judge	Count	1	12	112	13	138
		% of Total	.2%	2.8%	26.4%	3.1%	32.5%
Total		Count	4	33	340	47	424
		% of Total	.9%	7.8%	80.2%	11.1%	100.0%

14) Are you aware of any reasons for noncompliance with the redaction requirements? N = 424

Yes	35 (8.3%)
No	334 (78.8%)
Don't Know	53 (12.5%)

What type of judge are you? * Are you aware of any reasons for noncompliance with the redaction requirements?

			Are you aware of any reasons for noncompliance with the redaction requirements?				
				Don't Know	No	Yes	Total
What type of judge are you?	Active district judge	Count	0	12	95	11	118
		% of Total	.0%	2.8%	22.4%	2.6%	27.8%
	Bankruptcy judge	Count	0	13	66	4	83
		% of Total	.0%	3.1%	15.6%	.9%	19.6%
	Chief bankruptcy judge	Count	2	4	38	4	48
		% of Total	.5%	.9%	9.0%	.9%	11.3%
	Chief district judge	Count	0	2	31	4	37
		% of Total	.0%	.5%	7.3%	.9%	8.7%
	Magistrate judge	Count	0	22	104	12	138
		% of Total	.0%	5.2%	24.5%	2.8%	32.5%
Total		Count	2	53	334	35	424
		% of Total	.5%	12.5%	78.8%	8.3%	100.0%

15) What reasons were given?

See Appendix E

16) How were those matters resolved?

See Appendix E

17) When you learn about a violation of the redaction requirements, how do you respond? Please check all that apply. N = 424

Impose sanctions	9 (2.1%)
Threaten to impose sanctions	30 97.1%)
Direct party to revise filing	210 (49.5%)
Direct clerk to advise party to revise filing	174 (41.0%)
Other (please specify)	113 (26.7%)

If you selected other, please specify

See Appendix F

REDACTION IN BANKRUPTCY CASES
N = 131 Bankruptcy Judges

18) Has your court experienced problems with failures to comply with redaction requirements in filed documents -- including petitions, schedules proofs of claim, and adversary proceeding pleadings?

Yes	89 (67.9%)
No	33 (25.2%)
Don't Know	9 (6.9%)

19) How frequently does this occur? (N = 89)

Often	11 (12.4%)
Sometimes	35 (39.3%)
Rarely	43 (48.3%)

20) In what kinds of bankruptcy filings does this occur? (N = 89)
[Note: Respondents were only able to check one of these options, but in text responses indicated that there were multiple applicable answers. The text responses have been incorporated into the numbers below, and the "please specify" responses only show the answers that were not covered by the response selections.]

❍ Petitions	24 (27.0%)
❍ Schedules	32 (36.0%)
❍ Proof of Claims	68 (76.4%)
❍ Adversary Proceeding Pleadings	17 (19.1%)
❍ Other (please specify)	11 (12.4%)

If you selected other, please specify (11 responses)

1. Filings by pro se litigants
2. In exhibits attached to proofs of claim and also in motions in the estate case and in adversary proceedings and in trial and hearing exhibits and exhibits attached to motions and pleadings
3. Proof of claims are a real problem Creditors do file claims with credit identifing numbers and social security numbers this happens most often with unsophisticated creditors. Once filed the information
4. schedules, proofs of claim and exhibits in evidentiary hearings
5. Employee Income Records, Schedules, Petitions, Proofs of Claims.
6. exhibits to pleadings
7. Petitions, form 21, bank statements, tax returns
8. PAY ADVICES
9. Exhibits to motions and responses
10. We have a large pro se population, and they sometimes file documents or information that contains person identifier information.
11. Failure to redact to also occur in attachments, exhibits, motions and other pleadings. Such failure to redact is becoming less of a problem

Note: From here until the end of the survey, only District, Chief district and Magistrate judges answered the questions, because they are not relevant to Bankruptcy Judges. N = 293, unless otherwise specified.

VOIR DIRE TRANSCRIPTS

21) Have you used any of the following procedures to protect juror privacy in either the voir dire proceeding itself or any resulting transcripts? Please check all that apply.

203 (69.3%) Informed jurors that they have the right to share personal information at the bench in an in camera conference with the attorneys
54 (18.4%) Questioned all jurors individually
101 (34.5%) Made efforts to limit references to potential jurors' names by, for example, referring to them by their juror number
62 (21.2%) Reminded court reporters the transcripts of voir dire proceedings are to be prepared only if the appropriate section of the transcript request form is completed
29 (9.2%) Sealed a voir dire transcript
72 (42.6%) Sealed juror questionnaires
10 (3.4%) Allowed public access to voir dire transcripts only at the courthouse through the public access terminal
57 (18.4%) None of the above

22) Did these procedures appear to be effective in protecting juror privacy? N = 237

Yes	183 (62.5%)
No	4 (1.4%)
Don't Know	50 (17.1%)

23) Comments:

See Appendix G

24) Have you experienced any problems or complaints in protecting private information in voir dire transcripts from access through PACER?

Yes	3 (1.0%)
No	238 (81.2%)
Don't Know/Not Applicable	52 (17.7%)

25) You indicated that you experience problems or complaints in protecting private information in voir dire transcripts from access through PACER. Please describe those problems or complaints.

Failure of employees in the clerk's office to be diligent in protecting the private information. (Active district judge)

A newspaper reporter accessed pacer and obtained a criminal filing from the US Attorney's Office that contained improper personal information, and wrote a story that contained some of the personal information. The story brought this issue to light. (Magistrate judge)

In criminal felony plea proceedings, I always ask the defendant to provide his/her name and year of birth. Often times, I will say, "please let me have the year of your birth, not the date." Even with that admonition, from time-to-time a defendant will provide the full date. As proceedings are electronically recorded, we have no ability to redact that confidential information. Thus, the problem arises when a defendant fails to follow my instruction. (Magistrate judge)

SEALING DOCUMENTS

26) Have you sealed or otherwise restricted access to documents that have not been redacted in accordance with the privacy rules?

Yes	162 (55.3%)
No	90 (30.7%)
Don't Know	41 (14.0%)

27) How often does this occur? N = 162

Often	11 (6.8%)
Sometimes	49 (30.2%)
Rarely	101 (62.3%)
Missing data	1 (0.6%)

28) You indicated that you have sealed or otherwise restricted access to documents that have not been redacted in accordance with the privacy rules. Please explain.

See Appendix H

REDACTION IN GENERAL

29) Is there information in case files, not currently redacted, that should be subject to categorical redaction?

Yes	26 (8.9%)
No	71 (24.2%)
Don't Know	195 (66.6%)

30) What types of information? Please check all that apply. N = 222 ("yes" and "don't know" in response to Q29)

❑ Driver's license number	43 (19.4%)
❑ Passport number	41 (18.5%)
❑ State identification number	31 (14.0%)
❑ Health insurance identification number	37 (16.7%)
❑ Alien registration number	34 (15.3%)
❑ Other (please specify)	20 (9.0%)

For "Other, please specify", see Appendix I

31) Comments

See Appendix J

IMMIGRATION RECORDS

32) With respect to immigration cases, do you believe PACER access to additional forms of private information, such as alien registration numbers, should be restricted?

72 (24.6%) Yes, PACER access to such private information should be limited in all immigration cases.
4 (1.4%) PACER access should be limited in certain types of immigration cases.
33 (11.3%) No, PACER access should not be limited in immigration cases.
184 (62.8%) Don't Know/No opinion

33) Which types of immigration cases should require limited access?

1. Cases involving requests for asylum if there involves a physical threat to an individual or sexual matters. (Active district judge)
2. That can't be predicted. (Active district judge)
3. Situations involving existing or potential asylum requests/petitions and where accused may be involved in an investigation or pending case and could be a witness (Magistrate judge)

REDACTION OF CRIMINAL RECORDS

The Committee Note to Criminal Rule 49.1 lists documents that are not to be included in the public criminal case file. Those documents are the following:

Unexecuted summons or warrants of any kind
Pretrial bail or presentence investigation reports
Statements of reasons in the judgment of conviction
Juvenile records
Documents containing identifying information about jurors or potential jurors
Financial affidavits filed in seeking representation pursuant to CJA
Ex parte requests for authorization of investigative, expert or other services under the CJA
Sealed documents

34) In your opinion, are there categories of material that should be deleted from the current list of documents and included in the public criminal case file?

❍ Yes	15 (5.1%)
❍ No	235 (80.2%)
❍ Don't Know	43 (14.7%)

35) You indicated that there are categories of material that should be deleted from the current list of documents excluded from the public case file. Please note which categories should be deleted, and explain why you think the information should be included in the file.

See Appendix K

36) In your opinion, are there additional categories of materials that should be added to the list of documents that are not be included in the public criminal case file?

❍ Yes	23 (7.8%)
❍ No	169 (57.7%)
❍ Don't Know	99 (33.8%)
Missing Data	2 (0.7%)

37) You indicated that there are additional categories of materials that should be added to the list of documents not to be included in the public case file. Please describe those categories, and explain why you think this information should not appear in the public case file.

See Appendix L

38) Does your court seal, or otherwise limit public access to, plea agreements?

❍ Yes	159 (54.3%)
❍ No	99 (33/8%)
❍ Don't Know	34 (11.6%)

39) Does your court have a policy or a practice to eventually unseal (or consider unsealing) such agreements? N = 159

❍ Yes	41 (25.8%)
❍ No	76 (47.8%)
❍ Don't Know	41 (25.8%)

40) You indicated that your court has a policy or practice to unseal plea agreements. Please describe the policy or practice, referring specifically to any event or circumstance (e.g., imposition of sentence, remand to custody) that generally triggers unsealing or opening access.

See Appendix M

41) Please select the option that best describes your practice regarding posting of plea agreements:

145 (49.5%) Plea agreements are generally available to the public, but are sealed as needed, on a case-by-case basis.
19 (6.5%) Plea agreements are not available to the public through PACER, but are publicly available through the public access terminal in the Clerk's office.
29 (9.9%) Plea agreements are available to the public, but the cooperation information has been transferred from the plea agreement to a sealed document.
20 (6.8%) Plea agreements are available to the public, but the cooperation information has been transferred from the plea agreement to a document kept outside of the public case file.
26 (8.9%) Plea agreements are not filed.
44 (15.0%) Other (please specify)
10 (3.4%) Missing data

For "other, please specify", see Appendix N

42) What is done with the cooperation agreement?

See Appendix O

43) Do you follow the same practices with cooperation agreements?

❍ Yes	229 (78.2%)
❍ No	40 (13.7%)
Missing Data	24 (8.2%)

44) You indicated that you follow a different practice for cooperation agreements. Please describe the different practice for cooperation agreements.

See Appendix P

45) Do you or others in your court review decisions to restrict PACER access to plea or cooperation agreements after a certain point in time?

❍ Yes	16 (5.5%)
❍ No	134 (45.7%)
❍ Don't Know	134 (45.7%)
Missing data	9 (3.1%)

46) You indicated that you or others in your court review decisions to restrict PACER access to plea or cooperation agreements after a certain point in time. Please describe the process that is used.

See Appendix Q

47) Have you had any problems implementing the court's policy regarding posting of plea and cooperation agreements?

❍ Yes	3 (1.0%)
❍ No	242 (82.6%)
❍ Don't Know	42 (14.3%)
Missing data	6 (2.3%)

48) You indicated that you have had problems implementing the court's policy regarding posting of plea and cooperation agreements. Please explain those problems.

1. As to my (not the court's) policy requiring the government to notify the court as soon as the need for sealing no longer exists, I rarely receive such notice. (Active district judge)
2. There have been attempts to have separate side, substantial assistance aggreements, not a physical part of the plea agreement and not filed, to avoid public disclosure. In Feb. 2009, our court voted to make plea agreements public; I have tried to follow that vote by only accepting side substantial assistance agreements that become public. There have only been a few exceptions where concrete, credible threats have caused me to seal a plea agreement and/or side, substantial assistance agreement. No body has been killed yet, but I fear it is only a matter of time. (Active district judge)
3. use of them in another case (Active district judge)

49) In your opinion, has the court's policy regarding posting of plea and cooperation agreements been successful in protecting the privacy and security of individuals signing such an agreement?

❍ Yes	176 (60.1%)
❍ No	5 (1.7%)
❍ Don't Know	105 (35.8%)
Missing data	7 (2.4%)

50) You indicated that the court's policy regarding posting of plea and cooperation agreements has not been successful in protecting the privacy and security of individuals signing such agreements. Please explain.

1. Anyone can go on Pacer and see if a Defendant has pled guilty, and if so, whether cooperation is contemplated. The Public's right to know has trumped safety concerns. (Active district judge)
2. Docket entries entitled "sealed" in criminal cases have resulted in retaliation against the defendants named in the case. Because the public has access to these cases, these people are exposed. (Active district judge)
3. I do not believe that these records should be sealed, and our court does not seal them as a general rule. (Active district judge)
4. I don't know what you mean by posting plea and cooperation agreements. We son't post them we seal them. (Active district judge)
5. The entry of the sealed docket item is enough in cases where threats against the cooperating defendant have been made to signal that such an agreement is in place. There needs to be an alternative in which the cooperation agreement is not apparent on PACER. (Active district judge)
6. When a plea agreement is sealed, it is apparent that someone is cooperting with the government. Web sites like "who's a rat," publically list the sealed agreements. Thus, the very fact of sealing could be detrimental. I am unaware of any actual adverse consequence as a result of postings on "who's a rat." (Magistrate judge)

51) Have you or your court considered alternative policies governing access to plea agreements and cooperation agreements?

❍ Yes	58 (19.8%)
❍ No	93 (31.7%)
❍ Don't Know	136 (46.4%)
Missing data	6 (2.0%)

52) Please describe any alternatives that have been considered.

See Appendix R

53) Have those alternatives been implemented? N = 58

❍ Yes	9 (15.5%)
❍ No	42 (72.4%)
❍ Don't Know	7 (12.1%)

54) Have those alternatives been successful? N = 58

❍ Yes	4 (6.9%)
❍ No	1 (1.7%)
❍ Don't Know	5 (8.6%)

55) In cases involving cooperation, have you had experience in: (please check all that apply)

161 (54.9%)	Closing a courtroom
116 (39.6%)	Sealing a record in whole
177 (60.4%)	Sealing a record in part
118 (40.3%)	Sealing the transcript of a hearing in whole (if different from the record)
138 (47.1%)	Sealing the transcript of a hearing in part (if different from the record)
121 (41.3%)	Sealing docket entries (if different from the record)
54 (18.4%)	None of the above

56) Are you aware of any instance of harm or credible threat to a witness or defendant, arising from a perception that the witness or defendant was cooperating (either through language in plea agreement/cooperation agreement or a sealed document on a docket sheet)?

Yes, in plea agreement cases	16 (5.5%)
Yes, in cooperation agreement cases	26 (8.9%)
Yes, in both plea agreement and cooperation agreement cases	57 (19.5%)
No	142 (48.5%)
Don't Know	47 (16.0%)
Missing data	5 (1.7%)

57) In those instances, what circumstances gave rise to such suspicion or knowledge? Please check all that apply. N = 99

18 (18.2%)	Access to case files on the internet
15 (15.2%)	Access to case files at the courthouse
35 (35.4%)	Attendance at pretrial proceedings
22 (22.2%)	Attendance at trials
42 (42.4%)	Don't know
23 (23.2%)	Other (please specify)

For "Other, please specify", see Appendix S

58) If you have any other comments or suggestions about the privacy rules that have not been covered in this questionnaire, please provide them here.

See Appendix T

Appendix A (Question 2: In which district do you sit)

District Courts

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid		1	.3	.3	.3
	ALMD	3	1.0	1.0	1.4
	ALND	2	.7	.7	2.0
	ALSD	1	.3	.3	2.4
	ARED	3	1.0	1.0	3.4
	ARWD	1	.3	.3	3.8
	AZD	5	1.7	1.7	5.5
	CACD	10	3.4	3.4	8.9
	CAED	2	.7	.7	9.6
	CAND	2	.7	.7	10.2
	CASD	5	1.7	1.7	11.9
	COD	5	1.7	1.7	13.7
	CTD	3	1.0	1.0	14.7
	DCD	3	1.0	1.0	15.7
	DED	2	.7	.7	16.4
	FLMD	8	2.7	2.7	19.1
	FLND	2	.7	.7	19.8
	FLSD	3	1.0	1.0	20.8
	GAND	4	1.4	1.4	22.2
	GASD	1	.3	.3	22.5
	HID	1	.3	.3	22.9
	IAND	1	.3	.3	23.2
	IASD	2	.7	.7	23.9
	ILCD	4	1.4	1.4	25.3
	ILND	7	2.4	2.4	27.6
	ILSD	4	1.4	1.4	29.0
	INND	2	.7	.7	29.7
	KSD	4	1.4	1.4	31.1
	KYED	1	.3	.3	31.4
	KYWD	2	.7	.7	32.1
	LAED	3	1.0	1.0	33.1
	LAWD	2	.7	.7	33.8
	MAD	6	2.0	2.0	35.8
	MDD	2	.7	.7	36.5
	MED	1	.3	.3	36.9
	MIED	2	.7	.7	37.5
	MIWD	3	1.0	1.0	38.6
	MND	1	.3	.3	38.9
	MOED	2	.7	.7	39.6
	MOWD	2	.7	.7	40.3
	MSND	2	.7	.7	41.0
	MSSD	2	.7	.7	41.6
	MTD	2	.7	.7	42.3

NCED	1	.3	.3	42.7
NCMD	3	1.0	1.0	43.7
NCWD	3	1.0	1.0	44.7
NDD	1	.3	.3	45.1
NED	4	1.4	1.4	46.4
NHD	2	.7	.7	47.1
NJD	2	.7	.7	47.8
NMD	4	1.4	1.4	49.1
NMID	1	.3	.3	49.5
NVD	3	1.0	1.0	50.5
NVSD	1	.3	.3	50.9
NYED	11	3.8	3.8	54.6
NYND	4	1.4	1.4	56.0
NYSD	10	3.4	3.4	59.4
NYWD	4	1.4	1.4	60.8
OHND	6	2.0	2.0	62.8
OHSD	4	1.4	1.4	64.2
OKED	3	1.0	1.0	65.2
OKND	3	1.0	1.0	66.2
OKWD	4	1.4	1.4	67.6
ORD	1	.3	.3	67.9
PAED	2	.7	.7	68.6
PAMD	4	1.4	1.4	70.0
PAWD	5	1.7	1.7	71.7
PRD	3	1.0	1.0	72.7
RID	2	.7	.7	73.4
SCD	5	1.7	1.7	75.1
SDD	1	.3	.3	75.4
TNED	4	1.4	1.4	76.8
TNMD	2	.7	.7	77.5
TNWD	2	.7	.7	78.2
TXED	8	2.7	2.7	80.9
TXND	6	2.0	2.0	82.9
TXSD	9	3.1	3.1	86.0
TXWD	9	3.1	3.1	89.1
UTD	4	1.4	1.4	90.4
VAED	6	2.0	2.0	92.5
VAWD	3	1.0	1.0	93.5
VTD	2	.7	.7	94.2
WAED	1	.3	.3	94.5
WAWD	5	1.7	1.7	96.2
WIED	3	1.0	1.0	97.3
WIWD	1	.3	.3	97.6
WVND	3	1.0	1.0	98.6
WVSD	1	.3	.3	99.0
WYD	3	1.0	1.0	100.0
Total	293	100.0	100.0	

Question 2: District
Bankruptcy Districts

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	AKB	1	.8	.8	.8
	ALMB	1	.8	.8	1.5
	ALSB	1	.8	.8	2.3
	AREB	1	.8	.8	3.1
	CACB	5	3.8	3.8	6.9
	CAEB	3	2.3	2.3	9.2
	CANB	3	2.3	2.3	11.5
	CASB	1	.8	.8	12.2
	COB	4	3.1	3.1	15.3
	CTB	1	.8	.8	16.0
	DEB	6	4.6	4.6	20.6
	FLMB	2	1.5	1.5	22.1
	FLSB	2	1.5	1.5	23.7
	GANB	2	1.5	1.5	25.2
	HIB	1	.8	.8	26.0
	IDB	2	1.5	1.5	27.5
	ILCB	2	1.5	1.5	29.0
	ILNB	6	4.6	4.6	33.6
	INNB	2	1.5	1.5	35.1
	KSB	2	1.5	1.5	36.6
	KYEB	2	1.5	1.5	38.2
	LAED	1	.8	.8	38.9
	LAMB	1	.8	.8	39.7
	LAWD	1	.8	.8	40.5
	MAB	2	1.5	1.5	42.0
	MDB	2	1.5	1.5	43.5
	MEB	2	1.5	1.5	45.0
	MIEB	1	.8	.8	45.8
	MNB	3	2.3	2.3	48.1
	MSNB	1	.8	.8	48.9
	MSSB	1	.8	.8	49.6
	MTB	1	.8	.8	50.4
	NCEB	1	.8	.8	51.1
	NCMB	3	2.3	2.3	53.4
	NCWB	2	1.5	1.5	55.0
	NDB	1	.8	.8	55.7
	NEB	2	1.5	1.5	57.3
	NHB	1	.8	.8	58.0
	NJB	2	1.5	1.5	59.5
	NVB	1	.8	.8	60.3
	NYEB	5	3.8	3.8	64.1
	NYSB	6	4.6	4.6	68.7
	NYWB	1	.8	.8	69.5

Active district judge	I alert the attorneys at the beginning of the case and we advise them in the Clerk's office
Active district judge	I am generally careful about not including any such information in opinions. Also, in voir dire, we tell the jury panel not to disclose their addresses, although we do use names.
Active district judge	I attempt to deflect by speaking with counsel.
Active district judge	I avoid asking questions in plea colloquys that may call for personal idntifier information.
Active district judge	I carefully remind counsel of the applicable rules before an evidentiary proceeding.
Active district judge	I direct the parties to make appropriate redactions, consistent with the rules.
Active district judge	I discourage lawyers from asking questions about personal identifier information.
Active district judge	I discuss the privacy policy with counsel at the limine conference I conduct before trial and caution counsel not to elicit answers which would disclose such information unless it is actually relevant to a meaterial issue -- and if it is, to request a redaction of the transcript contemporaneously with the issue arising at the trial. I follow essentially the same procedure for other evidentiary hearings, such as contested sentencings, suppression hearings and the like. In addition, when counsel inadvertantly elicit such information I sua sponte ask leave to redact on the spot.
Active district judge	I do not have witnesses provide street addresses, ss# or DOB. I use numbers instead of names for jury selection,
Active district judge	I mention the issue to counsel before court proceedings if I think the privacy concerns may arise.
Active district judge	I often inform attorneys at the beginning of evidentiary hearings not to ask witnesses questions that would elicit such information.
Active district judge	I provide jurors with numbers and make all references to jurors through those number. Questions directed to witnesses which call for personal indentifier information are not allowed unless counsel indicate the relevance and need for such information to be placed on the record.
Active district judge	I remind counsel to redact such information, and not state it on the record.If I see it in an exhibit or pleading or hear it in court I order it redacted.
Active district judge	I sometimes remind the parties prior to proceeding.
Active district judge	I tell the lawyers to be mindful of their responsibility to not inject into the proceedings the type of information referenced in the civil and criminal rules that is deemed "private".

Active district judge	I try to advise counsel prior to a trial regarding the requiremnents of FRCrP 49.1 / FRCP 5.2 If an identifier comes out during testimony or a question, I strike it from the record, explain why, and direct counsel to avoid such questions.
Active district judge	I try to make sure that this information is not elicited in questioning
Active district judge	I warn the attorneys during trials and during hearings not to mention personal identifiers.
Active district judge	If I recognize the problem, I redact the information and also order the parties to redact it.
Active district judge	If lawyers refer to such information in open court, I remind them not to.
Active district judge	In the earlier years I made aa practice of discussing these matters at pre-trial . The word is "out" and it hasn't been a problem of late.
Active district judge	Instruct all court personnel not to disclose any personal indentifer information
Active district judge	Instruct counsel
Active district judge	Instruct counsel on proper procedures. Seal pleadings done improperty and require proper form.
Active district judge	Instruct lawyers to remove identifying information
Active district judge	Instructions to counsel before transcribed proceedings.
Active district judge	Jurors and witnesses are told that is not necessary to state their address.
Active district judge	Lawyers are given written notice as a part of our normal practice to be careful with personal information
Active district judge	local rules require redaction
Active district judge	My law clerks and judicial assitant are aware of the sensitive nature of this information and when necessary steps are taken to protect it.
Active district judge	Point it out to the lawyers in pre-trial and status conferences that they need to be mindful so that readaction will not have to occurr
Active district judge	Pretiral orders in civil cases and ordes setting trials in criminal cases remind lawyers of the need to limit personal information in testimony and to redact such information from exhibits. My staff -- court room deputy, court reporter, and myself -- are vigilant in checking exhibits and reminding lawyers about the need for redactions. My court reporter will bring to my attention information in a transcript that may need to be redacted before filling.
Active district judge	Pre-trial or pre-hearing redaction
Active district judge	prohibit reference unless absolutely necessary

Active district judge	Pursuant to local rule, complaints and other pleadings specifically do not require personal identifiers
Active district judge	refer to venirewo/men by their number; instruct witnesses to refer to minors by initials.
Active district judge	Remind counsel of our privacy rules and need to protect sensitive information from public disclosure.
Active district judge	Remind the parties through counsel at the CMC to take the necessary steps to redact.
Active district judge	Request lawyers to omit such information if possible and if not place it under seal.
Active district judge	Require counsel not to refer to such information in specific terms unless necessary to an issue in the case. When necessary, the record is sealed. Occassionally, counsel will include private information in documents filed in the docket and the pleading is replaced with the information omitted.
Active district judge	Sometimes attorneys examining a witness will be instructed not to elicit such information. When pro se refer to individual minors with respect to child abuse, the reference is redacted and the Clerk's office directs the pro se to amend the document.
Active district judge	The issue does not arise generally in day to day proceedings before the Court. It seems to be more of an issue at the trial of a case. Therefore, at the pretrial status conference, we discuss how to avoid using personal identifier information during the trial.
Active district judge	The parties are all aware that they do not need to refer to any personal information that can lead to harm to any person. If such information is necessary, the parties approach the bench with the information.
Active district judge	The parties redact information. For example, if a Social Security Number is to listed on a document, usually the first five numbers are covered with "X's".
Active district judge	use of initials for minors
Active district judge	Warn the attorneys not to use it. The attorneys are already quite careful.
Active district judge	We have a local rule that requires redation of certain personal identifiers and I at times have motions filed to remove personal identifier which I respond to immediately. In proceedings I have had to require the redaction of personal information from exhibits and I am moving toward not using panel or jury members names in the proceedings. I review all voir dire personally and prohibit questions that seek identifier or identifier like information. Finally, in making challenges we do so in a manner that does not disclose personal information

Active district judge	We make a conscious effort to address each document as it is considered.
Active district judge	We notify counsel of the prohibited privacy information in every case and halt counsel if they make a mistake. If they persist, I treat it as a waiver.
Active district judge	We tell the parties early on that they are to redact such information.
Active district judge	We warn the parties to avoid the issue.
Active district judge	When a question is raised that asks for personal identifier information (or a litigant, prospective juror, or witness starts to volunteer such information), I try to remember to avoid having them put such information on the record unless it is necessary. Often it is sufficient to get the city (not the address) or the last four digits of an SS number (instead of the entire number).
Active district judge	When an attorney asks for protected information, I stop the witness from providing it (when I remember).
Active district judge	when it is clear at the beginning of a proceeding that this is a potential problem, I bring it up and ask counsel to limit (or eliminate) mention on the record...substituting some other (agree upon) identifier in its place.
Active district judge	While I have not had to enter an order yet, in court we will usually follow the redactions that have appeared in the pleadings. Generally, the indictments or other pleadings with personal identifiers are redacted in part, like a credit card receipt. Either by implication or otherwise, we usually follow that in court unless there is an issue specific to the case that requires full disclosure.
Active district judge	WITNESSES ARE CAUTIONED NOT TO PROVIDE SUCH INFORMATION
Bankruptcy judge	(1) We have a Local Rule that has adopted the Judicial Conference's policy on personal information and states that parties should not elicit such information in testimony or include it in exhibits. (2) My scheduling order specifically requires counsel to
Bankruptcy judge	admonish counsel against eliciting personal information from witnesses not necessary to adjudication of issues.
Bankruptcy judge	Advise parties to redact personal identifiers from exhibits before submitting or filing them and advise counsel not to refer to social security numbers of people or ages of children on the record.
Bankruptcy judge	As parties may be presenting issues before the Court and ma offer documents I remind them of the privacy requirements.
Bankruptcy judge	Ask parties not to read SSNs and the like into the record, check that exhibits are redacted before accepting in court, telling parties to redact if they file documents with identifiers

Bankruptcy judge	During hearings, I block unnecessary disclosures
Bankruptcy judge	During questioning I request that no complete addresses nor other personal identifier information be included in testimony.
Bankruptcy judge	I advise parties at hearings to be careful in putting personal identifiers on the record.
Bankruptcy judge	I call attention to such information whe it is included in exhibits and ask that it be redacted before exhibits are introduced and admitted.
Bankruptcy judge	I caution the attorneys/litigants at the commencement of the proceedings not to ask the type of questions that will need to be redacted.
Bankruptcy judge	I do not allow personally identifiable information to be requested of witnesses.
Bankruptcy judge	I have asked counsel not to pursue questioning that will elicit this information during a hearing or trial.
Bankruptcy judge	I have consistently intervened when the routine background questions are asked to advise counsel that questions eliciting personal identifier information should not be asked. Slowly, but surely, the practice is changing.
Bankruptcy judge	I inform counsel on the record that home addresses should not be requested of witnesses
Bankruptcy judge	I insure that such information is never made part of the record by causing such information to be redacted in documents and insuring it is never read into the record.
Bankruptcy judge	I read a prepared speech. If you would like a copy, please call me.
Bankruptcy judge	I remind the attorneys that the transcript will be accessible to the public and, threfore, to consider the content of statements and documents.
Bankruptcy judge	I warn lawyers and parties not to put such informaton on the record.
Bankruptcy judge	If a court filing or exhibit has a social security number in it, I will have that redacted upon request of any party before it becomes part of the trial record.
Bankruptcy judge	If a statement of private information is requested of a witness in a proceeding, I try to caution the witness not to provide same.
Bankruptcy judge	If I see that some personal information, such as a Social Security number, is on an exhibit that is being offered into admission at trial, I will suggest that the exhibit be redacted. I have required some exhibits to be redacted as a condition for admission.
Bankruptcy judge	If in testimony, I strike the information on the spot. If on an exhibit, I instruct counsel to redact the information and supply a redacted copy.

Bankruptcy judge	If there is confidential information that the parties identify, I will seal the record by so indicating at the beginning and end of the sealed portion.
Bankruptcy judge	In instruct the witness on the stand not to use the names of minor children and for the attorneys not to use their names
Bankruptcy judge	In testimony I make sure that the information elicited and the answers given does not contain the private information, or go off record on occassion. We have, also, had records sealed where private information was disclosed in pleadings or transcripts.
Bankruptcy judge	In the courtroom I have cautioned litigants about using the name of minors, admonished attorneys for using Social Security numbers in pleadings, put some matters under seal to ensure medical information remains private. My staff is also sensitive to privacy concerns.
Bankruptcy judge	Information regarding use of personal identifier information is posted on the court's website.
Bankruptcy judge	Instruct parties to file redacted documents. Instruct witness to not identify address, etc.
Bankruptcy judge	Our clerks office immediately "seals" a pleading on which personal info may exist. We also warn litigants at pre trial conferences to review potential exhibits for such info and redact when necessary.
Bankruptcy judge	Our Court issued a general order last July (Gen.Order No.09-01) addressing this issue. We also have internal procedures which our case administrators follow in this regard.
Bankruptcy judge	Our local rules address this issue in detail, and in trial, I am careful about references to personal ientifiers and to documents containning that informaton.
Bankruptcy judge	Raise issue with counsel
Bankruptcy judge	Request at commencement of trial that parties be sensitive to personal identifier information and that such information be redacted from exhibits.
Bankruptcy judge	Review documents ahead of time to ensure no such information present and, if so, state on the record it needs to be redacted and not discussed on the record
Bankruptcy judge	Screen exhibits before introduction
Bankruptcy judge	The bankruptcy court requires all documents to redact the debtors' ssn or tax id no.
Bankruptcy judge	The following notice is posted in the Courtroom at the Counsel Tables: "The judiciary's privacy policy restrict the publication of certain personal data in documents filed with the court. The policy requires limiting Social Security and financial account

Bankruptcy judge	There is a notice on counsel table and I try to interupt an attorney or witness if he or she is about to disclose inappropriate info.
Bankruptcy judge	This has not yet come up but based upon the privacy rules am not paying special attention to testimony and will interrupt a witness if s/he appears to be moving toward giving PII on the record.
Bankruptcy judge	Try to be aware of rules and guide parties in their questioning, as appropriate
Bankruptcy judge	We follow the policy from the AO. Any transcripts that are transmitted to th court electronically are not accessible to the public for a period of time (I believe 90 days). This allows the parties an oppurtunity to request that certain information be redacted prior to downloading the transcript to the court's file.
Bankruptcy judge	We have notices on counsel table and I mention it to counsel at the commencement of testimonial hearings.
Bankruptcy judge	when discovered block access to the offending document
Bankruptcy judge	When it appears the issue may arise, I caution counsel about using exhibits or referring on the record to social security numbers.
Chief bankruptcy judge	As necessary, reminders are given to counsel and participants to ensure that private information is redacted.
Chief bankruptcy judge	Ask parties at pre-trial conference whether they have redacted all personal identifiers.
Chief bankruptcy judge	automaticly done
Chief bankruptcy judge	Caution attorneys who are introducing documentary evidence to redact before submitting the exhibit.
Chief bankruptcy judge	caution counsel during the hearing
Chief bankruptcy judge	Court e-filing web page has a warning notice about redaction of personal identifier information that must be acknowledged before e-filer can proceed.
Chief bankruptcy judge	During trials, I ask lawyers and witnesses not to put confidential information like full social security numbers or rull account numbers on the record unless absolutely necessary (which is almost never).
Chief bankruptcy judge	I advise the witness not to provide the information if the question appears designed to elicit it, and cut off the witness if he or she is about to provide it.
Chief bankruptcy judge	I mention the problem the first time counsel asks a question that would require disclosure; the reminder is generally sufficient.

Chief bankruptcy judge	I remind attorneys in open court, post notices on the attorney's tables, include notices within our Order setting deadlines, and I return any exhibits which contain personal identifying information in order for the information to be removed.
Chief bankruptcy judge	If such information inadvertently is stated on the record I immediately direct that the record be redacted. Also such information is be redacted in all filings and exhibits. By local rule, 9037-1 we have incorporated the federal rule.
Chief bankruptcy judge	If testimony is getting into an area which could invlve personal identifier information, I would caution the witness. However this rarely happens.
Chief bankruptcy judge	Laminated cards cautioning counsel about the use of protected information are placed on counsel's table in the courtroom. Also, cautionary warnings are prominently displayed on the court's CM/ECF site at log-in, and on the court's webpage.
Chief bankruptcy judge	Monitoring during the hearing
Chief bankruptcy judge	My courtroom deputy reads a prepared statement before any witness testifies alerting the witness to the problem.
Chief bankruptcy judge	Note for the parties, especially if requested by one of the hearing participants, that the record should be modified or purged of the personal identifier.
Chief bankruptcy judge	ORAL ADMONITION TO LITIGANTS. ALSO SCHEDULING ORDERS FOR TRIALS AND MANy OTHER (THOUGH NOT NECESSARILY ALL) EVIDENTIARY HEARINGS WARN COUNSEL ABOUT JUDICIARY PRIVACY POLICY.
Chief bankruptcy judge	our case managers, as a part of their quality control, are on the lookout for personal identified information; if they find any, they will notify the presding judge
Chief bankruptcy judge	Our clerk's staff screens documents carefully.
Chief bankruptcy judge	Our trial orders require that attorneys avoid introduction of personal identifiers in argument or in testimony. We also post privacy reminders on all counsel tables in courtrooms.
Chief bankruptcy judge	Remind counsel and parties
Chief bankruptcy judge	Remind counsel at beginning of hearings by flyers posted on counsel tables to not divulge personal information such as family names, children's names, account numbers, social security numbers, etc.
Chief bankruptcy judge	Reminder in standard scheduling order Oral reminder on the record at points where it appears such information may come out

Chief bankruptcy judge	Return exhibits unless appeal is filed, in which case redaction is required. POC's with such information is removed from public view, and an amended claim is required.
Chief bankruptcy judge	Transcript reviewed by a case manager to determine if any personal identifier information is included.
Chief bankruptcy judge	try to interrupt when PII is approached in testimony and will review proffered documents.
Chief bankruptcy judge	Try to limit reference to addresses, minors' names, etc. in open court.
Chief bankruptcy judge	We alert the parties to the privacy issues in GPOs and LBRs regarding the subject. At hearings, if testimony or exhibits in the court's public files raises identifier problems we tell the parties to redact. In some cases, we will seal the document from public access and order that a redacted amended copy be filed
Chief bankruptcy judge	We remind counsel not to ask for home address, to refer only to the last 4 digits of account numbers, not to refer to minor children by name.
Chief bankruptcy judge	We track and review redaction requests
Chief bankruptcy judge	When appropriate, I advise witnesses and counsel to refrain from placing personal identifier informtion on the record.
Chief bankruptcy judge	When PII is brought up, I instruct the parties to limit the tetsimony so that (for example) full social security numbers are not given in open court.
Chief district judge	Complete identifiers are not used on the record. Exhibits are redacted to meet this requirement. Regarding transcripts attorneys have the responsibility for redaction.
Chief district judge	Counsel are advised to limit the introduction of pesonal information when questioning witnesses and making statemetns in court. We do this by 1) posting an Advisory for Limiting Personal Information on our web site (http://www.ohnd.uscourts.gov/Electronic_Filing/Advisory_for_Limiting_Personal_Information_in_Transcripts.pdf) and 2) placing a laminated copy of the Advisory on the counsel tables in each of our courtrooms. The topic has also been mentioned in our bar association newsletters and during Federal Practice CLE programs.
Chief district judge	Counsel are reminded to speak appropriately and avoid use of personal identifying information.
Chief district judge	Do not identify jurors by name. Do not use minors names in pleadings.
Chief district judge	During the pretrial conference, I cover this topic with counsel, and I advise jurors at the commencement of voir dire.

Chief district judge	I ask the attorneys to avoid using the personal identifiers unless absolutely necessary. I have no problem with this procedure.
Chief district judge	I have asked the attorneys to "sanitize" their filings of items such as bank account numbers, social security numbers, etc. before those items are introduced into the record.
Chief district judge	I provide situational guidance to counsel in cases in which personal identifier information is at issue or may be referred to as the evidence is presented. In those situations, I instruct counsel to refrain from asking questions containing, or that would solicit answers disclosing, personal identifier information.
Chief district judge	I tell witnesses they are not required to answer such questions and then advise the lawyers to refrain as well. I also ask the lawyers to redact any exhibits that may be filed.
Chief district judge	I try to catch questions that include or seek personal identifier information and ask that they be rephrased to avoid answers that include such information. I also stop witnesses who are including such information in their responses.
Chief district judge	I would instruct the Counsel to frame their questions so as not to raise the personal identifiers in open Court - I would also instruct the court reporter not to disclose personal identifers in the transcript.
Chief district judge	In hearings, if such information is provided, I strike the response and require that only intiials be used. We review filings to be sure that they are not providing such information.
Chief district judge	In major criminal cases, I have had jurors referred to by number.
Chief district judge	Intensive trainning of court users and the bar has resulted in a first class operation Docket Clerks (quality analysts),pick up any mistake for instant correction.
Chief district judge	My staff and our Clerk's Office always look for any failure in complying with the redaction rules.
Chief district judge	Nothing other than try to stay alert to the possibility and head it off.
Chief district judge	Our court has advised attorneys in writing and I orally advise them if I believe that such information may come up.
Chief district judge	raise it with lawyers during hearings when personal identifers are being put in evidence
Chief district judge	remind lawyers to black out such info
Chief district judge	Remind lawyers verbally as needed; local court rule/administrative order.
Chief district judge	request counsel not use jurors names during voir dire
Chief district judge	strike it from the record and direct court reporter not to transcribe
Chief district judge	very careful that home addresses, social security #'s, etc. are never asked for or revealed so that redaction would be necessary

Chief district judge	Website informs lawyers. Docketing clerks check pleadings. Lawyers are often called by clerk's office.
Chief district judge	When a lawyer solicits such information, I stop the procedings and ask him or her if she really needs this question answered. If not, I ask the court reporter to not include this information if the witness has already answered the question.
Chief district judge	When something is said on the record that falls in this catagory, I either have it stricken, redacted or that part put under seal. Jury voir is always sealed from public access.
Magistrate judge	I simply remind counsel of the applicable rules during the final pretrial and limine conferences.
Magistrate judge	Address issue at the Case Management Conference and the Pretrial Conference. Encourage parties to redact during discovery and to reach agreements, if possible, on the presentation of evidence in a manner that would minimize any need to redact.
Magistrate judge	Admonish counsel
Magistrate judge	Admonish counsel
Magistrate judge	Admonish counsel and/or witness
Magistrate judge	Advise counsel not to disclose such information during any proceedings that are on the record.
Magistrate judge	advise the parties prior to hearing to be aware and keep personal identifiers out.
Magistrate judge	Ask counsel not to state personal identification information on the record. If stated inadvertently, strike it from the record and instruct court reporter when transcribing the hearing to redact the information from the transcript.
Magistrate judge	At pretrial or at beginning of a proceeding I remind counsel of their obligation to protect personally identifiable information.
Magistrate judge	Avoid reading it and advising the parties to do the same.
Magistrate judge	Before voir dire, I remind counsel to refer to jurors by their number and not their names.
Magistrate judge	clerk review
Magistrate judge	confirming that documents filed and issued do not contain such information
Magistrate judge	consciously do not state addresses, dates of birth, etc. during hearing, refer to reports.
Magistrate judge	Counsel andthe parties are advised prior to the proceedings that such information is to be avoided and if necessary will be under seal.
Magistrate judge	Direct it be redacted or stricken, remind the parties to avoid such references on-the-record unless material to issues in the case.
Magistrate judge	Discuss issues with parties at initial conferences and other proceedings to make them aware of the issue.

Magistrate judge	Filing documents with limited access to the parties and public terminal only; redacting portions (if not burdensome); sealing documents with private information if redaction would be burdensome
Magistrate judge	I do not ask it.
Magistrate judge	I generally do not mention such specific information in open court.
Magistrate judge	I have close communication with my docket clerk to flag and discuss any problems which appear.
Magistrate judge	I have the attorneys review the documents and redact if necessary
Magistrate judge	I instruct counsel prior to questioning witnesses, as necessary; I review grand jury indictments for victim information when I do returns; and I issue protective orders in criminal discovery matters.
Magistrate judge	I instruct witnesses not to provide personal identifier information in response to counsel questions. If a witness or counsel inadvertantly refers to such information on the record, I note on the record that any court reporter transcribing the proceeding to redact the information. I also instruct criminal defendants not to list the information on forms required to be filled out (e.g. financial affidavits).
Magistrate judge	I interrupt when necessary to prevent inclusion in the record.
Magistrate judge	I make every attempt to ensure that personal identifier information is not raised unnecessarily in a proceeding.
Magistrate judge	I normally instruct the lawyers to redact the document before entry of the document into evidence.
Magistrate judge	I occasionally remind the lawyers not to include unnecessarily such personal identifiers, or to truncate them to fewer than all the digits in numerical identifiers. But it is an occasional thing, not routine.
Magistrate judge	I purposely do not allow testimony regarding personal information into the record. Even with guilty pleas, I only ask the year of their birth, not the date.
Magistrate judge	I remind counsel
Magistrate judge	I send a form order to counsel prior to the hearing which instructs them to refrain from using personal and/or private information unnecessarily. It also instructs them to submit any such information in advance of the hearing either under seal (pursuant to Local Rules) or by email to my chambers with copies to opposing counsel.
Magistrate judge	I simply make sure that counsel do not inquire into these matters unnecessarily.

Magistrate judge	I tell them it is not necesary to recite personal identifiers in the record and encourage the attoneys to redact. I also redact personal identifiers from proposed orders
Magistrate judge	I tried to prevent testimony or statements on the record where personal information is going to be revealed and is unnecessary for the proceeding.
Magistrate judge	I try to make a point of advising attorneys that personal identifiers should, if at all possible, not be used in proceedings before me.
Magistrate judge	I warn the parties orally at the initial conference particularly in cases where infants may be involved
Magistrate judge	I will ask during plea hearings that personal identifiers not be placed on the record.
Magistrate judge	I will request on the record that the parties and attorneys try to discuss the matter without referring to individuals' social security numbers or other similar private information.
Magistrate judge	If a question being asked (and recorded by the court reporter) calls for such information, I direct counsel to withdraw the question or reframe it to exclude the information.
Magistrate judge	If I am concerned that personal identifier information will be addressed during a hearing, I caution counsel. If it appears that such information is about to be disclosed, I caution counsel.
Magistrate judge	In all proceedings, such as first appearances, arraignments, and pleas, I allow only year of birth, last four of Social Security numbers, etc.
Magistrate judge	In civil cases, I try to anticipate situations where personal identifier information may be disclosed and, depending on the stage of the case, try to address the issue at the initial conference or, if necessary, convene a conference to ensure proper safeguards are in place. In Section 1983 cases, where personnel records, etc., are often at issue, I have standing orders to protect privacy. The issue arises rarely often (for me) in criminal cases
Magistrate judge	In criminal cases, my staff insures that case agents do not include personal identifiers in criminal complaints and other papers that are presented.
Magistrate judge	In criminal proceedings when asking a defendant who is preparing to plea, I ask for name and year (not date) of birth; I ask for the last 4 digits of the ss#.
Magistrate judge	In guilty plea colloquys, when I ask whether you provide financial support to anyone, I ask that names not be mentioned. CJA form 23 affidavits requesting appointment of counsel at first appearance are filed under seal. Pretrial release orders no longer contain the address of the Defendant.

Magistrate judge	In hearings, I instruct counsel not to mention the material in the hearing. In pleadings, I require that the material be filed under seal.
Magistrate judge	In pro se cases we advise the litigant not to include such personal information in any filings or on the record in open court proceedings. Similiar advice is given to attorneys when the subject matter suggests that this may be an issue.
Magistrate judge	Instead of asking defendants their DOB, I ask how old they are and if they start to give a date of birth, I stop them before they complete it. If an attorney asks a witness for personally identifying information, I stop them before the witness answers and I explain why I do not want that information on the record. We also redact pleadings, such as complaints, affidavits for warrants, etc,, and remove this information prior to filing the document "of record."
Magistrate judge	Instruct counsel/witnesses not to disclose personal data identifiers and if they do, order the reporter to strike it.
Magistrate judge	Instruct witness re answering such questions
Magistrate judge	It is impractical to ask lawyers & witnesses to speak in code during trials and hearings. It is also extremely time-consuming to review transpripts for PI info after the fact. Instead, we ask the parties to stipulate before the hearing to automatic redaction by the court reporter of pre-identified PI info when the transcript is being prepared.
Magistrate judge	Language included in initial notice of pretrial conference reminding attorneys not to mention personal identifiers in open court
Magistrate judge	limit revealing speech and writings
Magistrate judge	Local Rule and practice of the clerk's office.
Magistrate judge	Local Rules and the court's web page set forth limitations for the placement of certain information in pleadings and on the record. If necessary, parties are reminded during the course of court proceedings
Magistrate judge	Local Rules provide counsel notice that such information should not be used.
Magistrate judge	Local Rules require redaction of personal identifier information by the attorneys in any document filed with the Court. Attorneys know not to reference personal identifier information during a public hearing. DOcuments submitted for consideration in Court are expected to be redacted beforehand or thay will not be admitted until after redaction has occurred.

Magistrate judge	Maintain an awareness of the sensitivity of such information and remain diligent in assuring that the information is not disclosed or, if necessary to disclose, is protected.
Magistrate judge	Minimize refering to such matters when possible.
Magistrate judge	my in-court deputy has modified forms & other materials to redact this info
Magistrate judge	My staff -- law clerks & Courtroom Deputies -- are aware of privacy matters and double-check every document
Magistrate judge	No street addresses given, only towns.
Magistrate judge	Notice to Counsel on CM/ECF and Notices posted on podiums in the Courtrooms
Magistrate judge	on cases where the problem is likely to arise we discuss it at the Rule 16 conference and clerk's office is especially vigilant
Magistrate judge	Our local rules have provisions of which I remind the parties.
Magistrate judge	Our local rules require that the information be redacted. And if not, parties are instructed to do so and refile.
Magistrate judge	Prompt attorneys in advance not to disclose any p/i/i on the record of the proceeding in which we are participating
Magistrate judge	Receive any personal identifier information, e.g., address, telephone number, either prior to or subsequent to the hearing.
Magistrate judge	Redacted from filings with the court
Magistrate judge	Require the filing of redacted filings if counsel has mistakenly included Social Security numbers.
Magistrate judge	The Clerk has placed a laminated reminder at each counsel table, clerks desk and on the bench that warns that the personal identifer information should not be used in court without permission. The personal identifers are specifically set out in bold on the notice. I also verbally warn parties of the restrictions on the use of personal idetifiers at the beginning of the hearing if I think there is a possiblity that a reference may be make to this information.
Magistrate judge	The Clerk's Office has a General Order to redact personal information
Magistrate judge	The Court reminds the parties that the proceedings are public and that they should be mindful of the type of information that is placed on the public record and evaluate if it is necessary to include the information.
Magistrate judge	WArn attys at court confs not to say things on record that are "private" so I don't have to seal part of a conf or trial transcript.
Magistrate judge	We are proactive in making sure the informaiton does not get into the record in the first place. We also have written instructions on the trial table.

Magistrate judge	We require that witness lists be filed under seal. We require attorneys to redact personal identifier information from depositions and other documents containing such information prior to filing, and we require that certain types of cases, such as social security appeals, be filed under restricted access
Magistrate judge	We reviewed and revised all forms we used to eliminate including personal information ("PI"), we have notified counsel of the need to eliminate PI in pleadings, and we are careful during court proceedings to insure that exhibits and testimony do not include PI (unless essential to resolving an issue) and strike from the record any inadvertent mentioning of PI. This issue also has been discussed at bench meetings to insure all our judges are aware of this issue.

Appendix C (Q9): Which documents are publicly available through PACER (other, please specify)

What type of judge are you?	Documents available through PACER? : OtherText
Active district judge	I don't know
Active district judge	Don't know
Active district judge	don't know
Active district judge	foreperson's signature only on verdict form and notes
Active district judge	I am not entirely certain about our District's full policy in this regard.
Active district judge	I am not sure, but I believe none of this information is available on pacer.
Active district judge	I am unaware of PACER practice. In most voir dires, juror candidates are referred to by number. The transcript would reflect any identifier mentioned during voir dire.
Active district judge	I cannot answer with certainty but to my knowledge, none of this is available on PACER
Active district judge	I do not use Pacer and do not know what information is posted.
Active district judge	I don't know - ask the Clerk
Active district judge	I don't know.
Active district judge	If there is a challenge to extraneous information, I will hold a voir dire of the jurors. This has only happened twice.
Active district judge	It is possible that a transcript of voir dire might be prepared and filed electronically, but efforts are taken to redact juror names in that event.
Active district judge	Mainly exhibits filed in 2254 cases
Active district judge	Names of jurors only get on PACER when mentioned during voir dire
Active district judge	Signature of jury foreperson on verdict form is only document available online.
Active district judge	This is handled by the clerk
Active district judge	Verdict form may have the foreperson's name.
Bankruptcy judge	As a bankruptcy court, we have never had a jury trial or sought to empanel a jury.
Bankruptcy judge	credit apps, certain medical info forms
Bankruptcy judge	do not deal with juries
Bankruptcy judge	Do not do jury trials.
Bankruptcy judge	do not have jury trials
Bankruptcy judge	don't know what, if any, information about jurors is available through PACER
Bankruptcy judge	Don't know; jury trials are very rare in our court.

Bankruptcy judge	Have not had a jury trial.
Bankruptcy judge	I do not deal with Juries
Bankruptcy judge	I have conducted no bankruptcy jury trials
Bankruptcy judge	I have had no jury tials in all my years on the bench.
Bankruptcy judge	I have never conducted a jury trial in bankruptcy court.
Bankruptcy judge	Juries in bankruptcy are only theoritical
Bankruptcy judge	jurors not regularly used in Bankruptcy Ct
Bankruptcy judge	n/a
Bankruptcy judge	N/A
Bankruptcy judge	N/A
Bankruptcy judge	N/A - I have not conducted a jury trial.
Bankruptcy judge	n/a, no jury trials
Bankruptcy judge	na
Bankruptcy judge	No juries
Bankruptcy judge	no juries in bankruptcy
Bankruptcy judge	no juries used in bankruptcy
Bankruptcy judge	No jurors
Bankruptcy judge	No jurors in this court
Bankruptcy judge	No jury trials
Bankruptcy judge	No jury trials
Bankruptcy judge	No jury trials conducted in my courtroom yet
Bankruptcy judge	No jury trials have been conducted in the bankruptcy court.
Bankruptcy judge	No jury trials to date
Bankruptcy judge	No juryies in my court
Bankruptcy judge	Not applicable
Bankruptcy judge	Not applicable
Bankruptcy judge	not applicable
Bankruptcy judge	Not applicable
Bankruptcy judge	Not Applicable - No jury trials
Bankruptcy judge	Not applicable since trials are by the court
Bankruptcy judge	Not applicable to our court.
Bankruptcy judge	Not applicable.
Bankruptcy judge	possibly debtor's schedules
Bankruptcy judge	Proofs of Claim
Bankruptcy judge	proofs of claim
Bankruptcy judge	We do not conduct jury trials.
Bankruptcy judge	We do not deal with jurors
Bankruptcy judge	We don't generally use juries in bankruptcy court
Bankruptcy judge	We have not had a jury trial
Bankruptcy judge	We rarely if ever have juries in bankruptcy court.
Bankruptcy judge	We've never had a jury trial.
Chief bankruptcy judge	Almost never have jury trials
Chief bankruptcy judge	Bk. ct. doesn't do jury trials here

Chief bankruptcy judge	don't have jury trials--bankruptcy
Chief bankruptcy judge	Haven't had a jury trial since enactment
Chief bankruptcy judge	I DO NOT CONDUCT JURY TRIALS.
Chief bankruptcy judge	I've held no jury trials (bankruptcy court).
Chief bankruptcy judge	n/a - We have not had a jury trial in the Massachusetts bankruptcy court for many years
Chief bankruptcy judge	N/A. No current jury experience
Chief bankruptcy judge	NA--don't use juries
Chief bankruptcy judge	No juries in bankruptcy
Chief bankruptcy judge	No jury in bankruptcy court
Chief bankruptcy judge	No jury trials conducted so far
Chief bankruptcy judge	no jurys
Chief bankruptcy judge	Not applicable
Chief bankruptcy judge	Not applicable
Chief bankruptcy judge	Not applicable
Chief bankruptcy judge	Not applicable.
Chief bankruptcy judge	Not applicable; jury panel is maintained by the district court
Chief bankruptcy judge	Our court does not try jury cases
Chief bankruptcy judge	proof of claim index; pleadings in ECF
Chief bankruptcy judge	Rarely applies in bankruptcy; and my position would be that no personal information be publicly available through PACER
Chief bankruptcy judge	To date, have not conducted jury trial
Chief bankruptcy judge	transcripts (with opport to redact); proofs of claim; exhibits to pleadings
Chief bankruptcy judge	We do not conduct jury trials
Chief bankruptcy judge	We do not have jurors.
Chief bankruptcy judge	We don't have jurors.
Chief bankruptcy judge	We generally don't do jury trials in bankruptcy court.
Chief bankruptcy judge	We have no jury trials
Chief bankruptcy judge	We have not had a jury trial since the implementation of the new rules.
Chief bankruptcy judge	we have not had any jury trials, so this is N/A
Chief bankruptcy judge	We have not held a jury trial in years.
Chief district judge	Civil cases: verdict form includes name of presiding juror and the preemptory strikes are publically filed. In criminal cases, the name of the presiding juror is redacted from the verdict form and the names of jury strikes are not publically filed.
Chief district judge	Don't know
Chief district judge	The verdict form will have the name of the foreperson.
Chief district judge	Verdict form with presiding juror's signature.
Magistrate judge	Do not personally deal with juror information.

Magistrate judge	don't know
Magistrate judge	Generally, none are supposed to include such iformation. Sometimes there are slips and we act then to redact or delete them.
Magistrate judge	I am rarely involved in this aspect of criminal matters. Consequently my knowledge is limited.
Magistrate judge	I do not know the answers to all the above
Magistrate judge	I do not know.
Magistrate judge	I do not work with juries.
Magistrate judge	I don't know
Magistrate judge	I have not had a jury trial so I do not know.
Magistrate judge	if trial transcript is filed, jury selection information could be made publically available
Magistrate judge	In response to this question, I assumed that you are referring to transcripts of proceedings that have been ordered and have been filed on cm/ecf.
Magistrate judge	No jury trials as of 11/13/09
Magistrate judge	not familiar with this
Magistrate judge	Orders Setting Conditions of Release
Magistrate judge	signature of jury foreperson on jury questions and verdict and signiature of grand jury foreperson on kindictments.
Magistrate judge	some indictments have forepersons name blacked out, some do not.
Magistrate judge	that I am aware of
Magistrate judge	Transcripts of voir dire, strikes, and notes from jurors are available with juror names only
Magistrate judge	Unknown
Magistrate judge	We do not have jury trials.
Magistrate judge	We generally do not have jury cases.

Appendix D (Q11): Please describe or provide an example of those instructions to counsel regarding redaction.

What type of judge are you?	Please describe or provide an example of those instructions to counsel regarding redaction.
Active district judge	any filing with personal identifiers is discouraged. My Court reporter provides notice to counsel to regarding redactions requested before filing a transcript.
Active district judge	Just instructed to redact same
Active district judge	A printed card is on counsel table reminding attorneys not to use personal identifiers and telling attorneys how to ask for a redaction if they do. The Court's website also includes instructions (I believe).
Active district judge	a sheet of paper has been placed under the glass on counsel tables in the courtrooms that provide information about transcripts, and the need to identify redaction in a period of time after the reporter frist discloses the transcript to the appearing attorneys.
Active district judge	All but last 4 digit of SS# Initials only of minor children Street name, no number No bank account numbers Year of birth only, no date
Active district judge	All counsel are directed to the rules
Active district judge	an instruction sheet is placed on each counsel table and we orally instruct counsel
Active district judge	Announcement from bench or written orders.
Active district judge	Anonymous jury questionnaires- jurors are given basic instructions in the questionnaire not to reveal information that could identify them. If juror requests to speak to me privately, I will hear the juror ex parte and make a record of the colloquy. The county of residence for the juror and the type of employment the juror has are elicited in very general terms.
Active district judge	as stated above.
Active district judge	Counsel are provided a period of time to request redaction of information in transcripts prior to the transcript being made public.
Active district judge	Counsel are required to review for redactions before transcripts are filed.
Active district judge	Counsel contact the court reporter with the information needed to be redacted. Copies of the advisories are provided to the Court.
Active district judge	Counsel have been instructed to avoid questions that call for this type of information.
Active district judge	Counsel is notified of the deadline for requesting redactions at time transcript is filed. Transcript is unavailable to public until time has expired.
Active district judge	Court Clerk is responsible for informing counsel and parties not to disclose peronal identifier information

Active district judge	Court reporter provides info and instructions
Active district judge	General informal advice from court staff.
Active district judge	I advise counsel during proceedings our standing order 04-02 prohibits the appearance of Social Security numbers, names of minor children, dates of birth, financial account numbers and home address in records and pleadings filed publically. A copy of the order will be provided if requested.
Active district judge	I advise them of privacy and confidential rights and then point to our court policies re: redaction.
Active district judge	I believe that they are told this by the court reporters.
Active district judge	I direct parties to consult the rules and make appropriate redactions.
Active district judge	I handle the issue as it arises. I am not certain whether the court as an institution has any policies in this area.
Active district judge	I instruct them orally in court.
Active district judge	I tell them that our court requires same at the CMC; at pretrial and at trial.
Active district judge	I use informal instructions.
Active district judge	In addition to what I described above, there is a notice on our public website.
Active district judge	In April of 2008, an e-mail was sent to all registered CM/ECF attorneys containing an attachment entitled Q&A on the Electronic Availability of Transcripts and Transcript Redaction Procedures.
Active district judge	Instructions are provided during training for electronic filing for all attorneys.
Active district judge	It is in our local rules, I think.
Active district judge	just a reminder to counsel by the court reporter
Active district judge	law clerks and in court deputy remind parties
Active district judge	Lawyer training and notice
Active district judge	Local court Rule
Active district judge	Local Rule 5.2-1 provides instructions on redacting personal identifiers and a procedure to address such concerns.
Active district judge	local rules
Active district judge	local rules
Active district judge	Local Rules contain instructions on what to delete or redact information
Active district judge	not sure
Active district judge	Notice is given counsel of her right to redact certain info, the time constraints and how to go about doing it.
Active district judge	On CM/ECF we notify the parties.
Active district judge	on the court website
Active district judge	Oral at pre-trialconference

Active district judge	Orally remind counsel of privacy rules and need to protect sensitive information. Court procedures posted on my court web site also remind attorneys.
Active district judge	Our ECF homepage carries a reminder.
Active district judge	Our local rules and handouts provide instructions.
Active district judge	Our Local Rules remind counsel and I verbally remind them.
Active district judge	our web site contains these instructions
Active district judge	Personnel at the Clerk's office give instructions to counsel when they review the transcripts pursuant to our district rules.
Active district judge	PLEASE STATE ONLY YOUR CITY OF RESIDENCE
Active district judge	previously discussed
Active district judge	See above.
Active district judge	see previous page
Active district judge	set out in local court rules
Active district judge	Simply to avoid any reference to such information to the extent possible.
Active district judge	The clerks office provides information to attorneys
Active district judge	they are in our ECF policies and procedures
Active district judge	This is handled by the clerk
Active district judge	Through local rules and clerk monitoring.
Active district judge	We have a deadline for redaction requests, after which time transcripts are available on PACER. We also have a link on the Court's web page that discusses the redaction process.
Active district judge	we have a general order requiring redaction
Active district judge	we have an ecf policy concerning requesting redaction from the transcript
Active district judge	We have general instructions in every courtroom. Most common, witnesses start to give their home address. I stop them and explain. That's usually a sufficient warning to counsel.
Active district judge	We have instructions and explanatory information on our web site.
Active district judge	We include reminders during some proceedings and cover the topic in court sponsored continuing legal education seminars. Also, I believe we post information on our website
Active district judge	We shred juror notes and always refer to jurors by their number. Juror lists and panel strike lists are restricted documents.

Active district judge	When a transcript is filed, CM/ECF participants receive an electronic notice of a docket entry containing the following: NOTICE RE REDACTION OF TRANCRIPTS:The parties have seven (7) calendar days to file with the Court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript will be made remotely electronically available to the public without redaction after 90 calendar days. The policy is located on our website at www.vawd.uscourts.gov Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 11/13/2009. Redacted Transcript Deadline set for 11/23/2009. Release of Transcript Restriction set for 1/21/2010.
Active district judge	When transcripts are filed, the docket entry includes instructions. We also have adopted a local rule (7.1) that addresses personal identifiers.
Bankruptcy judge	At times warn litigants not to use information that will need to be redacted. Also warning is on our court web page.
Bankruptcy judge	Attorneys often file requests to correct a Social Security number on the electronic filing system. As quickly as discovered, staff takes corrective action and the lawyer is informed, hopeful taught, that is is not acceptable.
Bankruptcy judge	Caution counsel not to use full social security numbers, full bank account numbers, full credit card account identifiers.
Bankruptcy judge	Contained in Local Rules
Bankruptcy judge	counsel receive notice when a transcript is docketed and blocked from access. Counsel are advised of time frames for redaction requests.
Bankruptcy judge	Court's website sets forth a redaction policy.
Bankruptcy judge	During in court proceedings, instructions given from bench if issue arises
Bankruptcy judge	electronic filing is mandatory. Filers are instructed to redact. Court administrators review filings and take corrective action where necessary
Bankruptcy judge	General instructions and local rules.
Bankruptcy judge	General Order
Bankruptcy judge	I ask parties to be careful not to disclose personal information. Our bankruptcy rules allow for the redaction of information on PACER>
Bankruptcy judge	I believe that our Clerk's Office has information available or will inform counsel of what type information is private information and how to not disclose.

Bankruptcy judge	I believe the Clerk's office advising cousel about the use of Social Security Numberson certain documents.
Bankruptcy judge	I believe there is a note that pops up prior to one's uploading to our CM/ECF system. I also read a preprepared speech before a trial starts. we also make announcements at bar associations meetings e.g., when rule 9037 was adopted, when we change a procedure, etc.)
Bankruptcy judge	I believe this is done in conjunction wih the procedure I outlined above. At time a transcript is submitted, I believe counsel are advised of the oppurtunity to have information redacted prior to publicaion.
Bankruptcy judge	If we notice it, we tell them to redact.
Bankruptcy judge	on web site
Bankruptcy judge	Our Clerk of Court has a procedure in place
Bankruptcy judge	Our Local Bankruptcy Rules and court website instruct counsel and the parties to redact all personal identifiers before filing any documents and when a transcript is ordered, the parties are given instructions as to redacting personal identifiers, with the initial burden being on the party that has requested the transcript.
Bankruptcy judge	Our Local Rule 9018-1(b) provides a detailed description of the redaction procedures recommended by the Judical Conference. When any trnascript is filed, a notice is issued that the parties must review it for personal information and it is withheld from public view pending that procedure.
Bankruptcy judge	refile excluding the personal identifier
Bankruptcy judge	see above
Bankruptcy judge	Specific instructions can be found on our website by searching redaction personal info
Bankruptcy judge	The above-referenced General Order is posted on the court's website and, also, has been distributed to all of the court's ECF attorneys.
Bankruptcy judge	The CMECF guidelines provide instructions on filing documents that remind filers not to include personal identifiers.
Bankruptcy judge	There are instructions concerning redaction posted on our court's website.
Bankruptcy judge	They are on our website and in a notice on counsel tables.
Bankruptcy judge	They are provided by the Clerk's office
Bankruptcy judge	We have a detailed process specified in our local rules that is effective before te public is able to access the document or transcript.

Bankruptcy judge	We have enacted a local rule, and posted it conspicuously on the Court's website, that offers guidelines for protecting PII. It is posted as follows: Vt. LBR 5007 - RECORD OF PROCEEDINGS & TRANSCRIPTS; ENSURING PRIVACY IN TRANSCRIPTS for guidelines regarding redaction procedures.
Bankruptcy judge	web site
Chief bankruptcy judge	A letter is sent to the party ordering the transcript describing the Judicial Conference policy re transcripts including deadlines for redaction.
Chief bankruptcy judge	An identification of a personal identifier has been made on the record; I order that such personal identifier be redacted from the transcript.
Chief bankruptcy judge	At periodic bench and bar meetings.
Chief bankruptcy judge	Below is the script for Standard Redaction Policy Announcement.... "I have a brief announcement before we get started. The Court has a policy called the "Policy and Procedure Regarding Electronic Availability of Transcripts of Court Proceedings" that allows you to remove certain personal information from the public copy of the transcript of this proceeding if one is ever made. Information about this new Policy is posted on the bulletin board outside this courtoom and you can ask me for copies of the forms you must file with the Court to remove personal information from the transcript. You can also find this information and the forms on the Court's website and in the Clerk's Office."
Chief bankruptcy judge	Clerk's Office provded notice when the issue first arose
Chief bankruptcy judge	Cm/ECF training and in web page. Also information appears in log on screen.
Chief bankruptcy judge	emphasis in Local Rules (adopted prior to changes in national rules)
Chief bankruptcy judge	I thought we adopted a judicial conference policy for having personal information redacted from transcripts before they are posted on the dockets but I am unable to locate it (and also unable to figure out how to go backwards in this survey to change my previous response!).
Chief bankruptcy judge	Inform them of need/right to redact certain information.
Chief bankruptcy judge	Information about redaction is available on our website and I routinely remind parties and counsel in the courtroom that redaction is their primary responsibility.
Chief bankruptcy judge	Information on our website. Sent e-amisl to bar at time of rule and local rule promulgation. Reminders during CLE's.
Chief bankruptcy judge	My law clerk will make available the form of order that will accomplish the necessary redaction.

Chief bankruptcy judge	Once a transcript is filed, notice and a deadline is provided to counsel reminding them of redaction requirements and a time frame within which accomplish redaction.
Chief bankruptcy judge	operating oreder 08-04- adopts judicial conference policy- 90 days after transcript is ordered, ordering party may identify what needs to be redacted
Chief bankruptcy judge	Our administrative procedures contain instructions regarding the redaction of personal identifiers from transcripts.
Chief bankruptcy judge	Our notice of filing of transcript includes a warning with time frames and instructions for redaction.
Chief bankruptcy judge	our web site has information on personal identifier information
Chief bankruptcy judge	Policy and Procedures Regarding Electronic Availability of Transcripts effective February 17, 2009 posted on court website
Chief bankruptcy judge	Reminder at beginning of a proceeding and during when necessary
Chief bankruptcy judge	See earlier response.
Chief bankruptcy judge	The full instructions are accessible through the court's web site. They identify the potentially redactable information, require a party or its attorney to file a notice of request for redaction within five days of the delivery of the transcript to the Clerk, and then give the requestor 21 days to identify to the court reporter the information that must be redacted. The instructions also include the following warning: "Attorneys should be diligent in altering courtroom behavior so that unnecessary information is not elicited in the proceeding, unless necessary to prove an element of the case."
Chief bankruptcy judge	VErbal for most part
Chief bankruptcy judge	We have a general order that describes the procedures for redacting private info from transcripts.
Chief bankruptcy judge	We have a GPO and the court's new LBRs effective Dec. 1, 2009 have warnings about the privacy rules and the need to comply.
Chief bankruptcy judge	We have court rules and policies that deal with privacy issues.
Chief bankruptcy judge	we post notices on the attorney's tables and in the order setting deadlines in adversary proceedings.
Chief bankruptcy judge	Website has reminder.
Chief district judge	cite to local rules
Chief district judge	Constant training and notices to counsel
Chief district judge	Examples of instructions are on our website, in accordance with Judicial Conference policy.

Chief district judge	First, we have modified our Notice of Electronic Filing for docketed transcripts to inform counsel of their obligation to request redaction of personal identifiers within a specified time frame. Second, we have posted a sample "Transcript Redaction Request Form" on our website forms page. Third, we have developed an informational piece on the transcript redaction rules that we have circulated using the court's list serve and published in the state bar newspaper. Fourth, that informational piece, as well as additional transcript redaction information, is notoriously posted on the court's website. The instructions can be found at this link: http://www.nhd.uscourts.gov/pdf/USDC-NH-Public%20Notice.pdf . The general information section of the website dedicated to redaction can be found here: http://www.nhd.uscourts.gov/ecf/cmecf/default.asp#redact .
Chief district judge	General Order 514, entered in May 2002 and revised on several ocasions since then, provides guidance on redaction of personal identifying information in all court documents
Chief district judge	I tell counsel orally on the record not to include home addresses, account numbers, or social security numbers in statements on the record, but, if such matters are included, I instruct them that they must physically black out material on the transcripts that are filed.
Chief district judge	Just that they are responsible for identifying necessary redactions because court reporters will not be able to do so.
Chief district judge	Local court rule/administrative order; verbal reminders as needed.
Chief district judge	Local Rule 5.2 lists the types of information that must be redacted.
Chief district judge	LR CV 5.2; LR CR 49.1
Chief district judge	My staff and the Clerk's Office point out to offending parties the Rules regarding redaction and request comliance.
Chief district judge	Once a transcript is electronically filed, counsel has a period of time to review the transcript, and if counsel wishes to redact, they file a "Notice of Intent to Redact." If counsel does file that notice of intent to redact, they must then submit to the reporter a statement outlining where the personal identifiers appear in the transcript that they wish be redacted. On docket sheets where a transcript has been filed it sets out the deadlines for the notice of intent to redact, the actual redaction deadline, and the release of the transcript to the public.
Chief district judge	Our webpage contains information on personal identifiers - also our pretrial orders contain information on the Federal Rules and Local Rules concerning personal identifiers.
Chief district judge	Policy posted on District of Mt web page
Chief district judge	redact names of minors.

Chief district judge	Reminder notes on CM/ECF Reminder notice on podiums in courtrooms
Chief district judge	Rules on electronic filing instructs filersd on privacy issues
Chief district judge	rules published on our website
Chief district judge	see above
Chief district judge	See above answer
Chief district judge	Some time ago, our court circulated a written notice. I also advise attorneys during hearings on occasion.
Chief district judge	Such instructions are contained in our local rules.
Chief district judge	the clerk of the court and deputy clerk address this particular issue
Chief district judge	The clerk's office advises all attorneys regarding the redaction requirement.
Chief district judge	The Clerk's office provides information.
Chief district judge	The policy is on our homepage and describes specifically what should be redacted and how.
Chief district judge	The procedure/instructions for redacting personal identifiers from transcripts is set forth in "Electroic Availability of Transcripts of Court Proceedings" on our web site at http://www.ohnd.uscourts.gov/Electronic_Filing/transcript-notice.pdf. In addition, an "Advisory for Limiting Personal Information in Transcripts" (http://www.ohnd.uscourts.gov/Electronic_Filing/Advisory_for_Limiting_Personal_Information_in_Transcripts.pdf) is placed on counsel tables in each courtroom and is published on our web site. Local Civil Rule 8.1 and Local Criminal Rule 49.1.1 set forth the personal identifiers that are to be redacted from documents, including transcripts. The Court has also published on its web site "Questions and Answers re: Electronic Availability of Transcripts and Transcript Redaction Procedures" (http://www.ohnd.uscourts.gov/Electronic_Filing/Q___A_for_attorneys.pdf).
Chief district judge	Through miscellaneous order addressing trial transcripts, via the practices of individual judges (see my prior response re my practices), and through warnings on the court website.
Chief district judge	We have a notice on the system which reminds the atorneys of their obligation to review the transcript within the specified time frame.
Chief district judge	We provide a specific notice to counsel that transcripts are locked for first 90 days to allow counsel to notify of need for redactions. Transcripts are unlocked if there is no request for redaction. Otherwise our Local Rule 7.1(b) cover the redaction policy.
Chief district judge	Website and phone calls
Magistrate judge	Appears on splash page of ECF filing system

Magistrate judge	As mentioned above, I cover this during the the final pretrial and limine conferences.
Magistrate judge	As previously noted, I try to advise counsel to keep personal identifiers out of court proceedings, if possible.
Magistrate judge	by local rule
Magistrate judge	By reference to Rule 49.1
Magistrate judge	Case by case basis, identify certain information which needs to be redacted in accordance with the rules.
Magistrate judge	Clerk's office availability for responding to inquiries
Magistrate judge	Clerk's office handles that
Magistrate judge	Comply with the Federal Rules
Magistrate judge	Counsel are informed that it is their responsibility to remove personal identifiers.
Magistrate judge	Counsel is reminded that the transcripts will be publicly filed and that they should consider the need for including such information.
Magistrate judge	e government act info on web site
Magistrate judge	Have informed the practicing bar about not putting personal information indetifiers in their filings with the court.
Magistrate judge	http://www.scd.uscourts.gov/CMECF/DOCS/Transcript_Redaction_Instructions.pdf
Magistrate judge	I explain the procedure. It is also on our web site.
Magistrate judge	I inform the attorneys thatif there is any sensitive information that they redact their submissions.
Magistrate judge	I meet with counsel at a pre-voir dire conference before each jury selection and instruct counsel directly
Magistrate judge	I suggest those portions of the record containing identifiers be sealed.
Magistrate judge	I understand that there are instructions provided upon an attorbney's signing up for electronic filing.
Magistrate judge	If redaction is determined to be necessary, a party must file a Notice of Intent to Request Redaction within seven business days of the filing of the official transcript. If a party files a Notice of Intent to Request Redaction, the transcript will not be made remotely available to the general public until the redactions have been made. A copy of the officially filed transcript will be available for reviewing in the Clerk's Office or may be purchased from the court reporter during this time.
Magistrate judge	In jury selection, I do not tell counsel not to identify a juror by name, nor do I take measures during trial not to identify a juror. In hearings, in which sensitive information is at issue, I instruct counsel not to talk about the specific information on the record.
Magistrate judge	In trial instructions and on counsel table are reminders not to refer to personal identifiers other than name.

Magistrate judge	Individual in clerk's office is available for consult and guidelines are on website.
Magistrate judge	information is not to be shared with defendant or placed on the record.
Magistrate judge	Instructions appear on the court's web page.
Magistrate judge	Instructions are contained in the CM-ECF Manual.
Magistrate judge	It is on the District website
Magistrate judge	local rule 5.2 which directs excluding social security numbers, names of minor children, dates of birth, financial account numbers, home address
Magistrate judge	Local Rule 5.3 requires filers to omit or, where inclusion is necessary, partially redact personal data identifiers from all filed pleadings, papers, and exhibits, unless otherwise ordered. A party filing a redacted document may at the same time file under seal a document containing the unredacted personal data identifiers or file a reference list without requiring a specific court order. Said document must indicate in the heading or style that it is an "UNREDACTED VERSION OR REFERENCE LIST pursuant to Local Rule 5.3." The responsibility for redacting personal data identifiers rests solely with counsel and the parties. The Clerk will not routinely review documents for compliance with this rule, seal documents containing personal data identifiers, or redact documents.
Magistrate judge	Local Rule 79-5.4 (Responsibilities of Parties to Redact or Exclude Personal Identifiers) tells counsel which personal identifiers must be redacted and which documents must be excluded from the public case file.
Magistrate judge	Local rules
Magistrate judge	local rules
Magistrate judge	local rules and CM/ECF guidelines
Magistrate judge	Local Rules inform counsel of redaction policy.
Magistrate judge	Local Rules require redaction of personal indentifier info.
Magistrate judge	Local Rules; personal contact; court orders
Magistrate judge	Notice to Counsel on CM/ECF
Magistrate judge	Occasionally in criminal proceedings (e.g., bond hearings) personal identifiers are brought up in open court. I may direct that those excerpts or direct counsel to take appropriate steps for redactions.
Magistrate judge	Only if they call and request information regarding redaction. The Court is not proactive in this issue.
Magistrate judge	our court has a transcript redaction policy and it is posted on our website at www.mssd.uscourts.gov
Magistrate judge	Our scheduling orders and other communications from the court provide these instructions.

Magistrate judge	Parties are advised of their responsibility to keep personal identifiers out of transcripts, pleadings and documents.
Magistrate judge	Parties are instructed no to file documents containing personal identifiers such as social security numbers, dates of birth, etc., unless the identifiers are redacted or blacked out.
Magistrate judge	Prior to the amendment of the rule, if personal information was presented in a pleading, I would seal the pleading and direct an amended pleading. However, prior to my sealing of the pleading, it was available on Pacer.
Magistrate judge	Reference to our Local Rules
Magistrate judge	Reminders at hearings and orders to redact
Magistrate judge	See above. In addition, the clerk's office post a notice about redaction of transcripts.
Magistrate judge	see prior answer
Magistrate judge	Social Security Administrative Reocrds are not accessible to the public.
Magistrate judge	The Clerk has a General Order
Magistrate judge	The Clerk's office has material available for counsel to review on the District's website.
Magistrate judge	The Clerk's office provides this information
Magistrate judge	The court adopted a written policy establishing redaction procedures.
Magistrate judge	The Court has a redaction policy in the form of a Local Rule.
Magistrate judge	The court has posted a notice on its web site.
Magistrate judge	The court's web site
Magistrate judge	The docket event directs parties to file motions to redact the transcript
Magistrate judge	The form order I referenced previously informs counsel to redact personal or private information from all exhibits and other publicly-available documents.
Magistrate judge	the instructions are on the district web site. Lawyers are instructed to redact and are advised it is their responsibility to redact private information. The description of "private information" is on the web site.
Magistrate judge	The instructions are part of our cm/ecf training, and there are warning boxes in cm/ecf which remind lawyers to redact when they're filing.
Magistrate judge	The issue arose on my notice to show cause why there should not be sanctions for leaving personal identifiers in a motion
Magistrate judge	The local rules have requirements as well as notices sent out with the complaint and summons. See also the notice metioned in previous answer that is placed

Magistrate judge	The privacy policy is posted on the website and on the attorney log in page for CM/ECF. When attorneys log into CM/ECF, they must certify that they have read the policy. When there is a violation, a notice is posted on the docket requiring the attorney to correct the violation.
Magistrate judge	They are published on the Court's web site
Magistrate judge	This arises with most frequency in cases brought on behalf of infants. Whenever I see reference to an infant's full name in pleadings or other documents, I convene a telephone conference and alert counsel to the need for redaction. It comes up less often but from time to time with respect to SSNs and medical information
Magistrate judge	This is done primarily through the Clerk's Office
Magistrate judge	via General Order issued by chief judge
Magistrate judge	We direct counsel and pro se litigants beforehand when possible not to make such disclosures. However if such does occur,counsel is instructed to redact any documents that must be filed before filing.
Magistrate judge	We have a local court rule that requires attorneys or pro se parties to redact personal data identifiers from transcripts before filing and our policy and procedures manual for electronic filing requires redaction
Magistrate judge	We have a local rule that addresses this.
Magistrate judge	We have a standing order available to counsel that incorporates the Judicial conference policy on personal data identifiers. We provide for such redactions in individual protective orders entered in civil matters.
Magistrate judge	We have an Administrative Order that sets forth a procedure for redaction
Magistrate judge	We have instructions in our CM/ECF Administration Manual, Rule 15 at page 12 which is available on our court's external website: www.nmcourt.fed.us. The rule requires counsel to review the transcript for information that should be redacted under the Judic
Magistrate judge	We use Standing Orders and published administrative procedures to notify counsel of the Court's requirements and offer the option of filing completed documents under seal when necessary but the only document published is the redacted document.
Magistrate judge	website
Magistrate judge	When transcript is available, the clerks office generates notice which informs attorneys of the redaction requirements
Magistrate judge	When transcript is filed, system automatically notifies attorneys regarding redaction and gives information regarding time limit to do so.

Magistrate judge	Where the information is material to legal argument to be submitted in conjunction with motion practice, the parties agree to redacted submission or identification of specific portion (e.g. transcript) to be filed under seal.

Appendix E (Q15 and Q16): Reasons for noncompliance and resolution of matters

What type of judge ?	What reasons were given? (for noncompliance with redaction requirements)	How were those matters resolved?
Active district judge	too difficult and time consuming	re)quired it, butin some cases (e.g., wiretaps, redacting cell #s and addresseswas not feasibl)
Active district judge	Inadvertence, negligence, counsel unaware of restriction. We have a significant problem in this area with pro se litigants.	When the problem is identified it is immediately brought to the offending party's attend and they usually take immediate corrective action and we take action to make sure the information is not available on the docket.
Active district judge	Attorneys do not understand their obligation, the law, or the interplay between the two. Nor, do they understand the interplay between the court's obligation and counsel's obligation.	They have not been resolved. However, I am unaware of any instances where something should have been redacted that was not. Although responsiblility solely with the attorney under the E-government Act, our court and court personel point out needed redactions should they see them.
Active district judge	Carelessness.	It only happened once. We had the transcript redacted.
Active district judge	inadvertance	it was orrected
Active district judge	Lack of awareness of rule or inattention	Referred to rules or pleadings returned
Active district judge	Not paying attention; not aware.	By proper redactions
Active district judge	mistake	redaction
Active district judge	Unfamiliarity with the redaction requirement.	
Active district judge	My assumption is that counsel was unaware of the redaction requirement	One matter is pending. In another case I think I sealed the document and required a redacted document be filed in its palce.
Active district judge	Our District does not currently post transcripts on Pacer and therefore there is no occasion for redaction to comply with the privacy	

	rules.	
Bankruptcy judge	unaware of the requirement	education and monitoring
Bankruptcy judge	Inadvertance. Oversight.	Through motion and sealing document from external review through CM/ECF, or, if at trial, substitution of exhibits.
Bankruptcy judge	Inadvertent error	motion and order to seal the erroneous item and and refile the item with proper redactions
Bankruptcy judge	1. Sloppy staff; 2. Did not notice the information was contained in the document.	Motion to Redact or Substitute
Chief bankruptcy judge	Lack of knowledge that there was a requirement to do so.	post-facto redaction
Chief bankruptcy judge	Lack of awareness of redaction requirement and implications of failure to redact.	
Chief bankruptcy judge	Inadvertance by counsel	Clerk notices defective document. Electronically served on attorney.
Chief bankruptcy judge	It is often inadvertance by creditors filing proofs of claims without redacting identifier info.	If clerk spots it in normal processing for filing, the pleading filer will be advised of the problem. However, it usually arises with an action to seal the pleading and a request for sanctions for violation of the privacy rules.
Chief district judge	Attorney Ignorance of the Rules. Usually by prctitioners who rarely practice in Federal Court	By my staff and the Clerk's Office bringing the Rules to the attention of the ignorant attorney.
Chief district judge	lack of knowledge	yes
Chief district judge	Ignorance--despite educational attempts--on the part of counsel and clients.	I cannot provide a uniform answer to this question.

Chief district judge	Depositions are difficult. Most lawyers who abuse, either don't know or are too lazy.	Calls.
Magistrate judge	overwhelming amount of material	on one occasion material was withdrawn. I recall accepting some information in camera.
Magistrate judge	some lawyers are not aware of the rule	the filed documents are redacted
Magistrate judge	The primary reason is inadvertence.	Many times, counsel catch themselves, but at times orders must be entered.
Magistrate judge	Ignorance--didn't know about the redaction requirement.	Provided counsel with a copy of court's administrative procedures manual for CM/ECF, which contains the redaction requirement. The manual is posted on the court's website for anyone to obtain.
Magistrate judge	counsel mistake	strike offending filings and order proper refiling
Magistrate judge	Counsel were not aware of the changes or had forgotten them	Reminders to counsel from the court
Magistrate judge	Lack of familiarity with the rules	I direct that the filing with identifiers be filed under seal and a new filing with appropriate redactions be submitted.
Magistrate judge	Most common reason is that counse forgets.	When a document is filed with the court containing personal information is discovered either by cut personnel or othewise brought to the court's attention, the document is put under seal or the document is redacted by the court or counsel.
Magistrate judge	Pro se litigant did not realize before filing. Attorney filed without properly screening.	Issued order directing Clerk to strike the document and directed attorney and or party to refile a redacted form.

Magistrate judge	Lack on attention, ignorance, laziness	By catching their mistakes, either in my office or in our clerk's office, and ordering redaction or other corrective action
Magistrate judge	Inadvertent failure to act to redact.	Having first submitted document(s) taken down from PACER and replaced with redacted copy
Magistrate judge	A pro se plaintiff wanted her address redacted from a transcript but it was also on the docket sheet because she was a party	Refused her request to redact transcript

Appendix F (Q17, other please specify): How do you respond to violation of redaction requirements? : OtherText

What type of judge are you?	How do you respond to violation of redaction requirements? : OtherText
Active district judge	Court contacts the party they did not redact and need to comply.
Active district judge	direct stenographer to advise party to revise
Active district judge	Directed party to adopt practice not to put full SSN in indictments
Active district judge	Has not arisen.
Active district judge	Has not occurred yet, to my knowledge
Active district judge	Hasn't happened
Active district judge	Hasn't happened in any of my cases
Active district judge	Hasn't occurred
Active district judge	Have not learned about a violation.
Active district judge	Have not learned of any violation.
Active district judge	Haven't been advised of any problems with transcripts.
Active district judge	Haven't had a problem to my knowledge
Active district judge	I cannot recall any violations
Active district judge	I direct the clerk to remove the image of the filing from CMECF.
Active district judge	I do not know as I have not had to address that yet.
Active district judge	I have never faced this issue.
Active district judge	I have never learned of a violation
Active district judge	I have no redaction issues because I do not post transcripts on Pacer.
Active district judge	I have not been faced with such violation
Active district judge	I have not had a problem and thus have taken no action.
Active district judge	I have not had this come up in transcript context
Active district judge	I have not had this problem occur.
Active district judge	I have not learned of any violation of the redaction requirement.
Active district judge	inform and educate
Active district judge	It hasn't come up in any matters before me
Active district judge	Never has occurred
Active district judge	No action
Active district judge	No claim of violation has ever been brought to my attention.
Active district judge	No known violations.
Active district judge	this has not occurred
Bankruptcy judge	Advise clerk to bar access to any filed doc containing priVATE INFO.
Bankruptcy judge	An appropriate show cause order will issue, if the matter is brought to the court's attention.
Bankruptcy judge	As explained above, I issue an order to show cause why the offending filing should not be stricken and give the filing party 14 days to refile the document with the offending information redacted. I strike the original if that does not happen.

Bankruptcy judge	Convene a hearing to better facilitate comunication. it is usually not necessary to do this more than once with any attorney.
Bankruptcy judge	Court's website states that it is the responsibility of counsel to request redaction of personal identifier information. To date, not aware of an instance where we have seen unredacted personal identifier information in a filed transcript.
Bankruptcy judge	direct atty to file motion to redact.
Bankruptcy judge	Has not occurred.
Bankruptcy judge	Have not had any violations alleged
Bankruptcy judge	Have not learned of any violation.
Bankruptcy judge	I have not encountered a violation of redaction requirements.
Bankruptcy judge	i try to take into considered the circumstances of the individual issue
Bankruptcy judge	If Clerk sees if before it is entered they black the personal info out. If document is entered in the system with personal info then Clerk calls offending party directs them to file a motion to redact
Bankruptcy judge	Issue had not arisen
Bankruptcy judge	n/a
Bankruptcy judge	n/a
Bankruptcy judge	na
Bankruptcy judge	Never had to address the problem
Bankruptcy judge	no experience
Bankruptcy judge	not applicable
Bankruptcy judge	not applicable in any matter before me yet
Bankruptcy judge	Notify the clerk's office of the need to redact and follow up with counsel to ensure a revision in filed immediately. Would sanction if the matter was not corrected within 24 hours.
Bankruptcy judge	Redact filing and refile redacted document
Bankruptcy judge	sanctions for repeat offenders
Bankruptcy judge	see answer to previous question
Bankruptcy judge	Sometimes the attorney comes forward before we know of the problem.
Bankruptcy judge	Sua sponte restrict access
Bankruptcy judge	The issue has not been raised in court.
Bankruptcy judge	Ususally comes as motion to redact.
Bankruptcy judge	wait for objection from interested party
Bankruptcy judge	we have had no problems whatsoever w/ transcri
Chief bankruptcy judge	direct clerk to redact the info
Chief bankruptcy judge	Has never come up
Chief bankruptcy judge	I don't recall learning of a violation
Chief bankruptcy judge	I haven't had the opportunity.

Chief bankruptcy judge	If a petiton, tax return, or similar document containing unredacted personal identfiers is presented at the counter fo filing, the clerk will point this out and direct the filer to redact.
Chief bankruptcy judge	If the violation is inadvertent I direct that such violation not occur again; if the violation is intentional I would threaten sanctions on the first violation and on the second violation I would impose sanctions
Chief bankruptcy judge	Issue order sealing erroneous filing and directing replacement to be fild
Chief bankruptcy judge	IT A VIOLATION COMES TO MY ATTENTION, I STRIKE THE FILING WITH ORDER TO REFILE REDACTED DOCUMENT. THE CLERK ALSO DOES THIS AS IN SOME CASES WHEN VIOLATIONS ARE DISCOVERED.
Chief bankruptcy judge	Matter set for hearing. Sanctions imposed only if merited.
Chief bankruptcy judge	no occurence
Chief bankruptcy judge	Seal the offending document to allow amended, redacted filing
Chief bankruptcy judge	Strike pleading with personal information
Chief bankruptcy judge	sua sponte, have the clerk's office delete the image
Chief bankruptcy judge	The situation has never arisen.
Chief bankruptcy judge	To date, redaction requirements have not been violated
Chief district judge	Direct clerk to restrict public access to the filing until violation is cured
Chief district judge	Has never come up
Chief district judge	Have not had any violations
Chief district judge	have not learned of a violation
Chief district judge	None. I consider it the parties' obligation.
Chief district judge	Not aware of any violations
Chief district judge	Seal the document and order counsel to file a redacted copy.
Chief district judge	Some offending documents are sealed.
Chief district judge	sua sponte correction by quality control analysts.
Chief district judge	The issue has not arisen.
Chief district judge	This issue has not occurred.
Chief district judge	we seal or delete the non-complying pdf
Magistrate judge	any of the above depending upon how egregious
Magistrate judge	clerk redacts documents
Magistrate judge	Contact parties and suggested a resolution by stipulation.
Magistrate judge	Generally, I do none of the above.
Magistrate judge	Has not happened
Magistrate judge	Has not happened
Magistrate judge	Has not occured yet.
Magistrate judge	Have never had it happen
Magistrate judge	Have not had the issue arise.
Magistrate judge	Have not had the issue come up

Magistrate judge	Have not had this problem yet
Magistrate judge	Have not learned of any such violations.
Magistrate judge	I am a part-time magistrate judge - I don't conduct trials
Magistrate judge	I am not aware of any violations
Magistrate judge	I don't generally deal with transcripts
Magistrate judge	I had not been aware that this was an issue and that I was supposed to deal with i, other than what I have already discussed above.
Magistrate judge	I have had no experience with a violation
Magistrate judge	I have never been so notified.
Magistrate judge	I have never had a violation brought to
Magistrate judge	I have never had a violation brought to my attention.
Magistrate judge	I have not been made aware of a violation to date.
Magistrate judge	I have not had the matter come up
Magistrate judge	I have not learned of any.
Magistrate judge	I have not learned of such violations.
Magistrate judge	I will impose sanctions if the request for redaction is no promptly addressed.
Magistrate judge	If I were to learn about a violation of the redaction requirements, I would direct clerk to advise part to revise filing.
Magistrate judge	Issue has not surfaced.
Magistrate judge	It has not come up.
Magistrate judge	Meet with counsel to assure counsel is aware of the problem.
Magistrate judge	never had that situation arise
Magistrate judge	No substantial violation has arisen
Magistrate judge	not applicable
Magistrate judge	Not aware of this problem arising
Magistrate judge	Not faced this situation
Magistrate judge	Sealing or redaction orders
Magistrate judge	The Clerk also directs corrections sua sponte.
Magistrate judge	Withdraw docment from PACER pending submission of redacted deocument.

Appendix G (Q23): Comments [regarding Voir Dire Transcripts; Q23]

What type of judge are you?	Comments [regarding Voir Dire Transcripts; Q23]
Active district judge	Generally, the voir dire portion of the transcript is not transcribed. I question venirepersons at the side bar on bases for "cause" challenges.
Active district judge	I don't think the lawyers, parties or the courtcatch everything and pro se filings are sometimes incapable of being sufficiently reviewed. Pro se actions are increasingly being filed. But, I think our sensitivity and efforts to limit personal information is generally effective.
Active district judge	I have experienced no over-reaching by counsel to learn or use personal identifier material during voir dire.
Active district judge	I have never received a complaint from a juror that his/her privacy has been compromised
Active district judge	I have taken extreme steps to protect juror privacy in one capital case.
Active district judge	I know of no problems to date
Active district judge	I think these measures are sufficient.
Active district judge	Jury panel members are increasingly complaining about concern for their safety in criminal cases, esp. drug cases.
Active district judge	My approach has not been focused on the transcripts.
Active district judge	No known problems have occurred or been reported. However, that does not mean that problematic contacts have not occurred.
Active district judge	This District places all voir dire transcripts under seal.
Active district judge	with exceptions, because lawyers had info and may have given it to media
Active district judge	Yes they do appear to work and while jurors names are available to the press for its in person review that rarely occurs and there are no addresses given only general location.
Chief district judge	Our district does not publically file juror questionnaires.
Chief district judge	Sealing the transcript gives control over access to personal information about jurors.
Chief district judge	voir dire transcripts are not available through PACER
Chief district judge	What "privacy" rights do jurors even have? We are sensitive to not making them discuss private issues in front of the entire panel.

Chief district judge	Yes. In this district, court reporters only transcribe voir dire if requested by counsel. When that occurs, the matter is brought to the attention of the presiding judge who has the option of sealing the voir dire portion of the transcript, sealing the bench conference only separately from the rest of the voir dire transcript, or not sealing the transcript at all. We also do not allow the public access to juror questionnaries. We also redact juror names from indictments, empaneled jury lists, jury questions and jury verdicts. Thus, we have developed procedures that I believe effectively protect juror privacy.
Magistrate judge	Bench conferences greatly protect jurors' privacy when discussing personally sensitive or embarrassing issues.
Magistrate judge	I answered yes but in a high profile trial I believe more stringent protections would be required.
Magistrate judge	I pick very few juries, so I cannot comment on this.
Magistrate judge	Most important is the redaction of foreperson's name from indictment.
Magistrate judge	Most, if not all of juror information dealing with personal identifiers, are not available in our District to the public.
Magistrate judge	My answers are exclusively concerning grand jurors.
Magistrate judge	Our judges are all sensitive to risks to jurors in particular cases. Steps unique to the circumstances have been implemented, e.g. juror anonymity in gang related cases.
Magistrate judge	The transcript of jury selection will either be redacted or sealed.

Magistrate judge	we shred the jury questionaires, after all are collected from counsel, and we keep a record of how many copies are made, and all are destroyed. that agreement is reached with prior to the court agreeing to the questionnaire

Appendix H (Q28): Explain how you sealed or restricted access to docs not redacted.

What type of judge are you?	Explain how you sealed or restricted access to docs not redacted.
Active district judge	actually, I generally order them redacted, allow the redacted version to be accessed, but seal the unredacted version (for appellate purposes)
Active district judge	An example would be a conference with a juror at the bench during voir dire.
Active district judge	Cooperation agreements entered as an addendum to plea agreements are regularly sealed. The portion of the plea hearing in which the addendum is discussed is also sealed.
Active district judge	Cooperation plea agreements in criminal cases as well as pleadings that reference cooperation.&CR;&LF;Trade secret information file pursuant to a confidentiality order.
Active district judge	Court has need to know the information.
Active district judge	Documents are sealed for reasons other than privacy in criminal cases.
Active district judge	Documents containiing such information often are supplied in connections with sentencing, e.g., psychiatric or medical reports. I order such documents sealed and, at times depending on the nature of discussion on the record, the accompanying transcript as well.
Active district judge	For example Juror Questionaires are stored in a secure area for seven years and then they are destroyed
Active district judge	I can not remember the details, but I recall addressing a violation of the rule in past by a sealing order, and an order requiring a redacted copy filed on the public docket.
Active district judge	I have an IDEA case where the parents are proceeding pro se. The plaintiffs and defendants in that case have submitted documents that contained personal identifiers that were not redacted in accordance with an order that the plaintiffs obtained at the outset of the case.
Active district judge	I have learned of complaints or documents filed by counsel which contain social security or other private information. We then seal the documents and order the attorney to redact.
Active district judge	I have sealed declarations where attachments contain "private" information

Active district judge	I have sealed protions of transcripts for reasons, e.g., related to a def't's cooperation
Active district judge	I have sealed the documents and ordered counsel to file redacted copies for public view
Active district judge	I may misundestand this question, but I occasonally seal papers and proceedings in criminal cases involving cooperating individuals; and a variety of mattes in civil cases on a showing of good cause.
Active district judge	I prefer to require a redacted filing
Active district judge	I seal any document containing private information that should have been redacted.
Active district judge	I will advised the clerk to seal the filing until the attorney can submit a revised document
Active district judge	If private information is included in a pleading or exhibit, I order it placed under seal and then order the filing party to submit the pleading after appropriate redaction.
Active district judge	In a health care fraud case, the govt. produced patient file information, and I directed it be sealed (after notice was given on pacer).
Active district judge	In both civil and criminal cases, parties may seek to file certain information under seal. I review those requests personally, and often grant them either in whole or in part.
Active district judge	In intellectual property cases and those involving trade secrets or other proprietary information document are filed under seal.
Active district judge	in limitrd instances I have sealed records
Active district judge	In one case I can recall personal information was necessary in deciding a motion and that matter was filed under seal but a redacted document was publicly available
Active district judge	In the event that the document contains too much information that would make it overly burdensome to redact, the document is otherwise sealed.
Active district judge	innocent error
Active district judge	medical records are sealed for privacy reasons.
Active district judge	Mental health information or sensitive personal information in civil cases. information re cooperation in criminal cases.
Active district judge	On one occasion, when I became aware a document containing private information was filed electronically, I directed the clerk to restrict it from public view until I could determine whether it should be redacted or sealed

Active district judge	on request of counsel or motion for protective order
Active district judge	Parties have requested documents with private information be sealed.
Active district judge	Plea agreements ; cooperaton agreements
Active district judge	Pro se litigant filed documents containing personal information
Active district judge	pursuant to our General Orders and Motions to seal under local rules
Active district judge	required temporary sealing until redacted
Active district judge	sealed until refiled
Active district judge	see earlier comments
Active district judge	Some documents are simply "un-redactable" as a practical matter. It is easier to seal those documents than to direct attorneys to redact them.
Active district judge	temporary sealing until redactions done
Active district judge	The Clerk will make the electrnically filed documents unavailable to the public temporarily until redactions have been made or the party has waived redaction.
Active district judge	The issue arises most often in sentencing submissions that include specific information such as the names of minor children and home addresses. Sometimes the parties agree to redact the informaton. Other times, the informaiton is sufficiently extensive that the parties agree to seal the submission along with the Pre-Sentence Report.
Active district judge	The only occasion I can recall was undertaken at the suggestion of counsel.
Active district judge	The parties ask and I agree to have the documents sealed. This occurs in connection with deposition transcripts and exhibits in summary judgment motion or other motion circumstances most often.
Active district judge	They are sealed until a redacted document can be substituted.
Active district judge	This usually happens in a pleading filed electronically by an incomptent lawyer or a pro se litigant.
Active district judge	upon request from counsel
Active district judge	Upon request of counsel, plea agreements of cooperating witnesses are sealed. Side bars during trial that identify targets or cooperators upon request are sealed.

Active district judge	Virtually all substantial assistance motions are filed under seal. Jury questionaires are never made publicly available and are destroyed unless counsel moves for good cause shown to preserve a specific juror's questionaire.
Active district judge	We routinely seal guilty plea and related papers in criminal cases.
Active district judge	When a privacy problem is brought to my attention by the Clerk's office, I will take action.
Active district judge	When I become aware that disclosure has been made (for example, to the press), I have sealed documents, such as plea agreements.
Active district judge	when information needs to be redacted the filing is sealed and the filing party is instructed to refile a redacted pleading
Active district judge	When it is not possible to redact, the materials are under seal.
Active district judge	when sealing is appropriate, I order a document sealed.
Active district judge	When the parties fail to redact, I order it sealed.
Active district judge	Where information might be pertinent to an appeal I have sealed the unredacted copy of the document.
Bankruptcy judge	Grant an application to strike and file a revised document.
Chief bankruptcy judge	Require amended proof of claim to be filed with redaction and then seal the previous proof of claim
Chief bankruptcy judge	We have restricted Pacer access to proofs of claims that have personal identifying information.
Chief district judge	At times when trade secrets were discussed in court testimony or injunction hearings, I have, at the request of the parties sealed or restricted access.
Chief district judge	by filing underseal jury information
Chief district judge	confidential informants in criminal cases
Chief district judge	Depending on the issue involved,temporary sealing is issued until matter is resolved.
Chief district judge	either seal or strike inappropriate filings
Chief district judge	I have directed the clerk to seal the document.
Chief district judge	I have sealed complete documents and required that redacted documents be filed that are public.
Chief district judge	I have sealed documents that contained personal identifiers and ordered the party to file a redacted copy.
Chief district judge	In response to requests to seal pleadings and opinions that refer to information in sealed documents.
Chief district judge	Juror Questionaires are sealed.

Chief district judge	Jury questionaires are restricted to the lawyers and are not to be provided to the clients; especially criminal defendants
Chief district judge	Local Rule sealing all Criminal cases until defendant makes first appearance in District
Chief district judge	Numerous personal disclosures, including medical or psychological reports as an example.
Chief district judge	On a few occasions, when it has come to my attention that there is personal identifying information in documents filed in CM/ECF, I have directed the Clerk to ebter minutes restricting or sealing the materials as appropriate.
Chief district judge	Plea agreements containing cooperation agreements are sealed as well as offers of proof; also change of plea and sentencing transcripts involving cooperation agreements are sealed
Chief district judge	see above. we seal the non-complying pdf and direct counsel to file a redacted pdf
Chief district judge	Sensitive criminal investigations.
Chief district judge	sometimes a voir dire transcript has contained personal identifiers and I have sealed
Chief district judge	Sometimes parties file personal medical information unsealed inadvertently.
Chief district judge	Sometimes the personal identifies are relevant to the evidence and can not be redacted. In those cases we seal the exhibit.
Chief district judge	We recently had a case in which a juveniles name was in the case caption and a number of documents had been filed using the caption. These documents were redacted when possible; others were sealed.
Chief district judge	We seal the documents from Pacer access until the appropriate redaction has been completed.
Chief district judge	when the problem arises, we either seal or restrict access to the document and insruct counsel to file a redacted document.
Magistrate judge	A document may have been prepared by a police officer new to his task in an investigation, or an attorney may be new to federal practice.
Magistrate judge	A redacted copy may be puiblicly available. The unredacted sealed copy may later be made available to a court if there is an appeal.
Magistrate judge	Access has been restricted for affidavits submitted in support of criminal complaints

Magistrate judge	Any documents that include personal identifiers such as address, date of birth or social security number are filed as non-public documents.
Magistrate judge	As indicated above, I have sealed unredacted copies of documents submitted in cases in which the plaintiff is an infant referred to by his or her full name.
Magistrate judge	As indicated, if an attorney makes a mistake and inadvertently includes private information in a pleading, if I catch it, I will seal the pleading and require an amendment.
Magistrate judge	At times, federal agents will submit documents (such as search warrants) with personal identifiers, which must, thereafter, be redacted. In addition, on civil matters, if there are personal identifiers being made available to the public, a telephone call has been made by the Court to advise the attorney to correct the filing.
Magistrate judge	Attorney attached personal medical records of client to his summary judgment motion. Sealed it when I saw what it was. Yikes!! His client would have killed him if she knew what had been filed. Had hearing later and he agreed to seal it. No opposition from the other side.
Magistrate judge	by striking
Magistrate judge	Certain ex-parte matters that generally become unsealed at some time where certain parts need to be redacted
Magistrate judge	confidential proprietary or financial information
Magistrate judge	Confidential trade secrets.
Magistrate judge	Either directing portion of the document to be sealed or having the document taken down, redacted, and re-filed
Magistrate judge	Have sealed some documents at request of parties for this reason.
Magistrate judge	I first instruct the Clerk's office to redact the information, but if there is so much personal information in the document that redacting it makes the document nonsensical then I instruct the Clerk's office to seal the document.
Magistrate judge	I have ordered documents to be sealed until a proper redaction can occur.
Magistrate judge	I have ordered sealing of documents with information subject to redaction requirements or otherwise of a private nature.

Magistrate judge	I have sealed transcripts where release of the information could create danger to persons and redaction had not been accomplished or was not feasible given the nature of the information.
Magistrate judge	I will order the party to refile a redacted version, keeping the original under seal
Magistrate judge	If the information to be redacted is so extensive that redaction is not practical, then I will simply order that that the document be sealed.
Magistrate judge	In civil cases, parties often tender a stipulated protective order which provides for sealing certain information, then don't follow it. I make them follow it.
Magistrate judge	in employment cases when emplyment files are part of the discovery provided
Magistrate judge	Inadvertent disclosures regarding cooperation with the government have been sealed.
Magistrate judge	informant pleas of guilty
Magistrate judge	Local Rule sealing Criminal cases until defendant has made first appearance in District
Magistrate judge	Mental health evaluation reports for defendants are routinely sealed. Very sensitive exhibits, such as bank records, are often sealed.
Magistrate judge	Names of minors
Magistrate judge	Occasionally in Social Security cases, I have sealed some filings that discuss highly confidential or personal items (such as rape, incest, etc.)
Magistrate judge	Occasionally the information is relevant and should be part of the record, i.e. redaction does not work, so I seal as narrow a portion of the record as possible.
Magistrate judge	Occasionally we will receive a filing where counsel failed to redact personal identifiers. Once we observe the violation we direct that the document be sealed and tell counsel to file a redacted version.
Magistrate judge	On occasion I have sealed materials that implicate or unnecssarily invade the privacy rights of litigants or others (i.e. personnel records of non parties in an employment discrimination case.)
Magistrate judge	On occasions when a party accidentally left personal identifier information in a document I either ordered revision before filing (e.g., search warrant) or order the document sealed until a redacted version was provided.

Magistrate judge	On occassion state probation reports are submitted for habeas cases, and are filed under seal due to the information they contain.
Magistrate judge	once counsel has filed redacted copies of documents, the prior unredacted copies are restricted from view on Pacer
Magistrate judge	Only in search warrant affidavits where specific information is necessary to establish probable cause. The private portions of the affidavit would be redacted before it was disclosed
Magistrate judge	Perhaps a dozen times a year, information that should be redacted under R. 5.2 is filed on PACER by a party. Either by motion of a party, if they self-monitor, or on order of the court, the document is sealed with a redacted version ordered filed.
Magistrate judge	Please refer to prior comments.
Magistrate judge	Prisoner pro se cases where prisoner files medical data or similiar personal information with the Clerk.
Magistrate judge	Pro se filers providing personal information
Magistrate judge	Pursuant to a stipulated protective order in a commercial IP case.
Magistrate judge	Received a pleading that gave a child's personal information and talked about the child being sexually abused. The pleading included a picture. Immediately sealed until further Order of the Court could be generaged.
Magistrate judge	Recently the Assistant Attorney Generals in state habeas cases have been askling us to seal state criminal records because trial transcripts contain all manner of personal identifiers, including names of sexual assault victims among other things. I have denied their requests, since the material is already public, but have also restricted access to the files to the parties and the public terminal at the courthouse. Therefore, none of the information is available on the internet. The state always has the option of cleaning up their transcripts.
Magistrate judge	Sealed the filing and instructed the lawyer to file a redacted version
Magistrate judge	search warrant affidavits with sensitive material
Magistrate judge	search warrants, attachments to informations, pen registers
Magistrate judge	Social Security and other administrative records. Mental and physical evluations of both civil and criminal parties and witnesses.

Magistrate judge	Sometimes attachments to motions will contain SS nos, bank acct nos. etc.
Magistrate judge	sometimes we accept documents as sealed documents if the exhibits are too cumbersome to redact.
Magistrate judge	Sometimes we use this as an interim measure to protect privacy until the redaction can be done.
Magistrate judge	The District of New Jersey has a local rule that addresses sealing of information submitted in connection with requests for nondiscovery relief and if the predicates are satisfied, permits sealing of information that may not be limited to personal identifying information.
Magistrate judge	The occurrence sometimes happens in a complaint, supporting affidavit, or search warrant affidavit. The AUSA & agent are requested to make the redaction.
Magistrate judge	Upon request by counsel, some documents are filed under seal when it is necessary to provide the Court with the personal identifiers.
Magistrate judge	We authorize counsel to include protected information when necessary but use the process of sealing the complete document and publishing the redacted document.
Magistrate judge	We file unredacted documents containing private information as "Court Only" access and then file the same document with redactions for public and party access.
Magistrate judge	We have limited access to transcripts involving child victims; we have sealed documents relating to private health and financial information.
Magistrate judge	when mistakes are seen, clerk corrects
Magistrate judge	When we become aware of such filings, as a matter of caution, we seal the record and then conduct proceedings to determine whether it should remain sealed.

Appendix I (Q30): What types of information should be subject to categorical redaction?OtherText

What type of judge are you?	What types of information should be subject to categorical redaction?OtherText
Active district judge	Home addresses. private information about children
Active district judge	I have found three social security numbers in exhibits filed by counsel in civil matters.
Active district judge	internet screen names and passwords, internet retailer account numbers--various things that personally identify one's personal accounts and commercial activity
Active district judge	Sensitive medical information
Active district judge	Social Security number.
Active district judge	Social Security Numbers
Active district judge	Social security numbers, birth dates
Chief district judge	Trade secrets
Magistrate judge	Address, Date of Birth, Social Security Number
Magistrate judge	As a rule, our District does redact all of the above.
Magistrate judge	credit card numbers
Magistrate judge	Do not understand the question
Magistrate judge	Don't know
Magistrate judge	I am not aware of any
Magistrate judge	I do not know of any
Magistrate judge	In pro se pleadings financial information was provided
Magistrate judge	Jurors' personal information obtained during voir dire, i.e., personal family issues, medical issues, etc.
Magistrate judge	medical records
Magistrate judge	Names of minors
Magistrate judge	Place of employment
Magistrate judge	social security - home addresses and helth ins info
Magistrate judge	Social security no.
Magistrate judge	Social Security Number

Appendix J (Q31): Comments about Redaction in General

What type of judge are you?	Comments [to Redaction in General, Q31]
Active district judge	Many search warrants filed 2 or more years ago contain this type of information.
Active district judge	Various criminal filings run the risk of exposing such information when a document is attached as an exhibit especially.
Magistrate judge	To the best of my knowledge, all of these are currently being redacted. Certainly, state identification and alien registration numbers are being redacted.
Magistrate judge	can be managed on individual basis
Magistrate judge	don't know
Magistrate judge	Generally this is an issue of counsel's not redacting information about their own clients
Magistrate judge	I am far more concerned about over-sealing than under-redacting.
Magistrate judge	I have no experience with this, but all of the above would qualify.
Magistrate judge	I'm not sure many women would want their OB-GYN records available on PACER
Magistrate judge	Social Security appeals focus on sensitive health issues and often include information about substance additictions. Very sensitive information is disucssed. Yet, the pleadings are not restricted to participants. When filed, they are available to anyon
Magistrate judge	Some court documents still included personal information even after the court determined no personal information should be included in any court pleadings.
Magistrate judge	Sorry, I do not understand the question.
Magistrate judge	unless there is a need for the information to prove a claim or defense in the case or if it is relevant to proving an element of a criminal offense.

Appendix K (Q35): Which categories should be deleted, and explain why you think the information should be included in the file.

What type of judge are you?	Which categories should be deleted, and explain why you think the information should be included in the file.
Active district judge	I see no reason why the SORs shouldn't be publicly available
Active district judge	I think there are some matters that initially are not filed should be available after a case is concluded, such as requests for requests under CJA.
Active district judge	Statements of reasons in the judgment of conviction
Active district judge	Statements of reasons in the judgment. Sentencing is a core judicial function. Nothing is more deserving of public scrutiny than the judge's reasons for imposing a sentence.
Active district judge	The public has an interest in sentencing. The statement of reasons should not be sealed except in rare circumstances (E.g. mention of minor child's medical conditions.)
Active district judge	The statement of reasons for a sentence is an integral part of the sentence and should be public
Active district judge	The statement of reasons should be public under the First Amendment unless there is cooperation.
Chief district judge	Documents containing identifying information about jurors or potential jurors&CR;&LF;Financial affidavits filed in seeking representation pursuant to CJA
Chief district judge	Financial records re: requests for CJA representation. No reason for that not to be public information.
Magistrate judge	Affidavit seeking CJA representation should be public since public funds are being sought and expended.

Magistrate judge	Financial affidavits. All too often, especially in drug cases, defendants indicate no gainful employment for years and no other source of income but manage to own expensive autos and support themselves raising serious doubts about the legitimacy of the affidavit. Public scrutiny may assist in exposing what appears to be a fraudulent practice with a hopeful deterrent effect.
Magistrate judge	Pretrial bail/presentence investigation reports, ex parte requests and otherwise properly sealed documents should remain excluded. Otherwise, I believe all court files (and most all court proceedings) should be available to the public.
Magistrate judge	Statement of reasons in the judgment of conviction
Magistrate judge	Statement of reasons in the judgment of conviction. Financial affidavits filed in seeking representaion pursuant to CJA.
Magistrate judge	Statements of reasons in the judgment of conviction

Appendix L (Q37): Describe those categories, and explain why you think this information should not appear in the public case file.

What type of judge are you?	Describe those categories, and explain why you think this information should not appear in the public case file.
Active district judge	Docket entries listed as "sealed" in criminal cases have resulted in retaliation against defendants because it is obvious that the document is sealed because a defendant is cooperating.
Active district judge	Generally, I favor sealing sentencing memoranda because the memos often reference facts or other information contained in the PSR.
Active district judge	I am generally reluctant to make it easy to access the names, addresses and substantive content of witnesses in criminal matters. Much harm can flow from easy access.
Active district judge	Indictment redacting grand jury foreman's signature; confidential plea agreements; cooperation agreements
Active district judge	Many guilty plea/sentencing memoranda---in order to protect cooperating persons from potential retribution a la "Who's A Rat. com"
Active district judge	Plea agreement under certain circumstances
Active district judge	Plea agreements with cooperation clauses
Active district judge	Plea agreements, 5K1.1 Motions, Requests to permit debriefing/cooperation
Active district judge	Plea agreements. 5K motions.
Active district judge	Sensitive medical information.
Active district judge	verdict forms containing jurors' names,psychological ,medical and psyc hiatric reports, sentencing recommendations, CJA vouchers certified for payment, correspondence from defendants relating to cooperation for substantial assistance purposes

Active district judge	When the probation department seeks a modification of release terms or a violation of probation or supervised release, it typically presents a narrative description of a defendant's behavior during probation or supervised release. This narrative should not be filed publicly.
Chief district judge	plea agreements that contain cooperation or 5k(1) applications
Chief district judge	Plea agreements; search warrant affidavits;
Magistrate judge	1) Inventories of personal property taken from defendants upon arrest for safekeeping rather than pursuant to warrant, as often occurs when a defendant is arrested at an airport; applications to lift travel restrictions imposed as a bail condition when the travel is to a funeral or the hospital bed of a family member.
Magistrate judge	forensic evaluations for competency proceedings
Magistrate judge	pen registers/trap and trace orders should remain sealed even if executed because there may not be an indicted case associated with the order. Should not alert a person that they were under investigation at one time
Magistrate judge	Plea agreeements containing cooperation agreements. Safety concerns.
Magistrate judge	Psychiatric and/or psychological reports prepared pursuant to 18 U.S.C. Section 4247.
Magistrate judge	Section 4241 and 4242 mental health evalutions.
Magistrate judge	Sentencing memorandum
Magistrate judge	under certain circumstances, plea agreements and letters submitted in connection with sentencing.

Appendix M (Q40): Describe the policy or practice of unsealing pleas agreements, referring to any event or circumstance that triggers unsealing or opening access.

What type of judge are you?	Describe the policy or practice, referring to any event or circumstance that triggers unsealing or opening access.
Active district judge	30 days afer sentencing
Active district judge	After cooperation is complete.
Active district judge	Case by case basis upon motion.
Active district judge	Closing of case file
Active district judge	discuss with attorneys
Active district judge	Generally in response to a request from counsel the Court will seal for a time and then unseal when disclosure would no longer threaten harm or death to a defendant, co-defendant or cooperating witness.
Active district judge	Generally, a time limit is placed on the sealing, with the U.S. Attorney's Office reqiuired to take action to unseal.
Active district judge	I don't know of a court-wide practice.
Active district judge	I generally seal plea agreements. Many of them invovle cooperation agreements. When the needs change and the court is notified (or otherwise requestedd to do so it will recondier its decision)
Active district judge	imposition of sentence or apprehension of co-defendants (fugitives)
Active district judge	It is my (not the Court's) policy to direct the government to let the court know, after consultation with the defense, as soon as the need for sealing no longer exists so that we may unseal.
Active district judge	Judges are required to put an unsealing date on the sealing envelope. We review sealed matters as a matter of course every two to three years.
Active district judge	Plea agreements are not filed and a copy is retained in the judges' file for sentence and the government retains the original.
Active district judge	The response was directed to limiting access, not sealing.

Active district judge	there is a preliminary plea agreement or SOR and there is an ammended one that is sealed
Active district judge	upon request of the parties
Active district judge	Usually it's a matter of 2 years with notice to AUSA first in case defendant has been threatened or harmed
Active district judge	When the reason for the sealing has expired and there is no further reason for keeping the document under seal.
Chief district judge	All cooperation clauses or safety valve considerations are placed in a plea addendum that is sealed.In csas with no cooperation or safety valve a negative sealed addendum is also filed.
Chief district judge	At the time of sentencing all plea agreements are unsealed if they have been previously been sealed for any reason.
Chief district judge	attorney representing same defendant in subsequent case
Chief district judge	in every case with a plea agreement, there is a sealed plea agreement supplement describing the cooperation agreement,if any
Chief district judge	sometimes they are unsealed to permit access by co-defendants for impeachment.
Chief district judge	Unseal in conspiracy cases to enable defense counsel to utilize the plea agreements during cross-exam of a cooperating co-conspirator.
Chief district judge	We wait until the case is ready for shipment to NARA, at which time we issue an Order to Show Cause as to why the document or case should not be unsealed.
Magistrate judge	Generally when all defendants have been sentenced.
Magistrate judge	If a plea agreement is sealed and the Government ask that it be unsealed as long as there is no opposition, then it is unsealed without the necessity of a hearing to consider unsealing
Magistrate judge	Not done automatically, motion required.
Magistrate judge	On motion of the Government
Magistrate judge	The Clerk's Office periodically inventories sealed documents and aks sealing judge to reconsider continued need for sealing.

Magistrate judge	The documents are subject to being unsealed upon a showing of good cause and court order. Otherwise, they remain sealed as far as I know. Not all plea agreements are sealed - - only those where a defendant may be seeking a 5K reduction for cooperating.

Appendix N (Q41, other, please specify): Select the option that best describes your practice on posting of plea agreements: : OtherText

What type of judge are you?	Select the option that best describes your practice on posting of plea agreements: : OtherText
Active district judge	Agreements are NOT made available to the public.
Active district judge	all plea agreements are public including cooperation sections unless reqested to be sealed by the parties
Active district judge	Don't know
Active district judge	don't know
Active district judge	I do not know how such documents are made availabe. In any event, all cooperation agreements atr filed under seal and are not publicly available in any form.
Active district judge	I don't have a chambers policy -- whatever the clerk does I do.
Active district judge	i don't know
Active district judge	If a sealing order is request, I issue it.
Active district judge	on a case by case basis
Active district judge	plea agreements and the part of the transcript of a plea hearing which recites the terms of the agreement are sealed.
Active district judge	Plea agreements are always sealed and not available to the public.
Active district judge	Plea agreements are filed, but they are sealed.
Active district judge	Plea agreements are publically available unless sealed due to cooperaton agreement.

Active district judge	Plea agreements not available through PACER, but publicly available through public access terminal in Clerk's office. Cooperation information filed as a separate, sealed document
Active district judge	see above
Active district judge	the docket reflects that a plea agreement has been filed, but the actual plea agreement is not available to the public.
Active district judge	The second option is the most applicable to our Court's policy. However, agreements are also sealed as needed. We seem to have a combination of options 1 and 2.
Active district judge	Upon application of the government in an appropriate case, the cooperation portion of a plea agreement is redacted from the publically available plea agreement and and the unredacted plea agreement is filed under seal
Chief district judge	only available to public after order
Chief district judge	OUr plea agreements do not contain much information about cooperation
Chief district judge	Plea Agreements are non public documents available only to parties and court personnel
Chief district judge	Plea agreements are publicly available through PACER. We do not docket any cooperation agreements, but we do receive 5K motions when applicable, which most often are requested to be placed under seal.
Chief district judge	Plea agreements are sealed.

Chief district judge	Some plea agreements are placed under seal
Magistrate judge	As a magistrate judge, I rarely deal with plea agreements.
Magistrate judge	As a part-time magistrate judge I only take pleas in misdemeanors. I have not had a plea agreement case
Magistrate judge	As of Dec 1.
Magistrate judge	Don't know
Magistrate judge	Don't know
Magistrate judge	Generally sealed and not available
Magistrate judge	I am unsure of which option describes our court's policy, other than a general sense that plea agreements are not publically available absent court order
Magistrate judge	I do not work with written plea agreements.
Magistrate judge	I don't believe they are available to the public generally
Magistrate judge	I don't get involved in these types of agreements as a Magistrate Judge, so I don't know
Magistrate judge	I don't handle plea agreements
Magistrate judge	Ple agreements are always available
Magistrate judge	Plea Agreements are filed and available to the public
Magistrate judge	Plea Agreements are filed as non-public documents.
Magistrate judge	Plea agreements are filed but remain sealed
Magistrate judge	Plea agreements are filed under seal.
Magistrate judge	Plea agreements are maintained in the record under seal
Magistrate judge	Plea Agreements are not available to public
Magistrate judge	plea agreements indicating cooperation are sealed
Magistrate judge	Plea agreements remain sealed

Magistrate judge	rarely an issue before me as a Magistrate judge
Magistrate judge	sealed and not available to the public
Magistrate judge	Sometimes plea agreements are filed, sometimes they are not, cooperation information is never filed.
Magistrate judge	They are filed, but sealed.

Appendix O (Q42): What is done with the cooperation agreement?

What type of judge are you?	What is done with the cooperation agreement?
Active district judge	A cooperation agreement should be sealed.
Active district judge	filed but sealed
Active district judge	Filed on the docket, but sealed.
Active district judge	filed under seal
Active district judge	Filed under seal. With physical original returned to the office of the U.S. Attorney.
Active district judge	Filed with the Judge's file and not available to public.
Active district judge	It is a separate contract with the USA and sealed
Active district judge	IT IS FILED AND MAINTAINED UNDER SEAL
Active district judge	It is filed in a vault under seal.
Active district judge	It is maintained in Chambers until sentencing (if not earlier) when the question ofwhether it should be filed publically or under seal is addressed
Active district judge	It is not filed on ECF but the court keeps a chamber's copy.
Active district judge	It is placed in an envelope kept separate from the plea agreement.
Active district judge	It is sealed on the docket and a document addressing this is filed in every case so no one is able to learn, without looking at the document, whether there was or was not cooperation
Active district judge	It is sealed.
Active district judge	Kept under seal by the Clerk's office
Active district judge	Kept under seal in the record.
Active district judge	Memoralized in a side letter of understanding between the parties which is not filed in the case.
Active district judge	placed in a document called a "plea supplement" which is filed and sealed in every case

Active district judge	Plea agreements including cooperation agreements are filed.
Active district judge	plea supplements are filed in every case, whether cooperative or not, and are filed under seal
Active district judge	The practice varies and this seldom occurs. Cooperation agreements are often in the plea agreement which is publicly available. Sometimes--seldom-there is a separate agreement which sometimes is filed under seal and sometimes kept in chambers.
Chief district judge	filed under seal and shows as a sealed document on the docket sheet with no pdf
Chief district judge	filed under seal as an attachment to the plea agreement.If there is no cooperation,a seled attachment is also filed stating no cooperation.All plea agrrement therefore have such sealed attachment ann the public cannot tell one from the other.
Chief district judge	It is filed under seal as a "plea agreement supplement."
Chief district judge	It is treated as a Court Exhibit and returned to the Government at the conclusion of the Plea.
Chief district judge	Sealed.
Magistrate judge	Filed under seal
Magistrate judge	Filed under seal and not available to the public.
Magistrate judge	Filed under seal.
Magistrate judge	filed under seal.
Magistrate judge	Filed with non-public access.
Magistrate judge	I believe that are retained by the Government and/or kept in the Chambers file of the sentencing judge.
Magistrate judge	I do not deal with these agreements
Magistrate judge	I have had none

Magistrate judge	I understand that it is sealed, but have not yet had direct experience with cooperation agreements and so defer to our clerk's office.
Magistrate judge	If they are filed, they are filed as a sealed document.
Magistrate judge	It is a document separate from the Plea Agreement. The Plea Agreement is filed in the public record, the cooperation agreement is filed separately and under seal.
Magistrate judge	It is filed as a separate document under seal.
Magistrate judge	it is sealed
Magistrate judge	It's filed under seal.
Magistrate judge	Kept by government and defense counsel
Magistrate judge	prosecutor or probation keeps agreement
Magistrate judge	Sealed
Magistrate judge	Sealed
Magistrate judge	sealed
Magistrate judge	sealed
Magistrate judge	sealed, until further order fo the court
Magistrate judge	unfiled

Appendix P (Q44): Describe the different practice for cooperation agreements.

What type of judge are you?	Describe the different practice for cooperation agreements.
Active district judge	Agreements are seald
Active district judge	Any such agreements are not filed with the clerk
Active district judge	As a matter of custom and practice separate cooperation agreements are not filed
Active district judge	Cooperation agreements and the transcript of the accompanying plea hearing are filed under seal.&CR;&LF;
Active district judge	Cooperation agreements are always sealed, at least for some period. Rarely, they can be unsealed at sentencing (if the cooperator testified in open court) but the USAO sentencing memo is kept sealed
Active district judge	Cooperation agreements are sealed absent court order unsealing them
Active district judge	Cooperation agreements are usually maintained by the probation department, but, if filed, they are sealed by court order
Active district judge	Cooperation agreements not filed.
Active district judge	Don't know how treated
Active district judge	filed under seal, if received by court at all
Active district judge	generally we don't see cooperation agreements filed separately from plea agreements
Active district judge	have not dealt with cooperations yet -- on federal bench only 14 months
Active district judge	I don't believe cooperation agreements are ever filed.
Active district judge	Motions are sealed proffers are taken at sidebar and are sealed
Active district judge	See previous answer
Active district judge	the US Attorney's Office in this District does not utlize separate cooperation agreements. Rather cooperation provisions are incorporated into the plea agreement.
Active district judge	These are under seal
Active district judge	They are routinely sealed if counsel so request.
Active district judge	they are sealed
Active district judge	Whenever the U.S. Attorney or the defendant requests, I seal the cooperation portion of the plea agreement, and also take that portion of the plea colloquy under seal
Chief district judge	Cooperation agreements are sealed, maintained in paper, and not publicly available
Chief district judge	Cooperation agreements tend to be placed under seal.
Chief district judge	generaly plea agreements that contain cooperation agreements are filed under seal.
Chief district judge	They are filed under seal.

Chief district judge	They are generally sealed until the need for sealing is over.
Chief district judge	We do not currently docket cooperation agreements as part of the court record.
Chief district judge	We don't have cooperation agreements.
Chief district judge	We don't receive from US Attorney's office
Magistrate judge	Always sealed unless good cause shown.
Magistrate judge	coop agr not usually filed
Magistrate judge	cooperation agreements are sealed
Magistrate judge	Cooperation agreements are usually not filed but held by counsel
Magistrate judge	I believe these are either not filed or sealed.
Magistrate judge	I didn't answer the last questions yes or no because I don't get involved in these types of agreements as a Magistrate Judge, so I don't know.
Magistrate judge	I do not know what the practice is with respect to cooperation agreements. The term cooperation agreements is not generally used in this district.
Magistrate judge	I do not work with these either.
Magistrate judge	If I was dealing with an agreement between the government and the the defendant for co-operation, I would require the document to be retained UNDER SEAL until such time as it could be made public without harm to the defendant.
Magistrate judge	If there is a separate cooperation agreement we do not require that be filed
Magistrate judge	I've never seen a cooperation agreement filed as part of the record
Magistrate judge	Never made public
Magistrate judge	not filed
Magistrate judge	Not filed or under seal.
Magistrate judge	There are no "cooperation agreements" that I am aware of separate from plea agreements that are presented to the Court.
Magistrate judge	They are not filed in CM/ECF
Magistrate judge	They are sealed
Magistrate judge	Those are generally filed under seal (though I don't see a lot of them because I am a magistrate judge).
Magistrate judge	We don't have cooperation agreements. All our plea agreements include a requirement that the defendant cooperate.

Appendix Q (Q46): **Describe the process used to review decision to restrict PACER access**

What type of judge are you?	Describe the process used to review decision to restrict PACER access
Active district judge	Case by case
Active district judge	Don't know it exactly; performed in clerk's office
Active district judge	Generally, if I enter an order sealing a plea agreement I require the attorneys to notify me when the need for sealing an otherwise public record has passed.
Active district judge	I do so on a periodic basis when reviewing semi-annually the status of my docket.
Active district judge	I think the clerk's docketing clerks check periodically during quality control.
Active district judge	Usually at the request of the government.
Active district judge	When the case is closed all documents are unsealed unless a motion is filed and granted to keep selected documents sealed.
Chief district judge	As I said before, all plea agreements, if sealed, will be unsealed at the time the defendant is sentenced.
Chief district judge	case by case basis and dependent upon the reason for access
Chief district judge	Our court has a committee with jurisdiction to review such matters and will review the policy periodically.
Chief district judge	We do not seal plea agreements and we do not docket cooperation agreements in this district. Thus, we have no occasion to review their seal status. We do, however, frequently seal 5K motions for a specific duration. Those 5K motions are subsequently reviewed at the conclusion of the ordered seal duration to determine whether to extend their sealed status or to make them publicly available.
Magistrate judge	seal at the time of plea

Magistrate judge	We do not restrict access to plea agreements. I am not aware of written cooperation agreements. From time to time, a portion of a bond hearing may be sealed if counsel address defendant's anticipated coopeartion

Appendix R (Q52): Please describe alternative policies governing access to plea and cooperation agreements.

What type of judge are you?	Please describe any alternatives that have been considered. [alternative policies governing plea and cooperation agreements]
Active district judge	Changing the way sealed documents appear on the docket is being considered.
Active district judge	cooperation info transferred to a sealed document or to a document kept outside of public case file
Active district judge	Filing all plea agreements with a sealed supplement. The supplement would contain the cooperation agreement, or a statement that there was no cooperation agreement. All filings would look the same and under seal filings would not flag cooperation.
Active district judge	FPD and USAtty are working on proposed alternative procedures
Active district judge	Full range of alternatives have been considered.
Active district judge	I have been on the job just over one year and have only heard discussions about this. I do not have enough information to give an informed answer.
Active district judge	not filing
Active district judge	Not filing plea agreements
Active district judge	Not referring to cooperation agreement in public proceeding; and filed with the Court only and not available to public.
Active district judge	putting plea agreements on PACER
Active district judge	Sealing all documents in certain cases
Active district judge	sealing all plea agreemnts
Active district judge	Sealing only certain plea agreements, but easier to seal all of them to ensure safety and privacy
Active district judge	Sealing Plea agreements and transcripts or not filing them.
Active district judge	see above
Active district judge	Some judges apparently are allowing side substantial assistance agreements to be unfiled or sealed.
Active district judge	Some judges reveal the statement of reasons with cooperation where the cooperation has already become public
Active district judge	The court has previously followed a practice of filing all plea agreements under seal, but has abandoned that procedure.

Active district judge	The matter has been raised, to our full court, for comprehensive discussion and debate multiple times. It would be impossible to deliniate each suggestion. However, at each discussion BOP and BOP's concerns, as well as probation and probation's concerns, factored in heavily.
Active district judge	The rules committee has discussed several alternatives. One is to attach a sealed addendum to every plea agreement. The issue remains unresolved.
Active district judge	We carefully reviewed other district's practices and studied the issue in a special committee. We have recommended that no plea or cooperation agreements be filed.
Active district judge	We considered and rejected allowing side agreements.
Active district judge	We considered not filing them.
Active district judge	We established a small committee made up of one District Court Judge, One Magistrate Judge, the US Attorney, the Federal Public Defender and Probation Office.
Active district judge	We have a committee of judges, court staff, and lawyers working to draft a district-wide policy.
Active district judge	We have considered, but rejected the notion of sealing all plea agreements.
Active district judge	We have discussed all the options.
Active district judge	We have discussed and rejected not filing them at all or removing cooperation or other sensitive information and placing it in a separate sealed document.
Active district judge	We have discussed what is done in various jurisdictions.
Active district judge	We have discussed what other districts have done.
Chief district judge	Considered all alternatives in developing existing policy
Chief district judge	Considered sealing all plea agreements.
Chief district judge	Currently the government is including the same substantial assistance language in every plea agreement filed in this district. In sum, the language says "if" the defendant provides substantial assistance, the government "may" file a 5K motion. If a defe
Chief district judge	having cooperation agreements as filing separate from the plea agreement
Chief district judge	I am unaware of the specific alternatives, but I know our court committee reviewed them before recommending the policy we adopted.

Chief district judge	Partial redaction is sometimes ordered (taking out cooperation provisions from what is publicly filed) on a case-by-case basis.
Chief district judge	Plea agreements available to the public, but cooperation information has been transferred from the plea agreement to a sealed document.
Chief district judge	Sealing all plea agreements
Chief district judge	There is some disagreement among our court concerning sealing of cooperation clause and having each plea agreement have two filings so no one would know whether there was a cooperation agreement
Chief district judge	We have considered keeping all plea agreements restricted--to avoid the situation that a partial sealing indicates there is a cooperation provision in the agreement. However we felt it would be inappropriate to seal every plea/cooperation agreement.
Chief district judge	We have discussed limiting public access to plea agreements and some judges have done so on an ad hoc basis.
Chief district judge	We have discussed placing the cooperation agreements and offers of proof in separate documents
Chief district judge	We have held meetings to examine other alternatives, but have found none.
Chief district judge	When the Court discussed web sites that seek to publicize the names of cooperating defendants (i.e. Whosearat.com), it considered making all plea agreements publicly available but requiring that the U.S. Attorney file a separate cooperating language statement under seal in each case (regardless of whether a defendant cooperated or not) to avoid creating any inference regarding whether the defendant cooperated. After discussing the matter with the U.S. Attorney's Office, the Federal Defender's Office and representative defense counsel, the Court decided against adopting that approach.
Magistrate judge	Different recommendations from advisory groups that were considered
Magistrate judge	Dummy filings in all cases.
Magistrate judge	Initially public counter access was not available. that practice has been abandoned after issuance of Judicial Conference policy.
Magistrate judge	Plea agreements are not always filed, particularly if they do not become court exhibits.

Magistrate judge	Separate document called plea supplement entered in all plea cases to contain cooperation agreement, if any.
Magistrate judge	the ones mentioned in your earlier listing
Magistrate judge	We have considered sealing additional portions of the plea agreements such as restitution.
Magistrate judge	We have talked about what other courts are doing
Magistrate judge	While alternatives have been discussed, we have not come up with an efficient alternative.

Appendix S (Q57, other, please specify): What gave rise to such suspicion or knowledge?: OtherText

What type of judge are you?	What gave rise to such suspicion or knowledge?: OtherText
Active district judge	A cooperation agreement was obtained by a codefendant from another codefendant.
Active district judge	A defendant's stated suspicion or knowledge.
Active district judge	Access via internet prior to policy change
Active district judge	AUSA reported defense counsel or defendant's freinds and family track case to see if defendant cooperating.
Active district judge	Based on prosecutor/agent's affirmation.
Active district judge	Concerns articulated by the AUSA and/or defense counsel.
Active district judge	cooperation can be inferred from something as simple as a defendant being taken from the holding area to meet with the federal prosecutor. I cannot know how, exactly, knowlege of cooperation was obtained.
Active district judge	counsel providing clients with copies
Active district judge	Government informed court at pretrial hearing, based on Defendant's motion to compel name of confidential informant.
Active district judge	jailhouse rumors
Active district judge	Not sure where the information came out.
Active district judge	Press release from USAO !!
Active district judge	Rat.com
Active district judge	Things which happened outside the court--prison conversations and defendants sharing presentence investigation reports
Active district judge	Threats and Death
Active district judge	Word of mouth based on rumor and innuendo.
Active district judge	Written threats sent to the cooperating defendant
Chief district judge	Communications in jail facilities and during transportation to and from court.
Chief district judge	Counsel have informed the court that third parties have made threats against defendants based on cooperation. In those instances, the genesis of this information has not been the court's records.
Chief district judge	Pretrial discovery and word on the street
Magistrate judge	access to discovery materials
Magistrate judge	I was a public defender prior to being appointed, and we knew of cases that persons were harmed for cooperating once they had a written plea agreement

Magistrate judge	Knowledge of co-defendants
Magistrate judge	Originally gov't moved to detain def. Thereafter def agreed to cooperate; gov't and defense moved jointly to allow def on bail in drug case. After def was released, in short period of time he was killed.
Magistrate judge	reports of counsel

Appendix T (Q58): Any other comments about privacy rules?

What type of judge are you?	Any other comments?
Active district judge	I am relatively new, so I do not know much of the background in this court on these issues. However, I will say that this whole process of protecting this information is a work in progress for judges and attorneys. When I have reminded attorneys not to use such identifiers, some of them seem to not know what I am talking about until after I tell them that transcripts are posted on PACER. I suspect that it will take time to sensitize attorneys to the issue.
Active district judge	I favor a practice in which an sealed addendum is placed in the file for every plea agreement.
Active district judge	I have a small criminal docket less than 10% of my case load so I don't believe my experience is "statiscally significant". Sorry to be tardy in my response.
Active district judge	I have many comments regarding civil matters, but this survey has concentrated on criminal proceedings, and I have nothing to add on that topic.
Active district judge	It is always best to err on the side of caution in making identifying information available to the public because of the ease of dissemination over the internet.
Active district judge	None.
Active district judge	our court addressed this last week and we opted to seal th supplemental plea agreemnt that wll befiled in every case ,evn when thert is no cooperation
Active district judge	Public substantial assistance agreements are a problem that will eventually assist individuals in obstructing justice. Balancing the public's right to know should rarely outweigh safety concerns, even if those concerns are only generalized in nature.
Active district judge	Rarely and only in the most extreme cases, I have been asked to refrain from docketing the entry that a defendant has taken a plea. This situation has occurred when a defendant's safety would be extremely comprised.

Active district judge	The Administrative Office should develop software to provide certifications by counsel that they have screened all documents before posting them on Pacer. We had a horrible situation where an attorney attached the social security numbers of multiple plaintiffs in a MDL. A docket clerk cannot screen all attachments. We should also have computer softward to screen for social security numbers.
Active district judge	The judge needs to be ever viligent and defense counsel need to feel the judge is open to their concerns as to the safety of their clients.
Active district judge	The privacy issue is overblown. Nothing need to be done. In particular, the public has a need to know more, and not less, about what goes on in our courts. This is especially true of criminal cases.
Active district judge	The results of this survey should be provided to the Committee on Court Administration and Case Management for any follow up action in order to preserve the continuity of the work that Committee has done on this subject.
Active district judge	We should have a best practices document
Active district judge	We should place protecting people above ready access to court files.
Active district judge	While the privacy rules are fairly simple, logical, and workable, the redaction rules are labyrinthine, unworkable, and impose an undue burden on court reporters. Far better for judges to take an active hand in enforcing them during trial and having a general waiver rule when they're ignored. No redactions.
Bankruptcy judge	I believe the privacy rules are a complete waste of judicial time. We are talking about public records and possible harmful access comes with the territory. Who would wish to steal the identity of someone who just filed bankruptcy? The private information supposedly protected in available in several public domains. All our efforts will always be bandaids.
Bankruptcy judge	I have no further comment or suggestion at this time.
Bankruptcy judge	I may not be aware of what the rules are in this area.
Bankruptcy judge	I wanted to check proofs of claims too, but the system would not allow it.
Bankruptcy judge	It appears that counsel practicing in this Court are generally sensitive to protecting PII; failures to comply appear to be inadvertent and are promptly remedied.

Bankruptcy judge	It seems counterproductive to require debtor's to remove SSN and other personal identifier information in all bankruptcy court filings but to require inclusion of full SSN in § 341 (creditors meeting) notices.
Bankruptcy judge	No other comments.
Bankruptcy judge	On our court website, we have posted the Administrative Procedures for Electronic Case Filings which sets out the privacy warnings.
Bankruptcy judge	Our court staff is very busy given the numbers of filings. The attorneys should be responsible for correcting the problem that they create, not us.
Bankruptcy judge	Our Florida State courts will implement redactions in real time upon receipt of a phone call. Our court requires a written motion.
Bankruptcy judge	The main problem this court has encountered is with exhibits for trials and hearings and exhibits attached to proofs of claim and filings containing personal identifiers. The problem is more significant with pro se filers, but attorneys also overlook redaction on occasions.
Bankruptcy judge	The problem that I have encountered is not covered in the Rules at all. Unless a decision is marked "not for publication" it can be obtained if the right Google inquiry is made. In student loans cases (always the debtors are individuals) the information
Bankruptcy judge	the redaction policy is a commendable endeavor, but in bk cases, where so much personal info is implicated, it is naive to expect that there will not be frequent, serious issues.
Bankruptcy judge	They are generally working if we keep reminding parties and counsel
Bankruptcy judge	This has been a concern for my division. We deal with a volume of consumer debtors with their financial life made 'public'. Damage to these individuals can be dramatic. We find the 'problems' arise msot often with the uneducated (pro se) users of the system (also with attorney unfamiliar with federal rules. Without an alert and active quality control oriented clerks' office this problem could become even more of an issue. Vigilance to privacy concern by the 'front-line' and resources to that end, I feel, is important. '

Bankruptcy judge	This issue comes up with some frequency in my court, and we try to be very vigilant about finding problems and correcting them. The first line of defense, of course, is the parties themselves. I find that as counsel become familar witht the redaction procedures and our methods of addressing this problem, they become more proactive in seeking relief when their clients' personal indfformation is included in filings.
Chief bankruptcy judge	Consideration should be given to incorporating the Judiciary's redaction policy into the FRBP's. Any rule should make it clear that the responsibility for redaction lies with the filing party, and that clerk's of court should not be responsible for redacting information from documents once filed. Please note: this survey was completed by R.G. Heltzel, Clerk, U.S.B.C, CA(E).
Chief bankruptcy judge	Creditors routinely file proofs of claim with personal identifiers like social security numbers and account numbers. Because debtor's and their counsel don't always see those right away, the proofs of claim go uncorrected. It is a continuing challenge to educate creditors about this problem. To correct the problem, the clerk's office has to block the claim from public view and the filer has to refile the claim.
Chief bankruptcy judge	I have also found problems arise when, even though counsel remembers to eliminate personal identifers in pleadings they draft, they attach voluminous documents as exhibits and the identifiers are in those, evidently unreiewed, exhibits.
Chief bankruptcy judge	I have had cases - and I'm told by the office of the United State Trustee's Office in Colorado that there are a good number more - where a debtor files bankruptcy using a previously stolen or purchased SSN of another person. In other words, an ill
Chief bankruptcy judge	I STRONGLY URGE THE COMMITTEE TO RESIST MAKING THE CLERK RESPONSIBLE FOR IDENTIFYING AND REDACTING PERSONAL IDENTIFIERS AND OTHER PROTECTED INFORMATION, IF THIS IS BEING CONSIDERED.
Chief bankruptcy judge	I think the rules exist to alert parties to the requirements and issues involved. It is a matter of parties putting internal procedures in place to ensure compliance with those rules.

Chief bankruptcy judge	In general, these are difficult to police and enforce. Creditors' counsel and claims filers need to be better educated on this than they currently appear to be.
Chief bankruptcy judge	None
Chief bankruptcy judge	The COurt has entered General Order #2008-6 which adopts the Judicial Conference policy on electronic availability of transcripts.
Chief bankruptcy judge	The inclusion of confidential information in documents filed with the court in violation of Bankruptcy Rule 9037 is a very serious problem in bankruptcy court. It is most often violated by creditors who file proofs of claim containing prohibited informat
Chief district judge	no
Chief district judge	None that I can think of at this time.
Chief district judge	None.
Chief district judge	While I am aware of witnesses who suffer retaliation in criminal cases, I am not aware of any cases where it can be traced back to public records.
Magistrate judge	Again, I am far more worried about the institutional trend toward court secrecy than I am about inadvertent disclosures of private information in a handful of cases.
Magistrate judge	As a magistrate judge my participation in plea and cooperation agreements is limited because our district judges generally take their own pleas. Personally I think plea agreements and cooperation agreements should be separate and the cooperation part kept private, but I haven't seen either the prosecution or the defense ask for that.
Magistrate judge	Educating lawyers is the key to the problem in civil cases.
Magistrate judge	Many of the questions concerned PACER. I do not use PACER, and I am not familiar with what documents are accessible by using it. My sense is that many of these questions would be better directed to court personnel who are familiar with PACER and what information is available through it.
Magistrate judge	My answers were limited to my experience as a new judge. Many of the questions would have been answered differently if I included my time as a criminal defense lawyer.
Magistrate judge	no other comments
Magistrate judge	No.
Magistrate judge	The U S Attorney's office has complained about the burdensome nature of the trial transcript redaction

	process.
Magistrate judge	this survey is difficult because of the number of variations in judicial practice. I am a USMJ and many of the questions do not pertain to my cases.
Magistrate judge	While I recognize the need to protect private information, it is often necessary to discuss private information in rendering decisions. How does the committee propose that judge's decision be made publicly available while still protecting privacy (example, request for review of denial of request for child's social security disability benefits)

Clerks Survey of Privacy Practices in Judicial Proceedings

Responses to this survey will aid Subcommittee on Privacy of the Judicial Conference's Committee on Rules of Practice and Procedure in its evaluation of the effectiveness of the federal courts' rules and procedures to protect private information in court filings. If you have questions about this survey, please contact Professor Daniel Capra (212-636-6855; dcapra@law.fordham.edu)

TYPE OF COURT:

	Frequency	Percent
Bankruptcy	73	50.3
District	72	49.7
Total	145	100.0

1) In which district do you serve?

(This information is not reported since it would identify individual clerks who responded and those clerks who did not respond.)

2) What is your position?

		Frequency	Percent
Missing		4	2.8
	Bankruptcy Court Clerk	65	44.8
	District Court Clerk	52	35.9
	District Executive	2	1.4
	Other	22	15.2
	Total	145	100.0

If you selected other, please specify

See Appendix A.

For the purposes of this survey, the term "personal identifier information" refers to those forms of personal information requiring protection under the national privacy rules (namely Civil Rule 5.2, Criminal Rule 49.1 and Bankruptcy Rule 9037), including the following:

Social-security number
Taxpayer-identification number
Financial-account number
Birth date
Home address in criminal cases, and
The name of an individual known to be a minor.

The term "private information" is broader than personal identifier information, and includes other sensitive personal information not covered by the rules that you think deserves restricted access.

JUROR RECORDS

3) In your court, which documents containing personal identifier information about individual jurors -- including the juror's name or background information -- are made publicly available through PACER? Please check all that apply.

District Court Clerks Only

9 (12.5%) ❑ Grand jury indictment (including foreman's signature)
1 (1.4%) ❑ Jury panel list
11 (15.3%) ❑ Transcripts of voir dire proceedings
3 (4.2%) ❑ Strikes by parties of identifiable jurors
8 (11.1%) ❑ Notes from jurors (either on a deliberating jury or not)
10 (13.9%) ❑ Verdict forms with juror names
49 (68.1%) ❑ No identifiable information about individual jurors available through PACER
9 (12.5%) ❑ Other (please specify)

If you selected other, please specify

See Appendix B.

4) In your court, which documents containing personal identifier information about individual jurors, if any, is made available through the public access terminal in the clerk's office? Please check all that apply.

District Court Clerks Only

10 (13.9%)	❑ Grand jury indictment (including foreman's signature)
0 (0.0%)	❑ Jury panel list
14 (19.4%)	❑ Transcripts of voir dire proceedings
3 (4.2%)	❑ Strikes by parties of identifiable jurors
9 (12.5%)	❑ Notes from jurors (either on a deliberating jury or not)
13 (18.1%)	❑ Verdict forms with juror names
47 (65.3%)	❑ No identifiable information about individual jurors is made available through the public access terminal in the clerk's office
6 (8.3%)	❑ Other (please specify)

If you selected other, please specify

See Appendix C

TRANSCRIPTS IN GENERAL

---

5) The Judicial Conference has established a policy that transcripts are to be posted on PACER 90 days after delivery to the clerk of court. When did your court begin posting transcripts on PACER?

_____(month and year)

Districts courts answers ranged from June 2002 to Pending

Bankruptcy courts answers ranged from January 2001 to December 2009

6) Has your court established local rules or policies about posting criminal and civil case transcripts on PACER to address perceived privacy concerns?

(Please note: This survey is not intended to suggest that the current Judicial Conference policy is to be altered or negated in any way.)

		Frequency	Percent
Missing		5	3.4
	Don't Know	5	3.4
	No	58	40.0
	Yes	77	53.1
	Total	145	100.0

7) What is the local rule or policy for criminal cases?

See Appendix D

8) What is the local rule or policy for civil cases?

See Appendix E

9) Have you received any complaints or requests for changes regarding private information appearing in transcripts generally?

		Frequency	Percent
Missing		3	2.1
	No	133	91.7
	Yes	9	6.2
	Total	145	100.0

District Clerks Only

		Frequency	Percent
Missing		2	2.8
	No	65	90.3
	Yes	5	6.9
	Total	72	100.0

Bankruptcy Clerks Only

		Frequency	Percent
Missing		1	1.4
	No	68	93.2
	Yes	4	5.5
	Total	73	100.0

10) Was the private information available through PACER?

		Frequency	Percent
Missing		136	93.8
	No	3	2.1
	Yes	6	4.1
	Total	145	100.0

District Clerks Only

		Frequency	Percent
Missing		67	93.1
	No	3	4.2
	Yes	2	2.8
	Total	72	100.0

Bankruptcy Clerks Only

		Frequency	Percent
Missing		69	94.5
	Yes	4	5.5
	Total	73	100.0

VOIR DIRE TRANSCRIPTS

11) Does your court place voir dire transcripts on PACER?

District Clerks Only

		Frequency	Percent
Missing		3	4.2
	No	43	59.7
	Yes, both civil and criminal voir dire transcripts	23	31.9
	Yes, civil voir dire transcripts	2	2.8
	Yes, criminal voir dire transcripts	1	1.4
	Total	72	100.0

12) Have you experienced any problems or complaints in protecting private information in voir dire transcripts from access through PACER?

District Clerks Only

		Frequency	Percent
Missing		44	61.1
	Don't Know/Not Applicable	3	4.2
	No	24	33.3
	Yes	1	1.4
	Total	72	100.0

13) You indicated that you have experienced problems or complaints in protecting private information in voir transcripts. Please describe those problems or complaints.

See Appendix F

DEPOSITION TRANSCRIPTS

14) Does your court post depositions on PACER?

		Frequency	Percent
Missing		3	2.1
	Don't Know	8	5.5
	No	96	66.2
	Yes, the court allows them to be posted in certain circumstances	32	22.1
	Yes, the court requires them to be posted	6	4.1
	Total	145	100.0

15) You indicated that your court posts depositions on PACER in certain circumstances. Please explain those circumstances.

See Appendix G

REDACTION IN GENERAL

16) Are you aware of ways to make it easier and more efficient for lawyers to search or review transcripts for personal identifier information that must be redacted?

		Frequency	Percent
Missing		2	1.4
	Don't Know	30	20.7
	No	85	58.6
	Yes	28	19.3
	Total	145	100.0

17) Please indicate the techniques currently used. (Check all that apply)

23 (15.9%) ❑ Requiring the transcripts be filed as text-searchable PDFs
7 (4.8%) ❑ Allowing attorneys to review their notes of the proceeding to make the initial determination as to whether redactable information was mentioned
7 (4.8%) ❑ Using software programs developed to identify personal identifier information
4 (2.8%) ❑ Other (please specify)

If you selected other, please specify

See Appendix H

18) Do you have any suggestions for improving the process of redacting personal identifier or other private information from transcripts?

See Appendix I

19) Does your court keep a record of complaints and requested changes regarding redacting transcripts that contain private information? (This includes both the

redaction of personal identifier information as required by the rules and possible over-redaction of information not protected by the privacy rules.)

		Frequency	Percent
Missing		3	2.1
	Don't Know	6	4.1
	No	94	64.8
	Yes	42	29.0
	Total	145	100.0

District Clerks

		Frequency	Percent
Missing		2	2.8
	Don't Know	2	2.8
	No	45	62.5
	Yes	23	31.9
	Total	72	100.0

Bankruptcy Clerks

		Frequency	Percent
Missing		1	1.4
	Don't Know	4	5.5
	No	49	67.1
	Yes	19	26.0
	Total	73	100.0

REDACTION IN BANKRUPTCY CASES

20) Has your court experienced problems with failures to comply with redaction requirements in filed documents -- including petitions, schedules, proofs of claim, and adversary proceeding pleadings?

Bankruptcy Clerks Only

	Frequency	Percent
Missing	8	11.0
Don't Know	1	1.4
No	9	12.3
Yes	55	75.3
Total	73	100.0

21) How frequently does this occur?

Bankruptcy Clerks Only

	Frequency	Percent
Missing	18	24.7
Often	11	15.1
Rarely	11	15.1
Sometimes	33	45.2
Total	73	100.0

22) What kinds of bankruptcy filings? Please check all that apply.

Bankruptcy Clerks Only

29 (39.7%) ❑ Petitions
35 (47.9%) ❑ Schedules
54 (74.0%) ❑ Proof of Claims
13 (17.8%) ❑ Adversary Proceeding Pleadings
21 (28.8%) ❑ Other (please specify)

If you selected other, please specify

See Appendix J

REDACTION IN GENERAL

23) Are you aware of any reasons for noncompliance with the redaction requirements?

	Frequency	Percent
Missing	67	46.2
Don't Know	2	1.4
No	71	49.0
Yes	5	3.4
Total	145	100.0

24) What reasons were given?

See Appendix K

25) How have those matters been resolved?

See Appendix L

REDACTION OF CRIMINAL RECORDS

26) Does your district have a policy with respect to posting plea agreements and cooperation agreements on PACER?

District Clerks Only

		Frequency	Percent
Missing		1	1.4
	Don't Know	2	2.8
	No, it is up to the individual judge	37	51.4
	Yes	32	44.4
	Total	72	100.0

27) You indicated that your district has a policy with regard to posting plea agreements and cooperation agreements on PACER. Please describe the policy or post a link to your district's policy.

See Appendix M

28) Does your district have a policy with respect to posting plea agreements and cooperation agreements on the public access terminal in the courthouse?

District Clerks Only

		Frequency	Percent
Missing		1	1.4
	Don't Know	1	1.4
	No, it is up to the individual judge	41	56.9
	Yes	29	40.3
	Total	72	100.0

29) You indicated that your district has a policy with regard to posting plea agreements and cooperation agreements on the public access terminal in the courthouse. Please describe the policy or post a link to your district's policy.

See Appendix N

30) Do you or others in your court review decisions to restrict PACER access to plea or cooperation agreements after a certain point in time?

District Clerks Only

		Frequency	Percent
Missing		1	1.4
	Don't Know	1	1.4
	No	67	93.1
	Yes	3	4.2
	Total	72	100.0

31) You indicated that you or others in your court review decision to restrict PACER access after a certain point in time. Please describe the process that is used.

See Appendix O

32) Have you had any problems implementing the court's policy regarding posting of plea and cooperation agreements?

District Clerks Only

		Frequency	Percent
Missing		1	1.4
	Don't Know	2	2.8
	No	66	91.7
	Yes	3	4.2
	Total	72	100.0

33) You indicated that you have had problems implementing the court's policy regarding posting of plea and cooperation agreements. Please explain those problems.

See Appendix P

IMMIGRATION RECORDS

34) With respect to immigration cases, do you believe PACER access to additional forms of private information, such as alien registration numbers, should be restricted?

District Clerks Only

		Frequency	Percent
Missing		1	1.4
	Don't Know/No opinion	43	59.7
	No, PACER access should not be limited in immigration cases.	5	6.9
	PACER access should be limited in certain types of immigration cases.	2	2.8
	Yes, PACER access to such private information should be limited in all immigration cases.	21	29.2
	Total	72	100.0

35) Which types of immigration cases should require limited access?

See Appendix Q

36) If you have any other comments or suggestions about the privacy rules that have not been covered in this questionnaire, please provide them here:

See Appendix R

Thank you for completing the survey. If you have any questions, please contact Professor Daniel Capra (212-636-6855; dcapra@law.fordham.edu)

Appendices to Clerks Survey of Privacy Practices in Judicial Proceedings

11/19/09

Appendix A:
2) What is your position?
If you selected other, please specify

District Court Respondents:

		Frequency	Percent
Missing		54	75.0
	Chief Deputy	4	5.6
	Chief Deputy Clerk	8	11.1
	Chief Deputy for Administration - District Court	1	1.4
	Deputy in Charge, District Court	1	1.4
	District Court Clerk, responding on behalf of the Court after consultation with the Judges to review our current practices and procedures	1	1.4
	Operations Manager	2	2.8
	Staff Attorney	1	1.4
	Total	72	100.0

Bankruptcy Court Respondents:

		Frequency	Percent
Missing		66	90.4
	[XXXXX for] XXX Clerk	1	1.4
	Bankruptcy Chief Deputy	1	1.4
	Chief Deputy	1	1.4
	Chief Deputy of Operations	1	1.4
	Operations Manager	2	2.7
	Operations Mgr on behalf of BK Clerk	1	1.4
	Total	73	100.0

Appendix B

3) In your court, which documents containing personal identifier information about individual jurors -- including the juror's name or background information -- are made publicly available through PACER? Please check all that apply.

If you selected other, please specify
District Clerks Only

Foreperson name available on verdict form in civil cases only

Juror information in civil cases is availabale on PACER for jury panel lists, notes and verdict forms. In criminal cases, these are sealed and therefor not available. Court is presently considering not having information about jurors public.
n/a - Bankruptcy Court

Note: The signature of the jury foreperson is available through PACER unless the presiding judge directs the clerk's office to redact it. Often the signature is illegible.

Notes from jurors are only made publicly available only in civil cases

Some Judges allow the foreperson's name to be publicly available on the verdict form. Otherwise, no other identifying information is available in this District.

trial transcripts might have a name

Verdict forms Civil only

Verdict Forms contain only foreperson's name and juror notes are available only in civil cases. Voir dire proceedings are sealed by some judges.

We redact or seal any document in a criminal case that contains a juror's name. We do not do the same in civil cases. We don't make publicaly available any other personal identifier other than names in civil cases.

Appendix C

4) In your court, which documents containing personal identifier information about individual jurors, if any, is made available through the public access terminal in the clerk's office? Please check all that apply.

If you selected other, please specify

District Clerks Only

Civil voir dire transcripts are available at the public terminals, criminal is not. Civil verdict forms are available at public terminals, criminal verdict forms in redacted form are available at the public terminals.

Foreperson name available on verdict form in civil cases

Same as above

trial transcripts might have a name

Verdict forms Civil only

Appendix D

7) What is the local rule or policy for criminal cases?

District Clerks:

#1) Local Rule 49.1.1 codifying current procedure to go into effect on 12/01/2009: (b) Transcripts of Hearings.&CR;&LF;If information is listed in Section (a) of this rule is elicited during testimony or other court proceedings (i.e., personal identifiers

Administrative Order 08-35 establishes general policy; policy supplemented by Adminstrative Order 09-09 to exclude voir dire hearing transcripts

Administrative Order 08-9&CR;&LF;&CR;&LF;http://www.iand.uscourts.gov/e-web/documents.nsf/0/C7DB007CCDFFD0E5862574980053A4A8/$File/Admin+Order+08+AO+0009.pdf

Administrative policy - Counsel will file a Notice of Intent to Redact within 5 days of transcript being delivered to the clerk. Cou will then follow-up, within 21 days of initial delivery of the transcript to the clerk, with a specific requestfor re

adopts national policy; Admin Order 2008-31 (available on our web site)

Central District of Illinois&CR;&LF;United States District Court&CR;&LF;&CR;&LF;Notice to Members of the Bar&CR;&LF;&CR;&LF;Electronic Availability of Transcripts of&CR;&LF;Proceedings Before U.S. District and Magistrate Judges&CR;&LF;,,&CR;&L
Criminal transcripts are filed with restricted access (available at public terminal in the clerk's office, but not remotely). During th time the transcripts cannot be printed. They go through the redaction period, then at 90 days if no requests for reda

Criminal Voir Dire must be filed in a separate volume and is always sealed. With unsealed transcript, official court reporter and clerk's staff provide parties with remote access. Notice of Intent to Redact due 10 days after transcript filed; Request for

Electronic transcripts will be e-filed and&CR;&LF;available for viewing at the Clerk's Office public terminal, but may NOT be&CR;&LF;copied or reproduced by the Clerk's Office for a period of 90 days. If there are&CR;&LF;no redactions to be made rest
For both civil and criminal, we have internal policy regarding juror voir dire transcript access.

GO-08-03

http://www.cod.uscourts.gov/Documents/CMECF/ElectronicTransrcriptPolicyStatement.pdf

http://www.mow.uscourts.gov/district/rules/ecf_transcript_policy.pdf

http://www.txs.uscourts.gov/transcripts/newpolicy.htm

Judicial Conference policy plus voir dire proceedings may not be transcribed without permission of the presiding judge.

Jurors are identified in transcripts by a juror number and initials.

Local Criminal Rule 49.1.1 identifies the privacy items to be redacted. &CR;&LF;&CR;&LF;General Order 2008-16 (http://www.ohnd.uscourts.gov/Clerk_s_Office/Local_Rules/General_Orders/2008-16.pdf) states that voir dire transcripts will n filed as part
Local policy is that we do not ask for any privacy act information while on record.

Local Rule 5.2

LR 80.1&CR;&LF;b) Access Restrictions After Transcript Filed.&CR;&LF;&CR;&LF; &CR;&LF;&CR;&LF;(1) Access to a transcript provided to the Court by a court reporter will be restricted in accordance with this rule. &CR;&LF;&CR;&LF;(B) Transcript
LR CR-49.1

LR Gen P 5.08

Mirrors JC policy

Miscelleneous Order No. 61, which is available on the court's website at http://www.txnd.uscourts.gov/pdf/Miscorder61_1021C

Note: " . . . This policy establishes a procedure for counsel to request the redaction from the transcript of specific personal dat identifiers before the transcript is made electronically available to the general public. Counsel are strongly urged to sh

Only redacted copies of transcripts are available via PACER.

Our policy is contained in a "Notice to Members of the Bar" issued on 5/9/08 and contained in the CM/ECF section of the Cou website.

Pending local criminal rule. Now covered by General Order #8-02

Policy is transcripts are sealed for 90 days pending redaction notification by attorney.

Provides guidlines for attorneys to review and file notices to redact transcripts. Sets forth procedures for the release of transs for public view on PACER

redaction policy

Rule 5.1.2 Electronic Case Filing ("ECF") Procedures - Transcript of criminal proceedings shall not be placed on CM/ECF or PACER, unless the presiding judge otherwise directs after giving the prosecution and defense counsel an opportunity to be he

same as Judicial Conference

Standing Order 08-02 and Section VI to Appendix H to Local Rules: Adopts Judicial Conference policy.

The Court's ECF Policies and Procedures which include the redaction policy.

The same as the JCUS policy

Transcripts of voire dire conducted at sidebar are sealed and not publicly available

Transcripts provided by the Court Reporter will be filed in electronic form into CM/ECF and will not be available on the Court's PACER system for a period of 90 days. During that time it the responsibility of the attorney who requested the transcript to

Voir dire is not filed. Transcripts not available for viewing except at the public terminal for the first 90 days. Attorney Redactio Statement is due within 21 days of the filing of the transcript. If no redaction requested, the transcript is available

We have a local rule that covers civil and criminal case redaction of personal identifiers in General, which is LR 5.2(d) that reads:&CR;&LF;LR 5.2(d) A filed document in a case (other than a social security case) shall not contain any of&CR;&LF;the

When a transcript is filed with the Court by a court reporter, the transcript will be available at the Clerks Office for 90 days for inspection only. During the 90-day period, a copy of the transcript may be obtained from the court reporter at the rate e

Within 7 days of the filing of transcript, parties wishing to redact identifiers pursuant to FRCRP 49.1 must file a Notice of Intent Redact. If the Notice of Intent is filed, the filing party must then file a Redaction Statement within 21 calendar day

Bankruptcy Clerks:

Bankruptcy Court - no criminal cases

Bankruptcy Court has no policy for criminal cases!

Bankruptcy Court so N/A

Civil L.R. 3-17

n/a - Bankruptcy Court

n/a

N/A

N/A.

n?a

NA- Bankruptcy

NA

not applicable

Not applicable

Not applicable to Bankruptcy Court

Not applicable.

Our current transcript redaction policy is on our website at:&CR;&LF;http://www.alsd.uscourts.gov/documents/index.cfm?docs=general_docs

See Transcript Redaction Procedure at http://www.ned.uscourts.gov/pom/transcript_redaction_procedure.pdf

Appendix E

8) What is the local rule or policy for civil cases?

District Clerks

#1) Same local rule as criminal, but labeled LR Civ P 5.2.1.&CR;&LF;#2) Same policy regarding filing of voir dire transcripts as a separate volume with access restricted to case participants and the public terminal;&CR;&LF;#3) Same as criminal set forth a

Administrative Order 08-35 establishes general policy; policy supplemented by Adminstrative Order 09-09 to exclude voir dire hearing transcripts

Administrative Order 08-9&CR;&LF;&CR;&LF;http://www.iand.uscourts.gov/e-web/documents.nsf/0/C7DB007CCDFFD0E5862574980053A4A8/$File/Admin+Order+08+AO+0009.pdf

Administrative policy-Counsel will file a Notice of Intent to Redact within 5 days of transcript being delivered to the clerk. Counsel will then follow-up, within 21 days of initial delivery of the transcript to the clerk, with a specific requestfor reda

adopts national policy; Admin Order 2008-31

Civil Voir Dire is filed in separate volume and sealed only upon Court order. Otherwise procedures are same as for criminal cases.

Electronic transcripts will be e-filed and&CR;&LF;available for viewing at the Clerk's Office public terminal, but may NOT be&CR;&LF;copied or reproduced by the Clerk's Office for a period of 90 days. If there are&CR;&LF;no redactions to be made, the rest

For both civil and criminal, we have internal policy regarding juror voir dire transcript access.

GO-08-03

http://www.cod.uscourts.gov/Documents/CMECF/ElectronicTransrcriptPolicyStatement.pdf

http://www.mow.uscourts.gov/district/rules/ecf_transcript_policy.pdf

Judicial Conference policy plus voir dire proceedings may not be transcribed without permission of the presiding judge.

Jurors are identified in transcripts by a juror number and initils.

Local Civil Rule 5.2 - and General Order #8-02

Local Civil Rule 8.1 identifies the privacy items to be redacted.&CR;&LF;&CR;&LF;General Order 2008-16 (http://www.ohnd.uscourts.gov/Clerk_s_Office/Local_Rules/General_Orders/2008-16.pdf) states that voir dire transcripts will not be filed as part of the

Local Rule 5.2

LR 80.1 (b)(1)&CR;&LF;(C) Remote electronic access to transcripts of civil voir dire proceedings shall remain restricted to the users identified in subsection (b)(2) of this rule indefinitely, unless otherwise ordered by the court.&CR;&LF;

LR CV-5.2

LR Gen P 5;08

Mirrors JC policy

Miscelleneous Order No. 61, which is available on the court's website at http://www.txnd.uscourts.gov/pdf/Miscorder61_102108.pdf.

Only redacted copies of transcripts are available via PACER.

Our policy is contained in a "Notice to Members of the Bar" issued on 5/9/08 and contained in the CM/ECF section of the Court's website.

Policy is transcripts are sealed for 90 days pending redaction notification by attorney.

redaction policy

Rule 5.1.2 Electronic Case Filing ("ECF") Procedures - Transcript of civil proceedings shall be placed on CM/ECF or PACER, unless the presiding judge otherwise directs.

same as above

Same as above

SAME AS ABOVE

Same as above with the exception of "Home Addresses to the city and state (criminal only)." &CR;&LF;

Same as above.

Same as criminal listed above.

Same as for criminal transcripts.

same as Judicial Conference

Same as the policy for criminal cases, with the exception that it references FRCvP 5.2.

Sameas Criminal.

The Court's ECF Policies and Procedures which include the redaction policy.

The same as the JCUS policy

Transcript is not available for public inspection for 90 day period following delivery/docketing of transcript into Electronic Case Filing system.

Transcripts of voire dire conducted at sidebar are sealed and not publicly available

When a transcript is filed with the Court by a court reporter, the transcript will be available at the Clerks Office for 90 days for inspection only. During the 90-day period, a copy of the transcript may be obtained from the court reporter at the rate e

Bankruptcy Clerks:

(Adversary Proceedings in Bankruptcy) Our procedural manual (on Intranet) addresses our requirement that counsel remain responsible for the content of transcripts. Our proposed local rules likewise reveal the court's requirements and judicial conference p

5003-1

All filers must redact: Social Security or tax-payer identification numbers; dates of birth; names of minor children; and financial account numbers, in compliance with Fed. R. Bankr. P. 9037. This requirement applies to all documents, including attachmen

Bankruptcy: Standing Order No. 09-3&CR;&LF;http://www.vaeb.uscourts.gov/files/SO_9-3.pdf&CR;&LF;

CANB Transcription Policy & Procedure, September, 2008

Civil L.R. 3-17

Contained in General Order 08-09, entered 9/12/08

Follow Judicial Conference policy for posting. Add an opportunity for opposing side to respond to request for redaction.

For bankruptcy cases and proceedings, we use an advisory that provides a cautionary statement as recomended by the J.C., plus we have a GPO that authorizes the clerk to replace an original transcript previously entered in CM/ECF with a redacted transcript

General Order #2008-6

I am the Bankruptcy Clerk for the SDFL. Our Court has adopted Local Rule 5005-1(A)(2)(b) and has issued Court Guidelines on Electronic Availability of Transcripts of Court Proceedings (effective 12/01/09.

In addition to following the Conference policy on availability of transcripts on PACER, counsel and parties are routinely reminded (by judges and also by reminder notices throughout the courtroom) to be cautious about what is said on the record.

It is the attorney's responsibility to redact personal identifiers from documents and transcripts.

Local Rule 9018-1

NA - Bankruptcy

No transcripts posted publicly until 90 days. Parties have seven days from notice sent out by court to request redactions.

Not applicable.

Notice of the filing of the transcript is sent, including deadlines for seeking redaction of any private data contained in the transcript. However, trial orders and notices posted in the courtroom remind attorneys they should avoid the introduction of pr

Order dated 2/23/2009, to be superseded by LBR 5077-1 eff. 12/1/2009

Our current transcript redaction policy is on our website at:&CR;&LF;http://www.alsd.uscourts.gov/documents/index.cfm?docs=general_docs

Page 1 of 6&CR;&LF;UNITED STATES BANKRUPTCY COURT&CR;&LF;EASTERN DISTRICT OF NEW YORK&CR;&LF;GUIDELINES FOR IMPLEMENTATION OF THE UNITED STATES&CR;&LF;JUDICIAL CONFERENCE POLICIES ON ELECTRONIC AVAILABILITY AND&CR;&LF;REDACTION OF TRANSCRIPTS OF COURT PRO
Participants are offered an opportunity to redact personal identifiers prior to public access to the transcript.

Policy for bankruptcy cases is same as civil cases:
caseshttp://www.txs.uscourts.gov/transcripts/newpolicy.htm&CR;&LF;

PUBLIC NOTICE REGARDING REDACTION PROCEDURES FOR TRANSCRIPTS

See Transcript Redaction Procedure at http://www.ned.uscourts.gov/pom/transcript_redaction_procedure.pdf

Standing Order entered whereby parties have opportunity to redact before transcript is posted along with process to redact after posting if something missed.

The procedures implement the Judicial Conference Policy.

There is a sign in the courtroom not to ask questions or refer to private information during questioning. &CR;&LF;&CR;&LF;Procedure is as follows:&CR;&LF;Procedure Regarding the Availability of Transcripts of Court Proceeding&CR;&LF;&CR;&LF;&CR;&LF;Backg

Transcripts are posted for review by limited parties to have personal identifiers redacted for a time certain. After this time runs, transcripts are released to PACER.

Transcripts are restricted from PACER viewing for 90 days after trascript is filed, except at the public viewing computer and those parties that have purchased a transcript.

We basically reinforce/publicize the JCUS policy in our bankruptcy matters.

We entered a standing order in 2008 that restricts access to transcripts during the first 90 days on the docket and sets forth procedures that should result in the redaction of any of the type of personal identifiers listed in BR 9037(a).

We follow JC policy

We implemented the Judicial Conference policy on redaction and transcript availability via General Order.

Appendix F

13) You indicated that you have experienced problems or complaints in protecting private information in voir transcripts. Please describe those problems or complaints.

US Attorney's and Court Reporters have identified materials that should be redacted or removed.

Appendix G
15) You indicated that your court posts depositions on PACER in certain circumstances. Please explain those circumstances.

District Clerks
#1) If the depositions are read into the record at trial;&CR;&LF;#2) If the deposition, or a portion thereof, is attached as an exhibit to a motion pursuant to Local Rule 26.3:&CR;&LF;(a) Non-filing of discovery materials other than certificates of servic
Attorneys may efile a deposition, but if not efiled by an attorney, we scan and upload the cover page. Once electronic appeals are available, entire deposition will be uploaded.

Depositions are not filed of record unless otherwise ordered.

Depositions read during trial that are not recorded are sometimes filed in the court record.

Designation of testimony for trial. Some portions for summary judgment.

If the deposition is an attachment or exhibit related to another filing, the deposition (or pertinent parts) would be allowed to be filed.

If the deposition is filed in support of a Motion, then it is filed and included on PACER.

IF they are exhibits to motions, such as summary judgment motions.

It allows it when filed as a public record.

Only excerpts which are germane to a matter under consideration, e.g., attachments to briefs or trial exhibits.

Only if the parties file the depositions.

Only posted if in support of motion. Redaction required by moving attorney.

Parties may file depositions in support of summary judgment motions.

require excerpts only are filed with document.

Sometimes depositions are included in attachments to motions, and thus end up filed as such.

Sometimes depositions in pro se cases are posted.

The Court discourages the filing of depositions and other discovery. However, if the permits believe it is necessary to do so, the court does not object.

When approved by court.

When attachments or parts of exhibits associated with a pleading.

When discovery requests are contested, and counsel must apply to a judicial officer, transcripts of depositions relevant to that dispute may be filed electronically by counsel.

When it is used as testimony at trial.

When submitted by the parties in support of requests for relief, motions for summary judgement, etc.

When used at trial

Bankruptcy Clerks

A deposition transcript (or a portion thereof) could be attached as an exhibit in support of a motion.

after redaction period

Attorney's may include excerpts of deposition transcripts as necessary to support motions.

Counsel may file depositions supporting or opposing motions. Deposition transcripts are subject to the rules and redaction requirements that apply to other filings by parties. See Transcript Redaction Procedure at http://www.ned.uscourts.gov/pom/transcr
If requested as part of the record on appeal

If the deposition is used at trial.

Occasionally, an attorney will attach a deposition transcript or portion thereof, to a pleading that is electronically filed.

We allow attorneys to file most anything electronically, including depositions, if they wish, prior to trial subject to Court review.

When portions of depositions are filed as exhibits or attachments to other pleadings.

Appendix H

17) Please indicate the techniques currently used. (Check all that apply)

If you selected other, please specify

District Clerks

Perhaps redaction processing software can be used to (1) identify sensitive data found in a transcript and (2) generate a list that could be provided to counsel. In turn, counsel would review the list and identify the personal identifiers to be rem

The attorneys elect the technique(s) to be used.

We post signs in courtroom not to go on the record with redactable information.

Bankruptcy Clerks

Counsel should obtain e-copies of transcripts and if excerpts are necessary they should be filed electronically and with search capability. Our court doesn't have a written requirement regarding text-searchability, but the 11th Circuit does.

Notice sent to all parties of any hearing when a transcript of hearing is filed with clerk allowing parties opportunity to review for potential redaction prior to public display of transcript.

Appendix I

18) Do you have any suggestions for improving the process of redacting personal identifier or other private information from transcripts?

District Clerks

No

Current policy and procedure sufficient

Develop routine within ECF that scans electronic documents for personal identifiers, and warns filer of any potential identifiers found before document is officially entered into the record.

Do a SEARCH for personal identifiers to find all.

Don't ask the question to elicit the information to begin with

Hasn't been a problem to date

I believe there is software being developed that will help filter identifiers. We are concerned about sensitive information being in transcripts because of multiple party accountability.

I have heard of software that will search, but not confident it is foolproof.

no

No

No suggestions at this time. However, having the transcripts "text searchable" would make the process easier.

No, except that physical obscuration, as by marker, is ineffective for efiled documents.

No.

No. On the question below, we do not record complaints because we haven't had any. If we started getting them, we probably would track them.

No. The duty to redact rests with counsel.

No. We give USA copis of transcripts with US as a party when they do not file the appeal.

None

Not at this time.

Our focus has been on eliminating, to the greatest extent possible, the inclusion of private information in transcripts. This is done via training and outreach to the bar.

Our judges routinely remind attorneys in open court of the privacy requirements and there is a real attempt to keep those personal identifiers out of the transcript.

Require all documents to be text searchable at the time of filing... we realize that if the document is PDF'd properly, this is not an issue.

The burden must be placed on the filing party. If there was a mechanism to mark improperly submitted documents (failure to comply with FRCP 5.2, for example) and then allow a Clerk's Office to restrict access by placing the document under seal on PACER un

To constantly advise counsel to limit the introduction of personal information when questioning witness and making statements in court. Northern Ohio does this by 1) posting an Advisory for Limiting Personal Information on its web site (http://www.ohnd.us

Use juror numbers and initials rather than names.

We feel this is the attorney's call.

Bankruptcy Clerks

NO

Allow case parties to access the transcript through PACER during the first 90 days. Making them buy the transcript or come to the Clerk's Office during that period almost ensures that they will not inspect the transcript for personal identifiers.
Continue to have judges be very proactive in court to advise attorneys/litigants about this, and to avoid inclusion of private data in court hearings.

Emphasize the importance of redaction to attorneys filing electronically, in conferences, training and seminars

Involve the transcriber, "at the front end," so to speak. Perhaps there's a way transcribers could flag possible personal identifiers and notice provided to the "offending" party. I suspect this extra work might need to be compensated. A small surcharg
no

No

No.

No. I think the procedures that the AO spelled out, and that our court followed are pretty good. Would be hard to come up with something more efficient.

None

None at this time.

Our court does not have any suggestions for improvement at this time.

Our current policy seems to work well. Parties receive notice of time frame to redact.

Our Judges do a very good job of taking steps to ensure personal identifiers don't get into transcripts (i.e., reminding attorneys about privacy restrictions during court proceedings).

Requiring that the transcriber/court reporter provide both full and redacted transcripts. CM/ECF could provide a mechanism for limiting public access to the redacted copy.

The best practice is to keep personal information out of the transcript in the first place. Counsel&CR;&LF;should take this into account when questioning witnesses or making other statements in court. If information&CR;&LF;subject to this policy is mentio
The best way to address this is to avoid the introduction of the information in the first place. Vigilance on the part of the judge and the attorneys can achieve this.

The most effective way to avoid personal identifiers in the court records (transcripts and pleadings) is to educate attorneys as to proper protocals.

The new notice in ECF 4.0 requiring counsel to check the box agreeing that they must comply with the redaction rules may help.

This has been a very rare issue for the Bankrupcty Court. The larger problem is personal information (e.g. loan applications) attached to Proof of Claims.

WE HAVE NO SUGGESTIONS.

We have sent out e-mail reminders to all CM/ECF filers regarding privacy information. This seems to raise the awareness to all filers.

We have signs posted at all counsel tables in each judge's courtroom reminding attorneys not to illicit testimony that include perosnal indentifier or other private information. Our judges are also mindful of this requirement and remind attorneys of the

Appendix J

22) What kinds of bankruptcy filings? Please check all that apply.

If you selected other, please specify

Bankruptcy Clerks Only

attachments and supportive docs to filings such as pay advices

Attachments to documents

Attachments to proof of claims

Attachments to proofs of claim

attachments to stay relief motions

Documents filed pursuant to 11 USC 521(a) such as pay stubs.

Employee wage statements

Exhibits

Exhibits and attachments

Exhibits on Motions to Lift Stay

motions- loan documents with financial account numbers can be attached

Motions

Motions for Unclaimed Funds or certain attachments to pleadings

pay stubs

payment advices

Payment advices

PAYMENT ADVICES

Protected information appears in motions, and in supporting attachments to pleadings.

reaffirmation agreements, motions to lift stay

Social security statement

Statement of Social Security - wrong event

Tax returns, pay stubs, motion with exhibits

Appendix K

24) [Are you aware of any reasons for noncompliance with the redaction requirements?] What reasons were given?

District Clerks

1) If it was public in the paper world, then it should be public in the electronic world. If it was sealed in the paper world, then it should be sealed in the electronic world. (2) Redaction is burdensome and unnecessary. The information is already pu

attorney lack of knowledge of requirements

personal information is essential to pleading, so unredactd copy filed under seal.

Bankruptcy Clerks

From attorneys - inadvertance. Pro se litigants - unaware of policy

The person making the actual filing is not fully aware of what should be redacted; filer forgot to review; filer missed a personal identifier within a document

Appendix L

25) How have those matters been resolved?

District Clerks

once the matters are in the court record, normally a motion seeking court authorization to redact must be filed

The court determines on a case by case basis whether redaction or sealing is required as the matter arises before an individual judge, with a presumption in favor of public disclosure.

Unredacted copy filed under seal.

Bankrtupcy Clerks

Attorneys and pro se parties continue to include private identifiers in documents from time to time.

We requrie a motion to strike the document be filed.

Appendix M

27) You indicated that your district has a policy with regard to posting plea agreements and cooperation agreements on PACER. Please describe the policy or post a link to your district's policy.

District Clerks Only

All plea agreements are filed in paper in the clerk's office. They are available for viewing by the public, if requested. The documents are not on the public terminals, nor on PACER. A docket entry entitled "Plea Agreement" is posted to ECF, without an

All plea agreements are posted. Plea agreement supplements (which are filed with every plea agreement) contain cooperation information. All plea agreement supplements are sealed under the court's Special Order No. 19. (See Special Order No. 19 on the cour

All plea agreements shall be filed electroniclaly by the U.S. Atty. The US Atty. shall retain orig. documents for future production, if necessary, for two years after the expiration of the time for filing a timely appeal of the final judgment or oder or a

All pleas are filled unsealed with no information regarding cooperation. All pleas have a sealed cooperation agreement filed that may or may not have language indicating a defendants cooperation. All pleas look the same whether or not defendat cooperate

Court policy requires two documents: a public plea agreement which is filed of record and a sealed plea supplement which contains cooperation information and other private matters as may be indicated.

Criminal Protocal - All documents on the ECF system related to pleas and sentencing and orders relating to these documents, will be designated on the docket as Plea Documents, Sentencing Documents and Judicial Documents respectively , no mater their conte

General Order 2007-14 Electronic Access to Plea Agreements and Related Documents in Criminal Cases (http://www.ohnd.uscourts.gov/Clerk_s_Office/Local_Rules/General_Orders/2007-14.pdf) states that no plea agreements filed pursuant to &.S.S.G. Section 5k1.1

Local Rule requiring Sealed Supplement to Plea filed with every Plea Agreement effective 12/01/2009

Our business practice is to notify attorneys that these documents are not avialable on PACER. Link:&CR;&LF;http://www.txwd.uscourts.gov/ecf/docs/efileprocd.pdf

Our procedures allow for the Plea Agreement ("main document") to be filed and made part of the record since it does not make any reference to the defendant's cooperation with the government. It also requires that a Plea Agreement Addendum be filed under

Plea agreements and cooperation agreements are not accessable on PACER... they are restricted events.

Plea Agreements and Sentencing Memos are not available on PACER. Access is limited to Court staff, Gov't, defense counsel and at Clerk's Office Public Terminals.

Plea agreements are posted on PACER unsealed unless a judge in a particular case orders the plea agreement sealed. Cooperation agreements have historically never been filed with the court in this district.

plea agreements are public and available, unless a motion to seal is filed and granted in advance of filing

Plea agreements are required to be done in two parts - first document is available on PACER and contains NO cooperation information; second document is NOT available on PACER and contains all cooperation information, including when there is no cooperation

Plea agreements are sealed in our District.

Plea agreements are sealed. The only thing that is public is a "notice of plea agreement" docket entry.&CR;&LF;

Plea agreements do not contain details of cooperation. Cooperation letters are executed by the parties and kept by the US Attorney and Probation Offices.

Plea agreements with cooperation are sealed.

Plea agreements with substantial assistance are filed as restricted documents and they are not available on PACER.

The agreements do not specify any cooperation. All plea agreements are available through PACER unless sealed on motion of parties.

The court files plea agreements only.

The normal plea agreement is set up as a "Case Participants and Public Terminal Access" in CM/ECF. Some plea agreements are ordered to be filed as "SEALED DOCUMENT" by the presiding judge.

The plea agreement is posted on PACER unless there is a Motion to Seal the Plea Agreement. Most plea agreements in our District do not outline cooperation with specificity and, therefore, do not require sealing. Anyone who watches a crime show on TV kno

The plea and statement of reasons are public and therefore are posted.

The policy is that these documents are filed under seal.

These are publicly available unless filed under seal

They are not on PACER but are at the pulbic terminals

They are restricted.

Verbal Order from the Chief Judge

We do not post them on PACER

We have a local rule (LR 111) which requires counsel to file a plea agreement and a plea agreement supplement for every guilty plea. The plea agreement supplement details the agreements re the plea. The docket entry for the plea agreement supplement is p

Appendix N

29) You indicated that your district has a policy with regard to posting plea agreements and cooperation agreements on the public access terminal in the courthouse. Please describe the policy or post a link to your district's policy.

District Clerks Only

A cooperation agreement is filed under seal with every plea (even if no cooperation agreement is reached with defendant):&CR;&LF;http://www.ndd.uscourts.gov/pdf/Plea_Agreements.pdf

actually no policy - they are posted as are all other documents

As explained in previous question we have two documents: public and sealed plea supplement.

As indicated above, plea agreements are public, but plea agreement supplements are sealed under Special Order No. 19.

If available on PACER it is also available on the public access terminal.

Plea agreeements and statement of reasons are public and therefore are posted.

Plea agreements and plea agreement addenda are treated in the same manner at our public access terminals as they are in PACER. That is, the plea agreement (main document) is docketed and the pdf of the plea agreement is available at the public access ter
Plea agreements are at the public terminals similar to social security cases.

Plea Agreements are available at public access terminals unless specifically ordered as sealed by the Court.

Plea agreements are available at the public terminals unless they are sealed. Cooperation agreements are not available.

Plea agreements are available on the public access terminal in the courthouse, as they are on PACER, unless they are sealed by order of the Court.

Plea agreements are sealed. The only thing that is public is a "notice of plea agreement" docket entry.

Plea agreements only are filed.

Plea agreements with cooperation are sealaed.

Plea agreements with substantial assistance are filed as restricted documents and they are not available at the Public Terminal.

Please see preceding link.

same access as through PACER on our public terminals

Same as above

Same as policy for PACER - public unless plea agreement is sealed by order of the judge.

Same as previous answer

see prior answer.

The normal plea agreement is set up as a "Case Participants and Public Terminal Access" in CM/ECF. Some plea agreements are ordered to be filed as "SEALED DOCUMENT" by the presiding judge.

These are publicly available unless filed under seal

These documents are filed under seal.

They are not available on PACER.

Verbal Order from our Chief Judge

We don't make them available on the public access terminal

We have a local rule (LR 111) which requires counsel to file a plea agreement and a plea agreement supplement for every guilty plea. The plea agreement supplement details the agreements re the plea. The docket entry for the plea agreement supplement is p

Appendix O

District Clerks Only

All sealed documents are reviewed periodically to determine the need to continue the seal

Substantial assistant motions are sealed from the public for two years.

This has been a topic from time to time at our quarterly Judges' Meetings. Since implementing the present plan, we have decided it works best for our district.

Appendix P

33) You indicated that you have had problems implementing the court's policy regarding posting of plea and cooperation agreements. Please explain those problems.

District Clerks Only

one time we had an Assistant US Attorney from another district make an appearance and refuse to follow local policy.

the process was quite involved. Initially, we restricted remote access. Ultimately, the topic was the subject of a public report through our Local Rules committee, and after public comment and an en banc, the Court adopted the policy of complete access

We wanted to adopt a policy similar to North Dakota where a sealed document was filed in every case so that to the public there would be no indication of a sealed plea agreement with cooperation. However, we were unable to adopt such a policy because of

Appendix Q
35) Which types of immigration cases should require limited access?

District Clerks Only
All immigration nature of suit codes

Limited access should be granted to those cases affecting detention/custody.

Appendix R
36) If you have any other comments or suggestions about the privacy rules that have not been covered in this questionnaire, please provide them here:

District Clerks

Please disregard the incomplete survey from the District of Connecticut submitted earlier today. Please call if you have any questions. Robin Tabora, Clerk, 203-773-2141 [earlier survey Deleted by MD]

1. I am concerned that some attorneys still do not take the redaction requirement seriously. 2. Many of our court reporters have expressed concern about making transcripts available on PACER. Part of the concern is financial, but the court reporters are a
By local rule the court has expanded private information that must be redacted. Includes immagration identifiers.

Court reporters are aware of the requirements to redact, but are somewhat unsure that the parties will move for redaction. I believe current federal rules do not permit reporters or others to redact a document without a party making the request. I do not
I am concerned about transcripts being posted on PACER as we do not get many redaction notices. Attorneys have an affirmative duty and I think the policy on acountability is confusing. Maybe we should restrict as an added protection in these cases.
I love the new message in CM/ECF. It should be the filers responsibility to make sure that their documents do not contain privacy information.

I strongly believe the responsibility for removing personal identifiers must stay with the filing party, and hope that the steps being taken now prevent any shifting of that responsibility to us. The word 'nightmare' comes to mind if anyone tries to shif
it's all about educating the bar about breaking old habits. rarely is the personal identifying information relevant.

My suspicion is that most attorneys are not reviewing transcripts for redaction. We receive very few requests for reporters to redact.

no

No :-)

None

None at this time.

on behalf of all of the district court judges for the District of Maine:&CR;&LF;&CR;&LF;Most privacy issues occur in civil cases regularly - counsel elicit privacy information from witnesses, frequently file documents that contain privacy information and
The exclusion in Crim.R. 49.1(b)(9) is difficult for us to understand. Personal identifiers must be redacted in all documents except for charging documents. Therefore, most often, personal identifiers are made public in every criminal case via the charg
The language below is taken from our Jury Plan - the committee notes to Rule 49.1 (e) discuss access to juror names - we have included this language in our Jury Plan and will also incorporate the language into our Local Rules in 2010.&CR;&LF;&CR;&LF;Pursu
There are some concerns from ERISA lawyers about the redaction requirements applying to their case files, including voluminous medical records. We've received a recommendation that ERISA records be treated as Social Security cases under FRCP 5.2. &CR;&L
There should be more of a national policy for all Courts, with a presumption in favor of public disclosure.

We are conduting the public's business and therefore should take great care in making decisions as to what documents the public should have access. Personal identifiers should be redacted. "Personal information" however is a very broad category and may
We still a lot of personal information such as dates of birth and defendant addresses coming in on forms generated by the U.S. Marshal and U.S. Attorney offices. Perhaps revisions to forms used by these agencies may be appropriate to assist in compliance
With regard to Immigration Records, I'm not quite sure why this was asked as the CM/ECF software restricts Nature of Suits 462, 463 and 465, which are the nature of suits for immigration cases. Any case with these nature of suits is restricted to court us

Bankruptcy Clerks

A notice has been added to the "CM/ECF Filer or PACER Login" screen,on version 3.3.2, reminding electronic filers of their responsibility to eliminate all personal identifiers from a document before filing it in CM/ECF. User is not allowes to log into the

Education is the most important component. Attorneys need to remain alert to the procedures and staff can assist by being mindful of the rules and advising filers when violations occur.

For Bankruptcy Court specifically, if the petition and schedules did not require personal information, it would reduce the frequency of the privacy acts violations and, therefore, individuals would be better protected. In other words, better clarify to t

I am not sure if Bankruptcy Court's were supposed to respond to the Civil questions. Many of those questions do apply to Bankruptcy cases but since there was a separate set of Bankruptcy questions I did not answer the Civil ?s.

None

See our local rule:&CR;&LF;&CR;&LF;http://www.miwb.uscourts.gov/content/services/rules/adminOrder_2008-02.pdf

The privacy rules should also address the filing of medical information covered by HIPAA. In Bankruptcy, creditors often include protected medical information as attachments to the proofs of claim. In our court, we have a local rule that provides for a s

This survey primarily pertains to USDC matters. Most of the questions are not applicable in bankruptcy court.

We appreciate the opportunity to provide input. Thank you for working to insure privacy to our citizens. We can always do better.

WE BELIEVE THAT THE CLERK SHOULD NOT BE RESPONSIBLE FOR REDACTING PERSONAL IDENTIFIERS FROM DOCUMENTS, AND POSSIBLY HAVE LIABILITY FOR OVERSIGHTS. THE RESPONSIBILITY SHOULD REMAIN WITH THE DEBTOR'S LAWYERS AND CREDITORS FILING PROOFS OF CLAIM.

We have had a request to limit the appearance of the full social security number on creditors' versions of the 341 Notice.

We routinely monitor pleadings for violations of BK Rule 9037. Typically, we see violations that involve SSNs and financial account numbers not being redacted. We inform counsel of the violation. If counsel repeatedly violates Rule 9037, we notify the

We send attorneys a deficiency notice when they include private information in documents that are filed, but it is already. Is cumbersome for the Clerk's Office to have to remove it, and the burden is rightly placed on the attorneys to redact it in the f

We should reconsider our decision to redact the fist five of a social security number. Industry standard is to redact last four and display first five. By displaying the last four numbers it is easy to guess the first three because they are related to the

Whatever is done, DON'T place any more of a burden on the Clerk's Office to monitor and fix errors, etc.!

Would be helpful to have official guidance on what to do with PDFs of scanned documents that are later 'pulled' because of personal identifiers - we have been destroying those PDFs to avoid any risk of disclosure internally

Attorney Survey of Privacy Practices in Judicial Proceedings

(N = 624, unless otherwise specified.)

REDACTION OF TRANSCRIPTS

1) Do you attempt to redact personal identifier information from a transcript before it is posted on PACER?

Yes:	415 (66.5%)
No	105 (16.8%)
Don't Know	97 (15.5%)
Blank/missing:	7 (1.1%)

2) Do you redact transcripts to delete other than personal identifier information?

Yes	201 (32.2%)
No	314 (50.3%)
Don't know	101 (16.2%)
Blank/Missing:	8 (1.3%)

3) Do you have any suggestions for improving the process of redacting personal identifier or other private information from transcripts?

See Appendix A

REDACTION IN GENERAL

4) Are you aware of any reasons for noncompliance with the redaction requirements?

Yes	74 (11.9%)
No	471 (75.5%)
Don't Know	76 (12.2%)
Blank/Missing:	3 (0.5%)

5) You indicated you were aware of reasons for noncompliance with the redaction requirements. What reasons were given?

See Appendix B

6) How have those matters been resolved?

See Appendix C

REDACTION OF TRANSCRIPTS

7) Have you done anything to ensure that personal identifier information is not raised unnecessarily in a proceeding, so that transcripts will not have to be redacted?

Yes	295 (47.3%)
No	249 (39.9%)
Don't Know	75 (12.0%)
Blank/Missing:	5 (0.8%)

8) You indicated that you have done something to ensure that personal identifier information is not raised unnecessarily. Please describe those measures.

See Appendix D

REDACTION IN GENERAL

9) Is there information in case files, not currently redacted, that should be subject to categorical redaction?

Yes	98 (15.7%)
No	185 (29.6%)
Don't Know	334 (53.5%)
Blank/Missing	7 (1.1%)

10) What types of information currently in the files should be redacted? Please check all that apply. (N = 98; only those who answered "Yes" to Question 9, above)

78 (79.6%)	Driver's license number
68 (69.4%)	Passport number
54 (55.1%)	State identification number
54 (55.1%)	Health insurance identification number
51 (52.0%)	Alien registration number
47 (48.0%)	Other (please specify)

If you selected other, please specify

See Appendix E

11) Comments

1. A client's Social Security file has multiple documents containinig the person's SSN. In addition, the medical records contain minor children's names.
2. Again, goes to documents filed by USA in criminal case on the docket.
3. also hiv status, etc. is often in medical records that are attached to motion papers

4. Also, As to the public filings I think children should not have their full names listed with their ages, they are not the "parties" and the pleadings do not surround their conduct so I don't think their full names and birthdates should be listed, but rather age and year would be all, a separate document could be filed that the judge sees only as to their personal info. They do that in Juvenile and adoption court proceedings so I believe it should also apply in divorce court and family law.
5. Any statement indicating cooperation with the government by any person should be sealed/redacted.
6. Anything that is requested to verify identity by medical, financial or government institutions should be redacted.
7. Before the rules required the redaction of personal information, many complaints were filed including the names, addresses and social security number of plaintiffs.
8. By should, I mean according to the rules. It is is so easy to get this information in other ways that redaction is a waste of time
9. Certain employment/personnel files should be reviewed for privacy information, some subject to the Rule, other info that should be subject to the Rule.
10. Defendants' medical information, including that pertaining to infectious diseases and mental health condition does not seem to be routinely redacted before being posted.
11. Fed. R. Crim. P. 49.1(b)(8)&(9) filings should not be made public until after redaction within a reasonable time such as 72 or 48 hours. (8) an arrest or search warrant; and (9) a charging document and an affidavit filed in support of any charging document.
12. I am thinking about docket entries that disclose confidential information to a judge who while he/she treats it in confidence, his court room clerk does not.
13. If you are redacting to eliminate a minor's name, you should also redact the parents' names and substitute initials. Otherwise it is very easy to identify the minor.
14. In my world, the presentence report in a criminal proceeding is forwarded to the BOP after sentencing. The BOP evidently uses the information contained in the PSR to determine where an individual is houses/placed. The problem is that some of the information should not be made available to the BOP because the BOP does not secure that information. In short, the BOP seems to share with everyone making the information virtually public.
15. In this age of identity theft and lack of privacy, this information should be protected.
16. Individuals in asylum hearings fear persecution and torture. Those who apply for asylum, withholding of removal or Protection under the Torture Convention should have the records sealed or all identifying information redacted. These hearings are confidential at the immigration court and board of immigration appeals level but not at the circuit court level. They should be.
17. some of previous questions were not understood & responses thereto marked as "don't know"
18. somehow information about cooperation by the defendant needs to be redacted, because disclosure of such information while the defendant is incarcerated (or afterwards for that matter) raises a serious risk of personal injury or worse
19. the names of child victims in sexual assault cases
20. The phone numbers and addresses of the debtors sometimes allows persons to harrass the debtor. These should be removed from documents. However we have had cases where stalking spouses looked through the court records for such indentifiers.
21. he types of information routinely established to come within FOIA exemptions should be a starting point for information that should be redacted from public files. In Florida, we have additional exemptions under our state records laws (for domestic violence victims, for example) that also should be considered when evaluating the types of information to be redacted, in my view.
22. These should apply to civil cases since in the majority of cases this information is irrelevant to the case.
23. Unless relevant to the dispute this information is largely irrelevant.
24. We would redact before putting in a public file.

IMMIGRATION RECORDS

12) With respect to immigration cases, do you believe PACER access to additional forms of private information, such as alien registration numbers, should be restricted?

Yes, PACER access to such private information should be limited in all immigration cases. 58 (9.3%)
PACER access should be limited in certain types of immigration cases. 11 (1.8%)
No, PACER access should not be limited in immigration cases. 31 (5.0%)
Don't Know/No opinion 49 (7.9%)
I do not practice immigration law. 471 (75.5%)
Blank/Missing: 4 (0.6%)

13) Which types of immigration cases should require limited access?

1. 1325 and some 1326 cases.
2. Asylum
3. Asylum cases. Perhaps others. We routinely remove it unless it is a specific piece of evidence.
4. Cases involving VAWA issues, asylum, and Cancellation of Removal based on the family relationship.
5. Where the immigrant is neither a witness nor a party to an action, the information can be protected. The information is necessary to do a thorough investigation for impeachment.
6. Where there are corollary proceedings going on involving an alien, such as, federal criminal charges.

14) Do you practice criminal law?

Yes	181 (29.0%)
No	442 (70.8%)
Blank/Missing	1 (0.2%)

REDACTION OF CRIMINAL RECORDS

* All the questions in the section about Redaction of Criminal Records were answered only by those respondents who indicated they practice criminal law in Question 14 (above). Thus, there are 181 respondents in this section, instead of 624.

N = 181 (all who indicated they practice criminal law)

The Committee Note to Criminal Rule 49.1 lists documents that are not to be included in the public criminal case file.

15) In your opinion, are there categories of material that should be <u>deleted</u> from the current list of documents and included in the public criminal case file?

Yes	44 (24.3%)
No	114 (63.0%)
Don't Know	23 (12.7%)

16) Please note which categories should be deleted from the current list of documents excluded from the public case file, and explain why you think the information should be included in the file.

See Appendix F

17) In your opinion, are there additional categories of materials that should be added to the list of documents that are not be included in the public criminal case file?

Yes	35 (19.3%)
No	96 (53.0%)
Don't Know	50 (27.6%)

18) Please describe those categories of materials that should not be included in the public case file, and explain why they should not be included.

See Appendix G

19) Are you aware of any instance of harm or credible threat to a witness or defendant, arising from a perception that the witness or defendant was cooperating (either through language in plea agreement/cooperation agreement or a sealed document on a docket sheet)?

Yes, in plea agreement cases	9 (5.0%)
Yes, in cooperation agreement cases	16 (8.8%)
Yes, in both plea agreement and cooperation agreement cases	54 (29.8%)
No	86 (47.5%)
Don't Know	16 (8.8%)

20) In those instances, what circumstances gave rise to such suspicion or knowledge? Please check all that apply.

36 (19.9%)	Access to case files on the internet
25 (13.8%)	Access to case files at the courthouse
27 (14.9%)	Attendance at pretrial proceedings
23 (12.7%)	Attendance at trials
16 (8.8%)	Don't know
19 (10.5%)	Other (please specify)

If you selected other, please specify

See Appendix H

21) In your opinion, has the court's policy regarding posting of plea and cooperation agreements been successful in protecting the privacy and security of individuals signing such an agreement?

Yes	64 (35.4%)
No	42 (23.2%)
Don't Know	75 (41.4)

22) You indicated that the court's policy regarding posting of plea and cooperation agreements has not been successful in protecting the privacy and security of individuals signing those agreements. Please explain.

See Appendix I

23) In cases involving cooperation, have you participated in a case that involved any of the following: (please check all that apply)

79 (43.6%) Closing a courtroom
50 (27.6%) Sealing a record in whole
107 (59.1%) Sealing a record in part
58 (32.0%) Sealing the transcript of a hearing in whole (if different from the record)
59 (32.6%) Sealing the transcript of a hearing in part (if different from the record)
62 (34.3%) Sealing docket entries (if different from the record)
51 (28.2%) None of the above

DEMOGRAPHICS
N = 624

***The rest of the questionnaire was answered by all 624 respondents, not just criminal attorneys**

24) In which federal district do you primarily practice? If you practice in more than one, please indicate the one in which you spend the most time.

See Appendix J

25) For how many years have you practiced law?

Mean: 21 years
Range: Minimum of 0 years, Maximum of 50 years
Median: 21 years

26) Which of the following types of clients do you primarily represent in federal court?

243 (38.9%) Plaintiff in a civil case
298 (47.8%) Defendant in a civil case
10 (1.6%) Prosecution in a criminal case
147 (23.6%) Defendant in a criminal case
74 (11.9%) Other (please specify)

If you selected other, please specify

See Appendix K

27) If you have any other comments or suggestions about the privacy rules that have not been covered in this questionnaire, please provide them here:

See Appendix L

A note about the Appendices: All text in the appendices was taken directly from the survey responses and may contain spelling errors or appear incomplete.

Appendix A

Question 3: **Do you have any suggestions for improving the process of redacting private information from transcripts?**

Do you have any suggestions for improving the process of redacting private information from transcripts?

A method to electronicall redact portions of a filed transcript that contains pi info inadvertantly left or subsequently determined to be pi would be helpful.

A reminder during electronic filing that pops up asking the filer to make sure that personal information is redacted would be helpful.

Actually I don't submit transcripts, but your question did not allow me to answer the question in the fashion

Actually, I contend redacting should be prohibited except for matters of national security. Redacting documents and filing under seal does not provide for a democracy because as limits are placed upon the freedom of information, so shall tyrany exists and blossom.

allow "non redaction" in cases where identity is a key issue for defendant (i.e., mistaken identity, alibi, etc.)

Allow the portion of the transcript which is confidential to be sealed

Any information that can potentially lead to the disclosure of "personal identifier" information. As my firm is in the industry of foreclosure, we have access to loan numbers and things of that nature. Disclosure of such information may potentially lead to searches that can reveal information such as social security numbers, birth date, etc. Therefore, we redact this information out of documents as necessary.

As a CJA attorney having 7 days to review transcripts I've never seen before is unrealistic. Fortunately, most attorneys don't include identifying information in testimony anymore.

As counsel appointed in the first instance on appeal in criminal cases, I order transcripts without any clue as to whether they may have private information in them. Furthermore, as I have a statewide practice, it is not feasible for me to go to the courts to read every unredacted transcript. Hence, the redaction duty should be placed on trial counsel who knows first hand what will be in the transcript. Alternatively or additionally, the court reporter, who may be in the best position to catch personal identifiers, should be required to alert counsel to the potential need for redaction.

As part of the the Rule 26(f) conference, the attorneys could agree on a procedure to employ so that the court reporters could automatically redact those items that are pre-determined

At start of depo, establish protocol with reporter so all such info is in bold or italics, etc

At the time the transcript order form is filed, appellate counsel should have to certify that they have reviewed the relevant privacy rule and certify that they have complied with it at the time they file the Joint Appendix.

At times I feel that the government over-redacts. I'm not sure if this is for privacy or a more general "err on the side of caution" rule, but at times, redacted portions of transcripts and other materials have gone over-the-top.

bankruptcy court notices of meeting of creditors, containing debtors' SSN still are mailed to all creditors & parties on debtors schedules - very unprotected dissemination.

be thorough

Because I have not encountered this yet, I would ensure that the PACER system have a prompt that asks whether personal information has been redacted from the filing (it may).

Before a document is allowed to be filed via PACER, the program could utilize a prompt asking the online filer to confirm that all private and confidential information has been redacted, similar to the prompts used by some companies to confirm that a user in fact wants to "reply all" to an e-mail.

cases our agency handled required certain personally identifying info be accessible, per court rules

Consider attention that may need to be given to avoid abuse of the process by using "privacy" concerns to hide wrongdoing.

Courts' web sites should include information regarding the requirements of Rule 5.2 with their information about the electronic filing process. It would also be helpful to have information about the use of proper tools (Acrobat's redaction tool) and the errors made by lawyers who improperly try other methods of redaction.

Create a "redacting tool so that we can redact after the documents are scanned in for CME/CF filing--similar to creating an "earser" function or a "marker" function or any mother function that allows us to highlight and redact the highlighted areas.

Do not include personal identifier information in the transcripts unless requested to do so.

Drivers License Numbers. Tag numbers.

Education about the existence of the Rule. I think many attorneys try to follow the practices set forth in this Rule instinctively, but many are not aware that there is a specific Federal Rule governing the issue.

First, better education of what happens in the Pacer system, and how it may be used outside of intended purposes. Second, communicate the rule to us attorneys so that we learn of the rule rather than later at a seminar, etc.

For what the reporters charge for transcripts, why can they not provide a copy for filing with the identifiers already redacted and a separte copy with complete information for the attorneys?

From now on, I will redact personal identifier information.

have not been involved in redactions

Have not yet posted a transeript. I would redact if required.

Have the court reporter do it! Identify the need for redaction at the time of entry so the court reporter can easily flag it. Have adobe support a redaction function in acrobat so it is fast and easy to redact transcripts and pdfs through adobe. Make redaction everyone's responsibility.

Have the reporter instructed to index such information to make removal easier.
Haven't had to do it yet but would.

Having a program that scans for account numbers and SSNs prior to displaying to stop them from being made public and giving the clerks the power to suspend the filing would be helpful. Once the information is out there, it cannot be retracted from all sources.

having an alert to inform filer right away that there are personal identifier information.

Having some restricted access seems to be working, i.e. restricted access in Social Security suits

I am not certain what you mean by transcripts. If you are referring to court transcripts,they are public documents and I would not recact them.
I am retired

I ask the court reporter in advance to mark the lines where personal information or private information protected by HIPAA, etc. to save the time when designations are required. I also reach agreements with the opposing parties in advance as to what should be redacted.

I believe that the court should send a notice after every evidentiary heraing informing the parties of the opportunity to redact private information.

I cannot recall in my practice filing a transcript with any Court. Were I to do so, however, I would redact from it any personal identifier information and so indicate when uploading the transcript with any Court. In addition to the current reminder to redact that is given to counsel when logging into ECF for filing documents with the US Bankruptcy Court, this same reminder --"Is the Document Redacted to Delete Personal Identification Information?" --could appear at the header of each transaction category (answers, motions, notices, miscellaneous, etc.) as well as each itemized category of documents.

I do not, I have not had an active practice in federal court for some time now.
I don't permit my witnesses (City employees) to provide personal information during depositions.

I don't redact this information because I avoid having the infomation in the transcript. I have not yet had a case in which it was unavoidable. However, if it were, redaction would be more appropos by the Court Reporter, who can scan the transcript a the time of creation for this limited information.

I handle criminal cases. The transcrips are filed by the court reporter or the district court, not by me. Since I don't see them until after they are filed, and I was not trial counsel (I usually handle only appeals), I don't know if there is any personal identifier information in the transcript until I read it -- after it has been filed.

I have no experience with redaction from transcripts - my concern is the over-use of filing under seal that is causing great problems in a case I have.

I have not been involved in a case so far in which it has been necessary to redact anything from a transcript.

I have not filed any documents using Pacer.

I have not had occasion to post dcouments on Pacer containing such information.

I HAVE NOT HAD OCCASION TO POST TRANSCRIPTS ON PACER.

I have not had to do this yet, but will do so if such info is in the portion of a transcript I am efiling

I have not had to redact a transcript, only records being filed with motions or responses.

I have not seen a transcript from any hearing - so far

I haven't had an occasion to do this. I'm not sure how I'm supposed to answer these questions, since there's no block for N/A.

I just started private practice, so I have no experience with redacting personal identifier information from transcripts.

I really don't know what this means. I haven't gotten transcripts from Pacer and have no idea how a party would redact such information. Wouldn't that be up to the court or court reporter?

I really have no experience in dealing with this type of filing.

I represent claimants in Social Security appeals. I redact all personal identifier information from my pleadings. The public does not have access to Social Security files unless they are at the courthouse computers and then they are able to access Social Security files if they know the social security number of the party. These files should all be sealed or people should not be able to access the files unless they are one of the parties or they are representing one of the parties.

I think it should be the attorney's responsibility to comply with the rules and to redact transcript information. Rule 11 will protect opposing parties from abuse and we do not want to remove the value of the transcript from the attorneys who buy them and use them in Court.

I think that no full account numbers should be listed. Nor should full birthdates or social security numbers be listed. These are all things a criminal can use for extensions of credit.

I think that the new reminder for redacted information that requires acknowlegment before Efiling is quite helpful

I think there needs to be a greater awareness among attorneys about it, just as lawyers had been previously unaware of Litigation Hold Letters

I try intellectual propery cases and trascripts are regularly redacted for confidential information but rarely involve personally identifier information. Typicallyy, it is commercial trade secret information.

I try to ask the social security number off the record so I do not have to to worry about redaction.

I would prefer that home addresses in civil cases be provided under oath but off the record. The only purpose for them in the usual case is service of process.

If possible, use the "find" function because reading alone frequently misses some private information or personal identifier information.

I'm not sure the Court can do anything more - but in our office, we use paralegals to handle this, and rely on them to be familiar with the rules.

In bankruptcy, although filings must have Social Security Numbers redacted, nonetheless, the Form B9A, Notice of Bankruptcy Case, that is mailed to creditors does have the full unredacted Social Security Number of the debtor. This has always seemed to me at odds with the purpose of the redaction rules.

In order to log on to Pacer we have to constantly click on the sign in that we know about the rule to redact. Clicking on that block was perhaps necessary the first 100 times. However it has become a nuisance. Also it is impossible to redact the social security number from the statement of social security number that must be filed with the bankruptcy petition. Could someone quit asking us to redact the social security number from the form that asks us what the complete social security number is??? That just seems insane.

Include a reminder on the electronic filing system.

Issue has not come up in any of my cases which tend to be based on administrative records rather than witness testimony

It has never been a big issue.

It is a difficult process and all redactions should be agreed upon by opposing counsel if possible.

it is an arduous process, but I know of no effective way to minimize the burden

It is often difficult to find all the identifiers on exhibits as often the info is not on the header of things like notes, mortgages, security agreements, etc.

It is performed manually. If soft ware were developed that allowed redacting on a .pdf file, it could decrease some of the efforts in now takes to redact from documents.

It is very rare that Social Security numbers are revealed in a transcript.

It would be helpful if we could work with the court reporters to produce and order redacted and non-redacted versions, because defense counsel is often not the party posting the transcript on PACER.

I've abandoned all hope of protecting privacy intersts.

Just an FYI - I am not sure this is a big issue, as it is not my practice to ask such personal identifying information during a deposition (other than during the introduction), which usually is never attached in full for submission to the Court. However, in candor, I am not sure I consciously considered the issue before.

knowledge of the rules as it becomes better known the parties will just know certain information is deemed sealed

Lawyers should not routinely ask witnesses for their social security numbers at depositions.

Make it a rule for court reporters to highlight the personal identifier.

Making sure that all AUSAs and staff consistently follow the redaction procedure. Perhaps, the Civil Chief should review all transcripts before they are filed. Presently, our AUSAs individually are responsible that the redactions occur.

medical or health info should be redacted

More publicity with respect to requirements

Much oersonal information, such as addresses, SSN, Driver's license, phone numbers and the like could be identified by Court Reporters and automatically redacted, or marked by the reporter and suggested. That would make life easier.

My approach, as a litigation attorney, is to limit personal identifier information in depositions to distinguishable parts thereof and I do not include these in filings. When I file a document, as part of a motion for summary judgment, I will try to exclude it whenever possible, or obtain that information from another type of document.

Need to have the rules required of court reporters. Lawyers have so many rules to remember that sometimes certain technical rules are not remembered. To ensure against this - the rule should directly impact the folks who earn a living from getting it right. Ask them to redact the information in the final form.

Never posted a transcript on Pacer before

No experience with redacting from transcripts.

no qualifying experience on this issue

No. The process is easy, as we tend to use the new version of Adobe Professional for our redactions.

No. I am not familiar with the process.

No. My experience is the practice is usually agreed upon with counsel or pursuant to a protective order.

Not so much a suggestion as an important point. Redaction is something that must be considered well in advance of a filing deadline. Often attorneys may run into trouble because they have neglected to consider the redaction rules before the day of the filing. Attorneys should have a system whereby personal identifier or other redactable information is identified well in advance, and the redaction process is accomplished prior to a filing deadline.

OFTEN, THERE ARE PERSONAL ITEMS THAT UST BE LISTED AND MENTIONED IN CORRESPONDENCE THAT ARE EMBARRASING. WHEN I HAD BREAST SURGERY AND REQUESTED AN ADJOURNMENT, I HAD TO STATE THAT I CORRESPONDENCE FOR AN ADJOURNMENT. IS THERE ANY WAY OF AVOIDING THIS? WE ARE ATTORNEYS YET WE ARE ALL HUMAN BEINGS, AND AS FEMALES, WE FACE A GREAT RISK OF BREAST CANCER. MY MOTHER DIED WHEN I WAS THREE YEARS OF AGE (SHE WAS 29) AND SO I AM A TARGET. I OFTEN HAVE TO EXPLAIN THIS IN LETTERS AS I OFTEN HAVE MEDICAL PROBLEMS. BEING A SOLO PRACTITIONER IS EVEN MORE DIFFICULT. HELP IS APPRECIATED AND OFTEN DOES NOT OCCUR. PERHAPS THE SOLUTION IS NOT REQIRING THAT PERSONAL LETTERS CONTAINING SENSITIVE INFORMATION BE PLACED ON THE ECF.

Only that at time of transcript we agree on the redactions.

Paystubs and payroll information could be sent directly to the Trustee rather than posting on computer.

Perhaps allowing (and instructing) court reporters to automatically redact personal identifiers, unless the parties specifically require the information. For example, the default would be to only include the last fourt of social security numbers, account numbers, and the year on dates of birth.

Perhaps each individual judge's rules should remind counsel of this requirement.

Perhaps when an exhibit is attached to a filing, there could be a prompt, that asks whether the document has any personal identifier information that the filer must answer before filing.

Provide attorneys ANNUALLY with a list of all the categories of items, and ask them to eleectronically accept this as a term and condition of PACER use. I had never seen the list of documents before, and had only redacted SSNs on a recent set of exhibits filed in support of SJM. I was up against a deadline and had no ability to go back and redact out all the other things that the disclaimer requested, and had no choice but to file as is. It included first names of minor children listed on leases, which in hindsight, bothers me.

Rather than handling redaction of personal or otherwise protected information during transcript review, it would make sense to have attorneys notify the Court Reporter that the answers to the following for example, two questions might require redaction. So, the transcript can signal areas for the attorneys to focus on during review.

Redact irrelevant personal info.

Redax

Reminder during electronic filing process.

Reminders on PACER that must be noted before filing.

Reporters should be trained to automatically highlight such information for redaction.

Require that personal identifiers be automatically placed into a confidential appendix to the transcript. Allow filing under seal without the need for court approval.

Require the court reporter to notify counsel before a transcript is posted to inquire if there is personal information to be redacted

Seemed to go well

Seems to work OK as is

Sorry I have never had the opportunity to come into contact with anything that may need to be redacted and don't file hardly anything at all in Federal Court

Specific identification as to redaction requirements to allow support personnel to review info. Too broad terms mean lawyer time is required to evaluate

Standardize a notice on page that it need be done per rule so as to minimize mistake of including it.

stop posting filings on PACER

Survey design is defective - you have yes/no/don't know, but not "not applicable" for those of us for whom the need to redact transcripts hasn't arisen.

that information should be included in a separate part of the transcript

The Anglo-American court system is open to the public. As we take steps to close it off we are threatening the basis of public confidence in the process. If transcripts are filed, the whole transcript should be filed.

The attorneys need to become aware of the information they are attempting to elicit and to avoid the personal information if posible. This is difficult if you are challenging the validity of a search warrant where the discription of the house to be searched is at issue.

The biggest help could come from court reporters. Even in the window given for redaction, we are not always able to personally review each line, each word, to feel confident nothing is getting through. If court reporters were to note when personal identifiers were reported, it could really help.

The Court Reporter could redact the information under the rules prior to filing on Pacer. If relevant, the attorney could file a Motion requesting a supplement to the record with the relevant information.

The court reporters should do it before the transcript is filed. Litigants should avoid using this information on the record unnecessarily.

The easier process is simply attempting to be mindful of FRCP 5.2 during the examination. I.e., instead of having a witness state a social security number or bank account number, ask him or her to identify the last four digits. It doesn't come up that often, but it's an easier way to resolve the problem than redaction after the fact.

The majority of information that requires redaction occurs in jury selection and the local district court judges have done a fairly good job of keeping that information out of the record.

The personal information is part of the record. I do not redact as the information is already public record unless the transcript/filings have been sealed.

The process for redacting and under seal filings is such a burden that I try to avoid collecting such information in the first place.

The redaction may pose a problem in terms of if the subject of the redacted material is the focus of the motion. That should be an exception to the redaction rule: i.e., if the subject person or information is considered in good faith to be relevant to the motion or pleading then it does not have to be redacted.

The rules could limit deposition questions which call for private information to a separated portion of the transcript which would be labeled confidential. It would make it possible for the parties to submit most transcripts for lodging or filing without the confidential segment but without a need to redact or to place only the confidential portion under seal.

The transcript should be sent to counsel by E-mail with adequate time to review and redact. Counsel then should be able to forward the redacted transcript to the appropriate parties.

The transcripts I use are from pretrial hearings and trials where the information already has been protected. I do not redact, delete or otherwise alter a transcript

The use of the "black out" in Adobe products should be banned. It often does not work because documents are not secured properly. Rather, redacted documents likely should be printed to paper and scanned as images to insure that the redacted information is not recovered by a simple "undo."

This would be more of a burden for court reporters, but perhaps court reporters could be required to flag obvious personal identifiers (e.g., SSN, address, etc.) when they are transcribing so that there is a presumption that these items will be redacted when posted on PACER.

To the extent PACER filings move toward word-searchable pdf formats, certain key word searches could routinely filter for personal identifier information.

To the extent personal identifier information may be needed to press a legal issue, it can be addressed by filings under seal, which has been my experience.

To the extent possible, I suggest that all parties classify the "typical" personal identifiers (for example SS#'s) and agree that such identifiers do not need to be made part of any court records, but rather be available to parties as needed.

Train Court Reporters to do so ahead of time and provide unredacted pages only for eyes of counsel

Typically do not personally handle it so do not have any information about it.

Unfortunately, Court Reporters are not bound by the rules as are attorneys. Nonetheless, the easiest means of redacting a transcript is to work with a Court Reporter who is familiar with the rules such that he or she can produce an original and a redacted copy of the transcript. Also, having the witness read the transcript (as opposed to waiving signature) with a focus on spotting personal information is important. In the end, the only true means of ensuring proper redaction is for the attorney to read each deposition under an agreement with opposing counsel that personal identifier information will be redacted from the original before any deposition is filed with the Court. Without following at least one of these methods, it is unlikely that an unredacted version of the transcript will be filed.

Use of advanced technology for automatic and expedited, nonmanual redaction

We can only redact if we are willing to pay for the transcript. This doesn't make sense, since we rarely order transcripts.

We do not allow our clients to give their social security numbers on the record in depositions.

We have not actually posted a transcript online, but are aware of the redaction rules.

We try to remove all personal information, for example, names of family members, that is not relevant to the action. Other personal information is provided under seal, if necessary.

When a transcript is scanned and saved in PDF format, the user can use the field tool, to create a field in a solid color without borders. The attorney can then copy that field and paste it over any other item he or she wishes to redact. It is useful, and works quite well. You will need the Adobe Acrobat Professional version; other third party PDF software makers have similar features.

who has the obligation to redact the info???

Yes, do not put it in the transcript to start with and redaction is not an issue

Yes, when the court reported is creating the record, maybe there can be an agreement of parties to redact such information.

Yes. Someone needs to have Adobe Acrobat software capable of applying a color to cover personal information, rather than us blacking it out, then scanning it into a pdf for filing.

Appendix B

Question 5: What reasons were given for noncompliance with the redaction requirements?

Laziness; convenience.

1) Time and effort necessary to remove all of the personal information; and 2) lawyer for client did not care if the confidential information remained on the documents.

1. lack of knowledge of the requirements 2. techncial problems

All my cases concern Erisa Trust Funds and my proof as to what is owed to the Funds on behalf of each employee is Employee pay stubs and Employer remittance reports that I sumbit on Pacer.

burden

Burden of locating and tracking such info.

cases our agency handled required certain personally identifying info be accessible, per court rules

Certain informaiton, motions, etc. filed under seal or otherwise protected. E.g. Presentence Reports, or Objects to PSRs.

concern over redacting an original deposition transcript

Death penalty Habeas case information that is over 10 years old.

Defense counsel needs personal identifiers to effectively find and interview State witnesses

Documents filed in paper formant only.

Failure to consider issue before a posting

From pro se litigants, ignorance. From others, simple oversight.

given the voluminous nature of some documents, sometimes the identifier information may slip by a reviewer and go unredacted.

Human error/oversight.

I don't think the requirements are well known or understood. I would suggest more public information.

I have been told that too much relevant data, pertaining to arguments is lost, if redaction rules are complied with.

I have not made a legal challenge to any redaction rule, but I would if the opportunity presents itself.

I have often seen items designated as confidential and subject to a protective order filed without redactions. The usual reason given is that the filing party does not know how to get the items, often exhibits to a declaration or motion, timely filed without redacting the confidential information.

I think there may be confusion about what references to a juvenile need to be redacted.

I was referring to the exceptions under Rule 9037. I have not been involved where the "exception" has been invoked.

If the information were germain to the case

Ignorance of rules Inadvertance

Ignorance of the rule requiring redaction.

ignorance of the rules

In general, there is a delay in the compliance with rules and, in particular, rules relating to changes in technology. For example, I still see counsel using their initials and social security numbers on papers filed in federal court.

Inadvertent failure to do so.

Lack of awareness.

lack of knowledge

Lack of knowledge. No penalties. No procedure for it/laziness.

Laziness, dependence on the other side

Many lawyers attach unredacted personnel or medical records to filings; I think because they don't take the time to think about the private information that may be disclosed.

Mistake

Mistake

Mistake, editing errors.

More veteran attorneys who are used to not having to redact tend not to redact. Also, it not always clear what information should be redacted.

Not being aware of the rule.

Not willing to pay for transcripts.

Notice is often not given of the opportunity to redact.

Often creditor notifications and demand letters to clients contain several references to account numbers, particularly where the account has been assigned for collection and the collection agency has its own internal number. The inclusion of all of the account information in the bankruptcy schedules assists us in identifying the account when, sometimes months, later we receive an inquiry from a creditor, whereas typing only, say, the last 4 digits might not identify the account or the creditor.

Often there are huge document productions or long depositions where the parties have agreed to a protective order so some personal identifier is not initially redacted; and then at a later time there is a related filing that includes the information.

Poor communication to the Defense Bar about ECF rules.

Prior to the new rules, we did often include dates of birth in filings related to Age Discrimination in Employment Act claims, where age was a key factor.

Problems in identifying particular accounts with multiple accounts in bankruptcy matters

Redaction creates significant problems in benefit plan litigation, in which a great deal of the evidence consists precisely of names, ages, social security numbers and account balances.

Redaction of creditor account numbers makes it difficult to identify and pay creditors in bankruptcy distributions.

See above. It is a rare occurrence when personal identiying information will be asked during a deposition. (It has, however, been done on occasion.)

See answers to previous question.

See my earlier comment box - lack of information about the expectations by the court.

Seizure warrants, for ex, specifically list account info. when filed under seal, redaction isn't necessary, but often they are unsealed or otherwise become part of criminal proceeding w/o involvement of atty involved in preparing warrant. Very difficult to monitor, prepare "public" and "nonpublic" versions,e tc.

Simply forget that the information is contained in the document, which usually results in a subsequent motion to correct the filing.

Sloppy lawyering

Social Security case transcripts would be impossible to redact.

Some attorneys not knowing what is required of them. Also, there may be ambiguities as to what information must be redacted.

Sometimes you may not know the age of a person who turns out to be a minor.

Takes too much time/cost.

The most frequent excuse I hear is simply that someone missed personal information in the course of reviewing and submitting hundreds or thousands of pages.

The only reason I have heard of is inadvertence. Not all lawyers are acclimated to the practice of regularly redacting this information. I wouldn't consider it a valid reason, but it does happen.

The Social Security Administration needs Social Security numbers and dates of birth to remain unredacted to insure that the often voluminous medical reports are kept in order and to insure that the correct information for each claimant/plaintiff is placed in the transcript.

The U.S. District Court for the N.D. of GA wants law firms to include their FEIN number on any proposed financial order authorizing a disbursement of funds on deposit with the Registry of the Court. Some District Courts request an out-of-state attorney disclose his or her home address in its Application to Appear Pro Hac Vice.

They don't accomplish what they are designed to accomplish.

Those responsible for actually preparing and filing matters with the court have not always been aware of the redaction requirements. These seems to be particularly true for attorneys who are not technology savvy and leave filings to their secretaries and other legal assistants, who do not always have the sophistication to recognize information that should be redacted before filing. A second reason for noncompliance that I am aware of has been due to ineffective redactions and a lack of knowledge that some electronic redactions (such as in Word) can easily be undone.

Time constraints.

To keep personal information private so that someone does not steal other's private information and identity.

To review a months worth of transcripts in 7 days to cull identifying information is not enough time.

Too much trouble. Mistakes. SS#, or other information that is being used for other purposes and not indexed that way.

Traditional to supply all relevant information and not yet used to redaction.

Unaware of requirments. Inadvertant disclosures.

Unawareness of the rule. Lack of familiarity with proper redaction tools and techniques.

Unfamiliarity with rules, technical inability or difficulties (including rules against "scanned" versus "published" PDF electronically filed documents, if possible.

UNFAMILIARITY WITH THE REDACTION STATUTE, CUMBERSOMNESS OF REDACTING DEPOSITION TRANSCRIPTS.

We made mistakes early before full understanding of the Rule

Witnesses inadvertently give information in depositions, and lawyers don't catach it.

Appendix C

Question 6: How have those matters been resolved?

1) Call the ECF clerk's office and request that the PACER document be locked. 2) Motion to remove incorrectly filed document. 3) Filing of corrected version.

1) The effort was made to redact the confidential information; and 2) the documents were filed with the confidential information on the documents.

1. education 2. help from office.

Adequately.

Almost invariably, this situation is resolved by calling the situation to the attention of opposing counsel and obtaining leave of court to substitute a redacted page or pages for the originally-filed pages containing personal identifier information.

Bankruptcy claims distributions are sent to creditors without complete account identification.

By a telephone call.

Contacting the clerk and deleting the filing.

Court usually removes file from electronic docket and orders re-filing

Do it anyway.

Documents filed in paper formant only.

filed under seal

Filing large numbers of otherwise public documents under seal, often unnecessarily (e.g. ERISA information returns)

Generally court or counsel remind counsel of requirements. Inadvertant disclosures are generally corrected.

Grabbing the records back from the court as quickly as possible once it is clear that the problems arose.

I do not have a particular instance in mind.

I have not had any matters like this yet.

I have not seen either in any of my cases, but I understand that the documents is pulled from the docket and resubmitted.

I initially try to submit summaries of what is owed that do not contain information regaridng the employee, however, certain Judges insist that I sumbit more proof before the Court will award damages.

I instruct my clients not to provide personal identifying information on the record.

I intend to contact the court to ask whether I can re-submit the exhibits.

Informally between counsel. Most attorneys will discuss and agree to what should be redacted.

it is a constant struggle that requires diligence.

Most courts allow the agency to file our records under seal and in other courts, the transcript can only be viewed by individuals who walk into the courthouse and use the court's computer terminals, which I am told never happens.

Never had an issue.

No

no

Nope.

Not well. The parties involved often elect not to press the issue because that would only draw more attention to the information. It is difficult to interest a district court judge in suvh matters. On a few occasions, when the problem was brought to the attention of opposing counsel, a stipulation and order resolved the matter.

not yet

Our Defender Office tries through email/ annual Seminar to keep the Bar updated.

PDF searches in the hope that nothing is missed.

Prosecutor filed a motion for redaction

see above

See above.

Someone makes the person aware.

Substitute redacted text when necessary.

Such transcripts are not available electronically except to those who physically go to the clerk of court's office.

The obligation in logging on to EM/ECF in some federal districts, that the redaction requirements be explicitly acknowledged, may have had some impact - but I am skeptical. I don't think these matters have been resolved. And I think among attorneys who have limited in-house technology support, the fact that electronic redaction (that has not been "flattened") can be undone is beyond their konwledge and so the problem continues.

They have not.

Try to avoid collecting such info in first place.

Try to have more than one person read over a document to ensure the redaction was complete.

Typically the lawyer will file a substituted filing with redactions, and ask the court to strike/delete the offending pleading.

Unfortunately, they have become missed opportunties.

Usually a request is made to US Attorney. In the alternative a motion must be filed

Usually, left it in

We simply include the FEIN in the disbursement order. Socials are not used. The money goes to the law firms for subsequent client disbursement. As for the pro hac vice matter, I simply comply.

Where a debt on an account is sought to be discharged in bankruptcy, typing the entire number allows the creditor to identify that its particular account has been included when it accesses the Court-filed documents. We favor the inclusion of the full account number -- not bank account numbers, but such numbers as credit card accounts.

Without penalties being assessed by the courts, litigation has been the only way to resolve these matters. At least one organization has made a greater effort to fix the problem once informed of it.

Yes

yes

yes

yes

Yes b/c I never submit information with private information.

Yes, attorneys have become exceedingly adept at coming up with creative ways to overcome this. Most recently, the exparte and selected parties options in ECF filing have also been useful.

Yes, simply by education

Yes, with the new rules, we have limited it to either the year of birth only or included the age (i.e., X years old) instead of using a date of birth.

Yes.

Appendix D

Question 8: Please describe the measures you've taken to ensure that personal identifier information is not raised unnecessarily.

We have received direction from our Defender raising these issues.

Adjust phrasing of questions, and agreement off record not to include that information

advise reporter
Advise witness not to reveal PII.

Again during jury selection making sure that personal identifiers are not put on the record

agree with attorney to provide information in paper form

Agree with counsel and court reporter before the deposition for redaction of inadvertently used ID.

Agree with counsel beforehand that we will not state such PII in our oral arugument/questioning; agreed to leave it out of some pleadings.

Agree with opposing counsel that the witness may provide the information off the record and that the parties will not file it unless necessary and pursuant to applicable rule, agreement, or order.

agreed to protective order to limit disclosure
Agreed to provide certain information about witnesses (addresses) off the record rather than have counsel ask for information in deposition.

AGREED TO REDACTION OF DOCUMENTS, AND ATTORNEY EYES ONLY RESTRICTIONS ON DOCUMENTS

Agreement among the parties beforehand to redact those items.

Agreement of counsel that information will be provided in some other manner as needed

agreement to not disclose the information
Agreement with counsel opposite as game rules for depositions are discussed.
Agreement with counsel that personal identifiers will not be used in open court. I have almost never had a problem with this issue.

Agreement with counsel to provide personal identifying information off the record

agreement with opposing counsel not to reference such information on record

agreement with opposing counsel to refer to social security number by last four digits only.

Agreements made during depositions to exclude identifying numbers.
Agreements with opposing counsel
Agreements with opposing counsel in advance.
always recite that this an account ending in 4 digits, never indentify the entire account, I don't ask about SSN unless there is a discrepancy

As before, we sometimes use age (i.e. X years old) instead of an exact DOB. For minors, we have also agreed to a generic system (like Minor A, Minor B) instead of using names.

As one example, I alerted a pro se plaintiff that the complaint he filed against the FDIC contained his Social Security Number. Because he was not registered to file ECF pleadings, I filed a motion on behalf of the parties to have his pleading removed from the ECF docket and replaced with one that redacted his SSN.

As previously stated, I first try to submit a summary of the amount owed without giving detail as to each employee, but sometimes, I have no choice.

Ask that if social security numbers are needed that only the last 4 digits be given as an answer.

Ask the plaintiff to provide this information pursuant to a protective order

asked opposing counsel to accept sensitive information off the record and state agreement on the record.

at court direction referred to child by initials

At trial I do not read or have read any portion of a transcript that contains PII.

Attempt not to raise those issues in proceedings unless absolutely necessary

Attempt not to use documents in open court containing such information.

Avoid asking those questions.

avoid questions or references to personal identifier information unless absolutely relevant.

Avoid using proper names at hearings, effectively use "code" language for the sensitive information, tell the court in advance at sidebar or in chambers what will not be said in open court

Avoid using such information in briefs or motions. (I'm an appellate lawyer so don't have much experience in district court proceedings.)

Be aware in direct examinations not to ask those questions converning personal identifiers.

Be selective in use of exhibits so as not to unnecessarily raise personal identifier information

Be selective in what is included in the appendix.

Because of my general awareness of the rulings, I try ensure that such information is raised only when absolutely necessary.

Besdies redacting the exhibits, we try to insure there are no questions asked on that subject but some times it cannot be avoided such as when a debtor or defendant denies execution or that they are the proper party.

Blackened specific account numbers, also in bky court we file a separate sheet with the social security full number on it, and on the public pleadings only list last 4 digits. In family law we have "sealed" pleadings to keep personal information from being public information.

By reaching an agreement with my adversary before the proceeding that we will not use personal identifier information because it is not necessary.

By redacting information from exhibits

By stipulation with the government, the protected information is shielded and withheld from display to the jury.

by working with opposing counsel and the court in fashioning orders and providing only necessary information. While most litigants want full disclosure there is usually cooperation when it comes to privacy protection for the parties.

Caution all in the firm to be sensitive to this issue

Defendants produce the documentary information with the identifier information replaced by a letter (e.g. person "A") or some other similar method so that plaintiff's counsel can cross-reference different documents or information relating to one individual without disclosure of the identity of the individual.

Discussed it with adversary counsel informally. Entered into stipulations and confidentiality agreements.

Discussed the issue with opposing counsel and have explained to the Court the resulting agreement.

discussion with counsel/court before proceeding

Discussion with opposing counsel and off line exchange of whatever personal info is required but need or should not be in a transcript.

Do not ask personal identification questions in depositions or allow clients to answer those questions in a deposition.

Do not seek Social Security information by examinations on record.

Documents filed in paper format only and under seal.

Documents get redacted before production (with consent of opposing parties), therefore no problems with regard to subsequent use.

Don't ask a witness unnecessary personal identification questions at the start of a deposition.

Don't ask, don't tell.

Don't mention personal information. Don't make it part of the unsealed record.

Drawn the issue to the attention of the court when others seemingly file documents without following the rule.

During a child porn case, information about a previous child molestation case from the state system was discussed. I endeavored not to say the child's name during questioning of the witness so that redaction would not be an issue.

During depositions, I have asked that portions of the transcript be sealed. Unfortunately, that doesn't always happen. Also, even with the best of intentions (e.g., refer to minor as "RS")during the deposition lawyers and witnesses invariably forget and refer to Robert Stone. Although we should go through the transcript and search out those mis-steps, as a practical matter, the attorneys often overlook that and file pleadings with unredacted information.

During depositions, I have objected to client offering their full social security number on the record, as opposed to simply the last for digits.

During depositions, information such as social security numbers can be given off the record so that counsel can conduct an investigation of the witness without disclosing the social security number.

During the initial Rule 26 conference we typically address such issues and develop protocols for addressing the issues prior to the deposition phase of the lawsuit. We also employ protective orders to protect senstive information.

Electronic filing sites remind of the need to redact, so I of course attempt to do so in pleadings, briefs.

Established internal office procedures requiring personnel filing documents to scan and redact personal information unless necessary to the issue in dispute.

Fashion witness questions to cause personal identifier information not to be stated in the answers

File under seal.

filed under seal

Filing pleadings under seal, holding conferences off the record.

filings under seal

For example, ask the witness to verify only the last four digits of a social security number, or only part of an account number.

For example, when asking a witness where they live specifying just the city and state and not their address. Objecting to questions that call for personal information and specifying that the witness should only have to provide for example, her city and state for her address.

for sentencing hearings, I have scanned medical/mental health records into pdf format and then put on a disc. I then file a motion requesting that these records be sealed and/or protected and state in the motion that I will be manually filing the records. I then mail copy with motion to U.S. Attorney and deliver the disc containing the scanned documents to the clerk's office pending the judge's ruling on my motion.

For transcripts, oftentimes there's no reason to have a witness state anything on the record that's subject to FRCP 5.2(a). If it is, then have the witness identify only the last four digits, year of birth only, etc.

Generally do not ask personal information questions unless necessary.

Generally, I avod asking for personal identifier information. It is rarely relevant in the types of cases I try.

Go off record when private info asked

go off the record at depos

go off the record in deposition when supplying social security numbers

gone off the record

Health issues, especially HIV, are always a problem. While it is important to inform the BOP, I limit any mention of these type of issues to keep them out of the record. As to personal identifiers, I never incorporate them in any filings.

I am careful to exclude personal identifier information in all public filings. I often use other non-personal identification techniques to ensure that the parties understand the information necessary for the litigation.

I am sensitive to privacy issues, so I automatically notice such things when reviewing documents.

I ask the questions off the record.

I avoid putting personal information on the record when examining a witness or offering an exhibit.

I avoid quesetions that would elicit such information unless absolutely essential

I do not ask for it and object when it is requested. Along with opposing counsel, we make sure that the redacted version of documents is all that is submitted into the record.

I do not ask of my witness or client any personal identifying information if it is not necessary.

I do not ask some of the questions that I would have asked prior to the change in the rules. Counsel periodically has agreed to a separate confidential transcript (portions)

i do not mention names of children in court or any of the prohibited info

I do not put personal identifier information in the pleadings and other documents I file, and have instructed my assistant, who handles our e-filing, to comply with redaction requirements of the court.

I do not refer to personal identification information on the record.

I do not use any personal identifier information in my pleadings.

I do not use the SSN in filings. When opposing counsel needs the information, I give it to his office on the telephone.

I don't ask (or permit witnesses to provide) personal identifer information "on the record."

I don't ask about social security numbers.

I don't ask for precise addresses.

I don't ask for such information on the record unless I believe it is directly relevant.

I don't ask for the witness' birthdate or social security number if I can avoid it reasonably, even though that information is sometimes very necessary.

I don't ask witnesses to give social security numbers, dates of birth, or addresses anymore unless the information is required for the case.

I don't mention the information unless it is absolutely necessary, which in my practice area is seldom.

I generally object to providing personal information, such as social security numbers, unnecessarily in a deposition or at trial.

I generally object to such inquires

I generally refrain, unless absolutely necessary to the case, to avoid such inquiries.

I get counsel's consent or a protective order.

I have asked the Government not to unnecessarily introduce such information at a sentencing or other hearing (i.e., if such information is contained in a document but that information is not relevant to the point being litigated, it should be redacted or omitted); I have indicated to the Court that I will avoid, and would like the Government to avoid, making reference to such information, so we don't use it casually.

I have discussed same with opposing counsel at depositions, often with a high degree of cooperation to omit the question

I have discussed the issue with opposing counsel prior to a hearing/trial and entered into stipulations and/or agreements not to reference such information.

I have objected in depositions to questions that call for such information on the ground that it is covered by the privacy rules and subject to redaction and that the information should not be sought in the first place, particularly where it appears unlikely to lead to admissible evidence. Depending on the intrusiveness of the questoning, if counsel has refused to withdraw questions seeking such information I have instructed a witness not to answer and stated that I will be seeking a protective order regarding those particular questions. I have also had witnesses in deposition refuse to answer questions because of the concern about personal identifier information (relating to identity theft as well as privacy concerns), without any instruction from me, placing upon the questioning attorney the need to move to compel answers to such questions. It would be helpful if there were rules that changed the burden in deposition and discovery and allowed a witness not to answer such questions without a demonstrated basis for it. Often the reason that the information is requested is to then have investigative background reports performed on witnesses which in turn implicate the Fair Credit Reporting Act and likely non-compliance with the notice provisions of that Act, further interfering with the privacy rights of individuals involved in litigation.

I have objected to the Government's filing of stipulations or other exhibits on the record without such redaction or have moved for their exhibits to be sealed. I have found U.S. Attorneys to be insensitive in this area with regard to criminal defendants.

I have occasionally referred to individuals by initials, or just referred to their titles, or descriptive information, to avoid using names.

I have raised the issue with opposing counsel and we have agreed to provide and to stipulate to the accuracy of such information outside of a deposition or in someplace other than a sworn pleading.

I have reached agreements with opposing counsel that personal identifier information will be redacted in the production process.

I have stipulated with opposing counsel that documents caontainig this information be produced in redacted form so no further precautions are necessary. I avoid issuing discovery that requires the production of such marginally relevant information, if possible.

I have used the initials of a juvenile and described the juvenile based on the juvenile's relationship to the witness or other known adult.

I instruct my clients not to provide personal identifying information on the record.

I instruct my deposition witnesses not to give SS#s and do not request it from others.

I just don't ask and object when the opposition does

I just try to make sure that it is not mentioned.

I never ask for Social Security numbers an allow the opposition to withhold or redact them. I don't disclose home addresses and telephon enumbers except when local rules require or they are relevant to a claim or defense.

I no longer include identifier information in requests for records and subpoenas to third parties (Medical providers, etc.)

I object and instruct my client not to answer if the personal information is not relevant. If the information is relevant we have the record reflect all "X"s or simply go off the record completely before providing the information to counsel.

I object and instruct the attorney or witness not to answer or question. So far I have been able to catch it before the information was spoken.

I object in depositions to providing any such information on the record of the deposition and instruct witnesses not to answer the question. I do not ask for such information unless it is directly and materially relevant to the case (a very rare occurrence).

I personnally review all exhibits and pleadings being filed in any case I'm involved in to ensure proper redaction, and I have done in-house training on the need for redaction.

I refrain from asking questions which would elicit personal identified information.

I require confidentiality agreements and protective orders regarding personal, private and medical information.

I seek protective orders from the court if I require sensitive personal information.

I specifically request the witness not to verbally state the specific personal identifier information.

I try not to put anything in a record that does not have to be there. Of course, in depositions, etc. I want all the protected information. Staff will be alerted again at the next staff meeting.

I try to avoid eliciting personal identifying information in transcripts whenever possible.

I try to structure questions so the private information is not included int he transscript

I used initials and partial addresses.

I usually have prior agreements with opposing counsel, whether through protective orders or otherwise, that would address the use of such confidential information.

I will not allow my client to say his social security number on the record.

I will not verbally state the information during a deposition, instead I will point to the information and ask the witnes if it is correct. That way the SS#, etc. does not appear in the transcript.

Identification of children by initials; identification of bank account information and social security idenitification by last 4 digits only;

If it's not relevant to anything, don't bring it up. If it is, I usually have an agreed protective order entered.

If requested at deposition, we have provided the information off the record.

If the information is not pertinent to the issue at hand, and I have the information in another admissible form, there is no need to inquire about it, thereby obviating the need to redact it later.

I'm very careful not to include information that is unnecessary

In addition to using confidentiality agreements and protective orders, we have made an effort to redact personal identifier information from discovery, so that as documents are included in motion papers the information is not inadvertently made public.

In at least one case, the real names of witnesses were not used in the transcript.

In cases where I anticipate a concern, I seek a protective order. That said, there is still a lack of information about how documents are to be filed in PACER when they are under seal.

In defending depositions of federal employees, I typically make a statement regarding personal i.d. info and Privacy Act sensitive information at the outset, and state an objection when personal and protected information is sought.

In deposition testimony, I have not asked personal identifier information and have had it written down on a separate sheet of paper.

In deposition, instruct the witness not to answer

In depositions, pi information needed from the deponent is given off the record.

In depositions, we go off record when dealing with names of minor children. In depositions, I instruct my client not to answer when asked their SS#; For interrogatories, when opposing counsel asks for personal identifying information, we only list the last four digits of the social security number and the year a a person was born.

In exhibits that contain confidential and personal identifier information, my office redacts the information prior to submitting the exhibit at trial.

In our practice regarding individuals with disabilities, we often refer to individuals by first name and last initial to preserve their privacy.

In suppression hearings, the address can be referred to by street without the precise address.

In the work that I do, rarely is personal identifier information needed. We take great measures not to include unnecessary information in our filings. Tax returns etc are usually filed under seal.

included info in a separate document

indicate in a deposition that that portion is deemed confidential --essentially a stipulation to a protective order regarding the confidential information

Instruct associates to avoid collecting such unless absolutely necessary.

Instruct witness in deposition not to give social security number.

Instructed associates and witnesses to avoid disclosure. Object to a question that may lead to disclosure

Instructed clients not to answer questions about social security numbers and offering to provide it to opposing counsel if it becomes relevant.

Instructed witnesses not to provide SSN's when requested.

It is just a matter of thinking ahead of time what information is actually needed and then tailoring questions accordingly.

It is my normal practice to discuss this issue with opposing counsel very soon in the litigation, and to come up with a procedure to deal with personal identifier information.

Just do't ask

Limit questions to name and address.

limiting information to what is essential to the litigation; objection to private information where appropriate; allowing the court to rule where the issue is contested.

Made an agreement with all parties that such information is not essential to the formal record. If that fails approach the court for an order.

Made an in firm presentation to attorneys and staff directing compliance with the rules and to use abbreviations whenever possible.

made staff aware of the need to redact

Mainly it is a matter of being aware of the problem.

Meet and confer with opposing counsel in the hope of obtaining an agreement regarding lodging documents under seal.

Motion in Liminie. Refer to witness by number rather than name

Motions to preclude the introduction or discussion of certain medical records prior to the hearing.

Never ask for it; object to opposing counsel's questions

no experience on this issue

No such information is requested during discovery

Not ask questions that lead to such information but do not lead to relevant information

Not asking for witnesses' Social Security Number or date of birth in depositions.

Not asking unnecessary questions during deposition / trial.

Not mention personal identifiers unless absolutely necessary. To date, I have not consciously had to do this, since I have yet had personal identifiers be a contested issue.

Not reading into a transcript, blacking out ss numbers,etc

Not to use information unless necessary

Notifying the court at a side bar or prior to the hearing that I wlll delete address of witness or names of minor(s) in my examination.

Object and ask that the information, if given, be sealed or redacted in the transcript at that time.

object or strike references, go off the record

Object to question asking that information. This has prevent the information from being made part of the record.

Object to such info at deposition

Objected to questions in depositions and specifically referred to initials of minors, etc. in hearings.

Objected to the question where social security numbers or similar information was asked where it had no relationship whatsoever to the subject matter of the case and could not lead to discoverable information.

Objections raised

Off record discussions

Office policy - Staff understands they must review all documents prior to filing with the Court to look for such personal id. information.

Off-record discussion

omitted the personal identification information and replaced with other descriptive information to assure proper identification

Only ask for or allow last four digits of Socal Security number to be identified in transcript.

Other than a name, which is normally part of an indictment, I never file anything with persaonal information, unless I first attempt to have it sealed.

paralegal review prior to filing

Paralegals review documents to be produced with an eye toward locating personal information that should be redacted.

Per protective orders, we designate the relevant portions of the transcript as "Confidential" or "Attorneys'Eyes Only".

Personal identifier information is rarely relevant or useful in my cases, so I don't ask for it unless it is needed.

Pre-hearing conference with opposing counsel, personal and staff review of documentation, review index to deposition transcript.

Prepare witnesses so that they do not include such information in answers unless expressly called for.

Prior agreement by parties to exclude certain unnecessary topics

produced redacted documents, so such information is not identified in the proceeding.

proffer documents form the court's examination instead of reading information on the record.

Proposed protective orders.

Protective orders or stipulations to seal portions of transcripts where personal identifier information must be disclosed. Avoid disclosure if not necessary, by agreement with adverse counsel and court.

Protective Orders requiring filing certain materials under seal

Protective orders.

Rarely an issue in my practice.

reach agreement with opposing counsel; object based on the rules and confidentiality

Reach an agreement with counsel to provide information off the record.

Redact before offered in evidence.

Redact documents containing such information before producing them in discovery or using them as a deposition exhibit.

Redact exhibits in advance. Read identifiers by using x's in place of numbers. Read indentifiers using for example the last 4 digits of a social security number.

redact information from the document prior to introduction, by stipulation of parties.

Redact or black out confidential information on documents attached to pleadings. Making sure not to publish or reference confidential information.

redact personal identifying info from certain discovery items

Redact.

redacted when required

Redacting the information and filing directly with the court.

redacting the information before it is offered in exhibits

Redaction of such information from documents before production in discovery.

referring only to the last 4 digits of SSN and asking other counsel to do the same

referring to children as "Jane Doe" etc.; advising my clients to be sure to just give year of birth in response to that question rather than giving full DOB

Referring to minor by initials, making sure Social Security numbers and DOBs are removed from any documents

Refrain from asking personal questions at deposition, e.g. home addresses in a business case.

Refrain from asking questions that require that information unless it is necessary for the case

remove ss nos.

Request permission to file information under seal.

Request the court to redact personal identify information from documets submitted at sentencing.

Request to the Court

Requested sealed hearings and/or filed sealed motions.

resist providing that information at all

review all exhibits for personal information before filing. didn't do that until the new rules and requirements were publicized

review and redact evidence or other documents prior to filing or a court hearing

review attachments for any social security information and redacted

screening of information

search for and redat same before producing or filing docs

Selecting only relevant portions of a transcript

Self-censorship in pleadings and at hearings, using initials, pseudonyms, etc. At times, I have omitted giving illustrations and examples to avoid referring to redacted information or the contents of sealed documents.

Simply intra-office discussion with attys and staff

Simply notifying the court and counsel of a potential concern in advance and clarifying the issue early in any proceeding

simply refrain from mentioning that information

SS numbers are redacted. The only federal court proceedings in which I am involved are Chapter 7 Bankruptcies. Other than names and addresses, which are required in BR Pleadings, the only other "identifier" is SS numbers. I hope this is responsive.

stipulating or agreeing with counsel to make only general reference in the record to a private or secure document that contains the identifiers

Submitting declaration instead of providing document as exhibit. This is only practical in limited circumstances.

The avoidance of questions that solicit such information and instead the exchange of such information in written form.

these issues are not inquired about

Think about the questions that are asked. Don't ask questions that unnecessarily require personal information. Stipulate to the existance of facts to avoid putting that information on the record. Actually read over the evidence admissions BEFORE the trial for personal information unnecessary to the case. Redact a copy of all documents when received and securely store the unredacted document with destruction date as soon as possible.

To the extent personal identifier information is not relevant to the dispute I generally agree that it need not be provided on the record and attempt to get the same concession from the other side.

to the extent unnecessary, it is not included in court filings

Trained my staff and provided notice to the court reporter.

Tried to avoid those topics unless absolutly called for.

Try to avoid having to use documents containing the information.

try to only ask for last for digits of account numbers

Urged our attorneys not to use this information if it is not necessary.

use astericks instead if full id numbers

Use just the appropriate last 4 digits.

Use of white out prior to efiling or document production.

Use only last 4 digits of account numbers, social security numbers, etc. do not use names of children is papers filed

Use the last four digits of social security numbers only.

Used last four of social security number or initials of minor.

Used redactions on exhibits, placed portions of transcripts under seal.

We advise all employees not to orally convey or write such information on documentsthat would become subject to public record. Therefore, the need for redaction will be minimal on transcripts where such policy is adhered with.

We ask clients to not provide social security numbers during depositions. We redact all personal identifying information from medical records before offering them into evidence.

We don't ask questions that reveal residence address, for example, and we try to redact that information from documents prior to introduction.

We have had numerous hearings where bank acount numbers, Social Security numbers, or minors were involved. Before trial, by motion or otherwise, we file with the court that we are going to use appropriate initials or digits necessary regarding the evidence.

We have taken steps to keep PII out of deposition transcripts. If we have the PII from another source we don't put it in the transcript.

We make sure our clients do not provided such information on the record. We will give it to opposing cousel but not on the record.

We redact documents during discovery, before they are produced.

We redact persoanl identifier information from all stored documents that are accessible by anyone either through online access to pleadings or on our bankruptcy information websites.

We routinely try to redact private personal information in exhibits filed with pleadings.

We try to avoid revealing social security number. One time we could not avoid it and the court sealed the records and we had to make a motion to obtain access.

when drfating a document, try to work around the need for such identification where possible.

When filing sentencing memoranda, I try to avoid the personal indentifier info and relate to the court that I have omitted the personal identifier info at the hearing.

When I am in a procedure I will try to stipulate matters and include them in materials that the judge or jury may review without going into the specifics for the record.

When I anticipate that private informaion might be divulged by a witness, etc., I caution the witness to not dicvulgwee such information.

When using documents with personal identification information, I generally do not read into the record the personal identification information.

When, during deposition, an opposing party asks my client his or her social security number, I object and promise to provide it in a disclosure.

Whenever possible, I simply control the questions I ask a witness so that the answer does not involve a disclosure of such information. This is easier in a civil case then a criminal case.

white out personal indetifier information from exhibits that are attached to pleadings filed with the court

Within this office, we attempt to screen for such information, redacting it in advance.

You simply don't ask the offending question. If the information is material, get it out once and then refer to it by a shortened form from then on.

Appendix E

Question 10 (Other): What types of information currently in the files should be redacted (Other: Text)

address, social security numbers, phone numbers and EINs
addresses

addresses, names and other information that is unnecessary to the case.

all information in asylum hearings
any other information provided at detention hearings
Any personal information of federal law enforcement officers.
any social security or military id numbers

any statement alluding to cooperation with the government in a criminal case.

Anything that could be reverse engineered to locate people or assets via a public internet search.

attorney cell phone number
auto insurance ##, tax preparer TIDNs, bank acct ##, birth dates,
citizenship and place of birth

Confidential business information, such as formulas, pricing, agreement terms etc.

content of confidential information conveyed to the court
cooperation of defendnt
credit and banking account record information
employment records
full birth dates, full account numbers for credit cards, etc.
home address
Home addresses
Home addresses except where necessary

in 1983 cases, home addresses and phone numbers of defendant police officers

juvenile offenses
Medical information
minors, peer review
Mother's Maiden Name
names of minors and SSN
Names or Minors
non-relevant personal information
Parents' names
personal telephone numbers
Phone numbers and addresses

Photographs (In situations where identity must be protected)
Photos associated with any of the above, cell phone numbers
PSR and BOP Reports
residential address

Sensitive personal health information (diagnoses and certain conditions)

Soc Sec #
Soc security no
Social Security number
Social Security Number
Social Security Number and bank account number
Social Security number, address, phone number
Social Security Numbers
Social Security Numbers
ss number
SSN
SSN
SSN and credit card numbers
telephone and email identification

Appendix F

Question 16: Please note which categories should be deleted from the current list of documents excluded from the public case file, and explain why you think the information should be included in the file.

Statements of reasons in the judgment of conviction. This is a matter that occurred in open court. The public ought to have it to review the exercise of the court's discretion in sentencing

Pretrial bail or presentence investigation reports Statements of reasons in the judgment of conviction

Statements of reasons in the judgment of conviction

Unexecuted summons or warrants of any kind Pretrial bail or presentence investigation reports Statements of reasons in the judgment of conviction Documents containing identifying information about jurors or potential jurors Financial affidavits filed in seeking representation pursuant to CJA

ALL

All of the categories should be public record, unless national security were to be at issue. The reason for my suggestion for a broad disclosure policy is that Democracy is at stake when the public is denied access to information.

All sentencing memorandums.

Any matter having to do with any kind of cooperation. These documents should not have to be sealed. They should be kept separately from general criminal case files. Period.

Because the district court is obligated to give reasons for its sentencing, it makes no sense to categorically exclude from the record the judge's statement of reasons, which is almost always pro forma any way. It should be no more subject to exclusion than the sentencing transcripts, and unless the the latter is sealed, the former should not be sealed.

Except in those cases where there is a motion to seal; the Statement of Reasons in the judgment of conviction should be made available to the public. Since the conviction itself is a public record, it does not make much sense to argue that the convicted individual has a privacy interest to protect. Of course a different argument can be made in the case where one cooperated with the government, but even in those instances there is little secret regarding anyone's status during the trial. Finally, it would do away with the requirement to file a motion to unseal the document when preparing the Joint Appendix for the Appellate Brief.

Exhibits attached to motions such as police reports, mental or medical report,or other infortion that is otherwise covered by privacy laws.

Financial affidavits filed in seeking representation pursuant to CJA Why conceal all the information contained in these affidavit? Some should be excluded from public review (the personal identifier information), but some of it shouldn't.

I think the presumption should be that none of these documents should be shielded. Transparency if very important to our societal goals.

Juror documents

My beef concerns sealed documents. At present a PACER docket does not list sealed documents. That is appropriate for the general public. However, I am appellate counsel in a case where about half of all documents were sealed. I am having an awful time getting just the docket listings for documents relating to my own client and for co-defendants. For example, although my client pled guilty and was sentenced, there were no docket entries for those events. I need those transcripts for an appeal. What else is there that I don not know about? After months of litigation the judge gave me the docket listing for my client, but he still won't give me docket listings for the co-defendants. What they are trying to hide is that certain co-defendants cooperated with the government - a fact my client already knows perfectly well because they testified against him in open court at his sentencing. Yet to protect against disclosure of this already-known fact they will not let me even see docket entries relating to co-defendants - without making any individualized item-by-item determination that they would have any harmful effect. This leaves me half-blind as an appellate attorney, but the judge seems not to care in the least, and seems actually to be amused by my situation.

Presentence investigation reports may be the most important document in a case file. Disclosure of the report would help explain how a judge arrived at a sentencing decision in a particular case.

Pretrial bail or presentence investigation reports Statements of reasons in the judgment of conviction

Prior criminal records because they are not always correct and potential employers may access the incorrect or incomplete records.

Sealed documents-when the reason for the sealing is past.

Sentencing position pleadings and motions for downward departure

Statement of Reasins in the Judgment of Conviction

Statement of reasons for conviction

statement of reasons for judgment of conviction should be kept confidential only when it reveals a defendant's cooperation; much of the information in a pretrial bail or presentence investigation report is found in public records -- more selective exclusion would be more difficult to accomplish but would make more sense if your goal is to have as open a file as possible

Statement of reasons in judgement of convictions

Statement of reasons in judgment of conviction

Statement of reasons in te judgement. If it is a reason for a judgement it should be public.

statement of reasons in the judgment

Statement of reasons in the judgment of conviction contains information of benefit to the public

Statement of resaons in the judgment of conviction and, possibly, pretrial bail or presentence investigative reports (if it could be limited to the parties only)

Statements of reasons

Statements of reasons in J&C. I have never read a statement of reasons, in over 200 cases, containing protected information

Statements of reasons in judgments- The rationale for imposing a sentence should be accessible to the general public. Persons interested in the basis for a sentence should be able to glean into the court's reasoning. Sometimes the reasoning can serve to protect the general public and other times it may act as a deterrent.

Statements of reasons in the judgment of conviction

Statements of reasons in the judgment of conviction Documents containing identifying information about jurors or potential jurors

Statements or reasons in the judgement of conviction. Presentence investigation reports. To the extent we have a system in which similar people are treated similarly we need to know why judges impose the sentences they impose. For that we need to know what the presentence investigation shows and why the judge followed or departed from it.

The statement of reasons should include information concerning the court's rationale for the sentence imposed, especially in the wake of the Supreme Court's decision in United States v. Booker. Sealing a SOR where the defendant co-operated could be done on a case-by-case basis.

Unexecuted summons or arrest warrants should not be deleted in co-defendant cases.

Unexecuted summons or warrants of any kind Statements of reasons in the judgment of conviction Ex parte requests for authorization of investigative, expert or other services under the CJA

Unexecuted summons, juvenile records, records with identifying informatino about jurors, sealed documents: all for the reason that the potential harms significantly outweigh the potential rewards for maintenance of those documents in the public file.

unexecuted warrants - can be helpful in assisting potential clients with pending cases - to determine what charged with, etc.

Appendix G

Question 18: Please describe those categories of materials that should not be included in the public case file, and explain why they should not be included.

Pretrial bail or presentence investigation reports Statements of reasons in the judgment of conviction THESE ITEMS ARE HELPFUL TO THE DEFENDANT AND POST CONVICTION RELIEF COUNSEL IN PREPARING PCR AND HABEUS MATTERS

ALL

all defense sentencing documents

All sentencing memorandums.

any filings by CJA counsel for payment that would reflect pedigree information about the attorney

any information pertaining to or suggesting witness i.d. or addresses; personal info or addresses of arresting agents. Certain of the list should, however, be available to attorneys not yet of record, with defendant's waiver

Any informational letters re: the accused or witnesses.

Any statement by the Defendant or the Government that a Defendant has debriefed, or voluntarily interviewed with the Government. This type of information not only subjects the Defendant, but also his/her innocent family members to retribution from violent criminals. In addition to the danger to the Defendants and their families, there are law enforcement concerns as well. Ongoing investigations could easily be rendered ineffective if the target of any investigation is made aware that the investigation is proceeding and who those witnesses are. In my practice, if I did not feel secure that information concerning my client's de-briefings was to remain private I would strongly suggest that they no cooperate with the government. I feel like many other Defense attorneys would do the same. Law enforcement agencies would lose a tremendous source of information. This is especially true when dealing with cases involving violent Mexican Drug Cartels. Defendants are usually willing to meet with the government under the understanding that there meetings are confidential. Drug Cartel cases always carry with them a risk of death and violence directed at keeping Defendants form de-briefing with the Government.

Anything pertaining to a defendant's medical or mental health records or condition.

CJA Payment Vouchers

Cooperation plea agreements

Defendant's family personal information

Exhibit attached to motions or in support of motions that are either police reports or medical or mental health records, or other types of records normally covered by privacy laws.

exhibits that are not redacted or filed under seal

government's motion for downward departure are sealed but the name of the motion appears on the docket sheet in pacer

Motion to withdraw as counsel could contain privileged information

Motions for reductions in sentence due to substantial assistance. Avoid retaliation from busybodies who hate snitches

motions requesting review of detention orders or reduction of bail.

Names and addresses of co-signers on release bonds

Notes made by law enforcement officers should be made public to enable the people to know and assess the credibility of matters related by law enforcement. The notes made by court reporters should be filed and made available to the public for viewing to allow the public to assess the accuracy of transcripts. The transcripts of grand jury proceedings really need to be made public so people may learn who is alleging what and to enable the public to make an informed assessment of the inegrity of the grand jury system, and to deter the abusive use of power.

Objections to the presentence investigation report. These reveal the contents of the report, which is sealed.

Plea agreements subject to 5K provisions.

plea agreements that contain language regarding cooperation of the defendant.

Plea agreements with cooperation language, or at least those parts of the agreement.

Pretrial Service Reports, Financial Affidavits, ex parte motions

sentencing memorandums which frequently give information about defendants and their respective families, including medical/mental health history

Sentencing pleadings

Something needs to be done with plea agreements that spend pages on the defendant's cooperation. Filing them under seal does not help, because it only alerts the outside that the defendant (probably) cooperated. The default would be to file all plea agreements under seal, but that defeats the goal of open files in court cases.

statements of reasons in the judgment of conviction

The Statement of Facts in a plea bargain case should be sealed.

transcripts will of hearings or trials will often have content that could put witnesses or the defendant at risk.

Appendix H

Question 20: What circumstances gave rise to such suspicion or knowledge? (Other, text)

All of the above, except "Don't Know". Also, defendants that are kept at outlying facilities and transported on non-court days are thought by co-defendants to be cooperating.

All of the above.

arrest/initial appearance of cooperating client at the same time as principal defendant

Because of behavior of a defendant post-arrest, confederates were suspicious of the actor's motives. In some cases the individual was completely blameless. Without access to the entire file, I was unable to declare that thepicions were groundless.

client advised me of fact.

Client reports.

Clients make us aware of the dangers of them cooperating with the government. This danger extends to the defense attorneys also.

co-defendants and co-defense counsel; jail chat; when being transported by USM or local law enforcement officials; even jail employees

Discovery to defense counsel

Everyone knows who the cooperators are. It is a waste of time sealing plea agreements and files.

inmate filed reviewed by other inmates

Inmates are required by other inmates to present docket sheets to confirm that no departure motions or Rule 35 motions are listed.

Inmates demanding cellmates show them their pleadings

Inmates in narcotics cases serving less than guideline sentences while in federal custody are presumed to have cooperated by other inmates.

loose procedures on the part of law enforcement

News reports/testimony in state court proceedings

Once in prison they are required to show their paperwork to other inmates.

Prisoners learn very quickly what repeated trips to the courthouse mean, also some view PSI's or other similar documents

Through debriefing reports provided in discovery

Word of mouth

Appendix I

Question 22: You indicated that the court's policy regarding posting of plea and cooperation agreements has not been successful in protecting the privacy and security of individuals signing those agreements. Please explain.

5k1 motions appear to be posted

AN ATMOSPHERE OF FEAR IS CREATED WHEN ONE DEFENDANT KNOWS THAT A CO-DEFENDANT IS COOPERATING WITH AUTHORITIES. I HAVE HAD A CLIENT THREATENED BY A CO-DEF WHO MUST HAVE KNOWN THAT MY CLIENT WAS COOPERATING WITH THE GOVERNMENT.

Any competant attorney can determine who is likely cooperating without theneed to review the agreements.

Anyone who knows how the system works can figure out, under the current system, whether someone is probably cooperating

Anyone with password access to the site can gain access to the plea agreement. While attorney's fof Defendants who are targets of cooperation should have access to such documetns in preparation of defense strategy, the general public should not. Access to plea agreements should be restricted to named parties.

As noted above, others still have ways of finding out who cooperated. I am just not sure what can be done, because there are individuals who do not have the interests of the cooperating defendant at heart when setting policies in this area, and some people in the criminal justice system simply do not see a problem here (exposure is simply the cost of cooperating).

At the Detention Center these documents are shared. I've heard of instances in which others demand that the defendant produce the document or where the defendant produces it to avoid any suggestion that s/he's cooperating.

Because the docket sheet will list th existence of a sealed filing, anyone with passing familiarity with the criminal justice system will be aware of the meaning of a sealed document.

Certain groups are sophisticated enough to have realized that when there is no entry at all (no "Plea agreement is Court Ex. 1" for example), that means the defendant is a cooperator.

Clients who arrive at a prison will often call and request a copy of the court's docket sheet, because they have been "asked" to do so by other inmates. I believe these inmates are being evaluated by other inmates to determmine if they are cooperators or not. If they are, they may be at risk of harm.

Given the due process and confrontation clause requirements, to some extent this problem can never be obviated.

I don't know of any specific instances of harm, and don't know how one would avoid it, but if you know how to read a docket sheet you'll see suspicious gaps in document numbering, indicating the existence of sealed documents.

I don't think plea agreements should be private, and the contents are unually found out anyway.

If someone really wants to find out if a defendant is cooperating and understands the system, the fact that a plea is sealed in some cases and not others is an indication that the sealed plea agreement contains a cooperation clause.

In cases in which cooperation agreements have been sealed, the USA insists on placing in the unsealed agreements language pertaining to proffers made by the defendant, which it does not put in non-cooperation plea agreements.

In my District, the US Attorneys Office has been using boilerplate language in their plea agreements which when asked to be removed they often will not.

In my experience the Factual Basis was not sealed when a plea bargain was entered. These Factual Basis documents contain information that could easily show that a Defendant may be cooperating.

In my opinion, all plea agreements involving cooperation should be automatically sealed, rather than on a case-by-case basis.

In some cases where defendants are cooperating, posting the fact that an individual has been arrested is enough to put that person in jeopardy. It is certainly enough to put an end to the individual's ability to actively cooperate. In the EDVA this information is not placed under seal. Othere districts place entire cases under seal during the period a defendant is cooperating.

In some cases, even when initially sealed, the information about pleas and cooperation later becomes public.

Individuals with a serious interest in intimidating cooperating witnesses are not deterred by the unavailability of plea and cooperation agreements on line.

Knowledgeable inmates and others know how to read docket sheets. Thy know what a notation that a document is sealed means. documents mea

Many times co-defendants or unindicted coconspirators attribute behavior to a defendant, even when the person in questuion has done nothing wrong. Access to information now sealed would allay those suspicions in certain cases. In cases where the defendant actually was cooperating in some manner, he would be no worse off because of disclosure of his actions.

More and more I hear of people monitoring court pleadings in a case finding these documents

people find out without the use of public docuemnts, they find out from other sources

Plea agreements are publicly filed in this district and can be accessed by any individual.

plea agreements containing cooperation clauses are not filed under seal and appear on pacer

Privacy, no; security, don't know, at least in my experience. The press tracks these things very closely. Stories are written that sensationalize a case beyond any rational basis for doing so.

some threats to defendants and witnesses come from law enforcement or the office of prosecutors

The Mexican cartels are very sensitive to defendants they think are cooperating. There are not enough separate facilities in which to ensure the safety of cooperators. The balance between safety and constitutionally guaranteed rights is sometimes hard to achieve, while trying to protect people. Here in the Northern District of Illinois, there is great cooperation and coordination among the U.S.Atty's Office, the Judiciary and the attorneys, especially the Federal Defender Staff and Panel Attorneys. Where the system sometimes breaks down is where the privately retained atty's are not paid by the defendants or their families, but by third parties whose interests may not coincide with those of the defendants.

The public notation that a "sealed" document is filed before sentencing indicates that the defendant is cooperating and the government has filed a sealed motion for sentence reduction.

There are instances where no plea agreement or cooperation agreement is signed, yet an individual cooperates anyway or attemps to cooperate anyway. Many times the government wants to meet with persons to see what they know before offering a deal. The idividual cooperates and meets with the government, but ultimately is not offerred a deal. At sentencing the Defendant's attorney wishes to apprise the Court of the Defendants attempts to cooperate in an effort to show that he did everything he could to mitigate his sentence. Under the current Court Policy that defendant's notice to the Court of his attempt to cooperate are not protected because there is no cooperation agreement or plea agreement. The Court's policy should be amended to state that any mention of a defendant's cooperation or attempt to cooperate with the government should remained sealed. This is a grave concern for us lawyers who represent clients that have had dealings with the violent Mexican Drug Cartels.

There is now way for it to be. Once an idividual cooperates, it is very difficult to keep that a secret. Just the way it is. But I think more can be done to protect those that do chose to talk.

They are available to the public.

TO my knowledge, there is no court policy. Rather, here in Centrla District of Calif., if parties want a plea agreement which contains a cooperation agreement sealed, they submit an in camera application to the court. However, PACER then lists the filing of an in camera for that defendant, and the filing of a plea agreement (or simpky a document) under seal, it is relatively apparent that the deft is cooperating.

Too many people seem to have access to info
TOO PUBLICLY ACCESSIBLE

When cooperating individuals are incarcerated, they are forced by other prisoners to disclose copies of their presentence investigation. They are then identified as cooperators.

With the exception of the few cooperators who are not in jail everyone in jail knows who is cooperating both because they make frequent trips to "court", becuase they do not attend co-defendant meetings, and because the jails are incubators for information. There is virtually no system which keeps the identity of cooperators secret and I am not convinced that there should be.

Appendix J

Question 24: In which federal district do you primarily practice?

DistrictAbbre

	Frequency	Percent
	44	7.1
5th Circuit	2	0.3
8th Circuit	2	0.3
9th Circuit	1	0.2
ALMD	4	0.6
ALND	8	1.3
ALSD	5	0.8
ARED	2	0.3
ARED, ARWD	1	0.2
AZD	7	1.1
CACD	26	4.2
CACD,CASD	1	0.2
CAD	1	0.2
CAED	6	1
CAND	12	1.9
CAND, CACD	1	0.2
CASD	4	0.6
COD	14	2.2
CTD	13	2.1
CTD, NYSD	1	0.2
DCD	19	3
DCD, ORD	1	0.2
DED	2	0.3
DED, PAED, NYSD, PAWD	1	0.2
FLMD	13	2.1
FLND	2	0.3
FLSD	15	2.4
GAMD	1	0.2
GAND	6	1
GAND, NYSD, TNMD, ALND	1	0.2
GASD	2	0.3
HID	4	0.6
IAND	2	0.3
IAND, IASD	1	0.2
IASD	2	0.3
IDD	1	0.2

IDD, WAED	1	0.2
ILCD	2	0.3
ILED	1	0.2
ILND	22	3.5
ILND, ILCD	1	0.2
ILND, ILED	1	0.2
INND	7	1.1
INSD	1	0.2
KSD	9	1.4
KSD, MOWD	1	0.2
KYED	3	0.5
KYWD	6	1
LAED	7	1.1
LAMD	1	0.2
LAWD	4	0.6
MAD	16	2.6
MAD, CTD, NYSD	1	0.2
MAD, RID	1	0.2
MDD	9	1.4
MED	2	0.3
MIED	4	0.6
MIWD	3	0.5
MND	9	1.4
MOED	6	1
MOWD	4	0.6
MOWD, KSD	1	0.2
MSND	1	0.2
MSND, MSSD	1	0.2
MSSD	4	0.6
MSSD, PAED	1	0.2
NCED	2	0.3
NCMD	1	0.2
NCWD	2	0.3
NDD	1	0.2
NED	1	0.2
NHD	1	0.2
NJD	13	2.1
NJD, NYSD	2	0.3
NMD	7	1.1
NMID	2	0.3
NVD	7	1.1

NYED	15	2.4
NYED, NYSD, NYND	1	0.2
NYND	2	0.3
NYSD	31	5
NYSD, NYED	5	0.8
NYSD, NYED, CTD	1	0.2
NYWD	3	0.5
OHND	7	1.1
OHND, OHSD	3	0.5
OHSD	14	2.2
OKED	1	0.2
OKND	2	0.3
OKWD	6	1
ORD	4	0.6
PAED	15	2.4
PAED, NYSD	1	0.2
PAMD	5	0.8
PAWD	9	1.4
PAWD, MDD, DCD	1	0.2
PRD	11	1.8
RID	2	0.3
SCD	4	0.6
SDD	1	0.2
TNED	2	0.3
TNMD	2	0.3
TNWD	1	0.2
TNWS	1	0.2
TXED	6	1
TXND	7	1.1
TXSD	15	2.4
TXWD	10	1.6
UTD	4	0.6
VAED	10	1.6
VAWD	2	0.3
VID	1	0.2
VTD	3	0.5
WAED	1	0.2
WAWD	8	1.3
WIED	4	0.6
WIED, WIWD	1	0.2
WIWD	3	0.5

	1	0.2
WIWS	1	0.2
WVSD	624	100
Total		

Appendix K

Question 26: Which types of clients do you primarily represent? (Other, text)

All Parties in Bankruptcy Matters
all three marked categories
Bankrupcy
Bankrupcy creditors
Bankruptcy
Bankruptcy
Bankruptcy
Bankruptcy
bankruptcy
Bankruptcy
Bankruptcy
Bankruptcy
bankruptcy
Bankruptcy
Bankruptcy
bankruptcy
Bankruptcy - Consumer Debtors
Bankruptcy (plaintiffs & defendants)
bankruptcy debtors
bankruptcy debtors
Bankruptcy Debtors
bankruptcy litigants
Bankruptcy Matters
Bankruptcy petitioners
Bankruptcy Trustee
Bankruptcy Trustee
Bankruptcy, both debtors & creditors
Bankruptcy, mainly debtors
Bankruptcy-Creditors and Debtors
bankrupts and creditors
Bankrutpcy debtors
Business cases - No real Plaintiff/Defendant delineation
capital habeas and state habeas
Chapter 7 Bankruptcy
Corporate Debtors in Chapter 11 Bankruptcy
Creditor in a bankruptcy case
Creditor in Bankruptcy case
creditor in bankruptcy cases

creditor/bankruptcy
creditors in bankruptcies
creditors in bankruptcy
creditors in bankruptcy cases
Creditors in Bankruptcy cases
Creditors in bankruptcy proceedings
Criminal appellants (pro bono)
criminal restitution victims, both private and federal
Debtor in bankruptcy case
debtors
debtors and creditors in bankruptcy
Debtors and creditors in bankruptcy cases
Debtors in Bankruptcy
Debtors in Bankruptcy cases
Debtors in Bankruptcy Cases
Debtors in Bankruptcy Cases & Adversary Proceedings
Debtors in Bankruptcy Court
Debtor's in business Chapter 11
Debtors, Creditors and Trustees in Bankrutpcy

Defendant (the State) in federal habeas off capital punishment cases.

Defendant on appeal
Defendant's appellate counsel
Government
Government agency and plaintiff class members
Government Attorney for EEOC
I don't hardly do any federal work at all

I represent various parties in bankruptcy cases, including appellate work in connection with same.

immigration - typically in circuit court

Internal Revenue Service as respondent in Tax Court or creditor in Bankruptcy Court

municipal corporation in civil cases
parteis in bankruptcy cases
Plaintiffs and defendants
Plaintiff's class actions

Plaintiffs, Defendants and Trustees in bankruptcy adversary proceedings

rare court practice - in house atty
represented federal agency
representing Material Witnesses

respondents in federal habeas actions
retired
software and technology businesses in trade secret matters
State Government
State in Federal Habeas Cases
State of Connecticut as party to a bankruptcy case
Trustees, debtors, and creditors in bankruptcy cases
US Government

Appendix L

Question 27: Any other comments or suggestions about the privacy rules that have not been covered in the questionnaire.

A CLE program on privacy and redaction requiriements could be offered by the court or state bar.

A frequent concern, somewhat beyond this survey, is the frequency with which corporate parties produce confidential information in reliance on and pursuant to a protective order only to have the protections removed after production.

As a defense attorney oft times I need DOB and SSN numbers to obtain medical records, credit records and insurance information. Without a social security number it is very difficult. There ought not be any blanket preclusion (privilege) for asking for such information in a deposition or written discovery. Plaintiff attorneys are increasing being difficult about giving this information up based on privacy reasons, yet they know it is needed for legitimate reasons. Privacy is becoming an excuse for being obstreperous.

As I commented above, this is a good topic for paralegals to take ownership of.

Flexibility in allowing attorneys to file documents under seal will balance any burden placed on an attorney under a privacy protection program. Because this exists, we should lean toward protecting privacy.

Have trial exhibits not put on docket so they do not have to be redacted after trial for purposes of appeal; huge waste of time and documents, as redacted, are not true copies of exhibits.

I am an appellate lawyer and typically deal with transcripts and docket entries as they were previously created in the district court. Although I have filed documents in district court, my experience with privacy practices in that court is limited.

I am engaged primarily in plaintiff class actions, many of which are on behalf of consumers. A judgment in a class action typically has a list of opt-outs who are excluded from the effect of the judgment, but I have attempted to submit these under seal when consumers are involved, even though I don't believe it is required. Especially when it potentially conveys health care information (eg they purchased a particular drug) I don't believe consumers names should be in the public record on a matter that they would like to exclude themselves from.

I am in-house, and have not practiced before fedl court for over a year

I am not a good candidate for this survey because my only experience in Federal Court is filing 7 or 8 unopposed chapter 7 bankrupties

I am not clear about the procedure for reviewing transcripts of trials, hearings and who has the responsibility to do so, and attendant liability for doing this incorrectly.

I beleive that there should be more protection for medical and health information in depo and trial transcripts and pleadings

I believe privacy rules for public records should be as least restrictive as possible.

I believe that all sentencing memorandum filed in criminal cases should be filed under seal of court and deleted from the public record.

I believe the systems works the best it can under the circumstances. The many drug cases for which I have been counsel are dangerous and the individuals we represent have many problems with the individuals they worked for. Some times it is a dangerous circumstance for all involved. When a plea is sealed, every one knows they are cooperating regardless of the case. Under the current system all plea agreements are sealed which helps therefore no one knows who is cooperating until tril. It is what it is!

I currently spend a significant amount of my time on cases involving current or former employees and/or competitor misappropriation of trade secrets and other intellectual property. The laxity in protecting information beyond identifiers that may not rise to the level of a trade secret but is still valuable confidential information of a company appears to allow the defendants in these sorts of actions to harness the litigation intended to provide some protection against such misappropriation to in fact make public the very confidential information that the plaintiff is trying to protect, and thereby retaliate against the plaintiff for bringing such actions, by filing confidential information not proprietary or trade secret information as exhibits to court filings with relative impunity.

I do not agree that documents/proceedings involving cooperators should be kept sealed, particularly plea agreements. I also disagree with the practice of requiring a "plea asupplement" in every chnge of plea to disguise the existence of a cooperation agreement. Cooperators have enough incentives to lie as it is.

I have none, thank you for conducting this survey.

I haven't had a problem.

I personally think the privacy rules are cumbersome and probably not worth the cost in time and effort. I would think that someone trying to get personal identifying information about people wrongfully can obtain it a lot more easily than by scouring federal filings. They would have to know how to get it, have a Pacer account, know what to look for and be willing to spend the time to get specific documents that might contain the information they want. Plus, the fact that they have to use Pacer means they could be caught.

I practice patent law. Except for litigation, my files are paper files. My secretary's computer, where such files are created is not connected to the internet for security purposes. I am one of a dying breed.

I tend to represent corporations whose confidential and proprietary information is subject to discovery as well. The rules and caselaw certainly provide for protection in this regard, but the protection afforded an individual as codified in Rule 5.2 seems to require a proactive approach by both parties. Whereas, it seems the confidential information of business entities is the subject of negotiation in discovery and sometimes gamesmanship. Is there a way to clear this up?

I think that privacy issues should be part of mandatory CLE

I think the further the court can go in requiring that documents be made available publicly without unnecessary deletions, etc., the more efficient and apparent our legal system will operate.

I think the privacy rules are motivated by good ideas but are impractical and undemocratic. Essentially the government gets to keep secrets and the defendants' and public's right to know what is going on in the COurt system are ignored.

I think the Rule needs inclusion of employment/personnel records especially those that include HIPAA references

I think there are some docs that seem to be protected in one district and not another (Wy vs Co.). The practice should be uniform and subject to some clear rules to expose the docs to other lawyers for cross examination purposes with cooperating co-defs or defs in other related cases.

I was not a good candidate for this survey because I litigate only rarely and am just becoming familar with ECF.

If Social Security numbers and dates of birth are removed/redacted from transcripts that Social Security files with the courts, the chances of mistakes occurring when claims are proceeded will increase. Therefore, the best option for handling Social Security transcripts is to have them filed under seal and/or limit access to the parties in the case.

In bankruptcy cases, attachments and exhibits to proofs of claim filed with the court require close scrutiny as many include unnecessary personal identifier information that should be redacted.

In general, I believe our concern for privacy in judicial proceedings is overblown. Private information is easily accessible by multiple means.

In light of the use of electronic case filing, when a court requests or the rules provide for the filing of unredacted copies of documents that were filed with redactions or otherwise underseal, it would be very useful to establish email addresses to which the unredacted or unsealed copies are sent so the party is not filing both electronic redacted copies and paper unredacted copies of pleadings.

In my current area of practice, the issue of redaction does not arise, since litigation focuses on state cases already adjudicated In the one federal capital trial in which I was involved, it appeared to me that the redaction policy adequately protected the cooperating witnesses

In the case of electronic filing, a screen that reminds the filer of the privacy requirements of the rule might help ensure compliance. I believe that bankruptcy courts have something like this for social security numbers.

It is difficult and very expensive to review and redact personal identification information from large case filings and motions. To add "insult to unjury," I have expended many $$ of my client's money to redact information, only to have the individual plaintiff file personal identiable information about themselves without care or complaimt. Thus, defendants are forced to carry the burden and expense, while a pro se plaintiff can try to obtain a settlement simply because the costs of litigation outweight the merits of any claim.

It is most important that cooperating defendants be protected and not subject to threat. Their safety and the need to safeguard ongoing investigation must constantly be balanced with the concept of open access to courts.

It is sometimes difficult to know what constitutes a financial account. For example, does it include only bank or credit card account numbers, or could it be any account number, such as with a contractor, vendor or store? Also, I believe the Rules should allow for an objection when opposing counsel asks for protected information in open court so that it can stay out of the transcript altogether and not have to be redacted, which can cost extra time and money for the parties.

It may be a good idea to seal pretrial release orders when a cooperating criminal defendant is released on a low bond [or seal all release information]. This tells the public that the person is helping the government and puts the defendant at risk.

It might be helpful, if the District Court would put on seminars about these subjects-almost like ECF training or in conjunction with the State Bar Association

It should be everyone's joint responsibility to ensure compliance. Initially it should be the offering party's but the other party and judge should be equally vigilent to catch anything that someone else misses. It should be a cooperative effort.

It should not be necessary for exhibits to be in the public record in most cases. Pleadings are easy to sanitize. The problems are exhibits or the spoken word. Ordinarily exhibits need not be shared on PACER.

It would be useful if the Judicial Conference would give some guidance on redaction software -- e.g. does Acrobat 8's redaction package generally work well enough.

Many of my clients have been law enforcement officers, some of them undercover, or public officials in sensitive or public safety positions. I have had difficulty in many cases in keeping their home address and other locating information confidential. Some judges are not willing to treat these individuals differently than other civil defendants or witnesses. However, there is a very real safety threat to these officers and their families if the information becomes public. Civil Rule 5.2 does not address this situation (or the situation where a witness/defendant has a restraining order against a stalker, etc.). Absent some direction from the rules, there are judges who will not (or cannot) accommodate individuals who are at risk. I would hope that could somehow be addressed.

Many privacy concerns should be handled by rules, implemented by the clerk, or by more automatic procedures with the assistance of technology available to court reporters. These people usually have electronic / searchable files that can be easily redacted. Requiring actual reading of paper transcripts is time wasting for everyone.

Most documents filed on the ECF system do not require redaction. Rather than require EVERY filier to check a box every time ANY document is filed cerifiying that personal data has been redacted, why not require a one time - or annual- certification. Filers are already subject to the obligation to redact, when necessary, under the FRCP. Personally, I don't think that checking a box adds to the privacy process.

My cases since the redaction requirements have been in effect have all fallen under the administrative record exception under FRCivP 5.2(b)(2), and in any event redactable information has not otherwise come up.

My general feeling is that the bar's sensitivity to personal identifier information is low.

Not sure your survey adequately covers questions pertaining to bankruptcy practice and procedure

Often examiner ask personal family including children's identities and personal history information regarding witness which is tied to the witnesses address and other identifiers. Making this informatin available on line allows the privacy of these individuals to be invaded for no public benefit.

Please don't let Judges create individual rules regarding this.

Privacy protections should be placed for restrictions on criminal records, marital history, employment history and health history if not relevant to disputed issues in proceedings.

Problem of sealing records from the public but MUST be still available to counsel in ongoing criminal case. Awkwardness of method of sealing entire case which then forbids filing of non-sealed documents via ECF.

Rules for transcript preparation, be they deposition or trial trascripts, which require a confidential transcript addendum containing personal identifiers, would do the most to ensure removal of personal identifiers from the public records.

Secret proceedings are unjust. If a man makes a deal, the terms of that deal should be public. Don't make deals you are ashamed of and you don't have to worry about privacy.

Several years ago, I was involved in a case filed in the United States District Court for the Eastern District of Kentucky and later removed to the Bankruptcy Court. The case was filed as a securities fraud case. It was filed by attorneys known for making outrageous allegations in complaints. The Complaint went on for page after page about the dishonesty of an individual who had done nothing wrong. Nearly all of the statements in the Complaint were untrue and slanderous. Ultimately, the case was settled for defense costs even though it demanded millions of dollars. For me, the case illustrated a defect with electronic filings and the PACER system. We have a system in which statements made in Court filings are privileged from claims of defamation. That worked well when court filings required an affirmative effort to access the Court filings. Now, however, most of what is stated in pleadings is readily available over the internet. I believe that lawyers are abusing the ability to make outrageous statements in pleadings filed in the federal court system in order to further illegitimate interests on the part of their clients. I would like to see the availability of a mechanism whereby certain cases, upon Motion and Order of the Court, could be removed from public access through PACER. This might only be available until the case is finally decided.

So Far, I am pleased with the rules relating to redaction of sensitive materials with respect to personal identifiers and cooperation agreements and criminal judgments.

The Court should have a PDF-handling module in order to perform redaction uniformly within that manual. In that way the underlying information may be saved for Court and authorized user access, meanwhile access to non-authorized individuals may be completely removed once the PDF document is rendered in a copy requested by an authorized individual. The module may ask the filer to define the areas or text that should be redacted, and then the module could strike the redacted data exclusively when a copy is requested by an unauthorized individual. Access to court information, essential for the proper conduct of democracy, is saved.

The Court's policy MUST be changed to protect all information regarding a defendant cooperation with the government.

The filing of redacted documents is often difficult, especially when it relates to sentencing.

The most common issue I run into is whether or not various account numbers are financial account numbers. For example, account numbers from medical providers or insurance companies.

The need to maintain the confidentiality of court records is itself a task filled with contradictions if we are to have faith in the open public trial the constitution requires. I am troubled greatly by the issue of client security, but the openness that the internet creates and all electronic media for that matter is difficult to combat successfully. I have at times tried to grapple with this problem in my own way with the assistance of judges and prosecutors and even clients for that matter, and have managed to conclude only two things: a one-size-fits-all solution will likely not be found; and maybe a case-by-case approach is all that we can expect in this area.

There are too many rules and regulations in federal court, especially at the appellate level. The 11th circuit is more interested in form and not substance.

There needs to be harmony among the circuits as to how mobile phone compaines should respond to subpoeans seeking phone records. Last week NPR had a short piece about this problem which I've encountered.

These rules are generally not applicable to my practice, as it seldom, if ever, involves individuals.

Though I practice very regularly in federal court, I am not aware of any filing we have made that contained information covered by Rule 5.2. We have redacted information covered by protective orders due to trade secrets.

To enforce the privacy laws in existence, the laws need teeth so that violators have a financial incentive to comply. For example, HIPPA has no private right of action. To put teeth in the HIPPA law, there should be a statutory damage provisions along with fee shifting.

Under electronic filing, and the very real threat of identity theft, the rules should provide for special penalties/sanctions if opposing parties file publicly information excluded under 5.2, such as SSN, birthdate, etc. Alternatively, opposing counsel should have a set period of time to move for removal of such information following notice by counsel.

We only list the last four digits of clients' social security numbers. We only list the last four digits of bank account numbers to identify the asset. However, we do list the entire account number for credit cards and other collection agency account numbers to ensure that notice of the debt sought to be discharged can be readily identified.

While I have had occasional cases in Federal Court (most of which involve personal injury cases), the vast majority of my practice is in the state court. While I do occasionally practice criminal law, I have not had any cases which I can recall in the last many years that were in Federal Court. I do believe the protection of private information is important, and while strive to comply with the rules on same. I think the questionnaire needs to allow more than yes/no or don't know responses as to many of the questions. Often the answer I wished to give to a question did not neatly fit into these basic categories.

Without sanctions for violating these commonly known rules, compliance will always be lacking as the cost to comply will always outweigh the cost of noncompliance. Also, the rules should allow for filing a Motion to Strike with an Order that the party who violated the rules file a corrected version of the document. The current implementation places the burden on the person who did nothing wrong and whose privacy was violated.

You may wish to consider these answers are provided by an attorney who strictly does appellate work.

TAB
11-E

Attachment 5 to Privacy Subcommittee Report

Fordham Law School Conference on Operation of the Federal Privacy Rules

JUDICIAL CONFERENCE PRIVACY SUBCOMMITTEE

CONFERENCE ON PRIVACY AND INTERNET ACCESS TO COURT FILES*

PANEL ONE: GENERAL DISCUSSION ON PRIVACY AND PUBLIC ACCESS TO COURT FILES

OPENING REMARKS

*Hon. Reena Raggi***

MODERATOR

*Daniel J. Capra****

PANELISTS

Joel Reidenberg[1]

Ronald Hedges[2]

Peter Winn[3]

Lucy Dalglish[4]

Hon. Cecelia G. Morris[5]

Maeva Marcus[6]

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* This Conference was held on April 13, 2010, at Fordham University School of Law. The text of the Conference transcripts has been lightly edited. The terms CACM (Committee on Court Administration and Court Management), and PACER (Public Access to Court Electronic Records), an electronic public access service for United States federal court documents, will be used throughout.

** United States Circuit Judge of the U.S. Court of Appeals for the Second Circuit; Chair, Judicial Conference Privacy Subcommittee.

*** Reed Professor of Law, Fordham University School of Law.

1. Professor of Law & Director, Center on Law & Information Policy, Fordham University School of Law.
2. Former Magistrate Judge for the District of New Jersey.
3. Department of Justice, University of Washington Law School. Mr. Winn is speaking in his personal capacity only and not on behalf of the U.S. Department of Justice.
4. Reporters Committee for Freedom of the Press.
5. United States Bankruptcy Court Judge, Southern District of New York.
6. Professor, George Washington University Law School.

JUDGE RAGGI: Good morning.

Everyone knows that we are here this morning for what is an important part of the work of the Privacy Subcommittee of the Judicial Conference Standing Committee on the Federal Rules.

Just to give you a little background on that work, the federal courts, obviously, are engaged in the public's business, and so the presumption is that our work, including our files, are open to the public. There are many reasons informing that presumption. Open files are important to the litigants who are involved in the cases before us. Open files are important to the public's oversight of the courts' work. Public access is also important to history. There is much that can be learned about a society from the work of its courts; from the concerns that prompt individuals to seek assistance in the courts.

All of these reasons have led the judiciary to presume that our files would be open. But increasingly, there have been concerns voiced about unnecessary disclosures of private information in court files. Some of these are not new. There has always been a concern about information disclosed in court files that could actually facilitate other criminal conduct. Identification information, such as Social Security numbers, that could be used as part of identity theft or information about individuals cooperating with government investigations, who, because they are helping to target individuals involved in crimes, could find themselves targeted by criminals.

There has also been a general concern about whether a high loss of privacy for litigants in the court will prompt people not to use the courts as a means of resolving their disputes. As history teaches us, a society where people do not think they can resolve their disputes in a court is a society where they find some other means to do so, not always positive. So we face these competing concerns of public access and protection of privacy.

The Federal Rules already provide for protection of privacy in many respects. And those are relatively recent rules. Nevertheless, the last decade's experience with greater public access on the Internet to court files has sharpened our understanding of privacy concerns. So in 2009 or thereabouts, the chairman of the Standing Committee on the Federal Rules, Lee Rosenthal, who I am so pleased is here with us today, started to receive inquiries from members of Congress that seemed to deal with both of the matters I have addressed: public access to the court. Congress is concerned about whether we are going online fast enough and whether our access is broad enough to serve the public. At the same time, Judge Rosenthal has received congressional inquiries about why we are not doing more to protect private material in these publicly available documents.

So in the best traditions of all bureaucracies, a subcommittee was formed to study this matter. This subcommittee is, of course, the one that is here today at Fordham.

We operate as a subcommittee of the Standing Committee on the Federal Rules, but I really have to say that our efforts represent a joint endeavor by both the Standing Committee and the Committee on Court Administration

and Court Management, CACM. They, of course, have responsibility for policy, and the Standing Committee has responsibility for implementation. I want to say thank you very much to all of my colleagues from CACM for helping us, and most particularly, to the former chairman of that committee, Judge Tunheim, who I am also pleased was able to join us today.

Most of you are here to serve on panels. I want to explain to you how we view your contribution in the overall work of the subcommittee. We broke our work down into two phases. The first I will call statistical. Through the work of the Administrative Office and the Judicial Center, we have been able to crunch lots and lots of numbers to get an idea of what is publicly available, what kind of private information is showing up in court files, and, just from a statistical perspective, how large a problem we have and in what areas.

With the benefit of that information, we are now moving to phase two, which is this conference. The subcommittee decided that it would be most helpful to have the viewpoints of as many different persons in the legal and related-to-law communities about public access and private information. So we have invited you today, civil and criminal lawyers, prosecutors and defense attorneys, academics, judges, and a variety of people who serve the court—who serve the court as clerks of court and in various other support functions—to come and talk to us about your experiences in these areas. I thank you so much, on behalf of the subcommittee, for giving us your time. And I want to remind you of what would be most helpful to us. You are here to educate the committee. Please be frank about what you have seen and where you identify concerns, and do not hesitate to disagree with your fellow panelists. I cannot emphasize enough our view that we need to hear diverse views on how to calibrate the balance between public access and protection of privacy.

All of this effort this morning is the work of one person, and that is the subcommittee reporter, Daniel Capra, Professor of Law here at Fordham. I thank Dan many, many times for his work for this committee. He also serves, in his spare time, as a reporter for the Evidence Committee and a variety of other tasks. As everyone says, he is a dynamo, and most particularly in the service to the judiciary. So thank you, Dan.

Of course, I also want to thank Fordham University for hosting this and for really giving a lot of thought to what the conference should involve. With that by way of welcome and introduction, let me turn it over to Dan Capra.

PROF. CAPRA: Thank you, Judge. Thank you very much for that excellent introduction, which sets forth basically what we are trying to do today.

I am moderating a panel which we have called the general panel. The subcommittee is considering at least possible changes to the privacy rules. The privacy rules are located in your materials, actually in a couple of places. There were some pamphlets that were given out by the Administrative Office, and behind Joe Cecil's report is the particular

privacy rules that were enacted in 2005, 5.2 of the Civil Rules, 49.1 of the Criminal Rules, and the like.

The subcommittee, as I say, is considering whether rule amendments are necessary and also is considering a discussion of policy changes, but all within the context of this broader idea that Judge Raggi was talking about: the balance between privacy on the one hand, and open access to court records on the other, in the light of ease of Internet access. So we thought it would be appropriate to kind of set the day with a general panel. By "general," it does not mean airy and platonic and talking about love and things like that. There will be practical discussions involved as well, but within the context of setting a broader framework.

I need to give my own thanks. First of all, I need to give my thanks to Joe Cecil for all his fine work in terms of the statistics that he has done and all the searches of the records that he has done over the past month. It has been truly amazing. He will talk about that later on today, but since I have the opportunity, I wanted to thank him for his excellent work in that respect. I want to thank Susan Del Monte, who gave me many great recommendations about who to call and who to bring here, especially for the Plea Agreements Panel. I think we have a Plea Agreements Panel that represents all the views that all the districts have been coming up with. I would like to thank Susan for giving me those suggestions.

Allyson Haynes, from the University of Charleston School of Law, I would like to thank because Charleston did a program that covered some of these issues, and she was very helpful in helping me to form ideas for this program.

With that, I am done. I would like to give you over to my colleague, who I am proud to have here on the panel, Professor Joel Reidenberg, Professor of Law at Fordham Law School and Director of the Center on Law and Information Privacy.

PROF. REIDENBERG: Thank you, Dan, thank you, judges. I think it is terrific that you are focusing so carefully on these issues.

My background is as a privacy scholar, not as a civil procedure expert. So my remarks will be focused on some of the broader privacy issues that open access raises.

To set the stage, I would like to focus on a few of the problems associated with too much transparency. We do not often think about publicly held information as giving us too much transparency in our society. But to follow up on some of the comments that Judge Raggi made just a few minutes ago, in the past, when we thought about the openness of public records and particularly about court records that were open to the public, we would find that those records still had an effective privacy protection through practical obscurity. Access to the information was not easy and physical or geographical limitations restricted how widely information in the public records could actually be disseminated or obtained. This made public record information practically obscure.

The Internet and network information flows eliminate that practical obscurity today. We now live in a context with an increasingly and

completely transparent citizen that has, I think, some very significant dimensions. I would like to focus on two points during this short presentation and make a suggestion for a way of approaching the tradeoff between openness and privacy.

The first point is that completely open access has important public safety implications. The Amy Boyer case illustrates this problem. Amy Boyer lived in New Hampshire and was murdered by an ex-boyfriend who, through access to information obtained from an information broker, found out where she lived and worked, stalked her, and shot her at her workplace.[7] That same kind of data, locational data, can now easily be gleaned from publicly available court records, if they are online and searchable, and used just as Boyer's ex-boyfriend used the same data obtained from the information broker. That is one obvious problem.

The less obvious, but very difficult, problem is the de-contextual use of information that would be contained in court filings and court decisions. If information about individuals is extracted from court filings and exploited through data mining or combined with additional information acquired from data brokers, from other public databases or from other publicly available information, the original context is lost and the data mining leads to the development of behavior profiles of individuals, to stereotyping, and to decisions based on what I will call "secretive data processing" because the data mining and profiling is hidden from the individuals. In effect, by making all this information about the citizen so transparent, the public does not really know what happens to their personal information and, ironically, the accuracy of the information describing individuals can be compromised through out-of-context compilations and profiling.

Another obvious consequence of the transparency of personal information is identity theft. The richness of data that is in court filings would be very useful for identity thieves. A criminal can very easily masquerade as someone else if data can be taken from varied sources and combined together to provide enough personal information about the victim.

The second point is that the integrity of the judicial system is challenged. This goes back to the comments that were made earlier in today's session. Unprecedented wide access and dissemination of everyday court records and proceedings can have an impact on jurors' willingness to serve and on witness candor. If the personal cost for engaging with the legal system is a perceived loss of privacy because the data is now publicly accessible, freely searchable, and "Google-able" on the Web, the public hesitates or opposes participation in the judicial system. Similarly, parties may be intimidated by the Internet accessibility of personal information related to their participation in a court proceeding. There is a qualitative difference from the days when an observer had to go to a musty courthouse to find the data. People will be reluctant to come to court to vindicate their rights if they perceive that it makes their lives a completely open book.

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7. Remsburg v. Docusearch, Inc., 816 A.2d 1001, 1005–06 (N.H. 2003).

Lastly, the transparency has an impact on perceptions of judicial integrity. The data mining that might go on with respect to litigants, witnesses, or statements made in a court filing can just as easily occur with respect to the judges themselves and the judges' personal lives. Many would be surprised at the associations about judges that might be made by data mining information in court cases just from the way judges manage their cases. So these issues suggest that public safety and the integrity of the judicial system are at risk from over-transparency.

As to my suggestion, I would like to focus on the approach to the trade-off between openness and privacy. I know that court systems have focused very carefully on redaction as one potential solution. The redaction model is also used outside the United States, in many foreign jurisdictions, as a way of balancing privacy interests with court oversight. But another model that I would like to recommend as a very worthwhile avenue for the courts to explore is limited-purposes disclosures. This approach makes personal information available publicly, but only for defined purposes. We see this approach in American legislation, specifically the Driver's Privacy Protection Act.[8] Under the Act, driver's license information is a public record, but the data cannot be used for purposes other than those enumerated in the statute. The permissible purposes relate to the reasons why the data is public information such as driver authentication, car insurance, recalls, that sort of thing.

I think we need to explore this approach in the court context. The court system should be addressing key questions. Why is the information about these individuals publicly available? What is the reason for the information to be publicly available? What are we trying to accomplish? Can we construct limits on use in ways that are compatible with the public purpose for the information being out there?

I will close with that.

PROF. CAPRA: Thank you, Joel.

I turn now to Ron Hedges, former Magistrate Judge for the District of New Jersey. He worked very hard to get the Sedona Conference to come up with principles on privacy and public access to courts in a civil context. I will also put in a plug that he is an excellent Special Master in the matter of *In re REFCO*.[9]

MR. HEDGES: As are you.

PROF. CAPRA: I do not know about excellent, but I am as well. Over to Ron.

MR. HEDGES: Good morning. Thank you for allowing me to be here. I want to spend a few minutes talking with you about how The Sedona

8. 18 U.S.C. § 2721 (2006).

9. *In re* REFCO Sec. Litig., No. 07 MDL 1902(JSR), 2010 WL 304966 (S.D.N.Y. Jan. 21, 2010).

Conference[10] [Sedona] came up with its Best Practices on Public Access and Confidentiality in Civil Litigation.

Sedona works through "Working Groups." The Best Practices were a product of Working Group 2 [WG2], and I was a member of the editorial team. I think I can tell you, not surprisingly—I expect you are going to hear it today—this was a very contentious process. There were a number of interests involved.

There were a lot of people on WG2 who were very pro-access. There were others representing corporate interests that were concerned about protecting secrets, and the like, that took an opposite view. It took four years to get the Best Practices to the public version that is now available. As I said, the process was contentious throughout.

What we did was to come up with a draft, and we did a series of "town halls" around the country, five or six, inviting different constituencies to come in and comment. It is fair to say that we have a couple of themes that go through everything.

The first theme was a very basic distinction between discovery materials that generally do not see the light of day and that people can protect as much as they want under Rule 26(c)[11] or the like and materials that are filed in court. We were very much opposed to the concept of confidentiality orders that included an automatic sealing provision such that, if parties exchange discovery materials, they can simply—by filing an affidavit or whatever—seal materials filed with the court. That is a First Amendment violation.

I realize that there has always been a concern that we are driving people out of the system because of transparency issues. We can debate that all day, if we need to do that. But it is fair to say that Sedona came down very much on the idea of open judicial proceedings, including jury selection, openness in settlements, and openness in anything that may be filed with the court. So we have the basic distinction between what goes on between parties and what goes into courts.

We also came out very strongly on the concept of intervention. If there are sealing orders filed, the public or the public is representative, which is often the press, should have an opportunity to come in and challenge these before a judge.

I am happy to say that we have been percolating along for three years now. We are about to go online with another version of a database that accumulates case law that has developed in the last several years, of which there is an enormous amount. I see a trend of the future that we will see a lot more issues created by electronic filings. For example, inadvertently produced materials may be on the Internet that should not have been there and how those materials are brought back.

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10. THE SEDONA CONFERENCE, http://www.thesedonaconference.org/ (last visited Sept. 23, 2010).

11. FED. R. CIV. P. 26(c).

In a nutshell, that is how The Sedona Conference put together the Best Practices, what the Best Practices are intended to accomplish, and where the Best Practices and WG2 may be in the course of the next several years.

PROF. CAPRA: Thank you, Ron.

Peter Winn has been writing articles in this area for a number of years now. He provided comments on the initial redaction rules that came through. He has written an article dealing with some of the issues that the subcommittee is investigating today. Peter Winn is an attorney for the Department of Justice and Adjunct Professor of Law at the University of Washington Law School. Let me turn it over to Peter.

MR. WINN: Thank you very much.

I got into this business by accident several years ago when one of the local judges in Seattle asked me to write an article about the privacy implications of putting judicial records online.[12] Over the next few years, I became less and less happy with the analysis in that article and wrote another that came out last year in the *Federal Courts Law Review*.[13] I am already starting to reconsider some of the arguments in that article.

I keep changing my mind because two things are going on here that are very difficult to reconcile: we want court records and proceedings to be open and transparent, but we also want to make sure that sensitive information in the hands of the courts is protected. Both goals are important. Transparency is necessary for the legitimacy of the system, necessary to maintain a healthy political feedback loop, and necessary for effective public oversight. However, at the same time, courts also have a fundamental responsibility to engage in a truth-finding process. To find the truth, courts need access to sensitive information from the participants in the process—not only the litigants, but jurors and witnesses as well—people who are critical for the fact-finding process to work. Traditionally, these judicial participants have been more or less comfortable disclosing their sensitive information with the understanding it would be used only for purposes of resolving the dispute in the context of the judicial process and would not come back to bite them. When participants start getting burned or hurt after disclosing their sensitive information to the court—when the information is used for other purposes than resolving the dispute—litigants, witnesses, and jurors are going to be less and less inclined to tell the truth in the first place. Thus, to make the system work we need both transparency and privacy.

In the good old days of the paper-based system, we could have our cake and eat it too. We could have both transparency and privacy because of the practical obscurity of paper. Paper records were public, or at least ninety-nine percent of them were public—the ones that were not filed under seal. But because paper records were difficult to access, very few people were

12. Peter A. Winn, *Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information*, 79 WASH. L. REV. 307 (2004).

13. Peter A. Winn, *Judicial Information Management in an Electronic Age: Old Standards, New Challenges*, 3 FED. CTS. L. REV. 135 (2009).

ever hurt when sensitive information was filed in the so-called "public" judicial system.

By contrast, electronic information is not practically obscure—its very essence is to be easy to access. In this new world of electronic information, we have become increasingly aware, sometimes shockingly aware, of just how complicated and difficult it is to have both a transparent system and a system that protects sensitive information. It was probably just as difficult when people started to use paper in the thirteenth century, but we had 800 years to get used to it.

So where are we in the federal system? I like to think of the federal system as a guinea pig, because it was out there first. That was probably because we did not know any better—the benefits seemed obvious, the costs hidden by the habits of centuries of using practically obscure paper. The state courts have been the next wave and are struggling with the same problems. I have learned much from watching the transition in the federal system, but, in many ways, the state courts have much greater challenges. Juvenile cases, divorce cases, probate cases, all present much more difficult problems than those typically faced in the federal system.

In the federal system, to some extent, we have only jumped halfway into the swimming pool. PACER is still not Google-searchable. It still has a lot of the attributes of practical obscurity, simply because of the difficulty of accessing the electronic information. I think it is almost certain that it is going to be Google-searchable in ten years or sooner. It may be Google-searchable much sooner than that. The law.gov movement, largely under the leadership of Carl Malamud, is already in the process of seeing to it that federal court records are online in a Google-searchable manner.[14] It is just in the nature of electronic information that it will become much more accessible and will raise more and more difficult problems in the context of protecting sensitive information.

So how do we protect sensitive information in courts? There are three basic strategies.

One is not to put the information into the system in the first place. Categories like Social Security numbers, names of minor children, financial account numbers—a lot of times you simply do not need that information in a pleading to start with—

JUDGE MORRIS: Excuse me, let me just interrupt. The word is called bankruptcy.

MR. WINN: Right, bankruptcy.

JUDGE MORRIS: I will get there in a minute.

MR. WINN: I stand corrected. You do need to put quite a lot of sensitive information in a bankruptcy file as a matter of law. So that strategy does not work very well in bankruptcy. And more generally, that

14. LAW.GOV: A PROPOSED DISTRIBUTED REPOSITORY OF ALL PRIMARY LEGAL MATERIALS OF THE UNITED STATES, http://public.resource.org/law.gov (last visited Sept. 23, 2010).

strategy will not work when sensitive information needs to be filed with the court.

A second strategy is to try to put it in the judicial system either under seal, or offline. The 2007 privacy rules permit the use of protective orders to take documents or information offline—similar to how Social Security and immigration cases are routinely handled today. This strategy has not yet widely been adopted by lawyers. Instead, agreed sealing orders are still the norm. However, while reliable to protect sensitive information, agreed sealing orders often fail to meet the required common law and constitutional standard—a standard seldom enforced in the absence of a dispute. As electronic court records become increasingly subject to computerized audits, and as the improper use by attorneys of the agreed sealing order to protect sensitive information becomes subject to greater legal scrutiny, the agreed sealing order, itself, may become a thing of the past. If that happens, using protective orders to take sensitive information offline may become the only practical alternative.

The third idea to protect sensitive information was just raised by Professor Joel Reidenberg. That is, to prevent people from using sensitive information filed in court records for secondary uses unrelated to the administration of justice. A general rule permitting disclosure of certain information in the context of the public court proceeding but prohibiting disclosure of the same information outside the courthouse would probably be unconstitutional. In my article in the *Federal Courts Law Review*,[15] however, I suggested that a more limited set of information management requirements, unrelated to any specific content, and imposed solely on bulk data aggregators might pass constitutional muster. Data aggregators might be required by contract to adhere to certain information management procedures in exchange for the grant of bulk access privileges. Thus, for instance, they might be required to "scrub" their data for inadvertently filed Social Security numbers (as many of them do now anyway). However, with the exception of limited computer "scrubbing" techniques, I have grave doubts that general rules to address the more difficult problem of secondary use of information from court files—for instance, "data mining" judicial information for commercial purposes—will ever be likely either to pass constitutional muster or be very effective as a practical matter at protecting sensitive information. In conclusion, I do not see any obvious, easy, one-size-fits-all solution.

I do have some hope that we will be able to muddle through and find solutions to these problems, but I do not think it will be easy, or that the solutions will be found quickly. We have three basic tools available: rules, training, and technology. I think the rules that the federal courts have developed are reasonably good. I am just not sure that there is much more you can do in the rulemaking process. You cannot have a general rule forbidding the filing of all sensitive information—much of that information must be part of the public court record, and what is sensitive in some

15. *See* Winn, *supra* note 13.

contexts is not sensitive in others. The courts have to rely on the parties and their attorneys to identify the sensitive information in their filings and take affirmative steps to protect it. That is pretty much all the rules do now, and pretty much what any rules in the future would ever be able to do.

The more significant area of deficiency—that is, the area where there is most room for improvement—is the need for better training of lawyers. Most of us have developed our intuitions in a paper-based world of practical obscurity. We have taken it for granted that documents filed with the clerk's office will stay in the court system and will not surprise us with unexpected secondary uses. Many older lawyers still have their secretaries file their pleadings on the PACER system, and lack any real personal knowledge of the system. The younger generation is much more technologically literate, but we can all do with better training. It may not be until our children's generation is practicing law that lawyers will become better attuned to the problems of handling judicial information properly, given the wider and more open set of possibilities for its secondary use. We, who have been trained in a particular way, will simply have to die and let somebody else take over.

The area with potentially the most promise is the improvement offered by better technology. We can do a much better job facilitating access. Court decisions, briefs ought to be Google-searchable. We can do a much better job than we are doing protecting sensitive information in the process, and technology is an important part of that solution. Professor Edward Felten has highlighted many of these potential solutions. These technological solutions are possible only if lawyers and judges begin to work proactively with computer programmers. We tend to assume that computer technology is a given when we engage in rulemaking or when we plan our CLE programs. It is not. The problems that we fashion rules to try to address, and that we train lawyers to better understand, are in part, creatures of a particular form of technology. The design of that technology can be changed to solve some of these problems. However, these technological changes often spawn new problems, making new rules and training necessary. It is an endless cycle, but that is no reason to give up.

As we struggle with these problems in the federal system, much can be learned from watching our sister courts in the state system navigate these electronic rapids. State courts have much larger dockets, and often manage much more sensitive information than do the federal courts—one need only think of the type of information handled by family courts and in juvenile criminal proceedings to see just how difficult these challenges are. One lesson that appears to have been learned by both the state and the federal courts is the importance of involving as diverse as possible group of interested parties in the development of both the rules and the technology which will be used as courts go online. At the Williamsburg conferences where state and federal court personnel meet to explore different ideas,[16]

16. *See* NATIONAL CENTER FOR STATE COURTS, http://www.ncsconline.org/images/NCSC_GeneralBrocWEB.pdf (last visited Sept. 23, 2010).

there appears to be a consensus that it is critical to get everybody to the table when you are making decisions. The process is similar to that involved in drafting an environmental-impact-statement. When all the affected players are at the table, the conversation can be contentious. However, it makes it more likely you will identify the problems at the front end, when it is still possible to hash out some solutions. Furthermore, it makes it more likely that the proposed solutions you reach will be more likely to work, with greater buy-in by participants in the end. It is nearly impossible to identify the problems of managing sensitive information when you try to think these things through in the abstract. You have to get everybody at the table and explore the problems before you can identify solutions.

Finally, a related point I would like to make is that sensitive information is largely a matter of context. Information is not sensitive simply because it jumps out at us that it needs protection. It all depends. Information can be sensitive in some contexts and not in others. For instance, information excluded by the application of the Rules of Evidence is not sensitive if disclosed to the public; but it is very sensitive if disclosed to the jury. Thus, a motion to suppress can be filed and disclosed to the public subject to the classic judicial oversight concepts. However, if a juror uses the PACER system to learn about the cocaine seized by an illegal government search or a defendant's prior criminal record—information which may be public and online—we may no longer be able to provide the defendant a fair trial, consistent with fundamental notions of due process.

In the eighteenth century, Jeremy Bentham argued against the exclusionary rules of evidence, arguing that jurors should be trusted to make decisions after hearing all the facts.[17] As electronic information becomes more and more difficult to control, we may be forced to adopt Bentham's view of the exclusionary rules. However, I believe and hope that we all can focus on this problem and get a handle on it. I think we have to get a handle on it. But I really do not have any obvious, easy solutions about how to do it, other than to try to muddle through, and continue to work together.

Thank you.

PROF. CAPRA: Thanks, Peter.

Our next speaker is Lucy Dalglish, Executive Director of the Reporters Committee for Freedom of the Press.

MS. DALGLISH: Thank you. Good morning. It is nice to be here.

The Reporters Committee, for those of you who do not know, is a legal defense and advocacy organization based in Washington, D.C.[18] We have been around for forty years. We help journalists defend themselves when they are in trouble and gain access to all sorts of state and federal records and proceedings. I have one entire program area, run by a super-fellow, an

17. *See* JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 15–16 (1827).

18. THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, http://www.rcfp.org (last visited Sept. 23, 2010).

experienced litigator who has spent a year with us, and they are focused solely in the area of secret courts and prior restraints. This is of great interest to me. I am a former journalist and a former litigator. All of my lawyers are former reporters.

I need you to understand a little bit about the landscape that journalism is operating in right now. Whereas all of the rest of you are probably going, "Oh, my God, the Internet. Everything's available," reporters are going, "Oh, my God, the Internet. Everything's available. Suddenly I might actually be able to do my job effectively."

We are in a situation where there are a lot fewer journalists in mainstream news organizations. By having easy access to this information, they are able to do a better job of reporting the news to the public. There are some jurisdictions—probably not Manhattan, but certainly in places like Utah—where you have many local newspapers and really only one federal court that covers an enormous geographic area. Now they are able to accurately and completely report news stories as well. We view the PACER system as miraculous. It by and large works very, very well. I work on cases all across the country, and I love it, because I no longer have to rely on a local lawyer to go and dig out some information about a case I have heard about.

There are, as I said, fewer reporters. Many of them who were able to support a family on a journalism income in the past are no longer able to do that, so you have a lot more independent journalists. Money is an obstacle to PACER. A lot of them just cannot even afford to use it anymore.

I want to break my comments, very briefly, down into several categories. One, I would like to talk about the identifiers issue. I would like to talk briefly about plea agreements. I would like to talk very briefly about settlement agreements, the trend toward anonymous juries, and then the most important problem of all, which really was not even on the agenda, the issue of disappearing cases in the federal docket system.

First of all, identifier issues. I was one of the folks who testified back in 2002 or when you came up with the first rules. By and large, I think the redaction system that you have implemented that allows the last four digits of bank account numbers and Social Security numbers works fairly well. It does not cause a lot of phone calls from reporters. They are not all that concerned about it.

One thing that is a problem, however, is the birth date issue. Reporters' issues have to do almost exclusively with making sure they have the right person. I come from the land of Johnsons, Andersons, Sorensons, and Carlsons. And there are not just hundreds of them; there are thousands of them. You need to make sure that you have the right John Anderson. Reporters do not want to identify the wrong John Anderson as a criminal. They want to be accurate. Often the best way to ensure you have the right John Anderson is to know the birth date of the person who has been charged with a crime. Perhaps even worse than having personal identifying information released about someone actually involved in a court case is when information is released and everybody thinks it is about the wrong

guy. That is a real problem, and the more information you can provide, particularly a birth date, helps reporters identify the right person.

If you do not need all the rest of this stuff—I understand bankruptcy is an exception—if you do not need it, why are you collecting it? I think you really need to think very carefully about the identifying information that you do collect in the federal court files.

Plea agreements are something that reporters traditionally have relied upon—not every day, but sometimes there is very useful information that appears in those cases. It is helpful to flesh out a story, to identify trends. Lately, with the reporters who are calling me and asking me, "Why can't I get this plea agreement information?" it has to do with business cases, where they are trying to figure out who in Enron or who in whatever other criminal economic case they have is talking to whom. That information is very useful.

One of the problems that I hear is from reporters who work for the national publications and national broadcast stations. You guys have rules that are different all over the country. I have one summer intern coming in this summer who is going to work on just keeping track of what the feds are doing with plea agreements, because we need to be able to tell reporters what they can get and what they cannot get in each district.

There is, in my mind, an appalling trend toward completely anonymous juries in the federal system and the state system as well. I understand that we are asking people to give up a lot when they become a juror. But you know what? That is something that, when you are an American citizen, you just sign up for. We have a responsibility to serve on juries. I think the notion that you cannot find out who jurors are in the federal system, unless you are really, really lucky or you file requests for it months and months after a case is resolved or you are lucky enough to sit through a trial, to find out who is sitting on that jury panel—I think it is appalling. I think a criminal defendant is entitled to a fair trial, and part of that is having the ability for the public to know whether or not the people who were empanelled on that jury should have been empanelled on that jury.

The best case I can think of about this—and it was not a federal case, but I think it illustrates my point—there was a murder case being tried in New Jersey. It resulted in a mistrial. *The Philadelphia Inquirer* did a story about what was going on in this entire case. [19] They were the ones that figured out that the jury foreman did not even live in New Jersey. She was from Pennsylvania. She had apparently had a car licensed in New Jersey. She got elected to be the jury foreman in this murder trial. That is just appalling. And it was a reporter who figured that out.

When you came up with the electronic court access rules, this completely slipped right by us. It was not until probably six months afterwards that reporters were calling saying, "What is going on? All of a sudden we

19. Rita Giordano, *Post-Neulander Trial Contempt Case Near End*, PHILA. INQUIRER, May 24, 2002, at B3.

cannot find out who is sitting on a federal jury unless we are actually sitting there and we might overhear a name."

It turned out that this was part of the electronic access rules that completely slipped by us. You would have heard from us if I had been paying better attention way back when.

Settlement agreements—I think Ron is going to talk more about all of this. There is some very important information that can be accessed. It is of great public benefit. Probably the best example—and perhaps Dave McCraw can talk about this a little bit more from The New York Times Company standpoint—*The Boston Globe*—again, I think these were mostly state court cases—found out a great deal of information from their Pulitzer Prize-winning stories on priest abuse in the Archdiocese of Boston.[20] Most of that information came after they were able to go back twenty, thirty, forty years and get a lot of those settlement agreements unsealed. I think when the safety of children is involved, there is no reason whatsoever why all of these things need to be sealed. It is a public safety issue.

Finally, the secret docket cases. I never in a million years would have thought this would be possible. We have a system of open courts in this country. I understand that in certain circumstances when you are conducting a criminal investigation and you have not completed all of the indictments in your case that you are trying to present and you are trying to get all your ducks in a row and get people charged in the right order, maybe it has to be temporarily sealed. But right now, as far as I can tell, there is not a single district in this country who has figured out how to reopen those completely secret cases once they have been closed.

What usually happens is a U.S. Attorney will come in and say, "We just caught this really bad guy," and you will go in and try to find the case—this is not in every district, but in a fair number of them—and it does not exist. You go to the clerk of court and they say, "We cannot open it unless we have a court order." You go to the judge and he says, "I cannot unseal it unless the U.S. Attorney tells me I can." And you go to the U.S. Attorney and they say, "Well, that is a problem that the judge is supposed to come up with."

Meanwhile, at one point several years ago, we found thousands of cases in the federal system where docket numbers were just missing. Now, I know the Judicial Conference has attempted to address this issue, but it has not been fixed yet.

My very last point is on the civil side. There was a case we got involved in about a year ago, involving a federal civil case that was conducted entirely in secret in Pennsylvania for seven years. It was a situation where a woman brought a claim under the federal anti-pregnancy discrimination law.[21] She sued her former employer, who, she contended, fired her

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20. *Predator Priests*, BOSTON GLOBE, http://www.boston.com/globe/spotlight/abuse/predators/ (last visited Sept. 23, 2010).

21. Doe v. C.A.R.S. Protection Plus, Inc., 527 F.3d 358, 371 (3d Cir. 2008) (affirming the district court's order to seal the case).

because she had an abortion. This thing was litigated for seven years. The only way we found out about it was when it was appealed to the Third Circuit and the Third Circuit decision was released and the local legal newspaper said, "What is this?" They went back to get the documents, and the entire case was sealed.

That is just plain not right.

PROF. CAPRA: Thanks, Lucy.

I will say there are people in this room who are on the case of some of the issues that Lucy was dealing with, particularly disappearing docket numbers, entirely sealed cases. That report, to my understanding, is forthcoming.

So there has been significant work done on that. The Privacy Subcommittee and the Sealing Subcommittee have been kind of working in tandem on these issues, because the issues do tend to overlap in some respects.

But thanks for bringing that up. That is an issue that the Judicial Conference is working on.

You have already heard the fact that some of these issues are much more difficult in bankruptcy than anywhere else. We will see when Joe Cecil presents his data that many of the unredacted Social Security numbers that have been found in the two-month search that Joe did were in bankruptcy proceedings. So we thought it appropriate in terms of setting the table for the rest of the day to bring in an expert on these matters. That is Judge Cecelia Morris, who is from the Southern District of New York Bankruptcy Court and also served as the clerk of that court for many years.

I turn the floor over to Judge Morris.

JUDGE MORRIS: Okay, everybody, get a pen and paper out right now and number from one to five. I am serious. Do it. I was given this idea by Karen Gross, the president of Southern Vermont College since 2006.

I want you to write down five entities that you owe money to. Do it. This is a serious test. Besides writing down who you owe money to, write down how much you owe them. And do not tell me you do not have any debt. If you have a phone in your pocket, you have debt, because they give it to you on credit. They give you electricity on credit. So you have debt.

While you are doing this, I want your full name, every name you have been known under, and your Social Security number. Your monthly mortgage payments, your cable bill, your insurance premiums. Keep writing. I see people not writing.

I want the ages of your minor children. Are you getting there?

Now, beginning right here, I want you to come up to this podium and read everything you have just written to this room.

That is how it feels to file bankruptcy.

Privacy is important. Last year the consumer cases skyrocketed, and 1.3 million entities filed bankruptcy, most of those filings were individuals that had to do exactly what you did. And, by the way, we are putting it on the Internet.

MS. DALGLISH: Full Social Security numbers are going on the Internet?

JUDGE MORRIS: No, full Social Security numbers are no longer going on the Internet. But that is what you are doing, and we are sending your full Social Security numbers to your creditors. They are not going on the Internet.

By the way, we are also putting this information on PACER at an incredibly low price. The idea that you cannot afford to go on PACER at how much a page? That is sort of beyond me.

There is a difference here also between the number of cases filed in federal district court of about 300,000 and the 1.3 million cases filed in bankruptcy courts. Bankruptcy, as we have already heard, more than any other area of law, has a pronounced dichotomy between the debtor's privacy rights and the rights of creditors and the public to this information.

Section 107 of the Bankruptcy Code states that information filed in the bankruptcy court is "public records and open to examination by an entity at reasonable times without charge."[22] That is what it says.

The press may want the birth date. My financial world wants my Social Security number. In 1995, when CM/ECF[23] went live, I did not even know my Social Security number. Why did I not know it? I did not have to have it for every credit card, for every financial transaction. Today it is memorized. Why? Because it is part of every financial transaction.

So I am filing bankruptcy. What do I need? I need my name, address, birth date, familial situation. Am I married? How many kids do I have? What are their ages? Employer, current income, assets, including real property, jewelry, household goods, liabilities, current rent, mortgage payment, taxes, club fees, medical expenses, tuition payments, charitable donations, creditors, judgment, liens, leases, security deposits, IRAs, and all other retirement accounts. Each of those entities that I owe money to needs correct information in order to prosecute their claim. Your credit life is now tracked through your Social Security number.

The bankruptcy electronic filing system is vital to the practitioners, the creditors, the judges that participate in the bankruptcy system. It also greatly expands the number of individuals who can easily access the information. The debtor and the creditors and the public all benefit from the thorough disclosure of information. My name is Cecelia Morris. I do not want to be confused with the Cecelia Morris that filed bankruptcy in Brooklyn. It is similar in this way to the no-fly list that unless you have another identifier to distinguish Cecelia Morris in Poughkeepsie and Cecelia Morris in Brooklyn, it would mess up my credit report.

In response to privacy concerns, we have all heard about the December 2003 rules that allow only the disclosure of the last four digits of a Social Security number on the publicly available bankruptcy petition. You still

22. 11 U.S.C. § 107 (2006).

23. CM/ECF (Case Management/Electronic Case Files) is the case management and electronic case files system for most United States federal courts.

have to file the Social Security number, because your creditors are entitled to the full Social Security number. It is only the public information and the public docket that redacts everything except the last four digits. Again, you want to make sure the right parties and interests have the right notice, the proper notice, and are necessarily at the meeting of creditors.

When I described to you about coming up here and talking, that is the meeting of creditors. The meeting of creditors is run by a trustee. "Raise your right hand. Do you solemnly swear that everything you have told me on this petition is true and correct? Does anyone have a question?"

Under this new system, most of the account numbers are redacted, including bank accounts, credit cards, loans. When a case is filed pro se, the court makes every effort to protect private information since pro se debtors will often fail to redact confidential information. There is good quality control in the bankruptcy court clerk's office. There is really very good quality control on the petition filed by attorneys. The lawyers know how to do it. It gets done. The pro ses hand it in physically—remember, the electronic case filing system in the bankruptcy court is made for lawyers. It is not made for pro ses. Pro ses still have to come to the court.

The last thing that happened to me in the courtroom that was just blatant was when a lawyer had filed a petition with the wrong Social Security number and, in filing with the wrong Social Security number, she then filed a motion that said that was the wrong Social Security number and this is the correct one. The motion had the full Social Security number. Needless to say, she was chastised in court. She also fired a staffer. I am sure that was not the only thing the staffer had done, but that incident underscores the importance of maintaining a high level of discipline when it comes to redacting information.

Now let's talk about creditors.

Everybody is familiar with the Bernie Madoff case. Does anyone in the room not know about Bernie Madoff and the Ponzi scheme? Guess what happened? All of the proofs of claims have attachments. What did they do with the attachments, these creditors? They scanned those—Social Security numbers, home addresses, investment account numbers. Some of these people are worth a lot of money. With their Social Security numbers, you can go down to the bankruptcy court or sit at home on your computer, and you can find out a lot of information.

If I had to identify the greatest source of unredacted information, I would point to proofs of claims filed by pro se creditors. Not all creditors are large banks with legal counsel; many creditors are small businesses or individuals who will attempt to fill out a proof of claim themselves. As in the Madoff case, they will attach all sorts of identifying information about both the debtor and themselves. Compounding this problem is that these proofs of claim, unlike the bankruptcy petition itself, is not quality controlled by the bankruptcy clerk's office.

With respect to pro se debtors and pro se creditors, it is clear that they do not know why it is so important to redact identifying information. The court and the official forms may be able to do a better job at clarifying why

things need to be redacted, to prevent identity theft, and how to redact information, block it out. Clear, unequivocal instructions such as, "Do not give us your full Social Security Number in this proof of claim."

PROF. CAPRA: Thank you, Judge.

As Judge Raggi pointed out in her introduction, a historical kind of framework for this is going to be very valuable for the committee. We could not get anybody better on that particular task than Professor Maeva Marcus. I would like to turn it over to her. She is a Research Professor of Law and Director of the Institute for Constitutional History at George Washington University Law School.

PROF. MARCUS: Thank you.

After reading the summaries of what will be discussed today, and after hearing my fellow panelists, I realize that historians' concerns are somewhat different from the problems on the conference agenda. We take the long view: we want court papers to be saved exactly as they were filed and to be accessible in the future, because they are a fruitful source for all kinds of historical research. Since the beginning of the national government in 1789, the operations of the federal judiciary have played a significant role in the development of the nation, and no one today can anticipate what particular topic will be of interest to scholars in the coming decades. It is impossible to determine what will be relevant and important to the questions that will be studied fifty or a hundred years from now. Historians, therefore, do not want records to be changed in any way or destroyed.

They also do not want records to be sealed. I do not have firsthand experience with case papers that have been sealed. I do know, however, that papers are sealed too frequently, and litigation has ensued. If these papers are not eventually opened, who knows what will have been lost to history. Historians would urge the privacy subcommittee to devote the time and energy to finding technological solutions to practical problems like the redacting of information that would identify individuals or making voir dire transcripts public, so that scholars can have access to as many court papers as possible in the future. I understand that there are instances in which sealing the record, or part of it, is the only feasible solution at the moment. I would encourage the subcommittee to consider time limits for sealed papers.

Time limits have been used in a variety of situations where privacy is a concern. Judges who leave their papers to public repositories, for example, often provide in the deeds of gift that the collections cannot be used for a specified length of time. We assume, especially when the time limit is stated as "after all judges who served with the subject have left the bench," that the concern is to spare embarrassment for the judge's colleagues. But often a judge's papers contain items such as information about litigants that raise privacy concerns. Historians sometimes find copies of court filings in these collections, and these papers do not necessarily have the redactions that you find in the official copies of the documents. And this is a good thing for us. The very items of information that are redacted are often

useful to scholarly studies. While the judge and parties might not want this information disseminated at the time the case is being considered by the court, we would like it to be preserved. Historians believe that primary sources should be kept just as they originated. No changes should be made by another hand. If a time limit is imposed on sealed court records or redactions, I think that privacy concerns would dissipate.

As illustration of historians' need for unadulterated court papers, I can point to a number of very important books whose authors have used federal court records as their primary sources. Most of these concern courts in the eighteenth and nineteenth centuries. Mary K. Bonsteel Tachau produced the only monograph dealing with a federal district court in the 1790s, an in-depth study of the court in Kentucky that served by law as both district and circuit court.[24] My own work on *The Documentary History of the Supreme Court of the United States*[25] required many visits to regional archives to find the lower federal court records that would reveal how and why the case was brought to the Supreme Court.

For the nineteenth century, Christian Fritz's book, *Federal Justice in California: The Court of Ogden Hoffman, 1851–1891*, is a perfect example.[26] This monograph illustrates a new trend in judicial history. Formerly, and still today to a large extent, our conclusions about the role of courts and judges in our society were based on appellate opinions. But a thorough study of a particular district court provides a view of the operation of law that had not been available to us previously. We learn about all kinds of judicial business that did not eventuate in appellate court decisions. The great variety of litigation, the people involved in it—and the trial court involves the largest number of people in the federal system—all inform the legal, economic, and social history of the period being studied. For an accurate picture to be drawn, records cannot be tampered with. Nothing has been removed from the eighteenth and nineteenth century records used in these works. If information is removed from twenty-first century court records, historians will not be able to produce equally valid studies.

Some authors who have tackled twentieth century topics that required research in federal court records have found the court records useful but had to supply information that had been redacted from them. Often, this information was found in copies of these court documents in private collections. Examples include Allen Weinstein's book, *Perjury: The Hiss-Chambers Case*[27] and Stanley Kutler's work, *The American Inquisition: Justice and Injustice in the Cold War*.[28]

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24. MARY K. BONSTEEL TACHAU, FEDERAL COURTS IN THE EARLY REPUBLIC: KENTUCKY 1789–1816 (1978).

25. THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800 (Maeva Marcus et al. eds., 8 vols., 1985–2007).

26. CHRISTIAN G. FRITZ, FEDERAL JUSTICE IN CALIFORNIA: THE COURT OF OGDEN HOFFMAN, 1851–1891 (1991).

27. ALLEN WEINSTEIN, PERJURY: THE HISS-CHAMBERS CASE (1978).

28. STANLEY I. KUTLER, THE AMERICAN INQUISITION: JUSTICE AND INJUSTICE IN THE COLD WAR (1982).

Writing history has changed a little bit in the twenty-first century. For example, a book on *Bush v. Gore*[29] came out sooner than it would have in the twentieth century, because all the Florida court records were on the Internet, and the author was able to do research in those records quickly.

I have addressed myself to the privacy concerns with which this conference is concerned. Let me just say in conclusion that there is a larger question in the minds of historians, and that is the condition of the permanent records and where they will be found in the future. Everyone seems to be talking about instant access online. Will the courts continue to administer the electronic database or will electronic records be turned over to the National Archives, as the law requires?

The records of federal executive agencies—and lower federal courts are treated as agencies by the statute—are to be turned over to the National Archives, and it is the National Archives' responsibility to decide which records should be kept permanently. When space for paper records was an issue, there were fights over the destruction of records by the National Archives, and court records often were involved.

About thirty years ago, for example, the National Archives decided to keep all bankruptcy records from the nineteenth century but to destroy a large portion of the twentieth century records because there were too many of them. In the early 1980s, Chief Judge of the Northern District of California Robert Peckham and a group of historians began a campaign to encourage the National Archives to rescind its decision. They were partially successful. The Archives agreed with the historians on a sampling plan that would preserve a sufficient number of twentieth century bankruptcy records to enable economic, social, and historical analyses to proceed. But I gather that this sampling may not yet be in place.

A similar problem has befallen the records of other federal courts. The National Archives put on hold its most recent records schedule, because of opposition to the plan to destroy a large number of court records. The Archives agreed to do an assessment, but that has not been completed.

Historians face many obstacles to using court records in their research. Even before the advent of electronic records, courts were derelict in sending their papers to the Archives. We expect to find court records in regional archives, but often they just are not there. Working in the 1980s, David Frederick, who wrote a history of the Ninth Circuit from 1891 to 1941,[30] found no records in the Archives but, after searching the courthouse, found some relevant material in the clerk's office. When I was working on my *Steel Seizure* book[31] in the 1970s, I, too, looked for records at the Archives but ended up finding them at the D.C. courthouse where the steel companies filed suit. When you are lucky enough to find that a court

29. CHARLES L. ZELDEN, BUSH V. GORE: EXPOSING THE HIDDEN CRISIS IN AMERICAN DEMOCRACY (2008).

30. DAVID C. FREDERICK, RUGGED JUSTICE: THE NINTH CIRCUIT COURT OF APPEALS AND THE AMERICAN WEST, 1891–1941 (1994).

31. MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER (1977).

actually has sent its records to the regional archives, you are faced with a warehouse of records and no good way to search for exactly what you would like to see. Electronic records represent an advance, because they, at least, are searchable. Are they permanent, however? And historians have found that the National Archives' own database is difficult to use and behind the times, so sending records there may not be the best thing for historians, though the law has not changed.

PROF. CAPRA: Thank you.

First, I want to ask Ron Hedges about the sealing issues. Just being involved anecdotally in cases, I see that it is kind of automatic that lawyers file things under seal. Is there something that needs to be done about this?

MR. HEDGES: I do not think it is automatic that lawyers file things under seal. I think it is automatic that lawyers sign protective orders that have provisions in them that really govern discovery, and some place in that protective order there is a sealing provision.

PROF. CAPRA: But in *REFCO*,[32] we had filings just filed under seal automatically, when they did not have any confidential information in them that we could see. Does that happen routinely, in people's experience?

MR. HEDGES: I think, depending on the nature of the litigation, yes. I supervised a lot of IP litigation, and it is common in patent litigation and the like to want to protect information because someone thinks there is a commercial secret somewhere that cannot see the light of day. The fact of the matter is, there are not many things in civil litigation that need to be filed under seal.

PROF. CAPRA: On the issue of anonymous juries, I do not know, Lucy, what the reference was to the electronic access stuff that you let go by, but there is nothing in the rules that I know about that deals with anonymous juries—in the privacy rules.

MS. DALGLISH: My understanding is, it says, while the case is pending, you cannot get it, and afterwards you can go back and make an application. Then, when the entire case is concluded somewhere down the line, you might be able to go back and do it.

PROF. CAPRA: That is not one of the Judicial Conference's rules, in my understanding. Is it?

MS. DALGLISH: I was told that it happened at the same time as the electronic court access rules.

PROF. CAPRA: I just think that it is a case-by-case approach. Am I wrong, Judge?

MS. DALGLISH: No, it is not case-by-case.

PROF. CAPRA: In terms of what CACM has on this, is there anything on anonymous juries?

MS. DALGLISH: In other words, if I am a reporter, I can go to any federal court in the country while the jury is being selected and they have

32. *In re* REFCO Sec. Litig., No. 07 MDL 1902(JSR), 2010 WL 304966 (S.D.N.Y. Jan. 21, 2010).

just been empanelled, and I can go to the clerk of court's office and say, "Can you tell me the names of the individuals on this jury?" I am not aware of a single U.S. district court in this country that would let you have it while the case is going on.

PROF. CAPRA: I am just inquiring as to where this doctrine comes from. Judge Huff wants to speak.

JUDGE HUFF: Isn't there a ninety-day hold on filing transcripts to permit the redaction process to occur?

JUDGE TUNHEIM: There is, and transcripts of juror voir dire are generally set aside separately.

PROF. CAPRA: This is not an anonymous jury rule per se. We are talking, really, about the transcripts, which leads us to the panel.

MS. DALGLISH: If you go and listen in court and attempt to catch their name, you can hear their name. If you have missed jury selection and you want to go in to the clerk's office and say, "Can I have a list of the folks who were empanelled?" they will tell you no. I am telling you, this is going on all over the country. I get about three phone calls a month.

JUDGE TUNHEIM: I am not aware of any rule or policy that affects that. You are probably right. In most instances, it depends on what the clerk's office will turn over to you. I think technically that should be available. But it is not the subject of any rule or policy that I am aware of.

PROF. CAPRA: Mr. Hedges?

MR. HEDGES: The big debate going on these days now is in large trials, where there are extensive juror voir dires being done and there are pre-questionnaires being sent out. A question that courts are facing is whether or not those questionnaires are things that should be available, especially now that a number are being offered electronically.

The anonymous juries that I have seen are really ad hoc events because of concerns, generally, about organized crime. The last time the Second Circuit really had a fight about that was the Martha Stewart trial four or five years ago.

PROF. CAPRA: In which the Second Circuit said that the judge had acted too broadly.

MR. HEDGES: That is right.

JUDGE RAGGI: I am sure we are going to discuss this more. I think what you are talking about is what judges would not consider to be an anonymous jury.

MS. DALGLISH: You are right. I misspoke.

JUDGE RAGGI: Just so we are all talking about the same thing. Because, as you yourself pointed out, the profession of journalism has changed so much. A person who comes to the clerk's office and says, "Could I have the names and addresses of the jury?" could be looking to do investigative reporting or could be up to mischief. No clerk is probably just going to turn it over without making sure the judge wants it. So in the end, that query is going to probably go to a judge, and then you are going to talk

to a judge about why you want it and whether he is going to give it to you or not.

PROF. CAPRA: Thank you.

I want to give Professor Reidenberg a chance to kind of sum up on this issue of limited usage. Then we will close and get to the next panel.

PROF. REIDENBERG: Thanks, Dan.

I think it is really a question of thinking about the disclosure and the uses that we associate with public access to the courts as really being part of our political checks and balances. What are some of the uses? Oversight of court fairness, oversight of court administration, uses connected with the litigation—that is the bankruptcy case.

But now, when we talk about secrecy of the identity of jurors during a trial and the points you just raised, we get into other areas where we must be far more careful. Is it okay, for example, that someone wants the names and addresses of jurors who are sitting on the jury because they want to sell them a particular cell phone service? Suppose the cell company's marketers discover that jurors, while they are sitting on juries, tend to be more susceptible to advertisements for text plans. Is that the kind of world that we want to see? I am very unsympathetic toward those types of releases.

What about someone who wants to gain access to information from probate records to create lists for a dating service of widows and widowers who happen to be wealthy?

If we start seeing too much secondary use or out of context use, if we start putting voir dire questionnaires in real time, online, in ways that are searchable from Bing, what will be the effect on the willingness of our citizens to participate in our legal system?

PROF. CAPRA: Is the technology available to limit that kind of motivational use?

PROF. REIDENBERG: Yes. We can build the architectures. But, we also need to build a legal structure that has some kind of sanction for the non-permissible uses.

CONFERENCE ON PRIVACY AND INTERNET ACCESS TO COURT FILES

PANEL TWO: SHOULD THERE BE REMOTE PUBLIC ACCESS TO COURT FILINGS IN IMMIGRATION CASES?

MODERATOR

*Judge Robert Hinkle**

PANELISTS

David McCraw[33]

Daniel Kanstroom[34]

Eleanor Acer[35]

Elizabeth Cronin[36]

Mark Walters[37]

JUDGE HINKLE: This next panel is a more specific application of some of the general principles that were addressed in the panel that we just finished. When CACM was first developing the privacy policies that led later to the adoption of the rules that we are operating under, Social Security cases were cut out for different treatment than all other kinds of cases, so that the Social Security files were available at the courthouse, but were not available electronically over the PACER system. Then, as it went on through, immigration cases got added to that, so that immigration cases now are handled like Social Security cases.

One of the questions is whether that should be done that way, and what adjustments, if any, should be made to the way they are handled. We have a panel of some people with a great deal of expertise in the immigration area to address it.

The first speaker we have is David McCraw. He is the Vice President and Assistant General Counsel for *The New York Times*, a job that I think probably 90% or maybe 100% of people at some point in their careers have aspired to. What a great thing to do.

MR. MCCRAW: I guess I am happy they do not reveal what I get paid. That would cut that number down. That is why privacy is so important.

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* United States District Court Judge, Northern District of Florida.

33. Vice President & Assistant General Counsel, The New York Times Co.

34. Director, International Human Rights Program, Boston College Law School.

35. Director, Refugee Protection Program, Human Rights First.

36. Director, Office of Legal Affairs, United States Court of Appeals for the Second Circuit.

37. Office of Immigration Litigation, Department of Justice.

Professor Dan Capra very wisely invited Nina Bernstein to be here today, . . . who is a *New York Times* reporter who covers immigration, on the theory that you probably will hear from a lot of lawyers today, and should hear from some real people. Nina, to her great fortune, is being honored this morning in Washington, at the American Society of Newspaper Editors, for her coverage of immigration. So to completely reverse the tables on Dan, she sent a lawyer in her place.

She did prepare remarks about Rule 5.2 for me that begin, highlighted in yellow: "Terrible mistake." That phrase comes up in the first paragraph of her remarks and her statement concludes with how many times government officials tell her privacy is important—right after someone has died in detention.

I will try to give a lawyerly gloss to those remarks.

As most of you know, and as I came to learn as I prepared for this, Rule 5.2 does have a carve-out, as Judge Hinkle suggests, for immigration cases, where you have electronic access at the courthouse for the whole docket; outside of the courthouse, you are limited to the docket itself, orders, and other dispositions. It is our view that this attempt at privacy, in effect, serves neither of the public policy goals that are implicit in that. It neither protects privacy very well nor does it bring the kind of transparency the court system should have. It is, in effect, a version of what you heard in the last panel, practical obscurity.

In my mind, "practical obscurity" is actually a code word for "elite access." It is a method by which we decide that certain people in this democracy should have greater access to information than others. We do that by making sure that people who cannot hire private investigators, who do not have lawyers to go down to the courthouse, who live far away, who are disabled, who do not know how the system works, do not have access. To me, that is fundamentally a very, very bad approach to transparency.

I think it is also a bad approach to privacy, if you look at how it actually plays out. I looked at about three months of Southern District filings in immigration cases, just using PACER. What you can see when you go onto the system are the orders and the decisions. You can see certain orders on scheduling and so forth. You know who the litigant is. You know who is seeking asylum. You know who is objecting to a deportation. If you look at the online decisions, you can find out a great deal about the cases.

What you do not find and what you cannot get is the habeas petition, and what you cannot get are complaints, usually in the nature of mandamus. Those are very, very important for people like Nina, who are trying to find out what is going on in a system that, on the administrative side, is shrouded in secrecy. It is when they pop up in court that there is a chance to understand what the complaints are about, what mistreatment is being alleged. It is very important for her and for others like her and for researchers to see that, and to see not only individual cases, but to see patterns.

Nina came to poignantly realize how the system worked when she wrote a story about a woman, whose name is Xiu Ping Jiang, a Chinese woman

who came to the United States.[38] In China, she, of course, did what is unthinkable: she had a second child. Therefore, she was being subjected to mandatory sterilization. She fled to this country, and later she was detained and in the process of being deported for violation of the immigration law. During her hearing, the judge asked her name and she responded twice, giving her name, not waiting for the Mandarin translator. The judge, an administrative judge, thought this was some example of bad faith that she was responding in English rather than waiting for the translator, and said, "I am going to treat you as if you did not appear."

Fortunately, she had relatives here, who were able to find a lawyer in New York who took her case.

Her habeas petition would never have been known and would never have been reported on except for the fact that it was misfiled. Even then it would not have been found, except that Xiu Ping happens to have the same name as the former wife of the gun man who shot up the Binghamton immigration center last year.[39] So while *Times* reporters were doing stories on him, they came across her filing. It had been misfiled. It had been filed publicly and was available remotely.

My point here is rather obvious, which is that it should not take a mistake for people to know about that and to write about that case and cases like it.

JUDGE HINKLE: Next we have Professor Daniel Kanstroom, of Boston College. He is the Director of the Immigration and Asylum Clinic and the Director of the International Human Rights Program at Boston College.

PROF. KANSTROOM: Thank you very much. It is an honor and a pleasure to be here.

I am going to speak from the perspective of both the theory and practice of immigration law, an area that has sometimes been referred to as standing in the same relationship to civil litigation as mud wrestling does to the Bolshoi Ballet. I was asked to speak specifically about the current bars on remote access to immigration cases.[40]

My understanding is that the bars were motivated by two background principles: one, a concern about sensitive information, and the second, a concern about volume. I think these are surely significant concerns and, in some cases, compelling ones. But my ultimate conclusion, which I will get to in a minute, is guided by a couple of fundamental principles that I will disclose as a suggested way of thinking about this.

The main principle, as others have noted, is a general background norm of openness, which I think is mandated by the First Amendment, in addition to due process and some deep common law traditional principles. The most basic idea is that federal court case files are generally presumed to be

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38. Nina Bernstein, *For a Mentally Ill Immigrant, a Path Clears Out of the Dark Maze of Detention*, N.Y. TIMES, Sept. 11, 2009, at A20.

39. *See* Robert D. McFadden, *Upstate Gunman Kills 13 at Citizenship Class*, N.Y. TIMES, Apr. 4, 2009, at A1.

40. Rule 5.2(c) of the Federal Rules of Civil Procedure and Rule 25 of the Federal Rules of Appellate Procedure bar electronic remote access by the public to filings in Social Security appeals and certain types of immigration cases. FED. R. CIV. P. 5.2(c); FED. R. APP. P. 25.

available for public inspection and copying.[41] Now, of course, these principles are not absolute. Still, I would suggest that we start with them and hold them, at least, as a kind of tiebreaker. I often tell my students in Administrative Law that when you have these kinds of "tectonic" conflicts, what you may really need is some sort of tiebreaker principle. I think the principle here ought to be a strong presumption of open access.

Those who have concerns about problems caused by openness, in my view, bear burdens of both production and persuasion. And I think those are heavy burdens. In immigration cases, especially in deportation cases, they are particularly heavy, due to a couple of other principles that derive from the nature of the cases.

First of all, as the Supreme Court has long recognized—and just recently reiterated in the *Padilla v. Kentucky*[42] case—deportation, while not technically a criminal punishment, is a severe penalty. The stakes are very, very high—sometimes, literally life and death. Although removal proceedings are technically civil, deportation "is nevertheless intimately related to the criminal process."[43] Also, as the Court has recently noted, "The 'drastic measure' of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes."[44] So I think we ought to look to the norms of criminal cases for some sort of analogous guidance. These are, for the most part, norms of open access. They are certainly not categorical bars.

Another guiding principle is the legendary, sometimes humorous, sometimes teeth-gnashing complexity of immigration law. One court has referred to immigration as an area of law that would "cross the eyes of a Talmudic scholar";[45] another, an area of law where "morsels of comprehension must be pried from mollusks of jargon."[46]

Complexity in this context, I think, matters, particularly because the exact boundaries of these rules are, to my eyes, rather unclear. I could not tell, upon reading the text of these rules, whether they would cover a case like, for example, *Hoffman Plastics*,[47] which was a Supreme Court case that dealt with the intersection between the National Labor Relations Act and immigration law. It is also far from clear whether these rules cover all habeas corpus challenges, particularly if they are just focusing on the conditions of detention, naturalization appeals, etc.

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41. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575–78 (1980); *see also* Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978) (recognizing common law right "to inspect and copy public records and documents, including judicial records and documents").

42. 130 S. Ct. 1473 (2010).

43. *Id.* at 1481. *See generally* Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th "Pale of Law"*, 29 N.C. J. INT'L L. & COM. REG. 639 (2004); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890 (2000).

44. *Padilla*, 130 S. Ct. at 1478 (citing Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948)).

45. Cervantes v. Perryman, 954 F. Supp. 1257, 1260 (N.D. Ill. 1997).

46. Kwon v. INS, 646 F.2d 909, 919 (5th Cir. 1981).

47. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002).

The point here is that immigration cases arise in a wide variety of contexts, and I fear the rules, as drafted, may be overbroad in ways that call their validity into question. In fact, I am fairly certain that they are.

Finally, though, as our President likes to say, "Let me be clear." In *certain* types of immigration-related cases, privacy concerns are quite compelling. For example, asylum cases, Convention against Torture[48] cases, S visa cases,[49] T visa (trafficking-victim) cases,[50] U visa cases,[51] mean that many of these cases require substantially *more* protection than the rules give. So the rules are overbroad in light of the background constitutional and immigration law norms, but they may be under-protective in others.

The over-breadth problem, I think, also relates to—as David was saying and as I will validate—the tremendous value that is brought by close public scrutiny to these cases. It has really made a huge difference, for a variety of reasons, which, if we have time for questions, I would be happy to talk with you more about.

A second feature of the system that I think should be highlighted in this vein is the prevalence of transfer and detention decisions. This is a powerful concern. Many thousands of people each year are arrested, placed in removal/deportation proceedings, and then summarily detained and transferred from, say, Massachusetts, where I have experienced it quite a bit, or New York to remote parts of Texas or Louisiana, where their cases proceed and where judicial review, if there is any, follows in that district, in that circuit. So, remote access to these cases is incredibly important, and incredibly difficult if you have to actually go to the courthouse to get it. I apologize to anybody who lives in either Texas or Louisiana, but for those of us practicing in Massachusetts or New York, I think it is a compelling problem.

So the rules, as I said, are both overbroad and they also seem under-protective in some cases. This under-protective aspect can inspire a false and, I think, dangerous sense of security. I would not want people to think that these rules are sufficiently protective in the cases in which more

48. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, 1465 U.N.T.S. 85 (as codified in 8 C.F.R. § 208.18 (2010)) [hereinafter *Convention Against Torture*].

49. S visas may be given to noncitizens who assist U.S. law enforcement to investigate and prosecute certain crimes and terrorist activities. *See* 8 U.S.C. § 1101 (a)(15)(S) (2006). They are strictly numerically limited.

50. T visas may be given to noncitizens who are victims of "a severe form of trafficking in persons," as defined in section 103 of the Trafficking Victims Protection Act of 2000. 8 U.S.C. § 1101 (a)(15)(T)(i).

51. U visas may be granted to noncitizens who have suffered substantial physical or mental abuse as a result of having been a victim of certain types of criminal activity; who possess information concerning such criminal activity; and have been helpful, are being helpful, or are likely to be helpful to a federal, state, or local law enforcement official, to a federal, state, or local prosecutor, to a federal or state judge, to the Service, or to other federal, state, or local authorities investigating or prosecuting criminal activity. *See* 8 U.S.C. § 1101(a)(15)(U).

protection is warranted. I think all of this amounts to a call for greater nuance and texture in the rules as they are drafted.

One last issue, which comes up a lot in current discussions about immigration law, is the question of volume. I do think that volume is a major problem, both for the administrative agencies and for the courts. I am not quite sure precisely how it compares to Social Security or other areas of law. I do think, though, that volume has disparate impact in certain circuits compared with others—more in the Second and Ninth, probably, and the Fifth and the Eleventh; maybe a little less so in the Seventh and the First. Anyway, it is certainly a concern. But I think it is a concern that should be more technically and more historically understood. The volume of appeals into the judicial system rose dramatically in the early 2000s for quite specific reasons. Though I do not have time to go into details, there was a confluence of three factors. One was vastly increased, post-9/11, workplace- and security-related immigration enforcement. A second was vastly increased and, in my view—and, it now seems, in the view of the Supreme Court[52]—rather overenthusiastic and legally incorrect criminal/immigration enforcement. This concerns a certain type of deportation case, where the person, often a person with legal status, is being deported because of criminal conduct. I have referred to this as "post-entry social control deportation" as opposed to "extended border control" deportation, which deals primarily with undocumented people.[53] The Court on that score, by the way, has ruled in a series of cases, nine-to-nothing, eight-to-one,[54] that the government theories in those cases were wrong. So there are a vast number of cases that are not going to be prosecuted as aggravated felonies anymore.

A third factor is the reduction in the size of the Board of Immigration Appeals that was championed by John Ashcroft.

None of these factors are now true. The Obama Administration has stopped the workplace raids. As I said, the Supreme Court has definitively rejected the Department of Justice's legal theories in major crime-related cases. Increased resources are now, properly in my view, being directed to the Board of Immigration Appeals and to the immigration judges, where the quality of administrative adjudication should improve. You can go to the website of the Executive Office for Immigration Review to see some statistics on this.[55] I should also disclose that I am on the Immigration Commission of the American Bar Association. We have just released a

52. *See* Padilla v. Kentucky, 130 S. Ct. 1473 (2010).

53. *See generally* DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY (2007) (analyzing these types of controls).

54. Lopez v. Gonzales, 549 U.S. 47 (2006) (holding that an "aggravated felony" includes only conduct punishable as a felony under the Federal Controlled Substances Act, regardless of whether state law classifies such conduct as a felony or a misdemeanor); Leocal v. Ashcroft, 543 U.S. 1 (2004) (holding that state drunk driving offenses, which do not have a mens rea component or require only a showing of negligence in the operation of a vehicle, do not qualify as an aggravated felony "crime of violence").

55. *See Statistical Year Book*, DEP'T OF JUSTICE, http://www.justice.gov/eoir/statspub/syb2000main.htm (last visited Sept. 23, 2010).

major report, written primarily by Arnold & Porter, about this last set of issues, and calling for certain further reforms, but highlighting the reforms that are already taking place.[56]

So I do think—though perhaps I am too optimistic about this—the volume concern is actually going to diminish, and I would bet that it already has diminished, as the quality of administrative adjudication has risen. Also, as I am sure you know, appellate court jurisdiction over deportation cases has been substantially limited in recent years, particularly in cases involving challenges to the denial of discretionary relief from deportation.[57]

In any case, the volume concern cuts two ways. High volume, while a concern for federal courts, also indicates to me that deportation can be a sort of enforcement tsunami that bears close watching, especially by lawyers, advocates, policy groups, and the press. Remote access to immigration cases has been crucially important to determine whether there have been patterns of racial disparities in enforcement, patterns of wrongful deportations of U.S. citizens, deportation of low-level offenders in categories that superficially appear to involve major crimes (e.g., "aggravated felonies"), and much more. Much of my own scholarly work has been in this vein.

So in sum, the general exemption of immigration, and especially deportation, cases from remote access seems to me to require much more substantial justification than I have yet heard. Certain types of cases clearly do require protection. But for those cases, sealing and redaction are much more appropriate.

But, in general, given the harshness of deportation, its convergence with the criminal justice system, the complexity of the law, the lack of counsel for most deportees, and the prevalence of detention and transfer policies, it seems to me that the costs of general exemption are much greater than the potential benefits.

Thank you.

JUDGE HINKLE: Next we have Eleanor Acer. She is the Director of the Refugee Protection Program at Human Rights First.

MS. ACER: Thank you very much. It is a pleasure to be here.

Human Rights First works in partnership with lawyers at law firms in New York, Washington, and other places around the country to help provide legal representation to asylum seekers who are indigent as they navigate their way through the asylum system. And we provide this representation at the Asylum Office level, before the immigration courts, and before the federal courts as well. We also advocate with the U.S. government to urge that U.S. asylum standards are in accordance with our

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56. ARNOLD & PORTER LLP FOR THE ABA COMMISSION ON IMMIGRATION, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES (2010), *available at* http://www.abanet.org/media/nosearch/immigration_reform_executive_summary_012510.pdf.

57. *See* Daniel Kanstroom, *The Better Part of Valor: The REAL ID Act, Discretion, and the "Rule" of Immigration Law*, 51 N.Y.L. SCH. L. REV. 161 (2006/07).

obligations under the 1968 Protocol Relating to the Status of Refugees (Refugee Protocol)[58] and other international human rights standards.

Asylum has a long history in this country. The pilgrims came here seeking some protection from persecution. In the wake of World War II, the United States led the international community in setting up a regime to ensure the protection of those who fled from persecution. In 1980, the United States enacted a law that actually created the status of asylum.[59] That law just celebrated its thirtieth anniversary last month.[60]

I am giving you a little bit of background just to set the stage for the importance of maintaining confidentiality and some protections for confidentiality in asylum cases and in similar cases involving withholding of removal due to refugee status[61] and withholding of removal under the Convention Against Torture.[62] I actually agree with many of the points raised by my fellow panelists. I agree that this is not an easy issue to navigate, but I think it needs some closer examination.

There are a number of reasons, which I will touch on, for maintaining confidentiality in cases involving asylum and similar forms of immigration relief. One is, of course, the potential for some kind of retaliation against an individual if he is returned home. Another reason is the potential for some kind of harm to family members or other colleagues who may actually still be in the country of persecution. In addition, asylum applications often involve very confidential types of information. Finally, another reason is that the very nature of an asylum application requires that applicants be honest about very intimate details of their lives, as well as about information that could affect the lives of other individuals, and so the assurance of confidentiality is actually incredibly important to the people in the process and also important to the strength of the asylum system, so that applicants and witnesses really do provide accurate information and are not scared to provide information that is important to the process out of a fear that it may later be publicly disclosed.

U.S. regulations, as some of you may know, actually contain specific protections for confidentiality in asylum cases. These regulations appear in two different places. They appear at 8 C.F.R. Section 208.6[63] as well as 8 C.F.R. Section 1208.6.[64] The reason they appear in two different places is that since the Department of Homeland Security took over the

58. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force 1968).

59. Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 (codified as amended at 8 U.S.C. § 1522 (2006)).

60. HUMAN RIGHTS FIRST, RENEWING U.S. COMMITMENT TO REFUGEE PROTECTION: RECOMMENDATIONS FOR REFORM ON THE 30TH ANNIVERSARY OF THE REFUGEE ACT 1 (2010), *available at* http://humanrightsfirst.org/asylum/refugee-act-symposium/30th-AnnRep-3-12-10.pdf.

61. *See* Withholding of Removal Under Section 241(b)(3)(B) of the Act and Withholding of Removal Under the Convention Against Torture, 8 C.F.R. § 208.16 (2010).

62. *See Convention Against Torture*, *supra* note 48.

63. 8 C.F.R. § 208.6.

64. *Id.* § 1208.6.

responsibilities of the former INS, the U.S. Immigration and Naturalization Service, in 2003, responsibility for immigration and asylum matters now rests with the Department of Homeland Security, though the Department of Justice continues to play a role as well. As a result, these regulations are essentially mirror regulations appearing in two different places.

Under 8 C.F.R. Section 208.6(a), "Information contained in or pertaining to any asylum application, records pertaining to any credible fear determination . . . pertaining to any reasonable fear determination . . . shall not be disclosed without the written consent of the applicant, except as permitted by this section or at the discretion of the Attorney General."[65] Now, under the Homeland Security Act, that discretion actually rests with the Secretary of Homeland Security.[66]

The regulations include an exception for "[a]ny Federal, State, or local court in the United States considering any legal action," including that "[a]rising from the proceedings of which the asylum application, credible fear determination, or reasonable fear determination is a part."[67]

In addition to these regulations calling for confidentiality in asylum proceedings, the instructions on the asylum application form actually inform the individual applicant at the time he or she actually fills out the initial asylum application.[68] The asylum application form's instructions state,

> The information collected will be used to make a determination . . . . It may also be provided to other government agencies . . . for purposes of investigation . . . . However, no information indicating that you have applied for asylum will be provided to any government or country from which you claim a fear of persecution.[69]

Then the instructions cite to the regulations, i.e., to 8 C.F.R. Section 208.6 and 8 C.F.R. Section 1208.6.[70]

Why does this matter? I can tell you why I think it matters, and I will in a little bit. But I am going to cite the Department of Homeland Security's explanation of why confidentiality matters first.

There is a fact sheet that was prepared by the U.S. Citizenship and Immigration Services (USCIS) Asylum Division and that fact sheet is posted on the USCIS website.[71] This fact sheet was prepared for those in the USCIS Asylum Division who actually adjudicate asylum cases.[72] In

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65. *Id.* § 208.6(a).

66. Homeland Security Act of 2002, 6 U.S.C. § 271 (2006).

67. 8 C.F.R. 208.6(c)(2).

68. U.S. Citizenship and Immigration Services, I-589, Application for Asylum and Withholding of Removal, *available at* http://www.uscis.gov/files/form/i-589.pdf.

69. *See* U.S. Citizenship and Immigration Services, Instructions, I-589, Application for Asylum and Withholding of Removal, *available at* http://www.uscis.gov/files/form/i-589instr.pdf.

70. *See id.*

71. *See* U.S. Citizenship and Immigration Services, *Fact Sheet: Federal Regulations Protecting the Confidentiality of Asylum Applicants* (June 3, 2005), *available at* http://www.uscis.gov/files/pressrelease/FctSheetConf061505.pdf.

72. *Id.*

both the first paragraph and in the response to the first of the frequently asked questions, USCIS explains some of the reasons why the regulations protect asylum-related information.[73] The fact sheet explains that "[p]ublic disclosure of asylum-related information may subject the claimant to retaliatory measures by government authorities or non-state actors in the event that the claimant is repatriated, or endanger the security of the claimant's family members who may still be residing in the country of origin."[74] Public disclosure also can, in rare circumstances, and only if the individual can meet the standards, give rise to a potential asylum claim in and of itself, based on potential for persecution based on the release of that information.[75]

The U.S. Court of Appeals for the Fourth Circuit, in its decision in *Anim v. Mukasey*,[76] has actually cited to this particular USCIS memorandum and its explanation of why maintaining the confidentiality of asylum seekers is important.[77] So, too, has the Court of Appeals for the Second Circuit in its decision in *Lin v. U.S. Department of Justice*.[78]

I am also going to read briefly from the policy of the UN Refugee Agency. The United Nations High Commissioner for Refugees (UNHCR) was actually created before the 1951 Refugee Convention.[79] The United States is a member of the Executive Committee of UNHCR and is also one of UNHCR's leading donors. UNHCR has explained, in a policy letter, that "the nature of asylum proceedings call[s] for strict observance of the duty of confidentiality."[80] The UNHCR itself has a confidentiality policy for all the refugee status adjudications it conducts itself across the world. As a general rule, UNHCR will not share any information with the country of origin (i.e., the country of feared persecution). The policy letter also stresses that information relating to the applications needs to be kept strictly confidential. The letter includes several additional paragraphs describing the importance of maintaining confidentiality in asylum cases.

For people who have actually applied for asylum, many kinds of information are included in their asylum applications. This information can be very personal and sensitive information: the details of an individual's rape or torture; the rape or torture of the applicant's family members or colleagues; details about an individual's sexual or gender identity, or the sexual or gender identity of another.

Sometimes asylum applications and testimony can include names of individuals who helped an asylum seeker escape from his or her

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73. *Id.* at 2, 3.

74. *Id.* at 3.

75. *Id.*; *see also* United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150.

76. 535 F.3d 243 (4th Cir. 2008).

77. *Id.* at 253–55.

78. 459 F.3d 255, 263–64 (2d Cir. 2006).

79. *See About Us*, UNCHR: THE UN REFUGEE AGENCY, http://www.unhcr.org/pages/49c3646c2.html (last visited Sept. 23, 2010).

80. Letter from Joanne Kelsey, Protection Officer, UNHCR, to Sandra Saltrese, Miller & Associates (July 12, 2007) (on file with Human Rights First).

persecutors; names of other individuals who participated in prohibited political activity with the asylum seeker; or the names of individuals who are members of an underground church. Often during the asylum process, the applicant will need to describe how other individuals who are similarly situated are treated, and U.S asylum adjudicators will want names, specifics, dates, and other detailed information to assess credibility and eligibility for asylum.

Oftentimes, the very fact that a person has applied for asylum can be viewed by a persecuting government as an act of treason, or at least as a blatant criticism of the government and its human rights policies.[81] This danger was publicized more at the height of the Cold War, but this danger is still very much present, whether we are talking about China or Iran or many countries where state and non-state persecutors may target individuals for a wide range of reasons.

In closing, I would like to thank the Judicial Conference Privacy Subcommittee and Fordham University School of Law for inviting me to participate in this panel. I actually did not realize that the confidentiality of asylum claims was a subject of discussion by the Judicial Conferences' Privacy Subcommittee. In looking at this issue in preparation for our discussion today, I realized that there needs to be a lot more attention devoted to these issues.[82]

JUDGE HINKLE: Thank you.

Next is Elizabeth Cronin. She is the Director of Legal Affairs and Senior Staff Counsel at the Second Circuit.

MS. CRONIN: Thank you, Judge. Good morning. Thank you so much for inviting me.

From the viewpoint of the federal courts, there are two issues that I think are relevant to the discussion here today. One is the public availability of the A-number, or the alien registration number, and then whether the federal rule 5.2(c)[83] should be reexamined or what the implications of that rule are. I am going to address the A-number issue very briefly. I think I am going to let Mark Walters talk about that in more depth. I would like to focus on the public access portion of the federal rule.

To set the stage, I would like to explain that, for the most part, up until about 2002, the federal circuit courts dealt with immigration cases, particularly asylum cases, on a relatively small scale. Prior to around 2002, immigration cases accounted for less than four percent of our circuit's caseload. Within just a couple of years, the filing of immigration cases exploded, and by 2004 to 2005, they accounted for over forty percent of the

81. *See* Virgil Wiebe et al., *Asking for a Note From Your Torturer: Corroboration and Authentication Requirements, in Asylum, Withholding and Torture Convention Claims*, IMMIGR. BRIEFINGS, Oct. 2001, at 6 n.24 (on file with Human Rights First).

82. *See* Memorandum from Bo Cooper, INS General Counsel, to Jeffrey Weiss, INS Director of Int'l Affairs, *in Hearing Before the Subcomm. on Immigration, Border Sec., & Claims of the H. Committee on the Judiciary*, 107th Cong. 41 (2002), *available at* http://judiciary.house.gov/legacy/82238.pdf.

83. FED. R. CIV. P. 5.2(c).

court's caseload.[84] So you can see that it increased exponentially over a really short period of time. As a result, many people in the court ended up becoming experts in a lot of different areas of immigration law, as a necessity.

As many of you are probably aware who are involved in this field, our court tried many different methods of handling the influx of cases, both to address a rising caseload and out of a desire to provide a timely forum for the litigants. Ultimately, the court developed a non-argument calendar, which we call the NAC,[85] successfully eliminating the backlog. But the cases continued to come, predominantly to the Second and the Ninth Circuits.

Prior to this time, I do not think a lot of thought was given to A-numbers or the implications of having A-numbers available. However, once the deluge of immigration cases came, it quickly became clear that the only reliable method for keeping track of the thousands of immigration cases that we were dealing with was to have the A-number utilized to identify who the cases belonged to. There is a letter from Molly Dwyer, who is the Clerk of Court in the Ninth Circuit, addressing this issue in the materials that were given out this morning.[86]

There have been some suggestions that the A-numbers should be redacted as a way of protecting the confidentiality of the litigants. But, as Molly says in her letter—and our clerk of court agrees—absent a suitable replacement system, this could really wreak havoc on the courts and the ability of the courts to maintain order of the thousands of cases that get filed.[87]

Some of the issues that are relevant with respect to the availability of the A-numbers:

First, the names in many of these cases are incredibly similar. In our circuit, a large majority of the cases are Chinese immigrants filing asylum.[88] There has been a lot of confusion in how the names are reported when they get to us, whether their first names are substituted for their last names. Many of the last names are similar. Without having some other identifier, like an A-number, it would be impossible for the clerk's offices to keep track of who the cases belong to.

Second, immigration cases, as you know, can go on for many, many years. They go from the agency up to the circuit. They go back to the

84. MICHAEL A. SCAPERLANDA, IMMIGRATION LAW: A PRIMER 7 (Federal Judicial Center, 2009), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/immlaw09.pdf/$file/immlaw09.pdf.

85. *See generally* 2D CIR. R. 34.2.

86. Letter from Molly C. Dwyer, Clerk of Court, U.S. Court of Appeals for the Ninth Circuit, to Professor Daniel Capra, Fordham Law School (Nov. 2, 2009) (on file with Fordham Law Review).

87. *Id.*

88. *See* John R.B. Palmer et al., *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 71–72 (2005).

agency, sometimes many times. It is an effective way of making sure that the case is tracked properly.

Third, clerks are always concerned that somebody may get deported by mistake because they were misidentified. The A-number is a way of preventing that from happening.

Fourth, the Board of Immigration Appeals (BIA) issues presidential decisions with A-numbers, except in asylum cases. But many cases begin as asylum cases and then turn into something else when they get to the circuit court.

Fifth, courts do not want to be in the business of doing redaction, for obvious reasons. They do not want to be taking documents that come to them and altering them in some way. Also they do not want to be charged with the awesome responsibility of perhaps taking something out that should not be taken out.

Lastly, there is a question of what harm could come to petitioners as a result of the A-numbers being made available, and even some Immigration Judges have asked courts to put the A-number on their decisions so that they can track the case that they had when it was at the agency level.

I will let Mark deal with that more. But those are some of the issues that are relevant to the A-number.

With respect to Federal Rule 5.2, as I understand it, initially the Social Security cases were the ones that were given protection from unlimited public access, because they are inherently different from regular civil cases. They are a continuation of an administrative proceeding, the files of which, at that level, are confidential. Moreover, according to the report of the committee when they were discussing this rule, the cases in the Social Security context are of limited or no legitimate value or use to anyone who is not a party in those cases.[89] As you know, with Social Security cases, they are replete with medical records, because the person has to put that information in, in order to qualify for the benefits.

Immigration cases were included in the new version of the rule because they presented similar privacy issues as those in the Social Security cases. As discussed, this federal rule limits access to actual documents at the courthouse and does not permit electronic access, other than to the docket sheets and the court's decision. I think, as both Mr. McCraw and Professor Reidenberg said, it ends up being practical privacy or practical security, because fewer people have physical access to those records.

It is not surprising to me that the media and research academics would want greater or easier access to court documents. I think in the written materials, Mr. McCraw mentioned judicial transparency. This is obviously a very important concept to the federal courts as well. Under this particular rule, the judiciary is trying its best to balance the court's own support of open access to records with the privacy of litigants. As everyone has discussed from this morning's panel to this panel, it is a very difficult and

89. FED. R. CIV. P. 5.2 advisory committee's note.

complicated issue. The rule is not perfect, but it is an effort to balance those two competing interests.

In this day and age of electronic availability of just about everything, I guess the question is, is this rule an anachronism, or is it a euphemism for "elite access"? Or is it trying to address a legitimate concern that unfettered electronic access to immigration records through the courts can lead to what, I think, one professor this morning said could be data mining that would create dangerous situations for petitioners because Internet access may allow for private or personal information to go viral?

Professor Kanstroom talked also about whether immigration cases are more akin to criminal cases, and mentioned that it would be helpful to look at the criminal privacy rules. But criminal cases, as we know, are available, for the most part, electronically. In my view, having read a lot of immigration cases and looked through a lot of immigration records, there are some differences between immigration and criminal cases that would make immigration cases more akin to Social Security-type cases that would warrant, perhaps, a stronger look at those privacy issues.

As I said earlier, Social Security cases originate in the administrative agency and then they come right to the Federal Circuit courts. The administrative records, as Ms. Acer so ably described, are replete with personal information. There is a letter from the government to a judge involved in the beginning process of developing these rules about what kinds of records are available.[90] If you have the ability to look through an administrative record in an immigration case, you can see that it is not in discrete areas, that this personal information is woven throughout the entire record, in the same way as the Social Security case. There are copies of passports, which include photographs. There are photographs of the individuals and their family members. They have history of their origin, their dates of birth, the addresses where they lived in the country from which they are coming to the United States. There is information about their children. There are often very detailed medical records. There are a lot of different statements, because these petitioners are giving statements, often from the time that they arrive in the United States, regarding torture, domestic violence, gender identification, political dissent, sexual assault, among many other issues.

As you know, in asylum cases, often what the immigration judge is looking at are credibility determinations. A lot of times, the decision as to whether or not to find the petitioner credible rests upon the information that that person is providing. If they are providing very little detail, then it is more likely that the immigration judge may rule against them. It is important for them to provide as much personal detail as possible.

One of the problems that our court has experienced is the lack of the quality of representation of asylum petitioners. About eighty percent of

90. Letter from Peter D. Keisler, U.S. Department of Justice, Civil Division, to Hon. Sidney A. Fitzwater, U.S. District Court for the Northern District of Texas (Oct. 15, 2004) (on file with Fordham Law Review).

petitioners in our court are represented by counsel, which would sound like a good thing. But many times they may often be better off representing themselves than having counsel. These are retained counsel. They are not appointed for them. So there is some concern that even if redaction rules are put into effect, these attorneys are not going to be providing the kind of redaction that would protect the people whom they are filing on behalf of.

Thank you.

JUDGE HINKLE: Thank you.

Mark Walters is the Senior Litigation Counsel at the Office of Immigration Litigation, the Department of Justice.

MR. WALTERS: Thank you, Judge Hinkle.

I have been doing appellate and trial litigation in the area of immigration law for twenty-five years at the Department of Justice, twenty of them as both a litigator and supervisor. For reasons I can no longer remember, I became the principal point of contact for the Ninth Circuit when there were issues related to mediation, or when general administrative matters needed to be addressed. One of the recurring topics of discussion with the Ninth Circuit was the process of getting administrative records to the court from the BIA. As we moved toward electronic filing, almost every aspect of that process needed to be looked at again: How are we going to transmit records? Will they be paper records or electronic? Are the records going to go online? If so, what portion of each record is going to be kept from the general public and what will be available to the public online?

The practice right now, as you all know, is that the public has limited access on PACER, but unlimited access at the courthouse for those who are willing to go there and ask for the file.

The current practice is working on a number of practical levels. That does not mean that public access cannot or should not be improved in the future. My concern is that we are not where we need to be technologically to improve access today.

Let me deal with the alien registration number, or A-number, issue first. I do not know if the Privacy Subcommittee has received any letters on this issue, but I know the clerks of the various circuits have gotten letters from time to time urging that the A-numbers be redacted from their orders. I think Elizabeth has given you a number of reasons why they should be left on court orders—common names, among other things. But also, more than in any other area of law, people in immigration proceedings are repeat litigants. Many immigration cases come to the Court of Appeals twice, and go through the agency two, three, or four times. You want to make sure you know, when you are dealing with somebody, whether there are already removal orders for this person, or whether they have already been granted immigration benefits. When aliens have interacted with the benefit side of the Department of Homeland Security, the U.S. Citizenship and Immigration Services, USCIS, or even with the now-defunct Immigration and Naturalization Service, they would have done so under an assigned A-number. But their names might change over time. There are lots of legitimate reasons for a subsequent name change. Marriage is an example.

In addition, after aliens have been here for a while, they may choose to anglicize the order of their names, or even change the spelling to make it more readable or pronounceable in English. There are also many illegitimate reasons for subsequent name changes, like the adoption of aliases for criminal activity or to avoid immigration enforcement. The A-number sticks to the individual despite these changes almost as well as the fingerprint. And it really helps avoid clerical error. In the end, it helps prevent mistaken removals, and promote accurate enforcement of court orders.

The Ninth Circuit has had hundreds of cases in the last several years where the surname is Singh; the Second Circuit, hundreds of Lin cases. One of my attorneys accused me of giving her only Lin cases after I assigned her three in a row. It was just a coincidence, but I think you get the point. The situation we have long had in the United States with an abundance of people named Smith and Jones presents itself even more frequently in some cultures, because of repetition or similarity of names.

Turning to the question of what should be available on PACER, the points made by Eleanor Acer on asylum are good points. The need for confidentiality in the asylum context is one of the primary reasons not to give public access to immigration records on PACER. The suggestion has been made to redact immigration records and then give the public full access online. This ignores the sheer volume of cases that would need careful redaction. In the last six years, the number of cases that have gone from the BIA to the courts of appeals have ranged from a low of about 7,500 to a high of about 12,300. To illustrate what redaction of these records would mean in practical terms, consider the experience of the Freedom of Information Act (FOIA) unit at the Board of Immigration Appeals. It takes a member of that unit about two hours to go through an inch of paper and redact it using FOIA standards. The average asylum record is four inches thick. This means one FOIA officer would have to work a full day to get just one average asylum record ready for transmission to the court of appeals in redacted form.

So why not ask the petitioners' attorneys to do it? For cases completed in immigration court in fiscal year 2009, only thirty-nine percent were represented, while sixty-one percent were unrepresented. For obvious reasons, it would be unwise to ask unrepresented aliens to apply the standards that trained FOIA officers apply if you expect to get a meaningful redaction. Such pro se redactions would be inconsistent in the extreme, sometimes to the public's detriment and sometimes to the alien's.

The Ninth Circuit has a pro bono program and makes a large effort to get quality law firms on the west coast to give their junior associates experience in the Court of Appeals by providing immigration training and asking them to take cases. If you are going to ask these firms and their lawyers to do redaction when they agree to take these cases, what impact will that have on the number of firms and lawyers willing to participate in the pro bono program? I am not sure you would get quite as many volunteers if the commitment up front is to spend a day or so doing redaction.

I want to sum up by saying that I think the ultimate goal, to reveal as much as possible online, is a worthy one. But practical realities mean we must wait for the technology that will make this reasonably possible. Right now, if redaction has to be done manually, given the amount of time and money that it would take to deal with up to 12,000 records a year, we are not there yet.

JUDGE HINKLE: We are at the point of taking questions.

PETER WINN: I just have a question for Elizabeth Cronin, in terms of the technology of the access to a Social Security or an immigration file. I did some experiments in Seattle on this. My understanding is that an outsider can actually enter a notice of appearance in a case as an interested party or something and actually have online access to it. It is just not anonymous access. So the parties to the case would know who was watching and looking at the pleadings. They would have remote access.

MS. CRONIN: I do not know. According to our Clerk of Court, PACER access is available to pretty much anyone who files, but I do not know about that specific issue.

MR. WINN: With respect to an offline case, which is what Social Security and immigration cases are, even though there is no access through PACER, the parties have online access.

MS. CRONIN: Correct.

MR. WINN: So a third party who is not a party has, technologically, the ability to identify themselves as somebody who wants that access and can file using the same technology as the parties do. It is just that the parties would be able to see that and see that transparently and be in a position to protect themselves if they wanted to.

I just was not sure if you were sort of zeroed in on the technological capacity to deal with some of the concerns of the press about online access to these offline records. But the availability of this intermediate system would also allow, to some extent, online access on an individualized basis.

PROF. KANSTROOM: May I speak to that? In anticipation of this, I did a little bit of unscientific empirical research, and I started calling around to some lawyers who litigate nationally in these kinds of cases. A couple of people did mention that. That made me think that a lot of the problem here is a question of coding, whether we could code asylum cases to protect them at a sort of anterior point in the system or not, and the idea that if we cannot, we still have this other problem. A couple of lawyers, for example, said to me that they were now thinking that all they had to do to maintain access to their cases was not code them as immigration cases, but get them coded as habeas or something else.

So I think this is a big question. Maybe there are the kernels of a solution in that understanding.

JUDGE TALLMAN: I am from the Ninth Circuit in Seattle.

I want to underscore a couple of points that Mark Walters and Elizabeth made. The letter that Molly Dwyer wrote was written at the direction of the fifty judges on our court, who process 8,000 immigration cases a year. I

think about the privacy problems in immigration, the sensitive information in Social Security appeals, the sensitive information in criminal cases. We are working on a national security case right now, with top-secret information. If we have to redact or somehow deal with these problems in each of these cases, it will bring the Ninth Circuit to its knees.

And I do not think the Ninth Circuit is alone. I cannot underscore the practical problems that we have in just getting access to information that has already been partially sealed or redacted before the administrative agency or the court below, in trying to get a comprehensive appellate record so that the decision maker is presented with the information that he or she needs in order to make the decision.

You can talk about all of these interim steps to try to protect some of the sensitive information. But how do you describe in the opinion, when you are writing the decision, the reasons why you decided the case, without disclosing that which you are seeking to protect?

I also want to underscore the point with regard to the identifiers. We just have too many litigants by the same name. We are going to have to give them some kind of a number that is going to be unique, whether it is an A-number or a Social Security number or a new litigation number. I just do not know any other way to do it. Otherwise, we cannot have any confidence when we put that person eventually on the plane, if they are going to be deported, that we have the right Singh who is going back to the Punjab.

JUDGE HINKLE: What do you do now? You issue the opinion where you describe the information in, say, an asylum appeal. That opinion goes out, and it has the name and it has the information in it, right?

JUDGE TALLMAN: That is exactly right. And you run into the problem that Mr. McCraw was talking about, where in the wrong case, that information can have very harmful consequences back in the country that you are going to repatriate the alien to.

MR. MCCRAW: I certainly have a great deal of sympathy for the practical problems of the courts dealing with paper. But I hope those of you who are attorneys for civil litigants will share with me sort of the irony, having been in front of judges, where, when we explain how hard electronic discovery is, how many documents we have to go through, and having judges tell us, "Figure it out. The law requires you to disclose those documents."

The fact is, we understand that. These practical problems should be taken seriously, but they should not overcome constitutional rights and the greater common law values of transparency in the court system.

JUDGE RAGGI: I have a question that asks this panel to think beyond its particular task and may actually tread a little bit on CACM's responsibilities. When we talk about redacting immigration cases, we are basically talking about creating an exception from the presumption in favor of open court files. We will hear in the course of today from any of a number of groups who will say, "Make an exception for me, too."

I am not sure I quite understand how the privacy concerns that you have articulated and that I recognize with respect to immigration warrant a different treatment from the privacy concerns of other litigants in a variety of cases, of jurors—we have just heard it said that for jurors it is tough. This is part of their civic duty. Why is not that also the answer with respect to any party that comes knocking at the court door? I am not suggesting that we may not recognize exceptions. But, why immigration and not other areas?

MR. WALTERS: I think one answer to that is the volume. The Ninth Circuit, in the last six years, has ranged from thirty-one to forty-one percent of their docket being immigration cases.

JUDGE RAGGI: You think that is an argument for sealing or redaction?

MR. WALTERS: That is an argument for why they should not have to be redacted, but, rather, limited access on PACER should continue, with only attorneys of record having access.

JUDGE RAGGI: Why limited access, though, for this type of case and not others presenting comparable privacy concerns or for jurors who have provided a host of private information to us?

MR. WALTERS: I think it is the practical problem with applying redaction rules to that volume of records, coupled with the fact that this would not be light redaction. As some of my co-panelists have indicated, in addition to the sensitive information in asylum cases, which are a large percentage of the immigration docket, you have quite a bit of personal information in every immigration case, having to do with Social Security, Selective Service, medical history, hardship claims with medical records, and marriage information, sometimes including very personal details. Is this a legitimate marriage or is it not? The list of sensitive and personal information frequently found in immigration records goes on and on. One of the letters in the materials gives a more comprehensive list.[91]

So I think it is volume combined with a need for thorough redaction that distinguishes immigration cases. It is not a light redaction, like you might see in some other cases, where there are only a few places in the record where you have to deal with sensitive or personal information. And it is not a manageable volume. These two factors call for an exception.

JUDGE RAGGI: If I can just press my concern, because the committee will undoubtedly discuss this at some length. This is not an area of simply a private dispute—contracts or anything else. This is an area of enormous public debate, reaching well beyond the judiciary. To not give broad access to what we are doing in this area raises some of the concerns that Mr. McCraw highlighted. I think we are a little hesitant about limiting access. Who would we limit access to? You have suggested just the litigants. How could we justify that in an area of serious public policy debate?

JUDGE HINKLE: We are at the end of the panel, basically. I would say this to everybody. One of the reasons we have panels like this is to hear stories like David McCraw told us about accidentally coming on to a case

91. *Id.*

that really needed to be reported. Yet the puzzle for everybody is to figure out a way to protect the private information. If that is an asylum case, it is probably chock-full of this really private information. Figure out a way to protect the private information while also allowing public access to the fact that there is an immigration judge who is being very arrogant and treating a person shabbily, which needs to be disclosed publicly. It is a very difficult problem.

MS. ACER: In many of these cases, at least in the asylum context, you are talking about returning people to places where individuals—either that individual or others—are at risk of persecution, torture, and serious harm, in states that either are not protecting individuals or are actively persecuting those people. We in the U.S. have no control over that.

I think that is one way in which these cases may be different. I am not at all commenting on the protections that other individuals should potentially enjoy or not.

CONFERENCE ON PRIVACY AND INTERNET ACCESS TO COURT FILES

PANEL THREE: IMPLEMENTATION—WHAT METHODS, IF ANY, CAN BE EMPLOYED TO PROMOTE THE EXISTING RULES' ATTEMPTS TO PROTECT PRIVATE IDENTIFIER INFORMATION FROM INTERNET ACCESS?

MODERATOR

*Hon. Ronald Leighton**

SPEAKER

*Joe Cecil***

PANELISTS

Michel Ishakian[92]

Edward Felten[93]

Joseph Goldstein[94]

Hon. Elizabeth Stong[95]

Jay Safer[96]

Robert Heinemann[97]

JUDGE LEIGHTON: My name is Ron Leighton. I am a United States District Judge from the Western District of Washington, a member of the Court Administration and Case Management Committee.

The panel we have here is the panel on implementation. We are here to discuss the means and methods by which the judiciary seeks to disseminate information and, at the same time, protect privacy.

When I was given responsibility by Judge Raggi for the implementation side of the aisle, I said this is a committee in need of a job description. When the other committees identified a policy, we would go to work in developing an appropriate method for achieving that objective—easy. As I

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* United States District Court Judge, Western District of Washington.

** Project Director, Division of Research, Federal Judicial Center.

92. Chief, Public Access & Records Management Division, Administrative Office of the United States Courts.

93. Professor, Princeton University.

94. Freelance Reporter.

95. United States Bankruptcy Court Judge, Eastern District of New York.

96. Partner, Locke Lord Bissell & Liddell LLP.

97. Clerk of Court, Eastern District of New York.

have drilled a little deeper, I have come to the conclusion that, just as the competing legitimate interests of the courts and its constituencies make policy making difficult, so too these important and oftentimes mutually exclusive interests make it difficult to select an appropriate method to best achieve what would otherwise be deemed a laudable goal.

To help us navigate through these choppy waters, we have assembled an interesting and informed panel of speakers.

To begin, we are going to ask Joe Cecil, who is a senior researcher for the Federal Judicial Center (FJC), to talk about a study that was just conducted by the FJC on unredacted Social Security numbers within the federal judiciary over a two-month period. Joe?

DR. CECIL: Thank you, Judge Leighton.

This is the implementation panel, and one of the things that we were asked to do was to determine the extent to which the protections in the rules to guard against improper disclosure of Social Security numbers have, in fact, been properly implemented. You will recall that the attorneys are instructed to redact the Social Security numbers upon filing.

Our study is essentially the study that you heard described by Peter Winn earlier. It was a Google search of all the documents filed in federal court, district court, and bankruptcy court in November and December of this year. We were looking for something that was very specific. We were looking for a pattern of numbers that followed the pattern that Social Security numbers have, the three digits, hyphen, two digits, hyphen, four digits.

The result of that search revealed about 2900 Social Security numbers in all the documents filed, the 10 million documents filed, during those two months.

The rules themselves have some exceptions for filing of Social Security numbers, and it looks to us like probably about five million of those Social Security numbers fall under some of the exceptions. There were numbers that were from the previous day's court proceedings that were not restricted. Some of the documents were, in fact, filed earlier than December of 2007. But in the end, we got down to 2400 Social Security numbers that look like they are still knocking around in the system, numbers that should have been redacted.

Two final points.

First, we are talking about 2400 documents. Some of these documents have more than one Social Security number. In a large commercial bankruptcy, we would find documents that listed Social Security numbers for all of the employees that worked at the business that went bankrupt. We would find documents and financial account numbers for investors in a failed enterprise. So some of these documents are really rich in Social Security numbers. We estimate that about twenty percent of them have more than one.

The last thing is that when we think about the 2400 Social Security numbers that still exist in the records, you have to keep in mind that we are talking about ten million records that are filed in court. So, really, only one

out of every 3400 documents that we examined had a Social Security number.

Thank you.

JUDGE LEIGHTON: Joe, thank you.

The first member of the panel to speak is Michel Ishakian. She is the Chief of the Public Access and Records Management Division at the Administrative Office of the United States Court. Prior to joining the Administrative Office, she worked as a management consultant for the EDS [Electronic Data Systems] Corporation and as a Foreign Service officer. Michel?

MS. ISHAKIAN: Thank you, Judge Leighton. Good morning.

I would like to begin by giving you a very brief overview of the judiciary's electronic public access program, the mission of which is to facilitate and improve public access to court records and court information. Although I am here today to discuss access to court records through PACER, I would be remiss not to mention that the program is broader and encompasses the judiciary's public websites, courtroom technology, and noticing.

PACER was established in 1988 as a dial-up service. In the last decade, through the implementation of CM/ECF—that would be the electronic case filing system—PACER has evolved into an Internet-based service. In other words, PACER is a portal to CM/ECF, which is integral to public access. PACER provides access to various reports, court dockets for more than 30 million cases, and over 500 million—that is 500 million—documents filed with the courts.[98] This is by any standard a massive collection.

During 2009, the program reached a new milestone, with over one million registered PACER accounts. In any given year, approximately one-third of those accounts are active, and many accounts do, in fact, have multiple users. PACER has several categories of users. They are fairly discrete. Fully 75% are from the legal sector or are litigants, 10% are commercial users, approximately 5% are background investigators, which we have sorted out from commercial institutions, 2% belong to the media, and 2% represent academia.

As I mentioned, PACER users are registered. All PACER access requires user authentication through the use of a log-in and password. Usage information is collected and stored, as set forth in the PACER privacy and security notice on our website, as well as the PACER log-in banner. This provides a deterrent to those who would use PACER to obtain information for nefarious purposes. I can tell you that the Administrative Office does respond promptly to subpoenas for information on PACER usage. Information that we have provided has been used quite effectively in the courts.

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98. ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR 12 (2009), *available at* http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/AdministrativeOffice/DirectorAnnualReport/Viewer.aspx?doc=/uscourts/FederalCourts/AnnualReport/2009/includes/annualReport2009_screenResolution.pdf.

The judiciary proactively works to strike a reasonable, reasoned balance between providing public access to court files and protecting sensitive information, as evidenced by the evolution of national policies, federal rules, and procedures over the years. We have not done so in a vacuum. We seek expert advice and input from all the various interested parties—especially all of you here today—which, as we have already heard today, are often seeking different, sometimes mutually exclusive outcomes. On a personal note, I will let you know that this is just the type of territory—fraught, ongoing, seemingly intractable issue—that a former diplomat really relishes.

Our efforts to inform the public of our policies, rules, and procedures extend to the Internet. We have published extensively at the following website: www.privacy.uscourts.gov.

In the interest of time, I would like to summarize just a few of the more recent steps that have been taken to protect sensitive information, while preserving a high level of public access to which we are committed.

In 2003, CM/ECF was modified so that only the last four digits of the Social Security number can be seen on the docket report in PACER. In May 2007, the Forms Working Group, comprising judges and clerks of court, reviewed over 500 national forms to ensure that they did not require personal-identifier information.[99] Although, as Judge Morris pointed out earlier, there is still work to be done, we only found six forms which required that information, and those forms were revised or modified to delete those fields.

Last August, the courts were asked to implement a new release of CM/ECF that was specifically designed to heighten the awareness of the filer's requirement to redact. The CM/ECF log-in screen now contains a notice of redaction responsibility and provides links to the federal rules on privacy. CM/ECF users must check a box acknowledging the requirement to comply with the rules in order to complete the log-in process. CM/ECF also displays another reminder to redact each and every time a document is filed.[100] Judging from the complaints we have received, these changes have certainly served to heighten awareness.

The judiciary continually seeks to expand public access. An important initiative to do so was approved by the Judicial Conference last month. Namely, the Digital Audio Pilot, which provides access to audio files of court hearings through PACER, was approved for national implementation.[101] During the pilot phase of this initiative, a major concern was assuring that personal information not be made available to the

99. *Good Form! Working Group Restyles, Improves Federal Court Forms*, THE THIRD BRANCH (Admin. Office of the U.S. Courts), May 2009, at 1, 7, *available at* http://www.uscourts.gov/uscourts/News/TTB/archive/200905%20May.pdf?page=1#page=1.

100. *News Item: Notice Enhanced for Redaction Responsibilities*, U.S. COURTS (July 27, 2009), http://www.uscourts.gov/News/NewsView/09-07-27/Notice_Enhanced_for_Redaction_Responsibilities.aspx.

101. *News Item: Judiciary Approves PACER Innovations To Enhance Public Access*, U.S. COURTS (Mar. 16, 2010), http://www.uscourts.gov/News/NewsView/10-03-16/Judiciary_Approves_PACER_Innovations_To_Enhance_Public_Access.aspx.

public through the audio files. Eight courts participated in the pilot, including the Nebraska and Pennsylvania Eastern District Courts, as well as the North Carolina Eastern, Maine, Alabama Northern, Rhode Island, and New York Eastern and New York Southern Bankruptcy Courts. Each of the pilot courts warned lawyers and litigants, in a variety of ways, not to introduce personal identifiers nor to ask questions which would elicit personal identifiers unless absolutely necessary. Lawyers and litigants were also warned that they could and should request that recorded proceedings that include information covered by the privacy rules or other sensitive matters not be posted. Of course, the presiding judge ultimately determines which audio files should be posted.

A word on the use of software to redact. Algorithms can and have been developed to identify Social Security numbers, and they are effective in most, but certainly not all, cases. Unfortunately, it is far more difficult, and in some instances not presently possible, to develop algorithms to identify other types of sensitive information, such as the name of a minor, which, I would argue, is far more sensitive in nature than a Social Security number. Be that as it may, technology is a wonderful tool. I know—we use it liberally. But it is not a fail-safe, and it is certainly not an adequate substitute for filer vigilance with respect to protecting sensitive information from disclosure.

I think it is fair to say that the judiciary's national and court-based efforts, which you will be hearing more about shortly, appear to be having the desired effect, as illustrated by the Federal Judicial Center's excellent study. We really took heart that, of the ten million recently filed documents that the researchers reviewed, less than .03% were found to contain Social Security numbers. Of those, 17% had a readily apparent basis for a waiver. Upon further scrutiny, we believe that we will find more documents that qualify for the waiver for pro se litigants. All in all, this is very valuable information, and we will use the results of the study to zero in on lapses and address them.

Thank you.

JUDGE LEIGHTON: Thank you, Michel.

Our next presenter is Professor Edward Felten. He is the Director of the Center for Information Technology Policy and Professor of Computer Science and Public Affairs at Princeton University. His research on topics such as web security, copyright and copy protection, and electronic voting has been covered extensively in the popular press. In 2004, *Scientific American* magazine named him to its list of fifty worldwide science and technology leaders. Professor Felten.

PROF. FELTEN: Thanks.

I would like to respectfully challenge the standard narrative about this issue. The standard narrative is that there is a longstanding tension between transparency and privacy, and that technology makes this worse. I would like to argue that technology can be our friend on these issues, in two ways. First, advanced technology can help us to address the privacy challenges we face. Second, advanced technology increases the benefits of openness.

First, we can use advanced technology to help address the privacy challenges. We have already seen an example of this earlier in the session, with the study of how many Social Security numbers are present in documents. That is a valuable step. Of course, Social Security numbers, as Michel said, are probably the easiest case, because there is a very fixed pattern that is easy to scan for technically. It is possible to find and automatically redact Social Security numbers in a lot of cases.

But I believe that technology can be pushed a lot farther to help identify failures to redact, not as a replacement for human attention, but to augment it. There are some simple things we can do, and some more technologically advanced things. As an example of a simple practice, if a particular name or piece of information is redacted in one case document, but not in another, a system could flag that fact at the time of filing and alert counsel or the court employee who is filing that document to take another look.

As an example of a more advanced use of technology in these fields, I am convinced that advanced machine learning methods can be very valuable in helping to find failures to redact, even for difficult types of information, such as names of minor children. This is a topic on which we have ongoing research at Princeton, and we are hoping to be in a position to talk about positive results soon.

So I believe that we can do a lot to help find redactions that are done wrong, and I think there is a lot that can be done in terms of how the system is structured and how users interact with it in order to make it more evident when certain kinds of sensitive information is available.

I would also like to talk about some of the benefits of transparency, of putting documents out there for people to use. The kind of research that I was talking about into machine learning, the kind of research into different interfaces, as well as research about the extent of privacy problems in the documents of the sort that we have been doing, is only possible because we do have access to a large number of documents. We have assembled a corpus of about two million documents by a variety of lawful means that has served to enable our research. But many people who are itching to do constructive research along these lines have been held back by lack of access to documents. It is simply not feasible to buy two million documents from PACER. That would cost too much money, as well as not really being feasible even to download them all. So access to documents has a lot of value.

Indeed, there are many new types of constructive and valuable research which will become possible when documents are available to researchers in bulk. This includes research on issues of direct interest to the judiciary, such as questions of judicial workload and case management, historical and journalistic research to look at global pictures and trends across the entire judicial system, as well as development of new tools for improved legal research. I am convinced that if and when a large quantity of court documents becomes available to the great minds of Silicon Valley, we will see great new ideas, improved ways of doing legal research that really put the sort of technology that has enabled companies like Google to succeed to

work on the specific problems of lawyers and legal researchers. I think there is a lot that can be done in that area, but it is not quite possible today because information and documents are not as available as they could be.

If the judiciary is going to move ahead toward a system that is more open and makes more documents available, the next logical question is how best to enable positive uses of those documents of the sorts that I described. From the viewpoint of researchers looking to use these documents, there are really two things that we would like to see.

First, we would like to see bulk access to the raw documents. There is no substitute for actually having the data on which your study is going to operate.

Second, I would argue for authentication of the documents by using a technology such as digital signatures, which is a kind of electronic seal of authenticity put on a document. The advantage of doing that is that it makes it self-evident that the document is authentic, regardless of from whom you received it. That makes it possible for, say, a commercial service to provide a document to a working lawyer. The lawyer can be sure that the document is authentic because it bears the digital signature of the Administrative Office of the courts or some other authoritative body.

I think there is a lot to learn, actually, from other branches of government which do face, not the same, but similar kinds of issues in balancing transparency against cases where information should legitimately be withheld. The executive branch and the legislative branch have been working through these issues, on a larger scale in some respects than the judiciary has. I think there is a significant amount to be learned there.

Finally, on this question of how best to enable access for positive use, let me just put in a brief plug for our paper on this topic, called *Government Data and the Invisible Hand*, which appeared in the *Yale Journal of Law & Technology*, Volume 11, last year.[102]

Thank you.

JUDGE LEIGHTON: Thank you, Professor.

Our next speaker is Judge Elizabeth Stong. Judge Stong has served as a United States Bankruptcy Judge for the Eastern District of New York, one of the pilot-project districts, since 2003. Before taking the bench, she was a litigation partner and associate at Willkie Farr & Gallagher in New York and associate at Cravath, Swaine & Moore and law clerk to the Honorable David Mazzone, U.S. District Judge in the District of Massachusetts.

Judge Stong.

JUDGE STONG: Thank you so much. Thank you especially to Professor Capra and Judge Raggi and Judge Rosenthal for convening this and for inviting me to participate.

It has been quite an interesting experience to step back and look at these issues systematically and from the special window that we have on personal information in the bankruptcy process. What we look at in the bankruptcy

102. David Robinson, Harlan Yu, William P. Zeller & Edward W. Felten, *Government Data and the Invisible Hand*, 11 YALE J.L. & TECH. 160 (2009).

arena is the most personal detailed information about an individual's situation that you can imagine. We do it at a point where they have come to the bankruptcy process for a fresh start, probably because something bad has happened—for whatever reason, not at a high point, but at a comparative low point in their lives.

So the question we are looking at is not like the question of the prior panel—whether to redact, what the tradeoffs are—because that decision was made back in 2003 when the bankruptcy process adapted to the need, the requirement, to get Social Security number information out of our public documents, at about the same time that we were going, universally throughout the system, in the bankruptcy courts in the United States, to electronic filing, electronic access to information.

So think about where this puts us. Disclosure drives our process. The kind of disclosure you see in a bankruptcy case is unlike anything I saw in my prior life as a big-case litigator. You can file a class action against the biggest company in America. You do not have to tell much of anybody much of anything about who you are. If you file an individual bankruptcy case, as 1.4 million consumers did last year, and you need to disclose your name, your address, your dependents by age, though not by name, where you work, where you used to work, how much you make, who you owe money to, what you own. I have seen debtors take this so literally as to itemize the things in their closets. It is a pretty intrusive process.

Access to this information is critical—access for courts, access for creditors, access for the trustees assigned in the case, access of the Office of the United States Trustee, part of the Department of Justice charged with the very important job of seeing if there is abuse of the bankruptcy system taking place. So you have broad disclosure by individuals. You have broad access to that information. And we put it all on the Internet. We have put it on the Internet because, as of 2003, in every single bankruptcy court, every single document, whether filed by a lawyer or filed pro se, winds up electronically accessible. This is, for many practitioners in the field, a volume practice.

I think and I assume—and I am generally gratified in this thought and assumption—that every lawyer who files a document with a federal court does it with the care and attention it requires and deserves. But it also happens from time to time that somebody has one too many cases to get filed that day, maybe in a bit of a hurry—it is a volume practice sometimes. Of those 1.4 million consumer cases that were filed last year, a certain number of them, filed by counsel, may nevertheless not have received precisely the attention we would like to see, and, yes, occasionally a mistake does happen.

I have to tell you, I was extremely interested in seeing the numbers uncovered by the study—ten million documents. This is taking me back to my days as a litigator, when we did document review in big cases, antitrust clearance, things like that. I was both heartened and concerned to see the number of documents in which Social Security numbers still appear. I was not surprised to see that we in the bankruptcy world have a certain number

of those on our watch—2244 of the 2899. I was struck to see that filing pro se is an exemption. When I see a pro se, I sometimes see someone who has already been victimized in one way and may well be victimized by not having a lawyer in a very complicated process, if the court process does not attend to the needs of that case.

So you take these competing factors that affect nearly every bankruptcy case—the need for disclosure, the need for access, the fact of electronic filing—and you get a bit of a perfect storm against which to apply a criterion that I think we universally understand should be as close to perfect compliance as we can get. Remember what comes along with an inadvertently included Social Security number: a name, a home address, a mailing address if it is different, employment, a record of every debt that person owes. This is a portfolio of information designed to facilitate identity theft. So you attach that also to a Social Security number, and you have your next perfect storm. Imagine the risks. Imagine the problems.

Now, you are going to say, is identity theft really such a problem for people who file bankruptcy? Is that the kind of identity people want to steal in the credit world? I am here to tell you, it happens. It happens. And it is a problem. Then you have again victimized somebody who has come to the court process for relief, relief for the honest but unfortunate debtor.

So what do we do in our court? First of all, I think we are grateful every time we see a properly redacted document. And they usually do come in that way. The statistics are consistent with our experience. I embrace this notion, mentioned in the prior panel, of informal, anecdotal, empirical research. I think that must be a professor's way to say, asking around, which is what I did. It sounds a lot better.

I will tell you that in our court we do not see a widespread problem. But it does not need to be a widespread problem in order to be a problem. When attorneys miss this, they create a potential issue; if it is not caught, it will live on that docket indefinitely. What we see anecdotally, as we follow up on these situations—when they are identified, for example, through the quality-control process that our wonderful Clerk's Office staff undertakes with every document filed electronically—it seems that most of the time this is a situation of staff in an attorney's office filing a document, with attorney supervision, but not at the level and with the guidance that we would like to see. And so a mistake happens.

How do we follow up with this? We have electronic filing training. We make it available to attorneys, but we invite staff to participate as well. We have a wide-open door to this training, and the more it is used, the better, from our perspective. Retraining is available too. These are complicated procedures, and if you do not use them every day, you should come back. We welcome that. We encourage it. We promote it, and not in a punitive way.

When we see it as a problem, it sometimes traces to staff. We immediately contact, through the Clerk's Office, the filing office and get a redacted document on the docket, and the unredacted document is taken down.

When you go into CM/ECF to file a document, as you have heard, you have to specifically check and click through a screen that acknowledges that you know you need to redact this information. Do we all check something and click through every time? I was recently away and clicked through to use a hotel's Internet access. Did I scroll down to the bottom and say, yes, I had seen the policy?

But I think it still serves a useful purpose. Every time filers log into CM/ECF, they are required to acknowledge that they are aware of this policy or they cannot go further in logging in and filing their documents.

We also try to remind people in other ways. We have an ECF newsletter. It is surprisingly interesting reading. I mean that. It is written in a short narrative way, kind of fun—how many documents have been filed? And we put reminders, again in a prose way—not just a policy, not just as a teaching thing, but reminders and information about the importance of complying with the requirement to redact Social Security numbers—not our court's policy, but a fundamental policy of the Judicial Conference.

Sometimes if we see a problem come up more than once with an attorney's office, the staff will really reach out to that office and try to get to the right staff people and invite them to come in. If they are having a problem or they have a question about our procedures, we want to hear from them, to make our procedures better.

Finally, it happens—and it is rare, I will say once or twice every two or three months—that we see a document in chambers or in court containing unredacted personal identifier information, often by a pro se, sometimes in the supporting documents filed with a proof of claim, which is what a creditor files, together with original documents that have been scanned, describing why they should get a payment in a bankruptcy case. If we see it in chambers, we are promptly responsive, either through our courtroom deputy in my own chambers, down to the Clerk's Office, to be sure that the problem is fixed. That is an informal procedure. It is a question that comes up rarely enough that that kind of direct intervention seems to be a practical solution, and a solution that gets the attorney's attention. Nothing like a call from the Clerk's Office or from the courtroom deputy to say, "We see something we are concerned about. Can you please fix this, and fix it promptly? Thank you so much."

It has worked. We have not yet established a system to impose a consequence or a penalty. I do not believe it has ever been the case that we have been required to take away someone's filing privileges, for example, and I expect it will not come to that. It would take an extraordinary amount of noncompliance, I think, for us to go to that level.

I will end with this. This reminds me a little bit of something I learned growing up in the San Francisco Bay Area, where we were never done painting the Golden Gate Bridge. You sanded it and painted it in one direction; and then you turned around and you started in the other direction. Once the decision is made, in whatever court, that information of this nature needs to be redacted from documents, but needs otherwise to be available to some participants in the process, just like the Golden Gate Bridge, you are

never done reinforcing the need to comply. As a court, we should never consider ourselves done with the enterprise of making compliance as easy as possible, as plain as possible from a procedural standpoint, and as comprehensive as possible, because even one mistake, given the potential consequences, is a mistake we should not tolerate.

Thanks very much.

JUDGE LEIGHTON: Judge Stong, thank you very much. Our next presenter is Jay Safer. Jay is a partner at Locke Lord Bissell & Liddell's New York office. He counsels clients on commercial matters, including protection and preventive measures, the creation of risk litigation plans, e-signature, e-discovery, e-readiness, and pre-litigation analysis. Jay?

MR. SAFER: Thank you, Judge. I recently had the opportunity to participate on a committee, which helped draft a proposed rule for the state courts on how to deal with private, sensitive information about individuals. It has to be remembered what we all recognize—that never have so many documents been so available to the general public that are filed with courts electronically. The FTC identity theft page[103] estimates that nine million Americans have their identity stolen each year.[104] In the federal courts, you have Rule 5.2,[105] which has been discussed in part. I will get to that in a second.

But think about how you would write a rule and what you would put in it. What information would you deem to be appropriate to tell an attorney not to put in papers? How would you tell that attorney so that it was effective, in having the attorney understand and follow the rule? What should be the enforcement of that rule? Who should be checking the documents? Should it be a clerk of the court? Should it be the judge? What information should be precluded, and should the rule be mandatory?

The federal court Rule 5.2, as I said, has selected information. It has Social Security numbers, as you know. It has taxpayer-identification numbers, birth date, the name of an individual known to be a minor, and financial-account numbers.[106] I want you to try to remember that.

Briefly in my time, I want you to compare what is now happening in the state courts with the federal rule. Keep in mind that in the state courts the general public has access now to almost all documents. First of all, while e-filing is not required in state courts specifically, once you get into the New York State Commercial Division, e-filing becomes, in effect, a presumption. A new proposed rule under legislation in New York State[107] will require e-filing in certain counties. Thus, any case involving commercial matters in New York County, Nassau County tort cases, and one other county and type of case to be selected, will be e-filed.

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103. *About Identity Theft*, FED. TRADE COMMISSION, http://www.ftc.gov/bcp/edu/microsites/idtheft/consumers/about-identity-theft.html (last visited Sept. 23, 2010).

104. *Id.*

105. FED. R. CIV. P. 5.2.

106. *Id.*

107. Act of Aug. 31, 2009, ch. 416, 2009 N.Y. Sess. Laws 1140–42 (McKinney).

But even putting aside e-filing, what they are doing in the state courts is scanning all documents that are filed. You can imagine, with all the documents being filed, how much is going to be available to the general public. All you have to do as a member of the general public is go to various links to the court website; www.nycourts.gov is the main website. There is specifically a link that is the Supreme Court Records On-line Library.[108] It is called SCROLL.

What it does is make available to the general public all these documents. However, the state of New York, unlike the federal courts, has no statewide unifying court rule on how to deal with sensitive information. It has a scattering here, a scattering there. A statewide rule was proposed in 2006. It did not go forward.

So in sitting around looking at this, the first question was, how do you deal with what information? At the New York City Bar Association, I am Chair of the Council on Judicial Administration, and we had a subcommittee dealing with this, consisting of a wide range of people: Steve Kayman, who was a lawyer; Judge Silbermann, a former administrative judge; Karen Milton, who is the Circuit Executive of the Second Circuit, and others. We prepared a report proposing nine types of information that would require exclusion in their entirety: Social Security numbers, taxpayer ID numbers, bank and other financial-account numbers, passport numbers, driver's license numbers, government-issued ID numbers, other identification numbers which uniquely identify an individual, names of minor children, and dates of birth. The rule would be mandatory.

This report is named the *Report Recommending a New York State Court Rule Requiring that Sensitive Personal Information Be Omitted or Redacted from Documents Filed with Civil Courts*.[109] The report is available at www.nycbar.org, Reports of the Council on Judicial Administration.

In doing the report, we looked at other states. Fifteen other states have rules on access, based on what you file. But they are all different. Looking at these nine types of information, one issue we looked at was whether if, for good cause, you needed to use such information, certain portions of the numbers, such as the four last digits of Social Security, could be included. But in looking at this and trying to decide whether a clerk should have the responsibility to look at this issue, we said the clerks have so much to do that it should not be their responsibility. It should be the responsibility of the attorney.

Then the question came up, should this be an ethical violation? The feeling was that it was just too hard to have it as an ethical violation, and it should be set forth as a court rule.

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108. *See Supreme Court Records On-Line Library*, THE COUNTY CLERK AND SUP. CT. OF N.Y. COUNTY, http://iapps.courts.state.ny.us/iscroll/index.jsp (last visited Sept. 23, 2010).

109. SUBCOMM. ON ELEC. COURT RECORDS, COUNCIL ON JUDICIAL ADMIN., REPORT RECOMMENDING A NEW YORK STATE COURT RULE REQUIRING THAT SENSITIVE PERSONAL INFORMATION BE OMITTED OR REDACTED FROM DOCUMENTS FILED WITH CIVIL COURT (2010), *available at* http://www.nycbar.org/pdf/report/uploads/20071821-Report RegardingNeedtoProtectSensitiveInformationFromIdentityTheft.pdf.

Then the question was, do you have other types of information, like email addresses, which you should include in the rule? But it was felt that the nine types of information contained the most sensitive information.

I sent the report with a letter to Chief Judge Jonathan Lippman of the New York State Court of Appeals and Chief Administrative Judge Anne Pfau. It was then sent to the Civil Practice Law and Rules Advisory Committee, on which I am fortunate also to be a member.

The CPLR Advisory Committee has now sent to the Administrative Board of the State of New York a modified version of what we proposed at the City Bar. Interestingly, the Advisory Committee took a much stronger view. They said it is not enough information. There should be more information excluded.

They have recommended the following exclusions: Social Security numbers, telephone numbers, date of birth, driver's license numbers, non-driver photo identification card numbers, employee identification numbers, mothers' maiden names, insurance and financial account numbers, demand deposit account numbers, savings account numbers, credit card numbers, computer password information, electronic signature data or unique biometric data, such as a fingerprint, voiceprint, retinol image, iris image, medical procedure, diagnosis, or billing codes.

That is a lot. But the CPLR Advisory Committee said, "We want to protect sensitive information. And we want to make it mandatory." It said the courts should have the ultimate responsibility to determine whether something should be removed, and they have the ability to do that upon motion if this issue is contested. Matrimonial litigations were excluded.

One area that may need a modification is consumer debt cases. On a number of occasions, with sewer service, people buy debt, and they sue people. Those defendants, if you require certain information be excluded, will not have the ability to know whether they are really being sued for something they did. It has been requested in those cases that, for example, the last four digits of Social Security numbers be allowed.

Another point is that, when you are looking at this and you are realizing all the issues that come up, there are also certain people—fairly—who say, "Wait a minute. We have a First Amendment right to have access to information. We want to have access and that there be as little restriction as possible."

So what is going to happen now, I think, we will know in the next few months, hopefully. Will the Administrative Board approve this? If they do, it will be the first time in New York State that there will be a statewide rule for which attorneys will be responsible for excluding certain sensitive information when filing their papers with the court.

Thank you.

JUDGE LEIGHTON: Jay, thank you.

Our next speaker comes from the U.S. District Court for the Eastern District of New York. Robert Heinemann is the Clerk of that court. He has held that position since 1983. Before that, he was a Chief Deputy Clerk and pro se staff attorney. He received his J.D. from Brooklyn Law School and

his A.B. from Fordham University. He has received the Director's Award for Outstanding Leadership from the Administrative Office of United States Courts.

Mr. Heinemann.

MR. HEINEMANN: Thank you, and I want to thank Judge Raggi for inviting me to this discussion.

As a Clerk of Court, I have a more general perspective about this. First, I am very aware that I am a public information officer between the court and the public. At the same time, I am also aware that I have to be a gatekeeper, a temporary gatekeeper. I want to underline the word "temporary," in deference to the press, because I also am a public information officer who responds to press inquiries.

I think the Internet is really our helper here, although it has been a hard way to get there at times. I agree with what was said earlier in another panel—I think it was by Judge Morris—that scanned documents are problematic. I would much rather always have an electronic document. I think electronic documents are easier to seal temporarily or completely, if it is done appropriately, and limited to certain views by parties and by the court. It is also easy to unseal an electronic document.

The flip side of all of this—and I think courts do a very, very good job in the criminal area and sometimes a less good job in the civil area—is in unsealing documents. When people are indicted before they have been arrested or there is a safety or security issue, for a very brief period of time, that information or indictment is sealed. As soon as that person is arrested or the reason for sealing it is gone, almost immediately the court directs the clerk to unseal.

I think that happens less often in civil litigation, where there is more of a desire on the part of one or more of the parties to seal a settlement agreement or to seal some corporate information. I am not talking about patents or other matters that often may need to be sealed and stay sealed. I think courts can do better in terms of unsealing civil cases.

But there are a lot of practical issues. I will not go over what was put in my statement, except briefly.

We have to comply with the federal rules. In each district, it is important to have local rules of policy. The Eastern District of New York has them.

It should be transparent why a document is being sealed, and there should be an order of approval to seal it by the court. I think the form we have developed in Eastern New York is useful for that purpose.

It also is very important—and here is where the problem comes in—to always use that form or to always make it clear why a document needs to be sealed, however briefly, or if it is the rare case that may have to have a longer-term seal. That is where human error comes in. We have to do our best, as public servants and as members of other agencies of the government, to limit that human error, and as members of the bar.

A core question for this committee may be: who ultimately is responsible to be a backstop to seal or unseal, or for redaction? I certainly

do not think it should be the Clerk's Office in the first instance, but maybe it should be the Clerk's Office in the last instance. Attorneys do get busy; attorneys will make errors. The U.S. Attorney's Office will make errors. The Clerk's Office will make errors. But at some point, since this area is so important in terms of privacy and, in criminal cases, protection and safety, someone has to be accountable as a backstop. That will not make human errors zero, but it will certainly make errors less likely because there is another pair of eyes looking at it.

That brings me to another point that I touched upon in the statement. I think we need more help with the software in terms of flagging potential areas where something should have been sealed that may have been missed. We do have quality-control deputies. That is a very important role now. The Clerk's Office has changed tremendously over the last ten years, going from a very paper-intensive office—we will always have paper, but where every item was paper—to now, where everything is potentially on the Internet that is filed by an attorney, very quickly. That is the beauty and I think it is a help, but it is also something that needs very careful control and monitoring.

To the extent that the Administrative Office can provide us with additional software tools—the Office does a great job right now, but if we can have some additional search that might be done to limit or to flag certain categories of docketing that we would look at more closely, since we have so many thousands of docket entries to look at in every situation—that would be very helpful.

Another obvious point is that courts can have local rules on a variety of matters, and they do—courts need to have them—and they can have local policy, but even with changed federal rules of procedure, I think it takes a good two to three years before the practicing bar really, in general, gets very familiar with those federal rules of procedure and starts to use them daily and uniformly and are aware of them. This means that Clerk's Offices have to do much more to be proactive, to put more on our website, to flag things in ways that make it available and right under the nose of counsel. If it takes two to three years for counsel, with all due respect, to get really familiar with the federal rule, imagine how much longer it takes counsel and the Clerk's Office and other government agencies to get familiar with local rules of policy, or administrative orders, which often are the most effective and efficient way to do something quickly, but also may be the least well known or well understood. So we have to use our public websites to call attention to policy changes in a very proactive way, in a way that you see it immediately as to what is new on your website, as soon as that administrative order goes out there, or policy or procedure or form.

So those are some of the things that I think Clerk's Offices can do to help the court police these matters, which are only really policed in the short term and only in maybe one or two percent of filed matters, before they are once again, in most instances, open to the public.

Thank you.

JUDGE LEIGHTON: Thank you, Mr. Heinemann.

Our final speaker is Joe Goldstein. He is a freelance reporter and former courts reporter for *The New York Sun*. He is currently working on a project for ProPublica, a nonprofit investigative newsroom.

Mr. Goldstein.

MR. GOLDSTEIN: Hi. About the only thing I am qualified to talk about here is how reporters actually use electronically filed documents.

I used to have a desk in the U.S. courthouse in Brooklyn, when I was writing for *The New York Sun*. I figured that most of my stories would be based on courtroom events that I had actually witnessed—trials, arraignments, and sentencings. On occasion, the courthouse will have a good trial, and that will keep the reporters nourished for a couple of weeks. But I was struck that there is a lot less courtroom action than we might actually expect. Criminal prosecutions, even the good ones, generally end in plea deals, and none of the evidence that the prosecutors have amassed ever comes out in open court.

The point here is that a robust right of public access to the courts needs to encompass more than just the right to sit in on court when there is a judge on the bench. Reporters rely very heavily on PACER to figure out what is actually going on. A huge share of what we write about comes from documents filed electronically, attachments to those documents, and the like.

I am trying to think of an example to illustrate this. You may remember the name of Russell Defreitas, who was indicted on charges of trying to blow up part of JFK Airport.[110] The case broke in June 2007, and he has been in court a handful of times since then. Certainly the case is still going on, and very little has actually emerged in open court. But if you log on to PACER and run a docket search, you will see that, as of last night, there were 192 motions and letters that have been filed. You can bet that most of the reporters in the Eastern District have read every single word of that. It is really from that that they are able to follow one of the more important cases that is currently winding through that courthouse.

I am unclear on what proposals, if any, are on the table to further redact court records, to seal additional court records. But I would like to say I am probably against it.

From this spectator's point of view, one of the main functions of courts is to pry sensitive, personal information from people. This is not an incidental function; this is what courts do. Much of what emerges in proceedings or in attachments filed on PACER does contain sensitive information, terribly private information, people's darkest secrets. The public has a right to know, and this information ought to very much be in the public domain.

At the sentencing of a murderer, for instance, a widow might talk about how this has traumatized her children. Just because the names of minors are disclosed, that does not mean that the transcript ought to be reflexively redacted or sealed. A defendant who does not want to go to prison for the

110. Cara Buckley & William K. Rashbaum, *4 Men Accused of Plot to Blow Up Kennedy Airport Terminals and Fuel Lines*, N.Y. TIMES, June 3, 2007, at 37.

rest of his life may tell the court a tale of woe about his ill health. He may provide medical records. He may provide psychological records. He may talk about abuse that he suffered as a child. Just because that is sensitive medical information does not mean that it should be reflexively sealed or kept private. It will factor into the sentence that the court makes, and the public ought to have a right to inspect the factual bases of that sentence.

There seems to be a concern that information filed electronically will be used for nefarious purposes. I believe that we have heard that there are instances of identity theft from bankruptcy proceedings. I am not very familiar with that, but I would like to know about instances in which we know that information filed on PACER or filed electronically has been used to do wrong. I want more than just sort of an undifferentiated fear.

I have read in the past about concerns that criminals will use electronic access to courts to access information about potential cooperators and coconspirators and use it for purposes of witness intimidation. I am not aware of any such cases. Maybe they do exist. But I think the courts should have a couple in hand before they act on that fear.

I do not want to be too provocative, but I will say that last year in Brooklyn an attorney was sentenced for trying to facilitate hits on a couple of witnesses. A defense attorney in New Jersey was indicted on a similar sort of thing just last year. My hunch—and I do not know for sure—is that defendants who want to use information that comes out in court to kill off those who might testify against them are generally getting their sources of information from discovery or from confidential information that never gets filed publicly. So I would caution against just being worried that the public has access to motions and the like that are filed electronically, and that that would suggest that some of this information might be used to intimidate witnesses and the like.

I would just like to close by saying that, especially in the civil context, a lot of documents are already filed under seal. Documents that could simply be redacted are instead just filed under seal. There has been talk about needing a backstop to make sure that Social Security numbers and other identifying information is not filed on PACER. The backstop that I am interested in seeing is a backstop of judges and court officials who make sure that attorneys engaged in civil litigation are not just filing documents under seal because it is more convenient and they would rather litigate privately than let the public have access. My hunch is that a good portion of the documents that are filed under seal need not be.

I will close with that.

JUDGE LEIGHTON: Joe, thank you. Does anybody have a question?

Judge Stong talked about the need to search for perfection here because the stakes are so high for some folks, particularly in bankruptcy. Yet we have an exemption for pro se filers. I have been told that 40% of the cases in the Ninth Circuit have a pro se participant, twenty-five percent in the Western District of Washington, where I am from.

Should we be doing something for those folks? And if so, what?

JUDGE STONG: As a practitioner, I can assure you that none of my clients was ever pro se. But moving to my role and my perspective in a bankruptcy court, where both debtors and creditors and other parties of interest may file pro se, I do not see a reduced risk of harm to people who do not have a lawyer in their Social Security number being electronically accessible in the docket. However you give effect to that concern, I do not see a principled basis to make a distinction in the kind of harm you are trying to avoid.

It is a lot easier to have a framework to instruct lawyers and require lawyers, for example, who file electronically—unlike pro se litigants, who bring paper to the counter, which is scanned—to base your requirements on that system. I would not want to create administrative traps for uninformed people trying to navigate a sufficiently complex process already by somehow creating impediments to the ability to file a case.

But I think your concern is spot-on. There is no difference whatsoever—in fact, maybe even more harm could be done to self-represented people through the inadvertent inclusion of Social Security numbers on the documents they file in the case. I certainly make no distinction if I see a Social Security number in the docket, based on whether the debtor has an attorney. If I see it in something that is handed up in court, if I see it on a proof of claim, we attend to it the same way.

I have taken the spirit, if not the letter, of the Judicial Conference policy and the requirements that we implement through CM/ECF to be that this information should not be publicly available. How we do it is through the requirements we impose on lawyers, through CM/ECF and otherwise. Why we do it, I think, would make no difference whatsoever whether there is a lawyer or not.

So I think I am agreeing with you.

JUDGE LEIGHTON: Professor, last word.

PROF. FELTEN: I think there are some things that can be done technologically to help pro se filers avoid mistakes of this sort, to scan their filings and be a little more aggressive about pointing out possible problems. As well, if you can ask them to fill out up front a fairly simple form—that might depend on the type of case they have—in which they explicitly list information—for example, in a bankruptcy case, information about their Social Security number and bank accounts—that could help to target a technological scan for information that ought to be redacted, which can then either be done for them or can be suggested.

JUDGE STONG: I will just note that the number is nine, nine Social Security numbers that were found in those documents that were reviewed in pro se papers. My speculation is that every single paper that comes in—and I do mean paper—at the Clerk's Office is reviewed for this purpose. That is the only way I can imagine that we are getting to a number like nine in the many pro se papers that are filed.

JUDGE LEIGHTON: My thanks to the panel.

CONFERENCE ON PRIVACY AND INTERNET ACCESS TO COURT FILES

PANEL FOUR: COOPERATION AND PLEA AGREEMENTS—PROFESSORS & PRACTITIONERS

MODERATOR

*Hon. Steven Merryday**

PANELISTS

Caren Myers Morrison[111]

Gerald Shargel[112]

Barbara Sale[113]

Christopher Brown[114]

Alan Vinegrad[115]

Jan Rostal[116]

Cris Arguedas[117]

JUDGE MERRYDAY: We will consider this afternoon the issue of plea agreements and cooperation agreements. It is a difficult subject. It is one that has, I think, the central attention of the subcommittee that is considering privacy issues, particularly in the area of criminal practice. From the vantage of our research, it is clear that many mechanisms are in place around the United States, based on similar but different operational principles. There is a variation in degree of satisfaction and confidence in those mechanisms, so we wanted to investigate an array of them.

We will do so in two panels, the first panel consisting of practitioners and academics, and the second panel of judges.

We will begin with a presentation from Professor Caren Morrison, of Georgia State University.

PROF. MORRISON: Thank you very much.

Internet access to criminal case records in general, and to plea agreements and cooperation agreements in particular, poses several

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difficulties. The first and most obvious is that it raises the fear of retaliation against cooperators. The second is that it may deter some individuals from cooperating in the first place. Third, and probably most importantly, these two concerns may encourage prosecutors, who are apprehensive of their cooperators getting hurt or of losing important sources of evidence, to take steps to limit the damage before their fears are realized, even if their concerns are overblown.

So concerns triggered by Internet access may drive prosecutors to hide what they are doing, either by over-relying on sealing, masking the kinds of deals that they make with cooperators, either by using charge bargaining or hiding sentencing facts from probation departments and courts, or avoiding filing plea agreements in the first place.

An important backdrop to the whole issue is that use of cooperating defendants is far from transparent. It is a law enforcement mechanism that is difficult to regulate, susceptible to arbitrary application, and seems to result in wide disparities in the treatment of defendants. So increasing meaningful information about how the government chooses and rewards cooperators is an important goal.

For these reasons, I suggest that the Committee consider limiting Internet access to criminal court records on PACER to the parties and to the court, and not having these files be accessible to the general public except in paper form at the courthouse. But in addition, I propose that the Committee require the government to provide detailed data on plea and cooperation bargains and sentencing in the aggregate.

Before I get into specifics, I want to make clear several underlying premises on which I am basing my proposal.

The first is that the fundamental role of public access to court records is to enable the informed discussion of public affairs and, in particular, to allow the public to understand what the government is doing. These are the purposes that Judge Raggi spoke about in her remarks this morning. These, in turn, will enhance public confidence in the system and allow increased public oversight.

The second is that any solution ultimately reached must not result in a net loss of information to the public or in the alteration of the character of that information. At a minimum, my proposal assumes that the public will continue to have access to court records at the courthouse to the same extent that the public did in the past.

Further, any solution that treats cooperator files differently from non-cooperator files will raise a red flag, and in so doing, is going to identify the cooperators. So any solution that seals only cooperation agreements and not plea agreements, for example, will do little to protect cooperator security.

In addition, identification of cooperators is not limited to plea documents. Sentencing memoranda—in particular, substantial assistance motions filed by the government—are just as revealing. So are motions to adjourn sentencing until all related defendants' cases have been resolved. Even the docket sheet itself frequently reveals cooperation. If, for example, there are

a lot of sealed entries or an unnaturally long delay between plea and sentencing, anybody who is familiar with the system will recognize that that is typically the file of the cooperator.

Prosecutors are well aware of these facts, and they will do whatever they feel is necessary to protect the safety of their cooperators. This can lead them to alter the way they conduct their business. So the practice of signing up and rewarding cooperators, which is already fairly opaque, can become even more so as prosecutors become concerned that their cooperators are in danger.

Finally, I think sealing documents is a poor solution, for a couple of reasons. First of all, sealing is not supposed to be a permanent or blanket solution. Sealing is supposed to be used in exigent circumstances and for limited periods of time only.[118] It is not meant to be used automatically in every case in which someone cooperates. Second, in an online context, there is a strong disincentive to unseal anything. Once something is unsealed, it immediately becomes available to an enormously wide public, and so prosecutors and defense lawyers representing cooperators will not be in any hurry to do so. Once again, this is contrary to the legal purposes of sealing, which is supposed to be a short term solution, ending once the exigency has passed.

As I said, the first part of what I am suggesting is to try to curb unwarranted exposure of cooperators by limiting access to the docket sheets and the case documents on PACER to the parties and to the court. This would leave all non-sealed documents still available at the courthouse.

Obviously, this kind of restriction on online access would need exceptions, particularly in high-profile cases or cases of heightened public interest, such as public corruption cases. That would help to answer the issues raised by the Salvatore Gravano or Bernie Madoff-type cases, where obviously there is going to be high newsworthiness content. In those cases it would make more sense, given the amount of publicity they generate, that the records be available online. In such cases, I think the district courts should have the flexibility, with input from the parties, to allow the public to access these cases on PACER, on a case-by-case basis.

But for the vast majority of run-of-the-mill cases which involve cooperators, such as narcotics cases, where the potential risks to the cooperators are high and the news value is low, I am not certain that there is that much public benefit from having those cases posted online.

This proposal might seem restrictive, but it actually would not result in a net loss of information to the public—at least not any more of a loss than there is already in a paper world. My concern with the solutions devised by the districts of North Dakota and New Hampshire, which have the virtue of treating cooperators and non-cooperators alike, is that they completely obscure the information about whether defendants are cooperating or not.

118. *See, e.g.*, United States v. Cojab, 996 F.2d 1404, 1405 (2d Cir. 1993) (noting that the power to seal documents "is one to be very seldom exercised, and even then only with the greatest caution, under urgent circumstances, and for very clear and apparent reasons").

In addition, they give the public no information whatsoever about what the terms of the cooperation agreements may be.

A system in which every plea agreement looks alike and everything is accompanied by a sealed plea supplement is misleading and fails to inform the public of what its government is doing. Worse, the public will be denied that information at the courthouse as well, as there is no access to sealed records. I think that solutions that provide protection to defendants by obscuring government action do run contrary to the purposes of public access.

So the second part of my proposal is that there really has to be a way of delivering information to the public so that it can understand how many defendants the government is cooperating with and the magnitude of the benefit given to those defendants compared to non-cooperating defendants. In my view, it is more important for the public to know exactly what kind of trades the government is making with individual cooperators than it is for them to know that the cooperator's name is, for example, "John Smith."

A way to increase public oversight without triggering fears of retaliation would be to organize the information differently, outside of the confines of a criminal case file with a specific defendant's name on it. Rather than sealing, redacting, or otherwise obscuring the terms of the cooperation bargain, it would be more helpful to disclose all cooperation agreements with the explicit terms of the bargain intact but the personal identifying information redacted. What I have in mind is a system of anonymous defendant profiles, which could be organized by the type of crime charged and then could include a statement of initial charges, all subsequent and superseding charges, plea documents, an indication of whether the defendant cooperated, and if so, the substance of his cooperation, and sentencing information. If the defendant did cooperate, the cooperation could be sorted into one of four general categories: providing background information, agreeing to testify, providing testimony, or taking an active part in the investigation.[119]

In this way, the computerization of the federal courts could give the government an opportunity to shed light on its practices without a massive loss of individual privacy.

JUDGE MERRYDAY: Thank you very much.

Criminal defense attorney and Professor at Brooklyn Law School, Gerald Shargel.

PROF. SHARGEL: Thank you. Good afternoon.

In a system that celebrates transparency, I do not think that sealing is appropriate in the case of cooperators. Not only is it not appropriate, I do not think it accomplishes anything. The idea that people learn that a particular person is a cooperator online, whether it is on ECF or PACER or Whosarat.com, is nonsense. People learn that someone is a cooperator

119. This proposal is described in greater detail in Caren Myers Morrison, *Privacy, Accountability, and the Cooperating Defendant: Towards a New Role for Internet Access to Court Records*, 62 VAND. L. REV. 921, 974–76 (2009).

because they know about the case and they know generally what has happened to the defendant. A sealed proceeding is an advertisement that the person is cooperating. So is a delay. It is usually obvious within hours or days that someone is cooperating. As I have said, it is like Thanksgiving dinner. When one of the relatives is absent, you know something is wrong. The same is true in a multi-defendant criminal case: when one of the defendants is absent or someone that is part of the gang is not charged or sentence is delayed for two, three, four years or more, you know something is terribly wrong.

There is one other thing that flies in the face of sealing the information pertaining to a cooperator—and let me make this clear. If someone makes a deal with the government and goes in, sometimes under cover of night, and pleads guilty, I am not suggesting that the plea minutes not be sealed. I am not suggesting that any information pertaining to the cooperator not be sealed. But I am suggesting that it would be unconstitutional for the sentencing proceeding itself to be sealed. The Supreme Court has said recently, back in January of this year, in *Presley v. Georgia*,[120] that the public has a qualified First Amendment right to know exactly what occurs in a case.[121]

I use the example of Sammy Gravano, who received a sentence in the Eastern District of New York of five years, having admitted to nineteen murders and other related criminal activity.[122] The public has an absolute right to know why that happened. The source material for why that happened would be the sentencing minutes and the comments of the judge in imposing the sentence. If a lawyer stands before a sentencing judge and makes an argument that that client was an important, effective, and essential cooperator in rooting out a serious criminal organization, the public has the right to see that—my point being that it is constitutionally wrong to think about sealing these records.

There was a case in the Southern District of New York that went to the Second Circuit where a district court judge decided, only for her own convenience, to hold all sentencing proceedings and some guilty pleas in the robing room, simply, as I said, for convenience. No reason was put on the record. The Second Circuit reversed convictions in two companion cases that were reviewed by it.[123] Once again, the court found that it was unconstitutional.

I cannot imagine that there can be a blanket rule where courts were permitted to make generalized findings that all records are sealed in the cases of cooperating witnesses. It would never pass constitutional muster.

The danger of cooperation is not caused by posting the sentencing proceeding online. The danger of cooperation is not posed by having the

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120. 130 S. Ct. 721 (2010).

121. *See id.* at 723–25.

122. Joseph P. Fried, *Ex-Mob Underboss Given Lenient Term For Help as Witness*, N.Y. TIMES, Sept. 27, 1994, at A1; *see* United States v. Gotti, 171 F.R.D. 19, 21–22 (E.D.N.Y. 1997).

123. *See* United States v. Alcantara, 396 F.3d 189, 201–03 (2d Cir. 2005).

sentencing proceeding as a public proceeding, which it is. Can we extend the closed filing online and say that the sentencing proceeding is closed, that the door should be closed and no one should be admitted, seal the courtroom? I do not think there is anyone in the room who would suggest that that is constitutional. I do not think there is anyone in the room that would suggest that is appropriate in any way.

My point, very simply, is this: if sentencing is an open proceeding, it should be available to the public, both in terms of entering the courtroom and seeing what occurred on PACER or ECF or any website that wants to pick it up. I think that cases like the Gravano case make absolutely clear that when something completely out of the ordinary happens, the public has a right to know why.

Moreover, I feel strongly that it is not the obligation of the judiciary, of the court system, to protect witnesses or protect cooperators. I think it is the obligation of the executive branch. I think it is the obligation of the Bureau of Prisons or the Marshals Service, with its Witness Protection Program, to engage in protecting its witnesses. There are mechanisms in place. There are separation orders. This is a vast country, with a vast network of prisons. Prisoners are routinely housed in places where a danger does not present itself. There are special prisons that accommodate cooperators. There are ways that the safety of a cooperator while in prison—and, of course, out of prison as well, in the Witness Protection Program—can and is effectively secured. The Marshals Service boasted of the fact, and I think continues to boast of the fact, that anyone who stayed in the program and followed its rules has never faced harm. There has never been a murder or an assault of any kind. I know that was true up until recent years, as long as that person stayed in the program.

This is the obligation of the executive branch. We have open court proceedings in this country, and it cannot be a policy to take a particular class of defendants and say, in those cases, we are going to seal.

Thank you.

JUDGE MERRYDAY: Thank you, Mr. Shargel.

Another vantage, no doubt, from the Criminal Chief, the United States Attorney's Office in the District of Maryland, Barbara Sale.

MS. SALE: Perhaps surprisingly, I agree with my colleague that sentencing proceedings should not be sealed. That is perhaps the extent of my agreement with him, however. And I thank the people who put this program together for allowing a diversity of views.

I come from the District of Maryland, where the primary office is in Baltimore, which has one of the highest homicide rates in the country, I am not proud to say. It is the home of the infamous *Stop Snitching* videos, which were actually marketed DVDs, which exhorted people not to snitch on other people and threatened harm to those who cooperated with law enforcement. *Stop Snitching II* featured a little boy of about ten wielding a gun. Baltimore is also a place where we have had a constant stream of notorious, high-profile witness retaliation cases.

We had a hideous arson case some years back in which a family of seven was burnt to death in their home because the mother was suspected—suspected, merely—of having passed information to the police about neighborhood narcotics transactions. We had another firebombing where an older lady was burned out of her home for the same reason. These are just citizens trying to clean up their neighborhoods and make them safer for ordinary law-abiding people to live in.

We have more recently had cases involving deliberate first-degree murders of people who were believed to be cooperating in criminal cases. We had a case last year in which a person who was awaiting trial on a homicide learned from a witness list that a particular person, whose name was not theretofore known to him, was expected to be a witness. This happened to be a key witness, but he was a bystander, just somebody who just happened to be there and see something and report it to the police. The witness's mother urged him not to get involved because she had heard about the dangers faced by witnesses to inner-city crime. From his prison cell, using a smuggled cell phone, the defendant put together a network of gang members, who together gunned this man down in his front yard in front of his four-year-old child.

In this climate, we have to take every precaution we can to protect those who want to come forward and cooperate with the prosecution. It is not easy.

My colleague here says that the Marshals Service has a record of protecting people one hundred percent, but that speaks only to the formal WitSec program, in which witnesses are given new identities and relocated. In the real world, very few are admitted to that program, and even those who are often choose to go back to the neighborhoods that they come from. We had a case a year ago where a protected witness went home on Thanksgiving Day. He was supposed to be in witness protection, but he went home to see his mom for Thanksgiving, and was gunned down a block from her house because he was believed to be cooperating.

I do not need to tell horror stories for the rest of the afternoon, but they are real, and they happen, day in and day out.

There are two consequences to this in our federal court system. Maryland was among the last to go to electronic case filing in criminal cases because our Chief Judge and some of the key players were very wary about what would happen. We finally bit the bullet and, in August 2008, went to electronic case filing in criminal cases, but only after the public defender and I, and one of the judges, and a representative of the private criminal defense bar sat down for months to try to figure out how best to protect cooperating witnesses. We adopted what has come to be known as the North Dakota plan. This means that whenever somebody pleads guilty, there are two documents that are filed on PACER. One of them is simply a plea agreement. It lays out all the things that you need for a plea agreement—the elements of the offense and the maximum penalty and the rights that the defendant is giving up and that sort of thing. Then there is filed in every case a "sealed supplement." If the person is not cooperating,

the sealed supplement simply says, "This is not a cooperation agreement." If the person *is* cooperating, it lays out in three or four pages the whole litany of expectations and obligations that go with the cooperation agreement. So anybody looking at the docket from outside on PACER would see that all plea agreements look exactly the same, and only by gaining access to the sealed supplement—and people do move to unseal from time to time—could somebody determine that Person A was cooperating, whereas Person B was not.

This seems to have been effective. The defense bar is very happy with it because they feel that it protects their clients. But that seems to have resolved itself. As we stand now, we are confident that we are doing what we can to protect cooperating defendants from exposure as they move through the system.

There are several points throughout the system where this becomes important. Early on in the case you may need to protect the identity of the cooperators to protect an ongoing investigation. You might think that after they have testified at trial, it is all out in the open and there is no longer any need to protect them. But it turns out that there is a continuing need to avoid identifying cooperating witnesses on paper. Judges that I work with and people in my office have gotten letters from cooperators in prison begging them to send some kind of phony court document so that they can show it to their new colleagues in prison to prove that they are not snitches, that they are not cooperators. It is not simply that a person is endangered by cooperating in a particular case. It turns out that being a "snitch" is a status that sticks to people throughout their incarcerations, and—who knows?—maybe beyond, which puts them at risk. So we have had people ask to have phony judgment and commitment orders, or phony plea agreements that show that they are not cooperating.

Of course, the court cannot do that and we cannot do that. The public defender in our district has generated letters to former clients saying, "It is too bad you elected not to cooperate. I could have gotten you a better deal"—wink, wink. Presumably, they can show this around, and it may protect them.

It turns out that *paper*, something that is actually in black and white, is important to people in prisons and in the criminal community on the street who are trying to determine who is and who is not a cooperator. We are investigating a case right now where an FBI 302 report of investigation was circulated as proof that the victim was cooperating. That 302 report had been turned over in discovery, and copies were located in four penal institutions in three states. The witness was, again, gunned down in his home neighborhood.

For now, I am not suggesting any global policy solution. Our solution of having a sealed supplement in every case seems to be working. Others have suggested the Southern District of New York solution of having the plea agreement remain in the prosecutor's file and never made a part of the court record. I think each district is going to have to work its way through these issues separately. I take Judge Raggi's point that everybody is

looking for a carve-out here. We certainly are. We would like to have cooperators not exposed on the public record in perpetuity and endangered by having their status as witnesses on PACER.

Thank you.

JUDGE MERRYDAY: Thank you, Barbara.

From the Intelligence Operations Office of the Bureau of Prisons, Christopher Brown.

MR. BROWN: Good afternoon.

I just want to take a couple of minutes to talk about what happens to inmates once they are received inside a federal prison with the tag as a "snitch" or a "rat." I can tell you from experience that one of the things that happens right away is that other inmates seek to find out why they are there. What I mean by that is, once an inmate is received at a federal prison—I basically call them the welcoming committee. These are the inmates who attempt to be your friends, just to find out why you are there, what your case is all about. What they are actually trying to find out is if this person can be trusted or not. The way they do that is, they want to see your pre-sentence investigative report or your statement of reason—just something to say you did not cooperate with the government and you did not take a plea to basically rat out others.

The Bureau of Prisons does do a good job—as well as the Marshals—in keeping these individuals safe. However, one of the problems that we are faced with is, once an inmate has been outed as being a rat or a snitch, what to do with him. Once we find out that the inmate has been compromised—and I am not talking about inmates that are in the Witness Protection Program. I am just talking about the average inmate who, for whatever his reasons were, decided to take a plea and he named his codefendants and he received a reduced sentence.

The Bureau of Prisons tries to keep these inmates within 500 miles of their home. However, that is not always possible. First and foremost is the inmate's safety. Once this inmate steps foot inside the institution, if this inmate cannot produce some sort of documentation that says that he did not cooperate or take a plea, then he is basically ostracized for whatever time that he has to do. No other inmates want to befriend him. The only other inmates that receive this type of treatment are child molesters. We read about it, we talk about it, we see it on television, but it is real. These inmates basically do their time in isolation.

Let's talk a couple of minutes about assaults. They are assaulted. They are harassed pretty much on a daily basis. Basically, what can be done? We can move them from prison to prison, but some of the intelligence of that inmate is passed on from institution to institution. Just like this inmate is transferred to another institution, so are others. It is almost like they have their own underground network.

The Bureau of Prisons does not allow these documents inside the prison, but the inmates are allowed to review them. However, they are not allowed to keep them in their possession. When I listen to the stories about the inmates asking for fake documentation, I have firsthand experience where

inmates have basically asked me the same question: "How do I go about getting fake documentation? I am receiving pressure on the yard to produce some type of documentation that says that I am not a cooperator."

What happens from that point on is, we have to assess whether or not we can keep that inmate in the same institution or whether we are going to break our own rule of 500 miles, which is really an unwritten rule, and send that inmate somewhere where he will be safe.

Not only is the inmate in danger, sometimes his family members are in danger. I have had inmates tell me that individuals in their community want to see their pre-sentence investigation report. Somebody in their family will show it to someone in the community, who will verify the information and then get the word back into the prison that this person is okay or this person cannot be trusted.

The Bureau of Prisons recognizes that this is a problem. In 2002, what the Bureau of Prisons did was to basically let all inmates know that they can no longer have access to these materials. Simply telling an inmate, "You cannot have these materials, but do not talk about your case"—there are 1800 other inmates there. You have to talk to someone. You cannot spend ten, twelve years in a federal prison and not try to fit in with someone.

There also was the issue of moving them to other prisons where they will be less susceptible to harm. That is something that we try to do. We still try to keep them close enough so they can maintain family ties. However, that is not always possible. A lot of things depend on whether or not that inmate will stay close to home—basically, the security level of that inmate. We may not have a facility close by.

Sometimes the inmate will feel, "What did I get for cooperating? I get harassed daily. I have been assaulted. And to add insult to injury, I am being moved away from my family, where they can only come and visit me once a year."

We are addressing issues with inmates. However, one of the biggest problems that we face inside the prison is getting the inmates to actually come forward. More often than not, the inmate who has been assaulted will not tell you he has been assaulted. It is usually a situation where they say they were injured doing a sports activity. If there were no witnesses to what the event was, there is no way we can go forward and investigate, when an inmate swears under oath that he was not assaulted.

My last point, and one of the issues that we are also addressing, is that the inmates know that once they are assaulted and they admit to being assaulted, they are going to be moved. They want to know how much time they are going to spend in the special housing unit under twenty-three-hour lockdown. They cooperated. They were assaulted, harassed. Now they are locked down for twenty-three hours a day, and they are going to be moved somewhere away from home.

Those issues are currently being addressed. We are doing the best we can. My personal opinion is that access to records—it is an issue where inmates know, once they step inside the prison, that they have done something wrong and their safety is basically going to be up to them. We

do provide the best security we can for them. However, we cannot be everywhere at once. We do ask them to cooperate with us. Sometimes they do, sometimes they do not. But I do not think limiting access to records will really help us at all, the issue being that the information that the other inmates receive is information that can be found just about anywhere.

Thank you.

JUDGE MERRYDAY: Thank you, Christopher.

A former United States Attorney and now an attorney with Covington & Burling, Alan Vinegrad.

MR. VINEGRAD: Thank you.

I start from the presumption, which is a safe one, because I think it has been endorsed by the Supreme Court of the United States,[124] that there should presumptively be a qualified First Amendment right of access—to be specific, to criminal proceedings, including plea agreements.[125] My general view on this issue is that the Federal Rules of Criminal Procedure and the case law that has developed surrounding the issue of sealing criminal proceedings or documents relating to them provide sufficient legal authority for case-by-case fact-specific determinations of when that presumptive right of access should be overridden.

The safety of witnesses is obviously an important consideration. Not having ongoing government investigations compromised is obviously a valid interest and consideration. In fact, it may be such that in a particular case it justifies denying public access to cooperation agreements, not just electronically, but even in hard copy from a courthouse.

But I caution against a categorical approach because even with cooperators—I am putting aside people who simply plead guilty (I think there is less of a concern about confidentiality for them)—I think a hard and fast rule that shields their agreements or sentencing proceedings from public view is hard to justify, the prime example being cases in which the cooperation of those defendants becomes publicly known, either at the time of their plea or the time that they testify in open court at a trial, or even earlier. To pick one recent notorious case, the longtime chief financial officer who worked for Bernard Madoff pled guilty several months ago, pursuant to a cooperation agreement.[126] I think the fact that he was cooperating became publicly and widely known even before he entered his plea.

So I am hard-pressed to envision a rule that would deny the public access, electronically or otherwise, to the terms and conditions of his cooperation agreement. It is hard to see what higher value, from the law-enforcement perspective, is being served there. And so I do question this

124. *See* Press-Enter. Co. v. Superior Court, 464 U.S. 501 (1984).

125. *See id.* at 510–12.

126. *See* Transcript of Plea at 8, 40-41, United States v. DiPascali, No. 09 CR 764 (RJS) (S.D.N.Y. Aug. 11, 2009); Jack Healy & Diana B. Henriques, *A Madoff Aide, Guilty, Reveals Scheme Details*, N.Y. TIMES, Aug. 12, 2009, at A1.

all-or-nothing approach, where either we grant access electronically or otherwise categorically to plea and cooperation agreements or we do not.

Obviously, there are competing considerations here. That is why we are all sitting in this room right now talking about it. But having said that, I would make just a couple of brief points.

One is, I do question the efficacy of what will be achieved ultimately by having varying levels of access to these types of agreements, either going to the courthouse to get them in hard-copy form or electronically, again as a categorical matter that says you can get it one way, but not the other. I think it is a challenge to see the meaningful, principled, constitutional difference that would support different rules for one versus the other. It seems to me that, in this day and age, with lots of enterprising people and organizations out there who amass data and information and documents, especially in our electronic age, equal access basically just avoids the necessity of having a so-called cottage industry of those who would gather this information anyway and make it public or sell it to persons and make it electronically available.

I could take a more cynical approach and say that basically, while I completely understand and agree with many of the concerns that Barbara Sale articulated earlier from the law enforcement perspective, it seems to me that in a great majority of cases, those who are bound and determined to make mischief with a cooperating defendant are going to be able to do that, whether the cooperation agreement is electronically available on PACER or not, whether they take the time to go to the courthouse and get it or get somebody to go get it. Or, I think as is more typically the case, as Gerry Shargel mentioned before, the people who have the greatest interest in finding out who the cooperators are and who may want to make mischief are going to figure it out anyway, through the normal course of events in a criminal case.

So, while I think the concerns are valid, I do not know what is really accomplished by denying electronic access. I would say the same about Mr. Brown's comments with regard to what happens in the Bureau of Prisons. I will not repeat it, but he basically said it at the end of his remarks. I do not know what sealing or denying electronic access accomplishes or does to solve the many problems that confront cooperators in prison. In fact, if I can plagiarize my former colleague Caren Myers Morrison's article, which is excellent on this topic, I think I question the severity of the risk, not posed by cooperation generally, but by electronic access to the sorts of documents we are talking about here, where there are organizations that have had a field day making these documents available, and virtually no documented instances of retaliation have resulted.[127]

There are districts that have come up with creative solutions, I think, to these problems. I think the creativity comes with concerns of its own. I will just mention two, and then I will be done.

127. *See* Morrison, *supra* note 119, at 956–58 (discussing www.whosarat.com).

One is the notion of filing generic plea agreements that all contain these generic cooperation provisions even for non-cooperators, which seems to me troubling from a public "right to know" perspective because what the public is getting is misleading information. So, too, I think one has to look hard at a practice well known to me—I hope the Chief Judge from my old district does not take my head off for saying this—of having plea or cooperation agreements not actually filed with the court, and therefore avoiding, frankly, the types of requirements that are embedded within our Rules of Criminal Procedure and our case law. I think there is a tension between that practice, on the one hand, and the notion that criminal matters and dispositions should be subject to public scrutiny.

Thank you.

JUDGE MERRYDAY: Thank you, Alan. From the Federal Defenders of New York, Jan Rostal.

MS. ROSTAL: Thank you, and thanks to the subcommittee for bringing out all these views.

I speak on behalf of the constituency my office represents, which is the indigent defendants in the Southern and Eastern District court system (we represent some 2500 indigent defendants a year). No one pays a lot of attention to my clients, including the press, which does not have a lot of interest in them. They are not the Bernie Madoffs, they are not the cases that the press really cares about or deems newsworthy.

I have to say, thinking about their cases, and thinking about the advice I have to give a client when he or she is deciding whether to cooperate, one of the questions I get is obviously how much time they are going to get. But the other is: what is it going to mean? Who is going to hear the details of my case and my life? What is it going to mean in the Bureau of Prisons? What is it going to mean when I get deported, as many of my clients will, to the Dominican Republic, Colombia, or Mexico? What is electronically available in other countries? What is my family going to be able to see? What are the enemies of my family going to be able to see?

Those are obvious and fair questions. Clients are being asked to cooperate by law enforcement, by U.S. Attorney's Offices, and being told that everything is being done to try to protect them. They are told maybe they will not have to testify, maybe their cooperation will never be made known to the public. Yet, under the current system of free electronic access, somebody out there Googling can get it, regardless of whether there is any true public interest in disclosure of the information.

This seems backwards to me. On behalf of my clients, I have to say, I fall with what I hope is going to be dubbed the "Professor Morrison rule," which is that the problem is not so much in the sealing or unsealing, it is in the unfettered electronic access. It seems to me that if there is going to be a presumption, why wouldn't the presumption be in favor of limiting the electronic access to parties and to the court, probation officers, pretrial officers, other people with an institutional need to know? If there is a case of public interest, a Bernie Madoff kind of situation for example, or any other case of a newsworthy level, let the press or parties come in and ask for

the access and then weigh all these competing interests. Why mess with it from the get-go and put my (no offense to them) less newsworthy when there is no one interested in their proverbial tree falling in the woods?

There should be a concern for the folks whom I represent, who, for the most part, have given up their freedom. Part of the bargain was not necessarily giving up their privacy, and not just whether they cooperated, but in sentencing submissions, what diseases they have, what learning disabilities their children have, what medications they are on, whether they did or did not give post-arrest statements when they were arrested. Maybe that does not rise to the level of cooperation, but who knows how that is going to play back home?

There are already too many personal details of clients' lives getting revealed in electronic systems, details that are not newsworthy, and that nobody really seems to care about, except for more sinister reasons. If there is an interest in those details, that interest it seems to me, can be protected by making the press or those who have the interest take the steps to get access to the information and show why they care, even if that is just going to check out the courthouse file the old-fashioned way. I object to the Facebook-ization of ECF and PACER.

Thank you.

JUDGE MERRYDAY: Thank you, Jan. Our final but not least panelist is Cris Arguedas, a criminal defense attorney. Cris?

MS. ARGUEDAS: Thank you. I am a criminal defense attorney. I started as a federal public defender, and I still do a lot of indigent work. I think this is a pretty complicated subject, actually.

My position is that the First Amendment requires that shutting out the public should be viewed as a drastic step, and it should be taken in as narrow a way as possible. I think that is probably kind of unassailable. The question is, how do you do that?

I think one needs to look at where the danger is from. It is, I think we all agree, from the people in the system. It is from your codefendants, your potential codefendants, or your prison mates. It is not from the public, basically. We now have a situation where all of these various versions of sealing very effectively do shut the public out of knowing what is going on, and they do not at all effectively stop your codefendants, potential codefendants, and housemates in the prison from knowing what is going on. So we have done a very dramatic thing that is aimed at the wrong section and that implicates the First Amendment.

I also think that there are some real dangers over the fact that we have such radically different procedures going on in each district of our federal courts. I want to just identify how different they are. One could argue that these are examples from a menu, so everyone could choose which one sounds good to them. And it does show flexibility in the federal system—always a good thing, I think. But the other thing is, it is quite chaotic, and it gives a lot of mixed messages that could be exactly misinterpreted by the people whom we are supposed to be protecting these cooperators from.

For example, in many districts, it is the way it always was. Plea agreements are filed and they are put on PACER, and that is where they are, unless I, when I am representing the cooperator, move to seal them. If I move to seal them, it is always granted and it is sealed. Then everyone in the system knows: sealed means cooperation. Right? So the public gets to know kind of nothing, but the flag is up for all the people who are dangerous to my client.

We have the Northern District of California, San Francisco. They have no plea agreements available on PACER at all. PACER shows a plea was entered. But if you go to the courthouse, you can see it all on paper, unless it is sealed, in which case, again, the public does not get to know what happened, but the people who are dangerous do.

You have the District of New Hampshire, in which every plea agreement has boilerplate language in it that says if the defendant gives valuable assistance and cooperates, the government will make a 5K1 motion.[128] You put that in every plea agreement, whether you are cooperating or not. This is supposed to be protecting someone from danger? I would not want to be the person at Lompoc [Federal Correctional Complex], who is saying, "Oh, no. They put it in everybody's. It is a way of camouflage." Does this make sense to anybody?

The District of North Dakota: they file a basic plea agreement. It never says you are cooperating. Then every case files something separate, which is under seal and says "Plea Agreement Supplement." My plea agreement supplement, which is under seal, might say I am cooperating. The other one says, not in these words, "This is just a camouflage document. I am not cooperating at all, and we do not even need this thing here, except it is here so that it hides the guys that are cooperating."

Again, I think that is pretty much a big deception. It should not be what our courts are doing. But also, if you are a San Francisco hoodlum and you see a sealed document from North Dakota, that means snitch in San Francisco and in a lot of places. So I do not even think it is very good camouflage.

The Eastern District of Pennsylvania: they are like the Northern District [of California], but they refuse to put on paper everything that has to do with a criminal case. Nothing from the criminal case is there—not the plea, not the motions, not the sentencing documents, not anything.

Then we have the Northern District of Illinois, which I think has been described, which says that the criminal case, all of it, is accessible to the lawyers, basically, to the people involved in the case. So the public is entirely shut out of that. In my opinion, most of the time, in most of the cases, the people who are dangerous know who is snitching and who is not. So what has happened in the Northern District of Illinois is that nobody in

128. A 5K1 motion is a "motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense." U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2009). When the government makes a 5K1 motion, the court may depart from the sentencing guidelines. *See id.*

Chicago gets to know what is happening in their federal criminal cases. That seems to me to be a serious abrogation of the First Amendment.

But my main message here is that we should be aware that there may be ninety different ways of doing this. It is because the various courts have decided this is the best way to protect their people. I appreciate, from Maryland, what your point is. But we cannot be so parochial, I do not think. What you may think is protection, I might think is a red flag based on the way my district does it. So it seems to me that at least there should be some guidelines and then exceptions, as always.

JUDGE MERRYDAY: Thank you, Cris.

Christopher, you were talking about the incidents in the Bureau of Prisons. Does the Bureau of Prisons compile data to determine the number of those and make any effort to categorize them by severity and cause?

MR. BROWN: We do collect data. But basically right now the only thing that we do is treat it as an assault. We do not categorize and say, this was an assault based on cooperation. That was one of the things that was brought up during the telephone conference. I did bring that up to my superiors. It would make it easier for us to track if we did have a system, not just saying it was a simple assault or a serious assault, if we broke it down to say it was because of cooperation.

JUDGE MERRYDAY: And you might have a problem with the credibility of your source for that information, as far as making a judgment about what it actually was. Some people would tell you that, I suppose, to divert your attention away from the real cause.

MR. BROWN: Yes, they do.

JUDGE MERRYDAY: Does the Department of Justice do that, Barbara? Do you know?

MS. SALE: Compile information about the reason for the assault? No.

JUDGE MERRYDAY: If a threat is made on a judge, the United States Marshals do a threat analysis, and they give it a rating and decide whether you will receive protection. I was wondering if the Department of Justice does that with respect to its witnesses or cooperators.

MS. SALE: It may be done with respect to witnesses who have been admitted to the Witness Protection Program because that is such a high level of protection. As Gerry mentioned, there are, I believe, four prisons where everybody in the prison is a cooperator. Presumably the risk level is a little bit lower there. But for the vast number of people—and I think probably thirty percent of our cases in the District of Maryland involve making 5K1 recommendations,[129] and that is a lot of defendants—there is no threat assessment that follows them.

We do, as you mentioned earlier, separation memoranda to the Bureau of Prisons and say that Gerry should not be with Cris, and so forth. There is only so much they can do. When you have a case that has thirty-seven individual cases—and some of these gang cases are just, as you all know,

129. *See id.*

unwieldy and huge—there is only so much you can do to keep people separated. I think some people just live on buses, getting moved around to BOP [Bureau of Prisons] facilities.

MR. BROWN: One of the things I want to clarify is, when you talk about threat assessments, we do complete threat assessments on inmates who have been threatened. Generally, we have thirty days to complete a threat assessment. At the end, we have to verify it or un-verify it. That stays as a part of that inmate's permanent record, no matter where they go, that a threat assessment was completed on that inmate.

JUDGE MERRYDAY: It seems that, at least in one sense, what we are doing here is deciding what risk to encounter and on whose behalf. Evaluating that is made particularly difficult if you do not have reliable data on how frequently this happens, how severe it is, what the source was, and whether there is, actually, anything you can do about it one way or the other.

JUDGE RAGGI: I have two questions, one for those of you who have supported removing criminal cases from the electronic filing and then one for those of you who think that is problematic.

To the former, as a rules committee, we can only implement congressional legislation. I am not sure that your proposal can be reconciled with the E-Government Act.[130] Is that right? Is this an argument for Congress rather than for a judiciary committee? Or are you urging something by the judiciary itself?

PROF. MORRISON: I am urging action by the judiciary itself, through its supervisory power over its own records. It is true that some of the tactics used in certain districts, such as the Eastern District of Pennsylvania, which provides no Internet access to criminal court records at all, seem as if they might fall afoul of the E-Government Act. But to my knowledge, no court has yet interpreted the E-Government Act as limiting the discretion of the judiciary to manage its own records. Congress has directed each federal court to maintain a website containing public information on its files, including docket sheets, but it could be argued that it gave substantial deference to the courts as to what information to provide. It is possible that a system that took docket sheets and court records offline but then provided detailed information in the aggregate would satisfy the requirements of the Act.

JUDGE RAGGI: For those of you who are more inclined to see this done ad hoc as individual cases may need attention, we are about to hear from a panel of judges who use some of the diverse means that you have talked about. There has been some question about whether the Privacy Committee should take a stand on any of these particular practices or view it as beneficial for individual districts to work out what suits their particular culture best. Does anyone want to speak to the issue of whether we ought to recognize certain best practices or encourage diversification?

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130. 44 U.S.C. § 101 (2006).

PROF. SHARGEL: I think it is problematic if you have an ad hoc approach. I think that is just too difficult. I think there has to be some symmetry. It is either going to be one way or another.

Another problem that you face is that all these plans have been implemented, and yet seemingly there has not been any challenge to the plans. Several panel members have been talking about the constitutional requirements of the First Amendment, yet none of these plans or programs have faced a First Amendment challenge. It would be interesting to see what happens if they do.

It would seem to me that it should be symmetrical. I think it should be uniform. I do not think it should be a catch-as-catch-can approach, with local rules in each district. But I think that the serious issue will be determined when someone, sooner or later—probably an institutional litigant like Federal Defenders—brings a First Amendment challenge.

MS. ARGUEDAS: To me, the salient point is that the most dangerous population, in terms of who is going to do the beating-up and killing of people, is in the federal prisons. They come from all the different districts, and so they are misinterpreting, or perhaps correctly interpreting, these different signals from the different places. So I think it has to be pretty uniform—not without some flexibility on a case-by-case basis. But I think we have to act like a federal system, since we are sending them to federal prisons.

MR. VINEGRAD: I think the rules currently provide both a general rule of application that people can follow and also an ability of courts, based on, not so much custom and practices, but particular problems in a particular district or case, to make a case-by-case determination of what falls within that standard. Rule 49.1[131] has a good-cause standard now for limiting electronic remote access to documents, and good cause may vary between New York and North Dakota as to what meets that standard. It is not all that different than what courts do all the time, which is apply a standard to the particular facts of a case and come up with their body of law for what is going to fly in terms of a request for confidentiality and what is not.

PROF. SHARGEL: Also, if I may, I do not think we should walk away from this meeting with the notion that there is an inexorable path from electronic filing to trouble in prison or trouble on the street. Trouble in prison happens in all sorts of ways. I have heard several times of people working in the prison offices actually selling information contained in private probation reports that are in the offices and alerting other prisoners that an inmate is cooperating. Stopping electronic filing is not going to solve that problem. On the street there are similar ways that lead to trouble and danger to cooperators or potential cooperators.

Keep in mind, the troublemakers, the killers, the vicious people do not have a proof-beyond-a-reasonable-doubt standard. They do not even need probable cause. Mere suspicion has resulted in the deaths of many cooperators and people who actually were not cooperating.

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131. FED. R. CRIM. P. 49.1.

We are here talking about a small segment of a potential problem, a problem with constitutional implications. That is why, once again, I look back to the executive branch to resolve this.

JUDGE MERRYDAY: On behalf of Judge Raggi and the Standing Committee, thank you all for participating in this panel.

CONFERENCE ON PRIVACY AND INTERNET ACCESS TO COURT FILES

PANEL FIVE: COOPERATION & PLEA AGREEMENTS—JUDGES' ROUNDTABLE

MODERATOR

*Hon. Steven Merryday**

PANELISTS

Hon. Loretta Preska[132]

Hon. K. Michael Moore[133]

Hon. Henry T. Wingate[134]

Hon. Michael Baylson[135]

Hon. Stefan Underhill[136]

Hon. Raymond Dearie[137]

JUDGE MERRYDAY: Thank you very much. We are now beginning the second phase of the afternoon panel on plea agreements and cooperation agreements.

Our first speaker, from the Eastern District of New York, Chief Judge Raymond Dearie.

JUDGE DEARIE: Thank you very much. I am delighted to be with you.

I have just a couple of points, listening to the previous panel. I think one of the very positive things about this conference is that it calls to our collective attention, in particular some of us judges, the fact that there has developed over the years a sort of knee-jerk endorsement or acceptance of applications to seal documents. Of course, I come from one of those districts where plea agreements are not made part of the record. But it goes beyond just plea agreements—sentencing letters, 5K1 letters[138] in particular. There has developed a practice, I think, in part because of some of the types of cases that have been ongoing here in New York City—gang cases, organized crime cases for example—the courts have been very receptive to applications by the executive. Gerry [Shargel] is quite right: it is the executive's responsibility to protect their witnesses and the integrity

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132. United States District Court Chief Judge, Southern District of New York.

133. United States District Court Judge, Southern District of Florida.

134. United States District Court Chief Judge, Southern District of Mississippi.

135. United States District Court Judge, Eastern District of Pennsylvania.

136. United States District Court Judge, District of Connecticut.

137. United States District Court Chief Judge, Eastern District of New York.

138. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2009).

of their investigations, but to do that, in part, they come to us and make applications. We have been enormously tolerant, I think—sometimes, arguably, absurdly so. You have, for example, the sentencing letter of someone who has testified in five or six or seven cases. It made the front page of the [*New York*] *Daily News* and the *New York Post* and even *The New York Times*, day after day after day, and the application by the government to seal the 5K1 letter, which does nothing more than chronicle, in lawyer's terms, the same sort of stories that we read in our morning papers.

We have gotten, it seems to me, perhaps a little bit too receptive, too tolerant, about these applications. I think we have to begin again to be far more selective in the kind of relief we grant and in the cases in which we grant that relief.

The idea of uniformity throughout the United States is not a notion that I personally have endorsed with great enthusiasm. After all, jurisprudence is not developed uniformly, except by cases that we get from the Supreme Court. We develop our law within our circuits. Circuits differ. Indeed, there are characteristics peculiar to certain circuits and districts that invite different approaches. Off the top of my head, I can think of the way some districts approach gun cases, for example. Marijuana cases in some parts of the United States are treated very severely. In the way we have applied the guidelines, there are regional differences. I think there needs to be a recognition that within a given district, perhaps within a given circuit, there are characteristics that are peculiar that will inform a judge when he or she is called upon to decide whether or not sealing or some form of that relief is appropriate. So, although I think the theme ought to be generally uniformity, there are circumstances peculiar to a given case that warrant variances from an established procedure.

Not only do we have to consider whether or not we ought to seal something or remove it from the public record or redact it, I think one of the problems is a tendency to seal on a particular day, and a document remains sealed indefinitely. It stays that way long after the reasons that might justify sealing, or some similar relief, have passed. The reason for that is more often institutional inertia and general indifference. Nobody is interested. The general public is not interested. The situation only changes when, for example, the news media is suddenly interested in a case and we get an issue before us and an application.

I think we have to take seriously the idea of cataloguing these cases when we take documents out of the public record for good reason, which we must articulate, subject to review and evolving jurisprudence within our circuits and beyond. We have an obligation, it seems to me—and this is totally in concert with our First Amendment sensitivities—we must continue to ask the question of whether or not a document may not be filed in the public record. I think we do not do that.

A recent study by the Administrative Office [of the United States Courts] makes clear that a lot of documents are sealed on day one, for good reason, but on day 401, those reasons no longer apply. If we are serious about our

First Amendment responsibilities, I think we need to be sensitive to that and guard against dispatching documents to the status of forever "private" without compelling justification.

As far as the public versus the Internet, I am a bit of a Luddite when it comes to things electronic, involving cyberspace. But I tend to think that is probably not the significant issue. If someone is intent on doing harm, the information will become available, either through the Internet or in public.

Just to sum up my little part, being sensitive to First Amendment concerns does not just mean making a given ruling in a given case at a given moment. We need to continue to ask the question of whether or not the relief secured at one time is necessary to keep in place.

JUDGE MERRYDAY: Thank you very much.

From the Southern District of New York, Judge Loretta Preska.

JUDGE PRESKA: Thank you.

Ladies and gentlemen, as we have all recognized, of course, there is a qualified First Amendment right of access to the public and the press in criminal proceedings, articulated in cases like *United States v. Alcantara*[139] here in the Second Circuit. These cases, of course, require that restrictions on public access to criminal proceedings and the docketing in those proceedings be accompanied by appropriate and contemporaneous findings of fact.[140]

Here in the Southern District, upon a defendant's pleading guilty to an indictment or superseding information with a cooperation agreement—and, indeed, really with any plea—several relevant documents are produced. The first is a minute entry. That is a memo from the judge's deputy clerk to the docket clerk setting out the fact that a particular defendant pleaded guilty on such-and-such a day, sentencing scheduled for another day, report on bail status, and the like. The docket clerk then converts that minute entry into a docket entry.

Although that docket entry might make no specific reference to a cooperation agreement, as we have all recognized, the experienced observer can often figure out when a cooperation agreement is in place. For example, if the transcript of the proceedings is sealed, the observer will assume cooperation. If a sentence date is not scheduled, but only a status letter, the observer will assume cooperation.

Although I agree with Chief Judge Dearie and others that the Internet is neither the be-all nor the end-all, concern for safety of cooperators was heightened by the electronic accessibility of the docketing materials. Of course, we have all read about the wonderfully named website, Whosarat.com,[141] which makes it its business to peruse the dockets and to inform anyone who is reading who is a cooperator, who is working undercover, often providing mug shots of those individuals.

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139. 396 F.3d 189 (2d Cir. 2005).

140. *See id.* at 199–200.

141. WHO'S A RAT—LARGEST ONLINE DATABASE OF INFORMANTS AND AGENTS, http://www.whosarat.com (last visited Sept. 23, 2010).

Adam Liptak in *The New York Times* quoted a Justice Department official saying, "We are witnessing the rise of a new cottage industry engaged in republishing court filings about cooperators . . . for the clear purpose of witness intimidation, retaliation and harassment . . . . The posting of sensitive witness information creates a grave risk of harm to cooperating witnesses and defendants."[142]

Obviously, that mission is made easier by the electronic accessibility, rather than schlepping down to the courthouse and going through paper records.

I note parenthetically that electronic availability of this information is not the only way information about cooperators gets out. I have recently been informed that the United States Attorney's Office in the Southern District of New York noticed lawyers perusing the lawyer sign-in sheet at the U.S. Attorney's Office to see who had gone in ahead of him or her. Needless to say, the multi-line sign-in sheets have been discontinued.

In the Southern District, decisions about accessibility of cooperation agreements are made on a case-by-case basis. In the most ordinary case, where, the Executive Branch has concern for a cooperator's safety, the assistant will ask that the minute entry and the transcript of the plea proceedings be sealed, usually until the cooperator testifies or is sentenced. The docket entry will not indicate the identity of the defendant. The docket merely reads, "Sealed document placed in vault." When the Executive Branch voices more concern over the safety of a cooperator, a judge might determine that the delay of any docket entry is necessary. In those instances, the United States Attorney's Office generally makes a written application setting out the reasons for the necessity of delaying docketing, and, if that application is granted, with, of course, the requisite findings of fact, all of the documents associated with that plea are put together in a sealing envelope and that sealed envelope is retained in chambers. No docket entry at all is made.

The Court of Appeals has specifically endorsed the delaying of docketing in the *Alcantara* case provided that the interval of delay ends on a specified date or the occurrence within a reasonable time of a specified event.[143] I think this goes to Chief Judge Dearie's point that there is often not an end to it. We have been urged in our court, on the basis of *Alcantara*, to set either a date or an event certain for the unsealing of the document and the docket entries. Again, generally, the court will provide for unsealing either at sentencing or when the cooperator testifies.

Thus, in almost all instances, the public will know why, for example, Sammy the Bull[144] got five years after admitting to nineteen murders. The public just might not know it on the day the individual pleads.

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142. Adam Liptak, *Web Sites Expose Informants, and Justice Dept. Raises Flag*, N.Y. TIMES, May 22, 2007, at A1.

143. *See Alcantara*, 396 F.3d at 200 n.8 (citing *In re The Herald Co.*, 734 F.2d 93, 102–03 n.7 (2d Cir. 1984)).

144. United States v. Gotti, 171 F.R.D. 19 (E.D.N.Y. 1997).

Finally, there are also some circumstances in our district where a case is commenced as *United States v. John Doe*. For example, if the government is building a case against an organization—let us say a Mexican drug cartel, or even a corporation—and if the government signs up a cooperator as the first step in the investigation, disclosure of that individual's name might well undermine the investigation or put the individual at risk. In these instances, again on application of the Executive Branch, the court will permit, upon findings, the proceeding under the *United States v. Doe* name and then will seal the proceedings. Sometimes they are sealed cases, again upon adequate findings.

It is also the general practice in the Southern District of New York not to docket any plea agreement, whether a cooperation agreement or otherwise. Most judges do not mark the plea agreements as exhibits to the plea proceedings. Generally, the court will review the agreement, allocute the defendant, and then return it to the United States Attorney's Office. This return is consistent with Local Rule 39.1,[145] which provides that lawyers retain the originals of any exhibits they proffer. This is a general rule; it does not just apply to plea situations.

It is also the policy of the United States Attorney's Office in the Southern District that, unless sealed, plea agreements, including cooperation agreements, are public. They are not generally on the docket, but if requested, they will be provided.

Eventually, as you can hear, most of these cooperation agreements are unsealed and the related docket entries made, indicating when the docket entry was made and when the original event reflected in the docket entry took place. That way, the public can see what the government is doing.

Thus, we in the Southern District feel that this approach is a good balance between the safety of the cooperators and their families, on one hand, and the need for transparency in our work, on the other. I suggest to the [Judicial Conference] Privacy [Sub]committee that such an approach allows judges to do what judges do—that is, to consider the competing interests and then to fashion a fact-specific remedy on a case-by-case basis. Thus, I commend that approach to the committee.

Thank you.

JUDGE MERRYDAY: Thank you.

From the district just to the south of the Middle District of Florida, my friend Mike Moore.

JUDGE MOORE: Thank you.

From the remarks that I have heard, there does seem to be some coalescing of practice around the various districts. This comes following the sort of district-by-district experimentation, with the advent of electronic access.

But just from a judicial perspective, and to give some context to our district practices before we get into how we got to where we are, I see one

145. S.D.N.Y. R. 39.1.

of the roles of a judicial officer as to promote public confidence in the judiciary as an institution. One of the ways in which we do that is to increase public access to our public records and public access generally to what we do. So, in one sense, I think it would be ironic if electronic access, which enhances public accessibility and ease of accessibility to public records, would be turned on its head and used as a way to limit access by the public to the work that we do.

I think that is just a frame of reference of where our court came from as we began dealing with the issue that arose out of the Whosarat website.[146]

When we were confronted with it, we did pilot it, so to speak, with this dual docket of a paper docket and an electronic docket, where we were withholding the plea and cooperation agreements from electronic filing. We did that for about a year and revisited the issue. I think there was some sentiment that it was somewhat unseemly to maintain a dual docket, a paper docket and an electronic docket, and that our electronic docket should mirror to the maximum extent, if not fully, what was being filed in our paper docket, with the idea that at some point in the future our electronic docket is our sole docket. That is where the future is taking us. To that extent, we should have an electronic docket that is at least as publicly accessible, in terms of all the documents that heretofore had been filed in the paper docket.

Having said that, we recognize the concern of the litigants. Certainly the U.S. Attorney's Office had a continuing concern in all of its cases. But if you are a defense attorney, you may have a concern at one point not to have cooperation agreements or plea agreements filed in the record, and at other times you may want to have somebody else's documents made publicly available.

But we looked at it, without trying to get into the fray and pick winners and losers on this for the parties, and found that there was an alternative. The alternative, I think, has been touched on. It has been adopted in other districts around the country. That was, at least in our minds, that there is no rule, substantive or procedural, in the federal criminal context that requires the filing of a plea agreement, much less a cooperation agreement. It has been a practice in many districts around the country, but it is just that. It has been a practice. There is no compelling reason why a lawyer has to file a plea agreement or a cooperation agreement.

Now, to the extent that a party seeks to do that and the concern is the cooperation aspect of an agreement, that can be parsed or made a separate agreement. If the lawyers want to file a plea agreement, they are welcome to do so. It becomes their choice, their decision. If they do not want to file the cooperation agreement because of concerns for the safety of witnesses, there is no obligation for them to do it, so they can elect not to do so.

But where does that leave us? When we go to a plea colloquy, it is incumbent upon the judge to ask the standard question: Are there any inducements for the entry of the plea of guilty? That is where it is made a

146. *See supra* note 4.

matter of public record that the individual has entered into a cooperation agreement with the government. The judge is free to look at the agreement. As Judge Preska has mentioned, it can become an exhibit. It can be returned to the parties. But the fact of cooperation is now in the public domain, through the transcript, and unless somebody finds it necessary to go to the public record and request a transcript of that proceeding, it is really of no interest to anyone else at that point and is not made a part of any electronic record.

I think it is a viable solution or a practical solution that does not undermine the court's otherwise obligation to promote transparency and public accessibility to our records.

That is the way we have handled it.

JUDGE MERRYDAY: Thank you, Mike.

The Chief Judge of the Southern District of Mississippi, Henry Wingate.

JUDGE WINGATE: Thank you. Thank you so much for inviting me here to share my few comments with you on this matter.

The people in my district have addressed this matter almost *ad nauseam* in trying to come up with what we thought to be the best approach. Mississippi has two districts, the Northern District and the Southern District. When I came on the bench many, many years ago, we were separate in almost everything. The Northern District had its rules and the Southern District had its rules. When I was a practicing attorney, I actually carried around rulebooks for the Northern District and for the Southern District. I had so much stuff in my trunk on the different rules that I had no place for my clothes or my tire.

But after I came on the bench, we all got together and decided that perhaps we ought to have one set of rules for the entire state. So now we have uniform rules for the Northern District and for the Southern District combined.[147]

When this thorny issue arose, the first thing that I did was to talk to my opposite number up in the Northern District to determine how we might address this issue. We conferred with the U.S. attorneys, the public defenders, the U.S. probation officers. They all were on the same page that we ought to do something. Then we referred it to our local Criminal Rules Advisory Committee, attorneys appointed by chief judges from both the Northern and the Southern Districts, and had them study the issue. They canvassed the country on possible solutions, and they came up with what they thought would be the best approach, which I will discuss with you in just a moment. They then published their suggested approach for comments in the local newspapers, to allow attorneys and other interested people to make a response. Then, after having received no negatives, the judges of the Northern District and the judges of the Southern District all voted to approve this local rule concerning this particular matter.

147. N.D. MISS. & S.D. MISS. L.U. CIV. R., *available at* http://www.msnd.uscourts.gov/FINAL%20CIVIL%20RULES%20w%20amendment%20.pdf.

We then sent it to the Fifth Circuit Court of Appeals to get the Fifth Circuit Court of Appeals' view on the matter, and the Fifth Circuit Court of Appeals approved it.

We have in effect a local rule dealing with plea agreements, which is different from our rule involving the sealing of documents. We also have a rule regarding motions for sentence reductions, based on cooperation with the government. I will start with the one on plea agreements.

Basically, it mirrors the North Dakota approach.[148] All plea agreements shall be submitted, with original signatures, in paper format to the court, and then shall be sanitized by the drafter of any references to cooperation. After a plea has been accepted in open court, plea agreements shall be scanned and electronically filed as public, unsealed documents. All plea agreements shall be accompanied by a sealed document entitled "Plea Supplement." The plea supplement will also contain the government's sentencing recommendation. The plea supplement will be electronically filed under seal. All cases will be docketed identically, with reference to the sealed plea supplement, regardless of whether a cooperation agreement exists. The district judge may order the entire plea agreement to be sealed for a specified period of time if the court finds an exception.

So we have two documents submitted. One is the plea agreement; the other is the plea supplement. They are both accepted by the court. One is to be sealed; the other is for public review.

The document-style plea agreement is read into the record. Nothing is read into the record concerning the [contents of the] plea agreement, other than the fact that there is one and that the parties have signed it and that it will be filed under seal.

The matter concerning reductions based on cooperation: Government motions filed pursuant to Federal Rule of Criminal Procedure 35[149] or Section 5K1.1 of the United States Sentencing Guidelines[150] or 18 U.S.C. Section 3553(e)[151] shall be filed under seal without prior leave of court. The government must provide notice to counsel for the defendant that such motion has been filed and provide defense counsel with a copy of the motion. Defense counsel may not copy or distribute the motion, nor may they reveal the contents of the motion to anyone other than their client, without prior leave of court. Said motions will remain under seal indefinitely, unless and until a court enters an order directing that they be unsealed.

In taking this approach, we took into consideration the public's right to know. We are concerned about it. We took into account the safety of prisoners. We are concerned about that, too. Then we took into account what we considered to be an abuse of our PACER system. We found that prisoners were accessing PACER. We found that some penitentiaries allow

148. D. N.D., Plea Agreements & Plea Agreement Supplements (2007), *available at* http://www.ndd.uscourts.gov/pdf/Plea_Agreements.pdf.

149. FED. R. CRIM. P. 35.

150. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2009).

151. 18 U.S.C. § 3553(e) (2006).

access to PACER on the computers in the penitentiaries. Therefore, they were pulling this information right out of PACER. So we tried to craft an approach that we thought would at least address the problem.

We also recognized that prisoners identified as snitches face problems in a penitentiary, not only because they have snitched in the past, but because prisoners are afraid they will snitch in the future. A lot of abuses occur in the penitentiary setting. There is the selling of drugs. There is other criminal activity afoot. There are assaults committed by anonymous persons. Prisoners feel that someone who has snitched in the past will snitch in the future, and thus, they pay special attention to snitches. So it is not just because of what they have done or the snitching they have done in the past that concerns the prisoners. It is also their fear of what they [past snitches] might say about what is going on in the penitentiary.

We have heard so many anecdotal stories about what has transpired in various prisons, both in our domain and elsewhere, that we felt we had some obligation there. We felt we had some obligation to protect our PACER from being a part of this wrongdoing. So we crafted the rules that I just described. These are rules that both the Northern District and the Southern District of Mississippi have embraced.

With regard to this matter of whether those of criminal intent or hostility will discover the information, no matter what we do, we do not take that view. We reject that view, just as we reject the view that one should not put locks on houses because a professional crook is going to break in anyway. We tried to make it a little more difficult for that individual to come forward and to hurt us. We tried to put some obstacles there to make them work just a little bit harder.

That is the view that we have taken in the Northern and the Southern Districts of Mississippi. That is the entire state of Mississippi. So we weighed in on this matter mightily. I might add again that our rule was approved by the United States Court of Appeals for the Fifth Circuit.

Thank you.

JUDGE MERRYDAY: Thank you.

From the Eastern District of Pennsylvania, Judge Michael Baylson.

JUDGE BAYLSON: Thank you very much.

The protocol that we adopted about three years ago is in your booklet, along with a short memo that I did with Professor Capra. It describes the formulation of this and how it has been working.

Basically, both the government and defense counsel, when they want to file a plea agreement, file it under the heading, "Plea Document." That is all the docket shows, the electronic docket or the physical docket. The same with a sentencing memorandum. It just shows the term "Sentencing Document." It is not accessible electronically, regardless of whether it is cooperation or not. However, the document is accessible to someone who comes into the Clerk's Office.

People can say that that is an artificial distinction, that it is an illegal distinction. I do not agree with either of those. It works for us. Our

Clerk's Office told us that it was exceptionally rare for anyone to come in and ask to see a document filed of record in a criminal case. It just really never happened. But based on Whosarat.com and some other stories, we felt that there was a risk of this happening remotely, electronically. That is why we designed the policy the way we did.

I respectfully take issue with those who think there is a guaranteed right of public access to plea agreements. I am not aware of any ruling of the Supreme Court or any circuit court that has ever held that. In the Third Circuit we have a fairly well-developed body of law that allows for sealing of lots of documents involved in the criminal process—the results of discovery, wiretap evidence, things like that. If a trial starts involving one of those things, there are many instances where representatives of the press have tried to gain access to them. If they petition the trial court to do that, the Third Circuit requires that we allow the press to intervene, to be heard. We have to rule promptly, with facts, defending the preclusion of the material from the public record or allowing access to it. Then there is an expedited appeal if the press wants to appeal. Usually the whole process is done and accomplished in three or four days. In past history, there are lots of instances of that.

So at least in the Third Circuit, I think we are well within our rights in protecting plea agreements from uniform public access.

We have many documented examples in the Philadelphia area of a culture of intimidation and retaliation. We feel as a court that we have some responsibility to take some action that protects our records, our court records, from being available for those purposes. Is there any guarantee? Is it failsafe? Of course not. But we thought it was reasonable, within the public interest, and did not deter people from looking at those court records if they really wanted to, by coming to the court and going to the Clerk's Office and asking to see them. We felt that that served the objectives of public access.

I should also say that I think it would make a lot of sense if the Department of Justice would take a position on these issues that we are exploring here today. I think there are a lot of reasons why courts may have their own local preferences for how they do things. I think some courts feel guided by circuit law in unique ways and that other districts in different circuits may not feel so compelled. But I think nationally and nationwide it would be advantageous for the Department of Justice to develop some guidelines or rules for various U.S. Attorney's Offices to follow in this instance. I would respectfully recommend that the Privacy Subcommittee make such a recommendation to the Attorney General.

I want to add just a couple of other things, and then I will stop.

The 5K1.1 motion[152]—and in the sentencing guidelines the word "motion" is used—was, under the pre-*Booker*[153] regime, a necessary motion for a judge to depart downward from the guidelines. Post-*Booker*, I

152. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2009).
153. United States v. Booker, 543 U.S. 220 (2005).

do not think 5K1.1 has the same significance, and I do not think a motion ought to be required. I think some thought should be given by the Sentencing Commission to eliminating the concept of a motion in order for a judge to apply 5K1.1. We all know that we have to make a Guidelines calculation before we apply the statutory factors and impose a sentence. But 5K1.1 no longer has that gateway significance that it had before.

Also I think there is a lot to be said for the practice in the Southern District of New York, and the Eastern and Northern Districts, for not filing these documents at all. We considered that in our court, but it did not carry the votes. But I think it has a lot of merit to it.

My own view also is that we should have some more development of substantive law in this area. I am sure these issues will come up, and we will get some more circuit law. Maybe the Supreme Court will take a case that involves some of them. I think the amendment of the Rules should await further substantive legal holdings.

Thanks.

JUDGE MERRYDAY: Thank you.

Let me clarify, if I may. You said that you do not agree that a qualified right of access attaches. Is that a statement that is applicable to a plea agreement in the public docket?

JUDGE BAYLSON: If the plea agreement is filed publicly—that is, if it is available in public—then obviously there is a right of public access to it.

JUDGE MERRYDAY: Your view is that that problem is made by the filing of it.

JUDGE BAYLSON: Yes, it is made by the filing of it. Furthermore, even though we have this protocol in our district, the government still files a lot of plea agreements under seal when there is a cooperation provision and they think the case is very sensitive. They recognize that that is, to some, a signal that the defendant may be cooperating, but nonetheless they go ahead and do it anyway, because they feel the protection of the terms of the agreement is more important than somebody making an inference out of the fact that it was filed under seal.

JUDGE MERRYDAY: Do you think that the event of sentencing affects whether the qualified right of access has attached? In other words, if it is not filed but a sentencing occurs in which a concession is made based upon a term in that plea agreement—

JUDGE BAYLSON: The uniform practice in our district is that where there is a sentencing of a defendant who has cooperated, colloquy on that takes place in sidebar, and the sidebar conference is sealed. If and when the sentencing transcript is uploaded—we have digital audio—the sidebar is not available publicly. If the transcript is to be prepared by a stenographer, then the sidebar is not available to the public.

JUDGE MERRYDAY: Satisfying the qualified right of access?

JUDGE BAYLSON: That is our feeling, yes.

JUDGE MERRYDAY: Thank you.

From the District of Connecticut, where my mother was born, Judge Stefan Underhill.

JUDGE UNDERHILL: Thank you.

Let me just give a little bit of background about how Connecticut came to undertake a very comprehensive revision of its local rules on these issues two or three years ago.

In 2005, two things happened that kind of shook up the District of Connecticut. The first was a very highly publicized criticism of the state court system in Connecticut for so-called secret files. It became known and widely reported in the press that the state court system basically would not acknowledge the existence of some several hundred files, principally the divorce files of politically connected folks in Connecticut. This was front-page news. The concern in the district was, are we doing the same thing? Are we hiding files in some way? Are we not letting the public know that we have cases pending?

The second thing that happened in 2005 was that the Second Circuit decided the case of *United States v. Alcantara*, [154] which made clear that plea proceedings, which, in our view, included cooperation colloquy, had to be conducted in open court unless the stiff requirements for court closure could be satisfied. [155]

So with those two concerns in mind, we undertook a comprehensive review of what we were doing. Frankly, there was quite a tension between the desire, both by the U.S. Attorney's Office and the court, frankly, to protect cooperators as much as possible against what we saw as very strict and clear guidelines from the Second Circuit Court of Appeals. I will say that with Judge Raggi sitting here. We always follow what the Second Circuit says to the "T."

I will disagree, at least in the Second Circuit, with the concept that a plea agreement or cooperation agreement is not a judicial document. As we read the Second Circuit cases, every document used by parties moving for or opposing adjudication by the court, other than a hearing or trial transcript, is a judicial document that is subject to the qualified First Amendment right of access. Now, the trick, I think, is that the right of access is a qualified right of access, and it can be overcome in circumstances that are sufficiently extraordinary.

If you look at a case like *United States v. Doe*,[156] in which the Second Circuit set forth four steps for closing a court,[157] that is essentially what our rule requires with respect to cooperation colloquies. The process in our district, in essence, is that the U.S. Attorney's Office or the defense counsel makes clear to chambers that there is a cooperator involved, that the plea agreement includes a separate document. In the District of Connecticut there are two letters. One is the plea letter; one is the cooperation letter.

154. 396 F.3d 189 (2d Cir. 2005).
155. *Id.*
156. 63 F.3d 121 (2d Cir. 1995).
157. *See id.* at 128.

When we are informed that there is a cooperation agreement involved, we begin the proceeding *in camera*. We give the U.S. Attorney's Office a chance to make a request that the proceeding be closed. We usually get an affidavit setting forth facts that we can rely upon to make the particularized findings of fact that are required for court closure. We then make a determination, based upon what we have been told by affidavit, whether to close that proceeding or not. Typically in a cooperation scenario, a closure motion is granted. The transcript of that proceeding—and that is usually undertaken prior to going into court for the plea colloquy—the transcript of that proceeding is sealed. If the correct findings are made, the docketing of that cooperation colloquy is also not shown on the docket sheet, until some later date, typically sometime after sentencing.

At that point, we go into court. We do the plea colloquy. The plea agreement makes no mention of cooperation. We do not mention cooperation. We do not include it as something that is inquired of on the record. Rather, it is a fairly discreet inquiry: Does the written plea agreement contain your entire agreement with the government? Has anybody made any other promises to you that are not put down in writing in your agreement with the government?

The agreement with the government, of course, includes both the plea and the cooperation agreement, which incorporate each other by reference. So the defendant can truthfully say, "No. My entire agreement is put down in writing," with no mention on the record of any cooperation agreement.

We think this works pretty well. I asked our U.S. Attorney just a moment ago whether she was aware of any complaints about it. The only complaint she has, which I would share a little bit, is that our judges have not been uniform in the way that they have followed the rule. Some of them who have been here longer than the rule are not going to be told how to do things, and they are going to do them their own way. So there is not uniformity.

But the rule, I think, is quite comprehensive. In my view, it tracks quite well a number of Second Circuit decisions that we wanted to make sure counsel were aware of and followed. We thought that that kind of enforcement would be increased if we put it expressly into the rule. Frankly, it also helps the judge do the right thing.

We did consider, after this rule came into effect, what I know as the South Dakota rule. Maybe North Dakota has the same rule—but the Dakota rule. We declined to adopt it, principally because of the concern that folks who had not cooperated would be deemed to have been cooperators and would be potentially subject to retaliation.

In sum, we like to think that our rule, although relatively strict—because the Second Circuit rules are relatively strict—strikes a pretty good balance between recognizing the substantial, although qualified, right of First Amendment access and balancing that right against the right of the individuals who are cooperating and the right not to be put at risk as a result of that cooperation.

JUDGE MERRYDAY: Thank you, Judge Underhill.

We do have a couple minutes for some questions.

JUDGE DAVID COAR (U.S. District Court for the Northern District of Illinois): If there is an 11(c) agreement,[158] an agreed-upon sentence, is that not covered in the plea colloquy?

JUDGE UNDERHILL: That would be in the plea agreement letter.

JUDGE COAR: But it would not be discussed in the colloquy?

JUDGE UNDERHILL: It would be. But I do not think there is a concern—at least in our district, those are relatively rare. Nora Dannehy can correct me if I am wrong, but my sense is that they are not really used as a substitute for a 5K1.1 motion. If I get an 11(c)(1)(C) agreement, it is going to be the concern that I am going to go too low or whatever. So they are going to try to say, "Here we go, so do not go below this." It is not really used with cooperators, to any great extent, as far as I am aware.

JUDGE COAR: In our district, we get fairly complicated 11(c)(1)(C) agreements, where there are variations—if this, then that. We may go through three or four levels.

JUDGE UNDERHILL: We have not seen that.

JUDGE RAGGI: I do have one question for the panel as a whole. As each of you have spoken about the reasons you have adopted your particular practices, I do not hear anyone saying that you really need any help from the Rules Committee. Am I right in that? No one is floundering or needs our help.

JUDGE PRESKA: Indeed, we must be cognizant of what Judge Underhill said about the rules having been made after people got here. Sometimes they are less likely to listen.

JUDGE MERRYDAY: Again, on behalf of Judge Raggi and the Privacy Subcommittee, thank you all for participating.

158. FED. R. CRIM. P. 11(c).

CONFERENCE ON PRIVACY AND INTERNET ACCESS TO COURT FILES

PANEL SIX: TRANSCRIPTS (INCLUDING VOIR DIRE TRANSCRIPTS)

MODERATOR

*Hon. John Koeltl**

PANELISTS

Hon. Gary Lancaster[159]

Hon. Randolph Treece[160]

Victor Kovner[161]

Nora Dannehy[162]

Ben Campbell[163]

Lori McCarthy[164]

JUDGE KOELTL: Hi. My name is John Koeltl. I am on the Southern District of New York. I guess we are the host district.

I want to add my thanks to Fordham Law School for hosting this event and to Professor Capra for the great job and the great hospitality that they have shown us. They have done a spectacular job.

This is a panel on transcripts and Electronic Case Filing. The Judicial Conference requires the filing of transcripts on ECF.[165] It did that after an extensive study by the Court Administration and Case Management Committee concerning the proper way to do this. It arises from the general proposition that what is public in the Clerk's Office should be available remotely online, and there is basically no reason to treat transcripts differently, except for the fact that there may be matters in the transcripts which are said in open court that you would not file in a document. So there is a careful procedure for a ninety-day period from the time that the transcript is filed to the time that it is available electronically.

There are several questions that have arisen over this:

- How are the courts dealing with the rule?

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160. United States District Court Judge, Northern District of New York.

161. Partner, Davis, Wright & Tremaine, LLP.

162. United States Attorney for the District of Connecticut.

163. United States Attorney for the Eastern District of New York.

164. Jury Clerk, Eastern District of New York.

165. *See* PUBLIC ACCESS TO COURT ELECTRONIC RECORDS, http://www.pacer.gov (last visited Sept. 23, 2010).

- How well does it work?
- Should we be doing anything better?
- How does it work in criminal cases, with some of the issues that you have heard from some of the filings in criminal cases?
- How does it affect jurors?
- How does it affect the voir dire process for jurors?

We have a great panel to help to answer some of these questions and give their perspective.

Our first speaker is Chief Judge Gary Lancaster, from the Western District of Pennsylvania.

JUDGE LANCASTER: Thank you.

I was asked to talk about the process starting when someone requests a transcript of the proceedings until the point when it is actually released, and what is done in the process to protect any confidential personal information that might be in the transcript. Others are going to talk about what is done prior to recording the transcript to protect information. But once the court reporter has a request for a transcript of the proceedings, he will then go ahead and transcribe his notes and then will file a notice of filing of the official transcript. All the deadlines generate from that date, from when he actually files a notice of filing of the official transcript.

In that notice, he tells the parties that they have seven days in which to file their notice of intent to request redactions—that is, within seven days, that we intend on filing redactions. They do not have the redactions in seven days. They have to file a notice that they are going to ask for redactions. Within twenty-one days from the date that the first notice of intent to request redactions comes out, they have to file the proposed redactions.

The court reporter can redact personal identifiers without a court order. There are five specifically listed, including names of minor children, home address, Social Security number, and the like.[166] Those can be redacted without any court order. Where the rubber hits the road, particularly in civil cases, is when a party wants to redact some additional information above and beyond personal identifiers. Usually, again, this comes up in civil cases, where they may want to redact proprietary information that came out during the course of the trial—a business model, price structuring, things of that nature. If they are defending a patent case and they want to demonstrate how their product differs from the patented product on infringement, they do not necessarily want everybody to know how their product works.

This is where the problems come with the court reporters, particularly in those instances where a party submits some items that they want redacted from the transcript, on the basis that this item, this document, was subject to a confidentiality agreement during discovery. There are parties who believe that, simply because evidence is subject to a confidentiality agreement

166. W.D. PA. LCVR 5.2(D) (also listing dates of birth and financial account numbers).

during discovery, it automatically gets redacted from the transcript. But that is not the case. When the court reporters get these redaction requests, they have a dilemma. They can either tell the judge, "They are asking me to redact these things that are beyond the personal identifiers," or they can call the attorneys and say, "I cannot do this, because this is above and beyond the identifiers and you have not given me a court order," or they can simply ignore the request.

Right now—and this may be something that the committee needs to look at, and we are certainly going to start to look at this on a local level, for a local rule—there is no rule that tells the court reporter what to do. As a result, there are differing practices. Some of them will simply do nothing and ignore it. Some of them, if they know the lawyer, will call him up and say, "I cannot do this. You need a court order."

But there needs to be some official direction, either on the national level or on the local level, that tells the court reporter what to do when he gets a request for a redaction that is above and beyond the five personal identifiers and is not subject to a court order.

So that is something that I think we are going to have to look at, and particularly when things are asked to be redacted because they assert that they are subject to a confidentiality agreement. You cannot ask a court reporter to make a determination as to whether or not this piece of paper comes under the umbrella of the confidentiality agreement. That is not within their purview. That is not what they do, so we need that local rule.

If we get past that, the court reporter has thirty-one days to actually post the redacted version of the transcript. Then, after ninety days, it is subject to release under PACER.

There are a couple of things you have to keep in mind. There is a difference between redaction and under seal. That is an important distinction. A redaction comes about, as I said, through this process—such as eliminating the identifiers. For something that is under seal, that requires a court order. They are different. The only way you could see something that has been placed under seal is if another court order unseals the document. You have to go back to the court to do that—with the exception of the Court of Appeals. I can put anything I want under seal and the Court of Appeals will say, "So?" They see it. But for the public, you have to get that unsealed, and parties who get a transcript under PACER cannot get the parts that are under seal.

Just one other point I want to make, on the difference between criminal cases and civil cases when we are talking about jury protection. There is no rule of law that requires the voir dire of a civil jury panel be recorded. The parties and the court can agree that it will not be recorded. Thus, the problem of worrying about personal information coming out from jurors is kind of eliminated there. But in the criminal cases, by statute, Congress has determined that all parts of a criminal case, including the voir dire of jurors, have to be recorded. However—and, again, others are going to talk about what we can do to protect people—assuming that certain information comes out in the voir dire in a criminal case that is of a personal nature that should

not be disclosed and would discourage anyone from ever wanting to serve on a jury, the court also has the discretion to place that under seal, whether anybody asks for it or not. If something comes out and it is the transcript of the voir dire and someone orders the transcript, I can still place that portion under seal, if I feel that justice warrants it.

Thank you.

JUDGE KOELTL: Thank you, Judge.

Our next speaker will be Judge Randolph Treece, from the Northern District of New York.

JUDGE TREECE: Thank you.

I am going to be discussing disclosure of jurors' personal information on transcripts. In the Northern District of New York, we have a local rule and two general orders with regard to the nondisclosure of jurors' private information. They derive from a confluence of different sources. It comes from statute. We have the Federal Rules of Criminal Procedure 49.1.[167] We have 28 U.S.C. Section 1867,[168] which discusses certain nondisclosures. We relied significantly upon the guide of judicial policies and procedure,[169] through the CACM Committee. Essentially, we have taken the language almost verbatim from those various rules and statutes.

With those references, we have devised the following local rules and general orders with regard to the jurors' personal information. Under our Local Rule 47.2(e),[170] we go a little further than the Federal Rules of Criminal Procedure 49.1,[171] and we direct that during voir dire, all jurors will be referred to by number and not by their name. If someone wants their names, then there must be a written motion or a written request to the presiding judge.

With regard to other sensitive information, our General Order 22 basically states that sensitive information regarding jurors will not be disclosed.[172] Then, in our General Order 24, section 12,[173] which is actually our jury plan, there are five principles we follow:

- The names of jurors will not be disclosed on a public document;
- The names can be released by court order;
- The contents of records that have been presented to the clerk of the court will not be disclosed;
- The transcripts will be redacted with regard to the personal identifiers that are listed in 49.1; and

167. FED. R. CRIM. P. 49.1.

168. 28 U.S.C. § 1867(f) (2006).

169. GUIDE TO JUDICIARY POLICIES AND PROCEDURES, Vol. 10, Ch. 3, §§ 310.10, 333.20, *available at* http://jnet.ao.dcn/Guide_New/Vol_10_Public_Access_and_Records/Ch_3_Privacy_ pdf.html. This document is only accessible by federal judiciary employees or through a Freedom of Information Act request.

170. N.D.N.Y. L.R. 47.2(e).

171. FED. R. CIV. P. 49.1.

172. N.D.N.Y. GEN. ORDER 22, § 11.2 (2010).

173. N.D.N.Y. GEN. ORDER 24, § XII (2009).

- There can be a request for an unredacted transcript, but that must be in writing.

Essentially, I can tell you that assigning jurors individual numbers is not strictly enforced. Only in high-profile cases does that occur. Clearly, in civil cases, just like in Judge Lancaster's court, assignment of individual numbers is not an issue, and it is not raised. But again, in high-profile cases it is.

However, what we do strictly enforce is that jurors' personal identifying information is redacted. It is done automatically by the stenographers. If there is anything else that needs to be brought to the court's attention for redaction, the court will give it due consideration as to whether there will be further redaction. If not raised, then those redactions will not occur.

If there is a request for further redaction, the court will perform a balancing of the public's qualified right of public access to the information against any other paramount right or higher value as to whether it should be disclosed or not. We do not seal jurors' transcripts. If it happens, it is very rare. I know of none. Also, jurors' transcripts are filed separately from other transcripts.

I now want shift to another topic—and it is not a digression, but it is an issue that probably has not been discussed much, and that is the disclosure of jurors' questionnaires. Under 28 U.S.C. Section 1867, it states that it is a crime for the clerk of the court to provide to the public those records that have jurors' personal information until such time as the entire master wheel has been exhausted and voir dire has been completed.[174] .

In the case of *United States v. Bruno*,[175] Judge Gary Sharpe conducted a dual-stage prescreening of jurors. First, there was the normal screening—the seven questions—that goes to the clerk.[176] Because of the complexity of the case, the court, along with the attorneys, fashioned another jury questionnaire that was approximately forty pages long and had maybe sixty-one questions. After reviewing those questionnaires, the panel of 600 was reduced to 300, which was the panel subjected to voir dire. Out of that, the actual jury was selected.[177]

At the conclusion of the case, the press asked for the 600 jury questionnaires. So Judge Sharpe conducted a very extensive analysis on this request. One, with regard to jurors' names, during the voir dire, their names were publicly listed. They were not assigned numbers. So when the transcript was provided to the public, the names were disclosed. What he did not disclose were the actual questionnaires. He did make that ruling on two, maybe three grounds.

First, he took a position, which was the first time I have ever heard it, that the jury questionnaires, both the first prescreening and the second prescreening, were the court's private record.[178] They were not judicial

174. 28 U.S.C. § 1867(f) (2006).
175. 700 F. Supp. 2d 175 (N.D.N.Y. 2010).
176. *See id.* at 178.
177. *See id.* at 178–79.
178. *Id.* at 184.

documents nor were they public records. He relied upon 28 U.S.C. Section 1867, and he further relied upon the guide of judicial policy and procedure.[179] He also referred to our local rules and general orders.[180]

Next, he discussed the general content of those questionnaires. He found that the answers to the questionnaires had extraordinarily sensitive information.[181] For that reason, he concluded that there was a higher value or a paramount right to confidentiality that exceeded the public's qualified right to public access [to those questionnaires].[182] He also found that there were present countervailing factors regarding the public's common law access to the questionnaires.[183]

Lastly, he wrote by performing this analysis, he had narrowly tailored a resolution: You are going to get the transcripts of the voir dire, but you will not get the questionnaires.[184]

Thank you.

JUDGE KOELTL: Thank you, Judge.

Our next speaker will be Victor Kovner, who is with Davis Wright Tremaine and who generally represents the press.

MR. KOVNER: Thank you, Judge Koeltl. Thank you, Professor Capra and Judge Raggi, for convening this excellent conference.

I am here as the press person. I just want to remind everyone at the outset, the press appreciates confidentiality in judicial matters as well. Their position is not always that everything ought to be public, that it is newsworthy and the public has a right to know. The press has come and will come before many of you asserting a qualified journalist's privilege in which they want to retain the confidentiality of their sources. Maybe there will be a federal shield law soon. There are shield laws in most states. It is a qualified privilege. Sometimes some confidential information comes out and may be available for attorneys' eyes only, it may have to come to trial. There are a variety of techniques where a case can be tried and yet some sensitive information may not be seen by everybody.

Keep that in mind when you hear that everything must be open.

I thought I would share the perfect storm of early 2004 with you very briefly. That is a trilogy of cases that arose in the New York metropolitan area where the press made successful requests for juror information during high-profile criminal trials. You are familiar with them, I am sure. But it is just worth noting, looking overall, in context.

We started with the Martha Stewart case in January of 2004—enormous press coverage.[185] Following the distribution of questionnaires in the impaneling process, a paraphrased portion of the questionnaire appeared on Gawker.com. There was no evidence that the media played any role in that

179. *See id.* at 180.
180. *See id.* at 180, 183.
181. *Id.* at 185.
182. *Id.*
183. *Id.*
184. *Id.* at 184.
185. United States v. Stewart, 317 F. Supp. 2d 426 (S.D.N.Y. 2004).

disclosure, but the district court chose thereafter to bar the media from attending voir dire while providing subsequent release of voir dire transcripts.[186] Unfortunately, the district court did not provide notice to the media or an opportunity to be heard. The press immediately moved to vacate the order, and the district court denied the motion.

The Second Circuit reversed, in an opinion by Judge [Robert] Katzmann, even though the juror selection was already complete by that time.[187] It cited the cases that would hold that documentary access is not a substitute for concurrent access,[188] and where Sixth Amendment rights of defendants were involved in *Stewart*, only the government had moved to close. The district court had not made, the Second Circuit said, the requisite finding that there was a substantial probability that the right to an impartial jury would be prejudiced.[189] Even though the defendant was high-profile, there was no evidence that the presence of the press would have any different effect on jurors than it would in any criminal case. It distinguished those cases where the voir dire, of its nature, touched on sensitive issues, such as whether jurors harbored racist views, as a kind of circumstance where at least some *in camera* voir dire would be appropriate.[190]

Only two months later, in the state Supreme Court, we had *People v. Kozlowski*,[191] the Tyco case, the prosecution of the chief executive of Tyco. There had been a six-month trial, and very late in that trial, the press noticed that one juror appeared to be making sympathetic signals toward the defendants. Much press attention followed, including, unfortunately, the identification of that juror while the case was continuing by one newspaper.

I make that point because the record is that the press never identifies jurors while a case is pending. Of course, after the case is over, then many of the jurors will speak to the press, and reporters will try to locate them. This was so exceptional. And, I have to say, the entire press was very troubled by it.

Thereafter, the juror received a questionable letter and a call. Other members of the jury had sent notes to the court regarding that juror. The court decided to hold an *in camera* inquiry into the circumstances, including of that juror, and eventually declared a mistrial. This was after six months. It caused quite a storm.

Thereafter, the press moved for access to the transcript of that *in camera* proceeding. The state resisted, on the basis that they had an ongoing investigation into juror tampering. The court thereafter unsealed the transcript of that *in camera* proceeding.

Now, a week after *Kozlowski,* the Southern District had *United States v. Quattrone*[192]—Frank Quattrone, a senior executive at Credit Suisse. After

186. United States v. Stewart, No. 03 Cr. 717, 2004 WL 65159 (S.D.N.Y. Jan. 15, 2004).
187. ABC, Inc. v. Stewart, 360 F.3d 90 (2d Cir. 2004).
188. *Id.* at 99–100.
189. *Id.* at 100–01.
190. *Id.* at 99.
191. 898 N.E.2d 891 (N.Y. 2008).
192. 277 F. Supp. 2d 278 (S.D.N.Y. 2003).

denying a motion to impanel an anonymous jury—there was no possible danger to any of the jurors in this kind of white-collar case—the district court, noting what had happened in *Kozlowski*, issued an order barring the press from publishing the names of jurors.[193] Unfortunately, the district court did so after many of the names of jurors had already been read in open court. Also unfortunately, he had not given the press an opportunity to be heard. The order was subsequently, found by the Second Circuit—by Justice Sotomayor, it might be noted—to have been an unconstitutional prior restraint.[194] That opinion asked the court to consider other methods to mitigate unrestricted publicity.[195]

Those three cases, I hope, have clarified the law, and some of the rules that have been discussed here have been adopted in the wake of those cases.

The most recent very high-profile case, *The People v. Anthony Marshall*, the son of Brooke Astor—received six months of intense coverage; every dot and title of what went on in the courtroom and outside was covered by the press during deliberations. These issues arise in the deliberation context as well. One juror sends a note that she had been threatened by another juror. Unlike *Kozslowski*, the judge in *Marshall* did not conduct an *in camera* inquiry and permitted the deliberations to continue, and a guilty verdict resulted. Not surprisingly, there was a motion to vacate the judgment of conviction, under these circumstances.[196] Now there are conflicting submissions regarding what went on in that jury. That motion is pending.

JUDGE KOELTL: Thank you, Victor.

Our next speaker is Nora Dannehy, the United States Attorney for the District of Connecticut.

MS. DANNEHY: Thank you. Thank you, Judge Raggi, Professor Capra.

I am going to give the perspective of the AUSA and the down-and-dirty mechanics of redaction: When that notice comes out, what does it mean for an AUSA as to redactions? What are the steps that he or she has to take? Then I will raise some of the steps that, at least in the District of Connecticut, we have started to do on the front end to avoid having to redact transcripts. Finally, I will just raise some general issues or concerns with the fact that transcripts will be remotely accessible electronically. What that really means is that they are widely accessible and much less expensive.

On the notice front: for an AUSA, the notice comes out that the transcript will be available in ninety days and redaction needs to take place. If the government has been the sponsoring entity for the witness, it is our

193. *See* United States v. Quattrone, 402 F.3d 304, 307 (2d Cir. 2005) (mentioning district court's order).

194. *Id.* at 312.

195. *Id.* at 311.

196. Indictment No. 6044/07 (N.Y. Sup. Ct. July 29, 2010), *available at* http://www.nylj.com/nylawyer/adgifs/decisions/073010bartley.pdf (denying motion to vacate).

responsibility to determine whether any redaction needs to take place. How that occurs is, really, in one of two ways. Depending on the relationship with the court reporter, the court reporter may give the AUSA a copy of the transcript so that he or she can just do the redaction in the office, with the understanding that if the AUSA really intends to use this transcript, he or she is going to order it from the court reporter, with whom we have a working relationship. Other times, the AUSA has to go over to the courthouse at the public terminal and do the redaction. There is a form that the District of Connecticut has issued with the five personal identifiers and the line number, page number, et cetera that must be used, to get it done.

When the requirement of transcript redaction first came out, the reaction was, "The sky is falling." That has not really proven to be true. I did a survey, very unscientific. I walked around the office last week and just said, "How's it going with that redaction?" Not surprisingly, everyone said, "Great."

I do not know if, in fact, it really is going well and folks are diligent in doing what they are supposed to do or if they just did not want to tell me. Maybe the next survey that is done is that the District of Connecticut is not complying. We will find out. But there was not, "This is awful. This is so burdensome," as I initially expected.

In terms of how different districts may be handling this, in Connecticut there is a policy on the district court website that specifically provides that attorneys, if they want to redact any information beyond the five personal identifiers, must file a motion with the court.

Steps on the front end to avoid having to go over to the courthouse and physically go through the transcript: most AUSAs are not putting personal identifiers on the record in court. That seems to be working very well. Exhibits, et cetera, that are filed are being redacted.

In addition, with child exploitation cases and human trafficking cases, we have reached agreements oftentimes with defense attorneys not to put the victim's name on the record. Both sides agree to refer to the victim by initials. It works well in sentencing or more controlled hearings. It is more difficult during a trial, where, not for any bad intent, but just in the moment, the attorneys tend to use the witness's name. We have had mixed results with the agreements at trial, but we are attempting to do that.

I think most of the judges in the District of Connecticut now, at voir dire, are no longer using potential jurors' names. They are referring to them by number. So there are no names in the transcript.

In terms of just general issues, we have heard today a lot about cooperators and the chilling effect or the increased potential for retribution if the information is electronically available. Obviously, with a transcript of a cooperator's testimony in detail, that concern is there.

In addition, having a transcript of the sentencing or even plea proceedings electronically available at a fairly inexpensive rate can also raise issues. Judge Underhill went through the steps in Connecticut that are taken to seal the cooperation agreement as well as to delay docketing of the cooperation agreement. When the transcript of the sentencing or the

transcript of the plea is ordered and potentially then becomes electronically available, it is going to reflect a sealed portion. So query whether that is sort of undermining the steps that are being taken with the documents themselves. If somebody orders that transcript and they see, up front, a sealed portion, they are going to know that there is likely cooperation in that case.

The other issue that the fact of an electronically available transcript raises is with victim witnesses and also standard fact witnesses. With victim witnesses—again, the human trafficking, child exploitation cases a prosecutor is asking this person to take the stand and, in open court where anybody can be sitting because it is a public forum—relay a very painful experience in their life. If a witness asks, the prosecutor has to say, "And the transcript will be electronically available and likely on the Internet forever." That fact has a real chilling effect for a victim. Again, I raise the question, is the benefit of remote access to the public at large versus making the transcript available to the parties and to the court worth this potential chilling effect on a witness?

One other type of case that we have not really talked that much about, a witness in a white-collar case or public corruption case. Those witnesses oftentimes are going to testify about people in their community, people they have worked with, and high-profile people in their community. One of the things that sometimes gets them through is when a prosecutor says, "You can go up there, tell the truth, tell your story, and it is behind you." Now it may not be behind them, in the sense that the transcript will be remotely available to the public, likely, in one form or another, on the Internet, and it is there forever. It is like when you are trying to tell your kids about posting a picture on Facebook: it will be there forever. So that when they are going to go for a job or anything else, they can be Googled, and that information is on the Internet. Again, it is something that I just think needs to be considered in weighing the benefits of remote access.

Finally—I do not think it has been out there long enough—I just raise the possibility of an increase in post-trial motions, most of which are likely to be frivolous. When the transcripts of witnesses' testimony are more easily available, and people can read them on the Internet, as opposed to going down to the courthouse, I question whether judges are going to start to get an increase in motions challenging the truth of what was testified to, and how those are going to be dealt with.

Thank you.

JUDGE KOELTL: Thank you, Nora.

Our next speaker is Ben Campbell, the U.S. Attorney for the Eastern District of New York.

MR. CAMPBELL: First off, let me say I am very happy to be here. Thank you, Professor Capra, and thank you, Judge Raggi, whom I had my first trial in front of—and taught me everything I know.

I thought what I would do is spend a little time focusing on the real practical, real-world aspects of the redaction process and how it works, and a couple of issues that have arisen.

As many of you know, the Department [of Justice] as a whole is revising its discovery policies. Each district had to come up with its discovery policy. We have had a discovery policy in our district for a very long time. What we did was, we used this as an opportunity, basically, to bring everything together and synthesize and write a comprehensive document that we can give to our newest people and we can give to our senior people.

One of the things that we also did in that is to look at some of the aspects of Rule 49.1[197] on the criminal side and 5.2[198] on the civil side. As you know, we also represent the United States government when it gets sued, and the government does get sued a lot.

As an aside, I had one meeting with our Civil Division folks, and they told me about a case that literally involved a seventy-year-old lady pushing a cartful of Bibles across the street who got hit by a postal truck. My advice was, "Settle."

But it was an opportunity, I think, for us to tune our practices a little bit in this regard.

We sent out a guidance memo, basically, which we did about a month before I knew I was going to be on this panel—so it is just synergy—which basically talks about Rule 49.1 and some of the steps that we can take up front to mitigate and remove the need to go through and redact later on. Our folks had the same reaction that Nora was describing—"Oh, my gosh, the sky is falling." The reality is that that really has not quite happened, largely because a lot of our people think ahead, and we do not solicit a lot of identifying information in the direct examinations or in proceedings before the court. Frankly, it is not really that necessary.

More sensitive issues, I think, are raised by cooperator testimony and some other things, which I will get to in a few minutes.

So we do a lot of the same kinds of things that Nora was describing in terms of frontloading and trying to avoid the need to go back and redact later on.

I will say, the rule has served very nicely for us to signpost some of the issues for our folks up front that we can use then to not elicit identifying information at trial. There are some exemptions in the rule, many of which I think tailor very nicely to some of the issues that we have to deal with. If we are in a suppression hearing and we are talking about a particular location or we are talking about an asset-forfeiture proceeding, the exemptions tailor very nicely to the kind of discussion that we are going to have to have on the record.

What else have we done? One of the areas where I think we have some concern, or at least some thought on where we are right now, is the question of voir dire. I conducted an in-house e-mail survey. I got a wide variety of responses. I got everything from, "We never order the voir dire unless there is a *Batson*[199] challenge or some appeals issue that we need," to, "We order

197. FED. R. CRIM. P. 49.1.
198. FED. R. CIV. P. 5.2.
199. *See generally* Batson v. Kentucky, 476 U.S. 79 (1986).

the voir dire in every case," to, "Well, it depends on what the court reporter gives you."

It gave us an opportunity to sort of think a little bit about conveying to our folks that, as a practical matter, unless you really need the voir dire, it is probably not a good idea to order the transcript. If you do not order the transcript, then many of the issues that are implicated by the redaction process and some of the sensitivities about what jurors disclose at the voir dire are not implicated.

It also got us thinking a lot about whether or not, just as a practice pointer, it is a good idea, when you are standing there at the sidebar and the juror is telling you the reason why he cannot be fair or he is conveying something very sensitive, like he was a victim of a crime or he has somebody in his family who is HIV-positive, or whatever the reasons may be—and they are diverse, to say the least—it is a good practice pointer for us, as a reminder, to make a potential application at that moment, when all the parties are right there, as to whether that should be sealed or not. In many cases, a lot of times many of our judges will beat us to the punch in that regard, because they understand the issue of making sure that the jurors feel that they can be completely candid.

So, in general, the voir dire aspect of this issue, while there is some degree of sensitivity, has not really manifested itself yet in a systemic, problematic way.

My issue that I am grappling with is whether or not that is because we can tinker with our process more effectively to head it off, whether or not it is not being done because the court reporters and the court and the Clerk's Office—everything is running sort of episodically. Sometimes we comply with the tenor of the rule; sometimes we do not. That is an issue, I think, that we are still burrowing into. I think we have a little bit more work to do in that regard, candidly.

Let me just close and talk about a couple of the issues that Nora raised and echo some of the concerns that we have.

One of them—several of the commentators in previous panels illustrated this point—is that it is not necessarily the public access to this information, but the ease of that access and the nature in which that access can become widely copied and widely available. That does raise some concerns that we do think about.

Now, look, to be perfectly candid, when you have a trial in which a cooperating witness is testifying—many of our trials get a lot of attention and a lot of press coverage—that means that there are folks sitting in the audience every day reporting on exactly what happens. But those cases are probably not the everyday case.

There are a lot more cases, as Jan was talking about, that involve a lot of folks that are just there doing the best they can under the system. We have a very sophisticated group of folks who pay a lot of attention to what we do and, more importantly, who testifies. That manifests itself in a lot of ways, and it does manifest itself by cooperator testimony getting posted on the Internet. That is a fact of life. We have had people threatened. We have

had people threatened in the institutions. We have had people killed as a result. Everything that Barbara said earlier does apply to us as well. We have spent a lot of time in our district paying a lot of attention to that. There are very significant organized crime cases or gang cases which we do a lot of. That is an issue that does cause us a little bit of concern.

Similarly, we do have some of the concerns for victims. We have had some very graphic testimony from victims, particularly in child abuse cases that have become increasingly common.

So those are some of the issues.

Thanks for the time.

JUDGE KOELTL: Our last speaker will be someone with firsthand knowledge of dealing with the jurors. Lori McCarthy, who is the Jury Clerk from the Eastern District of New York.

MS. MCCARTHY: Thank you very much. Good afternoon.

I am going to discuss voir dire transcripts and juror privacy concerns. I have not personally received any requests regarding voir dire transcripts, but recently there was a case where the press made a request to the court. About a week after the verdict was rendered, the press requested the release of the voir dire transcript, as well as the names, addresses, and telephone numbers of the jurors. The judge issued an order granting the release of the voir dire transcript, on the condition that prior to public release of the transcript, the court reporter redact any information that could reveal the identity of any prospective juror who participated in a sidebar discussion. On occasion, during orientation or before jurors are sent upstairs for jury selection, they have said that there may be some things that they do not wish to discuss in open court, and we always tell them that they have the opportunity to speak with the judge in sidebar if they are not comfortable about something.

I definitely think that before releasing voir dire transcripts, redacting any information from sidebar discussion that could potentially reveal the identity of a juror is a good idea. If voir dire transcripts do become available online and jurors know that their comments, especially sidebar discussion, will be accessible to the public online, they may not be as forthcoming with their opinions and experiences.

As far as the juror privacy concerns, I have found that when jurors fill out questionnaires, particularly anonymous questionnaires, many of them are more detailed and expressive in their comments, revealing more than they probably would in open court, and perhaps even sidebar. They know that the juror information sheet, which states their name, questionnaire number, and contact information, will only be seen by the Jury Department.

That is pretty much it.

JUDGE KOELTL: Thank you, Lori. First of all, questions from you all?

JUDGE HARRIS HARTZ (U.S. Court of Appeals for the Tenth Circuit): I am not asking this on behalf of myself. I am asking it on behalf of Professor Capra, in another capacity of his. This is for Judge Treece. Why

is it that with respect to your rules governing transcripts, you have one local rule and two general orders? Why isn't it all in a local rule?

JUDGE TREECE: I can tell you that, as of June of this year, the local rules will subsume the general orders. So there will not be any general orders after this year.

PROF. CAPRA: We have a whole report on that that you can access.[200]

PROF. CAPRA: I have a question about the juror number system that I guess is true in Connecticut and the Northern District. I have heard from a number of judges that that might depersonalize the whole voir dire process. I want to know if you have had that experience or you know of that experience in your districts. In other words, if you are referring to somebody as "Juror Number 2," it is different than referring to them by their real name.

I am asking that on Judge Leighton's behalf.

JUDGE LANCASTER: I had a case—I like to personally refer to the jurors by name and make them feel comfortable—where I had sentenced a guy to thirty years, a career criminal, and about seven months later, his sister, who works for a bail bondsman, ordered the transcript of voir dire—nothing else, just the transcript of voir dire. I ordered the court reporter to convert the names to initials and send the transcript out. I may have committed a reversible error. I do not know. I seldom know.

JUDGE TREECE: I can say, in terms of the assignment of numbers, it is more a practice in the breach. Judges and the attorneys often refer to the jurors by their names. It was just that in two very high-profile cases—and both of them were terrorist cases—where the court directed that jurors will be identified by their numbers. Those are the only two instances that I can think of. Nonetheless, the local rule basically says that we are supposed to assign numbers on a regular basis. Just goes to show you that judges do not even follow their own rules.

MR. KOVNER: In Connecticut, it is more of a common practice?

MS. DANNEHY: In Connecticut, it is more of a common practice. It is fairly recent. The judges themselves, from what I understand, have not objected. It was actually at their own suggestion that the practice started. I also understand that jurors, when it is explained to them why they are being referred to by numbers as opposed to names, appreciate it.

It is explained that they have been given numbers and, for purposes of this proceeding, they are going to be referred to by number, just for ease.

JUDGE KOELTL: Are the jurors told, "Look, we are not referring to you by name because the transcript of this proceeding may be available online. It may be available on the Internet. To protect your privacy, we are not going to refer to you by name"?

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200. JUDICIAL CONFERENCE OF THE U.S., COMM. ON RULES OF PRACTICE AND PROCEDURE, REPORT AND RECOMMENDED GUIDELINES ON STANDING ORDERS IN DISTRICT AND BANKRUPTCY COURTS (2009), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Standing_Orders_Dec_2009.pdf.

MS. DANNEHY: The answer is, I do not know. I do not want to answer that. I would think that would be a reasonable explanation, so I do not see why it could not be done. But I just do not want to speak, because I have not actually been there.

JUDGE ROSENTHAL: I just wanted to say that that is the practice in my district, telling jurors who are—and jurors are pretty smart. They get the fact that they are Juror Number One instead of Mr. or Ms. So-and-So, for the purpose of keeping their names optional or forbidden.

The real reason I raised my hand to speak to Panel Number Six is to thank everyone on behalf of the Standing Committee for participating in this extraordinarily helpful and informative day and to thank, in particular, Judge Raggi and Professor Capra and the Fordham Law School for the immense amount of work that has gone into this. And I thank all of you for the immense amount of insight that it has provided.

Attachment 6 to Privacy Subcommittee Report

Memorandum by Hon. Elizabeth Stong on Operation of the Federal Privacy Rules in Bankruptcy Proceedings

JCUS Subcommittee on Internet Access to Private Identifier Information

Outline by Hon. Elizabeth Stong on Operation of Privacy Rules in Bankruptcy Proceedings

April 2010

Synopsis:

I. Disclosure is essential to the purposes of the Bankruptcy Code. But with disclosure comes the potential for inadvertent disclosure of confidential information.

   a. The Rules require that a debtor provide the court with her full Social Security number. The caption of a petition must include the last four digits of a debtor's Social Security number. And a debtor's full Social Security number is available to a debtor's creditors.

   b. A debtor must also provide information and documents, including tax returns, that may contain her Social Security number. The Rules require the redaction of such documents.

II. Purpose of disclosure.

   a. The disclosure of a debtor's Social Security number allows the court and the debtor's creditors to verify the identify of the debtor, and to determine if the debtor has filed previous cases.

III. Rules have been enacted to protect disclosure of confidential information. For example:

   a. Rule 1005, as amended in 2003, no longer requires a debtor to include her full Social Security number on the petition.

   b. Rule 9037, enacted in 2007, requires redaction of sensitive information, such as a debtor's full Social Security number.

IV. Efforts to ensure compliance with redaction requirements.

   a. In the Eastern District, attorneys for debtors and creditors who file on the CM/ECF system must receive training prior to receiving a password to access the system. Attorneys using the CM/ECF system must check a box indicating that they have read a notice regarding the redaction requirement. The Eastern District also publishes information about this requirement on its website.

   b. The Eastern District's Clerk's Office and the Eastern District's Pro Se Law Clerk's Office remind non-ECF filers to redact Social Security numbers. The

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Clerk's Office also reviews paper submissions prior to uploading to CM/ECF to ensure compliance.

V. Reported problems.

a. Although the Eastern District is mindful of the problems that have been reported and the potential for problems, the Eastern District's Clerk's Office does not regularly receive complaints about or discover unredacted Social Security numbers in case filings.

i. But the Clerk's Office does see a problem occurring somewhat more frequently with attorneys who mistakenly file a debtor's Statement of Social Security number, rather than maintaining that document in her files.

ii. Another problem that occurs with somewhat more frequency is when creditors file proofs of claims that attach documents that contain Social Security numbers but do not redact them.

VI. Possible solutions.

a. Increase training. The filing of unredacted information sometimes occurs when an attorney allows members of her staff to file documents using her CM/ECF password. One solution would be to require staff members to receive the CM/ECF training provided by the Eastern District.

b. Impose penalties. There may be reason to impose penalties or consequences when an attorney checks the redaction responsibility box on the CM/ECF screen, but still uploads a document without the required redaction.

The Duty to Disclose Information in Bankruptcy Cases

- One of the fundamental objectives of the Bankruptcy Code is complete and accurate disclosure of all relevant information and meaningful notice to all parties in interest. As a result, the Bankruptcy Code and Rules, and the Local Rules for the Eastern District, require a debtor to disclose a great deal of information. By its nature, that is, bankruptcy is an intrusive process. Courts have made clear that "[a] debtor's complete disclosure is essential to the proper administration of the bankruptcy estate."
  - "The 'fresh start' policy of the consumer bankruptcy system is premised on the notion that a debtor comply fully and honestly with the requirements of the Bankruptcy Code. One essential obligation is the full disclosure that extends far beyond what debtors ordinarily would have to reveal in either a credit application or an ordinary lawsuit. For debtors to be eligible for bankruptcy relief, they must share details on assets, income, liabilities, expenses, previous bankruptcies, lawsuits, business attempts, and co-debtors. Debtors sign bankruptcy petitions under penalty of perjury, an admonition printed on the schedule above the signature line. ¶ Intentional failure to comply with the disclosure requirements carries large penalties. The court may deny or revoke the debtor's discharge. False statements on bankruptcy schedules might lead to the imposition of sanctions on the debtor and/or the debtor's attorney. Fraudulent concealment of assets may also be grounds for criminal conviction." G-44 COLLIER ON BANKRUPTCY § 1.1.2 (2010).

Rules Requiring Disclosure of a Debtor's Social Security Number

- A Debtor is required to provide the court with her full Social Security number.
  - Under Rule 1007(f), an individual debtor is required to "submit" to the clerk, rather than "file," a verified statement that sets out the debtor's Social Security number or that the debtor does not have a Social Security number. (A filer is also required to correct the information provided if it is incorrect. *See* Rule 1009(c)). This is known as the Official Bankruptcy Form 21 - Statement of Social Security Number.
    - When filing is made through the CM/ECF system, the filer must input the debtor's Social Security number into the CM/ECF system, but that information is not available to the public. The attorney retains the Form 21, but does not file it on the docket.
    - When a pro se debtor submits a petition to the Clerk's Office's intake counter, the intake clerk retains the Form 21, but does not file it on the docket.
  - A clerk's access to the debtor's full Social Security number serves several purposes. For example, it enables a clerk to include the full Social Security number on the notice of the Section 341 meeting of creditors.
  - As the Advisory Committee Note makes clear, the purpose of this procedure is to prevent the Social Security number from becoming a part of the "filed" papers that are in the case file available to the general public.

- Rule 1005 requires that the caption of a petition commencing a case under the Bankruptcy Code shall include, among other identifying information, the last four digits of the Social Security number or individual debtor's taxpayer-identification number. (This requirement is also found in Local Rule 9004-2(a), relating to the amendment of case captions.)
    - Prior to 2003, Rule 1005 required a debtor to provide a full Social Security number on the petition. As set forth in the Advisory Committee Notes, "this Rule was amended in 2003 to implement the Judicial Conference policy to limit the disclosure of a party's social security number and similar identifiers. Under the rule, as amended, only the last four digits of the debtor's social security number need be disclosed. Publication of the employer identification number does not present the same identity theft or privacy protection issues. Therefore, the caption must include the full employer identification number."
- Creditors are privy to a debtor's full Social Security number. For example, the debtor's Social Security number is included in the notice of the Section 341 or 1104(b) meeting of creditors sent to creditors pursuant to Rule 2002(a)(1).[1] And the full Social Security number is also sent to creditors on the notice amending Social Security number. But, as noted, a full Social Security number is not filed with the court, and is therefore not available to the general public by searching the docket.
- In addition to these specific requirements, a debtor's, or even a non-debtor's, Social Security number may be contained in documents that are required to be filed with the court. As discussed below, it is the filer's burden to redact such information, leaving only the last four digits of a Social Security number.
    - For example, the tax returns or transcripts filed with the court pursuant to Section 521, may contain a debtor's or a non-debtor's Social Security number.

Purpose of Disclosing

- The requirement that a debtor file a statement of Social Security number serves several purposes.
    - It allows the court to determine if the debtor has filed previous petitions under the same Social Security number, but under a different name.
    - It assists the process of notifying a debtor's creditors that the debtor has filed a petition for relief.
    - And it helps ensure that a party who does not intend to file for bankruptcy is not mistakenly identified as such, with resulting impairment to that person's credit and confusion on the part of creditors.

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[1] Rule 2001(a) provides that:

> [T]he clerk, or some other person and indenture trustees at least 21 days' notice by mail of:
>
> > (1) the meeting of creditors under § 341 or § 1104(b) of the Code, which notice, unless the court orders otherwise, shall include the debtor's employer identification number, social security number, and any other federal taxpayer identification number[.]

Privacy Considerations

- Over a decade ago, the Judicial Conference began consideration of and then formulated a privacy policy for electronic case files.
- The efforts of the Conference resulted in the passage of Rule 9037, in 2007, effective December 2007. (Likewise Fed. R. App. P. 25(a), Fed. R. Civ. P. 5.2, and Fed. R. Crim. P. 49.1 were enacted).
  - Rule 9037 provides that a party or nonparty making an electronic or paper filing may include only (1) the last four digits of a Social Security number and taxpayer-identification number; (2) the year of an individual's birth; (3) a minor's initials; and (4) the last four digits of the financial-account number.[2] This rule applies to all filings, except for certain exempted filings. *See* Rule 9037(b).[3]
  - The redaction of personal identifiers lies with the filing party.
    - The Advisory Committee Notes provide that "[t]he clerk is not required to review documents filed with the court for compliance with this rule. As subdivision (a) recognizes, the responsibility to redact filings rests with counsel, parties, and others who make filings with the court."
  - The Advisory Committee Notes indicate that the rule is adopted in compliance with Section 205(c)(3) of the E-Government Act of 2002, Pub. L. No. 107-347. Section 205(c)(3) requires the Supreme Court to prescribe rules "to protect

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[2] Rule 9037(a) provides that:

> Unless the court orders otherwise, in an electronic or paper filing made with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual, other than the debtor, known to be and identified as a minor, or a financial-account number, a party or nonparty making the filing may include only:
>
> (1) the last four digits of the social-security number and taxpayer-identification number;
> (2) the year of the individual's birth;
> (3) the minor's initials; and
> (4) the last four digits of the financial-account number.

[3] Rule 9027(b) provides that:

> The redaction requirement does not apply to the following:
>
> (1) a financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;
> (2) the record of an administrative or agency proceeding unless filed with a proof of claim;
> (3) the official record of a state-court proceeding;
> (4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;
> (5) a filing covered by subdivision (c) of this rule [sealed cases]; and
> (6) a filing that is subject to § 110 of the Code.

privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically."

- The Rule is derived from and implements the policy adopted by the Judicial Conference in September 2001 to address the privacy concerns resulting from public access to electronic case files. The Judicial Conference policy is that documents in case files generally should be made available electronically to the same extent they are available at the courthouse, provided that certain "personal data identifiers" are not included in the public file.
- Any personal information not otherwise protected by sealing or redaction will be made available over the Internet. Counsel should therefore notify clients of this fact so that an informed decision may be made about what information is to be included in a document filed with the court.
- Subdivision (d) of Rule 9037 recognizes the court's inherent authority to issue a protective order to prevent remote access to private or sensitive information and to require redaction of material in addition to that which would be redacted under subdivision (a) of the rule. These orders may be issued whenever necessary either by the court on its own motion, or on motion of a party in interest.
- Subdivision (g) of Rule 9037 allows an entity to waive the protections of the rule as to that entity's own information by filing it in unredacted form. An entity may elect to waive the protection if, for example, it is determined that the costs of redaction outweigh the benefits to privacy.
- Moreover, Rule 9037 does not affect the protection available under other rules, such as Rules 16 and 26(c) of the Federal Rules of Civil Procedure, or under other sources of protective authority.
- Under Rule 1007(b)(1)(E), a debtor must provide "copies of all payment advices or other evidence of payment, if any, received by the debtor from an employer within 60 days before the filing of the petition." But this Rule also provides that such production should be done "with redaction of all but the last four digits of the debtor's social-security number or individual taxpayer-identification number[.]"

Privacy Considerations Related to Disclosures to the Trustee

- A debtor in a Chapter 7 or 13 case must provide ample disclosure to the trustee under Section 521(e)[4] prior to the meeting of creditors under Bankruptcy Code Section 341.

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[4] Section 521(e)(2)(A) provides that:

The debtor shall provide--

(i) not later than 7 days before the date first set for the first meeting of creditors, to the trustee a copy of the Federal income tax return required under applicable law (or at the election of the debtor, a transcript of such return) for the most recent tax year ending immediately before the commencement of the case and for which a Federal income tax return was filed; and

- Under Rule 4002, every individual debtor shall bring to the meeting of creditors under § 341 information including evidence of social-security number(s), or a written statement that such documentation does not exist, and financial information including: evidence of current income such as the most recent payment advice; unless the trustee or the United States trustee instructs otherwise, statements for each of the debtor's depository and investment accounts, including checking, savings, and money market accounts, mutual funds and brokerage accounts for the time period that includes the date of the filing of the petition; and a tax return for the most recent tax year.
- The Advisory Committee Notes to Rule 4002 indicate that it is the debtor's duty to redact sensitive information. "Some of the documents may contain otherwise private information that should not be disseminated. For example, pay stubs and financial account statements might include the social-security numbers of the debtor and the debtor's spouse and dependents, as well as the names of the debtor's children. The debtor should redact all but the last four digits of all social-security numbers and the names of any minors when they appear in these documents. This type of information would not usually be needed by creditors and others who may be attending the meeting. If a creditor perceives a need to review specific documents or other evidence, the creditor may proceed under Rule 2004."
- The Advisory Committee Notes also indicate that "[b]ecause the amendment implements the debtor's duty to cooperate with the trustee, the materials provided to the trustee would not be made available to any other party in interest at the § 341 meeting of creditors other than the Attorney General."
- Local Rule 4002-1 also makes clear that it is the debtor's duty to redact personal identifiers and personal information. "An individual debtor providing information to the trustee or a creditor pursuant to Bankruptcy Code § 521(e) shall redact personal identifiers as follows: (i) if an individual's Social Security number, alien registration number, or tax identification number is included, only the last four digits of that number shall appear[.]"[5]

(ii) at the same time the debtor complies with clause (i), a copy of such return (or if elected under lause (i), such transcript) to any creditor that timely requests such copy.

Under Section 521(2)(B), "[i]f the debtor fails to comply with clause (i) or (ii) of subparagraph (A), the court shall dismiss the case unless the debtor demonstrates that the failure to so comply is due to circumstances beyond the control of the debtor."

[5] Rule 4002-1(a) provides that:

An individual debtor providing information to the trustee or a creditor pursuant to Bankruptcy Code § 521(e) shall redact personal identifiers as follows:

(i) if an individual's social security number, alien registration number, or tax identification number is included, only the last four digits of that number shall appear;

(ii) if minor children are identified by name, only the children's initials

Procedures Enacted to Strengthen These Rules in the Eastern District

- The Administrative Office proposed changes to the CM/ECF filing system to include a notice reminding filers of their obligation to redact personal identifier information. It also encourages courts to stress the rules to filers who file in court, and has asked individual courts to share information on actions they have taken to ensure compliance with the privacy rules, including promulgation of local rules, standing orders, and outreach programs to the public and bar.

Non-ECF Filers

- When documents are submitted for filing in hard copy, which is done most often by pro se debtors, the intake clerk reviews the filing to make sure that unredacted Social Security numbers are not submitted prior to filing. And the Eastern District Bankruptcy Court has a Pro Se Law Clerk's Office to assist pro se filers.
  - Among its other duties, the Pro Se Law Clerk's Office provides advice to filers who have forgotten to redact sensitive information on documents such as pay stubs, and it is the practice of the Office to remind the filer to redact her Social Security number prior to filing.

ECF Filers - Both Debtors' Attorneys and Creditors' Attorneys

- Training. In order to file documents in a bankruptcy case in the Eastern District, attorneys must complete the court's free training course or certify that they have received training at another court, after which attorneys are provided with a login and password that will allow access to the system. The requirement that attorneys redact Social Security numbers and other sensitive information is stressed at this training. Members of an attorney's support staff are also encouraged to attend. In addition, information about the redaction requirement is provided in the Court's ECF Newsletter posted on the Court's website.
- ECF Notice. One step taken by the Administrative Office, and currently in use by the Eastern District, is a modification to the CM/ECF system that requires an electronic filer to review a notice and check off that she has read the notice, and that if she files, that she must be in compliance with the redaction rules. Importantly, the filer cannot complete the log on process without checking the box. The notice reads:

> IMPORTANT NOTICE OF REDACTION RESPONSIBILITY: All filers must redact: Social Security or taxpayer-identification numbers; dates of birth; names of minor children; and financial account numbers, in compliance with Fed. R. Bankr. P. 9037. This requirement applies to all documents, including

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shall appear;
(iii) if an individual's date of birth is included, only the year shall appear; and
(iv) if financial account numbers are provided, only the last four digits of these numbers shall appear.

attachments.

___ *I understand that, if I file, I must comply with the redaction rules. I have read this notice.*

- In addition, another modification to the CM/ECF system is a reminder message added to the screen where the attorney finalizes the submission of filed documents. That message reads, "Have you redacted?" No affirming keystroke is required for that message.

Problems

- The Eastern District's Clerk's Office does not regularly receive complaints about or discover unredacted Social Security numbers in case filings. But when a problem arises, the attorney or other filer is notified, and asked to submit the document again with the proper redactions and the improperly filed document is removed from the docket.
  - The biggest problem the Clerk's Office runs into concerns attorneys who mistakenly file the Form 21 statement of Social Security number, rather than maintaining that document in her files. When this occurs, the Clerk's Office will notify the attorney of the error, and the filing will be removed from the docket. As noted, the attorney is required to input the debtor's Social Security number into CM/ECF for the Court's use, although this information is not publicly available, so the filing of Form 21 is not necessary for the Court to have the required information.
  - Another problem occurs when creditors file proofs of claim that attach documents that contain Social Security numbers but do not redact them. As with other filers, the Clerk's Office notifies the filer of the error, and removes the document. The creditor will then provide a properly redacted document.
  - Problems appear to arise most often when attorneys allow their staff to file on their behalf, but do not convey the proper procedures for redaction to their staff.
    - For this reason, attorneys are asked to have their support staff attend the Court's ECF training class where the procedures for redacting Social Security numbers are emphasized.
- The Pro Se Law Clerk's Office does not recall complaints from pro se debtors or non-debtors about their Social Security numbers having been made public.
- The Pro Se Law Clerk's Office does receive complaints concerning stolen Social Security numbers. This could arise in situations where an individual discovers that she was falsely or mistakenly placed into bankruptcy. Or by debtors who claim that creditors have invalid claims against them because of identity theft that occurred prior to her bankruptcy filing.
  - In such cases, the Pro Se Law Clerk's Office may make a referral to the United States Trustee for investigation, or to the FTC for help, and can provide credit freeze information.

- Some debtors attempt to file a petition using a fake Social Security number. While the

Eastern District Bankruptcy Court does not require debtors to present identification when filing, other courts do. But debtors who do file with a fake Social Security number are subject to dismissal without discharge, and possible prosecution for a bankruptcy crime.

Possible Improvements

- Require the staff of attorneys to receive CM/ECF training if the staff will be doing the filings.
- Impose penalties or consequences when an attorney checks the redaction responsibility box on the CM/ECF screen but still uploads a document that has not been redacted.

Enforcement: Case Law

Failure to Redact

- Courts have held that Rule 9037 does not provide a private right of action. Rather, the remedy appears to be either removal of the document from the docket, or a protective order under Rule 9037(b), in the form of either redacting the debtor's personal information or limiting electronic access to the document at issue.

Proofs of Claim

- There are a number of cases involving creditors who have filed proofs of claim without redacting sensitive information. Courts have held that Rule 9037 does not provide a private right of action for the relief sought by the plaintiff to cancel the debt owed to the defendant and/or assess sanctions against the defendant for attaching documentation to the proof of claim containing the plaintiff's full Social Security number and birth date. *In re French*, 401 B.R. 295 (Bankr. E.D. Tenn. 2009).
    - Case law has consistently held that a proof of claim may only be disallowed upon the nine statutory reasons enumerated in 11 U.S.C. § 502 of the Bankruptcy Code. *In re Lentz*, 405 B.R. 893 (Bankr. N.D. Ohio 2009) (ruling that a violation of Rule 9037 by a creditor filing a proof of claim that included the debtor's full Social Security number and other private information was not grounds for the disallowance of the proof of claim).
    - The remedy for violating Rule 9037 is set forth in the Rule itself, namely, to redact the information or limit electronic access to the document. *In re Carter*, 411 B.R. 730 (Bankr. M.D. Fla. 2009).

Providing a False Social Security Number

- The failure to provide a correct Social Security number, whether intentionally or unintentionally, may be grounds for dismissal without a discharge.
    - *See In re Riccardo*, 248 B.R. 717, 724 (Bankr. S.D.N.Y. 2000) ("This decision and its companion decisions are being published to give notice to the practicing bar that a discharge in bankruptcy will not be granted to those who use false social security numbers whether intentionally or mistakenly. Whether a debtor's use of a false social security number, and the subsequent failure to correct that error, was intentional or not is of little of concern to present or future creditors, whose rights

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and interests may be prejudiced by the error regardless of the debtor's intent to defraud or lack of it. In either case the false information undermines the fundamental objectives of the Bankruptcy Code, which include complete and accurate disclosure of all relevant information and meaningful notice to all parties in interest. It is at least as important to represent accurately the debtor's social security number as any other information required to be set forth in the petition. At a minimum, a debtor who files a petition with a false social security number violates his or her oath made in signing the petition and is not entitled to a discharge under 11 U.S.C. § 727(a)(4)(A). Use of a false social security number in this Court will result in the automatic dismissal and closure of a debtor's case or, if discovered after issuance of a discharge, reopening of the case, revocation of a debtor's discharge and dismissal, with notification to all creditors, the U.S. Trustee's office and the three credit reporting agencies.").

- In some circumstances it may be appropriate to bar a debtor who has intentionally used a false Social Security number from refiling for a certain period of time under Section 105(a).
  - *See In re Riccardo*, 248 B.R. 717, 724 (Bankr. S.D.N.Y. 2000) ("Such a remedy is most often invoked in the case of a serial refiler where the abuse of the bankruptcy process typically results in damage primarily to the interests of a single secured creditor . . . The potential damage to both existing and future creditors caused by the perpetration of identity fraud is far more pervasive and corrosive to the integrity of the bankruptcy process than the serial Chapter 13 filer seeking to stave off foreclosure by a single creditor. But such a determination should be made on a case-by-case basis, because it is not clear that the interests of the creditors and the objectives of the Bankruptcy Code would always be served by barring debtors from refiling.").
- And, the filing of a false Social Security number may also be chargeable as a bankruptcy crime under 18 U.S.C. § 152, which makes punishable by a fine or up to five years imprisonment or both an act by "[a] person who- . . . (2) knowingly and fraudulently makes a false oath or account in or in relation to any case under [the Bankruptcy Code]; (3) knowingly and fraudulently makes a false declaration, certificate, verification or statement under penalty of perjury . . . in or in relation to any case under [the Bankruptcy Code . . . ."

<u>Failure of an Attorney to Provide Client Social Security Numbers</u>

- In one extreme example, an attorney filed at least 27 bankruptcy petitions for clients in the Northern District of California within a 90 day period. Most of those filings were made without the minimum documents required to commence a good faith case. The cases all lacked a list of creditors. Several lacked a Statement of Social Security number and even a filing fee. As part of its decision, the court ordered that the attorney was permanently enjoined from filing any bankruptcy petition in any court not accompanied by a proper matrix listing all creditors, a properly signed petition, a Statement of Social Security number, and a proper filing fee. *In re Pimentel*, 2010 WL 843771 (Bankr.

N.D.Cal. Mar. 8, 2010).

Attachment 7 to Privacy Subcommittee Report

Chart Prepared by Administrative Office on Local Rules and Practices Governing Posting of Plea and Cooperation Agreements

TREATMENT OF PLEA AGREEMENTS

- ***Six courts have policies that restrict public access to plea agreements through PACER, but make them available to the public at the Clerk's office.***
- ***Nine courts indicate that they seal plea agreements when necessary, determined on a case-by-case basis.***
- ***Fourteen courts have policies in which plea agreements are available to the public, but the cooperation information has moved out of the plea agreement to a non-public document (one that is either sealed or is kept outside of the public case file).***

COURT	CIR.	SUMMARY OF POLICY	SOURCE OF INFORMATION
Courts with policies that restrict public access to plea agreements through PACER, but make them available to the public at the Clerk's office:			
PA-E	3	The court established a protocol in which all documents on the CM/ECF system related to pleas and sentencings will be denoted as "Plea Documents," "Sentencing Documents," and "Judicial Documents." If the documents are not under seal, they will be available for public review at the clerk's office (but not available on PACER). Passwords to electronically access the documents will be given to judges, law clerks, the government, specific defense attorneys involved in the filing, probation, and (where necessary), personnel at the court of appeals. Effective September 1, 2007.	July 9, 2007 notice on court's website
NC-E	4	The court entered a standing order in August 2009, directing the clerk to enter all plea agreements filed in criminal cases "in such a manner that there is no remote electronic public access to plea agreements." The public, including members of the news media, may have access to filed plea agreements at the public terminal in the clerk's office. All motions based on the substantial assistance of the defendant are automatically sealed by the clerk (no need for attorneys to file motion to seal). The filings are sealed for two years unless extended longer by the presiding judge. Attorneys who have filed a notice of appearance in another criminal case in the court may file a signed certification that there is a case-related need to receive and review a copy of any sealed document to receive it from the clerk without a court order.	09-SO-2 on court's website

COURT	CIR.	SUMMARY OF POLICY	SOURCE OF INFORMATION
NC-W	4	The court decided to close the electronic window to all Plea Agreements and have implemented a more restricted access policy to all plea agreements. Plea agreements filed with this court will no longer be available to the general public via the Internet or Pacer. Only court users and case participants will be able to see the electronic version of a plea agreement. The general public and press can still see a plea agreement at the public terminal in the clerk's office or by requesting to see the file, both requiring the requesting party to come to the courthouse.	Frank Johns, Clerk of Court, 10/30/08
OH-N	6	The Court's policy is that no newly filed plea agreements, motions filed pursuant to U.S.S.G. § 5K1.1 and/or 18 U.S.C. §3553(e) or Fed. R. Cr. P. 35(b), or statements of facts related thereto shall be available electronically through the PACER system. CM/ECF was modified in our Court to limit electronic access to these documents pursuant to a General Order, including identifying and restricting access to previously filed plea agreements. The new remote electronic access limitations are not a replacement for sealing documents. Documents that are intended to be completely unavailable to co-defendants and the public must be filed under seal as they have been in the past. Judges, Chambers and Court Staff have electronic access to the documents. Parties in the case will continue to have electronic access, unless the documents are sealed. The Public will not have internet access to the documents, but will be able to view the documents on the public access terminals at the court houses, unless the documents are under seal. Docket entries for plea agreements will contain generic language and the documents themselves will not be available through PACER over the Internet.	Order No. 2007-14
TX-E	5	Each unsealed plea agreement must be presented to the court in paper, not electronic, format. The clerk's office thereupon will scan the paper plea agreement and electronically file it as a "private entry document, " which limits electronic access to the document to the attorneys in the case, the presiding judge and the court staff. However, the clerk of court shall provide public access to all unsealed plea agreements at the clerk's offices upon request.	L. Rule CR-49
TX-W	5	Our business practice is . . . that these documents are not available on PACER.	11/19/09 Clerk's Privacy Survey, Appendix M

COURT	CIR.	SUMMARY OF POLICY	SOURCE OF INFORMATION
Courts that seal the plea agreement on a case-by-case basis.			
CT	2	If necessary, the court orders plea agreement to be filed under seal. If sealed, the judge who will sentence the defendant maintains the executed cooperation agreement and transcript of the canvass of the defendant regarding the cooperation agreement. In extraordinary situations, the docketing of a minute entry of the cooperation colloquy may be delayed.	Revised Local Criminal Rule 57(b)(7)(A), adopted December 15, 2007
VA-E	4	The EDVA judges studied this issue thoroughly and decided not to alter its practice in any way. Everything is unsealed unless counsel makes a motion otherwise, which is then decided on a case by case basis.	Fernando Galindo, Clerk of Court, 10/30/08
WV-S	4	Plea agreements are open to the public, unless the court orders it sealed in a particular case, based on the U.S. Attorney's office's motion or *sua sponte*.	Terry Depner, Clerk of Court, 11/03/08
TN-E	6	Our court looked at this last fall and considered following the North Dakota procedure. But after we conferred with the U.S. Attorney's office, they didn't think it was necessary. We left our procedure as is. If the U.S. Attorney's office wants a plea agreement sealed, they are to make a motion to seal. If the judges thought it was necessary, they could do so *sua sponte*.	Pat McNutt, Clerk of Court 11/02/08
IA-S	8	The court considered changing its practices, but, in the end, the judges kept the process as it is now – judges consider motions to seal on a case-by-case basis.	Marge Krahn, Clerk of Court (10/31/08)
CA-N	9	We do not have an explicit policy in this area. We rely for appropriate security on our local rule provisions for sealing documents. In other words, if a party feels the plea agreement should be walled off from observation by others, they may apply to have it sealed.	Rich Wieking, Clerk of Court, 10/30/08

COURT	CIR.	SUMMARY OF POLICY	SOURCE OF INFORMATION
WA-E	9	Documents listed in the Judiciary's Privacy Policy as not being included in the public case file are not reflected on the public docket in the EDWA. We have created restricted events for sealed documents such as motions for downward departure for substantial assistance and plea agreements indicating cooperation. There is no public docket entry and the court record number is skipped. We have several instances of skipped numbers in our dockets because we use restricted events for such things as presentence investigation reports, bail reports, assigning a law clerk, etc. Our judges did not want "Sealed Document" to show up on the court record around the time of sentencing, so we settled on using restricted entries based on the conference privacy policy.	Leslie Downey, Chief Deputy Clerk of Court, 11/14/08
CO	10	We left our procedure as is. If the U.S. Attorney's office wants a plea agreement sealed, they are to make a motion to seal. If the judges thought it was necessary, they could do so *sua sponte*.	Greg Lanham, Clerk of Court (11/03/08)
FL-S	11	After hearing oral arguments from representatives of both the U.S. Attorney's Office and the defense bar at an *en banc* hearing, the court voted to provide complete remote electronic access to plea agreements, rescinding its interim policy of providing no electronic public access. Each judge may, in accordance with the law, order specific plea agreements sealed.	Administrative Order 2009-2
Courts that have adopted policies in which plea agreements are available to the public, but the cooperation information has moved out of the plea agreement to a non-public document (one that is either sealed or is kept outside of the public case file):			
ME	1	Plea agreements are public and do not identify whether or not a defendant has cooperated with law enforcement. A second document entitled "Mandatory Plea Agreement Supplement" is filed under seal in conjunction with every plea agreement. If the defendant has agreed to cooperate, the supplement will contain the cooperation agreement. If there is no cooperation agreement, the supplement will so indicate. The mandatory plea agreement supplement will remain sealed until sentencing and for an additional 120 days thereafter, unless otherwise ordered by the court. A docket entry noting the filing of the sealed mandatory plea agreement supplement shall be publicly available through PACER, but the document will only be available to the court.	Local Rule 111
PR	1	The parties are to ensure that plea agreements are sanitized as to any reference as to whether a criminal defendant has agreed to cooperate with the United States. A document entitled "Plea Agreement Supplement" shall be filed under seal in conjunction with every plea agreement. If a criminal defendant has agreed to cooperate, the Plea Agreement Supplement shall contain the cooperation agreements. If the criminal defendant and the United States have not entered into a cooperation agreement, the Plea Agreement Supplement shall indicate that there is no cooperation agreement.	Local Rule 111(b)

COURT	CIR.	SUMMARY OF POLICY	SOURCE OF INFORMATION
NY-N	2	At Guilty Plea Hearing: the Government would file a standard Plea Agreement and during the course of the plea, hand up a document containing the cooperation information and have it marked as a Court Exhibit - after the Judge discussed the contents of the Court Exhibit with the defendant and his counsel in general terms, the exhibit is returned to the Government pending their 5k motion at the time of Sentencing. Sentencing Hearing: • The U.S. Attorney will electronically file in CM/ECF (within two weeks of sentencing) a Sentencing Memo that addresses all sentencing issues **other than** cooperation and their downward departure motion. They will not seek to file these sentencing memos under seal, as this can be an indication of cooperation. • The U.S. Attorney will submit (again, within two weeks of sentencing) a letter directly to the Court (Hand delivered or faxed to chambers), clearly marked **NOT FOR FILING** on the top of the first page, that 1) States the government's intention to move for downward departure at the time of sentencing, 2) Includes the government's anticipated recommended departure, and 3) States the supporting reasons (i.e. the nature and quality of cooperation). The defense attorney and Probation Officer should be copied on the letter, which will be treated like a victim letter or letters from defendant, or in support of defendant. • At the time of sentencing, the U.S. Attorney will formally make a motion for downward departure and state their recommendation. They may reference the prior letter to the court for the supporting reasons for their downward departure	Larry Baerman, Clerk of Court (10/30/08)
MD	4	The main plea agreement document is public unless otherwise ordered. The statement of facts is an attachment to plea agreement, which is an automatically sealed event that must be docketed in every case.	Felicia Cannon, Clerk of Court, 11/03/08
TX-S	5	Plea agreements are public, but motions for downward departure including motions under Fed. R. Crim. P. 35(b) (reducing sentence for substantial assistance) must be filed under seal (Admin Procedures for EF, Section 6(1)c.).	Mike Milby, Clerk of Court, 10/30/08

COURT	CIR.	SUMMARY OF POLICY	SOURCE OF INFORMATION
MS-N and MS-S	5	Joint local rule effective December 1, 2009 states that all plea agreements shall be "sanitized by the drafter of any references to cooperation. After a plea agreement has been accepted in open court, plea agreements shall be scanned and electronically filed as public, unsealed documents." All plea agreements are accompanied by a sealed document titled "Plea Supplement", which will also contain the government's sentencing recommendation. The Plea Supplement will be electronically filed under seal. All cases will be docketed identically with reference to a sealed Plea Supplement, regardless of whether or not a cooperation agreement exists. The District Judge may order the entire plea agreement to be sealed for a specified period of time if the Court finds that exceptional circumstances exist warranting the sealing of the agreement. (See Note about MS-N's former practice, below.)	Local Criminal Rule 49.1
KY-E	6	General Order 08-09 restructures the Court's practice with regard to plea agreements to establish a procedure where all plea agreements will be accompanied by a sealed document entitled "plea supplement." The sealed plea supplement will contain either a cooperation agreement or a statement that no such agreement exists. This practice makes each case appear identical in PACER.	Gen. Order 08-09
ND	8	The plea agreement does not contain any information about cooperation. A "plea agreement supplement" is filed under seal in every case with a plea, whether the defendant is cooperating or not. If there is cooperation, it will be detailed in the supplement.	Policy on plea agreements, on Local Court Information page of site. URL: http://www.ndd.uscourts.gov/pdf/Plea_Agreements.pdf
SD	8	(Nearly identical to ND's policy): The plea agreement does not contain any information about cooperation. A "plea agreement supplement" is filed under seal in every case with a plea, whether the defendant is cooperating or not. If there is cooperation, it will be detailed in the supplement.	Standing Order of March 4, 2008, available on the court's home page, URL: https://www.sdd.uscourts.gov/docs/standingorder030408.pdf

COURT	CIR.	SUMMARY OF POLICY	SOURCE OF INFORMATION
MN	8	One judge reports receiving cooperation information as a letter to the Judge, and keeping it in his chambers file, if requested. Ultimately, the letter will be docketed, although he hasn't done that yet.	The judge
MO-W	8	The plea agreement that is filed that does not contain any language concerning the cooperation of the defendant. The cooperation information will be contained in a letter that will reside with the USA and the Probation Office, and will be attached to the PSR or sentencing recommendation. The letter will be signed by the defendant, defense counsel, and the AUSA. It will **not** be part of the court file. The U.S. Attorney's Office is requiring that the sentencing judge sign the letter in a space marked "reviewed by ____." AUSAs are instructed that in cases where there is a cooperation agreement, but no reason to believe there is any chance for threats, etc. (e.g. – the typical white collar case) it will be up to the AUSA to decide when to make disclosure of the agreement. They may decide to do it on the record at the time of the guilty plea and immediately provide a copy to counsel for the co-defendants. However, if there is any possibility of reprisal then the confidentiality of the cooperation should be kept quiet until it becomes necessary to disclose the cooperation pursuant to the court's discovery order.	Bill Terry, Operations Manager (11/08)
AK	9	In each case with a plea agreement, the plea agreement "must not include any reference, direct or indirect, to either the existence or nonexistence of a cooperation agreement, if any, between the defendant and the government." LCrR 11.2(d) Instead, a "plea agreement supplement" is filed under seal in conjunction with every plea agreement. The plea agreement supplement will either contain the terms of any cooperation agreement, or indicate that no cooperation agreement exists.	Local Criminal Rule 11.2(d) & (e)
AZ	9	The terms of cooperation are not in the body of the plea agreement, but instead are in Exhibit 1 to the agreement. At the change of plea hearing, "Exhibit 1" is provided to the judge, admitted as an exhibit, and returned to the prosecutor at the conclusion of the proceeding. The prosecutor would be responsible for retaining the exhibit. (Of course, defense counsel also would have a copy.) Adopted April 25, 2008.	Source: 4/28/08 email from Judge Pyle

Notes:

- Tab 2C of the binder for the June 2009 meeting of the Privacy Subcommittee contains a 2005 Standing Order from the Northern District of Mississippi that effectively sealed all plea agreements. It appears that the order has been superceded by the joint Local Rule with Mississippi Southern, which is discussed on page 6.
- The 2008 version of this chart had an entry for the District of Rhode Island, which was deleted in this version. The entry had stated that in October 2008, the court was *considering* adopting a policy that would make plea agreements available to the public only at the courthouse (not through PACER). A December 2009 search of the court's website (e.g., its local rules, general orders, and CM/ECF web page) does not, however, indicate that the court ever adopted such a policy.

Attachment 8 to Privacy Subcommittee Report

Article by Professor Caryn Myers Morrison on

Posting of Plea and Cooperation Agreements

PRIVACY, ACCOUNTABILITY, AND THE COOPERATING DEFENDANT: TOWARDS A NEW ROLE FOR INTERNET ACCESS TO COURT RECORDS

Caren Myers Morrison[*]

INTRODUCTION

In Martin Scorsese's film *The Departed*,[1] crime boss Frank Costello, played by Jack Nicholson, learns that there is a rat in his crew—someone who is gathering evidence against him for the police. In order to uncover the rat's identity, Costello gathers his men in a bar, orders them to write down their full names and social security numbers, then hand delivers the information to his own mole in the police force for him to look up their records.

He needn't have gone to so much trouble. The federal courts' electronic public access program, known as PACER, now permits anyone to access case documents and docket information instantly over the Internet.[2] It is not even necessary to know the case file number, as a convenient indexing system allows one to search through criminal cases in every district court in the nation by defendant name.[3] In *The Departed*, the rat is actually an undercover cop named Billy Costigan. But if Costigan had been a cooperating defendant instead—an individual who pleads guilty and agrees to assist in the investigation or prosecution of former criminal accomplices in exchange for sentencing consideration—the crime boss could have done his own checking from his laptop.[4]

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[1] THE DEPARTED (Warner Bros. 2006).

[2] The Public Access to Court Electronic Records system is "an electronic public access service that allows users to obtain case and docket information from Federal Appellate, District and Bankruptcy courts" over the Internet. PACER Frequently Asked Questions [hereinafter PACER FAQ], http://pacer.psc.uscourts.gov/faq.html.

[3] The U.S. Party/Case Index covers every district court. *See* U.S. Party Case Index: Non-Participating Courts, http://pacer.psc.uscourts.gov/psco/cgi-bin/miss-court.pl.

[4] This article focuses solely on cooperating defendants, not confidential informants or undercover officers. Confidential informants are typically recruited by investigative agencies and paid in cash rather than leniency. *See* ROBERT M. BLOOM, RATTING: THE USE AND ABUSE OF INFORMANTS IN THE AMERICAN JUSTICE SYSTEM 1 (2002); Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1, 28 (1992). Undercover officers are not defendants at all but instead are police officers or

This innovation has transformed the traditional model of court access. Federal court records have always been open to public inspection,[5] but in practice the records were only available to those with the time and resources to travel to the clerk's office of the district court to consult individual case files.[6] Committed to paper, locked in filing cabinets, court records were maintained in a state of "practical obscurity."[7]

The public's newfound ability to summon up any criminal case, even a closed one, with the click of a mouse would appear to be an unmitigated victory for the right of popular access to government information. We value openness in our public institutions—our right as citizens "to be informed about 'what [our] government is up to,'"[8] — because it helps us understand how these institutions work, appreciate what they do, and maintain a sense of control over them. In judicial proceedings, openness has long been recognized as helping to check the abuse of governmental power, promote the informed discussion of public affairs, and enhance public confidence in the system.[9]

But this unfettered flow of information is in fundamental tension with a number of goals of the criminal justice system, including the integrity of criminal investigations, the accountability of prosecutors, and the security of witnesses. In order to function effectively, the system needs zones of shadow where the participants can deal candidly with each other. If those participants perceive instead that their actions, as memorialized in court documents such as plea agreements or sentencing motions, are on display, the process can become distorted. In response to unwanted scrutiny, prosecutors, sometimes aided by the courts, will attempt to conceal or disguise the information they regard as sensitive or confidential.[10] The result is that, as information becomes more easily accessible, it can also become less meaningful.

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federal agents posing as criminals in order to obtain evidence. *See* GARY T. MARX, UNDERCOVER: POLICE SURVEILLANCE IN AMERICA 4-6 (1989).

[5] The article limits its discussion to electronic access in the federal courts because, as a self-contained system about which we have more information than those of the various states, it is the most amenable to study. *Cf.* Tracy L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 852 n.4 (1995) (describing the federal system as "simply more accessible for analysis").

[6] *See infra* Part IB.

[7] U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 780 (1989).

[8] *Id.* at 773 (quoting EPA v. Mink, 410 U.S. 73, 105 (1973) (Douglas, J., dissenting)).

[9] *See infra* Part IIA.

[10] *See infra* Part IC.

In concrete terms, the ease with which court information can now be retrieved means that individuals' criminal case records are available to anyone surfing the Internet. This, in turn, raises what might be loosely termed the Billy Costigan problem[11]—the concern that the identities of cooperating defendants will be prematurely discovered, jeopardizing their lives and safety as well as the success of law enforcement investigations.[12]

While the first concern is that violence towards cooperators will increase,[13] the issues raised by electronic access are not limited to retaliation. Exposure of cooperators' identities, or the fear of it, entails several interrelated harms. Whether or not retaliation and intimidation of witnesses and cooperators is exacerbated by Internet access to court files, the risk alone might discourage defendants who would otherwise consider cooperating with the government, potentially hampering law enforcement efforts.[14]

The prospect of possible chilling effects and retaliation has already caused a shift in behavior among prosecutors and courts. Whereas a cooperation agreement might previously have detailed the terms of the bargain between the government and the defendant, some districts are now experimenting with ways to conceal the nature of these bargains, either through sealing portions of every plea agreement or using conditional boilerplate that sheds very little light on the rights and duties of the parties.[15] These practices result in a third kind of harm: a degrading of the information to which there is now increased access.

This is particularly problematic in the context of cooperator practice. The federal use of cooperators—and to some extent the plea-

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[11] This is a slight misnomer, of course, because Costigan was an undercover officer rather than a cooperator. However, the scenario remains emblematic of the problem and arguably influences the behavior of prosecutors and agents. *See infra* Part IC.

[12] While the issue of the online dissemination of sensitive private information, such as home addresses and social security numbers, has been the subject of detailed debate, *see, e.g.*, Gregory M. Silverman, *Rise of the Machines: Justice Information Systems and the Question of Public Access to Court Records over the Internet*, 79 WASH L. REV. 175, 206-10 (2004) (considering Internet access to civil and criminal cases), problems specific to cooperation in criminal cases have not yet been fully examined.

[13] Violence against cooperating defendants has been an intractable problem and shows no signs of abating. *See* discussion *infra* note 213 and accompanying text.

[14] "Law enforcement agencies may be less likely to cooperate with U.S. Attorneys if they know that *everything* they say will be spread on the public record . . . . For that matter, witnesses and defendants may be less willing to cooperate, for more disclosure increases the risk of retaliation by their former confederates in crime." United States v. Zingsheim, 384 F.3d 867, 872 (7th Cir. 2004) (emphasis in original).

[15] *See infra* notes 97-101 and accompanying text.

bargaining system in general—suffers from a lack of transparency, even a lack of basic information, that has persistently hobbled efforts toward effective public oversight.[16] While purchasing information and testimony from defendants in return for leniency has always been an integral part of federal investigations and prosecutions,[17] it is also a practice that is susceptible to capricious application, resulting in wide, unjustifiable disparities in the treatment of cooperators across the country.[18] The paradox of electronic access is that as ease of accessibility increases, so do the incentives to compensate for that access by further obfuscation. The forces that push the practice into the shadows can only be exacerbated by the fears raised by electronic access to court files.

In addition, the cost to privacy cannot be overlooked. Unlike the more forgiving world of paper records and fallible human memory, in cyberspace, nothing is ever forgotten.[19] Information remains eternally fresh, springing to the screen as quickly years later as it did on the day it was first generated. If all federal defendants run the risk of becoming a permanently stigmatized underclass, cut off from legitimate opportunities of mainstream society,[20] cooperating defendants are further burdened with potential rejection by their former communities.[21]

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[16] *See* Hughes, *supra* note 4, at 21; Daniel C. Richman, *The Challenges of Investigating Section 5K1.1 in Practice*, 11 FED. SENT'G REP. 75, 76 (1998) [hereinafter Richman, *Challenges*]; Patti B. Saris, *Below the Radar Screens: Have the Sentencing Guidelines Eliminated Disparity? One Judge's Perspective*, 30 SUFFOLK U. L. REV. 1027, 1047 (1997).

[17] Unlike in certain state systems, where many codes of criminal procedure forbid a jury relying on the uncorroborated word of an accomplice, *see* 7 WIGMORE § 2056, federal prosecutors can bring cases relying solely on cooperating witnesses. *See, e.g.*, United States v. DeLarosa, 450 F.2d 1057, 1060 (3d Cir. 1971) ("uncorroborated accomplice testimony may constitutionally provide the exclusive basis for a criminal conviction") (citing Caminetti v. United States, 242 U.S. 470, 495 (1917)).

[18] As Albert Alschuler has observed, "[t]he word 'disparity' can mean either inequality or difference. . . . Inequality is another word for 'unwarranted' disparity." Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85, 87 n.3 (2005).

[19] *See infra* notes 238-40.

[20] *See* James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 ST. THOMAS L. REV. 387, 387-91 (2006).

[21] *See* Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 4 (2003) [hereinafter Simons, *Retribution for Rats*] (noting that "the 'common disdain' in which cooperators are held often means that the cooperator is ostracized not only from his accomplices, but also from other communities that may be important to him.").

This Article argues that simply enabling the public and the press access to criminal court files over the Internet will not ultimately shed light on the workings of government and is likely to prove counterproductive. Electronic access and the fears it raises might increase the disparate ways in which cooperation is administered, with little hope of remedy. Instead, the twin interests of public access and the just administration of cooperation bargains would be better served, not by electronic access to individual criminal court files, but by systematic disclosure of plea bargains in all cases, with identifying information redacted. Greater information could be a step towards rationalizing and improving what has been an area particularly resistant to study, and thus to reform.

These suggestions are particularly timely in light of the recent public debate triggered by the use of PACER information on a website called Whosarat.Com, which maintains thousands of profiles of cooperators and informants.[22] The site's profiles are legitimized by their use of court records; otherwise empty allegations that someone is a "rat low-life informant"[23] are given substance when linked to court documents such as plea agreements that detail the quid pro quo struck between that person and the government.[24]

Concerned that the website would encourage violence against cooperators, the Department of Justice asked the Judicial Conference to remove all plea agreements from the PACER system.[25] This proposal was met with fierce resistance from the public, the press, and the defense bar.[26] The debate, which the Judicial Conference has for the moment

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[22] *See* Who's A Rat, http://www.whosarat.com.

[23] Who's A Rat Informant Profile 495, http://www.whosarat.com/search_profiles.php?keyword=&profile=2&x=43&y=4&start=450www.whosarat.com (last visited July 2, 2008).

[24] As the site itself notes, "[a]ll posts made by users should be taken with a grain of salt unless backed by official documents." Who's A Rat About Us, (last visited Aug. 4, 2008).

[25] Letter from Michael A. Battle, Dir., Executive Office for U.S. Attorneys, U.S. Dep't of Justice, to James C. Duff, Sec'y, U.S. Judicial Conference, at 2 (Dec. 6, 2006) [hereinafter Battle Letter] (on file with author). The Judicial Conference is "the principal policy making body concerned with the administration of the United States Courts." U.S. Courts Frequently Asked Questions, http://www.uscourts.gov/faq.html.

[26] In response to the Judicial Conference's Fall 2007 Request for Comment on Privacy and Security Implications of Public Access to Certain Electronic Criminal Case File Documents, http://www.privacy.uscourts.gov/requestcomment.htm, open access proponents argued that Internet access provides accountability, transparency, and convenience. *See, e.g.*, Sandra Baron, *Public Comments of the Media Law Resource Center, Inc., Concerning the Proposal to Restrict Public Internet Access to Plea Agreements in Criminal Cases* 4-5 (Oct. 25, 2007) [hereinafter MLRC Comment],

declined to resolve,[27] received scant scholarly attention. But the question—whether records revealing the identity of cooperating defendants should be accessible over the Internet—deserves scrutiny. The issue of what information should be available electronically is a pressing one, which has attracted the attention of key actors in the system. Yet current approaches, which range from untrammeled access to severe clampdowns on information, are unsatisfying. Since federal court records remain accessible at the courthouse,[28] unlimited electronic access is not strictly necessary, either under the Constitution or the common-law. This Article is an attempt to engage with the conflicting values of open access and the needs of a fair and effective criminal justice system and to forge a solution that can accommodate both.

The Article starts from the idea that the primary purpose of electronic access should be to enable the public to understand what their government is doing. There is no overwhelming public need to know that a defendant named Billy Costigan is cooperating, so long as the public understands what the government has traded in order to secure his

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available at www.privacy.uscourts.gov/2007text.htm [hereinafter Privacy Comments], Comment 63; Rene P. Milam & Guylyn R. Cummins, *Comments of the Newspaper Association of America et al. on Public Internet Access to Plea Agreements Filed as Court Records* 4-6 (Oct. 25, 2007) [hereinafter NAA Comment], *available at* Privacy Comments, Comment 64; Nat'l Assoc. of Criminal Defense Lawyers, *NACDL Comments on Privacy and Security Implications of Public Access to Certain Electronic Criminal Case File Documents* 1-3 (Oct. 26, 2007) [hereinafter NACDL Comment], *available at* Privacy Comments, Comment 67.

[27] *See* Judiciary Privacy Policy, available at http://privacy.uscourts.gov. As of August 2008, the Judicial Conference simply issued the following statement: "After considering the issue, including the comments received, the Court Administration and Case Management Committee decided to not recommend that the Conference change the national policy at this time. Instead, it informed the district courts of the need to consider adopting local policies while emphasizing that such policies should be the least restrictive to promote legitimate public access. The Committee may revisit the issue of a national policy at a later date." *Id.*

[28] For the moment, courts continue to maintain paper files. *See* JUD. CONF. COMM. ON COURT ADMIN. & CASE MGMT., REPORT ON PRIVACY AND PUBLIC ACCESS TO ELECTRONIC CASE FILES (amended Dec. 2006), *available at* www.privacy.uscourts.gov/Policy.htm (recommending that public access to case files in the courthouse not be affected by new policies). Even if paper records are phased out, each clerk's office can maintain a closed network of court documents accessible only through terminals at the courthouse, which would mimic the consultation of a paper file in a more convenient format. *See* William A. Fenwick & Robert D. Brownstone, *Electronic Filing: What Is It? What Are Its Implications?*, 19 SANTA CLARA COMPUTER & HIGH TECH. L.J. 181, 204 n.84 (2002) (noting that "plans for a kiosk or terminal in the courthouse that can be used to file pleadings and/or access the electronic files" accompany most e-filing projects).

cooperation. The recent controversy presents an opportunity to answer the call of scholars and practitioners to remedy the lack of insight into the cooperation process. As the Judicial Conference has declined to issue a nationwide standard addressing Internet access to plea documents, the time is ripe for a constructive compromise that could limit access, but enhance the content of public information across the country. The goal is not to leave the public in the dark, but to promote fairness and transparency in the administration of one of the federal criminal system's most frequently used, yet least understood tools.

The Article proceeds in three parts. Part I will explore the tension between electronic access and the operation of an effective criminal justice system. This section will discuss how federal cooperation works in practice, and will critique the lack of standards to guide courts and prosecutors in rewarding cooperation. The resulting disparities will only increase with rising prosecutorial concerns about the risks of exposure to cooperating defendants in an online world. By curtailing prosecutors' ability to shield certain transactions from view, electronic access ultimately risks causing the public to lose meaningful information about how sentencing bargains are made. Part II examines the theoretical foundations of the right of access to court proceedings and documents, which spring primarily from a political theory of the First Amendment. This Part also evaluates the Court's privacy jurisprudence, which provides support for a possible limitation on access. If the values of informed self-government are not advanced by the dissemination of information about private citizens that sheds no light on what the government is doing, perhaps the costs of such dissemination outweigh its benefits. Part III offers suggestions to reconcile the values of access with those of a fair and effective administration of justice. It considers the recent debate over the accessibility of plea agreements over the Internet and evaluates the different solutions that have been proposed by courts, practitioners, and the Justice Department. The Part concludes that electronic information should be treated differently than paper records, because unfettered electronic access causes the participants in the system to change their behavior in ways that can obstruct, rather than enhance, public oversight. The Article instead proposes an approach that would pair limitations on online access to criminal court files with systematic disclosure of detailed plea and cooperation agreements in their factual context, but divorced from identifying data. A solution of this type would best protect privacy and security, while enabling the public and press to engage in genuine government oversight.

I. THE COLLISION OF ELECTRONIC ACCESS AND CRIMINAL JUSTICE

While availability of court records on the Internet has seemingly fulfilled the promise of public access, it has only exacerbated the conflict between open access values and the operational needs of the criminal justice system. These problems are crystallized in the case of cooperating defendants,[29] where the government's desire for secrecy is at its height and the consequent distortions most pronounced.

A. The Specific Problem of Federal Cooperation

For a practice so deeply ingrained in our legal culture,[30] cooperation engenders an enormous amount of hostility. The overarching critique is that there is something fundamentally distasteful

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[29] I will only be looking at cooperating defendants in ordinary criminal cases, such as violent crime, narcotics, and organized crime, not national security or terrorism, where the government has resorted to a much higher level of secrecy. *See, e.g.*, Bill Mears, *Court Declines Appeal on 9/11 Secrecy*, CNN, Feb. 23, 2004, http://www.cnn.com/2004/LAW/02/23/scotus.terror.secrecy/index.html (former terror suspect Mohamed Bellahouel and news agencies both denied access to Bellahouel's sealed court proceedings).

[30] "In the words of Judge Learned Hand, 'Courts have countenanced the use of informers from time immemorial; in cases of conspiracy, or in other cases when the crime consists of preparing for another crime, it is usually necessary to rely upon them or upon accomplices because the criminals will almost certainly proceed covertly.'" Hoffa v. United States, 385 U.S. 293, 311 (1966) (quoting United States v. Dennis, 183 F.2d 201, 224 (2d Cir. 1959)). The earliest precursor of cooperation appears to have been the English medieval practice of "approvement," whereby a person indicted for a capital crime could elect to become an "approver," confessing his guilt and attempting to incriminate others in order to obtain a pardon. *See* Richard C. Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J 1091, 1091 (1951). The court had discretion to admit or reject the defendant as an approver. *See* Rex v. Rudd, 98 Eng. Rep. 1114, 1116 (1775). If the approver was admitted as such and the targets were convicted, the approver was pardoned, but if they were acquitted, the approver was hanged. *See* Donnelly, 60 YALE L.J at 1091 (citing 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW 631 (1899)). The draconian consequences of failing to convict one's accomplices were so conducive to perjury that the practice was abandoned. *See* 2 SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 226 (Sollom Emlyn ed. 1736). Accomplice testimony was thereafter procured by giving a defendant who turned "king's evidence" or "state's evidence" an equitable right to request a pardon. *See* Simons, *Retribution for Rats*, *supra* note 21, at 6 & n.11. Eventually, the power to decide which witnesses could cooperate and testify for the state shifted away from the court to the prosecutor, where it remains today. *See id.* at 6 & n.12, 13.

about rewarding wrongdoers for informing on their associates.[31] Because a cooperator's actions cannot easily be reconciled with our ideals of loyalty,[32] he is viewed, at best, with ambivalence, if not outright "aversion and nauseous disdain."[33] Nor does the practice reflect well on the government, which sends a troubling moral message that the consequences of criminality can be avoided by betraying more valuable targets.[34] As one commentator has observed, "[t]he spectacle of government secretly mated with the underworld and using underworld characters to gain its ends is not an ennobling one."[35]

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[31] This view has been dominant since the 19th century. *See* 2 SIR ERSKINE MAY, CONSTITUTIONAL HISTORY OF ENGLAND 277 (1863) ("So odious is the character of a spy, that his ignominy is shared by his employers, against whom public feeling has never failed to pronounce itself, in proportion to the infamy of the agent and the complicity of those whom he served."). A minority view holds that cooperation gives some defendants a chance to reject their criminal past and start a new life. *See* Simons, *Retribution for Rats*, *supra* note 21, at 4-5 ("While it is no doubt true that most defendants who cooperate do so (at least initially) for selfish reasons, there is an occasional defendant for whom the decision to cooperate is motivated by a genuine desire to make amends for wrongdoing."); John Gleeson, *Supervising Criminal Investigations: The Proper Scope of the Supervisory Power of Federal Judges*, 5 J.L. & POL'Y 423, 453 (1997) (noting prosecutors' belief that "cooperation with the government reveals something positive about a defendant's moral worthiness, contrition and prospects for rehabilitation.").

[32] George Fletcher posits that loyalty is central to our conception of justice. GEORGE P. FLETCHER, LOYALTY 20-21 (1993). We may feel aversion to the act of informing, "even when the bad act deserves exposure, because we appreciate the value of loyalty itself, apart from the worthiness of its object. . . . The argument that the relationship that pursues illegal ends deserves no loyalty fails to separate out the illegality from the relationship." Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563, 623 (1999). Still, some cooperators may inform on their associates because they value other relationships more highly, such as those with their children or aging parents.

[33] Donnelly, *supra* note 30, at 1093.

[34] *See* Daniel C. Richman, *Cooperating Defendants: The Costs and Benefits of Purchasing Information from Scoundrels*, 8 FED. SENT'G REP. 292, 292-93 & n.14 (1996) [hereinafter Richman, *Costs and Benefits*] (noting that cooperation has negative effect on deterrence); Donnelly, *supra* note 30, at 1094 ("Even confirmed law-breakers have their standards of 'squareness.' To them the stool pigeon situation is the outstanding proof that law enforcement is not square. Contempt for law is thus encouraged.").

[35] Donnelly, *supra* note 30, at 1094.

Still, we live with the practice because of its usefulness.[36] Cooperators enable the government to investigate and prosecute criminal organizations that it would otherwise be unable to infiltrate; without them, we would be limited to prosecuting only the most visible, low-level crimes.[37] Cooperators can give investigators and prosecutors an inside view into a criminal conspiracy[38] and, if a case does go to trial, they can help tell a coherent story to the jury.[39]

1. How Cooperators Are Recruited and Rewarded. While local practice varies by district, many cases follow a similar pattern. A defendant who is considering cooperation will first attend a proffer session, a meeting between the defendant and his lawyer, the prosecutor, and one or more investigating agents.[40] During that and any subsequent proffers, the defendant will typically be debriefed, not only as to his knowledge of the scheme for which he was arrested, but also as to his knowledge and involvement in all other crimes.[41] Because his ultimate object is to receive a motion from the government to the sentencing court stating that he has provided "substantial assistance" in the investigation or prosecution of another,[42] the defendant will attempt to convince the government that he is trustworthy and that he has information of value.

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[36] As Graham Hughes observed, "most cooperation agreements would be difficult to fit into any concept of repentance or rehabilitation. These are agreements to sell a commodity—knowledge." Hughes, *supra* note 4, at 13. Nonetheless, Hughes concludes that the "utilitarian approach is surely the correct one." *Id.* at 15.

[37] *See* Frank O. Bowman III, *Departing is Such Sweet Sorrow: A Year of Judicial Revolt on "Substantial Assistance" Departures Follows a Decade of Prosecutorial Indiscipline*, 29 STETSON L. REV. 7, 44 (1999) ("[W]ithout accomplice testimony secured through substantial assistance agreements, several important categories of serious federal crime would be far more difficult to prosecute, and many individual cases within those categories would not be prosecuted at all.").

[38] *See* Stephen S. Trott, *A Word of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381, 1391 (1996) ("It is a simple fact that frequently the only persons who qualify as witnesses to serious crime are the criminals themselves.").

[39] *See* Weinstein, *supra* note 32, at 595 (cooperator testimony can provide "the only complete narrative of a conspiracy whose details would otherwise only be presented to a jury in incomplete snatches obtained through wiretaps, undercover testimony and other investigative tools that cannot match an insider's view.").

[40] For a detailed description of the proffer process, *see* Gleeson, *supra* note 31, at 447-50.

[41] *See, e.g.*, Mary Patrice Brown & Stevan E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 AM. CRIM. L. REV. 1063, 1075 (2006) (practice in D.C.).

[42] In the federal system, cooperation is generally not rewarded based on the success of the government's prosecution. *See* Hughes, *supra* note 4, at 37 n.140.

If the government perceives that his benefit as a witness and source of information outweigh the disadvantages of a deal, it will offer the defendant a cooperation agreement, which typically requires the defendant to plead guilty, to testify truthfully if asked, to agree to delay his own sentencing, and to refrain from any other criminal conduct.[43] In return, the government will agree to make a motion for "substantial assistance," which enables the court, in its discretion, to impose a sentence lower than either the advisory sentencing guidelines or below any statutory mandatory minimum, or both.[44] The motion will set forth the nature and extent of the defendant's cooperation, which may consist of simply providing information, agreeing to testify, giving testimony, or taking an active part in an investigation.[45] Typically, the cooperator's sentence will be delayed until all the other targets of the investigation have been sentenced.[46] Committing additional crimes, or being found out in a lie, will usually be considered a breach of the cooperation agreement and will forfeit the cooperator's right to a government motion.[47]

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[43] Ordinarily, the cooperator is required to plead to the most serious charge to which he has admitted, or at least a charge commensurate with the defendants against whom he may testify. *See* U.S. Attorney's Manual 9-27.430 comment B(1), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.420.

[44] The government may make the motion pursuant to Section 5K1.1 of the U.S. Sentencing Guidelines or Section 3553(e) of Title 18 of the United States Code, or both. Section 3553(e) grants the district court authority, upon motion of the government, to impose a sentence below a statutory maximum "so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." 18 U.S.C. § 3553(e) (2006). Section 5K1.1 gives the court similar authority to depart from the Sentencing Guidelines. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2007). The court may then consider, among other things, "(1) . . . the significance and usefulness of the defendant's assistance, [. . .] (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant; (3) the nature and extent of the defendant's assistance; (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance; (5) the timeliness of the defendant's assistance." *Id.* § 5K1.1(a).

[45] *See* Stanley Marcus, *Substantial Assistance Motions: What Is Really Happening?*, 6 FED. SENT'G REP. 6, 7 (1993) (describing categories of cooperation).

[46] *See* Hughes, *supra* note 4, at 3. Like every other aspect of federal cooperator practice, this aspect varies by region. In the "rocket docket" of the Eastern District of Virginia, cooperators are routinely rewarded by a Rule 35(b) motion for resentencing, since sentences are not delayed. *See* Richman, *Challenges*, *supra* note 16, at 77.

[47] *See, e.g.*, United States v. Schwartz, 511 F.3d 403, 406 (3d Cir. 2008) (government properly withdrew substantial assistance motion where cooperator continued drug trafficking activities); United States v. Butler, 272 F.3d 683, 687 (4th Cir. 2001) (government properly refused to file substantial assistance motion where cooperator

The government's dependence on the cooperation process and the contingent nature of the bargain provoke their own critiques. Because only "successful" cooperation is rewarded, there is concern that this creates incentives for the cooperator to try to please the prosecutor, with attendant risks of perjury and false leads.[48] Some point to cooperation's deleterious effect on the adversary system, contending that lazy or overburdened prosecutors use cooperation as a case management tool,[49] and that defense lawyers are reduced to insignificant roles on the sidelines.[50] Additionally, because a sentencing court can only depart from the advisory Guidelines, and more critically, ignore any applicable mandatory minimum sentence, on motion by the government, critics contend that the practice shifts too much sentencing power from the courts to the government.[51] Finally, some argue that the system rewards

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threatened life of co-defendant in jail); United States v. Nealy, 232 F.3d 825, 830 (11th Cir. 2000) (no substantial assistance motion where cooperator was arrested with cocaine base five days after testifying against his supplier). *See also* Weinstein, *supra* note 32, at 585-87 (noting that unsuccessful efforts to cooperate can result not only in the denial of a substantial assistance motion, but also a potential sentence enhancement for obstruction of justice, or additional criminal liability).

[48] *See* R. Michael Cassidy, *Soft Words of Hope: Giglio, Accomplice Witnesses, and the Problem of Implied Inducements*, 98 NW. U. L. REV. 1129, 1147 (2004) ("a cooperating witness cannot help but perceive that leniency from the government will depend upon a successful prosecution."); Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 952 (1999) (interviews with former prosecutors and defense lawyers in the S.D.N.Y. indicating that "cooperators are eager to please prosecutors" and therefore have incentive to lie). *But see* Bowman, *supra* note 37, at 44 ("no one, on either side of the debate, has any idea how frequently cooperating government witnesses lie, or what is more to the point, whether they lie more than any other type of witness.").

[49] *See* Bowman, *supra* note 37, at 59 ("When cooperation departures are dispensed in nearly half of all cases, the substantial assistance motion has ceased to be a closely guarded method of obtaining needed evidence, and has degenerated into a convenient caseload reduction tool").

[50] *See* Weinstein, *supra* note 32, at 617 (arguing that cooperation "strips away what little remains of the adversary system" in cases resolved by guilty plea and "marginalizes and often eliminates the defense lawyer."). Daniel Richman, on the contrary, sees a critical role for the defense lawyer in helping the would-be cooperator assess his options and evaluate the trustworthiness of the attorney for the government. *See* Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69, 73-74, 89-111 (1995) [hereinafter Richman, *Cooperating Clients*].

[51] *See, e.g.*, Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105, 177-79 (1994) (arguing that the government motion requirement should be eliminated). Since judges have complete discretion as to whether to grant a departure at all, and can control its magnitude, underlying this critique is the assumption that prosecutors may fail to make substantial assistance motions even when the defendant has cooperated. Whether this

defendants without regard to moral culpability, since better informed defendants, who have more knowledge to sell, are frequently more deeply immersed in the criminal conduct, another problem exacerbated in the context of crimes carrying mandatory minimum sentences, such as narcotics offenses.[52]

2. Disparities in Administration. The limits of these criticisms are that no-one really knows how valid they are. Most of those who write about cooperation, including this author, are influenced by their former experiences as participants in the system. Because there is so little empirical information and available data, the literature is frequently grounded on the impressionistic and anecdotal.[53] But although no study has yet been able to reveal how cooperation actually works across the 94 federal districts, every indicator is that it is administered in widely disparate ways across the country.[54]

One of the main culprits is a lack of national standards, even within the Justice Department.[55] It is undisputed that the government

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happens often is open to debate; many note that it would ill serve prosecutors to fail to make these motions without good cause. *See, e.g.*, Gleeson, *supra* note 31, at 454-55 (noting powerful institutional incentives for government to foster cooperation). Indeed, some argue that the problem is not that prosecutors unreasonably withhold the motion, but are too liberal in handing them out. *See* Bowman, *supra* note 37, at 58 ("the persistent temptation for prosecutors is not to withhold § 5K1.1 motions from the deserving, but to distribute them liberally in order to facilitate easy guilty pleas").

[52] *See* Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 213 (1993) (observing how under a mandatory minimum regime, "[t]he big fish get the big breaks, while the minnows are left to face severe and sometimes draconian penalties"). There is some skepticism, however, about how frequently this type of inversion occurs. *See* Bowman, *supra* note 37, at 48. Since judges have discretion to grant or deny a substantial assistance motion, and control the magnitude of any such departure, Bowman argues, it would be only "a remarkably inept jurist" who could not "maintain rough proportionality within a single case if he or she considers it important to do so." *Id.* at 53.

[53] *See* Richman, *Costs and Benefits*, *supra* note 34, at 294 ("Because the exchange of cooperation for sentencing leniency is under-regulated and never the subject of systematic empirical investigation, the views of every actor or former actor in the system on this issue will be based on personal experience or anecdote.").

[54] *See* Richman, *Challenges*, *supra* note 16, at 75.

[55] The Sentencing Guidelines Manual recognizes the fact-specific nature of the inquiry: "The nature, extent, and significance of assistance can involve a broad spectrum of conduct that must be evaluated by the court on an individual basis." U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 cmt. background (2007). While each U.S. Attorney's Office can establish its own internal policies regarding substantial assistance, one study found that at least a third of U.S. Attorney's Offices did not adhere to their own policies. *See* Linda Drazga Maxfield & John H. Kramer, *Substantial Assistance: An*

alone holds the power to make a motion on the basis of substantial assistance, and that its decision, in most cases, cannot be reviewed.[56] But how much assistance is substantial? The answer seems to depend on the district in which the defendant is prosecuted. In some districts, a cooperator must testify in the grand jury or in a court proceeding in order to qualify for a sentence reduction.[57] In others, the prosecutor may give a defendant the benefit of a substantial assistance departure simply for providing truthful information and being willing to testify,[58] or even for not providing any assistance at all.[59] In the most demanding districts, even truthful in-court testimony will not suffice; the cooperator must participate in undercover operations, engaging in such risky tasks as wearing a wire, conducting undercover meetings with targets, or making recorded telephone calls.[60]

Even after the government has decided to file a motion for substantial assistance, there is no guidance on the degree of departure

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Empirical Yardstick Gauging Equity in Current Federal Policy and Practice 7-8 (1998), available at http://www.ussc.gov/publicat/5kreport.pdf.

[56] The only limit on the government's power is that it may not decline to file a motion for unconstitutional reasons, such as race, gender, or religious affiliation. *See* Wade v. United States, 501 U.S. 181, 185 (1992) ("in both § 3553(e) and § 5K1.1 the condition limiting the court's authority gives the Government a power, not a duty, to file a motion when a defendant has substantially assisted.").

[57] *See Federal Court Practices: Sentence Reductions Based on Defendants' Substantial Assistance to the Government*, 11 FED. SENT'G REP. 18, 23-24(1998) [hereinafter *Sentence Reductions*] (majority of judges interviewed for study reported that "providing testimony leading to the arrest/conviction of others was the primary behavior to warrant a departure").

[58] *See, e.g.*, Brown & Bunnell, *supra* note 41, at 1072 (cooperators must at a minimum "provide a full and complete debriefing about [their] own criminal conduct in the instant case, as well as information about the criminal conduct of others"); *Sentence Reductions*, *supra* note 57, at 20 (describing similar practice in "Site A").

[59] In one of the few empirical studies made of cooperation practice, prosecutors admitted to occasionally rewarding defendants for arbitrary reasons, such as finding them "sympathetic." *See* Ilene Nagel & Stephen Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 522-23, 531-32, 550 (1992) (interviewing prosecutors, defense lawyers, judges and probation officers in three different districts and finding that in an appreciable minority of cases, prosecutors were filing 5K motions when there was no substantial assistance). As the authors point out, "such individually made equity judgments open the door to race, gender, and social-class bias, notwithstanding the good intentions of individual AUSAs hoping to 'save' sympathetic defendants." *Id.* at 535-36.

[60] *See* Lee, *supra* note 51, at 125-26 (in C.D. Ill., "the U.S. Attorney's Office will not file a 5K1.1 motion unless the defendant goes undercover and wears a 'wire' to help law enforcement authorities apprehend other criminals").

warranted by the cooperation. Should the government even recommend a particular magnitude of departure? Some districts do, while others do not, leaving the entire matter to the discretion of the sentencing judge.[61] How much credit should the defendant be given for cooperation? Once again, it depends. Some U.S. Attorney's Offices recommend a specific number of levels to the sentencing court.[62] Other offices recommend a percentage discount of anywhere between 10 and 50 percent.[63]

Cooperation potentially provides a great benefit to the successful cooperator, who might ultimately get years off his sentence, or even avoid prison altogether.[64] But it is a benefit that is unevenly, if not arbitrarily, bestowed. Any attempt to remedy the situation is complicated by the fact that we do not even know how many defendants cooperate. The United States Sentencing Commission, which tracks federal sentencing, keeps statistics on how many substantial assistance departures are granted at sentencing,[65] but not on how many are made after sentencing pursuant to Rule 35(b),[66] or how many substantial

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[61] *See, e.g.*, Richman, *Cooperating Clients*, *supra* note 50, at 99-100 & n.108 (describing practice in E.D.N.Y. and D.C.).

[62] *See* Saris, *supra* note 16, at 1046-47 (reporting that in one district "the AUSA will recommend a two-level reduction for a defendant who agrees to testify against another person, and a four-level departure where the defendant participates in an investigation").

[63] *See, e.g.*, Ronald S. Safer and Matthew C. Crowl, *Substantial Assistance Departures: Valuable Tool or Dangerous Weapon?*, 12 FED. SENT'G REP. 41, 43-44 (1999) (N.D. Ill. U.S. Attorney's Office "typically insisted upon agreed sentences for cooperation plea agreements. . . . [that] typically reflected a 33% or 50% reduction of the applicable guideline"); Saris, *supra* note 16, at 1050 (50% reduction in D. Mass.); *Sentence Reductions*, *supra* note 57, at 21 , 23 (25% reduction in sentence in "Site D" and 33% in "Site F").

[64] *See, e.g.*, United States v. Featherstone, 1988 WL 142472, at *1-3 (S.D.N.Y. Dec. 27, 1988) (former Westies member, responsible for four murders, sentenced to five years' probation); Joseph P. Fried, *Ex-Mob Underboss Given Lenient Term For Help as Witness*, N.Y. TIMES, Sept. 27, 1994, at A1 (celebrated mob turncoat Salvatore Gravano sentenced to five years' imprisonment despite involvement in 19 murders).

[65] In 2007, 13.8% of federal defendants, or 10,049 people, cooperated and received downward departures for substantial assistance. *See* U.S. SENTENCING COMMISSION, 2007 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS [hereinafter 2007 SOURCEBOOK], Table 30 n.1, *available at* http://www.ussc.gov/ANNRPT/2007/Table30.pdf.

[66] *See supra* note 46 and accompanying text (describing use of Rule 35(b) in E.D. Va.). In 2000, 1,453 offenders received 35(b) sentence reductions. *See* United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing* 106 (2004), available at http://www.ussc.gov/15_year/chap3.pdf.

assistance motions are denied by the court.[67] More critically, these statistics do not account for occasions when cooperation is rewarded in ways other than the classic combination of cooperation agreement and substantial assistance motion, such as reduced charges or fact-bargaining.[68] It further fails to account for "unsuccessful" cooperators who violate the terms of their agreement and receive no motion.[69]

In addition, the rates of downward departure for substantial assistance vary widely, from slightly more than three percent in some districts to 36% in others.[70] While some of these differences might be due to regional differences in the types of crimes prosecuted, the composition of the bench, and internal U.S. Attorney's Office policy, there are striking contrasts even in neighboring U.S. Attorney's Offices.[71] Finally, there appear to be racial and gender disparities in the

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[67] *See, e.g.,* United States v. Winters, 117 F.3d 346, 350 (7th Cir. 1997) (dismissing defendant's appeal of district court's refusal to grant downward departure for substantial assistance); United States v. Mittelstadt, 969 F.2d 335, 337 (7th Cir. 1992) (same); United States v. Hayes, 939 F.2d 509, 511 (7th Cir. 1991) (same); United States v. Castellanos, 904 F.2d 1490, 1497 (11th Cir. 1990) (same).

[68] Fact-bargaining involves agreement between the parties as to which facts should be relied on by the sentencing court and typically involves understatement of critical facts, such as the weight of narcotics or whether a firearm was used. *See* Nagel & Schulhofer, *supra* note 59, at 547. While such bargaining runs contrary to the Sentencing Guidelines's mandate that plea agreements be based on a defendant's actual conduct in committing the offense of conviction, *see* U.S. SENTENCING GUIDELINES MANUAL § 6B1.2 (2007), in practice "parties can handicap the judge's ability to detect how their recommended disposition deviates from the Guidelines by managing the information that is revealed during the presentence investigation." Nancy J. King, *Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment*, 58 STAN. L. REV. 293, 295 (2005). *See also* Richman, *Challenges*, *supra* note 16, at 76 ("The challenge is for an outsider to figure out exactly *when* charge discounts or sentencing fact discounts are used in lieu of § 5K1.1 motions. . . . and it is not one that the Commission or anyone else appears equal to.") (emphasis in original).

[69] *See supra* note 47 and accompanying text.

[70] In 2007, the rate of substantial assistance departures among sentenced defendants in the District of New Mexico (3.3%), the District of South Dakota (3.4%), the District of Rhode Island (3.5%), the Western District of Wisconsin (3.6%), the District of Alaska (4.0%), and the Southern District of California (4.4%), was much lower than in the Eastern District of Pennsylvania (33.6%), the District of Columbia and the Middle District of Alabama (both 33.9%), the Middle District of Pennsylvania (35.5%), the Southern District of Ohio (35.7%), and the Eastern District of Kentucky (36%). *See* 2007 SOURCEBOOK, *supra* note 65, Table 26.

[71] Even in neighboring districts, such as the Western District of Pennsylvania (11.7% of substantial assistance departures) and the Middle District of Pennsylvania (35.5%), the Western District of Virginia (22.6%) and the Eastern District of Virginia (5.9%), or the Northern District of Mississippi (29.9%) and the Southern District of Mississippi (8.5%), the disparities are striking. *See* 2007 SOURCEBOOK, *supra* note 65, Table 26.

rate of substantial assistance motions and in the magnitude of departures granted, for which there is no apparent satisfactory explanation.[72]

B. What Can Be Revealed Through Electronic Access

It was within this environment that the federal courts began experimenting with ways of making information more easily accessible to litigants and to the public, with concomitant benefits in convenience, speed, and economy.[73] PACER began as a sluggish dial-up system that provided access to docket information in just a few courts.[74] Today, all ninety-four district courts offer PACER access over the Internet[75] to anyone with a valid registration.[76] A complementary system, Case Management/Electronic Case Filing ("CM/ECF"),[77] enables parties to file papers with the court electronically instead of scanning in paper records.[78] These documents are then available to PACER users, who

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[72] *See* Maxfield & Kramer, *supra* note 55, at 13-14 & n.30 (African-Americans are 8% to 9% less likely than Caucasians to receive substantial assistance departures, Latinos 7% less likely). The statistics also show that when minority defendants do receive substantial assistance departures, the magnitude of departure is less than for white defendants. *See id.*

[73] *See* Silverman, *supra* note 12, at 176-78.

[74] Early reports on PACER describe it as "agonizingly slow." M.J. Quinn, *PACER Today and Tomorrow: The Court's System Improves with Age*, 212 N.Y.L.J. 5, Dec. 6, 1994.

[75] *See* U.S. Courts About CM/ECF, www.uscourts.gov/cmecf/cmecf_about.html. PACER handled over 200 million requests for information in 2006. *See Access to Court Information Ever Expanding*, THIRD BRANCH (Admin. Off. U.S. Cts., Off. Pub. Affs, D.C.) July 2007, *available at* http://www.uscourts.gov/ttb/2007-07/accesstocourts/index.html.

[76] Anyone with a name, address and email address can register at http://pacer.psc.uscourts.gov/psco/cgi-bin/register.pl; with a valid credit card, registration is almost instantaneous. Without a credit card, a user will receive a password by mail. *See* PACER FAQ, *supra* note 2.

[77] As described by the CM/ECF website, "CM/ECF is a comprehensive case management system that [allows] courts to maintain electronic case files and offer electronic filing over the Internet. Courts can make all case information immediately available electronically through the Internet." ECF Frequently Asked Questions, http://pacer.psc.uscourts.gov/cmecf/ecffaq.html [hereinafter ECF FAQ]. By the beginning of 2008, all 94 district courts were using the system.

[78] Rule 49(d) of the Federal Rules of Criminal Procedure authorizes electronic filing by incorporating by reference Rule 5(e) of the Federal Rules of Civil Procedure. FED. R. CRIM. P. 49(d) & advisory committee's note. Rule 5(e) provides that "[a] court may by local rule permit papers to be filed, signed, or verified by electronic means that are consistent with the technical standards, if any, that the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with a local

can access them by clicking on the links in the docket sheet.[79] To navigate the system, the U.S. Party/Case Index allows searches by defendant name in the criminal index, obviating the need for a user to comb through each district court's files.[80]

In terms of convenience, accessing court records over the Internet is a vast improvement over paper records. Before the advent of PACER, anyone who wanted to consult a criminal case file had to go to the courthouse, stand in line at the clerk's office, and request the case file by number. The clerk would then go to the stacks, look for the case folder, and bring it to the requestor. If the file was misplaced, or had been checked out by a court's chambers, the requestor would have to come back another day. If the file was found, the person could then examine the file in the clerk's office, or could use the archaic, coin-operated photocopying machine to make copies. If the requestor wanted a closed file that had been sent to archives, she had to fill in a form, then wait several weeks for the file to be retrieved from an off-site storage facility.[81] In short, while court files were then, as now, publicly available, they were effectively available only to the very patient.[82]

This accessibility takes some of the guesswork out of identifying cooperators. Because the number of cases that go to trial is so low,[83] the vast majority of cooperating defendants never testify and their identities are not formally disclosed. Indications of their cooperation can nonetheless subsist in court records and docket sheets. For thousands of non-testifying cooperators, electronic access becomes a way by which they can be exposed, not only through PACER, but also through

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rule constitutes a written paper for the purpose of applying these rules." FED. R. CIV. P. 5(e).

[79] Documents filed in criminal cases prior to November 1, 2004 are only accessible by the attorneys of record, but for documents filed on or after that date, "any PACER user can view the docket sheet and filings for all non-sealed cases." ECF FAQ, *supra* note 77. The public access component of CM/ECF can be accessed with the user's PACER login and password; a specific CM/ECF login is only necessary when filing documents with the court. *See id.*

[80] *See supra* note 3.

[81] These observations are based on my experiences as a judicial clerk in the Eastern District of New York in the late Nineties, before the widespread adoption of PACER.

[82] For an entertaining description of how information moved from index cards to the Internet, *see* Silverman, *supra* note 12, at 176-78.

[83] The rate of cases resolved by guilty plea is around 95%. *See* 2007 SOURCEBOOK, *supra* note 65, Figure C (95.8% of cases resolved by guilty plea in fiscal year 2007).

websites that capitalize on the growing public hostility to "rats" and "snitches."[84]

There are of course numerous informal ways of identifying cooperators, including unexplained absences from the cellblock, prison gossip, and "word on the street."[85] In the notoriously paranoid world of federal detention centers, most defendants suspect each other of cooperating and, in many cases, they are correct. But easy access to court documents can confirm these suspicions. Typically, the most revealing documents are the defendant's cooperation agreement or the government's substantial assistance motion. Certain other documents, such as letters from the government to delay sentence until an investigation is concluded or until all co-defendants and other targets are sentenced, can also be strong indicators of cooperation.[86]

Sealing = Cooperation

Even if these documents are filed under seal, the sealing itself may serve as a "red flag" of cooperation.[87] In addition, sealing is

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[84] News reports indicate that cooperators, or "snitches," are currently objects of a popular culture backlash. The "Stop Snitching" campaign was sparked by an underground DVD of purported drug dealers threatening violence against informants, *see* Rick Hampson, *Anti-Snitch Campaign Riles Police, Prosecutors*, USA Today, Mar. 29, 2006, at 1A, and quickly gained the attention of the national media. *See, e.g.*, *America's Most Wanted: Gang Violence Boston Special Edition* (FOX television broadcast Feb. 11, 2006); *60 Minutes: Stop Snitchin'* (CBS television broadcast Apr. 22, 2007). Though the "Stop Snitching" movement initially targeted individuals who sought to cooperate with law enforcement by implicating others in exchange for leniency, the campaign against snitching has become more expansive and is now aimed even at witnesses and family members of crime victims. *See* Richard Delgado, *Police and Race Law Enforcement in Subordinated Communities: Innovation and Response*, 106 MICH. L. REV. 1193, 1204-05 (2008). Furthermore, the prohibition on snitching applies "not just when the crime is minor, such as drug possession, but also when it is major, such as homicide." *Id.* at 1205. In Baltimore and Boston, where the "Stop Snitching" message has been heavily espoused by rappers and gangs, "prosecutors estimate that witnesses face some sort of intimidation in 80 percent of all homicide cases." David Kocieniewski, *With Witnesses at Risk, Murder Suspects Go Free*, N.Y. TIMES, Mar. 1, 2007, at A1.

[85] Proponents of unlimited access contend that these informal risks of exposure eclipse that of court records. *See* NACDL Comment, *supra* note 26, at 6 ("Jailhouse gossip and 'word on the street' are far more likely sources of information for persons intending harm to a witness than plea agreements accessible on PACER.").

[86] This can mean that some cooperators plead guilty years before they are ever sentenced. This too, can be a "flag" for any person with familiarity with the federal system. *See* Letter from John R. Tunheim, Chair, Comm. on Court Admin. & Case Mgmt., & Paul Cassell, Chair, Comm. on Criminal Law, to Judges, U.S. Dist. Courts & U.S. Magistrate Judges at 1-2 (Nov. 9, 2006) (noting that motions to reschedule sentencing hearings might reveal cooperation).

[87] A study conducted by the Federal Judicial Center into remote public access to criminal court files in eleven pilot districts found that most practitioners believed that

disfavored in most jurisdictions[88] and a sealed motion or a motion to seal a proceeding must itself be part of the public record.[89]

More generally, a docket sheet can also reveal cooperation, a fact that is not lost on criminal defendants looking to identify those who might have informed against them.[90] Sometimes the information is unambiguous, such as docket entries explicitly identifying government motions for substantial assistance.[91] More often, docket sheet information can be "read" for markers of cooperation, such as sealed documents and proceedings around the time of plea or sentence, an unusually long delay between plea and sentence, or missing document numbers,[92] all of which are strongly suggestive of cooperation.

"a sealed document or a sealed hearing prior to sentencing may be evidence of cooperation by the defendant." *See* David Rauma, REMOTE PUBLIC ACCESS TO ELECTRONIC CRIMINAL CASE RECORDS: A REPORT ON A PILOT PROJECT IN ELEVEN FEDERAL COURTS 26 (2003) [hereinafter Pilot Project Report], *available at* http://www.fjc.gov/public/pdf.nsf/lookup/remotepa.pdf/$file/remotepa.pdf.

[88] *See, e.g.*, United States v. Cojab, 996 F.2d 1404, 1405 (2d Cir. 1993) (noting that the power to seal court documents "is one to be very seldom exercised, and even then only with the greatest caution, under urgent circumstances, and for very clear and apparent reasons.").

[89] The law in the majority of circuits requires that if a document is filed under seal, there must be a notation of the sealing on the docket sheet. *See In re* Application of The Herald Co., 734 F.2d 93, 102 (2d Cir. 1984); United States v. Criden, 675 F.2d 550, 558 (3d Cir. 1982). The *Herald* court noted that "[e]ntries on the docket should be made promptly, normally on the day the pertinent event occurs," although it allowed for delayed docketing in exigent circumstances. *See* 734 F.2d at 102-03 & n.7.

[90] "Some incarcerated clients advise me that they are under tremendous pressure from other inmates to produce their docket sheets for indications of cooperation." Judiciary Employee (Aug. 31, 2007) *in* Privacy Comments, *supra* note 26, Comment 3; *see also* Karen Moody, Chief, Probation & Pretrial Services, D. Maine (Sept. 23, 2007), *in* Privacy Comments, *supra* note 26, Comment 46 (local practice prohibits inmates from having court paperwork in their possession "because they are 'shaken down' by other inmates who want to read their documents in order to determine whether they are cooperating.").

[91] This is surprisingly frequent. A search of Westlaw's district court docket sheet database (DOCK-DCT-ALL), which collects information from PACER and repackages it in text-searchable form, turned up 3,208 cases where the term "substantial assistance" appeared in docket entries, and 5676 cases where the term "5K1.1" appeared. Only 614 docket sheets contained the term "3553(e)," the statutory basis for downward departure for substantial assistance to the government. *See* Westlaw, http://www.westlaw.com (last visited June 3, 2008). Nor were these docket entries subtle. Many of them state, "Motion by United States of America for Substantial Assistance as to [full name of defendant]," or words to that effect.

[92] *See* Pilot Project Report, *supra* note 87, at 26 ("If [a substantial assistance] motion is filed under seal, it may be accompanied by a docket entry that describes a sealed motion. Alternatively, that sealed motion may not be recorded in the online docket.

C. What Might Be Lost

The perceived risks of electronic access give prosecutors and defense counsel greater incentives to avoid the combination of cooperation agreement and motion for substantial assistance, and instead to bargain for other, less visible benefits. If prosecutors begin to feel that fewer defendants are willing to cooperate and that they might lose evidence, some may feel pressure to "sweeten the deal" by promising benefits with less public exposure. These can include charge-bargaining, which effectively conceals any sentence reductions,[93] fact-bargaining, which "often involves misleading the court and the probation department,"[94] dismissing federal charges and referring the cooperator's case for state prosecution,[95] or simply agreeing not to oppose a downward departure motion by the defense. And circumvention, "unlike overt downward departure, is hidden and unsystematic. It occurs in a context that forecloses oversight and obscures accountability."[96]

In some districts, the courts themselves are finding ways to camouflage cooperation agreements. The District of North Dakota has implemented a policy which requires prosecutors to file a generic plea agreement in all cases with no references to cooperation, as well as a sealed plea supplement."[97] The sealed supplement either contains a cooperation agreement or a statement that there is no cooperation

SEAL ALL AGREEMENTS SO YOU CAN'T TELL WHICH IS WHICH,

The result is a skip in the numbering of docket entries, which may be taken as evidence that a sealed document was filed with the court.").

[93] A charge bargain is a deal where the government allows a defendant to plead to a lesser crime than would otherwise be provable, or to which the defendant has admitted, obviating the need for a motion for sentence reduction. *See* Michael A. Simons, *Departing Ways: Uniformity, Disparity and Cooperation in Federal Drug Sentences*, 47 VILL. L. REV. 921, 959 (2002) [hereinafter Simons, *Departing Ways*] (charge-bargaining, while not lawless, "hides, or at least disguises, the sentencing reduction"). *See also* Nagel & Schulhofer, *supra* note 59, at 541-42 (describing how in one district, charge reductions were routinely used in lieu of substantial assistance motions; local probation officers estimated that this occurred in 50% of cooperation cases).

[94] Simons, *Departing Ways*, *supra* note 93, at 959. *See also supra* note 68.

[95] A 1998 study by the Sentencing Commission found that, in the district with the fewest substantial assistance departures, the government regularly engaged in charge bargaining "that allowed defendants to plead to lesser charges or referred the case to state/local courts for prosecution." *Sentence Reductions*, *supra* note 57, at 26.

[96] Nagel & Schulhofer, *supra* note 59, at 557.

[97] Rob Ansley, Clerk of Court, D.N.D. (Sept. 11, 2007), in Privacy Comments, *supra* note 26, Comment 6. Ansley writes that his district would be implementing a policy change that would mandate that "all plea agreements" would be filed as "public (unsealed) documents, sanitized by the drafter (USA) of any references to cooperation."

agreement.[98] Therefore, to anyone accessing records over the Internet, "every plea in North Dakota will appear identical: plea agreement void of cooperation language and sealed plea supplement."[99] Whether or not such a blanket sealing policy could withstand a legal challenge,[100] the policy leaves one with the uneasy feeling that even the pretense of keeping the public informed about the disposition of criminal cases has been abandoned.

Similarly, in New Hampshire, certain plea agreements contain boilerplate language conditionally referring to cooperation;[101] it therefore cannot be determined by reading the plea agreement whether a defendant is cooperating or not. These "hide in plain sight" approaches might help preserve the security of cooperators, but they undermine public oversight and understanding.

Generic Language

This is exactly what the system does not need. One judge, well before the migration of federal court records to the Internet, already denounced the substantial assistance motion as "unprincipled, undocumented, unreviewable, and secret."[102] More courts adopting measures like these, despite their prophylactic utility, can only add to the unhealthy obscurity that shrouds the practice. What is needed is more information, not less, in order to achieve public oversight and maintain some rough proportionality in the process.

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[98] *See id.*

[99] *Id.*

[100] *See, e.g.*, Globe Newspaper Co. v. Pokaski, 868 F.2d 497, 502 (1st Cir. 1989) (state statute mandating blanket provisional sealing of all criminal cases which did not result in conviction violated First Amendment); CBS, Inc. v. U.S. District Court, 765 F.2d 823, 826 (9th Cir. 1985) ("Confidence in the accuracy of its records is essential for a court . . . . Such confidence erodes if there is a two-tier system, open and closed. If public records cannot be compared with sealed ones, all of the former are put in doubt.").

[101] In the District of New Hampshire, many plea agreements contain the following paragraph: "If the defendant provides substantial assistance in the investigation or prosecution of another person who has committed an offense, the United States may file a motion pursuant to U.S.S.G. § 5K1.1 and 18 U.S.C. § 3553(e) advising the sentencing Court of all relevant facts pertaining to that determination and requesting the Court to sentence the defendant in light of the factors set forth in § 5K1.1(a)(1)-(5)." *See, e.g.*, plea agreement *in* United States v. Campos, No. 08-Cr-40 (D.N.H. Jun. 2, 2008), *available at* https://ecf.nhd.uscourts.gov/doc1/1171490967; United States v. Nguyen, No. 07-Cr-51 (D.N.H. Feb. 29, 2008), *available at* https://ecf.nhd.uscourts.gov/doc1/1171450670; United States v. Mesa, No. 07-Cr-210 (D.N.H. Feb. 20, 2008), *available at* https://ecf.nhd.uscourts.gov/doc1/1171446438.

[102] Saris, *supra* note 16, at 1062.

II. THEORETICAL FOUNDATIONS OF PUBLIC ACCESS

The body of law that granted the public and press an affirmative right of access to court proceedings was premised on the ideal of democratic self-government. Court proceedings have been held in public since the earliest days of the common law, "not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed."[103] It is to these concerns that the Article now turns.

A. The Right to Informed Self-Government

Proponents of online access frequently couch their arguments in terms of the First Amendment, a theory that comes with a rich set of rationales. Open access to judicial proceedings is said to encourage a sense of responsibility on the part of public servants,[104] facilitate community catharsis,[105] and enhance the appearance of fairness that is necessary to public confidence.[106] Above all, it enables the informed discussion of matters of public interest. Yet despite the fervor with which the First Amendment is currently invoked to justify continued

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[103] Cowley v. Pulsifer, 137 Mass. 392, 394 (1884) (Holmes, J.).

[104] "Both Hale in the 17th century and Blackstone in the 18th saw the importance of openness to the proper functioning of a trial; it gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality." Richmond Newspapers, Inc., v. Virginia, 448 U.S. 555, 569 (1980); *In re* Oliver, 333 U.S. 257, 270 (1948) ("The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.").

[105] "Civilized societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people's consciousness the fundamental, natural yearning to see justice done—or even the urge for retribution. The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is 'done in a corner [or] in any covert manner.'" *Richmond Newspapers*, 448 U.S. at 571 (quoting the 1677 Concessions and Agreements of West New Jersey, reprinted in SOURCES OF OUR LIBERTIES 188 (R. Perry ed. 1959)).

[106] *See Richmond Newspapers*, 448 U.S. at 595 (Brennan, J., concurring) ("Public access is essential . . . if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice.").

electronic access to court records,[107] the recognition of an affirmative right of access to judicial information is of fairly recent vintage and has never been extended to a right to receive information in a particular medium.[108]

1. The Supreme Court. Until 1980, when the Supreme Court decided *Richmond Newspapers, Inc. v. Virginia*,[109] the suggestion that the First Amendment could be used to demand openness from the government or to vindicate an independent "right to know" had encountered stiff resistance from the Court.[110] The year before

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[107] *See, e.g.*, NACDL Comment, *supra* note 26, at 2 ("Depriving the public of access to court records at any stage of the criminal process has been viewed by the federal judiciary as a paramount risk to the fundamental principles of our constitutional government"); MLRC Comment, *supra* note 26, at 3 ("The proposed blanket policy of denying Internet access to all plea agreements . . . offends the public's First Amendment right to access judicial records").

[108] *See, e.g.*, Mayo v. U.S. Gov't Printing Office, 9 F.3d 1450, 1451 (9th Cir. 1993) (operator of electronic bulletin board service not entitled to direct personal access to the Printing Office's electronic bulletin board containing Supreme Court slip opinions); Westbrook v. County of Los Angeles, 32 Cal. Rptr. 2d 383, 387 (Cal. App. Ct. 1994) (seller of criminal background information not entitled to periodic copies of computer tapes from the municipal court information system). The *Mayo* court, which considered a claim under the common law, held that the public's right to information did not mean "that a citizen has the right to obtain free of charge in the form he desires public records that are readily available in another form," in other words, paper copies at the library. *Mayo*, 9 F.3d at 1451.

[109] 448 U.S. 555 (1980). *Richmond Newspapers*, for the first time, held that the First Amendment granted a qualified right of public access to criminal trials. *Id.* at 580.

[110] *See, e.g.*, Zemel v. Rusk, 381 U.S. 1, 17 (1965) ("The right to speak and publish does not carry with it the unrestrained right to gather information."). In *Zemel*, the Court rejected a U.S. citizen's claim that the State Department's restrictions on travel to Cuba burdened his First Amendment rights to see conditions there for himself. *See id.* at 16. The Court hewed to this rationale over the next decade. In a series of cases involving regulations restricting press access to prisons, the Court rejected news organizations' claims that the burden on their ability to gather news violated the First Amendment. *See* Pell v. Procunier, 417 U.S. 817, 835 (1974) (upholding prison regulation preventing press from conducting interviews with specific prisoners at California state prisons); Saxbe v. Washington Post Co., 417 U.S. 843, 850 (1974) (applying *Pell* reasoning to similar federal prison regulation); Houchins v. KQED, Inc., 438 U.S. 1 (1978) (plurality opinion) (restricting access to prison area where inmate had allegedly committed suicide did not violate First Amendment). The prison access cases were widely viewed as constituting "the most explicit repudiation of the argument that the First Amendment might be wielded as a sword of access to a criminal trial or other government-controlled information." Eugene Cerruti, "*Dancing in the Courthouse": The First Amendment Right of Access Opens a New Round*, 29 U. RICH. L. REV. 237, 250 (1995).

Richmond Newspapers was decided, a divided Court had upheld the exclusion of the press from a pretrial suppression hearing in *Gannett Co. v. DePasquale*.[111] The Court held that the constitutional guarantee of a public trial was "personal to the accused"[112] and conferred no right of access to pretrial proceedings that could be enforced by the public or the press.[113] This appeared to close the door on an independent public right of access to judicial proceedings.[114]

Nonetheless, an opposing perspective, primarily championing the First Amendment as intimately linked to the processes of republican self-government, was gathering strength. This doctrine, most powerfully elaborated by Alexander Meiklejohn,[115] had already taken root in eloquent dissents,[116] dicta,[117] and public opinion.[118] In retrospect,

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[111] Gannett Co. v. DePasquale, 443 U.S. 368, 394 (1979).

[112] *Id.* at 379-80. Although Justice Stewart, writing for the Court, gave a ceremonial nod in the direction of "the strong societal interest in public trials," *id.* at 383, he concluded that "the public interest is fully protected by the participants in the litigation." *Id.* at 384.

[113] *See id.* at 385. The Court decided the case on the basis of the Sixth Amendment, rather than the First Amendment. *See id.* at 391.

[114] *See* Anthony Lewis, *A Public Right to Know About Public Institutions: The First Amendment as Sword*, 1980 SUP. CT. REV. 1, 13 (1980) ("The decision in *Gannett* was widely perceived, and deplored, as a drastic reduction on access to a traditionally open institution.").

[115] Meiklejohn is credited with crystallizing what is now the classic justification for the First Amendment as derived "from the necessities of self-government by universal suffrage." ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 94 (1948). For Meiklejohn, the First Amendment was essentially political in nature. "The guarantee given by the First Amendment . . . is assured only to speech which bears, directly or indirectly, upon issues with which voters have to deal—only, therefore, to consideration of matters of public interest." *Id.* While he did not address directly questions of public access to government proceedings, the import of his thinking is clear: "The primary purpose of the First Amendment is, then, that all the citizens shall, so far as possible, understand the issues which bear upon our common life. That is why no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information, may be kept from them." *Id.* at 88-89.

[116] The most notable example was Justice Powell's dissent in *Saxbe*, one of the prison access cases, arguing that what was at stake was "the societal function of the First Amendment in preserving free public discussion of governmental affairs." Saxbe v. Washington Post Co., 417 U.S. 843, 862 (1974) (Powell, J., dissenting). In Justice Powell's view, the First Amendment "embodies our Nation's commitment to popular self-determination and our abiding faith that the surest course for developing sound national policy lies in a free exchange of views on public issues. And public debate must not only be unfettered; it must also be informed." *Id.* at 862-63. Justice Powell acknowledged Meiklejohn's contribution to the idea that "'[t]he principle of the freedom of speech springs from the necessities of the program of self-government.'" *Id.* at 862 n.8 (quoting ALEXANDER MEIKLEJOHN, FREE SPEECH 26 (1948) (alteration

Gannett probably provided the impetus the doctrine needed to flower.[119] A year to the day after the *Gannett* decision was handed down, the Court located a right of access to criminal trials "implicit in the guarantees of the First Amendment."[120] Although the opinion of the Court[121] gave an extensive survey of the history of the public trial,[122] the more potent justification was that the "expressly guaranteed freedoms" in the First Amendment "share a common core purpose of assuring freedom of communication on matters relating to the functioning of government."[123]

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added)). Justice Steven's dissent in *Houchins* echoed the theme that the First Amendment "serves an essential societal function. Our system of self-government assumes the existence of an informed citizenry." Houchins v. KQED, Inc., 438 U.S. 1, 31 (1978) (Stevens, J., dissenting).

[117] *See, e.g.*, *Gannett*, 443 U.S. at 383 (noting the "strong societal interest in public trials"); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 492 (1975) ("Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally."); Estes v. Texas, 381 U.S. 532, 539 (1965) ("The free press has been a mighty catalyst in awakening public interest in governmental affairs").

[118] The *Gannett* decision sparked a wave of controversy as district courts took it "as a broad license to close courtrooms." Lewis, *supra* note 114, at 14. The press reaction was predictably critical. *See, e.g.*, Editorial, *Private Justice, Public Injustice*, N.Y. TIMES, July 5, 1979, at A16 ("Now the Supreme Court has endorsed secrecy in language broad enough to justify its use not only in a pre-trial context but even at a formal trial."). What was more unusual was that many of the Justices responded to the criticism personally, in a flurry of post-*Gannett* interviews. *See, e.g.*, *Burger Suggests Some Judges Err In Closing Trials*, N.Y. TIMES, Aug. 9, 1979, at A17; Linda Greenhouse, *Powell Says Court Has No Hostility Toward Press*, N.Y. TIMES, Aug. 14, 1979, at A13; Linda Greenhouse, *Stevens Says Closed Trials May Justify New Laws*, N.Y. TIMES, Sept. 9, 1979, at 41; Walter H. Waggoner, *Brennan Protests Criticism by Press*, N.Y. TIMES, Oct. 18, 1979, at B6.

[119] Some commentators were of the opinion that "*Gannett* in fact helped significantly to create the conditions for Supreme Court acceptance of a doctrine of public access to public institutions under the First Amendment." Lewis, *supra* note 114, at 14.

[120] Richmond Newspapers, Inc., v. Virginia, 448 U.S. 555, 580 (1980) (plurality opinion). The speed with which the Court reversed course prompted Anthony Lewis, referring to Hamlet's mother, to observe: "Not since Gertrude has anyone posted with such dexterity from one sets of sheets to another." Lewis, *supra* note 114, at 1.

[121] While seven of the Justices concurred in the result, *Richmond Newspapers* was a particularly fractured decision in terms of its rationale, resulting in seven separate opinions. Only Justice Rehnquist dissented, *see* 448 U.S. at 604-06; Justice Powell took no part in the case. "Despite the near unanimity of the result," wrote Lillian BeVier, "the Court was unable to present even the façade of a unifying rationale." Lillian R. BeVier, *Like Mackerel in the Moonlight: Some Reflections on* Richmond Newspapers, 10 HOFSTRA L. REV. 311, 313 (1982).

[122] *See* 448 U.S. at 564-75.

[123] *Id.* at 575. As one commentator noted, "[t]he words could have been Meiklejohn's." Lewis, *supra* note 114, at 16.

Justice Brennan's concurrence, drawing on various proponents of the political theory of the First Amendment,[124] argued that the First Amendment "embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government."[125]

Two years later, in *Globe Newspaper Co. v. Superior Court*,[126] a majority of the Court struck down a state statute requiring courtroom closure during the testimony of minor victims of sexual offenses.[127] The Court adopted Justice Brennan's view that "the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government,"[128] and noted that "the institutional value of the open criminal trial is recognized in both logic and experience."[129]

The Court extended the right of access beyond criminal trials proper to voir dire in *Press-Enterprise Co. v. Superior Court*,[130] observing that openness "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system."[131] In its last major case on the public right of access, also called *Press-Enterprise Co. v. Superior Court*,[132] the Court formulated a

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[124] *Id.* at 587 (Brennan, J., concurring in the judgment) (citing J. ELY, DEMOCRACY AND DISTRUST 93-94 (1980); T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 7 (1970); A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 23 (1971)).

[125] *Richmond Newspapers*, 448 U.S. at 587 (Brennan, J., concurring in the judgment) (emphasis in original). Justice Brennan suggested that the right of access should be informed by "two helpful principles": first, whether a particular process had been historically open, because "a tradition of accessibility implies the favorable judgment of experience," and second, whether access furthered the functioning of the process. *Id.* at 589.

[126] 457 U.S. 596 (1982).

[127] *Id.* at 610-11. The opinion of the Court was written by Justice Brennan.

[128] *Id.* at 604 (citing Thornhill v. Alabama, 310 U.S. 88 (1940))

[129] *Id.* at 606.

[130] 464 U.S. 501, 510 (1984) (*Press-Enterprise I*). The case involved the rape and murder of a teenage girl; the trial was highly publicized and the attempt to find an impartial jury took six weeks. *Id.* at 503.

[131] *Id.* at 508.

[132] Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (*Press-Enterprise II*). The Press-Enterprise Company sought access to the transcript of the 41-day preliminary hearing in the case of Robert Diaz, a nurse who had allegedly murdered 12 patients at the hospital where he worked. The Court noted the "'community therapeutic value' of openness," particularly in the context of violent crimes, which "provoke public concern, outrage, and hostility." *Id.* at 13.

two-part test to determine whether the public has a right of access to government information: first, "whether the place and process have historically been open to the press and general public"[133] and second, "whether public access . . . plays a particularly significant positive role in the actual functioning of the process."[134] If so, closure is subject to a form of strict scrutiny.[135]

2. *The Lower Courts.* After the Supreme Court's spate of public access cases, the federal circuit courts extended the First Amendment right of access beyond criminal trials and pretrial hearings to other phases of the criminal process. As one court put it, "[i]t makes little sense to recognize a right of public access to criminal courts and then limit that right to the trial phase of a criminal proceeding, something that occurs in only a small fraction of criminal cases."[136] Accordingly, the courts of appeals have found a First Amendment right of access to bail hearings,[137] suppression hearings,[138] guilty pleas,[139] and sentencing hearings.[140]

Whether there is a First Amendment right of access to judicial documents remains open to question. The Supreme Court's only explicit pronouncement regarding a right of access to judicial documents was couched in terms of the common law: "[T]he courts of this country recognize a general right to inspect and copy public records and

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[133] *Id.* at 8.

[134] *Id.* at 11. This was a return to Justice Brennan's "two helpful principles" from *Richmond Newspapers*. *See Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring).

[135] Court proceedings cannot be closed "unless specific, on the record findings are made demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" *Press-Enterprise II*, 478 U.S. at 13-14 (quoting *Press-Enterprise I*, 464 U.S. at 510).

[136] *In re* Application of The Herald Co., 734 F.2d 93, 98 (2d Cir. 1984).

[137] *See, e.g.*, Seattle Times Co. v. U.S. Dist. Ct., 845 F.2d 1513, 1515 (9th Cir. 1988); *In re* Globe Newspaper Co., 729 F.2d 47, 52 (1st Cir. 1984); United States v. Chagra, 701 F.2d 354, 363 (5th Cir. 1983).

[138] *See, e.g.*, *Herald Co.*, 734 F.2d at 98; United States v. Brooklier, 685 F.2d 1162, 1169-71 (9th Cir. 1982); United States v. Criden, 675 F.2d 550, 557 (3d Cir. 1982).

[139] *See, e.g.*, United States v. Alcantara, 396 F.3d 189, 191-92 (2d Cir. 2005); United States v. Danovaro, 877 F.2d 583, 589 (7th Cir.1989); United States v. Haller, 837 F.2d 84, 86-87 (2d Cir.1988); *In re* Washington Post Co., 807 F.2d 383, 388-89 (4th Cir. 1986).

[140] *See, e.g.*, United States v. Eppinger, 49 F.3d 1244, 1253 (7th Cir. 1995); *Alcantara*, 396 F.3d at 191-92; *Washington Post*, 807 F.2d at 388-89.

documents, including judicial records and documents."[141] Moreover, "the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes."[142]

Still, most circuits have found a qualified First Amendment right of access to court documents,[143] including plea agreements,[144] sentencing motions,[145] and other filings.[146] Some courts have further held that access to docket sheets too is constitutionally protected. In *United States v. Valenti*,[147] the Eleventh Circuit invalidated a practice in the Middle District of Florida of maintaining two docketing systems in criminal cases, one sealed and one public, as "an unconstitutional

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[141] Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978). In *Nixon*, Warner wanted to copy and sell the secret recordings made by President Nixon in the White House, but the Court held that the common law right of access did not authorize release of the tapes, finding the existence of the Presidential Recordings Act to be dispositive. *See id.* at 605-06.

[142] *Id.* at 598.

[143] The only circuits that have not yet recognized a First Amendment right of access to judicial documents are the Fifth, Sixth, and Tenth Circuits. The Eleventh Circuit appears to be on the fence. *Compare* United States v. Santarelli, 729 F.2d 1388, 1390 (11th Cir. 1984) ("[T]he public has a First Amendment right to see and hear that which is admitted in evidence in a public sentencing hearing") *with* United States v. Kooistra, 796 F.2d 1390, 1391 n.1 (11th Cir. 1986) ("this case may be governed by the somewhat less zealously protected common law right to inspect and copy court records.").

[144] *See, e.g.*, *In re* Copley Press, Inc., 518 F.3d 1022, 1028 (9th Cir. 2008); Washington Post v. Robinson, 935 F.2d 282, 288 (D.C. Cir. 1991); Oregonian Publ'g Co. v. U.S. Dist. Ct., 920 F.2d 1462, 1466 (9th Cir. 1990); *Haller*, 837 F.2d at 86; *Washington Post*, 807 F.2d at 390.

[145] *See, e.g.*, *Washington Post*, 807 F.2d at 390 (documents filed in connection with plea and sentencing hearings); CBS, Inc. v. U.S. Dist. Ct., 765 F.2d 823, 825 (9th Cir. 1985) (documents filed in connection with motion for reduction of sentence under Rule 35).

[146] *See, e.g.*, United States v. Eppinger, 49 F.3d 1244, 1253 (7th Cir. 1995) (criminal proceedings and documents); Globe Newspaper Co. v. Pokaski, 868 F.2d 497, 502 (1stCir. 1989) (judicial records and documents); *In re* Search Warrant for Secretarial Area Outside Office of Gunn, 855 F.2d 569, 573 (8th Cir. 1988) (documents filed in support of search warrant); *In re* New York Times Co., 828 F.2d 110, 114 (2d Cir. 1987) (documents filed in connection with suppression hearing); United States v. Smith, 776 F.2d 1104, 1111-12 (3d Cir. 1985) (pretrial documents); United States v. Peters, 754 F.2d 753, 763 (7th Cir. 1985) (trial exhibits); *In re* Globe Newspaper Co., 729 F.2d 47, 59 (1st Cir. 1984) (documents filed in support of the parties' arguments at bail hearings); Associated Press, Inc. v. U.S. Dist. Ct., 705 F.2d 1143, 1145 (9th Cir. 1983) (bill of particulars).

[147] 987 F.2d 708 (11th Cir. 1993).

infringement on the public and press's qualified right of access to criminal proceedings."[148]

Faced with a similar practice in Connecticut state court,[149] the Second Circuit held that there was a qualified First Amendment right to inspect docket sheets,[150] stating that "the ability of the public and press to attend civil and criminal cases would be merely theoretical if the information provided by docket sheets were inaccessible. In this respect, docket sheets provide a kind of index to judicial proceedings and documents, and endow the public and press with the capacity to exercise their rights guaranteed by the First Amendment."[151] Therefore, if the First Amendment protects the public's right to access court documents and docket sheets, at least in some circuits, Internet access cannot be limited without maintaining the availability of these records at the courthouse.

B. Privacy as a Possible Limitation on Access

As discussed above, information in court records, while nominally accessible to the public, had previously led a life of mostly undisturbed repose. Because of the costs associated with finding and copying this information, it existed in a state of "practical obscurity."[152] This, in turn, lessened concerns that private information would be wrongly disclosed to the public. Today that picture has changed. As Daniel Solove has observed, "in light of the revolution in accessibility

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[148] *Id.* at 715. The practice apparently did not die, because the court revisited the issue 12 years later in United States v. Ochoa-Vasquez, 428 F.3d 1015 (11th Cir. 2005). In that case, the defendant sought to unseal documents relevant to cooperating co-defendants, including motions. One of the potential witnesses, who was never called at trial, had a separate criminal case that was entirely under seal. *Id.* at 1024-25 & n.5. Although the docket sheets had been unsealed by the time of the appeal, the court had to "remind the district court that it cannot employ the secret docketing procedures that we explicitly found unconstitutional in *Valenti*." *Id.* at 1029.

[149] In Hartford Courant v. Pellegrino, 380 F.3d 83, 85 (2d Cir. 2004), the newspaper challenged the Connecticut state court practice of sealing certain docket sheets as well as entire case files in civil cases.

[150] *Id.* at 96.

[151] *Id.* at 93. To date, none of the other circuits have reached the question.

[152] U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 780 (1989).

provided by modern computer capabilities and the Internet, we must rethink the accessibility of the information in public records."[153]

1. The Emergence of Informational Privacy. Although the word "privacy" has powerful, almost visceral connotations,[154] its meaning is elusive.[155] Courts have equated privacy with secrecy,[156] personal autonomy,[157] and freedom from unreasonable government searches.[158] Today, even though people are more concerned with privacy then ever, the most salient fact about privacy may be "'that nobody seems to have any very clear idea what it is.'"[159]

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[153] Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN L. REV. 1393, 1456 (2001) [hereinafter Solove, *Privacy and Power*].

[154] *See* William H. Rehnquist, *Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?*, 23 U. KAN. L. REV. 1, 2 (1974) ("'Privacy' in today's lexicon is a 'good' word; that which increases privacy is considered desirable, and that which decreases it is considered undesirable. It is a 'positive' value."); U.S. DEP'T. OF HEALTH, EDUC. & WELFARE, RECORDS, COMPUTERS, AND THE RIGHTS OF CITIZENS 33 (1973) ("There is a widespread belief that personal privacy is essential to our well-being—physically, psychologically, socially, and morally."). Conversely, "[w]hen we contemplate an invasion of privacy—such as having our personal information gathered by companies in databases—we instinctively recoil." Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 480 (2006) [hereinafter Solove, *Taxonomy*].

[155] As Lillian BeVier has observed, "Privacy is a chameleon-like word, used denotatively to designate a range of wildly disparate interests—from confidentiality of personal information to reproductive autonomy—and connotatively to generate goodwill on behalf of whatever interest is being asserted in its name." Lillian R. BeVier, *Information about Individuals in the Hands of Government: Some Reflections on Mechanisms for Privacy Protection*, 4 WM. & MARY BILL RTS. J. 455, 458 (1995) [hereinafter BeVier, *Privacy Protection*].

[156] *See, e.g.*, Smith v. Maryland, 442 U.S. 735, 742-43 (1979) (no expectation of privacy in telephone numbers dialed since numbers are not kept secret); Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 487 (1974) (fundamental right to privacy is violated when trade secrets are stolen).

[157] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (right to privacy protects use of contraceptives by married couples); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (use of contraceptives by unmarried couples); Roe v. Wade, 410 U.S. 113, 154 (1973) (decision to have an abortion); Lawrence v. Texas, 539 U.S. 558, 578 (2003) (sexual relations between gay couples).

[158] *See, e.g.*, Winston v. Lee, 470 U.S. 753, 759 (1985) ("surgical intrusion into an individual's body . . . implicates expectations of privacy and security of such magnitude that the intrusion may be 'unreasonable' even if likely to produce evidence of a crime"); Schmerber v. California, 384 U.S. 757, 770 (1966) (unreasonable searches are forbidden by the Fourth Amendment for the sake of "human dignity and privacy").

[159] Solove, *Taxonomy*, *supra* note 154, at 480 (quoting Judith Jarvis Thomson, *The Right to Privacy*, *in* PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 272, 272 (Ferdinand David Schoeman ed., 1984)). Solove proposes a conception of privacy

The modern understanding of privacy can be traced back to Warren and Brandeis' famed article, *The Right to Privacy*,[160] which defined privacy as "the right to be let alone"[161] and spurred courts and legislatures to create a variety of torts to protect these newly-identified interests.[162] In 1960, Dean William Prosser classified the hundreds of cases so generated into four distinct causes of action,[163] one of which, public disclosure of private facts, echoes the current concern in the electronic age for informational privacy, or "freedom from unwanted disclosure of personal data."[164]

The Supreme Court's recognition of a constitutional right to privacy was originally grounded in an understanding of privacy as involving the right to make important choices in personal matters free from government interference,[165] sometimes referred to as decisional privacy.[166] But the Court quickly acknowledged a related right, closer to the unwanted disclosure of personal facts, of what is now termed

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encompassing information collection, dissemination, and processing, as well as intrusion into people's private affairs. *See id.* at 490-91. Employing Solove's categories, the privacy concerns raised by electronic access to court records from the point of view of cooperating defendants include aggregation ("the combination of various pieces of data about a person"), identification ("linking information to particular individuals"), insecurity ("carelessness in protecting stored information from leaks and improper access"), secondary use ("the use of information collected for one purpose for a different purpose without the data subject's consent"), disclosure ("the revelation of truthful information about a person that impacts the way others judge her character"), and increased accessibility ("amplifying the accessibility of information"). *Id.*

[160] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV L. REV. 193 (1890). The central thesis of their article was that existing law did not adequately protect privacy and that new legal concepts were needed to do so. *See id.* at 198.

[161] *Id.* at 195 (quoting THOMAS COOLEY, ON TORTS 29 (2d ed. 1888)).

[162] *See* Solove, *Privacy and Power*, *supra* note 153, at 1432.

[163] These were intrusion upon seclusion, public disclosure of private facts, false light, and appropriation. *See* William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960). These categories were adopted by the Restatement (Second) of Torts as the four recognized privacy torts. *See* RESTATEMENT (SECOND) OF TORTS §§ 652B, 652C, 652D, 652E (1977). The definition of publicity given to private life, or invasion of privacy, is publicity of a matter concerning the private life of another "if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." *Id.* at § 652D.

[164] BeVier, *Privacy Protection*, *supra* note 155, at 459.

[165] *See supra* note 157 (listing cases). Although "[t]he Constitution does not explicitly mention any right of privacy . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." Roe v. Wade, 410 U.S at 152.

[166] This right is arguably more accurately viewed as protecting personal autonomy.

informational privacy. In *Whalen v. Roe*,[167] the Court recognized that the constitutional protection of "privacy" involves two distinct but related interests: "the individual interest in avoiding disclosure of personal matters"[168] and "the interest in independence in making certain kinds of important decisions."[169]

In *Whalen*, a group of doctors and patients challenged the constitutionality of a New York statute that required doctors to disclose the names and addresses of all patients for whom they had prescribed certain drugs with a potential for abuse, which the state would maintain "in a centralized computer file."[170] The appellees claimed that both their decisional and informational privacy interests were impaired by the statute.[171]

While the Court upheld the statute as a reasonable exercise of the police power,[172] it was "not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files."[173] Justice Brennan concurred that "[t]he central storage and easy accessibility of computerized data vastly increase the potential for abuse of that

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[167] 429 U.S. 589 (1977).

[168] *Id.* at 599. The Court revisited this aspect of privacy in Nixon v. Adm'r of Gen. Servs., 433 U.S. 425 (1977), in which the Court acknowledged that President Nixon probably had a constitutionally protected privacy right in some of the recordings he had made at the White House, even though it was preempted by the Presidential Recordings Act. *See id.* at 457.

[169] *Whalen*, 429 U.S. at 599-600.

[170] *Id.* at 591.

[171] *See id.* at 600. Specifically, they argued that because the information about their use of the drugs existed "in readily available form," they had a genuine concern that the information might become public, which in turn, led them to be reluctant to prescribe and use the drugs even when medically indicated. *Id.* at 600. As Daniel Solove noted, the risk of disclosure itself led to the interference with their decisional privacy. *See* Solove, *Taxonomy*, *supra* note 154, at 558-59. While a similar link could be at play in the possible chilling effect of electronic access on cooperation, the question of whether cooperators have a protectable right of privacy in their decision to cooperate with the government—either conceptualized as cooperators exercising some right of association (by joining sides with the government) or making a personal decision about the relationships they wish to protect (children or family, for instance) and those they do not (former criminal associates)—is beyond the scope of this article. Such a theory would be open to the critique that the autonomy of such a choice is undermined by the inherently coercive aspect of making a deal with the government when the alternative is a long prison term.

[172] *See Whalen*, 429 U.S. at 603-04.

[173] *Id.* at 605. The Court later stated that its opinion in *Whalen* "recognized the privacy interest in keeping personal facts away from the public eye." U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 769 (1989).

information, and I am not prepared to say that future developments will not demonstrate the necessity of some curb on such technology."[174]

2. *The Modern View.* Even before *Whalen*, the Court had begun to recognize some of the dangers to privacy presented by the modern ability to compile, maintain, and analyze data. The right to informational privacy was given perhaps its most detailed review in the Court's cases dealing with claims arising under the Freedom of Information Act.[175] Although these cases did not deal with court records,[176] the values at stake were similar. In *Department of Air Force v. Rose*,[177] editors of the N.Y.U. Law Review sued under the FOIA for access to case summaries of honor and ethics hearings involving Air Force cadets, with personal references and other identifying information deleted.[178] One of the bases upon which the Air Force had denied access was that disclosure of the records "would constitute an unwarranted invasion of privacy."[179] The information had already been distributed within the Air Force Academy, but had not been disseminated to the public.[180]

While the Court upheld the release of the records,[181] its opinion is notable for the serious view it took of privacy. The Court did not discount the fact that re-publicizing damaging information that might have been "wholly forgotten" could be a separate harm,[182] observing that "the risk to the privacy interests of a former cadet, particularly one who has remained in the military, posed by his identification by otherwise unknowing former colleagues or instructors cannot be rejected as trivial."[183] The Court later referred to *Rose* as a case that had "recognized the privacy interest inherent in the nondisclosure of certain

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[174] *Whalen*, 429 U.S. at 607 (Brennan, J., concurring).
[175] Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2006).
[176] By its terms, the FOIA does not apply to the judiciary. See 5 U.S.C. § 552(f)(1).
[177] 425 U.S. 352 (1976).
[178] *See id.* at 355.
[179] 5 U.S.C. § 552(b)(6).
[180] "A case summary consisting of a brief statement, usually only one page, of the significant facts is prepared by the Committee. As we have said, copies of the summaries are posted on 40 squadron bulletin boards throughout the Academy, and distributed among Academy faculty and administration officials." *Rose*, 425 U.S. at 359.
[181] *See id.*
[182] "Despite the summaries' distribution within the Academy, many of this group with earlier access to summaries may never have identified a particular cadet, or may have wholly forgotten his encounter with Academy discipline." *Id.* at 380-81.
[183] *Id.* at 381.

information even where the information may have been at one time public."[184]

In *United States Department of Justice v. Reporters Committee for Freedom of the Press*,[185] the Court expanded the privacy concerns raised in *Rose* to prohibit the release of an individual's rap sheet.[186] The case made three important points. First, the Court re-emphasized its view that the fact that information may at one time have been public does not scuttle an individual's privacy claim.[187] Second, the Court noted the importance of the passage of time, as well as the way in which a privacy claim is affected by compilation of information and increased accessibility.[188] Third, the Court held that the purpose of the FOIA was to enable citizens to keep an eye on their government—the classic First Amendment self-government rationale.[189]

In *Reporters Committee*, the media sought access to the rap sheet of Charles Medico, an individual with ties to organized crime, whose company "allegedly had obtained a number of defense contracts as a result of an improper arrangement with a corrupt Congressman."[190] The respondents argued that because a rap sheet is merely a compilation of otherwise public information, "Medico's privacy interest in avoiding disclosure of a federal compilation of these events approaches zero."[191]

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[184] U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 767 (1989).

[185] 489 U.S. 749 (1989).

[186] In *Reporters Committee*, the Court considered the applicability of the FOIA exemption that excluded records or information compiled for law enforcement purposes, "to the extent that the production of such [materials] . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C).

[187] 489 U.S. at 763 ("[B]oth the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person. In an organized society, there are few facts that are not at one time or another divulged to another."). This surprisingly modern view is championed by Solove. *See* Solove, *Privacy and Power*, *supra* note 153, at 1457 ("courts must abandon the notion that privacy is limited to concealing or withholding information, and must begin to recognize that accessibility and uses of information—not merely disclosures of secrets—can threaten privacy.").

[188] *See* 489 U.S. at 763-64. "Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information." *Id.* at 764.

[189] *See id.* at 773.

[190] *Id.* at 757.

[191] *Id.* at 762-63.

The Court rejected this "cramped notion of personal privacy," [192] looking back instead to the informational privacy interest it had identified in *Whalen* of "'avoiding disclosure of personal matters.'"[193]

In the Court's view, the private character of the information, while potentially eroded by wide dissemination, could be restored by the passage of time and the fading of memory.[194] The increased accessibility represented by a "compilation of otherwise hard-to-obtain information"[195] that "would otherwise have surely been forgotten"[196] altered the balance that practical obscurity represented. In contrast, the clear purpose of the FOIA was to protect the "citizens' right to be informed about 'what their government is up to,'"[197] and this purpose was "not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct."[198]

Ultimately, the Court held that there was a strong privacy interest in practical obscurity itself[199] and that a third party request for law enforcement information about a private citizen would not only be "reasonably . . . expected to invade that citizen's privacy," but also, if the request sought no official information about a government agency, that invasion of privacy would be "unwarranted."[200]

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[192] *Id.* at 763.

[193] *Id.* at 762 (quoting Whalen v. Roe, 428 U.S. 589, 599 (1977)).

[194] *See id.* Referring to its decision in *Rose*, the Court observed, "If a cadet has a privacy interest in past discipline that was once public but may have been 'wholly forgotten,' the ordinary citizen surely has a similar interest in the aspects of his or her criminal history that may have been wholly forgotten." *Id.* at 769 (citing Dep't of Air Force v. Rose, 425 U.S. 352, 380-81 (1976)).

[195] *Id.* at 764.

[196] *Id.* at 771.

[197] *Id.* at 773 (quoting EPA v. Mink, 410 U.S. 73, 105 (1973) (Douglas, J., dissenting) (quoting Henry Steele Commager, N.Y. REV. OF BOOKS, Oct. 5, 1972, at 7)).

[198] *Id.* Again, the Court relied on *Rose* to support its point; in that case, the summaries were material to an investigation of how the government operated, while the identifying information about particular cadets was not. "The deletions [of identifying information] were unquestionably appropriate because the names of the particular cadets were irrelevant to the inquiry into the way the Air Force Academy administered its Honor Code; leaving the identifying material in the summaries would therefore have been a 'clearly unwarranted' invasion of individual privacy." *Id.* at 773-74.

[199] "The privacy interest in maintaining the practical obscurity of rap-sheet information will always be high." *Id.* at 780.

[200] *Id.* at 780. The Court recently reaffirmed its holding that the privacy interest "is at its apex" when documents requested under the FOIA concern private citizens. National Archives & Records Admin. v. Favish, 541 U.S. 157, 166 (2004) (quoting U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 780 (1989)). In *Favish*, a unanimous Court held that Exemption 7(C) of FOIA prevented the disclosure

Reporters Committee, *Rose*, and *Whalen* therefore reflect a sensitivity on the part of the Court to issues of privacy that might be broad enough to halt the march towards instantaneous disclosure of all criminal court records over the Internet.

III. A NORMATIVE FRAMEWORK FOR ELECTRONIC ACCESS

In discussing whether to limit Internet access to criminal court records, it bears repeating that paper records remain accessible at clerk's offices in every district. Electronic access is but an alternative means of consulting these records, albeit a much more convenient and economical one. Since neither the First Amendment nor the common law mandates electronic access to court records,[201] courts are free to evaluate electronic access as a matter of policy.[202] This issue recently has had the attention of the Justice Department, the Judicial Conference, the media, and the public, providing an opportunity to make meaningful improvements to the system.

A. The Instigator: Whosarat.Com

The catalyst for the renewed debate on electronic access was Whosarat.Com, a website started by a federal defendant now serving a twelve-year sentence for distribution of marihuana.[203] Despite its notoriety, the website is far from comprehensive.[204] It functions

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of death scene photographs of President Clinton's deputy counsel, Vince Foster. *See id.* at 174-75. The Court reiterated its belief that the FOIA functions as means for citizens to know "what their government is up to." It continued, "This phrase should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy." *Id.* at 171-72.

[201] *See supra* note 108.

[202] The federal judiciary has been wrestling with this question for the past decade. *See* JUD. CONF. COMM. ON CT. ADMIN. & CASE MGMT., REPORT ON PRIVACY AND PUBLIC ACCESS TO ELECTRONIC CASE FILES A-3 (June 26, 2001), *available at* www.uscourts.gov/Press_Releases/att81501.pdf.

[203] *See* PACER docket sheet, 03-cr-10220 (D. Mass.). Revenues from Whosarat.Com are helping defray the legal costs of his appeal. *See* Who's A Rat, About Us, http://www.whosarat.com/aboutus.php (last visited Aug. 4, 2008).

[204] It is, however, the largest and most professional-looking site of its type. The other informant websites I visited either contained little information or were more overtly activist. *See, e.g.*, Belleville, Ontario, Rat Listings, http://www.geocities.com/bellevillerat/ (last visited Aug. 8, 2008) (tagline: "Snitches get stitches"); Women's Anarchist Black Cross, http://www.wabc.mahost.org (last visited Aug. 8, 2008) ("Our goal is not a punitive one, our goal is to eradicate one of the government's most devastating weapons—The Confidential Reliable Informant");

primarily as a community bulletin board, where individual members post profiles of informants and undercover officers;[205] there is no centralized attempt to mine information from PACER or other online sources.[206] Anyone can pay the subscription fee and join the site, and only members may post profiles of alleged "rats."[207] These profiles list the cooperator or informant's name, alias, age, gender, address, illegal activity, known drug use, and specify the agency or law enforcement organization that uses the cooperator or informant.[208] Some of the profiles include a photograph, as well as links to the cooperator's criminal record and any court documents the posting member has found. At time of writing, there were 4,610 profiles of informants and cooperators posted on Whosarat.Com,[209] of which 1,026 contained links to court documents.[210] Of these profiles, 873 profiles contained links to documents available through PACER, including 607 plea agreements and 141 government motions for downward departure for substantial assistance.[211] Fifty-five of those profiles contained links to the alleged cooperator's PACER

RCMP Informants, http://rcmpsnitches.blogspot.com (last visited Aug. 8, 2008) (contains only five profiles).

[205] As the site explains, "Who's A Rat is a database driven website designed to assist attorneys and criminal defendants with few resources. The purpose of this website is for individuals and attorneys to post, share and request any and all information that has been made public at some point to at least 1 person of the public prior to posting it on this site pertaining to local, state and federal Informants and Law Enforcement Officers." Who's A Rat About Us, http://www.whosarat.com/aboutus.php (last visited Aug. 8, 2008). Under its category of "informants," the site lists both cooperating defendants and paid informants.

[206] Data mining allows the extraction of discrete information from large databases, more usually employed to reveal customer buying patterns, formulate marketing strategies, and more recently, identify terrorism suspects. *See* Daniel J. Steinbock, *Data Matching, Data Mining, and Due Process*, 40 GA L. REV. 1, 14-15 (2005).

[207] Subscriptions cost $22.99 for six months or $7.99 per week. *See* Who's A Rat Membership Page, http://www.whosarat.com/membership.php (last visited Aug. 8, 2008).

[208] Whosarat.Com disclaims any connection with violence or retaliation. "This website does not promote or condone violence or illegal activity against informants or law enforcement officers. If you post anything anywhere on this site relating to violence or illegal activity against informants or officers your post will be removed and you will be banned from this website." Who's A Rat About Us, http://www.whosarat.com/aboutus.php (last visited Aug. 8, 2008).

[209] *See* http://www.whosarat.com (last visited June 10, 2008). There were only 433 profiles of law enforcement agents. *See id.*

[210] See spreadsheet on file with author (information collected in March 2008).

[211] *See id.* It is notable that this represents only a small fraction of cooperator information currently available on PACER. *See supra* note 91 and accompanying text.

docket sheet.[212] Despite the website's protestations that it does not condone or seek to facilitate violence, it appears to capitalize on the widespread hostility against "rats" and "snitches." Nonetheless, in spite of the Justice Department's fears that Whosarat.Com would increase retaliation against cooperators,[213] there has only been one reported instance of anyone using Whosarat.Com to facilitate witness intimidation, which was promptly prosecuted.[214]

B. Recent Proposals for Electronic Access

1. Department of Justice Proposals. In its proposals to the judiciary sparked by its concern about the Who's a Rat website, the Department of Justice focused on plea agreements as the primary vehicle for exposing the identity of cooperators. Its main proposal was to remove all plea agreements and corresponding docket notations from

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[212] See spreadsheet on file with author.

[213] Violent retaliation against cooperators is a pervasive problem, of which cases where the perpetrators are identified and prosecuted only represent a fraction. *See, e.g.*, United States v. Stewart, 485 F.3d 666, 668-69 (2d Cir. 2007) (drug crew's code of vengeance mandated that if anyone cooperated with law enforcement, the "informer must die"); United States v. Carson, 455 F.3d 336, 346-47 (D.C. Cir 2006) (drug dealer who entered into cooperation agreement with government killed to prevent his testimony in a murder case); United States v. Rivera, 412 F.3d 562, 570 (4th Cir. 2005) (witness in murder trial killed to prevent him from testifying); United States v. Ochoa-Vasquez, 428 F.3d 1015, 1035 & n.27 (11th Cir. 2005) (Colombian drug traffickers allegedly murdered five people suspected of cooperating with American law enforcement); United States v. Cherry, 217 F.3d 811, 813-14 (10th Cir. 2000) (cooperating witness murdered by defendant after cooperator provided evidence in drug conspiracy case); United States v. Emery, 186 F.3d 921, 925-26 (8th Cir. 1999) (defendant killed federal informant in order to prevent further cooperation with law enforcement against him); Grievance Committee v. Simels, 48 F.3d 640, 642-43 (2d Cir. 1995) (cooperating witness in narcotics case shot two days before trial was due to begin); United States v. Amuso, 21 F.3d 1251, 1254-57 (2d Cir. 1994) (mob boss ordered murders of numerous associates suspected of cooperating); United States v. Galvan, 949 F.2d 777, 779-80 (5th Cir. 1991) (cooperator shot by co-defendant after cooperation with law enforcement discovered); United States v. Thevis, 665 F.2d 616, 624 (Former 5th Cir. 1982) (cooperating witness murdered by defendant against whom he was going to testify); State v. Maynard, 316 S.E.2d 197, 216 (N.C. 1984) (cooperating witness who agreed to testify pursuant to plea agreement murdered to prevent testimony). Nor are reprisals limited to the informants and cooperators themselves. *See, e.g.*, United States v. Johnson, 903 F.2d 1084, 1086 (7th Cir. 1990) (mother shot in retaliation after son cooperated with law enforcement in high-profile trials of gang members).

[214] The defendants pled guilty to witness tampering on April 2, 2008. See Maryclaire Dale, *Couple Admits Witness Tampering in Whosarat.Com Case*, ASSOCIATED PRESS, Apr. 2, 2008.

PACER,[215] leaving the documents available for inspection at the courthouse. This suggestion had the virtue of treating all cases alike, thus avoiding any "red flag" issues. But while the Department's proposal closed one avenue by which cooperation could be exposed, it did nothing to address the possible exposure of cooperation through sentencing documents or docket information. It was also the most restrictive proposal in terms of public understanding; in the absence of any docket notations on PACER regarding pleas, only a trip to the courthouse would reveal whether a defendant had pled guilty at all.

DOJ PROPOSALS

The Department also offered four alternative proposals. One was that all plea agreements be filed electronically, but that Internet access to these plea agreements would be limited to the court, counsel for the defendant, and counsel for the government, with all unsealed plea agreements available to the public at the courthouse.[216] Apart from added convenience for the parties, this suggestion would have had roughly the same effect as removing all plea agreements from PACER, with the same costs and benefits.

Another proposal was that the clerk of court in each district block remote Internet access for particular plea agreements or other documents containing sensitive information on a case-by-case basis, upon filing of a motion for a protective order.[217] While this would have been a less restrictive solution than blocking access to plea agreements in all cases, it would treat cooperation cases differently from non-cooperation cases and hence would create a "red flag" problem. In addition, just as for sealing, under the law of most circuits the filing of a motion for a protective order would have to be docketed, and would therefore serve as another indication of cooperation.[218]

The Department of Justice also proposed that prosecutors could file a generic plea agreement in all cases containing standard and hypothetical references to cooperation.[219] If actual cooperation occurred, "the prosecutor could notify the court of a defendant's cooperation through a non-public document."[220] While this suggestion

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[215] *See* Battle Letter, *supra* note 25, at 2, 7; Kenneth E. Melson, Dir., Executive Office for United States Attorneys, U.S. Dep't of Justice, *Response to Request for Comments on the Privacy and Security Implications of Public Internet Access to Federal Plea Agreements* (Oct. 26, 2007), *in* Privacy Comments, *supra* note 26, Comment 65 [hereinafter DOJ Comment], at 2-5.

[216] *See* DOJ Comment, *supra* note 215, at 5.

[217] *See id.*

[218] *See supra* note 89 and accompanying text.

[219] *See* DOJ Comment, *supra* note 215, at 6.

[220] *Id.*

would have homogenized cooperation agreements and ordinary plea agreements, it would also have done away with even the limited oversight the public currently has over the cooperation process. Under this proposal, while all unsealed documents would remain available over the Internet, they would serve little informational purpose because they would hide whether a given defendant was cooperating or not. Indeed, because the actual terms of the agreements would be filed under seal, they would not even be available at the courthouse, and useful information would be further obscured.[221]

The Justice Department's final proposal was the most promising: a uniform system of tiered electronic access, where certain documents would be restricted to that defendant's counsel and the government, others would be available to a broader group of counsel, and a third category would be available to the general public.[222] Under such a system, plea agreements and other documents would be filed electronically, but Internet access would be limited to the court, counsel for the defendant, and counsel for the government. All unsealed documents would remain accessible at the courthouse as before. This system has the advantage of flexibility and security, although, like any system with a large discretionary component, it could prove to be difficult to administer and subject to abuse. Some districts have already begun to employ a system of access privileges, so it appears to be a workable option.[223] This proposal, however, only addresses half of the equation: the risk to cooperators and the integrity of criminal investigations. It does nothing to shed light on how the cooperation process is administered across the country.

Plea Agreements Treatment Like Social Security Cases.

2. The "Public Is Public" Approach. Unsurprisingly, the majority of comments submitted to the Judicial Conference, particularly those from the media, defense lawyers, and the public, advocated a

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[221] This is the approach already taken in some districts, such as North Dakota. *See supra* notes 97-101 and accompanying text.

[222] *See* DOJ Comment, *supra* note 215, at 6.

[223] In the Eastern District of Pennsylvania, neither plea agreements nor sentencing documents are accessible via PACER, and the docket sheet gives only generic information. *See* Letter from Harvey Bartle III, Chief Judge, E.D. Pa., to John R. Tunheim, Dist. Judge, D. Minn. (Oct. 5, 2007), *in* Privacy Comments, *supra* note 26, Comment 53, at 1 ("If this protocol saves one life or one prosecution or prevents one injury, our court firmly believes our effort has been a success."). In the Northern District of Illinois, only case participants can access documents filed in criminal cases over the Internet. *See* U.S. Dist. Ct, N.D. Ill. Webpage, Electronic Filing Frequently Asked Questions, http://www.ilnd.uscourts.gov/PUBLIC/Dkt_Info/FAQ-CMECF.pdf (last visited Aug. 5, 2008).

"public is public" approach, where electronic case files would enjoy the same level of accessibility as paper files.[224] One private citizen summed up much of the pro-access argument as follows: "If they are public files, then they ought to be public. Period."[225] This approach echoes the classic First Amendment rationale that "[p]ublic debate must not only be unfettered, it must also be informed."[226] What better way to inform the public than to give it unlimited access to court records in the most convenient and fastest form the world has ever seen? Apart from its enviable simplicity, this argument has intuitive appeal: why should we treat electronic records differently than records in any other form? The information contained in a cooperation agreement is the same, whether the agreement was filed electronically or written with a quill and delivered to the courthouse by a coach and four.

This approach has been successful in the civil context. When civil court records were first made available online, there was widespread concern that the disclosure of sensitive personal information in court documents, such as social security numbers, home addresses, medical information, financial information, and names of minor children, could lead to identity theft, credit card fraud, or worse.[227] But the

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[224] *See, e.g.*, Alexander Bunin, Federal Public Defender, *Electronic Public Access to Plea Agreements* (Oct. 1, 2007), *in* Privacy Comments, *supra* note 26, Comment 50, at 1; Mark C. Zauderer, President, Federal Bar Council, *Comments on the Proposal to Limit Access to Certain Documents in Federal Court Criminal Case Files* (Oct. 25, 2007), *in* Privacy Comments, *supra* note 26, comment 62, at 4; MLRC Comment, *supra* note 26, at 1; NAA Comment, *supra* note 26, at 11; Reporters Comm. for Freedom of the Press et al., *Comments of the Reporters Committee for Freedom of the Press et al.* (Oct. 26, 2007), *in* Privacy Comments, *supra* note 26, Comment 66, at 3; NACDL Comment, *supra* note 26, at 3. In addition, 27 out of 28 comments posted by members of the public advocated open access. *See, e.g.*, Privacy Comments, *supra* note 26, Comments 15-17, 20-22.

[225] Private Citizen, Minneapolis, Minn. (Sept. 13, 2007) *in* Privacy Comments, *supra* note 26, Comment 32. The "public is public" approach has been adopted by several state courts in their own struggles with online access. *See, e.g.*, N.Y. STATE COMM'N. ON PUB. ACCESS TO COURT RECORDS, REPORT TO THE CHIEF JUDGE 1 (2004), *available at* http://www.courts.state.ny.us/ip/publicaccess/Report_PublicAccess_CourtRecords.pdf ("public access to court case records should be the same whether those records are made available in paper form at the courthouse or electronically over the Internet.").

[226] Saxbe v. Washington Post Co., 417 U.S. 843, 862-63 (1974) (Powell, J., dissenting).

[227] *See* Lynn E. Sudbeck, *Placing Court Records Online: Balancing Judicial Accountability with Public Trust and Confidence: An Analysis of State Court Electronic Access Policies and a Proposal for South Dakota Court Records*, 51 S.D. L. REV. 81, 83 (2006) ("Apart from identity theft and credit card fraud, public information in court records can be used to commit crimes involving blackmail, extortion, stalking, and sexual assault."); Silverman, *supra* note 12, at 207 ("certain categories of personal

solution was relatively simple: such information could simply be redacted from the court records without infringing on the public's right of access.[228] As one commentator observed, "the general education that an individual might be expected to acquire from the perusal of court records does not include committing to memory the street addresses of fellow citizens, their Social Security numbers, or their bank accounts."[229]

The sensitive personal information contained in civil court records could be separated from "the adjudicatory facts upon which a court relies to dispose of a case."[230] But in the case file of a cooperating defendant, the sensitive personal information (that a particular defendant is a cooperator) and the adjudicative information (that defendant pleading guilty to a cooperation agreement) cannot be disentangled. The personal information that can later be misused is generated by the adjudicative process itself.[231]

REDACTION WORKS FOR CIVIL, NOT FOR PLEA AGREEMENTS

Proponents of the "public is public" approach point out that, in cases where there is a genuine concern that disclosure will jeopardize an investigation or the safety of an individual, the information can be sealed.[232] While sealing has been the primary protective mechanism in the paper world, its efficacy is undermined in an online setting. The first

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information render a person particularly vulnerable to malfeasance and harm: these include a person's address, telephone number, social security number, driver's license identification number, bank accounts, debit and credit card numbers, and personal identification numbers").

[228] This practice has been codified by Rule 49.1(a) (providing for redaction from court filings of personal information, including social security numbers, taxpayer-identification numbers, birth dates, name of minor children, financial account numbers, and home addresses). FED. R. CRIM. P. 49.1(a).

[229] Silverman, *supra* note 12, at 209-10.

[230] *Id.* at 209.

[231] Attempting to redact the "cooperation paragraph" from the body of the plea agreement will not be of much help, as one federal judge observed: "if an order to redact the cooperation information from the plea agreement under pending Rule 49.1 is issued and docketed, it would serve as a red flag of cooperation, raising the same concerns as if the cooperation were detailed in the plea agreement." Chief Judge Kimba Wood, S.D.N.Y., Comment 2 (Aug. 31, 2007), in Privacy Comments, *supra* note 26.

[232] *See* NAA Comment, *supra* note 26, at 11 ("the judiciary should maintain its traditional case-by-case approach, which does not preclude motions to seal names from all copies of a plea agreement electronic and hardcopy—or motions to make certain plea agreements accessible only at the courthouse"); NACDL Comment, *supra* note 26, at 7 ("To the extent such remedies can be useful, moving the trial court to seal the plea agreement restricts specific knowledge of its terms from publication."); MLRC Comment, *supra* note 26, at 2 ("The MLRC urges the Federal Judiciary . . . to adopt a policy requiring U.S. Attorneys to file plea agreements and cooperation agreements and that the latter only be sealed by motion, for good cause shown, on a case-by-case basis.").

problem is that sealing, like courtroom closure, cannot be a stealthy process: to comport with due process it must call attention to itself.[233] Most circuit courts have concluded that sealing requires notice to the public, and therefore that motions for sealing and sealed documents should be listed on the docket sheet.[234] As discussed above,[235] sealed documents on a docket sheet can serve as "markers" of cooperation, a greater problem given the easy accessibility of docket sheets on PACER.

SEALING ITSELF IS A RED FLAG.

In addition, because sealing is supposed to be limited to extraordinary cases, where there is a risk of imminent harm to an individual or an investigation, [236] it cannot counter the chilling prospect of worldwide exposure on the Internet. And because sealing is not supposed to be more than a temporary measure,[237] it is of no comfort to former cooperators once their plea agreements and sentencing documents are unsealed.

C. How Electronic Information Is Different

1. Consequences for Privacy. Ultimately, the larger problem with the "public is public" approach is that it fails to acknowledge that, measured against paper records, electronic information has very different consequences for privacy. Electronic information can be reproduced without limit at minimal cost and without loss of quality, it can be accessed simultaneously by any number of people anywhere in the

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[233] *See* Gannett Co. v. DePasquale, 443 U.S. 368, 401 (1979) (Powell, J., concurring) ("If the constitutional right of the press and public to access is to have substance, representatives of these groups must be given an opportunity to be heard on the question of their exclusion.").

[234] *See supra* note 89 and accompanying text.

[235] *See supra* notes 87-92 and accompanying text.

[236] *See Gannett*, 443 U.S. at 441-42 (Blackmun, J., concurring and dissenting in part) (defendant seeking closure must establish substantial probability that irreparable damage to his fair-trial right will result from open proceeding, alternatives to closure will not adequately protect that right, and closure will be effective in protecting against the perceived harm); Seattle Times Co. v. U.S. Dist. Ct., 845 F.2d 1513, 1517-18 (9th Cir. 1988) (applying test); Associated Press, Inc. v. United States Dist. Ct., 705 F.2d 1143, 1146 (9th Cir. 1983) (same); United States v. Brooklier, 685 F.2d 1162, 1167 (9th Cir. 1982) (same); United States v. Criden, 675 F.2d 550, 557-58 (3d Cir. 1982) (same). Sealing is probably a lot more widespread in practice, as in my experience documents could be sealed with nothing more than a pro forma statement that disclosure would "jeopardize the safety of a witness."

[237] "Even where a court properly denies the public and press access to portions of a criminal trial, the transcripts of properly closed proceedings must be released when the danger of prejudice has passed." United States v. Valenti, 987 F.2d 708, 714 (11th Cir. 1993) (citing *Gannett*, 443 U.S at 393).

world, and once it has been disseminated, there can be no certainty that it has been entirely deleted.[238] Compared to the information filed in folders in clerk's offices throughout the land, it is public to a degree unparalleled in history.

In addition to its potential for limitless dissemination, the other signal feature of electronic information is its state of permanent availability. As Anita Allen writes, "[e]lectronic accessibility renders past and current events equally knowable. The very ideas of 'past' and 'present' in relation to personal information are in danger of evaporating."[239] In cyberspace, there is no such thing as yellowing paper, fading ink, or documents too hard to reach because they are squashed at the back of a rusty filing cabinet. In this world, summoning up the past is as effortless as clicking a mouse.[240]

The rules that were developed to protect sensitive information in the world of paper records represented a consensus as to the proper balance between the competing interests of public information and privacy, transparency, and security. As one commentator pointed out, applying the same rules to electronic records alters that balance, privileging the free flow of information to the exclusion of other interests.[241] Not everyone will be disturbed by this: one can make a robust argument that the privacy of convicted felons and turncoats is not a good that needs to be preserved. This kind of privacy is painted as merely a desire to evade personal responsibility, or as Judge Posner puts it, to have "more power to conceal information about [oneself] that others might use to [one's] disadvantage."[242] At worst, privacy can been seen as tantamount to cheating: if most people abide by social norms in order to maintain a good reputation, "[t]he ability to conceal discreditable facts about oneself permits one to acquire that benefit without having to pay the full behavioral price."[243]

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[238] While Internet pages can be taken down, there is no way of knowing whether the information contained in them has not been copied many times over.

[239] *See* Anita L. Allen, *Dredging Up the Past: Lifelogging, Memory, and Surveillance*, 75 U. CHI. L. REV. 47, 62 (2008).

[240] *See id.* at 62.

[241] *See* Peter A. Winn, *Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information*, 79 WASH. L. REV. 307, 315 (2004) ("When the same rules that have been worked out for the world of paper records are applied to electronic records, the result does not preserve the balance worked out between the competing policies in the world of paper records, but dramatically alters that balance.")

[242] RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 271 (1981).

[243] BeVier, *Privacy Protection*, *supra* note 155, at 470. For former cooperators, however, the "good reputation" that risks being tainted by disclosure is that of being a

But other values achieved by protecting privacy could answer these objections. One of these is a sense of community with our fellow citizens. At the most universal and benign level, everyone makes mistakes and commits acts they would just as soon forget. In order to distance themselves from regrettable past acts, people "need to be safe from memory: they need to forget and need others to forget, too."[244] This need for beneficial forgetting is complicated in the case of cooperators, whose mistakes and bad acts may be of greater magnitude than those of the average, law-abiding citizen. But "[p]eople grow and change, and disclosures of information from their past can inhibit their ability to reform their behavior, to have a second chance, or to alter their life's direction."[245] In *Reporters Committee*, the Court echoed its earlier observation in *Rose* that there may be a privacy interest in bad acts long forgotten: "If a cadet has a privacy interest in past discipline that was once public but may have been 'wholly forgotten,' the ordinary citizen surely has a similar interest in the aspects of his or her criminal history that may have been wholly forgotten." [246] The Court therefore ascribed legal significance, even positive value, to the act of forgetting. Even a convicted felon, implied the Court, should be able to leave the past behind.[247]

2. *Consequences for Rehabilitation.* Rehabilitation is another reason to allow a cooperator to escape being branded a felon and a rat. Constant access to a person's criminal past is unlikely to have a positive effect on potential rehabilitation. While the goal of rehabilitation may not enjoy the theoretical ascendancy it once did,[248] in practical terms it

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"stand-up guy"—someone who would rather go to prison than cooperate with the government. The people most disadvantaged by this reputational "fraud" would presumably be those engaged in criminal behavior.

[244] Allen, *supra* note 239, at 57.

[245] Solove, *Taxonomy*, *supra* note 154, at 532.

[246] U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 769 (1989) (quoting Dep't of Air Force v. Rose, 425 U.S. 352, 381 (1976)).

[247] In any event, felons remain subject to a whole host of disabilities under state and federal law. *See* North Carolina v. Rice, 404 U.S. 244, 247 & n.1 (1971) (noting that a convicted criminal may be disenfranchised, lose the right to hold federal or state office, be barred from entering certain professions, and disqualified from serving as a juror); Brian K. Pinaire et al., *Barred from the Bar: The Process, Politics, and Policy Implications of Discipline for Attorney Felony Offenders*, 13 VA. J. SOC. POL'Y & L. 290, 292 (convicted felons may also lose firearms privileges, public benefits such as housing and food stamps, and eligibility for certain federal student loans).

[248] *See generally*, FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE 5 (1981).

remains a social value. The United States claims the world's largest prison population,[249] which pumps thousands of ex-convicts and cooperators back onto the street every year.[250] Creating a "criminally stigmatized underclass screened out of legitimate opportunities, steered towards criminal careers and further incarceration"[251] only reinforces this cycle.

Courts have long recognized the link between rehabilitation and the anonymity that could gradually be regained in a world of practical obscurity. In *Melvin v. Reid*,[252] a former prostitute, acquitted of murder, had gone on to a respectable married life until her story and maiden name were used in a movie.[253] The court held that the defendants' use of the plaintiff's real name was actionable, particularly in light of her efforts to rehabilitate herself.[254] "One of the major objectives of society, as it is now constituted, and of the administration of our penal system, is the rehabilitation of the fallen and the reformation of the criminal," wrote the court. "Where a person has by his own efforts rehabilitated himself, we, as right-thinking members of society, should permit him to continue in the path of rectitude rather than throw him back into a life of shame or crime."[255]

This principle was extended to a convicted, rather than acquitted, felon in *Briscoe v. Reader's Digest Association*,[256] where the court held

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[249] *See* Adam Liptak, *Inmate Count In U.S. Dwarfs Other Nations'*, N.Y. TIMES, Apr. 23, 2008, at A1.

[250] In the year 2006, the federal government released 47,920 inmates from prison. *See* William J. Sabol & Heather Couture, BUREAU OF JUSTICE STATISTICS, PRISON INMATES AT MIDYEAR 2007 (June 2008), Table 4, *available at* http://www.ojp.gov/bjs/pub/pdf/pim07.pdf.

[251] Jacobs, *supra* note 20, at 387.

[252] 297 P. 91 (Cal. 1931).

[253] *See id.* at 91. Dean Prosser put it best: "The plaintiff, whose original name was Gabrielle Darley, had been a prostitute, and the defendant in a sensational murder trial. After her acquittal she had abandoned her life of shame, become rehabilitated, married a man named Melvin, and in a manner reminiscent of the plays of Arthur Wing Pinero, had led a life of rectitude in respectable society, among friends and associates who were unaware of her earlier career. Seven years afterward the defendant made and exhibited a motion picture, called 'The Red Kimono,' which enacted the true story, used the name of Gabrielle Darley, and ruined her new life by revealing her past to the world and her friends." Prosser, *supra* note 163, at 392.

[254] *See id.* at 93-94. *Melvin* became one of the bases for the tort of publicity given to private life in the Restatement of Torts. *See* RESTATEMENT (SECOND) OF TORTS §§ 652D, Illustration 26.

[255] *Id.* at 93.

[256] 483 P.2d 34 (Cal. 1971), *overruled by* Gates v. Discovery Comms., Inc., 101 P.3d. 552 (Cal. 2004).

that the plaintiff, who had been convicted of truck hijacking eleven years earlier, had a valid cause of action against a magazine for using his name.[257] The court acknowledged that soon after a crime is committed criminals can be the object of legitimate public interest, but that this interest fades with time.[258] Even though Briscoe's conviction had been a matter of public record, the court found that with the passage of time, he had regained an expectation of anonymity.[259]

While *Melvin* and *Briscoe* no longer have legal force,[260] they still have normative appeal. "It would be a crass legal fiction to assert that a matter once public never becomes private again," noted the *Briscoe* court. "Human forgetfulness over time puts today's 'hot' news in tomorrow's dusty archives. In a nation of 200 million people, there is ample opportunity for all but the most infamous to begin a new life."[261] When it made this observation, the court was expressing not only a view of information that may now seem quaint, but was also making a point about the beneficial nature of limited information.

Now that "crass legal fiction" has become a reality. In a world of imperishable, easily accessible criminal court records, the former cooperator can truly become "a prisoner of his recorded past."[262] In some areas of the law, courts have deemed that such a burden is acceptable.[263] Sexual offenders, for example, can constitutionally have

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[257] *See id.* at 40.

[258] *See id.* (citing RESTATEMENT OF TORTS § 867, comment c).

[259] *See id.* at 41 ("One of the premises of the rehabilitative process is that the rehabilitated offender can rejoin that great bulk of the community from which he has been ostracized for his anti-social acts").

[260] The Supreme Court subsequently held that the First Amendment prohibits the sanctioning of publication of true information contained in public records. *See* Cox Broad. v. Cohn, 420 U.S. 469, 496 (1975) (press could not constitutionally be exposed to tort liability for truthfully publishing the name of a rape and murder victim released to the public in official court records); *see also* Florida Star v. B.J.F., 491 U.S. 524, 526 (1989) (invalidating state statute imposing damages on newspaper for publishing name of rape victim); Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 98 (1979) (state criminal statute prohibiting publication of juvenile offender's name); Okla. Publ'g Co. v. Dist. Ct., 430 U.S. 308, 308 (1977) (per curiam) (invalidating district court order enjoining newspapers from publishing name and picture of juvenile offender). *Briscoe* was therefore overruled and *Melvin* discredited. *See, e.g.*, Willan v. Columbia County, 280 F.3d 1160, 1162 (7th Cir. 2002) (Posner, J.) (stating that *Melvin* was "dead").

[261] *Briscoe*, 483 P.2d at 41.

[262] U.S. DEP'T. OF HEALTH, *supra* note 154, at 112.

[263] Some courts see no problem with the disclosure of "legitimately discreditable information about a person, such as his criminal record," particularly if that person is running for office. *Willan*, 280 F.3d at 1163 (holding that a mayoral candidate had no

their identities and criminal pasts disseminated to the communities in which they live under state and federal Megan's Laws; most states allow this information to be posted on the Internet.[264] But this is a narrow class of cases in which the courts have found the offenders' privacy claims to be outweighed by concerns for public safety, and their desire for rehabilitation to be offset by their high recidivism rates.[265] The situation of cooperators, who have committed a range of criminal offenses, is considerably more ambiguous.[266] They are the only ex-offenders who have been publicly acknowledged as rendering a service to the government. Unsavory though many cooperators may be, the government may owe them some kind of obligation to ensure that their assistance is not later turned against them when they attempt to reenter society.[267]

D. Towards a New Role for Electronic Access

Given the dual nature of the problems raised by Internet access, any attempt to ameliorate these difficulties would have to address both the specter of cooperator retaliation and the disarray surrounding the use of cooperators. No solution will be perfect, as any initiative has its costs, and any proposal can become obsolete as technology continues to

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claim against law enforcement officers for disseminating his criminal history, which included a prior burglary conviction).

[264] *See* Smith v. Doe, 538 U.S. 84, 90-91 (2003) (upholding Alaska's Megan's Law, which requires sex offenders in the state to register information with authorities, including their names, addresses, and crimes of conviction, which the state then posts on the Internet). Many other states provide online access to their sexual offender registries, and one site, www.familywatchdog.us, provides visitors with the ability to conduct national searches across state registries. *See* Family Watchdog Offenders Searchpage, http://www.familywatchdog.us/Search.asp (last visited Aug. 5, 2008).

[265] *See* Paul P. v. Verniero, 170 F.3d 396, 404 (3d Cir. 1999) ("[t]he public interest in knowing where prior sex offenders live" outweighs any privacy interest offenders might have in preventing disclosure of their home addresses); Cutshall v. Sundquist, 193 F.3d 466, 476 (6th Cir. 1999) (noting high rates of recidivism and egregiousness of sex crimes as impetus for registering and monitoring sex offenders); Russell v. Gregoire, 124 F.3d 1079, 1091 (9th Cir. 1997) (Megan's Laws alert "the community to the presence of sexual predators adjudged likely to offend again").

[266] This is all the more so as empirical research supports the thesis that the older the criminal conviction, the less likely it is to be predictive of future criminal conduct. *See* Megan C. Kurlychek et al., *Enduring Risk? Old Criminal Records and Short-Term Predictions of Criminal Involvement*, 53 CRIME & DELINQUENCY 64, 71 (2007).

[267] While such a responsibility is not grounded in a legal duty, it seems appropriate as a matter of fair play.

evolve. Nonetheless, it is worth trying to see our way out of the current impasse.

1. Limiting Unwarranted Exposure. The Department of Justice's proposal of a system of tiered access privileges seems to be a good starting point to address the first problem. Internet access to docket sheets and case documents on PACER could be limited to the parties and the court,[268] while all non-sealed documents would remain available for inspection at the courthouse.[269] This would help curtail exposure of cooperators' identities over the Internet, which should ease concerns about increased retaliation attributable to remote accessibility of electronic court records.

Of course, even the tightest limits on electronic access cannot protect against all leaks of cooperator information.[270] Every prosecutor who investigates targets capable of violence is haunted, to a greater or lesser degree, by her own imagined Billy Costigan scenario. If these fears make her hesitate to file an explicit cooperation agreement that might be read by a target online, the question becomes less one of provable harm than of how the possibility of harm, however remote, shapes behavior. Cooperators cannot be insulated from retaliation, short

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[268] *See supra* notes 222-23 and accompanying text; *see also* Winn, *supra* note 241, at 325 (suggesting that access to criminal court records be controlled through a system of privileges whereby judges, law clerks and defense attorneys and prosecutors have full online access in specific cases, while members of the press could have access on consent of the parties).

[269] This proposal might arguably fall afoul of the E-Government Act, which requires the federal courts to provide public access to information over the Internet. *See* E-Government Act of 2002, 44 U.S.C. § 3501 note (2002) (directing each federal court to establish and maintain a website that contains or provides links to court information, including access to docket information for each case, the substance of all written opinions issued by the court, documents filed with the courthouse in electronic form, and "[a]ny other information . . . that the court determines useful to the public."). So far, however, it appears that the courts believe that they can limit electronic access to court files under their supervisory power, *see* Nixon v. Warner Comm'ns, Inc., 435 U.S. 589, 598 (1978), and no court has yet interpreted the E-Government Act as limiting their discretion to manage their own records. *Cf.* Winn, *supra* note 241, at 318 (E-Government Act "indicates a congressional deference to the courts to be responsible for the management and oversight of their own records"). Certainly the Eastern District of Pennsylvania and the Northern District of Illinois have not let the E-Government Act stop them from suspending public access to criminal case files. *See supra* note 223 and accompanying text.

[270] There are many sources of cooperator exposure, of which court files are only one part. *See supra* note 85 and accompanying text. This suggestion is not intended to be an answer to the larger problem of witness intimidation.

of all being placed in the Witness Protection Program.[271] But if the examples of New Hampshire and North Dakota are anything to go by, the concern that a cooperator's identity will be exposed on the Internet is a potent one.

One counter-argument to this proposal is that even if electronic access were curtailed, nothing prevents a motivated individual from physically visiting the clerk's office and reviewing the court files of a suspected cooperator. Equally, a more enterprising version of Whosarat.Com might send runners to the courts to scan criminal case information into mobile devices for subsequent dissemination online. While these risks will always exist so long as there is a right of access to court records,[272] if nothing else, raising the costs of access can slow this process and lessen the risks of cooperators' identities being discovered online. To the extent that placing limits on electronic access could protect even a small number of cooperating defendants from unnecessary exposure, and more importantly, reassure prosecutors and courts that cooperation bargains can be conducted more openly, it is still worth attempting.

Such a proposal is likely to displease those who insist that the public's right of access includes electronic access to every case.[273] As one of the members of the public put it, "[t]he public's need to know far outweighs the needs of those made uncomfortable by scrutiny. How else can the public be informed about what's going on?"[274] This is a fair question, but it begs another: What is the information of value that the public needs to know? Does the public need to know that an individual

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[271] And even that has its limits. *See, e.g.*, United States v. Thevis, 665 F.2d 616, 624 (Former 5th Cir. 1982). In *Thevis*, the cooperator, a small-time mob associate, was scheduled to enter the Witness Protection Program, but wanted to conduct one last business transaction—selling a piece of property—before he did. He was shot to death by the defendant, along with the person to whom he was showing the land. *Id.*

[272] Indeed, they have always existed, minus perhaps the development of technology to enable people to secretly photograph or scan court records while examining them at the clerk's office.

[273] *See, e.g.*, NAA Comment, *supra* note 26, at 6 (arguing that the public, through press reports about individual plea agreements, gains insight not only into the functioning of the judicial system, but also "the substance of specific court proceedings"). The NAA did not explain why access to specific court proceedings was an important interest, but contented itself with saying that in criminal cases, "the public interest in learning the particulars and the results of individual cases is obvious." *Id.* The NAA then listed nine news reports to illustrate the use of plea agreements in news coverage, all of which included some significant aspect of public corruption, bribery, corporate fraud, terrorism or the involvement of a sports figure. *See id.*

[274] Private Citizen, Wayland, Mass. (Sept. 13, 2007), *in* Privacy Comments, *supra* note 26, Comment 29.

indicted for distributing five kilograms of cocaine, which would ordinarily entail a mandatory minimum sentence of ten years,[275] cooperated with the government and received a sentence of 36 months, or does it need to know that Billy Costigan, in particular, cooperated with the government? In the vast majority of federal narcotics, weapons possession, extortion, and fraud cases, the truly valuable information is not the name of the cooperator, but what information was traded for what criminal liability in order to achieve a sentence that might be years shorter than the one attached to the offense of conviction.

The other difficulty with a rule limiting electronic access to the litigants and the court is that such a rule would need exceptions, particularly in cases of high public interest where the names do matter.[276] In high-profile cases, the usefulness of electronic access—its ability to ease the administrative burden on court personnel, facilitate the fact-gathering of news outlets and increase the public's own ability to seek out information—militates against its limitation. That said, "high-profile" is not a category susceptible to easy definition. Such an exception could obviously encompass cases where the public interest was at stake, such as cases of public corruption or bribery of governmental officials,[277] but would become more difficult to define when the celebrity of the defendant or the heinousness of the crime merely piqued the public's interest. A possible bright line could be drawn between those cases that went to trial and those that did not. In a case headed for trial, discovery obligations require that the government disclose all impeachment material relating to its witnesses, including cooperation agreements, therefore the marginal difference in having the information posted on the Internet would be negligible. Since reporters and the public will probably be attending most of the court proceedings

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[275] *See* 21 U.S.C. § 841(b)(1)(A)(ii) (2006).

[276] During a two-year moratorium on access to the content of criminal case files on PACER, though not to docket information, initiated in 2001, the Judicial Conference carved out an exception for extremely high-profile criminal cases that placed extraordinary demands on clerks' offices, such as the prosecution of the "20th hijacker" Zacarias Moussaoui. *See* Press Release, U.S. Courts, Web Sites Help Courts, Public in High-Profile Cases (May 22, 2003), *available at* http://www.uscourts.gov/newsroom/highprofilecases.htm.

[277] Jack Abramoff, the lobbyist at the center of several recent public corruption scandals, who cooperated with the government and was sentenced to five years' imprisonment, is a frequently-cited example. *See* MLRC Comment, *supra* note 26, at 2; Michael E. Stowell, Attorney (Sept. 12, 2007), *in* Privacy Comments, *supra* note 26, Comment 24; Private Citizen (Sept. 13, 2007), *in* Privacy Comments, *supra* note 26, Comment 35.

anyway, it makes little sense to limit accessibility to paper files at the courthouse.

For cases that did not go to trial, someone would have to decide whether a case was high-profile or not, and what the criteria should be. As a preliminary matter, these questions would probably be best answered by the district judge presiding over the case, considering the totality of the circumstances and with input from the parties..[278] In formulating its own high-profile exception, the Judicial Conference determined that in order to obtain the "high-profile" exemption, "[c]onsent of the parties would be required as well as a finding by the trial judge . . . that such access is warranted under the circumstances."[279]

High-Profile Exception.

Nonetheless, the foreseeable difficulties of formulating and administering exceptions to a regime of limited Internet access pale in comparison with the potential gains in terms of halting the trend towards prosecutorial evasion and loss of legitimate information. Limiting online access to criminal court records, which would curb the incentives for prosecutors to hide the nature of the bargains they enter into with cooperators, could at least maintain the level of information currently available to the public.

2. *Increasing Public Oversight.* No matter what limits are placed on electronic access, there remains the vexing issue of how to achieve meaningful oversight of cooperation practices. The cooperation system remains "a great source of dishonesty and evasion and a still uncertain amount of unwarranted disparities among individual defendants."[280] As discussed above, the lack of information as to how cooperation is administered within and among the districts,[281] coupled with a lack of standards and guidance to inform prosecutorial discretion, has lead to an undermining of the goals of sentencing uniformity and

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[278] Factors might include the likelihood of retaliation if cooperation was revealed, the nature of the crime charged, the nature of the public interest and the privacy concerns of the litigants.

[279] Judiciary Privacy Policy webpage, *Limited Exceptions to Judicial Conference Privacy Policy for Criminal Case Files* (adopted March 2002), *available at* http://www.privacy.uscourts.gov/privacypolicy.htm (follow "Limited Exceptions" hyperlink) (last visited Aug. 4, 2008). This could be supplemented by a requirement that consent not be unreasonably withheld.

[280] Weinstein, *supra* note 32, at 617.

[281] Scholars, judges, and practitioners have called for data to be collected for years. *See, e.g.*, Saris, *supra* note 16, at 1051-52; Bowman, *supra* note 37, at 65; Marcus, *supra* note 45, at 8; King, *supra* note 68, at 306.

fairness. Instead, these ideals have been replaced by the reality of hidden, unprincipled, ad hoc decisions by individual prosecutors.[282]

The open access advocates are right to demand greater public oversight into the federal criminal justice system, particularly in the subterranean area of cooperation agreements. Where they are wrong is in their method of achieving reform. Insisting on Internet access to cooperation agreements simply triggers fears of retaliation, encouraging prosecutors to find ways to avoid creating a paper trail, which in turn creates the risk of even greater disparities and increasingly ineffective review.

Nearly 20 years ago, Graham Hughes proposed a mechanism for review of cooperation decisions that would require prosecutors to file the details of their plea and cooperation agreements with a public commission that would periodically examine and report on these agreements.[283] Cooperation agreements deserved special scrutiny, Hughes argued, precisely because they were not standardized or governed by a consistent set of rules and therefore protection of the public interest and fairness in the administration of justice were implicated "with a special sharpness."[284] Because of the power of the government over such agreements, Hughes found that a cooperator's fate under a particular cooperation agreement was "an important index of the fairness and integrity of the prosecutorial system."[285] A review process, he believed, could help develop standards and criteria to measure what the cooperator would have to do in order to fully cooperate, as well as what actions would constitute a breach of that agreement.

If anything, his proposal is even more relevant today. The best way to disentangle the sensitive personal information from the adjudicatory facts in a cooperator's case[286] is to organize the information differently, outside of the confines of a criminal case file with a specific person's name on it. If the traditional way of making cooperation

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[282] As William Stuntz has observed, "The real law of crimes and sentences is the sum of those prosecutorial choices. That law is nearly opaque; even those who study the criminal justice system for a living know very little about it." William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2569 (2004).

[283] Hughes, *supra* note 4, at 20.

[284] *Id.* Hughes also noted that cooperation agreements were different from ordinary plea agreements in that the possibility of leniency they provided could be entirely unrelated from reduced culpability on the part of the cooperator, and they could sometimes risk licensing continuing criminal activity. *See id.* at 21.

[285] *Id.* at 40.

[286] *See supra* notes 230-31 and accompanying text.

agreements public has been to seal, redact, or otherwise hide the terms of the cooperation bargain, a far more enlightening alternative would be to disclose cooperation agreements with the explicit terms of the bargain intact, but the personal identifying information excised.[287] Since most government agreements are boilerplate, the agreements should be released in the context of an anonymous defendant "profile." Each defendant profile, which could be organized by the type of crime charged, could then include: (1) a copy or a statement of the initial charges;[288] (2) all subsequent and superseding charges; (3) plea documents; (4) an indication of whether the defendant cooperated, and if so, the substance of his cooperation;[289] and (5) sentencing information. If the defendant did cooperate, the cooperation could be sorted into one of four general categories:[290] providing background information,[291] agreeing to testify, providing testimony, or taking active part in an investigation. Finally, it would helpful to note the race and gender of the defendants (and possibly the targets) in order to monitor the disparities earlier recognized by the Sentencing Commission.[292]

Overall, such a system would help identify charge bargaining,[293] reveal the frequency of cooperator breaches, enable comparison between cooperation outcomes and the outcomes of "straight" pleas, and give an overview of what type of cooperation leads to what sentencing reductions across districts. In this way, the computerization of the federal courts could give the government an opportunity to shed light on its cooperation practices without triggering fears of increased retaliation or a massive loss of individual privacy.

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[287] The fact that there would anonymity for the individual line Assistant making the bargain as well as for the defendant could encourage candid reporting.

[288] In many cases, criminal complaints can be very fact-intensive, containing information such as conversations captured on wiretaps, detailed descriptions of physical surveillance, or specific events reported by confidential sources. If the complaint cannot be redacted sufficiently to protect the anonymity of the case, or would be meaningless without the specific identifying information such as names, places and dates, it might be better replaced by a simple statement of the crimes charged and a general description of the facts.

[289] This would replace disclosure of the government's substantial assistance motion, another typically fact-intensive document which, if redacted to remove identifying information, would probably be unintelligible.

[290] *See* Marcus, *supra* note 45.

[291] This category could be further subdivided into provision of background information or information leading to search warrants or arrest warrants.

[292] *See supra* note 72 and accompanying text.

[293] *See* Nagel & Schulhofer, *supra* note 59, at 516 ("[O]ur best window on potential circumvention is to trace the differences between indictment charges and conviction charges").

One practical question is who should be tasked with reporting this information. Because prosecutors are in the best position to collect information and report on their own cases, the most obvious choice would be the line assistants who sign up the cooperators. They could be responsible for redacting any markers that would identify the target, the cooperator, or the assistant, and for organizing the information into relevant categories. A periodic reporting requirement[294] would lessen both the administrative burden on the assistants and the chances that interested individuals could "decode" the defendant profiles and identify cooperators. There remains the risk that some prosecutors will continue to reward sympathetic defendants even where no assistance is given, and simply certify that they provided "background information." But the sense of greater public scrutiny, at a minimum, will remind prosecutors of their accountability and could encourage more honesty.[295]

Such a proposal is not likely to be met with unmitigated enthusiasm by the government. No bureaucrat—line assistants included—welcomes the thought of more paperwork, particularly a new reporting requirement without which they have managed quite nicely for years. Yet, realistically, the Department of Justice and the U.S. Attorney's Offices are faced with a choice. Public opinion is almost universally against removing plea agreements from PACER and, for the moment, the Judicial Conference is not taking steps to do so, leaving the decision-making to the individual districts. While certain districts have taken steps to limit access to criminal court records,[296] many more simply post all their files on PACER.[297] If the Department wants to convince the courts to limit the information on PACER, proposing a good-faith alternative might help overcome public resistance. There are also several benefits to the government from such a requirement. Individual line assistants might be encouraged to think through their decisions more carefully. The awareness that their charging decisions

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[294] Depending on the district's caseload, quarterly or yearly reporting might be appropriate.

[295] Better information would help prosecutors "develop a self-image of independence and fairness that can be a guarantor of liberty. . . . A proper understanding of the power they wield, and its quasi-judicial nature, should facilitate this development." Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2150 (1998).

[296] *See supra* note 223.

[297] *See* David L. Snyder, Note, *Nonparty Remote Electronic Access to Plea Agreeements in the Second Circuit*, 35 FORDHAM URB. L.J. 1263, 1307 (2008) (listing 65 districts that make plea agreements available on PACER to the same extent that they are available at the courthouse).

will be made public, even if not directly attributable to them, might increase a sense of professionalism. It might also provide guidance to the well-meaning assistant who is unsure what to do. The decision whether to "sign up" a defendant to a cooperation agreement is not an easy one. Assistants frequently find themselves under pressure from agents who often want to sign up defendants in the shortest time possible and with the fewest proffers sessions.[298] Substantial assistance motions can also be enthusiastic or grudging,[299] and the choice between these extremes is often made with only cursory input from supervisors who might be distracted by their own cases. Awareness of how prosecutors in other offices make decisions in similar circumstances, or even having a better sense of how their colleagues in the same office operate, should encourage more thoughtful determinations.

The benefits to the public could also be considerable. Even with all the advances in technology, there has never been a systematic overview of what cooperation deals are made in particular types of cases, and how they compare to "straight" pleas in similar cases. Making this information available for study and debate would be an important step towards encouraging greater prosecutorial accountability, avoiding unfair results and arbitrariness, and bringing greater rationality to the process. As one of the members of the public wrote to the Judicial Conference, "Access to these agreements provides the American people with a window into a contract that is being made with a defendant on behalf of the American people."[300] Such a reporting requirement would provide everyone—courts, litigants, the public, the press, and scholars—with a much clearer view.

If we are to take seriously the promise of well-informed public debate on the justice system in general and the practice of cooperation in particular, we should be able to make the information about "what the government is up to" available in a way that does not conflict with law enforcement concerns and the privacy rights of the cooperators

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[298] Once the cooperator has been fully debriefed, agents often have little patience with Colombo-like assistants who schedule additional proffers just to probe every contradiction.

[299] While in the Eastern District of New York, cooperators were only violated if they had clearly lied or committed another crime since signing the cooperation agreement, cooperators who had been economical with the truth early in the process or had committed other bad acts would usually receive a "warts and all" 5K letter, informing the judge of everything, good and bad, the cooperator had done of which the government was aware.

[300] Private Citizen, Portland, Ore., (Sept. 13, 2007), *in* Privacy Comments, *supra* note 26, Comment 30.

themselves. The student editors in *Rose* were onto something—they wanted to conduct a study of the Air Force's disciplinary proceedings without infringing on the privacy of the cadets or the integrity of the Air Force's process. Their request for the case summaries without identifying personal information permitted them to achieve both goals. We can build something similar for plea information in the criminal justice system generally—we have the technology.

CONCLUSION

The grant of electronic access to criminal files in the federal courts is likely to disappoint those who hope it will usher in a new era of governmental accountability. Spurred by fears of retaliation against cooperating defendants and a consequent hampering of law enforcement efforts, prosecutors and courts will find ways of concealing the terms of cooperation bargains reached. Information that was at least somewhat helpful when it was practically obscure now risks being degraded beyond legibility once it is released over the Internet. One possible way to reverse this trend would be to limit access, in exchange for an organized reporting system that concealed only the names and other identifying information of the defendants involved. This would answer the serious privacy concerns raised by imperishable electronic records and give the public more insight into the nature of federal plea bargains.

The use of cooperating defendants, one of the most difficult law enforcement techniques to regulate, and possibly the most susceptible to arbitrary application, could then endeavor to become more transparent and more fair, both through self-policing by U.S. Attorneys and through public oversight.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 6-7, 2011
San Francisco, California
Minutes

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ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in San Francisco, California, on Thursday and Friday, January 6 and 7, 2011. The following members were present:

Judge Lee H. Rosenthal, Chair
Douglas R. Cox, Esquire
Roy Englert, Esquire
Judge Neil M. Gorsuch
Judge Marilyn L. Huff
Chief Justice Wallace Jefferson
William J. Maledon, Esquire
Judge Reena Raggi
Judge Patrick J. Schiltz
Judge James A. Teilborg
Judge Diane P. Wood

Three members were unable to attend the meeting: Dean C. Colson, Esquire; Dean David F. Levi; and Deputy Attorney General James M. Cole. The Department of Justice was represented by Karen Temple Claggett, Esquire and S. Elizabeth Shapiro, Esquire.

Also participating in the meeting were the committee's consultants, Professors Geoffrey C. Hazard, Jr. and R. Joseph Kimble, and the following guests who participated in a panel discussion: Judge Barbara J. Rothstein; Judge Paul W. Grimm; Gregory P. Joseph, Esquire; Daniel C. Girard, Esquire; Thomas Y. Allman, Esquire: and John Barkett, Esquire.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Peter G. McCabe	The committee's secretary
John K. Rabiej	Special counsel, Administrative Office
James N. Ishida	Senior attorney, Administrative Office
Jeffrey N. Barr	Senior attorney, Administrative Office
Emery G. Lee	Research Division, Federal Judicial Center
Meghan A. Dunn	Research Division, Federal Judicial Center
Andrea Kuperman	Judge Rosenthal's rules law clerk

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
- Judge Jeffrey S. Sutton, Chair
- Professor Catherine T. Struve, Reporter

Advisory Committee on Bankruptcy Rules —
- Judge Eugene R. Wedoff, Chair
- Professor S. Elizabeth Gibson, Reporter

Advisory Committee on Civil Rules —
- Judge Mark R. Kravitz, Chair
- Professor Edward H. Cooper, Reporter
- Professor Richard L. Marcus, Associate Reporter

Advisory Committee on Criminal Rules —
- Judge Richard C. Tallman, Chair
- Professor Sara Sun Beale, Reporter
- Professor Nancy King, Associate Reporter

Advisory Committee on Evidence Rules —
- Judge Sidney A. Fitzwater, Chair
- Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Rosenthal welcomed the new committee members – Judge Gorsuch, Judge Schiltz, and Mr. Englert – and summarized their extensive professional backgrounds and achievements.

She reported that John Rabiej would be leaving the Administrative Office shortly to become executive director of the Sedona Conference. She noted that the committee would honor him for his service at its next meeting in June. As a short-term measure, she said, Andrea Kuperman, her rules law clerk, would be detailed to the Administrative Office to serve as chief counsel to the committee. She also asked the committee to recognize the excellent work that Katherine David had performed as rules law clerk during Ms. Kuperman's maternity leave.

With great sadness, Judge Rosenthal reported that Judge David G. Trager, a former member of the Advisory Committee on Criminal Rules, had just passed away. She also noted that Joe Cecil of the Federal Judicial Center, who has conducted a great deal of excellent research for the committee over many years, had recently lost his son in a tragic accident. She extended the deepest sympathies of the committee to the Trager and Cecil families.

Judicial Conference Action

Judge Rosenthal reported that the Judicial Conference at its September 2010 session had approved all the rules amendments recommended by the committee.

The Conference also approved the proposed statutory amendment to 28 U.S.C. § 2107. That legislative change, she explained, was needed to buttress the proposed amendment to FED. R. APP. P. 4(a)(1) (time to appeal) that would clarify the time to appeal in civil cases when a federal officer or employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States. The Supreme Court has held that time limits set forth in statutes are jurisdictional in nature. Therefore, the statute needs to be amended to complement the rule amendment. *Bowles v. Russell*, 551 U.S. 205 (2007). The statutory change, she noted, was essentially technical in nature. She reported that she and Mr. Rabiej had spoken to House and Senate judiciary committee staff about it and had received encouragement that it would likely be adopted.

Pleading Standards Legislation

Judge Rosenthal noted that two pieces of legislation had been introduced in 2009 that would regulate pleading standards in civil cases, and three Congressional hearings had been conducted on them. She suggested that it will be difficult for Congress to

achieve consensus on the specific language of a single bill. Nevertheless, the thrust of the various legislative efforts to date had been: (1) as an interim measure, to restore pleading standards to those in effect immediately before *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); and (2) as a longer-term measure, to allow the rules committees to work out the final standards under the Rules Enabling Act process.

She reported that it was unclear whether any of the bills will be successful in the new Congress. The committee's overarching interests, she said, are: (1) to avoid being drawn into the political fray; and (2) to preserve the integrity of the Rules Enabling Act process. She added that the committee and its staff will continue to monitor and document the extensive case law on pleading standards following *Twombly* and *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S.Ct. 1937 (2009). The committee's summaries of the developing case law are posted on the judiciary's rules web site, www.uscourts.gov. In addition, she noted, the Federal Judicial Center would continue to study civil cases after *Twombly* and *Iqbal* to elicit meaningful insights on how the district courts are handling motions to dismiss.

Finally, she observed that two bills had been introduced in Congress that would alter the standards for pleading in specific types of civil litigation – in fashion-design cases and "anti-SLAPP" cases. She solicited the committee's views on whether the Administrative Office should prepare a standard response that could be used for all future legislation affecting pleading standards or should wait and comment individually on each bill as it is introduced. A participant urged the judiciary to be very cautious and avoid being drawn into the legislative debate in light of the politically charged atmosphere that had accompanied the private securities legislation.

Sunshine in Litigation Legislation

Judge Rosenthal noted that some sort of "sunshine in litigation" legislation continues to be introduced in every Congress. Among other things, she said, the bills would prevent a court from issuing a protective order if the information that would be protected by the order could be relevant to protecting public health or safety.

She noted that concern had arisen again in the wake of the BP oil spill when a bill was introduced specifying that court orders restricting the dissemination of broad categories of information would be void and unenforceable in any legal proceeding. The proposed legislation would effectively have made discovery unworkable. As a result, she and Judge Kravitz had written to Congress explaining why that particular provision was unnecessary and would be disruptive, and the sponsors later removed it from the bill.

Judge Rosenthal reported that she and Judge Kravitz had met with the staff of Representative Nadler, who had introduced the latest version of the sunshine legislation. She noted that his current bill, although a little narrower than earlier versions, still

presented difficult and unnecessary problems that would make civil litigation more expensive, burdensome, and time-consuming. It would also make it more difficult to protect important privacy interests.

Bankruptcy Rules

Judge Rosenthal explained that under the Rules Enabling Act, the Supreme Court must promulgate rule amendments and send them to Congress by May 1 of each year. The amendments then take effect by operation of law on December 1 of each year, unless Congress acts during the interim seven months to reject, modify, or defer them.

She reported that on the eve of the December 1, 2010, deadline, Congressional staff had raised an objection to the 2010 rule amendments – apparently in response to a last-minute attempt by opponents of a particular bankruptcy rule. She noted that the matter had eventually been resolved to the satisfaction of the staff, and the rules went into effect on December 1.

Nevertheless, she said, this sort of last-minute action could become a recurring tactic every year. She explained that the committee chairs, the reporters, and AO staff were continuing to work hard at all stages of the rules process to avert potential surprises by informing Congressional staff in advance about pending amendments and potentially controversial issues. Those ongoing, informal communications, she said, had proven to be enormously beneficial.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of the last meeting, held on June 14-15, 2010.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. McCabe reported that appropriations legislation had still not been enacted by Congress to provide funds to operate the federal government for the 2011 fiscal year. As a result, the federal judiciary was operating under a continuing resolution limiting its funding to 2010 levels. He noted, moreover, that a great deal of talk had been heard in the political arena about imposing cuts in spending across all parts of the federal government. As a result, he said, the future budget for the courts could be very constrained.

REPORT OF THE FEDERAL JUDICIAL CENTER

Judge Rothstein reported that the Federal Judicial Center had come away from the Duke conference with clear instructions to pursue additional case-management training

for judges, regardless of whatever rules changes might be adopted by the committee. She noted that the Center had designed a new program focused on case management, and it had already been oversubscribed.

She reported that about 30 years ago the Center had conducted a study to identify the most effective case-management procedures. Now it is in the process of designing a similar, updated study to assess which procedures work well and which do not. Center staff, moreover, will be updating the Center's case-management monographs and drafting new publications. For example, the Center, working in conjunction with the Judicial Panel on Multi-District Litigation, will prepare a new series of "how-to" monographs for judges and lawyers on handling specific categories of civil cases before the panel.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Sutton and Professor Struve presented the report of the advisory committee, as set forth in Judge Sutton's memorandum and attachments of December 3, 2010 (Agenda Item 6).

Amendments for Publication

FED. R. APP. P. 13, 14 and 24

Judge Sutton noted that Congress enacted 26 U.S.C. § 7482 in 1986. It authorizes discretionary interlocutory appeals from the Tax Court to the courts of appeals, similar to the provision in 28 U.S.C. § 1292(b) that governs interlocutory appeals from the district courts. The Federal Rules of Appellate Procedure, however, have never been amended to implement the 1986 statute.

He reported that the advisory committee's proposed amendments to Rule 13(a) (appeal from the Tax Court) and Rule 14 (applicability of other rules) had been developed in close consultation with the Tax Court and the Department of Justice. In addition, the advisory committee had consulted tax lawyers on the proposed rules.

Revised FED. R. APP. P. 13(a) would largely carry forth the provisions of existing Rule 13 and address an "appeal as of right" from the Tax Court. Proposed FED. R. APP. P. 13(b) would address an "appeal by permission" from the Tax Court by incorporating the provisions of FED. R. APP. P. 5 (appeal by permission).

The proposed revisions to FED. R. APP. P. 14 had been designed to complement Rule 13. They would delete the current reference to Tax Court "decisions" and specify that references to the district court and the district clerk in any applicable appellate rule,

other than FED. R. APP. P. 24(b), should be read as referring to the Tax Court and its clerk.

The amendments to FED. R. APP. P. 24(b) had been recommended by the Tax Court. They would correct the impression fostered by the current rule that the Tax Court is an executive branch agency, rather than a court.

The committee without objection by voice vote approved the proposed amendments for publication.

Information Items

Judge Sutton asked the members for feedback and guidance on two potential rule amendments that the advisory committee had under consideration.

FED. R. APP. P. 29(a)

Judge Sutton reported that Rule 29(a) currently allows the following entities to file an amicus-curiae brief in a court of appeals without the consent of the parties or prior leave of court: (1) the United States; (2) a federal officer or agency; and (3) a state, commonwealth, or territory, and the District of Columbia. The advisory committee, he explained, was considering a proposal that would extend that exemption to federally recognized Indian tribes.

He explained that the original public suggestion had been much broader in scope and would have redefined the term "state" in FED. R. APP. P. 1(b) (scope and definitions) to include Indian tribes throughout the appellate rules. The advisory committee, however, decided against that proposal and currently was only considering the proposal to permit tribes to file amicus briefs without leave of court.

He noted that the Federal Judicial Center had conducted an empirical study at the committee's request. It revealed that Indian tribes do in fact file a number of motions for permission to file amicus briefs, most of them in three federal circuits. The study further showed that the great majority of the motions for leave to file are granted by the courts. In reality, thus, Indian tribes already have the ability to file amicus briefs. The key issue, therefore, is not access to the courts but the fundamental dignity of the tribes.

Judge Sutton said that he had written to the chief judges of the three circuits having the most motions for leave to file and had asked them: (1) whether they favored changing the national rule to allow tribes to file amicus briefs without court permission; and (2) whether their circuits would consider modifying their own local rules to permit tribes to file without permission. He reported that the circuits had not shown much enthusiasm so far for either course of action.

Judge Sutton pointed out that the rules of the U.S. Supreme Court allow municipalities to file amicus briefs without permission, but not Indian tribes. He added that there is no clear history as to why that particular choice had been made when the Court adopted its rule in the 1930s.

He reported that the advisory committee was divided on the merits of the proposal, and it would appreciate hearing any views that the members of the Standing Committee may have to offer. He proceeded to summarize the arguments offered by opponents and proponents of the proposal.

Advisory committee members opposed to the change had stated that there is no problem that needs fixing because Indian tribes routinely are given leave to file amicus briefs now. As a matter of substance, moreover, tribes are essentially different from states. In addition, the Supreme Court's amicus rule recognizes states and municipalities, but not tribes. Although dignity is important, opponents concede, it is in reality another name for sovereignty – a matter of great political sensitivity that the rules committees should avoid.

On the other hand, advisory committee members favoring the change had argued that dignity is a core value that should be recognized in the rule. Judge Sutton noted that the advisory committee had received a letter from several tribal groups strongly endorsing the proposed amendment. Proponents also argued that Indian tribes are exactly the same as states, at least for the purposes of Rule 29(a). If municipalities are allowed to file amicus briefs without permission in the Supreme Court, sovereign Indian tribes should have at least the same status. In fact, it would make sense to include both Indian tribes and municipalities in a revision of Rule 29(a). He also noted that the advisory committee had considered and rejected the possibility of adding foreign governments to the rule.

Judge Sutton pointed out that amicus briefs pose a risk because they may raise recusal problems for judges. With that in mind, he said, some courts currently specify that an amicus brief will not be allowed if it would result in the recusal of a judge. He suggested that if Rule 29(a) were to be amended, the revised rule could address the recusal prohibition directly or explicitly allow the courts of appeals to address it in their local rules.

The participants then expressed the same divergence of views that the members of the advisory committee had voiced. One member strongly supported the proposed amendment and pointed out that Indian tribes have a greater claim of sovereignty than municipalities because the latter are only creatures of the states. Moreover, tribes, as sovereign entities, have essentially the same important interests in third-party cases that states do.

A participant said that many commercial cases affect Indian tribes, and he suggested that the tribes normally can afford to write amicus briefs in these cases. He added that it is rare for a court to deny a tribe's request to file an amicus brief, although recusal problems arise from time to time.

Another participant cautioned that there is a real political risk in amending Rule 29. The rules committees may be used as a political stepping stone to achieve other political objectives involving sovereignty and tribal rights.

A member inquired as to why the advisory committee had decided to include Indian tribes only in Rule 29. Judge Sutton and Professor Struve responded that the committee had in fact reviewed all the appellate rules individually, and there were simply too many practical complications with adding tribes to the other rules.

A member encouraged the advisory committee to amend Rule 29 to include both tribes and municipalities. Among other things, he said, including cities in the rule would reduce any political fallout. In addition, if Rule 29 were amended, the Supreme Court would likely change its rule eventually to include tribes.

On the other hand, a member pointed to the lack of enthusiasm for the proposal on the part of the three circuits that have the most tribal cases. He emphasized that there is no real problem under the current rule because tribes as a practical matter have no problem in filing amicus briefs in meritorious cases. He expressed concern about the committee getting out ahead of the Supreme Court on a potentially controversial issue.

Ms. Claggett stated that the Department of Justice did not have an official view on the matter, but the Department encouraged the committee to keep the matter on its agenda.

Some participants suggested that it is not always clear what constitutes a tribe and who may speak for the tribe in litigation. In addition, a member cautioned that the amendment could lead to a slippery slope because other groups that Congress has "deemed" to be Indian tribes, such as Alaskan native villages and corporations, could ask to be included in the rule. Legislation had been introduced in Congress to recognize Native Hawaiians as a tribe. Judge Sutton explained that the advisory committee had deliberately limited the proposal to federally recognized tribes, and Professor Struve added that the process for federal recognition is a lengthy one.

A member suggested that the committee also needs to take account of the 2010 change in FED. R. APP. P. 29 that requires amicus briefs to disclose authorship and funding.

FED. R. APP. P. 28

Judge Sutton pointed out that Rule 28 (briefs) mandates the specific contents of a brief and the order in which the contents must be presented. Rule 28(a)(6), for example, states that a brief must contain "a statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below." Then Rule 28(a)(7) requires "a statement of facts relevant to the issues submitted for review." He suggested that it might make more sense to collapse (a)(6) and (a)(7) into a single statement, as the Supreme Court's rule does. That approach, he said, would allow lawyers to make their case and tell their story in a more natural way. Most lawyers, he said, would choose to follow a chronological approach.

Judge Sutton reported that there was strong support on the advisory committee in favor of reformulating the contents requirements. The committee was considering three options: (1) aligning Rule 28 more closely with the Supreme Court's rule; (2) leaving paragraphs (a)(6) and (a)(7) of Rule 28 in place, but reversing their order – placing the facts first and then the statement of the case; and (3) removing the words "course of proceedings" from Rule 28(a)(6). He added that the members of the advisory committee agree that there is a problem with Rule 28, but there is no consensus yet as to which particular option to pursue.

Several participants stated that, as a minimum, the phrase "course of the proceedings" should be eliminated from Rule 28(a)(6) because it induces lawyers to include unnecessary details about the proceedings below and causes briefs to be too long. Judges, they said, want briefs to focus on the dispositional ruling below. Chief Justice Jefferson quoted from the pertinent Texas state-court rule (Rule 38.1) that requires a concise statement of the case that "should seldom exceed one-half page, and . . . not discuss the facts." Several members praised that approach because it requires the lawyers to tell the court up front precisely and briefly what they want the court to do. Along the same lines, a member pointed out that some state courts specifically require an introduction to a brief.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Wedoff and Professor Gibson presented the report of the advisory committee, as set forth in Judge Wedoff's memorandum and attachments of December 6, 2010 (Agenda Item 9). Judge Wedoff reported that the advisory committee had no action items to present.

Informational Items

FED. R. BANKR. P. 1007

Judge Wedoff explained that the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 specifies that individual debtors in chapter 7 cases must file a statement that they have completed an approved course in personal financial management before they may receive a discharge. FED. R. BANKR. P. 1007(c) (time limits) had required a debtor to file the statement within 45 days after the first date set for the meeting of creditors under § 341 of the Code.

Some debtors, however, fail to file the required statement within 45 days. Therefore, the court has no choice under the statute but to close the case without a discharge. To alleviate that hardship, FED. R. BANKR. P. 5009(b) (notice of failure to file the Rule 1007(b)(7) statement) was amended, effective December 1, 2010. It now requires the bankruptcy clerk to notify individual debtors who have not filed the statement within 45 days to inform them that if they do not file the statement within an additional 15 days, their case will be closed without a discharge. As a conforming amendment, the time limit in Rule 1007(c) was increased from 45 days to 60 days.

Judge Wedoff reported that a complicating factor is that two versions of Rule 1007 were currently in place – FED. R. BANKR. P. 1007 and INTERIM RULE 1007-1. The latter, he said, was a special, temporary rule adopted by the bankruptcy courts as a local rule or standing order to deal temporarily with certain servicemen under the National Guard and Reservists Debt Relief Act of 2008. In that Act, Congress exempted certain members of the Guard and Reserves from the means testing required of other chapter 7 debtors. The statutory exemption, though, was made applicable only for cases filed during the three-year period from December 2008 to December 2011. Since the statutory provision would expire in less than a year, Judge Wedoff said that it made no sense to change the permanent, national rule. Therefore, the committee asked the courts to adopt the interim rule for servicemen as a local rule or standing order.

INTERIM BANKRUPTCY RULE 1007-1 also includes the requirement that debtors file the statement that they have completed a course in personal financial management. Therefore, when FED. R. BANKR. P. 1007 was amended on December 1, 2010, to extend the total time for debtors to file the statement from 45 days to 60 days, a corresponding

change had to be made in INTERIM BANKRUPTCY RULE 1007-1. So, on November 4, 2010, the chairs of the Standing Committee and the advisory committee sent a memorandum to the bankruptcy courts advising them to increase the interim rule's deadline for filing the statement from 45 days to 60 days, consistent with revised FED. R. BANKR. P. 1007.

Judge Wedoff pointed out that the December 2010 amendments to FED. R. BANKR. P. 1007 also had shortened from 14 days to 7 days the time for a debtor in an involuntary case to file a list of creditors' names and addresses. The debtor, however, only has to file the list of creditors after the court enters the order for relief.

FED. R. BANKR. P. 3001

Judge Wedoff reported that the proposed amendments to FED. R. BANKR. P. 3001 (proof of claim) published in August 2010 had been designed to address problems often arising with proofs of claims that involve credit-card debt, especially debt purchased by bulk buyers. He said that the documentation filed by some bulk creditors is often insufficient to support their claims because it fails to comply with Rule 3001's current requirement that a claim be accompanied by the original or a duplicate of the writing on which it is based.

He reported that the advisory committee had published a proposed revision to Rule 3001 in August 2009. It would have required a creditor holding a claim based on an open-end or revolving consumer-credit agreement to attach the last account statement sent to the debtor before the debtor filed the petition. At the public hearings, however, several institutional creditors stated that they were simply unable to produce a copy of the last statement.

In response, the advisory committee deleted the requirement that a copy of the last statement be attached. Instead, it republished a revised version of the rule in August 2010 that would instead require the holder of a claim to file five specific pieces of information with the proof of claim. He noted that a public hearing on the revised rule would be held in early February 2011.

FED. R. BANKR. P. 7054

Judge Wedoff reported that the proposed amendments to Rule 7054 (judgments and costs) would give a party more time to respond to a prevailing party's bill of costs.

FED. R. BANKR. P. 7056

Judge Wedoff explained that FED. R. BANKR. P.7056 (summary judgment) incorporates FED. R. CIV. P. 56 by reference. As amended effective December 1, 2009, FED. R. CIV. P. 56(c)(1)(A) specifies that a party may move for summary judgment at any time until 30 days after the close of all discovery, unless the court specifies another time.

Since bankruptcy matters tend to move quickly and hearings often occur shortly after the close of discovery, Judge Wedoff said that the advisory committee had decided that a shorter deadline was needed in bankruptcy. Therefore, it had published a proposed amendment to FED. R. BANKR. P. 7056 specifying that in bankruptcy adversary proceedings a summary-judgment motion must be made "at least 30 days before the initial date set for an evidentiary hearing on any issue for which summary judgment is sought." As with FED. R. CIV. P. 56(c)(1), the deadline may be altered by local rule or court order.

OFFICIAL FORMS

Judge Wedoff reported that the advisory committee had published proposed amendments to OFFICIAL FORM 10 (proof of claim) and three new forms to be filed with proofs of claims for home-mortgage debts. The changes would implement pending amendments to FED. R. BANKR. P. 3001 and new FED. R. BANKR. P. 3002.1, both due to take effect on December 1, 2011. In summary, they will require the holder of a home-mortgage claim to: (1) provide additional details about the breakdown of the mortgage debt; (2) give notice of any changes in installment payment amounts; and (3) give notice of the assessment of any fees, expenses, and charges after the claim is filed.

He reported that OFFICIAL FORM 25A (model plan for reorganization of a small business under chapter 11) would be amended to change its effective-date provisions. The changes, he said, were technical in nature and would give more time to appeal an order confirming the plan.

Judge Wedoff reported that the advisory committee will consider two new form amendments at its next meeting in response to the Supreme Court's recent decisions in *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010), and *Schwab v. Reilly*, 130 S. Ct. 2652 (2010).

He explained that under § 1325(b)(1) of the Bankruptcy Code, chapter 13 debtors may be required to devote all their "projected disposable income" to payment of unsecured claims. *Hamilton v. Lanning* concerned the calculation of that disposable income. In that case, the debtor's financial situation had changed, as he had acquired a new job at a considerably lower salary. The Supreme Court rejected the mechanical approach of considering only the debtor's average monthly income for the six months

preceding the bankruptcy filing. Instead, it adopted a forward-looking approach that will allow bankruptcy courts to consider changes in a debtor's income and expenses after filing.

As a result of *Lanning*, he said, the advisory committee was considering amending OFFICIAL FORM 22C (chapter 13 statement of current monthly income and calculation of commitment period and disposable income). The form currently asks debtors only to list their pre-bankruptcy average income and current expenses. The proposed revision would ask them to list any changes in income and expenses that have already occurred or are virtually certain to incur during the 12 months following filing.

Judge Wedoff explained that *Schwab v. Reilly* concerned how a debtor may claim an exemption in property where the actual value of the property exceeds the maximum dollar amount allowed for the exemption under the relevant federal or state law. The Supreme Court held that if the debtor enters a specific dollar amount on the exemption form, he or she is then limited to that amount. If the full market value of the property exceeds that amount, the trustee may use the overage.

Judge Wedoff said that OFFICIAL FORM 6C (property claimed as exempt) is ambiguous. In *Schwab*, the Court stated that the debtor's listing of the claimed exemption and the value of the property in the same amount did not put the trustee on notice that the debtor was claiming the full market value of the property as exempt, whatever the value might turn out to be. As a result of *Schwab*, Judge Wedoff said, the advisory committee had tentatively agreed to amend Form 6C to permit the debtor to exempt the "full fair market value of the property." The change would put the trustee on notice of the need to object if he or she believes that the value of the property exceeds the allowed exemption amount.

FORMS MODERNIZATION

Judge Wedoff reported that the advisory committee was engaged in a major project to modernize and reformulate all the bankruptcy forms to make them clearer and easier to complete, and to take full advantage of technological advances. He noted that considerable progress had been made under the direction of its forms modernization subcommittee, chaired by Judge Elizabeth Perris and assisted by Carolyn Bocella Bagin, a nationally prominent forms expert. The subcommittee, he said, should complete a set of revised forms for individual debtors in the next few months, and he anticipated that the advisory committee may have all the forms ready to be published for public comment in August 2012.

BANKRUPTCY APPELLATE RULES

Judge Wedoff noted that the advisory committee was also making major progress in revising Part VIII of the bankruptcy rules – the bankruptcy appellate provisions. He pointed out that the current Part VIII rules are difficult to follow and inconsistent in several respects with the Federal Rules of Appellate Procedure. He reported that the advisory committee was working closely with the Advisory Committee on Appellate Rules, and the two committees would meet jointly in April 2011.

He explained that the advisory committee was in the process of deciding which of two structural approaches to pursue in revising the Part VIII rules:

(1) to maintain stand-alone bankruptcy appellate rules that repeat many of the provisions of the Federal Rules of Appellate Procedure; or

(2) to incorporate the Federal Rules of Appellate Procedure into Part VIII of the bankruptcy rules by citation – with listed exceptions and modifications – in the same manner that Part VII of the bankruptcy rules now incorporates the Federal Rules of Civil Procedure by citation for adversary proceedings.

He pointed out that the advisory committee had prepared alternate drafts of a revised FED. R. BANKR. P. 8003, and he asked the members for their preferences as to the two approaches.

Incorporation, he said, would result in shorter rules that are clearer to lawyers familiar with the Federal Rules of Appellate Procedure. Incorporation would also have the advantage that when the FRAP are amended in the future, no additional changes will be needed in the bankruptcy rules. But, he noted, it will be complicated to incorporate FRAP by reference into the bankruptcy rules because bankruptcy appeals are different in several respects from civil and criminal appeals.

Professor Gibson added that the incorporation model was shorter, but it will present a number of drafting problems. For example, there are three different appellate "courts" to which an appeal may be taken from a bankruptcy judge, three different "clerks," and there may be several different adversary proceedings within a bankruptcy case. The Federal Rules of Appellate Procedure, moreover, contain a number of matters that do not apply to bankruptcy appeals or can only be applied uneasily.

Several members expressed a preference for the sample self-contained rule over the incorporation rule, suggesting that it was clearer and more intelligible. They pointed out that the apparent brevity of the incorporation model was illusory because the text of the incorporated appellate rules would have to be published along with the bankruptcy

rules in any event. They emphasized, though, that if the advisory committee chooses the stand-alone model, the revised bankruptcy appellate rules should be parallel to the Federal Rules of Appellate Procedure to the maximum extent possible. Moreover, whenever a change is made in the FRAP in the future, it needs to be picked up right away in the bankruptcy rules.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Kravitz and Professor Cooper presented the report of the advisory committee, as set forth in Judge Kravitz's memorandum and attachments of December 6, 2010 (Agenda Item 5). Judge Kravitz reported that the advisory committee had no action items to present.

Informational Items

ELECTRONIC DISCOVERY

Judge Kravitz reported that electronic discovery continued to be an important matter on the advisory committee's agenda. It had also been a major topic of discussion at the committee's May 2010 conference at Duke Law School. He said that the participants at Duke had urged the committee to focus on two issues of particular concern to the bar – preservation and sanctions. The lawyers, he said, had been seeking greater certainty and uniformity, both as to their preservation obligations and the standards for imposing sanctions. He added that Mr. Joseph had chaired a superb panel discussion at the conference, and the panel had produced a paper setting forth the elements that should be included in a proposed federal rule governing preservation.

Following the Duke conference, he said, he had asked the advisory committee's discovery subcommittee, chaired by Judge David Campbell, to follow up on both issues. There was, however, concern about the committee's authority under the Rules Enabling Act to address preservation obligations. Generally, he said, the obligations are governed by state law, and they often vest before a federal case is filed. Nevertheless, he said, the subcommittee would move forward to draft a rule while the issue of the committee's authority remains under advisement.

Judge Kravitz noted that the subcommittee had asked the Federal Judicial Center to conduct empirical research on spoliation sanctions in order to ascertain how frequently they are imposed in the federal courts. The Center's findings, he said, would be summarized by Dr. Lee during the upcoming panel discussion on spoliation and sanctions. In addition, he said, Andrea Kuperman and Katherine David had prepared an excellent memorandum analyzing the pertinent case law.

The subcommittee, he added, was of the view that even though courts do not impose sanctions very often, the very threat of sanctions for failure to preserve information has a profound effect on litigant behavior. The subcommittee, he said, was having difficulty in drafting the language of a rule on preservation that would give lawyers the specificity and comfort they seek. The essential problem, he said, is that there is simply an infinite variety of pre-litigation situations that may trigger preservation obligations.

On the other hand, he said, it should be easier for the subcommittee to agree on the language of a rule addressing sanctions. Just by improving the rule on sanctions, moreover, it may be possible to affect preservation behavior at the front end of a case. He added that the advisory committee will discuss a proposed rule at its April 2011 meeting, and it might possibly have a sanctions proposal for the Standing Committee's consideration in June 2011.

PANEL DISCUSSION ON SPOLIATION AND SANCTIONS

Empirical Study

To introduce the discussion, Emery Lee of the Federal Judicial Center outlined the results of the empirical study that he conducted for the committee to identify litigation in the federal courts involving spoliation sanctions. The first task of the study, he said, had been to ascertain the frequency with which spoliation issues are actually litigated. He emphasized that an empirical study – based on tabulating the frequency of court docket events and records – is a very different exercise from a review of the reported case law.

The Center's study, he explained, had examined the records of 131,992 civil cases filed in 19 district courts during the years 2007 and 2008. The number of those cases with spoliation issues, he noted, was very small, as sanctions motions were filed in only 209 cases – or 0.15% of all cases.

But the study also showed that the cases with sanctions motions were particularly contentious. They also had much longer disposition times than other civil cases – taking 649 days on average from filing to disposition, versus 153 days for all cases. In addition, they were far more likely to go to trial. About 17% of the spoliation cases went to trial, versus fewer than 1% of all the cases. Spoliation motions also tended to be filed late in the cases – on average 513 days into a case.

Dr. Lee added that every dispute involving electronic discovery tends to increase the costs of a case by about 10%. The empirical study found that spoliation issues had occurred both in cases with electronically stored information (62% of the total) and cases

without it (38%). About two-thirds of spoliation motions were made by plaintiffs, and businesses were the targets of the motions 74% of the time.

Of the motions ruled on, 28% were granted by the courts and 72% denied. For cases involving electronically stored information, the grant rates were slightly higher, at 34% granted and 66% denied. Dr. Lee noted that the numbers in the empirical study were very different from those in recent studies of published orders and opinions, which showed grant rates approaching 60%. The explanation, he said, is that cases with published orders and opinions are simply not typical of all cases. When a court grants sanctions, the order is much more likely to be published.

As for the types of sanctions imposed by the courts, Dr. Lee reported that the study showed that FED. R. CIV. P. 37 was the most prevalent basis for sanctions. Of the sanctions granted, 45% resulted in adverse inferences or instructions, 48% resulted in preclusion of evidence or testimony, 23% led to dismissal or default, and 3% involved civil contempt.

Judge Kravitz concurred that sanctions are rarely granted. Nevertheless, he said, the fear of sanctions clearly drives litigant behavior. As a result, clients tend to over-collect and over-preserve their records.

Panel Discussion

The panel was chaired by Mr. Joseph and included Judge Rothstein, Judge Grimm, and Messrs. Allman, Barkett, and Girard.

A panelist emphasized that spoliation issues arise far more often than the Federal Judicial Center study indicated. Preservation, he said, is raised frequently at Rule 26(f) attorney conferences and in other discussions among counsel. Lawyers and parties, he added, try to avoid sanctions and commonly work out preservation disputes on their own without court involvement. These discussions, however, are not reflected on the court's docket or in its opinions. In addition, he said, third parties are frequently involved in spoliation issues that do not appear in court records. He added that he receives regular reports of all cases in which there is a sanctions issue, whether or not a motion is filed. In all, he said, he had counted nearly 4,000 cases involving spoliation issues in the federal and state courts.

Other panelists agreed that the frequency of spoliation issues is much greater than the court dockets seem to indicate. Almost all sanctions decisions, moreover, are published, and the behavior of lawyers and their clients is greatly affected by what they read in opinions and orders.

A panelist explained that preservation and sanctions law varies greatly from jurisdiction to jurisdiction. In the absence of a clear national standard, companies that conduct business in multiple states must comply with the most stringent preservation standards extant, greatly increasing precautionary practices and costs.

One possible improvement that the rules could make, he said, would be to fold the limited safe-harbor provision of Rule 37(e) (failure to provide electronically stored information) into the general standard of Rule 37(c) (failure to disclose or supplement). A revised rule might specify that in the absence of willfulness or bad faith, a court could not order sanctions against a party that has acted reasonably and in proportion to the stakes in the litigation. The rule, though, would also have to address instances where there is only negligence, rather than wilfulness, but the negligence leads to a loss of information that destroys the other side's case. The rule, therefore, would have to include elements of reasonableness, proportionality, and prejudice.

Another panelist endorsed that approach, but added that the rule should be limited to instances involving gross negligence. A party should be protected against ordinary mistakes that may be mildly negligent, but do not warrant sanctions.

Another panelist, though, expressed serious concern with the approach. He noted that a judge's inherent power is the most significant source of sanctions authority, regardless of whatever specific language is set forth in a rule. That inherent power is hard to limit, so a more effective approach might be to harness that power and specify in the rule the criteria for invoking the power.

It was suggested that the result might be achieved by eliminating the qualifying phrase "under these rules" in Rule 37(e). Judge Rosenthal explained that when Rule 37(e) was being discussed in the Standing Committee, the concern had been voiced that the committee was approaching the outer limits of its authority under the Rules Enabling Act. That is why the words "under these rules" were added – to guarantee that the committee had the authority to adopt the rule.

A panelist emphasized that the case law on sanctions is intensely factually driven, and it would be unwise to have a rule that binds the court's ability to act to a particular level of fault. A rule that inflexibly requires a certain level of culpability would inevitably create a rational incentive to destroy information. As such, it would interfere with the truth-finding process.

The rule, instead, should focus on the policy objectives to be achieved when a litigant fails to preserve, and it should give weight to the injured party's showing of how it was hurt by the spoliation. The actor's state of mind is often not as important as the consequences of an act. As a practical matter, courts try to restore the innocent party to where it would have been without the destruction of information. The right rule will not

be easy to draft, but it should focus on restoring the situation and require a nexus between the loss of the information and the resulting prejudice.

A panelist pointed out that the culpability standards found in the case law among the circuits are chaotic and inconsistent, and they need to be addressed. The most difficult situation, he said, involves the case where there is no culpability, but an act has severely prejudiced a party or deprived it of information that it needs to make its case. Including a "bad faith" or "wilfulness" standard may be appropriate in a rule, but prejudice also needs to be included in the rule. In other words, the rule should aim to take care of litigants who have been hurt by the conduct, even though the conduct did not constitute bad faith or wilfulness.

A participant suggested that the range of sanctions available to a judge in dealing with spoliation problems is quite wide, and it might be possible to calibrate the sanctions to fit the level of culpability and the extent of the prejudice. For example, the offending party might be required pay the costs of restoring a situation, or the court may extend the time for discovery. Dismissal of a case or other severe sanctions might be reserved for only the most egregious conduct.

A panelist recommended that the committee work from the elements of a preservation rule that had been developed by the panel at the Duke conference. He emphasized the importance of specifying the preservation "triggers" in the rule, *i.e.*, identifying the specific events and point in time when an obligation to preserve attaches.

He suggested three potential approaches. First, the committee could be aggressive and list the minimum factors that trigger the preservation obligation. That approach, though, would raise questions about the committee's pre-litigation authority under the Rules Enabling Act. Second, the rule might state what preservation obligations arise on commencement of the litigation, leaving the pre-litigation field to the common law. Third, the rule could specify that once the common-law test of "reasonable forseeability of litigation" is met, a party must act reasonably, in good faith, and in proportionality to the stakes of the litigation.

He concluded that the committee does in fact have the authority to draft a federal rule defining what pre-litigation conduct triggers preservation obligations because the spoliation ultimately affects the federal case. He suggested, though, that in the final analysis, the process of education may be more effective than the rulemaking process. He noted, for example, that the Sedona Conference had produced a document setting forth best practices regarding triggering events and preservation obligations.

A panelist reiterated that under the common law the duty to preserve is triggered when there is a reasonable forseeability of litigation. The duty, he explained, is owed to the court itself because the court needs to have the evidence readily available for the case.

The preservation obligation predates the federal lawsuit, but it is vested in the lawsuit itself. He argued that the committee had authority under the Rules Enabling Act to specify the preservation obligations in the rule because there is sufficient nexus between those obligations and the federal case.

Another panelist pointed to several examples of rules that regulate pre-litigation conduct and are predicated on the consequences that the conduct may have on later litigation decisions. For example, FED. R. CIV. P. 27 (depositions to perpetuate testimony) governs the pre-litigation preservation of evidence. That rule, he said, could be amended to specify the obligations and the consequences. He suggested, moreover, that if the committee drafts a preservation rule, it should not restrict the rule to electronically stored information.

A member strongly endorsed efforts by the committee to amend the rules to address both spoliation and sanctions. He said that spoliation problems arise far more frequently than the study of dockets and opinions suggests. The issues do not get reported very often, but they are either discussed informally with the court at pretrial conferences or resolved by the attorneys without court involvement. Preservation issues, moreover, can be very complex, very important, and very expensive. The bar, he concluded, needs definitive guidance and greater certainty on the matter from the committee. In particular, the rules should be clear in addressing the penalties for violations of preservation obligations.

A member explained that whether or not there is authority under the Rules Enabling Act to issue a preservation rule, it is essential that lawyers and parties have clear national guidelines that they can rely on. She noted, for example, that it is well established in antitrust law that companies that act within antitrust compliance guidelines are generally safe from adverse action by the Department of Justice. Likewise, companies that have anti-harassment programs in place enjoy a level of defense in employment discrimination litigation. In short, parties that comply with a set of accepted professional guidelines generally receive the benefit of the doubt from the courts.

Judge Kravitz emphasized that the civil rules committee was not just pursuing the rulemaking path. It was also working with the Federal Judicial Center on case-management and educational approaches. In some areas, he said, the current civil rules are sufficient, but the bench and bar may not be applying them properly and consistently.

A member agreed, but pointed to practical limitations with traditional educational efforts. The law school curriculum, for example, allows little time for legal ethics, and it does not lend itself to the level of complexity that the committee is attempting to address. On the other hand, law firms and bar associations might do more with continuing education to address ethical issues for litigators, including preservation obligations.

A member noted that most litigation occurs in the state courts. The committee, therefore, would be well advised to examine developments in the states regarding preservation and sanctions that could be adapted for possible use in the federal courts. Uniformity in this area among all the federal courts and all the states would be very desirable. Therefore, it would be profitable to work in conjunction with the states on the matter. Other participants agreed, noting that the federal rules have a major influence on the state courts, and a revised federal rule could have a beneficial impact on state litigation.

Judge Rosenthal pointed out that the discussions, both at the meeting and at the Duke conference, had focused on a federal rule that would both define preservation duties and specify the consequences for violations. She emphasized that a rule dealing with sanctions would be far easier to draft than a rule dealing with preservation. Since the fear of sanctions was driving much of the behavior of lawyers and clients, she asked whether a federal rule that addressed sanctions alone would be sufficient.

A panelist said that it would be a great beginning, but it would not be enough alone to influence the desired behavior. The proposed rule would also have to address preservation. But a member questioned how the rule could specify pre-lawsuit preservation obligations, other than to use broad terms such as “reasonable” and “foreseeable.”

A participant suggested that the committee has clear authority to address sanctions in the federal rules. But in the absence of additional legislation, the Rules Enabling Act limits its authority to address preservation. He emphasized that the law of spoliation is essentially state law. The text of a federal procedural rule, he said, could make a reference to preservation duties, but it would have to recognize that the field is governed by state law, at least up to the point that a federal lawsuit is filed.

He recommended that corporate counsel think closely about developing a shared professional understanding as to what constitutes reasonable behavior. The professional standards that they develop could be recognized by courts in their rulings and listed as a relevant factor in a federal rule. He recommended that the corporate divisions of the American Bar Association focus on pursuing this approach.

A panelist expressed unease over the practical difficulty of applying any national preservation rule to small businesses and individuals. Adoption of national standards, he said, may result in disparate treatment. They may work very well for corporations or other large organizations that become familiar with them, but individuals and small organizations will not be as aware of their specific obligations. The disparity problem, he said, already exists with regard to document-preservation obligations. So, rather than devising a fixed culpability standard in a rule, which will inevitably be used by counsel

as a tool against their opponents, the federal rule should focus on providing comfort to those who act reasonably.

Finally, a panelist recommended that the committee address all three major issues discussed by the panel: (1) the triggers that initiate preservation obligations; (2) the scope of the preservation obligations; and (3) the culpability level required before sanctions may be imposed. Judge Kravitz said that the advisory committee and its subcommittee were planning to consider all three areas.

FED. R. CIV. P. 45

Judge Kravitz reported that the advisory committee was considering revisions to Rule 45 (subpoenas), and it had appointed a subcommittee to lead the effort, with Judge David Campbell as chair and Professor Marcus as reporter. The subcommittee, he said, had considered dozens of suggested improvements to Rule 45, but it had narrowed its focus to three main issues: (1) notice, (2) transfer of enforcement proceedings, and (3) the 100-mile rule. It was also considering overall simplification of the rule and was planning to present a revised rule to the Standing Committee at its June 2011 meeting.

(1) Notice of subpoena

Judge Kravitz explained that the current rule directs that "notice must be served on each party" before a subpoena to produce documents is served. Nevertheless, he said, few lawyers seem to follow the rule, perhaps because the notice requirement is buried in the last sentence of Rule 45(b)(1). The subcommittee planned to restructure the rule to give the requirement more prominence and a separate heading. Professor Cooper added that the revised rule would require for the first time that a copy of the subpoena be supplied with the notice.

Judge Kravitz said that beyond requiring notice to all parties that the subpoena has been served, the subcommittee had considered whether to add a requirement that notice also be provided to parties when the documents are produced. The subcommittee concluded, though, that the burden of providing notice could be great because a subpoena is often produced in pieces. Rule 45, moreover, is already too long. Adding another notice requirement would only make it harder to follow and comply with.

Nevertheless, he said, a prominent lawyer had informed the subcommittee that lack of notice of production is the most important problem that he faces in practice, and he often does not learn that documents have been produced until it is too late to act.

A member concurred strongly with this observation and recommended adding a provision to the rule requiring the server of a subpoena to give opposing parties notice of production and of any revisions to the subpoena, even if it further complicates the rule.

He said that lawyers are entitled to the documents, and they should receive copies when the subpoenaing party gets them. Other participants suggested, though, that lawyers normally tend to work out the problems on their own, even though they do not always comply with the details of the rule. They suggested that lawyers are always free to contact the subpoenaed party to ask for an update as to what has been produced, or they may serve their own subpoena. The member responded, though, that subpoenas are a substantial burden on third-party producers, and the third parties should not have to deal separately with all the lawyers. Having a rule that requires notice of production would be a much simpler approach.

(2) Transfer of enforcement proceedings

Judge Kravitz explained that under Rule 45, a subpoena is issued in the name of the court where the witness is located, and it is enforced by that court. He noted, though, that there are times when enforcement of a subpoena does not involve local issues. Rather, the issues go to the merits of the case and should be addressed by the court where the case is pending. Rule 45, however, does not currently provide for a transfer of authority for enforcement purposes, even though some courts have managed to find ways to transfer the enforcement dispute. It is also not unusual, he said, for a judge in the district where a subpoena has been served to call the presiding judge in the district where the case is pending to ask for advice.

Judge Kravitz noted that the subcommittee's pending proposal would explicitly authorize transfer of enforcement proceedings in certain limited circumstances. Judges should not routinely transfer cases, however, because enforcement issues are often truly local in nature and have nothing to do with the merits of a case. They frequently involve the convenience of the subpoenaed party. The subpoenaed party, moreover, should be able to use local counsel and go into the local court.

He noted that the subcommittee was struggling with drafting the language of the standard needed to justify a transfer. He said that one option would be to track 28 U.S.C. § 1404, the general change of venue provision dealing with "the interests of justice." Even if the subcommittee were to adopt that standard, the committee note would specify that if the issues are local, a case should not be transferred.

Professor Marcus said that a revised rule could take any of three approaches: (1) to favor transfer of enforcement most of the time; (2) to express no preference as to enforcement location; or (3) to oppose transfer of enforcement most of the time, but make it available in the right cases. He noted that the subcommittee had chosen the third option, and it was struggling to draft appropriate language.

Judge Kravitz added that the subcommittee had also asked whether Rule 45 should not simply discard the fiction and the complexity of having subpoenas issued in

the name of the court where a witness is located. The rule, instead, might move towards nationwide service, allowing the court where the case is pending to issue the subpoenas. But, he noted, that approach raises a number of other questions.

(3) The 100-mile rule

Judge Kravitz noted that in *In re Vioxx Products Liability Litigation*, 438 F. Supp.2d 664 (E.D.La. 2006), the district court had held that a subpoena may compel a party or a party's officer to appear as a witness at trial regardless of the 100-mile limit in FED. R. CIV. P. 45(b)(2). Some courts have followed the *Vioxx* ruling, while others have rejected it. The advisory committee, he said, planned to recommend an amendment to Rule 45 that would effectively undo the *Vioxx* ruling.

Judge Kravitz reported that the advisory committee was of the view that the 100-mile provision in Rule 45 should be retained and enforced for three reasons. First, there is a fear that litigants may demand the presence of high corporate officials at trial, even though they may not have first-hand knowledge of the facts, in order to force a settlement. Second, video depositions of corporate executives and other witnesses are a viable alternative to trial testimony in many cases. Third, if a high ranking official in fact has meaningful knowledge about a case, the presiding judge will attempt to persuade the party to bring the official to the trial.

Judge Kravitz noted that the committee was also considering publishing in brackets a non-favored alternative *Vioxx* approach that would allow a court to compel the presence of an official for trial under certain conditions. The subcommittee, he said, was working on drafting a high threshold standard for triggering the alternative.

PLEADING STANDARDS

Judge Kravitz reported that the Federal Judicial Center was conducting a survey of how motions to dismiss and motions to amend the pleadings are being handled in the 20 largest district courts since *Twombly* and *Iqbal*. Joe Cecil of the Center, he said, was examining the dockets and case files to ascertain the real impact of the *Twombly* and *Iqbal* decisions.

Judge Kravitz said that he had reported to the committee two years ago that a common-law process would develop following *Twombly* and *Iqbal* and that the federal courts would take a context-specific and nuanced approach to pleading requirements. That, he said, was in fact happening, and it had clearly been confirmed in Andrea Kuperman's summary of the extensive case law. He added that once the Federal Judicial Center's research findings are available, the advisory committee will discuss pleading issues and consider several different approaches in response to *Twombly* and *Iqbal*.

MISCELLANEOUS MATTERS

Judge Kravitz reported that following the May 2010 Duke conference, Judge John Koeltl had agreed to chair a subcommittee to implement the many suggestions raised at the conference. The subcommittee, he said, has had several meetings. In addition, the Duke Law Journal had published several of the articles produced for the conference, and the committee, in conjunction with the Standing Committee, had presented a report on the conference to the Chief Justice.

Judge Kravitz noted that the advisory committee still had FED. R. CIV. P. 26(c) (protective orders) on its agenda and will continue to monitor the case law on protective orders.

The advisory committee, he said, was generally of the view that it should eliminate the illustrative civil forms. But it had deferred action on the matter to avoid signaling any conclusions about *Twombly* and *Iqbal* if the pleading forms were to be abandoned. He noted, for example, that the patent bar had severely criticized the existing forms on patent litigation.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Tallman and Professor Beale presented the report of the advisory committee, as set forth in Judge Tallman's memorandum and attachments of December 8, 2010 (Agenda Item 7).

Amendments for Publication

FED. R. CRIM. P. 11

Judge Tallman reported that the proposed amendment to Rule 11 (pleas) had been motivated by the Supreme Court's decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). In *Padilla,* the Court found that the defendant had received ineffective assistance of counsel because his lawyer had failed to warn him about the possible deportation and immigration consequences of his guilty plea and conviction. The proposed amendment would require a court to expand the Rule 11 colloquy and advise defendants that if they are not United States citizens and are convicted, they may be removed from the country, denied citizenship, and denied admission in the future.

A member pointed out that Rule 11 does not currently require a court to advise a defendant of any of the collateral consequences of a conviction. He questioned why immigration had been singled out for inclusion in the rule and warned that it could lead to a "slippery slope" of other amendments – since several other collateral consequences are

equally important to some defendants. The proposal, moreover, would require judges to warn all defendants of the potential adverse consequences of deportation, even defendants who are United States citizens. At the most, he said, the rule should be limited only to defendants who are not citizens. He added that the Rule 11 plea colloquy is already very long, and many defendants do not understand all of it. Adding even more requirements may distract defendants from the more important consequences of conviction that they need to focus on.

Rule 11, he said, is a haven for prisoners who get buyer's remorse in prison after pleading guilty. He predicted that defendants will inevitably file motions attacking their sentence under 28 U.S.C. § 2255 on the grounds that the court did not follow the rule and inform them of the immigration consequences of their guilty plea.

Judge Tallman explained that the advisory committee had discussed these arguments extensively. But, he said, a majority of the members favored limiting the proposed amendment to immigration consequences because it had been the Supreme Court's focus in *Padilla.* The reason that the proposed amendment applied on its face to all defendants is that a judge cannot always tell at a Rule 11 proceeding whether the defendant is in fact an alien and subject to deportation. The defendant, for example, may not want to answer whether he is a citizen or may lie about citizenship.

Other participants expressed similar views and argued that the list of topics in Rule 11 is already too long. One emphasized that in *Padilla* the Supreme Court had placed the obligation to inform the defendant of deportation and immigration consequences squarely on defense counsel, and not on the court. There is, moreover, no real problem to address because most judges already include these consequences in their Rule 11 discussion whenever it is relevant. That practical approach is preferable to requiring a court by rule to advise every defendant of immigration consequences, even when not relevant.

A member expressed support for the proposed amendment as a matter of policy and pointed out that much of the Rule 11 colloquy is covered by the harmless error rule. If immigration consequences are not important in a particular case, such as when a defendant is a citizen, omitting it from the plea colloquy would clearly be harmless error.

A participant noted that the Department of Justice was in the process of adding language similar to the proposed amendment to its standard plea agreements. That course of action, she said, will help produce a record to assist the court of appeals.

A participant stated that the Bench Book for District Judges already recommends that judges include immigration consequences in the advice they give to defendants under Rule 11. Even if there were a violation of the rule, the case law is clear that it would not

rise to the level of constitutional due process if the judge failed to warn of immigration or other collateral consequences. She added that giving the warning of deportation consequences in open court at the plea proceedings will provide an additional safeguard. A defendant clearly will have no claim if the record shows that the judge clearly warned him or her of the consequences.

Even though several committee members expressed reservations about the wisdom of the proposed amendment, they all agreed that it should be published for public comment.

The committee without objection by voice vote approved the proposed amendment for publication.

FED. R. CRIM. P. 12 and 34

Judge Tallman reported that the advisory committee was seeking authority to publish amendments to Rule 12 (pleadings and pretrial motions) that would clarify which motions must be raised before trial and the consequences if not timely raised. He noted that a proposal had first been presented to the Standing Committee in 2009. But it had been returned for further study, and the advisory committee was asked at that time to consider the differences between "waiver" and "forfeiture" and whether some or all violations of Rule 12(b)(3) should be considered forfeited rather than waived.

Professor Beale pointed out that the impetus for the proposed amendments had been the Supreme Court's decision in *United States v. Cotton*, 535 U.S. 625 (2002). The Court held in *Cotton* that the defects in an indictment are not jurisdictional in nature, so the court continues to have jurisdiction over the case if the defendant fails to file a motion to dismiss based on those defects. Accordingly, she said, defendants should be channeled into raising defects in the indictment before trial. Therefore, the proposed amendments specify that a motion based on a defect in the indictment must be made before trial if the basis for the motion is reasonably available before trial and the motion can be determined without a trial on the merits.

She added that in the current Rule 12, all defaults are described as "waivers," including inadvertent forfeitures. But failure to raise a defect in the indictment before trial is not like other "waivers" – a knowing, intentional waiver of rights. Therefore, in revising the rule, the advisory committee had to decide whether a defendant's failure to make the motion before trial should constitute to be characterized as a "waiver."

Judge Tallman explained that the advisory committee proposal would restructure Rule 12. Revised Rule 12(b)(2) specifies that a motion that the court lacks jurisdiction may be made at any time while a case is pending. Rule 12(b)(3) then lists all the motions that must be raised before trial.

Under revised Rule 12(e)(2), a party would "forfeit" any claim not timely raised if it is based on: (1) failure to state an offense; (2) double jeopardy; or (3) the statute of limitations. Relief from a forfeited claim would be governed by Rule 52(b) (plain error).

Under revised Rule 12(e)(1), a party would "waive" any other defense, objection, or request listed in Rule 12(b)(3) if not timely raised by motion. The court could grant relief upon "a showing of cause and prejudice." Professor Beale noted that the choices that the advisory committee had made on the list had been derived in large part from the case law and how the courts have been addressing these motions.

Several members suggested specific refinements in the list and in the language of the proposed amendments. One pointed out that the Supreme Court had sharpened the distinctions between forfeiture and waiver and questioned retaining the word "waiver" in Rule 12. She suggested that "waiver" in Rule 12 was a peculiar, unique use of the term because it does not deal with a knowing and intentional relinquishment of a right. The rules, she said, should not retain an idiosyncratic use of the term. The committee should aim for clarity, but the current language of the amendment had not yet achieved it in this particular respect.

A participant noted that the Department of Justice had initiated the request to revise Rule 12 because it wanted to make clear that a failure to raise the defense of a defect in the indictment is waived if not asserted before trial. But the advisory committee's deliberations had broadened the scope of the proposal to address other defenses, such as double jeopardy and the statute of limitations.

Judge Tallman pointed out that the advisory committee had spent a great deal of time focusing on the concepts of waiver and forfeiture. By using "waiver," he said, the committee was indeed trying to address matters that involve a knowing relinquishment of a right. But several lawyers had informed the committee that many lawyers do not even think about these issues until later in a case. The proposed rule, therefore, in effect imposes a due diligence requirement on counsel.

The participants debated the differences between waiver and forfeiture, the consequences of each, and which of the two carries the more stringent consequences. One participant suggested that in light of the uncertainty surrounding the two terms and the consequences flowing from them, it might well be better to introduce a new term in the rule, such as "default." Others concurred and recommended deleting the term "waiver" from the rule entirely and replacing it with alternative language.

A member emphasized that the proposed Rule 12 amendments, though not yet perfect, will be very beneficial. They will give lawyers and judges necessary clarity and provide a very helpful check list for the bench and bar. She recommended that the amendments be published for public comment, perhaps using an alternate term for

"waiver." Another member agreed that the revised rule was very valuable, but recommended that the language be refined further before being published.

Professor Beale suggested that the published rule might use the word "default" and place both "default" and "waiver" in brackets in the text to solicit public comments on them. The advisory committee might also bracket the words "double jeopardy" and "statute of limitations" in proposed Rule 12(b)(3) and ask for comments on whether those claims should moved from the forfeiture category to the waiver category. A member endorsed that approach and pointed out that including the alternatives in brackets will avoid the need to republish the rule if further changes are made after publication.

Several participants emphasized that the advisory committee was on the right track and should continue to refine the rule. One urged the committee to be more adventuresome in drafting the rule and devise new language to replace "waiver" and "forfeiture." He suggested that the standards for relief under the two concepts are not clearly stronger or weaker than each other. Another participant, though, expressed concerns about changing the labels or tinkering with the substance of current standards because a great deal of law had already been built on the current rule.

Ms. Claggett urged the advisory committee to continue its work. She suggested that the current Rule 12 is incorrect, is inconsistent with *Cotton*, and needs to be changed. She said that the drafting problems could be worked out.

Judge Tallman expressed reservations about sending the rule back to the advisory committee again for another round of drafting in light of the continuing uncertainty and apparent lack of consensus. But several participants said that the proposed amendments were a major improvement over the current rule, and they urged further refinement in the language.

Judge Rosenthal pointed out that it had been very helpful for the advisory committee to have brought the revised draft of Rule 12 to the Standing Committee for a thorough discussion. She said that many excellent suggestions had been made. As a result, it appeared to be the clear consensus of the Standing Committee that: (1) the advisory committee's recent restructuring of the rule was very beneficial and represented a major improvement over the current rule; and (2) the advisory committee should continue to refine the language and return to the Standing Committee in June 2011 for approval to publish the rule, perhaps placing certain terms in brackets to attract public comment.

The committee without objection by voice vote approved the proposed amendments in principle and asked the advisory committee to continue refining them for presentation at the June 2011 Standing Committee meeting.

Informational Items

FED. R. CRIM. P. 16

Judge Tallman complimented the Federal Judicial Center for its excellent work in conducting a major survey of the bar on the issue of pretrial disclosure of exculpatory and impeachment information under *Brady v. Maryland*, 373 U.S. 83 (1963) and later cases. He noted that the survey had been sent to 1,500 federal judges, all the U.S. attorneys' offices, and 16,000 criminal defense lawyers. The response rate, he said, had been the highest of any Center survey ever. In addition, the survey had elicited 700 pages of detailed written comments.

The study, he said, had separated the federal judicial districts into two categories – districts that adhere literally to the current requirements of FED. R. CRIM. P. 16 (discovery and inspection) and those that have local rules supplementing Rule 16 with additional disclosure requirements. He added that the criminal discovery system must work within the framework of the Jencks Act. In practice, however, the statutory time frame is often honored in the breach. Disclosure of information by prosecutors before trial often helps to make the system work effectively and avoid trial adjournments.

Judge Tallman said that the central question for the advisory committee was to decide whether Rule 16 should be amended to require disclosure of exculpatory and impeaching information. He pointed out that 51% of judges responding to the Federal Judicial Center survey (64% in the broader disclosure districts) had favored an amendment to Rule 16 because it would: (1) eliminate confusion as to the "materiality " requirement for impeaching information; and (2) reduce the wide variation of discovery practices now existing among the federal courts and among individual judges. On the other hand, judges opposed to amending Rule 16 had asserted that the current system was working well and no changes were needed.

Judge Tallman noted that the Department of Justice opposed any amendment to Rule 16 and agreed with the reasoning of the judges who opposed changing the rule. The Department, he said, also emphasized another reason for opposition. It cited several important internal reforms that it has made, including: (1) major national efforts greatly increasing the advice and training given prosecutors and staff regarding their disclosure obligations; (2) appointment of a national discovery coordinator; and (3) establishment of local district discovery plans. He also pointed out that the Department stressed that there have been, on average, fewer than two complaints a year alleging *Brady* violations by prosecutors, even though 86,000 criminal cases had been filed in the federal courts last year.

He noted that a major concern raised by opponents of an expanded Rule 16 was its potential effect on the privacy and security of cooperating witnesses. The advisory

committee, he said, was extremely sensitive to that concern and to the impact that every proposed amendment may have on victims' rights. The Federal Judicial Center survey responses, though, showed that the great majority of respondents other than the Department of Justice had stated that an expanded rule would have little or no negative impact on witnesses. Nevertheless, the U.S. attorneys' offices remain very wary, and they argued that there is no way to know in advance with certainty whether there is going to be a threat in any particular case.

He suggested that it might have been better to have surveyed individual lawyers in the U.S. attorneys' offices, rather than the offices themselves. He pointed out that the survey had elicited many anecdotes and insights from the 5,000 individual defense lawyers, but very few details from the U.S. attorneys' offices. Therefore, it is difficult to fully assess the threat to cooperating witnesses in particular cases.

Judges who opposed a rule change in the survey had said that the gain to be derived from the rule would simply not be worth the gamble. Some had cited the potential chilling effect that an expanded rule would have on potential witnesses, even though many of them will not be called to testify at trial.

He said that U.S. attorneys' offices in the survey had relied heavily on the Jencks Act. They also responded that disclosure of information to defendants without regard to its materiality will result in making the lives of all potential witnesses an open book. It will also create a real risk that witnesses will simply refuse to come forward and cooperate or testify. At a minimum, moreover, any potential rule would have to include an exception for national security cases and certain other types of cases. Prosecutors should also be allowed in certain cases to defer turning over information until after the witness testifies.

The survey responses also showed, though, that judges have several devices to deal with security concerns, such as issuing protective orders. The survey also indicated that the defense bar was apparently not too concerned about the ethical problem raised by protective orders that prohibit them from disclosing information to their clients. They would rather have the information.

Proponents of an expanded disclosure rule also pointed out that exculpatory and impeaching information is turned over regularly in the state courts without adverse effects. They also argued that defendants for the most part already know who is going to testify against them.

On the other hand, survey respondents who oppose expanding Rule 16 had said that it would negatively impact safety and privacy and have a chilling effect on witnesses. Lawyers representing cooperating witnesses had also opposed greater

disclosure and said that their clients would be labeled as snitches and their safety in prison could not be guaranteed.

Judge Tallman said that it would be difficult to draft a rule requiring disclosure before trial that could be reconciled with the timing provisions of the Jencks Act. It would be necessary to ask Congress to change the Act. The rules committee, he advised, should not attempt to invoke the supersession clause of the Rules Enabling Act.

A member added that the Department had taken many important internal initiatives to emphasize the obligations of prosecutors to disclosure exculpatory and impeaching information. The Department, moreover, has asked that these initiatives continue to play out before the rules committees take any action on amending Rule 16.

Another member suggested that as long as the Department of Justice is adamantly opposed to a rule, the proposed amendments will never come to pass. The committee, therefore, should defer further action on the proposal.

Judge Tallman said that because of the sharp disagreements on fundamental, controversial issues among both bench and bar, the advisory committee was in a conundrum as to what to do. Much of the discussion to date, he said, had been general in nature and focused on broad policy concerns. The debates, though, have not identified with necessary precision the specific kinds of information that should be disclosed by prosecutors. A broad recommendation to delete the materiality requirement, for example, is well-meaning. But it would require disclosure of virtually everything, and it might well be unworkable.

He said that the advisory committee will have to decide at its next meeting whether to proceed at all with Rule 16 amendments. If it does decide to proceed, it will also have to decide the specifics of what to include in the amendments. He reported that the advisory committee was also considering developing a discovery check list that might be included in the Bench Book for District Judges. In addition, it was conferring with the Federal Judicial Center on publishing a best-practices guide that could be helpful to the litigating bar.

Judge Rosenthal pointed out that a great deal of creativity had been devoted to the issue, including the various non-rule approaches for dealing with disclosure of *Brady* materials. The debate, she said, had been a healthy development, and a great deal had already been accomplished, even without a rule change. The rules committees, however, will have to consider how much time and resources to continue devoting to the matter.

Judge Tallman added that about a third of the federal district courts have not waited for a national rule and have issued their own local rules, which offer quite varied solutions. Therefore, there is currently a lack uniformity in the federal courts.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Fitzwater and Professor Capra presented the report of the advisory committee, as set forth in Judge Fitzwater's memorandum and attachments of November 3, 2010 (Agenda Item 8). Judge Fitzwater reported that the advisory committee had no action items to present.

Informational Items

Judge Fitzwater reported that the advisory committee will hold its October 2011 meeting at the William and Mary Law School. In conjunction with that meeting, the advisory committee will host a symposium to commemorate the restyled evidence rules scheduled to take effect on December 1, 2011. The committee was planning to hear from a number of judges and law professors on the restyling process. He invited the Standing Committee members to attend.

He noted that the advisory committee expected to seek approval from the Standing Committee at its June 2011 meeting to publish a proposed amendment to Rule 803(10) – the hearsay exception for the absence of a public record. The change would be another in the line of fixes required by the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), dealing with testimonial statements.

He pointed to the Court's 2009 decision in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), holding unconstitutional a state procedure that allowed conviction on the basis of a certificate of forensic test results without personal testimony. The proposed amendment to Rule 803(a), he said, would adopt a notice-and-demand procedure, under which the government could give notice to the defendant of its intent to produce a certificate without personal testimony, and the defendant in turn could demand that the witness who produced the results testify in person at trial. In the absence of such a demand, the matter could proceed without the testimony.

He noted that Professor Capra had reviewed all the evidence rules for potential *Crawford* problems and had found no others. He added that the advisory committee was also working on a possible amendment to Rules 803(6), (7), and (8) that had surfaced during the restyling process.

REPORT OF THE PRIVACY SUBCOMMITTEE

Judge Raggi, chair of the Privacy Subcommittee, presented the subcommittee's report. (Agenda Item 11)

Judge Raggi reported that the agenda book included the subcommittee's report on the 2007 federal privacy rules. The subcommittee, she said, had also produced several appendices to the report that documented the subcommittee's inquiries and the data that it had gathered.

Judge Raggi noted that the subcommittee in conducting its review had made extensive efforts to obtain information about: (1) how the privacy rules are working; and (2) how they might be improved. Among other things, she said, the subcommittee had explored whether there are any additional privacy needs that the current rules do not address.

She summarized the report's findings and recommendations, including the key conclusion that the privacy rules are being implemented effectively by courts and parties. In essence, judges, lawyers, and clerks are doing their jobs well. She explained that there was no need to amend the privacy rules at this point. Nevertheless, the subcommittee pointed out some areas where further implementation was in order, such as continuing education, periodic monitoring, and experimentation.

She explained that the Judicial Conference's privacy policies, now embodied in the 2007 federal privacy rules, had been developed by the Court Administration and Case Management Committee. Fundamental to the current Conference policy is the concept that "public is public," *i.e.,* that court records available to the public at the courthouse should also be available to the public on the Internet. The subcommittee, she said, did not attempt to revisit that policy, and it invited members of the Court Administration and Case Management Committee to serve on the subcommittee.

The subcommittee, she said, had studied the problems comprehensively and had collected substantial data that will be of continuing value to both committees. It had received a great deal of research and other staff assistance from both the Administrative Office and the Federal Judicial Center.

She noted that the subcommittee had examined a complaint that social security numbers appear widely in court records. The staff, though, had examined all the case files of the federal courts, and the evidence clearly showed the opposite conclusion. Unredacted social security numbers appear in very few cases and seem to be a minor problem. Nevertheless, the subcommittee urged continuing monitoring and spot checking, and the report recommended that the Federal Judicial Center conduct a random review of case filings every other year.

In addition, the subcommittee had sent a questionnaire to judges, clerks of court, government lawyers, and private lawyers asking about privacy practices in federal cases. The vast majority of the respondents stated that they were aware of the privacy rules and their redaction obligations.

The subcommittee had also conducted critical studies and convened a major conference on privacy and public access at Fordham Law School in April 2010. The conference included nearly 100 people with a strong interest in privacy matters, including judges, lawyers from all segments of the legal profession, prison officials, professors and the press. Every point of view was represented. There were, of course, conflicting views, but the conference provided the subcommittee with a great deal of information and a broad perspective, which are reflected in its report.

Judge Raggi reported that although the subcommittee had concluded that no changes were needed in the federal rules at this point, three points needed to be made. First, the subcommittee had discovered in its research that a few local-court rules conflict with the national rules by imposing additional requirements on parties. The subcommittee would prefer to deal with that issue in the traditional way by communicating with the chief judges of the pertinent courts and pointing out the discrepancies.

Second, there is the unresolved problem of how to deal with cooperating witnesses in criminal cases. Different practices prevail among the district courts on whether cooperation documents should be filed or made public. Two separate panels at the Fordham conference had been devoted to the issue.

The professors and lawyers on one panel agreed that there should be a national rule addressing the subject, but there was no consensus among them as to what that rule should provide. The other panel, composed of judges, emphasized that their courts had studied the problem carefully, had discussed it with the bar, and had debated at length before adopting their local rules and practices. Each court was convinced that they had arrived at the right solution after all the study and collaboration, but the courts arrived at very different solutions. So, she said, there is no single best practice that could be embodied in a national rule at this point.

In addition, the subcommittee had invited the Department of Justice to offer a model national rule. It had not yet produced a rule because the topic had generated extensive discussion and debate within the Department.

Third, there is a potential issue that may arise in the future with voir dire transcripts, particularly in criminal cases. Recent Judicial Conference policy states that jury selection should be presumptively open to the public. The voir dire transcripts, accordingly, will be posted on the Internet. No problems had been reported yet, and a rule change is not in order, but concerns have been expressed about the privacy and safety of potential jurors.

Judge Raggi thanked Professor Capra for his enormous support to the Privacy Subcommittee and for organizing the conference at Fordham Law School. Professor

Capra, in turn, thanked Heather Williams and Henry Wigglesworth of the Administrative Office and Joe Cecil and Meaghan Dunn of the Federal Judicial Center for their substantial staff assistance to the subcommittee.

Ms. Shapiro thanked Judge Raggi and Professor Capra on behalf of the Department of Justice for their support in addressing the issue of protecting the privacy and security of witnesses and cooperators. She noted that the Department was continuing to work on promoting greater uniformity of practices among the districts.

Judge Raggi emphasized that the subcommittee's study had been comprehensive, and it concluded that no further action was needed at this point. She said that the subcommittee would continue its efforts and would continue to coordinate with the Court Administration and Case Management Committee.

The committee unanimously by voice vote approved the subcommittee's report for submission to the Judicial Conference as an information item. It further agreed to continue working collaboratively with the Court Administration and Case Management Committee on privacy issues.

REVISION OF RULES COMMITTEE PROCEDURES

Judge Rosenthal pointed out that the *Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure* govern the work of the rules committees. She reported that the procedures had been very effective, but they had not been updated since adoption by the Conference in 1983. She noted that committee staff and the reporters had prepared a draft revision of the procedures, and she invited the participants' comments.

Professor Coquillette summarized several of the changes that the proposed revisions would make in the current procedures. He noted that the suggested changes were not major, but they should bring greater clarity and direction to the process and define more sharply the respective responsibilities of the standing committee, the advisory committees, the reporters, and the staff. In addition, he said, the revised procedures adhere to the style conventions used in restyling the federal rules.

Judge Rosenthal added that the rules committees are "sunshine" committees, but there is disagreement over the contours of what documents and information must be made public. Some have suggested that e-mails, routine letters, draft documents, and subcommittee transactions should be public. Others countered that posting those materials is unnecessary and would chill and impede decision-making. Instead, only formal meetings and final drafts need be considered public.

LONG RANGE PLANNING

Judge Rosenthal reported that the committee had examined the Judicial Conference's new long-range plan and would report to the Conference's Ad Hoc Advisory Committee on Judiciary Planning on strategic initiatives that the rules committees were taking to implement the plan. She invited the members to send her any suggestions they may have.

NEXT MEETING

The committee will meet hold its next meeting on Thursday and Friday, June 2 and 3, 2011, in Washington, D.C.

Respectfully submitted,

Peter G. McCabe,
Secretary

(Rev. 2/22/11)

Agenda E-19 (Summary)
Rules
March 2011

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

Approve the proposed *Second Report of the Judicial Conference of the United States on the Adequacy of P* [illegible] *nt Act of 2002* for transmission to Congress. . . . . pp. 8-9

Approved by the Executive Committee.

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

- Federal Rules of Appellate Procedure. . . . . pp. 2-3
- Federal Rules of Bankruptcy Procedure.. . . . . pp. 3-4
- Federal Rules of Civil Procedure.. . . . . pp. 4-5
- Federal Rules of Criminal Procedure.. . . . . pp. 6-7
- Federal Rules of Evidence. . . . . p. 7
- Conference-Approved Legislative Proposals.. . . . . p. 9
- Long-Range Planning.. . . . . p. 10

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

Agenda E-19
Rules
March 2011

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure (the "Committee") met on January 6–7, 2011. All members attended, except Dean Colson, Esq., Dean David F. Levi, and *ex officio* member Deputy Attorney General James M. Cole. Elizabeth Shapiro, Esq., and Karyn Temple Claggett, Esq., attended on behalf of the Department of Justice.

Representing the advisory rules committees were: Judge Jeffrey S. Sutton, Chair, and Professor Catherine T. Struve, Reporter, of the Advisory Committee on Appellate Rules; Judge Eugene R. Wedoff, Chair, and Professor S. Elizabeth Gibson, Reporter, of the Advisory Committee on Bankruptcy Rules; Judge Mark R. Kravitz, Chair, Professor Edward H. Cooper, Reporter, and Professor Richard L. Marcus, Associate Reporter, of the Advisory Committee on Civil Rules; Judge Richard C. Tallman, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, of the Advisory Committee on Criminal Rules; and Judge Sidney A. Fitzwater, Chair, and Professor Daniel J. Capra, Reporter, of the Advisory Committee on Evidence Rules.

Participating in the meeting were Peter G. McCabe, the Committee's Secretary; Professor Geoffrey C. Hazard, Jr., and Professor R. Joseph Kimble, consultants to the Committee; John K. Rabiej, attorney in the Administrative Office's Rules Committee Support Office; James N.

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

Ishida and Jeffrey N. Barr, attorneys in the Office of Judges Programs in the Administrative Office; Judge Barbara Rothstein, Director, and Dr. Emery G. Lee and Meghan A. Dunn of the Federal Judicial Center; and Andrea Kuperman, Esq., Rules Law Clerk to Judge Rosenthal.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Approved for Publication and Comment

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 13, 14, and 24, with a request that they be published for comment. The proposed amendments to Rules 13 and 14 address permissive interlocutory appeals from the United States Tax Court under 26 U.S.C. § 7482(a)(2). The proposed amendment to Rule 24 more accurately reflects the status of the Tax Court as a court. The Committee approved the advisory committee's recommendation to publish the proposed amendments for public comment.

Informational Items

At its spring 2011 meeting, the advisory committee expects to discuss a proposal to amend Rule 4(a)(4), adjusting the time to appeal after the disposition of a tolling motion. A joint subcommittee of members from the advisory committee and the Civil Rules Advisory Committee is working on this issue as well as other issues of mutual concern, including whether parties can "manufacture finality" necessary to appeal by voluntarily dismissing without prejudice unresolved peripheral claims when the district court has ruled on the main claims in the case.

The advisory committee is examining several other issues, including a proposal to treat federally recognized Native American tribes the same as "states" for the purpose of amicus filings; potential modification of Rule 28(a)(6)'s requirement that briefs contain a separate statement of the case; possible rulemaking responses to the decision in *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599 (2009), which held that a district court's attorney-client privilege

ruling did not qualify for immediate appeal under the collateral order doctrine; appellate costs under Rule 39; and case law interpreting Rule 4(a)(2) on premature notices of appeal in civil cases.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

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

Informational Items

Proposed amendments to Rules 3001, 7054, and 7056, proposed amendments to Official Forms 10 and 25A, and three proposed new Official Forms were published for public comment in August 2010. The deadline for submitting comments is February 16, 2011. A hearing on the proposed amendments is scheduled for February 4, 2011, in Washington, D.C.

The advisory committee is continuing work on a comprehensive revision of Part VIII of the Bankruptcy Rules, which addresses appeals to district courts and bankruptcy appellate panels, to adopt a clearer and simpler style, to align the Part VIII rules more closely with the Federal Rules of Appellate Procedure, and to make the rules reflect the fact that most records in bankruptcy cases are filed, maintained, and transmitted in electronic format. The advisory committee will likely seek to have the proposed Part VIII revisions published for public comment in August 2012.

In light of recent Supreme Court rulings, the advisory committee is considering possible amendments to Official Form 6, Schedule C (Property Claimed as Exempt) and Official Form 22C (the Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income). The advisory committee may seek approval of amendments for publication in August 2011.

The advisory committee is revising and modernizing the bankruptcy forms. It will likely seek the Committee's approval for publication of the revised forms in August 2012.

FEDERAL RULES OF CIVIL PROCEDURE

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

Informational Items

The advisory committee is considering possible amendments to Rule 45, which governs discovery and trial subpoenas, to address several problems. Specific topics include improved notice to all parties before serving document-production subpoenas, transfer of motions to compel or quash such subpoenas to the court presiding over the underlying action, compelling a party to appear as a trial witness, and simplifying the rule.

The advisory committee is continuing to examine the standards that apply to motions to dismiss for failure to state a claim upon which relief can be granted in light of the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). The advisory committee continues to study and monitor the lower courts' application of the Supreme Court decisions and the effect of those decisions on rates of filing of motions to dismiss and rates of grants or denials in different kinds of cases. The advisory committee has requested that the Federal Judicial Center conduct an empirical analysis of experience with Rule 12(b)(6) motions to dismiss for failure to state a claim. That project will examine motions to dismiss filed in periods shortly before the *Twombly* decision and after the *Iqbal* decision, including the rates of filing motions to dismiss, rates of granting motions, and the frequency of granting leave to amend.

The advisory committee is also continuing to examine Rule 26(c), which addresses protective orders in discovery. The advisory committee has concluded that the present state of

the case law does not show a problem needing major rule revisions. The committee will continue to carefully monitor the case law.

A subcommittee has been formed to implement and oversee further work on ideas resulting from the 2010 Conference on Civil Litigation held at Duke University School of Law (the "2010 Conference"). The ideas generated by the 2010 Conference largely fall into four categories: (1) those that do not require rule changes but focus on fostering best practices through better lawyer and judicial education and development of supporting materials; (2) those that provide a foundation for pilot projects; (3) those that provide a starting point for further empirical research; and (4) those that may prompt revisions to the Civil Rules.

A second subcommittee is examining the recommendation made by a panel at the 2010 Conference that the Civil Rules Committee amend the rules to provide better guidance to lawyers, litigants, and judges on preservation obligations and spoliation sanctions, particularly for electronically stored information. The issues include: (1) what triggers an obligation to preserve; (2) the scope and duration of the obligation; and (3) the appropriate sanctions for different types of failure to preserve.

A panel consisting of Gregory Joseph, Esq. (moderator), Judge Barbara Rothstein, Daniel Girard, Esq., Judge Paul Grimm, Thomas Allman, Esq., and John Barkett, Esq., discussed issues related to preservation obligations and sanctions for spoliation, with emphasis on the impact of electronic discovery. The panel discussed a variety of possible approaches to addressing concerns about the scope of preservation obligations and sanctions for failure to preserve evidence, including rulemaking responses, lawyer education, and coordination with states.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Approved for Publication and Comment

The Advisory Committee on Criminal Rules submitted a proposed amendment to Rule 11, with a request that it be published for comment. The proposed amendment would expand the colloquy under that rule to advise a defendant of possible immigration consequences when the judge accepts a guilty plea. The amendment was made in light of the recent Supreme Court decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), which held that a defense attorney's failure to advise the defendant concerning the risk of removal fell below the objective standard of reasonable professional assistance guaranteed by the Sixth Amendment. The Committee approved the advisory committee's recommendation to publish the proposed amendment to Rule 11 for public comment.

Informational Items

The advisory committee continues to consider proposals to codify or expand the government's obligation to disclose exculpatory and impeaching information under *Brady v. Maryland*, 373 U.S. 83 (1963). The advisory committee received a presentation on the preliminary results of a survey conducted by the Federal Judicial Center on discovery concerns among defense attorneys, the Department of Justice, and judges. The preliminary results revealed that 51% of the judges and slightly more than 90% of the defense attorneys favor amending Rule 16, while the Department of Justice opposes any amendment. The advisory committee is also considering recommending to the Federal Judicial Center changes to the Judges' Benchbook to improve supervision of prosecutors' compliance with disclosure obligations. Such changes might serve either as a supplement or an alternative to a rule amendment. The Federal Judicial Center is also considering publishing a guide to the "best practices" in criminal discovery.

The advisory committee is considering revisions to Rule 12 on motions that must be made before trial, and it is reconsidering a proposed amendment to Rule 15 that would authorize the taking of depositions outside the presence of a defendant in special, limited circumstances, with the district judge's approval.

FEDERAL RULES OF EVIDENCE

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

Informational Items

The advisory committee is considering whether to amend Rule 803(10) in light of *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), in which the Court held that certificates reporting the results of certain forensic tests conducted by analysts are "testimonial" within the meaning of the Confrontation Clause, as construed in *Crawford v. Washington*, 541 U.S. 36 (2004), making admission of such certificates in lieu of in-court testimony a violation of the accused's right to confrontation. The advisory committee is also continuing to monitor the case law after *Crawford*.

The advisory committee is considering whether to propose amendments to Rules 803(6)-(8) (the hearsay exceptions for business records, absence of business records, and public records) to resolve an ambiguity revealed during the restyling project as to which party has the burden of showing trustworthiness or untrustworthiness.

The advisory committee has resumed work on a project to publish a pamphlet describing the federal common law on evidentiary privileges. This project had been put on hold during the restyling work on the Evidence Rules.

REPORT TO CONGRESS ON THE ADEQUACY OF THE PRIVACY RULES

The Committee's privacy subcommittee submitted a report on how the federal privacy rules, which took effect in 2007, are working. The report was based on varied sources of data, including discussions at a mini-conference held on April 13, 2010, at the Fordham University School of Law, a review of local rules governing redaction of private information in court filings, and surveys sent to randomly selected district judges, clerks of court, and attorneys with electronic filing experience. The subcommittee determined that there are no general problems with the privacy rules' operation and implementation and that no new or amended rules are needed at this time. The subcommittee recommended continued work with the Court Administration and Case Management Committee to monitor privacy issues. The Committee approved the subcommittee's report for consideration by the Judicial Conference.

Under the E-Government Act of 2002, Pub. L. 107-347, § 205(c)(3)(C), the Judicial Conference is required to report to Congress every two years on the effectiveness of the privacy rules. The privacy subcommittee's report will satisfy that requirement. A proposed *Second Report of the Judicial Conference of the United States on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002* (the "*Second Privacy Report*"), which includes the privacy subcommittee's report, is attached as an appendix. The attachments to the privacy subcommittee's report, which contain background materials, are not included due to their length, but they can be found at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2011-01_Vol_II.pdf#pagemode=bookmarks.

Recommendation: That the Judicial Conference —

Approve the proposed *Second Report of the Judicial Conference of the United States on the Adequacy* [illegible] *nent Act of 2002* for transmission to Congress.

Approved by the Executive Committee.

The Judicial Conference's Secretary sent a letter to Congress in December 2010 advising of the privacy subcommittee's work and explaining that the full Judicial Conference report would be submitted after the Committee and the Judicial Conference considered the privacy subcommittee's report. In light of the statutory deadline for the report to Congress, the Committee intends to seek the Judicial Conference Executive Committee's approval to transmit the *Second Privacy Report* to Congress.

CONFERENCE-APPROVED LEGISLATIVE PROPOSALS

At its September 2010 meeting, the Judicial Conference approved proposed amendments to Federal Rules of Appellate Procedure 4 and 40, clarifying the time to appeal or to seek rehearing in a case in which a United States officer or employee is a party. The Judicial Conference also approved the Committee's recommendation to seek legislation amending 28 U.S.C. § 2107, consistent with the proposed amendment to Appellate Rule 4. The Committee is still actively pursuing that legislation.

LONG-RANGE PLANNING

The Committee reviewed the Judicial Conference-approved *Strategic Plan for the Federal Judiciary* (JCUS-SEP 10, pp. 5-6), identified strategic initiatives it is pursuing, and suggested priorities for the next two years.

Respectfully submitted,

Lee H. Rosenthal, Chair

James M. Cole	Wallace Jefferson
Dean C. Colson	David F. Levi
Douglas R. Cox	William J. Maledon
Roy Englert	Reena Raggi
Neil M. Gorsuch	Patrick J. Schiltz
Marilyn L. Huff	James A. Teilborg
	Diane P. Wood

Appendix A – Second Report of the Judicial Conference of the United States on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002

12b-003836

Agenda E-19 (Appendix A)
Rules
March 2011

Second Report of the Judicial Conference of the United States on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002

PREPARED FOR THE
U.S. SENATE AND HOUSE OF REPRESENTATIVES

JUDICIAL CONFERENCE OF THE UNITED STATES

February 2011

SECOND REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE ADEQUACY OF PRIVACY RULES PRESCRIBED UNDER THE E-GOVERNMENT ACT OF 2002

February 2011

This report is transmitted in accordance with the E-Government Act of 2002 (Pub. L. No. 107-347). Section 205(c)(3)(C) of the Act directs the Judicial Conference (the "Conference") periodically to report to Congress on the "adequacy" of rules prescribed by the Supreme Court to protect the privacy and security of certain kinds of information in electronic filings. The Judicial Conference transmitted its first report to Congress in April 2009. This is the second report.

In accordance with the E-Government Act, the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure were amended effective December 1, 2007,[1] to prevent dissemination of personal identifier information in documents filed in federal courts. The amended rules were proposed after years of study under the Rules Enabling Act rulemaking process, including open committee meetings and public hearings. The amended rules generally require that federal court filings be available electronically to the same extent they are available at the courthouse, provided that certain personal identifier information, including social security numbers, is redacted from those filings by the attorney or the party making the filing. Certain categories of filings are not publicly accessible by remote electronic means because these filings generally have extensive personal information, including identifiers. For good cause in specific cases, the court may order more extensive redaction or restrict internet access to designated confidential or sensitive information.

The Judicial Conference's April 2009 report on the 2007 rules noted the emergence of new issues requiring a careful balance of privacy interests with the public interest in continued access to court filings. The report explained that two issues, in particular, warranted attention—court filings that did not have social security numbers redacted as required and, in criminal cases, plea agreements with cooperation provisions retrieved from the electronic case filings and posted on the internet. The April 2009 report also noted that the Judicial Conference's Committee on Rules of Practice and Procedure (the "Standing Rules Committee") had established a privacy subcommittee, composed of a representative from each of the advisory rules committees and representatives from the Conference's Committee on Court Administration and Case Management. The privacy subcommittee developed and proposed the 2007 rules implementing the E-Government Act. Since then, the privacy subcommittee has made a comprehensive assessment of the operation of those rules.

As explained in the privacy subcommittee's attached report, the subcommittee examined four general subjects, including the two issues raised in the April 2009 report. The four general subjects included: (1) the effectiveness of the implementation of the privacy rules; (2) privacy concerns in criminal cases; (3) electronic access to court transcripts; and (4) possible amendments to the privacy rules. The subcommittee examined whether rule changes were needed to improve the protection of

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[1] FED. R. APP. P. 25(a)(5); FED. R. BANKR. P. 9037; FED. R. CIV. P. 5.2; and FED. R. CRIM. P. 49.1.

social security numbers in electronic case filings from disclosure, whether procedures should be adopted to prevent the disclosure of highly sensitive information contained in plea agreements, and whether there should be remote public access to court filings in immigration cases. The privacy subcommittee convened a major conference on April 13, 2010 at the Fordham University School of Law to examine these and related questions. This conference brought together civil and criminal lawyers, prosecutors and defense attorneys, academics, judges, members of the media, and various staff who serve the courts, all with experience in the privacy issues raised by electronic court filings. The subcommittee also gathered information from a variety of other sources, including a report submitted by PublicResource.org on unredacted social security numbers in court filings; a survey conducted by the Federal Judicial Center of unredacted social security numbers; local rules governing redaction of private information in court filings; and surveys sent to randomly selected district judges, clerks of court, and attorneys with electronic filing experience.

In examining the issue of unredacted social security numbers appearing in electronic filings, the privacy subcommittee reviewed extensive surveys conducted by the Administrative Office and the Federal Judicial Center. These surveys found only a small number of instances in which unredacted social security numbers were accessible online and that such mistakes were rare. The privacy subcommittee concluded that no new amendments to the rules are necessary. The subcommittee recommended that education and monitoring continue, to ensure that information subject to redaction is properly removed from court filings and that the number of mistakes is reduced even more.

The privacy subcommittee also recommended against proposing a single uniform national rule limiting public access to plea agreements. The arguments for limiting public access are based on concerns about revealing cooperation provisions in plea agreements. District courts around the country are using different methods to address these concerns. A single best practice that would form the basis for a uniform national rule and meet the needs of all the districts has not yet emerged. The subcommittee's report recommends that district courts be encouraged to continue discussions about the relative benefits of various practices and to work toward developing a consensus on a best practice that might provide a basis for a national rule.

With respect to privacy concerns raised by electronic filing of transcripts, the privacy subcommittee concluded that the policies and practices for protecting personal identifier information in electronically filed transcripts are in place and being effectively applied. The report recommends continued monitoring of the policies and practices on the electronic filing of transcripts as well as continued efforts to educate attorneys and court reporters about privacy issues and redaction obligations.

The report also recommends retaining the rule provision that exempts immigration cases from the redaction requirements in the privacy rules. The provision is based on the large amount of sensitive information that can be in immigration case files, the burden of redacting that information, and the large volume of such cases. The report states that this exemption should be subject to future review in light of possible changes in technology and case volumes that could ease the burden of

redacting. The report suggests that such review also consider whether the exemption might be narrowed to particular types of immigration cases.

The Judicial Conference's Standing Rules Committee and Rules Advisory Committees have taken steps to address the small number of unredacted social security numbers appearing in electronic filings. The Rules Committees will continue to monitor the courts' experiences with providing the public access to electronic court filings, particularly with respect to plea and cooperation agreements in criminal cases, with a view to identifying any potential new problems and determining whether additional measures should be taken to address them.

Attachment

[For purposes of the March 2011 meeting of the Judicial Conference of the United States, the attachments to this report have been omitted due to their length. They can be found at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2011-01_Vol_II.pdf#pagemode=bookmarks.]

Operation of the Federal Privacy Rules

A Report to the Judicial Conference Standing Committee on the Rules of Practice and Procedure by the Subcommittee on Privacy

I. Introduction

A. The 2007 Adoption of the Privacy Rules

The E-Government Act of 2002 required the federal judiciary to formulate rules "to protect the privacy and security concerns relating to electronic filing of documents" in federal courts.[1] In response to this mandate, the Judicial Conference Committee on the Rules of Practice and Procedure (the "Standing Committee") established a Privacy Subcommittee, composed of a representative from each of the Advisory Rules Committees and representatives from the Committee on Court Administration and Case Management (CACM), to make rule recommendations. That Subcommittee's proposals for amendments to the Federal Rules of Civil Procedure,[2] Criminal Procedure,[3] Bankruptcy Procedure[4] and Appellate Procedure[5] (referred to collectively hereafter as "the "Privacy Rules") were adopted by the Standing Committee and went into effect on December 1, 2007. The Standing Committee recognized a likely need to review the operation of the Privacy Rules in the near future given the challenges of implementation, rapid technological advances, and ongoing concerns about the proper balance between public access to court proceedings and various claims to privacy.

B. Request for a Status Report on the Operation of the Privacy Rules

Since the Privacy Rules took effect, members of all three branches of government and of the public have raised questions about implementation and operation. Meanwhile, courts and litigants have gained practical experience in using the Privacy Rules in the context of expanding electronic access to court proceedings under CM/ECF and PACER. Thus, when in 2009, the Executive Committee of the Judicial Conference directed the Standing

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[1] Pub. L. 107-347, § 205(c)(3).

[2] Fed.R. Civ. P. 5.2.

[3] Fed.R. Crim. P. 49.1.

[4] Fed.R. Bankr. P. 9037.

[5] Fed.R. App. P. 25(a)(5).

Committee to report on the operation of the Privacy Rules, the Standing Committee revived its Privacy Subcommittee to conduct the necessary investigation. Once again, each Advisory Committee designated a member to serve on the Privacy Subcommittee, with the Advisory Committee Reporters serving as consultants. CACM also designated four members to serve on the Subcommittee, with former CACM Chair, Judge John Tunheim, serving as a member-at-large.

C. Principles Controlling Review

In undertaking its review, the Privacy Subcommittee recognized that its task was discrete. It was not charged with developing new policy, but only with assessing how the Privacy Rules operate consistent with existing policy established by the Judicial Conference (largely on the basis of extensive research and consideration by CACM). This policy generally favors making the same information that is available to the public at the courthouse available to the public electronically.[6]

In urging this "public is public" policy, CACM was mindful of an irony: that a system of public access that required a trip to the courthouse to see court filings, while outdated, may have afforded litigants, witnesses, and jurors more privacy – "practical obscurity" – than a system of easy electronic access. CACM further recognized that some persons availing themselves of electronic access might have illegitimate motives: identity theft, harassment, and even obstruction of justice. Nevertheless, CACM concluded that the judiciary's access policy should generally draw no distinction between materials available at the courthouse and online. This policy not only promotes long-standing principles of judicial transparency; it ensures against profiteering in information available only at the courthouse by entrepreneurs who could gather such information and market it over the Internet. CACM determined that privacy interests in electronically available information could be protected sufficiently by imposing redaction obligations on parties filing documents containing private information, specifically, social-security numbers, financial-account numbers, dates of birth, names of minor children, and, in criminal cases, home addresses.

The Standing Committee implemented these policy determinations in drafting the Privacy Rules. The Privacy Subcommittee's review of the operation of these rules is

[6] The Judicial Conference's privacy policy incorporated several policies, including those adopted by the Conference in 2001 and 2003 regarding electronic public access to appellate, bankruptcy, civil, and criminal case files (JCUS-SEP/OCT 01, pp. 48-50; JCUS-SEP 03, pp. 15-16), as well as guidance with respect to criminal case files (JCUS-MAR 04, p. 10).

informed by the judiciary's continued adherence to the stated policy.[7]

II. Organization and Work of the Privacy Subcommittee

A. Subjects Addressed By Working Groups

The Privacy Subcommittee quickly identified four general subjects for consideration and constituted itself into corresponding working groups to address each matter.

1. Implementation of the Privacy Rules

Members of Congress and of the public have questioned how effectively the courts have implemented the Privacy Rules, with particular concern for the appearance of unredacted social-security numbers in some court filings. The Privacy Subcommittee has reviewed this matter. It has further reviewed the efforts of individual courts and the Administrative Office to educate attorneys about their redaction responsibilities. The Subcommittee has reviewed local court rules addressing privacy concerns to determine their compliance with the national Privacy Rules. Finally, the Subcommittee has considered other procedures that might be implemented better to protect private information in court files.

2. Privacy Concerns in Criminal Cases

In criminal cases, a particular privacy concern has arisen with respect to electronic access to plea and cooperation agreements, aggravated by the emergence of various websites publicizing such information, of which *whosarat.com* is simply one example. In response to a Department of Justice request for a judicial policy denying any electronic access to plea agreements, CACM issued a March 2008 report to the Judicial Conference recommending against such a policy because it would deny public access to all plea agreements, including those that did not disclose cooperation.[8] In so reporting, CACM noted that the district courts vary widely in affording public access to plea and cooperation agreements. Thus, the Privacy Subcommittee has reviewed and evaluated these approaches with a view toward facilitating any future consideration of a uniform policy or rule.

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[7] The Privacy Rules provide exceptions for Social Security cases and immigration cases. These cases are not subject to the redaction requirements, but non-parties can obtain access only at the courthouse. The Privacy Subcommittee reviewed the continuing viability of these exceptions, and its conclusions are stated later in this report.

[8] *See* Report of CACM to Judicial Conference, March 2008 at 9.

3. Electronic Access to Court Transcripts

Consistent with the E-Government Act, clerks of court are responsible for placing transcripts of court proceedings on PACER. The Judicial Conference has made clear that it is the parties, not the clerks, who are responsible for making necessary redactions from such transcripts. The Privacy Subcommittee has considered the operation of this division of labor in practice as well as the efforts made by courts and parties to minimize references to private information in records that will eventually be transcribed. Special attention has been given to *voir dire* transcripts containing private information about jurors.

4. Possible Amendments to the Privacy Rules

The Privacy Subcommittee was asked to consider whether the redaction requirements of the existing Privacy Rules needed to be expanded to include more information, such as alien registration numbers, driver's license numbers, mental health matters, etc. At the same time, the Subcommittee was asked to consider whether the Privacy Rules should be contracted to eliminate or modify two exceptions to the basic "public is public" policy for social security and certain immigration cases.

B. Information Obtained by the Privacy Subcommittee

In conducting its review, the Privacy Subcommittee made extensive efforts to obtain information about how the Privacy Rules were working and how they might be improved. In addition to considering existing sources of information, the Subcommittee conducted its own surveys of court filings and of persons experienced with the operation of the Privacy Rules. Finally, the Subcommittee conducted a conference at which it heard from over thirty persons – judges, court personnel, attorneys, legal scholars, and media representatives – who expressed diverse views on the issues of public access to court filings and the need to protect private information. The results of the Subcommittee's efforts, which should assist in the future development of policies and rules regulating access to private information in court filings, are detailed in multiple attachments to this report. The Subcommittee here briefly describes its research efforts.

1. Review of Existing Report on Court Filings by PublicResource.org

A report published at PublicResource.org indicates that social-security numbers remain unredacted in a number of publicly available court files. With the assistance of Henry Wigglesworth of the Administrative Office, the Subcommittee conducted an in-depth analysis of the data contained in the PublicResource.org report. That analysis is attached to this Report. As the attachment indicates, very few cases (relative to the large number of

court filings) in fact revealed unredacted social-security numbers. Most of the disclosures cited by PublicResource.org related to filings made before the Privacy Rules were enacted, while others reflected a common disclosure made multiple times in the same case.

2. Survey of Court Filings for Unredacted Social-Security Numbers

At the request of the Privacy Subcommittee, the Federal Judicial Center conducted its own survey of court filings from a two-month period in 2010 to determine the frequency with which unredacted social-security numbers appear in court filings. The FJC found roughly 2400 documents — out of 10 million documents searched — with unredacted social-security numbers that did not appear to be subject to the exceptions to redaction provided by the Privacy Rules. Joe Cecil, who conducted the principal research, concluded that while the number of unredacted documents should not be ignored, it was proportionally minimal and did not indicate a widespread failure in the implementation of the Privacy Rules.[9]

3. Review of Local Rules

With the assistance of Heather Williams of the Administrative Office, the Privacy Subcommittee collected and reviewed all local rules governing redaction of private information in court filings. The Subcommittee determined that most local rules are intended to educate attorneys about their redaction obligations consistent with the Privacy Rules. The Subcommittee identified only a few local rules that conflict with the Privacy Rules, generally by requiring more redactions than the national rules. Such conflicts are easily addressed by an appropriate communication from the Standing Committee to the district chief judge.

4. Survey of Practical Experience with Privacy Rules

The Subcommittee early determined a need to know how those who regularly work with the Privacy Rules view their operation. With the assistance of Joe Cecil and Meghan Dunn of the FJC, the Subcommittee prepared and sent out surveys to a large number of

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[9] Joe Cecil provides the following illustration:

> If those 2,400 documents were the equivalent of one sheet of paper, and those papers were piled on top of each other, the stack of 2,400 sheets of paper would be just over nine and a half inches high. That sounds like a lot, but keep in mind that if we stack up 10 million sheets of paper to represent the almost 10 million documents that we searched, the stack of 10 million sheets of paper would be well over twice the height of the Empire State Building.

randomly selected district judges, clerks of court, and attorneys with electronic filing experience. The survey sought experiential information and invited opinions on the need for any rules changes. The results of this survey – including a description of methodology — are attached to this report. The survey data indicates that the Privacy Rules are generally working well and do not require amendment, but that continuing education efforts are necessary to ensure compliance.

5. Fordham Conference

The Privacy Subcommittee asked its reporter, Fordham Professor Daniel Capra, to identify persons with diverse views on the four areas of identified interest and to secure their participation at an all-day conference at Fordham Law School on April 13, 2010. Thanks to Professor Capra's efforts and Fordham's hospitality, the Subcommittee heard panel discussions on

- the broad question of transparency and privacy relating to court filings by a judge and various legal scholars;
- the exemption of immigration cases from electronic filing by private and public attorneys, a legal scholar, a member of the media, and a court representative;
- the present implementation of the Privacy Rules by a judge, a legal scholar, a member of the media, an AO representative, and a clerk of court;
- electronic access to plea and cooperation agreements and the need for a uniform rule on this subject by a prosecutor, criminal defense lawyers, a legal scholar, and a Bureau of Prisons official;
- the same subject by judges from districts affording different degrees of public access to such information; and
- electronic access to transcripts, including *voir dire* transcripts by a judge, two United States Attorneys, a First Amendment lawyer, and a jury clerk.

A transcript of these proceedings is attached to this report and will be published in the Fordham Law Review. Insights gained at the Fordham Conference inform all aspects of the findings and recommendations contained in this Subcommittee report.

III. Findings

A. Implementation of the Privacy Rules

1. Overview

The Privacy Subcommittee was charged with reviewing and reporting on the operation of the existing Privacy Rules throughout the federal courts, with particular attention to protection of the specified private identifier information in electronic filings available on PACER. The Subcommittee reports considerable success in the implementation of these Rules. At the same time, the Subcommittee identifies a continuing need for education efforts, monitoring, and study to ensure continued effective implementation.

2. Specific Findings

a. Administrative Office Efforts

The Privacy Subcommittee reports that the Administrative Office has made significant and effective efforts to implement the Privacy Rules' redaction requirements, while still providing the public with remote electronic access to court filings. For example:

- In 2003, the AO modified CM/ECF so that only the last four digits of a social security-number can be seen on the docket report in PACER. In the same vein, in May 2007 the AO's Forms Working Group, comprising judges and clerks of court, reviewed over 500 national forms to ensure that they did not require personal-identifier information. The Working Group identified only six forms that required personal identifier information, and those forms were revised or modified to delete those fields.

- In August 2009, the AO asked the courts to implement a new release of CM/ECF specifically designed to heighten a filer's awareness of redaction requirements. The CM/ECF log-in screen now contains a banner notice of redaction responsibility and provides links to the federal rules on privacy. CM/ECF users must check a box acknowledging their obligation to comply with the Privacy Rules redaction requirements in order to complete the log-in process. CM/ECF also displays another reminder to redact each and every time a document is filed.

- The Judicial Conference approval of a pilot project providing PACER access to audio files of court hearings raised concerns about audio disclosure of personal information. The eight courts participating in the pilot project employ various means

to discourage attorneys and litigants from introducing personal identifier information except where absolutely necessary. Lawyers and litigants are also warned that they could and should request that recorded proceedings containing information covered by the Privacy Rules or other sensitive matters not be posted, with the final decision made by the presiding judge. The AO has endeavored to ensure that courts and litigants are mindful of their redaction obligations as they participate in this project.

b. Efforts by the Courts

(1) Generally

All aspects of the Subcommittee's review confirm that federal courts throughout the country are undertaking vigorous and highly effective efforts to ensure compliance with the Privacy Rules generally and with the requirement that personal identifier information be redacted from or never included in court filings in particular. These efforts include:

- ECF training programs for both lawyers and non-attorney staff at law firms. The extension of training to staff is important because experience indicates that redaction failures, while infrequent, are frequently the result of filings made by staff who are unaware of the Rules requirements.

- ECF newsletters containing reminders about the redaction requirements.

- Making counsel aware of the Privacy Rules at the initial court conference and at evidentiary hearings, and also specifically advising counsel against unnecessary use of personal identifiers.

- Discouraging counsel from asking questions that would elicit testimony that would disclose private identifier information.

- Requiring redaction of exhibits containing personal identifier information as a condition of admissibility.

- Providing notices at counsel's table that describe the Rules' redaction requirements and that caution counsel not to put unredacted personal identifier information into the record.

- Reading a prepared statement to witnesses cautioning against disclosure of private identifier information.

- Assisting *pro se* filers, especially in bankruptcy cases, in redacting personal identifier information.

- Remedial action by clerks and courts when unredacted private identifiers are found, including consultation with filers who are repeat violators.[10]

(2) Social-Security Numbers in Court Filings

As discussed in an earlier section of this Report, surveys conducted by the AO and the FJC found only a small number of instances in which unredacted social-security numbers have been accessible online in violation of the Privacy Rules. Of the 10 million recently filed documents that the FJC researchers reviewed, less than .03 percent were found to contain unredacted social-security numbers. And of those, 17 percent appeared to be subject to some exception to redaction, such as waiver by the filing party.

The results indicate that such redaction failures as do occur are generally inadvertent. Some lawyers and staff remain unaware of the redaction policy. The results also indicate that the number of redaction failures is decreasing with time as courts continue and expand education efforts. The Privacy Subcommittee concludes that no redaction system can be error-free; nevertheless, continued education efforts should ensure that mistakes are rare and that almost all information subject to redaction is in fact removed from court filings.

(3) Implementation Challenges in Bankruptcy Cases

The Subcommittee's research indicates that most identified Privacy Rules violations occurred in bankruptcy cases. That is not surprising given the high number of first-time bankruptcy filers, the need for disclosure of substantial personal information in bankruptcy filings, and the probability that exhibits and proofs of claim will contain private identifiers. The Privacy Subcommittee reports that while the number of disclosures of unredacted personal identifiers is proportionately higher in bankruptcy cases, the actual number of

[10] The Privacy Subcommittee unanimously agrees with the basic premise of the Privacy Rules — that the redaction obligation is on the parties, not clerks or judges. Nonetheless, the Subcommittee notes and applauds the efforts of clerks and courts in taking remedial action when a failure to redact has been discovered.

disclosures remains small.[11] This is a tribute to the court efforts described generally in the preceding subsection, which include efforts by the bankruptcy courts.[12] The Subcommittee is, therefore, confident that, as educational efforts continue and other initiatives are pursued, the instances of errors in filing unredacted personal identifier information in bankruptcy cases will be reduced even further.

(4) Use of Local Rules

The Privacy Subcommittee conducted a comprehensive review of local court rules intended to implement the national Privacy Rules. The Subcommittee recognizes that local rules can have some value in educating filers about their redaction obligations. But local rules cannot impose obligations inconsistent with national rules. *See, e.g.,* Fed.R.Civ.P. 83(a). The Privacy Subcommittee has identified a few local rules inconsistent with the national Privacy Rules, notably, local rules demanding the redaction of *more* information than required by the national rules. National rules are a product of a carefully considered policy that calibrates the balance between the judiciary's commitment to public access and its protection of personal privacy. Local rules requiring more information to be redacted alter that balance.

An attached report identifies local rules that the Privacy Subcommittee finds inconsistent with the Privacy Rules. It recommends that the procedure employed in the last local rules project be employed here: the Standing Committee should inform the chief judge of a district with an inconsistent rule, and the Standing Committee should work together with the chief judge to remedy the situation.

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[11] Notably, Bankruptcy Rule 1005, as amended in 2003, now provides that the petitioner disclose only the last four digits of the petitioner's social-security number. Other Bankruptcy Rules require disclosure of the full social-security number, but that information is not available to the public. See, e.g., Bankruptcy Rule 1007(f), which requires an individual debtor to "submit" to the clerk, rather than "file" a verified statement containing an unredacted social-security number. At this point, in a bankruptcy case as in any other, unredacted social-security numbers are not accessible to the public unless permitted by one of the exceptions to the Privacy Rules.

[12] A paper prepared by Hon. Elizabeth Stong and submitted for the Fordham Privacy Conference provides a helpful description of how the Privacy Rules are implemented in the Eastern District of New York Bankruptcy Court. That paper is attached to this Report.

3. Possible Future Initiatives

Given inevitable advances in technology, the Subcommittee suggests that future attention be given to two possible developments.

- Current technology permits detection of unredacted social-security numbers in court filings, as the Federal Judicial Center did in the attached report. Current technology does not permit a comparable search for other unredacted personal identifiers, such as names of minor children. Nevertheless, at the Fordham Conference, Professor Edward Felten predicted that future technological developments might well provide such capacity. The Privacy Subcommittee recommends that the AO continue to monitor the state of search technology.

- Technology might also make it easier for a filing party to search for material to redact in a transcript or in a document that the party is going to file. For example, a pdf document is obviously easier to search if it is in searchable format. More broadly, as stated above, software might be developed in the future that would make it easier to search exhibits, immigration records, or indeed any document. While it is not the obligation of the courts to redact filings for litigants, to the extent the courts are already engaged in extensive and highly effective educational efforts, they might be encouraged to include relevant technological advances in the information conveyed.

While such future initiatives should be pursued, the Privacy Subcommittee concludes that the most important means of ensuring effective implementation of the Privacy Rules is to continue the current efforts to educate filers and other court participants about the need (a) to redact private identifiers from documents that must be filed, and (b) to avoid disclosure of private identifiers except when absolutely necessary.

Finally, the Subcommittee suggests continued monitoring of the implementation of the Privacy Rules. Specifically, a study of court filings for unredacted personal identifiers, such as that conducted by the Federal Judicial Center for this report, should be conducted on a regular basis, possibly every other year.

B. Criminal Cases: Affording Electronic Access to Plea and Cooperation Agreements

1. Overview

The Privacy Subcommittee quickly identified electronic public access to plea and

cooperation agreements in criminal cases as an area warranting careful review. Survey information and the Fordham Conference indicate that easy electronic access to such information, coupled with Internet sites committed to its collection and dissemination, have heightened concerns about retaliation against cooperators and prosecutors' ability to secure cooperation.

The Privacy Subcommittee views the recruitment and protection of cooperators as matters generally committed to the executive branch. At the same time, it recognizes judicial responsibility to minimize opportunities for obstruction of justice. How to do so without compromising public access to court proceedings – especially proceedings that may be of particular public interest, including the treatment of defendants who cooperate with the prosecution – admits no easy answer.

The Subcommittee has identified varied approaches by the district courts to the public posting of plea and cooperation agreements and general court resistance to a uniform national rule. To the extent the Department of Justice, some defense attorneys, and legal scholars support a national rule, the Subcommittee has identified no consensus on what that rule should be. Nor can it presently identify a "best practice."

The Subcommittee suggests that CACM and the Standing Committee encourage district courts to continue the discussion begun at the Fordham Conference about the relative advantages of various practices in order to determine if a consensus emerges in favor of a particular practice or rule. It further suggests that courts might consider methods, where appropriate, to avoid permanent sealing of plea or cooperation agreements — possibly by providing for such orders to expire at a fixed time subject to extension by the court upon further review.

2. Specific Findings

a. Existing District Court Practices for Posting Plea and Cooperation Agreements

The Privacy Subcommittee identified various approaches by the district courts in publicly posting plea and cooperation agreements,[13] which are summarized here in

[13] A chart of the various approaches, prepared by Susan Del Monte of the Administrative Office, is attached to this Report.

descending order of accessibility:

- Full electronic access to plea and cooperation agreements, except when sealed on a case-by-case basis.

- No remote electronic access to plea or cooperation agreements, but with such agreements fully available at the courthouse unless sealed in an individual case.

- Full electronic access to plea agreements, but with a separate sealed document filed in every case indicating whether or not the defendant has entered into a cooperation agreement.[14]

- No public access to plea or cooperation agreements either electronically or at the courthouse, because these documents are not made part of the case file.

b. Concerns with the Identified District Court Practices

At the Fordham Conference, prosecutors, defense counsel, and legal scholars expressed concerns about the various district court approaches. Again, working from the least to most restrictive approach, these concerns are summarized as follows:

- Full remote access to plea agreements with sealing of cooperation information in individual cases means a sealing order effectively raises a red flag signaling cooperation.

- Prohibiting electronic access to plea and cooperation agreements but allowing courthouse access to such documents encourages the development of cottage industries to acquire and post such information (often for sale), the very concern that prompted the Judicial Conference to adopt the "public is public" policy.

- Posting plea agreements that say nothing about any cooperation, or posting documents that use the same boilerplate language whether a party is cooperating or not, result in misleading court documents and preclude public scrutiny of how the judicial system treats cooperating defendants.

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[14] This approach is intended to minimize the ability to identify a cooperating defendant from the presence on the public record of sealed document. The Subcommittee notes the possibility of such identification from other public record entries, such as delayed or frequently adjourned sentencing proceedings.

- Not posting plea or cooperation agreements at all hampers public scrutiny not only of the treatment of cooperators but of the process by which guilty pleas are obtained.

Some Conference participants also raised a general concern: that as defendants from different districts found themselves housed together in the federal prison system, some might misconstrue records from districts with which they were not familiar. For example, a prisoner from a district where individual sealing signaled likely cooperation might mistakenly infer that every prisoner with a sealed record entry was a cooperator without realizing that some districts made a sealed entry in every case to ensure no difference between the dockets of cooperators and non-cooperators.

c. Support for a Uniform Rule

While prosecutors, most defense attorneys, and legal scholars urged a uniform rule for posting plea and cooperation agreements, they did not agree as to the content of that rule. Some urged few, if any, limits on public access to such agreements, while others supported strict limitations.[15]

The Subcommittee has considered the uniform rule proposal recommended by Professor Caren Myers in her article, *Privacy, Accountability, and the Cooperating Defendant: Towards a new Role for Internet Access to Court Records,* 62 Vand. L. Rev. 921 (2009), a copy of which is attached to this Report. Professor Myers, a former federal prosecutor, urges a rule that would (1) generally deny public access to individual plea and cooperation agreements except where ordered by the court on a case-by-case basis; and (2) provide public access to plea and cooperation information in the aggregate, without identifying individual defendants. As Professor Myers explained at the Fordham Conference, she thinks that in most cooperation cases, the risk to a defendant from public disclosure of the defendant's cooperation far outweighs any public interest in knowing that the defendant decided to cooperate. To the extent there is a public interest in knowing what kinds of deals the government is making with cooperators and what kinds of benefits they are receiving from the courts, Professor Myers submits that information can be provided anonymously or in the aggregate.

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[15] Because the Department of Justice has historically supported a uniform rule with strict limitations, the Subcommittee, early in its work, invited DOJ to propose a draft rule as a basis for Subcommittee discussion. DOJ continues to work on the issue, including the viability of a national rule, but has not at this time submitted draft language.

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Some participants at the Fordham Conference questioned the sweep of Professor Myers's proposal, which would severely limit public access to plea and cooperation agreements in individual cases. They also questioned the effectiveness of such a rule in protecting cooperators, given the ability to infer cooperation from delayed or adjourned sentences or from the sealing of sentencing minutes, in whole or in part.

d. Judicial Opposition to a Uniform National Rule

At the Fordham Conference, the Subcommittee also heard the views of judges drawn from districts pursuing each of the identified approaches. Their thoughtful responses to the concerns and suggestions of lawyers and legal scholars and their explanations for how and why their courts employed various approaches to posting plea and cooperation agreements were particularly informative. This discussion revealed that the various practices employed by courts with respect to plea and cooperation agreements were not casually developed. Rather, district courts have carefully considered the question of public access to such agreements, with individual courts soliciting the views of attorneys and other interested parties and engaging in substantial internal discussion before settling on an approach. The discussion further revealed that each district is strongly committed to its chosen approach, convinced that the approach satisfactorily balances the twin concerns of public access and cooperator safety, and resistant to the idea of a uniform national rule (particularly if it would differ from its own practice).

e. Subcommittee Conclusions

The Subcommittee concludes that no best practice has yet emerged supporting a uniform national rule with respect to granting public access to plea and cooperation agreements. The Subcommittee suggests that CACM and the Standing Committee encourage district courts to continue the discussion begun at the Fordham Conference as to the relative benefits of various practices, with a view toward determining if a consensus emerges in the coming years as to a best practice that might provide a basis for a uniform national rule.

At the same time, the Subcommittee is of the view that the rationale for limiting public access to such agreements – cooperator safety – does not necessarily support the permanent sealing of most cooperation agreements, much less plea agreements. Courts limiting access to such agreements might consider whether it is appropriate to include a "sunset" provision that allows sealing orders within a time prescribed either automatically for every case or specifically in individual cases with further sealing dependent on a court determination of a continued need.

C. Redacting Electronic Transcripts

1. Overview

Judicial Conference policy requires that court transcripts be posted on PACER within 90 days of delivery to the court clerk.[16] The Privacy Subcommittee has considered the judiciary's ability to comply with this policy while ensuring the redaction of personal identifier information as required by the Privacy Rules. The Subcommittee reports that the redaction of private information from transcripts on PACER is still a work in progress. Nevertheless, that work appears to be going well. Because the process relies on the vigilance and sensitivity of lawyers, judges, and court staff, continuing education is important to ensure these persons' awareness of the need to minimize record references to private identifier information and to redact such information when it appears in transcripts.

The Privacy Subcommittee has separately considered the privacy issues implicated by the electronic posting of *voir dire* transcripts, which may reveal personal information about potential jurors not required to be redacted by the Privacy Rules. Such information could be used to retaliate against jurors and could compromise the identification of prospective jurors able to serve without fear or favor. Because the Judicial Conference has recently provided the courts with guidance as to how to balance the competing interests in public access to *voir dire* and juror privacy, the Subcommittee suggests that the Standing Committee request CACM to monitor the operation of these guidelines to determine the need for any further policy action.

2. Specific Findings

a. The Redaction of Electronically Posted Transcripts

(1) Judicial Conference Policy for Electronic Filing

Consistent with the mandate of the E-Government Act to create a complete electronic file in the CM/ECF systems for every federal case, in 2003, the Judicial Conference, as stated above, adopted a policy requiring courts electronically to post transcripts of court proceedings within 90 days of their receipt by the clerk of court. In the 90-day period preceding electronic filing, each party's attorney (or each *pro se* party) must work with the

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[16] See JCUS Sep. 07 at 7. Extensive guidance on the implementation of the transcripts policy is found in a letter to clerks from Robert Lowney of the AO, dated January 30, 2008. See also Report of CACM to the Judicial Conference on Electronic Transcripts, June 2008.

court reporter according to a prescribed schedule to ensure that any electronically filed transcript is properly redacted of personal identifier information consistent with the requirements of the Privacy Rules.

(2) Survey Results Indicate General Compliance with Transcript Policy

The FJC survey reveals that, as of December 2009, all bankruptcy courts and all but a few district courts are posting trial transcripts on PACER, though most courts do not routinely post deposition transcripts. A majority of the surveyed courts have established local rules or policies to address privacy concerns arising from the electronic posting of trial transcripts. The number of clerks and judges who reported complaints about personal identifier information appearing in electronically filed transcripts is small.

The survey further revealed that clerks of court, judges, and lawyers are actively engaged in ensuring proper redaction of electronically filed transcripts. Specifically, a significant number of clerks reported that their courts require that transcripts be filed as text-searchable PDFs to facilitate redactions. Other clerks reported using software programs specifically developed to identify personal identifier information. Still more clerks expressed interest in the development of such programs.

The survey revealed that judges employ various means to educate counsel about their redaction obligations with respect to electronically filed transcripts. A common practice is to provide counsel with a card urging that personal identifier information not be elicited on the record and that any such information that appears in transcripts be redacted. Similar guidance is provided to counsel at the initial case conference, in formal written orders, and through communication with chambers staff. Judges also intervene to cut off a line of questions that appears to be eliciting personal identifier information. Judges report that they also rely on chambers staff and docket clerks to alert them to the appearance of personal identifier information in a transcript that will require redaction.

The survey confirms general attorney awareness of the Privacy Rules' redaction requirements. Two-thirds of attorneys responding reported that they redacted personal identifier information before transcripts were electronically filed. Half of attorneys surveyed reported that they actively sought to avoid eliciting personal identifier information on the record. Nevertheless, because 17% of responding attorneys reported that they made no effort to redact transcript before electronic filing, there is plainly a need for continuing education and monitoring in this area.

(3) The Fordham Conference

Participants at the Fordham Conference reinforced the conclusions drawn from the survey: (a) that courts and attorneys are striving to avoid disclosure of personal identifying information on the record, and (b) that the redaction procedure for electronic transcripts adopted by the Judicial Conference is generally working as intended.

Two United States Attorneys stated that although the redaction requirements were initially met with some displeasure by their Assistants, experience had shown that the required procedures were workable and not unduly burdensome. One of the United States Attorneys reported developing a standard form to facilitate the specification of pages and line numbers where personal identifier information needed to be redacted.

Both government and private attorneys stated that they generally sought to avoid eliciting personal identifier information in proceedings that could be transcribed. They agreed that there was rarely a need for such information, and that attorneys could usually avoid personal information coming into the record by applying some forethought to questions asked and documents introduced into evidence. The lawyers discussed the value of reaching advance agreements with opposing counsel to minimize the introduction of personal identifier information.

Some Conference participants identified concern that parties in civil cases were urging court reporters to redact from transcripts confidential information – such as proprietary information – not falling within the categories specified in Fed. R. Civ. P. 5.2(a). Parties and court reporters need to be made aware that redactions beyond those specified in Rule 5.2(a) require a court order pursuant to Rule 5.2 (e) and its counterparts.

b. The Electronic Filing of *Voir Dire* Transcripts

(1) Concerns Attending *Voir Dire* Transcripts

Electronic filing of *voir dire* transcripts raises unique concerns and, thus, was considered separately by the Privacy Subcommittee. *Voir dire* may elicit a range of personal, sensitive, or embarrassing information from a juror that need not be redacted under the Privacy Rules. The possibility of such information making its way from PACER access to broad disclosure on the Internet poses real risks for juror harassment or even retaliation. Many jurors may presently be unaware that *voir dire* transcripts will be electronically filed. With such awareness, courts may find it more difficult to identify potential jurors able to serve without fear or favor.

Because it is the court that summons persons for jury service, the judiciary's responsibility to safeguard jurors is arguably stronger than its responsibility to safeguard persons who enter into cooperation agreements with the executive branch. Nevertheless, some circuit precedent holds that *voir dire* proceedings should generally be open to public scrutiny. Further, if the transcript of an open *voir dire* proceeding is available at the courthouse, the judiciary's "public is public" policy suggests that it should also be electronically accessible.

(2) Judicial Conference Guidance for *Voir Dire*

Mindful of these competing concerns, the Judicial Conference, at its March 2009 session, provided courts with guidance on how to balance the public nature of jury selection with the protection of juror privacy.[17] Under the policy, Judges should inform jurors that they may approach the bench to share personal information in an on-the-record *in camera* conference with the attorneys, and should make efforts to limit references on the record to potential jurors' names by, for example, referring to them by their juror number. The policy further states that in deciding whether to release a *voir dire* transcript, a judge should balance the public's right of access with the jurors' right to privacy – consistent with applicable circuit precedent – and, only if appropriate, seal the transcript.[18]

Such guidance necessarily informs the Subcommittee's review of how courts and parties treat *voir dire* transcripts and juror privacy.

(3) Survey Results Respecting *Voir Dire* Transcripts

Courts presently vary widely in their policies on posting *voir dire* transcripts. Sixty percent of courts surveyed indicated that they did not place *voir dire* transcripts on PACER. Thirty-two percent indicated that they posted such transcripts in both civil and criminal cases.

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[17] JCUS-MAR 09, pp. 11-12.

[18] In the event the court seals the entire *voir dire* proceeding, the policy provides that the transcript should be docketed separately from the rest of the trial transcript. In the event the court seals only bench conferences with potential jurors, that part of the transcript should be docketed separately from the rest of the *voir dire* transcript. The parties should be required to seek permission of the court to use the *voir dire* transcript in any other proceeding.

Only a handful of clerks and judges reported problems or complaints about the proper redaction of personal identifier information in *voir dire* transcripts. The reason why few problems arise appears to be judicial vigilance. Over 70 percent of district and magistrate judges reported using one or more procedures to protect juror privacy during *voir dire* proceedings and in resulting transcripts. The most frequent procedure used is *in camera* conferences pursuant to the Judicial Conference policy. Judges also report the following procedures designed to protect juror privacy:

- sealing juror questionnaires or *voir dire* transcripts,

- referring to jurors by numbers rather than names,

- reminding court reporters that *voir dire* proceedings are to be transcribed only if the appropriate section of the transcript request form is completed, and

- limiting transcript accessibility to the courthouse.

Significantly, most judges reported that they considered the measures available to them adequate to protect juror privacy.

(4) The Fordham Conference

Participants at the Fordham Conference expressed some concern that posting *voir dire* transcripts could make it more difficult to select juries. They discussed various efforts to protect juror privacy, which generally tracked the methods reported by judges in the survey results, described above. Some additional procedures suggested included:

- using juror questionnaires to reduce courtroom questioning,

- providing for the automatic redaction of juror personal identification information from *voir dire* transcript by the court reporters,

- providing the names of persons selected for jury pools only upon request, with such a request denied if the court determines that the interests of justice require confidentiality, and

- withholding the names of jurors until the conclusion of trial and releasing them only on order of the court.

c. Subcommittee Conclusions

The Privacy Subcommittee concludes that the policies and practices for protecting personal identifier information in electronically filed transcripts are in place and, on the whole, being effectively applied by litigants and the courts. The Subcommittee suggests that CACM regularly review these policies and practices in light of constant technological advances. The Subcommittee also suggests continuing and expanding education efforts by the courts to raise attorneys' awareness of their redaction obligations with respect to electronically filed transcripts. Attorneys and court reporters also need to be made aware that the redaction of material not specified in subsection (a) of the Privacy Rules requires a court order.

With respect to *voir dire* transcripts, the Judicial Conference has recently provided guidance for courts in balancing the right of public access – including electronic access – to such transcripts with juror claims to privacy. The Subcommittee suggests that the Standing Committee request CACM to monitor whether this guidance is adequate to ensure the selection of fair and impartial jurors from a broad pool of persons and to safeguard against retaliation and harassment.

D. The Need For Rule Changes

1. Overview

Upon careful review of the survey data and the information provided at the Fordham Conference, the Privacy Subcommittee reports that, with the possible exception of the rules' treatment of immigration cases, there is no significant call by the bench or bar for changes to the Privacy Rules. Users of the rules generally agree that existing redaction requirements are manageable and provide necessary protection against identity theft and other threats to privacy presented by remote public access. Such complaints or suggestions as were heard derive from the necessary learning curve involved in recent implementation of the Privacy Rules. The Subcommittee thus concludes that the data collected do not support either expansion or contraction of the types of information subject to redaction requirements.

2. Areas Specifically Considered for Changes to the Rules

a. Alien Registration Numbers

In considering possible amendments to the Privacy Rules, the Subcommittee gave

particular attention to the need to redact alien registration numbers insofar as they might be analogized to social-security numbers. After extensive discussion and debate, including consideration at the Fordham Conference, the Subcommittee concludes that redaction of alien registration numbers is not warranted at this time.

Disclosure of an alien registration number, unlike a social-security number, poses no significant risk of identity theft. Moreover, the Subcommittee heard from a number of court clerks and Department of Justice officials, all of whom stressed that redacting alien registration numbers would make it extremely difficult for the courts to distinguish among large numbers of aliens with similar or identical names and to ensure that rulings were being entered with respect to the correct person. Redaction would create a particularly acute problem in the Second and Ninth Circuits, which have heavy immigration dockets. Given the lack of any expressed support for the redaction of alien registration numbers, the Privacy Subcommittee sees no reason to add them to the list of information subject to redaction under subdivision (a) of the Privacy Rules.

b. The Exemption for Social Security Cases

The Privacy Subcommittee considered the continued need for exempting Social Security cases from the redaction requirements of the Privacy Rules. The Subcommittee reports no call for a change to that exemption. Further, the reason for the exemption identified in 2007 pertains equally today: Social Security cases are rife with private information, individual cases hold little public interest, and redaction would impose unusually heavy burdens on filing parties.

c. The Exemption for Immigration Cases

The Privacy Subcommittee also considered the continued need for exempting immigration cases from the redaction requirements of the Privacy Rules.[19] Participants at the Fordham Conference vigorously argued both sides of the question. The argument for abrogating the exemption and affording remote public access to immigration case files was that the current system gives "elite access" to those with resources to go to a courthouse that,

[19] It should be noted that the Judicial Conference policy drafted by CACM provided an exemption from the redaction requirements for Social Security cases but not for immigration cases. During the process of drafting the Privacy Rules, the Department of Justice made arguments and provided data that persuaded the Privacy Subcommittee and eventually the Standing Committee that an exemption for immigration cases was warranted.

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especially in transfer cases, might be hundreds of miles away from a party interested in the information. It was argued that limiting access to the courthouse was particularly burdensome for members of the media. Under the current rule, the media must often depend on the parties to get information about habeas petitions and complaints in an immigration matter. It was also suggested that the exemption is ineffectual in that certain information in immigration cases *is* available over PACER — including the docket, identity of the litigants, and the orders and decisions, which will frequently contain sensitive information about asylum applicants. Thus, the media argues that the current system of access impairs First Amendment interests without providing much privacy protection.

On the other hand, the Privacy Subcommittee also heard forceful arguments from DOJ and court personnel in favor of the current system of limiting remote public access to immigration cases. They note the explosion of immigration cases since 2002, particularly in the Second and Ninth Circuits, and argue that immigration cases, especially asylum cases, are replete with private information on a par with or greater than Social Security cases. That personal and private information is necessary to the court's disposition, so there is no way to keep it out of the record. Moreover, it is woven throughout the record, precluding easy redaction.[20] Further, the burden of redaction would inevitably fall on the government because many petitioners are unrepresented, and imposing redaction requirements on *pro bono* counsel could discourage such representation. DOJ represents that there is no simple technological means presently available to redact all personal information in all the immigration cases. It urges that any change to current limitations on remote public access be deferred until technological advances facilitate redaction.

A compromise solution emerged at the Fordham Conference: maintaining existing limitations on remote public access for immigration cases most likely to include sensitive information, such as cases seeking asylum or relief under Convention Against Torture, but removing the exemption for immigration cases involving transfer, detention, or deportation. The Privacy Subcommittee agrees that a more nuanced approach to exempting immigration cases from remote public access warrants further consideration. One area for investigation is the plausibility of segregating cases by subject. For example, removal cases often present claims for asylum. Another factor to be considered is a possible decline in the volume of immigration cases, or types of immigration cases, which could lessen the burdens of redaction. A third factor — referred to earlier in other sections of this Report – is the possibility that advances in technology will ease the burdens of redaction.

The Privacy Subcommittee urges further research and consultation with interested

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[20] A DOJ official estimated that one FOIA officer would have to spend an entire work day with one case to get the average asylum case moved to the Court of Appeals in redacted form.

parties before any decision is made to abrogate the exemption for immigration cases. But, mindful of the significant public interest in open access generally, and in immigration policy in particular, the Subcommittee suggests that the current approach to immigration cases be subject to future review and possible modification.

III. Summary of Findings and Recommendations

The Privacy Subcommittee summarizes its findings and recommendations as follows:

1. The Privacy Rules are in place and are generally being implemented effectively by courts and parties.

2. To ensure continued effective implementation, every other year the FJC should undertake a random review of court filings for unredacted personal identifier information.

3. Also to ensure continued effective implementation of the Privacy Rules, the courts should continue to educate their own staffs and members of the bar about (a) redaction obligations under the Privacy Rules, (b) steps that can be taken to minimize the appearance of private identifier information in court filings and transcripts, and (c) the need to secure a court order under Fed. R. Civ. P. 5.2(e) or its counterparts before redacting any information beyond that specifically identified in the Privacy Rules.

4. The AO should monitor technological developments and make courts and litigants aware of software that would make it easier to search documents, transcripts, and court records for unredacted personal identifier information.

5. At present, no best practice can be identified to support a uniform national rule with respect to making plea and cooperation agreements publicly available. District courts should, however, be encouraged to continue discussing their different approaches, and the Standing Committee might request CACM to monitor these approaches to see if, at some future time, a best practice emerges warranting a uniform rule.

6. To the extent district courts seal plea or cooperation agreements, consideration might be given, where appropriate, to a "sunset provision" providing for their expiration unless sealing is extended after further review and order of the court.

7. There is no need to amend the Privacy Rules either to expand or to contract the type of information subject to redaction.

8. The exemption for Social Security cases should be retained in its current form.

9. The exemption for immigration cases should be retained in its current form. Nevertheless, this exemption should be subject to future review in light of possible changes in technology and case volumes that could ease the burden of redaction. Such review should also consider whether the exemption might be narrowed to particular types of immigration cases.

December, 2010

Judicial Conference Standing Committee on the Federal Rules
Subcommittee on Privacy

Hon. Reena Raggi, Chair

Hon. Robert L. Hinkle (Chair of Working Group on Rules Changes)

Hon. John G. Koeltl (Chair of Working Group on Transcripts)

Hon. Ronald B. Leighton (Chair of Working Group on Implementation)

Hon. Steven D. Merryday (Chair of Working Group on Criminal Cases)

Hon. David H. Coar

Hon. James B. Haines, Jr.

Hon. John R. Tunheim

James F. Bennett, Esq.

Leo P. Cunningham, Esq.

Elizabeth J. Shapiro, Esq., Department of Justice

Jonathan Wroblewski, Esq., Department of Justice

Professor Sara Sun Beale

Professor Edward H. Cooper

Professor S. Elizabeth Gibson

Professor Catherine T. Struve

Professor Daniel J. Capra, Reporter

COMMITTEE ON RULES
OF
PRACTICE AND PROCEDURE

Washington, DC
June 2-3, 2011

AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JUNE 2–3, 2011

1. Opening remarks of the Chair

   A. Report on the March 2011 Judicial Conference session
   B. Transmission of Supreme Court-approved proposed rule amendments to Congress

2. **ACTION** – Approving minutes of the January 2011 Committee meeting

3. Report of the Administrative Office

   A. Legislative Report
   B. Administrative Report

4. Report of the Federal Judicial Center

5. Report of the Civil Rules Committee

   A. **ACTION** – Approving publishing for public comment proposed amendments to Rule 45
   B. Preservation and sanctions
   C. Pleading
   D. Forms
   E. Work following the 2010 Duke Conference
   F. Minutes and other informational items

6. Report of the Appellate Rules Committee

   A. **ACTION** – Approving publishing for public comment proposed amendments to Appellate Rules 28 and 28.1 and Appellate Form 4
   B. Minutes and other informational items

7. Report of the Criminal Rules Committee

   A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Rules 5, 15, 58, and new Rule 37
   B. **ACTION** – Approving publishing for public comment proposed amendments to Rules 12 and 34
   C. Discovery issues, including work with the Federal Judicial Center on possible

additions to the Judge's Benchbook and a "Good Practices" guide for criminal discovery

D. Work with the Federal Judicial Center on warnings about immigration consequences of a guilty plea and restrictions imposed on sex offenders

E. Minutes and other informational items

8. Report of the Evidence Rules Committee

A. **ACTION** – Approving publishing for public comment an amendment to Rule 803(10) to comport with the Supreme Court's decision in *Melendez-Diaz v. Massachusetts*

B. Minutes and other informational items

9. Report of the Bankruptcy Rules Committee

A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Bankruptcy Rules 3001(c), 7054, and 7056, and Official Forms 10, 10 (Attachment A), 10 (Supplement 1), 10 (Supplement 2), and 25A

B. **ACTION** – Approving and transmitting to the Judicial Conference, without publication, proposed amendments to Rules 1007(c), 2015(a), 3001(c), and Official Forms 1 and 9A–9I

C. **ACTION** – Approving for publication for public comment proposed amendments to Rules 1007(b), 3007(a), 5009(b), 9006, 9013, and 9014, and Official Forms 6C, 7, 22A, and 22C

D. The Forms Modernization Project

E. Revision of the Part VIII Rules

F. Minutes and other informational items

10. **ACTION** – Approving and transmitting to the Judicial Conference revised *Procedures for the Judicial Conference's Committee on Rules of Practice and Procedure and Its Advisory Rules Committees*

11. Long-range planning report

A. Response to Judge Breyer's request

B. Long-term projects for the Rules Committees

12. Next meeting: January 5–6, 2012, in Phoenix, Arizona

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
CHAIRS and REPORTERS

Chair:	**Reporter:**
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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
(Standing Committee)

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Honorable Wallace Jefferson Supreme Court of Texas Supreme Court Building 201 W. 14th Street, Room 104 Austin, Texas 78701	Dean David F. Levi Duke Law School Science Drive and Towerview Road Room 2012 Durham, NC 27708
William J. Maledon, Esq. Osborn Maledon, P.A. 2929 North Central Avenue, Suite 2100 Phoenix, AZ 85012-2794	Honorable Reena Raggi United States Court of Appeals 704S United States Courthouse 225 Cadman Plaza East Brooklyn, NY 11201-1818

Honorable Patrick J. Schiltz United States District Court United States Courthouse 300 South Fourth Street – Suite 14E Minneapolis, MN 55415	Honorable James A. Teilborg United States District Court 523 Sandra Day O'Connor U. S. Courthouse 401 West Washington Street – Suite 523 Phoenix, AZ 85003-2146
Honorable Diane P. Wood United States Court of Appeals 2688 Everett McKinley Dirksen – U.S. Courthouse 219 South Dearborn Street Chicago, IL 60604	**Advisors and Consultants:** Professor Geoffrey C. Hazard, Jr. Hastings College of the Law 200 McAllister Street San Francisco, CA 94102
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Committee on Rules of Practice and Procedure

To carry on a continuous study of the operation and effect of the general rules of practice and procedure.

Members	Position	District/Circuit	Start Date	End Date
Lee H. Rosenthal Chair	D	Texas (Southern)	2007	2011
James Cole*	DOJ	Washington, DC	----	Open
Dean C. Colson	ESQ	Florida	2009	2012
Douglas R. Cox	ESQ	Washington, DC	2005	2011
Roy T. Englert, Jr.	ESQ	Washington, DC	2010	2013
Neil M. Gorsuch	C	Tenth Circuit	2010	2013
Marilyn L. Huff	D	California (Southern)	2007	2013
Wallace B. Jefferson	CJUST	Texas	2010	2013
David F. Levi	ACAD	North Carolina	2009	2012
William J. Maledon	ESQ	Arizona	2005	2011
Reena Raggi	C	Second Circuit	2007	2013
Patrick J. Schiltz	D	Minnesota	2010	2013
James A. Teilborg	D	Arizona	2006	2012
Diane P. Wood	C	Seventh Circuit	2007	2011
Daniel Coquillette Reporter	ACAD	Massachusetts	1985	Open

Principal Staff: Peter G. McCabe 202-502-1800

* Ex-officio

LIAISON MEMBERS

Appellate:	
Dean C. Colson	(Standing Committee)
Bankruptcy:	
Judge James A. Teilborg	(Standing Committee)
Civil:	
Judge Arthur I. Harris	(Bankruptcy Rules Committee)
Judge Diane P. Wood	(Standing Committee)
Criminal:	
Judge Reena Raggi	(Standing Committee)
Evidence:	
Judge Judith H. Wizmur	(Bankruptcy Rules Committee)
Judge Paul S. Diamond	(Civil Rules Committee)
Judge John F. Keenan	(Criminal Rules Committee)
Judge Marilyn Huff	(Standing Committee)

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Chief Counsel: Andrea Kuperman Chief Counsel to the Rules Committees 11535 Bob Casey U.S. Courthouse 515 Rusk Avenue Houston, TX 77002-2600
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Jeffrey N. Barr Attorney-Advisor Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544
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Ms. Gale B. Mitchell Administrative Specialist Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544

Revised: May 4, 2011

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Ms. LiAnn Shepard Program Assistant Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544

FEDERAL JUDICIAL CENTER

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Laural L. Hooper (Criminal Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Tim Reagan (Evidence Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003

TAB 1-A

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

PRELIMINARY REPORT
JUDICIAL CONFERENCE ACTIONS
March 15, 2011

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All the following matters requiring the expenditure of funds were approved by the Judicial Conference *subject to the availability of funds* and to whatever priorities the Conference might establish for the use of available resources.

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At its March 15, 2011 session, the Judicial Conference of the United States —

Elected to the Board of the Federal Judicial Center for a term of four years: Chief Judge James F. Holderman, Jr., United States District Court for the Northern District of Illinois, and Chief Judge Kathryn H. Vratil, United States District Court for the District of Kansas, to succeed Judge David O. Carter, United States District Court for the Central District of California, and Judge Philip M. Pro, United States District Court for the District of Nevada.

COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM

With regard to bankruptcy judgeships:

a. Recommended to Congress that it (1) authorize 49 additional judgeships (48 permanent, one temporary); and (2) convert 28 temporary judgeships to permanent status and extend the lapse dates for two temporary judgeships; and

b. Amended its 2010 policy concerning conversion of existing temporary bankruptcy judgeships to permanent status by clarifying that a district should have an annual weighted caseload of at least 1,500 per judgeship to justify conversion, calculated by using the number of judgeships currently authorized to the district minus one.

Approved revised Guidelines for the Intercircuit Assignment of Bankruptcy Judges.

Authorized the designation of St. George as an additional place of holding court in the District of Utah, as requested by the Judicial Council of the Tenth Circuit.

COMMITTEE ON THE BUDGET

Approved a 5.2 percent annual budget cap, in lieu of the current 8.2 percent budget cap, for the Salaries and Expenses account for fiscal years 2013 through 2017.

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT

Approved a revised district court records disposition schedule for criminal case files.

Approved a revised bankruptcy court records disposition schedule.

Endorsed the practice of scanning into CM/ECF older paper files stored at Federal Record Centers when they are requested for viewing, but agreed to require courts to restrict remote public access to those files and allow public access only at the clerk's office public terminal or counter.

Endorsed the scanning of open fugitive criminal case files into CM/ECF under the appropriate restriction levels.

Endorsed the scanning into CM/ECF of sealed paper case files and documents stored at the courts under the appropriate restriction level.

Approved a modification of the Electronic Public Access Fee Schedule to include the following sentence: "For individual researchers, courts must also find that the defined research project is intended for academic research purposes, and not for commercial purposes or internet redistribution."

Expanded the opinion pilot program to include up to 30 additional courts, to ensure that sufficient data is collected to evaluate the program.

[A recommendation regarding senior judge participation in en banc panels was withdrawn by the committee chair.]

COMMITTEE ON CRIMINAL LAW

Approved a new policy for probation and pretrial services offices governing the management of sex offenders.

COMMITTEE ON DEFENDER SERVICES

Approved the utilization of circuit Criminal Justice Act (CJA) case-budgeting attorney positions, the continued funding for the three current case-budgeting attorneys, and expansion in the number of positions. The case-budgeting attorney positions will be structured as circuit unit employees that are funded by the Defender Services account and will operate pursuant to a Memorandum of Understanding that will include an advisory role for the Administrative Office in the appointment, management, and oversight of the position, with the understanding that the circuit has the ultimate authority in the selection, retention, and management of the position. Expansion of the number of case-budgeting attorneys will occur incrementally, subject to the Committee's approval and the availability of funding.

Approved policy guidance pertaining to clemency representations furnished by panel attorneys.

COMMITTEE ON FEDERAL-STATE JURISDICTION

Agreed to support an amendment to 28 U.S.C. § 297 to specify that, in addition to circuit and district judges who are currently authorized to provide temporary service to the courts of the freely associated compact states (the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau), magistrate judges and territorial judges may be assigned temporarily to provide such service.

Rescinded its position supporting the repeal of the Federal Employers' Liability Act and the Jones Act.

COMMITTEE ON THE JUDICIAL BRANCH

Agreed that if the judiciary seeks legislation to provide that the District Courts of the Territory of Guam and the Commonwealth of the Northern Mariana Islands shall be courts with judicial power derived from Article III, Section 1, of the Constitution of the United States, it would also seek legislation to provide that in the event the incumbent judges of those courts are confirmed as Article III judges, their service as judges in their respective territorial district courts would be included in computing, under 28 U.S.C. §§ 371 and 372, their aggregate years of judicial service.

Agreed to request and encourage circuit judicial councils to consider establishing "judicial wellness" committees that would be charged with accomplishing objectives substantially similar to the following: (1) promoting health and wellness among judges by creating programs (educational or otherwise), policies, and/or practices that provide a supportive environment for the maintenance and restoration of health and wellness; and (2) providing information to judges on judicial retirement issues, including disability retirement.

Rescinded its position endorsing legislation to authorize the payment of nonforeign cost-of-living allowances to federal judges serving outside the continental United States or in Alaska.

Approved an amendment to section 250.30.40 of the Travel Regulations for United States Justices and Judges to provide that, in lieu of claiming a per diem allowance for the locality where temporary duty is performed, a judge may claim the cost of lodging plus the maximum General Services Administration per diem allowance for meals and incidental expenses, currently $71, provided that the sum total does not exceed 150 percent of the authorized per diem allowance.

Approved an amendment to section 250.40.20 of the Travel Regulations for United States Justices and Judges to clarify that, when the government or a third party pays directly for a judge's lodging and/or meals, the judge should take an appropriate reduction in the judges' subsistence/per diem allowance.

Approved an amendment to section 240.10 of the Travel Regulations for United States Justices and Judges to authorize judges' travel attendants' reimbursement on an actual expense basis (in lieu of a per diem allowance) consistent with the provisions of section 420.30.40 of the Judiciary Staff Travel Regulations, *Guide to Judiciary Policy*, Vol. 19, Ch. 4.

COMMITTEE ON JUDICIAL RESOURCES

With regard to Article III judgeships, agreed to —

a. Transmit to Congress a request for the addition of eight permanent judgeships and one temporary judgeship in the courts of appeals, and for the district courts, the addition of 53 permanent judgeships and 18 temporary judgeships, plus the conversion to permanent status of eight existing temporary judgeships; and

b. Recommend to the President and the Senate not filling the next judgeship vacancy in the District of Massachusetts, based on the three-year low weighted caseload in that district.

With regard to additional law clerk positions, agreed to —

a. Establish a "court law clerk" position in the Judiciary Salary Plan (JSP) using the specified qualifications standard. Each position requires Conference authorization. Each court law clerk position appointment will not exceed JSP-13, step 1, and is temporary, not to exceed three years on court staff rolls;

b. Allocate ten court law clerk positions to the Eastern District of California and one court law clerk position to the Western District of New York, based on specified criteria, for a test period of three years; and

c. Request the Administrative Office to devise a set of statistical criteria by which to evaluate at the end of three years whether the addition of court law clerks enabled more expeditious case resolution in the Eastern District of California and the Western District of New York.

Affirmed that under the September 2007 Conference policy limiting the tenure of term law clerks to four years, courts are not permitted to switch term law clerks with career law clerks or with incumbents of other attorney positions.

Took the following actions with regard to temporary and term appointments in courts and federal public defender organizations:

a. Agreed to —

(1) Limit temporary appointments prospectively to two categories: (i) one year or less; and (ii) at least one year and one day;

(2) Limit to four years all temporary and term appointments, including temporary bankruptcy law clerks, temporary law clerks funded by the Temporary Emergency Fund, and term staff attorneys;

(3) Provide that extensions would be allowed to temporary or term appointments so long as the total period of service in that position does not exceed a maximum duration of four years; and

(4) Exclude from these requirements (i) positions that have statutory appointment limitations, e.g., federal public defenders; (ii) land commissioners due to the infrequent, intermittent nature of the work; and (iii) positions that have Conference policy appointment limitations, such as term law clerks; certain re-employed annuitants; temporary medical, maternity, and extended military leave replacements in chambers; and chambers staff temporarily retained after separation of a judge; and

b. Agreed to eliminate the temporary indefinite appointment type, converting all such appointments to temporary appointments not-to-exceed four years from the date of Conference approval of this action and, where appropriate, to allow courts and federal public defender organizations to designate such positions as permanent.

Clarified a policy adopted at its September 1998 session regarding the grade level of a principal secretary to a chief circuit judge (and included in that policy the principal secretary to the chief judge of the Court of International Trade position) to state that (a) the Judiciary Salary Plan (JSP) grade 12 may only be "carried" from the position of principal secretary to a chief circuit judge to the position of secretary to a federal judge in the chambers of that same chief circuit judge upon that judge stepping down from the chief judge position; and (b) the assistant or additional secretaries in chambers may not be switched with principal secretaries to attain the JSP-12 once the principal secretary

acquires the permanent JSP-12. This would not preclude a chief circuit judge from appointing an assistant or additional secretary to the principal secretary position if the principal secretary has separated from the chief circuit judge's chambers.

Approved (a) a staffing formula for probation and pretrial services offices for implementation beginning in fiscal year 2012; and (b) a case-weighting supplement to the staffing formula to determine future staffing requirements in probation and pretrial services offices.

Approved a staffing formula for the clerk's office of the Court of Federal Claims for implementation beginning in fiscal year 2012.

Approved application of the alternative dispute resolution robust staffing factor for two years for the Western District of New York and the District of Idaho pending completion of the alternative dispute resolution work measurement study and a working group's analysis and suggestions.

With regard to the Court Personnel System, approved the following relating to student trainees:

a. That a pay band be established in the Court Personnel System for student trainees who are employed on a temporary basis during vacation periods or on a part-time basis while in school;

b. That the qualification requirements for entry to the pay band be the conditions identified in the minimum age requirement for high school students, as outlined in the *Guide to Judiciary Policy*, Vol. 12, Ch. 5, § 520.30.20(c), Employment, High School Student;

c. That an individual may be appointed into an ungraded Court Personnel System student trainee position at a base salary anywhere from a rate equivalent to the federal minimum wage rate up to a rate equal to that of a classification level (CL)-21, step 1; and

d. That the appointing officer have the discretionary authority to adjust pay within the band.

Amended the maximum fees for realtime services so that all parties to a case who receive a realtime feed pay the same amount for the services that are received, and agreed that those fees will be based on the number of feeds provided by a certified realtime court reporter as follows:

- One feed, the ordering party pays $3.05 per page;
- Two to four feeds, each party receiving a feed pays $2.10 per page; or
- Five or more feeds, each party receiving a feed pays $1.50 per page.

COMMITTEE ON JUDICIAL SECURITY

Concerning judges information on the internet:

a. Agreed to endorse the Seventh Circuit librarian's program, procedure, and protocol as a national model program wherein circuit librarians would monitor traditional media and the internet, including blogs and accessible social media sites for mentions of federal judges (circuit, district, magistrate, and bankruptcy) from their circuits, including threats and/or inappropriate communications, and urge circuit librarians, judges, and circuit judicial councils to consider adopting and implementing the model program locally. Under this program —

   (1) Librarians and others who locate a threat or inappropriate communication should forward it immediately to the judge and the local United States Marshals Service (USMS) district office;

   (2) Judges may choose not to participate, or may prefer to have chambers staff conduct the searches; and

   (3) The librarians' role is one of data gathering only and the primary responsibility for threat response, evaluation, and investigation remains with the USMS;

b. With regard to domain name issues, agreed to encourage judges to consult with their librarians if the judges want routine searches performed to determine if their names have been registered as domain names. Librarians will also alert the judges to whom they are assigned if their routine monitoring of the internet for judicial mentions uncovers the potential misuse of a judge's name as a domain name; and

c. With regard to ensuring that threats are reported to the USMS, agreed to urge each circuit librarian to coordinate with individual judges and the local USMS district office to assist in implementing the USMS protocol for reporting information located by the librarians that contains sensitive personal information about a judge or a judge's family or that could be interpreted as threatening (Protocol for Judges and the U.S. Marshals Service, May 21, 2010)

COMMITTEE ON THE ADMINISTRATION OF THE MAGISTRATE JUDGES SYSTEM

Amended the magistrate judge selection and appointment regulations to conform with a recent amendment to 28 U.S.C. § 631(a) by providing that senior judges with at least a 50 percent workload in the preceding calendar year may participate in the selection of new magistrate judges.

TAB 1-B

April 26, 2011

Honorable John A. Boehner
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

I have the honor to submit to the Congress the amendments to the Federal Rules of Appellate Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

/s/ John G. Roberts, Jr.

April 26, 2011

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Appellate Procedure be, and they hereby are, amended by including therein amendments to Appellate Rules 4 and 40.

[See infra., pp. __ __ __.]

2. That the foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on December 1, 2011, and shall govern in all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Appellate Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

April 26, 2011

Honorable John A. Boehner
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

I have the honor to submit to the Congress the amendments to the Federal Rules of Bankruptcy Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2075 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

/s/ John G. Roberts, Jr.

April 26, 2011

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Bankruptcy Procedure be, and they hereby are, amended by including therein amendments to Bankruptcy Rules 2003, 2019, 3001, 4004, and 6003, and new Rules 1004.2 and 3002.1.

[See infra., pp. __ __ __.]

2. That the foregoing amendments to the Federal Rules of Bankruptcy Procedure shall take effect on December 1, 2011, and shall govern in all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Bankruptcy Procedure in accordance with the provisions of Section 2075 of Title 28, United States Code.

April 26, 2011

Honorable John A. Boehner
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

I have the honor to submit to the Congress the amendments to the Federal Rules of Criminal Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

/s/ John G. Roberts, Jr.

April 26, 2011

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Criminal Procedure be, and they hereby are, amended by including therein amendments to Criminal Rules 1, 3, 4, 6, 9, 32, 40, 41, 43, and 49, and new Rule 4.1.

[See infra., pp. __ __ __.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 2011, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That the CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

April 26, 2011

Honorable John A. Boehner
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

I have the honor to submit to the Congress the amendments to the Federal Rules of Evidence that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying the rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

/s/ John G. Roberts, Jr.

April 26, 2011

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Evidence be, and they hereby are, amended by including therein the amendments to Evidence Rules 101-1103.

[See infra., pp. __ __ __.]

2. That the foregoing amendments to the Federal Rules of Evidence shall take effect on December 1, 2011, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Evidence in accordance with the provisions of Section 2072 of Title 28, United States Code.

TAB 2

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 6-7, 2011
San Francisco, California
Draft Minutes

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ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in San Francisco, California, on Thursday and Friday, January 6 and 7, 2011. The following members were present:

Judge Lee H. Rosenthal, Chair
Douglas R. Cox, Esquire
Roy Englert, Esquire
Judge Neil M. Gorsuch
Judge Marilyn L. Huff
Chief Justice Wallace Jefferson
William J. Maledon, Esquire
Judge Reena Raggi
Judge Patrick J. Schiltz
Judge James A. Teilborg
Judge Diane P. Wood

Three members were unable to attend the meeting: Dean C. Colson, Esquire; Dean David F. Levi; and Deputy Attorney General James M. Cole. The Department of Justice was represented by Karen Temple Claggett, Esquire and S. Elizabeth Shapiro, Esquire.

Also participating in the meeting were the committee's consultants, Professors Geoffrey C. Hazard, Jr. and R. Joseph Kimble, and the following guests who participated in a panel discussion: Judge Barbara J. Rothstein; Judge Paul W. Grimm; Gregory P. Joseph, Esquire; Daniel C. Girard, Esquire; Thomas Y. Allman, Esquire: and John Barkett, Esquire.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Peter G. McCabe	The committee's secretary
John K. Rabiej	Special counsel, Administrative Office
James N. Ishida	Senior attorney, Administrative Office
Jeffrey N. Barr	Senior attorney, Administrative Office
Emery G. Lee	Research Division, Federal Judicial Center
Meghan A. Dunn	Research Division, Federal Judicial Center
Andrea Kuperman	Judge Rosenthal's rules law clerk

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Jeffrey S. Sutton, Chair
Professor Catherine T. Struve, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Eugene R. Wedoff, Chair
Professor S. Elizabeth Gibson, Reporter
Advisory Committee on Civil Rules —
Judge Mark R. Kravitz, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate Reporter
Advisory Committee on Criminal Rules —
Judge Richard C. Tallman, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy King, Associate Reporter
Advisory Committee on Evidence Rules —
Judge Sidney A. Fitzwater, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Rosenthal welcomed the new committee members – Judge Gorsuch, Judge Schiltz, and Mr. Englert – and summarized their extensive professional backgrounds and achievements.

She reported that John Rabiej would be leaving the Administrative Office shortly to become executive director of the Sedona Conference. She noted that the committee would honor him for his service at its next meeting in June. As a short-term measure, she said, Andrea Kuperman, her rules law clerk, would be detailed to the Administrative Office to serve as chief counsel to the committee. She also asked the committee to recognize the excellent work that Katherine David had performed as rules law clerk during Ms. Kuperman's maternity leave.

With great sadness, Judge Rosenthal reported that Judge David G. Trager, a former member of the Advisory Committee on Criminal Rules, had just passed away. She also noted that Joe Cecil of the Federal Judicial Center, who has conducted a great deal of excellent research for the committee over many years, had recently lost his son in a tragic accident. She extended the deepest sympathies of the committee to the Trager and Cecil families.

Judicial Conference Action

Judge Rosenthal reported that the Judicial Conference at its September 2010 session had approved all the rules amendments recommended by the committee.

The Conference also approved the proposed statutory amendment to 28 U.S.C. § 2107. That legislative change, she explained, was needed to buttress the proposed amendment to FED. R. APP. P. 4(a)(1) (time to appeal) that would clarify the time to appeal in civil cases when a federal officer or employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States. The Supreme Court has held that time limits set forth in statutes are jurisdictional in nature. Therefore, the statute needs to be amended to complement the rule amendment. *Bowles v. Russell*, 551 U.S. 205 (2007). The statutory change, she noted, was essentially technical in nature. She reported that she and Mr. Rabiej had spoken to House and Senate judiciary committee staff about it and had received encouragement that it would likely be adopted.

Pleading Standards Legislation

Judge Rosenthal noted that two pieces of legislation had been introduced in 2009 that would regulate pleading standards in civil cases, and three Congressional hearings had been conducted on them. She suggested that it will be difficult for Congress to

achieve consensus on the specific language of a single bill. Nevertheless, the thrust of the various legislative efforts to date had been: (1) as an interim measure, to restore pleading standards to those in effect immediately before *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); and (2) as a longer-term measure, to allow the rules committees to work out the final standards under the Rules Enabling Act process.

She reported that it was unclear whether any of the bills will be successful in the new Congress. The committee's overarching interests, she said, are: (1) to avoid being drawn into the political fray; and (2) to preserve the integrity of the Rules Enabling Act process. She added that the committee and its staff will continue to monitor and document the extensive case law on pleading standards following *Twombly* and *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S.Ct. 1937 (2009). The committee's summaries of the developing case law are posted on the judiciary's rules web site, www.uscourts.gov. In addition, she noted, the Federal Judicial Center would continue to study civil cases after *Twombly* and *Iqbal* to elicit meaningful insights on how the district courts are handling motions to dismiss.

Finally, she observed that two bills had been introduced in Congress that would alter the standards for pleading in specific types of civil litigation – in fashion-design cases and "anti-SLAPP" cases. She solicited the committee's views on whether the Administrative Office should prepare a standard response that could be used for all future legislation affecting pleading standards or should wait and comment individually on each bill as it is introduced. A participant urged the judiciary to be very cautious and avoid being drawn into the legislative debate in light of the politically charged atmosphere that had accompanied the private securities legislation.

Sunshine in Litigation Legislation

Judge Rosenthal noted that some sort of "sunshine in litigation" legislation continues to be introduced in every Congress. Among other things, she said, the bills would prevent a court from issuing a protective order if the information that would be protected by the order could be relevant to protecting public health or safety.

She noted that concern had arisen again in the wake of the BP oil spill when a bill was introduced specifying that court orders restricting the dissemination of broad categories of information would be void and unenforceable in any legal proceeding. The proposed legislation would effectively have made discovery unworkable. As a result, she and Judge Kravitz had written to Congress explaining why that particular provision was unnecessary and would be disruptive, and the sponsors later removed it from the bill.

Judge Rosenthal reported that she and Judge Kravitz had met with the staff of Representative Nadler, who had introduced the latest version of the sunshine legislation. She noted that his current bill, although a little narrower than earlier versions, still

presented difficult and unnecessary problems that would make civil litigation more expensive, burdensome, and time-consuming. It would also make it more difficult to protect important privacy interests.

Bankruptcy Rules

Judge Rosenthal explained that under the Rules Enabling Act, the Supreme Court must promulgate rule amendments and send them to Congress by May 1 of each year. The amendments then take effect by operation of law on December 1 of each year, unless Congress acts during the interim seven months to reject, modify, or defer them.

She reported that on the eve of the December 1, 2010, deadline, Congressional staff had raised an objection to the 2010 rule amendments – apparently in response to a last-minute attempt by opponents of a particular bankruptcy rule. She noted that the matter had eventually been resolved to the satisfaction of the staff, and the rules went into effect on December 1.

Nevertheless, she said, this sort of last-minute action could become a recurring tactic every year. She explained that the committee chairs, the reporters, and AO staff were continuing to work hard at all stages of the rules process to avert potential surprises by informing Congressional staff in advance about pending amendments and potentially controversial issues. Those ongoing, informal communications, she said, had proven to be enormously beneficial.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of the last meeting, held on June 14-15, 2010.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. McCabe reported that appropriations legislation had still not been enacted by Congress to provide funds to operate the federal government for the 2011 fiscal year. As a result, the federal judiciary was operating under a continuing resolution limiting its funding to 2010 levels. He noted, moreover, that a great deal of talk had been heard in the political arena about imposing cuts in spending across all parts of the federal government. As a result, he said, the future budget for the courts could be very constrained.

REPORT OF THE FEDERAL JUDICIAL CENTER

Judge Rothstein reported that the Federal Judicial Center had come away from the Duke conference with clear instructions to pursue additional case-management training

for judges, regardless of whatever rules changes might be adopted by the committee. She noted that the Center had designed a new program focused on case management, and it had already been oversubscribed.

She reported that about 30 years ago the Center had conducted a study to identify the most effective case-management procedures. Now it is in the process of designing a similar, updated study to assess which procedures work well and which do not. Center staff, moreover, will be updating the Center's case-management monographs and drafting new publications. For example, the Center, working in conjunction with the Judicial Panel on Multi-District Litigation, will prepare a new series of "how-to" monographs for judges and lawyers on handling specific categories of civil cases before the panel.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Sutton and Professor Struve presented the report of the advisory committee, as set forth in Judge Sutton's memorandum and attachments of December 3, 2010 (Agenda Item 6).

Amendments for Publication

FED. R. APP. P. 13, 14 and 24

Judge Sutton noted that Congress enacted 26 U.S.C. § 7482 in 1986. It authorizes discretionary interlocutory appeals from the Tax Court to the courts of appeals, similar to the provision in 28 U.S.C. § 1292(b) that governs interlocutory appeals from the district courts. The Federal Rules of Appellate Procedure, however, have never been amended to implement the 1986 statute.

He reported that the advisory committee's proposed amendments to Rule 13(a) (appeal from the Tax Court) and Rule 14 (applicability of other rules) had been developed in close consultation with the Tax Court and the Department of Justice. In addition, the advisory committee had consulted tax lawyers on the proposed rules.

Revised FED. R. APP. P. 13(a) would largely carry forth the provisions of existing Rule 13 and address an "appeal as of right" from the Tax Court. Proposed FED. R. APP. P. 13(b) would address an "appeal by permission" from the Tax Court by incorporating the provisions of FED. R. APP. P. 5 (appeal by permission).

The proposed revisions to FED. R. APP. P. 14 had been designed to complement Rule 13. They would delete the current reference to Tax Court "decisions" and specify that references to the district court and the district clerk in any applicable appellate rule,

other than FED. R. APP. P. 24(b), should be read as referring to the Tax Court and its clerk.

The amendments to FED. R. APP. P. 24(b) had been recommended by the Tax Court. They would correct the impression fostered by the current rule that the Tax Court is an executive branch agency, rather than a court.

The committee without objection by voice vote approved the proposed amendments for publication.

Information Items

Judge Sutton asked the members for feedback and guidance on two potential rule amendments that the advisory committee had under consideration.

FED. R. APP. P. 29(a)

Judge Sutton reported that Rule 29(a) currently allows the following entities to file an amicus-curiae brief in a court of appeals without the consent of the parties or prior leave of court: (1) the United States; (2) a federal officer or agency; and (3) a state, commonwealth, or territory, and the District of Columbia. The advisory committee, he explained, was considering a proposal that would extend that exemption to federally recognized Indian tribes.

He explained that the original public suggestion had been much broader in scope and would have redefined the term "state" in FED. R. APP. P. 1(b) (scope and definitions) to include Indian tribes throughout the appellate rules. The advisory committee, however, decided against that proposal and currently was only considering the proposal to permit tribes to file amicus briefs without leave of court.

He noted that the Federal Judicial Center had conducted an empirical study at the committee's request. It revealed that Indian tribes do in fact file a number of motions for permission to file amicus briefs, most of them in three federal circuits. The study further showed that the great majority of the motions for leave to file are granted by the courts. In reality, thus, Indian tribes already have the ability to file amicus briefs. The key issue, therefore, is not access to the courts but the fundamental dignity of the tribes.

Judge Sutton said that he had written to the chief judges of the three circuits having the most motions for leave to file and had asked them: (1) whether they favored changing the national rule to allow tribes to file amicus briefs without court permission; and (2) whether their circuits would consider modifying their own local rules to permit tribes to file without permission. He reported that the circuits had not shown much enthusiasm so far for either course of action.

Judge Sutton pointed out that the rules of the U.S. Supreme Court allow municipalities to file amicus briefs without permission, but not Indian tribes. He added that there is no clear history as to why that particular choice had been made when the Court adopted its rule in the 1930s.

He reported that the advisory committee was divided on the merits of the proposal, and it would appreciate hearing any views that the members of the Standing Committee may have to offer. He proceeded to summarize the arguments offered by opponents and proponents of the proposal.

Advisory committee members opposed to the change had stated that there is no problem that needs fixing because Indian tribes routinely are given leave to file amicus briefs now. As a matter of substance, moreover, tribes are essentially different from states. In addition, the Supreme Court's amicus rule recognizes states and municipalities, but not tribes. Although dignity is important, opponents concede, it is in reality another name for sovereignty – a matter of great political sensitivity that the rules committees should avoid.

On the other hand, advisory committee members favoring the change had argued that dignity is a core value that should be recognized in the rule. Judge Sutton noted that the advisory committee had received a letter from several tribal groups strongly endorsing the proposed amendment. Proponents also argued that Indian tribes are exactly the same as states, at least for the purposes of Rule 29(a). If municipalities are allowed to file amicus briefs without permission in the Supreme Court, sovereign Indian tribes should have at least the same status. In fact, it would make sense to include both Indian tribes and municipalities in a revision of Rule 29(a). He also noted that the advisory committee had considered and rejected the possibility of adding foreign governments to the rule.

Judge Sutton pointed out that amicus briefs pose a risk because they may raise recusal problems for judges. With that in mind, he said, some courts currently specify that an amicus brief will not be allowed if it would result in the recusal of a judge. He suggested that if Rule 29(a) were to be amended, the revised rule could address the recusal prohibition directly or explicitly allow the courts of appeals to address it in their local rules.

The participants then expressed the same divergence of views that the members of the advisory committee had voiced. One member strongly supported the proposed amendment and pointed out that Indian tribes have a greater claim of sovereignty than municipalities because the latter are only creatures of the states. Moreover, tribes, as sovereign entities, have essentially the same important interests in third-party cases that states do.

A participant said that many commercial cases affect Indian tribes, and he suggested that the tribes normally can afford to write amicus briefs in these cases. He added that it is rare for a court to deny a tribe's request to file an amicus brief, although recusal problems arise from time to time.

Another participant cautioned that there is a real political risk in amending Rule 29. The rules committees may be used as a political stepping stone to achieve other political objectives involving sovereignty and tribal rights.

A member inquired as to why the advisory committee had decided to include Indian tribes only in Rule 29. Judge Sutton and Professor Struve responded that the committee had in fact reviewed all the appellate rules individually, and there were simply too many practical complications with adding tribes to the other rules.

A member encouraged the advisory committee to amend Rule 29 to include both tribes and municipalities. Among other things, he said, including cities in the rule would reduce any political fallout. In addition, if Rule 29 were amended, the Supreme Court would likely change its rule eventually to include tribes.

On the other hand, a member pointed to the lack of enthusiasm for the proposal on the part of the three circuits that have the most tribal cases. He emphasized that there is no real problem under the current rule because tribes as a practical matter have no problem in filing amicus briefs in meritorious cases. He expressed concern about the committee getting out ahead of the Supreme Court on a potentially controversial issue.

Ms. Claggett stated that the Department of Justice did not have an official view on the matter, but the Department encouraged the committee to keep the matter on its agenda.

Some participants suggested that it is not always clear what constitutes a tribe and who may speak for the tribe in litigation. In addition, a member cautioned that the amendment could lead to a slippery slope because other groups that Congress has "deemed" to be Indian tribes, such as Alaskan native villages and corporations, could ask to be included in the rule. Legislation had been introduced in Congress to recognize Native Hawaiians as a tribe. Judge Sutton explained that the advisory committee had deliberately limited the proposal to federally recognized tribes, and Professor Struve added that the process for federal recognition is a lengthy one.

A member suggested that the committee also needs to take account of the 2010 change in FED. R. APP. P. 29 that requires amicus briefs to disclose authorship and funding.

FED. R. APP. P. 28

Judge Sutton pointed out that Rule 28 (briefs) mandates the specific contents of a brief and the order in which the contents must be presented. Rule 28(a)(6), for example, states that a brief must contain "a statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below." Then Rule 28(a)(7) requires "a statement of facts relevant to the issues submitted for review." He suggested that it might make more sense to collapse (a)(6) and (a)(7) into a single statement, as the Supreme Court's rule does. That approach, he said, would allow lawyers to make their case and tell their story in a more natural way. Most lawyers, he said, would choose to follow a chronological approach.

Judge Sutton reported that there was strong support on the advisory committee in favor of reformulating the contents requirements. The committee was considering three options: (1) aligning Rule 28 more closely with the Supreme Court's rule; (2) leaving paragraphs (a)(6) and (a)(7) of Rule 28 in place, but reversing their order – placing the facts first and then the statement of the case; and (3) removing the words "course of proceedings" from Rule 28(a)(6). He added that the members of the advisory committee agree that there is a problem with Rule 28, but there is no consensus yet as to which particular option to pursue.

Several participants stated that, as a minimum, the phrase "course of the proceedings" should be eliminated from Rule 28(a)(6) because it induces lawyers to include unnecessary details about the proceedings below and causes briefs to be too long. Judges, they said, want briefs to focus on the dispositional ruling below. Chief Justice Jefferson quoted from the pertinent Texas state-court rule (Rule 38.1) that requires a concise statement of the case that "should seldom exceed one-half page, and . . . not discuss the facts." Several members praised that approach because it requires the lawyers to tell the court up front precisely and briefly what they want the court to do. Along the same lines, a member pointed out that some state courts specifically require an introduction to a brief.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Wedoff and Professor Gibson presented the report of the advisory committee, as set forth in Judge Wedoff's memorandum and attachments of December 6, 2010 (Agenda Item 9). Judge Wedoff reported that the advisory committee had no action items to present.

Informational Items

FED. R. BANKR. P. 1007

Judge Wedoff explained that the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 specifies that individual debtors in chapter 7 cases must file a statement that they have completed an approved course in personal financial management before they may receive a discharge. FED. R. BANKR. P. 1007(c) (time limits) had required a debtor to file the statement within 45 days after the first date set for the meeting of creditors under § 341 of the Code.

Some debtors, however, fail to file the required statement within 45 days. Therefore, the court has no choice under the statute but to close the case without a discharge. To alleviate that hardship, FED. R. BANKR. P. 5009(b) (notice of failure to file the Rule 1007(b)(7) statement) was amended, effective December 1, 2010. It now requires the bankruptcy clerk to notify individual debtors who have not filed the statement within 45 days to inform them that if they do not file the statement within an additional 15 days, their case will be closed without a discharge. As a conforming amendment, the time limit in Rule 1007(c) was increased from 45 days to 60 days.

Judge Wedoff reported that a complicating factor is that two versions of Rule 1007 were currently in place – FED. R. BANKR. P. 1007 and INTERIM RULE 1007-1. The latter, he said, was a special, temporary rule adopted by the bankruptcy courts as a local rule or standing order to deal temporarily with certain servicemen under the National Guard and Reservists Debt Relief Act of 2008. In that Act, Congress exempted certain members of the Guard and Reserves from the means testing required of other chapter 7 debtors. The statutory exemption, though, was made applicable only for cases filed during the three-year period from December 2008 to December 2011. Since the statutory provision would expire in less than a year, Judge Wedoff said that it made no sense to change the permanent, national rule. Therefore, the committee asked the courts to adopt the interim rule for servicemen as a local rule or standing order.

INTERIM BANKRUPTCY RULE 1007-1 also includes the requirement that debtors file the statement that they have completed a course in personal financial management. Therefore, when FED. R. BANKR. P. 1007 was amended on December 1, 2010, to extend the total time for debtors to file the statement from 45 days to 60 days, a corresponding

change had to be made in INTERIM BANKRUPTCY RULE 1007-1. So, on November 4, 2010, the chairs of the Standing Committee and the advisory committee sent a memorandum to the bankruptcy courts advising them to increase the interim rule's deadline for filing the statement from 45 days to 60 days, consistent with revised FED. R. BANKR. P. 1007.

Judge Wedoff pointed out that the December 2010 amendments to FED. R. BANKR. P. 1007 also had shortened from 14 days to 7 days the time for a debtor in an involuntary case to file a list of creditors' names and addresses. The debtor, however, only has to file the list of creditors after the court enters the order for relief.

FED. R. BANKR. P. 3001

Judge Wedoff reported that the proposed amendments to FED. R. BANKR. P. 3001 (proof of claim) published in August 2010 had been designed to address problems often arising with proofs of claims that involve credit-card debt, especially debt purchased by bulk buyers. He said that the documentation filed by some bulk creditors is often insufficient to support their claims because it fails to comply with Rule 3001's current requirement that a claim be accompanied by the original or a duplicate of the writing on which it is based.

He reported that the advisory committee had published a proposed revision to Rule 3001 in August 2009. It would have required a creditor holding a claim based on an open-end or revolving consumer-credit agreement to attach the last account statement sent to the debtor before the debtor filed the petition. At the public hearings, however, several institutional creditors stated that they were simply unable to produce a copy of the last statement.

In response, the advisory committee deleted the requirement that a copy of the last statement be attached. Instead, it republished a revised version of the rule in August 2010 that would instead require the holder of a claim to file five specific pieces of information with the proof of claim. He noted that a public hearing on the revised rule would be held in early February 2011.

FED. R. BANKR. P. 7054

Judge Wedoff reported that the proposed amendments to Rule 7054 (judgments and costs) would give a party more time to respond to a prevailing party's bill of costs.

FED. R. BANKR. P. 7056

Judge Wedoff explained that FED. R. BANKR. P.7056 (summary judgment) incorporates FED. R. CIV. P. 56 by reference. As amended effective December 1, 2009, FED. R. CIV. P. 56(c)(1)(A) specifies that a party may move for summary judgment at any time until 30 days after the close of all discovery, unless the court specifies another time.

Since bankruptcy matters tend to move quickly and hearings often occur shortly after the close of discovery, Judge Wedoff said that the advisory committee had decided that a shorter deadline was needed in bankruptcy. Therefore, it had published a proposed amendment to FED. R. BANKR. P. 7056 specifying that in bankruptcy adversary proceedings a summary-judgment motion must be made "at least 30 days before the initial date set for an evidentiary hearing on any issue for which summary judgment is sought." As with FED. R. CIV. P. 56(c)(1), the deadline may be altered by local rule or court order.

OFFICIAL FORMS

Judge Wedoff reported that the advisory committee had published proposed amendments to OFFICIAL FORM 10 (proof of claim) and three new forms to be filed with proofs of claims for home-mortgage debts. The changes would implement pending amendments to FED. R. BANKR. P. 3001 and new FED. R. BANKR. P. 3002.1, both due to take effect on December 1, 2011. In summary, they will require the holder of a home-mortgage claim to: (1) provide additional details about the breakdown of the mortgage debt; (2) give notice of any changes in installment payment amounts; and (3) give notice of the assessment of any fees, expenses, and charges after the claim is filed.

He reported that OFFICIAL FORM 25A (model plan for reorganization of a small business under chapter 11) would be amended to change its effective-date provisions. The changes, he said, were technical in nature and would give more time to appeal an order confirming the plan.

Judge Wedoff reported that the advisory committee will consider two new form amendments at its next meeting in response to the Supreme Court's recent decisions in *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010), and *Schwab v. Reilly*, 130 S. Ct. 2652 (2010).

He explained that under § 1325(b)(1) of the Bankruptcy Code, chapter 13 debtors may be required to devote all their "projected disposable income" to payment of unsecured claims. *Hamilton v. Lanning* concerned the calculation of that disposable income. In that case, the debtor's financial situation had changed, as he had acquired a new job at a considerably lower salary. The Supreme Court rejected the mechanical approach of considering only the debtor's average monthly income for the six months

preceding the bankruptcy filing. Instead, it adopted a forward-looking approach that will allow bankruptcy courts to consider changes in a debtor's income and expenses after filing.

As a result of *Lanning*, he said, the advisory committee was considering amending OFFICIAL FORM 22C (chapter 13 statement of current monthly income and calculation of commitment period and disposable income). The form currently asks debtors only to list their pre-bankruptcy average income and current expenses. The proposed revision would ask them to list any changes in income and expenses that have already occurred or are virtually certain to incur during the 12 months following filing.

Judge Wedoff explained that *Schwab v. Reilly* concerned how a debtor may claim an exemption in property where the actual value of the property exceeds the maximum dollar amount allowed for the exemption under the relevant federal or state law. The Supreme Court held that if the debtor enters a specific dollar amount on the exemption form, he or she is then limited to that amount. If the full market value of the property exceeds that amount, the trustee may use the overage.

Judge Wedoff said that OFFICIAL FORM 6C (property claimed as exempt) is ambiguous. In *Schwab*, the Court stated that the debtor's listing of the claimed exemption and the value of the property in the same amount did not put the trustee on notice that the debtor was claiming the full market value of the property as exempt, whatever the value might turn out to be. As a result of *Schwab*, Judge Wedoff said, the advisory committee had tentatively agreed to amend Form 6C to permit the debtor to exempt the "full fair market value of the property." The change would put the trustee on notice of the need to object if he or she believes that the value of the property exceeds the allowed exemption amount.

FORMS MODERNIZATION

Judge Wedoff reported that the advisory committee was engaged in a major project to modernize and reformulate all the bankruptcy forms to make them clearer and easier to complete, and to take full advantage of technological advances. He noted that considerable progress had been made under the direction of its forms modernization subcommittee, chaired by Judge Elizabeth Perris and assisted by Carolyn Bocella Bagin, a nationally prominent forms expert. The subcommittee, he said, should complete a set of revised forms for individual debtors in the next few months, and he anticipated that the advisory committee may have all the forms ready to be published for public comment in August 2012.

BANKRUPTCY APPELLATE RULES

Judge Wedoff noted that the advisory committee was also making major progress in revising Part VIII of the bankruptcy rules – the bankruptcy appellate provisions. He pointed out that the current Part VIII rules are difficult to follow and inconsistent in several respects with the Federal Rules of Appellate Procedure. He reported that the advisory committee was working closely with the Advisory Committee on Appellate Rules, and the two committees would meet jointly in April 2011.

He explained that the advisory committee was in the process of deciding which of two structural approaches to pursue in revising the Part VIII rules:

(1) to maintain stand-alone bankruptcy appellate rules that repeat many of the provisions of the Federal Rules of Appellate Procedure; or

(2) to incorporate the Federal Rules of Appellate Procedure into Part VIII of the bankruptcy rules by citation – with listed exceptions and modifications – in the same manner that Part VII of the bankruptcy rules now incorporates the Federal Rules of Civil Procedure by citation for adversary proceedings.

He pointed out that the advisory committee had prepared alternate drafts of a revised FED. R. BANKR. P. 8003, and he asked the members for their preferences as to the two approaches.

Incorporation, he said, would result in shorter rules that are clearer to lawyers familiar with the Federal Rules of Appellate Procedure. Incorporation would also have the advantage that when the FRAP are amended in the future, no additional changes will be needed in the bankruptcy rules. But, he noted, it will be complicated to incorporate FRAP by reference into the bankruptcy rules because bankruptcy appeals are different in several respects from civil and criminal appeals.

Professor Gibson added that the incorporation model was shorter, but it will present a number of drafting problems. For example, there are three different appellate "courts" to which an appeal may be taken from a bankruptcy judge, three different "clerks," and there may be several different adversary proceedings within a bankruptcy case. The Federal Rules of Appellate Procedure, moreover, contain a number of matters that do not apply to bankruptcy appeals or can only be applied uneasily.

Several members expressed a preference for the sample self-contained rule over the incorporation rule, suggesting that it was clearer and more intelligible. They pointed out that the apparent brevity of the incorporation model was illusory because the text of the incorporated appellate rules would have to be published along with the bankruptcy

rules in any event. They emphasized, though, that if the advisory committee chooses the stand-alone model, the revised bankruptcy appellate rules should be parallel to the Federal Rules of Appellate Procedure to the maximum extent possible. Moreover, whenever a change is made in the FRAP in the future, it needs to be picked up right away in the bankruptcy rules.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Kravitz and Professor Cooper presented the report of the advisory committee, as set forth in Judge Kravitz's memorandum and attachments of December 6, 2010 (Agenda Item 5). Judge Kravitz reported that the advisory committee had no action items to present.

Informational Items

ELECTRONIC DISCOVERY

Judge Kravitz reported that electronic discovery continued to be an important matter on the advisory committee's agenda. It had also been a major topic of discussion at the committee's May 2010 conference at Duke Law School. He said that the participants at Duke had urged the committee to focus on two issues of particular concern to the bar – preservation and sanctions. The lawyers, he said, had been seeking greater certainty and uniformity, both as to their preservation obligations and the standards for imposing sanctions. He added that Mr. Joseph had chaired a superb panel discussion at the conference, and the panel had produced a paper setting forth the elements that should be included in a proposed federal rule governing preservation.

Following the Duke conference, he said, he had asked the advisory committee's discovery subcommittee, chaired by Judge David Campbell, to follow up on both issues. There was, however, concern about the committee's authority under the Rules Enabling Act to address preservation obligations. Generally, he said, the obligations are governed by state law, and they often vest before a federal case is filed. Nevertheless, he said, the subcommittee would move forward to draft a rule while the issue of the committee's authority remains under advisement.

Judge Kravitz noted that the subcommittee had asked the Federal Judicial Center to conduct empirical research on spoliation sanctions in order to ascertain how frequently they are imposed in the federal courts. The Center's findings, he said, would be summarized by Dr. Lee during the upcoming panel discussion on spoliation and sanctions. In addition, he said, Andrea Kuperman and Katherine David had prepared an excellent memorandum analyzing the pertinent case law.

The subcommittee, he added, was of the view that even though courts do not impose sanctions very often, the very threat of sanctions for failure to preserve information has a profound effect on litigant behavior. The subcommittee, he said, was having difficulty in drafting the language of a rule on preservation that would give lawyers the specificity and comfort they seek. The essential problem, he said, is that there is simply an infinite variety of pre-litigation situations that may trigger preservation obligations.

On the other hand, he said, it should be easier for the subcommittee to agree on the language of a rule addressing sanctions. Just by improving the rule on sanctions, moreover, it may be possible to affect preservation behavior at the front end of a case. He added that the advisory committee will discuss a proposed rule at its April 2011 meeting, and it might possibly have a sanctions proposal for the Standing Committee's consideration in June 2011.

PANEL DISCUSSION ON SPOLIATION AND SANCTIONS

Empirical Study

To introduce the discussion, Emery Lee of the Federal Judicial Center outlined the results of the empirical study that he conducted for the committee to identify litigation in the federal courts involving spoliation sanctions. The first task of the study, he said, had been to ascertain the frequency with which spoliation issues are actually litigated. He emphasized that an empirical study – based on tabulating the frequency of court docket events and records – is a very different exercise from a review of the reported case law.

The Center's study, he explained, had examined the records of 131,992 civil cases filed in 19 district courts during the years 2007 and 2008. The number of those cases with spoliation issues, he noted, was very small, as sanctions motions were filed in only 209 cases – or 0.15% of all cases.

But the study also showed that the cases with sanctions motions were particularly contentious. They also had much longer disposition times than other civil cases – taking 649 days on average from filing to disposition, versus 153 days for all cases. In addition, they were far more likely to go to trial. About 17% of the spoliation cases went to trial, versus fewer than 1% of all the cases. Spoliation motions also tended to be filed late in the cases – on average 513 days into a case.

Dr. Lee added that every dispute involving electronic discovery tends to increase the costs of a case by about 10%. The empirical study found that spoliation issues had occurred both in cases with electronically stored information (62% of the total) and cases

without it (38%). About two-thirds of spoliation motions were made by plaintiffs, and businesses were the targets of the motions 74% of the time.

Of the motions ruled on, 28% were granted by the courts and 72% denied. For cases involving electronically stored information, the grant rates were slightly higher, at 34% granted and 66% denied. Dr. Lee noted that the numbers in the empirical study were very different from those in recent studies of published orders and opinions, which showed grant rates approaching 60%. The explanation, he said, is that cases with published orders and opinions are simply not typical of all cases. When a court grants sanctions, the order is much more likely to be published.

As for the types of sanctions imposed by the courts, Dr. Lee reported that the study showed that FED. R. CIV. P. 37 was the most prevalent basis for sanctions. Of the sanctions granted, 45% resulted in adverse inferences or instructions, 48% resulted in preclusion of evidence or testimony, 23% led to dismissal or default, and 3% involved civil contempt.

Judge Kravitz concurred that sanctions are rarely granted. Nevertheless, he said, the fear of sanctions clearly drives litigant behavior. As a result, clients tend to over-collect and over-preserve their records.

Panel Discussion

The panel was chaired by Mr. Joseph and included Judge Rothstein, Judge Grimm, and Messrs. Allman, Barkett, and Girard.

A panelist emphasized that spoliation issues arise far more often than the Federal Judicial Center study indicated. Preservation, he said, is raised frequently at Rule 26(f) attorney conferences and in other discussions among counsel. Lawyers and parties, he added, try to avoid sanctions and commonly work out preservation disputes on their own without court involvement. These discussions, however, are not reflected on the court's docket or in its opinions. In addition, he said, third parties are frequently involved in spoliation issues that do not appear in court records. He added that he receives regular reports of all cases in which there is a sanctions issue, whether or not a motion is filed. In all, he said, he had counted nearly 4,000 cases involving spoliation issues in the federal and state courts.

Other panelists agreed that the frequency of spoliation issues is much greater than the court dockets seem to indicate. Almost all sanctions decisions, moreover, are published, and the behavior of lawyers and their clients is greatly affected by what they read in opinions and orders.

A panelist explained that preservation and sanctions law varies greatly from jurisdiction to jurisdiction. In the absence of a clear national standard, companies that conduct business in multiple states must comply with the most stringent preservation standards extant, greatly increasing precautionary practices and costs.

One possible improvement that the rules could make, he said, would be to fold the limited safe-harbor provision of Rule 37(e) (failure to provide electronically stored information) into the general standard of Rule 37(c) (failure to disclose or supplement). A revised rule might specify that in the absence of willfulness or bad faith, a court could not order sanctions against a party that has acted reasonably and in proportion to the stakes in the litigation. The rule, though, would also have to address instances where there is only negligence, rather than wilfulness, but the negligence leads to a loss of information that destroys the other side's case. The rule, therefore, would have to include elements of reasonableness, proportionality, and prejudice.

Another panelist endorsed that approach, but added that the rule should be limited to instances involving gross negligence. A party should be protected against ordinary mistakes that may be mildly negligent, but do not warrant sanctions.

Another panelist, though, expressed serious concern with the approach. He noted that a judge's inherent power is the most significant source of sanctions authority, regardless of whatever specific language is set forth in a rule. That inherent power is hard to limit, so a more effective approach might be to harness that power and specify in the rule the criteria for invoking the power.

It was suggested that the result might be achieved by eliminating the qualifying phrase "under these rules" in Rule 37(e). Judge Rosenthal explained that when Rule 37(e) was being discussed in the Standing Committee, the concern had been voiced that the committee was approaching the outer limits of its authority under the Rules Enabling Act. That is why the words "under these rules" were added – to guarantee that the committee had the authority to adopt the rule.

A panelist emphasized that the case law on sanctions is intensely factually driven, and it would be unwise to have a rule that binds the court's ability to act to a particular level of fault. A rule that inflexibly requires a certain level of culpability would inevitably create a rational incentive to destroy information. As such, it would interfere with the truth-finding process.

The rule, instead, should focus on the policy objectives to be achieved when a litigant fails to preserve, and it should give weight to the injured party's showing of how it was hurt by the spoliation. The actor's state of mind is often not as important as the consequences of an act. As a practical matter, courts try to restore the innocent party to where it would have been without the destruction of information. The right rule will not

be easy to draft, but it should focus on restoring the situation and require a nexus between the loss of the information and the resulting prejudice.

A panelist pointed out that the culpability standards found in the case law among the circuits are chaotic and inconsistent, and they need to be addressed. The most difficult situation, he said, involves the case where there is no culpability, but an act has severely prejudiced a party or deprived it of information that it needs to make its case. Including a "bad faith" or "wilfulness" standard may be appropriate in a rule, but prejudice also needs to be included in the rule. In other words, the rule should aim to take care of litigants who have been hurt by the conduct, even though the conduct did not constitute bad faith or wilfulness.

A participant suggested that the range of sanctions available to a judge in dealing with spoliation problems is quite wide, and it might be possible to calibrate the sanctions to fit the level of culpability and the extent of the prejudice. For example, the offending party might be required pay the costs of restoring a situation, or the court may extend the time for discovery. Dismissal of a case or other severe sanctions might be reserved for only the most egregious conduct.

A panelist recommended that the committee work from the elements of a preservation rule that had been developed by the panel at the Duke conference. He emphasized the importance of specifying the preservation "triggers" in the rule, *i.e.*, identifying the specific events and point in time when an obligation to preserve attaches.

He suggested three potential approaches. First, the committee could be aggressive and list the minimum factors that trigger the preservation obligation. That approach, though, would raise questions about the committee's pre-litigation authority under the Rules Enabling Act. Second, the rule might state what preservation obligations arise on commencement of the litigation, leaving the pre-litigation field to the common law. Third, the rule could specify that once the common-law test of "reasonable forseeability of litigation" is met, a party must act reasonably, in good faith, and in proportionality to the stakes of the litigation.

He concluded that the committee does in fact have the authority to draft a federal rule defining what pre-litigation conduct triggers preservation obligations because the spoliation ultimately affects the federal case. He suggested, though, that in the final analysis, the process of education may be more effective than the rulemaking process. He noted, for example, that the Sedona Conference had produced a document setting forth best practices regarding triggering events and preservation obligations.

A panelist reiterated that under the common law the duty to preserve is triggered when there is a reasonable forseeability of litigation. The duty, he explained, is owed to the court itself because the court needs to have the evidence readily available for the case.

The preservation obligation predates the federal lawsuit, but it is vested in the lawsuit itself. He argued that the committee had authority under the Rules Enabling Act to specify the preservation obligations in the rule because there is sufficient nexus between those obligations and the federal case.

Another panelist pointed to several examples of rules that regulate pre-litigation conduct and are predicated on the consequences that the conduct may have on later litigation decisions. For example, FED. R. CIV. P. 27 (depositions to perpetuate testimony) governs the pre-litigation preservation of evidence. That rule, he said, could be amended to specify the obligations and the consequences. He suggested, moreover, that if the committee drafts a preservation rule, it should not restrict the rule to electronically stored information.

A member strongly endorsed efforts by the committee to amend the rules to address both spoliation and sanctions. He said that spoliation problems arise far more frequently than the study of dockets and opinions suggests. The issues do not get reported very often, but they are either discussed informally with the court at pretrial conferences or resolved by the attorneys without court involvement. Preservation issues, moreover, can be very complex, very important, and very expensive. The bar, he concluded, needs definitive guidance and greater certainty on the matter from the committee. In particular, the rules should be clear in addressing the penalties for violations of preservation obligations.

A member explained that whether or not there is authority under the Rules Enabling Act to issue a preservation rule, it is essential that lawyers and parties have clear national guidelines that they can rely on. She noted, for example, that it is well established in antitrust law that companies that act within antitrust compliance guidelines are generally safe from adverse action by the Department of Justice. Likewise, companies that have anti-harassment programs in place enjoy a level of defense in employment discrimination litigation. In short, parties that comply with a set of accepted professional guidelines generally receive the benefit of the doubt from the courts.

Judge Kravitz emphasized that the civil rules committee was not just pursuing the rulemaking path. It was also working with the Federal Judicial Center on case-management and educational approaches. In some areas, he said, the current civil rules are sufficient, but the bench and bar may not be applying them properly and consistently.

A member agreed, but pointed to practical limitations with traditional educational efforts. The law school curriculum, for example, allows little time for legal ethics, and it does not lend itself to the level of complexity that the committee is attempting to address. On the other hand, law firms and bar associations might do more with continuing education to address ethical issues for litigators, including preservation obligations.

A member noted that most litigation occurs in the state courts. The committee, therefore, would be well advised to examine developments in the states regarding preservation and sanctions that could be adapted for possible use in the federal courts. Uniformity in this area among all the federal courts and all the states would be very desirable. Therefore, it would be profitable to work in conjunction with the states on the matter. Other participants agreed, noting that the federal rules have a major influence on the state courts, and a revised federal rule could have a beneficial impact on state litigation.

Judge Rosenthal pointed out that the discussions, both at the meeting and at the Duke conference, had focused on a federal rule that would both define preservation duties and specify the consequences for violations. She emphasized that a rule dealing with sanctions would be far easier to draft than a rule dealing with preservation. Since the fear of sanctions was driving much of the behavior of lawyers and clients, she asked whether a federal rule that addressed sanctions alone would be sufficient.

A panelist said that it would be a great beginning, but it would not be enough alone to influence the desired behavior. The proposed rule would also have to address preservation. But a member questioned how the rule could specify pre-lawsuit preservation obligations, other than to use broad terms such as “reasonable” and “foreseeable.”

A participant suggested that the committee has clear authority to address sanctions in the federal rules. But in the absence of additional legislation, the Rules Enabling Act limits its authority to address preservation. He emphasized that the law of spoliation is essentially state law. The text of a federal procedural rule, he said, could make a reference to preservation duties, but it would have to recognize that the field is governed by state law, at least up to the point that a federal lawsuit is filed.

He recommended that corporate counsel think closely about developing a shared professional understanding as to what constitutes reasonable behavior. The professional standards that they develop could be recognized by courts in their rulings and listed as a relevant factor in a federal rule. He recommended that the corporate divisions of the American Bar Association focus on pursuing this approach.

A panelist expressed unease over the practical difficulty of applying any national preservation rule to small businesses and individuals. Adoption of national standards, he said, may result in disparate treatment. They may work very well for corporations or other large organizations that become familiar with them, but individuals and small organizations will not be as aware of their specific obligations. The disparity problem, he said, already exists with regard to document-preservation obligations. So, rather than devising a fixed culpability standard in a rule, which will inevitably be used by counsel

as a tool against their opponents, the federal rule should focus on providing comfort to those who act reasonably.

Finally, a panelist recommended that the committee address all three major issues discussed by the panel: (1) the triggers that initiate preservation obligations; (2) the scope of the preservation obligations; and (3) the culpability level required before sanctions may be imposed. Judge Kravitz said that the advisory committee and its subcommittee were planning to consider all three areas.

FED. R. CIV. P. 45

Judge Kravitz reported that the advisory committee was considering revisions to Rule 45 (subpoenas), and it had appointed a subcommittee to lead the effort, with Judge David Campbell as chair and Professor Marcus as reporter. The subcommittee, he said, had considered dozens of suggested improvements to Rule 45, but it had narrowed its focus to three main issues: (1) notice, (2) transfer of enforcement proceedings, and (3) the 100-mile rule. It was also considering overall simplification of the rule and was planning to present a revised rule to the Standing Committee at its June 2011 meeting.

(1) Notice of subpoena

Judge Kravitz explained that the current rule directs that "notice must be served on each party" before a subpoena to produce documents is served. Nevertheless, he said, few lawyers seem to follow the rule, perhaps because the notice requirement is buried in the last sentence of Rule 45(b)(1). The subcommittee planned to restructure the rule to give the requirement more prominence and a separate heading. Professor Cooper added that the revised rule would require for the first time that a copy of the subpoena be supplied with the notice.

Judge Kravitz said that beyond requiring notice to all parties that the subpoena has been served, the subcommittee had considered whether to add a requirement that notice also be provided to parties when the documents are produced. The subcommittee concluded, though, that the burden of providing notice could be great because a subpoena is often produced in pieces. Rule 45, moreover, is already too long. Adding another notice requirement would only make it harder to follow and comply with.

Nevertheless, he said, a prominent lawyer had informed the subcommittee that lack of notice of production is the most important problem that he faces in practice, and he often does not learn that documents have been produced until it is too late to act.

A member concurred strongly with this observation and recommended adding a provision to the rule requiring the server of a subpoena to give opposing parties notice of production and of any revisions to the subpoena, even if it further complicates the rule.

He said that lawyers are entitled to the documents, and they should receive copies when the subpoenaing party gets them. Other participants suggested, though, that lawyers normally tend to work out the problems on their own, even though they do not always comply with the details of the rule. They suggested that lawyers are always free to contact the subpoenaed party to ask for an update as to what has been produced, or they may serve their own subpoena. The member responded, though, that subpoenas are a substantial burden on third-party producers, and the third parties should not have to deal separately with all the lawyers. Having a rule that requires notice of production would be a much simpler approach.

(2) Transfer of enforcement proceedings

Judge Kravitz explained that under Rule 45, a subpoena is issued in the name of the court where the witness is located, and it is enforced by that court. He noted, though, that there are times when enforcement of a subpoena does not involve local issues. Rather, the issues go to the merits of the case and should be addressed by the court where the case is pending. Rule 45, however, does not currently provide for a transfer of authority for enforcement purposes, even though some courts have managed to find ways to transfer the enforcement dispute. It is also not unusual, he said, for a judge in the district where a subpoena has been served to call the presiding judge in the district where the case is pending to ask for advice.

Judge Kravitz noted that the subcommittee's pending proposal would explicitly authorize transfer of enforcement proceedings in certain limited circumstances. Judges should not routinely transfer cases, however, because enforcement issues are often truly local in nature and have nothing to do with the merits of a case. They frequently involve the convenience of the subpoenaed party. The subpoenaed party, moreover, should be able to use local counsel and go into the local court.

He noted that the subcommittee was struggling with drafting the language of the standard needed to justify a transfer. He said that one option would be to track 28 U.S.C. § 1404, the general change of venue provision dealing with "the interests of justice." Even if the subcommittee were to adopt that standard, the committee note would specify that if the issues are local, a case should not be transferred.

Professor Marcus said that a revised rule could take any of three approaches: (1) to favor transfer of enforcement most of the time; (2) to express no preference as to enforcement location; or (3) to oppose transfer of enforcement most of the time, but make it available in the right cases. He noted that the subcommittee had chosen the third option, and it was struggling to draft appropriate language.

Judge Kravitz added that the subcommittee had also asked whether Rule 45 should not simply discard the fiction and the complexity of having subpoenas issued in

the name of the court where a witness is located. The rule, instead, might move towards nationwide service, allowing the court where the case is pending to issue the subpoenas. But, he noted, that approach raises a number of other questions.

(3) The 100-mile rule

Judge Kravitz noted that in *In re Vioxx Products Liability Litigation*, 438 F. Supp.2d 664 (E.D.La. 2006), the district court had held that a subpoena may compel a party or a party's officer to appear as a witness at trial regardless of the 100-mile limit in FED. R. CIV. P. 45(b)(2). Some courts have followed the *Vioxx* ruling, while others have rejected it. The advisory committee, he said, planned to recommend an amendment to Rule 45 that would effectively undo the *Vioxx* ruling.

Judge Kravitz reported that the advisory committee was of the view that the 100-mile provision in Rule 45 should be retained and enforced for three reasons. First, there is a fear that litigants may demand the presence of high corporate officials at trial, even though they may not have first-hand knowledge of the facts, in order to force a settlement. Second, video depositions of corporate executives and other witnesses are a viable alternative to trial testimony in many cases. Third, if a high ranking official in fact has meaningful knowledge about a case, the presiding judge will attempt to persuade the party to bring the official to the trial.

Judge Kravitz noted that the committee was also considering publishing in brackets a non-favored alternative *Vioxx* approach that would allow a court to compel the presence of an official for trial under certain conditions. The subcommittee, he said, was working on drafting a high threshold standard for triggering the alternative.

PLEADING STANDARDS

Judge Kravitz reported that the Federal Judicial Center was conducting a survey of how motions to dismiss and motions to amend the pleadings are being handled in the 20 largest district courts since *Twombly* and *Iqbal*. Joe Cecil of the Center, he said, was examining the dockets and case files to ascertain the real impact of the *Twombly* and *Iqbal* decisions.

Judge Kravitz said that he had reported to the committee two years ago that a common-law process would develop following *Twombly* and *Iqbal* and that the federal courts would take a context-specific and nuanced approach to pleading requirements. That, he said, was in fact happening, and it had clearly been confirmed in Andrea Kuperman's summary of the extensive case law. He added that once the Federal Judicial Center's research findings are available, the advisory committee will discuss pleading issues and consider several different approaches in response to *Twombly* and *Iqbal*.

MISCELLANEOUS MATTERS

Judge Kravitz reported that following the May 2010 Duke conference, Judge John Koeltl had agreed to chair a subcommittee to implement the many suggestions raised at the conference. The subcommittee, he said, has had several meetings. In addition, the Duke Law Journal had published several of the articles produced for the conference, and the committee, in conjunction with the Standing Committee, had presented a report on the conference to the Chief Justice.

Judge Kravitz noted that the advisory committee still had FED. R. CIV. P. 26(c) (protective orders) on its agenda and will continue to monitor the case law on protective orders.

The advisory committee, he said, was generally of the view that it should eliminate the illustrative civil forms. But it had deferred action on the matter to avoid signaling any conclusions about *Twombly* and *Iqbal* if the pleading forms were to be abandoned. He noted, for example, that the patent bar had severely criticized the existing forms on patent litigation.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Tallman and Professor Beale presented the report of the advisory committee, as set forth in Judge Tallman's memorandum and attachments of December 8, 2010 (Agenda Item 7).

Amendments for Publication

FED. R. CRIM. P. 11

Judge Tallman reported that the proposed amendment to Rule 11 (pleas) had been motivated by the Supreme Court's decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). In *Padilla,* the Court found that the defendant had received ineffective assistance of counsel because his lawyer had failed to warn him about the possible deportation and immigration consequences of his guilty plea and conviction. The proposed amendment would require a court to expand the Rule 11 colloquy and advise defendants that if they are not United States citizens and are convicted, they may be removed from the country, denied citizenship, and denied admission in the future.

A member pointed out that Rule 11 does not currently require a court to advise a defendant of any of the collateral consequences of a conviction. He questioned why immigration had been singled out for inclusion in the rule and warned that it could lead to a "slippery slope" of other amendments – since several other collateral consequences are

equally important to some defendants. The proposal, moreover, would require judges to warn all defendants of the potential adverse consequences of deportation, even defendants who are United States citizens. At the most, he said, the rule should be limited only to defendants who are not citizens. He added that the Rule 11 plea colloquy is already very long, and many defendants do not understand all of it. Adding even more requirements may distract defendants from the more important consequences of conviction that they need to focus on.

Rule 11, he said, is a haven for prisoners who get buyer's remorse in prison after pleading guilty. He predicted that defendants will inevitably file motions attacking their sentence under 28 U.S.C. § 2255 on the grounds that the court did not follow the rule and inform them of the immigration consequences of their guilty plea.

Judge Tallman explained that the advisory committee had discussed these arguments extensively. But, he said, a majority of the members favored limiting the proposed amendment to immigration consequences because it had been the Supreme Court's focus in *Padilla.* The reason that the proposed amendment applied on its face to all defendants is that a judge cannot always tell at a Rule 11 proceeding whether the defendant is in fact an alien and subject to deportation. The defendant, for example, may not want to answer whether he is a citizen or may lie about citizenship.

Other participants expressed similar views and argued that the list of topics in Rule 11 is already too long. One emphasized that in *Padilla* the Supreme Court had placed the obligation to inform the defendant of deportation and immigration consequences squarely on defense counsel, and not on the court. There is, moreover, no real problem to address because most judges already include these consequences in their Rule 11 discussion whenever it is relevant. That practical approach is preferable to requiring a court by rule to advise every defendant of immigration consequences, even when not relevant.

A member expressed support for the proposed amendment as a matter of policy and pointed out that much of the Rule 11 colloquy is covered by the harmless error rule. If immigration consequences are not important in a particular case, such as when a defendant is a citizen, omitting it from the plea colloquy would clearly be harmless error.

A participant noted that the Department of Justice was in the process of adding language similar to the proposed amendment to its standard plea agreements. That course of action, she said, will help produce a record to assist the court of appeals.

A participant stated that the Bench Book for District Judges already recommends that judges include immigration consequences in the advice they give to defendants under Rule 11. Even if there were a violation of the rule, the case law is clear that it would not

rise to the level of constitutional due process if the judge failed to warn of immigration or other collateral consequences. She added that giving the warning of deportation consequences in open court at the plea proceedings will provide an additional safeguard. A defendant clearly will have no claim if the record shows that the judge clearly warned him or her of the consequences.

Even though several committee members expressed reservations about the wisdom of the proposed amendment, they all agreed that it should be published for public comment.

The committee without objection by voice vote approved the proposed amendment for publication.

FED. R. CRIM. P. 12 and 34

Judge Tallman reported that the advisory committee was seeking authority to publish amendments to Rule 12 (pleadings and pretrial motions) that would clarify which motions must be raised before trial and the consequences if not timely raised. He noted that a proposal had first been presented to the Standing Committee in 2009. But it had been returned for further study, and the advisory committee was asked at that time to consider the differences between "waiver" and "forfeiture" and whether some or all violations of Rule 12(b)(3) should be considered forfeited rather than waived.

Professor Beale pointed out that the impetus for the proposed amendments had been the Supreme Court's decision in *United States v. Cotton*, 535 U.S. 625 (2002). The Court held in *Cotton* that the defects in an indictment are not jurisdictional in nature, so the court continues to have jurisdiction over the case if the defendant fails to file a motion to dismiss based on those defects. Accordingly, she said, defendants should be channeled into raising defects in the indictment before trial. Therefore, the proposed amendments specify that a motion based on a defect in the indictment must be made before trial if the basis for the motion is reasonably available before trial and the motion can be determined without a trial on the merits.

She added that in the current Rule 12, all defaults are described as "waivers," including inadvertent forfeitures. But failure to raise a defect in the indictment before trial is not like other "waivers" – a knowing, intentional waiver of rights. Therefore, in revising the rule, the advisory committee had to decide whether a defendant's failure to make the motion before trial should constitute to be characterized as a "waiver."

Judge Tallman explained that the advisory committee proposal would restructure Rule 12. Revised Rule 12(b)(2) specifies that a motion that the court lacks jurisdiction may be made at any time while a case is pending. Rule 12(b)(3) then lists all the motions that must be raised before trial.

Under revised Rule 12(e)(2), a party would "forfeit" any claim not timely raised if it is based on: (1) failure to state an offense; (2) double jeopardy; or (3) the statute of limitations. Relief from a forfeited claim would be governed by Rule 52(b) (plain error).

Under revised Rule 12(e)(1), a party would "waive" any other defense, objection, or request listed in Rule 12(b)(3) if not timely raised by motion. The court could grant relief upon "a showing of cause and prejudice." Professor Beale noted that the choices that the advisory committee had made on the list had been derived in large part from the case law and how the courts have been addressing these motions.

Several members suggested specific refinements in the list and in the language of the proposed amendments. One pointed out that the Supreme Court had sharpened the distinctions between forfeiture and waiver and questioned retaining the word "waiver" in Rule 12. She suggested that "waiver" in Rule 12 was a peculiar, unique use of the term because it does not deal with a knowing and intentional relinquishment of a right. The rules, she said, should not retain an idiosyncratic use of the term. The committee should aim for clarity, but the current language of the amendment had not yet achieved it in this particular respect.

A participant noted that the Department of Justice had initiated the request to revise Rule 12 because it wanted to make clear that a failure to raise the defense of a defect in the indictment is waived if not asserted before trial. But the advisory committee's deliberations had broadened the scope of the proposal to address other defenses, such as double jeopardy and the statute of limitations.

Judge Tallman pointed out that the advisory committee had spent a great deal of time focusing on the concepts of waiver and forfeiture. By using "waiver," he said, the committee was indeed trying to address matters that involve a knowing relinquishment of a right. But several lawyers had informed the committee that many lawyers do not even think about these issues until later in a case. The proposed rule, therefore, in effect imposes a due diligence requirement on counsel.

The participants debated the differences between waiver and forfeiture, the consequences of each, and which of the two carries the more stringent consequences. One participant suggested that in light of the uncertainty surrounding the two terms and the consequences flowing from them, it might well be better to introduce a new term in the rule, such as "default." Others concurred and recommended deleting the term "waiver" from the rule entirely and replacing it with alternative language.

A member emphasized that the proposed Rule 12 amendments, though not yet perfect, will be very beneficial. They will give lawyers and judges necessary clarity and provide a very helpful check list for the bench and bar. She recommended that the amendments be published for public comment, perhaps using an alternate term for

"waiver." Another member agreed that the revised rule was very valuable, but recommended that the language be refined further before being published.

Professor Beale suggested that the published rule might use the word "default" and place both "default" and "waiver" in brackets in the text to solicit public comments on them. The advisory committee might also bracket the words "double jeopardy" and "statute of limitations" in proposed Rule 12(b)(3) and ask for comments on whether those claims should moved from the forfeiture category to the waiver category. A member endorsed that approach and pointed out that including the alternatives in brackets will avoid the need to republish the rule if further changes are made after publication.

Several participants emphasized that the advisory committee was on the right track and should continue to refine the rule. One urged the committee to be more adventuresome in drafting the rule and devise new language to replace "waiver" and "forfeiture." He suggested that the standards for relief under the two concepts are not clearly stronger or weaker than each other. Another participant, though, expressed concerns about changing the labels or tinkering with the substance of current standards because a great deal of law had already been built on the current rule.

Ms. Claggett urged the advisory committee to continue its work. She suggested that the current Rule 12 is incorrect, is inconsistent with *Cotton*, and needs to be changed. She said that the drafting problems could be worked out.

Judge Tallman expressed reservations about sending the rule back to the advisory committee again for another round of drafting in light of the continuing uncertainty and apparent lack of consensus. But several participants said that the proposed amendments were a major improvement over the current rule, and they urged further refinement in the language.

Judge Rosenthal pointed out that it had been very helpful for the advisory committee to have brought the revised draft of Rule 12 to the Standing Committee for a thorough discussion. She said that many excellent suggestions had been made. As a result, it appeared to be the clear consensus of the Standing Committee that: (1) the advisory committee's recent restructuring of the rule was very beneficial and represented a major improvement over the current rule; and (2) the advisory committee should continue to refine the language and return to the Standing Committee in June 2011 for approval to publish the rule, perhaps placing certain terms in brackets to attract public comment.

The committee without objection by voice vote approved the proposed amendments in principle and asked the advisory committee to continue refining them for presentation at the June 2011 Standing Committee meeting.

Informational Items

FED. R. CRIM. P. 16

Judge Tallman complimented the Federal Judicial Center for its excellent work in conducting a major survey of the bar on the issue of pretrial disclosure of exculpatory and impeachment information under *Brady v. Maryland*, 373 U.S. 83 (1963) and later cases. He noted that the survey had been sent to 1,500 federal judges, all the U.S. attorneys' offices, and 16,000 criminal defense lawyers. The response rate, he said, had been the highest of any Center survey ever. In addition, the survey had elicited 700 pages of detailed written comments.

The study, he said, had separated the federal judicial districts into two categories – districts that adhere literally to the current requirements of FED. R. CRIM. P. 16 (discovery and inspection) and those that have local rules supplementing Rule 16 with additional disclosure requirements. He added that the criminal discovery system must work within the framework of the Jencks Act. In practice, however, the statutory time frame is often honored in the breach. Disclosure of information by prosecutors before trial often helps to make the system work effectively and avoid trial adjournments.

Judge Tallman said that the central question for the advisory committee was to decide whether Rule 16 should be amended to require disclosure of exculpatory and impeaching information. He pointed out that 51% of judges responding to the Federal Judicial Center survey (64% in the broader disclosure districts) had favored an amendment to Rule 16 because it would: (1) eliminate confusion as to the "materiality " requirement for impeaching information; and (2) reduce the wide variation of discovery practices now existing among the federal courts and among individual judges. On the other hand, judges opposed to amending Rule 16 had asserted that the current system was working well and no changes were needed.

Judge Tallman noted that the Department of Justice opposed any amendment to Rule 16 and agreed with the reasoning of the judges who opposed changing the rule. The Department, he said, also emphasized another reason for opposition. It cited several important internal reforms that it has made, including: (1) major national efforts greatly increasing the advice and training given prosecutors and staff regarding their disclosure obligations; (2) appointment of a national discovery coordinator; and (3) establishment of local district discovery plans. He also pointed out that the Department stressed that there have been, on average, fewer than two complaints a year alleging *Brady* violations by prosecutors, even though 86,000 criminal cases had been filed in the federal courts last year.

He noted that a major concern raised by opponents of an expanded Rule 16 was its potential effect on the privacy and security of cooperating witnesses. The advisory

committee, he said, was extremely sensitive to that concern and to the impact that every proposed amendment may have on victims' rights. The Federal Judicial Center survey responses, though, showed that the great majority of respondents other than the Department of Justice had stated that an expanded rule would have little or no negative impact on witnesses. Nevertheless, the U.S. attorneys' offices remain very wary, and they argued that there is no way to know in advance with certainty whether there is going to be a threat in any particular case.

He suggested that it might have been better to have surveyed individual lawyers in the U.S. attorneys' offices, rather than the offices themselves. He pointed out that the survey had elicited many anecdotes and insights from the 5,000 individual defense lawyers, but very few details from the U.S. attorneys' offices. Therefore, it is difficult to fully assess the threat to cooperating witnesses in particular cases.

Judges who opposed a rule change in the survey had said that the gain to be derived from the rule would simply not be worth the gamble. Some had cited the potential chilling effect that an expanded rule would have on potential witnesses, even though many of them will not be called to testify at trial.

He said that U.S. attorneys' offices in the survey had relied heavily on the Jencks Act. They also responded that disclosure of information to defendants without regard to its materiality will result in making the lives of all potential witnesses an open book. It will also create a real risk that witnesses will simply refuse to come forward and cooperate or testify. At a minimum, moreover, any potential rule would have to include an exception for national security cases and certain other types of cases. Prosecutors should also be allowed in certain cases to defer turning over information until after the witness testifies.

The survey responses also showed, though, that judges have several devices to deal with security concerns, such as issuing protective orders. The survey also indicated that the defense bar was apparently not too concerned about the ethical problem raised by protective orders that prohibit them from disclosing information to their clients. They would rather have the information.

Proponents of an expanded disclosure rule also pointed out that exculpatory and impeaching information is turned over regularly in the state courts without adverse effects. They also argued that defendants for the most part already know who is going to testify against them.

On the other hand, survey respondents who oppose expanding Rule 16 had said that it would negatively impact safety and privacy and have a chilling effect on witnesses. Lawyers representing cooperating witnesses had also opposed greater

disclosure and said that their clients would be labeled as snitches and their safety in prison could not be guaranteed.

Judge Tallman said that it would be difficult to draft a rule requiring disclosure before trial that could be reconciled with the timing provisions of the Jencks Act. It would be necessary to ask Congress to change the Act. The rules committee, he advised, should not attempt to invoke the supersession clause of the Rules Enabling Act.

A member added that the Department had taken many important internal initiatives to emphasize the obligations of prosecutors to disclosure exculpatory and impeaching information. The Department, moreover, has asked that these initiatives continue to play out before the rules committees take any action on amending Rule 16.

Another member suggested that as long as the Department of Justice is adamantly opposed to a rule, the proposed amendments will never come to pass. The committee, therefore, should defer further action on the proposal.

Judge Tallman said that because of the sharp disagreements on fundamental, controversial issues among both bench and bar, the advisory committee was in a conundrum as to what to do. Much of the discussion to date, he said, had been general in nature and focused on broad policy concerns. The debates, though, have not identified with necessary precision the specific kinds of information that should be disclosed by prosecutors. A broad recommendation to delete the materiality requirement, for example, is well-meaning. But it would require disclosure of virtually everything, and it might well be unworkable.

He said that the advisory committee will have to decide at its next meeting whether to proceed at all with Rule 16 amendments. If it does decide to proceed, it will also have to decide the specifics of what to include in the amendments. He reported that the advisory committee was also considering developing a discovery check list that might be included in the Bench Book for District Judges. In addition, it was conferring with the Federal Judicial Center on publishing a best-practices guide that could be helpful to the litigating bar.

Judge Rosenthal pointed out that a great deal of creativity had been devoted to the issue, including the various non-rule approaches for dealing with disclosure of *Brady* materials. The debate, she said, had been a healthy development, and a great deal had already been accomplished, even without a rule change. The rules committees, however, will have to consider how much time and resources to continue devoting to the matter.

Judge Tallman added that about a third of the federal district courts have not waited for a national rule and have issued their own local rules, which offer quite varied solutions. Therefore, there is currently a lack uniformity in the federal courts.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Fitzwater and Professor Capra presented the report of the advisory committee, as set forth in Judge Fitzwater's memorandum and attachments of November 3, 2010 (Agenda Item 8). Judge Fitzwater reported that the advisory committee had no action items to present.

Informational Items

Judge Fitzwater reported that the advisory committee will hold its October 2011 meeting at the William and Mary Law School. In conjunction with that meeting, the advisory committee will host a symposium to commemorate the restyled evidence rules scheduled to take effect on December 1, 2011. The committee was planning to hear from a number of judges and law professors on the restyling process. He invited the Standing Committee members to attend.

He noted that the advisory committee expected to seek approval from the Standing Committee at its June 2011 meeting to publish a proposed amendment to Rule 803(10) – the hearsay exception for the absence of a public record. The change would be another in the line of fixes required by the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), dealing with testimonial statements.

He pointed to the Court's 2009 decision in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), holding unconstitutional a state procedure that allowed conviction on the basis of a certificate of forensic test results without personal testimony. The proposed amendment to Rule 803(a), he said, would adopt a notice-and-demand procedure, under which the government could give notice to the defendant of its intent to produce a certificate without personal testimony, and the defendant in turn could demand that the witness who produced the results testify in person at trial. In the absence of such a demand, the matter could proceed without the testimony.

He noted that Professor Capra had reviewed all the evidence rules for potential *Crawford* problems and had found no others. He added that the advisory committee was also working on a possible amendment to Rules 803(6), (7), and (8) that had surfaced during the restyling process.

REPORT OF THE PRIVACY SUBCOMMITTEE

Judge Raggi, chair of the Privacy Subcommittee, presented the subcommittee's report. (Agenda Item 11)

Judge Raggi reported that the agenda book included the subcommittee's report on the 2007 federal privacy rules. The subcommittee, she said, had also produced several appendices to the report that documented the subcommittee's inquiries and the data that it had gathered.

Judge Raggi noted that the subcommittee in conducting its review had made extensive efforts to obtain information about: (1) how the privacy rules are working; and (2) how they might be improved. Among other things, she said, the subcommittee had explored whether there are any additional privacy needs that the current rules do not address.

She summarized the report's findings and recommendations, including the key conclusion that the privacy rules are being implemented effectively by courts and parties. In essence, judges, lawyers, and clerks are doing their jobs well. She explained that there was no need to amend the privacy rules at this point. Nevertheless, the subcommittee pointed out some areas where further implementation was in order, such as continuing education, periodic monitoring, and experimentation.

She explained that the Judicial Conference's privacy policies, now embodied in the 2007 federal privacy rules, had been developed by the Court Administration and Case Management Committee. Fundamental to the current Conference policy is the concept that "public is public," *i.e.,* that court records available to the public at the courthouse should also be available to the public on the Internet. The subcommittee, she said, did not attempt to revisit that policy, and it invited members of the Court Administration and Case Management Committee to serve on the subcommittee.

The subcommittee, she said, had studied the problems comprehensively and had collected substantial data that will be of continuing value to both committees. It had received a great deal of research and other staff assistance from both the Administrative Office and the Federal Judicial Center.

She noted that the subcommittee had examined a complaint that social security numbers appear widely in court records. The staff, though, had examined all the case files of the federal courts, and the evidence clearly showed the opposite conclusion. Unredacted social security numbers appear in very few cases and seem to be a minor problem. Nevertheless, the subcommittee urged continuing monitoring and spot checking, and the report recommended that the Federal Judicial Center conduct a random review of case filings every other year.

In addition, the subcommittee had sent a questionnaire to judges, clerks of court, government lawyers, and private lawyers asking about privacy practices in federal cases. The vast majority of the respondents stated that they were aware of the privacy rules and their redaction obligations.

The subcommittee had also conducted critical studies and convened a major conference on privacy and public access at Fordham Law School in April 2010. The conference included nearly 100 people with a strong interest in privacy matters, including judges, lawyers from all segments of the legal profession, prison officials, professors and the press. Every point of view was represented. There were, of course, conflicting views, but the conference provided the subcommittee with a great deal of information and a broad perspective, which are reflected in its report.

Judge Raggi reported that although the subcommittee had concluded that no changes were needed in the federal rules at this point, three points needed to be made. First, the subcommittee had discovered in its research that a few local-court rules conflict with the national rules by imposing additional requirements on parties. The subcommittee would prefer to deal with that issue in the traditional way by communicating with the chief judges of the pertinent courts and pointing out the discrepancies.

Second, there is the unresolved problem of how to deal with cooperating witnesses in criminal cases. Different practices prevail among the district courts on whether cooperation documents should be filed or made public. Two separate panels at the Fordham conference had been devoted to the issue.

The professors and lawyers on one panel agreed that there should be a national rule addressing the subject, but there was no consensus among them as to what that rule should provide. The other panel, composed of judges, emphasized that their courts had studied the problem carefully, had discussed it with the bar, and had debated at length before adopting their local rules and practices. Each court was convinced that they had arrived at the right solution after all the study and collaboration, but the courts arrived at very different solutions. So, she said, there is no single best practice that could be embodied in a national rule at this point.

In addition, the subcommittee had invited the Department of Justice to offer a model national rule. It had not yet produced a rule because the topic had generated extensive discussion and debate within the Department.

Third, there is a potential issue that may arise in the future with voir dire transcripts, particularly in criminal cases. Recent Judicial Conference policy states that jury selection should be presumptively open to the public. The voir dire transcripts, accordingly, will be posted on the Internet. No problems had been reported yet, and a rule change is not in order, but concerns have been expressed about the privacy and safety of potential jurors.

Judge Raggi thanked Professor Capra for his enormous support to the Privacy Subcommittee and for organizing the conference at Fordham Law School. Professor

Capra, in turn, thanked Heather Williams and Henry Wigglesworth of the Administrative Office and Joe Cecil and Meaghan Dunn of the Federal Judicial Center for their substantial staff assistance to the subcommittee.

Ms. Shapiro thanked Judge Raggi and Professor Capra on behalf of the Department of Justice for their support in addressing the issue of protecting the privacy and security of witnesses and cooperators. She noted that the Department was continuing to work on promoting greater uniformity of practices among the districts.

Judge Raggi emphasized that the subcommittee's study had been comprehensive, and it concluded that no further action was needed at this point. She said that the subcommittee would continue its efforts and would continue to coordinate with the Court Administration and Case Management Committee.

The committee unanimously by voice vote approved the subcommittee's report for submission to the Judicial Conference as an information item. It further agreed to continue working collaboratively with the Court Administration and Case Management Committee on privacy issues.

REVISION OF RULES COMMITTEE PROCEDURES

Judge Rosenthal pointed out that the *Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure* govern the work of the rules committees. She reported that the procedures had been very effective, but they had not been updated since adoption by the Conference in 1983. She noted that committee staff and the reporters had prepared a draft revision of the procedures, and she invited the participants' comments.

Professor Coquillette summarized several of the changes that the proposed revisions would make in the current procedures. He noted that the suggested changes were not major, but they should bring greater clarity and direction to the process and define more sharply the respective responsibilities of the standing committee, the advisory committees, the reporters, and the staff. In addition, he said, the revised procedures adhere to the style conventions used in restyling the federal rules.

Judge Rosenthal added that the rules committees are "sunshine" committees, but there is disagreement over the contours of what documents and information must be made public. Some have suggested that e-mails, routine letters, draft documents, and subcommittee transactions should be public. Others countered that posting those materials is unnecessary and would chill and impede decision-making. Instead, only formal meetings and final drafts need be considered public.

LONG RANGE PLANNING

Judge Rosenthal reported that the committee had examined the Judicial Conference's new long-range plan and would report to the Conference's Ad Hoc Advisory Committee on Judiciary Planning on strategic initiatives that the rules committees were taking to implement the plan. She invited the members to send her any suggestions they may have.

NEXT MEETING

The committee will meet hold its next meeting on Thursday and Friday, June 2 and 3, 2011, in Washington, D.C.

Respectfully submitted,

Peter G. McCabe,
Secretary

TAB 3-A

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

112TH CONGRESS
1ST SESSION

S. 533

To amend Rule 11 of the Federal Rules of Civil Procedure to improve attorney accountability, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 9, 2011

Mr. GRASSLEY (for himself and Mr. LEE) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend Rule 11 of the Federal Rules of Civil Procedure to improve attorney accountability, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Lawsuit Abuse Reduction Act of 2011".

SEC. 2. ATTORNEY ACCOUNTABILITY.

(a) SANCTIONS UNDER RULE 11.—Rule 11(c) of the Federal Rules of Civil Procedure is amended—

(1) in paragraph (1), by striking "may" and inserting "shall";

(2) in paragraph (2), by striking ''Rule 5'' and all that follows through ''motion.'' and inserting ''Rule 5.''; and

(3) in paragraph (4), by striking ''situated'' and all that follows through the end of the paragraph and inserting ''situated, and to compensate the parties that were injured by such conduct. Subject to the limitations in paragraph (5), the sanction shall consist of an order to pay to the party or parties the amount of the reasonable expenses incurred as a direct result of the violation, including reasonable attorneys' fees and costs. The court may also impose additional appropriate sanctions, such as striking the pleadings, dismissing the suit, or other directives of a nonmonetary nature, or, if warranted for effective deterrence, an order directing payment of a penalty into the court''.

(b) RULE OF CONSTRUCTION.—Nothing in this Act shall be construed to bar or impede the assertion or development of new claims, defenses, or remedies under Federal, State, or local laws, including civil rights laws.

○

12b-003945

12b-003946

AUTHENTICATED
U.S. GOVERNMENT
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112TH CONGRESS
1ST SESSION

H. R. 966

To amend Rule 11 of the Federal Rules of Civil Procedure to improve attorney accountability, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 9, 2011

Mr. SMITH of Texas introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend Rule 11 of the Federal Rules of Civil Procedure to improve attorney accountability, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

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(b) RULE OF CONSTRUCTION.—Nothing in this Act shall be construed to bar or impede the assertion or development of new claims, defenses, or remedies under Federal, State, or local laws, including civil rights laws.

○

12b-003949

12b-003950

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

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JEFFREY S. SUTTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

March 14, 2011

Honorable Lamar S. Smith
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

On behalf of the Judicial Conference's Committee on the Rules of Practice and Procedure (the "Standing Rules Committee") and the Advisory Committee on the Federal Rules of Civil Procedure (the "Advisory Committee"), we write to oppose H.R. 966, which seeks to reduce lawsuit abuse by amending Rule 11 of the Federal Rules of Civil Procedure. The bill would reinstate a mandatory sanctions provision of Rule 11 that was adopted in 1983 and eliminated in 1993. The bill would also eliminate a provision adopted in 1993 to allow a party to withdraw challenged pleadings on a voluntary basis, without the added costs and delay to the challenging party of seeking and obtaining a court order. The concerns we express are the same concerns expressed by the Judicial Conference in 2004 and 2005, when similar legislation was introduced.

We greatly appreciate, and share, your desire to improve the civil justice system in our federal courts, including by reducing frivolous filings. But legislation that would restore the 1983 version of Rule 11 by undoing the 1993 amendments would create a "cure" far worse than the problem it is meant to solve. Such legislation also contravenes the longstanding Judicial Conference policy

opposing direct amendment of the federal rules by legislation instead of through the careful, deliberate process Congress developed in the Rules Enabling Act, 28 U.S.C. §§ 2071–2077.

The 1993 changes followed years of examination and were made on the Judicial Conference's strong recommendation, with the Supreme Court's approval, and after congressional review. The 1983 provision for mandatory sanctions was eliminated because during the ten years it was in place, it did not provide meaningful relief from the litigation behavior it was meant to address. Instead, it generated wasteful satellite litigation that had little to do with the merits of cases and that added to the time and costs of litigation.

The 1983 version of Rule 11 required sanctions for every violation of the rule. The rule was abused by resourceful lawyers. An entire "cottage industry" developed that churned tremendously wasteful satellite litigation that had everything to do with strategic gamesmanship and little to do with underlying claims. Rule 11 motions came to be met with counter-motions that sought Rule 11 sanctions for making the original Rule 11 motion.

The 1983 version of Rule 11 spawned thousands of court decisions unrelated to the merits of the cases, sowed discord in the bar, and generated widespread criticism. As letters from the Judicial Conference commenting on prior similar bills pointed out, some of the serious problems caused by the 1983 amendments to Rule 11 included:

1. creating a significant incentive to file unmeritorious Rule 11 motions by providing a greater possibility of receiving money;

2. engendering potential conflicts of interest between clients and their lawyers, who advised withdrawal of particular claims despite the clients' preference;

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4. providing a disincentive to abandon or withdraw a pleading or claim that lacked merit — and thereby admit error — after determining that it no longer was supportable in law or fact.

The 1993 amendments to Rule 11 were designed to remedy the major problems with the rule, strike a fair and equitable balance between competing interests, and allow courts to focus on the merits of the underlying cases rather than on Rule 11 motions. Since 1993, the rule has established a safe harbor, providing a party 21 days within which to withdraw a particular claim or defense before sanctions can be imposed. If the party fails to withdraw an allegedly frivolous claim or defense within the 21 days, a court may impose sanctions, including assessing reasonable attorney fees. The 1983 version of Rule 11 authorized a court to sanction discovery-related abuse under Rule 11, Rule 26(g), or Rule 37, which created confusion. Under the 1993 amendments to Rule 11, sanctioning of discovery-related abuse was limited to Rules 26 and 37, which provide for sanctions that include awards of reasonable attorney fees.

The 1993 amendments to Rule 11 culminated a long, critical examination of the rule begun four years earlier. The Advisory Committee reviewed a significant number of empirical examinations of the 1983 version of Rule 11, including three separate studies conducted by the Federal Judicial Center in 1985, 1988, and 1991, a Third Circuit Task Force report on Rule 11 in 1989, and a New York State Bar Committee report in 1987.

After reviewing the literature and empirical studies of problems caused by the 1983 amendments to Rule 11, the Advisory Committee issued in 1990 a preliminary call for general comment on the operation and effect of the rule. The response was substantial and clearly called for a change in the rule. The Advisory Committee concluded that the cost-shifting in Rule 11 created an incentive for too many unnecessary Rule 11 motions. Amendments to Rule 11 were drafted. The Supreme Court promulgated and transmitted the amendments to Congress in May 1993 after extensive scrutiny and debate by the bench, bar, and public in accordance with the Rules Enabling Act process.

Experience with the amended rule since 1993 has demonstrated a marked decline in Rule 11 satellite litigation without any noticeable increase in the number of frivolous filings. In June 1995, the Federal Judicial Center conducted a survey of 1,130 lawyers and 148 judges on the effects of the 1993 Rule 11 amendments. About 580 attorneys and 120 judges responded to the survey. The Center found general satisfaction with the amended rule. It also found that more than 75% of the judges and lawyers would oppose a provision that would require a court to impose a sanction when the rule is violated.

In 2005, the Federal Judicial Center surveyed the trial judges who apply the rules to get a clearer picture of how the revised Rule 11 was operating. A copy of the study is enclosed. The results of the Federal Judicial Center's study showed that judges strongly believed that the current Rule 11, which was carefully crafted to deter frivolous filings without unduly hampering the filing of legitimate claims or defenses, continues to work well. The study's findings include the following highlights:

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The findings of the Federal Judicial Center underscore the judiciary's united opposition to legislation amending Rule 11. Lawyers share this view. In 2005, the American Bar Association issued a resolution opposing an earlier, similar proposed bill.

Minimizing frivolous filings is, of course, vital. But there is no need to reinstate the 1983 version of Rule 11 to work toward this goal. Judges have many tools available to respond to, and deter, frivolous pleadings. Those tools include 28 U.S.C. § 1915e, which authorizes courts to dismiss, *sua sponte*, before an answer is filed, a lawsuit that is frivolous or malicious. Rule 12(b)(6) authorizes courts to dismiss pleadings that fail to state a claim on which relief can be granted. Section 1927 of Title 28 of the United States Code authorizes sanctions against lawyers for "unreasonably and vexatiously" multiplying the proceedings in any case. And the present version of Rule 11 itself provides an effective, balanced tool, without the problems and satellite litigation the 1983 version created.

In May 2010, the Advisory Committee on the Civil Rules held a major conference on civil litigation, examining the problems of costs and delay — which encompass frivolous filings — and potential ways to improve the system. The Conference encouraged, and generated, a broad spectrum of criticisms by lawyers, litigants (including businesses and governmental entities), judges, and academics of the current approaches to federal civil cases, including the rules, and proposals for change. Conspicuous in its absence was any criticism of Rule 11 or any proposal to restore the 1983 version of the rule.

Undoing the 1993 Rule 11 amendments, even though no serious problem has been brought to the Rules Committees' attention, would frustrate the purpose and intent of the Rules Enabling Act. There is no need to reinstate the 1983 version of Rule 11 that proved contentious and diverted so much time and energy of the bar and bench. Doing so would add to, not improve, the problems of costs and delay that we are working to address. I urge you on behalf of the Rules Committees to not support the proposed legislation amending Rule 11.

We greatly appreciate your consideration of the Rules Committees' views. We look forward to continuing to work together to ensure that our civil justice system is working well to fulfill its vital

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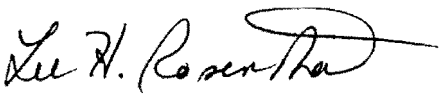

Lee H. Rosenthal
United States District Judge
Southern District of Texas
Chair, Committee on Rules
of Practice and Procedure

Mark R. Kravitz
United States District Judge
District of Connecticut
Chair, Advisory Committee
on Civil Rules

Enclosure

cc: Honorable Trent Franks

Identical letter sent to: Honorable John Conyers, Jr.

12b-003957

12b-003958

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

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SIDNEY A. FITZWATER
EVIDENCE RULES

March 14, 2011

Honorable John Conyers, Jr.
Ranking Member
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

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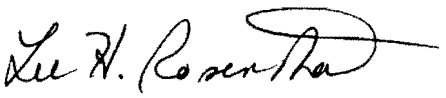

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Mark R. Kravitz
United States District Judge
District of Connecticut
Chair, Advisory Committee
on Civil Rules

Enclosure

cc: Honorable Jerrold Nadler

Identical letter sent to: Honorable Lamar S. Smith

12b-003965

12b-003966

Report of a Survey of United States District Judges' Experiences and Views Concerning Rule 11, Federal Rules of Civil Procedure

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Federal Judicial Center
2005

This Federal Judicial Center publication was undertaken at the request of the Judicial Conference's Advisory Committee on Civil Rules and is in furtherance of the Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. The views expressed are those of the authors and not necessarily those of the Advisory Committee or of the Federal Judicial Center.

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Introduction

The Judicial Conference's Advisory Committee on Civil Rules asked the Federal Judicial Center to design and implement a survey of a representative national sample of federal district judges. The purpose of the survey was to gather information about the judges' experiences with Rule 11 of the Federal Rules of Civil Procedure as well as to elicit their opinions about recent proposals in Congress to amend Rule 11. The chair of the Advisory Committee and the committee's reporters helped develop the questionnaires. Center staff conducted the survey and analyzed the results during December 2004 and January 2005.

As currently written, Rule 11 expressly authorizes judges to impose sanctions on lawyers and parties who present to a district court a pleading, written motion, or other paper without reasonable support in fact or law or for an improper purpose, such as to cause unnecessary cost or delay. Rule 11 provides that sanctions for violations are within the judge's discretion; that a party should have a period of time, a "safe harbor," within which to withdraw or correct a filing alleged to violate Rule 11; and that Rule 11's primary purpose is to deter future violations and not necessarily to compensate the opposing party for losses, including attorney fees.

In the 108th Congress, the House of Representatives passed H.R. 4571, the Lawsuit Abuse Reduction Act of 2004,[1] which would have amended Rule 11. That bill would have provided for mandatory sanctions for violations, repealed the safe harbor, and required judges to order the offending lawyer or party to compensate the opposing party for attorney fees incurred as a direct result of a Rule 11 violation. The proposed legislation would have reversed three amendments to Rule 11 adopted through the rulemaking process in 1993: to convert mandatory sanctions to discretionary sanctions, to create a safe harbor, and to deemphasize attorney fee awards. The proposed legislation also would have introduced a requirement that a district court suspend an attorney's license to practice in that district for one year if the attorney was found to have violated Rule 11 three or more times in that district.

The survey was designed, in part, to elicit district judges' views based on their experience with the 1993 amendments. The Advisory Committee was particularly interested in having the survey identify any differences in the views of district judges concerning the current Rule 11, the legislative pro-

1. H.R. 4571, 108th Cong. 2d Sess. (2004). The House version was introduced in the Senate on Sept. 15, 2004, referred to the Committee on the Judiciary, and was not the subject of a vote.

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posal, and the pre-1993 version of Rule 11. The pre-1993 version differs from the legislative proposal in significant ways, particularly in its treatment of attorney fees as a discretionary, not a mandatory, sanction for a violation of Rule 11.

On December 10, 2004, the Center E-mailed questionnaires to two random samples of 200 district judges each. District Judge Lee H. Rosenthal, chair of the Advisory Committee on Civil Rules, provided a cover letter for the E-mail. One sample comprised solely judges appointed to the bench before January 1, 1992, who would be expected to have had considerable experience with the pre-1993 version of Rule 11. The other sample comprised solely judges appointed to the bench after January 1, 1992, who would be expected to have had most of their judicial experience working with the 1993 amended version of Rule 11. Judge Rosenthal sent a follow-up E-mail on January 3, 2005. Of the 400 judges, 278 responded, a rate of 70%. Appendix A explains the methods used to select the samples. Appendix B contains a composite copy of the two questionnaires used in the survey.

Summary of Results

More than 80% of the 278 district judges indicated that "Rule 11 is needed and it is just right as it now stands." In evaluating the alternatives, 87% of the respondents preferred the current Rule 11, 5% preferred the version in effect between 1983 and 1993, and 4% preferred the version proposed in H.R. 4571.

Judges' opinions about specific provisions in Rule 11 and the proposed legislation followed a similar pattern. The results indicated that relatively large majorities of the judges who responded to our survey have the following views about Rule 11:

- 85% strongly or moderately support Rule 11's safe harbor provision;
- 91% oppose the proposed requirement that sanctions be imposed for every Rule 11 violation;
- 84% disagree with the proposition that an award of attorney fees should be mandatory for every Rule 11 violation; and
- 72% believe that having sanctions for discovery in Rules 26(g) and 37 is best.

A majority of the judges (55%) indicated that the purpose of Rule 11 should be both deterrence and compensation; almost all of the other judges (44%) indicated that deterrence should be the sole purpose of Rule 11.

The views of judges who responded to the survey are likely to be related to their estimation of the amount of groundless civil litigation they see in their own docket, especially when focusing on cases where the plaintiff is represented by counsel. Approximately 85% of the district judges view groundless litigation in such cases as no more than a small problem and another 12% see such litigation as a moderate problem. About 3% view groundless litigation brought by plaintiffs who are represented by counsel as a large or very large problem. For 54% of the judges who responded, the amount of groundless litigation has remained relatively constant during their tenure on the federal bench. Only 7% indicated that the problem is now larger. For 19%, the amount of groundless civil litigation has decreased during their tenure on the federal bench, and for 12% there has never been a problem.

Results

The Advisory Committee was especially interested in having a survey that was designed to inquire about district court judges' experience with Rule 11 as well as to solicit judges' opinions about the current Rule 11 relative to the proposed changes contained in the legislation. Those interests shaped the organization and content of the survey questionnaires. The survey results in this section of the report are presented in tables and text in the order in which the questions appeared on the survey instrument. The title of each table states the question asked of the judges, and the response categories are a shorthand version of the responses called for in the questionnaire. The preface of each questionnaire indicated in bold type that "This questionnaire is about the effects of Rule 11 in cases in which the plaintiff is represented by counsel." Many of the questions were modeled on questions asked of judges in a 1995 Center survey.[2] In order to facilitate comparisons between the findings of the 1995 survey and the current survey, we present applicable results of both surveys with appropriate references.

Frequency of Groundless Litigation

The questionnaire first asked judges about their perception of any problems with groundless litigation and whether such problems, if they exist, had

2. John Shapard et al., Report of a Survey Concerning Rule 11, Federal Rules of Civil Procedure (Federal Judicial Center 1995) [hereinafter FJC 1995 Rule 11 Survey].

changed since Rule 11 was last amended in 1993. Table 1 shows that 85% of the judges described any perceived problem with groundless litigation as being no more than a small one. Among judges commissioned before January 1, 1992, this figure was over 75%; the figure was almost 90% for judges commissioned after that date. In our 1995 study, 40% of the judges indicated that the problem with groundless litigation was moderate to very large;[3] only 15% believed this to be the case in the current study.

Table 1
Responses to Question 1.1, Is there a problem with groundless litigation in federal civil cases on your docket?

Possible Answer	All Judges (*N*=276)[4]	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=148)
No problem	15%	13%	16%
Very small problem	38%	31%	43%
Small problem	32%	34%	30%
Moderate problem	12%	16%	9%
Large problem	2%	2%	2%
Very large problem	1%	3%	0%
I can't say	0%	1%	0%

The questionnaire next asked whether such problems, if they exist, had changed since Rule 11 was last amended in 1993. Table 2 shows that about 7% said that the problem had increased. More than half said that the problem was the same, and 12% said that there has never been a problem. Judges commissioned after January 1, 1992, were more likely to say that there has never been a problem but, if there is a problem, it is about the same as it was during their first year on the bench.

3. *Id.* at 3.

4. *N* refers to the number of judges who answered the question. The value of *N* varies across tables because of differences in the number of judges who answered a particular question. Percentages in columns with results for all judges are weighted to reflect the fact that, by drawing two samples independently from two groups of judges, we have a stratified sample. In this case, weighted results for the entire sample are appropriate. Weighting is unnecessary for results reported separately by group. Finally, as a result of rounding, column percentages may not sum to 100.

Table 2
Responses to Question 1.2, Is the current problem (if any) with groundless litigation in civil cases on your docket smaller than, about the same as, or larger now than it was

before Rule 11 was amended? (asked of pre-1992 judges) *or*

during your first year as a federal district judge? (asked of post-1992 judges)

Possible Answer	All Judges (*N*=276)	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=148)
There has never been a problem	12%	9%	14%
The problem is much smaller now than it was then	8%	11%	6%
The problem is slightly smaller now than it was then	11%	14%	9%
The problem is the same now as it was then	54%	48%	59%
The problem is slightly larger now than it was then	6%	5%	7%
The problem is much larger now than it was then	1%	2%	1%
I can't say	7%	11%	4%

"Safe Harbor" Provision and Rule 11 Activity

The questionnaire asked judges if they supported or opposed the Rule 11 "safe harbor" provision, which was added as part of the 1993 amendments. Table 3 shows that 86% of the judges said they supported it, with the majority of the judges expressing strong support. Table 3 also shows somewhat stronger support among judges commissioned after 1992. This subgroup has very little or no experience with the pre-1993 version of Rule 11, which did not include the safe harbor provision. Overall, the percentage of judges supporting the safe harbor has increased from 70% to 86% since 1995; judges showing strong support has increased from 32% to 60%. The percentage of judges opposing the safe harbor has decreased from 16% to 10%.[5]

5. FJC 1995 Rule 11 Survey, *supra* note 2, at 4.

Table 3
Responses to Question 2.1, Based on your experience and your assessment of what would be fairest to all parties, do you oppose or support Rule 11's "safe harbor" provision?

Possible Answer	All Judges (*N*=277)	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=149)
Strongly support	60%	53%	65%
Moderately support	26%	25%	26%
Moderately oppose	6%	9%	3%
Strongly oppose	4%	5%	2%
I find it difficult to choose	4%	6%	3%
I can't say	1%	1%	1%

The questionnaire contained a follow-up question for the pre-1992 judges about changes in Rule 11 activity as a result of the addition of the safe harbor provision. Judges commissioned prior to 1992 were asked how the safe harbor provision has affected the amount of Rule 11 activity since the provision went into effect in 1993. Table 4 shows that 45% of these judges reported that Rule 11 activity had decreased, either slightly or substantially, and 29% reported that activity was about the same. Only 5% reported increases in Rule 11 activity, and 21% indicated that they could not give a definitive answer to this question. Similarly, judges commissioned after 1992 were asked about Rule 11 activity since their first year on the bench. Table 4 shows that almost two-thirds of the post-1992 judges reported that Rule 11 activity had remained about the same, 22% reported decreases, and 7% reported increases.

Table 4
Responses to Question 2.2,

How has the safe harbor provision affected the amount of Rule 11 activity on your docket since it went into effect in 1993? (asked of pre-1992 judges) *or*

Since your first year as a district judge what, if any, changes have you observed in the amount of Rule 11 activity on your docket? (asked of post-1992 judges)

Possible Answer	Judges Commissioned Before 1/1/92 (*N*=127)	Judges Commissioned After 1/1/92 (*N*=148)
Increased substantially	1%	0%
Increased slightly	4%	7%
About the same	29%	65%
Decreased slightly	17%	12%
Decreased substantially	28%	10%
I can't say	21%	6%

Rule 11 Sanctions

The current version of Rule 11 allows a district judge to impose sanctions for violations of the rule, at his or her own discretion, with the purpose of deterring similar conduct in the future. H.R. 4571 would require sanctions for every violation, with the purpose of compensating the injured party for reasonable expenses and attorney fees as well as to deter repetitions of such conduct.

The judges were asked first whether sanctions, monetary or nonmonetary, should be required. Table 5 shows that 91% said that sanctions should not be required. Among judges commissioned before 1992, 86% said sanctions should not be required; for judges commissioned after 1992 the figure was 95%. In 1995, 22% of the judges thought that a sanction should be required for every Rule 11 violation, compared with 9% who think so now.[6]

6. *Id.* at 6.

Table 5
Responses to Question 3.1, Should the court be required to impose a monetary or nonmonetary sanction when a violation is found?

Possible Answer	All Judges (*N*=277)	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=149)
Yes	9%	13%	5%
No	91%	86%	95%
I can't say	0%	1%	0%

Judges were next asked whether an award of attorney fees, sufficient to compensate the injured party, should be mandatory when a sanction is imposed. Table 6 shows that 84% of the judges said no. The result is approximately the same whether the judges were commissioned before or after 1992. The percentage of judges favoring mandatory attorney fees for Rule 11 violations was 15% in both the 1995 and 2005 surveys.[7]

Table 6
Responses to Question 3.2, When a sanction is imposed, should it be mandatory that the sanction include an award of attorney fees sufficient to compensate the injured party?

Possible Answer	All Judges (*N*=277)	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=149)
Yes	15%	14%	16%
No	84%	85%	83%
I can't say	1%	1%	1%

Regarding the proposed legislation's inclusion of financial compensation as a general purpose for Rule 11, judges were asked what should be the purpose of Rule 11. Almost 100% of the judges said that a purpose of Rule 11 should be deterrence. Their views were split on the role of compensation. The results in Table 7 reveal that slightly more than half, 55%, said that the purpose should be deterrence *and* compensation; 44% said that the purpose should be deterrence, with compensation if needed for the sake of deterrence. Reading the Table 7 results in light of the opinions expressed in

7. *Id.*

Table 5 and 6, it appears that most judges who favor compensating the opposing party do not favor such compensation in all cases and do not necessarily favor compensation in the form of attorney fees. In the 1995 survey, 66% of the judges thought that Rule 11 should include both compensatory and deterrent purposes.[8]

Table 7
Responses to Question 3.3, What should the purpose of Rule 11 sanctions be?

Possible Answer	All Judges (*N*=275)	Judges Commissioned Before 1/1/92 (*N*=126)	Judges Commissioned After 1/1/92 (*N*=149)
Deterrence (& compensation if warranted)	44%	40%	46%
Compensation only	0%	1%	0%
Both deterrence & compensation	55%	58%	53%
Other	1%	1%	1%

Three Strikes

Under the proposed legislation, when an attorney violates Rule 11 the federal court would determine how many times that attorney had violated Rule 11 in that court during the attorney's career. If that attorney had committed three or more violations, the court would suspend for one year the attorney's license to practice in that court.

To gauge the frequency with which this portion of the proposed Rule 11 might be invoked, judges were asked whether they had encountered an attorney with three or more violations in their district. Table 8 shows that 77% of the judges reported that they had not. Of the remaining 23%, more than half were not sure if they had encountered an attorney with three or more violations. Judges commissioned before 1992 were more likely to say they had encountered such an attorney. This result may, of course, be largely the result of their longer time on the bench.

8. *Id.*

Table 8
Responses to Question 4.1, In your experience as a district judge, have you encountered an attorney who has violated Rule 11 three or more times in your district?

Possible Answer	All Judges (*N*=277)	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=149)
Yes	11%	15%	8%
No	77%	71%	81%
I can't say	12%	14%	11%

At present, the efforts and methods required to enable courts to track attorney violations, in order to apply the proposed legislation's "three strikes" provision, are unknown. Judges were asked for their views, which are reported in Table 9. The choices were not mutually exclusive: Judges could check more than one response and therefore the percentages do not sum to 100. The most frequent response, given by 48% of the judges, was that a new database would be required to track Rule 11 violations. Examination of prior docket records was the next most frequent response, given by 35% of the judges. Only 4% said that little or no additional effort would be required, and nearly one-third (32%) were unsure about what would be needed to apply the three strikes provision.

Table 9
Responses to Question 4.2, In your district, how much effort would be required to obtain information about the number of prior Rule 11 violations committed by an attorney during his or her career?

Possible Answer	All Judges (*N*=277)	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=149)
Little or no additional effort	4%	3%	5%
Examining prior docket records for past violations	35%	35%	34%
Creating a new database for Rule 11 violations	48%	53%	44%
An affidavit or declaration from each attorney	19%	17%	20%
Other court action	3%	2%	3%
I can't say	32%	29%	34%

Judges were next asked their views on the impact of the proposed three strikes provision in deterring groundless litigation relative to the cost of implementation and in light of their courts' existing procedures for disciplining attorneys. Table 10 shows that 40% felt that the cost of implementation would exceed the deterrent value, while 25% of the judges felt that the value of the deterrent effect would exceed the cost of implementation. However, 27% were unsure about the tradeoff between cost and deterrent effect. Judges commissioned after 1992, compared with those commissioned earlier, were more likely to view the cost as exceeding the value of the proposed legislation and were less likely to view the deterrent value as exceeding the cost. They were also more likely to express uncertainty over the tradeoff.

Table 10
Responses to Question 4.3, Which of the following statements best captures your expectations regarding the impact of the proposal in deterring groundless litigation in comparison to the cost of implementing the proposal in your district?

Possible Answer	All Judges (*N*=277)	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=149)
Value of the deterrent effect would greatly exceed its cost	16%	15%	16%
Value of the deterrent effect would somewhat exceed its cost	9%	11%	7%
Value of the deterrent effect would about equal its cost	9%	13%	7%
Cost of implementing the proposal would somewhat exceed the value of the deterrent effect	10%	6%	13%
Cost of implementing the proposal would greatly exceed the value of the deterrent effect	30%	32%	28%
I can't say	27%	23%	30%

Application of Rule 11 to Discovery

The proposed legislation would extend Rule 11's application to discovery-related activity. Standards and sanctions for discovery are currently covered by Federal Rules of Civil Procedure 26(g) and 37, and the proposed legislation would augment these rules with an expanded Rule 11. The sampled judges were asked their opinion on the best combination of rules and sanctions. Table 11 shows that 72% of the judges (compared with 48% in 1995)[9] feel that the best option is the current version of Rule 11; 14% favored the proposed legislation. Judges commissioned after 1992 were a little more likely to favor the current version of the rule than judges commissioned before 1992.

9. *Id.* at 7.

Table 11
Responses to Question 5, Based on your experience, which of the following options do you believe would be best?

Possible Answer	All Judges (*N*=276)	Judges Commissioned Before 1/1/92 (*N*=127)	Judges Commissioned After 1/1/92 (*N*=149)
Sanctions provisions contained only in Rules 26(g) and 37	72%	68%	75%
Sanctions provisions contained in Rules 26(g), 37, and 11	13%	15%	12%
Sanctions provisions consolidated in Rule 11	5%	7%	3%
No significant difference among the three options	5%	6%	4%
I can't say	5%	5%	5%

How to Control Groundless Litigation?

To gauge judges' overall views on the proposed legislation and on controlling groundless litigation, the judges were asked whether Rule 11 should be modified. Table 12 shows their responses to the given options. The great majority of judges (81%) said that Rule 11 is just right as currently written. In 1995, 52% of the judges indicated that the same version of Rule 11 was just right as written. In 2005, there were differences among judges depending on when they were commissioned: 71% of judges commissioned before 1992 agreed that the current Rule 11 is just right, compared with 89% of judges commissioned afterwards. There was almost no support for modifying Rule 11 to reduce the risk of deterring meritorious filings, and only some support, primarily among the longer-serving judges, to modify Rule 11 to more effectively deter groundless filings.

Table 12
Responses to Question 6, Based on your view of how effective or ineffective these other methods are, how, if at all, should Rule 11 be modified?

Possible Answer	All Judges (*N*=270)	Judges Commissioned Before 1/1/92 (*N*=124)	Judges Commissioned After 1/1/92 (*N*=146)
Modified to increase its effectiveness in deterring groundless filings	13%	21%	7%
Rule 11 is just right as it now stands	81%	71%	89%
Modified to reduce the risk of deterring meritorious filings	1%	2%	1%
Rule 11 is not needed	1%	2%	1%
I can't say	3%	4%	3%

Finally, the judges were asked which version of Rule 11 they would prefer to have if and when they have to deal with groundless litigation. Given the choice among the current version of Rule 11, the pre-1993 version, or the proposed legislation, 87% of the judges preferred the current version. The percentages for surveyed judges commissioned before and after 1992 are 83% and 91%, respectively. There was little support expressed for either the pre-1993 version or the version contained in H.R. 4571.

Table 13
Responses to Question 7, Proposed legislation would repeal the safe harbor provision in Rule 11 and require that the court shall impose an appropriate sanction on a party or attorney who signed a pleading, motion, or other paper in violation of Rule 11 standards. Which approach would you prefer in dealing with groundless litigation?

Possible Answer	All Judges (*N*=271)	Judges Commissioned Before 1/1/92 (*N*=123)	Judges Commissioned After 1/1/92 (*N*=148)
The current Rule 11	87%	83%	91%
The 1983–1993 version of Rule 11	5%	7%	4%
The proposed legislation	4%	7%	2%
I can't say	4%	4%	3%

Conclusion

Based on their experiences in managing groundless civil litigation in their own courts, federal district judges find the current Rule 11 to be well suited to their needs. Almost all of the judges reported that, in their experience, groundless civil litigation is a small or at most a moderate problem. District judges' views on proposed changes to Rule 11 appear to be consistent with their experiences on the federal bench. Substantial majorities of the responding judges said, in effect, that none of the proposals for changing Rule 11—that is, proposals for mandatory sanctions, mandatory attorney fee awards, removal of the safe harbor, and application of Rule 11 to discovery disputes—would resolve problems that district judges are experiencing.

Appendix A
Method

Separate forms of the questionnaire were E-mailed by Center staff with a cover letter from the chair of the Advisory Committee to two samples of active and active-senior federal district court judges. The samples, each one of 200 judges, were separately and randomly selected from within two groups of judges defined by their commission date. Judges commissioned before January 1, 1992, formed one group; judges commissioned on or after that date formed the other. This date was selected in order that all judges in the first group would have had at least one year on the bench before the 1993 amendments to Rule 11 went into effect. This group of judges received a form of the questionnaire that, where necessary, asked them to use their pre-1993 period on the bench as a basis for comparison. The second group of judges received a questionnaire that instead asked them to use their first year on the bench as their basis for comparison. A composite of the two versions of the questionnaire is contained in Appendix B.

In order to quickly and easily convert the returned questionnaires into data files, Center research staff used special software to produce and read the questionnaires. Each of the two forms of the questionnaire was converted to Portable Document Format (PDF) and sent via E-mail to the 400 sampled judges. Each judge's file was named using a sequential, numbered ID that was used to track returned questionnaires for follow-up purposes. Upon receipt of the file, the judges were able to open the PDF file, answer the questions, save the file, and return it via E-mail. The software that produced the files was used to convert the returned questionnaires to a data file for analysis. Judges were also given the option of printing the PDF file, completing it, and faxing it to a fax server at the Center. Of the 280 responses received, 44 were returned via E-mail; the remainder were returned via fax. The questionnaires were sent on December 9, 2004, and a reminder was sent on January 3, 2005, to judges who had not yet responded. The response rates for the two samples were different. Post-1992 judges were more likely to return the questionnaire (74%) than were pre-1992 judges (64%).

The sample procedure described above produced a stratified sample in which the judges' commission dates defined the strata. In order to correctly interpret results for the sample of all judges, when reported, these data were weighted to reflect the fact that different sampling fractions were used for

the different strata. Results reported separately by strata do not require weighting.

Appendix B
Questionnaire

The questionnaire sent to judges commissioned before January 1, 1992 is reproduced below. Questions 1.2 and 2.2 differed in the version sent to judges commissioned on or after that date. The differences are indicated by bracketed text. Bold and underlined text was in that format in the original questionnaires.

RULE 11 SURVEY

PURPOSE AND INSTRUCTIONS. Federal Rule of Civil Procedure 11 (**Rule 11**) provides sanctions for presenting a pleading, written motion, or other paper without reasonable support in fact or law or for an improper purpose, such as to cause unnecessary cost or delay. This questionnaire seeks information from you about how Rule 11 is working and also seeks your evaluation of several issues concerning Rule 11 and current Congressional proposals to amend that rule. Rule 11 provides that sanctions for violations are within the judge's discretion; that a party should have a period of time, a "safe harbor," within which to withdraw or correct a filing alleged to violate Rule 11; and that Rule 11's primary purpose is to deter future violations and not necessarily to compensate the opposing party for losses, including attorney fees.

Proposed legislation (HR 4571, adopted by the House of Representatives on September 14, 2004) would amend Rule 11 to provide that sanctions for violations be mandatory, repeal the safe harbor, and require courts to order compensation to a party for attorney fees incurred as a direct result of a Rule 11 violation. The proposed legislation would reverse three changes made by **Rule11 amendments adopted in 1993**, namely to delete mandatory sanctions, to deemphasize attorney fee awards, and to create a safe harbor. The **proposed legislation** also requires a district court to suspend an attorney's license to practice in that district for one year if the attorney has violated Rule 11 three or more times in that district.

This questionnaire is about the effects of Rule 11 in cases in which the plaintiff is represented by counsel. Do not include in your evaluation of Rule 11 the effects it may or may not have had on cases in which the plaintiff is proceeding pro se.

Please respond to the questions on the basis of <u>your own</u> experience as a judge with cases on your docket, not the experiences of other judges or attorneys.

For convenience, throughout this questionnaire we refer to pleadings, written motions, and other papers that do not conform to the requirements of Rule 11 as *groundless litigation.*

Please respond by marking the box next to your answer.

1. FREQUENCY OF GROUNDLESS LITIGATION

1.1 Is there a problem with groundless litigation in federal civil cases on your docket? Please mark one.

a) There is no problem.
b) There is a very small problem.
c) There is a small problem.
d) There is a moderate problem.
e) There is a large problem.
f) There is a very large problem.
g) I can't say.

1.2 Is the current problem (if any) with groundless litigation in civil cases on your docket smaller, about the same as, or larger than it was before Rule 11 was amended in 1993? **[**Is the current problem (if any) with groundless litigation in civil cases on your docket smaller, about the same as, or larger than it was during your first year as a federal district judge?**]** Please mark one.

a) There has never been a problem.
b) The problem is much smaller now than it was then.
c) The problem is slightly smaller now than it was then.
d) The problem is the same now as it was then.
e) The problem is slightly larger now than it was then.
f) The problem is much larger now than it was then.
g) I can't say.

2. THE SAFE HARBOR PROVISION. **Rule 11** provides that a motion for sanctions shall not be filed with the court until 21 days after a copy is served on the opposing party. This provision creates a "safe harbor" by specifying that a party will not be subjected to sanctions on the basis of another party's motion unless, after receiving the motion, the party fails to withdraw or correct the challenged filing. **Proposed legislation** would eliminate the "safe harbor" provision.

Proponents of the safe harbor provision argue that it leads to the efficient resolution of both the Rule 11 issues and the underlying legal and factual issues with less court involvement; gives incentives to parties to withdraw or abandon questionable positions; decreases the number of sanctions motions that are filed for inappropriate reasons; and provides that abuses of the "safe harbor" can be dealt with by sua sponte sanctions. **Opponents** of the "safe harbor" provision argue that it allows filing of groundless papers without penalty and denies compensation to parties who have been subjected to groundless filings.

2.1 Based on your experience and your assessment of what would be fairest to all parties, do you oppose or support Rule 11's "safe harbor" provision? Please mark one.

a) I strongly support Rule 11's safe harbor provision.
b) I moderately support Rule 11's safe harbor provision.
c) I moderately oppose Rule 11's safe harbor provision.
d) I strongly oppose Rule 11's safe harbor provision.
e) I find it difficult to choose because the pros and cons of the safe harbor provision are about equally balanced.
f) I can't say.

2.2 How has the safe harbor provision affected the amount of Rule 11 activity on your docket since it went into effect in 1993? **[**Since your first year as a federal district judge what, if any, changes have you observed in the amount of Rule 11 activity on your docket?**]** Please mark one.

a) Rule 11 activity has increased substantially
b) Rule 11 activity has increased slightly
c) Rule 11 activity has remained about the same
d) Rule 11 activity has decreased slightly
e) Rule 11 activity has decreased substantially
f) I can't say

3. RULE 11 SANCTIONS. **Rule 11** provides that the court "may" impose a sanction when the rule has been violated, leaving the matter to the court's discretion. **Rule 11** also provides that the purpose of Rule 11 sanctions is to deter repetition of the offending conduct, rather than to compensate the parties injured by that conduct; that monetary sanctions, if imposed, should ordinarily be paid into court; and that awards of compensation to the injured party should be made only when necessary for effective deterrence.

Proposed legislation would alter these standards and require that a sanction be imposed for every violation. **Proposed legislation** would also provide that a purpose of sanctions is to compensate the injured party as well as to deter similar conduct and would require that any sanction be sufficient to compensate the injured party for the reasonable expenses and attorney fees that an injured party incurred as a direct result of a Rule 11 violation.

Please indicate for each of the three questions below what you think would be, on balance, the fairest form of Rule 11 for the types of cases you encounter on your docket.

3.1 Should the court be <u>required</u> to impose a monetary or nonmonetary sanction when a violation is found? Please mark one.

a) Yes
b) No
c) I can't say.

3.2 When a sanction is imposed, should it be mandatory that the sanction include an award of attorney fees sufficient to compensate the injured party? Please mark one.

a) Yes, an award of attorney fees should be mandatory if a sanction is imposed.
b) No, an award of attorney fees should not be mandatory.
c) I can't say.

3.3 What should the purpose of Rule 11 sanctions be? Please mark one.

a) deterrence (and compensation if warranted for effective deterrence)
b) compensation only
c) both compensation and deterrence
d) other (please specify in the answer space for question 8)

4. THREE STRIKES PROVISION. **Proposed** legislation would require a federal district court, after it has determined that an attorney violated Rule 11, to "determine the number of times that attorney has violated [Rule 11] in that Federal district court during that attorney's career. If an attorney has violated Rule 11 three or more times, the court must suspend that attorney's license to practice in that court for a period of one year."

4.1 In your experience as a district judge, have you encountered an attorney who has violated Rule 11 three or more times in your district? Please mark one:

a) Yes
b) No
c) I can't say

4.2 In your district, how much effort would be required to obtain information about the number of prior Rule 11 violations committed by an attorney during his or her career? Mark all that apply.

a) Obtaining such information would require little or no additional effort
b) Obtaining such information would require examining prior docket records for past violations
c) Obtaining such information would require creating a new database for Rule 11 violations
d) Obtaining such information would require an affidavit or declaration from each attorney
e) Obtaining such information would require other court action (specify) _____
f) I can't say

4.3 Which of the following statements best captures your expectations regarding the impact of the proposal in deterring groundless litigation in comparison to the cost of implementing the proposal in your district. In assessing the value of the proposal consider the effectiveness of existing procedures in your district for disciplining lawyers found to have engaged in misconduct of the type forbidden by Rule 11.Please mark one:

a) The value of the deterrent effect would greatly exceed its cost
b) The value of the deterrent effect would somewhat exceed its cost
c) The value of the deterrent effect would about equal its cost
d) The cost of implementing the proposal would somewhat exceed the value of the deterrent effect.
e) The cost of implementing the proposal would greatly exceed the value of the deterrent effect.
f) I can't say

5. APPLICATION TO DISCOVERY. Rule 11 does not apply to discovery-related activity because Federal Rules of Civil Procedure 26(g) and 37 establish standards and sanctions that apply to discovery disclosures, requests, responses, objections, and motions. **Proposed** legislation would amend Rule 11 to make it applicable to discovery-related activity.

Proponents of that legislative proposal argue that including discovery under Rule 11 or under Rule 11 together with Rules 26(g) and 37 is more effective in deterring groundless discovery-related activity than Rules 26(g) and 37 alone. **Opponents** of that proposal support the current version of Rule 11 and argue that discovery should not be covered by Rule 11 because the sanctions provisions of Rules 26(g) and 37 are stronger and are specifically designed for the discovery process.
Based on your experience, which of the following options do you believe would be best? Please mark one.

a) Sanctions provisions related to discovery contained only in Rules 26(g) and 37 (the current rule).
b) Sanctions provisions related to discovery contained in both Rules 26(g) and 37 and Rule 11.
c) Sanctions provisions related to discovery consolidated in Rule 11 and eliminated from Rules 26(g) and 37.
d) There is no significant difference among the three options.
e) I can't say.

6. RULE 11 AND OTHER METHODS OF CONTROLLING GROUNDLESS LITIGATION. Federal statutes, the Federal Rules of Civil Procedure, and inherent judicial authority provide judges with a number of opportunities and methods for deterring or minimizing the harmful effects of groundless claims, defenses, or legal arguments (e.g., informal admonitions, Rule 16 and Rule 26(f) conferences, 28 U.S.C. Section 1927, prompt dismissal of groundless claims, summary judgment). Based on your view of how effective or ineffective those other methods are, how, if at all, should Rule 11 be modified? Please mark one.

a) Rule 11 is needed, but it should be modified to increase its effectiveness in deterring groundless filings (even at the expense of deterring some meritorious filings).
b) Rule 11 is needed, and it is just right as it now stands.
c) Rule 11 is needed, but it should be modified to reduce the risk of deterring meritorious filings (even at the expense of failing to deter some groundless filings).
d) Rule 11 is not needed.
e) I can't say.

7. PREFERENCE FOR CURRENT OR PAST VERSIONS OF RULE 11 OR PROPOSED LEGISLATION.

The **version** of **Rule 11 in effect from 1983 to 1993** required that the court shall impose an appropriate sanction on a party or attorney who signed a pleading, motion or other paper in violation of Rule 11 standards. The appropriate sanction may, but need not, have included an order to pay the opposing party's reasonable attorney fees.

Rule 11 now provides that a court may impose an appropriate sanction on a party or attorney who signed a pleading, motion or other paper in violation of Rule 11 standards. The appropriate sanction may, but need not, include an order to pay the opposing party's reasonable attorney fees. **Rule 11** also provides a safe harbor that permits withdrawal without penalty of a filing that allegedly violates Rule 11, as long as the withdrawal takes place within 21 days of notice that another party intends to file a motion for Rule 11 sanctions.

Proposed legislation would repeal the safe harbor provision in Rule 11 and require that the court shall impose an appropriate sanction on a party or attorney who signed a pleading, motion or other paper in violation of Rule 11 standards. The proposed legislation would also require that the appropriate sanction be sufficient to compensate the parties injured by the conduct, including reasonable expenses and attorney fees. Which of the above approaches would you prefer to use in dealing with groundless litigation? Please mark one.

a) I prefer the current Rule 11
b) I prefer the 1983-1993 version of Rule 11
c) I prefer the proposed legislation
d) I can't say

8. Please use the space provided for any additional comments or suggestions you may have about issues raised in this questionnaire or about Rule 11 in general.

The Federal Judicial Center

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112TH CONGRESS
1ST SESSION

S. 623

To amend chapter 111 of title 28, United States Code, relating to protective orders, sealing of cases, disclosures of discovery information in civil actions, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 17, 2011

Mr. KOHL introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend chapter 111 of title 28, United States Code, relating to protective orders, sealing of cases, disclosures of discovery information in civil actions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Sunshine in Litigation Act of 2011".

SEC. 2. RESTRICTIONS ON PROTECTIVE ORDERS AND SEALING OF CASES AND SETTLEMENTS.

(a) IN GENERAL.—Chapter 111 of title 28, United States Code, is amended by adding at the end the following:

"§ 1660. Restrictions on protective orders and sealing of cases and settlements

"(a)(1) In any civil action in which the pleadings state facts that are relevant to the protection of public health or safety, a court shall not enter, by stipulation or otherwise, an order otherwise authorized under rule 26(c) of the Federal Rules of Civil Procedure restricting the disclosure of information obtained through discovery, an order approving a settlement agreement that would restrict the disclosure of such information, or an order restricting access to court records unless in connection with such order the court has first made independent findings of fact that—

"(A) such order would not restrict the disclosure of information which is relevant to the protection of public health or safety; or

"(B)(i) the public interest in the disclosure of past, present, or potential health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information or records in question; and

"(ii) the requested order is no broader than necessary to protect the confidentiality interest asserted.

"(2) No order entered as a result of the operation paragraph (1), other than an order approving a settlement agreement, may continue in effect after the entry of final judgment, unless at the time of, or after, such entry the court makes a separate finding of fact that the requirements of paragraph (1) continue to be met.

"(3) The party who is the proponent for the entry of an order, as provided under this section, shall have the burden of proof in obtaining such an order.

"(4) This section shall apply even if an order under paragraph (1) is requested—

"(A) by motion pursuant to rule 26(c) of the Federal Rules of Civil Procedure; or

"(B) by application pursuant to the stipulation of the parties.

"(5)(A) The provisions of this section shall not constitute grounds for the withholding of information in discovery that is otherwise discoverable under rule 26 of the Federal Rules of Civil Procedure.

"(B) A court shall not approve any party's stipulation or request to stipulate to an order that would violate this section.

"(b)(1) In any civil action in which the pleadings state facts that are relevant to the protection of public health or safety, a court shall not approve or enforce any provision of an agreement between or among parties, or approve or enforce an order entered as a result of the operation of subsection (a)(1), to the extent that such provision or such order prohibits or otherwise restricts a party from disclosing any information relevant to such civil action to any Federal or State agency with authority to enforce laws regulating an activity relating to such information.

"(2) Any such information disclosed to a Federal or State agency shall be confidential to the extent provided by law.

"(c)(1) Subject to paragraph (2), a court shall not enforce any provision of a settlement agreement described under subsection (a)(1) between or among parties that prohibits 1 or more parties from—

"(A) disclosing the fact that such settlement was reached or the terms of such settlement, other than the amount of money paid; or

"(B) discussing a civil action, or evidence produced in the civil action, that involves matters relevant to the protection of public health or safety.

"(2) Paragraph (1) applies unless the court has made independent findings of fact that—

"(A) the public interest in the disclosure of past, present, or potential public health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information or records in question; and

"(B) the requested order is no broader than necessary to protect the confidentiality interest asserted.

"(d) When weighing the interest in maintaining confidentiality under this section, there shall be a rebuttable presumption that the interest in protecting personally identifiable information relating to financial, health or other similar information of an individual outweighs the public interest in disclosure.

"(e) Nothing in this section shall be construed to permit, require, or authorize the disclosure of classified information (as defined under section 1 of the Classified Information Procedures Act (18 U.S.C. App.)).".

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 111 of title 28, United States Code, is amended by adding after the item relating to section 1659 the following:

"1660. Restrictions on protective orders and sealing of cases and settlements.".

SEC. 3. EFFECTIVE DATE.

The amendments made by this Act shall—

(1) take effect 30 days after the date of enactment of this Act; and

(2) apply only to orders entered in civil actions or agreements entered into on or after such date.

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AUTHENTICATED
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INFORMATION
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112TH CONGRESS
1ST SESSION

H. R. 592

To amend chapter 111 of title 28, United States Code, relating to protective orders, sealing of cases, disclosures of discovery information in civil actions, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 9, 2011

Mr. NADLER introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend chapter 111 of title 28, United States Code, relating to protective orders, sealing of cases, disclosures of discovery information in civil actions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Sunshine in Litigation Act of 2011".

SEC. 2. RESTRICTIONS ON PROTECTIVE ORDERS AND SEALING OF CASES AND SETTLEMENTS.

(a) IN GENERAL.—Chapter 111 of title 28, United States Code, is amended by adding at the end the following:

"§ 1660. Restrictions on protective orders and sealing of cases and settlements

''(a)(1) In any civil action in which the pleadings state facts that are relevant to the protection of public health or safety, a court shall not enter, by stipulation or otherwise, an order otherwise authorized under rule 26(c) of the Federal Rules of Civil Procedure restricting the disclosure of information obtained through discovery, an order otherwise authorized approving a settlement agreement that would restrict the disclosure of such information, or an order otherwise authorized restricting access to court records unless in connection with such order the court has first made independent findings of fact that—

''(A) such order would not restrict the disclosure of information which is relevant to the protection of public health or safety; or

''(B)(i) the public interest in the disclosure of past, present, or potential public health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information or records in question; and

"(ii) the requested order is no broader than necessary to protect the confidentiality interest asserted.

"(2) No order entered as a result of the operation of paragraph (1), other than an order approving a settlement agreement, may continue in effect after the entry of final judgment, unless at the time of, or after, such entry the court makes a separate finding of fact that the requirements of paragraph (1) continue to be met.

"(b) In any civil action in which the pleadings state facts that are relevant to the protection of public health or safety, a court shall not enforce any provision of an agreement between or among parties to a civil action, or enforce an order entered as a result of the operation of subsection (a)(1), to the extent that such provision or such order prohibits or otherwise restricts a party from disclosing any information relevant to such civil action to any Federal or State agency with authority to enforce laws regulating an activity relating to such information.

"(c)(1) Subject to paragraph (2), a court shall not enforce any provision of a settlement agreement in any civil action in which the pleadings state facts that are relevant to the protection of public health or safety, between or among parties that prohibits one or more parties from—

"(A) disclosing the fact that such settlement was reached or the terms of such settlement (excluding any money paid) that involve matters relevant to the protection of public health or safety; or

"(B) discussing matters relevant to the protection of public health or safety involved in such civil action.

"(2) Paragraph (1) applies unless the court has made independent findings of fact that—

"(A) the public interest in the disclosure of past, present, or potential public health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information in question; and

"(B) the requested order is no broader than necessary to protect the confidentiality interest asserted.

"(d) Notwithstanding subsections (a)(1)(B)(i) and (c)(2)(A), when weighing the interest in maintaining confidentiality under this section, there shall be a rebuttable presumption that the interest in protecting personally identifiable information of an individual outweighs the public interest in disclosure.

"(e) Nothing in this section shall be construed to permit, require, or authorize the disclosure of classified infor-

mation (as defined under section 1 of the Classified Information Procedures Act (18 U.S.C. App.)).''.

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 111 of title 28, United States Code, is amended by adding after the item relating to section 1659 the following:

''1660. Restrictions on protective orders and sealing of cases and settlements.''.

SEC. 3. EFFECTIVE DATE.

The amendments made by this Act shall—

(1) take effect 30 days after the date of enactment of this Act; and

(2) apply only to orders entered in civil actions or agreements entered into on or after such date.

○

12b-004013

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

LEE H. ROSENTHAL
CHAIR

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MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

May 2, 2011

Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

We write on behalf of the Judicial Conference Committee on Rules of Practice and Procedure and the Advisory Committee on the Federal Rules of Civil Procedure to oppose the Sunshine in Litigation Act of 2011 (S. 623), which was introduced on March 17, 2011. The Rules Committees have consistently opposed the similar protective-order bills regularly introduced since 1991. Our letters opposing such bills are available on request. Our opposition to S. 623, like the opposition to those earlier bills, is based in part on the fact that they are inconsistent with the Rules Enabling Act, 28 U.S.C. §§ 2071–2077. Our opposition is also based on the specific provisions of S. 623 and similar earlier bills.

Bills that would amend the Civil Rules to regulate the issuance of protective orders in discovery, similar to S. 623, have been introduced regularly since 1991. Like S. 623, these proposed bills would require courts to make particularized findings of fact that a discovery protective order would not restrict the disclosure of information relevant to the protection of public health and safety. Under the Rules Enabling Act, the Rules Committees studied Rule 26(c) to learn about the problems that these bills seek to solve and to bring the strengths of the Rules Enabling Act process to bear on any problems that might be found. Under that process, the Committees carefully examined and reexamined the issues, reviewed the pertinent case law and legal literature, and initiated and evaluated empirical research studies. The Committees' work led to the conclusions that: (1) there

was no evidence that discovery protective orders create any significant problem of concealing information about safety or health hazards from the public; (2) protective orders are important to litigants' privacy and property interests; (3) discovery will become more burdensome and costly if parties cannot rely on protective orders; (4) administering a rule that adds conditions before any discovery protective order could be entered would impose significant burdens on the court system, resulting in increased delay and costs for litigants; and (5) such a rule would have limited impact because much information gathered in discovery is not filed with the court and is not publicly available.

1. Proposed Legislation Amending Rule 26(c) of the Federal Rules of Civil Procedure

As part of its careful study of the issues, the Rules Committees asked the Federal Judicial Center (FJC) to undertake an empirical study on whether discovery protective orders issued in federal courts were operating to keep information about public safety or health hazards from the public. The FJC examined 38,179 civil cases filed in the District of Columbia, the Eastern District of Michigan, and the Eastern District of Pennsylvania from 1990 to 1992. The study showed that discovery protective orders were requested in about 6% of civil cases; most requests were made by motion; courts carefully reviewed such motions and denied or modified a substantial proportion of them; about one-quarter of the requests were made by party stipulations that courts usually accept; and most protective orders restricting parties from disclosing discovery material were entered in cases other than personal injury cases, in which public health and safety issues are most likely to arise.

Since the FJC study, the need for protective orders to maintain the confidentiality of highly sensitive personal and commercial information has only increased. The explosive growth in electronically stored information and the fact that most discovery is electronic, as well as the federal courts' adoption of electronic court filing systems that permit public remote electronic access to court files, have increased the risks of unduly imposing on privacy interests. Protective orders to safeguard against dissemination of highly personal and sensitive information are critical to both plaintiffs and defendants. If protective orders are restricted, litigation burdens are increased and some plaintiffs might abandon their claims rather than risk public disclosure of highly personal information. Section 1660(d) of the proposed legislation, which provides a rebuttable presumption that the interest in protecting certain personally identifiable information of an individual outweighs the public interest in disclosure, is inadequate reassurance. The proposed legislation would impose a cumbersome and time-consuming process that is much less likely to accurately identify and protect confidential and sensitive personal or proprietary information than current protective order practices. Litigants would be required to absorb the added costs and delays of the process and bear an increased risk of disclosure of sensitive information.

The need for protective orders for effective discovery management has also increased with the explosive growth in electronically stored information. Even relatively small cases often involve huge volumes of information. Relying on the ability to designate information as confidential, parties voluntarily produce much information without the need for extensive direct judicial supervision. If obtaining an enforceable protective order required item-by-item judicial consideration to

determine whether the information was relevant to the protection of public health or safety, as contemplated under the bill, that would create discovery disputes. Requiring courts to review information—which can often amount to thousands or even millions of pages—to make such determinations, and requiring parties to litigate and courts to resolve related discovery disputes, would impose significant costs, burdens, and delays on the discovery process. Such satellite litigation would increase the cost of litigation, lead to orders refusing to permit discovery into some information now disclosed under protective orders, add to the pressures that encourage litigants to pursue nonpublic means of dispute resolution, and force some parties to abandon the litigation.

The Committees' study revealed no significant problem of protective orders impeding access to information that affects the public health or safety. Close examination of the commonly cited illustrations has shown that in these cases, information sufficient to protect public health or safety was publicly available from other sources. And the case law shows that when parties file motions for protective orders, courts review them carefully and grant only the protection needed, recognizing the importance of public access to court filings. The case law also shows that courts reexamine protective orders if intervenors or third parties raise public health or safety concerns about them.

The Committees' careful study led to the conclusion that no change to the present protective-order practice is warranted. The Committees' conclusion is grounded in case law, studies, and analyses developed and reviewed over the past 15 years.

The Rules Committees also asked the FJC to do an extensive empirical study on court orders that limit the disclosure of settlement agreements filed in the federal courts. That study showed no need for legislation like S. 623. Both the discovery protective order and the settlement agreement studies have previously been provided to the Senate Judiciary Committee.[1]

2. Specific Concerns about S. 623

a. Section 1660(a)(1): The Scope of S. 623

S. 623 is narrower than some earlier protective-order bills because it is limited to cases in which the pleadings "state facts that are relevant to the protection of public health or safety." The language recognizes that most cases in the federal courts do not implicate public health or safety and should not be affected by the added requirements S. 623 would impose. But the provisions defining the scope of S. 623 are problematic. In many cases, it would not be possible for the court to determine by reviewing the pleadings whether S. 623 applies. The standard of "facts that are relevant to the protection of public health or safety" is so broad and indefinite that it will either sweep up many cases having little to do with public health or safety and impose on all these cases the costly and time-consuming requirements of S. 623, or require the parties and court to spend

[1] Additional copies can be obtained at:
http://www.fjc.gov/public/pdf.nsf/lookup/0029.pdf/$file/0029.pdf;
http://www.cklawreview.com/wp-content/uploads/vol81no2/Reagan.pdf;
http://www.fjc.gov/public/pdf.nsf/lookup/sealset3.pdf/$file/sealset3.pdf.

extensive time and resources litigating whether the statute applies.

b. Section 1660(a)(1)(A) and (B): The Procedure for Entering a Discovery Protective Order

Once an action is identified as one that based on the pleadings falls under S. 623, the requirement that the court make independent findings of fact before issuing a protective order in discovery is triggered. This requirement is very similar to prior protective-order bills. The Committees have consistently opposed those bills because the procedure they require would delay discovery, increase motions practice, and impose significant and unworkable new burdens on lawyers, litigants, and judges. S. 623 raises the same concerns.

In many cases, parties are unwilling to begin exchanging information in discovery until an enforceable protective order is entered. The vital role protective orders play in effective discovery management is well recognized. The information the parties exchange in discovery often includes highly sensitive personal and private information or extremely valuable confidential information. Plaintiffs as well as defendants have discoverable information that must be protected from public dissemination. And discoverable private or confidential information is often not just in the parties' hands, but may also be held by nonparties such as witnesses, coworkers, patients, customers, and many others. The internet has made it much more difficult to protect private and confidential information and has increased the importance of protective orders.

Protective orders avoid delay and cost by allowing the parties to exchange information in discovery that they would not exchange otherwise without objection or motion, hearing, and court order. The requesting party's chief interest is to get discovery produced as quickly and with as little expense and burden as possible. Protective orders serve that interest by allowing the parties to exchange information—with electronic discovery, in volumes that are often huge—without time-consuming, costly, and burdensome pre-production motions and hearings. S. 623 would frustrate the role of protective orders and would make discovery even more burdensome, time-consuming, and expensive than it already is.

The language of the proposed legislation, as in similar prior bills, calls for a procedure under which no protective order can issue unless and until: (1) the party seeking the order designates all the information that would be produced in discovery subject to restrictions on disclosure; (2) the judge reviews all this information to determine whether any of it is relevant to the protection of public health or safety; (3) if any of the information is determined to be relevant to the protection of public health or safety, the judge determines whether any of that information is subject to a specific and substantial interest in maintaining its confidentiality; (4) the judge then determines whether the public interest in the disclosure of any information about public health or safety hazards is outweighed by that interest; and (5) the judge then decides whether the requested order is no broader than necessary to protect that confidentiality interest. The procedure in the proposed legislation would often require the judge's review to occur relatively early in the litigation, when the judge—who knows less about the case than the parties—is the least informed about the case. Information sought in discovery does not come with labels such as "impacts public health or safety"

or "raises specific and substantial interest in confidentiality." The judge will often simply be unable to tell whether the information she is reviewing is relevant to public health or safety. The judge also will not be able to tell whether there are "specific and substantial" privacy or confidentiality interests or how they should be weighed.

Even in cases in which the pleadings state facts relevant to public health or safety, much of the information sought and produced in discovery will not implicate public health or safety. Indeed, much of the information will not be important or even relevant to the case and will not be used by the parties in litigating the case. But there may be significant amounts of private or confidential information that should be protected from public disclosure. Under the procedure set out in S. 623, a lawyer representing a client—plaintiff or defendant—could not seek a protective order without first doing the expensive and time-consuming work of identifying specific information to be obtained through discovery that would be subject to disclosure restrictions. The judge could not issue a protective order to restrict the dissemination of any information obtained through discovery without making the independent findings of fact as to all that information. The effect would be delay, increased motions, and a reduction in timely, cost-effective access to justice.

In addition to causing delay and increased costs in the cases in which protective orders are sought, the procedure in S. 623 would cause delays in access to the federal court system in all cases. If judges have to look through every document produced in discovery in cases in which a protective order is sought in order to be able to make the findings required by the legislation, that will take time away from other pressing court business that litigants expect judges to take care of in a timely manner.

Comparing the procedure under S. 623 with the protective-order practice followed under current law in the federal courts further illustrates problems the legislation would create. Under current law, when the parties ask the court to enter a protective order before discovery begins, the language of Rule 26(c) and the case law require the court to find good cause for entering such an order, even if the parties agree on the terms. In most cases in which a discovery protective order is sought, the court makes the good-cause determination by examining the nature of the case and the types or categories of information that are likely to be exchanged in discovery. Neither the parties nor the court is required to conduct a time-consuming and burdensome pre-discovery review of all the information that will be produced. But such time-consuming and burdensome pre-discovery review is required by the language of S. 623, and will result in increased costs and delays.

The protective order typically sets up a procedure for the parties to designate documents exchanged in discovery—as opposed to filed with the court—as confidential, restricting their dissemination. Most protective orders include "challenge provisions" under which the receiving party or third parties may dispute the designation of a particular document or categories of documents as confidential. Even without such challenge provisions, the case law provides this right. Once the requesting party—who knows the case much better than the judge—gets the documents in discovery and can review them, that party may ask the court to permit the dissemination of documents designated as confidential, to modify the terms of the protective order, or to dissolve the protective order. Among the reasons for modification are the relevance of the documents to

protecting public health or safety and the need to bring them to the appropriate regulatory agency, and the desire to use the documents in related litigation. The court can effectively and efficiently consider such requests because they are focused on specific documents or information. With this focus, the court is able to resolve the requests by applying the factors the case law establishes, including the protection of public health or safety.

The procedures followed under current law meet the goals of S. 623, including in the relatively small number of cases filed in federal courts that implicate public health or safety, without the grave additional burdens, costs, and delays S. 623 would impose. In contrast, the procedure established under S. 623 is ineffective to meet its purpose and would create severe problems in discovery.

c. Section 1660(a)(1): The Application to Orders Restricting Access to Court Records

Section 1660(a)(1) imposes the same requirements on court orders that would restrict public access to court records that apply to orders restricting public access to information exchanged in discovery. This provision weakens the standard federal courts apply under current law for ensuring public access to documents that are filed with the federal court. Under current law, if the parties want to take the material exchanged in discovery and file it with the court, either with a motion or in an evidentiary hearing or at trial, a standard different and higher than the discovery protective-order standard applies before a court can seal it from public view. Courts recognize a general right of public access to all materials filed with the court that bear on the merits of a dispute. This presumption of access usually can be overcome only for compelling reasons; access is granted without the need to show a threat to public health or safety or any other particular justification unless a powerful need for confidentiality is shown. A lower good-cause standard applies to an order restricting disclosure of information exchanged in discovery but not filed with the court.

This distinction between the standard for protecting the confidentiality of information exchanged in discovery and the standard for filing under seal is critical. It reflects the longstanding recognition that while there is no right of public access to information exchanged between litigants in discovery, there is a presumptive right of public access to information that is filed in court and used in deciding cases. Courts require a much more stringent showing to seal documents filed in court than to limit dissemination of documents exchanged in discovery but never filed with the court.
Section 1660(a)(1) reduces the standard necessary to seal documents filed in court and collapses it into the standard necessary to restrict public dissemination of documents exchanged in discovery. As a result, S. 623 weakens the right of public access to court documents.

d. Section 1660(a)(2): Discovery Protective Orders After the Entry of Final Judgment

Section 1660(a)(2) would make a discovery protective order unenforceable after final judgment unless the judge makes separate findings of fact that each of the requirements of (a)(1)(A) and (B) are met. The burden of proof provision in (a)(3) requires that the need for continuing

protection be demonstrated as to all the information obtained in discovery subject to the protective order. Under current practice, the protective order often continues in effect, subject to requests made by either parties or nonparties to release documents or information. Once a party or third party identifies documents or information for which disclosure is sought, the burden of proof is much clearer and efficiently applied. The court is able to effectively and efficiently determine whether the protective order should be modified or lifted because the focus is on specifically identified documents or information. This current practice is adequate to meet the purposes of S. 623 without the added burdens, delays, and costs the bill would add.

Section 1660(a)(2) would greatly add to the costs and burdens of conducting discovery because parties could not be confident that even the most sensitive information they produced would remain subject to the protective order provisions when the case ended. The great importance of limiting access to such highly confidential private information is evidenced by the frequent use in protective orders of "attorneys' eyes only" provisions, which preclude a receiving attorney from sharing certain information received in discovery even with her clients. Such provisions are frequently used in litigation involving complex technology. The parties involved in such litigation often require the return or destruction of their highly confidential and proprietary materials at the conclusion of litigation, to ensure that materials so confidential that they could not even be shared with the receiving attorney's client during the litigation remain confidential when the litigation ends. Such provisions are also used in many other cases in which highly sensitive and private information about both parties and nonparties is obtained in discovery. It is essential to the effective and efficient operation of discovery that litigants be able to rely on the continuing confidentiality of information produced, including after the case ends, subject to the right of others to ask the court to permit broader dissemination of specific information for reasons that could include relevance to public health or safety. S. 623 destroys the reliability that makes protective orders effective, with no evidence that such a step is needed.

e. The Provisions Relating to Orders Approving Settlement Agreements

Section 1660(a)(1) would prohibit a court from entering an order approving a settlement agreement that restricts the disclosure of information obtained through discovery, in a case in which the pleadings state facts that are relevant to the protection of public health or safety, unless the court makes the specified independent findings of fact. Section 1660(c)(1) would preclude a court from enforcing any provision of a settlement agreement in a case with such pleadings that restricts a party from disclosing the fact of settlement or the terms of the settlement (other than the amount of money paid), or that restricts a party from "discussing the civil action, or evidence produced in the civil action, that involves matters relevant to public health or safety," unless the court makes the specified independent findings of fact.

There are very few federal court orders approving settlement agreements. Settlements are generally a matter of private contract. Settlement agreements usually are only brought to a court for approval if the applicable law requires it, as in settlements on behalf of minors or absent class members. Similarly, federal courts are rarely called on to enforce settlement agreements. Unless the agreement specifically invokes a court's continuing jurisdiction or an independent basis for

jurisdiction applies, enforcement actions are generally brought in state courts. Because federal courts are rarely involved in approving or enforcing settlement agreements, the settlement provisions in S. 623 are an ineffective means of addressing the concerns behind the proposed legislation.

The extensive empirical study done by the FJC on court orders that limit the disclosure of settlement agreements filed in the federal courts and a follow-up study showed that in the few cases in which a potential public health or safety hazard might be involved and in which a settlement agreement was sealed by court order, the complaint and other documents remained in the court's file, fully accessible to the public. In these cases, the complaints identified the three most critical pieces of information about possible public health or safety risks: the risk itself, the source of that risk, and the harm that allegedly ensued. In many cases, the complaints went considerably further. The complaints, as well as other documents, provided the public with access to information about the alleged wrongdoers and wrongdoings, without the need to also examine the settlement agreement.

Based on the relatively small number of federal cases involving any sealed settlement agreement and the availability of other sources to inform the public of potential hazards in these few cases, the Rules Committees concluded that a statute restricting confidentiality provisions in settlement agreements is unnecessary and unlikely to be effective. S. 623 does not change these conclusions. Its primary effect is likely to be an added barrier to access to the federal courts by making it more difficult and cumbersome to resolve disputes, sending more disputes to private mediation or other avenues where there is no public access to information at all.

3. The Civil Rules Committee's Continued Work

In May 2010, the Civil Rules Committee sponsored an important conference on civil litigation at Duke University Law School. That conference addressed problems of costs, delays, and barriers to access at every stage ranging from pre-litigation to pleadings, motions, discovery, case-management, and trial. Many studies were conducted and many papers were prepared in conjunction with the conference.[2] It is worth noting that in all the studies conducted, the papers submitted, and the criticisms of and suggestions for improving the present system, no one raised problems with protective orders or orders limiting access to settlement agreements filed with the federal courts. This further underscores the lack of any need for legislation.

The Civil and Standing Rules Committees are deeply committed to identifying problems with the federal civil justice system that can be addressed by changes to the Federal Rules of Civil Procedure, and to making those changes through the process Congress established—the Rules Enabling Act. As part of that process, the Civil Rules Committee is continuing to monitor the case law under Rule 26(c) to ensure that it is not operating to prevent public access to important information about public health or safety. A memorandum has been prepared setting out the case law in every circuit on entering protective orders, modifying protective orders, and entering sealing

[2] The wide array of papers prepared for the conference are available on the conference's website at http://civilconference.uscourts.gov.

orders. The case law set out in the memo shows that courts are attuned to the public interest and have developed procedures for addressing the need to produce discovery materials to other litigants and agencies. The memo on protective order case law is available online.[3] The Advisory Committee continues to monitor the case law and protective order practice to ensure that rule amendments are not needed.

The Rules Committees very much appreciate the opportunity to express our views and share our concerns. If it would be useful, we are available to discuss these issues. Thank you for your consideration and for the continued dialogue on improving the system of justice in our federal courts.

Sincerely,

Lee H. Rosenthal
United States District Judge
Southern District of Texas
Chair, Committee on Rules
of Practice and Procedure

Mark R. Kravitz
United States District Judge
District of Connecticut
Chair, Advisory Committee
on Civil Rules

cc: Democratic Members, Judiciary Committee

Identical letter sent to: Honorable Charles E. Grassley

[3] The memo is available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Caselaw_Study_of_Discovery_Protective_Orders.pdf.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
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May 2, 2011

Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Grassley:

We write on behalf of the Judicial Conference Committee on Rules of Practice and Procedure and the Advisory Committee on the Federal Rules of Civil Procedure to oppose the Sunshine in Litigation Act of 2011 (S. 623), which was introduced on March 17, 2011. The Rules Committees have consistently opposed the similar protective-order bills regularly introduced since 1991. Our letters opposing such bills are available on request. Our opposition to S. 623, like the opposition to those earlier bills, is based in part on the fact that they are inconsistent with the Rules Enabling Act, 28 U.S.C. §§ 2071–2077. Our opposition is also based on the specific provisions of S. 623 and similar earlier bills.

Bills that would amend the Civil Rules to regulate the issuance of protective orders in discovery, similar to S. 623, have been introduced regularly since 1991. Like S. 623, these proposed bills would require courts to make particularized findings of fact that a discovery protective order would not restrict the disclosure of information relevant to the protection of public health and safety. Under the Rules Enabling Act, the Rules Committees studied Rule 26(c) to learn about the problems that these bills seek to solve and to bring the strengths of the Rules Enabling Act process to bear on any problems that might be found. Under that process, the Committees carefully examined and reexamined the issues, reviewed the pertinent case law and legal literature, and initiated and evaluated empirical research studies. The Committees' work led to the conclusions that: (1) there

was no evidence that discovery protective orders create any significant problem of concealing information about safety or health hazards from the public; (2) protective orders are important to litigants' privacy and property interests; (3) discovery will become more burdensome and costly if parties cannot rely on protective orders; (4) administering a rule that adds conditions before any discovery protective order could be entered would impose significant burdens on the court system, resulting in increased delay and costs for litigants; and (5) such a rule would have limited impact because much information gathered in discovery is not filed with the court and is not publicly available.

1. Proposed Legislation Amending Rule 26(c) of the Federal Rules of Civil Procedure

As part of its careful study of the issues, the Rules Committees asked the Federal Judicial Center (FJC) to undertake an empirical study on whether discovery protective orders issued in federal courts were operating to keep information about public safety or health hazards from the public. The FJC examined 38,179 civil cases filed in the District of Columbia, the Eastern District of Michigan, and the Eastern District of Pennsylvania from 1990 to 1992. The study showed that discovery protective orders were requested in about 6% of civil cases; most requests were made by motion; courts carefully reviewed such motions and denied or modified a substantial proportion of them; about one-quarter of the requests were made by party stipulations that courts usually accept; and most protective orders restricting parties from disclosing discovery material were entered in cases other than personal injury cases, in which public health and safety issues are most likely to arise.

Since the FJC study, the need for protective orders to maintain the confidentiality of highly sensitive personal and commercial information has only increased. The explosive growth in electronically stored information and the fact that most discovery is electronic, as well as the federal courts' adoption of electronic court filing systems that permit public remote electronic access to court files, have increased the risks of unduly imposing on privacy interests. Protective orders to safeguard against dissemination of highly personal and sensitive information are critical to both plaintiffs and defendants. If protective orders are restricted, litigation burdens are increased and some plaintiffs might abandon their claims rather than risk public disclosure of highly personal information. Section 1660(d) of the proposed legislation, which provides a rebuttable presumption that the interest in protecting certain personally identifiable information of an individual outweighs the public interest in disclosure, is inadequate reassurance. The proposed legislation would impose a cumbersome and time-consuming process that is much less likely to accurately identify and protect confidential and sensitive personal or proprietary information than current protective order practices. Litigants would be required to absorb the added costs and delays of the process and bear an increased risk of disclosure of sensitive information.

The need for protective orders for effective discovery management has also increased with the explosive growth in electronically stored information. Even relatively small cases often involve huge volumes of information. Relying on the ability to designate information as confidential, parties voluntarily produce much information without the need for extensive direct judicial supervision. If obtaining an enforceable protective order required item-by-item judicial consideration to

determine whether the information was relevant to the protection of public health or safety, as contemplated under the bill, that would create discovery disputes. Requiring courts to review information—which can often amount to thousands or even millions of pages—to make such determinations, and requiring parties to litigate and courts to resolve related discovery disputes, would impose significant costs, burdens, and delays on the discovery process. Such satellite litigation would increase the cost of litigation, lead to orders refusing to permit discovery into some information now disclosed under protective orders, add to the pressures that encourage litigants to pursue nonpublic means of dispute resolution, and force some parties to abandon the litigation.

The Committees' study revealed no significant problem of protective orders impeding access to information that affects the public health or safety. Close examination of the commonly cited illustrations has shown that in these cases, information sufficient to protect public health or safety was publicly available from other sources. And the case law shows that when parties file motions for protective orders, courts review them carefully and grant only the protection needed, recognizing the importance of public access to court filings. The case law also shows that courts reexamine protective orders if intervenors or third parties raise public health or safety concerns about them.

The Committees' careful study led to the conclusion that no change to the present protective-order practice is warranted. The Committees' conclusion is grounded in case law, studies, and analyses developed and reviewed over the past 15 years.

The Rules Committees also asked the FJC to do an extensive empirical study on court orders that limit the disclosure of settlement agreements filed in the federal courts. That study showed no need for legislation like S. 623. Both the discovery protective order and the settlement agreement studies have previously been provided to the Senate Judiciary Committee.[1]

2. Specific Concerns about S. 623

a. Section 1660(a)(1): The Scope of S. 623

S. 623 is narrower than some earlier protective-order bills because it is limited to cases in which the pleadings "state facts that are relevant to the protection of public health or safety." The language recognizes that most cases in the federal courts do not implicate public health or safety and should not be affected by the added requirements S. 623 would impose. But the provisions defining the scope of S. 623 are problematic. In many cases, it would not be possible for the court to determine by reviewing the pleadings whether S. 623 applies. The standard of "facts that are relevant to the protection of public health or safety" is so broad and indefinite that it will either sweep up many cases having little to do with public health or safety and impose on all these cases the costly and time-consuming requirements of S. 623, or require the parties and court to spend

[1] Additional copies can be obtained at:
http://www.fjc.gov/public/pdf.nsf/lookup/0029.pdf/$file/0029.pdf;
http://www.cklawreview.com/wp-content/uploads/vol81no2/Reagan.pdf;
http://www.fjc.gov/public/pdf.nsf/lookup/sealset3.pdf/$file/sealset3.pdf.

extensive time and resources litigating whether the statute applies.

b. Section 1660(a)(1)(A) and (B): The Procedure for Entering a Discovery Protective Order

Once an action is identified as one that based on the pleadings falls under S. 623, the requirement that the court make independent findings of fact before issuing a protective order in discovery is triggered. This requirement is very similar to prior protective-order bills. The Committees have consistently opposed those bills because the procedure they require would delay discovery, increase motions practice, and impose significant and unworkable new burdens on lawyers, litigants, and judges. S. 623 raises the same concerns.

In many cases, parties are unwilling to begin exchanging information in discovery until an enforceable protective order is entered. The vital role protective orders play in effective discovery management is well recognized. The information the parties exchange in discovery often includes highly sensitive personal and private information or extremely valuable confidential information. Plaintiffs as well as defendants have discoverable information that must be protected from public dissemination. And discoverable private or confidential information is often not just in the parties' hands, but may also be held by nonparties such as witnesses, coworkers, patients, customers, and many others. The internet has made it much more difficult to protect private and confidential information and has increased the importance of protective orders.

Protective orders avoid delay and cost by allowing the parties to exchange information in discovery that they would not exchange otherwise without objection or motion, hearing, and court order. The requesting party's chief interest is to get discovery produced as quickly and with as little expense and burden as possible. Protective orders serve that interest by allowing the parties to exchange information—with electronic discovery, in volumes that are often huge—without time-consuming, costly, and burdensome pre-production motions and hearings. S. 623 would frustrate the role of protective orders and would make discovery even more burdensome, time-consuming, and expensive than it already is.

The language of the proposed legislation, as in similar prior bills, calls for a procedure under which no protective order can issue unless and until: (1) the party seeking the order designates all the information that would be produced in discovery subject to restrictions on disclosure; (2) the judge reviews all this information to determine whether any of it is relevant to the protection of public health or safety; (3) if any of the information is determined to be relevant to the protection of public health or safety, the judge determines whether any of that information is subject to a specific and substantial interest in maintaining its confidentiality; (4) the judge then determines whether the public interest in the disclosure of any information about public health or safety hazards is outweighed by that interest; and (5) the judge then decides whether the requested order is no broader than necessary to protect that confidentiality interest. The procedure in the proposed legislation would often require the judge's review to occur relatively early in the litigation, when the judge—who knows less about the case than the parties—is the least informed about the case. Information sought in discovery does not come with labels such as "impacts public health or safety"

or "raises specific and substantial interest in confidentiality." The judge will often simply be unable to tell whether the information she is reviewing is relevant to public health or safety. The judge also will not be able to tell whether there are "specific and substantial" privacy or confidentiality interests or how they should be weighed.

Even in cases in which the pleadings state facts relevant to public health or safety, much of the information sought and produced in discovery will not implicate public health or safety. Indeed, much of the information will not be important or even relevant to the case and will not be used by the parties in litigating the case. But there may be significant amounts of private or confidential information that should be protected from public disclosure. Under the procedure set out in S. 623, a lawyer representing a client—plaintiff or defendant—could not seek a protective order without first doing the expensive and time-consuming work of identifying specific information to be obtained through discovery that would be subject to disclosure restrictions. The judge could not issue a protective order to restrict the dissemination of any information obtained through discovery without making the independent findings of fact as to all that information. The effect would be delay, increased motions, and a reduction in timely, cost-effective access to justice.

In addition to causing delay and increased costs in the cases in which protective orders are sought, the procedure in S. 623 would cause delays in access to the federal court system in all cases. If judges have to look through every document produced in discovery in cases in which a protective order is sought in order to be able to make the findings required by the legislation, that will take time away from other pressing court business that litigants expect judges to take care of in a timely manner.

Comparing the procedure under S. 623 with the protective-order practice followed under current law in the federal courts further illustrates problems the legislation would create. Under current law, when the parties ask the court to enter a protective order before discovery begins, the language of Rule 26(c) and the case law require the court to find good cause for entering such an order, even if the parties agree on the terms. In most cases in which a discovery protective order is sought, the court makes the good-cause determination by examining the nature of the case and the types or categories of information that are likely to be exchanged in discovery. Neither the parties nor the court is required to conduct a time-consuming and burdensome pre-discovery review of all the information that will be produced. But such time-consuming and burdensome pre-discovery review is required by the language of S. 623, and will result in increased costs and delays.

The protective order typically sets up a procedure for the parties to designate documents exchanged in discovery—as opposed to filed with the court—as confidential, restricting their dissemination. Most protective orders include "challenge provisions" under which the receiving party or third parties may dispute the designation of a particular document or categories of documents as confidential. Even without such challenge provisions, the case law provides this right. Once the requesting party—who knows the case much better than the judge—gets the documents in discovery and can review them, that party may ask the court to permit the dissemination of documents designated as confidential, to modify the terms of the protective order, or to dissolve the protective order. Among the reasons for modification are the relevance of the documents to

protecting public health or safety and the need to bring them to the appropriate regulatory agency, and the desire to use the documents in related litigation. The court can effectively and efficiently consider such requests because they are focused on specific documents or information. With this focus, the court is able to resolve the requests by applying the factors the case law establishes, including the protection of public health or safety.

The procedures followed under current law meet the goals of S. 623, including in the relatively small number of cases filed in federal courts that implicate public health or safety, without the grave additional burdens, costs, and delays S. 623 would impose. In contrast, the procedure established under S. 623 is ineffective to meet its purpose and would create severe problems in discovery.

c. Section 1660(a)(1): The Application to Orders Restricting Access to Court Records

Section 1660(a)(1) imposes the same requirements on court orders that would restrict public access to court records that apply to orders restricting public access to information exchanged in discovery. This provision weakens the standard federal courts apply under current law for ensuring public access to documents that are filed with the federal court. Under current law, if the parties want to take the material exchanged in discovery and file it with the court, either with a motion or in an evidentiary hearing or at trial, a standard different and higher than the discovery protective-order standard applies before a court can seal it from public view. Courts recognize a general right of public access to all materials filed with the court that bear on the merits of a dispute. This presumption of access usually can be overcome only for compelling reasons; access is granted without the need to show a threat to public health or safety or any other particular justification unless a powerful need for confidentiality is shown. A lower good-cause standard applies to an order restricting disclosure of information exchanged in discovery but not filed with the court.

This distinction between the standard for protecting the confidentiality of information exchanged in discovery and the standard for filing under seal is critical. It reflects the longstanding recognition that while there is no right of public access to information exchanged between litigants in discovery, there is a presumptive right of public access to information that is filed in court and used in deciding cases. Courts require a much more stringent showing to seal documents filed in court than to limit dissemination of documents exchanged in discovery but never filed with the court.
Section 1660(a)(1) reduces the standard necessary to seal documents filed in court and collapses it into the standard necessary to restrict public dissemination of documents exchanged in discovery. As a result, S. 623 weakens the right of public access to court documents.

d. Section 1660(a)(2): Discovery Protective Orders After the Entry of Final Judgment

Section 1660(a)(2) would make a discovery protective order unenforceable after final judgment unless the judge makes separate findings of fact that each of the requirements of (a)(1)(A) and (B) are met. The burden of proof provision in (a)(3) requires that the need for continuing

protection be demonstrated as to all the information obtained in discovery subject to the protective order. Under current practice, the protective order often continues in effect, subject to requests made by either parties or nonparties to release documents or information. Once a party or third party identifies documents or information for which disclosure is sought, the burden of proof is much clearer and efficiently applied. The court is able to effectively and efficiently determine whether the protective order should be modified or lifted because the focus is on specifically identified documents or information. This current practice is adequate to meet the purposes of S. 623 without the added burdens, delays, and costs the bill would add.

Section 1660(a)(2) would greatly add to the costs and burdens of conducting discovery because parties could not be confident that even the most sensitive information they produced would remain subject to the protective order provisions when the case ended. The great importance of limiting access to such highly confidential private information is evidenced by the frequent use in protective orders of "attorneys' eyes only" provisions, which preclude a receiving attorney from sharing certain information received in discovery even with her clients. Such provisions are frequently used in litigation involving complex technology. The parties involved in such litigation often require the return or destruction of their highly confidential and proprietary materials at the conclusion of litigation, to ensure that materials so confidential that they could not even be shared with the receiving attorney's client during the litigation remain confidential when the litigation ends. Such provisions are also used in many other cases in which highly sensitive and private information about both parties and nonparties is obtained in discovery. It is essential to the effective and efficient operation of discovery that litigants be able to rely on the continuing confidentiality of information produced, including after the case ends, subject to the right of others to ask the court to permit broader dissemination of specific information for reasons that could include relevance to public health or safety. S. 623 destroys the reliability that makes protective orders effective, with no evidence that such a step is needed.

e. The Provisions Relating to Orders Approving Settlement Agreements

Section 1660(a)(1) would prohibit a court from entering an order approving a settlement agreement that restricts the disclosure of information obtained through discovery, in a case in which the pleadings state facts that are relevant to the protection of public health or safety, unless the court makes the specified independent findings of fact. Section 1660(c)(1) would preclude a court from enforcing any provision of a settlement agreement in a case with such pleadings that restricts a party from disclosing the fact of settlement or the terms of the settlement (other than the amount of money paid), or that restricts a party from "discussing the civil action, or evidence produced in the civil action, that involves matters relevant to public health or safety," unless the court makes the specified independent findings of fact.

There are very few federal court orders approving settlement agreements. Settlements are generally a matter of private contract. Settlement agreements usually are only brought to a court for approval if the applicable law requires it, as in settlements on behalf of minors or absent class members. Similarly, federal courts are rarely called on to enforce settlement agreements. Unless the agreement specifically invokes a court's continuing jurisdiction or an independent basis for

jurisdiction applies, enforcement actions are generally brought in state courts. Because federal courts are rarely involved in approving or enforcing settlement agreements, the settlement provisions in S. 623 are an ineffective means of addressing the concerns behind the proposed legislation.

The extensive empirical study done by the FJC on court orders that limit the disclosure of settlement agreements filed in the federal courts and a follow-up study showed that in the few cases in which a potential public health or safety hazard might be involved and in which a settlement agreement was sealed by court order, the complaint and other documents remained in the court's file, fully accessible to the public. In these cases, the complaints identified the three most critical pieces of information about possible public health or safety risks: the risk itself, the source of that risk, and the harm that allegedly ensued. In many cases, the complaints went considerably further. The complaints, as well as other documents, provided the public with access to information about the alleged wrongdoers and wrongdoings, without the need to also examine the settlement agreement.

Based on the relatively small number of federal cases involving any sealed settlement agreement and the availability of other sources to inform the public of potential hazards in these few cases, the Rules Committees concluded that a statute restricting confidentiality provisions in settlement agreements is unnecessary and unlikely to be effective. S. 623 does not change these conclusions. Its primary effect is likely to be an added barrier to access to the federal courts by making it more difficult and cumbersome to resolve disputes, sending more disputes to private mediation or other avenues where there is no public access to information at all.

3. The Civil Rules Committee's Continued Work

In May 2010, the Civil Rules Committee sponsored an important conference on civil litigation at Duke University Law School. That conference addressed problems of costs, delays, and barriers to access at every stage ranging from pre-litigation to pleadings, motions, discovery, case-management, and trial. Many studies were conducted and many papers were prepared in conjunction with the conference.[2] It is worth noting that in all the studies conducted, the papers submitted, and the criticisms of and suggestions for improving the present system, no one raised problems with protective orders or orders limiting access to settlement agreements filed with the federal courts. This further underscores the lack of any need for legislation.

The Civil and Standing Rules Committees are deeply committed to identifying problems with the federal civil justice system that can be addressed by changes to the Federal Rules of Civil Procedure, and to making those changes through the process Congress established—the Rules Enabling Act. As part of that process, the Civil Rules Committee is continuing to monitor the case law under Rule 26(c) to ensure that it is not operating to prevent public access to important information about public health or safety. A memorandum has been prepared setting out the case law in every circuit on entering protective orders, modifying protective orders, and entering sealing

[2] The wide array of papers prepared for the conference are available on the conference's website at http://civilconference.uscourts.gov.

orders. The case law set out in the memo shows that courts are attuned to the public interest and have developed procedures for addressing the need to produce discovery materials to other litigants and agencies. The memo on protective order case law is available online.[3] The Advisory Committee continues to monitor the case law and protective order practice to ensure that rule amendments are not needed.

The Rules Committees very much appreciate the opportunity to express our views and share our concerns. If it would be useful, we are available to discuss these issues. Thank you for your consideration and for the continued dialogue on improving the system of justice in our federal courts.

Sincerely,

Lee H. Rosenthal
United States District Judge
Southern District of Texas
Chair, Committee on Rules
of Practice and Procedure

Mark R. Kravitz
United States District Judge
District of Connecticut
Chair, Advisory Committee
on Civil Rules

cc: Republican Members, Judiciary Committee

Identical letter sent to: Honorable Patrick J. Leahy

[3] The memo is available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Caselaw_Study_of_Discovery_Protective_Orders.pdf.

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12b-004038

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March 23, 2011

The Honorable Eugene R. Wedoff
Chairman, Advisory Committee on Bankruptcy Rules
Judicial Conference of the United States
Everett McKinley Dirksen United States Courthouse
219 South Dearborn Street
Chicago, IL 60604

Re: Advisory Committee on Bankruptcy Rules—Proposed Rule 4009 to the Federal Rules of Bankruptcy Procedure

Dear Judge Wedoff,

I write to ask that the Advisory Committee on Bankruptcy Rules move forward on the petition submitted by the U.S. Chamber of Commerce's Institute for Legal Reform to improve the openness and transparency of 524(g) asbestos trusts and initiate a formal process to give full consideration to the proposal in the rules-consideration process.

The increased transparency that the proposed rule would provide will benefit Congress, the judiciary, and all stakeholders with an interest in how asbestos trusts operate. In particular, asbestos trust claimants would benefit greatly from access to detailed information about trust payments. Disclosure of this information should assist in eliminating duplicate or erroneous claims, which should in turn help ensure that asbestos trusts and solvent tort defendants have adequate funds to pay asbestos claimants when actually appropriate.

Another reason to support greater openness and transparency relates to the amount of funds in asbestos trusts. There are estimates from reputable private-sector sources that asbestos trusts administer approximately $30-$60 billion in total assets. In my view, the normal checks and balances that ensure oversight of such a large amount of assets are largely absent for asbestos trusts. As the *Kananian* case referenced in the Institute for Legal Reform's petition shows, the inability to provide adequate oversight has allowed unscrupulous actors to make contradictory claims. The proposal before the Advisory Committee would help to remedy this lack of oversight.

Finally, the proposal would further Congress's intent when it enacted section 524(g), the explicit purpose of which is to ensure that present and future asbestos claimants would be treated equally. Without full transparency, it is difficult for Congress to determine whether the law is working as intended. For this reason, last year, I asked the Government Accountability Office to review the transparency and openness of the asbestos trust system. Although that review is not yet completed, I expect it will be in time to help inform the Bankruptcy Rules Committee's process in evaluating the proposed rule should you move forward.

In sum, there is ample evidence that justifies moving forward on the proposal to bring greater transparency to the asbestos trust system. Accordingly, I encourage the Bankruptcy Rules Committee to undertake formal consideration of the Institute for Legal Reform's proposed rule. Thank you for considering my views on this important matter. If you wish to discuss this matter, the appropriate counsel on the Judiciary Committee whom you may contact is Zachary Somers, who may be reached at 202-225-2825.

Sincerely,

Lamar Smith
Chairman

cc: Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
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May 4, 2011

Honorable Lamar S. Smith
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Re: Advisory Committee on Bankruptcy Rules – Proposed Rule 4009

Dear Mr. Chairman:

Thank you for your letter of March 23, requesting that the Advisory Committee on Bankruptcy Rules move forward on a suggestion of the U.S. Chamber of Commerce's Institute for Legal Reform. The Institute's suggestion is for a bankruptcy rule involving asbestos trusts established under § 524(g) of the Bankruptcy Code. I am writing to let you know the status of the Advisory Committee's consideration of the suggestion.

The suggestion has been the subject of extensive consideration in the Advisory Committee. The Committee's Business Subcommittee was asked to conduct an initial review. The subcommittee recognized the serious nature of the request and the concerns that motivated it. At the same time, the subcommittee raised issues about whether the proposed rule might exceed the scope of federal rules of procedure. One of the issues raised was that asbestos trusts are established pursuant to confirmed plans in Chapter 11 cases, and the jurisdiction of the courts after plan confirmation is limited. *See, e.g.*, *Pettibone Corp. v. Easley*, 935 F.2d 120, 122 (7th Cir. 1991) ("Once the bankruptcy court confirms a plan of reorganization, the debtor may go about its business without further supervision or approval."). Accordingly, the subcommittee recommended that the Advisory Committee carefully consider the scope of its rulemaking authority and whether implementing the proposed rule might exceed the scope of bankruptcy jurisdiction under 28 U.S.C. § 1334(a) and (b). The subcommittee's preliminary review is reflected in a memorandum enclosed with this letter.

At the Advisory Committee's meeting held on April 8, 2011, the Institute's suggestion and the subcommittee's analysis were given careful attention. At that meeting, the Advisory Committee determined to continue its study by obtaining the views of interested parties—including those of the Institute and the National Bankruptcy Conference—on the question of the appropriateness of a procedural rule governing asbestos trusts. The Advisory Committee will give the suggestion further consideration at its fall meeting after hearing responses from interested parties.

If any further information would be helpful, please let me know. Thank you again for your support of the rulemaking process.

Sincerely,

Eugene R. Wedoff
United States Bankruptcy Judge
Northern District of Illinois
Chair, Advisory Committee on
Bankruptcy Rules

Enclosure

cc: Honorable John Conyers, Jr.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON BUSINESS ISSUES

RE: SUGGESTION FOR RULE REQUIRING QUARTERLY REPORTING BY § 524(g) TRUSTS

DATE: MARCH 10, 2011

The Institute for Legal Reform ("ILR"), an affiliate of the U.S. Chamber of Commerce, has submitted a suggestion (10-BK-H) for a new rule that is aimed at requiring "greater transparency in the operation of trusts established under 11 U.S.C. § 524(g)." In the chapter 11 case of an asbestos defendant,[1] § 524(g) authorizes the creation of, and channeling of liability to, a trust for the post-confirmation compensation of present and future claimants. According to a 2010 study by the RAND Corporation,[2] 54 asbestos bankruptcy trusts had been established through June 2010. ILR argues that there is a need for greater access to information about the operation of these trusts in order to prevent the payment of duplicate demands for trust payments, inaccurate or inconsistent demands, and avoidance of tort system allocation rules. The Advisory Committee chair referred this suggestion to the Subcommittee for a preliminary discussion of it during its conference call on March 2.

Part I of this memorandum provides some background information about asbestos bankruptcy trusts and § 524(g). Part II discusses ILR's proposed rule and implementing form and its arguments in support of the suggestion. Part III then discusses some issues regarding the

[1] According to §524(g)(2)(B)(i)(I), the provision applies to a debtor that "has been named as a defendant in personal injury, wrongful death, or property-damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products."

[2] LLOYD DIXON, GEOFFREY MCGOVERN & AMY COOMBE, RAND INST. FOR CIVIL JUSTICE, ASBESTOS BANKRUPTCY TRUSTS – AN OVERVIEW OF TRUST STRUCTURE AND ACTIVITY WITH DETAILED REPORTS ON THE LARGEST TRUSTS xii (2010).

suggestion that the Subcommittee has identified and would like to consider further. The Subcommittee agrees with the importance of ensuring that trusts established through the bankruptcy process operate with integrity and in a manner consistent with the intent underlying § 524(g). It has some doubts, however, about whether bankruptcy rulemaking is an appropriate means of achieving these goals. After considering the matter in greater depth, the Subcommittee will be in a position to report its recommendation to the Advisory Committee at its fall 2011 meeting.

I. Asbestos Bankruptcy Trusts and § 524(g)[3]

The first bankruptcy cases filed by asbestos manufacturers in order to resolve their tort liability were commenced in 1982 by UNR and by Johns-Manville. At the time of the filing of these chapter 11 cases, the use of bankruptcy to resolve such large numbers of personal injury claims was unprecedented. The courts in these cases therefore had to grapple with a variety of novel issues presented by the attempt to apply the Bankruptcy Code to the resolution of hundreds of thousands of unliquidated tort claims held by both present and future claimants. The ways in which these issues were resolved by the UNR and Johns-Manville cases laid the groundwork for the numerous asbestos bankruptcy cases that followed.

The reorganization plans that were eventually confirmed in both the UNR and Johns-Manville cases provided for the creation of a trust to assume and resolve the asbestos claims against the debtor. The asbestos trust was funded by stock in the reorganized company and other company assets, including insurance proceeds. A so-called channeling injunction was entered, which prevented present and future claimants from pursuing their claims against the reorganized

[3] The information in this section is derived primarily from the following sources: S. ELIZABETH GIBSON, FED. JUDICIAL CTR., JUDICIAL MANAGEMENT OF MASS TORT BANKRUPTCY CASES (2005); S. ELIZABETH GIBSON, FED. JUDICIAL CTR., CASE STUDIES OF MASS TORT LIMITED FUND CLASS ACTION SETTLEMENTS & BANKRUPTCY REORGANIZATIONS (2000).

debtor and related entities. Thus claimants' only means of obtaining compensation with respect to this particular defendant was to follow the procedures established for seeking compensation from the trust. This method of providing compensation to asbestos claimants permitted the deferral of individual claims resolution to the post-confirmation phase of the bankruptcy case.

In 1994 Congress amended the Bankruptcy Code to add § 524(g),[4] which to a large degree validated and wrote into the law for future asbestos bankruptcy cases the approach that the first asbestos bankruptcy cases had taken. This complex and detailed statutory provision specifies the circumstances under which a channeling injunction may be entered in an asbestos bankruptcy case. Among other things, it requires the creation of a trust to assume the debtor's liability for damages due to the exposure of claimants to the debtor's asbestos-containing products. This trust must be funded by securities of the debtor and by the debtor's obligation to make future payments, including dividends, to the trust. The trust is required to own a majority of the voting shares of the debtor company or a parent or subsidiary corporation, and it must use its assets to pay claims (or demands) of present and future tort claimants. In order for the channeling injunction to be valid, § 524(g) requires approval by at least 75% of the affected tort claimants who vote on the confirmation of the reorganization plan. Moreover, for the injunction to be enforceable against future claimants, the bankruptcy court must have appointed a legal representative to protect the rights of future claimants in the bankruptcy proceedings.

Trust documents governing the creation and operation of asbestos bankruptcy trusts and documents specifying the trust distribution procedure ("TDP") have either been incorporated into confirmed bankruptcy reorganization plans or have been separately approved by the bankruptcy court presiding over an asbestos debtor's reorganization case. The TDP specifies in detail the procedures that the trust will follow in paying asbestos personal injury claims that are submitted

[4] Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 111, 108 Stat. 4106, 4114 (1994).

to it. Because payment from the trust is a claimant's exclusive avenue for compensation on account of injury by the debtor – given the channeling injunction – a claimant must comply with the TDP. The payment procedures are designed to ensure that the trust retains sufficient funds to make equitable payments to all eligible present and future claimants.

Typically a TDP for an asbestos bankruptcy trust specifies several categories of asbestos-related diseases and a scheduled value for most of those types of diseases. The values range from several hundred dollars for a non-asbestosis, non-malignant asbestos disease to a hundred thousand dollars or more for mesothelioma. If a claimant submits satisfactory evidence of diagnosis and exposure to satisfy the announced criteria of a particular category, the trust will offer to liquidate the claim at the scheduled amount. That offer, however, does not mean that the claimant is paid the scheduled value. Instead, with the exception of the lowest dollar amount, the liquidated value is multiplied by a payment percentage (for example 10%) set by the trustees in order to ensure the retention of sufficient funds to pay future claims at approximately the same level. The trustees retain the right to periodically adjust the payment percentage as they deem appropriate.

If a claimant fails to satisfy the medical or exposure criteria or chooses not to accept the scheduled value, he or she may seek an individual evaluation of the claim. This process could result in the trust offering to liquidate the claim for an amount that is either greater or less than the scheduled value. Again, however, actual payment would be the product of the liquidated amount multiplied by the payment percentage.

A claimant who does not accept the liquidated amount offered by the trust generally may seek either binding or non-binding arbitration. If non-binding arbitration is chosen and the result is not accepted, the claimant may at that point bring a lawsuit against the trust in the tort system.

The payment percentage is applicable to any judgment that is rendered, and additional restrictions may apply to the timing of payment of such judgments.

Courts presiding over asbestos and other mass tort bankruptcy cases have continued to exercise post-confirmation jurisdiction over proceedings involving or affecting the trust that was established to pay the tort claims. Among the actions of this type that bankruptcy courts have taken are the removal of trustees, limitation of fees for claimants' attorneys, entry of orders governing procedures for litigated and arbitrated claims against the trust, interpretation of confirmed plans and confirmation orders, enforcement of channeling injunctions, oversight of continued funding of the trust, receipt of annual reports and financial statements of the trust, and settlement of accounts of trustees.

II. ILR Suggestion

ILR has proposed that the following bankruptcy rule be adopted in order to make information about claims submitted and paid by asbestos bankruptcy trusts publicly accessible:

Rule 4009. Reports from Trusts Established Under Section 524(g)

> In addition to performing other duties prescribed by the Code and the rules, and subject to reasonable privacy safeguards, a trust established under Section 524(g) shall file periodic reports, available to the public and in a form prescribed by the Judicial Conference, on a quarterly basis. Such reports shall describe, with particularity, each demand for payment the trust received during the reporting period, including exposure history, as well as each amount paid for demands during the report period. Such reports shall not include confidential medical records or claimant social security numbers. If trust payments or demands are relevant to an action in any state or federal court, the trust

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established under Section 524(g) shall provide information related to demands and payments to any party to such action, upon written request and subject to protective orders as appropriate.

ILR also proposes an official form for making the required reports. It would provide an attachment for listing demands presented to the trust during the reporting period, revealing for each demand the name of the party making it, the amount of the demand, and the factual basis for it, including exposure history. There would also be an attachment for demands paid, which would require disclosure for each payment of the party to whom it was made, the amount paid, and the factual basis for the payment and amount.

In support of its suggested new rule, ILR argues that greater transparency regarding the operation of asbestos bankruptcy trusts is needed. It notes concern about claimants making demands for payment from several trusts that rest on inconsistent exposure histories or constitute duplicate demands. This overclaiming, it argues, undermines the congressional desire for equitable treatment of present and future claimants, which purpose underlies § 524(g). Of special concern for ILR is the difficulty that defendants to tort actions brought by trust claimants have in obtaining information from the trusts about demands made by and amounts paid to the plaintiffs. The unavailability of this information undermines state rules for contribution and allocation of liability among tortfeasors and prevents defendants from introducing evidence of the plaintiffs' prior inconsistent allegations of the cause of their injuries.

ILR asserts that the Rules Enabling Act, 28 U.S.C. § 2075, provides authority for promulgation of the proposed rule because it authorizes the establishment of "rules that facilitate the operation of the bankruptcy laws so long as the rules do not modify existing substantive

rights." Suggestion at p. 2. Mere disclosure of information, it contends, does not impact any substantive right created by § 524(g).

III. Some Issues Raised by the Suggestion

The ILR proposal brings to the Advisory Committee an important issue – disclosure of information about the operation of asbestos bankruptcy trusts – that has recently attracted congressional attention. Representative Lamar Smith, chair of the House Committee on the Judiciary, has requested the GAO to undertake a study on asbestos bankruptcy trust claims and payments, so it is possible that there will be legislative efforts on this issue.

A threshold issue for the Advisory Committee is whether the problem described by ILR is properly addressed by the Bankruptcy Rules. The Subcommittee, in its preliminary discussions, identified three issues that it believes need to be resolved in order to determine what action to recommend regarding this proposal.

1. Does the proposed rule fall within the scope of the Supreme Court's rulemaking authority? The Bankruptcy Rules Enabling Act provides that the "Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under title 11. Such rules shall not abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2075. Existing bankruptcy rules, as well as some pending amendments, require the disclosure of various types of information by parties participating in bankruptcy cases. The rule proposed by ILR, however, would operate after a chapter 11 plan is confirmed and would apply to entities that, although created through the reorganization process, act outside the contours of a bankruptcy case. The Subcommittee noted in particular the last sentence of the proposed rule, which would require § 524(g) trusts to provide information upon written request to parties in state or federal court actions. Members of the Subcommittee were

concerned that mandating discovery in tort and other non-bankruptcy suits might exceed the authority to prescribe rules for "the practice and procedure in cases under title 11."

2. Would implementation of the proposed rule exceed the scope of bankruptcy jurisdiction? Bankruptcy jurisdiction, whether exercised by a district or a bankruptcy judge in the first instance, extends to "all cases under title 11 [and] all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(a), (b). While this conferral of jurisdiction has spawned much litigation, its scope is especially uncertain in the post-confirmation phase of a chapter 11 case. It is generally recognized that the bankruptcy court's jurisdiction does not cease in its entirety upon plan confirmation, but it does decrease at that point. *See, e.g.,* Binder v. Price Waterhouse & Co. (*In re* Resorts Int'l, Inc.), 372 F.3d 154, 165 (3d Cir. 2004). The Third Circuit held that the test for whether the bankruptcy court retains jurisdiction after confirmation is "whether there is a [sufficiently] close nexus to the bankruptcy plan or proceeding." *Id.* at 166. It went on to explain that "[m]atters that affect the interpretation, implementation, consummation, execution, or administration of the confirmed plan will typically have the requisite close nexus." *Id.* at 167.

Bankruptcy courts that have confirmed plans in asbestos bankruptcies that created trusts under § 524(g) have continued to exercise jurisdiction in the case to receive annual reports and accounts from the trustees. In the Eagle-Picher asbestos bankruptcy case,[5] for example, the plan was confirmed in November 1996. A recent check of the docket in that case showed that Judge Perlman entered an order on June 10, 2010, approving the trustees' annual report and account for the 2009 calendar year and releasing the trustees from further liability for that period. The annual report and account, which was accompanied by audited financial statements, provided a summary of the claims processed and amounts paid to date and during 2009, as well as

[5] Consolidated Case No. 1-91-10100 (Bankr. S.D. Ohio).

information about trust and asset management. Of relevance to the ILR suggestion, the Eagle-Picher trust report stated that during 2009 the trust had responded to approximately 459 subpoenas that sought claims filing information. This information, it said, was sought primarily by non-asbestos defendants. The trust stated that it "did not divulge any medical information or trust settlement amounts in responding to the subpoenas." Annual Report and Account at p. 5.

Courts have provided relatively little explanation of the basis of continuing jurisdiction over the asbestos trusts. The exercise of that jurisdiction may be based on the view that the court that approved the creation and operating procedures of the trust has jurisdiction to provide continuing oversight of its operation. Even so, the Subcommittee questioned whether the existence of jurisdiction to provide an annual accounting necessarily extends to receipt of all of the information that the proposed rule would require. The resolution of that issue leads to the final question identified by the Subcommittee.

3. Is there a bankruptcy need for the quarterly reporting of the information sought by ILR? Two reasons are put forth for the need for greater disclosure by asbestos bankruptcy trusts: (1) ensuring the integrity of the trust payment system, and (2) enabling defendants in tort actions to determine whether the plaintiff has already received payment for the injury being alleged and whether the plaintiff has made inconsistent claims of exposure or causation.

As for the first goal, it is not clear to the Subcommittee that the quarterly reporting sought by ILR to each court that has approved the creation of a trust will provide a mechanism for rooting out improper claim payments. The mere fact that one person has sought and received payment from several trusts does not reveal impropriety. Many asbestos claimants were exposed to several different manufacturers' asbestos products, and they generally are paid less than 100% of their damages from any trust. It would be difficult to determine, therefore, when a claimant

has received more than he or she is entitled to receive. Furthermore, it is unlikely that any bankruptcy judge would be in a position to compare the various reports that are filed over time with numerous courts to determine if there have been inconsistent allegations or overpayments.

With respect to the second goal, the Subcommittee was concerned that it is beyond the scope of the bankruptcy court's responsibilities to serve as a repository of information merely for use in non-bankruptcy litigation. The bankruptcy court does not need information at the proposed level of detail in order to approve the trustees' report and account, and ILR does not suggest any use that the bankruptcy court will make the quarterly reports. It instead seems to be seeking to use the Bankruptcy Rules to mandate public disclosure of information that has been difficult or impossible to obtain.

To the extent that non-bankruptcy law allows a tort defendant to share liability with other tortfeasors or to offset against a judgment any amounts that the plaintiff has already been paid for the same injury, the Subcommittee agreed that there should be a way to discover this information. But if discovery tools in the tort litigation have proven to be ineffective and it is determined that the trusts should be providing more information than they currently are, the Subcommittee's preliminary thought was that this may be a matter more appropriately addressed by a legislative solution – such as an amendment of § 524(g) that imposes additional requirements on trusts created under that provision.

TAB 3-B

Administrative Report will be oral

TAB 4

Report of the Federal Judicial Center will be oral

TAB 5A-E

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

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CHAIR

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CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

DATE: May 2, 2011

TO: Honorable Lee H. Rosenthal, Chair, Standing Committee on Rules of Practice and Procedure

FROM: Honorable Mark R. Kravitz, Chair, Advisory Committee on Federal Rules of Civil Procedure

RE: Report of the Civil Rules Advisory Committee

I. Introduction

The Civil Rules Advisory Committee met at the University of Texas School of Law on April 4 and 5, 2011. Draft Minutes of this meeting are attached.

Part I presents the Committee's recommendation to publish for comment revisions of Civil Rule 45.

Part II presents several matters on the Committee agenda for information and possible discussion. Part II A provides illustrations of approaches that might be taken to crafting a rule on preserving information for discovery. These illustrations have been prepared to stimulate discussion at a miniconference the Committee plans to hold in September. II B describes continuing study of pleading standards, including a report by the Federal Judicial Center. II C is an account of the work being done to carry forward the ideas and energy generated by the 2010 Litigation Review Conference at Duke Law School. Finally, II D describes two general questions posed by Rule 6(d):

the best approach to take when an inadvertent ambiguity has been created by applying Style Project principles in amending rule text, and whether the time has come to reconsider the decision to extend time periods by three days when service is made by e-mail or some of the other means that now support the extension.

Part III notes pending legislation that would directly amend or limit Civil Rules.

I ACTION ITEM: CIVIL RULE 45

Although separated from the comprehensive discovery provisions in Rules 26 to 37, Rule 45 covers both trial subpoenas and discovery subpoenas. The Advisory Committee and its Discovery Subcommittee have spent several years studying Rule 45. The work was prompted by suggestions submitted by the public, extended to a review of the pertinent literature, and generated further ideas within the Committee. This work produced a list of 17 different possible areas for amendment.

The Subcommittee and Committee were assisted by many representatives of the Bench and Bar. Careful analyses were submitted, for example, by the Magistrate Judges' Association, and by the ABA Section of Litigation. In addition, in October, 2010, the Subcommittee held a very informative miniconference on Rule 45.

The ideas drawn from these sources were winnowed down to a package that was unanimously endorsed by the Advisory Committee. Although there are a number of small changes included as well, the main features are:

Notice of service of subpoena: The 1991 amendments to Rule 45 introduced the "documents only" subpoena, and added a requirement in Rule 45(b)(1) that each party be given notice of a subpoena that requires document production. In 2007 this provision was clarified to direct that the notice be provided before the subpoena is served.

As it examined Rule 45 practice, the Committee was repeatedly informed that many lawyers were not complying with this notice requirement, and that this failure caused problems fairly frequently. It concluded that the requirement should be moved to a more prominent position, and as a result the amendment package proposes that it be transferred to become Rule 45(a)(4), entitled "Notice to other parties."

The Committee also determined that modest improvements in the notice requirement were in order. Thus, proposed Rule 45(a)(4) directs that the notice include a copy of the subpoena; in this way other parties can learn what materials should be forthcoming under the subpoena, determine whether they want to seek additional materials, and perhaps conclude that there is a ground for resisting or seeking protection with regard to production of some materials. And the notice requirement is extended to trial subpoenas by striking the words that now limit it to subpoenas that

command production "before trial." The advantages of notifying the parties before the subpoena is served seem equally important for trial subpoenas.

On a number of occasions during consideration of the notice provision, attorneys argued that notice should also be required on one or more occasions after service. Various proposals along this line included requiring the party that served the subpoena to provide a description of what was produced, that it give notice when materials were produced, that it notify the other parties of any modifications of the subpoena negotiated with the person on whom it was served, and that it supply or provide access to the materials obtained. Variations of these suggestions were discussed during the Standing Committee meeting in January, 2011. After the January meeting, the ABA Section of Litigation urged that a second notice be added to the rule. Spurred by that proposal and the Standing Committee's discussion, the Discovery Subcommittee reexamined the question and decided to adhere
to its earlier conclusion that adding such a requirement would not be desirable. The matter was explored at the Advisory Committee's April meeting. The points examined earlier were re-examined. The robust discussion added the observation that the current rules provide an opportunity to alleviate any anticipated problems. Lawyers concerned about such access could include it in their Rule 26(f) plans, and ask the court to include provision for further notice or access in the scheduling order.

In all of these discussions, it has been agreed that the parties should cooperate in communicating about materials obtained pursuant to a subpoena and providing access to those materials. But each time it was concluded that adding a specific requirement to the rule would not be desirable. Often, production is handled on a rolling basis, and the timing and nature of the additional notice and access could prove difficult. Rather than handle this problem through a rule provision, it seemed that the more sensible solution would lie with the lawyers who received the initial notice; they could persist in seeking the materials from the party who served the subpoena, and perhaps contact the nonparty served with the subpoena. That effort should bear fruit, and adding further notice requirements to the rule might cause problems. It could introduce "gotcha" efforts on the eve of trial, when parties might argue that other parties' notice efforts were inadequate, and that the materials obtained by subpoena should therefore be excluded from evidence.

Ultimately, the Advisory Committee unanimously approved the notice provision.

Transfer of subpoena-related motions: The amendments continue to direct that motions to enforce or quash a subpoena, or to obtain a ruling on whether privilege protects material that was allegedly produced inadvertently, be made in the district where compliance with the subpoena is required, even when the underlying action is pending in a different district. But experience has shown that on occasion there are strong reasons to have some issues resolved by the judge presiding over the main action. That judge may already have ruled on the same or closely related issues, or the issues may directly impact management of the underlying action. Subpoenas may have been served or may be expected in a number of districts, raising a possibility of inconsistent resolution of issues bearing on all of them. On occasion, the issue raised regarding enforcement of a subpoena

may overlap with the merits of the underlying case so that a judge deciding whether to enforce the subpoena is, in effect, "deciding" part of the case itself.

The current rules do not absolutely require the court where the discovery is sought to shoulder the burden to decide all such issues when raised in connection with a disputed subpoena. Rule 26(c)(1) explicitly permits a person from whom discovery is sought to seek a protective order in the court where the underlying action is pending. If a motion for protection is instead filed in the district where the subpoena requires compliance, the matter may nonetheless be sent to the judge presiding over the underlying action. As recognized by the Committee Note to the 1970 amendments to Rule 26(c), "[t]he court in the district where the deposition is being taken may, and frequently will, remit the deponent or party to the court where the action is pending." "Given the clear language of Rule 26 and the Advisory Committee Notes, there is no question that a Rule 26 motion for a protective order may be transferred or remitted from a court with ancillary jurisdiction over a discovery dispute to the forum court in which the underlying action is pending." Melder v. State Farm Mut. Auto. Ins. Co., 2008 WL 1899569 (N.D. Ga., April 25, 2008) at *4. Authority to transfer a motion to enforce a subpoena is less clearly addressed in the current rule. Although there is some conflict in authority on that point, a respected treatise opines that it is "within the discretion of the district court that issued the subpoena to transfer motions involving the subpoena to the district where the action is pending." 9A C. Wright & A. Miller, Federal Practice & Procedure § 2463.1 at 520 (3d ed. 2008).

These amendments remove any uncertainty about authority to transfer to the court where the action is pending by adding Rule 45(f), which permits a court asked to rule on a motion under Rule 45 to transfer the motion. The standard for transfer has evolved as the Subcommittee and Advisory Committee have studied the issues. The basic objective is to ensure that transfer is a rare event. The proposed amendment authorizes transfer if the parties and the person subject to the subpoena consent to it, and directs that absent consent transfer is authorized only in "exceptional circumstances." The Committee Note fleshes out the sorts of circumstances that would support transfer, stressing that such circumstances would be rare.

Proposed Rule 45(f) also addresses additional matters that may be important when transfer is granted. Although the motion will usually be fully briefed by the time transfer is ordered, it directs that any lawyer admitted to practice in the district where the motion is filed may file papers and present argument in the court where the action is pending. In addition, when needed to enforce the order rendered by the court where the action is pending, the rule authorizes retransfer to the court where the motion was filed.

Parallel amendments to Rule 45(g) and Rule 37(b)(1) make clear that disobedience of a subpoena-related order entered after transfer is contempt of the court that entered the order and of the court where the motion was filed.

<u>Simplification of Rule 45</u>: Rule 45 is long and complicated. In part, that is because it seeks

to encompass in one rule all the pertinent discovery directions for subpoena practice that correspond to the topics covered for party discovery in Rules 26 through 37.

But some features of the rule provide further complications. The present rule presents a variety of challenges that do not arise in party discovery. It is necessary to determine which court should be the "issuing court," to find where the subpoena may be served, and to parse provisions located in several parts of the rule to determine where a person subject to a subpoena can be required to comply. Together, these features produce what the Subcommittee came to call the "three-ring circus" aspect of the rule.

Those complications in the rule were early recognized by thoughtful analysts. Evaluating the amended rule in 1991, Professor Siegel carefully sorted through the variety of sometimes competing provisions and concluded, with some vehemence, that "the rule comes off like a Tower of Babel," and that "it sometimes appears to require at least a college minor in mathematics just to figure out safely what court to issue the subpoena 'from' and where to effect its service." Siegel, Federal Subpoena Practice Under the New Rule 45 of the Federal Rules of Civil Procedure, 139 F.R.D. 197, 209, 214 (1991). For two decades, lawyers have struggled with these difficulties.

These amendments seek to simplify the 1991 rule to reduce those difficulties. Proposed Rule 45(a)(2) provides that the subpoena should issue from the court where the action is pending. Under the 1991 version, any lawyer admitted in that court could issue a subpoena in the name of any district court, even though that court would never learn that it had "issued" a subpoena unless a dispute led to a motion being filed before it as the "issuing court." The Committee Note accompanying the 1991 amendment recognized the reality of what it was doing: "In authorizing attorneys to issue subpoenas from distant courts, the amended rule effectively authorizes service of a subpoena anywhere in the United States by an attorney representing any party." This amendment recognizes the reality established in 1991 while removing the guessing game on which court's name should be entered at the top of the subpoena.

Proposed Rule 45(b)(2) removes the uncertainty about where a subpoena may be served; in place of a four-part provision in the current rule, the amended rule simply authorizes service "at any place within the United States." The rule is modeled on Fed. R. Crim. P. 17(e), which provides for nationwide service of subpoenas in criminal cases.

But unlike Criminal Rule 17(e), the amended rule does not purport to require a person subject to a subpoena to comply in the issuing court. Instead, new Rule 45(c) collects the provisions on place of compliance that were formerly located in a number of provisions of Rule 45 and simplifies them. The current provisions about place of compliance have contributed to a split in authority about whether parties and party officers can be required to travel more than 100 miles from outside the state to testify at trial. As discussed below, Rule 45(c) resolves that split.

More generally, Rule 45(c) simplifies the task of a lawyer who wants guidance about where compliance with a subpoena can be compelled. For example, while the current rule sometimes

requires that state law be consulted to answer this question, the amended rule does not. By gathering together the previously dispersed provisions on place of compliance and simplifying them, the amendments attempt to respond to the concerns voiced two decades ago by Professor Siegel.

At the same time, the amendments preserve protections for a nonparty subject to a subpoena. Rule 45(c) conforms very closely to the scattered provisions of the current rule regarding place of compliance, and the amendments direct that subpoena-related motions be filed in the district in which compliance may be required. Although Rule 45(f) adds authority to transfer those motions, that is permitted only in exceptional circumstances.

Trial subpoenas for distant parties and party officers: Present Rule 45(c)(3)(A)(ii) directs that a subpoena be quashed if it "requires a person who is neither a party nor a party's officer to travel more than 100 miles" to attend trial (except that a nonparty can be required to attend trial anywhere within the state if so authorized in the state's courts and undue expense would not be incurred). Rule 45(b)(2) — relating to the place of serving a subpoena — provides that it is "subject to" Rule 45(c)(3)(A)(ii).

These provisions have produced conflicting interpretations in the courts, sometimes between judges in the same district. One interpretation is that subpoenas may only be served and enforced within the boundaries permitted by Rule 45(b)(2), and that the additional protections of Rule 45(c)(3)(A)(ii) operate within those limitations. See *Johnson v. Big Lots Stores, Inc.*, 251 F.R.D. 213 (E.D. La. 2008) (holding that opt-in plaintiffs in a Fair Labor Standards Act action could not be compelled to travel more than 100 miles from a place outside the state to attend trial because they were not served with subpoenas in the state in accordance with Rule 45(b)(2)). Another interpretation is that the exclusion of parties and party officers from the protections of Rule 45(c)(3)(A)(ii) means that attendance at trial of these witnesses can be compelled without regard to the geographical limitations on serving subpoenas contained in Rule 45(b)(2). See *In re Vioxx Products Liability Litigation*, 438 F.Supp.2d 664 (E.D. La. 2006) (requiring an officer of the defendant corporation, who lived and worked in New Jersey, to testify at trial in New Orleans even though he was not served at a place within Rule 45(b)(2)).

The Committee has concluded that the 1991 amendments were not intended to create the expanded subpoena power recognized in *Vioxx* and its progeny. The Committee is also concerned that allowing subpoenas on an adverse party or its officers without regard to the geographical limitations of Rule 45(b)(2) — Rule 45(c) under the amended rule — would raise a risk of tactical use of a subpoena to apply inappropriate pressure to the adverse party. Officers subject to such subpoenas might often be able to secure protective orders against having to attend trial, but the motions would burden the courts and the parties. In addition, in many cases a party's other employees, not its officers, are the best witnesses about the matters actually in dispute in the case. To the extent that a party's or officer's testimony is truly needed, there are satisfactory alternatives to compelling their attendance at trial. See, e.g., Rule 30(b)(3) (authorizing audiovisual recording of deposition testimony); Rule 43(a) (permitting the court to order testimony by contemporaneous transmission).

These amendments are intended to restore the original meaning of the 1991 amendments and make clear that all subpoenas are subject to the geographical limitations of Rule 45(c), which are modeled on those of former Rule 45(b)(2).

Appendix seeking comment on providing authority to require trial testimony from a party or party officer: Although the Committee decided to reject the line of cases finding authority under the current rule to command testimony at trial from distant parties and party officers, some lawyers supported creating some limited authority to order such testimony in appropriate cases. In addition, some of the courts that regard the rule as preventing them from ordering a party or its officer to testify at trial seem to regard that as a poor policy choice.

Responding to these concerns, the Committee is providing an Appendix that invites public comment on whether it would be desirable to include explicit authority for such orders under limited circumstances. The Appendix makes clear that this is not the Committee's proposal, and that it is being presented only to obtain public comment. At the same time, if the public comment shows that the addition of this authority would be a good idea, including the Appendix in the published preliminary draft could obviate the need to republish.

The Appendix offers for comment a new Rule 45(c)(3), which would permit a judge, for good cause, to order a party or its officer to attend trial and testify. The Committee Note makes clear that the prime consideration of the good-cause inquiry is whether there is a real need for this person's testimony at trial. Even if there is, the court is directed to consider alternatives such as a videotaped deposition or testimony by simultaneous transmission from another location. In addition, the added provision would empower the court to order that the person be compensated for the expense incurred in attending trial.

Rule 45. Subpoena

(a) In General.

(1) ***Form and Contents.***

(A) ***Requirements – In General.*** Every subpoena must:

(i) state the court from which it issued;

(ii) state the title of the action~~, the court in which it is pending,~~ and its civil-action number;

(iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and

(iv) set out the text of Rule 45(d~~c~~) and (e~~d~~).

(B) *Command to Attend a Deposition – Notice of the Recording Method.* A subpoena commanding attendance at a deposition must state the method for recording the testimony.

(C) *Combining or Separating a Command to Produce or to Permit Inspection; Specifying the Form for Electronically Stored Information.* A command to produce documents, electronically stored information, or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out

in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(D) ***Command to Produce; Included Obligations.*** A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding person ~~party~~ to permit inspection, copying, testing, or sampling of the materials.

(2) ***Issuing*** ~~***Issued from Which***~~ ***Court.*** A subpoena must issue from the court where the action is pending. ~~as follows~~:

~~(A) for attendance at a hearing or trial, from the court for the district where the hearing or trial is to be held;~~

~~(B) for attendance at a deposition, from the court for the district where the deposition is to be taken; and~~

~~(C) for production or inspection, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.~~

(3) ***Issued by Whom.*** The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney also may issue and sign a subpoena if the attorney is authorized to practice in the issuing court. ~~as an officer of:~~

~~(A) a court in which the attorney is authorized to practice; or~~

~~(B) a court for a district where a deposition is to be taken or production is to be made, if the attorney is authorized to practice in the court where the action~~

48 ~~is pending.~~

49 ***(4)*** ***Notice to Other Parties.*** If the subpoena commands the production of documents,
50 electronically stored information, or tangible things or the inspection of premises,
51 then before it is served, a notice and a copy of the subpoena must be served on each
52 party.

53 **(b) Service.**

54 **(1)** ***By Whom and How; Tendering Fees; Serving a Copy of Certain Subpoenas.*** Any
55 person who is at least 18 years old and not a party may serve a subpoena. Serving
56 a subpoena requires delivering a copy to the named person and, if the subpoena
57 requires that person's attendance, tendering the fees for 1 day's attendance and the
58 mileage allowed by law. Fees and mileage need not be tendered when the subpoena
59 issues on behalf of the United States or any of its officers or agencies. ~~If the~~
60 ~~subpoena commands the production of documents, electronically stored information,~~
61 ~~or tangible things or the inspection of premises before trial, then before it is served,~~
62 ~~a notice must be served on each party.~~

63 **(2)** ***Service in the United States.*** A subpoena may be served at any place within the
64 United States. ~~Subject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any~~
65 ~~place:~~

66 ~~(A) within the district of the issuing court;~~

67 ~~(B) outside that district but within 100 miles of the place specified for the~~
68 ~~deposition, hearing, trial, production, or inspection;~~

69 ~~(C) within the state of the issuing court if a state statute or court rule allows~~

~~service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; or~~

~~(D) that the court authorizes on motion and for good cause, if a federal statute so provides;~~

(3) ***Service in a Foreign Country*.** 28 U.S.C. § 1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country.

(4) ***Proof of Service*.** Proving service, when necessary, requires filing with the issuing court a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

(c) Place of compliance.

(1) ***For a trial, hearing, or deposition*.** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if

(i) the person is a party or a party's officer; or

(ii) the person is commanded to attend a trial, and would not incur substantial expense.

(2) ***For other discovery*.** A subpoena may command:

(A) Production of documents, tangible things, or electronically stored

92 information at a place reasonably convenient for the person commanded to
93 produce.
94 **(B)** Inspection of premises, at the premises to be inspected.
95 **(d)~~(c)~~ Protecting a Person Subject to a Subpoena; Enforcement.**
96 **(1)** ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible
97 for issuing and serving a subpoena must take reasonable steps to avoid imposing
98 undue burden or expense on a person subject to the subpoena. The ~~issuing~~ court for
99 the district where compliance is required under Rule 45(c) must enforce this duty and
100 impose an appropriate sanction – which may include lost earnings and reasonable
101 attorney's fees – on a party or attorney who fails to comply.
102 **(2)** ***Command to Produce Materials or Permit Inspection.***
103 **(A)** *Appearance Not Required*. A person commanded to produce documents,
104 electronically stored information, or tangible things, or to permit the
105 inspection of premises, need not appear in person at the place of production
106 or inspection unless also commanded to appear for a deposition, hearing, or
107 trial.
108 **(B)** *Objections*. A person commanded to produce documents or tangible things
109 or to permit inspection may serve on the party or attorney designated in the
110 subpoena a written objection to inspecting, copying, testing, or sampling any
111 or all of the materials or to inspecting the premises – or to producing
112 electronically stored information in the form or forms requested. The
113 objection must be served before the earlier of the time specified for

compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the ~~issuing~~ court for the district where compliance is required under Rule 45(c) for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required*. On timely motion, the ~~issuing~~ court for the district where compliance is required under Rule 45(c) must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

~~(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person – except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;~~

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iii~~v~~) subjects a person to undue burden.

136 **(B)** *When Permitted*. To protect a person subject to or affected by a subpoena,
137 the ~~issuing~~ court for the district where compliance is required under Rule
138 45(c) may, on motion, quash or modify the subpoena if it requires:
139 **(i)** disclosing a trade secret or other confidential research, development, or
140 commercial information; or
141 **(ii)** disclosing an unretained expert's opinion or information that does not
142 describe specific occurrences in dispute and results from the expert's
143 study that was not requested by a party.~~; or~~
144 ~~(iii) a person who is neither a party nor a party's officer to incur substantial~~
145 ~~expense to travel more than 100 miles to attend trial.~~
146 **(C)** *Specifying Conditions as an Alternative*. In the circumstances described in
147 Rule 45(d~~c~~)(3)(B), the court may, instead of quashing or modifying a
148 subpoena, order appearance or production under specified conditions if the
149 serving party:
150 **(i)** shows a substantial need for the testimony or material that cannot be
151 otherwise met without undue hardship; and
152 **(ii)** ensures that the subpoenaed person will be reasonably compensated.
153 **(e~~d~~) Duties in Responding to a Subpoena.**
154 **(1)** ***Producing Documents or Electronically Stored Information.*** These procedures
155 apply to producing documents or electronically stored information:
156 **(A)** *Documents*. A person responding to a subpoena to produce documents must
157 produce them as they are kept in the ordinary course of business or must

158 organize and label them to correspond to the categories in the demand.

159 **(B)** *Form for Producing Electronically Stored Information Not Specified.* If a
160 subpoena does not specify a form for producing electronically stored
161 information, the person responding must produce it in a form or forms in
162 which it is ordinarily maintained or in a reasonably usable form or forms.

163 **(C)** *Electronically Stored Information Produced in Only One Form.* The person
164 responding need not produce the same electronically stored information in
165 more than one form.

166 **(D)** *Inaccessible Electronically Stored Information.* The person responding need
167 not provide discovery of electronically stored information from sources that
168 the person identifies as not reasonably accessible because of undue burden
169 or cost. On motion to compel discovery or for a protective order, the person
170 responding must show that the information is not reasonably accessible
171 because of undue burden or cost. If that showing is made, the court may
172 nonetheless order discovery from such sources if the requesting party shows
173 good cause, considering the limitations of Rule 26(b)(2)(C). The court may
174 specify conditions for the discovery.

175 **(2)** ***Claiming Privilege or Production.***

176 **(A)** *Information Withheld.* A person withholding subpoenaed information under
177 a claim that it is privileged or subject to protection as trial-preparation
178 material must:

179 **(i)** expressly make the claim; and

180 **(ii)** describe the nature of the withheld documents, communications, or
181 tangible things in a manner that, without revealing information itself
182 privileged or protected, will enable the parties to assess the claim.

183 **(B)** *Information Produced*. If information produced in response to a subpoena
184 is subject to a claim of privilege or of protection as trial-preparation material,
185 the person making the claim may notify any party that received the
186 information of the claim and the basis for it. After being notified, a party
187 must promptly return, sequester, or destroy the specified information and any
188 copies it has; must not use or disclose the information until the claim is
189 resolved; must take reasonable steps to retrieve the information if the party
190 disclosed it before being notified; and may promptly present the information
191 to the court for the district where compliance is required under Rule 45(c)
192 under seal for a determination of the claim. The person who produced the
193 information must preserve the information until the claim is resolved.

194 **(f) Transfer of Subpoena-related Motions.** When a motion is made under this rule in a court
195 where compliance is required, and that court did not issue the subpoena, the court may transfer the
196 motion to the issuing court if the parties and the person subject to the subpoena consent or if the
197 court finds exceptional circumstances. Then, if the attorney for a person subject to a subpoena is
198 authorized to practice in the court where the motion was made, the attorney may file papers and
199 appear on the motion as an officer of the issuing court. To enforce its order, the issuing court may
200 transfer the order to the court where the motion was made.

201 **(~~g~~e) Contempt.** The court for the district where compliance is required under Rule 45(c) -- or, after

202 transfer of the motion, the issuing court -- may hold in contempt a person who, having been served,
203 fails without adequate excuse to obey the subpoena or an order related to the subpoena. ~~A~~
204 ~~nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).~~

COMMITTEE NOTE[1]

Rule 45 was extensively amended in 1991. The general goal of these amendments is to clarify and simplify the rule. In particular, the amendments recognize the court where the action is pending as the issuing court, permit nationwide service of a subpoena, and collect in a new subdivision (c) the previously scattered provisions regarding place of compliance. These changes resolve a conflict that arose after the 1991 amendment about compelling a party or party officer to travel long distances to testify at trial; such testimony may now be required only as specified in new Rule 45(c). In addition, the amendments introduce authority in new Rule 45(f) for the court where compliance is required to transfer a subpoena-related motion to the court where the action is pending in exceptional circumstances or by agreement of the parties and the person subject to the subpoena.

Subdivision (a). As part of the simplification of Rule 45, subdivision (a) is amended to provide that a subpoena issues from the court in which the action is pending. Subdivision (a)(3) specifies that an attorney authorized to practice in the court in which the action is pending may issue a subpoena, which is consistent with current practice.

In Rule 45(a)(1)(D), "person" is substituted for "party" because the subpoena may be directed to a nonparty.

Rule 45(a)(4) is added to highlight and slightly modify a notice provision first included in the rule in 1991. The 1991 amendments added a requirement to Rule 45(b)(1) that prior notice of the service of a "documents only" subpoena be given to the other parties. Rule 45(b)(1) was clarified in 2007 to specify that this notice must be served before the subpoena is served on the witness.

The Committee has been informed that parties serving subpoenas frequently fail to give the required notice to the other parties. This amendment responds to that concern by moving the notice

[1] The following Committee Note was originally drafted before the rule language above was improved based on suggestions from the Standing Committee's style consultant. Some minor adjustments in Committee Note language may be necessary to take account of those style improvements.

requirement to a new provision in Rule 45(a), where it is hoped that it will be more visible. In addition, new Rule 45(a)(4) requires that the notice include a copy of the subpoena. This requirement is added to achieve the original purpose of enabling the other parties to object or to serve a subpoena for additional materials. The amendment also deletes the words "before trial" that appear in the current rule. Notice of trial subpoenas for documents is as important as notice of discovery subpoenas.

Parties desiring access to information produced in response to the subpoena will need to follow up with the party serving the subpoena or the person served with the subpoena to obtain such access. When access is requested, the party serving the subpoena should make reasonable provision for prompt access.

Subdivision (b). The former notice requirement in Rule 45(b)(1) has been moved to new Rule 45(a)(4).

Rule 45(b)(2) is amended to provide that a subpoena may be served at any place within the United States, thereby removing the complexities prescribed in prior versions of the rule.

Subdivision (c). Subdivision (c) is new. It has been added to collect the various provisions on where compliance can be required, and to simplify them. Unlike the prior rule, place of service is not critical to place of compliance. Although Rule 45(a)(1)(A)(iii) permits the subpoena to direct a place of compliance, that place must be selected under the provisions of Rule 45(c).

Rule 45(c)(1) addresses a subpoena to testify at a trial, hearing, or deposition. It provides that compliance is only required within 100 miles of where the person subject to the subpoena resides, is employed, or regularly conducts business in person. For parties and party officers, compliance may be required anywhere in the state in which the person resides, is employed, or regularly conducts business in person. Nonparty witnesses can be required to travel more than 100 miles within the state where they reside, are employed, or regularly conduct business in person only if "substantial expense would not be imposed on that person." When it appears that travel over 100 miles could impose substantial expense on the witness, one solution would be for the party that served the subpoena to pay that expense, and the court could condition enforcement of the subpoena on such payment.

These amendments resolve a split in interpretation of Rule 45 concerning subpoenas for trial testimony of parties and party officers. Compare In re Vioxx Products Liability Litigation, 438 F.Supp.2d 664 (E.D. La. 2006) (finding authority to compel a party officer from New Jersey to testify at trial in New Orleans), with Johnson v. Big Lots Stores, Inc., 251 F.R.D. (E.D. La. 2008) (holding that Rule 45 did not require attendance of plaintiffs at trial in New Orleans when they would have to travel more than 100 miles from outside the state). Rule 45(c)(1)(A) does not authorize a subpoena for trial to require a party or party officer to travel more than 100 miles from outside the state.

For other discovery, Rule 45(c)(2) directs that inspection of premises occur at the premises to be inspected, and that production of documents, tangible things, and electronically stored information occur at a place reasonably convenient for the producing person. The Committee is informed that under the current rule the place of production has not presented difficulties, and the flexibility of this provision is designed to ensure that it does not present difficulties in the future. For electronically stored information, for example, it may often be that the materials can be produced electronically. For documents and tangible things, the place for production must be reasonably convenient for the producing person. If issues about place of production arise, the party that served the subpoena and the person served with it should be flexible about a reasonable place for production, keeping in mind the assurance of Rule 45(d)(1) that undue expense or burden must not be imposed on the person subject to the subpoena. In some instances, it may be that documents or tangible things are located in multiple places and that producing them all in a single location would be unduly burdensome, but generally it is to be hoped that inspections at multiple locations can be avoided.

Subdivision (d). Subdivision (d) contains the provisions formerly in subdivision (c). It is revised to recognize the court where the action is pending as the issuing court, and to take account of the addition of Rule 45(c) to specify where compliance with a subpoena is required, which renders some provisions of the former rule superfluous.

Subdivision (f). Subdivision (f) is new. Under Rules 45(d)(2)(B), 45(d)(3), and 45(e)(2)(B), subpoena-related motions and applications are to be made to the court where compliance is required under Rule 45(c). Rule 45(f) provides authority for the court where compliance is required to transfer the motion to the court where the action is pending. It applies to all motions under this rule, including an application under Rule 45(e)(2)(B) for a privilege determination.

Subpoenas are essential to obtain discovery from nonparties. To protect local nonparties, local resolution of disputes about subpoenas is assured by the limitations of Rule 45(c) and the requirements in Rules 45(d) and (e) that motions be made in the court in which compliance is required under Rule 45(c).

Transfer to the court where the action is pending is sometimes warranted, however. If the parties and the person subject to the subpoena consent to transfer, Rule 45(f) provides that the court where compliance is required may do so. In the absence of such consent, the court may transfer in exceptional circumstances. Such circumstances will be rare, and the proponent of transfer bears the burden of showing that such circumstances are presented. Rule 45(d)(1) recognizes that nonparties subject to a subpoena should be protected against undue burden or expense; that consideration may often weigh heavily against transfer.

The rule authorizes transfer absent consent in "exceptional circumstances." A precise definition of "exceptional circumstances" is not feasible. Past experience suggests examples, however. On occasion the nonparty may actually favor transfer, and opposition to transfer may instead come from one of the parties to the underlying action, perhaps because that court has already

113 indicated a view -- or made a ruling -- on the issue raised in regard to the subpoena. More generally,
114 if the issue in dispute on the subpoena-related motion has already been presented to the issuing court
115 or bears significantly on its management of the underlying action, or if there is a risk of inconsistent
116 rulings on subpoenas served in multiple districts, or if the issues presented by the subpoena-related
117 motion overlap with the merits of the underlying action, transfer may be warranted. Other
118 exceptional circumstances may arise, but the rule contemplates that transfers will be truly rare
119 events.
120
121 If the motion is transferred, it should often be true that it has already been fully briefed, but
122 on occasion further filings may be needed. In addition, although it is hoped that telecommunications
123 methods can be used to minimize the burden a transfer imposes on nonparties, it may be necessary
124 for attorneys admitted in the court where the motion is made to appear in the court in which the
125 action is pending. The rule provides that if these attorneys are authorized to practice in the court
126 where the motion is made, they may file papers and appear in the court in which the action is
127 pending in relation to the motion as officers of that court.
128
129 After transfer, the court where the action is pending will decide the motion. If the court rules
130 that discovery is not justified, that should end the matter. If the court orders further discovery, it is
131 possible that retransfer may be important to enforce the order. One consequence of failure to obey
132 such an order is contempt, addressed in Rule 45(g). Rule 45(g) and Rule 37(b)(1) are both amended
133 to provide that disobedience of an order enforcing a subpoena after transfer is contempt of the
134 issuing court and the court where compliance is required under Rule 45(c). In some instances,
135 however, there may be a question about whether the issuing court can impose contempt sanctions
136 on a distant nonparty. If such circumstances arise, or if it is better to supervise compliance in the
137 court where compliance is required, the rule provides authority for retransfer for enforcement. It
138 is possible that a nonparty subject to such an order would, after retransfer, try to persuade the judge
139 in
140
141 the Rule 45(c) district to modify the order. But since that court originally transferred the motion to
142 the issuing court, instances of refusal to enforce the resulting order should be rare.
143
144 **Subdivision (g).** Subdivision (g) carries forward the authority of former subdivision (e) to
145 punish disobedience of subpoenas as contempt. It is amended to make clear that, in the event of
146 transfer of a subpoena-related motion, such disobedience constitutes contempt of both the court
147 where compliance is required under Rule 45(c) and the court where the action is pending. If
148 necessary for effective enforcement, Rule 45(f) authorizes retransfer after the motion is resolved.
149
150
151 The rule is also amended to clarify that contempt sanctions may be applied to a person who
152 disobeys a subpoena-related order, as well as one who fails entirely to obey a subpoena. In civil
153 litigation, it would be rare for a court to use contempt sanctions without first ordering compliance
154 with a subpoena, and the order might not require all the compliance sought by the subpoena. Often
155 contempt proceedings will be initiated by an order to show cause, and an order to comply or be held

156 in contempt may modify the subpoena's command. Disobedience of such an order may be treated
157 as contempt.
158

The second sentence of former subdivision (e) is deleted as unnecessary.

Conforming Amendment to Rule 37

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

* * * * *

1
2 **(b) Failure to Comply with a Court Order.**

3 **(1)** ***Sanctions Sought in the District Where the Deposition is Taken.*** If the court
4 where the discovery is taken orders a deponent to be sworn or to answer a
5 question and the deponent fails to obey, the failure may be treated as contempt of
6 court. If a deposition-related motion is transferred to the court where the action is
7 pending, and that court orders a deponent to be sworn or to answer a question and
8 the deponent fails to obey, the failure may be treated as contempt of either the
9 court where the discovery is taken or the court where the action is pending.
10

11 **(2)** ***Sanctions Sought in the District Where the Action is Pending.***

* * * * *

COMMITTEE NOTE

Rule 37(b) is amended to conform to amendments made to Rule 45, particularly the addition of Rule 45(f) allowing for transfer of a subpoena-related motion to the court where the action is pending. A second sentence is added to Rule 37(b)(1) to deal with contempt of orders entered after such a transfer. The Rule 45(f) transfer provision is explained in the Committee Note to Rule 45.

APPENDIX

New Rule 45(c) limits the geographic scope of the duty to comply with a subpoena in ways that eliminate the authority some judges found in the 1991 version of the rule to compel parties and party officers to testify at trial in distant fora. After consulting with practitioners and reviewing the relevant case law, the Committee concluded that the power to compel parties and party officers to testify at trial should not be expanded. Nonetheless, because some dissenting voices the Committee encountered during its consideration of these issues felt that in unusual cases there may be reason to empower the judge to order a distant party officer to attend and testify at trial, the Committee decided to seek public comment about adding such a power to the rules and to suggest rule language that could be used for that purpose.

This Appendix provides that language in the form of a new Rule 45(c)(3), which could be added to new Rule 45(c) proposed above by the Committee. The Committee invites comment on (a) whether the rules should be amended to include such power to order testimony, and (b) whether the following draft provision would be a desirable formulation of such power were it added to the rules. This is not a formal proposal for amendment, but instead an invitation to comment. If the public comment shows that this approach is strongly favored, the Committee will have the option of recommending it for adoption in substantially the form illustrated below without the need to republish for a further round of comment unless the testimony and comments suggest revisions that make republication desirable.

Rule 45. Subpoena

* * *

1 **(c)** **Place of compliance.**

2 **(1)** ***For a trial, hearing, or deposition.*** A subpoena may require a person to appear at

3 a trial, hearing, or deposition as follows:

4 **(A)** For a party or the officer of a party, [subject to the court's power under

5 Rule 45(c)(3),] within the state where the party or officer resides, is

6 employed, or regularly transacts business in person, or within 100 miles of

7 where the party or officer resides, is employed, or regularly transacts

8 business in person;

9

10 **(B)** For a person who is not a party or officer of a party, within 100 miles of
11 where the person resides, is employed, or regularly transacts business in
12 person; except that such a person may be required to attend trial within the
13 state where the person resides, is employed, or regularly transacts business
14 in person, if substantial expense would not be imposed on that person.

15

16 **(2)** ***For other discovery.*** A subpoena may require:

17 **(A)** Production of documents, tangible things, or electronically stored
18 information at a place reasonably convenient for the producing person.

19 **(B)** Inspection of premises, at the premises to be inspected.

20

21 **(3)** ***Order to party to testify at trial or to produce officer to testify at trial.***
22 Notwithstanding the limitations of Rule 45(c)(1)(A), for good cause the court may
23 order a party to appear and testify at trial, or to produce an officer to appear and
24 testify at trial. In determining whether to enter such an order, the court must
25 consider the alternative of an audiovisual deposition under Rule 30 or testimony
26 by contemporaneous transmission under Rule 43(a), and may order that the party
27 or officer be reasonably compensated for expenses incurred in attending the trial.
28 The court may impose the sanctions authorized by Rule 37(b) on the party subject
to the order if the order is not obeyed.

COMMITTEE NOTE

[This Note language could be integrated into the Note above were this provision added to the amendment package]

Subdivision (c)

* * * * *

Rule 45(c)(1)(A) places geographic limits on where subpoenas can require parties and party officers to appear and testify. These amendments disapprove decisions under the 1991 version of the rule that found it to authorize courts to require parties and party officers to testify at trial without regard to where they were served or where they resided, were employed, or transacted business in person. The amended provisions in part reflect concern that unrestricted power to subpoena party witnesses could be abused to exert pressure, particularly on large organizational parties whose officers might be subpoenaed to testify at many trials even though they had no personal involvement in the underlying events.

On occasion, however, it may be important for a party or party officer to testify at trial. New Rule 45(c)(3) therefore authorizes the court to order such trial testimony where a suitable showing of need is made. There is no parallel authority to order testimony by party witnesses at a "hearing," although in some cases a hearing may evolve into the trial on the merits.

The starting point in deciding whether to use the authority conferred by Rule 45(c)(3) is to determine whether there is a real need for testimony from the individual in question. The rule permits such an order only for good cause. The burden is on the party seeking the order to show that attendance of this specific witness is warranted. In evaluating that question, the court must consider the alternative of an audiovisual deposition or testimony by contemporaneous transmission. In some cases, the court may ask whether a different witness could be used to address the issues on which this witness would testify. The court should be alert to the possibility that a party may be attempting to place settlement or other pressure on the other party by seeking to force a busy officer to travel and to testify at trial.

Whether the witness is a party or the party's officer, the court's order is directed to the party. If the witness does not obey the order, the court may impose the sanctions authorized by Rule 37(b) on the party; the rule does not create authority to impose sanctions directly on a nonparty witness. In determining whether to impose a sanction for failure of a nonparty witness to appear and testify -- or which sanction to impose -- the court may consider the efforts the party made to obtain attendance of the nonparty witness at trial.

12b-004089

12b-004090

MEMORANDUM

DATE: December 15, 2010

TO: Discovery Subcommittee

FROM: Kate David

CC: Judge Mark Kravitz
Judge Lee H. Rosenthal
Professor Edward Cooper
John Rabiej

SUBJECT: Enforcing Subpoenas Nationwide

This memorandum addresses whether a rule can overcome jurisdictional issues that might arise when a court serves a subpoena in an out-of-state district. The Discovery Subcommittee is currently examining the possibility of amending Rule 45 to provide courts with the ability to serve subpoenas nationwide. The Discovery Subcommittee asked me to research whether a rule can constitutionally provide federal district courts with the ability to enforce subpoenas that are issued outside of the state where the district court is located. This memo summarizes my findings.

I. History of Limited Subpoena Power

From the beginning, subpoenas, inventions of the 14th Century English judicial system, had geographically limited enforceability which was tied to the jurisdiction of the issuing court. James B. Sloan and William T. Gotfried, *Eliminating the 100 Mile Limit for Civil Trial Witnesses: A Proposal to Modernize Civil Trial Practice*, 140 F.R.D. 33, 34 (1992) (citing Rhonda Wasserman, *The Subpoena Power: Pennoyer's Last Vestige*, 74 MINN. L. REV. 37, 43-46 (1989). At the time:

> [T]he trial process in England involved the selection of jurors qualified to serve by their being members of the community who either had personal knowledge of the matter brought before the tribunal or who could conduct an independent investigation of the incident. "Witnesses" as separate actors in the trial process were of lesser critical value than under modern justice systems.

Id.

In 1793, Congress enacted a statute enabling federal courts to issue subpoenas for trial witnesses residing within 100 miles from the site of the court. *Id.* at 35 (citing Act of March 2, 1973, ch. 22, § 6, 1 Stat. 333, 335 (1793)). In 1922, responding to protests by the Justice Department about its inability to assure the appearance and testimony of all necessary witnesses in actions against war materials contractors who had defrauded the United States, Congress amended the general subpoena statute to allow nationwide service of process, "upon proper application and good cause shown." *See id.* at 36 (citing 62 CONG. REC. 12,368 (Sept. 11, 1922) and Act of September 19, 1922, ch. 344, Pub. No. 310, 42 Stat. 848 (1921-23)).

Soon after, the Rules Enabling Act was passed, and the Federal Rules of Civil Procedure became effective as of 1938. *See id.* From the beginning, the Civil Rules incorporated the 100-mile-limit expressed in statute (thereby allowing service within 100 miles of the place of hearing or trial, regardless of state boundaries), and provided a general exception for other Acts of Congress expanding the court's ability to serve subpoenas. FED. R. CIV. P. 45(e)(1) (1934) ("A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is within 100 miles of the place of the hearing or trial specified in the subpoena; and, when a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place.").

Current Rule 45(b)(2) continues to impose the 100-mile-limit, despite the fact that Great Britain modernized its procedures in 1854, "to provide that in actions or suits pending in the courts of England, Ireland and Scotland, judges of those courts could compel the personal attendance at trial of witnesses by subpoena which could be served in any part of the United Kingdom." Sloan

and Gotfried, 140 F.R.D. at 36-37.

II. The Power To Authorize Nationwide Service

Unless expanded by Congress, the jurisdiction of district courts is limited to its territory. *See Robertson v. R.R. Labor Bd.*, 268 U.S. 619, 622 (1925) ("Under the general provisions of law, a United States District Court cannot issue process beyond the limits of the district"); *State of Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 467 (1945) ("Apart from specific exceptions created by Congress the jurisdiction of the district courts is territorial.").

Congress has the power to extend a district court's reach by authorizing nationwide service: "Congress clearly has the power to authorize a suit under a federal law to be brought in any inferior federal court. Congress has the power, likewise, to provide that the process of every District Court shall run into every other part of the United States." *Robertson*, 268 U.S. at 622; *see Eastman Kodak Co. of New York v. S. Photo Materials Co.*, 273 U.S. 359, 403-04 (1927) ("That Congress may, in the exercise of its legislative discretion, fix the venue of a civil action in a federal court in one district, and authorize the process to be issued in another district in which the defendant resides or is found, is not open to question."); *Coleman v. Am. Export Isbrandtsen Lines, Inc.*, 405 F.2d 250, 252 (2d Cir. 1968) ("Congress has power to provide that the process of every District Court shall run into every part of the United States....") (internal quotation omitted). As one court explained:

> [I]t is a matter of general agreement that the discretion of Congress 'as to the number, the character, [and] the territorial limits' of the inferior federal courts is not limited by the Constitution. Congress might have established only one such court, or a mere handful; in that event, nationwide service would have been a practical necessity clearly consonant with the Constitution. That it was considered expedient to establish federal judicial districts in harmony with state boundaries, did not alter the scope of legislative discretion in this regard, and in fact Congress has, on occasion, provided for nationwide service.

Briggs v. Goodwin, 569 F.2d 1, 9-10 (D.C. Cir. 1977), *rev'd on other grounds sub nom, Stafford v. Briggs*, 444 U.S. 527 (1980); *see also U.S. v. Union Pac. R.R. Co.*, 98 U.S. 569, (U.S. 1878) ("It would have been competent for Congress to organize a judicial system analogous to that of England and of some of the States of the Union, and confer all original jurisdiction on a court or courts which should possess the judicial power with which that body thought proper, within the Constitution, to invest them, with authority to exercise that jurisdiction throughout the limits of the Federal government.").

A. Statutes Expanding Territorial Jurisdiction.

Congress has authorized nationwide service in "a few clearly expressed and carefully guarded exceptions to the general rule of jurisdiction *in personam*." *Robertson*, 268 U.S. at 624. Some early examples were described in *Robertson*:

> In one instance, the Credit Mobilier Act March 3, 1873, c. 226, § 4, 17 Stat. 485, 509, it was provided that writs of subpoena to bring in parties defendant should run into any district. This broad power was to be exercised at the instance of the Attorney Gengeral [sic] in a single case in which, in order to give complete relief, it was necessary to join in one suit defendants living in different States. *United States v. Union Pacific Railroad*, 98 U. S. 569, 25 L. Ed. 143. Under similar circumstances, but only for the period of three years, authority was granted generally by Act Sept. 19, 1922, c. 345, 42 Stat. 849 (Comp. St. Ann. Supp. 1923, § 1035), to institute a civil suit by or on behalf of the United States, either in the district of the residence of one of the necessary defendants or in that in which the cause of action arose; and to serve the process upon a defendant in any district. The Sherman Act (Act July 2, 1890, c. 647, § 5, 26 Stat. 209, 210 [Comp. St. § 8827]), provides that when 'it shall appear to the court' in which a proceeding to restrain violations of the act is pending 'that the ends of justice require that other parties should be brought before the court,' it may cause them to be summoned although they reside in some other district. The Clayton Act (Act Oct. 15, 1914, c. 323, § 15, 38 Stat. 730, 737 [Comp. St. § 8835n]), contains a like provision.

Robertson, 268 U.S. at 624.

Congress continues to enact statutes authorizing nationwide, and in some cases worldwide, service. *See, e.g.*, 15 U.S.C. § 22 (providing worldwide service of process in antitrust cases); 15 U.S.C. § 23 (providing nationwide subpoena power in antitrust cases); 15 U.S.C. § 49 (granting nationwide subpoena power to the Federal Trade Commission); 18 U.S.C. § 78aa (providing for nationwide service of defendants in securities cases); 18 U.S.C. § 1965(d) (providing for nationwide service of process in RICO cases); 25 U.S.C. § 1451(d) (providing for nationwide service on defendants in ERISA actions); 28 U.S.C. § 1695 (providing that, in derivative action, process may be served nationwide upon the corporation) 28 U.S.C. § 2361 (authorizing nationwide service in actions brought under 28 U.S.C. § 1335, statutory interpleader); 28 U.S.C. § 3004(b) (authorizing nationwide service in FDCPA actions); 29 U.S.C. § 521 (granting nationwide subpoena power to the Secretary of Labor); 29 U.S.C. § 1132(e)(2) (providing nationwide service of process in ERISA enforcement actions); 29 U.S.C. § 1451(d) (providing nationwide service in ERISA civil actions); 28 U.S.C. § 1692 (authorizing nationwide service of process in actions to recover property by a receiver appointed by the court); 38 U.S.C. § 1984(c) (authorizing nationwide service of subpoenas in suits involving claims for war risk insurance); 42 U.S.C. § 9613 (authorizing nationwide service in certain CERCLA actions); 47 U.S.C. § 409(f) (granting nationwide subpoena power to the Federal Communications Commission).

These provisions have been deemed to"comport with all constitutional requirements." *Board of Trustees, Sheet Metal Workers' Nat'l Pension Fund v. Elite Erectors, Inc.*, 212 F.3d 1031, 1035 (7th Cir. 2000) (collecting cases); *see Combs v. Adkins & Adkins Coal Co.*, 597 F.Supp. 122, 125 (D.D.C. 1984) ("The Congress may constitutionally authorize extraterritorial service of process.");

see also Federal Trade Comm'n v. Tuttle, 244 F.2d 605 (2d Cir. 1957) (holding that Federal Trade Commission Act's nationwide service provision is "not unconstitutional" and District Court for the Southern District of New York erred in refusing to compel Boston resident to comply with subpoena duces tecum); *Interstate Commerce Comm'n v. Brimson*, 154 U.S. 447, 473-77 (1894) (rejecting constitutional challenge to statute authorizing Interstate Commerce Commission to invoke the aid of any court of the United States in requiring the attendance of witnesses and the production of books and papers).

Courts around the country have repeatedly rejected arguments that a district court, after issuing service pursuant to a statute providing for nationwide or worldwide service, cannot exercise personal jurisdiction over an out-of-state defendant/witness. *See Busch v. Buchman, Buchman & O'Brien*, 11 F.3d 1255, 1258 (5th Cir. 1994) ("Given that the relevant sovereign is the United States, it does not offend traditional notions of fair play and substantial justice to exercise personal jurisdiction over a defendant residing within the United States."); *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1056 (2d Cir. 1993) ("[T]he district court has personal jurisdiction over the defendants insofar as the MPPAA includes a provision for nationwide service of process."); *see, e.g., Elite Erectors*, 212 F.3d at 1037 (holding that service pursuant to nationwide service statute provided Eastern District of Virginia with personal jurisdiction over Indiana company and resident "even on the assumption that neither has any 'contacts' with Virginia"); *Application to Enforce Admin. Subpoenas Duces Tecum of S.E.C. v. Knowles*, 87 F.3d 413 (10th Cir. 1996) (holding statute providing for worldwide service valid in connection with subpoenas duces tecum served in Nassau, Bahamas); *Bellaire Gen. Hosp. v. Blue Cross Blue Shield of Michigan*, 97 F.3d 822, 825-26 (5th Cir. 1996) (holding Southern District of Texas properly exercised personal jurisdiction over defendant

corporation operating exclusively within the State of Michigan when defendant was served pursuant to statute providing for nationwide service); *Fleming v. Montgomery Ward & Co.*, 114 F.2d 384 (7th Cir. 1940) (affirming Northern District of Illinois's order requiring Missouri plant to comply with subpoena issued pursuant to Fair Labor Standards Act); *Combs*, 597 F.Supp. at 125 (holding D.C. District Court had jurisdiction over Kentucky residents who were served pursuant to statute authorizing nationwide service of process).

There are also statutes giving certain courts nationwide jurisdiction. For example, the Court of Federal Claims has nationwide jurisdiction. *Scott Timber, Inc. v. United States*, 93 Fed. Cl. 498, 499 (Ct. Fed. Claims 2010); *see* 28 USC § 2505 ("Any judge of the United States Court of Federal Claims may sit at any place within the United States to take evidence and enter judgment."); *Union Pacific R.R.*, 98 U.S. at 603-04("The jurisdiction of the Supreme Court and the Court of Claims is not confined by geographical boundaries. Each of them, having by the law of its organization jurisdiction of the subject-matter of a suit, and of the parties thereto, can, sitting at Washington, exercise its power by appropriate process, served anywhere within the limits of the territory over which the Federal government exercises dominion."); *Sabella v. Sec'y of Dep't of Health & Human Servs.*, 86 Fed. Cl. 201, 205 n.2 (2009) ("the jurisdiction of the United States Court of Federal Claims is not limited to a particular geographic area within the United States."). "A concomitant aspect of that jurisdiction is the power to issue a subpoena requiring a witness to appear and testify at a trial to be held more, and in some instances considerably more, than 100 miles from the witness' residence." *Scott Timber*, 93 Fed. Cl. at 499.

The multidistrict litigation statute also authorizes federal courts to exercise nationwide personal jurisdiction. *Howard v. Sulzer Orthopedics, Inc.*, 382 Fed. Appx. 436, 442 (6th Cir. 2010)

("The MDL statute (28 U.S.C. § 1407) is, in fact, legislation 'authorizing the federal courts to exercise nationwide personal jurisdiction.'"); *see In re FMC Corp. Patent Litig.*, 422 F.Supp. 1163, 1165 (J.P.M.D.L. 1976) ("Transfers under Section 1407 are simply not encumbered by considerations of *in personam* jurisdiction and venue.").

Due process challenges to Section 1407 have been universally rejected. *See In re "Agent Orange" Prod.Liab.Litig. MDL No. 381*, 818 F.2d 145, 163 (2d Cir. 1987) ("Congress may, consistent with the due process clause, enact legislation authorizing the federal courts to exercise nationwide personal jurisdiction. One such piece of legislation is 28 U.S.C. § 1407 (1982), the multidistrict litigation statute.") (citations omitted); *see, e.g., Howard*, 382 Fed. Appx.at 442 (6th Cir. 2010) (rejecting Oklahoma plaintiff's due process challenge to jurisdiction of Ohio court exercising jurisdiction under § 1407); *In re Sugar Indus. Antitrust Litig.*, 399 F.Supp. 1397, 1400 (J.P.M.D.L. 1975) (per curiam) (rejecting due process challenge of "Eastern Defendants" to transfer from Eastern District of Pennsylvania to Northern District of California).

B. Rules Expanding Territorial Jurisdiction.

Territorial jurisdiction may also be extended by rule. *See Coleman*, 405 F.2d at 252 ("Since Congress has power 'to provide that the process of every District Court shall run into every part of the United States,' the Supreme Court as its delegate can provide that process shall be effective if served within 100 miles of the courthouse even if a state line intervenes....") (quoting *Robertson*, 268 U.S. at 622); *McGonigle v. Penn-Central Transp. Co.*, 49 F.R.D. 58, 62 (D. Maryland 1969) ("Nor is the validity of [the 100-mile bulge provision for federal service of process] drawn into question because it was enacted as a rule of procedure rather than a statute."); *see also Resolution Trust Corp. v. McDougal*, 158 F.R.D. 1, 2 (D.D.C. 1994) ("The Court may reach parties like Tucker who live

outside the jurisdiction only if it is authorized to do so by a federal statute, the local long-arm statute, *or the Federal Rules of Civil Procedure*.") (emphasis added).

As described above, the power to expand the territorial jurisdiction by rule has been exercised from the beginning. In civil cases, a district court's territorial jurisdiction has been extended to the 100-mile-limit, or further, when provided by statute. *See* FED. R. CIV. P. 45(b). And in criminal cases, Rule 17(e) authorizes district courts to exercise nationwide subpoena power: "A subpoena requiring a witness to attend a hearing or trial may be served at any place within the United States."[1]

The validity of these rules has long been accepted. In 1833, the Circuit Court of the District of Columbia noted that a federal court has "a right to send its subpoena into another district in all cases. In criminal cases to any distance; in civil, to the extent of one hundred miles. And such has been the unquestioned practice of this court ever since its establishment in 1801." *U.S. v. Williams*, 28 F. Cas. 647, 657 (D.C. Cir. 1833).

The original, 1938, Federal Rules of Civil Procedure also provided for service of defendants located beyond the district court's territory. Federal Rule of Civil Procedure 4(f) provided that "[a]ll service other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state." Challenges to the expansion of district court jurisdiction to allow service outside of the district have been universally rejected.

For example, in *Mississippi Pub. Corp. v. Murphree*, the Supreme Court rejected the

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[1] Bankruptcy Rule 7004(d) allows national service of process of "summons and complaint and all other process except a subpoena...." Courts have concluded that nationwide service of process under Rule 7004(d) is constitutional. *See In re Federal Fountain, Inc.*, 165 F.3d 600 (8th Cir. 1999) (en banc).

argument that Rule 4(f) could not authorize a district court to serve a defendant located in another district, where defendant was located in the southern district of Mississippi and was served by the District Court of the Northern District of Mississippi pursuant to former Rule 4(f). 326 U.S. 438, 439-40, 443 (1946). The Court first decided that Rule 4(f) was not inconsistent with Rule 82 of the Federal Rules of Civil Procedure, which provides that the rules "shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein." *Id.* at 443-45. The court explained:

> It is true that the service of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served. But it is evident that Rule 4(f) and Rule 82 must be construed together and that the Advisory Committee, in doing so, has treated Rule 82 as referring to venue and jurisdiction of the subject matter of the district courts as defined by the statutes, ss 51 and 52 of the Judicial Code, 28 U.S.C.A. ss 112, 113, in particular, rather than the means of bringing the defendant before the court already having venue and jurisdiction of the subject matter. Rule 4(f) does not enlarge or diminish the venue of the district court, or its power to decide the issues in the suit, which is jurisdiction of the subject matter, to which Rule 82 must be taken to refer. Rule 4(f) serves only to implement the jurisdiction over the subject matter which Congress has conferred, by providing a procedure by which the defendant may be brought into court at the place where Congress has declared that the suit may be maintained. Thus construed, the rules are consistent with each other and do not conflict with the statute fixing venue and jurisdiction of the district courts.

Id. at 444-45 (internal citation omitted); *see also Ransom v. Brennan*, 437 F.2d 513, 518 n.6 (5th Cir. 1971) ("Fed. R. Civ. P. 82 says that the Rules are not intended to affect the jurisdiction of the federal courts. But this relates only to subject matter jurisdiction rather than the means of bringing the defendant before the court."); *H & F Barge Co., Inc. v. Garber Bros., Inc.*, 65 F.R.D. 399, 405 (E.D. La. 1974) ("The term 'jurisdiction' as used in Rule 82 refers only to the subject matter jurisdiction

of the courts, not the method of exercising personal jurisdiction through service of process.”).

The Court next decided that Rule 4(f) was “in harmony” with the Rules Enabling Act:

> Undoubtedly most alterations of the rules of practice and procedure may and often do affect the rights of litigants. Congress’ prohibition of any alteration of substantive rights of litigants was obviously not addressed to such incidental effects as necessarily attend the adoption of the prescribed new rules of procedure upon the rights of litigants who, agreeably to rules of practice and procedure, have been brought before a court authorized to determine their rights. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 11-14, 655, 61 S.Ct. 422, 425-427, 85 L.Ed. 479. The fact that the application of Rule 4(f) will operate to subject petitioner’s rights to adjudication by the district court for northern Mississippi will undoubtedly affect those rights. But it does not operate to abridge, enlarge or modify the rules of decision by which that court will adjudicate its rights. It relates merely to ‘the manner and the means by which a right to recover ... is enforced.’ *Guaranty Trust Co. v. York*, 326 U.S. 99, 65 S.Ct. 1464, 1470. In this sense the rule is a rule of procedure and not of substantive right, and is not subject to the prohibition of the Enabling Act.

Murphree, 326 U.S. at 445-46.

Other courts have acknowledged that the Rules of Civil Procedure can constitutionally extend a district court’s reach beyond state boundaries. *See Quinones v. Pa. Gen. Ins. Co.*, 804 F.2d 1167, 1169, 1176 (10th Cir. 1986) (rejecting argument that Rule 4(f) was unconstitutional if interpreted so as to extend personal jurisdiction beyond a state’s boundaries); *Coleman*, 405 F.2d at 252 (“Since Congress has power to provide that the process of every District Court shall run into every part of the United States, the Supreme Court as its delegate can provide that process shall be effective if served within 100 miles of the courthouse even if a state line intervenes....”); *Jacobs v. Flight Extenders, Inc.*, 90 F.R.D. 676, 679 (E.D. Penn. 1981) (“It is clear that Congress can extend the territorial jurisdiction of a federal district court, regardless of state boundaries.”); *McGonigle*, 39 F.R.D. at 61-62 (“Given the power of federal Congress to extend, nationwide, the territorial

jurisdiction of a federal district court, regardless of state boundaries ... the constitutionality of the 100-mile bulge provision for federal service of process is, *a fortiori*, unquestionable."); *see also Diamond Healthcare of Ohio, Inc. v. Humility of Mary Health Partners*, 229 F.3d 448, 450 (4th Cir. 2000) ("Congress has authority constitutionally to permit service in federal court beyond any state's boundaries."); *Sprow v. Hartford Ins. Co.*, 594 S.W.2d 412, 416 (5th Cir. 1979) ("the 100 mile bulge provision has effectively expanded the territorial jurisdiction of a federal district court beyond state lines"); *Williams*, 28 F. Cas. at 656 (Each state, "by adopting the constitution of the United States," has given permission to the court of the United States to send their process into that state, "in all cases of which the judicial power of the United States has cognizance.").

These courts permit the exercise of jurisdiction over out-of-state defendants. *See, e.g.*, *Quinones*, 804 F.2d at 1172, 1178 (reversing trial court dismissal of third party complaint where third party resided and was served process in El Paso, Texas, within 100 miles of the United States District Courthouse in Las Cruces, New Mexico); *Coleman*, 405 F.2d at 252 (reversing trial court dismissal of third-party complaint filed in Southern District of New York, where third party defendant was served at its Philadelphia office, which was within 100 miles of the Southern District of New York); *Jacobs*, 90 F.R.D. at 679 (denying third party defendant's motion to dismiss plaintiff's complaint in Pennsylvania where third party defendant had minimum contacts with the "bulge area" in New Jersey); *McGonigle*, 49 F.R.D. at 61-62 (denying third party defendant's motion to dismiss where it was served in Pennsylvania, within the "100-mile bulge area" around the situs of the Maryland District Court).

C. Enforcing Subpoenas Nationwide

When a court serves a subpoena outside of the state in which it is located pursuant to a rule

or statute authorizing nationwide service, the court has the power to enforce the subpoena. *See Williams*, 28 F. Cas. at 654 ("The subpoena would be nugatory, if it could not be followed by an attachment; and it cannot be supposed that congress intended to authorize the court to issue a command, the obedience to which it could not enforce.").

The Supreme Court explained:

> There can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt. *United States v. United Mine Workers*, 330 U.S. 258, 330-332(1947) (Black and Douglas, JJ., concurring in part and dissenting in part); *United States v. Barnett*, 376 U.S. 681, 753-754 (1964) (Goldberg, J., dissenting). And it is essential that courts be able to compel the appearance and testimony of witnesses. *United States v. Bryan*, 339 U.S. 323, 331, 70 S.Ct. 724, 730, 94 L.Ed. 884 (1950).

Shillitani v. United States, 384 U.S. 364 (1966)); *accord Spallone v. United States*, 493 U.S. 265, 276 (1990).

A subpoena is enforceable in the court which issued it. *In re Certain Complaints Under Investigation*, 783 F.2d 1488, 1495 (11th Cir. 1986); *see* FED. R. CIV. P. 45(f) ("Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued."); FED. R. CRIM. P. 17(g) ("Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a United States magistrate."). "Once [the court's] authority is invoked by service of the subpoena, the court under whose seal the subpoena was issued must have jurisdiction to enforce its subpoena and vindicate its own process, as Fed. R. Civ. p. 45(f) and Fed. R. Crim. P. 17(g) recognize." *In re Certain Complaints Under Investigation*, 783 F.2d at 1496.

When authorized by statute, courts other than the issuing court may enforce a subpoena even

if the enforcing court is in another state. For example, 28 U.S.C. § 1407(b) authorizes an MDL judge to "exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated proceedings.'" This includes the power to enforce a subpoena or rule on a motion to quash a subpoena. *See In re Clients & Former Clients of Baron & Budd, P.C.*, 478 F.3d 670, (5th Cir. 2007) (per curiam) (holding that MDL court in the Eastern District of Pennsylvania had power to rule on a motion to quash subpoena issued through the United States District Court for the Southern District of Texas); *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Products Liability Litiagation*, No. 07-20156, 2009 WL 5195783, at *1 n.1 (E.D.Pa. Dec. 22, 2009) ("As the court presiding over the MDL, we have authority to enforce the subpoena issued out of the Southern District of California."); *In re Sunrise Sec. Litig*., 130 F.R.D. 560, 586 (E.D.Pa. 1989) ("[A] multidistrict judge may decide a motion to compel a non-party in other districts even if he or she is not physically situated in those districts."); *see also Howard*, 382 Fed. Appx. at 442 ("The MDL statute (28 U.S.C. sec. 1407) in, in fact, legislation 'authorizing the federal courts to exercise nationwide personal jurisdiction.'"). As one treatise explains:

> [Section 1407(b)] therefore authorizes the transferee district court to exercise the authority of a district judge in any district: The transferee court may hear and decide motions to compel or motions to quash or modify subpoenas directed to nonparties in any district. Though the statutory language refers to "pretrial depositions," the statute wisely has been interpreted to embrace document production subpoenas as well.

9 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 45.50[4], at 45-75 through 45-77 (Matthew Bender 3d ed. 2006) (footnotes omitted). This explanation was embraced by the Fifth Circuit in *Baron & Budd*, and is also supported "by the convincing analysis of myriad district courts." *Baron & Budd*, 478 F.3d at 672 (collecting cases).

III. Due Process Limits on Exercising Nationwide Personal Jurisdiction

While rules and statutes authorizing nationwide service of process confer a basis for jurisdiction, the exercise of such jurisdiction may be subject to basic due process limitations.

The United States Supreme Court has not yet defined Fifth Amendment due process limits on personal jurisdiction. *Peay v. BellSouth Med. Assistance Plan*, 205 F.3d 1206, 1211 (10th Cir. 2000); *see Omni v. Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 103 n.5 (1987) (plurality op.) (declining to address the constitutionality of the national contacts test); *Asahi Metal Industry Co. v. Superior Court of Cal.*, 480 U.S. 102, 113 n.* (same). And the circuit courts considering the issue have split over the scope of the limits imposed by the Fifth Amendment when jurisdiction is established via a nationwide service of process provision – some (Second, Fifth, Sixth, Seventh, Eighth, and Ninth) apply a pure national contacts approach and hold that due process is satisfied if the party has "minimum contacts" with the United States, while others (Fourth, Tenth, and Eleventh) consider minimum contacts plus whether a party would be unduly burdened if forced to appear or defend in an inconvenient forum.[2]

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[2] While all of the cases discussing Fifth Amendment due process limits on personal jurisdiction do so in the context of determining whether the court has personal jurisdiction over an out-of-state defendant, a number of cases recognize that due process also imposes a limit on personal jurisdiction over nonparty witnesses. *See, e.g. First Am. Corp. v. Price Waterhouse LLP*, 154 F.3d 16, 20 (2d Cir. 1998) (holding that service of a subpoena on a foreign nonparty physically present in the district satisfies due process); *In re Application to Enforce Admin. Subpoenas Duces Tecum of SEC v. Knowles*, 87 F.3d 413, 418 (10th Cir. 1996) (requiring that foreign nonparty subject to an administrative agency subpoena possess minimum contacts with the United States); *Ariel v. Jones*, 693 F.2d 1058, 1061 (11th Cir. 1982) (quashing a subpoena based on the nonparty's lack of contacts with the forum); *In re Jee*, 104 B.R. 289, 293 (Bankr. C.D. Cal. 1989) (acknowledging the need for personal jurisdiction over nonparty witnesses); *Elder-Beerman Stores Corp. v. Federated Dep't Stores, Inc.*, 45 F.R.D. 515, 516 (S.D.N.Y. 1968) (quashing document subpoena based on lack of contacts with the forum); *see also* 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 108.125 (3d ed. 2003) (stating that "[a] nonparty witness cannot be compelled to testify at a trial, hearing, or deposition unless the witness is subject to the personal jurisdiction of the court"). The burdens on a nonparty witness of testifying in a distant forum are arguably less than the burdens faced by a nonresident defendant. Rhonda Wasserman, *The Subpoena Power: Pennoyer's Last Voyage*, 74 MINN. L. REV. 37, 94-97 (1989); *see also Price Waterhouse*, 154 F.3d at 20 ("PW-UK is a non-party, but it is unclear which way that should cut; a person who is subjected to liability by service of process far from home may have better cause

A. Pure National Contacts Approach

Most circuits that have considered the issue have adopted the "pure national contacts approach" and hold that due process is satisfied when the party is served under a nationwide service of process provision and resides within the United States or has "minimum contacts" with the United States as a whole. *See, e.g.*, *Medical Mutual of Ohio v. deSoto*, 245 F.3d 561, 567 (6th Cir. 2001) (applying national contacts test); *Elite Erectors, Inc.*, 212 F.3d at 1035-36(same); *In re Federal Fountain, Inc.*, 165 F.3d 600, 601-02 (8th Cir. 1999) (en banc) (adopting national contacts test); *Bellaire General*, 97 F.3d at 825-826 (applying national contacts test); *Busch*, 11 F.3d at 1258 (holding due process satisfied when defendant resides within the United States); *United Liberty Life Ins. Co. v. Ryan*, 985 F.2d 1320, 1330 (6th Cir. 1993) (deciding that "minimum contacts" with United States satisfies due process); *Go-Video, Inc. v. Akai Electric Co., Ltd.*, 885 F.2d 1406, 1416 (9th Cir. 1989) (applying national contacts test); *Fitzsimmons v. Barton*, 589 F.2d 330, 333 (7th Cir. 1979) (deciding that "there can be no question but that the defendant, a resident citizen of the United States, has sufficient contacts with the United States to support the fairness of the exercise of jurisdiction over him by a United States court"); *Mariash v. Morill*, 496 F.2d 1138, 1143 (2d Cir. 1974) (explaining that "where, as here, the defendants reside within the territorial boundaries of the United States, the 'minimal contacts,' required to justify the federal government's exercise of power over them, are present."); *see also Matter of Marc Rich & Co., A.G.*, 707 F.2d 663, 667 (2d Cir.), cert. denied, 463 U.S. 1215 (1983) (holding that authority to enforce a federal grand jury subpoena depends upon appellant's contacts with the entire United States, not simply the state of New York).

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to complain of an outrage to fair play than one similarly situated who is merely called upon to supply documents or testimony.")

These courts reason that the test that developed in state litigation – whether a defendant has adequate contacts with the forum – related to the court's jurisdictional power over non-residents and that the same concern is not present when a federal court exercises jurisdiction over a United States resident. The *Elite Erectors* court explained:

> Linking personal jurisdiction to a defendant's "contacts" with the forum developed in state litigation. Due process limitations on adjudication in state courts reflect not so much questions of convenience as of jurisdictional power. Barrow, Alaska, is farther from Juneau than Indianapolis is from Alexandria, and travel from Barrow to Juneau is much harder than is travel from Indianapolis to Alexandria (there are no highways and no scheduled air service from Barrow to anywhere), yet no one doubts that the Constitution permits Alaska to require any of its citizens to answer a complaint filed in Juneau, the state capital, just as the United States confines some kinds of federal cases to Washington, D.C., on the eastern seaboard. Conversely Kentucky's proximity to southern Indiana (Louisville would be more convenient for residents of New Albany than tribunals in Indianapolis) does not permit Kentucky to adjudicate the rights of people who have never visited that state or done business there; its sovereignty stops at the border. Limitations on sovereignty, and not the convenience of defendants, lie at the core of cases such as *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985), and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980), and their many predecessors.
>
> No limitations on sovereignty come into play in federal courts when all litigants are citizens. It is one sovereign, the same "judicial Power," whether the court sits in Indianapolis or Alexandria. *Peay* did not deny this. Instead it relied on the observation in *Omni Capital*, 484 U.S. at 104, 108 S.Ct. 404, that restrictions on state adjudication enable litigants to preserve their liberty and property from arbitrary confiscation. No one doubts this; Congress could violate the due process clause by requiring all federal cases to be tried in Adak (the westernmost settlement in the Aleutian Islands), because transportation costs easily could exceed the stakes and make the offer of adjudication a mirage. But this principle is unrelated to any requirement that a defendant have "contacts" with a particular federal judicial district and does not block litigation in easy-to-reach forums. A defendant who lives in Springfield, in the territory of the United States District Court for the Central District of Illinois, may be

> required to defend in Chicago (part of the Northern District) without any constitutional objection on the ground of undue inconvenience - even if the defendant has never been to Chicago and has no "contacts" with the Northern District - just as Illinois could allocate the bulk of litigation among its citizens to Chicago (or require residents of Chicago to visit Springfield, where the Supreme Court of Illinois sits).

212 F.3d at 1036; *see also Federal Fountain*, 165 F.3d at 602 ("We think, in sum, that the fairness that due process of law requires relates to the fairness or the exercise of power by a particular sovereign and there can be no question that the defendant has sufficient contacts with the United States to support the fairness of the exercise of jurisdiction over him by a United States court.") (internal quotations omitted); *Mariash*, 496 F.2d at 1143 ("Indeed, the 'minimal contacts' principle does not, in our view, seem particularly relevant in evaluating the constitutionality of *in personam* jurisdiction based on nationwide, but not extraterritorial, service of process. It is only the latter, quite simply, which even raises a question of the forum's power to assert control over the defendant.")

B. Considering Fairness to Defendant

In addition to minimum contacts, when determining whether due process is satisfied, the Fourth, Tenth, and Eleventh Circuits consider whether the defendant would be unduly burdened or inconvenienced if forced to defend in an inconvenient forum. *See Peay*, 205 F.3d at 1212 ("[W]e hold that in a federal question case where jurisdiction is invoked based on nationwide service of process, the Fifth Amendment requires the plaintiff's choice of forum to be fair and reasonable to the defendant. In other words, the Fifth Amendment 'protects individual litigants against the burdens of litigation in an unduly inconvenient forum.'"); *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 626 (4th Cir. 1997) ("The Fifth Amendment's Due Process Clause not only limits the extraterritorial scope of federal sovereign power, but also protects the liberty interests of individuals

against unfair burden and inconvenience."); *Republic of Panama v. BCCI Holdings (Luxembourg)*, 119 F.3d 935, 947 (11th Cir. 1997) ("A defendant's "minimum contacts" with the United States do not, however, automatically satisfy the due process requirements of the Fifth Amendment. There are circumstances, although rare, in which a defendant may have sufficient contacts with the United States as a whole but still will be unduly burdened by the assertion of jurisdiction in a faraway and inconvenient forum.").

In *Republic of Panama*, the court emphasized that "it is only in highly unusual cases that inconvenience will rise to a level of constitutional concern" because "modern means of communication and transportation have lessened the burden of defending a lawsuit in a distant forum." *Id*. at 947-48. And it placed the burden on the defendant "to demonstrate that the assertion of jurisdiction in the forum will 'make litigation so gravely difficult and inconvenient that [he] unfairly is at a severe disadvantage in comparison to his opponent.'" *Id*. at 948 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985) (citations omitted)). If the defendant makes this showing, "jurisdiction will comport with due process only if the federal interest in litigating the dispute in the chosen forum outweighs the burden imposed on the defendant." *Id*. "In evaluating the federal interest, courts should examine the federal policies advanced by the statute, the relationship between nationwide service of process and the advancement of these policies, the connection between the exercise of jurisdiction in the chosen forum and the plaintiff's vindication of his federal right, and concerns of judicial efficiency and economy." *Id.*

Applying these standards, the *Republic of Panama* court held that the Southern District of Florida erred in granting defendants' motion to dismiss for lack of personal jurisdiction because there was no "constitutional impediment" to jurisdiction where defendants were "large corporations providing banking services to customers in major metropolitan areas along the eastern seaboard"

who were properly served under the RICO statute authorizing nationwide service of process, despite the fact that defendants may not have had significant contacts with Florida. *Id*. at 948. In reaching this conclusion, the court noted that "the fact that discovery for the litigation would be conducted throughout the world suggests that Florida is not significantly more inconvenient than other districts in this country." *Id*.

Similarly, in *ESAB Group*, the Fourth Circuit held that the Fifth Amendment's Due Process Clause "protects the liberty interests of individuals against unfair burden and convenience," (126 F.3d at 626), but recognized that "it is only in highly unusual cases that inconvenience will rise to a level of constitutional concern." *Id*. (quoting *Republic of Panama*, 119 F.3d at 947). The *ESAB Group* court decided that the South Carolina District Court could constitutionally exercise personal jurisdiction over a New Hampshire company and a New Hampshire/Florida resident because there was no evidence of "such extreme inconvenience or unfairness" to either defendant as would outweigh the congressional policy choice to allow nationwide service in RICO actions. *Id*. at 627.

In *Peay*, the Tenth Circuit also analyzed whether plaintiff's choice of forum would be "fair and reasonable" to defendant, so as to satisfy due process. *Peay*, 205 F.3d at 1212 ("Like the Eleventh Circuit, we discern no reason why the Fourteenth Amendment's fairness and reasonableness requirements 'should be discarded completely when jurisdiction is asserted under a federal statute.'")

Like the Fourth and Eleventh Circuits, the *Peay* court emphasized that the inconvenience would rise to a level of constitutional concern "only in highly unusual cases." *Id.* And concluded that the defendants' liberty interests would not be infringed if defendants were forced to litigate in Utah, because the *Peay* defendants (headquarted in Alabama and Georgia) were "large corporations operating throughout the southeastern United States" and administering a multi-state insurance plan

regulated by federal law who "rendered benefits in Utah." *Id*.

II INFORMATION ITEMS
A DISCOVERY: PRESERVATION AND SPOLIATION

Discovery of electronically stored information commanded great attention at the Duke Conference. In this realm, anxiety bordering on anguish arises from uncertainty as to the beginning, scope, and duration of the duty to preserve and the concomitant risk of sanctions for spoliation. The panel chaired by Gregory Joseph proposed a thoughtful list of elements to be captured in a civil rule addressing these problems. The task of translating these elements into a workable rule is formidable, perhaps impossible. But the problems are so important that it is necessary to do everything possible to explore possible solutions. The Committee and more particularly the Discovery Subcommittee began work immediately after the Conference.

Three rough sketches of possible approaches were prepared by the Discovery Subcommittee and considered by the Committee at the April meeting. The first seeks to provide specific guidance, defining preservation obligations in considerable detail. The second is similar in outline, but substitutes general obligations of reasonable behavior for detailed directions. The third focuses on sanctions, relying on backward inference to shape preservation obligations. Each sketch is designed to provoke discussion in the expectation that much more work likely will be required before the Committee can decide whether to recommend publication of a proposed rule. The Advisory Committee has approved the suggestion of the Subcommittee that a miniconference be held to pursue the work further. The conference will gather lawyers with perspectives on all sides of a variety of litigation categories, including staff attorneys in private and government organizations. It also will include technology experts in search of current information about the most efficient methods of preserving, searching, and utilizing electronically stored information. It will be held on September 9, a date chosen to enable the Subcommittee to develop new models for consideration at the November Committee meeting.

The materials considered at the April Committee meeting are set out below to illustrate the nature of the issues that must be addressed. It is not too early to provide guidance for the next steps of this work. Suggestions will be welcome.

PRESERVATION/SANCTIONS ISSUES

Since the November full Committee meeting, the Discovery Subcommittee has continued to study preservation and sanctions issues. This study has included a conference call in early February and a meeting in late February. In addition, a panel of experts discussed these issues during the January, 2011, meeting of the Standing Committee. That panel included two members of the Discovery Subcommittee and several others who were on the Duke E-Discovery Panel. The ideas discussed during the Standing Committee meeting were among those considered by the Subcommittee.

[The agenda materials included the following items in addition to this memorandum, omitted from this Report:

[Notes on Feb. 20, 2011, Subcommittee meeting

[Notes on Feb. 4, 2011, Subcommittee conference call

[Three-page summary of elements of possible preservation rule provided by Duke E-Discovery Panel

[Dec. 15, 2010, memorandum from Katharine David providing illustrative examples of preservation obligations found in a variety of federal and state statutes and ordinances. This memorandum resulted from research that also included a memorandum done by Andrea Kuperman on case law on preservation and sanctions in various circuits that was included in the agenda materials for the November, 2010, Committee meeting.]

At its meeting on Feb. 20, 2011, the Subcommittee discussed the most productive way of proceeding toward possibly recommending rule amendments to deal with preservation and sanctions issues. Although there was some initial discussion of the possibility of proceeding with a sanctions rule proposal immediately, the consensus ultimately was that it would be preferable to proceed more deliberately.

By way of background, as the Committee has discussed, there are significant rulemaking challenges for a rule that attempts overtly and solely to regulate pre-litigation preservation. A "back end" sanctions rule might not present the same difficulties that could arise with a "front end" preservation rule. But to the extent the concerns voiced by those who favor a preservation rule could be addressed in the sanctions context, it might be that such a rule could provide much benefit without raising questions about the scope of rulemaking authority. On the other hand, it could be that such a "backward looking" sanctions rule might itself raise concerns about whether it intruded too far into pre-litigation preservation decisions. As before, the significance of limitations on rulemaking authority remain somewhat uncertain.

At the same time, the Subcommittee is also quite uncertain about the real-life dynamics of preservation problems and about whether rules would really provide significant solace for those concerned with these problems. As a very general matter, it seems clear that many are concerned that preservation obligations may often seem far too broad, and that huge expense has resulted from that overbreadth, particularly because the standard for severe sanctions is unpredictable and inconsistent across the nation. But the reasons for the huge expenses, and the components of them, are less clear, as are the nature of measures that would relieve these pressures. At least some preservation-rule ideas seem initially to be quite general, and perhaps they would not provide the solace sought. Others may be so specific that they would be superseded by technological change or would be inapplicable in broad categories of cases.

Given this variety of concerns, the Subcommittee's conclusion was that it needs more knowledge, and that the way to gain that needed insight is to hold a conference before the Fall full Committee meeting so that it can report back to the Committee, building on the knowledge base the conference would provide. Ideally, therefore, this conference would occur long enough before the next full Committee meeting so that the Subcommittee can react to what it learns and present the initial fruits to the Committee. Then, based on the Committee's discussion in Fall, 2011, the Subcommittee would hope to have a rule proposal to present to the Committee during its Spring, 2012 meeting, perhaps in a form that would be ready for public comment.

The general idea for the conference is that it include an array of those experienced in preservation and general E-Discovery issues, including specialists in technical and technological issues. Well in advance of the conference, the Subcommittee would provide attendees with illustrations of rule-amendment ideas falling into three general categories. The order of these categories does not indicate their priority or any preference in the eyes of the Subcommittee:

> Category 1: Preservation proposals incorporating considerable specificity, including specifics regarding digital data that ordinarily need not be preserved, elaborated with great precision. Submissions the Committee has received from various interested parties provide a starting point in drafting some such specifics. A basic question is whether it is necessary (or really useful) to include such specifics in rules to make them effective in solving the problems reportedly resulting from overbroad preservation expectations. At least, they could create very specific presumptions about what preservation is necessary. Perhaps they could be equally precise about the trigger. It might be that any such precision would run the risk of being obsolete by the time that a rule became effective, or soon thereafter.
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> Category 2: A more general preservation rule could address a variety of specific concerns, but only in more general terms. It would, nonetheless, be a "front end" proposal including specifics about preservation in the form of directives about what must be preserved. Compared to Category 1 rules, then, the question would be whether something along these lines would really provide value at all. Are they too general to be helpful?
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> Category 3: This approach would address only sanctions, and would in that sense be a "back end" rule. It would likely focus on preservation decisions, making the most serious sanctions unavailable if the party who lost information acted reasonably. In form, however, this approach would not contain any specific directives about specific preservation issues. By articulating what would be "reasonable," it might cast a long shadow over preservation without purporting directly to regulate it. It could also be seen as offering "carrots" to those who act reasonably, rather than relying mainly on "sticks," as a sanctions regime might be seen to do.

The conference could be educational for the Committee by explaining how preservation issues arise in real-life practice. By addressing the various categories of rules described above, it could provide insights about which category seems most promising to produce helpful

consequences, and about the specific features of rules that seem likely to produce helpful or harmful consequences.

Against that background, the remainder of this memorandum introduces an initial set of drafts of the three categories of rule exemplars. These drafts are provided for illustrative purposes only -- they do not represent the Subcommittee's considered views, and are offered only for purposes of fostering discussion. These exemplars build in part on an early set of possible amendment ideas included in the agenda materials for the November, 2010, full Committee meeting. Some provisions in the Category 1 sketch closely resemble those in the Category 2 sketch because they are in some ways parallel. Footnotes raise a number of questions, but should be included only once even though they focus on rule-amendment ideas that recur later in the package.

Before turning to the specific exemplars, it seems worthwhile to reiterate the Subcommittee has reached no conclusion on whether rule amendments would be a productive way of dealing with preservation/sanctions concerns, much less what amendment proposals would be useful. The purpose of the proposed conference is to provide a basis for making such judgments.

CATEGORY 1

Detailed and specific rule provisions

The concept behind this category is that rules with specifics would be beneficial. A key consequence of having such rules is that they can apprise parties about what they must do in ways that are very specific, providing a level of guidance that more general rules would not. But at the same time, this specificity may produce serious costs if it means that anything not specifically provided for is either beyond regulation or never required. Coupled with these concerns are concerns about transitory terms and technologies. To the extent the specifics are likely not to be important in five or ten years, or that other factors will be equally or more important, they may not be reasonable choices for rules that could not go into effect until the end of 2014 and that cannot be amended in less than three years.

Rule 26.1. Duty to Preserve Discoverable Information

(a) General Duty to Preserve. [In addition to any duty to preserve information provided by other law,][2] every person who reasonably expects [is reasonably certain][3] to be a party[4] to

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[2] The goal of this rule is not to supersede any existing duty to preserve information. A Committee Note would probably illustrate some of the kinds of sources of law that may bear on particular situations but also say that the illustrative listing was just that, and not complete.

An alternative could be to prescribe a duty to preserve and then assert that it supersedes all other duties. But those duties are numerous and emanate from many sources, both state and federal. Purportedly nullifying them would be a difficult business, particularly since much litigation does not end up in federal court, and in some instances could not constitutionally end up in federal court.

Indeed, the entire notion of supersession may strain the limits of the Rules Enabling Act process. Could a rule supersede state law on preservation as asserted in litigation in state courts, or by state administrative agencies? Even with regard to litigation in the federal courts, it may be that a Civil Rules cannot limit remedies provided by state law for violation of a state preservation requirements.

Given these uncertainties about the effect of a Civil Rules, it is not clear whether such a rule could provide the sort of reassurance about preservation that some hope it could provide.

[3] Would the bracketed phrase be preferable?

[4] Should this be limited to prospective parties? Could a Civil Rule impose a preservation duty on a third-party witness to an accident? Some states have recognized a tort of "spoliation" under some circumstances, but that suggests Enabling Act issues. On the other hand, we probably would

an action cognizable in a United States court[5] must preserve discoverable [electronically stored][6] information as follows.

(b) **Trigger for Duty to Preserve.** The duty to preserve discoverable information under Rule 26.1(a) arises only if a person becomes aware of one of the following facts or circumstances that would lead a reasonable person to expect to be a party to an action [cognizable in a United States court]:[7] [8]

(1) Service of a pleading or other document asserting a claim;[9] or

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say that, after service with a federal-court subpoena for specified information, such a third-party witness would have a duty to preserve the material requested by the subpoena even if it objected to producing it. The federal court's power to enforce subpoenas should reach that far.

[5] This formulation is modeled on Rule 27(a), which speaks of a petitioner who "expects to be a party to an action cognizable in a United States court" and of "persons whom the petitioner expects to be adverse parties."

[6] One question is whether this duty to preserve should be limited to electronically stored information. On the one hand, that appears to be the main focus of current concerns emphasized to the Committee. On the other hand, other material remains very important in much litigation, and many recent sanctions cases involve more traditional sources of information.

[7] At least one problem with this formulation is that it includes awareness that the action might be in a federal court. Since subdivision (a) imposes a duty only on those who reasonably expect to be a party of an action in federal court, saying that again here may be harmful; the only duty we are talking about here is the one in (a). For actions brought in state court, it seems fair to assume that some preservation duty would arise also, even though not based on this rule.

[8] The whole thrust of this approach is that it can identify in advance, at least by fairly specific category, all the events that would justify imposing a preservation duty. As noted below, including a "catch-all" final category may seem desirable because it would build in some flexibility, but that would seem to undermine the basic purpose of the rule. Absent that, however, one might expect fierce litigation about whether given events actually fall into one of the listed categories.

[9] This need not be a claim against this person, presumably. Under Rule 15(c)(1)(C), relation back may apply to a claim later asserted against an original nonparty who "should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity." See Krupski v. Costa Crociere, S.p.A., 130 S.Ct. 2485 (2010) (applying Rule 15(c)(1)(C) to uphold relation back of claim against added defendant). Indeed, in this situation the need to preserve may arise after the commencement of the action but long before the formal assertion of a

(2) Receipt of a notice of claim or other communication -- whether formal or informal -- indicating an intention to assert a claim; or

(3) Service of a subpoena or similar demand for information; or

(4) Retention of counsel, retention of an expert witness or consultant, testing of materials, discussion of possible compromise of a claim[10] or taking any other action in anticipation of litigation;[11] or

(5) Receipt by the person of a notice or demand to preserve discoverable information;[12] or

(6) The occurrence of an event that results in a duty to preserve information under a statute, regulation, contract, or knowledge of an event that calls for preservation

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claim against this party.

But the Rule 15(c)(1)(C) analogy is far from perfect. That rule is concerned primarily with limitations policies, not evidence preservation. Relation back does not involve a "duty" to preserve; it only preserves claims that would otherwise be barred by the passage of time when the party who could assert the limitations defense had adequate notice so that it should have taken precautions such as preserving its evidence. Put differently, the party who succeeds in obtaining relation back for an amended claim does not thereby also acquire a right under Rule 15(c) to argue that the other side therefore should have preserved the evidence it wants to use to support its added claim.

[10] This terminology is meant to track Evidence Rule 408.

[11] This provision draws on Rule 26(b)(3) for the general notion of "anticipation of litigation." It is worth noting that this is the one most likely to be important to plaintiffs, who do not usually await notice of a claim by others since they are the claimants. But whether the duty to preserve should arise at the same moment Rule 26(b)(3) protection attaches might be debated. Equating the inception of work product protection with the trigger for the preservation duty may mix two very different things.

[12] This is very open-ended. It does not purport to address the scope of the obligation to preserve, but only the trigger. It does not focus on the form of this notice, but does focus upon "receipt," which presumably means the demand is directed to the person to whom the duty will thereupon apply. It is worth noting, however, that delivery of such a notice to *A* might be regarded as sufficient to notify *B* of the need to preserve. At the same time, it could be that only a specific demand to preserve would be covered.

under the person's own retention program.[13]

[**(7)** Any other [extraordinary] circumstance that would make a reasonable person aware of the need to preserve information.][14]

(c) **Scope of Duty to Preserve.** A person whose duty to preserve discoverable information has been triggered under Rule 26.1(b) must take actions that are reasonable under the circumstances to preserve discoverable information [taking into account the proportionality

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[13] Including this provision might be said somewhat to undercut subdivision (a) above, for that provision was designed to specify a duty to preserve imposed by the rules without regard to what other sources of law require. Yet it may well be that failure to comply with other legal requirements would be a legitimate consideration for a preservation requirement imposed by the rules. To the extent subdivision (c) below is the sole definition of the scope of the duty to preserve, making another law (which may have a different scope) the trigger could cause difficulties. Would that trigger also determine the resulting scope of preservation?

The reference to the person's own retention program was not suggested by the Duke panel, but does appear in cases. See Kerkendall v. Department of the Army, 573 F.2d 1318, 1325-27 (Fed. Cir. 2009) (upholding adverse inference for destruction of documents by government agency in violation of its own retention program).

Whether this category of triggers should be included is debatable on its merits. Would including it tend to deter parties from adopting preservation rules of their own? If the sole focus of this rule is on the preservation obligation that flows from the prospect of litigation, why does an entirely unrelated preservation obligation -- even if imposed by rule or statute -- matter? At least arguably, it would seem odd that a party who violates a statutory or regulatory obligation and as a result deprives the opposing party if material evidence, can claim that it had no pertinent duty to preserve.

[14] Because this rule is designed as an all-encompassing catalog of the triggers that invoke the rule's preservation obligation, it may be important to include such a "catch-all" provision to cover situations that did not occur to the drafters. But to the extent the catch-all is really flexible, it may rob the entire rule of its supposed value in protecting the party that does not preserve. How is the potential litigant to know whether something that occurs fits into this provision?

Would it be helpful to add the word "extraordinary"? Without the qualifier, item (7) could swallow the others. But does the qualifier really help? Can the person possibly subject to a preservation duty determine what a court will later regard as satisfying this standard? And how about the sloppy manufacturer whose goods often fail. Is it "ordinary" for another failure to occur, leading to serious personal injury? If so, does that mean these events are not really "extraordinary"?

criteria of Rule 26(b)(2)(C)] {considering the burden or expense of preservation, the likely needs of the case, the amount likely to be in controversy, the parties' resources, the importance of the issues at stake in the action, and the potential importance of the preserved information in resolving the issues}[15] as follows:

(1) ***Subject matter***. *[Alternative 1]* The person must preserve information relevant to any claim or defense that might be asserted in the action to which the person might become a party or to a defense to such a claim;[16]

(1) ***Subject matter***. *[Alternative 2]* The person must preserve any information that constitutes evidence of a claim or of a defense to a claim;[17]

(1) ***Subject matter***. *[Alternative 3]* The person must preserve any information that is relevant to a subject on which a potential claimant has demanded preservation;[18]

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[15] The bracketed provision is intended to raise the issue of proportionality. Many agree that proportionality concepts should be crucial in determining what is a reasonable preservation regime. But merely saying that preservation should be "proportional" may not be very useful to a potential litigant who may have only the haziest notion what the claim involves and whether serious damages have occurred.

Assuming one wants to invoke proportionality, one could simply say the preservation must be "proportional." To add some specificity, however, the alternatives in text either invoke Rule 26(b)(2)(C) or paraphrase the criteria in Rule 26(b)(2)(C)(iii).

[16] The notion here is to invoke the scope of discovery or right under Rule 26(b)(1). Note that this scope may include such things as other similar incidents, impeaching material, and additional items that may not, on their face, relate to the claim raised.

[17] The effort here is to narrow the scope to what the rulemakers were trying to identify as "core information" in 1991 when initial disclosure was first proposed. This phraseology is different, and raises difficulties about deciding what is "evidence." For example, does that exclude hearsay? In general, hearsay is discoverable under Rule 26(b)(1) whether or not admissible.

[18] This would impose a very narrow requirement to preserve; unless a party giving notice of a claim has said something about preserving information there would be no duty. This sort of provision would seem to encourage broad demands to preserve in advance of litigation, probably not a desirable thing. Among other things, the person who receives such a demand has no immediate way to challenge the demand, as could happen in regard to undue demands during a Rule

(1) ***Subject matter***. *[Alternative 4]* The person must preserve information that a reasonable person would appreciate should be preserved under the circumstances;[19]

(2) ***Sources of information to be preserved***. *[Alternative 1]* The duty to preserve under Rule 26.1(a) extends to information in the person's possession, custody or control[20] that is reasonably accessible to the person;[21]

26(f) conference, for those can be submitted to the judge for resolution if needed. Perhaps more significantly, it would impose no duty to preserve unless a demand to preserve were made, seemingly disadvantaging those who don't have lawyers. A lesser point on that score is that it would cause uncertainty about whether there had been such a demand.

[19] This alternative invokes one of the suggestions of the Duke Panel. It may be circular, and seems to provide very little guidance to the party subject to the duty to preserve.

[20] This invokes Rule 34(a)(1)'s definition of the scope of the duty to produce in response to a Rule 34 request.

[21] The last clause invokes a version of Rule 26(b)(1)(B)'s exemption from initial discovery of electronically stored information that is "not reasonably accessible because of undue burden or cost."

It is debatable whether any such limitation should be included in a preservation rule. In the Committee Notes to Rules 26(b)(2)(B) and 37(e) in 2006, an effort was made to distinguish between the duty to preserve such information and the duty to provide it in response to discovery. The notion is that preservation imposes a smaller burden than restoration, and ensures that the material will be there if the court later orders production.

Another issue here (already mentioned above) is the question of preserving allegedly privileged material. To the extent that the trigger for the duty to preserve under Rule 26.1 corresponds to the "in anticipation of litigation" criterion of Rule 26(b)(3), for example, much material generated in trial preparation activity might fall within the duty to preserve. Does the fact that a party claims it need not produce this material exempt it from preservation? Ordinarily, as emphasized in Rule 26(b)(5), the decision whether a claim of privilege is valid is for the court, not the party; if the court cannot examine the material because it no longer exists, that is a problem.

Another issue has to do with whether it is desirable to expand the Rule 26(b)(2)(B) standard (at least as to preservation) to discoverable information that is not electronically stored. Hard copy information may be difficult to access or locate, but Rule 26(b)(2)(B) does not provide any exemption from providing it in response to a discovery request. Should preservation be treated differently?

(2) ***Sources of information to be preserved***. *[Alternative 2]* The duty to preserve under Rule 26.1(a) extends to information in the person's possession, custody or control that is routinely accessed in the usual course of business of the person;[22] the following types of information are presumptively excluded from the preservation duty unless otherwise agreed by the parties or ordered by the court:

(A) Deleted, slack, fragmented or unallocated data on hard drives;

(B) Random access memory (RAM) or other ephemeral data;

(C) On-line access data such as temporary internet files;[23]

(D) Data in metadata fields that are frequently updated, such as last opened dates;

(E) Information whose retrieval cannot be accomplished without substantial additional programming, or without transferring it into another form before search and retrieval can be achieved;

(F) Backup data that substantially duplicate more accessible data available elsewhere;

(G) Physically damaged media;

(H) Legacy data remaining from obsolete systems that is unintelligible on

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[22] The idea here is to invoke something that was frequently discussed in relation to preservation around a decade ago -- limiting duties to provide discovery to that electronically stored information that is regularly used by the party. The phrasing used here is borrowed from Rule 34(b)(2)(E)(i) regarding production of electronically stored information.

A different issue is how this duty should be phrased for individual nonbusiness litigants, such as individual plaintiffs. The idea should probably be to look to what they access and use on a regular basis, such as their active email accounts. But what if they have a cache for discarded items. Should that be included?

[23] This provision would not preclude a court order that such information must be preserved. See, e.g., Columbia Pictures Indus. v. Bunnell, 245 F.R.D. 443 (C.D. Cal. 2007) (order directing defendant to preserve server access data on downloading of material protected by plaintiff's copyright that would otherwise not be preserved).

successor systems [and otherwise inaccessible to the person]; or

(I) Other forms of electronically stored information that require extraordinary affirmative measures not utilized in the ordinary course of business;[24]

(3) ***Types of information to be preserved***. The duty to preserve under Rule 26.1(a) extends to documents, electronically stored information, or tangible things within Rule 34(a)(1).[25]

(4) ***Form for preserving electronically stored information***. A person under a Rule 26.1(a) duty to preserve electronically stored information must preserve that information in a form or forms in which it is ordinarily maintained.[26] The person need not preserve the same electronically stored information in more than one form.[27]

(5) ***Time frame for preservation of information***. The duty to preserve under Rule 26.1(a) is limited to information [created during] {that relates to events occurring during}

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[24] This specific listing is taken from submissions to the Advisory Committee. Besides asking whether it is sensible and complete, one might also ask whether a list this specific is likely to remain current for years.

[25] The Duke panel suggested including a provision about types of information to be preserved. It did not suggest limitations on the Rule 34(a)(1) scope of the duty to produce, and this initial effort therefore uses that provision as a guide. One possibility mentioned above is that backup tapes or the like could be excluded. But it may be that the scope of the duty provision already suffices for that purpose, and also that excluding backup materials may be unwise.

In a related vein, should preservation duties extend to "land or other property possessed or controlled" by the person, which is subject to discovery under Rule 34(a)(2)? Although that form of discovery is probably much rarer than document discovery, when it does matter preservation may be important.

[26] This provision is borrowed from Rule 34(b)(2)(E)(ii). If "ordinarily maintained" includes the form in which information is preserved for litigation purposes, this could be circular.

[27] This provision corresponds to Rule 34(b)(2)(E)(iii).

[Alternative 1] __ years prior to the date of the trigger under Rule 26.1(b)[28]

[Alternative 2] the period of the statute of limitations prior to the date of the trigger under Rule 26.1(b)[29]

[Alternative 3] a reasonable period under the circumstances.[30]

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[28] This provision has at least two problems. One is that it tracks backward from the date of the triggering event. It is not necessarily obvious that this should be the pertinent event, but in one sense it seems logical -- ordinarily preservation can't be expected to occur until that triggering event occurs. Of course, there might be multiple triggers, which would probably present additional complications.

A second difficulty is that it calls for the rules to specify a time period for this duty. Statutes of limitation vary considerably for different kinds of claims, and from jurisdiction to jurisdiction. That variability suggests the difficulty that might attend an effort to set a specific all-encompassing limitation here. In addition, some cases -- such as a groundwater contamination case -- may concern events that occurred decades ago. A lawsuit for breach of an old contract likewise could require discovery regarding events that occurred many years in the past. Suggesting that information about such events need not be preserved because they are beyond a rule-specified time frame would present obvious problems. A time-period limitation also might foster arguments about the limits of the rulemaking power.

[29] This approach might be preferred to setting a specific limit in a rule because it would borrow from other sources of law. But the borrowing experience for limitations periods has sometimes been an unhappy one. For limitations periods for federal claims lacking congressionally-set limitations, the task produced much disarray and finally Congress adopted the four-year limit in 28 U.S.C. § 1658. But that statute applies only to federal claims created by Congress after its effective date; for those already in existence, borrowing of limitations periods remains the rule.

An additional difficulty here is that the person subject to the duty to preserve must make predictions to use this approach. One is to determine what claim would be asserted; a pre-litigation notice may suggest a variety of claims that have different limitations periods. And the limitations period for a given claim may differ significantly in different jurisdictions, so there is a potential choice-of-law guess involved in the forecast. Beyond determining the pertinent limitations period there is also the possibility that a court would rule that the limitations period was tolled until prospective plaintiffs discovered their claims, or on grounds of estoppel or fraudulent concealment. Predicting how a court might resolve those issues would be very difficult.

[30] Given the difficulties mentioned in relation to the other two approaches, this might be preferred. But one could object that it provides limited or no guidance.

(6) ***Number of key custodians whose information must be preserved***.[31] The duty to preserve under Rule 26.1(a) is limited to information [possessed by] {under the control of} the [number] {a reasonable number of} key custodians in the person's organization who are [most likely to possess] {best positioned to identify} information subject to preservation under Rule 26.1(c).[32]

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[31] This sort of provision was suggested by the Duke Panel. It is not clear that "key custodian" is a definite enough term, but it is the one proposed by our panelists. If we want to adopt something along this line, there should be careful consideration about what term to use. The Committee Note could elaborate on what is meant. For one court's use of the "custodian" term, see Edelen v. Campbell Soup Co., 265 F.R.D. 676, 684 (N.D.Ga. 2010) ("Plaintiff then proposed a request that encompasses 55 custodians and 55 search terms over a three-year period.").

[32] This provision is a very halting first effort that bristles with issues. The question of how to define "key custodian" has already been mentioned. The question whether we are talking about "possession" or "control" of the information or something else seems somewhat tricky.

Choosing a number is another challenge. Shouldn't that depend on the size and makeup of the organization? In addition, might it not depend on the type of information involved? Isn't there always a risk that 20/20 hindsight will suggest that somebody else is an obvious choice who was overlooked? The alternative of saying "a reasonable number" may be more reasonable but not reassuring to the person seeking certainty about what to do to satisfy preservation obligations. How is the person to make this determination with confidence? Perhaps the answer is to designate twice as many as are minimally necessary. But even then there is the argument that somebody really important was overlooked.

A different question is whether this should excuse preservation by anyone who is not a "key custodian." Are those the individuals who were most involved in the events that matter in the suit, or the individuals who are officially designated as "custodians" in the organization? If the latter, could it be that there is no need to preserve information possessed by the people most involved? Does that bear on what is an adequate litigation hold?

It seems that what we are talking about is the whole scope of information to be preserved pursuant to Rule 26.1(c). Are there likely to be different custodians for different types of information?

This topic seems to relate to the time factor identified in Rule 26.1(c)(5). Are we talking about holders of specified positions in the organization, or the specific individuals? If the former (more likely), how should we deal with the hiring, promotion, and firing of specific holders of these positions, and with revisions in the organizational structure during the pertinent period?

(d) **Ongoing duty.** *[Alternative 1]* The person must take reasonable measures to continue to preserve information subject to preservation under Rule 26.1(c) from the date the obligation to preserve is triggered under Rule 26.1(b) until [the expiration of the statute of limitations if no suit is filed by that date] {the termination of litigation if a suit is filed}.[33]

(d) **Ongoing duty.** *[Alternative 2]* The person must take reasonable measures to preserve information received after the trigger date specified in Rule 26.1(c) unless it notifies [the person requesting preservation] {all reasonably identifiable interested persons} that it is not engaged in ongoing preservation.[34]

(e) **Remedies for failure to preserve.** The sole remedy for failure to preserve information is under Rule 37(e).[35]

Another question has to do with a litigation hold. Does the listing in this rule identify the only people who should be directed to retain information in a litigation hold? Our sense is that normally the notice of a hold should be directed to a larger group, but perhaps the goal here is to guard against requiring that effort.

Finally, how would this provision apply to parties that are not organizations? Are family members of individual litigants also custodians?

[33] The need to specify how long the duty to preserve remains in effect would seem to arise in situations where litigation is not filed. Where litigation is filed, the duration of the duty is more clear. And yet, as noted above, determining when the statue of limitations expires presents difficult issues about which limitations period to apply and whether it has been tolled.

[34] This alternative attempts to provide an out for those who wish to curtail the ongoing burden. But one serious difficulty is determining who should be notified that preservation is not ongoing. Does it apply only when the trigger is a demand for preservation? It does not seem to answer the question what the preserving person must do when the person who is notified objects to cessation of preservation. If anyone can dispense with preservation by giving notice, would everyone (who is advised by a lawyer) immediately give such notice?

[35] This hypothetical provision is designed as a bridge to possible amendments to Rule 37, as explored more fully below. The goal is to make clear that Rule 26.1 does not purport to do more than set ground rules in relation to litigation that actually occurs in federal court. Thus, one could not argue for any adverse consequence due to failure to preserve except in a pending case in federal court. By the time that argument occurs, there is no big problem with the authority of a federal court to address the problem. And there seems to be no problem with the idea that it may apply federal

Rule 37. Failure to Make Disclosures

or to Cooperate in Discovery; Sanctions

* * * * *

(e) Sanctions for failure to preserve [electronically stored] {discoverable} information. A court may not impose sanctions[36] [under these rules][37] on a party for failure to preserve information if the party has complied with Rule 26.1. The following rules apply to a request for sanctions for violation of Rule 26.1:[38]

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legal principles in determining whether a person has failed to preserve. So Rule 26.1 becomes more an advance warning that may limit federal principles of preservation than an all-purpose intrusion into the already crowded realm of preservation.

[36] A perennial question is to determine what is a "sanction." For example, to what extent is a directive to restore backup tapes to locate materials that were inappropriately deleted a "sanction." To many, it might seem a curative measure. For a thoughtful examination of such issues under the current rule, consider Major Tours, Inc. v. Colorel, 720 F.supp.2d 587 (D.N.J. 2010), in which Judge Simandle was presented with plaintiffs' argument that because defendants had failed to preserve emails they had to restore all backup tapes to see if some of the lost emails could be found on the tapes. Judge Simandle rejected this argument that failure to preserve is dispositive on the question under Rule 26(b)(2)(B) whether to order restoration of backup tapes. Instead, that is just one of many factors, and he declined to make such an order in this case, upholding the magistrate judge's decision that good cause did not exist for restoring the tapes despite the failure to preserve. Turning the situation around, would the conclusion that the preservation rule was not violated preclude ever ordering restoration of backup tapes?

[37] This phrase was inserted in Rule 37(e) by the Standing Committee in 2004, and permits sanctions pursuant to "inherent authority" or based on other sources of law while limiting sanctions under Rule 37(b) or other Civil Rules. Whether that limitation should endure if the rules themselves include a more expansive (and affirmative) set of preservation provisions, like hypothetical Rule 26.1, is not certain.

[38] Note that including a provision like this could obviate reliance on "inherent authority" to support sanctions like those listed in Rule 37(b) in cases in which failure to preserve did not violate any court order. A Committee Note could presumably say something like: "Given the introduction of a specific basis in Rule 37 for imposition of sanctions, and specific provisions in Rule 26.1 regarding the scope of the preservation duty, there should no longer be occasion for courts to rely on inherent authority to support sanctions in cases in which a party has failed to preserve discoverable information."

(1) ***Burden of proof***. The party seeking sanctions has the burden of proving that:

(A) a violation of Rule 26.1 has occurred;

(B) as a result of that violation, the party seeking sanctions has been denied access to specified electronically stored information, [documents or tangible things];[39]

(C) no alternative source exists for the specified electronically stored information [documents or tangible things];[40]

(D) the specified electronically stored information [documents or tangible things] would be [relevant under Rule 26(b)(1)] {relevant under Evidence Rule 401}

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[39] This criterion was suggested by the Duke Panel. The abiding problem is that one does not know what was there before the inappropriate deletion occurred; that makes it rather difficult for the party seeking sanctions (which has presumably not breached its responsibilities under the rules) to specify what it lost.

This factor seems to address the same thing as the harmlessness provision in current Rule 37(c)(1), but to put the burden with regard to that issue on the party seeking sanctions. Perhaps harmlessness is a better way of putting it; doing so would presumably shift the burden of proof to the party resisting sanctions.

Relatedly, it might be noted that this factor can cut differently for parties with and without the burden of proof. In at least some instances, parties with the burden of proof may lose *because* they no longer have evidence they lost. True, parties without the burden of proof may find their cases weakened due to loss of evidence that would have been helpful to them, but in at least some instances there may be an important difference between parties depending on who has the burden of proof.

[40] This resembles the current harmlessness criterion, and seems an important focus; to the extent alternative sources of information (or sources of alternative information) exist, there seems little reason for the sorts of sanctions listed in Rule 37(b)(2)(A). As noted above, however, measures designed to extract such information from those sources (e.g., backup tapes) might be called "sanctions" by some. Moreover, since the exact contours of the lost information are usually unknowable, it may be impossible to determine whether there is an alternative source of that information.

[material] to the claim or defense of the party seeking sanctions;[41]

(E) the party seeking sanctions promptly sought relief in court after it became aware of the violation of Rule 26.1.[42]

(2) ***Selection of sanction***. If the party seeking sanctions makes the showings specified in Rule 37(e)(1), the following rules apply to selection of a sanction:

(A) the court may employ any sanction listed in Rule 37(b)(2)(A)(i)-(vi) or inform the jury of the party's failure to preserve information,[43] but must select the least severe sanction necessary to redress [undo the harm caused by] the violation of Rule 26.1;[44]

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[41] Again, the moving party's difficulty in specifying what was lost presents something of a conundrum on this subject.

It is not clear that this provision adds usefully to (B), which focuses on the harm to the party seeking sanctions.

[42] This provision does not call for initial attempts to confer with the other side to obtain the nonjudicial solution to the problem. It might be said in a Committee Note that informal communication seems like a good way to explore the availability of other sources of information, but given that hypothetical subdivision (e) is only about sanctions of a rather serious sort, it may be that the time for conferring has passed.

[43] As noted, an adverse inference instruction is not included in the Rule 37(b)(2) listing. It is therefore addressed separately, but that does not explain how it should be ranked among the others in terms of "severity." Another issue might be the extent to which Fed. R. Evid. 301 (on presumptions) affects the use of this sanction.

In the same vein, one could consider listing other possible "sanctions" in this new provision. No effort has yet been made to chart these waters.

[44] This is a first effort to stratify sanctions. It seems from the ordering in Rule 37(b)(2)(A) that the list there goes from less severe to more severe. It is worth re-emphasizing, however, that an adverse inference instruction is not explicitly included on the list in Rule 37(b). Presumably that sanction is available also. Should sanctions be limited to those listed in Rule 37(b)?

Calibrating the severity of sanctions might sometimes be difficult. Consider, for example, Judge Gershon's reaction to arguments against using an adverse inference instruction:

(B) *[Alternative 1]* the court may not impose a sanction listed in Rule

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> In its papers, defendant repeatedly refers to adverse inferences and deemed findings as "severe" sanctions, but the case law is clear that these sanctions are not properly considered "severe." In this context, the term "severe" refers to sanctions of dismissal and contempt, not to the more limited sanctions imposed here.

Linde v. Arab Bank, Inc. 269 F.R.D. 186, 199 n.11 (S.D.N.Y. 2010).

Another point with regard to adverse inferences is that they are not all the same. Some may command the jury to find certain facts established, or even to find certain claims established. Others may be entirely permissive, simply telling the jury that if they find that a party lost something it should have retained the jury may infer that this lost item would help the other side if it concludes that the party was trying to get rid of harmful evidence. Even without an instruction, a lawyer could make that argument to the jury; having the judge endorse the possibility with a jury instruction is no doubt important to the lawyer but very different from a "severe" adverse inference instruction.

In re Oracle Corp. Securities Litig., 627 F.3d 376 (9th Cir. 2010), illustrates the range of adverse inferences possible, and also points out that they can be important at the summary judgment stage, not just in jury instructions. Plaintiffs in that securities fraud suit established that defendants willfully failed to preserve the email and other materials from Larry Ellison, Oracle's CEO. When defendants moved for summary judgment, the district court therefore gave the plaintiffs the benefit of an adverse inference that the lost materials would have proved Ellison's knowledge of any material facts plaintiffs were able to establish. But plaintiffs did not persuade Judge Illston that there were any material factual disputes, and she granted defendants' summary-judgment motion.

On appeal, plaintiffs urged that the district court should have used an adverse inference sufficient to establish their prima facie case and therefore to defeat the summary-judgment motion. The 9th Circuit disagreed (id. at 386):

> Over 2.1 million documents were produced during discovery. Although Ellison's email account files were not produced, the documents that were produced contained numerous email chains in which Ellison's correspondence was contained. If there were material issues of fact supporting securities fraud, Plaintiffs should have been able to glean them from the documents actually produced, the extensive deposition testimony, and the written discovery between the parties. An adverse inference would then properly apply to establish that Ellison must have known of those damaging material facts. Plaintiffs' problem here lies in the dearth of admissible evidence to show fraud.

The court added that an adverse inference sanctions "should be carefully fashioned to deny the wrongdoer the fruits of its misconduct yet not interfere with that party's right to produce other evidence." Id. at 386-87.

37(b)(2)(A)(i)-(vi) or inform the jury of the party's failure to preserve information unless the party seeking sanctions establishes that the party to be sanctioned violated Rule 26.1 [negligently] {due to gross negligence} [willfully] {in bad faith} [intending to prevent use of the lost information as evidence];[45]

(B) *[Alternative 2]* the court must not impose a sanction if the party to be sanctioned establishes that it acted in good faith in relation to the violation of Rule 26.1;[46]

(C) the court must be guided by proportionality, making the sanction proportional to the harm caused to the party seeking sanctions and the level of culpability[47] of the party to be sanctioned.

(3) ***Payment of Expenses***. Instead of or in addition to imposing a sanction, the court must order the party in violation of Rule 26.1, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the violation, unless the violation was substantially justified or other circumstances make an award of expenses unjust.

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[45] This is an effort to incorporate a showing of state of mind into the criteria for sanctions. Either here or in a Committee Note, one could address the significance of a litigation hold. That is not included in the draft rule language in part because it seems so difficult to determine what a "litigation hold" is, and also because the question whether adequate follow-up occurred could often be important.

The Duke panel urged that "[t]he state of mind necessary to warrant each identified sanction should be specified." Doing that seems quite difficult -- given the range of sanctions listed in Rule 37(b)(2)(A), the range of states of mind identified above, and the variety of facts arising in different cases.

[46] This is an effort to shift the state-of-mind inquiry from being a matter to be proven to support sanctions into being a matter of defense for the party resisting sanctions.

[47] This phrase is far from ideal, but attempts to capture what is meant.

CATEGORY 2

The concept behind this category is that it may be desirable and possible to devise more general rules regarding preservation. A key consideration here is whether rules of such generality will actually be useful to parties making preservation decisions, particularly before litigation begins. (After litigation begins, they can at least apply to the court for clarification about what they should be doing.)

Rule 26.1. Duty to Preserve Discoverable Information

(a) **General Duty to Preserve.** [In addition to any duty to preserve information provided by other law,] every person who reasonably expects [is reasonably certain] to be a party to an action cognizable in a United States court must preserve discoverable [electronically stored] information in as follows.

(b) **Trigger for Duty to Preserve.** *[Alternative 1]* The duty to preserve discoverable information under Rule 26.1(a) arises when a person becomes aware of facts or circumstances that would lead a reasonable person to expect to be a party to an action [cognizable in a United States court].

(b) **Trigger for Duty to Preserve.** *[Alternative 2]* The duty to preserve discoverable information arises when a person becomes aware of facts or circumstances that would lead a reasonable person to expect to be a party to an action [cognizable in a United States court] such as:

(1) Service of a pleading or other document asserting a claim; or

(2) Receipt of a notice of claim or other communication -- whether formal or informal -- indicating an intention to assert a claim; or

(3) Service of a subpoena or similar demand for information; or

(4) Retention of counsel, retention of an expert witness or consultant, testing of materials, discussion of possible compromise of a claim or taking any other action in anticipation of litigation; or

(5) Receipt of a notice or demand to preserve discoverable information; or

(6) The occurrence of an event that results in a duty to preserve information under a statute, regulation, contract, or the person's own retention program.

(c) **Scope of Duty to Preserve.** A person whose duty to preserve discoverable information has been triggered under Rule 26.1(b) must take actions reasonable under the circumstances to preserve [discoverable information][48] in regard to the potential claim of which the person is or should be aware, [taking into account the proportionality criteria of Rule 26(b)(2)(C)] {considering the burden or expense of preservation, the likely needs of the case, the amount likely to be in controversy, the parties' resources, the importance of the issues at stake in the action, and the potential importance of the preserved information in resolving the issues}.[49]

(d) **Ongoing duty.** The person must take reasonable measures to continue to preserve information subject to preservation under Rule 26.1(c) for a reasonable period after the date the obligation to preserve is triggered under Rule 26.1(b).

(e) **Remedies for failure to preserve.** The sole remedy for failure to preserve information is under Rule 37(e).

Rule 37. Failure to Make Disclosures

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[48] One suggestion from the Duke panel was to specify a different preservation duty for parties and nonparties. In the pre-litigation context, this seems particularly challenging since nobody is yet a party. Whether there should be a distinction on this ground is debatable in any event. For example, should it matter if, under Rule 15(c), the nonparty is one that should have realized it would have been sued?

[49] The idea here is to invoke the concept of relevance as a defining factor for the duty to preserve. Using it might raise several problems. For one thing, the claim involved has not been made in a formal way. For another, relevance is a very broad concept. Indeed, one might need to address whether this means relevant to the claim or defense or to the subject matter, topics last addressed in the 2000 amendments to Rule 26(b)(1).

Another question that might arise at this point is whether allegedly privileged materials must be preserved. Those are not within the scope of discovery, but the court can't pass on whether discarded materials were indeed privileged. This problem will be mentioned again below.

or to Cooperate in Discovery; Sanctions

* * * * *

(e) **Sanctions for failure to preserve [electronically stored] {discoverable} information.** A court may not impose sanctions [under these rules] on a party for failure to preserve information if the party has complied with Rule 26.1. The following rules apply to a request for sanctions for violation of Rule 26.1:

(1) ***Burden of proof***. The party seeking sanctions has the burden of proving that:

(A) a violation of Rule 26.1 has occurred;

(B) as a result of that violation, the party seeking sanctions has been denied access to specified electronically stored information, [documents or tangible things];

(C) no alternative source exists for the specified electronically stored information [documents or tangible things];

(D) the specified electronically stored information [documents or tangible things] would be [relevant under Rule 26(b)(1)] {relevant under Evidence Rule 401} [material] to the claim or defense of the party seeking sanctions;

(E) the party seeking sanctions promptly sought relief in court after it became aware of the violation of Rule 26.1.

(2) ***Selection of sanction***. If the party seeking sanctions makes the showings specified in Rule 37(e)(1), the following rules apply to selection of a sanction:

(A) the court may employ any sanction under Rule 37(b)(2)(A)(i)-(vi) or inform the jury of the party's failure to preserve information but must select the least severe sanction necessary to redress [undo the harm caused by] the violation of Rule 26.1;

(B) *[Alternative 1]* the court may not impose a sanction under Rule

37(b)(2)(A)(i)-(vi) or inform the jury of the party's failure to preserve information unless the party seeking sanctions establishes that the party to be sanctioned violated Rule 26.1 [negligently] {due to gross negligence} [willfully] {in bad faith} [intending to prevent use of the lost information as evidence];

(B) *[Alternative 2]* the court must not impose a sanction if the party to be sanctioned establishes that it acted in good faith in relation to the violation of Rule 26.1;

(C) the court must be guided by proportionality, making the sanction proportional to the harm caused to the party seeking sanctions and the level of culpability of the party to be sanctioned.

(3) ***Payment of Expenses***. Instead of or in addition to imposing a sanction, the court must order the party in violation of Rule 26.1, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the violation, unless the violation was substantially justified or other circumstances make an award of expenses unjust.

CATEGORY 3

This approach relies entirely on a "back end" rule provision and has no specific preservation provisions. It is intended to authorize Rule 37(b) sanctions whenever a party does not reasonably preserve, and so should generally make reliance on inherent authority unimportant.

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

* * * * *

(g) FAILURE TO PRESERVE DISCOVERABLE INFORMATION; REMEDIES

(1) If a party fails to preserve discoverable information that reasonably should be preserved in the anticipation or conduct of litigation, the court may[, when necessary][50]:

(A) permit additional discovery;

(B) order the party to undertake curative[51] measures; or

(C) require the party to pay the reasonable expenses, including attorney's fees,[52] caused by the failure.

(2) Absent extraordinary circumstances [irreparable prejudice],[53] the court may not impose

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[50] Whether this qualification is helpful could be debated. The idea is to authorize various responses to the loss of data that would not be characterized as "sanctions." Saying they may be used only "when necessary" might suggest that discovery orders more generally are subject to that limitation. Even Rule 26(b)(2)(B) would not necessarily condition an order to restore inaccessible sources on a showing of "necessity," much as that consideration could matter to judges considering what to do about backup tapes and the like.

[51] Does "curative" have a commonly understood meaning? Would "other remedial" give greater flexibility? The goal here is to emphasize that orders that otherwise not be made are justified due to the loss of data. Again, this is not a "sanction," but an effort by the court to minimize the possible harm to a litigant's case resulting from another party's loss of data.

[52] Would this possibility tend to encourage claims of spoliation? It might be that one could, by succeeding on a spoliation argument, get a "free ride" for discovery one would otherwise be doing at one's own expense. Hopefully, it should be clear that discovery is made necessary by the loss of data, and not something that would happen in the ordinary course. But will there be many instances in which that is not clear?

[53] This proviso is designed to authorize sanctions in the absence of fault in cases like Silvestri v. General Motors Corp., 271 F.3d 583 (4th Cir. 2001), where the loss of the data essentially preclude effective litigation by the innocent party. One question is whether such instances are truly extraordinary. If they happen with some frequency, this may be the wrong phrase.

any of the sanctions listed in Rule 37(b)(2) or give an adverse-inference jury instruction[54] unless the party's failure to preserve discoverable information was willful or in bad faith and caused [substantial] prejudice in the litigation.

(3) In determining whether a party failed to preserve discoverable information that reasonably should have been preserved, and whether the failure was willful or in bad faith,[55] the court may consider all relevant factors, including:

(A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable;[56]

(B) the reasonableness of the party's efforts to preserve the information, including the use of a litigation hold and the scope of the preservation efforts;[57]

(C) whether the party received a request that information be preserved, the clarity

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The term irreparable prejudice may be preferable to focus on the real concern here. It would be important, however, to ensure that this be limited to extremely severe prejudice. Most or all sanctions depend on some showing of prejudice. Often that will be irreparable unless the "curative" measures identified in (g)(1) above clearly solve the whole problem. The focus should be on whether the lost data are so central to the case that no cure can be found.

[54] Is this too broad? Adverse inference instructions can vary greatly. General jury instructions, for example, might tell the jury that it could infer that evidence not produced by a party even though it should have had access to the evidence supports an inference that the evidence would have weakened the party's case. Is that sort of general instruction, not focusing on any specific topic, forbidden? How about the judge's "comment on the evidence" concerning lost evidence but not in the form of a jury instruction? Would this rule forbid attorney argument to the jury inviting to make an adverse inference if there were no instruction at all on the subject?

[55] Combining an evaluation of reasonableness and willfulness or bad faith in one set of factors is attractive. Often the circumstances that bear on reasonableness also will bear on intent. Would it help to add other factors that bear directly on intent, but also may bear on reasonableness? Examples might include departure from independent legal requirements to preserve, departure from the party's own regular preservation practices, or deliberate destruction.

[56] Is this treatment sufficient to substitute for provisions about "trigger" like the ones in Category I or Category II. If those provide useful detail, would it be desirable to add similar detail here?

[57] The use of "scope" is designed to permit consideration of a variety of factors. The Committee Note would elaborate about breadth of subject matter, sources searched (including "key custodians:), form of preservation, retrospective reach in time, and so on. Cases are likely to differ from one another, and "scope" will hopefully permit sensible assessment of an array of circumstances.

and reasonableness[58] of the request, and — if a request was made — whether the person who made the request or the party offered to engage in good-faith consultation regarding the scope of preservation;

(D) the party's resources and sophistication in matters of litigation;[59]

(E) the proportionality of the preservation efforts to any[60] anticipated or ongoing litigation; and

(F) whether the party sought timely guidance from the court[61] regarding any unresolved disputes concerning the preservation of discoverable information.

* * * * *

Besides the footnoted questions, the Category 3 approach is intended generally to permit consideration of the extent to which the backwards shadow of such a rule would reassure and give direction to those making preservation decisions. Would it only do so if it absolutely precluded sanctions (absent "irreparable prejudice") in the absence of proof of bad faith or willfulness? Would it adequately ensure a uniform treatment of these issues nationwide, or possibly be interpreted in keeping with the existing (and seemingly inconsistent) precedents in the area?

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[58] Does this mean that an unreasonable request imposes a lesser duty than a reasonable request? Should clarity be the test here, since reasonableness of preservation efforts is already addressed in (B)?

[59] This consideration seems important to address the potential problem of spoliation by potential plaintiffs who may realize that they could have a claim, but not that they should keep their notes, etc. for the potential litigation. Are resources a useful consideration here? A wealthy individual might be quite unfamiliar with litigation. Is this somewhat at war with considering whether the party obeyed its own preservation standards? Making those relevant to the question of whether preservation should have occurred may be seen to deter organizations from having preservation standards. It is unclear how many organizational litigants -- corporate or governmental -- actually have such standards. Does the fact they exist prove that this litigant is "sophisticated"?

[60] This is broad, but probably the right choice. If the party reasonably anticipates multiple actions, proportionality is measured in contemplating all of them. A party to any individual action should be able to invoke the duty of preservation that is owed to the entire set of reasonably anticipated parties.

[61] This implicitly applies only when there is an ongoing action. Do we need anything more than a Committee Note to recognize that it is difficult to seek guidance from a court before there is a pending action? What if there is a pending action, and the party reasonably should anticipate further actions — is it fair to consult with one court (perhaps chosen from among many), pointing to the overall mass of pending and anticipated actions, and then invoke that court's guidance when addressing other courts?

B PLEADING STANDARDS

Lower courts continue to respond to the Supreme Court's rulings on pleading standards in the Twombly and Iqbal opinions. The memorandum prepared by Andrea Kuperman, Chief Counsel to the Rules Committee Support Office, continues to grow. More than 500 pages of case summaries, focused primarily on the more interesting published opinions of the courts of appeals, suggest that what once seemed a shifting target may be stabilizing.

Recent observations about pleading standards in Supreme Court opinions may reinforce the sense of convergence. *Skinner v. Switzer*, 2011 WL 767703 (March 7, 2011), upheld a state prisoner's complaint claiming a denial of due process in the district attorney's refusal to allow access to biological evidence for purposes of DNA forensic testing. The Court stated that on a motion to dismiss for failure to state a claim, the test is not whether the plaintiff will ultimately prevail, "but whether his complaint was sufficient to cross the federal court's threshold, see Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 * * * (2002). * * * [A] complaint need not pin plaintiff's claim for relief to a precise legal theory. Rule 8(a)(2) * * * generally requires only a plausible 'short and plain' statement of the plaintiff's claim, not an exposition of his legal argument." This passage seems to reinvigorate the Swierkiewicz rejection of "heightened pleading," and to apply it outside the employment-discrimination context.

Two weeks later the Court decided *Matrixx Initiatives, Inc. v. Siracusano*, 2011 WL 977060 (March 22, 2011). The sufficiency of the complaint claiming securities fraud was challenged on two issues: whether the facts not disclosed by the defendant were material, and whether the defendant's failure to disclose involved the required scienter. The defendant sold a cold remedy. It had reports suggesting that use of its product can cause loss of the sense of smell. The information did not amount to a statistically significant showing of causation. The question of materiality was whether investors might think the information important even if not statistically significant. The Court found reasonable investors might fear that consumers would switch to other cold remedies when confronted with the risk of losing the sense of smell. Quoting Twombly, the Court thought the allegations "'raise a reasonable expectation that discovery will reveal evidence'" satisfying the materiality standard. Quoting Iqbal, the allegations sufficed to "'allo[w] the court to draw a reasonable inference that the defendant is liable for the misconduct alleged.'" Turning to scienter, the Court invoked the Tellabs decision. The inference that Matrixx acted recklessly (or intentionally) "is at least as compelling, if not more compelling, than the inference that it simply thought the reports did not indicate anything meaningful about adverse reactions." Scienter was adequately pleaded; whether plaintiffs "can ultimately prove their allegations and establish scienter is an altogether different question."

These two Supreme court opinions do not clearly reset the rhetoric of the Twombly and Iqbal decisions. But they do reinforce the belief that context matters. How much fact is required to support a reasonable inference of liability varies with context, and in many types of action can be rather scant.

Taken together, moreover, the lower-court decisions may suggest that not much has changed in actual practice. That hypothesis finds support in the first detailed study done by the Federal

Judicial Center, although a follow-up study has been undertaken in the hope of providing additional important information. Still, there is ample reason to evaluate ongoing pleading practices with an eye to possible rules responses. The prospect of even subtle or subject-specific changes is viewed with fear by some observers and with hope by others. The Committee continues its close study of pleading standards and related discovery rules.

The FJC Study is attached. Joe Cecil will present it at this meeting, as he presented it to the Advisory Committee. The study sought to compare disposition of Rule 12(b)(6) motions to dismiss complaints before the Twombly decision and after the Iqbal decision, focusing not only on overall rates of motions and dismissals but also on the rates in broad categories of cases. The study proved complicated because of the need to make statistical adjustments to compensate for other developments occurring in the same time period that affect the raw count of motions and dispositions. "A lot changed between 2006 and 2010 that was unrelated to Twombly and Iqbal." A succinct but potentially misleading statement of the central finding would be that the rate of filing 12(b)(6) motions has increased, while the rate of granting the motions as held constant. A natural conclusion would be that a constant rate of granting an increased number of motions means that more cases are dismissed for failure to state a claim. But the comparison is made between two data sets, and it is difficult to confirm or deny this possible conclusion.

One major complication is an increase in the percentage of orders that grant a 12(b)(6) motion, but with leave to amend. This study did not undertake to determine what happens after leave to amend is granted — whether an amended complaint is filed, whether the amended complaint is challenged by a renewed motion to dismiss, whether discovery continues while any renewed motion remains pending, and whether any renewed motion is eventually granted. All of these questions need be answered to develop a better picture. The next study will attempt to answer them.

Other questions elude the capacities of even the most careful docket studies. It is not possible to identify cases that would have been filed under earlier understandings of pleading standards but were not filed for fear of heightened pleading standards. (Removal rates were studied; no differences were found.) It is not possible to determine whether cases were dismissed for want of pleading facts that could be known only by discovering information available only by discovery from the defendant. It would be difficult to assess the quality of the differences between initially unsuccessful complaints and successful amended complaints, or to measure the advantages of an amended complaint in working toward ultimate resolution. And it is similarly difficult to distinguish pleadings that fail for want of factual sufficiency alone and those that fail in whole or in part for advancing an untenable legal theory.

The FJC study — and the promise of its next study — combines with the review of judicial decisions to suggest there is no urgent need for immediate action on pleading standards. The courts are still sorting things out. There is reason to hope that the common-law process of responding to and refining the Supreme Court's invitation to reconsider pleading practices will arrive at good practices. An attempt to anticipate the process and capture it in reworded pleading rules might easily prove less effective. The first challenge that must be met whenever rule text is drafted is to determine whether there has been any significant change in practice, and whether any changed standards are too high, too low, or just about right. If the standards seem about right, there would

be little point in courting disruption by attempting to capture them in new rule text; Rule 8(a)(2), the subject of the Supreme Court's interpretation, would be doing good work. If the standards seem too high or too low, the array of possible drafting responses will be enormous.

Rather than revise general pleading standards, it might prove desirable to adopt specific standards for particular categories of cases. Since 1993 the Committee has periodically considered the possibility of adding more claims to the list of matters that must be pleaded with particularity under Rule 9(b). An alternative might be to list categories of claims that can be pleaded with less detail than most claims. Either approach would demand careful definitions. Either would raise potentially troubling questions of favor or disfavor for substantive, not procedural, reasons.

Other pleading approaches might be taken. One possibility, seriously considered but put aside shortly before the Twombly decision, would be to carry on with general notice pleading but reinvigorate the motion for a more definite statement.

Affirmative defenses may also become a subject for pleading reform. Why not expressly require a "short and plain statement" of an affirmative defense?

Apart from pleading standards, it may be desirable to integrate discovery more closely with pleading practice. Those who oppose heightened pleading requirements constantly point to circumstances of "information asymmetry," in which facts needed to plead the context that makes a claim plausible are known only to the defendant. Major variations are possible. Provision could be made for pre-filing discovery in aid of framing a complaint. Or discovery could be made available to a plaintiff who files an initial complaint together with a request for identified discovery to support an amended complaint. Or discovery could be made available — perhaps on terms similar to the summary-judgment practice in Rule 56(d) — to facilitate response to a motion to dismiss. If dismissals on the pleadings come to be a subject for rules revisions, these discovery possibilities will deserve serious development.

For all of these intriguing possibilities, the approach to pleading practice remains what it has been since 2007. The Committee will closely monitor developing practice, it will encourage and heed further rigorous empirical work, and it will listen carefully to the voices of bench, bar, and academy. Procedural ferment is exciting, but it does not justify an excited response.

Motions to Dismiss for Failure to State a Claim After *Iqbal*

Report to the Judicial Conference Advisory Committee on Civil Rules

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This Federal Judicial Center publication was undertaken in furtherance of the Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. While the Center regards the content as responsible and valuable, it does not reflect policy or recommendations of the Board of the Federal Judicial Center.

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Executive Summary

This report presents the findings of a Federal Judicial Center study on the filing and resolution of motions to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The study was requested by the Judicial Conference Advisory Committee on Civil Rules. The study compared motion activity in 23 federal district courts in 2006 and 2010 and included an assessment of the outcome of motions in orders that do not appear in the computerized legal reference systems such as Westlaw. Statistical models were used to control for such factors as differences in levels of motion activity in individual federal district courts and types of cases.

After excluding cases filed by prisoners and pro se parties, and after controlling for differences in motion activity across federal district courts and across types of cases and for the presence of an amended complaint, we found the following:

- There was a general increase from 2006 to 2010 in the rate of filing of motions to dismiss for failure to state a claim (see *infra* section III.A).
- In general, there was no increase in the rate of grants of motions to dismiss without leave to amend. There was, in particular, no increase in the rate of grants of motions to dismiss without leave to amend in civil rights cases and employment discrimination cases (see *infra* section III.B.1).
- Only in cases challenging mortgage loans on both federal and state law grounds did we find an increase in the rate of grants of motions to dismiss without leave to amend. Many of these cases were removed from state to federal court. This category of cases tripled in number during the relevant period in response to events in the housing market (see *infra* section III.B.1). There is no reason to believe that the rate of dismissals without leave to amend would have been lower in 2006 had such cases existed then.
- There was no increase from 2006 to 2010 in the rate at which a grant of a motion to dismiss terminated the case (see *infra* section III.B.1).

I. Origin of the Study

In October 2009, the Judicial Conference Advisory Committee on Civil Rules asked the Federal Judicial Center to undertake an analysis of changes in the filing and resolution of motions to dismiss filed under authority of Federal Rule of Civil Procedure 12(b)(6). This request was prompted by two recent Supreme Court decisions—*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. _, 129 S. Ct. 1937 (2009)—that interpreted Rule 8(a) by stating that a plaintiff must present a "plausible" claim for relief. A number of commentators expressed concern about whether lower courts would apply *Twombly* and *Iqbal* to dismiss claims that, had discovery proceeded, would have been shown to be meritorious.[1]

This study was designed to assess changes in motions to dismiss and decisions on such motions over time in broad categories of civil cases. Of course, this study could not fully capture all of the factors affecting motions to dismiss. In particular, it could not fully reflect the appellate court case law that continues to develop and that provides specific guidance for district courts.

At the request of the Advisory Committee, the Administrative Office of the U.S. Courts (AO) developed a series of tables that track the numbers of motions to dismiss filed and decided across all federal courts.[2] These tables do not indicate a clear change in filing patterns or disposition patterns after *Twombly* or *Iqbal*. But they include all types of motions to dismiss[3] and do not permit a precise assessment of Rule 12(b)(6) motions to dismiss for failure to state a claim. They also do not distinguish between orders granting motions to dismiss with leave to amend and orders granting motions without leave to amend.

Three scholars have undertaken four empirical studies to assess changes in pleading practice following the *Twombly* and *Iqbal* Supreme Court decisions.[4]

1. *See, e.g.*, Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 Notre Dame L. Rev. 849, 878–79 (2010) (expressing concern that plaintiffs will be unable to survive the pleading stage and have access to discovery when the defendant has critical information, especially in civil rights cases); Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L.J. 1, 14, 34 (2010) (*Twombly* and *Iqbal* may well have come at the expense of access to the courts and the ability of citizens to obtain adjudication of their claims' merits).

2. Statistical Information on Motions to Dismiss re *Twombly/Iqbal* (Rev. 12/3/10), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/NOS-Motions Quarterly December 031611.pdf. These tables are discussed in William M. Janssen, Iqbal *"Plausibility" in Pharmaceutical and Medical Device Litigation*, 71 La. L. Rev. 541, 575 (2011).

3. In addition to Rule 12(b)(6) motions to dismiss, the tables include other Rule 12(b) motions and Rule 12(c) motions. We are presently exploring the differences in the AO database and the databases developed for our study.

4. Kendall Hannon compared orders responding to motions to dismiss for failure to state a claim immediately before and soon after the *Twombly* decision. He found that such motions were more likely to be granted following *Twombly* in civil rights cases (41.7% prior to *Twombly*, 52.9% after *Twombly*), and that there was little change in other types of cases. *See* Kendall W. Hannon, *Much Ado About* Twombly, 83 Notre Dame L. Rev. 1811 (2008). This study did not distinguish between motions granted with leave to amend the complaint and those granted without leave to amend.

These four studies share two characteristics that limit their findings. First, each study was based on opinions appearing in the Westlaw database, which is likely to overrepresent orders granting motions to dismiss when compared with orders appearing on docket sheets.[5] Second, each of these studies reviewed district court orders decided soon after the Supreme Court decisions and before interpretation of the decisions by the courts of appeals. The courts of appeals have since reversed a number of the early district court decisions[6] and have issued a growing

Joseph Seiner has published two studies focusing on the outcome of motions to dismiss for failure to state a claim in civil rights litigation. His first study examined employment discrimination cases before and after *Twombly* and found increases in the rate at which motions were granted that did not reach levels of statistical significance. *See* Joseph A. Seiner, *The Trouble With Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. Ill. L. Rev. 1011, 1032. Seiner's study of motions to dismiss was based on searches for cases appearing in the Westlaw database. Seiner's second study examined motions in cases alleging discrimination under Title 1 of the Americans with Disabilities Act. Again, he found an increase in motions granted that did not meet standards of statistical significance. *See* Joseph A. Seiner, *Pleading Disability*, 51 B.C. L. Rev. 95 (2010).

Patricia Hatamyar examined orders responding to motions to dismiss for failure to state a claim two years before *Twombly*, two years after *Twombly*¸ and immediately after *Iqbal*; she found an increase in motions granted (46% to 48% to 56%, respectively). The greatest increases were in motions granted with leave to amend. Orders granting motions in civil rights cases also increased during the three periods (50% to 53% to 58%, respectively, without distinguishing leave to amend). *See* Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 Am. U. L. Rev. 553, 607 (2010). Hatamyar also presented a series of multinomial regression models that appear to confirm this increase over time in the rate at which motions are granted with leave to amend while controlling for pro se status, circuit, and type of case.

In addition to these four studies, there have been a number of empirical studies of motions to dismiss that are not directly related to an assessment of the effects of *Twombly* and *Iqbal*. Alexander Reinert examined cases from the 1990s in which grants of Rule 12(b)(6) motions have been reversed by the courts of appeals. Reinert regards such cases as similar to cases that would be dismissed and affirmed on appeal after *Iqbal*. He determined that after remand, these cases were as likely to succeed as all civil cases terminated during that period. *See* Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 Ind. L.J. 119 (2011). The strength of this analysis rests on the assumption that cases with motions reversed on appeal are comparable to all civil cases, including those in which a motion to dismiss was never filed. Adam Pritchard and Hillary Sale have examined the effects of the Private Securities Litigation Reform Act on motions to dismiss. *See generally* Adam C. Pritchard & Hillary A. Sale, *What Counts as Fraud? An Empirical Study of Motions to Dismiss Under the Private Securities Litigation Reform Act*, 2 J. Empirical Legal Stud. 125, 128 (2005).

5. *See* Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?* 1 J. Empirical Legal Stud. 591, 604 (2004) (asserting that reliance on published cases alone results in a distorted assessment of case activity); Brian N. Lizotte, *Publish or Perish: The Electronic Availability of Summary Judgments by Eight District Courts*, 2007 Wis. L. Rev. 107, 130 (reporting differences in published and unpublished orders granting summary judgment motions). A preliminary assessment found some evidence that orders granting motions to dismiss may be overrepresented in orders appearing in the Westlaw database. *Infra* note 47.

6. *See, e.g.*, Gonzalez v. Kay, 577 F.3d 600 (5th Cir. 2009) (reversing dismissal of claimed violation of the Fair Debt Collection Practices Act), *cert. denied*, 130 S. Ct. 1505 (2010); Siracusano v. Matrixx Initiatives, Inc., 585 F.3d 1167 (9th Cir. 2009) (reversing dismissal of complaint alleging violation of federal security laws), *aff'd*, ___ S. Ct. ___, No. 09-1156, 2011 WL 977060,

body of case law that requires district courts to be cautious and context-specific in applying *Twombly* and *Iqbal*.[7] Both recent Supreme Court decisions[8] and emerging appellate case law may reassure those concerned about the impact of *Twombly* and *Iqbal*.

at *12 (March 22, 2011); Braden v. Wal-Mart Stores, Inc., 588 F.3d 585 (8th Cir. 2009) (reversing dismissal of claim that defendants violated fiduciary duties imposed by the Employee Retirement Income Security Act (ERISA)); Sanchez v. Pereira-Castillo, 590 F.3d 31 (1st Cir. 2009) (reversing the dismissal of the Fourth Amendment claims by a prisoner against two correctional officers and a doctor); Swanson v. Citibank, N.A., 614 F.3d 400 (7th Cir. 2010) (reversing in part, finding that plaintiff stated a claim for racial discrimination); DiFolco v. MSNBC Cable L.L.C., 622 F.3d 104 (2d Cir. 2010) (reversing in part, finding that plaintiff stated a claim for breach of contract and defamation); Speaker v. U.S. Dep't of Health & Human Servs. Ctrs. for Disease Control & Prevention, 623 F.3d 1371 (11th Cir. 2010) (reversing dismissal of claims under the Privacy Act); West Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85 (3d Cir. 2010) (reversing dismissal of antitrust claims); Gee v. Pacheco, 627 F.3d 1178 (10th Cir. 2010) (reversing dismissal of pro se prisoner's claims of violations under 42 U.S.C. § 1983). These cases and others are summarized in Memorandum from Andrea Kuperman to Civil Rules Comm. and Standing Rules Comm., Review of Case Law Applying Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal (December 15, 2010), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Iqbal_memo_121510.pdf (last visited February 25, 2011).

7. *See Kuperman*, *supra* note 6.

8. *See* Skinner v. Switzer, ___ S. Ct. ___, No. 09-9000, 2011 WL 767703, at *6 (March 7, 2011) ("Because this case was resolved on a motion to dismiss for failure to state a claim, the question below was 'not whether [Skinner] will ultimately prevail' on his procedural due process claim, but whether his complaint was sufficient to cross the federal court's threshold, see Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002). Skinner's complaint is not a model of the careful drafter's art, but under the Federal Rules of Civil Procedure, a complaint need not pin plaintiff's claim for relief to a precise legal theory. Rule 8(a)(2) of the Federal Rules of Civil Procedure generally requires only a plausible 'short and plain' statement of the plaintiff's claim, not an exposition of his legal argument." (alteration in original) (internal citations omitted)); *see also* Matrixx Initiatives, Inc. v. Siracusano, ___ S. Ct. ___, No. 09-1156, 2011 WL 977060, at *12 (March 22, 2011) (unanimously affirming the circuit court's reversal of dismissal at the pleadings stage of a securities fraud class action).

II. Methodology

This study examined motion activity in 2006 and 2010. Using these periods allows an assessment that neither anticipates the decision in *Bell Atlantic Corp. v. Twombly* nor responds to the decision in *Ashcroft v. Iqbal* in the absence of appellate court guidance. This study also assessed changes in orders using records of the federal district courts rather than opinions published in computerized legal reference systems. We used the courts' CM/ECF codes indicating the filing of motions to dismiss and related orders to identify electronic documents with relevant motions and orders that were in PDF format and were linked to the civil case docket sheets. We then translated these documents into text format and searched electronically for terms that identified Rule 12(b)(6) motions and orders that respond to the merits of such motions.[9] This procedure is intended to be equivalent to identifying motions and orders through docket sheet entries and then reviewing documents linked to the docket entries. It provides a more complete assessment of motion activity than reliance on computerized legal reference systems.

We selected the 23 federal district courts to be included in the study by identifying the 2 districts in each of the 11 circuits with the largest number of civil cases filed in 2009. We also included the U.S. District Court for the District of Columbia. On occasion we were unable to obtain access to some of the courts' codes necessary to identify all of the relevant motions. In such cases, we chose the court in the circuit with the next greatest number of civil filings. These 23 district courts account for 51% of all federal civil cases filed during this period.

Two data sets were developed using these methods. To assess changes in filing patterns, we identified those cases with motions to dismiss for failure to state a claim filed in the first 90 days from among all civil cases filed in the selected districts from October 2005 through June 2006, and October 2009 through June 2010. To assess the changes in the outcomes of motions to dismiss for failure to state a claim, we identified orders responding to motions decided in January through June of 2006 and 2010. We coded these orders to identify the nature of the parties, whether the motion responded to an amended complaint, the presence of other Rule 12 motions, and judicial action taken in response to the motion. We indicated whether a motion was denied, was granted as to all relief requested by the motion, or was granted as to some but not all of the relief requested by the motion. These last two categories were often combined in the analyses and we simply noted that the motion was granted. In those instances in which the court granted at least some of the relief requested by the motion, we also coded whether the plaintiff was allowed to amend the complaint, and whether the motion eliminated only some claims or all claims of one or more plaintiffs.

9. We performed text searches using the following terms: "facts sufficient"; "sufficient facts"; "plausible claim"; "fails to state a claim"; "failed to state a claim"; and "failing to state a claim". We also searched for the phrase "12(b)(6)" with and without spaces separating the three elements of the phrase.

We excluded from these analyses all prisoner cases and cases with pro se parties.[10] We also excluded motions responding to counterclaims and affirmative defenses from the analysis of judicial actions on motions. The methodology and coding standards used in this study are described in greater detail in Appendices B and C.

10. We excluded prisoner cases because of the distinctive characteristics and procedural requirements of such litigation, and because they were concentrated in only 4 of the 23 districts included in this study. We also excluded pro se cases, which are governed by standards other than *Twombly* and *Iqbal*. Pro se pleadings are to be liberally construed, "however inartfully pleaded." Hughes v. Rowe, 449 U.S. 5, 9 (1980). The Supreme Court reaffirmed this standard soon after the *Twombly* decision. *See* Erickson v. Pardus, 551 U.S. 89 (2007). We were also concerned that our method for identifying motions to dismiss for failure to state a claim based on text searches would miss motions saved as static images in PDF format, which we suspect may be more likely to appear in prisoner and pro se filings. *See infra* note 46.

III. Results

Our assessment of the effect of *Twombly* and *Iqbal* on the filing and outcome of motions to dismiss was complicated by many changes that affected civil litigation between 2006 and 2010 in addition to the Supreme Court decisions. In 2008, the economy experienced a marked downturn that affected the housing market in particular. This change, along with many others, resulted in a shift in the case mix over this period. There was a general increase in cases challenging mortgages and other forms of financial debt instruments. Individual courts also experienced changes in filing patterns: most courts showed an overall increase in case filings. The courts in this study vary in size and contribute differently to the overall differences in activity from 2006 to 2010. We also found that the orders decided after *Iqbal* were different in nature from the orders decided before *Twombly*. Multiple motions to dismiss were resolved in 20% of the 2010 orders, down from 26% of the 2006 orders.[11] Previously amended complaints were considered in 48% of the 2010 motions, up from 38% of the 2006 orders.[12]

11. The resolution of multiple motions to dismiss for failure to state a claim by a single order is difficult to interpret, since the motions themselves are highly variable. One motion may be filed by multiple defendants and directed at multiple claims by one or more plaintiffs. Multiple motions may be filed by a single defendant, or multiple defendants may file separate motions attacking the same claim. For these reasons, we placed little weight on the drop in orders resolving multiple motions in 2010, and coded all motions resolved by a single order as though they were a single motion.

12. These differences achieved conventional levels of statistical significance ($p \leq 0.05$). Plaintiffs are likely to amend a complaint soon after a substantive change in pleading standards. Courts may be more likely to dismiss without leave to amend when a complaint has been amended to take new standards into account. Both before *Twombly* and after *Iqbal*, the number of times a plaintiff has amended the complaint is a factor a court considers in deciding whether to dismiss with prejudice. *See In re* Vantive Corp. Sec. Litig., 283 F.3d 1079, 1098 (9th Cir. 2002) ("In this case, the plaintiffs had three opportunities to plead their best possible case. It was therefore not unreasonable for the district court to conclude that it would be pointless to give the plaintiffs yet another chance to amend."), *abrogation on other grounds recognized by* South Ferry LP, No. 2 v. Killinger, 542 F.3d 776, 784 (9th Cir. 2008); Chudnovsky v. Leviton Mfg. Co., 158 F. App'x 312, 314 (2d Cir. 2005) ("Chudnovsky already has had one opportunity to amend his complaint. Moreover, in his motion for leave to amend below, Chudnovsky did not indicate that he could allege additional facts that would cure the deficiencies in his already-amended complaint. Therefore the complaint should be dismissed with prejudice."); Prasad v. City of New York, 370 F. App'x 163, 165 (2d Cir. 2010) (finding that the district court acted within its discretion in denying leave to amend after the plaintiffs had already amended once); Mann v. Brenner, 375 F. App'x 232, 240 n.9 (3d Cir. 2010) ("Mann suggests that the District Court should have granted him leave to amend his complaint. Because Mann was permitted to do so twice before the present motions to dismiss were filed, we think the District Court was well within its discretion in finding that allowing Mann a fourth bite at the apple would be futile."); Atkins v. City of Chicago, 631 F.3d 823, 832 (7th Cir. 2011) ("The plaintiff's lawyer has had four bites at the apple. Enough is enough."); Destfino v. Reiswig, 630 F.3d 952, 958–59 (9th Cir. 2011) ("Plaintiffs had three bites at the apple, and the court acted well within its discretion in disallowing a fourth."). In addition, a court's action on a motion responding to an unamended complaint soon after a substantive change in pleading standards may not provide a reliable indication of how courts will respond in the future. For these reasons, our statistical models control for the presence of an amended complaint.

These factors can affect the filing and resolution of motions to dismiss for reasons that are unrelated to the Supreme Court decisions themselves. To assess the effects of the Supreme Court decisions apart from these other factors, we developed a series of statistical models, presented in Appendix A, that attempt to control for these unrelated factors and identify those effects that may properly be attributed to reactions to the Supreme Court decisions. In this section we first present the straightforward comparisons of motion practice in 2006 and 2010. These comparisons reflect not only the effects of the Supreme Court decisions, but also changes in types of cases and the presence of an amended complaint. We then present the adjusted estimates of changes over time after controlling for factors unrelated to the Supreme Court decisions, as indicated by the statistical models in Appendix A. These later estimates offer the more accurate assessment of the federal district courts' reactions to the Supreme Court decisions.

A. Filing Rates for Motions to Dismiss for Failure to State a Claim

Motions to dismiss for failure to state a claim were more common in cases filed in late 2009 and 2010, after *Iqbal*, than in cases filed in late 2005 and 2006, before *Twombly*.[13] We identified motions filed within the first 90 days in cases either filed originally in federal court or removed from state court during the two nine-month periods ending in June 2006 and June 2010.[14] As indicated in Table 1, motions to dismiss for failure to state a claim were filed in 6.2% of all cases in 2009–2010, an increase of 2.2 percentage points over the filing rate for such motions in cases in 2005–2006.[15] This increase is especially notable in cases challenging financial instruments, which increased by more than five percentage points.[16]

In civil rights cases other than employment discrimination cases, the likelihood of a motion to dismiss increased 0.4% from 2005–2006 to 2009–2010. This increase did not reach conventional levels of statistical significance. Three-fourths of the cases in the civil rights category were designated on the cover sheet as

13. Our unit of analysis for this study of filing rates is an individual case. The figures resulting from our analysis understate the overall likelihood of motions to dismiss, since multiple motions may have been filed during this period and motions may be filed after the 90-day cutoff used in this study, often in response to amended complaints. We were limited to considering those motions filed within the first 90 days by our data collection timetable, which ended 90 days after the last case was filed on June 30, 2010. No meaningful differences were found in the length of time that elapsed from the filing of the case to filing of the motion to dismiss within the first 90 days; in 2009–2010, such motions were filed on average 40 days after the cases were filed or removed from state court, 2 days less than in 2005–2006.

14. This restriction excluded cases remanded from the courts of appeals, cases reopened or transferred from another district, and cases consolidated within the district as part of a multidistrict litigation proceeding. This restriction applied only to the study of motion filing rates.

15. Unless otherwise noted, the effects mentioned in this discussion are statistically significant at less than the 0.05 level using a two-tailed Goodman and Kruskal *tau*-b directional test with judicial action taken on the motion or motions as the dependent variable.

16. As indicated in Table 1, total case filings in these districts increased by 3,482 cases in 2010, and filings of financial instrument cases alone increased by 3,266 cases. Filings of contract cases also increased during this period, while filings of torts cases, civil rights cases, and "other" cases decreased. Filings of employment discrimination cases remained about the same.

"Other Civil Rights." We know from past research that many of these cases are brought under 28 U.S.C. § 1983, alleging constitutional violations. This narrower category of "Other Civil Rights" cases showed a statistically significant increase in the likelihood that a motion to dismiss for failure to state a claim would be filed, up from 10.5% of cases in 2006 to 12.4% of cases in 2010.[17]

The "Other" category includes the greatest number of cases. It combines a wide range of cases, typically based on statutory causes of action. Employee Retirement Income Security Act (ERISA) cases constitute 20% of the cases in this category. Other common types of cases include Social Security cases (14%), Fair Labor Standards Act cases (8%), trademark cases (6%), and copyright cases (6%). The remaining cases are scattered across a wide range of statutory actions.[18]

Table 1: Percentage of Civil Cases with a Motion to Dismiss for Failure to State a Claim Filed Within 90 Days of the Filing of the Case (Excluding Prisoner and Pro Se Cases)

	2005–2006 Percentage (and Number) of Cases	2009–2010 Percentage (and Number) of Cases	Difference
Total	4.0% (49,443)	6.2% (52,925)	+2.2%*
Contract	5.6% (8,651)	8.3% (9,139)	+2.7%*
Torts	2.3% (10,604)	4.1% (9,947)	+1.8%*
Employment Discrimination	6.9% (3,795)	9.0% (3,871)	+2.1%*
Civil Rights	9.7% (4,214)	10.1% (4,976)	+0.4%
Financial Instrument	4.3% (1,524)	9.6% (4,790)	+5.3%*
Other	2.5% (20,657)	4.1% (20,202)	+1.6%*

*$p < 0.01$.

Table 2 presents the adjusted estimates of changes in filing rates. The multivariate statistical models presented in Appendix A confirm an increase in the rate at which Rule 12(b)(6) motions were filed while controlling for overall differences

17. This difference just meets the conventional level of statistical significance ($p \leq 0.05$). Other types of cases in the civil rights category included cases brought under the Americans with Disabilities Act designated as "other" (14%) or designated as "employment" (7%). The remaining cases raised civil rights issues concerning accommodations (3.5%), voting (0.6%), and welfare (0.2%). None of these separate types of civil rights cases showed a statistically significant increase in filing rate from 2006 to 2010.

18. Another 14% of these cases were designated as "Other Statutory Action." No other specific case type constituted more than 5% of this category. A complete listing of case types that this category comprises is presented in Appendix B.

in filing rates across federal districts and across types of cases.[19] These adjusted estimates indicate that the probability of a motion to dismiss being filed in an individual case increased from a baseline of 2.9% of the cases in 2006 to 5.8% of the cases in 2010.[20] The table also shows a wide range of probabilities across types of cases.

Table 2: Adjusted Estimates of the Likelihood that a Motion to Dismiss for Failure to State a Claim Will Be Filed Within the First 90 Days

Type of Case	2006	2010
Torts	0.029	0.058
Contract	0.071	0.101
Civil Rights	0.117	0.127
Other	0.029[a]	0.046
Financial Instrument	0.053	0.104
Employment Discrimination	0.077	0.101

a. Estimated as the base rate in the absence of a significant effect for type of case.

Confirmation of the increase in the rate at which motions were filed is also evident in the monthly trend in the percentage of cases with such motions. As indicated in Figure 1, the percentage of cases with one or more motions to dismiss for failure to state a claim was higher in each month of 2009–2010 than in each month of 2005–2006. Moreover, in 2009–2010 there appeared to be a modest increase over time in the percentage of cases with such motions. The trend line for the percentage of cases in 2005–2006 with motions to dismiss was flat over time at just under 4%.[21]

19. The results in Table 2 are based on the statistical model presented in Table A-1 in Appendix A. This model shows considerable variations in filing rates across federal district courts, controlling for year and type of case.

20. The baseline serves as an initial reference point for assessing changes over time and across types of cases in these statistical models. The baseline is distinct from the percentages listed in Table 1. This particular model uses as a baseline the likelihood that a motion is filed in a tort case in the District of Rhode Island, the Eastern District of Michigan, or the District of Maryland in 2006 (i.e., 2.9%). We chose torts cases for the baseline because of the low likelihood of a motion to dismiss. We chose to combine these three districts because they had few motions to dismiss. We chose 2006 so that increases over time would appear as a positive effect. The baseline rate was substituted for effect estimates where the model indicated that the case type did not depart from that rate. The adjusted estimate for torts cases in Table 2, which takes district and the presence of an amended complaint into account, shows an increase from 2.9% in 2006 to 5.8% in 2010. The effect of the statistical adjustment can be seen by comparing these figures with the unadjusted estimate for torts cases in Table 1, which shows an increase from 4.0% in 2006 to 6.2% in 2010.

21. These filing rates are lower than rates indicated by previous studies of federal courts that considered motions to dismiss filed after the 90-day period used in this study. *See* Paul Connolly & Patricia Lombard, Judicial Controls and the Civil Litigative Process: Motions (Federal Judicial Center 1980) (finding that around 15% of civil cases terminated in 1975 included motions to dis-

Figure 1. Trend in Cases Filed with Motions to Dismiss Filed Within 90 Days

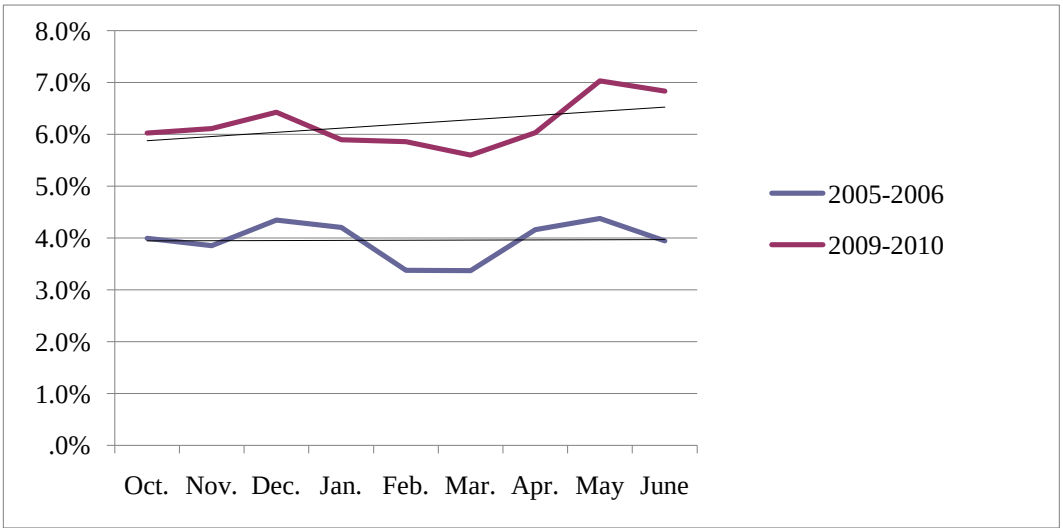

Motions to dismiss were more likely to be filed in cases removed from state court to federal court. As indicated in Table 3, motions to dismiss were more common in cases removed from state courts than in cases originally filed in federal courts both before *Twombly* and after *Iqbal*. This difference was greater in cases filed in 2009–2010 than in cases filed in 2005–2006. But a supplemental analysis of removal rates from January 2005 through December 2009 found no increase in rates of removal to federal courts in states with notice pleading standards in comparison with rates of removal in states using fact pleading.[22]

Table 3: Cases with Motions to Dismiss for Failure to State a Claim in Original and Removed Filings

	2005–2006	2009–2010	Difference
Original Filing	3.4% (41,698)	5.0% (44,298)	+1.6%*
Removed Filing	7.2% (7,745)	12.4% (8,627)	+5.2%*

* $p < 0.01$.

miss for failure to state a claim); Thomas E. Willging, Use of Rule 12(b)(6) in Two Federal District Courts 8 (Federal Judicial Center 1989) (finding that around 13% of the cases terminated in two federal districts courts included motions to dismiss for failure to state a claim).

22. We have no way of determining if cases that would have been filed in the federal courts before *Twombly* have been diverted to state courts because of concern over pleading standards. However, a supplemental study failed to find evidence of an increased rate of removal of cases to federal court after *Twombly* and *Iqbal* from states with notice pleading standards, compared with the rate of removal from states with fact pleading standards. Memorandum from Jill Curry and Matthew Ward to James Eaglin, Comparing Rates by States: Are *Twombly* and *Iqbal* Affecting Where Plaintiffs File? (February 14, 2011) (on file with the authors).

Finally, we note the distinctive nature and marked changes over time in cases challenging financial instruments. The "financial instrument" category of cases combines nature-of-suit codes indicating case categories for negotiable instruments, foreclosure, truth in lending, consumer credit, and "other real property." The great majority of these cases involve claims by individuals suing lenders and/or loan servicing companies over the terms of either an initial residential mortgage or a refinance of an existing residential mortgage. These cases include federal claims under statutes such as the Truth in Lending Act, the Real Estate Settlement Procedures Act, and the Fair Debt Collection Practices Act. These cases typically also raise a number of state law claims, often including fraud, negligence, unfair business practices, breach of fiduciary duty, and wrongful foreclosure. Plaintiffs generally seek rescission of the mortgage or loan, damages, and declaratory or injunctive relief.

Cases challenging financial instruments increased by 214%, from 1,524 cases in 2006 to 4,790 cases in 2010, apparently due in large part to the economic downturn in the housing market.[23] Such cases were especially likely to be removed from state court, increasing from 12% of all such cases in 2006 to 16% in 2010. Those cases that were removed from state court showed an increase in the percentage of cases with motions to dismiss, rising from 9.1% of such cases in 2005–2006 to 27.7% of such cases in 2009–2010, the largest increase in filing rates detected.

B. Outcome of Motions to Dismiss for Failure to State a Claim

1. Motions Granted with Leave to Amend

We assessed the outcome of motions to dismiss for failure to state a claim by identifying and coding court orders responding to the merits of such motions filed in January through June of 2006 and 2010 in the same 23 federal district courts.[24] We recorded whether an order denied the motion to dismiss in its entirety, granted all of the relief requested by the motion, or granted some but not all relief requested by the motion.[25] A single order resolving motions to dismiss filed by dif-

23. This downturn was especially sharp in some of the districts included in this study, such as districts in California, Florida, Georgia, Illinois, and Michigan, which are among the top 10 states with the highest number of residential mortgage foreclosures. *See* http://www.statehealthfacts.org/comparetable.jsp?cat=1&ind=649 (last visited February 22, 2010).

24. Ideally, the database of motions that was discussed in the previous section would have been followed over time through the motions' resolution. Time constraints did not permit an adequate opportunity to obtain the orders resolving those motions. This second database of orders was developed instead.

25. The unit of analysis for our study of outcomes of motions is a written judicial opinion or order disposing of the merits of at least one motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Of course, a single motion to dismiss may be directed at multiple claims, and an order may resolve multiple motions. Coding conventions for multiple motions and motions in which only some of the relief was granted are discussed in Appendix C. In addition to excluding pro se cases and prisoner cases, for this analysis we excluded motions to dismiss for failure to state a claim filed in response to counterclaims and affirmative defenses. We implemented this limitation by excluding the 70 orders responding to motions filed by a party other than a defendant or directed toward claims raised by a party other than the plaintiff. Scholars are

ferent parties was coded as resolving a single motion. If the court allowed amendment of the complaint with regard to at least one claim that was dismissed, we coded the motion as granted with leave to amend.

As indicated in Table 4, it first appears that motions to dismiss for failure to state a claim were more likely to grant all or some of the relief requested in 2010 than in 2006. In 2010, 75% of the orders responding to such motions granted all or some of the relief requested by the motion, compared with almost 66% of the orders in 2006.[26] But closer inspection reveals that the increase extends only to motions granted with leave to amend. No increase was found in motions granted without leave to amend.

As indicated above, it would be misleading to attribute this overall change only to the Supreme Court decisions. The rate at which motions were granted differs by type of case, and the mix of types of cases changed from 2006 to 2010. For example, cases challenging financial instruments were far more common in 2010, and motions to dismiss in such cases were more likely to be granted. The rate at which motions were granted also varied by district court, and some of the districts with the highest grant rates were also the districts that showed the greatest increase in the number of orders. Orders in 2010 were also more likely to respond to motions directed toward amended complaints. Courts are generally more willing to grant motions to dismiss after a plaintiff has already amended the complaint. All of these factors may contribute to differences over time that are unrelated to the Supreme Court decisions.

An important reason for caution in interpreting these differences is that in 2010, orders granting motions to dismiss were far more likely to allow the plaintiff to amend the complaint, leaving open the possibility that the plaintiff might cure the defect in the complaint and the case might proceed to discovery. In 2010, 35% of the orders granted motions to dismiss with leave to amend at least some of the claims in the complaint, compared with 21% of the orders in 2006.[27] The percentage of orders granting the motion without an opportunity to amend the complaint declined in 2010 in all types of cases other than those challenging financial instruments. This shift toward an increase in grants with an opportunity to amend and a decrease in grants with no opportunity to amend suggests that these two outcomes should be assessed separately.

only beginning to consider the effect of *Twombly* and *Iqbal* in such circumstances. *See, e.g.*, Melanie A. Goff & Richard A. Bales, *A "Plausible" Defense: Applying* Twombly *and* Iqbal *to Affirmative Defenses*, 34 Am. J. Trial Advoc. ___ (forthcoming Spring 2011); Joseph A. Seiner, Twombly, Iqbal, *and the Affirmative Defense*, available at http://ssrn. com/abstract=1721062 (last visited February 8, 2011).

26. This increase was due primarily to orders granting all relief sought by the motion, which increased from 36% of the orders in 2006 to 46% of the orders in 2010. Orders granting motions with regard to only part of the relief sought remained stable over time, constituting 30% of the orders in 2006 and 29% of the orders in 2010. Differences in the rates at which motions were denied were not entered into the table, but are the inverse of the rates at which motions were granted.

27. The increase in opportunity to amend complaints was almost entirely in orders granting all the relief requested by the motion (i.e., 19% in 2010 vs. 9% in 2006). This increase is especially notable, since, as indicated above, in 2010 the orders were more likely to respond to previously amended complaints.

Table 4: Outcome of Motions to Dismiss for Failure to State a Claim

	Action on Motion	2006	No. of Orders	2010	No. of Orders	Difference
Total	Denied	34.1%	(239)	25.0%	(305)	
	Granted All or Some Relief	65.9%	(461)	75.0%	(916)	+9.1%*
	With Amendment	20.9%	(146)	35.3%	(431)	+14.4%†
	Without Amendment	45.0%	(315)	39.7%	(485)	-5.3%
Contract	Denied	35.1%	(65)	33.6%	(81)	
	Granted All or Some Relief	64.9%	(120)	66.4%	(160)	+1.5%
	With Amendment	21.1%	(39)	30.3%	(73)	+9.2%†
	Without Amendment	43.8%	(81)	36.1%	(87)	-7.7%
Torts	Denied	30.0%	(21)	28.2%	(31)	
	Granted All or Some Relief	70.0%	(49)	71.8%	(79)	+1.8%
	With Amendment	21.4%	(15)	29.1%	(32)	+7.7%
	Without Amendment	48.6%	(34)	42.7%	(47)	-5.9%
Civil Rights	Denied	27.9%	(51)	22.0%	(51)	
	Granted All or Some Relief	70.3%	(121)	78.0%	(181)	+7.7%
	With Amendment	21.1%	(38)	32.8%	(76)	+11.7%
	Without Amendment	48.3%	(83)	45.3%	(105)	-3.0%
Employment Discrimination	Denied	32.6%	(31)	29.4%	(35)	
	Granted All or Some Relief	67.4%	(64)	70.6%	(84)	+3.2%
	With Amendment	17.9%	(17)	23.5%	(28)	+5.6%
	Without Amendment	49.5%	(47)	47.1%	(56)	-2.4%
Financial Instruments	Denied	52.9%	(9)	8.1%	(19)	
	Granted All or Some Relief	47.1%	(8)	91.9%	(216)	+44.8%*
	With Amendment	24.4%	(5)	54.9%	(129)	+30.5%
	Without Amendment	17.6%	(3)	37.0%	(87)	+19.4%
Other	Denied	38.5%	(62)	31.0%	(88)	
	Granted All or Some Relief	61.5%	(99)	69.0%	(196)	+7.5%
	With Amendment	19.9%	(32)	32.7%	(93)	+12.8%†
	Without Amendment	41.6%	(67)	36.3%	(103)	-5.3%

* $p \leq 0.01$, relative to the likelihood that the motion will be denied.
† $p \leq 0.05$, relative to the likelihood that the motion will be granted without leave to amend.

Motions granted with leave to amend leave open the questions whether the complaints were, in fact, amended; whether there were subsequent motions to dismiss; whether action was taken in response to the subsequent motions; and the extent to which these cases proceeded to discovery. We are presently undertaking a supplemental study to answer these questions.

Table 5 presents statistical estimates for the probability that Rule 12(b)(6) motions to dismiss would be granted in an individual case while controlling for factors unrelated to the Supreme Court decisions.[28] The baseline indicates that around 56% of the motions would be granted without leave to amend the complaint in torts cases in 2006 in the baseline districts.[29] The table lists only those districts in which the rate at which motions were granted, with or without the opportunity to amend the complaint, show a statistically significant difference from the baseline districts, as indicated in Table A-2 in Appendix A. Marked differences in grant rates and the opportunity to amend the complaint were found across the individual courts. Such motions were more likely to be granted with leave to amend in the Eastern and Northern Districts of California, and granted without leave to amend in the Eastern and Southern Districts of New York.[30]

Table 5: Estimated Values for Statistically Significant Variables in Multinomial Model Describing Whether a Motion Would Be Granted With or Without an Opportunity to Amend the Complaint

Variable	Deny	Grant and Amend	Grant and No Amend
Baseline	**0.298**	**0.145**	**0.557**
Districts			
Eastern District of California	0.149	0.613	0.238
Northern District of California	0.158	0.614	0.229
Middle District of Florida	0.358	0.449	0.193
Northern District of Illinois	0.409	0.266	0.324
Eastern District of New York	0.211	0.289	0.500
Southern District of New York	0.183	0.280	0.537
Eastern District of Pennsylvania	0.404	0.227	0.369
Northern District of Texas	0.461	0.254	0.285
Presence of Amended Complaint	0.244	0.115	0.641
Financial Instrument Cases in 2010	0.040	0.068	0.892

28. As indicated in Appendix A, we used multinomial logit and probit models to assess changes over time in the likelihood that motions to dismiss would be denied, granted with leave to amend, or granted without leave to amend. These models also allowed us to control for the differences across individual courts, for differences across types of cases, and for the presence of an amended complaint. Using the techniques described in the appendix, we then computed the adjusted estimates of effects presented in the table.

29. The baseline for the model is the outcome of an order deciding one or more Rule 12(b)(6) motions to dismiss filed in the District of Rhode Island, the Eastern District of Michigan, or the District of Maryland in 2006 in a tort case, responding to an unamended complaint.

30. The Eastern and Southern Districts of New York also had very low filing rates for motions to dismiss. A number of judges in these districts have procedures calling for premotion conferences at which the judges discuss with attorneys whether a motion will be appropriate.

Some of the significant differences over time indicated in Table 4 can be accounted for by controlling for differences across districts and the presence of an amended complaint. As shown in the last line of Table 5, we found that only in cases challenging financial instruments did the adjusted rate at which motions were granted without leave to amend increase in 2010. In such cases, the adjusted estimate indicates 90% of the motions were granted with regard to at least some of the relief requested, controlling for the effects of the other variables. We found no other significant increase over time in other types of cases in the adjusted rate at which motions were granted.[31]

The fact that cases with motions to dismiss granted with leave to amend remain unresolved is also reflected in the absence of a statistically significant increase in 2010 in the rate at which such cases terminated. We examined the percentage of cases that terminated after 30 days, 60 days, or 90 days following an order granting all or some of the relief requested by the motion to dismiss. Such orders may not address all of the claims in the litigation. Nevertheless, if the district courts were interpreting *Twombly* and *Iqbal* to significantly foreclose the opportunity for further litigation in the case, we would expect to see an increase in cases terminated soon after the order. However, as indicated in Table 6, we found no statistically significant increase in 2010 in the percentage of cases terminated in 30 days, 60 days, or 90 days after the order granting the motion. Nor did we find differences in termination rates across individual types of cases.

Table 6: Percentage of Cases Terminated 30, 60, and 90 Days After an Order Granting All or Some of the Relief Requested by a Motion to Dismiss

Percentage of Cases Terminated After:	**2006**	**2010**
30 days	26.6%	27.5%
60 days	30.6%	33.1%
90 days	34.2%	37.7%
Total orders	448 orders	897 orders

31. We also found that the presence of an amended complaint increased the likelihood that a motion would be granted without leave to amend. The details of the analysis are presented in Appendix A. Such an effect existed both before *Twombly* and after *Iqbal*. *See supra* note 12.

2. Motions Granted on All Claims Asserted by One or More Plaintiffs

Although we found no broad increase over time in the likelihood that a motion to dismiss would be granted without leave to amend, we also explored the possibility that, when granted, motions to dismiss may be more likely to exclude all claims by one or more plaintiffs, even if the litigation continues with claims by other plaintiffs.[32] As indicated in Table 7, in 2010, approximately 31% of the orders granting motions to dismiss appeared to eliminate all claims by one or more plaintiffs from the litigation, compared with approximately 23% of such orders in 2006.[33] The rate at which the grant of motions to dismiss eliminated some claims, but not all, by one or more plaintiffs increased by only one percentage point during this period. Of course, these figures include the effects of factors unrelated to the Supreme Court cases, such as differences across district courts, differences across types of cases, and differences in the presence of an amended complaint.

32. There was also a greater opportunity in 2010 to amend the complaint after the motion to dismiss was granted as to all claims by one or more plaintiffs (22% in 2006; 46% in 2010). We initially attempted to determine if the grant of a motion to dismiss had the effect of removing a defendant from the litigation, thereby limiting the opportunity for further discovery of that defendant under the standards of Rule 26. However, we had difficulty developing a reliable coding practice, especially in cases with multiple plaintiffs and defendants. Instead, we decided to focus on the effect of the motion on the ability of plaintiffs to continue in the litigation, which proved easier to study.

33. These figures include the effects of orders granted both with and without leave to amend the complaint. If the financial instrument cases are removed from the analysis, orders granting motions to dismiss that eliminate all claims by one or more plaintiffs increase to 28% in 2010. Unfortunately, we cannot determine what percentage of this increase is due to cases that involved only one plaintiff, thereby ending the case. Determining that a grant of a motion to dismiss for failure to state a claim excluded all claims by a plaintiff can be a difficult task. A plaintiff may have raised claims that were not challenged by the motion to dismiss and therefore not addressed by the order. Since our knowledge of the cases is limited to the single order that was included in the study, we must make a series of assumptions when determining that a grant of a motion to dismiss for failure to state a claim excludes all claims. Unless otherwise indicated in the order, we assumed that the motion to dismiss addressed all claims by a plaintiff, and that granting a motion as to all claims by a plaintiff would terminate the plaintiff's role in the litigation unless the plaintiff was permitted to amend the complaint. As a result, our analysis may overestimate the number of cases in which an order eliminates all claims by a plaintiff.

Table 7: Extent of Exclusion of Plaintiff Claims

	Action on Motion	2006	No. of Orders	2010	No. of Orders	Difference
Total	Denied	34.1%	(239)	25.0%	(305)	
	Granted All or Some Relief	65.9%	(461)	75.0%	(916)	+9.2%*
	Some Claims	43.3%	(303)	44.5%	(543)	+1.2%
	All Claims	22.6%	(158)	30.5%	(373)	+8.0%†
Contract	Denied	35.1%	(65)	33.6%	(81)	
	Granted All or Some Relief	64.9%	(120)	66.4%	(160)	+1.5%
	Some Claims	44.3%	(82)	40.7%	(98)	-3.7%
	All Claims	20.5%	(38)	25.7%	(62)	+5.2%
Torts	Denied	30.0%	(21)	28.2%	(31)	
	Granted All or Some Relief	70.0%	(49)	71.8%	(79)	+1.8%
	Some Claims	50.0%	(35)	47.3%	(52)	-2.7%
	All Claims	20.0%	(14)	24.5%	(27)	+4.5%
Civil Rights	Denied	27.9%	(51)	22.0%	(51)	
	Granted All or Some Relief	70.3%	(121)	78.0%	(181)	+6.2%
	Some Claims	44.2%	(69)	46.4%	(111)	+2.2%
	All Claims	25.1%	(52)	29.1%	(70)	+4.0%
Employment Discrimination	Denied	32.6%	(31)	29.4%	(35)	
	Granted All or Some Relief	67.4%	(64)	70.6%	(84)	+3.2%
	Some Claims	51.6%	(49)	43.7%	(52)	-7.9%
	All Claims	15.8%	(15)	26.9%	(32)	+11.1%
Financial Instruments	Denied	52.9%	(9)	8.1%	(19)	
	Granted All or Some Relief	47.1%	(8)	91.9%	(216)	+44.9%*
	Some Claims	29.4%	(5)	48.5%	(114)	+19.1%
	All Claims	17.6%	(3)	43.4%	(102)	+25.8%
Other	Denied	38.5%	(62)	31.0%	(88)	
	Granted All or Some Relief	61.5%	(99)	69.0%	(196)	+7.5%
	Some Claims	39.1%	(63)	40.8%	(116)	+1.7%
	All Claims	22.4%	(36)	28.2%	(80)	+5.8%

* $p \leq 0.01$, relative to the likelihood that the motion will be denied.
† $p \leq 0.05$, relative to the likelihood that the motion will be granted without leave to amend.

Table 8 presents statistical estimates for the rates at which granted motions dismiss some claims or all claims by a plaintiff (with or without leave to amend), while controlling for factors unrelated to the Supreme Court decisions. As indicated in Appendix B, we again used a similar multinomial probit model to control for other factors while assessing differences in the likelihood that motions to dismiss would be denied, granted to eliminate one or more plaintiffs/respondents

from the litigation,[34] or granted to eliminate only some claims while leaving all of the plaintiffs to pursue the remaining claims.

After using the multinomial probit model to control for differences across districts, types of case, and the presence of an amended complaint, we found that in 2010, only orders responding to motions in cases challenging financial instruments were more likely to be granted, both with respect to all claims by at least one plaintiff and with respect to only some claims, all else being equal. No statistically significant increase in the likelihood that motions would be granted was found for other types of cases. These results are consistent with the results in Table 7. There are differences across federal districts: the Northern and Eastern Districts of California were more likely to grant motions with regard to some claims, and the Southern District of New York was more likely to grant motions with regard to all claims by at least one plaintiff. Finally, responding to an amended complaint increased the likelihood of granting a motion with respect to some claims only, relative to those motions not based on an amended complaint.

Table 8: Estimated Values for Statistically Significant Variables in Multinomial Model of Whether a Motion Would Be Granted with Regard to Some or All Claims by At Least One Plaintiff

Variable	Deny	Grant as to Some Claims	Grant as to All Claims by at Least One Plaintiff
Baseline	**0.289**	**0.400**	**0.311**
Districts			
Eastern District of Arkansas	0.435	0.439	0.126
Eastern District of California	0.162	0.539	0.299
Northern District of California	0.171	0.494	0.335
Middle District of Florida	0.377	0.409	0.214
Southern District of New York	0.178	0.329	0.493
Eastern District of Pennsylvania	0.404	0.420	0.175
District of South Carolina	0.489	0.351	0.160
Northern District of Texas	0.464	0.343	0.193
Presence of Amended Complaint	0.246	0.493	0.261
Financial Instrument Cases in 2010	0.052	0.496	0.451

34. Such orders indicated that all claims raised by one or more plaintiffs were dismissed. We interpret this as dismissing all claims by the plaintiffs, but it is possible that the plaintiffs raised other claims that were not the subject of the motion to dismiss.

IV. Discussion and Conclusion

Assessing changes in the outcomes of motions that are attributable to *Twombly* and *Iqbal* is complicated. A thorough assessment must consider those cases that do not appear in computerized legal reference systems, since such databases may underrepresent cases in which motions have been denied. It is also necessary to take into account increases in case filings and changes in types of cases, which may vary across the federal district courts. Civil case filings themselves increased in the 23 federal district courts examined in this study by 7% in the past four years; more motions will be reported even without changes in motion practice. Changes in the case mix affect the types, numbers, and likely outcomes of motions to dismiss.

The data show a general increase in the rate at which motions to dismiss for failure to state a claim were filed in the first 90 days of the case. We found that motions were more likely to be filed across a wide range of case types, though the size of the increase depended on the type of case. We found the largest increase in filing rates of motions to dismiss in cases challenging financial instruments, such as mortgages and other loan documents. Such cases were rare in 2006, and this increase is most likely related to changes in the housing market and the increasing rate of foreclosure actions. We found no increase in filing rates over time in civil rights cases.

After controlling for identifiable effects unrelated to the Supreme Court decisions, such as differences in caseload across individual districts, we found a statistically significant increase in the rate at which motions to dismiss for failure to state a claim were granted only in cases challenging financial instruments. More specifically, we found an increase in this category of cases in motions to dismiss granted without leave to amend. We found no increase in the rate at which motions to dismiss were granted, with or without opportunity to amend, in other types of cases. We also found no increase in the rate at which motions to dismiss for failure to state a claim eliminated plaintiffs in other types of cases.

Again, the rise of cases challenging financial instruments and the increase in the rate at which motions were filed and granted in such cases appear to be due to changing economic conditions involving the housing market and are unrelated to the recent Supreme Court decisions. The prevalence of motions to dismiss in such cases and the high rate at which such motions are granted is often due to a failure to meet the pleading requirements established by federal statutes, not a failure to plead sufficient facts.[35] If such cases had existed in 2006, it is likely that such mo-

35. Courts in every circuit have dismissed homeowners' claims under the Truth in Lending Act (TILA), 15 U.S.C. § 1691 *et seq.*, and the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2601, under Rule 12(b)(6) for various reasons unrelated to *Twombly* and *Iqbal*. *See, e.g.*, Jones v. ABN Amro Mortg. Grp., 606 F.3d 119, 125 (3d Cir. 2010) (affirming 12(b)(6) dismissal of a RESPA claim because the defendant was not subject to RESPA); Taggart v. Chase Bank USA, N.A., 375 F. App'x 266, 268–69 (3d Cir. 2010) (affirming dismissal of a TILA claim on *res judicata* grounds after a 12(b)(6) dismissal on limitations grounds in a previous case filed by the plaintiff); Heil v. Wells Fargo Bank, N.A., 298 F. App'x 703, 705–07 (10th Cir. 2008) (affirming dismissal of TILA claims on limitations grounds); Frazile v. EMC Mortg. Corp., 382 F. App'x

tions would have been filed and granted in such cases at rates similar to those in 2010.

We also found that motions were more likely to be granted without leave to amend when they were directed at an amended complaint. This was true both before and after the Supreme Court decisions. This finding is unsurprising; courts take earlier amendments into account in deciding motions to dismiss. Motions directed to amended complaints were more common in 2010 than in 2006.

Even if the rate at which motions are granted remains unchanged over time, the total number of cases with motions granted may still increase. The 7% increase in case filings combined with the increase in the rate at which motions are filed in 2010 may result in more cases in recent years with motions granted, even though the rate at which motions are granted has remained the same. Such cases are especially likely to find their way into computerized legal reference systems and published reports, resulting in the impression that the rate at which motions are granted is increasing. But these increases can be largely a result of increases in filing rates for cases and motions, and not due to an increase in the rate at which courts are granting motions after *Twombly* and *Iqbal*.

This study has several limitations worth noting. Most important, our study did not examine the substantive law that formed the basis of the court orders resolving the motions. This study must be interpreted in the context of ongoing development of the case law in both the Supreme Court and the lower courts.[36]

This study did not take into account changes in pleading practice. Survey data indicate that plaintiffs may be including more factual allegations in their com-

833, 838–39 (11th Cir. 2010) (approving 12(b)(6) dismissal of some, but not all, TILA claims on limitations grounds); Wienke v. Indymac Bank FSB, No. CV 10-4082, 2011 WL 871749, at *7–8 (N.D. Cal. Mar. 14, 2011); Franz v. BAC Home Loans Servicing, LP, Civ. No. 10-2025, 2011 WL 846835, at *2–4 (D. Minn. Mar. 8, 2011) (dismissing under 12(b)(6) because the RESPA defendant was not a "servicer" under the Act, because the finance charges complied with TILA, and because TILA does not allow offensive assertion of a recoupment claim); Gordon v. Home Lone Ctr., LLC, No. 10-10508, 2011 WL 795037, at *3 (E.D. Mich. Feb. 28, 2011); Koehler v. Wells Fargo Bank, No. 10-1903, 2011 WL 691583, at *2 (D. Md. Feb. 18, 2011) (dismissing TILA and RESPA claims on limitations grounds); Davis v. GMAC Mortg., LLC, No. H-11-09, 2011 WL 677359, at *3 (S.D. Tex. Feb. 16, 2011) (dismissing a TILA claim based on limitations); Obi v. Chase Home Fin., LLC, No. 10 C. 5747, 2011 WL 529481, at *3–4 (N.D. Ill. Feb. 8, 2011); Cebrun v. HSBC Bank USA, N.A., No. C10-5742BHS, 2011 WL 321992, at *2 (W.D. Wash. Feb. 2, 2011) (dismissing RESPA claim because the defendant was the trustee, not the servicer); Morris v. Bank of Am., No. C 09-02849 SBA, 2011 WL 250325, at *5 (N.D. Cal. Jan. 26, 2011) (dismissing RESPA claim because the allegations showed that the defendant timely responded to the plaintiff's qualified written letter); Mantz v. Wells Fargo Bank, N.A., Civ. A. No. 09-12010-JLT, 2011 WL 196915, at *3–4 (D. Mass. Jan. 19, 2011); Wheatley v. Reconstruct Co. NA, No. 3:10CV00242 JLH, 2010 WL 4916372, at *4 (E.D. Ark. Nov. 23, 2010) (dismissing TILA claims on limitations grounds and dismissing a RESPA claim because the defendant was not subject to the Act); Hughes v. Abell, __ F. Supp. 2d __, 2010 WL 4630227, at *10–11 (D.D.C. 2010) (dismissing TILA claims on limitations grounds); Done v. HSBC Bank USA, No. 09-CV-4878 (JFB) (ARL), 2010 WL 3824142, at *1–2 & n.5 (E.D.N.Y. Sept. 23, 2010) (dismissing TILA and RESPA claims on limitations grounds).

36. *See* Kuperman, *supra* note 6, at 4.

plaints, at least in employment discrimination cases.[37] We examined motions only if they were filed within the first 90 days of a case, and we cannot determine if the increase in motions filed during this period would be sustained throughout the duration of the cases. We were not able to study certain case types. For example, our study found only 21 orders involving antitrust litigation, and we were not able to develop a statistical model that would test for changes in so few cases. Our study included motions that challenged claims for reasons other than the sufficiency of the factual pleadings, and a more focused study of these types of cases may reveal changes that our study failed to detect.

Finally, the prevalence of motions granted with leave to amend requires further study. Our follow-up on the outcome of cases in which the plaintiff had an opportunity to amend the complaint has just begun. This effort may provide a more precise assessment of the extent to which complaints that are amended are challenged by subsequent motions to dismiss, and the extent to which those motions are granted without leave to amend.

37. Emery G. Lee III & Thomas E. Willging, Attorney Satisfaction with the Federal Rules of Civil Procedure: Report to the Judicial Conference Advisory Committee on Civil Rules 12 (Federal Judicial Center March 2010) (Seventy percent of plaintiffs' attorneys who had filed employment discrimination cases after *Twombly* indicated that they have changed the way they structure complaints in employment discrimination cases. Almost all of those attorneys (94%) indicated that they include more factual allegations in the complaint than they did prior to *Twombly*. Seventy-five percent indicated that they have had to "respond to motions to dismiss that might not have been filed prior to *Twombly*/*Iqbal*." Seven percent of those attorneys indicated that they had cases dismissed for failure to state a claim under the standard announced in *Twombly* and *Iqbal*.

Appendix A: Multivariate Statistical Models

In order to understand the impact of the *Twombly* and *Iqbal* decisions on the filing and outcome of Rule 12(b)(6) motions for failure to state a claim, we developed two separate data sets, both of which excluded all prisoner cases and cases with pro se parties. The means by which we developed these two data sets are described in Appendices B and C.

A. Filing of Motion to Dismiss for Failure to State a Claim

The first data set examined civil cases filed in 23 federal district courts in the months October 2005 through June 2006, and October 2009 through June 2010. From among these we identified cases with one or more Rule 12(b)(6) motions to dismiss for failure to state a claim filed within the first 90 days after the case was either filed originally in federal court or removed from state court.

Table A-1 presents the results of a logit model predicting the presence of a motion to dismiss given the year the case was filed, the district, and the type of case. As indicated in the table, there is great variation in motion activity across federal district courts and across types of cases. For the combined two periods, the Northern District of California, the District of Columbia, and the Northern District of Illinois all have higher filing rates than the baseline districts (Rhode Island, Eastern Michigan, and Maryland combined). The districts in the baseline are a combination of typical districts and those with too few cases to merit a separate variable. A number of courts have lower combined filing rates; the Eastern and Southern Districts of New York have especially low filing rates.[38]

As indicated by the predicted probabilities, motions to dismiss were more likely to be filed in 2010, when we controlled for type of case and federal district; these motions doubled from an adjusted estimate of 2.9% in 2006 to 5.8% in 2010. Filing rates also differed greatly across types of cases. Contract cases were more than twice as likely as torts cases to have motions filed; torts cases set the baseline for case types. Civil rights cases had the highest level of filing activity, with an overall adjusted estimate of 11.7%. In 2010, this rate rose to 12.7%, which suggests a leveling off in the rate of filing of motions in civil rights cases. Motions in employment discrimination cases increased from 7.7% to 10.1%.

38. While the filing rates in the Eastern and Southern Districts of New York are very low, the likelihood that motions would be granted without leave to amend in these districts was among the highest of the districts. We believe this may be due to pretrial practices in these districts, in which the judges confer with the attorneys early in the case and provide an indication of the likelihood of success of a motion to dismiss. Such a practice would be similar to the practices of many judges in these districts who require a pretrial conference prior to the filing of a motion for summary judgment. *See, e.g.*, Individual Practices of Judge John G. Koeltl 2, http://www.nysd.uscourts.gov/cases/show.php?db=judge_info&id=385 (last visited February 22, 2011) (requiring a premotion conference before making a motion for summary judgment).

Table A-1: Presence of a Motion to Dismiss for Failure to State a Claim Within 90 Days of Case Filing

Variable	Coefficient	Standard Error	Predicted Probability
			Baseline = 0.029
Eastern District of Arkansas	**-0.489**	0.153	0.018
Northern District of California	**0.163**	0.069	0.033
Eastern District of California	0.024	0.083	0.029
District of Colorado	-0.044	0.092	0.029
District of the District of Columbia	**0.704**	0.086	0.056
Middle District of Florida	0.058	0.067	0.029
Northern District of Georgia	-0.081	0.082	0.029
Northern District of Illinois	**0.185**	0.060	0.034
Southern District of Indiana	**-0.342**	0.108	0.021
District of Kansas	**-0.254**	0.129	0.022
District of Massachusetts	0.092	0.086	0.029
District of Minnesota	**-0.703**	0.092	0.014
District of New Jersey	**-0.626**	0.080	0.016
Eastern District of New York	**-2.001**	0.134	0.004
Southern District of New York	**-1.258**	0.082	0.008
Southern District of Ohio	0.093	0.089	0.029
Eastern District of Pennsylvania	0.106	0.065	0.029
District of South Carolina	0.070	0.089	0.029
Northern District of Texas	**-0.291**	0.093	0.022
Southern District of Texas	**-0.247**	0.077	0.022
Year 2010	**0.740**	0.083	0.058
Contract	**0.956**	0.081	0.071
Civil Rights	**1.507**	0.085	0.117
Other	0.029	0.080	0.029
Financial Instrument	**0.635**	0.144	0.053
Employment Discrimination	**1.050**	0.093	0.077
Contract x 2010	**-0.354**	0.103	0.101
Civil Rights x 2010	**-0.647**	0.109	0.127
Other x 2010	**-0.262**	0.101	0.046
Financial Instrument x 2010	0.090	0.161	0.104
Employment Discrimination x 2010	**-0.442**	0.120	0.101
Constant	-3.533	0.079	0.029

Note: N = 102,368; PCP = 95%. Statistically significant effects ($p < 0.05$) appear in bold print. The baseline for the model is a tort case filed in the District of Rhode Island, the Eastern District of Michigan, or the District of Maryland in 2006. The baseline probability sets all variables to zero. PCP is the percentage correctly predicted by the model and is an estimate of model fit. Where the variables were not statistically significant we list the predicted probability as the same as the value for the baseline, with one exception. For financial instruments in 2010, the predicted probability includes the main effect for these two significant variables. We also employed a rare event analysis, and the results were unchanged.

B. Outcome of Motions to Dismiss for Failure to State a Claim

The second data set examined the outcome of motions to dismiss for failure to state a claim as indicated by court orders responding to the merits of such motions issued from January through June in 2006 and 2010. Again, we removed all orders in cases involving prisoners and pro se parties. We also removed orders responding to Rule 12(b)(6) motions in which the movant and respondent were not the original defendant and plaintiff, respectively, which resulted in the elimination of orders involving counterclaims and affirmative defenses.

We modeled the outcome of the order in two ways. First, we modeled the choice of granting some or all of the relief requested by the motion, either with or without leave to amend. Second, we modeled the choice of granting all or some of the relief requested by the motion with respect to either some but not all claims by one or more plaintiffs, or all claims by one or more plaintiffs.

1. Motions Granted With or Without Leave to Amend

These models implicitly assume that judges are making decisions from among three outcomes. In this first model, the judges are choosing from among denying the motion, granting the motion with leave to amend, and granting the motion without leave to amend. Using a multinomial probit model, we predicted the outcome of the motion given the year in which the order was filed, the district, the type of case, and if the motion responded to an amended complaint. The multinomial probit model allows us to assume that the introduction of a third choice does not draw judges proportionately from the other two choices (i.e., giving the judges the choice of granting the motion with leave to amend does not draw evenly from those who would grant with no leave to amend and those who would deny the motion). Judges choose whether to grant or deny the motion, and if they choose to grant, then they decide whether to allow leave to amend the complaint or not. The two choices of granting the motion are clearly similar to each other, and substantially different from denying the motion. Multinomial probit models account for those differences. In fact, statistical tests show that this is the appropriate model for these data.[39]

As indicated in Table A-2, there was great variation across districts in the probability of granting the motion with leave to amend. The Eastern District of California, the Northern District of California, the Middle District of Florida, the Eastern District of New York, and the Southern District of New York all had a higher probability of granting *with* leave to amend than the baseline districts did, all else being equal. On the other hand, the Middle District of Florida, the Northern District of Illinois, the Eastern District of Pennsylvania, and the Northern Dis-

39. One might also think of this decision making as a nested or conditional process. Judges make the decision to grant or deny, and then if they decide to grant, they decide the issue of giving leave to amend. While this model is certainly possible, its estimation requires some difference in the independent variables used in the analysis. Here the variables are the same, making multinomial probit the appropriate model for this analysis. We also ran logit models on subsets of variables and obtained the same results.

trict of Texas were all less likely than the baseline districts to grant *without* leave to amend, all else being equal.

Additionally, we found that orders filed in 2010 responding to motions in cases challenging financial instruments had a higher probability of being granted without leave to amend than those filed in 2006, all else being equal. We found no significant difference in the outcomes of motions in other types of cases and no other significant interactions between type of case and year of order. Finally, responding to an amended complaint increased the probability that the motion would be granted without leave to amend, all else being equal.

Table A-2: Multinomial Probit Model of Granting All or Some of the Relief Requested by the Motion With and Without Opportunity to Amend the Complaint

Variable	Grant and Amend		Grant and No Amend	
	Coefficient	Std. Error	Coefficient	Std. Error
Eastern District of Arkansas	-0.068	0.469	-0.668	0.391
Northern District of California	**1.625**	0.274	-0.191	0.243
Eastern District of California	**1.589**	0.250	-0.260	0.212
District of Colorado	-0.300	0.436	-0.519	0.329
District of the District of Columbia	-0.657	0.663	0.146	0.405
Middle District of Florida	**0.704**	0.256	**-0.983**	0.221
Northern District of Georgia	0.639	0.359	-0.054	0.304
Northern District of Illinois	0.179	0.283	**-0.709**	0.238
Southern District of Indiana	-0.363	0.420	-0.266	0.306
District of Kansas	0.274	0.357	-0.500	0.303
District of Massachusetts	0.160	0.467	0.251	0.364
District of Minnesota	0.206	0.400	-0.063	0.324
District of New Jersey	0.269	0.305	0.060	0.245
Eastern District of New York	**0.748**	0.329	0.157	0.279
Southern District of New York	**0.825**	0.376	0.324	0.324
Southern District of Ohio	0.217	0.333	-0.064	0.270
Eastern District of Pennsylvania	0.072	0.318	**-0.596**	0.261
District of South Carolina	-1.085	0.651	-0.626	0.395
Northern District of Texas	0.044	0.376	**-0.909**	0.333
Southern District of Texas	-0.200	0.416	-0.318	0.322
Year 2010	0.235	0.337	-0.115	0.300
Contract	-0.223	0.313	-0.289	0.272
Other	-0.545	0.320	-0.346	0.275
Civil Rights	-0.066	0.314	0.008	0.273
Financial Instrument	-0.163	0.540	-1.075	0.556
Employment Discrimination	-0.202	0.354	-0.049	0.303
Amended Complaint	-0.006	0.102	**0.283**	0.095
Contract x 2010	0.040	0.396	0.005	0.354
Other x 2010	0.335	0.397	0.077	0.353
Civil Rights x 2010	0.190	0.401	0.225	0.358
Financial Instrument x 2010	0.836	0.604	**1.828**	0.615
Employment Discrimination x 2010	0.104	0.454	0.126	0.399
Constant	**-0.752**	0.345	**0.636**	0.286

Note: N = 1,915. Statistically significant effects ($p < 0.05$) appear in bold print. The baseline for the model is an order deciding one or more Rule 12(b)(6) motions to dismiss filed in the District of Rhode Island, the Eastern District of Michigan, or the District of Maryland in 2006 in a tort case, responding to an un-amended complaint.

To understand the substantive impact of these factors, we estimated marginal effects. Table A-3 shows the results of these effects.

Table A-3: Marginal Effects Estimates for Multinomial Probit Model (Deny vs. Grant with Leave to Amend vs. Grant Without Leave to Amend)

Variable	Deny	Grant and Amend	Grant and No Amend
Baseline	**0.298**	**0.145**	**0.557**
Districts			
Eastern District of California	-0.149	0.468	-0.319
Northern District of California	-0.140	0.469	-0.328
Middle District of Florida	0.060	0.304	-0.364
Northern District of Illinois	0.111	0.121	-0.233
Eastern District of New York	-0.087	0.144	-0.057
Southern District of New York	-0.115	0.135	-0.020
Eastern District of Pennsylvania	0.106	0.082	-0.188
Northern District of Texas	0.163	0.109	-0.272
Amended Complaint	-0.054	-0.030	0.084
Financial Instrument x 2010	-0.258	-0.077	0.335

Table A-3 indicates the marginal effects of individual variables when other variables were held constant. These effects estimates allow for an assessment of the impact of each of the variables by adding the baseline probability of each outcome and the effects estimate for each variable that was statistically significant. For example, while the probability of orders granting a motion with leave to amend was only 15% (i.e., 0.145) in the baseline districts, the probability of orders granting motions with leave to amend in the Eastern and Northern Districts of California was 61% (0.145 + 0.468 in the Eastern District of California and 0.145 + 0.469 in the Northern District of California), when other variables were held constant. While granting motions without leave to amend was the most likely outcome (56% adjusted baseline probability), orders responding to motions challenging financial instruments had an 89% adjusted probability of being granted without leave to amend in 2010 (0.557 + 0.335). Responding to an amended complaint increased the adjusted probability of granting a motion without leave to amend to 64% (0.557 + 0.084).

2. Motions Granted with Respect to Only Some or All of the Claims of a Plaintiff

Motions may also be granted with respect to only some claims by plaintiffs, or with respect to all claims by at least one plaintiff, thereby eliminating one or more plaintiffs from the case (at least with respect to the issues addressed by the order). Table A-4 shows the results of the model estimating these two outcomes.

Table A-4: Multinomial Probit Model of Granting Motion with Respect to Some or All Claims by a Plaintiff

Variable	Grant with Respect to Claims Only		Grant with Respect to All Claims of at Least One Plaintiff	
	Coefficient	Std. Error	Coefficient	Std. Error
Eastern District of Arkansas	-0.251	0.389	**-0.974**	0.480
Eastern District of California	**0.675**	0.241	0.387	0.252
Northern District of California	**0.559**	0.212	**0.438**	0.221
District of Colorado	-0.429	0.340	-0.431	0.364
District of the District of Columbia	0.062	0.417	-0.053	0.440
Middle District of Florida	-0.193	0.218	**-0.489**	0.234
Northern District of Georgia	0.267	0.307	-0.001	0.330
Northern District of Illinois	-0.397	0.241	-0.453	0.255
Southern District of Indiana	-0.140	0.312	-0.454	0.345
District of Kansas	-0.375	0.314	-0.140	0.321
District of Massachusetts	0.315	0.371	0.110	0.393
District of Minnesota	0.074	0.332	-0.073	0.352
District of New Jersey	0.031	0.253	0.194	0.260
Eastern District of New York	0.343	0.284	0.308	0.296
Southern District of New York	0.198	0.337	**0.733**	0.335
Southern District of Ohio	0.088	0.277	-0.123	0.294
Eastern District of Pennsylvania	-0.226	0.264	**-0.687**	0.295
District of South Carolina	-0.535	0.406	**-0.911**	0.465
Northern District of Texas	-0.508	0.333	**-0.737**	0.363
Southern District of Texas	-0.120	0.327	-0.486	0.361
Year 2010	-0.044	0.298	0.138	0.328
Contract	-0.251	0.271	-0.247	0.304
Other	-0.504	0.276	-0.278	0.307
Civil Rights	-0.204	0.275	0.256	0.301
Financial Instrument	-0.796	0.520	-0.439	0.564
Employment Discrimination	0.002	0.302	-0.278	0.347
Amended Complaint	**0.297**	0.093	-0.015	0.100
Contract x 2010	0.002	0.351	0.041	0.387
Other x 2010	0.186	0.351	0.138	0.385
Civil Rights x 2010	0.330	0.357	0.019	0.387
Financial Instrument x 2010	**1.311**	0.580	**1.429**	0.624
Employment Discrimination x 2010	-0.010	0.397	0.327	0.443
Constant	0.302	0.289	-0.082	0.315

Note: N = 1,916. Statistically significant effects ($p < 0.05$) appear in bold print. The baseline for the model is an order deciding one or more Rule 12(b)(6) motions to dismiss filed in the District of Rhode Island, the Eastern District of Michigan, or the District of Maryland in 2006 in a tort case, responding to an un-amended complaint.

Using the same baseline discussed above, we found that the Eastern and Northern Districts of California were again more likely than the baseline districts to grant motions with respect to some of the claims by a plaintiff. The Northern District of California and the Southern District of New York were also more likely than the baseline districts to grant one or more motions with respect to all claims by one or more plaintiffs. On the other hand, the Eastern District of Arkansas, the Middle District of Florida, the Eastern District of Pennsylvania, the District of South Carolina, and the Northern District of Texas were less likely than the baseline districts to grant motions with respect to all claims by one or more plaintiffs.

Similarly, in 2010, orders responding to motions in cases challenging financial instruments were more likely to be granted, both with respect to all claims by at least one plaintiff and with respect to only some claims, all else being equal. As before, we found no statistically significant increase in the likelihood that motions were granted for other types of cases. Finally, responding to an amended complaint increased the likelihood of granting a motion with respect to claims only.

Table A-5 shows the marginal effects of these models. While granting a motion with respect to claims only was the most likely of the three outcomes overall, none of the baseline outcomes had a probability over 50%. Again, this effect varies by district. In the Eastern and Northern Districts of California, the probability of granting a motion with respect to claims only was approximately 50% (0.399 + 0.137 in the Eastern District of California, and 0.399 + 0.095 in the Northern District of California). Granting motions with respect to claims was also a more likely outcome in the Middle District of Florida and the Eastern District of Pennsylvania, though still not as likely as it was in the Eastern and Northern Districts of California. In the Northern District of Texas, denials of motions were more common than the other two outcomes. Orders filed in 2010 responding to motions challenging financial instruments had a higher probability of being granted in both categories, all else being equal. Finally, responding to an amended complaint increased the probability of granting a motion with respect to claims by approximately 49%.

Table A-5: Marginal Effects Multinomial Probit Model (Deny vs. Grant of Motion Dismissing Claims Only vs. Grant of Motion Dismissing All Claims of At Least One Plaintiff)

Variable	Deny	Only Claims	All Claims by a Plaintiff
Baseline	**0.289**	**0.400**	**0.311**
Districts			
Eastern District of Arkansas	0.146	0.039	-0.185
Eastern District of California	-0.127	0.139	-0.012
Northern District of California	-0.118	0.094	0.024
Middle District of Florida	0.088	0.009	-0.097
Southern District of New York	-0.111	-0.071	0.182
Eastern District of Pennsylvania	0.115	0.020	-0.136
District of South Carolina	0.200	-0.049	-0.151
Northern District of Texas	0.175	-0.057	-0.118
Amended Complaint	-0.043	0.093	-0.050
Financial x 2010	-0.237	0.096	0.140

C. Summary

Together these three analyses indicate that the likelihood of a motion to dismiss for failure to state a claim being filed has increased since 2006 across a wide range of types of cases. After controlling for differences across districts and the presence of an amended complaint, we found that motions to dismiss were more likely to be granted without an opportunity to amend the complaint in cases challenging financial instruments. Motions in such cases were rarely denied in 2010, and were split almost evenly between motions granted with respect to all claims by at least one plaintiff and motions granted with respect to only some claims by plaintiffs. We found no increase in the likelihood that motions to dismiss for failure to state a claim would be granted across other broad case types. The presence of an amended complaint also increased the likelihood that the motion would be granted without an opportunity to amend the complaint, and granted with regard to only some claims by a plaintiff.

Appendix B: Identification of Cases and Designation of Case Types

This study examined the filing and resolution of Rule 12(b)(6) motions to dismiss for failure to state a claim as revealed in orders filed in 23 federal district courts in January through June of 2006 and 2010. The courts included in this study represent each of the 12 federal circuits, often including the 2 districts in the circuits with the greatest number of civil filings in 2009.[40] The districts included in this study are listed in Table B-1.

Table B-1: Orders Resolving the Merits of Rule 12(b)(6) Motions

District	Order Year		Total
	2006	2010	
Eastern District of Arkansas	14	13	27
Eastern District of California	33	204	237
Northern District of California	100	238	338
District of Colorado	23	19	42
District of the District of Columbia	9	17	26
Middle District of Florida	84	124	208
Northern District of Georgia	47	13	60
Northern District of Illinois	44	86	130
Southern District of Indiana	24	28	52
District of Kansas	26	29	55
District of Massachusetts	14	23	37
District of Maryland	8	13	21
Eastern District of Michigan	38	58	96
District of Minnesota	16	31	47
District of New Jersey	45	71	116
Eastern District of New York	35	47	82
Southern District of New York	16	38	54
Southern District of Ohio	27	55	82
Eastern District of Pennsylvania	58	31	89
District of Rhode Island	0	7	7
District of South Carolina	9	18	27
Northern District of Texas	14	30	44
Southern District of Texas	16	29	45
Total	700	1,222	1,922

40. Several of the largest districts in some of the circuits were excluded because of problems in collecting the data necessary to conduct the study. Characteristics of the districts are found in the Administrative Office of the U.S. Courts publication Federal Court Management Statistics, http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics.aspx (last visited February 6, 2011).

We wanted to examine motion practice during periods that neither anticipated a change in pleading practice nor reacted to the Supreme Court opinions in the absence of appellate court guidance. January through June of 2006 was selected as a period of stable motion practice before the Supreme Court decision in *Bell Atlantic Corp. v. Twombly* in May 2007. January through June of 2010 was selected as a period after which each of the circuits had had a chance to publish at least one appellate court opinion interpreting *Ashcroft v. Iqbal* and offering guidance to the district courts. This analysis does not address motion activity in the interim period from July 2006 through December 2009.

This study is unlike other recent studies of motions to dismiss for failure to state a claim that rely on cases that appear in the computerized legal reference systems.[41] This study identified judicial orders resolving the merits of such motions in each of the selected districts by first identifying orders responding to one or more general motions to dismiss, as indicated by codes entered by the court clerks of the individual districts into the CM/ECF database.[42] These codes relate to the entries on the docket sheets of individual cases and point to documents related to the docket entry. Using a Structured Query Language (SQL) program, we identified all orders responding to all motions to dismiss filed in the selected district courts for the designated dates.[43] Next, we ran a Practical Extraction and Report Language (PERL) program to identify text indicating that the order resolved at least one Rule 12(b)(6) motion to dismiss for failure to state a claim.[44] This process identified 4,725 orders that included variations on the search terms and that were included in the coding task.[45] The PERL program was unable to convert certain types of non-text documents, such as PDF documents stored as static images, and we were unable to identify orders resolving motions to dismiss in such documents.[46] We believe this procedure is equivalent to identifying motions to dismiss on the docket sheets, then searching the text of the motions and responding orders to identify motions to dismiss for failure to state a claim.

A variation on this methodology was used to identify Rule 12(b)(6) motions to determine changes in filing rates. We expanded the case selection window to include cases filed as early as October 1, 2005, for the 2006 cohort, and as early as October 1, 2009, for the 2010 cohort. Again, we used the CM/ECF codes and an SQL program to identify motions to dismiss filed within three months of the case

41. *See supra* note 4 and accompanying text.

42. Our study relied on data in a backup database in order to avoid disrupting CM/ECF service.

43. We excluded all sealed records and other documents that were unavailable on the courts' electronic public access system (PACER).

44. *See supra* note 8.

45. As a result of an early error in framing the search request, a few hundred of these were cases that included only the term "pro se" without other terms indicating the presence of a Rule 12(b)(6) motion. These cases were identified and removed from the sample.

46. We presently do not know the extent to which motions and orders are stored as static images, and are not able to estimate the extent to which we may have failed to identify such motions and orders in our text search. However, we believe such images are more common in motions than in orders, and are more common in submissions by prisoners and pro se parties than in other cases.

being filed in federal court. We then used a PERL program to identify text indicating that the motion was brought under authority of Rule 12(b)(6).

This is the first time we are aware of that this particular research methodology has been used. We believe this methodology for identifying Rule 12(b)(6) motions and related orders represents an improvement over methods that rely on computerized legal reference systems, since this method relies on data prepared by the district courts to identify all orders responding to all motions to dismiss in all cases, and thereby includes cases that do not appear in the computerized legal reference systems.[47] We believe this methodology is also an improvement over methods that identify such motions on the basis of only the text of docket entries, since such docket entries often combine all Rule 12 motions and motions for voluntary dismissal under a single general docket entry.

However, this technique also has some disadvantages. These programs cannot convert motions and orders that appear as a non-text scanned image into searchable text. Also, the programs that convert the PDF formatted motions and orders into searchable text on occasion have difficulty recognizing relevant text, especially where the quality of the PDF document is poor. For example, we found a few instances in which the program overlooked a relevant motion or order because it read the text "12(b)(6)" as "12(b1(6)." We have not estimated the extent of these problems, but we believe they do not affect the accuracy of these results, since the text misinterpretations would not be related to the outcome of the motions. In other words, we believe such errors would be equally likely in orders granting motions and orders denying motions; in contrast, computerized legal reference systems are less likely to include a routine order denying a motion to dismiss.[48]

47. We found that the presence of 12(b)(6) orders in the Westlaw database varied greatly across federal districts. We searched in the Westlaw "allfeds" database for 30 to 40 Rule 12(b)(6) orders in each of three federal district courts: the Eastern District of Arkansas, the District of Colorado, and the District of Kansas. For the Eastern District of Arkansas, we found 87% of the orders on Westlaw, and for the District of Colorado, we found 82% of the orders. However, for the District of Kansas, we found only about 18% of the orders on Westlaw. These findings suggest that Westlaw may publish the majority of orders for some districts, but far less than the majority for other districts. In addition, whether an order was granted or denied may be related to its likelihood of publication. In the Eastern District of Arkansas, 65% of published orders were granted, and 100% of unpublished orders were granted (though there were only 4 unpublished orders). In the District of Colorado, 86% of published orders were granted, while only 62% of unpublished orders were granted. In the District of Kansas, about 71% of published and unpublished orders were granted. A search of Westlaw for a particular term or type of order may not present an accurate picture of the number or disposition of those cases in the district. We interpret these differences in publication rates and differences in grant rates as indicating a need for caution in basing conclusions regarding court practices on studies of orders appearing in the Westlaw federal court databases.

48. *See supra* note 5.

We linked the cases we identified with records from the Administrative Office of the U.S. Courts[49] to allow further specification of the origin and type of case. These origin codes allowed us to restrict our analyses to cases filed as an original proceeding or removed from the state court to the district court. In doing so, we excluded from our analyses cases remanded from the courts of appeals, reopened or reinstated for additional action, transferred from another federal district court, or transferred as part of a multidistrict litigation proceeding, as well as appeals from a magistrate judge's decision.

We also relied on data from the Administrative Office to identify types of cases. The AO data include a "Nature of Suit" code that is designated by the party filing the case or removing the case to federal court. We then combined these codes into seven categories for purposes of analysis. Table B-2 presents the number and types of cases included in each of the categories for the full database.

49. *See* Administrative Office of the U.S. Courts, Federal Court Cases: Integrated Database Series, available at http://www.icpsr.umich.edu/icpsrweb/NACJD/series/00072. These are administrative data prepared by the clerks in the individual federal district courts. For critiques of the usefulness of this data set for research purposes, see Theodore Eisenberg & Margo Schlanger, *The Reliability of the Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis*, 78 Notre Dame L. Rev. 1455, 1460 (2003) (finding errors in recorded award amounts in torts and prisoner civil rights cases); Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 Stan. L. Rev. 1275, 1309–11 (2005) (problems with codes indicating voluntary and other dismissals); and Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Non-Trial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. Empirical Legal Stud. 705 (2004) (finding other coding errors).

Table B-2: Classification of Nature of Suit Codes into Broad Case Types

Case Types		2006	2010	Total
Contract	Insurance	37	43	80
	Marine Contract Actions	0	3	3
	Miller Act	1	0	1
	Stockholders Suits	5	5	10
	Other Contract Actions	100	152	252
	Contract Product Liability	1	6	7
	Franchise	2	3	5
	Securities, Commodities, Exchange	39	29	68
	Total	185	241	426
Torts	Torts to Land	2	5	7
	Airplane Product Liability	0	3	3
	Assault, Libel, and Slander	4	6	10
	Federal Employers Liability	0	1	1
	Marine Personal Injury	2	2	4
	Motor Vehicle Personal Injury	1	3	4
	Motor Vehicle Product Liability	1	1	2
	Other Personal Injury	16	24	40
	Medical Malpractice	2	1	3
	Personal Injury—Product Liability	9	27	36
	Other Fraud	29	19	48
	Other Personal Property Damage	3	12	15
	Property Damage—Product Liability	1	7	8
	Total	70	111	181
Civil Rights	Other Civil Rights	150	209	359
	Civil Rights Voting	1	1	2
	Civil Rights Accommodations	8	3	11
	Americans with Disabilities Act Employment	4	10	14
	Americans with Disabilities Act Other	9	9	18
	Total	172	232	404

Table B-2: Classification of Nature of Suit Codes into Broad Case Types (continued)

Case Types		2006	2010	Total
Employment Discrimination	Civil Rights Jobs	95	119	214
	Total	95	119	214
Financial Instrument	Negotiable Instruments	0	64	64
	Foreclosure	2	49	51
	Other Real Property Actions	3	35	38
	Truth in Lending	5	34	39
	Consumer Credit	7	53	60
	Total	17	235	252
Other	Overpayments & Enforcement of Judgment	2	2	4
	Overpayments Under the Medicare Act	0	1	1
	Recovery of Overpayments of Vet Benefits	2	0	2
	Rent, Lease, Ejectment	0	2	2
	Antitrust	7	9	16
	Bankruptcy Withdrawal 28 U.S.C. § 157	0	6	6
	Banks and Banking	2	9	11
	Interstate Commerce	2	1	3
	Other Immigration Action	0	1	1
	Civil (RICO)	15	25	40
	Cable and Satellite TV	1	4	5
	Other Forfeiture and Penalty Suits	0	1	1
	Fair Labor Standards Act	4	15	19
	Labor/Management Relations Act	4	7	11
	Railway Labor Act	2	0	2
	Other Labor Litigation	7	13	20
	Employee Retirement Income Security Act	28	42	70
	Copyright	11	11	22
	Patent	7	19	26
	Trademark	8	16	24
	Social Security Disability Claim	0	1	1
	Tax Suits	2	2	4
	Other Statutory Actions	49	79	128
	Agricultural Acts	1	0	1
	Environmental Matters	6	13	19
	Freedom of Information Act of 1974	1	1	2
	Constitutionality of State Statutes	0	4	4
	Total	161	284	445
Grand Total		700	1,222	1,922

Appendix C: Coding and Analysis of Motions and Orders

We loaded relevant orders resolving Rule 12(b)(6) motions to dismiss for failure to state a claim into a FileMaker Pro database, along with identifying information and Administrative Office data related to the case. We assigned the cases random numbers, then sorted the cases by those numbers to ensure that coding assignments would be randomly assigned to coders across groups and districts. On two occasions we added additional cases to the database following the same randomization procedure.

A team of 10 recent law school graduates reviewed the judicial orders. Relying on remote access to the FileMaker Pro database, they coded information contained in the order indicating the nature and resolution of the motion.[50] The FileMaker Pro database allowed the coder to link to the relevant document and directly enter codes into the database. In reviewing the motions, the coders first confirmed that the order resolved the merits of at least one motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), noted characteristics of the movant and respondent, and indicated judicial action taken in response to the motion. If the order granted all or some of the relief requested by the motion, the coder indicated whether the order appeared to exclude all claims by one or more plaintiffs, and whether the order indicated that the respondent would have an opportunity to amend the complaint. Intercoder reliability checks for 25 orders revealed that the coders agreed on 89% to 97% of the coding choices, depending on the nature of the specific question. A copy of the code sheet appears as Figure C-1.

The coding instructions resolved a number of difficult questions. We excluded a number of cases in which Rule 12(b)(6) motions were granted for reasons other than a failure to state a claim. For example, we excluded cases in which motions were granted on the basis of sovereign or qualified immunity, which we regarded as a jurisdictional issue and which was usually raised as an affirmative defense. When a respondent failed to file a timely response and the court granted the Rule 12(b)(6) motion, thereby dismissing the claim, we coded the order as resolving the merits of the Rule 12(b)(6) motion, since we regarded the failure to respond in a timely manner as an admission that the respondent was unable to state a claim.

Coders often encountered circumstances in which a single order resolved more than one motion, or a single motion was directed at multiple claims. We also found multiple motions by multiple defendants directed at a single claim. For our purposes, we counted *all* Rule 12(b)(6) motions resolved by a single order as resolving a single 12(b)(6) motion addressing multiple claims.

50. The coders were former law review students who had recently graduated from the University of Oklahoma School of Law. The coders underwent a three-hour training program, and used a 12-page coding manual to aid in the process. E-mail exchanges, with copies to all members of the group, allowed coders to raise questions and seek clarification throughout the process. Steven Gensler, a professor of the University of Oklahoma School of Law and a member of the Judicial Conference Advisory Committee on Civil Rules, participated in the orientation program and supervised the coding process on-site.

Figure C-1: Code Sheet for Recording Action on Rule 12(b)(6) Motion

Oklahoma FRCivP 12(b)(6) Coding

SEQUENCE NUMBER : _____

CODER: _____ **DATE:** _____ **ORDER LINK:** _____

Show Document

1. DOCKET NUMBER: _____ **ORDER DATE:** _____

2. Order resolves the merits of at least one 12(b)(6) motion:

- ○ Yes
- ○ No (go to next order)
- ○ Unclear (go to next order)

3. Order resolves the merits of more than one 12(b)(6) motion:

- ○ Yes
- ○ No
- ○ Unclear

4. Order resolves the merits of <u>other</u> Rule 12 motions: ○ Yes ○ No

5. Rule 12(b)(6) motion directed to <u>amended</u> complaint: ○ Yes ○ No

6. Movant is Original:

○ Pl ○ Def ○ Third Party **Pro Se:** ○ Yes ○ No

○ Only Indiv(s) ○ Corp ○ Govt ○ Multip/Other **(specify)** _____

7. Respondent is Original:

○ Pl ○ Def ○ Third Party **Pro Se:** ○ Yes ○ No

○ Only Indiv(s) ○ Corp ○ Govt ○ Multip/Other **(specify)** _____

8. Judicial Action On Motion ○ Deny (go to next order)

○ Grant **Opportunity to Amend** ○ Yes ○ No

○ Grant in part **Opportunity to Amend** ○ Yes ○ No

○ Uncertain/Other **Specify:** _____

9. If the 12(b)(6) order is granted in whole or in part, does it:

- ○ No plaintiff is eliminated by way of a Rule 12(b)(6) ruling.
- ○ One or more but not all plaintiffs are eliminated by way of a Rule 12(b)(6) ruling.
- ○ All plaintiffs are eliminated by way of a Rule 12(b)(6) ruling.
- ○ Other **Specify:** _____

Rule 12(b)(6) motions directed toward multiple claims often were granted as to some claims and denied as to others. If an order granted any relief requested by the motion, we coded the motion as being granted as to some claims and then determined whether the order indicated an opportunity to amend the complaint with regard to the dismissed claims. Similarly, if the order resolved multiple Rule 12(b)(6) motions by granting some motions and denying others, the multiple motions were regarded as a single Rule 12(b)(6) motion for our purposes and coded as granting some of the relief requested. If an order granting any relief requested by a motion allowed an opportunity to amend the complaint, we coded the order as allowing an opportunity to amend.

If the order granted any relief sought by the Rule 12(b)(6) motion, the coder indicated whether the grant appeared to eliminate all claims by one or more plaintiffs, thereby excluding those plaintiffs from the litigation. If an order dismissed some but not all claims by a plaintiff, then the coder indicated that no plaintiff was eliminated by way of the ruling. This coding was somewhat imprecise, since the breadth of the litigation was sometimes difficult to interpret in the context of the order alone. The categories listed as responses in Question 9 on the code sheet were developed after pilot work revealed inconsistencies in our attempt to code for the effect of the motion on defendants. Unfortunately, after we changed the response categories, the language of the question no longer fit the revised categories. This fact was called to the attention of the coders, and we agreed that the question would be interpreted as asking how an order that granted at least some of the relief requested would affect the role of one or more plaintiffs.

Coding was reviewed by Center staff for completeness and consistency on an ongoing basis. Responses designated as “unclear,” “uncertain,” and “other” were reviewed and resolved in discussion with the coder. Data were then loaded into the SPSS (version 17) statistical analysis program. Multivariate statistical models were analyzed using STATA 11 SE. CLARIFY was used to estimate the predicted probabilities for the logit models.

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12b-004199

12b-004200

C RULE 84 FORMS

The Forms in the Civil Rules Appendix are venerable, familiar, and often useful. They have the imprimatur of the full Enabling Act process. It may seem startling to suggest that the time has come to consider basic changes in the means of generating and maintaining the Forms. But the Civil Rules Committee plans to undertake this chore. And because other advisory committees have followed different practices in respect to forms, it may prove useful to establish a joint project under the Standing Committee's guidance. The reasons for taking on the Forms are sketched below.

Rule 84 demonstrates in a single sentence the virtues it hopes to illustrate through the Forms:

> The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.

The Forms cover a variety of topics. Many of them serve useful purposes. Forms 1 and 2 provide a uniform caption and signature line. Form 3 is a summons. Form 5 provides a notice of a lawsuit and request to waive service — this form was developed with great care to implement Rule 4(d), and was thought so important that Rule 4(d)(1)(D) requires that the text prescribed in Form 5 be used to inform the defendant of the consequences of waiving and not waiving service. The Form 52 Report of the Parties' Planning Meeting was drafted with equal care, and was amended in 2010, to guide parties through the topics that should be considered in a Rule 26(f) conference. Form 80, the Notice of a Magistrate Judge's Availability, includes a paragraph designed to avoid any hint of pressure to consent to trial before a magistrate judge. Other forms are similarly useful or even important.

Forms 10 through 21 and 61 are complaints. They were revised, but not much revised, in the Style Project. The original purpose was to translate the abstract pleading standard of Rule 8(a)(2) into "pictures" showing that a remarkably short and plain statement can show the pleader is entitled to relief. The Form negligence complaint, then Form 9 and now Form 11, won honorable mention in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1970 n. 10 (2007): "A defendant wishing to prepare an answer in the simple fact pattern laid out in Form 9 would know what to answer."

The form complaints have gained prominence in the wake of the Twombly and Iqbal decisions. This increased visibility brings conflicting pressures to bear on any project to reconsider the Forms. Caution is supported by the considerations that counsel delay in any project to adjust pleading, discovery, or yet other rules to respond to the Twombly and Iqbal decisions. Rule 84 commits the courts to the proposition that these Forms suffice. Lower courts, however, are often puzzled about the contrast between this much "simplicity and brevity" and the seemingly elevated levels of contextual pleading described by the Supreme Court. A succinct statement was provided in *Tyco Fire Products, LP v. Victualic Company*, Civil Action 10-4645 (E.D.Pa. April 12, 2011), slip p. 26. In ruling that a counterclaim to declare a patent invalid must be more detailed than the "conclusory complaints of direct infringement" contemplated by Form 18, Judge Robreno said this:

> Put simply, the forms purporting to illustrate what level of pleading is required do not reflect the sea change of Twombly and Iqbal. Rule 84, however, instructs that the forms "suffice" such that pleaders who plead in accordance with the forms are

> subject to a safe harbor. * * * This inconsistency between the Supreme Court's interpretation of Rule 8(a) and the forms Rule 84 validates should be remedied: either by modifying or eliminating Rule 84 or by updating the forms to clearly comply with existing law.

Although the Forms cover only a small fraction of the varieties of claims that can be brought to a federal court, the backward implications of these pictures could have an important bearing on pleading standards across the board. Acting on the Forms now, without yet beginning a broader consideration of pleading, could easily be seen as an indirect or even covert attempt to set more general pleading standards.

The increased prominence of the pleading Forms, on the other hand, also prompts a fresh look at them. They do not all look good. The Form 18 complaint for patent infringement is a clear example. It does not even designate which claims are alleged to be infringed, nor the features of the defendant's acts that correspond to the claim limitations.

If there are persuasive reasons to believe a better form could be developed for patent-infringement complaints, there are powerful reasons to doubt the capacities of the Enabling Act process to devise a suitable form. A deep knowledge of the opportunities and challenges of pleading an infringement claim is required. The question is not merely one of substantive patent law. Imagine patents on a simple mechanical device, a complex biological process, an intricate computer system, or a design. Consider the possibility that several patents may bear on a single course of alleged infringement. Add in the prospect that the plaintiff may face a problem common in other kinds of litigation — it seems highly improbable the defendant could produce a particular product without infringing the plaintiff's process patent, but only access to the defendant's operations can provide the information.

One more illustration confirms the point. How could a Committee draft a form complaint that would adequately plead a "contract, combination, * * * or conspiracy" among the defendants in the Twombly case? If the form were devised, would it be useful for any other plaintiff, defendant, or court?

Apart from the form complaints, the Forms cover some parts of the Rules, but far from all. Forms 50 and 51 illustrate requests to produce documents under Rule 34 and to make admissions under Rule 36; there are no forms for a deposition notice, a subpoena to produce, an interrogatory (nor when a multiple question becomes a discrete subpart), or a motion to compel a physical examination. It may be possible to construct reasons for this pattern, but the same question could be asked throughout the Forms.

Of course the answer could be that the Forms are important, and the Rules Committees are obliged to generate and maintain more Forms, with greater care. But this answer prompts a counter-answer.

The historic fact is that the Committees have not devoted sustained attention to the Forms. Until the revisions effected in the Style Project, effective in 2007, many of the forms marked their pristine originality by using illustrative dates ranging from 1934 to 1936. In the Style Project itself,

the Forms received much less attention than the rules texts. This neglect does not reflect callous indifference. It reflects the continuing press of more important business. There is little reason to hope that the future will bring a period of relative calm, when the settled satisfactory operation of all the Civil Rules affords time to tend to the Forms in a comprehensive way.

It is not inevitable that the Forms be generated through the Enabling Act process. The statutes do not mention Forms. The Criminal Rules forms are generated by the Administrative Office, with advice from the Criminal Rules Committee but without invoking the Enabling Act process. The Administrative Office generates and maintains a large number of forms for civil actions that do not become Rule 84 Enabling Act Forms. These processes seem to have worked well.

Reliance on the Administrative Office is not the only possible alternative to full Enabling Act treatment. Other systems can be devised, and the alternatives should be explored.

If the Forms come to be separated from the Enabling Act process, it will be necessary to reconsider Rule 84. It does not seem wise to delegate authority to adopt forms that "suffice under these rules," even if the Enabling Act permits delegation. Rule 84 might be recast to tout the virtues of a set of "official" forms, by whatever process created, without endorsing them as sufficient under the rules. It might be better to withdraw Rule 84.

All of these considerations combine to make the Rule 84 Forms ripe for review. The outcome is not clear, nor is it clear that the same process is suitable for each Advisory Committee. Bankruptcy Forms may well require a unique process. But much can be learned by considering all of the rules, and all of the different Committees' processes, together.

D DUKE CONFERENCE

Rules amendments are but one of several paths to pursue in working to implement the many important lessons learned at the 2010 Litigation Review Conference. The theme that reappeared constantly was that the most important needs are for utilizing procedural opportunities in proportion to the reasonable demands of the case, for cooperation among lawyers, and for active and hands-on judicial management. Most participants believed that the basic framework of the Civil Rules can work well without drastic changes if, under active judicial guidance, lawyers cooperate in proportional litigation activity. Education of the bench and bar, best-practices guides, empirical research — often in conjunction with carefully planned and supervised pilot projects — can accomplish a great deal. The Federal Judicial Center is actively engaged in working with the Advisory Committee to pursue these goals. Much of the Subcommittee's work will lie in this area.

This optimistic view of the Civil Rules was not universal. The Duke Conference Subcommittee and the Advisory Committee have considered the possibility that dramatic reform, even drastic reform, is needed now. Some Committee members believe that work should begin to develop important changes in the Civil Rules. Whatever may be the lot of "average" actions in federal court, a significant number encounter forbidding, even prohibitive, costs and delay. On this view, the Committee is required to determine whether meaningful improvement is possible, and is responsible to recommend whatever seems possible. Potential projects may be identified to begin this work. But many have little enthusiasm for beginning now a task so difficult and contentious. One obstacle is the lack of persuasive alternative models that might prove acceptable within our traditions of open access, adversary litigation, jury trial, and reliance on private actors to enforce basic social policies through the courts. Another is the sense that present rules work reasonably well for most actions brought to federal court. The median figures on the cost and duration of civil actions reported by the FJC study for the Conference are reassuring. The cases that generate severe problems command attention and vigorous efforts toward improvement, but they are a relatively small portion of all cases. It is important to work as well toward improving procedures for all types of litigation, but many of these efforts will be made within the basic structure established in 1938. These efforts will be pursued actively, looking toward changes that can be achieved in the short run. More aggressive proposals also will be considered, but with the recognition that truly fundamental reform is likely only over the course of many years, only with strong showings of fundamental failures in administering civil justice or with powerfully persuasive new models.

One open-ended project will be to determine whether inspiration can be found in the "rocket docket" practices in the Eastern District of Virginia. The time from filing to disposition in the Eastern District is second shortest in the country. Deference to the local practices is reflected in Rule 26(f)(4), which authorizes a court to adopt a local rule accelerating the time for the Rule 26(f) conference of the parties and for reporting after the conference. Some or all of the local practices may be transferrable to other districts, perhaps by national rule provisions, perhaps by other means. The process of learning about these practices will begin with panel presentations by Eastern District judges and lawyers at the November Advisory Committee meeting.

A much more specific project is well underway. A group of lawyers who typically represent plaintiffs or defendants has been formed to develop a protocol of initial discovery requests that will be accepted without objection. Agreement has been reached as to many matters, and another meeting to be held this summer may be all that is needed to complete the work. It is expected that a good number of willing judges can be found to adopt the protocol in scheduling orders. The FJC is prepared to participate in a way that will ensure rigorous evaluation of the results. If this project succeeds, it may become a model that can be followed for other well-developed categories of litigation.

Working within the present framework, a long menu of possible rules amendments was generated by the Conference panels and papers. The Subcommittee has worked to establish priorities among these possibilities, without yet beginning drafting work on any of them. One goal common to some of the proposals is to better realize the capacities of the present rules. Among them are bolstering Rule 16, both for scheduling orders and pretrial conferences; adding a pre-motion conference requirement; reconsidering the rule that ordinarily discovery cannot begin until the parties have had a Rule 26(f) conference; and adding an explicit duty to cooperate. More detailed revisions also are being considered.

Rule 16(b) directs that a scheduling order issue in every case except in categories of actions exempted by local rule. The judge must consult with the parties "at a scheduling conference or by telephone, mail, or other means." Some of the information provided by the FJC study for the Conference suggests that scheduling orders may not always be issued — there was no discovery cutoff in nearly half the cases studied, even though Rule 16(b)(3)(A) requires that the order limit the time to complete discovery. Nor is it clear whether the parties consistently comply with the conference requirements imposed by Rule 26(f). Beyond education efforts to impress the directions of the present rule, some amendments might prove useful. It might be required that the parties and court confer directly, at least by telephone, in framing the order; the requirement might be excused if the parties agree on a joint scheduling order, although even then it may be helpful to confer with the judge to establish early familiarity and control.

Scheduling order practice raises another question — whether too much delay is permitted by the timing requirement, which supplements the hope that the order issue "as soon as practicable" by setting the outer limit as "the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared." Particularly in the era of electronic filing, it may prove possible to shorten the outer time limits as a step toward reducing delay.

In addition to focusing on scheduling-order practice, general pretrial-conference practice is being considered. It may be useful to require at least one conference in addition to a scheduling-order conference, although docket pressures in some districts may make this idea infeasible.

Pretrial-conference practices might be developed still further. One possibility would be to require a conference with the court before filing any motion. A survey of local rules and standing orders by the Administrative Office suggests that only a few judges impose a general pre-motion conference; there seems little reason to suggest a rule. On the other hand, pre-discovery-motion conferences are required by local rule or standing order of at least one judge in 37 districts. A

variation is found in the practices of many judges who announce that they are available to resolve discovery disputes at any time. For many years the Committees have heard that judges who do this find two benefits — many fewer discovery disputes come to the court at all, and most of those that do are resolved immediately by the phone call. Pre-motion conferences can work in much the same way. This may be an area in which much can be accomplished by ensuring that judges are aware of these approaches to keeping discovery under control. But revision of the national rules remains a possible alternative.

Rule 26(d) directs that a party may not seek discovery before the parties have conferred as required by Rule 26(f), with specified exceptions. The idea was that the conference will enable the parties to establish practical discovery plans proportional to the needs of the case, and ideally to achieve cooperative exchanges of information without the need for formal discovery requests and responses. There is a contrary view, however, suggesting that it would be useful to allow discovery requests to be served before the conference, deferring any obligation to respond. Knowing what at least the first wave of discovery will be may support better-informed discussion at the conference. This possibility remains open for further consideration.

The FJC is planning further research on the early phases of litigation. The results will inform the decision whether to work toward amending rule 16 and related provisions.

The need for cooperation among the parties is in large part served or defeated by the culture of the bar, as shaped by rules of professional responsibility. Nonetheless, it may be worthwhile to add an explicit rule provision. One possibility would be to add to Rule 1: "[These rules] should be construed and administered <u>by the court, parties, and attorneys</u> to secure the just, speedy, and expensive determination of every action and proceeding." Or: "should be construed and administered<u>, with the cooperation of the parties and attorneys,</u> to secure * * *."

Proportionality, a close cousin of cooperation in the elements of effective litigation, could be addressed in similarly general terms. Most of the concern about proportionality, however, focuses on discovery. What is now Rule 26(b)(2)(C) was added in 1983 "to guard against redundant or disproportionate discovery." The sponsors' high hopes have not been realized. The FJC study for the Conference did reconfirm the findings of several earlier empirical studies — in most actions in federal court there is little or even no discovery, and the overall cost seems reasonable for many actions. But it also reconfirmed the common lament that in some cases — enough cases to be truly worrisome — discovery can be very expensive, even as measured without accounting for the burdens shouldered by the parties themselves and the disruption of the parties' normal affairs. A cross-reference to Rule 26(b)(2) was later added to Rule 26(b)(1), and retained in the Style Project over objections of redundancy, in an effort to reinforce the command. But all too often courts address discovery disputes without seeming to mention proportionality. Still more emphatic rule language is possible, incorporating proportionality into the scope of discovery as defined by Rule 26(b)(1). Judge Grimm has undertaken to develop a set of materials that will provide guidance. This work, and the work of other groups, will support continuing education efforts. In the hope that efforts along these lines will prove effective, the possibility of recommending rules amendments has been deferred.

Other discovery topics have been considered. Daniel Girard advanced three specific proposals at the Conference to curtail evasive discovery responses. These proposals remain under active consideration. The initial disclosure requirements of Rule 26(a)(1), as diluted by amendments in 2000, provoked three sets of reactions at the conference: disclosure is not useful, it is useful sometimes, or it could become useful if restored to the more powerful version adopted in 1993. The division of views, and a sense that some good flows from at least some of the initial disclosure requirements, has led to deferring any further consideration in the near term. Specific presumptive numerical limits on the number of discovery requests might be added to Rule 34 document discovery and Rule 36 requests to admit, similar to the limits in Rules 30, 31, and 33. There is some broader concern with contention interrogatories and requests to admit. These topics remain on the agenda, but are not yet being developed.

Still other topics that veer toward radical reform have been suggested, but remain at the outer edge of possible active consideration. Rule 56 summary-judgment procedures were substantially revised by amendments that took effect on December 1, 2010. That project deliberately bypassed any attempt to reconsider the standards for summary judgment or the allocation of summary-judgment burdens. Dissatisfaction with Rule 56 remains, particularly among plaintiffs who believe that it contributes far more to cost and delay than it saves and may at times lead to improvident termination of valid claims. It seems too soon to revisit Rule 56, and the reasons that limited the scope of the recent project remain powerful. But this may be a good example of the issues that may provoke more sweeping projects over a period of several years.

E RULE 6(D): A STYLE GLITCH AND 3-ADDED DAYS

Eventually it will prove wise to amend Rule 6(d) as follows:

> **(d) Additional Time After Certain Kinds of Service.** When a party may or must act within a specified time after ~~service~~ being served and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a).

This amendment corrects a misstep taken when Rule 6(d) was amended in 2005 to establish a uniform rule for calculating the 3 added days. Until 2005, it was clear that the 3 added days were available only when an act was required within a time measured after service "upon the party." "[B]eing served" conveys the same meaning. "[A]fter service," however, can be read to include situations in which a party is allowed to act within a specified time after that party has made service on another party. Times to act after making service are included in Rule 14(a)(1) for joining a third-party defendant, Rule 15(a)(1)(A) for amending a pleading once as a matter of course, and Rule 38(b)(1) for demanding jury trial. No one thought of these provisions when Rule 6(d) was amended. It makes no sense to allow a party to control the time it has to act by choosing the means of service — for example, to gain an added 3 days to amend a pleading by choosing to serve it by mail or e-mail. The fix is simple.

If the fix is simple, why not do it now? Two sets of concerns counsel deferring action. The more general concern arises from the prospect that other missteps may be found in translating former rule language into the conventions adopted by the Style Project, either as part of the Style Project or independently. The more specific concern arises from the prospect that it may be time to reconsider the choice among the modes of service that do, or do not, win the 3 added days. Reconsideration most likely should be approached by coordinating work among Appellate, Bankruptcy, Civil, and Criminal Rules Committees.

Concern about style missteps has been expressed for many years. They seem almost inevitable, no matter how carefully the Style Projects have been implemented, and no matter how much care is taken with drafting outside the Projects. The Rule 6(d) contretemps was identified and explored at length by Professor James J. Duane in *The Federal Rule of Civil Procedure That Was Changed By Accident: A Lesson in the Perils of Stylistic Revision*, 62 S.C.L. Rev. 41 (2010). As the title suggests, the article expresses skepticism about the feasibility of implementing new style conventions without inadvertently changing meaning. Rule 6(d) is an example of restyling accomplished independently of the Style Project, but possible candidates from the Style Project have been suggested and others may appear.

The approach to correcting style missteps may be affected by the consequences of the misstep. Rule 6(d) is a good example of a misstep that is not likely to generate grave consequences. No cases have yet been found that allow a party to extend its own time to act by choosing the mode of service. If the issue does arise, there is a reasonable chance that a court will apply the caution expressed in the Committee Notes for each rule, even when the style changes were made outside the Style Project: style changes should not be read to change the rule's meaning. This prospect is enhanced by the lack of any reason to read the rule otherwise. But Rule 6(d) may be read as

Professor Duane argues. The consequences are not likely to be severe — a party wins 3 added days to act, usually in the early stages of an action. The most severe prospect is that a party will deliberately delay action to the end of the 3 added days, relying on that interpretation of Rule 6(d), only to confront a court that rejects the interpretation. Even then it seems unlikely that the court would deny leave to act if there were good reason to implead a third-party defendant, amend a pleading, or demand jury trial.

Absent the prospect of serious consequences, it may be wise to allow style missteps to accumulate for a while, to be addressed in a package. A continual parade of minor amendments should be avoided when possible. If only one or two appear, little is lost by delay. If a few appear, a package can be timed for publication in light of the apparent importance of one or more corrections, the possibility that publication with more important amendments might dilute the value of public comment, and the benefits of allowing a year or more to go by without any new rules.

Reconsideration of the 3-added days provision is most often suggested in the belief that service by electronic means does not merit the added time. Still, even e-mail from the court is not always delivered, and the concerns that prompted including electronic service in Rule 6(d) may survive in some measure. Service by mail, on the other hand, may well merit the 3 added days. The other modes of service specified in Rule 6(d) present intermediate questions — "leaving it with the court clerk if the person has no known address," or "delivering it by any other means that the person consented to in writing."

The 3-added-days questions affect other sets of rules intrinsically. What modes of service, if any, warrant increasing the time to act?

Even the style misstep may have some bearing on other rules. Appellate Rule 26(c) allows 3 added days only "after service." Apparently no Appellate Rule specifies a time to act after making service, so the style question does not arise. But the question of service by electronic means does arise. Criminal Rule 45(c) is nearly verbatim the same as Civil Rule 6(d), but apparently no Criminal Rule specifies a time to act after a party makes service. (The Criminal Rules Reporters suggest that Criminal Rule 12.1(b)(2) might be affected, but doubt that any possible problem is serious.) Bankruptcy Rule 9006(f) is similar to Rule 6(d); using language adopted long before Rule 6(d) was amended, it provides added time after a paper "is served by mail." The Bankruptcy Rules incorporate Civil Rules 14, 15, and 18 either for adversary proceedings or for all litigation. There to not appear to be any cases addressing the effect of the "served by mail" language in the context of Rules 14, 15, or 18.

If the 3-added-days question is to be revisited, most likely with some means of coordination among the Advisory Committees, the style issue can be dealt with in that context. Otherwise it will be moved ahead for action when there is no other reason to delay.

F CIVIL-APPELLATE RULES INTERSECTIONS

The Appellate Rules were liberated from the Civil Rules many years ago, but the Civil Rules continue to reflect the intertwining interests of trial courts and appellate courts. The Advisory Committees frequently work together to develop coordinated proposals that integrate related rules. A joint Civil-Appellate Rules Subcommittee has been formed to bring the perspectives of both Committees to bear on at least two current projects.

One project deals with problems that may arise from the effects of some post-judgment motions that suspend and then, on final disposition of the last such motion, "reset" or "restart" appeal time afresh. A pervasive problem in this area was corrected several years ago by parallel amendments of Civil Rule 58 on entering judgment and Appellate Rule 4. But, in the seemingly inevitable fashion of Rule 4, some possible problems linger on.

The second project deals with efforts to "manufacture" finality after adverse rulings that do not dispose of an entire action. Different circuits take different approaches to dismissal without prejudice, dismissal with prejudice, and dismissal with "conditional" prejudice that allows revival of the matters dismissed if the order giving rise to the appeal is reversed. These questions could be addressed, at least in part, through Civil Rule 41 on dismissal or Civil Rule 54(b) on partial final judgments. For that matter, it would be possible to craft an entirely new Civil Rule to complement Appellate Rules provisions.

The Appellate Rules Committee considered these matters at its April meeting, as discussed in their Report. The Civil Rules Committee will rely on the Subcommittee for initiating the next steps toward work on the Civil Rules.

III PENDING LEGISLATION

The Committee continues to monitor the progress of bills that affect the Civil Rules. The most prominent examples are the Sunshine in Litigation bills and the Lawsuit Abuse Reduction Act. Each set carries forward proposals that have been introduced regularly for many years — to curtail the use of discovery protective orders in actions that may affect public health or safety, and to restore Rule 11 to the version that was in effect from 1983 to 1993.

Andrea Kuperman's Legislative Report adds more detailed information.

TAB 5-F

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

APRIL 4-5, 2011

The Civil Rules Advisory Committee met at the University of Texas Law School on April 4 and 5, 2011. The meeting was attended by Judge Mark R. Kravitz, Chair; Elizabeth Cabraser, Esq.; Judge David G. Campbell; Judge Steven M. Colloton; Judge Paul S. Diamond; Professor Steven S. Gensler; Daniel C. Girard, Esq.; Judge Paul W. Grimm; Peter D. Keisler, Esq.; Judge John G. Koeltl; Judge Michael W. Mosman; Judge Gene E.K. Pratter; Chief Justice Randall T. Shepard; Anton R. Valukas, Esq.; Chilton D. Varner, Esq.; and Hon. Tony West. Professor Edward H. Cooper was present as Reporter, and Professor Richard L. Marcus was present as Associate Reporter. Judge Lee H. Rosenthal, Chair, Judge Diane P. Wood, Judge Wallace Jefferson, and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge Arthur I. Harris attended as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., was the court-clerk representative. Peter G. McCabe, James Ishida, Jeffrey Barr, Holly Sellers, and Andrea Kuperman, Chief Counsel to the Rules Committees, represented the Administrative Office. Judge Barbara Rothstein, Joe Cecil, and Emery Lee represented the Federal Judicial Center. Ted Hirt, Esq., Department of Justice, was present. Observers included Alfred W. Cortese, Jr., Esq.; Joseph Garrison, Esq. (National Employment Lawyers Association liaison); John Barkett, Esq. (ABA Litigation Section liaison); David Ackerman, Esq. (American College of Trial Lawyers); Kenneth Lazarus, Esq.; John Vail, Esq. (American Association for Justice); Thomas Y. Allman, Esq.; Robert Levy, Esq.; Jerry Scanlon (EEOC liaison); Professor Lonny Hoffman; Andrew Bradt, Esq.; and Professor Robert Bone.

Judge Kravitz expressed thanks to the University of Texas Law School for hosting the event, They have been gracious hosts throughout the planning process. He came early to attend a clerkship extravaganza, a gathering of judges that included many current participants in the rulemaking process. Real thanks are due to Dean Sager.

Judge Kravitz introduced Judge Mosman as a new Committee member. Judge Mosman is a graduate of Brigham Young, and clerked for Judge Wilkie and then Justice Powell. He was an Assistant United States Attorney up to 2001, and then became the United States Attorney for the District of Oregon. He was confirmed as a District Judge in 2003 by a 93-0 vote of the Senate.

Judge Kravitz also welcomed Elizabeth Cabraser to the Committee. She has appeared before the Committee many times, and has helped its work by responding to other outreaches. The rest of the day could be filled by reciting the many accolades and awards she has received. She is a Super Lawyer, and has been named as one of the 50 most influential lawyers in the country. And she has written many articles, including a wonderful contribution to the Duke Conference last May. She already has taken hold in the work of the Discovery Subcommittee. She will be an outstanding member.

Judge Vaughn Walker was unable to attend this meeting because he is teaching, but sends his regards. It would have been nice to have him present to hear a renewed salute for his many contributions to the Committee.

During the introductions of all those present Judge Kravitz expressed particular appreciation to Tony West, noting that it is particularly important to have the Assistant Attorney General for the Civil Division with the Committee to reflect the experience and judgment of the Department of Justice.

Judge Kravitz lauded Chilton Varner's service as a member, and presented a certificate of the Judicial Conference's appreciation for her distinguished service and commitment to the federal judiciary.

Judge Kravitz then reported that Greg Joseph, Tom Allman, John Barkett, Dan Girard, Paul Grimm, and Emery Lee presented a panel discussion of preservation of electronically stored information to the Standing Committee in January. The panel elaborated on the importance of the problems and the difficulties of crafting a useful rule to address them. The Standing Committee also discussed pleading standards, and the work of the Duke Conference Subcommittee.

Bills affecting the Federal Rules of Civil Procedure continue to be introduced in Congress. Andrea Kuperman said that the Administrative Office is monitoring the Sunshine in Litigation bills that have been introduced in the House and Senate. The bills are similar to those that have been introduced in many past Congresses, but there are differences. They apply only when the pleadings in an action show facts relevant to the public health and safety. In such actions, a discovery protective order can enter only if supported by findings of fact that the order will not restrict disclosure of information affecting the public health or safety, or that the order is narrowly tailored to protect a specific and substantial interest in confidentiality. Similar findings are required to approve a settlement agreement that would restrict disclosure of such information. The Senate bill includes a provision that it does not constitute grounds for withholding information in discovery that is otherwise discoverable; it is not clear what this provision may mean. The central problems presented by earlier bills in this series remain: it is not feasible to make the required findings before knowing what information may be involved in discovery, and the process will add greatly to the contentiousness, cost, and delays of discovery.

Another bill would enact a Lawsuit Abuse Reduction Act. The bill would unwind the 1993 amendments of Rule 11, returning to the 1983 version. Sanctions for violations would be made mandatory, including attorney fees. The safe-harbor provision would be deleted. The House has held a hearing on the bill. Judge Kravitz, the American Bar Association, and the American College of Trial Lawyers sent letters in opposition. The motivation for this bill, and similar predecessors, is unclear; it may be viewed as a part of "tort reform." Research shows that the 1983 version of Rule 11 was counterproductive; it increased delay and costs. Whatever share of the federal civil docket is made up of frivolous cases, all the evidence is that the proportion did not increase in the wake of the 1993 amendments, and that the amendments greatly curtailed the satellite litigation of Rule 11 motions that was compounded by Rule 11 motions claiming that Rule 11 motions violated Rule 11. All the empirical work by the Federal Judicial Center is being ignored. Professor Hoffman testified against the bill; Victor Schwartz testified in support, along with a representative of small businesses.

November 2010 Minutes

The draft minutes of the November 2010 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

Rule 45

Judge Kravitz prefaced the report of the Discovery Subcommittee by expressing thanks to Judge Campbell and Profesor Marcus for all their hard work on Rule 45. They and the Subcommittee were so devoted that they sacrificed President's Day to hold a meeting in Dallas. He noted that leaders of the American Bar Association Section of Litigation had provided comments on the current drafts, and that defense interests also had commented.

85 Judge Campbell introduced the Subcommittee report by stating the goal: To conclude work,
86 and send to the Standing Committee a draft recommended for publication.

87 The drafts present four issues:

88 First, to move, emphasize, and improve the notice requirement. It has been widely
89 disregarded. The basic proposal has been approved already, relocating the requirement to a more
90 prominent position in Rule 45 and adding a requirement that a copy of the subpoena be served with
91 the notice. Questions remain: some observers believe that the person serving the subpoena also
92 should be required to notify other parties as things are produced in response. And some language
93 changes have been suggested by the American Bar Association.

94 Second is the provision that would allow the court for the place of performance to transfer
95 enforcement disputes to the court where the action is pending. Issues to be resolved include the
96 standard for transfer, and — if transfer is made — which court should enforce the order issued by
97 the court where the action is pending.

98 Third are the "Vioxx" issues: should there be a provision to compel a party or a party's
99 officer to attend trial beyond the limits established by present Rule 45(b) provisions for serving a
100 subpoena? The Subcommittee recommends that the Vioxx reading of Rule 45 be overruled, but also
101 has prepared a draft that would restore some part of it. The alternative draft is not an alternative
102 recommendation. Nonetheless it may be wise to publish it to ensure full comment, paving the way
103 for adoption without republication if the testimony and comments persuade the Committee that it
104 is better to establish some provision for compelling attendance at trial beyond the limits established
105 for depositions.

106 Fourth is the proposal to simplify the "3-ring circus" aspect of Rule 45 created by the
107 complex interplay of provisions that identify the court that issues the subpoena, provide for place
108 of service, and, in a scattered fashion, address the place of performance. This proposal would
109 provide nationwide service, and separately specify the place of performance.

110 The Subcommittee unanimously recommends the simplification of Rule 45, but has
111 recognized that this departure from what has become familiar may encounter resistance. Alternative
112 drafts have been prepared to show what Rule 45 would look like if it included only the provisions
113 for notice, transfer, and overruling Vioxx. The agenda book thus contains four sets of Rule 45
114 materials: I is the Subcommittee's recommendation. II supplements I by showing a provision that
115 would preserve some part of Vioxx. III parallels I, but without the simplification. IV supplements
116 III by adapting the provisions that would preserve part of Vioxx in the rule as it would stand without
117 simplification. One of the questions to be addressed is whether this four-part presentation generates
118 too much confusion, whether it will be better to go forward to the Standing Committee with only
119 Parts I and II.

120 Judge Kravitz said it is important that the Committee choose its preferred version and explain
121 the choice. It may be useful to send Alternatives III and IV to the Standing Committee if this
122 Committee concludes that it is better to go ahead to publication now without attempting any
123 simplification of Rule 45 if the Standing Committee rejects whatever version of a simplified Rule
124 45 that may be approved at this meeting. The Standing Committee will be able to understand the
125 role of the alternatives.

126 Judge Campbell stated that the Subcommittee clearly favors version I — rejecting the Vioxx
127 decision, and simplifying Rule 45 by providing nationwide service of discovery subpoenas,
128 separately regulating the place of performance. But it recommends publication in a subordinate

129 posture of the alternative that would preserve some authority to command testimony at trial of a
130 party or a party's officer beyond the limits established for depositions. It does not recommend
131 publication of versions III and IV; they are intended, at most, as illustrations of an alternative for
132 the Standing Committee to consider if it rejects the Subcommittee's preferences.

133 Judge Rosenthal said that the Standing Committee would readily understand the role of
134 versions III and IV if the Committee decides to present them. They are a clear road map.

135 A question was raised about the practice of publishing alternatives. How does it work? One
136 practice, followed with some frequency, is to publish rule text with alternatives when the Committee
137 itself is uncertain which is better. Another practice is to publish a preferred version, clearly
138 identified as preferred, but also to focus comment on a competing version by presenting a clear text
139 that responds to weighty countervailing positions. So with the Vioxx alternatives, the proposal is
140 to publish the recommended version and to explain why it is recommended. The alternative would
141 be published, perhaps as an appendix, with a clear statement that it is not recommended but with a
142 request for comments both on the possible advantages of the alternative and on possible
143 improvements on the alternative. Publication has great virtues. Time and again the Committees
144 have been educated by comments and testimony that show how to improve initial proposals or show
145 that a proposal does not deserve adoption.

146 Further discussion agreed that the mode of presenting versions I, II, III, and IV was clear.
147 The value of publishing an alternative that carries forward some part of the Vioxx rule, albeit in a
148 subordinate posture, was recognized. The risk that republication will be required is much reduced
149 if there is an opportunity for public comment on a carefully developed draft. As for simplification,
150 the question may be "yes" or "no"; in that case, it can be useful to carry forward versions III and IV
151 at least as far as the Standing Committee. The question is a familiar severability question: the
152 Standing Committee will readily understand the alternatives that present all the recommendations
153 other than simplification. But it was asked whether it would be better to submit only versions I and
154 II if the Committee decides that simplification is clearly desirable.

155 Publication of a Vioxx-preserving alternative was further supported on the ground that the
156 district courts are divided. Several have adopted the Vioxx ruling. Some of the courts that reject
157 it as inconsistent with the plain language of Rule 45 seem to regret that result. The Committee must
158 be sensitive to a view that has attracted this much support.

159 The question whether to send forward a version that includes notice, overruling Vioxx, and
160 transfer, but that does not include simplification, was postponed with the observation that the
161 decision will depend on the course of deliberations on the merits. If simplification is clearly
162 preferred, it may make sense to go forward with the simplified version alone. This course will be
163 further supported if the Committee concludes that failure of the present simplification approach
164 leaves the possibility of an intermediate simplification that would remain to be drafted and debated.

165 A preliminary question was noted: if a discovery motion is transferred by the court for the
166 place of performance to the court where the action is pending, is there a problem with enforcing the
167 order? It was noted that the absence of any present provision for transfer deprives us of the
168 opportunity for any extensive experience. The Subcommittee has looked for published opinions,
169 but the prospect of finding much help seems slender. Professor Marcus has been looking, without
170 finding anything useful. A law clerk looked for contempt cases without success. And
171 Administrative Office data are not likely to provide reliable information.

172 Professor Marcus began the detailed presentation of the Rule 45 proposals with Version I,
173 Alternative A. Initially, he noted that a contemporary commentator reacted to the 1991 revisions

of Rule 45 when they were created by finding them highly complicated and difficult to follow. These sentiments have echoed through the following two decades.

Rule 45: Notice

The changes in the notice requirements are familiar from earlier Committee meetings. It is often lamented that many lawyers fail to heed the direction that before a subpoena to produce is served on the witness it must be served on each party. This problem is addressed by moving the direction from the last sentence of present Rule 45(b)(1) to become a new paragraph (a)(4). The notice requirement also is bolstered by requiring that the notice include a copy of the subpoena. Finally, the requirement is extended to include trial subpoenas by deleting the words that limit the notice requirement to subpoenas to produce "before trial." The Subcommittee concluded that prior notice may be even more important with respect to trial subpoenas than it is for discovery subpoenas.

The notice provision could be expanded. Several experienced lawyers urge that notice should be required when materials are produced in response to a subpoena. They complain that it is difficult to gain access to the materials. Leading figures in the ABA Litigation Section have recommended that after notice that the subpoena will be served, notice also should be given of any modification of the subpoena, and that things produced in response should be made available to all parties in a timely fashion. The Subcommittee has considered this question several times, and reconsidered it after it was raised at the Standing Committee last January. Each time it has concluded that these additional notices should not be required. There is a real concern that requiring subsequent notices could impose significant burdens, particularly when materials are produced in a rolling fashion — how many notices are required, and when? And there is concern that the requirement could become a source of "gotcha" disputes about compliance, particularly with respect to how many notices must be given, and how soon, when production spreads out over time. And the disputes may be deliberately deferred to motions made on the eve of trial, requesting exclusion of materials produced under the subpoena. Lawyers should bear the responsibility of following up on the notice that the subpoena will be served by making periodic inquiries about compliance, with requests for access to the materials produced. The draft Committee Note says, at pages 104-105 of the agenda materials, that parties desiring access should follow up to obtain access, and that the party serving the subpoena should respond by making reasonable provision for prompt access. This sort of advice does not seem appropriate for rule text.

Discussion began with observations that a lawyer who has notice that a subpoena is in play becomes responsible to follow up by inquiring about the response, and that it could be complicated to apply a notice requirement to rolling production — and phased discovery is often directed in the quest for proportionality. In addition, it was suggested that it is better to avoid anything that increases the length and complexity of Rule 45. This problem is a good example of the need to foster cooperation in litigation.

John Barkett, who participated in drafting the ABA letter, reported that it came out of exhaustive, robust discussions. The conclusion was unanimous. The participants included lawyers who engage in very complex litigation and others who engage in less complex litigation. Their experience is that no matter how often they call or ask, they do not get the documents produced under a subpoena. It is not enough to say it becomes the responsibility of other parties to pursue production by the party who served the subpoena. The suggestion that notice also should be required when the party who serves a subpoena negotiates modification of its terms with the person served may prove complicated in practice. But the problem is created by people who do not practice cooperatively. The prospect that a Committee Note can solve this behavior is not good.

It was suggested that there is no need for notice of modification if the breadth of the subpoena is cut back. Does it happen that modifications expand the reach, so other parties need notice that enables them to assert needs for protection?

An alternative was suggested: lawyers could agree in the Rule 26(f) plan to require the subsequent notices of modification and production, and the requirements could be included in the ensuing discovery order. Doubts were expressed in a different direction: "Rules are not always obeyed or enforced." Behavior will not be changed by adding new rule requirements. A similar doubt was expressed: "You cannot do all lawyering in the rules." Other parties should be responsible for calling the party who served the subpoena, or the nonparty who was served. If problems arise, the court can resolve them. "This is a 'gotcha' provision" that would cause lawyers to avoid doing what they should do to keep abreast of subpoena responses. A lawyer who encounters problems can issue an independent subpoena to the same nonparty.

The proposed notice provision, new Rule 45(a)(4), lines 62-65 on page 94 of the agenda materials, was approved without dissent.

Rule 45: Transfer

Earlier drafts had two transfer provisions that addressed motions to quash and motions to enforce, but not a motion to determine whether privilege or work-product protection apply to material covered by a notice given after initial production. It has seemed more efficient to redraft a single transfer provision, proposed Rule 45(f) at lines 257-263, pages 100-101 of the agenda materials. The transfer, at least at the first step, is from the court where compliance is required to the court where the action is pending. Three aspects of transfer should be discussed: the standard for transfer; enforcement issues that may arise if an order is entered by the court where the action is pending rather than by the court where performance is required; and potential choice-of-law issues. A minor drafting issue will be considered by the Subcommittee — whether the text should refer to a motion "in a court other than the issuing court," or instead to "in the court where compliance is required."

Earlier drafts began with the language of 28 U.S.C. § 1404(a) as a standard for transfer. But it seemed inappropriate to invoke the standard that governs transfer of an entire action, a more momentous event. A series of alternatives led to the current version: "considering the convenience of the person subject to the subpoena, the interests of the parties, and the interests of effective case management." The Committee Note attempts to make it clear that this standard is not easily met. Alternative approaches should be discussed. It may be that transfer should be readily made, or that it should be seldom made, or that some more-or-less neutral midpoint should be preferred. The Note comes close to the "really hard" end of the spectrum if the local nonparty addressed by the subpoena prefers local resolution without transfer. If that is the preferred approach, is the Note sufficient to overcome the fear that transfers will be ordered too often?

The ABA letter recommends that transfer should be ordered only on consent of the parties and the person subpoenaed, "or in exceptional circumstances." There may be little need to address the unanimous consent possibility in rule text — courts generally will honor such a request, and it may be better to recognize that in some circumstances the court may have good reason to refuse transfer in the face of unanimous consent. The "exceptional circumstances" term appears in other rules — 26(b)(4)(D)(ii) limiting discovery of consulting experts, and 37(e) on sanctions for failing to produce electronically stored information that has been lost. "[E]xceptional condition" appears in 53(a)(1)(B)(i) on appointing a special master. At the same time, the ABA provides examples of exceptional circumstances that do not seem all that exceptional — a risk of inconsistent rulings by different courts when performance is required in different places, the prospect that resolution of the

266 objections would materially affect the merits of the action, or the court for the place of performance
267 cannot timely address the matter.

268 Judge Campbell noted that the proposed draft reflected a Subcommittee expectation that
269 transfer will not happen very often, but that he has come to fear that the language may allow transfer
270 too often. Busy judges in the place of performance may find justification in one phrase or another
271 to justify transfer. It is not likely that a judge ruling on a discovery dispute will have time to consult
272 a Committee Note. The ABA request for stricter language seems attractive.

273 The factor addressing the "interests of effective case management" was questioned. "A
274 concept doesn't have interests. The draft permits too many arguments for transfer."

275 One possibility would be to provide that a person seeking transfer has the burden of
276 justification. But it was thought sufficient to state a standard; the burden falls naturally on a party
277 seeking transfer.

278 As usual, invoking a term found in other rules risks comparison to different problems that
279 require different approaches. But a phrase like "exceptional circumstances" resonates more to
280 general terms such as "good cause." There is little reason to fear that "good cause" provisions will
281 be read to require the same threshold of justification in every rule where they appear. So a generic
282 reference to "exceptional circumstances" will be read to set the tone for transfer in light of all the
283 interests that bear on choosing the court to rule on the motion.

284 It was urged that "exceptional circumstances is demanding." The ABA list of examples
285 "does not capture the situation where enforcement is integrally related to management of the case
286 by the court where the action is pending." The draft reference to effective case management does
287 capture this situation, although it might also be read to enable the court where discovery is pending
288 to manage its cases by transferring a problem away. The standard should be drafted in a way that
289 invokes the burdens on the nonparty subject to a subpoena, the interests of the parties, and the
290 relation of the discovery dispute to the underlying litigation.

291 Another member suggested that transfer is not necessarily a bad thing. Concern for local
292 interests and the nonparty subject to the subpoena may be relatively rare in comparison to concern
293 about the impact of the issues on the whole case. "Making transfer easier is not a bad thing."

294 The Subcommittee, however, has been worried that a nonparty should have access to a local
295 judge. It has believed that most issues relate to the nonparty, that relation to the central issues in the
296 case is less common.

297 Another suggestion was that it could be useful to put the ABA examples in the Committee
298 Note, and perhaps to refer to the local interests as well as the convenience of the local nonparty. An
299 example was given. Enterprises such as Google and Facebook are frequently served with nonparty
300 subpoenas. It often takes a few days for the subpoena to come to the attention of the appropriate
301 people. The time to respond is, as a practical matter, very short. It can be very helpful to locate the
302 dispute in the court local to the place where compliance is required.

303 A preference was expressed for "exceptional circumstances" as a way to avoid making it too
304 easy to transfer. "The focus should be on the nonparty, who has no interest in the case."

305 John Barkett noted that the ABA wants transfer really to be the exception, not the rule. If
306 there are words better than "exceptional circumstances" to achieve this end, that's fine. Another

observer said that Lawyers for Civil Justice also favors the "exceptional circumstances" wording. The Committee Note could provide examples in addition to those suggested by the ABA.

Still further support was offered for "exceptional circumstances." As drafted, Rule 45(f) reads as if the court can act on its own, without a motion. Do we want that? (No answer was given.)

The question was framed again: suppose, under the nationwide subpoena proposal, a subpoena issues from the Western District of Washington, addressed to a nonparty in Connecticut. Should we generally prefer that the parties deal with objections — particularly those made by the nonparty — in Connecticut? The provision for nationwide service intersects the provision for transfer, although transfer can be provided for in a rule that carries forward the present practice of issuing the subpoena from the court where performance is required.

In response to a question about actual experience with nonparty discovery disputes relating to a distant action, a judge described that he had encountered these problems twice. Once involved discovery in his court incident to an action elsewhere, while the other involved discovery elsewhere incident to an action in his court. These problems arise only in exceptional circumstances, and are likely to involve large, high-stakes commercial litigation. The nonparty is more likely to be a corporation than an individual. It is not a bad thing to have the dispute resolved in the court where the action is pending. But it would be better to provide that the party seeking transfer has the burden of showing justification.

After support was expressed for the "exceptional circumstances" test, a proposal to adopt it was approved unanimously. The Committee Note will be modified accordingly. Either in rule text or Note, account will be taken of the situation in which the parties and the person subject to the subpoena join in requesting transfer.

Rule 45(f) also includes a sentence authorizing an attorney for the party subject to a subpoena to appear in the court where the action is pending if a motion is transferred. An invitation to discuss the provision drew no response.

Rule 45: Enforcement After Transfer

Three draft provisions bear on the enforcement questions that may arise after a Rule 45 motion is transferred to the court where the action is pending. Two alternatives are proposed for Rule 45(f). The first: "If [appropriate]{necessary} to enforce its order on the motion, the issuing court may retransfer [the motion]{its order} after entering its order." The alternative: "If the issuing court orders discovery from a nonparty [not subject to its jurisdiction], it may retransfer [the motion]{its order}for enforcement after entering its order." The first alternative looks toward transfer back after problems arise; the second looks toward transfer back as a precautionary measure.

Proposed Rule 45(g), with an addition over the version that appears in the agenda materials, would provide: "The court for the district where compliance is required — or, after transfer of the motion, the issuing court — may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order relating to the subpoena."

Rule 37(b)(1), as presented, would allow "either court" to treat as contempt a deponent's failure to obey an order to be sworn or to answer a question if the court where the discovery is taken transfers the motion to the court where the action is pending. The draft could be read to allow the court where the action is pending to impose contempt sanctions even without transfer from the court where the motion is made. That will be corrected by further drafting.

349 There is a faint analogy for holding a nonparty witness in contempt of a court at a distance
350 from the witness in Criminal Rule 17, which authorizes nationwide service of trial-witness
351 subpoenas. There is not a lot of law on the enforcement aspects of these subpoenas.

352 Turning first to Rule 45(f), the basic question is whether the court where the action is
353 pending should want to remit enforcement to the court where the discovery is to occur before there
354 are any concrete reasons to anticipate failures to comply with the order.

355 A judge asked whether the standard for contempt is the same nationwide? And whether the
356 practice also is uniform. He holds a person in contempt only after an in-person appearance. Would
357 it be right to allow the Western District of Washington to hold a person in the Southern District of
358 Florida in contempt without a personal appearance in Washington? Would it be reasonable to drag
359 a nonparty charged with contempt across the country for this purpose? This is in part a subset of
360 the choice-of-law problem, as well as the decision to provide nationwide service of all nonparty
361 subpoenas from the court where the action is pending. "How far should we upset local-court
362 expectations in civil actions"? It also invokes the distinction between civil and criminal contempt
363 — and criminal contempt raises rights to jury trial and proof beyond a reasonable doubt.

364 The purpose of providing for transfer back to the court where compliance is required is to
365 ensure personal appearance in a convenient tribunal. Transfer seems less complicated than the
366 alternative of proceeding by motion in the court where compliance is required to enforce the order
367 of the court where the action is pending.

368 It also was noted that pro se parties will be a problem, assuming they manage to pursue
369 proceedings to the point of participating in a motion, transfer, and subsequent enforcement
370 proceedings. "It is the party trying to enforce the subpoena who will have to figure it out."

371 A further distinction may be drawn between enforcement of orders that restrict requested
372 discovery and enforcement of orders that compel discovery. Problems are more likely to arise from
373 orders that compel discovery.

374 The relationship between proposed 45(f) and proposed 45(g) was addressed by asking
375 whether 45(g) authorizes the court where compliance is required to enforce an order of the court
376 where the action is pending without transfer back. With the proposed revision, it would allow the
377 compliance court to enforce an order relating to the subpoena made by the court where the action
378 is pending. There may be real advantages in enforcement by the court where compliance is required.
379 Disputes about compliance may focus on whether what in fact has been done does in fact comply
380 with the order, raising essentially local issues.

381 A separate problem was noted. Civil contempt may be courted by a party that wants a basis
382 to appeal a discovery order. Selection of the court that enters the contempt order will determine the
383 circuit in which appeal is available, and that may affect the law that governs the dispute. Rule 45(g),
384 indeed, identifies only contempt as the enforcement sanction, although a minority of courts have
385 recognized the use of other sanctions.

386 The question was reframed: is there a clear answer to the place-of-enforcement question?
387 The reasons for preferring enforcement where the nonparty is required to comply might lead to a
388 rule that automatically calls for enforcement by that court. The court where the action is pending
389 could achieve most of the case-management advantages, and could satisfy any need for uniform
390 rulings on issues arising in different places of compliance, by issuing the order. Confiding
391 enforcement to the court for the place of compliance would seize the advantages of localy resolving
392 local issues as to compliance or no. There might be some awkwardness about interpreting the order,

or about motions to modify it, but they need not be great. And this approach would provide a clean, simple rule.

This suggestion was resisted. One difficulty would arise if the court where the action is pending is directed to rely for enforcement on several courts in several different places where compliance is required. Those courts might interpret and enforce the same order differently. And enforcement often will be ordered because it is a party that is causing the problem — one example was a case in which a defendant directed a nonparty witness to refuse to produce the documents. Compare Rule 26(c), which directs a nonparty from whom discovery is sought to move for a protective order in the court where the action is pending, and provides an alternative only for matters relating to a deposition by allowing a motion in the court where the deposition will be taken. Flexibility seems better than a simple requirement that enforcement always be in the court where compliance is required.

A preference was expressed for Alternative 1, providing for transfer back when a problem arises. That might make it wise to adopt "necessary" as the standard for transferring back, and to transfer back the order, not the motion. Style changes were also suggested. The sentence might be shortened like this: "To enforce its order on the motion, the issuing court may transfer the order." But it was asked whether drafting in this fashion would suggest that the court where the action is pending (the issuing court) lacks authority to enforce its order. That led to the question whether the court for the place of compliance can enforce an order of the court where the action is pending without transfer back; Rule 45(g), as proposed, may not clearly answer that question. It was observed that "We do not want two courts to be able to enforce the same order simultaneously — different parties may go to different courts." A rule that says "either" does not mean that both can do it. Another suggested edit would have the rule allow the court where the action is pending to "retransfer the matter," understanding "matter" to include both the motion and the order. Or: "To enforce its order, the issuing court may transfer the order to the court where [the motion was filed]{compliance is required}."

This discussion concluded with unanimous approval of "alternative 1," to provide — in language to be worked out — for retransfer to the court where the motion was filed.

The Committee unanimously approved the suggested addition to Rule 45(g), described above, adding at line 272, page 102, these words: "may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena <u>or an order relating to the subpoena</u>."

Turning to Rule 37(b)(1), the drafting problem described above came on for discussion. The Subcommittee does not want to establish power for the court where the action is pending to enforce an order entered by the court where compliance is required if there has not been a transfer. A relatively lengthy drafting fix is readily accomplished. Perhaps a shorter version can be managed. It is useful to amend Rule 37 because it is the only place that covers nonparty deposition testimony, as compared to the production subpoenas covered at length in Rule 45.

Rule 45: Choice of Law With Transfer

Choice-of-law problems can arise in the present structure of Rule 45, even absent a transfer provision. An illustration is provided by Jimenez v. City of Chicago, 733 F.Supp.2d 1268 (W.D.Wash.2010). A nonparty witness was subpoenaed in the Western District of Washington to give testimony for an action pending in the Northern District of Illinois. The question was whether to rely on Ninth Circuit journalist privilege law, or to invoke the Seventh Circuit's rejection of the privilege. The court chose Ninth Circuit law, as the precedent binding it as the court that issued the subpoena. This example is particularly useful because it serves as a reminder that not only may the

rules of evidence and discovery vary among the circuits, but state law also may become relevant, as when Evidence Rule 501 invokes state privilege law. In a transfer regime, the question would be sharpened if the subpoena issued from the court in Illinois and the court in Washington decided to transfer the issue to Illinois.

The agenda materials include only one entry on this question, a possible Committee Note sentence: "If the transfer might alter the legal standards governing the motion, this factor might affect the desirability of transfer." Would adding this to the Note help? Create confusion or even suggest undesirable practices? It was concluded that these questions should not be addressed, either in rule text or in the Committee Note.

Rule 45: Party as Trial Witness

The Vioxx decision, discussed at length in earlier meetings, interpreted Rule 45 to authorize a subpoena commanding a party or a party's officer to appear as a trial witness without regard to the place-of-service limits in Rule 45(b). It has been followed by other courts. It also has been rejected by other courts.

The Subcommittee proposes to reject the Vioxx ruling. It misreads the present rule. More importantly, it reaches a wrong result. Proposed Rule 45(c)(1)(A) expressly overrules the Vioxx result by providing that a subpoena may require a party or a party's officer to appear at a trial only within the state where the party or its officer resides, is employed, or regularly transacts business in person, or within 100 miles of where the party or its officer does such things. This proposal has been discussed and approved in earlier meetings. The Committee confirmed it again as a recommendation to the Standing Committee for publication.

At the same time, the Subcommittee recognizes the support that Vioxx has commanded. It may be that public comments supporting Vioxx will prove persuasive. To encourage and focus comments, the Subcommittee has prepared an alternative that would go part way to preserving the Vioxx result. But only part way. The alternative does not authorize a party to issue a subpoena to another party. It requires a court order, and requires good cause to issue the order. The order can be directed only to the party; if it seeks testimony of the party's officer, it is the party that is directed to produce the officer to appear and testify at trial. Before issuing the order the court must consider the alternative of audiovisual deposition, or securing testimony by contemporaneous transmission under Rule 43(a). The court may order reasonable compensation for expenses incurred to attend the trial. The Committee Note emphasizes the good-cause requirement. Vioxx does not include any of these limits.

The Subcommittee recommends that the alternative preserving some part of Vioxx be published along with the Rule 45 proposal, but in a subordinate posture that clearly marks it as something the Committees do not recommend.

The Committee approved the language of the alternative, as it appears on page 111 of the agenda materials.

Discussion turned to the question whether the alternative should be published. It was noted that Vioxx does not stand alone, but has gathered support. And some of the cases that reject Vioxx rely only on the language of present Rule 45, at times seeming to indicate a preference for the Vioxx rule if it could be squared with the rule language. And plaintiff's lawyers at the Dallas meeting in February thought it is good to be able to command trial testimony when it can be shown that a party's officer has important knowledge about the events in suit.

481 The efficacy of publishing an alternative for comment was also noted. There is a risk that
482 when an alternative is published as something the Committees do not favor, subsequent adoption
483 of the alternative will lead to protests that people who supported the Committees' primary
484 recommendation did not bother to express their support because they assumed the Committees
485 would not be moved from their initial preference. But a clear invitation to comment now on both
486 alternatives will reduce the force of any such protests. Various forms of alternative publication have
487 been used in the past. What is important is to be careful to actively solicit comment, without
488 presenting the disfavored alternative as if it were co-equal with the preferred version. The
489 solicitation for comment will be worked out carefully, for the purpose of enhancing the prospect that
490 if the Committees eventually decide to go part way toward embracing Vioxx there will be no need
491 to republish.

492 *Rule 45: Simplification*

493 Alternative I simplifies Rule 45 by providing that subpoenas issue from the court where the
494 action is pending and may be served anywhere in the United States. The place of compliance is
495 separated from the place of service. These changes are reflected in Rules 45(a)(2), (b)(2), and (c).

496 The subdivision (c) provisions for place of compliance are drawn from present Rule 45, but
497 are not entirely the same. Exact similarity would complicate the rule. The changes remove any
498 reliance on state law. They also end the possibility of compelling appearance for a deposition or
499 trial by serving a witness as a transient. On the other hand, nationwide service means there is no
500 need to serve the witness where the discovery is to occur; that issue is addressed directly by the
501 provisions designating the place of compliance. It seems likely that these changes will not matter
502 in most cases.

503 As a separate matter, the provision that would restore some part of the Vioxx rule will be
504 relocated from the position shown in the agenda materials to become part of subdivision (c). That
505 will put all of the provisions on place of compliance in the same subdivision.

506 The draft identifies many possible questions in footnotes. None of them were raised for
507 further discussion.

508 The Committee unanimously approved the recommendation to advance the simplified Rule
509 45 for publication.

510 The Committee then returned to the question whether to send on to the Standing Committee
511 the versions that omit simplification but incorporate the provisions for notice, transfer, and
512 overruling Vioxx. One concern is that there are many alternative means of simplifying Rule 45 in
513 some measure. If the Standing Committee concludes that full simplification goes too far, it may be
514 better to ask for a remand to consider alternative approaches. An invitation to publish Rule 45 now,
515 without any attempt to simplify, may be unduly defeatist. Deferring publication of Rule 45
516 proposals for another year is not a matter for great concern; we have been living with its present
517 form since 1991. And it would be unwise to publish one set of Rule 45 proposals now and then
518 publish a second set in another year or two.

519 The question whether to send Versions III and IV to the Standing Committee as a fallback
520 for publication if the simplification proposals are rejected was deferred for consideration on the
521 second day of the meeting. The Subcommittee then recommended that only the simplified version,
522 including the Vioxx alternative, be sent to the Standing Committee. If full simplification is rejected,
523 the Subcommittee will want to develop alternative versions in light of the discussion in the Standing
524 Committee. The no-simplification alternative presents questions different from going forward to

525 publish the alternative that partially restores Vioxx. Publishing the Vioxx alternative will enhance
526 the prospect that a final rule can be adopted without republication if public comments show that
527 Vioxx should be restored in part or in full. The comments will be more useful if they focus on a
528 specific model; criticisms of the model can suggest variations, or complete restoration of Vioxx.
529 Publication also will show respect for the courts that have adopted the Vioxx rule.

530 Concern was expressed that publishing an alternative that expands the reach of orders for
531 trial testimony by a party or a party's officer may appear as a recommendation to codify Vioxx. But
532 the publication will not be framed as one asking "which do you like." The alternative likely will be
533 framed as an appendix. The letter transmitting Rule 45 for publication will clearly recommend that
534 Vioxx be overruled. This approach will ensure active comments. At the Dallas meeting in February
535 plaintiffs lawyers who work in multidistrict cases thought the MDL panel should adopt the Vioxx
536 rule for MDL cases. A like approach has been taken in the past, asking for comment on alternatives
537 that are designated as disfavored. The resulting comments may cause the Committees to rethink the
538 question, and support adoption of a revised rule without the need to republish. The concern about
539 sending confused signals remains important, however, as a reminder of the need to be very careful
540 about how the proposal is published.

541 The concluding comments observed that "When we publish we are not necessarily trying to
542 persuade. We are seeking input." Putting the alternative out for comment will stimulate a more
543 complete spectrum of views. It seems particularly important to enhance the comment process by
544 these means when the courts have divided on a question addressed by a proposal.

545 The Committee agreed unanimously that the nonsimplified versions, III and IV, should not
546 be sent to the Standing Committee.

547 *Discovery: Preservation and Sanctions*

548 Prompted by the strong recommendations made at the Duke Conference by the panel chaired
549 by Greg Joseph, the Discovery Subcommittee began work last fall on possible rules governing
550 preservation of discoverable information and sanctions for failing to preserve. The task is
551 challenging. The case law is clear that a duty to preserve can arise before an action is filed. But
552 when? What must be preserved? How long must it be preserved? Wrong guesses can lead to
553 sanctions for spoliation. The uncertainties are reported to cause great anguish.

554 The anguish over exposure to sanctions could be alleviated by highly specific preservation
555 rules. But the more specific the rule, the greater the prospect there will be important omissions. A
556 more general rule designed flexibly to cover all important preservation duties, on the other hand,
557 may be of little use for want of concrete guidance.

558 After wrestling with illustrative drafts similar to those in the agenda materials, the
559 Subcommittee concluded that it needs more information. It hopes to hold a miniconference in
560 September, to hear from people versed in the technology of storing, searching, and retrieving
561 electronically stored information; from plaintiffs' counsel, defense counsel, and in-house counsel.
562 The miniconference will be focused by providing drafts similar to those presented in the agenda
563 materials for initial discussion. Suggestions about people who should be invited to the conference
564 are eagerly requested.

565 An immediate suggestion for a conference participant was made, pointing out that many
566 lawyers are poorly informed about the realities of preservation. In many circumstances it does not
567 cost much to preserve electronically stored information, whatever the cost may be to preserve other
568 forms of information. And the dreaded costs of searching huge accumulations of electronically

569 stored information may be reduced dramatically by electronic searching and screening. Beyond
570 word-search terms, concept searching is being developed. Comparisons to human searches show
571 that computer searching can produce far better results at dramatically lower costs.

572 The Committee agreed that the miniconference should be held.

573 The agenda materials illustrate three approaches. The first states a duty to preserve and
574 attempts to provide detailed provisions; the second states a duty to preserve but elaborates the duty
575 only in general terms; the third avoids any direct statement of a duty to preserve, but instead
576 describes appropriate responses and sanctions for failure to preserve. The thought behind the
577 sanctions-only rule is that it will give retrospective guidance on what should be preserved.

578 These models are presented for reactions at a conceptual level. The details are useful only
579 to illustrate the characteristics of each approach. And the Subcommittee is open to suggestions for
580 still different approaches that depart from any of these three models.

581 Models I and II present alternative forms of a new Rule 26.1 creating a duty to preserve. The
582 first model, full of specifics, provides the best model for discussion because the specifics identify
583 the problems encountered with preservation. The details have been borrowed from various sources,
584 beginning with the elements agreed upon by the Joseph panel at Duke. Additional sources continue
585 to emerge, including a lengthy comment by the Lawyers for Civil Justice received three days ago.

586 The very first part of the first subdivision, Rule 26.1(a), seeks to disclaim any intent to
587 supersede preservation duties "provided by other law." Katherine David, interim Rules Law Clerk,
588 provided a memorandum sketching the wide variety of other laws that establish duties to preserve.
589 A discovery preservation rule should not attempt to displace any of them; they exist for independent
590 purposes.

591 The draft imposes a duty to preserve on "every person who reasonably expects [is reasonably
592 certain] to be a party to an action cognizable in a United States Court." These few words address
593 several issues. The duty is established at a time before any action is filed. It reaches anyone who
594 reasonably expects to be a party — but should the standard be raised to "reasonably certain," higher
595 than the case law seems to be? Should the duty extend to a person who does not reasonably expect
596 to be a party, but who should reasonably understand that it has information that may be important
597 to litigation among others? The duty extends only to an expectation of litigation in a federal court
598 — it would not do to attempt to write a rule for state courts — but how is a prospective party (or
599 nonparty) to know whether anticipated litigation may be cognizable in a federal court? And
600 bracketed language identifies the question whether a preservation rule should be limited to
601 electronically stored information, the source of most current anxieties, or should extend to all
602 discoverable information. It may be useful to recall that many of the cases identified by Emery
603 Lee's FJC study involve tangible items — things, not simply paper documents.

604 The first question was whether the Enabling Act authorizes a rule that would establish a duty
605 before any federal-court action has been filed. The Committee still has not decided that question.
606 Instead, it seems useful to determine what sort of rule, if any, seems best. If the preferred rule
607 recognizes a duty to preserve before an action is filed, and if the Committees conclude that Enabling
608 Act authority for the rule is uncertain, Congress can be asked for authority to develop the rule. It
609 was pointed out that federal courts now enforce a duty to preserve that arises before a federal action
610 is filed: what is the authority to do that? If the duty can be, indeed has been established by
611 decisions, should there not be authority to clarify and regulate the duty through the Enabling Act?
612 One of the chief concerns is that the decisions are not uniform in some aspects, particularly on the

613 relationship between degree of culpability in failing to preserve, the degree of prejudice to others,
614 and selection of an appropriate sanction. That seems the stuff of proper rulemaking.

615 It was suggested that it is troubling to think of developing a rule aimed only at electronically
616 stored information. Other forms of information remain important, and often critical. And leaving
617 other forms of information outside the rule, to be governed by decisional law, would perpetuate
618 disuniformity and create complications in the many cases that involve preservation of information
619 in various forms. And there might be problems of categorization: is a printout of an e-mail message
620 electronically stored information?

621 It was pointed out that the "reasonably expects" phrase in 26.1(a) contrasts with "would lead
622 a reasonable person to expect to be a party" in 26.1(b). "Reasonable person" suggests an objective
623 standard, and the comparison may imply that "reasonably expects" is a subjective standard. What
624 is intended? The Subcommittee intends an objective standard — perhaps 26.1(a) should be revised
625 to say something like "who reasonably should expect."

626 The relationship to other sources of preservation duties was explored by an observer. There
627 are thousands of sources of obligations to preserve information. They are established independently
628 of whatever duties relate to litigation. The rules should not attempt to interfere with them. Professor
629 Marcus replied that the intent clearly is to leave all other duties as they are. Perhaps it would be
630 better to write the rule like this: "~~In addition~~ Without regard to any duty to preserve information
631 provided by other law * * *."

632 The relationship to other duties to preserve also is addressed by the "trigger" provisions of
633 26.1(b)(6), invoking a duty to preserve on "the occurrence of an event that results in a duty to
634 preserve information under a statute, regulation * * *." Does this mean that a litigant is the
635 beneficiary, for example, of a duty to preserve mandated by the SEC? An observer suggested that
636 major problems could be created by invoking external duties established without any thought to use
637 in litigation. A wondrous variety of duties to preserve are created by federal and state statutes,
638 administrative regulations, and ordinances. The focus should be on an objectively reasonable
639 anticipation of litigation, not failure to comply with standards that do not bear on litigation and that
640 often will be obscure or unknown.

641 It was pointed out that duties to preserve information overlap with state attorney-discipline
642 rules. In England, these problems are dealt with in disciplining the attorney who allowed spoliation.

643 The issue of preservation costs was addressed by another observer, who pointed out that
644 costs are imposed by preserving information for litigation that never gets filed. A group of in-house
645 counsel are trying to develop more specific information on these costs.

646 The identity of the beneficiary of a duty to preserve was raised as another source of
647 difficulty. Draft 26.1(b)(2) triggers a duty to preserve on receipt of a notice of claim or other
648 communication indicating an intention to assert a claim. Suppose one person indicates an intent to
649 sue, and suit is then brought by someone else? Does the duty to preserve extend to the benefit of
650 the actual plaintiff? Does it make a difference whether there was a reason to anticipate a possible
651 action by the actual plaintiff — if the original communication is made by the driver of an automobile
652 involved in a collision, for example, should it depend on whether the defendant was on notice that
653 there was a passenger in the automobile who ultimately proved to be the plaintiff? If there was no
654 information about the passenger, and the information was destroyed three years after the
655 communication, could there be a violation of the duty to preserve? For that matter, it was suggested
656 that outside the states that recognize a tort claim for spoliation, the duty to preserve is identified as
657 a duty to the court, not to opposing parties. That is important in determining sanctions.

658 The scope of the duty to preserve described in 26.1(b) raises still other problems. In the first
659 model the list initially appears as a finite and total list, but then (b)(7) seeks to avoid the risk of
660 omissions by adding a catch-all: "Any other [extraordinary] circumstance that would make a
661 reasonable person aware of the need to preserve information." The catch-all "may catch too much."
662 But a rule limited to defined categories will invite litigation disputing whether a bit of information
663 falls into any of the categories. Return to the example of a communication of intent to sue over an
664 automobile collision. Does the scope of the duty to preserve depend on whether the putative
665 defendant knows there was a passenger? On whether the model of automobile was identified to a
666 manufacturer defendant? So of the other categories. A potential party might retain an expert
667 consultant, (b)(4), for the purpose of correcting perceived problems in a product, without any
668 thought of being sued. A notice to preserve information, (b)(5) may be detailed — does that give
669 license to discard information not identified? And so on through the list. And the Lawyers for Civil
670 Justice submission identifies still other specific events that might trigger a duty to preserve.

671 One possibility is that ambiguity in the events that trigger a duty to preserve may be taken
672 into account in sanctions decisions. That directs attention to the third model, which relies on
673 provisions that directly govern sanctions as an indirect means of identifying the nature of the duty
674 to preserve.

675 Discussion of these questions began by asking whether "cloud computing" practices that
676 farm out data storage to unknown systems in unknown places is moving us toward a requirement
677 that everyone preserve everything? We need to be educated as to what cloud computing is —
678 perhaps as to the many different and potentially different things that it is or may become. Who
679 controls the cloud — the owner of the information, or the system operator? What happens if the
680 owner stops paying the cloud? How much of this will change in the next three years?

681 A specific example was offered. "Most people would say that filing an EEOC complaint
682 would trigger a duty to preserve," but only a small fraction of these complaints eventually lead to
683 litigation. Should the filing trigger a duty to preserve? The EEOC liaison responded by observing
684 that an EEOC regulation requires preservation of everything relevant to the EEOC complaint. But
685 he did not know how often private litigation follows after an employee files a complaint with the
686 EEOC. Another observation was that only a small fraction of people who receive right-to-sue letters
687 actually bring an action, but that there are a lot of private Title VII suits independent of the EEOC
688 complaint process. This example may illuminate the choice between defining the duty as one to
689 preserve by a person who is reasonably certain to become a party or one imposed on a person who
690 should reasonably expect to become a party. Perhaps "reasonably anticipates" would work better?

691 A member asked whether the "laundry list" of triggers might better be included in a
692 Committee Note, not rule text. The second version of 26.1(b) provides the same list, but in the form
693 of "such as" examples of a generally described duty to preserve. That approach also could be shifted
694 to a Note. An observer who had been a member of the Joseph panel noted that some panel members
695 thought the list of triggers should be exhaustive, while others thought it should include a catch-all.
696 A different observer who had been a member of the panel noted that he had preferred relegating the
697 list to a Committee note.

698 An observer asked why a list of triggers will cause any appreciable harm if preservation is
699 inexpensive? It was suggested that "we hear different things about the cost of preservation." And
700 so long as preservation is not costless in any dimension, there is a risk that expansive preservation
701 duties will impose unwarranted costs, or lead to unwarranted sanctions when they are overlooked.
702 An enterprise that frequently confronts the possibility of litigation may encounter substantial costs
703 if there is an expansive duty to preserve associated with each of them. And the cost of preserving

704 information is not limited to direct preservation costs — once you have preserved it, you face the
705 prospect of search costs if litigation is actually commenced.

706 After the trigger provisions of 26.1(b) come the "scope" provisions of 26.1(c). These may
707 create greater difficulty than the trigger provisions. An anecdote from long ago illustrates the
708 problems. In United States v. IBM the preservation order required IBM to retain "all documents
709 related to computing." IBM responded by not throwing away anything. The waste baskets were
710 emptied into storage. When the order was vacated, IBM had to file an environmental impact
711 statement because there was so much paper. "Scope matters."

712 The starting point of 26.1(c) requires "actions that are reasonable under the circumstances
713 to preserve discoverable information." Bracketed alternatives then invoke the proportionality
714 criteria of Rule 26(b)(2)(C) by cross-reference or by paraphrase. But when and how can a
715 prospective party identify what is proportional to litigation that has not even been filed?

716 The preface is followed by 26.1(c)(1), presented as four alternative provisions to define the
717 subject matter of what must be preserved. One of them is very narrow — it demands only
718 preservation of information relevant to a subject on which a potential claimant has demanded
719 preservation, seemingly obviating the duty to preserve anything in response to any of the other
720 triggering events listed in 26.1(b). The first alternative broadly requires preservation of anything
721 relevant to any claim or defense that might be asserted in the action: is that too broad? The fourth
722 alternative looks to what a reasonable person would appreciate should be preserved under the
723 circumstances: does that give sufficient guidance?

724 The next provision, 26.1(c)(2), addresses the sources of information to be preserved. One
725 alternative is limited to information "that is reasonably accessible to the person." This test looks to
726 the Rule 26(b)(2)(B)(2) protection against discovery of electronically stored information, but it
727 presents questions. Why not require preservation, particularly if the cost is low, against the prospect
728 that cause may be found for discovery? And how does this affect other forms of information? The
729 second alternative is specific, invoking all sorts of technological concepts that many will not
730 understand and that may become obsolete in short order. How many lawyers, for example, will fully
731 understand what it means to establish a presumptive exclusion that excuses preservation of "deleted,
732 slack, fragmented or unallocated data on hard drives"?

733 Draft 26.1(c)(3) extends the duty to preserve to documents and tangible things as well as
734 electronically stored information. But what of real property?

735 At this point Judge Campbell suggested that the central point had been made. Difficult and
736 controversial issues will arise at many points, perhaps at every point, in attempting to define a
737 specific duty to preserve. It may make better use of remaining meeting time to offer general
738 observations, leaving specific suggestions for later messages.

739 One suggestion was that it would be good to include in the September conference
740 representatives of medium-sized businesses that are based outside the United States but do business
741 here. It seems likely that they would view either version of Rule 26.1 as frightening, much more
742 frightening than the Rule 37 approach to preservation obligations by defining the occasions for
743 sanctions.

744 This observation led to another. The European Union, moved by privacy concerns different
745 from those that prevail in the United States, is aggressive in imposing obligations to discard data
746 after a relatively brief time. Stringent requirements in the United States could whipsaw enterprises

that operate in both places. Perhaps the United States Trade Representative's Office might be able to send someone to the conference to explore these issues.

The suggestion that the conference should be structured to include representatives of the plaintiff perspective was renewed. It will important to learn what they think is sensible, what they need to be able to discover.

It will be more difficult to know how to gain information about imposing duties to preserve on individual litigants. A prospective plaintiff or defendant may give little thought to these matters. In employment cases, for example, employers seek discovery of Facebook pages for information that may undercut the plaintiff's litigating positions. Similar quests may be made in class actions for information bearing on adequacy of representation and commonality of class-member interests. Other plaintiffs may be different — governments often appear as plaintiffs, and may be expected to preserve in a sophisticated way. Here too, the plaintiffs' bar should be searched for information.

Discussion closed with a statement that the Subcommittee hopes to be able to recommend a general approach at the November meeting, and to have a concrete proposal for consideration at the Spring 2012 meeting.

Pleading: FJC Report

Judge Kravitz noted that the Supreme Court has already delivered two opinions on pleading standards in 2011. The Skinner opinion invokes the Swierkiewicz decision and applies it outside employment law, finding the complaint sufficient. Matrixx Initiatives also seems to reflect a relatively relaxed approach. It has been suggested that before the Twombly and Iqbal decisions the Court seemed to swing back and forth between pronouncements that heightened pleading is not required and somewhat indirect approaches to raising pleading thresholds. It may be that a similar fluctuation is going on now.

The Committee asked the Federal Judicial Center to study the impact of the Twombly and Iqbal decisions on the district courts. The study will be presented by Joe Cecil. In addition, Judge Rothstein and Joe Cecil have agreed to do a follow-up study to determine what happens when dismissal is coupled with leave to amend: is a new motion filed to challenge the amended complaint? What happens on the renewed motion?

Joe Cecil presented the report, beginning with an expression of thanks to Professor Gensler, who recruited University of Oklahoma Law School students to do the coding for the study. "That's how we got it done."

The purpose of the study was to assess changes in Rule 12(b)(6) practice over time in broad categories of civil cases. Footnote 4 in the study summarizes other studies that have been done. The other studies find increases in motions to dismiss, particularly in civil rights cases. But they have relied on cases published in the Westlaw database, which is likely to overrepresent orders granting motions, and have examined orders decided soon after Iqbal and before interpretation of the decisions by the courts of appeals.

The study was based on 23 districts, generally the largest two districts in each regional Circuit. Together, these districts account for 51% of the actions filed in federal court.

The central conclusions of the study are that there has been an increase in the rate of filing Rule 12(b)(6) motions to dismiss, although this may not prove out in civil rights cases where the rate

789 of motions was high before the Twombly and Iqbal decisions. But the rate of granting motions and
790 the rate of termination after a grant both held constant. And as noted below, the picture is more
791 complicated than that.

792 Joe Cecil found this study the most complicated study that he has done in 30 years at the
793 Federal Judicial Center because of the need to make statistical adjustments to account for other
794 events that were occurring in the federal courts apart from the Twombly and Iqbal decisions.
795 Looking to the period immediately before the Twombly decision, for example, is subject to the
796 prospect that courts may defer rulings in anticipation of new guidance from the Supreme Court. But
797 decisions in 2006 are not likely to be affected by anticipation of Twombly.

798 The study is based on actual CM/ECF records. This approach yields more cases than
799 reliance on published decisions. It also shows more decisions denying motions, which are less likely
800 to be published than decisions that grant motions.

801 Prisoner and pro se cases were excluded from the study.

802 Motions in response to counterclaims and affirmative defenses also were not considered.
803 The study also excluded cases in which a motion to dismiss was converted to a motion for summary
804 judgment because materials outside the pleading were considered.

805 "A lot changed between 2006 and 2010 that was unrelated to Twombly and Iqbal." The
806 types of cases changed. There were fewer tort cases in 2010, and motions to dismiss are not made
807 as frequently in tort cases as in other types of cases. There were many more financial instrument
808 cases in 2010 than in 2006. The financial instrument cases often were filed in state court, removed,
809 dismissed as to the federal claims as a matter of law, and remanded. And there were more amended
810 complaints in 2010; they are more likely to be dismissed.

811 Different districts seem to take different approaches to motions to dismiss. Some tend to
812 deny. Others grant with leave to amend. The Southern District of New York seems to have a low
813 rate of filing motions to dismiss, but to tend to grant them without leave to amend. An effort was
814 made to control for these differences.

815 The study looked only to the rate of filing motions to dismiss in the first 90 days of an action.
816 It found an increased filing rate in all types of cases, including § 1983 civil rights cases, but not in
817 other types of civil rights cases where the rate was already high in 2006. Financial-instrument cases
818 "are a bubble in the data we have to account for."

819 Without statistical adjustments to account for factors unrelated to the Supreme Court
820 decisions, the grant rate increased from 66% to 75%. But it is an increase in grants with leave to
821 amend — the cases were not terminated. There were great variations across districts. And there
822 were more amended complaints in 2010 than in 2006.

823 The raw numbers seem to show an increase in claims dismissed, but after statistical
824 adjustment that held only for financial-instrument cases. As for types of cases where particular
825 concerns have been expressed, there was no increase in the rate of dismissal in employment
826 discrimination and civil rights cases.

827 The study did not examine possible changes in substantive law. Nor did it consider the effect
828 of any changes in pleading practices that may have resulted from the Twombly and Iqbal decisions.
829 Remember that it was based only on motions filed in the first 90 days of an action. And it did not
830 determine the outcomes after leave to amend was granted.

831 Critics of the study do not accept the statistical adjustments, but they have not heard of the
832 need to make the adjustments. They also question the exclusion of pro se and prisoner cases. But
833 the prisoner cases have a different procedure.

834 The study is not able to identify cases that were not filed in federal court because of pleading
835 standards, whether the choice was to file in state court or not to file at all. Removal rates were
836 considered; no change was found even after separating fact-pleading states from notice-pleading
837 states. (It was recognized that classifying state pleading practices can be difficult. California
838 formally seems to be a code pleading state. But at various times, and in different types of actions,
839 actual pleading standards may be more sympathetic to plaintiffs than federal notice pleading is. "It
840 goes in cycles.")

841 Nor was the study able to identify cases where the pleadings suffered from factual
842 deficiencies that could be cured only by discovery. The further study will attempt to determine
843 whether discovery continues after dismissal with leave to amend, but it may be difficult to find this.
844 A related comment observed that the problem of access to information available only to defendants
845 can be resolved by informal means in some situations. Antitrust plaintiffs, for example, may be able
846 to offer one potential defendant an exchange — give us all the information you have about the
847 conspiracy, and we won't name you as a defendant.

848 In response to a question, it was agreed that Table 4 shows a 7% increase in the rate of filing
849 motions to dismiss in civil rights cases, but the increase does not meet the ordinary 0.05 standard
850 of significance. It would be significant if a 0.10 standard of significance were employed. And the
851 number of cases increased from 2006 to 2010.

852 Another question pointed out that page 21 of the report finds no increase in the rate of
853 granting motions with or without leave to amend. But this reflects the difference between the raw
854 figures in Table 4 and the statistical adjustments. Table 5 shows that after statistical adjustments,
855 only financial instruments showed an increase. The adjustments are described in Appendix B. They
856 provide a way of accounting for changes that would have happened even if Twombly and Iqbal had
857 never been decided.

858 A judge observed that many district judges have said that Twombly and Iqbal have not made
859 much of a difference, apart from an increase in the rate of filing motions. Joe Cecil responded that
860 the study confirms these observations. And the study of what happens after leave to amend will be
861 important.

862 Another judge asked the direct question: if the rate of filing motions has increased, and if the
863 rate of granting motions holds constant, doesn't that mean that there are more dismissals? Joe Cecil
864 agreed that might be the case. With more cases being filed, and motions more likely to be filed in
865 those cases, the same rate of granting dismissal will result in more dismissals. "But we have two
866 very different data sets, so we can't just combine the estimates and be confident of the answer." It
867 is important to remember that leave to amend is more often granted than before.

868 Pro se cases were addressed by asking whether it is possible to go back to examine fee-paid
869 pro se cases. They may prove interesting because Twombly and Iqbal may make it easier to dismiss
870 "fanciful" claims than it was earlier. They are only conceivable, not plausible.

871 It was suggested that Committee members should think about anything that would be
872 particularly useful for the study about leave to amend. Do cases settle after leave to amend is
873 granted? Is there a renewed motion to dismiss?

And what about staying discovery while a motion to dismiss is pending? Joe Cecil was uncertain whether the codes will show whether there is a formal stay of discovery. But it would be useful to know whether discovery proceeds, with or in the absence of a formal stay. The difficulty is that discovery requests and responses are not filed. And the parties may suspend discovery without an order, perhaps after consulting with a judge who recommends the suspension. It was suggested that many pro se cases are brought against "the government," which responds with a motion for summary judgment that the plaintiff does not think to address by requesting an opportunity for discovery. Joe Cecil said he would think about the challenges of making reliable findings about discovery stays.

Joe Cecil also said that the greatest difficulty with the study arises in attempting to distinguish pleadings that fail for want of factual sufficiency alone and those that fail in whole or in part for advancing an untenable legal theory. The difficulty is most acute with cases decided before the Twombly decision. It was noted that the recent Skinner decision says that a complaint need not pin the claim on a precise legal theory. A plausible short and plain statement of the claim is all that is required. "This is likely to be quoted a lot."

Responding to a question about the time taken to decide motions to dismiss, Joe Cecil said that the motions may be filed a couple of days earlier after Twombly and Iqbal. The person who put the question then said that "there are cycles of relative desirability of state courts and federal courts." In California, the state courts believe the facts stated in the complaint; the baseline assumption is that discovery continues while the court deliberates a motion to dismiss. And the state court is required to decide the motion quickly. In the federal courts, at least in complex cases, discovery is stayed pending decision on the motion to dismiss. "State-court desirability is at an all-time high." Joe Cecil agreed to study the time taken to dispose of motions to dismiss.

An observer asked what it means to dismiss with leave to amend. Is it possible to find the changes that were made to enable the amended complaint to survive where the initial complaint failed? Joe Cecil said it would be possible to retrieve the pleadings, but the FJC is not in a position to suggest specific lessons about the comparison or the quality of the changes made by the amended complaint. A judge supported this approach, noting that — to take only one example — securities cases often have "huge complaints." Joe Cecil said it also would be interesting to look at the cases that were terminated by a motion to dismiss.

Judge Kravitz praised the report as enormously helpful to the Committee and to scholars. The FJC has the Committee's thanks. The further work, following up on what happens after leave to amend is granted, also will be very useful. The Al Kidd case pending in the Supreme Court may say something more about pleading.

Pleading: Rule Revisions?

Judge Kravitz introduced the question whether the time has come to consider rules revisions to respond to the Twombly and Iqbal decisions. The Supreme Court continues to describe pleading standards in variable terms. It may continue to provide guidance that helps lower courts to converge on a common understanding. Given this continuing evolution, it may not be useful to attempt to consider amending the pleading rules. Perhaps the right thing is to focus on discovery practices in relation to motions to dismiss. And the Court has not said anything about the standards for pleading affirmative defenses. Plaintiffs complain that defendants often plead affirmative defenses by label alone. It is more useful to require added detail — a fraud defense, for example, should be pleaded with some detail.

Doubts about amending the pleading rules were repeated. The Supreme Court seems to continue active consideration of these problems. It is a moving target.

The agenda-book sketches of possible revisions of the rules for pleading a complaint were described. The first step is to identify the reason for revision. What is it that needs to be changed in pleading practice has it has developed in the years since the Twombly and Iqbal decisions?

One sketch would "restore what never was." This approach would seek to reduce the pleading threshold to the discarded dictum that dismissal is proper only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." A pleading need only give notice of the claim. Courts routinely required more than that in countless decisions rendered before the Twombly opinion. It is fair to ask whether new reasons have appeared to justify going in this direction now.

Another approach would attempt to find rule language that would reestablish the pleading standards that prevailed before the Twombly and Iqbal decisions. This approach assumes that those decisions have caused the pleading threshold to be raised to some level identifiably higher than the standard prevailing on May 20, 2007. It may be too early to rely on that assumption. An attempt to roll back to pre-Twombly practice, moreover, must account for the fact that there was no easily stated or uniform practice. Actual pleading standards varied among different types of claims, and among different courts. Nor was practice entirely stable. Rule revisions could do no more than invite courts to disregard the Twombly and Iqbal opinions and to carry on the process of adapting practices vaguely characterized as "notice pleading" as they had been doing. And even that invitation would encounter the challenge of persuading lower courts that Supreme Court implementation of the new rule would not be affected by the concerns that led to the Twombly and Iqbal decisions.

A third approach might be to seek some sort of middle ground between the practices perceived to have existed before the Twombly decision and the standards perceived to have resulted from it. It could prove difficult to find words capturing this purpose.

Another approach would seek to confirm in rule language an understanding of what the Twombly and Iqbal decisions have come to mean. The opinions were not written as rule text, nor should they have been. Clear expression will require a clear understanding of what was intended, or — perhaps more usefully — what has emerged as lower courts have worked to implement the Court's intent in the best ways possible.

Defense interests have suggested another step up the scale. They suggest that, at least as lower courts have developed it, the practice emerging from Twombly and Iqbal has not raised pleading standards as high as they should be. Without attempting to judge whether this position is right, it must be recognized that rules proposed to adopt it would encounter fierce opposition.

Still other approaches to pleading a claim are possible, including an explicit revival of "fact pleading." Or the rules could expand the categories of claims singled out for pleading with particularity. Or, conversely, the rules might establish categories of claims that can be pleaded more generally than most claims.

A member asked whether there is any reason to suppose the Supreme Court would adopt a rule that reduces pleading standards below the level set by the Twombly and Iqbal decisions. It was suggested that the Court would be receptive if the Committee could show a major problem, that large classes of cases are being kept out of federal court. But that may not be likely. Observers

often complain, for example, about the fate of employment discrimination cases. But "I never get a motion to dismiss in employment cases." They are pleaded carefully and effectively.

Indirect responses also might be well received. Many courts have experimented over the years with a requirement that a plaintiff provide a reply when a defendant pleads official immunity. The Iqbal decision shows special concern for official-immunity cases, concern that might well support a rule requiring a reply.

The Committee concluded that it is not yet time to discuss these various possibilities. Nor did it find need to discuss a variety of models that would respond to the arguments that it is unfair to require plaintiffs to plead details of a claim that are known only to defendants. These models would provide for discovery in aid of stating a claim, perhaps before an action is filed, or at the time of filing, or in response to a motion to dismiss.

Pleading will remain on the agenda. It may be that further FJC work will show that the rise in orders granting dismissal but also granting leave to amend does not have the benign effect of simply provoking better pleadings that help frame the case and reduce the burdens of discovery. The prospect of further information, a sense that practice has not fully crystallized in the lower courts, and the possibility that the Supreme Court will have more to say, however, undercut arguments that the time has come to begin preparing rules revisions for publication and eventual adoption.

Pleading: Forms

The intense focus on pleading brought on by the Twombly and Iqbal decisions has put the illustrative "Rule 84" Forms back on the agenda. There are powerful arguments for taking the adoption and revision of forms outside the Enabling Act process. Action has been deferred, however, for fear that abrogation of the pleading forms — which are particular targets of criticism and doubt — might appear to be taking a position in the debates engendered by Twombly and Iqbal. But the debates have matured to a point that may make it feasible to launch a forms project.

The first observation was that the Forms were important in 1938 when the new pleading philosophy was just that — entirely new. The Forms provided concrete illustrations of "the simplicity and brevity" intended by the new rules. Now the rules are mature. "It is not Charles Clark's world." The pleading forms were time-bound, are no longer important.

Carrying the Forms forward as creatures of the Enabling Act process presents several problems. One big problem is that they need to be tended to, and tending to them would absorb great amounts of time. The Committee has not been able to devote serious attention to the Forms for many years. Even in the Style Project, they were revised by a process far less intense than the process for the rules themselves. The consequences may be troubling. The Form 18 form complaint for patent infringement, for example, has been excoriated. A related problem is that it would be useful to be able to revise forms with some speed to respond to changing circumstances. "Some speed" is not a characteristic of the Enabling Act process.

These problems may be exacerbated by the idiosyncratic selection of topics covered by the Civil Forms. It is not at all clear how possible topics were selected, honoring some problems with forms and ignoring others.

Consideration of the Forms questions should be undertaken in conjunction with the Appellate, Bankruptcy, and Criminal Rules Committees. The roles played by forms, and the means of developing them, are different among the different sets of rules. The criminal procedure forms are developed outside the Enabling Act framework, although the Criminal Rules Committee reviews

1004 some of the forms and offers advice. A similar process could be followed for civil procedure forms,
1005 leaving most of the work to the Administrative Office. Work is under way now on revising the
1006 procedures for the conduct of business by the rules committees. A focus on the procedures for
1007 generating forms is an appropriate adjunct of this work, although in the end it may be that work on
1008 the procedures should finish on other topics, leaving the way for additional provisions after the
1009 several committees and the Standing Committee work through the forms process.

1010 It was pointed out that most of the forms are not illustrative complaints. Revising the whole
1011 framework need not be seen as implicit commentary on the Twombly and Iqbal decisions, but
1012 instead can be recognized for what it is — a program to shift the initiating responsibility for forms
1013 away from the full Enabling Act process.

1014 The Committee concluded that work should begin on Rule 84. The rate of progress will
1015 depend on the interest of other advisory committees in beginning a joint project. At least a progress
1016 report should be submitted at the November meeting.

1017 *Duke Subcommittee*

1018 Judge Koeltl presented the report of the Duke Subcommittee. Its deliberations on possible
1019 rules revisions have been guided by the menu of possible subjects set out in the agenda materials
1020 at page 286. The menu itself is not all-inclusive; it filtered out suggestions that seemed not ripe for
1021 present action. The menu has been whittled down through e-mail messages, meetings by conference
1022 call, and in-person meetings. The agenda materials include a significantly narrowed set of rules to
1023 be considered further. Which of them will lead to specific proposals continues to be discussed.

1024 Some common themes will be recalled. Conference participants repeatedly emphasized the
1025 need for proportionality and cooperation in litigation, and for active judicial management to help
1026 achieve these goals. Radical revision of the rules has failed to command majority, or near-majority
1027 support. There is a strong stream of views that most problems can be resolved within the current
1028 framework of rules given sensible behavior by lawyers as encouraged by case management. But
1029 there is support for relatively modest "tweaks" of various rules to further these goals.

1030 One source of inspiration will be a study of the "rocket docket" practices in the Eastern
1031 District of Virginia. The study will aim to identify practices that might be generalized and carried
1032 to other courts. The Subcommittee will form panels of judges and lawyers to make presentations
1033 about rocket-docket practices at the November Committee meeting.

1034 Employment lawyers representing plaintiffs and defendants, led by Joseph Garrison and
1035 Chris Kitchell, have come together to develop a set of initial disclosures and discovery requests,
1036 documents to be provided and questions to be answered. The hope is to have these standard
1037 obligations incorporated in scheduling orders. They made enormous progress at a meeting at the
1038 Institute for the Advancement of the American Legal System two weeks ago. They plan to meet
1039 again this summer and expect to reach agreement then. They also expect that some judges will be
1040 eager to adopt these queries as scheduling orders. The FJC is prepared to frame a study that will
1041 determine in a rigorous way whether these practices reduce cost and delay. Many nuances remain
1042 to be resolved, but the process of bringing all the lawyers together for direct consultation has proved
1043 very good.

1044 Joseph Garrison said that it would be desirable to use the employment discrimination
1045 protocol as the prototype for developing protocols for other types of litigation. Judge Koeltl was
1046 a great facilitator at the IAALS meeting. The drafting group hopes that twenty or thirty judges will

1047 adopt the protocol as scheduling orders. And the drafting group is working on a model protective
1048 order.

1049 Judge Kravitz suggested that there will be no problem in finding a suitable number of judges
1050 willing to adopt the protocol. But it will be necessary to coordinate with the FJC in order to
1051 establish the framework for effectively measuring the results.

1052 Judge Koeltl noted that the protocol will function as a first wave of discovery, and may lead
1053 to early settlement. The possible facilitation of settlement will be another facet of the study of cost
1054 and delay. At the least, adoption of the protocol in a scheduling order should reduce disputes about
1055 what is discoverable.

1056 Judge Koeltl continued the Subcommittee report by noting that the Administrative Office
1057 did a study of pre-motion conference practices as revealed by district web sites. It asked about the
1058 use of conferences before discovery motions, and also before other motions such as Rule 12(b)(6)
1059 motions to dismiss and Rule 56 summary-judgment motions. The question was raised because some
1060 of the participants in the Duke Conference said that some judges are drowning in discovery motions,
1061 while others do not seem to have such severe problems.

1062 The Administrative Office found 37 districts in which some or all judges require a pre-
1063 motion conference before a discovery motion can be filed. Judges that require, a conference before
1064 other motions were found in only four districts.

1065 The dearth of pre-motion requirements for motions other than discovery motions effectively
1066 forecloses exploration of a rule that would impose this requirement. There is no real support for it.

1067 The question whether to require a conference before filing a discovery motion remains on
1068 the table. The same effect might be achieved by calling for oral discovery motions, avoiding the risk
1069 that a judge might fail to do anything after the pre-motion conference, effectively barring any
1070 motion. (That risk also could be addressed by providing that a motion could be filed if no action
1071 were taken within a prescribed number of days after the conference.)

1072 Judge Rothstein has agreed to have the FJC do research on the beginning phases of litigation.
1073 Rule 16(b) directs that a scheduling order must enter as soon as practicable, and no later than 120
1074 days after any defendant has been served or, if earlier, 90 days after any defendant has appeared.
1075 Among other things, the scheduling order must limit the time to complete discovery and file
1076 motions. And lawyers are required by Rule 26(f) to confer at least 21 days before a scheduling
1077 conference is to be held or a scheduling order is due.

1078 Several obscurities surround Rule 16(b). One arises from Rule 16(b)(1)(B), which directs
1079 that the order enter after receiving a Rule 26(f) report or after consulting with the parties at a
1080 conference "or by telephone, mail, or other means." What are the other means? Perhaps e-mail
1081 exchanges would be.

1082 The Duke Conference suggested there are problems. Data revealed that no discovery cutoff
1083 is set in nearly half of all cases. Why? Is it because the cases settle? Are dismissed before they
1084 progress to the scheduling-order phase? Do lawyers really hold Rule 26(f) conferences? Are Rule
1085 26(f) conferences helpful? Do the Rule 16(b)(1)(B) timing provisions make any sense, or are they
1086 too drawn out? The experience of Subcommittee members suggests that districts differ in these
1087 dimensions. In some districts lawyers do meet, provide a Rule 26(f) report, and the judges enter a
1088 scheduling order without actually meeting with the parties. It is a loss when the judge does not meet

1089 and confer with the lawyers to provide judicial management. In other districts, lawyers often do not
1090 meet together but instead go straight to a meeting with the judge.

1091 Changes are possible. The time to enter a scheduling order seems too long. Perhaps there
1092 should be a presumptive requirement to meet with the judge. The Rule 26(d) bar on discovery
1093 before the Rule 26(f) conference may deserve reconsideration — it might be better to allow
1094 discovery requests to be served before the conference, so that the parties and later the judge have
1095 a better idea of what the discovery issues may be. The FJC research will help to explore these
1096 issues.

1097 The Subcommittee is open to suggestions of other topics that should be considered, or
1098 excluded. It has tended to keep issues on the table to encourage discussion. The lack of suggestions
1099 has been disappointing.

1100 Initial disclosure under Rule 26(a)(1) has been put in the background. Some lawyers think
1101 it does no good. Others think it is worthwhile in some cases. Courts do impose sanctions for
1102 failures to disclose.

1103 The scope of discovery relates to the questions of proportionality and cooperation.
1104 Proportionality has been required by Rule 26(b)(2) since 1983, but it seems to be buried. It is
1105 seldom raised. When appellate courts describe the scope of discovery they focus on the broad terms
1106 of Rule 26(b)(1) without going on to note the express incorporation of 26(b)(2)(C) at the end of
1107 (a)(1). Should something be done about this? Would even a separate rule on proportionality capture
1108 judges' attention? Is it better to rely on judicial education to ensure that proportionality is addressed
1109 in all discovery conferences?

1110 Judge Grimm has volunteered to generate a list of references and a set of concrete examples
1111 to help walk through the need for proportionality. Cases can be found that note proportionality in
1112 passing, but there are not many cases on how to do it. Professor Gensler has written on it. The
1113 Sedona Conference has generated guides for cooperation. A set of guidelines and examples may
1114 prove helpful. Judge Kravitz thanked Judge Grimm for undertaking this work, and suggested that
1115 efforts to educate judges seem a desirable first step before considering rules changes. Judge Koeltl
1116 noted that Judge Rothstein has agreed to include discovery proportionality in judicial education
1117 materials.

1118 The Subcommittee also has considered the possibility of adding cooperation to the rules.
1119 Cooperation appears now only in the heading of Rule 37, but nowhere in the rule text; it was added
1120 in 1980, when the rules were amended to include a Rule 26(f) conference provision quite different
1121 from the present provision, which dates to 1993, and when what is now Rule 37(f) was added to
1122 reflect the duty to participate in a discovery conference in good faith. One possibility would be to
1123 add a duty of cooperation to Rule 1, imposing on attorneys as well as the courts the duty to achieve
1124 the just, speedy, and inexpensive disposition of every action and proceeding.

1125 Three specific proposals to curtail evasive discovery responses advanced by Daniel Girard
1126 at the Duke Conference continue to attract strong support in the Subcommittee. The first would
1127 amend Rule 26(g)(1)(B)(i) to add a certification that a discovery request, response, or objection is
1128 "not evasive." The second would add an explicit requirement to produce in response to a Rule 34
1129 request. The third would amend Rule 34 to provide that each objection to a request must specify
1130 whether any responsive documents are being withheld on the basis of the objection.

1131 Other discovery proposals remaining on the agenda would reconsider the role of contention
1132 interrogatories and requests to admit, and consider presumptive numerical limits on the number of

1133 Rule 34 requests to produce and Rule 36 requests to admit. Some judges now adopt pretrial orders
1134 that limit the number of requests to produce, perhaps to 25. The limit encourages parties to focus
1135 on what they need, but may have the counterproductive effect of encouraging more general requests.

1136 Discussion began with the observation that the tenor of the Duke Conference was to ask
1137 whether there is a better way to conduct litigation that too often is too long, too cumbersome, and
1138 too expensive. The Subcommittee has done a great job, but the present agenda does not seem
1139 calculated to accomplish broad improvement. Is there a way to force the Committee to think about
1140 more efficient procedures? Can something be done to help address pro se litigation — the civil
1141 docket in the District of Arizona is now up to 45% pro se cases. The rise of pro se litigation is both
1142 a problem and a symptom of the expense of litigating with a lawyer in federal court. Studying
1143 docket practices in the Eastern District of Virginia may yield clues as to how to experiment with
1144 moving cases along, but there is a concern that a solo practitioner may be forced to devote all
1145 available time to a single case under rocket-docket procedures.

1146 The Committee was reminded of the value in looking to what others do, including state
1147 courts. Oregon uses fact pleading. Arizona has vastly expanded unilateral disclosure requirements.
1148 There even may be lessons to learn from other countries. But we should remember the results of the
1149 FJC study for the Duke Conference. Many cases finish in ten months to a year, with some discovery
1150 but not a great deal, and with a cost of around $15,000. There are, to be sure, monster cases.
1151 Controlling them requires special techniques, but it is important to remember the frequent advice
1152 that the rules are adequate to the task, that the need is for better implementation of present rules
1153 more than for new rules.

1154 It was suggested that it would be helpful to study ways to deal with pro se cases apart from
1155 rules changes. "Help desks," and internet forms, might be a start.

1156 Judge Koeltl observed that even within the federal system there is an enormously diverse
1157 array of courts, case loads, and conditions. Courts are experimenting with ways to deal with pro se
1158 cases, and with other procedural devices. The Southern District of New York has adopted forms for
1159 excessive-force cases, and hopes to mount a pilot project for complex cases. The IAALS is looking
1160 for other pilot programs. The Seventh Circuit is well into its pilot project on e-discovery.
1161 Continuing experimentation will help. It also will help to pursue vigorous programs to educate
1162 judges and lawyers about the opportunities available in the present rules.

1163 Fact pleading has been one idea, but "we may not go there."

1164 Many states track cases. State courts have many more cases than the federal courts do, and
1165 they have many cases with little discovery. State courts also entertain complex litigation, however,
1166 and several states are creating complex-litigation courts that often attract cases that might have been
1167 filed in federal court. The Delaware Chancery court is a familiar example of a state court that has
1168 dealt with highly sophisticated and complex litigation for many years. And state courts entertain
1169 class actions of broad, even nationwide, scope.

1170 An observer suggested that "Rule 56 is a big driver of all the cost and expense." The
1171 Committee will have to deal with it in ways more fundamental than the recent amendments if cost
1172 and expense are to be reduced. A summary-judgment motion often forces discovery that otherwise
1173 would not be undertaken. Many arbitrators achieve efficiency by going straight to hearings, without
1174 summary judgment. Such, at least, is the experience in employment cases.

1175 A sympathetic comment observed that "Rule 56 makes no sense in excessive-force cases."
1176 Different judges have different ways of dealing with this.

1177 Another observer said that when acting as a mediator, he uses the costs of litigation as a tool
1178 to encourage settlement. But in arbitration, he finds criticisms that arbitration can be too slow and
1179 too expensive, with calls for summary judgment. What is most important, as said repeatedly at the
1180 Duke Conference, is engagement by and with the judge, cooperation, and proportionality.
1181 Engagement by the judge is the most important factor. The rules we have can work; a really fine
1182 judge can use them to deal with the problems. Long-range improvement must begin with changes
1183 in the law schools, teaching lawyers how to contribute to the administration of justice.

1184 Judge Kravitz noted that it is terrific that the FJC is considering ways to provide judicial
1185 education programs outside D.C. One shortcoming of education programs is measured by the judges
1186 who do not attend, and taking the programs to them may accomplish much good.

1187 Attention should be devoted to finding ways to get feedback from the bar outside major
1188 conferences, occasional miniconferences, and the publication of formal proposals for amendments.
1189 It will be useful to let the bar know what the Committees are doing, and to encourage a flow of
1190 information from lawyers and judges to the Committees.

1191 An optimistic note was suggested. It may not sound like much to achieve a 1% reduction
1192 in the cost of litigating all cases — it would not much reduce the burdens on litigants. But the
1193 cumulative saving for the system would be substantial. Seemingly modest improvements can do real
1194 good.

1195 It was asked when the Committee could devote a day to thinking about these issues. Some
1196 help might be available from the National Center for State Courts. David Steelman at the Center
1197 has studied what works for efficient court systems. Other people can be found who know of
1198 innovative ways of doing things.

1199 These questions will have to be worked out in developing the agenda for the November
1200 meeting. Time should be set aside for the first hearing on the Rule 45 proposals. The rocket-docket
1201 panel will take some time. The Discovery Subcommittee plans to present recommendations on the
1202 approach to be taken to preservation and sanctions issues, whether a highly detailed description of
1203 a duty to preserve, a more open-ended reasonable but express duty to preserve, or an indirect
1204 approach that defines the circumstances and limits of sanctions for failing to preserve. The Duke
1205 Conference Subcommittee can consider what is desirable and make recommendations for making
1206 use of the time available.

1207 And it will be important to let the Standing Committee know that the Advisory Committee
1208 is considering the possibility of aggressive changes, but also is tending to changes in the rules that
1209 can be achieved and do good in the short term.

1210 *Appellate-Civil Subcommittee*

1211 Judge Colloton delivered the report of the Appellate-Civil Subcommittee. There is no
1212 recommendation for present action.

1213 The one topic currently active on the agenda is "manufactured finality." The question arises
1214 when a plaintiff encounters an adverse ruling that cannot be appealed under normal rules. One tactic
1215 has been to achieve finality by dismissing whatever remains of the action. A common illustration
1216 arises when the principal claim is dismissed by the court, and the plaintiff believes that the
1217 remaining minor claims are not worth litigating alone or that it costs too much to litigate the
1218 remaining claims to final judgment with the hope that an appeal will revive the principal claim for
1219 a second trial. Most courts recognize that the plaintiff can achieve finality by dismissing all

1220 remaining parts of the action with prejudice, but the price is that those parts cannot be revived if
1221 dismissal of the principal claim is reversed. A few courts address that problem by allowing
1222 dismissal of the remaining claims without prejudice, but most courts reject that practice because it
1223 seriously corrodes the final judgment rule. An intermediate approach has occasionally been
1224 recognized, most clearly in the Second Circuit. Under this approach, the plaintiff secures dismissal
1225 of the remaining parts of the action with prejudice, but subject to revival if the adverse court rulings
1226 are reversed on appeal. This practice has been dubbed "conditional prejudice" in Subcommittee
1227 discussions. The Subcommittee has not been able to find out much about the operation of the
1228 conditional prejudice practice in the Second Circuit; it may be that it is little used.

1229 The Subcommittee believes that two approaches are most promising. One would be to craft
1230 a rule that allows finality to be manufactured only by dismissing all remaining parts of the action
1231 with prejudice. The rule would defeat attempts to manufacture finality by dismissing the remaining
1232 parts without prejudice, or with conditional prejudice. The other approach would be to do nothing,
1233 leaving it to the courts to continue present practices as they may evolve in the light of experience.
1234 The Subcommittee is pretty much in equipoise between these approaches. The Appellate Rules
1235 Committee will meet soon. Once its views are known, the Subcommittee will work toward a final
1236 recommendation.

1237 It was noted that Rule 54(b) does not address all of the concerns that lead litigants to seek
1238 manufactured finality. The district judge may refuse to enter a partial final judgment. The court of
1239 appeals may conclude that entry of judgment was an abuse of discretion. Or — and more
1240 sympathetically — the case may not fall within Rule 54(b) possibilities. A common illustration
1241 would be a ruling that excludes vital evidence, or rejects the major components of requested
1242 damages, but leaves all claims alive.

1243 *Rule 6(d): Three Added Days*

1244 The "three added days" provision in Rule 6(d) presents two problems. The more
1245 fundamental problem is whether all of the modes of service that now entitle a party to three added
1246 days deserve the added time. The simpler problem arises from a misstep in the 2005 amendment
1247 that revised Rule 6(d) to establish a single and uniform method of calculating the three added days.

1248 The misstep in drafting the 2005 amendment was identified in an article by Professor James
1249 J. Duane, *The Federal Rule of Civil Procedure that was Changed by Accident: A Lesson in the Perils*
1250 *of Stylistic Revision*," 62 S.C.L. Rev. 41 (2010). Although the change was made two years before
1251 the Style Project revisions, the misstep was a result of applying Style Project drafting conventions.

1252 The drafting problem is most easily identified by the simple fix: "When a party may or must
1253 act within a specified time after ~~service~~ being served and service is made under Rule 5(b)(2)(C).
1254 (D),(E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a)."

1255 Before the 2005 revision, Rule 6(d) provided added time after service "upon the party" if a
1256 paper or notice "is served upon the party" by designated means. "[A]fter service" seemed a
1257 reasonable way of saving words. But it overlooked three rules that permit a party to act within a
1258 specified time after the party has made service. See Rules 14(a)(1), 15(a)(1)(A), and 38(b)(1).
1259 Using Rule 15(a)(1)(A) as an illustration, the unintended but possible effect of the 2005 revision is
1260 to allow a party to expand the time available to amend its own pleading by choosing to serve the
1261 pleading by mail, e-mail, or the other means that support the 3 added days.

1262 No cases have been identified that make anything of the changed wording. It is possible that
1263 a court confronted with an argument from the apparent meaning of the present rule will reject the

1264 argument, ruling that it makes no sense to allow a party to expand its own time to act by unilaterally
1265 choosing the means of serving a paper, and that the rule should be read to carry forward the meaning
1266 clearly established by the prior language. Nonetheless, it seems appropriate to amend Rule 6(d) to
1267 restore the clear meaning that no one thought to change.

1268 The recommendation to amend Rule 6(d) does not determine how soon the amendment
1269 should be made. There is no apparent reason for urgent action. In most circumstances, the worst
1270 result may be that a party has three added days to implead a third-party defendant without seeking
1271 leave, to amend a pleading once as a matter of course, or to demand jury trial. It is possible that a
1272 wily party will make a deliberate decision to defer one of those acts in reliance on the apparent
1273 meaning of the rule, only to confront a court that chooses to carry forward the original clear
1274 meaning. It seems unlikely that the court would then deny leave to act if there were any persuasive
1275 reason for the desired action.

1276 Two reasons appear for delaying action. One is general. It seems likely that various
1277 missteps in the Style Project itself will be identified. Rather than act item-by-item, confronting the
1278 bar with an irregular series of amendments to digest, it may be better to allow non-urgent revisions
1279 to accumulate for a while, to be presented as a package.

1280 A second reason to delay is the growing sense that the 3-added days provision should be
1281 reconsidered. There is particular interest in the question whether 3 added days are appropriate when
1282 service is made by e-mail, particularly when service is made through the court's system. The 3-
1283 added days may seem a relatively minor cause of delay, but they also complicate time calculations.
1284 And when the time allowed is 7, 14, or 21 days, they defeat the purpose of same-day time
1285 computations.

1286 Committee discussion concluded that it is, or soon will be, time to reconsider which modes
1287 of service deserve the 3 added days. This question arises in other sets of rules, and likely should be
1288 addressed as a common project. Indeed it may be appropriate to make the question part of a much
1289 larger project for all the Advisory Committees to bring the rules of procedure into the e-filing and
1290 e-service world.

1291 The Committee agreed that case-law developments should be monitored for signs that the
1292 style misstep is causing trouble. Absent any indication of trouble, the question will be carried
1293 forward for action as part of a larger project.

1294 *Next Meeting*

1295 The dates for the next meeting have been set for November 7 and 8. The meeting likely will
1296 be in Washington, D.C.

1297 *Valedictory*

1298 Judge Kravitz noted that he had followed six years as a member of the Standing Committee
1299 with four years as chair of the Civil Rules Committee. The Advisory Committee members
1300 welcomed him warmly and supportively when he arrived, and have provided continued support and
1301 inspiration, and have worked enormously hard, ever since. The Committee has done a superb job,

1302 with first-rate results. The Reporters have provided fine support. Judge Rosenthal has provided
1303 wise and patient guidance. Now term limits provide the occasion for great thanks to all. The
1304 Committee responded with a long and loud standing ovation.

1305 Respectfully submitted,

1306 Edward H. Cooper
1307 Reporter

TAB 6-A

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

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JEFFREY S. SUTTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

DATE: May 2, 2011

TO: Honorable Lee H. Rosenthal, Chair, Standing Committee on Rules of Practice and Procedure

FROM: Honorable Jeffrey S. Sutton, Chair, Advisory Committee on Federal Rules of Appellate Procedure

RE: Report of the Appellate Rules Advisory Committee

I. Introduction

The Advisory Committee on Appellate Rules met on April 6 and 7, 2011, in San Francisco, California. The Committee approved for publication proposed amendments to Rules 28 and 28.1 and to Form 4, removed four items from its study agenda, and discussed a number of other items. On the second day of the meeting, the Committee met jointly with the Advisory Committee on Bankruptcy Rules.

Part II of this report discusses the proposals for which the Committee seeks publication for comment: proposed amendments to Rules 28 and 28.1 and Form 4. Part III covers other matters.

The Committee has scheduled its next meeting for October 13 and 14, 2011, in Atlanta, Georgia.

Detailed information about the Committee's activities can be found in the Reporter's draft of the minutes of the April meeting[1] and in the Committee's study agenda, both of which are attached to this report.

II. Action Items

The Committee is seeking approval to publish for comment proposed amendments to Rules 28 and 28.1 and Form 4. The proposed amendments to Rule 28(a) revise and combine existing Rules 28(a)(6) and 28(a)(7) into a single requirement that briefs contain a statement of the case and the facts (roughly emulating the approach taken in Supreme Court Rule 24.1(g)). Conforming amendments are proposed to Rules 28(b) and 28.1. The proposed amendments to Form 4 (concerning applications to proceed in forma pauperis ("IFP")) make some technical changes and remove the current Form's requirement of detailed information concerning the IFP applicant's expenditures for legal and other services in connection with the case.

A. Rule 28

The Committee recommends that the Standing Committee approve for publication the proposed amendments to Rule 28 as set out in the enclosure to this report. The proposed amendment would revise Rule 28(a) to remove the requirement of separate statements of the case and of the facts.

Current Rule 28(a)(6) requires "a statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below." Current Rule 28(a)(7) requires that the brief include "a statement of facts." Rule 28(a) requires these items to appear "in the order indicated." These dual requirements have confused practitioners. It seems intuitively more sensible to permit the appellant to weave those two statements together and present the relevant events in chronological order. As a point of comparison, Supreme Court Rule 24 does not separate the two requirements; rather, Supreme Court Rule 24.1(g) requires "[a] concise statement of the case, setting out the facts material to the consideration of the questions presented, with appropriate references to the joint appendix, e.g., App. 12, or to the record, e.g., Record 12."

The proposed amendment to Rule 28(a) would consolidate subdivisions (a)(6) and (a)(7) into a new subdivision (a)(6) that provides for one "statement." The proposed new Rule 28(a)(6) would allow the lawyer to present the factual and procedural history chronologically, but would also provide flexibility to depart from chronological ordering. Conforming changes would be made by

[1] These minutes have not yet been approved by the Committee.

renumbering Rules 28(a)(8) through (11) as Rules 28(a)(7) through (10), and by revising Rule 28(b)'s discussion of the appellee's brief.

B. Rule 28.1

The Committee recommends that the Standing Committee approve for publication the proposed amendment to Rule 28.1 as set out in the enclosure to this report. The proposed amendment complements the amendment to Rule 28 by making conforming changes to Rule 28.1 (concerning cross-appeals).

C. Form 4

The Committee recommends that the Standing Committee approve for publication the proposed amendments to Form 4 as set out in the enclosure to this report. Appellate Rule 24 requires a party seeking to proceed IFP in the court of appeals to provide an affidavit that, inter alia, "shows in the detail prescribed by Form 4 ... the party's inability to pay or to give security for fees and costs." (Likewise, a party seeking to proceed IFP in the Supreme Court must use Form 4. *See* Supreme Court Rule 39.1.) The proposed amendments would substitute one revised question for two of the questions on the current Form 4: Question 10 – which requests the name of any attorney whom the litigant has paid (or will pay) for services in connection with the case, as well as the amount of such payments – and Question 11 – which inquires about payments for non-attorney services in connection with the case.

Questions 10 and 11 have been criticized by commentators and those questions seek information that seems unnecessary to the IFP determination. Some commentators have suggested that Questions 10 and 11 might in some circumstances seek disclosure of information protected by attorney-client privilege and/or work product immunity. Research by the Committee's reporter suggested that though the information solicited by Questions 10 and 11 is relatively unlikely to be subject to attorney-client privilege, it may sometimes constitute protected work product. The Committee also discussed the possibility that even if the information solicited by Questions 10 and 11 is not privileged or protected, its disclosure could as a practical matter disadvantage some IFP litigants. In any event, the function of Form 4 is to provide the information necessary to determine whether the applicant is unable "to pay or to give security for fees and costs," Fed. R. App. 24(a)(1)(A). Neither the Committee's own deliberations and research nor informal discussions with the Supreme Court Clerk's Office have disclosed any reason to think that it is necessary to obtain all of the information currently sought by Questions 10 and 11. Accordingly, the proposed amendment would replace Questions 10 and 11 with a new Question 10 that would read: "Have you spent – or will you be spending – any money for expenses or attorney fees in connection with this lawsuit? If yes, how much?"

The proposed amendments would also make certain technical amendments to Form 4, to bring the official Form into conformity with changes that were approved by the Judicial Conference

in fall 1997 but were not subsequently transmitted to Congress. The proposed technical amendments would add columns in Question 1 to permit the applicant to list the applicant's spouse's income; would limit the requests for employment history in Questions 2 and 3 to the past two years; and would specify that the requirement for inmate account statements applies to civil appeals.

III. Information Items

The Committee's joint meeting with the Bankruptcy Rules Committee provided a beneficial opportunity for the two Committees to discuss the proposed revisions to Part VIII of the Bankruptcy Rules (dealing with bankruptcy appeals) and related revisions to Appellate Rule 6. The Committees plan to continue their collaboration on these matters.

The Committee has continued to work jointly with the Civil Rules Committee, through the Civil / Appellate Subcommittee. At its spring meeting, the Appellate Rules Committee discussed the Subcommittee's work on a proposal to amend Appellate Rule 4(a)(4) to adjust its treatment of the time to appeal after the disposition of a tolling motion, and also discussed the Subcommittee's work on a proposal to address the doctrine of "manufactured finality."

The Rule 4(a)(4) proposal arises from the observation that under Rule 4(a)(4)(B) the time to appeal from an amended judgment runs from the entry of the order disposing of the last remaining tolling motion. In some scenarios, a time lag between entry of the order and entry of the judgment can raise questions concerning the restarted appeal time. At its fall 2010 meeting, the Appellate Rules Committee discussed a possible solution that would peg the re-starting of appeal time to the "later of" the entry of the order disposing of the last remaining tolling motion or the entry of any resulting judgment. Difficulties with that proposal led the Committee to seek other options. The Committee now has before it a proposal to address the problem from another angle, by suggesting to the Civil Rules Committee that Civil Rule 58(a)'s separate document requirement be extended to encompass orders disposing of tolling motions. Further discussion in the Civil / Appellate Subcommittee and with the Civil Rules Committee will be needed in order to fully assess the costs and benefits of such a course. The main potential downside would appear to be the already troublesome degree of noncompliance with the existing separate document requirement.

The manufactured finality project concerns the doctrines that govern a litigant's attempt to "manufacture" a final judgment in order to take an appeal when the district court has disposed of fewer than all claims in an action. At the Appellate Rules Committee's spring meeting, members of the Civil / Appellate Subcommittee updated the Committee on the Subcommittee's discussions of this topic. There is consensus on the Subcommittee that a dismissal of the remaining claims with prejudice should produce finality for appeal purposes. As to dismissals of the remaining claims without prejudice, there is a circuit split, but the Subcommittee members believe that such dismissals should not produce finality. The question on which the Subcommittee has not yet reached consensus is how to treat conditional-prejudice dismissals – i.e., situations in which the would-be appellant dismisses the remaining claims subject to a right to reassert them if, and only if, the court's dismissal of the other claims is reversed or vacated on appeal. The Appellate Rules Committee decided to ask

the Subcommittee to try to formulate a concrete proposal on the topic of manufactured finality for consideration in the fall.

The Committee considered the Federal Judicial Center's report on the amount of appellate costs awarded under Appellate Rule 39. The Committee had asked the FJC to investigate this topic in response to concerns raised about the taxation of costs by the Fourth Circuit in the case of *Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009), *aff'd*, 131 S. Ct. 1207 (2011). The FJC study found that circuits differ in their approach to printing costs, and that this variation produces significant differences in the size of possible cost awards. The Committee plans to share the FJC report with the Chief Judges and Clerks of each Circuit. The Committee also discussed its ongoing review of the caselaw interpreting Appellate Rule 4(a)(2), which addresses premature notices of appeal in civil cases. Recent caselaw developments have suggested that some existing circuit splits may be lessening. The Committee decided to continue work on a proposal to amend Rule 4(a)(2), while also monitoring the caselaw for further developments. The Committee took up a new agenda item relating to redactions in appellate briefs. An attorney with the Public Citizen Litigation Group has raised a concern that such redactions are often insufficiently justified and that they impede meaningful briefing by amici. The Committee plans to confer with the Civil Rules Committee concerning principles that should govern the treatment of sealed documents on appeal.

The Committee removed four items from its study agenda. One item related to concerns raised by Public.Resource.Org about the presence of alien registration numbers in federal appellate opinions. The Standing Committee's Privacy Subcommittee considered these concerns at length and concluded that alien registration numbers should not be added to the list of items for which the national Rules require redaction. In the light of this conclusion, the Appellate Rules Committee decided to remove this item from its agenda. Another item arose from *Vanderwerf v. Smithkline Beecham Corp.*, 603 F.3d 842 (10th Cir. 2010), which held that the withdrawal of a Civil Rule 59(e) motion deprived that motion of tolling effect and rendered the movant's appeal untimely. Members were chiefly concerned about the possible effects of this ruling on situations in which a non-movant has relied on the tolling effect of a post-judgment motion that is subsequently withdrawn. Because no decision has applied *Vanderwerf* to an appeal by a non-movant, the Committee concluded that the decision did not warrant further consideration at this time. A third item concerned a suggestion that the Appellate Rules be amended to address intervention on appeal. No consensus emerged in favor of amending the Rules to address this issue. The fourth item removed from the Committee's agenda arose from a suggestion that Appellate Rule 32(a)(7)(B)(iii) be amended to exempt from the type-volume limitation for briefs the statement of interest required of amici by Appellate Rule 29(c)(4).

At its fall 2011 meeting, the Committee expects to continue its consideration of a number of other projects, including a proposal to treat federally recognized Native American tribes the same as states for the purpose of amicus filings. Another project concerns possible rulemaking responses to the Court's decision in *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599 (2009), which held that a district court's attorney-client privilege ruling did not qualify for an immediate appeal under the collateral order doctrine.

12b-004257

12b-004258

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE**

RULE 28. BRIEFS

1 **(a) Appellant's Brief.** The appellant's brief must
2 contain, under appropriate headings and in the order
3 indicated:
4 (1) a corporate disclosure statement if required by
5 Rule 26.1;
6 (2) a table of contents, with page references;
7 (3) a table of authorities – cases (alphabetically
8 arranged), statutes, and other authorities – with
9 references to the pages of the brief where they are cited;
10 (4) a jurisdictional statement, including:
11 (A) the basis for the district court's or
12 agency's subject-matter jurisdiction, with citations
13 to applicable statutory provisions and stating
14 relevant facts establishing jurisdiction;
15 (B) the basis for the court of appeals'
16 jurisdiction, with citations to applicable statutory

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

provisions and stating relevant facts establishing jurisdiction;

(C) the filing dates establishing the timeliness of the appeal or petition for review; and

(D) an assertion that the appeal is from a final order or judgment that disposes of all parties' claims, or information establishing the court of appeals' jurisdiction on some other basis;

(5) a statement of the issues presented for review;

(6) a concise statement of the case ~~briefly indicating the nature of the case, the course of proceedings, and the disposition below;~~

~~(7) a statement of~~ setting out the facts relevant to the issues submitted for review and identifying the rulings presented for review with appropriate references to the record (see Rule 28(e));

~~(8)~~ (7) a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings;

~~(9)~~ (8) the argument, which must contain:

38 (A) appellant's contentions and the reasons
39 for them, with citations to the authorities and parts
40 of the record on which the appellant relies; and
41 (B) for each issue, a concise statement of the
42 applicable standard of review (which may appear
43 in the discussion of the issue or under a separate
44 heading placed before the discussion of the issues);
45 ~~(10)~~ (9) a short conclusion stating the precise relief
46 sought; and
47 ~~(11)~~ (10) the certificate of compliance, if required
48 by Rule 32(a)(7).
49 **(b) Appellee's Brief.** The appellee's brief must conform
50 to the requirements of Rule 28(a)(1)-~~(9)~~ (8) and ~~(11)~~ (10),
51 except that none of the following need appear unless the
52 appellee is dissatisfied with the appellant's statement:
53 (1) the jurisdictional statement;
54 (2) the statement of the issues;
55 (3) the statement of the case;
56 ~~(4) the statement of the facts;~~ and
57 ~~(5)~~ (4) the statement of the standard of review.
58 * * *

Committee Note

Subdivision (a). Rule 28(a) is amended to remove the requirement of separate statements of the case and of the facts. Currently Rule 28(a)(6) provides that the statement of the case must "indicat[e] the nature of the case, the course of proceedings, and the disposition below," and it precedes Rule 28(a)(7)'s requirement that the brief include "a statement of facts." Experience has shown that these requirements have generated confusion and redundancy. Rule 28(a) is amended to consolidate subdivisions (a)(6) and (a)(7) into a new subdivision (a)(6) that provides for one "statement." This permits but does not require the lawyer to present the factual and procedural history chronologically. Conforming changes are made by renumbering Rules 28(a)(8) through (11) as Rules 28(a)(7) through (10).

Subdivision (b). Rule 28(b) is amended to accord with the amendment to Rule 28(a). Current Rules 28(b)(3) and (4) are consolidated into new Rule 28(b)(3), which refers to "the statement of the case." Rule 28(b)(5) becomes Rule 28(b)(4). And Rule 28(b)'s reference to certain subdivisions of Rule 28(a) is updated to reflect the renumbering of those subdivisions.

RULE 28.1. CROSS-APPEALS

1 * * *

2 **(c) Briefs.** In a case involving a cross-appeal:

3 **(1) Appellant's Principal Brief.** The appellant

4 must file a principal brief in the appeal. That brief must

5 comply with Rule 28(a).

6 **(2) Appellee's Principal and Response Brief.** The

7 appellee must file a principal brief in the cross-appeal

8 and must, in the same brief, respond to the principal

9 brief in the appeal. That appellee's brief must comply

with Rule 28(a), except that the brief need not include a statement of the case ~~or a statement of the facts~~ unless the appellee is dissatisfied with the appellant's statement.

(3) Appellant's Response and Reply Brief. The appellant must file a brief that responds to the principal brief in the cross-appeal and may, in the same brief, reply to the response in the appeal. That brief must comply with Rule 28(a)(2)-~~(9)~~ (8) and ~~(11)~~ (10), except that none of the following need appear unless the appellant is dissatisfied with the appellee's statement in the cross-appeal:

(A) the jurisdictional statement;

(B) the statement of the issues;

(C) the statement of the case;

~~(D) the statement of the facts;~~ and

~~(E)~~ (D) the statement of the standard of review.

(4) Appellee's Reply Brief. The appellee may file a brief in reply to the response in the cross-appeal. That brief must comply with Rule 28(a)(2)-(3) and ~~(11)~~ (10)

31 and must be limited to the issues presented by the

32 cross-appeal.

Committee Note

Subdivision (c). Subdivision (c) is amended to accord with the amendments to Rule 28(a). Rule 28(a) is amended to consolidate subdivisions (a)(6) and (a)(7) into a new subdivision (a)(6) that provides for one "statement of the case setting out the facts relevant to the issues submitted for review and identifying the rulings presented for review...." Rule 28.1(c) is amended to refer to that consolidated "statement of the case," and references to subdivisions of Rule 28(a) are revised to reflect the re-numbering of those subdivisions.

Form 4. Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis

* * * * *

1. *For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.*

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$_____	$_____	$_____	$_____
Self-employment	$_____	$_____	$_____	$_____
Income from real property (such as rental income)	$_____	$_____	$_____	$_____
Interest and dividends	$_____	$_____	$_____	$_____
Gifts	$_____	$_____	$_____	$_____
Alimony	$_____	$_____	$_____	$_____
Child support	$_____	$_____	$_____	$_____
Retirement (such as social security, pensions, annuities, insurance)	$_____	$_____	$_____	$_____
Disability (such as social security, insurance payments)	$_____	$_____	$_____	$_____
Unemployment payments	$_____	$_____	$_____	$_____
Public-assistance (such as welfare)	$_____	$_____	$_____	$_____
Other (specify): _____	$_____	$_____	$_____	$_____

Total monthly income: $_____ $_____ $_____ $_____

2. *List your employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

Employer	Address	Dates of employment	Gross monthly pay
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

3. *List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

Employer	Address	Dates of employment	Gross monthly pay
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

4. *How much cash do you and your spouse have? $_____*

Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
_____	_____	$_____	$_____
_____	_____	$_____	$_____
_____	_____	$_____	$_____

If you are a prisoner seeking to appeal a judgment in a civil action or proceeding, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have

multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

* * * * *

~~*10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form?* ☐ Yes ☐ No~~

~~If yes, how much? $_____~~

~~If yes, state the attorney's name, address, and telephone number:~~

~~_____~~

~~_____~~

~~_____~~

~~*11. Have you paid – or will you be paying – anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?*~~

~~☐ Yes ☐ No~~

~~If yes, how much? $_____~~

~~If yes, state the person's name, address, and telephone number:~~

~~_____~~

~~_____~~

~~_____~~

10. *Have you spent – or will you be spending – any money for expenses or attorney fees in connection with this lawsuit?*

☐ Yes ☐ No

If yes, how much? $_____

~~12.~~ 11. *Provide any other information that will help explain why you cannot pay the docket fees for your appeal.*

~~13.~~ 12. *State the city and state of your legal residence.*

_____

Your daytime phone number: (____) _____

Your age: _____ Your years of schooling: _____

Last four digits of your social-security number: _____

TAB 6-B

DRAFT

Minutes of Spring 2011 Meeting of
Advisory Committee on Appellate Rules
April 6 and 7, 2011
San Francisco, California

I. Introductions

Judge Jeffrey S. Sutton called the meeting of the Advisory Committee on Appellate Rules to order on Wednesday, April 6, 2011, at 8:35 a.m. at the Fairmont Hotel in San Francisco, California. The following Advisory Committee members were present: Judge Kermit E. Bye, Judge Robert Michael Dow, Jr., Justice Allison Eid, Judge Peter T. Fay, Professor Amy Coney Barrett, Mr. James F. Bennett, Ms. Maureen E. Mahoney, and Mr. Richard G. Taranto. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice ("DOJ"), was present representing the Solicitor General. Also present were Judge Lee H. Rosenthal, Chair of the Standing Committee; Professor Daniel R. Coquillette, Reporter for the Standing Committee; Mr. Peter G. McCabe, Secretary to the Standing Committee; Mr. Leonard Green, liaison from the appellate clerks; Mr. James N. Ishida and Mr. Jeffrey N. Barr from the Administrative Office ("AO"); Ms. Holly Sellers, a Supreme Court Fellow assigned to the AO; and Ms. Marie Leary from the Federal Judicial Center ("FJC"). Peder K. Batalden, Esq., attended the meeting on April 6. Prof. Catherine T. Struve, the Reporter, took the minutes. (On the second day of the meeting, the Appellate Rules Committee met jointly with the Bankruptcy Rules Committee. The attendees of the joint meeting are noted in Part VIII below.)

Judge Sutton welcomed the meeting participants and introduced the Committee's newest member, Professor Amy Coney Barrett. He noted that Professor Barrett attended Rhodes College and Notre Dame Law School, clerked for Judge Silberman and then for Justice Scalia, and now teaches Civil Procedure (among other subjects) at Notre Dame. Judge Bye introduced Mr. Batalden, who clerked for Judge Bye and who now, as an appellate practitioner, has submitted thoughtful suggestions and comments to the Appellate Rules Committee. Judge Sutton welcomed Mr. Batalden.

During the meeting, Judge Sutton thanked Mr. McCabe, Ms. Kuperman, Mr. Ishida, Mr. Barr, and the AO staff for their expert work in preparing for the meeting.

II. Approval of Minutes of October 2010 Meeting

A motion was made and seconded to approve the minutes of the Committee's October 2010 meeting. The motion passed by voice vote without dissent.

III. Report on January 2011 Meeting of Standing Committee

Judge Sutton summarized relevant events at the Standing Committee's January 2011 meeting. The Standing Committee approved for publication proposed amendments to Rules 13, 14, and 24; these amendments would address permissive interlocutory appeals from the United States Tax Court and also would revise Rule 24(b)'s reference to the Tax Court to remove a possible source of confusion concerning the Tax Court's legal status.

Judge Sutton noted that he also discussed with the Standing Committee the pending proposal to treat federally recognized Native American tribes the same as states for the purpose of amicus filings. Members of the Standing Committee expressed varying views concerning this proposal, with a couple of members expressing support and two or three others taking a contrary view. Judge Rosenthal observed that members from western states tend to be more familiar with the issue. Judge Sutton noted that the Appellate Rules Committee has consulted the Chief Judges of the Eighth, Ninth, and Tenth Circuits (where relatively many tribal amicus filings occur) for their views; so far, the Committee has received formal responses from the Eighth and Ninth Circuits and informal feedback from the Tenth Circuit. With that input, the Committee will be in a position to revisit this item in the fall.

IV. Other Information Items

Judge Sutton reported that the Supreme Court has approved the proposed amendments to Appellate Rules 4 and 40 that will clarify the treatment of the time to appeal or to seek rehearing in civil cases to which a United States officer or employee is a party. Because the time to appeal in a civil case is set not only by Appellate Rule 4 but also by 28 U.S.C. § 2107, the Judicial Conference is seeking legislation to make the same clarifying change to Section 2107. Senate Judiciary staff have conveyed an inquiry by the Office of Senate Legal Counsel (SLC), who have questioned whether the "safe harbors" in the proposed rule and statute amendments[1] apply in cases in which a House or Senate Member, officer, or employee is sued in an individual capacity and is represented by SLC or by the House Office of General Counsel rather than by the DOJ. Judge Sutton noted that the language of the proposals, as drafted, covers such cases, but he observed that the Senate Judiciary staff have expressed an inclination to add language underscoring that point in the legislative history of the proposed amendment to Section 2107. It has also been suggested that similar language should be added to the Committee Notes to Rules 4 and 40; but changing the Notes at this stage would be unusual and complicated, given that the Supreme Court has already approved the proposed amendments. Mr. Letter noted that he has spoken with House staffers to underscore the DOJ's support for the proposed amendments.

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[1] The "safe harbors" provide the longer appeal or rehearing periods when the United States represents the officer or employee at the time the relevant judgment is entered or when the United States files the appeal or petition for the officer or employee.

Judge Sutton recalled that the Committee, at its fall 2010 meeting, had discussed Chief Judge Rader's proposal, on behalf of the judges of the Federal Circuit, that 28 U.S.C. § 46(c) be amended to include in an en banc court any senior circuit judge "who participated on the original panel, regardless of whether an opinion of the panel has formally issued."[2] It turns out that the Judicial Conference Committee on Court Administration and Case Management (CACM) simultaneously considered this proposal and decided to recommend it favorably to the Judicial Conference. The CACM proposal was on the agenda for the Judicial Conference's March 2011 meeting, but was taken off the agenda in order to permit time for coordinated consideration of the proposal by CACM and the Appellate Rules Committee. The two committees will form a joint subcommittee to consider this question over the summer.

V. Action Items

A. For publication

1. Item No. 08-AP-G (substantive and style changes to Form 4)

Judge Sutton invited the Reporter to introduce this item, which concerns proposed revisions to Form 4 (the form that is used in connection with applications to proceed in forma pauperis ("IFP") on appeal). Effective December 1, 2010, Form 4 was revised to accord with the recently-adopted privacy rules. During the discussions that led to the 2010 amendments, the Committee also discussed possible substantive changes to the Form. In particular, it was suggested that Questions 10 and 11 request unnecessary information. Question 10 requests the name of any attorney whom the litigant has paid (or will pay) for services in connection with the case, as well as the amount of such payments; Question 11 inquires about payments for non-attorney services in connection with the case. In the past, the National Association of Criminal Defense Lawyers ("NACDL") has suggested that questions like Question 10 intrude upon the attorney-client privilege. More recently, comments received from attorneys in the Pro Se Staff Attorneys Office for the District of Massachusetts have suggested that requiring IFP applicants to disclose information concerning legal representation could impose a strategic disadvantage on those applicants.

The Reporter stated that, at least in most instances, the information requested by Questions 10 and 11 would not seem to be covered by attorney-client privilege. However, to the extent that Question 11 is read to encompass payments to investigators or to experts (especially non-testifying experts), it might elicit information that reveals litigation theories and strategy and that therefore qualifies as opinion work product. In addition, as the comments mentioned above suggest, the disclosures required by Questions 10 and 11 would enable an IFP applicant's opponent to learn the details of a represented applicant's fee arrangement with the applicant's lawyer, and could reveal the fact that an IFP applicant who is proceeding pro se has obtained legal advice from a lawyer who has not appeared in the case.

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[2] The statute currently provides that a senior judge may participate in an en banc court that is "reviewing a decision of a panel of which such judge was a member."

During the Committee's previous discussions of Form 4, members did not identify any reason to think that the details currently sought by Questions 10 and 11 are necessary to the disposition of IFP applications. Because Form 4 is also used in connection with applications to proceed IFP in the Supreme Court, members suggested seeking the Court's views on the question. Judge Sutton spoke informally to the Supreme Court Clerk's Office, which could not think of any reason why the information was necessary. In light of these discussions, the Reporter suggested, it would make sense to amend Form 4 by combining Questions 10 and 11 into a single, simpler question: "Have you spent – or will you be spending – any money for expenses or attorney fees in connection with this lawsuit? If yes, how much?"

The Reporter also suggested that the Committee make certain technical amendments to Form 4, to bring the official Form into conformity with changes that were approved by the Judicial Conference in fall 1997 but were not subsequently transmitted to Congress. The proposed technical amendments would add columns in Question 1 to permit the applicant to list the applicant's spouse's income; would limit the requests for employment history in Questions 2 and 3 to the past two years; and would specify that the requirement for inmate account statements applies to civil appeals.

A district judge member stated if the purpose of Form 4 is to enable the court to determine whether the applicant's finances qualify him or her to proceed IFP, then the simpler the form is, the better. He noted that information showing that a litigant has obtained legal advice might affect a judge's determination of how to construe the litigant's pleadings, but that the question of the amount of latitude to give a pro se litigant is separate from the question of whether a litigant should be permitted to proceed IFP. Professor Coquillette observed that the proposed amendment would address the complaints that NACDL has raised in the past.

Apart from the merits of the proposed amendments, Professor Coquillette suggested, the Committee should give attention to the process by which they are to be adopted. He reported that the Civil Rules Committee has begun to reconsider the procedures for adopting and amending forms. Participants have queried whether the forms should go through the standard rulemaking process. Judge Rosenthal observed that, at present, Civil Rule 84 addresses the forms that accompany the Civil Rules. The time may be opportune to reconsider the relationship of the forms and the rulemaking process. In 1938, the forms had a key function: to instruct the bench and bar concerning the new approach taken by the Civil Rules. But in 2011, the forms are no longer necessary for that purpose. Rather, in the case of the Civil Rules, it may be preferable for the Forms to focus on ministerial topics. Moreover, it is no longer practicable for the Rules Committees to monitor and maintain the forms on an ongoing basis in the way that they monitor and maintain the Rules themselves. It seems worthwhile for the rules committees jointly to consider how to handle the revision and maintenance of the forms. Mr. McCabe stated that the Bankruptcy Forms raise special issues. Under Bankruptcy Rule 9009, the Official Bankruptcy Forms go to the Judicial Conference for approval, but the Director of the AO is authorized to issue additional forms as well. Depending how quickly this inter-committee project proceeds, the fruits of this project may yield a new process that can be used to implement the proposed Form 4 amendments. However, it was noted that the project was likely to take at least three years.

An attorney member asked how a litigant responding to the proposed new Question 10 should answer the question if the litigant has a contingent fee arrangement with a lawyer. The Reporter responded that this excellent question also arises with respect to current Question 10. She suggested that such a litigant should check the "Yes" box in response to the amended Question 10, but that it would be unclear how to respond to the question's inquiry concerning "how much" money would be spent. The attorney member, though, predicted that an applicant who has a contingent fee arrangement might well check the "No" box in response to proposed Question 10 as drafted. He suggested revising proposed Question 10 to ask whether the litigant has agreed to share part of any recovery. Another attorney member, though, questioned whether that additional query is worthwhile; most of those applying to proceed IFP on appeal, she noted, will have lost in the court below.

Professor Coquillette mentioned the significant changes that are occurring concerning litigation financing. Mr. Letter noted that if a litigant's answers on Form 4 left the Clerk's Office unsatisfied, the office could inquire further of the litigant; given this possibility, he suggested, there is no need to further complicate the form. Mr. Green agreed that if the information provided on Form 4 proved inadequate, his office would request more information from the litigant; he reported that such situations are very rare.

A judge member suggested that even if the proposed amended Question 10 might not elicit full information in all cases, it strikes a reasonable balance. He noted that one might, in fact, argue for striking Questions 10 and 11 altogether, as unnecessary to the assessment of the litigant's finances. But he has seen some cases in which a litigant who was represented during part of a lawsuit later applies for IFP status. Gathering some information about the money spent on the litigation could be useful in assessing such requests.

A district judge member suggested that proposed Question 10 might be revised to read, in part, "or might you be spending" (rather than "or will you be spending") in order to more clearly encompass contingent fees arrangements. An attorney member responded that the key question is whether the Committee feels that it is necessary for Form 4 to elicit information that will reveal whether the applicant has a contingent-fee arrangement with a lawyer who may be advancing some of the litigation costs. If that is not a pressing concern, then it would be less important to draft Form 4 with a view to eliciting detailed information on this question. The Reporter observed that IFP status also relieves the litigant from any otherwise-applicable obligation to post security for costs.

Professor Coquillette expressed strong support for revising Questions 10 and 11. These questions, he suggested, should not be posed without a good reason. If the only goal of Form 4 is to elicit information concerning a litigant's poverty, Questions 10 and 11 are not germane. An appellate judge member asked whether it would be useful to seek the views of some practitioners' organizations such as the Litigation Section of the American Bar Association; another appellate judge predicted that such groups would be happy with the proposed revisions to Questions 10 and 11. An attorney member expressed support for adopting the proposed revisions to Form 4 as shown in the agenda book. The main issue that usually rides on IFP status, this member stated, is whether a litigant will be required to pay the $450 docket fee.

A motion was made and seconded to approve for publication all of the proposed revisions to Form 4 as shown in the agenda book. The motion passed by voice vote without dissent.

2. Item No. 10-AP-B (statement of the case)

Judge Sutton presented this item, which concerns Rule 28(a)(6)'s requirement that the brief contain "a statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below." The statement required by Rule 28(a)(6) must precede the "statement of facts" required by Rule 28(a)(7); and these requirements have confused practitioners and produced redundancy in briefs. Judge Sutton observed that the Committee has obtained input on this item from two groups – the ABA Council of Appellate Lawyers and the American Academy of Appellate Lawyers. Nearly everyone whom the Committee has heard from agrees that there is a problem with the current Rule. To focus the discussion, the agenda materials presented three possible options for revising Rule 28(a). The first option would revise Rule 28(a) to emulate the Supreme Court's approach of combining the statement of the case and of the facts. The second option would retain the separate subdivisions of Rule 28(a) requiring statements of the case and the facts, but would reverse their order and revise the reference to the "course of proceedings." The third option would relocate the "course of proceedings" requirement from Rule 28(a)(6) to Rule 28(a)(7) so as to permit the description of the course of proceedings in chronological order (after the facts). Mr. Batalden, in a recent letter, suggested another possible variation. Ms. Sellers, meanwhile, provided the Committee with illuminating research on similar requirements in state-court briefing rules. Judge Sutton invited Ms. Sellers to present the results of her research.

Ms. Sellers noted that characterizing the various state approaches had presented a challenge. It is possible to sort states into two rough categories – those with rules similar to Rule 28 and those with rules that diverge from Rule 28. Some states appear to model their rules on a former version of the U.S. Supreme Court rules. Three states have rules that provide explicitly for an introduction. Depending on what approach the Committee decides to take, the state-court rules may provide models. Judge Sutton thanked Ms. Sellers for her thorough and informative research, and noted that it was useful to know that the states have reached no consensus on the best means of approaching the question. He observed that the question of providing for an introduction in briefs warrants consideration as a distinct agenda item.

Judge Sutton next invited Mr. Batalden to comment. Mr. Batalden stated that the most important question, for attorneys, is the ordering of the statements: Was it necessary, he asked, that the statement of the course of proceedings precede the statement of the facts? Mr. Letter noted that he is part of a group of lawyers whom Chief Judge Kozinski has appointed to advise the Ninth Circuit on various matters; Mr. Letter reported that the group has discussed this question, and that judges who were present observed that when lawyers comply with the current Rule's ordering the result is unhelpful.[3] Judges, Mr. Letter emphasized, are the audience for briefs, so the question is

[3] Later in the discussion, Mr. Letter noted that the Ninth Circuit is currently considering moving the table of authorities to the back of the brief.

what judges find most useful. Judge Sutton reported that he spoke with one appellate judge who does not read the statement of the case in view of the redundancy caused by it. Mr. Letter agreed that judges' perspectives on this question are likely to vary; but most judges, he suggested, would favor a change in the order of the requirements.

An attorney member stated that she has always struggled with Rule 28(a)'s requirements, and she stressed that there is a need for more flexibility in the Rule. This member stated that she liked the first option set forth in the agenda materials, but suggested a change to that option. The first option, as shown in the agenda materials, proposed that the later references in Rules 28 and 28.1 to the "statement of the case" and "statement of the facts" be replaced by references to "the statement of the case and the facts." The member proposed deleting "and the facts," so as to refer simply to the "statement of the case." (Later in the discussion the Committee determined by consensus that conforming revisions should be made to the proposed amendments to Rules 28(b) and 28.1 – so that those Rules, as amended, would refer simply to "the statement of the case" rather than to "the statement of the case and the facts.") Also, the member proposed deleting from the Committee Note to the proposed amendment to Rule 28(a) a statement that the amendment "permits the lawyer to present the factual and procedural history in one place chronologically." The member stated that she did not favor the second of the options shown in the agenda materials because that option did not provide attorneys with flexibility in drafting their briefs. Nor did she favor the third option; that option, she suggested, could confuse attorneys who might wonder what the revised Rule 28(a)(6) meant by referring (without more) to "a statement of the case briefly indicating the nature of the case." Responding to the suggestion that flexibility is better than an approach that simply reverses the order of the statement-of-the-case and statement-of-the-facts requirements, Mr. Letter observed that in some instances a lawyer may wish to provide context for the brief and an introductory statement can be useful in that regard.

An attorney member stated that he also favored the first option set forth in the agenda materials, but he suggested inserting a reference to the "rulings presented for review" into the proposed new Rule 28(a)(6) so that the amended Rule would require "a concise statement of the case setting out the facts relevant to the issues submitted for review and identifying the rulings presented for review with appropriate references to the record (see Rule 28(e))." Mr. Batalden agreed that the inclusion of that language would be helpful, but wondered whether it could instead be added to Rule 28(a)(5), which currently directs the inclusion of "a statement of the issues presented for review. The attorney member responded that inserting the "rulings presented for review" requirement into subdivision (a)(5) might make the statement of the issues unduly long. An appellate judge noted that briefs filed in the Eleventh Circuit have a separate page for the issues and a separate page for the standard of review; this system, he observed, is very helpful. The attorney member suggested that it would also be useful to revise the Committee Note to Rule 28(a) to state that the amended Rule 28(a)(6) "permits but does not require the lawyer to present the factual and procedural history chronologically."

A motion was made and seconded to approve for publication the proposed amendments to Rules 28 and 28.1, with the changes noted above. The motion passed by voice vote without dissent.

Prior to the vote, an attorney member had stated that she read the proposed amended Rule 28(a)(6) to permit brief writers to include an introduction at the beginning of the "statement of the case" section of the brief. This member suggested that it might be useful to mention that fact in the Committee Note – perhaps by saying something like "Briefs may, but are not required to, include an introduction in the statement of the case." Judge Sutton responded, however, that it would be better to keep the issue of introductions to briefs separate from the proposed amendment to the statement of the case. Accordingly, after the Committee completed its consideration of Item No. 10-AP-B, Judge Sutton invited further discussion of the topic of introductions to briefs.

Mr. Letter reported that the United States Attorneys' Offices in the Southern District of New York and in districts within the Ninth Circuit customarily include introductions in their briefs. The U.S. Attorney's Office in the Southern District of New York usually keeps the introduction to a single page. But Mr. Letter reported occasions when a very complex case had occasioned a four-page introduction in a brief. He noted that there are no local rules provisions in the Second or Ninth Circuits that explicitly provide for introductions in briefs but that courts do not reject briefs that include such introductions. Mr. Letter noted the possibility that the Ninth Circuit might consider revising the Ninth Circuit's local rules to permit (though not require) an introduction. Judges, he reported, consider introductions very useful. Mr. Letter also observed that he has read briefs by public interest groups such as Public Citizen and the ACLU that make very effective use of introductions. Mr. Letter noted that one question that might arise is whether the inclusion of an introduction diminishes the need for a summary of the argument.

An appellate judge noted that introductions can be provided for by local rule; given that fact, he wondered, was it necessary for the national rules to address introductions? Mr. Letter responded that the key is what judges prefer; if judges would prefer to have an introduction, then the rules should require it. Mr. Batalden observed that lawyers include introductions in their briefs despite the fact that Rule 28 does not mention them. Thus, any rule amendment would be a matter of accommodating existing practice. He pointed out that if Rule 28(a) is amended to refer explicitly to introductions, then such an amendment could alter existing practice by mandating a particular placement for the introduction (because Rule 28(a) states that the listed items must be included "in the order indicated").

An attorney member reiterated her view that the new statement of the case provision that the Committee had approved for publication would permit the inclusion of an introduction in the statement of the case, and she advocated revising the Committee Note to mention that. The introduction, she suggested, could be placed either at the start of the statement of the case or directly before it. Somewhat later in the discussion, another attorney member returned to this suggestion. He wondered whether it might be useful to consider moving the statement of issues (currently required by Rule 28(a)(5)) so that it comes after rather than before the statement of the case. The jurisdictional statement required by Rule 28(a)(4) is short, but the statement of issues can be longer. If the statement of issues followed rather than preceded the statement of the case, then an introduction contained in the statement of the case would be the first item of substance in the brief. An appellate judge member noted that under the Supreme Court's rules, the questions presented are the first item in petitions for certiorari and in merits briefs. The attorney member suggested,

however, that the questions presented section in a Supreme Court brief differs from the statement of issues section in a court of appeals brief. Mr. Letter noted that Supreme Court briefs tend to include, in the questions presented section, a couple of sentences that serve, in effect, as an introduction.

An attorney member noted that if the Rule were revised to mandate (rather than merely permit) an introduction, then the Committee would have to determine what the introduction should contain. An appellate judge responded to this observation by asking what an introduction would contain that is not already set forth somewhere in the existing parts of the brief. Mr. Letter noted that while introductions can be designed to provide information concerning the posture of the case and the relevant issues, introductions can also serve a persuasive function. He observed that the proposal currently being considered by the Ninth Circuit contemplates that if the brief is to have an introduction, the introduction should be the first substantive item in the brief.

A member asked whether a provision concerning introductions would be better placed in the national rules or in local rules. Addressing the topic through local rules, she suggested, might provide more flexibility. A district judge member stated that he saw appeal in the idea of including the introduction in the statement of the case; that option, he suggested, would provide flexibility. He noted that the lawyers know more about the case than the judges do. On the other hand, he observed, the inclusion of an introduction in the statement of the case might occasion tension to the extent that the introduction is argumentative. This member noted that in the Seventh Circuit, lawyers must anchor in the record any citations to the facts. An appellate judge member asked Mr. Letter whether the proposed Ninth Circuit rule concerning introductions would provide for citations to the record in the introduction. Mr. Letter responded that the rule would not provide for record citations in the introduction, but that factual assertions elsewhere in the brief would be accompanied by citations to the record. The judge member noted that the quality of briefs filed in the Eleventh Circuit is very high. Mr. Letter suggested that judges in the Ninth Circuit may be less satisfied with the briefs filed in their circuit.

Judge Sutton summed up the range of issues that might arise with respect to introductions in briefs: Should introductions be permitted? Should they be mandatory? What should an introduction contain? Where should it be placed? He stated that it would make sense to solicit input on these questions. He suggested, however, that it would be difficult to take up these questions simultaneously with the proposed amendment to Rule 28(a)(6). Instead, he proposed, the Committee should make the introduction question a separate agenda item and discuss it in the fall. This new agenda item would include both the topic of introductions and also the possibility, noted above, of moving the statement of issues so that it follows rather than precedes the statement of the case.

VI. Discussion Items

A. Item No. 07-AP-E (issues relating to *Bowles v. Russell*)

Judge Sutton invited the Reporter to update the Committee on this item, which concerns issues related to the Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007). The

Reporter noted that in *Dolan v. United States*, 130 S. Ct. 2533 (2010), the Court had provided a typology of deadlines. The *Dolan* Court noted (citing *Bowles*) that some deadlines are jurisdictional; some other deadlines are claim-processing rules; and still other deadlines "seek[] speed by creating a time-related directive that is legally enforceable but do[] not deprive a judge ... of the power to take the action to which the deadline applies if the deadline is missed."

More recently still, in *Henderson ex rel. Henderson v. Shinseki*, 2011 WL 691592 (U.S. March 1, 2011), the Court held that the 120-day deadline set by 38 U.S.C. § 7266(a) for seeking review in the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' Appeals is not jurisdictional. The Court of Appeals for Veterans Claims had dismissed Mr. Henderson's appeal because he had filed it 15 days late. A divided en banc Federal Circuit affirmed, holding (in reliance on *Bowles*) that the deadline is jurisdictional. The dissenters pointed out that the very veterans who most deserve service-related benefits may be the litigants least likely to be able to comply with the filing deadline. The sympathetic facts of the case spurred legislative action, and four bills were introduced in Congress in response to the Federal Circuit's decision. This spring, the Supreme Court (with all eight participating Justices voting unanimously) reversed. The Court held that *Bowles* was inapplicable because *Bowles* involved a deadline for taking an appeal from one court to another; by contrast, Section 7266(a) sets a deadline for taking an appeal from an agency to an Article I court in connection with a "unique administrative scheme." Instead of applying *Bowles*, the Court applied the clear statement rule from *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006). The Court found no clear indication that Congress intended Section 7266(a)'s deadline to be jurisdictional. This holding, the Reporter observed, does not directly affect any deadlines that affect practice in the courts of appeals. But the *Henderson* Court's method of distinguishing *Bowles* – as a case that concerned court/court review – might leave the door open in future cases for the argument that *Bowles* does not govern the nature of deadlines for seeking court of appeals review of an administrative agency decision. Such an argument, though, would have to confront the precedent set by *Stone v. INS*, 514 U.S. 386 (1995), in which the Court held that the then-applicable statutory provision delineating the procedure for petitioning for court of appeals review of a final deportation order by the Board of Immigration Appeals was jurisdictional. The Reporter suggested that it will be interesting to see how this branch of the doctrine continues to develop. She also suggested that the Court's decision in *Henderson* appears likely to remove the impetus for the legislative proposals that grew out of the Federal Circuit's decision.

The Reporter also briefly noted a certiorari petition pending before the Court in *United States ex rel. O'Connell v. Chapman University* (No. 10-810), in which the petitioner seeks to narrow *Bowles* through the application of 28 U.S.C. § 2106. With respect to the development of *Bowles*-related caselaw in the courts of appeals, the Reporter observed that the most interesting questions continue to arise with respect to hybrid deadlines – namely, appeal deadlines set partly by statute and partly by rule.

B. Item No. 08-AP-D (FRAP 4(a)(4))

Judge Sutton invited Ms. Mahoney to introduce this item. Ms. Mahoney observed that this item arose from Mr. Batalden's observation that under Appellate Rule 4(a)(4)(B) the time to appeal

from an amended judgment runs from the entry of the order disposing of the last remaining tolling motion. In some scenarios, Mr. Batalden had suggested, the judgment might not be issued and entered until well after the entry of the order. Ms. Mahoney noted that the Committee has been considering how to clarify the Rule. The Committee has discussed a possible solution that would peg the re-starting of appeal time to the "later of" the entry of the order disposing of the last remaining tolling motion or the entry of any resulting judgment.

Ms. Mahoney reported that Mr. Taranto had recently suggested another possible approach – one that would require the entry of a new judgment on a separate document after the disposition of all tolling motions. If the court were to deny all of the tolling motions, it would re-enter the same judgment that it had originally entered. Such an approach, Ms. Mahoney suggested, could be by far the most sensible solution. Judge Sutton observed that Mr. Taranto has presented the Committee with a new way of thinking about the issue, and he suggested that it would be worthwhile to consider this new proposal over the summer.

Mr. Taranto noted that the proposal will require joint discussion with the Civil Rules Committee. He explained that his proposal uses the term "resetting motion," rather than "tolling motion," to indicate that the relevant motions, when timely filed, reset the appeal-time clock to 0. He stated that the extension of the separate-document requirement to this context is justified because the formality provided by that requirement is appropriate even when the end of the case follows from the disposition of a resetting motion. Extending the separate-document requirement, Mr. Taranto noted, might eliminate the need to define the term "disposing of" (a question that had occupied the Committee at the fall 2010 meeting). The extension of the separate-document requirement could also, he argued, provide an opportunity to simplify Civil Rule 58 and Appellate Rule 4(a), because there would be no need to address separately the situations in which no separate document is currently required. Mr. Taranto explained that the proposal would make use of the statutory authorization, in 28 U.S.C. § 2072(c), to define when a district court's ruling is final for purposes of appeal under 28 U.S.C. § 1291. Under the proposal, the judgment in a case where timely resetting motions have been made would not be final for appeal purposes until the entry of the required separate document after the disposition of all resetting motions. But an appellant could waive the separate-document requirement and appeal an otherwise-final judgment after disposition of all resetting motions but prior to the provision of the separate document.

Judge Sutton expressed the Committee's gratitude for Mr. Taranto's work on this item, and he suggested that Mr. Taranto's proposal be forwarded to the Civil / Appellate Subcommittee for its consideration. Judge Sutton noted he had previously heard some misgivings about the separate document requirement. Judge Rosenthal observed that it would be optimistic to assume that the separate document requirement is widely known or understood. Judge Sutton asked Mr. Green how the circuit clerks would react to an expansion of the separate document requirement. Mr. Green responded that the change should be straightforward from the clerks' perspective. A district judge member observed that district judges within the Seventh Circuit do not question the separate document requirement. If a separate document were always (rather than sometimes) required, this member suggested, that could make compliance simpler for the district judges. Mr. Batalden

expressed support for Mr. Taranto's proposal; he suggested that an additional benefit of requiring a new judgment on a separate document would be that enforcement of the judgment would be easier.

Judge Sutton thanked Mr. Taranto, Ms. Mahoney, Mr. Letter, and Mr. Batalden for their efforts with respect to this item.

C. Item No. 08-AP-H (manufactured finality)

Judge Sutton invited Mr. Letter to introduce this item, which concerns the doctrines that govern a litigant's attempt to "manufacture" a final judgment in order to take an appeal. Mr. Letter offered the following example: Suppose that a plaintiff includes five claims in a complaint and the court dismisses two of the five. Without obtaining a certification under Civil Rule 54(b), the plaintiff cannot appeal the dismissal of the two claims until the other three claims have been finally disposed of. Some lawyers have suggested that the option of seeking a Civil Rule 54(b) certification does not satisfactorily address this scenario because Rule 54(b) certification lies within the district judge's discretion. It is generally accepted that if the plaintiff dismisses the remaining three claims with prejudice, that dismissal results in a final judgment so that the plaintiff can appeal the dismissal of the two claims. If the plaintiff dismisses the three remaining claims without prejudice, some would argue this produces finality for appeal purposes but most take the contrary view. More difficult questions arise if the plaintiff dismisses the remaining three claims with conditional prejudice (that is to say, stating that the dismissal is without prejudice to the reinstatement of the remaining three claims if the two previously-dismissed claims are reinstated on appeal).

Mr. Letter reported that the Civil / Appellate Subcommittee, which has been considering this item, has recently discussed suggestions by Ms. Mahoney and by Mr. Keisler. Judge Rosenthal observed that the Civil Rules Committee – at its spring meeting – discussed this item and concluded that it would welcome guidance from the Appellate Rules Committee.

Mr. Letter noted that lawyers in his office regularly ask him questions relating to the manufactured-finality doctrine. During the Subcommittee's prior discussions, questions were raised concerning the experience within the Second Circuit (which is the only Circuit so far to issue a decision approving the use of a conditional-prejudice dismissal to create an appealable judgment). Mr. Letter informally canvassed Assistant United States Attorneys in the Second Circuit – and especially in the Southern District of New York – to ask their experience; they told him that the issue of conditional-prejudice dismissals does not come up frequently.

Ms. Mahoney noted that there is consensus on the Subcommittee that a dismissal of the remaining claims with prejudice should produce finality. As to dismissals without prejudice, there is a circuit split, but the Subcommittee members believe that such dismissals should not produce finality. The question on which the Subcommittee has not reached consensus is how to treat conditional-prejudice dismissals. An attorney member of the Subcommittee from the Civil Rules Committee has expressed support for permitting conditional-prejudice dismissals to produce finality, and has expressed opposition to amending the rules to bar such dismissals from producing finality. Ms. Mahoney argued that the rules should be amended to provide for a nationally uniform approach

to the question of manufactured finality. She noted that she finds the conditional-prejudice idea appealing but that it is proving complicated to devise a rule that would implement the idea in multi-party cases. In such cases, she observed, there is a possibility that unrestrained use of the conditional-prejudice dismissal mechanism could result in unfairness to parties other than the would-be appellant. Ms. Mahoney suggested that one possible approach would be to amend Civil Rule 54(b) to provide that the district court shall certify a separate Rule 54(b) judgment when the would-be appellant has dismissed all other claims with conditional prejudice, unless another party shows that such a certification would be unfair.

Mr. Taranto observed that the question of manufactured finality also arises in the context of criminal cases, and he asked Mr. Letter whether the DOJ has a view concerning potential amendments that would address this topic. Mr. Letter responded that the DOJ would definitely wish to express its views on the matter. Judge Rosenthal observed that many districts will not allow a criminal defendant to plead guilty unless the defendant waives appeal (including with respect to constitutional issues). Thus, in the criminal context, these issues could implicate the dynamic of plea bargaining. She noted that it would be wise to seek the views of the Criminal Rules Committee in order to gain a sense of how such changes would be viewed on the criminal side.

An appellate judge member observed that it is useful to ask whether a question of this nature is better resolved by rule or by caselaw; in this instance, he noted, the fact that the question concerns appellate jurisdiction might weigh against leaving the issue to development in the caselaw. Concerning Ms. Mahoney's suggestion that it would be useful for a rules amendment to address the circuit split concerning the effect of dismissals without prejudice, the member noted that such an amendment would seek to achieve uniformity by adopting the more stringent side of the circuit split. Ms. Mahoney acknowledged this point but argued that the circumstances under which an appeal is available should be uniform from one circuit to another. She suggested that it would be useful to know whether the Appellate Rules Committee feels that the circuit split should be addressed.

An appellate judge member of the Civil / Appellate Subcommittee expressed a preference for not amending the rules to address the manufactured-finality issue. Amending the rules, he suggested, might interfere with the flexibility that is currently available to district judges. Another appellate judge member of the Committee expressed agreement with this view. An attorney member argued, in response, that in the circuits where the manufactured-finality doctrine currently permits the appellant an alternative way to appeal without obtaining a Civil Rule 54(b) certification, the existing doctrine can be seen as removing control from the district judges. The appellate judge member responded that such a result would only occur in a circuit in which the court of appeals has chosen to move the doctrine in that direction. This judge member stated that if the Rules Committees were to do anything with respect to this item, he would lean toward putting control in the hands of the district judge.

An appellate judge member wondered whether it would be beneficial for the Committee to ask the Subcommittee whether the Subcommittee's members could reach consensus on a concrete proposal. Mr. Letter suggested that it would be a mistake not to take action to address the question of manufactured finality. The appellate judge member responded that it would be helpful for the

Subcommittee to craft a concrete proposal, at least concerning the treatment of dismissals without prejudice. An attorney member of the Subcommittee suggested that it would be useful to encourage the Subcommittee to address both dismissals without prejudice and conditional-prejudice dismissals. An appellate judge member of the Subcommittee reiterated his view that the rulemakers should not proceed at this time to propose an amendment; rather, he suggested, the Committee could re-consider the question later if someone in the future formulates a proposal on the subject.

It was decided that the Committee would request that the Subcommittee attempt to reach consensus on a specific proposal. Consultation with the Criminal Rules Committee will become necessary in the event that the Civil and Appellate Rules Committees decide to move forward with a proposal.

D. Item No. 08-AP-K (alien registration numbers)

Judge Sutton invited the Reporter to introduce this item, which arose from concerns voiced in 2008 by Public.Resource.Org about the presence of social security numbers and alien registration numbers in federal appellate opinions. The Appellate Rules Committee discussed the issue in fall 2008 and referred it to the Standing Committee's Privacy Subcommittee, which was considering various privacy-related questions relating to the national Rules. The Privacy Subcommittee reviewed the materials submitted by Public.Resource.Org; it commissioned the FJC to conduct a survey of court filings; it reviewed local rules concerning redaction; with the assistance of the FJC, it surveyed judges, clerks and attorneys about privacy-related issues; and it held a day-long conference at Fordham Law School in April 2010. One of the panels at the Fordham Conference focused specifically on immigration cases.

In its recent report to the Standing Committee, the Privacy Subcommittee concluded that alien registration numbers should not be added to the list of items for which the national Rules require redaction. The Subcommittee found that disclosure of alien registration numbers does not pose a substantial risk of identity theft. In addition, the Subcommittee noted that both the DOJ and circuit clerks had emphasized that alien numbers provide an essential means of distinguishing among litigants and preventing confusion.

The Reporter suggested that in the light of the Privacy Subcommittee's determination, the Committee might wish to consider removing Item No. 08-AP-K from the Committee's study agenda. A motion to remove that item from the study agenda was made and seconded and passed by voice vote without opposition.

E. Item No. 10-AP-A (premature notices of appeal)

Judge Sutton introduced this item, which concerns the possibility of amending Appellate Rule 4(a)(2) to address the question of the relation forward of a premature notice of appeal. Judge Sutton noted that the Committee's previous review of the caselaw applying the relation-forward doctrine to a range of fact patterns had found a number of lopsided circuit splits concerning the availability of relation forward in particular sorts of circumstances. He observed that, since the time

that the Committee commenced its consideration of this issue, developments in the caselaw appear to have lessened or removed some of the circuit splits. He suggested that the Committee should consider whether it would prefer to consider amending Rule 4(a)(2); or hold the item on the agenda while monitoring the developing caselaw; or remove the item altogether.

Judge Sutton pointed out that if the Committee decides to consider amending Rule 4(a), the agenda materials included four sketches designed to illustrate different possible approaches. Judge Sutton stated that among those four sketches, he slightly favored the fourth, which would amend Rule 4(a)(2) to provide a (non-exhaustive) list of scenarios in which relation forward occurs. He asked participants for their views on whether pursuit of a Rules amendment would be worthwhile.

A district judge member asked whether the relation-forward ruling in in *Strasburg v. State Bar of Wisconsin*, 1 F.3d 468 (7th Cir. 1993), *overruled on other grounds by Otis v. City of Chicago*, 29 F.3d 1159 (7th Cir. 1994), was still good law. He suggested that the Seventh Circuit's caselaw may be moving away from the *Strasburg* approach for cases where a decision is announced contingent on a future event and the notice of appeal is filed between the announcement and the occurrence of the contingency. He wondered whether there is any problem that needs to be addressed through a Rules amendment.

Judge Sutton responded that Rule 4(a)(2) does not set out the approaches that courts have developed through the caselaw, and he wondered whether the Rule could usefully codify existing practice. The question, he suggested, is whether the existence of inter-circuit consensus on a given approach provides a reason to codify that approach in the Rule. Judge Rosenthal observed that one could view the recent adoption of Civil Rule 62.1 and Appellate Rule 12.1 as an example of such codification. There was general consensus (subject to variation on some details) among the circuits concerning the practice of indicative rulings, but many practitioners were unfamiliar with the indicative-ruling mechanism. There is a role, she suggested, for Rule amendments that codify and/or clarify existing practice. Such rules can be especially helpful in providing guidance to pro se litigants.

An attorney member expressed support for retaining this item on the agenda and continuing to work on it while also monitoring the caselaw developments. This member pointed out that the Eighth Circuit has rejected the majority approach to scenarios that involve a judgment as to fewer than all claims or parties, with later disposition of all remaining claims with respect to all parties. There is no reason to think, the member suggested, that the Eighth Circuit will reverse itself on this point. Turning to the four possibilities sketched in the agenda materials, this member expressed skepticism concerning the second and third sketches because those approaches would not resolve all of the existing circuit splits. The member stated that the first sketch[4] provides an approach that

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[4] In that sketch, Rule 4(a)(2) would be amended to read: "A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry, if and only if the decision or order, as announced, would otherwise be appealable."

seems harsh but would be clear. As to the fourth sketch, the member suggested that the list of scenarios in which relation forward can occur should be introduced by the phrase "including but not limited to" in order to avoid creating the impression that the listed scenarios are the only ones in which relation forward can occur. There are, the member observed, many possible permutations.

By consensus, the Committee resolved to continue its work on this item.

F. Item No. 10-AP-D (taxing costs under FRAP 39)

Judge Sutton thanked Ms. Leary for her excellent research concerning the award of costs under Appellate Rule 39, and he invited her to present that research to the Committee. Ms. Leary observed that the Committee had asked the FJC to provide data in response to concerns raised about the taxation of costs by the Fourth Circuit in the case of *Snyder v. Phelps*. Ms. Leary explained that the FJC had researched each circuit's local rules and procedures for determining cost awards, and that the FJC had used the courts of appeals' CM/ECF databases to identify cases in which cost awards had been made.

Ms. Leary reported that there is no simple answer to the question what constitutes a typical award of appellate costs under Rule 39. Multiple variables determine the amount of a Rule 39 cost award, and each circuit has adopted its own combination of those variables. The variables include the range of documents and fees that are recoverable, the amount recoverable for copying each page of a document, and the number of copies for which costs are recoverable.

Turning to the results of the FJC's database search, Ms. Leary cautioned that the search was limited by the fact that the FJC had not obtained data from the Federal Circuit because that Circuit was not yet live on CM/ECF. In addition, the data from the Second and Eleventh Circuits were limited because those Circuits only recently went live on CM/ECF. Some limitations also applied to the data from the Fifth, Seventh, and Ninth Circuits. The data show that most cost awards go to appellees upon affirmance of the judgment below. But when appellants received cost awards upon reversal, partial reversal, modification, or vacatur of the judgment below, their average cost award was higher than the average cost award to appellees. Using the range in size of a majority of the awards in a given circuit as a benchmark, the FJC assessed whether any awards in that circuit could be seen as "outliers" in relation to that circuit's normal range. Such outliers were found in nine circuits; the award in *Snyder* was one such outlier. The very large award in *Snyder* resulted from the length of the appendix and the fact that the Fourth Circuit permits recovery of printing costs up to $4.00 per page (which in *Snyder* meant recovery of 50 cents per page for each of eight copies of the appendix).

Judge Sutton noted that in the *Snyder* case, the existing rules gave the court of appeals the discretion not to impose costs on the appellant. Professor Coquillette agreed that Rule 39 gives the court of appeals discretion. Mr. Letter noted that it would not be a good idea for Rule 39 to be amended to distinguish among particular types of cases with respect to the permissibility of cost awards.

Judge Sutton asked how costs would be computed in a case where the briefs are filed electronically. Mr. Green responded that if the briefs were filed only in electronic form, then no printing costs would be awarded. However, he noted that – with the exception of the Sixth Circuit – the circuits that have transitioned to electronic filing nonetheless require paper copies as well.

Judge Sutton stated that he would send a copy of Ms. Leary's report to the Chief Judge and Circuit Clerk for each Circuit. By consensus, the Committee retained this item on its study agenda.

G. Item No. 10-AP-E (effect of withdrawal of a timely-filed post-judgment motion on the time to appeal in a civil case)

Judge Sutton invited the Reporter to introduce this item, which arose from Howard Bashman's suggestion that the Committee consider issues raised by *Vanderwerf v. SmithKline Beecham Corp.*, 603 F.3d 842 (10th Cir. 2010). The Reporter reminded the Committee that in *Vanderwerf*, the majority held that the withdrawal of a Civil Rule 59(e) motion deprived that motion of tolling effect and rendered the movant's appeal untimely. No consensus emerged, at the fall 2010 meeting, in favor of a rulemaking response to *Vanderwerf*. Members did express interest in considering further the situation faced by a non-movant who has relied on the tolling effect of a post-judgment motion that is subsequently withdrawn. One might question whether the *Vanderwerf* holding extends to cases in which the movant and the appellant are different parties. It would not seem to make sense to extend the *Vanderwerf* holding to situations in which the tolling motion is made (and then withdrawn) by a litigant other than the would-be appellant. Admittedly, no textual basis is readily apparent in Appellate Rule 4(a)(4) for distinguishing between appeals by the litigant that made the withdrawn motion and appeals by other litigants. However, there has as yet been no decision that applies *Vanderwerf* to an appeal by a non-movant. The Reporter suggested that the Committee consider whether, in the absence of such a decision, it is worthwhile to maintain this item on the study agenda.

A motion was made and seconded to remove Item No. 10-AP-E from the study agenda. The motion passed by voice vote without dissent.

H. Item No. 10-AP-G (intervention on appeal)

Judge Sutton invited discussion of this item, which arose from Mr. Letter's observation that Civil Rule 24 sets standards for intervention in the district courts, but that no comparable provision covers the general question of intervention in the courts of appeals. Mr. Letter noted that the United States has been successful in moving to intervene in a number of appeals. He observed that unless a statute provides a right to intervene, the decision whether to allow intervention rests in the court's discretion. An attorney member expressed concern with the idea of formalizing a procedure for seeking to intervene in the court of appeals (instead of in the district court); such a measure, this member suggested, might have unintended consequences.

A motion was made and seconded to remove Item No. 10-AP-G from the study agenda. The motion passed by voice vote without dissent.

VII. Additional Old Business and New Business

A. Item No. 10-AP-I (consider issues raised by redactions in appellate briefs)

Judge Sutton invited the Reporter to present this item, which arises from concerns expressed by Paul Alan Levy, an attorney at Public Citizen Litigation Group, concerning redactions in appellate briefs. Mr. Levy explains that in some cases, broadly worded district court orders permitting the parties to designate discovery materials as confidential may be followed by the filing, on appeal, of briefs that are heavily redacted to obscure references to those materials. Mr. Levy reports that the filers of such redacted briefs often provide no justification for the redactions. In some cases, no one files a motion to unseal the unredacted copies of the briefs; and even if such a motion is filed, by the time that the unredacted copies of the briefs are filed it is too late for would-be amici to have a meaningful chance to draft their briefs in the light of the unredacted record.

The Reporter noted that she had shared Mr. Levy's suggestion with the Chairs and Reporters of the Privacy and Sealing Subcommittees, and that Judge Hartz had provided thoughtful comments. Judge Hartz observed that the questions raised by Mr. Levy fall outside the scope of the Sealing Subcommittee's inquiries, because that Subcommittee considered only the sealing of entire cases. But some of the Subcommittee's suggestions – such as requiring judicial oversight of sealing decisions and sealing as little as necessary – could be relevant to Mr. Levy's concerns. Judge Hartz noted that the appellate context poses challenges because judges are not usually assigned to a case until after the answering brief is filed, and even then judges may feel uncomfortable resolving a sealing question before having had a chance to fully consider the merits of the appeal. The challenge, he suggested, is to provide for judicial involvement without creating too great a burden. One possibility might be an approach that provides that matters are unsealed when submitted to the court of appeals absent a showing of good cause.

The Reporter noted that all circuits have one or more local provisions dealing with sealed materials. Not all circuits specify whether materials sealed below presumptively remain sealed on appeal. Seven circuits have provisions that state or imply (with varying degrees of explicitness) that materials sealed below presumptively remain sealed on appeal. But two of those seven circuits – the First and the Sixth – also provide that a party wishing to file a sealed brief must move for leave to do so. Two circuits take a different approach: When records have been sealed below, these circuits maintain the seal only for a limited period to afford an opportunity for a party to move in the court of appeals to seal the materials. The Seventh Circuit applies this approach to all cases, except where a statute or procedural rule provides otherwise. The Third Circuit follows this approach in appeals in civil cases, and also provides that a litigant must move for leave to file a sealed brief.

Mr. Taranto drew the Committee's attention to the Federal Circuit's recent decision in *In re Violation of Rule 28(d)*, 2011 WL 1137296 (Fed. Cir. Mar. 29, 2011), in which the court of appeals sanctioned counsel for improperly marking portions of briefs confidential in violation of Federal Circuit Rule 28(d). Judge Rosenthal noted the Civil Rules Committee's extensive consideration of protective orders issued under Civil Rule 26. She observed that the law is quite clear that good

cause is required in order for the court to seal discovery items. And a more stringent showing is required in order to seal materials filed with the court in support of a request for judicial action. Despite the clarity of the law, however, practitioners persist in asserting that materials subject to a protective order are for that reason subject to sealing even when submitted as part of a court filing. There is a divide between law and practice. A district judge member agreed, and noted that in the Seventh Circuit matters are presumptively unsealed if the litigant fails to show within 14 days why they should remain sealed. Judge Sutton asked whether the concerns about sealing in the court of appeals would dissipate if questions of sealing were properly addressed at the district court level. A district judge participant said that they would.

A district judge member suggested that practices would improve if the Appellate Rules embodied the approach taken by the Seventh Circuit; the presence of such a provision in the Appellate Rules would help to focus district judges on the need to require a stringent showing to seal materials filed in support of a request for judicial action. An attorney member stated that the standards for sealing in the district court and the court of appeals should be the same. Another attorney member agreed, but noted that the application of those standards in the court of appeals might differ from that in the district court if the reason for protecting the materials at issue has dissipated by the time of the appeal. Mr. Letter pointed out that D.C. Circuit Rule 47.1(b) requires the parties to an appeal to review the record to make sure that continued sealing is appropriate.

Judge Sutton suggested that the Committee coordinate its consideration of these questions with the Civil Rules Committee. Mr. Letter observed that this topic also has implications for criminal matters. He suggested that one approach to the issue might be to impose a requirement that the district court review any sealing orders before closing a case. An alternative approach would be to adopt the D.C. Circuit's requirement of continuing review. Judge Rosenthal observed that the question of Rule 26 and protective orders has been on the agenda of the Civil Rules Committee for a very long time. The Civil Rules Committee has not, to date, found it necessary to update Rule 26 as it relates to protective orders and confidentiality, because the caselaw dealing with this issue is on the right track. However, a conclusion by the Civil Rules Committee that there is no need to amend Civil Rule 26 does not necessarily answer the question raised by Mr. Levy. The Appellate Rules Committee could consider requiring re-justification of any sealing decisions in the context of an appeal; it might be the case that a separate set of arguments becomes relevant in the appeal context. Professor Coquillette expressed agreement.

A district judge member observed that in the Seventh Circuit, lawyers know that the court of appeals will unseal matters that should not have been sealed, and this provides accountability. An attorney member asked whether the Appellate Rules Committee should consider adopting in the national rules an approach like the Seventh Circuit's. An appellate judge member asked whether the Supreme Court has a rule governing sealed documents. Mr. Letter stated that he did not think that the Supreme Court has a rule. Sealed filings are rare in the Supreme Court, he observed, but the DOJ has made such filings on occasion.

By consensus, the Committee retained this item on its study agenda. Judge Dow agreed to work with the Reporter to develop a proposal for presentation to the Committee in the fall.

B. Item No. 11-AP-A (exempt amicus statement of interest from length limit)

Judge Sutton invited the Reporter to introduce this item, which concerns a proposal by R. Shawn Gunnarson and Alexander Dushku that Appellate Rule 32(a)(7)(B)(iii) be amended to "provide that the statement of interest by an amicus curiae, required by Rule 29(c)(4), is not included in the word count for purposes of the type-volume limitation of Rule 32(a)(7)(B)." The proponents argue that amici's statements of interest are more similar to items already excluded from Rule 32(a)(7)(B)'s limits than to other items that must be counted under those limits. They report that counting the statement of interest for purposes of Rule 32(a)(7)(B)'s limits is burdensome when a brief is filed by a large consortium of amici. And they state that the interpretations of the current Rule by clerk's offices vary from circuit to circuit.

The Reporter stated that Messrs. Gunnarson and Dushku make good arguments for exempting the statement of interest from the length limit. On the other hand, it is worth considering the possible downside of such an exemption: It might tempt amici to skirt the length limits by smuggling argument into the statement of interest. To get a sense of length of statements of interest, the Reporter had performed a small and rough search on Westlaw. The search – described in the agenda materials – found a wide variation in length, both in absolute terms and when measured in number of words per amicus. Many statements in the sample were concise, but not all were. And the three briefs, within the sample, that had the greatest number of words per amicus contained argumentation.

The Reporter noted that most circuits do not appear to address by local rule whether the statement of interest is included in the length limit; the Third Circuit, though, does have a local rule that appears intended to exclude the statement. A member asked whether the three longest statements in the sample came from briefs filed in a circuit that excluded the statement of interest from the length limit. The Reporter stated that she would check.[5] An attorney member observed that the Rules should attempt to encourage multiple amici to file a single brief when possible. This member wondered whether a rule could be drafted that would exclude the statement of interest from the word count, but only up to a specific number of words per amicus. Another attorney member responded that any rule that depended on the number of amici could be manipulated – for example, by listing as amici not only an association but also its members. This member suggested, as an alternative, a rule that would exclude the statement of interest up to a uniform ceiling (such as 250 words). A third attorney member stated that he did not think it was worthwhile to address this matter in the national Rules.

An attorney member noted that in Supreme Court briefs, it has become customary to place in a separate addendum or appendix a paragraph describing each amicus; that addendum or appendix does not count toward the length limit. A district judge member observed that some court of appeals judges prefer not to encourage amicus filings, and he suggested that such judges would fail to see

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[5] Subsequent to the meeting, the Reporter determined that one of the three briefs in question was filed in the Third Circuit.

a reason to address this question in the national Rules; he noted that an amicus can make a motion for permission to serve an over-length brief. Judge Sutton asked the meeting participants whether any of them had found the current Rule to be problematic. An attorney member responded that she could envision cases in which it could be a problem, but that in such instances the amicus could file a motion.

The Reporter had noted earlier that an argument might be made for excluding new Rule 29(c)(5)'s authorship-and-funding disclosure requirement from the length limits. Judge Sutton recommended that the Committee defer considering that possibility until such time as it is considering other amendments to the relevant Rule.

A motion was made and seconded to remove Item No. 11-AP-A from the study agenda. The motion based by voice vote without dissent.

VIII. Joint Discussion with Advisory Committee on Bankruptcy Rules concerning Item No. 09-AP-C (Bankruptcy Rules Committee's project to revise Part VIII of the Bankruptcy Rules), and Item No. 08-AP-L (FRAP 6(b)(2)(A) / *Sorensen* issue)

At 8:35 a.m. on April 7, Judge Sutton and Judge Eugene R. Wedoff called to order the joint meeting of the Bankruptcy Rules Committee and the Appellate Rules Committee. Present from the Bankruptcy Rules Committee were Judge Wedoff (the Chair of the Committee); Judge Karen K. Caldwell; Judge Arthur I. Harris; Judge Sandra Segal Ikuta; Judge Robert James Jonker; Judge Adalberto Jordan; Judge William H. Pauley III; Judge Elizabeth L. Perris; Chief Judge Judith H. Wizmur; J. Michael Lamberth, Esq.; David A. Lander, Esq.; and John Rao, Esq. J. Christopher Kohn, Esq., Director of the Commercial Litigation Branch of the Civil Division of the DOJ, was present as an ex officio member of the Bankruptcy Rules Committee. Judge Laura Taylor Swain attended as the past Chair of the Bankruptcy Rules Committee. Judge James A. Teilborg attended as liaison from the Standing Committee and Judge Joan Humphrey Lefkow attended as liaison from the Committee on the Administration of the Bankruptcy System. Present as Advisors or Consultants to the Bankruptcy Rules Committee were Patricia S. Ketchum, Esq.; Mark A. Redmiles (Deputy Director, Executive Office for U.S. Trustees); and James J. Waldron (Clerk of the United States Bankruptcy Court for the District of New Jersey). Also present were Judge Dennis Montali, Molly T. Johnson from the FJC, and James H. Wannamaker III and Scott Myers from the AO. Professor S. Elizabeth Gibson and Professor Troy A. McKenzie were present as the Reporter and Assistant Reporter for the Bankruptcy Rules Committee. Also in attendance were Philip S. Corwin, Esq. of Butera & Andrews; David Melcer, Esq. of Bass & Associates P.C.; and Lisa A. Tracy of the Executive Office for U.S. Trustees.

Judge Sutton commenced by observing that the joint meeting would be interesting and helpful. He noted that the Appellate Rules Committee members were eager to benefit from discussions with the Bankruptcy Rules Committee, including with respect to the experience with electronic filing in bankruptcy. Judge Wedoff thanked the Appellate Rules Committee for agreeing to meet jointly with the Bankruptcy Rules Committee. He noted that one of the goals of the

Bankruptcy Rules Committee's Part VIII revision project is to achieve consistency with the Appellate Rules. Judge Wedoff introduced three new members of the Bankruptcy Rules Committee. Judge Robert James Jonker is a district judge in the Western District of Michigan who has had a longstanding interest in bankruptcy law. Judge Adalberto Jordan, who clerked for Justice O'Connor, will be joining the subcommittee on appeals and will bring a great deal of appellate experience to that subcommittee. Professor Troy A. McKenzie joins the Committee as its Assistant Reporter; Professor McKenzie, who teaches at N.Y.U. Law School, has a rare combination of expertise in both bankruptcy and civil procedure.

Judge Pauley observed that the Part VIII revision project arose from the efforts of Eric Brunstad, who produced an initial draft of the proposed revision. The Bankruptcy Rules Committee's Subcommittee on Privacy, Public Access, and Appeals has held two mini-conferences on the subject. The process has been iterative and thoughtful.

Professor Gibson proposed that the joint meeting focus on issues of common interest to the two Committees. Those include issues relating to electronic filing and transmission, as well as issues concerning the intersection of the Bankruptcy and Appellate Rules (especially with respect to appeals directly from the bankruptcy court to the court of appeals). Professor Gibson noted that bankruptcy appeals are relatively rare, and that it is thus a challenge to find practitioners who specialize in appellate bankruptcy practice. She reported that there have been two perspectives voiced during the deliberations thus far – that of practitioners who handle bankruptcy appeals only occasionally and who view the Part VIII Rules as difficult, and that of appellate specialists who would like the Part VIII Rules to more closely resemble the Appellate Rules.

Professor Gibson observed that the Bankruptcy Rules elsewhere incorporate by reference a number of Civil Rules. Thus, a question that arose early on was whether the Part VIII Rules should simply incorporate the Appellate Rules by reference. At the Standing Committee's January 2011 meeting, it became clear that the Standing Committee does not favor such an approach for the Part VIII Rules.

Professor Gibson suggested that it might be useful for the joint meeting to commence by discussing the possibility of incorporating into the national Rules a presumption of electronic filing and transmission. For example, how would such a change affect the rules concerning the submission of briefs, the form of briefs, and how the record is assembled? Professor Gibson noted that it would be particularly useful to learn about the experience in the Sixth Circuit; she observed that other courts, such as the Ninth Circuit Bankruptcy Appellate Panel ("BAP"), have also moved toward electronic filing. She pointed out that a key question is how to manage the transition to electronic filing while also retaining paper filing where necessary. Judge Sutton responded that in the courts of appeals, there is a presumption that there will continue to be paper filings; the courts must accommodate filings by inmates, who will ordinarily file in paper form rather than electronically. Professor Gibson noted that in bankruptcy a similar accommodation must be made for paper filings by pro se debtors. A member of the Bankruptcy Rules Committee noted that the rates of paper filings vary by district but can be as high as 25 or 30 percent; this member noted that the court will scan paper filings into PDF format. Judge Wedoff noted that the requirement that attorneys file

electronically has worked well. Mr. Green observed that while circuits other than the Sixth Circuit will accept electronic filings, those circuits also require paper copies. In courts within the Sixth Circuit, he reported, some 40 to 45 percent of the filings are paper filings by inmates; the court converts those filings to PDF format. The Sixth Circuit generally will not accept paper filings from attorneys and does not accept the appendix or record excerpts in paper form. Instead, the judges access the electronic record themselves. But the Sixth Circuit, he noted, is an outlier in this respect. Judge Wedoff asked whether the Sixth Circuit's system has worked well. Judge Sutton responded that it is the right approach, but that it took years for judges' chambers to adjust; the Sixth Circuit's system transfers the burden of printing to chambers. During the first year of electronic filing, Judge Sutton printed paper copies of briefs; now, he reads them on an iPad. Professor Gibson asked how the record is handled in the Sixth Circuit. Mr. Green responded that the electronic case filing architecture differs in the court of appeals, so the Clerk's Office must reach out and bring the electronic record from the court below into the court of appeals' system. The Clerk's Office is able to use that method to provide the court of appeals judges with electronic links to the record. Counsel identify for the court of appeals what the relevant portions of the record are. Judge Sutton noted that the Sixth Circuit used to include in the case schedule time to assemble the appendix; things move faster now because there is no need to allow time for putting the appendix together.

A participant asked whether bankruptcy judges like the system of electronic filing. Judge Wedoff responded that the system works well because the Clerk's Office provides whatever support the judges need. A key benefit is that a judge can work on the latest filings from anywhere, whether at home or during travel. And litigants, similarly, can file wherever and whenever they prefer. A bankruptcy judge from the Ninth Circuit agreed. In his district, each judge posts his or her policy concerning chambers copies. Another advantage of electronic filing is that emergency matters can be filed and accessed at any time. Electronic filing is particularly useful for the BAP because the Ninth Circuit spans such a large area. Judge Sutton asked what provisions the bankruptcy courts have made for situations in which the computer system crashes. Judge Wedoff responded that the courts have backup centers at other locations; backing up court files, he observed, is easier when those files are in electronic format.

Professor Gibson turned the Committees' attention to proposed Bankruptcy Rule 8006, which concerns the certification of a direct appeal to the court of appeals. Professor Gibson explained that the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") put in place for bankruptcy appeals a framework – in 28 U.S.C. § 158(d)(2) – for direct appeals by permission that is in some ways similar to, but in other ways quite distinct from, the interlocutory-appeal framework set by 28 U.S.C. § 1292(b). Under Section 158(d)(2), a direct appeal from the bankruptcy court to the court of appeals requires a certification from a lower court and also requires permission from the court of appeals. Section 158(d)(2)'s criteria for the certification differ from those set by Section 1292(b) for interlocutory appeals from the district court to the court of appeals. Moreover, Section 158(d)(2) sets out a variety of means for certification. The certification may be made by the court on its own motion; by the court on a party's motion; by the court on request by a majority of the appellants and a majority of the appellees; or jointly by all the appellants and appellees. Three different courts can make the required certification in appropriate circumstances – the bankruptcy court, the BAP, or the district court. Proposed Rule

8006(d) provides that the certification is to be made by the court in which the matter is pending, and proposed Rule 8006(b) sets for the rule for determining in which court the matter is pending at a given time. Proposed Rule 8006(g) then sets a 30-day time limit for filing in the court of appeals a request for permission to take a direct appeal to the court of appeals.

Professor Gibson invited Professor Struve to discuss proposed new Appellate Rule 6(c), which would address the procedure for permissive direct appeals under Section 158(d)(2) subsequent to the filing in the court of appeals of the petition for leave to appeal. Proposed Rule 6(c)(1) provides that the Appellate Rules, with specified exceptions, govern such an appeal. Proposed Rule 6(c)(2) provides that Bankruptcy Rule 8009 and 8010 govern the designation and transmission of the record on appeal.

Professor Struve noted that it would be useful to obtain participants' views on whether proposed Appellate Rule 6(c), as drafted, appropriately addresses the procedure for direct appeals under Section 158(d)(2). As an example, she noted the question of stays pending appeal. The proposal as drafted would provide that Appellate Rule 8 would apply to direct appeals. That Rule's treatment of stays is basically similar to proposed Bankruptcy Rule 8007 (which addresses stays in the context of appeals from the bankruptcy court to the district court or BAP), but there is a question about Rule 8's provision for proceeding directly against a surety. Rule 8 provides that a surety's liability can be enforced on motion in the district court without the need for an independent action. If Rule 8 applies to bankruptcy direct appeals, then it would contemplate such a direct proceeding in the bankruptcy court. One question is whether such a proceeding would fall naturally within the existing jurisdiction of the bankruptcy court. Professor Gibson noted that Bankruptcy Rule 9025 currently provides that sureties submit to the jurisdiction of the bankruptcy court. Rule 9025, though, provides for the determination of the surety's liability in an adversary proceeding. This raises a question as to whether any provision for proceedings against the surety in the bankruptcy court should contemplate an adversary proceeding; perhaps proposed Appellate Rule 6(c) could be revised to incorporate by reference the terms of Bankruptcy Rule 9025. Professor Gibson asked whether any of the bankruptcy judges on the Committee wished to comment on their experiences with proceedings against sureties, but no members volunteered a response.

Professor Gibson asked whether participants in the meeting had experience with direct appeals under Section 158(d)(2). Mr. Green reported that there have been few such direct appeals in the Sixth Circuit, and that there have been no problems with their processing. A bankruptcy judge observed that *Blausey v. United States Trustee*, 552 F.3d 1124 (9th Cir. 2009), illustrates the confusion that can arise concerning the appropriate procedure in connection with direct appeals under Section 158(d)(2). This judge observed that it would be salutary for the Rules to settle the question of the proper procedures on such appeals.

An attorney member of the Appellate Rules Committee observed that proposed Bankruptcy Rule 8006's certification provisions seem odd. Professor Gibson explained that those provisions are drawn from Section 158(d)(2). A participant questioned why Section 158(d)(2) provides for the four different means of certification noted previously. A bankruptcy judge member of the Bankruptcy Rules Committee observed that a Section 158(d)(2) certification can read in various ways; the

bankruptcy judge can draft the certification with varying degrees of forcefulness. For example, if the judge is issuing the certification only because he or she is required to do so in response to a request by a majority of the appellants and a majority of the appellees, the judge may draft a certification that sounds equivocal.

Professor Struve noted that the joint Part VIII project also provides an occasion to address possible revisions to Appellate Rule 6(b), which concerns appeals from a district court or BAP exercising appellate jurisdiction in a bankruptcy case. One proposed amendment to Rule 6(b) would update a cross-reference to Appellate Rule 12. Another proposed amendment would revise Rule 6(b)(2)(A) to eliminate an ambiguity; a similar ambiguity in Appellate Rule 4(a)(4) was eliminated by a 2009 amendment.

Professor Struve observed that the Appellate Rules Committee is currently considering other possible changes to Appellate Rule 4(a)(4), stemming from the fact that the time to appeal after disposition of a tolling motion runs from entry of the order disposing of the last remaining tolling motion rather than from entry of any resulting altered or amended judgment. In some instances, there can be a time lag between the two events – as when the court grants a motion for remittitur and the plaintiff has a period of time within which to decide whether to accept the remitted amount. At the Appellate Rules Committee's meeting the previous day, the Committee's consensus was that the possibilities it had previously considered for addressing this issue were not worth proceeding with. Instead, the Committee has decided to consider a new suggestion by Mr. Taranto that takes a different approach. Mr. Taranto's proposal addresses the timing question by extending Civil Rule 58's separate document requirement to the disposition of tolling motions. Such an extension would provide clarity concerning the point at which the appeal time resets under Appellate Rule 4(a)(4). The Committee has not yet had an opportunity to seek the views of the Civil Rules Committee or the Civil / Appellate Subcommittee. Professor Struve noted that this project, as it develops, may be of interest to the Bankruptcy Rules Committee for several reasons. First, Bankruptcy Rule 7058 incorporates by reference the terms of Civil Rule 58. Second, it would be useful for participants to consider whether the issue that gave rise to the Appellate Rule 4(a)(4) project is salient in the bankruptcy context. Is a similar time lag (between entry of an order disposing of the last remaining tolling motion under current Bankruptcy Rule 8015 and entry of any resulting altered or amended judgment) a problem in bankruptcy practice? Professor Gibson noted an additional reason for coordination on this issue: Proposed Bankruptcy Rule 8002 includes a subdivision modeled on Appellate Rule 4(a)(4). As to Appellate Rule 6(b)(2)(A), Professor Gibson observed that this Rule may present fewer current problems than Appellate Rule 4(a)(4) because Appellate Rule 6(b)(2)(A) treats only one type of tolling motion (namely, rehearing motions). Professor Gibson observed that current Bankruptcy Rule 8015 might provide a useful model for resolving any timing issue that arises from the disposition of such motions.

Judge Sutton asked the meeting participants for their thoughts on Civil Rule 58's separate document requirement. A participant responded that in bankruptcy, the separate document requirement becomes a trap for the unwary. To impose the separate document requirement, this participant suggested, could in effect be to extend appeal time in the name of clarity. Professor Struve asked whether compliance with the separate document requirement might increase if the

requirement applied across the board (in contrast to the present system, which exempts dispositions of tolling motions). A participant predicted that such a change would not result in greater compliance. This participant observed that there used to be a brighter line for the separate document requirement in bankruptcy, but now the rules only impose the separate document requirement in adversary proceedings and not in contested matters. Another participant observed that adversary proceedings are very like civil actions; contested matters, however, can be a hodgepodge, and the operation of the separate document requirement in that context could be confusing. A bankruptcy judge member expressed gratitude for the fact that the separate document requirement no longer applies in contested matters.

Professor Gibson noted that another point of intersection between the Bankruptcy Rules and the Appellate Rules concerns indicative rulings. Proposed Bankruptcy Rule 8008 is intended to serve two functions. With respect to appeals pending in the court of appeals, it is the equivalent of Civil Rule 62.1 – namely, it tells the trial court what to do if someone seeks relief that the trial court lacks authority to grant due to a pending appeal. Proposed Bankruptcy Rule 8008 is also designed to address the indicative-ruling procedure for the appellate court when the appellate court in question is a district court or a BAP. Professor Gibson noted a further issue: Should the procedures set out in proposed Bankruptcy Rule 8008 apply when an indicative ruling is sought in the bankruptcy court while a non-direct appeal is pending in the court of appeals under Section 158(d)(1)? A participant responded that she thought the Rule should apply in that context as well.

Professor Gibson raised a question concerning the source of the authority to promulgate local rules for BAPs. She noted that it would be useful to determine whether that authority resides in the court of appeals, in the circuit judicial council, or in the BAP. Perhaps, she suggested, it would make sense that the body that creates the BAP also has the authority to promulgate rules for the BAP. Mr. Green reported that the Sixth Circuit BAP relies on the circuit council for promulgation of its local rules; the proposed rules are sent out for comment during the development of the proposals, and are ultimately sent to the circuit judicial council for approval. Another participant observed that in the Ninth Circuit, the Circuit's standing rules committee handles the task of obtaining public comment on proposed BAP rules; this participant noted the importance of public comment.

Professor Gibson noted that the Appellate Rules contain a high level of detail concerning briefs, and she stated that it would be useful to get a sense whether participants favor a similar approach for the Part VIII Rules. An attorney member of the Appellate Rules Committee noted that detailed rules are useful to practitioners because such rules provide guidance. On the other hand, this member questioned whether district judges really want to receive briefs that conform to the Appellate Rules. A participant responded that the district court cares less about formalities than about simplicity and speed; the goal is to get the briefs in and resolve the case quickly. A court of appeals judge stated that it would be useful for the rules to evolve so that they do not specify the colors of brief covers. Another participant noted that Mr. Brunstad had proposed setting a default rule for the color of brief covers when the briefs are filed in paper form.

Professor Gibson also noted the potential importance of maintaining similar length limits for briefs at both stages of the appellate process (in the district court or BAP, and in the court of appeals). A bankruptcy judge agreed, and observed that Mr. Brunstad had expressed concern with the "dumbbell problem" – namely, that if the district court's length limit is tighter than the one that applies in the court of appeals, a party may find it difficult to preserve adequately all the points that it wishes to argue on appeal. A bankruptcy judge member stated that he likes the idea of specific requirements because they provide attorneys with structure; and he favors ensuring that the length limits are consistent at the two levels of appeal. An attorney participant agreed that he favors consistency between the two levels of appeal.

A district judge member of the Appellate Rules Committee expressed agreement with the idea that detailed briefing rules make things fairer for the lawyers. He noted that his district has a local rule that imposes a low page limit. Another district judge observed that bankruptcy cases are sufficiently challenging to begin with, and that it would be helpful for the briefs to be consistent from case to case.

Professor Gibson drew the Committees' attention to proposed Bankruptcy Rule 8009(f), concerning the treatment of sealed documents on appeal. The Appellate Rules do not currently address that issue. Professor Struve noted that the local rules in some circuits do address some issues relating to sealed documents. She also observed that another question might be whether all the circuits are ready to handle sealed documents electronically. Mr. Green responded that some circuits are prepared but that others are not. Another participant observed that it would be a good idea to look into the way in which the CM/ECF system handles sealed documents; she noted that the relevant technology is changing. A bankruptcy judge suggested that the Rule be drafted so as to incorporate by reference whatever the current CM/ECF technology and practice are.

In closing, Professor Gibson predicted that the Bankruptcy Rules Committee would discuss a portion of the project at its fall 2011 meeting and another portion at the spring 2012 meeting. In the meantime, the Bankruptcy Rules Committee's working group will further refine the proposals. She expressed the Bankruptcy Rules Committee's desire to continue coordinating efforts with the Appellate Rules Committee. Judge Sutton promised to appoint one or two members of the Appellate Rules Committee to the working group, and expressed commitment to coordinating the two Committees' work going forward.

Judge Sutton thanked Judge Wedoff and the Bankruptcy Rules Committee for inviting the Appellate Rules Committee to join them. Judge Sutton noted that this was Judge Rosenthal's last meeting with the Appellate Rules Committee. He thanked her for her prodigious efforts and superb work as Chair of the Standing Committee. He observed that during her time as Chair she has attended the meetings of the Advisory Committees and the Standing Committee and the Judicial Conference. Judge Rosenthal thanked the Advisory Committees for their thorough, thoughtful, and innovative work. Judge Wedoff thanked the Appellate Rules Committee for their participation in the joint meeting.

IX. Adjournment

The Appellate Rules Committee adjourned at 10:25 a.m. on April 7, 2011.

Respectfully submitted,

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Catherine T. Struve
Reporter

12b-004299

12b-004300

Advisory Committee on Appellate Rules
Table of Agenda Items — May 2011

FRAP Item	Proposal	Source	Current Status
03-09	Amend FRAP 4(a)(1)(B) & 40(a)(1) to clarify treatment of U.S. officer or employee sued in individual capacity.	Solicitor General	Discussed and retained on agenda 11/03; awaiting revised proposal from Department of Justice Tentative draft approved 04/04 Revised draft approved 11/04 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07 Discussed and retained on agenda 04/08 FRAP 40(a)(1) amendment approved 11/08 for submission to Standing Committee FRAP 40(a)(1) proposal remanded to Advisory Committee 06/09 Discussed and retained on agenda 11/09 Draft approved 05/10 for submission to Standing Committee Approved by Standing Committee 06/10 Approved by Judicial Conference 09/10 Approved by Supreme Court 04/11
05-01	Amend FRAP 21 & 27(c) to conform to Justice for All Act of 2004.	Advisory Committee	Discussed and retained on agenda 04/05; awaiting proposal from Department of Justice Discussed and retained on agenda 04/06; Department of Justice will monitor practice under the Act
07-AP-E	Consider possible FRAP amendments in response to Bowles v. Russell (2007).	Mark Levy, Esq.	Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 04/11
07-AP-H	Consider issues raised by Warren v. American Bankers Insurance of Florida, 2007 WL 3151884 (10th Cir. 2007), concerning the operation of the separate document rule.	Appellate Rules Committee	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08
07-AP-I	Consider amending FRAP 4(c)(1) to clarify the effect of failure to prepay first-class postage.	Hon. Diane Wood	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09

FRAP Item	Proposal	Source	Current Status
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08
08-AP-C	Abolish FRAP 26(c)'s three-day rule.	Hon. Frank H. Easterbrook	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09
08-AP-D	Delete reference to judgment's alteration or amendment from FRAP 4(a)(4)(B)(ii)	Peder K. Batalden, Esq.	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 10/10 Discussed and retained on agenda 04/11
08-AP-G	Consider substantive and style changes to FRAP Form 4	Appellate Rules Committee	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 10/10 Draft approved 04/11 for submission to Standing Committee
08-AP-H	Consider issues of "manufactured finality" and appealability	Mark Levy, Esq.	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 10/10 Discussed and retained on agenda 04/11
08-AP-J	Consider FRAP implications of conflict screening	Committee on Codes of Conduct	Discussed and retained on agenda 11/08
08-AP-L	Amend FRAP 6(b)(2)(A)(ii) to remove ambiguity	Reporter	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09 Discussed and retained on agenda 10/10 Discussed jointly with Bankruptcy Rules Committee and retained on agenda 04/11
08-AP-M	Consider FRAP implications of interlocutory appeals in tax cases	Reporter	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Draft approved 10/10 for submission to Standing Committee Approved for publication by Standing Committee 01/11

FRAP Item	Proposal	Source	Current Status
08-AP-N	Amend FRAP 5 to allow parties to submit an appendix of key documents from the record along with petitions and answers	Peder K. Batalden, Esq.	Discussed and retained on agenda 04/09
08-AP-P	Amend FRAP 32 to change from double line-spacing to 1.5 line-spacing for briefs	Peder K. Batalden, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09
08-AP-Q	Consider amending FRAP 10(b) to permit the use of digital audio recordings in place of written transcripts	Hon. Michael M. Baylson	Discussed and retained on agenda 04/09 Discussed and retained on agenda 10/10
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09
09-AP-A	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	ABA Council of Appellate Lawyers	Discussed and retained on agenda 04/09
09-AP-B	Amend FRAP 1(b) to include federally recognized Indian tribes within the definition of “state”	Daniel I.S.J. Rey-Bear, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10
09-AP-C	Consider possible FRAP amendments in the light of project to revise Part VIII of the Bankruptcy Rules	Bankruptcy Rules Committee	Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed jointly with Bankruptcy Rules Committee and retained on agenda 04/11
09-AP-D	Consider implications of Mohawk Industries, Inc. v. Carpenter	John Kester, Esq.	Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10
10-AP-A	Consider treatment of premature notices of appeal under FRAP 4(a)(2)	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed and retained on agenda 04/11
10-AP-B	Consider FRAP 28's treatment of statements of the case and of the facts	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Draft approved 04/11 for submission to Standing Committee
10-AP-D	Consider factors to be taken into account when taxing costs under FRAP 39	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/10 Discussed and retained on agenda 04/11

FRAP Item	Proposal	Source	Current Status
10-AP-H	Consider issues relating to appellate review of remand orders	Committee on Federal-State Jurisdiction	Discussed and retained on agenda 10/10
10-AP-I	Consider issues raised by redactions in appellate briefs	Paul Alan Levy, Esq.	Discussed and retained on agenda 04/11
11-AP-B	Consider amending FRAP 28 to provide for introductions in briefs	Appellate Rules Committee	Awaiting initial discussion

TAB 7-A-D

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

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JEFFREY S. SUTTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

DATE: May 12, 2011

TO: Honorable Lee H. Rosenthal, Chair, Standing Committee on Rules of Practice and Procedure

FROM: Honorable Richard C. Tallman, Chair, Advisory Committee on Federal Rules of Criminal Procedure

RE: Report of the Criminal Advisory Committee

I. Introduction

The Advisory Committee on the Federal Rules of Criminal Procedure ("the Committee") met on April 11-12, 2011, in Portland, Oregon, and took action on a number of proposals. The Draft Minutes are attached.

This report presents four action items:

(1) approval to transmit to the Judicial Conference proposed amendments to Rules 5 and 58 (initial appearance in extradition cases and consular notification);

(2) approval to transmit to the Judicial Conference a proposed Rule 37 (indicative rulings);

(3) approval to transmit to the Supreme Court Rule 15 (depositions in foreign countries when the defendant is not physically present); and

(4) approval to publish a proposed amendment to Rule 12 (motions that must be made before trial), and a conforming amendment to Rule 34.

The report also includes a discussion of the Committee's decision not to move forward at this time with an amendment to Rule 16 dealing with discovery practices and exculpatory evidence. Instead, the Committee will work with the Federal Judicial Center on recommendations for amending the DISTRICT JUDGES BENCHBOOK, preparation of a Best Practices Guide for Criminal Discovery, and in-service training for judges on improving pretrial criminal discovery practices.

II. Action Items—Recommendations to Publish Amendments to the Rules

1. ACTION ITEM—Rules 5 and 58

The proposed amendments to Rule 5 and Rule 58 were designed to (1) deal with unique aspects of the international extradition process and (2) ensure that certain treaty obligations of the United States are fulfilled. After reviewing public comments concerning these amendments, the Advisory Committee recommends that they be transmitted to the Judicial Conference as published.

Rule 5(c)(4)

The amendment to Rule 5(c) clarifies where an initial appearance should take place for persons who have been surrendered to the United States pursuant to an extradition request to a foreign country. The amendment codifies the longstanding practice that persons who are charged with criminal offenses in the United States and surrendered to the United States following extradition in a foreign country make their initial appearance in the jurisdiction that sought their extradition.

This rule is applicable even if the defendant arrives first in another district. Rule 5(a)(1)(B) requires the person be taken before a magistrate judge without unnecessary delay. Consistent with this obligation, it is preferable not to delay an extradited person's transportation for the purpose of holding an initial appearance in the district of arrival, even if the person will be present in that district for some time as a result of connecting flights or logistical difficulties. Interrupting an extradited defendant's transportation at this point can impair his or her ability to obtain and consult with trial counsel and to prepare his or her defense in the district where the charges are pending. It should also be noted that during foreign extradition proceedings, the extradited person, assisted by counsel, has already been afforded an opportunity to review the charging document, United States arrest warrant, and supporting evidence.

The Committee received two comments on this rule. The National Association of Criminal Defense Lawyers (NACDL) and the Federal Magistrate Judges Association (FMJA) suggested that the amendment be revised to require the initial appearance to be held "without unnecessary delay." The Advisory Committee declined to make this revision because the rule itself already makes this clear. Subdivision (a) of Rule 5 contains the timing requirements for all initial appearances, and subdivision (c) governs the place of initial appearances. Rule 5(a)(1) already requires all defendants who have been arrested to be taken before a magistrate judge "without unnecessary delay," and

contains a provision that directly addresses cases in which the defendant has been arrested outside the United States.

Rule5(a)(1)(B) now provides:

> (B) A person making an arrest outside the United States must take the defendant *without unnecessary delay* before a magistrate judge, unless a statute provides otherwise.

(Emphasis added). The Advisory Committee concluded that this provision—which is referred to in the Committee Note—addresses the concerns noted by the NACDL and FMJA. The Committee declined to add an additional statement regarding timing to subdivision (c), which governs only the *place* of the initial appearance, not its timing.

Rules 5(d) and 58

The proposed amendments to Rules 5(d) and 58(b) are designed to ensure that the United States fulfills its international obligations under Article 36 of the Vienna Convention on Consular Relations and other bilateral treaties. Bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 of the Vienna Convention provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention. Many questions remain unresolved concerning Article 36, including whether it creates individual rights that may be invoked in a judicial proceeding and what, if any, remedy may exist for a violation. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). This amendment—which was proposed by the Department of Justice after consultation with the State Department—does not address those questions.

Comments were received from the NACDL and the FMJA. The NACDL endorsed the proposed amendment in principle, but suggested modifications to define "held in custody," to expand on the warnings given to defendants, and to make it clear that consular notification should not be delayed until the initial appearance. The Advisory Committee concluded that the term "held in custody" was sufficiently clear for this purpose, and declined to require a more detailed explanation or colloquy about consular notification at the initial appearance.

The Committee also concluded that the rule need not be revised to address administrative warnings that should take place prior to the initial appearance. The amendment was designed to be an additional assurance, in the nature of a "failsafe" provision, not the primary means of satisfying the United States' obligations under the Vienna Convention and other bilateral treaties. Consular notification advice is required to be given "without delay," and arresting officers are primarily responsible for providing this advice. *See* 28 C.F.R. 50.5 (requiring Department of Justice officers to inform foreign nationals they arrest of policies regarding consular notification). The Committee was advised that the government has taken substantial measures to ensure prompt compliance with the notification requirements, including implementing Justice Department regulations establishing

a uniform procedure for consular notification when non-United States citizens are arrested or detained by officers of the Department; State Department instructions for federal, state, and local law enforcement officials on providing consular notification advice, which are available on a public website and published in a booklet; and which are regularly covered in training of law enforcement authorities provided by the State Department.

The Committee also took note of two FMJA observations: (1) reservations about the necessity of procedural rules concerning consular notification, which is principally an executive function, and (2) the need to take great care to insure that the new procedures do not result in defendants being asked to incriminate themselves. The FMJA concluded that the proposed amendment was adequate.

The Committee voted unanimously to recommend that the amendment be approved as published and forwarded to the Judicial Conference.

Recommendation–The Advisory Committee recommends that the proposed amendments to Rules 5 and 58 be approved as published and forwarded to the Judicial Conference.

2. ACTION ITEM—Rule 37

Appellate Rule 12.1 and Civil Rule 62.1, both of which went into effect on December 1, 2009, create a mechanism for obtaining "indicative rulings." They establish procedures facilitating the remand of certain post-judgment motions filed after an appeal has been docketed in a case where the district court indicated it would grant the motion. Proposed Rule 37, which was published for comment in 2010, parallels Civil Rule 62.1 and clarifies that this procedure is available in criminal cases. After reviewing the comments received following publication, the Advisory Committee recommends that the amendment be approved as published and forwarded to the Judicial Conference.

The Committee received two comments concerning Rule 37. The FMJA stated that it "endorses the proposed changes." Writing on behalf of the NACDL, Peter Goldberger expressed support for the proposal and suggested two additions to the Committee Note that might be helpful to practitioners with little experience in appellate procedures:

(1) a parenthetical mentioning the possibility that the conditions of release or detention pending execution of sentence or pending appeal may be modified in the district court without resort to the new procedure; and

(2) a reference to the availability of the procedure in Section 2255 cases. The NACDL proposed adding such a reference to the portion of the Committee Note that reads:

In the criminal context, the Committee anticipates that Criminal Rule 37 will be used primarily if not exclusively for newly discovered evidence motions under Criminal Rule

33(b)(1) (*see United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c). Rule 37 does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in the face of a pending appeal.

After discussion, the Advisory Committee declined both of the NACDL's suggestions . The Committee determined that the first suggestion went substantially beyond the focus of the amendment itself, running the risk of being either over- or under-inclusive and violating the Standing Committee's policy of keeping Committee Notes short. Regarding the NACDL's second suggestion, the language the NACDL identified for purposes of adding a Section 2255 reference tracks the language of the Committee Note accompanying Appellate Rule 12.1, which was approved by the Standing Committee after considerable discussion. Prior to publishing proposed Criminal Rule 37, the Advisory Committee wrestled with whether to include a reference to the use of the indicative rulings procedure in Section 2255 cases. It eventually decided that the Committee Note as written already makes clear that the identified uses are not exclusive. The Advisory Committee maintained that conclusion after considering the NACDL's comments.

At the conclusion of this discussion, the Advisory Committee voted unanimously to recommend that Rule 37 be forwarded to the Standing Committee as published.

Recommendation–The Advisory Committee recommends that proposed Rule 37 be approved as published and forwarded to the Judicial Conference.

3. ACTION ITEM—Rule 15

The proposed amendment to Rule 15 would authorize the taking of depositions outside the United States without the defendant's presence in special limited circumstances with the district judge's approval.

<u>The purpose of the amendment</u>

The amendment, which applies only to depositions taken outside the United States, provides a procedural mechanism to address cases in which important witnesses—both government and defense witnesses—live in, or have fled to, countries where they cannot be reached by the court's subpoena power.

The amendment authorizes *only* the taking of pretrial depositions; it does not speak to their ultimate admissibility at trial. As stated in the Committee Note, questions of admissibility are left to the courts to resolve on a case-by-case basis, applying the Federal Rules of Evidence and the Constitution.

Issues concerning the propriety of allowing depositions for witnesses outside the United States and the procedures under which such depositions may be taken have arisen, and will continue

to arise, in cases such as *United States v. Ali*, 528 F.3d 210 (4th Cir. 2008), *cert. denied*, 129 S.Ct. 1312 (2009).[1] The Committee concluded that it was appropriate to distill the analysis in cases such as *Ali* and use it to set forth a procedural framework in the Federal Rules of Criminal Procedure.

The amendment requires case-specific findings regarding (1) the importance of the witness's testimony, (2) the likelihood that the witness's attendance at trial cannot be obtained, and (3) why it is not feasible to have face-to-face confrontation by either (a) bringing the witness to the United States for a deposition at which the defendant can be present or (b) transporting the defendant to the deposition outside the United States.

The new procedure does not apply if it is possible to bring the witness to the United States for trial or for a deposition at which the defendant can be present, or if it is feasible for the defendant to be present at a deposition outside the United States. The proposal thus creates a very limited exception to the requirement that the defendant must be present at any deposition under Rule 15 unless the defendant waives the right to be present or is excluded by the court for being disruptive.

Although the amendment would not predetermine the admissibility of any deposition taken pursuant to it, in drafting the amendment the Committee was attentive to both criteria developed in the lower courts and to Supreme Court Confrontation Clause precedent.

The history of the amendment

The Department of Justice wrote to the Advisory Committee in 2006 proposing that Rule 15 be amended. After a period of study and discussion from 2006 to 2008, the Advisory Committee sought and received Standing Committee approval to publish the proposed amendment for public comment in 2008.

After making several changes in response to public comments, in April 2009 the Advisory Committee recommended that the Standing Committee approve the proposed amendment and forward it to the Judicial Conference. Four comments were received in response to the publication

[1] The defendant in *Ali* was convicted of multiple crimes arising from his affiliation with an al-Qaeda terrorist cell and its plans to carry out terrorist acts in United States. Before trial Ali sought to suppress a confession he made in Saudi Arabia, alleging it was the product of torture by Mabahith security officials. As Saudi citizens residing in Saudi Arabia, the Mabahith officers were beyond the district court's subpoena power. The Saudi government denied the United States's request to allow the officers to testify at trial in the United States but permitted the officers to sit for depositions in Riyadh. The Saudi government had never before allowed such foreign access to a Mabahith officer. After finding it was not feasible for Ali (who was in custody following his earlier extradition from Saudi Arabia) to be transported to Riyadh for the depositions, the district court adopted procedures similar to those outlined in the proposed amendment. Ali had defense counsel both in Riyadh and with him in the United States, the Saudi officials testified under oath, defense counsel was able to cross-examine the Mabahith witnesses extensively, and a two-way video link allowed the defendant, judge, and jury to observe the demeanor of the witnesses. At trial the videotape presented side-by-side footage of the Mabahith officers testifying and the defendant's simultaneous reactions to the testimony. On appeal the Fourth Circuit held that introduction of deposition testimony taken under those procedures did not violate the Confrontation Clause.

of the proposed amendment, and one witness representing the Federal Defenders testified concerning the amendment. The Magistrate Judges Association endorsed the proposal. The General Counsel of the Drug Enforcement Administration raised some issues concerning the drafting of the rule. The Federal Defenders and the National Association of Criminal Defense Lawyers opposed the rule and urged that it be withdrawn, or, at a minimum, substantially redrafted.

The principal arguments in the lengthy submissions from the Federal Defenders and NACDL concerned the effect of the proposed amendment on the defendant's rights under the Confrontation Clause of the Sixth Amendment. They argued that *Crawford v. Washington*, 541 U.S. 36 (2004), interprets the Confrontation Clause as providing an unqualified right to face-to-face confrontation that would preclude the admission of testimony preserved by a deposition taken under the proposed rule. There is no indication that the Supreme Court will continue to allow any exception to the right of face-to-face confrontation even when this would serve an important public policy interest and there are guarantees of trustworthiness. Moreover, the proposed amendment may not be confined to a small number of exceptional cases. The amendment is not, in the opponents' view, limited to cases where an interest as significant as national security is at issue, nor does it guarantee the level of participation by the defendant that was provided in *United States v. Ali*, 528 F.3d 210 (4th Cir. 2008), *cert. denied*, 129 S.Ct. 1312 (2009).

Specifically, as published the amendment (1) was not limited to transnational cases, (2) was not limited to felonies, (3) did not require a showing that the evidence sought is "necessary" to the government's case, and (4) imposed no obligation on the government to secure the witness's presence.

NACDL argued that the real significance of the amendment is not the taking of the depositions per se, but rather that it would enable the prosecution to present evidence at trial that has not been subject to confrontation. They argued that the amendment would in effect create a right to introduce the resulting deposition at trial, and as such exceed the authority of the Rules Enabling Act. It would also be a back door means of achieving the goals of the failed 2002 attempt to amend Rule 26. Rather than create inevitable constitutional challenges, they urge the Committee to await either legislation or further clarification from the case law. They also urged that the safeguards and limits in the proposed amendment are insufficient to restrict its scope and to guarantee the defendant's participation. In their view, "meaningfully participate . . . through reasonable means" creates only a vague and subjective test that offers little real protection. Similarly, the showing required would encompass every witness beyond the court's subpoena power. Finally, they noted there is reason to doubt the credibility and reliability of the testimony of the potential witnesses who are willing to be deposed, but not travel to the United States to testify. These will include, for example, persons who have fled justice in this country and know that their oath taken abroad will have no practical significance.

The Committee also heard testimony stressing the frequency with which the technology is inadequate or fails, as well as other problems that defense attorneys experience in taking foreign

depositions, such as the requirement in some countries that only local counsel can question witnesses.

The Advisory Committee adopted several amendments intended to address some of the issues raised during the comment period. It explicitly limited the amendment to felonies. After discussion, the Committee declined to adopt a requirement that the Attorney General or his designee certify or determine that the case serves an important public interest. Although there was support for a mechanism that would guarantee that requests under the new rule would be rigorously reviewed within the Department of Justice and made only infrequently, members were concerned that adding a provision in the rules requiring the action by the Attorney General might raise separation of power issues. (The Committee did add a provision requiring the attorney for the government to establish that the prosecution advances an important public interest, but this provision was deleted by the Standing Committee.)

The Committee also incorporated several minor changes suggested during the comment period and by the style consultant to improve the clarity of the proposed amendment.

The Committee did not adopt three other suggestions. First, it declined to limit the rule to government witnesses, though it recognized that there will be only a small number of cases in which a defendant will wish to use this procedure.[2] Second, the Committee declined to require the government to show that the deposition would produce evidence "necessary" to its case, viewing that standard as unrealistic when the government is still assembling its case. Third, the Committee declined to add a requirement that the government show it had made diligent efforts to secure the witness's testimony in the United States. In the Committee's view, this might actually water down the requirement in the rule as published that the witness's presence "cannot be obtained."

The Committee discussed the Confrontation Clause issues at length. Members emphasized that when that the government (or a codefendant) seeks to introduce deposition testimony, the court will rule on admissibility under the Rules of Evidence as well as the Sixth Amendment. Members stressed that providing a procedure to take a deposition did not guarantee its later admission, which could turn on a number of factors. For example, if the technology does not work well enough to allow the defendant to participate or to create a high quality recording, the deposition would likely not be admitted. Similarly, the situation might change so that it would be possible for the witness to testify at the trial. The decision to allow the taking of the deposition in no way forecloses a Confrontation Clause challenge to admission or one based on the Rules of Evidence. The Committee Note was amended to make this point clear.

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[2] In cases involving a single defendant, Rule 15 would pose no difficulties if the defendant consented not to be present at the deposition of his witness, and there would be no Confrontation Clause barrier to the introduction of the deposition. However, in a case involving multiple defendants, one defendant might wish to depose a witness overseas, and another defendant who could not be present at the deposition might object to the admission of the evidence.

The proposed amendment is intended to meet the criteria developed in lower court decisions such as *Ali*, as well as the Supreme Court's Confrontation Clause decisions. Although there will undoubtably be issues arising from the use of technology, members felt that the district courts have ample authority and experience to handle those issues on a case by case basis.

The Advisory Committee voted, with three dissents, to approve the proposed amendment to Rule 15, as revised, and to send it to the Standing Committee. The Standing Committee approved the amendment in June 2009, and the Judicial Conference approved it in September 2009.

In 2010 the Supreme Court remanded the proposed amendment to the Advisory Committee for further consideration. No statement accompanied the Court's action.

The Committee's recommendation

At its April meeting the Committee voted, with one dissent, to recommend that the Standing Committee approve and transmit a revised Rule 15 proposal to the Judicial Conference. The revised proposal makes no change in the text of the amendment approved in 2009, but the Committee Note has been substantially revised to clarify that compliance with the procedural requirements for the taking of the foreign testimony does not predetermine its admissibility at trial. Because the text of the amendment remained unchanged, there was no need for republication.

As revised, the Committee Note emphasizes that the proposed amendment does not predetermine whether depositions conducted outside the presence of the defendant would be admissible at trial. Rather, it is limited to providing assistance in pretrial discovery. As is the case with all depositions, courts determine admissibility on a case-by-case basis, applying the Federal Rules of Evidence and the Constitution.

The revised Committee Note emphasizes the limited scope of the proposed amendment, which is significantly different from an earlier amendment to Rule 26 that the Supreme Court declined to transmit to Congress. *See* 207 F.R.D. 89, 93-104 (2002). The focus of the proposed 2002 amendment to Rule 26 was the admissibility of evidence at trial; the amendment would have authorized the use of two-way video transmissions in criminal cases in (1) "exceptional circumstances," with (2) "appropriate safeguards," and if (3) "the witness is unavailable."

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 15 be approved as revised and forwarded to the Judicial Conference.

4. ACTION ITEM—Rule 12

With one dissent, the Advisory Committee voted to recommend that a proposed amendment to Rule 12 be published for public comment. Because the discussion of this recommendation is lengthy and includes an appendix which sets forth the research basis for the recommendations in greater detail, it is provided in a separate document and electronic file.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 12 be approved for publication.

III. Discussion Items

A. Rule 16

In its consideration of whether Rule 16 should be amended and whether such an amendment could or should do more than restate existing Supreme Court authority on a prosecutor's disclosure obligations, the Advisory Committee conducted the largest survey in the Federal Judicial Center's history and held a special mini-conference in Houston, Texas, to discuss the survey's results and solicit feedback. Participants included defense counsel, prosecutors, judges, academics, agency counsel, and crime victims representatives. Judge Emmet Sullivan accepted the Committee's invitation to attend three of its meetings and to discuss the results of the Committee's ongoing study efforts. Chief Judge Mark Wolf also participated in Committee meetings. Additionally, the Committee heard from the Department of Justice's national discovery coordinator and other Department representatives regarding changes the Department is making internally to address the concerns Judge Sullivan raised.

After extended discussion at its April 2011 meeting, the Advisory Committee voted 6 to 5 not to pursue an amendment to Rule 16 at this time. The reasons for the Committee's decision can be summarized as follows:

First, the survey shows there is a lack of consensus among the federal judiciary as to whether an amendment is necessary.

Second, the Committee was impressed with the extent of institutional structural changes in policies, procedures, and training the Department of Justice has implemented following the *Stevens* case and the Committee was not persuaded that a rule change was required to ensure that those changes will carry over from one administration to the next.

Third, the Committee was not convinced that the problem is so severe as to warrant a rule change when existing Supreme Court authority on a prosecutor's disclosure obligations is clear and for which substantial sanctions are available for non-compliance. No rule can effectively prevent intentional misconduct by prosecutors who knowingly withhold exculpatory information. While people agree that it is important to have the disclosure obligation effectively implemented, it is unclear that merely repeating a long-standing constitutional requirement in a rule would be an effective way to improve compliance. On the other hand, drafting a rule that goes beyond the existing constitutional obligations proved enormously difficult in ways that would clearly defeat the support necessary for such a rule change.

The Committee wrestled with several drafts of amendments. In doing so, some of the specific challenges the Committee encountered include:

- A conflict in timing. Through the Jencks Act, 18 U.S.C. § 3500, Congress has clearly restricted when actual witness statements may be disclosed, which may contain impeachment material. It is Judicial Conference policy to try to avoid making rule changes that create conflicts with existing law, so the Committee was reluctant to propose a rule that would conflict with the statutory timing under the Jencks Act and invite congressional rewriting of a carefully drafted discovery rule.

- Districts take a variety of approaches in this area and, especially in light of the lack of consensus, the Committee was reluctant to propose a rule that might interfere with each district's continuing ability to experiment with different discovery techniques.

- The Committee could not reach a consensus on the extent to which the rule needed to be amended to accommodate everyone's concerns. For example, the Committee struggled to find ways to amend the rule that would not jeopardize the government's ability to protect witnesses from harm, or to promote national security without creating an exception that some thought was too broad and fraught with danger. There was also concern that an amendment might discourage foreign governments from cooperating with the United States during international criminal investigations.

- The Committee could not reach consensus on a mechanism for unilateral withholding of discovery by prosecutors where witness safety concerns exist but are supported by less than evidence of probable harm.

- The Committee recognized that while any rule would generate litigation about its precise terms in the myriad of circumstances presented by criminal cases, a rule that attempted to codify a constitutional obligation could generate excessive litigation.

- The Department of Justice opposed any new rule and argued that pretrial disclosure should be bilateral, which would have raised significant issues.

- A rule attempting to restate the constitutional obligations stated in *Brady/Giglio* may not fit well with the common-law development of those obligations. Further, the *Brady/Giglio* obligations are not easily reduced to a list that parties and judges can reference and thereby know their obligation—the presumed object of a rule of procedure.

- The Committee was concerned that trying to avoid some of the *Brady/Giglio* problems by

eliminating the materiality requirement would significantly expand disclosure requirements beyond those constitutionally required and invite more litigation in any case of non-disclosure: (1) was there constitutional error from the non-disclosure; and (2) even if not, was there Rule error? If so, what should the consequences be?

The Committee is not, however, abandoning efforts to make improvements in this area and it also gave extended consideration to alternatives that could be implemented more quickly and effectively. After its most recent meeting, the Committee proposed to the Federal Judicial Center the creation of a Best Practices Guide for Criminal Discovery, inclusion of a discovery checklist in the DISTRICT JUDGES BENCHBOOK, and implementation of more educational programs for district judges on overseeing pretrial criminal discovery. These are alternatives that can be implemented more quickly than a rule change and which experience has shown are likely to be effective.

12b-004320

AGENDA ACTION ITEM—RULE 12

Criminal Rules Advisory Committee

May 2011 Report to Standing Committee

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A. INTRODUCTION

The Criminal Rules Committee has been studying a proposal to amend Fed. R. Crim. P. 12 since 2006. It returns for the third time to the Standing Committee seeking authorization to publish for notice and comment a substantially revised rule. In response to the Standing Committee's suggestions and concerns raised in January 2011, the Advisory Committee undertook at its Spring meeting a final and more fundamental revision of Rule 12. The current proposal responds to each of the three major issues raised by the Standing Committee six months ago. It makes the following new changes:

1. Deleting use of the terms "waiver" and "forfeiture"

The revised proposal no longer employs the terms "waiver" or "forfeiture." Numerous participants at the Standing Committee expressed concern that even as restructured in January 2011, subdivision (e) ("Consequences of Not Making a Motion Before Trial as Required") still used the problematic terms "waiver" and "forfeiture." Because the ordinary meaning of waiver is a knowing and intentional relinquishment of a right, the non-standard use of that term in Rule 12 creates unnecessary confusion and difficulties. The Advisory Committee was urged to consider revising the rule to avoid using these terms.

After discussion the Advisory Committee concluded that it would be feasible and desirable to revise the rule to avoid these terms. Although the elimination of these terms was not part of the purpose of the amendment as originally envisioned by the Advisory Committee, there was agreement that the use of the term "waiver" has been a source of considerable confusion (see cases discussed in the Appendix to this report). Redrafting to avoid the terms "waiver" and "forfeiture" will achieve clarity and avoid traps for the unwary.

2. The standard for review of late-raised claims and the relationship to Rule 52

The revised proposal, like the earlier proposal in June 2009 and the January 2011 proposal, bifurcates the standard applicable when a defense, claim, or objection subject to Rule 12(b)(3) is raised in an untimely fashion, depending upon the type of claim at issue.

Omitting any reference to the term waiver, the Rule specifies that for all but two specific types of claims, an untimely claim may be considered only if the party who seeks to raise it shows "cause and prejudice." As explained in detail below, the Committee replaced the phrase "good cause" with "cause and prejudice" to reflect the Supreme Court's interpretation of the current rule.

For claims of failure to state an offense or double jeopardy, the amendment provides that the court may consider the claim if the party shows "prejudice only." This is a more generous test than that applicable to other claims raised late under Rule 12, because it does not require the objecting party to demonstrate "cause," i.e. the reason for failing to raise the claim earlier. It is also intended to be a more generous test than plain error under Rule 52(b) – the standard included in the January 2011 proposal – because it does not require the objecting party to show, in addition to prejudice, that the error was "plain" or that "the error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.' " *United States v. Olano*, 507 U.S. 725, 731-32 (1993).

Finally, the amendment directly addresses the relationship between these provisions and Rule 52. It provides that "Rule 52 does not apply."

3. Outrageous government conduct and reorganization

The revised amendment also reflects two other changes responsive to the comments of the Standing Committee and its style consultant in January 2011. First, because at least one circuit (the Seventh) does not recognize the defense of outrageous government conduct, the proposal omits any reference to the defense of outrageous government conduct. Second, the current proposal reflects some reorganization recommended by Professor Joseph Kimble to solve an organizational problem present in the current rule. Currently subdivision (d) (ruling on the motion) comes between the timing provisions in (c) and the consequences of failing to meet the timing requirements in (e). Professor Kimble recommended moving the provision on the consequences of failing to meet the deadline to solve this organizational problem. The current proposal bifurcates subdivision (c) and moves the redrafted provisions governing the consequences of failure to make a timely motion from Rule 12(e) to new paragraph (c)(2). Although the new proposal deletes current subdivision (e), it avoids renumbering the remainder of the rule by reserving subdivision (e).

The remainder of the memorandum will discuss in detail the Committee's rationale for each aspect of the amended proposal. An Appendix providing case authority and the Advisory Committee's current and prior proposals are provided at the end of the memorandum.

B. THE DECISION TO CLARIFY THE STANDARDS OF REVIEW IN RULE 12

Several reasons prompted the Advisory Committee to propose a clarification of the standard for consideration of claims and defenses not raised within the time prescribed by Rule 12(b)(3). The Advisory Committee expanded the scope of its initial proposal and explored the relationship between Rule 12 "waiver," on the one hand, and the concepts of forfeiture and plain error under Rule 52(b) at the urging of the Standing Committee. The results of the Advisory Committee's research have been described in the Appendix. Although the Supreme Court defined "good cause" under Rule 12 in its decisions in *Davis v. United States*, 371 U.S. 341, 364 (1963), and *Shotwell Mfg. Co. v. United States*, 411 U.S. 233 (1973), there has been a great deal of litigation and a multiplicity of approaches have developed in different circuits. The Advisory Committee concluded that an amendment clarifying the standard of review would benefit courts and litigants, and would eliminate the current disparity in treatment of similar cases that arise in different circuits.

1. The Standing Committee's role in the development of the current proposal

Although the Advisory Committee initially proposed a very narrow amendment to Rule 12 dealing solely with failure-to-state-an offense claims, the Standing Committee twice urged the Advisory Committee to undertake a more comprehensive examination of the Rule. The amendment proposed by the Advisory Committee in 2009 merely added a new standard of relief from waiver for claims of a failure to state an offense if a defendant showed prejudice to his substantial rights. The Standing Committee remanded this proposal with instructions to give additional consideration to the concepts of "waiver" and "forfeiture" and how Rule 12 interacted with Rule 52. After the Advisory Committee reworked the rule more substantially, allowing for certain claims to be considered "forfeited," not waived, and to be considered for relief on a showing of plain error, the Standing Committee again remanded. Members urged the Advisory Committee to consider not using the terms "waiver" and "forfeiture." They also expressed concern that using plain error review for more favored claims might be too demanding a standard. The Advisory Committee responded to the latest Standing Committee remand by eliminating the terms "waiver" and "forfeiture" and instead simply specifying the circumstances under which a late-filed motion may be considered, adding that the Rule 12 standards are to be used and not those of Rule 52. Thus the Advisory Committee's latest clarification of the Rule 12 standards is in answer to specific suggestions of the Standing Committee.

2. The need for clarification

There is applicable Supreme Court precedent interpreting the current Rule 12(e), and in particular its "good cause" standard, which some lower courts have been failing to follow. In *Shotwell Mfg. Co. v. United States* ,[1] reviewing on direct appeal the defendants' untimely objection to jury selection, the Court held that the standard for relief from waiver under Rule 12 included an inquiry into prejudice. And in *Davis v. United States*,[2] the Court held that "a claim once waived pursuant to [Rule 12] may not later be resurrected, *either in the criminal proceedings* or in federal habeas, in the absence of the showing of 'cause' which that Rule requires."[3] The Court has never questioned the interpretations of Rule 12's "good cause" standard that it announced in *Shotwell* and *Davis.* Indeed, in later cases it has reiterated both key points about that standard: First, the standard is cause *and prejudice*,[4] and second, the standard applies on direct appeal as well as in the district court.[5]

Despite *Shotwell* and *Davis,* courts of appeals have divided over the standard for reviewing claims that should have been raised before trial under Rule 12, but were instead raised for the first time on appeal. Although none of the Court's cases discussing Rule 52 – including *Olano v. United*

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[1]371 U.S. 341, 364 (1963).

[2]411 U.S. 233 (1973).

[3]*Id.* at 242 (emphasis added).

[4]*See Murray v. Carrier*, 477 U.S. 478, 494 (1986) ("the former Rule 12(b)(2) . . . as interpreted in [*Shotwell* and *Davis*] treated prejudice as a component of the inquiry into whether there was cause for noncompliance with that rule"); *United States v. Frady*, 456 U.S. 152, 185 (1982) (Brennan, J., dissenting) (stating that the Court in *Shotwell* "construed the cause exception to Rule12(b)(2) as encompassing an inquiry into prejudice.")

[5]*See Wainwright v. Sykes*, 433 U.S. 72, 84 (1986) (noting that in *Davis,* "we concluded that review of [a claim waived under Rule 12] should be barred on habeas, *as on direct appeal*, absent a showing of cause for the noncompliance and some showing of actual prejudice resulting from the alleged constitutional violation").

States[6] – even mention Rule 12, some courts of appeals have applied plain error review to such claims. Four approaches have emerged:

(1) The majority of circuits will not consider the claim unless the defendant can meet the Rule 12 exception for "good cause" and do not apply plain error;

(2) Several decisions from the Seventh Circuit require the appellant to establish first "good cause" under Rule 12 and then, in addition, establish plain error under Rule 52(b);

(3) Cases from the Fifth Circuit, and a number of cases from various circuits, reason that even without showing of cause under Rule 12, the claim should be remedied if it amounts to plain error; and

(4) Several recent decisions of the Seventh Circuit require the appellate court to ask whether it *would have been* within the trial court's discretion to have denied a claim as untimely if the claim *had been* raised in the trial court.

These approaches and cases following each are explained in more detail in the Appendix.

Clarifying the rule's standards will benefit litigants and courts alike, giving litigants clearer expectations regarding the precise consequences of a failure to timely file their required motions and guiding courts out of the present disagreement. Recent appellate decisions have noted the need for clarification.[7] Finally, clarifying the rule's standards will promote a uniformity of treatment for Rule 12 motions in place of the current confusion, which has resulted in similar situations receiving different treatment depending on the particular circuit and even sometimes based on the particular panel within the same circuit.

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[6] 507 U.S. 725 (1993). The Supreme Court cases reviewing late-raised error, including *Shotwell*, *Davis*, and *Olano*, are examined in more detail in the Appendix.

[7] *See United States v. Burke*, 633 F.3d 984, 988 (10th Cir. 2011) (noting "confusion in this area" and deciding to "clarify" by holding that Rule 12 and not Rule 52 applies to suppression motions raised for the first time on appeal); *United States v. Rose*, 538 F.3d 175, 183–84 (3d Cir. 2008) (noting that court has chosen to "analyze and resolve explicitly the tension between Rule 52(b) and Rule 12 where suppression motions are concerned").

C. THE CHOICE OF "CAUSE AND PREJUDICE" AS THE SHOWING REQUIRED TO OBTAIN CONSIDERATION OF MOST LATE-FILED RULE 12 MOTIONS

1. Retaining (but clarifying) the Current Standard

Rule 12 as presently written provides that a party "waives" any defense, objection, or request that he has not timely filed, but that "[f]or good cause, the court may grant relief from the waiver." Fed. R. Crim. P. 12(e). There are two important aspects of this standard: (1) the notion of "waiver" as stated in the present rule was intended to bar any consideration of a late-filed motion unless the court found an adequate basis to excuse the waiver (for "good cause"); and (2) the "good cause" standard for relief from the waiver as interpreted by the Supreme Court encompasses a showing of both "cause," – *i.e.*, a satisfactory reason for the party's meeting the deadline – and prejudice. The Advisory Committee found no reason to change either aspect of the standard as applied to the majority of motions that fall within the Rule (though it did slightly modify the language to more clearly state that standard).

a. The "Waiver" standard of the present Rule 12

It is clear from the present rule that it was meant to extinguish and bar judicial consideration of a late-filed motion, absent a court's finding of "good cause." As discussed in detail in *United States v. Chavez-Valencia*, 116 F.3d 127, 130–31 (5th Cir. 1997), and *United States v. Rose*, 538 F.3d 175, 177–79 (3rd Cir. 2008), both the text and history of the Rule demonstrate that it was meant to require certain motions to be raised before trial, and that the failure to do so would result in a waiver of that claim, not a mere forfeiture. The Supreme Court has confirmed that meaning of the Rule in *Davis v. United States*, 411 U.S. 233 (1973). In that case, the Supreme Court described the question before it as a construction of Rule 12's waiver provision, when it said, "We are called upon to determine the effect of Rule 12(b)(2) of the Federal Rules of Criminal Procedure on a postconviction motion for relief which raises for the first time a claim of unconstitutional discrimination in the composition of a grand jury." *Id*. at 234. The district court denied Davis's habeas petition, finding that he had waived the claim by not raising it under Rule 12(b), and that there was no cause to excuse the waiver. *Id*. at 235–36.

On Supreme Court review, the defendant argued that a fundamental constitutional right cannot be waived absent a finding after a hearing that the defendant had understandingly and knowingly relinquished the right. *Id*. at 236. The Supreme Court rejected that argument, noting that "[b]y its

terms," the Rule "applies to both procedural and constitutional defects in the institution of prosecutions which do not affect the jurisdiction of the trial court." *Id*. at 236–37. The Court found defendant's reliance on other Supreme Court precedent on waiver inapposite where a specific rule, "promulgated by this Court and, pursuant to 18 U.S.C. § 3771, 'adopted' by Congress, governs by its terms the manner in which the claims of defects in the institution of criminal proceedings may be waived." *Id*. at 241. The Court therefore held that an untimely claim under Rule 12 "once waived pursuant to that Rule may not later be resurrected, either in the criminal proceedings or in federal habeas, in the absence of the showing of 'cause' which that Rule requires." *Id*. at 242.

Davis thus makes clear that Rule 12 was intended to completely bar consideration of a claim that the Rule requires a party to raise before trial when the party fails to raise it on time, unless the party has shown cause and prejudice for his omission. While it is true that the notion of waiver often means a knowing and intentional relinquishment, the Supreme Court explained in *Davis* that that concept of waiver did not apply where the express waiver provision of Rule 12 governed to warn a litigant that his failure to comply with the rule would result in its waiver. *Davis*, 411 U.S. at 239–40.[8]

Several members of the Standing Committee suggested that it would avoid confusion if Rule 12 omitted use of the term "waiver" because the Rule's concept of waiver is different from the definition most people consider typical of a waiver. The Advisory Committee's current draft omits the term "waiver" and avoids using the word "forfeiture," and instead expresses the same idea in different language. In doing so, the Advisory Committee did not intend to change the basic policy of the Rule with respect to the majority of motions the Rule requires to be raised pretrial: that is, that a claim not raised by the deadline the court sets is extinguished, absent a showing of cause and prejudice. Indeed, no one advocated a change in this standard; as a previous memo to the Advisory Committee explained, the Rule 12 Subcommittee found no basis for replacing the Rule's present

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[8] In *United States v. Olano*, 507 U.S. 725, 733 (1993), the Supreme Court described the concept of waiver as "the 'intentional relinquishment or abandonment of a known right,'" but it went on to clarify that certain features of a waiver, including "whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." Lower courts have thus found that *Olano* and *Davis* are not inconsistent with each other, and that *Olano*, which never mentioned Rule 12 or *Davis*, did not overrule *Davis*. *See United States v. Weathers*, 186 F.3d 948, 957 (D.C. Cir. 1999) (finding no indication that *Olano* meant to redefine the meaning of Rule 12 as established in *Davis*); *see also Rose*, 538 F.3d at 183 (finding no indication that the Rule 12 concept of waiver—extinguishing an unraised claim—is at odds with *Olano*).

standard with plain error review, finding that "the reasons for denying relief for untimely claims absent a showing of cause and prejudice remain unchanged." March 14, 2010, Memo Regarding Proposed Amendments to Rules 12 and 34 from Reporters Sara Beale and Nancy King to Criminal Rules Committee.

The Supreme Court explained one rationale for Rule 12's waiver provision in *Davis*, 411 U.S. at 241, describing the kind of "sandbagging" that the Rule seeks to avoid:

> If its time limits are followed, inquiry into an alleged defect may be concluded and, if necessary, cured before the court, the witnesses, and the parties have gone to the burden and expense of a trial. If defendants were allowed to flout its time limitations, on the other hand, there would be little incentive to comply with its terms when a successful attack might simply result in a new indictment prior to trial. Strong tactical considerations would militate in favor of delaying the raising of the claim in hopes of an acquittal, with the thought that if those hopes did not materialize, the claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult.

In addition, quite apart from the concern about "sandbagging," considerations of judicial efficiency and economy also favor requiring litigants to file in advance of trial certain motions that are collateral to the merits and that can be resolved before trial. Moreover, for some motions that seek suppression of evidence or dismissal of an indictment, pre-trial resolution is important in order to allow for the possibility of an interlocutory appeal by the government, no longer available once jeopardy has attached (*see* 18 U.S.C. § 3731). *See United States v. Pope*, 467 F.3d 912, 919 (5th Cir. 2006). And in the case of suppression motions, if no motion has been made before trial, the government may rely on that in choosing the quantity or quality of evidence it introduces, a decision that might be quite different if it knew that a suppression motion could be entertained later. *United States v. Chavez-Valencia*, 116 F.3d 127, 132 (5th Cir. 1997). For all these reasons, the Advisory Committee saw no basis for making any substantive change in the "waiver" except for "good cause" standard of Rule 12 for the majority of motions governed by the Rule. Avoiding the term "waiver," the proposed amendment now speaks in terms of "consequences" of an untimely motion under Rule 12(b)(3), and states that a court "may consider the defense, objection or request" only under certain specified circumstances.

b. The "Good Cause" standard of the present Rule 12

The second aspect of the present Rule 12 is the feature that allows relief from the waiver of a claim if the party shows "good cause." The Advisory Committee also saw no reason to change that aspect of the Rule's standard, believing that the Rule was intended – and should continue – to significantly restrict relief for untimely claims. The Advisory Committee did, however, conclude that the language of the Rule should be modified slightly to bring it in line with the Supreme Court's reading of the Rule in *Davis*. As noted above and described in more detail in the Appendix, the Supreme Court was quite clear in *Davis*, drawing from its decision in *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 363 (1963), that the "good cause" provision of Rule 12 must include a showing of actual prejudice as well as a reason for the late filing (*see Davis*, 411 U.S. at 243–45; *Shotwell*, 371 U.S. at 363 (finding it "entirely proper to take absence of prejudice into account in determining whether a sufficient showing has been made to warrant relief from the effect of [Rule 12(b)(3)]")).

In later cases involving the "cause and prejudice" standard as applied to other types of defaulted claims brought on collateral attack, the Court referred to *Davis*, reiterating that the same test applied in the Rule 12(b) context. In *Murray v. Carrier*, 477 U.S. 478 (1986), for example, both Justice O'Connor's opinion for the Court and Justice Stevens' opinion concurring in the judgment agreed on the content of Rule 12's "cause" standard. 477 U.S. at 494 ("the former Rule 12(b)(2) of the Federal Rules of Criminal Procedure, as interpreted in *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 83 S. Ct. 448, 9 L.Ed.2d 357 (1963), and *Davis v. United States*, 411 U.S. 233, 93 1577, 36 L.Ed.2d 216 (1973), treated prejudice as a component of the inquiry into whether there was cause for noncompliance with that rule") (opinion of the Court); *id*. at 502–03 (though "[t]he term 'prejudice' was not used in Rule 12(b)(2)," the Court in *Shotwell* "decided that a consideration of the prejudice to the defendant, or the absence thereof, was an appropriate component of the inquiry into whether there was 'cause' for excusing the waiver that had resulted from the failure to follow the Rule") (Stevens, J., concurring in the judgment). *See also Coleman v. Thompson*, 501 U.S. 722, 745 (1991) (noting that *Davis* had held that a defaulted Rule 12 claim could not be heard absent a showing of cause and actual prejudice).

The Advisory Committee found, however, that some confusion had developed in the federal appellate courts regarding the meaning of the "good cause" requirement in Rule 12. Many courts have

held, consistently with *Davis*, that a party must show both a reason for failing to raise the claim and prejudice to his case in order to have his late-filed claim considered by the court.[9] But other opinions reflect confusion about the need for a showing of prejudice. See *Rose*, 538 F.3d at 184; *United States v. Anderson*, 472 F.3d 662, 670 (9th Cir. 2006); *United States v. Campbell*, 999 F.2d 544 (9th Cir. 1993), 1993 WL 263432, *6 n.2 (unpublished); *United States v. Cathey*, 591 F.2d 268, 271 n.1 (5th Cir. 1979).

The Advisory Committee saw no reason to depart from the standard of "good cause" as interpreted by the Supreme Court and applied by the majority of courts of appeals. If the Rule's policy of strictly requiring timely motions is to have any teeth, a party should not be permitted to raise an untimely claim unless he can show both a good reason not to have met the deadline and some actual prejudice to his case if his claim is not heard. As the Supreme Court explained in *Davis*, there are good reasons to require that certain motions be raised and resolved in the district court when objections can be remedied before a trial commences. If a required motion is not timely filed, and a sufficient reason is shown for a party's failure to abide by the Rule, but the party has suffered no prejudice from the failure to address his claim, the same reasons that motivated the rule – the concern for preventing "sandbagging" as a defense tactic, judicial economy and the desire not to interrupt a trial for auxiliary inquiries that should have been resolved in advance, and the resulting prejudice, in some cases, to the government's interests in having one fair chance to convict (*see* 6 Wayne R. La Fave, *Search and Seizure* § 11.1(a) at 8 (2004 ed.)) – all argue against allowing consideration of the motion. *See, e.g.*, *Kopp*, 562 F.3d at 143 (even if cause were shown, no prejudice demonstrated where defendant testified and admitted substance of statements he sought to have suppressed).

Because, however, of the disagreement that has developed among some courts as to whether "good cause" includes a requirement to show prejudice, and because this particular use of the term "good cause"—to include both a sufficient reason and prejudice—is not obvious from the face of the rule, the Advisory Committee thought it advisable to modify the language of the rule to ensure that

[9] *See United States v. Kopp*, 562 F.3d 141, 143 (2d Cir.), *cert. denied*, 130 S. Ct. 529 (2009); *United States v. Santos Batista*, 239 F.3d 16, 19–20 (1st Cir. 2001); *United States v. Oldfield*, 859 F.2d 392, 397 (6th Cir. 1988); *United States v. Hirschhorn*, 649 F.2d 360, 364 (5th Cir. 1981); *United States v. Williams*, 544 F.2d 1215, 1217 (4th Cir. 1976).

the current standard is read as construed by *Davis* and *Shotwell*. Thus the proposed amendment provides that an untimely motion may still be considered if "the party shows cause and prejudice."[10]

2. The "Cause and Prejudice" Standard Also Applies in the Courts of Appeals

Although there has been no question that the "good cause" or "cause and prejudice" standard of Rule 12 applies whenever a late-filed motion is presented to the district court, the appellate courts are divided on the question of the applicable standard when a party raises a Rule 12 motion for the first time in the court of appeals. As discussed in the Appendix, eight circuits have applied Rule 12's "good cause" standard when a party raises for the first time on appeal a claim that Rule 12 requires to be raised before trial.[11] But other courts have decided or assumed that at the appellate level Rule 52(b)'s plain error rule applies, although sometimes in combination with Rule 12's good cause standard.[12] (And some courts take differing views even within the same circuit.[13])

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[10] No other similar example of the use of the term "good cause" with this particular meaning has been brought to the Advisory Committee's attention; thus it did not appear necessary to change that term as it appears elsewhere in the rules.

[11] *E.g.*, *United States v. Weathers*, 186 F.3d 948, 954–58 (D.C. Cir. 1999); *United States v. Yousef*, 327 F.3d 56, 125 (2d Cir. 2003); *United States v. Rose*, 538 F.3d 175, 182–85 (3d Cir. 2008); *United States v. Collins*, 372 F.3d 629, 633 (4th Cir. 2004); *United States v. Collier*, 246 Fed. Appx. 321 (6th Cir. 2007) (unpublished); *United States v. Anderson*, 472 F.3d 662, 668–69 (9th Cir. 2006); *United States v. Burke*, 633 F.3d 984, 988–91 (10th Cir.), *cert. denied*, 2011 WL 939018 (2011); *United States v. Nix*, 438 F.3d 1284, 1288 (11th Cir. 2006).

[12] *See United States v. Lugo Guerrero*, 524 F.3d 5, 11 (1st Cir. 2008) (assuming claim could be reviewed for plain error despite Rule 12 waiver); *United States v. Scroggins*, 599 F.3d 433, 448 (5th Cir.), *cert. denied*, 131 S. Ct. 158 (2010); *United States v. Johnson*, 415 F.3d 728, 730–31 (7th Cir. 2005).

[13] *Compare Nix*, 438 F.3d at 1288 (finding claim waived) *with United States v. Sanders*, 315 Fed. Appx. 819, 821 (11th Cir. 2009) (using plain error); *and compare Scroggins*, 599 F.3d at 448 (using plain error) *with United States v. St. Martin*, 119 Fed. Appx. 645, 649 (5th Cir. 2005) (using cause); *and compare United States v. Wilson*, 962 F.2d 621, 626–27 (7th Cir. 1992) (finding multiplicity claim waived), and *United States v. Welsh*, 721 F.2d 1142, 1145 (7th Cir. 1983) (finding suppression

The Advisory Committee concluded that it would be desirable to clarify the rules to promote uniformity on this important point, and that the amendment should make it clear that Rule 12's "good cause" standard – rather than the plain error standard of Rule 52(b) – applies when a party raises for the first time on appeal a claim that Rule 12 requires to be raised before trial. In so doing, the proposed amendment adopts the position taken by the majority of circuits.[14]

There are a number of reasons for specifying that Rule 12's standard must be applied both at the district court level and in the court of appeals, and that Rule 12 rather than Rule 52(b)'s plain error standard governs in the court of appeals.

Applying Rule 52(b) rather than Rule 12(e) would undercut the policy expressed in Rule 12[15] and create a perverse incentive to raise late claims on appeal rather than in the district court. Indeed, in *Davis* the Supreme Court emphasized that it was important to continue using Rule 12's scheme of waiver/good cause beyond the trial court proceedings in order to preserve the policy of the Rule. It was argued in *Davis*, a proceeding under Section 2255, that Rule 12's waiver standard did not apply to bar consideration of the defendant's claim on collateral attack. After noting that "Congress did not deal with the question of waiver in the federal collateral relief statutes," the Court determined that Rule 12's express waiver standard must apply throughout the criminal proceedings in order give effect to the Rule. It explained:

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claim waived), *with United States v. Percival*, 756 F.2d 600, 611 (7th Cir. 1985) (finding plain error), and *United States v. Clarke*, 227 F.3d 874, 880-881 (7th Cir. 2000) (using plain error in the alternative).

[14]*See, e.g.*, *Weathers*, 186 F3d at 954–58*; Rose*, 538 F.3d at 182–85; *Anderson*, 472 F.3d at 668-669; *Burke*, 633 F.3d at 988-991.

[15]A related line of analysis has been persuasive to many appellate courts, which have concluded that the more specific provisions of Rule 12, rather than the more general provisions of Rule 52(b), should be controlling when appellate courts review claims not raised before trial as required by Rule 12(b)(3). *See Rose*, *supra*, 538 F.3d at 183; *Burke*, 633 F.3d at 989; *Weathers*, 186 F.3d at 955. These cases reflect a recognition that the more specific standard of Rule 12(e) that is expressed as waiver with relief for good cause is not consistent with the more general plain error/forfeiture standard of Rule 52(b), and application of Rule 52(b) would nullify Rule 12.

> We think it inconceivable that Congress, having in the criminal proceeding foreclosed the raising of a claim such as this after the commencement of trial in the absence of a showing of 'cause' for relief from waiver, nonetheless intended to perversely negate the Rule's purpose by permitting an entirely different but much more liberal requirement of waiver in federal habeas proceedings. We believe that the necessary effect of the congressional adoption of Rule 12(b)(2) is to provide that a claim once waived pursuant to that Rule may not later be resurrected, either in the criminal proceedings or in federal habeas, in the absence of the showing of 'cause' which that Rule requires. We therefore hold that the waiver standard expressed in Rule 12(b)(2) governs an untimely claim of grand jury discrimination, not only during the criminal proceeding, but also later on collateral review.

411 U.S. at 242.

It would be odd indeed if the waiver/good cause standard of Rule 12 applied in the district court and again on collateral review, but the more generous plain error standard applied in the court of appeals. If it would "perversely negate the Rule's purpose" to use a different standard on collateral review, surely it would also be perverse to use a different standard on direct review. The Court must have meant, when it said that a "claim once waived . . . may not later be resurrected either in the criminal proceedings or in federal habeas" that "criminal proceedings" includes direct appeal.

And it is quite clear, also from Supreme Court case law, that a plain error standard is both different from and more lenient than the "waiver except for cause and prejudice" standard of Rule 12. In *United States v. Frady*, 456 U.S. 152 (1982), the Court considered a claim of error in the jury instructions, a claim that the defendant had failed to raise either in the trial court or on appeal. On collateral attack, he argued that his default should be reviewed according to the plain error standard of Rule 52(b), but the Supreme Court disagreed and held that the court of appeals was wrong to have used that standard, which is appropriate for correcting obvious injustices on direct appeal, but is not for use on collateral review. Instead, referring to previous cases that had made the same point, the Court reiterated that a defendant must "clear a significantly higher hurdle" on collateral review "than would exist on direct appeal" and that the plain error standard was not sufficiently stringent at the collateral stage. *Frady*, 456 U.S. at 166. The Court then referred back to *Davis* and held that the proper standard was the "cause and actual prejudice" standard enunciated there, which it had later

confirmed applied not only in the Rule 12 context but in other cases when a defendant sought relief on collateral attack from a trial error to which no objection had previously been made. *Id*. at 167–68.

See also United States v. Evans, 131 F.3d.1192, 1193 (7th Cir. 1997) ("'Cause' is a more stringent requirement than the plain-error standard of Fed. R. Crim. P. 52(b)" (citing *Frady*)).

In short, the Supreme Court has unequivocally stated that the same "cause and actual prejudice" standard described in *Davis* is a far harder standard to meet than Rule 52's plain error standard. Thus, the reasoning in decisions of the courts cited in the Appendix, *infra*, is correct: if the courts of appeal revert to Rule 52's plain error standard when a Rule 12 claim is raised for the first time on appeal, the effect is to give the defendant a more lenient standard to satisfy than he would have faced if his motion were late but still made in the district court. This is an illogical result if Rule 12's policy of requiring certain motions to be made before trial is to have any real meaning. And such a result would also mean that Rule 12's stringent standard actually adds nothing to Rule 52(b)'s forfeiture standard, rendering Rule 12 entirely ineffective. This is true whether plain error is used exclusively on appeal or if it is used as an alternative to Rule 12's good cause requirement. Once it is established that good cause has not been shown, Rule 12 should allow no further consideration of the claim, even for plain error, or the effect of the waiver is nullified.

Nor should the two standards, "cause and prejudice" and plain error, be applied in combination, as some courts have done.[16] *Frady* itself indicates that the two standards are distinct – either one or the other is appropriate, but not both – and mutually exclusive. If only one of the two standards, not both, is appropriate on collateral review, it is hard to see why they should be combined on direct appeal. In addition, overlaying the two standards forces an appellant to satisfy *two* demanding standards instead of just one, a result that seems even harsher than Rule 12's policy of allowing relief from a waiver if the litigant can satisfy the stated standard.

One major concern prompting an appellate court's refusal to apply Rule 12's cause and prejudice standard is the view that Rule 12's cause and prejudice standard must apply only at the trial court level because "cause and prejudice" is the sort of factually based determination that can only be

[16] *See, e.g. United States v. King*, 627 F.3d 641, 647 (7th Cir. 2010) ("King has not established good cause for his failure to present the illegal entry argument previously. And even if he passed that threshold, King has not shown error, much less plain error, in the district judge's decision.").

made by a district court. *See United States v. Acox*, 595 F.3d 729, 731 (7th Cir. 2010). *Acox*, while recognizing that Rule 52(b) should not be used "to undercut an express provision of Rule 12(e)" (*id.* at 731), went on to conclude that Rule 12's waiver provision is for the district court only. Though the Rule says that "the court" may grant relief from the waiver, not specifically "the district court," *Acox* reasoned that it must mean the district court because "Rule 12 as a whole governs pretrial proceedings in federal district courts." *Id*. at 731. The court then determined that the court of appeals could only review what the district court had decided regarding whether to find "good cause," and if no relief from the waiver was requested of the district court, the court of appeals would determine whether, had a motion for relief been made and denied, the district court would have abused its discretion in finding no good cause. *Id*. at 732.

But when the text of the rule is not limited to consideration of "good cause" by district courts alone, it seems odd to conclude that Rule 12 contemplates appellate review of a district court action that did not occur. And in other decisions, the Seventh Circuit has indicated that the appellate court could indeed assess cause itself.[17] Thus the concerns expressed in *Acox* have not deterred that court from using the cause standard in other cases. And while *Acox* distinguished a "handful" of that court's prior decisions assessing cause in the first instance, it did not distinguish or even mention the decisions in footnote 17. So it is not at all clear that *Acox* represents the settled view of the Seventh Circuit on this point.

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[17]*See United States v. Dimitrova*, 266 Fed. Appx. 486, 489 (7th Cir. 2008) ("Dimitrova has offered no cause or explanation for her failure to raise the suppression issue before trial . . . [She] did not offer a 'good cause' explanation sufficient under Rule 12(e) and *Johnson* in her posttrial motion, nor has she done so on appeal."); *United States v. Quintanilla*, 218 F.3d 674, 678–79 (7th Cir. 2000) ("Although it is the appellant's burden to establish 'cause' for his failure to raise the no-knock issue in a motion to suppress, Quintanilla's brief fails to even suggest a reason for the failure . . . Furthermore . . . [g]iven the circumstances surrounding the actual entry into the defendant's home . . . [w]e are convinced that Quintanilla has failed to establish cause for his failure to raise the authorization of a no-knock entry in a motion to suppress. "); *United States v. Evans*, 131 F.3d 1192, 1193 (7th Cir. 1997) ("Evans has not tried to establish 'cause' for neglecting this subject earlier; indeed, his opening brief does not mention the fact that the issue was not presented to the district court. His reply brief halfheartedly contends that trial counsel was ineffective for failing to make the necessary motion to suppress, but this argument is too late and too undeveloped to be considered.").

Record concerns have not prevented most appellate courts from applying the Rule 12 cause and prejudice standard. When the record does contain enough information, courts have either reviewed the record to evaluate the propriety of the district court's determination,[18] or reviewed the record themselves to evaluate the cause claimed for the first time on appeal.[19] When no record on cause and prejudice exists, either because no attempt was made to show good cause to the district court or because no motion was ever made in the district court, some courts of appeals seem to invite a showing of good cause on appeal by either noting that appellant has made no attempt to

[18]*United States v. Rodriguez-Lozada*, 558 F.3d 29, 37–38 (1st Cir.) (record showed no abuse of discretion in district court's rejection of claim of good cause), *cert. denied*, 130 S. Ct. 283 (2009); *United States v. Mendoza-Acevedo*, 950 F.2d 1, 3 (1st Cir. 1991) (same); *United States v. Blair*, 214 F.3d 690, 699–701 (6th Cir. 2000) (upholding district court's rejection of good cause because "George has failed to demonstrate an objective external factor that prohibited him from raising an objection to the jury selection plan prior to his trial"); *United States v. Moore*, 98 F.3d 347, 351 (8th Cir. 1996) (district court correctly denied claim of good cause when defendants were personally present during the stop they belatedly challenged and they were responsible for informing counsel of those facts).

[19]*United States v. Heilman*, 377 Fed. Appx. 157, 201 n.33 (3d Cir.) ("we are not persuaded by Napoli's argument that the second superseding indictment was so vague as to preclude a misjoinder argument" when defense counsel received relevant materials a month before trial, allowing plenty of time to develop a basis for a severance motion), *cert. denied*, 131 S. Ct. 490 (2010).

show cause or evaluating in the first instance the proffered showing.[20] Other courts suggest a remand for an evidentiary hearing on the issue.[21] And some decisions state that attorney ineffectiveness as cause should be presented in a motion under 28 U.S.C. § 2255.[22] Finally, some appellate courts have decided that in the absence of a record on cause, the appellant simply loses on his request for relief from waiver.[23]

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[20]*See United States v. Howard*, 998 F.2d 42, 52 (2d Cir. 1993) ("counsel offers no reason for her failure to discuss with her client the circumstances of his arrest before the court's April 26 deadline" and in the absence of "a demonstration of cause, we need not address the merits of Santana's fourth amendment argument"); *United States v. Collier*, 246 Fed. Appx. 321, 335 (6th Cir. 2007) (unpublished) ("record reflects no attempt on Defendant's part to demonstrate good cause before the district court, or even to assert these challenges during trial. Nor does Defendant's brief on appeal address or explain his Rule 12(e) waiver."); *United States v. Anderson*, 472 F.3d 662, 668–69 (9th Cir. 2006) (though appellant never asked district court for relief from waiver, appellate court has "authority to decide whether there is good cause;" based on representations in reply brief and absence of document necessary to appellant's claim in the docket, court of appeals found good cause and granted relief from waiver); *United States v. Suescun*, 237 F.3d 1284, 1286–87 (11th Cir. 2001) (noting that appellant did not ask district court for relief from his waiver, and that "[a]rguably, he could have asked us to grant relief from the waiver, but he has not done so").

[21]*See Weathers*, 186 F.3d at 958–59 (where appellant claimed ineffective assistance of counsel as cause for waiver of claim, court remanded to district court for factual development of ineffectiveness claim); *Rose*, 538 F.3d at 184 (where cause argued for first time on appeal, court could remand for evidentiary hearing, but no need here where appellant offered no colorable explanation for his failure to file timely claim).

[22]*See Evans*, 131 F.3d at 1193; *United States v. Nix*, 438 F.3d 1284, 1288 (11th Cir. 2006); *Rudisill v. United States*, 222 Fed. Appx. 844, 846 (11th Cir. 2007).

[23]*See United States v. Nunez*, 19 F.3d 719, 722 (1st Cir. 1994) ("we have not had occasion, nor are we disposed, *sua sponte*, to conjure relief from waiver under Rule 12(f) in circumstances where no cause for relief appears and the district court record does not enable reliable appellate review on the merits"); *United States v. Yousef*, 327 F.3d 56, 125 (2d Cir. 2003) ("Murad had ample opportunity to raise and develop this argument before the District Court and he has not provided, much less established, any reasonable excuse for his failure to do so. Accordingly, we hold that Murad has waived this argument."); *United States v. Crowley*, 236 F.3d 104, 109–10 (2d Cir. 2000) (where

In sum, for all the reasons explained above, the Advisory Committee concluded that the better-reasoned view was that Rule 12's cause and prejudice standard should apply both at the district court level and on appeal, and the Advisory Committee therefore chose to clarify the Rule so that courts and litigants will clearly understand that any request for relief from the waiver must be judged by the same standard whenever it is presented.

3. The Decision to Specify in the Rule that Rule 12 Controls, Not Rule 52

Finally, the Advisory Committee chose to state explicitly in Rule 12 that Rule 52 does not apply, making it clear that the new standards in Rule 12 *substitute* for the default standards provided in Rule 52. Providing more clarity about the relationship between the two Rules is something the Standing Committee requested in 2009.

The Advisory Committee wanted to foreclose any argument that by including the language drawn from Rule 52(a), while being silent about plain error and Rule 52(b), the Rule would leave open the possibility of applying plain error. In *United States v. Vonn*, 535 U.S. 55 (2002), the Court held that plain error review under Rule 52(b) applies to untimely Rule 11 errors, despite the language in Rule 11(h), which provides: "A variance from the requirements of this rule is harmless error if it does not affect substantial rights." The Court concluded (with only Justice Stevens dissenting), that "there are good reasons to doubt that expressing a harmless-error standard in Rule 11(h) was meant to carry any implication beyond its terms. At the very least, there is no reason persuasive enough to think 11(h) was intended to repeal Rule 52(b) for every Rule 11 case." *Vonn*, 535 U.S. at 74. Although the present amendment could be distinguished from the provision interpreted in *Vonn*, the Advisory Committee concluded that *Vonn* demonstrates the value of explicitly addressing the relationship between the proposed amendment and Rule 52.

Furthermore, addressing this issue in the text of the rule is preferable to addressing it in the Committee Note. As a policy matter, any substance should be addressed in the rules rather than in the

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district court gave no explanation of how defendants had shown cause for non-compliance with Rule 12 "and we have found nothing in the record that would explain why defendants did not raise their objection to the specificity of the indictment before trial," district court's decision to grant relief from waiver was legal error).

accompanying note. Addressing the applicability of Rule 52(b) in the text of the rule is particularly appropriate because of the continuing confusion in the lower courts, as noted above, about what standard of review Rule 12 requires for untimely claims. Adding language to the text of the Rule would eliminate uncertainty and resulting litigation costs.

D. WHY THE COMMITTEE USED A DIFFERENT STANDARD FOR MOTIONS CHALLENGING THE INDICTMENT FOR FAILURE TO STATE AN OFFENSE

1. The Committee's Original Proposal to Amend Rule 12

The proposal to amend Rule 12 had as its genesis a proposal in 2006 from the Department of Justice. The Department urged Rule 12 to be amended to take account of the Supreme Court's decision in *United States v. Cotton*, 535 U.S. 625 (2002), which held that an indictment's failure to state an offense does not deprive the court of jurisdiction. One justification for the present Rule 12's provision that allows such claims to be raised at any time, even on appeal, was that they were thought to be jurisdictional defects. The *Cotton* decision undercut this rationale for not requiring that this particular error in the indictment be raised prior to trial. The Department therefore proposed that claims challenging the indictment for failure to state an offense should be added to the list of motions that must be raised before trial.

In April 2009, the Advisory Committee approved a proposal to amend Rule 12, but its proposal did not simply move failure-to-state-an-offense claims to the list of motions that must be filed before trial or be subject to the same waiver provision in current Rule 12(e). Rather, the Advisory Committee's proposed amendment provided for two different standards for obtaining relief from the waiver. The amendment would have allowed the court to grant relief from the waiver for good cause – as in the current rule – *or* "when a failure to state an offense in the indictment or information has prejudiced a substantial right of the defendant."

The more generous standard for relief from waiver of a late-filed Rule 12 claim was chosen in recognition that an indictment's failure to state an offense could at times implicate important constitutional rights of a defendant, such as due process, the need for adequate notice of the offense charged, or the ability to present a defense. *See, e.g., United States v. Hathaway*, 318 F.3d 1001 (10th Cir. 2003) (where indictment contained no language to indicate offense charged was felony assault, late Rule 12 objection allowed to prevent defendant from being sentenced as a felon); *United States v. Hosseini*, 506 F. Supp. 2d 269, 270–71 (N.D. Ill. 2007) (one count of indictment challenged as

failing to state an offense after jury sworn; though indictment could have been cured if motion made earlier, no question that it failed to allege each element of the offense and count was dismissed). Because of these qualitatively different and potentially more serious consequences, the Advisory Committee has consistently taken the position that a defendant should face an easier standard for relief from the consequences of a late-filed Rule 12 motion if his late motion claims that the indictment fails to state an offense. Specifically, recognizing that an oversight by a defendant's attorney will generally not qualify as "cause" under the standard of review applied by most courts to other untimely claims under Rule 12, the Advisory Committee decided that requiring a showing of "cause" as well as prejudice would be inappropriate if an indictment failed to state an offense.

2. The Committee's Revised Proposals in Response to Standing Committee Concerns

As explained more fully in the Appendix, the Standing Committee remanded the Advisory Committee's 2009 proposal for further study of the concepts of "waiver" and "forfeiture" and how Rule 12 interacts with Rule 52. The Advisory Committee determined that the Rule would in fact benefit from a broader reworking so as to clarify several aspects of the Rule, but it continued to believe that the standard for obtaining consideration of a late-filed claim that the indictment fails to state an offense should be a more lenient one for the defendant. The Advisory Committee first attempted to accomplish this by providing that untimely claims of failure to state an offense (as well as two others, double jeopardy and statute of limitations) could nevertheless be considered if the defendant met the requirements of plain error under Rule 52(b). While all other claims would continue to be considered waived if not timely raised, unless cause and prejudice were shown, this second category of claims would be considered merely forfeited if untimely raised. Because the plain error standard from Rule 52(b) did not include a showing of cause, the Advisory Committee believed that the choice of that standard would appropriately provide a less stringent showing to excuse the late filing.

The Standing Committee also remanded that proposal, concerned that the plain error standard might be too demanding for late-filed claims of failure to state an offense, in light of the Advisory Committee's expressed intention of making it easier to excuse the untimeliness of such claims. The Standing Committee also expressed concern about the continued use of the term "waiver" differently from the usual definition of that concept. After further discussion, the Advisory Committee agreed with both suggestions of the Standing Committee.

The Advisory Committee redrafted the Rule's language to delete the words "waiver" and "forfeiture" and instead to describe the *consequences* of untimely motions, a provision now moved to follow immediately after the timing provisions. And to best describe the circumstances under which untimely motions could still be considered, the proposal now provides that a party must show cause and prejudice, or, for claims of failure to state an offense, he may show prejudice only. This makes clear that for most untimely motions, a party must meet the demanding standard of cause and prejudice or his claim is foreclosed, but that for failure to state an offense, untimeliness may be more easily excused. The Advisory Committee agreed that a defendant might not be able to satisfy all four prongs of the plain error standard yet be deserving of relief from an indictment that fails to state an offense. It thus determined that its original notion — that a defendant should not suffer prejudice to his case from an untimely discovery that the indictment failed to state an offense — was the desired principle, and that it would be appropriate to allow consideration of such a claim on a showing of prejudice alone.[24] By making these additional changes, the Advisory Committee believes it has both

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[24]The Advisory Committee recognized that in *United States v. Cotton*, 535 U.S. 625, 634 (2002), the Supreme Court applied Rule 52(b) plain error review to the indictment error in that case, the failure to include drug quantity, a fact required under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), for defendant's enhanced sentences. The Advisory Committee concluded that *Cotton* created no obstacle to its proposal to prejudice — rather than plain error — as the standard for review of late claims alleging the failure to state an offense. In applying the default provisions of Rule 52, the Court in *Cotton* did not consider what standard of review should apply to claims of failure to state an offense if such claims were added to the list of those that must be raised prior to trial in Rule 12, nor did it mention Rule 12 at all. The *Cotton* Court stated:

> "Freed from the view that indictment omissions deprive a court of jurisdiction, we proceed to apply the plain-error test of Federal Rule of Criminal Procedure 52(b) to respondents' forfeited claim. *See United States v. Olano*, 507 U.S. 725, 731, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). "Under that test, before an appellate court can correct an error not raised at trial, there must be (1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.' " *Johnson v. United States*, 520 U.S. 461, 466-467, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (*quoting Olano, supra*, at 732, 113 S.Ct. 1770). "If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." 520 U.S. at 467, 117 S.Ct. 1544 (internal quotation marks omitted) (*quoting Olano, supra*, at 732, 113 S.Ct. 1770)."

clarified and simplified the rule, while achieving the original goal of requiring any defective indictment to be challenged before trial without sacrificing basic fairness to a defendant.

E. WHY THE COMMITTEE INCLUDED DOUBLE JEOPARDY CLAIMS IN THE CATEGORY SUBJECT TO A SHOWING OF PREJUDICE ONLY

After a study of the issue, the Advisory Committee decided to add one more type of claim to the category of those whose late filing would be excused more readily – claims of a double jeopardy violation. This was done to preserve as closely as possible the current treatment of such claims without adding further complexity with a third standard of review.

Many courts of appeals currently apply plain error review, rather than cause and prejudice, to double jeopardy challenges to the charge that were available, but not raised, before trial.[25] Moreover, cases reviewing double jeopardy claims after a guilty plea have expressly recognized that a double jeopardy violation clear on the face of the indictment is not waived by the plea. In this situation courts have reviewed the double jeopardy claims either de novo[26] or using plain error.[27] Designating the

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[25]*See United States v. Mahdi*, 598 F.3d 883 (D.C. Cir. 2010); *United States v. Robertson*, 606 F.3d 943 (8th Cir. 2010) (collecting authority); *United States v. Mungro*, 365 Fed. Appx. 494 (4th Cir. 2010); *United States v. Hansen*, 434 F.3d 92 (1st Cir. 2006). *But compare United States v. Whitfield*, 590 F.3d 325 (5th Cir. 2009) (stating that unraised double jeopardy objection is waived, but assuming arguendo that plain error and not waiver applies); *United States v. Flint*, 394 Fed. Appx. 273 (6th Cir. 2010) (describing as waived and declining to reach merits of double jeopardy claim raised for the first time on appeal by defendant found guilty after trial).

[26]*See, e.g.*, *United States v. Moreno-Diaz*, 257 Fed. Appx. 435 (2d Cir. 2007) (quoting *Menna* and noting that guilty plea does not waive double jeopardy claim when, judged on its face, charge is one that government may not constitutionally prosecute); *United States v. Poole*, 96 Fed. Appx. 897, 899 (4th Cir. 2004) (granting relief on defendant's unraised double jeopardy claim, despite defendant's guilty plea: "Because on its face the superseding indictment exposed Poole to multiple sentences for a single offense, we conclude that Poole has not waived his claim of multiplicity on appeal"); *United States v. Saldua*, 120 Fed. Appx. 553 (5th Cir. 2005) (remanding to vacate one of defendant's convictions and noting that the government chose not to argue that appeal waiver barred relief); *United States v. Zalapa*, 509 F.3d 1060, 1063 (9th Cir. 2007) ("we recognize the distinction between objections to multiplicity in the indictment, which can be waived, and objections to multiplicitous sentences and convictions, which cannot be waived. *See United States v. Smith*, 424 F.3d 992, 1000

& n.4 (9th Cir. 2005) ("Multiplicity of sentences is unlike the issue of multiplicity of an indictment which can be waived if not raised below.") This conclusion is consistent with our holding in *Launius v. United States*, 575 F.2d 770 (9th Cir. 1978). In that case, we held that a defendant's guilty plea to a multiplicitous indictment did not constitute a waiver of the right to raise a double jeopardy claim as to his multiplicitous convictions and sentences. *Id*. at 771–72. We also recognized that Rule 12 of the Federal Rules of Criminal Procedure, the rule relating to pretrial motions, "'applies only to objections with regard to the error in the indictment itself.'" *Id*. at 772."); *United States v. Williams*, 2011 WL 462156, *1 (11th Cir. 2011) ("Williams's appeal is not waived because he does not seek to introduce evidence from outside of the plea hearing to demonstrate that the conduct at issue in the sentencing phase of the first trial and the conduct at issue in the indictment of the second trial were the same offense."); *United States v. Bonilla*, 579 F.3d 1233 (11th Cir.2009) (defendant can raise double jeopardy claim if he does not need to go outside record at plea hearing, the case here as to indictment with multiplicitous charges of both identity theft and aggravated identity theft); *United States v. Harper*, 398 Fed. Appx. 550, 553 (11th Cir. 2010) (noting that entering a guilty plea generally waives all non-jurisdictional challenges to a conviction, with a few exceptions, including one for certain double jeopardy challenges, when the government is precluded from haling the defendant into court at all, citing *Menna v. New York*, 423 U.S. 61, 62 (1975)).

[27]Several appellate decisions apply plain error review in this situation, including *United States v. Kelly*, 552 F.3d 824 (D.C. Cir. 2009); *United States v. Cesare*, 581 F.3d 206 (3d Cir. 2009) (finding plain error); *United States v. Grober*, 624 F.3d 592 (3d Cir. 2010) (holding that even if claim was not waived by guilty plea, it could not, in circumstances of this case, survive plain error review); *United States v. Lebreux*, 2009 WL 87505 (6th Cir.2009) (considering claim but rejecting it on plain error review); *United States v. Plenty Chief*, 561 F.3d 846 (8th Cir. 2009) (court's review "limited to plain error").

Other appellate decisions, however, state that in guilty plea cases the appropriate standard is waiver rather than plain error. *See, e.g. United States v. Adams*, 256 Fed. Appx. 796, 798 (7th Cir. 2007) ("Adams entered unconditional guilty pleas and therefore waived his right to appeal the denial of any pretrial motions based on his indictment"); *United States v. Moreno-Diaz*, 257 Fed. Appx. 435, 436 (2d Cir. 2007).

plain error standard for untimely double jeopardy claims would preserve this current treatment. The Advisory Committee considered but rejected as unduly complex a proposal to have three tiers of review:

- prejudice alone for claims of failure to state an offense,
- "plain error" for double jeopardy claims, and
- "cause and prejudice" for everything else.

The Advisory Committee concluded that the standard of showing prejudice alone was appropriate for violations of the fundamental right not to be twice placed in jeopardy or punished more than once for the same offense. Allowing review for untimely double jeopardy claims on the basis of prejudice alone would simplify the analysis without changing the result in most or all double jeopardy cases. The second and fourth prongs of the *Olano* test – which look to whether the error is "plain" and whether it "seriously affects the fairness, integrity, or public reputation of judicial proceedings" – have not made much difference when courts review alleged double jeopardy violations.[28]

Although double jeopardy claims arise in a number of different situations,[29] we have been unable to identify a case in which the second and fourth prongs would not be satisfied if a defendant has been (or could be) convicted for an offense that judging from the indictment before trial should have been barred by double jeopardy. If indeed plain error review is applied whenever a defendant objects during trial, or after conviction, to a double jeopardy error available and resolvable before trial

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[28]*See, e.g.*, *United States v. Robertson*, 606 F.3d 943, 952 (8th Cir. 2010) (concluding that failing to remedy such a clear violation of a core constitutional principle would be error so obvious that failure to notice it would seriously affect the fairness integrity, or public reputation of the judicial proceedings and result in a miscarriage of justice); *United States v. Ogba*, 526 F.3 214, 238 (5th Cir. 2008) (same); *United States v. Fortenberry*, 914 F.2d 671, 673 (5th Cir. 1990) (same) (reversing conviction on plain error review after finding a double jeopardy violation in part because the defendant was subjected to multiple special assessments).

[29]The Double Jeopardy clause bars a charge following an acquittal or conviction for the same offense, after an acquittal definitively rejecting a necessary element of the charged offense, or after an earlier mistrial lacking manifest necessity. It also bars a conviction on one count charging the same offense as another count of conviction.

and which he failed to raise before trial or plea, it appears to make sense to dispense with the second and fourth prongs of the *Olano* test and, for the sake of simplicity, to use the same "prejudice only" standard as for claims of failure to state an offense.

F. OTHER FEATURES OF THE PROPOSAL

As noted above, the core elements of the proposed amendment are that it deletes the language in Rule 12(b)(3)(B) that allows a failure to state an offense claim to be raised "at any time while the case is pending," and requires claims that an indictment fails to state an offense to be raised prior to trial. The amendment also clarifies the standard for consideration of claims not raised before trial as required by Rule 12(b)(3): except for failure to state an offense and double jeopardy – which may be reviewed whenever "prejudice" is shown – the courts may consider a claim only if the party who wishes to raise it can show "cause and prejudice."

Several other features of the proposed amendment also warrant some discussion. The proposal includes the following elements:

- It continues to provide that a jurisdictional error can be raised at any time while a case is pending and places the jurisdictional provision in a more prominent position.

- It enumerates in Rule 12(b)(3) a non-exclusive list of common claims that must be raised before trial.

- For all of the defenses, objections and requests listed in Rule 12(b)(3), it introduces a new criterion for determining which must be raised before trial: whether the "basis" for the defense/objection/request is "then available."

- It shifts from (b)(2) the requirement that motions raised prior to trial be those that "the court can determine without a trial of the general issue" to (b)(3), and also rephrases that limitation to provide that "the motion can be determined without a trial on the merits."

- It shifts the provisions on the consequences of failing to make a timely motion from subdivision (e) to subdivision (c), solving an organizational problem within the current rule.

- It provides a conforming amendment to Rule 34.

The discussion that follows explains each of these elements.

1. Jurisdictional Issues

At present, Rule 12(b)(3)(B) allows review of "a claim that the indictment or information fails to invoke the court's jurisdiction" at "any time while the case is pending." The Advisory Committee concluded that it was important to retain this provision, but that it should be moved to a separate subdivision. At present, it is stated as an exception to one of the defenses and claims subject to the timing requirements of Rule 12(b)(3).[30] The proposed amendment places this new subdivision in Rule 12(b)(2). This placement was possible because the Advisory Committee recommends the deletion of current (b)(2), as discussed below.

2. Deleting (b)(2)

Rule 12(b)(2) presently provides that "any defense, objection, or request that the court can determine without trial of the general issue" *may* be raised by a motion before trial. The 1944 Advisory Committee Notes explain that the purpose of this provision was to make clear that pretrial motions could be used to raise matters previously raised "by demurrers, special pleas in bar and motions to quash." The Advisory Committee concluded that the use of motions is now so well established that it no longer requires explicit authorization. The deletion of (b)(2) would be consistent with a decision made in 2002 as part of the restyling of the Criminal Rules. At that time, language in Rule 12(a) abolishing "all other pleas, and demurrers and motions to quash" was deleted as unnecessary.

The Advisory Committee was also concerned that there is, inevitably, some tension between (b)(2) and (b)(3) if (b)(2) is read literally. The drafters of the original Rule 12 envisioned two categories of motions, those that may and those that must be raised before trial.[31] See the 1944

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[30]This provision is now stated as an exception to the rule that "a motion alleging a defect in the indictment or information" "must be raised before trial." *See* Rule 12(b)(3)(B).

[31]The Advisory Committee note describes the two categories and explains that the defenses and objections that must be raised before trial are generally those that were generally raised before trial "by plea of abatement, demurrer, motion to quash, etc." The other group, which may but need not be raised before trial, were issues that "have been heretofore raised by demurrers, special pleas in bar, and motions to quash." 1944 Advisory Committee note to Rule 12(b)(1) and (2). The latter

Committee note to Rule 12(b)(1) and (2). As noted, (b)(2) says that any defense, objection, or request that is capable of being determined before trial "may" be raised by pretrial motion. The difficulty is that the permissive term "may" might be understood to indicate that each party has the *option* of bringing or not bringing *all* such motions before trial. This is in tension with (b)(3), which provides a list of motions that *must* be brought before trial.

Since the "may be raised" language now found in (b)(2) is no longer needed and it might create confusion, the Advisory Committee concluded it should be deleted. The limitation that the motion be one that can be determined without trial was shifted to (b)(3), as discussed in paragraph 5, below.

The decision to delete the language now found in (b)(2) raised the possibility that the subdivisions that followed (b)(2) would all be renumbered. The subdivisions of Rule 12 were reordered (or relettered) in 2002, and this has caused courts and litigants some difficulty in researching and writing about the rule. For that reason, several judges contacted members of the Advisory Committee to request that the current revision avoid another renumbering or relettering. The Advisory Committee was sensitive to this concern, and concluded that it was preferable to use this subdivision for the new separate jurisdictional provision, thereby avoiding the necessity of renumbering the later subdivisions.

3. Spelling Out the Claims That Must Be Raised Before Trial

The Advisory Committee's proposal retains the current categories of claims that Subdivision (b)(3) requires to be raised before trial: two general categories of claims (defects in "instituting the prosecution" and defects "in the indictment or information") as well as three specific categories (discovery, suppression, and joinder). For claims not specifically listed in Rule 12(b)(3) today, courts must determine whether a claim is a "defect in the indictment" or "the institution of the prosecution,"

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group was described as including some issues – double jeopardy and statute of limitations – that many courts now generally regard as falling within the terms of Rule 12(b)(3). See note 32 infra. As noted in point 3, public comments may address the advisability of including these or other defenses and claims in the text of Rule 12(b)(3).

to determine whether it must be raised prior to trial.[32] To add

[32]This has been an issue, for example, with claims based on the statute of limitations. Most courts have treated a statute of limitations claim as a defect in the institution of the prosecution or the sufficiency of the indictment, finding it is waived if not raised prior to trial. *See United States v. Gallup*, 812 F.2d 1271, 1280 (10th Cir. 1987); *United States v. Ramirez*, 324 F.3d 1225, 1227–28 & n. 6 (11th Cir. 2003); *United States v. Clark*, 319 Fed.Appx. 46, 48–49 (2d Cir. 2009); *United States v. Kelly*, 147 F.3d 172, 177 (2d Cir.1998); *United States v. Gaudet*, 966 F.2d 959, 962 (5th Cir. 1992). However, in *United States v. Baldwin*, 414 F.3d 791, 795–96 n.2 (7th Cir. 2005), the court noted that the Seventh Circuit had taken a different approach. Noting that the defendant raising a statute of limitations defense for the first time on appeal was entitled "at best" to review for plain error, the court explained:

> We say "at best" because there is an argument, not made by the government, that under Fed. R. Crim. P. 12(b)(3) Baldwin has waived and not merely forfeited his statute of limitations defense. Rule 12(b)(3) specifies motions that must be made before trial; the rule includes motions "alleging a defect in instituting the prosecution" or "a defect in the indictment or information." Rule 12(e) provides that matters covered by Rule 12(b)(3) that are not raised by the pretrial motion deadline set by the court are waived, subject to the district court's authority to grant relief from the waiver "[f]or good cause." Other circuits apply Rules 12(b)(3) and the waiver rule of (e) to statute of limitations arguments. *United States v. Ramirez*, 324 F.3d 1225, 1228-29 (11th Cir.2003); *United States v. Gallup*, 812 F.2d 1271, 1280 (10th Cir.1987). In this circuit, statute of limitations arguments not timely raised in the district court are considered forfeited, not waived, and are accorded plain-error review. United States v. Ross, 77 F.3d 1525, 1536 (7th Cir. 1996). The holding in *Ross* is premised upon certain language in the advisory committee note to Rule 12(b) suggesting that a statute of limitations defense is among those matters that *may*, not *must*, be raised by pretrial motion." Id. *The government has not argued that Ross should be revisited in light of the clear text of the rule and the apparent conflict with other circuits*; the government cited *Ross* for the proposition that Baldwin's statute of limitations argument should be considered forfeited and reviewed for plain error.

Id. (emphasis added). In contrast, concluding that "the plain language of Rule 12 dictates that defenses based upon the sufficiency of the indictment must be brought before trial," the Eleventh Circuit rejected the argument that the advisory committee note permits statute of limitations

clarity and provide guidance to litigants, the proposed rule lists the more common claims that fall into these two general categories, using the word "including" to make it clear that the lists are not exhaustive.[33] The Advisory Committee attempted to draft these lists broadly, to include all of the common claims that courts have found to be included in these general categories. If the proposed amendment is approved for publication, the lists might be expanded or trimmed on the basis of public comments.

In response to a comment at the January 2011 meeting of the Standing Committee, the Advisory Committee deleted the defense of "outrageous government conduct" from the list in Rule 12(b)(3)(A) because one circuit has held that the defense "does not exist." See *United States v. Boyd*, 55 F.3d 239, 241 (7th Cir. 1995). Identification of the defense on the list of "defects in the institution of the prosecution" might imply that the defense does exist, despite case law to the contrary. Although the Seventh Circuit appears to be the only circuit that has flatly held that the defense of outrageous government conduct does not exist, other circuits have expressed doubt about the continued vitality

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defenses to be raised after trial begins. *United States v. Ramirez*, 324 F.3d 1225, 1227 n.6 (11th Cir. 2003).

Relying on the fourth prong of the *Olano* test, the court in *Baldwin* found no plain error and denied relief because the sentence for the allegedly time-barred charge was to run concurrently to a non-barred sentence and the government had missed the statute of limitations by only one day. 414 F.3d at 795–96. In *United States v. Parker*, 508 F.3d 434, 435 (7th Cir. 2007), the Seventh Circuit overruled *Baldwin* insofar as it held that concurrent sentences could not constitute plain error, but the court has not revisited the other issues concerning the statute of limitations discussed in *Baldwin*.

[33]The proposal includes "a violation of the constitutional right to Speedy Trial" as one of the defects in the institution of a prosecution that must be raised before trial under (b)(3)(A). *See, e.g., United States v. Forrester*, 60 F.3d 52, 59 (2d Cir. 1995). The Advisory Committee did not include statutory speedy trial violations because the Speedy Trial Act already specifies that a defendant must raise any claim under the act before trial. *See* 18 U.S.C. § 3162(a)(2).

of the defense or recognized but discouraged it. And there are few — if any — cases in which the courts have granted relief on this basis.[34] Under these circumstances, the Advisory Committee concluded it would be prudent to delete the defense from (b)(3)(A). Because the list is illustrative and not exhaustive, failure to list the outrageous government conduct defense would not suggest a position one way or the other on its continued viability. Inclusion, on the other hand, might generate opposition on the ground that it would imply the defense is viable.

4. The Availability Requirement

As a general rule, the types of claims and defenses subject to Rule 12(b)(3) will be available before trial and they can – and should – be resolved then. Except for jurisdictional errors, the proposal brings virtually all claims and defenses within subdivision (b)(3), which requires that they be raised by motion before trial. It provides that if (b)(3) claims and defenses – other than failure to state an offense and double jeopardy – are not raised before trial they are "untimely" and subject to further review only upon a showing of cause and prejudice.[35]

The Advisory Committee recognized, however, that in some exceptional cases, it may not be possible to raise particular claims that fall within the general categories subject to Rule 12(b)(3). If the basis for the motion was not available to a party before trial, some courts conclude the claim is not affected by Rule 12 and need not have been raised before trial.[36] Others conclude that the claim is

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[34]*See, e.g., United States v Luisi*, 482 F.3d 43, 59 (1st Cir. 2007) ("The outrageousness doctrine permits dismissal of criminal charges only in those very rare instances when the government's misconduct is so appalling and egregious as to violate due process by 'shocking ... the universal sense of justice.' While the doctrine is often invoked by criminal defendants, it has never yet been successful in this circuit.") (citations omitted).

[35]As discussed more fully in the Part E (text accompanying notes 25-28), claims of failure to state an offense and double jeopardy are subject to review if "prejudice" can be established.

[36]Decisions finding no waiver when ground for claim was not available before trial include *United States v. Sturdivant*, 244 F.3d 71, 76 (2d Cir. 2001) (". . . we will not find a defendant has waived a duplicity argument where the claimed defect in the indictment was not apparent on its face at the institution of the proceeding"); *United States v. Coiro*, 922 F.2d 1008, 1013 (2d Cir. 1991) (multiplicity challenge not waived when neither nature of defendant's conduct nor fact that counts charged same conduct was evident from face of indictment, and could only be known upon the

waived under Rule 12, but that there was good cause for not raising it earlier.[37] The Advisory Committee concluded that (1) the failure to raise a claim one could not have raised should never be considered waiver and (2) it would be desirable to make this point explicit in the rule rather than assuming that the courts that do not already exempt such claims from the requirements of (b)(3) will

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receipt of evidence); *United States v. Collins*, 372 F.3d 629, 632–633 (4th Cir. 2004) (if an indictment properly alleges venue, but the proof at trial fails to support the venue allegation, an objection to venue can be raised at the close of the evidence; a defendant does not waive venue unless the indictment clearly reveals the venue defect but the defendant fails to object); *United States v. Zalapa*, 509 F.3d 1060 (9th Cir. 2007) (by failing to object to the indictment before pleading guilty, defendant waived any objection to the form of the indictment but did not waive his right to object to his sentences and convictions as multiplicitous on appeal). *Cf. United States v. Pitt*, 193 F.3d 751, 760–761 (3d Cir. 1999) (defense of outrageous government conduct must be raised pretrial unless the evidence supporting the claim is not known to the defendant prior to trial).

[37]Decisions treating unavailability of grounds as "good cause" affording relief from waiver include *United States v. Anderson*, 472 F.3d 662, 668–670 (9th Cir. 2006) (granting relief from waiver for pro se defendant who had no access to translated copy of Costa Rican extradition order until after deadline set by the district court for pretrial motions); *United States v. Madeoy*, 912 F.2d 1486, 1490–91 (D.C. Cir. 1990) (noting in dicta that a defendant who receives Jencks Act material only after his trial has begun, and is thus first apprised of the facts upon which his motion to dismiss the indictment is based, may be in a position to argue good cause for his failure to have moved for dismissal prior to trial); *United States v. Chavez*, 902 F.2d 259 (4th Cir. 1990) (concluding trial court abused its discretion in denying defendant's request to file for suppression hearing out of time where request was made almost two weeks prior to trial and one day after defense counsel received grand-jury transcript that revealed answer to inquiry that defendant had unsuccessfully made at preliminary hearing); *United States v. Roberts*, 2009 WL 2960409 (E.D. Tenn. Sept. 9, 2009) (recognizing good cause when discovery materials not previously available to the defendants are uncovered). *Cf. United States v. Cameron*, 729 F.Supp.2d 418, 419–21 (D.Me. 2010) (finding cause when newly appointed counsel uncovered a potentially serious and dispositive Fourth Amendment violation that "only beg[an] to receive legal attention" after the deadline has passed"); *United States v. Slay*, 673 F.Supp. 336, 342, (E.D. Mo. 1987) (good cause shown when a subsequent Supreme Court decision after trial but before sentencing for the first time provided a basis for challenging intangible rights theory of indictment).

recognize that it is contained within the concept of "good cause." Accordingly, the Advisory Committee added the language that limits the requirement that defenses, objections, and claims "must" be raised before trial to those in which "the basis for the motion is then reasonably available . . . ." This standard is intended to be similar to that of the Jury Selection and Service Act, which requires claims to be raised promptly after they were "discovered or could have been discovered by the exercise of due diligence." 28 U.S.C. § 1867(a) & (b).

The addition of this language means that if a party raises an issue governed by Rule 12(b)(3) at any time after the trial has begun, the first step in the analysis should be to determine whether the basis for raising the issue was "reasonably available" before trial to the party who wishes to raise it (and the second step, discussed below, would be to determine whether it would have been possible for the court to resolve the issue at that time, before trial). For example, Rule 12(b)(3)(A) requires that a defect in the prosecution ordinarily be raised before trial. If, however, in a particular case the information necessary to raise such a defect first becomes "available" during the trial, the defendant's failure to raise the issue earlier would not be considered untimely under the Rule. Similarly, Rule 12(b)(3)(C) requires suppression motions to be made before trial, but the proposal would provide that the rule is applicable only if the basis for a motion to suppress was "reasonably available" before trial.

5. The Capable-of-Determination-Without-Trial Requirement

The Advisory Committee was also concerned that parties not be encouraged to raise (or punished for not raising) claims that depend on factual development at trial. Presently (b)(2) accomplishes this by the negative implication that issues that depend on a trial "of the general issue" may not be raised prior to trial. The Advisory Committee's proposal shifts this requirement to the introductory language of (b)(3), which provides that only those issues which can be determined "without a trial on the merits" "must be raised by motion before trial," and if not so raised are subject to cause and prejudice analysis (or "prejudice only" for failure to state an offense and double jeopardy). Recognizing that the Rule's language "determine without a trial of the general issue" has a well-settled meaning, specifically that trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the motion,[38] the Advisory Committee

[38]*E.g., Serfass v. United States*, 420 U.S. 377, 389 (1975) (citing *United States v. Covington*, 395 U.S. 57, 60 (1969)); *United States v. Sisson*, 399 U.S. 267, 302 & n. 56 (1970) (plurality opinion) ("We think a defense to a pre-induction suit based on conscientious objections that require factual determinations is so intertwined with the general issue that it must be tried with the general issue.

substituted the modern phrase "trial on the merits" for the more archaic phrase "trial of the general issue" now found in (b)(2). No change in meaning is intended.

6. Reorganization

At the January 2011 meeting, Professor Joseph Kimble, our style consultant, urged the Advisory Committee to use the proposed amendment to solve an organizational problem in the current rule. At present, the organization of the subdivisions separates the provisions requiring certain motions to be made before trial and the deadline for those motions (which are now in subdivisions (b) and (c)) from the provision governing the consequences of failure to file a timely motion (which is found in subdivision (e)). Professor Kimble noted that subdivision (d) (Ruling on a Motion) interrupts the logical sequence and makes it more difficult to find the critical provisions on the consequences of failure to file in a timely fashion.

The Advisory Committee accepted Professor Kimble's suggestion that it relocate the provision governing the "Consequences of Not Making a Timely Motion" to subdivision (c), so that it would address both the deadline for pretrial motions and the consequences for failure to meet this deadline. The Advisory Committee agreed that this was the logical placement of the provisions, and it concluded that there were also advantages to the reorganization. In general, the Advisory Committee thought that it was important not to renumber (reletter) the provisions of Rule 12. In this case, however, the provisions now found in Rule 12(e) are being significantly changed to eliminate the word "waiver" and add a new provision concerning failure-to-state-an-offense and double jeopardy claims. Researchers will be able easily to determine whether a case was decided under the older version of the rule if the court applies Rule 12(e) rather than Rule 12(c)(2). The proposed amendment avoids the need to renumber the later subdivisions of the rule any future confusion by reserving subdivision (e).

7. Conforming Amendment to Rule 34

. . . A defense is thus 'capable of determination' if trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense. Rule 12(b)(4) allows the District Court in its discretion to postpone determination of the motion to trial, and permits factual hearings prior to trial if necessary to resolve issues of fact peculiar to the motion.").

If the Advisory Committee's proposal is approved, it will revive the need for the conforming amendment to Rule 34 (included below) that was approved by the Advisory Committee.

APPENDIX

Because the proposed amendment to Rule 12 has a lengthy history, and has already been twice presented to the Standing Committee, we set forth in this Appendix more fully the legal research we undertook during the course of our deliberations. Both the Advisory Committee's current proposal, and the earlier versions reviewed by the Standing Committee in January 2011, and also in June 2009, are discussed to permit comparison and facilitate review.

The 2009 proposal

The Advisory Committee's original proposal, presented to the Standing Committee in June 2009, was narrowly drafted to respond to the Supreme Court's decision in *United States v. Cotton*, 535 U.S. 625 (2002). *Cotton* held that an indictment's failure to state an offense does not deprive the court of its jurisdiction. In 2006, in the wake of *Cotton*, the Department of Justice asked the Advisory Committee to consider amending Rule 12(b)(3)(B) to require defendants to raise *before trial* any objection that the indictment failed to state an offense by eliminating the provision that required review of such a claim even when raised for the first time after conviction. The proposed amendment to Rule 12(b) made two related changes. First, it amended Rule 12(b)(3)(B) to add failure to state an offense to the list of requests, defenses, and objections that must be raised prior to trial. Second, it provided for the consequence of failure to raise the objection as required by the amended rule. Under Rule 12(e), claims not raised in timely fashion under (b)(3)(B) are "waived," but for "good cause, the court may grant relief from the waiver." The Advisory Committee deemed that standard too strict for failure to state an offense, and proposed amending Rule 12(e) to allow such claims to be considered, even if not raised prior to trial, if the failure to state an offense "has prejudiced a substantial right of the defendant."

The Standing Committee remanded the proposed amendment to the Advisory Committee for further study on two points: (1) the concepts of "waiver" (the term used in Rule 12(e)) and "forfeiture" (the term used in the Supreme Court's decision in *Cotton*); and (2) how Rule 12 interacted with Rule 52.

The January 2011 proposal

Responding to the Standing Committee's concerns, the Advisory Committee redrafted the proposed amendment to Rule 12, this time attempting to clarify exactly which sorts of claims must be raised, and when a claim was considered "waived" under the rule.

To address the confusion in the courts over whether Rule 52(b) plain error review applied and when, the proposed amendment (1) expressly designated plain error review under Rule 52(b) as the standard for obtaining relief for three specific claims (failure to state an offense, double jeopardy, and statute of limitations) under a new subsection entitled "forfeiture," and (2) left in place the "good cause" standard already applied to all other untimely claims, changing the language to "cause and prejudice" to reflect the Supreme Court's interpretation of the "good cause" standard, and moving this into a separate subsection entitled "waiver."

At its January 2011 meeting, the Standing Committee expressed general approval of the Advisory Committee's approach of specifying the types of motions falling within the various categories of Rule 12(b)(3). But the proposal was remanded once again to allow the Advisory Committee to consider several concerns. First, some members expressed concern that the Rule continued to employ the term "waiver" to mean something other than deliberate and knowing relinquishment. Second, some members were concerned that requiring a defendant to show plain error under Rule 52 could be even more difficult than showing "cause and prejudice." If so, the proposed amendment would not create a more generous review standard for three favored claims. Third, concern was expressed about the inclusion of the defense of "outrageous government conduct." And finally, the Reporters were also urged to consider some reorganization.

A. SUPREME COURT PRECEDENT ON THE REVIEW OF LATE-RAISED ERROR

1. Consideration of error "waived" under Rule 12: The Supreme Court's standard.

Rule 12(e), subtitled "Waiver of a Defense, Objection, or Request," presently provides: "A party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. For good cause, the court may grant relief from the waiver."

The Court has addressed this provision limiting the review of claims not raised in accordance with Rule 12(b) in two cases: *Shotwell Mfg. Co. v. United States*, 371 U.S. 341 (1963), and *Davis v. United States*, 411 U.S. 233 (1973). Because these cases are critical to some of the Advisory Committee's proposed changes to Rule 12, and because there is so much disagreement about the meaning of Rule 12(e), it is useful to set out in some detail the Court's discussion of this aspect of Rule 12 in each case.

In *Shotwell*, the defendants' direct appeal was remanded to the trial court for fact finding.[39] While on remand in the trial court, the defendants challenged jury selection for the first time. The district court, and then the court of appeals, found that consideration of the claim was barred by Rule 12 because the defendants had failed to show a reason that would excuse a delay of four years after a conviction before raising their jury claims, and also found no prejudice from any error.[40] In the Supreme Court, the defendants argued that it was improper for the courts below to have considered

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[39]During the pendency of the petition for certiorari the Supreme Court granted the motion of the Solicitor General to remand the case to the District Court for further proceedings on the suppression issue. The District Court again denied suppression and also denied motions for a new trial and overruled challenges to the original grand and petit jury arrays, which had been brought for the first time during the remand. 371 U.S. 341, 344–45.

[40]The court of appeals described the rulings below as follows (287 F.2d 667, 673):

> In denying the motions, which ruling defendants now say was erroneous, the district court held that defendants "failed to establish any sufficient grounds which (would) justify the granting of relief from the waiver." However, exhibiting an extraordinary desire to cover all points, he then found that the jurors. . . possessed the necessary legal qualifications [,] . . .that no one was excluded because of race, color, economic status, political conviction, geographical location, religious beliefs or social status, and [the use of volunteers was not unconstitutional]. Inasmuch as defendants have not shown that these findings are without support in the record or that they were actually prejudiced by the method by which the jurors were selected, we hold that their motions were properly denied.

prejudice as well as cause under Rule 12. The Supreme Court rejected this argument.[41] The Court stated:

> . . . In denying the motions the District Court found that the facts concerning the selection of the grand and petit juries were notorious and available to petitioners in the exercise of due diligence before the trial. The same method of selecting jurors in the district had been followed by the clerk and the jury commissioner for years. Inquiry as to the system employed could have been made at any time. . . .
>
> Finally, *both courts below* have found that petitioners were not prejudiced in any way by the alleged illegalities in the selection of the juries. Nor do petitioners point to any resulting prejudice. In *Ballard* it was said that 'reversible error does not depend on a showing of prejudice in an individual case.' However, where, as here, objection to the jury selection has not been timely raised under Rule 12(b)(2), *it is entirely proper to take absence of prejudice into account in determining whether a sufficient showing has been made to warrant relief from the effect of that Rule."*
>
> We need express no opinion on the propriety of the practices attacked. It is enough to say that we find no error in the two lower courts' holding that the objection has been lost.

371 U.S. at 364 (emphasis added; footnote and citations omitted).

In *Davis*, a decade later, the Supreme Court took on the task of defining the conditions under which a court may review the merits of a claim raised in an application for relief under 28 U.S.C. § 2255, when that claim should have been raised in the district court before trial under Rule 12. The Court explained:

> *Shotwell* held that a claim of unconstitutional grand jury composition raised four years after conviction, but while the appeal proceedings were still alive, was governed by Rule 12(b)(2). Both the reasons for the Rule and the normal rules of statutory construction clearly indicate

[41]As Justice Brennan later wrote, the Court in *Shotwell* "construed the cause exception to Rule12(b)(2) as encompassing an inquiry into prejudice." *United States v. Frady*, 456 U.S. 152, 185 (1982) (Brennan, J., dissenting).

> that no more lenient standard of waiver should apply to a claim raised three years after conviction simply because the claim is asserted by way of collateral attack rather than in the criminal proceeding itself.
>
> The waiver provisions of Rule 12(b)(2) are operative only with respect to claims of defects in the institution of criminal proceedings. If its time limits are followed, inquiry into an alleged defect may be concluded and, if necessary, cured before the court, the witnesses, and the parties have gone to the burden and expense of a trial. If defendants were allowed to flout its time limitations, on the other hand, there would be little incentive to comply with its terms when a successful attack might simply result in a new indictment prior to trial. Strong tactical considerations would militate in favor of delaying the raising of the claim in hopes of an acquittal, with the thought that if those hopes did not materialize, the claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult.
>
> Rule 12(b)(2) promulgated by this Court and, pursuant to 18 U.S.C. § 3771, 'adopted' by Congress, governs by its terms the manner in which the claims of defects in the institution of criminal proceedings may be waived. . . . But Congress did not deal with the question of waiver in the federal collateral relief statutes . . . . We think it inconceivable that Congress, having in the criminal proceeding foreclosed the raising of a claim such as this after the commencement of trial in the absence of a showing of 'cause' for relief from waiver, nonetheless intended to perversely negate the Rule's purpose by permitting an entirely different but much more liberal requirement of waiver in federal habeas proceedings. We believe that the necessary effect of the congressional adoption of Rule 12(b)(2) is to provide that a claim once waived pursuant to that Rule may not later be resurrected, *either in the criminal proceedings or in federal habeas, in the absence of the showing of 'cause' which that Rule requires.* We therefore hold that the waiver standard expressed in Rule 12(b)(2) governs an untimely claim of grand jury discrimination, not only during the criminal proceeding, but also later on collateral review.

411 U.S. at 241–42 (emphasis added).

The Court has never questioned the interpretations announced in *Shotwell* and *Davis*, even though it has mentioned Rule 12 in several cases. Later decisions have reiterated both key points

about the standard for reviewing error "waived" under Rule 12: First, the standard is "cause and prejudice,"[42] and second, that standard applies on direct appeal as well as in the district court.[43]

2. **Olano** *and the development of plain error review under Rule 52(b) for unraised errors; confusion about the meaning of "waiver" under Rule 52.*

The Supreme Court has used the term "waiver" to refer to both deliberate relinquishment and what is commonly considered forfeiture.[44] But in 1993, in the course of interpreting Rule 52(b), the

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[42]*See Murray v. Carrier*, 477 U.S. 478, 494 (1986) ("the former Rule 12(b)(2) . . . as interpreted in [*Shotwell* and *Davis*] treated prejudice as a component of the inquiry into whether there was cause for noncompliance with that rule"); *United States v. Frady*, 456 U.S. 152, 185 (Brennan, J., dissenting) (stating that the Court in *Shotwell* "construed the cause exception to Rule12(b)(2) as encompassing an inquiry into prejudice.").

[43]Consider *Wainwright v. Sykes*, 433 U.S. 72, 84 (1986), where the Court described its decision in *Davis* this way (emphasis added):

> We noted that the Rule "promulgated by this Court and, pursuant to 18 U.S.C. § 3771, 'adopted' by Congress, governs by its terms the manner in which the claims of defects in the institution of criminal proceedings may be waived," . . . and held that this standard contained in the Rule, rather than the *Fay v. Noia* concept of waiver, should pertain in federal habeas *as on direct review*. Referring to previous constructions of Rule 12(b)(2), we concluded that review of the claim should be barred on habeas, *as on direct appeal*, absent a showing of cause for the noncompliance and some showing of actual prejudice resulting from the alleged constitutional violation.

[44]For example, in *Peretz v. United States*, 501 U.S. 923, 936 (1991), the Court stated:

> The most basic rights of criminal defendants are similarly subject to waiver. See, *e.g.*, *United States v. Gagnon*, 470 U.S. 522, 528, 105 S. Ct. 1482, 1485, 84 L.Ed.2d 486 (1985) (absence of objection constitutes waiver of right to be present at all stages of criminal trial); *Levine v. United States*, 362 U.S. 610, 619, 80 S. Ct. 1038, 1044, 4 L.Ed.2d 989 (1960) (failure to object to closing of courtroom is waiver of right to public trial); *Segurola v. United States*, 275 U.S. 106, 111, 48 S. Ct. 77, 79, 72 L.Ed. 186 (1927) (failure to object constitutes waiver of Fourth Amendment right against unlawful search and seizure); *United States v. Figueroa*, 818 F.2d 1020, 1025 (CA1 1987) (failure to object results in forfeiture of claim of unlawful

Court in *Olano* addressed the differences between the concepts of "waiver" and "forfeiture," and announced that plain error review applies only to error "forfeited," and not to error that is "waived." The Court stated:

> The first limitation on appellate authority under Rule 52(b) is that there indeed be an "error." Deviation from a legal rule is "error" unless the rule has been waived. For example, . . . [b]ecause the right to trial is waivable, and because the defendant who enters a valid guilty plea waives that right, his conviction without a trial is not "error."
>
> Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the "intentional relinquishment or abandonment of a known right." *Johnson v. Zerbst*, 304 U.S. 458 (1938); see, *e.g.*, *Freytag v. Commissioner*, 501 U.S. 868, 894, n. 2 (1991) (SCALIA, J., concurring in part and concurring in judgment) (distinguishing between "waiver" and "forfeiture"); . . . Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake. . . . Mere forfeiture, as opposed to waiver, does not extinguish an "error" under Rule 52(b). Although in theory it could be argued that "[i]f the question was not presented to the trial court no error was committed by the trial court, hence there is nothing to review," . . . this is not the theory that Rule 52(b) adopts. If a legal rule was violated during the district court proceedings, and if the defendant did not waive the rule, then

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postarrest delay); *United States v. Bascaro*, 742 F.2d 1335, 1365 (CA11 1984) (absence of objection is waiver of double jeopardy defense), *cert. denied sub nom. Hobson v. United States*, 472 U.S. 1017, 105 S. Ct. 3476, 87 L.Ed.2d 613 (1985); *United States v. Coleman*, 707 F.2d 374, 376 (CA9) (failure to object constitutes waiver of Fifth Amendment claim), *cert. denied*, 464 U.S. 854, 104 S. Ct. 171, 78 L.Ed.2d 154 (1983). *See generally Yakus v. U.S.*, 321 U.S. 414, 444, 64 S. Ct. 660, 677, 88 L.Ed. 834 (1944) ("No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right"). Just as the Constitution affords no protection to a defendant who waives these fundamental rights, so it gives no assistance to a defendant who fails to demand the presence of an Article III judge at the selection of his jury.

> there has been an "error" within the meaning of Rule 52(b) despite the absence of a timely objection.

Olano, 507 U.S. 725, 733–34 (1993) (citations to law reviews and treatise omitted).

This paradigm meaning for the term "waiver"—as intentional relinquishment—is different than the meaning assigned to the very same term in Rule 12 by the Court in *Shotwell* and *Davis*.[45] Although the Court never mentioned Rule 12 in *Olano* or in *any* of the cases involving plain error that have followed *Olano*,[46] courts of appeals have become divided over the relationship between Rule 12 and Rule 52, particularly for claims that are raised for the first time on appeal.[47]

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[45]Even in *Olano* itself, the Court seemed to recognize that not all waivers will fit this paradigm. As the Tenth Circuit noted in United States v. Burke, 633 F.3d 984, 991 (10th Cir. 2011):

> [I]n *Gonzalez v. United States*, 553 U.S. 242, 128 S. Ct. 1765, 170 L.Ed.2d 616 (2008), the Court recognized defendants could waive certain rights (i.e., what arguments to pursue, what evidentiary objections to raise, and what stipulations to make regarding the admission of evidence) without doing so knowingly and voluntarily. *Id.* at 248–49, 128 S. Ct. 1765. Even *Olano* itself stated, "[W]hether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." 507 U.S. at 733, 113 S. Ct. 1770.

[46]*United States v. Marcus*, 130 S. Ct. 2159 (2010); *Puckett v. United States*, 129 S. Ct. 1423 (2009); *United States v. Dominguez Benitez*, 542 U.S. 74 (2004); *Nguyen v. United States*, 539 U.S. 69 (2003); *United States v. Cotton*, 535 U.S. 625 (2002); *United States v. Vonn*, 535 U.S. 55 (2002); *Jones v. United States*, 527 U.S. 373 (1999); *Johnson v. United States*, 520 U.S. 461 (1997).

[47]Although *Olano* appears to have aggravated the disparity in approaches in the courts of appeals, the differential treatment was evident even prior to *Olano*. Many courts of appeals applied Rule 12's "good cause" exception to claims raised for the first time on appeal and thus "waived" under the terms of the Rule, demanding both cause and prejudice be shown before considering an untimely claim. *E.g., United States v. Coppola*, 526 F.2d 764, 773 (10th Cir. 1975) (refusing to grant an exception to waiver of claim of unauthorized prosecutor on appeal when defendant failed to demonstrate good cause for non-compliance with Rule 12(b), and "In neither his opening brief nor

B. COURT OF APPEALS INTERPRETATIONS TODAY: WHICH STANDARD APPLIES?

Courts of appeals[48] evaluating claims raised for the first time on appeal[49] that should have

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in his reply brief, [did] appellant indicate how he may have been prejudiced by the special attorney's appearance before the grand jury"). Other approaches were used as well, sometimes in the same circuit. *Compare United States v. Simone*, 931 F.2d 1186, 1192 (7th Cir. 1991) (grant relief from waiver only if cause is shown, and, in addition, the defendant establishes plain error) *with United States v. Gio*, 7 F.3d 1279, 1284-85 (7th Cir. 1993) (use plain error review if cause can not be established) and *with United States v. Griffin*, 765 F.2d 677, 682 (7th Cir. 1985) (find claim waived and that plain error did not apply, reasoning that *Frady* "bars Griffin from arguing that the plain error standard of Fed. R. Crim. P. 52(b) should govern the question of whether he waived his right to challenge his allegedly multiplicitous indictment").

[48]Although Rule 52 is regularly applied by trial courts, particularly when a claim is raised in a motion for new trial, trial courts generally require "good cause," applying some version of the Rule 12 exception, regardless of whether the claim is raised prior to trial but after the deadline for pretrial motions, during trial, or in a post-conviction motion for new trial.

[49]The diverging approaches appear most pronounced when courts of appeals review claims raised for the first time on appeal. Before and after *Olano*, courts of appeals have generally reviewed *district court decisions* to grant or deny relief from waiver using the abuse of discretion standard. *See e.g*, *United States v. Sobin*, 56 F.3d 1423, 1427 (D.C. Cir. 1995) (upholding denial of untimely suppression motion filed day of trial); *United States v. Madeoy*, 912 F.2d 1486, 1491 (D.C. Cir. 1990) ("Because we find that the appellants have shown neither cause for the untimeliness of their motion, nor actual prejudice from its denial, we conclude that the district court did not abuse its discretion in refusing to relieve them from their waiver of the right to challenge their indictment"); *United States v. Rodriguez-Lozada*, 558 F.3d 29, 37–38 (1st Cir.) (not abuse of discretion to deny suppression motion as untimely when filed during trial), *cert. denied sub nom. Rivera-Garcia v. United States*, 130 S. Ct. 283 (2009); *United States v. Gomez-Benabe*, 985 F.2d 607, 611 (1st Cir. 1993) (no abuse of discretion to reject as waived late motion to suppress); *United States v. Mendoza-Acevedo*, 950 F.2d 1, 3 (1st Cir. 1991) (suppression not raised until the fifth day of trial was waived when record shows no reason for the delay that would have permitted the court to grant relief from the waiver, noting relief under Rule 12(f) should be granted only upon showing of cause and prejudice); *United States v. Kopp*, 562 F.3d 141, 143 (2d Cir.) (no abuse of discretion to deny

been filed before trial under Rule 12 have disagreed about how to review such claims. Part of the difficulty is reconciling the command in *Olano* that Rule 52 applies unless there is true "waiver"by

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untimely motion to suppress when defendant has failed to show cause and prejudice), *cert. denied*, 130 S. Ct. 529 (2009); *United States v. Forrester*, 60 F.3d 52, 59 (2d Cir. 1995) (no abuse of discretion for trial court to deny motion to dismiss based on violation of constitutional speedy trial rights brought after conviction when no cause demonstrated); *United States v. Nunez-Rios*, 622 F.2d 1093, 1098–99 (2d Cir. 1980) (denying defense of outrageous governmental conduct affirmed, this "should normally be raised prior to trial, so that the trial court can conduct a hearing with respect to any disputed issues of fact. . . [b]y failing to raise this issue prior to trial, [defendant] waived the right to assert it on appeal); *United States v. Rad-O-Lite of Philadelphia, Inc.*, 612 F.2d 740, 744-45 (3d Cir. 1979) (affirming district court's denial of late filed motion to strike, when no cause shown for delay); *United States v. Ferguson*, 778 F.2d 1017, 1019-20 (4th Cir. 1985) (no abuse of discretion in denying severance motion raised after closing arguments based on new theory when no cause or prejudice shown); *United States v. Payne*, 341 F.3d 393, 402-03 (5th Cir. 2003) (no abuse of discretion to refuse relief from waiver of duplicity objection); *United States v. Hirschhorn*, 649 F.2d 360, 364 (5th Cir. 1981) (denial of suppression motion filed two days before trial as waived not abuse of discretion when no prejudice shown); *United States v. Blair*, 214 F.3d 690, 699–701 (6th Cir. 2000) (district court properly denied late constitutional challenge to grand jury composition); *United States v. Trobee*, 551 F.3d 835, 838 (8th Cir.) (denial of tardy suppression motion not abuse of discretion), *cert. denied*, 130 S. Ct. 279 (2009); *United States v. Bloate*, 534 F.3d 893, 901 (8th Cir. 2008), *rev'd on other grounds*, 130 S. Ct. 1345 (2008) (denial of motion as untimely was not abuse of discretion when no cause shown); *United States v. Moore*, 98 F.3d 347, 351 (8th Cir. 1996) (denial of late suppression motion not abuse of discretion); *United States v. Tekle*, 329 F.3d 1108, 1112 (9th Cir. 2003); *United States v. Vasquez*, 2011 WL 1533495, at *3 (10th Cir. April 25, 2011) (no abuse of discretion to find late suppression claim waived); *United States v. Salom*, 349 Fed.Appx. 409, 411 (11th Cir.) (district court did not abuse its discretion by denying motion as untimely, defendant had not shown cause), *cert. denied*, 130 S. Ct. 2130 (2009).

For cases finding that a district court had abused its discretion, see *United States v. Crowley*, 236 F.3d 104, 110 (2d Cir. 2000) (error for district court to grant relief from waiver of challenge to specificity of indictment when no cause shown); *United States v. Chavez*, 902 F.2d 259 (4th Cir. 1990) (error for court to reject cause); *United States v. Salahuddin*, 509 F.3d 858 (7th Cir. 2007) (same).

intentional relinquishment, with the command in Rule 12 that says claims are "waived" whenever they are raised late. Four basic approaches have emerged.

1. ***Consider the claim if the defendant can meet the Rule 12 exception for "good cause"***

The courts of appeals for eight circuits—D.C.,[50] Second,[51] Third, [52] Fourth,[53] Sixth,[54]

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[50]*See United States v. Hemphill*, 514 F.3d 1350, 1365 (D.C. Cir. 2008) (challenge to flawed ground in indictment was waived absent showing of cause, citing *Weathers*); *United States v. Burroughs*, 161 Fed. Appx. 13, 14 (D.C. Cir. 2005) (venue claim raised for first time on appeal waived when defendant failed to show "good cause" for his failure to raise objection on time); *United States v. Mathis*, 216 F.3d 18 (D.C. Cir. 2000) (duplicity challenge to indictment waived, citing *Weathers*); *United States v. Weathers*, 186 F.3d 948, 955 (D.C. Cir. 1999) (multiplicity challenge to indictment waived absent showing of cause and prejudice, noting "We cannot conclude that the Court intended *Olano*, a case which mentioned neither Rule 12 nor *Davis*, to overrule *Davis* by redefining sub silentio the meaning of the word "waiver" in Rule 12"). For a case finding simply that the claim first raised on appeal was waived and not addressing good cause option for relief, *see United States v. Hewlett*, 395 F.3d 458, 460–461 (D.C. Cir. 2005) (suppression issue not raised was waived); *United States v. Gaviria*, 116 F.3d 1498, 1517 n. 22 (D.C. Cir. 1997) (venue challenge waived).

[51]*See United States v. Yousef*, 327 F.3d 56, 125 (2d Cir. 2003) (rejecting plain error review and stating, "we will find complete waiver of a suppression argument that was made in an untimely fashion before the district court unless there is a showing of cause").

[52]*See United States v. Rose*, 538 F.3d 175, 177–83 (3d Cir. 2008) (suppression issues raised for the first time on appeal are waived absent good cause under Rule 12, concluding, after lengthy analysis, "Though each of Rule 52(b) and Rule 12 appears applicable when read alone, when considered together we believe Rule 12's waiver provision must prevail."); *United States v. Pitt*, 193 F.3d 751, 759–61 (3d Cir. 1999) (failure to raise before trial waived claim of outrageous governmental conduct, where defendant made no showing of cause or prejudice).

[53] *See United States v. Richardson*, 276 Fed. Appx. 320, 323 (4th Cir. 2008) (per curiam) ("Because Richardson failed to raise the issue of suppression based on invalid search prior to or during trial, and he does not allege cause for his failure to do so, we find he has waived his right to raise the issue on appeal"); *United States v. Collins*, 372 F.3d 629, 633 (4th Cir. 2004) (failure to object to venue before trial waives claim); *United States v. Colton*, 231 F.3d 890, 909 (4th Cir. 2000) (failure to object to a count on grounds of multiplicity prior to trial waives objection, unless party can demonstrate cause for the failure to object and actual prejudice resulting from the defect). For a case finding simply that the claim first raised on appeal was waived and not addressing good cause option for relief, *see United States v. Whorley*, 550 F.3d 326, 337 (4th Cir. 2008) (suppression argument waived), *cert. denied*, 130 S. Ct. 1052 (2010).

Ninth,[55] Tenth,[56] and Eleventh[57]—have stated that they will not consider a claim first raised on

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[54]*See United States v. Auston*, 355 Fed. Appx. 919, 922–24 (6th Cir. 2009) (new basis for venue challenge raised for the first time on appeal waived, no cause shown), *cert. denied*, 130 S. Ct. 1558 (2010); *United States v. Collier*, 246 Fed. Appx. 321, 334–36 (6th Cir. 2007) (rejecting plain error review finding suppression challenge not raised below waived, "record reflects no attempt on Defendant's part to demonstrate good cause before the district court, or even to assert these challenges during trial. Nor does Defendant's *brief on appeal* address or explain his Rule 12(e) waiver. Accordingly, Defendant's "omission below to make a facial showing of the 'good cause' required" by Rule 12(e) precludes our review"). For a case finding simply that the claim first raised on appeal was waived and not addressing good cause option for relief, *see United States v. Deitz*, 577 F.3d 672 (6th Cir. 2009) (severance objection waived), *cert. denied*, 130 S. Ct. 1720 (2010); *United States v. Brown*, 498 F.3d 523, 528 (6th Cir. 2007) (delayed indictment claim waived); *United States v. Neumann*, 887 F.2d 880, 885–86 (8th Cir. 1989) (en banc) (suppression issue waived); *United States v. Abboud*, 438 F.3d 554, 567–68 (6th Cir. 2006) (suppression argument waived); *United States v. Hamilton*, 263 F.3d 645, 655 (6th Cir. 2001) (*Miranda* claim waived).

[55]*See United States v. Anderson*, 472 F.3d 662, 668–669 (9th Cir. 2006) (granting relief from waiver of challenge based on dual criminality and speciality, remanding issue to district court); *United States v. Technic Services*, 314 F.3d 1031, 1039 (9th Cir. 2002) (duplicity challenge waived, noting defendant do not argue that they had cause), *overruled on other grounds*, *United States v. Contreras*, 593 F.3d 1135 (9th Cir. 2010); *United States v. Wright*, 215 F.3d 1020, 1026–27 (9th Cir. 2000) (defendant "waived any dispute about the legality of his arrest and placed the issue beyond this court's ability to review for plain error" and has "advanced no cause for failing to first raise his illegal arrest claim to the district court in a pre-trial suppression motion"). For cases finding simply that the claim first raised on appeal was waived and not addressing good cause option for relief, *see United States v. Mausali*, 590 F.3d 1077, 1081 (9th Cir.) (severance motion waived), *cert. denied*, 131 S. Ct. 342 (2010); *United States v. Kahlon*, 38 F.3d 467, 469 (9th Cir. 1994) (failure to raise grand jury defects before trial results in waiver); *United States v. Klinger*, 128 F.3d 705, 708 (9th Cir. 1997) (duplicity and multiplicity challenges to the indictments waived).

[56]*United States v. Burke*, 633 F.3d 984, 988–89 (10th Cir. 2011) (suppression argument waived, noting defendant made no effort to demonstrate cause, nor does impediment to timely filing appear in record, rejecting plain error review), *cert. denied*, 2011 U.S. LEXIS 2907 (U.S. April 18, 2011); *United States v. Schneider*, 594 F.3d 1219, 1228 n.9 (10th Cir. 2010) (duplicitous indictment not raised until appeal, waived, unless good cause can be shown); *United States v. Haber*, 251 F.3d 881,

appeal that should have been raised before trial under Rule 12 unless the defendant can meet the Rule 12 exception for "good cause;" they do not apply plain error review.[58]

888-89 (10th Cir. 2001) (duplicity argument waived, no cause shown). For cases finding simply that the claim first raised on appeal was waived and not addressing good cause option for relief, *see United States v. Rodriguez-Chavez*, 291 Fed. Appx. 915, 917 n.1 (10th Cir. 2008) (argument that indictment was ambiguous was waived); *United States v. Dirden*, 38 F.3d 1131, 1139 n. 10 (10th Cir.1994) (suppression issue waived).

[57]*United States v. Suescun*, 237 F.3d 1284, 1286–87 (11th Cir. 2001) (challenge to authority of prosecutor was required to be presented prior to trial under Rule 12 and defendant has not "asked us to grant relief from the waiver"). For cases finding simply that the claim first raised on appeal was waived and not addressing good cause option for relief, *see United States v. Nix*, 438 F.3d 1284, 1288 (11th Cir. 2006) (suppression motion waived); *United States v. Dabbs*, 134 F.3d 1071, 1078 (11th Cir. 1998) (venue objection waived).

[58]The Fifth Circuit also has decisions following this approach. *See United States v. St. Martin*, 119 Fed. Appx. 645, 649–650 (5th Cir. 2005) (joinder and severance objections waived, and need not be addressed, when defendant does not provide any excuse for her failure to raise these objections before trial); United States v. Mann, 161 F.3d 840, 862 (5th Cir. 1998) (appellants failed to show cause, severance argument waived). More decisions from the Fifth Circuit appear to take a different approach. *See* note 62 *infra*.

The Seventh Circuit, too, has many decisions following the majority approach. *United States v. Quintanilla*, 218 F.3d 674, 678-79 (7th Cir. 2000) ("Although it is the appellant's burden to establish 'cause' for his failure to raise the no-knock issue in a motion to suppress, Quintanilla's brief fails to even suggest a reason for the failure. . . . [he] has failed to establish any possible prejudice from the inclusion of authorization for a no-knock entry in the warrant. We are convinced that Quintanilla has failed to establish cause for his failure to raise" the argument); *United States v. Evans*, 131 F.3d 1192, 1193 (7th Cir. 1997) ("Evans has not tried to establish 'cause' for neglecting this subject earlier"); *United States v. Dimitrova*, 266 Fed. Appx. 486, 487 (7th Cir. 2008) (noting the defendant offered no cause or explanation for her failure to raise the suppression issue before trial, did not offer a "good cause" explanation sufficient under Rule 12(e) and *Johnson* in her postrial motion, "nor has she done so on appeal"). Another approach in the Seventh Circuit is discussed at note 63 *infra*.

2. Require the defendant to meet the Rule 12 exception for "good cause," then if cause is established, review the late claim for plain error under Rule 52(b).

Several decisions from the Seventh Circuit require the appellant raising a claim that should have been raised before trial first to meet the Rule 12 exception for "good cause" and then establish

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Decisions from the Fifth and Seventh Circuits also find late claims waived without mentioning cause: *United States v. Cano*, 519 F.3d 512, 515 (5th Cir. 2008) (suppression arguments not raised are waived); *United States v. Whitfield*, 590 F.3d 325, 359 (5th Cir. 2009) (failure to make motion alleging defect in the indictment before trial "generally constitutes waiver"' error in indictment was waived), *cert. denied*, 131 S. Ct. 136 (2010); *United States v. Creech*, 408 F.3d 264 (5th Cir. 2005) (duplicity objection waived); *United States v. Chavez-Valencia*, 116 F.3d 127, 130–31 (5th Cir. 1997) (suppression claim waived, rejecting plain error review); *United States v. Pineda-Buenaventura*, 622 F.3d 761, 777 (7th Cir. 2010) (defendant waived issue on appeal of whether co-tenants had authority to actually give consent, since defendant did not object to magistrate judge's recommendation finding that they had authority, not discussing plain error).

whether there was plain error under Rule 52(b).[59] In other words both cause and plain error are required.

3. Apply plain error under Rule 52(b) instead of Rule 12.

A number of cases from the circuits above have applied plain error under Rule 52(b) to late claims that should have been raised prior to trial under Rule 12, either failing to mention Rule 12,[60]

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[59]*E.g.*, *United States v. King*, 627 F.3d 641, 647 (7th Cir. 2010) ("If a party raises new arguments for suppression on appeal, Court of Appeals reviews for plain error if the defendant can show good cause for failing to make those arguments in the district court. . . . King has not established good cause for his failure to present the illegal entry argument previously. And even if he passed that threshold, King has not shown error, much less plain error, in the district judge's decision . . ."); *United States v. Figueroa*, 622 F.3d 739, 742 (7th Cir. 2010) ("If a party filed a motion to suppress in the district court but raises new arguments for suppression on appeal . . . we review for plain error if the defendant can show good cause for failing to make those arguments in the district court."); *United States v. Brodie*, 507 F.3d 527, 530–31 (7th Cir. 2007); *United States v. Hargrove*, 508 F.3d 445, 450 (7th Cir. 2007) ("Hargrove has given us no explanation for his failure to seek suppression of this identification evidence before trial as required by Rule 12. . . . [He] has not made the good cause showing required by Rule 12(e) for the waiver. We need not move on to the question of whether he was prejudiced to the degree required in plain error review."); *United States v. Murdock* 491 F.3d 694, 698 (7th Cir. 2007) ("before we will review a forfeited suppression argument for plain error, the defendant must first show good cause for failing to make that argument in the district court"); *United States v. Johnson*, 415 F.3d 728, 730-31 (7th Cir. 2005) ("Before we even reach the question of plain error, however, we must consider the antecedent question implicit in the language of Rule 12(e) that we just quoted—namely, whether Johnson has shown good cause for his failure to make a timely motion to suppress on the *Miranda* ground.").

[60]*United States v. Moore*, 104 F.3d 377, 382 (D.C. Cir. 1997) ("Where, as here, a defendant fails to move for severance of a charge at the trial level, we will review only for 'plain error' not mentioning Rule 12); *United States v. Rumley*, 588 F.3d 202, 205 (4th Cir. 2009) (noting that "because Rumley did not challenge the constitutionality of the search in the district court, we review only for plain error"); *United States v. Stevens*, 487 F.3d 232, 242 (5th Cir. 2007) ("Because Raul Stevens raises his Miranda-based argument for the suppression of his statement of consent for the first time on appeal, we review for plain error."), *cert. denied*, 552 U.S. 936 (2007); *United States v. Deitz*, 577

or suggesting that even without showing cause under Rule 12, an untimely claim should be remedied if it amounts to plain error.[61] This latter approach appears to be the predominant view in the Fifth Circuit.[62]

F.3d 672 (6th Cir. 2009) (applying plain error), *cert. denied*, 130 S. Ct. 1720 (2010); *United States v. Sanders*, 315 Fed. Appx. 819 (11th Cir. 2009); *United States v. Galdos*, 308 Fed. Appx. 346, 357 (11th Cir. 2009) ("Because Galdos did not move for a severance of the charges in the district court and raises the severance issue for the first time on appeal, we review this issue only for plain error."); *United States v. Lewis*, 492 F.3d 1219, 1222 (11th Cir. 2007) (en banc) ("We now hold, consistent with *Olano*, that a waiver is the intentional relinquishment of a known right, whereas the simple failure to assert a right, without any affirmative steps to voluntary waive the claim, is a forfeiture to be reviewed under the plain error standard embodied in Rule 52(b). Lewis took no affirmative steps to waive his right against double jeopardy; he simply failed to assert his right. Accordingly, Lewis forfeited his right to a double jeopardy defense, and his claim is entitled to plain error review").

[61]*United States v. Brown*, 16 F.3d 423, 427 (D.C. Cir. 1994) (stating that if the defendant waived misjoinder issue under Rule 12(f), we will not reverse a conviction, even if Rule 8 would not have permitted joinder, unless there is plain error resulting in actual prejudice to the defendant, denying relief); *United States v. Lopez-Medina*, 461 F.3d 724, 738–39 (6th Cir. 2006) (finding suppression argument raised for the first time on appeal waived and that defendant has shown no good cause, but reviewing for plain error, noting question in circuit as to whether plain error should apply in addition to Rule 12, and finding no plain error); *United States v. Buchanon*, 72 F.3d 1217, 1227 (6th Cir. 1995) (a suppression argument forfeited under Rule 12(f) could be reviewed for plain error under Rule 52(b)); *United States v. Jones*, 530 F.3d 1292, 1298 (10th Cir. 2008) (where defendant failed to raise the misjoinder claim prior to trial, the court of appeals, with the agreement of both defendant and the government, reviewed for plain error); *United States v. Milian-Rodriguez*, 828 F.2d 679, 683–84 (11th Cir. 1987) (concluding that the defendant's failure to raise timely (without good cause) a suppression argument was a waiver under Rule 12(f), but then went on to review the argument for plain error); *United States v. Dewitt*, 946 F.2d 1497, 1502 (10th Cir. 1991) (holding that suppression issue was waived under Rule 12, but then noting that the Court did "not find plain error in the district court's admission of the evidence").

[62]*United States v. Scroggins*, 599 F.3d 433 (5th Cir.) (noting that the Fifth Circuit follows the view that "a defendant who fails to make a timely suppression motion cannot raise that claim for the first

4. Determine if district court would have abused its discretion had it been raised.

Several recent decisions of the Seventh Circuit require the appellate court to ask whether it *would have been* within the trial court's discretion to have denied a claim as untimely if the claim *had been* raised in the trial court.[63]

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time on appeal," but that "[n]onetheless, our cases identifying such waiver have often proceeded to evaluate the issues under a plain error standard for good measure"), *cert. denied,*131 S. Ct. 158 (2010); *United States v. Baker*, 538 F.3d 324, 329 (5th Cir. 2008) ("The *Pope* decision considered at some length reasons supporting its conclusion that arguments not urged in a motion to suppress may not be considered on appeal, [but] also conducted a plain-error analysis and concluded there was no plain error as did our court in *United States v. Maldonado.* We follow the same course today.") (footnotes omitted); *United States v. Whittington*, 269 Fed. Appx. 388, 401 (5th Cir. 2008) (unraised severance motion waived, but in the alternative will be reviewed for plain error); *United States v. Pope*, 467 F.3d 912, 917–20 (5th Cir. 2006) (suppression argument waived, but no plain error either).

[63]*See United States v. Acox*, 595 F.3d 729, 731-32 (7th Cir. 2010) (stating that the cause standard is for the district court alone to apply and requiring the appellate court to ask, in the absence of a district-court decision on good cause, "if a motion for relief had been made and denied, [whether] the district court would have abused its discretion in concluding that the defense lacked good cause"); *United States v. Bright*, 578 F.3d 547, 550-51 (7th Cir. 2009) ("Rule 12 mandates that Bright must have filed a suppression motion before his trial or risk losing it, and because he did not, it cannot be said that the district court committed any error, let alone plain error, when it followed the federal rules as written."); *United States v. Kirkland*, 567 F.3d 316, 322 (7th Cir. 2009) ("Considering that Kirkland gives no explanation for his failure to raise these arguments in his initial motion, it would have been within the district court's discretion to refuse to consider them in the first instance"), *cert. denied,* 130 S. Ct. 1120 (2010).

Other decisions of the Seventh Circuit, gathered in note 59 *supra*, appear to recognize the appellate court's authority to assess the presence of cause under Rule 12, and insist on such a showing as an antecedent to plain error review.

Finally, the First[64] and the Eighth[65] Circuits have expressly declined to decide the issue.

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[64]*United States v. Guerrero*, 524 F.3d 5, 11-12 (1st Cir. 2008) ("Assuming that we may review the claim for plain error despite the Rule 12(e) waiver, *see United States v. Perez-Gonzalez*, 445 F.3d 39, 44 (1st Cir. 2006) (noting that this remains an open question in this circuit), it is clear from the record that no Miranda violation occurred . . ."); *United States v. Colon-Munoz*, 192 F.3d 210, 218 (1st Cir. 1999) (participation of interim United States Attorney in grand jury waived when not raised until after verdict, declining to resolve whether Rule 12 waiver precludes plain error review, noting error harmless as a matter of law under *Mechanik*). But see United States v. Calderon, 578 F.3d 78, 99 (1st Cir.) (motion to sever never raised before trial was waived, defendant failed to identify any cause, much less good cause), *cert. denied sub nom Pomales-Pizarro v. United States*, 130 S. Ct. 437 (2009); *United States v. Pimentel*, 539 F.3d 26, 31 (1st Cir. 2008) (lack of specificity in indictment waived); *United States v. Page*, 521 F.3d 101, 110 (1st Cir. 2008) (severance motion waived when raised for the first time on appeal and defendant "has presented no additional argumentation as to how the denial of severance might have caused him actual prejudice"); *United States v. Negron*, 23 Fed. Appx. 10, 11 (1st Cir. 2001) ("Appellant's submissions wholly fail to show cause for his failure to raise [challenge that he was not indicted by a vote of at least 12 grand jurors] before his trial"); *United States v. Hansen*, 434 F.3d 92, 101–04 (1st Cir. 2006) ("[W]here a defendant has failed altogether to file a motion to suppress below, and as such, we will not consider Hansen's suppression arguments on appeal."); *United States v. Lopez-lopez*, 282 F.3d 1 (1st Cir. 2002) (defendant has not shown cause for relief from his waiver of late suppression motion so his argument is waived); *United States v. Batista*, 239 F.3d 16, 19 (1st Cir. 2001) (stating that relief from waiver under Rule 12 is proper "only where there is a showing of cause and prejudice"); *United States v. Rodriguez-Marrero*, 390 F.3d 1, 11–12 (1st Cir. 2004) (challenge to the specificity of the indictment was waived where it was not raised prior to trial); *United States v. Valerio*, 48 F.3d 58, 63 (1st Cir. 1995) ("Baez never objected to Count II for duplicity, or any other grounds, in the district court. He accordingly has waived his argument.").

[65]*See United States v. Eagle*, 498 F.3d 885, 892 (8th Cir. 2007) ("We have not yet decided whether the failure to raise a suppression matter in a timely pretrial motion precludes plain error review"); *United States v. Frazier*, 280 F.3d 835, 845 (8th Cir. 2002) (declining to decide "interesting question" of whether a court of appeals is barred altogether from reviewing an issue that has been "waived" under Rule 12(f)).

But see *United States v. Oslund*, 453 F.3d 1048 (8th Cir. 2006) (finding claim of pre-charge

The Advisory Committee's proposal adopted the majority approach, specifying that for all but two specified claims, a late claim—whether raised in the district court or the court of appeals—may only be considered if the party shows cause and prejudice. Plain error analysis under Rule 52, the Advisory Committee decided, is irrelevant. The reasons for adopting this approach are spelled out in detail in Section C of the accompanying report. The proposed language, then, omits any reference to the confusing term "waiver" and simply dictates the circumstances of the failure to raise on time and the circumstances under which a court may consider the claim:

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delay waived); *United States v. Cordova*, 157 F.3d 587, 597 (8th Cir. 1998) (venue objection waived).

Rule 12. Pleadings and Pretrial Motions *

1 * * * * *

2 **(b) Pretrial Motions.**

3 **(1)** ***In General.*** Rule 47 applies to a pretrial motion.

4 **(2)** ~~***Motions That May Be Made Before Trial.*** A~~

5 ~~party may raise by pretrial motion any defense,~~

6 ~~objection, or request that the court can determine~~

7 ~~without a trial of the general issue.~~***Motion That***

8 ***May Be Made at Any Time.*** A motion that the

9 court lacks jurisdiction may be made at any time

10 while the case is pending.

11 **(3)** ***Motions That Must Be Made Before Trial.*** The

12 following defenses, objections, and requests must

13 be raised by motion before trial if the basis for the

14 motion is then reasonably available and the

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

15 motion can be determined without a trial on the
16 merits:
17 (A) ~~a motion alleging~~ a defect in instituting the
18 prosecution, including:
19 (i) improper venue;
20 (ii) preindictment delay;
21 (iii) a violation of the constitutional
22 right to a speedy trial;
23 (iv) double jeopardy;
24 (v) the statute of limitations;
25 (vi) selective or vindictive
26 prosecution; and
27 (vii) an error in the grand-jury
28 proceeding or preliminary hearing;
29 (B) ~~a motion alleging~~ a defect in the indictment
30 or information, including:
31 (i) joining two or more offenses in the
32 same count (duplicity);

33 (ii) charging the same offense in more
34 than one count (multiplicity);
35 (iii) lack of specificity;
36 (iv) improper joinder; and
37 (v) failure to state an offense.
38 ~~— but at any time while the case is pending, the~~
39 ~~court may hear a claim that the indictment or~~
40 ~~information fails to invoke the court's jurisdiction~~
41 ~~or to state an offense~~;
42 (C) ~~a motion to~~ suppression of evidence;
43 (D) ~~a Rule 14 motion to~~ severance of charges or
44 defendants under Rule 14; and
45 (E) ~~a Rule 16 motion for~~ discovery under Rule
46 16.
47 **(4)** ***Notice of the Government's Intent to Use***
48 ***Evidence*.**
49 (A) *At the Government's Discretion*. At the
50 arraignment or as soon afterward as

51 practicable, the government may notify the
52 defendant of its intent to use specified
53 evidence at trial in order to afford the
54 defendant an opportunity to object before
55 trial under Rule 12(b)(3)(C).
56 (B) *At the Defendant's Request*. At the
57 arraignment or as soon afterward as
58 practicable, the defendant may, in order to
59 have an opportunity to move to suppress
60 evidence under Rule 12(b)(3)(C), request
61 notice of the government's intent to use (in
62 its evidence-in-chief at trial) any evidence
63 that the defendant may be entitled to
64 discover under Rule 16.
65 **(c) ~~Motion Deadline..~~ <u>Deadline for a Pretrial Motion;</u>**
66 **<u>Consequences of Not Making a Timely Motion.</u>**
67 <u>(1) *Setting a Deadline.*</u> The court may, at
68 the arraignment or as soon afterward as

69 practicable, set a deadline for the parties to make
70 pretrial motions and may also schedule a motion
71 hearing.
72 **(2) *Consequences of an Untimely Motion***
73 ***under Rule 12(b)(3).*** If a party does not meet the
74 deadline – or any extension the court provides –
75 for making a Rule 12(b)(3) motion, the motion is
76 untimely. In such a case, Rule 52 does not apply,
77 but a court may consider the defense, objection,
78 or request when:
79 (A) the party shows cause and
80 prejudice; or
81 (B) if the defense or objection is
82 failure to state an offense or double
83 jeopardy, the party shows prejudice
84 only.
85 **(d) Ruling on a Motion.** The court must decide
86 every pretrial motion before trial unless it finds

87 good cause to defer a ruling. The court must not
88 defer ruling on a pretrial motion if the deferral
89 will adversely affect a party's right to appeal.
90 When factual issues are involved in deciding a
91 motion, the court must state its essential findings
92 on the record.

93 **(e)** **[Reserved]** ~~**Waiver of a Defense, Objection, or**~~
94 ~~**Request.** A party waives any Rule 12(b)(3)~~
95 ~~defense, objection, or request not raised by the~~
96 ~~deadline the court sets under Rule 12(c) or by any~~
97 ~~extension the court provides. For good cause, the~~
98 ~~court may grant relief from the waiver.~~

99 *** * * * ***

Committee Note

Rule 12(b)(2). The amendment deletes the provision providing that "any defense**,** objection, or request that the court can determine without trial of the general issue" may be raised by motion before trial. This language was added in 1944 to make sure that matters previously raised by demurrers, special pleas, and motions to quash could be raised by pretrial motion. The Committee concluded that the use of pretrial motions is so well established that it no longer

requires explicit authorization. Moreover, the Committee was concerned that the permissive language might be misleading, since Rule 12(b)(3) does not permit the parties to wait until after the trial begins to make certain motions that can be determined without a trial on the merits.

As revised, subdivision (b)(2) states that lack of jurisdiction may be raised at any time the case is pending. This provision was relocated from its previous placement at the end of subsection (b)(3)(B) and restyled. No change in meaning is intended.

Rule 12(b)(3). The amendment clarifies which motions must be raised before trial.

The introductory language includes two important limitations. The basis for the motion must be one that is "available" and the motion must be one that the court can determine "without trial on the merits." The types of claims subject to Rule 12(b)(3) generally will be available before trial and they can – and should – be resolved then. The Committee recognized, however, that in some cases, a party may not have access to the information needed to raise particular claims that fall within the general categories subject to Rule 12(b)(3) prior to trial. The "then reasonably available" language is intended to ensure that a claim a party could not have raised on time is not subject to the limitation on review imposed by Rule 12(c)(2). Cf. 28 U.S.C. § 1867(a) & (b) (requiring claims to be raised promptly after they were "discovered or could have been discovered by the exercise of due diligence"). Additionally, only those issues that can be determined "without a trial on the merits" need be raised by motion before trial. The more modern phrase "trial on the merits" is substituted for the more archaic phrase "trial of the general issue" that appeared in existing (now deleted) (b)(2). No change in meaning is intended.

The rule's command that motions alleging "a defect in instituting the prosecution" and "errors in the indictment or information" must be made before trial is unchanged. The amendment adds a nonexclusive list of commonly raised claims under each category to help ensure that such claims are not overlooked.

Rule 12(b)(3)(B) has also been amended to remove language that allowed the court at any time while the case is pending to hear a claim that the "indictment or information fails . . . to state an offense." This specific charging error was previously considered fatal whenever raised and was excluded from the general requirement that charging deficiencies be raised prior to trial. The Supreme Court abandoned any jurisdictional justification for the exception in *United States v. Cotton*, 535 U.S. 625, 629-31 (2002) (overruling *Ex parte Bain*, 121 U.S. 1 (1887), "[i]nsofar as it held that a defective indictment deprives a court of jurisdiction").

Rule 12(c). As revised, subdivision (c) governs both the deadline for making pretrial motions and the consequences of failing to meet the deadline for motions that must be made before trial under Rule 12(b)(3).

As amended, subdivision (c) contains two paragraphs. Paragraph (c)(1) retains the existing provisions for establishing the time when pretrial motions must be made. New paragraph (c)(2) governs review of untimely claims, which were previously addressed in Rule 12(e).

Rule 12(e) provided that a party "waives" a defense not raised within the time set under Rule 12(c). Although the term waiver in the context of a criminal case ordinarily refers to the intentional

relinquishment of a known right, Rule 12(e) has never required any determination that a party who failed to make a timely motion intended to relinquish a defense, objection, or request that was not raised in a timely fashion. Accordingly, to avoid possible confusion the Committee decided not to employ the term "waiver" in new paragraph (c)(2).

The standard for review of untimely claims under new subdivision 12(c)(2) depends on the nature of the defense, objection, or request. The general standard for claims that must be raised before trial under Rule 12(b)(3) is stated in (c)(2)(A), which requires that the party seeking relief show "cause and prejudice" for failure to raise a claim by the deadline. Although former Rule 12(e) referred to "good cause," no change in meaning is intended. The Supreme Court and lower federal courts interpreted the "good cause" standard under Rule 12(e) to require both (1) "cause" for the failure to raise the claim on time, and (2) "prejudice" resulting from the error. *Davis v. United States*, 411 U.S. 233, 242 (1973); *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 363 (1963). Each concept – "cause" and "prejudice" – is well-developed in case law applying Rule 12. The amended rule reflects the judicial construction of Rule 12(e).

Subdivision (c)(2)(B) provides a different standard for two specific claims: failure of the charging document to state an offense and violations of double jeopardy. The Committee concluded that judicial review of these claims, which go to adequacy of the notice afforded to the defendant, and the power of the state to bring a defendant to trial or to impose punishment, should be available without a showing of "cause." Accordingly, paragraph (c)(2)(B) provides that the court can consider these claims if the party "shows prejudice only." Unlike plain error review under Rule 52(b), the new standard under Rule (12)(c)(2)(B) does not require a showing

that the error was "plain" or that the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." Nevertheless, it will not always be possible for a defendant to make the required showing. For example, in some cases in which the charging document omitted an element of the offense the defendant may have admitted the element as part of a guilty plea after having been afforded timely notice by other means.

Rule 12(e). The effect of failure to raise issues by a pretrial motion have been relocated from (e) to (c)(2).

Rule 34. Arresting Judgment

(a) In General. Upon the defendant's motion or on its own, the court must arrest judgment if the court does not have jurisdiction of the charged offense. ~~if:~~

~~(1) the indictment or information does not charge an offense; or~~

~~(2) the court does not have jurisdiction of the charged offense.~~

* * * * *

Advisory Committee Note

This amendment conforms Rule 34 to Rule 12(b) which has been amended to remove language that the court at any time while the case is pending may hear a claim that the "indictment or information fails . . . to state an offense." The amended Rule 12 instead requires that such a defect be raised before trial.

AS SUBMITTED TO THE STANDING COMMITTEE JANUARY 2010

Rule 12. Pleadings and Pretrial Motions *

1 * * * * *

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

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11 **(3)** ***Motions That Must Be Made Before Trial.*** The
12 following defenses, objections, and requests must
13 be raised by motion before trial if the basis for the
14 motion is then reasonably available and the
15 motion can be determined without a trial on the
16 merits:
17 (A) ~~a motion alleging~~ a defect in instituting the
18 prosecution, including:
19 (i) improper venue;
20 (ii) preindictment delay;
21 (iii) a violation of the constitutional
22 right to a speedy trial;
23 (iv) double jeopardy;
24 (v) the statute of limitations;
25 (vi) selective or vindictive
26 prosecution;

27 (vii) outrageous government conduct;

28 and

29 (viii) an error in the grand jury

30 proceeding or preliminary hearing;

31 (B) ~~a motion alleging~~ a defect in the indictment

32 or information, including:

33 (i) joining two or more offenses in the

34 same count (duplicity);

35 (ii) charging the same offense in more

36 than one count (multiplicity);

37 (iii) lack of specificity;

38 (iv) improper joinder; and

39 (v) failure to state an offense;

40 ~~— but at any time while the case is pending, the~~

41 ~~court may hear a claim that the indictment or~~

~~information fails to invoke the court's jurisdiction or to state an offense~~;

(C) ~~a motion to~~ suppressi<u>on of</u> evidence;

(D) ~~a Rule 14 motion to~~ <u>severance of</u> charges or defendants <u>under Rule 14</u>; and

(E) ~~a Rule 16 motion for~~ discovery <u>under Rule 16</u>.

(4) ***Notice of the Government's Intent to Use Evidence*.**

(A) *At the Government's Discretion*. At the arraignment or as soon afterward as practicable, the government may notify the defendant of its intent to use specified evidence at trial in order to afford the defendant an opportunity to object before trial under Rule 12(b)(3)(C).

58 (B) *At the Defendant's Request*. At the
59 arraignment or as soon afterward as
60 practicable, the defendant may, in order to
61 have an opportunity to move to suppress
62 evidence under Rule 12(b)(3)(C), request
63 notice of the government's intent to use (in
64 its evidence-in-chief at trial) any evidence
65 that the defendant may be entitled to
66 discover under Rule 16.

67 **(c) Motion Deadline.** The court may, at the
68 arraignment or as soon afterward as practicable,
69 set a deadline for the parties to make pretrial
70 motions and may also schedule a motion hearing.

71 **(d) Ruling on a Motion.** The court must decide
72 every pretrial motion before trial unless it finds
73 good cause to defer a ruling. The court must not
74 defer ruling on a pretrial motion if the deferral

75 will adversely affect a party's right to appeal.
76 When factual issues are involved in deciding a
77 motion, the court must state its essential findings
78 on the record.

79 **(e)** **~~Waiver of a Defense, Objection, or Request.~~**
80 **Consequence of Not Making a Motion Before**
81 **Trial as Required.**

82 **(1)** ***Waiver.*** A party waives any Rule 12(b)(3)
83 defense, objection, or request – other than failure
84 to state an offense , double jeopardy, or the statute
85 of limitations – not raised by the deadline the
86 court sets under Rule 12(c) or by any extension
87 the court provides. ~~For good cause~~ Upon a
88 showing of cause and prejudice, the court may
89 grant relief from the waiver. Otherwise, a party
90 may not raise the waived claim.

91 **(2)** ***Forfeiture.*** A party forfeits any claim based on
92 the failure to state an offense, double jeopardy, or
93 the statute of limitations, if the claim was not
94 raised by the deadline the court sets under Rule
95 12(c) or by any extension the court provides. A
96 forfeited claim is not waived. Rule 52(b) governs
97 relief for forfeited claims.

Committee Note

Rule 12(b)(2). The amendment deletes the provision providing that "any defense**,** objection, or request that the court can determine without trial of the general issue" may be raised by motion before trial. This language was added in 1944 to make sure that matters previously raised by demurrers, special pleas, and motions to quash could be raised by pretrial motion. The Committee concluded that the use of pretrial motions is so well established that it no longer requires explicit authorization. Moreover, the Committee was concerned that the permissive language might be misleading, since Rule 12(b)(3) does not permit the parties to wait until after the trial begins to make certain motions that can be determined without a trial on the merits.

As revised, subdivision (b)(2) states that lack of jurisdiction may be raised at any time the case is pending. This provision was relocated from its previous placement at the end of subsection (b)(3)(B) and restyled. No change in meaning is intended.

Rule 12(b)(3). The amendment clarifies which motions must be raised before trial.

The introductory language includes two important limitations. The basis for the motion must be one that is "available" and the motion must be one that the court can determine "without trial on the merits." The types of claims subject to Rule 12(b)(3) generally will be available before trial and they can – and should – be resolved then. The Committee recognized, however, that in some cases, a party may not have access to the information needed to raise particular claims that fall within the general categories subject to Rule 12(b)(3) prior to trial. The "then reasonably available" language is intended to ensure that the failure to raise a claim a party could not have raised on time is not deemed to be "waiver" or "forfeiture" under the Rule. Cf. 28 U.S.C. § 1867(a) & (b) (requiring claims to be raised promptly after they were "discovered or could have been discovered by the exercise of due diligence"). Additionally, only those issues that can be determined "without a trial on the merits" need be raised by motion before trial. The more modern phrase "trial on the merits" is substituted for the more archaic phrase "trial of the general issue" that appeared in existing (now deleted) (b)(2). No change in meaning is intended.

The rule's command that motions alleging "a defect in instituting the prosecution" and "errors in the indictment or information" must be made before trial is unchanged. The amendment adds a nonexclusive list of commonly raised claims under each category to help ensure that such claims are not overlooked.

Rule 12(b)(3)(B) has also been amended to remove language that allowed the court at any time while the case is pending to hear a claim that the "indictment or information fails . . . to state an offense." This specific charging error was previously considered fatal whenever raised and was excluded from the general requirement that charging deficiencies be raised prior to trial. The

Supreme Court abandoned any jurisdictional justification for the exception in *United States v. Cotton*, 535 U.S. 625, 629-31 (2002) (overruling *Ex parte Bain*, 121 U.S. 1 (1887), "[i]nsofar as it held that a defective indictment deprives a court of jurisdiction").

Rule 12(e). Rule 12(e) has also been amended to clarify when a court may grant relief for untimely claims that should have been raised prior to trial under Rule 12(b)(3). Rule 12(e) has been subdivided into two sections, each specifying a different standard of review for untimely claims of error.

Subdivision (e)(1) carries over the "waiver" standard of the existing rule, applying it to all untimely claims except for those that allege a violation of double jeopardy or the statute of limitations or that the charge fails to state an offense. The rule retains the language that provides a party "waives" all other challenges by not raising them on time as required by Rule 12(b)(3), as well as the language that relief is available only if the defendant makes a certain showing, previously described as "good cause." "Good cause" for securing relief for an untimely claim "waived" under Rule 12 has been interpreted by the Supreme Court as well as most lower courts to require two showings: (1) "cause" for the failure to raise the claim on time, and (2) "prejudice" resulting from the error. *Davis v. United States*, 411 U.S. 233, 242 (1973); *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 363 (1963). Each concept – "cause" and "prejudice" – is well-developed in case law applying Rule 12. To clarify this standard, with no change in meaning intended, the words "for good cause" in the existing rule have been replaced by "upon a showing of cause and prejudice."

Subdivision (e)(2) provides a different standard for three specific claims, those that allege a violation of double jeopardy, a violation of the statute of limitations, or that the charge fails to state an offense. The Committee concluded that the "cause" showing required for excusing waiver of other sorts of claims is inappropriate for these claims. The new subdivision provides that a court may

grant relief for such a claim whenever the error amounts to plain error under Rule 52(b). This new standard is also consistent with the Court's holding in *Cotton*, that a claim that an indictment failed to allege an essential element, raised for the first time after conviction, was forfeited and must meet "the plain-error test of Federal Rule of Criminal Procedure 52(b)." *Cotton*, 535 U.S. at 631.

Rule 34. Arresting Judgment

(a) In General. Upon the defendant's motion or on its own, the court must arrest judgment if the court does not have jurisdiction of the charged offense. ~~if:~~

~~(1) the indictment or information does not charge an offense; or~~

~~(2) the court does not have jurisdiction of the charged offense.~~

* * * * *

Advisory Committee Note

This amendment conforms Rule 34 to Rule 12(b) which has been amended to remove language that the court at any time while the case is pending may hear a claim that the "indictment or information fails . . . to state an offense." The amended Rule 12 instead requires that such a defect be raised before trial.

RULE 12 PROPOSAL SUBMITTED TO STANDING COMMITTEE JUNE 2009

Rule 12. Pleadings and Pretrial Motions

* * * * *

(b) Pretrial Motions.

* * * * *

(3) Motions That Must Be Made Before Trial. The following must be raised before trial:

(A) a motion alleging a defect in instituting the prosecution;

(B) a motion alleging a defect in the indictment or information, including failure to state an offense--but at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction ~~or to state an offense~~;

15 (C) a motion to suppress evidence;

16 (D) a Rule 14 motion to sever charges or
17 defendants; and

18 (E) a Rule 16 motion for discovery.

19 * * * * *

20 **(e) Waiver of a Defense, Objection, or Request.**

21 **(1) Generally.** A party waives any Rule 12(b)(3)
22 defense, objection, or request not raised by the deadline
23 the court sets under Rule 12(c) or by any extension the
24 court provides.

25 **(2) Relief from Waiver.** ~~For good cause,~~ T~~t~~he court
26 may grant relief from the waiver:

27 (A) for good cause; or

28 (B) when a failure to state an offense in the
29 indictment or information has prejudiced a
30 substantial right of the defendant.

* * * * *

Committee Note

Rule 12(b)(3)(B) has been amended to remove language that allowed the court at any time while the case is pending to hear a claim that the "indictment or information fails . . . to state an offense." This specific charging error was previously considered "jurisdictional," fatal whenever raised, and was excluded from the general requirement that charging deficiencies be raised prior to trial. The Supreme Court abandoned this justification for the exception in *United States v. Cotton*, 535 U.S. 625, 629-31 (2002) (overruling *Ex parte Bain*, 121 U.S. 1 (1887), "[i]nsofar as it held that a defective indictment deprives a court of jurisdiction"). The Court in *Cotton* held that a claim that an indictment failed to allege an essential element, raised for the first time after conviction, was forfeited and must meet "the plain-error test of Federal Rule of Criminal Procedure 52(b)." *Cotton*, 535 U.S. at 631.

The amendment requires the failure to state an offense to be raised before trial, like any other deficiency in the charge. Under the amended rule, a defendant who fails to object before trial that the charge does not state an offense now "waives" that objection under Rule 12(e). However, Rule 12(e) has also been amended so that even when the objection is untimely, a court may grant relief whenever a failure to state an offense has prejudiced a substantial right of the defendant, such as when the faulty charge has denied the defendant an adequate opportunity to prepare a defense.

The amendment is not intended to affect existing law concerning when relief may be granted for other untimely challenges "waived" under Rule 12(e).

Rule 34. Arresting Judgment

(a) In General. Upon the defendant's motion or on its own, the court must arrest judgment ~~if: (1) the indictment or information does not charge an offense; or (2)~~ the court does not have jurisdiction of the charged offense.

* * * * *

Committee Note

This amendment conforms Rule 34 to Rule 12(b) which has been amended to remove language that the court at any time while the case is pending may hear a claim that the "indictment or information fails . . . to state an offense." The amended Rule 12 instead requires that such a defect be raised before trial.

12b-004404

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 5. Initial Appearance

*** * * * ***

(c) Place of Initial Appearance; Transfer to Another District.

*** * * * ***

(4) ***Procedure for Persons Extradited to the United States.*** If the defendant is surrendered to the United States in accordance with a request for the defendant's extradition, the initial appearance must be in the district (or one of the districts) where the offense is charged.

(d) Procedure in a Felony Case.

(1) ***Advice.*** If the defendant is charged with a felony, the judge must inform the defendant of the following:

* * * * *

(D) any right to a preliminary hearing; ~~and~~

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

17 (E) the defendant's right not to make a
18 statement, and that any statement made
19 may be used against the defendant; and
20 (F) if the defendant is held in custody and is
21 not a United States citizen, that an attorney
22 for the government or a federal law
23 enforcement officer will:
24 (i) notify a consular officer from the
25 defendant's country of nationality that
26 the defendant has been arrested if the
27 defendant so requests; or
28 (ii) make any other consular notification
29 required by treaty or other
30 international agreement.

* * * * *

Committee Note

Subdivision (c)(4). The amendment codifies the longstanding practice that persons who are charged with criminal offenses in the United States and surrendered to the United States following extradition in a foreign country make their initial appearance in the jurisdiction that sought their extradition.

This rule is applicable even if the defendant arrives first in another district. The earlier stages of the extradition process have already fulfilled some of the functions of the initial appearance. During foreign extradition proceedings, the extradited person, assisted by counsel, is afforded an opportunity to review the charging document, U.S. arrest warrant, and supporting evidence. Rule 5(a)(1)(B) requires the person be taken before a magistrate judge without unnecessary delay. Consistent with this obligation, it is preferable not to delay an extradited person's transportation to hold an initial appearance in the district of arrival, even if the person will be present in that district for some time as a result of connecting flights or logistical difficulties. Interrupting an extradited defendant's transportation at this point can impair his or her ability to obtain and consult with trial counsel and to prepare his or her defense in the district where the charges are pending.

Subdivision (d)(1)(F). This amendment is designed to ensure that the United States fulfills its international obligations under Article 36 of the Vienna Convention on Consular Relations, and other bilateral treaties. Bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 of the Vienna Convention provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention. At the time of this amendment, many questions remain unresolved concerning Article 36, including whether it creates individual rights that may be invoked in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). This amendment does not address those questions.

PUBLIC COMMENTS CONCERNING RULE 5

10-CR-001. Peter Goldberger on behalf of the National Association of Criminal Defense Lawyers. NACDL agrees with the amendment in principle, but suggests amendments (1) clarify the meaning of "held in custody," (2) make clear that consular warnings may not be delayed until the initial hearing, and (3) make clear that the initial hearing in extradition cases must be held "without unnecessary delay."

10-CR-002. Federal Magistrate Judges Association. FMJA (1) recommends that proposed Rule 5(c)(4) be revised to require that the initial hearing for extradited defendants must be held "without unnecessary delay," (2) expresses some reservations about imposing upon courts the executive function of giving consular notification, and (3) notes that great care would have to be taken to ensure that defendants who are given this notice do not incriminate themselves.

Rule 12. Pleadings and Pretrial Motions *

* * * * *

(b) Pretrial Motions.

(1) ***In General.*** Rule 47 applies to a pretrial motion.

(2) ~~***Motions That May Be Made Before Trial.*** A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue.~~***Motion That May Be Made at Any Time.*** A motion that the court lacks jurisdiction may be made at any time while the case is pending.

(3) ***Motions That Must Be Made Before Trial.*** The following defenses, objections, and requests must be raised by motion before trial if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits:

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

(A) ~~a motion alleging~~ a defect in instituting the prosecution, including:

(i) improper venue;

(ii) preindictment delay;

(iii) a violation of the constitutional right to a speedy trial;

(iv) double jeopardy;

(v) the statute of limitations;

(vi) selective or vindictive prosecution; and

(vii) an error in the grand-jury proceeding or preliminary hearing;

(B) ~~a motion alleging~~ a defect in the indictment or information, including:

(i) joining two or more offenses in the same count (duplicity);

(ii) charging the same offense in more than one count (multiplicity);

(iii) lack of specificity;

(iv) improper joinder; and

(v) failure to state an offense.

~~— but at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense~~;

(C) ~~a motion to~~ suppression of evidence;

(D) ~~a Rule 14 motion to~~ severance of charges or defendants under Rule 14; and

(E) ~~a Rule 16 motion for~~ discovery under Rule 16.

(4) ***Notice of the Government's Intent to Use Evidence*.**

(A) *At the Government's Discretion.* At the arraignment or as soon afterward as practicable, the government may notify the

defendant of its intent to use specified evidence at trial in order to afford the defendant an opportunity to object before trial under Rule 12(b)(3)(C).

(B) *At the Defendant's Request*. At the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)(C), request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.

(c) ~~Motion Deadline..~~ <u>Deadline for a Pretrial Motion; Consequences of Not Making a Timely Motion.</u>

<u>(1) *Setting a Deadline.*</u> The court may, at the arraignment or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing.

(2) *Consequences of an Untimely Motion under Rule 12(b)(3).* If a party does not meet the deadline – or any extension the court provides – for making a Rule 12(b)(3) motion, the motion is untimely. In such a case, Rule 52 does not apply, but a court may consider the defense, objection, or request when:

(A) the party shows cause and prejudice; or

(B) if the defense or objection is failure to state an offense or double jeopardy, the party shows prejudice only.

(d) Ruling on a Motion. The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding a motion,

89 the court must state its essential findings on the

90 record.

91 **(e)** **[Reserved]** ~~**Waiver of a Defense, Objection, or**~~

92 ~~**Request.** A party waives any Rule 12(b)(3)~~

93 ~~defense, objection, or request not raised by the~~

94 ~~deadline the court sets under Rule 12(c) or by any~~

95 ~~extension the court provides. For good cause, the~~

96 ~~court may grant relief from the waiver.~~

97 *** * * * ***

Committee Note

Rule 12(b)(2). The amendment deletes the provision providing that "any defense**,** objection, or request that the court can determine without trial of the general issue" may be raised by motion before trial. This language was added in 1944 to make sure that matters previously raised by demurrers, special pleas, and motions to quash could be raised by pretrial motion. The Committee concluded that the use of pretrial motions is so well established that it no longer requires explicit authorization. Moreover, the Committee was concerned that the permissive language might be misleading, since Rule 12(b)(3) does not permit the parties to wait until after the trial begins to make certain motions that can be determined without a trial on the merits.

As revised, subdivision (b)(2) states that lack of jurisdiction may be raised at any time the case is pending. This provision was relocated from its previous placement at the end of subsection (b)(3)(B) and restyled. No change in meaning is intended.

Rule 12(b)(3). The amendment clarifies which motions must be raised before trial.

The introductory language includes two important limitations. The basis for the motion must be one that is "available" and the motion must be one that the court can determine "without trial on the merits." The types of claims subject to Rule 12(b)(3) generally will be available before trial and they can – and should – be resolved then. The Committee recognized, however, that in some cases, a party may not have access to the information needed to raise particular claims that fall within the general categories subject to Rule 12(b)(3) prior to trial. The "then reasonably available" language is intended to ensure that a claim a party could not have raised on time is not subject to the limitation on review imposed by Rule 12(c)(2). Cf. 28 U.S.C. § 1867(a) & (b) (requiring claims to be raised promptly after they were "discovered or could have been discovered by the exercise of due diligence"). Additionally, only those issues that can be determined "without a trial on the merits" need be raised by motion before trial. The more modern phrase "trial on the merits" is substituted for the more archaic phrase "trial of the general issue" that appeared in existing (now deleted) (b)(2). No change in meaning is intended.

The rule's command that motions alleging "a defect in instituting the prosecution" and "errors in the indictment or information" must be made before trial is unchanged. The amendment adds a nonexclusive list of commonly raised claims under each category to help ensure that such claims are not overlooked.

Rule 12(b)(3)(B) has also been amended to remove language that allowed the court at any time while the case is pending to hear a claim that the "indictment or information fails . . . to state an offense." This specific charging error was previously considered fatal whenever raised and was excluded from the general requirement that charging deficiencies be raised prior to trial. The Supreme Court abandoned any jurisdictional justification for the exception in *United States v. Cotton*, 535 U.S. 625, 629-31 (2002) (overruling *Ex parte Bain*, 121 U.S. 1 (1887), "[i]nsofar as it held that a defective indictment deprives a court of jurisdiction").

Rule 12(c). As revised, subdivision (c) governs both the deadline for making pretrial motions and the consequences of failing

to meet the deadline for motions that must be made before trial under Rule 12(b)(3).

As amended, subdivision (c) contains two paragraphs. Paragraph (c)(1) retains the existing provisions for establishing the time when pretrial motions must be made. New paragraph (c)(2) governs review of untimely claims, which were previously addressed in Rule 12(e).

Rule 12(e) provided that a party "waives" a defense not raised within the time set under Rule 12(c). Although the term waiver in the context of a criminal case ordinarily refers to the intentional relinquishment of a known right, Rule 12(e) has never required any determination that a party who failed to make a timely motion intended to relinquish a defense, objection, or request that was not raised in a timely fashion. Accordingly, to avoid possible confusion the Committee decided not to employ the term "waiver" in new paragraph (c)(2).

The standard for review of untimely claims under new subdivision 12(c)(2) depends on the nature of the defense, objection, or request. The general standard for claims that must be raised before trial under Rule 12(b)(3) is stated in (c)(2)(A), which requires that the party seeking relief show "cause and prejudice" for failure to raise a claim by the deadline. Although former Rule 12(e) referred to "good cause," no change in meaning is intended. The Supreme Court and lower federal courts interpreted the "good cause" standard under Rule 12(e) to require both (1) "cause" for the failure to raise the claim on time, and (2) "prejudice" resulting from the error. *Davis v. United States*, 411 U.S. 233, 242 (1973); *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 363 (1963). Each concept – "cause" and "prejudice" – is well-developed in case law applying Rule 12. The amended rule reflects the judicial construction of Rule 12(e).

Subdivision (c)(2)(B) provides a different standard for two specific claims: failure of the charging document to state an offense and violations of double jeopardy. The Committee concluded that judicial review of these claims, which go to adequacy of the notice afforded to the defendant, and the power of the state to bring a defendant to trial or to impose punishment, should be available without a showing of "cause." Accordingly, paragraph (c)(2)(B)

provides that the court can consider these claims if the party "shows prejudice only." Unlike plain error review under Rule 52(b), the new standard under Rule (12)(c)(2)(B) does not require a showing that the error was "plain" or that the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." Nevertheless, it will not always be possible for a defendant to make the required showing. For example, in some cases in which the charging document omitted an element of the offense the defendant may have admitted the element as part of a guilty plea after having been afforded timely notice by other means.

Rule 12(e). The effect of failure to raise issues by a pretrial motion have been relocated from (e) to (c)(2).

Rule 15. Depositions

* * * * *

(c) Defendant's Presence.

(1) ***Defendant in Custody*.** Except as authorized by Rule 15(c)(3), the ~~The~~ officer who has custody of the defendant must produce the defendant at the deposition and keep the defendant in the witness's presence during the examination, unless the defendant:

(A) waives in writing the right to be present; or

(B) persists in disruptive conduct justifying exclusion after being warned by the court that disruptive conduct will result in the defendant's exclusion.

(2) ***Defendant Not in Custody*.** Except as authorized by Rule 15(c)(3), a ~~A~~ defendant who is not in custody has the right upon request to be present at the deposition, subject to any conditions imposed by the court. If the government tenders the defendant's expenses as provided in Rule 15(d) but the defendant still fails to appear, the defendant — absent good cause — waives both the right to appear and any objection to the taking and use of the deposition based on that right.

(3) ***Taking Depositions Outside the United States Without the Defendant's Presence.*** The deposition of a witness who is outside the United States may be taken without the defendant's presence if the court makes case-specific findings of all the following:

(A) the witness's testimony could provide substantial proof of a material fact in a felony prosecution;

(B) there is a substantial likelihood that the witness's attendance at trial cannot be obtained;

(C) the witness's presence for a deposition in the United States cannot be obtained;

(D) the defendant cannot be present because:

(i) the country where the witness is located will not permit the defendant to attend the deposition;

(ii) for an in-custody defendant, secure transportation and continuing custody cannot be assured at the witness's location; or

38 (iii) for an out-of-custody defendant, no reasonable

39 conditions will assure an appearance at the

40 deposition or at trial or sentencing; and

41 (E) the defendant can meaningfully participate in the

42 deposition through reasonable means.

43 * * * * *

Committee Note

Subdivision (c)(3). This amendment provides a mechanism for taking depositions in cases in which important witnesses — government and defense witnesses both — live in, or have fled to, countries where they cannot be reached by the court's subpoena power. Although Rule 15 authorizes depositions of witnesses in certain circumstances, the Rule to date has not addressed instances where an important witness is not in the United States, there is a substantial likelihood the witness's attendance at trial cannot be obtained, and it would not be possible to securely transport the defendant or a co-defendant to the witness's location for a deposition.

The Committee recognized that authorizing the taking of a deposition under new Rule15(c)(3) would not determine whether the resulting deposition will be admissible, in part or in whole, at trial. As is true of any other deposition, questions of admissibility of the evidence taken by means of these depositions are left to resolution by the courts, on a case by case basis, applying the Federal Rules of Evidence and the Constitution.

Recognizing that important witness confrontation principles and vital law enforcement and other public interests are involved in these instances, the amended Rule authorizes a deposition outside a defendant's physical presence only in very limited circumstances where case-specific findings are made by the trial court. New Rule 15(c)(3) delineates these circumstances and the specific findings a trial court must make before permitting parties to depose a witness

outside the defendant's presence. The party requesting the deposition shoulders the burden of proof — by a preponderance of the evidence — as to the elements that must be shown

This amendment does not supersede the relevant provisions of 18 U.S.C. § 3509, authorizing depositions outside the defendant's physical presence in certain cases involving child victims and witnesses, or any other provision of law.

Rule 34. Arresting Judgment

(a) In General. Upon the defendant's motion or on its own, the court must arrest judgment if the court does not have jurisdiction of the charged offense. ~~if:~~

~~(1) the indictment or information does not charge an offense;~~

~~or~~

~~(2) the court does not have jurisdiction of the charged offense.~~

* * * * *

Advisory Committee Note

This amendment conforms Rule 34 to Rule 12(b) which has been amended to remove language that the court at any time while the case is pending may hear a claim that the "indictment or information fails . . . to state an offense." The amended Rule 12 instead requires that such a defect be raised before trial.

Rule 37. Indicative Ruling on a Motion for Relief That Is Barred by a Pending Appeal

(a) Relief Pending Appeal. If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:

(1) defer considering the motion;

(2) deny the motion; or

(3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

(b) Notice to the Court of Appeals. The movant must promptly notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue.

(c) Remand. The district court may decide the motion if the court of appeals remands for that purpose.

Committee Note

This new rule adopts for any motion that the district court cannot grant because of a pending appeal the practice that most courts follow when a party makes a motion under Rule 60(b) of the Federal Rules of Civil Procedure to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot grant a Rule 60(b) motion without a remand. But it can entertain the motion and deny it, defer consideration, or state that it would grant the motion if the court of appeals remands for that purpose or state that the motion raises a substantial issue. Experienced lawyers often refer to the suggestion for remand as an "indicative ruling." (Federal Rule of Appellate Procedure 4(b)(3) lists three motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before or after the motion is filed until the judgment of conviction is entered and the last such motion is ruled upon. The district court has authority to grant the motion without resorting to the indicative ruling procedure.)

The procedure formalized by Federal Rule of Appellate Procedure 12.1 is helpful when relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. In the criminal context, the Committee anticipates that Criminal Rule 37 will be used primarily if not exclusively for newly discovered evidence motions under Criminal Rule 33(b)(1) (*see United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c). Rule 37 does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in the face of a pending appeal. The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appellate jurisdiction. Rule 37 applies only when those rules deprive the district court of authority to grant relief without appellate permission. If the district court concludes that it has authority to grant relief without appellate permission, it can act without falling back on the indicative ruling procedure.

To ensure proper coordination of proceedings in the district court and in the appellate court, the movant must notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court

states that it would grant the motion or that the motion raises a substantial issue. Remand is in the court of appeals' discretion under Federal Rule of Appellate Procedure 12.1.

Often it will be wise for the district court to determine whether it in fact would grant the motion if the court of appeals remands for that purpose. But a motion may present complex issues that require extensive litigation and that may either be mooted or be presented in a different context by decision of the issues raised on appeal. In such circumstances the district court may prefer to state that the motion raises a substantial issue, and to state the reasons why it prefers to decide only if the court of appeals agrees that it would be useful to decide the motion before decision of the pending appeal. The district court is not bound to grant the motion after stating that the motion raises a substantial issue; further proceedings on remand may show that the motion ought not be granted.

PUBLIC COMMENTS CONCERNING RULE 37

10-CR-001. Peter Goldberger on behalf of the National Association of Criminal Defense Lawyers. NACDL "is pleased with" the proposed rule, but suggests amendments to the committee note to provide additional guidance to practitioners.

10-CR-002. Federal Magistrate Judges Association. FMJA "endorses" the proposed rule.

Rule 58. Petty Offenses and Other Misdemeanors

* * * * *

(b) Pretrial Procedure.

* * * * *

(2) ***Initial Appearance.*** At the defendant's initial appearance on a petty offense or other misdemeanor charge, the magistrate judge must inform the defendant of the following:

* * * * *

(F) the right to a jury trial before either a magistrate judge or a district judge – unless the charge is a petty offense; ~~and~~

(G) any right to a preliminary hearing under Rule 5.1, and the general circumstances, if any, under which the defendant may secure pretrial release; and

(H) if the defendant is held in custody and is not a United States citizen, that an attorney for the government or a federal law enforcement officer will:

22 (i) notify a consular officer from the
23 defendant's country of nationality that the
24 defendant has been arrested if the
25 defendant so requests; or

26 (ii) make any other consular notification
28 required by treaty or other international
28 agreement.

* * * * *

COMMITTEE NOTE

Subdivision (b)(2)(H). This amendment is designed to ensure that the United States fulfills its international obligations under Article 36 of the Vienna Convention on Consular Relations, and other bilateral treaties. Bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 of the Vienna Convention provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention. At the time of this amendment, many questions remain unresolved concerning Article 36, including whether it creates individual rights that may be invoked in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). This amendment does not address those questions.

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PUBLIC COMMENTS CONCERNING RULE 58

10-CR-001. Peter Goldberger on behalf of the National Association of Criminal Defense Lawyers. NACDL agrees with the amendment in principle, but suggests amendments (1) clarify the meaning of "held in custody," (2) make clear that consular warnings may not be delayed until the initial hearing, and (3) make clear that the initial hearing in extradition cases must be held "without unnecessary delay."

10-CR-002. Federal Magistrate Judges Association. FMJA (1) recommends that proposed rule be revised to require that the initial hearing for extradited defendants must be held "without unnecessary delay," (2) expresses some reservations about imposing upon courts the executive function of giving consular notification, and (3) notes that great care would have to be taken to ensure that defendants who are given this notice do not incriminate themselves.

TAB 7-E

ADVISORY COMMITTEE ON CRIMINAL RULES

DRAFT MINUTES

April 11-12, 2011, Portland Oregon

I. ATTENDANCE AND PRELIMINARY MATTERS

The Advisory Committee on Criminal Rules of the Judicial Conference of the United States met in Portland, Oregon, on April 11-12, 2011. The following members participated:

Judge Richard C. Tallman, Chair
Rachel Brill, Esquire
Leo P. Cunningham, Esquire
Judge Morrison C. England, Jr.
Chief Justice David E. Gilbertson
Judge John F. Keenan
Judge David M. Lawson
Professor Andrew D. Leipold
Thomas P. McNamara, Esquire
Judge Donald W. Molloy
Judge Timothy R. Rice
Professor Sara Sun Beale, Reporter
Professor Nancy King, Assistant Reporter

The Hon. Lanny A. Breuer, Assistant Attorney General, Criminal Divison, Department of Justice (ex officio), participated in the meeting by telephone. One member, Judge James B. Zagel, was unable to attend.

Representing the Standing Committee were its chair, Judge Lee H. Rosenthal, and liaison member, Judge Reena Raggi.

Supporting the committee were:

Peter G. McCabe, Committee Secretary
Andrea Kuperman, Chief Counsel, Rules Committee Support Office
James Ishida, Attorney, Administrative Office
Jeffrey Barr, Attorney, Administrative Office
Holly Sellers, Supreme Court Fellow, Administrative Office
Laural L. Hooper, Senior Research Associate, Federal Judicial Center
Charlene Koski, law clerk to Judge Tallman

Also participating from the Department of Justice were Jonathan J. Wroblewski, Director

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of the Office of Policy and Legislation, Kathleen Felton, Deputy Chief of the Appellate Section, and Andrew Goldsmith, National Criminal Discovery Coordinator.

A. Chair's Remarks, Introductions, and Administrative Announcements

Judge Tallman welcomed everyone, particularly the committee's newest member, Chief Justice David E. Gilbertson of the Supreme Court of South Dakota, who is replacing Justice Edmunds. Judge Tallman also welcomed a distinguished visitor, Judge Emmet G. Sullivan of the United States District Court for the District of Columbia.

The committee noted that this was the last meeting for the chair, Judge Tallman. Judge Rosenthal conveyed the great thanks of the Standing Committee for the outstanding work of Judge Tallman and all that he has done.

The committee also noted that this was the last meeting for Mr. McNamara. Judge Tallman lauded Mr. McNamara as a wonderful representative of the Federal Public Defenders. The committee agreed that both Judge Tallman and Mr. McNamara had made superb contributions to the committee's work.

B. Review and Approval of the Minutes

A motion was made to approve the draft minutes of the September 2010 meeting.

The committee approved the minutes unanimously by voice vote.

C. Status of Criminal Rules; Report of the Rules Committee Support Office

Ms. Kuperman reported that the Supreme Court recently approved the committee's proposed amendments (see below) that will take effect on December 1, 2011, unless Congress were to act to the contrary. In addition, in fall 2010, the committee's proposed amendments to Rules 5, 58, and 37 were published for public comment. The public comment period ended in February 2011.

II. CRIMINAL RULES UNDER CONSIDERATION

A. Proposed Amendments Approved By the Judicial Conference for Transmittal to the Supreme Court

Ms. Kuperman reported that the following proposed amendments had been approved by the Judicial Conference for transmittal to the Supreme Court, and now have been approved by the Supreme Court for transmittal to Congress:

1. Rule 1. Scope: Definitions. Proposed amendment broadens the definition of telephone.

2. Rule 3. The Complaint. Proposed amendment allows complaint to be made by telephone or other reliable electronic means as provided by Rule 4.1.

3. Rule 4. Arrest Warrant or Summons on a Complaint. Proposed amendment adopting concept of "duplicate original," allowing submission of return by reliable electronic means, and authorizing issuance of arrest warrants by telephone or other reliable electronic means as provided by Rule 4.1.

4. Rule 4.1. Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means. Proposed amendment provides comprehensive procedure for issuance of complaints, warrants, or summons.

5. Rule 6. The Grand Jury. Proposed amendment authorizing grand jury return to be taken by video teleconference.

6. Rule 9. Arrest Warrant or Summons. Proposed amendment authorizing issuance of warrant or summons by telephone or other reliable electronic means as provided by Rule 4.1.

7. Rule 32. Sentencing and Judgment. Proposed technical and conforming amendment concerning information in presentence report.

8. Rule 40. Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District. Proposed amendment authorizing use of video teleconferencing.

9. Rule 41. Search and Seizure. Proposed amendment authorizing request for warrants to be made by telephone or other reliable electronic means as provided by Rule 4.1 and return of warrant and inventory by reliable electronic means, and proposed technical and conforming amendment deleting obsolescent references to calendar days.

10. Rule 43. Defendant's Presence. Proposed amendment authorizing defendant to participate in misdemeanor proceedings by video teleconference.

11. Rule 49. Serving and Filing Papers. Proposed amendment authorizing papers to be filed, signed, and verified by electronic means.

B. Proposed Amendment Approved by the Standing Committee for Publication in August 2011

Ms. Kuperman further reported that the following amendment had been approved by the Standing Committee for publication:

1. Rule 11. Advice re Immigration Consequences of Guilty Plea; Advice re Sex Offender Registration and Notification Consequences of Guilty Plea.

Prof. Beale reported that the Standing Committee approved this proposal for publication at its January 2011 meeting. The amendment will be published for comment in August 2011.

She added that the committee had discussed the idea that, in addition to the rule amendment, related changes might be made to the section of the judges' benchbook addressing the plea colloquy, perhaps touching on more issues than the rule amendment does. The committee had before it a draft letter to Judge Rothstein of the FJC requesting the changes in the benchbook. The committee that oversees the benchbook, chaired by Judge Irma Gonzalez, will make the final determination on such changes.

A member questioned whether it is a good idea to ask the defendant whether he has discussed the issue of immigration consequences with his attorney. This could lead into a morass. Another member responded that discussing this with your attorney is at the heart of *Padilla v.. Kentucky*, 130 S. Ct. 1473 (2010). That is the whole point, that the judge should not accept your plea if you have not discussed this with your attorney.

A member argued that the Rule 11 issue relates to advice from the court to the defendant about collateral consequences, which has nothing to do with what the defendant has discussed with his attorney. Even if the defendant has had discussions with his attorney, if he still doesn't understand, then the court cannot accept his plea. In *Padilla*, the issue was incorrect advice given defendant by his attorney, not a failure to have the conversation.

A member added that if the defendant says yes, I talked to my attorney about this, all that means is that the topic has come up. It does not mean that defendant got good advice, or full advice, or the right advice. Is the judge in any position to do anything about that? The judge cannot give the defendant any advice at all.

Judge Tallman emphasized that the committee is not writing a script for the plea colloquy here. The committee is merely trying to identify issues that need to be considered at the plea. Every judge will ask about this in the judge's own way.

Judge Tallman called for a vote on whether to include the language in the letter regarding the immigration consequences of a guilty plea.

The committee voted unanimously by voice vote to approve this language.

A member stated that the remaining issue, the language in the letter relating to sex offenses, is more complicated. It could be simplified by not getting into issues of civil commitment. Another member disagreed and argued that that language should be included, because these civil commitment issues are arising more often and are proving to be quite challenging for defense counsel.

Prof. Beale noted that under the statute addressed in *United States v. Comstock*, 560 U.S. ___ (2010), any defendant leaving the custody of the Bureau of Prisons can be subject to civil commitment, no matter what the offense for which the defendant was imprisoned, if the government can show that the defendant has committed a sex offense previously. Also, if someone pleads guilty to a federal sex offense, they are subject to both federal and state civil commitment and sex offender registration laws.

A member stated that with all of this added to the benchbook, the plea allocutions are going to be too lengthy. If it's not in the rule, the committee should not add it to the benchbook. A member agreed that every judge can decide for himself, but said it's a good idea to flag issues.

Mr. Wroblewski reported that in the Department of Justice manual, which discusses this topic, the coverage is limited to the consequences that flow directly from the guilty plea. Otherwise, you could go on forever. There are a whole host of possible indirect consequences.

Judge Tallman called for a vote on whether to include the language in the letter regarding the collateral consequences of a guilty plea to a sex offense.

The committee voted unanimously by voice vote to approve this language.

The chair subsequently transmitted the final letter to the benchbook committee.

C. Proposed Amendments Approved by the Standing Committee for Publication in August 2010

Ms. Kuperman reported that the following amendments had been published for public comment in August 2010.

1. Rule 5. Initial Appearance. Proposed amendment providing that initial appearance for extradited defendants shall take place in the district in which defendant was charged, and that non-citizen defendants in U.S. custody shall be informed that upon request a consular official from the defendant's country of nationality will be notified, and that the government will make any other consular notification required by its international obligations.

Prof. Beale reported that the comments received on the proposed amendment were generally very positive.

There were comments suggesting that the rule should state that the initial appearance must take place without unnecessary delay. But a different part of the rule already says that, and the draft Committee Note mentions it, so there is no need for any change.

Some comments suggested that the rule should also require certain advice and warnings from the court to the defendant. This is something the government has long opposed. The language of the current rule amendment was carefully negotiated. It is not the court's responsibility to give the diplomatic notification. Perhaps, Prof. Beale suggested, language could be added to the draft Committee Note addressing this issue.

Judge Tallman stated that he does not think the committee needs to further tinker with the draft Committee Note.

The committee voted unanimously by voice vote to approve the amendment, with no change in the draft Committee Note, for transmission to the Judicial Conference.

2. Rule 58. Initial Appearance. Proposed amendment providing that in petty offense and misdemeanor cases non-citizen defendants in U.S. custody shall be informed that upon request a consular official from the defendant's country of nationality will be notified, and that the government will make any other consular notification required by its international obligations.

Prof. Beale reported that Rule 58 contains a provision parallel to the provision in Rule 5 that is to be amended. Accordingly, this is a conforming amendment to Rule 58.

The committee voted unanimously by voice vote to approve the amendment for transmission to the Judicial Conference.

3. Rule 37. Indicative Rulings. Proposed amendment authorizing district court to make indicative rulings when it lacks authority to grant relief because appeal has been docketed.

Prof. Beale reported that this amendment dovetails with similar provisions that have recently been adopted in the Civil and Appellate Rules governing indicative rulings. Among the comments received, the Federal Magistrate Judges Association has endorsed this. The National Association of Criminal Defense Lawyers approves of the rule, but has suggested changes to the Committee Note to help guide practitioners about the kinds of cases in which this procedure could be employed. Prof. Beale expressed doubt that the committee should expand the Note to specify more details. The Standing Committee prefers shorter Notes. Even if the committee gave more examples, that would not exhaust all the situations in which the rule might be employed. Listing more examples starts down a slippery slope.

She added that the draft Committee Note contains the words "if not exclusively," suggesting there might be no other proper uses of the procedure. The committee could delete those three words, but the Standing Committee added those words after much negotiation, because the Department of Justice had concerns. Those words reflect a considered policy judgment by the Standing Committee.

Judge Rosenthal added that this same language is now in the Committee Note accompanying the Appellate Rule. If the language is not here, and it remains there, that will create questions.

The committee voted unanimously by voice vote to approve the amendment, with no change in the draft Committee Note, for transmission to the Judicial Conference.

III. CONTINUING AGENDA ITEMS

A. Rule 12 (Pleadings and Pretrial Motions)

Judge Tallman noted that the committee's proposals to amend Rule 12 had been remanded back to the committee, once again, by the Standing Committee at its meeting in January. Judge England, the chair of the Rule 12 subcommittee, reported that the committee's effort to amend Rule 12 began in 2006 as a surgical attempt to simply require that a claim that the indictment failed to state an offense must be raised before trial. It turned out, however, that that change raised other, difficult issues surrounding the standard to be applied when such a claim was not timely brought before trial. The subcommittee has met many times to take up these issues, including issues specifically raised by the Standing Committee.

Judge England added that the subcommittee believes it is important that the reasons for the committee's latest round of modifications to its Rule 12 proposal are fully explained to the Standing Committee. The subcommittee believes that in the past there may have been a disconnect between what the committee recommended and the way the Standing Committee perceived it.

Prof. Beale explained that at the urging of the Standing Committee in 2010, the committee had reworked the proposal to address the relationship between Rule 12 and plain error review. The proposal the committee sent to the Standing Committee for its January 2011 meeting distinguished between those claims "waived" absent a showing of cause, as the current language of Rule 12 provides, and those claims "forfeited" and subject to plain error, the approach applied by the Supreme Court in *United States v. Cotton*, 535 U.S. 625 (2002). That proposal was again remanded by the Standing Committee, which expressed concerns about the confusion from the use of the terms "waiver" and "forfeiture" in the rule. The proposal now before the committee eliminates the terms "waiver" and "forfeiture" altogether.

But even without use of these terms, there still remains the continuing issue of distinguishing between the treatment of most untimely claims and the treatment given a smaller special group of untimely claims, e.g., the indictment's failure to state an offense and double jeopardy. The current proposal attempts to avoid confusing terms like "waiver" and "forfeiture" and instead clarify as much as possible the standard for raising an untimely claim. Thus the current proposal has some very different language from the proposal considered by the Standing Committee at its June 2011 meeting.

There is also the question of filing the claim late in the district court, as distinguished from raising the claim for the first time in the court of appeals. In *United States v. Vonn*, 535 U.S. 55

(2002), the Supreme Court held, with regard to the harmless error provisions of Rule 11, that because Rule 11 did not specifically state that Rule 52 did not apply to claims analyzed under Rule 11, Rule 52 did apply. For that reason the current proposal states explicitly, "Rule 52 does not apply." If the amended Rule 12 does not specify that the Rule 52 "plain error" standard does not apply, then *Vonn* would appear to dictate that the Rule 52 standard will apply.

Prof. King noted that the committee's new proposed language makes it clear that the two standards – i.e., the standard applied to late claims of an indictment's failure to state an offense or of double jeopardy, and the standard applied to all other late claims – are exactly the same except for "cause." That is all that stands between them. "Cause" must be shown to raise the latter claims late, but need not be shown to raise the former claims late.

A participant observed that the committee's Rule 12 amendment process started with the purpose of eliminating from the rule, in the light of the Supreme Court's ruling in *Cotton*, the exception permitting a claim of the indictment's failure to state an offense to be raised at any time. But now, the proposed Rule 12 amendment has gone way beyond that. Under the current rules, all untimely motions can be heard under Rule 12(e) for good cause. Now, instead, the committee is considering a new review standard that would apply in both the district courts and the courts of appeals. It is not clear that this is the correct standard on appellate review in the court of appeals. It is good that the committee's new proposal no longer uses the terms "waiver" and "forfeiture," since use of those terms would create a morass. But the new proposal still threatens to mess with appellate review standards. The committee seems to believe that it's not enough for the Supreme Court to tell the courts of appeals what the standard of review on appeal is, the committee also has to tell them in a rule. The courts of appeals may follow the Supreme Court, not the rule.

Prof. Beale disagreed, stating that the committee had researched the question and the current proposal for considering these untimely claims only after a showing of cause and prejudice states the current standard for review applied by most courts of appeals. A member agreed that this is the same standard. The only thing that is new under the current proposal is that it adds to the list of claims that must be raised before trial a claim that an indictment fails to state an offense. Also, the committee is trying to help the courts by making the existing standard clearer for everyone to understand.

Prof. King added that there is disagreement, not just confusion, about this question in the courts. The courts of appeals do not agree on what the correct standard should be. So the committee is trying to clarify this. If the committee wishes to make clear to a court of appeals that wants to review such questions for "plain error" that it should not do so, the best way to achieve that is to say expressly, "Rule 52 does not apply."

A participant stated that to a district judge, the reference to Rule 52 means nothing. To the extent that the committee's Rule 12 proposal is directed at district judges, any reference to Rule 52 muddies the waters. A member agreed that removing any reference to Rule 52 from the amendment will make the standard clear for district judges, and allow the courts of appeals to do whatever they normally do.

A member reported that the defense bar is opposed to any change at all to Rule 12, but if there must be an amendment, the defense bar wants a statement that Rule 52 will not apply. Otherwise the amendment will be even more unfair to defendants.

Prof. Beale reiterated that it would be very helpful, in light of *Vonn, supra*, to be explicit about whether or not Rule 52 applies. If the rule does not mention Rule 52, then courts will continue to struggle with the question whether Rule 52 should apply.

A member stated that the debate about the review standard in the courts of appeals is an exercise in futility. The committee should just clarify the standard for considering untimely claims in the district courts, and leave the court of appeals alone, making no mention of Rule 52. The committee can always return to the issue of the appellate standard in two or three years, if that is needed. Judge Tallman expressed hesitation about the committee having to revisit this yet again since this is our third effort at settling the language.

A member suggested that the committee publish the proposal with "Rule 52 does not apply" in brackets as an alternative. Judge Tallman noted that the rules committees typically use bracketed language as a method of flagging an issue in order to seek input on something the committee believes may be controversial or has had trouble resolving.

Prof. Beale reiterated that the committee originally wanted to just fix the *Cotton* problem, and the committee's original proposal only addressed the failure-to-state-an-offense claim in *Cotton*. It was the Standing Committee that asked the committee to do more, stating that there was confusion among the courts of appeals on these issues generally, which the committee could dispel by revising Rule 12.

Judge Rosenthal advised that in sending its proposal to the Standing Committee, the committee should be clearer in explaining the arguments raised and the reasons for the committee's decisions. Also, the committee should send the Standing Committee a clear signal about severability, whether the committee believes the committee's Rule 12 amendment should still go forward if the issue of the appellate review standard is severed. The committee should explain the debate on this question to the Standing Committee, and solicit comment on how the appellate review standard can best be conveyed.

Prof. King noted that, in fact, the Rule 12 proposal started as a response to cases in which the defendant's claim was raised for the first time on appeal. Judge Rosenthal acknowledged that, but reminded the committee of the need to step back from the history that brought the committee to this point, and look at the committee's proposal instead from the viewpoint of someone reading it for the first time.

Judge Tallman called for a vote on proceeding with a Rule 12 amendment which includes the language, "In such a case, Rule 52 does not apply."

The committee voted 8-3 in favor of proceeding with consideration of the proposed amendment containing this reference to Rule 52.

Prof. Beale reported that the category of "outrageous government conduct" had been deleted from the list of defects contained in the Rule 12 amendment. The Seventh Circuit has ruled that such a defect does not exist. If the committee includes it, it will look as though the committee concluded that nevertheless this defect does exist. The amendment's list of defects is non-exhaustive, so excluding it does not mean or imply that it does not exist. This is an easy call to avoid taking an unnecessary position on a controversial question.

In addition, claims based on the statute of limitations have been removed from the list of favored untimely claims that are to receive a more generous standard of review. Under the current proposal, there are only two such claims, not three as before: claims that the indictment fails to state an offense, and double jeopardy claims. Removing statute of limitations claims from the list of favored claims would preserve the current case law.

Judge Tallman called for a vote on the Rule 12 amendment before the committee.

The committee voted 8-3 to approve for publication the proposed amendment to Rule 12, and a conforming amendment to Rule 34.

Prof. Beale reported that the committee had failed to delete two references in the draft Committee Note to statute of limitations claims. Now that statute of limitations claims have been deleted from the amendment's list of favored claims, these Note references are obsolete.

The committee voted 8-3 to revise the draft Committee Note to delete these references to statute of limitations claims.

Judge Tallman asked whether the committee wanted to take a position on the severability of the question of including the reference to the application of Rule 52.

A member stated that the committee should make it clear that this issue is severable. If the Standing Committee wants to delete the reference to Rule 52, the remainder of the Rule 12 amendment stands and should be approved. The member added that if the reference is ultimately deleted, and the appellate standard of review is left to case law development in the appellate courts, then the Committee Note should not state a position on the question.

Judge Tallman noted the consensus of the committee that if the Standing Committee wants to delete the reference to Rule 52, the committee favors proceeding to publish the amendment without the Rule 52 language.

B. Rule 16 (Discovery and Inspection)

Judge Tallman reported that the Rule 16 subcommittee, which he chairs, has been unable to agree on any acceptable amendment to Rule 16. He had circulated a discussion draft of a proposed amendment in order to stimulate a full committee discussion. The Department of Justice, at Judge Tallman's request, also prepared language along the lines the Department had previously mentioned it would not oppose, merely incorporating or codifying the principles of the Supreme Court rulings in *Brady* and *Giglio*. The Department made clear that it is not advocating that this language be adopted, and that it was prepared solely at Judge Tallman's request.

Mr. Breuer reported that the Department has taken unprecedented steps to ensure that federal prosecutors meet their disclosure obligations. The Department has appointed Andrew Goldsmith as its first national criminal discovery coordinator. They have amended the U.S. Attorneys' Manual to address this issue. They have adopted a groundbreaking and transparent policy on criminal discovery, going beyond the basic Supreme Court requirements. They have directed each U.S. Attorney to develop granular discovery policies suiting the needs of that particular district. All federal prosecutors are now required to take annual discovery training.

The Department is also training thousands of law enforcement personnel in discovery practices, including personnel of the FBI, DEA, ATF, Marshals Service, and Bureau of Prisons. When that is done, they will train personnel from IRS and other agencies outside the Department of Justice. Then they will train district attorneys and local law enforcement.

The Department has also emphasized the use of software to manage discovery electronically. They have published a bluebook dealing with discovery requirements, written by senior prosecutors who have dealt with discovery matters for many years.

When, on rare occasions, the Department does not meet its discovery obligations, it's not for lack of a rule, but because of the demands on prosecutors and the lack of resources. The Department's comprehensive approach is what is needed to improve its performance. A rule change will not address anything. There will still be mistakes no matter what the rule says.

Mr. Goldsmith reported that he has traveled all over the nation addressing this issue. He now has a Deputy Coordinator helping him, another senior prosecutor. When he spoke to this committee in Chicago in April 2010, one participant lauded the performance of Attorney General Holder in this area, but expressed concern about what will happen when Attorney General Holder leaves. Mr. Goldsmith said that the Department has tried in a serious way to change the culture of the Department in this respect, so that compliance with disclosure obligations will be ongoing and will not depend on the efforts of a particular Attorney General.

Some have objected that the Department has been great at training prosecutors, but the prosecutors only know what the agents tell them. So now the Department is also training the agents, getting everyone on the same page with respect to disclosure obligations. If it is perceived as just a situation of prosecutors telling agents what to do, the agents won't listen. But now, with all this training, the agents are buying in. The Department is training 26,000 agents on a national basis, telling them, "When in doubt, disclose." Disclosure is the default position.

The Department has also trained federal prosecutors from around the nation, actually going out there and speaking with them. It's not just a situation of local prosecutors getting faceless memos from Washington about discovery. Meetings are also underway about training state and local prosecutors. Also, the Department has been interacting with Federal Public Defenders about the idea of coming up with a protocol for exchange of electronic information.

Mr. Wroblewski explained that the rule language the Department drafted at Judge Tallman's request recognizes that the disclosure obligations are not just those of the attorney for the government, but the entire prosecution team. The language refers to *Brady*, *Giglio* and their "progeny," because there is a lot of case law dealing with nuances of *Brady* and *Giglio*.

Judge Tallman wondered whether there are any current rules that cite cases in the text of the rule, as this proposal would. Judge Rosenthal responded no. The Standing Committee even worries about citing cases in Committee Notes because case law changes.

Judge Tallman stated that to the extent the committee wants to make a modest change in Rule 16, one way to do that would be to incorporate the two Supreme Court rulings. That would be a significant step. The question before the committee now is whether to go forward with any rule change at all. The Federal Judicial Center survey shows an even split among judges on the issue, with the Department of Justice opposing any rule amendment and the defense bar in favor of a rule amendment. Consequently, the chance that the committee can come up with a Rule 16 proposal that has any chance of success is slim.

Judge Tallman stated that Ms. Brill also had produced a draft of a Rule 16 amendment. Ms. Brill reported that she worked on the draft with several Federal Public Defenders and private defense lawyers around the country. Their draft attempts to be more descriptive than merely citing *Brady*, *Giglio*, and their progeny. Their idea, like the Department of Justice's approach, was just to codify the current law, but they did try to flesh out what that means. They stated that if their proposal is shown to go beyond current law, they will change their proposal. They are not trying to slip in a clandestine expansion of existing law.

Ms. Brill argued that the need for such a rule amendment is there. There have been instances of prosecutors not understanding discovery obligations after the Department started all its changes and training, and not just with complex electronic discovery, but with traditional kinds of materials not being disclosed. Further, there really is common ground to support such a modest proposal. The FJC survey reveals that 51% of judges favor a rule change, even though a majority of those judges are happy with prosecutors' performance of discovery obligations. This is compelling. The judges who oppose a rule change may be motivated by security issues, which she expressed willingness to accommodate by providing exceptions to disclosure.

A member responded that Ms. Brill's proposal does not even mention witness security. And it does not even mention the Jencks Act, which is a huge problem here. If prosecutors are determined to break the law governing disclosure obligations, then they will, rule or no rule.

A member stated that the member has received messages from Federal Public Defenders saying that they are still seeing disclosure problems out there. It is great that the Department of Justice is taking these steps, but why are they so afraid of a rule? With a rule, there are teeth there. The biggest problems are with agents. The prosecutor will give the defense at the last minute some statement he says he didn't know his agent had.

Mr. Wroblewski said that the Department does not deny that it faces challenges in complying with existing discovery obligations. There are complex electronic repositories of information, and a lot of federal and state actors. But changing the rule does not help with any of that. If the goal is to increase the amount of material that is actually disclosed, then it's not about the rule. Merely codifying the existing law in a rule would not affect that. A member agreed that the Department has problems with limited budgets and expanding technology.

Members lauded the admirable job done by the Department in this area, but asked, how do you institutionalize these policies and practices without a rule change, without black letter law requiring them? A member expressed doubt that some future administration's Department of Justice is going to place much emphasis on this. The committee needs to provide real guidance in a rule. With a rule, the particular policies of each future Attorney General may matter less.

Mr. Wroblewski responded that the Department needs to put all the information about discovery in one place, and that's what they are doing now. Errors typically are not about a bad decision the prosecutor made about disclosure of a particular document – and, in any event, no rule change will help with that. The typical situation is that the prosecutor finds out about the information late, so the prosecutor turns it over late. Rule changes won't help with that either. The Department does not believe that a rule is the best way to ensure compliance with discovery obligations. And the proposed rule amendments do not address victims' rights and witness security.

Mr. Goldsmith responded that he has worked for years at the Department, and he rejects the notion that if the Republicans win the White House in 2012, all his work on criminal discovery will go up in flames. He would be beyond shocked if that happened. That's not how the Department works. Making the Department's policies clear and well-disseminated is far more important than a rule change; it gives prosecutors meaningful guidance, which a rule amendment would not do. A member agreed that a new administration is not going to remove these procedures from the U.S. Attorneys' manual.

A member expressed skepticism about the value of trying to capture moving, changing case law in a rule. That would be very difficult, and perhaps not very useful.

A member stated that the timing issues only come up with impeachment materials. Core *Brady* materials must be turned over immediately. Mr. Wroblewski agreed. He predicted that the committee could come to some agreement fairly quickly on just core *Brady* materials. It is the timing of disclosure of impeachment materials that is the most complex issue.

A member stated that whatever rule is adopted, any rule amendment will create additional satellite litigation. In a large district like the Southern District of New York, games playing is simply what lawyers do. Litigation already takes forever, and any rule amendment will add another layer of satellite litigation. Another member agreed, arguing that prosecutors are not intentionally violating the *Brady* principle. No rule would have changed what happened in the Sen. Ted Stevens case. If a prosecutor is going to ignore 47 years of Supreme Court case law, they'll ignore a rule. Budget limitations may be a factor when the prosecution falls short.

Judge Tallman added that he worries that the Department won't get the money it needs for the steps it wants to take to meet its disclosure obligations in the electronic discovery area.

A participant pointed to Fed. R. Evid. 901, which is unique in that it provides a non-exhaustive checklist of possible methods to authenticate evidence and satisfy the requirements of Fed. R. Evid. 901. That rule comes closest to merging the concept of a checklist with a Department of Justice manual, and gives some rule teeth to it. There are no teeth to a mere checklist or manual, no penalty if you fail to comply.

A participant expressed skepticism about the committee's ability to create a rule to give rule-effect to the principles of *Brady* and *Giglio*. It is a false premise that the current administration is somehow the first to discover *Brady* obligations. Another false premise is that half of all judges want a rule amendment. Studies are useful but do not provide conclusive information. 50% of judges indicated some approval of a rule, but also 60% said they had seen no *Brady* violations in the last five years. A rule amendment may be a solution without a problem, since there have really been only a handful of highly publicized violations.

People keep saying that we need a rule, with teeth. But there already is a "rule," it's *Brady* and *Giglio*. There are hundreds of cases about sanctions for violations of *Brady* or *Giglio*. That's already out there, and sanctions are teeth. What some people are really looking for are consequences beyond what *Brady* and *Giglio* already provide. A rule will just create a lot of satellite litigation for those who will game the system.

Judge Tallman noted this discussion underscores the complete lack of consensus about what the committee should do. He tried, in his discussion draft of a proposed amendment, to break out what would be exculpatory material and what would be impeachment material. The feedback he got was that any rule language, even closely based on existing case law, would create more litigation over the precise meaning of the language. He stated that he does not know of any way to draft around that. He is concerned about the time courts would have to devote to such satellite litigation, and the expense that would impose on defense counsel and the Department of Justice. The result would be to transform criminal litigation into civil discovery practice.

In addition, the Jencks Act is almost an insurmountable obstacle. Judge Tallman stated that his attempt to work around the Jencks Act would have provided that prosecutors need not disclose witness statements until later, as the Act provides, but would nevertheless require earlier disclosure of <u>summaries</u> of the witness statements. But DOJ objected that preparing these summaries is going

to take time. And then there will be a new wave of satellite litigation over the content and accuracy of the summaries. His draft also contained "trump" language that would permit the government to withhold disclosure of dangerous information upon the filing of an unreviewable statement of the need to do so. That provision, too, would invite satellite litigation.

Judge Tallman reiterated that he is not now advocating adoption of his discussion draft, which many have opposed. But he noted no consensus draft has emerged. He suggested that the committee could vote to abandon, at least for now, its consideration of any Rule 16 amendment.

A member argued that the committee could issue a proposed amendment for public comment, and see what develops. Judge Tallman reminded the committee that the Standing Committee would need to approve such publication. In 2007, the Standing Committee refused to publish a proposed Rule 16 amendment after hearing impassioned objections from the Department of Justice, which had made changes to the U.S. Attorneys' manual on this issue. The Standing Committee instead remanded the issue back to this committee. The issue then was reopened in light of the Sen. Ted Stevens case after the chair received a letter from Judge Emmett Sullivan requesting reconsideration. If the committee decides to take no action now, the committee can still revisit the subject down the road. The Department has done a lot more this time than the last time. For that reason, it may be even tougher to win Standing Committee approval for publication, given that the Department's position opposing any rule amendment has not changed.

A member stated that, speaking for the defense side, the defense bar is interested only in putting forth a proposal that would have the support of – or at least that would not be actively opposed by – the Department of Justice. That is why representatives of the defense bar attempted to draft a proposal that found common ground, hoping that the Department would not oppose a mere codification of the existing case law.

Judge Tallman called for a vote on whether to make any change at all in Rule 16. A yes vote would favor proceeding to consider some change. A no vote would oppose making any change in Rule 16.

The committee voted 6-5 against any amendment to Rule 16.

Judge Tallman stated that in light of the committee's vote, the committee would table any further work on amending Rule 16. The committee will not go forward with any rule change. But that does not mean that the committee will abandon its initiatives that do not involve a rule change, such as working with the Federal Judicial Center to include this issue as a checklist in the judges' benchbook, asking the FJC to compile a "best practices" guide for criminal discovery, and expanding judicial education efforts. He emphasized that the issue of improving criminal discovery by amending rule 16 – which the committee has looked at for forty years – will not go away.

Judge Rosenthal observed that there can be beneficial effects and improvements as a result of the rulemaking process, even if there is no rule change. This is the best example of that she has ever seen. Because of the committee's process, the Department of Justice and others have

undertaken major policy changes and extensive education initiatives that they would not otherwise have done, or at least would not have done so quickly.

Judge Tallman promised that the issue of non-rule initiatives on criminal discovery will be pursued with the FJC. He pointed to the materials in the current agenda book listing specific points the committee might recommend that the FJC include in the judges' benchbook, and in a best-practices manual, on this issue.

Ms. Hooper reported that the FJC will probably conduct nationwide interviews with judges about best practices. As for the benchbook, there is a judges' committee, chaired by Judge Irma Gonzalez, that oversees changes in the benchbook. Judge Tallman stated that he would follow up by letter with that committee and be sure that this issue gets on that committee's agenda. Subsequent to the meeting the chair transmitted the committee's proposals to the FJC.

A participant suggested that it is imperative that the FJC conduct annual education of judges – not just new judges, but all judges – about criminal discovery. Judge Tallman stated that he has already discussed this with Judge Rothstein of the FJC and she is very supportive.

A participant suggested that any transmittal to the FJC make clear that the committee is looking for a list of best practices, not some kind of exhaustive checklist that encourages judges to turn their brains off. Judges must stay aware of a wide variety of unforseen problems that can arise. Judges must understand the difference between what the law mandates, and the actual practices favored across the courts. Judges should not conclude that once they go through the checklist, they don't have to think about *Brady* any further.

A member asked if this material goes in a benchbook, what does a judge do with it? Meet with the lawyers and tell them to do what's in the benchbook? If they don't, what should be the consequence? Judge Tallman responded that this issue does require more active judicial involvement in criminal discovery. A member agreed that the civil model of the Fed. R. Civ. P. 16 and 26 conferences might be useful. Mr. Wroblewski emphasized that the timing is important. If such a conference is held just before trial, a lot of this makes sense. But at the start of a case, a lot of this material will not yet have been disclosed.

Prof. King stated that a big point of contention will be whether such a criminal discovery conference has to happen before a guilty plea. Judge Tallman responded that the Supreme Court already has decided that is not constitutionally required. Prof. King agreed as to impeachment material, but noted that the Court's decision in *Ruiz* did not directly address known information establishing factual innocence.

A participant stated that sometimes guilty pleas are negotiated precisely to resolve the case quickly and spare the government additional investigation costs. The committee should not require the government to prepare every case for trial when the defendant is ready to plead guilty. A member agreed, but suggested that prosecutors be required to disclose material that the prosecutor actually knows about, without imposing any further duty on the prosecutor to investigate. Mr.

Wroblewski stated that usually the defendant is ready to plead right away, and warned that requiring the government to put off plea negotiations pending a *Brady* investigation would be a big change in practice. A member observed that sometimes defendants want to plead right away to avert any further government investigation, because defendants are afraid of what more the government will discover. Another member added that if defendants are going to re-plead after receiving *Brady* disclosures, that will wreak havoc in a busy district.

A participant objected that nevertheless this material has to be produced. A defendant cannot plead guilty, for example, without knowing of a recanting witness' statement. Prof. King noted that she'd read that some states consider it unethical for a prosecutor to sign a plea agreement in which the defendant waives the right to known exculpatory information. This is seen as the prosecutor gaining a waiver of the prosecutor's own misconduct.

A participant noted that the FJC will survey judges to ask what best practices judges are actually using. They are not going to find many judges requiring *Brady* disclosures before guilty pleas.

A member stated that the current draft checklist contains too many adverbs, too many quantitative words and intensifiers. These kinds of words plant the seeds of future disputes and should be removed from the checklist. Prof. King responded that most of that language was lifted from the U.S. Attorneys' manual. Judge Tallman agreed that the checklist is not a rule, and does not need to be so precise and didactic. The actual wording lies in the jurisdiction of the Benchbook Committee chaired by Judge Gonzalez.

A member stated that some of the objections to codifying disclosure obligations in a rule have to do with the dicey proposition of correctly characterizing the current case law, which is a moving target. It might be better to create in a rule an early conference to discuss the timing of disclosure of certain items, and then a pre-trial conference to discuss what has been disclosed. This could be placed in Rule 17.1 (pre-trial conference). The committee could graft ideas from Civil Rule 16 about such conferences into Rule 17.1. A whole variety of issues could be worked out at such a conference. This approach would not impose black-letter requirements on the government and, flexibly administered, it would not bog down the processing of routine cases.

Judge Tallman asked what judges' current practices are. Two members responded that they conduct a very general conference early on, and following that conference, issue an order setting schedules and deadlines. Another member reported that only one judge in the member's district does this, the other judges are "old-school" and do not. Another member reported that every judge in the member's district holds a conference almost immediately. There are several conferences, usually, in the average case, with a pre-trial conference usually two weeks before trial. Another member reported that in the member's district, three of the seven judges set a trial date in a vacuum, without any conference, which creates chaos every time.

A participant expressed skepticism about the notion of trying to create a formula for a Rule 17.1 conference. This cannot simply copy civil procedures, with Fed. R. Civ. P. 16 and 26 conferences. There are usually many more than two conferences in a criminal case.

A member objected to forcing mandatory conferences on judges. Another member agreed, but stated that the proposal was not mandatory and would maintain judicial discretion. The proposal is merely an attempt to set forth best practices with some kind of formality.

Judge Tallman stated that the committee had already voted not to amend the rules now to address *Brady*, and instead to pursue best practices and education through the FJC and others. Accordingly, he stated, he was concerned that this Rule 17.1 proposal is meant to address the same subject indirectly and is thus inconsistent with the committee's vote. And in any event, what would this Rule 17.1 proposal accomplish that the FJC best practices approach could not?

Judge Rosenthal added that there is a real concern in the civil area that judges and lawyers are not adequately using Civil Rule 16. Until the committee identifies some concrete problem that an amendment to Rule 17.1 would seek to solve, the committee is going to face opposition from district judges, who do not want mandatory practices imposed on them.

Judge Tallman stated that he will refer the Rule 17.1 proposal to the criminal discovery subcommittee. But, in light of the vote, amending Rule 16 is off the table for now.

C. Rule 15 (Depositions)

Judge Keenan, chair of the Rule 15 subcommittee, reported that years ago the Department of Justice pointed out to the committee that in terrorist or certain international criminal cases, there is some need for foreign depositions outside the physical presence of the defendant. Suppose a witness in a foreign country refuses to, or is unable to, come to the U.S. to testify. For whatever reason, the defendant cannot get to the foreign country to be present at a deposition of that witness. The committee drafted a proposed Rule 15 amendment to address this problem. The amendment would authorize the deposition outside the presence of the defendant – with the defendant participating by video technology – only under very limited circumstances. The court must first make case-specific findings on a whole list of requirements.

The Standing Committee and Judicial Conference approved this proposal, but the Supreme Court sent it back, apparently on Confrontation Clause grounds. The committee has been informally advised that the Court was concerned that the rule did not clarify that compliance with the procedures for gathering the evidence did not resolve the ultimate admissibility of such a deposition at trial. The committee has added language to the Committee Note further explaining that the rule amendment only addresses the taking of the deposition, and the later admissibility of such evidence at trial is determined by the Federal Rules of Evidence and the Constitution.

Judge Tallman explained that the committee had considered this issue before, and a sentence at the end of the current Committee Note addresses this. Now the committee has elevated that discussion to an entire paragraph at the beginning of the Committee Note to clarify the point.

Judge Rosenthal cautioned that the informal advice given about the Supreme Court's view of this amendment was just advice. There are no guarantees that the Court will accept what the committee has done. Judge Tallman agreed.

Prof. King pointed out that, nevertheless, the second-to-last paragraph of the Committee Note is about the admissibility of the evidence. She suggested that that paragraph be deleted. A member suggested deleting everything in that paragraph except the first sentence, and moving that first sentence to be the concluding sentence of the preceding paragraph.

The member also suggested, in the second paragraph of the Committee Note, inserting the language, "*As is true of every other deposition*, questions of admissibility of the evidence . . . ." This would make clear that the committee is not creating some new creature governed by new standards – the standards are the same as for any other deposition.

Judge Rosenthal suggested that it would be useful to run this Committee Note language, as revised, by the chair and reporter of the Advisory Committee on Evidence Rules.

Judge Tallman called for a vote on the above revisions to the draft Committee Note.

The committee unanimously by voice vote approved the above revisions to the Committee Note.

Judge Tallman called for a vote on final approval of the rule amendment and Committee Note, to be sent to the Judicial Conference.

The committee by voice vote, with a single dissenting vote, approved the amendment for transmission to the Judicial Conference.

IV. RULES AND PROJECTS PENDING BEFORE CONGRESS, STANDING COMMITTEE, JUDICIAL CONFERENCE, AND OTHER ADVISORY COMMITTEES

A. Status Report on Legislation and Other Matters Affecting the Federal Rules of Criminal Procedure

Ms. Kuperman reported that nothing is happening on the legislative front right now that would affect the Criminal Rules.

She stated that the Standing Committee is in the process of revising the procedures under which the rules committees operate. One change from the current procedures will be to recognize that there is now a rules web-site, and to specify what items must be posted there. The revised procedures will be presented to the Standing Committee at its June 2011 meeting.

Judge Rosenthal noted that the current procedures are not very readable, and are being restyled. Also, it is useful to think about what it means to be a sunshine committee in an electronic age, and what must be posted on-line. Mr. McCabe added that these procedures have not been changed since 1983.

B. Rule 45(c) and the "Three Days Added" Rule

Prof. Beale reported that Rule 45(c) on computation of time is parallel to the time-computation provisions in the other federal rules, and is modeled on Fed. R. Civ. P. 6(d). An academic published an article noting that a styling change to these provisions had produced an unintended consequence. The party who made service may benefit from the extra three days, which were intended only to benefit the party receiving service.

But in the Criminal Rules, only one provision, Rule 12.1(b)(2), could even conceivably be affected by this, and even then only in limited circumstances. The Civil Rules, by contrast, contain a number of affected provisions. For that reason it would be best for the committee to let the Advisory Committee on Civil Rules take the lead on this.

Judge Rosenthal agreed. If the committee doesn't like what the Civil Rules committee is doing, let them know. This is part of a potential larger project to remove from all the rules the vestigial remnants of the paper age. If the default filing method is electronic, not paper, then adjustments are needed. But doing that is tricky, where there are still a lot of paper filers such as pro se litigants. There is also a question whether to make such changes piecemeal, thereby pestering the bar with many small changes dribbling out over time, or instead to do it all at once in a large future project.

V. DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETINGS

Judge Tallman reminded members that the next meeting of the committee would be held on October 31-November 1, 2011, in St. Louis. After discussion, Judge Tallman stated that the spring 2012 meeting of the committee would be held on April 23-24, 2012, in San Francisco.

TAB 8-A-B

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

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JEFFREY S. SUTTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

DATE: **April 8, 2011**

TO: **Honorable Lee H. Rosenthal, Chair, Standing Committee on Rules of Practice and Procedure**

FROM: **Honorable Sidney A. Fitzwater, Chair, Advisory Committee on Federal Rules of Evidence Procedure**

RE: **Report of the Evidence Rules Advisory Committee**

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on April 1, 2011 in Philadelphia at The University of Pennsylvania Law School.

The Committee seeks approval of one proposal for release for public comment: an amendment to Evidence Rule 803(10)—the hearsay exception for absence of public record or entry—that is intended to address a constitutional infirmity in light of the Supreme Court's decision in *Melendez-Diaz v. Massachusetts*.

A complete discussion of this proposal can be found in the draft minutes of the Spring 2011 meeting, attached as an appendix to this Report.

II. Action Item

Proposed Amendment to Evidence Rule 803(10)

In June 2009 the Supreme Court decided *Melendez-Diaz v. Massachusetts*. The Court held that certificates reporting the results of forensic tests conducted by analysts are "testimonial" within the meaning of the Confrontation Clause, as construed in *Crawford v. Washington.* Consequently, admitting such certificates in lieu of in-court testimony violates the accused's right of confrontation. The Committee has concluded that, in a criminal case, *Melendez-Diaz* also precludes the admission under Rule 803(10) of certificates offered to prove the *absence* of a public record. Like the certificates at issue in *Melendez-Diaz,* certificates proving the *absence* of public records are prepared with the sole motivation that they be used at trial as a substitute for live testimony. Lower courts after *Melendez-Diaz* have recognized that admitting a certificate of the absence of a public record under Rule 803(10), where the certificate is prepared for use in court, violates the accused's right of confrontation.

The Committee at its Fall 2010 meeting discussed the possibility of amending Rule 803(10) to correct this constitutional infirmity, and it voted unanimously to consider a proposed amendment at the Spring meeting. The Reporter suggested adding a "notice-and-demand" procedure to the Rule that would require production of the person who prepared the certificate only if, after receiving notice from the government of intent to introduce a certificate, the defendant made a timely pretrial demand for production of the witness. The Court in *Melendez-Diaz* specifically approved a state version of a notice-and-demand procedure. The Committee directed the Reporter to work with the Justice Department to review all the possible viable alternatives for a notice-and-demand procedure, including ones that added procedural details such as providing for continuances. After consulting with the DOJ, the Reporter prepared proposed amendments to Rule 803(10).

At its Spring meeting, the Committee voted unanimously to refer a proposed amendment to Rule 803(10), and the Committee Note, to the Standing Committee, with the recommendation that the amendment be released for public comment. The proposed Rule and Committee Note are set out in an appendix to this report. As amended, Rule 803(10) would permit a prosecutor who intends to offer a certification to provide written notice of that intent at least 14 days before trial. If the defendant does not object in writing within 7 days of receiving the notice, the prosecutor would be permitted to introduce a certification that a diligent search failed to disclose a public record or statement rather than produce a witness to so testify. The amended Rule would allow the court to set a different time for the notice or the objection.

Recommendation: The Committee recommends that the proposed amendment to Evidence Rule 803(10) be approved for release for public comment.

III. Information Items

A. Possible Amendment to Rule 801(d)(1)(B)

At its Spring meeting, the Committee considered a proposed amendment to Rule 801(d)(1)(B) initially suggested by Judge Bullock when he was a member of the Standing Committee. Judge Bullock proposed that Rule 801(d)(1)(B)—the hearsay exemption for certain prior consistent statements—be amended to provide that prior consistent statements are admissible under the hearsay exemption whenever they would be admissible to rehabilitate the witness's credibility.

Under the current rule, some prior consistent statements offered to rehabilitate a witness's credibility—specifically those that rebut a charge of recent fabrication or improper motive—are also admissible substantively under the hearsay exemption. But other rehabilitative statements—such as those that explain a prior inconsistency or rebut a charge of bad memory—are not admissible under the hearsay exemption but only for rehabilitation. The justification for amending the Rule is that there is no meaningful distinction between substantive and rehabilitative use of prior consistent statements.

The Committee voted to consider at its Fall 2011 meeting a proposed amendment to Rule 801(d)(1)(B). The Committee requested that the Department of Justice representative and the Public Defender representative solicit the views of interested parties. The Committee directed the Reporter to research the practices in the states with similar rules. And one committee member will solicit the views of state supreme court justices.

B. Decision Not to Continue Considering Possible Amendments of Rules 803(6)-(8)

The restyling project revealed an ambiguity in Rules 803(6)-(8), the hearsay exceptions for business records, absence of business records, and public records. These exceptions set out admissibility requirements and provide that a record meeting the requirements is admissible, despite the fact that it is hearsay, "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." The Rules do not specify which party has the burden of showing trustworthiness or untrustworthiness.

The Committee did not submit proposed amendments to these Rules as part of restyling because research into the case law indicated that the changes would be substantive. While most courts impose the burden of proving untrustworthiness on the opponent, a few courts require the proponent to prove that the record is trustworthy. When the Standing Committee approved the Restyled Rules, however, several members suggested that the Evidence Advisory Committee consider making minor substantive changes that would clarify who has the burden.

At its Fall meeting, the Committee, while dubious about the need for amendments, directed the Reporter to consult representatives of the ABA Litigation Section, the American College of Trial Lawyers, and other interested parties to determine whether amendments should be proposed. The American College, the Litigation Section, and the Department of Justice favor amending the Rules to clarify that the opponent has the burden of showing untrustworthiness. They believe amending the Rules will provide a useful clarification.

At the Spring meeting, however, the Committee voted not to propose amendments to Rules 803(6)-(8). Members stated that any problems in applying the Rules are the result of a few outlier cases, that amending the Rules could create new problems for courts and litigants, and that the Rules clearly place the burden of establishing untrustworthiness on the party who opposes admitting the evidence.

C. Decision Not to Continue Considering Possible Amendment of Rule 806

In response to a directive from the Committee to identify rules that have been the subject of conflicting interpretations in the courts, the Reporter identified Rule 806, the Rule that allows impeachment of hearsay declarants.

At the Spring meeting, the Committee considered possible changes to the Rule and voted unanimously not to proceed with any. It concluded that difficulties in amending the Rule, coupled with concerns that changing the Rule could undermine a good policy of barring extrinsic evidence to impeach hearsay declarants, warranted a decision not to proceed further.

D. *Crawford* Developments

The Committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*. The Reporter has provided the Committee a case digest of all federal circuit cases discussing *Crawford* and its progeny. The goal of the digest is to allow the Committee to keep current on developments in the law of confrontation because such developments might affect the constitutionality of hearsay exceptions contained in the Evidence Rules. Apart from Rule 803(10), nothing in the developing case law appears to require amending the Evidence Rules at this time. The Supreme Court is currently considering the case of *Bullcoming v. New Mexico*, in which it will address whether lab results can be introduced by a witness other than the person who conducted the test. The Court's decision in *Bullcoming* could affect the application of Rule 703. The Committee will continue monitoring developments in this area.

E. Privilege Project

Several years ago, the Committee voted to undertake a project to publish a pamphlet that describes the federal common law of evidentiary privileges. The project is only intended as a restatement of the federal common law, not a proposed codification of the law of privileges or a set

of proposals for consideration by the Congress. This project is considered a valuable service to the bench and bar because it will set out in text and commentary the privileges that exist under federal common law.

At its Spring meeting, the Committee considered materials on the attorney-client privilege and the psychotherapist-patient privilege. It determined that the project should cover the basic privileges: attorney-client; interspousal; psychotherapist; clergy; journalist; informant; deliberative process; and other governmental privileges. The Committee also concluded that there should be a separate section on waiver.

F. Restyling Symposium

The Committee is sponsoring a Symposium on the Restyled Rules of Evidence in conjunction with its Fall meeting. The symposium and the meeting will take place at William and Mary Law School on Friday, October 28, 2011. The proceedings of the Symposium will be published in the *William and Mary Law Review*. Standing Committee members who are not already participating as panelists are invited to attend. Members of the William and Mary Law School community have also been invited, as has been a representative from the National Center for State Courts.

IV. Minutes of the Spring 2011 Meeting

The Reporter's draft of the minutes of the Committee's Spring 2011 meeting is attached to this report as an appendix. These minutes have not yet been approved by the Committee.

12b-004459

12b-004460

Appendix to Report to the Standing Committee from the Advisory Committee on Evidence Rules

June 2011

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 803(10)

Rule 803. Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

* * *

(10) ***Absence of a Public Record.*** Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record or statement if ~~the testimony or certification is admitted to prove that~~:

(A) the testimony or certification is admitted to prove that

(~~A~~ i) the record or statement does not exist; or

(~~B~~ ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

(B) if the prosecutor in a criminal case intends to offer a certification, the prosecutor provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice — unless the court sets a different time for the notice or the objection.

Committee Note

Rule 803(10) has been amended in response to *Melendez-Diaz v. Massachusetts,* 129 S.Ct. 2527 (2009). The *Melendez-Diaz* Court declared that a testimonial certificate could be admitted if the accused is given advance notice and does not timely demand the presence of the official who prepared the certificate. The amendment incorporates, with minor variations, a "notice-and-demand" procedure that was approved by the *Melendez-Diaz* Court. See Tex. Code Crim. P. Ann., art. 38.41.

12b-004463

12b-004464

Advisory Committee on Evidence Rules

Minutes of the Meeting of April 1, 2011

Philadelphia, Pennsylvania

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on April 1, 2011 in Philadelphia, Pennsylvania.

The following members of the Committee were present:

Hon. Sidney A. Fitzwater, Chair
Hon. Joseph F. Anderson, Jr.
Hon. Brent R. Appel
Hon. Anita B. Brody
Hon. Joan N. Ericksen.
William T. Hangley, Esq.
Marjorie A. Meyers, Esq.
Paul Shechtman, Esq.
Elizabeth J. Shapiro, Esq., Department of Justice

Also present were:

Hon. Lee H. Rosenthal, Chair of the Committee on Rules of Practice and Procedure ("Standing Committee")
Hon. Marilyn L. Huff, Liaison from the Committee on Rules of Practice and Procedure and member of the Standing Committee's Style Subcommittee
Hon. John F. Keenan, Liaison from the Criminal Rules Committee
Hon. Paul S. Diamond, Liaison from the Civil Rules Committee
Hon. Judith H. Wizmur, Liaison from the Bankruptcy Rules Committee
James N. Ishida, Esq., Rules Committee Support Office
Peter McCabe, Esq., Secretary to the Standing Committee
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee
Timothy Reagan, Esq., Federal Judicial Center
Jeffrey Barr, Esq., Rules Committee Support Office

12b-004465 506

I. Opening Business

Introductory Matters

Judge Fitzwater, the Chair of the Committee, welcomed the members.

Dean Fitts of Penn Law School welcomed the Committee and stated that he was honored to have the Committee meeting at the Law School.

The minutes of the Fall 2010 Committee meeting were approved.

Judge Fitzwater noted with regret that it was the last meeting for two valued members of the Committee — Judge Joan Ericksen and Judge Joseph Anderson. He expressed the Committee's thanks and gratitude for all their fine work, and observed that they would receive a formal tribute at the next Committee meeting.

The Reporter noted for the record that this would be the first Evidence Rules Committee meeting without the stellar assistance of John Rabiej, who has taken an important position at the Sedona Conference. The Reporter stated that John's presence would be sorely missed at this meeting and in the future.

Restyling: Supreme Court Review

The Restyled Rules of Evidence were approved by the Judicial Conference in the Fall of 2010 and were sent to the Supreme Court. The Court notified Judge Rosenthal that it was considering four changes to the Restyled Rules. After a dialog with Judge Rosenthal and the Chair and Reporter of the Evidence Rules Committee, the Supreme Court withdrew its suggestions for change to two of the Rules ---- Rule 405(b) (the suggestion being to drop the word "relevant" from the rule), and Rule 801(a) (the suggestion being to specify that the intent requirement applies only to conduct and not to written or verbal assertions).

Judge Rosenthal, the Chair and the Reporter agreed with the changes suggested by the Court with respect to two rules: Rules 408 and 804(b)(4). Both changes restored language from the existing rule. Those changes, shown in blackline form, are as follows:

12b-004466507

Rule 408:

(a) Prohibited uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction: **(1)** furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and	**(a) Prohibited Uses.** Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction: **(1)** furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration ~~in order to compromise~~ in compromising or attempting to compromise the claim; and

Rule 804(b)(4):

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.	**(4)** ***Statement of Personal or Family History.*** A statement about: **(A)** the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or **(B)** another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

12b-004467 508

In sum, the proposed changes restored "in compromising or attempting to compromise a claim" to Rule 408 and "adoption" to Rule 804(b)(4). In response to these suggestions, Judge Rosenthal contacted Judge Sentelle, the Chair of the Executive Committee of the Judicial Conference, and asked for approval of the changes proposed by the Supreme Court. The Executive Committee approved the changes on an expedited basis. The changes were then presented to the Court as a recommendation of the Judicial Conference.

At the Advisory Committee meeting, the Committee discussed the two changes proposed by the Supreme Court. Committee members noted that the Court had obviously reviewed the Restyled Rules with significant care and detail. Committee members expressed pride in the fact that out of the hundreds of changes made in the restyling, the Supreme Court found only two small revisions to be advisable. After discussion of those proposed changes, the Committee voted unanimously to ratify the changes to Rules 408 and Rule 804(b)(4)

The Committee expressed its gratitude to Judge Rosenthal and to Andrea Kuperman, Chief of the Rules Committee Support Office for their outstanding work under considerable time pressure in effectuating the changes raised by the Supreme Court. The Chair thanked the Reporter for his quick responses on the legal questions raised by the Supreme Court proposals.

Restyling Project: Legal Writing Award

Judge Rosenthal informed the Committee that the Restyled Rules have been awarded a legal writing award from the Center for Plain Language. The award will be given at an award ceremony at the National Press Club. Judge Hinkle, who chaired the Evidence Rules Committee during the restyling project, will accept the award on behalf of the Standing Committee and the Evidence Rules Committee.

II. Proposed Amendment to Rule 803(10)

In *Melendez-Diaz v. Massachusetts,* the Supreme Court held that certificates reporting the results of forensic tests conducted by analysts were "testimonial" and therefore the admission of such certificates (in lieu of testimony) violated the accused's right to confrontation. The Court reasoned that the certificates were prepared exclusively for use in a criminal trial, as substitutes for trial testimony, and so were testimonial within the meaning of the Confrontation Clause as construed by *Crawford v. Washington.*

At the last meeting, the Reporter prepared a memorandum for the Committee on the effect of *Melendez-Diaz* on the constitutionality, as applied, of the hearsay exceptions that cover records in the Federal Rules of Evidence. The memorandum made the following tentative conclusions:

1) Records fitting within the business records exception are unlikely to be testimonial, and addressing any uncertainty about the constitutional admissibility of business records in certain unusual cases should await more case law development.

12b-004468 509

2) Records admissible under the public records exception are unlikely to be testimonial, because to be admissible under that exception the record cannot be prepared with the primary motivation of use in a criminal prosecution.

3) Authenticating business and public records by certificate under various provisions in Rule 902 is unlikely to raise constitutional concerns, because the Court in *Melendez-Diaz* found an exception to testimoniality for certificates that did nothing but authenticate a document. That exception has already been invoked by lower federal courts to uphold Rule 902 authentications against confrontation challenges.

4) *Melendez-Diaz* appears to bar the admission of certificates offered to prove the absence of a public record under Rule 803(10). Like the certificates at issue in *Melendez-Diaz*, a certificate proving up the absence of a public record is ordinarily prepared with the sole motivation that it will be used at trial — as a substitute for live testimony. Lower courts after *Melendez-Diaz* have recognized that admitting a certificate of absence of public record under Rule 803(10), where the certificate is prepared for use in court, violates the accused's right to confrontation after *Melendez-Diaz.*

In light of the above, the Committee at its Fall 2010 meeting discussed the possibility of an amendment to Rule 803(10) that would correct the constitutional problem raised by *Melendez-Diaz.* The possible fix suggested in the Reporter's memo was to add a "notice-and-demand" procedure to the Rule: requiring production of the person who prepared the certificate only if after receiving notice from the government of intent to introduce a certificate, the defendant makes a timely pretrial demand for production of the witness. The Court in *Melendez-Diaz* specifically approved a state version of a notice-and-demand procedure, and the Reporter's draft added the language from that state version to the existing Rule 803(10).

The Committee unanimously resolved to consider a proposed amendment to Rule 803(10) at the Spring meeting. The Reporter was directed to work with the Justice Department to review all the possible viable alternatives for a notice-and-demand procedure, including ones that add procedural details such as providing for continuances.

After consulting with the DOJ, the Reporter prepared a proposed amendment to Rule 803(10) that provided as follows:

(10) Absence of a Public Record. Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record or statement if ~~the testimony or certification is admitted to prove that~~:

(A) the testimony or certification is admitted to prove that

(~~A~~ i) the record or statement does not exist; or

(~~B~~ ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

(B) if the prosecutor in a criminal case intends to offer a certification, the prosecutor provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice — unless the court, for good cause, sets a different time for the notice or the objection.

In drafting this proposed amendment, the Reporter relied on the following considerations:

1. The basic Texas rule, approved by the Supreme Court in *Melendez-Diaz*, serves as a good template for a notice-and-demand provision.

2. The rule should contain specific time periods.

3. The time for demand should be measured from the date of receipt of notice, rather than the number of days before trial.

4. A good cause provision should be added.

5. The amendment need not address such details as continuance, waiver, and testimony by an expert.

6. The amendment should not provide that if the defendant makes a proper demand, the government must produce the person who prepared the certificate.

In discussion on the proposal, the Committee agreed with all the above principles but for one. A number of members argued against a good cause provision on two grounds: 1) it would undermine the predictability of the rule, as a prosecutor could never be sure that even if a timely demand is not made, the court might still find good cause and then the government would have to produce the witness; 2) good cause would be applied in the context of the confrontation rights found in *Melendez-Diaz* and it is unclear how that might work in practice; and 3) the Court in *Melendez-Diaz* approved a notice-and-demand statute that did not contain a good cause requirement.

One member suggested that a good cause requirement was necessary because of unforeseen circumstances such as phones being out, computers crashing, and the like. But other members responded in two ways: 1) all the defendant has to do is make a demand within seven days of receiving the notice — there is no requirement of a substantial production or significant effort that would be forestalled by an emergency event; and 2) if the defendant truly has a justification for failing to timely comply, a court is likely to grant relief even without good cause language in the Rule.

The Committee then considered whether, if good cause language were cut from the proposal, the rule should still provide that the court could set a different time for the notice and demand.

Members generally agreed that it would be useful to retain such a provision. It was noted that many of the Civil and Criminal Rules provide specifically that a court can set a different time than the period provided by a particular rule. Moreover, courts may want to provide time periods at the outset of a case to require the government to provide notice before the time required by the rule.

Finally, the Committee considered whether the procedural fix of a notice-and-demand statute should be placed somewhere other than Rule 803(10). One member pointed out that certain excited utterances might be testimonial — though this is far less likely after the Supreme Court's decision in *Michigan v. Bryant* — or that other hearsay exceptions might encompass testimonial hearsay. But other members responded that it was only Rule 803(10) that authorizes admission of hearsay that will almost always be testimonial — because certificates of the absence of public record are almost always prepared with the primary motivation that they would be used in a criminal prosecution. It would make no sense to impose notice and demand provisions on other hearsay exceptions that rarely if ever embrace testimonial hearsay. The effect of a notice and demand provision is to require the government to produce a witness in lieu of a hearsay statement, and that effect is not justified unless the hearsay is testimonial.

After significant discussion, the Committee unanimously approved the following amendment to the text of Rule 803(10), to be transmitted to the Standing Committee with the recommendation that it be approved for public comment:

(10) Absence of a Public Record. Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record or statement if ~~the testimony or certification is admitted to prove that~~:

(A) the testimony or certification is admitted to prove that

(~~A~~ i) the record or statement does not exist; or

(~~B~~ ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

(B) if the prosecutor in a criminal case intends to offer a certification, the prosecutor provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice — unless the court sets a different time for the notice or the objection.

The Committee unanimously approved a Committee Note to accompany the proposed amendment to Rule 803(10). That Note provides as follows:

Committee Note

> Rule 803(10) has been amended in response to *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009). The *Melendez-Diaz* Court declared that a testimonial certificate could be admitted if the accused is given advance notice and an opportunity to demand the presence of the official who prepared the certificate. The amendment incorporates, with minor variations, a "notice-and-demand" procedure that was approved by the *Melendez-Diaz* Court. See Tex. Code Crim. P. Ann., art. 38.41.

The proposed amendment and Committee Note, in proper format, are attached as an appendix to Judge Fitzwater's report to the Standing Committee.

III. Possible Amendments to Rules 803(6)-(8)

The restyling project uncovered an ambiguity in Rules 803(6)-(8), the hearsay exceptions for business records, absence of business records, and public records. Those exceptions in current form set forth admissibility requirements and then provide that a record meeting those requirements is admissible despite the fact it is hearsay "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." The rules do not specifically state which party has the burden of showing trustworthiness or untrustworthiness.

The restyling sought to clarify the ambiguity by providing that a record fitting the other admissibility requirements would satisfy the exception if "the opponent does not show that" the source of information, etc., indicate a lack of trustworthiness. But the Committee did not submit this proposal as part of restyling because research into the case law indicated that the change would be substantive. While most courts impose the burden of proving untrustworthiness on the opponent, a few courts require the proponent to prove that the record is trustworthy. Thus the proposal would have changed the law in at least one court, and so was substantive under the restyling protocol.

When the Standing Committee approved the Restyled Rules, several members suggested that the Evidence Rules Committee consider making the minor substantive change that would clarify what is implicit in Rules 803(6)-(8) — that the opponent has the burden of showing untrustworthiness. Those members believed that allocating the burden to the opponent made sense for a number of reasons, including: 1) the Rules' reference to a "lack of trustworthiness" suggests strongly that the burden is on the opponent, as it is the opponent who would want to prove the lack of trustworthiness; 2) almost all the case law imposes the burden on the opponent; and 3) if the other admissibility requirements are met, the qualifying record is entitled to a presumption of trustworthiness, and adding an additional requirement of proving trustworthiness would unduly limit these records-based exceptions.

At the Fall 2010 meeting, the Advisory Committee was dubious about the need for an amendment that would clarify the burden of proof as to trustworthiness. Some members suggested that the determination of trustworthiness might be a process and a court may decide that a record is untrustworthy even if the opponent does not provide any evidence or argument on that subject. Others noted that almost all courts impose the burden on the opponent and so there was really no serious problem worth addressing. Ultimately the Committee directed the Reporter to check with representatives of the ABA Litigation Section, the American College of Trial Lawyers, and other interested parties to determine whether it would be helpful to propose an amendment that would clarify that the burden of showing untrustworthiness is on the opponent. The Committee determined that it would revisit the question of a possible amendment at the Spring meeting.

The Reporter sought input from the American College, the Litigation Section, and the Department of Justice. All came out in favor of an amendment to clarify that the opponent has the burden of showing untrustworthiness of business and public records. Those organizations thought the amendment would provide a useful clarification and would assist courts and litigants in structuring arguments and admissibility determinations for business and public records.

But at the Spring meeting, Committee members were opposed to any amendment to the trustworthiness language of Rules 803(6)-(8). Members stated that any problem in the application in the rule was caused by a few wayward cases; that an amendment could simply invite parties to raise trustworthiness arguments that would not otherwise be raised; that courts need flexibility to deal with trustworthiness arguments; that parties understand that the burden of proving untrustworthiness is on the opponent; and that the restyling did nothing to change that basic understanding.

The Committee noted for the record that the burden of proving untrustworthiness is on the opponent and that this is clear enough in the existing language of the rule, so that clarification is unnecessary.

A motion was made against publishing an amendment to the trustworthiness clauses of Rules 803(6)-(8). Eight members voted in favor of the motion. One member abstained.

IV. Possible Amendment to Rule 801(d)(1)(B)

At the Spring meeting the Committee considered a proposed amendment that had been tabled a number of years earlier when the Committee was involved in Rule 502 and then restyling. The proposal — made by Judge Bullock, then a member of the Standing Committee — was to amend Evidence Rule 801(d)(1)(B). That is the hearsay exemption for certain prior consistent statements. Judge Bullock proposed that Rule 801(d)(1)(B) be amended to provide that prior consistent statements are admissible under the hearsay exception whenever they would be admissible to rehabilitate the witness's credibility. The justification for the amendment is that there is no meaningful distinction between substantive and rehabilitative use of prior consistent statements.

Under the current rule, some prior consistent statements offered to rehabilitate a witness's credibility — specifically those that rebut a charge of recent fabrication or improper motive — are also admissible substantively under the hearsay exemption. But other rehabilitative statements — such as those which explain a prior inconsistency or rebut a charge of bad memory — are not admissible under the hearsay exception but only for rehabilitation. There are two basic practical problems in the distinction between substantive and credibility use as applied to prior consistent statements. First, as Judge Bullock noted, the necessary jury instruction is almost impossible for jurors to follow. The prior consistent statement is of little or no use for credibility unless the jury believes it to be true. Second, and for similar reasons, the distinction between substantive and impeachment use of prior consistent statements has little, if any, practical effect. The proponent has already presented the witness's trial testimony, so the prior consistent statement adds no real substantive effect to the proponent's case.

The Committee unanimously agreed with Judge Bullock's argument that the current distinction between substantive and impeachment use of prior consistent statements is impossible for jurors to follow and makes no practical difference. But some members were concerned that any expansion of the hearsay exemption to cover all prior consistent statements admissible for rehabilitation might be taken as a signal that the Rules were taking a more liberal attitude toward admitting prior consistent statements. Parties might seek to use the exemption as a means to bolster the credibility of their witnesses. The Committee was cognizant of the Supreme Court's concern in *Tome v. United States*, 513 U.S. 150 (1995): that under an expansive treatment of prior consistent statements "the whole emphasis of the trial could shift to the out-of-court statements, not the in-court ones."

One member agreed with the point that the current rule was problematic in treating some rehabilitative prior consistent statements differently from others, but suggested that the proper result is that *none* of them should be admissible substantively — i.e., the Committee should propose deleting Rule 801(d)(1)(B). But this suggestion was rejected by other Committee members, who found no good reason for upsetting the current practice in this way. The Department of Justice member was also opposed to any proposal to limit the current substantive admissibility of prior consistent statements.

Both the Department of Justice representative and the Public Defender representative noted that they had not yet had the opportunity to vet the proposed amendment with their interested parties. Committee members also noted that it might be useful to determine how the practice has gone under the states that already have a rule that is similar to the possible amendment.

Accordingly, after extensive discussion, the Committee resolved to further consider the proposal to amend Rule 801(d)(1)(B) at the next meeting. The working language for the proposed amendment is as follows:

> **(d) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:

(1) ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

* * *

(B) is consistent with the declarant's testimony and ~~is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying~~ rehabilitates the declarant's credibility as a witness;

The Committee requested the Department of Justice representative and the Public Defender representative to solicit the views of their interested parties. The Reporter was directed to research the practice in the states with similar rules. And Justice Appel offered to solicit the views of other state supreme court justices.

V. Proposed Amendment to Rule 806

In 2001, the Evidence Rules Committee directed the Reporter to review all the Evidence Rules and report on which rules were the subject of a conflict in interpretation in the courts. The goal of the project was to allow the Committee to consider whether to propose an amendment to any such rule in order to rectify the conflict. One rule subject to such a conflict was and is Rule 806 — the rule allowing impeachment of hearsay declarants. The Reporter prepared a memorandum discussing the conflict and providing language for a possible amendment. But by the time the Committee considered the conflict regarding Rule 806, it had become involved in developing Rule 502, and then restyling, and so consideration of a possible amendment was tabled.

At the Spring meeting, the Committee considered the possibility of two separate changes to Rule 806. One change addressed the conflict in the case law over whether a hearsay declarant may be impeached by extrinsic evidence of bad acts bearing on character for truthfulness. If the declarant were to testify as a witness, he could be questioned about pertinent bad acts, but Rule 608(b) would prohibit extrinsic evidence of those acts. Rule 806 is designed to allow an opponent to impeach a hearsay declarant in the same way that he could be impeached on the stand. But the problem is that a hearsay declarant ordinarily cannot be asked about bad acts — so the only way to raise the act would be through extrinsic evidence. Rule 806 currently does not provide for an exception to Rule 608(b), but at least one court has read such an exception into the Rule, in order to allow the opponent a means of attacking the credibility of a hearsay declarant through bad acts. The rationale of that court is that the goal of Rule 806 is to allow the opponent to impeach the declarant as fully as if he were on the stand. Other courts, however, read the rule literally and refuse to add an extrinsic evidence exception that is not in the text.

The possible amendment to the Rule — considered by the Committee at the Spring meeting — would have provided that "the court may admit extrinsic evidence of the declarant's conduct when offered to attack or support the declarant's character for truthfulness."

Committee members discussed the proposal and unanimously determined that the amendment should not proceed. Members noted that it is impossible to treat impeachment with bad acts exactly the same when the person to be impeached is a hearsay declarant. That is because extrinsic evidence would have to be admitted, where it would be barred if the declarant were to testify. Given that impossibility of exactly equal treatment, the Committee considered whether it was good policy to allow extrinsic evidence of bad acts to impeach a hearsay declarant. It concluded that the policy of barring extrinsic evidence was a good one, as it prevented minitrials on collateral bad acts — minitrials that would require discovery by the parties. Because impeachment of witnesses and impeachment of hearsay declarants can never be exactly the same, the Committee saw no need to open up the costs of admitting extrinsic evidence to impeach hearsay declarants.

The other possible amendment to Rule 806 would deal with a narrow issue. Under the rule, a criminal defendant in a multi-defendant trial could end up being impeached with a prior conviction even if he never took the stand. This could occur when his hearsay statement is admitted against himself and his co-defendants (e.g., as a co-conspirator statement), and the co-defendants seek to attack the declarant's credibility. Some have argued that Rule 806 should be amended to prohibit the impeachment of an accused whose hearsay statements are admitted in a multiple defendant trial where the declarant-defendant does not testify. But the Committee determined that the solution to the problem of impeaching an accused who does not testify does not lie in the rules of evidence but rather in the law of severance. The Committee also noted that there was no easy answer to whether such impeachment should be permitted — while the declarant/defendant's rights are obviously at stake, so are the rights of the impeaching party to challenge the credibility of a hearsay declarant. The Committee unanimously determined that the proper resolution to these problems should be left to the trial judge considering the circumstances of the particular case, with the possible remedy of severance.

The Committee unanimously determined that there was no sentiment to move forward with any amendment to Rule 806.

VI. *Crawford* Developments

The Reporter provided the Committee with a case digest of all federal circuit cases discussing *Crawford v. Washington* and its progeny. The digest was grouped by subject matter. The goal of the digest is to allow the Committee to keep apprised of developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions.

The Committee reviewed the memo and the Reporter noted that — with the exception of Rule 803(10), discussed supra — nothing in the developing case law mandated an amendment to the Evidence Rules at this time. The digest contained an extensive discussion of the Supreme Court's recent decision in *Michigan v. Bryant*, which considered whether a hearsay statement admitted as an excited utterance was testimonial. The Court's decision in *Bryant* makes it very unlikely that a statement admitted under Rule 803(2) — the Federal Rules hearsay exception for excited utterances — will be found testimonial. The Reporter observed that the Supreme Court is currently considering the case of *Bullcoming v. New Mexico*, in which it will address whether lab

results can be introduced by a witness other than the person who conducted the test. The Court's decision in *Bullcoming* may have an effect on the application of Rule 703. The Committee resolved to continue monitoring developments on the relationship between the Federal Rules of Evidence and the accused's right to confrontation.

VII. Privilege Project

Several years ago the Committee voted to undertake a project to publish a pamphlet that would describe the federal common law on evidentiary privileges. The Committee determined that it would not be advisable to propose an actual codification of all the evidentiary privileges to Congress. But it concluded that it could perform a valuable service to the bench and bar by setting forth in text and commentary the privileges that exist under federal common law. Professor Broun had prepared drafts of a number of privileges, but the project was put on hold given the time and resources required for Rule 502 and the restyling project.

At the Spring meeting, Professor Broun submitted materials on the attorney-client privilege and the psychotherapist-patient privilege. Committee members praised his work and predicted that the final product, when published, would be extremely useful to the bench and bar. The Committee resolved unanimously that the privilege project should be continued.

Professor Broun stated that the goal of the project was to provide a textual "restatement" of the federal law of privilege, with an explanatory section setting forth the case law. Professor Broun sought guidance on which privileges should be addressed as the project goes forward. After discussion, the Committee determined that the project should cover the basic privileges: attorney-client; interspousal; psychotherapist; clergy; journalist; informant; deliberative process; and other governmental privileges. In addition, the Committee agreed with Professor Broun's suggestion that there should be a separate section on waiver — analogous to the separate rule on waiver proposed by the original Advisory Committee.

Committee members stated for the record that the project was intended only as a restatement of the federal common law of privilege — a published product that would assist the bench and bar. Members emphasized that the Committee has no intent to propose codification of privileges or to intrude on Congress's role in enacting privilege rules.

At the suggestion of the Chair, Judge Rosenthal agreed to check on whether the American Law Institute might be working on any project involving privileges.

Professor Broun stated that at the next meeting he would provide materials on the attorney-client privilege and the interspousal privileges.

VIII. Restyling Symposium

The Chair reported to the Committee on plans being made for a Symposium on the Restyled Rules of Evidence, to take place on the morning before the scheduled Fall meeting of the Committee. The Symposium and the Committee meeting will take place at William and Mary Law School on Friday October 28, 2011.

The Chair explained that the Fall meeting will be an opportune moment for the Committee to take pride in the restyling effort, as the Restyled Rules are scheduled to go into effect on December 1, 2011 (if all goes well). The Chair and the Reporter have begun to put together two panels for the Symposium. One is a retrospective panel that will look at the process and protocol of restyling, problems encountered by the Committee, and how those problems were addressed in the Restyled Rules. The second panel will discuss how the Restyled Rules are likely to be received by the bench and bar; any questions about meaning that may exist; and what problems if any there might be in applying the Restyled Rules.

The proceedings of the Symposium will be published. Standing Committee members are enthusiastically invited to attend. Members of the William and Mary community will also be invited to attend.

The following people have agreed to make a presentation at the symposium — with subject matter of each presentation to be determined:

- Judge Robert Hinkle, Chair of the Committee during the restyling effort
- Professor Joe Kimble, style consultant
- Judge James Teilborg, Chair of the Style Subcommittee of the Standing Committee
- Judge Marilyn Huff, Member of the Style Subcommittee of the Standing Committee
- Professor Steve Saltzburg (Litigation Section representative on the restyling project).
- Judge Reena Raggi (Standing Committee member who provided very helpful comments on restyling)
- Judge Harris Hartz (former Standing Committee member who provided very helpful comments on restyling)
- Justice Andy Hurwitz, member of the Committee during restyling
- Judge Joan Ericksen, member of the Committee during restyling
- Professor Deborah Merritt, Ohio State (comment on Rule 1101)
- Professor Roger Park, Hastings (provided public comment)
- Judge S. Allan Alexander, Federal Magistrate Judges' Association
- Professor Katherine Schaffzin, Memphis (provided public comment)
- A representative from the National Center for State Courts.

The Chair invited Committee members to suggest any other individuals who should be invited to make a presentation, and to propose any other topics that might be covered by the panels.

IX. Next Meeting

The Fall 2011 meeting of the Committee is scheduled for Friday, October 28 in Williamsburg. It will take place after the Restyling Symposium.

Respectfully submitted,

Daniel J. Capra
Reporter

TAB 9-A-E

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

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JEFFREY S. SUTTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

TO: Honorable Lee H. Rosenthal, Chair, Standing Committee on Rules of Practice and Procedure

FROM: Honorable Eugene R. Wedoff, Chair, Advisory Committee on Bankruptcy Rules

DATE: May 6, 2011

RE: Report of the Bankruptcy Rules Advisory Committee

I. Introduction

The Advisory Committee on Bankruptcy Rules met on April 7 and 8, 2011, in San Francisco, California. The initial portion of the meeting was held jointly with the Advisory Committee on Appellate Rules in order to discuss possible revisions of the bankruptcy appellate rules (Part VIII of the Bankruptcy Rules) and of Appellate Rule 6, which governs bankruptcy appeals in the courts of appeals.

Among the matters before the Committee were the proposed rule and form amendments and proposed new forms that were published for comment in August 2010. Thirty-seven comments were submitted in response to the publication. The Committee held a hearing in Washington, D.C., on February 4, 2011, at which six witnesses testified. Through a series of subcommittee conference calls and discussions at the San Francisco meeting, the Committee carefully considered the comments and testimony that were submitted. They are summarized below, along with the changes that the Committee recommends making to the published rules and forms in response to the comments received.

At its April meeting and at an earlier meeting in September 2010, the Committee took action on several matters that it now presents to the Standing Committee. The action items are grouped into three categories:

(a) matters published in August 2010 for which the Committee seeks approval for transmission to the Judicial Conference—amendments to Rules 3001(c), 7054, 7056, Official Form 10, and Official Form 25A; and new Official Forms 10 (Attachment A), 10 (Supplement 1), and 10 (Supplement 2);

(b) matters for which the Committee seeks approval for transmission to the Judicial Conference without publication—amendments to Rules 1007(c), 2015(a), 3001(c), and Official Forms 1 and 9A - 9I; and

(c) matters for which the Committee seeks approval for publication in August 2011—amendments to Rules 1007(b), 3007(a), 5009(b), 9006, 9013, and 9014, and Official Forms 6C, 7, 22A, and 22C.

After discussing these action items, the report presents information about the Committee's ongoing work on revising the bankruptcy appellate rules and on the Forms Modernization Project.

II. Action Items

A. Items for Final Approval

1. Amendments and New Forms Published for Comment in August 2010. **The Advisory Committee recommends that the proposed amendments and new forms that are summarized below be approved and forwarded to the Judicial Conference. The Advisory Committee recommends that the amended forms and new forms be effective on December 1, 2011.** The texts of the amended rules and forms and the new forms are set out in Appendix A.

Action Item 1. Rule 3001(c) would be amended to provide, in new paragraph (3), requirements for the documentation of claims based on an open-end or revolving consumer credit agreement. Subdivision (c)(1) currently requires the attachment to a proof of claim of the writing, if any, on which a claim or an interest in property is based. That provision would be amended to create an exception for claims governed by paragraph (3) of the subdivision. New paragraph (3) would require for an open-end or revolving consumer credit claim that a statement be filed with the proof of claim that provides the following information to the extent applicable: name of the entity from whom the creditor purchased the account; name of the entity to whom the debt was owed at the time of the account holder's last transaction; date of the account holder's last transaction; date of the last payment on the account; and the charge-off date. This information may be needed by the debtor to associate the claim with a known account, since claims of this type—primarily for credit card debts—are frequently sold one or more times before being held by the claim filer, which may be an entity unknown to the debtor. The required information would also provide a basis for assessing the timeliness of the claim. In addition to this information, which must be routinely provided, a party in interest could obtain a copy of the writing on which an open-end or revolving consumer credit claim is based by requesting it in writing from the holder of the claim.

a. Testimony and comments

Four witnesses testified at the February 4, 2011 hearing on these proposed amendments, and 24 people submitted written comments on them. Individual summaries of the testimony and comments are set forth in Appendix A. The major topics they addressed are the following:

Whether there is a need for the amendments. A few representatives of consumer lenders or purchasers of credit card debt questioned the need for the proposed amendments. They noted the low incidence of objections to the claims they file and said that in many cases the debtor has scheduled the debts owed to them, thus acknowledging the validity of their claims.

Lawyers for consumer debtors and a bankruptcy judge supported the rule's requirement that credit card claimants provide specific information to support their claims. They stated that these claimants are ignoring the current requirement for attaching the writing on which the claim is based and that, having purchased the claims in bulk, the claimants generally have very little information about the claims they file. Two comments noted that the U.S. Trustee Program recently entered into a settlement with Capital One Bank for filing thousands of previously discharged claims.

Whether the amendments place an appropriate burden on consumer lenders and debt purchasers. One witness representing the American Bankers Association testified that the proposed amendment would place an unreasonable burden on consumer lenders and debt purchasers and would improperly shift the burden of proof to the creditor. This, he said, would adversely affect an industry that purchased $100 billion of charged-off debt last year. Several representatives of debt purchasing companies suggested that the rule should acknowledge that compliance with the requirements of Rule 3001(c)(3)(A) entitles the claim to prima facie validity without regard to whether the supporting writing is requested or provided.

Some consumer lawyers commented that the proposed amendment would not place a sufficient burden on credit card claimants. They objected to excepting these types of claims from the general requirement for attachment of the writing on which a claim is based. Some argued for a requirement that a debt buyer who files a claim produce a complete chain of title, and another urged that a full account transaction history be required. One comment stated that the rule should require more diligence, more documentation, and more care in the preparation of a proof of claim given the "sorry state of compliance with existing rules." A representative of the National Association of Consumer Bankruptcy Attorneys characterized the proposed amendment as "quite modest and, at best, barely adequate to deal with widespread problems."

Whether subdivision (c)(3)(A) requires disclosure of the appropriate items of information. Some witnesses and commentators questioned the value of some of the information required to be included in the statement accompanying the proof of claim or suggested other information that should be required. Some comments suggested that particular provisions were ambiguous.

Whether subdivision (c)(3)(B) requires too much or too little of holders of credit card claims. Much of the public comment was addressed to the requirement that the claimant provide the writing on which the claim is based if a party in interest makes a written request for this document. Comments and testimony by some representatives of consumer lenders and bulk claims purchasers argued that a threshold showing of need for the writing should be required of the requesting party, that the rule should clarify the specific writing that should be produced for credit card claims, or that the provision should be deleted.

Some of the consumer bankruptcy lawyers, on the other hand, commented that there was no reason to have this special rule for holders of credit card claims and that they should have to produce the writing without request like all other creditors filing proofs of claim. Others argued that the rule should provide a time limit for the production of the writing in response to a request and that the

Committee Note should state that the documentation that must be produced includes the chain of title, the contract upon which the claim is based, and a transaction record.

Some commentators on both sides of the issue said that requiring production of the writing will lead to litigation and delay.

Comments on previously approved amendments to Rule 3001(c). Some commentators representing bulk claims purchasers used this occasion to object to amendments to Rule 3001(c)(2) that were recently approved by the Supreme Court and transmitted to Congress. In particular they expressed displeasure with the requirement that interest, fees, expenses, and other charges included in a claim be itemized and with the authorization of sanctions for the failure to comply with the requirements of Rule 3001(c).

b. Committee consideration

Many of the issues raised in the testimony and written comments were ones that the Advisory Committee had previously considered. The Committee concluded that the proposed rule amendment will permit enforcement of an appropriate disclosure requirement on creditors seeking recovery from bankruptcy estates for claims based on open-end or revolving consumer credit agreements. Under the existing rule, all creditors are required to file the writing on which the claim is based. As reflected in comments from advocates for all affected parties, this requirement is generally not being complied with by credit card claimants. Rather than imposing a new requirement of document production on credit card claimants, the proposed amendments allow those creditors flexibility in providing information that will provide a basis for debtors and trustees to assess whether a claim is valid and enforceable. The proposed amendments for credit card claimants are less stringent than the requirements under existing Rule 3001(c), but they are designed to provide more information than is often provided under current practices. The Committee concluded that the comments and testimony did not provide any reason to revisit the basic decisions that it had previously reached.

The Committee did agree that a deadline for responding to a request for the underlying writing should be imposed. Specifying a time limit will enable the requesting party to determine when there has been a failure to comply if the request is met with silence. The Committee therefore voted to add a 30-day deadline for responding to a written request under proposed Rule 3001(c)(3)(B). The time would run from when the written request is sent. This time limit would be subject to enlargement or reduction by the court for cause under Rule 9006.

Because there is no deadline for making a request under proposed Rule 3001(c)(3)(B), the Committee discussed the point at which a properly filed proof of claim based on an open-end or revolving credit card agreement would be entitled to be treated under Rule 3001(f) as prima facie evidence of the validity and amount of the claim. If the applicability of subdivision (f) depended upon compliance with proposed subsection (c)(3)(B), it would be uncertain whether the claim was entitled to the benefit of prima facie validity until a written request was made—if and whenever that might occur—and the claimant did or did not provide a proper response. The Committee voted to add to the Committee Note a statement that a proof of claim based on an open-end or revolving credit card agreement that is filed and executed in accordance with Rule 3001(a), (b), (c)(1), (c)(2), (c)(3)(A), and (e) is entitled to the benefit of subdivision (f). Failure of a claimant to comply with proposed Rule (c)(3)(B) would not affect the applicability of subdivision (f), but would subject the claimant to possible sanctions.

Finally, the Committee agreed with one witness that proposed Rule 3001(c)(3) is not intended to apply to home equity lines of credit. Those types of loans, which are secured by a security interest in the debtor's real property, are covered by the pending home mortgage amendments and were not intended to be included within subdivision (c)(3). The Committee therefore added an exception for these types of loans to proposed Rule 3001(c)(3).

Action Item 2. Rule 7054 incorporates Fed. R. Civ. P. 54(a) - (c) for adversary proceedings, and in subdivision (b) it provides for the awarding of costs. The proposed amendment that was published for comment would amend (b) to provide more time—14 days rather than one day—for a party to respond to the prevailing party's bill of costs, and extend from five to seven days the time for seeking court review of the costs taxed by the clerk. The first change was proposed in order to provide a more reasonable period of time for a response, and the latter period was changed to conform to the 2009 time-computation amendments, which changed five-day periods in the rules to seven days. These changes are also intended to make the rule consistent with Civil Rule 54, which was previously amended to adopt the proposed time periods.

One comment was submitted on this proposed amendment. Norman H. Meyer, Jr., Clerk of the U.S. Bankruptcy Court for the District of New Mexico, suggested that both time periods in Rule 7054(b) be extended to 14 days. His district's local rule allows 14 days after entry of the judgment to move for the taxation of costs, 14 days after notice of the motion to object to the bill of costs, and 14 days after the taxation of costs to seek court review.

Because one of the goals of the proposed amendment is to make Rule 7054(b) consistent with the civil rule, the Committee voted unanimously to recommend approval of the amended rule as published.

Action Item 3. Rule 7056 makes Fed. R. Civ. P. 56 applicable in adversary proceedings. Under Rule 9014(c), Rule 7056 also applies in contested matters unless the court directs otherwise. The amendment was proposed in response to the civil rule's imposition of a new default deadline for filing a motion for summary judgment. Under the civil rule, the deadline for filing a motion for summary judgment is 30 days after the close of all discovery, unless a different time is set by local rule or court order. Because hearings in bankruptcy cases sometimes occur shortly after the close of discovery, the proposed amendment to Rule 7056 bases the default deadline on the scheduled hearing date, rather than on the close of discovery. The deadline for filing a summary judgment motion would be 30 days before the initial date set for an evidentiary hearing on any issue for which summary judgment is sought, unless a local rule or the court sets a different deadline.

No one submitted a comment on this amendment. The Committee voted unanimously to recommend approval of the proposed amendment to Rule 7056 as published.

Action Item 4. Official Form 10 (Proof of Claim) would be amended in several respects. As published, the proposed amendments included the following:

- a request for additional information about the interest rate for secured claims and a clarification that the information concerns the rate as of the filing of the petition;

- clarification that a summary of supporting documents may be submitted only as an addition to copies of the documents themselves and not as a substitute;

- additional emphasis of the need to redact attached documents to eliminate personal data identifiers;

- changes to the date and signature box to emphasize the duty of care that must be exercised in filing a proof of claim and to require disclosure of the capacity in which the filer is acting;

- the addition of a space for a uniform claim identifier; and

- various formatting and stylistic changes.

a. Comments

Six comments were submitted regarding the proposed Form 10 amendments, and an additional inquiry was informally made regarding that form.

Judge Paul Mannes (Bankr. D. Md.) pointed out that, as proposed to be amended, Form 10 would contain two places to indicate whether the proof of claim is being filed by a trustee or debtor, rather than by a creditor. He suggested that the first request for that information be deleted, and that the resulting space be used to allow the claimant to indicate that it did not receive notice of the filing of the bankruptcy case from the court.

Linda Spaight, of the Administrative Office's Bankruptcy Court Administrative Division, noted the continuation of an existing discrepancy between the form's instruction not to "send original documents, as attachments may be destroyed after scanning" and Rule 3001(c)'s requirement that the original or a duplicate of a writing on which a claim is based be attached. The National Association of Consumer Bankruptcy Attorneys commented that Form 10, either on its face or in the instructions, should state that attachments are required for open-end consumer credit claims and mortgage claims. It stated that not all claimants will be familiar with the rules requiring the attachment of those documents.

Two attorneys expressed support for the amendments, and another commentator questioned whether "email" was spelled properly.

Finally, Robby Robinson of the Bankruptcy Court Administrative Division, on behalf of the NextGen project, informally questioned why requests for email addresses were added to Form 10 and whether the provision of that information was intended to constitute consent to receive notices and service by email.

b. Committee consideration

The Committee considered these comments and voted unanimously to recommend approval of the amendments to Form 10, with the following changes to the published draft:

- the deletion of the debtor/trustee checkbox on page 1 of the form, without adding a replacement for the checkbox, leaving the identity of the person filing the claim for disclosure only in the signature box; and

- the addition of a statement to the Committee Note, explaining that the new requests for email addresses are intended only to facilitate communication with the claimant and that the provision of this information does not affect any requirements for serving or providing notice to the claimant.

The Committee also decided to include additional statements in box 7 of Form 10 reminding claimants of the need to attach the documentation required by Rule 3001(c) for claims secured by a security interest in the debtor's principal residence and claims based on an open-end or revolving consumer credit agreement. Because the latter documentation requirement will not take effect until December 1, 2012, the Committee voted to delay recommending these additions to box 7 until June 2012, when it will submit them to the Standing Committee for approval.

The Committee decided to respond to the discrepancy between Rule 3001(c) and Form 10—concerning whether original documents should be filed—by proposing a technical amendment to the rule, rather than amending the form. This change, which brings the rule into conformity with existing practice, is addressed in Part II.A.2 of this report.

Action Item 5. Official Form 10 (Attachment A) (Mortgage Proof of Claim Attachment) is new. It would implement the requirements of Rule 3001(c)(2) for a claim secured by a security interest in the debtor's principal residence. That rule amendment was recently approved by the Supreme Court and transmitted to Congress. Accompanying the proof of claim for a home mortgage, this attachment form would require a statement of the principal and interest due as of the petition date; a statement of prepetition fees, expenses, and charges; and a statement of the amount necessary to cure a default as of the petition date.

Two witnesses testified at the February 4, 2011 hearing about this and the other two proposed mortgage claims, and thirteen written comments were submitted. Summaries of the testimony and comments are included in Appendix A.

The Committee thoroughly discussed the testimony and comments that were submitted on the proposed mortgage forms. Members agreed that the major issue raised at the hearing and in the comments was whether a mortgage lender should be required to provide a complete account history as an attachment to its proof of claim. The Committee had considered this issue prior to recommending the proposed forms for publication, and the decision not to require this information was based largely on the desire to require the disclosure of information about the basis for a mortgage claim without imposing an undue burden on the mortgagee or overwhelming the debtor with too much detail. The Committee recognized that some of the comments and testimony, particularly those of Bankruptcy Judges Marvin Isgur (S.D. Tex.) and Elizabeth Magner (E.D La.), called into question whether the proper balance had been struck.

The Committee discussed various options for giving further consideration to whether a full loan history should be required. In the end, the Committee concluded that it was important that the proposed rules and forms requiring greater disclosure of information about mortgage claims not be delayed and that they remain on track to take effect in December 2011. Amending the attachment form to require a loan history would require republication and thus a year's delay in the effective date of the form. The Committee did not support allowing the rules to go into effect without all of the implementing forms.

The Committee did not, however, want to dismiss completely the possibility of requiring a loan history. Testimony and comments supporting such a requirement persuasively explained the value that this information might provide, in particular by showing how the lender applied prepetition payments it had received from the debtor. But the Committee noted that only a small number of persons had been heard from, and none of the comments were submitted by mortgage lenders or servicers. Some members of the Committee expressed concern about whether it would be feasible for creditors of all sizes to comply with a loan-history requirement and whether the costs of implementing automation systems to provide this information were justified by the value of the information to parties and the courts.

The Committee concluded that gathering information about people's experience with the proposed rules and forms after they go into effect could be helpful in deciding later whether to require a loan history. The Committee discussed several means of gathering this information, including holding a mini-conference of mortgage lenders and servicers, chapter 13 trustees, consumer debtors' attorneys, and judges; asking the Federal Judicial Center to undertake a survey or study; or having the reporter publish a request for information. Ultimately, the Committee voted to give further consideration in the future to requiring attachment of a complete loan history to a proof of claim filed for a claim secured by a security interest in the debtor's principal residence. A decision by the Committee will be informed by information obtained after a period of experience with the currently proposed attachment form.

Following that decision, the Committee voted unanimously to approve Form 10 (Attachment A), with the changes noted below made to the published draft. These changes are responsive to comments that were submitted and Committee members' suggestions:

- Change the instruction at the top of Part 2 to read, "Itemize the fees, expenses, and charges due on the claim as of the petition date." This will clarify that the intended disclosure is of amounts remaining due as of the petition date, not all amounts that have been incurred as of that date.

- After the item in the Part 2 list labeled "Escrow shortage or deficiency," change the parenthetical to read, "(Do not include amounts that are part of any installment payment listed in Part 3.)." This will prevent duplication with the escrow portion of missed installment payments listed in Part 3.

- In Part 3, add a new line reading "<u>Subtract</u> amounts for which debtor is entitled to a refund."

- Add a new item in Part 3 reading "3. Calculation of cure amount."

- For ease of completion and reading, add numbers to the left and right columns of Part 2.

<u>Action Item 6</u>. Official Form 10 (Supplement 1) (Notice of Mortgage Payment Change) is new. Designed to implement Rule 3002.1(b), this form would be used by the holder of a home mortgage claim to provide notice of any escrow account payment adjustment, interest payment change, or other mortgage payment change while a chapter 13 case is pending.

Only two comments on the mortgage forms addressed Supplement 1 specifically. A chapter 13 trustee expressed support for the proposed form. He stated that notices of payment change are not always provided during the chapter 13 case. Without that information, disbursements may be made that result in the debtor incurring late charges. He stated that the debtor needs complete information about the mortgage in order to emerge from bankruptcy with a fresh start.

Judge Marvin Isgur expressed concern about the form's provision for the reporting of escrow changes. He said that Supplement 1 should not instruct the mortgagee to attach an escrow account statement "prepared according to applicable nonbankruptcy law." He believed that the instruction provided for an analysis of an escrow shortage according to the federal Real Estate Settlement Procedures Act. That analysis, he said, might improperly allow the mortgagee to collect the escrow shortage as part of an ongoing adjusted mortgage payment, as well as under the plan as part of the cure payment.

The Committee had previously decided that the forms should not dictate the method of determining escrow arrearages, an issue on which courts disagree. In response to Judge Isgur's comment, however, the Committee concluded that the instructions in Parts 1 and 2 of the Notice of Mortgage Payment Change form should be worded the same way that Part 3 of Attachment A is worded: "Attach . . . an escrow account statement prepared . . . in a form consistent with applicable nonbankruptcy law" (rather than "prepared according to applicable nonbankruptcy law"). That change was intended to clarify that nonbankruptcy law determines only the form of disclosure and not the method of calculating escrow balances.

With that change and another minor stylistic change made, the Committee voted unanimously to recommend the approval of Form 10 (Supplement 1).

Action Item 7. Official Form 10 (Supplement 2) (Notice of Postpetition Mortgage Fees, Expenses, and Charges), which is new, would implement Rule 3002.1(c). It would be used in a chapter 13 case by the holder of a home mortgage claim to provide notice of the date incurred and amount of any postpetition fees, expenses, and charges.

Several comments on the proposed mortgage forms expressed general support for requiring home mortgage claimants to provide more information about changes in amounts required to be paid during the life of the chapter 13 plan. Three comments addressed Supplement 2 specifically.

One consumer attorney expressed strong support for requiring home mortgage claimants to inform debtors of any charges assessed during bankruptcy. In one of her cases, the mortgagee paid property taxes without the debtor's knowledge, even though those taxes were being paid under the plan. She said that toward the end of the five-year plan, the lender sought to foreclose due to its payment of the taxes. According to her, it took over a year and six hearings to resolve the matter (efforts that she handled pro bono).

Another consumer attorney stated that the forms implementing Rule 3002.1 (Supplements 1 and 2) should not be limited to chapter 13 cases, but should also apply in chapter 7 asset cases and in chapter 11 individual cases.

The National Association of Consumer Bankruptcy Attorneys urged the Committee to add to the Committee Note accompanying Supplement 2 a statement that mortgage claimants are not authorized to charge additional fees for providing the information required by the form.

After considering these comments, the Committee voted unanimously to recommend approval of Form 10 (Supplement 2) with only two minor changes to the form as published: the addition of numbers to the left and right columns of Part 1 and (to correct an internal reference) the substitution of "Notice" for "Claim" in the declaration at the end of the form.

Action Item 8. Official Form 25A (Plan of Reorganization in Small Business Case Under Chapter 11) would be amended to change the effective-date provision to reflect the 2009 amendments that increased from 10 to 14 days the time periods for filing a notice of appeal and for the duration of the stay of a confirmation order. Under the amended provision, the effective date of the plan would generally be the first business day following the date that is 14 days after the entry of the order of confirmation.

No comments were submitted on this proposed amendment. The Committee voted unanimously to recommend that it be approved as published.

2. Amendments for Which Final Approval is Sought Without Publication. **The Advisory Committee recommends that the proposed amendments that are summarized below be approved and forwarded to the Judicial Conference. The Advisory Committee recommended that the amended forms be effective on December 1, 2011.** Because the proposed amendments are technical or conforming in nature, the Committee concluded that publication for comment is not required. The texts of the amended rules and forms are set out in Appendix A.

Action Item 9. Rule 1007(c) would be amended to eliminate a time period that is now inconsistent with Rule 1007(a)(2). Rule 1007(c) prescribes the time limits for filing various documents. Among its provisions is the following sentence: "In an involuntary case, the list in subdivision (a)(2), and the schedules, statements, and other documents required by subdivision (b)(1) shall be filed by the debtor within 14 days of the entry of the order for relief." Rule 1007(a)(2) was amended as of December 1, 2010, to reduce to seven days the time for an involuntary debtor to file the list of creditors. Unfortunately, during the process leading to the amendment of Rule 1007(a)(2), the redundant deadline in subdivision (c) was overlooked. Thus it remains at 14 days, despite the change to seven days in subdivision (a)(2).

Because there is no need to repeat the deadline, the Committee voted unanimously at its September 2010 meeting to delete from subdivision (c) the time limit for filing the list of creditors in an involuntary case. As amended, the sentence would parallel the prior sentence that imposes time limits for filing schedules, statements, and other documents in a voluntary case.

Action Item 10. Rule 2015(a) would be amended to correct a reference to 11 U.S.C. § 704 of the Bankruptcy Code. Prior to the 2005 Amendments to the Code, § 704 was not divided into subsections. Rule 2015(a) therefore correctly referred to § 704(8) in requiring the trustee or debtor in possession to file reports and summaries required by that provision. The 2005 Amendments, however, expanded § 704 and broke it into subsections. What was previously § 704(8) became § 704(a)(8).

In order to correct the now erroneous reference, the Committee voted unanimously at its September 2010 meeting to amend Rule 2015(a) to refer to § 704(a)(8).

Action Item 11. Rule 3001(c)(1) would be amended to delete the option of filing with a proof of claim the original of a writing on which a claim is based. As noted above, in response to the August 2010 publication of amendments to Rule 3001(c) and Form 10, Linda Spaight of the Administrative Office's Bankruptcy Court Administration Division submitted a comment pointing out a discrepancy between Rule 3001(c)(1) and paragraph 7 of the instructions for Form 10. The rule requires the attachment of "the original or duplicate" of a writing on which a claim is based, whereas the instructions direct the claimant not to "send original documents, as attachments may be destroyed after scanning."

The Committee concluded that the discrepancy pointed out by Ms. Spaight was created by earlier Committee action, and not by either the pending amendments to Rule 3001(c) or the proposed amendments to Form 10. Ms. Spaight's comment was therefore treated as a suggestion for an amendment to either Form 10 or Rule 3001(c). After discussion, the Committee concluded that the language of the form, rather than of the rule, reflects the current practice of filing copies, not originals, of documents supporting proofs of claim. It therefore voted unanimously to recommend the amendment of Rule 3001(c)(1) to replace "the original or a duplicate" with "a copy of the writing."

Action Item 12. Official Form 1 (Voluntary Petition) would be amended to include lines on the form for a foreign representative filing a chapter 15 petition to indicate the country of the debtor's center of main interests and countries in which related proceedings are pending. This amendment would implement the requirements of new Rule 1004.2 (Petition in Chapter 15 Cases), which is scheduled to go into effect on December 1, 2011.

The Committee voted unanimously at its September 2010 meeting to recommend approval of this conforming change to Form 1, with the same effective date as Rule 1004.2.

Action Item 13. Official Forms 9A - 9I (Notice of Meeting of Creditors & Deadlines) would be amended to conform to a rule amendment scheduled to take effect on December 1, 2011, and to make some minor stylistic changes.

Rule 2003(e) currently states that a meeting of creditors "may be adjourned . . . by announcement at the meeting of the adjourned date and time without further written notice." A pending amendment to Rule 2003(e) that has been approved by the Supreme Court and transmitted to Congress would require the presiding official at a meeting of creditors to file a statement specifying the date and time to which such a meeting is adjourned.

All of the versions of Form 9 (A - I) reflect the current wording of Rule 2003(e). On the back of each form, the explanation of "Meeting of Creditors" states that the "meeting may be continued and concluded at a later date without further notice." The Committee therefore voted unanimously at its September 2010 meeting to recommend that the explanation be revised to state that the "meeting may be continued and concluded at a later date specified in a notice filed with the court."

In addition, the amendment to the forms would correct a spelling and a punctuation error and call greater attention to the instruction to "See Reverse Side for Important Explanations."

B. Items for Publication in August 2011

The Advisory Committee recommends that the proposed amendments that are summarized below be published for public comment. The texts of the amended rules and official forms are set out in Appendix B.

Action Item 14. Rule 1007(b)(7) would be amended to relieve individual debtors of the obligation to file Official Form 23 if the provider of an instructional course concerning personal financial management directly notifies the court that the debtor has completed the course. This amendment is proposed in response to a suggestion by Dana McWay, the Clerk of the Bankruptcy Court for the Eastern District of Missouri, which she submitted on behalf of the NextGen Clerk's Office Functional Requirements Group ("FRG").

The Bankruptcy Code provides that a discharge must be denied an individual debtor who does not complete a personal financial management course after filing the bankruptcy petition, but the Code does not address what document must be filed to attest to course completion or who must file it. In implementing the Code requirement, Rule 1007(b)(7) currently requires that the debtor file a "statement of completion of a course concerning personal financial management, prepared as prescribed by the appropriate Official Form." The form referred to is Official Form 23, and it requires the debtor to certify that he or she has completed an instructional course in personal financial management.

As part of its effort to plan for the Next Generation of Bankruptcy CM/ECF, the FRG recommends authorizing financial management course providers, who must be approved by the United States trustee or the bankruptcy administrator, to file course completion statements directly with the court. Ms. McWay indicated that this change is intended to reduce the number of cases closed without entry of a discharge, which currently occurs when debtors are unable to get the necessary certificate from the course provider or they fail to file Form 23. Many of these cases are reopened later, necessitating the payment of an additional fee, in order for the debtor to file the statement and the court to issue the discharge.

Under the FRG's proposal, approved personal financial management course providers would be given "limited user" logins/passwords for the CM/ECF filing system. The FRG envisions that, as a condition for being approved by the U.S. trustee or bankruptcy administrator, a provider would have to use computer software that allows for automatic filing with the court of a statement indicating that the debtor has completed the personal financial management course. A debtor would be required to provide certain information to the course provider (such as case name, case number, district in which case is pending). Then, upon the debtor's completion of the course, the statement would be automatically e-filed as either a text entry or a PDF; no human intervention would be required.

The Committee expressed support for the goal of reducing the number of individual cases that are dismissed—even though the debtor had completed the financial management

course—without the granting of a discharge and later reopened at a cost to the debtor and the court system. It concluded that, while it might not be appropriate for a Bankruptcy Rule to impose a requirement directly on providers of personal financial management courses, Rule 1007(b)(7) could be amended to facilitate the filing of statements by those providers. The Committee voted unanimously at its September 2010 meeting to seek publication of an amendment to Rule 1007(b)(7) that would eliminate the requirement that Form 23 be filed by individual debtors if a course provider notifies the court that the debtor has completed the course. A related amendment to Rule 5009(b) is discussed below.

Action Item 15. Rule 3007(a) would be amended to allow the use of a negative notice procedure for objections to claims and to clarify the method for serving claim objections. These proposed amendments are made in response to suggestions submitted to the Committee by Bankruptcy Judges Margaret D. McGarity (E.D. Wis.) and Michael E. Romero (D. Colo.) on behalf of the Bankruptcy Judges Advisory Group. The Committee considered these suggestions during its September 2010 and April 2011 meetings.

Judge McGarity suggested that the Committee amend Rule 3007(a) to dispense with the rule's apparent requirement that every objection to a claim be noticed for a hearing, a procedure currently not followed by a number of bankruptcy courts. She instead urged the Committee to amend Rule 3007(a) to allow the court to place the burden on a claimant to request a hearing after receiving notice of an objection.

Section 502(b) of the Code provides that if an objection to a claim is made, "the court, after notice and a hearing, shall determine the amount of such claim . . . and shall allow such claim," except to the extent that one of the specified grounds for disallowance applies. As used in the Code and rules, the phrase "after notice and a hearing," or similar wording, allows action to be taken without a hearing if notice is properly given and a hearing is not timely requested by a party in interest. *See* 11 U.S.C. § 102(1); Bankr. Rule 9001. The Code, therefore, does not mandate that a hearing actually be conducted on every objection to a claim. Rule 3007(a), however, by not using the phrase "after notice and a hearing" and by affirmatively requiring a hearing date to be noticed along with the objection, might be read to require that a hearing be calendared for all objections to claims.

The Committee concluded that a negative notice procedure should be permitted for objections to claims. The bases for some objections are straightforward and do not require a hearing for their resolution. The Committee therefore voted unanimously to propose an amendment to Rule 3007(a) that deletes the requirement for service of a "notice of the hearing" on the objection and that adds a reference to a possible "deadline for the claimant to request a hearing."

With respect to the manner of serving objections to claims, Judge Romero noted that there is confusion and disagreement among the courts about whether an objection must be served according to one of the methods specified for service of complaints in Rule 7004, which is made applicable to contested matters by Rule 9014(b), or whether it is sufficient to serve the objection by mail on the person designated on the proof of claim. The Committee concluded that the issue should be clarified and that, to the extent possible, claim objections should be served by first-class mail to the person designated on the proof of claim for receipt of notices, at the address there indicated.

The Committee concluded, however, that certain types of claimants should be served by an additional method. Because of the large number of claims filed by the federal government and the dispersed responsibility for litigating them, the Committee decided that service by mail as provided under Rule 7004(b)(4) and (5) to the appropriate U.S. Attorney's office, the Attorney General, and, where appropriate, a federal officer or agency should also be required for objections to federal claims.

Claims filed by insured depository institutions must also receive special treatment. Because Congress enacted Rule 7004(h), which specifies the method of serving such institutions in a contested matter or adversary proceeding, the Committee concluded that a claim objection must be served on an insured depository institution in the congressionally prescribed manner, as well as by mailing the objection to the person designated on the proof of claim.

Action Item 16. Rule 5009(b) would be amended to reflect the proposed amendment of Rule 1007(b)(7). As discussed above, Rule 1007(b)(7) would be amended to relieve an individual debtor of the obligation to file a statement of completion of a personal financial management course if the course provider notifies the court directly that the debtor has completed it. Rule 5009(b) currently requires the clerk to send a notice to an individual debtor who has not filed the statement within 45 days after the first date set for the meeting of creditors. The proposed amendment would require the clerk to send this notice only if the debtor is required to file the statement and has failed to do so within the 45-day period. If a course provider has already provided notification of the debtor's completion of the course, the debtor would not be required to file Form 23, and the clerk would not be required to send the notice under Rule 5009(b).

Action Item 17. Rule 9006(d) would be amended to draw attention to the fact that it prescribes default deadlines for the service of motions and written responses. A suggestion to the Committee submitted by Bankruptcy Judge Raymond Lyons (D.N.J.) urged the deletion of the provision for two reasons. First, he contended that the provision is superfluous because most districts have their own local rules governing motion practice that specify time periods for service of motions and responses. Second, he stated that the rule is "misplaced" because motion practice and contested matters are otherwise governed by Rules 9013 and 9014. Judge Lyons therefore suggested that Rule 9006(d) may be overlooked by parties filing and responding to motions.

At its September 2010 meeting, the Committee discussed this suggestion and concluded that the provision should not be deleted. Rule 9006 is based on Civil Rule 6, which also contains a subsection regarding the time for service of motions. Although many districts have their own local rules governing motion practice, some do not. For the latter districts, Rule 9006(d) provides timing rules for any motions not addressed elsewhere in the Bankruptcy Rules or imposed in an individual case.

Unlike the civil rule, however, Rule 9006 does not indicate in its title that it addresses time periods for motions. Nor is it followed by a rule that addresses the form of motions, as is the case with the civil rule. The Committee concluded that several rule amendments should be proposed to highlight the existence of Rule 9006(d). The first set of changes is to Rule 9006 itself. The Committee voted to amend the title of the rule to add a reference to the "time for motion papers."

This change, which is consistent with Civil Rule 6, should make it easier to find the provision governing motion practice.

The Committee also proposes that the coverage of subdivision (d) be expanded to address the timing of the service of any written response to a motion, not just opposing affidavits. Local motion practices vary widely, so the Committee concluded that the provision should be as inclusive as possible. The caption of subdivision (d) and its wording would be changed to reflect this expansion.

Action Item 18. Rule 9013, which addresses the form and service of motions, would be amended to provide a cross-reference to the time periods in Rule 9006(d). This amendment, like the ones to Rule 9006(d), is proposed to call greater attention to the default deadlines for motion practice. In addition, stylistic changes would be made to Rule 9013 to add greater clarity.

Action Item 19. Rule 9014, which addresses contested matters, would be similarly amended to add a cross-reference to the times under Rule 9006(d) for serving motions and responses.

Action Item 20. Official Form 6C (Schedule C – Property Claimed as Exempt) would be amended to reflect the Supreme Court's decision in *Schwab v. Reilly*, 130 S. Ct. 2652 (2010). It would provide a new option permitting the debtor to state the value of the claimed exemption as the "full fair market value of the exempted property."

In *Schwab* the Court held that a debtor's claim of an exemption in the same amount as the value specified for the exempted property does not constitute a claim for the entire value of the property if the actual property value is more than the value specified. Rather, it is a claim of exemption limited to the specific value stated. Thus, if the debtor "accurately describes an asset subject to an exempt interest and . . . declares the 'value of [the] claimed exemption' as a dollar amount within the range the Code allows," the trustee has no duty to object to the exemption within the time limit specified by Rule 4003(b). 130 S. Ct. at 2662. On the facts of the case before it, the Court held that the debtor's Schedule C revealed a valid exemption claim, limited in amount, to which the trustee had no duty to object. As a result, the trustee was not barred from later contending that the property was worth more than the specific exemption amount claimed and seeking to sell the property to collect that excess value for the estate.

At the end of the majority opinion, the Court explained how a debtor can indicate the intent to exempt "the full market value of the asset or the asset itself" in a manner that puts the trustee on notice of the scope of the claimed exemption. The Court stated that the debtor can list as the exempt value of the asset on Schedule C "'full fair market value (FMV)' or '100% of FMV.'" Then, the Court explained, "[i]f the trustee fails to object, or if the trustee objects and the objection is overruled, the debtor will be entitled to exclude the full value of the asset." 130 S. Ct. at 2668.

In considering the impact of *Schwab* on Schedule C, the Committee noted that the current form does not indicate the right of a debtor to exercise the option described by the Supreme Court of exempting the full fair market value of an asset. Schedule C requires four pieces of information for each exemption claimed: description of property, law providing each exemption, value of claimed exemption, and current value of property without deducting exemption. Members of the Committee expressed concern that only knowledgeable debtors (or more likely, debtors represented

by knowledgeable lawyers) would understand that "value of claimed exemption" could be stated as something other than a specific dollar amount.

After discussing the matter at both the September 2010 and April 2011 meetings, the Committee voted to propose an amendment to Schedule C that would change the column for value of claimed exemption in the following manner. Two options for that column would be provided: one that says "Exemption limited to $_____" and the other that says "Full fair market value of the exempted property." The debtor would be instructed to "Check one box only for each claimed exemption." The columns would also be rearranged so that the current market value of the property would follow the description of the property. In *Schwab* the Court stated that the property's market value provides useful information but is not essential for determining the validity of a claimed exemption.

Action Item 21. Official Form 7 (Statement of Financial Affairs) would be amended to make the definition of "insider" consistent with the Bankruptcy Code's definition of the word. The phrase "any owner of 5 percent or more of the voting or equity securities of a corporate debtor" would be deleted, and "any persons in control of a corporate debtor" would be included.

This amendment is proposed in response to a suggestion submitted by attorney Aaron Cahn. He pointed out that Form 7 defines "insider" to include "any owner of 5 percent or more of the voting or equity securities of a corporate debtor." By contrast, the definition of "insider" in § 101(31) of the Code does not list such a person as being an insider of a corporate debtor. Section 101(31) includes an affiliate as an insider, but "affiliate" is defined in § 101(2) to mean, among other things, an "entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor." The Code definition of "insider" lists other relationships that make someone an insider, including a "person in control" of a corporate debtor, but Mr. Cahn stated that the statute contains no bright-line test that would invariably make a 5 percent shareholder an insider. He suggested therefore that Form 7 be amended to conform to the Code.

The Committee concluded that Mr. Cahn's suggestion was well taken. The language proposed to be deleted was added to the form's definition in 2000, but no explanation for this amendment appears in the Committee Note, Advisory Committee report to the Standing Committee, or the Advisory Committee minutes. The Committee recognized that the Code definition of "insider" is not exclusive since it says that the term "includes" the relationships that are listed. It found no basis, however, for concluding that § 101(31) provides authority to create the bright-line, 5 percent definition that currently appears in Form 7.

Action Item 22. Official Forms 22A (Chapter 7 Statement of Current Monthly Income and Means-Test Calculations) and 22C (Chapter 13 Statement of Current Monthly Income and Calculations of Commitment Period and Disposable Income) would be amended to make a minor adjustment to the deduction for telecommunication expenses. In addition Form 22C would be amended in response to the Supreme Court's decision in *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010).

The telecommunications-deduction issue was raised in a comment by attorney William Neild on earlier amendments to Forms 22A and 22C. He proposed that Form 22A be revised to allow chapter 7 debtors to deduct from income any expenses incurred in the production of income. He

contended that deductions of this type are allowed by the IRS and thus are required to be deducted by § 707(b)(2)(A)(ii) of the Code.

The Committee disagreed with Mr. Neild's broad argument because § 707(b)(2)(A)(ii) only allows the deduction of "the debtor's actual monthly expenses for the *categories specified* as Other Necessary Expenses issued by the Internal Revenue Service" (emphasis added). The Committee concluded that Form 22A properly limits deductions for Other Necessary Expenses to the expense items specifically listed in the IRS Financial Analysis Handbook. This part of the means test does not permit the deduction of all expenses incurred in the production of income.

The Committee's comparison of Form 22A to the IRS list of Other Necessary Expenses did reveal one respect in which the allowed deductions on the form are narrower than the IRS categories. The deduction for telecommunication services allows for the monthly cost of pagers, call waiting, internet service, etc. "to the extent necessary for your health and welfare or that of your dependents." The IRS, on the other hand, includes as Other Necessary Expenses the cost of optional telephones, telephone services, and internet provider/email "if it meets the necessary expense test." For internet and email services, the explanation goes on to say, "generally for the production of income." It therefore appears that the IRS necessary expense test does not limit these types of expenses to ones necessary for the debtor's health and welfare but considers as well their necessity for the production of income.

The Committee therefore voted at the September 2010 meeting to propose an amendment to Forms 22A and 22C (which allows the same deduction) that would permit the deduction of telecommunication services, including business cell phone service, to the extent necessary for the production of income if not reimbursed by the debtor's employer.

Official Form 22C would be amended as well to reflect the *Hamilton v. Lanning* decision. That case concerned the calculation of a chapter 13 debtor's "projected disposable income," which under § 1325(b)(1) of the Bankruptcy Code the debtor's plan may be required to devote to payment of unsecured claims. The Supreme Court rejected a purely "mechanical" approach to the calculation that considers only the debtor's average monthly income for the six months before bankruptcy. The Court instead adopted a "forward-looking" approach that allows consideration of changes in the debtor's income and expenses that have occurred before confirmation or are virtually certain to occur afterward. Because Form 22C calculates disposable income for above-median-income debtors—following the Code definition of "disposable income"—based only on information about the debtor's pre-bankruptcy average income and current expenses, the Advisory Committee considered whether the form should be amended.

At the September 2010 meeting, the Committee approved adding a question to Form 22C in which above-median-income chapter 13 debtors would list any changes in the income and expenses reported on the form that have already occurred or are virtually certain to occur during the 12 months following the filing of the petition. The same time frame for reporting anticipated changes is set out in § 521(a)(1)(vi) of the Code and is included in Schedules I and J (Current Income and Current Expenditures of Individual Debtor(s)).

III. Information Items

The draft minutes of the April 7-8, 2011, Advisory Committee meeting are attached to this report as Appendix C.

A. Revision of the Bankruptcy Appellate Rules

The Advisory Committee is proceeding with its consideration of a comprehensive revision of the bankruptcy appellate rules (Part VIII of the Bankruptcy Rules). As previously reported, the goals of this project are the following:

- Make the bankruptcy appellate rules easier to read and understand by adopting the clearer and more accessible style of the Federal Rules of Appellate Procedure ("FRAP").
- Incorporate into the Part VIII rules useful FRAP provisions that currently are unavailable for bankruptcy appeals.
- Retain distinctive features of the Part VIII rules that address unique aspects of bankruptcy appeals or that have proven to be useful in that context.
- Clarify existing Part VIII rules that have caused uncertainty for courts or practitioners or that have produced differing judicial interpretations.
- Modernize the Part VIII rules to reflect technological changes—such as the electronic filing and storage of documents—while also allowing for future technological advancements.

At its April 2011 meeting, the Committee met jointly with the Advisory Committee on Appellate Rules to discuss issues presented by the intersection of the bankruptcy appellate rules and FRAP. The Appellate Rules Committee provided valuable input with respect to issues involving direct bankruptcy appeals to the court of appeals; the revision of the rules to take account of the courts' use of electronic filing technology; indicative rulings by the bankruptcy court; the handling of documents under seal; and the rulemaking authority for local rules of bankruptcy appellate panels. The Bankruptcy Rules Committee likewise provided input to the Appellate Rules Committee about its possible amendment of Appellate Rule 6, which governs bankruptcy appeals in the courts of appeals.

This summer a working group comprising several members of the Committee, its reporters, and one or two members of the Appellate Rules Committee will engage in a thorough review and editing of the current draft of revised Part VIII and accompanying committee notes. Half of the preliminary draft will be presented to the Committee at its fall meeting for its consideration and approval, and the other half will be presented at the spring 2012 meeting. The entire Part VIII revision, if approved by the Committee, will be submitted to the Standing Committee at its June 2012 meeting for approval of the revision's publication for comment in August 2012. Under that schedule, the presumptive effective date of the new bankruptcy appellate rules would be December 1, 2014.

B. Forms Modernization Project

The Committee's Forms Subcommittee continues its multi-year Forms Modernization Project, which was initiated to develop recommendations for making the bankruptcy forms more user-friendly and less error-prone and taking better advantage of modern information technology.

With help from the Federal Judicial Center, the Project is testing drafts of bankruptcy forms for individual debtors with career law clerks, law students, attorneys, lay people, and other groups. While the first forms are being tested, the Project is beginning work on the business forms and additional forms for individuals. The goal is to publish for comment in August 2012 a package of new forms for individual debtors.

12b-004503

Appendix A

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

For Final Approval and Transmittal to the Judicial Conference

Rule 1007. Lists, Schedules, Statements, and Other Documents; Time Limits

* * * * *

(c) TIME LIMITS. In a voluntary case, the schedules, statements, and other documents required by subdivision (b)(1), (4), (5), and (6) shall be filed with the petition or within 14 days thereafter, except as otherwise provided in subdivisions (d), (e), (f), and (g) of this rule. In an involuntary case, ~~the list in subdivision (a)(2), and~~ the schedules, statements, and other documents required by subdivision (b)(1) shall be filed by the debtor within 14 days ~~of~~ after the entry of the order for relief. * * * * *

* * * * *

COMMITTEE NOTE

In subdivision (c), the time limit for a debtor in an involuntary case to file the list required by subdivision (a)(2) is deleted as unnecessary. Subdivision (a)(2) provides that the list must be filed within seven days after the entry of the order for relief. The other change to subdivision (c) is stylistic.

Because this amendment is being made to conform to an amendment to Rule 1007(a)(2) that took effect on December 1, 2010, final approval is sought without publication.

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

Rule 2015. Duty to Keep Records, Make Reports, and Give Notice of Case or Change of Status

(a) TRUSTEE OR DEBTOR IN POSSESSION. A trustee or debtor in possession shall:

* * * * *

(3) file the reports and summaries required by § 704(a)(8) of the Code, which shall include a statement, if payments are made to employees, of the amounts of deductions for all taxes required to be withheld or paid for and in behalf of employees and the place where these amounts are deposited;

* * * * *

COMMITTEE NOTE

Subdivision (a)(3) is amended to correct the reference to § 704. The 2005 amendments to the Code expanded § 704 and created subsections within it. The provision that was previously § 704(8) became § 704(a)(8). The other change to (a)(3) is stylistic.

Final approval of this technical amendment is sought without publication.

Rule 3001. Proof of Claim[**]

* * * * *

(c) SUPPORTING INFORMATION.

(1) *Claim Based on a Writing*. Except for a claim governed by paragraph (3) of this subdivision, w~~W~~hen a claim, or an interest in property of the debtor securing the claim, is based on a writing, ~~the original or a duplicate~~ a copy of the writing shall be filed with the proof of claim. If the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim.

* * * * *

(3) *Claim Based on an Open-End or Revolving Consumer Credit Agreement.*

(A) When a claim is based on an open-end or revolving consumer credit agreement—except one for which a security interest is claimed in the debtor's real property—a statement shall be filed with the proof of claim, including all of the following information that applies to the account:

(i) the name of the entity from whom the creditor purchased the account;

[**] Incorporates amendments that are due to take effect on December 1, 2011, if Congress takes no action otherwise.

20 (ii) the name of the entity to whom

21 the debt was owed at the time of an account holder's last

22 transaction on the account;

23 (iii) the date of an account holder's

24 last transaction;

25 (iv) the date of the last payment on

26 the account; and

27 (v) the date on which the account

28 was charged to profit and loss.

29 (B) On written request by a party in

30 interest, the holder of a claim based on an open-end or revolving

31 consumer credit agreement shall, within 30 days after the request is

32 sent, provide the requesting party a copy of the writing specified in

33 paragraph (1) of this subdivision.

COMMITTEE NOTE

Subdivision (c) is amended in several respects. The former requirement in paragraph (1) to file an original or duplicate of a supporting document is amended to reflect the current practice of filing only copies. The proof of claim form instructs claimants not to file the original of a document because it may be destroyed by the clerk's office after scanning.

Subdivision (c) is further amended to add paragraph (3). Except with respect to claims secured by a security interest in the debtor's real property (such as a home equity line of credit), paragraph (3) specifies information that must be provided in support of a claim based on an open-end or revolving consumer credit agreement (such as an agreement underlying the issuance of a credit card). Because a claim of this type may have been sold one or more times prior to the debtor's bankruptcy, the

debtor may not recognize the name of the person filing the proof of claim. Disclosure of the information required by paragraph (3) will assist the debtor in associating the claim with a known account. It will also provide a basis for assessing the timeliness of the claim. The date, if any, on which the account was charged to profit and loss ("charge-off" date) under subparagraph (A)(v) should be determined in accordance with applicable standards for the classification and account management of consumer credit. A proof of claim executed and filed in accordance with subparagraph (A), as well as the applicable provisions of subdivisions (a), (b), (c)(2), and (e), constitutes prima facie evidence of the validity and amount of the claim under subdivision (f).

To the extent that paragraph (3) applies to a claim, paragraph (1) of subdivision (c) is not applicable. A party in interest, however, may obtain the writing on which an open-end or revolving consumer credit claim is based by requesting in writing that documentation from the holder of the claim. The holder of the claim must provide the documentation within 30 days after the request is sent. The court, for cause, may extend or reduce that time period under Rule 9006.

Changes Made After Publication

Subdivision (c)(1). The requirement for the attachment of a writing on which a claim is based was changed to require that a copy, rather than the original or a duplicate, of the writing be provided.

Subdivision (c)(3). An exception to subparagraph (A) was added for open-end or revolving consumer credit agreements that are secured by the debtor's real property.

A time limit of 30 days for responding to a written request under subparagraph (B) was added.

Committee Note. A statement was added to clarify that if a proof of claim complies with subdivision (c)(3)(A), as well as with subdivisions (a), (b), (c)(2), and (e), it constitutes prima facie evidence of the validity and amount of the claim under subdivision (f).

Other changes. Stylistic changes were also made to the rule.

Summary of Public Comment

10-BK-003. Philip S. Corwin (American Bankers Association, Independent Community Bankers of America, and the Financial Services Roundtable). The proposed amendments to Rule 3001(c) may be inconsistent with § 502(b) of the Code, which provides the exclusive grounds for disallowance of a claim. Proposed subdivision (c)(3) would place an unreasonable burden on consumer lenders and debt purchasers. The rule would shift the burden of proof to the creditor and would adversely affect an industry that purchased $100 billion of charged-off debt last year. He is not aware of any objective evidence that indicates a problem that needs addressing. Most credit card debts for which proofs of claim are filed have already been scheduled by the debtors, and the vast majority of chapter 7 consumer cases have no assets to distribute. Proposed Rule 3001(c)(3) as drafted is unclear. What do "as applicable" and "last transaction" mean? The rule should be clarified to indicate that it is not applicable to home equity lines of credit. The documentation requirements are inconsistent with Rule 3001(f), which presumes the validity of a creditor's claim. The proposed rule is also inconsistent with Federal Rules of Evidence 803(6), 803(15), and 807. The Judicial Conference should also reconsider the amendments to Rule 3001(c) that are scheduled to go into effect this year that require an itemization of interest and fees and authorize the imposition of sanctions.

10-BK-006. Raymond P. Bell, Jr. (Creditors Interchange Receivables Management LLC). The Committee is to be commended for its recent revision of Rule 3001. The reference in (c)(3) to consumer credit agreement should be changed to consumer credit bilateral agreement. Rather than requiring disclosure of the name of the entity from whom the creditor purchased the account, (c)(3)(i) should require disclosure of the name of the original creditor. Rule 3001(c)(3) should refer to "an originated open-end or revolving credit claim as defined under the Truth in Lending Act." Rather than requiring the name of the entity to which the debt was owed at the time of the last transaction, the rule should require the name of the original creditor. Subdivision (c)(3)(A)(iii) should require disclosure of the date of the last payment by the account holder, not the date of the last transaction. Items (iv) and (v) should be deleted, as should (c)(3)(B).

Brett Weiss (testimony on behalf of the National Association of Consumer Bankruptcy Attorneys). Virtually all credit card claims today are filed by debt buyers. They typically buy only specific electronic data; as a result there are large gaps in what a filing creditor knows about the claim. What they file in court is just hearsay, based on what they were told by the

creditor from whom they purchased the account. Significant errors result. The information required by (c)(3)(A)(i) and (ii)—creditor from whom account was purchased and creditor at time of account holder's last transaction—is important. A comment should be added to the Committee Note stating that if an account is purchased from a securitized trust, the full name of the trust must be provided. The rule should also require the creditor to provide a chain of title, showing the creditor's entitlement to file the POC. Subdivision (c)(3)(B) should state a time in which the creditor must respond to a request for the underlying writing and the penalty for failing to do so. Moreover, it is not clear why a credit card creditor, unlike all other creditors, should have to provide this documentation only upon request.

10-BK-010. Bankruptcy Judge William R. Sawyer (M.D. Ala.). The new rule and amended proof of claim form will add much clarity to current practice, which too often involves the filing of vague claims that are met by vague objections.

10-BK-012. Ellen Holland Keller. If a credit card debt has been sold more than once, the current creditor should be required to provide a complete chain of title back to the original creditor. Otherwise, duplicate claims may be filed. With that change, it would be acceptable to require the credit card claimant to produce the underlying writing only upon request.

10-BK-013. Daniel Greenbaum. While the proposed rules are a welcome improvement, they do not go far enough to protect consumer debtors. Stricter rules need to be imposed for all creditors, not just holders of credit card debt.

10-BK-014. B-Line, LLC (submitted by Linh K. Tran). The proposed amendments to Rule 3001(c) should not be approved. They violate due process and conflict with Rules 3001, 3007, 9010, 9014, the Part VII rules, and Fed. R. Civ. P. 26, 34, and 37. Because the sanction provision of Rule 3001(c) that is scheduled to go into effect in December 2011 is justified as being similar to Civil Rule 37, it must be that the Advisory Committee views every proof of claim as a complaint filed in an adversary proceeding. As a result, an attorney would have to sign the proof of claim. Moreover, by requiring information from only the claimant, the proposed rule impermissibly requires one-sided discovery and permits the imposition of one-sided sanctions. A party in interest that requests the writing underlying a credit card claim does not need to act in good faith or provide any reason for making the request, as Rule 9011 would not apply to the request since it is not filed in court. The rule also permits the imposition of sanctions on a claimant for the failure to disclose enumerated data fields, even if the data

do not exist or are not reasonably available. Because there is no requirement for the parties to confer in good faith, the rule will encourage litigation.

10-BK-016. David R. Badger. It is a major problem to obtain the original account application in order to determine whether the non-filing spouse is jointly liable or simply received a courtesy card. The credit card industry should not get a free pass on proof-of-claim documentation. The rules need to provide some balance in the system. Requiring account writings to be produced upon request is an improvement, but requiring a request will unnecessarily delay case administration and increase costs.

10-BK-017. Fred Welch. Requiring more information for a proof of claim will prevent debtors from having to pay more than they owe and creditors from receiving more than they are entitled to receive.

10-BK-018. Penny Souhrada. Often the attachment to a proof of claim filed by a debt buyer consists only of a redacted account number and an amount owed. Debt buyers should be required to provide the name of the original creditor and subsequent assignees, as well as the writing on which the claim is based. The rule needs to provide a deadline for responding and penalties for failure to respond to a request for the underlying writing.

10-BK-019. Christopher D. Lagow (Portfolio Recovery Associates, Inc.). PRA appreciates the Committee's revisions based on the earlier public comment. As drafted, however, the proposed amendments are likely to cause more confusion and litigation. Subdivision (c)(3)(A)(iii) should either be deleted or revised to define the meaning of "transaction." Subdivision (c)(3)(A)(iv) should be revised to provide for the possibility that no payment has ever been made. If a creditor complies with (c)(3), the claim should be entitled to prima facie validity. That would shift the burden of proof to the debtor on any claim objection. Subdivision (c)(3)(B) will likely lead to more litigation and will do little to enhance the debtor's recognition of accounts. There is no compelling evidence of a need for these changes, but if amendments are approved, they should address the concerns noted.

10-BK-20. Alane A. Becket. It will be impossible for many unsecured creditors to comply with proposed Rule 3001(c)(2)(A) [approved by the Supreme Court in April 2010] that requires an itemized statement of interest, fees, and charges. Credit card balances revolve, and interest compounds; thus it is not possible to break down a credit card balance into its component parts. Proposed Rule 3001(c)(3)(B) will subject unsecured creditors to arbitrary and harassing requests for documents with no

articulated or demonstrated need for the writing. The provision should at least require a requesting party to articulate a substantive need for the documents or dispute the underlying debt and subject the requesting party to sanctions if the request is not made in good faith.

10-BK-021. David Melcer. If the information required by subdivision (c)(3)(A) is filed with the claim, the claim should be entitled to a presumption of prima facie validity under Rule 3001(f) without the actual writing on which the claim is based. That result would be made clear by eliminating subdivision (c)(3)(B). The new proposal is an improvement over the withdrawn requirement for the last account statement, but there are ambiguities in the wording of (c)(3). For example, the meaning of "transaction" is not clear. It would be better to use "purchase" or "borrowing." There is no need for the required information when a debtor has scheduled the claim in question, thereby admitting the claim's validity.

10-BK-022. Matthew Bogosian. He supports proposed Rule 3001, but it should be made clear that it sets the minimum threshold in bankruptcy court and does not preempt states from creating more stringent debt-buyer standards for state-based actions.

10-BK-023. Wendell J. Sherk. Rule 3001 should require more diligence, more documentation, and more care in the preparation of a proof of claim, especially given the "sorry state of compliance with existing rules." The U.S. Trustee Program recently settled a case with Capital One Bank with a multi-million dollar refund to consumers and estates. That problem would probably have been caught sooner if Rule 3001 had been strengthened and strictly enforced. The proposed amendments largely eliminate the utility of Rule 3001, apparently as the result of "special pleading and lobbying." A proof of claim should require sufficient documentation to meet a prima facie burden of proof.

10-BK-024. Michael Bahner (Resurgent Capital Services L.P.). Proposed Rule 3001(c)(3)(B) does not clearly state what is required. The Committee should consider deleting it, but if it is retained, a threshold showing (such as a good faith dispute) should be required before the creditor has to produce the underlying writing. It is unclear which writing must be produced. It could be the credit application, the terms and conditions of the credit agreement, or evidence of a transaction. The time frame for responding is not stated. This provision creates more questions than it answers. A valuable compromise would be to acknowledge that compliance with Rule 3001(c)(3)(A) entitles the claimant to prima facie validity of the claim and to add a burden-shifting mechanism as a precondition to a (c)(3)(B) request.

10-BK-025. Richard I. Isacoff. A full account transaction history should be required. For credit cards and other revolving lines, once payments stop and the debt is sold, there is an industry practice of showing a payment that was never made to avoid a statute of limitations defense.

10-BK-027. National Association of Consumer Bankruptcy Attorneys (submitted by Henry J. Sommer). The importance of the proposed amendments cannot be overstated. As bad as the problems in the mortgage servicing industry have been, "they pale in comparison to the abuses that [NACBA] members have seen in the credit card and credit card debt buying arena." Claims are regularly filed without a showing of entitlement of the claimant to collect. For example, claims are filed even though the statute of limitations has run on the claim, the debtor has already settled with a prior debt buyer or collection agency, the claim arises from identity theft, or the debt was discharged in a prior bankruptcy. Others have seen these same problems. (He cites, among other things, the U.S. Trustee Program's settlement with Capital One for filing thousands of previously discharged claims, Consumers Union report on problems with debt buyers, and an FTC report). The proposed amendments to Rule 3001 are "quite modest and, at best, barely adequate to deal with the widespread problems." It is not clear why one group of creditors should be excused from the requirements applicable to all other creditors. Mere inconvenience to debt buyers is not a good reason. The rule does not specify how long a claimant has to respond to a request for a writing or what the consequences are for failing to comply. The committee note should make clear that the documentation required upon request includes the chain of title, the contract upon which the claim is based, and a transaction record. Requiring adequate documentation of claims protects other creditors as well as the debtor. Trustees also need the information to carry out their statutory duties.

10-BK-028. Travis L. Starr. These amendments should absolutely not be adopted. Credit card claimants should not be relieved of the obligation of filing the writing on which the claim is based. They should also have to file a transactional history. Unsecured creditors are required to prove what they are owed.

10-BK-029. D. Nathan Davis. Proofs of claim for credit card debts should have to identify the name of the creditor that appears on the credit card since many issuers use more than one trade name. Requiring the debt buyer to tell who the original creditor was will assist the debtor in recognizing the debt and will eliminate unnecessary challenges.

10-BK-031. Dee Compton. Adopt the NACBA position on Rule 3001.

10-BK-032. Ellen Carlson. Credit card creditors and assignees should be required, like other creditors, to provide a copy of the account-opening document or an explanation of why it is not available.

10-BK-036. Peter A. Ryan. The rules should require a debt buyer to provide a complete chain of title, and failure to provide the required documentation should constitute prima facie evidence of the invalidity of the claim. The burden should be on the creditor to prove that the debt is owed.

10-BK-037. Hartley Roush. The rule changes should be adopted as proposed.

Jane McLaughlin. Unsecured creditors in bankruptcy should have the same burden of proof that would be imposed on them in collection actions outside of bankruptcy.

Rule 7054. Judgments; Costs

1 * * * * *

2 (b) COSTS. The court may allow costs to the prevailing

3 party except when a statute of the United States or these rules

4 otherwise provides. Costs against the United States, its officers

5 and agencies shall be imposed only to the extent permitted by law.

6 Costs may be taxed by the clerk on ~~one day's~~ 14 days' notice; on

7 motion served within ~~five~~ seven days thereafter, the action of the

8 clerk may be reviewed by the court.

COMMITTEE NOTE

Subdivision (b) is amended to provide more time for a party to respond to the prevailing party's bill of costs. The former rule's provision of one day's notice was unrealistically short. The change to 14 days

conforms to the change made to Civil Rule 54(d). Extension from five to seven days of the time for serving a motion for court review of the clerk's action implements changes in connection with the December 1, 2009, amendment to Rule 9006(a) and the manner by which time is computed under the rules. Throughout the rules, deadlines have been amended in the following manner:

- 5-day periods became 7-day periods
- 10-day periods became 14-day periods
- 15-day periods became 14-day periods
- 20-day periods became 21-day periods
- 25-day periods became 28-day periods

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

10-BK-026. Norman H. Meyer, Jr. (Clerk of the U.S. Bankruptcy Court for the District of New Mexico). Both time periods in Rule 7054(b) should be extended to 14 days. His district's local rule allows 14 days after entry of the judgment to move for the taxation of costs, 14 days after notice of the motion to object to the bill of costs, and 14 days after the taxation of costs to seek court review.

Rule 7056. Summary Judgment

1 Rule 56 F. R. Civ. P. applies in adversary proceedings~~.~~,

2 except that any motion for summary judgment must be made at

3 least 30 days before the initial date set for an evidentiary hearing

4 on any issue for which summary judgment is sought, unless a

5 different time is set by local rule or the court orders otherwise.

COMMITTEE NOTE

The only exception to complete adoption of Rule 56 F.R. Civ. P. involves the default deadline for filing a summary judgment motion. Rule 56(c)(1)(A) makes the default deadline 30 days after the close of all discovery. Because in bankruptcy cases hearings can occur shortly after the close of discovery, a default deadline based on the scheduled hearing date, rather than the close of discovery, is adopted. As with Rule 56(c)(1), the deadline can be altered either by local rule or court order.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

No comments were submitted on this amendment.

12b-004519

12b-004520

B1 (Official Form 1) (12/11)

United States Bankruptcy Court _____DISTRICT OF _____	Voluntary Petition
Name of Debtor (if individual, enter Last, First, Middle):	Name of Joint Debtor (Spouse) (Last, First, Middle):
All Other Names used by the Debtor in the last 8 years (include married, maiden, and trade names):	All Other Names used by the Joint Debtor in the last 8 years (include married, maiden, and trade names):
Last four digits of Soc. Sec. or Individual-Taxpayer I.D. (ITIN)/Complete EIN (if more than one, state all):	Last four digits of Soc. Sec. or Individual-Taxpayer I.D. (ITIN)/Complete EIN (if more than one, state all):
Street Address of Debtor (No. and Street, City, and State): ZIP CODE	Street Address of Joint Debtor (No. and Street, City, and State): ZIP CODE
County of Residence or of the Principal Place of Business:	County of Residence or of the Principal Place of Business:
Mailing Address of Debtor (if different from street address): ZIP CODE	Mailing Address of Joint Debtor (if different from street address): ZIP CODE
Location of Principal Assets of Business Debtor (if different from street address above): ZIP CODE	

Type of Debtor (Form of Organization) (Check **one** box.)	Nature of Business (Check **one** box.)	Chapter of Bankruptcy Code Under Which the Petition is Filed (Check **one** box.)
☐ Individual (includes Joint Debtors) *See Exhibit D on page 2 of this form.* ☐ Corporation (includes LLC and LLP) ☐ Partnership ☐ Other (If debtor is not one of the above entities, check this box and state type of entity below.)	☐ Health Care Business ☐ Single Asset Real Estate as defined in 11 U.S.C. § 101(51B) ☐ Railroad ☐ Stockbroker ☐ Commodity Broker ☐ Clearing Bank ☐ Other	☐ Chapter 7 ☐ Chapter 9 ☐ Chapter 11 ☐ Chapter 12 ☐ Chapter 13 ☐ Chapter 15 Petition for Recognition of a Foreign Main Proceeding ☐ Chapter 15 Petition for Recognition of a Foreign Nonmain Proceeding

Chapter 15 Debtors	Tax-Exempt Entity (Check box, if applicable.)	Nature of Debts (Check **one** box.)
Country of debtor's center of main interests: _____ _____ Each country in which a foreign proceeding by, regarding, or against debtor is pending: _____ _____	☐ Debtor is a tax-exempt organization under title 26 of the United States Code (the Internal Revenue Code).	☐ Debts are primarily consumer debts, defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose." ☐ Debts are primarily business debts.

Filing Fee (Check one box.)	**Chapter 11 Debtors**
☐ Full Filing Fee attached. ☐ Filing Fee to be paid in installments (applicable to individuals only). Must attach signed application for the court's consideration certifying that the debtor is unable to pay fee except in installments. Rule 1006(b). See Official Form 3A. ☐ Filing Fee waiver requested (applicable to chapter 7 individuals only). Must attach signed application for the court's consideration. See Official Form 3B.	**Check one box:** ☐ Debtor is a small business debtor as defined in 11 U.S.C. § 101(51D). ☐ Debtor is not a small business debtor as defined in 11 U.S.C. § 101(51D). **Check if:** ☐ Debtor's aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than $2,190,000. - **Check all applicable boxes:** ☐ A plan is being filed with this petition. ☐ Acceptances of the plan were solicited prepetition from one or more classes of creditors, in accordance with 11 U.S.C. § 1126(b).

Statistical/Administrative Information

☐ Debtor estimates that funds will be available for distribution to unsecured creditors.
☐ Debtor estimates that, after any exempt property is excluded and administrative expenses paid, there will be no funds available for distribution to unsecured creditors.

THIS SPACE IS FOR COURT USE ONLY

Estimated Number of Creditors

☐ 1-49	☐ 50-99	☐ 100-199	☐ 200-999	☐ 1,000-5,000	☐ 5,001-10,000	☐ 10,001-25,000	☐ 25,001-50,000	☐ 50,001-100,000	☐ Over 100,000

Estimated Assets

☐ $0 to $50,000	☐ $50,001 to $100,000	☐ $100,001 to $500,000	☐ $500,001 to $1 million	☐ $1,000,001 to $10 million	☐ $10,000,001 to $50 million	☐ $50,000,001 to $100 million	☐ $100,000,001 to $500 million	☐ $500,000,001 to $1 billion	☐ More than $1 billion

Estimated Liabilities

☐ $0 to $50,000	☐ $50,001 to $100,000	☐ $100,001 to $500,000	☐ $500,001 to $1 million	☐ $1,000,001 to $10 million	☐ $10,000,001 to $50 million	☐ $50,000,001 to $100 million	☐ $100,000,001 to $500 million	☐ $500,000,001 to $1 billion	☐ More than $1 billion

Voluntary Petition *(This page must be completed and filed in every case.)*	Name of Debtor(s):	
All Prior Bankruptcy Cases Filed Within Last 8 Years (If more than two, attach additional sheet.)		
Location Where Filed:	Case Number:	Date Filed:
Location Where Filed:	Case Number:	Date Filed:
Pending Bankruptcy Case Filed by any Spouse, Partner, or Affiliate of this Debtor (If more than one, attach additional sheet.)		
Name of Debtor:	Case Number:	Date Filed:
District:	Relationship:	Judge:

Exhibit A

(To be completed if debtor is required to file periodic reports (e.g., forms 10K and 10Q) with the Securities and Exchange Commission pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 and is requesting relief under chapter 11.)

☐ Exhibit A is attached and made a part of this petition.

Exhibit B

(To be completed if debtor is an individual whose debts are primarily consumer debts.)

I, the attorney for the petitioner named in the foregoing petition, declare that I have informed the petitioner that [he or she] may proceed under chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each such chapter. I further certify that I have delivered to the debtor the notice required by 11 U.S.C. § 342(b).

X _____

Signature of Attorney for Debtor(s) (Date)

Exhibit C

Does the debtor own or have possession of any property that poses or is alleged to pose a threat of imminent and identifiable harm to public health or safety?

☐ Yes, and Exhibit C is attached and made a part of this petition.

☐ No.

Exhibit D

(To be completed by every individual debtor. If a joint petition is filed, each spouse must complete and attach a separate Exhibit D.)

☐ Exhibit D, completed and signed by the debtor, is attached and made a part of this petition.

If this is a joint petition:

☐ Exhibit D, also completed and signed by the joint debtor, is attached and made a part of this petition.

Information Regarding the Debtor - Venue

(Check any applicable box.)

☐ Debtor has been domiciled or has had a residence, principal place of business, or principal assets in this District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District.

☐ There is a bankruptcy case concerning debtor's affiliate, general partner, or partnership pending in this District.

☐ Debtor is a debtor in a foreign proceeding and has its principal place of business or principal assets in the United States in this District, or has no principal place of business or assets in the United States but is a defendant in an action or proceeding [in a federal or state court] in this District, or the interests of the parties will be served in regard to the relief sought in this District.

Certification by a Debtor Who Resides as a Tenant of Residential Property

(Check all applicable boxes.)

☐ Landlord has a judgment against the debtor for possession of debtor's residence. (If box checked, complete the following.)

_____

(Name of landlord that obtained judgment)

_____

(Address of landlord)

☐ Debtor claims that under applicable nonbankruptcy law, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after the judgment for possession was entered, and

☐ Debtor has included with this petition the deposit with the court of any rent that would become due during the 30-day period after the filing of the petition.

☐ Debtor certifies that he/she has served the Landlord with this certification. (11 U.S.C. § 362(l)).

Voluntary Petition
(This page must be completed and filed in every case.)

Name of Debtor(s):

Signatures

Signature(s) of Debtor(s) (Individual/Joint)

I declare under penalty of perjury that the information provided in this petition is true and correct.
[If petitioner is an individual whose debts are primarily consumer debts and has chosen to file under chapter 7] I am aware that I may proceed under chapter 7, 11, 12 or 13 of title 11, United States Code, understand the relief available under each such chapter, and choose to proceed under chapter 7.
[If no attorney represents me and no bankruptcy petition preparer signs the petition] I have obtained and read the notice required by 11 U.S.C. § 342(b).

I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X _____
Signature of Debtor

X _____
Signature of Joint Debtor

_____
Telephone Number (if not represented by attorney)

_____
Date

Signature of a Foreign Representative

I declare under penalty of perjury that the information provided in this petition is true and correct, that I am the foreign representative of a debtor in a foreign proceeding, and that I am authorized to file this petition.

(Check only **one** box.)

☐ I request relief in accordance with chapter 15 of title 11, United States Code. Certified copies of the documents required by 11 U.S.C. § 1515 are attached.

☐ Pursuant to 11 U.S.C. § 1511, I request relief in accordance with the chapter of title 11 specified in this petition. A certified copy of the order granting recognition of the foreign main proceeding is attached.

X _____
(Signature of Foreign Representative)

_____
(Printed Name of Foreign Representative)

_____
Date

Signature of Attorney*

X _____
Signature of Attorney for Debtor(s)

_____
Printed Name of Attorney for Debtor(s)

_____
Firm Name

_____
Address

_____

_____

_____
Telephone Number

_____
Date

*In a case in which § 707(b)(4)(D) applies, this signature also constitutes a certification that the attorney has no knowledge after an inquiry that the information in the schedules is incorrect.

Signature of Debtor (Corporation/Partnership)

I declare under penalty of perjury that the information provided in this petition is true and correct, and that I have been authorized to file this petition on behalf of the debtor.

The debtor requests the relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X _____
Signature of Authorized Individual

_____
Printed Name of Authorized Individual

_____
Title of Authorized Individual

_____
Date

Signature of Non-Attorney Bankruptcy Petition Preparer

I declare under penalty of perjury that: (1) I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110; (2) I prepared this document for compensation and have provided the debtor with a copy of this document and the notices and information required under 11 U.S.C. §§ 110(b), 110(h), and 342(b); and, (3) if rules or guidelines have been promulgated pursuant to 11 U.S.C. § 110(h) setting a maximum fee for services chargeable by bankruptcy petition preparers, I have given the debtor notice of the maximum amount before preparing any document for filing for a debtor or accepting any fee from the debtor, as required in that section. Official Form 19 is attached.

_____
Printed Name and title, if any, of Bankruptcy Petition Preparer

_____
Social-Security number (If the bankruptcy petition preparer is not an individual, state the Social-Security number of the officer, principal, responsible person or partner of the bankruptcy petition preparer.) (Required by 11 U.S.C. § 110.)

_____
Address

_____

X _____

_____
Date

Signature of bankruptcy petition preparer or officer, principal, responsible person, or partner whose Social-Security number is provided above.

Names and Social-Security numbers of all other individuals who prepared or assisted in preparing this document unless the bankruptcy petition preparer is not an individual.

If more than one person prepared this document, attach additional sheets conforming to the appropriate official form for each person.

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 11 U.S.C. § 110; 18 U.S.C. § 156.

COMMITTEE NOTE

The form is amended to implement Rule 1004.2. Subdivision (a) of that rule requires a chapter 15 petition to state the country of the debtor's center of main interests and to identify each country in which a foreign proceeding by, regarding, or against the debtor is pending. A box is added to the first page of the form for this purpose. Minor stylistic changes are also made.

Because this amendment to the form implements Rule 1004.2, which will take effect on December 1, 2011, if Congress takes no action otherwise, final approval is sought without publication.

12b-004525

12b-004526

UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 7 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____(date) and was converted to a case under chapter 7 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address):	Case Number: Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include married, maiden, and trade names): Attorney for Debtor(s) (name and address): Telephone number:	Bankruptcy Trustee (name and address): Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Presumption of Abuse under 11 U.S.C. § 707(b)
See "Presumption of Abuse" on the reverse side.

Depending on the documents filed with the petition, one of the following statements will appear.

The presumption of abuse does not arise.
Or
The presumption of abuse arises.
Or
Insufficient information has been filed to date to permit the clerk to make any determination concerning the presumption of abuse. If more complete information, when filed, shows that the presumption has arisen, creditors will be notified.

Deadlines:
Papers must be *received* by the bankruptcy clerk's office by the following deadlines:
Deadline to Object to Debtor's Discharge or to Challenge Dischargeability of Certain Debts:

Deadline to Object to Exemptions:
Thirty (30) days after the *conclusion* of the meeting of creditors.

Creditors May Not Take Certain Actions:
In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Please Do Not File a Proof of Claim Unless You Receive a Notice To Do So.

Creditor with a Foreign Address:
A creditor to whom this notice is sent at a foreign address should read the information under "Do Not File a Proof of Claim at This Time" on the reverse side.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

Filing of Chapter 7 Bankruptcy Case	A bankruptcy case under Chapter 7 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Presumption of Abuse	If the presumption of abuse arises, creditors may have the right to file a motion to dismiss the case under § 707(b) of the Bankruptcy Code. The debtor may rebut the presumption by showing special circumstances.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court.
Do Not File a Proof of Claim at This Time	There does not appear to be any property available to the trustee to pay creditors. *You therefore should not file a proof of claim at this time.* If it later appears that assets are available to pay creditors, you will be sent another notice telling you that you may file a proof of claim, and telling you the deadline for filing your proof of claim. If this notice is mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that the debtor is not entitled to receive a discharge under Bankruptcy Code § 727(a) *or* that a debt owed to you is not dischargeable under Bankruptcy Code § 523(a)(2), (4), or (6), you must file a complaint -- or a motion if you assert the discharge should be denied under § 727(a)(8) or (a)(9) -- in the bankruptcy clerk's office by the "Deadline to Object to Debtor's Discharge or to Challenge the Dischargeability of Certain Debts" listed on the front of this form. The bankruptcy clerk's office must receive the complaint or motion and any required filing fee by that deadline.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors. The debtor must file a list of all property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objections by the "Deadline to Object to Exemptions" listed on the front side.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

12b-004529

12b-004530

UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 7 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____(date) and was converted to a case under chapter 7 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address):	Case Number:
	Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the debtor(s) in the last 8 years (include trade names):	Bankruptcy Trustee (name and address):
Attorney for Debtor(s) (name and address): Telephone number:	 Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Please Do Not File a Proof of Claim Unless You Receive a Notice To Do So.

Creditor with a Foreign Address:

A creditor to whom this notice is sent at a foreign address should read the information under "Do Not File a Proof of Claim at This Time" on the reverse side.

Address of the Bankruptcy Clerk's Office:	**For the Court:**
	Clerk of the Bankruptcy Court:
Telephone number:	
Hours Open:	Date:

Filing of Chapter 7 Bankruptcy Case	A bankruptcy case under Chapter 7 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; and starting or continuing lawsuits or foreclosures. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor's representative must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court.
Do Not File a Proof of Claim at This Time	There does not appear to be any property available to the trustee to pay creditors. *You therefore should not file a proof of claim at this time.* If it later appears that assets are available to pay creditors, you will be sent another notice telling you that you may file a proof of claim, and telling you the deadline for filing your proof of claim. If this notice is mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

12b-004533

12b-004534

UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 7 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____(date) and was converted to a case under chapter 7 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address):	Case Number:
	Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include married, maiden, and trade names):	Bankruptcy Trustee (name and address):
Attorney for Debtor(s) (name and address): Telephone number:	Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Presumption of Abuse under 11 U.S.C. § 707(b)

See "Presumption of Abuse" on the reverse side.

Depending on the documents filed with the petition, one of the following statements will appear.

The presumption of abuse does not arise.

Or

The presumption of abuse arises.

Or

Insufficient information has been filed to date to permit the clerk to make any determination concerning the presumption of abuse. If more complete information, when filed, shows that the presumption has arisen, creditors will be notified.

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors (except a governmental unit): For a governmental unit:

Creditor with a Foreign Address:

A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to Object to Debtor's Discharge or to Challenge Dischargeability of Certain Debts:

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

Filing of Chapter 7 Bankruptcy Case	A bankruptcy case under Chapter 7 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim from other assets in the bankruptcy case. To be paid, you must file a Proof of Claim even if your claim is listed in the schedules filed by the debtor. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Creditor with a Foreign Address:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that the debtor is not entitled to receive a discharge under Bankruptcy Code § 727(a) *or* that a debt owed to you is not dischargeable under Bankruptcy Code § 523(a)(2), (4), or (6), you must file a complaint -- or a motion if you assert the discharge should be denied under § 727(a)(8) or (a)(9) -- in the bankruptcy clerk's office by the "Deadline to Object to Debtor's Discharge or to Challenge the Dischargeability of Certain Debts" listed on the front of this form. The bankruptcy clerk's office must receive the complaint or motion and any required filing fee by that deadline.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors. The debtor must file a list of all property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objections by the "Deadline to Object to Exemptions" listed on the front side.
Presumption of Abuse	If the presumption of abuse arises, creditors may have the right to file a motion to dismiss the case under § 707(b) of the Bankruptcy Code. The debtor may rebut the presumption by showing special circumstances.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Liquidation of the Debtor's Property and Payment of Creditors' Claims	The bankruptcy trustee listed on the front of this notice will collect and sell the debtor's property that is not exempt. If the trustee can collect enough money, creditors may be paid some or all of the debts owed to them, in the order specified by the Bankruptcy Code. To make sure you receive any share of that money, you must file a Proof of Claim, as described above.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

12b-004537

12b-004538

UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 7 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____(date) and was converted to a case under chapter 7 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address):	Case Number:
	Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include trade names):	Bankruptcy Trustee (name and address):
Attorney for Debtor(s) (name and address): Telephone number:	Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadline to File a Proof of Claim

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

For all creditors (except a governmental unit): For a governmental unit:

Creditor with a Foreign Address:
A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

Filing of Chapter 7 Bankruptcy Case	A bankruptcy case under Chapter 7 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; and starting or continuing lawsuits or foreclosures. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor's representative must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim from other assets in the bankruptcy case. To be paid, you must file a Proof of Claim even if your claim is listed in the schedules filed by the debtor. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Creditor with a Foreign Address:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Liquidation of the Debtor's Property and Payment of Creditors' Claims	The bankruptcy trustee listed on the front of this notice will collect and sell the debtor's property that is not exempt. If the trustee can collect enough money, creditors may be paid some or all of the debts owed to them, in the order specified by the Bankruptcy Code. To make sure you receive any share of that money, you must file a Proof of Claim, as described above.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

12b-004541

12b-004542

UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 11 bankruptcy case concerning the debtor(s) listed below was filed on _____ (date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____ (date) and was converted to a case under chapter 11 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address):	Case Number:
	Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include married, maiden, and trade names):	Attorney for Debtor(s) (name and address): Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadlines:
Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:
Notice of deadline will be sent at a later time.

Creditor with a Foreign Address:
A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Deadline to File a Complaint Objecting to Discharge of the Debtor:

First date set for hearing on confirmation of plan
Notice of that date will be sent at a later time.

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Creditors May Not Take Certain Actions:
In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: **Telephone number:**	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

Filing of Chapter 11 Bankruptcy Case	A bankruptcy case under Chapter 11 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 11 allows a debtor to reorganize or liquidate pursuant to a plan. A plan is not effective unless confirmed by the court. You may be sent a copy of the plan and a disclosure statement telling you about the plan, and you might have the opportunity to vote on the plan. You will be sent notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. Unless a trustee is serving, the debtor will remain in possession of the debtor's property and may continue to operate any business.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court. The court, after notice and a hearing, may order that the United States trustee not convene the meeting if the debtor has filed a plan for which the debtor solicited acceptances before filing the case.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. You may look at the schedules that have been or will be filed at the bankruptcy clerk's office. If your claim is scheduled and is *not* listed as disputed, contingent, or unliquidated, it will be allowed in the amount scheduled unless you filed a Proof of Claim or you are sent further notice about the claim. Whether or not your claim is scheduled, you are permitted to file a Proof of Claim. If your claim is not listed at all *or* if your claim is listed as disputed, contingent, or unliquidated, then you must file a Proof of Claim or you might not be paid any money on your claim and may be unable to vote on a plan. The court has not yet set a deadline to file a Proof of Claim. If a deadline is set, you will be sent another notice. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Creditor with a Foreign Address:** The deadline for filing claims will be set in a later court order and will apply to all creditors unless the order provides otherwise. If notice of the order setting the deadline is sent to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Discharge of Debts	Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of your debt. *See* Bankruptcy Code § 1141 (d). Unless the court orders otherwise, however, the discharge will not be effective until completion of all payments under the plan. A discharge means that you may never try to collect the debt from the debtor except as provided in the plan. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 523 (a) (2), (4), or (6), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and any required filing fee by that Deadline. If you believe that the debtor is not entitled to receive a discharge under Bankruptcy Code § 1141 (d) (3), you must file a complaint with the required filing fee in the bankruptcy clerk's office not later than the first date set for the hearing on confirmation of the plan. You will be sent another notice informing you of that date.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors, even if the debtor's case is converted to chapter 7. The debtor must file a list of property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 11 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____(date) and was converted to a case under chapter 11 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address):	Case Number:
	Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include married, maiden, and trade names):	Attorney for Debtor(s) (name and address): Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors (except a governmental unit): For a governmental unit:

Creditor with a Foreign Address:
A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Deadline to File a Complaint Objecting to Discharge of the Debtor:

First date set for hearing on confirmation of plan
Notice of that date will be sent at a later time.

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Creditors May Not Take Certain Actions:
In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: **Telephone number:**	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

Filing of Chapter 11 Bankruptcy Case	A bankruptcy case under Chapter 11 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 11 allows a debtor to reorganize or liquidate pursuant to a plan. A plan is not effective unless confirmed by the court. You may be sent a copy of the plan and a disclosure statement telling you about the plan, and you might have the opportunity to vote on the plan. You will be sent notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. Unless a trustee is serving, the debtor will remain in possession of the debtor's property and may continue to operate any business.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court. The court, after notice and a hearing, may order that the United States trustee not convene the meeting if the debtor has filed a plan for which the debtor solicited acceptances before filing the case.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. You may look at the schedules that have been or will be filed at the bankruptcy clerk's office. If your claim is scheduled and is *not* listed as disputed, contingent, or unliquidated, it will be allowed in the amount scheduled unless you filed a Proof of Claim or you are sent further notice about the claim. Whether or not your claim is scheduled, you are permitted to file a Proof of Claim. If your claim is not listed at all *or* if your claim is listed as disputed, contingent, or unliquidated, then you must file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side or you might not be paid any money on your claim and may be unable to vote on a plan. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Creditor with a Foreign Address:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Discharge of Debts	Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of your debt. *See* Bankruptcy Code § 1141 (d). Unless the court orders otherwise, however, the discharge will not be effective until completion of all payments under the plan. A discharge means that you may never try to collect the debt from the debtor except as provided in the plan. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 523 (a) (2), (4), or (6), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and any required filing fee by that Deadline. If you believe that the debtor is not entitled to receive a discharge under Bankruptcy Code § 1141 (d) (3), you must file a complaint with the required filing fee in the bankruptcy clerk's office not later than the first date set for the hearing on confirmation of the plan. You will be sent another notice informing you of that date.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors, even if the debtor's case is converted to chapter 7. The debtor must file a list of property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

12b-004549

12b-004550

UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 11 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____(date) and was converted to a case under chapter 11 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address):	Case Number:
	Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include trade names):	Attorney for Debtor(s) (name and address): Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadline to File a Proof of Claim

Proof of Claim must be *received* by the bankruptcy clerk's office by the following deadline:

Notice of deadline will be sent at a later time.

Creditor with a Foreign Address:
A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Creditors May Not Take Certain Actions:
In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: **Telephone number:**	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

Filing of Chapter 11 Bankruptcy Case	A bankruptcy case under Chapter 11 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 11 allows a debtor to reorganize or liquidate pursuant to a plan. A plan is not effective unless confirmed by the court. You may be sent a copy of the plan and a disclosure statement telling you about the plan, and you might have the opportunity to vote on the plan. You will be sent notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. Unless a trustee is serving, the debtor will remain in possession of the debtor's property and may continue to operate any business.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; and starting or continuing lawsuits or foreclosures. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor's representative must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court. The court, after notice and a hearing, may order that the United States trustee not convene the meeting if the debtor has filed a plan for which the debtor solicited acceptances before filing the case.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. You may look at the schedules that have been or will be filed at the bankruptcy clerk's office. If your claim is scheduled and is *not* listed as disputed, contingent, or unliquidated, it will be allowed in the amount scheduled unless you filed a Proof of Claim or you are sent further notice about the claim. Whether or not your claim is scheduled, you are permitted to file a Proof of Claim. If your claim is not listed at all *or* if your claim is listed as disputed, contingent, or unliquidated, then you must file a Proof of Claim or you might not be paid any money on your claim and may be unable to vote on a plan. The court has not yet set a deadline to file a Proof of Claim. If a deadline is set, you will be sent another notice. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Creditor with a Foreign Address:** The deadline for filing claims will be set in a later court order and will apply to all creditors unless the order provides otherwise. If notice of the order setting the deadline is sent to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Discharge of Debts	Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of your debt. *See* Bankruptcy Code § 1141 (d). A discharge means that you may never try to collect the debt from the debtor, except as provided in the plan. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 1141 (d) (6) (A), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and any required filing fee by that deadline.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

12b-004553

12b-004554

UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 11 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____(date) and was converted to a case under chapter 11 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address):	Case Number:
	Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include trade names):	Attorney for Debtor(s) (name and address): Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadline to File a Proof of Claim

Proof of Claim must be *received* by the bankruptcy clerk's office by the following deadline:

For all creditors (except a governmental unit): For a governmental unit:

Creditor with a Foreign Address:
A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Creditors May Not Take Certain Actions:
In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: **Telephone number:**	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

Filing of Chapter 11 Bankruptcy Case	A bankruptcy case under Chapter 11 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 11 allows a debtor to reorganize or liquidate pursuant to a plan. A plan is not effective unless confirmed by the court. You may be sent a copy of the plan and a disclosure statement telling you about the plan, and you might have the opportunity to vote on the plan. You will be sent notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. Unless a trustee is serving, the debtor will remain in possession of the debtor's property and may continue to operate any business.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; and starting or continuing lawsuits or foreclosures. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor's representative must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court. The court, after notice and a hearing, may order that the United States trustee not convene the meeting if the debtor has filed a plan for which the debtor solicited acceptances before filing the case.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. You may look at the schedules that have been or will be filed at the bankruptcy clerk's office. If your claim is scheduled and is *not* listed as disputed, contingent, or unliquidated, it will be allowed in the amount scheduled unless you filed a Proof of Claim or you are sent further notice about the claim. Whether or not your claim is scheduled, you are permitted to file a Proof of Claim. If your claim is not listed at all *or* if your claim is listed as disputed, contingent, or unliquidated, then you must file a Proof of Claim by the "Deadline to File Proof of Claim" listed on the front side, or you might not be paid any money on your claim and may be unable to vote on a plan. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Creditor with a Foreign Address:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Discharge of Debts	Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of your debt. *See* Bankruptcy Code § 1141 (d). A discharge means that you may never try to collect the debt from the debtor, except as provided in the plan. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 1141 (d) (6) (A), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and any required filing fee by that deadline.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

12b-004557

12b-004558

UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 12 Bankruptcy Case, Meeting of Creditors, & Deadlines

[The debtor(s) listed below filed a chapter 12 bankruptcy case on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____ (date) and was converted to a case under chapter 12 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address):	Case Number: Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include married, maiden, and trade names): Attorney for Debtor(s) (name and address): Telephone number:	Bankruptcy Trustee (name and address): Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors(except a governmental unit): For a governmental unit:

Creditor with a Foreign Address:
A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Deadline to Object to Exemptions:
Thirty (30) days after the *conclusion* of the meeting of creditors.

Filing of Plan, Hearing on Confirmation of Plan

[The debtor has filed a plan. The plan or a summary of the plan is enclosed. The hearing on confirmation will be held:
Date:_____Time:_____Location:_____]
or [The debtor has filed a plan. The plan or a summary of the plan and notice of confirmation hearing will be sent separately.]
or [The debtor has not filed a plan as of this date. You will be sent separate notice of the hearing on confirmation of the plan.]

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor, the debtor's property, and certain codebtors. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: **Telephone number:**	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

Filing of Chapter 12 Bankruptcy Case	A bankruptcy case under Chapter 12 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 12 allows family farmers and family fishermen to adjust their debts pursuant to a plan. A plan is not effective unless confirmed by the court. You may object to confirmation of the plan and appear at the confirmation hearing. A copy or summary of the plan [is included with this notice] *or* [will be sent to you later], and [the confirmation hearing will be held on the date indicated on the front of this notice] *or* [you will be sent notice of the confirmation hearing]. The debtor will remain in possession of the debtor's property and may continue to operate the debtor's business unless the court orders otherwise.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions against the debtor and certain codebtors are listed in Bankruptcy Code § 362 and § 1201. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages. Under certain circumstances, the stay may be limited in duration or not exist at all, although the debtor may have the right to request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim from other assets in the bankruptcy case. To be paid, you must file a Proof of Claim even if your claim is listed in the schedules filed by the debtor. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Creditor with a Foreign Address:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 523 (a) (2), (4), or (6), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and any required filing fee by that Deadline.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors, even if the debtor's case is converted to chapter 7. The debtor must file a list of all property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.
Refer To Other Side For Important Deadlines and Notices	

12b-004561

12b-004562

UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 12 Bankruptcy Case, Meeting of Creditors, & Deadlines

[The debtor [corporation] *or* [partnership] listed below filed a chapter 12 bankruptcy case on _____ (date).]
or [A bankruptcy case concerning the debtor [corporation] *or* [partnership] listed below was originally filed under chapter_____
on _____ (date) and was converted to a case under chapter 12 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address):	Case Number: Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include trade names): Attorney for Debtor(s) (name and address): Telephone number:	Bankruptcy Trustee (name and address): Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors(except a governmental unit): For a governmental unit:

Creditor with a Foreign Address:

A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Filing of Plan, Hearing on Confirmation of Plan

[The debtor has filed a plan. The plan or a summary of the plan is enclosed. The hearing on confirmation will be held:
Date:_____Time:_____Location:_____]
or [The debtor has filed a plan. The plan or a summary of the plan and notice of confirmation hearing will be sent separately.]
or [The debtor has not filed a plan as of this date. You will be sent separate notice of the hearing on confirmation of the plan.]

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: **Telephone number:**	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

Filing of Chapter 12 Bankruptcy Case	A bankruptcy case under Chapter 12 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by the debtor listed on the front side, and an order for relief has been entered. Chapter 12 allows family farmers and family fishermen to adjust their debts pursuant to a plan. A plan is not effective unless confirmed by the court. You may object to confirmation of the plan and appear at the confirmation hearing. A copy or summary of the plan [is included with this notice] *or* [will be sent to you later], and [the confirmation hearing will be held on the date indicated on the front of this notice] *or* [you will be sent notice of the confirmation hearing]. The debtor will remain in possession of the debtor's property and may continue to operate the debtor's business unless the court orders otherwise.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions against the debtor and certain codebtors are listed in Bankruptcy Code § 362 and § 1201. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; and starting or continuing lawsuits or foreclosures. Under certain circumstances, the stay may be limited in duration or not exist at all, although the debtor may have the right to request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor's representative must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim from other assets in the bankruptcy case. To be paid, you must file a Proof of Claim even if your claim is listed in the schedules filed by the debtor. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Creditor with a Foreign Address:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 523 (a) (2), (4), or (6), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and any required filing fee by that Deadline.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

12b-004565

12b-004566

UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 13 Bankruptcy Case, Meeting of Creditors, & Deadlines

[The debtor(s) listed below filed a chapter 13 bankruptcy case on _____ (date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____
on _____ (date) and was converted to a case under chapter 13 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address):	Case Number: Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include married, maiden, and trade names): Attorney for Debtor(s) (name and address): Telephone number:	Bankruptcy Trustee (name and address): Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors (except a governmental unit):

For a governmental unit (except as otherwise provided in Fed . R. Bankr. P. 3002(c)(1)):

Creditor with a Foreign Address:

A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to Object to Debtor's Discharge or to Challenge Dischargeability of Certain Debts:

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Filing of Plan, Hearing on Confirmation of Plan

[The debtor has filed a plan. The plan or a summary of the plan is enclosed. The hearing on confirmation will be held:
Date:_____Time:_____Location:_____]
or [The debtor has filed a plan. The plan or a summary of the plan and notice of confirmation hearing will be sent separately.]
or [The debtor has not filed a plan as of this date. You will be sent separate notice of the hearing on confirmation of the plan.]

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor, the debtor's property, and certain codebtors. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: **Telephone number:**	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

Filing of Chapter 13 Bankruptcy Case	A bankruptcy case under Chapter 13 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 13 allows an individual with regular income and debts below a specified amount to adjust debts pursuant to a plan. A plan is not effective unless confirmed by the bankruptcy court. You may object to confirmation of the plan and appear at the confirmation hearing. A copy or summary of the plan [is included with this notice] *or* [will be sent to you later], and [the confirmation hearing will be held on the date indicated on the front of this notice] *or* [you will be sent notice of the confirmation hearing]. The debtor will remain in possession of the debtor's property and may continue to operate the debtor's business, if any, unless the court orders otherwise.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions against the debtor and certain codebtors are listed in Bankruptcy Code § 362 and § 1301. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to exceed or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim from other assets in the bankruptcy case. To be paid, you must file a Proof of Claim even if your claim is listed in the schedules filed by the debtor. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Creditor with a Foreign Address:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that the debtor is not entitled to a discharge under Bankruptcy Code § 1328(f), you must file a motion objecting to discharge in the bankruptcy clerk's office by the "Deadline to Object to Debtor's Discharge or to Challenge the Dischargeability of Certain Debts" listed on the front of this form. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 523(a)(2) or (4), you must file a complaint in the bankruptcy clerk's office by the same deadline. The bankruptcy clerk's office must receive the motion or the complaint and any required filing fee by that deadline.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors, even if the debtor's case is converted to chapter 7. The debtor must file a list of all property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

12b-004569

12b-004570

COMMITTEE NOTE

The form's explanation of the "Meeting of Creditors" is amended to take account of the amendment of Rule 2003(e). When a meeting of creditors is adjourned to another date, the rule requires the official presiding at the meeting to file a statement specifying the date and time to which the meeting is adjourned. The explanation on all versions of the form is amended to reflect that requirement. Stylistic changes to the form are also made.

Final approval of these conforming and stylistic amendments is sought without publication.

12b-004573

12b-004574

B 10 (Official Form 10) (12/11)

UNITED STATES BANKRUPTCY COURT _____ DISTRICT OF _____

PROOF OF CLAIM

Name of Debtor:

Case Number:

NOTE: *Do not use this form to make a claim for an administrative expense that arises after the bankruptcy filing. You may file a request for payment of an administrative expense according to11 U.S.C. § 503.*

Name of Creditor (the person or other entity to whom the debtor owes money or property):

COURT USE ONLY

Name and address where notices should be sent:

Telephone number: email:

❒ Check this box if this claim amends a previously filed claim.

Court Claim Number:_____
(*If known*)

Filed on:_____

Name and address where payment should be sent (if different from above):

Telephone number: email:

❒ Check this box if you are aware that anyone else has filed a proof of claim relating to this claim. Attach copy of statement giving particulars.

1. Amount of Claim as of Date Case Filed: $_____

If all or part of the claim is secured, complete item 4.

If all or part of the claim is entitled to priority, complete item 5.

❒Check this box if the claim includes interest or other charges in addition to the principal amount of the claim. Attach a statement that itemizes interest or charges.

2. Basis for Claim: _____
(See instruction #2)

3. Last four digits of any number by which creditor identifies debtor:
___ ___ ___ ___

3a. Debtor may have scheduled account as:
_____
(See instruction #3a)

3b. Uniform Claim Identifier (optional):
_ _
(See instruction #3b)

4. Secured Claim (See instruction #4)
Check the appropriate box if the claim is secured by a lien on property or a right of setoff, attach required redacted documents, and provide the requested information.

Nature of property or right of setoff: ❒Real Estate ❒Motor Vehicle ❒Other
Describe:

Value of Property: $_____

Annual Interest Rate_____**%** ❒Fixed or ❒Variable
(when case was filed)

Amount of arrearage and other charges, as of the time case was filed, included in secured claim, if any:
$_____

Basis for perfection: _____

Amount of Secured Claim: **$**_____

Amount Unsecured: **$**_____

5. Amount of Claim Entitled to Priority under 11 U.S.C. §507(a). If any part of the claim falls into one of the following categories, check the box specifying the priority and state the amount.

❒ Domestic support obligations under 11 U.S.C. §507(a)(1)(A) or (a)(1)(B).

❒ Wages, salaries, or commissions (up to $11,725*) earned within 180 days before the case was filed or the debtor's business ceased, whichever is earlier – 11 U.S.C. §507 (a)(4).

❒ Contributions to an employee benefit plan – 11 U.S.C. §507 (a)(5).

Amount entitled to priority:

$_____

❒ Up to $2,600* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. §507 (a)(7).

❒ Taxes or penalties owed to governmental units – 11U.S.C. §507 (a)(8).

❒ Other – Specify applicable paragraph of 11 U.S.C. §507 (a)(__).

**Amounts are subject to adjustment on 4/1/13 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.*

6. Credits. The amount of all payments on this claim has been credited for the purpose of making this proof of claim. (See instruction #6)

7. Documents: Attached are **redacted** copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. If the claim is secured, box 4 has been completed, and **redacted** copies of documents providing evidence of perfection of a security interest are attached. *(See instruction #7, and the definition of "**redacted**".)*

DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.

If the documents are not available, please explain:

8. Signature: (See instruction #8)

Check the appropriate box.

❒ I am the creditor. ❒ I am the creditor's authorized agent. (Attach copy of power of attorney, if any.) ❒ I am the trustee, or the debtor, or their authorized agent. (See Bankruptcy Rule 3004.) ❒ I am a guarantor, surety, indorser, or other codebtor. (See Bankruptcy Rule 3005.)

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

Print Name: _____
Title: _____
Company: _____
Address and telephone number (if different from notice address above):
_____
_____
_____
Telephone number: email:

(Signature) (Date)

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

INSTRUCTIONS FOR PROOF OF CLAIM FORM

The instructions and definitions below are general explanations of the law. In certain circumstances, such as bankruptcy cases not filed voluntarily by the debtor, exceptions to these general rules may apply.

Items to be completed in Proof of Claim form

Court, Name of Debtor, and Case Number:
Fill in the federal judicial district in which the bankruptcy case was filed (for example, Central District of California), the debtor's full name, and the case number. If the creditor received a notice of the case from the bankruptcy court, all of this information is at the top of the notice.

Creditor's Name and Address:
Fill in the name of the person or entity asserting a claim and the name and address of the person who should receive notices issued during the bankruptcy case. A separate space is provided for the payment address if it differs from the notice address. The creditor has a continuing obligation to keep the court informed of its current address. See Federal Rule of Bankruptcy Procedure (FRBP) 2002(g).

1. Amount of Claim as of Date Case Filed:
State the total amount owed to the creditor on the date of the bankruptcy filing. Follow the instructions concerning whether to complete items 4 and 5. Check the box if interest or other charges are included in the claim.

2. Basis for Claim:
State the type of debt or how it was incurred. Examples include goods sold, money loaned, services performed, personal injury/wrongful death, car loan, mortgage note, and credit card. If the claim is based on delivering health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information. You may be required to provide additional disclosure if an interested party objects to the claim.

3. Last Four Digits of Any Number by Which Creditor Identifies Debtor:
State only the last four digits of the debtor's account or other number used by the creditor to identify the debtor.

3a. Debtor May Have Scheduled Account As:
Report a change in the creditor's name, a transferred claim, or any other information that clarifies a difference between this proof of claim and the claim as scheduled by the debtor.

3b. Uniform Claim Identifier:
If you use a uniform claim identifier, you may report it here. A uniform claim identifier is an optional 24-character identifier that certain large creditors use to facilitate electronic payment in chapter 13 cases.

4. Secured Claim:
Check whether the claim is fully or partially secured. Skip this section if the claim is entirely unsecured. (See Definitions.) If the claim is secured, check the box for the nature and value of property that secures the claim, attach copies of lien documentation, and state, as of the date of the bankruptcy filing, the annual interest rate (and whether it is fixed or variable), and the amount past due on the claim.

5. Amount of Claim Entitled to Priority Under 11 U.S.C. §507(a).
If any portion of the claim falls into any category shown, check the appropriate box(es) and state the amount entitled to priority. (See Definitions.) A claim may be partly priority and partly non-priority. For example, in some of the categories, the law limits the amount entitled to priority.

6. Credits:
An authorized signature on this proof of claim serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

7. Documents:
Attach redacted copies of any documents that show the debt exists and a lien secures the debt. You must also attach copies of documents that evidence perfection of any security interest. You may also attach a summary in addition to the documents themselves. FRBP 3001(c) and (d). If the claim is based on delivering health care goods or services, limit disclosing confidential health care information. Do not send original documents, as attachments may be destroyed after scanning.

8. Date and Signature:
The individual completing this proof of claim must sign and date it. FRBP 9011. If the claim is filed electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what constitutes a signature. If you sign this form, you declare under penalty of perjury that the information provided is true and correct to the best of your knowledge, information, and reasonable belief. Your signature is also a certification that the claim meets the requirements of FRBP 9011(b). Whether the claim is filed electronically or in person, if your name is on the signature line, you are responsible for the declaration. Print the name and title, if any, of the creditor or other person authorized to file this claim. State the filer's address and telephone number if it differs from the address given on the top of the form for purposes of receiving notices. If the claim is filed by an authorized agent, attach a complete copy of any power of attorney, and provide both the name of the individual filing the claim and the name of the agent. If the authorized agent is a servicer, identify the corporate servicer as the company. Criminal penalties apply for making a false statement on a proof of claim.

DEFINITIONS

Debtor
A debtor is the person, corporation, or other entity that has filed a bankruptcy case.

Creditor
A creditor is a person, corporation, or other entity to whom debtor owes a debt that was incurred before the date of the bankruptcy filing. See 11 U.S.C. §101 (10).

Claim
A claim is the creditor's right to receive payment for a debt owed by the debtor on the date of the bankruptcy filing. See 11 U.S.C. §101 (5). A claim may be secured or unsecured.

Proof of Claim
A proof of claim is a form used by the creditor to indicate the amount of the debt owed by the debtor on the date of the bankruptcy filing. The creditor must file the form with the clerk of the same bankruptcy court in which the bankruptcy case was filed.

Secured Claim Under 11 U.S.C. §506(a)
A secured claim is one backed by a lien on property of the debtor. The claim is secured so long as the creditor has the right to be paid from the property prior to other creditors. The amount of the secured claim cannot exceed the value of the property. Any amount owed to the creditor in excess of the value of the property is an unsecured claim. Examples of liens on property include a mortgage on real estate or a security interest in a car. A lien may be voluntarily granted by a debtor or may be obtained through a court proceeding. In some states, a court judgment is a lien. A claim also may be secured if the creditor owes the debtor money (has a right to setoff).

Unsecured Claim
An unsecured claim is one that does not meet the requirements of a secured claim. A claim may be partly unsecured if the amount of the claim exceeds the value of the property on which the creditor has a lien.

Claim Entitled to Priority Under 11 U.S.C. §507(a)
Priority claims are certain categories of unsecured claims that are paid from the available money or property in a bankruptcy case before other unsecured claims.

Redacted
A document has been redacted when the person filing it has masked, edited out, or otherwise deleted, certain information. A creditor must show only the last four digits of any social-security, individual's tax-identification, or financial-account number, only the initials of a minor's name, and only the year of any person's date of birth. If the claim is based on the delivery of health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information.

Evidence of Perfection
Evidence of perfection may include a mortgage, lien, certificate of title, financing statement, or other document showing that the lien has been filed or recorded.

INFORMATION

Acknowledgment of Filing of Claim
To receive acknowledgment of your filing, you may either enclose a stamped self-addressed envelope and a copy of this proof of claim or you may access the court's PACER system (www.pacer.psc.uscourts.gov) for a small fee to view your filed proof of claim.

Offers to Purchase a Claim
Certain entities are in the business of purchasing claims for an amount less than the face value of the claims. One or more of these entities may contact the creditor and offer to purchase the claim. Some of the written communications from these entities may easily be confused with official court documentation or communications from the debtor. These entities do not represent the bankruptcy court or the debtor. The creditor has no obligation to sell its claim. However, if the creditor decides to sell its claim, any transfer of such claim is subject to FRBP 3001(e), any applicable provisions of the Bankruptcy Code (11 U.S.C. § 101 *et seq.*), and any applicable orders of the bankruptcy court.

12b-004579

12b-004580

COMMITTEE NOTE

The form is amended in several respects. A new section—3b—is added to allow the reporting of a uniform claim identifier. This identifier, consisting of 24 characters, is used by some creditors to facilitate automated receipt, distribution, and posting of payments made by means of electronic funds transfers by chapter 13 trustees. Creditors are not required to use a uniform claim identifier.

Language is added to section 4 to clarify that the annual interest rate that must be reported for a secured claim is the rate applicable at the time the bankruptcy case was filed. Checkboxes for indicating whether the interest rate is fixed or variable are also added.

Section **7** of the form is revised to clarify that, consistent with Rule 3001(c), writings supporting a claim or evidencing perfection of a security interest must be attached to the proof of claim. If the documents are not available, the filer must provide an explanation for their absence. The instructions for this section of the form explain that summaries of supporting documents may be attached only in addition to the documents themselves.

Section 8—the date and signature box—is revised to include a declaration that is intended to impress upon the filer the duty of care that must be exercised in filing a proof of claim. The individual who completes the form must sign it. By doing so, he or she declares under penalty of perjury that the information provided "is true and correct to the best of my knowledge, information and reasonable belief." That individual must also provide identifying information—name; title; company; and, if not already provided, mailing address, telephone number, and email address—and indicate by checking the appropriate box the basis on which he or she is filing the proof of claim (for example, as creditor or authorized agent for the creditor). Because a trustee or debtor that files a proof of claim under Rule 3004 will indicate that basis for filing here, the checkbox on the first page of the form for stating the filer's status as a trustee or debtor is deleted. When a servicing agent files a proof of claim on behalf of a creditor, the individual completing the form must sign it and must provide his or her own name, as well as the name of the company that is the servicing agent.

Amendments are made to the instructions that reflect the changes made to the form, and stylistic and formatting changes are made to the form and instructions. Spaces are added for providing email addresses in addition to other contact information in order to facilitate communication with the claimant. The provision of this additional information does not affect any requirements for serving or providing official notice to the claimant.

Changes Made After Publication

Page 1 of the form. The checkbox for identifying that the filer of the proof of claim is the debtor or the trustee, rather than a creditor, was deleted.

Committee Note. A statement was added to the Committee Note explaining that the new requests for email addresses are intended only to facilitate communication with the claimant and that the provision of this information does not affect any requirements for serving or providing notice to the claimant.

Summary of Public Comment

10-BK-001. Bankruptcy Judge Paul Mannes (D. Md.). Form 10 contains two places to indicate whether the proof of claim is being filed by a trustee or debtor, rather than by a creditor. The first request for that information should be deleted, and that space should be used to allow the claimant to indicate that it did not receive notice of the filing of the bankruptcy case from the court.

10-BK-002. Linda Spaight (Administrative Office, Bankruptcy Court Administration Division). There is a discrepancy between Rule 3001(c)(1) and paragraph 7 of the instructions to Form 10. The rule requires the attachment of "the original or duplicate" of a writing on which a claim is based, whereas the instructions direct the claimant not to "send original documents, as attachments may be destroyed after scanning."

10-BK-015. Ebony R. Huddleston. This is a good start to revising the proof of claim requirements.

10-BK-023. Wendell J. Sherk. The changes to Official Form 10 are very good and should be adopted.

10-BK-027. Henry Sommer (on behalf of National Association of Consumer Bankruptcy Attorneys). Form 10, either on its face or in the instructions, should state that attachments are required for open-end consumer credit claims and mortgage claims. Not all claimants will be familiar with the rules requiring the attachment of these documents.

10-BK-030. Margaret Grammar Gay (Senior Advisor to the Clerk, Bankr. D.N.M.). Form 10, as well as Supplements 1 and 2, use the term "email." According to the Microsoft Manual of Style for Technical Publications, the word should be spelled "E-mail."

12b-004583

12b-004584

Mortgage Proof of Claim Attachment

If you file a claim secured by a security interest in the debtor's principal residence, you must use this form as an attachment to your proof of claim. See Bankruptcy Rule 3001(c)(2).

Name of debtor: _____ **Case number**: _____

Name of creditor: _____ **Last four digits** of any number you use to identify the debtor's account: ____ ____ ____ ____

Part 1: Statement of Principal and Interest Due as of the Petition Date

Itemize the principal and interest due on the claim as of the petition date (included in the Amount of Claim listed in Item 1 on your Proof of Claim form).

1. **Principal due** (1) $ _____

2. **Interest due**

Interest rate	From mm/dd/yyyy	To mm/dd/yyyy	Amount
_____%	__/__/____	__/__/____	$ _____
_____%	__/__/____	__/__/____	$ _____
_____%	__/__/____	__/__/____	+ $ _____
Total interest due as of the petition date			$ _____

Copy total here ▶ (2) + $ _____

3. **Total principal and interest due** (3) $ _____

Part 2: Statement of Prepetition Fees, Expenses, and Charges

Itemize the fees, expenses, and charges due on the claim as of the petition date (included in the Amount of Claim listed in Item 1 on the Proof of Claim form).

Description	Dates incurred		Amount
1. **Late charges**	_____	(1)	$ _____
2. **Non-sufficient funds (NSF) fees**	_____	(2)	$ _____
3. **Attorney's fees**	_____	(3)	$ _____
4. **Filing fees and court costs**	_____	(4)	$ _____
5. **Advertisement costs**	_____	(5)	$ _____
6. **Sheriff/auctioneer fees**	_____	(6)	$ _____
7. **Title costs**	_____	(7)	$ _____
8. **Recording fees**	_____	(8)	$ _____
9. **Appraisal/broker's price opinion fees**	_____	(9)	$ _____
10. **Property inspection fees**	_____	(10)	$ _____
11. **Tax advances (non-escrow)**	_____	(11)	$ _____
12. **Insurance advances (non-escrow)**	_____	(12)	$ _____
13. **Escrow shortage or deficiency** (Do not include amounts that are part of any installment payment listed in Part 3.)	_____	(13)	$ _____
14. **Property preservation expenses. Specify**:_____	_____	(14)	$ _____
15. **Other. Specify**:_____	_____	(15)	$ _____
16. **Other. Specify**:_____	_____	(16)	$ _____
17. **Other. Specify**:_____	_____	(17)	+ $ _____
18. **Total prepetition fees, expenses, and charges. Add all of the amounts listed above.**		(18)	$ _____

Part 3. Statement of Amount Necessary to Cure Default as of the Petition Date

Does the installment payment amount include an escrow deposit?

❑ No

❑ Yes. Attach to the Proof of Claim form an escrow account statement prepared as of the petition date in a form consistent with applicable nonbankruptcy law.

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1. **Installment payments due**	Date last payment received by creditor	__/__/____		
	Number of installment payments due	(1) _____		
2. **Amount of installment payments due**	_____installments @	$ _____		
	_____installments @	$ _____		
	_____installments @	+ $ _____		
	Total installment payments due as of the petition date	$ _____	Copy total here ►	(2) $ _____
3. **Calculation of cure amount**	**Add total prepetition fees, expenses, and charges**		Copy total from Part 2 here ►	+ $ _____
	Subtract total of unapplied funds (funds received but not credited to account)			- $ _____
	Subtract amounts for which debtor is entitled to a refund			- $ _____
	Total amount necessary to cure default as of the petition date			(3) $ _____

Copy total onto Item 4 of Proof of Claim form

12b-004587

12b-004588

COMMITTEE NOTE

This form is new. It must be completed and attached to a proof of claim secured by a security interest in a debtor's principal residence. The form, which implements Rule 3001(c)(2), requires an itemization of prepetition interest, fees, expenses, and charges included in the claim amount, as well as a statement of the amount necessary to cure any default as of the petition date. If the mortgage installment payments include an escrow deposit, an escrow account statement must also be attached to the proof of claim, as required by Rule 3001(c)(2)(C).

Changes Made After Publication

Part 2. The instruction at the beginning of this part was changed to require itemization of "fees, expenses, and charges due on the claim as of the petition date," rather than "fees, expenses, and charges incurred in connection with the claim as of the petition date."

The parenthetical following "Escrow shortage or deficiency" was changed to state more clearly that amounts that are part of any installment payment listed in Part 3 should not be included here.

Item numbers were added to the left and right columns.

Part 3. A heading labeled "3. Calculation of cure amount" was added.

A line reading "Subtract amounts for which debtor is entitled to a refund" was added.

Summary of Public Comment

10-BK-003. Bankruptcy Judge Marvin Isgur (S.D. Tex.). Home mortgage claimants should be required to submit with their proofs of claim a loan history that reflects amounts received and applied by the lender. His district requires a detailed loan history, rather than just a summary of amounts due as of the petition, and this requirement has worked well. Because the loan history shows how the lender applied payments received from the debtor, the parties are able to reconcile differences in their calculations for themselves. The components of charges are revealed, thereby allowing a comparison of the claimed arrearages with the debtor's

own payment records. Major lenders have developed programs to extract the necessary information from their databases, at a cost of under $10,000. They have expressed a desire for a uniform national form so that they can set up a single automation system to comply with the proposed new rules.

New forms should be adopted, but they should be ones that work. The currently proposed forms should not be adopted without substantial amendment.

10-BK-009. Bankruptcy Judge Elizabeth Magner (E.D. La.). The proposed forms represent an improvement, but more information is needed. Without a history of payment and assessment in date order, the debtor cannot determine whether the claim amounts were properly calculated. In the 25 trials that she has conducted involving mortgage claim calculations, incorrect accounting was discovered in all of the cases. The forms also need to provide an explanation for how the lender calculated the escrow balance, since there are at least three different methods of accounting that might comply with the Real Estate Practices Settlement Act.

Nothing in the published forms is incorrect; the information solicited is just incomplete. Rather than requiring lenders to extract the dates that charges were incurred, a spreadsheet would be easier to produce and would provide better information. It will allow the lender in some cases to see and correct errors itself.

Part 3 of the form, which provides for the calculation of the amount necessary to cure any default as of the petition date, leads to an incorrect calculation of past due escrow balances. The cure amount should include past due, prepetition principal and interest portions of mortgage installment payments, plus escrow balances calculated by a method she has ordered for use in her court. This method "does assume that the past due amounts owed for escrow charges and missed prepetition escrow payments are reflected on the proof of claim as part of the arrearage."

Brett Weiss (National Association of Consumer Bankruptcy Attorneys). Lenders should not be allowed to impose fees for completing and filing proofs of claim, attachments, and supplements.

10-BK-13. Daniel Greenbaum. He expresses excitement and relief for the prospect that the mortgage rules may be implemented. The rules, however, do not go far enough. The mortgage industry has been involved in fraudulent and suspicious lending practices.

10-BK-18. Penny Souhrada. The new mortgage forms will be an important step in insuring that accurate claims are filed. Creditors should not be allowed to charge the debtor with the costs incurred in providing information

that the creditor should already have available.

10-BK-23. Wendell J. Sherk. The mortgage attachment form should apply to all residential mortgages. It is crucial that it contain a payment history, not just a summary. The history reveals the lender's management of the debtor's account. The rule should allow local rules to require additional documentation.

10-BK-25. Richard I. Isacoff, P.C. All creditors, but especially holders of home mortgage claims, should be required to provide a full account transaction history if the debtor requests it. They should have 14 days to comply.

10-BK-27. National Association of Consumer Bankruptcy Attorneys (submitted by Henry Sommer). The mortgage attachments should apply to all residential mortgages. The proof-of-claim attachment should include in Part 3, item 2, a line to subtract amounts that are to be refunded to the debtor's account (such as a sheriff's sale deposit paid by the lender for a sale that was not conducted). The attachment of a payment history should be required. Often disputes about amounts claimed arise from the way in which the lender applied the debtor's payments. A payment history can allow these disputes to be resolved. Since local laws governing foreclosure vary so widely, the Committee Note should clarify that local rules can require additional information. The Committee Notes to the forms should state that, by asking for information about various types of charges, the forms do not express any opinion about whether the mortgagee is entitled to collect them. In particular, the forms should not be deemed to take a position on whether the lender may assess attorney's fees for preparation of a proof of claim.

10-BK-033. Neal R. Allen. The mortgage claimant should be required to attach a chain of title from the original mortgagee to show that it actually owns the note and mortgage or deed of trust.

10-BK-034. Keith Rodriguez (chapter 13 trustee). Rules that require mortgage servicers to provide more specific information are welcomed. Proofs of claim filed by servicers often make it difficult to determine whether the servicer has a right to file the claim.

10-BK-035. Yvonne V. Valdez. She expresses strong support for the requirement of greater information disclosure by mortgage creditors. A payment history should also be provided, as well as a complete chain of title. This information will make it easier to identify errors and miscalculations by the mortgage lender.

12b-004593

12b-004594

B 10 (Supplement 1) (12/11)

UNITED STATES BANKRUPTCY COURT

_____ District of _____

In re _____,
Debtor

Case No. _____

Chapter 13

Notice of Mortgage Payment Change

If you file a claim secured by a security interest in the debtor's principal residence provided for under the debtor's plan pursuant to § 1322(b)(5), you must use this form to give notice of any changes in the installment payment amount. File this form as a supplement to your proof of claim at least 21 days before the new payment amount is due. See Bankruptcy Rule 3002.1.

Name of creditor: _____

Court claim no. (if known): _____

Last four digits of any number you use to identify the debtor's account: ____ ____ ____ ____

Date of payment change:
Must be at least 21 days after date of this notice ____/____/_____

New total payment:
Principal, interest, and escrow, if any $ _____

Part 1: Escrow Account Payment Adjustment

Will there be a change in the debtor's escrow account payment?

- ❑ No
- ❑ Yes. Attach a copy of the escrow account statement prepared in a form consistent with applicable nonbankruptcy law. Describe the basis for the change. If a statement is not attached, explain why: _____

Current escrow payment: $ _____ **New escrow payment:** $ _____

Part 2: Mortgage Payment Adjustment

Will the debtor's principal and interest payment change based on an adjustment to the interest rate in the debtor's variable-rate note?

- ❑ No
- ❑ Yes. Attach a copy of the rate change notice prepared in a form consistent with applicable nonbankruptcy law. If a notice is not attached, explain why: _____

Current interest rate: _____% **New interest rate:** _____%

Current principal and interest payment: $ _____ **New principal and interest payment:** $ _____

Part 3: Other Payment Change

Will there be a change in the debtor's mortgage payment for a reason not listed above?

- ❑ No
- ❑ Yes. Attach a copy of any documents describing the basis for the change, such as a repayment plan or loan modification agreement. (*Court approval may be required before the payment change can take effect.*)

Reason for change: _____

Current mortgage payment: $ _____ **New mortgage payment:** $ _____

Part 4: Sign Here

The person completing this Notice must sign it. Sign and print your name and your title, if any, and state your address and telephone number if different from the notice address listed on the proof of claim to which this Supplement applies.

Check the appropriate box.

❒ I am the creditor. ❒ I am the creditor's authorized agent.
(Attach copy of power of attorney, if any.)

I declare under penalty of perjury that the information provided in this Notice is true and correct to the best of my knowledge, information, and reasonable belief.

✘ _____ Date ____/_____/_____
Signature

Print: _____ Title _____
First Name Middle Name Last Name

Company _____

Address _____
Number Street

_____
City State ZIP Code

Contact phone (_____) _____– _____ Email _____

12b-004597

12b-004598

COMMITTEE NOTE

This form is new and applies in chapter 13 cases. It implements Rule 3002.1, which requires the holder of a claim secured by a security interest in the debtor's principal residence—or the holder's agent—to provide notice at least 21 days prior to a change in the amount of the ongoing mortgage installment payments. The form requires the holder of the claim to indicate the basis for the changed payment amount and when it will take effect. The notice must be filed as a supplement to the claim holder's proof of claim, and it must be served on the debtor, debtor's counsel, and the trustee.

The individual completing the form must sign and date it. By doing so, he or she declares under penalty of perjury that the information provided is true and correct to the best of that individual's knowledge, information, and reasonable belief. The signature is also a certification that the standards of Rule 9011(b) are satisfied.

Changes Made After Publication

Part 1. The instruction to "Attach a copy of the escrow account statement, prepared according to applicable nonbankruptcy law" was changed to "Attach a copy of the escrow account statement prepared in a form consistent with applicable nonbankruptcy law."

Part 2. The instruction to "Attach a copy of the rate change notice, prepared according to applicable nonbankruptcy law" was changed to "Attach a copy of the rate change notice prepared in a form consistent with applicable nonbankruptcy law."

Part 4. In the declaration, the word "claim" was changed to "Notice."

Summary of Public Comment

10-BK-005. Bankruptcy Judge Marvin Isgur (S.D. Tex.). Supplement 1 should not instruct the mortgagee to attach an escrow account statement "prepared according to applicable nonbankruptcy law." That instruction, which provides for a RESPA-based analysis, improperly allows the mortgagee to collect the escrow shortage under the plan as part of the cure payment *and* as part of an ongoing adjusted mortgage payment.

10-BK-034. Keith Rodriguez (chapter 13 trustee). Notices of payment change are not always provided. Without that information, disbursements may be made that result in the debtor incurring late charges. The debtor needs complete information to emerge from bankruptcy with a fresh start.

12b-004601

12b-004602

B 10 (Supplement 2) (12/11)

UNITED STATES BANKRUPTCY COURT

_____ District of _____

In re _____, Case No. _____
Debtor

Chapter 13

Notice of Postpetition Mortgage Fees, Expenses, and Charges

If you hold a claim secured by a security interest in the debtor's principal residence, you must use this form to give notice of any postpetition fees, expenses, and charges that you assert are recoverable against the debtor or against the debtor's principal residence. File this form as a supplement to your proof of claim. See Bankruptcy Rule 3002.1.

Name of creditor: _____ **Court claim no**. (if known): _____

Last four digits of any number you use to identify the debtor's account: ____ ____ ____ ____

Does this notice supplement a prior notice of postpetition fees, expenses, and charges?

- ❑ No
- ❑ Yes. Date of the last notice: ____/____/_____

Part 1: Itemize Postpetition Fees, Expenses, and Charges

Itemize the fees, expenses, and charges incurred on the debtor's mortgage account after the petition was filed. Do not include any escrow account disbursements or any amounts previously itemized in a notice filed in this case or ruled on by the bankruptcy court.

Description	Dates incurred		Amount
1. Late charges	_____	(1)	$ _____
2. Non-sufficient funds (NSF) fees	_____	(2)	$ _____
3. Attorney fees	_____	(3)	$ _____
4. Filing fees and court costs	_____	(4)	$ _____
5. Bankruptcy/Proof of claim fees	_____	(5)	$ _____
6. Appraisal/Broker's price opinion fees	_____	(6)	$ _____
7. Property inspection fees	_____	(7)	$ _____
8. Tax advances (non-escrow)	_____	(8)	$ _____
9. Insurance advances (non-escrow)	_____	(9)	$ _____
10. Property preservation expenses. Specify:_____	_____	(10)	$ _____
11. Other. Specify:_____	_____	(11)	$ _____
12. Other. Specify:_____	_____	(12)	$ _____
13. Other. Specify:_____	_____	(13)	$ _____
14. Other. Specify:_____	_____	(14)	$ _____

The debtor or trustee may challenge whether the fees, expenses, and charges you listed are required to be paid. See 11 U.S.C. § 1322(b)(5) and Bankruptcy Rule 3002.1.

Part 2: Sign Here

The person completing this Notice must sign it. Sign and print your name and your title, if any, and state your address and telephone number if different from the notice address listed on the proof of claim to which this Supplement applies.

Check the appropriate box.

❒ I am the creditor.

❒ I am the creditor's authorized agent. (Attach copy of power of attorney, if any.)

I declare under penalty of perjury that the information provided in this Notice is true and correct to the best of my knowledge, information, and reasonable belief.

✘ _____ Date ____/_____/_____
Signature

Print: _____ Title _____
First Name Middle Name Last Name

Company _____

Address _____
Number Street

_____
City State ZIP Code

Contact phone (_____) _____– _____ Email _____

12b-004605

12b-004606

COMMITTEE NOTE

This form is new and applies in chapter 13 cases. It implements Rule 3002.1, which requires the holder of a claim secured by a security interest in the debtor's principal residence—or the holder's agent—to file a notice of all postpetition fees, expenses, and charges within 180 days after they are incurred. The notice must be filed as a supplement to the claim holder's proof of claim, and it must be served on the debtor, debtor's counsel, and the trustee.

The individual completing the form must sign and date it. By doing so, he or she declares under penalty of perjury that the information provided is true and correct to the best of that individual's knowledge, information, and reasonable belief. The signature is also a certification that the standards of Rule 9011(b) are satisfied.

Changes Made After Publication

Part 1. Item numbers were added to the left and right columns.

Part 2. In the declaration, the word "claim" was changed to "Notice."

Summary of Public Comment

10-BK-004. Erin Shank. Mortgage companies should be required to inform debtors of any charges assessed during bankruptcy. In one of her cases, the mortgagee paid property taxes without the debtor's knowledge, even though those taxes were being paid under the plan. Toward the end of the five-year plan, the lender sought to foreclose due to their payment of the taxes. It took over a year and six hearings to straighten the matter out (efforts handled pro bono by the attorney).

10-BK-027. National Association of Consumer Bankruptcy Attorneys (submitted by Henry Sommer). The Committee Note to Supplement 2 should state that creditors are not authorized to charge additional fees for sending a notice of a change in payments or the assessment of additional charges. Outside of bankruptcy, creditors cannot collect fees for such notices.

10-BK-032. Ellen Carlson. The mortgage forms that implement Rule 3002.1 should not be limited to use in chapter 13 cases. They should also apply in chapter 7 asset cases and chapter 11 cases.

12b-004609

12b-004610

B25A (Official Form 25A) (12/11)

United States Bankruptcy Court
_____ District of _____

In re_____, Case No. _____
Debtor

Small Business Case under Chapter 11

[NAME OF PROPONENT]'S PLAN OF REORGANIZATION, DATED [INSERT DATE]

ARTICLE I
SUMMARY

This Plan of Reorganization (the "Plan") under chapter 11 of the Bankruptcy Code (the "Code") proposes to pay creditors of [insert the name of the debtor] (the "Debtor") from [specify sources of payment, such as an infusion of capital, loan proceeds, sale of assets, cash flow from operations, or future income]**.**

This Plan provides for _____ classes of secured claims; _____ classes of unsecured claims; and _____ classes of equity security holders. Unsecured creditors holding allowed claims will receive distributions, which the proponent of this Plan has valued at approximately __ cents on the dollar. This Plan also provides for the payment of administrative and priority claims [if payment is not in full on the effective date of this Plan with respect to any such claim (to the extent permitted by the Code or the claimant's agreement), identify such claim and briefly summarize the proposed treatment.]

All creditors and equity security holders should refer to Articles III through VI of this Plan for information regarding the precise treatment of their claim. A disclosure statement that provides more detailed information regarding this Plan and the rights of creditors and equity security holders has been circulated with this Plan. **Your rights may be affected. You should read these papers carefully and discuss them with your attorney, if you have one. (If you do not have an attorney, you may wish to consult one.)**

ARTICLE II
CLASSIFICATION OF CLAIMS AND INTERESTS

2.01 Class 1. All allowed claims entitled to priority under § 507 of the Code (except administrative expense claims under § 507(a)(2), ["gap" period claims in an involuntary case under § 507(a)(3),] and priority tax claims under § 507(a)(8)).

2.02 Class 2. The claim of _____ , to the extent allowed as a secured claim under § 506 of the Code.

[Add other classes of secured creditors, if any. Note: Section 1129(a)(9)(D) of the Code provides that a secured tax claim which would otherwise meet the description of a priority tax claim under § 507(a)(8) of the Code is to be paid in the same manner and over the same period as prescribed in § 507(a)(8).]

2.03 Class 3. All unsecured claims allowed under § 502 of the Code.

[Add other classes of unsecured claims, if any.]

2.04 Class 4 . Equity interests of the Debtor. [If the Debtor is an individual, change this heading to "The interests of the individual Debtor in property of the estate."]

ARTICLE III
TREATMENT OF ADMINISTRATIVE EXPENSE CLAIMS, U.S. TRUSTEES FEES, AND PRIORITY TAX CLAIMS

3.01 Unclassified Claims. Under section §1123(a)(1), administrative expense claims, ["gap" period claims in an involuntary case allowed under § 502(f) of the Code,] and priority tax claims are not in classes.

3.02 Administrative Expense Claims. Each holder of an administrative expense claim allowed under § 503 of the Code [, and a "gap" claim in an involuntary case allowed under § 502(f) of the Code,] will be paid in full on the effective date of this Plan (as defined in Article VII), in cash, or upon such other terms as may be agreed upon by the holder of the claim and the Debtor.

3.03 Priority Tax Claims. Each holder of a priority tax claim will be paid [specify terms of treatment consistent with § 1129(a)(9)(C) of the Code].

3.04 United States Trustee Fees. All fees required to be paid by 28 U.S.C. §1930(a)(6) (U.S. Trustee Fees) will accrue and be timely paid until the case is closed, dismissed, or converted to another chapter of the Code. Any U.S. Trustee Fees owed on or before the effective date of this Plan will be paid on the effective date.

ARTICLE IV
TREATMENT OF CLAIMS AND INTERESTS UNDER THE PLAN

4.01 Claims and interests shall be treated as follows under this Plan:

Class	Impairment	Treatment
Class 1 - Priority Claims	[State whether impaired or unimpaired.]	[Insert treatment of priority claims in this Class, including the form, amount and timing of distribution, if any. For example: "Class 1 is unimpaired by this Plan, and each holder of a Class 1 Priority Claim will be paid in full, in cash, upon the later of the effective date of this Plan as defined in Article VII, or the date on which such claim is allowed by a final non-appealable order. Except: _____."]
Class 2 – Secured Claim of [Insert name of secured creditor.]	[State whether impaired or unimpaired.]	[Insert treatment of secured claim in this Class, including the form, amount and timing of distribution, if any.] [Add class[es] of secured claims if applicable]
Class 3 - General Unsecured Creditors	[State whether impaired or unimpaired.]	[Insert treatment of unsecured creditors in this Class, including the form, amount and timing of distribution, if any.] [Add administrative convenience class if applicable]
Class 4 - Equity Security Holders of the Debtor	[State whether impaired or unimpaired.]	[Insert treatment of equity security holders in this Class, including the form, amount and timing of distribution, if any.]

ARTICLE V
ALLOWANCE AND DISALLOWANCE OF CLAIMS

5.01 Disputed Claim. A disputed claim is a claim that has not been allowed or disallowed [by a final non-appealable order], and as to which either: (i) a proof of claim has been filed or deemed filed, and the Debtor or another party in interest has filed an objection; or (ii) no proof of claim has been filed, and the Debtor has scheduled such claim as disputed, contingent, or unliquidated.

5.02 Delay of Distribution on a Disputed Claim. No distribution will be made on account of a disputed claim unless such claim is allowed [by a final non-appealable order].

5.03 Settlement of Disputed Claims. The Debtor will have the power and authority to settle and compromise a disputed claim with court approval and compliance with Rule 9019 of the Federal Rules of Bankruptcy Procedure.

ARTICLE VI
PROVISIONS FOR EXECUTORY CONTRACTS AND UNEXPIRED LEASES

6.01 Assumed Executory Contracts and Unexpired Leases.

(a) The Debtor assumes the following executory contracts and/or unexpired leases effective upon the [Insert "effective date of this Plan as provided in Article VII," "the date of the entry of the order confirming this Plan," or other applicable date]:

[List assumed executory contracts and/or unexpired leases.]

(b) The Debtor will be conclusively deemed to have rejected all executory contracts and/or unexpired leases not expressly assumed under section 6.01(a) above, or before the date of the order confirming this Plan, upon the [Insert "effective date of this Plan," "the date of the entry of the order confirming this Plan," or other applicable date]. A proof of a claim arising from the rejection of an executory contract or unexpired lease under this section must be filed no later than _____ (___) days after the date of the order confirming this Plan.

ARTICLE VII
MEANS FOR IMPLEMENTATION OF THE PLAN

[Insert here provisions regarding how the plan will be implemented as required under §1123(a)(5) of the Code. For example, provisions may include those that set out how the plan will be funded, as well as who will be serving as directors, officers or voting trustees of the reorganized debtor.]

ARTICLE VIII
GENERAL PROVISIONS

8.01 Definitions and Rules of Construction. The definitions and rules of construction set forth in §§ 101 and 102 of the Code shall apply when terms defined or construed in the Code are used in this Plan, and they are supplemented by the following definitions: [Insert additional definitions if necessary].

8.02 Effective Date of Plan. The effective date of this Plan is the first business day following the date that is fourteen days after the entry of the order of confirmation. If, however, a stay of the confirmation order is in effect on that date, the effective date will be the first business day after the date on which the stay of the confirmation order expires or is otherwise terminated.

8.03 Severability. If any provision in this Plan is determined to be unenforceable, the determination will in no way limit or affect the enforceability and operative effect of any other provision of this Plan.

8.04 Binding Effect. The rights and obligations of any entity named or referred to in this Plan will be binding upon, and will inure to the benefit of the successors or assigns of such entity.

8.05 Captions. The headings contained in this Plan are for convenience of reference only and do not affect the meaning or interpretation of this Plan.

[8.06 Controlling Effect. Unless a rule of law or procedure is supplied by federal law (including the Code or the Federal Rules of Bankruptcy Procedure), the laws of the State of _____ govern this Plan and any agreements, documents, and instruments executed in connection with this Plan, except as otherwise provided in this Plan.]

[8.07 Corporate Governance. [If the Debtor is a corporation include provisions required by § 1123(a)(6) of the Code.]]

ARTICLE IX
DISCHARGE

[If the Debtor is not entitled to discharge under 11 U.S.C. § 1141(d)(3) change this heading to "**NO DISCHARGE OF DEBTOR**."]

9.01. **[Option 1 – If Debtor is an individual and § 1141(d)(3) is not applicable]**
Discharge. Confirmation of this Plan does not discharge any debt provided for in this Plan until the court grants a discharge on completion of all payments under this Plan, or as otherwise provided in § 1141(d)(5) of the Code. The Debtor will not be discharged from any debt excepted from discharge under § 523 of the Code, except as provided in Rule 4007(c) of the Federal Rules of Bankruptcy Procedure.

[Option 2 -- If the Debtor is a partnership and section 1141(d)(3) of the Code is not applicable]
Discharge. On the confirmation date of this Plan, the debtor will be discharged from any debt that arose before confirmation of this Plan, subject to the occurrence of the effective date, to the extent specified in § 1141(d)(1)(A) of the Code. The Debtor will not be discharged from any debt imposed by this Plan.

[Option 3 -- If the Debtor is a corporation and § 1141(d)(3) is not applicable]

Discharge. On the confirmation date of this Plan, the debtor will be discharged from any debt that arose before confirmation of this Plan, subject to the occurrence of the effective date, to the extent specified in § 1141(d)(1)(A) of the Code, except that the Debtor will not be discharged of any debt: (i) imposed by this Plan; (ii) of a kind specified in § 1141(d)(6)(A) if a timely complaint was filed in accordance with Rule 4007(c) of the Federal Rules of Bankruptcy Procedure; or (iii) of a kind specified in § 1141(d)(6)(B).

[Option 4 – If § 1141(d)(3) is applicable]

No Discharge. In accordance with § 1141(d)(3) of the Code, the Debtor will not receive any discharge of debt in this bankruptcy case.

ARTICLE X
OTHER PROVISIONS

[Insert other provisions, as applicable.]

Respectfully submitted,

By: _____
The Plan Proponent

By:_____
Attorney for the Plan Proponent

12b-004619

12b-004620

COMMITTEE NOTE

Provision 8.02 of Article VIII of the form, which specifies the plan's effective date, is amended to reflect the change in the time periods of Rules 3020(e) and 8002(a) for a stay of the confirmation order and the filing of a notice of appeal. As of December 1, 2009, both time periods were increased from ten to fourteen days. The effective date of the plan will generally be the first business day after those time periods expire. Accordingly, the effective date of the plan is extended to the first business day following the date that is fourteen days after the entry of the order of confirmation. If, however, a stay of the confirmation order remains in effect on the specified effective date, the plan will instead go into effect on the first business day after the stay expires or is terminated, so long as the order of confirmation has not been vacated.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

No comments were submitted on this amendment.

12b-004623

12b-004624

Appendix B

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

For Publication for Public Comment

Rule 1007. Lists, Schedules, Statements, and Other Documents; Time Limits**

* * * * *

(b) SCHEDULES, STATEMENTS, AND OTHER DOCUMENTS REQUIRED.

* * * * *

(7) Unless an approved provider of an instructional course concerning personal financial management has notified the court that a debtor has completed the course after filing the petition:

(A) An individual debtor in a chapter 7 or chapter 13 case shall file a statement of completion of the ~~a~~ course ~~concerning personal financial management~~, prepared as prescribed by the appropriate Official Form~~.~~; and

(B) An individual debtor in a chapter 11 case shall file the statement ~~in a chapter 11 case in which~~ if

---

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

** In addition to the amendment of Rules 1007(b) and 5009(b), Official Form 23 would be amended to clarify that the debtor should not file the form if the provider of a personal financial management course has already notified the court of the debtor's completion of the course.

§ 1141(d)(3) applies.

COMMITTEE NOTE

Subdivision (b)(7) is amended to relieve an individual debtor of the obligation to file a statement of completion of a personal financial management course if the course provider notifies the court that the debtor has completed the course. Course providers approved under § 111 of the Code may be permitted to file this notification electronically with the court immediately upon the debtor's completion of the course. If the provider does not notify the court, the debtor must file the statement, prepared as prescribed by the appropriate Official Form, within the time period specified by subdivision (c).

Rule 3007. Objections to Claim

(a) ~~OBJECTIONS TO CLAIMS~~ TIME AND MANNER OF SERVICE. An objection to the allowance of a claim and a notice of objection that conforms substantially to the appropriate Official Form shall be ~~in writing and~~ filed and served at least 30 days before any scheduled hearing on the objection or any deadline for the claimant to request a hearing. The objection and notice shall be served as follows:

(1) on the claimant, by first-class mail addressed to the person most recently designated on the original or amended proof of claim as the person to receive notices, at the address so indicated; and

(A) if the objection is to a claim of the United States or any of its officers or agencies, in the manner provided for serving a summons and complaint by Rule 7004(b)(4)

15 or (5); or

16 (B) if the objection is to a claim or an

17 insured depository institution, according to Rule 7004(h); and

18 (2) on the debtor or debtor in possession and the

19 trustee by first-class mail or other permitted means.

20 ~~A copy of the objection with notice of the hearing thereon shall be~~

21 ~~mailed or otherwise delivered to the claimant, the debtor or debtor~~

22 ~~in possession, and the trustee at least 30 days prior to the hearing.~~

23 * * * * *

COMMITTEE NOTE

Subdivision (a) is amended to specify the manner in which an objection to a claim and notice of the objection must be served. It clarifies that Rule 7004 does not apply to the service of most claim objections. Instead, a claimant must be served by first-class mail sent to the person that the claimant most recently designated on its proof of claim to receive notices, at the address so indicated. If, however, the claimant is the United States, an officer or agency of the United States, or an insured depository institution, service must also be made according to the method prescribed by the appropriate provision of Rule 7004. The service methods for the depository institutions are statutorily mandated, and the size and dispersal of the decision-making and litigation authority of the federal government necessitate service on the appropriate United States attorney's office and the Attorney General, as well as the person designated on the proof of claim.

As amended, subdivision (a) no longer requires that a hearing be scheduled or held on every objection. The rule requires the objecting party to provide notice and an opportunity for a hearing on the objection, but, by deleting from the subdivision references to "the hearing," it permits local practices that require a claimant to timely request a hearing or file a response in order to obtain a hearing. The official notice form served with a copy of the objection will inform the claimant of any actions it must take.

Rule 5009. Closing Chapter 7 Liquidation, Chapter 12 Family Farmer's Debt Adjustment, Chapter 13 Individual's Debt Adjustment, and Chapter 15 Ancillary and Cross-Border Cases

* * * * *

(b) NOTICE OF FAILURE TO FILE RULE 1007(b)(7) STATEMENT. If an individual debtor in a chapter 7 or 13 case is required to ~~has not~~ file~~d~~ ~~the~~ a statement under ~~required by~~ Rule 1007(b)(7) and fails to do so within 45 days after the first date set for the meeting of creditors under § 341(a) of the Code, the clerk shall promptly notify the debtor that the case will be closed without entry of a discharge unless the required statement is filed within the applicable time limit under Rule 1007(c).

* * * * *

COMMITTEE NOTE

Subdivision (b) is amended to conform to the amendment of Rule 1007(b)(7). Rule 1007(b)(7) relieves an individual debtor of the obligation to file a statement of completion of a personal financial management course if the course provider notifies the court that the debtor has completed the course. The clerk's duty under subdivision (b) to notify the debtor of the possible closure of the case without discharge if the statement is not timely filed therefore applies only if the course provider has not already notified the court of the debtor's completion of the course.

Rule 9006. Computing and Extending Time; Time for Motion Papers

* * * * *

(d) ~~FOR~~ MOTION~~S~~ PAPERS~~ AFFIDAVITS~~. A written motion, other than one which may be heard ex parte, and notice of any hearing shall be served not later than seven days before the time specified for such hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion. ~~and, e~~Except as otherwise provided in Rule 9023, ~~opposing affidavits~~ any written response shall ~~may~~ be served not later than one day before the hearing, unless the court permits otherwise~~them to be served at some other time~~.

* * * * *

COMMITTEE NOTE

The title of this rule is amended to draw attention to the fact that it prescribes time limits for the service of motion papers. These time periods apply unless another Bankruptcy Rule or a court order, including a local rule, prescribes different time periods. Rules 9013 and 9014 should also be consulted regarding motion practice. Rule 9013 governs the form of motions and the parties who must be served. Rule 9014 prescribes the procedures applicable to contested matters, including the method of serving motions commencing contested matters and subsequent papers.

Subdivision (d) is amended to apply to any written response to a motion, rather than just to opposing affidavits. The caption of the subdivision is amended to reflect this change. Other changes are stylistic.

Rule 9013. Motions: Form and Service

A request for an order, except when an application is authorized by the rules, shall be by written motion, unless made during a hearing. The motion shall state with particularity the grounds therefor, and shall set forth the relief or order sought. Every written motion, other than one which may be considered ex parte, shall be served by the moving party within the time determined under Rule 9006(d). The moving party shall serve the motion on:

(a) the trustee or debtor in possession and on those entities specified by these rules; or

(b) the entities the court directs if these rules do not require service or specify the entities to be served ~~if service is not required or the entities to be served are not specified by these rules, the moving party shall serve the entities the court directs~~.

* * * * *

COMMITTEE NOTE

A cross-reference to Rule 9006(d) is added to this rule to call attention to the time limits for the service of motions, supporting affidavits, and written responses to motions. Rule 9006(d) prescribes time limits that apply unless other limits are fixed by these rules, a court order, or a local rule. The other changes are stylistic.

Rule 9014. Contested Matters

* * * * *

1 (b) SERVICE. The motion shall be served in the manner
2 provided for service of a summons and complaint by Rule 7004
3 <u>and within the time determined under Rule 9006(d). Any written</u>
4 <u>response to the motion shall be served within the time determined</u>
5 <u>under Rule 9006(d).</u> Any paper served after the motion shall be
6 served in the manner provided by Rule 5(b) F.R. Civ. P.

* * * * *

COMMITTEE NOTE

A cross-reference to Rule 9006(d) is added to subdivision (b) to call attention to the time limits for the service of motions, supporting affidavits, and written responses to motions. Rule 9006(d) prescribes time limits that apply unless other limits are fixed by these rules, a court order, or a local rule.

12b-004633

12b-004634

In re _____, **Case No. _____**
Debtor **(If known)**

SCHEDULE C - PROPERTY CLAIMED AS EXEMPT

Debtor claims the exemptions to which debtor is entitled under:
(Check one box)
□ 11 U.S.C. § 522(b)(2)
□ 11 U.S.C. § 522(b)(3)

□ Check if debtor claims a homestead exemption that exceeds $146,450.*

DESCRIPTION OF PROPERTY	CURRENT MARKET VALUE OF PROPERTY WITHOUT DEDUCTING EXEMPTIONS	SPECIFY LAW PROVIDING EACH EXEMPTION	VALUE OF CLAIMED EXEMPTION (Check only one box for each exemption.)
			❏ Exemption limited to $_____ ❏ Full fair market value of the exempted property
			❏ Exemption limited to $_____ ❏ Full fair market value of the exempted property
			❏ Exemption limited to $_____ ❏ Full fair market value of the exempted property
			❏ Exemption limited to $_____ ❏ Full fair market value of the exempted property
			❏ Exemption limited to $_____ ❏ Full fair market value of the exempted property
			❏ Exemption limited to $_____ ❏ Full fair market value of the exempted property
			❏ Exemption limited to $_____ ❏ Full fair market value of the exempted property
			❏ Exemption limited to $_____ ❏ Full fair market value of the exempted property

* *Amount subject to adjustment on 4/1/13, and every three years thereafter with respect to cases commenced on or after the date of adjustment.*

COMMITTEE NOTE

Schedule C—Property Claimed As Exempt—is amended to provide the option of declaring as exempt the full fair market value of property. This option, suggested by the Supreme Court in *Schwab v. Reilly*, 130 S. Ct. 2652, 2668 (2010), allows a debtor to state the intent to exempt the entire value of property, even if that value is found to be greater than the debtor's estimate of the property value. Alternatively, as under the prior version of Schedule C, a debtor may claim an exemption limited to a certain dollar amount.

The amendment also rearranges the order of the columns in Schedule C so that the column for the current market value of the property follows the description of the property.

12b-004637

12b-004638

UNITED STATES BANKRUPTCY COURT

_____ DISTRICT OF _____

In re:_____ _____, Case No. _____
Debtor (if known)

STATEMENT OF FINANCIAL AFFAIRS

This statement is to be completed by every debtor. Spouses filing a joint petition may file a single statement on which the information for both spouses is combined. If the case is filed under chapter 12 or chapter 13, a married debtor must furnish information for both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed. An individual debtor engaged in business as a sole proprietor, partner, family farmer, or self-employed professional, should provide the information requested on this statement concerning all such activities as well as the individual's personal affairs. To indicate payments, transfers and the like to minor children, state the child's initials and the name and address of the child's parent or guardian, such as "A.B., a minor child, by John Doe, guardian." Do not disclose the child's name. See, 11 U.S.C. §112 and Fed. R. Bankr. P. 1007(m).

Questions 1 - 18 are to be completed by all debtors. Debtors that are or have been in business, as defined below, also must complete Questions 19 - 25. **If the answer to an applicable question is "None," mark the box labeled "None."** If additional space is needed for the answer to any question, use and attach a separate sheet properly identified with the case name, case number (if known), and the number of the question.

DEFINITIONS

"In business." A debtor is "in business" for the purpose of this form if the debtor is a corporation or partnership. An individual debtor is "in business" for the purpose of this form if the debtor is or has been, within six years immediately preceding the filing of this bankruptcy case, any of the following: an officer, director, managing executive, or owner of 5 percent or more of the voting or equity securities of a corporation; a partner, other than a limited partner, of a partnership; a sole proprietor or self-employed full-time or part-time. An individual debtor also may be “in business” for the purpose of this form if the debtor engages in a trade, business, or other activity, other than as an employee, to supplement income from the debtor’s primary employment.

"Insider." The term "insider" includes but is not limited to: relatives of the debtor; general partners of the debtor and their relatives; corporations of which the debtor is an officer, director, or person in control; officers, directors, and any persons in control of a corporate debtor and their relatives; affiliates of the debtor and insiders of such affiliates; and any managing agent of the debtor. 11 U.S.C. § 101(2), (31).

---

1. Income from employment or operation of business

None ☐

State the gross amount of income the debtor has received from employment, trade, or profession, or from operation of the debtor's business, including part-time activities either as an employee or in independent trade or business, from the beginning of this calendar year to the date this case was commenced. State also the gross amounts received during the **two years** immediately preceding this calendar year. (A debtor that maintains, or has maintained, financial records on the basis of a fiscal rather than a calendar year may report fiscal year income. Identify the beginning and ending dates of the debtor's fiscal year.) If a joint petition is filed, state income for each spouse separately. (Married debtors filing under chapter 12 or chapter 13 must state income of both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

AMOUNT SOURCE

2. Income other than from employment or operation of business

None ☐

State the amount of income received by the debtor other than from employment, trade, profession, operation of the debtor's business during the **two years** immediately preceding the commencement of this case. Give particulars. If a joint petition is filed, state income for each spouse separately. (Married debtors filing under chapter 12 or chapter 13 must state income for each spouse whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

AMOUNT	SOURCE

---

3. Payments to creditors

Complete a. or b., as appropriate, and c.

None ☐

a. *Individual or joint debtor(s) with primarily consumer debts:* List all payments on loans, installment purchases of goods or services, and other debts to any creditor made within **90 days** immediately preceding the commencement of this case unless the aggregate value of all property that constitutes or is affected by such transfer is less than $600. Indicate with an asterisk (*) any payments that were made to a creditor on account of a domestic support obligation or as part of an alternative repayment schedule under a plan by an approved nonprofit budgeting and credit counseling agency. (Married debtors filing under chapter 12 or chapter 13 must include payments by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR	DATES OF PAYMENTS	AMOUNT PAID	AMOUNT STILL OWING

None ☐

b. Debtor whose debts are not primarily consumer debts: List each payment or other transfer to any creditor made within **90 days** immediately preceding the commencement of the case unless the aggregate value of all property that constitutes or is affected by such transfer is less than $5,850*. If the debtor is an individual, indicate with an asterisk (*) any payments that were made to a creditor on account of a domestic support obligation or as part of an alternative repayment schedule under a plan by an approved nonprofit budgeting and credit counseling agency. (Married debtors filing under chapter 12 or chapter 13 must include payments and other transfers by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR	DATES OF PAYMENTS/ TRANSFERS	AMOUNT PAID OR VALUE OF TRANSFERS	AMOUNT STILL OWING

**Amount subject to adjustment on 4/01/13, and every three years thereafter with respect to cases commenced on or after the date of adjustment.*

None ☐ c. *All debtors:* List all payments made within **one year** immediately preceding the commencement of this case to or for the benefit of creditors who are or were insiders. (Married debtors filing under chapter 12 or chapter 13 must include payments by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR AND RELATIONSHIP TO DEBTOR	DATE OF PAYMENT	AMOUNT PAID	AMOUNT STILL OWING

4. Suits and administrative proceedings, executions, garnishments and attachments

None ☐ a. List all suits and administrative proceedings to which the debtor is or was a party within **one year** immediately preceding the filing of this bankruptcy case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

CAPTION OF SUIT AND CASE NUMBER	NATURE OF PROCEEDING	COURT OR AGENCY AND LOCATION	STATUS OR DISPOSITION

None ☐ b. Describe all property that has been attached, garnished or seized under any legal or equitable process within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning property of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF PERSON FOR WHOSE BENEFIT PROPERTY WAS SEIZED	DATE OF SEIZURE	DESCRIPTION AND VALUE OF PROPERTY

5. Repossessions, foreclosures and returns

None ☐ List all property that has been repossessed by a creditor, sold at a foreclosure sale, transferred through a deed in lieu of foreclosure or returned to the seller, within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning property of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR OR SELLER	DATE OF REPOSSESSION, FORECLOSURE SALE, TRANSFER OR RETURN	DESCRIPTION AND VALUE OF PROPERTY

6. Assignments and receiverships

None ☐ a. Describe any assignment of property for the benefit of creditors made within **120 days** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include any assignment by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF ASSIGNEE	DATE OF ASSIGNMENT	TERMS OF ASSIGNMENT OR SETTLEMENT

None ☐ b. List all property which has been in the hands of a custodian, receiver, or court-appointed official within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning property of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CUSTODIAN	NAME AND LOCATION OF COURT CASE TITLE & NUMBER	DATE OF ORDER	DESCRIPTION AND VALUE Of PROPERTY

7. Gifts

None ☐ List all gifts or charitable contributions made within **one year** immediately preceding the commencement of this case except ordinary and usual gifts to family members aggregating less than $200 in value per individual family member and charitable contributions aggregating less than $100 per recipient. (Married debtors filing under chapter 12 or chapter 13 must include gifts or contributions by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF PERSON OR ORGANIZATION	RELATIONSHIP TO DEBTOR, IF ANY	DATE OF GIFT	DESCRIPTION AND VALUE OF GIFT

8. Losses

None ☐ List all losses from fire, theft, other casualty or gambling within **one year** immediately preceding the commencement of this case **or since the commencement of this case**. (Married debtors filing under chapter 12 or chapter 13 must include losses by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

DESCRIPTION AND VALUE OF PROPERTY	DESCRIPTION OF CIRCUMSTANCES AND, IF LOSS WAS COVERED IN WHOLE OR IN PART BY INSURANCE, GIVE PARTICULARS	DATE OF LOSS

9. Payments related to debt counseling or bankruptcy

None ☐

List all payments made or property transferred by or on behalf of the debtor to any persons, including attorneys, for consultation concerning debt consolidation, relief under the bankruptcy law or preparation of a petition in bankruptcy within **one year** immediately preceding the commencement of this case.

NAME AND ADDRESS OF PAYEE	DATE OF PAYMENT, NAME OF PAYER IF OTHER THAN DEBTOR	AMOUNT OF MONEY OR DESCRIPTION AND VALUE OF PROPERTY

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10. Other transfers

None ☐

a. List all other property, other than property transferred in the ordinary course of the business or financial affairs of the debtor, transferred either absolutely or as security within **two years** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include transfers by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF TRANSFEREE, RELATIONSHIP TO DEBTOR	DATE	DESCRIBE PROPERTY TRANSFERRED AND VALUE RECEIVED

None ☐

b. List all property transferred by the debtor within **ten years** immediately preceding the commencement of this case to a self-settled trust or similar device of which the debtor is a beneficiary.

NAME OF TRUST OR OTHER DEVICE	DATE(S) OF TRANSFER(S)	AMOUNT OF MONEY OR DESCRIPTION AND VALUE OF PROPERTY OR DEBTOR'S INTEREST IN PROPERTY

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11. Closed financial accounts

None ☐

List all financial accounts and instruments held in the name of the debtor or for the benefit of the debtor which were closed, sold, or otherwise transferred within **one year** immediately preceding the commencement of this case. Include checking, savings, or other financial accounts, certificates of deposit, or other instruments; shares and share accounts held in banks, credit unions, pension funds, cooperatives, associations, brokerage houses and other financial institutions. (Married debtors filing under chapter 12 or chapter 13 must include information concerning accounts or instruments held by or for either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF INSTITUTION	TYPE OF ACCOUNT, LAST FOUR DIGITS OF ACCOUNT NUMBER, AND AMOUNT OF FINAL BALANCE	AMOUNT AND DATE OF SALE OR CLOSING

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12. Safe deposit boxes

None ☐

List each safe deposit or other box or depository in which the debtor has or had securities, cash, or other valuables within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include boxes or depositories of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF BANK OR OTHER DEPOSITORY	NAMES AND ADDRESSES OF THOSE WITH ACCESS TO BOX OR DEPOSITORY	DESCRIPTION OF CONTENTS	DATE OF TRANSFER OR SURRENDER, IF ANY

13. Setoffs

None ☐

List all setoffs made by any creditor, including a bank, against a debt or deposit of the debtor within **90 days** preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR	DATE OF SETOFF	AMOUNT OF SETOFF

14. Property held for another person

None ☐

List all property owned by another person that the debtor holds or controls.

NAME AND ADDRESS OF OWNER	DESCRIPTION AND VALUE OF PROPERTY	LOCATION OF PROPERTY

15. Prior address of debtor

None ☐

If debtor has moved within **three years** immediately preceding the commencement of this case, list all premises which the debtor occupied during that period and vacated prior to the commencement of this case. If a joint petition is filed, report also any separate address of either spouse.

ADDRESS	NAME USED	DATES OF OCCUPANCY

16. Spouses and Former Spouses

None ☐ If the debtor resides or resided in a community property state, commonwealth, or territory (including Alaska, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington, or Wisconsin) within **eight years** immediately preceding the commencement of the case, identify the name of the debtor's spouse and of any former spouse who resides or resided with the debtor in the community property state.

NAME

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17. Environmental Information.

For the purpose of this question, the following definitions apply:

"Environmental Law" means any federal, state, or local statute or regulation regulating pollution, contamination, releases of hazardous or toxic substances, wastes or material into the air, land, soil, surface water, groundwater, or other medium, including, but not limited to, statutes or regulations regulating the cleanup of these substances, wastes, or material.

"Site" means any location, facility, or property as defined under any Environmental Law, whether or not presently or formerly owned or operated by the debtor, including, but not limited to, disposal sites.

"Hazardous Material" means anything defined as a hazardous waste, hazardous substance, toxic substance, hazardous material, pollutant, or contaminant or similar term under an Environmental Law.

None ☐ a. List the name and address of every site for which the debtor has received notice in writing by a governmental unit that it may be liable or potentially liable under or in violation of an Environmental Law. Indicate the governmental unit, the date of the notice, and, if known, the Environmental Law:

SITE NAME AND ADDRESS	NAME AND ADDRESS OF GOVERNMENTAL UNIT	DATE OF NOTICE	ENVIRONMENTAL LAW

None ☐ b. List the name and address of every site for which the debtor provided notice to a governmental unit of a release of Hazardous Material. Indicate the governmental unit to which the notice was sent and the date of the notice.

SITE NAME AND ADDRESS	NAME AND ADDRESS OF GOVERNMENTAL UNIT	DATE OF NOTICE	ENVIRONMENTAL LAW

None ☐ c. List all judicial or administrative proceedings, including settlements or orders, under any Environmental Law with respect to which the debtor is or was a party. Indicate the name and address of the governmental unit that is or was a party to the proceeding, and the docket number.

NAME AND ADDRESS OF GOVERNMENTAL UNIT	DOCKET NUMBER	STATUS OR DISPOSITION

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18 . Nature, location and name of business

None ☐ a. *If the debtor is an individual*, list the names, addresses, taxpayer-identification numbers, nature of the businesses, and beginning and ending dates of all businesses in which the debtor was an officer, director, partner, or managing executive of a corporation, partner in a partnership, sole proprietor, or was self-employed in a trade, profession, or

other activity either full- or part-time within **six years** immediately preceding the commencement of this case, or in which the debtor owned 5 percent or more of the voting or equity securities within **six years** immediately preceding the commencement of this case.

If the debtor is a partnership, list the names, addresses, taxpayer-identification numbers, nature of the businesses, and beginning and ending dates of all businesses in which the debtor was a partner or owned 5 percent or more of the voting or equity securities, within **six years** immediately preceding the commencement of this case.

If the debtor is a corporation, list the names, addresses, taxpayer-identification numbers, nature of the businesses, and beginning and ending dates of all businesses in which the debtor was a partner or owned 5 percent or more of the voting or equity securities within **six years** immediately preceding the commencement of this case.

NAME	LAST FOUR DIGITS OF SOCIAL-SECURITY OR OTHER INDIVIDUAL TAXPAYER-I.D. NO. (ITIN)/ COMPLETE EIN	ADDRESS	NATURE OF BUSINESS	BEGINNING AND ENDING DATES

None ☐ b. Identify any business listed in response to subdivision a., above, that is "single asset real estate" as defined in 11 U.S.C. § 101.

NAME	ADDRESS

The following questions are to be completed by every debtor that is a corporation or partnership and by any individual debtor who is or has been, within **six years** immediately preceding the commencement of this case, any of the following: an officer, director, managing executive, or owner of more than 5 percent of the voting or equity securities of a corporation; a partner, other than a limited partner, of a partnership, a sole proprietor, or self-employed in a trade, profession, or other activity, either full- or part-time.

*(An individual or joint debtor should complete this portion of the statement **only** if the debtor is or has been in business, as defined above, within six years immediately preceding the commencement of this case. A debtor who has not been in business within those six years should go directly to the signature page.)*

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19. Books, records and financial statements

None ☐ a. List all bookkeepers and accountants who within **two years** immediately preceding the filing of this bankruptcy case kept or supervised the keeping of books of account and records of the debtor.

NAME AND ADDRESS	DATES SERVICES RENDERED

None ☐ b. List all firms or individuals who within **two years** immediately preceding the filing of this bankruptcy case have audited the books of account and records, or prepared a financial statement of the debtor.

NAME	ADDRESS	DATES SERVICES RENDERED

None ☐ c. List all firms or individuals who at the time of the commencement of this case were in possession of the books of account and records of the debtor. If any of the books of account and records are not available, explain.

NAME	ADDRESS

None ☐ d. List all financial institutions, creditors and other parties, including mercantile and trade agencies, to whom a financial statement was issued by the debtor within **two years** immediately preceding the commencement of this case.

NAME AND ADDRESS	DATE ISSUED

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20. Inventories

None ☐ a. List the dates of the last two inventories taken of your property, the name of the person who supervised the taking of each inventory, and the dollar amount and basis of each inventory.

DATE OF INVENTORY	INVENTORY SUPERVISOR	DOLLAR AMOUNT OF INVENTORY (Specify cost, market or other basis)

None ☐ b. List the name and address of the person having possession of the records of each of the inventories reported in a., above.

DATE OF INVENTORY	NAME AND ADDRESSES OF CUSTODIAN OF INVENTORY RECORDS

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21 . Current Partners, Officers, Directors and Shareholders

None ☐ a. If the debtor is a partnership, list the nature and percentage of partnership interest of each member of the partnership.

NAME AND ADDRESS	NATURE OF INTEREST	PERCENTAGE OF INTEREST

None ☐ b. If the debtor is a corporation, list all officers and directors of the corporation, and each stockholder who directly or indirectly owns, controls, or holds 5 percent or more of the voting or equity securities of the corporation.

NAME AND ADDRESS	TITLE	NATURE AND PERCENTAGE OF STOCK OWNERSHIP

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22 . Former partners, officers, directors and shareholders

None ☐ a. If the debtor is a partnership, list each member who withdrew from the partnership within **one year** immediately preceding the commencement of this case.

NAME	ADDRESS	DATE OF WITHDRAWAL

None ☐ b. If the debtor is a corporation, list all officers or directors whose relationship with the corporation terminated within **one year** immediately preceding the commencement of this case.

NAME AND ADDRESS	TITLE	DATE OF TERMINATION

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23 . Withdrawals from a partnership or distributions by a corporation

None ☐ If the debtor is a partnership or corporation, list all withdrawals or distributions credited or given to an insider, including compensation in any form, bonuses, loans, stock redemptions, options exercised and any other perquisite during **one year** immediately preceding the commencement of this case.

NAME & ADDRESS OF RECIPIENT, RELATIONSHIP TO DEBTOR	DATE AND PURPOSE OF WITHDRAWAL	AMOUNT OF MONEY OR DESCRIPTION AND VALUE OF PROPERTY

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24. Tax Consolidation Group.

None ☐ If the debtor is a corporation, list the name and federal taxpayer-identification number of the parent corporation of any consolidated group for tax purposes of which the debtor has been a member at any time within **six years** immediately preceding the commencement of the case.

NAME OF PARENT CORPORATION	TAXPAYER-IDENTIFICATION NUMBER (EIN)

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25. Pension Funds.

None ☐ If the debtor is not an individual, list the name and federal taxpayer-identification number of any pension fund to which the debtor, as an employer, has been responsible for contributing at any time within **six years** immediately preceding the commencement of the case.

NAME OF PENSION FUND	TAXPAYER-IDENTIFICATION NUMBER (EIN)

* * * * * *

[If completed by an individual or individual and spouse]

I declare under penalty of perjury that I have read the answers contained in the foregoing statement of financial affairs and any attachments thereto and that they are true and correct.

Date	_____	Signature of Debtor	_____
Date	_____	Signature of Joint Debtor (if any)	_____

[If completed on behalf of a partnership or corporation]

I declare under penalty of perjury that I have read the answers contained in the foregoing statement of financial affairs and any attachments thereto and that they are true and correct to the best of my knowledge, information and belief.

Date	_____	Signature	_____
		Print Name and Title	_____

[An individual signing on behalf of a partnership or corporation must indicate position or relationship to debtor.]

___continuation sheets attached

Penalty for making a false statement: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571

DECLARATION AND SIGNATURE OF NON-ATTORNEY BANKRUPTCY PETITION PREPARER (See 11 U.S.C. § 110)

I declare under penalty of perjury that: (1) I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110; (2) I prepared this document for compensation and have provided the debtor with a copy of this document and the notices and information required under 11 U.S.C. §§ 110(b), 110(h), and 342(b); and, (3) if rules or guidelines have been promulgated pursuant to 11 U.S.C. § 110(h) setting a maximum fee for services chargeable by bankruptcy petition preparers, I have given the debtor notice of the maximum amount before preparing any document for filing for a debtor or accepting any fee from the debtor, as required by that section.

Printed or Typed Name and Title, if any, of Bankruptcy Petition Preparer	Social-Security No. (Required by 11 U.S.C. § 110.)

If the bankruptcy petition preparer is not an individual, state the name, title (if any), address, and social-security number of the officer, principal, responsible person, or partner who signs this document.

Address

Signature of Bankruptcy Petition Preparer	Date

Names and Social-Security numbers of all other individuals who prepared or assisted in preparing this document unless the bankruptcy petition preparer is not an individual:

If more than one person prepared this document, attach additional signed sheets conforming to the appropriate Official Form for each person

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 18 U.S.C. § 156.

COMMITTEE NOTE

The definition of "insider" is amended to conform to the statutory definition of the term. See 11 U.S.C. § 101(31). Under the Code definition, ownership of 5% or more of the voting shares of a corporate debtor does not automatically make the owner an insider of the corporation. And in order to be an affiliate of the debtor and an insider on that basis, ownership or control of at least 20% of the outstanding voting securities of the debtor is required. 11 U.S.C. § 101(2). The phrase "any owner of 5% or more of the voting or equity securities" is therefore deleted. Because § 101(31) provides that a person in control of a debtor corporation is an insider, that term is substituted for the deleted phrase.

12b-004651

12b-004652

In re _____
Debtor(s)

Case Number: _____
(If known)

According to the information required to be entered on this statement (check one box as directed in Part I, III, or VI of this statement):

☐ **The presumption arises.**
☐ **The presumption does not arise.**
☐ **The presumption is temporarily inapplicable.**

CHAPTER 7 STATEMENT OF CURRENT MONTHLY INCOME AND MEANS-TEST CALCULATION

In addition to Schedules I and J, this statement must be completed by every individual chapter 7 debtor. If none of the exclusions in Part I applies, joint debtors may complete one statement only. If any of the exclusions in Part I applies, joint debtors should complete separate statements if they believe this is required by § 707(b)(2)(C).

Part I. MILITARY AND NON-CONSUMER DEBTORS

1A	**Disabled Veterans.** If you are a disabled veteran described in the Declaration in this Part 1A, (1) check the box at the beginning of the Declaration, (2) check the box for "The presumption does not arise" at the top of this statement, and (3) complete the verification in Part VIII. Do not complete any of the remaining parts of this statement. ☐ **Declaration of Disabled Veteran.** By checking this box, I declare under penalty of perjury that I am a disabled veteran (as defined in 38 U.S.C. § 3741(1)) whose indebtedness occurred primarily during a period in which I was on active duty (as defined in 10 U.S.C. § 101(d)(1)) or while I was performing a homeland defense activity (as defined in 32 U.S.C. §901(1)).
1B	**Non-consumer Debtors.** If your debts are not primarily consumer debts, check the box below and complete the verification in Part VIII. Do not complete any of the remaining parts of this statement. ☐ **Declaration of non-consumer debts.** By checking this box, I declare that my debts are not primarily consumer debts.
1C	**Reservists and National Guard Members; active duty or homeland defense activity.** Members of a reserve component of the Armed Forces and members of the National Guard who were called to active duty (as defined in 10 U.S.C. § 101(d)(1)) after September 11, 2001, for a period of at least 90 days, or who have performed homeland defense activity (as defined in 32 U.S.C. § 901(1)) for a period of at least 90 days, are excluded from all forms of means testing during the time of active duty or homeland defense activity and for 540 days thereafter (the "exclusion period"). If you qualify for this temporary exclusion, (1) check the appropriate boxes and complete any required information in the Declaration of Reservists and National Guard Members below, (2) check the box for "The presumption is temporarily inapplicable" at the top of this statement, and (3) complete the verification in Part VIII. **During your exclusion period you are not required to complete the balance of this form, but you must complete the form no later than 14 days after the date on which your exclusion period ends, unless the time for filing a motion raising the means test presumption expires in your case before your exclusion period ends.** ☐ **Declaration of Reservists and National Guard Members.** By checking this box and making the appropriate entries below, I declare that I am eligible for a temporary exclusion from means testing because, as a member of a reserve component of the Armed Forces or the National Guard a. ☐ I was called to active duty after September 11, 2001, for a period of at least 90 days and ☐ I remain on active duty /or/ ☐ I was released from active duty on _____, which is less than 540 days before this bankruptcy case was filed; OR b. ☐ I am performing homeland defense activity for a period of at least 90 days /or/ ☐ I performed homeland defense activity for a period of at least 90 days, terminating on _____, which is less than 540 days before this bankruptcy case was filed.

Part II. CALCULATION OF MONTHLY INCOME FOR § 707(b)(7) EXCLUSION

2	**Marital/filing status.** Check the box that applies and complete the balance of this part of this statement as directed. a. ☐ Unmarried. **Complete only Column A ("Debtor's Income") for Lines 3-11.** b. ☐ Married, not filing jointly, with declaration of separate households. By checking this box, debtor declares under penalty of perjury: "My spouse and I are legally separated under applicable non-bankruptcy law or my spouse and I are living apart other than for the purpose of evading the requirements of § 707(b)(2)(A) of the Bankruptcy Code." **Complete only Column A ("Debtor's Income") for Lines 3-11.** c. ☐ Married, not filing jointly, without the declaration of separate households set out in Line 2.b above. **Complete both Column A ("Debtor's Income") and Column B ("Spouse's Income") for Lines 3-11.** d. ☐ Married, filing jointly. **Complete both Column A ("Debtor's Income") and Column B ("Spouse's Income") for Lines 3-11.**		
	All figures must reflect average monthly income received from all sources, derived during the six calendar months prior to filing the bankruptcy case, ending on the last day of the month before the filing. If the amount of monthly income varied during the six months, you must divide the six-month total by six, and enter the result on the appropriate line.	**Column A Debtor's Income**	**Column B Spouse's Income**
3	**Gross wages, salary, tips, bonuses, overtime, commissions.**	$	$
4	**Income from the operation of a business, profession or farm.** Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 4. If you operate more than one business, profession or farm, enter aggregate numbers and provide details on an attachment. Do not enter a number less than zero. **Do not include any part of the business expenses entered on Line b as a deduction in Part V.** a. Gross receipts $ b. Ordinary and necessary business expenses $ c. Business income Subtract Line b from Line a	$	$
5	**Rent and other real property income.** Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 5. Do not enter a number less than zero. **Do not include any part of the operating expenses entered on Line b as a deduction in Part V.** a. Gross receipts $ b. Ordinary and necessary operating expenses $ c. Rent and other real property income Subtract Line b from Line a	$	$
6	**Interest, dividends and royalties.**	$	$
7	**Pension and retirement income.**	$	$
8	**Any amounts paid by another person or entity, on a regular basis, for the household expenses of the debtor or the debtor's dependents, including child support paid for that purpose.** Do not include alimony or separate maintenance payments or amounts paid by your spouse if Column B is completed. Each regular payment should be reported in only one column; if a payment is listed in Column A, do not report that payment in Column B.	$	$
9	**Unemployment compensation.** Enter the amount in the appropriate column(s) of Line 9. However, if you contend that unemployment compensation received by you or your spouse was a benefit under the Social Security Act, do not list the amount of such compensation in Column A or B, but instead state the amount in the space below: Unemployment compensation claimed to be a benefit under the Social Security Act — Debtor $ _____ — Spouse $ _____	$	$

10	**Income from all other sources.** Specify source and amount. If necessary, list additional sources on a separate page. **Do not include alimony or separate maintenance payments paid by your spouse if Column B is completed, but include all other payments of alimony or separate maintenance.** Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, crime against humanity, or as a victim of international or domestic terrorism. a. $ b. $ Total and enter on Line 10	$	$
11	**Subtotal of Current Monthly Income for § 707(b)(7).** Add Lines 3 thru 10 in Column A, and, if Column B is completed, add Lines 3 through 10 in Column B. Enter the total(s).	$	$
12	**Total Current Monthly Income for § 707(b)(7).** If Column B has been completed, add Line 11, Column A to Line 11, Column B, and enter the total. If Column B has not been completed, enter the amount from Line 11, Column A.	$	

Part III. APPLICATION OF § 707(b)(7) EXCLUSION

13	**Annualized Current Monthly Income for § 707(b)(7).** Multiply the amount from Line 12 by the number 12 and enter the result.	$
14	**Applicable median family income.** Enter the median family income for the applicable state and household size. (This information is available by family size at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) a. Enter debtor's state of residence: _____ b. Enter debtor's household size: _____	$
15	**Application of Section 707(b)(7).** Check the applicable box and proceed as directed. ☐ **The amount on Line 13 is less than or equal to the amount on Line 14.** Check the box for "The presumption does not arise" at the top of page 1 of this statement, and complete Part VIII; do not complete Parts IV, V, VI or VII. ☐ **The amount on Line 13 is more than the amount on Line 14.** Complete the remaining parts of this statement.	

Complete Parts IV, V, VI, and VII of this statement only if required. (See Line 15.)

Part IV. CALCULATION OF CURRENT MONTHLY INCOME FOR § 707(b)(2)

16	**Enter the amount from Line 12.**	$
17	**Marital adjustment.** If you checked the box at Line 2.c, enter on Line 17 the total of any income listed in Line 11, Column B that was NOT paid on a regular basis for the household expenses of the debtor or the debtor's dependents. Specify in the lines below the basis for excluding the Column B income (such as payment of the spouse's tax liability or the spouse's support of persons other than the debtor or the debtor's dependents) and the amount of income devoted to each purpose. If necessary, list additional adjustments on a separate page. If you did not check box at Line 2.c, enter zero. a. $ b. $ c. $ Total and enter on Line 17.	$
18	**Current monthly income for § 707(b)(2).** Subtract Line 17 from Line 16 and enter the result.	$

Part V. CALCULATION OF DEDUCTIONS FROM INCOME

Subpart A: Deductions under Standards of the Internal Revenue Service (IRS)

19A	**National Standards: food, clothing and other items.** Enter in Line 19A the "Total" amount from IRS National Standards for Food, Clothing and Other Items for the applicable number of persons. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) The applicable number of persons is the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.	$
19B	**National Standards: health care.** Enter in Line a1 below the amount from IRS National Standards for Out-of-Pocket Health Care for persons under 65 years of age, and in Line a2 the IRS National Standards for Out-of-Pocket Health Care for persons 65 years of age or older. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) Enter in Line b1 the applicable number of persons who are under 65 years of age, and enter in Line b2 the applicable number of persons who are 65 years of age or older. (The applicable number of persons in each age category is the number in that category that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.) Multiply Line a1 by Line b1 to obtain a total amount for persons under 65, and enter the result in Line c1. Multiply Line a2 by Line b2 to obtain a total amount for persons 65 and older, and enter the result in Line c2. Add Lines c1 and c2 to obtain a total health care amount, and enter the result in Line 19B.	$

Persons under 65 years of age			**Persons 65 years of age or older**		
a1.	Allowance per person		a2.	Allowance per person	
b1.	Number of persons		b2.	Number of persons	
c1.	Subtotal		c2.	Subtotal	

20A	**Local Standards: housing and utilities; non-mortgage expenses.** Enter the amount of the IRS Housing and Utilities Standards; non-mortgage expenses for the applicable county and family size. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court). The applicable family size consists of the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.	$
20B	**Local Standards: housing and utilities; mortgage/rent expense.** Enter, in Line a below, the amount of the IRS Housing and Utilities Standards; mortgage/rent expense for your county and family size (this information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court) (the applicable family size consists of the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support); enter on Line b the total of the Average Monthly Payments for any debts secured by your home, as stated in Line 42; subtract Line b from Line a and enter the result in Line 20B. **Do not enter an amount less than zero.**	$

a.	IRS Housing and Utilities Standards; mortgage/rental expense	$
b.	Average Monthly Payment for any debts secured by your home, if any, as stated in Line 42	$
c.	Net mortgage/rental expense	Subtract Line b from Line a.

21	**Local Standards: housing and utilities; adjustment.** If you contend that the process set out in Lines 20A and 20B does not accurately compute the allowance to which you are entitled under the IRS Housing and Utilities Standards, enter any additional amount to which you contend you are entitled, and state the basis for your contention in the space below: _____ _____ _____	$

22A	**Local Standards: transportation; vehicle operation/public transportation expense.** You are entitled to an expense allowance in this category regardless of whether you pay the expenses of operating a vehicle and regardless of whether you use public transportation. Check the number of vehicles for which you pay the operating expenses or for which the operating expenses are included as a contribution to your household expenses in Line 8. ☐ 0 ☐ 1 ☐ 2 or more. If you checked 0, enter on Line 22A the "Public Transportation" amount from IRS Local Standards: Transportation. If you checked 1 or 2 or more, enter on Line 22A the "Operating Costs" amount from IRS Local Standards: Transportation for the applicable number of vehicles in the applicable Metropolitan Statistical Area or Census Region. (These amounts are available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	$
22B	**Local Standards: transportation; additional public transportation expense.** If you pay the operating expenses for a vehicle and also use public transportation, and you contend that you are entitled to an additional deduction for your public transportation expenses, enter on Line 22B the "Public Transportation" amount from IRS Local Standards: Transportation. (This amount is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	$
23	**Local Standards: transportation ownership/lease expense; Vehicle 1.** Check the number of vehicles for which you claim an ownership/lease expense. (You may not claim an ownership/lease expense for more than two vehicles.) ☐ 1 ☐ 2 or more. Enter, in Line a below, the "Ownership Costs" for "One Car" from the IRS Local Standards: Transportation (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 1, as stated in Line 42; subtract Line b from Line a and enter the result in Line 23. **Do not enter an amount less than zero.**	
	a. IRS Transportation Standards, Ownership Costs — $	
	b. Average Monthly Payment for any debts secured by Vehicle 1, as stated in Line 42 — $	
	c. Net ownership/lease expense for Vehicle 1 — Subtract Line b from Line a.	$
24	**Local Standards: transportation ownership/lease expense; Vehicle 2.** Complete this Line only if you checked the "2 or more" Box in Line 23. Enter, in Line a below, the "Ownership Costs" for "One Car" from the IRS Local Standards: Transportation (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 2, as stated in Line 42; subtract Line b from Line a and enter the result in Line 24. **Do not enter an amount less than zero.**	
	a. IRS Transportation Standards, Ownership Costs — $	
	b. Average Monthly Payment for any debts secured by Vehicle 2, as stated in Line 42 — $	
	c. Net ownership/lease expense for Vehicle 2 — Subtract Line b from Line a.	$
25	**Other Necessary Expenses: taxes.** Enter the total average monthly expense that you actually incur for all federal, state and local taxes, other than real estate and sales taxes, such as income taxes, self-employment taxes, social-security taxes, and Medicare taxes. **Do not include real estate or sales taxes.**	$
26	**Other Necessary Expenses: involuntary deductions for employment.** Enter the total average monthly payroll deductions that are required for your employment, such as retirement contributions, union dues, and uniform costs. **Do not include discretionary amounts, such as voluntary 401(k) contributions.**	$
27	**Other Necessary Expenses: life insurance.** Enter total average monthly premiums that you actually pay for term life insurance for yourself. **Do not include premiums for insurance on your dependents, for whole life or for any other form of insurance.**	$
28	**Other Necessary Expenses: court-ordered payments.** Enter the total monthly amount that you are required to pay pursuant to the order of a court or administrative agency, such as spousal or child support payments. **Do not include payments on past due obligations included in Line 44.**	$

29	**Other Necessary Expenses: education for employment or for a physically or mentally challenged child.** Enter the total average monthly amount that you actually expend for education that is a condition of employment and for education that is required for a physically or mentally challenged dependent child for whom no public education providing similar services is available.	$
30	**Other Necessary Expenses: childcare.** Enter the total average monthly amount that you actually expend on childcare—such as baby-sitting, day care, nursery and preschool. **Do not include other educational payments.**	$
31	**Other Necessary Expenses: health care.** Enter the total average monthly amount that you actually expend on health care that is required for the health and welfare of yourself or your dependents, that is not reimbursed by insurance or paid by a health savings account, and that is in excess of the amount entered in Line 19B. **Do not include payments for health insurance or health savings accounts listed in Line 34.**	$
32	**Other Necessary Expenses: telecommunication services.** Enter the total average monthly amount that you actually pay for telecommunication services other than your basic home telephone and cell phone service—such as pagers, call waiting, caller id, special long distance, internet service, or business cell phone service—to the extent necessary for your health and welfare or that of your dependents or for the production of income if not reimbursed by your employer. **Do not include any amount previously deducted.**	$
33	**Total Expenses Allowed under IRS Standards.** Enter the total of Lines 19 through 32.	$

Subpart B: Additional Living Expense Deductions

Note: Do not include any expenses that you have listed in Lines 19-32

34	**Health Insurance, Disability Insurance, and Health Savings Account Expenses.** List the monthly expenses in the categories set out in lines a-c below that are reasonably necessary for yourself, your spouse, or your dependents. a. Health Insurance $ b. Disability Insurance $ c. Health Savings Account $ Total and enter on Line 34 **If you do not actually expend this total amount**, state your actual total average monthly expenditures in the space below: $ _____	$
35	**Continued contributions to the care of household or family members.** Enter the total average actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses.	$
36	**Protection against family violence.** Enter the total average reasonably necessary monthly expenses that you actually incurred to maintain the safety of your family under the Family Violence Prevention and Services Act or other applicable federal law. The nature of these expenses is required to be kept confidential by the court.	$
37	**Home energy costs.** Enter the total average monthly amount, in excess of the allowance specified by IRS Local Standards for Housing and Utilities, that you actually expend for home energy costs. **You must provide your case trustee with documentation of your actual expenses, and you must demonstrate that the additional amount claimed is reasonable and necessary.**	$
38	**Education expenses for dependent children less than 18.** Enter the total average monthly expenses that you actually incur, not to exceed $147.92* per child, for attendance at a private or public elementary or secondary school by your dependent children less than 18 years of age. **You must provide your case trustee with documentation of your actual expenses, and you must explain why the amount claimed is reasonable and necessary and not already accounted for in the IRS Standards.**	$

**Amount subject to adjustment on 4/01/13, and every three years thereafter with respect to cases commenced on or after the date of adjustment.*

39	**Additional food and clothing expense.** Enter the total average monthly amount by which your food and clothing expenses exceed the combined allowances for food and clothing (apparel and services) in the IRS National Standards, not to exceed 5% of those combined allowances. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) **You must demonstrate that the additional amount claimed is reasonable and necessary**.	$
40	**Continued charitable contributions.** Enter the amount that you will continue to contribute in the form of cash or financial instruments to a charitable organization as defined in 26 U.S.C. § 170(c)(1)-(2).	$
41	**Total Additional Expense Deductions under § 707(b).** Enter the total of Lines 34 through 40	$

Subpart C: Deductions for Debt Payment

42 **Future payments on secured claims.** For each of your debts that is secured by an interest in property that you own, list the name of the creditor, identify the property securing the debt, state the Average Monthly Payment, and check whether the payment includes taxes or insurance**.** The Average Monthly Payment is the total of all amounts scheduled as contractually due to each Secured Creditor in the 60 months following the filing of the bankruptcy case, divided by 60. If necessary, list additional entries on a separate page. Enter the total of the Average Monthly Payments on Line 42.

	Name of Creditor	Property Securing the Debt	Average Monthly Payment	Does payment include taxes or insurance?
a.			$	☐ yes ☐ no
b.			$	☐ yes ☐ no
c.			$	☐ yes ☐ no
			Total: Add Lines a, b and c.	

$

43 **Other payments on secured claims.** If any of debts listed in Line 42 are secured by your primary residence, a motor vehicle, or other property necessary for your support or the support of your dependents, you may include in your deduction 1/60th of any amount (the "cure amount") that you must pay the creditor in addition to the payments listed in Line 42, in order to maintain possession of the property. The cure amount would include any sums in default that must be paid in order to avoid repossession or foreclosure. List and total any such amounts in the following chart. If necessary, list additional entries on a separate page.

	Name of Creditor	Property Securing the Debt	1/60th of the Cure Amount
a.			$
b.			$
c.			$
			Total: Add Lines a, b and c

$

44	**Payments on prepetition priority claims.** Enter the total amount, divided by 60, of all priority claims, such as priority tax, child support and alimony claims, for which you were liable at the time of your bankruptcy filing. **Do not include current obligations, such as those set out in Line 28.**	$

45	**Chapter 13 administrative expenses.** If you are eligible to file a case under chapter 13, complete the following chart, multiply the amount in line a by the amount in line b, and enter the resulting administrative expense. a. Projected average monthly chapter 13 plan payment. $ b. Current multiplier for your district as determined under schedules issued by the Executive Office for United States Trustees. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) x c. Average monthly administrative expense of chapter 13 case Total: Multiply Lines a and b	$
46	**Total Deductions for Debt Payment.** Enter the total of Lines 42 through 45.	$

Subpart D: Total Deductions from Income

47	**Total of all deductions allowed under § 707(b)(2).** Enter the total of Lines 33, 41, and 46.	$

Part VI. DETERMINATION OF § 707(b)(2) PRESUMPTION

48	**Enter the amount from Line 18 (Current monthly income for § 707(b)(2))**	$
49	**Enter the amount from Line 47 (Total of all deductions allowed under § 707(b)(2))**	$
50	**Monthly disposable income under § 707(b)(2).** Subtract Line 49 from Line 48 and enter the result	$
51	**60-month disposable income under § 707(b)(2).** Multiply the amount in Line 50 by the number 60 and enter the result.	$
52	**Initial presumption determination.** Check the applicable box and proceed as directed. ☐ **The amount on Line 51 is less than $7,025***. Check the box for "The presumption does not arise" at the top of page 1 of this statement, and complete the verification in Part VIII. Do not complete the remainder of Part VI. ☐ **The amount set forth on Line 51 is more than $11,725***. Check the box for "The presumption arises" at the top of page 1 of this statement, and complete the verification in Part VIII. You may also complete Part VII. Do not complete the remainder of Part VI. ☐ **The amount on Line 51 is at least $7,025*, but not more than $11,725*.** Complete the remainder of Part VI (Lines 53 through 55).	
53	**Enter the amount of your total non-priority unsecured debt**	$
54	**Threshold debt payment amount.** Multiply the amount in Line 53 by the number 0.25 and enter the result.	$
55	**Secondary presumption determination.** Check the applicable box and proceed as directed. ☐ **The amount on Line 51 is less than the amount on Line 54.** Check the box for "The presumption does not arise" at the top of page 1 of this statement, and complete the verification in Part VIII. ☐ **The amount on Line 51 is equal to or greater than the amount on Line 54.** Check the box for "The presumption arises" at the top of page 1 of this statement, and complete the verification in Part VIII. You may also complete Part VII.	

Part VII: ADDITIONAL EXPENSE CLAIMS

56 **Other Expenses.** List and describe any monthly expenses, not otherwise stated in this form, that are required for the health and welfare of you and your family and that you contend should be an additional deduction from your current monthly income under § 707(b)(2)(A)(ii)(I). If necessary, list additional sources on a separate page. All figures should reflect your average monthly expense for each item. Total the expenses.

	Expense Description	Monthly Amount
a.		$
b.		$
c.		$
	Total: Add Lines a, b and c	$

**Amounts are subject to adjustment on 4/01/13, and every three years thereafter with respect to cases commenced on or after the date of adjustment.*

Part VIII: VERIFICATION	
57	I declare under penalty of perjury that the information provided in this statement is true and correct. *(If this is a joint case, both debtors must sign.)* Date: _____ Signature: _____ *(Debtor)* Date: _____ Signature: _____ *(Joint Debtor, if any)*

12b-004663

12b-004664

In re _____
Debtor(s)

Case Number: _____
(If known)

According to the calculations required by this statement:
☐ **The applicable commitment period is 3 years.**
☐ **The applicable commitment period is 5 years.**
☐ **Disposable income is determined under § 1325(b)(3).**
☐ **Disposable income is not determined under § 1325(b)(3).**
(Check the boxes as directed in Lines 17 and 23 of this statement.)

CHAPTER 13 STATEMENT OF CURRENT MONTHLY INCOME AND CALCULATION OF COMMITMENT PERIOD AND DISPOSABLE INCOME

In addition to Schedules I and J, this statement must be completed by every individual chapter 13 debtor, whether or not filing jointly. Joint debtors may complete one statement only.

Part I. REPORT OF INCOME

1	**Marital/filing status.** Check the box that applies and complete the balance of this part of this statement as directed. a. ☐ Unmarried. **Complete only Column A ("Debtor's Income") for Lines 2-10.** b. ☐ Married. **Complete both Column A ("Debtor's Income") and Column B ("Spouse's Income") for Lines 2-10.**		
	All figures must reflect average monthly income received from all sources, derived during the six calendar months prior to filing the bankruptcy case, ending on the last day of the month before the filing. If the amount of monthly income varied during the six months, you must divide the six-month total by six, and enter the result on the appropriate line.	**Column A** **Debtor's Income**	**Column B** **Spouse's Income**
2	**Gross wages, salary, tips, bonuses, overtime, commissions.**	$	$
3	**Income from the operation of a business, profession, or farm.** Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 3. If you operate more than one business, profession or farm, enter aggregate numbers and provide details on an attachment. Do not enter a number less than zero. **Do not include any part of the business expenses entered on Line b as a deduction in Part IV.** a. Gross receipts $ b. Ordinary and necessary business expenses $ c. Business income Subtract Line b from Line a	$	$
4	**Rent and other real property income.** Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 4. Do not enter a number less than zero. **Do not include any part of the operating expenses entered on Line b as a deduction in Part IV.** a. Gross receipts $ b. Ordinary and necessary operating expenses $ c. Rent and other real property income Subtract Line b from Line a	$	$
5	**Interest, dividends, and royalties.**	$	$
6	**Pension and retirement income.**	$	$
7	**Any amounts paid by another person or entity, on a regular basis, for the household expenses of the debtor or the debtor's dependents, including child support paid for that purpose.** Do not include alimony or separate maintenance payments or amounts paid by the debtor's spouse. Each regular payment should be reported in only one column; if a payment is listed in Column A, do not report that payment in Column B.	$	$

8	**Unemployment compensation.** Enter the amount in the appropriate column(s) of Line 8. However, if you contend that unemployment compensation received by you or your spouse was a benefit under the Social Security Act, do not list the amount of such compensation in Column A or B, but instead state the amount in the space below: Unemployment compensation claimed to be a benefit under the Social Security Act | Debtor $ _____ | Spouse $ _____	$	$
9	**Income from all other sources.** Specify source and amount. If necessary, list additional sources on a separate page. Total and enter on Line 9. **Do not include alimony or separate maintenance payments paid by your spouse, but include all other payments of alimony or separate maintenance. Do not include** any benefits received under the Social Security Act or payments received as a victim of a war crime, crime against humanity, or as a victim of international or domestic terrorism. a. | $ b. | $	$	$
10	**Subtotal.** Add Lines 2 thru 9 in Column A, and, if Column B is completed, add Lines 2 through 9 in Column B. Enter the total(s).	$	$
11	**Total.** If Column B has been completed, add Line 10, Column A to Line 10, Column B, and enter the total. If Column B has not been completed, enter the amount from Line 10, Column A.	$	

Part II. CALCULATION OF § 1325(b)(4) COMMITMENT PERIOD

12	**Enter the amount from Line 11.**	$
13	**Marital adjustment.** If you are married, but are not filing jointly with your spouse, AND if you contend that calculation of the commitment period under § 1325(b)(4) does not require inclusion of the income of your spouse, enter on Line 13 the amount of the income listed in Line 10, Column B that was NOT paid on a regular basis for the household expenses of you or your dependents and specify, in the lines below, the basis for excluding this income (such as payment of the spouse's tax liability or the spouse's support of persons other than the debtor or the debtor's dependents) and the amount of income devoted to each purpose. If necessary, list additional adjustments on a separate page. If the conditions for entering this adjustment do not apply, enter zero. a. | $ b. | $ c. | $ Total and enter on Line 13.	$
14	**Subtract Line 13 from Line 12 and enter the result.**	$
15	**Annualized current monthly income for § 1325(b)(4).** Multiply the amount from Line 14 by the number 12 and enter the result.	$
16	**Applicable median family income.** Enter the median family income for applicable state and household size. (This information is available by family size at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) a. Enter debtor's state of residence: _____ b. Enter debtor's household size: _____	$
17	**Application of § 1325(b)(4).** Check the applicable box and proceed as directed. ☐ **The amount on Line 15 is less than the amount on Line 16.** Check the box for "The applicable commitment period is 3 years" at the top of page 1 of this statement and continue with this statement. ☐ **The amount on Line 15 is not less than the amount on Line 16.** Check the box for "The applicable commitment period is 5 years" at the top of page 1 of this statement and continue with this statement.	

Part III. APPLICATION OF § 1325(b)(3) FOR DETERMINING DISPOSABLE INCOME

18	**Enter the amount from Line 11.**	$

19	**Marital adjustment.** If you are married, but are not filing jointly with your spouse, enter on Line 19 the total of any income listed in Line 10, Column B that was NOT paid on a regular basis for the household expenses of the debtor or the debtor's dependents. Specify in the lines below the basis for excluding the Column B income (such as payment of the spouse's tax liability or the spouse's support of persons other than the debtor or the debtor's dependents) and the amount of income devoted to each purpose. If necessary, list additional adjustments on a separate page. If the conditions for entering this adjustment do not apply, enter zero. a. $ b. $ c. $ Total and enter on Line 19.	$
20	**Current monthly income for § 1325(b)(3).** Subtract Line 19 from Line 18 and enter the result.	$
21	**Annualized current monthly income for § 1325(b)(3).** Multiply the amount from Line 20 by the number 12 and enter the result.	$
22	**Applicable median family income.** Enter the amount from Line 16.	$
23	**Application of § 1325(b)(3).** Check the applicable box and proceed as directed. ☐ **The amount on Line 21 is more than the amount on Line 22.** Check the box for "Disposable income is determined under § 1325(b)(3)" at the top of page 1 of this statement and complete the remaining parts of this statement. ☐ **The amount on Line 21 is not more than the amount on Line 22.** Check the box for "Disposable income is not determined under § 1325(b)(3)" at the top of page 1 of this statement and complete Part VII of this statement. **Do not complete Parts IV, V, or VI.**	

Part IV. CALCULATION OF DEDUCTIONS FROM INCOME

Subpart A: Deductions under Standards of the Internal Revenue Service (IRS)

24A	**National Standards: food, apparel and services, housekeeping supplies, personal care, and miscellaneous.** Enter in Line 24A the "Total" amount from IRS National Standards for Allowable Living Expenses for the applicable number of persons. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) The applicable number of persons is the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.	$
24B	**National Standards: health care.** Enter in Line a1 below the amount from IRS National Standards for Out-of-Pocket Health Care for persons under 65 years of age, and in Line a2 the IRS National Standards for Out-of-Pocket Health Care for persons 65 years of age or older. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) Enter in Line b1 the applicable number of persons who are under 65 years of age, and enter in Line b2 the applicable number of persons who are 65 years of age or older. (The applicable number of persons in each age category is the number in that category that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.) Multiply Line a1 by Line b1 to obtain a total amount for persons under 65, and enter the result in Line c1. Multiply Line a2 by Line b2 to obtain a total amount for persons 65 and older, and enter the result in Line c2. Add Lines c1 and c2 to obtain a total health care amount, and enter the result in Line 24B.	$

Persons under 65 years of age			**Persons 65 years of age or older**		
a1.	Allowance per person		a2.	Allowance per person	
b1.	Number of persons		b2.	Number of persons	
c1.	Subtotal		c2.	Subtotal	

25A	**Local Standards: housing and utilities; non-mortgage expenses.** Enter the amount of the IRS Housing and Utilities Standards; non-mortgage expenses for the applicable county and family size. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court). The applicable family size consists of the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.	$

25B	**Local Standards: housing and utilities; mortgage/rent expense.** Enter, in Line a below, the amount of the IRS Housing and Utilities Standards; mortgage/rent expense for your county and family size (this information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court) (the applicable family size consists of the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support); enter on Line b the total of the Average Monthly Payments for any debts secured by your home, as stated in Line 47; subtract Line b from Line a and enter the result in Line 25B. **Do not enter an amount less than zero.** a. IRS Housing and Utilities Standards; mortgage/rent expense $ b. Average Monthly Payment for any debts secured by your home, if any, as stated in Line 47 $ c. Net mortgage/rental expense Subtract Line b from Line a.	$
26	**Local Standards: housing and utilities; adjustment.** If you contend that the process set out in Lines 25A and 25B does not accurately compute the allowance to which you are entitled under the IRS Housing and Utilities Standards, enter any additional amount to which you contend you are entitled, and state the basis for your contention in the space below: _____ _____ _____	$
27A	**Local Standards: transportation; vehicle operation/public transportation expense.** You are entitled to an expense allowance in this category regardless of whether you pay the expenses of operating a vehicle and regardless of whether you use public transportation. Check the number of vehicles for which you pay the operating expenses or for which the operating expenses are included as a contribution to your household expenses in Line 7. ☐ 0 ☐ 1 ☐ 2 or more. If you checked 0, enter on Line 27A the "Public Transportation" amount from IRS Local Standards: Transportation. If you checked 1 or 2 or more, enter on Line 27A the "Operating Costs" amount from IRS Local Standards: Transportation for the applicable number of vehicles in the applicable Metropolitan Statistical Area or Census Region. (These amounts are available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	$
27B	**Local Standards: transportation; additional public transportation expense.** If you pay the operating expenses for a vehicle and also use public transportation, and you contend that you are entitled to an additional deduction for your public transportation expenses, enter on Line 27B the "Public Transportation" amount from IRS Local Standards: Transportation. (This amount is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	$
28	**Local Standards: transportation ownership/lease expense; Vehicle 1.** Check the number of vehicles for which you claim an ownership/lease expense. (You may not claim an ownership/lease expense for more than two vehicles.) ☐ 1 ☐ 2 or more. Enter, in Line a below, the "Ownership Costs" for "One Car" from the IRS Local Standards: Transportation (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 1, as stated in Line 47; subtract Line b from Line a and enter the result in Line 28. **Do not enter an amount less than zero.** a. IRS Transportation Standards, Ownership Costs $ b. Average Monthly Payment for any debts secured by Vehicle 1, as stated in Line 47 $ c. Net ownership/lease expense for Vehicle 1 Subtract Line b from Line a.	$

29	**Local Standards: transportation ownership/lease expense; Vehicle 2.** Complete this Line only if you checked the "2 or more" Box in Line 28. Enter, in Line a below, the "Ownership Costs" for "One Car" from the IRS Local Standards: Transportation (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 2, as stated in Line 47; subtract Line b from Line a and enter the result in Line 29. **Do not enter an amount less than zero.** a. IRS Transportation Standards, Ownership Costs $ b. Average Monthly Payment for any debts secured by Vehicle 2, as stated in Line 47 $ c. Net ownership/lease expense for Vehicle 2 Subtract Line b from Line a.	$
30	**Other Necessary Expenses: taxes.** Enter the total average monthly expense that you actually incur for all federal, state, and local taxes, other than real estate and sales taxes, such as income taxes, self-employment taxes, social-security taxes, and Medicare taxes. **Do not include real estate or sales taxes.**	$
31	**Other Necessary Expenses: involuntary deductions for employment.** Enter the total average monthly deductions that are required for your employment, such as mandatory retirement contributions, union dues, and uniform costs. **Do not include discretionary amounts, such as voluntary 401(k) contributions.**	$
32	**Other Necessary Expenses: life insurance.** Enter total average monthly premiums that you actually pay for term life insurance for yourself. **Do not include premiums for insurance on your dependents, for whole life or for any other form of insurance.**	$
33	**Other Necessary Expenses: court-ordered payments.** Enter the total monthly amount that you are required to pay pursuant to the order of a court or administrative agency, such as spousal or child support payments. **Do not include payments on past due obligations included in Line 49.**	$
34	**Other Necessary Expenses: education for employment or for a physically or mentally challenged child.** Enter the total average monthly amount that you actually expend for education that is a condition of employment and for education that is required for a physically or mentally challenged dependent child for whom no public education providing similar services is available.	$
35	**Other Necessary Expenses: childcare.** Enter the total average monthly amount that you actually expend on childcare—such as baby-sitting, day care, nursery and preschool. **Do not include other educational payments.**	$
36	**Other Necessary Expenses: health care.** Enter the total average monthly amount that you actually expend on health care that is required for the health and welfare of yourself or your dependents, that is not reimbursed by insurance or paid by a health savings account, and that is in excess of the amount entered in Line 24B. **Do not include payments for health insurance or health savings accounts listed in Line 39.**	$
37	**Other Necessary Expenses: telecommunication services.** Enter the total average monthly amount that you actually pay for telecommunication services other than your basic home telephone and cell phone service—such as pagers, call waiting, caller id, special long distance, internet service, or business cell phone service—to the extent necessary for your health and welfare or that of your dependents or for the production of income if not reimbursed by your employer. **Do not include any amount previously deducted.**	$
38	**Total Expenses Allowed under IRS Standards.** Enter the total of Lines 24 through 37.	$

Subpart B: Additional Living Expense Deductions

Note: Do not include any expenses that you have listed in Lines 24-37

39	**Health Insurance, Disability Insurance, and Health Savings Account Expenses.** List the monthly expenses in the categories set out in lines a-c below that are reasonably necessary for yourself, your spouse, or your dependents. a. Health Insurance $ b. Disability Insurance $ c. Health Savings Account $ Total and enter on Line 39 **If you do not actually expend this total amount**, state your actual total average monthly expenditures in the space below: $ _____	$
40	**Continued contributions to the care of household or family members.** Enter the total average actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses. **Do not include payments listed in Line 34.**	$
41	**Protection against family violence.** Enter the total average reasonably necessary monthly expenses that you actually incur to maintain the safety of your family under the Family Violence Prevention and Services Act or other applicable federal law. The nature of these expenses is required to be kept confidential by the court.	$
42	**Home energy costs.** Enter the total average monthly amount, in excess of the allowance specified by IRS Local Standards for Housing and Utilities that you actually expend for home energy costs. **You must provide your case trustee with documentation of your actual expenses, and you must demonstrate that the additional amount claimed is reasonable and necessary.**	$
43	**Education expenses for dependent children under 18.** Enter the total average monthly expenses that you actually incur, not to exceed $147.92 per child, for attendance at a private or public elementary or secondary school by your dependent children less than 18 years of age. **You must provide your case trustee with documentation of your actual expenses, and you must explain why the amount claimed is reasonable and necessary and not already accounted for in the IRS Standards.**	$
44	**Additional food and clothing expense.** Enter the total average monthly amount by which your food and clothing expenses exceed the combined allowances for food and clothing (apparel and services) in the IRS National Standards, not to exceed 5% of those combined allowances. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) **You must demonstrate that the additional amount claimed is reasonable and necessary**.	$
45	**Charitable contributions.** Enter the amount reasonably necessary for you to expend each month on charitable contributions in the form of cash or financial instruments to a charitable organization as defined in 26 U.S.C. § 170(c)(1)-(2). **Do not include any amount in excess of 15% of your gross monthly income.**	$
46	**Total Additional Expense Deductions under § 707(b).** Enter the total of Lines 39 through 45.	$

Subpart C: Deductions for Debt Payment

47 **Future payments on secured claims.** For each of your debts that is secured by an interest in property that you own, list the name of the creditor, identify the property securing the debt, state the Average Monthly Payment, and check whether the payment includes taxes or insurance**.** The Average Monthly Payment is the total of all amounts scheduled as contractually due to each Secured Creditor in the 60 months following the filing of the bankruptcy case, divided by 60. If necessary, list additional entries on a separate page. Enter the total of the Average Monthly Payments on Line 47.

	Name of Creditor	Property Securing the Debt	Average Monthly Payment	Does payment include taxes or insurance?
a.			$	☐ yes ☐ no
b.			$	☐ yes ☐ no
c.			$	☐ yes ☐ no
			Total: Add Lines a, b, and c	$

48	**Other payments on secured claims.** If any of debts listed in Line 47 are secured by your primary residence, a motor vehicle, or other property necessary for your support or the support of your dependents, you may include in your deduction 1/60th of any amount (the "cure amount") that you must pay the creditor in addition to the payments listed in Line 47, in order to maintain possession of the property. The cure amount would include any sums in default that must be paid in order to avoid repossession or foreclosure. List and total any such amounts in the following chart. If necessary, list additional entries on a separate page.	

	Name of Creditor	Property Securing the Debt	1/60th of the Cure Amount
a.			$
b.			$
c.			$
			Total: Add Lines a, b, and c $

49	**Payments on prepetition priority claims.** Enter the total amount, divided by 60, of all priority claims, such as priority tax, child support and alimony claims, for which you were liable at the time of your bankruptcy filing. **Do not include current obligations, such as those set out in Line 33.**	$
50	**Chapter 13 administrative expenses.** Multiply the amount in Line a by the amount in Line b, and enter the resulting administrative expense.	

a.	Projected average monthly chapter 13 plan payment.	$
b.	Current multiplier for your district as determined under schedules issued by the Executive Office for United States Trustees. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	x
c.	Average monthly administrative expense of chapter 13 case	Total: Multiply Lines a and b $

51	**Total Deductions for Debt Payment.** Enter the total of Lines 47 through 50.	$

Subpart D: Total Deductions from Income

52	**Total of all deductions from income.** Enter the total of Lines 38, 46, and 51.	$

Part V. DETERMINATION OF DISPOSABLE INCOME UNDER § 1325(b)(2)

53	**Total current monthly income.** Enter the amount from Line 20.	$
54	**Support income.** Enter the monthly average of any child support payments, foster care payments, or disability payments for a dependent child, reported in Part I, that you received in accordance with applicable nonbankruptcy law, to the extent reasonably necessary to be expended for such child.	$
55	**Qualified retirement deductions.** Enter the monthly total of (a) all amounts withheld by your employer from wages as contributions for qualified retirement plans, as specified in § 541(b)(7) and (b) all required repayments of loans from retirement plans, as specified in § 362(b)(19).	$
56	**Total of all deductions allowed under § 707(b)(2).** Enter the amount from Line 52.	$

57 **Deduction for special circumstances.** If there are special circumstances that justify additional expenses for which there is no reasonable alternative, describe the special circumstances and the resulting expenses in lines a-c below. If necessary, list additional entries on a separate page. Total the expenses and enter the total in Line 57. **You must provide your case trustee with documentation of these expenses and you must provide a detailed explanation of the special circumstances that make such expenses necessary and reasonable.**

	Nature of special circumstances	Amount of expense
a.		$
b.		$
c.		$
		Total: Add Lines a, b, and c

$

58 **Total adjustments to determine disposable income.** Add the amounts on Lines 54, 55, 56, and 57 and enter the result. $

59 **Monthly Disposable Income Under § 1325(b)(2).** Subtract Line 58 from Line 53 and enter the result. $

Part VI: ADDITIONAL INFORMATION

60 **Other Expenses.** List and describe any monthly expenses, not otherwise stated in this form, that are required for the health and welfare of you and your family and that you contend should be an additional deduction from your current monthly income under § 707(b)(2)(A)(ii)(I). If necessary, list additional sources on a separate page. All figures should reflect your average monthly expense for each item. Total the expenses.

	Expense Description	Monthly Amount
a.		$
b.		$
c.		$
	Total: Add Lines a, b, and c	$

61 **Change in income or expenses.** If any change from the income or expenses you reported in this form has occurred or is virtually certain to occur during the 12-month period following the date of the filing of your petition, state in the space below: each line affected, the reason for the change, the date of the change, and the amount by which the income or expense reported on the affected line would be increased or decreased. For example, if the wages reported in Line 2 have increased or decreased, or are definitely scheduled to increase or decrease in the future, you would make an entry listing Line 2, the reason for the increase or decrease, the date it has occurred or will occur, and the amount of the change. Make a similar entry for increases or decreases in expenses reported earlier in this form. Add a separate page with additional lines, if necessary.

Line to change	Reason for change	Date of change	Increase (+) or decrease (-)	Amount of change
				$
				$
				$

Part VII: VERIFICATION

62 I declare under penalty of perjury that the information provided in this statement is true and correct. *(If this is a joint case, both debtors must sign.)*

Date: _____ Signature: _____
(Debtor)

Date: _____ Signature: _____
(Joint Debtor, if any)

12b-004673

12b-004674

COMMITTEE NOTE

The chapter 13 form is amended in response to the Supreme Court's decision in *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010). Adopting a forward-looking approach, the Court there held that the calculation of a chapter 13 debtor's projected disposable income under §1325(b) of the Code may take into account changes to income or expenses reported elsewhere on this form that, at the time of plan confirmation, have occurred or are virtually certain to occur. Those changes could result in either an increased or decreased projected disposable income.

A new line 61 is added to Form 22C for the reporting of those changes, and the title of Part VI is changed to reflect its broadened content. Only debtors whose annualized current monthly income exceeds the applicable median family income have their projected disposable income determined exclusively by the information provided on Form 22C. Therefore they are the only debtors required to provide the information about changes to income and expenses on this form. Debtors whose annualized current monthly income falls at or below the applicable median must report on Schedules I and J any changes to income and expenses that are reasonably expected to occur within the next year.

In reporting changes to income on line 61, a debtor must indicate whether the amounts reported in Part I of the form—which are monthly averages of various types of income received during the six months prior to the filing of the bankruptcy case—have already changed or are virtually certain to change during the 12 months following the filing of the bankruptcy petition. For each change, the debtor must indicate the line of this form on which the changed amount was reported, the reason for the change, the date of its occurrence, whether the change was an increase or decrease of income, and the amount of the change.

In reporting changes to expenses on line 61, a debtor must list changes to the debtor's actual expenditures reported in Part IV that are virtually certain to occur during the 12 months following the filing of the bankruptcy petition. With respect to the deductible amounts reported in Part IV that are determined by the IRS national and local standards, only changed amounts that result from changed circumstances in the debtor's life—such as the addition of a family member or the surrender of a vehicle—should be reported. For each change in expenses, the same information required to be provided for income changes must be reported.

Because of the addition of new line 61, the line for the debtor's verification is renumbered as 62.

The chapter 7 and chapter 13 forms are amended to permit the deduction of telecommunications expenses (Line 32 on Form 22A and line 37 on Form 22C) that are necessary for the production of income if those expenses have not been reimbursed by the debtor's employer. If a debtor is self-employed, those expenses are deductible as ordinary and necessary operating expenses at line 4 on Form 22A and line 3 on Form 22C.

TAB 9-F

Appendix C

Minutes of the Bankruptcy Rules Committee Meeting on April 7-8, 2011, will be distributed separately.

TAB 10

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

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JEFFREY S. SUTTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

May 12, 2011

MEMORANDUM TO STANDING RULES COMMITTEE

SUBJECT: *Recommendation to Approve Revised Judicial Conference Procedures Governing Work of Rules Committees*

FROM: Judge Lee H. Rosenthal

At the January 2011 meeting, we provided draft revisions to the *Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure.* As you recall, these *Procedures* govern the work of the rules committees and are routinely included in the broadly circulated brochures containing the proposed rule changes for public comment. We recommended that these *Procedures* be revised. Once this committee has approved revisions, they will be sent to the Judicial Conference with a recommendation for approval.

The need for revision is shown by a review of the *Procedures*. The Judicial Conference first promulgated them in June 1983. The Conference approved revisions in 1989 to reflect the 1988 amendments to the Rules Enabling Act. These amendments required an increase in public notice of proposed rule changes and prescribed open meetings. The 1988 revisions also made provisions requiring a follow-up notice to every individual who commented on a proposed rule more flexible.

The rules committees have worked under the same set of *Procedures* since 1989. During this time, the committees' work, records, and communications have been significantly affected by a number of changes, including the internet. And experience with the rulemaking process has revealed some recurring practical difficulties with the *Procedures*. It is time to revise them again.

The draft of the revised *Procedures* included in the January 2011 agenda book accounted for the impact of the internet, addressed some of the practical difficulties, proposed ways to make the

process more efficient, and followed the style protocols used in drafting the rules. Since January, the reporters and Andrea Kuperman have been working on a number of other issues, including the standard for republication; what comprises the records of the committees, particularly with respect to correspondence; what records are to be posted on the rulemaking website and what records are maintained in the Administrative Office; whether transcripts should be prepared of public hearings; and when hearings can be canceled due to insufficient interest.

The revised draft attached to this memo accounts for the reporters' resolution of these issues, makes clear which procedures are mandatory and which are simply descriptions of usual practice, and contains further stylistic revisions. A redlined version comparing them to the present version is also attached. The Committee is asked to review the revised *Procedures*, make comments and suggestions for further refinements or changes, and consider whether to submit them to the Judicial Conference with a recommendation that they be approved.

I want to thank all the reporters and particularly Andrea Kuperman for the careful work that has gone into the revisions made since January and look forward to the discussion.

L.H.R.

Proposed Revised Procedures "Clean" Version

§ 440 Procedures for the Judicial Conference's Committee on Rules of Practice and Procedure and Its Advisory Rules Committees

§ 440.10 Overview

The Rules Enabling Act, 28 U.S.C. §§ 2071–2077, authorizes the Supreme Court to prescribe general rules of practice and procedure and rules of evidence for the federal courts. Under the Act, the Judicial Conference must appoint a standing committee, and may appoint advisory committees to recommend new and amended rules. Section 2073 requires the Judicial Conference to publish the procedures that govern the work of the Committee on Rules of Practice and Procedure (the "Standing Committee") and its Advisory Committees on the Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure and on the Evidence Rules. *See* 28 U.S.C. § 2073(a)(1); *cf.* JCUS-SEP 83, pp. 65–67. These procedures do not limit the rules committees' authority. Failure to comply with them does not invalidate any rules-committee action. *Cf.* 28 U.S.C. § 2073(e).

§ 440.20 Advisory Committees

§ 440.20.10 *Functions*

Each advisory committee must engage in "a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use" in its field, taking into consideration suggestions and recommendations received from any source, new statutes and court decisions affecting the rules, and legal commentary. *See* 28 U.S.C. § 331.

§ 440.20.20 *Suggestions and Recommendations*

Suggestions and recommendations on the rules are submitted to the Secretary of the Standing Committee at the Administrative Office of the United States Courts, Washington, D.C. The Secretary will acknowledge the suggestions or recommendations and refer them to the appropriate committee. If the Standing Committee takes formal action on them, that action will be reflected in the Standing Committee's minutes, which are posted on the judiciary's rulemaking website.

§ 440.20.30 *Drafting Rule Changes*

(a) *Meetings*

Each advisory committee meets at the times and places that the chair designates. Advisory-committee meetings must be open to the public, except when the committee — in open session and with a majority present — determines that it is in the public interest to have all or part of the meeting closed and states the reason. Each meeting must be preceded by notice of the time and place, published in the *Federal Register*

and on the judiciary's rulemaking website, sufficiently in advance to permit interested persons to attend.

(b) *Preparing Draft Changes*

The reporter assigned to each advisory committee should prepare for the committee, under the direction of the committee or its chair, draft rule changes, committee notes explaining their purpose, and copies or summaries of written recommendations and suggestions received by the committee.

(c) *Considering Draft Changes*

The advisory committee studies the rules' operation and effect. It meets to consider proposed new and amended rules (together with committee notes), whether changes should be made, and whether they should be submitted to the Standing Committee with a recommendation to approve for publication. The submission must be accompanied by a written report explaining the advisory committee's action and its evaluation of competing considerations.

§ 440.20.40 *Publication and Public Hearings*

(a) *Publication*

Before any proposed rule change is published, the Standing Committee must approve publication. The Secretary then arranges for printing and circulating the proposed change to the bench, bar, and public. Publication should be as wide as possible. The change must be published in the *Federal Register* and on the judiciary's rulemaking website. The Secretary must:

(1) notify members of Congress, federal judges, and the chief justice of each state's highest court, with a link to the judiciary's rulemaking website; and
(2) provide copies of the proposed change to legal-publishing firms with a request to timely include it in publications.

(b) *Public-Comment Period*

A public-comment period on the proposed change must extend for at least six months after notice is published in the *Federal Register*, unless a shorter period is approved under paragraph (d) of this section.

(c) *Hearings*

The advisory committee must conduct public hearings on the proposed change unless eliminating them is approved under paragraph (d) of this section or not enough witnesses ask to testify at a particular hearing. The hearings are held at the times and places that the advisory committee's chair determines. Notice of the times and places

must be published in the *Federal Register* and on the judiciary's rulemaking website. The hearings must be recorded. Whenever possible, a transcript should be produced by a qualified court reporter.

(d) *Expedited Procedures*

The Standing Committee may shorten the public-comment period or eliminate public hearings if it determines that the administration of justice requires a proposed rule change to be expedited and that appropriate notice to the public can still be provided and public comment obtained. The Standing Committee may also eliminate public notice and comment for a technical or conforming amendment if the Committee determines that they are unnecessary. When an exception is made, the chair must advise the Judicial Conference and provide the reasons.

§ 440.20.50 *Procedures After the Comment Period*

(a) *Summary of Comments*

When the public-comment period ends, the reporter must prepare a summary of the written comments received and of the testimony presented at public hearings. If the number of comments is very large, the reporter may summarize and aggregate similar individual comments, identifying the source of each one.

(b) *Advisory Committee Review; Republication*

The advisory committee reviews the proposed change in light of any comments and testimony. If the advisory committee makes substantial changes, the proposed rule should be republished for an additional period of public comment unless the advisory committee determines that republication would not be necessary to achieve adequate public comment and would not assist the work of the rules committees.

(c) *Submission to the Standing Committee*

The advisory committee submits to the Standing Committee the proposed change and committee note that it recommends for approval. Each submission must:

(1) be accompanied by a separate report of the comments received;
(2) explain the changes made after the original publication; and
(3) include an explanation of competing considerations examined by the advisory committee.

§ 440.20.60 *Preparing Minutes and Maintaining Records*

(a) *Minutes of Meetings*

The advisory committee's chair arranges for preparing the minutes of the committee meetings.

(b) *Records*

The advisory committee's records consist of:

- written suggestions received from the public;
- written comments received from the public on drafts of proposed rules;
- the committee's responses to public suggestions and comments;
- other correspondence with the public about proposed rule changes;
- electronic recordings and transcripts of public hearings (when prepared);
- the reporter's summaries of public comments and of testimony from public hearings;
- agenda books and materials prepared for committee meetings;
- minutes of committee meetings;
- approved drafts of rule changes; and
- reports to the Standing Committee

(c) *Public Access to Records*

The records must be posted on the judiciary's rulemaking website, except for general public correspondence about proposed rule changes and electronic recordings of hearings when transcripts are prepared. This correspondence and archived records are maintained by the Administrative Office of the United States Courts and are available for public inspection. Minutes of a closed meeting may be made available to the public but with any deletions necessary to avoid frustrating the purpose of closing the meeting under § 440.20.30(a).

§ 440.30 Standing Committee

§ 440.30.10 *Functions*

The Standing Committee's functions include:

(1) coordinating the work of the advisory committees;
(2) suggesting proposals for them to study;
(3) considering proposals they recommend for publication for public comment; and
(4) for proposed rule changes that have completed that process, deciding whether to accept or modify the proposals and transmit them with its own recommendation to the Judicial Conference, recommit them to the advisory committee for further study and consideration, or reject them.

§ 440.30.20 ***Procedures***

(a) *Meetings*

The Standing Committee meets at the times and places that the chair designates. Committee meetings must be open to the public, except when the Committee — in open session and with a majority present — determines that it is in the public interest to have all or part of the meeting closed and states the reason. Each meeting must be preceded by notice of the time and place, published in the *Federal Register* and on the judiciary's rulemaking website, sufficiently in advance to permit interested persons to attend.

(b) *Attendance by the Advisory Committee Chairs and Reporters*

The advisory committees' chairs and reporters should attend the Standing Committee meetings to present their committees' proposed rule changes and committee notes, to inform the Standing Committee about ongoing work, and to participate in the discussions.

(c) *Action on Proposed Rule Changes or Committee Notes*

The Standing Committee may accept, reject, or modify a proposed change or committee note, or may return the proposal to the advisory committee with instructions or recommendations.

(d) *Transmission to the Judicial Conference*

The Standing Committee must transmit to the Judicial Conference the proposed rule changes and committee notes that it approves, together with the advisory-committee report. The Standing Committee's report includes its own recommendations and explains any changes that it made.

§ 440.30.30 ***Preparing Minutes and Maintaining Records***

(a) *Minutes of Meetings*

The Secretary prepares minutes of Standing Committee meetings.

(b) *Records*

The Standing Committee's records consist of:

- the minutes of Standing-Committee and advisory-committee meetings;
- agenda books and materials prepared for Standing Committee meetings;
- reports to the Judicial Conference; and
- official correspondence about rule changes, including correspondence with advisory-committee chairs

(c) *Public Access to Records*

The records must be posted on the judiciary's rulemaking website, except for official correspondence about rule changes. This correspondence and archived records are maintained by the Administrative Office of the United States Courts and are available for public inspection. Minutes of a closed meeting may be made available to the public but with any deletions necessary to avoid frustrating the purpose of closing the meeting under § 440.30.20(a).

Proposed Revised Procedures "Redline" Version

~~PROCEDURES FOR THE CONDUCT OF BUSINESS BY THE JUDICIAL CONFERENCE COMMITTEES ON RULES OF PRACTICE AND PROCEDURE~~

~~Scope~~

~~These procedures govern the operations of~~§ 440 Procedures for the Judicial Conference's Committee on Rules of Practice~~, Procedure, and Evidence (Standing Committee) and the various Judicial Conference Advisory Committees on Rules of Practice and Procedure in drafting and recommending new~~ and Procedure and Its Advisory Rules Committees

§ 440.10 Overview

The Rules Enabling Act, 28 U.S.C. §§ 2071–2077, authorizes the Supreme Court to prescribe general rules of practice~~,~~ and procedure~~, and evidence and amendments to existing rules.~~

~~**Part I -**~~ and rules of evidence for the federal courts. Under the Act, the Judicial Conference must appoint a standing committee, and may appoint advisory committees to recommend new and amended rules. Section 2073 requires the Judicial Conference to publish the procedures that govern the work of the Committee on Rules of Practice and Procedure (the "Standing Committee") and its Advisory Committees

~~1. Functions~~

~~Each~~ on the Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure and on the Evidence Rules. *See* 28 U.S.C. § 2073(a)(1); *cf.* JCUS-SEP 83, pp. 65–67. These procedures do not limit the rules committees' authority. Failure to comply with them does not invalidate any rules-committee action. *Cf.* 28 U.S.C. § 2073(e).

§ 440.20 Advisory ~~Committee shall carry on "a~~Committees

§ 440.20.10 *Functions*

Each advisory committee must engage in "a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use~~"~~" in its ~~particular~~ field, taking into consideration suggestions and~~-~~ recommendations received from any source, new statutes and court decisions affecting the rules, and legal commentary. *See* 28 U.S.C. § 331.

§ 440.20.20 ***Suggestions and Recommendations***

Suggestions and recommendations with respect toon the rules should be sent to the Secretary, Committee on Rules of Practice and Procedure,are submitted to the Secretary of the Standing Committee at the Administrative Office of the United States Courts, Washington, D.C. 20544, who shall, to the extent feasible, acknowledge in writing every written suggestion The Secretary will acknowledge the suggestions or recommendation so received s and shall refer all suggestions and

~~recommendations~~them to the appropriate ~~Advisory Committee. To the extent feasible, the Secretary, in consultation with the Chairman of the Advisory Committee, shall advise the person making a recommendation or suggestion of the action taken thereon by the Advisory Committee.~~

~~3. Drafting Rules Changes~~

~~a. An Advisory Committee shall meet at such~~committee. If the Standing Committee takes formal action on them, that action will be reflected in the Standing Committee's minutes, which are posted on the judiciary's rulemaking website.

§ 440.20.30 ***Drafting Rule Changes***

(a) *Meetings*

Each advisory committee meets at the times and places ~~as~~that the ~~Chairman may authorize~~chair designates. ~~All~~ Advisory ~~Committee~~-committee meetings ~~shall~~must be open to the public, except when the committee ~~so meeting,~~ — in open session and with a majority present~~,~~ — determines that it is in the public interest ~~that~~to have all or part ~~of the remainder~~ of the meeting ~~on that day shall be~~ closed ~~to the public~~ and states the reason ~~for closing the meeting.~~. Each meeting ~~shall~~must be preceded by notice of the time and place ~~of the meeting~~, ~~including publication~~ published in the *Federal Register* and on the judiciary's rulemaking website, ~~sufficient~~sufficiently in advance to permit interested persons to attend.

(b) *Preparing Draft Changes*

~~b.~~ The reporter assigned to each ~~A~~advisory ~~C~~committee ~~shall~~should prepare for the committee, under the direction of the ~~C~~committee or its ~~Chairman~~chair, ~~prepare initial~~ draft rule~~s~~ changes, ~~"C~~committee ~~N~~notes~~"~~ explaining their purpose, and ~~intent,~~ copies or summaries of ~~all~~ written recommendations and suggestions received by the ~~Advisory Committee, and shall forward them to the Advisory C~~committee.

~~c. The Advisory Committee shall then meet to consider the draft proposed new rules and rules amendments, together with Committee Notes, make revisions therein, and submit them for approval of publication~~

(c) *Considering Draft Changes*

The advisory committee studies the rules' operation and effect. It meets to consider proposed new and amended rules (together with committee notes), whether changes should be made, and whether they should be submitted to the Standing Committee~~, or its Chairman, with~~ with a recommendation to approve for publication. The submission must be accompanied by a written report explaining the ~~Committee's~~advisory committee's action~~, including any minority or other separate views~~ and its evaluation of competing considerations.

4 **§ 440.—20.40** ***Publication and Public Hearings***

(a) a. When publication*Publication*

Before any proposed rule change is approved bypublished, the Standing Committee, t must approve publication. The Secretary shall then arranges for the printing and circulation ofcirculating the proposed rules changes to the bench and, bar, and to the public generally.. Publication shallshould be as wide as practicablepossible. Notice of t The proposed rule shallchange must be published in the *Federal Register* *and copies provided to appropriate legal publishing*and on the judiciary's rulemaking website. The Secretary must:

(1) notify members of Congress, federal judges, and the chief justice of each state's highest court, with a link to the judiciary's rulemaking website; and
(2) provide copies of the proposed change to legal-publishing firms with a request that they beto timely included in their publications. The Secretary shall also provide copies to the chief justice of the highest court of each state and, insofar as is practicable, to all individuals and organizations that request them.

b. In order to provide full notice and opportunity for comment on proposed rule changes, a period of it in publications.

(b) *Public-Comment Period*

A public-comment period on the proposed change must extend for at least six months from the time of publication ofafter notice is published in the *Federal Register* *shall be permitted*, unless a shorter period is approved under the provisions of subparagraph paragraph (d) of this paragraphsection.

(c) c.*Hearings*

An AThe advisory Ccommittee shallmust conduct public hearings on allthe proposed rules changes unless elimination of such hearingseliminating them is approved under the provisions of subparagraph d of this paragraph. The hearings shall be held at suchparagraph (d) of this section or not enough witnesses ask to testify at a particular hearing. The hearings are held at the times and places as determined by the chairman of the Advisory Committee and shall be preceded by adequate notice, including publication in the that the advisory committee's chair determines. Notice of the times and places must be published in the *Federal Register*. *Proceedings shall be recorded and a transcript prepared. Subject to the provisions of paragraph six, such transcript shall be available for public inspection.*

d. Exceptions to the time period for public comment and the public hearing requirement may be granted by the and on the judiciary's rulemaking website.

The hearings must be recorded. Whenever possible, a transcript should be produced by a qualified court reporter.

(d) *Expedited Procedures*

The Standing Committee ~~or its chairman when~~may shorten the ~~Standing Committee~~public-comment period or ~~its chairman~~eliminate public hearings if it determines that the administration of justice requires ~~that~~ a proposed rule change ~~should~~ to be expedited and that appropriate notice to the public ~~notice and comment may be achieved by a shortened comment period, without public hearings, or both.~~can still be provided and public comment obtained. The Standing Committee may also eliminate ~~the~~ public notice and comment ~~requirement if, in the case of~~for a technical or conforming amendment~~, it~~ if the Committee determines that ~~notice and comment~~they are ~~not appropriate or necessary~~unnecessary. ~~Whenever such~~ When an exception is made, the ~~Standing Committee shall~~chair must advise the Judicial Conference ~~of the exception and the reasons for the exception.~~

~~5. Subsequent Procedures~~

~~a. At the conclusion of the comment period the reporter shall~~ and provide the reasons.

§ 440.20.50 ***Procedures After the Comment Period***

(a) *Summary of Comments*

When the public-comment period ends, the reporter must prepare a summary of the written comments received and of the testimony presented at public hearings. ~~The~~ If the number of comments is very large, the reporter may summarize and aggregate similar individual comments, identifying the source of each one.

(b) *Advisory Committee ~~shall review the proposed rules changes in the light of the~~Review; Republication*

The advisory committee reviews the proposed change in light of any comments and testimony. If the ~~A~~advisory ~~C~~committee makes ~~any~~ substantial changes, the proposed rule should be republished for an additional period ~~for~~of public ~~notice and comment may be provided.~~

~~b. The Advisory Committee shall submit proposed rules changes and Committee Notes, as finally agreed upon,~~ comment unless the advisory committee determines that republication would not be necessary to achieve adequate public comment and would not assist the work of the rules committees.

(c) *Submission to the Standing Committee*

The advisory committee submits to the Standing Committee the proposed change and committee note that it recommends for approval. Each submission ~~shall~~ must:

(1) be accompanied by a separate report of the comments received and shall ;
(2) explain anythe changes made subsequent toafter the original publication. The submission shall also include minority views of Advisory Committee members who wish to have separate views recorded.

6. Records

a. The Chairman of the Advisory Committee shall arrange for the preparation of minutes of all Advisory Committee; and
(3) include an explanation of competing considerations examined by the advisory committee.

§ 440.20.60 ***Preparing Minutes and Maintaining Records***

(a) *Minutes of Meetings*

The advisory committee's chair arranges for preparing the minutes of the committee meetings.

(b.) *Records*

The advisory committee's records of an Advisory Committee shall consist of the :

- written suggestions received from the public; the
- written comments received from the public on drafts of proposed rules, responses thereto,;
- the committee's responses to public suggestions and comments;
- other correspondence with the public about proposed rule changes;
- electronic recordings and transcripts of public hearings, and summaries prepared by the reporter; all correspondence relating to proposed rules changes; minutes of Advisory Committee (when prepared);
- the reporter's summaries of public comments and of testimony from public hearings;
- agenda books and materials prepared for committee meetings;
- minutes of committee meetings;
- approved drafts of rules changes; and
- reports to the Standing Committee. The records shall be maintained at

(c) *Public Access to Records*

The records must be posted on the judiciary's rulemaking website, except for general public correspondence about proposed rule changes and electronic recordings of hearings when transcripts are prepared. This correspondence and archived records are maintained by the Administrative Office of the United States Courts for a minimum of two years and shall beare available for public inspection during reasonable office hours. Thereafter the records may be transferred to a Government

Records Center in accordance with applicable Government retention and disposition schedules.

c. Any portion of minutes, relating to. Minutes of a closed meeting andmay be made available to the public, may contain such but with any deletions as may be necessary to avoid frustrating the purposes of closing the meeting as provided in subparagraph 3a.

d. Copies of records shall be furnished to any person upon payment of a reasonable fee for the cost of reproduction.

Part II - under § 440.20.30(a).

§ 440.30 Standing Committee

7 § 440.—30.10 *Functions*

The Standing Committee shall coordinate's functions include:

(1) coordinating the work of the several Advisory Committees, make suggestions of proposals to be studied by them, consider proposals recommended by the Advisory Committees, and transmit such proposals with itsadvisory committees;
(2) suggesting proposals for them to study;
(3) considering proposals they recommend for publication for public comment; and
(4) for proposed rule changes that have completed that process, deciding whether to accept or modify the proposals and transmit them with its own recommendation to the Judicial Conference, or recommit them to the appropriate Advisory Cadvisory committee for further study and consideration, or reject them.

8 § 440.—30.20 *Procedures*

(a.) *Meetings*

The Standing Committee shall meets at suchthe times and places asthat the Chairman may authorizechair designates. All Committee meetings shallmust be open to the public, except when the cCommittee so meeting,— in open session and with a majority present, — determines that it is in the public interest thatto have all or part of the remainder of the meeting on that day shall be closed to the public and states the reason for closing the meeting.. Each meeting shallmust be preceded by notice of the time and place of the meeting, including publication published in the *Federal Register* and on the judiciary's rulemaking website, sufficientsufficiently in advance to permit interested persons to attend.

b. When an Advisory Committee's final recommendations for rules changes have been submitted, the Chairman and Reporter of (b) *Attendance by the Advisory Committee shallChairs and Reporters*

The advisory committees' chairs and reporters should attend the Standing Committee meetings to present the proposed rules changes andtheir committees' proposed rule changes and committee notes, to inform the Standing Committee about ongoing work, and to participate in the discussions.

(c) *Action on Proposed Rule Changes or Committee Notes.*

c. The Standing Committee may accept, reject, or modify a proposal. If a modification effects a substantial change, the proposal will be returned to the Advisory Committee with appropriate instructions.

d.proposed change or committee note, or may return the proposal to the advisory committee with instructions or recommendations.

(d) *Transmission to the Judicial Conference*

The Standing Committee shallmust transmit to the Judicial Conference the proposed rules changes and Ccommittee Nnotes approved by it that it approves, together with the Advisory Committeeadvisory-committee report. The Standing Committee''s report to the Judicial Conference shall includes its own recommendations and explains any changes that it has made.

9. Records

a. The Secretary shall prepare minutes of all **§ 440.30.30** ***Preparing Minutes and Maintaining Records***

(a) *Minutes of Meetings*

The Secretary prepares minutes of Standing Committee meetings.

(b.) The records of the*Records*

The Standing Committee shall 's records consist of :

- the minutes of Standing and AdvisoryStanding-Committee and advisory-committee meetings;
- agenda books and materials prepared for Standing Committee meetings, ;
- reports to the Judicial Conference; and
- official correspondence concerningabout rules changes, including correspondence with Advisory Committee Chairmen. The records shall be maintained atadvisory-committee chairs

(c) *Public Access to Records*

The records must be posted on the judiciary's rulemaking website, except for official correspondence about rule changes. This correspondence and archived records are maintained by the Administrative Office of the United States Courts for a minimum of two years and shall beare available for public inspection during reasonable office hours. Thereafter the records may be transferred to a Government Records Center in accordance with applicable Government retention and disposition schedules.

c. Copies of records shall be furnished to any person upon payment of a reasonable fee for the cost of reproduction.

. Minutes of a closed meeting may be made available to the public but with any deletions necessary to avoid frustrating the purpose of closing the meeting under § 440.30.20(a).

Procedures Presently in Effect

PROCEDURES FOR THE CONDUCT OF BUSINESS BY THE JUDICIAL CONFERENCE COMMITTEES ON RULES OF PRACTICE AND PROCEDURE

Scope

These procedures govern the operations of the Judicial Conference Committee on Rules of Practice, Procedure, and Evidence (Standing Committee) and the various Judicial Conference Advisory Committees on Rules of Practice and Procedure in drafting and recommending new rules of practice, procedure, and evidence and amendments to existing rules.

Part I - Advisory Committees

1. Functions

   Each Advisory Committee shall carry on "a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use" in its particular field, taking into consideration suggestions and recommendations received from any source, new statutes and court decisions affecting the rules, and legal commentary.

2. Suggestions and Recommendations

   Suggestions and recommendations with respect to the rules should be sent to the Secretary, Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts, Washington, D.C. 20544, who shall, to the extent feasible, acknowledge in writing every written suggestion or recommendation so received and shall refer all suggestions and

recommendations to the appropriate Advisory Committee. To the extent feasible, the Secretary, in consultation with the Chairman of the Advisory Committee, shall advise the person making a recommendation or suggestion of the action taken thereon by the Advisory Committee.

3. Drafting Rules Changes

a. An Advisory Committee shall meet at such times and places as the Chairman may authorize. All Advisory Committee meetings shall be open to the public, except when the committee so meeting, in open session and with a majority present, determines that it is in the public interest that all or part of the remainder of the meeting on that day shall be closed to the public and states the reason for closing the meeting. Each meeting shall be preceded by notice of the time and place of the meeting, including publication in the Federal Register, sufficient to permit interested persons to attend.

b. The reporter assigned to each Advisory Committee shall, under the direction of the Committee or its Chairman, prepare initial draft rules changes, "Committee Notes" explaining their purpose and intent, copies or summaries of all written recommendations and suggestions received by the Advisory Committee, and shall forward them to the Advisory Committee.

c. The Advisory Committee shall then meet to consider the draft proposed new rules and rules amendments, together with Committee Notes, make revisions therein, and submit them for approval of publication to the Standing Committee, or its Chairman, with a written report explaining the Committee's action, including any minority or other separate views.

4. Publication and Public Hearings

a. When publication is approved by the Standing Committee, the Secretary shall arrange for the printing and circulation of the proposed rules changes to the bench and bar, and to the public generally. Publication shall be as wide as practicable. Notice of the proposed rule shall be published in the Federal Register and copies provided to appropriate legal publishing firms with a request that they be timely included in their publications. The Secretary shall also provide copies to the chief justice of the highest court of each state and, insofar as is practicable, to all individuals and organizations that request them.

b. In order to provide full notice and opportunity for comment on proposed rule changes, a period of at least six months from the time of publication of notice in the Federal Register shall be permitted, unless a shorter period is approved under the provisions of subparagraph d of this paragraph.

c. An Advisory Committee shall conduct public hearings on all proposed rules changes unless elimination of such hearings is approved under the provisions of subparagraph d of this paragraph. The hearings shall be held at such times and places as determined by the chairman of the Advisory Committee and shall be preceded by adequate notice, including publication in the Federal Register. Proceedings shall be recorded and a transcript prepared. Subject to the provisions of paragraph six, such transcript shall be available for public inspection.

d. Exceptions to the time period for public comment and the public hearing requirement may be granted by the

Standing Committee or its chairman when the Standing Committee or its chairman determines that the administration of justice requires that a proposed rule change should be expedited and that appropriate public notice and comment may be achieved by a shortened comment period, without public hearings, or both. The Standing Committee may eliminate the public notice and comment requirement if, in the case of a technical or conforming amendment, it determines that notice and comment are not appropriate or necessary. Whenever such an exception is made, the Standing Committee shall advise the Judicial Conference of the exception and the reasons for the exception.

5. Subsequent Procedures

   a. At the conclusion of the comment period the reporter shall prepare a summary of the written comments received and the testimony presented at public hearings. The Advisory Committee shall review the proposed rules changes in the light of the comments and testimony. If the Advisory Committee makes any substantial change, an additional period for public notice and comment may be provided.

   b. The Advisory Committee shall submit proposed rules changes and Committee Notes, as finally agreed upon, to the Standing Committee. Each submission shall be accompanied by a separate report of the comments received and shall explain any changes made subsequent to the original publication. The submission shall also include minority views of Advisory Committee members who wish to have separate views recorded.

6. Records

a. The Chairman of the Advisory Committee shall arrange for the preparation of minutes of all Advisory Committee meetings.

b. The records of an Advisory Committee shall consist of the written suggestions received from the public; the written comments received on drafts of proposed rules, responses thereto, transcripts of public hearings, and summaries prepared by the reporter; all correspondence relating to proposed rules changes; minutes of Advisory Committee meetings; approved drafts of rules changes; and reports to the Standing Committee. The records shall be maintained at the Administrative Office of the United States Courts for a minimum of two years and shall be available for public inspection during reasonable office hours. Thereafter the records may be transferred to a Government Records Center in accordance with applicable Government retention and disposition schedules.

c. Any portion of minutes, relating to a closed meeting and made available to the public, may contain such deletions as may be necessary to avoid frustrating the purposes of closing the meeting as provided in subparagraph 3a.

d. Copies of records shall be furnished to any person upon payment of a reasonable fee for the cost of reproduction.

Part II - Standing Committee

7. Functions

The Standing Committee shall coordinate the work of the several Advisory Committees, make suggestions of proposals to be studied by them, consider proposals recommended by the Advisory Committees, and transmit such proposals with its recommendation to the Judicial Conference, or recommit them to the appropriate Advisory Committee for further study and consideration.

8. Procedures

a. The Standing Committee shall meet at such times and places as the Chairman may authorize. All Committee meetings shall be open to the public, except when the committee so meeting, in open session and with a majority present, determines that it is in the public interest that all or part of the remainder of the meeting on that day shall be closed to the public and states the reason for closing the meeting. Each meeting shall be preceded by notice of the time and place of the meeting, including publication in the Federal Register, sufficient to permit interested persons to attend.

b. When an Advisory Committee's final recommendations for rules changes have been submitted, the Chairman and Reporter of the Advisory Committee shall attend the Standing Committee meeting to present the proposed rules changes and Committee Notes.

c. The Standing Committee may accept, reject, or modify a proposal. If a modification effects a substantial change, the proposal will be returned to the Advisory Committee with appropriate instructions.

d. The Standing Committee shall transmit to the Judicial Conference the proposed rules changes and Committee Notes approved by it, together with the Advisory

Committee report. The Standing Committee's report to the Judicial Conference shall include its recommendations and explain any changes it has made.

9. Records

a. The Secretary shall prepare minutes of all Standing Committee meetings.

b. The records of the Standing Committee shall consist of the minutes of Standing and Advisory Committee meetings, reports to the Judicial Conference, and correspondence concerning rules changes including correspondence with Advisory Committee Chairmen. The records shall be maintained at the Administrative Office of the United States Courts for a minimum of two years and shall be available for public inspection during reasonable office hours. Thereafter the records may be transferred to a Government Records Center in accordance with applicable Government retention and disposition schedules.

c. Copies of records shall be furnished to any person upon payment of a reasonable fee for the cost of reproduction.

TAB 11

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

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JEFFREY S. SUTTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

TO: Members, Committee on Rules of Practice and Procedure

FROM: Lee H. Rosenthal

RE: Judiciary Planning

DATE: May 11, 2011

I attach a memo that responds to a request by Judge Charles Breyer, the Judiciary Planning Coordinator, for information on the Standing Committee's work in implementing strategic initiatives and goals from the *Strategic Plan for the Federal Judiciary*. In January 2011, in response to a request of the Executive Committee, the Standing Committee identified two strategic initiatives and a goal from the *Strategic Plan*. For your convenience, the January 2011 memorandum from the Standing Committee to the Advisory Committee on Judiciary Planning is attached.

At the February 2011 meeting of the Executive Committee, Judge Breyer reported on the efforts of the various Judicial Conference committees to implement the *Strategic Plan*. The approach to strategic planning for the Judicial Conference and its committees calls for the Executive Committee to identify strategic planning priorities. On March 14, 2011, the Executive Committee selected four strategies and one goal from the *Strategic Plan* as priorities for the next two years, as follows:

Strategy 1.1. Pursue improvements in the delivery of justice on a nationwide basis.

Strategy 1.3. Secure resources that are sufficient to enable the judiciary to accomplish its mission in a manner consistent with judiciary core values.

Strategy 2.1. Allocate and manage resources more efficiently and effectively.

Strategy 4.1. Harness the potential of technology to identify and meet the needs of court users for information, service, and access to the courts.

Goal 7.2b. Communicate and collaborate with organizations outside the judicial branch to improve the public's understanding of the role and functions of the federal judiciary.

Also attached is the May 5, 2011 letter from Judge Breyer, seeking information on the work of the Standing Committee in implementing the *Strategic Plan*. Specifically, Judge Breyer requests information about the Standing Committee's planned approach to assessing whether its identified initiatives will have met their desired outcomes. The Executive Committee has asked Judge Breyer to prepare an interim assessment of the judiciary's progress in implementing the *Strategic Plan* by September 2012. An update on the Judicial Conference committees' work on their strategic initiatives will be provided at the Executive Committee's meeting in August 2011.

The Standing Committee is asked to review the descriptions of our strategic initiatives (*see* Attachment 2 of Judge Breyer's letter), revise or update them as appropriate, and add any new strategic initiatives we may be pursuing. For each initiative, we are also asked to include a statement about the initiative's purpose and desired outcome, and describe the planned approach for assessing whether its desired outcome has been achieved. We are also asked to review the Judicial Conference committees that are the "partners" or "stakeholders" for our initiatives and make sure that they are appropriately involved in or informed about our efforts. The goal is to encourage "communication and collaboration on cross-cutting issues facing the judiciary."

As noted in our earlier response to the Judiciary Planning Committee, although in a sense the work of the rules committees as contained in the Standing Committee's entire agenda book provides a general response to the Planning Committee's request, the Planning Committee defines "strategic initiative" in a more limited way: "A project, study or effort that has the potential to make a significant contribution to the accomplishment of a strategy or goal set forth in the Strategic Plan for the Federal Judiciary. The completion of a strategic initiative should result in a completed study or analysis, a new capability or service, a new policy, or the accomplishment of a measurable goal or objective." Our draft response, which is attached to this memo, is based on this definition. I welcome your thoughts on the draft response.

Attachments

12b-004719

12b-004720

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
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WASHINGTON, D.C. 20544

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CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

[DRAFT] MEMORANDUM

TO: Advisory Committee on Judiciary Planning

FROM: Lee H. Rosenthal

CC: Judge David Sentelle
James C. Duff, Esq.

DATE: June __, 2011

In a May 5, 2011 letter, Judge Charles Breyer, Judiciary Planning Coordinator, reported on the Executive Committee's five priorities from the *Strategic Plan for the Federal Judiciary*. Judge Breyer asked that the Committee on Rules of Practice and Procedure (the "Standing Committee") verify and update, as appropriate, the information previously provided about the strategic initiatives that the Standing Committee is pursuing, identifying desired outcomes for each initiative. Judge Breyer also asked that the Standing Committee begin considering how to measure or assess its progress in implementing the *Strategic Plan*. Judge Breyer finally asked that the Standing Committee review the Judicial Conference committees that are the partners or stakeholders for its initiatives, and make sure that they are appropriately involved in or informed about these efforts. This memorandum is intended to be responsive to these requests.

As with our January 2011 response to the Judiciary Planning Committee's request to identify strategic initiatives, in a sense the work of the rules committees as contained in the Standing Committee's entire agenda book provides a general response to the Judiciary Planning Committee's request for an update on strategic initiatives. However, the Judiciary Planning Committee defines "strategic initiative" in a more limited way: "A project, study or effort that has the potential to make a significant contribution to the accomplishment of a strategy or goal set forth in the Strategic Plan for the Federal Judiciary. The completion of a strategic initiative should result in a completed study

or analysis, a new capability or service, a new policy, or the accomplishment of a measurable goal or objective." Our response is based on this definition.

Strategic Initiatives

The Standing Committee continues to pursue the strategic initiative identified in January 2011 of working with the Advisory Committee on Civil Rules to implement the results of the May 2010 Conference on Civil Litigation held at the Duke University School of Law. This initiative is related to Strategy 1.1 ("[p]ursue improvements in the delivery of justice on a nationwide basis"), Strategy 5.1 ("[e]nsure that court rules, processes and procedures meet the needs of lawyers and litigants in the judicial process"), and Goal 5.1b ("[a]dopt measures designed to provide flexibility in the handling of cases, while reducing cost, delay, and other unnecessary burdens to litigants in the adjudication of disputes"). The Duke Conference presented a wide array of views on litigation problems and exploration of the most promising opportunities to improve federal civil litigation. The Conference generated specific and general suggestions for changing both rules and litigation practices. The suggestions included changes to the federal rules; changes to judicial and legal education; the development of protocols, guidelines, and projects to test and refine continued improvements; and the development of materials to support these efforts. The Civil Rules Committee has formed a subcommittee to consider the suggestions raised at the conference and ways to implement them. Some aspects of the work, such as judicial education, the development of supporting materials, and the development and implementation of pilot projects, will be coordinated with the Federal Judicial Center ("FJC") and other Judicial Conference committees, particularly the Committee on Court Administration and Case Management ("CACM").

The advisory committee is focusing its immediate attention on three issues: (1) the rules governing discovery, particularly in complex or highly contested cases; (2) the rules governing pleading, in light of recent Supreme Court cases; and (3) the rules that directly involve case management, to determine if rule amendments are need to improve reliable and effective application.

A primary desired outcome of the Rules Committees' work is to determine whether clarifying certain rules, particularly those governing discovery rights and obligations and the sanctions for failing to meet these obligations, would reduce costs and delays in civil litigation, and if so, to propose amending the rules to achieve those clarifications. A second desired outcome is to determine whether and what rule changes would make judges more effective case managers, better able to tailor motions, discovery, and other pretrial work to what is proportional to each case, and if so, to propose those rule changes. The Committees will use the Rules Enabling Act process to achieve and measure progress. That process will involve gathering empirical data, with the FJC's help; holding miniconferences to learn from the bench and bar; publishing proposed amendments for public comment, including hearings; and proposing rule changes through the Committees to the Judicial Conference and the Supreme Court.

Another primary strategic initiative identified in January 2011 was for the Standing

Committee to work with the Advisory Committee on Criminal Rules on its analysis of whether the present rules and related materials adequately support the disclosure obligations of prosecutors. The FJC has conducted a major study. The Criminal Rules Committee has recommended that no rule change be made, but that the FJC should consider publishing a "Good Practices" guide to criminal discovery and should consider revising the District Judges' Bench Book to give judges greater guidance in protecting defendants' right to obtain exculpatory and impeaching information. This initiative is associated with Strategy 1.1, to pursue improvements in the delivery of justice on a nationwide basis. The desired outcome is to make sure the rules effectively support prosecutors' disclosure obligations and to work with other entities and committees on creating supporting materials and judicial education programs that further support effectively enforcing disclosure obligations. As noted, part of this initiative has been completed because the Criminal Rules Committee has determined that no rule change is appropriate at this time to support disclosure obligations. Success of the remainder of this initiative will be assessed by the progress of the Rules Committees' work with the FJC on a "Good Practices" guide and on whether the District Judges' Bench Book should be revised. The Rules Committees will continue to monitor disclosure obligations to assess whether the rules and other supporting materials that may be developed continue adequately to support the disclosure obligations.

In addition to those initiatives identified in the Standing Committee's January 2011 response, the Advisory Committee on the Criminal Rules has been working for years to identify ways in which technology can be used to make the preparation and development of criminal cases more efficient, without risking constitutional limits or sacrificing the important role of in person appearances and communications. An initial package of amendments to achieve this initiative has been approved by the Judicial Conference and the Supreme Court and is pending before Congress. If Congress takes no action to the contrary, the amendments will become effective December 1, 2011. The advisory committee will continue to examine ways in which technological advances can be applied for this purpose. This work is directly responsive to Strategy 4.1, to "[h]arness the potential of technology to identify and meet the needs of court users for information, service, and access to the courts." If these proposals become effective on December 1, 2011, the advisory committee will monitor the practice of the courts under the amendments to ensure that the effect is to increase efficiency without introducing unfairness. Although this initiative has begun with the Advisory Committee on the Criminal Rules, the Appellate, Bankruptcy, and Civil Rules Committees are also examining their rules to determine whether a coordinated revision to reflect the impact of electronic filing and to take advantage of technological advances is appropriate. That work is in its early stages, with the Advisory Committee on the Bankruptcy Rules taking the lead. This work will also be assessed through the Rules Enabling Act process.

Another additional initiative involves the work of the Advisory Committee on the Bankruptcy Rules on revising the bankruptcy forms. The Forms Modernization Project is designed to simplify the extensive financial information that debtors are currently required to supply, elicit more accurate responses, reduce redundant re-entry of information, take advantage of new technology, and facilitate the capture of individual data elements for statistical and operational purposes. This initiative fits

within Strategy 4.1 ("[h]arness the potential of technology to identify and meet the needs of court users for information, service, and access to the courts"), as well as Strategy 5.1 ("[e]nsure that court rules, processes and procedures meet the needs of lawyers and litigants in the judicial process"). Drafts of the first set of revised forms are currently undergoing testing, with the goal of an August 2012 publication for public comment of a set of revised forms for individual debtors. The Bankruptcy Rules Committee is working closely with the Committee on the Administration of the Bankruptcy System on the forms project, and the FJC has also been significantly involved. The Bankruptcy Rules Committee has sought input from others involved in the bankruptcy system, including clerks of court and bankruptcy judges. The desired outcome of this initiative is to improve the forms by making them easier to use, by eliciting more accurate information from debtors and parties, and by making the intake and litigation process more efficient through more effective use of technology. The success of this initiative will be assessed through the Rules Enabling Act process and the monitoring of the experience with the forms before and after adoption.

These initiatives involve working with the FJC and with CACM. Both the FJC and CACM are essential partners in conducting empirical studies, in developing supporting materials to assist judges in understanding and implementing the rules, and in improving judicial education and lawyer education to make the rules more effective. The Standing Committee will continue to work on ways to improve collaboration with the FJC and with CACM to achieve these and other initiatives.

Judiciary Priorities

Judge Breyer's letter noted that the Executive Committee has identified Goal 7.2b, to communicate and collaborate with organizations outside the judicial branch to improve the public's understanding of the role and functions of the federal judiciary, as a priority. The Standing Committee is committed to working to achieve Goal 7.2b. The Rules Committees have worked very hard to build effective communication with a number of different bar organizations and groups and with members of Congress and their staff on rules issues. In particular, the Committees have worked very hard to convey the principled and transparent nature of the process that Congress created under the Rules Enabling Act. The Rules Committees also have worked very hard to increase the understanding of their work and the nature of the rulemaking process. That work is vital to achieving the bar's effective participation in, and support for, the Committees' work and to achieving an effective working relationship with Congress in changing rules and related statutes as necessary to improve the administration of justice.

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
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WASHINGTON, D.C. 20544

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SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM TO: ADVISORY COMMITTEE ON JUDICIARY PLANNING

The Advisory Committee on Judiciary Planning has requested the Committee on Rules of Practice and Procedure (and all other Judicial Conference committees) (1) "to identify strategic initiatives it is pursuing," indicating the anticipated completion date and whether the initiative is being conducted in partnership with other Judicial Conference committees, and (2) to "[r]eview the *Strategic Plan for the Federal Judiciary* . . . and suggest which of its issues, strategies, or goals the Executive Committee should consider to be high priorities over the next two years." Although in a sense the work of the rules committees as contained in the Committee's entire agenda book provides a general response to this request, the Long Range Planning Committee defines "strategic initiative" in a more limited way: "A project, study or effort that has the potential to make a significant contribution to the accomplishment of a strategy or goal set forth in the Strategic Plan for the Federal Judiciary. The completion of a strategic initiative should result in a completed study or analysis, a new capability or service, a new policy, or the accomplishment of a measurable goal or objective." The following response is based on this definition.

Strategic Initiatives

A primary "strategic initiative" the Committee on Practice and Procedure is pursuing is to work with the Advisory Committee on Civil Rules in implementing the results of the May 2010 Conference held at the Duke University School of Law. At that conference, more than seventy moderators, panelists, and speakers presented a wide array of views on litigation problems and exploration of the most promising opportunities to improve federal civil litigation. The conference generated specific and general suggestions for changing both rules and litigation practices. The suggestions included changes to the federal rules; changes to judicial and legal education; the

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development of protocols, guidelines, and projects to test and refine continued improvements; and the development of materials to support these efforts. The advisory committee has formed a subcommittee to consider the suggestions raised at the conference and ways to implement them. Some aspects of the work, such as judicial education, the development of supporting materials, and the development and implementation of pilot projects, will be coordinated with the Federal Judicial Center ("FJC") and other Judicial Conference committees, including the Committee on Court Administration and Case Management. The advisory committee is focusing its immediate attention on two issues: (1) discovery in complex or highly contested cases; and (2) review of pleading standards in light of recent Supreme Court cases. The completion date for the entire initiative is unknown.

Another primary strategic initiative is to work with the Advisory Committee on Criminal Rules on its ongoing analysis of whether the present rules and related materials adequately support the disclosure obligations of prosecutors. The FJC has conducted a major study and the advisory committee is studying not only the possibility of rules changes but also whether the District Judges' Bench Book should be revised to give judges greater guidance in protecting defendants' right to obtain exculpatory and impeaching information. The completion date is unknown.

Judiciary Priorities

The strategy or goal that the Committee on Rules of Practice and Procedure recommends that the Executive Committee consider to be a high priority over the next two years is the following.

1. Strategy 6.1, "Develop and implement a comprehensive approach to enhancing relations between the judiciary and the Congress." Goal 6.1a, "Improve the early identification of legislative issues in order to improve the judiciary's ability to respond and communicate with Congress on issues affecting the administration of justice."

12b-004729

12b-004730

United States District Court
Northern District of California
United States Courthouse
San Francisco, California 94102

Chambers of
Charles R. Breyer
United States District Judge

May 5, 2011

Honorable Lee H. Rosenthal
United States District Court
Bob Casey United States Courthouse
515 Rusk Street, Room 11535
Houston, TX 77002-2600

Dear Lee:

As the Judiciary Planning Coordinator, I am writing to report on the five priorities from the *Strategic Plan for the Federal Judiciary* that the Executive Committee has identified. I also request your assistance in reporting to the Executive Committee about the implementation of the plan.

Executive Committee Priorities

As you know, at its March 14, 2011 meeting, the Executive Committee identified four strategies and one goal from the *Strategic Plan* as priorities for the next two years. Briefly, the Executive Committee's priorities are to 1) improve the delivery of justice, 2) secure sufficient resources, 3) manage and allocate resources efficiently and effectively, 4) harness technology's potential, and 5) work with outside organizations to improve public understanding of the judiciary. A statement from the Executive Committee about these five priorities is included as Attachment 1.

I would like to thank you for educating me about the strategic initiatives that the Committee on Rules of Practice and Procedure is pursuing to implement the *Strategic Plan*. Both of these initiatives are directly linked the Executive Committee's priority strategy of pursuing improvements in the delivery of justice. The Executive Committee is hopeful that the judiciary can make significant progress implementing the results of the 2010 Conference on Civil Litigation, and ensuring that rules and related materials adequately support the disclosure obligations of prosecutors.

Action Requested

To help me keep the Executive Committee apprised of committee efforts to implement the *Strategic Plan*, staff has prepared some materials for your review and consideration. (See Attachment 2). We request two actions of all committees. First, we

ask that you verify and update, as appropriate, the information about the strategic initiatives that your committee is pursuing. In particular, it would be helpful to identify desired outcomes for each initiative. For the second action, we ask that committees begin to consider how to measure or assess progress in implementing the *Strategic Plan*. At your June meeting, we ask that you identify your planned approach to assessing whether or not each initiative's outcome will have been met – including, where appropriate, the measures or metrics that may be used to gauge progress. The Executive Committee has asked me for an interim assessment of the judiciary's progress in implementing the *Strategic Plan* by September 2012, and information about how you plan to measure progress will be of great help in preparing this assessment.

Information about the work of the Rules Committee in implementing the *Strategic Plan* is critical, and I thank you for taking the time to provide it to me. The Executive Committee appreciated the report that I was able to provide in February, and the work of your committee that the report reflected.

I have one final request for the Committee as it considers the judiciary planning agenda topic next month. Please take a moment and review the Judicial Conference committees that are the partners or stakeholders for your initiatives, and make sure that they are appropriately involved in or informed about these efforts. One of the reasons that the Executive Committee decided to establish a new approach to planning was to encourage communication and collaboration on cross-cutting issues facing the judiciary. I understand that there is already considerable coordination, but I would be remiss if I did not continue to emphasize these efforts.

Thank you for all of your hard work. If you have any questions about this request, or suggestions about the planning process, please let me know. Also available to field your questions and gather your suggestions is Brian Lynch, the Administrative Office's Long-Range Planning Officer. Brian can be reached at 202-502-1405 or Brian_Lynch@ao.uscourts.gov.

Sincerely,

Charles R. Breyer

Enclosures

cc: Honorable David Bryan Sentelle

Attachment 1

EXECUTIVE COMMITTEE PRIORITIES
STRATEGIC PLAN FOR THE FEDERAL JUDICIARY

The Executive Committee's responsibility for facilitating and coordinating judiciary planning includes priority-setting. When the Judicial Conference approved the *Strategic Plan for the Federal Judiciary*, it also approved the following as part of the planning approach for the Conference and its committees:

> With suggestions from Judicial Conference committees and others, and the input of the judiciary planning coordinator, the Executive Committee will identify issues, strategies, or goals to receive priority attention over the next two years. (JCUS-SEP 10, pp. 5-6).

At its March 14, 2011 meeting, the Executive Committee identified four strategies and one goal that should receive priority attention over the next two years:

Strategy 1.1. Pursue improvements in the delivery of justice on a nationwide basis.

Strategy 1.3. Secure resources that are sufficient to enable the judiciary to accomplish its mission in a manner consistent with judiciary core values.

Strategy 2.1. Allocate and manage resources more efficiently and effectively.

Strategy 4.1. Harness the potential of technology to identify and meet the needs of court users for information, service, and access to the courts.

Goal 7.2b. Communicate and collaborate with organizations outside the judicial branch to improve the public's understanding of the role and functions of the federal judiciary.

All of the strategies and goals in the *Strategic Plan* are important, and should continue to be pursued. Some elements of the *Strategic Plan* are of immediate concern, while others should be addressed in the long term. Thus, given limited time and resources, over the next two years particular attention should be directed toward the priority strategies and the priority goal. Given the cross-cutting nature of the goal and strategies that have been identified as priorities, continued coordination of efforts across committees is essential.

In assessing the implementation of the *Strategic Plan*, the Executive Committee will closely follow the progress of efforts to pursue the above-listed priorities. The Committee may request additional information and reports from Conference committees about implementation efforts in these areas. The Committee may also request that certain committees take on new initiatives relating to *Strategic Plan* priorities, or participate as a stakeholder in an initiative that is being led by another committee.

Rules of Practice and Procedure Committee - Judiciary Strategic Initiatives

Action Requested: Please review the table below describing the strategic initiatives that the Committee on Rules of Practice and Procedure is currently

1) Verify and update, as appropriate, the information regarding the committee's strategic initiatives, including new initiatives.
    a) If possible, include a statement about each initiative's purpose and desired outcome.
2) Identify the planned approach to assessing each strategic initiative, including, as appropriate, the metrics or measures to be used to gauge progress.

Strategic Initiative	Purpose	Desired Outcome/Related Strategies and Goals	Timeframe for Completion	Partnerships
Implementing the Results of the 2010 Conference on Civil Litigation. Work with the Advisory Committee on Civil Rules to implement the results of the May 2010 Conference held at the Duke University School of Law.		Strategy 1.1; Strategy 5.1; Goal 5.1.b.	The Advisory Committee on Civil Rules is focusing its immediate attention on two issues: (1) discovery in complex or highly contested cases; and (2) review of pleading standards in light of recent Supreme Court cases. The completion date for the entire initiative is unknown.	• Court Administration and Case Management Committee • Advisory Committee on Civil Rules • Federal Judicial Center
Planned Assessment Approach				
Rules Regarding Disclosure Obligations of Prosecutors. Work with the Advisory Committee on Criminal Rules on its ongoing analysis of whether the present rules and related materials adequately support the disclosure obligations of prosecutors.		Strategy 1.1.	The FJC has conducted a major study and the Advisory Committee on Criminal Rules is studying not only the possibility of rules changes but also whether the District Judges' Bench Book should be revised to give judges greater guidance in protecting defendants' right to obtain exculpatory and impeaching information. The completion date is unknown.	• Advisory Committee on Criminal Rules • Federal Judicial Center
Planned Assessment Approach				

TAB 12

December 2011							February 2012							March 2012						
S	M	T	W	T	F	S	S	M	T	W	T	F	S	S	M	T	W	T	F	S
				1	2	3				1	2	3	4					1	2	3
4	5	6	7	8	9	10	5	6	7	8	9	10	11	4	5	6	7	8	9	10
11	12	13	14	15	16	17	12	13	14	15	16	17	18	11	12	13	14	15	16	17
18	19	20	21	22	23	24	19	20	21	22	23	24	25	18	19	20	21	22	23	24
25	26	27	28	29	30	31	26	27	28	29				25	26	27	28	29	30	31

January 2012

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
1 New Year's Day	**2**	**3**	**4**	**5**	**6**	**7**
8	**9**	**10**	**11**	**12**	**13**	**14**
15	**16** Martin Luther King Jr. Day	**17**	**18**	**19**	**20**	**21**
22	**23**	**24**	**25**	**26**	**27**	**28**
29	**30**	**31**				
						U.S. Federal Holidays are in Red.

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May 2012							July 2012							August 2012						
S	M	T	W	T	F	S	S	M	T	W	T	F	S	S	M	T	W	T	F	S
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June 2012

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
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3	4	5	6	7	8	9
10	11	12	13	14	15	16
17 **Father's Day**	18	19	20 **Summer Begins**	21	22	23
24	25	26	27	28	29	30
						U.S. Federal Holidays are in Red.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 2-3, 2011
Washington, D.C.
Minutes

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C. on Thursday and Friday, June 2 and 3, 2011. The following members were present:

Judge Lee H. Rosenthal, Chair
Dean C. Colson, Esquire
Douglas R. Cox, Esquire
Roy Englert, Esquire
Judge Marilyn L. Huff
Chief Justice Wallace Jefferson
Dean David F. Levi
William J. Maledon, Esquire
Judge Reena Raggi
Judge Patrick J. Schiltz
Judge James A. Teilborg
Judge Diane P. Wood

Deputy Attorney General James M. Cole participated in part of the meeting. In addition, the Department of Justice was represented by Kathleen Felton, Esquire; Elizabeth J. Shapiro, Esquire; Jessica Hertz, Esquire; and Ted Hirt, Esquire.

Judge Neil M. Gorsuch was unable to attend the meeting.

Judge Anthony J. Scirica, former chair of the committee, participated in much of the meeting, and Judge Barbara J. Rothstein, Director of the Federal Judicial Center, attended a portion of the meeting. Also participating were the committee's consultants: Joseph F. Spaniol, Jr.; Professor Geoffrey C. Hazard, Jr.; and Professor R. Joseph Kimble.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Peter G. McCabe	The committee's secretary
Andrea L. Kuperman	The committee's chief counsel
James N. Ishida	Senior attorney, Administrative Office
Jeffrey N. Barr	Senior attorney, Administrative Office
Joe Cecil	Research Division, Federal Judicial Center
Emery G. Lee	Research Division, Federal Judicial Center

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Jeffrey S. Sutton, Chair
Professor Catherine T. Struve, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Eugene R. Wedoff, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Troy A. McKenzie, Associate Reporter
Advisory Committee on Civil Rules —
Judge Mark R. Kravitz, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Richard C. Tallman, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter
Advisory Committee on Evidence Rules —
Judge Sidney A. Fitzwater, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Committee Changes

Judge Rosenthal reminded the committee that her term as chair will expire on October 1, 2011, and that Chief Justice Roberts had named Judge Kravitz as her successor. The Chief Justice also named Judge David Campbell to succeed Judge Kravitz as chair of the Advisory Committee on Civil Rules and Judge Raggi to succeed Judge Tallman as chair of the Advisory Committee on Criminal Rules. Judge Rosenthal said that these selections were truly extraordinary and will greatly benefit the rules program.

She pointed out that Judge Tallman was attending his last Standing Committee meeting and had been an enormously successful chair of the Advisory Committee on Criminal Rules. Among his many accomplishments, she noted, were the package of technology amendments scheduled to take effect on December 1, 2011, the pending amendments to Rule 12 (pretrial motions) and Rule 15 (depositions), and the comprehensive and meticulous review of prosecutors' obligations to disclose exculpatory and impeachment information to the defense. She emphasized that he had steered the committee carefully among major competing interests and considerations. In doing so, he had shown consistently great insight and was a delight to work with.

Judge Rosenthal pointed out that the terms of Mr. Cox and Mr. Maledon were also due to expire on October 1, 2011. She emphasized the importance of both members' contributions to the Standing Committee and noted that the committee will celebrate their distinguished service more formally at the next meeting.

Remembering Judge John M. Roll

Judge Tallman asked the committee to remember and honor the late Chief Judge John M. Roll, a beloved former member of the Advisory Committee on Criminal Rules. He pointed out that Judge Roll had contributed mightily to the federal rules process, had been a major force in restyling the Federal Rules of Criminal Procedure, and had worked tirelessly in the cause of justice until his untimely death.

Judicial Conference Report

Judge Rosenthal reported that no proposed rule amendments had been presented to the Judicial Conference at its March 2011 session. In January 2011, the Conference's Executive Committee approved the committee's report on the privacy rules, which was then submitted to Congress.

She noted that the Conference in March had been asked to approve a proposal from the Court Administration and Case Management Committee to revise the standard for senior judges to participate in en banc decisions. The Conference deferred the matter, however, to allow the rules committees time to collaborate with the Court Administration Committee on the matter. Judge Sutton affirmed that the Advisory Committee on Appellate Rules was currently in the process of considering the proposal, but would most likely not recommend a change in the rules.

Pending Rule Amendments

Judge Rosenthal reported that the Supreme Court had approved all the rule amendments approved by the Judicial Conference in September 2010, except for two minor language changes in the restyled evidence rules. She pointed out that it is clear that the Court reviews the proposed rules extremely closely, and it had raised specific concerns regarding the language of four of the restyled rules. Judge Rosenthal worked with the chair and reporter of the Advisory Committee on Evidence Rules to address those concerns. In the end, two of the rules were promulgated by the Court as originally presented to it, and minor changes were made in the text of the other two rules with the approval of the Judicial Conference's Executive Committee.

Judge Rosenthal noted that the amendments were now pending before Congress and scheduled to take effect on December 1, 2011. She added, though, that there may be some concerns in Congress over some of the bankruptcy rule amendments.

Professor Capra announced that the restyled evidence rules had won two prestigious legal-writing awards – the Clear Mark Award for clear legal writing and the Burton Reform in Law Award. He said that principal credit for this major achievement belonged to Professor Kimble and the style committee – Judge Teilborg, Judge Huff, and Mr. Maledon.

Legislative Report

Ms. Kuperman reported that the proposed Lawsuit Abuse Reduction Act of 2011 had been introduced in each house of Congress, and a hearing had been held before the House Judiciary Committee. The proposed legislation, she said, would restore the 1983 version of FED. R. CIV. P. 11 (sanctions), thereby eliminating the current safe harbor provision in the rule and making imposition of sanctions mandatory for rule violations. She noted that the committee had sent a letter to Congress opposing the legislation, noting, among other things, that an empirical study by the Federal Judicial Center had demonstrated that the 1983 version of the rule simply did not work, had led to strategic gamesmanship by lawyers, and had resulted in satellite litigation over imposition of sanctions. Nevertheless, the House bill was scheduled for markup within a week. The Senate bill, she added, was still pending before the Senate Judiciary Committee.

Ms. Kuperman reported that the proposed Sunshine in Litigation Act of 2011 was similar to other Sunshine Acts introduced in every Congress since the 1990s. It would prevent a court from issuing a discovery protective order without first making particularized findings of fact that the order would not restrict the disclosure of information relevant to protection of public health and safety. The latest version of the legislation, she noted, was limited to cases where the pleadings state facts relevant to protection of public health or safety. The committee, she said, had written to the Senate expressing its opposition to the bill on the grounds that it was inconsistent with the Rules Enabling Act and would make discovery more burdensome and costly. Nevertheless, she said, the Senate Judiciary Committee favorably reported a substitute version of the bill.

Ms. Kuperman reported that efforts were well underway to obtain legislation to conform 28 U.S.C. § 2107 to the pending amendment to FED. R. APP. P. 4(a)(1) (time to file a notice of appeal in a civil case), scheduled to take effect on December 1, 2011. The amendment will clarify the time to appeal in civil cases in which one of the parties is a United States officer or employee sued in an individual capacity for acts or omissions in connection with official duties.

She added that no legislation was pending to deal with pleading standards in civil cases in light of the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937 (2009).

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of the last meeting, held on January 6-7, 2011.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Sutton and Professor Struve presented the report of the advisory committee, as set forth in Judge Sutton's memorandum and attachments of May 2, 2011 (Agenda Item 6).

Amendments for Publication

FED. R. APP. P. 28 and 28.1

Judge Sutton reported that the proposed amendments to FED. R. APP. P. 28(a) (briefs) would remove the current requirement that an appellant's brief contain separate statements of the case and of the facts. The proposed changes in Rule 28(b) (appellee's brief) and Rule 28.1 (cross-appeals) complement those in Rule 28(a).

Rule 28(a) currently requires a brief to contain a statement of the case – including the nature of the case, the course of proceedings, and the disposition below – followed in order by a statement of the facts. The current rule, he said, has confused practitioners and led to redundancy of information in briefs. Moreover, it is not logical in most cases for an attorney to address the case before setting forth the underlying facts.

Judge Sutton noted that the revised rule would allow appellants to weave the two statements together and present the events to the court in a more logical order, such as in chronological order. The proposed rule would consolidate subdivisions (a)(6) and (a)(7) into a single new subdivision that requires a "concise statement of the case setting out the facts relevant to the issues submitted for review and identifying the rulings presented for review. . . ." That approach, he said, was very similar to the Supreme Court's Rule 24.1(g).

Judge Sutton noted that the advisory committee had discussed the proposed revisions with leading appellate lawyers and had received largely favorable reactions to them. A member added that the proposed rule would be very beneficial because it is open-ended and flexible, rather than prescriptive.

The committee without objection by voice vote approved the proposed amendments for publication.

APPELLATE FORM 4

Judge Sutton reported that the advisory committee was proposing to modify APPELLATE FORM 4 (affidavit accompanying a motion for permission to appeal in forma pauperis). Questions 10 and 11 on the current form ask litigants to disclose: (1) the name of any attorney or other person (such as a paralegal or typist) whom they have paid, or will pay, for services in connection with the case; and (2) the amount of the payments. Critics have said that the questions are overly intrusive and unnecessary in making a determination of in forma pauperis status. They also assert that the questions may raise issues involving attorney-client privilege and work-product protection.

Judge Sutton explained that the advisory committee would replace the current two questions with a single new Question 10 that would read as follows: "Have you spent – or will you be spending – any money for expenses or attorney fees in connection with this lawsuit? If yes, how much?" In addition, some technical changes would be made in the form.

He also reported that the advisory committee believed that it may be time to separate the appellate forms from the full, three-year Rules Enabling Act process. That issue was also discussed during the presentation of the report of the Advisory Committee on Civil Rules. (See pages 30-31 of these minutes.)

The committee without objection by voice vote approved the proposed amendments for publication.

Informational Items

FED. R. APP. P. 4(a)(1) and 28 U.S.C. § 2107

Judge Sutton reported that the advisory committee was continuing its efforts to secure legislation to amend 28 U.S.C. § 2107 to conform that statute to the amendment to FED. R. APP. P. 4(a)(1) (time to file a notice of appeal in a civil case) that will take effect on December 1, 2011. The legislative change, he said, was necessary to buttress the rule amendment because the Supreme Court held in *Bowles v. Russell*, 551 U.S. 205 (2007), that appeal time limits set forth in statutes are jurisdictional in nature. The proposed statutory amendment, he said, mirrors the amended rule and will clarify the time to appeal in civil cases when a federal officer or employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States.

Judge Sutton noted that in pursuing the legislation, Congressional staff had expressed concern that the additional time provided by the rule and statute might not be applicable if they themselves were sued. The proposed statutory language gives all parties 60 days, rather than 30 days, to file a notice of appeal if one of the parties is "a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection [with official duties], including all instances in which the United States represents that [person] when the judgment, order, or decree is entered or files the appeal for that [person]."

Congressional staff appeared to have read the safe harbors in that text as applicable only to representation by the Department of Justice, and not to representation by congressional counsel. Judge Sutton argued, though, that the reference to representation by the "United States" clearly covers representation by congressional counsel, as all agree that the reference to a suit against "a United States officer" covers members of Congress and their staff.

It is likely, he said, that the legislation will proceed as planned. It is important to have it enacted in time to take effect along with the amended rule on December 1, 2011.

FED. R. APP. P. 29

Judge Sutton reported that the advisory committee had not yet determined whether and how to proceed with a proposed amendment to FED. R. APP. P. 29 (amicus briefs) that would treat federally recognized Indian tribes the same as states for the purpose of filing amicus briefs. He noted that both the advisory committee and the Standing Committee had been divided on the merits of the proposal. Moreover, two of the three circuit courts that hear the bulk of the cases in which tribes file amicus briefs had shown little interest in changing the rule. But, he said, the Ninth Circuit – the court with the largest number of cases – had now informed the advisory committee that it favored adoption of a national rule permitting Indian tribes to file amicus briefs without party consent or court permission.

Judge Sutton pointed out that a recent study by the Federal Judicial Center had demonstrated that the courts of appeals deny very few applications from Indian tribes to file amicus briefs. Accordingly, the key issue at stake is the sovereignty and dignity of the tribes, not the actual denial of any rights.

JOINT MEETING WITH THE BANKRUPTCY ADVISORY COMMITTEE

Judge Sutton reported that the advisory committee had met jointly in April 2011 with the Advisory Committee on Bankruptcy Rules to discuss proposed, major revisions to Part VIII of the bankruptcy rules. Part VIII governs appeals from a bankruptcy judge to a district court or bankruptcy appellate panel. The meeting, he said, had been very productive.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Wedoff and Professor Gibson presented the report of the advisory committee, as set forth in Judge Wedoff's memorandum and attachments of May 6, 2011 (Agenda Item 9). He reported that the advisory committee had 22 action items to present, falling into three categories:

1. Eight matters published in August 2010 and ready for final approval by the Judicial Conference;
2. Five matters for final approval by the Conference without publication; and
3. Nine matters to be published for public comment.

To aid in presenting the 22 proposals, Judge Wedoff grouped them by subject matter, rather than by procedural status, and he discussed the subjects in the following order:

1. Procedures for creditor claims and claim objections;
2. Incorporating recent Supreme Court rulings;
3. Simplified procedure for filing a certificate of debtor financial education;
4. Adjusting time deadlines; and
5. Other corrections and adjustments.

1. Creditor Claims and Claim Objections

Background and Procedural Status

Judge Wedoff reported that several bankruptcy judges have voiced concern about the accuracy and adequacy of the information that creditors submit to support their claims, especially in cases where the original creditor has sold the debt to another entity before the bankruptcy case is filed. The problems arise most frequently with regard to home mortgages and credit-card debt. As a result, it is often unclear: (1) who the original holder of the debt was; (2) what the current balance on the debt is; and (3) what it will take to pay off the debt. Moreover, he added, there is often no way for a debtor or trustee to know from the documentation filed with the proof of claim whether the statute of limitations has passed.

To address these problems, he said, the advisory committee in 2009 published proposed amendments to FED. R. BANKR. P. 3001 (proof of claim) and proposed new FED. R. BANKR. P. 3002.1 (notice related to claims secured by a security interest in the debtor's principal residence).

Proposed Rule 3001(c)(2) – scheduled to take effect on December 1, 2011 – will require that additional supporting information accompany proofs of claim in all individual-debtor cases. The revised rule also prescribes the sanctions that may be imposed by the court against a creditor in an individual-debtor case that fails to provide that information.

Another proposed amendment in 2009, new subdivision 3001(c)(1), would have required creditors holding claims based on an open-end or revolving consumer-credit agreement to file with the proof of claim a copy of the last account statement sent to the debtor before the bankruptcy petition was filed. The advisory committee, however, withdrew the proposal because of adverse comments from representatives of bulk purchasers of credit-card debt asserting that often a copy of the last account statement simply cannot be produced.

Instead, the committee was now proposing a new subdivision 3001(c)(3) that would require the creditor of a claim based on an open-end or revolving consumer-credit agreement to provide with the proof of claim five specific pieces of information in support of the claim. That provision was published for further comment in August 2010 and is currently before the Standing Committee for final approval. (See pages 12-13 of these minutes.)

Mortgage Debt

OFFICIAL FORM 10

Judge Wedoff explained that the proposed changes to OFFICIAL FORM 10 (proof of claim) were minor and relatively technical. The form would ask claimants for additional information about the interest rate on secured claims, and some of the instructions would be clarified. The revised form also adds space for an optional uniform claim identifier number, which will assist creditors in facilitating electronic payment in chapter 13 cases. In addition, he said, stylistic and formatting changes would be made.

The committee unanimously by voice vote approved the amendments for final approval by the Judicial Conference, effective December 1, 2011.

OFFICIAL FORM 10 (ATTACHMENT A)
OFFICIAL FORM 10 (SUPPLEMENT 1)
OFFICIAL FORM 10 (SUPPLEMENT 2)

Judge Wedoff pointed out that the three new forms associated with OFFICIAL FORM 10 were designed to implement new Rule 3002.1. The new rule – scheduled to take effect on December 1, 2011 – will assist in implementing § 1322(b)(5) of the Bankruptcy Code. It permits a chapter 13 debtor to cure a default and maintain home mortgage payments over the course of the plan.

OFFICIAL FORM 10, ATTACHMENT A (mortgage proof of claim attachment) implements Rule 3002.1(c)(2). It will give the debtor and the trustee important information on the status of a claim secured by a security interest in the debtor's principal residence. The holder of the claim must specify the principal and interest due on the residence as of the date of filing the petition; itemize pre-petition interest, fees, expenses, and charges included in the claim; and specify the amount needed to cure any default.

OFFICIAL FORM 10, SUPPLEMENT 1 (notice of mortgage payment change) implements Rule 3002.1(b). It applies in chapter 13 cases where the debtor is maintaining current payments on the principal residence and attempting to cure any default. The debtor and trustee need to know whether there have been any changes in the installment payment amount. The new form provides the notification and requires the

holder of a home mortgage claim to provide 21 days' advance notice of any escrow account payment adjustment, interest payment change, or other mortgage payment change.

OFFICIAL FORM 10, SUPPLEMENT 2 (notice of post-petition mortgage fees, expenses, and charges) implements Rule 3002.1(c). It will be used in a chapter 13 case by the holder of a home mortgage claim to notify the debtor and trustee of the amount of all post-petition fees, expenses, and charges and the dates incurred.

Judge Wedoff noted that no opposition had been voiced to the forms during the public comment period, with one important exception regarding OFFICIAL FORM 10 (ATTACHMENT A). He explained that two bankruptcy judges had pointed out that the manner in which mortgage servicers treat mortgage payments varies considerably. The servicers commonly credit late-received payments to late charges and attorney fees before applying them to the principal. Therefore, fees and charges may pile up, and the debtor or trustee cannot tell how the payments have been allocated without a full mortgage history.

The judges proposed that home-mortgage claimants be required to submit a complete loan history with their proofs of claim reflecting all amounts received and credited by the lender. This would allow the debtor and trustee to compare and reconcile the claimed arrearages with their own payment records.

Judge Wedoff noted that the proposed new OFFICIAL FORM 10 (ATTACHMENT A) does not require a loan history because the advisory committee concluded that it is not necessary in most chapter 13 cases. It might also impose an undue burden on the mortgagee and overwhelm debtors with too much detail. Moreover, the additional loan history information that debtors or trustees need in a specific case may be obtained through discovery.

In addition, the advisory committee concluded as a practical matter that there was simply insufficient time to redraft the form to incorporate additional information and still meet the deadline of having the form take effect at the same time as new Rule 3002.1, on December 1, 2011. Amending the form to require a loan history, for example, would require republication and an additional year's delay in issuing the form. Therefore, he said, the committee had decided to approve the form as currently drafted, but to keep the matter on its docket and gather information about the experience of debtors and creditors with the new rule and forms after they go into effect. Informed by those experiences, the committee will be in a better position in the future to decide whether to require the holder of a claim secured by the debtor's principal residence to attach a complete loan history to the proof of claim.

A member noted that OFFICIAL FORM 10, ATTACHMENT A will likely be opposed by bankruptcy judges who have developed their own forms and do not want to switch to a new national form that gives them less information. Her own chief bankruptcy judge, for example, had expressed concern that the proposed new form may preclude continued use of his more detailed local form. Judge Wedoff and Professor Gibson responded that FED. R. BANKR. P. 9009 allows the official forms to be used "with alterations as may be appropriate." They also suggested that a district might consider using the national form, but also requiring a supplemental local form asking for additional information. A member favored the use of supplemental local forms and said that they would inform the advisory committee in fashioning any needed changes in the national form in the future.

The committee unanimously by voice vote approved the three new forms for final approval by the Judicial Conference, effective December 1, 2011.

Open-Ended Credit Card Debt

FED. R. BANKR. P. 3001(c)(3)

Judge Wedoff reported that the amendments to Rule 3001 (proof of claim) originally proposed by the advisory committee in 2009 would have required that a proof of claim based on open-end or revolving consumer-credit agreements be accompanied by a copy of the last account statement sent to the debtor before the bankruptcy filing. The additional documentation, he said, would merely provide needed definition to the basic requirement currently set forth in FED. R. BANKR. P. 3001(c) that "[w]hen a claim . . . is based on a writing, the original or a duplicate shall be filed with the proof of claim." The debtor, he said, needs the information to associate the claim with a known account and to ascertain whether the claim is timely.

The proposal, however, was opposed vigorously by the bulk purchasers of credit-card claims on two grounds. First, they asserted that buyers of credit-card debt receive only a computer print-out of basic information when they purchase the debt and do not have access to the last account statement. Second, they said that producing the statements would raise serious privacy issues because the debtor's full credit-card debts would be disclosed on the public record, including such sensitive matters as medical debts.

Judge Wedoff said that the advisory committee had redrafted the proposal in light of the comments from the credit industry, and it had published a substitute proposal in 2010 that would require creditors to provide certain specific information to the extent applicable – the name of the entity from which the creditor purchased the debt, the name of the entity to which the debt was owed at the time of the debtor's last transaction, the date of the last transaction on the account, the date of the last payment, and the charge-off date.

He reported that the advisory committee had received no objections to the revised proposal based either on the unavailability of the information or on privacy concerns. Nevertheless, he said, some creditors are still opposed on the grounds that the amendments are not needed and would place an unreasonable burden on consumer lenders and debt purchasers.

Judge Wedoff noted, on the other hand, that the advisory committee had received several comments from debtors' representatives that the rule does not go far enough in making creditors document their claims, and it should require a complete chain of title. They assert that creditors regularly ignore the rule's current requirement of attaching to a proof of claim the writing on which it is based. As a result, they say, debtors do not receive sufficient information to pursue their interests effectively.

He explained that proposed FED. R. BANKR. P. 3001(c)(3)(B) would authorize a debtor or trustee to request a copy of the writing on which a credit-card claim is based, and the creditor would have a deadline of 30 days to comply with the request. That provision also received some opposition from the creditors, who recommended that the requesting party be required to make a threshold showing of need for the writing. The advisory committee decided, though, that a good cause showing is unnecessary and would lead to needless litigation. Realistically, he said, debtors will only seek a copy of the underlying contract if they have good reasons for doing so.

Judge Wedoff noted that a new objection raised by creditors relates to the provision in FED. R. BANKR. P. 3001(c)(2)(D) that lists sanctions that a court may impose when a creditor fails to provide required information. Under the rule, for example, a debtor or trustee could ask that certain papers not be allowed or that appropriate attorney fees be imposed. Creditors argue, he said, that the provision is overly harsh.

Judge Wedoff said that sanctions will rarely arise. The sanctions specified in Rule 3001(c)(2)(D), moreover, are the same as those available generally in every bankruptcy and civil case for violations of the rules. In addition, Rule 3001(c)(2)(D) actually serves as a limitation on actions that several bankruptcy judges have already been taking, such as ruling that a creditor's failure to produce needed information requires disallowance of a claim.

Judge Wedoff added that the sanction provision is not set forth in the proposed new Rule 3001(c)(3), but in Rule 3001(i), scheduled to take effect on December 1, 2011. That general provision, moreover, applies in all individual-debtor cases and is not limited to claims based on an open-end or revolving consumer-credit agreement.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

Procedures for Objecting to Claims

FED. R. BANKR. P. 3007(a)

Judge Wedoff explained that there is confusion under the current rule about the proper procedure for filing an objection to a claim. The rule seems to require that every objection to a claim be noticed for a hearing, although many courts do not follow that procedure. The proposed amendments to Rule 3007(a) (objections to claim) would authorize a negative-notice procedure for filing objections and clarify the method for serving the objections.

The proposed amendments would allow a court to place the burden on a claimant to request a hearing after receiving notice of an objection. The change, he said, is consistent with § 502(b) of the Bankruptcy Code, which defines the phrase "after notice and a hearing" as allowing a court to act without a hearing if notice is properly given and a party in interest does not timely request a hearing.

With respect to the manner of serving objections to claims, Judge Wedoff explained that courts currently disagree on whether an objection to a claim must be served by one of the methods specified for service of a complaint in FED. R. BANKR. P. 7004 or whether it is sufficient to serve the objection by mail on the person designated on the proof of claim. The advisory committee concluded that the matter should be clarified, and it proposes that objections be served by first-class mail addressed to the person designated on the proof of claim to receive notices.

The committee, he said, also concluded that two types of claimants should be served in the manner prescribed by FED. R. BANKR. P. 7004 – insured depository institutions and officers and agencies of the United States. The service methods for depository institutions are statutorily mandated, and the size and dispersion of authority in the federal government necessitate service on the Attorney General and the appropriate U.S. attorney's office, as well as on the person designated on the proof of claim.

The committee unanimously by voice vote approved the proposed amendments for publication.

FED. R. BANKR. P. 3001(c)(1)

Judge Wedoff reported that FED. R. BANKR. P. 3001(c)(1) (supporting information for a proof of claim) would be amended to delete the option of filing with a proof of claim the original of a writing on which the claim is based. The instructions to OFFICIAL FORM 10 (proof of claim) direct claimants not to "send original documents, as attachments may be destroyed after scanning." Those instructions reflect the current practice of filing copies, not originals, in the bankruptcy courts. The advisory committee

therefore would amend Rule 3001(c)(1) to conform it to the official form and current practice by replacing "the original or a duplicate" with "a copy of the writing" on which the claim is based.

The committee approved the proposed conforming amendment for final approval by the Judicial Conference without publication.

2. Responses to Recent Supreme Court Decisions

OFFICIAL FORM 6C

Judge Wedoff reported that the Supreme Court ruled in *Schwab v. Reilly*, 560 U.S. __, 130 S. Ct. 2652 (2010), that if a debtor claims property as exempt and enters a specific dollar amount on OFFICIAL FORM 6C, he or she is limited to that amount. If the full fair market value of the property is found to exceed that amount, the trustee may use the overage.

The Supreme Court suggested in *Schwab* that the debtor could claim the full amount of the property by stating so on the face of the form. But the current form does not provide a space for the debtor to exercise that option. So the advisory committee proposed rearranging the form and adding an additional column to give the debtor two options: (1) to claim a specific dollar amount; or (2) to claim the full fair market value of the exempted property.

The committee unanimously by voice vote approved the proposed amendments for publication.

OFFICIAL FORMS 22A and 22C

Judge Wedoff reported that OFFICIAL FORM 22C (chapter 13 statement of current monthly income and calculation of commitment period and disposable income) would be amended to reflect the Supreme Court's decision in *Hamilton v. Lanning*, 560 U.S. ___, 130 S. Ct. 2464 (2010). The case dealt with calculating a chapter 13 debtor's "projected disposable income" under § 1325(b)(1) of the Bankruptcy Code. That income normally has to be devoted to paying unsecured claims.

The term "projected disposable income" is not defined in the Code, but "disposable income" is defined in § 1325(b)(2) as the debtor's "current monthly income" less reasonably necessary expenses. In turn, "current monthly income" is calculated under § 101(10A) of the Code by averaging the debtor's monthly income for the six months preceding the filing of the bankruptcy petition.

In *Lanning*, the debtor's financial situation had changed just before her chapter 13 filing, as she had received a one-time severance buyout from her former employer and had acquired a new job at a considerably lower salary. The buyout payment greatly inflated her gross income for the six-month period before she filed the bankruptcy petition.

The Supreme Court rejected the purely "mechanical" approach of considering only the debtor's average monthly income for the six months before the bankruptcy filing. Instead, it adopted a "forward looking" approach allowing courts to consider changes that have occurred, or are likely to occur, in a debtor's income and expenses after filing.

Judge Wedoff explained that OFFICIAL FORM 22C currently calculates disposable income based only on information about the debtor's pre-bankruptcy average monthly income and current expenses. In light of *Lanning*, though, the Advisory Committee decided to amend the form by adding a new paragraph 61. It will ask the debtor to specify any change in the income or expenses reported on the form that has occurred, or that is virtually certain to occur, during the 12-month period following filing of the bankruptcy petition.

Professor Gibson added that both OFFICIAL FORM 22C and OFFICIAL FORM 22A (Chapter 7 statement of current monthly income and means-test calculation) would also be amended to make a minor adjustment in the deduction for telecommunication expenses. The revision will allow deduction of telecommunication services, including business cell phone service, to the extent necessary for production of income, if not reimbursed by the debtor's employer.

The committee unanimously by voice vote approved the proposed amendments for publication.

3. Simplified Procedure for Filing a Certificate of Debtor Financial Education

FED. R. BANKR. P. 1007(b)(7)

Judge Wedoff explained that the Bankruptcy Code was amended in 2005 to require individual debtors in chapter 7, 11, and 13 cases to complete an instructional course on personal financial management approved by the local U.S. trustee or bankruptcy administrator before they may receive a discharge. The Code does not address what document must be filed to provide notice that the course has been completed, or who must file it. The procedure is set forth in FED. R. BANKR. P. 1007(b)(7) (schedules, statements, and other required documents), which requires the debtor to file a "statement of completion of a course concerning personal financial

management, prepared as prescribed by the appropriate Official Form" – OFFICIAL FORM 23 (debtor's certification of completion of instructional course concerning financial management).

Judge Wedoff noted that the rule imposes the burden of providing notice of completing the course on the debtor, not on the course provider. If the debtor fails to file the notice, the court must close the case without a discharge, even if the debtor has in fact completed the course.

He said that the judges and clerks designing the judiciary's Next Generation of CM/ECF system have recommended that approved providers of financial-management courses be authorized to file course-completion statements electronically and directly with the bankruptcy courts. That procedure will be more efficient, require less human involvement, and reduce the number of cases dismissed for failure to file the required certificate.

Judge Wedoff reported that the advisory committee had concluded that it would be inappropriate for a bankruptcy rule to impose a requirement directly on providers of personal financial-management courses. But Rule 1007(b)(7) should be amended to facilitate approved course providers filing the statements. The proposed amendments would eliminate the requirement that an individual debtor file Form 23 if a course provider has notified the court that the debtor has completed the course after filing the petition.

The committee unanimously by voice vote approved the proposed amendments for publication.

FED. R. BANKR. P. 5009(b)

Judge Wedoff reported that the proposed amendment to FED. R. BANKR. P. 5009(b) (notice of failure to file Rule 1007(b)(7) statement) conforms to the proposed amendments to Rule 1007(b)(7). Rule 5009(b) requires the clerk to send an individual debtor who has not filed the certificate of completing a financial-management course a notice within 45 days after the first date set for the meeting of creditors that the case will be closed without entry of a discharge unless the required statement is timely filed. The proposed amendment recognizes that the clerk need not send the notice if the course provider has already notified the court that the debtor has completed the course.

The committee unanimously by voice vote approved the proposed amendment for publication.

4. Timing and Deadlines

FED. R. BANKR. P. 7054

Judge Wedoff noted that FED. R. BANKR. P. 7054 (judgment and costs) incorporates FED. R. CIV. P. 54(a)-(c) for adversary proceedings and provides for the award of costs. The proposed amendments would expand from one day to 14 days the time for a party to respond to the prevailing party's bill of costs and from five days to seven days the time for seeking court review of the costs taxed by the clerk. He noted that both time limits follow the general rule that time limits be expressed in multiples of seven days. He also pointed out that one public comment had suggested extending both time periods to 14 days, but the advisory committee decided that it was important to make Rule 7054(b) consistent with the civil rule, FED. R. CIV. P. 54(d)(1).

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

FED. R. BANKR. P. 7056

Judge Wedoff explained that FED. R. BANKR. P. 7056 (summary judgment) makes FED. R. CIV. P. 56 applicable in adversary proceedings. He added that it is also applicable in contested matters under FED. R. BANKR. P. 9014(c) unless the court directs otherwise. Civil Rule 56, as revised in 2009, sets a default deadline to file a summary judgment motion of 30 days after the close of all discovery. That deadline, however, is not appropriate in bankruptcy cases because hearings are frequently held very shortly after the close of discovery.

Therefore, the proposed amendment would depart from the civil rule and establish a new default deadline of 30 days before the initial date set for an evidentiary hearing on any issue for which summary judgment is sought. That change would give the court at least 30 days to consider the motion before the hearing. Judge Wedoff emphasized that the deadlines under both FED. R. CIV. P. 56 and FED. R. BANKR. P. 7056 are default deadlines, applicable only if no local rule or court order sets a different date.

The committee unanimously by voice vote approved the proposed amendment for final approval by the Judicial Conference.

OFFICIAL FORM 25A

Judge Wedoff explained that the proposed amendment to OFFICIAL FORM 25A (plan of reorganization in a small business chapter 11 case) would change the effective-date provision of a small business chapter 11 plan to conform to amendments to the bankruptcy rules that took effect in 2009. Those amendments increased from 10 days to 14 days the time periods for the duration of a stay of an order confirming a plan, FED. R. BANKR. P. 3020(e), and for filing a notice of appeal, FED. R. BANKR. P. 8002(a). Under

the proposed amendment to § 8.02 of the form, the effective date of the plan would generally be the first business day following the date that is 14 days after entry of the order of confirmation.

The committee unanimously by voice vote approved the proposed conforming amendment for final approval by the Judicial Conference without publication, effective December 1, 2011.

FED. R. BANKR. P. 1007(c)

Judge Wedoff reported that the proposed amendment to FED. R. BANKR. P. 1007(c) (time limits to file documents) was a technical and conforming change to remove an inconsistency in the current rule with FED. R. BANKR. P. 1007(a)(2) (filing documents in an involuntary case). Rule 1007(c) prescribes time limits for filing various lists, schedules, statements, and other documents. It specifies that in an involuntary case the debtor must file the list of creditors specified in Rule 1007(a)(2), as well as certain other documents, within 14 days of entry of the order for relief. In 2010, however, Rule 1007(a)(2) was amended to reduce to seven days the time for an involuntary debtor to file the list of creditors. As a result, the proposed amendment would delete from subdivision (c) the inconsistent reference to the time limit for filing the list of creditors in an involuntary case.

The committee unanimously by voice vote approved the proposed conforming amendment for final approval by the Judicial Conference without publication.

FED. R. BANKR. P. 9006(d)

Judge Wedoff explained that FED. R. BANKR. P. 9006(d) (time limit for serving motions and affidavits) would be amended to draw attention to the fact that it prescribes default deadlines for service of motions and written responses. A bankruptcy judge had suggested deleting the rule because most districts have their own local rules governing motion practice. Moreover, Rule 9006(d) may be overlooked by parties filing and responding to motions because motion practice and contested matters generally are covered by Rules 9013 (form and service of motions) and 9014 (contested matters).

The advisory committee concluded that Rule 9006(d) needed to be retained, but decided that it should be amended, highlighted, and made more like the civil rule on which is it based – FED. R. CIV. P. 6 (computing and extending time; time for motion papers). Unlike the civil rule, though, FED. R. BANKR. P. 9006 does not state in its title that it governs time periods for motion papers. Moreover, Bankruptcy Rule 9006 is not followed immediately by a rule that addresses the form of motions, as in the civil rules – FED. R. CIV. P. 7 (pleadings allowed; form of motions and other papers).

The advisory committee would amend the title of Rule 9006 to add a reference to the "time for motions papers." Subdivision (d) would be amended to govern the timing of service of any written response to a motion, not just opposing affidavits. The title of the subdivision would be changed from "For Motions–Affidavits" to "Motion Papers."

The committee unanimously by voice vote approved the proposed amendments for publication.

FED. R. BANKR. P. 9013

Judge Wedoff reported that the proposed amendment to FED. R. BANKR. P. 9013 (form and service of motions) would provide a cross-reference to the time periods in FED. R. BANKR. P. 9006(d) to call greater attention to the default deadlines for motion practice. In addition, some stylistic changes would be made to provide greater clarity.

The committee unanimously by voice vote approved the proposed amendments for publication.

FED. R. BANKR. P. 9014

Judge Wedoff reported that the proposed amendment to FED. R. BANKR. P. 9014 (contested matters) would add a cross-reference to the time limits for serving motions and responses in FED. R. BANKR. P. 9006(d).

The committee unanimously by voice vote approved the proposed amendment for publication.

5. Corrections and Adjustments

FED. R. BANKR. P. 2015(a)

Judge Wedoff reported that FED. R. BANKR. P. 2015(a) (duty to keep records, make reports, and give notice) would be amended with a technical change to correct its reference to § 704 of the Bankruptcy Code from § 704(8) to § 704(a)(8).

The committee unanimously by voice vote approved the proposed conforming amendment for final approval by the Judicial Conference without publication.

OFFICIAL FORM 1

Judge Wedoff said that OFFICIAL FORM 1 (voluntary petition) would be amended to include lines for a foreign representative filing a chapter 15 petition to state the

country of the debtor's center of main interests and the countries in which related proceedings are pending. The change merely implements the requirements of new FED. R. BANKR. P. 1004.2 (petition in a chapter 15 case), scheduled to take effect on December 1, 2011.

The committee unanimously by voice vote approved the proposed conforming amendment for final approval by the Judicial Conference without publication, effective December 1, 2011.

OFFICIAL FORM 7

Judge Wedoff reported that the proposed change to OFFICIAL FORM 7 (statement of financial affairs) would make the definition of an "insider" consistent with the Bankruptcy Code's definition of the term. The form currently defines an insider as one who holds more than a 5% voting interest in a corporate debtor – a bright-line test not found in the Code. The revised form, on the other hand, refers more generally to a person in a position to control the entity. He noted that the proposed change is substantive and needed to be published for public comment.

The committee unanimously by voice vote approved the proposed amendment for publication.

OFFICIAL FORMS 9A - 9I

Judge Wedoff explained that the proposed changes in OFFICIAL FORMS 9A - 9I (notice of meeting of creditors and deadlines) are technical and would conform the forms to an amendment to FED. R. BANKR. P. 2003(e), scheduled to take effect on December 1, 2011. Rule 2003(e) currently states that a meeting of creditors may be adjourned "by announcement at the meeting of the adjourned date and time without further notice." The 2011 amendment to the rule will require the presiding official to file a written statement for the record specifying the date and time to which the meeting is adjourned.

The revised forms would be amended to make the explanation of the meeting of creditors on the back of the form consistent with the amended rule. In addition, the revised forms correct a spelling error, correct a punctuation error, and call greater attention to the instructions.

The committee unanimously by voice vote approved the proposed conforming amendments for final approval by the Judicial Conference without publication, effective December 1, 2011.

Information Items

MODERNIZING THE BANKRUPTCY FORMS

Judge Wedoff reported that the advisory committee, working through a subcommittee chaired by Judge Elizabeth L. Perris, was making substantial progress on its major project to modernize the bankruptcy forms. The goals of the project are to avoid redundant information on the forms, make them more user-friendly, elicit more accurate information, and take advantage of technological developments, especially the judiciary's Next Generation of CM/ECF system, currently under development.

He said that the forms project was currently running ahead of the projected deployment of the Next Generation system. A package of forms for use by individual debtors may be ready for publication in August 2012, and the committee may decide to release the forms serially and implement them before the Next Generation system is in place.

He noted that the bankruptcy process relies heavily on forms and added that Judge Perris, chair of the advisory committee's forms modernization project, will serve as the committee's representative on the new inter-committee subcommittee on forms.

MODEL CHAPTER 13 PLAN

Judge Wedoff said that the advisory committee was considering developing a new model chapter 13 plan form. Under the pertinent case law, bankruptcy judges have an obligation to review proposed chapter 13 plans carefully and to deny any that include improper provisions. In *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. ___, 130 S. Ct. 1367 (2010), the Supreme Court upheld the enforceability of a chapter 13 plan that called for the discharge of a government-sponsored student loan. A loan of that sort, though, may only be discharged if the debtor brings an adversary proceeding and the bankruptcy court rules that failure to discharge the debt would impose an undue hardship on the debtor and the debtor's dependents.

In *Espinosa*, the discharge was never the subject of an adversary proceeding. But since the bankruptcy court confirmed the plan, even without the necessary finding of undue hardship, the Supreme Court ruled that it was a binding final judgment. The Court noted that bankruptcy judges have an obligation to review a chapter 13 plan carefully, to direct that debtors conform their plan to the requirements of the Bankruptcy Code, and to deny confirmation if the plan does not. But there are thousands of plans that busy judges must review and a great many variations among them. It would be very helpful, he said, to have a standard plan to aid in the review process.

REVISING THE BANKRUPTCY APPELLATE RULES

Judge Wedoff reported that the advisory committee was proceeding well with its comprehensive revision of the bankruptcy appellate rules (Part VIII of the Federal Rules of Bankruptcy Procedure). It had just conducted a very productive joint meeting with the Advisory Committee on Appellate Rules to discuss issues presented by the intersection of the bankruptcy appellate rules and the Federal Rules of Appellate Procedure.

Professor Gibson added that a working group of advisory committee members, plus the reporter and a member of the appellate advisory committee, would conduct further drafting sessions in July 2011. Professor Kimble, the Standing Committee's style consultant, will then review the draft later in the summer. At its fall 2011 meeting, the advisory committee may be able to approve half, or possibly all, the rules. She said that some rules may be presented to the Standing Committee as early as January 2012, and the full package of proposed rules should be ready for publication in August 2012.

ASBESTOS TRUSTS

Judge Wedoff reported that the Chamber of Commerce had suggested a new rule that would require asbestos trusts created in accordance with § 524(g) of the Bankruptcy Code to file quarterly reports with the bankruptcy court that detail each claimant's demand for payment from the trust and each amount paid. He noted that the matter had been referred to the advisory committee's business subcommittee. The subcommittee, he said, had expressed concern over whether the committee has jurisdiction under the Rules Enabling Act to issue a rule requiring a trust to file documents after the debtor's plan has been confirmed and the bankruptcy court has closed the case.

Judge Wedoff said that the committee was in the process of seeking additional information on the matter from interested organizations with relevant expertise. In the meantime, he added, the committee had received a letter from the chairman of the Judiciary Committee of the House of Representatives asking that the proposal move forward.

RESTYLING THE BANKRUPTCY RULES

Judge Rosenthal pointed out that the committee needed to decide in the not-too-distant future whether the bankruptcy rules should be restyled. She noted that restyling would be a major and difficult project, complicated by the interface of the bankruptcy rules with the Bankruptcy Code. Nevertheless, she suggested, there are various ways in which the matter might be accomplished.

OFFICIAL SET OF BANKRUPTCY RULES

Judge Wedoff thanked Mr. Ishida for his dedicated and painstaking work in producing the first official version of the Federal Rules of Bankruptcy Procedure and in leading the successful efforts to have the rules printed for the first time in handy pamphlet form by the Government Printing Office.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Kravitz and Professor Cooper presented the report of the advisory committee, as set forth in Judge Kravitz's memorandum and attachments of May 2, 2011 (Agenda Item 5). Judge Kravitz reported that the advisory committee had conducted its April 2011 meeting at the University of Texas Law School in Austin. Chief Justice Jefferson of Texas participated in the meeting, and Justice Stephen Breyer spoke to the committee.

Amendments for Publication

FED. R. CIV. P. 45

Judge Kravitz pointed out that the advisory committee had received many letters from lawyers complaining about the current Rule 45 (subpoenas) and its complexity. In 2008, the committee formed a subcommittee, with Judge David G. Campbell as chair and Professor Richard L. Marcus as reporter, to conduct a comprehensive study of the rule. Most of the members of the subcommittee, he said, were practicing lawyers.

As part of its extensive study, the subcommittee sorted through about twenty different areas for potential amendments to Rule 45, and it eventually settled on four areas that it deemed in need of amendment:

1. Notice of service of a subpoena;
2. Transfer of subpoena-related motions;
3. Trial subpoenas for distant parties and party officers; and
4. Simplification of the rule.

The subcommittee worked with many judges and lawyers in fashioning appropriate amendments to the rule, and in October 2010 it conducted a productive mini-conference in Dallas to obtain feedback from lawyers on the proposed amendments.

1. Notice

Judge Kravitz reported that Rule 45(b)(1) requires that each party be given notice of subpoenas that require document production. The advisory committee was informed that many lawyers are unaware of the notice requirement and regularly fail to comply with it. Accordingly, the advisory committee proposed moving the notice requirement to a more prominent position as Rule 45(a)(4) and adding a new caption entitled "Notice to Other Parties." The amended rule also requires that the subpoena be attached to the notice, and include trial subpoenas.

Judge Kravitz noted that some attorneys had argued that the rule should go further and require additional notice each time that a subpoena is modified or updated. The American Bar Association had suggested that notice be provided not only of service of the subpoena, but also of compliance with it. Some lawyers wanted the rule to require a description of the materials produced and access to them. The advisory committee, however, unanimously rejected these proposals for two reasons.

First, the committee concluded that a national rule simply cannot prescribe every aspect of the lawyering process needed to obtain documents in a given case. As a practical matter, discovery materials are often produced on a rolling basis. Negotiations and production may occur over a considerable period of time, and lawyers need to communicate directly and periodically with their opponents and with the targets of subpoenas. They may also assert their need for additional notices and access in their Rule 26(f) plans or ask a court to include appropriate provisions in its scheduling order. These matters are too much dependent on context to be addressed by rule text

Second, the advisory committee wanted to avoid litigation over compliance issues. It was concerned that lawyers might be tempted to ask courts to preclude documents from evidence on the grounds that the other side's notices were inadequate.

2. Transfer

Judge Kravitz explained that the proposed amendments to Rule 45 do not change the direction in the current rule that motions to enforce or quash a subpoena be made in the district of compliance, even though the underlying civil action may be pending in a different district. Proposed Rule 45(f), however, would in very limited circumstances explicitly allow the court for the district of compliance to transfer subpoena-related motions to the court presiding over the main action. He added that the bar was very supportive of including a transfer provision in the rule.

He said that the advisory committee was concerned about the standard for transferring a subpoena dispute, and it wanted to avoid making a transfer so easy that judges might reflexively transfer subpoena disputes on a regular basis. But he pointed out that there are strong reasons in certain cases to have enforcement of the subpoena handled by the judge who presides over the underlying case. The presiding judge, for example, may have already ruled on the same issues raised by the subpoena. The subpoena dispute, moreover, might relate to the merits of the underlying action or impact the judge's management of the case. The committee, he said, had concluded that local production issues should be handled locally in the district of compliance, and only issues affecting the merits or case management should be transferred. To balance these considerations, he said, the committee had decided on a standard that requires "exceptional circumstances" to permit transfer.

A member argued that "exceptional circumstances" was too narrow a standard. He said that the kinds of situations described in the Committee Note, in which a subpoena dispute relates to the merits of the main case, occur quite regularly and are not at all "exceptional." He suggested that "good cause" might be better.

Judge Kravitz said that the advisory committee recognized the importance of allowing the subpoenaed party to litigate a dispute in its own, convenient forum. It wanted to discourage transfers and therefore had selected the narrower term "exceptional circumstances." He noted that the American Bar Association's Litigation Section also favored the narrower standard, as it was concerned that a looser standard might tempt judges to transfer cases to remove them from their dockets. Members added that it might also encourage gamesmanship by some lawyers.

Judge Kravitz explained that the committee was proposing to publish the tougher standard, and it may later relax it if the public comments indicate that the standard should be more permissive. He noted, too, that even if a subpoena dispute is not transferred, the judge in the district of compliance may seek informal advice from the judge presiding over the main case. A participant added that the proposed rule merely establishes a framework for handling enforcement issues, and it is simply not possible to address or resolve every potential problem in a rule. He suggested that the committee note emphasize that point.

Judge Kravitz pointed out that proposed Rule 45(f) would also allow the court in the district of compliance to transfer subpoena-related motions if the parties and the person subject to the subpoena consent to the transfer. A member suggested, though, that only the views of the subpoenaed party should prevail, and the parties should not be allowed to block a transfer. Judge Kravitz agreed to have the advisory committee consider the matter further.

A member pointed out that the proposed language in Rule 45(f) attempts to resolve the issue of legal representation when a case is transferred and the witness does not have a lawyer in the other state. To ease the burden on the witness, who would have to hire another lawyer, the rule creates something akin to an automatic *pro hac vice* admission. It would allow an attorney authorized to practice in the court where the motion is made to file papers and appear in the court in which the action is pending.

A member cautioned that this provision constitutes attorney regulation and would preempt local court rules, state rules, and local legal culture. In effect, he said, the rule would order a district court to accept an out-of-state lawyer to practice before it, even though the lawyer may not be subject to regulation by the state bar or meet other requirements traditionally imposed by the district court. He predicted that the committee will receive negative public comments on the issue. A participant agreed, but emphasized that the particular proposal is limited and restrained, and it is good policy.

Judge Kravitz noted that if enforcement is transferred to the court where the underlying action is pending, that court may have to deal with contempt orders if the subpoena is not obeyed. Therefore, the advisory committee added proposed Rule 45(g), giving the transferee court flexibility to transfer the contempt matter back to the court having jurisdiction over the disobedient party.

Professor Cooper explained that the committee note points out that in the event of a transfer, disobedience constitutes contempt of both the court where compliance is required and the court where the action is pending. Judge Kravitz noted that contempt matters will normally be transferred back to the court of compliance because it is difficult for a judge to hold a person in contempt who is not actually before the judge. He added that the rule raises potential choice-of-law issues, but the committee had decided that these issues were not appropriate for treatment in procedural rules and should be left to case-law development.

3. Trial subpoenas

Judge Kravitz explained that there was a split of authority in the case law over whether subpoenas for parties or party officers to testify at trial may compel them to travel more than 100 miles from outside the state. Most recent district court opinions, he said, have followed *In re Vioxx Products Liability Litigation*, 438 F. Supp. 2d 664 (E.D.La. 2006). In *Vioxx*, an officer of the defendant corporation, who lived and worked in New Jersey, was required to testify at trial in New Orleans. The advisory committee, however, noted that there is a growing body of law rejecting *Vioxx*, as exemplified by *Johnson v. Big Lots Stores, Inc.*, 251 F.R.D. (E.D.La. 2008), holding that Rule 45 did not require attendance of plaintiffs at trial in New Orleans when they would have to travel more than 100 miles from outside the state.

The advisory committee concluded that Rule 45 was not intended to create the expanded subpoena power recognized in *Vioxx*, and the *Vioxx* decision should not be followed. The committee was also concerned that allowing subpoenas on an adverse party and its officers without regard to the traditional geographical limits would raise a real risk of lawyers using subpoenas tactically to apply inappropriate litigation pressure and undue burdens on their opponents.

In many cases, moreover, an adverse party's other employees, rather than its distant executives, are the best witnesses to testify about matters actually in dispute in a case. Judge Kravitz suggested that when a truly knowledgeable person chooses not to show up at trial, the jury notices the absence. In addition, he said, there are satisfactory alternatives to compelling personal attendance of distant witnesses at trial, such as audiovisual recording of deposition testimony and testimony at trial by contemporaneous transmission.

Judge Kravitz said that the advisory committee planned on publishing an appendix to the publication package setting out an alternative amendment that leans in the direction of *Vioxx* and permits a judge, for good cause, to order a party or its officer to attend trial and testify. The publication, however, will not indicate that the two choices are of equal value. Rather, it will state that the committee unanimously favors the *Big Lots* approach and rejects the *Vioxx* line of cases. But since there is a clear split of authority on the issue, an opposing approach is set forth in an appendix and comments are invited on both. He noted that at the committee's recent mini-conference, all the defense lawyers supported the *Big Lots* approach, while all the plaintiffs' lawyers, many of whom handle multi-district litigation, favored *Vioxx.*

A member strongly opposed publishing the appendix. Judge Kravitz responded that publication of both versions is advisable because the committee's approach is currently the minority view of the law. Publishing both versions, moreover, will avoid the need to republish the amendments if the public comments were to favor *Vioxx* and the advisory committee were to change its decision and adopt a *Vioxx*-inspired approach. A member added that another reason to publish an alternative text is to enhance the likelihood that the committee will receive thoughtful and focused comments on the issue.

A member observed that there are appropriate cases in which a judge should have authority to compel attendance of a particular executive or party at trial, despite the distance. It may be difficult, he said, to define those situations, but the courts should have discretion to bring in witnesses when they are really needed. Judge Kravitz added that lawyers at the recent mini-conference had said that if the person has meaningful knowledge and is really needed in a case, the court will normally make it clear to the parties that the witness should be brought in for the trial.

4. <u>Simplification of the rule</u>

Judge Kravitz pointed out that the current Rule 45 is very complex and needs to be simplified. The current rule, for example, requires independent determinations regarding the issuing court, the place of service, and the place of performance. To make those determinations, one has to consult ten different sections of the rule.

To simplify the rule, the proposed amendments adopt the approach of the corresponding criminal rule regarding service of a subpoena. Under FED. R. CRIM. P. 17 (subpoenas), a subpoena is issued by the court where the action is pending and may be served anywhere in the United States. But the proposed civil rule differs from the criminal rule by specifying that the court of compliance is the court for the district where the subpoenaed party is located.

A member said that the proposal was a remarkable piece of work that will greatly improve Rule 45, even though he did not agree with a couple of its provisions. He said that it had been very carefully drafted, enjoyed a broad consensus, and should be published essentially as is. He argued against publishing any alternative version.

Judge Kravitz reiterated that the advisory committee was planning to include in the publication a preface stating that the committee has rejected the *Vioxx* view of nationwide service of trial subpoenas, but recognizes that there is a split of authority and welcomes public comments on the matter. He added that the publication will state clearly that each provision in the proposed rule had been approved unanimously by the advisory committee.

The committee without objection by voice vote approved the proposed amendments for publication.

FED. R. CIV. P. 37

Judge Kravitz noted that the advisory committee was recommending publication of a change in FED. R. CIV. P. 37(b)(1) as a conforming amendment to proposed Rule 45. It would add a second sentence to paragraph (b)(1) specifying that after a subpoena-related motion has been transferred, failure to obey a court order may be treated as contempt of either the court where the discovery is taken or the court where the action is pending.

The committee without objection by voice vote approved the proposed amendment for publication.

Informational Items

PRESERVATION AND SPOLIATION

Judge Kravitz reported that the advisory committee was actively following up on the key issues raised by the bar at the May 2010 Duke Law School conference, especially those relating to discovery of electronically stored information. In particular, the committee was focusing on potential rule amendments addressing: (1) obligations to preserve information in anticipation of litigation; and (2) imposition of sanctions for failure to preserve. He added that in September 2011 the committee will convene a mini-conference with knowledgeable members of the bench and bar to consider these issues and potential rule amendments.

He said that the advisory committee will consider specific rule proposals on preservation and spoliation at its November 2011 and April 2012 meetings, and it may propose amendments for publication at the Standing Committee's June 2012 meeting.

PLEADING STANDARDS

Judge Kravitz reported that Dr. Cecil and his colleagues at the Federal Judicial Center had conducted an amazing empirical study to ascertain whether the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937 (2009), have had an appreciable effect on motions to dismiss for failure to state a claim under FED. R. CIV. P. 12(b)(6). He summarized the Center's report as concluding that there was a slight increase in the number of dismissal motions filed in the district courts from 2006 to 2010, but no increase in the percentage of motions granted by the court without leave to amend.

A key conclusion to be derived from the study so far, he suggested, is that civil cases are not being jettisoned out of the federal system in the way that some academic writers have claimed. He noted, though, that the Center's study could not capture whether plaintiffs are simply not filing cases in the federal courts that they might have filed before *Twombly* and *Iqbal*. He added that the committee had asked the Center to begin analyzing the cases in which the courts granted a motion to dismiss, but with leave to amend, to see what happened later in those cases. The Center will also attempt to ascertain whether any discovery preceded the amendments to the complaints and whether the amendments repaired the problems in the complaints.

FORMS

Judge Kravitz reported that the advisory committee was contemplating removing the illustrative civil forms from the full operation of the Rules Enabling Act process. He pointed out that some of the forms, such as the patent infringement complaint form, are

of questionable validity and have been subject to criticism. The committee, though, would probably continue to deal with forms in some way. One alternative would be to abrogate FED. R. CIV. P. 84 (forms) and have the forms handled like the bankruptcy forms, for which Judicial Conference approval is sufficient. Another approach would be to have the forms issued and maintained by the Administrative Office with committee approval.

Judge Rosenthal added that the advisory committees currently handle forms in a variety of different ways, and greater consistency among the different sets of rules might be in order. She said that she would appoint an inter-committee Forms Subcommittee, led by representatives of the Advisory Committee on Civil Rules and chaired by Judge Gene E. K. Pratter. The subcommittee will coordinate information among the advisory committees, but most of the work will be done by each advisory committee separately conducting a detailed examination of its own forms. The work, she said, will begin in the summer of 2011. Judge Kravitz added that the advisory committee may make a recommendation to the Standing Committee regarding FED. R. CIV. P. 84 in June 2012.

DUKE SUBCOMMITTEE

Judge Kravitz reported that the advisory committee had appointed an ad hoc subcommittee, chaired by Judge John G. Koeltl, to implement the recommendations made at the 2010 Duke Law School conference The subcommittee's work, he said, was proceeding hand-in-hand with that of the committee's discovery subcommittee. Its scope of inquiry includes not only potential changes to the Federal Rules of Civil Procedure, but also potential pilot projects and experiments conducted by the Federal Judicial Center and others and educational efforts to educate judges about what they can do to make better use of the many management tools provided by the present rules.

He reported that participants at the Duke conference had emphasized that more cooperation among parties and lawyers was needed in the discovery process to reduce unnecessary costs and delay. In addition, they stressed the importance of bringing greater proportionality to the discovery process, as contemplated in FED. R. CIV. P. 26(b)(2)(C). He added that proportionality is also a key concept in determining a party's need to preserve materials in anticipation of litigation.

Judge Kravitz said that the advisory committee was not proposing rule amendments addressing cooperation and proportionality at this time. But he reported that Judge Paul W. Grimm, a member of the committee, was developing a set of materials to provide detailed guidance on the importance of proportionality in civil discovery and to give practical examples for the bench and bar to work with.

FED. R. CIV. P. 6(d)

Judge Kravitz noted that Rule 6(d) (additional time after certain kinds of service) contains a glitch resulting from a 2005 amendment that established a uniform rule for calculating three added days. Until 2005, the rule had been clear that a party has three added days to act after service "upon the party" by certain designated means. The amended rule, though, merely provides three added days "after service." That revised language may be read as giving additional time to both the serving party and the party being served. To restore the rule to its intended meaning, the advisory committee would simply change the language of Rule 6(d) to state that: "When a party may or must act within a specified time after ~~service~~ being served . . . 3 days are added after the period would otherwise expire. . . ."

Judge Kravitz noted that there may be other places in the rules where changes have introduced unintentional errors. The question before the committee, therefore, concerns timing – whether the advisory committee should correct any errors as it uncovers them or accumulate the fixes and include them in a package of non-controversial, technical amendments. The glitch in Rule 6(d), he emphasized, had not caused any problems, and there has been no case law on it. That fact, he said, argues for deferring making a corrective amendment at this time. Moreover, the rule will likely need to be reconsidered in the near future to determine whether to eliminate electronic service as one of the service methods that trigger the extra three days for the receiving party to act.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Tallman and Professor Beale presented the report of the advisory committee, as set forth in Judge Tallman's memorandum and attachments of May 12, 2011 (Agenda Item 7).

Amendments for Final Approval

FED. R. CRIM. P. 5(c)(4)

Judge Tallman reported that the proposed amendment to FED. R. CRIM. P. 5(c)(4) (initial appearance for persons extradited to the United States) clarifies that the initial appearance for a defendant charged with a criminal offense in the United States, arrested outside the country, and surrendered to the United States following extradition must be held in the district where the defendant has been charged. He added that the rule applies even when a defendant arrives first in another district and has already been informed of his or her rights during the earlier stages of the extradition proceedings. The amendment,

he said, will avoid the delay in the extradited person's transportation resulting from an unneeded initial appearance in the district of initial arrival in the United States.

The committee without objection by voice vote approved the proposed amendment for final approval by the Judicial Conference.

FED. R. CRIM. P. 5(d) and 58(b)(2)(H)

Judge Tallman explained that the United States has treaty obligations that require it to advise detained foreign nationals that they may have their home country's consulate notified of their arrest and detention. The executive branch, through the Department of Justice, is responsible for informing the defendants, and the Department has effective procedures and training programs in place to do so. Bilateral agreements with numerous countries also require consular notification whether or not the detained foreign national requests it.

The proposed amendment to FED. R. CRIM. P. 5(d) (initial appearance in a felony case) was designed as a back-up precaution to ensure that the government fulfills its international obligations to make the required consular notification. It will also produce a court record establishing that the defendant has been notified.

The proposed amendment to FED. R. CRIM. P. 58(b)(2)(H) (initial appearance in a misdemeanor case) would add the identical requirement in misdemeanor cases.

The committee without objection by voice vote approved the proposed amendments for final approval by the Judicial Conference.

FED. R. CRIM. P. 15

Judge Tallman reported that the proposed amendments to Rule 15 (depositions) would establish a clear procedure for taking depositions outside the United States without the defendant's presence in certain limited circumstances if the district court makes a number of case-specific findings. The amendments had been presented before to the Supreme Court for approval, but the Court returned them without comment to the advisory committee in 2010 for further consideration.

The advisory committee, he said, believed that the Supreme Court's concern was over the ultimate admissibility of the deposition as evidence at trial. He pointed out that the committee note accompanying the rule had made it clear that a district judge's decision to permit a deposition to be taken under revised Rule 15 was an entirely separate matter from the later judicial determination of whether the deposition should be admitted into evidence at trial.

Judge Tallman reported that the advisory committee had voted to resubmit the proposed rule to the Judicial Conference and the Supreme Court. At first, it decided not to change the text of the rule, but to give greater prominence in a revised committee note to the difference between taking a deposition and admitting evidence. But after further consultation among the committee chairs and reporters of the criminal rules committee, the evidence rules committee, and the Standing Committee, a consensus was reached that it would be desirable to make that point explicitly in Rule 15(f) itself. Accordingly, in a handout distributed at the meeting, the advisory committee recommended that the Standing Committee add the following text to Rule 15(f): "An order authorizing a deposition to be taken under this rule does not determine its admissibility."

In addition, the advisory committee revised the committee note further to clarify the relationship between the authority to take a deposition under Rule 15(c)(3) and the admission of deposition testimony at trial. The revised note therefore states that although "a party invokes Rule 15 to preserve testimony for trial, the Rule does not determine whether the resulting deposition will be admissible in whole or in part."

He noted that the defense bar had understandably opposed the rule on Confrontation Clause grounds. That, he said, is further reason to clarify the bifurcated nature of the proceedings and emphasize the limited scope of the amendments.

Judge Tallman explained that the amendments establish a two-step process: (1) court authorization to take a deposition; and (2) later, if an objection is made, a court ruling on admissibility of some or all of the deposition at trial. He noted that the party conducting the deposition may not in fact seek to introduce it at trial. Circumstances may change, for example, and it may become possible later to bring the witness to the United States to testify at trial.

The courts, he said, will determine admissibility on a case-by-case basis applying the Constitution and the Federal Rules of Evidence. A court, moreover, might not admit a deposition into evidence because of the Confrontation Clause or FED. R. EVID. 402. It might refuse to admit it because of unforeseen problems created by foreign law or foreign officials in taking the deposition, or because of problems with the technical equipment, communications, or recording.

He pointed out that courts will continue to be faced with ad hoc requests to take depositions outside the United States. International criminal investigations are increasing as the world grows smaller, and courts have been adapting and authorizing new evidence-gathering techniques on a case-by-case basis. The advisory committee, he said, was firmly convinced that the Department of Justice had made the case for the proposed procedure and had concluded that it was appropriate to establish a uniform, national procedure through Rule 15. The proposed amendments, he added, were modeled in large

part on procedures approved by the Fourth Circuit in *United States v. Ali*, 528 F.3d 210 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 1312 (2009).

A member urged that the proposed amendments be given particularly careful reflection because the Supreme Court had returned the earlier version of the same proposal without approving it. The advisory committee, moreover, was now only making a small change in the rejected proposal, based on what it believes to have been the Court's concern over admissibility.

A member said that she had no problem with approving the revised proposal and sending it back to the Supreme Court with the recommended changes in the rule and the committee note. She added that it might be helpful to include information in the note stating that the rule applies only to the United States legal system and does not attempt to govern whatever laws there are in other countries. Many foreign countries, for example, require that any deposition be taken only in accordance with their own court procedures.

A member observed that the current Rule 15 could be construed as only permitting depositions to be taken if the defendant is physically present. Therefore, some judges may now deny authorization for any foreign deposition outside the defendant's presence. The proposed rule, therefore, is an improvement because it will remove that potential impediment and permit a judge to authorize a foreign deposition in the defendant's absence in limited, appropriate circumstances. The situations in which the revised rule will be used are very few, and courts have been handling them to date on an ad hoc basis.

The member asked whether it would be better for the proposed rule to make it clear that Rule 15 does not absolutely foreclose foreign depositions at which the defendant is not present, without detailing all the specific conditions that would have to be met. As drafted, the proposed amendments are very strict in setting forth all conditions that have to be met. Clearly, they are designed that way deliberately to maximize the likelihood of eventual admissibility of the testimony. But the revised rule later goes on to state that it does not govern admissibility. That seems strange because admissibility is the very reason for taking the deposition.

It is possible, she said, that the Supreme Court might eventually rule that no set of circumstances will permit a deposition to be taken in the defendant's absence. At that point, the courts will be left with a rule that imposes strict conditions, even in cases where the Confrontation Clause may not be implicated. But compliance with the conditions will never lead to admissible evidence. Moreover, by listing all the specific conditions, the revised rule may invite satellite litigation. It might well be more effective just to allow a deposition to be taken at the court's discretion and then admit if it satisfies the requirements of the Sixth Amendment and the Federal Rules of Evidence.

Deputy Attorney General Cole stated that the rule will rarely be used, but it is very much needed in certain cases. The potential occasions for its use cannot all be foreseen, but they are expanding every day with the gathering of evidence of international crimes that impact the United States. The proposed rule, he said, had been carefully crafted to achieve the right balance between admissibility of essential information in a few important criminal cases and protecting defendants' rights under the Confrontation Clause. It will be used only in situations where a deposition is truly important – in large part because of restrictions imposed by foreign countries and the amount of effort it takes for the Department of Justice to coordinate with the State Department and others in arranging for depositions overseas.

He said that the Department was comfortable with the strict criteria set out in the rule and did not find them onerous. The rule will, he said, provide welcome guidance to judges and help the Department establish a record that will assist it in obtaining admissibility.

The committee without objection by voice vote approved the proposed amendments for final approval by the Judicial Conference.

FED. R. CRIM. P. 37

Judge Tallman reported that FED. R. APP. P. 12.1 and FED. R. CIV. P. 62.1, which took effect on December 1, 2009, established a uniform national procedure for obtaining indicative rulings. The proposed new FED. R. CRIM. P. 37, he said, is parallel to FED. R. CIV. P. 62.1 and would make the indicative ruling procedure applicable in criminal cases.

The proposed new rule would facilitate remand from the court of appeals when certain post-judgment motions are filed in the district court after an appeal has been docketed and the district court has stated that it would grant the motion if the court of appeals were to remand for that purpose or that the motion raises a substantial issue. The matter might arise, for example, if the district court were to state that it would grant a motion for a new trial on the basis of newly discovered evidence.

The committee without objection by voice vote approved the proposed new rule for final approval by the Judicial Conference.

Amendments for Publication

FED. R. CRIM. P. 12

Judge Tallman explained that the Supreme Court in *Cotton v. United States*, 535 U.S. 625 (2002), changed what had previously been thought to be the law by holding that an indictment's failure to state an offense does not deprive the court of jurisdiction over

the case. But FED. R. CRIM. P. 12 (pleadings and pretrial motions) currently allows a claim that the indictment fails to state an offense to be raised at any time, even on appeal, because it had been thought to be jurisdictional.

Based on a request from the Department of Justice, the advisory committee decided to amend Rule 12, in light of *Cotton*, to require that a motion to dismiss an indictment for failure to state an offense be made before trial. The proposed change, however, opened up a number of difficult issues concerning the appropriate standard for relief when a claim is untimely filed. In addition, Standing Committee members expressed concern over whether the term "waiver" should continue to be used in the rule and whether other types of motions should also be revisited.

Judge Tallman reported that the advisory committee had been studying proposals to amend Rule 12 since 2006, and amendments were now before the Standing Committee for the third time. He pointed out that at the last Standing Committee meeting, in January 2011, members had offered comments that were enormously helpful in guiding the advisory committee's current proposal.

The advisory committee, he said, undertook an additional, comprehensive review and approved a more fundamental revision of Rule 12 at its April 2011 meeting. The current version, which the committee now seeks approval to publish, addresses all the members' concerns and makes some additional improvements in the rule.

Proposed Rule 12(b)(1), he said, specifies that a motion asserting that the court lacks jurisdiction may be made at any time while a case is pending. Proposed Rule 12(b)(3) then lists all the common defenses, objections, and requests that must be raised by motion before trial. For those motions, the revised rule introduces a new factor for determining whether a motion must be raised before trial – that the basis for the motion was "then reasonably available." The motion must also be able to be determined without a trial on the merits. The outdated reference in the current rule to "a trial of the general issue" would be deleted.

Proposed Rule 12(c) specifies the consequences for not timely raising those motions. Judge Tallman said that courts have struggled with the concepts of "waiver" and "forfeiture" and the respective consequences of each. They have also struggled with the tension between the standards of relief under the current Rule 12 and the plain error standard under Rule 52 (harmless and plain error).

Proposed Rule 12(c), he said, would resolve the current confusion and specify the consequences of not making a timely motion. Generally, it provides that untimely motions will be extinguished and not considered on the merits unless the party shows both good cause and prejudice – as the Supreme Court has held in interpreting the "good

cause" standard in the current Rule 12(e) in *Davis v. United States*, 371 U.S. 233, 242 (1973), and *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 363 (1963).

The rule, however, makes two exceptions for late-filed motions that may be excused more readily. Under proposed Rule 12(c)(2)(B), a party need only show prejudice if the defense or objection is based either on failure of the indictment to state an offense or on double jeopardy.

Judge Tallman said that double jeopardy requires special treatment and a more lenient standard for relief. He noted, for example, that a defendant may raise the issue of double jeopardy even after having entered a guilty plea.

A member warned that some judges may object to the proposed rule change because they believe that double-jeopardy claims are no different from any other defense. Professor Beale said that there is a good deal of case law on the matter. Although the law is not uniform, most cases currently give double-jeopardy claims preferential treatment under Rule 12 and analyze a late-filed claim for "plain error." Rather than have three different standards in the rule – cause plus prejudice, prejudice only, and plain error – she explained that the advisory committee decided to abandon the "plain error" test and let double-jeopardy claims, like claims of failure to state an offense, be governed by the prejudice-only standard. The change would likely not affect the result of any case.

A member recommended that the rule be published as presented but that the issue of double jeopardy be highlighted for comment in the publication or transmittal letter. Judge Tallman agreed with the suggestion.

Judge Tallman said that the proposed rule will clarify a difficult area of the law, provide guidance to both bench and bar, and lead to more uniform, nationwide application of the rule. Moreover, by specifying that Rule 52 does not apply, the rule will clarify how cases should be handled on appeal. The standards set forth in Rule 12 will apply exclusively, both in the trial courts and on appeal.

A member noted that a district court currently may forgive a matter not timely raised before trial for good cause, and it should continue to have maximum flexibility before trial to forgive any matter not raised in a timely manner. The proposed rule, however, requires a showing of both cause and prejudice at any stage.

Professor Beale responded although the rule itself is strict, it gives the court considerable leeway to be lenient in appropriate circumstances. Rule 12(b)(3) states that motions must be made before trial, but Rule 12(c)(1) and (2) allow the court to set a deadline for making motions and to provide extensions of the deadline. Judge Tallman also pointed to the language in paragraph 12(b)(3) that the basis for the motion must have been "then reasonably available."

Several members praised the advisory committee for its accomplishment and noted that all their concerns from earlier meetings had been addressed. Some offered suggestions for specific changes in the language of the proposed rule and committee note. Judge Tallman agreed to make further edits before publication.

The committee without objection by voice vote approved the proposed amendments for publication.

FED. R. CRIM. P. 34

Judge Tallman noted that the proposed amendment to Rule 34(b) (arresting judgment) conforms to the proposed amendments to FED. R. CRIM. P. 12(b). It would delete language from the current rule that the court "at any time while the case is pending . . . may hear a claim that the indictment or information fails to . . . state an offense." The revised rule will require that a defect in the indictment or information be raised before trial. He noted that the Standing Committee had previously approved the conforming amendment to Rule 34. Therefore, there was no need to seek further approval.

Informational Items

FED. R. CRIM. P. 16

Judge Tallman reported that the advisory committee at its April 2011 meeting had decided not to proceed at this time with any proposed amendments to Rule 16 (discovery and inspection) dealing with the government's obligation to disclose exculpatory and impeaching information under *Brady v. Maryland*, 373 U.S. 83 (1963). He explained that the committee could not reach a consensus on rule language that would effectively solve the problems that proponents of the amendments had cited regarding the failure of certain prosecutors to turn over needed information. Moreover, the Federal Judicial Center's recent survey had shown that there is a lack of consensus within the judiciary as to whether an amendment to Rule 16 is needed. The committee also had not been convinced that a rule change would actually prevent or dissuade an unscrupulous prosecutor from knowingly withholding exculpatory or impeaching information.

Judge Tallman thanked the Department of Justice for its comprehensive efforts to address its disclosure obligations through various internal means, including revision of the Department's manuals, compulsory training programs for prosecutors and staff, district-wide disclosure plans, local points of contact, and appointment of a national disclosure coordinator. Deputy Attorney General Cole added that the Department was further institutionalizing its policies by making the national criminal discovery coordinator a permanent position.

Judge Tallman thanked the Federal Judicial Center for its excellent research efforts, including the massive survey soliciting the views of judges and lawyers on disclosure of exculpatory and impeaching information. He also noted that the advisory committee was working with the Center to improve training for judges regarding disclosure issues, to create a good-practices guide on criminal discovery, and to amend the *Bench Book for U.S. District Court Judges* to provide additional practical advice for judges on how to handle disclosure issues.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Fitzwater and Professor Capra presented the report of the advisory committee, as set forth in Judge Fitzwater's memorandum and attachments of April 8, 2011 (Agenda Item 8).

Judge Fitzwater reported that the advisory committee had held its April 2011 meeting at the University of Pennsylvania Law School in Philadelphia and had one amendment to present for publication.

Amendment for Publication

FED. R. EVID. 803(10)

He explained that the proposed amendment to Rule 803(10) (hearsay exception for the absence of a public record) responds to the Supreme Court's decision in *Melendez-Diaz v. Massachusetts,* 129 S. Ct. 2527 (2009). In that case, the Court held that certifications reporting the results of forensic tests conducted by analysts are "testimonial" under the Confrontation Clause, as construed in *Crawford v. Washington,* 541 U.S. 36 (2004).

Under *Melendez-Diaz,* admitting a certification in lieu of in-court testimony violates the accused's right of confrontation. Likewise, it would be constitutionally infirm to admit a certification under FED. R. EVID. 803(10) offering to prove the absence of a public record. In both cases, admission would allow the truth of a matter to be proven by a written certification without live testimony.

Judge Fitzwater said that the proposed amendment to Rule 803(10) was based on a notice-and-demand procedure used in Texas and sanctioned in the Supreme Court's decision in *Melendez-Diaz*. The amendments specify that a prosecutor who intends to offer a certification must provide the defendant advance written notice of that intent at least 14 days before trial. The defendant is then given seven days to object in writing to use of the certification, putting the prosecutor on notice to produce the official preparing the certification at trial. If the defendant does not timely object, the certification may be

admitted. Professor Capra added that the advisory committee had worked closely with the Department of Justice and the federal public defenders in preparing the language of the proposal.

The committee without objection by voice vote approved the proposed amendment for publication.

Informational Items

SYMPOSIUM

Judge Fitzwater reported that the advisory committee will hold a symposium in October 2011 at William and Mary Law School to celebrate the restyled evidence rules – six weeks before the rules take effect. Several members of the Standing Committee will participate as panelists. One panel will look back at the decisions made during the restyling process. Another will explore the evidence issues likely to be considered in the future. The proceedings, he said, will eventually be printed in the *William and Mary Law Review*.

FED. R. EVID. 801

Judge Fitzwater said that the advisory committee at its April 2011 meeting had considered a proposed amendment to Rule 801(d)(1)(B) (hearsay exemption for certain prior statements) suggested initially by Judge Frank W. Bullock, Jr., a former member of the Standing Committee. He had proposed that the rule be amended to provide that all prior consistent statements be admissible under the hearsay exemption whenever they would be admissible to rehabilitate the witness's credibility. The amendment would eliminate the distinction between admission of a prior consistent statement solely for impeachment purposes and admission of the statement for its truth.

A member expressed strong support for the change and said that juries never understand the distinction and always use the prior consistent statement for all purposes, even though instructed that it may be used only for impeachment. Judge Fitzwater said that the advisory committee would take up a proposed amendment at its October 2011 meeting and was in the process of soliciting the views of interested parties and researching practices in state courts that have similar rules.

RULES COMMITTEE PROCEDURES

Ms. Kuperman reported that she, the committee reporters, and the rules staff had made additional changes in the draft revisions to *Procedures for the Conduct of Business*

by the Judicial Conference Committees on Rules of Practice and Procedure. An earlier draft had been presented to the committee at its January 2011 meeting.

She noted that the recent refinements defined such matters as: the appropriate standard for republishing proposed amendments, which documents comprise the official records of the committees, which records should be posted on the rules website, whether transcripts should be prepared of public hearings, and when hearings may be canceled because of insufficient public interest.

The committee unanimously by voice vote approved the proposed revisions in the committee procedures for approval by the Judicial Conference.

STRATEGIC PLANNING

Judiciary's Strategic Plan

Judge Rosenthal reported that Judge Charles R. Breyer, the Judiciary Planning Coordinator, had written to all Judicial Conference committees on May 5, 2011, seeking information on their efforts to implement the Judiciary's *Strategic Plan.* Specifically, he asked them to: (1) verify and update the information they had previously provided regarding the strategic initiatives they are pursuing; and (2) begin to consider how to measure progress in implementing the *Strategic Plan.* He also asked the committees at their June 2011 meetings to identify how they will assess whether each initiative's outcome has been met and the metrics they use to gauge progress.

Judge Rosenthal asked the committee to consider a draft committee response that she had prepared in response to Judge Breyer's requests.

The committee unanimously by voice vote approved sending the proposed response to the Judicial Conference's Advisory Committee on Judiciary Planning.

Status of the Rules Program

Judge Rosenthal said that the work of the rules committees was of a uniformly high standard and pointed out that the agenda book currently before the committee was excellent. She emphasized that a great deal of detailed work is needed on an ongoing basis to prepare a dozen committee agenda books each year, an annual package of proposed rule amendments for publication and comment, an annual package of rule amendments and supporting documents for the Supreme Court, and numerous letters and reports to Congress. All the work, moreover, has to be perfect.

She said that each committee has an excellent chair, reporters, and membership. She explained that the chair, with the help of others, makes recommendations to the Chief Justice on a regular basis of individuals who would be outstanding future members. She asked the members to help her and her successor, Judge Kravitz, in identifying people who would be candidates for the committees in the future.

She noted that one of the committees' overarching concerns is guaranteeing productive relations with Congress. She said that the committees currently have very good communications with the Hill and work hard to maintain them. It is essential, she added, that the rules committees continue to be viewed as truly professional and truly nonpartisan. She emphasized that the committees' work is subject to great public scrutiny, and it is becoming more common to receive last-minute calls from Congressional staff motivated by suggestions made by opponents of particular amendments. She predicted that those calls would likely continue, and the committees will have to be prepared to deal with them.

She noted that the committees had succeeded well in explaining the Rules Enabling Act process to Congressional staff and demonstrating how careful and meticulous the committees are in their work. But these educational efforts, she said, are complicated by the regular turnover in Congressional staff, as well as in members of Congress. The work of the rules committees, she said, is very different from the legislative process that Congress is used to. Moreover, unlike the Congressional process, the work of the rules committees, and the positions the committees take, defy partisan lines.

Judge Rosenthal reported that the committees' relations with the Supreme Court are very important. She noted that the Standing Committee chair and reporter meet every year with the chief justice to make sure that he is apprised of pending rules projects and proposed amendments. She added that both Chief Justice Roberts and Justice Alito are alumni of the rules committees. The other members of the Court, though, may not know in detail how the committees operate. She said that she was pursuing the idea of having an informal discussion with the full Court about how the committees do their work and what projects they are working on.

She pointed out that relations with the Department of Justice are also very important and have been very productive. Department officials serve on each of the committees, and Department staff have been extremely cooperative and helpful.

She noted that the committees need to be more effective in their relationships with other Judicial Conference committees and with other parts of the Administrative Office. She emphasized that the rules committees gain a great deal of useful information regarding court practices and procedures as part of their detailed work under the Rules

Enabling Act process. They also have an important interest in implementing the rules and educating judges and lawyers about them.

The committees, she said, need to be more consistent in following up on suggestions made to other committees. She urged closer coordination, in particular, with the Court Administration and Case Management Committee, mentioning the recent collaborative efforts with that committee on the privacy and sealing reports. She pointed out that the committees were also working closely with the Federal Judicial Center on revising the *Bench Book for U.S. District Judges*, suggesting educational programs for judges, and producing guidebooks and other supporting information.

She suggested that the committees' relationship with the academy is not where it needs to be. She noted that several law professors had expressed skepticism about the rules process during the recent debates on the impact of the Supreme Court's decisions in *Twombly* and *Iqbal*. She recommended that the committees meet more often at law schools and invite law professors to observe and participate in what the committees do and how they do it. In addition, it would be beneficial, both for the students and the professors, for committee members to go to law schools and teach classes explaining the rules process. It is also essential to continue inviting law professors to attend the various committee special programs and mini-conferences.

Judge Rosenthal pointed to the close and growing relations between the committees and the American Bar Association and other bar organizations. She said that the committees had encouraged ongoing working relations with the major bar associations, but more work was needed in the area of criminal rules. She noted that a meeting had been held with representatives of the National Association of Criminal Defense Lawyers, and the association had been invited to send a member as liaison to the rules meetings. She added that more outreach could also be done with the bankruptcy community. It is likely, she said, that there will be political opposition in Congress to some of the proposed bankruptcy rules.

She reported that all the rules committees have to deal with the twin issues of the impact of technology and the tension between making all records and proceedings widely available to the public and protecting valid privacy interests. She suggested that the committees need to examine all the rules to consider the impact of technology on the legal process.

Finally, Judge Rosenthal thanked the Administrative Office staff for their excellent work in supporting all the many functions of the rules committees and the Federal Judicial Center for its superb efforts on all the many research projects that the committees have asked it to undertake.

NEXT MEETING

The committee will hold its next meeting on Thursday and Friday, January 5 and 6, 2012, in Phoenix, Arizona.

Respectfully submitted,

Peter G. McCabe,
Secretary

Agenda E-19 (Summary)
Rules
September 2011

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

1. a. Approve the proposed amendments to Bankruptcy Rules 1007, 2015, 3001, 7054, and 7056, and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law . . . . . pp. 4–8

   b. Approve the proposed revisions of Official Forms 1, 9A–9I, 10, and 25A and new Official Forms 10 (Attachment A), 10 (Supplement 1), and 10 (Supplement 2), to take effect on December 1, 2011 . . . . . pp. 8–12

2. Approve the proposed amendments to Criminal Rules 5, 15, and 58, and new Rule 37, and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law . . . . . pp. 21–25

3. Approve the proposed revised *Procedures for the Judicial Conference's Committee on Rules of Practice and Procedure and Its Advisory Rules Committees* . . . . . pp. 30–31

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

- Federal Rules of Appellate Procedure . . . . . pp. 2–4
- Federal Rules of Bankruptcy Procedure . . . . . pp. 12–15
- Federal Rules of Civil Procedure . . . . . pp. 15–21
- Federal Rules of Criminal Procedure . . . . . pp. 25–27
- Federal Rules of Evidence . . . . . pp. 28–30
- Conference-Approved Legislative Proposals . . . . . p. 31
- Long-Range Planning . . . . . p. 32

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

Agenda E-19
Rules
September 2011

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure (the "Committee") met on June 2–3, 2011. All members attended, except Judge Neil M. Gorsuch. Deputy Attorney General James M. Cole attended part of the meeting.

Representing the advisory rules committees were: Judge Jeffrey S. Sutton, Chair, and Professor Catherine T. Struve, Reporter, of the Advisory Committee on Appellate Rules; Judge Eugene R. Wedoff, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Troy A. McKenzie, Associate Reporter, of the Advisory Committee on Bankruptcy Rules; Judge Mark R. Kravitz, Chair, and Professor Edward H. Cooper, Reporter, of the Advisory Committee on Civil Rules; Judge Richard C. Tallman, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, of the Advisory Committee on Criminal Rules; and Chief Judge Sidney A. Fitzwater, Chair, and Professor Daniel J. Capra, Reporter, of the Advisory Committee on Evidence Rules.

Participating in the meeting were Professor Daniel R. Coquillette, the Committee's Reporter; Peter G. McCabe, the Committee's Secretary; Professor Geoffrey C. Hazard, Jr., Professor R. Joseph Kimble, and Joseph F. Spaniol, Jr., consultants to the Committee; Andrea L. Kuperman, Chief Counsel to the Rules Committees; James N. Ishida and Jeffrey N. Barr,

NOTICE
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attorneys in the Office of Judges Programs in the Administrative Office; and Judge Barbara J. Rothstein, Director, and Dr. Joe Cecil and Dr. Emery G. Lee of the Federal Judicial Center. Elizabeth J. Shapiro, Jessica Hertz, Kathleen Felton, and Ted Hirt attended on behalf of the Department of Justice. Judge Anthony J. Scirica, former Committee Chair, also participated in the meeting.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Approved for Publication and Comment

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 28 and 28.1, and to Appellate Form 4, with a request that they be published for comment.[1] The proposed amendment to Rule 28 removes the requirement of separate statements of the case and of the facts, merging them into a single requirement that briefs contain a statement of the case and the facts. The approach is similar to that in the Supreme Court Rules. The proposed amendment to Rule 28.1 applies the change to cross-appeals. The proposed amendment to Form 4, the application to proceed in forma pauperis, makes some technical changes and removes the requirement that the applicant provide detailed information about expenditures for legal and other services in connection with the case. The Committee approved the advisory committee's recommendation to publish the proposed amendments for public comment.

Informational Items

At its Spring 2011 meeting, the advisory committee met jointly with the Bankruptcy Rules Advisory Committee to discuss proposed revisions to Part VIII of the Bankruptcy Rules

[1]As described in the Committee's March 2011 report to the Judicial Conference, the Committee approved of publication of proposed amendments to Appellate Rules 13, 14, and 24 in January 2011. Those proposed amendments will be published in August 2011, together with the proposed amendments to Rules 28 and 28.1 and Form 4.

(on bankruptcy appeals) and related revisions to Appellate Rule 6. These proposed revisions are discussed further on page 15 of this report.

The advisory committee also discussed a proposal to amend Appellate Rule 4(a)(4) to adjust the time to appeal after the disposition of a tolling motion. A joint subcommittee of members from the advisory committee and the Civil Rules Advisory Committee is working on this issue as well as other issues of mutual concern, including whether parties can "manufacture finality" necessary to appeal by voluntarily dismissing without prejudice unresolved peripheral claims when the district court has ruled on the main claims in the case.

In addition, the advisory committee considered a report by the Federal Judicial Center (FJC) on appellate costs awarded under Appellate Rule 39. The advisory committee had asked the FJC to conduct this research into how the circuit courts tax costs in light of concerns raised by that aspect of *Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009), *aff'd*, 131 S. Ct. 1207 (2011). In *Snyder*, the Fourth Circuit taxed over $16,000 in costs against Albert Snyder after reversing the judgment in his favor against the Westboro Baptist Church for protesting near the funeral of Snyder's son, who died in Iraq. The FJC study found that the circuits vary in how they implement Appellate Rule 39's directives on costs. In particular, the variations stem from differences among the circuits over factors such as the ceilings (for purposes of reimbursement) on the cost per page of copying and on the number of copies. (In *Snyder*, most of the cost award — $ 16,060.80 — resulted from the costs of copying the briefs and voluminous appendices.) After discussing the FJC study at its Spring 2011 meeting, the Advisory Committee sent the study to the chief judge of each circuit, to enable each circuit to review its cost-award practices. The circuits' reaction to the study has been swift and positive. For example, the Fourth Circuit judges have voted to amend that court's rules to lower the maximum reimbursable copying cost to $0.15 a page. The Fourth Circuit's maximum reimbursable copying cost was $4.00 per page at

the time of the *Snyder* decision. This was in stark contrast to the practice in most circuits, which set maximum rates of $0.10 to $0.15 per page.

The advisory committee is examining several other issues, including whether the case law interpreting Rule 4(a)(2) on premature notices of appeal in civil cases raises rulemaking concerns; issues relating to sealing records on appeal and redactions in appellate briefs; a proposal to treat federally recognized Native American tribes the same as "states" for the purpose of the rule on amicus filings; and possible rulemaking issues raised by the decision in *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599 (2009), which held that a district court's attorney-client privilege ruling did not qualify for immediate appeal under the collateral order doctrine.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 1007, 2015, 3001, 7054, and 7056; proposed revisions to Official Forms 1, 9A–9I, 10, and 25A; and proposed new Official Forms 10 (Attachment A), 10 (Supplement 1), and 10 (Supplement 2), with a recommendation that they be approved and transmitted to the Judicial Conference. Except as noted below, the proposed changes were circulated to the bench and bar for comment in August 2010. Six witnesses appeared at a public hearing conducted on February 4, 2011, in Washington, D.C. The other scheduled public hearing on the proposed changes was canceled because the one witness who requested to testify at that hearing agreed to testify at the February 2011 hearing. The advisory committee considered more than 35 written comments on the proposed amendments.

Rule 1007(c)

This proposed amendment is a technical and conforming amendment to remove an inconsistency created by an amendment to Rule 1007(a) that went into effect on December 1, 2010. The proposed amendment eliminates a time limit for filing the list of creditors in an involuntary bankruptcy case. That time limit is inconsistent with the same limit in Rule 1007(a)(2), which was amended on December 1, 2010, to reduce the period to file the list of creditors from 14 to seven days, and is redundant of the time set out in Rule 1007(a)(2). Because this is a technical and conforming amendment, publication for public comment was unnecessary.

Rule 2015

The proposed amendment to Rule 2015(a) corrects a reference to 11 U.S.C. § 704 of the Bankruptcy Code. The 2005 amendments to the Code broke up § 704 into subsections. The proposed amendment changes the reference to § 704(8) in Rule 2015(a) to § 704(a)(8). Because this is a technical and conforming amendment, publication for public comment was unnecessary.

Rule 3001

The proposed amendment addresses the documents required for proofs of claim based on an open-end or revolving consumer credit account, such as credit card debt. Subdivision (c)(1) currently requires a creditor to attach to a proof of claim either the original or duplicate of the writing, if any, on which a claim or an interest in property is based. That provision would be amended to create an exception for claims governed by paragraph (3) of the subdivision. For claims based on an open-end or revolving consumer credit agreement, new paragraph (3) requires that a statement be filed with the proof of claim providing the following information, to the extent applicable: the name of the entity from whom the creditor purchased the account; the name of the entity to whom the debt was owed at the time of the account holder's last transaction; the date of the account holder's last transaction; the date of the last payment on the

account; and the charge-off date. There are a number of reasons for the clarified disclosure obligations. Because claims of this type — primarily for credit card debts — are frequently sold, the claim filer may be an entity unknown to the debtor. The debtor often needs the information paragraph (3) would require to associate the claim with a known account and to know whether the claim is timely. A party in interest may obtain a copy of the writing on which an open-end or revolving consumer credit claim is based by requesting it in writing from the claim holder.

These proposed amendments are revisions of proposals first published for comment in August 2009. The proposals were republished in August 2010 with revisions based on comments received after the 2009 publication. As published in August 2009, the proposed amendments to Rule 3001(c) would have required the holder of a claim based on an open-end or revolving consumer credit agreement to attach to its proof of claim the last account statement sent to the debtor before the commencement of the bankruptcy case. During the public comment period, many supported the increased disclosure requirements, but representatives of bulk purchasers of credit card debt objected to the account statement requirement, asserting that the statement will often not be available when the proof of claim is filed. Based on the public comments, the advisory committee concluded that if there is a less burdensome way for a creditor to provide the information needed to assess the validity of its claim, the rule should not insist on an exclusive and more costly means of providing the information. The provision was revised to allow creditors to provide relevant information in a more convenient fashion and to relieve claimants to which it applies from the general requirement of filing the original or duplicate of the writing on which the claim is based. Because the revisions were significant, the advisory committee published the revised proposal in August 2010.

The advisory committee carefully considered the comments received after publication in August 2010. The advisory committee concluded that the proposed amendment will permit

better enforcement of existing disclosure obligations and will clarify how creditors seeking recovery from bankruptcy estates for claims based on open-end or revolving consumer credit agreements can meet those obligations. The advisory committee concluded that a deadline for responding to a request for the underlying writing should be added, to enable the requesting party to determine when there has been a failure to comply if the request is met with silence. The advisory committee added a 30-day deadline for responding to a written request under proposed Rule 3001(c)(3)(B), starting from when the written request is sent and subject to enlargement or reduction by the court under Rule 9006 if cause is shown. The advisory committee also added to the committee note a statement that a proof of claim based on an open-end or revolving credit card agreement that is filed and executed in accordance with Rule 3001(a), (b), (c)(1), (c)(2), (c)(3)(A), and (e) is entitled to the benefit of subdivision (f), which provides that a proof of claim executed and filed in accordance with the rules constitutes prima facie evidence of the validity and amount of the claim. A claimant's failure to comply with proposed Rule 3001(c)(3)(B), which requires producing a copy of the writing on which the claim is based if an interested party requests it, will not affect the applicability of subdivision (f), but could subject the claimant to sanctions. The advisory committee also added a provision excepting home equity lines of credit from the Rule 3001(c)(3)(A) requirement that certain information be submitted with the proof of claim.

Finally, the advisory committee proposed amending Rule 3001(c)(1) to delete the option of filing with a proof of claim the original of a writing on which a claim is based, to conform with the instructions in Form 10. Because this proposed amendment is technical and conforming, publication for public comment was unnecessary.

Rule 7054

Rule 7054 incorporates Civil Rule 54(a)–(c) for adversary proceedings. The proposed amendment that was published for comment would amend subsection (b) on cost awards to extend the time — from one day to 14 days — for a party to respond to the prevailing party's bill of costs, and extend the time — from five to seven days — to seek court review of the costs taxed by the clerk. The first change is proposed to provide a more reasonable period for a response. The second period was changed to conform to the 2009 time-computation amendments, which changed five-day periods in the rules to seven-day periods. The changes are also intended to make these time periods consistent with Civil Rule 54.

Rule 7056

Rule 7056 makes Civil Rule 56 applicable in adversary proceedings. Civil Rule 56 was amended in December 2010 to impose a new default deadline for filing a summary judgment motion, tying the deadline to the close of discovery. Because hearings in bankruptcy cases sometimes occur shortly after the close of discovery, the proposed amendment to Rule 7056 bases the default deadline on the scheduled hearing date, rather than the close of discovery, requiring a summary judgment motion to be filed 30 days before the initial date set for an evidentiary hearing on any issue for which summary judgment is sought, unless a local rule or court order sets a different deadline. No comments were submitted on the proposed amendment.

Official Forms

The proposed amendment to Official Form 1 (Voluntary Petition) includes lines on the form for a foreign representative filing a chapter 15 petition to indicate the country of the debtor's center of main interests and countries in which related proceedings are pending. These amendments implement the requirements of new Rule 1004.2 (Petition in Chapter 15 Cases),

which is scheduled to go into effect on December 1, 2011. Because this is a technical and conforming change, publication was unnecessary.

The proposed amendments to Official Forms 9A–9I (Notice of Meeting of Creditors & Deadlines) conform to an amendment to Rule 2003(e) currently pending before Congress and scheduled to take effect on December 1, 2011, if Congress takes no action. The amendments also make some minor stylistic changes. Rule 2003(e) states that a meeting of creditors "may be adjourned . . . by announcement at the meeting of the adjourned date and time without further written notice." The proposed amendment to Rule 2003(e) would require the presiding official at a meeting of the creditors to file a statement specifying the date and time to which such a meeting is adjourned. The proposed amendments to Forms 9A–9I conform the wording to the proposed amendment to Rule 2003(e). Because the proposed changes are technical and conforming, publication for public comment was unnecessary.

The proposed amendment to Form 10 (Proof of Claim) includes: (1) a request for additional information about the interest rate for secured claims and a clarification that the information concerns the rate as of the filing of the petition; (2) clarification that a summary of supporting documents may be submitted only as an addition to copies of the documents themselves and not as a substitute; (3) additional emphasis on the need to redact documents attached to the form to eliminate personal identifiers; (4) changes to the date and signature box to emphasize the duty of care that must be exercised in filing a proof of claim and to require disclosure of the capacity in which the filer is acting; (5) the addition of a space for a uniform claim identifier; and (6) various formatting and stylistic changes. After public comment, the advisory committee made two changes to the published draft. First, the advisory committee deleted the debtor/trustee checkbox on page 1 of the form without adding a replacement, leaving the signature box as the place for disclosure of the identity of the person filing the claim.

Second, the advisory committee added a statement to the committee note explaining that the new requests for email addresses are intended only to facilitate communication with the claimant and that this information does not affect requirements for serving or providing notice to the claimant.[2]

Proposed Official Form 10 (Attachment A) (Mortgage Proof of Claim Attachment) is new. It would implement proposed amended Rule 3001(c)(2), relating to a claim secured by a security interest in the debtor's principal residence. The proposed amendments to Rule 3001(c)(2) were approved by the Supreme Court in April 2011 and are currently pending before Congress. Attachment A to proposed Official Form 10 would accompany the proof of claim for a home mortgage. The Attachment would require a statement of the principal and interest due as of the petition date; a statement of prepetition fees, expenses, and charges; and a statement of the amount necessary to cure a default as of the petition date. During the public comment period, some suggested that a mortgage lender should be required to attach a complete account history to its proof of claim. The advisory committee concluded that amending to require a complete loan history would require republication and delay the effective date of the form, which meant that rule amendments would likely become effective without all the implementing forms. The advisory committee also concluded that information about the experience after the proposed rules and forms become effective will be helpful in deciding whether to require a complete loan

[2]After publication, the advisory committee also decided to include additional statements in box 7 of Form 10 reminding claimants of the need to attach the documentation required by Rule 3001(c) for (1) claims secured by a security interest in the debtor's principal residence and (2) claims based on an open-end or revolving consumer credit agreement. However, the latter documentation requirement will not take effect until December 1, 2012, so the advisory committee did not present the additions to box 7 for the Standing Committee's approval, and those changes are not presented for Judicial Conference approval at this time.

history. The advisory committee revised the published proposal in other respects in response to comments received to clarify a few parts of the form and avoid duplication with other parts.

Official Form 10 (Supplement 1) (Notice of Mortgage Payment Change) is new. It is designed to implement Rule 3002.1(b), which is also pending before Congress. Supplement 1 to Official Form 10 would be used by the holder of a home mortgage claim to provide notice of any escrow account payment adjustment, interest payment change, or other mortgage payment change while a chapter 13 case is pending. After public comment, the advisory committee made some stylistic revisions and revised the proposal to address a concern about the provision for the reporting of escrow changes, to clarify that nonbankruptcy law determines only the form of disclosure and not the method of calculating escrow balances.

Official Form 10 (Supplement 2) (Notice of Postpetition Mortgage Fees, Expenses, and Charges) is new. Supplement 2 would implement Rule 3002.1(c). This supplement would be used in a chapter 13 case by the holder of a home mortgage claim to provide notice of the amount of any postpetition fees, expenses, and charges and the date they were incurred. After publication, the advisory committee made a stylistic change and corrected an internal reference.

The proposed amendment to Official Form 25A (Plan of Reorganization in Small Business Case Under Chapter 11) changes the effective date provision to reflect the 2009 amendments that increased from 10 to 14 days the time periods for filing a notice of appeal and for the duration of the stay of a confirmation order. No comments were submitted on this proposal.

The advisory committee recommended that all proposed amendments to the Official Forms and proposed new Official Forms go into effect on December 1, 2011.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference —

a. Approve the proposed amendments to Bankruptcy Rules 1007, 2015, 3001, 7054, and 7056, and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

b. Approve the proposed revisions of Official Forms 1, 9A–9I, 10, and 25A and new Official Forms 10 (Attachment A), 10 (Supplement 1), and 10 (Supplement 2), to take effect on December 1, 2011.

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

Rules Approved for Publication and Comment

The advisory committee submitted proposed amendments to Rules 1007, 3007, 5009, 9006, 9013, and 9014, and proposed revisions of Official Forms 6C, 7, 22A, and 22C, with a request that they be published for comment. The Committee approved the advisory committee's recommendation to publish the proposed amendments for public comment.

Rule 1007

The proposed amendment to Rule 1007(b)(7) relieves individual debtors of the obligation to file Official Form 23 if the provider of an instructional course concerning personal financial management directly notifies the court that the debtor has completed the course.

Rule 3007

The proposed amendment to Rule 3007(a) allows the use of a negative notice procedure for objections to claims and clarifies the method for serving claim objections. The Code does not mandate that a hearing be conducted on every objection to a claim, but current Rule 3007(a) could be read to require that a hearing be calendared for all claim objections. Because the bases for some objections are straightforward and do not require a hearing for their resolution, the advisory committee recommended deleting the requirement for service of a "notice of the

hearing" on the objection and adding a reference to a possible "deadline for the claimant to request a hearing." The proposed amendment also clarifies that to the extent possible, claim objections should be served by first-class mail to the person designated on the proof of claim for receipt of notices, at the address there indicated. An additional method of service is required for objections to federal government claims. In addition, a claim objection must be served on an insured depository institution in the manner prescribed in Rule 7004(h), which was enacted by Congress.

Rule 5009

The proposed amendment to Rule 5009(b) reflects the proposed amendment of Rule 1007(b)(7), which relieves an individual debtor of the obligation to file a statement of completion of a personal financial management course if the course provider notifies the court directly that the debtor has completed it. Rule 5009(b) currently requires the clerk to send a notice to an individual debtor who has not filed the statement within 45 days after the first date set for the meeting of creditors, and the proposed amendment would require this notice to be sent only if the debtor is required to file the statement and has failed to do so in 45 days.

Rule 9006

The proposed amendment to Rule 9006(d) draws attention to the fact that the rule prescribes default deadlines for the service of motions and written responses. The proposal amends the rule title to add a reference to the "time for motion papers," and the coverage of subdivision (d) is expanded to address the time to serve a written response to a motion, not just opposing affidavits.

Rule 9013

The proposed amendment to Rule 9013, which addresses the form and service of motions, provides a cross-reference to the time periods in Rule 9006(d) and makes some stylistic changes. This amendment would call attention to the default deadlines for motion practice.

Rule 9014

The proposed amendment to Rule 9014, which addresses contested matters, similarly adds a cross-reference to the times under Rule 9006(d) for serving motions and responses.

Official Forms

The proposed amendment to Official Form 6C (Schedule C – Property Claimed as Exempt) would reflect the Supreme Court's decision in *Schwab v. Reilly*, 130 S. Ct. 2652 (2010), by providing a new option permitting the debtor to state the value of the claimed exemption as the "full fair market value of the exempted property."

The proposed amendment to Official Form 7 (Statement of Financial Affairs) would make the definition of "insider" consistent with the Bankruptcy Code's definition of the word by deleting the phrase "any owner of 5 percent or more of the voting or equity securities of a corporate debtor" and including "any persons in control of a corporate debtor."

The proposed amendments to Official Forms 22A (Chapter 7 Statement of Current Monthly Income and Means-Test Calculations) and 22C (Chapter 13 Statement of Current Monthly Income and Calculations of Commitment Period and Disposable Income) make a minor adjustment to the deduction for telecommunication expenses. The proposed amendment to Form 22C also responds to the Supreme Court's decision in *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010), by adding a question asking above-median-income chapter 13 debtors to list any changes in the income and expenses reported on the form that have already occurred or are virtually certain to occur during the 12 months following the filing of the petition.

Informational Items

The advisory committee is continuing work on a comprehensive revision of Part VIII of the Bankruptcy Rules, which addresses appeals to district courts and bankruptcy appellate panels, to adopt a clearer and simpler style, to align the Part VIII rules more closely with the Federal Rules of Appellate Procedure, and to revise the rules to reflect electronic filing and existing and anticipated changes in information technology. The advisory committee met jointly with the Appellate Rules Committee at its April 2011 meeting to discuss issues presented by the intersection of the bankruptcy appellate rules and the Federal Rules of Appellate Procedure. In Summer 2011, a working group made up of representatives from the advisory committee and the Appellate Rules Committee, as well as the reporters, will engage in a thorough review and editing of the current draft of the revised Part VIII rules and committee notes. The advisory committee will likely seek to have the proposed Part VIII revisions published for public comment in August 2012.

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

FEDERAL RULES OF CIVIL PROCEDURE

Rules Approved for Publication and Comment

The advisory committee submitted proposed amendments to Rule 45, and a conforming amendment to Rule 37, with a request that they be published for comment. The Committee approved the advisory committee's recommendation to publish the proposed amendments for public comment.

The proposed amendments to Rule 45, which covers both trial subpoenas and discovery subpoenas, address the following issues: (1) notice of service of a subpoena; (2) transfer of

subpoena-related motions; (3) simplification of the rule; and (4) trial subpoenas for distant parties and party officers. The advisory committee and its discovery subcommittee have been studying Rule 45 for several years. After receiving input from the public both informally and through a miniconference held in Dallas, Texas, and reviewing relevant literature, the advisory committee decided that these four areas, together with a number of other small changes, were the areas in which amendments would be most helpful.

In 1991, amendments to Rule 45 introduced the "documents only" subpoena, and added a requirement in Rule 45(b)(1) that each party be given notice of a subpoena that requires document production. That provision was later clarified to require that notice be provided before the subpoena is served, but experience has shown that many lawyers do not comply with the notice requirement. The proposed amendments move the notice provision to a more prominent position, making the provision Rule 45(a)(4), entitled "Notice to other parties." The proposed amendments require that the notice include a copy of the subpoena and extend the notice requirement to trial subpoenas.

The proposed amendments to Rule 45 continue to direct that motions to enforce or quash a subpoena, or to obtain a ruling on whether privilege protects material that was allegedly produced inadvertently, be made in the district where compliance with the subpoena is required, even when the underlying action is pending in a different district. But because on occasion there are strong reasons to have some issues resolved by the judge presiding over the main action, the proposed amendments remove any uncertainty about authority to transfer to the court where the action is pending by adding Rule 45(f), which permits a court asked to rule on a motion under Rule 45 to transfer the motion. The amendments contemplate that transfer will be rare, and permit it only if the parties and the person subject to the subpoena consent or in exceptional circumstances. The proposed amendments also provide that a lawyer admitted to practice in the

district where the motion is filed may file papers and present argument in the court where the action is pending. The proposed amendments authorize retransfer to the court where the motion is filed to enforce the order rendered by the court where the action is pending. Parallel proposed amendments to Rule 45(g) and Rule 37(b)(1) clarify that disobedience of a subpoena-related order entered after transfer is contempt of the court that entered the order and of the court where the motion was filed.

The proposed amendments also seek to simplify the 1991 version of the rule in several respects. Proposed Rule 45(a)(2) provides that the subpoena should issue from the court where the action is pending. Proposed Rule 45(b)(2) removes the uncertainty about where a subpoena may be served by replacing a four-part provision with one authorizing service "at any place within the United States." New Rule 45(c) collects the provisions on place of compliance and simplifies them, while preserving protections for nonparties subject to subpoenas. These changes are intended to make it easier for both parties and nonparties to understand and apply a rule that covers both discovery and trial.

The proposed amendments also resolve conflicting interpretations of the rule as to whether a party or party officer can be compelled by subpoena to travel more than 100 miles to attend trial. They are intended to restore the original meaning of the 1991 amendments and make clear that all subpoenas are subject to the geographical limitations of Rule 45(c), which is modeled on former Rule 45(b)(2). The provisions in the current rule have produced conflicting interpretations in the courts. Some courts interpret the current rule to mean that subpoenas may only be served and enforced within the boundaries permitted by Rule 45(b)(2) (relating to the place of serving a subpoena), and that the additional protections of Rule 45(c)(3)(A)(ii) — which directs that a subpoena be quashed if it "requires a person who is neither a party nor a party's officer to travel more than 100 miles" to attend trial — operate within those limitations. *See,*

e.g., *Johnson v. Big Lots Stores*, 251 F.R.D. 213 (E.D. La. 2008). Other courts interpret the exclusion of parties and party officers from the protections of Rule 45(c)(3)(A)(ii) to mean that attendance at trial of these witnesses can be compelled without regard to the geographical limitations on serving subpoenas contained in Rule 45(b)(2). *See, e.g.*, *In re Vioxx Prods. Liab. Litig.*, 438 F. Supp. 2d 664 (E.D. La. 2006). The advisory committee concluded that the 1991 amendments were not intended to create the expanded subpoena power recognized in *Vioxx* and similar cases, and the committee was also concerned that the *Vioxx* approach would raise a risk of tactical use of a subpoena to apply inappropriate pressure on the adverse party.

Although the advisory committee decided to reject the *Vioxx* line of cases, the committee heard from some lawyers at a miniconference it held in Dallas, Texas on October 4, 2010, who supported creating some limited authority to order such testimony in appropriate cases. The advisory committee also noted that some of the courts that interpret the rule as preventing them from ordering a party or its officer to testify at trial seem to regard that limitation as unduly restricting their ability to command testimony at trial. To respond to these concerns, the advisory committee recommended providing an appendix to the recommended proposal that would invite public comment on the possibility of providing authority to require trial testimony from a party or party officer. Although the advisory committee does not favor the proposal in the appendix, the committee felt that it would be helpful to solicit views on the disfavored alternative out of respect for the courts that hold a different view. If, after public comment, the advisory committee determines that it would be better to provide authority to require trial testimony by parties and party officers, the advisory committee could change its recommendation without the delay inherent in republication.

Informational Items

The advisory committee is considering possible rulemaking responses to concerns about preservation obligations and spoliation sanctions. At its April 2011 meeting, the advisory committee considered three possible approaches. The first would seek to provide specific guidance, defining preservation obligations in considerable detail. The second would focus on general obligations of reasonable behavior. The third possibility would focus on sanctions, relying on backward inference to shape preservation obligations. The discovery subcommittee is planning a miniconference in Dallas, Texas on September 9, 2011, to further examine possible approaches.

The advisory committee is continuing to examine the standards that apply to motions to dismiss for failure to state a claim upon which relief can be granted in light of the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). The advisory committee continues to study and monitor the lower courts' application of the Supreme Court decisions and the effect of those decisions on rates of filing of motions to dismiss and rates of grants or denials in different kinds of cases. At the request of the advisory committee, the Federal Judicial Center conducted an empirical analysis of experience with Rule 12(b)(6) motions to dismiss for failure to state a claim, which examined motions to dismiss filed in periods shortly before the *Twombly* decision and after the *Iqbal* decision, including the rates of filing motions to dismiss, rates of granting motions, and the frequency of granting leave to amend. That study was released shortly before the advisory committee's April 2011 meeting, and the advisory committee discussed it at the meeting. This study did not undertake to determine what happens after leave to amend is granted — whether an amended complaint is filed, whether the amended complaint is challenged, whether discovery continues while any renewed motion remains pending, and whether any renewed motion is

eventually granted. The FJC will be conducting a follow-up study to address some of these questions.

The advisory committee is also continuing to examine Rule 26(c), which addresses protective orders in discovery. The advisory committee has concluded that the present state of the case law does not show a problem needing major rule revisions. The committee will continue to carefully monitor the case law.

The advisory committee is taking a fresh look at the forms, to determine whether they should continue to be subject to the full Rules Enabling Act process. Different advisory committees take different approaches to the forms, and the committees are undertaking a joint project under the Standing Committee's guidance to determine how forms should be handled going forward.

A subcommittee has been formed to implement and oversee further work on ideas resulting from the 2010 Conference on Civil Litigation held at Duke University School of Law. One project generated from that conference is to determine whether the "rocket docket" practices in districts such as the Eastern District of Virginia can provide inspiration for changes to the federal rules. The advisory committee will hear panel presentations on this topic at its November 2011 meeting. Another project has been launched by a group of employment lawyers, including those who typically represent plaintiffs and those who typically represent defendants. They have made strong progress toward developing a protocol of presumptively unobjectionable discovery requests for employment disputes. The protocols will be proposed for adoption by individual courts as a pilot project. The hope is that success for this category of cases will encourage other groups to develop similar protocols for other types of cases. The subcommittee is also exploring suggestions on ways to make the present rules more effective, focusing on discovery, motions, and pretrial case management.

At its April 2011 meeting, the advisory committee also considered a suggestion to revise Rule 6(d), which provides additional time to act after certain kinds of service, to address a possible concern arising from the 2005 amendments that established a uniform rule for calculating the three added days. The 2005 amendments added the words "after service." The concern is that this could be read to include situations in which a party is allowed to act within a specified time after that party has made service on another party. The 2005 amendments were not intended to allow a party to control the time it has to act by choosing the means of service. The advisory committee will therefore eventually recommend changing "after service" to "after being served." The advisory committee does not recommend immediate publication of the proposed amendment. The current language has not caused any visible problem in practice. The rule now allows the three added days after electronic service, a choice that may be open to reconsideration, perhaps as part of a more general project on adjusting the rules to an increasingly electronic world. The other advisory committees would need to be involved in any such project. The advisory committee concluded that it would be better to defer publication, until a real-world problem appears, until the e-service provision is reconsidered, or until other style glitches appear that justify proposing a package of style corrections.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted proposed amendments to Rules 5, 15, and 58, and new Rule 37, with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments to Rules 5 and 58 and new Rule 37 were circulated to the bench and bar for comment in August 2010. Scheduled public hearings on the amendments were canceled because no one asked to testify. The proposed amendment to Rule 15 was circulated to the bench and bar for comment in August 2008 and approved by the Judicial

Conference in September 2009, but remanded to the advisory committee by the Supreme Court for further study in April 2010. The advisory committee revised the language in the proposed amendment to Rule 15 and the accompanying committee note and determined that republication was unnecessary.

The proposed amendments to Rules 5 and 58 were designed to deal with aspects of the international extradition process and help ensure that certain treaty obligations of the United States are fulfilled. The proposed amendment to Rule 5(c) clarifies where an initial appearance should take place for persons who have been surrendered to the United States pursuant to an extradition request to a foreign country. The amendment codifies the longstanding practice that persons who are charged with criminal offenses in the United States and surrendered to the United States following extradition in a foreign country make their initial appearance in the jurisdiction that sought their extradition. The rule applies even if the defendant first arrives in another district. Interrupting an extradited defendant's transportation to hold an initial appearance in the district of arrival can impair the defendant's ability to obtain and consult with trial counsel and to prepare a defense in the district where the charges are pending.

The proposed amendments to Rules 5(d) and 58(b) are designed to help ensure that the United States fulfills its international obligations under Article 36 of the Vienna Convention on Consular Relations and bilateral treaties. Bilateral agreements with numerous countries require consular notification, whether or not the detained foreign national requests it. The proposed amendment does not address other issues surrounding Article 36 of the Vienna Convention, such as whether it creates individual rights that may be invoked in a judicial proceeding, and what, if any, remedy may exist for a violation. After considering public comments, the advisory committee recommended approval of the proposed amendments to Rules 5 and 58 as published.

The proposed amendment to Rule 15 authorizes the taking of depositions outside the United States without the defendant's presence in specified limited circumstances and with the district judge's approval. The amendment addresses cases in which important witnesses — for both the government and the defense — live in, or have fled to, countries where they cannot be reached by the court's subpoena power. The amendment does not apply if it is possible to bring the witness to the United States for trial or for a deposition at which the defendant can be present, or if it is feasible for the defendant to be present at a deposition outside the United States. The amendment authorizes only the taking of pretrial depositions; it does not speak to their admissibility. Questions of admissibility are left to the courts to resolve on a case-by-case basis, applying the Federal Rules of Evidence and the Constitution.

The proposed amendment requires that before such a deposition may be taken, the judge must make case-specific findings regarding: (1) the importance of the witness's testimony; (2) the likelihood that the witness's attendance at trial cannot be obtained; (3) why it is not feasible to have face-to-face confrontation by either (a) bringing the witness to the United States for a deposition at which the defendant can be present or (b) transporting the defendant to the deposition outside the United States; and (4) the ability of the defendant to meaningfully participate in the deposition through reasonable means.

After the proposed amendment was published for public comment in August 2008, the advisory committee received four comments. The Magistrate Judges Association endorsed the proposal. The General Counsel of the Drug Enforcement Administration raised some drafting issues. The Federal Defenders and the National Association of Criminal Defense Lawyers (NACDL) opposed the proposed amendment, primarily because of concerns about the effect of the proposed amendment on the defendant's rights under the Sixth Amendment's Confrontation Clause. NACDL argued that the amendment would create a right to introduce a deposition

obtained through the new procedure, thereby exceeding the authority of the Rules Enabling Act, and that the proposed amendment would be a back-door means of achieving the goals of a failed attempt to amend Rule 26 in 2002. To address the concerns raised during the public comment period, the advisory committee revised the proposed amendment by explicitly limiting it to felonies and amending the committee note to clarify that the decision to allow the taking of the deposition in no way forecloses or predetermines challenges to admissibility, whether based on the Confrontation Clause or on the Rules of Evidence. With these changes, the advisory committee approved the amendment for submission to the Standing Committee. The Standing Committee approved it in June 2009, and the Judicial Conference approved it in September 2009. In 2010, the Supreme Court remanded the proposed amendment to the advisory committee for further consideration.

At its April 2011 meeting, the advisory committee reconsidered the proposed amendment. The advisory committee made no change in the text of the amendment approved in 2009, but revised the committee note to further clarify that compliance with the procedural requirements for obtaining the deposition testimony does not predetermine its admissibility at trial. Following its April 2011 meeting, after consultation with the reporters and chairs of the Standing Committee and the Evidence Rules Committee, the advisory committee voted unanimously to revise the text of Rule 15(f) to state explicitly in the text of the rule that authorization to take a deposition does not determine admissibility. The advisory committee also approved a further revised committee note that describes the amendment to subdivision (f) and clarifies the relationship between the authority to take a deposition under Rule 15(c)(3) and the admission of the deposition testimony at trial. Because the changes simply move to the text a point previously made in the committee note, further emphasize the point in the committee note, and are in accordance with the comments previously received, republication was unnecessary.

The Standing Committee approved the revised amendment to Rule 15, with a few stylistic changes, at its June 2011 meeting.

Proposed new Rule 37 clarifies that the procedure described in Appellate Rule 12.1 and Civil Rule 62.1 for obtaining "indicative rulings" also applies in criminal cases. The proposed rule establishes procedures facilitating the remand of certain postjudgment motions filed after an appeal has been docketed in a case where the district court indicated it would grant the motion. After considering public comments, the advisory committee recommended approval of the proposed new rule as published.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed amendments to Criminal Rules 5, 15, and 58, and new Rule 37, and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendments to the Federal Rules of Criminal Procedure are in Appendix B, with an excerpt from the advisory committee report and a separate supplemental memo on the proposed amendment to Rule 15.

Rules Approved for Publication and Comment

The Advisory Committee on Criminal Rules submitted proposed amendments to Rules 12 and 34, with a request that they be published for comment.[3] The Committee approved the advisory committee's recommendation to publish the proposed amendments for public comment.

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[3]As described in the Committee's March 2011 report to the Judicial Conference, the Committee approved of publication of a proposed amendment to Criminal Rule 11 in January 2011. That proposed amendment will be published in August 2011, together with the proposed amendments to Rules 12 and 34. Related to the proposed amendment to Rule 11, at its April 2011 meeting, the advisory committee approved of sending a letter to the Federal Judicial Center, recommending that the *Benchbook for U.S. District Court Judges* be amended to include a colloquy when taking a plea of guilty (1) to cover adverse consequences involving immigration status and (2) those flowing from conviction for sex offenses.

Rule 12(b)(3) lists motions that must be made before trial. Rule 12 allows a motion raising failure to state an offense at any time, in part because such a failure was thought to be jurisdictional. The proposal to amend Rule 12 arose from the Department of Justice's suggestion that the Supreme Court's decision in *United States v. Cotton*, 535 U.S. 625 (2002), which held that an indictment's failure to state an offense does not deprive the court of jurisdiction, undercut this rationale for not requiring such a defect to be raised before trial.

The advisory committee's examination of whether claims challenging the indictment for failure to state an offense should be added to the list of motions that must be raised before trial led to the proposal for clarifying the provisions setting out the consequences of making an untimely motion. The core elements of the proposed amendment are that it deletes the language in Rule 12(b)(3)(B) that allows a failure to state an offense claim to be raised "at any time while the case is pending," and it requires claims that an indictment fails to state an offense to be raised before trial. The proposed amendment also clarifies the standard for consideration of claims not raised before trial as required by Rule 12(b)(3). Except for claims of a failure to state an offense and double jeopardy — which may be reviewed when "prejudice" is shown — the courts may consider a claim only if the party who wishes to raise it can show "cause and prejudice," a phrase chosen to reflect the Supreme Court's interpretation of "good cause" in the current rule.

The proposed amendment also includes the following elements: (1) it continues to provide that a jurisdictional error can be raised at any time while a case is pending and places the jurisdictional provision in a more prominent position; (2) it enumerates in Rule 12(b)(3) a nonexclusive list of claims that must be raised before trial; (3) for all of the defenses, objections, and requests listed in Rule 12(b)(3), it introduces a new criterion for determining which must be raised before trial — whether the "basis" for the defense/objection/request is "then reasonably available"; (4) it shifts from Rule 12(b)(2) the requirement that motions raised before trial be

those that "the court can determine without a trial of the general issue" to (b)(3) and rephrases that limitation to provide that "the motion can be determined without a trial on the merits"; and (5) it shifts the provisions on the consequences of failing to make a timely motion from subdivision (e) to subdivision (c), solving an organizational problem within the current rule.

The proposed amendment to Rule 34 conforms that rule to the proposed amendment to Rule 12.

Informational Items

The advisory committee has considered for some time proposals to codify or expand the government's obligation to disclose exculpatory and impeaching information under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, but decided at its April 2011 meeting not to pursue an amendment to Rule 16 at this time. There were four reasons for the committee's decision not to act at this time. First, a comprehensive survey conducted by the FJC showed a lack of consensus within the federal judiciary as to whether an amendment is necessary. Second, the Department of Justice has implemented extensive institutional structural changes in policies, procedures, and training on discovery issues. Third, the advisory committee was not persuaded that a rule change was required to ensure that those changes will carry over from one administration to the next. Fourth, the advisory committee was not convinced that a rule change was necessary, given that the Supreme Court authority on a prosecutor's disclosure obligations is clear and that substantial sanctions are available for noncompliance. The advisory committee has recommended that the FJC create a guide to good practices for criminal discovery, that the *Benchbook for U.S. District Court Judges* be revised to include better guidance on pretrial discovery in criminal cases, and that more educational programs on overseeing such discovery be implemented for district judges.

12b-004813

FEDERAL RULES OF EVIDENCE

Rules Approved for Publication and Comment

The advisory committee submitted a proposed amendment to Rule 803(10), with a request that it be published for public comment. The proposed amendment revises the hearsay exception for absence of public record or entry to avoid a constitutional infirmity in the current rule in light of the Supreme Court's decision in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009). In *Melendez-Diaz*, the Court held that certificates reporting the results of forensic tests conducted by analysts are "testimonial" within the meaning of the Confrontation Clause, as construed in *Crawford v. Washington*. Consequently, admitting such certificates in lieu of in-court testimony violates the accused's right of confrontation. The advisory committee concluded that, in a criminal case, *Melendez-Diaz* also precludes the admission under Rule 803(10) of certificates offered to prove the absence of a public record. Like the certificates at issue in *Melendez-Diaz*, certificates proving the absence of public records are prepared with the sole motivation that they be used at trial as a substitute for live testimony. The proposed amendment adds a "notice-and-demand" procedure to the rule that would require the production of the person who prepared the certificate only if, after receiving notice from the government of intent to introduce a certificate, the defendant made a timely pretrial demand for production of the witness. The *Melendez-Diaz* Court specifically approved a state version of a notice-and-demand procedure. The Committee approved the advisory committee's recommendation to publish the proposed amendment for public comment.

Informational Items

The advisory committee is considering a suggestion that Rule 801(d)(1)(B) — the hearsay exemption for certain prior inconsistent statements — be amended to provide that prior consistent statements are admissible under the hearsay exemption whenever they would be

admissible to rehabilitate the witness's credibility. Under the current rule, some prior consistent statements offered to rehabilitate a witness's credibility are also admissible substantively under the hearsay exemption, but other rehabilitative statements are admissible only for rehabilitation and not substantively under the hearsay exemption. The justification for amending the rule is that there is no meaningful distinction between substantive and rehabilitative use of prior consistent statements. The advisory committee will consider a proposed amendment to the rule at its Fall 2011 meeting.

The advisory committee has decided not to propose amendments to Rules 803(6)–(8) (the hearsay exceptions for business records, absence of business records, and public records) to resolve an ambiguity revealed during the restyling project as to which party has the burden of showing trustworthiness or untrustworthiness. The advisory committee concluded that any problems in applying the rules are a result of a few outlier cases not generally followed; amending the rules could create new problems for courts and litigants; and the rules clearly place the burden of establishing untrustworthiness on the party who opposes admitting the evidence, making amendment unnecessary.

The advisory committee also voted not to move forward with a possible amendment to Rule 806, which allows the impeachment of hearsay declarants. As part of an ongoing review of case law on conflicting interpretations of the Evidence Rules, the advisory committee's reporter identified that rule as one that has conflicting interpretations. The advisory committee concluded that difficulties in amending the rule, coupled with concerns that changing it could undermine a good policy of barring extrinsic evidence to impeach hearsay declarants, warranted a decision not to proceed with a potential amendment.

12b-004815

The advisory committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004). Other than Rule 803(10), nothing in the developing case law appears to require amending the Evidence Rules at this time.[4]

The advisory committee is continuing work on a project to publish a pamphlet describing the federal common law on evidentiary privileges. The project is intended as a restatement of the federal common law, not a proposed codification of the law of privileges or a set of proposals for consideration by Congress.

The advisory committee will be sponsoring a symposium on the restyled Rules of Evidence in conjunction with its Fall meeting at the William and Mary Law School. The proceedings of the symposium will be published in the *William and Mary Law Review*.

PROCEDURES GOVERNING THE WORK OF THE RULES COMMITTEES

The Committee approved proposed revisions to the *Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure*. The *Procedures* govern the work of the rules committees and are routinely included in the broadly circulated brochures containing the proposed rule changes for public comment. The Judicial Conference first promulgated the *Procedures* in 1983. The Judicial Conference approved revisions in 1989 to reflect the 1988 amendments to the Rules Enabling Act. Those amendments required an increase in public notice of proposed rule changes, prescribed open meetings, and made provisions requiring a follow-up notice to every individual who commented on a proposed rule more flexible. Since 1989, the committees' work, records, and communications have been

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[4]After the Committee's June meeting, the Supreme Court issued its decision in *Bullcoming v. New Mexico*, No. 09-10876 (June 23, 2011), holding that the Confrontation Clause does not permit the prosecution to introduce a forensic lab report containing a testimonial certification through the in-court testimony of an analyst who did not sign the document or personally observe the test. The *Bullcoming* decision does not alter the conclusion that there is no need (other than in Rule 803(10)) for a rulemaking response to the *Crawford* line of cases at this time.

significantly affected by a number of changes, including the internet. Experience with the *Procedures* has also revealed some recurring practical difficulties. For these reasons, the Committee recommends revising the *Procedures*. The proposed revised *Procedures* account for the impact of the internet, propose ways to make the process more efficient, and follow the style protocols used in drafting the rules. In drafting the revised *Procedures*, the reporters to the Rules Committees worked through a number of issues, including the standard for republication; what comprises the official records of the committees, particularly with respect to correspondence; what records are to be posted on the rulemaking website and what records are maintained in the Administrative Office; whether transcripts should be prepared of public hearings; and when hearings can be canceled due to insufficient interest. The proposed revised *Procedures* are attached to this report in Appendix C. A redlined version comparing the revised *Procedures* to the present version, as well as a clean copy of the present version of the *Procedures*, are also included in Appendix C.

> **Recommendation:** That the Judicial Conference approve the proposed revised *Procedures for the Judicial Conference's Committee on Rules of Practice and Procedure and Its Advisory Rules Committees*.

CONFERENCE-APPROVED LEGISLATIVE PROPOSALS

At its September 2010 meeting, the Judicial Conference approved proposed amendments to Federal Rules of Appellate Procedure 4 and 40, clarifying the time to appeal or to seek rehearing in a case in which a United States officer or employee is a party. Those amendments were approved by the Supreme Court in April 2011 and are currently pending before Congress. The Judicial Conference also approved the Committee's recommendation to seek legislation amending 28 U.S.C. § 2107, consistent with the proposed amendment to Appellate Rule 4. The Committee is working with Congress on that legislation, to be coordinated with the effective date of the proposed rule changes.

LONG-RANGE PLANNING

The Committee reviewed and approved a memorandum to Judge Charles R. Breyer, Judiciary Planning Coordinator, updating the information the Committee previously provided on its work in implementing strategic initiatives and goals from the *Strategic Plan for the Federal Judiciary*.

Respectfully submitted,

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Lee H. Rosenthal, Chair

James M. Cole	Wallace B. Jefferson
Dean C. Colson	David F. Levi
Douglas R. Cox	William J. Maledon
Roy T. Englert	Reena Raggi
Neil M. Gorsuch	Patrick J. Schiltz
Marilyn L. Huff	James A. Teilborg
	Diane P. Wood

Appendix A – Proposed Amendments to the Federal Rules of Bankruptcy Procedure
Appendix B – Proposed Amendments to the Federal Rules of Criminal Procedure
Appendix C – Proposed Revised *Procedures for the Judicial Conference's Committee on Rules of Practice and Procedure and Its Advisory Rules Committees*

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

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RICHARD C. TALLMAN
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

TO: Honorable Lee H. Rosenthal, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Eugene R. Wedoff, Chair
Advisory Committee on Bankruptcy Rules

DATE: May 6, 2011

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on April 7 and 8, 2011, in San Francisco, California.

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Among the matters before the Committee were the proposed rule and form amendments and proposed new forms that were published for comment in August 2010. Thirty-seven comments were submitted in response to the publication. The Committee held a hearing in Washington, D.C., on February 4, 2011, at which six witnesses testified. Through a series of subcommittee conference calls and discussions at the San Francisco meeting, the Committee carefully considered the comments and testimony that were submitted. They are summarized below, along with the changes that the Committee recommends making to the published rules and forms in response to the comments received.

At its April meeting and at an earlier meeting in September 2010, the Committee took action on several matters that it now presents to the Standing Committee. The action items are grouped into three categories:

(a) matters published in August 2010 for which the Committee seeks approval for transmission to the Judicial Conference—amendments to Rules 3001(c), 7054, 7056, Official Form 10, and Official Form 25A; and new Official Forms 10 (Attachment A), 10 (Supplement 1), and 10 (Supplement 2);

(b) matters for which the Committee seeks approval for transmission to the Judicial Conference without publication—amendments to Rules 1007(c), 2015(a), 3001(c), and Official Forms 1 and 9A - 9I;

* * * * *

II. Action Items

A. Items for Final Approval

1. Amendments and New Forms Published for Comment in August 2010. **The Advisory Committee recommends that the proposed amendments and new forms that are summarized below be approved and forwarded to the Judicial Conference. The Advisory Committee recommends that the amended forms and new forms be effective on December 1, 2011.** The texts of the amended rules and forms and the new forms are set out in Appendix A.

Action Item 1. Rule 3001(c) would be amended to provide, in new paragraph (3), requirements for the documentation of claims based on an open-end or revolving consumer credit agreement. Subdivision (c)(1) currently requires the attachment to a proof of claim of the writing, if any, on which a claim or an interest in property is based. That provision would be amended to create an exception for claims governed by paragraph (3) of the subdivision. New paragraph (3) would require for an open-end or revolving consumer credit claim that a statement be filed with the proof of claim that provides the following information to the extent applicable: name of the entity from whom the creditor purchased the account; name of the entity to whom the debt was owed at the time of the account holder's last transaction; date of the account holder's last transaction; date of the last payment on the account; and the charge-off date. This information may be needed by the debtor to associate the claim with a known account, since claims of this type—primarily for credit card debts—are frequently sold one or more times before being held by the claim filer, which may be an entity unknown to the debtor. The required information would also provide a basis for assessing the timeliness of the claim. In addition to this information, which must be routinely provided, a party in interest could obtain a copy of the writing on which an open-end or revolving consumer credit claim is based by requesting it in writing from the holder of the claim.

a. Testimony and comments

Four witnesses testified at the February 4, 2011 hearing on these proposed amendments, and 24 people submitted written comments on them. Individual summaries of the testimony and comments are set forth in Appendix A. The major topics they addressed are the following:

Whether there is a need for the amendments. A few representatives of consumer lenders or purchasers of credit card debt questioned the need for the proposed amendments. They noted the low incidence of objections to the claims they file and said that in many cases the debtor has scheduled the debts owed to them, thus acknowledging the validity of their claims.

Lawyers for consumer debtors and a bankruptcy judge supported the rule's requirement that credit card claimants provide specific information to support their claims. They stated that these claimants are ignoring the current requirement for attaching the writing on which the claim is based and that, having purchased the claims in bulk, the claimants generally have very little information about the claims they file. Two comments noted that the U.S. Trustee Program recently entered into a settlement with Capital One Bank for filing thousands of previously discharged claims.

Whether the amendments place an appropriate burden on consumer lenders and debt purchasers. One witness representing the American Bankers Association testified that the proposed amendment would place an unreasonable burden on consumer lenders and debt purchasers and would improperly shift the burden of proof to the creditor. This, he said, would adversely affect an industry that purchased $100 billion of charged-off debt last year. Several representatives of debt purchasing companies suggested that the rule should acknowledge that compliance with the requirements of Rule 3001(c)(3)(A) entitles the claim to prima facie validity without regard to whether the supporting writing is requested or provided.

Some consumer lawyers commented that the proposed amendment would not place a sufficient burden on credit card claimants. They objected to excepting these types of claims from the general requirement for attachment of the writing on which a claim is based. Some argued for a requirement that a debt buyer who files a claim produce a complete chain of title, and another urged that a full account transaction history be required. One comment stated that the rule should require more diligence, more documentation, and more care in the preparation of a proof of claim given the "sorry state of compliance with existing rules." A representative of the National Association of Consumer Bankruptcy Attorneys characterized the proposed amendment as "quite modest and, at best, barely adequate to deal with widespread problems."

Whether subdivision (c)(3)(A) requires disclosure of the appropriate items of information. Some witnesses and commentators questioned the value of some of the information required to be included in the statement accompanying the proof of claim or suggested other information that should be required. Some comments suggested that particular provisions were ambiguous.

Whether subdivision (c)(3)(B) requires too much or too little of holders of credit card claims. Much of the public comment was addressed to the requirement that the claimant provide the writing on which the claim is based if a party in interest makes a written request for this document. Comments and testimony by some representatives of consumer lenders and bulk claims purchasers argued that a threshold showing of need for the writing should be required of the requesting party, that the rule should clarify the specific writing that should be produced for credit card claims, or that the provision should be deleted.

Some of the consumer bankruptcy lawyers, on the other hand, commented that there was no reason to have this special rule for holders of credit card claims and that they should have to produce the writing without request like all other creditors filing proofs of claim. Others argued that the rule should provide a time limit for the production of the writing in response to a request and that the Committee Note should state that the documentation that must be produced includes the chain of title, the contract upon which the claim is based, and a transaction record.

Some commentators on both sides of the issue said that requiring production of the writing will lead to litigation and delay.

Comments on previously approved amendments to Rule 3001(c). Some commentators representing bulk claims purchasers used this occasion to object to amendments to Rule 3001(c)(2) that were recently approved by the Supreme Court and transmitted to Congress. In particular they expressed displeasure with the requirement that interest, fees, expenses, and other charges included in a claim be itemized and with the authorization of sanctions for the failure to comply with the requirements of Rule 3001(c).

b. Committee consideration

Many of the issues raised in the testimony and written comments were ones that the Advisory Committee had previously considered. The Committee concluded that the proposed rule amendment will permit enforcement of an appropriate disclosure requirement on creditors seeking recovery from bankruptcy estates for claims based on open-end or revolving consumer credit agreements. Under the existing rule, all creditors are required to file the writing on which the claim is based. As reflected in comments from advocates for all affected parties, this requirement is generally not being complied with by credit card claimants. Rather than imposing a new requirement of document production on credit card claimants, the proposed amendments allow those creditors flexibility in providing information that will provide a basis for debtors and trustees to assess whether a claim is valid and enforceable. The proposed amendments for credit card claimants are less stringent than the requirements under existing Rule 3001(c), but they are designed to provide more information than is often provided under current practices. The Committee concluded that the comments and testimony did not provide any reason to revisit the basic decisions that it had previously reached.

The Committee did agree that a deadline for responding to a request for the underlying writing should be imposed. Specifying a time limit will enable the requesting party to determine

when there has been a failure to comply if the request is met with silence. The Committee therefore voted to add a 30-day deadline for responding to a written request under proposed Rule 3001(c)(3)(B). The time would run from when the written request is sent. This time limit would be subject to enlargement or reduction by the court for cause under Rule 9006.

Because there is no deadline for making a request under proposed Rule 3001(c)(3)(B), the Committee discussed the point at which a properly filed proof of claim based on an open-end or revolving credit card agreement would be entitled to be treated under Rule 3001(f) as prima facie evidence of the validity and amount of the claim. If the applicability of subdivision (f) depended upon compliance with proposed subsection (c)(3)(B), it would be uncertain whether the claim was entitled to the benefit of prima facie validity until a written request was made—if and whenever that might occur—and the claimant did or did not provide a proper response. The Committee voted to add to the Committee Note a statement that a proof of claim based on an open-end or revolving credit card agreement that is filed and executed in accordance with Rule 3001(a), (b), (c)(1), (c)(2), (c)(3)(A), and (e) is entitled to the benefit of subdivision (f). Failure of a claimant to comply with proposed Rule (c)(3)(B) would not affect the applicability of subdivision (f), but would subject the claimant to possible sanctions.

Finally, the Committee agreed with one witness that proposed Rule 3001(c)(3) is not intended to apply to home equity lines of credit. Those types of loans, which are secured by a security interest in the debtor's real property, are covered by the pending home mortgage amendments and were not intended to be included within subdivision (c)(3). The Committee therefore added an exception for these types of loans to proposed Rule 3001(c)(3).

Action Item 2. Rule 7054 incorporates Fed. R. Civ. P. 54(a) - (c) for adversary proceedings, and in subdivision (b) it provides for the awarding of costs. The proposed amendment that was published for comment would amend (b) to provide more time—14 days rather than one day—for a party to respond to the prevailing party's bill of costs, and extend from five to seven days the time for seeking court review of the costs taxed by the clerk. The first change was proposed in order to provide a more reasonable period of time for a response, and the latter period was changed to conform to the 2009 time-computation amendments, which changed five-day periods in the rules to seven days. These changes are also intended to make the rule consistent with Civil Rule 54, which was previously amended to adopt the proposed time periods.

One comment was submitted on this proposed amendment. Norman H. Meyer, Jr., Clerk of the U.S. Bankruptcy Court for the District of New Mexico, suggested that both time periods in Rule 7054(b) be extended to 14 days. His district's local rule allows 14 days after entry of the judgment to move for the taxation of costs, 14 days after notice of the motion to object to the bill of costs, and 14 days after the taxation of costs to seek court review.

Because one of the goals of the proposed amendment is to make Rule 7054(b) consistent with the civil rule, the Committee voted unanimously to recommend approval of the amended rule as published.

Action Item 3. Rule 7056 makes Fed. R. Civ. P. 56 applicable in adversary proceedings. Under Rule 9014(c), Rule 7056 also applies in contested matters unless the court directs otherwise. The amendment was proposed in response to the civil rule's imposition of a new default deadline for filing a motion for summary judgment. Under the civil rule, the deadline for filing a motion for summary judgment is 30 days after the close of all discovery, unless a different time is set by local rule or court order. Because hearings in bankruptcy cases sometimes occur shortly after the close of discovery, the proposed amendment to Rule 7056 bases the default deadline on the scheduled hearing date, rather than on the close of discovery. The deadline for filing a summary judgment motion would be 30 days before the initial date set for an evidentiary hearing on any issue for which summary judgment is sought, unless a local rule or the court sets a different deadline.

No one submitted a comment on this amendment. The Committee voted unanimously to recommend approval of the proposed amendment to Rule 7056 as published.

Action Item 4. Official Form 10 (Proof of Claim) would be amended in several respects. As published, the proposed amendments included the following:

- a request for additional information about the interest rate for secured claims and a clarification that the information concerns the rate as of the filing of the petition;
- clarification that a summary of supporting documents may be submitted only as an addition to copies of the documents themselves and not as a substitute;
- additional emphasis of the need to redact attached documents to eliminate personal data identifiers;
- changes to the date and signature box to emphasize the duty of care that must be exercised in filing a proof of claim and to require disclosure of the capacity in which the filer is acting;
- the addition of a space for a uniform claim identifier; and
- various formatting and stylistic changes.

a. Comments

Six comments were submitted regarding the proposed Form 10 amendments, and an additional inquiry was informally made regarding that form.

Judge Paul Mannes (Bankr. D. Md.) pointed out that, as proposed to be amended, Form 10 would contain two places to indicate whether the proof of claim is being filed by a trustee or debtor, rather than by a creditor. He suggested that the first request for that information be deleted, and that

the resulting space be used to allow the claimant to indicate that it did not receive notice of the filing of the bankruptcy case from the court.

Linda Spaight, of the Administrative Office's Bankruptcy Court Administrative Division, noted the continuation of an existing discrepancy between the form's instruction not to "send original documents, as attachments may be destroyed after scanning" and Rule 3001(c)'s requirement that the original or a duplicate of a writing on which a claim is based be attached.

The National Association of Consumer Bankruptcy Attorneys commented that Form 10, either on its face or in the instructions, should state that attachments are required for open-end consumer credit claims and mortgage claims. It stated that not all claimants will be familiar with the rules requiring the attachment of those documents.

Two attorneys expressed support for the amendments, and another commentator questioned whether "email" was spelled properly.

Finally, Robby Robinson of the Bankruptcy Court Administrative Division, on behalf of the NextGen project, informally questioned why requests for email addresses were added to Form 10 and whether the provision of that information was intended to constitute consent to receive notices and service by email.

b. Committee consideration

The Committee considered these comments and voted unanimously to recommend approval of the amendments to Form 10, with the following changes to the published draft:

- the deletion of the debtor/trustee checkbox on page 1 of the form, without adding a replacement for the checkbox, leaving the identity of the person filing the claim for disclosure only in the signature box; and

- the addition of a statement to the Committee Note, explaining that the new requests for email addresses are intended only to facilitate communication with the claimant and that the provision of this information does not affect any requirements for serving or providing notice to the claimant.

The Committee also decided to include additional statements in box 7 of Form 10 reminding claimants of the need to attach the documentation required by Rule 3001(c) for claims secured by a security interest in the debtor's principal residence and claims based on an open-end or revolving consumer credit agreement. Because the latter documentation requirement will not take effect until December 1, 2012, the Committee voted to delay recommending these additions to box 7 until June 2012, when it will submit them to the Standing Committee for approval.

The Committee decided to respond to the discrepancy between Rule 3001(c) and Form 10 — concerning whether original documents should be filed — by proposing a technical amendment to the rule, rather than amending the form. This change, which brings the rule into conformity with existing practice, is addressed in Part II.A.2 of this report.

Action Item 5. Official Form 10 (Attachment A) (Mortgage Proof of Claim Attachment) is new. It would implement the requirements of Rule 3001(c)(2) for a claim secured by a security interest in the debtor's principal residence. That rule amendment was recently approved by the Supreme Court and transmitted to Congress. Accompanying the proof of claim for a home mortgage, this attachment form would require a statement of the principal and interest due as of the petition date; a statement of prepetition fees, expenses, and charges; and a statement of the amount necessary to cure a default as of the petition date.

Two witnesses testified at the February 4, 2011 hearing about this and the other two proposed mortgage claims, and thirteen written comments were submitted. Summaries of the testimony and comments are included in Appendix A.

The Committee thoroughly discussed the testimony and comments that were submitted on the proposed mortgage forms. Members agreed that the major issue raised at the hearing and in the comments was whether a mortgage lender should be required to provide a complete account history as an attachment to its proof of claim. The Committee had considered this issue prior to recommending the proposed forms for publication, and the decision not to require this information was based largely on the desire to require the disclosure of information about the basis for a mortgage claim without imposing an undue burden on the mortgagee or overwhelming the debtor with too much detail. The Committee recognized that some of the comments and testimony, particularly those of Bankruptcy Judges Marvin Isgur (S.D. Tex.) and Elizabeth Magner (E.D La.), called into question whether the proper balance had been struck.

The Committee discussed various options for giving further consideration to whether a full loan history should be required. In the end, the Committee concluded that it was important that the proposed rules and forms requiring greater disclosure of information about mortgage claims not be delayed and that they remain on track to take effect in December 2011. Amending the attachment form to require a loan history would require republication and thus a year's delay in the effective date of the form. The Committee did not support allowing the rules to go into effect without all of the implementing forms.

The Committee did not, however, want to dismiss completely the possibility of requiring a loan history. Testimony and comments supporting such a requirement persuasively explained the value that this information might provide, in particular by showing how the lender applied prepetition payments it had received from the debtor. But the Committee noted that only a small number of persons had been heard from, and none of the comments were submitted by mortgage lenders or servicers. Some members of the Committee expressed concern about whether it would be feasible for creditors of all sizes to comply with a loan-history requirement and whether the costs

of implementing automation systems to provide this information were justified by the value of the information to parties and the courts.

The Committee concluded that gathering information about people's experience with the proposed rules and forms after they go into effect could be helpful in deciding later whether to require a loan history. The Committee discussed several means of gathering this information, including holding a mini-conference of mortgage lenders and servicers, chapter 13 trustees, consumer debtors' attorneys, and judges; asking the Federal Judicial Center to undertake a survey or study; or having the reporter publish a request for information. Ultimately, the Committee voted to give further consideration in the future to requiring attachment of a complete loan history to a proof of claim filed for a claim secured by a security interest in the debtor's principal residence. A decision by the Committee will be informed by information obtained after a period of experience with the currently proposed attachment form.

Following that decision, the Committee voted unanimously to approve Form 10 (Attachment A), with the changes noted below made to the published draft. These changes are responsive to comments that were submitted and Committee members' suggestions:

- Change the instruction at the top of Part 2 to read, "Itemize the fees, expenses, and charges due on the claim as of the petition date." This will clarify that the intended disclosure is of amounts remaining due as of the petition date, not all amounts that have been incurred as of that date.

- After the item in the Part 2 list labeled "Escrow shortage or deficiency," change the parenthetical to read, "(Do not include amounts that are part of any installment payment listed in Part 3.)." This will prevent duplication with the escrow portion of missed installment payments listed in Part 3.

- In Part 3, add a new line reading "Subtract amounts for which debtor is entitled to a refund."

- Add a new item in Part 3 reading "3. Calculation of cure amount."

- For ease of completion and reading, add numbers to the left and right columns of Part 2.

Action Item 6. Official Form 10 (Supplement 1) (Notice of Mortgage Payment Change) is new. Designed to implement Rule 3002.1(b), this form would be used by the holder of a home mortgage claim to provide notice of any escrow account payment adjustment, interest payment change, or other mortgage payment change while a chapter 13 case is pending.

Only two comments on the mortgage forms addressed Supplement 1 specifically. A chapter 13 trustee expressed support for the proposed form. He stated that notices of payment change are

not always provided during the chapter 13 case. Without that information, disbursements may be made that result in the debtor incurring late charges. He stated that the debtor needs complete information about the mortgage in order to emerge from bankruptcy with a fresh start.

Judge Marvin Isgur expressed concern about the form's provision for the reporting of escrow changes. He said that Supplement 1 should not instruct the mortgagee to attach an escrow account statement "prepared according to applicable nonbankruptcy law." He believed that the instruction provided for an analysis of an escrow shortage according to the federal Real Estate Settlement Procedures Act. That analysis, he said, might improperly allow the mortgagee to collect the escrow shortage as part of an ongoing adjusted mortgage payment, as well as under the plan as part of the cure payment.

The Committee had previously decided that the forms should not dictate the method of determining escrow arrearages, an issue on which courts disagree. In response to Judge Isgur's comment, however, the Committee concluded that the instructions in Parts 1 and 2 of the Notice of Mortgage Payment Change form should be worded the same way that Part 3 of Attachment A is worded: "Attach . . . an escrow account statement prepared . . . in a form consistent with applicable nonbankruptcy law" (rather than "prepared according to applicable nonbankruptcy law"). That change was intended to clarify that nonbankruptcy law determines only the form of disclosure and not the method of calculating escrow balances.

With that change and another minor stylistic change made, the Committee voted unanimously to recommend the approval of Form 10 (Supplement 1).

Action Item 7. Official Form 10 (Supplement 2) (Notice of Postpetition Mortgage Fees, Expenses, and Charges), which is new, would implement Rule 3002.1(c). It would be used in a chapter 13 case by the holder of a home mortgage claim to provide notice of the date incurred and amount of any postpetition fees, expenses, and charges.

Several comments on the proposed mortgage forms expressed general support for requiring home mortgage claimants to provide more information about changes in amounts required to be paid during the life of the chapter 13 plan. Three comments addressed Supplement 2 specifically.

One consumer attorney expressed strong support for requiring home mortgage claimants to inform debtors of any charges assessed during bankruptcy. In one of her cases, the mortgagee paid property taxes without the debtor's knowledge, even though those taxes were being paid under the plan. She said that toward the end of the five-year plan, the lender sought to foreclose due to its payment of the taxes. According to her, it took over a year and six hearings to resolve the matter (efforts that she handled pro bono).

Another consumer attorney stated that the forms implementing Rule 3002.1 (Supplements 1 and 2) should not be limited to chapter 13 cases, but should also apply in chapter 7 asset cases and in chapter 11 individual cases.

The National Association of Consumer Bankruptcy Attorneys urged the Committee to add to the Committee Note accompanying Supplement 2 a statement that mortgage claimants are not authorized to charge additional fees for providing the information required by the form.

After considering these comments, the Committee voted unanimously to recommend approval of Form 10 (Supplement 2) with only two minor changes to the form as published: the addition of numbers to the left and right columns of Part 1 and (to correct an internal reference) the substitution of "Notice" for "Claim" in the declaration at the end of the form.

Action Item 8. Official Form 25A (Plan of Reorganization in Small Business Case Under Chapter 11) would be amended to change the effective-date provision to reflect the 2009 amendments that increased from 10 to 14 days the time periods for filing a notice of appeal and for the duration of the stay of a confirmation order. Under the amended provision, the effective date of the plan would generally be the first business day following the date that is 14 days after the entry of the order of confirmation.

No comments were submitted on this proposed amendment. The Committee voted unanimously to recommend that it be approved as published.

2. Amendments for Which Final Approval is Sought Without Publication. **The Advisory Committee recommends that the proposed amendments that are summarized below be approved and forwarded to the Judicial Conference. The Advisory Committee recommends that the amended forms be effective on December 1, 2011.** Because the proposed amendments are technical or conforming in nature, the Committee concluded that publication for comment is not required. The texts of the amended rules and forms are set out in Appendix A.

Action Item 9. Rule 1007(c) would be amended to eliminate a time period that is now inconsistent with Rule 1007(a)(2). Rule 1007(c) prescribes the time limits for filing various documents. Among its provisions is the following sentence: "In an involuntary case, the list in subdivision (a)(2), and the schedules, statements, and other documents required by subdivision (b)(1) shall be filed by the debtor within 14 days of the entry of the order for relief." Rule 1007(a)(2) was amended as of December 1, 2010, to reduce to seven days the time for an involuntary debtor to file the list of creditors. Unfortunately, during the process leading to the amendment of Rule 1007(a)(2), the redundant deadline in subdivision (c) was overlooked. Thus it remains at 14 days, despite the change to seven days in subdivision (a)(2).

Because there is no need to repeat the deadline, the Committee voted unanimously at its September 2010 meeting to delete from subdivision (c) the time limit for filing the list of creditors in an involuntary case. As amended, the sentence would parallel the prior sentence that imposes time limits for filing schedules, statements, and other documents in a voluntary case.

Action Item 10. Rule 2015(a) would be amended to correct a reference to 11 U.S.C. § 704 of the Bankruptcy Code. Prior to the 2005 Amendments to the Code, § 704 was not divided into

subsections. Rule 2015(a) therefore correctly referred to § 704(8) in requiring the trustee or debtor in possession to file reports and summaries required by that provision. The 2005 Amendments, however, expanded § 704 and broke it into subsections. What was previously § 704(8) became § 704(a)(8).

In order to correct the now erroneous reference, the Committee voted unanimously at its September 2010 meeting to amend Rule 2015(a) to refer to § 704(a)(8).

Action Item 11. Rule 3001(c)(1) would be amended to delete the option of filing with a proof of claim the original of a writing on which a claim is based. As noted above, in response to the August 2010 publication of amendments to Rule 3001(c) and Form 10, Linda Spaight of the Administrative Office's Bankruptcy Court Administration Division submitted a comment pointing out a discrepancy between Rule 3001(c)(1) and paragraph 7 of the instructions for Form 10. The rule requires the attachment of "the original or duplicate" of a writing on which a claim is based, whereas the instructions direct the claimant not to "send original documents, as attachments may be destroyed after scanning."

The Committee concluded that the discrepancy pointed out by Ms. Spaight was created by earlier Committee action, and not by either the pending amendments to Rule 3001(c) or the proposed amendments to Form 10. Ms. Spaight's comment was therefore treated as a suggestion for an amendment to either Form 10 or Rule 3001(c). After discussion, the Committee concluded that the language of the form, rather than of the rule, reflects the current practice of filing copies, not originals, of documents supporting proofs of claim. It therefore voted unanimously to recommend the amendment of Rule 3001(c)(1) to replace "the original or a duplicate" with "a copy of the writing."

Action Item 12. Official Form 1 (Voluntary Petition) would be amended to include lines on the form for a foreign representative filing a chapter 15 petition to indicate the country of the debtor's center of main interests and countries in which related proceedings are pending. This amendment would implement the requirements of new Rule 1004.2 (Petition in Chapter 15 Cases), which is scheduled to go into effect on December 1, 2011.

The Committee voted unanimously at its September 2010 meeting to recommend approval of this conforming change to Form 1, with the same effective date as Rule 1004.2.

Action Item 13. Official Forms 9A - 9I (Notice of Meeting of Creditors & Deadlines) would be amended to conform to a rule amendment scheduled to take effect on December 1, 2011, and to make some minor stylistic changes.

Rule 2003(e) currently states that a meeting of creditors "may be adjourned . . . by announcement at the meeting of the adjourned date and time without further written notice." A pending amendment to Rule 2003(e) that has been approved by the Supreme Court and transmitted

to Congress would require the presiding official at a meeting of creditors to file a statement specifying the date and time to which such a meeting is adjourned.

All of the versions of Form 9 (A - I) reflect the current wording of Rule 2003(e). On the back of each form, the explanation of "Meeting of Creditors" states that the "meeting may be continued and concluded at a later date without further notice." The Committee therefore voted unanimously at its September 2010 meeting to recommend that the explanation be revised to state that the "meeting may be continued and concluded at a later date specified in a notice filed with the court." In addition, the amendment to the forms would correct a spelling and a punctuation error and call greater attention to the instruction to "See Reverse Side for Important Explanations."

* * * * *

Appendix A

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

For Final Approval and Transmittal to the Judicial Conference

Rule 1007. Lists, Schedules, Statements, and Other Documents; Time Limits

1 * * * * *

2 (c) TIME LIMITS. In a voluntary case, the schedules,
3 statements, and other documents required by subdivision
4 (b)(1), (4), (5), and (6) shall be filed with the petition or
5 within 14 days thereafter, except as otherwise provided in
6 subdivisions (d), (e), (f), and (h) of this rule. In an
7 involuntary case, ~~the list in subdivision (a)(2), and~~ the
8 schedules, statements, and other documents required by
9 subdivision (b)(1) shall be filed by the debtor within 14 days
10 ~~of~~ after the entry of the order for relief.

11 * * * * *

COMMITTEE NOTE

In subdivision (c), the time limit for a debtor in an involuntary case to file the list required by subdivision (a)(2) is deleted as unnecessary. Subdivision (a)(2) provides that the list must be filed within seven days after the entry of the order for relief. The other change to subdivision (c) is stylistic.

Because this amendment is being made to conform to an amendment to Rule 1007(a)(2) that took effect on December 1, 2010, final approval is sought without publication.

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

Rule 2015. Duty to Keep Records, Make Reports, and Give Notice of Case or Change of Status

(a) TRUSTEE OR DEBTOR IN POSSESSION. A trustee or debtor in possession shall:

* * * * *

(3) file the reports and summaries required by § 704(a)(8) of the Code, which shall include a statement, if payments are made to employees, of the amounts of deductions for all taxes required to be withheld or paid for and in behalf of employees and the place where these amounts are deposited;

* * * * *

COMMITTEE NOTE

Subdivision (a)(3) is amended to correct the reference to § 704. The 2005 amendments to the Code expanded § 704 and created subsections within it. The provision that was previously § 704(8) became § 704(a)(8). The other change to (a)(3) is stylistic.

Final approval of this technical amendment is sought without publication.

Rule 3001. Proof of Claim[**]

* * * * *

(c) SUPPORTING INFORMATION.

(1) *Claim Based on a Writing*. Except for a claim governed by paragraph (3) of this subdivision, w~~W~~hen a claim, or an interest in property of the debtor securing the claim, is based on a writing, ~~the original or a duplicate~~ a copy of the writing shall be filed with the proof of claim. If the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim.

* * * * *

(3) *Claim Based on an Open-End or Revolving Consumer Credit Agreement.*

(A) When a claim is based on an open-end or revolving consumer credit agreement — except one for

[**] Incorporates amendments that are due to take effect on December 1, 2011, if Congress takes no action otherwise.

16 which a security interest is claimed in the debtor's real
17 property — a statement shall be filed with the proof of claim,
18 including all of the following information that applies to the
19 account:
20 (i) the name of the entity from whom
21 the creditor purchased the account;
22 (ii) the name of the entity to whom the
23 debt was owed at the time of an account holder's last
24 transaction on the account;
25 (iii) the date of an account holder's last
26 transaction;
27 (iv) the date of the last payment on the
28 account; and
29 (v) the date on which the account was
30 charged to profit and loss.
31 (B) On written request by a party in interest,
32 the holder of a claim based on an open-end or revolving

33 consumer credit agreement shall, within 30 days after the

34 request is sent, provide the requesting party a copy of the

35 writing specified in paragraph (1) of this subdivision.

COMMITTEE NOTE

Subdivision (c). Subdivision (c) is amended in several respects. The former requirement in paragraph (1) to file an original or duplicate of a supporting document is amended to reflect the current practice of filing only copies. The proof of claim form instructs claimants not to file the original of a document because it may be destroyed by the clerk's office after scanning.

Subdivision (c) is further amended to add paragraph (3). Except with respect to claims secured by a security interest in the debtor's real property (such as a home equity line of credit), paragraph (3) specifies information that must be provided in support of a claim based on an open-end or revolving consumer credit agreement (such as an agreement underlying the issuance of a credit card). Because a claim of this type may have been sold one or more times prior to the debtor's bankruptcy, the debtor may not recognize the name of the person filing the proof of claim. Disclosure of the information required by paragraph (3) will assist the debtor in associating the claim with a known account. It will also provide a basis for assessing the timeliness of the claim. The date, if any, on which the account was charged to profit and loss ("charge-off" date) under subparagraph (A)(v) should be determined in accordance with applicable standards for the classification and account management of consumer credit. A proof of claim executed and filed in accordance with subparagraph (A), as well as the applicable provisions of subdivisions (a), (b), (c)(2), and (e), constitutes prima

facie evidence of the validity and amount of the claim under subdivision (f).

To the extent that paragraph (3) applies to a claim, paragraph (1) of subdivision (c) is not applicable. A party in interest, however, may obtain the writing on which an open-end or revolving consumer credit claim is based by requesting in writing that documentation from the holder of the claim. The holder of the claim must provide the documentation within 30 days after the request is sent. The court, for cause, may extend or reduce that time period under Rule 9006.

Changes Made After Publication

Subdivision (c)(1). The requirement for the attachment of a writing on which a claim is based was changed to require that a copy, rather than the original or a duplicate, of the writing be provided.

Subdivision (c)(3). An exception to subparagraph (A) was added for open-end or revolving consumer credit agreements that are secured by the debtor's real property.

A time limit of 30 days for responding to a written request under subparagraph (B) was added.

Committee Note. A statement was added to clarify that if a proof of claim complies with subdivision (c)(3)(A), as well as with subdivisions (a), (b), (c)(2), and (e), it constitutes prima facie evidence of the validity and amount of the claim under subdivision (f).

Other changes. Stylistic changes were also made to the rule.

* * * * *

Rule 7054. Judgments; Costs

* * * * *

(b) COSTS. The court may allow costs to the prevailing party except when a statute of the United States or these rules otherwise provides. Costs against the United States, its officers and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on ~~one day's~~ 14 days' notice; on motion served within ~~five~~ seven days thereafter, the action of the clerk may be reviewed by the court.

COMMITTEE NOTE

Subdivision (b). Subdivision (b) is amended to provide more time for a party to respond to the prevailing party's bill of costs. The former rule's provision of one day's notice was unrealistically short. The change to 14 days conforms to the change made to Civil Rule 54(d). Extension from five to seven days of the time for serving a motion for court review of the clerk's action implements changes in connection with the December 1, 2009, amendment to Rule 9006(a) and the manner by which time is computed under the rules. Throughout the rules, deadlines have been amended in the following manner:

- 5-day periods became 7-day periods
- 10-day periods became 14-day periods
- 15-day periods became 14-day periods
- 20-day periods became 21-day periods
- 25-day periods became 28-day periods

Changes Made After Publication

No changes were made after publication.

* * * * *

Rule 7056. Summary Judgment

Rule 56 F.R.Civ.P. applies in adversary proceedings~~.~~, except that any motion for summary judgment must be made at least 30 days before the initial date set for an evidentiary hearing on any issue for which summary judgment is sought, unless a different time is set by local rule or the court orders otherwise.

COMMITTEE NOTE

The only exception to complete adoption of Rule 56 F.R.Civ.P. involves the default deadline for filing a summary judgment motion. Rule 56(c)(1)(A) makes the default deadline 30 days after the close of all discovery. Because in bankruptcy cases hearings can occur shortly after the close of discovery, a default deadline based on the scheduled hearing date, rather than the close of discovery, is adopted. As with Rule 56(c)(1), the deadline can be altered either by local rule or court order.

Changes Made After Publication

No changes were made after publication.

* * * * *

B1 (Official Form 1) (12/11)

United States Bankruptcy Court _____DISTRICT OF _____	Voluntary Petition
Name of Debtor (if individual, enter Last, First, Middle):	Name of Joint Debtor (Spouse) (Last, First, Middle):
All Other Names used by the Debtor in the last 8 years (include married, maiden, and trade names):	All Other Names used by the Joint Debtor in the last 8 years (include married, maiden, and trade names):
Last four digits of Soc. Sec. or Individual-Taxpayer I.D. (ITIN)/Complete EIN (if more than one, state all):	Last four digits of Soc. Sec. or Individual-Taxpayer I.D. (ITIN)/Complete EIN (if more than one, state all):
Street Address of Debtor (No. and Street, City, and State): ZIP CODE	Street Address of Joint Debtor (No. and Street, City, and State): ZIP CODE
County of Residence or of the Principal Place of Business:	County of Residence or of the Principal Place of Business:
Mailing Address of Debtor (if different from street address): ZIP CODE	Mailing Address of Joint Debtor (if different from street address): ZIP CODE
Location of Principal Assets of Business Debtor (if different from street address above): ZIP CODE	

Type of Debtor
(Form of Organization)
(Check **one** box.)

- ☐ Individual (includes Joint Debtors)
  See Exhibit D on page 2 of this form.
- ☐ Corporation (includes LLC and LLP)
- ☐ Partnership
- ☐ Other (If debtor is not one of the above entities, check this box and state type of entity below.)

Nature of Business
(Check **one** box.)

- ☐ Health Care Business
- ☐ Single Asset Real Estate as defined in 11 U.S.C. § 101(51B)
- ☐ Railroad
- ☐ Stockbroker
- ☐ Commodity Broker
- ☐ Clearing Bank
- ☐ Other

Chapter of Bankruptcy Code Under Which the Petition is Filed (Check **one** box.)

- ☐ Chapter 7
- ☐ Chapter 9
- ☐ Chapter 11
- ☐ Chapter 12
- ☐ Chapter 13
- ☐ Chapter 15 Petition for Recognition of a Foreign Main Proceeding
- ☐ Chapter 15 Petition for Recognition of a Foreign Nonmain Proceeding

Chapter 15 Debtors

Country of debtor's center of main interests: _____
_____

Each country in which a foreign proceeding by, regarding, or against debtor is pending: _____
_____

Tax-Exempt Entity
(Check box, if applicable.)

- ☐ Debtor is a tax-exempt organization under title 26 of the United States Code (the Internal Revenue Code).

Nature of Debts
(Check **one** box.)

- ☐ Debts are primarily consumer debts, defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose."
- ☐ Debts are primarily business debts.

Filing Fee (Check one box.)

- ☐ Full Filing Fee attached.
- ☐ Filing Fee to be paid in installments (applicable to individuals only). Must attach signed application for the court's consideration certifying that the debtor is unable to pay fee except in installments. Rule 1006(b). See Official Form 3A.
- ☐ Filing Fee waiver requested (applicable to chapter 7 individuals only). Must attach signed application for the court's consideration. See Official Form 3B.

Chapter 11 Debtors

Check one box:
- ☐ Debtor is a small business debtor as defined in 11 U.S.C. § 101(51D).
- ☐ Debtor is not a small business debtor as defined in 11 U.S.C. § 101(51D).

Check if:
- ☐ Debtor's aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than $2,190,000.

- -

Check all applicable boxes:
- ☐ A plan is being filed with this petition.
- ☐ Acceptances of the plan were solicited prepetition from one or more classes of creditors, in accordance with 11 U.S.C. § 1126(b).

Statistical/Administrative Information

- ☐ Debtor estimates that funds will be available for distribution to unsecured creditors.
- ☐ Debtor estimates that, after any exempt property is excluded and administrative expenses paid, there will be no funds available for distribution to unsecured creditors.

THIS SPACE IS FOR COURT USE ONLY

Estimated Number of Creditors

☐ 1-49	☐ 50-99	☐ 100-199	☐ 200-999	☐ 1,000-5,000	☐ 5,001-10,000	☐ 10,001-25,000	☐ 25,001-50,000	☐ 50,001-100,000	☐ Over 100,000

Estimated Assets

☐ $0 to $50,000	☐ $50,001 to $100,000	☐ $100,001 to $500,000	☐ $500,001 to $1 million	☐ $1,000,001 to $10 million	☐ $10,000,001 to $50 million	☐ $50,000,001 to $100 million	☐ $100,000,001 to $500 million	☐ $500,000,001 to $1 billion	☐ More than $1 billion

Estimated Liabilities

☐ $0 to $50,000	☐ $50,001 to $100,000	☐ $100,001 to $500,000	☐ $500,001 to $1 million	☐ $1,000,001 to $10 million	☐ $10,000,001 to $50 million	☐ $50,000,001 to $100 million	☐ $100,000,001 to $500 million	☐ $500,000,001 to $1 billion	☐ More than $1 billion

12b-004841

Voluntary Petition *(This page must be completed and filed in every case.)*	Name of Debtor(s):	
All Prior Bankruptcy Cases Filed Within Last 8 Years (If more than two, attach additional sheet.)		
Location Where Filed:	Case Number:	Date Filed:
Location Where Filed:	Case Number:	Date Filed:
Pending Bankruptcy Case Filed by any Spouse, Partner, or Affiliate of this Debtor (If more than one, attach additional sheet.)		
Name of Debtor:	Case Number:	Date Filed:
District:	Relationship:	Judge:

Exhibit A

(To be completed if debtor is required to file periodic reports (e.g., forms 10K and 10Q) with the Securities and Exchange Commission pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 and is requesting relief under chapter 11.)

☐ Exhibit A is attached and made a part of this petition.

Exhibit B

(To be completed if debtor is an individual whose debts are primarily consumer debts.)

I, the attorney for the petitioner named in the foregoing petition, declare that I have informed the petitioner that [he or she] may proceed under chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each such chapter. I further certify that I have delivered to the debtor the notice required by 11 U.S.C. § 342(b).

X _____

Signature of Attorney for Debtor(s) (Date)

Exhibit C

Does the debtor own or have possession of any property that poses or is alleged to pose a threat of imminent and identifiable harm to public health or safety?

☐ Yes, and Exhibit C is attached and made a part of this petition.

☐ No.

Exhibit D

(To be completed by every individual debtor. If a joint petition is filed, each spouse must complete and attach a separate Exhibit D.)

☐ Exhibit D, completed and signed by the debtor, is attached and made a part of this petition.

If this is a joint petition:

☐ Exhibit D, also completed and signed by the joint debtor, is attached and made a part of this petition.

Information Regarding the Debtor - Venue

(Check any applicable box.)

☐ Debtor has been domiciled or has had a residence, principal place of business, or principal assets in this District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District.

☐ There is a bankruptcy case concerning debtor's affiliate, general partner, or partnership pending in this District.

☐ Debtor is a debtor in a foreign proceeding and has its principal place of business or principal assets in the United States in this District, or has no principal place of business or assets in the United States but is a defendant in an action or proceeding [in a federal or state court] in this District, or the interests of the parties will be served in regard to the relief sought in this District.

Certification by a Debtor Who Resides as a Tenant of Residential Property

(Check all applicable boxes.)

☐ Landlord has a judgment against the debtor for possession of debtor's residence. (If box checked, complete the following.)

_____

(Name of landlord that obtained judgment)

_____

(Address of landlord)

☐ Debtor claims that under applicable nonbankruptcy law, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after the judgment for possession was entered, and

☐ Debtor has included with this petition the deposit with the court of any rent that would become due during the 30-day period after the filing of the petition.

☐ Debtor certifies that he/she has served the Landlord with this certification. (11 U.S.C. § 362(l)).

Voluntary Petition
(This page must be completed and filed in every case.)

Name of Debtor(s):

Signatures

Signature(s) of Debtor(s) (Individual/Joint)

I declare under penalty of perjury that the information provided in this petition is true and correct.
[If petitioner is an individual whose debts are primarily consumer debts and has chosen to file under chapter 7] I am aware that I may proceed under chapter 7, 11, 12 or 13 of title 11, United States Code, understand the relief available under each such chapter, and choose to proceed under chapter 7.
[If no attorney represents me and no bankruptcy petition preparer signs the petition] I have obtained and read the notice required by 11 U.S.C. § 342(b).

I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X _____
Signature of Debtor

X _____
Signature of Joint Debtor

_____
Telephone Number (if not represented by attorney)

_____
Date

Signature of a Foreign Representative

I declare under penalty of perjury that the information provided in this petition is true and correct, that I am the foreign representative of a debtor in a foreign proceeding, and that I am authorized to file this petition.

(Check only **one** box.)

☐ I request relief in accordance with chapter 15 of title 11, United States Code. Certified copies of the documents required by 11 U.S.C. § 1515 are attached.

☐ Pursuant to 11 U.S.C. § 1511, I request relief in accordance with the chapter of title 11 specified in this petition. A certified copy of the order granting recognition of the foreign main proceeding is attached.

X _____
(Signature of Foreign Representative)

_____
(Printed Name of Foreign Representative)

_____
Date

Signature of Attorney*

X _____
Signature of Attorney for Debtor(s)

_____
Printed Name of Attorney for Debtor(s)

_____
Firm Name

_____
Address

_____

_____

_____
Telephone Number

_____
Date

*In a case in which § 707(b)(4)(D) applies, this signature also constitutes a certification that the attorney has no knowledge after an inquiry that the information in the schedules is incorrect.

Signature of Debtor (Corporation/Partnership)

I declare under penalty of perjury that the information provided in this petition is true and correct, and that I have been authorized to file this petition on behalf of the debtor.

The debtor requests the relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X _____
Signature of Authorized Individual

_____
Printed Name of Authorized Individual

_____
Title of Authorized Individual

_____
Date

Signature of Non-Attorney Bankruptcy Petition Preparer

I declare under penalty of perjury that: (1) I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110; (2) I prepared this document for compensation and have provided the debtor with a copy of this document and the notices and information required under 11 U.S.C. §§ 110(b), 110(h), and 342(b); and, (3) if rules or guidelines have been promulgated pursuant to 11 U.S.C. § 110(h) setting a maximum fee for services chargeable by bankruptcy petition preparers, I have given the debtor notice of the maximum amount before preparing any document for filing for a debtor or accepting any fee from the debtor, as required in that section. Official Form 19 is attached.

_____
Printed Name and title, if any, of Bankruptcy Petition Preparer

_____
Social-Security number (If the bankruptcy petition preparer is not an individual, state the Social-Security number of the officer, principal, responsible person or partner of the bankruptcy petition preparer.) (Required by 11 U.S.C. § 110.)

_____
Address

_____

X _____

_____
Date

Signature of bankruptcy petition preparer or officer, principal, responsible person, or partner whose Social-Security number is provided above.

Names and Social-Security numbers of all other individuals who prepared or assisted in preparing this document unless the bankruptcy petition preparer is not an individual.

If more than one person prepared this document, attach additional sheets conforming to the appropriate official form for each person.

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 11 U.S.C. § 110; 18 U.S.C. § 156.

COMMITTEE NOTE

The form is amended to implement Rule 1004.2. Subdivision (a) of that rule requires a chapter 15 petition to state the country of the debtor's center of main interests and to identify each country in which a foreign proceeding by, regarding, or against the debtor is pending. A box is added to the first page of the form for this purpose. Minor stylistic changes are also made.

Because this amendment to the form implements Rule 1004.2, which will take effect on December 1, 2011, if Congress takes no action otherwise, final approval is sought without publication.

B9A (Official Form 9A) (Chapter 7 Individual or Joint Debtor No Asset Case) (12/11)

UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 7 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____(date) and was converted to a case under chapter 7 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address):	Case Number: Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include married, maiden, and trade names): Attorney for Debtor(s) (name and address): Telephone number:	Bankruptcy Trustee (name and address): Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Presumption of Abuse under 11 U.S.C. § 707(b)

See "Presumption of Abuse" on the reverse side.

Depending on the documents filed with the petition, one of the following statements will appear.

The presumption of abuse does not arise.

Or

The presumption of abuse arises.

Or

Insufficient information has been filed to date to permit the clerk to make any determination concerning the presumption of abuse. If more complete information, when filed, shows that the presumption has arisen, creditors will be notified.

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to Object to Debtor's Discharge or to Challenge Dischargeability of Certain Debts:

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Please Do Not File a Proof of Claim Unless You Receive a Notice To Do So.

Creditor with a Foreign Address:

A creditor to whom this notice is sent at a foreign address should read the information under "Do Not File a Proof of Claim at This Time" on the reverse side.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

Filing of Chapter 7 Bankruptcy Case	A bankruptcy case under Chapter 7 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Presumption of Abuse	If the presumption of abuse arises, creditors may have the right to file a motion to dismiss the case under § 707(b) of the Bankruptcy Code. The debtor may rebut the presumption by showing special circumstances.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court.
Do Not File a Proof of Claim at This Time	There does not appear to be any property available to the trustee to pay creditors. *You therefore should not file a proof of claim at this time.* If it later appears that assets are available to pay creditors, you will be sent another notice telling you that you may file a proof of claim, and telling you the deadline for filing your proof of claim. If this notice is mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that the debtor is not entitled to receive a discharge under Bankruptcy Code § 727(a) *or* that a debt owed to you is not dischargeable under Bankruptcy Code § 523(a)(2), (4), or (6), you must file a complaint -- or a motion if you assert the discharge should be denied under § 727(a)(8) or (a)(9) -- in the bankruptcy clerk's office by the "Deadline to Object to Debtor's Discharge or to Challenge the Dischargeability of Certain Debts" listed on the front of this form. The bankruptcy clerk's office must receive the complaint or motion and any required filing fee by that deadline.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors. The debtor must file a list of all property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objections by the "Deadline to Object to Exemptions" listed on the front side.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 7 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____(date) and was converted to a case under chapter 7 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address):	Case Number:
	Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the debtor(s) in the last 8 years (include trade names):	Bankruptcy Trustee (name and address):
Attorney for Debtor(s) (name and address): Telephone number:	 Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Please Do Not File a Proof of Claim Unless You Receive a Notice To Do So.

Creditor with a Foreign Address:

A creditor to whom this notice is sent at a foreign address should read the information under "Do Not File a Proof of Claim at This Time" on the reverse side.

Address of the Bankruptcy Clerk's Office:	**For the Court:**
	Clerk of the Bankruptcy Court:
Telephone number:	
Hours Open:	Date:

Filing of Chapter 7 Bankruptcy Case	A bankruptcy case under Chapter 7 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; and starting or continuing lawsuits or foreclosures. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor's representative must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court.
Do Not File a Proof of Claim at This Time	There does not appear to be any property available to the trustee to pay creditors. *You therefore should not file a proof of claim at this time.* If it later appears that assets are available to pay creditors, you will be sent another notice telling you that you may file a proof of claim, and telling you the deadline for filing your proof of claim. If this notice is mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

B9C (Official Form 9C) (Chapter 7 Individual or Joint Debtor Asset Case) (12/11)

UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 7 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____(date) and was converted to a case under chapter 7 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address):	Case Number:
	Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include married, maiden, and trade names):	Bankruptcy Trustee (name and address):
Attorney for Debtor(s) (name and address): Telephone number:	Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Presumption of Abuse under 11 U.S.C. § 707(b)

See "Presumption of Abuse" on the reverse side.

Depending on the documents filed with the petition, one of the following statements will appear.

The presumption of abuse does not arise.

Or

The presumption of abuse arises.

Or

Insufficient information has been filed to date to permit the clerk to make any determination concerning the presumption of abuse. If more complete information, when filed, shows that the presumption has arisen, creditors will be notified.

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors (except a governmental unit): For a governmental unit:

Creditor with a Foreign Address:

A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to Object to Debtor's Discharge or to Challenge Dischargeability of Certain Debts:

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

Filing of Chapter 7 Bankruptcy Case	A bankruptcy case under Chapter 7 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim from other assets in the bankruptcy case. To be paid, you must file a Proof of Claim even if your claim is listed in the schedules filed by the debtor. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Creditor with a Foreign Address:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that the debtor is not entitled to receive a discharge under Bankruptcy Code § 727(a) *or* that a debt owed to you is not dischargeable under Bankruptcy Code § 523(a)(2), (4), or (6), you must file a complaint -- or a motion if you assert the discharge should be denied under § 727(a)(8) or (a)(9) -- in the bankruptcy clerk's office by the "Deadline to Object to Debtor's Discharge or to Challenge the Dischargeability of Certain Debts" listed on the front of this form. The bankruptcy clerk's office must receive the complaint or motion and any required filing fee by that deadline.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors. The debtor must file a list of all property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objections by the "Deadline to Object to Exemptions" listed on the front side.
Presumption of Abuse	If the presumption of abuse arises, creditors may have the right to file a motion to dismiss the case under § 707(b) of the Bankruptcy Code. The debtor may rebut the presumption by showing special circumstances.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Liquidation of the Debtor's Property and Payment of Creditors' Claims	The bankruptcy trustee listed on the front of this notice will collect and sell the debtor's property that is not exempt. If the trustee can collect enough money, creditors may be paid some or all of the debts owed to them, in the order specified by the Bankruptcy Code. To make sure you receive any share of that money, you must file a Proof of Claim, as described above.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.
Refer To Other Side For Important Deadlines and Notices	

UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 7 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____(date) and was converted to a case under chapter 7 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address):	Case Number:
	Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include trade names):	Bankruptcy Trustee (name and address):
Attorney for Debtor(s) (name and address): Telephone number:	Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadline to File a Proof of Claim

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

For all creditors (except a governmental unit): For a governmental unit:

Creditor with a Foreign Address:
A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

Filing of Chapter 7 Bankruptcy Case	A bankruptcy case under Chapter 7 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; and starting or continuing lawsuits or foreclosures. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor's representative must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim from other assets in the bankruptcy case. To be paid, you must file a Proof of Claim even if your claim is listed in the schedules filed by the debtor. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Creditor with a Foreign Address:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Liquidation of the Debtor's Property and Payment of Creditors' Claims	The bankruptcy trustee listed on the front of this notice will collect and sell the debtor's property that is not exempt. If the trustee can collect enough money, creditors may be paid some or all of the debts owed to them, in the order specified by the Bankruptcy Code. To make sure you receive any share of that money, you must file a Proof of Claim, as described above.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 11 bankruptcy case concerning the debtor(s) listed below was filed on _____ (date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____ (date) and was converted to a case under chapter 11 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address):	Case Number:
	Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include married, maiden, and trade names):	Attorney for Debtor(s) (name and address): Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadlines:
Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:
Notice of deadline will be sent at a later time.

Creditor with a Foreign Address:
A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Deadline to File a Complaint Objecting to Discharge of the Debtor:

First date set for hearing on confirmation of plan
Notice of that date will be sent at a later time.

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Creditors May Not Take Certain Actions:
In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: **Telephone number:**	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

Filing of Chapter 11 Bankruptcy Case	A bankruptcy case under Chapter 11 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 11 allows a debtor to reorganize or liquidate pursuant to a plan. A plan is not effective unless confirmed by the court. You may be sent a copy of the plan and a disclosure statement telling you about the plan, and you might have the opportunity to vote on the plan. You will be sent notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. Unless a trustee is serving, the debtor will remain in possession of the debtor's property and may continue to operate any business.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court. The court, after notice and a hearing, may order that the United States trustee not convene the meeting if the debtor has filed a plan for which the debtor solicited acceptances before filing the case.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. You may look at the schedules that have been or will be filed at the bankruptcy clerk's office. If your claim is scheduled and is *not* listed as disputed, contingent, or unliquidated, it will be allowed in the amount scheduled unless you filed a Proof of Claim or you are sent further notice about the claim. Whether or not your claim is scheduled, you are permitted to file a Proof of Claim. If your claim is not listed at all *or* if your claim is listed as disputed, contingent, or unliquidated, then you must file a Proof of Claim or you might not be paid any money on your claim and may be unable to vote on a plan. The court has not yet set a deadline to file a Proof of Claim. If a deadline is set, you will be sent another notice. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Creditor with a Foreign Address:** The deadline for filing claims will be set in a later court order and will apply to all creditors unless the order provides otherwise. If notice of the order setting the deadline is sent to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Discharge of Debts	Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of your debt. *See* Bankruptcy Code § 1141 (d). Unless the court orders otherwise, however, the discharge will not be effective until completion of all payments under the plan. A discharge means that you may never try to collect the debt from the debtor except as provided in the plan. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 523 (a) (2), (4), or (6), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and any required filing fee by that Deadline. If you believe that the debtor is not entitled to receive a discharge under Bankruptcy Code § 1141 (d) (3), you must file a complaint with the required filing fee in the bankruptcy clerk's office not later than the first date set for the hearing on confirmation of the plan. You will be sent another notice informing you of that date.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors, even if the debtor's case is converted to chapter 7. The debtor must file a list of property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 11 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____(date) and was converted to a case under chapter 11 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address):	Case Number:
	Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include married, maiden, and trade names):	Attorney for Debtor(s) (name and address): Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors (except a governmental unit): For a governmental unit:

Creditor with a Foreign Address:
A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Deadline to File a Complaint Objecting to Discharge of the Debtor:

First date set for hearing on confirmation of plan
Notice of that date will be sent at a later time.

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Creditors May Not Take Certain Actions:
In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: **Telephone number:**	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

Filing of Chapter 11 Bankruptcy Case	A bankruptcy case under Chapter 11 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 11 allows a debtor to reorganize or liquidate pursuant to a plan. A plan is not effective unless confirmed by the court. You may be sent a copy of the plan and a disclosure statement telling you about the plan, and you might have the opportunity to vote on the plan. You will be sent notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. Unless a trustee is serving, the debtor will remain in possession of the debtor's property and may continue to operate any business.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court. The court, after notice and a hearing, may order that the United States trustee not convene the meeting if the debtor has filed a plan for which the debtor solicited acceptances before filing the case.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. You may look at the schedules that have been or will be filed at the bankruptcy clerk's office. If your claim is scheduled and is *not* listed as disputed, contingent, or unliquidated, it will be allowed in the amount scheduled unless you filed a Proof of Claim or you are sent further notice about the claim. Whether or not your claim is scheduled, you are permitted to file a Proof of Claim. If your claim is not listed at all *or* if your claim is listed as disputed, contingent, or unliquidated, then you must file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side or you might not be paid any money on your claim and may be unable to vote on a plan. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Creditor with a Foreign Address:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Discharge of Debts	Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of your debt. *See* Bankruptcy Code § 1141 (d). Unless the court orders otherwise, however, the discharge will not be effective until completion of all payments under the plan. A discharge means that you may never try to collect the debt from the debtor except as provided in the plan. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 523 (a) (2), (4), or (6), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and any required filing fee by that Deadline. If you believe that the debtor is not entitled to receive a discharge under Bankruptcy Code § 1141 (d) (3), you must file a complaint with the required filing fee in the bankruptcy clerk's office not later than the first date set for the hearing on confirmation of the plan. You will be sent another notice informing you of that date.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors, even if the debtor's case is converted to chapter 7. The debtor must file a list of property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 11 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____(date) and was converted to a case under chapter 11 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address):	Case Number:
	Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include trade names):	Attorney for Debtor(s) (name and address): Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadline to File a Proof of Claim

Proof of Claim must be *received* by the bankruptcy clerk's office by the following deadline:

Notice of deadline will be sent at a later time.

Creditor with a Foreign Address:
A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Creditors May Not Take Certain Actions:
In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: **Telephone number:**	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

Filing of Chapter 11 Bankruptcy Case	A bankruptcy case under Chapter 11 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 11 allows a debtor to reorganize or liquidate pursuant to a plan. A plan is not effective unless confirmed by the court. You may be sent a copy of the plan and a disclosure statement telling you about the plan, and you might have the opportunity to vote on the plan. You will be sent notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. Unless a trustee is serving, the debtor will remain in possession of the debtor's property and may continue to operate any business.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; and starting or continuing lawsuits or foreclosures. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor's representative must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court. The court, after notice and a hearing, may order that the United States trustee not convene the meeting if the debtor has filed a plan for which the debtor solicited acceptances before filing the case.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. You may look at the schedules that have been or will be filed at the bankruptcy clerk's office. If your claim is scheduled and is *not* listed as disputed, contingent, or unliquidated, it will be allowed in the amount scheduled unless you filed a Proof of Claim or you are sent further notice about the claim. Whether or not your claim is scheduled, you are permitted to file a Proof of Claim. If your claim is not listed at all *or* if your claim is listed as disputed, contingent, or unliquidated, then you must file a Proof of Claim or you might not be paid any money on your claim and may be unable to vote on a plan. The court has not yet set a deadline to file a Proof of Claim. If a deadline is set, you will be sent another notice. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Creditor with a Foreign Address:** The deadline for filing claims will be set in a later court order and will apply to all creditors unless the order provides otherwise. If notice of the order setting the deadline is sent to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Discharge of Debts	Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of your debt. *See* Bankruptcy Code § 1141 (d). A discharge means that you may never try to collect the debt from the debtor, except as provided in the plan. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 1141 (d) (6) (A), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and any required filing fee by that deadline.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 11 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____(date) and was converted to a case under chapter 11 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address):	Case Number:
	Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include trade names):	Attorney for Debtor(s) (name and address): Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadline to File a Proof of Claim

Proof of Claim must be *received* by the bankruptcy clerk's office by the following deadline:

For all creditors (except a governmental unit): For a governmental unit:

Creditor with a Foreign Address:
A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Creditors May Not Take Certain Actions:
In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: **Telephone number:**	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

Filing of Chapter 11 Bankruptcy Case	A bankruptcy case under Chapter 11 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 11 allows a debtor to reorganize or liquidate pursuant to a plan. A plan is not effective unless confirmed by the court. You may be sent a copy of the plan and a disclosure statement telling you about the plan, and you might have the opportunity to vote on the plan. You will be sent notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. Unless a trustee is serving, the debtor will remain in possession of the debtor's property and may continue to operate any business.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; and starting or continuing lawsuits or foreclosures. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor's representative must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court. The court, after notice and a hearing, may order that the United States trustee not convene the meeting if the debtor has filed a plan for which the debtor solicited acceptances before filing the case.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. You may look at the schedules that have been or will be filed at the bankruptcy clerk's office. If your claim is scheduled and is *not* listed as disputed, contingent, or unliquidated, it will be allowed in the amount scheduled unless you filed a Proof of Claim or you are sent further notice about the claim. Whether or not your claim is scheduled, you are permitted to file a Proof of Claim. If your claim is not listed at all *or* if your claim is listed as disputed, contingent, or unliquidated, then you must file a Proof of Claim by the "Deadline to File Proof of Claim" listed on the front side, or you might not be paid any money on your claim and may be unable to vote on a plan. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Creditor with a Foreign Address:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Discharge of Debts	Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of your debt. *See* Bankruptcy Code § 1141 (d). A discharge means that you may never try to collect the debt from the debtor, except as provided in the plan. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 1141 (d) (6) (A), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and any required filing fee by that deadline.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 12 Bankruptcy Case, Meeting of Creditors, & Deadlines

[The debtor(s) listed below filed a chapter 12 bankruptcy case on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____ (date) and was converted to a case under chapter 12 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address):	Case Number: Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include married, maiden, and trade names): Attorney for Debtor(s) (name and address): Telephone number:	Bankruptcy Trustee (name and address): Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors(except a governmental unit): For a governmental unit:

Creditor with a Foreign Address:
A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Deadline to Object to Exemptions:
Thirty (30) days after the *conclusion* of the meeting of creditors.

Filing of Plan, Hearing on Confirmation of Plan

[The debtor has filed a plan. The plan or a summary of the plan is enclosed. The hearing on confirmation will be held:
Date:_____Time:_____Location:_____]
or [The debtor has filed a plan. The plan or a summary of the plan and notice of confirmation hearing will be sent separately.]
or [The debtor has not filed a plan as of this date. You will be sent separate notice of the hearing on confirmation of the plan.]

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor, the debtor's property, and certain codebtors. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: **Telephone number:**	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

Filing of Chapter 12 Bankruptcy Case	A bankruptcy case under Chapter 12 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 12 allows family farmers and family fishermen to adjust their debts pursuant to a plan. A plan is not effective unless confirmed by the court. You may object to confirmation of the plan and appear at the confirmation hearing. A copy or summary of the plan [is included with this notice] *or* [will be sent to you later], and [the confirmation hearing will be held on the date indicated on the front of this notice] *or* [you will be sent notice of the confirmation hearing]. The debtor will remain in possession of the debtor's property and may continue to operate the debtor's business unless the court orders otherwise.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions against the debtor and certain codebtors are listed in Bankruptcy Code § 362 and § 1201. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages. Under certain circumstances, the stay may be limited in duration or not exist at all, although the debtor may have the right to request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim from other assets in the bankruptcy case. To be paid, you must file a Proof of Claim even if your claim is listed in the schedules filed by the debtor. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Creditor with a Foreign Address:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 523 (a) (2), (4), or (6), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and any required filing fee by that Deadline.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors, even if the debtor's case is converted to chapter 7. The debtor must file a list of all property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 12 Bankruptcy Case, Meeting of Creditors, & Deadlines

[The debtor [corporation] *or* [partnership] listed below filed a chapter 12 bankruptcy case on _____ (date).]
or [A bankruptcy case concerning the debtor [corporation] *or* [partnership] listed below was originally filed under chapter_____
on _____ (date) and was converted to a case under chapter 12 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address):	Case Number: Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include trade names): Attorney for Debtor(s) (name and address): Telephone number:	Bankruptcy Trustee (name and address): Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors(except a governmental unit): For a governmental unit:

Creditor with a Foreign Address:

A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Filing of Plan, Hearing on Confirmation of Plan

[The debtor has filed a plan. The plan or a summary of the plan is enclosed. The hearing on confirmation will be held:
Date:_____Time:_____Location:_____]
or [The debtor has filed a plan. The plan or a summary of the plan and notice of confirmation hearing will be sent separately.]
or [The debtor has not filed a plan as of this date. You will be sent separate notice of the hearing on confirmation of the plan.]

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: **Telephone number:**	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

Filing of Chapter 12 Bankruptcy Case	A bankruptcy case under Chapter 12 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by the debtor listed on the front side, and an order for relief has been entered. Chapter 12 allows family farmers and family fishermen to adjust their debts pursuant to a plan. A plan is not effective unless confirmed by the court. You may object to confirmation of the plan and appear at the confirmation hearing. A copy or summary of the plan [is included with this notice] *or* [will be sent to you later], and [the confirmation hearing will be held on the date indicated on the front of this notice] *or* [you will be sent notice of the confirmation hearing]. The debtor will remain in possession of the debtor's property and may continue to operate the debtor's business unless the court orders otherwise.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions against the debtor and certain codebtors are listed in Bankruptcy Code § 362 and § 1201. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; and starting or continuing lawsuits or foreclosures. Under certain circumstances, the stay may be limited in duration or not exist at all, although the debtor may have the right to request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor's representative must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim from other assets in the bankruptcy case. To be paid, you must file a Proof of Claim even if your claim is listed in the schedules filed by the debtor. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Creditor with a Foreign Address:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 523 (a) (2), (4), or (6), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and any required filing fee by that Deadline.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 13 Bankruptcy Case, Meeting of Creditors, & Deadlines

[The debtor(s) listed below filed a chapter 13 bankruptcy case on _____ (date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____
on _____ (date) and was converted to a case under chapter 13 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address):	Case Number: Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include married, maiden, and trade names): Attorney for Debtor(s) (name and address): Telephone number:	Bankruptcy Trustee (name and address): Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors (except a governmental unit):

For a governmental unit (except as otherwise provided in Fed. R. Bankr. P. 3002(c)(1)):

Creditor with a Foreign Address:

A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to Object to Debtor's Discharge or to Challenge Dischargeability of Certain Debts:

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Filing of Plan, Hearing on Confirmation of Plan

[The debtor has filed a plan. The plan or a summary of the plan is enclosed. The hearing on confirmation will be held:
Date:_____Time:_____Location:_____]
or [The debtor has filed a plan. The plan or a summary of the plan and notice of confirmation hearing will be sent separately.]
or [The debtor has not filed a plan as of this date. You will be sent separate notice of the hearing on confirmation of the plan.]

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor, the debtor's property, and certain codebtors. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: **Telephone number:**	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

Filing of Chapter 13 Bankruptcy Case	A bankruptcy case under Chapter 13 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 13 allows an individual with regular income and debts below a specified amount to adjust debts pursuant to a plan. A plan is not effective unless confirmed by the bankruptcy court. You may object to confirmation of the plan and appear at the confirmation hearing. A copy or summary of the plan [is included with this notice] *or* [will be sent to you later], and [the confirmation hearing will be held on the date indicated on the front of this notice] *or* [you will be sent notice of the confirmation hearing]. The debtor will remain in possession of the debtor's property and may continue to operate the debtor's business, if any, unless the court orders otherwise.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions against the debtor and certain codebtors are listed in Bankruptcy Code § 362 and § 1301. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to exceed or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim from other assets in the bankruptcy case. To be paid, you must file a Proof of Claim even if your claim is listed in the schedules filed by the debtor. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Creditor with a Foreign Address:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that the debtor is not entitled to a discharge under Bankruptcy Code § 1328(f), you must file a motion objecting to discharge in the bankruptcy clerk's office by the "Deadline to Object to Debtor's Discharge or to Challenge the Dischargeability of Certain Debts" listed on the front of this form. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 523(a)(2) or (4), you must file a complaint in the bankruptcy clerk's office by the same deadline. The bankruptcy clerk's office must receive the motion or the complaint and any required filing fee by that deadline.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors, even if the debtor's case is converted to chapter 7. The debtor must file a list of all property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

COMMITTEE NOTE

The form's explanation of the "Meeting of Creditors" is amended to take account of the amendment of Rule 2003(e). When a meeting of creditors is adjourned to another date, the rule requires the official presiding at the meeting to file a statement specifying the date and time to which the meeting is adjourned. The explanation on all versions of the form is amended to reflect that requirement. Stylistic changes to the form are also made.

Final approval of these conforming and stylistic amendments is sought without publication.

B 10 (Official Form 10) (12/11)

UNITED STATES BANKRUPTCY COURT _____ DISTRICT OF _____

PROOF OF CLAIM

Name of Debtor:

Case Number:

NOTE: *Do not use this form to make a claim for an administrative expense that arises after the bankruptcy filing. You may file a request for payment of an administrative expense according to 11 U.S.C. § 503.*

Name of Creditor (the person or other entity to whom the debtor owes money or property):

COURT USE ONLY

Name and address where notices should be sent:

Telephone number: email:

❒ Check this box if this claim amends a previously filed claim.

Court Claim Number:_____
(*If known*)

Filed on:_____

Name and address where payment should be sent (if different from above):

Telephone number: email:

❒ Check this box if you are aware that anyone else has filed a proof of claim relating to this claim. Attach copy of statement giving particulars.

1. Amount of Claim as of Date Case Filed: $_____

If all or part of the claim is secured, complete item 4.

If all or part of the claim is entitled to priority, complete item 5.

❒Check this box if the claim includes interest or other charges in addition to the principal amount of the claim. Attach a statement that itemizes interest or charges.

2. Basis for Claim: _____
(See instruction #2)

3. Last four digits of any number by which creditor identifies debtor:
___ ___ ___ ___

3a. Debtor may have scheduled account as:
_____
(See instruction #3a)

3b. Uniform Claim Identifier (optional):
_ _
(See instruction #3b)

4. Secured Claim (See instruction #4)
Check the appropriate box if the claim is secured by a lien on property or a right of setoff, attach required redacted documents, and provide the requested information.

Nature of property or right of setoff: ❒Real Estate ❒Motor Vehicle ❒Other
Describe:

Value of Property: $_____

Annual Interest Rate_____**%** ❒Fixed or ❒Variable
(when case was filed)

Amount of arrearage and other charges, as of the time case was filed, included in secured claim, if any:

$_____

Basis for perfection: _____

Amount of Secured Claim: **$**_____

Amount Unsecured: **$**_____

5. Amount of Claim Entitled to Priority under 11 U.S.C. §507(a). If any part of the claim falls into one of the following categories, check the box specifying the priority and state the amount.

❒ Domestic support obligations under 11 U.S.C. §507(a)(1)(A) or (a)(1)(B).

❒ Wages, salaries, or commissions (up to $11,725*) earned within 180 days before the case was filed or the debtor's business ceased, whichever is earlier – 11 U.S.C. §507 (a)(4).

❒ Contributions to an employee benefit plan – 11 U.S.C. §507 (a)(5).

Amount entitled to priority:

$_____

❒ Up to $2,600* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. §507 (a)(7).

❒ Taxes or penalties owed to governmental units – 11 U.S.C. §507 (a)(8).

❒ Other – Specify applicable paragraph of 11 U.S.C. §507 (a)(__).

**Amounts are subject to adjustment on 4/1/13 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.*

6. Credits. The amount of all payments on this claim has been credited for the purpose of making this proof of claim. (See instruction #6)

7. Documents: Attached are **redacted** copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. If the claim is secured, box 4 has been completed, and **redacted** copies of documents providing evidence of perfection of a security interest are attached. *(See instruction #7, and the definition of "**redacted**".)*

DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.

If the documents are not available, please explain:

8. Signature: (See instruction #8)

Check the appropriate box.

❒ I am the creditor. ❒ I am the creditor's authorized agent. (Attach copy of power of attorney, if any.) ❒ I am the trustee, or the debtor, or their authorized agent. (See Bankruptcy Rule 3004.) ❒ I am a guarantor, surety, indorser, or other codebtor. (See Bankruptcy Rule 3005.)

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

Print Name: _____
Title: _____
Company: _____
Address and telephone number (if different from notice address above):
_____
_____
_____
Telephone number: email:

(Signature) (Date)

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

INSTRUCTIONS FOR PROOF OF CLAIM FORM

The instructions and definitions below are general explanations of the law. In certain circumstances, such as bankruptcy cases not filed voluntarily by the debtor, exceptions to these general rules may apply.

Items to be completed in Proof of Claim form

Court, Name of Debtor, and Case Number:
Fill in the federal judicial district in which the bankruptcy case was filed (for example, Central District of California), the debtor's full name, and the case number. If the creditor received a notice of the case from the bankruptcy court, all of this information is at the top of the notice.

Creditor's Name and Address:
Fill in the name of the person or entity asserting a claim and the name and address of the person who should receive notices issued during the bankruptcy case. A separate space is provided for the payment address if it differs from the notice address. The creditor has a continuing obligation to keep the court informed of its current address. See Federal Rule of Bankruptcy Procedure (FRBP) 2002(g).

1. Amount of Claim as of Date Case Filed:
State the total amount owed to the creditor on the date of the bankruptcy filing. Follow the instructions concerning whether to complete items 4 and 5. Check the box if interest or other charges are included in the claim.

2. Basis for Claim:
State the type of debt or how it was incurred. Examples include goods sold, money loaned, services performed, personal injury/wrongful death, car loan, mortgage note, and credit card. If the claim is based on delivering health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information. You may be required to provide additional disclosure if an interested party objects to the claim.

3. Last Four Digits of Any Number by Which Creditor Identifies Debtor:
State only the last four digits of the debtor's account or other number used by the creditor to identify the debtor.

3a. Debtor May Have Scheduled Account As:
Report a change in the creditor's name, a transferred claim, or any other information that clarifies a difference between this proof of claim and the claim as scheduled by the debtor.

3b. Uniform Claim Identifier:
If you use a uniform claim identifier, you may report it here. A uniform claim identifier is an optional 24-character identifier that certain large creditors use to facilitate electronic payment in chapter 13 cases.

4. Secured Claim:
Check whether the claim is fully or partially secured. Skip this section if the claim is entirely unsecured. (See Definitions.) If the claim is secured, check the box for the nature and value of property that secures the claim, attach copies of lien documentation, and state, as of the date of the bankruptcy filing, the annual interest rate (and whether it is fixed or variable), and the amount past due on the claim.

5. Amount of Claim Entitled to Priority Under 11 U.S.C. §507(a).
If any portion of the claim falls into any category shown, check the appropriate box(es) and state the amount entitled to priority. (See Definitions.) A claim may be partly priority and partly non-priority. For example, in some of the categories, the law limits the amount entitled to priority.

6. Credits:
An authorized signature on this proof of claim serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

7. Documents:
Attach redacted copies of any documents that show the debt exists and a lien secures the debt. You must also attach copies of documents that evidence perfection of any security interest. You may also attach a summary in addition to the documents themselves. FRBP 3001(c) and (d). If the claim is based on delivering health care goods or services, limit disclosing confidential health care information. Do not send original documents, as attachments may be destroyed after scanning.

8. Date and Signature:
The individual completing this proof of claim must sign and date it. FRBP 9011. If the claim is filed electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what constitutes a signature. If you sign this form, you declare under penalty of perjury that the information provided is true and correct to the best of your knowledge, information, and reasonable belief. Your signature is also a certification that the claim meets the requirements of FRBP 9011(b). Whether the claim is filed electronically or in person, if your name is on the signature line, you are responsible for the declaration. Print the name and title, if any, of the creditor or other person authorized to file this claim. State the filer's address and telephone number if it differs from the address given on the top of the form for purposes of receiving notices. If the claim is filed by an authorized agent, attach a complete copy of any power of attorney, and provide both the name of the individual filing the claim and the name of the agent. If the authorized agent is a servicer, identify the corporate servicer as the company. Criminal penalties apply for making a false statement on a proof of claim.

DEFINITIONS

Debtor
A debtor is the person, corporation, or other entity that has filed a bankruptcy case.

Creditor
A creditor is a person, corporation, or other entity to whom debtor owes a debt that was incurred before the date of the bankruptcy filing. See 11 U.S.C. §101 (10).

Claim
A claim is the creditor's right to receive payment for a debt owed by the debtor on the date of the bankruptcy filing. See 11 U.S.C. §101 (5). A claim may be secured or unsecured.

Proof of Claim
A proof of claim is a form used by the creditor to indicate the amount of the debt owed by the debtor on the date of the bankruptcy filing. The creditor must file the form with the clerk of the same bankruptcy court in which the bankruptcy case was filed.

Secured Claim Under 11 U.S.C. §506(a)
A secured claim is one backed by a lien on property of the debtor. The claim is secured so long as the creditor has the right to be paid from the property prior to other creditors. The amount of the secured claim cannot exceed the value of the property. Any amount owed to the creditor in excess of the value of the property is an unsecured claim. Examples of liens on property include a mortgage on real estate or a security interest in a car. A lien may be voluntarily granted by a debtor or may be obtained through a court proceeding. In some states, a court judgment is a lien. A claim also may be secured if the creditor owes the debtor money (has a right to setoff).

Unsecured Claim
An unsecured claim is one that does not meet the requirements of a secured claim. A claim may be partly unsecured if the amount of the claim exceeds the value of the property on which the creditor has a lien.

Claim Entitled to Priority Under 11 U.S.C. §507(a)
Priority claims are certain categories of unsecured claims that are paid from the available money or property in a bankruptcy case before other unsecured claims.

Redacted
A document has been redacted when the person filing it has masked, edited out, or otherwise deleted, certain information. A creditor must show only the last four digits of any social-security, individual's tax-identification, or financial-account number, only the initials of a minor's name, and only the year of any person's date of birth. If the claim is based on the delivery of health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information.

Evidence of Perfection
Evidence of perfection may include a mortgage, lien, certificate of title, financing statement, or other document showing that the lien has been filed or recorded.

INFORMATION

Acknowledgment of Filing of Claim
To receive acknowledgment of your filing, you may either enclose a stamped self-addressed envelope and a copy of this proof of claim or you may access the court's PACER system (www.pacer.psc.uscourts.gov) for a small fee to view your filed proof of claim.

Offers to Purchase a Claim
Certain entities are in the business of purchasing claims for an amount less than the face value of the claims. One or more of these entities may contact the creditor and offer to purchase the claim. Some of the written communications from these entities may easily be confused with official court documentation or communications from the debtor. These entities do not represent the bankruptcy court or the debtor. The creditor has no obligation to sell its claim. However, if the creditor decides to sell its claim, any transfer of such claim is subject to FRBP 3001(e), any applicable provisions of the Bankruptcy Code (11 U.S.C. § 101 *et seq.*), and any applicable orders of the bankruptcy court.

COMMITTEE NOTE

The form is amended in several respects. A new section—3b—is added to allow the reporting of a uniform claim identifier. This identifier, consisting of 24 characters, is used by some creditors to facilitate automated receipt, distribution, and posting of payments made by means of electronic funds transfers by chapter 13 trustees. Creditors are not required to use a uniform claim identifier.

Language is added to section 4 to clarify that the annual interest rate that must be reported for a secured claim is the rate applicable at the time the bankruptcy case was filed. Checkboxes for indicating whether the interest rate is fixed or variable are also added.

Section 7 of the form is revised to clarify that, consistent with Rule 3001(c), writings supporting a claim or evidencing perfection of a security interest must be attached to the proof of claim. If the documents are not available, the filer must provide an explanation for their absence. The instructions for this section of the form explain that summaries of supporting documents may be attached only in addition to the documents themselves.

Section 8—the date and signature box—is revised to include a declaration that is intended to impress upon the filer the duty of care that must be exercised in filing a proof of claim. The individual who completes the form must sign it. By doing so, he or she declares under penalty of perjury that the information provided "is true and correct to the best of my knowledge, information and reasonable belief." That individual must also provide identifying information—name; title; company; and, if not already provided, mailing address, telephone number, and email address—and indicate by checking the appropriate box the basis on which he or she is filing the proof of claim (for example, as creditor or authorized agent for the creditor). Because a trustee or debtor that files a proof of claim under Rule 3004 will indicate that basis for filing here, the checkbox on the first page of the form for stating the filer's status as a trustee or debtor is deleted. When a servicing agent files a proof of claim on behalf of a creditor, the individual completing the form must sign it and must provide his or her own name, as well as the name of the company that is the servicing agent.

Amendments are made to the instructions that reflect the changes made to the form, and stylistic and formatting changes are

made to the form and instructions. Spaces are added for providing email addresses in addition to other contact information in order to facilitate communication with the claimant. The provision of this additional information does not affect any requirements for serving or providing official notice to the claimant.

Changes Made After Publication

Page 1 of the form. The checkbox for identifying that the filer of the proof of claim is the debtor or the trustee, rather than a creditor, was deleted.

Committee Note. A statement was added to the Committee Note explaining that the new requests for email addresses are intended only to facilitate communication with the claimant and that the provision of this information does not affect any requirements for serving or providing notice to the claimant.

* * * * *

Mortgage Proof of Claim Attachment

If you file a claim secured by a security interest in the debtor's principal residence, you must use this form as an attachment to your proof of claim. See Bankruptcy Rule 3001(c)(2).

Name of debtor: _____ **Case number**: _____

Name of creditor: _____ **Last four digits** of any number you use to identify the debtor's account: ____ ____ ____ ____

Part 1: Statement of Principal and Interest Due as of the Petition Date

Itemize the principal and interest due on the claim as of the petition date (included in the Amount of Claim listed in Item 1 on your Proof of Claim form).

1. **Principal due** (1) $ _____

2. **Interest due**

Interest rate	From mm/dd/yyyy	To mm/dd/yyyy	Amount
_____%	__/__/____	__/__/____	$ _____
_____%	__/__/____	__/__/____	$ _____
_____%	__/__/____	__/__/____	+ $ _____
Total interest due as of the petition date			$ _____

Copy total here ▶ (2) + $ _____

3. **Total principal and interest due** (3) $ _____

Part 2: Statement of Prepetition Fees, Expenses, and Charges

Itemize the fees, expenses, and charges due on the claim as of the petition date (included in the Amount of Claim listed in Item 1 on the Proof of Claim form).

Description	Dates incurred		Amount
1. **Late charges**	_____	(1)	$ _____
2. **Non-sufficient funds (NSF) fees**	_____	(2)	$ _____
3. **Attorney's fees**	_____	(3)	$ _____
4. **Filing fees and court costs**	_____	(4)	$ _____
5. **Advertisement costs**	_____	(5)	$ _____
6. **Sheriff/auctioneer fees**	_____	(6)	$ _____
7. **Title costs**	_____	(7)	$ _____
8. **Recording fees**	_____	(8)	$ _____
9. **Appraisal/broker's price opinion fees**	_____	(9)	$ _____
10. **Property inspection fees**	_____	(10)	$ _____
11. **Tax advances (non-escrow)**	_____	(11)	$ _____
12. **Insurance advances (non-escrow)**	_____	(12)	$ _____
13. **Escrow shortage or deficiency** (Do not include amounts that are part of any installment payment listed in Part 3.)	_____	(13)	$ _____
14. **Property preservation expenses. Specify**:_____	_____	(14)	$ _____
15. **Other. Specify**:_____	_____	(15)	$ _____
16. **Other. Specify**:_____	_____	(16)	$ _____
17. **Other. Specify**:_____	_____	(17)	+ $ _____
18. **Total prepetition fees, expenses, and charges. Add all of the amounts listed above.**		(18)	$ _____

Part 3. Statement of Amount Necessary to Cure Default as of the Petition Date

Does the installment payment amount include an escrow deposit?

- ❑ No
- ❑ Yes. Attach to the Proof of Claim form an escrow account statement prepared as of the petition date in a form consistent with applicable nonbankruptcy law.

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1. **Installment payments due**	Date last payment received by creditor	__/__/____		
	Number of installment payments due	(1) _____		
2. **Amount of installment payments due**	_____installments @	$ _____		
	_____installments @	$ _____		
	_____installments @	+ $ _____		
	Total installment payments due as of the petition date	$ _____	Copy total here ►	(2) $ _____
3. **Calculation of cure amount**	**Add total prepetition fees, expenses, and charges**		Copy total from Part 2 here ►	+ $ _____
	Subtract total of unapplied funds (funds received but not credited to account)			- $ _____
	Subtract amounts for which debtor is entitled to a refund			- $ _____
	Total amount necessary to cure default as of the petition date			(3) $ _____

Copy total onto Item 4 of Proof of Claim form

COMMITTEE NOTE

This form is new. It must be completed and attached to a proof of claim secured by a security interest in a debtor's principal residence. The form, which implements Rule 3001(c)(2), requires an itemization of prepetition interest, fees, expenses, and charges included in the claim amount, as well as a statement of the amount necessary to cure any default as of the petition date. If the mortgage installment payments include an escrow deposit, an escrow account statement must also be attached to the proof of claim, as required by Rule 3001(c)(2)(C).

Changes Made After Publication

Part 2. The instruction at the beginning of this part was changed to require itemization of "fees, expenses, and charges due on the claim as of the petition date," rather than "fees, expenses, and charges incurred in connection with the claim as of the petition date."

The parenthetical following "Escrow shortage or deficiency" was changed to state more clearly that amounts that are part of any installment payment listed in Part 3 should not be included here.

Item numbers were added to the left and right columns.

Part 3. A heading labeled "3. Calculation of cure amount" was added.

A line reading "Subtract amounts for which debtor is entitled to a refund" was added.

* * * * *

B 10 (Supplement 1) (12/11)

UNITED STATES BANKRUPTCY COURT

_____ District of _____

In re _____,
Debtor

Case No. _____

Chapter 13

Notice of Mortgage Payment Change

If you file a claim secured by a security interest in the debtor's principal residence provided for under the debtor's plan pursuant to § 1322(b)(5), you must use this form to give notice of any changes in the installment payment amount. File this form as a supplement to your proof of claim at least 21 days before the new payment amount is due. See Bankruptcy Rule 3002.1.

Name of creditor: _____

Court claim no. (if known): _____

Last four digits of any number you use to identify the debtor's account: ____ ____ ____ ____

Date of payment change:
Must be at least 21 days after date of this notice ____/____/_____

New total payment:
Principal, interest, and escrow, if any $ _____

Part 1: Escrow Account Payment Adjustment

Will there be a change in the debtor's escrow account payment?

- ❑ No
- ❑ Yes. Attach a copy of the escrow account statement prepared in a form consistent with applicable nonbankruptcy law. Describe the basis for the change. If a statement is not attached, explain why: _____

Current escrow payment: $ _____ **New escrow payment:** $ _____

Part 2: Mortgage Payment Adjustment

Will the debtor's principal and interest payment change based on an adjustment to the interest rate in the debtor's variable-rate note?

- ❑ No
- ❑ Yes. Attach a copy of the rate change notice prepared in a form consistent with applicable nonbankruptcy law. If a notice is not attached, explain why: _____

Current interest rate: _____% **New interest rate:** _____%

Current principal and interest payment: $ _____ **New principal and interest payment:** $ _____

Part 3: Other Payment Change

Will there be a change in the debtor's mortgage payment for a reason not listed above?

- ❑ No
- ❑ Yes. Attach a copy of any documents describing the basis for the change, such as a repayment plan or loan modification agreement. (*Court approval may be required before the payment change can take effect.*)

Reason for change: _____

Current mortgage payment: $ _____ **New mortgage payment:** $ _____

Part 4: Sign Here

The person completing this Notice must sign it. Sign and print your name and your title, if any, and state your address and telephone number if different from the notice address listed on the proof of claim to which this Supplement applies.

Check the appropriate box.

❒ I am the creditor. ❒ I am the creditor's authorized agent.
(Attach copy of power of attorney, if any.)

I declare under penalty of perjury that the information provided in this Notice is true and correct to the best of my knowledge, information, and reasonable belief.

✘ _____ Date ____/_____/_____
Signature

Print: _____ Title _____
First Name Middle Name Last Name

Company _____

Address _____
Number Street

_____
City State ZIP Code

Contact phone (_____) _____– _____ Email _____

COMMITTEE NOTE

This form is new and applies in chapter 13 cases. It implements Rule 3002.1, which requires the holder of a claim secured by a security interest in the debtor's principal residence—or the holder's agent—to provide notice at least 21 days prior to a change in the amount of the ongoing mortgage installment payments. The form requires the holder of the claim to indicate the basis for the changed payment amount and when it will take effect. The notice must be filed as a supplement to the claim holder's proof of claim, and it must be served on the debtor, debtor's counsel, and the trustee.

The individual completing the form must sign and date it. By doing so, he or she declares under penalty of perjury that the information provided is true and correct to the best of that individual's knowledge, information, and reasonable belief. The signature is also a certification that the standards of Rule 9011(b) are satisfied.

Changes Made After Publication

Part 1. The instruction to "Attach a copy of the escrow account statement, prepared according to applicable nonbankruptcy law" was changed to "Attach a copy of the escrow account statement prepared in a form consistent with applicable nonbankruptcy law."

Part 2. The instruction to "Attach a copy of the rate change notice, prepared according to applicable nonbankruptcy law" was changed to "Attach a copy of the rate change notice prepared in a form consistent with applicable nonbankruptcy law."

Part 4. In the declaration, the word "claim" was changed to "Notice."

* * * * *

B 10 (Supplement 2) (12/11)

UNITED STATES BANKRUPTCY COURT

_____ District of _____

In re _____, Case No. _____
Debtor

Chapter 13

Notice of Postpetition Mortgage Fees, Expenses, and Charges

If you hold a claim secured by a security interest in the debtor's principal residence, you must use this form to give notice of any postpetition fees, expenses, and charges that you assert are recoverable against the debtor or against the debtor's principal residence. File this form as a supplement to your proof of claim. See Bankruptcy Rule 3002.1.

Name of creditor: _____ **Court claim no**. (if known): _____

Last four digits of any number you use to identify the debtor's account: ____ ____ ____ ____

Does this notice supplement a prior notice of postpetition fees, expenses, and charges?

- ❑ No
- ❑ Yes. Date of the last notice: ____/____/_____

Part 1: Itemize Postpetition Fees, Expenses, and Charges

Itemize the fees, expenses, and charges incurred on the debtor's mortgage account after the petition was filed. Do not include any escrow account disbursements or any amounts previously itemized in a notice filed in this case or ruled on by the bankruptcy court.

Description	Dates incurred		Amount
1. Late charges	_____	(1)	$ _____
2. Non-sufficient funds (NSF) fees	_____	(2)	$ _____
3. Attorney fees	_____	(3)	$ _____
4. Filing fees and court costs	_____	(4)	$ _____
5. Bankruptcy/Proof of claim fees	_____	(5)	$ _____
6. Appraisal/Broker's price opinion fees	_____	(6)	$ _____
7. Property inspection fees	_____	(7)	$ _____
8. Tax advances (non-escrow)	_____	(8)	$ _____
9. Insurance advances (non-escrow)	_____	(9)	$ _____
10. Property preservation expenses. Specify:_____	_____	(10)	$ _____
11. Other. Specify:_____	_____	(11)	$ _____
12. Other. Specify:_____	_____	(12)	$ _____
13. Other. Specify:_____	_____	(13)	$ _____
14. Other. Specify:_____	_____	(14)	$ _____

The debtor or trustee may challenge whether the fees, expenses, and charges you listed are required to be paid. See 11 U.S.C. § 1322(b)(5) and Bankruptcy Rule 3002.1.

Part 2: Sign Here

The person completing this Notice must sign it. Sign and print your name and your title, if any, and state your address and telephone number if different from the notice address listed on the proof of claim to which this Supplement applies.

Check the appropriate box.

❒ I am the creditor.

❒ I am the creditor's authorized agent. (Attach copy of power of attorney, if any.)

I declare under penalty of perjury that the information provided in this Notice is true and correct to the best of my knowledge, information, and reasonable belief.

✘ _____ Date ____/_____/_____
Signature

Print: _____ Title _____
First Name Middle Name Last Name

Company _____

Address _____
Number Street

_____
City State ZIP Code

Contact phone (_____) _____– _____ Email _____

COMMITTEE NOTE

This form is new and applies in chapter 13 cases. It implements Rule 3002.1, which requires the holder of a claim secured by a security interest in the debtor's principal residence—or the holder's agent—to file a notice of all postpetition fees, expenses, and charges within 180 days after they are incurred. The notice must be filed as a supplement to the claim holder's proof of claim, and it must be served on the debtor, debtor's counsel, and the trustee.

The individual completing the form must sign and date it. By doing so, he or she declares under penalty of perjury that the information provided is true and correct to the best of that individual's knowledge, information, and reasonable belief. The signature is also a certification that the standards of Rule 9011(b) are satisfied.

Changes Made After Publication

Part 1. Item numbers were added to the left and right columns.

Part 2. In the declaration, the word "claim" was changed to "Notice."

* * * * *

B25A (Official Form 25A) (12/11)

United States Bankruptcy Court

_____ District of _____

In re_____, Case No. _____

Debtor

Small Business Case under Chapter 11

[NAME OF PROPONENT]'S PLAN OF REORGANIZATION, DATED [INSERT DATE]

ARTICLE I
SUMMARY

This Plan of Reorganization (the "Plan") under chapter 11 of the Bankruptcy Code (the "Code") proposes to pay creditors of [insert the name of the debtor] (the "Debtor") from [specify sources of payment, such as an infusion of capital, loan proceeds, sale of assets, cash flow from operations, or future income]**.**

This Plan provides for _____ classes of secured claims; _____ classes of unsecured claims; and _____ classes of equity security holders. Unsecured creditors holding allowed claims will receive distributions, which the proponent of this Plan has valued at approximately __ cents on the dollar. This Plan also provides for the payment of administrative and priority claims [if payment is not in full on the effective date of this Plan with respect to any such claim (to the extent permitted by the Code or the claimant's agreement), identify such claim and briefly summarize the proposed treatment.]

All creditors and equity security holders should refer to Articles III through VI of this Plan for information regarding the precise treatment of their claim. A disclosure statement that provides more detailed information regarding this Plan and the rights of creditors and equity security holders has been circulated with this Plan. **Your rights may be affected. You should read these papers carefully and discuss them with your attorney, if you have one. (If you do not have an attorney, you may wish to consult one.)**

ARTICLE II
CLASSIFICATION OF CLAIMS AND INTERESTS

2.01 Class 1. All allowed claims entitled to priority under § 507 of the Code (except administrative expense claims under § 507(a)(2), ["gap" period claims in an involuntary case under § 507(a)(3),] and priority tax claims under § 507(a)(8)).

2.02 Class 2. The claim of _____ , to the extent allowed as a secured claim under § 506 of the Code.

[Add other classes of secured creditors, if any. Note: Section 1129(a)(9)(D) of the Code provides that a secured tax claim which would otherwise meet the description of a priority tax claim under § 507(a)(8) of the Code is to be paid in the same manner and over the same period as prescribed in § 507(a)(8).]

2.03 Class 3. All unsecured claims allowed under § 502 of the Code.

[Add other classes of unsecured claims, if any.]

2.04 Class 4 . Equity interests of the Debtor. [If the Debtor is an individual, change this heading to "The interests of the individual Debtor in property of the estate."]

ARTICLE III
TREATMENT OF ADMINISTRATIVE EXPENSE CLAIMS, U.S. TRUSTEES FEES, AND PRIORITY TAX CLAIMS

3.01 Unclassified Claims. Under section §1123(a)(1), administrative expense claims, ["gap" period claims in an involuntary case allowed under § 502(f) of the Code,] and priority tax claims are not in classes.

3.02 Administrative Expense Claims. Each holder of an administrative expense claim allowed under § 503 of the Code [, and a "gap" claim in an involuntary case allowed under § 502(f) of the Code,] will be paid in full on the effective date of this Plan (as defined in Article VII), in cash, or upon such other terms as may be agreed upon by the holder of the claim and the Debtor.

3.03 Priority Tax Claims. Each holder of a priority tax claim will be paid [specify terms of treatment consistent with § 1129(a)(9)(C) of the Code].

3.04 United States Trustee Fees. All fees required to be paid by 28 U.S.C. §1930(a)(6) (U.S. Trustee Fees) will accrue and be timely paid until the case is closed, dismissed, or converted to another chapter of the Code. Any U.S. Trustee Fees owed on or before the effective date of this Plan will be paid on the effective date.

ARTICLE IV
TREATMENT OF CLAIMS AND INTERESTS UNDER THE PLAN

4.01 Claims and interests shall be treated as follows under this Plan:

Class	Impairment	Treatment
Class 1 - Priority Claims	[State whether impaired or unimpaired.]	[Insert treatment of priority claims in this Class, including the form, amount and timing of distribution, if any. For example: "Class 1 is unimpaired by this Plan, and each holder of a Class 1 Priority Claim will be paid in full, in cash, upon the later of the effective date of this Plan as defined in Article VII, or the date on which such claim is allowed by a final non-appealable order. Except: _____."]
Class 2 – Secured Claim of [Insert name of secured creditor.]	[State whether impaired or unimpaired.]	[Insert treatment of secured claim in this Class, including the form, amount and timing of distribution, if any.] [Add class[es] of secured claims if applicable]
Class 3 - General Unsecured Creditors	[State whether impaired or unimpaired.]	[Insert treatment of unsecured creditors in this Class, including the form, amount and timing of distribution, if any.] [Add administrative convenience class if applicable]
Class 4 - Equity Security Holders of the Debtor	[State whether impaired or unimpaired.]	[Insert treatment of equity security holders in this Class, including the form, amount and timing of distribution, if any.]

ARTICLE V
ALLOWANCE AND DISALLOWANCE OF CLAIMS

5.01 Disputed Claim. A disputed claim is a claim that has not been allowed or disallowed [by a final non-appealable order], and as to which either: (i) a proof of claim has been filed or deemed filed, and the Debtor or another party in interest has filed an objection; or (ii) no proof of claim has been filed, and the Debtor has scheduled such claim as disputed, contingent, or unliquidated.

5.02 Delay of Distribution on a Disputed Claim. No distribution will be made on account of a disputed claim unless such claim is allowed [by a final non-appealable order].

5.03 Settlement of Disputed Claims. The Debtor will have the power and authority to settle and compromise a disputed claim with court approval and compliance with Rule 9019 of the Federal Rules of Bankruptcy Procedure.

ARTICLE VI
PROVISIONS FOR EXECUTORY CONTRACTS AND UNEXPIRED LEASES

6.01 Assumed Executory Contracts and Unexpired Leases.

(a) The Debtor assumes the following executory contracts and/or unexpired leases effective upon the [Insert "effective date of this Plan as provided in Article VII," "the date of the entry of the order confirming this Plan," or other applicable date]:

[List assumed executory contracts and/or unexpired leases.]

(b) The Debtor will be conclusively deemed to have rejected all executory contracts and/or unexpired leases not expressly assumed under section 6.01(a) above, or before the date of the order confirming this Plan, upon the [Insert "effective date of this Plan," "the date of the entry of the order confirming this Plan," or other applicable date]. A proof of a claim arising from the rejection of an executory contract or unexpired lease under this section must be filed no later than _____ (___) days after the date of the order confirming this Plan.

ARTICLE VII
MEANS FOR IMPLEMENTATION OF THE PLAN

[Insert here provisions regarding how the plan will be implemented as required under §1123(a)(5) of the Code. For example, provisions may include those that set out how the plan will be funded, as well as who will be serving as directors, officers or voting trustees of the reorganized debtor.]

ARTICLE VIII
GENERAL PROVISIONS

8.01 Definitions and Rules of Construction. The definitions and rules of construction set forth in §§ 101 and 102 of the Code shall apply when terms defined or construed in the Code are used in this Plan, and they are supplemented by the following definitions: [Insert additional definitions if necessary].

8.02 Effective Date of Plan. The effective date of this Plan is the first business day following the date that is fourteen days after the entry of the order of confirmation. If, however, a stay of the confirmation order is in effect on that date, the effective date will be the first business day after the date on which the stay of the confirmation order expires or is otherwise terminated.

8.03 Severability. If any provision in this Plan is determined to be unenforceable, the determination will in no way limit or affect the enforceability and operative effect of any other provision of this Plan.

8.04 Binding Effect. The rights and obligations of any entity named or referred to in this Plan will be binding upon, and will inure to the benefit of the successors or assigns of such entity.

8.05 Captions. The headings contained in this Plan are for convenience of reference only and do not affect the meaning or interpretation of this Plan.

[8.06 Controlling Effect. Unless a rule of law or procedure is supplied by federal law (including the Code or the Federal Rules of Bankruptcy Procedure), the laws of the State of _____ govern this Plan and any agreements, documents, and instruments executed in connection with this Plan, except as otherwise provided in this Plan.]

[8.07 Corporate Governance. [If the Debtor is a corporation include provisions required by § 1123(a)(6) of the Code.]]

ARTICLE IX
DISCHARGE

[If the Debtor is not entitled to discharge under 11 U.S.C. § 1141(d)(3) change this heading to "**NO DISCHARGE OF DEBTOR**."]

9.01. **[Option 1 – If Debtor is an individual and § 1141(d)(3) is not applicable]**
Discharge. Confirmation of this Plan does not discharge any debt provided for in this Plan until the court grants a discharge on completion of all payments under this Plan, or as otherwise provided in § 1141(d)(5) of the Code. The Debtor will not be discharged from any debt excepted from discharge under § 523 of the Code, except as provided in Rule 4007(c) of the Federal Rules of Bankruptcy Procedure.

[Option 2 -- If the Debtor is a partnership and section 1141(d)(3) of the Code is not applicable]
Discharge. On the confirmation date of this Plan, the debtor will be discharged from any debt that arose before confirmation of this Plan, subject to the occurrence of the effective date, to the extent specified in § 1141(d)(1)(A) of the Code. The Debtor will not be discharged from any debt imposed by this Plan.

[Option 3 -- If the Debtor is a corporation and § 1141(d)(3) is not applicable]

Discharge. On the confirmation date of this Plan, the debtor will be discharged from any debt that arose before confirmation of this Plan, subject to the occurrence of the effective date, to the extent specified in § 1141(d)(1)(A) of the Code, except that the Debtor will not be discharged of any debt: (i) imposed by this Plan; (ii) of a kind specified in § 1141(d)(6)(A) if a timely complaint was filed in accordance with Rule 4007(c) of the Federal Rules of Bankruptcy Procedure; or (iii) of a kind specified in § 1141(d)(6)(B).

[Option 4 – If § 1141(d)(3) is applicable]

No Discharge. In accordance with § 1141(d)(3) of the Code, the Debtor will not receive any discharge of debt in this bankruptcy case.

ARTICLE X
OTHER PROVISIONS

[Insert other provisions, as applicable.]

Respectfully submitted,

By: _____
The Plan Proponent

By:_____
Attorney for the Plan Proponent

COMMITTEE NOTE

Provision 8.02 of Article VIII of the form, which specifies the plan's effective date, is amended to reflect the change in the time periods of Rules 3020(e) and 8002(a) for a stay of the confirmation order and the filing of a notice of appeal. As of December 1, 2009, both time periods were increased from ten to fourteen days. The effective date of the plan will generally be the first business day after those time periods expire. Accordingly, the effective date of the plan is extended to the first business day following the date that is fourteen days after the entry of the order of confirmation. If, however, a stay of the confirmation order remains in effect on the specified effective date, the plan will instead go into effect on the first business day after the stay expires or is terminated, so long as the order of confirmation has not been vacated.

Changes Made After Publication

No changes were made after publication.

* * * * *

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

Agenda E-19 (Appendix B)
Rules
September 2011

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CHAIR

PETER G. McCABE
SECRETARY

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CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

DATE: May 12, 2011 [revised June 30, 2011]

TO: Honorable Lee H. Rosenthal, Chair, Standing Committee on Rules of Practice and Procedure

FROM: Honorable Richard C. Tallman, Chair, Advisory Committee on Federal Rules of Criminal Procedure

RE: Report of the Criminal Advisory Committee

I. Introduction

The Advisory Committee on the Federal Rules of Criminal Procedure ("the Committee") met on April 11-12, 2011, in Portland, Oregon, and took action on a number of proposals.

* * * * *

This report presents four action items:

(1) approval to transmit to the Judicial Conference proposed amendments to Rules 5 and 58 (initial appearance in extradition cases and consular notification);

(2) approval to transmit to the Judicial Conference a proposed Rule 37 (indicative rulings);

(3) approval to transmit to the Judicial Conference proposed amendments to Rule 15 (depositions in foreign countries when the defendant is not physically present);

* * * * *

II. Action Items

1. ACTION ITEM—Rules 5 and 58

The proposed amendments to Rule 5 and Rule 58 were designed to (1) deal with unique aspects of the international extradition process and (2) ensure that certain treaty obligations of the United States are fulfilled. After reviewing public comments concerning these amendments, the Advisory Committee recommends that they be transmitted to the Judicial Conference as published.

Rule 5(c)(4)

The amendment to Rule 5(c) clarifies where an initial appearance should take place for persons who have been surrendered to the United States pursuant to an extradition request to a foreign country. The amendment codifies the longstanding practice that persons who are charged with criminal offenses in the United States and surrendered to the United States following extradition in a foreign country make their initial appearance in the jurisdiction that sought their extradition.

This rule is applicable even if the defendant arrives first in another district. Rule 5(a)(1)(B) requires the person be taken before a magistrate judge without unnecessary delay. Consistent with this obligation, it is preferable not to delay an extradited person's transportation for the purpose of holding an initial appearance in the district of arrival, even if the person will be present in that district for some time as a result of connecting flights or logistical difficulties. Interrupting an extradited defendant's transportation at this point can impair his or her ability to obtain and consult with trial counsel and to prepare his or her defense in the district where the charges are pending. It should also be noted that during foreign extradition proceedings, the extradited person, assisted by counsel, has already been afforded an opportunity to review the charging document, United States arrest warrant, and supporting evidence.

The Committee received two comments on this rule. The National Association of Criminal Defense Lawyers (NACDL) and the Federal Magistrate Judges Association (FMJA) suggested that the amendment be revised to require the initial appearance to be held "without unnecessary delay." The Advisory Committee declined to make this revision because the rule itself already makes this clear. Subdivision (a) of Rule 5 contains the timing requirements for all initial appearances, and subdivision (c) governs the place of initial appearances. Rule 5(a)(1) already requires all defendants who have been arrested to be taken before a magistrate judge "without unnecessary delay," and contains a provision that directly addresses cases in which the defendant has been arrested outside the United States.

Rule 5(a)(1)(B) now provides:

> (B) A person making an arrest outside the United States must take the defendant *without unnecessary delay* before a magistrate judge, unless a statute provides otherwise.

(Emphasis added). The Advisory Committee concluded that this provision—which is referred to in the Committee Note—addresses the concerns noted by the NACDL and FMJA. The Committee declined to add an additional statement regarding timing to subdivision (c), which governs only the *place* of the initial appearance, not its timing.

Rules 5(d) and 58

The proposed amendments to Rules 5(d) and 58(b) are designed to ensure that the United States fulfills its international obligations under Article 36 of the Vienna Convention on Consular Relations and other bilateral treaties. Bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 of the Vienna Convention provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention. Many questions remain unresolved concerning Article 36, including whether it creates individual rights that may be invoked in a judicial proceeding and what, if any, remedy may exist for a violation. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). This amendment—which was proposed by the Department of Justice after consultation with the State Department—does not address those questions.

Comments were received from the NACDL and the FMJA. The NACDL endorsed the proposed amendment in principle, but suggested modifications to define "held in custody," to expand on the warnings given to defendants, and to make it clear that consular notification should not be delayed until the initial appearance. The Advisory Committee concluded that the term "held in custody" was sufficiently clear for this purpose, and declined to require a more detailed explanation or colloquy about consular notification at the initial appearance.

The Committee also concluded that the rule need not be revised to address administrative warnings that should take place prior to the initial appearance. The amendment was designed to be an additional assurance, in the nature of a "failsafe" provision, not the primary means of satisfying the United States' obligations under the Vienna Convention and other bilateral treaties. Consular notification advice is required to be given "without delay," and arresting officers are primarily responsible for providing this advice. *See* 28 C.F.R. 50.5 (requiring Department of Justice officers to inform foreign nationals they arrest of policies regarding consular notification). The Committee was advised that the government has taken substantial measures to ensure prompt compliance with the notification requirements, including implementing Justice Department regulations establishing a uniform procedure for consular notification when non-United States citizens are arrested or detained by officers of the Department; State Department instructions for federal, state, and local law enforcement officials on providing consular notification advice, which are available on a public

website and published in a booklet; and which are regularly covered in training of law enforcement authorities provided by the State Department.

The Committee also took note of two FMJA observations: (1) reservations about the necessity of procedural rules concerning consular notification, which is principally an executive function, and (2) the need to take great care to insure that the new procedures do not result in defendants being asked to incriminate themselves. The FMJA concluded that the proposed amendment was adequate.

The Committee voted unanimously to recommend that the amendment be approved as published and forwarded to the Judicial Conference.

Recommendation–The Advisory Committee recommends that the proposed amendments to Rules 5 and 58 be approved as published and forwarded to the Judicial Conference.

2. ACTION ITEM—Rule 37

Appellate Rule 12.1 and Civil Rule 62.1, both of which went into effect on December 1, 2009, create a mechanism for obtaining "indicative rulings." They establish procedures facilitating the remand of certain post-judgment motions filed after an appeal has been docketed in a case where the district court indicated it would grant the motion. Proposed Rule 37, which was published for comment in 2010, parallels Civil Rule 62.1 and clarifies that this procedure is available in criminal cases. After reviewing the comments received following publication, the Advisory Committee recommends that the amendment be approved as published and forwarded to the Judicial Conference.

The Committee received two comments concerning Rule 37. The FMJA stated that it "endorses the proposed changes." Writing on behalf of the NACDL, Peter Goldberger expressed support for the proposal and suggested two additions to the Committee Note that might be helpful to practitioners with little experience in appellate procedures:

(1) a parenthetical mentioning the possibility that the conditions of release or detention pending execution of sentence or pending appeal may be modified in the district court without resort to the new procedure; and

(2) a reference to the availability of the procedure in Section 2255 cases. The NACDL proposed adding such a reference to the portion of the Committee Note that reads:

In the criminal context, the Committee anticipates that Criminal Rule 37 will be used primarily if not exclusively for newly discovered evidence motions under Criminal Rule 33(b)(1) (*see United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c). Rule 37 does

not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in the face of a pending appeal.

After discussion, the Advisory Committee declined both of the NACDL's suggestions. The Committee determined that the first suggestion went substantially beyond the focus of the amendment itself, running the risk of being either over- or under-inclusive and violating the Standing Committee's policy of keeping Committee Notes short. Regarding the NACDL's second suggestion, the language the NACDL identified for purposes of adding a Section 2255 reference tracks the language of the Committee Note accompanying Appellate Rule 12.1, which was approved by the Standing Committee after considerable discussion. Prior to publishing proposed Criminal Rule 37, the Advisory Committee wrestled with whether to include a reference to the use of the indicative rulings procedure in Section 2255 cases. It eventually decided that the Committee Note as written already makes clear that the identified uses are not exclusive. The Advisory Committee maintained that conclusion after considering the NACDL's comments.

At the conclusion of this discussion, the Advisory Committee voted unanimously to recommend that Rule 37 be forwarded to the Standing Committee as published.

Recommendation–The Advisory Committee recommends that proposed Rule 37 be approved as published and forwarded to the Judicial Conference.

3. ACTION ITEM—Rule 15

The proposed amendment to Rule 15 would authorize the taking of depositions outside the United States without the defendant's presence in special limited circumstances with the district judge's approval.

<u>The purpose of the amendment</u>

The amendment, which applies only to depositions taken outside the United States, provides a procedural mechanism to address cases in which important witnesses—both government and defense witnesses—live in, or have fled to, countries where they cannot be reached by the court's subpoena power.

The amendment authorizes *only* the taking of pretrial depositions; it does not speak to their ultimate admissibility at trial. As stated in the Committee Note, questions of admissibility are left to the courts to resolve on a case-by-case basis, applying the Federal Rules of Evidence and the Constitution.

Issues concerning the propriety of allowing depositions for witnesses outside the United States and the procedures under which such depositions may be taken have arisen, and will continue to arise, in cases such as *United States v. Ali*, 528 F.3d 210 (4th Cir. 2008), *cert. denied*, 129 S. Ct.

1312 (2009).[1] The Committee concluded that it was appropriate to distill the analysis in cases such as *Ali* and use it to set forth a procedural framework in the Federal Rules of Criminal Procedure.

The amendment requires case-specific findings regarding (1) the importance of the witness's testimony, (2) the likelihood that the witness's attendance at trial cannot be obtained, and (3) why it is not feasible to have face-to-face confrontation by either (a) bringing the witness to the United States for a deposition at which the defendant can be present or (b) transporting the defendant to the deposition outside the United States.

The new procedure does not apply if it is possible to bring the witness to the United States for trial or for a deposition at which the defendant can be present, or if it is feasible for the defendant to be present at a deposition outside the United States. The proposal thus creates a very limited exception to the requirement that the defendant must be present at any deposition under Rule 15 unless the defendant waives the right to be present or is excluded by the court for being disruptive.

Although the amendment would not predetermine the admissibility of any deposition taken pursuant to it, in drafting the amendment the Committee was attentive to both criteria developed in the lower courts and to Supreme Court Confrontation Clause precedent.

The history of the amendment

The Department of Justice wrote to the Advisory Committee in 2006 proposing that Rule 15 be amended. After a period of study and discussion from 2006 to 2008, the Advisory Committee sought and received Standing Committee approval to publish the proposed amendment for public comment in 2008.

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[1] The defendant in *Ali* was convicted of multiple crimes arising from his affiliation with an al-Qaeda terrorist cell and its plans to carry out terrorist acts in United States. Before trial Ali sought to suppress a confession he made in Saudi Arabia, alleging it was the product of torture by Mabahith security officials. As Saudi citizens residing in Saudi Arabia, the Mabahith officers were beyond the district court's subpoena power. The Saudi government denied the United States's request to allow the officers to testify at trial in the United States but permitted the officers to sit for depositions in Riyadh. The Saudi government had never before allowed such foreign access to a Mabahith officer. After finding it was not feasible for Ali (who was in custody following his earlier extradition from Saudi Arabia) to be transported to Riyadh for the depositions, the district court adopted procedures similar to those outlined in the proposed amendment. Ali had defense counsel both in Riyadh and with him in the United States, the Saudi officials testified under oath, defense counsel was able to cross-examine the Mabahith witnesses extensively, and a two-way video link allowed the defendant, judge, and jury to observe the demeanor of the witnesses. At trial the videotape presented side-by-side footage of the Mabahith officers testifying and the defendant's simultaneous reactions to the testimony. On appeal the Fourth Circuit held that introduction of deposition testimony taken under those procedures did not violate the Confrontation Clause.

After making several changes in response to public comments, in April 2009 the Advisory Committee recommended that the Standing Committee approve the proposed amendment and forward it to the Judicial Conference. Four comments were received in response to the publication of the proposed amendment, and one witness representing the Federal Defenders testified concerning the amendment. The Federal Magistrate Judges Association endorsed the proposal. The General Counsel of the Drug Enforcement Administration raised some issues concerning the drafting of the rule. The Federal Defenders and the National Association of Criminal Defense Lawyers opposed the rule and urged that it be withdrawn, or, at a minimum, substantially redrafted.

The principal arguments in the lengthy submissions from the Federal Defenders and NACDL concerned the effect of the proposed amendment on the defendant's rights under the Confrontation Clause of the Sixth Amendment. They argued that *Crawford v. Washington*, 541 U.S. 36 (2004), interprets the Confrontation Clause as providing an unqualified right to face-to-face confrontation that would preclude the admission of testimony preserved by a deposition taken under the proposed rule. There is no indication that the Supreme Court will continue to allow any exception to the right of face-to-face confrontation even when this would serve an important public policy interest and there are guarantees of trustworthiness. Moreover, the proposed amendment may not be confined to a small number of exceptional cases. The amendment is not, in the opponents' view, limited to cases where an interest as significant as national security is at issue, nor does it guarantee the level of participation by the defendant that was provided in *United States v. Ali*, 528 F.3d 210 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 1312 (2009).

Specifically, as published the amendment (1) was not limited to transnational cases, (2) was not limited to felonies, (3) did not require a showing that the evidence sought is "necessary" to the government's case, and (4) imposed no obligation on the government to secure the witness's presence.

NACDL argued that the real significance of the amendment is not the taking of the depositions per se, but rather that it would enable the prosecution to present evidence at trial that has not been subject to confrontation. They argued that the amendment would in effect create a right to introduce the resulting deposition at trial, and as such exceed the authority of the Rules Enabling Act. It would also be a back door means of achieving the goals of the failed 2002 attempt to amend Rule 26. Rather than create inevitable constitutional challenges, they urge the Committee to await either legislation or further clarification from the case law. They also urged that the safeguards and limits in the proposed amendment are insufficient to restrict its scope and to guarantee the defendant's participation. In their view, "meaningfully participate . . . through reasonable means" creates only a vague and subjective test that offers little real protection. Similarly, the showing required would encompass every witness beyond the court's subpoena power. Finally, they noted there is reason to doubt the credibility and reliability of the testimony of the potential witnesses who are willing to be deposed, but not travel to the United States to testify. These will include, for example, persons who have fled justice in this country and know that their oath taken abroad will have no practical significance.

The Committee also heard testimony stressing the frequency with which the technology is inadequate or fails, as well as other problems that defense attorneys experience in taking foreign depositions, such as the requirement in some countries that only local counsel can question witnesses.

The Advisory Committee adopted several amendments intended to address some of the issues raised during the comment period. It explicitly limited the amendment to felonies. After discussion, the Committee declined to adopt a requirement that the Attorney General or his designee certify or determine that the case serves an important public interest. Although there was support for a mechanism that would guarantee that requests under the new rule would be rigorously reviewed within the Department of Justice and made only infrequently, members were concerned that adding a provision in the rules requiring the action by the Attorney General might raise separation of powers issues. (The Committee did add a provision requiring the attorney for the government to establish that the prosecution advances an important public interest, but this provision was deleted by the Standing Committee.)

The Committee also incorporated several minor changes suggested during the comment period and by the style consultant to improve the clarity of the proposed amendment.

The Committee did not adopt three other suggestions. First, it declined to limit the rule to government witnesses, though it recognized that there will be only a small number of cases in which a defendant will wish to use this procedure.[2] Second, the Committee declined to require the government to show that the deposition would produce evidence "necessary" to its case, viewing that standard as unrealistic when the government is still assembling its case. Third, the Committee declined to add a requirement that the government show it had made diligent efforts to secure the witness's testimony in the United States. In the Committee's view, this might actually water down the requirement in the rule as published that the witness's presence "cannot be obtained."

The Committee discussed the Confrontation Clause issues at length. Members emphasized that when the government (or a codefendant) seeks to introduce deposition testimony, the court will rule on admissibility under the Federal Rules of Evidence as well as the Sixth Amendment. Members stressed that providing a procedure to take a deposition did not guarantee its later admission, which could turn on a number of factors. For example, if the technology does not work well enough to allow the defendant to participate or to create a high-quality recording, the deposition would likely not be admitted. Similarly, the situation might change so that it would be possible for the witness to testify at the trial. The decision to allow the taking of the deposition in no way

[2] In cases involving a single defendant, Rule 15 would pose no difficulties if the defendant consented not to be present at the deposition of his witness, and there would be no Confrontation Clause barrier to the introduction of the deposition. However, in a case involving multiple defendants, one defendant might wish to depose a witness overseas, and another defendant who could not be present at the deposition might object to the admission of the evidence.

forecloses a Confrontation Clause challenge to admission or one based on the Rules of Evidence. The Committee Note was amended to make this point clear.

The proposed amendment is intended to meet the criteria developed in lower court decisions such as *Ali*, as well as the Supreme Court's Confrontation Clause decisions. Although there will undoubtably be issues arising from the use of technology, members felt that the district courts have ample authority and experience to handle those issues on a case by case basis.

The Advisory Committee voted, with three dissents, to approve the proposed amendment to Rule 15, as revised, and to send it to the Standing Committee. The Standing Committee approved the amendment in June 2009, and the Judicial Conference approved it in September 2009.

In 2010 the Supreme Court remanded the proposed amendment to the Advisory Committee for further consideration. No statement accompanied the Court's action.

The Committee's recommendation

At its April meeting the Advisory Committee voted, with one dissent, to recommend that the Standing Committee approve and transmit a revised Rule 15 proposal to the Judicial Conference. Initially, the Advisory Committee made no change in the text of the amendment approved in 2009, but substantially revised the Committee Note to clarify that authorizing the taking of the foreign deposition does not determine its admissibility at trial. Before the Standing Committee met in June 2011, the Advisory Committee submitted a supplemental memorandum describing revisions in the text of the proposed amendment to Rule 15 and the Committee Note that had been unanimously approved by an e-mail vote of the Advisory Committee. That supplemental memorandum is attached and describes the final version of the amendment proposed by the Advisory Committee. Because the changes further emphasized a point that had already been made in the Committee Note published for public comment, republication remained unnecessary.

As revised, the Committee Note emphasizes that the proposed amendment does not predetermine whether depositions conducted outside the presence of the defendant would be admissible at trial. Rather, it is limited to providing assistance in pretrial discovery. As is the case with all depositions, courts determine admissibility on a case-by-case basis, applying the Federal Rules of Evidence and the Constitution.

The revised Committee Note emphasizes the limited scope of the proposed amendment, which is significantly different from an earlier amendment to Rule 26 that the Supreme Court declined to transmit to Congress. *See* 207 F.R.D. 89, 93-104 (2002). The focus of the proposed 2002 amendment to Rule 26 was the admissibility of evidence at trial; the amendment would have authorized the use of two-way video transmissions in criminal cases in (1) "exceptional circumstances," with (2) "appropriate safeguards," and if (3) "the witness is unavailable."

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 15 be approved as revised and forwarded to the Judicial Conference.

*** * * * ***

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

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To: **Hon. Lee H. Rosenthal, Chair**
Standing Committee on Rules of Practice and Procedure

From: **Hon. Richard C. Tallman, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

Subject: **Proposed Amendment to Rule 15**

Date: **May 24, 2011 (revised June 2011)**

This memorandum supplements the material previously circulated in the Agenda Book. It includes revisions in the proposed amendment to Rule 15 and the accompanying Committee Note that have been unanimously approved by an e-mail vote of the Advisory Committee. These revisions are the result of consultation with the reporters and chairs of the Standing Committee and Evidence Rules Committee. This memorandum also brings to your attention an issue concerning the interplay between the proposed amendment and the Rules of Evidence.

1. The revision in the text of Rule 15 and the accompanying note.

The proposed amendment, which applies only to depositions taken outside the United States, provides a procedural mechanism to address cases in which important witnesses—both government and defense witnesses—live in, or have fled to, countries where they cannot be reached by the court's subpoena power. Following the Supreme Court's remand for further consideration, at its April meeting the Advisory Committee voted to transmit the text of the rule without change, but it revised the Committee Note to emphasize the limited function of the proposed amendment: it authorizes *only* the taking of pretrial depositions and does not speak to their ultimate admissibility at trial. As stated in the Committee Note, questions of admissibility are left to the courts to resolve on a case-by-case basis, applying the Federal Rules of Evidence and the Constitution.

In preparation for the meeting of the Standing Committee, further consultation among the committee chairs and reporters led to a consensus that it would be desirable to state that point in the text of Rule 15(f), which now states that "A party may use all or part of a deposition as provided by the Federal Rules of Evidence." By unanimous e-mail vote, the Advisory Committee approved the following language:

Rule 15. Depositions*

* * * * *

(f) Use as Evidence. Authorization to take a deposition under this rule does not determine admissibility. A party may use all or part of a deposition as provided by the Federal Rules of Evidence.

With the exception of this language—which moves to the text a point previously made in the Committee Note—the proposed amendment is identical to that previously approved by the Standing Committee and the Judicial Conference.

By email vote the Advisory Committee also approved a revised Committee Note that describes the amendment to subdivision (f) and clarifies the relationship between the authority to take a deposition under Rule 15(c)(3) and the admission of deposition testimony at trial. The revised Note language states:

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*After the distribution of this memorandum, the proposed language was revised to conform to the Standing Committee's style conventions. The restyled language was submitted on behalf of the Advisory Committee and approved at the Standing Committee meeting:

> **(f) Admissibility and Use as Evidence.** An order authorizing a deposition to be taken under this rule does not determine its admissibility.

While a party invokes Rule 15 in order to preserve testimony for trial, the rule does not determine whether the resulting deposition will be admissible, in whole or in part. Subdivision (f) provides that in the case of all depositions, questions of admissibility of the evidence obtained are left to the courts to resolve on a case by case basis. Under Rule 15(f), the courts make this determination applying the Federal Rules of Evidence, which state that relevant evidence is admissible except as otherwise provided by the Constitution, statutes, the Rules of Evidence, and other rules prescribed by the Supreme Court. Fed. R. Evid. 402.

Rule 15(c) as amended imposes significant procedural limitations on taking certain depositions in criminal cases. The amended rule authorizes a deposition outside a defendant's physical presence only in very limited circumstances after the trial court makes case-specific findings. Amended Rule 15(c)(3) delineates these circumstances and the specific findings a trial court must make before permitting parties to depose a witness outside the defendant's presence. The party requesting the deposition shoulders the burden of proof — by a preponderance of the evidence — on the elements that must be shown. The amended rule recognizes the important witness confrontation principles and vital law enforcement and other public interests that are involved**.**

2. The relationship between the proposed amendment to Rule 15 and the Rules of Evidence.

Because the admissibility of deposition testimony is governed by the Rules of Evidence, we have attempted to determine whether the amendment would have any implications for or effects on the Rules of Evidence. The Reporter and Chair of the Evidence Rules Committee have noted an ambiguity already present in Rule 804(a)(5) which might come into play if depositions were taken under the proposed amendment. Rule 804(a)(5) provides:

> (a) Definition of unavailability. ''Unavailability as a witness'' includes situations in which the declarant—
>
> > (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

Subdivisions (b)(2), (3), and (4) govern dying declarations, statements against interest, and personal and family history. These forms of hearsay are admissible only when the declarant is unavailable under (a)(5). Under (a)(5), a declarant is unavailable only if the proponent has been "*unable to procure* the declarant's attendance (or in the case of a hearsay exception *under subdivision (b)(2), (3), or (4), the declarant's* attendance or *testimony*)." (Emphasis added.)

Because the parenthetical in Rule 804(a)(5) refers simply to "testimony," it might possibly be read to include testimony that is for one reason or another not admissible at trial. For example,

a prior deposition or testimony in a different case is inadmissible if the party against whom the testimony is now offered did not have an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. *See* Fed. R. Evid. 804(b)(1). In the criminal context, the government often has grand jury "testimony" by a witness which will not be admissible because there was no confrontation or cross examination. In any of these cases, Rule 804(a)(5) might be read at present to bar the admission of hearsay statements under Rule 804(b)(2)–(4). Similarly, if the proposed amendment to Rule 15 were adopted, a court might hold that the government "procure[d]" the resulting deposition "testimony" even if it were ruled inadmissible at trial for Confrontation Clause, poor quality recording, or any other reason. This interpretation would likely be of greatest concern in connection with declarations against interest. Dying declaration declarants are unlikely to be deposeable, and pedigree statements rarely come up.

We have found no cases in which this interpretation has been considered, and there is reason to think that courts would limit Rule 804(a)(5)'s preclusive effect to admissible testimony. As the Committee Note to 804(b) states: "The rule expresses preferences: testimony given on the stand in person is preferred over hearsay, and hearsay, if of a specified quality, is preferred over complete loss of the evidence of the declarant." If the rule is construed to implement those policy preferences, inadmissible testimony would certainly not be preferred, so it provides no basis for blocking the admission of quality hearsay. Thus Rule 804(b)'s second policy preference comes into play, and the rule should be interpreted to avoid "the complete loss of the evidence of the declarant."

The history of Rule 804 indicates that the drafters were aware of the possibility that civil and criminal depositions might be taken that would not be admissible,[1] and there is no indication that

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[1]Congress added the parenthetical to Rule 804(a)(5). As explained in MUELLER AND KIRKPATRICK ON FEDERAL EVIDENCE, 3d ed., § 8:108, 10–12 (footnotes omitted and emphasis added):

> On the definition of unavailability, Congress added the parenthetical qualification in Fed. R. Evid. 804(a)(5). The added language keeps the proponent invoking the dying statement, against-interest, or family history exceptions from claiming the speaker is unavailable because of unavoidable absence unless that proponent took reasonable steps to secure the speaker's testimony, *and the clear intent was to make the party who would invoke those exceptions try to depose the declarant or show why it couldn't be done*. The change originated in the House, and drew some comment and support. It also drew the opposition of the Advisory Committee, which defended the original version of Fed. R. Evid. 804(a)(5):
>
>> . . . None of them [dying declarations, declarations against interest, and declarations of pedigree] warrants this needless, impractical and highly restrictive complication. . . .
>>
>> Depositions are expensive and time-consuming. In any event, deposition

the Committee thought a deposition, once taken but ruled inadmissible, would block a finding of unavailability. To the contrary, since the language in question was added to force parties to try to take depositions, courts might be reluctant to adopt an interpretation that would penalize parties from taking depositions when possible and seeking to introduce them.

Although the proposed amendment does not create the ambiguity in Rule 804, it would provide one more circumstance in which these arguments might foreseeably arise if depositions taken under the rule were deemed inadmissible. Alternatively, if the proposed amendment were to increase the number of admissible depositions, that would have a different impact on the Evidence Rules: it would create situations in which declarations against interest—admissible before the amendment—would be barred because of the availability of a preferred form of evidence.

Because the proposal to amend Rule 15 came from the Department of Justice, we consulted with Jonathan Wroblewski and Kathleen Felton about this issue. This memorandum reflects their view of the law, and the Department continues to support the amendment to Rule 15.

We obviously hope that the issue addressed in this memo will not dissuade the Standing Committee from approving Rule 15 and sending it on to the Judicial Conference in the Fall. But I thought alerting you in advance of the June meeting would be helpful.

> procedures are available to those who wish to resort to them. Moreover, the deposition procedures of the Civil Rules and Criminal Rules are only imperfectly adapted to implementing the amendment. *No purpose is served unless the deposition, if taken, may be used in evidence. Under Civil Rule 32(a)(3) and Criminal Rule 15(e), a deposition, though taken, may not be admissible***,** and under Criminal Rule 15(a) substantial obstacles exist in the way of even taking a deposition.

This argument persuaded the Senate, which tried to delete the parenthetical phrase, but in the end it was restored by the Conference Committee and enacted into law.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 5. Initial Appearance

1 * * * * *

2 **(c) Place of Initial Appearance; Transfer to Another**

3 **District.**

4 * * * * *

5 **(4)** ***Procedure for Persons Extradited to the United***

6 ***States.*** If the defendant is surrendered to the United

7 States in accordance with a request for the

8 defendant's extradition, the initial appearance must

9 be in the district (or one of the districts) where the

10 offense is charged.

11 **(d) Procedure in a Felony Case.**

12 **(1)** ***Advice.*** If the defendant is charged with a felony,

13 the judge must inform the defendant of the

14 following:

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

15 * * * * *

16 (D) any right to a preliminary hearing; ~~and~~

17 (E) the defendant's right not to make a

18 statement, and that any statement made

19 may be used against the defendant; and

20 (F) if the defendant is held in custody and is

21 not a United States citizen, that an attorney

22 for the government or a federal law

23 enforcement officer will:

24 (i) notify a consular officer from the

25 defendant's country of nationality that

26 the defendant has been arrested if the

27 defendant so requests; or

28 (ii) make any other consular notification

29 required by treaty or other

30 international agreement.

31 * * * * *

Committee Note

Subdivision (c)(4). The amendment codifies the longstanding practice that persons who are charged with criminal offenses in the United States and surrendered to the United States following extradition in a foreign country make their initial appearance in the jurisdiction that sought their extradition.

This rule is applicable even if the defendant arrives first in another district. The earlier stages of the extradition process have already fulfilled some of the functions of the initial appearance. During foreign extradition proceedings, the extradited person, assisted by counsel, is afforded an opportunity to review the charging document, U.S. arrest warrant, and supporting evidence. Rule 5(a)(1)(B) requires the person be taken before a magistrate judge without unnecessary delay. Consistent with this obligation, it is preferable not to delay an extradited person's transportation to hold an initial appearance in the district of arrival, even if the person will be present in that district for some time as a result of connecting flights or logistical difficulties. Interrupting an extradited defendant's transportation at this point can impair his or her ability to obtain and consult with trial counsel and to prepare his or her defense in the district where the charges are pending.

Subdivision (d)(1)(F). This amendment is designed to ensure that the United States fulfills its international obligations under Article 36 of the Vienna Convention on Consular Relations, and other bilateral treaties. Bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 of the Vienna Convention provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention. At the time of this amendment, many questions remain unresolved concerning Article 36, including whether it creates

individual rights that may be invoked in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). This amendment does not address those questions.

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* * * * *

Rule 15. Depositions

1 * * * * *

2 **(c) Defendant's Presence.**

3 **(1)** ***Defendant in Custody*.** Except as authorized by

4 Rule 15(c)(3), the ~~The~~ officer who has custody of

5 the defendant must produce the defendant at the

6 deposition and keep the defendant in the witness's

7 presence during the examination, unless the

8 defendant:

9 (A) waives in writing the right to be present; or

10 (B) persists in disruptive conduct justifying

11 exclusion after being warned by the court that

12 disruptive conduct will result in the
13 defendant's exclusion.
14 **(2)** ***Defendant Not in Custody*.** Except as authorized
15 by Rule 15(c)(3), a ~~A~~ defendant who is not in
16 custody has the right upon request to be present at
17 the deposition, subject to any conditions imposed
18 by the court. If the government tenders the
19 defendant's expenses as provided in Rule 15(d) but
20 the defendant still fails to appear, the defendant —
21 absent good cause — waives both the right to
22 appear and any objection to the taking and use of
23 the deposition based on that right.
24 **(3)** ***Taking Depositions Outside the United States***
25 ***Without the Defendant's Presence*.** The
26 deposition of a witness who is outside the United
27 States may be taken without the defendant's
28 presence if the court makes case-specific findings

29 of all the following:

30 (A) the witness's testimony could provide
31 substantial proof of a material fact in a felony
32 prosecution;

33 (B) there is a substantial likelihood that the
34 witness's attendance at trial cannot be
35 obtained;

36 (C) the witness's presence for a deposition in the
37 United States cannot be obtained;

38 (D) the defendant cannot be present because:

39 (i) the country where the witness is located
40 will not permit the defendant to attend
41 the deposition;

42 (ii) for an in-custody defendant, secure
43 transportation and continuing custody
44 cannot be assured at the witness's
45 location; or

46 (iii) for an out-of-custody defendant, no
47 reasonable conditions will assure an
48 appearance at the deposition or at trial
49 or sentencing; and
50 (E) the defendant can meaningfully participate in
51 the deposition through reasonable means.
52 * * * * *
53 **(f) Admissibility and Use as Evidence.** An order
54 authorizing a deposition to be taken under this rule does
55 not determine its admissibility. A party may use all or
56 part of a deposition as provided by the Federal Rules of
57 Evidence.
58 * * * * *

Committee Note

Subdivisions (c)(3) and (f). This amendment provides a mechanism for taking depositions in cases in which important witnesses — government and defense witnesses both — live in, or have fled to, countries where they cannot be reached by the court's subpoena power. Although Rule 15 authorizes depositions of

witnesses in certain circumstances, the rule to date has not addressed instances where an important witness is not in the United States, there is a substantial likelihood the witness's attendance at trial cannot be obtained, and it would not be possible to securely transport the defendant or a co-defendant to the witness's location for a deposition.

While a party invokes Rule 15 in order to preserve testimony for trial, the rule does not determine whether the resulting deposition will be admissible, in whole or in part. Subdivision (f) provides that in the case of all depositions, questions of admissibility of the evidence obtained are left to the courts to resolve on a case by case basis. Under Rule 15(f), the courts make this determination applying the Federal Rules of Evidence, which state that relevant evidence is admissible except as otherwise provided by the Constitution, statutes, the Rules of Evidence, and other rules prescribed by the Supreme Court. Fed. R. Evid. 402.

Rule 15(c) as amended imposes significant procedural limitations on taking certain depositions in criminal cases. The amended rule authorizes a deposition outside a defendant's physical presence only in very limited circumstances after the trial court makes case-specific findings. Amended Rule 15(c)(3) delineates these circumstances and the specific findings a trial court must make before permitting parties to depose a witness outside the defendant's presence. The party requesting the deposition shoulders the burden of proof — by a preponderance of the evidence — on the elements that must be shown. The amended rule recognizes the important witness confrontation principles and vital law enforcement and other public interests that are involved.

This amendment does not supersede the relevant provisions of 18 U.S.C. § 3509, authorizing depositions outside the defendant's physical presence in certain cases involving child victims and witnesses, or any other provision of law.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

The limiting phrase "in the United States" was deleted from Rule 15(c)(1) and (2) and replaced with the phrase "Except as authorized by Rule 15(c)(3)." The revised language makes clear that foreign depositions under the authority of (c)(3) are exceptions to the provisions requiring the defendant's presence, but other depositions outside the United States remain subject to the general requirements of (c)(1) and (2). For example, a defendant may waive his right to be present at a foreign deposition, and a defendant who attends a foreign deposition may be removed from such a deposition if he is disruptive. In subdivision (c)(3)(D) the introductory phrase was revised to the simpler "because."

In order to restrict foreign depositions outside of the defendant's presence to situations where the deposition serves an important public interest, the limiting phrase "in a felony prosecution" was added to subdivision (c)(3)(A).

The text of subdivision (f) and the Committee Note were revised to state more clearly the limited purpose and effect of the amendment, which is providing assistance in pretrial discovery. Compliance with the procedural requirements for the taking of the foreign testimony does not predetermine admissibility at trial, which is determined on a case-by-case basis, applying the Federal Rules of Evidence and the Constitution.

Other changes were also made in the Committee Note. In conformity with the style conventions governing the rules, citations to cases were deleted, and other changes were made to improve clarity.

* * * * *

Rule 37. Indicative Ruling on a Motion for Relief That Is Barred by a Pending Appeal

1 **(a) Relief Pending Appeal.** If a timely motion is made for
2 relief that the court lacks authority to grant because of
3 an appeal that has been docketed and is pending, the
4 court may:
5 **(1)** defer considering the motion;
6 **(2)** deny the motion; or
7 **(3)** state either that it would grant the motion if the
8 court of appeals remands for that purpose or that the
9 motion raises a substantial issue.
10 **(b) Notice to the Court of Appeals.** The movant must
11 promptly notify the circuit clerk under Federal Rule of
12 Appellate Procedure 12.1 if the district court states that
13 it would grant the motion or that the motion raises a
14 substantial issue.
15 **(c) Remand.** The district court may decide the motion if

16 the court of appeals remands for that purpose.

Committee Note

This new rule adopts for any motion that the district court cannot grant because of a pending appeal the practice that most courts follow when a party makes a motion under Rule 60(b) of the Federal Rules of Civil Procedure to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot grant a Rule 60(b) motion without a remand. But it can entertain the motion and deny it, defer consideration, or state that it would grant the motion if the court of appeals remands for that purpose or state that the motion raises a substantial issue. Experienced lawyers often refer to the suggestion for remand as an "indicative ruling." (Federal Rule of Appellate Procedure 4(b)(3) lists three motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before or after the motion is filed until the judgment of conviction is entered and the last such motion is ruled upon. The district court has authority to grant the motion without resorting to the indicative ruling procedure.)

The procedure formalized by Federal Rule of Appellate Procedure 12.1 is helpful when relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. In the criminal context, the Committee anticipates that Criminal Rule 37 will be used primarily if not exclusively for newly discovered evidence motions under Criminal Rule 33(b)(1) (*see United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c). Rule 37 does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in the face of a pending appeal. The rules that govern

the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appellate jurisdiction. Rule 37 applies only when those rules deprive the district court of authority to grant relief without appellate permission. If the district court concludes that it has authority to grant relief without appellate permission, it can act without falling back on the indicative ruling procedure.

To ensure proper coordination of proceedings in the district court and in the appellate court, the movant must notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue. Remand is in the court of appeals' discretion under Federal Rule of Appellate Procedure 12.1.

Often it will be wise for the district court to determine whether it in fact would grant the motion if the court of appeals remands for that purpose. But a motion may present complex issues that require extensive litigation and that may either be mooted or be presented in a different context by decision of the issues raised on appeal. In such circumstances the district court may prefer to state that the motion raises a substantial issue, and to state the reasons why it prefers to decide only if the court of appeals agrees that it would be useful to decide the motion before decision of the pending appeal. The district court is not bound to grant the motion after stating that the motion raises a substantial issue; further proceedings on remand may show that the motion ought not be granted.

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Rule 58. Petty Offenses and Other Misdemeanors

1 * * * * *

2 **(b) Pretrial Procedure.**

3 * * * * *

4 **(2)** ***Initial Appearance*.** At the defendant's initial
5 appearance on a petty offense or other misdemeanor
6 charge, the magistrate judge must inform the
7 defendant of the following:

8 * * * * *

9 (F) the right to a jury trial before either a
10 magistrate judge or a district judge — unless
11 the charge is a petty offense; ~~and~~

12 (G) any right to a preliminary hearing under Rule
15 5.1, and the general circumstances, if any,
16 under which the defendant may secure pretrial
17 release; and

18 (H) if the defendant is held in custody and is not a

19 United States citizen, that an attorney for the
20 government or a federal law enforcement
21 officer will:
22 (i) notify a consular officer from the
23 defendant's country of nationality that the
24 defendant has been arrested if the
25 defendant so requests; or
26 (ii) make any other consular notification
28 required by treaty or other international
28 agreement.
29 * * * * *

Committee Note

Subdivision (b)(2)(H). This amendment is designed to ensure that the United States fulfills its international obligations under Article 36 of the Vienna Convention on Consular Relations, and other bilateral treaties. Bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 of the Vienna Convention provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention. At the time of this amendment, many questions remain unresolved concerning Article 36, including whether it creates

individual rights that may be invoked in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). This amendment does not address those questions.

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§ 440 Procedures for the Judicial Conference's Committee on Rules of Practice and Procedure and Its Advisory Rules Committees

§ 440.10 Overview

The Rules Enabling Act, 28 U.S.C. §§ 2071–2077, authorizes the Supreme Court to prescribe general rules of practice and procedure and rules of evidence for the federal courts. Under the Act, the Judicial Conference must appoint a standing committee, and may appoint advisory committees to recommend new and amended rules. Section 2073 requires the Judicial Conference to publish the procedures that govern the work of the Committee on Rules of Practice and Procedure (the "Standing Committee") and its Advisory Committees on the Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure and on the Evidence Rules. *See* 28 U.S.C. § 2073(a)(1). These procedures do not limit the rules committees' authority. Failure to comply with them does not invalidate any rules committee action. *Cf.* 28 U.S.C. § 2073(e).

§ 440.20 Advisory Committees

§ 440.20.10 *Functions*

Each advisory committee must engage in "a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use" in its field, taking into consideration suggestions and recommendations received from any source, new statutes and court decisions affecting the rules, and legal commentary. *See* 28 U.S.C. § 331.

§ 440.20.20 *Suggestions and Recommendations*

Suggestions and recommendations on the rules are submitted to the Secretary of the Standing Committee at the Administrative Office of the United States Courts, Washington, D.C. The Secretary will acknowledge the suggestions or recommendations and refer them to the appropriate advisory committee. If the Standing Committee takes formal action on them, that action will be reflected in the Standing Committee's minutes, which are posted on the judiciary's rulemaking website.

§ 440.20.30 *Drafting Rule Changes*

(a) *Meetings*

Each advisory committee meets at the times and places that the chair designates. Advisory committee meetings must be open to the public, except when the committee — in open session and with a majority present — determines that it is in the public

interest to have all or part of the meeting closed and states the reason. Each meeting must be preceded by notice of the time and place, published in the *Federal Register* and on the judiciary's rulemaking website, sufficiently in advance to permit interested persons to attend.

(b) *Preparing Draft Changes*

The reporter assigned to each advisory committee should prepare for the committee, under the direction of the committee or its chair, draft rule changes, committee notes explaining their purpose, and copies or summaries of written recommendations and suggestions received by the committee.

(c) *Considering Draft Changes*

The advisory committee studies the rules' operation and effect. It meets to consider proposed new and amended rules (together with committee notes), whether changes should be made, and whether they should be submitted to the Standing Committee with a recommendation to approve for publication. The submission must be accompanied by a written report explaining the advisory committee's action and its evaluation of competing considerations.

§ 440.20.40 *Publication and Public Hearings*

(a) *Publication*

Before any proposed rule change is published, the Standing Committee must approve publication. The Secretary then arranges for printing and circulating the proposed change to the bench, bar, and public. Publication should be as wide as possible. The proposed change must be published in the *Federal Register* and on the judiciary's rulemaking website. The Secretary must:

(1) notify members of Congress, federal judges, and the chief justice of each state's highest court of the proposed change, with a link to the judiciary's rulemaking website; and
(2) provide copies of the proposed change to legal-publishing firms with a request to timely include it in publications.

(b) *Public Comment Period*

A public comment period on the proposed change must extend for at least six months after notice is published in the *Federal Register*, unless a shorter period is approved under paragraph (d) of this section.

(c) *Hearings*

The advisory committee must conduct public hearings on the proposed change unless eliminating them is approved under paragraph (d) of this section or not enough witnesses ask to testify at a particular hearing. The hearings are held at the times and places that the advisory committee's chair determines. Notice of the times and places must be published in the *Federal Register* and on the judiciary's rulemaking website. The hearings must be recorded. Whenever possible, a transcript should be produced by a qualified court reporter.

(d) *Expedited Procedures*

The Standing Committee may shorten the public comment period or eliminate public hearings if it determines that the administration of justice requires a proposed rule change to be expedited and that appropriate notice to the public can still be provided and public comment obtained. The Standing Committee may also eliminate public notice and comment for a technical or conforming amendment if the Committee determines that they are unnecessary. When an exception is made, the chair must advise the Judicial Conference and provide the reasons.

§ 440.20.50 *Procedures After the Comment Period*

(a) *Summary of Comments*

When the public comment period ends, the reporter must prepare a summary of the written comments received and of the testimony presented at public hearings. If the number of comments is very large, the reporter may summarize and aggregate similar individual comments, identifying the source of each one.

(b) *Advisory Committee Review; Republication*

The advisory committee reviews the proposed change in light of any comments and testimony. If the advisory committee makes substantial changes, the proposed rule should be republished for an additional period of public comment unless the advisory committee determines that republication would not be necessary to achieve adequate public comment and would not assist the work of the rules committees.

(c) *Submission to the Standing Committee*

The advisory committee submits to the Standing Committee the proposed change and committee note that it recommends for approval. Each submission must:

(1) be accompanied by a separate report of the comments received;
(2) explain the changes made after the original publication; and
(3) include an explanation of competing considerations examined by the advisory committee.

§ 440.20.60 *Preparing Minutes and Maintaining Records*

(a) *Minutes of Meetings*

The advisory committee's chair arranges for preparing the minutes of the committee meetings.

(b) *Records*

The advisory committee's records consist of:

- written suggestions received from the public;
- written comments received from the public on drafts of proposed rules;
- the committee's responses to public suggestions and comments;
- other correspondence with the public about proposed rule changes;
- electronic recordings and transcripts of public hearings (when prepared);
- the reporter's summaries of public comments and of testimony from public hearings;
- agenda books and materials prepared for committee meetings;
- minutes of committee meetings;
- approved drafts of rule changes; and
- reports to the Standing Committee

(c) *Public Access to Records*

The records must be posted on the judiciary's rulemaking website, except for general public correspondence about proposed rule changes and electronic recordings of hearings when transcripts are prepared. This correspondence and archived records are maintained by the Administrative Office of the United States Courts and are available for public inspection. Minutes of a closed meeting may be made available to the public but with any deletions necessary to avoid frustrating the purpose of closing the meeting under § 440.20.30(a).

§ 440.30 Standing Committee

§ 440.30.10 *Functions*

The Standing Committee's functions include:

(1) coordinating the work of the advisory committees;
(2) suggesting proposals for them to study;
(3) considering proposals they recommend for publication for public comment; and
(4) for proposed rule changes that have completed that process, deciding whether to accept or modify the proposals and transmit them with its own recommendation to the Judicial Conference, recommit them to the advisory committee for further study and consideration, or reject them.

§ 440.30.20 *Procedures*

(a) *Meetings*

The Standing Committee meets at the times and places that the chair designates. Committee meetings must be open to the public, except when the Committee — in open session and with a majority present — determines that it is in the public interest to have all or part of the meeting closed and states the reason. Each meeting must be preceded by notice of the time and place, published in the *Federal Register* and on the judiciary's rulemaking website, sufficiently in advance to permit interested persons to attend.

(b) *Attendance by the Advisory Committee Chairs and Reporters*

The advisory committees' chairs and reporters should attend the Standing Committee meetings to present their committees' proposed rule changes and committee notes, to inform the Standing Committee about ongoing work, and to participate in the discussions.

(c) *Action on Proposed Rule Changes or Committee Notes*

The Standing Committee may accept, reject, or modify a proposed change or committee note, or may return the proposal to the advisory committee with instructions or recommendations.

(d) *Transmission to the Judicial Conference*

The Standing Committee must transmit to the Judicial Conference the proposed rule changes and committee notes that it approves, together with the advisory committee report. The Standing Committee's report includes its own recommendations and explains any changes that it made.

§ 440.30.30 *Preparing Minutes and Maintaining Records*

(a) *Minutes of Meetings*

The Secretary prepares minutes of Standing Committee meetings.

(b) *Records*

The Standing Committee's records consist of:

- the minutes of Standing Committee and advisory committee meetings;
- agenda books and materials prepared for Standing Committee meetings;
- reports to the Judicial Conference; and
- official correspondence about rule changes, including correspondence with advisory committee chairs

(c) *Public Access to Records*

The records must be posted on the judiciary's rulemaking website, except for official correspondence about rule changes. This correspondence and archived records are maintained by the Administrative Office of the United States Courts and are available for public inspection. Minutes of a closed meeting may be made available to the public but with any deletions necessary to avoid frustrating the purpose of closing the meeting under § 440.30.20(a).

PROPOSED REVISED PROCEDURES "REDLINE" VERSION

~~PROCEDURES FOR THE CONDUCT OF BUSINESS BY THE JUDICIAL CONFERENCE COMMITTEES ON RULES OF PRACTICE AND PROCEDURE~~

~~Scope~~

~~These procedures govern the operations of~~§ 440 Procedures for the Judicial Conference's Committee on Rules of Practice~~, Procedure, and Evidence (Standing Committee) and the various Judicial Conference Advisory Committees on Rules of Practice and Procedure in drafting and recommending new~~ and Procedure and Its Advisory Rules Committees

§ 440.10 Overview

The Rules Enabling Act, 28 U.S.C. §§ 2071–2077, authorizes the Supreme Court to prescribe general rules of practice~~,~~ and procedure~~, and evidence and amendments to existing rules.~~

~~Part I -~~ and rules of evidence for the federal courts. Under the Act, the Judicial Conference must appoint a standing committee, and may appoint advisory committees to recommend new and amended rules. Section 2073 requires the Judicial Conference to publish the procedures that govern the work of the Committee on Rules of Practice and Procedure (the "Standing Committee") and its Advisory Committees

~~1. Functions~~

~~Each~~ on the Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure and on the Evidence Rules. *See* 28 U.S.C. § 2073(a)(1). These procedures do not limit the rules committees' authority. Failure to comply with them does not invalidate any rules committee action. *Cf.* 28 U.S.C. § 2073(e).

§ 440.20 **Advisory ~~Committee shall carry on "a~~**Committees

§ 440.20.10 *Functions*

Each advisory committee must engage in "a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use~~"~~" in its ~~particular~~ field, taking into consideration suggestions and recommendations received from any source, new statutes and court decisions affecting the rules, and legal commentary. *See* 28 U.S.C. § 331.

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§ 440.20.—20 ***Suggestions and Recommendations***

Suggestions and recommendations ~~with respect to~~on the rules ~~should be sent to the Secretary, Committee on Rules of Practice and Procedure,~~are submitted to the Secretary of the Standing Committee at the Administrative Office of the United States Courts, Washington, D.C. ~~20544, who shall, to the extent feasible, acknowledge in writing every written suggestion~~ The Secretary will acknowledge the suggestions or recommendation~~ so received~~ s and ~~shall~~ refer ~~all suggestions and recommendations~~them to the appropriate ~~A~~advisory committee. If the Standing Committee~~. To the extent feasible, the Secretary, in consultation with the Chairman of the Advisory Committee, shall advise the person making a recommendation or suggestion of the action taken thereon by the Advisory Committee.~~

~~3. Drafting Rules Changes~~

~~a. An Advisory Committee shall meet at such~~ takes formal action on them, that action will be reflected in the Standing Committee's minutes, which are posted on the judiciary's rulemaking website.

§ 440.20.30 *Drafting Rule Changes*

(a) *Meetings*

Each advisory committee meets at the times and places ~~as~~that the ~~Chairman may authorize~~chair designates. ~~All~~ Advisory ~~C~~committee meetings ~~shall~~must be open to the public, except when the committee ~~so meeting,~~ — in open session and with a majority present~~,~~ — determines that it is in the public interest ~~that~~to have all or part ~~of the remainder~~ of the meeting ~~on that day shall be~~ closed ~~to the public~~ and states the reason ~~for closing the meeting.~~ Each meeting ~~shall~~must be preceded by notice of the time and place ~~of the meeting, including publication~~ published in the *Federal Register* and on the judiciary's rulemaking website, ~~sufficient~~sufficiently in advance to permit interested persons to attend.

(b) *Preparing Draft Changes*

~~b.~~ The reporter assigned to each ~~A~~advisory ~~C~~committee ~~shall~~should prepare for the committee, under the direction of the ~~C~~committee or its ~~Chairman~~chair~~, prepare initial~~ draft rules changes, "~~C~~committee ~~N~~notes" explaining their purpose, and ~~intent,~~ copies or summaries of ~~all~~ written recommendations and suggestions received by the ~~Advisory Committee, and shall forward them to the Advisory C~~committee.

~~c. The Advisory Committee shall then meet to consider the draft proposed new rules and rules amendments, together with Committee Notes, make revisions therein, and submit them for approval of publication~~

(c) *Considering Draft Changes*

The advisory committee studies the rules' operation and effect. It meets to consider

proposed new and amended rules (together with committee notes), whether changes should be made, and whether they should be submitted to the Standing Committee~~, or its Chairman, with~~ with a recommendation to approve for publication. The submission must be accompanied by a written report explaining the ~~Committee's~~advisory committee's action~~, including any minority or other separate views~~ and its evaluation of competing considerations.

~~4~~ § ~~440.~~—20.40 ***Publication and Public Hearings***

(a) ~~a. When publication~~*Publication*

Before any proposed rule change is ~~approved by~~published, the Standing Committee~~, t~~ must approve publication. The Secretary ~~shall~~ then arranges for ~~the~~ printing and ~~circulation of~~circulating the proposed ~~rules~~ changes to the bench ~~and~~, bar, and ~~to the~~ public ~~generally.~~. Publication ~~shall~~should be as wide as ~~practicable~~possible. ~~Notice of t~~The proposed ~~rule shall~~change must be published in the *Federal Register* ~~*and copies provided to appropriate legal publishing*~~and on the judiciary's rulemaking website. The Secretary must:

(1) notify members of Congress, federal judges, and the chief justice of each state's highest court of the proposed change, with a link to the judiciary's rulemaking website; and
(2) provide copies of the proposed change to legal-publishing firms with a request ~~that they be~~to timely included ~~in their publications. The Secretary shall also provide copies to the chief justice of the highest court of each state and, insofar as is practicable, to all individuals and organizations that request them.~~

~~b. In order to provide full notice and opportunity for comment on proposed rule changes, a period of~~ it in publications.

(b) *Public Comment Period*

A public comment period on the proposed change must extend for at least six months ~~from the time of publication of~~after notice is published in the *Federal Register* ~~*shall be permitted*~~, unless a shorter period is approved under ~~the provisions of subparagraph~~ paragraph (d) of this ~~paragraph~~section.

(c) ~~c.~~*Hearings*

~~An A~~The advisory ~~C~~committee ~~shall~~must conduct public hearings on ~~all~~the proposed ~~rules~~ changes unless ~~elimination of such hearings~~eliminating them is approved under ~~the provisions of subparagraph d of this paragraph. The hearings shall be held at such~~paragraph (d) of this section or not enough witnesses ask to testify at a particular hearing. The hearings are held at the times and places ~~as determined by the chairman of the Advisory Committee and shall be preceded by adequate notice, including~~

~~publication in the~~ that the advisory committee's chair determines. Notice of the times and places must be published in the *Federal Register*~~. Proceedings shall be recorded and a transcript prepared. Subject to the provisions of paragraph six, such transcript shall be available for public inspection.~~

~~d. Exceptions to the time period for public comment and the public hearing requirement may be granted by the~~ and on the judiciary's rulemaking website. The hearings must be recorded. Whenever possible, a transcript should be produced by a qualified court reporter.

(d) *Expedited Procedures*

The Standing Committee ~~or its chairman when~~may shorten the ~~Standing Committee~~public comment period or ~~its chairman~~eliminate public hearings if it determines that the administration of justice requires ~~that~~ a proposed rule change ~~should~~ to be expedited and that appropriate notice to the public ~~notice and comment may be achieved by a shortened comment period, without public hearings, or both.~~can still be provided and public comment obtained. The Standing Committee may also eliminate ~~the~~ public notice and comment ~~requirement if, in the case of~~for a technical or conforming amendment~~, it~~ if the Committee determines that ~~notice and comment~~they are ~~not appropriate or necessary~~unnecessary. ~~Whenever such~~ When an exception is made, the ~~Standing Committee shall~~chair must advise the Judicial Conference ~~of the exception and the reasons for the exception.~~

~~5. Subsequent Procedures~~

~~a. At the conclusion of the~~and provide the reasons.

§ 440.20.50 *Procedures After the Comment Period*

(a) *Summary of Comments*

When the public comment period ends, the reporter ~~shall~~ must prepare a summary of the written comments received and of the testimony presented at public hearings. ~~The~~ If the number of comments is very large, the reporter may summarize and aggregate similar individual comments, identifying the source of each one.

(b) *Advisory Committee ~~shall review the proposed rules changes in the light of the~~Review; Republication*

The advisory committee reviews the proposed change in light of any comments and testimony. If the ~~A~~advisory ~~C~~committee makes ~~any~~ substantial changes, the proposed rule should be republished for an additional period ~~for~~of public ~~notice and comment may be provided.~~

~~b. The Advisory Committee shall submit proposed rules changes and Committee Notes, as finally agreed upon,~~ comment unless the advisory committee determines that republication would not be necessary to achieve adequate public comment

and would not assist the work of the rules committees.

(c) *Submission to the Standing Committee*

The advisory committee submits to the Standing Committee the proposed change and committee note that it recommends for approval. Each submission ~~shall~~ must:

(1) be accompanied by a separate report of the comments received ~~and shall~~;
(2) explain ~~any~~the changes made ~~subsequent to~~after the original publication~~.~~ ~~The submission shall also include minority views of Advisory Committee members who wish to have separate views recorded.~~

~~6. Records~~

~~a. The Chairman of the Advisory Committee shall arrange for the preparation of minutes of all Advisory Committee~~; and
(3) include an explanation of competing considerations examined by the advisory committee.

§ 440.20.60 *Preparing Minutes and Maintaining Records*

(a) *Minutes of Meetings*

The advisory committee's chair arranges for preparing the minutes of the committee meetings.

(b~~.~~) *Records*

The advisory committee's records ~~of an Advisory Committee shall~~ consist of ~~the~~:

- written suggestions received from the public; ~~the~~
- written comments received from the public on drafts of proposed rules~~.~~ ~~responses thereto,~~;
- the committee's responses to public suggestions and comments;
- other correspondence with the public about proposed rule changes;
- electronic recordings and transcripts of public hearings~~, and summaries prepared by the reporter; all correspondence relating to proposed rules changes; minutes of Advisory Committee~~ (when prepared);
- the reporter's summaries of public comments and of testimony from public hearings;
- agenda books and materials prepared for committee meetings;
- minutes of committee meetings;
- approved drafts of rules changes; and~~-~~
- reports to the Standing Committee~~. The records shall be maintained at~~

(c) *Public Access to Records*

The records must be posted on the judiciary's rulemaking website, except for general

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public correspondence about proposed rule changes and electronic recordings of hearings when transcripts are prepared. This correspondence and archived records are maintained by the Administrative Office of the United States Courts ~~for a minimum of two years~~ and ~~shall be~~are available for public inspection~~during reasonable office hours. Thereafter the records may be transferred to a Government Records Center in accordance with applicable Government retention and disposition schedules.~~

~~c. Any portion of minutes, relating to~~. Minutes of a closed meeting ~~and~~may be made available to the public~~, may contain such~~ but with any deletions~~as may be~~ necessary to avoid frustrating the purposes of closing the meeting ~~as provided in subparagraph 3a.~~

~~d. Copies of records shall be furnished to any person upon payment of a reasonable fee for the cost of reproduction.~~

~~**Part H -**~~under § 440.20.30(a).

§ 440.30 Standing Committee

~~7~~ § 440.~~—~~30.10 ***Functions***

The Standing Committee~~shall coordinate~~'s functions include:

(1) coordinating the work of the ~~several Advisory Committees, make suggestions of proposals to be studied by them, consider proposals recommended by the Advisory Committees, and transmit such proposals with its~~advisory committees;
(2) suggesting proposals for them to study;
(3) considering proposals they recommend for publication for public comment; and
(4) for proposed rule changes that have completed that process, deciding whether to accept or modify the proposals and transmit them with its own recommendation to the Judicial Conference, ~~or~~ recommit them to the ~~appropriate Advisory C~~advisory committee for further study and consideration, or reject them.

~~8~~ § 440.~~—~~30.20 ***Procedures***

(a~~.~~) *Meetings*

The Standing Committee ~~shall~~ meets at ~~such~~the times and places ~~as~~that the ~~Chairman may authorize~~chair designates. ~~All~~ Committee meetings ~~shall~~must be open to the public, except when the ~~c~~Committee ~~so meeting,~~ in open session and with a majority present~~,~~ determines that it is in the public interest ~~that~~to have all or part of the ~~remainder of the~~ meeting ~~on that day shall be~~ closed~~to the public~~ and states the reason~~for closing the meeting.~~. Each meeting ~~shall~~must be preceded by notice of the time and place~~of the meeting, including publication~~ published in the *Federal Register* and on the judiciary's rulemaking website, ~~sufficient~~sufficiently in advance

to permit interested persons to attend.

~~b. When an Advisory Committee's final recommendations for rules changes have been submitted, the Chairman and Reporter of~~ (b) *Attendance by the Advisory Committee ~~shall~~Chairs and Reporters*

The advisory committees' chairs and reporters should attend the Standing Committee meetings to present ~~the proposed rules changes and~~their committees' proposed rule changes and committee notes, to inform the Standing Committee about ongoing work, and to participate in the discussions.

(c) *Action on Proposed Rule Changes or Committee Notes~~.~~*

~~c.~~ The Standing Committee may accept, reject, or modify a ~~proposal. If a modification effects a substantial change, the proposal will be returned to the Advisory Committee with appropriate instructions.~~

~~d.~~proposed change or committee note, or may return the proposal to the advisory committee with instructions or recommendations.

(d) *Transmission to the Judicial Conference*

The Standing Committee ~~shall~~must transmit to the Judicial Conference the proposed rules changes and ~~C~~committee ~~N~~notes ~~approved by it~~ that it approves, together with the ~~A~~advisory ~~C~~committee report. The Standing Committee~~'~~'s report ~~to the Judicial Conference shall~~ includes its own recommendations and explains any changes that it ~~has~~ made.

~~9. Records~~

~~a. The Secretary shall prepare minutes of all~~

§ 440.30.30 *Preparing Minutes and Maintaining Records*

(a) *Minutes of Meetings*

The Secretary prepares minutes of Standing Committee meetings.

~~(b.)~~ ~~The records of the~~*Records*

The Standing Committee ~~shall~~ 's records consist of~~:~~:

- the minutes of Standing ~~and Advisory~~Committee and advisory committee meetings;
- agenda books and materials prepared for Standing Committee meetings~~,~~;
- reports to the Judicial Conference~~;~~; and
- official correspondence ~~concerning~~about rules changes, including correspondence with ~~A~~advisory ~~C~~committee ~~Chairmen. The records shall be maintained at~~chairs

(c) *Public Access to Records*

The records must be posted on the judiciary's rulemaking website, except for official correspondence about rule changes. This correspondence and archived records are maintained by the Administrative Office of the United States Courts ~~for a minimum of two years~~ and ~~shall be~~are available for public inspection~~ during reasonable office hours. Thereafter the records may be transferred to a Government Records Center in accordance with applicable Government retention and disposition schedules.~~

~~c. Copies of records shall be furnished to any person upon payment of a reasonable fee for the cost of reproduction.~~

. Minutes of a closed meeting may be made available to the public but with any deletions necessary to avoid frustrating the purpose of closing the meeting under § 440.30.20(a).

PROCEDURES CURRENTLY IN EFFECT

PROCEDURES FOR THE CONDUCT OF BUSINESS BY THE JUDICIAL CONFERENCE COMMITTEES ON RULES OF PRACTICE AND PROCEDURE

Scope

These procedures govern the operations of the Judicial Conference Committee on Rules of Practice, Procedure, and Evidence (Standing Committee) and the various Judicial Conference Advisory Committees on Rules of Practice and Procedure in drafting and recommending new rules of practice, procedure, and evidence and amendments to existing rules.

Part I - Advisory Committees

1. Functions

   Each Advisory Committee shall carry on "a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use" in its particular field, taking into consideration suggestions and recommendations received from any source, new statutes and court decisions affecting the rules, and legal commentary.

2. Suggestions and Recommendations

   Suggestions and recommendations with respect to the rules should be sent to the Secretary, Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts, Washington, D.C. 20544, who shall, to the extent feasible, acknowledge in writing every written suggestion or recommendation so received and shall refer all suggestions and

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recommendations to the appropriate Advisory Committee. To the extent feasible, the Secretary, in consultation with the Chairman of the Advisory Committee, shall advise the person making a recommendation or suggestion of the action taken thereon by the Advisory Committee.

3. Drafting Rules Changes

   a. An Advisory Committee shall meet at such times and places as the Chairman may authorize. All Advisory Committee meetings shall be open to the public, except when the committee so meeting, in open session and with a majority present, determines that it is in the public interest that all or part of the remainder of the meeting on that day shall be closed to the public and states the reason for closing the meeting. Each meeting shall be preceded by notice of the time and place of the meeting, including publication in the Federal Register, sufficient to permit interested persons to attend.

   b. The reporter assigned to each Advisory Committee shall, under the direction of the Committee or its Chairman, prepare initial draft rules changes, "Committee Notes" explaining their purpose and intent, copies or summaries of all written recommendations and suggestions received by the Advisory Committee, and shall forward them to the Advisory Committee.

   c. The Advisory Committee shall then meet to consider the draft proposed new rules and rules amendments, together with Committee Notes, make revisions therein, and submit them for approval of publication to the Standing Committee, or its Chairman, with a written report explaining the Committee's action, including any minority or other separate views.

4. Publication and Public Hearings

a. When publication is approved by the Standing Committee, the Secretary shall arrange for the printing and circulation of the proposed rules changes to the bench and bar, and to the public generally. Publication shall be as wide as practicable. Notice of the proposed rule shall be published in the Federal Register and copies provided to appropriate legal publishing firms with a request that they be timely included in their publications. The Secretary shall also provide copies to the chief justice of the highest court of each state and, insofar as is practicable, to all individuals and organizations that request them.

b. In order to provide full notice and opportunity for comment on proposed rule changes, a period of at least six months from the time of publication of notice in the Federal Register shall be permitted, unless a shorter period is approved under the provisions of subparagraph d of this paragraph.

c. An Advisory Committee shall conduct public hearings on all proposed rules changes unless elimination of such hearings is approved under the provisions of subparagraph d of this paragraph. The hearings shall be held at such times and places as determined by the chairman of the Advisory Committee and shall be preceded by adequate notice, including publication in the Federal Register. Proceedings shall be recorded and a transcript prepared. Subject to the provisions of paragraph six, such transcript shall be available for public inspection.

d. Exceptions to the time period for public comment and the public hearing requirement may be granted by the

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Standing Committee or its chairman when the Standing Committee or its chairman determines that the administration of justice requires that a proposed rule change should be expedited and that appropriate public notice and comment may be achieved by a shortened comment period, without public hearings, or both. The Standing Committee may eliminate the public notice and comment requirement if, in the case of a technical or conforming amendment, it determines that notice and comment are not appropriate or necessary. Whenever such an exception is made, the Standing Committee shall advise the Judicial Conference of the exception and the reasons for the exception.

5. Subsequent Procedures

a. At the conclusion of the comment period the reporter shall prepare a summary of the written comments received and the testimony presented at public hearings. The Advisory Committee shall review the proposed rules changes in the light of the comments and testimony. If the Advisory Committee makes any substantial change, an additional period for public notice and comment may be provided.

b. The Advisory Committee shall submit proposed rules changes and Committee Notes, as finally agreed upon, to the Standing Committee. Each submission shall be accompanied by a separate report of the comments received and shall explain any changes made subsequent to the original publication. The submission shall also include minority views of Advisory Committee members who wish to have separate views recorded.

6. Records

a. The Chairman of the Advisory Committee shall arrange for the preparation of minutes of all Advisory Committee meetings.

b. The records of an Advisory Committee shall consist of the written suggestions received from the public; the written comments received on drafts of proposed rules, responses thereto, transcripts of public hearings, and summaries prepared by the reporter; all correspondence relating to proposed rules changes; minutes of Advisory Committee meetings; approved drafts of rules changes; and reports to the Standing Committee. The records shall be maintained at the Administrative Office of the United States Courts for a minimum of two years and shall be available for public inspection during reasonable office hours. Thereafter the records may be transferred to a Government Records Center in accordance with applicable Government retention and disposition schedules.

c. Any portion of minutes, relating to a closed meeting and made available to the public, may contain such deletions as may be necessary to avoid frustrating the purposes of closing the meeting as provided in subparagraph 3a.

d. Copies of records shall be furnished to any person upon payment of a reasonable fee for the cost of reproduction.

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Part II - Standing Committee

7. Functions

The Standing Committee shall coordinate the work of the several Advisory Committees, make suggestions of proposals to be studied by them, consider proposals recommended by the Advisory Committees, and transmit such proposals with its recommendation to the Judicial Conference, or recommit them to the appropriate Advisory Committee for further study and consideration.

8. Procedures

a. The Standing Committee shall meet at such times and places as the Chairman may authorize. All Committee meetings shall be open to the public, except when the committee so meeting, in open session and with a majority present, determines that it is in the public interest that all or part of the remainder of the meeting on that day shall be closed to the public and states the reason for closing the meeting. Each meeting shall be preceded by notice of the time and place of the meeting, including publication in the Federal Register, sufficient to permit interested persons to attend.

b. When an Advisory Committee's final recommendations for rules changes have been submitted, the Chairman and Reporter of the Advisory Committee shall attend the Standing Committee meeting to present the proposed rules changes and Committee Notes.

c. The Standing Committee may accept, reject, or modify a proposal. If a modification effects a substantial change, the proposal will be returned to the Advisory Committee with appropriate instructions.

d. The Standing Committee shall transmit to the Judicial Conference the proposed rules changes and Committee Notes approved by it, together with the Advisory Committee report. The Standing Committee's report to the Judicial Conference shall include its recommendations and explain any changes it has made.

9. Records

a. The Secretary shall prepare minutes of all Standing Committee meetings.

b. The records of the Standing Committee shall consist of the minutes of Standing and Advisory Committee meetings, reports to the Judicial Conference, and correspondence concerning rules changes including correspondence with Advisory Committee Chairmen. The records shall be maintained at the Administrative Office of the United States Courts for a minimum of two years and shall be available for public inspection during reasonable office hours. Thereafter the records may be transferred to a Government Records Center in accordance with applicable Government retention and disposition schedules.

c. Copies of records shall be furnished to any person upon payment of a reasonable fee for the cost of reproduction.

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COMMITTEE ON RULES
OF
PRACTICE AND PROCEDURE

PHOENIX, AZ
JANUARY 5-6, 2012

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AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JANUARY 5-6, 2012

1. Welcome and Opening Remarks

   A. Welcome to new members

   B. Report on September 2011 Judicial Conference session

   C. Transmission of Judicial Conference-approved proposed rule amendments to Supreme Court

2. **ACTION –** Approving minutes of the June 2011 committee meeting

3. Legislative Report

4. Report of the Administrative Office

5. Report of the Federal Judicial Center

6. Report of the Civil Rules Committee

   A. Preservation and sanctions
   B. Rule 45 published for public comment
   C. Work relating to the 2010 Duke Conference
   D. Pleading
   E. Forms
   F. Formation of Rule 23 subcommittee
   G. Minutes and other informational items

7. Panel on Class Actions

8. Report of the Bankruptcy Rules Committee

   A. **ACTION –** Approving publishing for public comment proposed amendments to Bankruptcy Rules 7054 and 7008(b)
   B. Interim report on the revision of Part VIII of the Bankruptcy Rules, governing appeals
   C. Rules and forms published for public comment
   D. Minutes and other informational items

9. Report of the Criminal Rules Committee

   A. **ACTION –** Approving and transmitting to the Judicial Conference proposed

technical and conforming amendments to Criminal Rule 16

B. Minutes and other informational items

10. Report of the Appellate Rules Committee

A. Minutes and other informational items

11. Report of the Evidence Rules Committee

A. Minutes and other informational items

12. Five-Year Review of Committee Jurisdiction and Structure

13. Next Meeting: June 11–12, 2012

COMMITTEES ON RULES OF PRACTICE AND PROCEDURE
CHAIRS and REPORTERS

Chair, Committee on Rules of Practice and Procedure ***(Standing Committee)***	**Honorable Mark R. Kravitz** United States District Court Richard C. Lee United States Courthouse 141 Church Street New Haven, CT 06510
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Reporter, Standing Committee	**Professor Daniel R. Coquillette** Boston College Law School 885 Centre Street Newton Centre, MA 02459
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Committee on Rules of Practice and Procedure

To carry on a continuous study of the operation and effect of the general rules of practice and procedure.

Members	Position	District/Circuit	Start Date	End Date
Mark R. Kravitz Chair	D	Connecticut	2011	2014
James Cole*	DOJ	Washington, DC	----	Open
Dean C. Colson	ESQ	Florida	2009	2012
Roy T. Englert, Jr.	ESQ	Washington, DC	2010	2013
Gregory G. Garre	ESQ	Washington, DC	2011	2014
Neil M. Gorsuch	C	Tenth Circuit	2010	2013
Marilyn L. Huff	D	California (Southern)	2007	2013
Wallace B. Jefferson	CJUST	Texas	2010	2013
David F. Levi	ACAD	North Carolina	2009	2012
Patrick J. Schiltz	D	Minnesota	2010	2013
James A. Teilborg	D	Arizona	2006	2012
Richard C. Wesley	C	Second Circuit	2011	2014
Diane P. Wood	C	Seventh Circuit	2007	2013
Daniel Coquillette Reporter	ACAD	Massachusetts	1985	Open

Secretary: Peter G. McCabe 202-502-1800
Principal Staff: Jonathan C. Rose 202-502-1820

* Ex-officio

Legend: **C**= circuit judge; **CFC**=Court of Federal Claims; **D** = district judge; **M** = magistrate judge; **B** = bankruptcy judge; **DIR, AO** = Director, Administrative Office of U.S. Courts; **JUST** = chief or associate justice, state supreme court (or equivalent presiding judge); **FPD** = Federal Public Defender; **ACAD** = academician; **ESQ** = private attorney; **DOJ** = Department of Justice; **DOS** = Department of State; **CIT** = Court of International Trade.

LIAISON MEMBERS

Liaison for the Advisory Committee on Appellate Rules	**Dean C. Colson**	***(Standing)***
Liaison for the Advisory Committee on Bankruptcy Rules	**Judge James A. Teilborg**	***(Standing)***
Liaison for the Advisory Committee on Civil Rules	**Judge Arthur I. Harris**	***(Bankruptcy)***
Liaison for the Advisory Committee on Civil Rules	**Judge Diane P. Wood**	***(Standing)***
Liaison for the Advisory Committee on Criminal Rules	**Judge Marilyn Huff**	***(Standing)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Judith H. Wizmur**	***(Bankruptcy)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Paul S. Diamond**	***(Civil)***
Liaison for the Advisory Committee on Evidence Rules	**Judge John F. Keenan**	***(Criminal)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Richard C. Wesley**	***(Standing)***

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TAB 1-B

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

PRELIMINARY REPORT
JUDICIAL CONFERENCE ACTIONS
September 13, 2011

****

All the following matters requiring the expenditure of funds were approved by the Judicial Conference *subject to the availability of funds* and to whatever priorities the Conference might establish for the use of available resources.

****

At its September 13, 2011 session, the Judicial Conference of the United States —

EXECUTIVE COMMITTEE

Approved a resolution in recognition of the substantial contributions made by the Judicial Conference committee chairs whose terms of service end in 2011.

Approved a resolution in honor of outgoing Administrative Office Director James C. Duff.

Delegated to the Director of the Administrative Office, the Director of the Federal Judicial Center, and the Chair of the United States Sentencing Commission the authority to designate supervisors and managers of their respective agencies with regard to eligibility for professional liability insurance reimbursement. This authority may be re-delegated to executives or human resources officials of the respective judicial branch agencies.

COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM

With regard to official duty stations for bankruptcy judges:

a. Authorized the designation of Los Angeles as the duty station for a vacant bankruptcy judgeship in the Central District of California; and

b. Authorized the designation of Charleston as the duty station for Chief Bankruptcy Judge John E. Waites in the District of South Carolina.

COMMITTEE ON THE BUDGET

Approved the Budget Committee's budget request for fiscal year 2013, subject to amendments necessary as a result of (a) new legislation, (b) actions of the Judicial Conference, or (c) any other reason the Executive Committee considers necessary and appropriate.

Approved the expansion of reprogramming authority so that local funds can be reprogrammed among court units (regardless of type, geographical location, or judicial district or circuit) for voluntary shared services arrangements. The new reprogramming authority is subject to the approval of the Administrative Office, and semi-annual reports will be provided to the Budget Committee.

COMMITTEE ON CODES OF CONDUCT

Approved proposed Model Forms for Waiver of Judicial Disqualification and delegated to the Committee on Codes of Conduct the authority to make technical, conforming, and non-controversial changes, as necessary.

Approved a revised Model Confidentiality Statement (Form AO-306) and delegated to the Committee on Codes of Conduct the authority to make technical, conforming, and non-controversial changes, as necessary.

Approved a revised Application for Approval of Compensated Teaching Activities (Form AO-304) and delegated to the Committee on Codes of Conduct the authority to make technical, conforming, and non-controversial changes, as necessary.

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT

Took the following actions with regard to fees:

a. Amended the miscellaneous fee schedules for the courts of appeals, district courts, bankruptcy courts, U.S. Court of Federal Claims, and Judicial Panel on Multidistrict Litigation to increase certain fees for inflation, to be effective November 1, 2011; and

b. Amended the Electronic Public Access (EPA) Fee Schedule to—

   (1) Increase the EPA fee to $.10 per page;

   (2) Suspend for three years the increase for local, state, and federal government agencies; and

   (3) Provide that no fee be owed until an account holder accrues charges of more than $15 in a quarterly billing cycle.

Endorsed a courtroom sharing policy for bankruptcy judges in new courthouse and courtroom construction for inclusion in the *U.S. Courts Design Guide*.

Approved the removal of the three-year electronic record transfer reference from the records disposition schedules for civil and criminal case files.

Approved amending the district court records disposition schedule for criminal case files to designate non-trial cases pertaining to embezzlement, fraud, or bribery by a public official (nature of suit codes 4350 and 7100) as permanent records.

Approved an amended bankruptcy court records disposition schedule.

Approved an exception to the policy restricting PACER access to bankruptcy filings filed before December 1, 2003 in cases closed for more than one year, as follows:

> Access may be granted pursuant to a judicial finding that such access is necessary for determining class member certification, subject to the following limitations to be set forth in the judge's order:
>
> - Access limited to a particular identified list of cases or a specified universe of cases (e.g., lift stay motions filed by a specified lender in a limited period of time);
> - Time limitations on the period of access (corresponding to the scope and number of potential cases involved);
> - Inclusion of a verified statement of counsel that access would be solely for the purpose of determining class member status and that counsel is aware that unauthorized use is prohibited and may result in sanctions; and
> - Any other conditions, limitations, or direction that the judge deems necessary under the specific circumstances of the request.

Approved the following policy regarding the sealing of entire civil case files:

> An entire civil case file should only be sealed consistent with the following criteria:
>
> a. Sealing the entire civil case file is required by statute or rule or justified by a showing of extraordinary circumstances and the absence of narrower feasible and effective alternatives (such as sealing discrete documents or redacting information), so that sealing an entire case file is a last resort;
>
> b. A judge makes or promptly reviews the decision to seal a civil case;

c. Any order sealing a civil case contains findings justifying the sealing of the entire case, unless the case is required to be sealed by statute or rule; and

d. The seal is lifted when the reason for sealing has ended.

COMMITTEE ON CRIMINAL LAW

Amended standard condition number two in national forms, including the judgment in a criminal case (AO forms 7A, 7A-S, 245, 245B-D, 245I and 246), to state that the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer.

Authorized the Director of the Administrative Office to adopt regulations governing the disclosure of federal probation system data by the AO to entities outside the courts.

Agreed to seek legislation amending 18 U.S.C. § 3154 and § 3603 to specifically authorize probation and pretrial services officers to supervise sexually dangerous persons who have been conditionally released following a period of civil commitment pursuant to 18 U.S.C. § 4248.

COMMITTEE ON DEFENDER SERVICES

Approved revisions to chapters 2 and 3 of the *Guide to Judiciary Policy*, Volume 7A (Criminal Justice Act Guidelines), regarding the proration of claims by attorneys and other service providers and the billing of interpreting services.

COMMITTEE ON INFORMATION TECHNOLOGY

Approved the fiscal year 2012 update to the *Long Range Plan for Information Technology in the Federal Judiciary.*

COMMITTEE ON THE JUDICIAL BRANCH

Approved an amendment to section 220.30.10(g)(3)(B) of the Travel Regulations for United States Justices and Judges to provide that if a senior judge is commissioned to a court of national jurisdiction and the judge intends to travel a distance of more than 75 miles from his or her residence to hold court or to transact official business for that court and to claim reimbursement for any expenses associated with that travel, such travel must be authorized by the chief judge of the court.

Approved an amendment to section 220.30.10(g)(3)(A) of the Travel Regulations for United States Justices and Judges to require the authorization of the circuit judicial council rather than the chief circuit judge when a senior judge relocates his or her residence outside the district or circuit of the judge's original commission and intends to seek reimbursement for travel back to the court for official business.

Approved amendments to sections 250.20.20, 250.20.30, 250.20.50, 250.20.60, and 250.40.20 of the Travel Regulations for United States Justices and Judges to limit judges' actual expense reimbursement for meals in connection with official travel, and agreed that the limits will be subject to annual and automatic adjustment for inflation in the same manner as the judges' alternative maximum daily subsistence allowance.

COMMITTEE ON JUDICIAL RESOURCES

Approved a new executive grading process for determining the target grades for district and bankruptcy clerks of court and chief probation and pretrial services officers.

Eliminated the saved pay policy for the courts, but grandfathered for two years any employees currently in a saved pay status under the policy. After two years, the Administrative Office will place those employees who remain in a saved pay status at the top step of their respective grade or classification level.

Approved the following policy for Court Personnel System temporary pay adjustments:

> An appointing officer may provide a temporary pay adjustment in the full performance range to a Court Personnel System employee who is temporarily in charge of a work project with other employees. A temporary pay adjustment provides for a temporary pay increase within the employee's existing classification level at the lowest step which equals or exceeds the employee's existing rate of pay by anywhere from one to three percent, at the appointing officer's discretion. A temporary pay adjustment may not exceed 52 weeks without re-authorization.

Approved a clarification to the policy for granting awards to court employees to prohibit time-off awards for intermittent employees.

Approved a revision to the current telework policy for courts and federal public defender organizations to state that a court or federal public defender organization, at its discretion, may require eligible employees to telework as needed during a continuity of operations event, inclement weather, or similar situation.

Authorized a second fully funded JSP-16 Type II chief deputy clerk position for the District of Idaho. This position is subject to any budget-balancing reductions.

With regard to additional staff court interpreter positions:

a. Authorized one additional Spanish staff court interpreter position beginning in fiscal year 2013 for the District of Arizona based on the Spanish language interpreting workload in this court; and

b. Authorized accelerated funding in fiscal year 2012 for the additional Spanish staff court interpreter position for the District of Arizona.

Amended the maximum realtime transcript rate policy adopted in March 1999 to eliminate the requirement that a litigant who orders realtime services in the courtroom must purchase a certified transcript (original or copy) of the same pages of realtime unedited transcript at the regular rates, effective January 1, 2012.

COMMITTEE ON ADMINISTRATION OF THE MAGISTRATE JUDGES SYSTEM

Approved recommendations regarding specific magistrate judge positions to (1) authorize three new full-time magistrate judge positions and make no other change in those three district courts; (2) make no change in one district court that had requested an additional magistrate judge position; (3) make no change in one part-time magistrate judge position in one district court; and (4) make no change in the magistrate judge positions in five other district courts reviewed by the Magistrate Judges Committee.

Designated the new full-time magistrate judge positions at Wilmington in the District of Delaware, Durham in the Middle District of North Carolina, and Orlando or Tampa in the Middle District of Florida for accelerated funding effective April 1, 2012.

Agreed not to authorize the Middle District of Louisiana to fill the magistrate judge position to be vacated in May 2012.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

With regard to bankruptcy rules:

a. Approved proposed amendments to Bankruptcy Rules 1007, 2015, 3001, 7054, and 7056, and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and

b. Approved proposed revisions of Official Forms 1, 9A–9I, 10, and 25A and new Official Forms 10 (Attachment A), 10 (Supplement 1), and 10 (Supplement 2), to take effect on December 1, 2011.

Approved proposed amendments to Criminal Rules 5, 15, and 58, and new Rule 37, and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved revised "Procedures for the Judicial Conference's Committee on Rules of Practice and Procedure and Its Advisory Rules Committees."

COMMITTEE ON SPACE AND FACILITIES

Approved the *Five-Year Courthouse Project Plan for Fiscal Years 2013-2017* and granted the Committee authority to remove the Los Angeles project from that plan when appropriate.

Endorsed a General Services Administration feasibility study for the backfill of Moss Courthouse in Salt Lake City, Utah, contingent upon final court approval of the District of Utah long-range facilities plan.

Approved changes to the *U.S. Courts Design Guide* to take into account recent policy and planning methodology revisions.

Approved a new approach for planning the size of new courthouses and agreed that this approach will be incorporated into the *U.S. Courts Design Guide* and the asset management planning business rules.

TAB 2

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 2-3, 2011
Washington, D.C.
Draft Minutes

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C. on Thursday and Friday, June 2 and 3, 2011. The following members were present:

Judge Lee H. Rosenthal, Chair
Douglas R. Cox, Esquire
Roy Englert, Esquire
Judge Marilyn L. Huff
Chief Justice Wallace Jefferson
Dean David F. Levi
William J. Maledon, Esquire
Judge Reena Raggi
Judge Patrick J. Schiltz
Judge James A. Teilborg
Judge Diane P. Wood

Deputy Attorney General James M. Cole participated in part of the meeting. In addition, the Department of Justice was represented by Kathleen Felton, Esquire; Elizabeth J. Shapiro, Esquire; Jessica Hertz, Esquire; and Ted Hirt, Esquire.

Judge Neil M. Gorsuch was unable to attend the meeting.

Judge Anthony J. Scirica, former chair of the committee, participated in much of the meeting, and Judge Barbara J. Rothstein, Director of the Federal Judicial Center, attended a portion of the meeting. Also participating were the committee's consultants: Joseph F. Spaniol, Jr.; Professor Geoffrey C. Hazard, Jr.; and Professor R. Joseph Kimble.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Peter G. McCabe	The committee's secretary
Andrea L. Kuperman	The committee's chief counsel
James N. Ishida	Senior attorney, Administrative Office
Jeffrey N. Barr	Senior attorney, Administrative Office
Joe Cecil	Research Division, Federal Judicial Center
Emery G. Lee	Research Division, Federal Judicial Center

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Jeffrey S. Sutton, Chair
Professor Catherine T. Struve, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Eugene R. Wedoff, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Troy A. McKenzie, Associate Reporter
Advisory Committee on Civil Rules —
Judge Mark R. Kravitz, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Richard C. Tallman, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter
Advisory Committee on Evidence Rules —
Judge Sidney A. Fitzwater, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Committee Changes

Judge Rosenthal reminded the committee that her term as chair will expire on October 1, 2011, and that Chief Justice Roberts had named Judge Kravitz as her successor. The Chief Justice also named Judge David Campbell to succeed Judge Kravitz as chair of the Advisory Committee on Civil Rules and Judge Raggi to succeed Judge Tallman as chair of the Advisory Committee on Criminal Rules. Judge Rosenthal said that these selections were truly extraordinary and will greatly benefit the rules program.

She pointed out that Judge Tallman was attending his last Standing Committee meeting and had been an enormously successful chair of the Advisory Committee on Criminal Rules. Among his many accomplishments, she noted, were the package of technology amendments scheduled to take effect on December 1, 2011, the pending amendments to Rule 12 (pretrial motions) and Rule 15 (depositions), and the comprehensive and meticulous review of prosecutors' obligations to disclose exculpatory and impeachment information to the defense. She emphasized that he had steered the committee carefully among major competing interests and considerations. In doing so, he had shown consistently great insight and was a delight to work with.

Judge Rosenthal pointed out that the terms of Mr. Cox and Mr. Maledon were also due to expire on October 1, 2011. She emphasized the importance of both members' contributions to the Standing Committee and noted that the committee will celebrate their distinguished service more formally at the next meeting.

Remembering Judge John M. Roll

Judge Tallman asked the committee to remember and honor the late Chief Judge John M. Roll, a beloved former member of the Advisory Committee on Criminal Rules. He pointed out that Judge Roll had contributed mightily to the federal rules process, had been a major force in restyling the Federal Rules of Criminal Procedure, and had worked tirelessly in the cause of justice until his untimely death.

Judicial Conference Report

Judge Rosenthal reported that no proposed rule amendments had been presented to the Judicial Conference at its March 2011 session. In January 2011, the Conference's Executive Committee approved the committee's report on the privacy rules, which was then submitted to Congress.

She noted that the Conference in March had been asked to approve a proposal from the Court Administration and Case Management Committee to revise the standard for senior judges to participate in en banc decisions. The Conference deferred the matter, however, to allow the rules committees time to collaborate with the Court Administration Committee on the matter. Judge Sutton affirmed that the Advisory Committee on Appellate Rules was currently in the process of considering the proposal, but would most likely not recommend a change in the rules.

Pending Rule Amendments

Judge Rosenthal reported that the Supreme Court had approved all the rule amendments approved by the Judicial Conference in September 2010, except for two minor language changes in the restyled evidence rules. She pointed out that it is clear that the Court reviews the proposed rules extremely closely, and it had raised specific concerns regarding the language of four of the restyled rules. Judge Rosenthal worked with the chair and reporter of the Advisory Committee on Evidence Rules to address those concerns. In the end, two of the rules were promulgated by the Court as originally presented to it, and minor changes were made in the text of the other two rules with the approval of the Judicial Conference's Executive Committee.

Judge Rosenthal noted that the amendments were now pending before Congress and scheduled to take effect on December 1, 2011. She added, though, that there may be some concerns in Congress over some of the bankruptcy rule amendments.

Professor Capra announced that the restyled evidence rules had won two prestigious legal-writing awards – the Clear Mark Award for clear legal writing and the Burton Reform in Law Award. He said that principal credit for this major achievement belonged to Professor Kimble and the style committee – Judge Teilborg, Judge Huff, and Mr. Maledon.

Legislative Report

Ms. Kuperman reported that the proposed Lawsuit Abuse Reduction Act of 2011 had been introduced in each house of Congress, and a hearing had been held before the House Judiciary Committee. The proposed legislation, she said, would restore the 1983 version of FED. R. CIV. P. 11 (sanctions), thereby eliminating the current safe harbor provision in the rule and making imposition of sanctions mandatory for rule violations. She noted that the committee had sent a letter to Congress opposing the legislation, noting, among other things, that an empirical study by the Federal Judicial Center had demonstrated that the 1983 version of the rule simply did not work, had led to strategic gamesmanship by lawyers, and had resulted in satellite litigation over imposition of sanctions. Nevertheless, the House bill was scheduled for markup within a week. The Senate bill, she added, was still pending before the Senate Judiciary Committee.

Ms. Kuperman reported that the proposed Sunshine in Litigation Act of 2011 was similar to other Sunshine Acts introduced in every Congress since the 1990s. It would prevent a court from issuing a discovery protective order without first making particularized findings of fact that the order would not restrict the disclosure of information relevant to protection of public health and safety. The latest version of the legislation, she noted, was limited to cases where the pleadings state facts relevant to protection of public health or safety. The committee, she said, had written to the Senate expressing its opposition to the bill on the grounds that it was inconsistent with the Rules Enabling Act and would make discovery more burdensome and costly. Nevertheless, she said, the Senate Judiciary Committee favorably reported a substitute version of the bill.

Ms. Kuperman reported that efforts were well underway to obtain legislation to conform 28 U.S.C. § 2107 to the pending amendment to FED. R. APP. P. 4(a)(1) (time to file a notice of appeal in a civil case), scheduled to take effect on December 1, 2011. The amendment will clarify the time to appeal in civil cases in which one of the parties is a United States officer or employee sued in an individual capacity for acts or omissions in connection with official duties.

She added that no legislation was pending to deal with pleading standards in civil cases in light of the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937 (2009).

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of the last meeting, held on January 6-7, 2011.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Sutton and Professor Struve presented the report of the advisory committee, as set forth in Judge Sutton's memorandum and attachments of May 2, 2011 (Agenda Item 6).

Amendments for Publication

FED. R. APP. P. 28 and 28.1

Judge Sutton reported that the proposed amendments to FED. R. APP. P. 28(a) (briefs) would remove the current requirement that an appellant's brief contain separate statements of the case and of the facts. The proposed changes in Rule 28(b) (appellee's brief) and Rule 28.1 (cross-appeals) complement those in Rule 28(a).

Rule 28(a) currently requires a brief to contain a statement of the case – including the nature of the case, the course of proceedings, and the disposition below – followed in order by a statement of the facts. The current rule, he said, has confused practitioners and led to redundancy of information in briefs. Moreover, it is not logical in most cases for an attorney to address the case before setting forth the underlying facts.

Judge Sutton noted that the revised rule would allow appellants to weave the two statements together and present the events to the court in a more logical order, such as in chronological order. The proposed rule would consolidate subdivisions (a)(6) and (a)(7) into a single new subdivision that requires a "concise statement of the case setting out the facts relevant to the issues submitted for review and identifying the rulings presented for review. . . ." That approach, he said, was very similar to the Supreme Court's Rule 24.1(g).

Judge Sutton noted that the advisory committee had discussed the proposed revisions with leading appellate lawyers and had received largely favorable reactions to them. A member added that the proposed rule would be very beneficial because it is open-ended and flexible, rather than prescriptive.

The committee without objection by voice vote approved the proposed amendments for publication.

APPELLATE FORM 4

Judge Sutton reported that the advisory committee was proposing to modify APPELLATE FORM 4 (affidavit accompanying a motion for permission to appeal in forma pauperis). Questions 10 and 11 on the current form ask litigants to disclose: (1) the name of any attorney or other person (such as a paralegal or typist) whom they have paid, or will pay, for services in connection with the case; and (2) the amount of the payments. Critics have said that the questions are overly intrusive and unnecessary in making a determination of in forma pauperis status. They also assert that the questions may raise issues involving attorney-client privilege and work-product protection.

Judge Sutton explained that the advisory committee would replace the current two questions with a single new Question 10 that would read as follows: "Have you spent – or will you be spending – any money for expenses or attorney fees in connection with this lawsuit? If yes, how much?" In addition, some technical changes would be made in the form.

He also reported that the advisory committee believed that it may be time to separate the appellate forms from the full, three-year Rules Enabling Act process. That issue was also discussed during the presentation of the report of the Advisory Committee on Civil Rules. (See pages 30-31 of these minutes.)

The committee without objection by voice vote approved the proposed amendments for publication.

Informational Items

FED. R. APP. P. 4(a)(1) and 28 U.S.C. § 2107

Judge Sutton reported that the advisory committee was continuing its efforts to secure legislation to amend 28 U.S.C. § 2107 to conform that statute to the amendment to FED. R. APP. P. 4(a)(1) (time to file a notice of appeal in a civil case) that will take effect on December 1, 2011. The legislative change, he said, was necessary to buttress the rule amendment because the Supreme Court held in *Bowles v. Russell*, 551 U.S. 205 (2007), that appeal time limits set forth in statutes are jurisdictional in nature. The proposed statutory amendment, he said, mirrors the amended rule and will clarify the time to appeal in civil cases when a federal officer or employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States.

Judge Sutton noted that in pursuing the legislation, Congressional staff had expressed concern that the additional time provided by the rule and statute might not be applicable if they themselves were sued. The proposed statutory language gives all parties 60 days, rather than 30 days, to file a notice of appeal if one of the parties is "a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection [with official duties], including all instances in which the United States represents that [person] when the judgment, order, or decree is entered or files the appeal for that [person]."

Congressional staff appeared to have read the safe harbors in that text as applicable only to representation by the Department of Justice, and not to representation by congressional counsel. Judge Sutton argued, though, that the reference to representation by the "United States" clearly covers representation by congressional counsel, as all agree that the reference to a suit against "a United States officer" covers members of Congress and their staff.

It is likely, he said, that the legislation will proceed as planned. It is important to have it enacted in time to take effect along with the amended rule on December 1, 2011.

FED. R. APP. P. 29

Judge Sutton reported that the advisory committee had not yet determined whether and how to proceed with a proposed amendment to FED. R. APP. P. 29 (amicus briefs) that would treat federally recognized Indian tribes the same as states for the purpose of filing amicus briefs. He noted that both the advisory committee and the Standing Committee had been divided on the merits of the proposal. Moreover, two of the three circuit courts that hear the bulk of the cases in which tribes file amicus briefs had shown little interest in changing the rule. But, he said, the Ninth Circuit – the court with the largest number of cases – had now informed the advisory committee that it favored adoption of a national rule permitting Indian tribes to file amicus briefs without party consent or court permission.

Judge Sutton pointed out that a recent study by the Federal Judicial Center had demonstrated that the courts of appeals deny very few applications from Indian tribes to file amicus briefs. Accordingly, the key issue at stake is the sovereignty and dignity of the tribes, not the actual denial of any rights.

JOINT MEETING WITH THE BANKRUPTCY ADVISORY COMMITTEE

Judge Sutton reported that the advisory committee had met jointly in April 2011 with the Advisory Committee on Bankruptcy Rules to discuss proposed, major revisions to Part VIII of the bankruptcy rules. Part VIII governs appeals from a bankruptcy judge to a district court or bankruptcy appellate panel. The meeting, he said, had been very productive.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Wedoff and Professor Gibson presented the report of the advisory committee, as set forth in Judge Wedoff's memorandum and attachments of May 6, 2011 (Agenda Item 9). He reported that the advisory committee had 22 action items to present, falling into three categories:

1. Eight matters published in August 2010 and ready for final approval by the Judicial Conference;
2. Five matters for final approval by the Conference without publication; and
3. Nine matters to be published for public comment.

To aid in presenting the 22 proposals, Judge Wedoff grouped them by subject matter, rather than by procedural status, and he discussed the subjects in the following order:

1. Procedures for creditor claims and claim objections;
2. Incorporating recent Supreme Court rulings;
3. Simplified procedure for filing a certificate of debtor financial education;
4. Adjusting time deadlines; and
5. Other corrections and adjustments.

1. Creditor Claims and Claim Objections

Background and Procedural Status

Judge Wedoff reported that several bankruptcy judges have voiced concern about the accuracy and adequacy of the information that creditors submit to support their claims, especially in cases where the original creditor has sold the debt to another entity before the bankruptcy case is filed. The problems arise most frequently with regard to home mortgages and credit-card debt. As a result, it is often unclear: (1) who the original holder of the debt was; (2) what the current balance on the debt is; and (3) what it will take to pay off the debt. Moreover, he added, there is often no way for a debtor or trustee to know from the documentation filed with the proof of claim whether the statute of limitations has passed.

To address these problems, he said, the advisory committee in 2009 published proposed amendments to FED. R. BANKR. P. 3001 (proof of claim) and proposed new FED. R. BANKR. P. 3002.1 (notice related to claims secured by a security interest in the debtor's principal residence).

Proposed Rule 3001(c)(2) – scheduled to take effect on December 1, 2011 – will require that additional supporting information accompany proofs of claim in all individual-debtor cases. The revised rule also prescribes the sanctions that may be imposed by the court against a creditor in an individual-debtor case that fails to provide that information.

Another proposed amendment in 2009, new subdivision 3001(c)(1), would have required creditors holding claims based on an open-end or revolving consumer-credit agreement to file with the proof of claim a copy of the last account statement sent to the debtor before the bankruptcy petition was filed. The advisory committee, however, withdrew the proposal because of adverse comments from representatives of bulk purchasers of credit-card debt asserting that often a copy of the last account statement simply cannot be produced.

Instead, the committee was now proposing a new subdivision 3001(c)(3) that would require the creditor of a claim based on an open-end or revolving consumer-credit agreement to provide with the proof of claim five specific pieces of information in support of the claim. That provision was published for further comment in August 2010 and is currently before the Standing Committee for final approval. (See pages 12-13 of these minutes.)

Mortgage Debt

OFFICIAL FORM 10

Judge Wedoff explained that the proposed changes to OFFICIAL FORM 10 (proof of claim) were minor and relatively technical. The form would ask claimants for additional information about the interest rate on secured claims, and some of the instructions would be clarified. The revised form also adds space for an optional uniform claim identifier number, which will assist creditors in facilitating electronic payment in chapter 13 cases. In addition, he said, stylistic and formatting changes would be made.

The committee unanimously by voice vote approved the amendments for final approval by the Judicial Conference, effective December 1, 2011.

OFFICIAL FORM 10 (ATTACHMENT A)
OFFICIAL FORM 10 (SUPPLEMENT 1)
OFFICIAL FORM 10 (SUPPLEMENT 2)

Judge Wedoff pointed out that the three new forms associated with OFFICIAL FORM 10 were designed to implement new Rule 3002.1. The new rule – scheduled to take effect on December 1, 2011 – will assist in implementing § 1322(b)(5) of the Bankruptcy Code. It permits a chapter 13 debtor to cure a default and maintain home mortgage payments over the course of the plan.

OFFICIAL FORM 10, ATTACHMENT A (mortgage proof of claim attachment) implements Rule 3002.1(c)(2). It will give the debtor and the trustee important information on the status of a claim secured by a security interest in the debtor's principal residence. The holder of the claim must specify the principal and interest due on the residence as of the date of filing the petition; itemize pre-petition interest, fees, expenses, and charges included in the claim; and specify the amount needed to cure any default.

OFFICIAL FORM 10, SUPPLEMENT 1 (notice of mortgage payment change) implements Rule 3002.1(b). It applies in chapter 13 cases where the debtor is maintaining current payments on the principal residence and attempting to cure any default. The debtor and trustee need to know whether there have been any changes in the installment payment amount. The new form provides the notification and requires the

holder of a home mortgage claim to provide 21 days' advance notice of any escrow account payment adjustment, interest payment change, or other mortgage payment change.

OFFICIAL FORM 10, SUPPLEMENT 2 (notice of post-petition mortgage fees, expenses, and charges) implements Rule 3002.1(c). It will be used in a chapter 13 case by the holder of a home mortgage claim to notify the debtor and trustee of the amount of all post-petition fees, expenses, and charges and the dates incurred.

Judge Wedoff noted that no opposition had been voiced to the forms during the public comment period, with one important exception regarding OFFICIAL FORM 10 (ATTACHMENT A). He explained that two bankruptcy judges had pointed out that the manner in which mortgage servicers treat mortgage payments varies considerably. The servicers commonly credit late-received payments to late charges and attorney fees before applying them to the principal. Therefore, fees and charges may pile up, and the debtor or trustee cannot tell how the payments have been allocated without a full mortgage history.

The judges proposed that home-mortgage claimants be required to submit a complete loan history with their proofs of claim reflecting all amounts received and credited by the lender. This would allow the debtor and trustee to compare and reconcile the claimed arrearages with their own payment records.

Judge Wedoff noted that the proposed new OFFICIAL FORM 10 (ATTACHMENT A) does not require a loan history because the advisory committee concluded that it is not necessary in most chapter 13 cases. It might also impose an undue burden on the mortgagee and overwhelm debtors with too much detail. Moreover, the additional loan history information that debtors or trustees need in a specific case may be obtained through discovery.

In addition, the advisory committee concluded as a practical matter that there was simply insufficient time to redraft the form to incorporate additional information and still meet the deadline of having the form take effect at the same time as new Rule 3002.1, on December 1, 2011. Amending the form to require a loan history, for example, would require republication and an additional year's delay in issuing the form. Therefore, he said, the committee had decided to approve the form as currently drafted, but to keep the matter on its docket and gather information about the experience of debtors and creditors with the new rule and forms after they go into effect. Informed by those experiences, the committee will be in a better position in the future to decide whether to require the holder of a claim secured by the debtor's principal residence to attach a complete loan history to the proof of claim.

A member noted that OFFICIAL FORM 10, ATTACHMENT A will likely be opposed by bankruptcy judges who have developed their own forms and do not want to switch to a new national form that gives them less information. Her own chief bankruptcy judge, for example, had expressed concern that the proposed new form may preclude continued use of his more detailed local form. Judge Wedoff and Professor Gibson responded that FED. R. BANKR. P. 9009 allows the official forms to be used "with alterations as may be appropriate." They also suggested that a district might consider using the national form, but also requiring a supplemental local form asking for additional information. A member favored the use of supplemental local forms and said that they would inform the advisory committee in fashioning any needed changes in the national form in the future.

The committee unanimously by voice vote approved the three new forms for final approval by the Judicial Conference, effective December 1, 2011.

Open-Ended Credit Card Debt

FED. R. BANKR. P. 3001(c)(3)

Judge Wedoff reported that the amendments to Rule 3001 (proof of claim) originally proposed by the advisory committee in 2009 would have required that a proof of claim based on open-end or revolving consumer-credit agreements be accompanied by a copy of the last account statement sent to the debtor before the bankruptcy filing. The additional documentation, he said, would merely provide needed definition to the basic requirement currently set forth in FED. R. BANKR. P. 3001(c) that "[w]hen a claim . . . is based on a writing, the original or a duplicate shall be filed with the proof of claim." The debtor, he said, needs the information to associate the claim with a known account and to ascertain whether the claim is timely.

The proposal, however, was opposed vigorously by the bulk purchasers of credit-card claims on two grounds. First, they asserted that buyers of credit-card debt receive only a computer print-out of basic information when they purchase the debt and do not have access to the last account statement. Second, they said that producing the statements would raise serious privacy issues because the debtor's full credit-card debts would be disclosed on the public record, including such sensitive matters as medical debts.

Judge Wedoff said that the advisory committee had redrafted the proposal in light of the comments from the credit industry, and it had published a substitute proposal in 2010 that would require creditors to provide certain specific information to the extent applicable – the name of the entity from which the creditor purchased the debt, the name of the entity to which the debt was owed at the time of the debtor's last transaction, the date of the last transaction on the account, the date of the last payment, and the charge-off date.

He reported that the advisory committee had received no objections to the revised proposal based either on the unavailability of the information or on privacy concerns. Nevertheless, he said, some creditors are still opposed on the grounds that the amendments are not needed and would place an unreasonable burden on consumer lenders and debt purchasers.

Judge Wedoff noted, on the other hand, that the advisory committee had received several comments from debtors' representatives that the rule does not go far enough in making creditors document their claims, and it should require a complete chain of title. They assert that creditors regularly ignore the rule's current requirement of attaching to a proof of claim the writing on which it is based. As a result, they say, debtors do not receive sufficient information to pursue their interests effectively.

He explained that proposed FED. R. BANKR. P. 3001(c)(3)(B) would authorize a debtor or trustee to request a copy of the writing on which a credit-card claim is based, and the creditor would have a deadline of 30 days to comply with the request. That provision also received some opposition from the creditors, who recommended that the requesting party be required to make a threshold showing of need for the writing. The advisory committee decided, though, that a good cause showing is unnecessary and would lead to needless litigation. Realistically, he said, debtors will only seek a copy of the underlying contract if they have good reasons for doing so.

Judge Wedoff noted that a new objection raised by creditors relates to the provision in FED. R. BANKR. P. 3001(c)(2)(D) that lists sanctions that a court may impose when a creditor fails to provide required information. Under the rule, for example, a debtor or trustee could ask that certain papers not be allowed or that appropriate attorney fees be imposed. Creditors argue, he said, that the provision is overly harsh.

Judge Wedoff said that sanctions will rarely arise. The sanctions specified in Rule 3001(c)(2)(D), moreover, are the same as those available generally in every bankruptcy and civil case for violations of the rules. In addition, Rule 3001(c)(2)(D) actually serves as a limitation on actions that several bankruptcy judges have already been taking, such as ruling that a creditor's failure to produce needed information requires disallowance of a claim.

Judge Wedoff added that the sanction provision is not set forth in the proposed new Rule 3001(c)(3), but in Rule 3001(i), scheduled to take effect on December 1, 2011. That general provision, moreover, applies in all individual-debtor cases and is not limited to claims based on an open-end or revolving consumer-credit agreement.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

Procedures for Objecting to Claims

FED. R. BANKR. P. 3007(a)

Judge Wedoff explained that there is confusion under the current rule about the proper procedure for filing an objection to a claim. The rule seems to require that every objection to a claim be noticed for a hearing, although many courts do not follow that procedure. The proposed amendments to Rule 3007(a) (objections to claim) would authorize a negative-notice procedure for filing objections and clarify the method for serving the objections.

The proposed amendments would allow a court to place the burden on a claimant to request a hearing after receiving notice of an objection. The change, he said, is consistent with § 502(b) of the Bankruptcy Code, which defines the phrase "after notice and a hearing" as allowing a court to act without a hearing if notice is properly given and a party in interest does not timely request a hearing.

With respect to the manner of serving objections to claims, Judge Wedoff explained that courts currently disagree on whether an objection to a claim must be served by one of the methods specified for service of a complaint in FED. R. BANKR. P. 7004 or whether it is sufficient to serve the objection by mail on the person designated on the proof of claim. The advisory committee concluded that the matter should be clarified, and it proposes that objections be served by first-class mail addressed to the person designated on the proof of claim to receive notices.

The committee, he said, also concluded that two types of claimants should be served in the manner prescribed by FED. R. BANKR. P. 7004 – insured depository institutions and officers and agencies of the United States. The service methods for depository institutions are statutorily mandated, and the size and dispersion of authority in the federal government necessitate service on the Attorney General and the appropriate U.S. attorney's office, as well as on the person designated on the proof of claim.

The committee unanimously by voice vote approved the proposed amendments for publication.

FED. R. BANKR. P. 3001(c)(1)

Judge Wedoff reported that FED. R. BANKR. P. 3001(c)(1) (supporting information for a proof of claim) would be amended to delete the option of filing with a proof of claim the original of a writing on which the claim is based. The instructions to OFFICIAL FORM 10 (proof of claim) direct claimants not to "send original documents, as attachments may be destroyed after scanning." Those instructions reflect the current practice of filing copies, not originals, in the bankruptcy courts. The advisory committee

therefore would amend Rule 3001(c)(1) to conform it to the official form and current practice by replacing "the original or a duplicate" with "a copy of the writing" on which the claim is based.

The committee approved the proposed conforming amendment for final approval by the Judicial Conference without publication.

2. Responses to Recent Supreme Court Decisions

OFFICIAL FORM 6C

Judge Wedoff reported that the Supreme Court ruled in *Schwab v. Reilly*, 560 U.S. __, 130 S. Ct. 2652 (2010), that if a debtor claims property as exempt and enters a specific dollar amount on OFFICIAL FORM 6C, he or she is limited to that amount. If the full fair market value of the property is found to exceed that amount, the trustee may use the overage.

The Supreme Court suggested in *Schwab* that the debtor could claim the full amount of the property by stating so on the face of the form. But the current form does not provide a space for the debtor to exercise that option. So the advisory committee proposed rearranging the form and adding an additional column to give the debtor two options: (1) to claim a specific dollar amount; or (2) to claim the full fair market value of the exempted property.

The committee unanimously by voice vote approved the proposed amendments for publication.

OFFICIAL FORMS 22A and 22C

Judge Wedoff reported that OFFICIAL FORM 22C (chapter 13 statement of current monthly income and calculation of commitment period and disposable income) would be amended to reflect the Supreme Court's decision in *Hamilton v. Lanning*, 560 U.S. ___, 130 S. Ct. 2464 (2010). The case dealt with calculating a chapter 13 debtor's "projected disposable income" under § 1325(b)(1) of the Bankruptcy Code. That income normally has to be devoted to paying unsecured claims.

The term "projected disposable income" is not defined in the Code, but "disposable income" is defined in § 1325(b)(2) as the debtor's "current monthly income" less reasonably necessary expenses. In turn, "current monthly income" is calculated under § 101(10A) of the Code by averaging the debtor's monthly income for the six months preceding the filing of the bankruptcy petition.

In *Lanning*, the debtor's financial situation had changed just before her chapter 13 filing, as she had received a one-time severance buyout from her former employer and had acquired a new job at a considerably lower salary. The buyout payment greatly inflated her gross income for the six-month period before she filed the bankruptcy petition.

The Supreme Court rejected the purely "mechanical" approach of considering only the debtor's average monthly income for the six months before the bankruptcy filing. Instead, it adopted a "forward looking" approach allowing courts to consider changes that have occurred, or are likely to occur, in a debtor's income and expenses after filing.

Judge Wedoff explained that OFFICIAL FORM 22C currently calculates disposable income based only on information about the debtor's pre-bankruptcy average monthly income and current expenses. In light of *Lanning*, though, the Advisory Committee decided to amend the form by adding a new paragraph 61. It will ask the debtor to specify any change in the income or expenses reported on the form that has occurred, or that is virtually certain to occur, during the 12-month period following filing of the bankruptcy petition.

Professor Gibson added that both OFFICIAL FORM 22C and OFFICIAL FORM 22A (Chapter 7 statement of current monthly income and means-test calculation) would also be amended to make a minor adjustment in the deduction for telecommunication expenses. The revision will allow deduction of telecommunication services, including business cell phone service, to the extent necessary for production of income, if not reimbursed by the debtor's employer.

The committee unanimously by voice vote approved the proposed amendments for publication.

3. Simplified Procedure for Filing a Certificate of Debtor Financial Education

FED. R. BANKR. P. 1007(b)(7)

Judge Wedoff explained that the Bankruptcy Code was amended in 2005 to require individual debtors in chapter 7, 11, and 13 cases to complete an instructional course on personal financial management approved by the local U.S. trustee or bankruptcy administrator before they may receive a discharge. The Code does not address what document must be filed to provide notice that the course has been completed, or who must file it. The procedure is set forth in FED. R. BANKR. P. 1007(b)(7) (schedules, statements, and other required documents), which requires the debtor to file a "statement of completion of a course concerning personal financial

management, prepared as prescribed by the appropriate Official Form" – OFFICIAL FORM 23 (debtor's certification of completion of instructional course concerning financial management).

Judge Wedoff noted that the rule imposes the burden of providing notice of completing the course on the debtor, not on the course provider. If the debtor fails to file the notice, the court must close the case without a discharge, even if the debtor has in fact completed the course.

He said that the judges and clerks designing the judiciary's Next Generation of CM/ECF system have recommended that approved providers of financial-management courses be authorized to file course-completion statements electronically and directly with the bankruptcy courts. That procedure will be more efficient, require less human involvement, and reduce the number of cases dismissed for failure to file the required certificate.

Judge Wedoff reported that the advisory committee had concluded that it would be inappropriate for a bankruptcy rule to impose a requirement directly on providers of personal financial-management courses. But Rule 1007(b)(7) should be amended to facilitate approved course providers filing the statements. The proposed amendments would eliminate the requirement that an individual debtor file Form 23 if a course provider has notified the court that the debtor has completed the course after filing the petition.

The committee unanimously by voice vote approved the proposed amendments for publication.

FED. R. BANKR. P. 5009(b)

Judge Wedoff reported that the proposed amendment to FED. R. BANKR. P. 5009(b) (notice of failure to file Rule 1007(b)(7) statement) conforms to the proposed amendments to Rule 1007(b)(7). Rule 5009(b) requires the clerk to send an individual debtor who has not filed the certificate of completing a financial-management course a notice within 45 days after the first date set for the meeting of creditors that the case will be closed without entry of a discharge unless the required statement is timely filed. The proposed amendment recognizes that the clerk need not send the notice if the course provider has already notified the court that the debtor has completed the course.

The committee unanimously by voice vote approved the proposed amendment for publication.

4. Timing and Deadlines

FED. R. BANKR. P. 7054

Judge Wedoff noted that FED. R. BANKR. P. 7054 (judgment and costs) incorporates FED. R. CIV. P. 54(a)-(c) for adversary proceedings and provides for the award of costs. The proposed amendments would expand from one day to 14 days the time for a party to respond to the prevailing party's bill of costs and from five days to seven days the time for seeking court review of the costs taxed by the clerk. He noted that both time limits follow the general rule that time limits be expressed in multiples of seven days. He also pointed out that one public comment had suggested extending both time periods to 14 days, but the advisory committee decided that it was important to make Rule 7054(b) consistent with the civil rule, FED. R. CIV. P. 54(d)(1).

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

FED. R. BANKR. P. 7056

Judge Wedoff explained that FED. R. BANKR. P. 7056 (summary judgment) makes FED. R. CIV. P. 56 applicable in adversary proceedings. He added that it is also applicable in contested matters under FED. R. BANKR. P. 9014(c) unless the court directs otherwise. Civil Rule 56, as revised in 2009, sets a default deadline to file a summary judgment motion of 30 days after the close of all discovery. That deadline, however, is not appropriate in bankruptcy cases because hearings are frequently held very shortly after the close of discovery.

Therefore, the proposed amendment would depart from the civil rule and establish a new default deadline of 30 days before the initial date set for an evidentiary hearing on any issue for which summary judgment is sought. That change would give the court at least 30 days to consider the motion before the hearing. Judge Wedoff emphasized that the deadlines under both FED. R. CIV. P. 56 and FED. R. BANKR. P. 7056 are default deadlines, applicable only if no local rule or court order sets a different date.

The committee unanimously by voice vote approved the proposed amendment for final approval by the Judicial Conference.

OFFICIAL FORM 25A

Judge Wedoff explained that the proposed amendment to OFFICIAL FORM 25A (plan of reorganization in a small business chapter 11 case) would change the effective-date provision of a small business chapter 11 plan to conform to amendments to the bankruptcy rules that took effect in 2009. Those amendments increased from 10 days to 14 days the time periods for the duration of a stay of an order confirming a plan, FED. R. BANKR. P. 3020(e), and for filing a notice of appeal, FED. R. BANKR. P. 8002(a). Under

the proposed amendment to § 8.02 of the form, the effective date of the plan would generally be the first business day following the date that is 14 days after entry of the order of confirmation.

The committee unanimously by voice vote approved the proposed conforming amendment for final approval by the Judicial Conference without publication, effective December 1, 2011.

FED. R. BANKR. P. 1007(c)

Judge Wedoff reported that the proposed amendment to FED. R. BANKR. P. 1007(c) (time limits to file documents) was a technical and conforming change to remove an inconsistency in the current rule with FED. R. BANKR. P. 1007(a)(2) (filing documents in an involuntary case). Rule 1007(c) prescribes time limits for filing various lists, schedules, statements, and other documents. It specifies that in an involuntary case the debtor must file the list of creditors specified in Rule 1007(a)(2), as well as certain other documents, within 14 days of entry of the order for relief. In 2010, however, Rule 1007(a)(2) was amended to reduce to seven days the time for an involuntary debtor to file the list of creditors. As a result, the proposed amendment would delete from subdivision (c) the inconsistent reference to the time limit for filing the list of creditors in an involuntary case.

The committee unanimously by voice vote approved the proposed conforming amendment for final approval by the Judicial Conference without publication.

FED. R. BANKR. P. 9006(d)

Judge Wedoff explained that FED. R. BANKR. P. 9006(d) (time limit for serving motions and affidavits) would be amended to draw attention to the fact that it prescribes default deadlines for service of motions and written responses. A bankruptcy judge had suggested deleting the rule because most districts have their own local rules governing motion practice. Moreover, Rule 9006(d) may be overlooked by parties filing and responding to motions because motion practice and contested matters generally are covered by Rules 9013 (form and service of motions) and 9014 (contested matters).

The advisory committee concluded that Rule 9006(d) needed to be retained, but decided that it should be amended, highlighted, and made more like the civil rule on which is it based – FED. R. CIV. P. 6 (computing and extending time; time for motion papers). Unlike the civil rule, though, FED. R. BANKR. P. 9006 does not state in its title that it governs time periods for motion papers. Moreover, Bankruptcy Rule 9006 is not followed immediately by a rule that addresses the form of motions, as in the civil rules – FED. R. CIV. P. 7 (pleadings allowed; form of motions and other papers).

The advisory committee would amend the title of Rule 9006 to add a reference to the "time for motions papers." Subdivision (d) would be amended to govern the timing of service of any written response to a motion, not just opposing affidavits. The title of the subdivision would be changed from "For Motions–Affidavits" to "Motion Papers."

The committee unanimously by voice vote approved the proposed amendments for publication.

FED. R. BANKR. P. 9013

Judge Wedoff reported that the proposed amendment to FED. R. BANKR. P. 9013 (form and service of motions) would provide a cross-reference to the time periods in FED. R. BANKR. P. 9006(d) to call greater attention to the default deadlines for motion practice. In addition, some stylistic changes would be made to provide greater clarity.

The committee unanimously by voice vote approved the proposed amendments for publication.

FED. R. BANKR. P. 9014

Judge Wedoff reported that the proposed amendment to FED. R. BANKR. P. 9014 (contested matters) would add a cross-reference to the time limits for serving motions and responses in FED. R. BANKR. P. 9006(d).

The committee unanimously by voice vote approved the proposed amendment for publication.

5. Corrections and Adjustments

FED. R. BANKR. P. 2015(a)

Judge Wedoff reported that FED. R. BANKR. P. 2015(a) (duty to keep records, make reports, and give notice) would be amended with a technical change to correct its reference to § 704 of the Bankruptcy Code from § 704(8) to § 704(a)(8).

The committee unanimously by voice vote approved the proposed conforming amendment for final approval by the Judicial Conference without publication.

OFFICIAL FORM 1

Judge Wedoff said that OFFICIAL FORM 1 (voluntary petition) would be amended to include lines for a foreign representative filing a chapter 15 petition to state the

country of the debtor's center of main interests and the countries in which related proceedings are pending. The change merely implements the requirements of new FED. R. BANKR. P. 1004.2 (petition in a chapter 15 case), scheduled to take effect on December 1, 2011.

The committee unanimously by voice vote approved the proposed conforming amendment for final approval by the Judicial Conference without publication, effective December 1, 2011.

OFFICIAL FORM 7

Judge Wedoff reported that the proposed change to OFFICIAL FORM 7 (statement of financial affairs) would make the definition of an "insider" consistent with the Bankruptcy Code's definition of the term. The form currently defines an insider as one who holds more than a 5% voting interest in a corporate debtor – a bright-line test not found in the Code. The revised form, on the other hand, refers more generally to a person in a position to control the entity. He noted that the proposed change is substantive and needed to be published for public comment.

The committee unanimously by voice vote approved the proposed amendment for publication.

OFFICIAL FORMS 9A - 9I

Judge Wedoff explained that the proposed changes in OFFICIAL FORMS 9A - 9I (notice of meeting of creditors and deadlines) are technical and would conform the forms to an amendment to FED. R. BANKR. P. 2003(e), scheduled to take effect on December 1, 2011. Rule 2003(e) currently states that a meeting of creditors may be adjourned "by announcement at the meeting of the adjourned date and time without further notice." The 2011 amendment to the rule will require the presiding official to file a written statement for the record specifying the date and time to which the meeting is adjourned.

The revised forms would be amended to make the explanation of the meeting of creditors on the back of the form consistent with the amended rule. In addition, the revised forms correct a spelling error, correct a punctuation error, and call greater attention to the instructions.

The committee unanimously by voice vote approved the proposed conforming amendments for final approval by the Judicial Conference without publication, effective December 1, 2011.

Information Items

MODERNIZING THE BANKRUPTCY FORMS

Judge Wedoff reported that the advisory committee, working through a subcommittee chaired by Judge Elizabeth L. Perris, was making substantial progress on its major project to modernize the bankruptcy forms. The goals of the project are to avoid redundant information on the forms, make them more user-friendly, elicit more accurate information, and take advantage of technological developments, especially the judiciary's Next Generation of CM/ECF system, currently under development.

He said that the forms project was currently running ahead of the projected deployment of the Next Generation system. A package of forms for use by individual debtors may be ready for publication in August 2012, and the committee may decide to release the forms serially and implement them before the Next Generation system is in place.

He noted that the bankruptcy process relies heavily on forms and added that Judge Perris, chair of the advisory committee's forms modernization project, will serve as the committee's representative on the new inter-committee subcommittee on forms.

MODEL CHAPTER 13 PLAN

Judge Wedoff said that the advisory committee was considering developing a new model chapter 13 plan form. Under the pertinent case law, bankruptcy judges have an obligation to review proposed chapter 13 plans carefully and to deny any that include improper provisions. In *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. ___, 130 S. Ct. 1367 (2010), the Supreme Court upheld the enforceability of a chapter 13 plan that called for the discharge of a government-sponsored student loan. A loan of that sort, though, may only be discharged if the debtor brings an adversary proceeding and the bankruptcy court rules that failure to discharge the debt would impose an undue hardship on the debtor and the debtor's dependents.

In *Espinosa*, the discharge was never the subject of an adversary proceeding. But since the bankruptcy court confirmed the plan, even without the necessary finding of undue hardship, the Supreme Court ruled that it was a binding final judgment. The Court noted that bankruptcy judges have an obligation to review a chapter 13 plan carefully, to direct that debtors conform their plan to the requirements of the Bankruptcy Code, and to deny confirmation if the plan does not. But there are thousands of plans that busy judges must review and a great many variations among them. It would be very helpful, he said, to have a standard plan to aid in the review process.

REVISING THE BANKRUPTCY APPELLATE RULES

Judge Wedoff reported that the advisory committee was proceeding well with its comprehensive revision of the bankruptcy appellate rules (Part VIII of the Federal Rules of Bankruptcy Procedure). It had just conducted a very productive joint meeting with the Advisory Committee on Appellate Rules to discuss issues presented by the intersection of the bankruptcy appellate rules and the Federal Rules of Appellate Procedure.

Professor Gibson added that a working group of advisory committee members, plus the reporter and a member of the appellate advisory committee, would conduct further drafting sessions in July 2011. Professor Kimble, the Standing Committee's style consultant, will then review the draft later in the summer. At its fall 2011 meeting, the advisory committee may be able to approve half, or possibly all, the rules. She said that some rules may be presented to the Standing Committee as early as January 2012, and the full package of proposed rules should be ready for publication in August 2012.

ASBESTOS TRUSTS

Judge Wedoff reported that the Chamber of Commerce had suggested a new rule that would require asbestos trusts created in accordance with § 524(g) of the Bankruptcy Code to file quarterly reports with the bankruptcy court that detail each claimant's demand for payment from the trust and each amount paid. He noted that the matter had been referred to the advisory committee's business subcommittee. The subcommittee, he said, had expressed concern over whether the committee has jurisdiction under the Rules Enabling Act to issue a rule requiring a trust to file documents after the debtor's plan has been confirmed and the bankruptcy court has closed the case.

Judge Wedoff said that the committee was in the process of seeking additional information on the matter from interested organizations with relevant expertise. In the meantime, he added, the committee had received a letter from the chairman of the Judiciary Committee of the House of Representatives asking that the proposal move forward.

RESTYLING THE BANKRUPTCY RULES

Judge Rosenthal pointed out that the committee needed to decide in the not-too-distant future whether the bankruptcy rules should be restyled. She noted that restyling would be a major and difficult project, complicated by the interface of the bankruptcy rules with the Bankruptcy Code. Nevertheless, she suggested, there are various ways in which the matter might be accomplished.

OFFICIAL SET OF BANKRUPTCY RULES

Judge Wedoff thanked Mr. Ishida for his dedicated and painstaking work in producing the first official version of the Federal Rules of Bankruptcy Procedure and in leading the successful efforts to have the rules printed for the first time in handy pamphlet form by the Government Printing Office.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Kravitz and Professor Cooper presented the report of the advisory committee, as set forth in Judge Kravitz's memorandum and attachments of May 2, 2011 (Agenda Item 5). Judge Kravitz reported that the advisory committee had conducted its April 2011 meeting at the University of Texas Law School in Austin. Chief Justice Jefferson of Texas participated in the meeting, and Justice Stephen Breyer spoke to the committee.

Amendments for Publication

FED. R. CIV. P. 45

Judge Kravitz pointed out that the advisory committee had received many letters from lawyers complaining about the current Rule 45 (subpoenas) and its complexity. In 2008, the committee formed a subcommittee, with Judge David G. Campbell as chair and Professor Richard L. Marcus as reporter, to conduct a comprehensive study of the rule. Most of the members of the subcommittee, he said, were practicing lawyers.

As part of its extensive study, the subcommittee sorted through about twenty different areas for potential amendments to Rule 45, and it eventually settled on four areas that it deemed in need of amendment:

1. Notice of service of a subpoena;
2. Transfer of subpoena-related motions;
3. Trial subpoenas for distant parties and party officers; and
4. Simplification of the rule.

The subcommittee worked with many judges and lawyers in fashioning appropriate amendments to the rule, and in October 2010 it conducted a productive mini-conference in Dallas to obtain feedback from lawyers on the proposed amendments.

1. Notice

Judge Kravitz reported that Rule 45(b)(1) requires that each party be given notice of subpoenas that require document production. The advisory committee was informed that many lawyers are unaware of the notice requirement and regularly fail to comply with it. Accordingly, the advisory committee proposed moving the notice requirement to a more prominent position as Rule 45(a)(4) and adding a new caption entitled "Notice to Other Parties." The amended rule also requires that the subpoena be attached to the notice, and include trial subpoenas.

Judge Kravitz noted that some attorneys had argued that the rule should go further and require additional notice each time that a subpoena is modified or updated. The American Bar Association had suggested that notice be provided not only of service of the subpoena, but also of compliance with it. Some lawyers wanted the rule to require a description of the materials produced and access to them. The advisory committee, however, unanimously rejected these proposals for two reasons.

First, the committee concluded that a national rule simply cannot prescribe every aspect of the lawyering process needed to obtain documents in a given case. As a practical matter, discovery materials are often produced on a rolling basis. Negotiations and production may occur over a considerable period of time, and lawyers need to communicate directly and periodically with their opponents and with the targets of subpoenas. They may also assert their need for additional notices and access in their Rule 26(f) plans or ask a court to include appropriate provisions in its scheduling order. These matters are too much dependent on context to be addressed by rule text

Second, the advisory committee wanted to avoid litigation over compliance issues. It was concerned that lawyers might be tempted to ask courts to preclude documents from evidence on the grounds that the other side's notices were inadequate.

2. Transfer

Judge Kravitz explained that the proposed amendments to Rule 45 do not change the direction in the current rule that motions to enforce or quash a subpoena be made in the district of compliance, even though the underlying civil action may be pending in a different district. Proposed Rule 45(f), however, would in very limited circumstances explicitly allow the court for the district of compliance to transfer subpoena-related motions to the court presiding over the main action. He added that the bar was very supportive of including a transfer provision in the rule.

He said that the advisory committee was concerned about the standard for transferring a subpoena dispute, and it wanted to avoid making a transfer so easy that judges might reflexively transfer subpoena disputes on a regular basis. But he pointed out that there are strong reasons in certain cases to have enforcement of the subpoena handled by the judge who presides over the underlying case. The presiding judge, for example, may have already ruled on the same issues raised by the subpoena. The subpoena dispute, moreover, might relate to the merits of the underlying action or impact the judge's management of the case. The committee, he said, had concluded that local production issues should be handled locally in the district of compliance, and only issues affecting the merits or case management should be transferred. To balance these considerations, he said, the committee had decided on a standard that requires "exceptional circumstances" to permit transfer.

A member argued that "exceptional circumstances" was too narrow a standard. He said that the kinds of situations described in the Committee Note, in which a subpoena dispute relates to the merits of the main case, occur quite regularly and are not at all "exceptional." He suggested that "good cause" might be better.

Judge Kravitz said that the advisory committee recognized the importance of allowing the subpoenaed party to litigate a dispute in its own, convenient forum. It wanted to discourage transfers and therefore had selected the narrower term "exceptional circumstances." He noted that the American Bar Association's Litigation Section also favored the narrower standard, as it was concerned that a looser standard might tempt judges to transfer cases to remove them from their dockets. Members added that it might also encourage gamesmanship by some lawyers.

Judge Kravitz explained that the committee was proposing to publish the tougher standard, and it may later relax it if the public comments indicate that the standard should be more permissive. He noted, too, that even if a subpoena dispute is not transferred, the judge in the district of compliance may seek informal advice from the judge presiding over the main case. A participant added that the proposed rule merely establishes a framework for handling enforcement issues, and it is simply not possible to address or resolve every potential problem in a rule. He suggested that the committee note emphasize that point.

Judge Kravitz pointed out that proposed Rule 45(f) would also allow the court in the district of compliance to transfer subpoena-related motions if the parties and the person subject to the subpoena consent to the transfer. A member suggested, though, that only the views of the subpoenaed party should prevail, and the parties should not be allowed to block a transfer. Judge Kravitz agreed to have the advisory committee consider the matter further.

A member pointed out that the proposed language in Rule 45(f) attempts to resolve the issue of legal representation when a case is transferred and the witness does not have a lawyer in the other state. To ease the burden on the witness, who would have to hire another lawyer, the rule creates something akin to an automatic *pro hac vice* admission. It would allow an attorney authorized to practice in the court where the motion is made to file papers and appear in the court in which the action is pending.

A member cautioned that this provision constitutes attorney regulation and would preempt local court rules, state rules, and local legal culture. In effect, he said, the rule would order a district court to accept an out-of-state lawyer to practice before it, even though the lawyer may not be subject to regulation by the state bar or meet other requirements traditionally imposed by the district court. He predicted that the committee will receive negative public comments on the issue. A participant agreed, but emphasized that the particular proposal is limited and restrained, and it is good policy.

Judge Kravitz noted that if enforcement is transferred to the court where the underlying action is pending, that court may have to deal with contempt orders if the subpoena is not obeyed. Therefore, the advisory committee added proposed Rule 45(g), giving the transferee court flexibility to transfer the contempt matter back to the court having jurisdiction over the disobedient party.

Professor Cooper explained that the committee note points out that in the event of a transfer, disobedience constitutes contempt of both the court where compliance is required and the court where the action is pending. Judge Kravitz noted that contempt matters will normally be transferred back to the court of compliance because it is difficult for a judge to hold a person in contempt who is not actually before the judge. He added that the rule raises potential choice-of-law issues, but the committee had decided that these issues were not appropriate for treatment in procedural rules and should be left to case-law development.

3. Trial subpoenas

Judge Kravitz explained that there was a split of authority in the case law over whether subpoenas for parties or party officers to testify at trial may compel them to travel more than 100 miles from outside the state. Most recent district court opinions, he said, have followed *In re Vioxx Products Liability Litigation*, 438 F. Supp. 2d 664 (E.D.La. 2006). In *Vioxx*, an officer of the defendant corporation, who lived and worked in New Jersey, was required to testify at trial in New Orleans. The advisory committee, however, noted that there is a growing body of law rejecting *Vioxx*, as exemplified by *Johnson v. Big Lots Stores, Inc.*, 251 F.R.D. (E.D.La. 2008), holding that Rule 45 did not require attendance of plaintiffs at trial in New Orleans when they would have to travel more than 100 miles from outside the state.

The advisory committee concluded that Rule 45 was not intended to create the expanded subpoena power recognized in *Vioxx*, and the *Vioxx* decision should not be followed. The committee was also concerned that allowing subpoenas on an adverse party and its officers without regard to the traditional geographical limits would raise a real risk of lawyers using subpoenas tactically to apply inappropriate litigation pressure and undue burdens on their opponents.

In many cases, moreover, an adverse party's other employees, rather than its distant executives, are the best witnesses to testify about matters actually in dispute in a case. Judge Kravitz suggested that when a truly knowledgeable person chooses not to show up at trial, the jury notices the absence. In addition, he said, there are satisfactory alternatives to compelling personal attendance of distant witnesses at trial, such as audiovisual recording of deposition testimony and testimony at trial by contemporaneous transmission.

Judge Kravitz said that the advisory committee planned on publishing an appendix to the publication package setting out an alternative amendment that leans in the direction of *Vioxx* and permits a judge, for good cause, to order a party or its officer to attend trial and testify. The publication, however, will not indicate that the two choices are of equal value. Rather, it will state that the committee unanimously favors the *Big Lots* approach and rejects the *Vioxx* line of cases. But since there is a clear split of authority on the issue, an opposing approach is set forth in an appendix and comments are invited on both. He noted that at the committee's recent mini-conference, all the defense lawyers supported the *Big Lots* approach, while all the plaintiffs' lawyers, many of whom handle multi-district litigation, favored *Vioxx.*

A member strongly opposed publishing the appendix. Judge Kravitz responded that publication of both versions is advisable because the committee's approach is currently the minority view of the law. Publishing both versions, moreover, will avoid the need to republish the amendments if the public comments were to favor *Vioxx* and the advisory committee were to change its decision and adopt a *Vioxx*-inspired approach. A member added that another reason to publish an alternative text is to enhance the likelihood that the committee will receive thoughtful and focused comments on the issue.

A member observed that there are appropriate cases in which a judge should have authority to compel attendance of a particular executive or party at trial, despite the distance. It may be difficult, he said, to define those situations, but the courts should have discretion to bring in witnesses when they are really needed. Judge Kravitz added that lawyers at the recent mini-conference had said that if the person has meaningful knowledge and is really needed in a case, the court will normally make it clear to the parties that the witness should be brought in for the trial.

4. <u>Simplification of the rule</u>

Judge Kravitz pointed out that the current Rule 45 is very complex and needs to be simplified. The current rule, for example, requires independent determinations regarding the issuing court, the place of service, and the place of performance. To make those determinations, one has to consult ten different sections of the rule.

To simplify the rule, the proposed amendments adopt the approach of the corresponding criminal rule regarding service of a subpoena. Under FED. R. CRIM. P. 17 (subpoenas), a subpoena is issued by the court where the action is pending and may be served anywhere in the United States. But the proposed civil rule differs from the criminal rule by specifying that the court of compliance is the court for the district where the subpoenaed party is located.

A member said that the proposal was a remarkable piece of work that will greatly improve Rule 45, even though he did not agree with a couple of its provisions. He said that it had been very carefully drafted, enjoyed a broad consensus, and should be published essentially as is. He argued against publishing any alternative version.

Judge Kravitz reiterated that the advisory committee was planning to include in the publication a preface stating that the committee has rejected the *Vioxx* view of nationwide service of trial subpoenas, but recognizes that there is a split of authority and welcomes public comments on the matter. He added that the publication will state clearly that each provision in the proposed rule had been approved unanimously by the advisory committee.

The committee without objection by voice vote approved the proposed amendments for publication.

FED. R. CIV. P. 37

Judge Kravitz noted that the advisory committee was recommending publication of a change in FED. R. CIV. P. 37(b)(1) as a conforming amendment to proposed Rule 45. It would add a second sentence to paragraph (b)(1) specifying that after a subpoena-related motion has been transferred, failure to obey a court order may be treated as contempt of either the court where the discovery is taken or the court where the action is pending.

The committee without objection by voice vote approved the proposed amendment for publication.

Informational Items

PRESERVATION AND SPOLIATION

Judge Kravitz reported that the advisory committee was actively following up on the key issues raised by the bar at the May 2010 Duke Law School conference, especially those relating to discovery of electronically stored information. In particular, the committee was focusing on potential rule amendments addressing: (1) obligations to preserve information in anticipation of litigation; and (2) imposition of sanctions for failure to preserve. He added that in September 2011 the committee will convene a mini-conference with knowledgeable members of the bench and bar to consider these issues and potential rule amendments.

He said that the advisory committee will consider specific rule proposals on preservation and spoliation at its November 2011 and April 2012 meetings, and it may propose amendments for publication at the Standing Committee's June 2012 meeting.

PLEADING STANDARDS

Judge Kravitz reported that Dr. Cecil and his colleagues at the Federal Judicial Center had conducted an amazing empirical study to ascertain whether the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937 (2009), have had an appreciable effect on motions to dismiss for failure to state a claim under FED. R. CIV. P. 12(b)(6). He summarized the Center's report as concluding that there was a slight increase in the number of dismissal motions filed in the district courts from 2006 to 2010, but no increase in the percentage of motions granted by the court without leave to amend.

A key conclusion to be derived from the study so far, he suggested, is that civil cases are not being jettisoned out of the federal system in the way that some academic writers have claimed. He noted, though, that the Center's study could not capture whether plaintiffs are simply not filing cases in the federal courts that they might have filed before *Twombly* and *Iqbal*. He added that the committee had asked the Center to begin analyzing the cases in which the courts granted a motion to dismiss, but with leave to amend, to see what happened later in those cases. The Center will also attempt to ascertain whether any discovery preceded the amendments to the complaints and whether the amendments repaired the problems in the complaints.

FORMS

Judge Kravitz reported that the advisory committee was contemplating removing the illustrative civil forms from the full operation of the Rules Enabling Act process. He pointed out that some of the forms, such as the patent infringement complaint form, are

of questionable validity and have been subject to criticism. The committee, though, would probably continue to deal with forms in some way. One alternative would be to abrogate FED. R. CIV. P. 84 (forms) and have the forms handled like the bankruptcy forms, for which Judicial Conference approval is sufficient. Another approach would be to have the forms issued and maintained by the Administrative Office with committee approval.

Judge Rosenthal added that the advisory committees currently handle forms in a variety of different ways, and greater consistency among the different sets of rules might be in order. She said that she would appoint an inter-committee Forms Subcommittee, led by representatives of the Advisory Committee on Civil Rules and chaired by Judge Gene E. K. Pratter. The subcommittee will coordinate information among the advisory committees, but most of the work will be done by each advisory committee separately conducting a detailed examination of its own forms. The work, she said, will begin in the summer of 2011. Judge Kravitz added that the advisory committee may make a recommendation to the Standing Committee regarding FED. R. CIV. P. 84 in June 2012.

DUKE SUBCOMMITTEE

Judge Kravitz reported that the advisory committee had appointed an ad hoc subcommittee, chaired by Judge John G. Koeltl, to implement the recommendations made at the 2010 Duke Law School conference The subcommittee's work, he said, was proceeding hand-in-hand with that of the committee's discovery subcommittee. Its scope of inquiry includes not only potential changes to the Federal Rules of Civil Procedure, but also potential pilot projects and experiments conducted by the Federal Judicial Center and others and educational efforts to educate judges about what they can do to make better use of the many management tools provided by the present rules.

He reported that participants at the Duke conference had emphasized that more cooperation among parties and lawyers was needed in the discovery process to reduce unnecessary costs and delay. In addition, they stressed the importance of bringing greater proportionality to the discovery process, as contemplated in FED. R. CIV. P. 26(b)(2)(C). He added that proportionality is also a key concept in determining a party's need to preserve materials in anticipation of litigation.

Judge Kravitz said that the advisory committee was not proposing rule amendments addressing cooperation and proportionality at this time. But he reported that Judge Paul W. Grimm, a member of the committee, was developing a set of materials to provide detailed guidance on the importance of proportionality in civil discovery and to give practical examples for the bench and bar to work with.

FED. R. CIV. P. 6(d)

Judge Kravitz noted that Rule 6(d) (additional time after certain kinds of service) contains a glitch resulting from a 2005 amendment that established a uniform rule for calculating three added days. Until 2005, the rule had been clear that a party has three added days to act after service "upon the party" by certain designated means. The amended rule, though, merely provides three added days "after service." That revised language may be read as giving additional time to both the serving party and the party being served. To restore the rule to its intended meaning, the advisory committee would simply change the language of Rule 6(d) to state that: "When a party may or must act within a specified time after ~~service~~ being served . . . 3 days are added after the period would otherwise expire. . . ."

Judge Kravitz noted that there may be other places in the rules where changes have introduced unintentional errors. The question before the committee, therefore, concerns timing – whether the advisory committee should correct any errors as it uncovers them or accumulate the fixes and include them in a package of non-controversial, technical amendments. The glitch in Rule 6(d), he emphasized, had not caused any problems, and there has been no case law on it. That fact, he said, argues for deferring making a corrective amendment at this time. Moreover, the rule will likely need to be reconsidered in the near future to determine whether to eliminate electronic service as one of the service methods that trigger the extra three days for the receiving party to act.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Tallman and Professor Beale presented the report of the advisory committee, as set forth in Judge Tallman's memorandum and attachments of May 12, 2011 (Agenda Item 7).

Amendments for Final Approval

FED. R. CRIM. P. 5(c)(4)

Judge Tallman reported that the proposed amendment to FED. R. CRIM. P. 5(c)(4) (initial appearance for persons extradited to the United States) clarifies that the initial appearance for a defendant charged with a criminal offense in the United States, arrested outside the country, and surrendered to the United States following extradition must be held in the district where the defendant has been charged. He added that the rule applies even when a defendant arrives first in another district and has already been informed of his or her rights during the earlier stages of the extradition proceedings. The amendment,

he said, will avoid the delay in the extradited person's transportation resulting from an unneeded initial appearance in the district of initial arrival in the United States.

The committee without objection by voice vote approved the proposed amendment for final approval by the Judicial Conference.

FED. R. CRIM. P. 5(d) and 58(b)(2)(H)

Judge Tallman explained that the United States has treaty obligations that require it to advise detained foreign nationals that they may have their home country's consulate notified of their arrest and detention. The executive branch, through the Department of Justice, is responsible for informing the defendants, and the Department has effective procedures and training programs in place to do so. Bilateral agreements with numerous countries also require consular notification whether or not the detained foreign national requests it.

The proposed amendment to FED. R. CRIM. P. 5(d) (initial appearance in a felony case) was designed as a back-up precaution to ensure that the government fulfills its international obligations to make the required consular notification. It will also produce a court record establishing that the defendant has been notified.

The proposed amendment to FED. R. CRIM. P. 58(b)(2)(H) (initial appearance in a misdemeanor case) would add the identical requirement in misdemeanor cases.

The committee without objection by voice vote approved the proposed amendments for final approval by the Judicial Conference.

FED. R. CRIM. P. 15

Judge Tallman reported that the proposed amendments to Rule 15 (depositions) would establish a clear procedure for taking depositions outside the United States without the defendant's presence in certain limited circumstances if the district court makes a number of case-specific findings. The amendments had been presented before to the Supreme Court for approval, but the Court returned them without comment to the advisory committee in 2010 for further consideration.

The advisory committee, he said, believed that the Supreme Court's concern was over the ultimate admissibility of the deposition as evidence at trial. He pointed out that the committee note accompanying the rule had made it clear that a district judge's decision to permit a deposition to be taken under revised Rule 15 was an entirely separate matter from the later judicial determination of whether the deposition should be admitted into evidence at trial.

Judge Tallman reported that the advisory committee had voted to resubmit the proposed rule to the Judicial Conference and the Supreme Court. At first, it decided not to change the text of the rule, but to give greater prominence in a revised committee note to the difference between taking a deposition and admitting evidence. But after further consultation among the committee chairs and reporters of the criminal rules committee, the evidence rules committee, and the Standing Committee, a consensus was reached that it would be desirable to make that point explicitly in Rule 15(f) itself. Accordingly, in a handout distributed at the meeting, the advisory committee recommended that the Standing Committee add the following text to Rule 15(f): "An order authorizing a deposition to be taken under this rule does not determine its admissibility."

In addition, the advisory committee revised the committee note further to clarify the relationship between the authority to take a deposition under Rule 15(c)(3) and the admission of deposition testimony at trial. The revised note therefore states that although "a party invokes Rule 15 to preserve testimony for trial, the Rule does not determine whether the resulting deposition will be admissible in whole or in part."

He noted that the defense bar had understandably opposed the rule on Confrontation Clause grounds. That, he said, is further reason to clarify the bifurcated nature of the proceedings and emphasize the limited scope of the amendments.

Judge Tallman explained that the amendments establish a two-step process: (1) court authorization to take a deposition; and (2) later, if an objection is made, a court ruling on admissibility of some or all of the deposition at trial. He noted that the party conducting the deposition may not in fact seek to introduce it at trial. Circumstances may change, for example, and it may become possible later to bring the witness to the United States to testify at trial.

The courts, he said, will determine admissibility on a case-by-case basis applying the Constitution and the Federal Rules of Evidence. A court, moreover, might not admit a deposition into evidence because of the Confrontation Clause or FED. R. EVID. 402. It might refuse to admit it because of unforeseen problems created by foreign law or foreign officials in taking the deposition, or because of problems with the technical equipment, communications, or recording.

He pointed out that courts will continue to be faced with ad hoc requests to take depositions outside the United States. International criminal investigations are increasing as the world grows smaller, and courts have been adapting and authorizing new evidence-gathering techniques on a case-by-case basis. The advisory committee, he said, was firmly convinced that the Department of Justice had made the case for the proposed procedure and had concluded that it was appropriate to establish a uniform, national procedure through Rule 15. The proposed amendments, he added, were modeled in large

part on procedures approved by the Fourth Circuit in *United States v. Ali*, 528 F.3d 210 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 1312 (2009).

A member urged that the proposed amendments be given particularly careful reflection because the Supreme Court had returned the earlier version of the same proposal without approving it. The advisory committee, moreover, was now only making a small change in the rejected proposal, based on what it believes to have been the Court's concern over admissibility.

A member said that she had no problem with approving the revised proposal and sending it back to the Supreme Court with the recommended changes in the rule and the committee note. She added that it might be helpful to include information in the note stating that the rule applies only to the United States legal system and does not attempt to govern whatever laws there are in other countries. Many foreign countries, for example, require that any deposition be taken only in accordance with their own court procedures.

A member observed that the current Rule 15 could be construed as only permitting depositions to be taken if the defendant is physically present. Therefore, some judges may now deny authorization for any foreign deposition outside the defendant's presence. The proposed rule, therefore, is an improvement because it will remove that potential impediment and permit a judge to authorize a foreign deposition in the defendant's absence in limited, appropriate circumstances. The situations in which the revised rule will be used are very few, and courts have been handling them to date on an ad hoc basis.

The member asked whether it would be better for the proposed rule to make it clear that Rule 15 does not absolutely foreclose foreign depositions at which the defendant is not present, without detailing all the specific conditions that would have to be met. As drafted, the proposed amendments are very strict in setting forth all conditions that have to be met. Clearly, they are designed that way deliberately to maximize the likelihood of eventual admissibility of the testimony. But the revised rule later goes on to state that it does not govern admissibility. That seems strange because admissibility is the very reason for taking the deposition.

It is possible, she said, that the Supreme Court might eventually rule that no set of circumstances will permit a deposition to be taken in the defendant's absence. At that point, the courts will be left with a rule that imposes strict conditions, even in cases where the Confrontation Clause may not be implicated. But compliance with the conditions will never lead to admissible evidence. Moreover, by listing all the specific conditions, the revised rule may invite satellite litigation. It might well be more effective just to allow a deposition to be taken at the court's discretion and then admit if it satisfies the requirements of the Sixth Amendment and the Federal Rules of Evidence.

Deputy Attorney General Cole stated that the rule will rarely be used, but it is very much needed in certain cases. The potential occasions for its use cannot all be foreseen, but they are expanding every day with the gathering of evidence of international crimes that impact the United States. The proposed rule, he said, had been carefully crafted to achieve the right balance between admissibility of essential information in a few important criminal cases and protecting defendants' rights under the Confrontation Clause. It will be used only in situations where a deposition is truly important – in large part because of restrictions imposed by foreign countries and the amount of effort it takes for the Department of Justice to coordinate with the State Department and others in arranging for depositions overseas.

He said that the Department was comfortable with the strict criteria set out in the rule and did not find them onerous. The rule will, he said, provide welcome guidance to judges and help the Department establish a record that will assist it in obtaining admissibility.

The committee without objection by voice vote approved the proposed amendments for final approval by the Judicial Conference.

FED. R. CRIM. P. 37

Judge Tallman reported that FED. R. APP. P. 12.1 and FED. R. CIV. P. 62.1, which took effect on December 1, 2009, established a uniform national procedure for obtaining indicative rulings. The proposed new FED. R. CRIM. P. 37, he said, is parallel to FED. R. CIV. P. 62.1 and would make the indicative ruling procedure applicable in criminal cases.

The proposed new rule would facilitate remand from the court of appeals when certain post-judgment motions are filed in the district court after an appeal has been docketed and the district court has stated that it would grant the motion if the court of appeals were to remand for that purpose or that the motion raises a substantial issue. The matter might arise, for example, if the district court were to state that it would grant a motion for a new trial on the basis of newly discovered evidence.

The committee without objection by voice vote approved the proposed new rule for final approval by the Judicial Conference.

Amendments for Publication

FED. R. CRIM. P. 12

Judge Tallman explained that the Supreme Court in *Cotton v. United States*, 535 U.S. 625 (2002), changed what had previously been thought to be the law by holding that an indictment's failure to state an offense does not deprive the court of jurisdiction over

the case. But FED. R. CRIM. P. 12 (pleadings and pretrial motions) currently allows a claim that the indictment fails to state an offense to be raised at any time, even on appeal, because it had been thought to be jurisdictional.

Based on a request from the Department of Justice, the advisory committee decided to amend Rule 12, in light of *Cotton*, to require that a motion to dismiss an indictment for failure to state an offense be made before trial. The proposed change, however, opened up a number of difficult issues concerning the appropriate standard for relief when a claim is untimely filed. In addition, Standing Committee members expressed concern over whether the term "waiver" should continue to be used in the rule and whether other types of motions should also be revisited.

Judge Tallman reported that the advisory committee had been studying proposals to amend Rule 12 since 2006, and amendments were now before the Standing Committee for the third time. He pointed out that at the last Standing Committee meeting, in January 2011, members had offered comments that were enormously helpful in guiding the advisory committee's current proposal.

The advisory committee, he said, undertook an additional, comprehensive review and approved a more fundamental revision of Rule 12 at its April 2011 meeting. The current version, which the committee now seeks approval to publish, addresses all the members' concerns and makes some additional improvements in the rule.

Proposed Rule 12(b)(1), he said, specifies that a motion asserting that the court lacks jurisdiction may be made at any time while a case is pending. Proposed Rule 12(b)(3) then lists all the common defenses, objections, and requests that must be raised by motion before trial. For those motions, the revised rule introduces a new factor for determining whether a motion must be raised before trial – that the basis for the motion was "then reasonably available." The motion must also be able to be determined without a trial on the merits. The outdated reference in the current rule to "a trial of the general issue" would be deleted.

Proposed Rule 12(c) specifies the consequences for not timely raising those motions. Judge Tallman said that courts have struggled with the concepts of "waiver" and "forfeiture" and the respective consequences of each. They have also struggled with the tension between the standards of relief under the current Rule 12 and the plain error standard under Rule 52 (harmless and plain error).

Proposed Rule 12(c), he said, would resolve the current confusion and specify the consequences of not making a timely motion. Generally, it provides that untimely motions will be extinguished and not considered on the merits unless the party shows both good cause and prejudice – as the Supreme Court has held in interpreting the "good

cause" standard in the current Rule 12(e) in *Davis v. United States*, 371 U.S. 233, 242 (1973), and *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 363 (1963).

The rule, however, makes two exceptions for late-filed motions that may be excused more readily. Under proposed Rule 12(c)(2)(B), a party need only show prejudice if the defense or objection is based either on failure of the indictment to state an offense or on double jeopardy.

Judge Tallman said that double jeopardy requires special treatment and a more lenient standard for relief. He noted, for example, that a defendant may raise the issue of double jeopardy even after having entered a guilty plea.

A member warned that some judges may object to the proposed rule change because they believe that double-jeopardy claims are no different from any other defense. Professor Beale said that there is a good deal of case law on the matter. Although the law is not uniform, most cases currently give double-jeopardy claims preferential treatment under Rule 12 and analyze a late-filed claim for "plain error." Rather than have three different standards in the rule – cause plus prejudice, prejudice only, and plain error – she explained that the advisory committee decided to abandon the "plain error" test and let double-jeopardy claims, like claims of failure to state an offense, be governed by the prejudice-only standard. The change would likely not affect the result of any case.

A member recommended that the rule be published as presented but that the issue of double jeopardy be highlighted for comment in the publication or transmittal letter. Judge Tallman agreed with the suggestion.

Judge Tallman said that the proposed rule will clarify a difficult area of the law, provide guidance to both bench and bar, and lead to more uniform, nationwide application of the rule. Moreover, by specifying that Rule 52 does not apply, the rule will clarify how cases should be handled on appeal. The standards set forth in Rule 12 will apply exclusively, both in the trial courts and on appeal.

A member noted that a district court currently may forgive a matter not timely raised before trial for good cause, and it should continue to have maximum flexibility before trial to forgive any matter not raised in a timely manner. The proposed rule, however, requires a showing of both cause and prejudice at any stage.

Professor Beale responded although the rule itself is strict, it gives the court considerable leeway to be lenient in appropriate circumstances. Rule 12(b)(3) states that motions must be made before trial, but Rule 12(c)(1) and (2) allow the court to set a deadline for making motions and to provide extensions of the deadline. Judge Tallman also pointed to the language in paragraph 12(b)(3) that the basis for the motion must have been "then reasonably available."

Several members praised the advisory committee for its accomplishment and noted that all their concerns from earlier meetings had been addressed. Some offered suggestions for specific changes in the language of the proposed rule and committee note. Judge Tallman agreed to make further edits before publication.

The committee without objection by voice vote approved the proposed amendments for publication.

FED. R. CRIM. P. 34

Judge Tallman noted that the proposed amendment to Rule 34(b) (arresting judgment) conforms to the proposed amendments to FED. R. CRIM. P. 12(b). It would delete language from the current rule that the court "at any time while the case is pending . . . may hear a claim that the indictment or information fails to . . . state an offense." The revised rule will require that a defect in the indictment or information be raised before trial. He noted that the Standing Committee had previously approved the conforming amendment to Rule 34. Therefore, there was no need to seek further approval.

Informational Items

FED. R. CRIM. P. 16

Judge Tallman reported that the advisory committee at its April 2011 meeting had decided not to proceed at this time with any proposed amendments to Rule 16 (discovery and inspection) dealing with the government's obligation to disclose exculpatory and impeaching information under *Brady v. Maryland*, 373 U.S. 83 (1963). He explained that the committee could not reach a consensus on rule language that would effectively solve the problems that proponents of the amendments had cited regarding the failure of certain prosecutors to turn over needed information. Moreover, the Federal Judicial Center's recent survey had shown that there is a lack of consensus within the judiciary as to whether an amendment to Rule 16 is needed. The committee also had not been convinced that a rule change would actually prevent or dissuade an unscrupulous prosecutor from knowingly withholding exculpatory or impeaching information.

Judge Tallman thanked the Department of Justice for its comprehensive efforts to address its disclosure obligations through various internal means, including revision of the Department's manuals, compulsory training programs for prosecutors and staff, district-wide disclosure plans, local points of contact, and appointment of a national disclosure coordinator. Deputy Attorney General Cole added that the Department was further institutionalizing its policies by making the national criminal discovery coordinator a permanent position.

Judge Tallman thanked the Federal Judicial Center for its excellent research efforts, including the massive survey soliciting the views of judges and lawyers on disclosure of exculpatory and impeaching information. He also noted that the advisory committee was working with the Center to improve training for judges regarding disclosure issues, to create a good-practices guide on criminal discovery, and to amend the *Bench Book for U.S. District Court Judges* to provide additional practical advice for judges on how to handle disclosure issues.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Fitzwater and Professor Capra presented the report of the advisory committee, as set forth in Judge Fitzwater's memorandum and attachments of April 8, 2011 (Agenda Item 8).

Judge Fitzwater reported that the advisory committee had held its April 2011 meeting at the University of Pennsylvania Law School in Philadelphia and had one amendment to present for publication.

Amendment for Publication

FED. R. EVID. 803(10)

He explained that the proposed amendment to Rule 803(10) (hearsay exception for the absence of a public record) responds to the Supreme Court's decision in *Melendez-Diaz v. Massachusetts,* 129 S. Ct. 2527 (2009). In that case, the Court held that certifications reporting the results of forensic tests conducted by analysts are "testimonial" under the Confrontation Clause, as construed in *Crawford v. Washington,* 541 U.S. 36 (2004).

Under *Melendez-Diaz,* admitting a certification in lieu of in-court testimony violates the accused's right of confrontation. Likewise, it would be constitutionally infirm to admit a certification under FED. R. EVID. 803(10) offering to prove the absence of a public record. In both cases, admission would allow the truth of a matter to be proven by a written certification without live testimony.

Judge Fitzwater said that the proposed amendment to Rule 803(10) was based on a notice-and-demand procedure used in Texas and sanctioned in the Supreme Court's decision in *Melendez-Diaz*. The amendments specify that a prosecutor who intends to offer a certification must provide the defendant advance written notice of that intent at least 14 days before trial. The defendant is then given seven days to object in writing to use of the certification, putting the prosecutor on notice to produce the official preparing the certification at trial. If the defendant does not timely object, the certification may be

admitted. Professor Capra added that the advisory committee had worked closely with the Department of Justice and the federal public defenders in preparing the language of the proposal.

The committee without objection by voice vote approved the proposed amendment for publication.

Informational Items

SYMPOSIUM

Judge Fitzwater reported that the advisory committee will hold a symposium in October 2011 at William and Mary Law School to celebrate the restyled evidence rules – six weeks before the rules take effect. Several members of the Standing Committee will participate as panelists. One panel will look back at the decisions made during the restyling process. Another will explore the evidence issues likely to be considered in the future. The proceedings, he said, will eventually be printed in the *William and Mary Law Review*.

FED. R. EVID. 801

Judge Fitzwater said that the advisory committee at its April 2011 meeting had considered a proposed amendment to Rule 801(d)(1)(B) (hearsay exemption for certain prior statements) suggested initially by Judge Frank W. Bullock, Jr., a former member of the Standing Committee. He had proposed that the rule be amended to provide that all prior consistent statements be admissible under the hearsay exemption whenever they would be admissible to rehabilitate the witness's credibility. The amendment would eliminate the distinction between admission of a prior consistent statement solely for impeachment purposes and admission of the statement for its truth.

A member expressed strong support for the change and said that juries never understand the distinction and always use the prior consistent statement for all purposes, even though instructed that it may be used only for impeachment. Judge Fitzwater said that the advisory committee would take up a proposed amendment at its October 2011 meeting and was in the process of soliciting the views of interested parties and researching practices in state courts that have similar rules.

RULES COMMITTEE PROCEDURES

Ms. Kuperman reported that she, the committee reporters, and the rules staff had made additional changes in the draft revisions to *Procedures for the Conduct of Business*

by the Judicial Conference Committees on Rules of Practice and Procedure. An earlier draft had been presented to the committee at its January 2011 meeting.

She noted that the recent refinements defined such matters as: the appropriate standard for republishing proposed amendments, which documents comprise the official records of the committees, which records should be posted on the rules website, whether transcripts should be prepared of public hearings, and when hearings may be canceled because of insufficient public interest.

The committee unanimously by voice vote approved the proposed revisions in the committee procedures for approval by the Judicial Conference.

STRATEGIC PLANNING

Judiciary's Strategic Plan

Judge Rosenthal reported that Judge Charles R. Breyer, the Judiciary Planning Coordinator, had written to all Judicial Conference committees on May 5, 2011, seeking information on their efforts to implement the Judiciary's *Strategic Plan.* Specifically, he asked them to: (1) verify and update the information they had previously provided regarding the strategic initiatives they are pursuing; and (2) begin to consider how to measure progress in implementing the *Strategic Plan.* He also asked the committees at their June 2011 meetings to identify how they will assess whether each initiative's outcome has been met and the metrics they use to gauge progress.

Judge Rosenthal asked the committee to consider a draft committee response that she had prepared in response to Judge Breyer's requests.

The committee unanimously by voice vote approved sending the proposed response to the Judicial Conference's Advisory Committee on Judiciary Planning.

Status of the Rules Program

Judge Rosenthal said that the work of the rules committees was of a uniformly high standard and pointed out that the agenda book currently before the committee was excellent. She emphasized that a great deal of detailed work is needed on an ongoing basis to prepare a dozen committee agenda books each year, an annual package of proposed rule amendments for publication and comment, an annual package of rule amendments and supporting documents for the Supreme Court, and numerous letters and reports to Congress. All the work, moreover, has to be perfect.

She said that each committee has an excellent chair, reporters, and membership. She explained that the chair, with the help of others, makes recommendations to the Chief Justice on a regular basis of individuals who would be outstanding future members. She asked the members to help her and her successor, Judge Kravitz, in identifying people who would be candidates for the committees in the future.

She noted that one of the committees' overarching concerns is guaranteeing productive relations with Congress. She said that the committees currently have very good communications with the Hill and work hard to maintain them. It is essential, she added, that the rules committees continue to be viewed as truly professional and truly nonpartisan. She emphasized that the committees' work is subject to great public scrutiny, and it is becoming more common to receive last-minute calls from Congressional staff motivated by suggestions made by opponents of particular amendments. She predicted that those calls would likely continue, and the committees will have to be prepared to deal with them.

She noted that the committees had succeeded well in explaining the Rules Enabling Act process to Congressional staff and demonstrating how careful and meticulous the committees are in their work. But these educational efforts, she said, are complicated by the regular turnover in Congressional staff, as well as in members of Congress. The work of the rules committees, she said, is very different from the legislative process that Congress is used to. Moreover, unlike the Congressional process, the work of the rules committees, and the positions the committees take, defy partisan lines.

Judge Rosenthal reported that the committees' relations with the Supreme Court are very important. She noted that the Standing Committee chair and reporter meet every year with the chief justice to make sure that he is apprised of pending rules projects and proposed amendments. She added that both Chief Justice Roberts and Justice Alito are alumni of the rules committees. The other members of the Court, though, may not know in detail how the committees operate. She said that she was pursuing the idea of having an informal discussion with the full Court about how the committees do their work and what projects they are working on.

She pointed out that relations with the Department of Justice are also very important and have been very productive. Department officials serve on each of the committees, and Department staff have been extremely cooperative and helpful.

She noted that the committees need to be more effective in their relationships with other Judicial Conference committees and with other parts of the Administrative Office. She emphasized that the rules committees gain a great deal of useful information regarding court practices and procedures as part of their detailed work under the Rules

Enabling Act process. They also have an important interest in implementing the rules and educating judges and lawyers about them.

The committees, she said, need to be more consistent in following up on suggestions made to other committees. She urged closer coordination, in particular, with the Court Administration and Case Management Committee, mentioning the recent collaborative efforts with that committee on the privacy and sealing reports. She pointed out that the committees were also working closely with the Federal Judicial Center on revising the *Bench Book for U.S. District Judges*, suggesting educational programs for judges, and producing guidebooks and other supporting information.

She suggested that the committees' relationship with the academy is not where it needs to be. She noted that several law professors had expressed skepticism about the rules process during the recent debates on the impact of the Supreme Court's decisions in *Twombly* and *Iqbal*. She recommended that the committees meet more often at law schools and invite law professors to observe and participate in what the committees do and how they do it. In addition, it would be beneficial, both for the students and the professors, for committee members to go to law schools and teach classes explaining the rules process. It is also essential to continue inviting law professors to attend the various committee special programs and mini-conferences.

Judge Rosenthal pointed to the close and growing relations between the committees and the American Bar Association and other bar organizations. She said that the committees had encouraged ongoing working relations with the major bar associations, but more work was needed in the area of criminal rules. She noted that a meeting had been held with representatives of the National Association of Criminal Defense Lawyers, and the association had been invited to send a member as liaison to the rules meetings. She added that more outreach could also be done with the bankruptcy community. It is likely, she said, that there will be political opposition in Congress to some of the proposed bankruptcy rules.

She reported that all the rules committees have to deal with the twin issues of the impact of technology and the tension between making all records and proceedings widely available to the public and protecting valid privacy interests. She suggested that the committees need to examine all the rules to consider the impact of technology on the legal process.

Finally, Judge Rosenthal thanked the Administrative Office staff for their excellent work in supporting all the many functions of the rules committees and the Federal Judicial Center for its superb efforts on all the many research projects that the committees have asked it to undertake.

NEXT MEETING

The committee will hold its next meeting on Thursday and Friday, January 5 and 6, 2012, in Phoenix, Arizona.

Respectfully submitted,

Peter G. McCabe,
Secretary

TAB 3

Legislation and Legislative Activities
Affecting the Federal Rules of Practice and Procedure
(Oral Report)

S. 533
Lawsuit Abuse Reduction Act

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

112TH CONGRESS
1ST SESSION

S. 533

To amend Rule 11 of the Federal Rules of Civil Procedure to improve attorney accountability, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 9, 2011

Mr. GRASSLEY (for himself and Mr. LEE) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend Rule 11 of the Federal Rules of Civil Procedure to improve attorney accountability, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Lawsuit Abuse Reduction Act of 2011".

SEC. 2. ATTORNEY ACCOUNTABILITY.

(a) SANCTIONS UNDER RULE 11.—Rule 11(c) of the Federal Rules of Civil Procedure is amended—

(1) in paragraph (1), by striking "may" and inserting "shall";

1 (2) in paragraph (2), by striking "Rule 5" and
2 all that follows through "motion." and inserting
3 "Rule 5."; and
4 (3) in paragraph (4), by striking "situated"
5 and all that follows through the end of the para-
6 graph and inserting "situated, and to compensate
7 the parties that were injured by such conduct. Sub-
8 ject to the limitations in paragraph (5), the sanction
9 shall consist of an order to pay to the party or par-
10 ties the amount of the reasonable expenses incurred
11 as a direct result of the violation, including reason-
12 able attorneys' fees and costs. The court may also
13 impose additional appropriate sanctions, such as
14 striking the pleadings, dismissing the suit, or other
15 directives of a nonmonetary nature, or, if warranted
16 for effective deterrence, an order directing payment
17 of a penalty into the court".
18 (b) RULE OF CONSTRUCTION.—Nothing in this Act
19 shall be construed to bar or impede the assertion or devel-
20 opment of new claims, defenses, or remedies under Fed-
21 eral, State, or local laws, including civil rights laws.

○

H.R. 966
Lawsuit Abuse Reduction Act

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

IB

Union Calendar No. 114

112TH CONGRESS
1ST SESSION

H. R. 966

[Report No. 112–174]

To amend Rule 11 of the Federal Rules of Civil Procedure to improve attorney accountability, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 9, 2011

Mr. SMITH of Texas introduced the following bill; which was referred to the Committee on the Judiciary

JULY 21, 2011

Additional sponsors: Mr. CANSECO, Mr. GALLEGLY, Mr. CALVERT, and Mr. HERGER

JULY 21, 2011

Reported with an amendment, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

To amend Rule 11 of the Federal Rules of Civil Procedure to improve attorney accountability, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

~~**SECTION 1. SHORT TITLE.**~~

~~This Act may be cited as the "Lawsuit Abuse Reduction Act of 2011".~~

~~**SEC. 2. ATTORNEY ACCOUNTABILITY.**~~

~~(a) SANCTIONS UNDER RULE 11.—Rule 11(c) of the Federal Rules of Civil Procedure is amended—~~

~~(1) in paragraph (1), by striking "may" and inserting "shall";~~

~~(2) in paragraph (2), by striking "Rule 5" and all that follows through "motion." and inserting "Rule 5."; and~~

~~(3) in paragraph (4), by striking "situated" and all that follows through the end of the paragraph and inserting "situated, and to compensate the parties that were injured by such conduct. Subject to the limitations in paragraph (5), the sanction shall consist of an order to pay to the party or parties the amount of the reasonable expenses incurred as a direct result of the violation, including reasonable attorneys' fees and costs. The court may also impose additional appropriate sanctions, such as striking the pleadings, dismissing the suit, or other directives of a nonmonetary nature, or, if warranted~~

1 ~~for effective deterrence, an order directing payment~~
2 ~~of a penalty into the court".~~
3 ~~(b) RULE OF CONSTRUCTION.—Nothing in this Act~~
4 ~~shall be construed to bar or impede the assertion or devel-~~
5 ~~opment of new claims, defenses, or remedies under Fed-~~
6 ~~eral, State, or local laws, including civil rights laws.~~
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9 *tion Act of 2011".*
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25 *of the violation, including reasonable attorneys' fees*

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8 *shall be construed to bar or impede the assertion or develop-*
9 *ment of new claims, defenses, or remedies under Federal,*
10 *State, or local laws, including civil rights laws, or under*
11 *the Constitution.*

Union Calendar No. 114

112TH CONGRESS
1ST SESSION

H. R. 966

[Report No. 112–174]

A BILL

To amend Rule 11 of the Federal Rules of Civil Procedure to improve attorney accountability, and for other purposes.

JULY 21, 2011

Reported with an amendment, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

March 14, 2011 Letter to Rep. Smith re H.R. 966 with attached FJC Survey

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

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CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

March 14, 2011

Honorable Lamar S. Smith
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

On behalf of the Judicial Conference's Committee on the Rules of Practice and Procedure (the "Standing Rules Committee") and the Advisory Committee on the Federal Rules of Civil Procedure (the "Advisory Committee"), we write to oppose H.R. 966, which seeks to reduce lawsuit abuse by amending Rule 11 of the Federal Rules of Civil Procedure. The bill would reinstate a mandatory sanctions provision of Rule 11 that was adopted in 1983 and eliminated in 1993. The bill would also eliminate a provision adopted in 1993 to allow a party to withdraw challenged pleadings on a voluntary basis, without the added costs and delay to the challenging party of seeking and obtaining a court order. The concerns we express are the same concerns expressed by the Judicial Conference in 2004 and 2005, when similar legislation was introduced.

We greatly appreciate, and share, your desire to improve the civil justice system in our federal courts, including by reducing frivolous filings. But legislation that would restore the 1983 version of Rule 11 by undoing the 1993 amendments would create a "cure" far worse than the problem it is meant to solve. Such legislation also contravenes the longstanding Judicial Conference policy

opposing direct amendment of the federal rules by legislation instead of through the careful, deliberate process Congress developed in the Rules Enabling Act, 28 U.S.C. §§ 2071–2077.

The 1993 changes followed years of examination and were made on the Judicial Conference's strong recommendation, with the Supreme Court's approval, and after congressional review. The 1983 provision for mandatory sanctions was eliminated because during the ten years it was in place, it did not provide meaningful relief from the litigation behavior it was meant to address. Instead, it generated wasteful satellite litigation that had little to do with the merits of cases and that added to the time and costs of litigation.

The 1983 version of Rule 11 required sanctions for every violation of the rule. The rule was abused by resourceful lawyers. An entire "cottage industry" developed that churned tremendously wasteful satellite litigation that had everything to do with strategic gamesmanship and little to do with underlying claims. Rule 11 motions came to be met with counter-motions that sought Rule 11 sanctions for making the original Rule 11 motion.

The 1983 version of Rule 11 spawned thousands of court decisions unrelated to the merits of the cases, sowed discord in the bar, and generated widespread criticism. As letters from the Judicial Conference commenting on prior similar bills pointed out, some of the serious problems caused by the 1983 amendments to Rule 11 included:

1. creating a significant incentive to file unmeritorious Rule 11 motions by providing a greater possibility of receiving money;

2. engendering potential conflicts of interest between clients and their lawyers, who advised withdrawal of particular claims despite the clients' preference;

3. exacerbating tensions between lawyers; and

4. providing a disincentive to abandon or withdraw a pleading or claim that lacked merit — and thereby admit error — after determining that it no longer was supportable in law or fact.

The 1993 amendments to Rule 11 were designed to remedy the major problems with the rule, strike a fair and equitable balance between competing interests, and allow courts to focus on the merits of the underlying cases rather than on Rule 11 motions. Since 1993, the rule has established a safe harbor, providing a party 21 days within which to withdraw a particular claim or defense before sanctions can be imposed. If the party fails to withdraw an allegedly frivolous claim or defense within the 21 days, a court may impose sanctions, including assessing reasonable attorney fees. The 1983 version of Rule 11 authorized a court to sanction discovery-related abuse under Rule 11, Rule 26(g), or Rule 37, which created confusion. Under the 1993 amendments to Rule 11, sanctioning of discovery-related abuse was limited to Rules 26 and 37, which provide for sanctions that include awards of reasonable attorney fees.

The 1993 amendments to Rule 11 culminated a long, critical examination of the rule begun four years earlier. The Advisory Committee reviewed a significant number of empirical examinations of the 1983 version of Rule 11, including three separate studies conducted by the Federal Judicial Center in 1985, 1988, and 1991, a Third Circuit Task Force report on Rule 11 in 1989, and a New York State Bar Committee report in 1987.

After reviewing the literature and empirical studies of problems caused by the 1983 amendments to Rule 11, the Advisory Committee issued in 1990 a preliminary call for general comment on the operation and effect of the rule. The response was substantial and clearly called for a change in the rule. The Advisory Committee concluded that the cost-shifting in Rule 11 created an incentive for too many unnecessary Rule 11 motions. Amendments to Rule 11 were drafted. The Supreme Court promulgated and transmitted the amendments to Congress in May 1993 after extensive scrutiny and debate by the bench, bar, and public in accordance with the Rules Enabling Act process.

Experience with the amended rule since 1993 has demonstrated a marked decline in Rule 11 satellite litigation without any noticeable increase in the number of frivolous filings. In June 1995, the Federal Judicial Center conducted a survey of 1,130 lawyers and 148 judges on the effects of the 1993 Rule 11 amendments. About 580 attorneys and 120 judges responded to the survey. The Center found general satisfaction with the amended rule. It also found that more than 75% of the judges and lawyers would oppose a provision that would require a court to impose a sanction when the rule is violated.

In 2005, the Federal Judicial Center surveyed the trial judges who apply the rules to get a clearer picture of how the revised Rule 11 was operating. A copy of the study is enclosed. The results of the Federal Judicial Center's study showed that judges strongly believed that the current Rule 11, which was carefully crafted to deter frivolous filings without unduly hampering the filing of legitimate claims or defenses, continues to work well. The study's findings include the following highlights:

- more than 80 percent of the 278 district judges surveyed indicated that "Rule 11 is needed and it is just right as it now stands";
- 87 percent prefer the existing Rule 11 to the 1983 version or the version proposed by legislation (e.g., H.R. 4571 (the Lawsuit Abuse Reduction Act of 2004) or H.R. 420 (the Lawsuit Abuse Reduction Act of 2005));
- 85 percent strongly or moderately support Rule 11's safe harbor provisions;
- 91 percent oppose the proposed requirement that sanctions be imposed for every Rule 11 violation;

- 84 percent disagree with the proposition that an award of attorney fees should be mandatory for every Rule 11 violation;

- 85 percent believe that the amount of groundless civil litigation has not grown since the promulgation of the 1993 rule, with 12 percent noting that such litigation has not been a problem, 19 percent noting that such litigation decreased during their tenure on the federal bench, and 54 percent noting that such litigation has remained relatively constant; and

- 72 percent believe that addressing sanctions for discovery abuse in Rules 26(g) and 37 is better than in Rule 11.

The findings of the Federal Judicial Center underscore the judiciary's united opposition to legislation amending Rule 11. Lawyers share this view. In 2005, the American Bar Association issued a resolution opposing an earlier, similar proposed bill.

Minimizing frivolous filings is, of course, vital. But there is no need to reinstate the 1983 version of Rule 11 to work toward this goal. Judges have many tools available to respond to, and deter, frivolous pleadings. Those tools include 28 U.S.C. § 1915e, which authorizes courts to dismiss, *sua sponte*, before an answer is filed, a lawsuit that is frivolous or malicious. Rule 12(b)(6) authorizes courts to dismiss pleadings that fail to state a claim on which relief can be granted. Section 1927 of Title 28 of the United States Code authorizes sanctions against lawyers for "unreasonably and vexatiously" multiplying the proceedings in any case. And the present version of Rule 11 itself provides an effective, balanced tool, without the problems and satellite litigation the 1983 version created.

In May 2010, the Advisory Committee on the Civil Rules held a major conference on civil litigation, examining the problems of costs and delay — which encompass frivolous filings — and potential ways to improve the system. The Conference encouraged, and generated, a broad spectrum of criticisms by lawyers, litigants (including businesses and governmental entities), judges, and academics of the current approaches to federal civil cases, including the rules, and proposals for change. Conspicuous in its absence was any criticism of Rule 11 or any proposal to restore the 1983 version of the rule.

Undoing the 1993 Rule 11 amendments, even though no serious problem has been brought to the Rules Committees' attention, would frustrate the purpose and intent of the Rules Enabling Act. There is no need to reinstate the 1983 version of Rule 11 that proved contentious and diverted so much time and energy of the bar and bench. Doing so would add to, not improve, the problems of costs and delay that we are working to address. I urge you on behalf of the Rules Committees to not support the proposed legislation amending Rule 11.

We greatly appreciate your consideration of the Rules Committees' views. We look forward to continuing to work together to ensure that our civil justice system is working well to fulfill its vital

role. If you or your staff have any questions, please contact Andrea Kuperman, Chief Counsel to the Rules Committees, at 713-250-5980.

Sincerely,

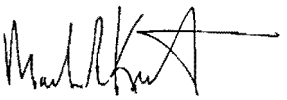

Lee H. Rosenthal
United States District Judge
Southern District of Texas
Chair, Committee on Rules
of Practice and Procedure

Mark R. Kravitz
United States District Judge
District of Connecticut
Chair, Advisory Committee
on Civil Rules

Enclosure

cc: Honorable Trent Franks

Identical letter sent to: Honorable John Conyers, Jr.

Report of a Survey of United States District Judges' Experiences and Views Concerning Rule 11, Federal Rules of Civil Procedure

David Rauma & Thomas E. Willging

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Federal Judicial Center
2005

This Federal Judicial Center publication was undertaken at the request of the Judicial Conference's Advisory Committee on Civil Rules and is in furtherance of the Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. The views expressed are those of the authors and not necessarily those of the Advisory Committee or of the Federal Judicial Center.

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Introduction

The Judicial Conference's Advisory Committee on Civil Rules asked the Federal Judicial Center to design and implement a survey of a representative national sample of federal district judges. The purpose of the survey was to gather information about the judges' experiences with Rule 11 of the Federal Rules of Civil Procedure as well as to elicit their opinions about recent proposals in Congress to amend Rule 11. The chair of the Advisory Committee and the committee's reporters helped develop the questionnaires. Center staff conducted the survey and analyzed the results during December 2004 and January 2005.

As currently written, Rule 11 expressly authorizes judges to impose sanctions on lawyers and parties who present to a district court a pleading, written motion, or other paper without reasonable support in fact or law or for an improper purpose, such as to cause unnecessary cost or delay. Rule 11 provides that sanctions for violations are within the judge's discretion; that a party should have a period of time, a "safe harbor," within which to withdraw or correct a filing alleged to violate Rule 11; and that Rule 11's primary purpose is to deter future violations and not necessarily to compensate the opposing party for losses, including attorney fees.

In the 108th Congress, the House of Representatives passed H.R. 4571, the Lawsuit Abuse Reduction Act of 2004,[1] which would have amended Rule 11. That bill would have provided for mandatory sanctions for violations, repealed the safe harbor, and required judges to order the offending lawyer or party to compensate the opposing party for attorney fees incurred as a direct result of a Rule 11 violation. The proposed legislation would have reversed three amendments to Rule 11 adopted through the rulemaking process in 1993: to convert mandatory sanctions to discretionary sanctions, to create a safe harbor, and to deemphasize attorney fee awards. The proposed legislation also would have introduced a requirement that a district court suspend an attorney's license to practice in that district for one year if the attorney was found to have violated Rule 11 three or more times in that district.

The survey was designed, in part, to elicit district judges' views based on their experience with the 1993 amendments. The Advisory Committee was particularly interested in having the survey identify any differences in the views of district judges concerning the current Rule 11, the legislative pro-

1. H.R. 4571, 108th Cong. 2d Sess. (2004). The House version was introduced in the Senate on Sept. 15, 2004, referred to the Committee on the Judiciary, and was not the subject of a vote.

posal, and the pre-1993 version of Rule 11. The pre-1993 version differs from the legislative proposal in significant ways, particularly in its treatment of attorney fees as a discretionary, not a mandatory, sanction for a violation of Rule 11.

On December 10, 2004, the Center E-mailed questionnaires to two random samples of 200 district judges each. District Judge Lee H. Rosenthal, chair of the Advisory Committee on Civil Rules, provided a cover letter for the E-mail. One sample comprised solely judges appointed to the bench before January 1, 1992, who would be expected to have had considerable experience with the pre-1993 version of Rule 11. The other sample comprised solely judges appointed to the bench after January 1, 1992, who would be expected to have had most of their judicial experience working with the 1993 amended version of Rule 11. Judge Rosenthal sent a follow-up E-mail on January 3, 2005. Of the 400 judges, 278 responded, a rate of 70%. Appendix A explains the methods used to select the samples. Appendix B contains a composite copy of the two questionnaires used in the survey.

Summary of Results

More than 80% of the 278 district judges indicated that "Rule 11 is needed and it is just right as it now stands." In evaluating the alternatives, 87% of the respondents preferred the current Rule 11, 5% preferred the version in effect between 1983 and 1993, and 4% preferred the version proposed in H.R. 4571.

Judges' opinions about specific provisions in Rule 11 and the proposed legislation followed a similar pattern. The results indicated that relatively large majorities of the judges who responded to our survey have the following views about Rule 11:

- 85% strongly or moderately support Rule 11's safe harbor provision;
- 91% oppose the proposed requirement that sanctions be imposed for every Rule 11 violation;
- 84% disagree with the proposition that an award of attorney fees should be mandatory for every Rule 11 violation; and
- 72% believe that having sanctions for discovery in Rules 26(g) and 37 is best.

A majority of the judges (55%) indicated that the purpose of Rule 11 should be both deterrence and compensation; almost all of the other judges (44%) indicated that deterrence should be the sole purpose of Rule 11.

The views of judges who responded to the survey are likely to be related to their estimation of the amount of groundless civil litigation they see in their own docket, especially when focusing on cases where the plaintiff is represented by counsel. Approximately 85% of the district judges view groundless litigation in such cases as no more than a small problem and another 12% see such litigation as a moderate problem. About 3% view groundless litigation brought by plaintiffs who are represented by counsel as a large or very large problem. For 54% of the judges who responded, the amount of groundless litigation has remained relatively constant during their tenure on the federal bench. Only 7% indicated that the problem is now larger. For 19%, the amount of groundless civil litigation has decreased during their tenure on the federal bench, and for 12% there has never been a problem.

Results

The Advisory Committee was especially interested in having a survey that was designed to inquire about district court judges' experience with Rule 11 as well as to solicit judges' opinions about the current Rule 11 relative to the proposed changes contained in the legislation. Those interests shaped the organization and content of the survey questionnaires. The survey results in this section of the report are presented in tables and text in the order in which the questions appeared on the survey instrument. The title of each table states the question asked of the judges, and the response categories are a shorthand version of the responses called for in the questionnaire. The preface of each questionnaire indicated in bold type that "This questionnaire is about the effects of Rule 11 in cases in which the plaintiff is represented by counsel." Many of the questions were modeled on questions asked of judges in a 1995 Center survey.[2] In order to facilitate comparisons between the findings of the 1995 survey and the current survey, we present applicable results of both surveys with appropriate references.

Frequency of Groundless Litigation

The questionnaire first asked judges about their perception of any problems with groundless litigation and whether such problems, if they exist, had

2. John Shapard et al., Report of a Survey Concerning Rule 11, Federal Rules of Civil Procedure (Federal Judicial Center 1995) [hereinafter FJC 1995 Rule 11 Survey].

changed since Rule 11 was last amended in 1993. Table 1 shows that 85% of the judges described any perceived problem with groundless litigation as being no more than a small one. Among judges commissioned before January 1, 1992, this figure was over 75%; the figure was almost 90% for judges commissioned after that date. In our 1995 study, 40% of the judges indicated that the problem with groundless litigation was moderate to very large;[3] only 15% believed this to be the case in the current study.

Table 1
Responses to Question 1.1, Is there a problem with groundless litigation in federal civil cases on your docket?

Possible Answer	All Judges (*N*=276)[4]	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=148)
No problem	15%	13%	16%
Very small problem	38%	31%	43%
Small problem	32%	34%	30%
Moderate problem	12%	16%	9%
Large problem	2%	2%	2%
Very large problem	1%	3%	0%
I can't say	0%	1%	0%

The questionnaire next asked whether such problems, if they exist, had changed since Rule 11 was last amended in 1993. Table 2 shows that about 7% said that the problem had increased. More than half said that the problem was the same, and 12% said that there has never been a problem. Judges commissioned after January 1, 1992, were more likely to say that there has never been a problem but, if there is a problem, it is about the same as it was during their first year on the bench.

3. *Id.* at 3.

4. *N* refers to the number of judges who answered the question. The value of *N* varies across tables because of differences in the number of judges who answered a particular question. Percentages in columns with results for all judges are weighted to reflect the fact that, by drawing two samples independently from two groups of judges, we have a stratified sample. In this case, weighted results for the entire sample are appropriate. Weighting is unnecessary for results reported separately by group. Finally, as a result of rounding, column percentages may not sum to 100.

Table 2
Responses to Question 1.2, Is the current problem (if any) with groundless litigation in civil cases on your docket smaller than, about the same as, or larger now than it was

before Rule 11 was amended? (asked of pre-1992 judges) *or*

during your first year as a federal district judge? (asked of post-1992 judges)

Possible Answer	All Judges (*N*=276)	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=148)
There has never been a problem	12%	9%	14%
The problem is much smaller now than it was then	8%	11%	6%
The problem is slightly smaller now than it was then	11%	14%	9%
The problem is the same now as it was then	54%	48%	59%
The problem is slightly larger now than it was then	6%	5%	7%
The problem is much larger now than it was then	1%	2%	1%
I can't say	7%	11%	4%

"Safe Harbor" Provision and Rule 11 Activity

The questionnaire asked judges if they supported or opposed the Rule 11 "safe harbor" provision, which was added as part of the 1993 amendments. Table 3 shows that 86% of the judges said they supported it, with the majority of the judges expressing strong support. Table 3 also shows somewhat stronger support among judges commissioned after 1992. This subgroup has very little or no experience with the pre-1993 version of Rule 11, which did not include the safe harbor provision. Overall, the percentage of judges supporting the safe harbor has increased from 70% to 86% since 1995; judges showing strong support has increased from 32% to 60%. The percentage of judges opposing the safe harbor has decreased from 16% to 10%.[5]

5. FJC 1995 Rule 11 Survey, *supra* note 2, at 4.

Table 3
Responses to Question 2.1, Based on your experience and your assessment of what would be fairest to all parties, do you oppose or support Rule 11's "safe harbor" provision?

Possible Answer	All Judges (*N*=277)	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=149)
Strongly support	60%	53%	65%
Moderately support	26%	25%	26%
Moderately oppose	6%	9%	3%
Strongly oppose	4%	5%	2%
I find it difficult to choose	4%	6%	3%
I can't say	1%	1%	1%

The questionnaire contained a follow-up question for the pre-1992 judges about changes in Rule 11 activity as a result of the addition of the safe harbor provision. Judges commissioned prior to 1992 were asked how the safe harbor provision has affected the amount of Rule 11 activity since the provision went into effect in 1993. Table 4 shows that 45% of these judges reported that Rule 11 activity had decreased, either slightly or substantially, and 29% reported that activity was about the same. Only 5% reported increases in Rule 11 activity, and 21% indicated that they could not give a definitive answer to this question. Similarly, judges commissioned after 1992 were asked about Rule 11 activity since their first year on the bench. Table 4 shows that almost two-thirds of the post-1992 judges reported that Rule 11 activity had remained about the same, 22% reported decreases, and 7% reported increases.

Table 4
Responses to Question 2.2,

How has the safe harbor provision affected the amount of Rule 11 activity on your docket since it went into effect in 1993? (asked of pre-1992 judges) *or*

Since your first year as a district judge what, if any, changes have you observed in the amount of Rule 11 activity on your docket? (asked of post-1992 judges)

Possible Answer	Judges Commissioned Before 1/1/92 (*N*=127)	Judges Commissioned After 1/1/92 (*N*=148)
Increased substantially	1%	0%
Increased slightly	4%	7%
About the same	29%	65%
Decreased slightly	17%	12%
Decreased substantially	28%	10%
I can't say	21%	6%

Rule 11 Sanctions

The current version of Rule 11 allows a district judge to impose sanctions for violations of the rule, at his or her own discretion, with the purpose of deterring similar conduct in the future. H.R. 4571 would require sanctions for every violation, with the purpose of compensating the injured party for reasonable expenses and attorney fees as well as to deter repetitions of such conduct.

The judges were asked first whether sanctions, monetary or nonmonetary, should be required. Table 5 shows that 91% said that sanctions should not be required. Among judges commissioned before 1992, 86% said sanctions should not be required; for judges commissioned after 1992 the figure was 95%. In 1995, 22% of the judges thought that a sanction should be required for every Rule 11 violation, compared with 9% who think so now.[6]

6. *Id.* at 6.

Table 5
Responses to Question 3.1, Should the court be required to impose a monetary or nonmonetary sanction when a violation is found?

Possible Answer	All Judges (*N*=277)	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=149)
Yes	9%	13%	5%
No	91%	86%	95%
I can't say	0%	1%	0%

Judges were next asked whether an award of attorney fees, sufficient to compensate the injured party, should be mandatory when a sanction is imposed. Table 6 shows that 84% of the judges said no. The result is approximately the same whether the judges were commissioned before or after 1992. The percentage of judges favoring mandatory attorney fees for Rule 11 violations was 15% in both the 1995 and 2005 surveys.[7]

Table 6
Responses to Question 3.2, When a sanction is imposed, should it be mandatory that the sanction include an award of attorney fees sufficient to compensate the injured party?

Possible Answer	All Judges (*N*=277)	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=149)
Yes	15%	14%	16%
No	84%	85%	83%
I can't say	1%	1%	1%

Regarding the proposed legislation's inclusion of financial compensation as a general purpose for Rule 11, judges were asked what should be the purpose of Rule 11. Almost 100% of the judges said that a purpose of Rule 11 should be deterrence. Their views were split on the role of compensation. The results in Table 7 reveal that slightly more than half, 55%, said that the purpose should be deterrence *and* compensation; 44% said that the purpose should be deterrence, with compensation if needed for the sake of deterrence. Reading the Table 7 results in light of the opinions expressed in

7. *Id.*

Table 5 and 6, it appears that most judges who favor compensating the opposing party do not favor such compensation in all cases and do not necessarily favor compensation in the form of attorney fees. In the 1995 survey, 66% of the judges thought that Rule 11 should include both compensatory and deterrent purposes.[8]

Table 7
Responses to Question 3.3, What should the purpose of Rule 11 sanctions be?

Possible Answer	All Judges (*N*=275)	Judges Commissioned Before 1/1/92 (*N*=126)	Judges Commissioned After 1/1/92 (*N*=149)
Deterrence (& compensation if warranted)	44%	40%	46%
Compensation only	0%	1%	0%
Both deterrence & compensation	55%	58%	53%
Other	1%	1%	1%

Three Strikes

Under the proposed legislation, when an attorney violates Rule 11 the federal court would determine how many times that attorney had violated Rule 11 in that court during the attorney's career. If that attorney had committed three or more violations, the court would suspend for one year the attorney's license to practice in that court.

To gauge the frequency with which this portion of the proposed Rule 11 might be invoked, judges were asked whether they had encountered an attorney with three or more violations in their district. Table 8 shows that 77% of the judges reported that they had not. Of the remaining 23%, more than half were not sure if they had encountered an attorney with three or more violations. Judges commissioned before 1992 were more likely to say they had encountered such an attorney. This result may, of course, be largely the result of their longer time on the bench.

8. *Id.*

Table 8
Responses to Question 4.1, In your experience as a district judge, have you encountered an attorney who has violated Rule 11 three or more times in your district?

Possible Answer	All Judges (*N*=277)	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=149)
Yes	11%	15%	8%
No	77%	71%	81%
I can't say	12%	14%	11%

At present, the efforts and methods required to enable courts to track attorney violations, in order to apply the proposed legislation's "three strikes" provision, are unknown. Judges were asked for their views, which are reported in Table 9. The choices were not mutually exclusive: Judges could check more than one response and therefore the percentages do not sum to 100. The most frequent response, given by 48% of the judges, was that a new database would be required to track Rule 11 violations. Examination of prior docket records was the next most frequent response, given by 35% of the judges. Only 4% said that little or no additional effort would be required, and nearly one-third (32%) were unsure about what would be needed to apply the three strikes provision.

Table 9
Responses to Question 4.2, In your district, how much effort would be required to obtain information about the number of prior Rule 11 violations committed by an attorney during his or her career?

Possible Answer	All Judges (*N*=277)	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=149)
Little or no additional effort	4%	3%	5%
Examining prior docket records for past violations	35%	35%	34%
Creating a new database for Rule 11 violations	48%	53%	44%
An affidavit or declaration from each attorney	19%	17%	20%
Other court action	3%	2%	3%
I can't say	32%	29%	34%

Judges were next asked their views on the impact of the proposed three strikes provision in deterring groundless litigation relative to the cost of implementation and in light of their courts' existing procedures for disciplining attorneys. Table 10 shows that 40% felt that the cost of implementation would exceed the deterrent value, while 25% of the judges felt that the value of the deterrent effect would exceed the cost of implementation. However, 27% were unsure about the tradeoff between cost and deterrent effect. Judges commissioned after 1992, compared with those commissioned earlier, were more likely to view the cost as exceeding the value of the proposed legislation and were less likely to view the deterrent value as exceeding the cost. They were also more likely to express uncertainty over the tradeoff.

Table 10
Responses to Question 4.3, Which of the following statements best captures your expectations regarding the impact of the proposal in deterring groundless litigation in comparison to the cost of implementing the proposal in your district?

Possible Answer	All Judges (*N*=277)	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=149)
Value of the deterrent effect would greatly exceed its cost	16%	15%	16%
Value of the deterrent effect would somewhat exceed its cost	9%	11%	7%
Value of the deterrent effect would about equal its cost	9%	13%	7%
Cost of implementing the proposal would somewhat exceed the value of the deterrent effect	10%	6%	13%
Cost of implementing the proposal would greatly exceed the value of the deterrent effect	30%	32%	28%
I can't say	27%	23%	30%

Application of Rule 11 to Discovery

The proposed legislation would extend Rule 11's application to discovery-related activity. Standards and sanctions for discovery are currently covered by Federal Rules of Civil Procedure 26(g) and 37, and the proposed legislation would augment these rules with an expanded Rule 11. The sampled judges were asked their opinion on the best combination of rules and sanctions. Table 11 shows that 72% of the judges (compared with 48% in 1995)[9] feel that the best option is the current version of Rule 11; 14% favored the proposed legislation. Judges commissioned after 1992 were a little more likely to favor the current version of the rule than judges commissioned before 1992.

9. *Id.* at 7.

Table 11
Responses to Question 5, Based on your experience, which of the following options do you believe would be best?

Possible Answer	All Judges (*N*=276)	Judges Commissioned Before 1/1/92 (*N*=127)	Judges Commissioned After 1/1/92 (*N*=149)
Sanctions provisions contained only in Rules 26(g) and 37	72%	68%	75%
Sanctions provisions contained in Rules 26(g), 37, and 11	13%	15%	12%
Sanctions provisions consolidated in Rule 11	5%	7%	3%
No significant difference among the three options	5%	6%	4%
I can't say	5%	5%	5%

How to Control Groundless Litigation?

To gauge judges' overall views on the proposed legislation and on controlling groundless litigation, the judges were asked whether Rule 11 should be modified. Table 12 shows their responses to the given options. The great majority of judges (81%) said that Rule 11 is just right as currently written. In 1995, 52% of the judges indicated that the same version of Rule 11 was just right as written. In 2005, there were differences among judges depending on when they were commissioned: 71% of judges commissioned before 1992 agreed that the current Rule 11 is just right, compared with 89% of judges commissioned afterwards. There was almost no support for modifying Rule 11 to reduce the risk of deterring meritorious filings, and only some support, primarily among the longer-serving judges, to modify Rule 11 to more effectively deter groundless filings.

Table 12
Responses to Question 6, Based on your view of how effective or ineffective these other methods are, how, if at all, should Rule 11 be modified?

Possible Answer	All Judges (*N*=270)	Judges Commissioned Before 1/1/92 (*N*=124)	Judges Commissioned After 1/1/92 (*N*=146)
Modified to increase its effectiveness in deterring groundless filings	13%	21%	7%
Rule 11 is just right as it now stands	81%	71%	89%
Modified to reduce the risk of deterring meritorious filings	1%	2%	1%
Rule 11 is not needed	1%	2%	1%
I can't say	3%	4%	3%

Finally, the judges were asked which version of Rule 11 they would prefer to have if and when they have to deal with groundless litigation. Given the choice among the current version of Rule 11, the pre-1993 version, or the proposed legislation, 87% of the judges preferred the current version. The percentages for surveyed judges commissioned before and after 1992 are 83% and 91%, respectively. There was little support expressed for either the pre-1993 version or the version contained in H.R. 4571.

Table 13
Responses to Question 7, Proposed legislation would repeal the safe harbor provision in Rule 11 and require that the court shall impose an appropriate sanction on a party or attorney who signed a pleading, motion, or other paper in violation of Rule 11 standards. Which approach would you prefer in dealing with groundless litigation?

Possible Answer	All Judges (*N*=271)	Judges Commissioned Before 1/1/92 (*N*=123)	Judges Commissioned After 1/1/92 (*N*=148)
The current Rule 11	87%	83%	91%
The 1983–1993 version of Rule 11	5%	7%	4%
The proposed legislation	4%	7%	2%
I can't say	4%	4%	3%

Conclusion

Based on their experiences in managing groundless civil litigation in their own courts, federal district judges find the current Rule 11 to be well suited to their needs. Almost all of the judges reported that, in their experience, groundless civil litigation is a small or at most a moderate problem. District judges' views on proposed changes to Rule 11 appear to be consistent with their experiences on the federal bench. Substantial majorities of the responding judges said, in effect, that none of the proposals for changing Rule 11—that is, proposals for mandatory sanctions, mandatory attorney fee awards, removal of the safe harbor, and application of Rule 11 to discovery disputes—would resolve problems that district judges are experiencing.

Appendix A
Method

Separate forms of the questionnaire were E-mailed by Center staff with a cover letter from the chair of the Advisory Committee to two samples of active and active-senior federal district court judges. The samples, each one of 200 judges, were separately and randomly selected from within two groups of judges defined by their commission date. Judges commissioned before January 1, 1992, formed one group; judges commissioned on or after that date formed the other. This date was selected in order that all judges in the first group would have had at least one year on the bench before the 1993 amendments to Rule 11 went into effect. This group of judges received a form of the questionnaire that, where necessary, asked them to use their pre-1993 period on the bench as a basis for comparison. The second group of judges received a questionnaire that instead asked them to use their first year on the bench as their basis for comparison. A composite of the two versions of the questionnaire is contained in Appendix B.

In order to quickly and easily convert the returned questionnaires into data files, Center research staff used special software to produce and read the questionnaires. Each of the two forms of the questionnaire was converted to Portable Document Format (PDF) and sent via E-mail to the 400 sampled judges. Each judge's file was named using a sequential, numbered ID that was used to track returned questionnaires for follow-up purposes. Upon receipt of the file, the judges were able to open the PDF file, answer the questions, save the file, and return it via E-mail. The software that produced the files was used to convert the returned questionnaires to a data file for analysis. Judges were also given the option of printing the PDF file, completing it, and faxing it to a fax server at the Center. Of the 280 responses received, 44 were returned via E-mail; the remainder were returned via fax. The questionnaires were sent on December 9, 2004, and a reminder was sent on January 3, 2005, to judges who had not yet responded. The response rates for the two samples were different. Post-1992 judges were more likely to return the questionnaire (74%) than were pre-1992 judges (64%).

The sample procedure described above produced a stratified sample in which the judges' commission dates defined the strata. In order to correctly interpret results for the sample of all judges, when reported, these data were weighted to reflect the fact that different sampling fractions were used for

the different strata. Results reported separately by strata do not require weighting.

Appendix B
Questionnaire

The questionnaire sent to judges commissioned before January 1, 1992 is reproduced below. Questions 1.2 and 2.2 differed in the version sent to judges commissioned on or after that date. The differences are indicated by bracketed text. Bold and underlined text was in that format in the original questionnaires.

RULE 11 SURVEY

PURPOSE AND INSTRUCTIONS. Federal Rule of Civil Procedure 11 (**Rule 11**) provides sanctions for presenting a pleading, written motion, or other paper without reasonable support in fact or law or for an improper purpose, such as to cause unnecessary cost or delay. This questionnaire seeks information from you about how Rule 11 is working and also seeks your evaluation of several issues concerning Rule 11 and current Congressional proposals to amend that rule. Rule 11 provides that sanctions for violations are within the judge's discretion; that a party should have a period of time, a "safe harbor," within which to withdraw or correct a filing alleged to violate Rule 11; and that Rule 11's primary purpose is to deter future violations and not necessarily to compensate the opposing party for losses, including attorney fees.

Proposed legislation (HR 4571, adopted by the House of Representatives on September 14, 2004) would amend Rule 11 to provide that sanctions for violations be mandatory, repeal the safe harbor, and require courts to order compensation to a party for attorney fees incurred as a direct result of a Rule 11 violation. The proposed legislation would reverse three changes made by **Rule11 amendments adopted in 1993**, namely to delete mandatory sanctions, to deemphasize attorney fee awards, and to create a safe harbor. The **proposed legislation** also requires a district court to suspend an attorney's license to practice in that district for one year if the attorney has violated Rule 11 three or more times in that district.

This questionnaire is about the effects of Rule 11 in cases in which the plaintiff is represented by counsel. Do not include in your evaluation of Rule 11 the effects it may or may not have had on cases in which the plaintiff is proceeding pro se.

Please respond to the questions on the basis of <u>your own</u> experience as a judge with cases on your docket, not the experiences of other judges or attorneys.

For convenience, throughout this questionnaire we refer to pleadings, written motions, and other papers that do not conform to the requirements of Rule 11 as *groundless litigation.*

Please respond by marking the box next to your answer.

1. FREQUENCY OF GROUNDLESS LITIGATION

1.1 Is there a problem with groundless litigation in federal civil cases on your docket? Please mark one.

a) There is no problem.
b) There is a very small problem.
c) There is a small problem.
d) There is a moderate problem.
e) There is a large problem.
f) There is a very large problem.
g) I can't say.

1.2 Is the current problem (if any) with groundless litigation in civil cases on your docket smaller, about the same as, or larger than it was before Rule 11 was amended in 1993? **[**Is the current problem (if any) with groundless litigation in civil cases on your docket smaller, about the same as, or larger than it was during your first year as a federal district judge?**]** Please mark one.

a) There has never been a problem.
b) The problem is much smaller now than it was then.
c) The problem is slightly smaller now than it was then.
d) The problem is the same now as it was then.
e) The problem is slightly larger now than it was then.
f) The problem is much larger now than it was then.
g) I can't say.

2. THE SAFE HARBOR PROVISION. **Rule 11** provides that a motion for sanctions shall not be filed with the court until 21 days after a copy is served on the opposing party. This provision creates a "safe harbor" by specifying that a party will not be subjected to sanctions on the basis of another party's motion unless, after receiving the motion, the party fails to withdraw or correct the challenged filing. **Proposed legislation** would eliminate the "safe harbor" provision.

Proponents of the safe harbor provision argue that it leads to the efficient resolution of both the Rule 11 issues and the underlying legal and factual issues with less court involvement; gives incentives to parties to withdraw or abandon questionable positions; decreases the number of sanctions motions that are filed for inappropriate reasons; and provides that abuses of the "safe harbor" can be dealt with by sua sponte sanctions. **Opponents** of the "safe harbor" provision argue that it allows filing of groundless papers without penalty and denies compensation to parties who have been subjected to groundless filings.

2.1 Based on your experience and your assessment of what would be fairest to all parties, do you oppose or support Rule 11's "safe harbor" provision? Please mark one.

a) I strongly support Rule 11's safe harbor provision.
b) I moderately support Rule 11's safe harbor provision.
c) I moderately oppose Rule 11's safe harbor provision.
d) I strongly oppose Rule 11's safe harbor provision.
e) I find it difficult to choose because the pros and cons of the safe harbor provision are about equally balanced.
f) I can't say.

2.2 How has the safe harbor provision affected the amount of Rule 11 activity on your docket since it went into effect in 1993? **[**Since your first year as a federal district judge what, if any, changes have you observed in the amount of Rule 11 activity on your docket?**]** Please mark one.

a) Rule 11 activity has increased substantially
b) Rule 11 activity has increased slightly
c) Rule 11 activity has remained about the same
d) Rule 11 activity has decreased slightly
e) Rule 11 activity has decreased substantially
f) I can't say

3. RULE 11 SANCTIONS. **Rule 11** provides that the court "may" impose a sanction when the rule has been violated, leaving the matter to the court's discretion. **Rule 11** also provides that the purpose of Rule 11 sanctions is to deter repetition of the offending conduct, rather than to compensate the parties injured by that conduct; that monetary sanctions, if imposed, should ordinarily be paid into court; and that awards of compensation to the injured party should be made only when necessary for effective deterrence.

Proposed legislation would alter these standards and require that a sanction be imposed for every violation. **Proposed legislation** would also provide that a purpose of sanctions is to compensate the injured party as well as to deter similar conduct and would require that any sanction be sufficient to compensate the injured party for the reasonable expenses and attorney fees that an injured party incurred as a direct result of a Rule 11 violation.

Please indicate for each of the three questions below what you think would be, on balance, the fairest form of Rule 11 for the types of cases you encounter on your docket.

3.1 Should the court be <u>required</u> to impose a monetary or nonmonetary sanction when a violation is found? Please mark one.

a) Yes
b) No
c) I can't say.

3.2 When a sanction is imposed, should it be mandatory that the sanction include an award of attorney fees sufficient to compensate the injured party? Please mark one.

a) Yes, an award of attorney fees should be mandatory if a sanction is imposed.
b) No, an award of attorney fees should not be mandatory.
c) I can't say.

3.3 What should the purpose of Rule 11 sanctions be? Please mark one.

a) deterrence (and compensation if warranted for effective deterrence)
b) compensation only
c) both compensation and deterrence
d) other (please specify in the answer space for question 8)

4. THREE STRIKES PROVISION. **Proposed** legislation would require a federal district court, after it has determined that an attorney violated Rule 11, to "determine the number of times that attorney has violated [Rule 11] in that Federal district court during that attorney's career. If an attorney has violated Rule 11 three or more times, the court must suspend that attorney's license to practice in that court for a period of one year."

4.1 In your experience as a district judge, have you encountered an attorney who has violated Rule 11 three or more times in your district? Please mark one:

a) Yes
b) No
c) I can't say

4.2 In your district, how much effort would be required to obtain information about the number of prior Rule 11 violations committed by an attorney during his or her career? Mark all that apply.

a) Obtaining such information would require little or no additional effort
b) Obtaining such information would require examining prior docket records for past violations
c) Obtaining such information would require creating a new database for Rule 11 violations
d) Obtaining such information would require an affidavit or declaration from each attorney
e) Obtaining such information would require other court action (specify) _____
f) I can't say

4.3 Which of the following statements best captures your expectations regarding the impact of the proposal in deterring groundless litigation in comparison to the cost of implementing the proposal in your district. In assessing the value of the proposal consider the effectiveness of existing procedures in your district for disciplining lawyers found to have engaged in misconduct of the type forbidden by Rule 11.Please mark one:

a) The value of the deterrent effect would greatly exceed its cost
b) The value of the deterrent effect would somewhat exceed its cost
c) The value of the deterrent effect would about equal its cost
d) The cost of implementing the proposal would somewhat exceed the value of the deterrent effect.
e) The cost of implementing the proposal would greatly exceed the value of the deterrent effect.
f) I can't say

5. APPLICATION TO DISCOVERY. Rule 11 does not apply to discovery-related activity because Federal Rules of Civil Procedure 26(g) and 37 establish standards and sanctions that apply to discovery disclosures, requests, responses, objections, and motions. **Proposed** legislation would amend Rule 11 to make it applicable to discovery-related activity.

Proponents of that legislative proposal argue that including discovery under Rule 11 or under Rule 11 together with Rules 26(g) and 37 is more effective in deterring groundless discovery-related activity than Rules 26(g) and 37 alone. **Opponents** of that proposal support the current version of Rule 11 and argue that discovery should not be covered by Rule 11 because the sanctions provisions of Rules 26(g) and 37 are stronger and are specifically designed for the discovery process.
Based on your experience, which of the following options do you believe would be best? Please mark one.

a) Sanctions provisions related to discovery contained only in Rules 26(g) and 37 (the current rule).
b) Sanctions provisions related to discovery contained in both Rules 26(g) and 37 and Rule 11.
c) Sanctions provisions related to discovery consolidated in Rule 11 and eliminated from Rules 26(g) and 37.
d) There is no significant difference among the three options.
e) I can't say.

6. RULE 11 AND OTHER METHODS OF CONTROLLING GROUNDLESS LITIGATION. Federal statutes, the Federal Rules of Civil Procedure, and inherent judicial authority provide judges with a number of opportunities and methods for deterring or minimizing the harmful effects of groundless claims, defenses, or legal arguments (e.g., informal admonitions, Rule 16 and Rule 26(f) conferences, 28 U.S.C. Section 1927, prompt dismissal of groundless claims, summary judgment). Based on your view of how effective or ineffective those other methods are, how, if at all, should Rule 11 be modified? Please mark one.

a) Rule 11 is needed, but it should be modified to increase its effectiveness in deterring groundless filings (even at the expense of deterring some meritorious filings).
b) Rule 11 is needed, and it is just right as it now stands.
c) Rule 11 is needed, but it should be modified to reduce the risk of deterring meritorious filings (even at the expense of failing to deter some groundless filings).
d) Rule 11 is not needed.
e) I can't say.

7. PREFERENCE FOR CURRENT OR PAST VERSIONS OF RULE 11 OR PROPOSED LEGISLATION.

The **version** of **Rule 11 in effect from 1983 to 1993** required that the court shall impose an appropriate sanction on a party or attorney who signed a pleading, motion or other paper in violation of Rule 11 standards. The appropriate sanction may, but need not, have included an order to pay the opposing party's reasonable attorney fees.

Rule 11 now provides that a court may impose an appropriate sanction on a party or attorney who signed a pleading, motion or other paper in violation of Rule 11 standards. The appropriate sanction may, but need not, include an order to pay the opposing party's reasonable attorney fees. **Rule 11** also provides a safe harbor that permits withdrawal without penalty of a filing that allegedly violates Rule 11, as long as the withdrawal takes place within 21 days of notice that another party intends to file a motion for Rule 11 sanctions.

Proposed legislation would repeal the safe harbor provision in Rule 11 and require that the court shall impose an appropriate sanction on a party or attorney who signed a pleading, motion or other paper in violation of Rule 11 standards. The proposed legislation would also require that the appropriate sanction be sufficient to compensate the parties injured by the conduct, including reasonable expenses and attorney fees. Which of the above approaches would you prefer to use in dealing with groundless litigation? Please mark one.

a) I prefer the current Rule 11
b) I prefer the 1983-1993 version of Rule 11
c) I prefer the proposed legislation
d) I can't say

8. Please use the space provided for any additional comments or suggestions you may have about issues raised in this questionnaire or about Rule 11 in general.

The Federal Judicial Center

Board
The Chief Justice of the United States, *Chair*
Magistrate Judge Robert B. Collings, U.S. District Court for the District of Massachusetts
Judge Bernice B. Donald, U.S. District Court for the Western District of Tennessee
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Judge Sarah S. Vance, U.S. District Court for the Eastern District of Louisiana
Leonidas Ralph Mecham, Director of the Administrative Office of the U.S. Courts

Director
Judge Barbara J. Rothstein

Deputy Director
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The organization of the Center reflects its primary statutory mandates. The Education Division plans and produces education and training programs for judges and court staff, including satellite broadcasts, video programs, publications, curriculum packages for in-court training, and Web-based programs and resources. The Research Division examines and evaluates current and alternative federal court practices and policies. This research assists Judicial Conference committees, who request most Center research, in developing policy recommendations. The Center's research also contributes substantially to its educational programs. The two divisions work closely with two units of the Director's Office—the Systems Innovations & Development Office and Communications Policy & Design Office—in using print, broadcast, and on-line media to deliver education and training and to disseminate the results of Center research. The Federal Judicial History Office helps courts and others study and preserve federal judicial history. The International Judicial Relations Office provides information to judicial and legal officials from foreign countries and assesses how to inform federal judicial personnel of developments in international law and other court systems that may affect their work.

S. 623

Sunshine in Litigation Act of 2011

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

Calendar No. 64

112TH CONGRESS
1ST SESSION

S. 623

To amend chapter 111 of title 28, United States Code, relating to protective orders, sealing of cases, disclosures of discovery information in civil actions, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 17, 2011

Mr. KOHL (for himself, Mr. GRAHAM, Mr. LEAHY, and Mrs. FEINSTEIN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

MAY 19, 2011

Reported by Mr. LEAHY, with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

To amend chapter 111 of title 28, United States Code, relating to protective orders, sealing of cases, disclosures of discovery information in civil actions, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 ~~**SECTION 1. SHORT TITLE.**~~

2 ~~This Act may be cited as the "Sunshine in Litigation~~

3 ~~Act of 2011".~~

4 ~~**SEC. 2. RESTRICTIONS ON PROTECTIVE ORDERS AND SEAL-**~~

5 ~~**ING OF CASES AND SETTLEMENTS.**~~

6 ~~(a) IN GENERAL.—Chapter 111 of title 28, United~~

7 ~~States Code, is amended by adding at the end the fol-~~

8 ~~lowing:~~

9 ~~**"§ 1660. Restrictions on protective orders and sealing**~~

10 ~~**of cases and settlements**~~

11 ~~"(a)(1) In any civil action in which the pleadings~~

12 ~~state facts that are relevant to the protection of public~~

13 ~~health or safety, a court shall not enter, by stipulation or~~

14 ~~otherwise, an order otherwise authorized under rule 26(c)~~

15 ~~of the Federal Rules of Civil Procedure restricting the dis-~~

16 ~~closure of information obtained through discovery, an~~

17 ~~order approving a settlement agreement that would re-~~

18 ~~strict the disclosure of such information, or an order re-~~

19 ~~stricting access to court records unless in connection with~~

20 ~~such order the court has first made independent findings~~

21 ~~of fact that—~~

22 ~~"(A) such order would not restrict the disclo-~~

23 ~~sure of information which is relevant to the protec-~~

24 ~~tion of public health or safety; or~~

25 ~~"(B)(i) the public interest in the disclosure of~~

26 ~~past, present, or potential health or safety hazards~~

1 ~~is outweighed by a specific and substantial interest~~
2 ~~in maintaining the confidentiality of the information~~
3 ~~or records in question; and~~
4 ~~"(ii) the requested order is no broader than~~
5 ~~necessary to protect the confidentiality interest as-~~
6 ~~serted.~~
7 ~~"(2) No order entered as a result of the operation~~
8 ~~paragraph (1), other than an order approving a settlement~~
9 ~~agreement, may continue in effect after the entry of final~~
10 ~~judgment, unless at the time of, or after, such entry the~~
11 ~~court makes a separate finding of fact that the require-~~
12 ~~ments of paragraph (1) continue to be met.~~
13 ~~"(3) The party who is the proponent for the entry~~
14 ~~of an order, as provided under this section, shall have the~~
15 ~~burden of proof in obtaining such an order.~~
16 ~~"(4) This section shall apply even if an order under~~
17 ~~paragraph (1) is requested—~~
18 ~~"(A) by motion pursuant to rule 26(c) of the~~
19 ~~Federal Rules of Civil Procedure; or~~
20 ~~"(B) by application pursuant to the stipulation~~
21 ~~of the parties.~~
22 ~~"(5)(A) The provisions of this section shall not con-~~
23 ~~stitute grounds for the withholding of information in dis-~~
24 ~~covery that is otherwise discoverable under rule 26 of the~~
25 ~~Federal Rules of Civil Procedure.~~

1 ~~"(B) A court shall not approve any party's stipulation~~
2 ~~or request to stipulate to an order that would violate this~~
3 ~~section.~~
4 ~~"(b)(1) In any civil action in which the pleadings~~
5 ~~state facts that are relevant to the protection of public~~
6 ~~health or safety, a court shall not approve or enforce any~~
7 ~~provision of an agreement between or among parties, or~~
8 ~~approve or enforce an order entered as a result of the op-~~
9 ~~eration of subsection (a)(1), to the extent that such provi-~~
10 ~~sion or such order prohibits or otherwise restricts a party~~
11 ~~from disclosing any information relevant to such civil ac-~~
12 ~~tion to any Federal or State agency with authority to en-~~
13 ~~force laws regulating an activity relating to such informa-~~
14 ~~tion.~~
15 ~~"(2) Any such information disclosed to a Federal or~~
16 ~~State agency shall be confidential to the extent provided~~
17 ~~by law.~~
18 ~~"(c)(1) Subject to paragraph (2), a court shall not~~
19 ~~enforce any provision of a settlement agreement described~~
20 ~~under subsection (a)(1) between or among parties that~~
21 ~~prohibits 1 or more parties from—~~
22 ~~"(A) disclosing the fact that such settlement~~
23 ~~was reached or the terms of such settlement, other~~
24 ~~than the amount of money paid; or~~

1 ~~"(B) discussing a civil action, or evidence pro-~~
2 ~~duced in the civil action, that involves matters rel-~~
3 ~~evant to the protection of public health or safety.~~
4 ~~"(2) Paragraph (1) applies unless the court has made~~
5 ~~independent findings of fact that—~~
6 ~~"(A) the public interest in the disclosure of~~
7 ~~past, present, or potential public health or safety~~
8 ~~hazards is outweighed by a specific and substantial~~
9 ~~interest in maintaining the confidentiality of the in-~~
10 ~~formation or records in question; and~~
11 ~~"(B) the requested order is no broader than~~
12 ~~necessary to protect the confidentiality interest as-~~
13 ~~serted.~~
14 ~~"(d) When weighing the interest in maintaining con-~~
15 ~~fidentiality under this section, there shall be a rebuttable~~
16 ~~presumption that the interest in protecting personally~~
17 ~~identifiable information relating to financial, health or~~
18 ~~other similar information of an individual outweighs the~~
19 ~~public interest in disclosure.~~
20 ~~"(e) Nothing in this section shall be construed to per-~~
21 ~~mit, require, or authorize the disclosure of classified infor-~~
22 ~~mation (as defined under section 1 of the Classified Infor-~~
23 ~~mation Procedures Act (18 U.S.C. App.)).".~~
24 ~~(b) TECHNICAL AND CONFORMING AMENDMENT.—~~
25 ~~The table of sections for chapter 111 of title 28, United~~

1 ~~States Code, is amended by adding after the item relating~~
2 ~~to section 1659 the following:~~
~~"1660. Restrictions on protective orders and sealing of cases and settlements.".~~
3 ~~**SEC. 3. EFFECTIVE DATE.**~~
4 ~~The amendments made by this Act shall—~~
5 ~~(1) take effect 30 days after the date of enact-~~
6 ~~ment of this Act; and~~
7 ~~(2) apply only to orders entered in civil actions~~
8 ~~or agreements entered into on or after such date.~~
9 ***SECTION 1. SHORT TITLE.***
10 *This Act may be cited as the "Sunshine in Litigation*
11 *Act of 2011".*
12 ***SEC. 2. RESTRICTIONS ON PROTECTIVE ORDERS AND SEAL-***
13 ***ING OF CASES AND SETTLEMENTS.***
14 *(a) IN GENERAL.—Chapter 111 of title 28, United*
15 *States Code, is amended by adding at the end the following:*
16 ***"§ 1660. Restrictions on protective orders and sealing***
17 ***of cases and settlements***
18 *"(a)(1) Except as provided under subsection (e), in*
19 *any civil action in which the pleadings state facts that are*
20 *relevant to the protection of public health or safety, a court*
21 *shall not enter, by stipulation or otherwise, an order other-*
22 *wise authorized under rule 26(c) of the Federal Rules of*
23 *Civil Procedure restricting the disclosure of information ob-*
24 *tained through discovery, an order approving a settlement*
25 *agreement that would restrict the disclosure of such infor-*

1 *mation, or an order restricting access to court records unless*
2 *in connection with such order the court has first made inde-*
3 *pendent findings of fact that—*
4 *"(A) such order would not restrict the disclosure*
5 *of information which is relevant to the protection of*
6 *public health or safety; or*
7 *"(B)(i) the public interest in the disclosure of*
8 *past, present, or potential health or safety hazards is*
9 *outweighed by a specific and substantial interest in*
10 *maintaining the confidentiality of the information or*
11 *records in question; and*
12 *"(ii) the requested order is no broader than nec-*
13 *essary to protect the confidentiality interest asserted.*
14 *"(2) No order entered as a result of the operation para-*
15 *graph (1), other than an order approving a settlement*
16 *agreement, may continue in effect after the entry of final*
17 *judgment, unless at the time of, or after, such entry the*
18 *court makes a separate finding of fact that the requirements*
19 *of paragraph (1) continue to be met.*
20 *"(3) The party who is the proponent for the entry of*
21 *an order, as provided under this section, shall have the bur-*
22 *den of proof in obtaining such an order.*
23 *"(4) This section shall apply even if an order under*
24 *paragraph (1) is requested—*

1 *"(A) by motion pursuant to rule 26(c) of the*
2 *Federal Rules of Civil Procedure; or*
3 *"(B) by application pursuant to the stipulation*
4 *of the parties.*
5 *"(5)(A) The provisions of this section shall not con-*
6 *stitute grounds for the withholding of information in dis-*
7 *covery that is otherwise discoverable under rule 26 of the*
8 *Federal Rules of Civil Procedure.*
9 *"(B) A court shall not approve any party's stipulation*
10 *or request to stipulate to an order that would violate this*
11 *section.*
12 *"(b)(1) In any civil action in which the pleadings state*
13 *facts that are relevant to the protection of public health or*
14 *safety, a court shall not approve or enforce any provision*
15 *of an agreement between or among parties, or approve or*
16 *enforce an order entered as a result of the operation of sub-*
17 *section (a)(1), to the extent that such provision or such*
18 *order prohibits or otherwise restricts a party from dis-*
19 *closing any information relevant to such civil action to any*
20 *Federal or State agency with authority to enforce laws reg-*
21 *ulating an activity relating to such information.*
22 *"(2) Any such information disclosed to a Federal or*
23 *State agency shall be confidential to the extent provided by*
24 *law.*

1 *"(c)(1) Subject to paragraph (2), a court shall not en-*
2 *force any provision of a settlement agreement described*
3 *under subsection (a)(1) between or among parties that pro-*
4 *hibits 1 or more parties from—*
5 *"(A) disclosing the fact that such settlement was*
6 *reached or the terms of such settlement, other than the*
7 *amount of money paid; or*
8 *"(B) discussing a civil action, or evidence pro-*
9 *duced in the civil action, that involves matters rel-*
10 *evant to the protection of public health or safety.*
11 *"(2) Paragraph (1) applies unless the court has made*
12 *independent findings of fact that—*
13 *"(A) the public interest in the disclosure of past,*
14 *present, or potential public health or safety hazards*
15 *is outweighed by a specific and substantial interest in*
16 *maintaining the confidentiality of the information or*
17 *records in question; and*
18 *"(B) the requested order is no broader than nec-*
19 *essary to protect the confidentiality interest asserted.*
20 *"(d) When weighing the interest in maintaining con-*
21 *fidentiality under this section, there shall be a rebuttable*
22 *presumption that the interest in protecting personally iden-*
23 *tifiable information relating to financial, health or other*
24 *similar information of an individual outweighs the public*
25 *interest in disclosure.*

1 *"(e) Nothing in this section—*

2 *"(1) shall prohibit a court from entering an*
3 *order that would restrict the disclosure of informa-*
4 *tion, or an order restricting access to court records,*
5 *if in either instance such order is necessary to protect*
6 *from public disclosure—*

7 *"(A) information classified under criteria*
8 *established by an Executive order to be kept se-*
9 *cret in the interest of national defense or foreign*
10 *policy; or*

11 *"(B) intelligence sources and methods; or*

12 *"(2) shall be construed to permit, require, or au-*
13 *thorize the disclosure of information that—*

14 *"(A) is classified under criteria established*
15 *by an Executive order to be kept secret in the in-*
16 *terest of national defense or foreign policy; or*

17 *"(B) reveals intelligence sources and meth-*
18 *ods.".*

19 *(b) TECHNICAL AND CONFORMING AMENDMENT.—The*
20 *table of sections for chapter 111 of title 28, United States*
21 *Code, is amended by adding after the item relating to sec-*
22 *tion 1659 the following:*

"1660. Restrictions on protective orders and sealing of cases and settlements.".

23 ***SEC. 3. EFFECTIVE DATE AND APPLICATION.***

24 *The amendments made by this Act shall—*

1 *(1) take effect 30 days after the date of enact-*
2 *ment of this Act;*
3 *(2) apply only to orders entered in civil actions*
4 *or agreements entered into on or after the effective*
5 *date of this Act; and*
6 *(3) not provide a basis for the—*
7 *(A) granting of a motion to reconsider,*
8 *modify, amend or vacate a protective order or*
9 *settlement order entered into before the effective*
10 *date of this Act; or*
11 *(B) reversal on appeal of a protective order*
12 *or settlement order entered into before the effec-*
13 *tive date of this Act.*

Calendar No. 64

112TH CONGRESS
1ST SESSION

S. 623

A BILL

To amend chapter 111 of title 28, United States Code, relating to protective orders, sealing of cases, disclosures of discovery information in civil actions, and for other purposes.

MAY 19, 2011

Reported with an amendment

H.R. 592

Sunshine in Litigation Act of 2011

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

112TH CONGRESS
1ST SESSION

H. R. 592

To amend chapter 111 of title 28, United States Code, relating to protective orders, sealing of cases, disclosures of discovery information in civil actions, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 9, 2011

Mr. NADLER introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend chapter 111 of title 28, United States Code, relating to protective orders, sealing of cases, disclosures of discovery information in civil actions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Sunshine in Litigation Act of 2011".

1 **SEC. 2. RESTRICTIONS ON PROTECTIVE ORDERS AND SEAL-**
2 **ING OF CASES AND SETTLEMENTS.**

3 (a) IN GENERAL.—Chapter 111 of title 28, United
4 States Code, is amended by adding at the end the fol-
5 lowing:

6 **"§ 1660. Restrictions on protective orders and sealing**
7 **of cases and settlements**

8 "(a)(1) In any civil action in which the pleadings
9 state facts that are relevant to the protection of public
10 health or safety, a court shall not enter, by stipulation or
11 otherwise, an order otherwise authorized under rule 26(c)
12 of the Federal Rules of Civil Procedure restricting the dis-
13 closure of information obtained through discovery, an
14 order otherwise authorized approving a settlement agree-
15 ment that would restrict the disclosure of such informa-
16 tion, or an order otherwise authorized restricting access
17 to court records unless in connection with such order the
18 court has first made independent findings of fact that—

19 "(A) such order would not restrict the disclo-
20 sure of information which is relevant to the protec-
21 tion of public health or safety; or

22 "(B)(i) the public interest in the disclosure of
23 past, present, or potential public health or safety
24 hazards is outweighed by a specific and substantial
25 interest in maintaining the confidentiality of the in-
26 formation or records in question; and

1 "(ii) the requested order is no broader than
2 necessary to protect the confidentiality interest as-
3 serted.
4 "(2) No order entered as a result of the operation
5 of paragraph (1), other than an order approving a settle-
6 ment agreement, may continue in effect after the entry
7 of final judgment, unless at the time of, or after, such
8 entry the court makes a separate finding of fact that the
9 requirements of paragraph (1) continue to be met.
10 "(b) In any civil action in which the pleadings state
11 facts that are relevant to the protection of public health
12 or safety, a court shall not enforce any provision of an
13 agreement between or among parties to a civil action, or
14 enforce an order entered as a result of the operation of
15 subsection (a)(1), to the extent that such provision or such
16 order prohibits or otherwise restricts a party from dis-
17 closing any information relevant to such civil action to any
18 Federal or State agency with authority to enforce laws
19 regulating an activity relating to such information.
20 "(c)(1) Subject to paragraph (2), a court shall not
21 enforce any provision of a settlement agreement in any
22 civil action in which the pleadings state facts that are rel-
23 evant to the protection of public health or safety, between
24 or among parties that prohibits one or more parties
25 from—

1 "(A) disclosing the fact that such settlement
2 was reached or the terms of such settlement (exclud-
3 ing any money paid) that involve matters relevant to
4 the protection of public health or safety; or
5 "(B) discussing matters relevant to the protec-
6 tion of public health or safety involved in such civil
7 action.
8 "(2) Paragraph (1) applies unless the court has made
9 independent findings of fact that—
10 "(A) the public interest in the disclosure of
11 past, present, or potential public health or safety
12 hazards is outweighed by a specific and substantial
13 interest in maintaining the confidentiality of the in-
14 formation in question; and
15 "(B) the requested order is no broader than
16 necessary to protect the confidentiality interest as-
17 serted.
18 "(d) Notwithstanding subsections (a)(1)(B)(i) and
19 (c)(2)(A), when weighing the interest in maintaining con-
20 fidentiality under this section, there shall be a rebuttable
21 presumption that the interest in protecting personally
22 identifiable information of an individual outweighs the
23 public interest in disclosure.
24 "(e) Nothing in this section shall be construed to per-
25 mit, require, or authorize the disclosure of classified infor-

1 mation (as defined under section 1 of the Classified Infor-
2 mation Procedures Act (18 U.S.C. App.)).".
3 (b) TECHNICAL AND CONFORMING AMENDMENT.—
4 The table of sections for chapter 111 of title 28, United
5 States Code, is amended by adding after the item relating
6 to section 1659 the following:

"1660. Restrictions on protective orders and sealing of cases and settlements.".

7 **SEC. 3. EFFECTIVE DATE.**

8 The amendments made by this Act shall—
9 (1) take effect 30 days after the date of enact-
10 ment of this Act; and
11 (2) apply only to orders entered in civil actions
12 or agreements entered into on or after such date.

○

May 2, 2011 Letter to Sen. Leahy re S. 623

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

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
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CHAIRS OF ADVISORY COMMITTEES

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CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

May 2, 2011

Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

We write on behalf of the Judicial Conference Committee on Rules of Practice and Procedure and the Advisory Committee on the Federal Rules of Civil Procedure to oppose the Sunshine in Litigation Act of 2011 (S. 623), which was introduced on March 17, 2011. The Rules Committees have consistently opposed the similar protective-order bills regularly introduced since 1991. Our letters opposing such bills are available on request. Our opposition to S. 623, like the opposition to those earlier bills, is based in part on the fact that they are inconsistent with the Rules Enabling Act, 28 U.S.C. §§ 2071–2077. Our opposition is also based on the specific provisions of S. 623 and similar earlier bills.

Bills that would amend the Civil Rules to regulate the issuance of protective orders in discovery, similar to S. 623, have been introduced regularly since 1991. Like S. 623, these proposed bills would require courts to make particularized findings of fact that a discovery protective order would not restrict the disclosure of information relevant to the protection of public health and safety. Under the Rules Enabling Act, the Rules Committees studied Rule 26(c) to learn about the problems that these bills seek to solve and to bring the strengths of the Rules Enabling Act process to bear on any problems that might be found. Under that process, the Committees carefully examined and reexamined the issues, reviewed the pertinent case law and legal literature, and initiated and evaluated empirical research studies. The Committees' work led to the conclusions that: (1) there

was no evidence that discovery protective orders create any significant problem of concealing information about safety or health hazards from the public; (2) protective orders are important to litigants' privacy and property interests; (3) discovery will become more burdensome and costly if parties cannot rely on protective orders; (4) administering a rule that adds conditions before any discovery protective order could be entered would impose significant burdens on the court system, resulting in increased delay and costs for litigants; and (5) such a rule would have limited impact because much information gathered in discovery is not filed with the court and is not publicly available.

1. Proposed Legislation Amending Rule 26(c) of the Federal Rules of Civil Procedure

As part of its careful study of the issues, the Rules Committees asked the Federal Judicial Center (FJC) to undertake an empirical study on whether discovery protective orders issued in federal courts were operating to keep information about public safety or health hazards from the public. The FJC examined 38,179 civil cases filed in the District of Columbia, the Eastern District of Michigan, and the Eastern District of Pennsylvania from 1990 to 1992. The study showed that discovery protective orders were requested in about 6% of civil cases; most requests were made by motion; courts carefully reviewed such motions and denied or modified a substantial proportion of them; about one-quarter of the requests were made by party stipulations that courts usually accept; and most protective orders restricting parties from disclosing discovery material were entered in cases other than personal injury cases, in which public health and safety issues are most likely to arise.

Since the FJC study, the need for protective orders to maintain the confidentiality of highly sensitive personal and commercial information has only increased. The explosive growth in electronically stored information and the fact that most discovery is electronic, as well as the federal courts' adoption of electronic court filing systems that permit public remote electronic access to court files, have increased the risks of unduly imposing on privacy interests. Protective orders to safeguard against dissemination of highly personal and sensitive information are critical to both plaintiffs and defendants. If protective orders are restricted, litigation burdens are increased and some plaintiffs might abandon their claims rather than risk public disclosure of highly personal information. Section 1660(d) of the proposed legislation, which provides a rebuttable presumption that the interest in protecting certain personally identifiable information of an individual outweighs the public interest in disclosure, is inadequate reassurance. The proposed legislation would impose a cumbersome and time-consuming process that is much less likely to accurately identify and protect confidential and sensitive personal or proprietary information than current protective order practices. Litigants would be required to absorb the added costs and delays of the process and bear an increased risk of disclosure of sensitive information.

The need for protective orders for effective discovery management has also increased with the explosive growth in electronically stored information. Even relatively small cases often involve huge volumes of information. Relying on the ability to designate information as confidential, parties voluntarily produce much information without the need for extensive direct judicial supervision. If obtaining an enforceable protective order required item-by-item judicial consideration to

determine whether the information was relevant to the protection of public health or safety, as contemplated under the bill, that would create discovery disputes. Requiring courts to review information—which can often amount to thousands or even millions of pages—to make such determinations, and requiring parties to litigate and courts to resolve related discovery disputes, would impose significant costs, burdens, and delays on the discovery process. Such satellite litigation would increase the cost of litigation, lead to orders refusing to permit discovery into some information now disclosed under protective orders, add to the pressures that encourage litigants to pursue nonpublic means of dispute resolution, and force some parties to abandon the litigation.

The Committees' study revealed no significant problem of protective orders impeding access to information that affects the public health or safety. Close examination of the commonly cited illustrations has shown that in these cases, information sufficient to protect public health or safety was publicly available from other sources. And the case law shows that when parties file motions for protective orders, courts review them carefully and grant only the protection needed, recognizing the importance of public access to court filings. The case law also shows that courts reexamine protective orders if intervenors or third parties raise public health or safety concerns about them.

The Committees' careful study led to the conclusion that no change to the present protective-order practice is warranted. The Committees' conclusion is grounded in case law, studies, and analyses developed and reviewed over the past 15 years.

The Rules Committees also asked the FJC to do an extensive empirical study on court orders that limit the disclosure of settlement agreements filed in the federal courts. That study showed no need for legislation like S. 623. Both the discovery protective order and the settlement agreement studies have previously been provided to the Senate Judiciary Committee.[1]

2. Specific Concerns about S. 623

a. Section 1660(a)(1): The Scope of S. 623

S. 623 is narrower than some earlier protective-order bills because it is limited to cases in which the pleadings "state facts that are relevant to the protection of public health or safety." The language recognizes that most cases in the federal courts do not implicate public health or safety and should not be affected by the added requirements S. 623 would impose. But the provisions defining the scope of S. 623 are problematic. In many cases, it would not be possible for the court to determine by reviewing the pleadings whether S. 623 applies. The standard of "facts that are relevant to the protection of public health or safety" is so broad and indefinite that it will either sweep up many cases having little to do with public health or safety and impose on all these cases the costly and time-consuming requirements of S. 623, or require the parties and court to spend

[1] Additional copies can be obtained at:
http://www.fjc.gov/public/pdf.nsf/lookup/0029.pdf/$file/0029.pdf;
http://www.cklawreview.com/wp-content/uploads/vol81no2/Reagan.pdf;
http://www.fjc.gov/public/pdf.nsf/lookup/sealset3.pdf/$file/sealset3.pdf.

extensive time and resources litigating whether the statute applies.

b. Section 1660(a)(1)(A) and (B): The Procedure for Entering a Discovery Protective Order

Once an action is identified as one that based on the pleadings falls under S. 623, the requirement that the court make independent findings of fact before issuing a protective order in discovery is triggered. This requirement is very similar to prior protective-order bills. The Committees have consistently opposed those bills because the procedure they require would delay discovery, increase motions practice, and impose significant and unworkable new burdens on lawyers, litigants, and judges. S. 623 raises the same concerns.

In many cases, parties are unwilling to begin exchanging information in discovery until an enforceable protective order is entered. The vital role protective orders play in effective discovery management is well recognized. The information the parties exchange in discovery often includes highly sensitive personal and private information or extremely valuable confidential information. Plaintiffs as well as defendants have discoverable information that must be protected from public dissemination. And discoverable private or confidential information is often not just in the parties' hands, but may also be held by nonparties such as witnesses, coworkers, patients, customers, and many others. The internet has made it much more difficult to protect private and confidential information and has increased the importance of protective orders.

Protective orders avoid delay and cost by allowing the parties to exchange information in discovery that they would not exchange otherwise without objection or motion, hearing, and court order. The requesting party's chief interest is to get discovery produced as quickly and with as little expense and burden as possible. Protective orders serve that interest by allowing the parties to exchange information—with electronic discovery, in volumes that are often huge—without time-consuming, costly, and burdensome pre-production motions and hearings. S. 623 would frustrate the role of protective orders and would make discovery even more burdensome, time-consuming, and expensive than it already is.

The language of the proposed legislation, as in similar prior bills, calls for a procedure under which no protective order can issue unless and until: (1) the party seeking the order designates all the information that would be produced in discovery subject to restrictions on disclosure; (2) the judge reviews all this information to determine whether any of it is relevant to the protection of public health or safety; (3) if any of the information is determined to be relevant to the protection of public health or safety, the judge determines whether any of that information is subject to a specific and substantial interest in maintaining its confidentiality; (4) the judge then determines whether the public interest in the disclosure of any information about public health or safety hazards is outweighed by that interest; and (5) the judge then decides whether the requested order is no broader than necessary to protect that confidentiality interest. The procedure in the proposed legislation would often require the judge's review to occur relatively early in the litigation, when the judge—who knows less about the case than the parties—is the least informed about the case. Information sought in discovery does not come with labels such as "impacts public health or safety"

or "raises specific and substantial interest in confidentiality." The judge will often simply be unable to tell whether the information she is reviewing is relevant to public health or safety. The judge also will not be able to tell whether there are "specific and substantial" privacy or confidentiality interests or how they should be weighed.

Even in cases in which the pleadings state facts relevant to public health or safety, much of the information sought and produced in discovery will not implicate public health or safety. Indeed, much of the information will not be important or even relevant to the case and will not be used by the parties in litigating the case. But there may be significant amounts of private or confidential information that should be protected from public disclosure. Under the procedure set out in S. 623, a lawyer representing a client—plaintiff or defendant—could not seek a protective order without first doing the expensive and time-consuming work of identifying specific information to be obtained through discovery that would be subject to disclosure restrictions. The judge could not issue a protective order to restrict the dissemination of any information obtained through discovery without making the independent findings of fact as to all that information. The effect would be delay, increased motions, and a reduction in timely, cost-effective access to justice.

In addition to causing delay and increased costs in the cases in which protective orders are sought, the procedure in S. 623 would cause delays in access to the federal court system in all cases. If judges have to look through every document produced in discovery in cases in which a protective order is sought in order to be able to make the findings required by the legislation, that will take time away from other pressing court business that litigants expect judges to take care of in a timely manner.

Comparing the procedure under S. 623 with the protective-order practice followed under current law in the federal courts further illustrates problems the legislation would create. Under current law, when the parties ask the court to enter a protective order before discovery begins, the language of Rule 26(c) and the case law require the court to find good cause for entering such an order, even if the parties agree on the terms. In most cases in which a discovery protective order is sought, the court makes the good-cause determination by examining the nature of the case and the types or categories of information that are likely to be exchanged in discovery. Neither the parties nor the court is required to conduct a time-consuming and burdensome pre-discovery review of all the information that will be produced. But such time-consuming and burdensome pre-discovery review is required by the language of S. 623, and will result in increased costs and delays.

The protective order typically sets up a procedure for the parties to designate documents exchanged in discovery—as opposed to filed with the court—as confidential, restricting their dissemination. Most protective orders include "challenge provisions" under which the receiving party or third parties may dispute the designation of a particular document or categories of documents as confidential. Even without such challenge provisions, the case law provides this right. Once the requesting party—who knows the case much better than the judge—gets the documents in discovery and can review them, that party may ask the court to permit the dissemination of documents designated as confidential, to modify the terms of the protective order, or to dissolve the protective order. Among the reasons for modification are the relevance of the documents to

protecting public health or safety and the need to bring them to the appropriate regulatory agency, and the desire to use the documents in related litigation. The court can effectively and efficiently consider such requests because they are focused on specific documents or information. With this focus, the court is able to resolve the requests by applying the factors the case law establishes, including the protection of public health or safety.

The procedures followed under current law meet the goals of S. 623, including in the relatively small number of cases filed in federal courts that implicate public health or safety, without the grave additional burdens, costs, and delays S. 623 would impose. In contrast, the procedure established under S. 623 is ineffective to meet its purpose and would create severe problems in discovery.

c. Section 1660(a)(1): The Application to Orders Restricting Access to Court Records

Section 1660(a)(1) imposes the same requirements on court orders that would restrict public access to court records that apply to orders restricting public access to information exchanged in discovery. This provision weakens the standard federal courts apply under current law for ensuring public access to documents that are filed with the federal court. Under current law, if the parties want to take the material exchanged in discovery and file it with the court, either with a motion or in an evidentiary hearing or at trial, a standard different and higher than the discovery protective-order standard applies before a court can seal it from public view. Courts recognize a general right of public access to all materials filed with the court that bear on the merits of a dispute. This presumption of access usually can be overcome only for compelling reasons; access is granted without the need to show a threat to public health or safety or any other particular justification unless a powerful need for confidentiality is shown. A lower good-cause standard applies to an order restricting disclosure of information exchanged in discovery but not filed with the court.

This distinction between the standard for protecting the confidentiality of information exchanged in discovery and the standard for filing under seal is critical. It reflects the longstanding recognition that while there is no right of public access to information exchanged between litigants in discovery, there is a presumptive right of public access to information that is filed in court and used in deciding cases. Courts require a much more stringent showing to seal documents filed in court than to limit dissemination of documents exchanged in discovery but never filed with the court.
Section 1660(a)(1) reduces the standard necessary to seal documents filed in court and collapses it into the standard necessary to restrict public dissemination of documents exchanged in discovery. As a result, S. 623 weakens the right of public access to court documents.

d. Section 1660(a)(2): Discovery Protective Orders After the Entry of Final Judgment

Section 1660(a)(2) would make a discovery protective order unenforceable after final judgment unless the judge makes separate findings of fact that each of the requirements of (a)(1)(A) and (B) are met. The burden of proof provision in (a)(3) requires that the need for continuing

protection be demonstrated as to all the information obtained in discovery subject to the protective order. Under current practice, the protective order often continues in effect, subject to requests made by either parties or nonparties to release documents or information. Once a party or third party identifies documents or information for which disclosure is sought, the burden of proof is much clearer and efficiently applied. The court is able to effectively and efficiently determine whether the protective order should be modified or lifted because the focus is on specifically identified documents or information. This current practice is adequate to meet the purposes of S. 623 without the added burdens, delays, and costs the bill would add.

Section 1660(a)(2) would greatly add to the costs and burdens of conducting discovery because parties could not be confident that even the most sensitive information they produced would remain subject to the protective order provisions when the case ended. The great importance of limiting access to such highly confidential private information is evidenced by the frequent use in protective orders of "attorneys' eyes only" provisions, which preclude a receiving attorney from sharing certain information received in discovery even with her clients. Such provisions are frequently used in litigation involving complex technology. The parties involved in such litigation often require the return or destruction of their highly confidential and proprietary materials at the conclusion of litigation, to ensure that materials so confidential that they could not even be shared with the receiving attorney's client during the litigation remain confidential when the litigation ends. Such provisions are also used in many other cases in which highly sensitive and private information about both parties and nonparties is obtained in discovery. It is essential to the effective and efficient operation of discovery that litigants be able to rely on the continuing confidentiality of information produced, including after the case ends, subject to the right of others to ask the court to permit broader dissemination of specific information for reasons that could include relevance to public health or safety. S. 623 destroys the reliability that makes protective orders effective, with no evidence that such a step is needed.

e. The Provisions Relating to Orders Approving Settlement Agreements

Section 1660(a)(1) would prohibit a court from entering an order approving a settlement agreement that restricts the disclosure of information obtained through discovery, in a case in which the pleadings state facts that are relevant to the protection of public health or safety, unless the court makes the specified independent findings of fact. Section 1660(c)(1) would preclude a court from enforcing any provision of a settlement agreement in a case with such pleadings that restricts a party from disclosing the fact of settlement or the terms of the settlement (other than the amount of money paid), or that restricts a party from "discussing the civil action, or evidence produced in the civil action, that involves matters relevant to public health or safety," unless the court makes the specified independent findings of fact.

There are very few federal court orders approving settlement agreements. Settlements are generally a matter of private contract. Settlement agreements usually are only brought to a court for approval if the applicable law requires it, as in settlements on behalf of minors or absent class members. Similarly, federal courts are rarely called on to enforce settlement agreements. Unless the agreement specifically invokes a court's continuing jurisdiction or an independent basis for

jurisdiction applies, enforcement actions are generally brought in state courts. Because federal courts are rarely involved in approving or enforcing settlement agreements, the settlement provisions in S. 623 are an ineffective means of addressing the concerns behind the proposed legislation.

The extensive empirical study done by the FJC on court orders that limit the disclosure of settlement agreements filed in the federal courts and a follow-up study showed that in the few cases in which a potential public health or safety hazard might be involved and in which a settlement agreement was sealed by court order, the complaint and other documents remained in the court's file, fully accessible to the public. In these cases, the complaints identified the three most critical pieces of information about possible public health or safety risks: the risk itself, the source of that risk, and the harm that allegedly ensued. In many cases, the complaints went considerably further. The complaints, as well as other documents, provided the public with access to information about the alleged wrongdoers and wrongdoings, without the need to also examine the settlement agreement.

Based on the relatively small number of federal cases involving any sealed settlement agreement and the availability of other sources to inform the public of potential hazards in these few cases, the Rules Committees concluded that a statute restricting confidentiality provisions in settlement agreements is unnecessary and unlikely to be effective. S. 623 does not change these conclusions. Its primary effect is likely to be an added barrier to access to the federal courts by making it more difficult and cumbersome to resolve disputes, sending more disputes to private mediation or other avenues where there is no public access to information at all.

3. The Civil Rules Committee's Continued Work

In May 2010, the Civil Rules Committee sponsored an important conference on civil litigation at Duke University Law School. That conference addressed problems of costs, delays, and barriers to access at every stage ranging from pre-litigation to pleadings, motions, discovery, case-management, and trial. Many studies were conducted and many papers were prepared in conjunction with the conference.[2] It is worth noting that in all the studies conducted, the papers submitted, and the criticisms of and suggestions for improving the present system, no one raised problems with protective orders or orders limiting access to settlement agreements filed with the federal courts. This further underscores the lack of any need for legislation.

The Civil and Standing Rules Committees are deeply committed to identifying problems with the federal civil justice system that can be addressed by changes to the Federal Rules of Civil Procedure, and to making those changes through the process Congress established—the Rules Enabling Act. As part of that process, the Civil Rules Committee is continuing to monitor the case law under Rule 26(c) to ensure that it is not operating to prevent public access to important information about public health or safety. A memorandum has been prepared setting out the case law in every circuit on entering protective orders, modifying protective orders, and entering sealing

[2] The wide array of papers prepared for the conference are available on the conference's website at http://civilconference.uscourts.gov.

orders. The case law set out in the memo shows that courts are attuned to the public interest and have developed procedures for addressing the need to produce discovery materials to other litigants and agencies. The memo on protective order case law is available online.[3] The Advisory Committee continues to monitor the case law and protective order practice to ensure that rule amendments are not needed.

The Rules Committees very much appreciate the opportunity to express our views and share our concerns. If it would be useful, we are available to discuss these issues. Thank you for your consideration and for the continued dialogue on improving the system of justice in our federal courts.

Sincerely,

Lee H. Rosenthal
United States District Judge
Southern District of Texas
Chair, Committee on Rules
of Practice and Procedure

Mark R. Kravitz
United States District Judge
District of Connecticut
Chair, Advisory Committee
on Civil Rules

cc: Democratic Members, Judiciary Committee

Identical letter sent to: Honorable Charles E. Grassley

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[3] The memo is available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Caselaw_Study_of_Discovery_Protective_Orders.pdf.

H.R. 3041

Federal Consent Decree Fairness Act

AUTHENTICATED
U.S. GOVERNMENT
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112TH CONGRESS
1ST SESSION

H. R. 3041

To amend chapter 111 of title 28, United States Code, to limit the duration of Federal consent decrees to which State and local governments are a party, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 23, 2011

Mr. COOPER (for himself, Mr. DAVIS of Kentucky, Mr. PAUL, and Mr. SMITH of Texas) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend chapter 111 of title 28, United States Code, to limit the duration of Federal consent decrees to which State and local governments are a party, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Federal Consent Decree Fairness Act".

1 **SEC. 2. FINDINGS.**

2 Congress finds that the United States Supreme
3 Court, in its unanimous decision in Frew v. Hawkins, 540
4 U.S. 431 (2004), found the following:

5 (1) Consent decrees may "lead to federal court
6 oversight of state programs for long periods of time
7 even absent an ongoing violation of federal law,".
8 540 U.S. 431, 441.

9 (2) "If not limited to reasonable and necessary
10 implementations of federal law, remedies outlined in
11 consent decrees involving state officeholders may im-
12 properly deprive future officials of their designated
13 legislative and executive powers.". 540 U.S. 431,
14 441.

15 (3) "The federal court must exercise its equi-
16 table powers to ensure that when the objects of the
17 decree have been attained, responsibility for dis-
18 charging the State's obligations is returned promptly
19 to the State and its officials.". 540 U.S. 431, 442.

20 (4) "As public servants, the officials of the
21 State must be presumed to have a high degree of
22 competence in deciding how best to discharge their
23 governmental responsibilities.". 540 U.S. 431, 442.

24 (5) "A State, in the ordinary course, depends
25 upon successor officials, both appointed and elected,
26 to bring new insights and solutions to problems of

allocating revenues and resources. The basic obligations of federal law may remain the same, but the precise manner of their discharge may not.". 540 U.S. 431, 442.

SEC. 3. LIMITATION ON CONSENT DECREES.

(a) IN GENERAL.—Chapter 111 of title 28, United States Code, is amended by adding at the end the following:

"§ 1660. Consent decrees

"(a) DEFINITION.—In this section, the term 'consent decree'—

"(1) means any order imposing injunctive or other prospective relief against a State or local government, or a State or local official against whom suit is brought, that is entered by a court of the United States and is based in whole or part upon the consent or acquiescence of the parties; and

"(2) does not include—

"(A) any private settlement agreement;

"(B) any order arising from an action filed against a government official that is unrelated to his or her official duties;

"(C) any order entered by a court of the United States to implement a plan to end segregation of students or faculty on the basis of

1 race, color, or national origin in elementary
2 schools, secondary schools, or institutions of
3 higher education; and
4 "(D) any order entered in any action in
5 which one State is an adverse party to another
6 State.
7 "(b) LIMITATION ON DURATION.—
8 "(1) IN GENERAL.—A State or local govern-
9 ment, or a State or local official who is a party to
10 a consent decree (or the successor to that individual)
11 may file a motion under this section with the court
12 that entered the consent decree to modify or termi-
13 nate the consent decree upon the earliest of—
14 "(A) 4 years after the consent decree is
15 originally entered by a court of the United
16 States, regardless of whether the consent decree
17 has been modified or reentered during that pe-
18 riod;
19 "(B) in the case of a civil action in which
20 a State or an elected State official is a party,
21 the date of expiration of the term of office of
22 the highest elected State official who is a party
23 to the consent decree;
24 "(C) in the case of a civil action in which
25 a local government or elected local government

1 official is a party, the date of expiration of the
2 term of office of the highest elected local gov-
3 ernment official who is a party to the consent
4 decree;

5 "(D) in the case of a civil action in which
6 the consent to the consent decree was author-
7 ized by an appointed State or local official, the
8 date of expiration of the term of office of the
9 elected official who appointed that State or
10 local official, or the highest elected official in
11 that State or local government; or

12 "(E) the date otherwise provided by law.

13 "(2) BURDEN OF PROOF.—

14 "(A) IN GENERAL.—With respect to any
15 motion filed under paragraph (1), the burden of
16 proof shall be on the party who originally filed
17 the civil action to demonstrate that the denial
18 of the motion to modify or terminate the con-
19 sent decree or any part of the consent decree is
20 necessary to prevent the violation of a require-
21 ment of Federal law that—

22 "(i) was actionable by such party; and

23 "(ii) was addressed in the consent de-
24 cree.

1 "(B) FAILURE TO MEET BURDEN OF
2 PROOF.—If a party fails to meet the burden of
3 proof described in subparagraph (A), the court
4 shall terminate the consent decree.
5 "(C) SATISFACTION OF BURDEN OF
6 PROOF.—If a party meets the burden of proof
7 described in subparagraph (A), the court shall
8 ensure that any remaining provisions of the
9 consent decree represent the least restrictive
10 means by which to prevent such a violation.
11 "(3) RULING ON MOTION.—
12 "(A) IN GENERAL.—The court shall rule
13 expeditiously on a motion filed under this sub-
14 section.
15 "(B) SCHEDULING ORDER.—Not later
16 than 30 days after the filing of a motion under
17 this subsection, the court shall enter a sched-
18 uling order that—
19 "(i) limits the time of the parties to—
20 "(I) file motions; and
21 "(II) complete any required dis-
22 covery; and
23 "(ii) sets the date or dates of any
24 hearings determined necessary.

1 "(C) STAY OF INJUNCTIVE OR PROSPEC-
2 TIVE RELIEF.—In addition to any other orders
3 authorized by law, the court may stay the in-
4 junctive or prospective relief set forth in the
5 consent decree in an action under this sub-
6 section if a party opposing the motion to modify
7 or terminate the consent decree seeks any con-
8 tinuance or delay that prevents the court from
9 entering a final ruling on the motion within 180
10 days after the date on which the motion is filed.
11 "(c) OTHER FEDERAL COURT REMEDIES.—The pro-
12 visions of this section shall not be interpreted to prohibit
13 a Federal court from entering a new order for injunctive
14 or prospective relief to the extent that it is otherwise au-
15 thorized by Federal law.
16 "(d) AVAILABLE STATE COURT REMEDIES.—The
17 provisions of this section shall not prohibit the parties to
18 a consent decree from seeking appropriate relief under
19 State law.".
20 (b) CONFORMING AMENDMENT.—The table of sec-
21 tions for chapter 111 of title 28, United States Code, is
22 amended by adding at the end the following:

"1660. Consent decrees.".

23 **SEC. 4. GENERAL PRINCIPLES.**
24 (a) NO EFFECT ON OTHER LAWS RELATING TO
25 MODIFYING OR VACATING CONSENT DECREES.—Nothing

1 in the amendments made by section 3 shall be construed
2 to preempt or modify any other provision of law providing
3 for the modification or vacating of a consent decree.

4 (b) FURTHER PROCEEDINGS NOT REQUIRED.—
5 Nothing in the amendments made by section 3 shall be
6 construed to affect or require further judicial proceedings
7 relating to prior adjudications of liability or class certifi-
8 cations.

9 **SEC. 5. DEFINITION.**

10 In this Act, the term "consent decree" has the mean-
11 ing given that term in section 1660(a) of title 28, United
12 States Code, as added by section 3 of this Act.

13 **SEC. 6. EFFECTIVE DATE.**

14 This Act and the amendments made by this Act shall
15 take effect on the date of the enactment of this Act and
16 apply to any consent decree regardless of—

17 (1) the date on which the order of the consent
18 decree is entered; or

19 (2) whether any relief has been obtained under
20 the consent decree before such date of enactment.

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December 9, 2011 Letter to Rep. Franks re the "Costs and Burdens of Civil Discovery"

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

MARK R. KRAVITZ
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JEFFREY S. SUTTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

December 9, 2011

Honorable Trent Franks
Chairman
Subcommittee on the Constitution
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

We understand that the Subcommittee on the Constitution is holding a hearing on December 13 to address "The Costs and Burdens of Civil Discovery." On behalf of the Judicial Conference's Committee on Rules of Practice and Procedure (the "Standing Rules Committee") and the Advisory Committee on Civil Rules (the "Advisory Committee"), we write to provide you an update on the Advisory Committee's work on reducing the costs, burdens, and delays of discovery in civil cases and request that it be made part of the record of your hearing. The Rules Committees understand that discovery is an important issue to all litigants, whether plaintiffs or defendants, and are closely examining ways to improve the current system. Thus, we understand the impetus for this hearing and look forward to learning additional facts it may develop on this important subject.

As the discussion below demonstrates, the Rules Enabling Act process for examining and addressing these concerns is already well underway. The Advisory Committee is taking a close look at discovery and other aspects of civil litigation to explore ways to reduce costs, burdens, and delays. We urge you to allow the Rules Committees to continue their consideration of these issues through the thorough, deliberate, and time-tested procedure Congress created in the Rules Enabling Act.

Preservation and Sanctions

The Advisory Committee is engaged in an extensive study of the difficulties facing litigants, courts, and third parties in dealing with issues related to preserving documents and information for litigation and the related issue of the sanctions imposed when preservation obligations are not met. In May 2010, the Committee hosted a conference on civil litigation at Duke University (the "2010 Conference") to examine ways to address costs and delays in the federal civil justice system. The Conference gathered over 200 judges, lawyers, in-house counsel, state judges, and nonprofit organizations to consider the state of the civil justice system. The Conference had numerous panels devoted to particular topics. The panelists, as well as many other organizations, submitted empirical data and papers on a variety of topics relating to the civil justice system.[1] A significant amount of the work of the 2010 Conference was devoted to electronic discovery. The Conference resulted in a strong recommendation that the Advisory Committee consider ways to provide more clarity and guidance on preservation obligations and spoliation sanctions through changes to the Federal Rules of Civil Procedure. As a result, the Committee and its Discovery Subcommittee have been closely examining potential rule amendments. The Discovery Subcommittee began work on preservation immediately after the 2010 Conference and has met repeatedly over the past year and a half to focus its work on this issue.

The Subcommittee commissioned research into how federal courts throughout the country are addressing triggers for the preservation of electronic information, the scope of the preservation obligation, and sanctions for the failure to preserve such information.[2] The Subcommittee asked the Federal Judicial Center ("FJC") to conduct empirical research on motions for federal court sanctions based on allegations of spoliation of evidence.[3] The Subcommittee also commissioned research on statutes, regulations, and rules requiring preservation at the national, state, and local level, to assist in its examination of how other preservation obligations might interact with obligations imposed by courts and potential rule amendments.[4]

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[1]The empirical data and papers submitted for the 2010 Conference are available at http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Overview/DukeWebsiteMsg.aspx.

[2]The research is summarized in a long memorandum available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Case_Law_on_Potential_Preservation_2011-11.pdf.

[3]The results of the FJC study are available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Empirical_Data/Federal%20Judicial%20Center.pdf.

[4]The results of the research are summarized in a memorandum available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Laws%20Imposing%20Preservation%20Obligations.pdf.

In September of this year, the Subcommittee hosted a one-day conference in Dallas, Texas, to further examine possible rulemaking responses to preservation and spoliation sanction issues. The Subcommittee invited about 25 participants, including in-house counsel, plaintiff and defense lawyers, academics, judges, and technology experts, to provide their views on these issues. The Subcommittee circulated ideas for possible rule amendments in advance of the conference to focus the conversation on possible solutions to current preservation burdens. The Subcommittee received very valuable input at the Dallas conference. The Subcommittee also received, and continues to receive, written commentary and proposals from participants and other organizations interested in these issues.[5]

At the Advisory Committee's recent meeting on November 7 and 8, 2011, the Subcommittee solicited the views of the full Committee on whether and how to proceed with rulemaking efforts to address preservation issues. The agenda materials included a 31-page report from the Subcommittee, charts summarizing case law from around the country on relevant issues, minutes of the Dallas conference and discussions of the Subcommittee, and 13 submissions from corporations and organizations on the issues being addressed by the Subcommittee.[6] A large number of observers, including some congressional staff, attended the Committee meeting. The discussion was robust. The Subcommittee will continue to consider both providing detailed guidance on preservation obligations and providing more clarity on sanctions, as well as other rulemaking possibilities for addressing preservation concerns. The Subcommittee plans to present a recommendation on how to proceed at the next Advisory Committee meeting, scheduled for March 22 and 23, 2012.

Committee Work on Litigation Costs

Another subcommittee formed after the 2010 Duke Conference (the "2010 Conference Subcommittee") is addressing other proposals for reducing costs in civil litigation. This Subcommittee is considering possible rulemaking approaches, as well as other means for addressing costs and efficiency concerns, such as judicial education, lawyer education, revisions to the *Benchbook for U.S. District Court Judges*, and guides to "best practices." The FJC has already undertaken several projects to emphasize the advantages of active case management in reducing litigation time and expense.

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[5]All of the written materials that were prepared by the Subcommittee and considered at the September conference, as well as submissions received by the Advisory Committee, are posted on the federal rulemaking website at http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Overview/DallasMiniConfSept2011.aspx.

[6]The full agenda materials are available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2011-11.pdf. The materials considered by the Committee in connection with its discussion of preservation issues can be found at pages 53–469 of the pdf file.

Empirical work also continues to be done to build on the work undertaken for the 2010 Conference. The FJC has concluded the first phase of work on the impact of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), on federal pleading practice,[7] and is continuing work on a second phase of that project.[8] The FJC is also examining the frequency and timing of initial case-management orders.[9] Another project on discovery conferences conducted under Civil Rule 26(f) is expected to begin early next year. Other organizations are also conducting empirical research on the costs of discovery, and the Subcommittee will be considering the results of their work.

The 2010 Conference Subcommittee, together with the FJC, is also gathering information on pilot projects being conducted in federal courts around the country. These include a pilot project in the Southern District of New York on managing complex cases more efficiently, a project in the Seventh Circuit on reducing the complexity of electronic discovery, and an expedited trial program adopted in the Northern District of California.

The 2010 Conference Subcommittee has worked with a group of plaintiffs' and defense lawyers to develop a set of standard discovery requests that should significantly streamline the discovery process in employment cases. Such cases are a significant part of federal district court dockets.[10] The protocols were presented at the Advisory Committee's meeting and will be offered as a model for adoption by individual judges around the country. Experience in those courts may encourage more general adoption and may inspire other groups to develop similar discovery protocols to simplify and reduce the cost of discovery in federal civil litigation.

The 2010 Conference Subcommittee is examining the possibility of several rulemaking responses to concerns about costs and delays in civil litigation. Many proposals are currently being considered, including reducing the amount of time before a scheduling order is entered; emphasizing cooperation among the parties in the rules; giving even greater emphasis to proportionality limits on discovery; implementing methods to avoid evasion in responding to discovery; setting presumptive limits on certain types of discovery; and implementing a pre-motion conference with the court before discovery motions are filed. The Subcommittee has

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[7]The FJC's first report on motions to dismiss after *Iqbal* is available at http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf.

[8]The FJC's report with an update on its study of motions to dismiss after *Iqbal* is available at http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal2.pdf/$file/motioniqbal2.pdf.

[9]The FJC's report on the timing of scheduling orders and discovery cut-off dates is available at http://www.fjc.gov/public/pdf.nsf/lookup/leetiming.pdf/$file/leetiming.pdf.

[10]*See* SEAN FARHANG, THE LITIGATION STATE 3 (2010) ("Next to petitions by prisoners to be set free, job discrimination lawsuits are the *single largest category* of litigation in federal courts.").

asked the Advisory Committee's reporters to draft rule language so the Subcommittee can consider concrete approaches. The Subcommittee continues to actively solicit suggestions for other innovative ways to make pretrial litigation more efficient and effective.

The Advisory Committee discussed these efforts at its recent meeting.[11]

Conclusion

The Advisory Committee is examining the issue of cost reduction in civil litigation in great detail. Any rulemaking proposals will go through the full Rules Enabling Act process, including publication for public comment and review by the Standing Rules Committee, the Judicial Conference, the Supreme Court, and Congress. This multi-layered process ensures the thorough evaluation of proposals to address problems in litigation, while reducing the possibility of unintended consequences.

We appreciate your consideration of the Rules Committees' current work in this area. We will continue to pursue the goal, as stated in Rule 1 of the Federal Rules of Civil Procedure, of securing the just, speedy, and inexpensive determination of every action in federal court. If you or your staff have any questions, please contact Jonathan Rose, Rules Committee Officer, Administrative Office of the United States Courts, at 202-502-1820.

Sincerely,

Mark R. Kravitz
United States District Judge
District of Connecticut
Chair, Committee on Rules
of Practice and Procedure

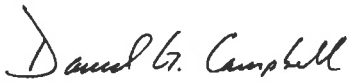

David G. Campbell
United States District Judge
District of Arizona
Chair, Advisory Committee
on Civil Rules

Identical letter sent to: Honorable Jerrold Nadler

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[11]The portion of the November 2011 Committee agenda materials that relate to the 2010 Conference Subcommittee's work can be found at page 567–622 of the materials located at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2011-11.pdf. An addendum to the materials is available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/Tab%20VI%20Appendix%20F%20SDNY%20Pilot%20Project%20for%20Complex%20Litigation.pdf.

S. 1637
Appeal Time Clarification Act

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
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Public Law 112–62
112th Congress

An Act

Nov. 29, 2011
[S. 1637]

To clarify appeal time limits in civil actions to which United States officers or employees are parties.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Appeal Time Clarification Act of 2011.
28 USC 1 note.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Appeal Time Clarification Act of 2011".

28 USC 2107 note.

SEC. 2. FINDINGS.

Congress finds that—

(1) section 2107 of title 28, United States Code, and rule 4 of the Federal Rules of Appellate Procedure provide that the time to appeal for most civil actions is 30 days, but that the appeal time for all parties is 60 days when the parties in the civil action include the United States, a United States officer, or a United States agency;

(2) the 60-day period should apply if one of the parties is—

(A) the United States;

(B) a United States agency;

(C) a United States officer or employee sued in an official capacity; or

(D) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States;

(3) section 2107 of title 28, United States Code, and rule 4 of the Federal Rules of Appellate Procedure (as amended to take effect on December 1, 2011, in accordance with section 2074 of that title) should uniformly apply the 60-day period to those civil actions relating to a Federal officer or employee sued in an individual capacity for an act or omission occurring in connection with Federal duties;

(4) the civil actions to which the 60-day periods should apply include all civil actions in which a legal officer of the United States represents the relevant officer or employee when the judgment or order is entered or in which the United States files the appeal for that officer or employee; and

(5) the application of the 60-day period in section 2107 of title 28, United States Code, and rule 4 of the Federal Rules of Appellate Procedure—

(A) is not limited to civil actions in which representation of the United States is provided by the Department of Justice; and

(B) includes all civil actions in which the representation of the United States is provided by a Federal legal officer acting in an official capacity, such as civil actions in which a Member, officer, or employee of the Senate or the House of Representatives is represented by the Office of Senate Legal Counsel or the Office of General Counsel of the House of Representatives.

SEC. 3. TIME FOR APPEALS TO COURT OF APPEALS.

Section 2107 of title 28, United States Code, is amended by striking subsection (b) and inserting the following:

"(b) In any such action, suit, or proceeding, the time as to all parties shall be 60 days from such entry if one of the parties is— Deadline.

"(1) the United States;

"(2) a United States agency;

"(3) a United States officer or employee sued in an official capacity; or

"(4) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States, including all instances in which the United States represents that officer or employee when the judgment, order, or decree is entered or files the appeal for that officer or employee.".

SEC. 4. EFFECTIVE DATE. 28 USC 2107 note.

The amendment made by this Act shall take effect on December 1, 2011.

Approved November 29, 2011.

LEGISLATIVE HISTORY—S. 1637 (H.R. 2633):

HOUSE REPORTS: No. 112–199 (Comm. on the Judiciary) accompanying H.R. 2633.

CONGRESSIONAL RECORD, Vol. 157 (2011):
Oct. 31, considered and passed Senate.
Nov. 18, considered and passed House.

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

MARK R. KRAVITZ
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JEFFREY S. SUTTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

December 8, 2011

Honorable Amy Klobuchar
Chairman
Subcommitttee on Administrative
Oversight and the Courts
Committee on the Judiciary
United States Senate
302 Hart Senate Office Building
Washington, DC 20510

Dear Madam Chairwoman:

On behalf of the Judicial Conference's Committee on the Rules of Practice and Procedure and the Advisory Committee on the Federal Rules of Appellate Procedure, we write to thank you for your judicious handling of the amendments to the federal rules of procedure and evidence that became effective on December 1, 2011, and particularly for all your work to sponsor and secure the passage of S. 1637, the Appeal Time Clarification Act of 2011.

As you know, the legislation was crucial to align 28 U.S.C. § 2107 with amendments to the Federal Rules of Appellate Procedure that became effective on December 1, 2011. The rule and statutory amendments clarify the time to appeal in civil cases to which a United States officer or employee is a party. Because the time to appeal in a civil case is set both by rule and by statute, the change to the statute was critical to avoid confusion that could imperil appellate rights of federal officers and employees sued in civil cases. In addition, as you know, it was necessary to have the statutory and rule amendments take effect on the same day. We sincerely thank you for ensuring that the legislation was introduced and passed in time to allow the statute and the rules to continue to be aligned.

In addition, we wanted to express our sincere thanks to the Senate Judiciary Committee staffers, who were, as always, exceedingly helpful and courteous. Their able handling of the package of rules amendments and the necessary implementing legislation affecting the Appellate Rules is greatly appreciated.

Thank you again for your assistance in ensuring that the statutory change was made, and done in time to take effect at the same time as the rule amendments. We look forward to continuing to work together to ensure that our civil justice system is working well.

Sincerely,

Mark R. Kravitz
United States District Judge
District of Connecticut
Chair, Committee on Rules
of Practice and Procedure

Jeffrey S. Sutton
United States Circuit Judge
Sixth Circuit
Chair, Advisory Committee
on Appellate Rules

Lee H. Rosenthal
United States District Judge
Southern District of Texas
Former Chair, Committee on Rules
of Practice and Procedure

H.R. 2192

National Guard and Reservist Debt Relief Extension Act

AUTHENTICATED
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H. R. 2192

One Hundred Twelfth Congress of the United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Wednesday, the fifth day of January, two thousand and eleven

An Act

To exempt for an additional 4-year period, from the application of the means-test presumption of abuse under chapter 7, qualifying members of reserve components of the Armed Forces and members of the National Guard who, after September 11, 2001, are called to active duty or to perform a homeland defense activity for not less than 90 days.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "National Guard and Reservist Debt Relief Extension Act of 2011".

SEC. 2. NATIONAL GUARD AND RESERVISTS DEBT RELIEF AMENDMENT.

Section 4(b) of the National Guard and Reservists Debt Relief Act of 2008 (Public Law 110–438; 122 Stat. 5000) is amended by striking "3-year" and inserting "7-year".

Speaker of the House of Representatives.

Vice President of the United States and President of the Senate.

TAB 4

Oral Report by
Rules Committee Support Office

TAB 5

Agenda Item Tab 5
Committee on Rules of
Practice and Procedure
January 2012
Informational

Federal Judicial Center Activities

The Federal Judicial Center is pleased to provide this report on education and research activities that may be of interest to the members of the Committee on the Rules of Practice and Procedure.

I. Budget

As this report is written, the Center, like the rest of the judiciary, does not know what its fiscal year 2012 appropriation will be. Based on actions in the Senate and the House of Representatives in summer 2011, a reduction in the Center's appropriation for fiscal year 2012 of between one and three percent seems likely. Thanks to cost-containment measures instituted previously, even with reductions at these levels the Center would be able to execute all programs and projects that it has already announced for 2012. However, there will be little room for additional programs and projects at the appropriation levels currently projected.

II. Education

A. Update

This report covers the period from July 1, 2011 through December 31, 2011. By the end of the reporting period, the Center will have produced:

- 30 national travel-based programs for over 1,495 participants;
- 53 in-court programs for 2,124 participants; and
- 16 technology-based programs for 1,859 participants.

The Center also produced online and printed programs and resources. Detailed information on recent and upcoming Center programs, products, and resources can be found on FJC Online at http://cwn.fjc.dcn/.

B. Highlights

The Center conducted 17 national workshops, orientation programs, and special focus workshops for judges. These included a national symposium for courts of appeals judges, and national workshops for bankruptcy and magistrate judges. The Center also held orientations for new courts of appeals, district, bankruptcy, and magistrate judges. A workshop for Eighth Circuit appellate and district judges covered topics of particular interest to the judges of that circuit.

The Center also held five special focus programs for judges: Capital Habeas Corpus for United States District Judges; Environmental Law (co-sponsored with Lewis and Clark Law School), Mediation Skills for Magistrate Judges, Water Rights Litigation (co-sponsored with the National Judicial College), and Emerging Issues in Neuroscience (in cooperation with the American Association for the Advancement of Science, the National Center for State Courts, the American Bar Association Judicial Division, and the Dana Foundation).

The Center offers judicial in-court seminars to 15-20 districts each year, providing a menu of subjects from which districts may choose. During the reporting period, one Procedural Fairness and two Science and the Founders seminars were delivered to the requesting districts.

Team workshops delivered for judges and staff together included A Quality Improvement Workshop for Federal Reentry Courts (in cooperation with George Mason University's Center for Advancing Correctional Excellence); an Executive Institute for Chief Bankruptcy Judges and Clerks of Court; and a Facilitating Offender Reentry to Reduce Recidivism workshop (co-

sponsored with the Harvard Law School Petrie-Flom Center for Health Law Policy, Biotechnology, and Bioethics).

The Center conducted two programs for federal defenders: an orientation seminar for new assistant federal defenders and a national seminar for federal defenders. The Center also held a workshop for circuit mediators.

Seven national and regional in-person programs were conducted for court staff. A national conference was held for bankruptcy clerks of court, bankruptcy appellate panel clerks, bankruptcy administrators, and bankruptcy chief deputy clerks of court. Leadership and management programs for clerk's office staff included workshops for experienced court managers and for new court managers and supervisors. Leadership and management programs for probation and pretrial services staff included a seminar for new deputy chiefs; a Building Outstanding Supervisors program; one strategic planning training-for-trainers workshop; and one strategic planning pilot.

The Center also provides a range of in-district programs for court staff. Out of the 50 programs delivered during the reporting period, the most frequently requested programs were Code of Conduct and Structured Writing. Sixteen technology-based training programs were held for clerks' and probation and pretrial services offices.

Center staff made presentations at ten conferences and educational programs held by the Administrative Office, individual courts, or associations of court employees.

In addition, the Center provided training and curriculum development in support of several Judicial Conference policies and Administrative Office programs.

Preventing Workplace Harassment is an in-district program consisting of two modules—one for managers and supervisors and one for all court staff. The workshop enables participants

to understand what constitutes workplace harassment, types of behaviors that may be interpreted as workplace harassment, how a workplace can become a hostile environment, and how to minimize the occurrence of workplace harassment. It also emphasizes how to respond to harassment if it arises, and how to proceed in the event staff is involved in a workplace harassment investigation. One training-for-trainers program was held in October 2011 to train 15 faculty to facilitate this new in-district program in 2012 and beyond.

The Judges Information Technology training-for-trainers was held in August 2011. The curriculum focused on training court staff to teach judges in their districts how to use information technology to perform judicial functions more efficiently.

Center staff assisted the Administrative Office with the instructional design of a new e-learning program for the Personnel Projection System. The program features a multi-module tutorial designed to teach users the features of the system's new software package, which manages personnel projections.

The Center provided support for on-site training requests for the Administrative Office's circuit-based in-person programs for court unit executives and staff with space and facilities responsibilities.

The Center developed a number of customized in-district performance management programs, and designed a new module for performance management titled Getting the Most from Your Performance Management System. The programs help court supervisors and managers build skills that support effective performance management under the court compensation policy developed by the Judicial Conference.

The Center completed the curriculum design for the Probation and Pretrial Services Monograph 111: Improving Outcomes; Improving Lives seminar, and delivered two seminars

designed to help districts prepare an action plan for implementing the new treatment services policy in Monograph 111, Supervision for Federal Defendants. The curriculum includes major changes to the policy, organizational readiness, coping with barriers to implementation, and an overview of evidence-based practices. Participation in discussions of scenarios in a Blackboard course was a prerequisite for attendance at the travel-based workshops.

The Judicial Resources Committee has expressed interest in educational opportunities for court unit executives. In addition to its existing programs for court unit executives, which include biennial conferences, executive institutes, and a program for new and experienced managers, the Center has begun planning for a more comprehensive educational program for experienced court unit executives, and suggestions have been solicited from some experienced court unit executives. The Center should be able to report more concrete steps at the meeting in June 2012.

C. Administrative Office and Federal Judicial Center Education and Training

Earlier this year, the Administrative Office and the Center began a comprehensive examination of curricula offered by the two agencies. In June 2011, the Administrative Office provided the Center with a list of education and training offerings, compiled by 13 different offices in the Administrative Office. This listing included almost 200 in-person, web-conference, and e-learning programs, as well as hundreds of instructional and informational videos. The Center has been comparing this list with its own offerings, which include roughly the same number of in-person, web-conference, and e-learning programs, along with hundreds more videos, publications, and web resources. A detailed analysis is not yet complete. However, an initial review reveals very few instances of overlap. Most of the programs produced by the Administrative Office address specific tasks or functions under the purview of

the various Administrative Office directorates (e.g., records management, use of the Financial Accounting System for Tomorrow, and Human Resources Management Information System training). Center programs fall into the categories of judicial training (in law, case management, and related adjudicatory tasks and techniques), and leadership and management generally. The Center will continue its review of these curricula and consult with the Administrative Office on any gaps or overlaps identified.

III. Research

Since the Center's last report to the Committee, the Center completed work on 12 major projects, commenced work on ten new major projects, and continued work on 40 others. Most are projects requested by Judicial Conference committees. A full listing of Center research projects and activities is available at FJC Online, http://cwn.fjc.dcn/fjconline/home.nsf/pages/967.01. Below are brief descriptions of projects that may be of special interest to the members of the Committee.

District Court Case Weighting: Follow-up Regarding the 2004 Case Weights. The Center continued its analysis of district court caseload data to determine whether some or all of the 2004 case weights should be updated. The Committee on Judicial Resources has asked the Center to have a study design prepared for consideration at its Spring 2012 meeting.

Study of Recalled Bankruptcy Judges Program. The Committee on the Administration of the Bankruptcy System asked the Center to collect objective data regarding the bankruptcy judges recall service to assist the committee with its efforts to maximize the effectiveness of the recall program as a priority in its strategic plan.

Dodd Frank Wall Street Reform and Consumer Protection Act of 2010: Assistance to Administrative Office with Congressionally mandated Study. The Center provided research

assistance to the Bankruptcy Committee's Dodd-Frank Act working group with the preparation of a July 2011 congressionally mandated report regarding financial institutions. A senior member of the Center's research staff continues to assist a working group convened by the Administrative Office with efforts in anticipation of a July 2012 report to Congress.

Survey of Bankruptcy Court Practices Regarding Applications for Administrative Costs. At the request of the Advisory Committee on Bankruptcy Rules, the Center conducted an online survey of bankruptcy clerks and attorneys regarding practices with applications by parties for case-related administrative costs.

Evaluation of Southern District of New York's Pilot Implementation of Pretrial Case Management Best Practices in Complex Civil Cases. The Center commenced an evaluation in support of work being done by a subcommittee of the Advisory Committee on Civil Rules. The goal is to assess various pretrial costs and delay reduction strategies that are being piloted by the Southern District of New York.

Patent Reform Act of 2011-mandated Pilot Study. The Center has been asked by the Committee on Court Administration and Case Management to conduct an evaluation of the congressionally mandated ten-year pilot program involving the assignment of patent cases in 14 district courts. The pilot formally commenced on September 19, 2011.

Digital Video Recording of Civil Proceedings in the District Court. The Center was also asked by the Court Administration and Case Management Committee to evaluate a three-year Judicial Conference-authorized pilot in 14 district courts, in which the parties in civil cases can jointly consent to digital video recording. The pilot commenced on July 18, 2011.

Survey of Courts Regarding Use of Social Media by Jurors While on Jury Duty. In response to a request by the Court Administration and Case Management Committee, the Center designed and conducted a survey of instances in which jurors were found to have improperly used social media while on active jury duty. The survey also identified districts that have adopted model jury instructions regarding the use of electronic technologies by jurors to research or communicate information about a case.

Issues Related to Motions for Preservation of Electronically Stored Information. The Center completed a report for the Advisory Committee on Civil Rules that contained the results of the analysis of a sample of motions filed in the districts courts for preservation of electronically stored information. The report has also been posted on FJC Online.

Update of the Center's 1997 Pocket Guide for eDiscovery in Civil Cases. This Center publication has been updated to incorporate judges' experiences with eDiscovery and advances in the law since the guide was first published in 1997.

Pocket Guide on Product Liability Cases for Multidistrict Litigation Transferee Judges. This newly published pocket guide is part of the Center's ongoing effort to develop multidistrict litigation resources for transferee judges. Other publications are being planned to assist multidistrict litigation transferee judges with the many unique problems and challenges that often arise in particular types of multidistrict litigation cases.

Third Edition of the Reference Manual on Scientific Evidence. The latest edition of the Center's reference manual was produced in cooperation with the National Academy of Sciences. Following its release in late September 2011, copies were provided to all appellate and district judges.

Evaluation of Prisoner Litigation Mediation Programs in the Eastern District of California. The Center was asked by the chair of a Ninth Circuit resource group to conduct an evaluation of the Eastern District of California's prisoner litigation mediation program. The Center will complete its report of the analysis of the data from more than 100 mediated prisoner cases in the district in early 2012.

Study of Scheduling Orders Under Rule 16 of the Federal Rules of Civil Procedure. At the request of the Advisory Committee on Civil Rules, the Center commenced an examination of the role and use of scheduling orders in civil pretrial case management by district and magistrate judges.

Pocket Guide on Protective Orders. The Center is preparing a guide on protective orders for judges that focuses on civil, criminal, and national security cases. This guide is a follow-up to previous Center research and publications on sealing practices in the district courts.

Survey of Districts' Efforts to Assist Pro Se Bankruptcy Debtors and Creditors. The Center, at the request of the Bankruptcy Committee and the Court Administration and Case Management Committee, conducted separate surveys of the district and bankruptcy clerks' offices regarding their efforts with pro se litigants. The information from both surveys is being made available to assist courts to address pro se litigant-related challenges.

Study of Judge-Involved Federal Offender Reentry Programs. The Center continued its multi-year evaluations of federal reentry programs as requested by the Committee on Criminal Law and as noted in earlier reports. In addition to continuing an experimental evaluation of programs in five districts, the Center commenced a process-descriptive study of the judge-involved reentry programs that were operational prior to December 2010.

IV. Federal Judicial History and International Rule of Law Functions

The Center provides assistance to federal courts and others in developing information and teaching about the history of the federal judiciary. The Center will publish the first two volumes of a projected three-volume documentary history of debates on the federal judiciary in early 2012. In addition, the Center continues to develop new reference materials for the online History of the Federal Judiciary, including information on the circuit allotments of Supreme Court Justices, appropriations for the judicial branch, and historical caseloads in the federal courts.

The Center's Office of International Judicial Relations coordinates its programs with the judiciaries of other nations. Center staff met with judges and court officials representing over 19 countries, including the Director of the Judicial Academy of Argentina, a judicial delegation from the Seychelles, and law students from China. The Center hosted a delegation of judges from Iraq, led by the Chief Justice and including the Director of the Iraqi Judicial Development Institute, for a week-long program on judicial education. The Center also conducted a week-long workshop on opinion writing for members of the judiciary of Georgia, including the Chief Justice and Director of Georgia's judicial training institute. The Center's visiting foreign judicial fellows program received fellows from Korea, Brazil, China, and Kosovo; their research projects included e-discovery and judicial independence.

TAB 6

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

MARK R. KRAVITZ
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

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

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

Date: December 2, 2011

Re: Report of the Civil Rules Advisory Committee

Introduction

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts on November 7 and 8, 2011. Draft Minutes of this meeting are attached. The minutes were prepared by the Committee's Reporter, Professor Edward H. Cooper, as was this report.

This Report presents several matters on the Committee agenda for information and possible discussion. In order, they include a possible rule regarding preservation of information for future litigation; initial responses to the proposal to amend Civil Rule 45 that was published for comment last summer; the activities of the Subcommittee that is pursuing issues raised during the conference held at Duke University School of Law in May, 2010, including a presentation on Civil Case Management Practices of the Eastern District of Virginia, Alexandria Division; pleading

standards; the role of Civil Rule 84 forms; class action issues; and action on accumulating agenda items.

Preservation for Litigation

A panel at the Duke Conference urged that there is a great and growing need for guidance on the obligation to preserve information that may be subject to future discovery requests. The primary source of concern seems to arise from electronically stored information. The panel presentation included a detailed list of issues that might be addressed by a preservation rule, and urged that the Committee should begin work toward developing a rule.

The panel invitation was accepted. The Discovery Subcommittee immediately set to work. Initial research by Andrea Kuperman showed that federal courts have a uniform approach to the events that trigger a duty to preserve — with only slight variations in expression, all agree that a duty to preserve can arise before litigation is actually filed. A reasonable expectation that litigation may be filed triggers the duty. There is no uniform case law on the scope, location, or age of information that must be preserved, and there are significant differences among the circuits on what conduct can lead to sanctions for failure to preserve. Some cases permit sanctions on a showing of mere negligence, while others require some form of willfulness or bad faith. One view, for example, is that failure to impose a "written" litigation hold constitutes gross negligence and warrants severe sanctions. Other decisions take different views. An adverse-inference instruction, for example, may be thought warranted only on showing intentional destruction of information for the purpose of preventing its use as evidence, reasoning that only intentional destruction supports a logical inference that the information was adverse to the party who destroyed it.

In addition to Ms. Kuperman's research, the Subcommittee arranged for an FJC study concerning the frequency of spoliation motions in federal court. That study, conducted by Emery Lee, found that spoliation motions were filed in 209 cases, less than one-half of one percent of the 131,992 civil cases filed in 19 districts between 2007 and 2008, and that barely more than half of these motions concerned electronically stored information.

The Subcommittee also conducted a survey of laws that already impose some kind of preservation obligation. The study found a wide array of federal and state statutes and regulations that require preservation of information in a variety of settings.

To aid in its evaluation of possible preservation rules, the Subcommittee developed initial drafts to illustrate three different possible approaches. The first, responding to the cues provided by the Duke panel, included detailed provisions describing the events that trigger a duty to preserve. This draft also describes the scope of the duty in time, backward from the time the trigger is

set, ongoing as information continues to accumulate, and terminating at some point after litigation is finished or the threat of litigation has passed. Scope is defined in other dimensions as well — how many "custodians" must be identified and told to preserve; what breadth of information must be preserved in relation to foreseeable discovery requests; what sources may be disregarded, such as deleted information or information that is difficult to access.

The second draft approach also addressed the duty to preserve directly, but in less detail. Trigger, scope, and duration were addressed, but the primary direction was only to behave reasonably in all dimensions.

The third draft did not directly impose a duty to preserve. Instead, it defined the limits on sanctions for failure to preserve discoverable information that reasonably should be preserved. It also sought to recognize a difference between "sanctions" and remedial measures designed to cure the consequences of a failure to preserve. The discovery sanctions listed in Rule 37(b) or adverse-inference instructions would be treated as sanctions. Allowing extra time for discovery, requiring the party who failed to preserve to pay the costs of seeking substitutes for the vanished information, and like steps would be treated as remedies rather than sanctions. The theory underlying this approach is that it speaks directly to the subject of greatest concern and greatest disagreement among federal cases — sanctions — and will indirectly relieve much uncertainty about the trigger and scope of the duty to preserve.

These drafts were sent to a diverse group of lawyers, technology experts, and e-discovery experts who then came together with the Subcommittee and other Committee members for a miniconference in Dallas on September 9. Many of the participants provided written submissions before the conference began. Other submissions have continued to flow after the conference concluded. The miniconference provided vigorous, wide-ranging, and richly valuable advice. In different ways, with different illustrations, many in-house counsel for large businesses — including one deeply engaged in software design — described present concerns and offered tentative solutions.

Many of the problems described at the miniconference involve costly over-preservation of potentially discoverable information. The participants recognize that the duty to preserve is triggered by a reasonable expectation of litigation. But they are very uncertain as to what it is they must preserve. They also described a great aversion to the risk of sanctions in whatever litigation might actually ensue. The risks feared go beyond the direct impact of sanctions in a particular action. There is great concern about the reputational effect of sanctions — reputable businesses do not want to be branded as evidence destroyers. One result is to preserve information for litigation that is never brought. One

anecdote described spending $5,000,000 to preserve information, with costs increasing by $100,000 a month, for litigation that had not yet been filed. Others, multiplied in different directions, described preserving far greater volumes of information than were ever sought in litigation that actually ensued. Part of the problem is that before an action is brought, there often is no opponent with whom to discuss the claims that may be made, what information should reasonably be preserved, and so on. Another part of the problem is that there is no court available to resolve pre-filing disputes: a letter demanding preservation, for example, may demand far more than is reasonable, and may not lead to an opportunity to work toward reasonable restrictions. It became clear that many highly responsible, sensible, and able lawyers believe that current uncertainties about the duty to preserve elicit costly and wasteful over-preservation.

There was an undercurrent of concern with costs apart from preservation costs. Although voiced indirectly, some participants were concerned that the cost of having preserved information is that it must be searched when discovery requests are made. More information available to search makes for greater search costs.

Participants also noted that preservation issues are not limited to large institutions that typically have massive volumes of information potentially subject to discovery. The obligations of individual parties as well will increasingly be recognized. A personal-injury plaintiff, for example, may talk of the event, injury, and aftermath in e-mail messages, social-network postings, and other media. Written or electronically stored records may be created. There may be no one to educate an individual about preservation obligations until a lawyer is consulted. Perhaps some account must be taken of this likely ignorance in crafting a rule. But it will be important that lawyers recognize the preservation obligation as soon as consulted, and instruct the client. The lawyer's failure may come to harm the client.

Discussion at the miniconference generated considerable disagreement about the steps that might be taken to address preservation problems, and even disagreement whether the time has come to begin to consider draft solutions. The Department of Justice, for an important example, believes that the law should be allowed to develop further, to provide a sounder foundation, before attempting to provide rule-based answers. There is a powerful tension between the desire to preserve information that will support the best possible basis for deciding an action on the merits and the great costs that flow from over-preservation. In addition, crafting a specific preservation rule must confront many specific difficulties. A few illustrations make the point.

Initial deliberations suggested that a preservation rule should begin with the present law that recognizes the duty when there is a reasonable expectation of litigation. But alternatives continue to be pressed, and must be considered. One alternative

would create a duty to preserve only when there is a "reasonable expectation of the certainty of litigation." Another, possessing the virtue of setting a bright line, would create a duty to preserve only on notice that an actual judicial or administrative complaint has been filed.

If a duty to preserve arises before litigation is actually filed, it becomes necessary to define the scope of preservation in relation to the scope of anticipated discovery. It seems natural to define preservation in terms of the Rule 26(b)(1) scope of discovery — not only information relevant to the claim or defense of any party, but also information relevant to the subject matter that becomes discoverable on showing good cause. Since there is no actual complaint as yet, there are no actual claims or defenses and it can be anticipated that anything that bears on the subject matter may become a claim. But that approach threatens to expand the scope of preservation beyond, perhaps far beyond, the claims that actually will be made (if any ever are made). A manufacturer learns that one of its automobiles has gone off the road: preserving all information relevant to the design, manufacture, and distribution of that make and model of automobile may go far beyond the scope of an eventual claim that a tire failed. And the question may arise in reverse. Rule 26(b)(2)(B) protects against discovery of electronically stored information from sources that are not reasonably accessible. But preserving that information may be relatively inexpensive, and events may show good cause for allowing discovery. The duty to preserve might reasonably extend to information not likely to be discoverable. (The same question could arise from communications between a lawyer and an expert that may become a trial witness: Rule 26(b)(4)(C) extends work-product protection to the communications, but work-product protection is defeasible.)

Consideration of specific triggers led to discussion of preservation-demand letters. There was concern that writing a rule that identifies a demand letter as a trigger for preservation obligations would encourage a proliferation of over-broad demands. Discussion wandered into the territory of possible claims for a tort of unreasonable preservation demands. The concern may be real; the possibility of finding effective remedies is less certain.

One last specific example from the conference: Discussion of the vexing question of culpability standards suggested the ambiguity of traditional phrases. A rule that requires a showing of gross negligence to support severe sanctions, for example, would have to confront the question whether it is grossly negligent to fail to create a written litigation hold, to identify the key players most likely to identify and direct preservation of important information, and to follow up to make sure suitable preservation measures are taken. Similarly, if the most severe sanctions could be imposed only for wilful behavior, may it be willful to fail to preserve obviously important information — if an

engine falls off an airplane, surely wilfulness could be found on post-event failure to preserve the engine, manufacturing and design records for engine and plane, service records, and the like. And even if there is no wilfulness — the manufacturer does not know about, and therefore fails to preserve, critical documents in the possession of a subcontractor — the severity of the prejudice to other parties might warrant some sanctions or remedial measures.

The Subcommittee met at the close of the miniconference and met again in two conference calls. In November, it reported to the Committee at length on the miniconference, described the three major alternatives it had been considering, and presented a draft of Rule 37 sanctions and remedial-measure provisions for consideration as a possible approach to developing a recommended rule for publication. Lengthy discussion by the Committee led to the conclusion that the Subcommittee should continue to consider all approaches. "This is a very important task. There is much yet to learn." It may be that approaching the problems through a sanctions rule is the best answer available, but the Subcommittee should assume that all issues remain open and report to the Committee again in March.

Discovery: Rule 45

Last June the Standing Committee approved publication for comment of a proposal to amend Civil Rule 45. The proposal simplifies the rule's structure, in large part by providing that discovery subpoenas issue from the court where the action is pending. The proposal, however, carries forward without substantial change the provisions that require the party serving the subpoena to go to the place where a nonparty witness is located to conduct a deposition or discover subpoenaed materials. Disposition of objections to the discovery begins in the court for the place of performance, but provision is made to transfer the motion to the court where the action is pending. Related provisions are made for enforcing a discovery order. The rule would also supersede a line of cases that interpret the present rule to authorize nationwide jurisdiction to enforce a trial subpoena against a party or a party's officer. At the same time, in deference to those cases and also to cases that seemed to regret the conclusion that present rule text does not support nationwide jurisdiction, the published materials asked for comment on an alternative that was explicitly not supported by the Committee but that would restore some measure of power to order a party to appear — or to produce an officer to appear — as a witness at trial. Finally, the rule relocates and clarifies the requirement that parties serving subpoenas give notice to other parties in the litigation.

Substantial debate was anticipated on at least three points: the "exceptional circumstances" test to transfer a discovery motion to the court where the action is pending may seem too restrictive, and indeed may not seem to describe the illustrations offered in

the Committee Note; the proposal does not include any requirement that the party who served a documents subpoena notify other parties as materials are received in response to the subpoena; and the determination to reject the decisions asserting nationwide authority to subpoena a party or its officer to appear as a witness at trial. Only a small number of written comments have been received. No one asked to testify at the first scheduled hearing in November; it was cancelled. But it is common experience that when there are extensive comments and requests to testify, they ordinarily begin to arrive late in the comment period.

Duke Conference Subcommittee

The Duke Conference Subcommittee was formed to respond to the welter of ideas produced by the Duke Conference sponsored by the Civil Rules Committee in May, 2010. Consideration of Civil Rules amendments is part of the Subcommittee's work, but several other paths have been followed as well.

One suggestion made repeatedly by Conference participants was that although present rules provide many opportunities for effective case management, there is a pressing need for more universal use of these rules. Early, continuing, hands-on case management is thought to solve many problems that linger and fester if left to the hope of responsible cooperation among the parties. The Subcommittee has worked with the Federal Judicial Center to improve judicial education programs and resources. Members also drafted portions of the new benchbook for judges, focusing particularly on Rule 16 conferences and the relationships between Rules 16 and 26.

Pilot projects testing new procedures will provide fertile sources of information for considering future rules amendments. The Subcommittee is working with the Federal Judicial Center to identify pilot projects in federal courts around the country and to encourage structuring the projects in ways that will support rigorous analysis of the results. The Seventh Circuit project on e-discovery, described at the Conference, is ongoing, and will be assessed by the FJC. The Northern District of California has adopted an expedited trial procedure. The Southern District of New York has launched a Pilot Project Regarding Case Management Techniques for Complex Civil Cases; the FJC is undertaking a survey to establish a base line of experience at the beginning of the project, establishing a foundation for evaluating experience at the end of the pilot period.

Another pilot project is just beginning. The Duke Conference inspired two employment lawyers who represent the National Employment Lawyers Association and the American College of Trial Lawyers at Civil Rules Committee meetings to undertake development of a protocol for initial discovery in employment cases. They formed a drafting group of experienced lawyers representing primarily plaintiffs and others representing primarily defendants.

After considerable hard work, and with the help of neutral brokers, they succeeded. The protocol will be made available to all federal courts, with encouragement to judges to adopt it for use in their employment cases. The district-judge members of the Committee have agreed to adopt the protocol in their cases and it is expected that many other judges will adopt it. If the protocol succeeds in its goals of speeding discovery, reducing costs, and supporting better early case evaluation by the parties, it may serve as an impetus for other groups to develop similar protocols for other types of litigation frequently encountered in federal courts. This work counts as an early and significant success for ideas advanced at the Conference.

In addition to pilot projects, the Subcommittee has also encouraged additional empirical work. The Committee is always eager to enlist the Federal Judicial Center in supporting Committee work, and the Subcommittee reflects that enthusiasm. The Center has begun an inquiry into actual practices at the outset of litigation, focusing on initial scheduling orders and Rule 16(b) conferences, and also on Rule 26(f) discovery-planning conferences. The work began with an extensive docket study focusing on scheduling orders, and will continue with a lawyer survey on Rule 26(f) practice.

A gentler form of empirical inquiry was arranged for the Committee meeting. The Subcommittee arranged for a panel presentation on Civil Case Management Practices of the Eastern District of Virginia, Alexandria Division. The panel, moderated by Committee member Peter Keisler, included Judge Leonie M. Brinkema, Judge Thomas Rawles Jones, Jr., and three practitioners — Dennis C. Barghaan, Jr., William D. Dolan, III, and Craig C. Reilly. The court prides itself on achieving times from filing to disposition that are consistently the shortest, or next to the shortest, in the country. The panelists emphasized that this accomplishment rests only in part on local rules governing the time for pretrial events. The judges share a common philosophy on case management, they work hard to implement it, and the bar has become skilled in working within it. The system has enough flexibility to recognize and account for the needs of specific cases that do not fit comfortably within general practices. Motions must be noticed for prompt hearing, responses are due shortly before the hearing, judges are prepared, and most rulings are made from the bench after argument. The former master docket system has been replaced by individual dockets without impeding the steady push toward final disposition. This experience provides a useful foundation for considering opportunities to guide other courts toward successful case management.

Of course possible rule amendments also have a place on the Subcommittee agenda. Consideration of the pleading rules has been placed on a separate track, noted briefly below. Many other suggestions at the Conference addressed discovery problems. The work undertaken by the Discovery Subcommittee to consider the

problems surrounding the duty to preserve electronically stored information is described above. Other discovery issues will be pursued by one subcommittee or the other depending on the interdependence between the issues and other discovery topics or nondiscovery topics. The time for the Rule 26(f) discovery conference of the parties is tied to the time for the Rule 16(b) scheduling conference and order. The two should be considered by a single subcommittee.

Several other discovery issues will be considered for possible proposed rules changes. It has been suggested that the Rule 26(d) moratorium should be revised to allow the parties to make discovery requests before the Rule 26(f) conference, delaying the time to respond to a point after the conference — the thought is that the conference could be better focused if the parties can consider actual initial discovery requests. When a discovery dispute arises after the Rule 26(f) conference, experience suggests that the dispute could be resolved more quickly, at less expense, by requiring a conference with the court before filing a formal motion. Present Rule 26(b)(2) provisions designed to hold discovery within limits proportional to the reasonable needs of the case have not had the impact that was hoped for. Some advantage might be found in adding a proportionality limit to the broad scope provisions in Rule 26(b)(1), superseding the codicil sentence of (b)(1) that simply cross-refers to (b)(2). It also might help to add explicit cost-shifting provisions to express the authority now implicit in the protective-order provisions of Rule 26(c) and in the "conditions" referred to in the (b)(2)(B) provisions for discovery of electronically stored information that is not reasonably accessible. Three interrelated proposals by a former Committee member are designed to reduce obstructive or confusing discovery responses.

Presumptive numerical limits on the numbers of discovery requests also have been suggested. The existing limits on depositions might be tightened — for example, to five depositions per side, with each deposition lasting no more than four hours. Limits could be added to rules that do not have them now, for example no more than 25 requests to produce or subpoenas under Rules 34 or 45, or 25 requests to admit under Rule 36.

Contention interrogatories also have become the subject of some contention. Although they may be useful at the outset of an action to focus the claims and issues more clearly than notice pleading often managed to do, there are arguments that ordinarily they should be allowed only after all other discovery concludes, subject to earlier use by agreement or on court order.

Other familiar discovery issues connect discovery to pleading. One asks whether discovery should be stayed, in whole or in part, pending disposition of a motion to dismiss for failure to state a claim. Renewed attention to pleading issues may bring this question up for consideration. For that matter, specific pleading

requirements have stirred concerns about potential plaintiffs who do not have access to information needed to frame a sustainable complaint. Enhanced opportunities for discovery before ruling on a motion to dismiss have been proposed as a possible solution.

Scheduling order practice is the subject of at least some suggestions. One is to expedite litigation by advancing the time for the order, perhaps to 60 days after any defendant is served (rather than the current 120 days). Experience in the Eastern District of Virginia suggests that this acceleration is feasible, at least for most cases. A related change might be to reduce the presumptive time for service in Rule 4(m) to 60 days after filing (rather than 120 days). The FJC study found that the median time for entry of a scheduling order is 106 days after filing. A second is to require an actual scheduling conference between court and parties, even if only by telephone, eliminating the "mail or other means" alternatives in Rule 16(b)(1). And a third is to add to the list of optional contents, Rule 16(b)(3), a provision for setting a date by which parties must abandon any claims or defenses that can no longer be asserted in good faith.

Cooperation of the parties and attorneys was a third strong concern of the Conference, along with strong case management and proportionality. Cooperation could be emphasized in the aspirational provisions of Rule 1, directing the parties to cooperate with the court and each other in seeking the just, speedy, and inexpensive determination of the action. It also could be added to Rule 16 pretrial conference provisions and at various places in the discovery rules.

The Subcommittee has reached the stage of drafting illustrative rule language to consider some of these possibilities. It does not expect to have concrete proposals ready to propose for publication by the time of the Committee's March meeting. It also holds open a continuing invitation for suggestions of other topics it should consider.

The Committee also is considering the possibility of holding a second Conference on the model of the 2010 conference, perhaps as early as spring 2013. One purpose would be to consider concrete rules proposals built on the 2010 conference. A second would be to renew opportunities like those offered at the 2010 conference, raising new and perhaps fundamental challenges for change.

Pleading Standards

Lower-court opinions deciphering and applying the *Twombly* and *Iqbal* decisions continue to command the Committee's attention. Two important avenues of investigation provide the primary focus of current discussions. Andrea Kuperman's survey of court opinions, focusing primarily on appellate decisions, has grown near the 700-page mark. Joe Cecil's empirical work at the Federal Judicial Center is well advanced, and includes careful study of empirical

studies undertaken by others. This work, and the experience of Committee members, suggest that pleading standards continue to present a vitally important subject for ongoing consideration. But the Committee does not believe that the time has come to begin deliberating the questions whether evolving practice should be entrenched, expanded, or restrained. There is no sign of widespread undesirable practices that might warrant hasty response. The subject is too important, and the target too indistinct, to move forward just yet.

The Kuperman survey provides an illuminating set of many pictures. Some stand out. Two were used as illustrations in Committee discussion. The first, reversing dismissal for failure to state a claim, described at length fact allegations detailed enough to seem a response to a motion for summary judgment. The other recognized that it was demanding that the plaintiff plead facts known only to the defendant, and that without discovery the plaintiff must fail, but concluded that language in the *Iqbal* opinion requires that a factually deficient complaint be dismissed without any opportunity for discovery. Each, in different ways, underscores the need to maintain a prominent place for pleading on the Committee agenda.

The FJC study has moved far into the second stage. The first stage found that motions to dismiss for failure to state a claim are being made more frequently in the aftermath of the *Twombly* and *Iqbal* decisions. It also concluded, after applying multinomial corrections to account for different types of cases, different practices in different courts, and the presence of an amended complaint, and apart from "financial instrument" cases, that there was no statistically significant increase in the rate of granting motions to dismiss. Because different sets of cases were used for the "before" and "after" periods, it was not possible to make a statistically valid assertion that more cases are dismissed on the pleadings simply because more motions to dismiss are made and the rate of granting the motions remains constant. The second phase explored the increase in the frequency of granting motions to dismiss with leave to amend by asking what happens next. Amended complaints were filed in many cases; renewed motions to dismiss were made in response to many, but not all amended complaints; and dismissal was again ordered on many, but not all, of the renewed motions. "Our conclusions remain the same. We found a statistically significant increase in motions granted only in cases involving financial instruments, and we found no statistically significant increase in plaintiffs excluded by such motions or in cases terminated by such motions." The work continues because the second stage uncovered anomalies in coding practices by court staff that, once identified, led to more orders resolving motions to dismiss. These orders will be included as the study is completed. There is some prospect that another study will be undertaken to explore practice on all motions to dismiss, not only motions addressed to failure to state a claim. This further work, if

undertaken, may provide important additional information for Committee study.

The FJC work has included review and appraisal of case studies done by others. Much of this work confirms the finding that the rate of filing motions to dismiss for failure to state a claim has increased. Much of it also suggests that the rate of granting these motions has increased. And much of it is subject to methodological challenge. All of it is important, and the FJC's help has proved important in this dimension as well.

This work suggests one fairly clear conclusion. An increase in the frequency of filing motions to dismiss means an increase in the frequency of responses. A plaintiff contemplating an action must count this prospect among the potential costs.

Another impact seems at least a fair surmise. Faced with new pleading opinions and more frequent motions to dismiss, complaints are likely to be longer, filled with greater fact detail, than formerly. This surmise is subject to the observation that before *Twombly* and *Iqbal* many good lawyers routinely pleaded far more detail than notice pleading required. "I have never seen a notice pleading" is a reasonable description of at least some areas of practice. And the increased detail, if provided, may reflect only the added work of including in the complaint more of the information that was gathered in deciding whether to file and in preparing for litigation after filing.

Beyond that point, counting the outcomes of motions to dismiss, while truly important, does not answer the central question. Suppose changed pleading standards lead to terminating more actions on the pleadings. Is that result good, bad, or neutral? The Supreme Court was manifestly concerned with the costs that may be imposed by allowing an action to move beyond the pleadings into discovery. On balance, across the universe of cases, what balance should be drawn between the different categories of error? Those who decry pleading dismissals focus on the costs of dismissing claims that, if admitted to the world of discovery and pretrial management, would have prevailed on the merits. Those who champion the need to maintain some measure of scrutiny on the pleadings focus on the costs inflicted by discovery and pretrial management in support of attempted claims that ultimately fail on summary judgment or at trial, or that succeed in settlement only because of the costs of litigation. These value judgments may be attempted in gross. They may be attempted instead as to particular categories of litigation. The eventual judgments, if they can be made at all, may be mixed: The Rule 8(a)(2) standard, or more specifically focused standards, may require different levels of fact specificity in pleading different kinds of claims.

The difficulty of the judgments that lie ahead is emphasized simply by articulating them in this way. It may be an exaggeration

to proclaim that heightened pleading standards threaten to undermine the role of private litigation in enforcing fundamental public policies. The structure created in 1938, moving responsibilities from the pleading stage into discovery and summary judgment, has developed over time. Further development need not portend disaster, even if it pulls back from more lenient pleading standards to substitute more demanding standards. But these are not idle concerns.

A responsible approach to Enabling Act responsibilities must be shaped by the importance of the issues. And it also is shaped by the responsibility of the courts to carry on the common-law process of ever-more nuanced interpretation of Rule 8(a)(2) as shaped by the *Twombly* and *Iqbal* decisions. The research that has been done shows that the courts generally are discharging their responsibility thoughtfully, with real care. Much remains to be learned from their work. The Committee will continue to study pleading standards carefully. Over the years it has studied many possible pleading rules, and related discovery rules, both before the Supreme Court spoke and since. But it is not likely to advance specific rules proposals for publication in 2012.

Pleading Forms

The *Twombly* and *Iqbal* decisions create serious tensions with the form pleadings included with the Civil Rules. Rule 84 says that these forms suffice under the rules. A footnote in the *Twombly* opinion observed that Form 11 is consistent with the Court's view of proper pleading. That footnote itself could be useful to illuminate one aspect of the full opinion. But it does not address the other forms. The Form 18 complaint for patent infringement has created particular difficulties for lower courts attempting to find some reconciliation with the Supreme Court's pronouncements.

Consideration of the pleading forms was initially deferred out of concern that it was too early to attempt to draft rule language to capture or revise whatever pleading standards emerge from the Supreme Court's opinions. The initial work, however, raised additional questions about the role of the Rule 84 forms. The forms cover an incomplete range of the rules. It is difficult to account for the selection of some subjects while others are excluded, although some forms have a clear history. Forms 5 and 6, the request to waive service and the waiver, were carefully drafted as part of creating the Rule 4(d) waiver provisions. Equal care has been taken with some other forms. But many forms have received scant attention, as witnessed by the prevalence of illustrative dates in 1936 that persisted until the forms were revised in the 2007 Style Rules.

The benign neglect that has attended most of the Rule 84 forms may rest in part on their general obscurity. But it also reflects implicit choices to devote Committee energies to more pressing

matters. It is fair to ask whether a choice must be made: Tend to the rules regularly and thoroughly, deploying the full resources of the Enabling Act, or demote them from official status as forms that suffice under the rules.

These questions led to formation of a Forms Subcommittee drawn from the Appellate, Bankruptcy, Civil, and Criminal Rules Committees. Early work by the Subcommittee has illuminated the differences between the treatment of forms in the different sets of rules. Differences appear in the process of adopting the rules. Only the Appellate and Civil Rules forms go through the full Enabling Act process. More importantly, the role played by forms differs greatly among the different sets of rules. Those differences may account in part for the choice whether to rely on the Enabling Act, but do not seem to provide a full explanation. For the moment, there does not appear to be a compelling reason to establish uniform practices across the advisory committees and sets of rules.

Work by the Subcommittee will continue, and the Civil Rules Committee will take account of it. It remains to determine whether any recommendations will be ready for action by the Standing Committee in 2012.

Class Actions

The Committee has opened the question whether class-action practice should claim a place on the agenda for consideration over the next few years. The most recent phase of class-action work began in 1991 and culminated with amendments that took effect in 1996 and 2003. It was a painstaking and lengthy process, undertaken after an interlude in which courts developed the 1966 Rule 23 amendments in many creative ways. Interpretations of Rule 23 have continued to evolve since 2003. The Class Action Fairness Act of 2005 has brought new and different kinds of class actions to the federal courts. And the Supreme Court has rendered a number of important class-action decisions in recent years. As difficult, protracted, and contentious as any project would be, it seems suitable to ask whether the Committee should prepare to make room for Rule 23 on its near-term agenda.

Brief initial discussion suggested several topics that might be raised if class actions are brought back to the agenda. One involves proof on the merits in determining whether to certify a class. In the most recent class-action work, the Committee recognized that measuring predominance and superiority for a (b)(3) class may justify consideration of a "trial plan" that predicts how the claims might be tried on the merits. Some preliminary sense of the merits is involved. This perception has been developed in different ways by different courts. Review may be appropriate to assess the depth of the preliminary consideration of the merits that may be suitable at the certification stage. Questions of preliminary discovery on the merits would be tied to this review.

Issues classes present a separate set of questions. Enthusiasm for issues classes rose and then diminished during the most recent work. Some observers fear that the predominance requirement for a (b)(3) class is being applied to defeat any use of class adjudication in circumstances that might benefit from at least class-wide resolution of important common issues.

The criteria for reviewing proposed class-action settlements vary among the circuits, at least in the length and content of the lists of factors to be considered. A list of factors was included in early drafts of the amendments finally made to Rule 23(e). The list grew to something like a dozen factors, several of them innovations on the case law. The Committee came to fear that the list would be treated as a simple check-off, perhaps encouraging rote application and discouraging serious case-specific review. The list was transferred to the draft Note. The same concerns led to dropping it even from the Note. Those judgments may have been wrong. Or, if right for the time, they may deserve further consideration now.

Cy pres settlement provisions have come in for substantial criticism, particularly to the extent that they provide remedies that the law would prohibit in an adjudicated judgment. It may prove tricky to draft a rule prohibiting cy pres provisions, but the effort could be launched.

The Supreme Court decision in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, 130 S.Ct. 1431 (2010), authorizes use of Rule 23 to provide a class-action remedy for a state-law claim despite a specific state-law prohibition on enforcing the claim by class actions. It would be relatively easy to disclaim this role for Rule 23. The task may be worthy, if not as a stand-alone project then as part of any more general project that might be undertaken.

Another suggestion was that it might be useful to review the American Law Institute Principles of Aggregate Litigation to determine whether worthy subjects of reform can be found there.

The Committee has formed a subcommittee to begin initial consideration of these issues, and looks forward to the advice that will be generated by the panel discussion at this Standing Committee meeting.

Other Docket Items

The Committee reviewed a number of proposals based on suggestions made to the Committee by members of the public, bar, bench, and another Judicial Conference committee. The proposals and dispositions are reflected in the draft Minutes. One is that a rule should be adopted to allow appeal by permission from an order granting or denying discovery of materials claimed to be protected by attorney-client privilege. This proposal intersects

the responsibilities of at least the Appellate, Civil, and Evidence Rules Committees. The Bankruptcy Rules Committee might have an independent interest. The Criminal Rules Committee also would be interested if there is any thought that the proposal should reach criminal prosecutions as well as civil actions. The Civil Rules Committee will defer any work on this subject pending expressions of interest or a lack of interest in other committees.

TAB 6-A

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

NOVEMBER 7-8, 2011

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts on November 7 and 8, 2011. The meeting was attended by Judge David G. Campbell, Chair; Elizabeth Cabraser, Esq.; Judge Steven M. Colloton; Professor Steven S. Gensler; Judge Paul W. Grimm; Peter D. Keisler, Esq.; Dean Robert H. Klonoff; Judge John G. Koeltl; Judge Michael W. Mosman; Judge Solomon Oliver, Jr.; Judge Gene E.K. Pratter; Anton R. Valukas, Esq.; and Hon. Tony West. Professor Edward H. Cooper was present as Reporter, and Professor Richard L. Marcus was present as Associate Reporter. Judge Mark R. Kravitz, Chair, Judge Lee H. Rosenthal, outgoing Chair, Judge Diane P. Wood, and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge Arthur I. Harris attended as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., was the court-clerk representative. Peter G. McCabe, Jonathan C. Rose, Benjamin Robinson, and Andrea Kuperman, Chief Counsel to the Rules Committees, represented the Administrative Office. Judge Jeremy Fogel, Joe Cecil, and Emery Lee represented the Federal Judicial Center. Ted Hirt, Esq., and Allison Stanton, Esq., Department of Justice, were present. Observers included Alfred W. Cortese, Jr., Esq.; Joseph Garrison, Esq. (National Employment Lawyers Association liaison); John Barkett, Esq. (ABA Litigation Section liaison); Chris Kitchel, Esq. (American College of Trial Lawyers liaison); Kenneth Lazarus, Esq.; John Vail, Esq. (American Association for Justice); Thomas Y. Allman, Esq.; Robert Levy, Esq.; Ariana J. Tadler, Esq.; William P. Butterfield, Esq.; Jonathan Redgrave, Esq.; John K. Rabiej, Esq. (Sedona Conference); Jerry Scanlon (EEOC liaison); Professor Lonny Hoffman; and Andrew Bradt, Esq.

Judge Campbell opened the meeting by greeting Committee members, committee support staff, and observers. The Committee appreciates the interest shown by the observers in the Committee's work, and welcomes the presence of several staff lawyers for the House Judiciary Committee.

Two new Committee members were also greeted. Dean Klonoff is a graduate of the University of California at Berkeley, and the Yale Law School. He clerked for the Chief Judge of the Fifth Circuit, practiced with Jones Day for many years, took a chair on the law faculty at the University of Missouri, was a Reporter for the ALI Principles of Complex Litigation, and is Dean of the Lewis and Clark Law School. Judge Oliver is a graduate of Worcester College and NYU Law School; he also has a masters degree. He clerked for Judge Hastie in the Third Circuit. As Assistant United States Attorney he served as chief of both civil and appellate divisions. He also was in private practice, and has taught at the

46 Cleveland-Marshall College of the Law. He has been a judge since
47 1994, and now is Chief Judge of the Northern District of Ohio.

48 Jonathan Rose was welcomed as the new Rules Committee Support
49 Officer; most recently he has been a partner at Jones Day, and has
50 served in a variety of federal government positions. Benjamin
51 Robinson is the Deputy Rules Officer and Counsel; he too comes to
52 the Administrative Office from Jones Day.

53 This is the final meeting for Professor Gensler, who has
54 completed serving his two terms. He has provided much wise counsel
55 during his time as member, and can be expected to continue to help
56 the Committee in other roles. Judge Kravitz will return to the
57 Standing Committee, this time as Chair. The Civil Rules Committee
58 gained immediate benefit from his earlier years on the Standing
59 Committee, and will benefit from his wise guidance as Chair. Judge
60 Rosenthal has been CEO, presiding judge, chief architect, and
61 mother superior of the rules process. As difficult as it will be
62 to succeed her, Judge Kravitz will carry forward the outstanding
63 tradition of her work. Andrea Kuperman, who began as Rules law
64 clerk for Judge Rosenthal, will transition to serving in the same
65 role for Judge Kravitz.

66 Judge Fogel, of the Northern District of California, is the
67 new head of the Federal Judicial Center. The Committee has
68 depended on support by the FJC research staff for many important
69 projects. Several ongoing research projects attest to the role the
70 FJC has played; the Committee will continue to draw as heavily on
71 the FJC as can be fit into the many competing demands for its work.

72 **STANDING COMMITTEE REPORT**

73 Judge Kravitz reported on the June Standing Committee meeting
74 and the September Judicial Conference meeting. There were no rules
75 items on the Judicial Conference calendar. The Standing Committee
76 considered the current Rule 45 proposal, liked it, and approved
77 publication for comment. The Standing Committee also discussed the
78 activities of the Duke Conference Subcommittee and other Civil
79 Rules projects.

80 Judge Kravitz added that while chair of this Committee he had
81 achieved outstanding results by delegating the most important work.
82 Judge Campbell did a great job in leading the Discovery
83 Subcommittee through, among other things, the Rule 45 proposal and
84 the initial stages of the work on preservation, spoliation, and
85 sanctions. Judge Koeltl did a masterful job in orchestrating the
86 Duke Conference, and has followed through with the Duke Conference
87 Subcommittee. Other Subcommittee chairs have done as well, albeit
88 with less onerous tasks. It is good to turn the reins of the
89 Committee over to Judge Campbell.

90 **APRIL 2011 MINUTES**

91 The draft minutes of the April 2011 Committee meeting were
92 approved without dissent, subject to correction of typographical
93 and similar errors.

94 **LEGISLATIVE ACTIVITY**

95 Andrea Kuperman reported on legislative activity that bears on
96 the Civil Rules.

97 The Law Abuse Reduction Act, introduced in both the House and
98 the Senate, is the latest in a long string of bills that would
99 restore the 1983 version of Civil Rule 11, superseding the changes
100 made in 1993. Professor Hoffman testified against the bill at a
101 House hearing in March. The FJC did extensive research on the 1983
102 version, finding it caused many problems. There is no indication
103 that the 1993 version has called any problems. The American Bar
104 Association Litigation Section and the American College of Trial
105 Lawyers oppose the bills. The bill has been reported by the House
106 Judiciary Committee. There has been no activity in the Senate.

107 The Sunshine in Litigation Act is similar to prior bills
108 dating back through several Congresses. The common feature is to
109 require specified findings of fact before entering a protective
110 order, or approving a settlement, to ensure that the order does not
111 prevent dissemination of information relevant to the public health
112 and safety. The new version is different from earlier bills
113 because it is limited to actions in which the pleadings show issues
114 relevant to the public health and safety. The rules Committees
115 have opposed these bills over the years. The Senate Judiciary
116 Committee has favorably reported a bill, but it has not yet been
117 taken up in the Senate. The House bill has not been taken up.

118 There is no legislation currently pending to address the
119 *Twombly* and *Iqbal* decisions.

120 HR 3401, the Consent Decree Fairness Act, would establish term
121 limits on injunctive relief against state and local officials. It
122 would require scheduling order timing and content different from
123 Civil Rule 16(b). It would apply in only a narrow set of cases.

124 **DUKE CONFERENCE SUBCOMMITTEE**

125 Judge Koeltl delivered the report of the Duke Conference
126 Subcommittee. The Subcommittee was formed to deal with many of the
127 questions addressed at the May, 2010 Conference at Duke Law School.
128 Pleading issues have been left on a separate track, and issues
129 relating to preservation and spoliation of discoverable information
130 have been left with the Discovery Subcommittee. This Subcommittee
131 deals with the "great other."

132 A wide variety of proposals have been advanced to serve the
133 cause of greater speed, efficiency, and justice. These are the
134 goals of Rule 1.

135 Many paths are open to pursue better results under present
136 rules without need for any rules amendments. The Federal Judicial
137 Center is developing several means of improving judicial education
138 programs and resources by emphasizing the flexible and powerful
139 management tools available today. Committee members, particularly
140 Judges Kravitz and Rosenthal and Professor Gensler, drafted
141 important portions of the new benchbook for judges, focusing
142 particularly on Rule 16 conferences and the relationships between
143 Rules 16 and 26. The Sedona Conference has added the advice that
144 it is really important to encourage chief district judges to urge
145 effective use of these rules.

146 Pilot programs also can be encouraged. They will work best
147 when they are framed from the beginning in ways that will enable
148 the Federal Judicial Center to provide rigorous evaluation of the
149 results. The Seventh Circuit e-discovery pilot program was already
150 under way, and was described at the Conference. Since then the
151 Northern District of California has adopted an expedited Trial
152 Procedure.

153 Another project has just been launched in the Southern
154 District of New York, the Pilot Project Regarding Case Management
155 Techniques for Complex Civil Cases. The Project had its genesis in
156 the Duke Conference. Judge Scheindlin chaired the Judicial
157 Improvements Committee that drafted the program, with the help of
158 a very distinguished advisory committee that was widely
159 representative of the bar and clients. The lawyers were really
160 enthusiastic about the project. The full Board of Judges,
161 including all active and all senior judges, adopted the program.
162 Not every judge was enthusiastic — the program includes things that
163 some had not been doing. But the board decided to adopt the
164 project as a court project; all judges are participating. The
165 procedures reflect the court's trust of the bar. The court
166 respects the recommendations, and will attempt to do what the
167 lawyers asked. The program will run for 18 months. The FJC is
168 surveying lawyers in closed cases to provide a baseline for
169 studying the project's impact. They are asking questions on such
170 matters as whether there was a Rule 16 conference? A Rule 26(f)
171 conference? Were they useful? The FJC will conduct another survey
172 at the end of the project. The second survey will be facilitated
173 by adopting a set of docket flags to be used by court clerks for
174 cases handled under the project.

175 The Southern District procedures include shortening the time
176 set by Rule 16(b) for the scheduling order from 120 days after
177 service to 45 days after service. The court is to do more than
178 "consult" with the lawyers; there must be an actual conference,
179 although it can be accomplished by phone or other means short of a

180 physical meeting. There is a long list of subjects to discuss at
181 the Rule 26(f) conference, and then at the Rule 16 conference.
182 Discovery disputes are resolved by letter submissions, not motion;
183 "we don't have discovery motions." A Rule 12(b)(6) motion stops
184 all discovery other than Rule 34 discovery of documents and
185 electronically stored information. The number of Rule 36 requests
186 to admit is limited to 50. A lawyer who wishes to file a motion
187 must have a pre-motion conference with the court. Attorneys were
188 unhappy with the Local Rule 56.1 statement, thinking it too long
189 and too expensive; if the parties request and the court approves,
190 the statement need not be filed. If the court requires a
191 statement, it must not exceed 20 pages per party.

192 A pretrial report by the lawyers is required after fact
193 discovery, and before expert discovery.

194 It will be important to attempt to measure how effective these
195 innovations are. The court has some reservations about the ability
196 to achieve rigorous measurement.

197 The Committee has encouraged another endeavor, development of
198 a discovery protocol for employment cases. The project was
199 fostered by the bar. The drafting group included plaintiffs
200 lawyers, headed by Joe Garrison, and defendant lawyers, headed by
201 Chris Kitchel. They inspired wonderful work, despite initial
202 obstacles: "with litigators, you know"? Many of the participants
203 began by opposing elements favored by the other side: "never." But
204 ultimately, after a series of meetings and conference calls, and
205 with the help of the IAALS and Judge Courlis, they finished the job
206 "in the best spirit of the bar." The resulting protocol is
207 endorsed by the plaintiff lawyers and the defendant lawyers. It is
208 an intelligent, thoughtful way to begin the litigation. It
209 recognizes the information that reasonably will be produced, and
210 aims to get it produced more directly than the usual discovery
211 process, and early in the litigation. This will enable the parties
212 to evaluate the case, and to move it ahead to the second wave of
213 discovery if it is fit to move ahead. The second wave itself will
214 be better focused.

215 Chris Kitchel noted that the protocol was developed through
216 vigorous debate. Judge Koeltl and Judge Courlis were a great help.
217 And it was a great committee. The work began with discussion by
218 Judge Rosenthal with Kitchel and Garrison at the Duke Conference.
219 The protocol itself identifies the information lawyers should
220 really want at the beginning of the action, the information that
221 will enable the case to go forward before formal discovery. The
222 protocol will replace initial disclosures. The group worked hard
223 to make sure the obligations are mutual.

224 Joe Garrison repeated the observation that Judge Courlis was
225 a very good facilitator in resolving what seemed to be intractable
226 disputes.

227 Further discussion described some aspects of the protocol.
228 The information is to be exchanged 30 days after the first response
229 to the complaint. The protocol will work better if there are no
230 extensions. No objections are allowed, other than to preserve
231 privilege. The ban on objections is the most important part; the
232 protocol will not work if objections are allowed. The materials
233 also include a proposed protective order, but it is a "check-the-
234 box" form because the participants could not agree on a single
235 uniform order. There is a difference of opinion on whether
236 discovery can be stayed on filing a Rule 12(b)(6) motion, but it is
237 accepted that a stay may be appropriate if the action seems
238 frivolous on the face of the pleadings. The protocol applies to
239 pro se parties as well as to represented parties.

240 Although the protocol does not address the Rule 26(f)
241 conference, the conference will be important. It can help, for
242 example, in forging agreement on a proposed protective order.

243 Joe Garrison stated that the effort now should be to implement
244 the protocol. The work can begin by persuading the FJC and IAALS
245 to post the protocol on their web sites. It also would be
246 desirable to post a list of the judges who are using the protocol
247 around the country. This information will make it much easier to
248 adopt the protocol in other courts. Adoption can be accomplished
249 by a standing order, entered by an individual judge. The order
250 should be entered before the Rule 16 conference. It also will be
251 good to encourage judges to comment on what is working, and on what
252 can be improved. A volunteer committee of three judges was later
253 formed to help Joe Garrison and Chris Kitchel with monitoring and
254 implementing the protocol. They are Judges Koeltl, Mosman, and
255 Rosenthal. Judge Fogel has agreed to send out a message from the
256 FJC notifying chief district judges of the protocol, and urging
257 adoption. The letter will note that all the district judges on the
258 Civil Rules Committee are adopting the protocol. Those judges also
259 will urge adoption by other judges in their districts.

260 New pilot projects in other courts will be encouraged. Emery
261 Lee has agreed to be the clearing house for other projects. Judge
262 Kravitz noted that Judge Fogel had sent a message to all chief
263 district judges asking that they identify all pilot projects, and
264 thanked Judge Fogel for doing that. All projects that are
265 identified will be listed on the FJC web site.

266 Beyond judicial education, ongoing empirical work, and pilot
267 projects, the Duke Subcommittee also has an agenda of possible
268 rules amendments. The list has been whittled down over time, but
269 additions also have been made and observers are invited to make
270 suggestions. One of the relatively recent additions is a proposal
271 to add new limits on the numbers of discovery events, adding
272 numerical limits to Rule 34 and Rule 36, and perhaps reducing the
273 limits in at least Rules 30 and 31. The limits could be set to
274 reflect the median experience revealed in the FJC survey for the

275 Duke Conference, perhaps with a slight margin. For example, the
276 limit to 10 depositions per side might be reduced to 5, better
277 reflecting the fact that in a majority of cases the parties take
278 only 2 or 3 per side.

279 The focus of rules proposals has been on the beginning of
280 litigation. The time for the Rule 16(b) scheduling order could be
281 accelerated, and an actual conference could be required. The need
282 to actually hold a Rule 26(f) conference could be underscored. The
283 Rule 26(d) discovery moratorium could be changed by providing that
284 discovery requests can be made before the Rule 26(f) conference,
285 although responses are not required until a time after the
286 conference. The conference would then be better focused on at
287 least the initial discovery requests actually made in the case.
288 (It was noted that even good lawyers seem to forget the moratorium,
289 as shown by requests to stay discovery before the 26(f) conference.
290 And they may forget that in many cases the moratorium obviates any
291 occasion to seek a stay of discovery pending disposition of a Rule
292 12(b)(6) motion because there has not yet been a Rule 26(f)
293 conference.)

294 Emery Lee described ongoing and pending FJC research projects
295 to support these efforts. A docket study aims at measuring the
296 frequency of scheduling orders, the time entered, the typical
297 length of discovery cut-offs, and the holding of Rule 26(f)
298 conferences. They are surveying lawyers in the Southern District
299 of New York as the foundation for measuring the effects of the
300 complex case management pilot project. Next February a
301 questionnaire will go out to lawyers seeking information about the
302 second phase of the Northern District of Illinois e-discovery pilot
303 project.

304 So far there have not been many responses to the FJC message
305 asking about local experiments. It is not yet clear what should be
306 done with the information as it accumulates.

307 The work on scheduling orders and Rule 26(f) conferences has
308 progressed to the point of an initial report on scheduling orders
309 and discovery cut-offs. It has proved difficult to identify
310 scheduling orders in the CM/ECF system. Courts use different codes
311 for scheduling orders. Some of the codes bury this information
312 "deep in the docket leaves." Many can be found by searching for a
313 discovery cut-off. But not all. The search has turned up more
314 than 11,000 scheduling orders. The median date of entry is 106
315 days from filing the action; the mean is 120 days. The median
316 discovery cut-off is 6.2 months, or approximately 10 months from
317 filing to the first discovery cut-off. This initial search will be
318 followed by a nationwide closed-case survey. A closed-case survey,
319 however, encounters difficulties. Lawyers' memories often fade as
320 to closed cases. Even identifying the attorneys who were involved
321 in a case at the time for a scheduling order or Rule 26(f)
322 conference may prove elusive because the lawyers who were on the

323 case when it concluded may not be the same as those who filed it,
324 particularly in complex cases.

325 Judge Koeltl noted that the Duke Subcommittee agenda also
326 includes three proposals by former Committee member Dan Girard to
327 reduce evasion and stonewalling. One frequent problem is that a
328 party objects to document requests in broad blanket terms at the
329 outset, then produces documents "subject to the objections," but
330 does not say whether some document have been withheld from
331 production because of the objections. The Lawyers for Civil
332 Justice group opposes the Girard proposals; he has responded to
333 their objections. The proposals continue to command a place on the
334 agenda.

335 Other rules topics include adding express provisions requiring
336 cooperation among lawyers. Rule 1 could be amended to require the
337 parties as well as the court to act to achieve the just, speedy,
338 and inexpensive determination of every action or proceeding.
339 Cooperation also could be built into Rule 16 or the discovery rules
340 in various ways; all that exists now is a reference in the title of
341 Rule 37, a remnant of an abandoned proposal to insert a duty to
342 cooperate into rule text.

343 Proportionality continues to be an object of concern,
344 particularly with respect to discovery. Proportionality is made an
345 explicit requirement in Rule 26(b)(2), and Rule 26(b)(1) — as well
346 as other rules — expressly invokes (b)(2). Proportionality also
347 can be implemented through Rule 26(c) protective orders. And the
348 FJC survey for the Duke Conference suggests that for a great many
349 cases, discovery is held within appropriate limits proportional to
350 the needs of the case. But it also seems clear that discovery can
351 run beyond what is reasonable. When courts of appeals discuss the
352 scope of discovery, they seldom mention proportionality. New rule
353 provisions might yet provide some help, perhaps as part of Rule
354 26(b)(1) defining the scope of discovery.

355 Much of the Subcommittee's focus will be on the beginning of
356 litigation. As already noted, Rule 16(b) might be revised to
357 require an actual conference among the attorneys and a judicial
358 officer, whether or not in person. The time for the scheduling
359 order could be advanced. The scheduling order provisions might be
360 expanded to include a date for explicitly abandoning claims or
361 defenses that a party has decided not to press further. A
362 provision might be added to address stays of discovery pending a
363 motion to dismiss. And as also already noted the Rule 26(d)
364 moratorium might be reconsidered, perhaps to allow discovery
365 requests to be made — but not answered — before the Rule 26(f)
366 conference.

367 Discovery cost-shifting also may be considered. And the time
368 for serving contention interrogatories might be considered,

369 creating a presumption that they are appropriate only after fact
370 discovery has closed.

371 Discussion began with an observation that the case law on cost
372 taxation for discovery is growing. The amendment of 28 U.S.C. §
373 1920 to allow costs for "exemplification" has led some courts to
374 expansive awards of costs for responding to discovery of
375 electronically stored information. The conduct of e-discovery
376 could be dramatically affected by a string of cost awards in the
377 hundreds of thousands of dollars.

378 Judge Campbell noted that Arizona sets a presumptive 4-hour
379 limit to depositions. About half the lawyers who appear before him
380 stipulate to adopting this limit. The result is better-focused
381 depositions. And his Rule 16 order limits the parties to 25
382 requests to produce under Rule 34 and 25 requests to admit under
383 Rule 36. Requests to expand these limits are made in about 5% of
384 his cases. They work.

385 Another observed that the Sedona Conference is discussing the
386 interplay between Rule 16 and Rule 26, and will have some
387 suggestions.

388 It also was noted that the panel discussion of the "rocket
389 docket" practices in the Eastern District of Virginia to be held at
390 this meeting is part of the Duke Conference Subcommittee program.

391 The possibility of holding a second "Duke" Conference in the
392 spring of 2013 is being considered. At least one purpose would be
393 to present concrete proposals for rule amendments for discussion
394 and evaluation. To do that, concrete proposals must be developed.
395 The goal would be to present a package of changes that work well
396 together, and that will be acceptable to lawyers "on both sides of
397 the v." There also should be room to hear "bigger picture"
398 proposals. No final decision has been made whether, or when, to
399 hold a second conference of this magnitude.

400 The final part of the Duke Conference Subcommittee report
401 addressed a "mailbox" suggestion by Daniel J. DeWit proposing
402 adoption of a new Rule 33(e). This rule would authorize a party
403 who serves a request to admit under Rule 36 to serve with the
404 request an interrogatory asking whether the response was an
405 unqualified admission. If not an unqualified admission, the
406 responding party should state all facts on which the response is
407 based, identify each person who has knowledge of those facts, and
408 identify all documents and tangible things that support the
409 response. The Subcommittee recommends that this suggestion be
410 dropped from the Committee agenda. The proposed provision would
411 "add clutter" to the rules; it would generate disputes; and the
412 described information can better be got by other means. The
413 Committee unanimously approved a motion to drop this item from the
414 agenda.

415 **DISCOVERY: PRESERVATION AND SANCTIONS**

416 Judge Campbell began the discussion of preservation and
417 sanctions by observing that these questions were raised by a very
418 distinguished panel at the Duke Conference. The panel presented a
419 unanimous recommendation that the Committee do something to address
420 these problems. The recommendation included a list of issues that
421 might be addressed by rules provisions. The Discovery Subcommittee
422 began work in the fall of 2010. It has had several meetings and
423 conference calls. It held a miniconference in Dallas on September
424 9, 2011, hearing a wide range of views from many lawyers,
425 technology experts, and others. Suggestions continue to arrive
426 from many groups, down to a November 6 letter from Ariana J. Tadler
427 and William P. Butterfield. The flow of additional information
428 will continue, and is encouraged.

429 Judge Grimm introduced the Subcommittee report by praising the
430 September 9 miniconference as tremendously educational for everyone
431 involved. There were many submissions before the conference began.
432 Some presented empirical work. Others were based on experience.
433 There were formal papers and other submissions. This wealth of
434 material is included in the agenda book for this meeting; along
435 with a few pages of notes on Subcommittee discussions, the material
436 runs from page 87 through page 516. The round-table discussion
437 involved many people. The Subcommittee has held two conference
438 calls after that.

439 One submission, by Robert Owen, a private practice attorney,
440 presents 26 pages of specific recommendations for radical reform.
441 The views expressed reflect the concerns of many. Current law is
442 inconsistent and imprecise. There seems to be an assumption that
443 there is a lot of destruction. Current rules on proportionality in
444 discovery are not adequate to the need to protect against requiring
445 preservation of disproportionately large volumes of information
446 before litigation is even filed. The operating regime has changed
447 from "do not destroy" to "preserve everything." The suggestions
448 include these: (1) Carry forward the prohibition against
449 intentional destruction. (2) The trigger for a duty to preserve
450 should be actual notice of the filing of an action or a petition to
451 a government agency. (3) Rule 27 should be amended to permit
452 courts to enter a prefiling order to preserve information, on a
453 showing of good cause. (4) The scope of preservation should be
454 limited to the claims pleaded in the complaint. The duty should be
455 confined to materials in the possession, custody, or control of a
456 party and used in its regular affairs. (5) Punitive sanctions
457 should be available only on a showing of bad faith.

458 The Lawyers for Civil Justice proposals made after the Dallas
459 miniconference discuss the economic benefits that would be achieved
460 by clear rules on preservation and sanctions. There should be a
461 clear trigger for the duty to preserve: a reasonable expectation of
462 the certainty of litigation. The duty should be defined by concise

463 scope and boundaries. It should be limited to information in a
464 party's possession, custody, or control and used in the ordinary
465 conduct of business or personal affairs. Non-active information
466 need be preserved only on a showing of good cause. No more than 10
467 key custodians need be required to preserve, and preservation is
468 required only for a period of two years preceding the preservation
469 trigger. The information should be that relevant and material to
470 a claim or defense. Sanctions should be awarded only for willful
471 and prejudicial conduct intended to prevent use in litigation.

472 The Sedona Working Group 1 has devoted much time and energy to
473 discussing the issues explored in Dallas. The Subcommittee is
474 grateful for their work.

475 The materials for the Dallas miniconference sketched three
476 different approaches to drafting a preservation rule. The first,
477 taking many of its cues from the Duke panel suggestions, provided
478 comprehensive and specific rules for triggering the duty to
479 preserve, defining its scope and duration, and establishing
480 sanctions. The miniconference discussion suggested several
481 difficulties with the specifics, and the Subcommittee concluded
482 that this approach would require a great deal of work to generate
483 specific provisions that might soon be superseded by advancing
484 technology. The second approach also addressed trigger, scope,
485 duration, and sanctions, but only in general terms: reasonable
486 scope, and so on. This approach offered so little guidance as to
487 be of little apparent use. The third approach focused on sanctions,
488 in part because the fear of sanctions is said to drive many
489 companies to preserve far more information than reasonably should
490 be preserved, and in part because of the wide differences among the
491 circuits in setting the levels of culpability required for
492 different sanctions. This approach would not directly define a
493 duty to preserve, but limiting the definition of conduct that
494 supports sanctions would provide implied directions about what
495 preservation is required. It won the Subcommittee's tentative
496 support as the most promising path to be pursued. But the Sedona
497 group thinks it premature to attempt even this approach. They
498 think it better to attempt to strengthen Rules 16 and 26(f), and to
499 pursue further education of bench and bar.

500 Opponents of adopting any preservation rule argue that
501 Enabling Act authority does not extend to a rule that would require
502 preservation before an action is filed in a federal court. The
503 Subcommittee decided to carry this question forward in a general
504 way. It seems best to attempt to draft the best rule that can be
505 crafted, and then to focus the Enabling Act inquiry on this
506 specific model.

507 Professor Hubbard, at the University of Chicago, provided a
508 thought-provoking article. He begins with the reflection that
509 judges and lawyers evaluate preservation decisions in hindsight,
510 while actual preservation decisions must be made ex ante.

511 Judgments should be based on what was reasonable in prospect, not
512 on what seems reasonable with the benefit of hindsight.
513 Proportionality cannot be measured by the judge, who often will not
514 have the information needed to measure preservation in reasonable
515 proportion to the needs of the case. It is better to place
516 responsibility on the parties. And the responsibilities must be
517 distinguished: not to spoliate; to preserve; to retain in light of
518 the obligations imposed by law independent of preservation for
519 litigation; to produce. A duty to preserve is not the same thing
520 as a duty to not spoliate. When there is a duty to preserve, it
521 should be defined by setting a presumptive limit on the number of
522 custodians who must be directed to preserve. With even a generous
523 limit such as 15 custodians, having a limit will provide a focal
524 point for bargaining between the parties. Without giving at least
525 this much presumptive protection to the party that has a
526 disproportionate share of the information, the party who has little
527 information has no incentive to bargain to a reasonable
528 preservation regime. Sanctions should be imposed for loss of
529 information only on showing a guilty state of mind. The rules
530 should be amended.

531 The Tadler-Butterfield letter urges it is too early to adopt
532 comprehensive rules changes. The 2006 amendments addressing
533 discovery of electronically stored information are only 5 years
534 old. Important questions have been raised, but there is no need
535 for the level of change recommended in any of the models.

536 The Subcommittee now seeks direction from the Committee. What
537 direction should be followed? Do nothing? Is it time to draft a
538 proposed rule, or should more information be gathered? What should
539 a proposed preservation rule look like? If not a preservation
540 rule, would it be better to draft a sanctions rule that backs into
541 preservation and indirectly reduces the fears of those who are
542 over-preserving?

543 Professor Marcus carried the discussion on, stating that the
544 basic message is one of caution "in dealing with things we do not
545 fully appreciate or understand." The Committee first began
546 thinking about these sorts of problems more than 15 years ago.
547 From 1997 to 2003 it was uncertain what approach to take.
548 Preservation was a concern then, as now. After a temporary
549 impasse, the Committee moved ahead toward adoption of what now is
550 Rule 37(e). "Facebook did not exist then." And new technologies
551 continually appear that require consideration. One recent example
552 is news of a program that sends and receives e-mail messages
553 without leaving any record. But it may be that for the time and
554 the problems that were addressed, "we got it about right." The
555 letter from RAND in the materials argues that the law may be
556 relatively stable vis-a-vis technology with respect to the part of
557 the discovery cycle that involves actual production of information.

558 Preservation law and practice is not stable. The agenda book
559 summarizes the many divergent thoughts that have been expressed to
560 the Subcommittee. Fifteen years ago the Committee proceeded
561 cautiously, with deliberation. How fast should we move now?
562 Proliferating social media, smart phones, all sorts of hard- and
563 software developments raise all sorts of questions. But there is
564 a "very much enhanced concern" with preservation that may justify
565 attempts to move toward rules changes.

566 Judge Campbell recounted the Dallas conference descriptions of
567 the problems corporations face. A big corporation with 200,000
568 employees may lose or transfer 10,000 of them every year. We heard
569 of a corporation that had 10,000 employees under a litigation hold.
570 One company told of spending $5,000,000, increasing at a rate of
571 $100,000 a month, preserving information against the prospect of
572 litigation that had not yet even been filed. There is a great
573 concern about differences in the standard of fault that supports
574 sanctions. The consequence is that people over-preserve.

575 As serious as the problems are, there are many ongoing efforts
576 to develop more information to support better-informed rules
577 proposals. The problem is real. The risks in addressing it
578 prematurely are real. Should the Subcommittee at least work toward
579 developing a draft or drafts that might be considered for a
580 recommendation for publication at the March meeting?

581 Discussion began with agreement that these are really tough
582 questions. But does the prospect that technology will change
583 continually justify a failure to do anything, ever? People are
584 very concerned about the ex ante duty to preserve. "The trigger is
585 very important." It is all very difficult. "But perhaps we should
586 do something now."

587 A committee member expressed similar troubles about the
588 trigger, but suggested that "sanctions is the area where we can do
589 something now." Attempting to define a trigger would be hard. No
590 reputable corporation will chance sanctions. The result is to
591 preserve under the most severe view. "I would not defer a uniform
592 rule on sanctions."

593 The Committee was reminded that these questions overlap the
594 rules of conduct for lawyers. Professional obligations also will
595 engender very conservative behavior. The Committee should proceed
596 with great caution. This theme recurred. "Everything comes down
597 to attorney conduct." Years ago, the Standing Committee worked on
598 developing federal rules of attorney conduct. It held three major
599 conferences, and then gave up. Although the Committee was
600 concerned about Enabling Act limits, interested members of Congress
601 thought the subject is within the Act. The result today is that
602 most districts adopt a dynamic conformity to local state rules.
603 Local rules usually are the ABA Model Rules, with some local
604 adaptations. The rules forbid unlawfully obstructing another

605 party's access to evidence, and speak in other ways to issues that
606 bear on preservation. Sanctions can be imposed under the state
607 systems of attorney regulation. "This is very difficult. But that
608 is not to argue we should do nothing." Responding to an
609 observation that the attorney discipline rules do not command
610 federal courts to impose Rule 37 sanctions, it was noted that
611 lawyers do have to worry about state sanctions. But it was
612 suggested that state sanctions may be a source of "angst that we
613 cannot do anything about." The Code of Conduct for judges, indeed,
614 obligates judges to notify disciplinary authorities of lawyers'
615 violations of professional responsibility requirements.

616 Another member suggested that the attempt to focus on
617 spoliation as the easier target cannot really succeed because
618 preservation is so tightly tied to spoliation. And a rule on
619 sanctions will lead to emergence of new specialists in how to
620 litigate spoliation issues. Who will decide those issues? "We
621 cannot escape" defining triggers for the duty to preserve.

622 A Subcommittee member noted that at the end of the September
623 miniconference he had suggested the Committee should think hard
624 about the advantages of doing nothing. But that probably is not
625 the best answer. "At least a sanctions rule is necessary." And it
626 may prove that a workable sanctions rule cannot be completely
627 divorced from trigger and preservation issues. A rule must attempt
628 to hit a rapidly moving target. The proposal that the obligation
629 to preserve should be triggered by a "reasonable expectation of the
630 certainty of litigation," for example, does not provide real
631 certainty in the current landscape.

632 Another Committee member observed that although it is possible
633 to think about a sanctions rule rather than an express preservation
634 rule, the separation is difficult. If different courts have
635 different concepts of trigger, scope, and duration, the outcomes
636 will be different. "How do you plan to avoid sanctionable
637 behavior"?

638 Yet another Committee member thought the submissions to the
639 Subcommittee are impressive. Some urge that we do nothing,
640 implementing the principle that the first thing is to do no harm.
641 Others urge that attempting specific or general rules on trigger,
642 scope, and duration is too risky, but that a sanctions rule may be
643 feasible. There are variations on the level of detail that might
644 wisely be incorporated in a sanctions-only approach. It is
645 possible to craft a sanctions rule that incorporates an idea of
646 reasonable conduct that should not be sanctioned. "The number of
647 cases where this actually comes up is limited. People self-
648 regulate for fear of extreme cases." At the end, it seems likely
649 that an explicit preservation rule, whether one that expresses
650 detailed obligations or one that simply directs reasonable
651 behavior, will not repay the effort of creating it. But a creative

652 sanctions rule may be useful to protect against extreme behavior.
653 "People will talk more and that will reduce problems."

654 Committee discussion continued with the view that a sanctions
655 rule will provide only limited help with the preservation
656 obligation. The guidance "will be hard to build on." "But a
657 uniform rule on sanctions is important even if it does not address
658 preservation." The rule is likely to come up short of the most
659 demanding present standards, and in this way will provide some
660 comfort. Preservation is important. The Committee should continue
661 to work on it as a highly significant problem.

662 An observer suggested that there is a "big Erie problem." The
663 source of the duty to preserve bears on the cure; is it state law?
664 federal procedure? substantive law? There also is a nomenclature
665 issue — what *is* a "sanction"? A curative order is not a sanction,
666 and any rule must draw the distinction. An order directing
667 additional discovery, or shifting costs, to compensate for the loss
668 of information is not punitive. "Negligence is better fit for
669 curative orders than for sanctions."

670 The diversity of present law was explained in part by looking
671 to the charts breaking the questions down by circuit. Most of the
672 decisions are district-court decisions. Courts of appeals do not
673 often get these cases. That may provide added reason for adopting
674 a rule, achieving greater national uniformity.

675 The value of working toward a sanctions rule was further
676 underscored by urging that success would produce national harmony,
677 "replacing present cacophony." It is not good to have many
678 different standards in different courts. Negligence, for example,
679 might support cost-shifting, but not adverse inferences. It may
680 not ever be possible to create a satisfactory preservation rule,
681 but it makes sense to move ahead on sanctions. In any event, the
682 Standing Committee may incline toward a conservative approach,
683 welcoming a uniform sanctions rule, recognizing a preservation rule
684 as presenting an ongoing challenge that deserves continued
685 attention but may not yield to early answers.

686 The Committee was reminded that the 2006 amendment of Rule 37
687 was narrow. It was conceived as a first step. "It was an essential
688 first step because of the degree of anxiety that had already
689 developed." It was an attempt to catch up with the fact that with
690 automated information systems, "doing nothing can cause the
691 destruction of information." It was understood that the Committee
692 would continue to study the problem. Electronically stored
693 information is different from paper information in these
694 dimensions. Are more changes needed? Reducing the fear of
695 sanctions may reduce the extent of over-preservation. "It can be
696 good to do something, rather than risk never doing anything."

697 Turning to scope, it was suggested that the preservation
698 obligation leads to discovery. Should the scope of the duty to
699 preserve be tied to the scope of discovery? Or should it be
700 something less than everything that can be anticipated to fall
701 within the scope of discovery after litigation is filed? It might
702 prove awkward to define a scope of preservation different than the
703 scope of discovery. And it may be that the Duke Subcommittee will
704 recommend that the scope of discovery be narrowed; that would bear
705 on the scope of preservation, reducing the burdens.

706 All of this discussion, initially focused on whether to
707 attempt anything, clearly moved in the direction of counsel about
708 what to do. A transitional summary was offered. Defining the
709 trigger for a preservation duty is the subject most likely to raise
710 concerns about making changes to the common law. The notion of
711 spoliation goes back a long way; it is anchored in an 1817 Supreme
712 Court decision, which in turn has roots in the common law. But
713 would it help to have a rule that identifies conduct that is
714 sheltered? Is it possible to address proportionality in
715 preservation, compare the present discovery rules? As Professor
716 Hubbard's article points out, the parties have to make preservation
717 decisions, and courts enforce proportionality. A sanctions rule
718 can address reasonable care, proportionality, attempts at
719 discussion among parties or intending parties to solve the problem
720 (as compared to an over-reaching preservation demand letter). Is
721 it indeed legitimate to build into a sanctions rule factors that
722 will protect reasonable behavior?

723 The Committee was reminded of the recommendation that it will
724 work best to devise the most attractive rule that can be drafted,
725 and then to determine whether it can be squared with the Enabling
726 Act. A sanctions rule could be more detailed than any of the
727 drafts yet devised. And "Rule 37 sanctions in a case actually
728 before the court seem to fall in the heartland of § 2072."

729 The Subcommittee began with the view that it should restate
730 the generally accepted definition of the events that trigger a duty
731 to preserve: a reasonable expectation of litigation. But recent
732 discussion has suggested that the common and general rule should be
733 changed, that it creates problems that should be addressed. The
734 Department of Justice, on the other hand, disagrees.

735 Defining the scope of the duty to preserve also is a problem.
736 Actual rulings on actual questions are not easy to predict. That
737 makes it difficult to decide on what to preserve, particularly
738 before litigation is filed. Specifics could be built into a
739 sanctions rule, such as a presumptive upper limit on the number of
740 custodians to be directed to preserve, but this approach might
741 encounter difficulties. Or the limit could be built into "Rule
742 26." The number of custodians could be set, for example, at 15,
743 requiring good cause to raise the number. The attorneys would be
744 required to confer before making or opposing a motion to raise the

745 number. And the presumptive limits would tie back to measuring
746 what it is reasonable to preserve. Still, it is not clear whether
747 such a rule would make a difference. The proposal that became Rule
748 26(b)(2)(B) caused consternation when it was published; it is not
749 clear whether it has made any difference in practice.

750 The concept that Rule 37 limits on sanctions may be
751 appropriate was said to rest on the belief that inherent authority
752 is what authorizes sanctions under present practice. If a
753 sanctions rule gets it right on the level of culpability for
754 different sanctions, the Chambers v. NASCO, Inc. [501 U.S. 32
755 (1991)] concept of inherent authority would likely not be a serious
756 threat.

757 Concern was expressed that this discussion reinforces the fear
758 that it is premature to begin drafting. The position of the
759 Department of Justice has been described as "do nothing," but that
760 is not accurate. Instead the Department believes it is important
761 to work toward a careful approach. With pleading, the Committee
762 has declined to rush into rule drafting. It is wise to wait to
763 sense the scope of any problems, so as to draft a workable
764 solution. What we have now is a snapshot. We need a better sense
765 of the direction of the law, about effects on pro se litigants,
766 about access to information, and about access to justice. "There
767 is a lot to do. Drafting language is premature."

768 Another Committee member suggested that "there is a real
769 problem." A sanctions rule would not get directly to preservation.
770 Thought should be given to developing a preservation rule. "We
771 should not give up on that, even if we do sanctions first."

772 The virtues of going slowly about the task were suggested from
773 a different perspective. There are choices intermediate between
774 creating a rule now and doing nothing. Education of bench and bar
775 might accomplish something. "If huge numbers of litigants do not
776 experience preservation as a big problem," immediate drafting
777 efforts may not be justified. A similar thought was that there is
778 room to go forward with drafting a rule, but it is unclear whether
779 it is reasonable to aim to achieve a proposal for publication at
780 the March meeting.

781 An observer said that "there is a vacuum. It is filled by
782 judges deciding cases. A sanctions rule would be some help, but it
783 would not help businesses to understand what they have to do. We
784 need guidance."

785 Identifying the trigger for a duty to preserve came back for
786 discussion. The first comment was that the RAND study discussed at
787 the Dallas miniconference found that in-house people find the law
788 clear. The Sedona Conference agrees. So does the chart of
789 decisions prepared by Judge Grimm. A reasonable expectation of
790 litigation triggers the duty to preserve. The differences arise in

791 evaluating the established trigger. Some think it works. Others
792 think it too broad, urging scaling it back to a reasonable
793 anticipation of the certainty of litigation. And yet others would
794 narrow it further, to arise only on the filing of an action or
795 service of a subpoena. There have been strong reservations about
796 proceeding with a rule in the shape of the specific model that
797 lists a number of specific triggers, such as receipt of a letter
798 demanding preservation.

799 The next observation was that the common law "is causing the
800 preservation of information far out of proportion to its value in
801 litigation." If we have authority to do so, it would be good to
802 limit the trigger. An observer challenged this view, opposing any
803 change. Seizing on the "reasonable expectation of the certainty of
804 litigation," this comment asked how this standard would work when
805 a statute of limitations may extend for years into the future?

806 Examples given at the Dallas miniconference were recalled. A
807 duty to preserve may properly arise "before there is a lawyer even
808 in sight." "A patient dies in the operating room; an engine falls
809 off an airplane." "We have to continue to work on preservation,
810 even though we may never succeed in crafting a workable rule."
811 Judge Scheindlin, who has dealt with these issues extensively,
812 believes it would be sensible to adopt a rule.

813 A district judge offered several thoughts. Some companies now
814 have specialists in e-discovery on staff. One case illustrates a
815 special problem — it is a patent infringement action pending in
816 Delaware and California; the different courts have different
817 preservation standards. The resulting costs run in the tens of
818 millions of dollars. Technology is changing rapidly; "you can
819 store almost anything easily in the cloud." And the Supreme Court
820 decision in the MedImmune case changes the trigger — it is not the
821 certainty of litigation, but something much looser.

822 It was asked what policies should be followed in defining the
823 trigger. Is it to save money? Protect access to information? A
824 firm has many reasons to preserve information, including state and
825 federal regulation and business reasons. What problems are we
826 trying to solve in adopting an independent duty to preserve for
827 litigation? In patent cases, for example, there will be a huge
828 preservation endeavor independent of any rule-based duty to
829 preserve. "We need a better sense of the reasons to move toward
830 adopting a rule."

831 A Committee member responded that there *is* a class of
832 corporations spending a lot of money on what they think is
833 unnecessary preservation. "The value of uniform standards for
834 sanctions is real. This is a significant problem. Can we address
835 it"? Identifying the trigger is a problem. Most firms assume the
836 common-law trigger. The disparate standards for sanctions also
837 present problems.

838 Preservation duties and sanctions affect plaintiffs as well as
839 defendants. The problem is important. Whether or not a
840 publishable proposal can be drafted by March, it is important that
841 work on a sanctions rule should go forward.

842 A broader conceptual approach was suggested. "Over-
843 preservation is an error. So is under-preservation. We cannot
844 build an error-free system. So how do we define success"? Is it
845 an acceptable error rate for parties acting in good faith? Should
846 we weight differently the costs of over- and under-preservation?
847 The best we can achieve will be clarity. Certainty is not within
848 reach.

849 The first response to this question was that it would be a
850 success to reduce the consequences of under-preservation, to reduce
851 the tendency to over-preserve. A rule change will not give
852 certainty. But there is a chorus of people who request information
853 — mostly plaintiffs — who fear that needed information will not be
854 there. And those who are called upon to produce information fear
855 sanctions, and the reputational effect of sanctions. Neither side
856 can be fully protected by a rule.

857 So a Committee member agreed that it is good to conserve
858 resources, to avoid wasting time and resources on litigation. But
859 "it's not just about the parties, or the court system." There is
860 also a public interest in deciding controversies on the merits.
861 "We cannot easily monetize that." Preservation entails cost, but
862 the cost is constantly diminishing. "The cost of error on the
863 merits will not diminish." The goal of certain guidance to
864 litigants should not be reached by creating a loophole for non-
865 preservation. And the trigger for preserving information in
866 anticipation of federal-court litigation should not be different
867 from the rules and practices that guide real-world preservation of
868 information in other ways.

869 The suggestion that the cost of preserving electronically
870 stored information is small was met by observing that although the
871 cost seems to fall continually per unit of information, there is an
872 unending supply in the number of units. "We cannot say that the
873 cost of preservation is de minimis." On the other hand, there is
874 an independent reason to be wary of adopting a trigger based on the
875 actual filing of an action — "we will have more cases filed."

876 Discussion of preservation obligations concluded by agreeing
877 that this is a very important task. There is much yet to learn.
878 The Committee and Subcommittee can expect to receive continuing
879 submissions of new information and views; the submissions will be
880 much appreciated. The Subcommittee will look for near-term
881 solutions, such as sanctions. But "it should work as if all issues
882 are still in play." The Subcommittee will report to the Committee
883 at the March meeting.

884 **RULE 45**

885 Professor Marcus said that work on the proposed Rule 45
886 amendments that were published for comment in August could command
887 an important part of the agenda for the March meeting. No one
888 asked to testify at the hearing that was scheduled for this
889 morning; it was cancelled. It remains to be seen how many people
890 will appear for the two hearings scheduled in January.

891 The published proposal sought to simplify Rule 45; to revise
892 the notice provisions and make them more prominent; to reject the
893 Vioxx approach to commanding a party or its officer to appear at
894 trial; and to establish authority to transfer a nonparty subpoena
895 dispute to the court where the action is pending. The Vioxx
896 proposal was accompanied by a request for comment on an alternative
897 that was not endorsed by the Committee, granting the court
898 authority to command a party to appear as a witness at trial.

899 Modification of the notice provision expanded it to include
900 trial subpoenas as well as discovery subpoenas. But it did not
901 include any requirement of subsequent notice as information is
902 produced in response to the subpoena. The American Bar Association
903 Litigation Section feels strongly that notice of production should
904 be required. There are likely to be extensive comments on that
905 subject.

906 The standard to transfer a discovery dispute was set at
907 consent of all, or "exceptional circumstances." There have been
908 two written comments so far, pointing in different directions.

909 Another comment has suggested that a provision akin to Rule
910 30(b)(6) be adopted for trial subpoenas, so that a party could
911 subpoena a corporation or other entity with a direction that it
912 provide witnesses to testify on designated subjects. The
913 Subcommittee considered this possibility early on, and rejected it
914 for a variety of reasons. But it has been brought back and will be
915 considered further.

916 The relative paucity of early comments was not seen as a sign
917 that there will be few comments overall. The rate of submitting
918 comments commonly accelerates toward the deadline. Early hearings
919 often are cancelled; they tend to be held, and to be useful, when
920 a proposal stirs deep controversy. These issues are presented in
921 some pending MDL proceedings, providing an added incentive to
922 comment.

923 **CASE MANAGEMENT PRACTICES, EASTERN DISTRICT OF VIRGINIA**

924 Peter Keisler chaired a panel presentation on the "rocket
925 docket" practices in the Eastern District of Virginia. Panel
926 members included Judge Leonie M. Brinkema; Judge Thomas Rawles

927 Jones, Jr.; Dennis C. Barghaan, Jr., Assistant United States
928 Attorney; William D. Dolan, III, Esq.; and Craig C. Reilly, Esq.

929 Judge Brinkema opened the presentation by summarizing: "The
930 heart of the matter is not to waste time." The court has local
931 rules and practices. But it also has "a shared judicial
932 philosophy." The court takes pride in being one of the fastest
933 courts in the country. That helps the court. There are no
934 "renegade judges," an essential part of making it work. It also
935 helps the bar. The bar have become accustomed to the practice.

936 The practice begins with an early scheduling order. The order
937 is one page long. It provides the structural framework. There is
938 an early date for a Rule 16 conference with a Magistrate Judge.
939 There is an early discovery cut-off, set for the second Friday of
940 the month — usually about 16 weeks. Most lawyers know that when
941 you file a case, "you need to be ready to try it soon." Final
942 pretrial conferences are set for the third Thursday of the month.
943 Lawyers file plans for these conferences, and know that trial will
944 be held approximately eight weeks after the conference.

945 The scheduling order sets the time for objecting to exhibits.
946 This cuts out a lot of work. The order limits the number of
947 nonparty, nonexpert depositions to five. It also limits the number
948 of interrogatories. "We are extremely strict about enforcing the
949 order. But there is some flexibility."

950 "We do not let lawyers dictate the schedule." They cannot
951 agree to extend the discovery cut-off or the like. They can agree
952 to submit a joint motion, but the court may deny it.

953 "Another technique is to rule from the bench as much as
954 possible." With adequate briefs and bench memos, the court should
955 be able to rule on most motions after brief argument. "I do it on
956 about 85% of motions." This saves a lot of time as compared to
957 writing opinions.

958 The court uses its magistrate judges very efficiently. It
959 avoids referring matters that call for a report and
960 recommendations; that procedure uses the time of two judges.

961 Friday is motions day. Criminal motions are scheduled for
962 9:00, civil motions for 10:00. Lawyers know to notice motions for
963 a Friday.

964 Judge Jones began his presentation by noting that from the
965 perspective of a magistrate judge, the district judges "have not
966 given up their independence." They agree with the docket
967 practices. Empirical evidence shows that these practices achieve
968 efficiencies and economies in managing their own dockets.

969 The standard management of pretrial matters is left to the
970 magistrate judges up to the close of discovery. "The
971 predictability for the bar enables us to move at the pace we do."

972 At the end of the pretrial schedule, each district judge sets
973 up his or her own calendar for dispositive motions, motions in
974 limine, other matters, and trial dates.

975 Several aspects of magistrate-judge management were described.

976 All nondispositive motions automatically go to the magistrate
977 judge, with few exceptions. This enables lawyers to keep things
978 moving. "An attorney cannot slow things down."

979 The magistrate judges work closely with the district judges on
980 what they expect, and know when to consult with the district judge.
981 A consent motion to enlarge time, for example, comes to the
982 magistrate judge — and often is not granted.

983 There is a quick Rule 16(b) conference in every case. It may
984 be held by telephone conference when the attorneys are experienced.
985 The conference leads to a more detailed Rule 16 order. An effort
986 is made to resolve problems in advance of the Rule 16 conference,
987 addressing such matters as the number of depositions, known
988 privilege issues, and production of documents and electronically
989 stored information. This drastically cuts down on motions
990 practice.

991 The court does not allow general objections. This works so
992 well that it would be good to amend Rules 33 and 34 to disallow
993 them. Lawyers, if allowed, often file general objections at the
994 beginning of their responses, and then, addressing specific
995 requests, provide answers "without waiving objections." That
996 leaves no idea whether anything is being withheld. The court
997 allows only specific objections.

998 The court encourages streamlined privilege logs.

999 A judge is available by telephone to rule on problems at
1000 depositions.

1001 Final expert witness depositions are frequently allowed after
1002 the final pretrial conference. This works, and does not interfere
1003 with the trial date. "The goal is to get the case packaged for
1004 trial."

1005 Peter Keisler introduced the lawyer members of the panel.
1006 Judge Brinkema and Judge Jones had extensive experience practicing
1007 in the Eastern District before going on the bench. "The current
1008 practitioners are essential to make the docket work." A lawyer
1009 from outside the district immediately associates an experienced
1010 Eastern District practitioner. "It *is* a different culture."

1011 "Justice Delayed Is Justice Denied" is carved over the courthouse
1012 door. Etchings inside the courthouse illustrate the fable of the
1013 tortoise and the hare — the court does not think of itself as the
1014 erratically speedy hare, but instead sees itself as moving at the
1015 steady, inexorable march of the tortoise.

1016 At the beginning, there was some question whether to divide
1017 the presentation into two panels, lest practitioners be inhibited
1018 in speaking frankly to their experiences. But that proved
1019 unnecessary. The court has a tradition of open and robust candor
1020 between bench and bar. The practitioners do not hesitate to speak
1021 freely.

1022 Craig Reilly began by saying that the court has a spare set of
1023 local rules. Its practice is rooted in judicial philosophy.
1024 Routine cases are governed by standard practices. Exceptions are
1025 made on a case-by-case basis, not by relying on complicated rules
1026 that attempt to provide guidance.

1027 The benefit of these practices is immediate and sustained
1028 attention to the case. "30 days to answer Rule 33 interrogatories
1029 means 30 days." Less time is less expense, although you may need
1030 more lawyers and cost to bring them up to speed.

1031 More discovery does not lead to more truth at trial. Often
1032 less.

1033 Patent cases are brought to the Eastern District to avoid the
1034 costly wheel-spinning of preliminary-injunction practice in other
1035 districts. There is little reason to spend months arguing over a
1036 preliminary injunction when you can get to trial on the merits in
1037 six months. The joint discovery plan, prepared under Rule 26(f),
1038 works well; it is followed by the Rule 16(b) conference with the
1039 magistrate judge, leading to specific tasks with a time table that
1040 suits that case. Disclosure practices are like those in the
1041 Northern District of California — there is an early disclosure of
1042 detailed infringement and invalidity contentions; noninfringement
1043 contentions are put off until discovery is completed. A protective
1044 order is presented early; it can be complex; and information is
1045 exchanged on a "counsel-eyes-only" basis until the order is
1046 entered. The role of in-house counsel in the protective order is
1047 often disputed, particularly in litigation that involves source-
1048 code discovery, and implementation of the order may be difficult.

1049 Discovery of electronically stored information often is
1050 addressed. The issues typically involve form of production;
1051 timing; volume and rolling production; and whether e-mail messages
1052 should be discovered at all — often discovery is sought, but there
1053 have been cases where discovery is bypassed.

1054 Deposition disputes may extend to who counts as a party — how
1055 to count different witnesses designated under Rule 30(b)(6). The

1056 resolution may be to measure deposition limits in the number of
1057 hours per side, perhaps 100 hours or 150 hours, and not to consider
1058 the number of depositions at all.

1059 Expert discovery is often postponed. Parties reserve the
1060 right to supplement earlier responses to meet new expert opinions.

1061 Motion practice is frequent and contentious.

1062 Extensions of discovery cut-offs can be had on a case-specific
1063 basis.

1064 Claim construction is done late, so the case is mature. It
1065 can be a few-week process.

1066 Summary-judgment practice is done in one round, with one
1067 brief. There used to be a series of motions. The court is not
1068 shy; many defenses are stricken on summary judgment.

1069 The court offers excellent mediation opportunities, including
1070 with magistrate judges, third parties, or sometimes a second
1071 district judge. The court does not engage in "head banging"; it
1072 does not seek to force bad settlements.

1073 Securities fraud class actions are a second distinctive group.
1074 They do not arise that often. The PSLRA gets these cases off the
1075 ordinary track because of the discovery stay. But the delay is not
1076 great, because judges rule quickly on the motion to dismiss. These
1077 cases are subject to the discovery cutoff; usually discovery is all
1078 one way. The case might be stayed for mediation.

1079 Securities fraud, patent cases, and class actions involve
1080 highly skilled and motivated counsel. That makes it easier to get
1081 things resolved despite the complex nature of the litigation.

1082 Dennis Barghaan said that as a civil litigator on the United
1083 States Attorney's office he finds two big advantages in the rocket
1084 docket. Often he is the only attorney for the government in the
1085 case, as compared to the four or five lawyers Craig Reilly
1086 described. The docket practices allow him to move his cases
1087 forward: "I can say 'no' to my client." Beyond that, the
1088 government is a large repository of documents, giving adversaries
1089 an incentive to demand everything. The docket practices force them
1090 to cut back.

1091 The docket practices also pose challenges for cases that
1092 typically involve the government. Administrative Procedure Act
1093 cases often are esoteric, and can be very complicated. They span
1094 the full range of subject matters confided to federal agencies.
1095 The government lawyer often comes into the case knowing nothing
1096 about the subject matter, confronting lawyers who specialize and
1097 know this particular subject inside-out. "There is an incentive to

1098 file here to take advantage." But the judges are good at providing
1099 leeway. It works, but only if the judge is an active participant.

1100 *Bivens* cases also present problems. There is no discovery
1101 until immunity questions are resolved. So the defendant's motion
1102 to dismiss is met by a Rule 16(b) order that discovery is to begin
1103 now — "We need a ruling from the bench on Friday morning," although
1104 judges often do a pre-screening Rule 16(b) order for *Bivens* and
1105 sovereign-immunity cases that stays discovery pending a ruling on
1106 the motion to dismiss.

1107 William Dolan observed that in litigating in other districts
1108 around the country, some judges have a notion that speed means a
1109 lack of substantive attention to nuances of law and fact. Not so.
1110 The judges in the Eastern District of Virginia work hard. Not all
1111 judges do. In a case now pending in another district a 12(b)(6)
1112 motion to dismiss has been pending for 8 months. The cost is high;
1113 in retrospect, it would have been better not to file the motion.

1114 The money spent on discovery "is scandalous." Speed in moving
1115 the case reduces the costs. On Friday morning the judge ruling on
1116 a motion knows what the case is about. The first question from the
1117 bench shows that the judge has read the motion and briefs; the
1118 arguments go quickly. The lawyer has the obligation to point out
1119 what is unusual to justify departure from the regular docket
1120 practices. "It is a paper court. They read first." They rule
1121 promptly, so the case can move on.

1122 There are local rules. But there is also a culture. Lawyers
1123 look to the culture as what the judges really look to. This makes
1124 the lawyer's task easier; "you can explain to your client what's
1125 going to happen."

1126 "Unless you've been there, you can't believe how it's going to
1127 happen." As local counsel, a lawyer has to be true co-counsel.
1128 "We have to argue the motion, or conduct the trial, if you're not
1129 there."

1130 If you lose in this court, "you've got bad facts or a bad
1131 lawyer."

1132 People are always calling for preliminary injunctions. Given
1133 the speed of the docket, preliminary injunctions are seldom
1134 necessary. It is better to get on to the merits. "I had an
1135 injunction motion in another court with a 4-day hearing; the court
1136 never ruled on it."

1137 Lawyers want to persuade and please the judge. It is good to
1138 go to court on a Friday when you do not have a motion and listen.
1139 The judges will explain what they are doing: "The framework is A,
1140 B, C; B is missing. Motion denied. The judges distill it to the

1141 essence." A good lawyer, like Craig Reilly, "goes straight for
1142 it."

1143 "In-house lawyers are playing a more aggressive game. They
1144 insist I find the smoking gun. 'Argue this.' 'Approach it that
1145 way.' Younger lawyers are subject to this pressure. I can tell
1146 them to bug off" because the docket practices force more sensible
1147 behavior.

1148 There is a risk that we will have a generation of lawyers and
1149 judges who do not know how to try cases. But courts are there for
1150 trials. "Trial is not a failure of administration."

1151 Discussion began with a judge's observation that a lot of solo
1152 practitioners in his court cannot meet a 16-week schedule for
1153 discovery; they want to have other cases. Do solo practitioners in
1154 the Eastern District file in state courts to avoid the rocket
1155 docket? Judge Jones responded that this *is* a cultural phenomenon.
1156 Tell them they have to do it, they do it. "In private practice as
1157 a solo, I did it. And nothing says it has to be 16 weeks; it could
1158 work with equal effect in a longer period." Craig Reilly added
1159 that except for employment cases, there are few cases in federal
1160 court that can be handled by a solo lawyer. One federal case could
1161 take as much time as 20 in state courts. But the state courts are
1162 moving toward the federal practices. "Still, it does not prove
1163 easy for a solo." William Dolan added that a plaintiff waits to
1164 file the action until ready to go. Then the rocket docket can be
1165 an advantage.

1166 The same question was asked about excessive force cases, where
1167 "discovery is all in the police department." Judge Jones said that
1168 "we do them, with solo practitioners for the plaintiffs." Dennis
1169 Barghaan added that "it does force you to think more carefully
1170 about how to narrow discovery, about what really is at issue in the
1171 case."

1172 In response to a question about briefing practices on summary-
1173 judgment motions and about how many cases go to trial, Judge
1174 Brinkema said that most civil cases settle. The court has a great
1175 mediation program. For summary-judgment motions, the court limits
1176 the opening brief to 30 pages, including the statement of facts.
1177 The answering brief is also limited. The court strongly believes
1178 in these limits because they force lawyers to make the best
1179 arguments. But the court does get some really complex cases. The
1180 court has a 3- to 4-week lead time on Rule 56 motions. They are
1181 discussed in chambers. The briefs are read before the hearing, and
1182 so is the bench memo. "When I go to argument, 95% of the time I
1183 know how I'm going to rule and I rule from the bench."

1184 Dennis Barghaan added that litigants have to think about
1185 summary judgment ahead of time, during discovery. This helps the

1186 plaintiff to realize what information it needs, and helps the
1187 defendant to know what facts are troubling.

1188 Craig Reilly pointed out that the number of trials per judge
1189 in the Eastern District is 32, compared to a national average of
1190 20. The national average time from filing to trial is 24.7 months;
1191 in the Eastern District it is 11.5 months. "We're way faster."
1192 The national average case filings per judge is 428, in the Eastern
1193 District it is 312. But the national weighted average is 505,
1194 while it is 497 in the Eastern District.

1195 A judge asked whether the benefits of the Eastern District
1196 practices can be transferred to other courts if the only common
1197 element is strong management? How far does it depend on the
1198 division of responsibilities between magistrate judges and district
1199 judges, on early and continued strong judicial control, on prompt
1200 rulings, on a collegial bar, on a bench that works to the same
1201 judicial philosophy? Judge Brinkema responded that there are
1202 interesting anecdotes about experiences when Eastern District
1203 judges sit in other districts — they impose Eastern District
1204 practices, the local lawyers yell and scream, and then they find
1205 out that it really works.

1206 Another question asked whether lawyers will work together when
1207 the court imposes discipline. William Dolan said "absolutely. But
1208 if there is one judge who will give you relief, on a court where
1209 the other 15 judges will not, the lawyers will somehow wind up on
1210 the forgiving judge's doorstep."

1211 A judge asked whether scheduling works better if the first
1212 conference has a real exchange with the lawyers — "can you do this
1213 on paper"? Judge Jones answered that the default is an in-person
1214 conference. "I do it in chambers." But if a participant is from
1215 out of town, it can be done by conference call. "Paper cases are
1216 normally those with agreement among lawyers I know. Everything
1217 that can be dealt with early has been. I'm not looking for excuses
1218 to do it on paper."

1219 The question of "drive-by" Rule 26(f) conferences was raised
1220 by asking what is the culture in the Eastern District. Craig
1221 Reilly answered that knowing what judges are likely to do if a
1222 dispute arises means the conferences usually are not contentious.
1223 They are never a "drive-by." "Many of my cases have counsel eager
1224 to be involved in scheduling, not that we always agree." When
1225 agreement fails, competing proposals are submitted for resolution
1226 at the Rule 16(b) conference. Judge Jones added that the initial
1227 order requires a real Rule 26(f) conference, and a real plan at
1228 least 7 days before the 16(b) conference.

1229 A judge observed that the discussion suggested that the real
1230 time saving comes between the close of discovery and trial. How is
1231 this accomplished? By setting trials a lot more quickly? By

1232 ruling on dispositive motions? Judge Brinkema observed that
1233 motions are noticed for the next Friday, and that the reply brief
1234 comes in on Wednesday or Thursday. Judge Jones added that the time
1235 for filing a summary-judgment motion varies from judge to judge on
1236 the court, "but it's quick."

1237 The question then turned to scheduling trials: if the time
1238 from the close of discovery to trial is compressed, does the court
1239 stack up trials for the same day? Judge Brinkema said that that
1240 does not often happen, but there is always a judge available. "I
1241 do set two trials for the same day. We set strict time limits for
1242 trial — no cumulative witnesses, or the like — so there is no
1243 problem that one trial lasts long enough to run into the time set
1244 for the next trial. Dennis Barghaan added that the time for the
1245 final pretrial conference means it is necessary to ask for some
1246 delay in the trial setting; "I don't have the deposition
1247 transcripts yet. Collegiality of the bench with the bar is
1248 necessary."

1249 Another judge asked whether the Rule 56 timing means the
1250 parties have to prepare for trial before the ruling on summary
1251 judgment? The panel's common response was "yes." But if you can
1252 file the summary-judgment motion, you should be able to prepare an
1253 exhibit list for trial. "There is a window — the case should be
1254 ready for trial. It will not be a 6-week trial." There is no
1255 reason to think that the court gets fewer summary-judgment motions
1256 because of its speed. Craig Reilly said "I've never given up the
1257 chance to move for this reason."

1258 The Committee thanked the panel warmly for a thoroughly
1259 prepared and fascinating presentation.

1260 **PLEADING**

1261 Judge Campbell noted that the continuing study of pleading
1262 practice has stemmed from the decisions in the *Twombly* and *Iqbal*
1263 cases. The subject continues to command close attention, including
1264 ongoing empirical work by the Federal Judicial Center.

1265 Joe Cecil summarized the ongoing FJC study. The first phase
1266 found an increase in the rate of making motions to dismiss for
1267 failure to state a claim. The only measurable change in the rate
1268 of granting the motions occurred in financial instrument cases.
1269 And orders granting the motion more often grant leave to amend.
1270
1271 The second phase is looking into experience when a motion to
1272 dismiss is granted with leave to amend. An amended complaint is
1273 filed in two-thirds of these cases. The amended complaint often is
1274 followed by a renewed motion to amend. There is no significant
1275 increase in the rates of granting dismissal. Pro se cases and
1276 prisoner cases have been added to the study.

1277 This second phase reveals that some data are missing. An
1278 effort is under way to find the missing data.

1279 The first-phase report "was received less than warmly by
1280 some." Focused criticisms have been made in articles by Professor
1281 Lonny Hoffman and by Professor Hatamayr-Moore. A response to those
1282 criticisms is being prepared, and will be posted on the FJC site.

1283 In other research, Professor Hubbard could not find a change
1284 in the rate at which motions are granted. Others find a shift in
1285 the way judges assess complaints — there is an increased focus on
1286 a demand for detailed fact pleading. Professor Dodson finds a
1287 small but significant shift in grant rates, based on much more
1288 reliance on the sufficiency of pleading facts.

1289 The rate of granting dismissal for amended complaints was
1290 about the same as for original complaints. A supplemental report
1291 will be prepared to elaborate on these findings.

1292 Professor Hoffman addressed the committee. He began by noting
1293 that he testified in a congressional hearing that the prospect of
1294 amending Rule 8(a) by legislation is a bad idea. But he has been
1295 concerned that readers of the FJC first-phase study would be
1296 confused into thinking there is no change in dismissal practices,
1297 or would be confused about the cause of changes. The findings as
1298 to filing rates are significant and interesting. A plaintiff is
1299 50% more likely to face a motion to dismiss. There is a whole new
1300 class of cases in which defendants who would not have moved to
1301 dismiss before the *Twombly* and *Iqbal* decisions are now moving to
1302 dismiss. And the FJC data show that a motion to dismiss is more
1303 likely to be granted. But that does not show whether the Supreme
1304 Court decisions cause the increase. Except for financial
1305 instrument cases, the FJC reports that the increase is not
1306 statistically significant. "But the 'null hypothesis' is difficult
1307 to understand." To say that fact pattern is not significant at the
1308 0.05 level is to say there is a greater than 5% chance the changes
1309 were random. It is better to ask whether we should demand so high
1310 a level of confidence. It is a two-edged sword. "We're not likely
1311 to be wrong in concluding that *Twombly* and *Iqbal* had an effect; we
1312 can be wrong in thinking they had no effect." It would be unwise
1313 to move too quickly. But we should remain concerned that they are
1314 having an effect. One study shows a 20% reduced chance a case will
1315 survive to discovery. Others are finding statistically significant
1316 increases in dismissal rates. "Results very much depend on the
1317 inputs." The two biggest case categories in the study are "other"
1318 and "civil rights." There is not a 95% level of confidence of
1319 changes in those categories, but the level is greater than 90%.
1320 "That's pretty good odds." But that does not say what should be
1321 done.

1322 A judge noted that the circuit courts have taken a much harder
1323 look at pleading than the Supreme Court did. The message is

1324 getting to the district courts — they cannot throw out claims
1325 willy-nilly. The Supreme Court "kind of made the same point" in
1326 this year's *Skinner* decision. It has been observed that the Court
1327 is cyclical in its approaches to pleading; there may be a pull-
1328 back. An exhaustive source of information about emerging
1329 approaches is provided by Andrea Kuperman's study.

1330 Joe Cecil said that he and Professor Hoffman agree on more and
1331 more points. There are more motions to dismiss being filed. As to
1332 the grant rate, page 7 of the report shows the overall numbers, but
1333 that does not tell the whole story. Using multivariate analysis to
1334 account for other factors that affect the outcome, such as the type
1335 of case, the numbers of cases in different courts in the study,
1336 whether there has been an amended complaint, reduces any change in
1337 grant rate below a statistically significant level, apart from
1338 financial instrument cases. As to statistical significance, "we
1339 cannot prove no effect. We could never prove that. But the
1340 patterns of findings we see could easily have happened by chance."
1341 There is other research going on. Some of it assumes that there
1342 will be no amendment if dismissal is granted without leave to
1343 amend. "That is not always so."

1344 So there are differences in patterns among the districts
1345 studied. The Southern District of New York has a low rate of
1346 filing motions to dismiss, but a high grant rate. But the patterns
1347 do not show identifiable differences among the circuits; there are
1348 differences between districts in the same circuit.

1349 It was noted that the Second Circuit has established a program
1350 to decide quickly on appeals from pleadings dismissals. The
1351 records are compact, enabling prompt decision.

1352 It was asked whether at a 90% level of confidence we can find
1353 an effect in civil rights cases? Joe Cecil said yes. But it is
1354 important to set the significance level before doing the research.
1355 The rate chosen will depend on whether you're exploring or whether
1356 you want to test a theory. To test a theory, there should be a
1357 higher level of significance. But the choice of the level of
1358 significance is for the Committee.

1359 A judge noted that from a district judge's perspective, it is
1360 important to know the extent to which *Twombly* and *Iqbal* lead to
1361 ending cases without an opportunity to get the information needed
1362 to frame the complaint. Dismissal of only part of a complaint
1363 leaves open the opportunity for discovery, and the discovery may
1364 reveal information that enables the plaintiff to reinstate the
1365 parts that were initially dismissed. The bite is in the cases
1366 where the plaintiff cannot get the necessary information. There is
1367 important work left to be done, and it must be based on a wide
1368 foundation of information.

1369 It was asked whether the high dismissal rates in financial
1370 instrument cases are linked to the mortgage foreclosure crisis.
1371 Joe Cecil responded that the pattern is in cases in areas where the
1372 crisis appeared to be particularly acute. The common pattern is
1373 that a case is filed in state court, removed to federal court,
1374 dismissed as to the federal claims, and survives to be remanded to
1375 state court on the state claims. That is especially common in the
1376 Northern and Eastern Districts of California.

1377 Discussion then turned to the question whether the time has
1378 come to begin actively developing specific proposals to revise
1379 pleading practice or, perhaps, discovery practices integrated with
1380 pleading practice. A wide variety of illustrative proposals have
1381 been sketched during the years since the *Twombly* and *Iqbal*
1382 decisions turned the Committee's attention from the question
1383 whether heightened pleading standards should somehow be
1384 incorporated in the rules to the question whether pleading
1385 standards have been heightened in a desirable way — whether too
1386 high, about right, or not high enough. All of them have been
1387 carried forward as worthy possibilities. But none has yet
1388 generated confidence that the time has come for active advancement.

1389 Familiar themes were recalled. The Supreme Court's opinions
1390 can easily be seen as a call for help from the lower courts. The
1391 Court is concerned that three decades of effort have not succeeded
1392 in sufficiently reducing the burdens that discovery imposes in an
1393 improperly high portion of federal cases. But it is not sure
1394 whether pleading standards can be developed to provide a
1395 sophisticated screen that dismisses unfounded claims before
1396 discovery, while letting worthy claims through to discovery. The
1397 opinions are multi-faceted, offering many different cues that can
1398 be selected to support substantial changes or relatively modest
1399 changes.
1400
1401 The common-law process opened by the Court is working
1402 thoroughly. Pleading questions can be raised across the entire
1403 spectrum of federal litigation, yielding many opportunities to
1404 confront and develop pleading standards. The great outpouring of
1405 decisions in the appellate courts may be working toward some degree
1406 of uniformity, but consensus has not yet been reached. Among the
1407 welter of opinions, two recent decisions singled out by Andrea
1408 Kuperman's work provide nice illustrations. One is a First Circuit
1409 decision reversing dismissal for failure to state a claim. What is
1410 remarkable about the opinion is the intense fact detail set out in
1411 the complaint; in many ways it is more extensive than the facts
1412 that likely would be singled out on a motion for summary judgment.
1413 The opinion, moreover, deals with claims of discharge from public
1414 service for political reasons; it may reflect the "judicial
1415 experience" component of the "judicial experience and common sense"
1416 formula in the *Iqbal* opinion, since the First Circuit has had
1417 frequent experience with cases of this sort. The other decision is
1418 a Sixth Circuit decision in a case urging an "indirect purchaser"

1419 claim of price discrimination under the Robinson-Patman Act. The
1420 court affirmed dismissal for failure to plead sufficient facts to
1421 show the manufacturer-supplier's control of the prices charged by
1422 the plaintiff's competitor, a distributor who both sold in direct
1423 competition with the plaintiff and acted as the plaintiff's
1424 exclusive source of supply. The most notable part of the opinion
1425 responded to the plaintiff's argument that because the defendants
1426 controlled access to information about their pricing practices,
1427 discovery should be allowed before dismissing for failure to plead
1428 facts inaccessible to the plaintiff. The court invoked part IV C
1429 3 of the *Iqbal* opinion, which discussed at length the need to
1430 protect public officials claiming official immunity against the
1431 burdens of discovery. The Supreme Court concluded: "Because [the]
1432 complaint is deficient under Rule 8, [the plaintiff] is not
1433 entitled to discovery, cabined or otherwise." Generalizing this
1434 observation, extending it from the special concerns that treat
1435 immunity as conferring a right not to be tried, is a ground for
1436 real concern. It may be that the Sixth Circuit was responding to
1437 a different kind of "judicial experience" — the common view of
1438 economists and many lawyers that the Robinson-Patman Act is an
1439 obsolete artifact of the 1930s that should be interpreted narrowly
1440 to prevent becoming a tool to suppress efficient competition.
1441 However that may be, the seemingly flat rule barring discovery to
1442 support an amended and sufficient complaint is cause for concern.

1443 These observations led to the suggestion that matters remain
1444 in the stage of waiting to see what is happening and how practice
1445 will develop. Discussion agreed that pleading proposals should
1446 remain on the agenda, with continuing active study, but should not
1447 yet be brought to the point of developing proposals for publication
1448 and comment. A Committee member "did not disagree," but asked
1449 whether very modest changes could be made in the rules that would
1450 discourage "the inevitable tendency to cite *Twombly* and *Iqbal* in
1451 every case, whether or not on point." One useful practice might be
1452 to adopt a limit on the length of motions to dismiss.

1453 A judge observed that motions to dismiss come in infinite
1454 variety. His own practice is to ask the plaintiff whether the
1455 plaintiff would like to amend. If the plaintiff accepts the
1456 invitation, the motion to dismiss is denied without prejudice.
1457 "Most times the amended complaint works — there is no renewed
1458 motion to dismiss."

1459 The Committee agreed to keep pleading topics on the agenda for
1460 continuing active study and attention, but to continue to stay
1461 active development of specific proposals.

1462 **CIVIL-APPELLATE SUBCOMMITTEE**

1463 Judge Colloton delivered the report of the Civil-Appellate
1464 Subcommittee. The Subcommittee has carried two items on its
1465 agenda.

1466 The first subject involved a question that could lead to
1467 amending Civil Rule 58 to complement an amendment of Appellate Rule
1468 4(a). The question was stirred by considering hypothetical
1469 circumstances in which it could be argued that appeal time might
1470 expire before the period allowed by an order for remittitur, or to
1471 draft an injunction. The remittitur example, for instance, was an
1472 order granting a new trial unless the plaintiff would accept
1473 remittitur within 40 days. The Appellate Rules Committee has
1474 concluded that amending Rule 4(a) is not warranted. That means
1475 there is no need to consider Rule 58 amendments. These questions
1476 have been dropped from the Subcommittee agenda.

1477 The other subject involves "manufactured finality." This
1478 tactic may prove attractive to a plaintiff who suffers dismissal of
1479 the principal claim while peripheral claims remain alive. A
1480 variety of means have been attempted to achieve a final judgment so
1481 as to win immediate appeal from dismissal of the principal claim.
1482 Dismissal of the remaining claims with prejudice works to establish
1483 finality. Most courts agree that dismissal of the remaining claims
1484 without prejudice does not establish finality, although a couple of
1485 circuits have accepted this strategy. The more interesting
1486 question is presented by dismissal with "conditional prejudice" —
1487 the remaining claims are dismissed with prejudice, but on the
1488 condition that they may be resurrected if dismissal of the
1489 principal claim is reversed. The Second Circuit has accepted this
1490 practice; it has been disallowed in two others. The Subcommittee
1491 could not reach any consensus as to the need to act on this
1492 subject. Barring renewed enthusiasm from an advisory committee,
1493 the Subcommittee is not likely to recommend action. A judge agreed
1494 that it is "good to do nothing."

1495 The Subcommittee continues in existence as a vehicle should
1496 new questions arise — as has happened with some regularity —
1497 involving integration of the Civil Rules with the Appellate Rules.

1498 **RULE 23: CLASS ACTIONS**

1499 The Standing Committee has planned a panel on class-actions
1500 for the January meeting. The broad question is whether sufficient
1501 problems have emerged in practice to warrant beginning work toward
1502 amending Rule 23.

1503 The Committee was reminded that Rule 23 was deliberately put
1504 off limits between the 1966 amendments and 1991. The 1991 report
1505 of the ad hoc Judicial Conference Committee on asbestos litigation
1506 suggested that perhaps Rule 23 might be amended to improve the
1507 disposition of asbestos claims. The Committee set to work. After
1508 considering a top-to-bottom restructuring of Rule 23, more modest
1509 proposals were published in 1996. The only one that survived to
1510 adoption was Rule 23(f), a provision for appeal from orders
1511 granting or denying class certification that has proved successful.
1512 Work continued, resulting in a variety of amendments that took

1513 effect in 2003. That experience suggests that any class-action
1514 project will endure for many years. The only prospect for a
1515 relatively short-term project would be identification of one, or
1516 perhaps a few, small changes that command general consensus
1517 support. Any significant change is likely to stir deep
1518 controversy, and any package of significant changes surely will
1519 stir broad controversy. This prospect makes it important to weigh
1520 whatever needs for reform may be identified against the need to
1521 allocate Committee resources to the projects that most need
1522 attention. Discovery work continues apace. Pleading may come on
1523 for development of specific proposals. The Duke Conference
1524 Subcommittee is preparing a package of amendments. There is enough
1525 on the agenda to keep the Committee well occupied for some time.

1526 The agenda materials presented a summary of recent Supreme
1527 Court decisions bearing on class actions, a reminder of past
1528 proposals that failed of adoption, and a general request for advice
1529 based on the continuing experience of Committee members. Have
1530 problems emerged with administration of Rule 23, perhaps influenced
1531 by experience with the kinds of cases being brought to the federal
1532 courts by the Class Action Fairness Act, that justify launching a
1533 class-action project?

1534 The first response suggested four topics that deserve study.

1535 One topic is the extent of considering evidence on the merits
1536 of class claims to inform the determination whether to certify a
1537 class. The Seventh Circuit decision in the *Szabo* case has been
1538 picked up in most circuits. The problem is that some courts are
1539 moving toward basing the certification decision on a determination
1540 whether there is enough evidence to go to the jury on the merits.
1541 There is a thread of a view that the district court has to choose
1542 which competing expert witness is correct in making a certification
1543 decision whether common questions predominate in the case as it
1544 will be tried. There are real variations among the circuits on
1545 these questions.

1546 A second question relates to issues classes. Should
1547 predominance in the Rule 26(b)(3) inquiry be measured by the case
1548 as a whole? Or should it be measured by looking only to the issues
1549 that will be tried on a class basis? The Third Circuit has looked
1550 to a balancing test, considering a variety of factors.

1551 The criteria for reviewing a proposed class settlement also
1552 vary. Courts establish different lists of factors, some longer,
1553 some shorter. (The Committee was reminded that the process that
1554 amended Rule 23(e) began with enumerating some 16 factors, some of
1555 them innovations over case law, in rule text. The Committee became
1556 concerned that the factors would become a mere check-list, a
1557 laundry list that would encourage rote recitals without actual
1558 thought. The list was moved to the Committee Note, and then

1559 discarded entirely.) It also should be established whether there
1560 is a presumption in favor of a settlement supported by all parties.

1561 Finally, there has been a lot of reconsideration of the value
1562 of cy pres settlements. This topic seems ripe for consideration.

1563 Another Committee member agreed that these four issues are
1564 worthy of consideration. That does not mean that it will be easy
1565 to agree on the solutions. Consideration of the merits as part of
1566 the certification decision is addressed by many cases, but there is
1567 no clear path. There is a real tension with summary judgment and
1568 the right to jury trial, a risk that the court will decide jury
1569 issues in the guise of a certification decision.

1570 A separate possibility is to study the American Law Institute
1571 Principles of Aggregate Litigation to see whether some of the
1572 principles should be incorporated in Rule 23.

1573 An observer agreed that these topics deserve study, and added
1574 that consideration of the merits in the certification process
1575 intersects discovery. "We need to have discovery" to the extent
1576 that predictions about the merits influence certification.

1577 These suggestions led to the question whether Rule 23 is
1578 working well enough as a whole. Class actions are so
1579 consequential, and so hard fought, that there will always be
1580 disagreements among the circuits. Amendments will produce new
1581 litigation. Has the time come to take on these consequences?

1582 A Committee member suggested that it may be better not to
1583 tinker with Rule 23 at this point, although cy pres settlements
1584 have become a more prevalent issue. (It was later noted that
1585 legislation addressing cy pres settlements has been introduced;
1586 there is no sense whether it will be adopted.)

1587 The Standing Committee panel in January will look at the
1588 proper time for the Committees to address Rule 23. It has not been
1589 considered since 2003. The Class Action Fairness Act may have had
1590 an impact on administration of Rule 23. And the change in overall
1591 litigation contexts affects class actions. "There is no
1592 predetermined answer."

1593 It was asked whether the ALI Principles "have a gravitational
1594 pull"? An answer was that they do. And the "Hydrogen Peroxide"
1595 issue [In re Hydrogen Peroxide Antitrust Litigation, 552 F.3d 305
1596 (3d Cir.2008)] has been percolating for years.

1597 A more specific note was that the agenda materials include two
1598 alternative approaches that might be taken to overruling the ruling
1599 that federal courts can certify a class action to enforce a state-
1600 law claim even though state law specifically denies class-action

1601 enforcement of the claim. This is a valid subject of consideration
1602 if a Rule 23 project moves forward.

1603 There is a prospect that the Standing Committee will ask the
1604 Civil Rules Committee to consider some aspects of Rule 23. But the
1605 Civil Rules Committee will have to decide independently whether it
1606 has the capacity to tackle this work immediately.

1607 It was decided that some clear issues have been identified,
1608 and there may be others that deserve study. A subcommittee will be
1609 formed to explore the issues.

1610 **RULE 84 FORMS**

1611 Judge Pratter reported on launching the Forms Subcommittee.
1612 The Subcommittee is composed of representatives from the advisory
1613 committees for the Appellate, Bankruptcy, Civil, and Criminal
1614 Rules, and the Standing Committee. The focus is on the way in
1615 which "official" forms are used in the contexts of the different
1616 sets of rules, and on the ways in which they are generated.

1617 For the Civil Rules, a source of growing concern has been the
1618 pleading forms. Rule 84 says they suffice under the rules. But
1619 they were generated long ago. Many judges think they are
1620 inconsistent with the pleading standards directed by the *Twombly*
1621 and *Iqbal* decisions. Judge Hamilton's recent dissent in a Seventh
1622 Circuit case lists Forms 11, 15, and 21 as inadequate under present
1623 pleading doctrine.

1624 The Subcommittee has met by phone conference. The Notes
1625 provide a good summary of the discussion.

1626 The Subcommittee is collecting the history of the several
1627 advisory committees, looking to the ways in which forms have been
1628 developed and how they are used. It will move on to consider
1629 recommendations for possible revisions of Rule 84, to be shaped in
1630 part by exploring the desirability of revising and amending the
1631 forms through the full Enabling Act process. If the advisory
1632 committee cannot find time enough to ensure that the forms remain
1633 relevant and useful, it may prove wise to find new ways to develop
1634 suggested forms. And if resort is not had to the full Enabling Act
1635 process, it may be wise to back away from endorsing them by the
1636 Rule 84 statement that the forms suffice under the rules.

1637 A further subject may be working toward features in the forms
1638 that will make it easier to track issues through FJC docket
1639 research.

1640 **OTHER AGENDA ITEMS**

1641 The agenda book includes brief descriptions of several
1642 proposals submitted by members of the public. As happens

1643 periodically, it seems useful to determine whether any of them
1644 should be moved ahead for active consideration.

1645 09-CV-D: This question arises from changes made by the Time
1646 Computation Project amendments that took effect in 2009. Rule
1647 62(a) provided a 10-day automatic stay of execution on a judgment.
1648 Rule 62(b) provided that a court could stay execution "pending
1649 disposition of" motions under Rules 50, 52, 59, or 60. Those
1650 motions also must be made within 10 days after entry of judgment.
1651 Then the Time Computation Project changed the automatic stay under
1652 Rule 62(a) to 14 days, but extended the time to move under Rules
1653 50, 52, or 59 to 28 days. The question is whether the court can
1654 stay execution more than 14 days after judgment is entered if there
1655 is no pending motion under Rule 50, 52, 59, or 60 but time remains
1656 to make such a motion.

1657 Discussion began with the suggestion that the rule recognizes
1658 authority to grant a stay if a party seeks a stay before filing a
1659 motion under Rules 50, 52, 59, or 60, but represents that a timely
1660 motion will be filed. The time for Rule 50, 52, and 59 motions was
1661 extended to recognize that the former 10-day period was often
1662 inadequate to frame a motion, even as computed under the former
1663 rules that made a 10-day period equal to at least 14 calendar days.
1664 This opportunity should be preserved, without forcing an
1665 accelerated motion in order to avoid a gap after the automatic stay
1666 expires. This conclusion is easily supported by finding that a
1667 stay ordered before a promised motion is filed is one "pending
1668 disposition of" the motion. If there is concern about procedural
1669 maneuvering, the stay can readily be ordered to expire
1670 automatically if a timely motion is not filed under Rule 50, 52,
1671 59, or 60.

1672 Incidental discussion reflected the belief that it makes sense
1673 to have an automatic stay. The alternative of forcing an immediate
1674 motion could not always protect against immediate execution before
1675 the judgment debtor learns of the judgment and takes steps to seek
1676 a stay. There may be many good reasons for a stay, including both
1677 the prospect of post-judgment motions in the trial court and
1678 appeal. (Other provisions deal with stays once an appeal has been
1679 taken.) And forcing an immediate motion would generate hasty
1680 drafting and argument. On the other hand, there may be good
1681 reasons to deny a stay even when a post-judgment motion has been
1682 filed.

1683 Committee members agreed that a court has authority to stay
1684 execution of its own judgment, and that judges will realize this
1685 power as an essential safeguard. Unless misunderstanding becomes
1686 common enough to show a real problem, there is no need to amend
1687 Rule 62. This proposal will be removed from the agenda.

1688 09-CV-B: This proposal suggests adoption of detailed rule
1689 provisions for agreements governing e-service among counsel. They

1690 would govern such matters as specific e-mail addresses, subject-
1691 line identifications, types of attachment formats, and so on.

1692 Discussion began with recognition that details at this level
1693 are not commonly included in the national rules. But it was asked
1694 whether the proposal should be tracked in some way so that it will
1695 remain as a prompt when the general subjects of e-filing and e-
1696 notification come up for renewed study. The conclusion was that
1697 when those questions are taken up, the process will stimulate
1698 suggestions like this one, and likely many variations. This
1699 proposal will be removed from the agenda.

1700 09-CV-A: This proposal provides alternative suggestions. One is
1701 that Rule 4(d)(2) sanctions for refusal to waive service should be
1702 made available as to foreign defendants, as they are now available
1703 as to domestic defendants. The suggestion rests on the perception
1704 that the opposition to sanctions emanated not so much from a
1705 genuine sense of affront to foreign sovereignty as from the desire
1706 of defendants to make it difficult and costly to drag a foreign
1707 defendant into a United States court. As an alternative, it was
1708 suggested that improvements might be made in the Rule 4(f)
1709 provisions for serving an individual in a foreign country.

1710 Discussion began with the observation that foreign countries
1711 really do hold a serious view that service is a sovereign act.
1712 They take offense, much as they would take offense if a United
1713 States police officer attempted to make an arrest in a foreign
1714 country. And there are international conventions for service.
1715 These questions are very sensitive. At a minimum, these subjects
1716 would require careful study.

1717 A Committee member noted that there is a particular cost
1718 problem that arises in complex litigation. The Hague convention
1719 requires translation of the documents. Translating a*Twombly-Iqbal*
1720 complaint can cost $50,000 to $100,000. In some cases counsel do
1721 waive service in an effort to be cooperative, but in other cases
1722 service is not waived. The court does not have authority to coerce
1723 waiver. A refusal to waive can be one tactic of attrition.

1724 A similar observation was made: sending a letter is not likely
1725 to induce waiver.

1726 Another member noted that the Department of State views these
1727 matters as sensitive. Foreign sovereigns would view service by
1728 mail as inconsistent with their sovereignty. Sanctions for
1729 refusing to waive service would come close to that.

1730 The Committee determined to remove this proposal from the
1731 agenda.

1732 10-CV-G: This proposal echoes the common lament that the Form 18
1733 model of a complaint for patent infringement is woefully

1734 inadequate. It proposes a more detailed substitute, tuned to the
1735 real needs of litigation. It will be held on the docket for
1736 consideration by the Rule 84 Subcommittee, and will be considered
1737 carefully if the Subcommittee concludes both that form complaints
1738 should be carried forward and that one of them should be a
1739 complaint for patent infringement.

1740 10-CV-F, 10-CV-E: These suggestions, provided by the same person,
1741 address a question triggered by recent amendments of the Rule
1742 15(a)(1) right to amend a pleading once as a matter of course.
1743 Before the amendments, the right was cut off immediately on service
1744 of a responsive pleading, but was unaffected by a motion to
1745 dismiss. The amendments establish a uniform approach to the
1746 effects of a responsive pleading or a motion under Rule 12(b), (e),
1747 or (f). The right to amend once survives for 21 days after service
1748 of either the responsive pleading or the motion, but no longer.
1749 The new question is what happens if the time to respond to a motion
1750 to dismiss is extended beyond 21 days. The Committee concluded
1751 that any problem can be addressed by requesting an extension of the
1752 time to amend once as a matter of course, and it is better to give
1753 the court control of the timing question.

1754 A related proposal would amend Rule 12(f) so that a motion to
1755 strike can be used to challenge a motion as well as to challenge a
1756 pleading. The Committee concluded that there is no need to expand
1757 the motion to strike. These motions are overused as it is.

1758 These proposals will be removed from the agenda.

1759 10-CV-D: This proposal offers several changes in the offer-of-
1760 judgment provisions in Rule 68. One of them addresses an issue
1761 that has not been considered in earlier Committee deliberations on
1762 Rule 68. The suggestion is that a complaint may seek only nominal
1763 damages, perhaps $1. The offer of judgment is then for $1.01, or
1764 perhaps a more generous $10. The problem is that the purpose of
1765 the litigation is not to win a dollar, but to win the implicit
1766 declaratory value of a judgment on the merits. These problems are
1767 similar to those that arise when comparing an offer of judgment to
1768 the terms of injunctive or declaratory relief.

1769 The Committee has undertaken two major efforts to reconsider
1770 Rule 68. The first generated a storm of critical comment on
1771 published proposals and was abandoned. The second led to ever-
1772 more-elaborate draft rules, and was abandoned before seeking public
1773 comment. Proposals for amendments continue to be made, most
1774 commonly to add "teeth" to the rule so that it will become a more
1775 powerful vehicle for promoting settlement. The Committee has not
1776 yet been willing to enter the fray once more.

1777 This proposal will be removed from the agenda.

1778 10-CV-C: This proposal would amend Rule 41(a)(1)(A) to expand the
1779 category of motions that would cut off a plaintiff's right to
1780 dismiss an action without prejudice. The expressed concern is that
1781 a motion to dismiss may become a de facto motion for summary
1782 judgment when the court considers materials outside the pleadings.
1783 Concern also is expressed about fairness to a defendant who has
1784 paid a filing fee to remove, and then is confronted by a dismissal
1785 without prejudice that leaves the plaintiff free to begin anew.

1786 The proposal raises a broader question. Rule 15(a)(1) was
1787 amended to establish that a motion to dismiss cuts off the right to
1788 amend once as a matter of course. Would it be useful to adapt the
1789 same change to Rule 41(a)(1)(A), so that the plaintiff can dismiss
1790 without prejudice "before the opposing party files ~~either~~ an
1791 answer, a motion under Rule 12(b), (e), or (f), or a motion for
1792 summary judgment"? There is an abstract symmetry, but does it make
1793 sense?

1794 Discussion suggested that it would be a bad idea to expand the
1795 category of events that terminate the right to dismiss without
1796 prejudice. There is an opportunity for gamesmanship that should
1797 not be expanded.

1798 This proposal will be removed from the agenda.

1799 10-CV-B: This proposal would amend Rule 23 to incorporate
1800 provisions similar to the parens patriae provisions that recognize
1801 the authority of state attorneys general to bring suit for
1802 pricefixing. The statute allows calculation of damages by
1803 statistical or sampling means or other reasonable systems. The
1804 discretion to calculate aggregate damages includes authority to
1805 dispense with proving the individual claims of persons on whose
1806 behalf the action is brought. The proposal is designed to counter
1807 decisions ruling that class certification is appropriate only if
1808 each and every member of a plaintiff class is harmed in the same
1809 way.

1810 This proposal was advanced at the Duke Conference and was on
1811 the initial menu of proposals considered by the Duke Conference
1812 Subcommittee. It was not advanced for further discussion. It
1813 raises obvious questions of Enabling Act Authority.

1814 Discussion asked whether the proposal is consistent with the
1815 decision in the Wal-Mart case dealing with the Rule 23(a)(2)
1816 prerequisite of common questions. This question would be debated
1817 vigorously, even though it remains possible to amend Rule 23 to
1818 supersede a Supreme Court interpretation. And it was noted that
1819 there is a big difference between authorizing an action in the
1820 public interest by a state attorney general and authorizing a
1821 similar action in a private form of group litigation. And it would
1822 be improper to adopt a rule provision limited to antitrust actions;

1823 that would become too far entangled with a specific set of
1824 substantive rights.

1825 The Committee concluded that this proposal should be
1826 considered by the Rule 23 Subcommittee.

1827 10-CV-A: This proposal would create a rule allowing interlocutory
1828 appeal by permission from an order granting or denying discovery of
1829 materials claimed to be protected by attorney-client privilege. In
1830 refusing to allow collateral-order appeal from an order directing
1831 discovery on finding that the privilege had been waived, the
1832 Supreme Court suggested that the Enabling Act process is the
1833 appropriate forum for considering these questions.

1834 It was noted that the courts of appeals would resist any
1835 effort to create a right to appeal whenever a district court grants
1836 permission. But the model contemplated by the proposal seems to be
1837 Rule 23(f), which requires permission only from the court of
1838 appeals.

1839 The possible attraction of the proposal lies in the same
1840 pressures that led to several decisions allowing collateral-order
1841 appeal before the Supreme Court spoke. Once privileged information
1842 is disclosed, "the bell cannot be unrung." And the discovery order
1843 can become a pressure point that encourages a reluctant party to
1844 settle rather than disclose or chance the uncertain path of
1845 disobeying the order and hoping for a contempt sanction in a form
1846 that supports appeal. (A nonparty can appeal either civil or
1847 criminal contempt; a party can appeal only a criminal contempt
1848 order.)

1849 This question clearly involves topics that involve the
1850 Appellate and Evidence Rules as well as the Civil Rules, even if
1851 the outcome might be adoption of a Civil Rule modeled more or less
1852 closely on Rule 23(f). The Committee voted to refer the question
1853 to the Appellate and Evidence Rules Committees without
1854 recommendation.

1855 11-CV-C: This proposal would allow pro se litigants an extra 7 days
1856 to submit a Rule 26(f) report to the court. It may be that the
1857 Committee should go back to earlier efforts to devise alternative
1858 and simplified rules for some kinds of cases. Pro se cases might
1859 be included in those rules, either generally or as the subject of
1860 specific provisions. But until then, the Committee believes it
1861 inappropriate to depart from the long tradition that refuses to
1862 make specific exceptions for pro se litigants.

1863 This proposal will be removed from the agenda.

1864 11-CV-A: This proposal would amend Rule 55 to provide guidance for
1865 circumstances in which a default judgment is entered as to part of
1866 a case. It might be a judgment that leaves some claims pending

1867 among all parties, or it might be a judgment that disposes of all
1868 claims against one party while leaving claims pending against
1869 others. Questions arise as to coordination between judge and court
1870 clerk when the clerk is authorized to enter default judgment as to
1871 one part, while action by the court is required as to another.
1872 Questions also arise as to execution on a money judgment, and as to
1873 default judgments on claims for declaratory or injunctive relief.

1874 Discussion began by noting that Rule 54(b) provides that a
1875 judgment as to fewer than all claims among all parties becomes
1876 final only on express direction for entry of judgment. Absent
1877 entry of a partial final judgment, the order may be revised at any
1878 time before entry of a complete final judgment. Rule 55(c), which
1879 provides that a default judgment may be set aside under Rule 60(b),
1880 should be read in light of Rule 54(b). Rule 60(b) itself applies
1881 only to relief "from a final judgment, order, or proceeding."
1882 Until a default judgment becomes final under Rule 54(b), Rule 60(b)
1883 is inapposite.

1884 The first reaction was that Rule 55 is administered by the
1885 court clerk as well as by the judge. Adding complexity would make
1886 it more difficult.

1887 A judge added that he always tells the parties that a default
1888 judgment in a multiparty or multiclaim case is not a final
1889 judgment, unless made so under Rule 54(b). It cannot be enforced.
1890 The court retains authority to set it aside. One good reason for
1891 relief is illustrated by a claim against two defendants; one is
1892 subject to a default judgment, while the other wins on merits
1893 grounds that show the defaulted defendant also is not liable.
1894 Another judge agreed with these views.

1895 There was a suggestion that there may be special problems in
1896 bankruptcy cases, perhaps tied to the special and expansive view of
1897 "finality" that applies on appeals to the court of appeals. There
1898 might be reasons of bankruptcy administration to establish forever-
1899 finality that do not apply in ordinary civil proceedings.

1900 The Committee concluded that this proposal will be removed
1901 from the agenda unless further investigation shows special problems
1902 in bankruptcy proceedings that need to be addressed.

1903 Failed Notice of Judgment: This question arises from the Judicial
1904 Conference work designing the next generation of the CM/ECF system.
1905 Rule 77(d)(1) directs the clerk to serve notice of entry of an
1906 order or judgment "as provided in Rule 5(b)." Most courts make
1907 service by electronic means under Rule 5(b)(2)(E). The problem
1908 arises when the notice bounces back to the court as undeliverable.
1909 Rule 5 provides that e-service "is not effective if the serving
1910 party learns that it did not reach the person to be served." The
1911 question is what features should be built into the CM/ECF system to
1912 address this problem.

1913 A proposal under study would require a party agreeing to e-
1914 service to provide a secondary address. When notice to the primary
1915 address bounces back, the system would automatically send an
1916 "alert" to the secondary address. The alert would not include the
1917 text of the judgment or order, nor would it include a link. The
1918 attorney would be responsible to go to the docket to find out what
1919 had happened.

1920 Laura Briggs expressed skepticism about the value of the
1921 "alert." In her court, at least, the original notice goes to both
1922 the primary address and the secondary address. Why send a second
1923 notice to the secondary address? And why only to that address, if
1924 there is to be duplication? Although some lawyers' systems
1925 automatically reject messages with big attachments, the Rule
1926 77(d)(1) notice does not include an attachment. The first thing
1927 her office does when notice bounces back is to call the attorney.
1928 That works most of the time.

1929 It was noted that the CM/ECF project has found that lawyers
1930 often have full e-mail boxes, causing messages to be rejected.
1931 Most courts follow up by postal mail.

1932 In response to the question whether any member thought it
1933 would be useful to provide advice on these questions, a member
1934 thought not, but added a question about pro se cases. How many
1935 attempts at notice are required in pro se actions? Apparently some
1936 courts use e-notice in pro se actions, while others do not. And it
1937 may happen that repeated efforts fail. A conscientious judge may
1938 devote considerable time to writing an explanation to the litigant
1939 of how many attempts have been made. There should be a reasonable
1940 limit.

1941 This discussion led to the question whether there should be
1942 some formalized system to ensure that rules proposals are
1943 considered from the perspective of pro se litigants. Emery Lee
1944 noted that the Committee on Court Administration and Case
1945 Management is thinking about pro se litigation. And the rules
1946 committees are working with that Committee to make sure that the
1947 new generation CM/ECF system is consistent with the Rules. And
1948 perhaps this could be tied to the simplified rules effort. It was
1949 also noted that docket item 11-CV-C provided a refreshing
1950 perspective on the ability of a pro se litigant to wade through the
1951 rules, a task made easier by the Style Project.

1952 **NEXT MEETING**

1953 The next meeting is scheduled for March 22-23, 2012, in Ann
1954 Arbor, Michigan, at the University of Michigan Law School.
1955
1956 Respectfully submitted,

1957 Edward H. Cooper
1958 Reporter

TAB 7

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

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M E M O R A N D U M

Date: December 12, 2011

To: Standing Committee

From: Lee H. Rosenthal
Daniel C. Girard
Robert H. Klonoff
John H. Beisner

Re: Discussion on Class Actions

After years in which Rule 23 was a constant presence on the Civil Rules agenda, it has been conspicuous in its absence for the past nine years. It is the topic of today's panel discussion in part because of the unusual number of Supreme Court cases on class actions in the last two terms, and in part because almost a decade has passed since the Rules Committees last examined the issues. During that decade, there have been at least three major developments in addition to the Supreme Court cases. First, enough time has passed to begin to evaluate the effects of the 2003 Rule 23 changes. Second, CAFA became law and enough time has passed to evaluate some of its effects.

Third, one of the major recent developments affecting all litigation—electronic discovery— has had an impact on class actions as well. The panel will look at the impact of the recent cases (not on the jurisprudence itself but on the impact of the cases on how class actions are litigated) and these three areas. The discussion will focus on identifying problems and, most important, whether they can helpfully be addressed by amending the rules or if other approaches, ranging from statutes to better educational or supporting materials for judges and lawyers, are more useful.

The following background materials are included. The excerpts from the cases are provided for those who want the ready reference; many of you have no need for refresher reading. The materials are:

1. Excerpt from the Supreme Court's 2011 opinion in *AT&T v. Concepcion*.

2. Excerpts from the Court's 2011 opinion in *Wal-Mart v. Dukes*.

3. An article by John Coffee on *Dukes.*

4. A recent Sixth Circuit case illustrating motions to strike class allegations.

5. The Third Circuit opinion in *Hydrogen Peroxide* that addresses issues relating to merits v. certification discovery.

6. An article on ascertainability as an issue in class action certification.

We look forward to a good discussion.

L.H.R.

TAB 7-1

AT&T MOBILITY LLC v. CONCEPCION

Supreme Court of the United States, 2011.
131 S.Ct. 1740.

JUSTICE SCALIA delivered the opinion of the Court.

Section 2 of the Federal Arbitration Act (FAA) makes agreements to arbitrate "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. We consider whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures.

I

In February 2002, Vincent and Liza Concepcion entered into an agreement for the sale and servicing of cellular telephones with AT&T Mobility LCC (AT&T). The contract provided for arbitration of all disputes between the parties, but required that claims be brought in the parties' "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding." * * * The version at issue in this case reflects revisions made in December 2006, which the parties agree are controlling.

The revised agreement provides that customers may initiate dispute proceedings by completing a one-page Notice of Dispute form available on AT&T's Web site. AT&T may then offer to settle the claim; if it does not, or if the dispute is not resolved within 30 days, the customer may invoke arbitration by filing a separate Demand for Arbitration, also available on AT&T's Web site. In the event the parties proceed to arbitration, the agreement specifies that AT&T must pay all costs for nonfrivolous claims; that arbitration must take place in the county in which the customer is billed; that, for claims of $10,000 or less, the customer may choose whether the arbitration proceeds in person, by telephone, or based only on submissions; that either party may bring a claim in small claims court in lieu of arbitration; and that the arbitrator may award any form of individual relief, including injunctions and presumably punitive damages. The agreement, moreover, denies AT&T any ability to seek reimbursement of its attorney's fees, and, in the event that a customer receives an arbitration award greater than AT&T's last written settlement offer, requires AT&T to pay a $7,500 minimum recovery and twice the amount of the claimant's attorney's fees.

The Concepcions purchased AT&T service, which was advertised as including the provision of free phones; they were not charged for the phones, but they were charged $30.22 in sales tax based on the phones' retail value. In March 2006, the Concepcions filed a complaint against

AT&T in the United States District Court for the Southern District of California. The complaint was later consolidated with a putative class action alleging, among other things, that AT&T had engaged in false advertising and fraud by charging sales tax on phones it advertised as free.

In March 2008, AT&T moved to compel arbitration under the terms of its contract with the Concepcions. The Concepcions opposed the motion, contending that the arbitration agreement was unconscionable and unlawfully exculpatory under California law because it disallowed classwide procedures. The District Court denied AT&T's motion. It described AT&T's arbitration agreement favorably noting, for example, that the informal dispute-resolution process was "quick, easy to use" and likely to "promp[t] full or TTT even excess payment to the customer *without* the need to arbitrate or litigate"; that the $7,500 premium functioned as "a substantial inducement for the consumer to pursue the claim in arbitration" if a dispute was not resolved informally; and that consumers who were members of a class would likely be worse off. Nevertheless, relying on the California Supreme Court's decision in *Discover Bank v. Superior Court,* 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100 (2005), the court found that the arbitration provision was unconscionable because AT&T had not shown that bilateral arbitration adequately substituted for the deterrent effects of class actions.

The Ninth Circuit affirmed, also finding the provision unconscionable under California law as announced in *Discover Bank*. It also held that the *Discover Bank* rule was not preempted by the FAA because that rule was simply "a refinement of the unconscionability analysis applicable to contracts generally in California." In response to AT&T's argument that the Concepcions' interpretation of California law discriminated against arbitration, the Ninth Circuit rejected the contention that " 'class proceedings will reduce the efficiency and expeditiousness of arbitration' " and noted that " '*Discover Bank* placed arbitration agreements with class action waivers on the *exact same footing* as contracts that bar class action litigation outside the context of arbitration.' " We granted *certiorari*.

II

The FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements. Section 2, the "primary substantive provision of the Act," reflect[s] both a "liberal federal policy favoring arbitration," and the "fundamental principle that arbitration is a matter of contract." In line with these principles, courts must place arbitration agreements on an equal footing with other contracts,

and enforce them according to their terms.

The final phrase of § 2, however, permits arbitration agreements to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." This saving clause permits agreements to arbitrate to be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability," but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. The question in this case is whether § 2 preempts California's rule classifying most collective-arbitration waivers in consumer contracts as unconscionable. We refer to this rule as the *Discover Bank* rule.

Under California law, courts may refuse to enforce any contract found "to have been unconscionable at the time it was made," or may "limit the application of any unconscionable clause." A finding of unconscionability requires "a 'procedural' and a 'substantive' element, the former focusing on 'oppression' or 'surprise' due to unequal bargaining power, the latter on 'overly harsh' or 'one-sided' results."

In *Discover Bank,* the California Supreme Court applied this framework to class-action waivers in arbitration agreements and held as follows:

> "[W]hen the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then TTT the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' Under these circumstances, such waivers are unconscionable under California law and should not be enforced."

California courts have frequently applied this rule to find arbitration agreements unconscionable.

III

A

The Concepcions argue that the *Discover Bank* rule, given its origins in California's unconscionability doctrine and California's policy against exculpation, is a ground that "exist[s] at law or in equity for the revocation of any contract" under FAA § 2. Moreover, they argue that even if we construe the *Discover Bank* rule as a prohibition on collective-action waivers rather than simply an application of

unconscionability, the rule would still be applicable to all dispute-resolution contracts, since California prohibits waivers of class litigation as well.

When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA. But the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration. * * *

An obvious illustration of this point would be a case finding unconscionable or unenforceable as against public policy consumer arbitration agreements that fail to provide for judicially monitored discovery. The rationalizations for such a holding are neither difficult to imagine nor different in kind from those articulated in *Discover Bank*. A court might reason that no consumer would knowingly waive his right to full discovery, as this would enable companies to hide their wrongdoing. Or the court might simply say that such agreements are exculpatory—restricting discovery would be of greater benefit to the company than the consumer, since the former is more likely to be sued than to sue. And, the reasoning would continue, because such a rule applies the general principle of unconscionability or public-policy disapproval of exculpatory agreements, it is applicable to "any" contract and thus preserved by § 2 of the FAA. In practice, of course, the rule would have a disproportionate impact on arbitration agreements; but it would presumably apply to contracts purporting to restrict discovery in litigation as well.

Other examples are easy to imagine. [The Court describes rules requiring adherence to the Federal Rules of Evidence or jury-like dispositions as examples of rules that would have a disproportionate impact on arbitration agreements, but presumably apply to litigation and arbitration alike.]

The Concepcions suggest that all this is just a parade of horribles, and no genuine worry. "Rules aimed at destroying arbitration" or "demanding procedures incompatible with arbitration," they concede, "would be preempted by the FAA because they cannot sensibly be reconciled with Section 2." The "grounds" available under § 2's saving clause, they admit, "should not be construed to include a State's mere preference for procedures that are incompatible with arbitration and 'would wholly eviscerate arbitration agreements.' "

* * *

We largely agree. Although § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent

to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives. * * *

We differ with the Concepcions only in the application of this analysis to the matter before us. We do not agree that rules requiring judicially monitored discovery or adherence to the Federal Rules of Evidence are "a far cry from this case." The overarching purpose of the FAA * * * is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.

B

The "principal purpose" of the FAA is to "ensur[e] that private arbitration agreements are enforced according to their terms." This purpose is readily apparent from the FAA's text. * * * In light of these provisions, we have held that parties may agree to limit the issues subject to arbitration, to arbitrate according to specific rules, and to limit *with whom* a party will arbitrate its disputes.

The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. * * * And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.

* * *

Contrary to the dissent's view, our cases place it beyond dispute that the FAA was designed to promote arbitration. They have repeatedly described the Act as "embod[ying] [a] national policy favoring arbitration," and "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." Thus, in *Preston v. Ferrer,* 552 U.S. 346 (2008), holding preempted a statelaw rule requiring exhaustion of administrative remedies before arbitration, we said: "A prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results,' " which objective would be "frustrated" by requiring a dispute to be heard by an agency first. That rule, we said, would "at the least, hinder speedy resolution of the controversy."

California's *Discover Bank* rule similarly interferes with arbitration. Although the rule does not *require* classwide arbitration, it allows any party to a consumer contract to demand it *ex post.* The [*Discover Bank*] rule is limited to adhesion contracts, but the times in which consumer contracts were anything other than adhesive are long

past. The rule also requires that damages be predictably small, and that the consumer allege a scheme to cheat consumers. The former requirement, however, is toothless and malleable * * *, and the latter has no limiting effect, as all that is required is an allegation. Consumers remain free to bring and resolve their disputes on a bilateral basis under *Discover Bank,* and some may well do so; but there is little incentive for lawyers to arbitrate on behalf of individuals when they may do so for a class and reap far higher fees in the process. And faced with inevitable class arbitration, companies would have less incentive to continue resolving potentially duplicative claims on an individual basis.

Although we have had little occasion to examine classwide arbitration, our decision in *Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758 (2010), is instructive. In that case we held * * * that the [arbitration] agreement at issue, which was silent on the question of class procedures, could not be interpreted to allow them because the "changes brought about by the shift from bilateral arbitration to class-action arbitration" are "fundamental." This is obvious as a structural matter: Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties. The conclusion follows that class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA.

First, the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment. "In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." But before an arbitrator may decide the merits of a claim in classwide procedures, he must first decide, for example, whether the class itself may be certified, whether the named parties are sufficiently representative and typical, and how discovery for the class should be conducted. * * *

Second, class arbitration *requires* procedural formality. The AAA's rules governing class arbitrations mimic the Federal Rules of Civil Procedure for class litigation. And while parties can alter those procedures by contract, an alternative is not obvious. If procedures are

too informal, absent class members would not be bound by the arbitration. For a class-action money judgment to bind absentees in litigation, class representatives must at all times adequately represent absent class members, and absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class. *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 811–12 (1985). At least this amount of process would presumably be required for absent parties to be bound by the results of arbitration.

We find it unlikely that in passing the FAA Congress meant to leave the disposition of these procedural requirements to an arbitrator. Indeed, class arbitration was not even envisioned by Congress when it passed the FAA in 1925; as the California Supreme Court admitted in *Discover Bank,* class arbitration is a "relatively recent development." And it is at the very least odd to think that an arbitrator would be entrusted with ensuring that third parties' due process rights are satisfied.

Third, class arbitration greatly increases risks to defendants. Informal procedures do of course have a cost: The absence of multilayered review makes it more likely that errors will go uncorrected. Defendants are willing to accept the costs of these errors in arbitration, since their impact is limited to the size of individual disputes, and presumably outweighed by savings from avoiding the courts. But when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims. Other courts have noted the risk of "in terrorem" settlements that class actions entail, and class arbitration would be no different.

Arbitration is poorly suited to the higher stakes of class litigation. In litigation, a defendant may appeal a certification decision on an interlocutory basis and, if unsuccessful, may appeal from a final judgment as well. Questions of law are reviewed *de novo* and questions of fact for clear error. In contrast, 9 U.S.C. § 10 allows a court to vacate an arbitral award *only* where the award "was procured by corruption, fraud, or undue means"; "there was evident partiality or corruption in the arbitrators"; "the arbitrators were guilty of misconduct in refusing to postpone the hearing . . . or in refusing to hear evidence pertinent and material to the controversy[,] or of any other misbehavior by which the rights of any party have been prejudiced"; or if the "arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award . . . was not made." The AAA rules do authorize judicial review of certification decisions, but this review is unlikely to have much effect

given these limitations; review under § 10 focuses on misconduct rather than mistake. And parties may not contractually expand the grounds or nature of judicial review. We find it hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision.

The Concepcions contend that because parties may and sometimes do agree to aggregation, class procedures are not necessarily incompatible with arbitration. But the same could be said about procedures that the Concepcions admit States may not superimpose on arbitration: Parties *could* agree to arbitrate pursuant to the Federal Rules of Civil Procedure, or pursuant to a discovery process rivaling that in litigation. Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations. But what the parties in the aforementioned examples would have agreed to is not arbitration as envisioned by the FAA, lacks its benefits, and therefore may not be required by state law.

The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system. But States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons. Moreover, the claim here was most unlikely to go unresolved. As noted earlier, the arbitration agreement provides that AT&T will pay claimants a minimum of $7,500 and twice their attorney's fees if they obtain an arbitration award greater than AT&T's last settlement offer. The District Court found this scheme sufficient to provide incentive for the individual prosecution of meritorious claims that are not immediately settled, and the Ninth Circuit admitted that aggrieved customers who filed claims would be "essentially guarantee[d]" to be made whole. Indeed, the District Court concluded that the Concepcions were *better off* under their arbitration agreement with AT&T than they would have been as participants in a class action * * *.

Because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," California's *Discover Bank* rule is preempted by the FAA. The judgment of the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

* * *

JUSTICE THOMAS, concurring.

* * *

* * * As I would read it, the FAA requires that an agreement to arbitrate be enforced unless a party successfully challenges the formation of the arbitration agreement, such as by proving fraud or duress. 9 U.S.C. §§ 2, 4. Under this reading, I would reverse the Court of Appeals because a district court cannot follow both the FAA and the *Discover Bank* rule, which does not relate to defects in the making of an agreement.

This reading of the text, however, has not been fully developed by any party and could benefit from briefing and argument in an appropriate case. Moreover, I think that the Court's test will often lead to the same outcome as my textual interpretation and that, when possible, it is important in interpreting statutes to give lower courts guidance from a majority of the Court. *See U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 411 (2002) (O'Connor, J., concurring). Therefore, although I adhere to my views on purposes-and-objectives pre-emption, *see Wyeth v. Levine*, 129 S.Ct 1187 (2009) (opinion concurring in judgment), I reluctantly join the Court's opinion.

* * *

Under [Justice Thomas's] reading, the question here would be whether California's *Discover Bank* rule relates to the making of an agreement. I think it does not.

* * *

The court's analysis and conclusion that the arbitration agreement was exculpatory reveals that the *Discover Bank* rule does not concern the making of the arbitration agreement. Exculpatory contracts are a paradigmatic example of contracts that will not be enforced because of public policy. Refusal to enforce a contract for public-policy reasons does not concern whether the contract was properly made.

Accordingly, the *Discover Bank* rule is not a "groun[d] . . . for the revocation of any contract" as I would read § 2 of the FAA in light of § 4. Under this reading, the FAA dictates that the arbitration agreement here be enforced and the *Discover Bank* rule is pre-empted.

JUSTICE BREYER, with whom JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, dissenting.

The Federal Arbitration Act says that an arbitration agreement "shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*." 9 U.S.C. § 2 (emphasis added). California law sets forth certain circumstances in which "class action waivers" in *any* contract are unenforceable. In my view, this rule of state law is consistent with the federal Act's language and primary objective. It does not "stan[d] as an obstacle" to the Act's "accomplishment and execution." And the Court is wrong to hold that the federal Act pre-empts the rule of state law.

I.

The California law in question consists of an authoritative state-court interpretation of two provisions of the California Civil Code. The first provision makes unlawful all contracts "which have for their object, directly or indirectly, to exempt anyone from responsibility for his own . . . violation of law." The second provision authorizes courts to "limit the application of any unconscionable clause" in a contract so "as to avoid any unconscionable result."

The specific rule of state law in question consists of the California Supreme Court's application of these principles to hold that "some" (but not "all") "class action waivers" in consumer contracts are exculpatory and unconscionable under California "law." In particular, in *Discover Bank* the California Supreme Court stated that, when a class-action waiver

> "is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' "

In such a circumstance, the "waivers are unconscionable under California law and should not be enforced."

The *Discover Bank* rule does not create a "blanket policy in California against class action waivers in the consumer context." Instead, it represents the "application of a more general [unconscionability] principle." Courts applying California law have enforced class action waivers where they satisfy general

unconscionability standards. And even when they fail, the parties remain free to devise other dispute mechanisms, including informal mechanisms, that, in context, will not prove unconscionable.

II

A

The *Discover Bank* rule is consistent with the federal Act's language. It "applies equally to class action litigation waivers in contracts without arbitration agreements as it does to class arbitration waivers in contracts with such agreements." Linguistically speaking, it falls directly within the scope of the Act's exception permitting courts to refuse to enforce arbitration agreements on grounds that exist "for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). The majority agrees.

B

The *Discover Bank* rule is also consistent with the basic "purpose behind" the Act. We have described that purpose as one of "ensur[ing] judicial enforcement" of arbitration agreements. As is well known, prior to the federal Act, many courts expressed hostility to arbitration, for example by refusing to order specific performance of agreements to arbitrate. The Act sought to eliminate that hostility by placing agreements to arbitrate " '*upon the same footing as other contracts*.' "

Congress was fully aware that arbitration could provide procedural and cost advantages. The House Report emphasized the "appropriate[ness]" of making arbitration agreements enforceable "at this time when there is so much agitation against the costliness and delays of litigation." And this Court has acknowledged that parties may enter into arbitration agreements in order to expedite the resolution of disputes.

But we have also cautioned against thinking that Congress' primary objective was to guarantee these particular procedural advantages. Rather, that primary objective was to secure the "enforcement" of agreements to arbitrate. The relevant Senate Report points to the Act's basic purpose when it says "[t]he purpose of the [Act] is *clearly set forth in section 2*," namely, the section that says that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2.

Thus, insofar as we seek to implement Congress' intent, we should think more than twice before invalidating a state law that does

just what § 2 requires, namely, puts agreements to arbitrate and agreements to litigate "upon the same footing."

III

The majority's contrary view (that *Discover Bank* stands as an "obstacle" to the accomplishment of the federal law's objective) rests primarily upon its claims that the *Discover Bank* rule increases the complexity of arbitration procedures, thereby discouraging parties from entering into arbitration agreements, and to that extent discriminating in practice against arbitration. These claims are not well founded.

For one thing, a state rule of law that would sometimes set aside as unconscionable a contract term that forbids class arbitration is not (as the majority claims) like a rule that would require "ultimate disposition by a jury" or "judicially monitored discovery" or use of "the Federal Rules of Evidence." Unlike the majority's examples, class arbitration is consistent with the use of arbitration. It is a form of arbitration that is well known in California and followed elsewhere. Indeed, the AAA has told us [in its amicus brief] that it has found class arbitration to be "a fair, balanced, and efficient means of resolving class disputes." And unlike the majority's examples, the *Discover Bank* rule imposes equivalent limitations on litigation; hence it cannot fairly be characterized as a targeted attack on arbitration.

Where does the majority get its contrary idea—that individual, rather than class, arbitration is a "fundamental attribut[e]" of arbitration? The majority does not explain. And it is unlikely to be able to trace its present view to the history of the arbitration statute itself.

When Congress enacted the Act, arbitration procedures had not yet been fully developed. Insofar as Congress considered detailed forms of arbitration at all, it may well have thought that arbitration would be used primarily where merchants sought to resolve disputes of fact, not law, under the customs of their industries, where the parties possessed roughly equivalent bargaining power. This last mentioned feature of the history—roughly equivalent bargaining power—suggests, if anything, that California's statute is consistent with, and indeed may help to further, the objectives that Congress had in mind.

Regardless, if neither the history nor present practice suggests that class arbitration is fundamentally incompatible with arbitration itself, then on what basis can the majority hold California's law pre-empted?

For another thing, the majority's argument that the *Discover*

Bank rule will discourage arbitration rests critically upon the wrong comparison. The majority compares the complexity of class arbitration with that of bilateral arbitration. And it finds the former more complex. But, if incentives are at issue, the *relevant* comparison is not "arbitration with arbitration" but a comparison between class arbitration and judicial class actions. After all, in respect to the relevant set of contracts, the *Discover Bank* rule similarly and equally sets aside clauses that forbid class procedures—whether arbitration procedures or ordinary judicial procedures are at issue.

Why would a typical defendant (say, a business) prefer a judicial class action to class arbitration? AAA statistics "suggest that class arbitration proceedings take more time than the average commercial arbitration, but may take *less time* than the average class action in court." Data from California courts confirm that class arbitrations can take considerably less time than in-court proceedings in which class certification is sought. And a single class proceeding is surely more efficient than thousands of separate proceedings for identical claims. Thus, if speedy resolution of disputes were all that mattered, then the *Discover Bank* rule would reinforce not obstruct, that objective of the Act.

The majority's related claim that the *Discover Bank* rule will discourage the use of arbitration because "[a]rbitration is poorly suited to . . . higher stakes" lacks empirical support. Indeed, the majority provides no convincing reason to believe that parties are unwilling to submit highstakes disputes to arbitration. And there are numerous counterexamples.

Further, even though contract defenses, *e.g.,* duress and unconscionability, slow down the dispute resolution process, federal arbitration law normally leaves such matters to the States. * * * California is free to define unconscionability as it sees fit, and its common law is of no federal concern so long as the State does not adopt a special rule that disfavors arbitration.

Because California applies the same legal principles to address the unconscionability of class arbitration waivers as it does to address the unconscionability of any other contractual provision, the merits of class proceedings should not factor into our decision. If California had applied its law of duress to void an arbitration agreement, would it matter if the procedures in the coerced agreement were efficient?

Regardless, the majority highlights the disadvantages of class arbitrations, as it sees them. But class proceedings have countervailing advantages. In general, agreements that forbid the consolidation of claims can lead small-dollar claimants to abandon their claims rather than to litigate. I suspect that it is true even here,

for as the Court of Appeals recognized, AT&T can avoid the $7,500 payout (the payout that supposedly makes the Concepcions' arbitration worthwhile) simply by paying the claim's face value, such that "the maximum gain to a customer for the hassle of arbitrating a $30.22 dispute is still just $30.22."

What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim? In California's perfectly rational view, nonclass arbitration over such sums will also sometimes have the effect of depriving claimants of their claims (say, for example, where claiming the $30.22 were to involve filling out many forms that require technical legal knowledge or waiting at great length while a call is placed on hold). *Discover Bank* sets forth circumstances in which the California courts believe that the terms of consumer contracts can be manipulated to insulate an agreement's author from liability for its own frauds by "deliberately cheat[ing] large numbers of consumers out of individually small sums of money." Why is this kind of decision—weighing the pros and cons of all class proceedings alike—not California's to make?

Finally, the majority can find no meaningful support for its views in this Court's precedent. * * * [W]e have not, to my knowledge, applied the Act to strike down a state statute that treats arbitrations on par with judicial and administrative proceedings.

At the same time, we have repeatedly referred to the Act's basic objective as assuring that courts treat arbitration agreements "like all other contracts."

* * *

IV

By using the words "save upon such grounds as exist at law or in equity for the revocation of any contract," Congress retained for the States an important role incident to agreements to arbitrate. 9 U.S.C. § 2. * * * But federalism is as much a question of deeds as words. It often takes the form of a concrete decision by this Court that respects the legitimacy of a State's action in an individual case. Here, recognition of that federalist ideal, embodied in specific language in this particular statute, should lead us to uphold California's law, not to strike it down. We do not honor federalist principles in their breach.

With respect, I dissent.

TAB 7-2

WAL-MART STORES, INC. v. DUKES

Supreme Court of the United States, 2011.
131 S.Ct. 2541.

JUSTICE SCALIA delivered the opinion of the Court.

We are presented with one of the most expansive class actions ever. The District Court and the Court of Appeals approved the certification of a class comprising about one and a half million plaintiffs, current and former female employees of petitioner Wal–Mart who allege that the discretion exercised by their local supervisors over pay and promotion matters violates Title VII by discriminating against women.

* * *

I

A

Petitioner Wal–Mart is the Nation's largest private employer. It operates four types of retail stores throughout the country: Discount Stores, Supercenters, Neighborhood Markets, and Sam's Clubs. Those stores are divided into seven nationwide divisions, which in turn comprise 41 regions of 80 to 85 stores apiece. Each store has between 40 and 53 separate departments and 80 to 500 staff positions. In all, Wal–Mart operates approximately 3,400 stores and employs more than one million people.

Pay and promotion decisions at Wal–Mart are generally committed to local managers' broad discretion, which is exercised "in a largely subjective manner." Local store managers may increase the wages of hourly employees (within limits) with only limited corporate oversight. As for salaried employees, such as store managers and their deputies, higher corporate authorities have discretion to set their pay within preestablished ranges.

Promotions work in a similar fashion. Wal–Mart permits store managers to apply their own subjective criteria when selecting candidates as "support managers," which is the first step on the path to management. Admission to Wal–Mart's management training program, however, does require that a candidate meet certain objective criteria, including an above–average performance rating, at least one year's tenure in the applicant's current position, and a willingness to relocate. But except for those requirements, regional and district managers have discretion to use their own judgment when selecting candidates for management training. Promotion to higher office—*e.g.*, assistant manager, co–manager, or store manager—is similarly at the discretion of the employee's superiors after prescribed objective factors are satisfied.

B

The named plaintiffs in this lawsuit, representing the 1.5 million members of the certified class, are three current or former Wal–Mart employees who allege that the company discriminated against them on the basis of their sex by denying them equal pay or promotions, in violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e–1 *et seq*.

Betty Dukes began working at a Pittsburgh, California, Wal–Mart in 1994. She started as a cashier, but later sought and received a promotion to customer service manager. After a series of disciplinary violations, however, Dukes was demoted back to cashier and then to greeter. Dukes concedes she violated company policy, but contends that the disciplinary actions were in fact retaliation for invoking internal complaint procedures and that male employees have not been disciplined for similar infractions. Dukes also claims two male greeters in the Pittsburgh store are paid more than she is.

Christine Kwapnoski has worked at Sam's Club stores in Missouri and California for most of her adult life. She has held a number of positions, including a supervisory position. She claims that a male manager yelled at her frequently and screamed at female employees, but not at men. The manager in question "told her to 'doll up,' to wear some makeup, and to dress a little better."

The final named plaintiff, Edith Arana, worked at a Wal–Mart store in Duarte, California, from 1995 to 2001. In 2000, she approached the store manager on more than one occasion about management training, but was brushed off. Arana concluded she was being denied opportunity for advancement because of her sex. She initiated internal complaint procedures, whereupon she was told to apply directly to the district manager if she thought her store manager was being unfair. Arana, however, decided against that and never applied for management training again. In 2001, she was fired for failure to comply with Wal–Mart's timekeeping policy.

These plaintiffs, respondents here, do not allege that Wal–Mart has any express corporate policy against the advancement of women. Rather, they claim that their local managers' discretion over pay and promotions is exercised disproportionately in favor of men, leading to an unlawful disparate impact on female employees, *see* 42 U.S.C. § 2000e–2(k). And, respondents say, because Wal–Mart is aware of this effect, its refusal to cabin its managers' authority amounts to disparate treatment, *see* § 2000e–2(a). * * *

Importantly for our purposes, respondents claim that the discrimination to which they have been subjected is common to *all*

Wal–Mart's female employees. The basic theory of their case is that a strong and uniform "corporate culture" permits bias against women to infect, perhaps subconsciously, the discretionary decisionmaking of each one of Wal–Mart's thousands of managers—thereby making every woman at the company the victim of one common discriminatory practice. Respondents therefore wish to litigate the Title VII claims of all female employees at Wal–Mart's stores in a nationwide class action.

C

* * * Under Rule 23(a), the party seeking certification must demonstrate, first, that: "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

* * *

* * * [R]espondents moved the District Court to certify a plaintiff class consisting of "[a]ll women employed at any Wal–Mart domestic retail store at any time since December 26, 1998, who have been or may be subjected to Wal–Mart's challenged pay and management track promotions policies and practices." As evidence that there were * * * "questions of law or fact common to" all the women of Wal–Mart, as Rule 23(a)(2) requires, respondents relied chiefly on three forms of proof: statistical evidence about pay and promotion disparities between men and women at the company, anecdotal reports of discrimination from about 120 of Wal–Mart's female employees, and the testimony of a sociologist, Dr. William Bielby, who conducted a "social framework analysis" of Wal–Mart's "culture" and personnel practices, and concluded that the company was "vulnerable" to gender discrimination. * * *

Wal–Mart unsuccessfully moved to strike much of this evidence. It also offered its own countervailing statistical and other proof in an effort to defeat Rule 23(a)'s requirements of commonality, typicality, and adequate representation. * * *

* * *

[The district court certified a nationwide class of female Wal–Mart employees. On the (a)(2) issue, it noted that "Wal–Mart raised a number of challenges to Plaintiffs' evidence of commonality but concluded that, in fact, most of these objections related *not* to * * * commonality but to the ultimate merits of the case and 'thus should properly be addressed by a jury considering the merits' rather than a

judge considering class certification." 509 F.3d at 1168, 1177–78 (9th Cir. 2007) (quoting district court; emphasis in original). The Ninth Circuit panel endorsed this analysis. *Id.* The Court of Appeals, rehearing the case *en banc*, affirmed in substantial part. 603 F.3d 571 (9th Cir. 2010) (en banc). As to Rule 23(a)(2), it held that "Plaintiffs' factual evidence, expert opinions, statistical evidence, and anecdotal evidence provide sufficient support *to raise the common question* whether Wal–Mart's female employees nationwide were subjected to *a single set of corporate policies* (not merely a number of independent discriminatory acts) that may have worked to unlawfully discriminate against them in violation of Title VII." *Id.* at 612 (emphases in original). Judge Ikuta, joined by four other judges, dissented, reasoning that the class failed to meet, *inter alia*, the commonality requirement of 23(a)(2), because "[n]one of plaintiffs' evidence is probative of company–wide discrimination." *Id.* at 640 (Ikuta, J., dissenting). In the dissent's view, "[e]very piece of evidence merely purport[ed] to support another," and "the plaintiffs' circular presentation cannot conceal the fact that they have failed to offer any significant proof of a company-wide policy of discrimination * * *." *Id.* at 640–41. *See also id.* at 652 (Kozinski, C.J., dissenting) ("the half–million members of the majority's approved class * * * have little in common but their sex and this lawsuit.")]

* * *

II

* * *

A

The crux of this case is commonality—the rule requiring a plaintiff to show that "there are questions of law or fact common to the class." Rule 23(a)(2).[5] That language is easy to misread, since "[a]ny competently crafted class complaint literally raises common 'questions.' " Richard Nagareda, *Class Certification in the Age of*

[5] We have previously stated in this context that "[t]he commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest." *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157–58, n.13 (1982). In light of our disposition of the commonality question, however, it is unnecessary to resolve whether respondents have satisfied the typicality and adequate-representation requirements of Rule 23(a).

Aggregate Proof, 84 N.Y.U. L. Rev. 97, 131–132 (2009). For example: Do all of us plaintiffs indeed work for Wal–Mart? Do our managers have discretion over pay? Is that an unlawful employment practice? What remedies should we get? Reciting these questions is not sufficient to obtain class certification. Commonality requires the plaintiff to demonstrate that the class members "have suffered the same injury." This does not mean merely that they have all suffered a violation of the same provision of law. Title VII, for example, can be violated in many ways—by intentional discrimination, or by hiring and promotion criteria that result in disparate impact, and by the use of these practices on the part of many different superiors in a single company. Quite obviously, the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once. Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

> "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." Nagareda, *supra*, at 132.

Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc. We recognized in *Falcon*[, 457 U.S. 147 (1982),] that "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question," and that certification is proper only if "the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." Frequently that "rigorous analysis" will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped. " '[T]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.' " *Id.* at 160.

In this case, proof of commonality necessarily overlaps with respondents' merits contention that Wal–Mart engages in a *pattern or*

practice of discrimination.[7] That is so because, in resolving an individual's Title VII claim, the crux of the inquiry is "the reason for a particular employment decision," *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984). Here respondents wish to sue about literally millions of employment decisions at once. Without some glue holding the alleged reasons for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*.

B

This Court's opinion in *Falcon* describes how the commonality issue must be approached. There an employee who claimed that he was deliberately denied a promotion on account of race obtained certification of a class comprising all employees wrongfully denied promotions and all applicants wrongfully denied jobs. We rejected that composite class for lack of commonality and typicality, explaining:

> "Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion [or higher pay] on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claim will share common questions of law or fact and that the individual's claim will be typical of the class claims." *Id.*, at 157–58.

Falcon suggested two ways in which that conceptual gap might be bridged. First, if the employer "used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule 23(a)." Second, "[s]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective

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[7] In a pattern-or-practice case, the plaintiff tries to "establish by a preponderance of the evidence that . . . discrimination was the company's standard operating procedure[,] the regular rather than the unusual practice." *Teamsters v. United States*, 431 U.S. 324, 358 (1977); *see also Franks v. Bowman Transp. Co.*, 424 U.S. 747, 772 (1976). If he succeeds, that showing will support a rebuttable inference that all class members were victims of the discriminatory practice, and will justify "an award of prospective relief," such as "an injunctive order against the continuation of the discriminatory practice."

decisionmaking processes." We think that statement precisely describes respondents' burden in this case. The first manner of bridging the gap obviously has no application here; Wal–Mart has no testing procedure or other companywide evaluation method that can be charged with bias. The whole point of permitting discretionary decisionmaking is to avoid evaluating employees under a common standard.

The second manner of bridging the gap requires "significant proof" that Wal–Mart "operated under a general policy of discrimination." That is entirely absent here. Wal–Mart's announced policy forbids sex discrimination, and * * * the company imposes penalties for denials of equal employment opportunity. The only evidence of a "general policy of discrimination" respondents produced was the testimony of Dr. William Bielby, their sociological expert. * * * Bielby testified that Wal–Mart has a "strong corporate culture," that makes it " 'vulnerable' " to "gender bias." He could not, however, "determine with any specificity how regularly stereotypes play a meaningful role in employment decisions at Wal–Mart. At his deposition . . . Dr. Bielby conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal–Mart might be determined by stereotyped thinking." The parties dispute whether Bielby's testimony even met the standards for the admission of expert testimony under Federal Rule of [Evidence] 702 and our *Daubert* case, *see Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so, but even if properly considered, Bielby's testimony does nothing to advance respondents' case. "[W]hether 0.5 percent or 95 percent of the employment decisions at Wal–Mart might be determined by stereotyped thinking" is the essential question on which respondents' theory of commonality depends. If Bielby admittedly has no answer to that question, we can safely disregard what he has to say. It is worlds away from "significant proof" that Wal–Mart "operated under a general policy of discrimination."

C

The only corporate policy that the plaintiffs' evidence convincingly establishes is Wal–Mart's "policy" of *allowing discretion* by local supervisors over employment matters. On its face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy *against having* uniform employment practices. It is also a very common and presumptively reasonable way of doing business—one that we have

said "should itself raise no inference of discriminatory conduct," *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988).

To be sure, we have recognized that, "in appropriate cases," giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory—since "an employer's undisciplined system of subjective decisionmaking [can have] precisely the same effects as a system pervaded by impermissible intentional discrimination." But the recognition that this type of Title VII claim "can" exist does not lead to the conclusion that every employee in a company using a system of discretion has such a claim in common. To the contrary, left to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance–based criteria for hiring and promotion that produce no actionable disparity at all. Others may choose to reward various attributes that produce disparate impact—such as scores on general aptitude tests or educational achievements. And still other managers may be guilty of intentional discrimination that produces a sex-based disparity. In such a company, demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's. A party seeking to certify a nationwide class will be unable to show that all the employees' Title VII claims will in fact depend on the answers to common questions.

Respondents have not identified a common mode of exercising discretion that pervades the entire company—aside from their reliance on Dr. Bielby's [testimony] that we have rejected. In a company of Wal–Mart's size and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction. Respondents attempt to make that showing by means of statistical and anecdotal evidence, but their evidence falls well short.

The statistical evidence consists primarily of regression analyses performed by Dr. Richard Drogin, a statistician, and Dr. Marc Bendick, a labor economist. Drogin conducted his analysis region-by-region, comparing the number of women promoted into management positions with the percentage of women in the available pool of hourly workers. After considering regional and national data, Drogin concluded that "there are statistically significant disparities between men and women at Wal–Mart . . . [and] these disparities . . . can be explained only by gender discrimination." Bendick compared work-force data from Wal–Mart and competitive retailers and concluded that Wal–Mart "promotes a lower percentage of women than its competitors."

Even if they are taken at face value, these studies are insufficient to establish that respondents' theory can be proved on a classwide basis. In *Falcon*, we held that one named plaintiff's experience of discrimination was insufficient to infer that "discriminatory treatment is typical of [the employer's employment] practices." 457 U.S. at 158. A similar failure of inference arises here. * * * A regional pay disparity, for example, may be attributable to only a small set of Wal–Mart stores, and cannot by itself establish the uniform, store-by-store disparity upon which the plaintiffs' theory of commonality depends.

There is another, more fundamental, respect in which respondents' statistical proof fails. Even if it established (as it does not) a pay or promotion pattern that differs from the nationwide figures or the regional figures in *all* of Wal–Mart's 3,400 stores, that would still not demonstrate that commonality of issue exists. Some managers will claim that the availability of women, or qualified women, or interested women, in their stores' area does not mirror the national or regional statistics. And almost all of them will claim to have been applying some sex-neutral, performance–based criteria—whose nature and effects will differ from store to store. In the landmark case of ours which held that giving discretion to lower–level supervisors can be the basis of Title VII liability under a disparate–impact theory, the plurality opinion *conditioned* that holding on the corollary that merely proving that the discretionary system has produced a racial or sexual disparity is *not enough*. "[T]he plaintiff must begin by identifying the specific employment practice that is challenged." *Watson*, 487 U.S., at 994. * * * That is all the more necessary when a class of plaintiffs is sought to be certified. Other than the bare existence of delegated discretion, respondents have identified no "specific employment practice"—much less one that ties all their 1.5 million claims together. Merely showing that Wal–Mart's policy of discretion has produced an overall sex–based disparity does not suffice.

Respondents' anecdotal evidence suffers from the same defects, and in addition is too weak to raise any inference that all the individual, discretionary personnel decisions are discriminatory. In *Teamsters v. United States*, 431 U.S. 324 (1977), in addition to substantial statistical evidence of company-wide discrimination, the Government (as plaintiff) produced about 40 specific accounts of racial discrimination from particular individuals. That number was significant because the company involved had only 6,472 employees, of whom 571 were minorities, and the class itself consisted of around 334 persons. The 40 anecdotes thus represented roughly one account for every eight members of the class. Moreover, the Court of Appeals

noted that the anecdotes came from individuals "spread throughout" the company who "for the most part" worked at the company's operational centers that employed the largest numbers of the class members. Here, by contrast, respondents filed some 120 affidavits reporting experiences of discrimination—about 1 for every 12,500 class members—relating to only some 235 out of Wal–Mart's 3,400 stores. More than half of these reports are concentrated in only six States (Alabama, California, Florida, Missouri, Texas, and Wisconsin); half of all States have only one or two anecdotes; and 14 States have no anecdotes about Wal–Mart's operations at all. Even if every single one of these accounts is true, that would not demonstrate that the entire company "operate[s] under a general policy of discrimination," which is what respondents must show to certify a companywide class.[9]

The dissent misunderstands the nature of the foregoing analysis. It criticizes our focus on the dissimilarities between the putative class members on the ground that we have "blend[ed]" Rule 23(a)(2)'s commonality requirement with Rule 23(b)(3)'s inquiry into whether common questions "predominate" over individual ones. That is not so. We quite agree that for purposes of Rule 23(a)(2) " '[e]ven a single [common] question' " will do. We consider dissimilarities not in order to determine (as Rule 23(b)(3) requires) whether common questions predominate, but in order to determine (as Rule 23(a)(2) requires) whether there is "[e]ven a single [common] question." And there is not here. Because respondents provide no convincing proof of a companywide discriminatory pay and promotion policy, we have concluded that they have not established the existence of any common question.[10]

* * *

The judgment of the Court of Appeals is

Reversed.

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[9] The dissent says that we have adopted "a rule that a discrimination claim, if accompanied by anecdotes, must supply them in numbers proportionate to the size of the class." That is not quite accurate. A discrimination claimant is free to supply as few anecdotes as he wishes. But when the claim is that a company operates under a general policy of discrimination, a few anecdotes selected from literally millions of employment decisions prove nothing at all.

[10] For this reason, there is no force to the dissent's attempt to distinguish *Falcon* on the ground that in that case there were " 'no common questions of law or fact' between the claims of the lead plaintiff and the applicant class." Here also there is nothing to unite all of the plaintiffs' claims, since (contrary to the dissent's contention) the same employment practices do not "touch and concern all members of the class."

JUSTICE GINSBURG, with whom JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, [dissenting in relevant part].

* * * Whether the class the plaintiffs describe meets the specific requirements of Rule 23(b)(3) is not before the Court, and I would reserve that matter for consideration and decision on remand. The Court, however, disqualifies the class at the starting gate, holding that the plaintiffs cannot cross the "commonality" line set by Rule 23(a)(2). In so ruling, the Court imports into the Rule 23(a) determination concerns properly addressed in a Rule 23(b)(3) assessment.

I

A

Rule 23(a)(2) establishes a preliminary requirement for maintaining a class action: "[T]here are questions of law or fact common to the class." The Rule "does not require that all questions of law or fact raised in the litigation be common;" indeed, "[e]ven a single question of law or fact common to the members of the class will satisfy the commonality requirement," Richard Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 Colum. L. Rev. 149, 176, n.110 (2003). A "question" is ordinarily understood to be "[a] subject or point open to controversy." American Heritage Dictionary 1483 (3d ed. 1992). Thus, a "question" "common to the class" must be a dispute, either of fact or of law, the resolution of which will advance the determination of the class members' claims.[3]

B

The District Court, recognizing that "one significant issue common to the class may be sufficient to warrant certification," found that the plaintiffs easily met that test. Absent an error of law or an abuse of discretion, an appellate tribunal has no warrant to upset the District Court's finding of commonality. The District Court certified a class of "[a]ll women employed at any Wal–Mart domestic retail store at any time since December 26, 1998." The named plaintiffs, led by Betty Dukes, propose to litigate, on behalf of the class, allegations that Wal–Mart discriminates on the basis of gender in pay and promotions. They allege that the company "[r]eli[es] on gender stereotypes in

[3] The Court suggests Rule 23(a)(2) must mean more than it says. If the word "questions" were taken literally, the majority asserts, plaintiffs could pass the Rule 23(a)(2) bar by "[r]eciting . . . questions" like "Do all of us plaintiffs indeed work for Wal–Mart?" Sensibly read, however, the word "questions" means disputed issues, not any utterance crafted in the grammatical form of a question.

making employment decisions such as . . . promotion[s] [and] pay." Wal–Mart permits those prejudices to infect personnel decisions, the plaintiffs contend, by leaving pay and promotions in the hands of "a nearly all male managerial workforce" using "arbitrary and subjective criteria." Further alleged barriers to the advancement of female employees include the company's requirement, "as a condition of promotion to management jobs, that employees be willing to relocate." Absent instruction otherwise, there is a risk that managers will act on the familiar assumption that women, because of their services to husband and children, are less mobile than men.

Women fill 70 percent of the hourly jobs in the retailer's stores but make up only "33 percent of management employees." "[T]he higher one looks in the organization the lower the percentage of women." The plaintiffs' "largely uncontested descriptive statistics" also show that women working in the company's stores "are paid less than men in every region" and "that the salary gap widens over time even for men and women hired into the same jobs at the same time."

The District Court identified "systems for . . . promoting in-store employees" that were "sufficiently similar across regions and stores" to conclude that "the manner in which these systems affect the class raises issues that are common to all class members." The selection of employees for promotion to in-store management "is fairly characterized as a 'tap on the shoulder' process," in which managers have discretion about whose shoulders to tap. Vacancies are not regularly posted; from among those employees satisfying minimum qualifications, managers choose whom to promote on the basis of their own subjective impressions.

Wal–Mart's compensation policies also operate uniformly across stores, the District Court found. The retailer leaves open a $2 band for every position's hourly pay rate. Wal–Mart provides no standards or criteria for setting wages within that band, and thus does nothing to counter unconscious bias on the part of supervisors.

Wal–Mart's supervisors do not make their discretionary decisions in a vacuum. The District Court reviewed means Wal–Mart used to maintain a "carefully constructed . . . corporate culture," such as frequent meetings to reinforce the common way of thinking, regular transfers of managers between stores to ensure uniformity throughout the company, monitoring of stores "on a close and constant basis," and "Wal–Mart TV," "broadcas[t] . . . into all stores."

The plaintiffs' evidence, including class members' tales of their own experiences,[4] suggests that gender bias suffused Wal–Mart's company culture. Among illustrations, senior management often refer to female associates as "little Janie Qs." One manager told an employee that "[m]en are here to make a career and women aren't." A committee of female Wal–Mart executives concluded that "[s]tereotypes limit the opportunities offered to women."

Finally, the plaintiffs presented an expert's appraisal to show that the pay and promotions disparities at Wal–Mart "can be explained only by gender discrimination and not by TTT neutral variables." Using regression analyses, their expert, Richard Drogin, controlled for factors including, inter alia, job performance, length of time with the company, and the store where an employee worked.[5] The results, the District Court found, were sufficient to raise an "inference of discrimination."

C

The District Court's identification of a common question, whether Wal–Mart's pay and promotions policies gave rise to unlawful discrimination, was hardly infirm. The practice of delegating to supervisors large discretion to make personnel decisions, uncontrolled by formal standards, has long been known to have the potential to produce disparate effects. Managers, like all humankind, may be prey to biases of which they are unaware.[6] The risk of discrimination is

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[4] The majority purports to derive from *Teamsters v. United States*, 431 U.S. 324 (1977), a rule that a discrimination claim, if accompanied by anecdotes, must supply them in numbers proportionate to the size of the class. *Teamsters*, the Court acknowledges, instructs that statistical evidence alone may suffice; that decision can hardly be said to establish a numerical floor before anecdotal evidence can be taken into account.

[5] The Court asserts that Drogin showed only average differences at the "regional and national level" between male and female employees. In fact, his regression analyses showed there were disparities within stores. The majority's contention to the contrary reflects only an arcane disagreement about statistical method—which the District Court resolved in the plaintiffs' favor. Appellate review is no occasion to disturb a trial court's handling of factual disputes of this order.

[6] An example vividly illustrates how subjective decisionmaking can be a vehicle for discrimination. Performing in symphony orchestras was long a male preserve. Goldin and Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 Am. Econ. Rev. 715, 715–16 (2000). In the 1970's orchestras began hiring musicians through auditions open to all comers. Reviewers were to judge applicants solely on their musical abilities, yet subconscious bias led some reviewers to disfavor women. Orchestras that permitted reviewers to see the applicants hired far fewer female musicians than orchestras that conducted blind auditions, in which candidates played behind opaque screens.

heightened when those managers are predominantly of one sex, and are steeped in a corporate culture that perpetuates gender stereotypes.

* * *

We have held that "discretionary employment practices" can give rise to Title VII claims, not only when such practices are motivated by discriminatory intent but also when they produce discriminatory results. *See Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 988, 991 (1988). In *Watson*, as here, an employer had given its managers large authority over promotions. An employee sued the bank under Title VII, alleging that the "discretionary promotion system" caused a discriminatory effect based on race. Four different supervisors had declined, on separate occasions, to promote the employee. Their reasons were subjective and unknown. The employer, we noted "had not developed precise and formal criteria for evaluating candidates"; "[i]t relied instead on the subjective judgment of supervisors."

Aware of "the problem of subconscious stereotypes and prejudices," we held that the employer's "undisciplined system of subjective decisionmaking" was an "employment practic[e]" that "may be analyzed under the disparate impact approach."

The plaintiffs' allegations state claims of gender discrimination in the form of biased decisionmaking in both pay and promotions. The evidence reviewed by the District Court adequately demonstrated that resolving those claims would necessitate examination of particular policies and practices alleged to affect, adversely and globally, women employed at Wal–Mart's stores. Rule 23(a)(2), setting a necessary but not a sufficient criterion for class–action certification, demands nothing further.

II

A

The Court gives no credence to the key dispute common to the class: whether Wal–Mart's discretionary pay and promotion policies are discriminatory. "What matters," the Court asserts, "is not the raising of common 'questions,' " but whether there are "[d]issimilarities within the proposed class" that "have the potential to impede the generation of common answers." (quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)).

The Court blends Rule 23(a)(2)'s threshold criterion with the more demanding criteria of Rule 23(b)(3), and thereby elevates the

(a)(2) inquiry so that it is no longer "easily satisfied."[7] Rule 23(b)(3) certification requires, in addition to the four 23(a) findings, determinations that "questions of law or fact common to class members predominate over any questions affecting only individual members" and that "a class action is superior to other available methods for . . . adjudicating the controversy."

The Court's emphasis on differences between class members mimics the Rule 23(b)(3) inquiry into whether common questions "predominate" over individual issues. And by asking whether the individual differences "impede" common adjudication, the Court duplicates 23(b)(3)'s question whether "a class action is superior" to other modes of adjudication. Indeed, Professor Nagareda, whose "dissimilarities" inquiry the Court endorses, developed his position in the context of Rule 23(b)(3). * * * "The Rule 23(b)(3) predominance inquiry" is meant to "tes[t] whether proposed classes are sufficiently cohesive to warrant adjudication by representation." If courts must conduct a "dissimilarities" analysis at the Rule 23(a)(2) stage, no mission remains for Rule 23(b)(3).

Because Rule 23(a) is also a prerequisite for Rule 23(b)(1) and Rule 23(b)(2) classes, the Court's "dissimilarities" position is far reaching. Individual differences should not bar a Rule 23(b)(1) or Rule 23(b)(2) class, so long as the Rule 23(a) threshold is met. For example, in *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976), a Rule 23(b)(2) class of African–American truck drivers complained that the defendant had discriminatorily refused to hire black applicants. We recognized that the "qualification[s] and performance" of individual class members might vary. "Generalizations concerning such individually applicable evidence," we cautioned, "cannot serve as a justification for the denial of [injunctive] relief to the entire class."

B

The "dissimilarities" approach leads the Court to train its attention on what distinguishes individual class members, rather than

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[7] The Court places considerable weight on *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982). That case has little relevance to the question before the Court today. The lead plaintiff in *Falcon* alleged discrimination evidenced by the company's failure to promote him and other Mexican–American employees and failure to hire Mexican–American applicants. There were "no common questions of law or fact" between the claims of the lead plaintiff and the applicant class. The plaintiff-employee alleged that the defendant-employer had discriminated against him intentionally. The applicant class claims, by contrast, were "advanced under the 'adverse impact' theory," appropriate for facially neutral practices. "[T]he only commonality [wa]s that respondent is a Mexican–American and he seeks to represent a class of Mexican–Americans." Here the same practices touch and concern all members of the class.

on what unites them. Given the lack of standards for pay and promotions, the majority says, "demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's."

Wal–Mart's delegation of discretion over pay and promotions is a policy uniform throughout all stores. The very nature of discretion is that people will exercise it in various ways. A system of delegated discretion, *Watson* held, is a practice actionable under Title VII when it produces discriminatory outcomes. A finding that Wal–Mart's pay and promotions practices in fact violate the law would be the first step in the usual order of proof for plaintiffs seeking individual remedies for company-wide discrimination. *Teamsters v. United States*, 431 U.S. 324, 359 (1977). That each individual employee's unique circumstances will ultimately determine whether she is entitled to backpay or damages, § 2000e–5(g)(2)(A) (barring backpay if a plaintiff "was refused . . . advancement . . . for any reason other than discrimination"), should not factor into the Rule 23(a)(2) determination.

* * *

The Court errs in importing a "dissimilarities" notion suited to Rule 23(b)(3) into the Rule 23(a) commonality inquiry. I therefore cannot join Part II of the Court's opinion.

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WAL-MART STORES, INC. v. DUKES

Supreme Court of the United States, 2011.
131 S.Ct. 2541.

JUSTICE SCALIA delivered the opinion of the Court.

* * * The District Court and the Court of Appeals approved the certification of a class comprising about one and a half million plaintiffs, current and former female employees of petitioner Wal–Mart who allege that the discretion exercised by their local supervisors over pay and promotion matters violates Title VII by discriminating against women. In addition to injunctive and declaratory relief, the plaintiffs seek an award of backpay. We consider whether the certification of the plaintiff class was consistent with * * * [Rule 23(b)(2)].

* * *

The named plaintiffs in this lawsuit, representing the 1.5 million members of the certified class, are three current or former Wal–Mart employees who allege that the company discriminated against them on the basis of their sex by denying them equal pay or promotions, in violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e–1 *et seq*. * * * [Plaintiffs'] complaint seeks injunctive and declaratory relief, punitive damages, and backpay. It does not ask for compensatory damages.

* * *

[In addition to meeting the requirements of Rule 23(a)], the proposed class must satisfy at least one of the three requirements listed in Rule 23(b). Respondents rely on Rule 23(b)(2), which applies when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."

Invoking these provisions, respondents moved the District Court to certify a plaintiff class consisting of " '[a]ll women employed at any Wal–Mart domestic retail store at any time since December 26, 1998, who have been or may be subjected to Wal–Mart's challenged pay and management track promotions policies and practices.' " * * * Wal–Mart * * * contended that respondents' monetary claims for backpay could not be certified under Rule 23(b)(2), first because that Rule refers only to injunctive and declaratory relief, and second because the backpay claims could not be manageably tried as a class without depriving Wal–Mart of its right to present certain statutory defenses. With one limitation not relevant here, the District Court granted respondents' motion and certified their proposed class.

A divided en banc Court of Appeals substantially affirmed the

District Court's certification order. * * * With respect to the Rule 23(b)(2) question, the Ninth Circuit held that respondents' backpay claims could be certified as part of a (b)(2) class because they did not "predominat[e]" over the requests for declaratory and injunctive relief, meaning they were not "superior in strength, influence, or authority" to the nonmonetary claims.

* * *

III

We * * * conclude that respondents' claims for backpay were improperly certified under Federal Rule of Civil Procedure 23(b)(2). Our opinion in *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994) (per curiam) expressed serious doubt about whether claims for monetary relief may be certified under that provision. We now hold that they may not, at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief.

A

Rule 23(b)(2) allows class treatment when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." One possible reading of this provision is that it applies *only* to requests for such injunctive or declaratory relief and does not authorize the class certification of monetary claims at all. We need not reach that broader question in this case, because we think that, at a minimum, claims for *individualized* relief (like the backpay at issue here) do not satisfy the Rule. The key to the (b)(2) class is "the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." Richard Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009). In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant. Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.

That interpretation accords with the history of the Rule. Because Rule 23 "stems from equity practice" that pre-dated its codification, *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997), in determining its meaning we have previously looked to the

historical models on which the Rule was based, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 841–45 (1999). As we observed in *Amchem*, "[c]ivil rights cases against parties charged with unlawful, class–based discrimination are prime examples" of what (b)(2) is meant to capture. In particular, the Rule reflects a series of decisions involving challenges to racial segregation—conduct that was remedied by a single classwide order. In none of the cases cited by the Advisory Committee as examples of (b)(2)'s antecedents did the plaintiffs combine any claim for individualized relief with their classwide injunction. *See* Advisory Committee's Note, 39 F.R.D. 69, 102 (1966) (citing cases).

* * *

Permitting the combination of individualized and class–wide relief in a (b)(2) class is also inconsistent with the structure of Rule 23(b). Classes certified under (b)(1) and (b)(2) share the most traditional justifications for class treatment—that individual adjudications would be impossible or unworkable, as in a (b)(1) class, or that the relief sought must perforce affect the entire class at once, as in a (b)(2) class. For that reason these are also mandatory classes: The Rule provides no opportunity for (b)(1) or (b)(2) class members to opt out, and does not even oblige the District Court to afford them notice of the action. Rule 23(b)(3), by contrast, is an "adventuresome innovation" of the 1966 amendments, framed for situations "in which 'class–action treatment is not as clearly called for.' " It allows class certification in a much wider set of circumstances but with greater procedural protections. Its only prerequisites are that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." And unlike (b)(1) and (b)(2) classes, the (b)(3) class is not mandatory; class members are entitled to receive "the best notice that is practicable under the circumstances" and to withdraw from the class at their option.

Given that structure, we think it clear that individualized monetary claims belong in Rule 23(b)(3). The procedural protections attending the (b)(3) class—predominance, superiority, mandatory notice, and the right to opt out—are missing from (b)(2) not because the Rule considers them unnecessary, but because it considers them unnecessary *to a (b)(2) class*. When a class seeks an indivisible injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute. Predominance and superiority are self–evident. But with respect to each class member's individualized claim

for money, that is not so—which is precisely why (b)(3) requires the judge to make findings about predominance and superiority before allowing the class. Similarly, (b)(2) does not require that class members be given notice and opt–out rights, presumably because it is thought (rightly or wrongly) that notice has no purpose when the class is mandatory, and that depriving people of their right to sue in this manner complies with the Due Process Clause. In the context of a class action predominantly for money damages we have held that absence of notice and opt-out violates due process. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). While we have never held that to be so where the monetary claims do not predominate, the serious possibility that it may be so provides an additional reason not to read Rule 23(b)(2) to include the monetary claims here.

B

Against that conclusion, respondents argue that their claims for backpay were appropriately certified as part of a class under Rule 23(b)(2) because those claims do not "predominate" over their requests for injunctive and declaratory relief. They rely upon the Advisory Committee's statement that Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates *exclusively or predominantly* to money damages." The negative implication, they argue, is that it *does* extend to cases in which the appropriate final relief relates only partially and nonpredominantly to money damages. Of course it is the Rule itself, not the Advisory Committee's description of it, that governs. And a mere negative inference does not in our view suffice to establish a disposition that has no basis in the Rule's text, and that does obvious violence to the Rule's structural features. The mere "predominance" of a proper (b)(2) injunctive claim does nothing to justify elimination of Rule 23(b)(3)'s procedural protections: It neither establishes the superiority of *class* adjudication over *individual* adjudication nor cures the notice and opt–out problems. We fail to see why the Rule should be read to nullify these protections whenever a plaintiff class, at its option, combines its monetary claims with a request—even a "predominating request"—for an injunction.

Respondents' predominance test, moreover, creates perverse incentives for class representatives to place at risk potentially valid claims for monetary relief. In this case, for example, the named plaintiffs declined to include employees' claims for compensatory damages in their complaint. That strategy of including only backpay claims made it more likely that monetary relief would not "predominate." But it also created the possibility (if the predominance test were correct) that individual class members' compensatory-damages claims would be *precluded* by litigation they had no power to

hold themselves apart from. If it were determined, for example, that a particular class member is not entitled to backpay because her denial of increased pay or a promotion was *not* the product of discrimination, that employee might be collaterally estopped from independently seeking compensatory damages based on that same denial. That possibility underscores the need for plaintiffs with individual monetary claims to decide *for themselves* whether to tie their fates to the class representatives' or go it alone—a choice Rule 23(b)(2) does not ensure that they have.

The predominance test would also require the District Court to reevaluate the roster of class members continually. The Ninth Circuit recognized the necessity for this when it concluded that those plaintiffs no longer employed by Wal–Mart lack standing to seek injunctive or declaratory relief against its employment practices. The Court of Appeals' response to that difficulty, however, was not to eliminate *all* former employees from the certified class, but to eliminate only those who had left the company's employ by the date the complaint was filed. That solution has no logical connection to the problem, since those who have left their Wal–Mart jobs *since* the complaint was filed have no more need for prospective relief than those who left beforehand. As a consequence, even though the validity of a (b)(2) class depends on whether "final injunctive relief or corresponding declaratory relief is appropriate respecting the class *as a whole*," about half the members of the class approved by the Ninth Circuit have no claim for injunctive or declaratory relief at all. Of course, the alternative (and logical) solution of excising plaintiffs from the class as they leave their employment may have struck the Court of Appeals as wasteful of the District Court's time. Which indeed it is, since if a backpay action were properly certified for class treatment under *(b)(3)*, the ability to litigate a plaintiff's backpay claim as part of the class would not turn on the irrelevant question whether she is still employed at Wal–Mart. What follows from this, however, is not that some arbitrary limitation on class membership should be imposed but that the backpay claims should not be certified under Rule 23(b)(2) at all.

Finally, respondents argue that their backpay claims are appropriate for a (b)(2) class action because a backpay award is equitable in nature. The latter may be true, but it is irrelevant. The Rule does not speak of "equitable" remedies generally but of injunctions and declaratory judgments. As Title VII itself makes pellucidly clear, backpay is neither. *See* 42 U.S.C. § 2000e–5(g)(2)(B)(i) and (ii) (distinguishing between declaratory and injunctive relief and the payment of "backpay," see § 2000e– 5(g)(2)(A)).

C

In *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998), the Fifth Circuit held that a (b)(2) class would permit the certification of monetary relief that is "incidental to requested injunctive or declaratory relief," which it defined as "damages that flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief." In that court's view, such "incidental damage should not require additional hearings to resolve the disparate merits of each individual's case; it should neither introduce new substantial legal or factual issues, nor entail complex individualized determinations." We need not decide in this case whether there are any forms of "incidental" monetary relief that are consistent with the interpretation of Rule 23(b)(2) we have announced and that comply with the Due Process Clause. Respondents do not argue that they can satisfy this standard, and in any event they cannot. Contrary to the Ninth Circuit's view, Wal–Mart is entitled to individualized determinations of each employee's eligibility for backpay. Title VII includes a detailed remedial scheme. If a plaintiff prevails in showing that an employer has discriminated against him in violation of the statute, the court "may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, [including] reinstatement or hiring of employees, with or without backpay . . . or any other equitable relief as the court deems appropriate." § 2000e–5(g)(1). But if the employer can show that it took an adverse employment action against an employee for any reason other than discrimination, the court cannot order the "hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any backpay." § 2000e–5(g)(2)(A).

We have established a procedure for trying pattern–or–practice cases that gives effect to these statutory requirements. When the plaintiff seeks individual relief such as reinstatement or backpay after establishing a pattern or practice of discrimination, "a district court must usually conduct additional proceedings . . . to determine the scope of individual relief." *Teamsters*, [431 U.S. 324, 361 (1977)]. At this phase, the burden of proof will shift to the company, but it will have the right to raise any individual affirmative defenses it may have, and to "demonstrate that the individual applicant was denied an employment opportunity for lawful reasons."

The Court of Appeals believed that it was possible to replace such proceedings with Trial by Formula. A sample set of the class members would be selected, as to whom liability for sex discrimination and the backpay owing as a result would be determined in depositions supervised by a master. The percentage of claims determined to be

valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings. We disapprove that novel project. Because the Rules Enabling Act forbids interpreting Rule 23 to "abridge, enlarge or modify any substantive right," 28 U.S.C.§ 2072(b), a class cannot be certified on the premise that Wal–Mart will not be entitled to litigate its statutory defenses to individual claims. And because the necessity of that litigation will prevent backpay from being "incidental" to the classwide injunction, respondents' class could not be certified even assuming, *arguendo*, that "incidental" monetary relief can be awarded to a 23(b)(2) class.

* * *

The judgment of the Court of Appeals is

Reversed.

TAB 7-3

BNA Insights

CLASS ACTIONS

Most of the journalistic commentary about the U.S. Supreme Court's decision in *Wal-Mart Stores Inc. v. Dukes*, 79 U.S.L.W. 4527 (U.S. June 20, 2011), (slip opinion No. 10-277 available at http://www.supremecourt.gov/opinions/10pdf/10-277.pdf), has missed the forest for the trees. The case is extremely significant and will close the courthouse doors to most employment discrimination litigation under Title VII of the 1964 Civil Rights Act—but not for the reasons most seem to think, according to the author, John C. Coffee Jr.

"You Just Can't Get There From Here": A Primer on *Wal-Mart v. Dukes*

BY JOHN C. COFFEE JR.

The problem is not the U.S. Supreme Court's 5-4 decision that Fed. R. Civ. P. 23(a)(2)'s "commonality" requirement was not satisfied (that outcome was widely expected), but rather the court's unanimous decision that back pay (and other forms of money damages) could not be awarded in a Rule 23(b)(2) class action.

Most commentary has focused on the issue on which the court split and ignored the greater significance of the issue on which they agreed. That the court's liberals went docilely along with the conservative majority on the Rule 23(b)(2) money damages issue seems surprising and raises a question: Did they really understand the impact of what they were doing?

The simple truth is that employment discrimination litigation cannot normally be certified under Rule 23(b)(3) because of the "predominance" requirement of that rule, which requires that the common questions of law and fact "predominate" over the individual ones. Even in a far simpler, more streamlined case than *Wal-Mart*, there will still typically be a host of individual issues that will make it difficult (and usually impossible) to satisfy that predominance standard.

Indeed, recognizing this problem a decade ago, the U.S. Court of Appeals for the Second Circuit crafted in response an "ad hoc balancing" approach in *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147 (2d Cir. 2001). Under this approach, in a Title VII class action, the class members could seek compensatory damages when "the positive weight or value to the plaintiffs of the injunctive or declaratory relief sought is predominant even though compensatory or punitive damages are also claimed." *Robinson*'s test looked to whether "(1) even in the absence of a possible monetary recovery, reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought, and (2) the injunctive or declaratory relief sought would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits." *Id.* at 164.

Robinson's test was indeed ad hoc and arguably a jury-rigged judicial invention with little support in the text of the rule, but it worked. An invention born of necessity, the *Robinson* decision was adopted two years later by the Ninth Circuit, which reached the same assessment. See *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003). Other circuits disagreed, and the resulting split in the circuits had long made a Supreme Court review of this issue seem inevitable, even without the overbroad, sprawling class that plaintiffs cobbled together in *Wal-Mart*. Although *Robinson* employed a narrower, more defensible standard than the Ninth Circuit adopted in its *Wal-Mart* decision to determine when monetary relief can be awarded under Rule 23(b)(2), both the Second and Ninth circuits' decisions have been clearly overruled by *Wal-Mart*. Yet curiously, nowhere in *Wal-Mart* is *Robinson* cited.

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This suggests that the liberal wing of the court may not have recognized how procedurally cut off and trapped employment discrimination victims are if back pay cannot be obtained as a form of "incidental" relief under Rule 23(b)(2). Reinforcing this sense is the casual assertion by Justice Ruth Bader Ginsburg in her *Wal-Mart* dissent that the case should be remanded to the district court for a determination as to whether it could be certified under Rule 23(b)(3). *Wal-Mart*, slip op. at 1-2 (Ginsburg, J., dissenting). That idea is a non-starter. In all circuits, the predominance standard has long been the Grim Reaper of putative class actions, and the sprawling character of the *Wal-Mart* class (with 1.5 million or more class members working in 3,500 stores in 50 states at a broad assortment of jobs) doomed it from the start—if the predominance standard applied.

So what are the issues that survive *Wal-Mart* or that *Wal-Mart* raises for the first time? They are numerous:

1. When Can Money Damages Be Awarded Under Rule 23(b)(2)?

Justice Antonin Scalia's majority decision stops short of holding that monetary relief can never be awarded under Rule 23(b)(2) (although he does acknowledge that is "one possible reading" of the text of the rule—*Wal-Mart*, slip op. at 20). Instead, his opinion holds that:

> [A]t a minimum, claims for individualized relief (like the backpay at issue here) do not satisfy the Rule. *Id.*

Emphasizing the non-opt-out character of Rule 23(b)(2) and its lack of mandatory notice, he then added:

> Permitting the combination of individualized and class wide relief in a (b)(2) class is also inconsistent with the structure of Rule 23(b)(2). *Id.* at 20-21.

When then can damages be obtained in a Rule 23(b)(2) class action? Some federal statutes provide for statutory penalties under which any victim receives an automatic, legislatively specified award. For example, the 1984 Cable Communications Policy Act, 47 U.S.C. § 521 et seq., provides for $1,000 damages per victim for certain privacy violations. Prior to *Wal-Mart*, the Second Circuit had questioned whether such damages could be awarded in a large class action. After all, $1,000 times 100,000 class members could produce an astronomical recovery, which the Second Circuit reasoned did not seem at all "incidental" to the injunctive relief. See *Parker v. Time Warner Entertainment Co.*, 331 F.3d 13 (2d Cir. 2003). But after *Wal-Mart*, that "incidental" standard may not survive and the focus may shift to whether the damages are "individualized" or uniform.

Another decision that may survive *Wal-Mart* is *In re Monumental Life Ins. Co.*, 365 F.3d 408 (5th Cir. 2004). There, in a case involving alleged discrimination against African-Americans in life insurance benefits, the Fifth Circuit found that the differential between the life insurance premiums charged to African-American policyholders and that charged to other policyholders could be calculated objectively from the face of the policy. Thus, the Fifth Circuit upheld class certification because the potential money damages award would not require judicial discretion and thus could be termed "incidental." After *Wal-Mart*, if the damages award can be determined under an objective formula (with little discretion in the court), it is possible that this will be seen as uniform and not "individualized" relief. But it is also possible that if there can be significant variations in awards among class members, this would lead to a characterization of the relief as "individualized." Moreover, even if the damages can be calculated objectively, at some point the damages formula may become sufficiently complicated that the relief also becomes "individualized" and hence unavailable. Time will tell.

2. Can Defenses Preclude Class Certification?

Let us suppose that a Rule 23(b)(3) class is proposed on behalf of the employees of a single plant and the basis for the claim of discrimination is an express rule requiring applicants to obtain a specified score on a standardized exam that cannot be shown to be job-related and whose use has a disparate (and adverse) impact on minorities. Here, there is a strong possibility that the common issues will predominate over the individual issues.

But still problems remain under *Wal-Mart*. As Justice Scalia noted, Title VII gives the employer an affirmative defense:

> [I]f the employer can show that it took an adverse employment action against an employee for any reason other than discrimination, the court cannot order the 'hiring, reinstatement, or promotion of an individual, as an employee, or the payment to him of any backpay.' *Id.* at 26.

Suppose then that the employer alleges that it either failed to promote or discharge minority employees because of poor attendance records, recurrent disputes with customers, or the misstatement or omission of information in their employment application. The defendant further asserts that these individualized defenses (as to which it bears the burden of proof) defeat predominance so that the putative class action may not be certified. Alternatively, this same argument can be stated in terms of the "superiority" requirement of Rule 23(b)(3) on the ground that a class action is not the "superior" means of resolving the dispute because the individual defenses must be heard.

The Ninth Circuit had attempted to sidestep this problem of individual defenses (which would have swamped any district court in a class numbering perhaps 1.5 million class members) by approving a sampling methodology. A statistically valid subset of the class would have been selected; a special master would then determine the validity of these defenses in these sample cases; and the court would project these results upon the class as a whole. Thus, if the defenses were determined to be valid in 10 percent of the cases in the sample, the total class action recovery after trial would be reduced by 10 percent. Calling this approach "Trial by Formula," Scalia rejected it on the grounds that, under the Rules Enabling Act, a federal rule of procedure, including Rule 23, may not "abridge, enlarge or modify any substantive right." (*Id.* at 27). Because of this limitation, he concluded that: "a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims." *Id.*

But if each claim can be challenged before any judgment can be awarded, a large class simply cannot be

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certified (indeed, even a class of 10,000 members would drain the time and energy of most district court judges, even if they had a deep supply of magistrates at their disposal). Once again, the result is that the class action cannot be tried (Scalia and the majority do not even address the issue of whether the jury has to hear these affirmative defense disputes or whether they can be handled in a supplemental proceeding). The bottom line appears to be that: "You just can't get there from here."

The implications of the Supreme Court's insistence that the employer's defenses be respected extends beyond employment litigation or the use of a sampling methodology. Suppose in a securities class action that the district court determines at class certification that the relevant market is efficient and thus that the corporate issuer is subject to the "fraud on the market" doctrine. But *Basic v. Levinson*, 485 U.S. 224 (1988), did say that its presumption of reliance was rebuttable. Assume further then that the defendant seeks at trial to introduce evidence of its claim that 20 percent of the class consists of "indexed" institutional investors who could not have relied on any financial information because they simply hold a diversified portfolio consisting of the stocks of all public companies. Today, the correct answer is that these investors could still say that, even if they did not study this information, they still relied on the market to price these stocks correctly. But, in the future, will the Supreme Court allow defendants to seek to rebut reliance at trial for those investors they think did not rely on the alleged misstatement? The result would be to make individual issues predominate over common issues (and also to make the action unmanageable for purposes of Rule 23(b)(3)). *Wal-Mart* does not suggest that the court will go this far. In a footnote, the court asserts that at trial in a securities class action the plaintiffs "will surely have to prove again at trial [that the market was efficient] in order to make out their case on the merits." (*Id.* at 10, n.6.) At trial, defendants will be able to attack both loss causation and market efficiency, but not individual reliance (at least unless the Court decides to re-consider *Basic v. Levinson*).

3. Can Sampling Methodology Be Used in Individual Mass Tort Cases?

Assume that several thousand asbestos (or similar mass tort cases involving exposure to a dangerous chemical) have been consolidated before a district court. Rather than try each case, it is seeking to use a sampling methodology under which outcomes reached in a subset of cases will be applied to the entire population. But Scalia denigrated this approach in *Wal-Mart*, calling it "Trial By Formula." No doubt that there are risks in using such a procedure in the future after *Wal-Mart*, but Scalia's rejection of sampling was based on the Rules Enabling Act ("REA"). The decision holds that because the REA forbids any interpretation of the federal rules that "abridge, enlarge or modify any substantive right," Rule 23 cannot be read to permit any eclipsing of defendant's ability to raise its statutory defenses. But consolidated individual mass tort cases are not governed by any special rule, and that consideration does not apply. Possibly, the court may in the future find due process problems in use of sampling problems, but that day has not yet arrived.

4. How Will the Commonality Requirement Be Read in Future Cases?

Traditionally, commonality was the easiest requirement to satisfy in Rule 23(a). In some contexts, it will remain easy to satisfy (for example, securities class actions where the common issue is typically whether the defendant made a material misstatement or omission in its public disclosures. But *Wal-Mart*'s basic holding on the commonality issue appears to be that plaintiffs must identify "a common mode of exercising discretion that pervades the entire company." (*Id.* at 15). This will probably force plaintiffs to reduce the size of proposed classes, limiting them to single plants or job classifications—or at the least to a common supervisor who arguably exercised discretion in a discriminatory fashion. That already was the tendency in most other circuits. See, e.g., *Andersen v. Westinghouse Savannah River Co.*, 406 F.3d 248 (4th Cir. 2005); *Cooper v. Southern Co.*, 390 F.3d 695 (11th Cir. 2004); *Bacon v. Honda of Am. Mfg. Inc.*, 370 F.3d 565, 571 (6th Cir. 2004). In general, these cases have disfavored classes that encompass both workers and supervisors or production line workers in different plants with different production capabilities.

In this light, the majority's refusal in *Wal-Mart* to certify an extremely sprawling class action, covering 3,500 stores, 50 states and a broadly number of job classifications, was not surprising. Indeed, it is doubtful that even the Second Circuit (or any other circuit) would have certified *Wal-Mart* (and the Ninth Circuit did so only by one vote on en banc review).

But if the dissent may protest too much about the majority's failure to certify a class of *Wal-Mart*'s scope, they can object more convincingly to how the majority construes the commonality requirement. Scalia argues succinctly that:

> Without some glue holding the alleged reasons for all these decisions together, it will be impossible to say that examination of all of the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored.* (*Id.* at 12).

The required "glue" here seems to be not only a similar identity on the part of the plaintiffs, but a similar motivation or purpose on the part of the defendant. Relying on *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982), Scalia concludes that the plaintiffs must plead a "common answer" that will satisfy the commonality requirement, either by showing a "biased testing procedure," or "significant proof that an employer operated under a general policy of discrimination." *Id.* at 12. But that is what the plaintiffs' regression statistics arguably showed—not enough to prove the case at trial, but arguably enough to provide the requisite "glue."

In future cases in which plaintiffs assert a "general policy of discrimination," it appears likely that they will have to supply a substantial narrative, and a virtual mini-trial may ensue. As redefined, commonality necessarily overlaps with the merits, and *Wal-Mart* shows the majority unpersuaded by anecdotes, sociological models, or regression equations. But unconscious discrimination will seldom manifest itself in explicit statements, and employers have long ago learned not to rely on

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standardized testing procedures (at least unless the test has been empirically validated as job related).

In the last analysis, the majority was probably justified in saying that the *Wal-Mart* class was too sprawling, but less so in requiring a "common answer" that knits together all the examples of discrimination with a common thread. Less damage would have been done if the court had rejected the proposed class on grounds of typicality or adequacy of representation (i.e., Rules 23(a)(3) or (a)(4)). After all, a shop floor employee on the West Coast really cannot adequately represent administrators on the East Coast (or vice versa), and subclasses might have been properly required. At some point, multiple subclasses might have made the class "unmanageable" under Rule 23(b)(3), but this would have only required multiple class actions to be filed.

Instead, for the future, class certification in cases where a "general policy of discrimination" is alleged will see a long debate over whether a "common answer" linking together all these episodes has been adequately alleged—which debate will then have to be repeated at trial before the jury. Even in a case involving a single plant, this will be a significant obstacle and may require a possible minitrial.

5. What Should Corrective Legislation Do?

If we recognize (as we must) that collective litigation for money damages for employment discrimination is now largely foreclosed, the next question becomes: What type of legislative reform would both work and be feasible? Polarized as the political system is today, the one reform that might pass over the intermediate future is a narrow revision of the procedures applicable to employment discrimination. Conceivably, Republican women might join their Democratic counterparts in supporting such a reform. In contrast, an attempt to rewrite Rule 23 generally to soften its "predominance" requirement would spur the entire business community into frenzied lobbying in opposition. Moreover, reforms addressed to the Supreme Court's revision of the "commonality" requirement are likely to be futile. In the next sprawling class action, the majority might instead seize on the "typicality" or "adequate representation" requirements or some other provision in Rule 23.

But Congress could establish a special collective litigation procedure for employment claims that did not rely on Rule 23. For example, consider a statute that reads:

Proposed Addition to Title VII

(a) One or more person may sue on behalf of themselves and other persons, without complying with Rule 23 of the Federal Rules of Civil Procedure, with respect to [an alleged violation of Title VII] for compensation (including back pay) and related money damages, injunctive, equitable, or declaratory relief if:

(1) the individual or individuals bringing suit and their counsel can adequately represent the other persons sought to be represented in the action;

(2) the persons sought to be so represented are reasonably similarly situated in terms of both (i) the allegations pleaded with specificity in the complaint and (ii) their job categories, employment positions and records, or applicant status; and

(3) pursuant to the court's direction, reasonable notice is given to the other persons sought to be represented and they do not decline such representation.

(b) In determining whether the [violation of Title VII] caused injury or loss to any person, the court may use a reasonable sampling methodology and adjust the total damage award in accordance therewith if, and to the extent that, it determines that individualized hearings with regard to defenses or related factual questions would sufficiently burden the court so as to make a collective proceeding infeasible.

Crude and imperfect as this language is, it seeks to restore an opt-out employment discrimination class action of intermediate scope. It also largely outflanks the limitations imposed by *Wal-Mart* on Rule 23. As long as Due Process standards are complied with, Congress need not drive all its square pegs into the round hole of Rule 23 (and then watch the current Supreme Court frustrate its legislative intent).

The proposed language confers considerable (but not unlimited) discretion upon the district court to determine which job categories or employment positions are "reasonably similarly situated in terms of the allegations pleaded" in order to be grouped within the same collective action. Thus, it does not authorize companywide sprawling class actions of the same breadth as *Wal-Mart* presented, but multi-jurisdictional and multiplant actions would still be possible. This language also allows money damages and injunctive relief to be combined within the functional equivalent of an opt-out class action. Finally, it specifically authorizes sampling procedures (although the Supreme Court may yet find a Due Process obstacle in their use).

Ultimately, it is time to recognize that the concept of a collective remedy need not be co-extensive with, or depend upon, the boundaries of Rule 23. This recognition is necessary because the current Supreme Court is shrinking Rule 23's boundaries and seems likely to continue to do so. At the same time, another sad lesson of *Wal-Mart* is that when plaintiffs seek to maximize their leverage by suing on a companywide, "mega" basis, they invite judicial reversal. Hubris leads to disaster, and *Wal-Mart* presents the paradigmatic case of such a train wreck—one that has been coming for several years and now has arrived.

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TAB 7-4

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 11a0289p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DANIEL PILGRIM and PATRICK KIRLIN,
Plaintiffs-Appellants,

v.

UNIVERSAL HEALTH CARD, LLC and
COVERDELL & COMPANY, INC.,
Defendants-Appellees.

Nos. 10-3211/3475

Appeal from the United States District Court
for the Northern District of Ohio at Akron.
No. 09-00879—John R. Adams, District Judge.

Argued: October 6, 2011

Decided and Filed: November 10, 2011

Before: KEITH, SUTTON and McKEAGUE, Circuit Judges.

COUNSEL

ARGUED: Peter N. Freiberg, MEISELMAN, DENLEA, PACKMAN, CARTON & EBERZ P.C., White Plains, New York, for Appellants. Robert N. Rapp, CALFEE, HALTER & GRISWOLD LLP, Cleveland, Ohio, Gary A. Corroto, TZANGAS, PLAKAS, MANNOS & RAIES, LTD., Canton, Ohio, for Appellees. **ON BRIEF:** Peter N. Freiberg, MEISELMAN, DENLEA, PACKMAN, CARTON & EBERZ P.C., White Plains, New York, for Appellants. Robert N. Rapp, Matthew J. Kucharson, Eric S. Zell, CALFEE, HALTER & GRISWOLD LLP, Cleveland, Ohio, Gary A. Corroto, Lee E. Plakas, Edmond J. Mack, TZANGAS, PLAKAS, MANNOS & RAIES, LTD., Canton, Ohio, for Appellees.

OPINION

SUTTON, Circuit Judge. Hoping to represent a nationwide class of consumers, Daniel Pilgrim and Patrick Kirlin sued two companies responsible for creating and marketing a healthcare discount program, alleging that the companies had used deceptive advertising to sell their product. The consumer-protection laws of many States, not just of Ohio, govern these claims and factual variations among the claims abound, making a class action in this setting neither efficient nor workable nor above all consistent with the requirements of Rule 23 of the Federal Rules of Civil Procedure. We affirm.

I.

In 2007, Universal Health Card and Coverdell & Company created a program designed to provide healthcare discounts to consumers. Membership in the program gave consumers access to a network of healthcare providers that had agreed to lower their prices for members. Universal placed ads in newspapers around the country encouraging customers to visit its website or call its toll-free hotline to learn more about the program and to sign up for a membership. Coverdell was responsible for maintaining the network of healthcare providers and for reviewing Universal's advertising materials.

Some people did not like the program. They discovered healthcare providers listed in the discount network that had never heard of the program, and complained that the newspaper advertisements, designed to look like news stories and dubbed "advertorials," were deceptive.

Two disenchanted consumers, Pilgrim and Kirlin, sued Universal and Coverdell in federal court, seeking to represent a nationwide class of all people who had joined the program. The opt-out class encompassed 30,850 people. The district court exercised jurisdiction under a provision of CAFA, the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d), which grants jurisdiction over class actions in which the amount

in controversy exceeds $5 million and the parties are minimally diverse. The plaintiffs complained that the defendants advertised the program as "free" when it included a non-refundable registration fee and a monthly membership fee after the first thirty days. Even then, the program was worthless, they added, because the advertised providers in their area did not offer the featured discounts. Based on these and other allegedly deceptive practices, the plaintiffs claimed that the companies had violated the Ohio Consumer Sales Practices Act as well as Ohio's common law prohibition against unjust enrichment.

Coverdell filed a motion to dismiss the complaint under Rule 12(b)(6), which the district court granted. It reasoned that Universal, not Coverdell, peddled and sold the memberships, making Coverdell too far removed from the transactions to qualify as a "supplier" under Ohio law or to have to answer to an unjust-enrichment claim under Ohio law.

Of more pertinence to this appeal, Universal filed a motion to strike the class allegations, which the district court also granted. It reasoned that, under Ohio's choice-of-law rules, it would have to analyze each class member's claim under the law of his or her home State. "Such a task," the district court concluded, "would make this case unmanageable as a class action" and would dwarf any common issues of fact implicated by the lawsuit. Reasoning that the claims of the named plaintiffs did not exceed $75,000, the district court dismissed the lawsuit without prejudice for lack of subject matter jurisdiction.

II.

Rule 23 of the Federal Rules of Civil Procedure governs class actions in federal court. To obtain class certification, a claimant must satisfy two sets of requirements: (1) each of the four prerequisites under Rule 23(a), and (2) the prerequisites of one of the three types of class actions provided for by Rule 23(b). A failure on either front dooms the class. A district court's class-certification decision calls for an exercise of judgment; its use of the proper legal framework does not. So long as the district court applies the correct framework, we review its decision for an abuse of discretion.

In this instance, the district court opted to focus on a failure to meet the predominance requirement under Rule 23(b), more particularly under Rule 23(b)(3), the only conceivable vehicle for this claim. To demonstrate predominance, parties seeking class recognition must show that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). The plaintiffs could not do that here, the district court held, because each class member's claim would be governed by the law of the State in which he made the challenged purchase, and the differences between the consumer-protection laws of the many affected States would cast a long shadow over any common issues of fact plaintiffs might establish. That judgment is sound and far from an abuse of discretion for three basic reasons.

Reason one: different laws would govern the class members' claims. As the parties agree (quite properly, we might add), Ohio's choice-of-law rules determine which consumer-protection laws cover these claims. *See Muncie Power Prod., Inc. v. United Techs. Automotive, Inc.*, 328 F.3d 870, 873 (6th Cir. 2003). Under those rules, "the law of the place of injury controls unless another jurisdiction has a more significant relationship to the lawsuit." *Morgan v. Biro Mfg. Co.*, 474 N.E.2d 286, 289 (Ohio 1984). In determining the State with the most significant relationship, Ohio courts consider: (1) "the place of the injury"; (2) the location "where the conduct causing the injury" took place; (3) "the domicile, residence, . . . place of incorporation, and place of business of the parties"; (4) "the place where the relationship between the parties . . . is located"; and (5) any of the factors listed in Section 6 of the Restatement (Second) of Conflict of Laws "which the court may deem relevant to the litigation." *Id.* The Section 6 factors include: "the relevant policies of the [State in which the suit is heard]," "the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue," "the basic policies underlying the particular field of law," "certainty, predictability and uniformity of result" and "ease in the determination and application of law to be applied." *Id.* at 289 n.6 (internal quotation omitted).

Gauged by these factors, the consumer-protection laws of the potential class members' home States will govern their claims. As with any claim arising from an interstate transaction, the location-based factors point in opposite directions: injury in one State, injury-causing conduct in another; residence in one State, principal place of business in another. Yet the other factors point firmly in the direction of applying the consumer-protection laws of the States where the protected consumers lived and where the injury occurred. No doubt, States have an independent interest in preventing deceptive or fraudulent practices by companies operating within their borders. But the State with the strongest interest in regulating such conduct is the State where the consumers—the residents protected by *its consumer*-protection laws—are harmed by it. That is especially true when the plaintiffs complain about the conduct of companies located in separate States (Universal in Ohio; Coverdell in Georgia), diluting the interest of any one State in regulating the source of the harm yet in no way minimizing the interest of each consumer's State in regulating the harm that occurred to its residents.

To conclude otherwise would frustrate the "basic policies underlying" consumer-protection laws. *Morgan*, 474 N.E.2d at 289 n.6. It would permit companies to "evade [local] consumer protection laws by locating themselves just across the [border] from the . . . citizens they seek as customers." *Williams v. First Gov't Mortg. & Investors Corp.*, 176 F.3d 497, 499 (D.C. Cir. 1999) (internal quotation marks omitted). And it would permit nationwide companies to choose the consumer-protection law they like best by locating in a State that demands the least. Does anyone think that, if State A opted to attract telemarketing companies to its borders by diluting or for that matter eliminating any regulation of them, the policy makers of State B would be comfortable with the application of the "consumer-protection" laws of State A to their residents—the denizens of State B? Highly doubtful: the idea that "one state's law would apply to claims by consumers throughout the country—not just those in Indiana, but also those in California, New Jersey, and Mississippi—is a novelty." *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1016 (7th Cir. 2002); *see also id.* at 1018 ("We do not for a second suppose that Indiana would apply Michigan law to an auto sale if Michigan permitted auto companies to conceal defects from customers; nor do we think it likely that Indiana

would apply Korean law (no matter *what* Korean law on the subject may provide) to claims of deceit in the sale of Hyundai automobiles, in Indiana, to residents of Indiana . . . ."). Indeed, it is not even clear whether, under a proper interpretation of the Ohio Consumer Sales Practices Act, that law would apply to extraterritorial injuries. *See Chesnut v. Progressive Cas. Ins. Co.*, 850 N.E.2d 751, 756 (Ohio Ct. App. 2006). Under *Morgan*, the place of the injury controls in a consumer-protection lawsuit, requiring application of the home-state law of each potential class member.

Working to overcome this conclusion, plaintiffs offer up a pair of Ohio common pleas court decisions that applied the Ohio Consumer Sales Practices Act to out-of-state sales by Ohio suppliers. *See Parker v. Berkley Premium Nutraceuticals, Inc.*, 2005 Ohio Misc. LEXIS 605 (Montgomery County 2005); *Brown v. Market Dev., Inc.*, 322 N.E.2d 367 (Hamilton County 1974). Yet one case (*Brown*) was decided before the Ohio Supreme Court's decision in *Morgan* and understandably makes no mention of it. The other (*Parker*) was decided after *Morgan*, and less understandably makes no mention of it, and, worse, treats *Brown* as a decision by the Ohio Supreme Court. *See Parker*, 2005 Ohio Misc. LEXIS 605, at *44. These decisions shed no light on the proper application of *Morgan*—a decision of the Ohio Supreme Court—to this case.

In the final analysis, *Morgan*'s choice-of-law rules make clear that the consumer-protection laws of the State where each injury took place would govern these claims. In view of this reality and in view of plaintiffs' appropriate concession that the consumer-protection laws of the affected States vary in material ways, no common legal issues favor a class-action approach to resolving this dispute.

Reason two: any potential common issues of fact cannot overcome this problem. Even if a nationwide class covering claims governed by the laws of the various States could overcome this problem by demonstrating considerable factual overlap, a point we need not decide, this is not such a case. The defendants' program did not operate the same way in every State and the plaintiffs suffered distinct injuries as a result. A core part of the claim is that the program was worthless because the listed healthcare providers near the plaintiffs did not offer the promised discounts or because there were

no listed providers near them in the first place. But to establish the point, the plaintiffs would need to make particularized showings in different parts of the country, particularly since the program apparently satisfied some consumers, as confirmed by the unchallenged reality that fifteen percent of those who signed up remained enrolled months after the suit was filed. Where and when featured providers offered discounts is a prototypical factual issue that will vary from place to place and from region to region. *Cf. Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. __, 131 S. Ct. 2541, 2552 (2011).

On top of that, the advertisements varied to account for the different requirements of each State's consumer-protection laws, a point plaintiffs acknowledge but cannot overcome. "Other than variations to ensure compliance with consumer regulations of the different states," they say, "the advertisements that were published [in various local newspapers] were substantially the same." Plaintiffs' Br. at 12. The key words are "[o]ther than" and "substantially," and these qualifications show that the plaintiffs' claims are not even linked by a common advertisement. Variations designed to account for differences in the applicable laws not only might suggest that the defendants *were trying* to comply in different ways with their legal obligations in each State, but they also confirm the varied nature of the claims, injuries and defenses. Even if, as the plaintiffs claim, callers heard identical sales pitches, Internet visitors saw the same website and purchasers received the same fulfillment kit, these similarities establish only that there is *some* factual overlap, not a predominant factual overlap among the claims and surely not one sufficient to overcome the key defect that the claims must be resolved under different legal standards.

Reason three: this conclusion is consistent with decisions of this court and several others. In a case involving negligence claims against a prosthetics manufacturer, we refused to allow a nationwide class covered by the laws of different States. "If more than a few of the laws of the fifty states differ," we explained, "the district judge would face an impossible task of instructing a jury on the relevant law." *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1995). So too here. Other circuits have come to similar conclusions. The Seventh Circuit reversed a district court's certification of a

nationwide class in a contract and consumer fraud suit involving allegedly defective tires, holding that such a class is rarely, if ever, appropriate where each plaintiff's claim will be governed by the law of his own State. *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015, 1018 (7th Cir. 2002). "Because these claims must be adjudicated under the law of so many jurisdictions," the Court reasoned, "a single nationwide class is not manageable." *Id.* at 1018. Likewise, in a negligence, products liability and medical monitoring lawsuit stemming from allegedly faulty pacemakers, the Ninth Circuit held that variations in state law greatly compounded the factual differences between claims, overwhelming any common issues related to causation and making national class resolution impractical. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189–90 (9th Cir. 2001); *see also Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 674 (7th Cir. 2001) ("Differences of [state law] cut strongly against nationwide classes . . . ."); *Castano v. American Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996) ("In a multi-state class action, variations in state law may swamp any common issues and defeat predominance."); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 627 (3d Cir. 1996) ("[B]ecause we must apply an individualized choice of law analysis to each plaintiff's claims, the proliferation of disparate factual and legal issues is compounded exponentially." (citation omitted)), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). In each of these cases, there were many common issues of fact, but none of that dissuaded the courts from refusing to certify class claims that would be measured by the legal requirements of different state laws.

The plaintiffs' other objection to the district court's class-action ruling goes to the timing, not the substance, of it. Given more time and more discovery, they say, they would have been able to poke holes in the court's class-certification analysis. We think not.

That the motion to strike came before the plaintiffs had filed a motion to certify the class does not by itself make the court's decision reversibly premature. Rule 23(c)(1)(A) says that the district court should decide whether to certify a class "[a]t an early practicable time" in the litigation, and nothing in the rules says that the court must

await a motion by the plaintiffs. As a result, "[e]ither plaintiff or defendant may move for a determination of whether the action may be certified under Rule 23(c)(1)." 7AA Charles Allen Wright et al., *Federal Practice and Procedure* § 1785; *see also, e.g.*, *Vinole v. Countrywide Home Loans, Inc*., 571 F.3d 935, 941–44 (9th Cir. 2009); *Cook County College Teachers Union, Local 1600 v. Byrd*, 456 F.2d 882, 884–85 (7th Cir. 1972).

To say that a defendant may freely move for resolution of the class-certification question whenever it wishes does not free the district court from the duty of engaging in a "rigorous analysis" of the question, and "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161, 160 (1982). The problem for the plaintiffs is that we cannot see how discovery or for that matter more time would have helped them. To this day, they do not explain what type of discovery or what type of factual development would alter the central defect in this class claim. The key reality remains: Their claims are governed by different States' laws, a largely legal determination, and no proffered or potential factual development offers any hope of altering that conclusion, one that generally will preclude class certification.

That leaves one final point. After the district court granted the motion to strike the class allegations, it dismissed the action without prejudice for lack of jurisdiction. The jurisdictional determination is mistaken. *See Metz v. Unizan Bank*, 649 F.3d 492, 500 (6th Cir. 2011); *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers' Int'l Union v. Shell Oil Co.*, 602 F.3d 1087, 1091–92 (9th Cir. 2010); *Cunningham Charter Corp. v. Learjet, Inc.*, 592 F.3d 805, 806 (7th Cir. 2010); *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1268 n.12 (11th Cir. 2009). This flaw, however, need not detain us or the parties. Even though parties may not establish subject matter jurisdiction in the federal courts by consenting to it, *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93 (1998), that does not mean they must *remain* in federal court even when they cannot do so on their own terms. The federal courts closely guard the entrance to jurisdiction but not the exit. If the plaintiffs do not wish to continue pursuing

relief in this court and in this context, nothing about Article III requires them to do so. That is what happened here: the plaintiffs declined to appeal the district court's holding that it lacked jurisdiction once it struck the class allegations, and the parties agreed at oral argument that an affirmance of the class issue as to Universal would apply with equal force to Coverdell.

III.

For these reasons, we affirm the district court's judgment striking the class allegations and dismissing this lawsuit without prejudice against both defendants.

TAB 7-5

IN RE HYDROGEN PEROXIDE ANTITRUST LITIGATION

United States Court of Appeals, Third Circuit, 2008.
552 F.3d 305.

Before SCIRICA, CHIEF JUDGE, AMBRO, and FISHER, CIRCUIT JUDGES.

SCIRICA, CHIEF JUDGE.

[A class of purchasers of hydrogen peroxide (a chemical used in the pulp and paper industry, and for other purposes, such as making cleaning chemicals, textiles, and electronics) brought suit against a group of chemical manufacturers, alleging that the manufacturers had conspired to keep the prices of their products artificially high, in violation of federal antitrust laws. The district court certified a class under Rule 23(b)(3) consisting of "[a]ll persons or entities * * * who purchased hydrogen peroxide, [and/or two related chemicals] in the United States * * * or from a facility located in the United States * * * directly from any of the defendants, or [entities affiliated with defendants] during the period from September 14, 1994 to January 5, 2005." *In re Hydrogen Peroxide Antitrust Litig.*, 240 F.R.D. 163, 178 (E.D.Pa. 2007). Although defendants challenged the appropriateness of class treatment on a number of grounds, the district court interpreted existing case law as "obliging [it] to limit [the certification] inquiry to the minimum necessary at this juncture." *Id.* at 170. The district court added that, "[s]o long as plaintiffs demonstrate their intention to prove a significant portion of their case though factual evidence and legal arguments common to all class members, that will now suffice." *Id.* The Third Circuit granted defendants' petition for interlocutory appeal under Rule 23(f).]

* * *

* * * In this appeal, we clarify three key aspects of class certification procedure. First, the decision to certify a class calls for findings by the court, not merely a "threshold showing" by a party, that each requirement of Rule 23 is met. Factual determinations supporting Rule 23 findings must be made by a preponderance of the evidence. Second, the court must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits—including disputes touching on elements of the cause of action. * * *

[The third issue addressed by the court, regarding evaluation of expert testimony at the class certification stage, is taken up in the following subsection. [Eds.]]

* * *

II.

Class certification is proper only "if the trial court is satisfied, after a rigorous analysis, that the prerequisites" of Rule 23 are met.[5] *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982): * * * "A class certification decision requires a thorough examination of the factual and legal allegations." *Newton* [*v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 166 (3d Cir. 2001)].

* * *

The trial court, well–positioned to decide which facts and legal arguments are most important to each Rule 23 requirement, possesses broad discretion to control proceedings and frame issues for consideration under Rule 23. But proper discretion does not soften the rule: a class may not be certified without a finding that each Rule 23 requirement is met. Careful application of Rule 23 accords with the pivotal status of class certification in large–scale litigation, because:

> denying or granting class certification is often the defining moment in class actions (for it may sound the "death knell" of the litigation on the part of plaintiffs, or create unwarranted pressure to settle nonmeritorious claims on the part of defendants) . . . .

Newton, 259 F.3d at 162. * * *

III.

Here, the District Court found the Rule 23(a) requirements were met, a determination defendants do not now challenge. Plaintiffs sought certification under Rule 23(b)(3) * * *.

Only the predominance requirement is disputed in this appeal. Predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation," *Amchem* [*Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997)] * * *. Because the "nature of the evidence that will suffice to resolve a question determines whether the question is common or individual," "a district court must formulate some prediction as

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[5] Although the Supreme Court in the quoted statement addressed Fed.R.Civ.P. 23(a), there is "no reason to doubt" that the language "applies with equal force to all Rule 23 requirements, including those set forth in Rule 23(b)(3)." *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 33 n.3 (2d Cir. 2006).

to how specific issues will play out in order to determine whether common or individual issues predominate in a given case." "If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable." Accordingly, we examine the elements of plaintiffs' claim "through the prism" of Rule 23 to determine whether the District Court properly certified the class.

A.

The elements of plaintiffs' claim are (1) a violation of the antitrust laws—here, § 1 of the Sherman Act, (2) individual injury resulting from that violation, and (3) measurable damages. Importantly, individual injury (also known as antitrust impact) is an element of the cause of action; to prevail on the merits, every class member must prove at least some antitrust impact resulting from the alleged violation.

In antitrust cases, impact often is critically important for the purpose of evaluating Rule 23(b)(3)'s predominance requirement because it is an element of the claim that may call for individual, as opposed to common, proof. * * * Plaintiffs' burden at the class certification stage is not to prove the element of antitrust impact, although in order to prevail on the merits each class member must do so. Instead, the task for plaintiffs at class certification is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members. Deciding this issue calls for the district court's rigorous assessment of the available evidence and the method or methods by which plaintiffs propose to use the evidence to prove impact at trial. * * *

[Plaintiffs' expert economist opined that the alleged conspiracy could be shown at trial by evidence common to the class. Defendants' expert economist opined to the contrary.]

* * * The District Court held that it was sufficient that [plaintiffs' expert] proposed reliable methods for proving impact and damages; it did not matter that [plaintiffs' expert] had not completed any benchmark or regression analyses, and the [district] court would not require plaintiffs to show at the certification stage that either method would work.

IV.

A.

Defendants contend the District Court applied too lenient a standard of proof with respect to the Rule 23 requirements by

(1) accepting only a "threshold showing" by plaintiffs rather than making its own determination, (2) requiring only that plaintiffs demonstrate their "intention" to prove impact on a class–wide basis, and (3) singling out antitrust actions as appropriate for class treatment even when compliance with Rule 23 is "in doubt."

Although it is clear that the party seeking certification must convince the district court that the requirements of Rule 23 are met, little guidance is available on the subject of the proper standard of "proof" for class certification. The Supreme Court has described the inquiry as a "rigorous analysis," *Falcon*, 457 U.S. at 161, and a "close look," *Amchem*, 521 U.S. at 615, but it has elaborated no further.

1.

The following principles guide a district court's class certification analysis. First, the requirements set out in Rule 23 are not mere pleading rules. *Szabo* [*v. Bridgeport Machines, Inc.*, 249 F.3d 672, 675–77 (7th Cir. 2001)]. The court may "delve beyond the pleadings to determine whether the requirements for class certification are satisfied." *Newton*, 259 F.3d at 167 (quoting 5 James Wm. Moore et al., Moore's Federal Practice § 23.61[5]) * * *.

An overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met. Some uncertainty ensued when the Supreme Court declared in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), that there is "nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." * * * As we explained in *Newton*, 259 F.3d at 166–69, *Eisen* is best understood to preclude only a merits inquiry that is not necessary to determine a Rule 23 requirement. Other courts of appeals have agreed. Because the decision whether to certify a class "requires a thorough examination of the factual and legal allegations," *Newton*, 259 F.3d at 166, the court's rigorous analysis may include a "preliminary inquiry into the merits," *id.* at 168, and the court may "consider the substantive elements of the plaintiffs' case in order to envision the form that a trial on those issues would take," *id.* at 166. A contested requirement is not forfeited in favor of the party seeking certification merely because it is similar or even identical to one normally decided by a trier of fact. Although the district court's

findings for the purpose of class certification are conclusive on that topic, they do not bind the fact–finder on the merits.

The evidence and arguments a district court considers in the class certification decision call for rigorous analysis. A party's assurance to the court that it intends or plans to meet the requirements is insufficient.

Support for our analysis is drawn from amendments to Rule 23 that took effect in 2003. First, amended Rule 23(c)(1)(A) altered the timing requirement for the class certification decision. The amended rule calls for a decision on class certification "[a]t an early practicable time after a person sues or is sued as a class representative," while the prior version had required that decision be made "as soon as practicable after commencement of an action." * * * Relatedly, in introducing the concept of a "trial plan," the Advisory Committee's 2003 note focuses attention on a rigorous evaluation of the likely shape of a trial on the issues:

> A critical need is to determine how the case will be tried. An increasing number of courts require a party requesting class certification to present a "trial plan" that describes the issues likely to be presented at trial and tests whether they are susceptible of class–wide proof.

Fed.R.Civ.P. 23 advisory committee's note, 2003 Amendments.

Additionally, the 2003 amendments eliminated the language that had appeared in Rule 23(c)(1) providing that a class certification "may be conditional." The Advisory Committee's note explains: "A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met." * * *

While these amendments do not alter the substantive standards for class certification, they guide the trial court in its proper task—to consider carefully all relevant evidence and make a definitive determination that the requirements of Rule 23 have been met before certifying a class.

To summarize: because each requirement of Rule 23 must be met, a district court errs as a matter of law when it fails to resolve a genuine legal or factual dispute relevant to determining the requirements.

2.

Class certification requires a finding that each of the requirements of Rule 23 has been met. Factual determinations necessary to make Rule 23 findings must be made by a

preponderance of the evidence. In other words, to certify a class the district court must find that the evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23.

In reviewing a district court's judgment on class certification, we apply the abuse of discretion standard. * * * Under these Rule 23 standards, a district court exercising proper discretion in deciding whether to certify a class will resolve factual disputes by a preponderance of the evidence and make findings that each Rule 23 requirement is met or is not met, having considered all relevant evidence and arguments presented by the parties. * * *

B.

Although the District Court properly described the class certification decision as requiring "rigorous analysis," some statements in its opinion depart from the standards we have articulated. The District Court stated, "So long as plaintiffs demonstrate their intention to prove a significant portion of their case through factual evidence and legal arguments common to all class members, that will now suffice. It will not do here to make judgments about whether plaintiffs have adduced enough evidence or whether their evidence is more or less credible than defendants'." With respect to predominance, the District Court stated that "[p]laintiffs need only make a threshold showing that the element of impact will predominantly involve generalized issues of proof, rather than questions which are particular to each member of the plaintiff class." As we have explained, proper analysis under Rule 23 requires rigorous consideration of all the evidence and arguments offered by the parties. It is incorrect to state that a plaintiff need only demonstrate an "intention" to try the case in a manner that satisfies the predominance requirement. Similarly, invoking the phrase "threshold showing" risks misapplying Rule 23. A "threshold showing" could signify, incorrectly, that the burden on the party seeking certification is a lenient one (such as a prima facie showing or a burden of production) or that the party seeking certification receives deference or a presumption in its favor. So defined, "threshold showing" is an inadequate and improper standard. "[T]he requirements of Rule 23 must be met, not just supported by some evidence."

* * *

To the extent that the District Court's analysis reflects application of incorrect standards, remand is appropriate. We recognize that the able District Court did not have the benefit of the standards we have articulated. Faced with complex, fact–intensive disputes, trial courts have expended considerable effort to interpret and apply faithfully the requirements of Rule 23. * * *

* * * We do not question plaintiffs' general proposition, which the District Court accepted, that a conspiracy to maintain prices could, in theory, impact the entire class despite a decrease in prices for some customers in parts of the class period, and despite some divergence in the prices different plaintiffs paid. But the question at class certification stage is whether, if such impact is plausible in theory, it is also susceptible to proof at trial through available evidence common to the class. When the latter issue is genuinely disputed, the district court must resolve it after considering all relevant evidence. Here, the District Court apparently believed it was barred from resolving disputes between the plaintiffs' and defendants' experts. Rule 23 calls for consideration of all relevant evidence and arguments, including relevant expert testimony of the parties. * * *

* * *

For the foregoing reasons, we will vacate the class certification order and remand for proceedings consistent with this opinion.

TAB 7-6

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CERTIFICATION

CLASS DEFINITIONS

Recent class certification rulings make clear that federal courts will generally not tolerate overbroad, vague, subjective or ''fail-safe'' class definitions, say attorneys John H. Beisner, Jessica D. Miller, and Jordan M. Schwartz in this BNA Insight.

The authors urge defendants facing a class action to carefully assess whether the proposed class satisfies the explicit requirements of Rule 23, and whether the class definition passes muster under recent ascertainability jurisprudence.

Ascertainability: Reading Between the Lines of Rule 23

BY JOHN H. BEISNER, JESSICA D. MILLER, AND JORDAN M. SCHWARTZ

While federal courts continue to consider the express prerequisites of Rule 23 in assessing class-certification proposals, more and more decisions are turning on an ''implied'' requirement of Rule 23: that a proposed class must be ascertainable. As the California Court of Appeal recently recognized, the ''require[ment that] a class definition [be] 'precise, objective and presently ascertainable' '' ''goes to the heart of the question of class certification.''[1] Moreover, because a court can generally determine whether a proposed class is ascertainable without resort to discovery, a growing number of courts are willing to dispose of class actions at the pleading stage if the class definition is improper on its face.[2]

[1] *Sevidal v. Target Corp.*, 189 Cal. App. 4th 905, 919 (Cal. Ct. App. 2010) (citation omitted); *see also, e.g.*, *Cunningham Charter Corp. v. Learjet Inc.*, 2009 U.S. Dist. LEXIS 35184, at *12 (S.D. Ill. Apr. 27, 2009) (similar); *Lyell v. Farmers Group Inc. Employees' Pension Plan*, 2008 U.S. Dist. LEXIS 107332 (D. Ariz. Dec. 3, 2008) (''[I]n order to maintain a class action, the class must be adequately defined and *clearly ascertainable*.'') (emphasis added).

[2] *See, e.g.*, *John v. National Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007) (''where it is facially apparent from the pleadings that there is no ascertainable class, a district court

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The California Court of Appeal recently articulated the parameters of the ascertainability requirement in *Sevidal v. Target Corp*.[3] There, the plaintiff asserted claims for, *inter alia*, consumer fraud and unjust enrichment under California law and sought to certify a class of California consumers who purchased certain items from the defendant seller that were misidentified as made in the United States.[4] The trial court found that the proposed class of California consumers was unascertainable and impermissibly overbroad because it would be too difficult to identify the class members. In affirming the trial court's ruling, the California Court of Appeal delineated the contours of the implied requirement of ascertainability. According to the court, ''[a]scertainability is achieved by defining the class in terms of objective characteristics and common transactional facts making the ultimate identification of class members possible.''[5] Therefore, ascertainability is satisfied when class members ''may be readily identified without unreasonable expense or time by reference to official [or business] records.''[6] The court went on to highlight the purpose of this requirement, which is ''to give adequate notice to class members'' and ''to determine after the litigation has concluded who is barred from relitigating.''[7]

Applying these principles, the appellate court affirmed the lower court's ruling that the proposed class was not ascertainable. The court determined that substantial evidence supported the trial court's finding that the putative class members ''could not be 'readily identified' because Target did not maintain, or have access to, records identifying the individuals who purchased a product with an erroneous country-of-origin designation.''[8]

Although plaintiff had argued that the proposed class was ascertainable because ''Target ha[d] already identified specific products which fall within this definition,'' and ''ascertaining the members that fit within the class definition'' would merely require ''identifying the consumers who purchased those products,'' the Court of Appeal rejected this argument, agreeing with the trial court that Target's records did not ''reflect only the items which were misidentified''—and more importantly—that the company could not determine ''***who*** purchased [the misidentified] products.''[9] The plaintiff also argued that the proposed class was ''specific enough such that purchasers could identify themselves.''

The court once again disagreed, reasoning that because the proposed class included consumers ''who were never exposed to the country-of-origin information'' many putative class members ''would, by definition, have no way of knowing whether [they] purchased an item *when* it was misidentified, and thus would have no way of knowing whether [they are] member[s] of the class.''[10] As the court explained, the fact that some class members may be easily identifiable ''does not mean that the class as a whole [is] ascertainable.''[11] Because the putative class members could not be easily and objectively identified, the Court of Appeal affirmed the trial court's denial of class certification.

Recent case law addressing ascertainability generally focuses on three problematic types of classes: (1) the overbroad class; (2) the difficult-to-identify class; and (3) the fail-safe class. Below, we discuss recent developments with respect to each of these three categories.

The Overbroad Class

Over the last several years, multiple courts have found that a proposed class that includes all users of a product or service—irrespective of whether the proposed class members suffered any injury or have any complaints about the product or service—is not ascertainable.[12] As some courts have explained, this is so because such a class encompasses a substantial number of class members who lack standing to recover on the asserted claims.[13]

The overbreadth principle was at play in *Sevidal*, because nearly 80 percent of the proposed class purchased an item without viewing the allegedly deceptive country-of-origin information.[14] As a result, the vast majority of the proposed class members were never ''deceived by the alleged false or misleading advertising.''[15] Accordingly, the Court of Appeal reasoned, even if Target's conduct was ''unlawful'' under California's Unfair Competition Law, the proposed class was overly broad—and therefore uncertifiable—because ''the essence of [plaintiff's] allegation [was] based on an alleged false misrepresentation to which the majority of class members were never exposed.''[16]

The California Court of Appeal says the requirement that a class definition be precise, objective, and presently ascertainable ''goes to the heart'' of the question of class certification.

A number of other federal and state court rulings are in accord, finding that a proposed class definition that

may dismiss the class allegation on the pleadings''); *Sanders v. Apple Inc.*, 2009 U.S. Dist. LEXIS 6676 (N.D. Cal. Jan. 21, 2009) (striking class allegations on ascertainability grounds); *Brazil v. Dell*, 585 F. Supp. 2d 1158, 1167 (N.D. Cal. 2008) (same); *Barasich v. Shell Pipeline Co.*, 2008 U.S. Dist. LEXIS 47474, at *13-14 (E.D. La. June 19, 2008) (same); *In re Vioxx Prod. Liab. Litig.*, No. MDL 1657, 2008 WL 4681368, at *10 (E.D. La. Oct. 21, 2008) (lack of ascertainability ''alone is sufficient to warrant striking the Plaintiffs' class allegations on the pleadings'').

[3] 189 Cal. App. 4th 905 (Cal. Ct. App. 2010).

[4] *Id.* at 911.

[5] *Id.* at 918 (internal quotation marks and citation omitted).

[6] *Id.* at 919 (internal quotation marks and omitted, alteration in original).

[7] *Id.* (internal quotation marks and citation omitted).

[8] *Id.*

[9] *Id.* at 920 (emphasis added).

[10] *Id.* at 921.

[11] *Id.*

[12] *See Konik v. Time Warner Cable*, 2010 U.S. Dist. LEXIS 136923, at *33 (C.D. Cal. Nov. 24, 2010).

[13] *See McDonald v. Corr. Corp. of Am.*, 2010 U.S. Dist. LEXIS 122674, at *8 (D. Ariz. Nov. 4, 2010).

[14] 189 Cal. App. 4th at 921.

[15] *Id.* at 925 (internal quotation marks and citation omitted).

[16] *Id.* at 928.

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includes uninjured members is overbroad and patently uncertifiable.[17] For example, in *Oshana v. Coca-Cola Co.*, the U.S. Court of Appeals for the Seventh Circuit upheld the district court's decision not to certify a proposed class of Illinois residents alleging consumer-fraud and unjust-enrichment claims based on their purchase of fountain Diet Coke. There, the named plaintiff alleged that Coca-Cola ''tricked consumers into believing that fountain diet coke'' did not contain artificial saccharin and sought to certify a class of all individuals in Illinois who had purchased the fountain soda.[18] The court denied class certification because ''[m]embership in [the] proposed class required only the purchase of a fountain Diet Coke.'' As such, the court found that the proposed class ''could include millions who were not deceived and thus h[ad] no grievance''[19] and the class was impermissibly overbroad.[20]

This principle was also illustrated in *Sanders v. Apple Inc.*,[21] where plaintiffs, who purchased Apple's 20-inch Aluminum iMac, brought a putative class action against the defendant manufacturer, asserting fraud and warranty claims. Plaintiffs sought to certify a class of ''[a]ll persons or entities located within the United States who own[ed] a 20-inch Aluminum iMac.''[22] Before addressing the explicit prerequisites to class certification, the court considered the question of ascertainability and determined that the proposed class was overly broad. Specifically, because the proposed class definition included individuals who did not actually purchase their iMac, individuals who were not subject to the allegedly deceptive advertisements and individuals who were not injured by defendant's conduct, the class was overbroad.[23] Accordingly, the court denied certification.[24]

An overly broad class definition also doomed the proposed class in *In re McDonald's French Fries Litigation*.[25] There, the plaintiffs commenced a putative class action against McDonald's for alleged violation of state consumer-protection statutes, breach of warranty, and unjust enrichment, alleging that they were deceived by representations regarding the potato products' ingredients.[26] Plaintiffs sought to certify a nationwide class of ''[a]ll persons residing in the United States . . . (i) who purchased Potato Products from McDonald's restaurants . . . and (ii) who at the time of purchase had been medically diagnosed with celiac disease . . . .''[27] Noting that the proposed class was not limited to persons who necessarily saw or knew of the alleged representations, the court declared that the class was ''overinclusive'' and denied class certification.[28]

Not all courts have embraced this argument, however.[29] In *In re Whirlpool*, for example, the court certified a class of Ohio residents who purchased allegedly defective front-loading washing machines.[30] Plaintiffs asserted claims for negligent design, negligent failure to warn, tortious breach of warranty and violation of the Ohio Consumer Sales Practice Act, based on the machine's alleged propensity to develop mold.[31] Whirlpool argued that the proposed class was overbroad because it consisted of ''many plaintiffs whose washers have not manifested any mold problems.''[32] But the court summarily rejected this argument, finding that ''[w]hether any particular plaintiff has suffered harm is a merits issue not relevant to class certification.''[33] The *Whirlpool* ruling is currently on appeal to the Sixth Circuit, which may provide further insight into the vitality of the ''overbreadth'' doctrine.

The Difficult-to-Identify Class

Another problematic group of cases involves the difficult-to-identify class. This problem arises where determining membership in the proposed class would be administratively burdensome. As one MDL court put it: a proposed class must be ''sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member.''[34]

In *Solo v. Bausch & Lomb*, for example, the plaintiffs filed a class action suit against the defendant manufacturer of contact lens solution. Plaintiffs asserted claims for, *inter alia*, consumer fraud and unjust enrichment.[35] Plaintiffs alleged that they suffered economic losses by paying for a defective contact lens solution and discarding it per the defendant's directive after a recall, because defendant did not fully reimburse plaintiffs for the defective and discarded product.[36] Plaintiffs sought to certify classes of people who purchased the product ''between September 1, 2004, and April 10, 2006, and 'lack[ed] full reimbursement for any quantity discarded following [the] recall.' ''[37] The court refused to certify the proposed classes on the ground that it ''would have to make thousands of fact-intensive inquiries'' to determine who had been adequately reimbursed and who ''lack[ed] full reimbursement.''[38] Among other things, the court recognized, it would ''need to determine whether an individual purchased MoistureLoc between

[17] *See, e.g.*, *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513-14 (7th Cir. 2006); *Davenport v. Interactive Communs. Int'l*, 2010 Cal. App. Unpub. LEXIS 6364, at *19-22 (Cal. Ct. App. Aug. 9, 2010).
[18] 472 F.3d at 509.
[19] *Id.* at 513-14.
[20] *Id* at 514.
[21] 2009 U.S. Dist. LEXIS 6676 (N.D. Cal. Jan. 21, 2009).
[22] *Id.* at *25.
[23] *Id.* at *28.
[24] *Id.* at *28-30.
[25] 257 F.R.D. 669 (N.D. Ill. 2009).
[26] *Id.* at 670.
[27] *Id.* at 671.
[28] *Id.* at 671-72.
[29] *See, e.g.*, *Daffin v. Ford Motor Co.*, 458 F.3d 549, 553 (6th Cir. 2006) (rejecting overbreadth argument in putative class action involving alleged defect in vans because whether some class members did not experience any problems with their accelerator would constitute an improper ''inquiry into the merits of [the] suit''); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 2010 U.S. Dist. LEXIS 69254, at *4-5 (N.D. Ohio July 12, 2010) (certifying class and finding that overbreadth argument implicates ''a merits issue not relevant to class certification'').
[30] 2010 U.S. Dist. LEXIS 69254, at *4.
[31] *Id.*
[32] *Id.* at *4-5.
[33] *Id.*
[34] *Solo v. Bausch & Lomb Inc.*, 2009 U.S. Dist. LEXIS 115029, at *13 (D.S.C. Sept. 25, 2009); *see also, e.g.*, *Oshana*, 472 F.3d at 513.
[35] 2009 U.S. Dist. LEXIS 115029, at *8-9.
[36] *Id.*
[37] *Id.* at *13-14.
[38] *Id.* at *18.

September 1, 2004, and April 10, 2006 . . . how much was purchased and at what price, whether the individual discarded the solution, when it was discarded, and how much was discarded.''[39] Given these significant administrative burdens to determining class membership, the court agreed with the defendant that the class was not ascertainable and therefore denied class certification.[40]

A similar problem resulted in the denial of class certification in *Cole*.[41] There, plaintiff residents and property owners filed a class action lawsuit against the defendant as a result of pollution that was allegedly caused by mining conducted by defendants. Plaintiffs asserted claims for nuisance and sought to certify a medical monitoring class and a property owner class.[42] While the court denied certification of both proposed classes, it found that the property owner class was particularly problematic with respect to ascertainability. The proposed property-owner class was defined as ''[a]ll individuals and entities who owned or had an interest in real property in the Class Area as of May 14, 2001.''[43]

Although plaintiffs conclusorily contended that class members could be identified ''through examination of deeds,'' the court found that reliance on these deeds was insufficient for purposes of ascertainability.[44] The court pointed to the example of one of the named plaintiffs, who sought to represent commercial property owners in the proposed class, but who did not live or own property in the affected area.[45] This plaintiff was an owner of a bank that owned property in the class area.[46] However, an examination of deeds would not have revealed this named plaintiff's membership in the class.[47] The court reasoned that ''[i]f examination of deeds does not pick up the interests claimed by even named plaintiffs, it could not be expected to suffice to identify the interests of other putative class members who 'owned or had an interest in real property' in the Class Area.''[48] Because it would be ''extremely difficult, applying plaintiffs' suggested [class definition], to identify the potential class members having any interest, recorded or unrecorded, in real property . . . identification of members of the proposed class would be administratively unfeasible.''[49] Accordingly, plaintiffs' class definition was inadequate, and the motion for class certification was denied.

Class definitions that turn on subjective criteria, such as a class member's mental state, also fall within the difficult-to-identify category because these definitions make it impractical and administratively burdensome to determine whether an individual is part of the class.[50] Courts have determined that these kinds of class definitions ''yield [too much] indeterminacy and imprecision'' to satisfy the ascertainability requirement.[51] As one court faced with a subjective class definition put it, merely determining who is in the class would be a ''Sisyphean task'' that ''would be a burden on the court and require a large expenditure of valuable court time.''[52]

For example, in *Biediger v. Quinnipiac Univ.*, plaintiffs sought to certify two groups of female athletes whose rights under Title IX were allegedly violated by Quinnipiac University.[53] Although both proposed class definitions contained subjective elements, the court focused on the second group, which was defined as ''women who have not and will not enroll at Quinnipiac because of Quinnipiac's allegedly discriminatory athletic programming.''[54] The court agreed with the defendant that this proposed class was not ascertainable given the subjective criteria by which class membership would have to be determined.[55] The court reasoned that ''[u]nlike the first subclass, which [was] composed of a definite and identifiable pool of possible members (at its broadest, all current, prospective, and future female athletes at Quinnipiac), the second subclass could conceivably be every person who decided, or who will decide, not to attend Quinnipiac.''[56] Because the court would have to determine each potential class members' motivations in deciding not to attend Quinnipiac, the proposed class was too ''amorphous and unwieldy'' to satisfy the requirement of ascertainability and certification was denied.[57]

Some courts have rejected arguments like those described above on the ground that ''[e]ach individual class member need not be identifiable at the class certification stage.''[58] These courts have held that a class is ascertainable as long as class members ''can be identified when judgment is rendered.''[59] In addition, other courts have taken it upon themselves to modify class definitions rather than deny motions for class certification.[60] For example, in *Chakejian*, the plaintiff alleged violations of the Fair Credit Reporting Act based on letters from the defendant that allegedly contained misstatements and misrepresentations regarding class

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[39] *Id.*
[40] *Id.* at *14.
[41] *Cole*, 256 F.R.D. at 693.
[42] *Id.*
[43] *Id.* at 696.
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.* at 696-97.
[48] *Id.*
[49] *Id.*
[50] *See, e.g.*, *Oshana v. Coca-Cola Co.*, 255 F.R.D. 575, 580-81 (N.D. Ill. 2005), *aff'd*, 472 F.3d 506 (7th Cir. 2006); *Rios v. Marshall*, 100 F.R.D. 395, 404 (S.D.N.Y. 1983); *see also* Manual for Complex Litigation (4th) § 21.222, at 270 (while ''[a]n identifiable class exists if its members can be ascertained by reference to objective criteria,'' class definitions must ''avoid subjective standards (e.g., a plaintiff's state of mind) or terms that depend on resolution of the merits (e.g., persons who were discriminated against)'').
[51] *Conigliaro v. Norwegian Cruise Line*, No. 05-21584-CIV-ALTONAGA/Turnoff, 2006 U.S. Dist. LEXIS 95576, at *20 (S.D. Fla. Aug. 31, 2006).
[52] *Simer v. Rios*, 661 F.2d 655, 669 (7th Cir. 1981).
[53] 2010 U.S. Dist. LEXIS 50044 (D. Conn. May 20, 2010).
[54] *Id.* at *10.
[55] *Id.* at *13.
[56] *Id.*
[57] *Id.* at *14.
[58] *Guadiana v. State Farm Fire & Cas. Co.*, 2010 U.S. Dist. LEXIS 129588, at *12 (D. Ariz. Dec. 7, 2010) (rejecting argument that ''class is not administratively feasible or ascertainable because of the unique characteristics of each leak'' in class action arising out of defendant insurance carrier's alleged breach of insurance contract); *Chana Friedman-Katz v. Lindt & Sprungli (USA) Inc.*, 270 F.R.D. 150, 154-55 (S.D.N.Y. Nov. 19, 2010) (''the Court views the small number of individualized factual determinations that must be made here in ascertaining membership in the class as entirely manageable'').
[59] *Guadiana*, 2010 U.S. Dist. LEXIS 129588, at *12.
[60] *See, e.g.*, *Chakejian v. Equifax Info. Servs.*, 256 F.R.D. 492, 497 (E.D. Pa. 2009).

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members' credit data.[61] Plaintiff sought to certify a class of [a]ll consumers in . . . Pennsylvania to whom . . . Defendant sent a letter *substantially similar* to the Letter attached to the Amended Complaint.''[62] Although the court agreed that the proposed class definition was vague, it chose to modify the proposed class definition rather than deny class certification. According to the court, the letter at issue in the case was received in response to a dispute solely involving public records information. The allegations only pertained to information from public records such as bankruptcies, liens, and judgments.[63] Therefore, the court concluded that ''the defendant's objection that the class definition [was] vague because it d[id] not define 'substantially similar' c[ould] be ameliorated by amending the class definition as follows'':

> All consumers in the Commonwealth of Pennsylvania to whom, beginning two years prior to the filing of the Amended Complaint and continuing through the resolution of this action, in response to a dispute [over a public record (including, but not limited to a bankruptcy, lien, or judgment)], Defendant sent a letter substantially similar to the Letter attached to the Amended Complaint as Exhibit A.[64]

The Fail-Safe Class

A third category of ascertainability cases concerns fail-safe classes. Recent court decisions make it clear that a class is not ascertainable where the named plaintiffs propose a class definition that incorporated a legal conclusion (*e.g.*, all consumers who were wrongfully denied. . . .).[65] This is so because identification of class members would require the court to make legal determinations and conclusions that are closely intertwined with the claims of the class members.[66] In addition, fail-safe classes set up a situation in which class members are only bound by a judgment that finds the defendant liable.[67] After all, if the class is defined as everyone who was wronged by the defendant and the defendant prevails at trial, then it turns out that nobody was in the class to begin with—and thus nobody is bound by the ruling.[68] For these reasons, an increasing number of federal and state courts have rejected fail-safe definitions, recognizing that they ''turn [] Rule 23 on its head.''[69]

The challenges posed by a fail-safe class were at issue in *Kirts v. Green Bullion Financial Services LLC*.[70] There, the plaintiffs sought to certify a class of ''[a]ll individuals who submitted jewelry to [defendant] and were damaged because [defendant] broke its promise and advertised procedures to handle the jewelry with a high standard of care, or fairly appraise the jewelry, or provide an adequate return period.''[71] To ascertain membership in this proposed class, the court would have needed to ''determine with respect to each potential member (1) whether the individual owned the jewelry in question, (2) whether the individual sent jewelry to [defendant], and (3) whether [defendant] committed any of the misconduct described with respect to that individual's submitted jewelry.''[72] As the court explained, under this fail-safe class definition, ''the Court would essentially have to make a determination that [defendant] is liable to an individual before it could conclude that the individual is a member of the class.''[73] Because such a determination would impermissibly intertwine class certification with the merits of the case—thereby ''defeat[ing] the [very] purpose of conducting a class action''—the court held that the class was unascertainable and denied plaintiffs' motion for class certification.

Similarly, in *Brazil v. Dell*,[74] the plaintiff consumers filed a putative class action, alleging that the defendant advertised false discounts for its computer products. Plaintiffs sought to certify a class of California citizens who purchased products that ''Dell ***falsely*** advertised as discounted.''[75] According to the defendant, the plaintiffs proposed an impermissible ''fail-safe'' class because membership in the class was contingent on a finding that defendant was liable.[76] The court agreed and found that the proposed class could not be ''ascertained'' because the court would have to determine whether defendant ''falsely advertised,'' a legal question that implicated the merits of the underlying claims.[77] Because the proposed class was not ascertainable, the court granted defendant's motion to strike the class allegations.[78]

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[61] 256 F.R.D. at 494.

[62] *Id.* at 496 (emphasis added).

[63] *Id.* at 497.

[64] *Id.*

[65] *See Brazil v. Dell Inc.*, 585 F. Supp. 2d 1158, 1167 (N.D. Cal. 2008); *Agostino v. Quest Diagnostics Inc.*, 256 F.R.D. 437, 479 (D.N.J. 2009) (''A court must reject a proposed class or subclass definition that 'inextricably intertwines identification of class members with liability determinations.' ''); *In re Vioxx Prod. Liab. Litig.*, No. MDL 1657, 2008 WL 4681368, at *9 (E.D. La. Oct. 21, 2008) (highlighting that it is a '' 'basic tenet of class certification [that] a court may not inquire into the merits of the case at the class certification stage' '') (citation omitted).

[66] *See Demmick v. Cellco P'ship*, 2010 U.S. Dist. LEXIS 94041, at *17-18 (D.N.J. Sept. 8, 2010) (modifying proposed fail-safe definition, which turned on ''[w]hether proposed class members were charged more than what was agreed to in the contract[,] [thereby implicating] a central issue in this case'').

[67] *See, e.g.*, *Canez v. King Van & Storage*, 2010 Cal. App. Unpub. LEXIS 9687, at *7-8 n.8 (Cal. Ct. App. Dec. 7, 2010).

[68] *See Genenbacher v. CenturyTel Fiber Co. II*, 244 F.R.D. 485, 488 (C.D. Ill. 2007) (explaining that fail-safe classes are unfair because the result of resolution of membership question is that class members ''win or are not in the class'').

[69] *Heffelfinger v. Elec. Data Sys. Corp.*, 2008 U.S. Dist. LEXIS 5296, at *42 (C.D. Cal. Jan. 7, 2008); *see also, e.g.*, *Kirts v. Green Bullion Fin. Servs.*, LLC, 2010 U.S. Dist. LEXIS 92381 (S.D. Fla. Aug. 3, 2010); *Eversole v. EMC Mortgage Corp.*, No 05-124-KSF, 2007 U.S. Dist. LEXIS 38892, at *15 (E.D. Ky. May 29, 2007); *Bostick v. St. Jude Med. Inc.*, No 03-2626, 2004 WL 3313614, at *15-16 (W.D. Tenn. Aug. 17, 2004); *cf. Alvarez v. Hyatt Regency Long Beach*, 2010 U.S. Dist. LEXIS 99281, at *5 (C.D. Cal. Sept. 21, 2010) (explaining that definition that consists of ''all non-exempt employees of the Defendants' hotel . . . is not a prohibited 'fail safe' putative class'').

[70] 2010 U.S. Dist. LEXIS 92381.

[71] *Id.* at *20.

[72] *Id.* at *20-21.

[73] *Id.* at *21.

[74] 585 F. Supp. 2d at 1158.

[75] *Id.* at 1167.

[76] *Id.*

[77] *Id.*

[78] *Id.* Plaintiffs subsequently moved to certify a new class consisting of ''[a]ll persons or entities who are citizens of the State of California who on or after March 23, 2003, purchased via Dell's Web site Dell-branded products advertised with a

A similar result obtained in *Barasich v. Shell Pipeline Co.*[79] There, the plaintiffs, commercial fishermen, filed suit against the defendant oil companies, contending that defendants negligently failed to prevent oil from leaking from their tanks or pipelines during Hurricane Katrina. The plaintiffs claimed that defendants' alleged negligence resulted in a loss of income and other economic damages for commercial fishermen.[80] Plaintiffs sought to certify a class of ''[a]ll commercial fishermen whose oyster leases were contaminated by oil discharge during Hurricane Katrina ***due to the negligence of defendants***.''[81] Before addressing the explicit prerequisites to class certification, the court considered the question of ascertainability.[82] The court found the class definition inadequate for two reasons: (1) it had no geographic limits; and (2) identification of class members would require the court to inquire into the merits of each member's claim because of the phrase, ''due to the negligence of defendants.''[83] Based on plaintiffs' inadequate class definition and other Rule 23 deficiencies, the court refused to certify the proposed class.

At the same time, however, some courts have rejected ascertainability arguments challenging the ''fail-safe'' nature of a proposed class[84] or have chosen to modify a purported fail-safe class definition instead of denying a motion for class certification.[85] For example, in *Kamar v. Radio Shack Corp.*,[86] the Ninth Circuit affirmed the trial court's certification of a class of California employees who, for a certain period, worked a Saturday meeting as instructed or a split-shift without receiving the full amount of mandated premium pay. Radio Shack argued that the district court erroneously certified a fail-safe class.[87] The Ninth Circuit agreed with the trial court that the class definition was not defective, reasoning that the class was limited to ''employees within the reporting time and split-shift classifications,'' and did not ''actually distinguish[] between those who may and those who may not ultimately turn out to be entitled to premium pay.''[88] The court thus concluded that the proposed class was not defined in terms of defendant's liability—and moreover—that if a class member was not aggrieved by Radio Shack, the defendant would be shielded from liability to that person.[89]

Conclusion

In sum, recent class certification rulings have made it clear that federal courts will generally not tolerate overbroad, vague, subjective or ''fail-safe'' class definitions. Thus, defendants faced with a class action proposal should carefully assess not only whether the proposed class satisfies the explicit requirements of Rule 23, but also whether the class definition passes muster under recent ascertainability jurisprudence.

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represented former sales price (i.e., a ''Slash-Thru'' price or a ''Starting Price'') as indicated and set forth [in attached schedules, with limited exclusions].'' *Brazil v. Dell Inc.*, C-07-01700 RMW, 2010 WL 5387831, at *2 (N.D. Cal. Dec. 21, 2010). The court certified the class, determining that ''[u]nlike earlier proposed class definitions, th[e] [revised] class definition does not require a legal determination in order to ascertain class membership.'' *Id.*

[79] 2008 U.S. Dist. LEXIS 47474 (E.D. La. June 19, 2008).

[80] *Id.* at *4-5.

[81] *Id.*

[82] *Id.* at *13.

[83] *Id.* at *13-14.

[84] *See, e.g.*, *LaBerenz v. Am. Family Mut. Ins. Co.*, 181 P.3d 328, 336 (Colo. App. 2007) (holding that the '' 'fail-safe' concept is inapplicable here'' because ''the proposed class is not framed as a legal conclusion, but in more neutral terms as insureds whose non-PPO, PIP-related medical services were paid under Explanation Code 41 and health care providers whose medical bills were reduced under Explanation Code 41''); *Dale v. DaimlerChrysler Corp.*, 204 S.W.3d 151, 178-80 (Mo. Ct. App. 2006) (rejecting fail-safe argument because ''the class definitions do not make any merit determinations'').

[85] *See, e.g.*, *Perez v. First Am. Title Ins. Co.*, 2009 U.S. Dist. LEXIS 75353, at *25-26 (D. Ariz. Aug. 12, 2009) (rejecting defendant's argument that defining class in terms of liability necessitates denial of class certification because court has power to redefine class and the ''defect is . . . rather easily cured by recasting the definition in terms of Plaintiffs' liability theory'').

[86] 375 Fed. Appx. 734 (9th Cir. 2010).

[87] *Id.* at 736.

[88] *Id.*

[89] *Id.*

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TAB 8

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

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CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

TO: Honorable Mark R. Kravitz, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Eugene R. Wedoff, Chair
Advisory Committee on Bankruptcy Rules

DATE: December 12, 2011

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on September 26 and 27, 2011, at Northwestern University School of Law in Chicago. The draft minutes of that meeting are attached to this report as Appendix C.

Among the matters the Committee considered at the fall meeting were several suggestions for amendments to existing rules and forms that were submitted by bankruptcy judges, organizations, and members of the bar. The Committee also discussed the potential impact on the Bankruptcy Rules and Official Forms of recent court decisions and legislation. Finally, the Committee continued its deliberations regarding two multi-year projects – the revision of Part VIII of the Bankruptcy Rules and the Forms Modernization Project.

The Committee brings to the Standing Committee one action item from the September meeting. As discussed in Part II of this report, the Committee considered and voted to recommend publishing for comment proposed amendments to Rules 7054 and 7008(b). These amendments are intended to clarify the procedure for seeking an award of attorney's fees in adversary proceedings.

Part III of the report presents for the Standing Committee's preliminary consideration the first half of the proposed comprehensive revision of Part VIII of the Bankruptcy Rules, which govern appeals from bankruptcy courts. The Committee does not seek approval for publication of any of the proposed rules at this meeting. Instead, the entire Part VIII revision package will be brought to the Standing Committee at the June meeting with a recommendation that they be published for comment in August 2012.

The remainder of the report discusses the rules and forms published for comment in August 2011 and the following additional information items:

- unanswered questions raised by *Stern v. Marshall* and courts' initial responses to the decision;
- the Committee's decision to take no further action on the suggestion of the Institute for Legal Reform for quarterly reporting of claims activity by trusts established under § 524(g) of the Bankruptcy Code; and
- the current status of the Forms Modernization Project and the Committee's timetable for seeking publication for comment of the revised forms.

II. Action Item—Rules 7054 and 7008(b)

The Committee unanimously recommends that amendments to Rules 7054 and 7008(a) be published for comment. Rule 7054 would be amended to make applicable in adversary proceedings most of the provisions regarding attorney's fees in Civil Rule 54(d)(2). Rule 7008(b), which requires pleading a claim for attorney's fees in the complaint or other appropriate pleading, would be deleted. The two rules, with the proposed amendments indicated, are set out in Appendix A.

In March 2011 the Ninth Circuit Bankruptcy Appellate Panel issued an opinion in which it "suggest[ed] that the Judicial Conference's Advisory Committee on Bankruptcy Rules may want to address th[e] apparent 'gap' in Rule 7054." *Charlie Y., Inc. v. Carey (In re Carey)*, 446 B.R. 384, 389 n.3 (2011). The gap to which the court referred is the absence of a provision in Rule 7054 concerning the procedure for obtaining an allowance of attorney's fees in adversary proceedings. Although Rule 7054(a) incorporates Civil Rule 54(a)-(c), it has its own provision – subdivision (b) – governing the recovery of costs by a prevailing party, and it does not have a provision that parallels Rule 54(d)(2), which governs the recovery of attorney's fees.

The reason that Bankruptcy Rule 7054 originally incorporated Civil Rule 54(a)-(c), but not (d), was that Rule 54(d) provided that "costs *shall be awarded as of course* to the prevailing party unless the court otherwise directs" (emphasis added). The Bankruptcy Rules Committee concluded that costs should not be routinely awarded to the prevailing party against a bankruptcy estate since the impact of the award would be borne by creditors.[1] Rule 7054(b), which was adopted instead of Rule 54(d), provides that "[t]he court *may allow costs* to the prevailing party except when a statute of the United States or these rules otherwise applies" (emphasis added).

[1] *See* Laura B. Bartell, *Award of Costs in Bankruptcy Courts*, 17 J. BANKR. L. & PRAC. 6 (Sept. 2008) (quoting Advisory Committee Note to Bankruptcy Rule 754, the predecessor of Rule 7054).

The 1993 amendment to Rule 54(d) substantially expanded the subdivision to expressly address attorney's fees as well as costs. The existing provision was renumbered (d)(1) and was re-titled "Costs Other Than Attorney's Fees." Paragraph (2), titled "Attorney's Fees," was added, and it requires a "claim for attorney's fees and related nontaxable expenses . . . [to] be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages." Fed. R. Civ. P. 54(d)(2)(A). The rule governs the timing ("no later than 14 days after the entry of judgment") and content of the motion and the conduct of the proceedings in response to the motion, incorporating Rule 78, dealing with motion practice. It also authorizes local rules to adopt special procedures for resolving fee issues without extensive evidentiary hearings, and it permits the referral of fee issues to special masters and magistrate judges. The provision is not applicable to fees awarded as sanctions under the rules or under 28 U.S.C. § 1927.

Rule 7054 was never amended to incorporate any of the provisions of Rule 54(d)(2) or to otherwise address the procedure for claiming attorney's fees. Attorney's fees are addressed instead by Rule 7008(b). That provision, which has no counterpart in Civil Rule 8, provides that "[a] request for an award of attorney's fees shall be pleaded as a claim in a complaint, cross-claim, third-party complaint, answer, or reply as may be appropriate."

Under existing Rules 7054 and 7008(b), there is a lack of uniformity in how bankruptcy courts handle awards of attorney's fees. The Central District of California, for example, has a local bankruptcy rule governing the taxation of costs and the award of attorney's fees. It generally requires filing a motion for attorney's fees within 30 days after the entry of judgment or other final order "[i]f not previously determined at trial or other hearing." Thus by local rule that district has adopted a bankruptcy rule similar to Civil Rule 54(d)(2)(A).[2] A recent decision of the Bankruptcy Court for the Southern District of New York, however, discussed the general inapplicability of Rule 54(d)(2) in bankruptcy proceedings, with the possible exception of class actions. *In re* Partsearch Techs., Inc., 2011 WL 2456227 (Bankr. S.D.N.Y. June 21, 2011), at *13.[3] Yet another court concluded that an award of attorney's fees in bankruptcy is generally governed by Rule 7008(b), but held in that case that, because the applicable Virgin Islands law defined attorney's fees as "costs," Rule 7054(b) applied. *In re* Kool, Mann, Coffee & Co., 2007 WL 1202888 (Bank. D.V.I. 2007). Finally, the Ninth Circuit BAP, in the *Carey* decision that led to the Committee's consideration of this issue, recognized that Rule 7008(b) requires the pleading of a claim for attorney's fees, but the court said that the rule "does not shed any light on whether such a claim must be proven at trial or left for determination on application or motion following the trial." Because there was no local bankruptcy rule that governed the procedure for pursuing an attorney's fees claim beyond the pleading stage, the court concluded that "no provision of the Rules proscribed the Appellant's request for an award of attorney's fees through the Fee Motion following the trial of the Adversary Proceeding." 446 B.R. at 390.

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[2] *See also In re* Branford Partners, 2008 WL 8444795, at * 4 (9th Cir. BAP 2008) ("A post trial motion for costs is the 'preferred method' for seeking attorneys' fees and costs.").

[3] The court noted that Rule 7023 fully incorporates Civil Rule 23 and that Rule 23(h)(1) provides that a claim for an award of attorney's fees must be made by motion under Rule 54(d)(2). The court cited the Collier treatise as stating that "'Rule 54(d)(2) is applicable in bankruptcy, but only with respect to class actions,'" but noted that another commentator questioned whether "'Rule 23(h) can override the procedures set forth in Rule 7008(b).'" 2011 WL 2456227 at * 13.

In order to clarify the procedure for seeking an award of attorney's fees and to promote uniformity, the Committee voted to propose amending Rule 7054 to include much of the substance of Civil Rule 54(d)(2) and to delete Rule 7008(b). By bringing the bankruptcy rules into closer alignment with the civil rules, this amendment would eliminate a potential trap for an attorney, particularly one familiar with the civil rules, who might overlook the Rule 7008(b) requirement to plead a request for attorney's fees as a claim in the complaint, answer, or other pleading. As under the civil rules, the procedure for seeking an award of attorney's fees would be governed exclusively by Rule 7054, unless the governing substantive law requires the fees to be proved at trial as an element of damages.

All of the provisions of Rule 54(d)(2), however, cannot be made applicable in bankruptcy proceedings. Subdivision (d)(2)(D) would not be incorporated in its entirety because bankruptcy courts may not refer matters to special masters, *see* Bankruptcy Rule 9031, or magistrate judges. *See* 28 U.S.C. § 636. The reference to Rule 78 in Civil Rule 54(d)(2)(C) would also not be incorporated because that rule is not applicable in bankruptcy proceedings.

III. Interim Report on the Revision of Part VIII of the Bankruptcy Rules

As reported at past meetings, the Committee has been engaged for several years in a project to revise the Part VIII Bankruptcy Rules, which govern appeals from bankruptcy courts, primarily to district courts and bankruptcy appellate panels. Among the goals of this project are to bring the bankruptcy appellate rules into closer alignment with the Federal Rules of Appellate Procedure and to incorporate into the rules greater use of electronic transmission, filing, and storage of court documents. At the outset of the project, the Committee hosted two mini-conferences on the subject of the bankruptcy appellate rules. In attendance were judges, lawyers, court personnel, and academics who had substantial experience with bankruptcy appeals.

The Committee has worked on this project in conjunction with the Advisory Committee on Appellate Rules and has been greatly assisted in its work by that committee's reporter. The two advisory committees held a joint meeting in April 2011, and last summer a meeting to review and edit the Part VIII draft and accompanying committee notes was conducted by a working group composed of several members of the Bankruptcy Rules Committee, its reporters, a member of the Appellate Rules Committee, and that committee's reporter. Half of the revised draft that resulted from this meeting was considered by the Committee at its September 2011 meeting. After a full discussion, the Committee approved for submission to the Standing Committee Rules 8001-8012, subject to the additional revision of a few rules and review by the style consultants. The other half of the revised Part VIII rules (Rules 8013-8028) will be presented to the Committee at its spring 2012 meeting.

The Committee does not seek any action by the Standing Committee on the Part VIII rules at this meeting. The first half of the revision, which is being presented for preliminary review, still needs to undergo style review and further consideration by the Committee of a few of its provisions. If the Committee approves the entire Part VIII revision, it will submit the revision to the Standing Committee at the June 2012 meeting with a recommendation that it be published for comment in August 2012. Under that schedule, the presumptive effective date of the new bankruptcy appellate rules would be December 1, 2014.

The revision of Part VIII is comprehensive. Existing rules have been reorganized and renumbered, some rules have been combined, and provisions of other rules have been moved to

several new locations. Much of the language of the existing rules has been restyled. Because of the comprehensive nature of the proposed revision, it is not possible to present the amendments in a redlined version pointing out changes to the existing rules. Nor can the proposed revision be presented in a comparative format like the one used for the restyled Evidence Rules.

Rather, to introduce the first half of the proposed revision of Part VIII to the Standing Committee and assist in its preliminary consideration of these rules, this part of the report will provide a brief discussion of each of the first twelve proposed rules. Significant changes from the existing Bankruptcy Rules, decisions to depart from the Appellate Rules, and any significant issues that have arisen are noted for each rule. The text of proposed Rules 8001-8012 and accompanying committee notes are attached to this report as Appendix B.

Rule 8001 (Scope of Part VIII Rules; Definitions) – This rule is new; it does not have a counterpart in the existing Part VIII rules, but it is similar to Appellate Rule 1. The rule explains the scope of Part VIII. It clarifies that these rules apply to appeals from a bankruptcy court to the district court or bankruptcy appellate panel and that some of the rules (specified in the Committee Note) apply to appeals from bankruptcy courts to courts of appeals.

Rule 8001 also provides definitions of three terms that are used in Part VIII – BAP, appellate court, and transmit. The definition of "transmit" includes a key feature of the revised Part VIII: there is a presumption that documents are to be sent electronically. This presumption does not apply to pro se parties and can be overridden by the governing rules of a court. Although use of the word "transmit" is generally avoided in federal rules, the Committee favors its use here to signal to the reader that it is a term with a special meaning.

Although the Committee is not embarking on a general restyling of the Bankruptcy Rules, in revising Part VIII it has adopted many of the style conventions of the Appellate Rules, including the use of "must" rather than "shall." The Committee believes that this part of the Bankruptcy Rules is sufficiently discrete that its use of restyled language and form will not cause confusion in the meaning of rules in the other parts.

Rule 8002 (Time for Filing Notice of Appeal) – This rule is largely a restyled version of current Rule 8002. Because 28 U.S.C. § 158(c)(2) refers to this rule by number, the provisions regarding the time for filing a notice of appeal must be retained in Rule 8002, rather than being placed after the rule governing the procedure for taking an appeal as of right, as the Appellate Rules are organized. The revised rule retains the 14-day period for filing a notice of appeal in bankruptcy cases.

Subdivision (c) regarding an appeal by an inmate confined in an institution is a new provision. It mirrors the provision in Appellate Rule 4(c)(1) and (2).

Rule 8003 (Appeal as of Right – How Taken; Docketing of Appeal) – This rule is based on Appellate Rule 3. It includes provisions of current Rule 8001(a) governing the taking of an appeal by right and Rule 8004 governing service of notice of the filing of a notice of appeal. The proposed rule includes new provisions, modeled on Appellate Rule 3(b), allowing joint and consolidated appeals.

In a significant change from current Rule 8007(b), an appeal would be docketed in the appellate court when the clerk of that court receives the notice of appeal, rather than, as under

current practice, when the complete record is transmitted to the appellate court. This change reflects the view expressed by some participants in the mini-conferences that docketing in the appellate court should occur earlier in order to eliminate most instances of a motion being filed in the appellate court with regard to a case not yet on its docket.

Rule 8004 (Appeal by Leave – How Taken; Docketing of Appeal) – This rule contains provisions that are currently set forth in Rules 8001(b) and 8003. It follows the format and style of Appellate Rule 5, but it retains the current bankruptcy practice of requiring the filing of a notice of appeal in addition to a motion for leave to appeal.

Consistent with proposed Rule 8003, this rule provides that docketing in the appellate court should occur promptly after the clerk of that court receives the notice of appeal and motion for leave to appeal. As a result of this change in the time of docketing, responses in opposition to motions for leave to appeal would be filed in the appellate court rather than in the bankruptcy court, a change from existing Rule 8003(a).

Rule 8005 (Election to Have Appeal Heard by District Court Instead of BAP) – This rule is a revision of current Rule 8001(e). Under 28 U.S.C. § 158(c)(1), if a bankruptcy appellate panel has been established to hear appeals from a bankruptcy court, an appellant may elect to have an appeal heard instead by a district court by making an election at the time of filing a notice of appeal, and an appellee may make such an election within 30 days after service of the notice of appeal. The proposed rule provides for the promulgation of an Official Form for making an election. The Committee believes that use of this form would make the election process more straightforward and less likely to give rise to challenges. Should a dispute about the validity of an election arise, the rule provides a procedure for resolution of the dispute. The court in which the appeal is pending when a determination of the validity of an election is sought would have authority to determine whether an election has been properly made according to the rule and statute.

Rule 8006 (Certification of Direct Appeal to Court of Appeals) – This rule, like current Rule 8001(f), implements 28 U.S.C. § 158(d)(2), which authorizes certification of bankruptcy appeals for direct review by a court of appeals under three circumstances: (1) if the court in which the case is pending, acting on its own motion or on the request of a party, makes the certification specified in § 158(d)(2)(A)(i), (ii), and (iii); (2) if all parties to the appeal make the certification; or (3) if a majority of appellants and a majority of appellees request the court to make the certification, in which case the court is required to do so. Because of the earlier time of docketing an appeal in the appellate court under the proposed rules, this rule provides that, for purposes of certification only, a case remains pending in the bankruptcy court for 30 days after the effective date of a notice of appeal. Once a certification is made, a request for permission to take a direct appeal to the court of appeals must be filed with the circuit clerk within 30 days after the certification. Appellate Rule 6 would be amended to provide in new subdivision (c) the procedures for requesting permission of the court of appeals and for any subsequent proceedings in that court.

Rule 8007 (Stay Pending Appeal; Bonds; Suspension of Proceedings) – This rule is derived from current Rule 8005 and Appellate Rule 8. In a change from the current rule, Rule 8007 would apply to appeals taken directly to the court of appeals, as well as to ones taken to the district court or the bankruptcy appellate panel. It retains a feature of current Rule 8005 that differs from Rule 8. If a bankruptcy court grants a stay or other relief authorized under

subdivision (a) of the rule, a party may seek to have that order vacated or modified by means of a motion filed in the reviewing court, rather than by filing a notice of appeal.

Rule 8008 (Indicative Rulings) – This rule would add to the Bankruptcy Rules a provision governing indicative rulings. Because it addresses procedures in both the trial and appellate courts, the proposed rule is a combination of Civil Rule 62.1 and Appellate Rule 12.1. Subdivision (a), which authorizes the bankruptcy court to issue an indicative ruling, and subdivision (b), which requires the movant to notify the "court in which the appeal is pending" of the bankruptcy court's ruling, would apply when a bankruptcy appeal is pending in the court of appeals, as well as when an appeal is pending in the district court or bankruptcy appellate panel. Subdivision (c), however, which authorizes the "appellate court" to remand for further proceedings, would apply only to district courts and bankruptcy appellate panels. Appellate Rule 12.1(b) would govern the actions of a court of appeals in response to an indicative ruling of a bankruptcy court. However, the procedures of proposed Rule 8008(c) and Appellate Rule 12.1(b) are identical.

Rule 8009 (Record and Issues on Appeal; Sealed Documents) – This rule is a revision of current Rule 8006. It borrows provisions from Appellate Rules 10 and 11(a) that would be new to the Bankruptcy Rules, including provisions regarding a statement of the record when no transcript is available, an agreed statement as the record on appeal, and correction or modification of the record. Rule 8009 would continue the current practice in bankruptcy appeals of having the parties designate items to be included in the record on appeal. It would include a new provision regarding the handling of documents under seal that are designated for inclusion in the record. That provision has no counterpart in the Appellate Rules. Rule 8009 would apply to direct appeals to the court of appeals, as well as to appeals to the district court and the bankruptcy appellate panel.

Rule 8010 (Completion and Transmission of the Record) – This rule is derived from current Rule 8007 and Appellate Rule 11. The Committee is still considering how best to draft the rule so that it will work smoothly in the majority of bankruptcy courts that record proceedings electronically without a court reporter present. The provision of current Rule 8007(b) regarding the docketing of an appeal upon the appellate clerk's receipt of the complete record has been deleted and, as noted above, replaced by provisions in Rules 8003 and 8004 requiring the appeal to be docketed when the appellate clerk receives the notice of appeal. In addition to applying to appeals from the bankruptcy court to the district court and to the bankruptcy appellate panel, Rule 8009 would apply to cases on direct appeal to the court of appeals under 28 U.S.C. §158(d)(2).

Rule 8011 (Filing and Service; Signature) – This rule is based on current Rule 8008 and Appellate Rule 25. It adopts the format, style, and some of the greater detail of Rule 25, and—consistent with the overall goals of the Part VIII revision project—it places a greater emphasis on the electronic filing and service of documents. Subdivision (e) is a new provision that would require an electronic signature of counsel or unrepresented parties for documents filed electronically in the appellate court.

Rule 8012 (Corporate Disclosure Statement) – This rule, new to the Part VIII rules, is based on Appellate Rule 26.1.

IV. Rules and Forms Published for Comment in August 2011

At the June 2011 meeting, the Standing Committee authorized the publication of proposed amendments to Bankruptcy Rules 1007, 3007, 5009, 9006, 9013, and 9014, and proposed amendments to Official Forms 6C, 7, 22A, and 22C. The deadline for submission of comments on these proposed amendments is February 15, 2012. Thus far eight comments have been submitted on the published amendments. Public hearings are tentatively scheduled for January 13, 2012, in Washington, D.C., and February 10, 2012, in Chicago, Illinois. No requests to testify at a hearing have yet been submitted.

The Committee will consider all of the comments submitted on the proposed amendments during its March 2012 meeting. The Committee will present the amendments approved at that meeting, with any appropriate changes, to the Standing Committee at its June 2012 meeting for its approval and transmittal to the Judicial Conference.

V. Other Information Items

A. *Stern v. Marshall*

The Committee continues to monitor case law developments following the Supreme Court's decision in *Stern v. Marshall*. In *Stern*, the Court considered whether a bankruptcy judge had the power, consistent with Article III, to hear and finally determine a debtor's state law counterclaim against a creditor who had filed a transactionally related claim against the estate. Although the governing statute, 28 U.S.C. § 157(b)(1) & (b)(2)(C), categorizes estate counterclaims as "core" proceedings that may be fully adjudicated by a bankruptcy judge, the Court held that the Constitution permits a bankruptcy judge to enter a final judgment, without consent of the parties, only when a counterclaim "stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process." Finding that test to be unsatisfied, the Court ultimately concluded that the creditor's counterclaim was entitled to the Article III forum the creditor had demanded.

Because the case touches on the power of bankruptcy judges to enter final judgments in disputes before them, *Stern* has garnered a high level of interest among the bankruptcy courts and the Article III courts. It has already been cited in more than 180 federal court opinions. Many citations to *Stern* reflect relatively restrained applications by bankruptcy courts of the Supreme Court's test for when they may finally determine a dispute. *See, e.g.*, *In re Salander O'Reilly Galleries*, 453 B.R. 106, 118 (Bankr. S.D.N.Y. 2011) (concluding that the bankruptcy court could finally determine a dispute that "implicate[d] the adjudication of the [creditor's] proof of claim"). Others involve decisions by district courts contemplating (and usually rejecting) the argument that *Stern* requires withdrawal of a proceeding referred to the bankruptcy court. *See, e.g.*, *In re Mortgage Store, Inc.*, 2011 WL 5056990 (D. Hawaii Oct. 5, 2011) (denying withdrawal of the reference because the bankruptcy court could submit proposed findings and conclusions even if it could not enter a final judgment); *Kelley v. JPMorgan Chase & Co.*, 2011 WL 4403289 at *5-6 (D. Minn. Sept. 21, 2011) (same).

While the Supreme Court described its holding as "a 'narrow' one," *Stern* has generated three significant open questions percolating in the courts. The first is whether the Court's decision applies to fraudulent conveyance actions. The second is whether the consent of litigants is sufficient to permit a bankruptcy court to enter final judgment when doing so would otherwise

be beyond the court's powers under *Stern*. The third is whether there are some proceedings over which the bankruptcy court has no power at all to entertain because of the interplay between *Stern* and provisions of the Judicial Code and Bankruptcy Rules.

The application of *Stern* to fraudulent conveyance actions—a common feature of bankruptcy litigation—has created divergent views. The Judicial Code categorizes actions "to determine, avoid, or recover fraudulent conveyances" as core proceedings. 28 U.S.C. § 157(b)(2)(H). Nevertheless, a number of decisions have read that statutory provision to run afoul of *Stern* in light of the Supreme Court's previous description of fraudulent conveyance actions as essentially common law claims like those usually committed to the Article III courts. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 56 (1989). Other courts, however, have found fraudulent conveyance actions to be sufficiently entwined with the bankruptcy process to permit the bankruptcy court to enter final judgment. *Compare In re Canopy Fin. Inc.*, 2011 WL 3911082 (N.D. Ill. Sept. 1, 2011) (concluding that the bankruptcy court cannot enter a final judgment on a fraudulent conveyance action), and *In re Blixseth*, 2011 WL 3274042, at *11–12 (Bankr. D. Mont. Aug. 1, 2011) (same), with *In re Heller Ehrman LLP*, 2011 WL 4542512 at *5-6 (Bankr. N.D. Cal. Sept. 28, 2011) (finding that a fraudulent conveyance action may be finally determined by the bankruptcy court), *In re Am. Bus. Fin. Servs., Inc.*, 457 B.R. 314, 319-20 (Bankr. D. Del. 2011) (holding that a bankruptcy court may enter final judgment in a fraudulent conveyance action involving "matters integral to the bankruptcy case"), and *In re Refco*, 2011 WL 5974532 at *9 (Bankr. S.D.N.Y. Nov. 30, 2011) ("Article III of the Constitution does not prohibit the bankruptcy courts' determination of fraudulent transfer claims under 11 U.S.C. §§ 544 and 548 by final judgment."). At least one decision has drawn a distinction, for Article III purposes, between proceedings brought under the Bankruptcy Code's own fraudulent conveyance provisions, §§ 548 and 549, and those brought under state law but asserted in bankruptcy as permitted by Code § 544. *See In re Innovative Commc'n Corp.*, 2011 WL 3439291, at *3-4 (Bankr. D.V.I. Aug. 5, 2011) (concluding that a bankruptcy court may finally determine a fraudulent conveyance action brought under § 548 but not under § 544). Although no court of appeals so far has confronted the question, the Ninth Circuit recently invited briefing on whether *Stern* prohibits bankruptcy courts from entering final judgment in a fraudulent conveyance action. *In re Bellingham Insurance Agency, Inc.*, 661 F.3d 476 (9th Cir. 2011).

The second question prompted by *Stern* is whether and to what extent the consent of the litigants may authorize a bankruptcy judge to hear and finally determine a proceeding that would otherwise fall beyond a bankruptcy judge's powers. Every court to consider the matter has held (or assumed) that litigant consent is ordinarily sufficient to permit a bankruptcy judge to enter a final judgment. The consent question has arisen in a variety of contexts. Typically, bankruptcy courts have simply noted that the parties have consented to entry of a final judgment, and that their consent satisfies *Stern*. In some cases, however, the court has raised *sua sponte* a potential *Stern* issue and required the parties to file a formal consent or objection to the bankruptcy court's power to adjudicate. *See, e.g.*, *In re Rancher Energy Corp.*, 2011 WL 5320971 at *3 (Bankr. D. Colo. Nov. 2, 2011) (ordering the litigants to enter a formal consent or objection to the bankruptcy court's power to enter final judgment). In other cases, the consent question has been raised in the district court on a motion to withdraw the reference. *See, e.g.*, *Mercury Companies, Inc. v. FNF Sec. Acquisition, Inc.*, 2011 WL 5127613 (D. Colo. Oct. 31, 2011) (rejecting the argument by defendants in a fraudulent conveyance action that "one cannot consent to the Bankruptcy Court's jurisdiction where the Bankruptcy Court does not have the authority to

resolve claims before it").[4] What constitutes "consent" and the timing of that consent have presented additional wrinkles. *See In re Development Specialists, Inc.*, 2011 WL 5244463, at *11-13 (S.D.N.Y. Nov. 2, 2011) (finding no consent even though the objecting parties had previously admitted that the bankruptcy court had jurisdiction and requested that the bankruptcy court enter judgment in their favor).

A third post-*Stern* question is whether the decision creates a category of disputes that fall into an adjudicatory gap between core and noncore proceedings. Courts have addressed whether there are some proceedings that a bankruptcy court cannot, as a constitutional matter, hear and finally determine as core proceedings but that the court also cannot, as a statutory and Rules matter, dispose of by a report and recommendation as noncore proceedings. The difficulty comes from the interplay between the Judicial Code's list of core proceedings and the provisions for the treatment of noncore proceedings. Bankruptcy courts may hear without finally determining "a proceeding that is not a core proceeding." 28 U.S.C. § 157(c)(1); *see also* Fed. R. Bankr. P. 9033. No provision explicitly provides for that treatment in a core proceeding. Therefore, some litigants have argued, claims governed by *Stern* cannot be treated as noncore proceedings, because the statute categorizes them as "core." At the same time, the argument goes, they cannot be heard and finally decided by the bankruptcy court without violating Article III. To date, only one bankruptcy court has embraced this reasoning. *See In re Blixseth*, 2011 WL 3274042 at *10-12. Other courts that have considered the argument have rejected it. *See, e.g., In re El-Atari*, 2011 WL 5828013, at *4-5 (E.D. Va. Nov. 18, 2011); *In re Mortgage Store, Inc.*, 2011 WL 5056990, at *5-6; *In re Canopy Fin., Inc.*, 2011 WL 3911082, at *4-5.

As this summary of decisions demonstrates, the post-*Stern* landscape is rapidly developing. The Committee will continue to assess whether there is a need for responsive rulemaking in light of continuing developments.

B. *Suggestion of Institute for Legal Reform for Quarterly Reporting by § 524(g) Trusts*

The Institute for Legal Reform ("ILR") submitted a suggestion to amend the Bankruptcy Rules to require "greater transparency in the operation of [asbestos] trusts established under 11 U.S.C. § 524(g)." In bankruptcy cases in which debtors face liability on asbestos-related personal injury or property damage claims, § 524(g) of the Bankruptcy Code permits the creation of a trust to pay those claimants, including future claimants, after confirmation of the debtor's plan of reorganization. Under ILR's proposal, asbestos trusts would file with bankruptcy courts quarterly reports describing in detail each demand for payment the trusts received during the reporting period. The proposal would also require trusts to disclose to third parties information regarding demands for payment presented to trusts by asbestos claimants if that information is relevant to litigation in any state or federal court. In explaining its suggestion, ILR stated that claimants may be making demands to asbestos trusts that are inaccurate or inconsistent with similar claims that the claimants brought in the tort system, thereby seeking overcompensation and depleting trusts to the detriment of future trust claimants. The proposal would represent a departure from the current practice among asbestos trusts, which typically make periodic reports

[4] Further guidance may come from a nonbankruptcy case pending in the Fifth Circuit, which has requested briefing on the question whether parties may consent to the entry of a final judgment by a magistrate judge in light of *Stern*. *See Technical Automation Servs. Corp. v. Liberty Surplus Ins. Corp.*, No. 10-20640 (5th Cir. Sept. 9, 2011).

of aggregate claims-handling information but do not disclose detailed information about the treatment of individual demands for payment.

The Committee recognized that ILR's suggestion addressed an important matter deserving careful attention. Committee members, however, expressed concern about the proposal. Because it would apply to trust operations after the confirmation of a debtor's plan of reorganization, members noted that the proposal might exceed the limited scope of post-confirmation bankruptcy jurisdiction. Members also stated that the proposal, although perhaps beneficial to parties in nonbankruptcy tort litigation, was arguably of limited use to bankruptcy courts and might be beyond the proper reach of the Bankruptcy Rules.

In assessing these concerns, members referred to comments received from interested individuals and groups—including practicing lawyers, asbestos trusts, representatives of future asbestos claimants, bar organizations, and ILR—who responded to a request from the Chair of the Committee for input on ILR's suggestion. Although some of the detailed responses supported the proposal, the majority urged the Committee not to adopt it. Many comments questioned whether bankruptcy rulemaking of the kind proposed was the appropriate mechanism to address the issues raised by ILR.

In light of these concerns, the Committee adopted the recommendation of its Business Subcommittee that further action not be taken on ILR's suggestion.

C. *Forms Modernization Project ("FMP")*

Since 2008 the Committee's Subcommittee on Forms has led a project to revise the Official Forms. Among the goals of this project are obtaining more complete and accurate responses on the forms, making the questions easier to understand, giving end users of the information the ability to extract data needed for specific purposes, and coordinating with the next generation of CM/ECF ("NextGen"). In the early stages of its work, the FMP decided that particular forms should no longer apply to all types of debtors. Instead, there should be forms specifically designed for individual debtors and another set for debtors that are entities, such as corporations. The FMP began by drafting individual debtor forms. At the Committee's September 2011 meeting, Bankruptcy Judge Elizabeth Perris, chair of the FMP and the Subcommittee on Forms, reported that drafts of the initial official bankruptcy forms to be filed by individuals have been prepared and approved by the FMP. Those drafts were included in the Committee's agenda materials.

The FMP has sought feedback on the drafts from a number of external users, including the National Association of Chapter Thirteen Trustees, the National Association of Bankruptcy Trustees, the National Association of Consumer Bankruptcy Attorneys, a group of attorneys from the Executive Office for United States Trustees, and an organization of creditor attorneys. Comments from those organizations and other reviewers have been mixed. Most reviewers support the user-friendly language in the new forms, but some believe the language is less precise and will lead to more pro se filings. Others think that the length of the forms (including instructions not intended to be filed) will discourage pro se filings, but will require additional work for debtor's counsel and therefore increase fees. Reviewers were less concerned about the length of the forms once they were informed that the goal was to make the new forms effective in conjunction with NextGen, which will allow custom reports to be created from the data collected on the forms.

The FMP's goal had been to publish the individual filing package for comment in August 2012, which would mean that the new forms could be effective as early as December 1, 2013. In light of comments about length, the FMP believes that the acceptance and success of the individual filing package will depend to a large extent on whether NextGen is sufficiently operational to permit data to be extracted from the forms when they go into effect.

It is not clear that NextGen will be at that stage by the end of 2013. Accordingly, the Committee preliminarily approved the FMP's recommendation to seek to publish in 2012 a subset of the individual filing package, consisting of, the fee waiver and installment fee forms, the income and expense forms, and the means test forms. These particular forms involve only the debtors' income and expenses and are not significantly longer than the forms they replace. The FMP will work with NextGen to emphasize the need to extract data from these forms when they become effective. For the same reasons, the FMP will recommend that a revised proof of claim form be included in the initial group of forms for publication.

The Committee will review the forms and revisit its publication recommendation at the spring meeting, after the FMP considers all the pre-publication comments. While the first forms are being tested, the FMP is working on the business forms and additional forms for individuals.

TAB 8-A

Appendix A

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

For Publication for Public Comment

Rule 7008. General Rules of Pleading

~~(a) APPLICABILITY OF RULE 8 F.R.CIV. P.~~ Rule 8 F.R. Civ. P. applies in adversary proceedings. The allegation of jurisdiction required by Rule 8(a) shall also contain a reference to the name, number, and chapter of the case under the Code to which the adversary proceeding relates and to the district and division where the case under the Code is pending. In an adversary proceeding before a bankruptcy judge, the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement that the proceeding is core or non-core and, if non-core, that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy judge.

~~(b) ATTORNEY'S FEES. A request for an award of attorney's fees shall be pleaded as a claim in a complaint, cross-claim, third-party complaint, answer, or reply as may be appropriate.~~

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

COMMITTEE NOTE

This rule is amended to delete subdivision (b), which required a request for attorney's fees always to be pleaded as a claim in an allowed pleading. That requirement, which differed from the practice under the Federal Rules of Civil Procedure, had the potential to serve as a trap for the unwary.

The procedures for seeking an award of attorney's fees are now set out in Rule 7054(b)(2), which makes applicable most of the provisions of Rule 54(d)(2) F.R. Civ. P. As specified by Rule 54(d)(2)(A) and (B) F.R. Civ. P., a claim for attorney's fees must be made by a motion filed no later than 14 days after entry of the judgment unless the governing substantive law requires those fees to be proved at trial as an element of damages. When fees are an element of damages, such as when the terms of a contract provide for the recovery of fees incurred prior to the instant adversary proceeding, the general pleading requirements of this rule still apply.

Rule 7054. Judgments; Costs[**]

1 (a) JUDGMENTS. Rule 54(a)-(c) F.R. Civ. P. applies in
2 adversary proceedings.
3 (b) COSTS; ATTORNEY'S FEES
4 (1) *Costs Other Than Attorney's Fees*. The court
5 may allow costs to the prevailing party except when a statute of the
6 United States or these rules otherwise provides. Costs against the
7 United States, its officers and agencies shall be imposed only to
8 the extent permitted by law. Costs may be taxed by the clerk on 14
9 days' notice; on motion served within seven days thereafter, the
10 action of the clerk may be reviewed by the court.

[**] Incorporates amendments that are due to take effect on December 1, 2012, if approved by the Supreme Court and Congress takes no action otherwise.

11 (2) *Attorney's Fees.*

12 (A) Rule 54(d)(2)(A)-(C) and (E) F.R. Civ.

13 P. applies in adversary proceedings except for the reference in

14 Rule 54(d)(2)(C) to Rule 78.

15 (B) By local rule, the court may establish

16 special procedures to resolve fee-related issues without extensive

17 evidentiary hearings.

COMMITTEE NOTE

Subdivision (b) is amended to prescribe the procedure for seeking an award of attorney's fees and related nontaxable expenses in adversary proceedings. It does so by adding new paragraph (2) that incorporates most of the provisions of Rule 54(d)(2) F.R. Civ. P. The title of subdivision (b) is amended to reflect the new content, and the previously existing provision governing costs is renumbered as paragraph (1) and re-titled.

As provided in Rule 54(d)(2)(A), new subsection (b)(2) does not apply to fees recoverable as an element of damages, as when sought under the terms of a contract providing for the recovery of fees incurred prior to the instant adversary proceeding. Such fees typically are required to be claimed in a pleading.

Rule 54(d)(2)(D) F.R. Civ. P. does not apply in adversary proceedings insofar as it authorizes the referral of fee matters to a master or a magistrate judge. The use of masters is not authorized in bankruptcy cases, *see* Rule 9031, and 28 U.S.C. § 636 does not authorize a magistrate judge to exercise jurisdiction upon referral by a bankruptcy judge. The remaining provision of Rule 54(d)(2)(D) is expressed in subdivision (b)(2)(B) of this rule.

Rule 54(d)(2)(C) refers to Rule 78 F.R. Civ. P., which is not applicable in adversary proceedings. Accordingly, that reference is not incorporated by this rule.

TAB 8-B

Appendix B

FEDERAL RULES OF BANKRUPTCY PROCEDURE

PART VIII. BANKRUPTCY APPEALS

Rule

8001. Scope of Part VIII Rules; Definitions

8002. Time for Filing Notice of Appeal

8003. Appeal as of Right – How Taken; Docketing of Appeal

8004. Appeal by Leave – How Taken; Docketing of Appeal

8005. Election to Have Appeal Heard by District Court Instead of BAP

8006. Certification of Direct Appeal to Court of Appeals

8007. Stay Pending Appeal; Bonds; Suspension of Proceedings

8008. Indicative Rulings

8009. Record and Issues on Appeal; Sealed Documents

8010. Completion and Transmission of the Record

8011. Filing and Service

8012. Corporate Disclosure Statement

Rule 8001. Scope of Part VIII Rules; Definitions

1 (a) GENERAL SCOPE. These Part VIII rules govern the
2 procedure in United States district courts and bankruptcy appellate
3 panels for appeals taken from judgments, orders, and decrees of
4 bankruptcy courts. They also govern certain procedures involving
5 appeals to courts of appeals under 28 U.S.C. § 158(d).
6 (b) DEFINITIONS
7 (1) "BAP." As used in these Part VIII rules, "BAP"
8 means a bankruptcy appellate panel established by the judicial
9 council of a circuit and authorized to hear appeals from the
10 bankruptcy court for the district in which an appeal is taken under
11 28 U.S.C. § 158.
12 (2) "APPELLATE COURT." As used in these Part
13 VIII rules, "appellate court" means either the district court or the
14 BAP – whichever is the court in which the bankruptcy appeal is
15 pending or to which the appeal will be taken.
16 (3) "TRANSMIT." As used in these Part VIII
17 rules, "transmit" means to send electronically unless the document
18 is being sent by or to an individual who is not represented by
19 counsel or the governing rules of the court permit or require
20 mailing or other means of delivery of the document in question.

COMMITTEE NOTE

These Part VIII rules apply to appeals under 28 U.S.C. § 158(a) from bankruptcy courts to district courts and BAPs. As provided in subdivision (d) of this rule, the term "appellate court" is used in Part VIII to refer to the court – district court or BAP – to which a bankruptcy appeal is taken.

Subsequent appeals to courts of appeals are generally governed by the Federal Rules of Appellate Procedure. Seven of the Part VIII rules do, however, relate to appeals to courts of appeals. Rule 8004(e) provides that authorization by the court of appeals of a direct appeal of a bankruptcy court's interlocutory judgment, order, or decree constitutes a grant of leave to appeal. Rule 8006 governs the procedure for certification under 28 U.S.C. § 158(d)(2) of a direct appeal from a judgment, order, or decree of a bankruptcy court to a court of appeals. Rule 8007 addresses stays pending a direct appeal to a court of appeals. Rule 8008 authorizes a bankruptcy court to issue an indicative ruling while an appeal is pending in a court of appeals. Rules 8009 and 8010 govern the record on appeal in a direct appeal allowed under 28 U.S.C. § 158(d)(2). And Rule 8026 governs the granting of a stay of an appellate court judgment pending an appeal to the court of appeals.

These rules take account of the evolving technology in the federal courts for the electronic filing, storage, and transmission of documents. Any form of the term "transmit" is used to encompass the electronic conveyance of information. Except as applied to pro se parties, a requirement in the Part VIII rules to transmit a document means that it must be sent electronically unless applicable rules or orders require or permit another means of sending a particular document.

Rule 8002. Time for Filing Notice of Appeal

1 (a) FOURTEEN-DAY PERIOD.

2 (1) Except as provided in Rule 8002(b) and (c), the
3 notice of appeal required by Rule 8003 or 8004 must be filed with
4 the bankruptcy clerk within 14 days after entry of the judgment,
5 order, or decree being appealed.

6 (2) If one party files a timely notice of appeal, any
7 other party may file a notice of appeal with the bankruptcy clerk
8 within 14 days after the date on which the first notice of appeal
9 was filed, or within the time otherwise allowed by this rule,
10 whichever period ends later.

11 (3) A notice of appeal filed after a bankruptcy court
12 announces a decision or order, but before entry of the judgment,
13 order, or decree, is treated as filed after entry of the judgment,
14 order, or decree and on the date of entry.

15 (4) If a notice of appeal is mistakenly filed with the
16 appellate court or the court of appeals, the clerk of that court must
17 indicate on the notice the date on which it was received and
18 transmit it to the bankruptcy clerk. The notice of appeal is then
19 considered filed in the bankruptcy court on the date so indicated.

20 (b) EFFECT OF MOTION ON TIME FOR APPEAL.

21 (1) If a party timely files in the bankruptcy court

22 any of the following motions, the time to file an appeal runs for all
23 parties from the entry of the order disposing of the last such
24 remaining motion:
25 (A) to amend or make additional findings
26 under Rule 7052, whether or not granting the motion would alter
27 the judgment;
28 (B) to alter or amend the judgment under
29 Rule 9023;
30 (C) for a new trial under Rule 9023; or
31 (D) for relief under Rule 9024 if the motion
32 is filed no later than 14 days after entry of the judgment.
33 (2)(A) If a party files a notice of appeal after the
34 court announces or enters a judgment, order, or decree – but before
35 it disposes of any motion listed in Rule 8002(b)(1) – the notice
36 becomes effective when the order disposing of the last such
37 remaining motion is entered.
38 (B) A party intending to challenge on appeal an
39 order disposing of any motion listed in Rule 8002(b)(1), or the
40 alteration or amendment of a judgment, order, or decree upon such
41 a motion, must file a notice of appeal or an amended notice of
42 appeal. The notice of appeal or amended notice of appeal must be
43 filed in compliance with Rule 8003 or 8004 and within the time

44 prescribed by this rule, measured from the entry of the order
45 disposing of the last such remaining motion.
46 (3) No additional fee is required to file an amended
47 notice of appeal.
48 (c) APPEAL BY AN INMATE CONFINED IN AN
49 INSTITUTION.
50 (1) If an inmate confined in an institution files a
51 notice of appeal from a judgment, order, or decree of a bankruptcy
52 court to an appellate court, the notice is timely if it is deposited in
53 the institution's internal mail system on or before the last day for
54 filing. If an institution has a system designed for legal mail, the
55 inmate must use that system to receive the benefit of this rule.
56 Timely filing may be shown by a declaration in compliance with
57 28 U.S.C. § 1746 or by a notarized statement, either of which must
58 set forth the date of deposit and state that first-class postage has
59 been prepaid.
60 (2) If an inmate files under Rule 8002(c) the first
61 notice of appeal from a judgment, order, or decree of a bankruptcy
62 court to an appellate court, the 14-day period provided in Rule
63 8002(a)(2) for another party to file a notice of appeal runs from the
64 date when the bankruptcy court dockets the first notice.
65 (d) EXTENSION OF TIME FOR APPEAL.

66 (1) The bankruptcy court may extend the time for
67 filing a notice of appeal by a party unless the judgment, order, or
68 decree appealed from:
69 (A) grants relief from an automatic stay
70 under § 362, 922, 1201, or 1301 of the Code;
71 (B) authorizes the sale or lease of property
72 or the use of cash collateral under § 363 of the Code;
73 (C) authorizes the obtaining of credit under
74 § 364 of the Code;
75 (D) authorizes the assumption or
76 assignment of an executory contract or unexpired lease under §
77 365 of the Code;
78 (E) approves a disclosure statement under
79 § 1125 of the Code; or
80 (F) confirms a plan under § 943, 1129,
81 1225, or 1325 of the Code.
82 (2) The bankruptcy court may extend the time to
83 file a notice of appeal if:
84 (A) a motion for extension of time is filed
85 with the bankruptcy clerk within the time prescribed by this rule;
86 or
87 (B) a motion is filed with the bankruptcy

88 clerk no later than 21 days after the time prescribed by this rule

89 expires and is accompanied by a demonstration of excusable

90 neglect; but

91 (C) no extension of time for filing a notice

92 of appeal may exceed 21 days after the time otherwise prescribed

93 by this rule, or 14 days after the date the order granting the motion

94 is entered, whichever is later.

COMMITTEE NOTE

This rule is derived from former Rule 8002 and F.R. App. P. 4(a) and (c). With the exception of subdivision (c), the changes to the former rule are stylistic. The rule retains the former rule's 14-day time period for filing a notice of appeal, as opposed to the longer periods permitted for appeals in civil cases under F.R. App. P. 4(a).

Subdivision (a) continues to allow any other party to file a notice of appeal within 14 days after the first notice of appeal is filed, or thereafter to the extent otherwise authorized by this rule. Subdivision (a) also retains provisions of the former rule that prescribe the date of filing of the notice of appeal if the appellant files it prematurely or in the wrong court.

Subdivision (b), like former Rule 8002(b) and F.R. App. P. 4(a), tolls the time for filing a notice of appeal when certain post-judgment motions are filed, and it prescribes the effective date of a notice of appeal that is filed before the court disposes of all of the specified motions. As under the former rule, a party that wants to appeal the court's disposition of such a motion or the alteration or amendment of a judgment, order, or decree in response to such a motion must file a notice of appeal or, if it has already filed one, an amended notice of appeal.

Although Rule 8003(a)(3)(C) requires a notice of appeal to be accompanied by the required fee, no additional fee is required for the filing of an amended notice of appeal.

Subdivision (c) mirrors the provisions of F.R. App. P. 4(c)(1) and (2), which specify timing rules for a notice of appeal filed by an inmate

confined in an institution.

Subdivision (d) continues to allow the court to grant an extension of time to file a notice of appeal, except with respect to certain specified judgments, orders, and decrees.

Rule 8003. Appeal as of Right – How Taken; Docketing of Appeal

1 (a) FILING THE NOTICE OF APPEAL.

2 (1) An appeal from a judgment, order, or decree of
3 a bankruptcy court to an appellate court as permitted by 28 U.S.C.
4 § 158(a)(1) or (a)(2) may be taken only by filing a notice of appeal
5 with the bankruptcy clerk within the time allowed by Rule 8002.

6 (2) An appellant's failure to take any step other
7 than the timely filing of a notice of appeal does not affect the
8 validity of the appeal, but is ground only for the appellate court to
9 act as it considers appropriate, including dismissing the appeal.

10 (3) The notice of appeal must:

11 (A) conform substantially to the appropriate
12 Official Form;

13 (B) be accompanied by the judgment, order,
14 or decree, or part thereof, being appealed; and

15 (C) be accompanied by the prescribed fee.

16 (4) If requested by the bankruptcy clerk, each
17 appellant must promptly file the number of copies of the notice of
18 appeal that the bankruptcy clerk needs for compliance with Rule
19 8003(c).

20 (b) JOINT OR CONSOLIDATED APPEALS.

21 (1) When two or more parties are entitled to appeal

22 from a judgment, order, or decree of a bankruptcy court and their
23 interests make joinder practicable, they may file a joint notice of
24 appeal. They may then proceed on appeal as a single appellant.
25 (2) When parties have separately filed timely
26 notices of appeal, the appellate court may join or consolidate the
27 appeals.
28 (c) SERVING THE NOTICE OF APPEAL.
29 (1) The bankruptcy clerk must serve notice of the
30 filing of a notice of appeal by transmitting it to counsel of record
31 for each party to the appeal – excluding the appellant – or, if a
32 party is proceeding pro se, sending it to the pro se party's service
33 address.
34 (2) The bankruptcy clerk's failure to serve notice
35 does not affect the validity of the appeal.
36 (3) The bankruptcy clerk must give each party
37 served notice of the date on which the notice of appeal was filed
38 and note on the docket the names of the parties served and the date
39 and method of the service.
40 (4) The bankruptcy clerk must promptly transmit
41 the notice of appeal to the United States trustee, but failure to
42 transmit notice to the United States trustee does not affect the
43 validity of the appeal.

44 (d) TRANSMITTING THE NOTICE OF APPEAL TO

45 THE APPELLATE COURT; DOCKETING THE APPEAL.

46 (1) The bankruptcy clerk must promptly transmit

47 the notice of appeal to the BAP clerk if a BAP has been established

48 for appeals from that district and the appellant has not elected to

49 have the appeal heard by the district court. Otherwise, the

50 bankruptcy clerk must promptly transmit the notice of appeal to

51 the district clerk.

52 (2) Upon receiving the notice of appeal, the clerk

53 of the appellate court must docket the appeal under the title of the

54 bankruptcy court action with the appellant identified – adding the

55 appellant's name if necessary.

COMMITTEE NOTE

This rule is derived in part from former Rule 8001(a) and F.R. App. P. 3. It encompasses stylistic changes to the former provision governing appeals as of right. In addition it addresses joint and consolidated appeals and incorporates and modifies provisions of former Rule 8004 regarding service of the notice of appeal. The rule changes the timing of the docketing of an appeal in the district court or BAP.

Subdivision (a) incorporates much of the content of former Rule 8001(a) regarding the taking of an appeal as of right under 28 U.S.C. § 158(a)(1) or (2). The rule now requires that the judgment, order, or decree being appealed be attached to the notice of appeal.

Subdivision (b), which is an adaptation of F.R. App. P. 3(b), permits the filing of a joint notice of appeal by multiple appellants that have sufficiently similar interests that their joinder is practicable. It also provides for the appellate court's consolidation of appeals taken separately by two or more parties.

Subdivision (c) is derived from former Rule 8004 and F.R. App. P. 3(d). By using the term "transmitting," it modifies the former rule's requirement that service of the notice of appeal be accomplished by mailing and allows the bankruptcy clerk to serve counsel by electronic means. Service on pro se parties must be made by sending the notice to the address – whether street, post office box, or email – most recently provided to the court.

Subdivision (d) modifies the provision of former Rule 8007(b), which delayed the docketing of an appeal by the appellate court until the record was complete and transmitted by the bankruptcy clerk. The new provision, adapted from F.R. App. P. 3(d) and 12(a), requires the bankruptcy clerk to promptly transmit the notice of appeal to the clerk of the appellate court. Upon receipt of the notice of appeal, the clerk of the appellate court must docket the appeal. Under this procedure, motions filed in the appellate court prior to completion and transmission of the record can generally be placed on the docket of an already pending appeal.

Rule 8004. Appeal by Leave – How Taken; Docketing of Appeal

1 (a) NOTICE OF APPEAL AND MOTION FOR LEAVE
2 TO APPEAL. An appeal from an interlocutory judgment, order, or
3 decree of a bankruptcy court as permitted by 28 U.S.C. § 158(a)(3)
4 may be taken only by filing with the bankruptcy clerk a notice of
5 appeal as prescribed by Rule 8003(a) and within the time allowed
6 by Rule 8002. The notice of appeal must be accompanied by a
7 motion for leave to appeal prepared in accordance with Rule
8 8004(b) and, unless served electronically using the court's
9 transmission equipment, with proof of service in accordance with
10 Rule 8011(d).
11 (b) CONTENT OF MOTION; RESPONSE.
12 (1) A motion for leave to appeal under 28 U.S.C.
13 § 158(a)(3) must include the following:
14 (A) the facts necessary to understand the
15 questions presented;
16 (B) the questions themselves;
17 (C) the relief sought;
18 (D) the reasons why leave to appeal should
19 be granted; and
20 (E) an attachment of the interlocutory
21 judgment, order, or decree from which appeal is sought, and any

22 related opinions or memoranda.

23 (2) A party may file with the clerk of the appellate
24 court a response in opposition or a cross-motion within 14 days
25 after the motion is served.

26 (c) TRANSMITTING THE NOTICE OF APPEAL AND
27 MOTION; DOCKETING THE APPEAL; DETERMINING THE
28 MOTION.

29 (1) The bankruptcy clerk must promptly transmit
30 the notice of appeal and the motion for leave to appeal, together
31 with any statement of election under Rule 8005, to the clerk of the
32 appellate court.

33 (2) Upon receiving the notice of appeal and motion
34 for leave to appeal, the clerk of the appellate court must docket the
35 appeal under the title of the bankruptcy court action with the
36 movant-appellant identified – adding the movant-appellant's name
37 if necessary.

38 (3) The motion and any response or cross-motion
39 are submitted without oral argument unless the appellate court
40 orders otherwise. If the motion for leave to appeal is denied, the
41 appellate court must dismiss the appeal.

42 (d) FAILURE TO FILE A MOTION. If an appellant does
43 not file a motion for leave to appeal an interlocutory judgment,

44 order, or decree, but timely files a notice of appeal, the appellate
45 court may:
46 • direct the appellant to file a motion for leave to
47 appeal; or
48 • treat the notice of appeal as a motion for leave to
49 appeal and either grant or deny leave.
50 If the court directs that a motion for leave to appeal be filed, the
51 appellant must file the motion within 14 days after the order
52 directing the filing is entered, unless the order provides otherwise.
53 (e) DIRECT APPEAL TO COURT OF APPEALS. If
54 leave to appeal an interlocutory judgment, order, or decree is
55 required under 28 U.S.C. § 158(a)(3) and has not been granted by
56 the appellate court, an authorization by the court of appeals of a
57 direct appeal under 28 U.S.C. § 158(d)(2) satisfies the requirement
58 for leave to appeal.

COMMITTEE NOTE

This rule is derived from former Rules 8001(b) and 8003 and F.R. App. P. 5. It retains the practice for interlocutory bankruptcy appeals of requiring a notice of appeal to be filed along with a motion for leave to appeal. Like current Rule 8003, it alters the timing of the docketing of the appeal in the appellate court.

Subdivision (a) requires a party seeking leave to appeal under 28 U.S.C. § 158(a)(3) to file with the bankruptcy clerk both a notice of appeal and a motion for leave to appeal.

Subdivision (b) prescribes the contents of the motion, retaining the

requirements of former Rule 8003(a). It also continues to allow another party to file a cross-motion or response to the appellant's motion. Because of the prompt docketing of the appeal under the current rule, the cross-motion or response must be filed in the appellate court, rather than in the bankruptcy court as the former rule required.

Subdivision (c) requires the bankruptcy clerk to transmit promptly the notice of appeal and the motion for leave to appeal to the appellate court. Upon receipt of the notice and the motion, the clerk of the appellate court must docket the appeal. Unless the appellate court orders otherwise, no oral argument will be held on the motion.

Subdivision (d) retains the provisions of former Rule 8003(c). It provides that if the appellant timely files a notice of appeal, but fails to file a motion for leave to appeal, the court can either direct that a motion be filed or treat the notice of appeal as the motion and either grant or deny leave.

Subdivision (e), like former Rule 8003(d), treats the authorization of a direct appeal by the court of appeals as a grant of leave to appeal under 28 U.S.C. § 158(a)(3) if the appellate court has not already granted leave to appeal. Thus a separate order granting leave to appeal is not required. If the court of appeals grants permission to appeal, the record must be assembled and transmitted in accordance with Rules 8009 and 8010.

Rule 8005. Election to Have Appeal Heard by District Court Instead of BAP

1 (a) FILING OF THE STATEMENT OF ELECTION. To
2 elect under 28 U.S.C. § 158(c)(1) to have an appeal heard by the
3 district court, a party must:
4 (1) submit a statement of election that conforms
5 substantially to the appropriate Official Form; and
6 (2) file the statement within the time prescribed by
7 28 U.S.C. § 158(c)(1).
8 (b) TRANSFER OF THE APPEAL. Upon receiving an
9 appellant's timely statement of election, the bankruptcy clerk must
10 transmit all documents related to the appeal to the district court.
11 Upon receiving a timely statement of election by a party other than
12 the appellant, the BAP clerk must promptly transfer the appeal and
13 any pending motions to the district court.
14 (c) DETERMINING THE VALIDITY OF AN
15 ELECTION. No later than 14 days after the statement of election
16 is filed, a party seeking a determination of the validity of an
17 election must file a motion in the court in which the appeal is then
18 pending.
19 (d) APPEAL BY LEAVE – TIMING OF ELECTION. If
20 an appellant moves for leave to appeal under Rule 8004 and fails
21 to file a separate notice of appeal concurrently with the filing of its

22 motion, the motion must be treated as if it were a notice of appeal

23 for purposes of determining the timeliness of the filing of a

24 statement of election.

COMMITTEE NOTE

This rule is derived from former Rule 8001(e), and it implements 28 U.S.C. § 158(c)(1).

As was required by the former rule, subdivision (a) requires an appellant that elects to have its appeal heard by a district court, rather than a BAP, to file with the bankruptcy clerk a statement of election when it files its notice of appeal. The statement must conform substantially to the appropriate Official Form. If a BAP has been established for appeals from the bankruptcy court and the appellant does not file a timely statement of election, any other party that elects to have the appeal heard by the district court must file a statement of election with the BAP clerk no later than 30 days after service of the notice of appeal.

Subdivision (b) requires the bankruptcy clerk to transmit all appeal documents to the district clerk if the appellant files a timely statement of election. If the appellant does not make that election, the bankruptcy clerk must transmit the appeal documents to the BAP clerk, and upon a timely election by any other party, the BAP clerk must promptly transfer the appeal to the district court.

Subdivision (c) provides a new procedure for the resolution of disputes regarding the validity of an election. A motion challenging the validity of an election must be filed no later than 14 days after the statement of election is filed. Nothing in this rule prevents a court from determining the validity of an election on its own motion.

Subdivision (d) provides that, in the case of an appeal by leave, if the appellant files a motion for leave to appeal but fails to file a notice of appeal, the filing and service of the motion will be treated for timing purposes under this rule as the filing and service of the notice of appeal.

Rule 8006. Certification of Direct Appeal to Court of Appeals

1 (a) EFFECTIVE DATE OF CERTIFICATION.
2 Certification of a judgment, order, or decree of a bankruptcy court
3 for direct review in a court of appeals under 28 U.S.C. § 158(d)(2)
4 is effective when the following events have occurred:
5 (1) the certification has been filed;
6 (2) a timely appeal has been taken from the
7 judgment, order, or decree in accordance with Rule 8003 or 8004;
8 and
9 (3) the notice of appeal has become effective under
10 Rule 8002.
11 (b) FILING OF CERTIFICATION. The certification
12 required by 28 U.S.C. § 158(d)(2)(A) must be filed with the clerk
13 of the court in which a matter is pending. For purposes of this
14 rule, a matter is pending in the bankruptcy court for 30 days after
15 the effective date of the first notice of appeal from the judgment,
16 order, or decree for which direct review in the court of appeals is
17 sought. A matter is pending in the appellate court thereafter.
18
19 (c) JOINT CERTIFICATION BY ALL APPELLANTS
20 AND APPELLEES. A joint certification by all the appellants and
21 appellees under 28 U.S.C. § 158(d)(2)(A) must be made by

22 executing the appropriate Official Form and filing it with the clerk
23 of the court in which the matter is pending. The parties may
24 supplement the certification with a short statement of the basis for
25 the certification, which may include the information listed in Rule
26 8006(f)(3).
27 (d) COURT THAT MAY MAKE CERTIFICATION.
28 (1) Only the bankruptcy court may make a
29 certification on request of parties or on its own motion while the
30 matter is pending before it as provided in Rule 8006(b).
31 (2) Only the appellate court may make a
32 certification on request of parties or on its own motion while the
33 matter is pending before it as provided in Rule 8006(b).
34 (e) CERTIFICATION ON THE COURT'S OWN
35 MOTION.
36 (1) A certification on the court's own motion under
37 28 U.S.C. § 158(d)(2)(A) must be set forth in a separate document.
38 The clerk of the certifying court must serve this document on the
39 parties in the manner required for service of a notice of appeal
40 under Rule 8003(c)(1). The certification must be accompanied by
41 an opinion or memorandum that contains the information required
42 by Rule 8006(f)(3)(A)-(D).
43 (2) Within 14 days after the court's certification, a

44 party may file with the clerk of the certifying court a short
45 supplemental statement regarding the merits of certification.
46 (f) CERTIFICATION BY THE COURT ON REQUEST.
47 (1) A request by a party for certification that a
48 circumstance specified in 28 U.S.C. § 158(d)(2)(A)(i)-(iii) exists,
49 or a request by a majority of the appellants and a majority of the
50 appellees, must be filed with the clerk of the court in which the
51 matter is pending within the time specified by 28 U.S.C.
52 § 158(d)(2)(E).
53 (2) A request for certification must be served in the
54 manner required for service of a notice of appeal under Rule
55 8003(c)(1).
56 (3) A request for certification must include the
57 following:
58 (A) the facts necessary to understand the
59 question presented;
60 (B) the question itself;
61 (C) the relief sought;
62 (D) the reasons why the appeal should be
63 allowed and is authorized by statute and rule, including why a
64 circumstance specified in 28 U.S.C. § 158(d)(2)(A)(i)-(iii) exists;
65 and

66 (E) a copy of the judgment, order, or decree
67 that is the subject of the requested certification and any related
68 opinion or memorandum.
69 (4) A party may file a response to a request for
70 certification within 14 days after the request is served, or such
71 other time as the court in which the matter is pending may allow.
72 A party may file a cross-request for certification within 14 days
73 after the request is served, or within 60 days after the entry of the
74 judgment, order, or decree, whichever occurs first.
75 (5) The request, cross-request, and any response
76 are not governed by Rule 9014 and are submitted without oral
77 argument unless the court in which the matter is pending otherwise
78 directs.
79 (6) A certification of an appeal under 28 U.S.C.
80 § 158(d)(2) in response to a request must be made in a separate
81 document served on the parties in the manner required for service
82 of a notice of appeal under Rule 8003(c)(1).
83 (g) PROCEEDING IN THE COURT OF APPEALS
84 FOLLOWING CERTIFICATION. A request for permission to
85 take a direct appeal to the court of appeals under 28 U.S.C.
86 § 158(d)(2) must be filed with the circuit clerk within 30 days after
87 the date the certification becomes effective under subdivision (a).

COMMITTEE NOTE

This rule is derived from former Rule 8001(f), and it provides the procedures for the certification of a direct appeal of a judgment, order, or decree of a bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2). Once a case has been certified in the bankruptcy court or the appellate court for direct appeal and a request for permission to appeal has been timely filed, the Federal Rules of Appellate Procedure govern further proceedings in the court of appeals.

Subdivision (a), like the former rule, requires that an appeal be properly taken – now under Rule 8003 or 8004 – before a certification for direct review in the court of appeals takes effect. This rule requires the timely filing of a notice of appeal under Rule 8002 and accounts for the delayed effectiveness of a notice of appeal under the circumstances specified in Rule 8002. Normally a notice of appeal is effective when it is filed in the bankruptcy court. Rule 8002, however, delays the effectiveness of a notice of appeal when (1) it is filed after the announcement of a decision or order but prior to the entry of the judgment, order, or decree; or (2) it is filed after the announcement or entry of a judgment, order, or decree but before the bankruptcy court disposes of certain post-judgment motions.

When the bankruptcy court enters an interlocutory judgment, order, or decree that is appealable under 28 U.S.C. § 158(a)(3), certification for direct review in the court of appeals may take effect before the appellate court grants leave to appeal. The certification is effective when the actions specified in subdivision (a) have occurred. Rule 8004(e) provides that if the court of appeals grants permission to take a direct appeal before leave to appeal an interlocutory ruling has been granted, the authorization by the court of appeals is treated as the granting of leave to appeal.

Subdivision (b) provides that a certification must be filed in the court in which the matter is pending, as determined by this subdivision. This provision modifies the former rule. Because of the prompt docketing of appeals in the appellate court under Rules 8003 and 8004, a matter is deemed – for purposes of this rule only – to remain pending in the bankruptcy court for 30 days after the effective date of the notice of appeal. This provision will in appropriate cases give the bankruptcy judge, who will be familiar with the matter being appealed, an opportunity to decide whether certification for direct review is appropriate. Similarly, subdivision (d) provides that, when certification is made by the court, only the court in which the matter is then pending according to (b) may make the

certification.

Section 158(d)(2) provides three different ways in which an appeal may be certified for direct review. Implementing these options, the rule provides in subdivision (c) for the joint certification by all appellants and appellees, in subdivision (e) for the bankruptcy or appellate court's certification on its own motion, and in subdivision (f) for the bankruptcy or appellate court's certification on request of a party or of a majority of appellants and a majority of appellees.

Subdivision (g) requires that, once a certification for direct review has been made, a request to the court of appeals for permission to take a direct appeal to that court must be filed with the circuit clerk no later than 30 days after the effective date of the certification. Rule 6(c) of the Federal Rules of Appellate Procedure, which incorporates all of F.R. App. P. 5 except subdivision (a)(3), prescribes the procedure for requesting the permission of the court of appeals, and it governs proceedings that take place thereafter in that court.

Rule 8007. Stay Pending Appeal; Bonds; Suspension of Proceedings

(a) INITIAL MOTION IN THE BANKRUPTCY COURT; TIME TO FILE.

(1) A party must ordinarily move first in the bankruptcy court for the following relief:

(A) a stay of a judgment, order, or decree of the bankruptcy court pending appeal;

(B) approval of a supersedeas bond;

(C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending; or

(D) the suspension or continuation of proceedings in a case or other relief permitted by Rule 8007(e).

(2) A motion for a type of relief specified in Rule 8007(a)(1) may be made in the bankruptcy court either before or after the filing of a notice of appeal of the judgment, order, or decree appealed from.

(b) MOTION IN THE APPELLATE COURT OR THE COURT OF APPEALS IN A DIRECT APPEAL; CONDITIONS ON RELIEF.

(1) A motion for a type of relief specified in Rule 8007(a)(1), or to vacate or modify an order of the bankruptcy court granting such relief, may be made in the appellate court or in the

22 court of appeals in a direct appeal to that court.

23 (2) The motion must:

24 (A) show that it would be impracticable to

25 move first in the bankruptcy court if the moving party has not

26 sought relief in the first instance in the bankruptcy court; or

27 (B) state the bankruptcy court's ruling and

28 any reasons given by the bankruptcy court for its ruling.

29 (3) The motion must also include:

30 (A) the reasons for granting the relief

31 requested and the pertinent facts;

32 (B) originals or copies of affidavits or other

33 sworn statements supporting facts subject to dispute; and

34 (C) relevant parts of the record.

35 (4) The movant must give reasonable notice of the

36 motion to all parties.

37 (c) FILING OF BOND OR OTHER SECURITY. The

38 appellate court may condition relief under this rule on the filing of

39 a bond or other appropriate security with the bankruptcy court.

40 (d) REQUIREMENT OF BOND FOR TRUSTEE OR

41 THE UNITED STATES. When a trustee appeals, a bond or other

42 appropriate security may be required. When an appeal is taken by

43 the United States, its officer, or its agency or by direction of any

44 department of the federal government, a bond or other security is

45 not required.

46 (e) CONTINUATION OF PROCEEDINGS IN THE

47 BANKRUPTCY COURT. Notwithstanding Rule 7062 and subject

48 to the authority of the appellate court or court of appeals, the

49 bankruptcy court may:

50 (1) suspend or order the continuation of other

51 proceedings in the case; or

52 (2) make any other appropriate orders during the

53 pendency of an appeal on terms that protect the rights of all parties

54 in interest.

COMMITTEE NOTE

This rule is derived from former Rule 8005 and F.R. App. P. 8. It now applies to direct appeals in courts of appeals.

Subdivision (a), like the former rule, requires a party ordinarily to seek relief pending an appeal in the bankruptcy court. Subdivision (a)(1) expands the list of relief enumerated in F.R. App. P. 8(a)(1) to reflect bankruptcy practice. It includes the suspension or continuation of other proceedings in the bankruptcy case, as authorized by subdivision (e). Subdivision (a)(2) clarifies that a motion for a stay pending appeal, approval of a supersedeas bond, or any other relief specified in paragraph (1) may be made in the bankruptcy court before or after the filing of a notice of appeal.

Subdivision (b) authorizes a party to seek the relief specified in (a)(1), or the vacation or modification of the granting of such relief, by means of a motion filed in the appellate court or the court of appeals. Accordingly, a notice of appeal need not be filed with respect to a bankruptcy court's order granting or denying such a motion. The motion for relief in the appellate court or court of appeals must state why it was impracticable to seek relief initially in the bankruptcy court, if a motion was

not filed there, or why the bankruptcy court denied the relief sought.

Subdivisions (c) and (d) retain the provisions of the former rule that permit the appellate court (and now the court of appeals) to condition the granting of relief on the posting of a bond by the appellant, except when that party is a federal government entity. Rule 9025 governs proceedings against sureties.

Rule 8008. Indicative Rulings

1 (a) RELIEF PENDING APPEAL. If a party files a timely
2 motion in the bankruptcy court for relief that the bankruptcy court
3 lacks authority to grant because of an appeal that has been
4 docketed and is pending, the bankruptcy court may:
5 (1) defer consideration of the motion;
6 (2) deny the motion; or
7 (3) state that the court would grant the motion if the
8 court in which the appeal is pending remands for that purpose, or
9 state that the motion raises a substantial issue.
10 (b) NOTICE TO COURT IN WHICH THE APPEAL IS
11 PENDING. If the bankruptcy court states that it would grant the
12 motion, or that the motion raises a substantial issue, the movant
13 must promptly notify the clerk of the court in which the appeal is
14 pending.
15 (c) REMAND AFTER INDICATIVE RULING. If the
16 bankruptcy court states that it would grant the motion or that the
17 motion raises a substantial issue and the appeal is pending in an
18 appellate court, the appellate court may remand for further
19 proceedings, but it retains jurisdiction unless it expressly dismisses
20 the appeal. If the appellate court remands but retains jurisdiction,
21 the parties must promptly notify the clerk of that court when the

22 bankruptcy court has decided the motion on remand.

COMMITTEE NOTE

This rule is an adaptation of F.R. Civ. P. 62.1 and F.R. App. P. 12.1. It provides a procedure for the issuance of an indicative ruling when a bankruptcy court determines that, because of a pending appeal, the court lacks jurisdiction to grant a request for relief that the court concludes is meritorious or raises a substantial issue. The rule, however, does not attempt to define the circumstances in which an appeal limits or defeats the bankruptcy court's authority to act in the face of a pending appeal. (Rule 8002(b) identifies motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before the last such motion is resolved. In these circumstances, the bankruptcy court has authority to resolve the motion without resorting to the indicative ruling procedure.)

Subdivision (b) requires the movant to notify the court in which an appeal is pending if the bankruptcy court states that it would grant the motion or that it raises a substantial issue. This provision applies to appeals pending in the district court, the BAP, or the court of appeals.

Federal Rules of Appellate Procedure 6 and 12.1 govern the procedure in the court of appeals following notification of the bankruptcy court's indicative ruling.

Subdivision (c) of this rule governs the procedure in the district court or BAP upon notification that the bankruptcy court has issued an indicative ruling. The appellate court may remand to the bankruptcy court for a ruling on the motion for relief. The appellate court may also remand all proceedings, thereby terminating the initial appeal, if it expressly states that it is dismissing the appeal. It should do so, however, only when the appellant has stated clearly its intention to abandon the appeal. Otherwise, the appellate court may remand for the purpose of ruling on the motion, while retaining jurisdiction to proceed with the appeal after the bankruptcy court rules, provided that the appeal is not then moot and any party wishes to proceed.

Rule 8009. Record and Issues on Appeal; Sealed Documents

1 (a) DESIGNATION AND COMPOSITION OF RECORD
2 ON APPEAL; STATEMENT OF ISSUES ON APPEAL.
3 (1) *Appellant's Duties*. Within 14 days after:
4 • filing a notice of appeal as prescribed by Rule
5 8003(a);
6 • entry of an order granting leave to appeal; or
7 • entry of an order disposing of the last remaining
8 motion of a kind listed in Rule 8002(b)(1);
9 whichever is later,
10 the appellant must file with the bankruptcy clerk and serve on the
11 appellee a designation of the items to be included in the record on
12 appeal and a statement of the issues to be presented. A designation
13 and statement served prematurely must be treated as served on the
14 first day on which filing is timely under this paragraph.
15 (2) *Appellee's and Cross-Appellant's Duties.*
16 Within 14 days after service of the appellant's designation and
17 statement, the appellee may file and serve on the appellant a
18 designation of additional items to be included in the record on
19 appeal and, if the appellee has filed a cross-appeal, the appellee as
20 cross-appellant must file and serve a statement of the issues to be
21 presented on the cross-appeal and a designation of additional items

22 to be included in the record.

23 (3) *Cross-Appellee's Duties*. Within 14 days after
24 service of the cross-appellant's designation and statement, a cross-
25 appellee may file and serve on the cross-appellant a designation of
26 additional items to be included in the record.

27 (4) *Record on Appeal*. Subject to Rule 8009(d) and
28 (e), the record on appeal must include the following:

29 • items designated by the parties as provided by
30 paragraphs (1)-(3);
31 • the notice of appeal;
32 • the judgment, order, or decree being appealed;
33 • any order granting leave to appeal;
34 • any certification under 28 U.S.C. § 158(d)(2);
35 • any opinion, findings of fact, and conclusions of
36 law of the court relating to the subject of the appeal,
37 including transcripts of all oral rulings;
38 • any transcript ordered as prescribed by Rule
39 8009(b); and
40 • any statement required by Rule 8009(c).

41 Notwithstanding the parties' designations, the appellate court may
42 order the inclusion of additional items from the record as part of
43 the record on appeal.

44 (5) *Copies for the Bankruptcy Clerk*. If paper
45 copies are needed, a party filing a designation of items to be
46 included in the record must provide to the bankruptcy clerk a copy
47 of any designated items that the bankruptcy clerk requests. If the
48 party fails to provide the copy, the bankruptcy clerk must prepare
49 the copy at the party's expense.
50 (b) TRANSCRIPT OF PROCEEDINGS.
51 (1) *Appellant's Duty*. Within the time period
52 prescribed by Rule 8009(a)(1), the appellant must:
53 (A) order in writing from the reporter a
54 transcript of any parts of the proceedings not already on file that
55 the appellant considers necessary for the appeal, and file the order
56 with the bankruptcy clerk; or
57 (B) file with the bankruptcy clerk a
58 certificate stating that the appellant is not ordering a transcript.
59 (2) *Cross-Appellant's Duty*. Within 14 days after
60 the appellant files with the bankruptcy clerk a copy of the
61 transcript order or a certificate stating that appellant is not ordering
62 a transcript, the appellee as cross-appellant must:
63 (A) order in writing from the reporter a
64 transcript of any parts of the proceedings not ordered by appellant
65 and not already on file that the cross-appellant considers necessary

66 for the appeal, and file a copy of the order with the bankruptcy
67 clerk; or
68 (B) file with the bankruptcy clerk a
69 certificate stating that the cross-appellant is not ordering a
70 transcript.
71 (3) *Appellee's or Cross-Appellee's Right to Order*.
72 Within 14 days after the appellant or cross-appellant files with the
73 bankruptcy clerk a copy of a transcript order or certificate stating
74 that a transcript will not be ordered, the appellee or cross-appellee
75 may order in writing from the reporter a transcript of any parts of
76 the proceedings not already ordered or on file that the appellee or
77 cross-appellee considers necessary for the appeal. The order must
78 be filed with the bankruptcy clerk.
79 (4) *Payment*. At the time of ordering, a party must
80 make satisfactory arrangements with the reporter for paying the
81 cost of the transcript.
82 (5) *Unsupported Finding or Conclusion.* If the
83 appellant intends to urge on appeal that a finding or conclusion is
84 unsupported by the evidence or is contrary to the evidence, the
85 appellant must include in the record a transcript of all testimony
86 and copies of all exhibits relevant to that finding or conclusion.
87 (c) STATEMENT OF THE EVIDENCE WHEN A

88 TRANSCRIPT IS UNAVAILABLE. Within the time period
89 prescribed by Rule 8009(a)(1), the appellant may prepare a
90 statement of the evidence or proceedings from the best available
91 means, including the appellant's recollection, if a transcript of a
92 hearing or trial is unavailable. The statement must be served on
93 the appellee, who may serve objections or proposed amendments
94 within 14 days after being served. The statement and any
95 objections or proposed amendments must then be submitted to the
96 bankruptcy court for settlement and approval. As settled and
97 approved, the statement must be included by the bankruptcy clerk
98 in the record on appeal.
99 (d) AGREED STATEMENT AS THE RECORD ON
100 APPEAL. Instead of the record on appeal as defined in (a), the
101 parties may prepare, sign, and submit to the bankruptcy court a
102 statement of the case showing how the issues presented by the
103 appeal arose and were decided in the bankruptcy court. The
104 statement must set forth only those facts averred and proved or
105 sought to be proved that are essential to the court's resolution of
106 the issues. If the statement is accurate, it, together with any
107 additions that the bankruptcy court may consider necessary to a
108 full presentation of the issues on appeal, must be approved by the
109 bankruptcy court and certified to the appellate court as the record

110 on appeal. The bankruptcy clerk must then transmit it to the clerk
111 of the appellate court within the time provided by Rule 8010. A
112 copy of the agreed statement may be filed instead of the appendix
113 required by Rule 8018(b).
114 (e) CORRECTION OR MODIFICATION OF THE
115 RECORD.
116 (1) If any difference arises about whether the
117 record truly discloses what occurred in the bankruptcy court, the
118 difference must be submitted to and settled by that court and the
119 record conformed accordingly. If an item has been improperly
120 designated as part of the record on appeal, a party may move to
121 strike the improperly designated item.
122 (2) If anything material to either party is omitted
123 from or misstated in the record by error or accident, the omission
124 or misstatement may be corrected, and a supplemental record may
125 be certified and transmitted:
126 (A) on stipulation of the parties;
127 (B) by the bankruptcy court before or after
128 the record has been forwarded; or
129 (C) by the appellate court.
130 (3) All other questions as to the form and content
131 of the record must be presented to the appellate court.

132 (f) SEALED DOCUMENTS. A document placed under
133 seal by the bankruptcy court may be designated as part of the
134 record on appeal. In designating a sealed document, a party must
135 identify it without revealing confidential or secret information.
136 The bankruptcy clerk must not transmit a sealed document to the
137 clerk of the appellate court as part of the transmission of the
138 record. Instead, a party seeking to present a sealed document to
139 the appellate court as part of the record on appeal must file a
140 motion with the appellate court to accept the document under seal.
141 If the motion is granted, the movant must notify the bankruptcy
142 court of the ruling, and the bankruptcy clerk must promptly
143 transmit the sealed document to the clerk of the appellate court.
144 (g) OTHER. All parties to an appeal must take any other
145 action necessary to enable the bankruptcy clerk to assemble and
146 transmit the record.
147 (h) DIRECT APPEALS TO COURT OF APPEALS. Rules
148 8009 and 8010 apply to appeals taken directly to the court of
149 appeals under 28 U.S.C. § 158(d)(2). A reference in Rules 8009
150 and 8010 to the "appellate court" includes the court of appeals
151 when it has authorized a direct appeal under 28 U.S.C. § 158(d)(2).
152 In direct appeals to the court of appeals, the reference in Rule
153 8009(d) to Rule 8018(b) means F.R. App. P. 30.

COMMITTEE NOTE

This rule is derived from former Rule 8006 and F.R. App. P. 10 and 11(a). It retains the practice of former Rule 8006 of requiring the parties to designate items to be included in the record on appeal. In this respect the bankruptcy rule differs from the appellate rule. Among other things, F.R. App. P. 10(a) provides that the record on appeal consists of all the documents and exhibits filed in the case. This requirement would often be unworkable in a bankruptcy context because thousands of items might have been filed in the overall bankruptcy case.

Subdivision (a) provides the time period for the appellant's filing of a designation of items to be included in the record on appeal and a statement of the issues to be presented. It then provides for the designation of additional items by the appellee, cross-appellant, and cross-appellee, as well as for the cross-appellant's statement of the issues to be presented in its appeal. Subdivision (a)(4) prescribes the content of the record on appeal. Ordinarily, the bankruptcy clerk will not need to have paper copies of the designated items because the clerk will either transmit them to the appellate court electronically or otherwise make them available electronically. If the bankruptcy clerk requires a paper copy of some or all of the items designated as part of the record, the clerk may request the parties to provide the necessary copies, and the parties must comply with the request.

Subdivision (b) governs the process for ordering a complete or partial transcript of the bankruptcy court proceedings. In situations in which a transcript is unavailable, subdivision (c) allows for the parties' preparation of a statement of the evidence or proceedings, which must be approved by the bankruptcy court.

Subdivision (d) adopts the practice of F.R. App. P. 10(d) of permitting the parties to agree on a statement of the case in place of the record on appeal. The statement must show how the issues on appeal arose and were decided in the bankruptcy court. It must be approved by the bankruptcy court in order to be certified as the record on appeal.

Subdivision (e), modeled on F.R. App. P. 10(e), provides a procedure for correcting the record on appeal if an item is improperly designated, omitted, or misstated.

Subdivision (f) is a new provision that governs the handling of any document that remains sealed by the bankruptcy court and that a party wants to include in the record on appeal. The party must request the

appellate court to accept the document under seal, and that motion must be granted before the bankruptcy clerk may transmit the sealed document to the clerk of the appellate court.

Subdivision (g), which requires the parties' cooperation with the bankruptcy clerk in assembling and transmitting the record, retains the requirement of former Rule 8006, which was adapted from F.R. App. P. 11(a).

Subdivision (h) is new. It makes the provisions of this rule and Rule 8010 applicable to appeals taken directly to a court of appeals under 28 U.S.C. § 158(d)(2). See F.R. App. P. 6(c)(2)(A) and (B).

Rule 8010. Completion and Transmission of the Record

1 (a) DUTIES OF REPORTER TO PREPARE AND FILE
2 TRANSCRIPT. The reporter must prepare and file a transcript as
3 follows:
4 (1) Upon receiving an order for a transcript, the
5 reporter must file in the bankruptcy court an acknowledgment of
6 the request, the date it was received, and the date on which the
7 reporter expects to have the transcript completed.
8 (2) Upon completing the transcript, the reporter
9 must file it with the bankruptcy clerk, who will notify the clerk of
10 the appellate court of the filing.
11 (3) If the transcript cannot be completed within 30
12 days of receipt of the order, the reporter must seek an extension of
13 time from the bankruptcy clerk. The clerk must enter on the
14 docket and notify the parties whether the extension is granted.
15
16 (4) If the reporter does not file the transcript within
17 the time allowed, the bankruptcy clerk must notify the bankruptcy
18 judge.
19 (b) DUTY OF BANKRUPTCY CLERK TO TRANSMIT
20 RECORD.
21 (1) Subject to Rules 8009(f) and 8010(b)(5), when

22 the record is complete for purposes of appeal, the bankruptcy clerk
23 must transmit to the clerk of the appellate court either the record or
24 a notice of the availability of the record and the means of accessing
25 it electronically.
26 (2) If there are multiple appeals from a judgment or
27 order, the bankruptcy clerk must transmit a single record.
28 (3) Upon receiving the transmission of the record
29 or notice of the availability of the record, the clerk of the appellate
30 court must enter its receipt on the docket and give prompt notice to
31 all parties to the appeal.
32 (4) If the appellate court directs that paper copies
33 of the record be furnished, the clerk of that court must notify the
34 appellant and, if the appellant fails to provide the copies, the
35 bankruptcy clerk must prepare the copies at the appellant's
36 expense.
37 (5) Subject to Rule 8010(c), if a motion for leave to
38 appeal has been filed with the bankruptcy clerk under Rule 8004,
39 the bankruptcy clerk must prepare and transmit the record only
40 after the appellate court grants leave to appeal.
41 (c) RECORD FOR PRELIMINARY MOTION IN
42 APPELLATE COURT. If, prior to the transmission of the record
43 as prescribed by (b), a party moves in the appellate court for any of

44 the following relief:

45 • leave to appeal;

46 • dismissal;

47 • a stay pending appeal;

48 • approval of a supersedeas bond, or additional

49 security on a bond or undertaking on appeal; or

50 • any other intermediate order –

51 the bankruptcy clerk, at the request of any party to the appeal,

52 must transmit to the clerk of the appellate court any parts of the

53 record designated by a party to the appeal or a notice of the

54 availability of those parts and the means of accessing them

55 electronically.

COMMITTEE NOTE

This rule is derived from former Rule 8007 and F.R. App. P 11.

Subdivision (a) generally retains the procedure of former Rule 8007(a) regarding the reporter's duty to prepare and file a transcript if one is requested by a party. It clarifies that the reporter must file with the bankruptcy court the acknowledgment of the request for a transcript and statement of the expected completion date, the completed transcript, and any request for an extension of time beyond 30 days for completion of the transcript. In courts that record courtroom proceedings electronically, the person who transcribes the recording of a proceeding is the reporter for purposes of this rule.

Subdivision (b) requires the bankruptcy clerk to transmit the record to the clerk of the appellate court when the record is complete and, in the case of appeals under 28 U.S.C. § 158(a)(3), leave to appeal has been granted. This transmission will be made electronically, either by sending the record itself or sending notice of how the record can be accessed

electronically. The appellate court may, however, require that a paper copy of some or all of the record be furnished, in which case the bankruptcy clerk will direct the appellant to provide the copies or will make the copies at the appellant's expense.

In a change from former Rule 8007(b), subdivision (b) of this rule no longer directs the clerk of the appellate court to docket the appeal upon receipt of the record from the bankruptcy clerk. Instead, under Rules 8003(d) and 8004(c), the clerk of the appellate court dockets the appeal upon receipt of the notice of appeal or, in the case of appeals under 28 U.S.C. § 158(a)(3), the notice of appeal and the motion for leave to appeal. Those documents are to be sent promptly to the appellate court by the bankruptcy clerk. Accordingly, by the time the clerk of the appellate court receives the record, the appeal will already be docketed in that court.

Subdivision (c) is derived from former Rule 8007(c) and F.R. App. P. 11(g) . It provides for the transmission of parts of the record designated by the parties for consideration by the appellate court in ruling on specified preliminary motions filed prior to the preparation and transmission of the record on appeal.

Rule 8009(h) makes this rule applicable to direct appeals to the court of appeals under 28 U.S.C. § 158(d)(2). It also provides that, for purposes of this rule and Rule 8009,"appellate court" includes the court of appeals when it has authorized a direct appeal under § 158(d)(2).

Rule 8011. Filing and Service; Signature

1 (a) FILING.

2 (1*) Filing with the Clerk*. A document required or
3 permitted to be filed in the appellate court must be filed with the
4 clerk of that court.

5 (2) *Filing: Method and Timeliness*.

6 (A) *In general*. Filing may be
7 accomplished by transmission to the clerk of the appellate court.
8 Except as provided in Rule 8011(a)(2)(B)(ii), (B)(iii), and (C),
9 filing is timely only if the clerk receives the document within the
10 time fixed for filing.

11 (B) *Brief or appendix*. A brief or appendix
12 is timely filed if, on or before the last day for filing, it is:

13 (i) transmitted to the clerk of the
14 appellate court in accordance with applicable electronic
15 transmission procedures for the filing of documents in that court;

16 (ii) mailed to the clerk of the
17 appellate court by first-class mail – or other class of mail that is at
18 least as expeditious – postage prepaid, if the court's procedures
19 permit or require a brief or appendix to be filed by mailing; or

20 (iii) dispatched to a third-party
21 commercial carrier for delivery within three days to the clerk of the

22 appellate court, if the court's procedures permit or require a brief
23 or appendix to be filed by commercial carrier.
24 (C) *Inmate filing*. A document filed by an
25 inmate confined in an institution is timely if deposited in the
26 institution's internal mailing system on or before the last day for
27 filing. If an institution has a system designed for legal mail, the
28 inmate must use that system to receive the benefit of this rule.
29 Timely filing may be shown by a declaration in compliance with
30 28 U.S.C. § 1746 or by a notarized statement, either of which must
31 set forth the date of deposit and state that first-class postage has
32 been prepaid.
33 (D) *Copies*. If a document is filed
34 electronically in the appellate court, no paper copy is required. If a
35 document is filed by mail or delivery to the appellate court, no
36 additional copies are required The appellate court may, however,
37 require by local rule or order in a particular case the filing or
38 furnishing of a specified number of paper copies.
39 (3) *Filing a Motion with a Judge*. In appeals to the
40 BAP, if a motion requests relief that may be granted by a single
41 judge, any judge of that court may permit the motion to be filed
42 with that judge. The judge must note the filing date on the motion
43 and transmit it to the BAP clerk.

44 (4) *Clerk's Refusal of Documents*. The clerk of the
45 appellate court must not refuse to accept for filing any document
46 transmitted for that purpose solely because it is not presented in
47 proper form as required by these rules or by any local rule or
48 practice.
49 (b) SERVICE OF DOCUMENTS REQUIRED. Copies of
50 all documents filed by any party and not required by these Part
51 VIII rules to be served by the clerk of the appellate court must, at
52 or before the time of filing, be served on all other parties to the
53 appeal by the party making the filing or a person acting for that
54 party. Service on a party represented by counsel must be made on
55 counsel.
56 (c) MANNER OF SERVICE.
57 (1) Service must be made electronically if feasible
58 and permitted by local procedure. If not, service may be made by
59 any of the following methods:
60 (A) personal, including delivery to a
61 responsible person at the office of counsel;
62 (B) mail; or
63 (C) third-party commercial carrier for
64 delivery within three days.

65 (2) When it is reasonable, considering such factors
66 as the immediacy of the relief sought, distance, and cost, service
67 on a party must be by a manner at least as expeditious as the
68 manner used to file the document with the appellate court.
69 (3) Service by mail or by commercial carrier is
70 complete on mailing or delivery to the carrier. Service by
71 electronic means is complete on transmission, unless the party
72 making service receives notice that the document was not
73 transmitted successfully to the party attempted to be served.
74 (d) PROOF OF SERVICE.
75 (1) Documents presented for filing must contain
76 either:
77 (A) an acknowledgment of service by the
78 person served; or
79 (B) proof of service in the form of a
80 statement by the person who made service certifying:
81 (i) the date and manner of service;
82 (ii) the names of the persons served;
83 and
84 (iii) for each person served, the mail
85 or electronic address, facsimile number, or the address of the place
86 of delivery, as appropriate for the manner of service.

87 (2) The clerk of the appellate court may permit
88 documents to be filed without acknowledgment or proof of service
89 at the time of filing, but must require the acknowledgment or proof
90 of service to be filed promptly thereafter.
91 (3) When a brief or appendix is filed by mailing,
92 delivery, or electronic transmission in accordance with Rule
93 8011(a)(2)(B), the proof of service must also state the date and
94 manner by which the document was filed.
95 (e) SIGNATURE. If filed electronically, every motion,
96 response, reply, brief, or submission authorized by these Part VIII
97 rules must include the electronic signature of the person filing the
98 document or, if the person is represented, the electronic signature
99 of counsel. The electronic signature must be provided by
100 electronic means that are consistent with any technical standards
101 that the Judicial Conference of the United States establishes. If
102 filed in paper form, every motion, response, reply, brief, or
103 submission authorized by these rules must be signed by the person
104 filing the document or, if the person is represented, by counsel.

COMMITTEE NOTE

This rule is derived from former Rule 8008 and F.R. App. P. 25. It adopts some of the additional details of the appellate rule, and it provides greater recognition of the possibility of electronic filing and service.

Subdivision (a) governs the filing of documents in the appellate court. Consistent with other provisions of these Part VIII rules, subdivision (a)(2) requires electronic filing of documents, including briefs and appendices, unless the appellate court's procedures permit or require other methods of delivery to the court. An electronic filing is timely if it is received by the clerk of the appellate court within the time fixed for filing. No paper copies need be submitted when documents are filed electronically, unless the appellate court requires them.

Subdivision (a)(4) provides that the clerk of the appellate court may not refuse to accept a document for filing solely because its form does not comply with these rules or any local rule or practice. The appellate court may, however, direct the correction of any deficiency in any document that does not conform to the requirements of these rules or applicable local rule, and may prescribe such other relief as the court deems appropriate.

Subdivisions (b) and (c) address the service of documents in the appellate court. Except for documents that the clerk of the appellate court must serve, a party that makes a filing must serve copies of the document on all other parties to the appeal. Service on represented parties must be made on counsel. The methods of service are listed in subdivision (c). Electronic service is required when feasible and authorized by the appellate court.

Subdivision (d) retains the former rule's provisions regarding proof of service of a document filed in the appellate court. In addition it provides that, when service is made electronically, a certificate of service must state the mail or electronic address or facsimile number to which service was made.

Subdivision (e) is a new provision that requires an electronic signature of counsel or an unrepresented filer for documents that are filed electronically in the appellate court. The method of providing an electronic signature may be specified by a local court rule that is consistent with any standards established by the Judicial Conference of the United States. Paper copies of documents filed in the appellate court must bear an actual signature of counsel or the filer. By requiring a signature, subdivision (e) ensures that a readily identifiable attorney or party takes responsibility for every document that is filed.

Rule 8012. Corporate Disclosure Statement

1 (a) WHO MUST FILE. Any nongovernmental corporate
2 party appearing in the appellate court must file a statement that
3 identifies any parent corporation and any publicly held corporation
4 that owns 10% or more of its stock or states that there is no such
5 corporation.
6 (b) TIME FOR FILING; SUPPLEMENTAL FILING. A
7 party must file the statement prescribed by subdivision (a) with its
8 principal brief or upon filing a motion, response, petition, or
9 answer in the appellate court, whichever occurs first, unless a local
10 rule requires earlier filing. Even if the statement has already been
11 filed, the party's principal brief must include a statement before the
12 table of contents. A party must supplement its statement whenever
13 the information that must be disclosed under subdivision (a)
14 changes.

COMMITTEE NOTE

This rule is derived from F.R. App. P. 26.1. It requires the filing of corporate disclosure statements and supplemental statements in order to assist appellate court judges in determining whether they have interests that should cause recusal. If filed separately from a brief, motion, response, petition, or answer, the statement must be filed and served in accordance with Rule 8011. Under Rule 8015(a)(7)(B)(iii), the corporate disclosure statement is not included in calculating applicable word-count limitations.

TAB 8-C

Report on Rules and Forms Published for Public Comment (Oral Report)

TAB 8-D

ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of September 26 - 27, 2011
Chicago, Illinois

(DRAFT MINUTES)

The following members attended the meeting:

Bankruptcy Judge Eugene R. Wedoff, Chair
Circuit Judge Sandra Segal Ikuta
District Judge Karen Caldwell
District Judge Robert James Jonker
District Judge Adalberto Jordan
District Judge William H. Pauley III
Bankruptcy Judge Arthur I. Harris
Bankruptcy Judge Elizabeth L. Perris
Bankruptcy Judge Judith H. Wizmur
Professor Edward R. Morrison
Michael St. Patrick Baxter, Esquire
J. Christopher Kohn, Esquire
J. Michael Lamberth, Esquire
David A. Lander, Esquire

The following persons also attended the meeting:

District Judge Jean Hamilton (new member – term beginning 10/01/11)
Richardo I. Kilpatrick, Esquire (new member – term beginning 10/01/11)
Professor S. Elizabeth Gibson, reporter
Professor Troy McKenzie, assistant reporter
District Judge James A. Teilborg, liaison from the Committee on Rules of Practice and Procedure (Standing Committee)
District Judge Joan Humphrey Lefkow, liaison from the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee)
Professor Daniel Coquillette, reporter of the Standing Committee
Peter G. McCabe, secretary of the Standing Committee
Patricia S. Ketchum, advisor to the Committee
Mark Redmiles, Deputy Director, Executive Office for U.S. Trustees (EOUST)
Nan Eitel, Associate General Counsel – Chapter 11, EOUST
Professor Douglas Baird (attended second day only)
James J. Waldron, Clerk, U.S. Bankruptcy Court for the District of New Jersey
Jonathan Rose, Rules Committee Support Officer, Administrative Office of the U.S. Courts (Administrative Office)
Benjamin Robinson, Administrative Office
Jeffery Barr, Administrative Office
James H. Wannamaker, Administrative Office
Scott Myers, Administrative Office

Molly Johnson, Federal Judicial Center (FJC)
Beth Wiggins, FJC
Christopher Blickley, law clerk for the Hon. Eugene R. Wedoff
Kathy Byrne, Cooney & Conway
Joseph D. Frank, Frank/Gecker LLP

The following member was unable to attend the meeting:

John Rao, Esquire

Introductory Items

1. Greetings; Introduction of new committee members and Administrative Office staff, and acknowledgment of the service of outgoing committee members.

The Chair welcomed new members Judge Jean Hamilton (E.D. MO), and Richardo I. Kilpatrick, Esquire. He also introduced the Administrative Office's new Rules Committee Officer, Jonathon Rose, and its Deputy Rules Committee Officer, Benjamin Robinson.

The Chair thanked outgoing members Judge William Pauley and Michael Lamberth for their hard work and their many contributions to the Committee over the past six years.

2. Approval of minutes of San Francisco meeting of April 7 - 8, 2011.

The San Francisco minutes were approved with minor changes noted by Mr. Kohn.

3. Oral reports on meetings of other committees:

(A) June 2011 meeting of the Committee on Rules of Practice and Procedure.

The Chair said the Standing Committee approved all the Committee's action items.

(B) June 2010 meeting of the Committee on the Administration of the Bankruptcy System.

Judge Lefkow reported that in light of current budget concerns, Congress is unlikely to approve the Judicial Conference's most recent request for over 50 additional bankruptcy judges. Consequently, the Bankruptcy Committee was focused on the need for extending the 28 temporary bankruptcy judgeship positions that were added in 2005 and are now set to expire. She explained that the expiration of a temporary bankruptcy judgeship position in a district means that the next retiring judge in that district cannot be replaced – unless the temporary position is extended. Because roughly two thirds of bankruptcy judges will be eligible for retirement in the next 10

years, a contraction of the total number of bankruptcy judges is likely if the temporary positions are not extended or made permanent.

Judge Lefkow said that the Bankruptcy Committee has approved a policy for courtroom sharing in new construction. She said the new policy would be triggered most often in larger courts, but would probably have no immediate effect because new construction is unlikely in the current budget environment.

(C) Meeting of the Advisory Committee on Civil Rules.

Judge Harris said that Civil Rules Committee will not meet until November, but that its Subcommittee on Discovery held a mini-conference on discovery preservation and sanctions issues in Dallas on September 9. He said no decisions were made at the mini-conference, but that much of the material discussed has been posted on the U.S. Courts' public website at: http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Overview/DallasMiniConfSept2011.aspx.

(D) Meeting of the Advisory Committee on Evidence.

Judge Wizmur said the Evidence Committee will next meet in October and that there is nothing new to report since its last meeting. She said the restyled evidence rules have been approved and are in effect. She also noted that a proposed amendment to Evidence Rule 803(10) was out for publication. The amendment—to the hearsay exception for absence of public record or entry—is intended to address a constitutional infirmity in light of the Supreme Court's decision in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009).

(E) Meeting of the Advisory Committee on Appellate Rules.

The Reporter said the Appellate Rules Committee will next meet in October. She noted that the Committee met jointly with the Appellate Rules Committee at its last meeting to discuss proposed changes to the bankruptcy appellate rules (the Part VIII Rules). She said that the Appellate Rules Committee was also proposing amendments to Appellate Rule 6 concerning bankruptcy appeals, including a new subdivision governing appeals taken directly to a court of appeals from a bankruptcy court. The proposed amendments are designed to coordinate with proposed changes to the Part VIII Rules.

(F) Bankruptcy CM/ECF Working Group and the CM/ECF NextGen Project.

Judge Perris reported on the work of the CM/ECF Working Group and the CM/ECF NextGen Project in the context of her report on the Forms Modernization Project at Agenda Item 7.

Subcommittee Reports and Other Action Items

4. Report by the Subcommittee on Consumer Issues.

(A) Recommendation concerning Suggestion (11-BK-B) by Judge A. Benjamin Goldgar (Bankr. N.D. Ill.) to amend Rule 3002(a) to require secured creditors to file proofs of claim.

The Assistant Reporter said that Judge Goldgar suggests amending the Bankruptcy Rules to require secured creditors to file proofs of claim. According to Judge Goldgar, Rule 3002(a), which currently provides that "[a]n unsecured creditor or an equity security holder must file a proof of claim or interest for the claim or interest to be allowed . . . ," has led to confusion with respect to the need for secured creditors to file claims. Courts disagree on two related questions: (1) whether a secured creditor must file a proof of claim to participate in a chapter 13 plan, and (2) whether a nongovernmental secured creditor must file a proof of claim within 90 days of the meeting of creditors, as required by Rule 3002(c).

The Subcommittee discussed Judge Goldgar's suggestion and concluded that the issue deserves further study. Because the omission of secured creditors from Rule 3002(a) has the greatest impact in chapter 13 cases, the Subcommittee recommended that the Advisory Committee fold the suggestion into the ongoing project to draft a model chapter 13 plan and related amendments to the Bankruptcy Rules.

Although several members agreed that the failure of a secured creditor to file a proof of claims was most problematic in chapter 13, where the secured creditor may be barred from collecting anything during the course of the debtor's chapter 13 plan, others noted that there are issues in chapter 7 as well. And some members suggested a possible need for different approaches in chapters 7 and 13. **After additional discussion, the Chair asked the Subcommittee to consider a rule change that would apply to all chapters, allowing for the possibility that a model plan provision might be the best approach in chapter 13**

(B) Recommendation concerning Suggestion (10-BK-K) by Judge Paul Mannes to amend Rule 4004(c)(1)(J) to delay the entry of a discharge if a scheduled hearing on a reaffirmation agreement has not concluded.

Judge Harris said the Subcommittee concluded that the basis for the suggested amendment was the requirement that a hearing to disapprove a reaffirmation agreement based on undue hardship be concluded before the entry of the discharge. Judge Mannes would add explicit language to Rule 4004(c)(1) to permit the entry of the discharge to be delayed until after the conclusion of such a hearing.

The Subcommittee, however, did not see a need for the amendment. Rule 4004(c)(1)(K) already provides for a delay in the entry of a discharge if "a presumption has arisen under § 524(m)

that a reaffirmation agreement is an undue hardship." The exception is broader than the one proposed by Judge Mannes, and it encompasses the situation he apparently had in mind. If the court has scheduled a reaffirmation hearing that has to be concluded before the discharge is entered, it would be a situation in which a presumption of undue hardship has arisen. Thus under Rule 4004(c)(1)(K), the court could delay the entry of the discharge until after the conclusion of the hearing.

Although the Subcommittee did not recommend any changes to Rule 4004(c)(1) to address the issue raised by Judge Mannes, as described in the agenda materials, it did identify some wording problems that could be considered by the Advisory Committee at an appropriate time. It also identified a more immediate issue in Rule 4004(c)(1) concerning pending changes Rule 1007(b)(7).

The Committee has proposed an amendment to Rule 1007(b)(7) that would relieve the debtor of the obligation to file Official Form 23 if the course provider notifies the court directly that the debtor has completed the course. Subparagraph (H) of Rule 4004(c)(1), however, provides for delay in the entry of the discharge if "the debtor has not filed with the court a statement of completion of a course concerning personal financial management [Official Form 23] as required by Rule 1007(b)(7)." If the amendment to Rule 1007(b)(7) is adopted, Rule 4004(c)(1)(H) will need to be reworded so that it will not unnecessarily delay the discharge if the debtor's "failure" to file Official Form 23 is because the course provider has already notified the court that the debtor completed the required personal financial management course.

The Committee agreed that no amendment to Rule 4004(c) is needed to address Judge Mannes' suggestion, and asked the Subcommittee to report at the spring meeting on any needed changes to Subparagraph (c)(1)(H) to conform to the pending Rule 1007(b)(7) changes.

5. Joint Report by the Subcommittees on Business Issues and Consumer Issues.

> Recommendation concerning the opinion issued by the Ninth Circuit BAP in *Charlie Y., Inc. v. Carey* concerning the procedure for obtaining an allowance of attorney's fees in adversary proceedings.

Judge Harris explained that in March 2011 the Ninth Circuit Bankruptcy Appellate Panel issued an opinion—*Charlie Y., Inc. v. Carey (In re Carey)*, 446 B.R. 384, 389 n.3 (2011)—in which it suggested that the Advisory Committee might want to address the absence of a provision in Rule 7054 concerning the procedure for obtaining an allowance of attorney's fees in adversary proceedings. Although Rule 7054(a) incorporates Civil Rule 54(a)-(c), it does not have a provision that parallels Civil Rule 54(d)(2), which governs the recovery of attorney's fees. Instead Rule 7008(b) provides that attorney fees must be pled as a claim in the complaint.

The Subcommittee recommended that Rule 7054 be amended to include much of the substance of Civil Rule 54(d)(2) and that the provision on attorney's fees in Rule 7008 be deleted. The amendments would clarify the procedure for seeking an award of attorney's fees and provide a nationally uniform procedure for doing so. They also would bring the bankruptcy rules into closer alignment with the civil rules and eliminate a trap for the unwary. Proposed language amending Rules 7054 and 7008 was included in the agenda materials.

A motion to recommend publication of amendments to Rules 7008 and 7054 as set forth in the agenda book, subject to review by the Style Subcommittee, was approved without objection.

6. Joint Reports by the Subcommittees on Consumer Issues and Forms.

(A) Recommendation on how and when to gather input on the new mortgage forms and the desirability of including a complete loan history on Form 10-A

Judge Harris gave the report. He said that in light of comments and testimony about the need for a full loan history as an attachment to the proof of claim, the Subcommittees considered how best to get feedback on the loan summary contained the newly approved attachment to the proof of claim form, B10 (Attachment A), as well as the two new proof of claim supplement forms, B10 (Supplement 1) and B10 (Supplement 2), that will be used in chapter 13 cases.

Because B10 (Attachment A), B10 (Supplement 1) and B10 (Supplement 2) will not be used until December 1, 2011, the Subcommittees suggested waiting to solicit feedback until parties have developed some experience with the new forms. They recommended, therefore, holding a mini-conference next fall, possibly in conjunction with the fall 2012 Committee meeting. The Subcommittees favored a mini-conference as the best option for promoting a back-and-forth exchange of ideas and concerns about the new forms from interested parties, but recognized that in the current budget environment cost may be a factor.

The Committee agreed that a mini-conference would provide the most effective feedback on the new proof of claim attachment and supplements and recommended such a conference in the fall, with targeted conference calls as a fallback position if funding is not available for the mini-conference. As a cost-saving measure, members agreed that the proposed mini-conference should overlap if possible with the fall Committee meeting.

(B) Oral report on consideration of a form or model chapter 13 plan.

Judge Perris reported that the working group has reviewed many of the model plans in existence, and it has requested information from judges around the country about the idea of a national model plan. The Assistant Reporter said there have been 40-50 responses – mostly in support of the project (though many supporters anticipate negative responses once a detailed plan is produced for comment). Some responses objected to the idea of a national plan, arguing that it is

more important that chapter 13 plans be flexible and allow for local practice, but that was a minority position.

Judge Perris said that the working group has gone through common plan provisions and has preliminary ideas on what should be in the plan. Many choices remain, however, such as whether claims dealt with in the plan must also be addressed through the claims allowance process, whether payments can or should be made outside the plan, and whether payments are made from a pot, or by percentage. The working group will also consider whether changes in the rules are needed to make a national chapter 13 plan easier to implement. For example, a change to Rule 3001 that requires secured creditors to file a proof of claim could also explain when and how to resolve differences (if any) in the amount listed on the proof of claim and the amount listed in the debtor's plan.

Judge Perris said that now that the working group has considered what should be in a plan, the next step will be to draft a model plan and consider possible rule changes. She said that in the spring the group may recommend rule changes and talk about seeking pre-publication comment from interested groups.

(C) Recommendation concerning the amendment of section 109(h)(1) of the Bankruptcy Code by the Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327, regarding the timing of credit counseling for individual debtors.

The Assistant Reporter said the Subcommittees discussed a technical change to 11 U.S.C. § 109(h)(1) that, read literally, could allow an individual debtor to complete the "pre-petition" credit counseling briefing after the petition is filed, so long as it is completed on the same day the petition is filed. The Subcommittees considered whether the rules and forms should be revised to account for this possibility.

The Assistant Reporter said that prior to this technical change, many courts concluded that statutory requirement to complete credit counseling briefing during the 180-day period "preceding the date of filing" meant that the requirement could not be satisfied on the same calendar day the petition is filed. Other courts concluded that same-day completion satisfied the statutory language so long as the course is completed before the petition is filed. The Assistant Reporter said that the purpose of the technical change was presumably to address the statutory ambiguity that led to the split in the case law, but that the "fix" seems to have introduced a new ambiguity. Because there is no case law on the new language, the Subcommittees recommended waiting before revising the rules or forms.

Committee members agreed that, because the forms and rules anticipate that the credit counseling course will be taken before the petition is filed, no change is needed unless case law develops that allows debtors to take the course post-petition but on the day of filing. **Members agreed to await further developments in the case law.**

(D) Oral report on revising Official Form 22A and advising the courts to rescind Interim Rule 1007-I if the temporary exclusion from the means test for Reservists and National Guard members provided in Public Law No. 110-438 is no longer available after December 18, 2011.

The Chair explained that the temporary exclusion from the means test for Reservists and National Guard members provided in Public Law No. 110-438 is scheduled to expire on December 18, 2011. Mr. Wannamaker reported, however, that a four-year extension of the exclusion has just been voted out of the House of Representative's Judiciary Committee, and that an extension seems uncontroversial. The Chair added that no action was necessary at this time, but if the proposed extension fails to pass before December 18, the Committee will have to consider whether to revise Official Form 22A to remove the exclusion as an option. If Congress seems likely to extend the exclusion but has not done so by December 18, one possible option will be to leave the form unchanged, but notify courts, the public, and the EOUST that the option may be temporarily unavailable.

7. Report of the Subcommittee on Forms.

Review of the draft individual forms developed by the Bankruptcy Forms Modernization Project and the question whether the rules should be amended to establish standards regarding signatures by parties in the electronic context in which the courts currently operate.

Judge Perris reported on the most recent updates to CM/ECF, including program changes needed to implement the new amendment and supplements to the proof of claim (B10-A, B10-S1, and B10-S2) that are scheduled to go into effect December 1, 2011.

She said that functional requirements phase of CM/ECF NextGen should be complete by February 12, 2012. The next step (Phase 2) will be to take all of the requirements, code them and put them into effect. Rollout will probably be in iterations and modules, with the first module coming out as early as the end of 2013. She said the plan was to use as much code as possible from existing CM/ECF and not lose any existing functionality. It will probably take four to six years to fully implement.

Mr. Waldron spoke briefly on the pro se pathfinder project. He said the pro se pathfinder was an electronic filing module for unrepresented debtors being developed by NextGen and tested in current CM/ECF pilot courts. Mr. Waldron and Judge Perris noted that one obstacle being examined in the pro se pathfinder that has also come up in the Forms Modernization Project was whether electronic signatures are enforceable under the bankruptcy code and existing rules. Mr. Waldron said for the initial testing phases, the pro se pathfinder will require users to submit a hard copy signature page that incorporates by reference the debtor's signature from the various official forms. He believes, however, that standards establishing the acceptability of electronic signatures in some form would greatly facilitate electronic filings. **The Chair referred the electronic**

signature issue to the Technology and Cross Boarder Subcommittee for consideration of any needed rule changes.

For the benefit of new members, Judge Perris gave an overview of the Forms Modernization Project (FMP). She explained that the FMP was an undertaking by the Forms Subcommittee to systematically revise all official bankruptcy forms to make them more understandable and thereby improve the accuracy of the data collected and to improve the interface between the forms and technology. She said the FMP surveyed judges, clerks, case trustees, United States trustees, law professors and members of the bankruptcy bar for comments on what does and does not work in the current forms. Armed with that information and drafting help from a contractor with experience in revising tax forms, census forms and other government and corporate forms, the FMP began the drafting process.

The guiding principles behind redrafting the forms were to help debtors understand the bankruptcy process and what they are being asked by using conversational language, instructions, and context to explain the process and show the timing of the case. In general, the idea was to improve the accuracy of the information provided by the debtors, and help them better understand what they are attesting to under penalty of perjury. Judge Perris said that the FMP has solicited and is reviewing pre-publication comments from a number of external users, including the National Association of Chapter Thirteen Trustees, the National Association of Bankruptcy Trustees, the National Association of Consumer Bankruptcy Attorneys and a group of attorneys from the Executive Office for United States trustees.

Judge Perris said that the conversational language and length of the forms has led to negative feedback from some reviewers. Some criticized the FMP forms as making bankruptcy look too easy, and thereby encouraging pro se filings. Others thought the length of the forms would make them harder for regular users to sort through and would increase attorney costs because it would take longer for counsel to review the forms. Conversely, some thought the project was a laudable achievement and while the conversational tone might seem more inviting, it was also more understandable. Moreover, the many warnings and amount of detail requested would make the need for counsel plainer, which would tend to lower the likelihood of pro se filings.

One important concept that emerged throughout the drafting process and through comments received on early drafts of the FMP forms is that input (what debtors see and sign) and output (what judges, clerks, trustees, creditors, and others need to review) are different things. Judge Perris said that because the FMP forms were designed to maximize the accuracy of input, they were not necessarily great for output and the comments reflected that fact. She said the issue was particularly complicated because different users are interested in different output. Judges, for example, often want to compare income and expense information on the schedules and means test forms in the context of requests for fee waivers. Case trustees, on the other hand, might be most interested in comparing exemptions and any security interests as they pertain to particular properties.

Judge Perris said the need for customized output is where NextGen and the FMP intersect. Reviewers were generally excited about the prospect that NextGen would collect the data contained in the forms and that user-created reports could be generated from the form data. If the Judicial Conference allowed non-judiciary users, such as case trustees and other parties in the case, to generate reports, the length of the new forms would much less of an issue to those users.

Judge Perris asked the Advisory Committee for guidance on a number of issues going forward. She asked whether members agreed that the conversational language would lead to more pro se filings, and, if so, whether more formal language should be reintroduced. No member favored reintroducing more formal language, and several members questioned the assumption that conversational language would lead to more pro se filings. With respect to increased costs, one member thought that if the length of the forms required more attorney time to review debtor responses, it was probably time well spent and could eliminate problems that would otherwise come up later in the case.

Next, Judge Perris asked for comments on the increased length of the FMP forms, which she said is generally attributable to the increased use of close-ended questions and integrated instructions. She said that the current forms, which consist of mostly open-ended questions and separate instructions, provide a model for shortening, but that comments solicited at the beginning of the Forms Modernization Project were that debtors don't seem to read separate instructions and often don't answer open-ended questions. Several members voiced support of the increased use of integrated instructions and close-ended questions, and they suggested that the issue of length would recede after the forms are used for a while.

Judge Perris suggested three approaches to publication of the new forms: (1) publish the whole individual filing package at once; (2) publish a subset of the individual package – the fee waiver and installment payment forms, and the income, expense and means test forms; or (3) radically change the current direction.

She said the FMP leadership favored publishing only the subset in 2012 for at least two reasons. First, under the normal publication process, any forms published in 2012 will be ready to go into effect on December 1, 2013. Although parts of CM/ECF NextGen may be operational by December 2013, no computer code has been written yet, and different constituents will have their own ideas of what should be implemented first. Second, given that the appellate rules package is also on track to be published in 2012, publishing just a subset of the forms would be less of a shock to the bankruptcy community and may allow for more constructive feedback.

The Chair supported an incremental approach, and said he thought the Committee already began that approach when it published the mortgage-related attachment and supplements to the proof of claim form last year, as all three of the new forms followed the formatting and some of the plain language style of FMP forms. Several other members agreed with the Chair, and **the Committee voted in favor of an incremental approach and recommended working with NextGen to get it implemented as soon as possible.**

8. Report of the Subcommittee on Business Issues.

(A) Consideration of Suggestion 10-BK-H by the Institute for Legal Reform for a rule and form to promote greater transparency in the operation of trusts established under section 524(g) of the Bankruptcy Code.

The Assistant Reporter explained that the Institute for Legal Reform ("ILR") proposed an amendment to the Bankruptcy Rules to require "greater transparency in the operation of [asbestos] trusts established under 11 U.S.C. § 524(g)." Under the ILR proposal, asbestos trusts would file with bankruptcy courts quarterly reports describing in detail each demand for payment received during the reporting period. The proposal would also require trusts to disclose to third parties information regarding demands for payment by asbestos claimants if that information is relevant to litigation in any state or federal court.

Committee members recognized that the ILR suggestion addressed an important matter deserving careful attention, but members also expressed concern that the proposal presented difficult jurisdictional questions and would not serve a sufficiently bankruptcy-specific purpose. Because it would apply to trust operations after confirmation of a plan, members noted that the proposal might exceed the limited scope of post-confirmation bankruptcy jurisdiction. Members also stated that the proposal, although possibly beneficial to parties in nonbankruptcy tort litigation, was of limited use in administering bankruptcy cases and therefore might be beyond the proper reach of the Bankruptcy Rules.

Members discussed comments received from interested individuals and groups (practicing lawyers, asbestos trusts, representatives of future asbestos claimants, bar organizations, and the ILR) who responded to a request from the Chair for input on the ILR suggestion. As detailed in the agenda materials, some responses supported the proposal, but most urged the Committee not to adopt it, and many questioned whether the bankruptcy rules are the appropriate mechanism to address the concerns raised by the ILR.

After discussing the ILR suggestion and considering all the responses, the Committee adopted the recommendation of the Business Subcommittee that further action not be taken on ILR's suggestion.

(B) Recommendation concerning Suggestion (10-BK-J) by Judge Linda Riegle to amend Rule 1014(b).

The Reporter described Judge Reigle's suggestion. Bankruptcy Rule 1014(b) governs the procedure for determining where cases will proceed if petitions are filed in different districts by, against, or regarding the same debtor or related debtors. The rule provides that, upon motion, the court in which the first-filed petition is pending may determine – in the interest of justice or for the convenience of the parties – the district or districts in which the cases will proceed. Except as

otherwise ordered by that court, proceedings in the cases in the other districts "shall be stayed by the courts in which they have been filed" until the first court makes its determination.

Judge Riegle expressed concern that there is no mechanism for alerting the first court that a subsequent case has been filed. She also said that the rule seems to prevent the second court from transferring venue on its own motion, and she offered suggested amendments that would address the problems.

For reasons detailed in the agenda materials, the Subcommittee concluded that the amendments suggested by Judge Riegle are unnecessary. As currently drafted, the rule provides a solution for a problem the venue statute leaves open: which of the judges of the different districts has authority to transfer venue. The rule avoids possible conflicting rulings by giving the authority to decide venue to the judge in the first filed case. The Subcommittee was not concerned that the judge in the first case would not become aware of the second case because generally some party in the second case will have an interest in bringing that case to the attention of the judge in the first case.

The Subcommittee did conclude, however, that Rule 1014(b) should be amended to state clearly when the stay of any subsequently filed case goes into effect. Rather than selecting either the filing of a subsequent petition or the filing of a motion under the rule as the event that commences the stay, the Subcommittee recommended that an order by the first court be required. That requirement would eliminate any uncertainty about whether a stay was in effect. It would also permit a judicial determination – not just a party's assertion – that the rule applied and that a stay of other proceedings was needed. The Subcommittee also recommended a number of stylistic changes that could be made to the rule if the Committee decided to recommend a change clarifying when the stay in the second case goes into effect. **After a short discussion, the Committee agreed with the Subcommittee, and recommended publishing for comment the proposed changes, as set forth in the agenda materials, in the summer of 2012.**

(C) Recommendation concerning Suggestion 09-BK-J by Judge William F. Stone, Jr., for rules and an Official Form to govern applications for the payment of administrative expenses.

Judge Wizmur gave the report. She said that Judge Stone's suggestion was referred to the Subcommittee at the spring 2010 Committee meeting. The Subcommittee recommended at the fall 2010 meeting that additional information be gathered to determine whether there is a need for a national rule or official form for the allowance of administrative expenses. Accepting that recommendation, the Committee asked Molly Johnson and Beth Wiggins of the Federal Judicial Center ("FJC") to survey bankruptcy clerks and business bankruptcy attorneys regarding local rules and practices currently governing applications for administrative expenses, whether there have been problems with existing practices, and whether a national rule and form is needed.

Ms. Johnson reported on the survey results at the spring 2011 Advisory Committee meeting. After disucssing the results, the Committee asked the Subcommittee to consider the range of possible responses to Judge Stone's suggestion and to recommend whether one or more national rules and/or forms for the allowance of administrative expenses should be developed.

During a conference call on June 15, the Subcommittee reviewed the survey results and noted that there did not seem to be a major outcry for a rule or national form. Clerks saw virtually no problem at all, and, of over 2000 ABA business bankruptcy committee attorneys surveyed, only about five percent responded. Although approximately two-thirds of the 94 business attorney respondents thought a national rule could be helpful, few thought there was a problem with the local procedures that have developed over the past thirty years. Because the lack of a national rule for paying administrative expenses did not seem to be a problem, the Subcommittee recommended that Judge Stone's suggestion not be pursued further.

After a short discussion, the Committee accepted the Subcommittee's recommendation that there is no need for a national rule or form governing the payment of administrative expenses.

9. Report of the Subcommittee on Privacy, Public Access, and Appeals.

Oral report on the revision of the Part VIII rules.

For the benefit of the new members, Judge Pauley and the Reporter recapped the progress of the of the Subcommittee's efforts over the past several years to review Part VIII of the Bankruptcy Rules, which govern appeals from bankruptcy courts to district courts and bankruptcy appellate panels. They explained that an early goal of the revision project was to bring the bankruptcy appellate rules more in line the Federal Rules of Appellate Procedure (FRAP) and that comment on early drafts emphasized the need to incorporate into the rules greater use of the electronic transmission, filing, and storage of electronic documents.

Over the summer, a working group composed of several members of the Advisory Committee, its reporters, a member of the Appellate Rules Advisory Committee, and that committee's reporter met to thoroughly review and edit the Part VIII draft and accompanying committee notes. The Reporter explained that the working group recommended a number of changes and that during this meeting she would go through approximately one half of the package, explain drafting choices, and ask for comments. She said the Subcommittee would present the second half of the draft at the spring 2012 meeting, with a recommendation that the entire package be published for public comment in August 2012.

The Reporter said that a number of general drafting decisions reflected reoccurring issues throughout the Part VIII draft. For example, the working group concluded that references to appellate "court" are more common than appellate "judge" and therefor adopted an "appellate court" convention. And, although the bankruptcy rules historically favor "shall" over "must," the

working group concluded that using "must" would make the Part VIII rules more consistent with FRAP. The working group also decided that internal references to "this rule" should be avoided if possible, and instead chose to restate the entire rule or refer to the rule subsection. **The Committee supported the working group's drafting conventions.**

The Committee reviewed Rules 8001 – 8012, and recommended publishing them for public comment in August 2012, with changes described below and subject to the additional revision of a few rules and review by the style consultant.

Rule 8001: Subsection (b) deleted; new (b) "Definitions" added with BAP and Appellate Court as (b)(1) and (b)(2) respectively; "Transmit" changed from subsection (e) to (b)(3) and the Subcommittee was asked to add language clarifying that the court must allow reasonable exceptions to the preference for electronic filing.

Rule 8002: no amendments suggested.

Rule 8003: changed "district court or a BAP" references to "appellate court;" at line 34, added "*sending it* to the pro se party's last known address;" made several other stylistic changes.

Rule 8004: changed "district court or a BAP" references to "appellate court" and the Reporter said she would search the draft and replace similar instances; Judge Pauley suggested changes to the committee note describing subsection (d) to be added after the meeting.

Rule 8005: one member suggested changing "the BAP clerk" at line 16 to "a BAP clerk."

Rule 8006: several changes to the committee note to explain the effective date of the certification and to deal with interlocutory judgments (interlocutory judgment language to come from strike-out material at lines 13-20 of Rule 8004).

Rule 8007: revisions to paragraph one of the committee note.

Rule 8008: no changes.

Rule 8009: bullet points added to 8009(a)(1); line 103, change "judge" to "court"; line 106, change "truthful" to "accurate."

Rule 8010: one member noted that requiring the court reporter to file a transcript in the BAP or district court would be problematic in practice because bankruptcy court reporters typically do not have authority to file electronically in those courts. District courts and BAPs generally can, however, view the lower court's docket, so it probably makes more sense to allow all filings to occur on the bankruptcy court's docket. **A motion to allow all filings by the reporter on the bankruptcy court docket passed and the Subcommittee agreed to revise Rule 8010 accordingly for consideration in the spring. Other stylistic changes also approved.**

Rule 8011: Subsection (2)(D) deleted, other stylistic changes made and **a motion to strike the reference to Rule 9037 and consider at the next meeting which 9000 rules apply carried without objection**.

Rule 8012: stylistic changes.

10. Report of the Subcommittee on Attorney Conduct and Health Care.

(A) Recommendation on Suggestion 10-BK-M by the States' Association of Bankruptcy Attorneys for a uniform rule for national admissions and local counsel requirements for governmental entities.

The Reporter said that the States' Association of Bankruptcy Attorneys ("SABA") has proposed a rule that would allow attorneys admitted to practice in any U.S. bankruptcy court, and in good standing in all jurisdictions in which they are a members of the bar, to practice in one or more cases in any other bankruptcy court, subject to certain conditions. Under the proposal, eligible attorneys would not be required to associate with local counsel for these representations.

Although the suggestion proposed a national admission rule applicable to all attorneys, the Subcommittee focused primarily on an alternative proposal limited to government attorneys. The Reporter said that subcommittee members recognized the difficulties that strict admission and local counsel requirements pose for state and local government attorneys who are required to participate in an out-of-state bankruptcy cases, but they questioned whether the matters raised by SABA are ones appropriately addressed by the Advisory Committee. Many bankruptcy court admission rules are governed by the district court, and the idea of a national federal bar or national admission standards to federal courts has been advocated for many years without success because both the Advisory Committee and the Standing Committee have been reluctant to override local admission requirements.

After discussing the suggestion, the Committee accepted the recommendation by the Subcommittee to take no further action.

(B) Recommendation on Suggestion 10-BK-N by Judge Thomas Waldrep concerning a new rule to provide greater transparency in the process for retaining counsel to creditors' committees.

The Assistant Reporter said that the issue arose in the context of *In re United Building Products*, 2010 WL 4642046 (Bankr. D. Del. Nov. 4, 2010). In that case the court denied the application to retain a law firm as committee counsel because it had engaged in solicitation for that position through the use of a surrogate to obtain the proxies of creditors. He said the Subcommittee was aware of EOUST interest in *United Building Products*, and suggested awaiting responsive action from the EOUST.

Mr. Redmiles said that the formation of committees was under review by the EOUST well before the *United Building Products* came out, and Ms. Eitel said that the EOUST has developed new internal guidance and template forms for U.S. trustees that explain how to form committees. She said the biggest problem with respect to committee formation was getting creditors to serve at all, and the new guidelines address that, but they will also reveal proxy votes and should address the concerns raised in *United Building Products.*

In response to a question from the Chair, Ms. Eitel said the EOUST does not think any amendments to the Bankruptcy Rules are needed to address the *United Building Products* situation, and that Bankruptcy Rule 2014 is sufficiently broad to do its job. **After further discussion, the Committee decided to take no action on Judge Waldrep's suggestion at this time.**

11. Oral Report of the Subcommittee on Technology and Cross Border Insolvency.

No report.

Discussion Items

12. Oral report on the impact of the Supreme Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011).

The Assistant Reporter gave a brief overview of *Stern* and then explained that there appear to be two immediate practical considerations. He said that in light of some of the language in *Stern* there was concern about whether parties can consent to entry of a final judgment by a bankruptcy judge in matters that are not "constitutionally" core matters. In his opinion, consent is still valid in part because the court made a point of demonstrating that there was no consent with respect to the issue before it, the counterclaim. On the other hand, the court found that consent to final judgment on the proof of claim itself was explicit, and it had no concerns with bankruptcy judge entering a final judgment on that matter. In addition, the Court made clear that its ruling was a narrow one. The Assistant Reporter said the consent issue is a concern to many commentors, however, and a panel of the Fifth Circuit is already seeking briefing on whether *Stern* upsets long-standing case law that consent to a final judgment by a magistrate judge is valid.

A second issue raised by *Stern* is how best to deal with the apparent statutory gap that now exists in 28 U.S.C. § 157. Although *Stern*-like counterclaims were found to be "core" in sense of the statute, the Court made clear that the bankruptcy court could not enter a final judgment on that matter constitutionally, at least not without the consent of the parties. Section 157 has no guidance, however, on a bankruptcy court's power to decide a matter that is core under the statute, but is not core under the Constitution. The Assistant Reporter said it makes sense to treat the *Stern*-like matters as if they are non-core but otherwise related to the bankruptcy case under Section 157(c),

such that the bankruptcy judge can enter a final judgment if consent is given by both parties; otherwise, the court can enter a report and recommendation.

The Assistant Reporter said he did not think there was anything the Committee could do at this point but see how courts interpret the opinion. **A motion to take no action at this time, and to monitor case law, passed without opposition.**

13. Oral report on the change in how the IRS allocates internet services in its "National Standards and Local Standards," which are used by debtors to complete Official Forms 22A and 22C.

The Chair said that effective October 3, 2011, the IRS will remove internet service expenses from its "Other Necessary Expense" category, and incorporate that expense into its Local Standards for Housing and Utilities. He said the change will affect Official Forms 22A and 22C. Both forms currently direct the debtor to deduct as an expense the actual amount paid for telecommunication services, including "internet service." OF 22A, Line 32; OF 22C, Line 37. Because of the IRS change, the forms will double count internet expenses if any are reported on telecommunication lines of the forms.

Mr. Redmiles gave members some background information about how the IRS change came about and why the notice to the EOUST and the Committee was too short to revise the forms this year. Members agreed that any needed revisions to the forms would be technical and would not require publication, so that once revised they could go into effect in December 2012. **The Chair asked the Consumer Subcommittee to suggest changes for December 1, 2012 that the Committee could consider at its spring meeting.**

14. Suggestion 11-BK-C by Wendell J. Sherk to amend Official Forms 22A and 22C to allow debtors with a below-median income to file shortened versions of the forms.

The Chair said that the FMP had incorporated the suggestion into its proposed drafts of 22A and 22C, which the Committee will consider at its spring meeting.

15. Suggestion 11-BK-D by Sabrina L. McKinney to amend Official Form B10 to provide a space for designating the amount of a general unsecured claim.

Afer the meeing the suggestion was referred to the Consumer and Forms Subcommittees, along with a suggestion by Mr. Kilpatrick that B10 also address leases and executory contracts.

16. Suggestion 11-BK-E by Judge A. Thomas Small to amend Rules 7016 and 8001 to permit parties to agree that their appellate options will be limited to no more than one appeal or to no appeal at all.

Some members expressed concerns about how knowledge of the waiver might affect the bankruptcy judge's consideration. **Referred to the Appellate Rules Subcommittee.**

17. Suggestion 11-BK-F by Chief Judge Peter W. Bowie to amend Rules 7012, 7004(e), and 9006(f) to provide that the deadline for responding runs from the date of service of a summons, rather than the date of issuance.

Referred to the Business and Consumer Subcommittees.

Information Items

18. Oral report on the status of bankruptcy-related legislation.

Mr. Wannamaker reported on pending bankruptcy legislation. He said HR 2192, introduced on 6-15-11 by Representative Steve Cohen, was of particular interest because it would extend the temporary exclusion from the means-test in Public Law No. 110-438 for certain Reservists and National Guard members for an additional four years. Mr. Wannamaker said the bill was referred to the Judiciary Committee on June 15, 2011, and was voted out of committee last week. [See also, Agenda Item 6-D].

19. Oral update on opinions interpreting section 521(i) of the Bankruptcy Code.

The Reporter said that courts continue to say that despite the automatic dismissal language in 11 U.S.C. § 521(i), a bankruptcy court retains discretion not to dismiss, at least if it appears that the debtor is trying to use the provision to avoid court scrutiny.

20. *Bull Pen*:

A. Proposed new Rule 8007.1 and the proposed amendment to Rule 9024 (indicative rulings), approved at September 2008 meeting.

B. Amendment to Official Form 23 to implement the proposed amendment to Rule 1007(b)(7), which would authorize providers of postpetition personal financial courses to notify the court directly of a debtor's completion of the course, approved at September 2010 meeting.

C. Amendment to Box 7 on Official Form 10 to add a reminder to attach the new mortgage attachment form under proposed Rule 3001(c), (Official Form 10 (Attachment A)), and the statement concerning open-end or revolving consumer credit agreements under proposed Rule 3001(c)(3)(A), approved at April 2011 meeting.

No comments were made on matters in the bull pen.

21. Rules Docket.

Mr. Wannamaker said the rules docket was meant to help the Advisory Committee keep track of its work, and that he would appreciate any comments.

22. Future meetings:

Spring 2012 meeting, March 29 - 30, 2012, at the Arizona Biltmore http://www.arizonabiltmore.com in Phoenix, Arizona. Possible locations for the fall 2012 meeting.

The Chair said he was considering Portland, Oregon for the fall, 2012 meeting, but that he was open to suggestions.

23. New business.

No new business.

24. Adjourn.

Respectfully submitted,

Scott Myers

TAB 9

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

MARK R. KRAVITZ
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PETER G. McCABE
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DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

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

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

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

Date: **December 12, 2011**

I. Introduction

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

This report presents one action item: the Committee's recommendation that a proposed amendment to Rule 16 (discovery and inspection) be approved and transmitted to the Judicial Conference as a technical and conforming amendment. The report also discusses several information items, including the formation of a subcommittee to study a proposal to amend Rule 6(e) to provide for the disclosure of grand jury materials of historical interest.

II. Action Item—Rule 16

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

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

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

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

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

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

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

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

III. Information Items

The Committee acknowledged the service of and said farewell to its former chair, Judge Richard C. Tallman, and it welcomed new member Carol Brook, Executive Director of the Illinois Federal Defender Program, new Standing Committee Liaison Judge Marilyn L. Huff, and new Clerk of Court Representative James N. Hatten of the Northern District of Georgia.

The Committee discussed a proposal from Attorney General Eric H. Holder, Jr. to amend Rule 6(e)'s provisions regarding grand jury secrecy to authorize the disclosure of historically significant grand jury materials after a suitable period of years, subject to various limitations and procedural protections. The Attorney General's letter called the Committee's attention to the recent decision granting access to President Richard Nixon's testimony before the Watergate grand jury, *In re Petition of Kutler*, No. 10-547, 2011 WL 3211516 (D. D.C. July 29, 2011), and to earlier decisions that granted access to grand jury materials in cases involving the espionage investigation of Alger Hiss, the espionage indictment of Julius and Ethel Rosenberg, and the jury-tampering indictment of Jimmy Hoffa. These decisions relied on the courts' inherent authority, rather than Rule 6(e), to authorize disclosure in special circumstances. In the Attorney General's view, however, the courts have no inherent authority to authorize disclosures not provided for under Rule 6. The proposed amendment is intended to recognize the public's interest in gaining access to records casting light on important historical events while continuing to protect grand jury secrecy.

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

After discussion, the Committee concluded that the proposal warranted in depth consideration. Accordingly, Judge Raggi appointed a subcommittee, chaired by Judge John Keenan, to study the proposal and report at the April meeting.

The Advisory Committee also considered four proposals for amendments received from judges and members of the public. After discussion, the Committee decided not to move forward to full consideration of these proposals.

The Committee discussed a suggestion from Judge Robert Jones (D. Or.) to eliminate or reduce the number of peremptory challenges afforded by Rule 24(b). The number of peremptory challenges has remained unchanged for more than sixty-five years, and two previous efforts to reduce the number of peremptory challenges were controversial and ultimately unsuccessful. Committee members expressed the view that it was not clear that reducing the number of peremptory challenges would yield significant cost savings, and all agreed that any change would generate substantial controversy. In light of these concerns, the Committee voted unanimously to take no further action to pursue this suggestion.

The Committee also discussed a suggestion forwarded by the Administrative Office on behalf of the Forms Working Group, which is composed of judges and clerks of court. The Working Group suggested that the Advisory Committee consider amending Rule 17 to eliminate the requirement that criminal subpoenas include the seal of the court. Several committee members expressed the view that the presence of the seal on criminal subpoenas was very helpful, causing subpoenas to be taken more seriously and increasing the likelihood of compliance . Mr. Hatten, the Committee's clerk of court representative, stated that imposing the court's seal was neither time consuming nor costly. The Committee voted unanimously not to pursue the suggestion that the rule be amended to eliminate the court's seal.

The Committee also received, and decided not to pursue, two suggested amendments proposed by members of the public. Professor Carrie Leonetti proposed an amendment to allow the district courts to grant pretrial judgments of acquittal. Mr. Eric Deleon suggested that Rule 6 be amended to spell out the precise wording of the oath or affirmation to be administered by the grand jury foreperson. Neither of these proposals garnered support, and the Committee voted unanimously not to pursue them.

Judge Raggi informed the Committee that she had met with Judge Paul Friedman, Chair of the Judicial Conference's Benchbook Committee, to follow up on the Committee's suggestion that the *Brady*/*Giglio* decisions be addressed in some form of a "best practices section" of the benchbook. The meeting was constructive, and Judge Raggi has been invited to participate in additional conference calls and discussions.

TAB 9-A

Rule 16. Discovery and Inspection

(a) Government's Disclosure.

* * * * *

(2) Information Not Subject to Disclosure. Except as permitted by Rule 16(a)(1)(A)-(D), (F), and (G) ~~Except as Rule 16(a)(1) provides otherwise~~, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.

Committee Note

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

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

to his defense, but, under Rule 16(a)(2), he may not examine Government work product." *United States v. Armstrong*, 517 U.S. 456, 463 (1996).

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

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

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

TAB 9-B

ADVISORY COMMITTEE ON CRIMINAL RULES
DRAFT MINUTES
October 31, 2011, St. Louis, Missouri

I. ATTENDANCE AND PRELIMINARY MATTERS

The Criminal Rules Advisory Committee ("Committee") met in St. Louis, Missouri on October 31, 2011. The following persons were in attendance:

Judge Reena Raggi, Chair
Judge Richard C. Tallman, Outgoing Chair
Rachel Brill, Esq.
Carol A. Brook, Esq.
Leo P. Cunningham, Esq.
Kathleen Felton, Esq.
Chief Justice David E. Gilbertson
James N. Hatten, Esq.
Judge John F. Keenan
Judge David M. Lawson
Professor Andrew D. Leipold
Judge Donald W. Molloy
Jonathan Wroblewski, Esq.
Judge James B. Zagel
Professor Sara Sun Beale, Reporter
Professor Nancy King, Reporter

Judge Mark R. Kravitz, Standing Committee Incoming Chair (by telephone)
Judge Marilyn L. Huff, Standing Committee Liaison

The following persons were absent:

Judge Morrison C. England, Jr.
Judge Timothy R. Rice
Assistant Attorney General Lanny A. Breuer

The following persons were present to support the Committee:

Andrea L. Kuperman, Esq. (by telephone)
Laural L. Hooper, Esq.
Peter G. McCabe, Esq.
Jonathan C. Rose, Esq.
Benjamin J. Robinson, Esq.

The following invited observer was present:

Peter Goldberger, Esq.
(on behalf of the National Association of Criminal Defense Lawyers).

II. REVIEW AND APPROVAL OF MINUTES OF APRIL 2011 MEETING

A motion to approve the minutes of the April 2011 Committee meeting in Portland, Oregon, having been moved and seconded,

The Committee unanimously approved the April 2011 meeting minutes by voice vote.

III. CHAIR'S REMARKS

Judge Raggi introduced (1) new member Carol Brook, the Executive Director of the Federal Defender Program for the Northern District of Illinois; (2) new Standing Committee liaison, Judge Marilyn Huff, of the Southern District of California; (3) new clerk representative, James Hatten, Clerk of Court for the Northern District of Georgia; and (4) invited observer Peter Goldberger, Esq., on behalf of the National Association of Criminal Defense Lawyers. Judge Raggi noted that, at the suggestion of Standing Committee Chair, Judge Lee Rosenthal, and following the practice of the Civil Rules Committee, the Committee had extended invitations to various criminal defense organizations to send observers to Committee meetings.

On behalf of the entire Committee, Judge Raggi thanked Judge Richard C. Tallman, the outgoing Chair, for his outstanding leadership over four years that had brought many challenging issues before the Committee requiring a number of amendments to the Criminal Rules.

Judge Raggi noted that Committee member, Judge Keenan, had recently been honored by the New York County Lawyers Association with the Edward Weinfeld Award for his outstanding service on the bench.

Judge Raggi reported on cost containment efforts by the Judicial Conference of the United States, noting that few affected the Committee, whose mandate did not involve making decisions about the expenditure of public monies.

Judge Raggi also reported on her communications with members of the Federal Judicial Center's Benchbook Committee, and particularly with Benchbook Committee Chair Judge Irma Gonzalez, and member, Judge Paul Friedman, regarding the Criminal Rules Committee's referral to the Benchbook Committee of the question of "best practices" regarding the government's *Brady/Giglio* disclosure obligations. Judge Raggi advised that the Benchbook Committee has invited her continued participation as it pursues the matter.

IV. CRIMINAL RULES ACTIONS

A. Proposed Amendments Approved by the Supreme Court for Transmittal to Congress

Judge Raggi reported that the following proposed amendments, approved by the Supreme Court and transmitted to Congress, will take effect on December 1, 2011, unless Congress acts to the contrary:

1. Rule 1. Scope: Definitions. Proposed amendment broadens the definition of telephone.

2. Rule 3. The Complaint. Proposed amendment allows complaint to be made by telephone or other reliable electronic means as provided by Rule 4.1.

3. Rule 4. Arrest Warrant or Summons on a Complaint. Proposed amendment adopting concept of "duplicate original," allowing submission of return by reliable electronic means, and authorizing issuance of arrest warrants by telephone or other reliable electronic means as provided by Rule 4.1.

4. Rule 4.1. Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means. Proposed amendment provides comprehensive procedure for issuance of complaints, warrants, or summons.

5. Rule 6. The Grand Jury. Proposed amendment authorizing grand jury return to be taken by video teleconference.

6. Rule 9. Arrest Warrant or Summons. Proposed amendment authorizing issuance of warrant or summons by telephone or other reliable electronic means as provided by Rule 4.1.

7. Rule 32. Sentencing and Judgment. Proposed technical and conforming amendment concerning information in presentence report.

8. Rule 40. Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District. Proposed amendment authorizing use of video teleconferencing.

9. Rule 41. Search and Seizure. Proposed amendment authorizing request for warrants to be made by telephone or other reliable electronic means as provided by Rule 4.1 and return of warrant and inventory by reliable electronic means, and proposed technical and conforming amendment deleting obsolescent references to calendar days.

10. Rule 43. Defendant's Presence. Proposed amendment authorizing defendant to participate in misdemeanor proceedings by video teleconference.

11. Rule 49. Serving and Filing Papers. Proposed amendment authorizing papers to be filed, signed, and verified by electronic means.

B. Proposed Amendments Approved by the Judicial Conference

Judge Raggi reported that the following amendments were approved by the Judicial Conference at its September 2011 meeting, and will be transmitted to the Supreme Court for review:

1. Rule 5. Initial Appearance. Proposed amendment providing that initial appearance for extradited defendants shall take place in the district in which defendant was charged, and that non-citizen defendants in U.S. custody shall be informed that upon request a consular official from the defendant's country of nationality will be notified, and that the government will make any other consular notification required by its international obligations.

2. Rule 58. Initial Appearance. Proposed amendment providing that in petty offense and misdemeanor cases non-citizen defendants in U.S. custody shall be informed that upon request a consular official from the defendant's country of nationality will be notified, and that the government will make any other consular notification required by its international obligations.

3. Rule 15. Depositions. Proposed amendment authorizing deposition in foreign countries when the defendant is not physically present if court makes case-specific findings regarding (1) the importance of the witness's testimony, (2) the likelihood that the witness's attendance at trial cannot be obtained, and (3) why it is not feasible to have face-to-face confrontation by either (a) bringing the witness to the United States for a deposition at which the defendant can be present or (b) transporting the defendant to the deposition outside the United States.

4. Rule 37, Indicative Rulings: Proposed amendment authorizing district court to make indicative rulings when it lacks authority to grant belief because appeal has been docketed.

With respect to Rule 15, Professor Beale reminded the Committee that, to the extent the Supreme Court's return of an earlier version of the amended rule without comment signaled possible Sixth Amendment concerns about the admissibility of evidence obtained under the rule, the amendment had been revised so that Subsection (f) now stated explicitly that an order authorizing a deposition to be taken under the rule does not determine its admissibility.

C. Proposed Amendments Approved by the Standing Committee for Publication in August 2011

Judge Raggi reported that the following proposed amendments had been approved by the Standing Committee for publication:

1. Rule 11. Advice re Immigration Consequences of Guilty Plea; Advice re Sex Offender Registration and Notification Consequences of Guilty Plea.

2. Rule 12(b). Clarifying Motions that Must Be Made Before Trial; Addresses Consequences of Motion; Provides Rule 52 Does Not Apply To Consideration Of Untimely Motion.

3. Rule 34, Arresting Judgment: Conforming Changes To Implement Amendment to Rule 12.

With respect to Rule 12(b), Judge Raggi advised that questions had been raised in the Standing Committee regarding the rule's treatment of double jeopardy claims and its possible diminution of district court discretion to entertain late motions before trial. The Standing Committee approved publication, concluding that it would be useful to learn whether such concerns were expressed in public comments.

V. NEW PROPOSALS FOR DISCUSSION

A. Rule 16(a)(2), Pretrial Disclosure of Government Work Product

Judge Raggi reported that Standing Committee Chair, Judge Lee Rosenthal, had called attention to *United States v. Rudolph*, 224 F.R.D. 503 (N.D. Ala. 2004), which identified "scrivener's error" in Rule 16(a)(2), in that restyled language could be construed to eliminate protection from discovery expressly provided to government work product under the predecessor rule. A report prepared by Professors Beale and King agreed with *Rudolph*'s assessment and noted that a total of four courts had now concluded that the revised rule contained a scrivener's error. The reporters provided the Committee with language for a possible amendment.

Judge Raggi invited discussion, noting that the matter did not require subcommittee consideration but could be addressed by the Committee as a whole. There was general agreement with one member's observation that the error "is an embarrassment to the Committee" and warranted prompt correction. A motion being made and seconded to correct the scrivener's error by amending the rule as recommended by the reporters,

The Committee unanimously voted to amend Rule 16(a)(2) by adopting the language suggested by the reporters and to transmit the matter to the Standing Committee.

Judge Raggi asked Professors Beale and King to draft a Committee Note to accompany the rule amendment, which Committee members would review by email. Mr. McCabe observed that because the proposed amendment only corrected scrivener's error, it could probably be reviewed under the Standing Committee's expedited procedures, which permit technical and conforming changes to rules to be adopted without a hearing period and public comment.

B. Rule 17, Seal of Court on Subpoenas

The Administrative Office's "Forms Working Group" asked the Committee to consider amending Rule 17(a) to eliminate the requirement that criminal subpoenas bear the seal of the issuing court. The Working Group noted the elimination of a parallel sealing requirement in the civil rules.

Judge Raggi and Judge Kravitz observed that there may be reasons for treating civil and criminal subpoenas differently to ensure compliance with the latter.

Judge Raggi asked Mr. Hatten to comment on the burden for clerks' offices in having to place seals on criminal subpoenas. Mr. Hatten stated that the seal requirement imposes no burden.

Discussion revealed the Committee's agreement that the seal of the court on a criminal subpoena served the useful purpose of ensuring compliance.

A motion having been made and seconded,

The Committee unanimously decided by voice vote not to amend Rule 17(a).

C. Rule 6, Grand Jury Oaths

A citizen request from Eric DeLeon asked the Committee to amend Rule 6(c) to state the oath required in grand jury proceedings or to provide a cross-reference to the text of that oath. Judge Raggi and the Committee reporters recommended no action but invited discussion. The Committee agreed that there was no problem requiring rule amendment. A motion having been made and seconded,

The Committee unanimously decided by voice vote not to pursue an amendment to Rule 6(c).

D. Rule 24(b), Peremptory Challenges

Judge Raggi reported that Judge Robert E. Jones of the District of Oregon suggested that an amendment to Rule 24(b) to eliminate or reduce peremptory challenges would reduce costs for the judiciary. Members generally agreed that any cost reduction from such an amendment would be minimal. Such a significant change in the jury selection process would, however, undoubtedly prompt strong opposition from the bar. No member of the Committee voicing support for the proposal, and a motion having been made and seconded,

The Committee unanimously decided by voice vote not to amend Rule 24(b).

E. Rule 29, Summary Judgment Prior to Trial

The Committee considered a proposal from Assistant Professor Carrie Leonetti of the University of Oregon School of Law to amend the criminal rules to authorize pre-trial awards of summary judgment to the defense. Upon review of a report prepared by Professor King that recommended against the proposal, no member of the Committee voiced support for an amendment. A motion having been made and seconded,

The Committee unanimously decided by voice vote not to amend Rule 29.

F. Rule 6(e), Historically Significant Grand Jury Materials

After the October agenda materials were distributed, the Committee received a proposal from Attorney General Eric H. Holder, Jr. to amend Rule 6(e) to establish procedures for the disclosure of historically significant grand jury materials, which some courts have done by invoking "inherent authority." At Judge Raggi's request, Kathleen Felton summarized the views expressed in the Attorney General's letter.

Judge Raggi formed a subcommittee to study the matter and report to the full Committee at its April meeting. Judge Keenan agreed to chair the subcommittee. Judges Malloy and Zagel, Professor Leipold, Ms. Brook, Ms. Felton, Mr. Wroblewski and Mr. Hatten will also serve, with Professors Beale and King providing legal support.

G. Rule 17.1, Pretrial Procedures

Judge Lawson noted that, at the Portland meeting, he had suggested that Rule 17.1 be amended to provide for certain matters, notably *Brady/Giglio* compliance, to be discussed at a pre-trial conference. He indicated that he had sent a draft proposal to Judge Tallman and wished to have the matter put on the next meeting agenda. In response to Judge Raggi's inquiry as to whether the content of pre-trial conferences should really be the subject of a rule (rather than best practices), Judge Lawson indicated that the Committee's recent *Brady/Giglio* discussions persuaded him that the matter was important enough to deserve a rule. Judge Raggi asked Professors Beale and King to secure a copy of Judge Lawson's proposal and to prepare a report for the Committee so that the matter could be discussed at the next meeting.

VI. INFORMATION ITEMS

A. Status Report on Legislation Affecting Criminal Rules

Mr. Rose reported that no legislation was anticipated that would affect the Criminal Rules.

B. Electronic Discovery

Judge Raggi observed that district courts were increasingly confronting questions about electronic discovery in criminal cases, a matter that might merit future Committee consideration. Because the Civil Rules Committee has already done considerable work in the area, Judge Raggi stated that she would discuss the subject with Judge Kravitz and Ed Cooper, the Civil Rules Committee reporter, to benefit from their experience.

Mr. Wroblewski advised that the Justice Department was working with Federal Defenders, the Administrative Office, and the Federal Judicial Center to develop protocols for discovery of electronically stored information and drafts were expected in six to eight months. Judge Raggi asked if these protocols might be shared with the Committee for possible discussion as an information item.

C. Inter-Committee Forms Subcommittee

Judge Lawson and Professor King, the Committee's representatives to the Inter-Committee Forms Subcommittee, reported that the Subcommittee was exploring the possibility of a unified approach to forms among the five advisory rules committees and, thus, sought information as to each advisory committee's practices.

Professor King advised that until 1983, Criminal Rule 58 encouraged the use of some 27 appended forms pertaining to complaints, indictments, informations, etc. In 1983, Rule 58 and the appended forms were abrogated, so that no mention of forms is made in the criminal rules. (There are, however, forms appended to the rules governing habeas procedures under 28 U.S.C. §§ 2254 and 2255.) Rather, a Forms Working Group in the Administrative Office develops forms for use in criminal proceedings. Judge Lawson asked whether this Forms Working Group should be added to the Inter-Committee Forms Subcommittee. Judge Raggi stated that, because there have been no complaints about forms produced by the AO's Forms Working Group, there appeared to be no reason for the Committee to seek to reassume a role in that area. Accordingly, Judge Lawson and Professor King will report to the Forms Subcommittee that the Criminal Rules Committee, in contrast to other advisory committees, has played little role in the process of developing and revising criminal forms and that the assignment of that responsibility to the AO Forms Working Group seems satisfactory.

VII. SUBCOMMITTEE ASSIGNMENTS

Judge Raggi identified the Committee's active subcommittees as follows:

A. Rule 12 Subcommittee

Judge England, Chair
Judge Lawson
Professor Leipold
Ms. Brook
Ms. Felton
Mr. Wroblewski

B. Rule 11 Subcommittee

Judge Rice, Chair
Judge Lawson
Judge Malloy
Professor Leipold
Mr. Cunningham
Ms. Felton
Mr. Wroblewski

C. Rule 6(e) Subcommittee

Judge Keenan, Chair
Judge Malloy

Judge Zagel
Professor Leipold
Ms. Brook
Ms. Felton
Mr. Wroblewski
Mr. Hatten

All other subcommittees having completed their work, Judge Raggi declared them dissolved.

VIII. FUTURE MEETINGS AND HEARINGS

Judge Raggi announced that the Committee will next meet on Monday and Tuesday, April 23-24, 2012, at the Federal Courthouse in San Francisco, California. The autumn 2012 meeting will be held on Thursday and Friday, October 18-19, 2012, at the Administrative Office in Washington, D.C.

Hearing dates on criminal rules published for public comment are scheduled for January 6, 2012, in Phoenix, Arizona, in conjunction with the Standing Committee meeting; and February 12, 2012, in Washington, D.C. Members will be advised in advance as to whether public comments are received necessitating one or both of these hearings.

Before the Committee adjourned, Judge Tallman expressed his thanks to all members and staff for the honor of serving as chair, congratulated Judge Raggi on her appointment, and promised his continued support for the work of the Committee.

All business being concluded, Judge Raggi adjourned the meeting.

TAB 10

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

MARK R. KRAVITZ
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JEFFREY S. SUTTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

DATE: December 7, 2011

TO: Judge Mark R. Kravitz, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Jeffrey S. Sutton, Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on October 13 and 14, 2011, in Atlanta, Georgia. The Committee discussed a number of existing items, including a proposal to amend Appellate Rule 6 in tandem with proposed amendments to Part VIII of the Bankruptcy Rules. It considered the possibility of a future project to amend the Appellate Rules in the light of electronic filing. And it removed two items from its agenda.

This report does not present any action items for consideration at the Standing Committee's January meeting. In particular, the proposed amendment to Appellate Rule 6 is not yet ready to be presented for approval for publication; rather, the Committee's goal is to finalize that proposal at its April 2012 meeting. But the Committee would welcome the opportunity to obtain the Standing Committee's views on the Rule 6 proposal at the January meeting.

Accordingly, Part II of this report discusses that proposal. Part III describes the Committee's initial discussion of possible amendments to the Appellate Rules in the light of electronic filing. Part IV covers other matters.

The Committee has scheduled its next meeting for April 12 and 13, 2012, in Washington, DC.

Detailed information about the Committee's activities can be found in the Reporter's draft of the minutes of the October meeting[1] and in the Committee's study agenda, both of which are attached to this report.

II. The proposal to amend Appellate Rule 6

As discussed in the report of the Bankruptcy Rules Committee, that Committee is working on a proposal to amend Part VIII of the Bankruptcy Rules – the rules that govern appeals from bankruptcy court to a district court or bankruptcy appellate panel ("BAP"). In connection with that project, the Bankruptcy and Appellate Rules Committees have been working together on a proposal to amend Appellate Rule 6 in order to ensure that Rule 6 dovetails with the amended Part VIII Rules. The Appellate Rules Committee is indebted to the Bankruptcy Rules Committee for its expert input on the Rule 6 proposal. The proposed amendments to Rule 6 would update that Rule's cross-references to the Bankruptcy Part VIII Rules; would amend Rule 6(b)(2)(A)(ii) to remove an ambiguity dating from the 1998 restyling; would add a new Rule 6(c) to address permissive direct appeals from the bankruptcy court under 28 U.S.C. § 158(d)(2); and would revise Rule 6 to take account of the range of methods available now or in the future for dealing with the record on appeal.[2] The first and second of these changes are straightforward, and for that reason are not discussed in this report. The third and fourth of these changes pose drafting challenges; these changes are discussed in Parts II.A and II.B below. II.C sums up by considering whether, despite the challenges discussed in II.A and II.B, it is still worthwhile to proceed with the Rule 6 proposal during the current rulemaking cycle.

A. Proposed new Rule 6(c) concerning direct bankruptcy appeals

The Appellate Rules do not currently address in explicit terms the topic of permissive direct appeals from a bankruptcy court to a court of appeals under 28 U.S.C. § 158(d)(2). At the time that Section 158(d)(2) came into being as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), the Appellate Rules Committee decided that no immediate action was necessary with respect to the Appellate Rules, because BAPCPA put in place interim procedures for administering the new direct appeals mechanism. Some of those interim procedures were subsequently displaced by the 2008 addition of subdivision (f) in

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[1] These minutes have not yet been approved by the Committee.

[2] A sketch of the proposed amendments to Appellate Rule 6 is enclosed with this report.

Bankruptcy Rule 8001. The Committee now considers it worthwhile to specify in more detail the way in which the Appellate Rules apply to direct appeals under Section 158(d)(2), and the Bankruptcy Rules Committee's Part VIII project provides an opportune context in which to obtain input and guidance on this question.

Proposed Appellate Rule 6(c) would treat the record on direct appeals differently than existing Rule 6(b) treats the record on bankruptcy appeals from a district court or BAP. Rule 6(b) contains a streamlined procedure for redesignating and forwarding the record on appeal, because in the appeals covered by Rule 6(b) the appellate record will already have been compiled for purposes of the appeal to the district court or the BAP. In the context of a direct appeal, the record will generally require compilation from scratch. The closest model for the compilation and transmission of the bankruptcy court record would appear to be the rules chosen by the Part VIII project for appeals from the bankruptcy court to the district court or the BAP. Thus, Rule 6(c) in the sketch enclosed with this report incorporates the relevant Part VIII rules by reference[3] while making some adjustments to account for the particularities of direct appeals to the court of appeals.

B. Methods for dealing with the record on appeal

Both the Bankruptcy Rules Part VIII project and the project to revise Appellate Rule 6 have highlighted changes in the treatment of the record. The Appellate Rules as they currently exist were drafted on the assumption that the record on appeal would be available only in paper form. Reflecting the fact that the bankruptcy courts were ahead of other federal courts in making the transition to electronic filing, the proposed Part VIII Rules are drafted with a contrary presumption in mind: The default principle under those Rules is that the record will be made available in electronic form. In revising Rule 6(b) and in drafting new Rule 6(c), the Appellate Rules Committee's goal is to adopt language that can accommodate the various ways in which the lower-court record could be made available to the court of appeals – e.g., in paper form; or in electronic files that can be sent to the court of appeals; or by means of electronic links.[4] It is this endeavor that has proven most challenging, and on which the Appellate Rules Committee would particularly welcome input from the Standing Committee.

A description of the Committee's consideration of these challenges can be found in the minutes of the October 2011 meeting. Since the time of that meeting, participants have continued to try to reach consensus on appropriate language. Instead of referring to "forwarding" the record, the enclosed sketch refers to "furnishing" or "providing" the record. That choice among terms is one of the questions the Committee has not yet resolved. An

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[3] The latest drafts of the relevant Bankruptcy Rules are included in Appendix B to the report of the Bankruptcy Rules Committee.

[4] Adopting such language seems generally advisable in the light of the shift to electronic filing; and such language seems particularly salient in the case of proposed Rule 6(c) because – as noted in Part II.A – that Rule will incorporate by reference the Part VIII Rules that deal with the record on appeal.

additional question is whether the text of the Rule should make explicit the range of methods that can constitute "furnishing" or "providing" or whether that level of detail should be left to the Committee Note. Bracketed sentences in proposed Rules 6(b)(2)(C) and 6(c)(2)(B) illustrate ways of addressing this issue in the text of the Rule.

C. Timing of the Rule 6 revision

As noted above, the proposed changes to Rule 6 would adjust that Rule to reflect the ongoing shift to electronic filing. The amended Rule 6 would then differ from the rest of the Appellate Rules (which have not yet been adjusted to take account of electronic filing), and the approach adopted for Rule 6 would have implications for future amendments to the other Appellate Rules. This raises the question whether it is worthwhile to proceed with the Rule 6 amendments without (yet) amending the rest of the Appellate Rules to address electronic filing.

If Rule 6 is revised to refer to "furnishing" or "providing" the record, Rule 6 will stand in contrast to other aspects of the Appellate Rules (which were drafted against a background assumption that the record would be compiled and sent in paper form). Broader terms such as "furnish" or "provide" may eventually become appropriate for use in the context of non-bankruptcy appeals. Part III below discusses the possibility of a broader project to review and revise the Appellate Rules in the light of electronic filing and service. In that broader project, the rules that speak of "retaining," "forwarding," "sending," and "filing" the record or other court documents would warrant review.

Even if the Committee later concludes that it is appropriate to adopt for the other Appellate Rules the new terminology selected for Rule 6, there will presumably be a time lag between the effective date of the Rule 6 revisions and the effective date of the broader electronic-filing-related revisions. That time lag would not be ideal, but it is not a reason to hold back the Rule 6 project. The Appellate Rules already provide a distinctive set of procedures for the treatment of the record in the context of bankruptcy appeals, so one additional difference in terminology does not seem likely to add a great deal more to the confusion that any generalist litigator would experience when encountering a bankruptcy appeal.

There is also a chance that the Committee will later conclude that the terminology adopted for Rule 6 is not suitable for non-bankruptcy appeals. Once again, though such an outcome would not be optimal, the risk does not seem to justify delaying the Rule 6 proposal. In fact, experience with an amended Rule 6 may help to inform the Committee's consideration of broader questions relating to the Appellate Rules' treatment of electronic filing. And the Part VIII project provides an opportunity to obtain comments from the bankruptcy appeals bar in the context of their review of the Part VIII project.

It will, of course, be very important to ensure that the language selected for Appellate Rule 6 will fit with the language employed in the revised Part VIII Rules. The two Committees will continue to work together toward this end. The Standing Committee's guidance on the questions raised here will be of great assistance in the drafting effort.

III. A possible project to amend the Appellate Rules in the light of electronic filing

At its October 2011 meeting, the Committee discussed the possibility of amending the Appellate Rules to take account of the shift to electronic filing and service. Now that almost all circuits accept electronic filings, it seems worthwhile to consider taking up such a project. Moreover, the proposed amendments to Part VIII of the Bankruptcy Rules provide a potential model for the treatment of some of the issues raised by electronic filing and service.

There are a significant number of Appellate Rules that could be affected by such a project. As to some of those Rules, one approach might be to add language stating that circuits that permit or require certain filings to be electronic may promulgate local rules prescribing particular technical requirements governing the manner of filing. Of course, such amendments would implicate the usual policy choices concerning when and how to permit or encourage the promulgation of local rules.

In terms of topic areas that might form the focus of an electronic-filing project, several obvious examples come to mind. Provisions that require service by the clerk might no longer be necessary in cases where all parties participate in (and will receive notice through) CM/ECF. The project might also include review of Rule 25's provisions for electronic service and filing as well as Rule 26(c)'s treatment of the three-day rule. As noted in Part II above, one of the most significant changes that CM/ECF may bring to appellate practice concerns the treatment of the record; if the appellate judges and clerks can access the district court record by means of links in the electronic docket, then the need for a paper record may eventually dissipate. In turn, changes in the handling of the record might – but will not necessarily – lead to changes in the nature of any appendix. And some of the Appellate Rules' detailed instructions concerning the format of briefs and other papers may be unnecessary for electronic filings.

Not all of these issues will necessitate Rule amendments. In some instances, a practice may not yet be sufficiently widespread to warrant treatment in the Rules. In other instances, the existing Rules may be flexible enough to permit new practices relating to electronic service and filing. In drafting any amendments to the Rules, it will be important to provide the capacity to accommodate future technological advances.

Even this brief overview demonstrates that these issues are unlikely to be unique to the Appellate Rules Committee. The Committee believes that it would be beneficial to coordinate its efforts – on such a project – with those of the other Advisory Committees.

IV. Other information Items

At the October 2011 meeting, the Committee discussed the proposal to amend Rule 29(a) to treat federally recognized Native American tribes the same as states for purposes of amicus filings. Such an amendment would authorize tribes to file amicus briefs without party consent or court leave and (under the structure employed by the current Rule 29) would also exempt tribes from the authorship-and-funding disclosure requirement set by Rule 29(c)(5). The Committee noted that the Eighth, Ninth, and Tenth Circuits have expressed varying views on the desirability of adopting such a provision either in the Appellate Rules or in a local rule. Members also

discussed whether parity of treatment (under Rule 29) should be extended not only to Native American tribes but also to municipalities. Members indicated that it would be helpful to obtain the views of all the circuits on these questions; accordingly, I have written to the Chief Judge of each circuit to seek that input.

The Committee also discussed a proposal to address the sealing or redaction of briefs or record materials on appeal. Although the comment giving rise to this item focused on the difficulties that redacted briefs create for would-be amicus filers, the possible issues concerning sealing on appeal extend more broadly. These issues intersect with the treatment of similar issues in the district court, and with questions considered by other Judicial Conference committees. Thus, any rulemaking response to such questions would require coordination with all affected committees. The circuits currently take a range of approaches to sealing on appeal. The D.C. Circuit and Federal Circuits direct the litigants – at the outset of the appeal – to review the record, reach agreement on whether some or all sealed portions can be unsealed, and present that agreement to the district court. In some other circuits, materials that were sealed in the district court presumptively remain sealed on appeal. By contrast, the Seventh Circuit requires a timely motion to maintain sealing for purposes of appeal. In the light of the diversity of approaches among the circuits, one central question will be whether there is a need for a uniform national rule. An alternative to rulemaking might be an informational project that gathers and shares the current circuit approaches so that each circuit can evaluate its own approach in light of possible alternatives.

The Committee discussed a proposal to amend Rule 28 to authorize the inclusion of introductions in briefs. Members noted that experienced appellate lawyers often include introductions and that such introductions can be useful. Amending Rule 28 to mention the possibility would reflect existing practice and would make that practice more accessible to less sophisticated lawyers. But members also noted possible downsides, such as the possibility that some of the newly-encouraged introductions would be inartful and unhelpful. The Committee plans to discuss this proposal further at its spring meeting. At that point the Committee will also have the benefit of any comments submitted on the related proposal (currently out for comment) to amend Rule 28(a) to consolidate the statements of the case and of the facts.

The Committee removed from its agenda a proposal to amend Rule 4(a)(4) to address potential problems arising from the possibility of a time lag between entry of the order disposing of a tolling motion and entry of any resulting amended judgment. The Committee's consideration of this proposal was informed by the efforts of the Civil/Appellate Subcommittee, which worked hard to find a way to address this issue without creating unintended problems. In the end, each possible approach had costs that appeared to outweigh its benefits. Most recently, the Committee considered the possibility of recommending to the Civil Rules Committee that Civil Rule 58(a)'s separate document requirement be extended to encompass orders disposing of tolling motions. Serious concerns, however, were raised about such a proposal; in particular, a number of participants worried that the existing levels of district court noncompliance with the separate document requirement would worsen if the requirement were to be expanded. Members questioned the wisdom of amending the Rules to address this issue in the absence of evidence of actual problems caused by the current Rules.

The Committee also removed from its agenda a proposal to amend Rule 4(a)(2) – which concerns relation forward of premature notices of appeal – in response to issues raised by the petition in *CHF Industries, Inc. v. Park B. Smith, Inc.*, 130 S. Ct. 622 (2009). The caselaw on premature notices of appeal includes some circuit splits, but the most notable of those circuit splits are lopsided splits and most of those splits appear likely to resolve themselves without rulemaking action. It proved challenging to draft an amendment that would improve on the status quo, and some members were concerned that if Rule 4(a)(2) were amended to list the scenarios in which current law permits relation forward, it would encourage less careful practices among would-be appellants. Members believed that leaving the practice unspecified in the Rule would allow courts to continue to rescue appeals where relation forward is currently permitted but would not encourage litigants to rely on the availability of such rescues.

The Committee discussed briefly the fact that the Federal Judicial Center's report on appellate cost awards has generated positive changes in some local circuit practices. The Committee reviewed recent certiorari petitions concerning the Appellate Rules, but did not identify any new items that should be added to its agenda at this time.

TAB 10-A

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*****

Rule 6. Appeal in a Bankruptcy Case ~~From a Final Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel~~

(a) Appeal From a Judgment, Order, or Decree of a District Court Exercising Original Jurisdiction in a Bankruptcy Case. An appeal to a court of appeals from a final judgment, order, or decree of a district court exercising jurisdiction under 28 U.S.C. § 1334 is taken as any other civil appeal under these rules.

(b) Appeal From a Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel Exercising Appellate Jurisdiction in a Bankruptcy Case.

(1) Applicability of Other Rules. These rules apply to an appeal to a court of appeals under 28 U.S.C. § 158(d)(1) from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction under 28 U.S.C. § 158(a) or (b)~~.~~ ~~But there are 3 exceptions~~, but with these qualifications:

(A) Rules 4(a)(4), 4(b), 9, 10, 11, ~~12(b)~~ 12(c), 13-20, 22-23, and 24(b) do not apply;

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

(B) the reference in Rule 3(c) to "Form 1 in the Appendix of Forms" must be read as a reference to Form 5; ~~and~~

(C) when the appeal is from a bankruptcy appellate panel, ~~the term~~ "district court," as used in any applicable rule, means "appellate panel~~.~~"; and

(D) in Rule 12.1, "district court" includes a bankruptcy court or bankruptcy appellate panel.

(2) Additional Rules. In addition to the rules made applicable by Rule 6(b)(1), the following rules apply:

(A) Motion for r~~R~~ehearing.

(i) If a timely motion for rehearing under Bankruptcy Rule ~~8015~~ 8023 is filed, the time to appeal for all parties runs from the entry of the order disposing of the motion. A notice of appeal filed after the district court or bankruptcy appellate panel announces or enters a judgment, order, or decree – but before disposition of the motion for rehearing – becomes effective when the order disposing of the motion for rehearing is entered.

(ii) ~~Appellate review of~~ If a party intends to challenge the order disposing of the motion – or the alteration or amendment of a judgment, order,

or decree upon the motion – then ~~requires~~ the party, in compliance with Rules 3(c) and 6(b)(1)(B), ~~to amend a previously filed notice of appeal. A party intending to challenge an altered or amended judgment, order, or decree~~ must file a notice of appeal or amended notice of appeal. The notice or amended notice must be filed within the time prescribed by Rule 4 – excluding Rules 4(a)(4) and 4(b) – measured from the entry of the order disposing of the motion.

(iii) No additional fee is required to file an amended notice.

(B) The ~~r~~Record on ~~a~~Appeal.

(i) Within 14 days after filing the notice of appeal, the appellant must file with the clerk possessing the record assembled in accordance with Bankruptcy Rule ~~8006~~ 8009 – and serve on the appellee – a statement of the issues to be presented on appeal and a designation of the record to be certified and ~~sent~~ [furnished] [provided] to the circuit clerk.

(ii) An appellee who believes that other parts of the record are necessary must, within 14 days

after being served with the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included.

(iii) The record on appeal consists of:

• the redesignated record as provided above;

• the proceedings in the district court or bankruptcy appellate panel; and

• a certified copy of the docket entries prepared by the clerk under Rule 3(d).

(C) ~~Forwarding~~ [Furnishing] [Providing] the ~~r~~Record.

(i) When the record is complete, the district clerk or bankruptcy appellate panel clerk must number the documents constituting the record and ~~send~~ promptly [furnish] [provide] them ~~them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified~~ to the circuit clerk. [For this purpose, a document may be [furnished] [provided] to the circuit clerk either by transferring it (or a copy of it) in paper or electronic form or by supplying the circuit clerk means of electronic

access to it.] [The court of appeals may adopt a local rule defining the acceptable methods for [furnishing] [providing] those documents to the circuit clerk.] ~~Unless directed to do so by a party or the circuit clerk~~ If the record is [furnished] [provided] in paper form, the clerk will not send ~~to the court of appeals~~ documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals, unless directed to do so by a party or the circuit clerk. If ~~the exhibits are~~ unusually bulky or heavy exhibits are to be sent in paper form, a party must arrange with the clerks in advance for their transportation and receipt.

(ii) All parties must do whatever else is necessary to enable the clerk to assemble and ~~forward~~ [furnish] [provide] the record. When the record is [furnished] [provided] in paper form, t~~T~~he court of appeals may provide by rule or order that a certified copy of the docket entries be sent in place of the redesignated record~~, b~~. B~~b~~ut any party may request at any time during the pendency of the appeal that the redesignated record be sent.

(D) Filing the r~~R~~ecord. ~~Upon receiving the record – or a certified copy of the docket entries sent in place of the redesignated record – the circuit clerk must file it and immediately notify all parties of the filing date~~ When the district clerk or bankruptcy appellate panel clerk has [furnished] [provided] the record, the circuit clerk must note that fact on the docket. The date noted on the docket serves as the filing date of the record for purposes of [these Rules] [Rules 28.1(f), 30(b)(1), 31(a)(1), and 44]. The circuit clerk must immediately notify all parties of the filing date.

(c) Direct Review by Permission Under 28 U.S.C. § 158(d)(2).

(1) Applicability of Other Rules. These rules apply to a direct appeal by permission under 28 U.S.C. § 158(d)(2), but with these qualifications:

(A) Rules 3-4, 5(a)(3), 6(a), 6(b), 8(a), 8(c), 9-12, 13-20, 22-23, and 24(b) do not apply;

(B) the last sentence in Rule 5(d)(3) does not apply; and

(C) as used in any applicable rule, "district court" or "district clerk" includes – to the extent

appropriate – a bankruptcy court or bankruptcy appellate panel or its clerk.

(2) Additional Rules. In addition to the rules made applicable by Rule 6(c)(1), the following rules apply:

(A) **The Record on Appeal.** Bankruptcy Rule 8009 governs the record on appeal.

(B) **[Furnishing] [Providing] the Record.** Bankruptcy Rule 8010 governs completing and [furnishing] [providing] the record. [But the court of appeals may adopt a local rule defining the acceptable methods for [furnishing] [providing] the record to the circuit clerk.]

(C) **Stays Pending Appeal.** Bankruptcy Rule 8007 applies to stays pending appeal.

(D) **Duties of the Circuit Clerk.** When the bankruptcy clerk has [furnished] [provided] the record, the circuit clerk must note that fact on the docket. The date noted on the docket serves as the filing date of the record for purposes of [these Rules] [Rules 28.1(f), 30(b)(1), 31(a)(1), and 44]. The circuit clerk must immediately notify all parties of the filing date.

1 (E) **Filing a Representation Statement**.

2 Unless the court of appeals designates another

3 time, within 14 days after entry of the order

4 granting permission to appeal, the attorney who

5 sought permission to appeal must file a statement

6 with the circuit clerk naming the parties that the

7 attorney represents on appeal.

* * *

TAB 10-B

DRAFT

Minutes of Fall 2011 Meeting of
Advisory Committee on Appellate Rules
October 13 and 14, 2011
Atlanta, Georgia

I. Introductions

Judge Jeffrey S. Sutton called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, October 13, 2011, at 8:30 a.m. at the Ritz-Carlton Hotel in Atlanta, Georgia. The following Advisory Committee members were present: Judge Michael A. Chagares, Judge Robert Michael Dow, Jr., Justice Allison H. Eid, Judge Peter T. Fay, Professor Amy Coney Barrett, Mr. Kevin C. Newsom, and Mr. Richard G. Taranto. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice ("DOJ"), was present representing the Solicitor General. Also present were former Committee members Judge Kermit E. Bye, Mr. James F. Bennett, and Ms. Maureen E. Mahoney; Mr. Dean C. Colson, liaison from the Standing Committee; Professor Daniel R. Coquillette, Reporter for the Standing Committee; Mr. Peter G. McCabe, Secretary to the Standing Committee; Mr. Jonathan C. Rose, Rules Committee Officer in the Administrative Office ("AO"); Benjamin Robinson, deputy in the Rules Committee Support Office; Mr. Leonard Green, liaison from the appellate clerks; and Ms. Marie Leary from the Federal Judicial Center ("FJC"). Also attending the meeting's opening session were Dean Robert Schapiro and Professor Richard D. Freer of Emory Law School.

Judge Sutton welcomed the meeting participants. He introduced two of the Committee's new members, Judge Chagares and Mr. Newsom. He observed that Judge Chagares was replacing Judge Bye, and that Judge Chagares's chambers were formerly those of another Appellate Rules Committee Chair, Justice Alito. Judge Sutton noted that Mr. Newsom had clerked for Judge O'Scannlain and for Justice Souter, that he had served as Alabama's Solicitor General, and that he chairs the appellate litigation group at Bradley Arant Boult Cummings in Birmingham, Alabama. Judge Sutton reported that the third new member of the Committee – Neal Katyal, former Acting Solicitor General of the United States – was unable to attend the meeting. Judge Sutton also welcomed Mr. Rose and Mr. Robinson and noted that they both came to the AO from Jones Day, where Mr. Rose was a partner and Mr. Robinson an associate. Professor Coquillette observed that Mr. Rose and Mr. Robinson are doing a wonderful job in their new positions. Judge Sutton thanked the three departing Committee members – Judge Bye, Mr. Bennett, and Ms. Mahoney – for their superb service to the Committee. Judge Bye stated what a pleasure it had been to work with the Committee. During the meeting, Judge Sutton thanked Mr. McCabe, Mr. Rose, Mr. Robinson, and the AO staff for their preparations for and participation in the meeting.

Dean Schapiro welcomed the Committee to Atlanta and introduced Professor Freer, whom Judge Sutton had invited to address the Committee on the topic of rulemaking. Professor Freer presented an assessment and critique of the rulemaking process, with a focus on the Civil Rules. Professor Freer asserted that there have been two big problems with the rulemaking process over the past 15 to 20 years: first, that the rulemakers have been too active, and second, that some of the rules amendments were directed toward nonexistent problems. During the roughly three-quarters of a century of federal rulemaking under the Rules Enabling Act there have been more than 30 sets of amendments – 14 of which took effect within the last 15 years. The increased frequency of rule amendments creates fatigue among judges, practitioners, and academics, with the result that people no longer pay attention to pending rule amendments and when amendments take effect there is no "buy-in" among those who must read and apply the Rules.

Professor Freer gave two examples of the public's lack of engagement with the rulemaking process. One was a case in which the court was unaware that the 2000 amendment to Civil Rule 26(b)(1) had changed the presumptive scope of discovery from nonprivileged matter relevant to "the subject matter" of the action to nonprivileged matter relevant to any party's "claim or defense." In fact, Professor Freer stated, a recent study has suggested that this change in Rule 26(b)(1) has had no actual impact. Another example was the 2007 restyling of the Civil Rules; Professor Freer reported that when he had mentioned the upcoming restyling to practitioners, none of them knew about it. The Civil Rules, Professor Freer asserted, are not read by lay people; they are read by lawyers who are familiar with the pre-restyling language. Professor Freer pointed out that changes in well-established terminology impose costs. For instance, changing the term "directed verdict" in Civil Rule 50 to "judgment as a matter of law" means that Civil Rule 50's language now differs from the language in many cognate state procedure rules. The restyling of the Civil Rules has required law firms to revise many standard forms, and has required new editions of many treatises and casebooks.

Professor Freer suggested that the rulemaking process is dominated by a small group of people who set the rulemaking agenda. One cannot, he suggested, impose changes from the top; rather, buy-in is needed from those who use the Rules. Rule amendments, Professor Freer concluded, should be like faculty meetings: rare and purposeful. A participant asked Professor Freer for his thoughts on the reasons for the increase in rulemaking activity. He responded that he does not have an explanation for the increase, but he suggested that perhaps members of the Rules Committees feel that they should work on rules changes every year. Professor Freer argued that the rulemakers' activities used to be more focused; for example, in the 1966 amendments to the Civil Rules the rulemakers overhauled party joinder.

An attorney member noted that it is expensive for firms to buy the new editions of treatises and rule books; this member also agreed that there are a lot of differences between federal and state procedural rules that do not make much sense. Professor Freer observed that states are less likely to have the resources to engage in continual updates to their rules. He posited that the Rules Committees' focus on issues such as restyling had distracted the committees from focusing on larger issues. He stated that the Rules Committees had done a

good job with the Civil Rules amendments relating to electronic discovery but he argued that they had not done as well in responding to concerns about pleading.

Professor Coquillette observed that Professor Freer is a valued coauthor of the Moore's Federal Practice treatise. Professor Coquillette pointed out that from the perspective of the Rules Committees, three factors have contributed to the frequency of rule amendments. First, the Committees often must respond to legislative initiatives to change the Rules. Second, the Supreme Court has taken an active role, in recent decisions, in interpreting the Rules. Third, changes in technology have required changes in the Rules – for example, with respect to electronic filing and electronic discovery.

Judge Sutton asked Professor Freer whether he would prefer a system in which each set of Rules were revised only every five years. Professor Freer responded that such a system would be beneficial; whether the interval were five years or three years, such a system would provide users of the Rules with some predictability. An appellate judge member asked Professor Freer for his views on local rules. Professor Freer observed that local rules are very important in everyday practice; commentators often discuss the issue of disuniformity arising from local rules, but he stated that he does not have a sense of whether that is a serious problem. Another appellate judge member voiced the view that there should be no local rules, and that federal practice should be entirely uniform throughout the country. An attorney member asked whether the time lag between a rule amendment's initial introduction and its effective date risks rendering rule amendments obsolete before they even take effect. Professor Freer added that part of the time lag is due to the layers of public participation built into the rulemaking process, and he argued that this is ironic given that many interested parties do not participate in that process. An attorney participant voiced doubt that reducing the frequency of rule amendments would increase participation by lawyers.

An attorney member asked whether the restyling of the Rules had made the Rules more accessible to new lawyers. Professor Freer conceded that it had, but argued that older lawyers had invested a lot of effort in becoming familiar with the pre-restyling version of the Rules. A member noted that law students may find the restyled Rules more accessible, but they will still need to contend with the pre-restyling version of the Rules when they research older cases. Professor Coquillette noted that the Bankruptcy Rules have not yet been restyled, and that many litigants in bankruptcy court are pro se.

Judge Sutton asked Professor Freer whether he feels that it would be useful to amend a Rule where the Rule's text does not currently reflect actual practice. For example, Appellate Rule 4(a)(2)'s text provides little guidance as to the circumstances when a premature notice of appeal will relate forward. Is it helpful to the bench and bar for the Rules to codify what the courts are doing in caselaw? Professor Freer responded that it would be useful to amend the Rule to reflect current practice, particularly if a majority view can be identified.

Judge Sutton thanked Professor Freer for his thought-provoking presentation. It is always important, he noted, to keep in mind the costs as well as the benefits of amending the Rules.

II. Approval of Minutes of April 2011 Meeting

A motion was made and seconded to approve the minutes of the Committee's April 2011 meeting. The motion passed by voice vote without dissent.

III. Report on June 2011 Meeting of Standing Committee

Judge Sutton summarized relevant events at the Standing Committee's June 2011 meeting. The Standing Committee approved for publication proposed amendments to Rules 28 and 28.1 concerning the statement of the case, and proposed amendments to Form 4 concerning applications to appeal in forma pauperis. Those proposals, along with previously-approved proposals to amend Rules 13, 14, and 24, are currently out for public comment. Judge Sutton noted that the Standing Committee has created a Forms Subcommittee to coordinate the efforts of the Advisory Committees to review their forms and the process for amending them.

Judge Sutton reported that the proposed amendments to Appellate Rules 4 and 40 (which will clarify the treatment of the time to appeal or to seek rehearing in civil cases to which a United States officer or employee is a party) are currently on track to take effect on December 1, 2011 (absent contrary action by Congress). Because the time to appeal in a civil case is set not only by Appellate Rule 4 but also by 28 U.S.C. § 2107, legislation has been introduced that will make the same clarifying change to Section 2107. Such a change is very important in order to avoid creating a trap for unsophisticated litigants. The goal is for the amendment to Section 2107 to take effect simultaneously with the amendments to Rules 4 and 40.

IV. Action Items

A. For publication

1. Item No. 09-AP-C (FRAP 6 / direct bankruptcy appeals) and Item No. 08-AP-L (FRAP 6(b)(2)(A) / *Sorensen* issue)

Judge Sutton invited Professor Barrett to introduce these items, which relate to proposals to amend the Appellate Rules' treatment of appeals in bankruptcy matters. Professor Barrett observed that the context for these items is the Bankruptcy Rules Committee's project to amend Part VIII of the Bankruptcy Rules (dealing with appellate procedure in bankruptcy). She reminded members that the two Committees had held a joint meeting in spring 2011 to discuss the Part VIII project and related proposals concerning Appellate Rule 6. During summer 2011, Professor Barrett attended (and the Reporter participated telephonically in) a meeting to further discuss these issues.

Professor Barrett provided an overview of the proposals to amend Appellate Rule 6. Rule 6(a) addresses appeals from a district court exercising original jurisdiction in a bankruptcy case. Rule 6(b) governs appeals from a district court or a bankruptcy appellate panel (BAP) exercising appellate jurisdiction in a bankruptcy case. Rule 6 does not currently address the procedure for taking a permissive appeal directly from the bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2). Since Section 158(d)(2)'s enactment in 2005, direct appeals under that provision have been governed by interim statutory provisions that referenced Appellate Rule 5. The proposed amendments would add a new subdivision (c) to Rule 6 that would govern such direct appeals. The proposals would also make several amendments to Rule 6(b)'s treatment of appeals from district courts or BAPs exercising appellate jurisdiction.

The Reporter observed that Rule 6's title would be amended to reflect an expanded breadth of application. Various portions of the Rule's text would be restyled. Cross-references to statutory and rules provisions would be updated. Under Rules 6(b) and 6(c), Rule 12.1's indicative-ruling procedure would apply to appeals in bankruptcy cases, with references to the "district court" read to include a bankruptcy court or BAP.

Rule 6(b)(2) would be revised to remove an ambiguity that had resulted from the 1998 restyling: Instead of referring to challenges to "an altered or amended judgment, order, or decree," the Rule would refer to challenges to "the alteration or amendment of a judgment, order, or decree." (The 2009 amendments to Rule 4(a)(4) removed a similar ambiguity from that Rule.) The amended provision would read: "If a party intends to challenge the order disposing of the motion – or the alteration or amendment of a judgment, order, or decree upon the motion – then the party, in compliance with Rules 3(c) and 6(b)(1)(B), must file a notice of appeal or amended notice of appeal. The notice or amended notice must be filed within the time prescribed by Rule 4 – excluding Rules 4(a)(4) and 4(b) – measured from the entry of the order disposing of the motion." In the second of these sentences, Professor Kimble has suggested replacing "The notice or amended notice" with "It." The Reporter stated that she disagrees with this suggestion; the longer option is clearer, and given the importance of this filing requirement, clarity is key. Mr. Letter stated that "The notice or amended notice" is clearer; two appellate judge members and an attorney participant expressed agreement with this view.

The Reporter pointed out that a number of the proposed changes to Rule 6(b)(2)(C) and (D) – and a number of aspects of proposed Rule 6(c) – are designed to reflect the ongoing shift to electronic filing. This shift is changing the way in which the record is assembled and transmitted to the court of appeals. The proposed amendments use the term "transmit" to denote both transmission of a paper record and transmission of an electronic record; they use the term "send" to denote transmission of a paper record. An appellate judge suggested that the proposals' use of the term "transmit" is clear when read in context. Professor Barrett pointed out that the Part VIII proposals also use the term "transmit." Mr. McCabe reported that the Bankruptcy Rules Committee had discussed this term at length during its fall 2011 meeting, and had decided to include a definition of "transmit" for the purposes of the Part VIII rules. An appellate judge member asked how the Civil Rules and the other Appellate Rules treat the topic of electronic

filing and transmission; this member also asked whether the proposed Part VIII rules will define "transmit."

An attorney member asked whether the language proposed for Rule 6 would encompass all the possible modes of furnishing the record; for example, he noted that a record could be sent in paper form, or could be transmitted as an electronic document, or could be made available in the form of a set of links to portions of the electronic record. Mr. Green observed that when the record is transmitted electronically this is usually accomplished by transmitting a list of the record's components, which can then be accessed by document number. In the Sixth Circuit, he reported, the court directly accesses any desired portions of the record. Mr. Green concluded that there are a variety of ways in which the record can be furnished to the court of appeals and that the various methods are changing over time. The attorney member suggested that the term "transmit" does not seem to encompass instances where the court below sends a list or index as opposed to the documents themselves; he proposed that better terms might be "furnish" or "provide." He noted that such a change in terminology could also affect any cross-references to the transmission of the record. A district judge member agreed that a broader term like "furnish" or "provide" seems preferable. Mr. Robinson observed that the Committee Note to the original adoption of Appellate Rule 11 uses the term "transmit." An attorney participant pointed out that the term "send" could be read to encompass electronic transmission, and that using "send" specifically to denote paper transmission would not be clear.

Judge Sutton noted that it will be important to discuss this issue with the Bankruptcy Rules Committee and to coordinate with that Committee in preparing proposals for consideration at the Committees' spring meetings. Professor Coquillette predicted that the Standing Committee will have a heavy agenda at the June 2012 meeting, and he suggested that it would be advisable to discuss the Appellate Rule 6 proposal at the Standing Committee's January 2012 meeting. Judge Sutton proposed that the Committee should try to settle on appropriate terminology for the Rule 6 draft in advance of the January 2012 Standing Committee meeting.

Mr. Green noted that these questions about electronic transmission relate to more general issues about the need to consider updating the Appellate Rules to address electronic filing. (The Committee discussed those broader issues later in the meeting.) The Committee briefly discussed other features of the Rule 6 proposal, including the treatment of stay requests and the treatment of materials that had been sealed in the lower court. Professor Barrett suggested that it would promote clarity to state in Rule 6(c)(2)(C) that Rule 8(b) (in addition to Bankruptcy Rule 8007) applies to requests for stays pending appeal.

The Committee determined by consensus to work further on the drafting of the Rule 6 proposal in advance of the January 2012 Standing Committee meeting.

V. Discussion Items

A. Item No. 08-AP-D (FRAP 4(a)(4))

Judge Sutton invited Mr. Taranto to introduce Item No. 08-AP-D, which concerns Peder Batalden's suggestion that the Committee amend Appellate Rule 4(a)(4) to address potential problems arising from the possibility of a time lag between entry of the order disposing of a tolling motion and entry of any resulting amended judgment. Mr. Taranto began by suggesting that this is an issue that started small; then it got bigger; and now it seems that perhaps the balloon has burst. He noted that sometimes it is not clear whether an order has "disposed of" a postjudgment motion. Moreover, he noted, in some instances the time lag between entry of such an order and entry of a resulting amended judgment might be longer than the 30-day time limit for taking an appeal. The Committee considered various ways to address this issue, but found that each possibility carried a risk of creating other problems. Mr. Taranto recalled that he had suggested that the Committee consider proposing to the Civil Rules Committee that it broaden Civil Rule 58(a)'s separate document requirement. Mr. Taranto observed that a number of participants had expressed concern about such a proposal – notably the participants in the Appellate Rules Committee's joint discussion with the Bankruptcy Rules Committee, and also Professor Cooper. A central concern, Mr. Taranto noted, is that district courts already neglect to comply with the existing separate document requirement. Mr. Taranto closed his introductory remarks by wondering whether this item presented an example of the occasions that Professor Freer had posited, when rulemaking changes are not warranted.

Judge Sutton thanked Mr. Taranto for his work on this item, and noted that Ms. Mahoney had also participated in the efforts to find a solution. Judge Sutton observed that Mr. Batalden had identified a potential problem. It is not clear, however, how frequently this problem arises in practice. Any changes in the mechanics of Rule 4(a) are delicate in light of the fact that statutory appeal deadlines (such as those set in 28 U.S.C. § 2107) are jurisdictional. Improving the clarity of Rule 4 is an important goal, and the Committee tried diligently to find a way to address Mr. Batalden's concerns, but each possibility that the Committee discussed raised potential problems. Judge Sutton suggested that it was time for the Committee to determine what to do with this item.

An appellate judge participant stated that it would be worthwhile to explore the question further. An attorney participant suggested that, if this issue comes up in practice, courts are likely to interpret the term "disposing of" in Rule 4(a)(4) in a way that preserves appeal rights; it might be better, this participant posited, to leave the issue to the courts. An attorney member stated that, although he had not recently reviewed the prior options considered by the Committee, he recalled that each presented difficult issues; one should not, this member suggested, amend the Rule absent a real need to do so. A participant asked the Reporter what she thought; she responded that the concerns about district-court noncompliance with the separate document requirement seem well-founded, and she wondered whether the costs of amending Rule 4(a)(4) might outweigh the benefits.

A member moved that the Committee remove this item from its agenda until a case raising this problem is brought to the Committee's attention. The motion was seconded and passed by voice vote without dissent. Judge Sutton undertook to write to Mr. Batalden and thank him for his helpful suggestion.

B. Item No. 09-AP-B (definition of "state" and Indian tribes)

Judge Sutton invited Justice Eid to introduce this item, which concerns Daniel Rey-Bear's proposal that federally recognized Native American tribes be treated the same as states for purposes of amicus filings. Justice Eid described Mr. Rey-Bear's proposal and noted that the Committee had received resolutions in support of the proposal from the National Congress of American Indians and the Coalition of Bar Associations of Color. She reminded the Committee that it had asked Ms. Leary and the FJC to research the treatment of tribal amicus filings in the courts of appeals. Ms. Leary found that motions to make such filings are ordinarily granted, and that the filings are largely concentrated in the Eighth, Ninth, and Tenth Circuits. At the Committee's request, Judge Sutton wrote to the Chief Judges of those three circuits to ask for their circuits' views on the proposal to amend Appellate Rule 29 to treat tribes the same as states and also for their views on the possibility of adopting a local rule on the subject. Chief Judge Riley subsequently reported that he had circulated the inquiry to three relevant Eighth Circuit committees and had received only three responses, of which two favored either a national or a local rule amendment and one favored only a local rule amendment if appropriate. Circuit Clerk Molly Dwyer reported that the Ninth Circuit supported the proposal to amend Rule 29 and offered some drafting suggestions for such an amendment. The Reporter added that, since receiving those responses, the Committee had also received a response from Chief Judge Briscoe, who reported that the Tenth Circuit judges had considered Judge Sutton's inquiry and that a majority of the judges saw no need to amend Rule 29. Chief Judge Briscoe reported that the discussion was lively but that the majority view was clear that Native American tribes should not be treated differently from other litigants.

Justice Eid summarized the Committee's prior discussions, noting that those discussions had focused on the value of treating Native American tribes with dignity and also on the question of whether municipalities should also be accorded the right to file amicus briefs without party consent or court leave. Judge Sutton observed that there are strong arguments both for and against amending Rule 29. As to the dignity issue, he noted that tribes share qualities with both states and the federal government. He observed that, if anything, Supreme Court Rule 37.4 is harder to explain, from this perspective, because Rule 37.4 permits municipal governments, but not Native American tribes, to file amicus briefs without party consent or court leave. Often, he noted, when the Appellate Rules are amended the Supreme Court also amends its own rules in a similar fashion. One possible course of action would be to amend Rule 29 to treat both tribes and municipalities the same as states. Although one Committee member had earlier asked why those types of entities should be treated better – for purposes of amicus filings – than foreign governments are, one could argue that it is possible to draw the line at the United States' border. On the other side of the argument, Judge Sutton noted that the Eighth, Ninth, and Tenth Circuits have voiced a spectrum of views on this proposal – as have the members of the Standing

Committee. There are no local rules in any circuit that currently take the approach that is proposed for Rule 29.

Judge Sutton suggested that one possible course of action would be to write to the Chief Judges of all the circuits to share with them the Committee's discussions and research, and to state that although the Committee is not moving ahead with a national rule change at this point, it is open to each circuit to adopt a local rule authorizing Native American tribes to file amicus briefs without party consent or court leave. The letter could report that a number of Committee members favor such a rule but that the Committee is not prepared at this point to adopt it as an amendment to Rule 29. The responses to such a letter, he suggested, could help the Committee discern whether it makes sense to amend Rule 29. On the other hand, though a circuit could adopt a local rule permitting amicus filings as of right by Native American tribes, it does not appear that a circuit would have authority to adopt a local rule exempting Native American tribes from Rule 29(c)(5)'s authorship-and-funding disclosure requirement. Professor Coquillette cautioned against sending a letter that would encourage the proliferation of local rules.

Alternatively, Judge Sutton suggested, he could write to the Chief Judges of all the circuits to solicit their views concerning the proposal to amend Rule 29. A district judge member stated that it would be useful to do so. This member stated that he finds the dignity argument compelling, but that if there were resistance from the courts of appeals, that would give him pause. One participant suggested that although the dignity argument is appealing, not everyone is persuaded by it and the issue is one with political overtones. An attorney participant argued that it would be preferable for the Committee to follow the Supreme Court's lead concerning the question of tribal amicus filings. Mr. Letter stated that he supported the idea of soliciting the views of the rest of the circuits; he also reiterated the DOJ's position that Native American tribes should be consulted and he offered the DOJ's help in arranging that consultation. It was suggested that it would be helpful if the DOJ could explain in writing its views concerning consultation.

An attorney member asked whether anyone had asserted that Native American tribes have been deterred from proffering amicus briefs due to the requirement of seeking court leave to file them. Judge Sutton responded that such a concern does not seem to be the motivating factor in Mr. Rey-Bear's proposal. The attorney member also observed that the overall issue of tribal amicus filings includes not only Rule 29(a)'s provision concerning filing without court leave or party consent but also Rule 29(c)(5)'s requirement of the authorship-and-funding disclosure.

A committee member asked whether soliciting the views of the other circuits would provide the Committee with useful information; this member noted that the Committee is already aware that the Tenth Circuit strongly opposes amending Rule 29. Judge Sutton responded that if it turns out that there is a lopsided division in views among the circuits – for example, if no circuits other than the Tenth Circuit oppose amending Rule 29 – then some members might find that information to be relevant. A district judge member agreed and suggested that if that were to turn out to be the case, that information might even persuade the Tenth Circuit to reconsider

its own view of the matter.

An appellate judge member offered a differing view, arguing that the Committee has the information it needs and that it should decide whether to amend Rule 29. This member argued in support of treating tribes the same as states for purposes of amicus filings; the member stated that such an approach would have no downside and that the rule amendment could also encompass municipalities and could be justified on the grounds that all large, important, sovereign entities should be treated similarly under Rule 29. The Reporter stated that although the extent of tribal government authority is much debated and has been altered in Supreme Court decisions since 1978, the doctrine is still clear that Native American tribes retain their sovereignty except to the extent that it has been removed by a federal treaty, by a federal statute, or by implication of the tribes' status as "domestic dependent nations." An attorney member observed that the term "state" is now defined by Appellate Rule 1(b) to include United States territories, which are not sovereign entities; under Rules 1(b) and 29(a), those non-sovereign entities are permitted to file amicus briefs without party consent or court leave. This member asked whether amending Rule 29(a) to treat tribes the same as states would be perceived as having broader implications for legal doctrines concerning tribal authority. A participant responded that the answer to that question is unclear. In any event, this participant observed, those who oppose treating tribes the same as states for purposes of Rule 29(a) may do so for reasons unrelated to their views of tribal sovereignty; such opponents may have a general aversion to amicus filings and may view the requirement of a motion for leave to file an amicus brief as a useful hurdle.

An attorney member asked whether the Committee knows how frequently municipalities seek leave to file amicus briefs in the courts of appeals. A district judge member noted that a letter soliciting the views of the circuits concerning tribal amicus filings could also solicit their views concerning municipal amicus filings. Mr. Letter argued that, given the range of views expressed by the three circuits the Committee consulted to date, the Committee should not move forward without consulting the remaining circuits. The attorney member expressed support for asking the circuits about both tribal amicus filings and municipal amicus filings, in order to get a sense of how a rule change would affect the courts' functioning. An appellate judge member observed that such information would not change the assessment of the dignity argument. But the attorney member responded that this information would illuminate the likely impact of a rule change. Another attorney participant stated that it would be useful to learn the views of the other circuits. An appellate judge member stated that the inquiry to the circuits should ask about both tribal and municipal amicus filers.

An attorney member – turning to the question of the disclosure requirement – observed that as one moves along the spectrum from the federal government to other government entities the likelihood of ghostwritten briefs increases (though it is still low). States with well-developed appellate operations write their own amicus briefs, but that might not always be true of states with less-developed appellate litigation functions. When a brief is circulated among the members of the National Association of Attorneys General, those reviewing the brief want to know who wrote it. An appellate judge member agreed that states' practices vary. Another

attorney member asked whether one could amend Rule 29(c)(5) to apply the authorship-and-funding disclosure requirement to all amici, including government amici. Such an approach would differ from that taken in Supreme Court Rule 37.6, but, he argued, the practicalities of amicus briefs differ as between filings in the courts of appeals and filings in the Supreme Court. Mr. Letter noted that if the disclosure requirement extended to the United States' amicus filings, the United States' answers to all the questions would always be "No." A participant asked whether extending the disclosure requirement to the United States would raise separation of powers issues. An attorney participant asked whether such an amendment to Rule 29(c)(5) would run counter to the presumption that one should not amend a rule that is functioning well.

By consensus, the Committee resolved to return to this item at its spring 2012 meeting.

C. Item No. 10-AP-A (premature notices of appeal)

Judge Sutton introduced this item, which concerns the possibility of amending Appellate Rule 4(a)(2) to reflect the treatment of premature notices of appeal. He noted that it would be hard to guess, from the current language of Rule 4(a)(2), the way that the caselaw treats the various situations in which a premature notice of appeal might be filed. The caselaw itself appears to be developing in a way that shows a convergence of approaches among the circuits. The exception is the treatment of instances when an order disposing of fewer than all claims or parties is followed by disposition as to all remaining claims or parties; the majority view allows relation forward in that circumstance but the Eighth Circuit takes the opposite view.

Judge Sutton noted three possible approaches that the Committee could take. It could amend Rule 4(a)(2) to codify the majority approach to common scenarios; this would provide information that the average litigant could not infer from current Rule 4(a)(2). Or the Committee could choose not to amend the rule and to allow the caselaw to continue to develop. Or the Committee could amend Rule 4(a)(2) to narrow the range of circumstances in which relation forward is permitted; although such an amendment could provide a bright line rule, it would overrule a good deal of precedent and could lead to the loss of appeal rights. Judge Sutton asked whether Committee members would support the latter approach; no members indicated support for it. He then asked whether the Committee was interested in amending the Rule to codify existing practices.

Mr. Letter suggested that it would be useful to provide clarity and to diminish the need to research the law. A district judge member asked whether it would be possible to amend the Committee Note to provide this clarification. Mr. McCabe explained that it is not an option to amend the Notes without amending the Rule text. Professor Coquillette recalled that Professor Capra had published (through the FJC) a pamphlet discussing aspects of the original Committee Notes to the Federal Rules of Evidence that warranted clarification (in some instances, because the rule discussed in the relevant Note was later altered by Congress). Professor Coquillette pointed out that there is a preference for not citing caselaw in Committee Notes because the cases might later be overruled.

Judge Sutton asked how often rules have been amended in order to codify existing practices. The Reporter noted the example of Civil Rule 62.1 and Appellate Rule 12.1, concerning indicative rulings. However, Professor Coquillette observed that such codification is not the norm. An attorney participant suggested that making the law more accessible provides a good reason for rulemaking. But an appellate judge member noted that, on the other hand, it might be argued that specifying in the rule the instances in which a premature notice of appeal relates forward might encourage imprecise practice concerning notices of appeal.

An attorney member asked whether it would be possible to amend Rule 4(a)(2) merely by substituting "an appealable" for "the," so that the Rule would read: "A notice of appeal filed after the court announces a decision or order – but before the entry of an appealable judgment or order – is treated as filed on the date of and after the entry." That amendment could be accompanied by an explanatory Committee Note. However, one problem with that language might be its potential breadth; it could be read to cover, for example, a notice of appeal filed after entry of a clearly interlocutory order and well before entry of final judgment.

An attorney participant turned the Committee's attention to another possible amendment illustrated in the materials. This proposal would leave the existing language of Rule 4(a)(2) as it stands and then add: "Instances in which a notice of appeal relates forward under the first sentence of this provision include, but are not limited to, those in which a notice is filed" (followed by a list of instances in which relation forward is permitted under current law). The attorney pointed out that this proposal was incoherent because the examples in which current law permits relation forward do not actually fit within the language of Rule 4(a)(2)'s current text. An attorney member pointed out that this inconsistency would not arise if "an appealable" were substituted for "the" in the current text of Rule 4(a)(2). But the attorney participant responded that such a change could broaden the application of relation forward beyond that permitted by current doctrine.

An appellate judge member agreed with the concern – voiced earlier in the discussion – that such an amendment to Rule 4(a)(2) could unduly encourage parties to file notices of appeal early. This member suggested that it might be better not to amend the rule. He moved to remove this item from the Committee's agenda. The motion was seconded and passed by voice vote without opposition.

D. Item No. 10-AP-I (consider issues raised by redactions in appellate briefs)

Judge Sutton invited Judge Dow to introduce Item No. 10-AP-I, which concerns questions raised by sealing or redaction of appellate filings. Judge Dow observed that this item arose from a suggestion by Paul Alan Levy – an attorney at Public Citizen Litigation Group – that redaction of appellate briefs creates problems for would-be filers of amicus briefs. Sealing on appeal, Judge Dow noted, raises questions beyond those that concern amici. He noted a number of related but distinct issues, such as issues raised by protective orders in the district court that seal discovery materials, and issues concerning redactions pursuant to the recently-adopted privacy rules. In contrast to questions relating to protective orders governing discovery,

the question of sealing on appeal solely concerns materials filed with the court.

Judge Dow observed that there are a number of different possible approaches to sealing on appeal. One approach is that taken by the D.C. Circuit and Federal Circuit; these circuits require the litigants – at the outset of the appeal – to review the record, mutually agree on whether some or all sealed portions can be unsealed, and present that agreement to the court or agency below. Some other circuits appear to operate on the assumption that materials that were sealed in the district court presumptively remain sealed on appeal. A third approach is that taken by the Seventh Circuit (and in some instances by the Third Circuit); this approach provides a grace period during which matters sealed below remain sealed on appeal, but mandates that those matters are unsealed (to the extent they appear in the record on appeal) if no motion is made within the grace period to maintain the seal on appeal.

Judge Dow suggested several questions for the Committee to consider. An initial question is whether there should be a national rule governing sealing on appeal. A national rule, he observed, would create a uniform approach. He noted the underlying principle that court business should be public. An appeal, he pointed out, comes later in the court process and the original reason for sealing an item in the court below may have dissipated by the time of the appeal. Another question is who should review the question of sealing at the time of the appeal. One possibility is to put the onus on the parties to review the continued appropriateness of any sealing orders. Another possibility would be to place this burden on the lower court. One advantage of that approach is that the district judge is familiar with the record. But requiring the district judge to review sealing orders at the conclusion of every case would be overbroad, because not all judgments are appealed; a narrower approach would provide that the judge's duty to review any sealing orders would be triggered by the filing of a notice of appeal. A third possibility would be to adopt the Seventh Circuit approach and require the parties to an appeal to make a motion if they desire the sealing to continue on appeal.

Judge Dow pointed out that this set of issues is complex, and that a number of areas require further study – for instance, concerning the question of sealing in criminal appeals. He observed that it will be important to consider how the CM/ECF systems are working. For example, in the Seventh Circuit, the CM/ECF system has sealed functionality (so that the district judge assigned to the case can view sealed filings through CM/ECF). Courts are in different places on these questions.

The Reporter posited that the question of sealing on appeal is distinct from the question of protective orders concerning discovery materials under Civil Rule 26(c). In the latter context, many or all of the sealed materials may never be filed with the court; by contrast, sealing on appeal by definition concerns materials filed by a party in support of or in opposition to a request for action by the court. Judge Sutton, noting the variation among the circuits' approaches to sealing on appeal, suggested that the Committee discuss the significance of that variation. Professor Coquillette responded that one approach would be to wait for the Supreme Court to resolve these questions; another approach would be to pursue uniformity through the promulgation of a national rule. Mr. McCabe pointed out the salience of the Judicial Conference

Committee on Court Administration and Case Management ("CACM"). CACM's jurisdiction, he noted, encompasses questions of privacy and sealing. He observed that those planning the Next Generation of CM/ECF have approved two requirements for the next iteration of the CM/ECF system: First, the system must accommodate a sealed as well as a non-sealed level of filing; and second, there should be a system for "lodging" submissions with the court without actually filing them. An attorney participant asked how frequently non-parties make motions to unseal a sealed filing.

Judge Sutton suggested that it might be useful to form a working group to consider these issues further; the group could consider not only the possibility of a rule change but also alternatives to rulemaking. Mr. Letter agreed to work with Judge Dow and the Reporter on this topic. Judge Sutton invited any other member who is interested to participate in this effort. By consensus, the Committee retained this item on its study agenda.

VI. Additional Old Business and New Business

A. Item No. 11-AP-B (FRAP 28 / introductions in briefs)

Judge Sutton invited the Reporter to introduce Item No. 11-AP-B, which concerns the possibility of amending Rule 28 to discuss the inclusion of introductions in briefs. The Reporter stated that this topic grows out of Committee discussions concerning the proposal – currently out for comment – that would amend Rule 28 to combine the statement of the case and of the facts. Some participants in those discussions had suggested that it would be useful for Rule 28 to alert lawyers to the possibility of including an introduction in their brief. Participants had also discussed a related idea of moving the statement of issues (currently provided for in Rule 28(a)(5)) so that it would follow rather than precede the statement of the case. Rather than attempt to address these issues in the context of the proposal concerning the statement of the case, the Committee had added these questions to its agenda as a separate item.

Few rules currently address the question of introductions in briefs, though experienced appellate litigators often include them. Eighth Circuit Rule 28A(i)(1) requires appellants to include an up-to-one-page statement that includes a summary of the case and a statement of whether oral argument should be heard; appellees may include a responsive statement. Mr. Letter has mentioned to the Committee that the Ninth Circuit is considering adopting a local rule on introductions in briefs. Apart from that, there do not appear to be local circuit rules on point. The Supreme Court rules do not address introductions; the first item in a Supreme Court brief is the Questions Presented (in which experienced litigators may include a few sentences that serve the role of an introduction). Thanks to helpful research by Holly Sellers, the Committee is aware that three states have relevant provisions. Kentucky requires a very brief introduction (one or two sentences concerning the nature of the case). New Jersey permits a "preliminary statement" of up to three pages. Washington permits the inclusion of an introduction.

Amending Rule 28 to discuss introductions would codify current practice and might simplify the lawyer's task by making clear that an introduction is permissible. Promoting the

inclusion of introductions would be helpful to the extent that those introductions are well-written. But such an amendment might also have costs. Not all introductions would be skillfully drafted. Some might include factual assertions that are not tied to the record. Some might try to present too many ideas "up front." Given those possible costs, perhaps this is something that should be dealt with, if at all, by local rule. If a national rule were to be drafted, it presumably would permit but not require an introduction. Other things that the rule might address could include the introduction's length (presumably the introduction would count toward the overall length limit for the brief); guidance concerning the introduction's contents; the introduction's placement in the brief (a necessary topic given that Rule 28(a) directs that the listed items appear in the order stated in the rule); and the respective roles of the introduction and the summary of argument.

Judge Sutton suggested that a central question is whether Rule 28 should be amended to reflect current practice concerning introductions. An attorney participant suggested that such an amendment is unnecessary because the proposed amendments to Rules 28 and 28.1 that are currently out for comment give lawyers flexibility to include an introduction as part of the statement of the case. An attorney member agreed that this item is "a solution in search of a problem"; he currently includes introductions in his briefs. Mr. Letter disagreed, arguing that although experienced appellate lawyers include introductions, the rest of the bar may not be aware that they can do so under the current Rule. He noted that when he advises young lawyers to add an introduction in a brief, they often come back to him, after reading Rule 28, to ask whether it is permissible to do so.

Judge Sutton observed that if the currently published proposals are adopted, Rule 28(a)(6) would require "a concise statement of the case setting out the facts relevant to the issues submitted for review and identifying the rulings presented for review, with appropriate references to the record (see Rule 28(e))." The attorney participant suggested that it would be possible to amend this provision to mention "an optional introduction." But even without such a modification, she argued, the published language would permit the inclusion of an introduction as part of the statement of the case.

An attorney member asked how one would describe the appropriate contents of an introduction. Mr. Letter stated that an introduction can usefully state what the case is about and identify the basic arguments. The attorney member responded that it seems difficult to formulate just what an introduction should contain. An attorney participant suggested that it would be counter-productive to specify the contents of the introduction because flexibility is important; the best approach if one is mentioning an introduction, she argued, would be a simple reference to "an optional introduction." An appellate judge member asked whether mentioning an "optional introduction" would suggest by implication that no other optional components can be included in the brief. By way of comparison, it was noted that Rule 28(a)(10) currently requires "a short conclusion stating the precise relief sought." The attorney participant stated her understanding that this provision requires the brief to state what the appellant is asking the court of appeals to do with the judgment below (reverse, vacate, or the like).

A member, noting that the proposal concerning the statement of the case is currently out for comment, asked whether it would be wise to amend Rule 28 twice in a row. Judge Sutton responded that if the Committee were to decide that the rule should discuss introductions, it would be possible to hold the currently published amendment and bundle it with the proposal concerning introductions. Mr. McCabe observed that the Committee Note of the currently published proposal could be revised after the comment period.

A member suggested that it did not make sense to amend Rule 28 to discuss introductions. Two attorney members agreed with this view, as did two other participants. A district judge member suggested that it could be useful to provide guidance concerning introductions in the Committee Note. Two appellate judge members agreed with this idea, as did two other participants (one of those participants reiterated her alternative suggestion that the rule text could be revised to refer to an "optional introduction"). Mr. Letter advocated adding a discussion of introductions either to the rule text or to the Committee Note in order to raise awareness concerning the possibility of including introductions; he argued that it would be better to address this topic in the rule text than in the Note. Professor Coquillette advised against including in the Committee Note something that should be addressed in the rule text. An appellate judge member stated that junior lawyers need guidance, and advocated addressing introductions either in the rule text or in the Note.

Judge Sutton suggested that – because it was time for the Committee to break for the day – Mr. Letter could formulate proposed language for a rule amendment that the Committee could then consider the next day. The following morning (after discussing the other matters noted below) the Committee resumed its discussion of this topic.

Mr. Letter offered some possible language to describe what should be included in the introduction. An appellate judge member asked whether an introduction differs from the summary of argument. Mr. Letter answered in the affirmative: An introduction says what the case is about and summarizes one or two key arguments. The Reporter asked whether one would ever omit the summary of argument because an introduction took its place. Mr. Letter suggested that judges' views on this point would differ. Another appellate judge member predicted that adding a new section to the brief would tend to make briefs longer (because, currently, not all briefs are as long as they could be under the length limits). And in the case of unsophisticated litigants, this member suggested, authorizing the inclusion of an introduction could dilute the usefulness of the summary of the argument. Mr. Letter predicted that, without a rule that mentions introductions, experienced litigators will continue to include them and inexperienced lawyers will continue not including them. An appellate judge member predicted that most judges would not wish to encourage the inclusion of another section in briefs, and that judges certainly would not wish to render the summary of argument optional. This member stated that it seems difficult to draft rule language that would explain the difference between the introduction and the summary of argument. The difference, he observed, is that the summary of argument is legalistic and the introduction is not, but it is hard to know how to say that in a rule without confusing the reader. Mr. Letter observed that circuits could address the matter by local rule. He asked whether Assistant United States Attorneys in the Third Circuit include

introductions. An appellate judge member stated that they usually do not.

By consensus, the Committee decided to keep this item on its agenda and discuss it again at the Spring 2012 meeting.

B. Item Nos. 11-AP-D (changes to FRAP in light of CM/ECF), 08-AP-A (changes to FRAP 3(d) in light of CM/ECF), and 11-AP-C (same)

Judge Sutton introduced this topic, which concerns a couple of specific proposals for amending Appellate Rule 3(d), as well as a broader proposal for reviewing all of the Appellate Rules' functioning, in the light of electronic filing and service. He observed that there will always be some litigants who submit paper filings; the question is when and how to amend the rules to address the growing prevalence of electronic filings. He invited Mr. Green to provide a further introduction to this topic.

Mr. Green noted that all but two circuits have moved to the electronic world. (The Eleventh Circuit will come online within a year or so; the Federal Circuit has yet to come online.) The systems in a number of circuits are mature. Local practices have developed side by side with the Appellate Rules. A key question concerns the treatment of the record and appendix. An attorney member asked whether the Sixth Circuit's CM/ECF system is coordinated with those of the district courts within the Sixth Circuit. Mr. Green reported that the systems are coordinated. The bankruptcy courts were the first to come online, then the district courts, and now the court of appeals. The courts are now at the stage of developing the Next Generation of CM/ECF. There are some areas where the Appellate Rules are silent concerning electronic filings. There is no urgent need to revise the Rules, but over the next couple of years it would make sense to consider amending them.

Judge Sutton asked whether any meeting participants were aware of Appellate Rules that urgently need revision in light of the shift to electronic filing. An appellate judge said that he was not aware of any such rules; the big advantage of the advent of electronic filing, he noted, is that the court is always open to receive such filings. Mr. Letter stated that although there is no urgent need for a rule amendment, it would make sense to consider whether to change Appellate Rule 26(c)'s "three-day rule" (which adds three days to a given period if that period is measured after service and service is accomplished electronically or by a non-electronic means that does not result in delivery on the date of service). Mr. Letter reported that lawyers constantly ask why the three-day rule encompasses electronic service. The problems with electronic service, he noted, are decreasing. Mr. Green agreed that including electronic service within the three-day rule seems like an anachronism.

Mr. Letter noted the possibility that a judge who receives an electronic brief might print it in a format that yields page numbers that differ from those referred to in the briefs. Mr. Green observed that electronic briefs are always required to be filed in PDF format. Mr. Letter responded that PDF briefs can be manipulated to yield different fonts. An appellate judge member stated that he does not change the appearance of briefs in this manner. Mr. Letter asked

whether it would make sense for cross-references in briefs to refer to something other than page numbers. An attorney member responded that numbering the paragraphs in a brief would be an unappealing prospect. Another member suggested that even if a judge prints a brief in another format, he or she could return to the originally-filed version when determining what to refer to in the course of an oral argument. Another appellate judge observed that he had not heard of this phenomenon causing problems.

Judge Sutton suggested that changes relating to electronic filing and service might be addressed over the next few years through a joint project with the other Advisory Committees. Professor Coquillette stated that he would raise this possibility with Judge Kravitz (the Chair of the Standing Committee). Mr. McCabe observed that questions like the proper definition of "transmit" present global issues. A member noted that on that particular question, the Committee's choice of wording for Appellate Rule 6 (in the context of the project to revise that Rule and Part VIII of the Bankruptcy Rules) could end up affecting the overall approach to terminology throughout the Appellate Rules. An appellate judge member asked whether those working on a joint project on electronic filing and service should include court employees who work with the relevant technology. Judge Sutton responded that if the Appellate Rules Committee forms a working group on this topic it could include not only Mr. Green but perhaps also another court employee with technical knowledge. Mr. McCabe noted that such a project would also involve CACM, and that the Next Generation of CM/ECF would presume the use of an all-electronic system. An attorney member agreed that it would be important to involve people with technical knowledge; he observed that in this fast-changing area the time lag between consideration and adoption of rule amendments would pose particular challenges.

VII. Other Information Items

A. Item No. 10-AP-D (taxing costs under FRAP 39)

Judge Sutton invited the Reporter to update the Committee concerning Item No. 10-AP-D. This item relates to the proposed "Fair Payment of Court Fees Act of 2011," which would have amended Civil Rule 68 and Appellate Rule 39 in response to concerns raised about the taxation of costs in *Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009), *aff'd*, 131 S. Ct. 1207 (2011). The bill would have added a new subdivision (f) to Rule 39; that provision would require the court to order a waiver of appellate costs if the court determined that the interest of justice so required, and would define the "interest of justice" to include the establishment of constitutional or other precedent.

As the Committee has previously discussed, current Rule 39 already provides the courts of appeals with discretion to deny costs in a case such as *Snyder*. On the other hand, the circuits have varied in their application of Rule 39's cost provisions. Pursuant to a request from the Committee, Ms. Leary and the FJC completed a very informative study of circuit practices concerning appellate costs. Ms. Leary found that the circuit practices vary due to differences with respect to factors such as the ceilings on the reimbursable cost per page of copying and the

number of copies. In *Snyder*, the great bulk of the cost award was due to the cost of copying the briefs and extensive appendices.

At the Committee's request, Judge Sutton sent Ms. Leary's report to the Chief Judges of each circuit; and the circuits are responding to the study. Thus, for example, the Fourth Circuit has amended Fourth Circuit Rule 39(a) to lower the ceiling on reimbursable costs from $ 4.00 per page to 15 cents per page. Chief Judge Easterbrook has commented that there seems to be no need to amend the Seventh Circuit's local rules, but that the Appellate Rules should be amended to set the maximum reimbursement per page, to provide that only actual costs are reimbursable, and to clarify that reimbursement can be claimed only for the number of copies that are required by local rule. Chief Judge Lynch has disseminated the FJC study to the judges in the First Circuit for their review. In July 2011, the Rules Committees submitted a memo to argue that the proposed bill to amend Civil Rule 68 and Appellate Rule 39
would be unnecessary in light of, inter alia, the circuits' responses to the FJC study and the growing prevalence of electronic filing (which will decrease copying costs). The bill has not been reintroduced in the 112th Congress.

Judge Sutton thanked Ms. Leary for her informative and timely research, which was key to these positive developments.

B. FRAP-related circuit splits and certiorari petitions

Judge Sutton observed that the ongoing projects to review circuit splits and certiorari petitions relating to the Appellate Rules are designed to help the Committee investigate proactively how the Appellate Rules are functioning. He invited members to comment on these projects, and he invited the Reporter to highlight aspects of the memos concerning them.

The Reporter noted that the certiorari petitions had raised a number of interesting issues concerning appellate practice. For example, the petition in *In re Text Messaging Antitrust Litigation* (No. 10-1172), had challenged the practice of simultaneously granting permission to take a discretionary appeal and deciding the merits of that appeal. The petition for certiorari in *United States v. Irey*, 612 F.3d 1160 (11th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 1813 (2011), presented a case in which the court of appeals' judgment was entered at the end of March; there was no petition for rehearing, but the mandate did not issue; and the court of appeals in mid-August granted rehearing en banc and vacated the panel opinion. The Eleventh Circuit has now adopted an internal operating procedure under which – if no rehearing petition has been filed by the time the mandate would otherwise issue – the clerk will make a docket entry to advise the parties when a judge has notified the clerk to withhold the mandate.

Judge Sutton asked whether Committee members wished to discuss any of the other cases addressed in the memos. An appellate judge member noted that he had been struck by the procedure employed by the court of appeals in *Karls v. Goldman Sachs Group, Inc.*, 131 S. Ct. 180 (2010). The practice followed in the Ninth Circuit appears to be that if an appeal meets the test for summary affirmance (in the Ninth Circuit, "appeals obviously controlled by

precedent and cases in which the insubstantiality is manifest from the face of appellant's brief"), then the panel that summarily affirmed can, if it chooses, reject any petition for rehearing en banc without circulating it to the other active judges. The member noted that when an appeal is controlled by circuit precedent, rehearing en banc would be a particularly important avenue for the litigant seeking to overturn that precedent. A member suggested that the Ninth Circuit's use of this procedure may stem from the docket pressures in that circuit. Another member observed that this procedure ceded authority (over whether to vote to rehear a case en banc) to the judges on the panel.

VIII. Date and Location of Spring 2012 Meeting

Judge Sutton noted that the Committee's Spring 2012 meeting is scheduled for April 12 and 13 in Washington, D.C.

IX. Adjournment

The Committee adjourned at 9:40 a.m. on October 14, 2011.

Respectfully submitted,

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Catherine T. Struve
Reporter

Advisory Committee on Appellate Rules
Table of Agenda Items — December 2011

FRAP Item	Proposal	Source	Current Status
05-01	Amend FRAP 21 & 27(c) to conform to Justice for All Act of 2004.	Advisory Committee	Discussed and retained on agenda 04/05; awaiting proposal from Department of Justice Discussed and retained on agenda 04/06; Department of Justice will monitor practice under the Act
07-AP-E	Consider possible FRAP amendments in response to Bowles v. Russell (2007).	Mark Levy, Esq.	Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 04/11
07-AP-H	Consider issues raised by Warren v. American Bankers Insurance of Florida, 2007 WL 3151884 (10th Cir. 2007), concerning the operation of the separate document rule.	Appellate Rules Committee	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08
07-AP-I	Consider amending FRAP 4(c)(1) to clarify the effect of failure to prepay first-class postage.	Hon. Diane Wood	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08
08-AP-C	Abolish FRAP 26(c)'s three-day rule.	Hon. Frank H. Easterbrook	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09
08-AP-G	Consider substantive and style changes to FRAP Form 4	Appellate Rules Committee	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 10/10 Draft approved 04/11 for submission to Standing Committee Approved for publication by Standing Committee 06/11 Published for comment 08/11

FRAP Item	Proposal	Source	Current Status
08-AP-H	Consider issues of "manufactured finality" and appealability	Mark Levy, Esq.	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 10/10 Discussed and retained on agenda 04/11
08-AP-J	Consider FRAP implications of conflict screening	Committee on Codes of Conduct	Discussed and retained on agenda 11/08
08-AP-L	Amend FRAP 6(b)(2)(A)(ii) to remove ambiguity	Reporter	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09 Discussed and retained on agenda 10/10 Discussed jointly with Bankruptcy Rules Committee and retained on agenda 04/11 Discussed and retained on agenda 10/11
08-AP-M	Consider FRAP implications of interlocutory appeals in tax cases	Reporter	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Draft approved 10/10 for submission to Standing Committee Approved for publication by Standing Committee 01/11 Published for comment 08/11
08-AP-N	Amend FRAP 5 to allow parties to submit an appendix of key documents from the record along with petitions and answers	Peder K. Batalden, Esq.	Discussed and retained on agenda 04/09
08-AP-P	Amend FRAP 32 to change from double line-spacing to 1.5 line-spacing for briefs	Peder K. Batalden, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09
08-AP-Q	Consider amending FRAP 10(b) to permit the use of digital audio recordings in place of written transcripts	Hon. Michael M. Baylson	Discussed and retained on agenda 04/09 Discussed and retained on agenda 10/10
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09
09-AP-A	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	ABA Council of Appellate Lawyers	Discussed and retained on agenda 04/09

FRAP Item	Proposal	Source	Current Status
09-AP-B	Amend FRAP 1(b) to include federally recognized Indian tribes within the definition of "state"	Daniel I.S.J. Rey-Bear, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed and retained on agenda 10/11
09-AP-C	Consider possible FRAP amendments in the light of project to revise Part VIII of the Bankruptcy Rules	Bankruptcy Rules Committee	Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed jointly with Bankruptcy Rules Committee and retained on agenda 04/11 Discussed and retained on agenda 10/11
09-AP-D	Consider implications of Mohawk Industries, Inc. v. Carpenter	John Kester, Esq.	Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10
10-AP-B	Consider FRAP 28's treatment of statements of the case and of the facts	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Draft approved 04/11 for submission to Standing Committee Approved for publication by Standing Committee 06/11 Published for comment 08/11
10-AP-D	Consider factors to be taken into account when taxing costs under FRAP 39	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/10 Discussed and retained on agenda 04/11 Discussed and retained on agenda 10/11
10-AP-H	Consider issues relating to appellate review of remand orders	Committee on Federal-State Jurisdiction	Discussed and retained on agenda 10/10
10-AP-I	Consider issues raised by redactions in appellate briefs	Paul Alan Levy, Esq.	Discussed and retained on agenda 04/11 Discussed and retained on agenda 10/11
11-AP-B	Consider amending FRAP 28 to provide for introductions in briefs	Appellate Rules Committee	Discussed and retained on agenda 10/11
11-AP-C	Amend FRAP 3(d)(1) to take account of electronic filing	Harvey D. Ellis, Jr., Esq.	Awaiting initial discussion
11-AP-D	Consider changes to FRAP in light of CM/ECF	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/11
11-AP-E	Consider amendment to FRAP 4(b)	Roger I. Roots, Esq.	Awaiting initial discussion

FRAP Item	Proposal	Source	Current Status
11-AP-F	Consider amendment authorizing discretionary interlocutory appeals from attorney-client privilege rulings	Amy M. Smith, Esq.	Awaiting initial discussion

TAB 11

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

MARK R. KRAVITZ
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JEFFREY S. SUTTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

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

FROM: **Honorable Sidney A. Fitzwater, Chair**
Advisory Committee on Evidence Rules

DATE: **November 28, 2011**

RE: **Report of the Advisory Committee on Evidence Rules**

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on October 28, 2011 in Williamsburg, Virginia at the William and Mary Marshall-Wythe College of Law. The meeting was preceded by a Symposium on the Restyled Rules of Evidence that William and Mary hosted at the Committee's request. The Committee is not proposing any action items for the Standing Committee at its January 2012 meeting. It continues to monitor the need for rule changes necessitated by the Supreme Court's decision in *Crawford v. Washington* and its progeny. The Committee's work also includes considering whether Rule 801(d)(1)(B) should be amended, a privileges project (which is the subject of a separate memorandum to the Standing Committee), and a continuous study of the Evidence Rules.

II. Action Items

No action items.

III. Information Items

A. Symposium on the Restyled Rules of Evidence

Prior to commencement of the fall meeting, at the request of the Committee, the William and Mary Marshall-Wythe College of Law hosted a Symposium on the Restyled Rules of Evidence. The Committee was particularly pleased that members of the Standing Committee were able to attend.

The Symposium consisted primarily of presentations made by two panels that included key participants in the restyling project. One panel—moderated by Committee Reporter Professor Daniel J. Capra (Fordham Law School)—examined the restyled rules retrospectively, sharing critical insights into how this complicated project was completed. The other panel—moderated by Committee Consultant Professor Kenneth S. Broun (University of North Carolina School of Law)—considered the future of the Federal Rules of Evidence, including the restyled rules, examining issues that remain for further consideration.

The members of the "Looking Back" panel were Judge Robert L. Hinkle (Northern District of Florida), the immediate past chair of the Committee; Judge Joan N. Ericksen (District of Minnesota), a Committee member; Judge Marilyn L. Huff (Southern District of California), the Standing Committee liaison to the Committee and a member of the Standing Committee Style Subcommittee; Judge Reena A. Raggi (Second Circuit), a member of the Standing Committee Style Subcommittee; Judge Geraldine Soat Brown (Northern District of Illinois), representing the Federal Magistrate Judges Association; Professor Joseph Kimble (Thomas Cooley Law School), Style Consultant to the Restyling Project; Professor Edward H. Cooper (University of Michigan Law School), Reporter to the Advisory Committee on Civil Rules; and Professor Stephen A. Saltzburg (George Washington University Law School), ABA Consultant to the Restyling Project (who submitted a written statement).

The "Looking Forward" panelists were Judge Harris L. Hartz (Tenth Circuit), a member of the Standing Committee during the Restyling Project; Justice Andrew D. Hurwitz (Arizona Supreme Court), former Committee member; Professor Roger C. Park (University of California Hastings College of the Law); Professor Deborah J. Merritt (Ohio State University Michael E. Moritz College of Law); Professor Kathryn Traylor Schaffzin (University of Memphis Cecil C. Humphreys School of Law); Professor Jeremy Counsellor (Baylor Law School); and attorney Paul Hannaford-Agor, Director, Center for Jury Studies, National Center for State Courts (Williamsburg, Virginia).

The Symposium proceedings will be published in the *William and Mary Law Review* on an expedited schedule, with publication expected in late March 2012.

B. Proposed Amendment to Rule 803(10)

The amendment to Rule 803(10) that the Standing Committee approved for release for public comment at its June 2011 meeting is out for public comment.

Rule 803(10) currently allows the government to prove in a criminal case, through the introduction of a certificate, that a public record does not exist. Under *Melendez-Diaz v. Massachusetts* such a certificate would be "testimonial" within the meaning of the Confrontation Clause, as construed by *Crawford v. Washington*. Therefore, the admission of such certificates (in lieu of testimony) violates the accused's right to confrontation. The proposed amendment to Rule 803(10) addresses the confrontation clause problem in the current rule by adding a "notice-and-demand" procedure. This procedure requires that the government produce the person who prepared the certificate only if, after receiving notice from the government of its intent to introduce a certificate, the defendant makes a timely pretrial demand for production of the witness. In *Melendez-Diaz* the Court stated that the use of a notice-and-demand procedure (and the defendant's failure to demand production under that procedure) would cure an otherwise unconstitutional use of testimonial certificates

As of the Committee's fall meeting, no comments had been received. Hearings on the proposed rule are currently scheduled for January 7, 2012 in Phoenix, Arizona and January 17, 2012 in Washington, D.C. The Committee will consider at its spring 2012 meeting any comments received.

C. Possible Amendment to Rule 801(d)(1)(B)

As it did at its spring 2011 meeting, the Committee considered at its fall 2011 meeting a proposal to amend Rule 801(d)(1)(B), the hearsay exemption for certain prior consistent statements. Although not listed as an action item, the Committee intends at the January 2012 meeting of the Standing Committee to seek its guidance regarding whether the proposal should be considered further. Subject to that guidance, the Committee intends to take up this proposal again at its spring 2012 meeting.

Under the proposal, Rule 801(d)(1)(B) would be amended to provide that prior consistent statements are admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness' credibility. The justification for the amendment is that there is no meaningful distinction between substantive and rehabilitative use of prior consistent statements. Under the current rule, some prior consistent statements offered to rehabilitate a witness' credibility—specifically, those that rebut a charge of recent fabrication or improper influence or motive—are also admissible substantively under the hearsay exemption. In contrast, other rehabilitative statements—such as those that explain a prior inconsistency or rebut a charge of faulty recollection—are admissible only for rehabilitation but not substantively.

Proponents of a rule change maintain that there are two basic problems under the present rule. First, the necessary jury instruction is almost impossible for jurors to follow. The prior consistent statement is of little or no use for credibility unless the jury believes it to be true. Second, and for similar reasons, the distinction between substantive and impeachment use of prior consistent statements has little, if any, practical effect. The proponent has already presented the witness' trial testimony, so the prior consistent statement adds no real substantive effect to the proponent's case.

Concerns, however, have been expressed about this proposal. One concern is that any expansion of the hearsay exemption to cover all prior consistent statements admissible for rehabilitation might be viewed as a signal that the Rules are taking a more liberal attitude toward admitting prior consistent statements generally. Under an amended version of Rule 801(d)(1)(B), parties might seek to use the exemption as a means to bolster the credibility of their witnesses, and courts might admit more prior consistent statements, leading to impermissible bolstering.

Prior its spring meeting, the Committee, with the assistance of the Federal Judicial Center, intends to survey all district judges to obtain their views on whether the proposal is needed and has merit. The Committee will also solicit the views of the American Bar Association, the American College of Trial Lawyers, the National Association of Criminal Defense Lawyers, and other interested groups.

D. Privileges Project

Several years ago, the Committee undertook a project to publish a pamphlet describing the federal common law on evidentiary privileges. The Committee determined that, although it would be inappropriate to propose to Congress a codification of the evidentiary privileges, it would be valuable to the Bench and Bar to set out in text and commentary the federal common law privileges. The Consultant to the Committee has prepared drafts of several privileges.

Although not listed as an action item, as explained more fully in a separate memorandum, the Committee is requesting the guidance of the Standing Committee regarding whether and how this project should proceed.

E. "Continuous Study" of the Evidence Rules

The Committee is responsible for engaging in a "continuous study" of the need for any amendment to the Federal Rules of Evidence. The grounds for a possible amendment include (1) a split in authority about the meaning of a rule; (2) a disparity between the text of a rule and the way that the Rule is actually being applied in courts; and (3) difficulties in applying a rule, as experienced by courts, practitioners, and academic commentators.

Under this standard, the Reporter has raised the following possible amendments for the Committee's consideration: (1) amending Rule 106 to provide that statements may be used for completion even if they are hearsay; (2) clarifying that Rule 607 does not permit a party to impeach its own witness if the only reason for calling the witness is to present otherwise inadmissible evidence to the jury; (3) clarifying that Rule 803(5) can be used to admit statements made by one person and recorded by another; (4) clarifying the business duty requirement in Rule 803(6); and (5) resolving a dispute in the courts over whether prior testimony in a civil case may be admitted against one who was not a party at the time the testimony was given.

The Committee will consider at its spring 2012 meeting the possible amendments that the Reporter has identified.

F. *Crawford v. Washington* and the Hearsay Exceptions in the Evidence Rules

As previous reports have noted, the Committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*, in which the Court held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to confront and cross-examine the declarant.

The Reporter regularly provides the Committee a case digest of all federal circuit cases discussing *Crawford* and its progeny. The goal of the digest is to enable the Committee to keep current on developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions.

With the exception of Rule 803(10), nothing in the developing case law appears to mandate an amendment to the Evidence Rules at this time. The Supreme Court is currently considering the case of *Williams v. Illinois*, in which it will address whether an expert witness can testify to the results of a laboratory test where the certificate of the test is not itself admitted at trial. The Court's decision in *Williams* may have an effect on the application of Rule 703. The Committee will monitor developments on the relationship between the Federal Rules of Evidence and the accused's right to confrontation.

IV. Minutes of the Fall 2011 Meeting

The Reporter's draft of the minutes of the Committee's October 2011 meeting is attached to this report. These minutes have not yet been approved by the Committee.

TAB 11-A

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

MARK R. KRAVITZ
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

TO: **Honorable Mark R. Kravitz, Chair, and the Members of the Standing Committee on Rules of Practice and Procedure**

FROM: **Honorable Sidney A. Fitzwater, Chair Advisory Committee on Evidence Rules**

DATE: **November 28, 2011**

RE: **Request of the Advisory Committee on Evidence Rules for Guidance Concerning its Privileges Project**

I Background

Congress has excluded rules governing privilege from the Rules Enabling Act process. Any new rule concerning privilege must be directly enacted by Congress. *See* 28 U.S.C. § 2074(b). Accordingly, with one exception, the Advisory Committee on Evidence Rules ("Committee") has not dealt with the possibility of new rules governing privilege. The exception is Rule 502, which governs inadvertent waiver and scope of waiver. But even that Rule, although initially drafted by the Committee, went through the usual legislative process.

Ten years ago, the Committee decided that, in lieu of rules governing privilege, it would attempt to survey the federal law of privilege. Professor Kenneth S. Broun of the University of North Carolina School of Law was hired as a consultant to work with the Committee Reporter, Professor Dan Capra, in a project to draft survey rules governing the most important privileges. It was intended that the survey rules be published either in a monograph or in a legal journal. The Committee has sponsored two other projects that were not intended to result in rule amendments. The first was an article discussing original Advisory Committee Notes that were superseded in whole or part by Congressional changes to the Committee draft. The second was an article about case law that diverged from the explicit text of an applicable Federal Rule of Evidence. Both articles were published under the name of the Reporter, who wrote them. In the text of the articles, the

Reporter referred to the Committee's interest in and review of the project, but made clear that the Committee was not proposing any change to any existing Rules of Evidence. Similarly, Professor Broun's work under the auspices of the privileges project is not intended to have any binding effect; instead, it would constitute a guide for the courts, in much the same way as does a Restatement. The Committee does not intend through this project to make new law or to change existing case law. Points of uncertainty or conflict would be noted but not resolved.

Professor Broun initially prepared two survey rules: psychotherapist-patient privilege and attorney-client privilege. As the Committee had directed, the survey rules attempted only to restate federal case law. Where there was no federal case law directly on point, the survey rules borrowed from the prevailing state law or sources such as the Uniform Rules of Evidence or the Restatement of the Law Governing Lawyers. There was considerable discussion of both survey rules in a subcommittee appointed to review the Rules and in the Committee itself. Amendments and additional research were prepared in response to the comments made in those discussions.

The project was placed on an undeclared hold from 2006-2010. During this period, the Committee was occupied primarily with Rule 502 or with the extensive work of restyling. Professor Broun's time was spent assisting with these projects.

At its fall 2010 meeting, the Committee asked Professor Broun to renew his work. He updated his drafts of the psychotherapist-patient and attorney-client privileges and prepared a new survey rule dealing with the marital communications privilege. These survey rules were presented to the Committee, first at its spring 2011 meeting and again at its fall 2011 meeting.

At the fall 2011 meeting, a few Committee members raised questions about the project. Some concern was expressed that a survey rule published under the auspices of the Committee would be given weight similar to the Rules of Evidence promulgated through the Rules Enabling Act process. Concern was also expressed that law might be created where, in the absence of federal case law, a survey rule borrowed from state law or other sources. The Committee decided that the working name of the project would be changed from "survey rules" to "compendium of the federal law on privileges" to avoid any inference that the Committee was trying to establish new rules of evidence.

II. Request for Guidance

The Committee has concluded that it is prudent to seek the Standing Committee's guidance on this project. Guidance regarding the following questions would be helpful.

- Should the Committee continue the project as it is now intended, i.e., review by the Committee of a compendium of privileges law drafted by Professor Broun in consultation with the Committee Reporter?

- If the project continues in its present form, should the Committee review any of the work on privileges with the same rigor as it would review a rule that was going through the Rules Enabling Act process?

- If the privileges project continues in its present form, should it exclude rules or aspects of rules as to which there is no federal case law or where the federal case law is in conflict?

- Assuming that Professor Broun and the Reporter publish their work, should the publication indicate that the work was done at the request, or under the auspices, of the Committee, or should it disclaim Committee approval and/or involvement?

The Committee is grateful for any guidance the Standing Committee deems it appropriate to provide.

TAB 11-B

Advisory Committee on Evidence Rules

Minutes of the Meeting of October 28, 2011

Williamsburg, Virginia

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Advisory Committee") met on October 28, 2011 in Williamsburg, Virginia.

The following members of the Committee were present:

Hon. Sidney A. Fitzwater, Chair
Hon. Brent R. Appel
Hon. Anita B. Brody
Hon. John A. Woodcock, Jr.
Hon. William K. Sessions III
William T. Hangley, Esq.
Marjorie A. Meyers, Esq.
Paul Shechtman, Esq.
Elizabeth J. Shapiro, Esq., Department of Justice

Also present were:

Hon. Marilyn L. Huff, Liaison from the Committee on Rules of Practice and Procedure and member of the Standing Committee's Style Subcommittee
Hon. Wallace Jefferson, member of the Standing Committee
Hon. Joan N. Ericksen., former member of the Evidence Rules Committee
Hon. Judith H. Wizmur, Liaison from the Bankruptcy Rules Committee
Hon. Andrew Hurwitz, former member of the Evidence Rules Committee
Jonathan Rose, Chief, Rules Committee Support Office
Benjamin Robinson, Esq., Rules Committee Support Office
Peter McCabe, Esq., Secretary to the Standing Committee
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee
Timothy Reagan, Esq., Federal Judicial Center
Professor Laird Kirkpatrick, George Washington University Law School
Professor Frederic Lederer, William and Mary Law School
Professor Roger Park, Hastings Law School
Professor Katherine Schaffzin, University of Memphis School of Law

I. Opening Business

Introductory Matters

Judge Fitzwater, the Chair of the Committee, welcomed the members, liaisons, other members of the Standing Committee, and members of the public. The minutes of the Spring 2011 Committee meeting were approved.

Judge Fitzwater noted that the Restyled Rules of Evidence will go into effect on December 1, 2011. The Restyled Rules have won two important awards for excellence in legal writing — the Burton Award and the Clearmark Award. In honor of the Restyled Rules going into effect, the Advisory Committee sponsored a Symposium on the Restyled Rules of Evidence, which took place on the morning of the Advisory Committee meeting. Judge Fitzwater stated that the Symposium was a great success. He observed that the ideas exchanged by the panel members will provide an important historical record on the meaning of the Restyled Rules, and will also assist the Advisory Committee going forward. Judge Fitzwater thanked the Reporter for putting together the Symposium; William and Mary Law School for hosting the event; Professor Frederic Lederer for all his help in hosting the Symposium; the William and Mary Law Review for publishing the proceedings; and all the panelists and moderators who made such outstanding presentations.

Judge Fitzwater then welcomed and introduced the two new members of the Advisory Committee, Judge Sessions and Judge Woodcock.

Judge Fitzwater and the Reporter then provided heartfelt thanks to two former members — Justice Hurwitz and Judge Ericksen — who both provided excellent service to the Committee. Each has been and will be sorely missed.

II. Proposed Amendment to Rule 803(10)

In *Melendez-Diaz v. Massachusetts,* the Supreme Court held that certificates reporting the results of forensic tests conducted by analysts were "testimonial" and therefore the admission of such certificates (in lieu of testimony) violated the accused's right to confrontation. The Court reasoned that the certificates were prepared exclusively for use in a criminal trial, as substitutes for trial testimony, and so were testimonial within the meaning of the Confrontation Clause as construed by *Crawford v. Washington.*

The Advisory Committee at its Spring 2011 meeting proposed an amendment to Rule 803(10), which currently allows the government to introduce a certificate to prove that a public record does not exist. A certificate of the absence of public record is ordinarily prepared for use in a criminal case, and so under *Melendez-Diaz,* such a certificate would be testimonial. The proposed amendment to Rule 803(10) adds a "notice-and-demand" procedure to the Rule: requiring production of the person who prepared the certificate only if after receiving notice from the

government of intent to introduce a certificate, the defendant makes a timely pretrial demand for production of the witness. In *Melendez-Diaz* the Court declared that the use of a notice-and-demand procedure (and the defendant's failure to demand production under that procedure) would cure an otherwise unconstitutional use of testimonial certificates. The Advisory Committee's proposed amendment was approved for release for public comment.

The Reporter reported to the Advisory Committee that no public comments had yet been received on the proposed amendment to Rule 803(10). Any comments that are received will, of course, be reviewed by the Committee at its Spring 2012 meeting.

III. Possible Amendment to Rule 801(d)(1)(B)

At the Spring 2011 meeting the Committee considered a proposal to amend Evidence Rule 801(d)(1)(B), the hearsay exemption for certain prior consistent statements. Under the proposal, Rule 801(d)(1)(B) would be amended to provide that prior consistent statements are admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility. The justification for the amendment is that there is no meaningful distinction between substantive and rehabilitative use of prior consistent statements.

Under the current rule, some prior consistent statements offered to rehabilitate a witness's credibility — specifically those that rebut a charge of recent fabrication or improper motive — are also admissible substantively under the hearsay exemption. In contrast, other rehabilitative statements — such as those which explain a prior inconsistency or rebut a charge of faulty recollection — are not admissible under the hearsay exception but only for rehabilitation. There are two basic practical problems in the distinction between substantive and credibility use as applied to prior consistent statements. First, the necessary jury instruction is almost impossible for jurors to follow. The prior consistent statement is of little or no use for credibility unless the jury believes it to be true. Second, and for similar reasons, the distinction between substantive and impeachment use of prior consistent statements has little, if any, practical effect. The proponent has already presented the witness's trial testimony, so the prior consistent statement adds no real substantive effect to the proponent's case.

At the Spring 2011 meeting the Committee unanimously agreed that the current distinction between substantive and impeachment use of prior consistent statements is impossible for jurors to follow. But some members were concerned that any expansion of the hearsay exemption to cover all prior consistent statements admissible for rehabilitation might be taken as a signal that the Rules were taking a more liberal attitude toward admitting prior consistent statements generally. Parties might seek to use the exemption as a means to bolster the credibility of their witnesses. The Committee at the Spring meeting resolved to consider the amendment further, and also to seek the input of public defenders, the Department of Justice, and state court judges on the merits of amending Rule 801(d)(1)(B). Before the Fall meeting, the Department of Justice submitted a letter in favor of the amendment and the Public Defender submitted a letter opposed to the amendment. Justice Appel contacted courts in three states and reported that there was recognition that the current

distinction between rehabilitation and substantive use was confusing and not meaningful — but that there was no sense of urgency to amend the rule in those three states.

At the Fall meeting, the Public Defender expressed concern that courts would end up admitting more prior consistent statements under the amendment, leading to impermissible bolstering of witnesses. The Reporter responded that the amendment by its terms would admit no statements that are not already admitted for rehabilitation — and any possible risk of abuse would be tempered by the court's judicious use of Rule 403, as emphasized in the proposed Advisory Committee Note. The Reporter also noted that in Minnesota, where the Rule is similar to the proposed amendment, there does not appear to be any indication in the case law that prior consistent statements had been more liberally admitted.

The Public Defender also expressed concern that if a witness had made both consistent and inconsistent statements, all of them admissible for impeachment or rehabilitation, then under the amendment all of the consistent statements would be admissible for their truth while the prior inconsistent statements — if not made under oath — would be admissible only for impeachment and not for their truth. The Public Defender argued that in this situation the judge would completely confuse the jury by giving different instructions for consistent and inconsistent statements. (But in fact the judge in such a situation would not give any instruction about the consistent statements because, under the amendment, the consistent statements would be admissible for both rehabilitation and substantive use — this means that under the amendment there will be fewer, not more, instructions).

A member of the Committee noted that the rule as it exists is logically inconsistent and intellectually dishonest; as such the Committee should approve the amendment to further its goal of providing consistent and logical rules. Another member observed that prior consistent statements often had value as corroboration. He also noted that the clearer the judge can be to the jury, the better for the system — and the instruction required as to certain prior consistent statements under current law is incomprehensible to jurors and accordingly brings disrespect to the system. The Reporter and the Chair noted that the proposed amendment had been greeted with enthusiasm by some of the district court judges on the Standing Committee when it was raised as an information item at the Spring 2011 meeting. Those judges remarked that in their experience, an instruction that a prior consistent statement was admissible for rehabilitation and not for its truth is one that jurors find impossible to follow.

One Committee member suggested that the instruction currently given for consistent statements admissible only for rehabilitation might in fact have some value for counsel in argument to the jury.

Other members of the Committee were undecided about the amendment and suggested the Committee seek more input from judges and interested groups to determine whether it would be worthwhile to proceed with an amendment.

The Committee ultimately voted to table the proposal and conduct further research so that it could be considered on the merits at the Spring 2012 meeting. The Reporter stated that he would work with Dr. Reagan, the FJC representative, to send out a survey to district judges to seek their views on the need for and merits of the proposed amendment. The Reporter stated that he would also send the proposal to the ABA, the American College of Trial Lawyers, the NACDL, and other interested groups for their views on the proposal. The Chair also stated that he would raise the proposal as an information item at the next Standing Committee, in order to seek guidance on whether the amendment was worth pursuing.

The working language for the proposed amendment, to be considered at the next meeting, is as follows:

> **(d) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:
>
> > **(1)** ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
> >
> > * * *
> >
> > > **(B)** is consistent with the declarant's testimony and ~~is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying~~ rehabilitates [is otherwise admissible to rehabilitate] [supports] the declarant's credibility as a witness;

IV. *Crawford* Developments

The Reporter provided the Committee with a case digest of all federal circuit cases discussing *Crawford v. Washington* and its progeny. The digest was grouped by subject matter. The goal of the digest is to allow the Committee to keep apprised of developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions.

The Committee reviewed the memo and the Reporter noted that — with the exception of Rule 803(10), the proposed amendment currently out for public comment — nothing in the developing case law mandated an amendment to the Evidence Rules at this time. The Reporter observed that the Supreme Court is currently considering the case of *Williams v. Illinois*, in which it will address whether an expert witness can testify to the results of a lab test where the certificate of the test is not itself admitted at trial. The Court's decision in *Williams* may have an effect on the application of Rule 703. The Committee resolved to continue monitoring developments on the relationship between the Federal Rules of Evidence and the accused's right to confrontation.

V. Privilege Project

Several years ago the Committee voted to undertake a project to publish a pamphlet that would describe the federal common law on evidentiary privileges. The Committee determined that it would not be advisable to propose an actual codification of all the evidentiary privileges to Congress, or even to opine on what model rules of privilege would look like. But it concluded that it could perform a valuable service to the bench and bar by setting forth, in text and commentary, the privileges that exist under federal common law. Professor Broun had prepared drafts of a number of privileges, but the project was put on hold given the time and resources required for Rule 502 and the restyling project.

At the Fall meeting, Professor Broun submitted materials on the attorney-client privilege and the marital privileges. Committee members stated for the record that the project was intended only as a description of the federal common law of privilege, and would result in a published product that would assist the bench and bar. Members emphasized that the Committee has no intent to propose codification of privileges or to intrude on Congress's role in enacting privilege rules.

But some members expressed concern that the project might be read as the Committee's statement about what privileges *ought* to look like or which side of a dispute about the meaning or extent of a privilege should be adopted. There was also a concern that by even stating what the law was, the Committee might put its imprimatur on bad or disputed law. Other members suggested that calling the project a "survey" or a "restatement" might be misinterpreted as the Committee's attempt to establish the law of privileges.

Professor Broun and the Reporter emphasized that the project was not intended to provide the Committee's imprimatur on any question of privilege law. Committee members suggested that the title of the project should be changed to indicate the limited intent. After discussion, the working title of the project was changed from "privilege survey" to "compendium" on the federal common law of privilege.

The Committee also determined that the ultimate work product should not be published under the name of the Committee. The Reporter noted that he had, at the Committee's direction, written two articles about the Federal Rules. Those articles were reviewed and approved by the Committee, but they were published under the Reporter's name in pamphlets published by the Federal Judicial Center. Those pamphlets thus were not sent out under the Advisory Committee's auspices, and accordingly their publication was outside the rules process. They were not sent out for a period of public comment and they were not approved by a vote of the Standing Committee. Committee members generally agreed that the same or a similar process should be employed if and when the work on privileges is ready for publication.

Judge Fitzwater stated that he would raise the privilege project at the next Standing Committee meeting and seek advice on how and whether the project should be published. Professor

Broun and the Reporter stated that they would prepare a memorandum for the Committee's next meeting on the process questions involved in preparing and publishing a work on privileges.

VI. "Continuous Study" of the Evidence Rules

The Procedures for the Standing Committee require the Evidence Rules Committee to engage in a "continuous study" of the need for any amendment to the Rules. At the Chair's request, the Reporter prepared a memorandum setting forth the history of the studies that have already been undertaken by the Advisory Committee, and providing some suggestions of possible amendments for consideration by the Committee. The grounds for a possible amendment included: 1) a split in authority about the meaning of an Evidence Rule; 2) a disparity between the text of a rule and the way that the rule is actually being applied in courts; 3) difficulties in applying a rule, as experienced by courts, practitioners, and academic commentators.

Possible amendments raised by the Reporter included: 1) amending Rule 106 to provide that statements may be used for completion even if they are hearsay; 2) clarifying that Rule 607 does not permit a party to impeach its own witness if the only reason for calling the witness is to present otherwise inadmissible evidence to the jury; 3) clarifying that Rule 803(5) can be used to admit statements made by one person and recorded by another; 4) clarifying the business duty requirement in Rule 803(6); and 5) resolving the dispute in the courts over whether prior testimony in a civil case may be admitted against one who was not a party at the time the testimony was given.

At the meeting, after a brief discussion, Judge Fitzwater noted that the Committee was just coming off a number of difficult and time-consuming projects and could use more time to consider the possible amendments set out by the Reporter. Accordingly, the Committee resolved to place the Reporter's memorandum on the Spring agenda. One member stated for the record that he was in favor of the proposal to amend Rule 607 to prevent parties from abusing the rule by calling a witness solely to introduce otherwise inadmissible evidence.

VII. Next Meeting

The Spring 2012 meeting of the Committee is scheduled for Tuesday April 3 in Dallas.

Respectfully submitted,

Daniel J. Capra
Reporter

TAB 12

COMMITTEE FIVE-YEAR JURISDICTIONAL REVIEW

Each Judicial Conference committee has been asked to complete a periodic review of its jurisdiction and functions. As the attached questionnaire explains, in September 1987, when the Judicial Conference committee structure was last substantially revised, the Conference determined that each committee should perform a self-evaluation every five years and recommend to the Executive Committee, with justification, whether the committee should be abolished or maintained. At each five-year review of its jurisdiction and functions since that time, the Standing Rules Committee–and each of its five Advisory Rules Committees–has recommended that the Committees be maintained.

As part of this evaluation, the Committees have been asked to complete a questionnaire. Draft responses to the questionnaire will be distributed for the Committee's consideration. A copy of the Standing Rules Committee's jurisdictional statement is provided further below. There are no proposals or recommendations to modify the Standing Rules Committee's jurisdictional statement.

> **Recommendation:** It is recommended that the Committee advise the Executive Committee of the Judicial Conference that, upon review of its jurisdiction and functions, the Committee on Rules of Practice and Procedure, in coordination with the Advisory Rules Committees, recommends that the Committees be maintained and that the Committee on Rules of Practice and Procedure's jurisdictional statement remain unchanged.

Jurisdictional Statement of the
Committee on Rules of Practice and Procedure

Committee on Rules of Practice and Procedure: To carry on a continuous study of the operation and effect of the general rules of practice and procedure.

Review reports and recommendations submitted by the five Advisory Committees and approve, modify, disapprove or return those recommendations to the Advisory Committees, as appropriate.

Transmit to the Judicial Conference proposed rules changes, together with Committee Notes relating thereto, and a summary indicating which proposed changes were the subject of substantial controversy.

Review and make recommendations to the Judicial Conference with regard to legislation affecting rules of practice and procedure.

Coordinate the work of the Advisory Committees, and make suggestions of proposals to be studied by them.

Rules Advisory Committees: To study the rules of practice and procedure in each Advisory Committee's field.

Consider suggestions and recommendations from bench and bar for changes in the rules.

Draft and publish proposed rules changes and Committee Notes and, when necessary, conduct public hearings thereon.

Submit to the Rules Committee those rule changes and Committee Notes finally agreed upon, a summary indicating which proposed rules changes were the subject of substantial controversy, the reports of the comments received in writing or during public hearings, and an explanation of any changes made subsequent to the original publication.

Excerpted from *JCUS - Jurisdiction of Committees,* September 2009, available at http://jnet.ao.dcn/Judicial_Conference/Jurisdictional_Statements.html.

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE THOMAS F. HOGAN
Secretary

October 25, 2011

MEMORANDUM

To: Judicial Conference Committee Chairs

From: Judge Thomas F. Hogan Thomas F. Hogan

RE: QUESTIONNAIRE ON THE FIVE-YEAR REVIEW OF COMMITTEE JURISDICTION AND STRUCTURE

A number of procedures were put into place as part of the last major restructuring of the Judicial Conference and its committees in 1987. Among them was a requirement that "[e]very five years, each committee must recommend to the Executive Committee, with a justification for the recommendation, either that the committee be maintained or that it be abolished." This review is scheduled to occur again in 2012, and attached you will find a questionnaire that will assist your committee in conducting this review. I am asking you to place this issue on the agendas for your committees' winter 2011-2012 meetings so that the Executive Committee can consider your responses at its February 2012 meeting.

As with past five-year reviews, this is an opportunity for committees to reexamine their structure and functions and to discuss possible modifications to their jurisdictional statements and composition that might enhance their operations. Committees should pay particular attention to the process involved in instances where committees must work together on cross-cutting issues. Each committee staff has received this memorandum and will include the attached questionnaire, your committee's current jurisdictional statement, and any other relevant information in the committee's agenda materials for its winter meeting.

When completed, the questionnaires should be emailed to Laura C. Minor, Assistant Director, Office of Judicial Conference Executive Secretariat at OJCES@ao.uscourts.gov. To permit timely consideration by the Executive Committee, the questionnaires should be received no later than **January 18, 2012**.

Attachment

cc: Committee staffers

2012 JUDICIAL CONFERENCE COMMITTEES' SELF-EVALUATION QUESTIONNAIRE

Committee Name: _____

Background

In 1987, as part of the last major restructuring of the Judicial Conference and its committees, the Conference established a policy that "[e]very five years, each committee must recommend to the Executive Committee, with a justification for the recommendation, either that the committee be maintained or that it be abolished." This review examines not only the need for a committee's continued existence but also the scope of its jurisdiction and its workload, composition, and operating processes, as well as aspects of the committee structure that might be reevaluated in the future. All committees have been asked to include it on their agendas for the winter 2011-12 meetings, and the following questionnaire is intended to facilitate the review process. The Executive Committee will consider the committees' responses at its February 2012 meeting.

Jurisdiction

1. Is the work of the Committee consistent with its jurisdictional statement?
   _____ yes _____ no

   If no, please explain:

2. Are there areas in which the Committee's work currently overlaps with the work of other committees? _____ yes _____ no

   If yes, please explain:

3. Are there areas currently within the jurisdiction of this Committee that might be handled by another committee? _____ yes _____ no

   If yes, please explain:

Committee Name: _____

4. Are there areas currently within the jurisdiction of other committees that might be handled by this Committee? _____ yes _____ no

   If yes, please explain:

5. Are issues that cut across committee jurisdictional lines adequately identified and addressed? _____ yes _____ no

   If no, what more can be done to facilitate the handling of cross-cutting issues?

Size/Composition

6. Is the size of the Committee—

_____ too big? _____ too small? _____ appropriate?

   If too big or too small, please explain:

7. Is the Committee membership appropriately representative? _____ yes _____ no

   If no, please explain:

Committee Name: _____

8. Do non-committee members regularly attend your meetings? _____ yes _____ no

   If yes, on average how many non-committee members attend and, generally, for what purpose?

Amount of Work

9. Overall, the Committee has—

_____ too much to do.	_____ too little to do.	_____ the appropriate amount of work.

   If too much or too little, please explain:

Operating Processes

10. How often and on what types of issues is Committee business conducted by means other than face-to-face meetings?

11. Does the Committee use subcommittees to conduct its business? _____ yes _____ no

    If yes, have the 2009 guidelines on the use of subcommittees[1] had an impact on your use and management of subcommittees?

[1] For access to these guidelines, committee chairs please click here, and committee staffers please click here.

Committee Name: _____

12. How, if at all, has technology facilitated the work of your committee? Are there additional technology needs that would further facilitate your work?

13. Are the materials you receive in preparation for committee meetings appropriate in terms of content and quantity? _____ yes _____ no

    If no, please explain:

Conclusion

14. This Committee should—

    _____ continue to exist.

    _____ be divided into two or more committees.

    _____ be combined with one or more committees.

    _____ be abolished.

    Please explain why:

14. Would you suggest any other changes related to this Committee?

Committee Name: _____

15. Would you suggest any near-term changes related to the committee structure as a whole? For example, should the number of committees be enlarged or reduced? Should other committees be combined, eliminated or divided?

16. For the longer term, what issues or possible changes to committee structure should be considered? Please think broadly.

* * * * * *

Please return by email to OJCES@ao.uscourts.gov.

Feb. 28, 2012

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 5-6, 2012
Phoenix, Arizona
Minutes

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ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Phoenix, Arizona, on Thursday and Friday, January 5 and 6, 2012. The following members were present:

Judge Mark R. Kravitz, Chair
Dean C. Colson, Esquire
Roy T. Englert, Jr., Esquire
Gregory G. Garre, Esquire
Judge Neil M. Gorsuch
Judge Marilyn L. Huff
Chief Justice Wallace B. Jefferson
Dean David F. Levi
Judge Patrick J. Schiltz
Judge James A. Teilborg
Judge Richard C. Wesley
Judge Diane P. Wood

Deputy Attorney General James M. Cole and Larry D. Thompson, Esquire were unable to attend, but Mr. Thompson participated by telephone. The Department of Justice was represented at the meeting by Elizabeth J. Shapiro, Esquire.

Also participating were the committee's former chair, Judge Lee H. Rosenthal, former lawyer members Douglas R. Cox and William J. Maledon, and the committee's style consultant, Professor R. Joseph Kimble.

Judge Rosenthal chaired a discussion on class action issues with the following panelists: Dean Robert H. Klonoff, a member of the Advisory Committee on Civil Rules; Daniel C. Girard, Esquire, a former member of the advisory committee; and John H. Beisner, Esquire.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Peter G. McCabe	The committee's secretary
Jonathan C. Rose	Rules Committee Officer
Andrea L. Kuperman	Rules law clerk to Judge Kravitz
Joe Cecil	Research Division, Federal Judicial Center
Bernida Evans	Rules Office Management Analyst

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
- Judge Jeffrey S. Sutton, Chair
- Professor Catherine T. Struve, Reporter

Advisory Committee on Bankruptcy Rules —
- Judge Eugene R. Wedoff, Chair
- Professor S. Elizabeth Gibson, Reporter
- Professor Troy A. McKenzie, Associate Reporter

Advisory Committee on Civil Rules —
- Judge David G. Campbell, Chair
- Professor Edward H. Cooper, Reporter
- Professor Richard L. Marcus, Associate Reporter

Advisory Committee on Criminal Rules —
- Judge Reena Raggi, Chair
- Professor Sara Sun Beale, Reporter
- Professor Nancy J. King, Associate Reporter

Advisory Committee on Evidence Rules —
- Judge Sidney A. Fitzwater, Chair
- Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Committee Membership Changes

Judge Kravitz announced with regret that the terms of Messrs. Cox and Maledon had expired on October 1, 2011, and both were attending their last Standing Committee meeting. He thanked them for their distinguished service on the committee, described their many contributions to the committee's work and the rules program, and presented each with a plaque signed by Chief Justice John Roberts, Jr. and Judge Thomas F. Hogan, Director of the Administrative Office.

Judge Kravitz introduced the new committee members, Judge Wesley and Mr. Garre, and he summarized their impressive legal backgrounds. He reported that Mr. Thompson was also a newly appointed member of the committee, but was unable to attend the meeting.

Meeting with Supreme Court Justices

Judge Rosenthal reported on a recent meeting held at the Supreme Court that she had attended with Judge Kravitz, Dean Levi, Professor Coquillette, and former committee chair Judge Anthony J. Scirica. They had an extensive and candid exchange with the Chief Justice and other justices on the rules program. The discussion, she said, touched upon such matters as the openness of the rules process, the procedures followed by the rules committees, the effective use of empirical research to support proposed rule amendments, and the rules committees' ongoing relationships with Congress, the bar, and the academy. The meeting, she said, had been very beneficial and met all the committee's objectives. She added that it would make sense to pursue similar dialogues with the Court every five years or so.

Judicial Conference Report

Judge Kravitz reported that the Judicial Conference at its September 2011 session had approved all the proposed amendments to the rules and forms presented by the committee.

Rules Taking Effect on December 1, 2011

Judge Kravitz referred to the amendments to the appellate, criminal, and evidence rules and the bankruptcy rules and forms that took effect by operation of law on December 1, 2011.

Pending Rule Amendments

Judge Kravitz reported that proposed amendments to the appellate, bankruptcy, civil, criminal, and evidence rules had been published for comment in August 2011. Although public hearings had been scheduled, few requests had been submitted by bench and bar to date to testify on the proposals.

Lawsuit Abuse Reduction Act

Ms. Kuperman reported that the proposed Lawsuit Abuse Reduction Act of 2011 (H.R. 966) would restore the mandatory-sanctions provision of FED. R. CIV. P. 11 (sanctions). Adopted in 1983, she said, the provision simply did not work and was later repealed in 1993. In addition, she said, the proposed legislation would eliminate the beneficial safe-harbor provision of Rule 11(c)(2), added in 1993. It gives a party 21 days to withdraw challenged assertions on a voluntary basis.

She pointed out that Judges Rosenthal and Kravitz had written to the chair of the House Judiciary Committee to oppose the bill. Their letter emphasized that the Federal Judicial Center's empirical research had demonstrated that the 1983 version of Rule 11 had produced wasteful satellite litigation and increased the time and costs of civil litigation. She added that the American Bar Association and other organizations had also sent letters to Congress opposing the legislation.

She noted that the House Judiciary Committee had held a hearing on H.R. 966 in March 2011 and then reported out the bill. But there was no further action in the House, although a companion bill (S. 533) was introduced in the Senate.

Sunshine in Litigation Act

Ms. Kuperman reported that Judges Rosenthal and Kravitz had written to the chair of the Senate Judiciary Committee to oppose the proposed Sunshine in Litigation Act of 2011 (S. 623). The bill would prevent a court from issuing a discovery protective order unless it first makes particularized findings of fact that the order would not restrict the disclosure of information relevant to protecting public health or safety. She noted that the bill, similar to others introduced in past Congresses, had been favorably reported out of committee in May 2011, but there had been no further action on it.

Pleading Standards

Ms. Kuperman reported that no legislation was currently pending in Congress to address civil pleading standards in light of the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

Consent Decrees

Ms. Kuperman noted that legislation (H.R. 3041) had been introduced to limit the duration of consent decrees issued by federal courts that impose injunctive or other prospective relief against state or local programs or officials. The bill, she said, was being monitored closely by the Judicial Conference's Federal-State Jurisdiction Committee. It would not amend the federal rules directly, but could impact the rules in procedural ways. The legislation, she said, had been referred to Congressional committee, but no further action had taken place on it.

Costs and Burdens of Civil Discovery

Ms. Kuperman reported that the House Judiciary Committee Subcommittee on the Constitution had held a hearing in December 2011 on "the costs and burdens of civil discovery." She noted that Judges Kravitz and Campbell had sent a letter to the subcommittee chair providing an update on the advisory committee's various efforts to reduce discovery costs, burdens, and delays. The letter, she said, urged Congress to allow the Advisory Committee on Civil Rules to continue pursuing these issues under the thorough and deliberate process that Congress created in the Rules Enabling Act. She added that Congressional staff had been invited to, and had attended, the advisory committee's recent meeting in Washington. The committee, she added, will continue to keep members and staff of Congress informed of pertinent developments.

Time to File a Notice of Appeal When a Federal Officer or Employee is a Party

Ms. Kuperman reported that the Congress had enacted legislation amending 28 U.S.C. § 2107 to conform it to the December 2011 change in FED. R. APP. P. 4(a)(1) (time to file a notice of appeal in a civil case). The statute mirrors the amended rule and clarifies the time for parties to appeal in a civil case when a federal officer or employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States.

Bankruptcy Legislation

Ms. Kuperman reported that legislation (Pub. L. No. 112-64) had been enacted in December 2011 to extend for another four years the exemption given to qualified reservists and members of the National Guard from application of the means-test presumption of abuse in Chapter 7 bankruptcy cases. She noted that a footnote in an interim bankruptcy rule would have to be updated to incorporate the number of the new public law. In addition, she said, legislation was pending to add some bankruptcy judgeships and increase the filing fee for chapter 11 cases. If enacted, it would require conforming changes to the bankruptcy forms to reflect the higher fee.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rose reported that Judge Thomas F. Hogan had assumed his duties as the new Director of the Administrative Office.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil reported that Judge Jeremy D. Fogel, the new Director of the Federal Judicial Center, had decided to undertake a comprehensive study of case-dispositive motions in civil cases. To that end, he said, the Center was seeking assistance from several law professors to participate in the study and provide law students to help in the research. The Center, he added, was conducting pilot efforts for the project and would present proposals for consideration by the Advisory Committee on Civil Rules at its March 2012 meeting. He suggested that the project would likely be ready to proceed at the start of the next academic year.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of the last meeting, held on June 2-3, 2011.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Sutton and Professor Struve presented the report of the advisory committee, as set forth in Judge Sutton's memorandum and attachments of December 7, 2011 (Agenda Item 10). Judge Sutton reported that the advisory committee had no action items to present.

Informational Items

Judge Sutton thanked the members, reporters, and committee staff for working with congressional staff on the amendment of 28 U.S.C. § 2107 to make it consistent with FED. R. APP. P. 4(a)(1) (time to file a notice of appeal in a civil case). Even though it involved a relatively minor, technical change, he said, it had taken enormous effort and skill to accomplish the legislative action.

He reported that only one comment had been received to date on the advisory committee's proposed amendment to FED. R. APP. P. 28 (briefs) that would remove the requirement that a brief set forth separate statements of the case and of the facts. The comment, from a prominent appellate judge, opposed combining the two statements.

But, he said, the advisory committee believed that the current requirement of separate statements had generated confusion and redundancy. Combining them would provide lawyers with greater flexibility in making their presentations.

Judge Sutton reported that the advisory committee had not reached a consensus on whether to treat federally recognized Indian tribes the same as states for the purpose of filing amicus briefs under FED. R. APP. P. 29(a) (amicus briefs). The committee, though, did reach a consensus that municipalities should be included with Indian tribes if a Rule 29 amendment were pursued. Judge Sutton added that he had sent a letter to the chief judges of all the courts of appeals soliciting their views on the matter.

Judge Sutton reported that Professor Richard D. Freer of Emory Law School, a guest speaker at the advisory committee's recent meeting had complained about the frequency of federal rule changes. Professor Freer argued that frequent changes increase costs, add confusion for lawyers, complicate electronic searches, and may lead to unintended consequences. He suggested that if rule changes were made less often – such as once every several years – the bar would pay more attention to the rules and submit more and better comments. Judge Sutton noted that the advisory committee was taking the criticism to heart and generally supports deferring and bundling amendments where feasible.

A member endorsed the suggestion generally and added that lawyers often complain about the committees "tinkering" with the rules. Other participants pointed out that the advisory committees do in fact bundle rule amendments where possible. Nevertheless, many rule changes are required by legislation, case law developments, and other factors beyond the committees' control.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Wedoff and Professor Gibson presented the report of the advisory committee, as set forth in Judge Wedoff's memorandum and attachments of December 12, 2011 (Agenda Item 8).

Amendments for Publication

FED. R. BANKR. P. 7054(b) and 7008(b)

Judge Wedoff reported that the proposed amendments to FED. R. BANKR. P. 7054 (judgments and costs) and FED. R. BANKR. P. 7008(b) (attorney's fees) would clarify the procedure for seeking the award of attorney's fees in adversary proceedings. Bankruptcy procedures, he explained, are different from those in civil actions in the district courts.

Civil practice is governed by FED. R. CIV. P. 54(d)(2) (attorney's fees), which specifies that a claim for attorney fees be made by motion unless the substantive law requires proving the fees at trial as an element of damages. The bankruptcy rules, though, have no analog to FED. R. CIV. P. 54(d)(2). Instead, attorney's fees are governed by FED. R. BANKR. P. 7008(b), which specifies that a request for the award of attorney's fees be pleaded as a claim in a complaint or other pleading.

The difference between the civil and bankruptcy rules, he said, creates a trap for the unwary, especially for lawyers who practice regularly in the district courts. Moreover, the difference between bankruptcy practice and civil practice has led bankruptcy courts to adopt different, non-uniform approaches to handling fee applications. The largest bankruptcy court in the country, for example, has adopted the civil practice by local rule.

In a recent decision, the Ninth Circuit bankruptcy appellate panel pointed to a gap in the current bankruptcy rules. It noted that when a party follows FED. R. BANKR. P. 7008(b) and pleads its demand for attorney's fees in the complaint, the bankruptcy rules specify no procedure for awarding them. The panel's opinion expressly invited the advisory committee to close the gap by amending FED. R. BANKR. P. 7054. That rule currently incorporates FED. R. CIV. P. 54(a)-(c) and has its own provision governing recovery of costs by a prevailing party. But it has no provision like FED. R. CIV. P. 54(d)(2) governing recovery of attorney's fees.

Judge Wedoff explained that the advisory committee agreed with the bankruptcy appellate panel and decided to conform the bankruptcy rules to the civil rules – thus requiring that a claim for the award of attorney's fees in an adversary proceeding be made by motion. To do so, the proposed amendments incorporate much of FED. R. CIV. P. 54(d)(2) into a new FED. R. BANKR. P. 7054(b)(2) prescribing the procedure for seeking attorney fees. Current FED. R. BANKR. P. 7008(b), requiring that the demand be pleaded in a complaint or other pleading, would be deleted. Judge Wedoff added that FED. R. CIV. P. 54(d)(2)(D), dealing with referral of matters to a master or magistrate judge, would not be incorporated because it is not relevant to the bankruptcy courts.

Judge Wedoff reported that the advisory committee would also correct a long-standing grammatical error in the first sentence of FED. R. BANKR. P. 7054(b) by changing the verb "provides" to "provide."

The committee without objection by voice vote approved publication of the proposed amendments to FED. R. BANKR. P. 7054(b) and the proposed deletion of FED. R. BANKR. P. 7008(b).

Information Items

PART VIII – THE BANKRUPTCY APPELLATE RULES

Judge Wedoff reported that the advisory committee had been engaged for several years in a major project to revise the Part VIII rules. The principal objectives of the project, he said, are: (1) to align Part VIII more closely with the Federal Rules of Appellate Procedure; and (2) to adjust the rules to the reality that bankruptcy court records today are filed, stored, and transmitted electronically, rather than in paper form.

He explained that the advisory committee had made substantial progress and would return to the Standing Committee in June 2012 seeking permission to publish the revised Part VIII rules for public comment. At this point, the advisory committee just wanted to give the Standing Committee a preliminary look at the first half of the rules, explain the principal changes from the current rules, and address any concerns that members might have. He invited the members to bring any suggestions to the advisory committee's attention.

Professor Gibson noted that Part VIII deals primarily with appeals from a bankruptcy court to a district court or bankruptcy appellate panel. If a case proceeds from there to the court of appeals, the Federal Rules of Appellate Procedure take over. In addition, in 2005 Congress authorized direct appeals from a bankruptcy court to a court of appeals in limited circumstances. Accordingly, the new Part VIII rules also contain provisions dealing with permissive direct appeals.

She noted that Part VIII had largely been neglected since 1983, even though the Federal Rules of Appellate Procedure have since been amended on several occasions and completely restyled in 1998. She pointed out that Part VIII was difficult to follow and needs to be reorganized and rewritten for greater ease of use. In addition, it needs to be updated and made more consistent with the current Federal Rules of Appellate Procedure. She emphasized that the proposed revisions were comprehensive in nature. Some rules would be combined, some deleted, and some moved to new locations.

Professor Gibson explained that the advisory committee had conducted two mini-conferences on the proposed rules with members of the bench and bar. The participants, she said, expressed substantial support for the proposed revisions, but several recommended that additional changes be made to take account of the widespread use of technology in the federal courts. They urged the committee to revise the rules to recognize explicitly that court records in bankruptcy cases now are filed and maintained in electronic form.

Judge Wedoff and Professor Gibson noted that the proposed new Part VIII rules largely adopt the style conventions of the other, restyled federal rules. For example, they

consistently use the word "must" to denote an affirmative obligation to act, even though the other parts of the bankruptcy rules still use the word "shall." He pointed out that the Part VIII rules are largely distinct from the rest of the bankruptcy rules. As a result, there should be no problem with using the modern terminology only in Part VIII and not in other bankruptcy rules.

Professor Gibson noted that the advisory committee had revised and reorganized Part VIII so thoroughly that it would not be meaningful to produce a redlined or side-by-side version comparing the old and new rules. Rather, she said, the committee was using the committee notes to specify where particular provisions in the new rules are located in the current rules.

A participant suggested that it would be helpful to produce a chart showing readers where each provision in the current rules has been relocated. Professor Gibson agreed, but explained that some provisions had been broken up and relocated in several different places. Judge Wedoff agreed to work on producing a chart, but added that it might be of limited value because readers will need to examine the new rules as a whole.

FED. R. BANKR. P. 8001

Professor Gibson noted that proposed FED. R. BANKR. P. 8001 (scope and definitions) was new and had no counterpart in the existing rules. Similar to FED. R. APP. P. 1, it sets forth the scope of the Part VIII rules and contains three definitions: (1) "BAP" to mean a bankruptcy appellate panel; (2) "appellate court" to mean either the district court or the BAP to which an appeal is taken; and (3) "transmit" to mean sending documents electronically (unless a document is sent by or to a pro se litigant, or a local court rule requires a different means of delivering the document).

She explained that the advisory committee had deliberately selected the term "transmit" to highlight a specific process with a strong presumption in favor of electronic transfer of a document or record. A member suggested, though, that the proposed definition of "transmit" was not sufficiently forceful and suggested including a stronger affirmative statement that electronic transmission is to be the norm. Judge Wedoff agreed and added that electronic transmission was already universal in the bankruptcy courts except for pro se litigants. Another member cautioned that it is problematic to use a word like "transmit," which has a much broader common meaning, and ascribe to it an intentionally narrower meaning. Perhaps a unique new term could be devised, such as "e-transmit."

Some members questioned the proposed definition of "appellate court" because it contradicted the ordinary meaning of the term, which normally refers to the courts of appeals. Judge Wedoff and Professor Gibson agreed to have the advisory committee reconsider the definition.

FED. R. BANKR. P. 8002

Professor Gibson reported that proposed FED. R. BANKR. P. 8002 (time to file a notice of appeal) must remain in its current place because 28 U.S.C. § 158(c)(2) refers to it by number. She said that the committee had essentially restyled the existing rule and added a provision to cover inmates confined in institutions.

FED. R. BANKR. P. 8003 and 8004

Professor Gibson explained that proposed Rules 8003 (appeal as of right) and 8004 (appeal by leave) would set forth in two separate rules the provisions governing appeals as of right and appeals by leave. The two are combined in the current FED. R. BANKR. P. 8001 (manner of taking an appeal). The proposed revisions, she said, will conform Part VIII to the Federal Rules of Appellate Procedure.

She noted that under the current bankruptcy appellate rules, an appeal is not docketed in the appellate court until the record is complete and received from the bankruptcy clerk. Proposed FED. R. BANKR. P. 8003(d)(2), however, conforms to the Federal Rules of Appellate Procedure and requires the clerk of the appellate court to docket the appeal earlier, as soon as a notice of appeal is received. Proposed FED. R. BANKR. P. 8004 would continue the current bankruptcy practice of requiring an appellant to file both a notice of appeal and a motion for leave to appeal.

FED. R. BANKR. P. 8005

Professor Gibson explained that proposed FED. R. BANKR. P. 8005 (election to have an appeal heard by the district court) governs appeals in those circuits that have a BAP. Under 28 U.S.C. § 158(c)(1), an appeal in those circuits is heard by the BAP unless a party to the appeal elects to have it heard by the district court. The proposed rule provides the procedure for exercising that election, and it eliminates the current requirement that the election be made on a separate document. Instead, a new Official Form will be devised for the election. Proposed Rule 8005(c) specifies that a party seeking a determination of the validity of an election must file a motion in the court in which the appeal is then pending.

FED. R. BANKR. P. 8006

Professor Gibson noted that proposed FED. R. BANKR. P. 8006 (certification of a direct appeal to the court of appeals) overlaps substantially with the Federal Rules of Appellate Procedure. Under 28 U.S.C. § 158(d)(2), a case may be certified for direct appeal from a bankruptcy court in three ways. First, the bankruptcy court, the district court, or the BAP may make the certification itself based on one of the direct appeal criteria specified in 28 U.S.C. § 158(d)(2)(A). Second, the certification may be made by all the parties to the appeal. Third, the bankruptcy court, district court, or BAP must make the certification if a majority of the parties on both sides of the appeal ask the court to make it.

Judge Wedoff explained that the proposed rule provides the procedures for implementing each of the three options. Since the bankruptcy court is likely to have the most knowledge about a case, proposed Rule 8006(b) specifies that a case will remain pending in the bankruptcy court, for purposes of certification only, for 30 days after the effective date of the first notice of appeal. The 30-day hold gives the bankruptcy court time to make a certification. Once the certification has been made, the case is in the court of appeals, and the request for permission to take a direct appeal must be filed with the circuit clerk within 30 days. The court of appeals has discretion to take the direct appeal, and the procedure is similar to that under 28 U.S.C. § 1292(b).

Judge Sutton reported that the Advisory Committee on Appellate Rules was working closely with the bankruptcy advisory committee on revising the Part VIII rules, with Professor Struve and Professor Amy Barrett serving as liaisons to the project. He noted that the appellate advisory committee had drafted corresponding changes in FED. R. APP. P. 6 (appeal in a bankruptcy case) by adding a new subdivision 6(c) to address permissive direct appeals from a bankruptcy court.

He reported that appellate advisory committee members had questioned the choice of the verb "transmit" in FED. R. APP. P. 6 and debated several other potential terms. In addition, he said, concern had been voiced over the wisdom of introducing a new term, such as "transmit,""provide," or "furnish," but only in FED. R. APP. P. 6. It would be inconsistent with the terminology used in the other appellate rules. The appellate courts, moreover, are not as far advanced with electronic filing as the bankruptcy courts and may not be ready to receive other types of appeals in the same manner as bankruptcy appeals. But, he added, it may well be acceptable as a practical matter to live with two different verbs in the rules for a while. A member suggested using the term "send," but Judge Sutton pointed out that in the electronic environment, the clerk of the bankruptcy court may merely provide the appellate court with links to the bankruptcy court record, rather than actually send or transmit the record to the appellate court.

Judge Sutton suggested convening an ad hoc subcommittee, comprised of at least one person from each advisory committee, to consider a uniform way of describing the transmission of records throughout the federal rules. Several participants endorsed the concept and emphasized the desirability of using the same language across all the rules. Others warned, though, that the project could be very complicated because many other provisions in the rules also need to be amended to take account of technology, and they cited several examples. A member cautioned that whatever terminology is selected must accommodate the continuing need for paper records and paper copies.

Professor Gibson said that the new bankruptcy appellate rules, scheduled to be published in August 2012, will be the test case for the new terminology. Judge Sutton added that eventually all the federal rules will have to be accommodated to the electronic world. But that project, he said, will take considerable time to accomplish. He emphasized that the immediate problem facing the advisory committees was to decide before publication on the right terminology for the proposed new Part VIII bankruptcy rules and the amendments to FED. R. APP. P. 6.

Judge Kravitz appointed Judge Gorsuch to chair an ad hoc subcommittee to consider devising a standard way of describing electronic filing and transmission throughout the rules. He asked the chairs of the appellate, bankruptcy, civil, and criminal advisory committees to provide at least one representative each.

FED. R. BANKR. P. 8007

Professor Gibson noted that proposed FED. R. BANKR. P. 8007 (stay pending appeal) would continue the practice of current FED. R. BANKR. P. 8005 that requires a party ordinarily to seek relief pending an appeal in the bankruptcy court first.

A member pointed out that proposed Rule 8007(b)(2) did not provide for the situation in which a bankruptcy court fails to issue a timely ruling. He said that the Federal Rules of Appellate Procedure in that circumstance authorize a party to ask the court of appeals for relief. Professor Gibson replied that the advisory committee will consider the matter.

FED. R. BANKR. P. 8008

Professor Gibson explained that proposed FED. R. BANKR. P. 8008 (indicative rulings) had been adapted from the new indicative ruling provisions in the civil and appellate rules. Proposed FED. R. BANKR. P. 8008(a) is parallel to FED. R. CIV. P. 62.1. It specifies what action a bankruptcy court may take on a motion for relief that it lacks authority to grant because an appeal has been docketed and is pending. The moving party must notify the appellate court if the bankruptcy court states either that it would grant the motion or the motion raises a substantial issue.

She pointed out that the rule is complicated because an appeal may be pending in the district court, the BAP, or the court of appeals. Proposed FED. R. BANKR. P. 8008(c) governs the indicative ruling procedure in the district court and the BAP, while FED. R. APP. P. 12.1 takes over if the appeal is pending in the court of appeals.

FED. R. BANKR. P. 8009 and 8010

Professor Gibson reported that proposed FED. R. BANKR. P. 8009 (record and issues on appeal) and FED. R. BANKR. P. 8010 (completing and transmitting the record) would govern the record on appeal. They apply to direct appeals to the court of appeals, as well as to appeals to the district court or BAP.

Rule 8009 differs from the Federal Rule of Appellate Procedure because it continues the current bankruptcy practice of requiring the parties to designate the record on appeal. That procedure is necessary because a bankruptcy case is a large umbrella that may cover thousands of documents, of which only a few may be at issue on appeal.

Proposed FED. R. BANKR. P. 8009(f) would govern sealed documents. If a party designates a sealed document as part of the record, it must identify the document without revealing secret information and file a motion with the appellate court to accept it under seal. If the motion is granted, the bankruptcy clerk transmits the sealed document to the appellate court.

Professor Gibson noted that the advisory committee was still refining proposed FED. R. BANKR. P. 8010 to specify a court reporter's duty to provide a transcript and file it with the appellate court. The majority of bankruptcy courts, she said, record proceedings by machine. A transcript is prepared by a transcription service when ordered through the clerk. She suggested that the court reporters may not always know in which court an appeal is pending and where they must file the transcript.

FED. R. BANKR. P. 8011

Professor Gibson reported that proposed FED. R. BANKR. P. 8011 (filing, service, and signature) had been derived from current FED. R. BANKR. P. 8008 (filing and service) and FED. R. APP. P. 25 (filing and service). She noted that it followed the format, style, and some of the detail of FED. R. APP. P. 25, but placed more emphasis on electronic filing and service.

FED. R. BANKR. P. 8012

Professor Gibson reported that proposed FED. R. BANKR. P. 8012 (corporate disclosure statement) was a new provision derived from FED. R. APP. P. 26.1.

RULES AND FORMS PUBLISHED FOR COMMENT IN AUGUST 2011

Judge Wedoff reported that the advisory committee had received 11 comments and one request to testify on the proposed rules and forms published in August 2011. The only significant area of concern reflected in the comments, he said, related to the proposed amendment to Official Form 6C, dealing with exemptions. Prompted by the Supreme Court's decision in *Schwab v. Reilly*, 130 S. Ct. 2652 (2010), the revised form would give debtors the option of stating the value of their claimed exemptions as "the full fair market value of the exempted property." Some trustees, he said, are concerned that the change will encourage people to claim the entire value of the property even though they are not entitled to it.

STERN V. MARSHALL

Judge Wedoff reported that the advisory committee was continuing to monitor case law developments in the wake of the Supreme Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011). He pointed out that Professor McKenzie was leading the committee's efforts and had identified three concerns.

First, he said, the scope of the decision was unclear. The holding itself was narrow. It stated that even though that the Bankruptcy Code designates a counterclaim by a bankruptcy estate against a creditor as a "core" bankruptcy proceeding that a bankruptcy judge may decide with finality, that statutory grant of authority is inconsistent with Article III of the Constitution. A non-Article III bankruptcy judge cannot exercise the authority constitutionally because the counterclaim is really a non-bankruptcy matter.

It is not clear, he said, whether the constitutional prohibition will be held to apply to other matters designated by the statute as "core," especially fraudulent conveyance claims. The Supreme Court, he explained, has previously described fraudulent conveyance actions as essentially common law claims like those usually reserved to the Article III courts.

Second, there is uncertainty over the extent to which litigant consent may cure the defect and authorize a bankruptcy judge to hear and finally determine a proceeding that would otherwise fall beyond the judge's authority. The governing statute, 28 U.S.C. § 157(b) and (c), specifies that a bankruptcy judge may decide "core" bankruptcy proceedings with finality. If a matter is not a "core" proceeding, the bankruptcy judge

may only file proposed findings and conclusions for disposition by the district court, unless the parties consent to entry of a final order or judgment by the bankruptcy judge.

The bankruptcy rules, he explained, currently contain a mechanism for obtaining litigant consent, but only in "non-core" proceedings. FED. R. BANKR. P. 7008(a) (general pleading rules) provides that parties must specify in their pleadings whether an adversary proceeding is "core" or "non-core" and, if "non-core," whether the pleader consents to entry of final orders or judgment by the bankruptcy judge. The problem, he said, is that the term "core" now is ambiguous. As a result of *Stern v. Marshall*, he suggested, there are now statutory "core" proceedings, enumerated in 28 U.S.C. § 157(b), and constitutional "core" proceedings. The advisory committee, he said, was considering proposed rule amendments to resolve the ambiguity.

Third, there is a potential for reading *Stern v. Marshall* as having created a complete jurisdictional hole in which a bankruptcy court may not be able to do anything at all in some cases – either to enter a final order or to submit proposed findings and conclusions. He explained that 28 U.S.C. § 157(c) specifies that if a matter is not a "core" proceeding under 28 U.S.C. § 157(b), a bankruptcy judge may enter proposed findings of fact and conclusions of law for disposition by the district court. After *Stern v. Marshall*, some statutory "core" proceedings are now unconstitutional for the bankruptcy court to decide with finality. Therefore, there is a question as to whether 28 U.S.C. § 157(c), which specifically authorizes a bankruptcy judge to issue proposed findings and conclusions in "a matter that is not a core proceeding," refers only to matters that are not core under 28 U.S.C. § 157(b) or also includes matters that are not "core" under the Constitution.

If § 157(c) refers only to matters that are not "core" under the statute, bankruptcy judges would have no authority to issue proposed findings and conclusions of law in matters that the statute explicitly defines as "core" matters. And for some of these statutory "core" matters, the Constitution prevents bankruptcy judges from entering a final judgment. The potential void, he said, could arise relatively frequently. It would apply to all counterclaims by a bankruptcy estate against creditors filing claims against the estate, and it might also be held to include fraudulent conveyance cases.

QUARTERLY REPORTING BY ASBESTOS TRUSTS

Judge Wedoff reported that the advisory committee had decided to take no action on a proposal for a new rule that would require asbestos trusts created in accordance with § 524(g) of the Bankruptcy Code to file quarterly reports with the bankruptcy courts. The committee, he said, had concerns over its authority to issue a rule to that effect under the Rules Enabling Act because the trusts are created at the conclusion of a chapter 11 case. He noted that the committee had obtained input on the proposal from various interested organizations, and the great majority stated that a rule was not appropriate.

FORMS MODERNIZATION PROJECT

Judge Wedoff reported that the advisory committee's forms modernization project was making substantial progress and was linked ultimately to the Administrative Office's development of the Next Generation electronic system to supersede CM/ECF. He said that the new forms produced by the committee had been designed in large measure to take advantage of electronic filing and reporting. They are clearer, easier to read, and have instructions integrated into the questions. As a result, though, some attorneys have complained that the new forms are appreciably longer than the current versions and will require more time to complete.

The advisory committee, he said, was very sensitive to these concerns and was trying to shorten the forms where possible, while still eliciting more accurate information. Moreover, he said, the length of the forms will be substantially reduced by not having separate instructions filed.

He added that the advisory committee would like to expedite implementation of the new forms, especially consumer forms that deal with debtor income and expenses. The committee, he said, was planning to bring some of the forms to the Standing Committee at its next meeting and seek authority to publish them for public comment.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell and Professor Cooper presented the report of the advisory committee, as set forth in Judge Campbell's memorandum and attachments of December 2, 2011 (Agenda Item 6). Judge Campbell reported that the advisory committee had no action items to present.

Information Items

POTENTIAL RULE ON PRESERVATION FOR FUTURE LITIGATION

Judge Campbell reported that a panel at the May 2010 Duke Law School conference on civil litigation had urged the advisory committee to adopt a new national rule governing preservation of evidence in civil cases. The panel, he said, presented the outline of a proposed preservation rule, including eight specific elements that it said needed to be addressed in order to provide appropriate guidance to bench and bar. The proposal, he said, had been referred to the committee's discovery subcommittee, and Ms. Kuperman was asked to prepare a memorandum on the state of the law regarding preservation obligations and sanctions.

Judge Campbell pointed out that the committee's research revealed that federal case law is unanimous in holding that the duty to preserve discoverable information is triggered when a party reasonably anticipates being a party to litigation. But, he said, no consensus exists in the case law regarding: (1) when a party should reasonably anticipate being brought into litigation; and (2) the extent of the preservation duty. Rather, the law is fact-driven and left to resolution on a case-by-case basis.

As for the law on sanctions for failure to preserve, the courts of appeals are in disagreement. Some circuits hold that mere negligence is sufficient for a court to invoke sanctions, while others require some form of willfulness or bad faith before sanctions may be imposed. Some courts, moreover, have tried to specify what kinds of conduct may result in what kinds of sanctions.

Judge Campbell reported that the advisory committee wanted to ascertain the extent of preservation problems, and it asked the Federal Judicial Center to study the frequency of spoliation motions in the federal courts. That study, conducted by Emery Lee, reviewed over 131,000 cases filed in 19 district courts in 2007 and 2008. It found that spoliation motions had been filed in only 209 cases, or 0.15% of the total. About half those motions related to electronically stored information. The study revealed, moreover, that sanctions had been imposed against both plaintiffs and defendants.

In addition, the committee examined the existing laws that impose preservation obligations. It found that there is a substantial body of statutes that deal with preservation, covering many different subjects. But no coherent pattern emerges from them.

Judge Campbell reported that the discovery subcommittee had focused on what elements should be included in a proposed rule, and Professor Marcus produced initial discussion drafts to show three different possible approaches to a rule. The first was a very detailed rule, as proposed by the Duke panel. It included specific provisions giving examples of the types of events that constitute reasonable anticipation of litigation and trigger a duty to preserve. It addressed the scope of the duty to preserve, including the subject matter, the sources of information, the types of information, and the form of preservation. It also laid out time limits on the scope of the duty, such as how far back a custodian must retain information and how long the obligation to preserve continues. It contained a presumptive number of record custodians who must be identified and instructed to preserve information. The rule was also detailed on sanctions, specifying what kinds of conduct will lead to what kinds of sanctions.

The second proposed rule, he said, was substantially more general, addressing the trigger, scope, and duration of the duty to preserve and the selection of sanctions, but in less detail. Essentially, it directed parties to behave reasonably in all dimensions.

The third proposed rule addressed only sanctions and did not specify the trigger, scope, or duration of preservation obligations. Instead, it focused exclusively on the area of greatest concern to lawyers and their clients – the area, moreover, where there is the greatest disagreement and uncertainty in the law. The expectation was that by addressing the key problem of sanctions, the rule would give guidance to the people who make preservation decisions and relieve much of the uncertainty about the trigger and scope of the duty to preserve.

The third rule also distinguished between sanctions and curative measures. The latter consist of targeted actions designed to cure the consequences flowing from a failure to preserve information, such as allowing extra time for discovery or requiring the party who failed to preserve to pay the costs of seeking substitutes for the missing information. Under the proposed rule, remedial measures could be imposed if a preservation duty were not followed.

Imposition of more serious sanctions – such as an adverse inference instruction, claim preclusion, dismissal, or entry of judgment – would require something more than a mere failure to preserve. A showing would have to be made of some kind of knowing conduct, such as willfulness or bad faith. The rule also laid out the factors that a judge should consider in imposing sanctions, including the level of notice given the custodians, the reasonableness and proportionality of the efforts, whether there was good faith consultation, the sophistication of the parties, the actual demands made for preservation, and whether a party sought quick guidance from a judge.

Judge Campbell reported that the three rules had been discussed at a one-day mini-conference in Dallas in September with invited attorneys, judges, law professors, and technical experts. The committee, he said, heard very thoughtful, competing views from the participants. The discussions were very helpful, and several participants submitted papers elaborating on their positions.

In essence, he said, corporate representatives argued that the sheer cost of preserving information in anticipation of litigation is an urgent problem that calls for a strong, detailed rule providing clear guidance to record custodians. In particular, they complained about the uncertainty that corporations face in not knowing where and when a suit will be filed against them, what the claims will be, and what information may be relevant in each case. They are concerned about the heavy costs of over-preserving information. But, more importantly, they fear the harm to their reputation that may result from accusations of spoliation.

On the other hand, plaintiffs' lawyers argued that a detailed national rule would lead to greater destruction of information because of its negative implications. It would encourage custodians to destroy information not explicitly spelled out in the rule. They

emphasized that there will always be information that simply does not fit within the details of a rule, but must nevertheless be preserved.

Department of Justice representatives argued that case law should be allowed to continue running its course, and no preservation rule should be adopted at this time. They argued, in particular, that the first of the three proposed rules would lead to over-preservation by government agencies, as they would be forced to preserve records whenever there is a dispute over a claim with the government.

Judge Campbell noted that the discovery subcommittee met at the close of the mini-conference and later by telephone. It then reported in detail on the mini-conference at the full advisory committee's November 2011 meeting. After lengthy discussion, the committee decided that the subcommittee needed to continue to receive input and explore the three potential options. Under its new chair, Judge Paul W. Grimm, the subcommittee will continue to consider all the issues as open and report back at the advisory committee's March 2012 meeting.

Several members suggested that the first of the three proposed rules, the detailed option, would not be workable because of the endless variety of possible situations that may arise. A detailed new national rule, moreover, could lead to satellite litigation, as with the 1983 amendments to FED. R. CIV. P. 11 (sanctions). A sanctions-only rule, on the other hand, such as the third proposal, would resolve the serious split among the circuits on the law of sanctions, and it might well be effective in sending strong signals regarding pre-litigation conduct.

Judge Campbell suggested that even if the committee were to adopt a new federal rule on spoliation, a myriad of different rules will still exist in the state courts. Accordingly, there will not be national uniformity in any event. The problems of uncertainty will continue because state law often governs preservation obligations. A participant added that the rules on preservation are largely rules of attorney conduct, which lie within the traditional province of the states. Because of the relevance of state law, the federal courts would be on stronger jurisdictional grounds if the rule were limited to sanctions.

A member added that in most cases no federal proceeding is pending when the duty to preserve first attaches. It was suggested that the advisory committee take a limited focus because it may lack authority under the Rules Enabling Act to adopt pre-litigation preservation standards.

A participant pointed out that the scope of the obligation to preserve before trial is related to the scope of discovery under FED. R. CIV. P. 26(b)(1). Therefore, it may not be possible to have a rule that narrows the scope of what information must be preserved before a case is filed if that provision is at odds with what information must be produced

in discovery after a case is filed. Moreover, apart from the duty to preserve certain records and information, substantial additional cost is incurred in searching the information. Thus, even if it were inexpensive just to preserve information, it would still be expensive for the parties to search through it. Therefore, it might be necessary to reconsider the scope of discovery under Rule 26(b)(1).

FED. R. CIV. P. 45

Judge Campbell reported that the proposed amendments to Rule 45 (subpoena) had been published in August 2011. They make four basic changes: (1) simplifying the rule by having a subpoena issued in the name of the presiding court, authorizing nationwide service, and having local enforcement in the district where the witness is; (2) allowing the court where discovery is taken in appropriate instances to send disputes back to the court presiding over the case; (3) overruling the *Vioxx* line of cases that authorize subpoenas for out-of-state parties and a party's corporate officers to testify at trial from a distance of over 100 miles; and (4) clarifying the obligation of a serving party to provide notice.

He said that a public hearing had been scheduled for January 27, 2012, but the committee had received only two requests to testify. As a result, the hearing may be canceled and the requesting parties asked to put their views in writing or participate in a teleconference.

DUKE CONFERENCE SUBCOMMITTEE

Judge Campbell reported that a subcommittee chaired by Judge John G. Koeltl was studying the many recommendations for improvements in civil litigation made by participants at the May 2010 Duke Law School conference. He noted that the subcommittee was focusing on five categories of proposals to implement suggestions made at the conference.

First, one of the common themes voiced by lawyers at the conference was that judges need to be more active in case management. But merely promulgating additional rules will not produce better managers. Therefore, the subcommittee was coordinating with the Federal Judicial Center to improve judicial education programs and enhance informational resources. Among other things, a new civil case-management section of the *Benchbook for U.S. District Court Judges* had been drafted.

Second, Judge Campbell noted that efforts were being made to tap into local efforts around the country to test new procedures for managing litigation. A number of case-management pilot programs were underway, and the committee was working with the Federal Judicial Center to identify and monitor them. In addition, the committee

would ask chief judges around the country to keep it informed about pertinent local developments.

Judge Campbell reported that one of the initiatives that the committee was encouraging was a project to develop a standard protocol for initial discovery in employment discrimination cases. Drafted jointly by lawyers representing both plaintiffs and defendants, the protocol identifies the information that each side must exchange at the outset of an employment case, without the need for depositions or interrogatories. No objections are allowed except for attorney-client privilege. The protocol, he said, will be made available to all federal courts, and all the judges on the advisory committee will adopt it and encourage their colleagues to do the same.

Third, the advisory committee had encouraged additional empirical work, especially by the Federal Judicial Center, on how federal courts are actually handling their cases on a daily basis. One study by the Center was focusing on the early stages of a civil case, including initial scheduling orders, Rule 26(f) planning conferences, and Rule 16(b) initial pretrial conferences. The study revealed that court dockets show that the initial scheduling orders required by FED. R. CIV. P. 16(b)(1) are issued in only about half the civil cases in the district courts. But, he cautioned, docket information may not be sufficiently reliable because there are no uniform ways of recording the pertinent data, and the absence of public records may be the result of inadequate docketing practices. In addition to reviewing the docket sheets, the Center will conduct a survey of lawyers to ascertain what events occurred early in their cases.

Fourth, Judge Campbell noted that the committee had invited judges and lawyers from the Alexandria Division of the Eastern District of Virginia to discuss their experiences with that court's "rocket docket." He added that all the judges on the court share a common philosophy that cases must be handled promptly, and the bar works very well within that court culture.

Fifth, Judge Campbell said that several specific rule amendments were being considered in light of the Duke Conference, including: reducing the time to hold an initial case management conference from 120 to 60 days; eliminating the moratorium on discovery until after the Rule 26(f) conference is held; requiring parties to talk to the court about discovery problems before filing motions; amending Rule 26 to emphasize the importance of proportionality; reducing obstructive objections; limiting the presumed number of depositions in a case to five and the presumptive maximum time of a deposition from seven hours to four; reducing the presumptive number of interrogatories below the current 25; postponing contention interrogatories until later in a case; reducing service time; mandating that judges hold a scheduling conference; and emphasizing in Rule 1 that lawyers must cooperate with each other. He added that rules language was being drafted to help in considering these various ideas.

Professor Cooper added that another area for potential rulemaking was the relationship between pleading motions and discovery. Two competing proposals had been offered. One would suspend discovery until the court rules on a motion to dismiss for failure to state a claim. The other would create a presumption in favor of ruling on a motion to dismiss only after some discovery has occurred.

Judge Campbell said that the central theme at the Duke conference had been that parties generally believe that civil litigation takes too long and costs too much. The advisory committee, he said, was contemplating conducting a "Duke II" conference, but had not yet made a decision on the matter.

PLEADING STANDARDS

Professor Cooper reported that the advisory committee had no immediate plans to propose rule amendments dealing with pleading standards. The committee was actively reviewing the developing case law, and the Federal Judicial Center was continuing to conduct empirical research on the frequency of motions to dismiss and their disposition.

The Center's research had found a statistically significant increase in the number of motions filed, but not in the rate of granting motions. It was not possible to tell whether more cases were being dismissed out of the system because courts often grant motions to dismiss with leave to amend. A follow-up study by the Center had shown no statistically significant increase in plaintiffs excluded from the system by motions to dismiss or cases terminated by motions to dismiss, other than in financial instrument cases. On the other hand, some law professors have conducted their own research and claim that there has in fact been an increase in dismissals from the system.

Professor Cooper noted that the advisory committee had been presented with a large number of suggested changes in pleading standards and various suggestions for integrating pleading practice with discovery practice. He noted that there were many opportunities and possibilities for rule changes, but the committee was not contemplating proposing any rule for publication in the coming year.

PLEADING FORMS

Professor Cooper pointed out that FED. R. CIV. P. 84 (forms) specifies that the illustrative civil forms in the appendix "suffice" under the rules. He noted specifically that the form for pleading negligence had been approved by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 565 n.10 (2007). But lower federal courts have found a tension between Supreme Court cases and the current pleading forms, especially Form 18 (complaint for patent infringement).

The larger question, he said, was why the committee was still in the forms business. There was a clear need for illustrative forms in 1938 to show the bar how the new federal rules would work in practice. That objective, however, may no longer be important. Moreover, the committee has generally not paid a great deal of attention to the forms over the years. Although some, such as Form 5 (notice of a lawsuit) and Form 6 (waiver of service of a summons) had been very carefully coordinated with FED. R. CIV. P. 4(d) (waiver of service), most forms do not receive much attention.

He noted that the advisory committees have adopted different approaches towards drafting forms, and the forms are used in different ways for different purposes. The civil and appellate forms, for example, are promulgated through the full Rules Enabling Act process. The official bankruptcy forms, on the other hand, follow the first several steps of that process, but are prescribed by the Judicial Conference. The criminal forms do not go through the Rules Enabling Act process at all. They are drafted by the Administrative Office with some consultation with the criminal advisory committee..

The Standing Committee, he said, had appointed an ad hoc subcommittee on forms, composed of members of the advisory committees, to consider the appropriate role of the committees in preparing forms. Among other things, the subcommittee will consider whether the current variety of approaches is appropriate or whether there is a need for more uniformity. There appears to be little support for adopting a uniform approach, as sufficient coordination may be achieved through the Standing Committee's review of the advisory committees' recommendations. The subcommittee will also consider whether it is advisable for any of the forms to continue to follow all the steps of the full Rules Enabling Act process. He added that there was no urgency in making those decisions.

CLASS ACTIONS

Judge Campbell reported that the advisory committee had recently formed a subcommittee on class actions, chaired by Judge Michael W. Mosman, and it had begun to identify issues that might possibly warrant future rulemaking.

Professor Marcus provided background on the development of Rule 23. He explained that after the important 1966 amendments to FED. R. CIV. P. 23 (class actions), the advisory committee took no action on class actions for 25 years. In 1991, the Judicial Conference, on the recommendation of its ad hoc committee on asbestos litigation, directed the committee to study whether Rule 23 should be amended to improve the disposition of mass tort cases.

In response, the committee considered a wide range of different possible changes in the rule and sought extensive input from the bench and bar. In 1996, it published a limited number of significant amendments. They would have required a court to consider whether a class claim is sufficiently mature and whether the probable relief to individual class members justifies the costs and burdens of class litigation (commonly referred to as the "just ain't worth it" test). They would also have explicitly permitted certification of settlement classes and a discretionary interlocutory appeal from certification decisions.

During the publication period, the proposed amendments to revise the certification process proved to be very controversial. Moreover, the Supreme Court issued its decision in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), dealing with settlement certification. As a result, the committee decided to proceed only with the proposed addition of Rule 23(f) authorizing a discretionary interlocutory appeal. That provision took effect in 1998 and has proved successful.

In 2000, the committee continued working on the rule. Its additional efforts resulted in several amendments that took effect in 2003, including improving the timing of the court's certification decision, strengthening the process for reviewing proposed class-action settlements, and authorizing a second opt-out opportunity for certain class members to seek exclusion from the settlement. It also added Rule 23(g) governing the appointment of class counsel, including interim class counsel, and Rule 23(h) governing the award of attorney's fees.

Judge Campbell pointed out that the amendments pursued by the advisory committee did not address the problems of overlapping classes, recurrent efforts to certify a class through judge-shopping, or recurrent efforts to approve a settlement. Professor Cooper, he noted, had devised creative ideas on addressing those issues by rule, but they attracted too much controversy.

Judge Campbell reported that the advisory committee was considering whether Rule 23 needs to be amended to take account of several recent developments, including enactment of the Class Action Fairness Act and recent class-action case law. The committee, he said, had compiled a list of potential issues that might be addressed and was considering whether the time was ripe to give further consideration to Rule 23. On the other hand, he said, any significant change in the rule would likely be controversial, and the committee has several other, more important projects on its agenda.

INTERLOCUTORY APPEAL FROM ATTORNEY-CLIENT PRIVILEGE DECISION

Professor Cooper reported that a suggestion had been referred to the advisory committee for a rule amendment that would allow appeal by permission from an order granting or denying discovery of materials claimed to be protected by attorney-client privilege. Although referred to the civil committee, he said, the matter should also be considered by the other advisory committees.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raggi and Professor Beale presented the report of the advisory committee, as set forth in Judge Raggi's memorandum and attachments of December 12, 2011 (Agenda Item 9).

Amendments for Final Approval

FED. R. CRIM. P. 16(a)(2)

Judge Raggi reported that the advisory committee was proposing an amendment to FED. R. CRIM. P. 16(a)(2) (discovery and inspection) that would clarify an ambiguity introduced during the 2002 restyling of the criminal rules. The change would make it clear that the restyling of the rule had made no change in the protection given to government work product.

She explained that Rule 16(a) allows a defendant to inspect papers and materials held by the government. Before restyling, Rule 16(a)(1)(C) had contained enumerated exceptions to that access, including one for the government's work product. The restyled rule, however, eliminated the exceptions.

The district courts, she said, have rejected claims that the 2002 amendments had changed the substance of the rule, using the doctrine of a "scrivener's error" to deny access by the defendant to the government's work product. As a result, there appear to be no serious practical problems and no urgency to make a correction. Nevertheless, she said, the advisory committee agreed unanimously that it was inappropriate to have an ambiguous restyled rule and decided to pursue an amendment.

The committee, she pointed out, believed that the proposed change was technical and could be made without publication. Nevertheless, it recognized that the Standing Committee needed to make that policy decision.

The committee without objection by voice vote approved the proposed technical and conforming amendment for final approval by the Judicial Conference without publication.

Information Items

FED. R. CRIM. P. 6(e)

Judge Raggi reported that the advisory committee was considering the Attorney General's recommendation to amend FED. R. CRIM. P. 6(e) (recording and disclosing grand jury proceedings). The amendment would provide procedures for authorizing disclosure of historically significant grand jury materials after a suitable period of years.

The proposal, she said, was in response to a district court decision that ordered the release of grand jury materials dealing with President Nixon's testimony before the Watergate grand jury. The district court issued the release order relying on its inherent authority, even though FED. R. CRIM. P. 6(e) contains no provision expressly authorizing release of the materials.

She noted that the Department of Justice did not agree that the court had inherent authority to order disclosure, but it did not appeal the decision. Instead, it asked the advisory committee to amend Rule 6 to allow disclosure after a specified period of years. The proposal, she said, was being studied by a subcommittee chaired by Judge John F. Keenan.

FED. R. CRIM. P. 16

Judge Raggi reported that the advisory committee – after extensive study and debate – had decided not to pursue amendments to FED. R. CRIM. P. 16 (discovery and inspection) to codify the duty of prosecutors to turn over exculpatory information to the defendant. The committee, however, agreed to address the matter in a "best practices" section of the *Benchbook for U.S. District Court Judges.* She said that she had met with Judge Paul L. Friedman, chairman of the Federal Judicial Center's Benchbook Committee, and a draft section had been prepared.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Fitzwater and Professor Capra presented the report of the advisory committee, as set forth in Judge Fitzwater's memorandum and attachments of November 28, 2011 (Agenda Item 11). Judge Fitzwater noted that the advisory committee had no action items to present.

Information Items

SYMPOSIUM ON THE RESTYLED FEDERAL RULES OF EVIDENCE

Judge Fitzwater reported that the restyled Federal Rules of Evidence had taken effect on December 1, 2011. The advisory committee, he said, had held its October 2011 meeting in Williamsburg, Virginia, at the William and Mary Marshall-Wythe College of Law. The meeting was preceded by a symposium on the restyled rules, hosted by William and Mary at the committee's request.

FED. R. EVID. 801(d)(1)(B)

Judge Fitzwater noted that the advisory committee was considering a proposal to amend Rule 801(d)(1)(B) (hearsay exemption for certain prior consistent statements). It would make prior consistent statements admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility. The amendment, he said, was based on the premise that there is no meaningful distinction between substantive and rehabilitative use of prior consistent statements. The needed jury instruction, moreover, is almost impossible for jurors to understand.

He noted that there was a difference of opinion in the advisory committee on whether to pursue a change in the rule, and the members would appreciate receiving any further advice from the Standing Committee on the matter. He also noted that the committee, with the help of the Federal Judicial Center, was planning to send a questionnaire to all district judges soliciting their views on the advisability of the proposed amendment.

A member supported making the proposed change in Rule 801, but cautioned against sending out questionnaires to all judges on potential rule changes, especially where a proposed rule is not particularly significant. He said that it could set a bad precedent for other committees to send out surveys on a regular basis.

PRIVILEGES PROJECT

Judge Fitzwater reported that the advisory committee undertook a project several years ago to compile the federal common law on evidentiary privileges. The initiative, he said, was not intended to result in a codification of the evidentiary privileges or in new federal rules. Rather, it was expected to lead to a Federal Judicial Center monograph providing a restatement of the federal common law. Because of the potential sensitivity of the project, however, the committee decided not to proceed further without Standing Committee guidance and approval.

Professor Capra explained that the committee had undertaken similar types of projects in the past. For example, when Congress enacted the evidence rules in 1975, it made several changes in the rules proposed by the judiciary, but it did not change the accompanying committee notes. As a result, some of the notes are inconsistent with the text of the rules. At the committee's request, he compiled the inconsistencies and produced a Federal Judicial Center monograph under his own name. Later, the advisory committee authorized him to write a monograph on the discordance between some of the rules and the prevailing case law. Both publications were very helpful to the bar.

Professor Capra said that the law of privileges is very important, but it is not codified. The advisory committee began developing a set of privilege rules to reflect the federal common law. After initial efforts, the project, under the leadership of Professor Kenneth S. Broun, was deferred because of the committee's other priorities, such as restyling the rules. He added that the project was a low priority for the committee and would be put aside if other matters need attention. After having completed the restyling project, however, the committee now has a light pending agenda.

Members asked whether the advisory committee itself was planning to approve the work and whether the project was the best use of the committee's time and the judiciary's limited resources. Several agreed that it would be a beneficial project, but it should have a relatively low priority. Judge Kravitz added that it was fine to produce the paper, but he would not recommend giving it official advisory committee approval.

A participant recommended that the project continue because there has been recurring interest by Congress over the years in enacting privileges by law. Professor Capra added that since 1996, the advisory committee had been asked to comment on six different proposals dealing with privileges.

A member said that the Standing Committee should defer to the advisory committee's best judgment on the matter. If the advisory committee finds the project useful, especially since Congress may ask for input on privileges, it should continue.

Judge Fitzwater and Professor Capra suggested allowing Professor Broun to continue on the work on the matter and report to the advisory committee as needed at its meetings. A committee consensus developed to adopt their suggestion.

COMMITTEE JURISDICTIONAL REVIEW

The committee authorized Judge Kravitz and Professor Coquillette to complete for the committee a self-evaluation questionnaire for the Judicial Conference's Executive Committee on the need for the committee's continued existence, the scope of its jurisdiction, and its workload, composition, and operating processes.

PANEL DISCUSSION ON CLASS ACTIONS

Judge Rosenthal presided over a panel discussion on class actions with Dean Robert H. Klonoff, a member of the Advisory Committee on Civil Rules, Daniel C. Girard, Esquire, a former member of the advisory committee, and John H. Beisner, Esquire.

Judge Rosenthal noted that the discussion was in accord with the committee's tradition of spending time at its January meetings in examining long-term trends and issues that may affect the rules process in the future, but do not require immediate changes in the rules. She explained that the Class Action Fairness Act of 2005 (CAFA) had now been in place for seven years and the courts have issued several important class-action decisions in the last few years. In light of the committee's statutory obligation to monitor the continuing operation and effect of the federal rules, she said, it was an opportune time to start thinking about whether any changes in FED. R. CIV. P. 23 might be needed in the future. Class actions, she added, are a high profile area of the law and involve a great deal of money and interest.

The panel, she pointed out, consisted of an attorney who primarily represents plaintiffs and a lawyer and a law professor who normally have represented defendants. She asked them to focus on the impact of the recent cases on class-action practice and to identify any potential rule changes that might have a beneficial impact on class-action litigation.

The panel discussed a wide range of issues, but the exchange can be categorized as falling into the following four broad topics:

1. Front-loading of cases;
2. Class definition;
3. Settlement classes; and
4. Competing classes and counsel.

1. FRONT-LOADING OF CASES

In re Hydrogen Peroxide

The panel discussed the impact of *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3rd Cir. 2009). In the case, the Third Circuit held that the district court was obligated at the certification phase of a class action to apply a rigorous analysis of the available evidence and make findings supported by a preponderance of the evidence (rather than a mere threshold showing) that each element of Rule 23 has been met.

The district court was required to resolve all factual and legal disputes relevant to class certification, even if they overlap with the merits. Specifically, it should have resolved the battle of the experts over whether the alleged injury could be demonstrated by proof common to the class, rather than individual to its members. The decision, moreover, expressed concern that the district court's order certifying the class would place unwarranted pressure on the defendant to settle non-meritorious claims – elevating that concern, in effect, into a policy factor to consider in the certification process.

Although not all courts follow *Hydrogen Peroxide*, it was suggested that the practical impact of the case has been that plaintiffs are now confronted with an early merits-screening test. They must present their evidence at the certification stage or risk losing the case if the court denies certification. That conclusion, moreover, was seen as bolstered by several other cases, including the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

In *Wal-Mart*, the Supreme Court ruled that if the plaintiffs had evidence of company-wide employment discrimination, they had to present it by the time of the certification hearing. A key question, therefore, is whether the courts will now impose a higher standard of "commonality," as in *Wal-Mart*, which would necessitate more expansive discovery, or whether they will read *Wal-Mart* as limited to the unique employment setting and continue the traditional concept of commonality.

Discovery at certification

A panelist argued that *Hydrogen Peroxide* has created a much more expensive class-certification process, particularly in complex cases. He said that there is considerable uncertainty for the lawyers on how discovery is to take place after the pleading stage. Discovery may have to be conducted before certification is heard and expert witnesses may be subjected to a full *Daubert* analysis.

It was noted that expert testimony now is often a central feature at the certification stage, and extensive case law is developing on the subject, including whether *Daubert* applies at the class-certification stage. In *Wal-Mart*, the treatment of expert witnesses at certification was an important factor in the majority opinion, and *Hydrogen Peroxide* was largely a battle of the experts.

It was suggested that plaintiffs' lawyers often feel disadvantaged by the front-loading of discovery. At the same time, defendants traditionally have preferred to bifurcate discovery and avoid excessive costs by limiting discovery at certification and deferring full-blown discovery on the merits until later.

In front-loading the discovery, though, the recent decisions have raised questions about how much merits discovery is actually required up front and whether the discovery

can continue to be bifurcated if plaintiffs are now required to prove the merits of the certification issues. The discovery problems are complicated, moreover, because discovery is now largely electronic and does not lend itself very well to phasing.

A panelist said that the recent decisions have caused additional work and difficulties for the parties but have not created a crisis situation. It appears, for example, that meritorious class actions are not being killed in the cradle, as plaintiffs are afforded a fair chance to explain to the court why they believe that their class can be certified.

One panelist argued that what information both sides should put forward in class certification briefing is becoming much clearer. The information necessarily will vary from case to case, but much of the discovery is simply not relevant for certification purposes. The judges, he said, are closely managing the cases and overseeing the discovery.

The focus now for the parties, he said, is on providing useful information that a court needs to make the certification decision. Judges, for example, often ask the lawyers whether particular discovery is really needed for certification or can be deferred until later in order to meet the schedule for class certification. Some judges also indicate to the parties what sort of discovery will be needed for certification and set a time for certification briefing, leaving it up to the lawyers to figure out the details of what discovery must be exchanged for certification.

A panelist noted that *Hydrogen Peroxide* cited the advisory committee note to the 2003 amendments to Rule 23, which sets forth the concept of a "trial plan that describes the issues likely to be presented at trial and tests whether they are susceptible of class-wide proof." The recent cases, he said, have been sending a uniform message that the district court should instruct the parties to gather their available information and figure out what a class trial would look like. The court, thus, exercises the gateway function of deciding whether the jury will have the evidence it needs to make a decision that the entire class is entitled to relief. The key issue is whether the evidence varies so much among the individual plaintiffs that the jury is unable to decide that the defendant is liable to all members of the class.

Early practicable time for making the certification decision

In light of the additional information that now has to be gathered for certification, the panel discussed whether courts are being more flexible in applying Rule 23(c)(1)(A)'s requirement that certification occur at "an early practicable time." There appears to be little uniformity among the courts, however, as courts cite the language of the rule to support every conceivable outcome. Some make the certification decision very early in the case, while others defer it until much later. A few districts specify

categorically that a class certification motion be made within 90 days, while in others, the certification process occurs at the close of discovery.

Early dispositive motions

It was reported that the trend towards front-loading of class-action litigation has led to an increasing tendency to find ways to dispose of cases at an early stage. As a matter of good practice, therefore, a defendant who believes that a national class action cannot be certified under any circumstances should force the plaintiffs to come forward at an early stage and move for class certification.

Since CAFA, many more class-action cases are being brought in the federal courts that involve state laws, and more motions are being filed that challenge jurisdiction. Some state laws, moreover, appear to grant relief for class members in circumstances that may not meet the criteria for standing in the Article III federal courts.

It was suggested that there has been some drift away from analyzing class membership questions under the criteria specified in Rule 23(a) and (b) and framing them instead as matters of standing. A defendant, thus, moves to strike class allegations at the pleading stage, challenging the definition of the class through a dispositive motion, claiming that the class includes members who do not have standing. The trend may be a reaction to the sheer complexity of the issues in a multi-state post-CAFA class action, the high costs of conducting discovery, and a lack of clear guidance. In essence, the dispositive motions assert that there is some fundamental flaw in a particular class and, therefore, no need to go through the expense of discovery and the certification process.

In addition, there is some confusion over the ability of an individual plaintiff to act in a representative capacity. Some defendants claim that unless a plaintiff's claim is a mirror image of the claim of every other person in the class, in ways that do not necessarily relate to the presentation of common proof, the plaintiff does not have standing to act on behalf of others in a representative capacity.

2. CLASS DEFINITION

Preponderance and Commonality

It was suggested that there is uncertainty over what is meant by "preponderance" in Rule 23(b)(3). Under the current language of the rule, it was argued, plaintiffs are faced with a "winner take all" proposition. The court has to decide whether common issues of law and fact predominate. If they do, the court will certify the class. If they do not, certification will be denied.

It was noted that if common issues of law and fact do not predominate under Rule 23(b)(3), a court may still certify a class action under Rule 23(c)(4) for particular common issues. There is, however, very little guidance as to when a court may certify an issues class. Although a body of case law is developing on issues classes, it varies from circuit to circuit.

Recent cases show that the courts are sharply divided on Rule 23(c)(4). One circuit has ruled that an issues class is a housekeeping remedy, and predominance still must be shown. Another has held that predominance need not be shown, and a court only has to consider whether resolution of the issue will materially advance the case.

A panelist said that issues classes are not commonly invoked by counsel because lawyers prefer a more complete outcome to their litigation. They are not normally interested in litigating on a piece-meal basis. As a practical matter, there are too many complications in issues-class litigation, and it is generally not worth it for them. Another panelist disagreed, however, and suggested that issues classes are quite important and have been used effectively in environmental tort cases and employment cases.

It was recommended that the Advisory Committee on Civil Rules monitor the developing case law and ultimately evaluate whether to consider a rule amendment that adjusts the standards of Rule 23(c)(4) to give the courts greater guidance on when a class may be certified that has both common issues and individual issues. The panelists pointed out that courts that have wrestled with the rule have said that the matter is unclear. It was also noted that the ALI had spent a great deal of time on issues classes as part of its recent restatement project. If properly defined, it was argued, an amended federal rule on issues classes could be beneficial to the mass adjudication of cases.

It was pointed out that there is a mechanism for dealing with predominance issues arising from state-law variations, especially in post-CAFA cases involving consumer claims arising under the laws of multiple states. In these cases, defendants generally argue that the claims have to be considered individually under different state consumer protection laws. Although a national class action may still be maintained, as in the *De Beers* litigation in the Third Circuit, a case may effectively be divided into sub-classes on a state-by-state basis for litigation purposes. In the settlement context, the analysis of state law variations historically was an issue of "manageability." Defense counsel would argue that the court cannot litigate the case on a manageable basis because the jury would have to be charged on the law of 50 states.

It was pointed out that one factor that has increased the number of class-action cases in the federal courts is the strategy of plaintiffs – reinforced by a general skepticism of federal courts towards nationwide classes – to break down a class into several subclasses, such as a separate class action for each state. That tendency will continue to occur in employment cases, as classes are broken down into smaller class actions,

especially after *Wal-Mart v. Dukes*. The trend will result in more class actions, and multiple class actions on the same subject. The Judicial Panel on Multidistrict Litigation will routinely draw the federal cases together to conduct the discovery on a common basis. In the end, though, separate certification determinations will have to be made in each class action.

In the past, commonality was not an important issue and was often stipulated. The real issue, rather, was predominance. But the Supreme Court has now said that the common issue has to be central to the validity of each of the claims. It has to be a central, dispositive issue to class certification. Commonality, moreover, is used in other rules, such as Rule 20 (joinder), which contains the exact same language. So one issue for the future will be whether *Wal-Mart* will have an impact on joinder.

Rule 23(b)(2) classes

It was suggested that *Wal-Mart v. Dukes* represents a potential sea change, not only regarding "commonality" under Rule 23(a), but also for classes under Rule 23(b)(2). A panelist said that the most remarkable aspect of the *Wal-Mart* decision, and potentially the most important aspect, was the section dealing with Rule 23(b)(2). The Court's statements that back pay could not be brought as part of a (b)(2) action because it was not "incidental" were a major departure from the decisions of the courts of appeals. Moreover, the Supreme Court suggested that there may be a due process problem with any monetary claim in a (b)(2) action, even a claim for statutory damages or incidental damages.

Accordingly, many difficult questions arise as to the scope of Rule 23(b)(2) after *Wal-Mart*, and there will be a great deal of analysis of the decision and the ensuing case law. Questions will arise, for example, on whether some problems can be dealt with by allowing opt-out classes under (b)(2) or hybrid classes under (b)(2) and (b)(3).

Arbitration Clause Cases

It was argued that *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), may have the most important impact of any of the recent class-action cases, for it has been seen as effectively eviscerating many small claims cases. Although the Supreme Court noted in *Amchem* (which dealt with mass torts) that class actions are really about small claims cases, rather than mass torts, it later dealt a virtual death knell to many small claims cases in *Concepcion.*

It was suggested that one of the issues that plaintiffs thought was left open in *Concepcion* was whether a "no class-arbitration" clause may be invalidated if the plaintiffs can show that it is impossible to vindicate their rights other than through class

arbitration. One court of appeals ruled recently, however, that the argument could not survive after *Concepcion*.

3. SETTLEMENT CLASSES

The need for a Rule 23 amendment on settlement classes

A panelist said that many of the court decisions since *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), have wrestled with what must be shown in the context of certifying a settlement class. Although *Amchem* said that the district court does not have to worry about "manageability" in a settlement case under Rule 23(b)(3), the class must still meet the tests of preponderance, commonality, and adequacy, and the case has to be treated as if it were going to trial. In the Third Circuit's *De Beers* litigation, for example, the court's opinion noted that "(e)ver since the Supreme Court's landmark decisions in *Amchem Products Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), one of the most vexing questions in modern class action practice has been the proper treatment of settlement classes, especially in cases national in scope that may also implicate state law."

Judge Kravitz asked the panel whether FED. R. CIV. P. 23 should be amended to deal specifically with settlement classes.

The panelists agreed that the absence of a settlement-class provision has created problems and has tended to push settlements, especially in mass-tort cases, outside the court system. Since *Amchem*, the parties in these cases have had to construct work-around solutions to achieve settlements, often a settlement that lies outside judicial supervision under Rule 23(e).

The absence of a workable settlement-class device is seen as a major problem in mass torts because there is no supervision of the parties' actions or the attorney's fees. Defendants, moreover, are concerned about engaging in settlements outside the courts because they are left to their own devices. They must hope that the terms of the settlement stick because they have not been sanctioned by a court.

A panelist summarized three specific impacts of *Amchem*. First, he said, more cases are now proceeding to non-class settlements, where there are no criteria and no supervision. Second, several cases have struck down non-judicial settlements, forcing the parties to go back to the court and try cases that all the parties wanted to settle. Third, the requirements for a litigation class place defendants in an awkward position. If they claim under *Amchem* that the case is suitable for class certification and trial, and then fail to settle, they may have stipulated to something that will harm them for litigation purposes. The internal problem for the defendants is what they must do to support and

enforce a settlement after they have asserted to the court that the case is suitable for certification as a litigation class.

A panelist added that the absence of a clearly defined standard for certification of a settlement class is exploited by tactical, professional objectors. In essence, they want a financial reward in return for dropping their objections. Greater clarity in the rule, he said, would not solve the problem of non-meritorious objections entirely, but it would take an argument away from nuisance objectors.

Approval of Settlements

Judge Rosenthal reported that the rules committees retreated in the 1990s from the decision to seek approval of a separate provision for settlement classes because *Amchem* and *Ortiz* were pending in the Supreme Court. But there was also strong and negative reaction to the committee's published rule, especially from law professors who argued that it would unleash the forces of collusion and lead to rampant reverse auctions.

At the same time, defendants feared that loosening the standards for certification of settlement classes would bleed over inevitably to loosen the standards for litigation class actions. They warned that the proposal would invite more class actions because it would be easier for potential plaintiffs to obtain settlement awards. In light of these concerns, she said, there was no consensus for the committee to proceed with the proposal.

She added that the 2003 amendments to Rule 23 were designed to put rigor into the evaluation of a settlement's fairness, reasonableness and adequacy and to strengthen the oversight of attorney's fees. The amendments, though, deliberately did not address whether the standards for certifying a settlement class should be different from those for certifying a trial class. She asked whether conditions have changed since 2003 and whether the absence of a settlement class certification standard in Rule 23, coupled with other concerns raised by the panelists, are sufficiently acute to warrant pursuing rule amendments.

A panelist explained that effective brakes are currently in place to deal with abusive settlements. Most class actions, moreover, are litigated in a relatively small number of district courts. The judges are sophisticated and experienced and know how to deal with issues of fairness and compensation.

A panelist urged pursuing a distinct rule addressing settlement classes. He noted that the current requirements for certification are clear, perhaps too clear, and are inconsistent with the realities of the settlement process. The defendants, in reality, are waiving their defenses and do not have a trial plan because their objective is a settlement without a trial. Nevertheless, *Amchem* requires them to go through a certification process

that does not make a lot of sense for them. Another panelist did not see a pressing need for a settlement-class rule in anti-trust, securities, and financial services cases, but agreed that it could be helpful in mass-tort cases.

A panelist argued that the primary focus of a proposed settlement-class rule should not be on the class-certification process. He pointed out that settlements in mass-tort cases do not reach the stage of court approval under Rule 23(e)(2) because the plaintiffs cannot meet the certification requirements of Rule 23(a) and (b).

Rather, an amended rule should build on Rule 23(e)(2), which specifies that a settlement must be "fair, reasonable, and adequate." The rule would alter *AmChem's* statement that Rule 23(e) is not a substitute for Rule 23(a) and (b). Instead, the inquiry in a settlement-class case would proceed directly to Rule 23(e), essentially skipping over Rule 23(a) and (b).

The amendment could augment the court's inquiry under Rule 23(e)(2) by requiring it to examine the fairness of compensation among the different members of the class and determine whether variations in individual entitlement are adequately reflected in the proposed settlement. Injuries of class members, for example, may well range from mere fear of injury to permanent disability. It was pointed out that most mass-tort settlements do in fact consider those distinctions and typically provide a grid of different compensation levels for different levels of injury. They also establish some sort of due process arrangements for making the awards.

The recent ALI principles of aggregate litigation deal with certification of a settlement class and provide that a settlement class does not have to meet the standards for a litigation class. They specify the various fairness factors that must be applied to settlements and address second opt-outs and objectors. It was recommended that the civil advisory rules committee review the ALI deliberations to see whether any of the proposals it considered would be suitable for a federal rule change.

It was reported that the ALI also had taken a hard look at cy-près cases. Its principles of aggregate litigation create a presumption that undistributed money is given to the class. If there is a cy-près issue, it is normally because it is difficult to distribute the money, and a recipient or recipients must be selected that mirrors the purpose of the class.

Although just one part of the larger ALI project to address settlement classes, the cy-près portion of the new principles has been cited more often than all other provisions of the principles combined. It has recently been adopted as the law of a federal circuit and cited by two other circuits. A panelist recommended that if the advisory committee decides to proceed with amendments to address settlement classes, cy-près should be an important component of them.

Role of the state attorneys general in class settlements

It was pointed out that the attorneys general of the states review class-action settlements carefully and play a useful and appropriate role. The attorneys general have a sharing arrangement and work well together in reviewing settlements and taking action where appropriate.

Under CAFA a defendant has to give notice of a settlement to the attorneys general of the affected states within 90 days. After the notice, the lawyers may receive calls from a group of attorneys general inquiring into the facts and details of the case and the settlement. They are also often asked to present supporting information to justify their fees. In addition, when a truly abusive settlement is announced, law professors, concerned lawyers who may have had competing cases, as well as the attorneys general, normally come forward to object.

It was agreed that the impact of the efforts of the attorneys general has been to raise the bar generally for negotiating and presenting settlements. Courts, moreover, are very conscious in overseeing how much money is distributed to the class, how soon it is distributed, and how much the lawyers receive in fees.

In light of the effectiveness of the review of settlements by the attorneys general, the panel was asked whether there is still a need for Rule 23(e)'s requirement that the presiding judge review and approve all settlements. The panelists replied that judicial supervision is still appropriate and pointed out that the attorneys general do not intervene in every case.

4. COMPETING CLASSES AND COUNSEL

Duplication of efforts

A panelist pointed to the problems arising when many different counsel file similar class actions, as often occurs under the federal anti-trust laws. Historically, the cases have been coordinated by having the Multidistrict Litigation Panel sweep them into a single proceeding for pretrial purposes. Recently, though, lawyers for both plaintiffs and defendants have been invoking the "first-filed" rule. Thus, if the defendants have no objection to the location of the first-filed case, their lawyers file motions to stay or dismiss all other class actions, and the matter never reaches the MDL panel. Likewise, plaintiffs who file the first case defend their turf by filing motions to stay or dismiss all later cases.

It was reported that law firms filing class-action cases have a significant problem in controlling the work of other, competing lawyers. When a law firm representing a class of plaintiffs reaches the point of resolving the case with the defendants, it is often

confronted with other lawyers seeking fees for having performed unnecessary or counter-productive services. The lawyers were not asked to perform the work for the class, and their intervention may in fact be an impediment to resolution of the case. Defendants should not have to pay for the unnecessary services, nor should fees be diverted from the lawyers who actually handled the important work on the case.

It was pointed out that the Southern District of New York has developed a body of case law specifying that before class counsel is appointed, services that duplicate the work rendered by other counsel are not compensable. And after the appointment of counsel, only services performed at the direction of lead counsel are compensable. That process was said to be working effectively and might be considered for inclusion in an amended rule.

Appointment of Counsel

It was reported that Rule 23(g), part of the 2003 rule amendments, has worked very well and is beneficial for practitioners. It allows the court to appoint interim class counsel after a case has been filed to represent the class up through certification. Then at certification the court decides whom to appoint as class counsel. There is some question, though, as to whether the rule applies when there is just one case.

A panelist said that Rule 23(g) should be applied early and often, for it is essential for the courts to control the appointment of counsel and the payment of attorney fees. In many CAFA cases, for example, a lawyer must negotiate with other lawyers who have filed duplicative cases in order to reach agreement on the hard policy decisions on how best to frame the case to achieve court certification. It leads to a good deal of tactical behavior among counsel that has little to do with the presentation of the case for certification. To make those hard policy decisions, he said, it is important to have only one lead lawyer, or maybe two lawyers, in charge of the case. Better outcomes are reached when a court asserts strong control at the front end of a case, and Rule 23(g) is the perfect vehicle to achieve that control.

A panelist said that when there is an MDL proceeding, which brings many class actions together, some courts forgo Rule 23(g) and rely on their inherent authority and do one of two things. On the one hand, they may instruct the counsel of all the many overlapping cases that they should get together and file a consolidated complaint that is, in effect, an amalgam of all the actions. Usually, as a part of that process, a management team emerges to take responsibility for the new complaint, which essentially initiates a new action. On the other hand, where there are many single-state actions in the MDL proceeding, the cases will not be combined because each state wants to stand on its own. Typically a liaison counsel is appointed by the court to bring all the counsel together. He added that counsel are not usually brought together for fee-sharing purposes, although they generally have made some arrangements on their own.

Federal-State coordination

Judge Rosenthal noted that CAFA has increased the number of federal class actions and affected the nature and extent of federal-state issues. She asked whether the pre-CAFA problems have abated and whether Rule 23 is adequate in dealing with current federal-state coordination issues.

It was agreed that CAFA is working much as its proponents intended. Cases with interstate implications are migrating to the federal courts, while those involving local controversies remain in the state courts.

A panelist said that the remaining coordination problems arise mostly in one state. When there is a multi-state controversy after CAFA, most class actions will be filed in the federal courts. But if a group of plaintiffs live in the same state as the defendant, their class action will be heard in the state courts. He said that it is common to have a national MDL proceeding that consolidates class actions proceedings for all the federal cases, except those in one state. In that state, there will be a parallel class action in the state courts for local residents. Despite the separate proceedings, coordination normally occurs among counsel and the courts.

The panelists noted that the federal MDL judges have become very proficient in handling MDL proceedings and in reaching out to work cooperatively with the state courts in mass-tort cases. They added that state court judges have their own difficult issues to resolve, and coordination with their federal colleagues has been very beneficial.

CONCLUSIONS

Judge Rosenthal summarized the various concerns voiced by the panelists and asked each to pick the single most promising potential rule amendment that would have a beneficial impact on class-action practice.

Front-loading of cases

One panelist cited the front-loading of cases after *Hydrogen Peroxide* as an important issue that needs to be addressed. He suggested drafting a rule to give the parties and the courts more guidance on exactly what information a plaintiff must produce for class certification. The parties, he said, are uncertain about the impact of all the recent cases. They want an early ruling on class certification, but they also want to avoid discovery costs and prefer to continue with some form of bifurcated discovery.

Class definition

Another panelist suggested a rule that revisits the issue of predominance and acknowledges that most cases appropriate for class adjudication in fact have individual issues. To pretend that such is not the case, he said, results in a waste of time and much unproductive behavior. There is, moreover, a difficult intersection among several class-definition issues, including the current ambiguity over issues classes under Rule 23(c)(4), the use of (b)(2)-(b)(3) hybrid classes, certification of settlement-only classes, and handling (b)(3) classes that have some individual issues with bifurcated liability and damages.

Rather than having an "all or nothing" approach to certification based on whether common issues predominate or not, the committee might prepare a rule that gives the courts direction and discretion in class-actions that have individual issues. As a starting point, he suggested examining the case law on issues-classes under Rule 23(c)(4). A wide variety of cases, he said, can be adjudicated very effectively on a class basis. But many of the most important – those where group adjudication will confer the most social benefit – will likely have individual issues as well as common issues. He also suggested developing a rule that is flexible enough to accommodate a lower bar for certification of classes for settlement purposes.

Settlement classes

Another panelist's choice was for a distinct settlement-class rule. It might be similar to the advisory committee's proposed amendments to Rule 23(b)(4) in the 1990s. Regardless of the details of the rule, though, it should contain a specific provision that creates a clear basis for a district court to approve and supervise mass-tort settlements under Rule 23.

NEXT MEETING

The committee will hold its next meeting on Monday and Tuesday, June 11 and 12, 2012, in Washington, D.C.

Respectfully submitted,

Peter G. McCabe,
Secretary

Agenda E-19 (Summary)
Rules
March 2012

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

Approve the proposed amendment to Criminal Rule 16, and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law. . . . . pp. 8-9

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

- Federal Rules of Appellate Procedure. . . . . pp. 2-3
- Federal Rules of Bankruptcy Procedure.. . . . . pp. 3-4
- Federal Rules of Civil Procedure.. . . . . pp. 4-7
- Federal Rules of Criminal Procedure.. . . . . pp. 9-10
- Federal Rules of Evidence. . . . . pp. 10-11
- Five-Year Review of Committee Jurisdiction and Structure.. . . . . p. 11

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

Agenda E-19
Rules
March 2012

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure (Committee) met on January 5–6, 2012. All members attended, except Larry D. Thompson, Esq., who participated by telephone, and *ex officio* member Deputy Attorney General James M. Cole. Elizabeth Shapiro, Esq., attended on behalf of the Department of Justice.

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

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

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

FEDERAL RULES OF APPELLATE PROCEDURE

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

Informational Items

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

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

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

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules Approved for Publication and Comment

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

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

Informational Items

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

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

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

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

FEDERAL RULES OF CIVIL PROCEDURE

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

Informational Items

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

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

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

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

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

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

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

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

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

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

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

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

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

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

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

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

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

> **Recommendation:** Approve the proposed amendment to Criminal Rule 16, and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

Informational Items

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

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

FEDERAL RULES OF EVIDENCE

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

Informational Items

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

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

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

FIVE-YEAR REVIEW OF COMMITTEE JURISDICTION AND STRUCTURE

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

Respectfully submitted,

Mark R. Kravitz, Chair

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

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

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

MARK R. KRAVITZ
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JEFFREY S. SUTTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

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

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

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

Date: **December 12, 2011**

I. Introduction

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

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

* * * * *

II. Action Item—Rule 16

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

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

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

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

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

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

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

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

* * * * *

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

PROPOSED AMENDMENT TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 16. Discovery and Inspection

1 **(a) Government's Disclosure.**

2 * * * * *

3 **(2)** ***Information Not Subject to Disclosure.***

4 Except as permitted by Rule 16(a)(1)(A)-(D),

5 (F), and (G) ~~Except as Rule 16(a)(1) provides~~

6 ~~otherwise~~, this rule does not authorize the

7 discovery or inspection of reports, memoranda,

8 or other internal government documents made

9 by an attorney for the government or other

10 government agent in connection with

11 investigating or prosecuting the case. Nor does

12 this rule authorize the discovery or inspection of

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

1 statements made by prospective government

2 witnesses except as provided in 18 U.S.C.

3 § 3500.

Committee Note

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

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

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

the restyled rule as eliminating protection for government work product.

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

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

COMMITTEE ON RULES
OF
PRACTICE AND PROCEDURE

Washington, DC
June 11-12, 2012

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AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
June 11–12, 2012

1. Welcome and Opening Remarks

   A. Opening remarks by Chair
   B. Report on March 2012 Judicial Conference session
   C. Transmission of Supreme Court-approved proposed rule amendments to Congress

2. **ACTION** – Approving minutes of January 2012 committee meeting

3. Report of the Administrative Office

   A. Legislative Report
   B. Administrative Report

4. Report of the Advisory Committee on Civil Rules – Judge David Campbell

   A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Rules 45 and 37
   B. Preservation and sanctions
   C. Work relating to the 2010 Duke Conference
   D. Pleading
   E. Rule 84 forms
   F. Rule 23 subcommittee work
   G. Minutes and other informational items

5. Report of the Advisory Committee on Bankruptcy Rules – Judge Eugene Wedoff

   A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Rules 1007(b)(7), 4004(c), 5009(b), 9006(d), 9013, 9014, Official Form 7, Official Forms 9A–9I, Official Form 10, and Official Form 21
   B. **ACTION** – Approving publishing for public comment proposed amendments to Rules 1014, 7004, 7008, 7012, 7016, 8001–8027, 9023, 9024, 9027, 9033, Official Forms 3A and 3B, Official Forms 6I and 6J, and Official Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2
   C. Ongoing work on model chapter 13 plan and related rule amendments
   D. Mini-conference on mortgage forms
   E. Minutes and other informational items

6. Report of the Advisory Committee on Evidence Rules – Chief Judge Sidney Fitzwater

   A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Rule 803(10)

B. **ACTION** – Approving publishing for public comment proposed amendments to Rules 801(d)(1)(B) and 803(6), (7), and (8)
C. Minutes and other informational items

7. Report of the Advisory Committee on Appellate Rules – Judge Jeffrey Sutton

A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Rules 13, 14, 24, 28, 28.1, and Form 4
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C. Minutes and other informational items

8. Report of the Advisory Committee on Criminal Rules – Judge Reena Raggi

A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Rule11
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D. Minutes and other informational items

9. Other Informational Items

A. Report of the E-Filing Subcommittee – Judge Neil Gorsuch
B. Memorandum on possible substantive changes made by the style projects
C. Interim assessment of the *Strategic Plan for the Federal Judiciary*

10. Next meeting in Boston, MA on January 3 and 4, 2013

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To carry on a continuous study of the operation and effect of the general rules of practice and procedure.

Members	Position	District/Circuit	Start Date	End Date
Mark R. Kravitz Chair	D	Connecticut	2011	2014
James Cole*	DOJ	Washington, DC	----	Open
Dean C. Colson	ESQ	Florida	2009	2012
Roy T. Englert, Jr.	ESQ	Washington, DC	2010	2013
Gregory G. Garre	ESQ	Washington, DC	2011	2014
Neil M. Gorsuch	C	Tenth Circuit	2010	2013
Marilyn L. Huff	D	California (Southern)	2007	2013
Wallace B. Jefferson	CJUST	Texas	2010	2013
David F. Levi	ACAD	North Carolina	2009	2012
Patrick J. Schiltz	D	Minnesota	2010	2013
James A. Teilborg	D	Arizona	2006	2012
Richard C. Wesley	C	Second Circuit	2011	2014
Diane P. Wood	C	Seventh Circuit	2007	2013
Daniel Coquillette Reporter	ACAD	Massachusetts	1985	Open

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Liaison for the Advisory Committee on Bankruptcy Rules	**Judge James A. Teilborg**	***(Standing)***
Liaison for the Advisory Committee on Civil Rules	**Judge Arthur I. Harris**	***(Bankruptcy)***
Liaison for the Advisory Committee on Civil Rules	**Judge Diane P. Wood**	***(Standing)***
Liaison for the Advisory Committee on Criminal Rules	**Judge Marilyn L. Huff**	***(Standing)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Judith H. Wizmur**	***(Bankruptcy)***
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Liaison for the Advisory Committee on Evidence Rules	**Judge John F. Keenan**	***(Criminal)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Richard C. Wesley**	***(Standing)***

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TAB 1A

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Feb. 28, 2012

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 5-6, 2012
Phoenix, Arizona
Draft Minutes

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ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Phoenix, Arizona, on Thursday and Friday, January 5 and 6, 2012. The following members were present:

Judge Mark R. Kravitz, Chair
Dean C. Colson, Esquire
Roy T. Englert, Jr., Esquire
Gregory G. Garre, Esquire
Judge Neil M. Gorsuch
Judge Marilyn L. Huff
Chief Justice Wallace B. Jefferson
Dean David F. Levi
Judge Patrick J. Schiltz
Judge James A. Teilborg
Judge Richard C. Wesley
Judge Diane P. Wood

Deputy Attorney General James M. Cole and Larry D. Thompson, Esquire were unable to attend, but Mr. Thompson participated by telephone. The Department of Justice was represented at the meeting by Elizabeth J. Shapiro, Esquire.

Also participating were the committee's former chair, Judge Lee H. Rosenthal, former lawyer members Douglas R. Cox and William J. Maledon, and the committee's style consultant, Professor R. Joseph Kimble.

Judge Rosenthal chaired a discussion on class action issues with the following panelists: Dean Robert H. Klonoff, a member of the Advisory Committee on Civil Rules; Daniel C. Girard, Esquire, a former member of the advisory committee; and John H. Beisner, Esquire.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Peter G. McCabe	The committee's secretary
Jonathan C. Rose	Rules Committee Officer
Andrea L. Kuperman	Rules law clerk to Judge Kravitz
Joe Cecil	Research Division, Federal Judicial Center
Bernida Evans	Rules Office Management Analyst

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
- Judge Jeffrey S. Sutton, Chair
- Professor Catherine T. Struve, Reporter

Advisory Committee on Bankruptcy Rules —
- Judge Eugene R. Wedoff, Chair
- Professor S. Elizabeth Gibson, Reporter
- Professor Troy A. McKenzie, Associate Reporter

Advisory Committee on Civil Rules —
- Judge David G. Campbell, Chair
- Professor Edward H. Cooper, Reporter
- Professor Richard L. Marcus, Associate Reporter

Advisory Committee on Criminal Rules —
- Judge Reena Raggi, Chair
- Professor Sara Sun Beale, Reporter
- Professor Nancy J. King, Associate Reporter

Advisory Committee on Evidence Rules —
- Judge Sidney A. Fitzwater, Chair
- Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Committee Membership Changes

Judge Kravitz announced with regret that the terms of Messrs. Cox and Maledon had expired on October 1, 2011, and both were attending their last Standing Committee meeting. He thanked them for their distinguished service on the committee, described their many contributions to the committee's work and the rules program, and presented each with a plaque signed by Chief Justice John Roberts, Jr. and Judge Thomas F. Hogan, Director of the Administrative Office.

Judge Kravitz introduced the new committee members, Judge Wesley and Mr. Garre, and he summarized their impressive legal backgrounds. He reported that Mr. Thompson was also a newly appointed member of the committee, but was unable to attend the meeting.

Meeting with Supreme Court Justices

Judge Rosenthal reported on a recent meeting held at the Supreme Court that she had attended with Judge Kravitz, Dean Levi, Professor Coquillette, and former committee chair Judge Anthony J. Scirica. They had an extensive and candid exchange with the Chief Justice and other justices on the rules program. The discussion, she said, touched upon such matters as the openness of the rules process, the procedures followed by the rules committees, the effective use of empirical research to support proposed rule amendments, and the rules committees' ongoing relationships with Congress, the bar, and the academy. The meeting, she said, had been very beneficial and met all the committee's objectives. She added that it would make sense to pursue similar dialogues with the Court every five years or so.

Judicial Conference Report

Judge Kravitz reported that the Judicial Conference at its September 2011 session had approved all the proposed amendments to the rules and forms presented by the committee.

Rules Taking Effect on December 1, 2011

Judge Kravitz referred to the amendments to the appellate, criminal, and evidence rules and the bankruptcy rules and forms that took effect by operation of law on December 1, 2011.

Pending Rule Amendments

Judge Kravitz reported that proposed amendments to the appellate, bankruptcy, civil, criminal, and evidence rules had been published for comment in August 2011. Although public hearings had been scheduled, few requests had been submitted by bench and bar to date to testify on the proposals.

Lawsuit Abuse Reduction Act

Ms. Kuperman reported that the proposed Lawsuit Abuse Reduction Act of 2011 (H.R. 966) would restore the mandatory-sanctions provision of FED. R. CIV. P. 11 (sanctions). Adopted in 1983, she said, the provision simply did not work and was later repealed in 1993. In addition, she said, the proposed legislation would eliminate the beneficial safe-harbor provision of Rule 11(c)(2), added in 1993. It gives a party 21 days to withdraw challenged assertions on a voluntary basis.

She pointed out that Judges Rosenthal and Kravitz had written to the chair of the House Judiciary Committee to oppose the bill. Their letter emphasized that the Federal Judicial Center's empirical research had demonstrated that the 1983 version of Rule 11 had produced wasteful satellite litigation and increased the time and costs of civil litigation. She added that the American Bar Association and other organizations had also sent letters to Congress opposing the legislation.

She noted that the House Judiciary Committee had held a hearing on H.R. 966 in March 2011 and then reported out the bill. But there was no further action in the House, although a companion bill (S. 533) was introduced in the Senate.

Sunshine in Litigation Act

Ms. Kuperman reported that Judges Rosenthal and Kravitz had written to the chair of the Senate Judiciary Committee to oppose the proposed Sunshine in Litigation Act of 2011 (S. 623). The bill would prevent a court from issuing a discovery protective order unless it first makes particularized findings of fact that the order would not restrict the disclosure of information relevant to protecting public health or safety. She noted that the bill, similar to others introduced in past Congresses, had been favorably reported out of committee in May 2011, but there had been no further action on it.

Pleading Standards

Ms. Kuperman reported that no legislation was currently pending in Congress to address civil pleading standards in light of the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

Consent Decrees

Ms. Kuperman noted that legislation (H.R. 3041) had been introduced to limit the duration of consent decrees issued by federal courts that impose injunctive or other prospective relief against state or local programs or officials. The bill, she said, was being monitored closely by the Judicial Conference's Federal-State Jurisdiction Committee. It would not amend the federal rules directly, but could impact the rules in procedural ways. The legislation, she said, had been referred to Congressional committee, but no further action had taken place on it.

Costs and Burdens of Civil Discovery

Ms. Kuperman reported that the House Judiciary Committee Subcommittee on the Constitution had held a hearing in December 2011 on "the costs and burdens of civil discovery." She noted that Judges Kravitz and Campbell had sent a letter to the subcommittee chair providing an update on the advisory committee's various efforts to reduce discovery costs, burdens, and delays. The letter, she said, urged Congress to allow the Advisory Committee on Civil Rules to continue pursuing these issues under the thorough and deliberate process that Congress created in the Rules Enabling Act. She added that Congressional staff had been invited to, and had attended, the advisory committee's recent meeting in Washington. The committee, she added, will continue to keep members and staff of Congress informed of pertinent developments.

Time to File a Notice of Appeal When a Federal Officer or Employee is a Party

Ms. Kuperman reported that the Congress had enacted legislation amending 28 U.S.C. § 2107 to conform it to the December 2011 change in FED. R. APP. P. 4(a)(1) (time to file a notice of appeal in a civil case). The statute mirrors the amended rule and clarifies the time for parties to appeal in a civil case when a federal officer or employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States.

Bankruptcy Legislation

Ms. Kuperman reported that legislation (Pub. L. No. 112-64) had been enacted in December 2011 to extend for another four years the exemption given to qualified reservists and members of the National Guard from application of the means-test presumption of abuse in Chapter 7 bankruptcy cases. She noted that a footnote in an interim bankruptcy rule would have to be updated to incorporate the number of the new public law. In addition, she said, legislation was pending to add some bankruptcy judgeships and increase the filing fee for chapter 11 cases. If enacted, it would require conforming changes to the bankruptcy forms to reflect the higher fee.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rose reported that Judge Thomas F. Hogan had assumed his duties as the new Director of the Administrative Office.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil reported that Judge Jeremy D. Fogel, the new Director of the Federal Judicial Center, had decided to undertake a comprehensive study of case-dispositive motions in civil cases. To that end, he said, the Center was seeking assistance from several law professors to participate in the study and provide law students to help in the research. The Center, he added, was conducting pilot efforts for the project and would present proposals for consideration by the Advisory Committee on Civil Rules at its March 2012 meeting. He suggested that the project would likely be ready to proceed at the start of the next academic year.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of the last meeting, held on June 2-3, 2011.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Sutton and Professor Struve presented the report of the advisory committee, as set forth in Judge Sutton's memorandum and attachments of December 7, 2011 (Agenda Item 10). Judge Sutton reported that the advisory committee had no action items to present.

Informational Items

Judge Sutton thanked the members, reporters, and committee staff for working with congressional staff on the amendment of 28 U.S.C. § 2107 to make it consistent with FED. R. APP. P. 4(a)(1) (time to file a notice of appeal in a civil case). Even though it involved a relatively minor, technical change, he said, it had taken enormous effort and skill to accomplish the legislative action.

He reported that only one comment had been received to date on the advisory committee's proposed amendment to FED. R. APP. P. 28 (briefs) that would remove the requirement that a brief set forth separate statements of the case and of the facts. The comment, from a prominent appellate judge, opposed combining the two statements.

But, he said, the advisory committee believed that the current requirement of separate statements had generated confusion and redundancy. Combining them would provide lawyers with greater flexibility in making their presentations.

Judge Sutton reported that the advisory committee had not reached a consensus on whether to treat federally recognized Indian tribes the same as states for the purpose of filing amicus briefs under FED. R. APP. P. 29(a) (amicus briefs). The committee, though, did reach a consensus that municipalities should be included with Indian tribes if a Rule 29 amendment were pursued. Judge Sutton added that he had sent a letter to the chief judges of all the courts of appeals soliciting their views on the matter.

Judge Sutton reported that Professor Richard D. Freer of Emory Law School, a guest speaker at the advisory committee's recent meeting had complained about the frequency of federal rule changes. Professor Freer argued that frequent changes increase costs, add confusion for lawyers, complicate electronic searches, and may lead to unintended consequences. He suggested that if rule changes were made less often – such as once every several years – the bar would pay more attention to the rules and submit more and better comments. Judge Sutton noted that the advisory committee was taking the criticism to heart and generally supports deferring and bundling amendments where feasible.

A member endorsed the suggestion generally and added that lawyers often complain about the committees "tinkering" with the rules. Other participants pointed out that the advisory committees do in fact bundle rule amendments where possible. Nevertheless, many rule changes are required by legislation, case law developments, and other factors beyond the committees' control.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Wedoff and Professor Gibson presented the report of the advisory committee, as set forth in Judge Wedoff's memorandum and attachments of December 12, 2011 (Agenda Item 8).

Amendments for Publication

FED. R. BANKR. P. 7054(b) and 7008(b)

Judge Wedoff reported that the proposed amendments to FED. R. BANKR. P. 7054 (judgments and costs) and FED. R. BANKR. P. 7008(b) (attorney's fees) would clarify the procedure for seeking the award of attorney's fees in adversary proceedings. Bankruptcy procedures, he explained, are different from those in civil actions in the district courts.

Civil practice is governed by FED. R. CIV. P. 54(d)(2) (attorney's fees), which specifies that a claim for attorney fees be made by motion unless the substantive law requires proving the fees at trial as an element of damages. The bankruptcy rules, though, have no analog to FED. R. CIV. P. 54(d)(2). Instead, attorney's fees are governed by FED. R. BANKR. P. 7008(b), which specifies that a request for the award of attorney's fees be pleaded as a claim in a complaint or other pleading.

The difference between the civil and bankruptcy rules, he said, creates a trap for the unwary, especially for lawyers who practice regularly in the district courts. Moreover, the difference between bankruptcy practice and civil practice has led bankruptcy courts to adopt different, non-uniform approaches to handling fee applications. The largest bankruptcy court in the country, for example, has adopted the civil practice by local rule.

In a recent decision, the Ninth Circuit bankruptcy appellate panel pointed to a gap in the current bankruptcy rules. It noted that when a party follows FED. R. BANKR. P. 7008(b) and pleads its demand for attorney's fees in the complaint, the bankruptcy rules specify no procedure for awarding them. The panel's opinion expressly invited the advisory committee to close the gap by amending FED. R. BANKR. P. 7054. That rule currently incorporates FED. R. CIV. P. 54(a)-(c) and has its own provision governing recovery of costs by a prevailing party. But it has no provision like FED. R. CIV. P. 54(d)(2) governing recovery of attorney's fees.

Judge Wedoff explained that the advisory committee agreed with the bankruptcy appellate panel and decided to conform the bankruptcy rules to the civil rules – thus requiring that a claim for the award of attorney's fees in an adversary proceeding be made by motion. To do so, the proposed amendments incorporate much of FED. R. CIV. P. 54(d)(2) into a new FED. R. BANKR. P. 7054(b)(2) prescribing the procedure for seeking attorney fees. Current FED. R. BANKR. P. 7008(b), requiring that the demand be pleaded in a complaint or other pleading, would be deleted. Judge Wedoff added that FED. R. CIV. P. 54(d)(2)(D), dealing with referral of matters to a master or magistrate judge, would not be incorporated because it is not relevant to the bankruptcy courts.

Judge Wedoff reported that the advisory committee would also correct a long-standing grammatical error in the first sentence of FED. R. BANKR. P. 7054(b) by changing the verb "provides" to "provide."

The committee without objection by voice vote approved publication of the proposed amendments to FED. R. BANKR. P. 7054(b) and the proposed deletion of FED. R. BANKR. P. 7008(b).

Information Items

PART VIII – THE BANKRUPTCY APPELLATE RULES

Judge Wedoff reported that the advisory committee had been engaged for several years in a major project to revise the Part VIII rules. The principal objectives of the project, he said, are: (1) to align Part VIII more closely with the Federal Rules of Appellate Procedure; and (2) to adjust the rules to the reality that bankruptcy court records today are filed, stored, and transmitted electronically, rather than in paper form.

He explained that the advisory committee had made substantial progress and would return to the Standing Committee in June 2012 seeking permission to publish the revised Part VIII rules for public comment. At this point, the advisory committee just wanted to give the Standing Committee a preliminary look at the first half of the rules, explain the principal changes from the current rules, and address any concerns that members might have. He invited the members to bring any suggestions to the advisory committee's attention.

Professor Gibson noted that Part VIII deals primarily with appeals from a bankruptcy court to a district court or bankruptcy appellate panel. If a case proceeds from there to the court of appeals, the Federal Rules of Appellate Procedure take over. In addition, in 2005 Congress authorized direct appeals from a bankruptcy court to a court of appeals in limited circumstances. Accordingly, the new Part VIII rules also contain provisions dealing with permissive direct appeals.

She noted that Part VIII had largely been neglected since 1983, even though the Federal Rules of Appellate Procedure have since been amended on several occasions and completely restyled in 1998. She pointed out that Part VIII was difficult to follow and needs to be reorganized and rewritten for greater ease of use. In addition, it needs to be updated and made more consistent with the current Federal Rules of Appellate Procedure. She emphasized that the proposed revisions were comprehensive in nature. Some rules would be combined, some deleted, and some moved to new locations.

Professor Gibson explained that the advisory committee had conducted two mini-conferences on the proposed rules with members of the bench and bar. The participants, she said, expressed substantial support for the proposed revisions, but several recommended that additional changes be made to take account of the widespread use of technology in the federal courts. They urged the committee to revise the rules to recognize explicitly that court records in bankruptcy cases now are filed and maintained in electronic form.

Judge Wedoff and Professor Gibson noted that the proposed new Part VIII rules largely adopt the style conventions of the other, restyled federal rules. For example, they

consistently use the word "must" to denote an affirmative obligation to act, even though the other parts of the bankruptcy rules still use the word "shall." He pointed out that the Part VIII rules are largely distinct from the rest of the bankruptcy rules. As a result, there should be no problem with using the modern terminology only in Part VIII and not in other bankruptcy rules.

Professor Gibson noted that the advisory committee had revised and reorganized Part VIII so thoroughly that it would not be meaningful to produce a redlined or side-by-side version comparing the old and new rules. Rather, she said, the committee was using the committee notes to specify where particular provisions in the new rules are located in the current rules.

A participant suggested that it would be helpful to produce a chart showing readers where each provision in the current rules has been relocated. Professor Gibson agreed, but explained that some provisions had been broken up and relocated in several different places. Judge Wedoff agreed to work on producing a chart, but added that it might be of limited value because readers will need to examine the new rules as a whole.

FED. R. BANKR. P. 8001

Professor Gibson noted that proposed FED. R. BANKR. P. 8001 (scope and definitions) was new and had no counterpart in the existing rules. Similar to FED. R. APP. P. 1, it sets forth the scope of the Part VIII rules and contains three definitions: (1) "BAP" to mean a bankruptcy appellate panel; (2) "appellate court" to mean either the district court or the BAP to which an appeal is taken; and (3) "transmit" to mean sending documents electronically (unless a document is sent by or to a pro se litigant, or a local court rule requires a different means of delivering the document).

She explained that the advisory committee had deliberately selected the term "transmit" to highlight a specific process with a strong presumption in favor of electronic transfer of a document or record. A member suggested, though, that the proposed definition of "transmit" was not sufficiently forceful and suggested including a stronger affirmative statement that electronic transmission is to be the norm. Judge Wedoff agreed and added that electronic transmission was already universal in the bankruptcy courts except for pro se litigants. Another member cautioned that it is problematic to use a word like "transmit," which has a much broader common meaning, and ascribe to it an intentionally narrower meaning. Perhaps a unique new term could be devised, such as "e-transmit."

Some members questioned the proposed definition of "appellate court" because it contradicted the ordinary meaning of the term, which normally refers to the courts of appeals. Judge Wedoff and Professor Gibson agreed to have the advisory committee reconsider the definition.

FED. R. BANKR. P. 8002

Professor Gibson reported that proposed FED. R. BANKR. P. 8002 (time to file a notice of appeal) must remain in its current place because 28 U.S.C. § 158(c)(2) refers to it by number. She said that the committee had essentially restyled the existing rule and added a provision to cover inmates confined in institutions.

FED. R. BANKR. P. 8003 and 8004

Professor Gibson explained that proposed Rules 8003 (appeal as of right) and 8004 (appeal by leave) would set forth in two separate rules the provisions governing appeals as of right and appeals by leave. The two are combined in the current FED. R. BANKR. P. 8001 (manner of taking an appeal). The proposed revisions, she said, will conform Part VIII to the Federal Rules of Appellate Procedure.

She noted that under the current bankruptcy appellate rules, an appeal is not docketed in the appellate court until the record is complete and received from the bankruptcy clerk. Proposed FED. R. BANKR. P. 8003(d)(2), however, conforms to the Federal Rules of Appellate Procedure and requires the clerk of the appellate court to docket the appeal earlier, as soon as a notice of appeal is received. Proposed FED. R. BANKR. P. 8004 would continue the current bankruptcy practice of requiring an appellant to file both a notice of appeal and a motion for leave to appeal.

FED. R. BANKR. P. 8005

Professor Gibson explained that proposed FED. R. BANKR. P. 8005 (election to have an appeal heard by the district court) governs appeals in those circuits that have a BAP. Under 28 U.S.C. § 158(c)(1), an appeal in those circuits is heard by the BAP unless a party to the appeal elects to have it heard by the district court. The proposed rule provides the procedure for exercising that election, and it eliminates the current requirement that the election be made on a separate document. Instead, a new Official Form will be devised for the election. Proposed Rule 8005(c) specifies that a party seeking a determination of the validity of an election must file a motion in the court in which the appeal is then pending.

FED. R. BANKR. P. 8006

Professor Gibson noted that proposed FED. R. BANKR. P. 8006 (certification of a direct appeal to the court of appeals) overlaps substantially with the Federal Rules of Appellate Procedure. Under 28 U.S.C. § 158(d)(2), a case may be certified for direct appeal from a bankruptcy court in three ways. First, the bankruptcy court, the district court, or the BAP may make the certification itself based on one of the direct appeal criteria specified in 28 U.S.C. § 158(d)(2)(A). Second, the certification may be made by all the parties to the appeal. Third, the bankruptcy court, district court, or BAP must make the certification if a majority of the parties on both sides of the appeal ask the court to make it.

Judge Wedoff explained that the proposed rule provides the procedures for implementing each of the three options. Since the bankruptcy court is likely to have the most knowledge about a case, proposed Rule 8006(b) specifies that a case will remain pending in the bankruptcy court, for purposes of certification only, for 30 days after the effective date of the first notice of appeal. The 30-day hold gives the bankruptcy court time to make a certification. Once the certification has been made, the case is in the court of appeals, and the request for permission to take a direct appeal must be filed with the circuit clerk within 30 days. The court of appeals has discretion to take the direct appeal, and the procedure is similar to that under 28 U.S.C. § 1292(b).

Judge Sutton reported that the Advisory Committee on Appellate Rules was working closely with the bankruptcy advisory committee on revising the Part VIII rules, with Professor Struve and Professor Amy Barrett serving as liaisons to the project. He noted that the appellate advisory committee had drafted corresponding changes in FED. R. APP. P. 6 (appeal in a bankruptcy case) by adding a new subdivision 6(c) to address permissive direct appeals from a bankruptcy court.

He reported that appellate advisory committee members had questioned the choice of the verb "transmit" in FED. R. APP. P. 6 and debated several other potential terms. In addition, he said, concern had been voiced over the wisdom of introducing a new term, such as "transmit,""provide," or "furnish," but only in FED. R. APP. P. 6. It would be inconsistent with the terminology used in the other appellate rules. The appellate courts, moreover, are not as far advanced with electronic filing as the bankruptcy courts and may not be ready to receive other types of appeals in the same manner as bankruptcy appeals. But, he added, it may well be acceptable as a practical matter to live with two different verbs in the rules for a while. A member suggested using the term "send," but Judge Sutton pointed out that in the electronic environment, the clerk of the bankruptcy court may merely provide the appellate court with links to the bankruptcy court record, rather than actually send or transmit the record to the appellate court.

Judge Sutton suggested convening an ad hoc subcommittee, comprised of at least one person from each advisory committee, to consider a uniform way of describing the transmission of records throughout the federal rules. Several participants endorsed the concept and emphasized the desirability of using the same language across all the rules. Others warned, though, that the project could be very complicated because many other provisions in the rules also need to be amended to take account of technology, and they cited several examples. A member cautioned that whatever terminology is selected must accommodate the continuing need for paper records and paper copies.

Professor Gibson said that the new bankruptcy appellate rules, scheduled to be published in August 2012, will be the test case for the new terminology. Judge Sutton added that eventually all the federal rules will have to be accommodated to the electronic world. But that project, he said, will take considerable time to accomplish. He emphasized that the immediate problem facing the advisory committees was to decide before publication on the right terminology for the proposed new Part VIII bankruptcy rules and the amendments to FED. R. APP. P. 6.

Judge Kravitz appointed Judge Gorsuch to chair an ad hoc subcommittee to consider devising a standard way of describing electronic filing and transmission throughout the rules. He asked the chairs of the appellate, bankruptcy, civil, and criminal advisory committees to provide at least one representative each.

FED. R. BANKR. P. 8007

Professor Gibson noted that proposed FED. R. BANKR. P. 8007 (stay pending appeal) would continue the practice of current FED. R. BANKR. P. 8005 that requires a party ordinarily to seek relief pending an appeal in the bankruptcy court first.

A member pointed out that proposed Rule 8007(b)(2) did not provide for the situation in which a bankruptcy court fails to issue a timely ruling. He said that the Federal Rules of Appellate Procedure in that circumstance authorize a party to ask the court of appeals for relief. Professor Gibson replied that the advisory committee will consider the matter.

FED. R. BANKR. P. 8008

Professor Gibson explained that proposed FED. R. BANKR. P. 8008 (indicative rulings) had been adapted from the new indicative ruling provisions in the civil and appellate rules. Proposed FED. R. BANKR. P. 8008(a) is parallel to FED. R. CIV. P. 62.1. It specifies what action a bankruptcy court may take on a motion for relief that it lacks authority to grant because an appeal has been docketed and is pending. The moving party must notify the appellate court if the bankruptcy court states either that it would grant the motion or the motion raises a substantial issue.

She pointed out that the rule is complicated because an appeal may be pending in the district court, the BAP, or the court of appeals. Proposed FED. R. BANKR. P. 8008(c) governs the indicative ruling procedure in the district court and the BAP, while FED. R. APP. P. 12.1 takes over if the appeal is pending in the court of appeals.

FED. R. BANKR. P. 8009 and 8010

Professor Gibson reported that proposed FED. R. BANKR. P. 8009 (record and issues on appeal) and FED. R. BANKR. P. 8010 (completing and transmitting the record) would govern the record on appeal. They apply to direct appeals to the court of appeals, as well as to appeals to the district court or BAP.

Rule 8009 differs from the Federal Rule of Appellate Procedure because it continues the current bankruptcy practice of requiring the parties to designate the record on appeal. That procedure is necessary because a bankruptcy case is a large umbrella that may cover thousands of documents, of which only a few may be at issue on appeal.

Proposed FED. R. BANKR. P. 8009(f) would govern sealed documents. If a party designates a sealed document as part of the record, it must identify the document without revealing secret information and file a motion with the appellate court to accept it under seal. If the motion is granted, the bankruptcy clerk transmits the sealed document to the appellate court.

Professor Gibson noted that the advisory committee was still refining proposed FED. R. BANKR. P. 8010 to specify a court reporter's duty to provide a transcript and file it with the appellate court. The majority of bankruptcy courts, she said, record proceedings by machine. A transcript is prepared by a transcription service when ordered through the clerk. She suggested that the court reporters may not always know in which court an appeal is pending and where they must file the transcript.

FED. R. BANKR. P. 8011

Professor Gibson reported that proposed FED. R. BANKR. P. 8011 (filing, service, and signature) had been derived from current FED. R. BANKR. P. 8008 (filing and service) and FED. R. APP. P. 25 (filing and service). She noted that it followed the format, style, and some of the detail of FED. R. APP. P. 25, but placed more emphasis on electronic filing and service.

FED. R. BANKR. P. 8012

Professor Gibson reported that proposed FED. R. BANKR. P. 8012 (corporate disclosure statement) was a new provision derived from FED. R. APP. P. 26.1.

RULES AND FORMS PUBLISHED FOR COMMENT IN AUGUST 2011

Judge Wedoff reported that the advisory committee had received 11 comments and one request to testify on the proposed rules and forms published in August 2011. The only significant area of concern reflected in the comments, he said, related to the proposed amendment to Official Form 6C, dealing with exemptions. Prompted by the Supreme Court's decision in *Schwab v. Reilly*, 130 S. Ct. 2652 (2010), the revised form would give debtors the option of stating the value of their claimed exemptions as "the full fair market value of the exempted property." Some trustees, he said, are concerned that the change will encourage people to claim the entire value of the property even though they are not entitled to it.

STERN V. MARSHALL

Judge Wedoff reported that the advisory committee was continuing to monitor case law developments in the wake of the Supreme Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011). He pointed out that Professor McKenzie was leading the committee's efforts and had identified three concerns.

First, he said, the scope of the decision was unclear. The holding itself was narrow. It stated that even though that the Bankruptcy Code designates a counterclaim by a bankruptcy estate against a creditor as a "core" bankruptcy proceeding that a bankruptcy judge may decide with finality, that statutory grant of authority is inconsistent with Article III of the Constitution. A non-Article III bankruptcy judge cannot exercise the authority constitutionally because the counterclaim is really a non-bankruptcy matter.

It is not clear, he said, whether the constitutional prohibition will be held to apply to other matters designated by the statute as "core," especially fraudulent conveyance claims. The Supreme Court, he explained, has previously described fraudulent conveyance actions as essentially common law claims like those usually reserved to the Article III courts.

Second, there is uncertainty over the extent to which litigant consent may cure the defect and authorize a bankruptcy judge to hear and finally determine a proceeding that would otherwise fall beyond the judge's authority. The governing statute, 28 U.S.C. § 157(b) and (c), specifies that a bankruptcy judge may decide "core" bankruptcy proceedings with finality. If a matter is not a "core" proceeding, the bankruptcy judge

may only file proposed findings and conclusions for disposition by the district court, unless the parties consent to entry of a final order or judgment by the bankruptcy judge.

The bankruptcy rules, he explained, currently contain a mechanism for obtaining litigant consent, but only in "non-core" proceedings. FED. R. BANKR. P. 7008(a) (general pleading rules) provides that parties must specify in their pleadings whether an adversary proceeding is "core" or "non-core" and, if "non-core," whether the pleader consents to entry of final orders or judgment by the bankruptcy judge. The problem, he said, is that the term "core" now is ambiguous. As a result of *Stern v. Marshall*, he suggested, there are now statutory "core" proceedings, enumerated in 28 U.S.C. § 157(b), and constitutional "core" proceedings. The advisory committee, he said, was considering proposed rule amendments to resolve the ambiguity.

Third, there is a potential for reading *Stern v. Marshall* as having created a complete jurisdictional hole in which a bankruptcy court may not be able to do anything at all in some cases – either to enter a final order or to submit proposed findings and conclusions. He explained that 28 U.S.C. § 157(c) specifies that if a matter is not a "core" proceeding under 28 U.S.C. § 157(b), a bankruptcy judge may enter proposed findings of fact and conclusions of law for disposition by the district court. After *Stern v. Marshall*, some statutory "core" proceedings are now unconstitutional for the bankruptcy court to decide with finality. Therefore, there is a question as to whether 28 U.S.C. § 157(c), which specifically authorizes a bankruptcy judge to issue proposed findings and conclusions in "a matter that is not a core proceeding," refers only to matters that are not core under 28 U.S.C. § 157(b) or also includes matters that are not "core" under the Constitution.

If § 157(c) refers only to matters that are not "core" under the statute, bankruptcy judges would have no authority to issue proposed findings and conclusions of law in matters that the statute explicitly defines as "core" matters. And for some of these statutory "core" matters, the Constitution prevents bankruptcy judges from entering a final judgment. The potential void, he said, could arise relatively frequently. It would apply to all counterclaims by a bankruptcy estate against creditors filing claims against the estate, and it might also be held to include fraudulent conveyance cases.

QUARTERLY REPORTING BY ASBESTOS TRUSTS

Judge Wedoff reported that the advisory committee had decided to take no action on a proposal for a new rule that would require asbestos trusts created in accordance with § 524(g) of the Bankruptcy Code to file quarterly reports with the bankruptcy courts. The committee, he said, had concerns over its authority to issue a rule to that effect under the Rules Enabling Act because the trusts are created at the conclusion of a chapter 11 case. He noted that the committee had obtained input on the proposal from various interested organizations, and the great majority stated that a rule was not appropriate.

FORMS MODERNIZATION PROJECT

Judge Wedoff reported that the advisory committee's forms modernization project was making substantial progress and was linked ultimately to the Administrative Office's development of the Next Generation electronic system to supersede CM/ECF. He said that the new forms produced by the committee had been designed in large measure to take advantage of electronic filing and reporting. They are clearer, easier to read, and have instructions integrated into the questions. As a result, though, some attorneys have complained that the new forms are appreciably longer than the current versions and will require more time to complete.

The advisory committee, he said, was very sensitive to these concerns and was trying to shorten the forms where possible, while still eliciting more accurate information. Moreover, he said, the length of the forms will be substantially reduced by not having separate instructions filed.

He added that the advisory committee would like to expedite implementation of the new forms, especially consumer forms that deal with debtor income and expenses. The committee, he said, was planning to bring some of the forms to the Standing Committee at its next meeting and seek authority to publish them for public comment.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell and Professor Cooper presented the report of the advisory committee, as set forth in Judge Campbell's memorandum and attachments of December 2, 2011 (Agenda Item 6). Judge Campbell reported that the advisory committee had no action items to present.

Information Items

POTENTIAL RULE ON PRESERVATION FOR FUTURE LITIGATION

Judge Campbell reported that a panel at the May 2010 Duke Law School conference on civil litigation had urged the advisory committee to adopt a new national rule governing preservation of evidence in civil cases. The panel, he said, presented the outline of a proposed preservation rule, including eight specific elements that it said needed to be addressed in order to provide appropriate guidance to bench and bar. The proposal, he said, had been referred to the committee's discovery subcommittee, and Ms. Kuperman was asked to prepare a memorandum on the state of the law regarding preservation obligations and sanctions.

Judge Campbell pointed out that the committee's research revealed that federal case law is unanimous in holding that the duty to preserve discoverable information is triggered when a party reasonably anticipates being a party to litigation. But, he said, no consensus exists in the case law regarding: (1) when a party should reasonably anticipate being brought into litigation; and (2) the extent of the preservation duty. Rather, the law is fact-driven and left to resolution on a case-by-case basis.

As for the law on sanctions for failure to preserve, the courts of appeals are in disagreement. Some circuits hold that mere negligence is sufficient for a court to invoke sanctions, while others require some form of willfulness or bad faith before sanctions may be imposed. Some courts, moreover, have tried to specify what kinds of conduct may result in what kinds of sanctions.

Judge Campbell reported that the advisory committee wanted to ascertain the extent of preservation problems, and it asked the Federal Judicial Center to study the frequency of spoliation motions in the federal courts. That study, conducted by Emery Lee, reviewed over 131,000 cases filed in 19 district courts in 2007 and 2008. It found that spoliation motions had been filed in only 209 cases, or 0.15% of the total. About half those motions related to electronically stored information. The study revealed, moreover, that sanctions had been imposed against both plaintiffs and defendants.

In addition, the committee examined the existing laws that impose preservation obligations. It found that there is a substantial body of statutes that deal with preservation, covering many different subjects. But no coherent pattern emerges from them.

Judge Campbell reported that the discovery subcommittee had focused on what elements should be included in a proposed rule, and Professor Marcus produced initial discussion drafts to show three different possible approaches to a rule. The first was a very detailed rule, as proposed by the Duke panel. It included specific provisions giving examples of the types of events that constitute reasonable anticipation of litigation and trigger a duty to preserve. It addressed the scope of the duty to preserve, including the subject matter, the sources of information, the types of information, and the form of preservation. It also laid out time limits on the scope of the duty, such as how far back a custodian must retain information and how long the obligation to preserve continues. It contained a presumptive number of record custodians who must be identified and instructed to preserve information. The rule was also detailed on sanctions, specifying what kinds of conduct will lead to what kinds of sanctions.

The second proposed rule, he said, was substantially more general, addressing the trigger, scope, and duration of the duty to preserve and the selection of sanctions, but in less detail. Essentially, it directed parties to behave reasonably in all dimensions.

The third proposed rule addressed only sanctions and did not specify the trigger, scope, or duration of preservation obligations. Instead, it focused exclusively on the area of greatest concern to lawyers and their clients – the area, moreover, where there is the greatest disagreement and uncertainty in the law. The expectation was that by addressing the key problem of sanctions, the rule would give guidance to the people who make preservation decisions and relieve much of the uncertainty about the trigger and scope of the duty to preserve.

The third rule also distinguished between sanctions and curative measures. The latter consist of targeted actions designed to cure the consequences flowing from a failure to preserve information, such as allowing extra time for discovery or requiring the party who failed to preserve to pay the costs of seeking substitutes for the missing information. Under the proposed rule, remedial measures could be imposed if a preservation duty were not followed.

Imposition of more serious sanctions – such as an adverse inference instruction, claim preclusion, dismissal, or entry of judgment – would require something more than a mere failure to preserve. A showing would have to be made of some kind of knowing conduct, such as willfulness or bad faith. The rule also laid out the factors that a judge should consider in imposing sanctions, including the level of notice given the custodians, the reasonableness and proportionality of the efforts, whether there was good faith consultation, the sophistication of the parties, the actual demands made for preservation, and whether a party sought quick guidance from a judge.

Judge Campbell reported that the three rules had been discussed at a one-day mini-conference in Dallas in September with invited attorneys, judges, law professors, and technical experts. The committee, he said, heard very thoughtful, competing views from the participants. The discussions were very helpful, and several participants submitted papers elaborating on their positions.

In essence, he said, corporate representatives argued that the sheer cost of preserving information in anticipation of litigation is an urgent problem that calls for a strong, detailed rule providing clear guidance to record custodians. In particular, they complained about the uncertainty that corporations face in not knowing where and when a suit will be filed against them, what the claims will be, and what information may be relevant in each case. They are concerned about the heavy costs of over-preserving information. But, more importantly, they fear the harm to their reputation that may result from accusations of spoliation.

On the other hand, plaintiffs' lawyers argued that a detailed national rule would lead to greater destruction of information because of its negative implications. It would encourage custodians to destroy information not explicitly spelled out in the rule. They

emphasized that there will always be information that simply does not fit within the details of a rule, but must nevertheless be preserved.

Department of Justice representatives argued that case law should be allowed to continue running its course, and no preservation rule should be adopted at this time. They argued, in particular, that the first of the three proposed rules would lead to over-preservation by government agencies, as they would be forced to preserve records whenever there is a dispute over a claim with the government.

Judge Campbell noted that the discovery subcommittee met at the close of the mini-conference and later by telephone. It then reported in detail on the mini-conference at the full advisory committee's November 2011 meeting. After lengthy discussion, the committee decided that the subcommittee needed to continue to receive input and explore the three potential options. Under its new chair, Judge Paul W. Grimm, the subcommittee will continue to consider all the issues as open and report back at the advisory committee's March 2012 meeting.

Several members suggested that the first of the three proposed rules, the detailed option, would not be workable because of the endless variety of possible situations that may arise. A detailed new national rule, moreover, could lead to satellite litigation, as with the 1983 amendments to FED. R. CIV. P. 11 (sanctions). A sanctions-only rule, on the other hand, such as the third proposal, would resolve the serious split among the circuits on the law of sanctions, and it might well be effective in sending strong signals regarding pre-litigation conduct.

Judge Campbell suggested that even if the committee were to adopt a new federal rule on spoliation, a myriad of different rules will still exist in the state courts. Accordingly, there will not be national uniformity in any event. The problems of uncertainty will continue because state law often governs preservation obligations. A participant added that the rules on preservation are largely rules of attorney conduct, which lie within the traditional province of the states. Because of the relevance of state law, the federal courts would be on stronger jurisdictional grounds if the rule were limited to sanctions.

A member added that in most cases no federal proceeding is pending when the duty to preserve first attaches. It was suggested that the advisory committee take a limited focus because it may lack authority under the Rules Enabling Act to adopt pre-litigation preservation standards.

A participant pointed out that the scope of the obligation to preserve before trial is related to the scope of discovery under FED. R. CIV. P. 26(b)(1). Therefore, it may not be possible to have a rule that narrows the scope of what information must be preserved before a case is filed if that provision is at odds with what information must be produced

in discovery after a case is filed. Moreover, apart from the duty to preserve certain records and information, substantial additional cost is incurred in searching the information. Thus, even if it were inexpensive just to preserve information, it would still be expensive for the parties to search through it. Therefore, it might be necessary to reconsider the scope of discovery under Rule 26(b)(1).

FED. R. CIV. P. 45

Judge Campbell reported that the proposed amendments to Rule 45 (subpoena) had been published in August 2011. They make four basic changes: (1) simplifying the rule by having a subpoena issued in the name of the presiding court, authorizing nationwide service, and having local enforcement in the district where the witness is; (2) allowing the court where discovery is taken in appropriate instances to send disputes back to the court presiding over the case; (3) overruling the *Vioxx* line of cases that authorize subpoenas for out-of-state parties and a party's corporate officers to testify at trial from a distance of over 100 miles; and (4) clarifying the obligation of a serving party to provide notice.

He said that a public hearing had been scheduled for January 27, 2012, but the committee had received only two requests to testify. As a result, the hearing may be canceled and the requesting parties asked to put their views in writing or participate in a teleconference.

DUKE CONFERENCE SUBCOMMITTEE

Judge Campbell reported that a subcommittee chaired by Judge John G. Koeltl was studying the many recommendations for improvements in civil litigation made by participants at the May 2010 Duke Law School conference. He noted that the subcommittee was focusing on five categories of proposals to implement suggestions made at the conference.

First, one of the common themes voiced by lawyers at the conference was that judges need to be more active in case management. But merely promulgating additional rules will not produce better managers. Therefore, the subcommittee was coordinating with the Federal Judicial Center to improve judicial education programs and enhance informational resources. Among other things, a new civil case-management section of the *Benchbook for U.S. District Court Judges* had been drafted.

Second, Judge Campbell noted that efforts were being made to tap into local efforts around the country to test new procedures for managing litigation. A number of case-management pilot programs were underway, and the committee was working with the Federal Judicial Center to identify and monitor them. In addition, the committee

would ask chief judges around the country to keep it informed about pertinent local developments.

Judge Campbell reported that one of the initiatives that the committee was encouraging was a project to develop a standard protocol for initial discovery in employment discrimination cases. Drafted jointly by lawyers representing both plaintiffs and defendants, the protocol identifies the information that each side must exchange at the outset of an employment case, without the need for depositions or interrogatories. No objections are allowed except for attorney-client privilege. The protocol, he said, will be made available to all federal courts, and all the judges on the advisory committee will adopt it and encourage their colleagues to do the same.

Third, the advisory committee had encouraged additional empirical work, especially by the Federal Judicial Center, on how federal courts are actually handling their cases on a daily basis. One study by the Center was focusing on the early stages of a civil case, including initial scheduling orders, Rule 26(f) planning conferences, and Rule 16(b) initial pretrial conferences. The study revealed that court dockets show that the initial scheduling orders required by FED. R. CIV. P. 16(b)(1) are issued in only about half the civil cases in the district courts. But, he cautioned, docket information may not be sufficiently reliable because there are no uniform ways of recording the pertinent data, and the absence of public records may be the result of inadequate docketing practices. In addition to reviewing the docket sheets, the Center will conduct a survey of lawyers to ascertain what events occurred early in their cases.

Fourth, Judge Campbell noted that the committee had invited judges and lawyers from the Alexandria Division of the Eastern District of Virginia to discuss their experiences with that court's "rocket docket." He added that all the judges on the court share a common philosophy that cases must be handled promptly, and the bar works very well within that court culture.

Fifth, Judge Campbell said that several specific rule amendments were being considered in light of the Duke Conference, including: reducing the time to hold an initial case management conference from 120 to 60 days; eliminating the moratorium on discovery until after the Rule 26(f) conference is held; requiring parties to talk to the court about discovery problems before filing motions; amending Rule 26 to emphasize the importance of proportionality; reducing obstructive objections; limiting the presumed number of depositions in a case to five and the presumptive maximum time of a deposition from seven hours to four; reducing the presumptive number of interrogatories below the current 25; postponing contention interrogatories until later in a case; reducing service time; mandating that judges hold a scheduling conference; and emphasizing in Rule 1 that lawyers must cooperate with each other. He added that rules language was being drafted to help in considering these various ideas.

Professor Cooper added that another area for potential rulemaking was the relationship between pleading motions and discovery. Two competing proposals had been offered. One would suspend discovery until the court rules on a motion to dismiss for failure to state a claim. The other would create a presumption in favor of ruling on a motion to dismiss only after some discovery has occurred.

Judge Campbell said that the central theme at the Duke conference had been that parties generally believe that civil litigation takes too long and costs too much. The advisory committee, he said, was contemplating conducting a "Duke II" conference, but had not yet made a decision on the matter.

PLEADING STANDARDS

Professor Cooper reported that the advisory committee had no immediate plans to propose rule amendments dealing with pleading standards. The committee was actively reviewing the developing case law, and the Federal Judicial Center was continuing to conduct empirical research on the frequency of motions to dismiss and their disposition.

The Center's research had found a statistically significant increase in the number of motions filed, but not in the rate of granting motions. It was not possible to tell whether more cases were being dismissed out of the system because courts often grant motions to dismiss with leave to amend. A follow-up study by the Center had shown no statistically significant increase in plaintiffs excluded from the system by motions to dismiss or cases terminated by motions to dismiss, other than in financial instrument cases. On the other hand, some law professors have conducted their own research and claim that there has in fact been an increase in dismissals from the system.

Professor Cooper noted that the advisory committee had been presented with a large number of suggested changes in pleading standards and various suggestions for integrating pleading practice with discovery practice. He noted that there were many opportunities and possibilities for rule changes, but the committee was not contemplating proposing any rule for publication in the coming year.

PLEADING FORMS

Professor Cooper pointed out that FED. R. CIV. P. 84 (forms) specifies that the illustrative civil forms in the appendix "suffice" under the rules. He noted specifically that the form for pleading negligence had been approved by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 565 n.10 (2007). But lower federal courts have found a tension between Supreme Court cases and the current pleading forms, especially Form 18 (complaint for patent infringement).

The larger question, he said, was why the committee was still in the forms business. There was a clear need for illustrative forms in 1938 to show the bar how the new federal rules would work in practice. That objective, however, may no longer be important. Moreover, the committee has generally not paid a great deal of attention to the forms over the years. Although some, such as Form 5 (notice of a lawsuit) and Form 6 (waiver of service of a summons) had been very carefully coordinated with FED. R. CIV. P. 4(d) (waiver of service), most forms do not receive much attention.

He noted that the advisory committees have adopted different approaches towards drafting forms, and the forms are used in different ways for different purposes. The civil and appellate forms, for example, are promulgated through the full Rules Enabling Act process. The official bankruptcy forms, on the other hand, follow the first several steps of that process, but are prescribed by the Judicial Conference. The criminal forms do not go through the Rules Enabling Act process at all. They are drafted by the Administrative Office with some consultation with the criminal advisory committee..

The Standing Committee, he said, had appointed an ad hoc subcommittee on forms, composed of members of the advisory committees, to consider the appropriate role of the committees in preparing forms. Among other things, the subcommittee will consider whether the current variety of approaches is appropriate or whether there is a need for more uniformity. There appears to be little support for adopting a uniform approach, as sufficient coordination may be achieved through the Standing Committee's review of the advisory committees' recommendations. The subcommittee will also consider whether it is advisable for any of the forms to continue to follow all the steps of the full Rules Enabling Act process. He added that there was no urgency in making those decisions.

CLASS ACTIONS

Judge Campbell reported that the advisory committee had recently formed a subcommittee on class actions, chaired by Judge Michael W. Mosman, and it had begun to identify issues that might possibly warrant future rulemaking.

Professor Marcus provided background on the development of Rule 23. He explained that after the important 1966 amendments to FED. R. CIV. P. 23 (class actions), the advisory committee took no action on class actions for 25 years. In 1991, the Judicial Conference, on the recommendation of its ad hoc committee on asbestos litigation, directed the committee to study whether Rule 23 should be amended to improve the disposition of mass tort cases.

In response, the committee considered a wide range of different possible changes in the rule and sought extensive input from the bench and bar. In 1996, it published a limited number of significant amendments. They would have required a court to consider whether a class claim is sufficiently mature and whether the probable relief to individual class members justifies the costs and burdens of class litigation (commonly referred to as the "just ain't worth it" test). They would also have explicitly permitted certification of settlement classes and a discretionary interlocutory appeal from certification decisions.

During the publication period, the proposed amendments to revise the certification process proved to be very controversial. Moreover, the Supreme Court issued its decision in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), dealing with settlement certification. As a result, the committee decided to proceed only with the proposed addition of Rule 23(f) authorizing a discretionary interlocutory appeal. That provision took effect in 1998 and has proved successful.

In 2000, the committee continued working on the rule. Its additional efforts resulted in several amendments that took effect in 2003, including improving the timing of the court's certification decision, strengthening the process for reviewing proposed class-action settlements, and authorizing a second opt-out opportunity for certain class members to seek exclusion from the settlement. It also added Rule 23(g) governing the appointment of class counsel, including interim class counsel, and Rule 23(h) governing the award of attorney's fees.

Judge Campbell pointed out that the amendments pursued by the advisory committee did not address the problems of overlapping classes, recurrent efforts to certify a class through judge-shopping, or recurrent efforts to approve a settlement. Professor Cooper, he noted, had devised creative ideas on addressing those issues by rule, but they attracted too much controversy.

Judge Campbell reported that the advisory committee was considering whether Rule 23 needs to be amended to take account of several recent developments, including enactment of the Class Action Fairness Act and recent class-action case law. The committee, he said, had compiled a list of potential issues that might be addressed and was considering whether the time was ripe to give further consideration to Rule 23. On the other hand, he said, any significant change in the rule would likely be controversial, and the committee has several other, more important projects on its agenda.

INTERLOCUTORY APPEAL FROM ATTORNEY-CLIENT PRIVILEGE DECISION

Professor Cooper reported that a suggestion had been referred to the advisory committee for a rule amendment that would allow appeal by permission from an order granting or denying discovery of materials claimed to be protected by attorney-client privilege. Although referred to the civil committee, he said, the matter should also be considered by the other advisory committees.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raggi and Professor Beale presented the report of the advisory committee, as set forth in Judge Raggi's memorandum and attachments of December 12, 2011 (Agenda Item 9).

Amendments for Final Approval

FED. R. CRIM. P. 16(a)(2)

Judge Raggi reported that the advisory committee was proposing an amendment to FED. R. CRIM. P. 16(a)(2) (discovery and inspection) that would clarify an ambiguity introduced during the 2002 restyling of the criminal rules. The change would make it clear that the restyling of the rule had made no change in the protection given to government work product.

She explained that Rule 16(a) allows a defendant to inspect papers and materials held by the government. Before restyling, Rule 16(a)(1)(C) had contained enumerated exceptions to that access, including one for the government's work product. The restyled rule, however, eliminated the exceptions.

The district courts, she said, have rejected claims that the 2002 amendments had changed the substance of the rule, using the doctrine of a "scrivener's error" to deny access by the defendant to the government's work product. As a result, there appear to be no serious practical problems and no urgency to make a correction. Nevertheless, she said, the advisory committee agreed unanimously that it was inappropriate to have an ambiguous restyled rule and decided to pursue an amendment.

The committee, she pointed out, believed that the proposed change was technical and could be made without publication. Nevertheless, it recognized that the Standing Committee needed to make that policy decision.

The committee without objection by voice vote approved the proposed technical and conforming amendment for final approval by the Judicial Conference without publication.

Information Items

FED. R. CRIM. P. 6(e)

Judge Raggi reported that the advisory committee was considering the Attorney General's recommendation to amend FED. R. CRIM. P. 6(e) (recording and disclosing grand jury proceedings). The amendment would provide procedures for authorizing disclosure of historically significant grand jury materials after a suitable period of years.

The proposal, she said, was in response to a district court decision that ordered the release of grand jury materials dealing with President Nixon's testimony before the Watergate grand jury. The district court issued the release order relying on its inherent authority, even though FED. R. CRIM. P. 6(e) contains no provision expressly authorizing release of the materials.

She noted that the Department of Justice did not agree that the court had inherent authority to order disclosure, but it did not appeal the decision. Instead, it asked the advisory committee to amend Rule 6 to allow disclosure after a specified period of years. The proposal, she said, was being studied by a subcommittee chaired by Judge John F. Keenan.

FED. R. CRIM. P. 16

Judge Raggi reported that the advisory committee – after extensive study and debate – had decided not to pursue amendments to FED. R. CRIM. P. 16 (discovery and inspection) to codify the duty of prosecutors to turn over exculpatory information to the defendant. The committee, however, agreed to address the matter in a "best practices" section of the *Benchbook for U.S. District Court Judges.* She said that she had met with Judge Paul L. Friedman, chairman of the Federal Judicial Center's Benchbook Committee, and a draft section had been prepared.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Fitzwater and Professor Capra presented the report of the advisory committee, as set forth in Judge Fitzwater's memorandum and attachments of November 28, 2011 (Agenda Item 11). Judge Fitzwater noted that the advisory committee had no action items to present.

Information Items

SYMPOSIUM ON THE RESTYLED FEDERAL RULES OF EVIDENCE

Judge Fitzwater reported that the restyled Federal Rules of Evidence had taken effect on December 1, 2011. The advisory committee, he said, had held its October 2011 meeting in Williamsburg, Virginia, at the William and Mary Marshall-Wythe College of Law. The meeting was preceded by a symposium on the restyled rules, hosted by William and Mary at the committee's request.

FED. R. EVID. 801(d)(1)(B)

Judge Fitzwater noted that the advisory committee was considering a proposal to amend Rule 801(d)(1)(B) (hearsay exemption for certain prior consistent statements). It would make prior consistent statements admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility. The amendment, he said, was based on the premise that there is no meaningful distinction between substantive and rehabilitative use of prior consistent statements. The needed jury instruction, moreover, is almost impossible for jurors to understand.

He noted that there was a difference of opinion in the advisory committee on whether to pursue a change in the rule, and the members would appreciate receiving any further advice from the Standing Committee on the matter. He also noted that the committee, with the help of the Federal Judicial Center, was planning to send a questionnaire to all district judges soliciting their views on the advisability of the proposed amendment.

A member supported making the proposed change in Rule 801, but cautioned against sending out questionnaires to all judges on potential rule changes, especially where a proposed rule is not particularly significant. He said that it could set a bad precedent for other committees to send out surveys on a regular basis.

PRIVILEGES PROJECT

Judge Fitzwater reported that the advisory committee undertook a project several years ago to compile the federal common law on evidentiary privileges. The initiative, he said, was not intended to result in a codification of the evidentiary privileges or in new federal rules. Rather, it was expected to lead to a Federal Judicial Center monograph providing a restatement of the federal common law. Because of the potential sensitivity of the project, however, the committee decided not to proceed further without Standing Committee guidance and approval.

Professor Capra explained that the committee had undertaken similar types of projects in the past. For example, when Congress enacted the evidence rules in 1975, it made several changes in the rules proposed by the judiciary, but it did not change the accompanying committee notes. As a result, some of the notes are inconsistent with the text of the rules. At the committee's request, he compiled the inconsistencies and produced a Federal Judicial Center monograph under his own name. Later, the advisory committee authorized him to write a monograph on the discordance between some of the rules and the prevailing case law. Both publications were very helpful to the bar.

Professor Capra said that the law of privileges is very important, but it is not codified. The advisory committee began developing a set of privilege rules to reflect the federal common law. After initial efforts, the project, under the leadership of Professor Kenneth S. Broun, was deferred because of the committee's other priorities, such as restyling the rules. He added that the project was a low priority for the committee and would be put aside if other matters need attention. After having completed the restyling project, however, the committee now has a light pending agenda.

Members asked whether the advisory committee itself was planning to approve the work and whether the project was the best use of the committee's time and the judiciary's limited resources. Several agreed that it would be a beneficial project, but it should have a relatively low priority. Judge Kravitz added that it was fine to produce the paper, but he would not recommend giving it official advisory committee approval.

A participant recommended that the project continue because there has been recurring interest by Congress over the years in enacting privileges by law. Professor Capra added that since 1996, the advisory committee had been asked to comment on six different proposals dealing with privileges.

A member said that the Standing Committee should defer to the advisory committee's best judgment on the matter. If the advisory committee finds the project useful, especially since Congress may ask for input on privileges, it should continue.

Judge Fitzwater and Professor Capra suggested allowing Professor Broun to continue on the work on the matter and report to the advisory committee as needed at its meetings. A committee consensus developed to adopt their suggestion.

COMMITTEE JURISDICTIONAL REVIEW

The committee authorized Judge Kravitz and Professor Coquillette to complete for the committee a self-evaluation questionnaire for the Judicial Conference's Executive Committee on the need for the committee's continued existence, the scope of its jurisdiction, and its workload, composition, and operating processes.

PANEL DISCUSSION ON CLASS ACTIONS

Judge Rosenthal presided over a panel discussion on class actions with Dean Robert H. Klonoff, a member of the Advisory Committee on Civil Rules, Daniel C. Girard, Esquire, a former member of the advisory committee, and John H. Beisner, Esquire.

Judge Rosenthal noted that the discussion was in accord with the committee's tradition of spending time at its January meetings in examining long-term trends and issues that may affect the rules process in the future, but do not require immediate changes in the rules. She explained that the Class Action Fairness Act of 2005 (CAFA) had now been in place for seven years and the courts have issued several important class-action decisions in the last few years. In light of the committee's statutory obligation to monitor the continuing operation and effect of the federal rules, she said, it was an opportune time to start thinking about whether any changes in FED. R. CIV. P. 23 might be needed in the future. Class actions, she added, are a high profile area of the law and involve a great deal of money and interest.

The panel, she pointed out, consisted of an attorney who primarily represents plaintiffs and a lawyer and a law professor who normally have represented defendants. She asked them to focus on the impact of the recent cases on class-action practice and to identify any potential rule changes that might have a beneficial impact on class-action litigation.

The panel discussed a wide range of issues, but the exchange can be categorized as falling into the following four broad topics:

1. Front-loading of cases;
2. Class definition;
3. Settlement classes; and
4. Competing classes and counsel.

1. FRONT-LOADING OF CASES

In re Hydrogen Peroxide

The panel discussed the impact of *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3rd Cir. 2009). In the case, the Third Circuit held that the district court was obligated at the certification phase of a class action to apply a rigorous analysis of the available evidence and make findings supported by a preponderance of the evidence (rather than a mere threshold showing) that each element of Rule 23 has been met.

The district court was required to resolve all factual and legal disputes relevant to class certification, even if they overlap with the merits. Specifically, it should have resolved the battle of the experts over whether the alleged injury could be demonstrated by proof common to the class, rather than individual to its members. The decision, moreover, expressed concern that the district court's order certifying the class would place unwarranted pressure on the defendant to settle non-meritorious claims – elevating that concern, in effect, into a policy factor to consider in the certification process.

Although not all courts follow *Hydrogen Peroxide*, it was suggested that the practical impact of the case has been that plaintiffs are now confronted with an early merits-screening test. They must present their evidence at the certification stage or risk losing the case if the court denies certification. That conclusion, moreover, was seen as bolstered by several other cases, including the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

In *Wal-Mart*, the Supreme Court ruled that if the plaintiffs had evidence of company-wide employment discrimination, they had to present it by the time of the certification hearing. A key question, therefore, is whether the courts will now impose a higher standard of "commonality," as in *Wal-Mart*, which would necessitate more expansive discovery, or whether they will read *Wal-Mart* as limited to the unique employment setting and continue the traditional concept of commonality.

Discovery at certification

A panelist argued that *Hydrogen Peroxide* has created a much more expensive class-certification process, particularly in complex cases. He said that there is considerable uncertainty for the lawyers on how discovery is to take place after the pleading stage. Discovery may have to be conducted before certification is heard and expert witnesses may be subjected to a full *Daubert* analysis.

It was noted that expert testimony now is often a central feature at the certification stage, and extensive case law is developing on the subject, including whether *Daubert* applies at the class-certification stage. In *Wal-Mart*, the treatment of expert witnesses at certification was an important factor in the majority opinion, and *Hydrogen Peroxide* was largely a battle of the experts.

It was suggested that plaintiffs' lawyers often feel disadvantaged by the front-loading of discovery. At the same time, defendants traditionally have preferred to bifurcate discovery and avoid excessive costs by limiting discovery at certification and deferring full-blown discovery on the merits until later.

In front-loading the discovery, though, the recent decisions have raised questions about how much merits discovery is actually required up front and whether the discovery

can continue to be bifurcated if plaintiffs are now required to prove the merits of the certification issues. The discovery problems are complicated, moreover, because discovery is now largely electronic and does not lend itself very well to phasing.

A panelist said that the recent decisions have caused additional work and difficulties for the parties but have not created a crisis situation. It appears, for example, that meritorious class actions are not being killed in the cradle, as plaintiffs are afforded a fair chance to explain to the court why they believe that their class can be certified.

One panelist argued that what information both sides should put forward in class certification briefing is becoming much clearer. The information necessarily will vary from case to case, but much of the discovery is simply not relevant for certification purposes. The judges, he said, are closely managing the cases and overseeing the discovery.

The focus now for the parties, he said, is on providing useful information that a court needs to make the certification decision. Judges, for example, often ask the lawyers whether particular discovery is really needed for certification or can be deferred until later in order to meet the schedule for class certification. Some judges also indicate to the parties what sort of discovery will be needed for certification and set a time for certification briefing, leaving it up to the lawyers to figure out the details of what discovery must be exchanged for certification.

A panelist noted that *Hydrogen Peroxide* cited the advisory committee note to the 2003 amendments to Rule 23, which sets forth the concept of a "trial plan that describes the issues likely to be presented at trial and tests whether they are susceptible of class-wide proof." The recent cases, he said, have been sending a uniform message that the district court should instruct the parties to gather their available information and figure out what a class trial would look like. The court, thus, exercises the gateway function of deciding whether the jury will have the evidence it needs to make a decision that the entire class is entitled to relief. The key issue is whether the evidence varies so much among the individual plaintiffs that the jury is unable to decide that the defendant is liable to all members of the class.

Early practicable time for making the certification decision

In light of the additional information that now has to be gathered for certification, the panel discussed whether courts are being more flexible in applying Rule 23(c)(1)(A)'s requirement that certification occur at "an early practicable time." There appears to be little uniformity among the courts, however, as courts cite the language of the rule to support every conceivable outcome. Some make the certification decision very early in the case, while others defer it until much later. A few districts specify

categorically that a class certification motion be made within 90 days, while in others, the certification process occurs at the close of discovery.

Early dispositive motions

It was reported that the trend towards front-loading of class-action litigation has led to an increasing tendency to find ways to dispose of cases at an early stage. As a matter of good practice, therefore, a defendant who believes that a national class action cannot be certified under any circumstances should force the plaintiffs to come forward at an early stage and move for class certification.

Since CAFA, many more class-action cases are being brought in the federal courts that involve state laws, and more motions are being filed that challenge jurisdiction. Some state laws, moreover, appear to grant relief for class members in circumstances that may not meet the criteria for standing in the Article III federal courts.

It was suggested that there has been some drift away from analyzing class membership questions under the criteria specified in Rule 23(a) and (b) and framing them instead as matters of standing. A defendant, thus, moves to strike class allegations at the pleading stage, challenging the definition of the class through a dispositive motion, claiming that the class includes members who do not have standing. The trend may be a reaction to the sheer complexity of the issues in a multi-state post-CAFA class action, the high costs of conducting discovery, and a lack of clear guidance. In essence, the dispositive motions assert that there is some fundamental flaw in a particular class and, therefore, no need to go through the expense of discovery and the certification process.

In addition, there is some confusion over the ability of an individual plaintiff to act in a representative capacity. Some defendants claim that unless a plaintiff's claim is a mirror image of the claim of every other person in the class, in ways that do not necessarily relate to the presentation of common proof, the plaintiff does not have standing to act on behalf of others in a representative capacity.

2. CLASS DEFINITION

Preponderance and Commonality

It was suggested that there is uncertainty over what is meant by "preponderance" in Rule 23(b)(3). Under the current language of the rule, it was argued, plaintiffs are faced with a "winner take all" proposition. The court has to decide whether common issues of law and fact predominate. If they do, the court will certify the class. If they do not, certification will be denied.

It was noted that if common issues of law and fact do not predominate under Rule 23(b)(3), a court may still certify a class action under Rule 23(c)(4) for particular common issues. There is, however, very little guidance as to when a court may certify an issues class. Although a body of case law is developing on issues classes, it varies from circuit to circuit.

Recent cases show that the courts are sharply divided on Rule 23(c)(4). One circuit has ruled that an issues class is a housekeeping remedy, and predominance still must be shown. Another has held that predominance need not be shown, and a court only has to consider whether resolution of the issue will materially advance the case.

A panelist said that issues classes are not commonly invoked by counsel because lawyers prefer a more complete outcome to their litigation. They are not normally interested in litigating on a piece-meal basis. As a practical matter, there are too many complications in issues-class litigation, and it is generally not worth it for them. Another panelist disagreed, however, and suggested that issues classes are quite important and have been used effectively in environmental tort cases and employment cases.

It was recommended that the Advisory Committee on Civil Rules monitor the developing case law and ultimately evaluate whether to consider a rule amendment that adjusts the standards of Rule 23(c)(4) to give the courts greater guidance on when a class may be certified that has both common issues and individual issues. The panelists pointed out that courts that have wrestled with the rule have said that the matter is unclear. It was also noted that the ALI had spent a great deal of time on issues classes as part of its recent restatement project. If properly defined, it was argued, an amended federal rule on issues classes could be beneficial to the mass adjudication of cases.

It was pointed out that there is a mechanism for dealing with predominance issues arising from state-law variations, especially in post-CAFA cases involving consumer claims arising under the laws of multiple states. In these cases, defendants generally argue that the claims have to be considered individually under different state consumer protection laws. Although a national class action may still be maintained, as in the *De Beers* litigation in the Third Circuit, a case may effectively be divided into sub-classes on a state-by-state basis for litigation purposes. In the settlement context, the analysis of state law variations historically was an issue of "manageability." Defense counsel would argue that the court cannot litigate the case on a manageable basis because the jury would have to be charged on the law of 50 states.

It was pointed out that one factor that has increased the number of class-action cases in the federal courts is the strategy of plaintiffs – reinforced by a general skepticism of federal courts towards nationwide classes – to break down a class into several subclasses, such as a separate class action for each state. That tendency will continue to occur in employment cases, as classes are broken down into smaller class actions,

especially after *Wal-Mart v. Dukes*. The trend will result in more class actions, and multiple class actions on the same subject. The Judicial Panel on Multidistrict Litigation will routinely draw the federal cases together to conduct the discovery on a common basis. In the end, though, separate certification determinations will have to be made in each class action.

In the past, commonality was not an important issue and was often stipulated. The real issue, rather, was predominance. But the Supreme Court has now said that the common issue has to be central to the validity of each of the claims. It has to be a central, dispositive issue to class certification. Commonality, moreover, is used in other rules, such as Rule 20 (joinder), which contains the exact same language. So one issue for the future will be whether *Wal-Mart* will have an impact on joinder.

Rule 23(b)(2) classes

It was suggested that *Wal-Mart v. Dukes* represents a potential sea change, not only regarding "commonality" under Rule 23(a), but also for classes under Rule 23(b)(2). A panelist said that the most remarkable aspect of the *Wal-Mart* decision, and potentially the most important aspect, was the section dealing with Rule 23(b)(2). The Court's statements that back pay could not be brought as part of a (b)(2) action because it was not "incidental" were a major departure from the decisions of the courts of appeals. Moreover, the Supreme Court suggested that there may be a due process problem with any monetary claim in a (b)(2) action, even a claim for statutory damages or incidental damages.

Accordingly, many difficult questions arise as to the scope of Rule 23(b)(2) after *Wal-Mart*, and there will be a great deal of analysis of the decision and the ensuing case law. Questions will arise, for example, on whether some problems can be dealt with by allowing opt-out classes under (b)(2) or hybrid classes under (b)(2) and (b)(3).

Arbitration Clause Cases

It was argued that *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), may have the most important impact of any of the recent class-action cases, for it has been seen as effectively eviscerating many small claims cases. Although the Supreme Court noted in *Amchem* (which dealt with mass torts) that class actions are really about small claims cases, rather than mass torts, it later dealt a virtual death knell to many small claims cases in *Concepcion.*

It was suggested that one of the issues that plaintiffs thought was left open in *Concepcion* was whether a "no class-arbitration" clause may be invalidated if the plaintiffs can show that it is impossible to vindicate their rights other than through class

arbitration. One court of appeals ruled recently, however, that the argument could not survive after *Concepcion*.

3. SETTLEMENT CLASSES

The need for a Rule 23 amendment on settlement classes

A panelist said that many of the court decisions since *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), have wrestled with what must be shown in the context of certifying a settlement class. Although *Amchem* said that the district court does not have to worry about "manageability" in a settlement case under Rule 23(b)(3), the class must still meet the tests of preponderance, commonality, and adequacy, and the case has to be treated as if it were going to trial. In the Third Circuit's *De Beers* litigation, for example, the court's opinion noted that "(e)ver since the Supreme Court's landmark decisions in *Amchem Products Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), one of the most vexing questions in modern class action practice has been the proper treatment of settlement classes, especially in cases national in scope that may also implicate state law."

Judge Kravitz asked the panel whether FED. R. CIV. P. 23 should be amended to deal specifically with settlement classes.

The panelists agreed that the absence of a settlement-class provision has created problems and has tended to push settlements, especially in mass-tort cases, outside the court system. Since *Amchem*, the parties in these cases have had to construct work-around solutions to achieve settlements, often a settlement that lies outside judicial supervision under Rule 23(e).

The absence of a workable settlement-class device is seen as a major problem in mass torts because there is no supervision of the parties' actions or the attorney's fees. Defendants, moreover, are concerned about engaging in settlements outside the courts because they are left to their own devices. They must hope that the terms of the settlement stick because they have not been sanctioned by a court.

A panelist summarized three specific impacts of *Amchem*. First, he said, more cases are now proceeding to non-class settlements, where there are no criteria and no supervision. Second, several cases have struck down non-judicial settlements, forcing the parties to go back to the court and try cases that all the parties wanted to settle. Third, the requirements for a litigation class place defendants in an awkward position. If they claim under *Amchem* that the case is suitable for class certification and trial, and then fail to settle, they may have stipulated to something that will harm them for litigation purposes. The internal problem for the defendants is what they must do to support and

enforce a settlement after they have asserted to the court that the case is suitable for certification as a litigation class.

A panelist added that the absence of a clearly defined standard for certification of a settlement class is exploited by tactical, professional objectors. In essence, they want a financial reward in return for dropping their objections. Greater clarity in the rule, he said, would not solve the problem of non-meritorious objections entirely, but it would take an argument away from nuisance objectors.

Approval of Settlements

Judge Rosenthal reported that the rules committees retreated in the 1990s from the decision to seek approval of a separate provision for settlement classes because *Amchem* and *Ortiz* were pending in the Supreme Court. But there was also strong and negative reaction to the committee's published rule, especially from law professors who argued that it would unleash the forces of collusion and lead to rampant reverse auctions.

At the same time, defendants feared that loosening the standards for certification of settlement classes would bleed over inevitably to loosen the standards for litigation class actions. They warned that the proposal would invite more class actions because it would be easier for potential plaintiffs to obtain settlement awards. In light of these concerns, she said, there was no consensus for the committee to proceed with the proposal.

She added that the 2003 amendments to Rule 23 were designed to put rigor into the evaluation of a settlement's fairness, reasonableness and adequacy and to strengthen the oversight of attorney's fees. The amendments, though, deliberately did not address whether the standards for certifying a settlement class should be different from those for certifying a trial class. She asked whether conditions have changed since 2003 and whether the absence of a settlement class certification standard in Rule 23, coupled with other concerns raised by the panelists, are sufficiently acute to warrant pursuing rule amendments.

A panelist explained that effective brakes are currently in place to deal with abusive settlements. Most class actions, moreover, are litigated in a relatively small number of district courts. The judges are sophisticated and experienced and know how to deal with issues of fairness and compensation.

A panelist urged pursuing a distinct rule addressing settlement classes. He noted that the current requirements for certification are clear, perhaps too clear, and are inconsistent with the realities of the settlement process. The defendants, in reality, are waiving their defenses and do not have a trial plan because their objective is a settlement without a trial. Nevertheless, *Amchem* requires them to go through a certification process

that does not make a lot of sense for them. Another panelist did not see a pressing need for a settlement-class rule in anti-trust, securities, and financial services cases, but agreed that it could be helpful in mass-tort cases.

A panelist argued that the primary focus of a proposed settlement-class rule should not be on the class-certification process. He pointed out that settlements in mass-tort cases do not reach the stage of court approval under Rule 23(e)(2) because the plaintiffs cannot meet the certification requirements of Rule 23(a) and (b).

Rather, an amended rule should build on Rule 23(e)(2), which specifies that a settlement must be "fair, reasonable, and adequate." The rule would alter *AmChem's* statement that Rule 23(e) is not a substitute for Rule 23(a) and (b). Instead, the inquiry in a settlement-class case would proceed directly to Rule 23(e), essentially skipping over Rule 23(a) and (b).

The amendment could augment the court's inquiry under Rule 23(e)(2) by requiring it to examine the fairness of compensation among the different members of the class and determine whether variations in individual entitlement are adequately reflected in the proposed settlement. Injuries of class members, for example, may well range from mere fear of injury to permanent disability. It was pointed out that most mass-tort settlements do in fact consider those distinctions and typically provide a grid of different compensation levels for different levels of injury. They also establish some sort of due process arrangements for making the awards.

The recent ALI principles of aggregate litigation deal with certification of a settlement class and provide that a settlement class does not have to meet the standards for a litigation class. They specify the various fairness factors that must be applied to settlements and address second opt-outs and objectors. It was recommended that the civil advisory rules committee review the ALI deliberations to see whether any of the proposals it considered would be suitable for a federal rule change.

It was reported that the ALI also had taken a hard look at cy-près cases. Its principles of aggregate litigation create a presumption that undistributed money is given to the class. If there is a cy-près issue, it is normally because it is difficult to distribute the money, and a recipient or recipients must be selected that mirrors the purpose of the class.

Although just one part of the larger ALI project to address settlement classes, the cy-près portion of the new principles has been cited more often than all other provisions of the principles combined. It has recently been adopted as the law of a federal circuit and cited by two other circuits. A panelist recommended that if the advisory committee decides to proceed with amendments to address settlement classes, cy-près should be an important component of them.

Role of the state attorneys general in class settlements

It was pointed out that the attorneys general of the states review class-action settlements carefully and play a useful and appropriate role. The attorneys general have a sharing arrangement and work well together in reviewing settlements and taking action where appropriate.

Under CAFA a defendant has to give notice of a settlement to the attorneys general of the affected states within 90 days. After the notice, the lawyers may receive calls from a group of attorneys general inquiring into the facts and details of the case and the settlement. They are also often asked to present supporting information to justify their fees. In addition, when a truly abusive settlement is announced, law professors, concerned lawyers who may have had competing cases, as well as the attorneys general, normally come forward to object.

It was agreed that the impact of the efforts of the attorneys general has been to raise the bar generally for negotiating and presenting settlements. Courts, moreover, are very conscious in overseeing how much money is distributed to the class, how soon it is distributed, and how much the lawyers receive in fees.

In light of the effectiveness of the review of settlements by the attorneys general, the panel was asked whether there is still a need for Rule 23(e)'s requirement that the presiding judge review and approve all settlements. The panelists replied that judicial supervision is still appropriate and pointed out that the attorneys general do not intervene in every case.

4. COMPETING CLASSES AND COUNSEL

Duplication of efforts

A panelist pointed to the problems arising when many different counsel file similar class actions, as often occurs under the federal anti-trust laws. Historically, the cases have been coordinated by having the Multidistrict Litigation Panel sweep them into a single proceeding for pretrial purposes. Recently, though, lawyers for both plaintiffs and defendants have been invoking the "first-filed" rule. Thus, if the defendants have no objection to the location of the first-filed case, their lawyers file motions to stay or dismiss all other class actions, and the matter never reaches the MDL panel. Likewise, plaintiffs who file the first case defend their turf by filing motions to stay or dismiss all later cases.

It was reported that law firms filing class-action cases have a significant problem in controlling the work of other, competing lawyers. When a law firm representing a class of plaintiffs reaches the point of resolving the case with the defendants, it is often

confronted with other lawyers seeking fees for having performed unnecessary or counter-productive services. The lawyers were not asked to perform the work for the class, and their intervention may in fact be an impediment to resolution of the case. Defendants should not have to pay for the unnecessary services, nor should fees be diverted from the lawyers who actually handled the important work on the case.

It was pointed out that the Southern District of New York has developed a body of case law specifying that before class counsel is appointed, services that duplicate the work rendered by other counsel are not compensable. And after the appointment of counsel, only services performed at the direction of lead counsel are compensable. That process was said to be working effectively and might be considered for inclusion in an amended rule.

Appointment of Counsel

It was reported that Rule 23(g), part of the 2003 rule amendments, has worked very well and is beneficial for practitioners. It allows the court to appoint interim class counsel after a case has been filed to represent the class up through certification. Then at certification the court decides whom to appoint as class counsel. There is some question, though, as to whether the rule applies when there is just one case.

A panelist said that Rule 23(g) should be applied early and often, for it is essential for the courts to control the appointment of counsel and the payment of attorney fees. In many CAFA cases, for example, a lawyer must negotiate with other lawyers who have filed duplicative cases in order to reach agreement on the hard policy decisions on how best to frame the case to achieve court certification. It leads to a good deal of tactical behavior among counsel that has little to do with the presentation of the case for certification. To make those hard policy decisions, he said, it is important to have only one lead lawyer, or maybe two lawyers, in charge of the case. Better outcomes are reached when a court asserts strong control at the front end of a case, and Rule 23(g) is the perfect vehicle to achieve that control.

A panelist said that when there is an MDL proceeding, which brings many class actions together, some courts forgo Rule 23(g) and rely on their inherent authority and do one of two things. On the one hand, they may instruct the counsel of all the many overlapping cases that they should get together and file a consolidated complaint that is, in effect, an amalgam of all the actions. Usually, as a part of that process, a management team emerges to take responsibility for the new complaint, which essentially initiates a new action. On the other hand, where there are many single-state actions in the MDL proceeding, the cases will not be combined because each state wants to stand on its own. Typically a liaison counsel is appointed by the court to bring all the counsel together. He added that counsel are not usually brought together for fee-sharing purposes, although they generally have made some arrangements on their own.

Federal-State coordination

Judge Rosenthal noted that CAFA has increased the number of federal class actions and affected the nature and extent of federal-state issues. She asked whether the pre-CAFA problems have abated and whether Rule 23 is adequate in dealing with current federal-state coordination issues.

It was agreed that CAFA is working much as its proponents intended. Cases with interstate implications are migrating to the federal courts, while those involving local controversies remain in the state courts.

A panelist said that the remaining coordination problems arise mostly in one state. When there is a multi-state controversy after CAFA, most class actions will be filed in the federal courts. But if a group of plaintiffs live in the same state as the defendant, their class action will be heard in the state courts. He said that it is common to have a national MDL proceeding that consolidates class actions proceedings for all the federal cases, except those in one state. In that state, there will be a parallel class action in the state courts for local residents. Despite the separate proceedings, coordination normally occurs among counsel and the courts.

The panelists noted that the federal MDL judges have become very proficient in handling MDL proceedings and in reaching out to work cooperatively with the state courts in mass-tort cases. They added that state court judges have their own difficult issues to resolve, and coordination with their federal colleagues has been very beneficial.

CONCLUSIONS

Judge Rosenthal summarized the various concerns voiced by the panelists and asked each to pick the single most promising potential rule amendment that would have a beneficial impact on class-action practice.

Front-loading of cases

One panelist cited the front-loading of cases after *Hydrogen Peroxide* as an important issue that needs to be addressed. He suggested drafting a rule to give the parties and the courts more guidance on exactly what information a plaintiff must produce for class certification. The parties, he said, are uncertain about the impact of all the recent cases. They want an early ruling on class certification, but they also want to avoid discovery costs and prefer to continue with some form of bifurcated discovery.

Class definition

Another panelist suggested a rule that revisits the issue of predominance and acknowledges that most cases appropriate for class adjudication in fact have individual issues. To pretend that such is not the case, he said, results in a waste of time and much unproductive behavior. There is, moreover, a difficult intersection among several class-definition issues, including the current ambiguity over issues classes under Rule 23(c)(4), the use of (b)(2)-(b)(3) hybrid classes, certification of settlement-only classes, and handling (b)(3) classes that have some individual issues with bifurcated liability and damages.

Rather than having an "all or nothing" approach to certification based on whether common issues predominate or not, the committee might prepare a rule that gives the courts direction and discretion in class-actions that have individual issues. As a starting point, he suggested examining the case law on issues-classes under Rule 23(c)(4). A wide variety of cases, he said, can be adjudicated very effectively on a class basis. But many of the most important – those where group adjudication will confer the most social benefit – will likely have individual issues as well as common issues. He also suggested developing a rule that is flexible enough to accommodate a lower bar for certification of classes for settlement purposes.

Settlement classes

Another panelist's choice was for a distinct settlement-class rule. It might be similar to the advisory committee's proposed amendments to Rule 23(b)(4) in the 1990s. Regardless of the details of the rule, though, it should contain a specific provision that creates a clear basis for a district court to approve and supervise mass-tort settlements under Rule 23.

NEXT MEETING

The committee will hold its next meeting on Monday and Tuesday, June 11 and 12, 2012, in Washington, D.C.

Respectfully submitted,

Peter G. McCabe,
Secretary

TAB 1B

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JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE THOMAS F. HOGAN
Secretary

PRELIMINARY REPORT
JUDICIAL CONFERENCE ACTIONS
March 13, 2012
****

All the following matters requiring the expenditure of funds were approved by the Judicial Conference *subject to the availability of funds* and to whatever priorities the Conference might establish for the use of available resources.

****

At its March 13, 2012 session, the Judicial Conference of the United States —

Elected to the Board of the Federal Judicial Center for a term of four years: Judge Michael J. Melloy, United States Court of Appeals for the Eighth Circuit, and Judge Catherine C. Blake, United States District Court for the District of Maryland, to succeed Judge Susan H. Black, United States Court of Appeals for the Eleventh Circuit, and Chief Judge Loretta A. Preska, United States District Court for the Southern District of New York.

EXECUTIVE COMMITTEE

Approved a resolution in recognition of the substantial contributions made by Judge John Walker, Jr., Chair of the Committee on Judicial Conduct and Disability, whose term of service ended January 26, 2012.

COMMITTEE ON THE BUDGET

Approved a 4.0 percent annual budget cap, in lieu of the current 7.5 percent budget cap, for the Defender Services account from fiscal year 2014 through fiscal year 2018, while maintaining the exception for increases in panel attorney rates above inflation.

Approved a 5.2 percent annual budget cap, in lieu of the current 6.6 percent budget cap, for the Court Security account from fiscal year 2014 through fiscal year 2018.

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT

Raised the exemplification fee, item number three under the district court fee schedule, from $18 to $21, and raised the record search fee, item number eight under the Court of Federal Claims fee schedule, from $26 to $30.

Approved a revised schedule for the disposition of records of the Judicial Panel on Multidistrict Litigation.

Approved a revised schedule for the disposition of records of the Court of Federal Claims.

Approved a revision of the schedule for the disposition of criminal case file records in the district courts to permit the disposal of electronic sound recordings (produced in lieu of transcript) of arraignments, pleas, and proceedings with the imposition of sentence when the connected recordings are 20 years old.

Approved a revised schedule for the disposition of case file records in the appellate courts.

Agreed to request that 28 U.S.C. § 105(a) be amended to transfer Ste. Genevieve and Iron Counties from the Eastern Division to the Southeastern Division within the Eastern District of Missouri.

COMMITTEE ON CRIMINAL LAW

Agreed to seek legislation to:

a. Amend 18 U.S.C. § 3142(c) to allow a court to waive the electronic monitoring condition if the court orders a more restrictive condition of pretrial services release;

b. Amend 18 U.S.C. § 3154(1) to allow a court to waive the preparation of the bail report in all cases where the report would have little or no bearing on the court's release decision;

c. Amend 18 U.S.C. § 3155 to eliminate the requirement that the chief probation or pretrial services officer submit an annual report to the Director of the Administrative Office of the U.S. Courts;

d. Amend 18 U.S.C. § 3602 to allow a probation officer appointed in one district to perform services for another district with the consent of the appointing court;

e. Amend 18 U.S.C. § 3664(d)(2) to waive the requirement that a probation officer provide notice to a victim of an offense if a representative of an executive branch agency has already provided such notice; and

f. Amend 18 U.S.C. § 3561(a)(3) to clarify a judge's authority to impose a combined sentence of probation and imprisonment for the same or multiple charges in petty offense cases.

With regard to the use-of-force and other safety-related policies:

a. Amended the use-of-force policy to:

   i. Extend its applicability to probation and pretrial services officer assistants, and

   ii. Authorize officers and officer assistants to use restraints when the use of force has been authorized;

b. Revised the oleoresin capsicum (OC) policy to extend its applicability to probation and pretrial services officer assistants; and

c. Authorized the Director of the Administrative Office to develop a national curriculum of safety and defensive tactics training for probation and pretrial services officer assistants, which will incorporate training on the proper use of OC products and restraints in the performance of official duties.

Authorized revisions to Monograph 111, *The Supervision of Federal Defendants*, and Monograph 112, *Pretrial Services Investigation and Report*, to include guidance on pretrial diversion.

COMMITTEE ON INFORMATION TECHNOLOGY

Adopted a policy that no national funds will be provided to local court units to acquire new telephone systems other than the national internet protocol (IP) telephone system unless the local court unit first submits a detailed justification to its circuit judicial council as to why the national system would be an inadequate solution for that court unit and receives prior approval from the circuit judicial council.

COMMITTEE ON THE JUDICIAL BRANCH

Approved an amendment to section 260.10 of the Travel Regulations for United States Justices and Judges, *Guide to Judiciary Policy*, Vol. 19, Ch. 2, to clarify that a judge can approve his or her own claim for reimbursement of travel expenses, and to state that a court certifying officer must confirm that the judge's travel was for official business, that the mathematical calculations on the voucher are correct, and that the judge's claims for reimbursement are necessary and proper to the travel involved, consistent with the travel regulations, and supported with the receipts and approvals as necessary.

Approved amendments to the Relocation Allowances for United States Justices and Judges, *Guide to Judiciary Policy*, Vol. 19, Ch. 3, to bring them into conformity with changes to the General Services Administration relocation regulations (41 C.F.R. Ch. 302) that took effect in August 2011.

COMMITTEE ON JUDICIAL RESOURCES

Modified its policy on promotion to Judiciary Salary Plan (JSP) grade 12 of the principal secretary to a chief circuit judge to state that the promotion is temporary and that the grade of that secretary will revert to JSP grade 11 at the expiration of the judge's tenure as chief judge or when the secretary leaves that position. This policy also applies to the principal secretary to the chief judge of the Court of International Trade. Any JSP grade 12 secretary who has attained the JSP grade 12 as principal secretary to a chief circuit judge or a chief judge of the Court of International Trade prior to the date of this policy change (March 13, 2012) is not affected by this change.

Approved, for each court or federal public defender organization employee on a regularly scheduled bi-weekly tour of duty of less than or equal to 64 hours, payment of the judiciary's contribution to the employee's Federal Employee Health Benefits premium on a simple prorated basis based on the proportion of the employee's standard tour of duty to that of a full-time, 80-hours-per-pay-period employee, effective the first full pay period of January 2013.

Approved a formula to allocate staff for alternative dispute resolution programs in the district courts, starting in fiscal year 2013, based on 2.46 hours per alternative dispute resolution case and a constant value of 394.09 hours for all alternative dispute resolution programs.

Approved a staffing formula to allocate death penalty law clerks in the district courts, starting in fiscal year 2013, based on a per pending case credit of 77.4 hours for cases that are not stayed as of the end of a statistical year, regardless of age, and a constant value of 691.2 hours provided to each district court meeting a three-case minimum.

Declined to rescind its September 1992 policy that allows for an increase in the grade of the district court clerk in those instances where the grade of the district court clerk would otherwise be lower than the grade of the bankruptcy clerk, the chief probation officer, or the chief pretrial services officer in the same district.

Approved a one-year stabilization period for increases or decreases in court unit executive target grades based on the approved executive grading process.

Approved the discontinuation of non-foreign post differential payments to current and prospective eligible court employees.

Modified its March 1997 policy regarding over-strength official court reporter positions to state the following:

> In the event a judge changes the election of the method of recording court proceedings from official court reporters to electronic sound recording systems, funding for the court reporter will be discontinued 90 days from the date of election to electronic sound recording systems. One additional period of up to 120 days beyond the original 90-day period will be allowed upon certification by the chief judge of the affected court to the circuit judicial council that additional staff resources are necessary.

COMMITTEE ON JUDICIAL SECURITY

Approved the following concerning membership of court security committees –

> A court security committee shall consist of the members set forth below. The chief judge (as chair) may designate a judge to serve as his or her designee, and may adjust the membership as deemed appropriate. The district U.S. marshal (as the principal coordinator) and other members may, with the concurrence of the chair, have a designee attend in their place.
>
> Membership:
>
> (1) chair: chief district judge;
> (2) principal coordinator: district U.S. marshal;
> (3) the chief bankruptcy judge;
> (4) a magistrate judge;
> (5) a court of appeals judge when there is a court of appeals or the chambers of a circuit judge within the district;
> (6) the United States attorney;
> (7) the federal public defender;
> (8) the district clerk of court;
> (9) the bankruptcy clerk of court;
> (10) the chief probation officer;
> (11) the chief pretrial services officer;
> (12) the circuit executive if physically located within the district;
> (13) the bankruptcy administrator or U.S. trustee;
> (14) a representative of the General Services Administration, where appropriate; and
> (15) a government-employee representative of the Federal Protective Service.

COMMITTEE ON THE ADMINISTRATION OF THE MAGISTRATE JUDGES SYSTEM

Approved recommendations regarding specific magistrate judge positions to (a) increase the salary of a part-time magistrate judge position in the Middle District of Pennsylvania;

and (b) discontinue a part-time magistrate judge position and decrease the salaries of three part-time magistrate judge positions in the District of Wyoming.

Agreed to seek legislation to amend 18 U.S.C. § 3401 to give magistrate judges authority to act on all post-conviction motions in misdemeanor cases where a magistrate judge has imposed a sentence.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Approved a proposed amendment to Criminal Rule 16, and agreed to transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

COMMITTEE ON SPACE AND FACILITIES

Agreed to amend the *U.S. Courts Design Guide* to eliminate raised access flooring as a mandatory requirement for wire management in all areas of the courthouse, except the courtroom well, where frequent changes to wire management make it cost-effective.

TAB 1C

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Oral Report by the Administrative Office

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TAB 2A

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

OF THE

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

MARK R. KRAVITZ
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JEFFREY S. SUTTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

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

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

Date: May 8, 2012

Re: Report of the Civil Rules Advisory Committee

Introduction

The Civil Rules Advisory Committee met at the University of Michigan Law School in Ann Arbor on March 22 and 23, 2012. Draft Minutes of this meeting are attached. This report has been prepared by Professor Cooper, Committee Reporter, with Professor Marcus, Associate Reporter, and various subcommittee chairs.

Part I of this Report presents for action a proposal to amend Civil Rule 45. The proposal was published in August, 2011. Some modest changes are recommended in light of the public comments and further Subcommittee and Committee deliberations. It is recommended that the revised Rule 45 be recommended to the Judicial Conference for transmission to the Supreme Court for adoption.

Part II presents several matters on the Committee agenda for information and possible discussion. In order, they include preservation of information to respond to future discovery requests, a topic discussed at the January meeting of the Standing Committee; the work of the Subcommittee that is pursuing activities prompted by the conference held at Duke University School of Law in May, 2010; pleading standards; Civil Rule 84 forms; class-action issues; and the gradual accumulation of issues arising from the Style Project as well as similar issues.

I. RULES 45 & 37: ACTION TO RECOMMEND ADOPTION OF REVISED RULES 45 & 37

ACTION ITEM: RULE 45

A preliminary draft of proposed amendments to Rule 45 was published for comment in August, 2011. Three public hearings were scheduled, but all were eventually cancelled. Nobody indicated an interest in testifying at either the first or the second, and the two who indicated an interest in testifying at the last hearing decided to submit written comments instead. The Advisory Committee received 25 written comments; a summary of those comments is attached.

After the public comments were in, the Discovery Subcommittee of the Advisory Committee met by conference call to consider them, and based on that discussion suggested some modifications to the proposed amendments. At the Advisory Committee's Spring meeting, those modifications were reviewed, and a few topics were identified for additional consideration. After the Advisory Committee's meeting and review by the Subcommittee, a revised Rule 45 package was circulated to the full Advisory Committee and received unanimous support from the Advisory Committee. The changes recommended to the Rule 45 package since publication are very minor, and will be summarized below. The modified version of the amendment package also includes style changes recommended by the Standing Committee's Style Consultant.

The proposed amendments to Rule 45 result from a multi-year study conducted by the Advisory Committee that began with a literature search and an effort to canvass bar groups to identify issues possibly warranting amendments to the rule. That activity initially produced a list of some 17 specific possible amendments that was winnowed to a much shorter list. Meanwhile, overall concerns about the length and complexity of Rule 45 produced a variety of ideas about ways to simplify the rule, in addition to amendments targeting specific concerns. After much work had been done on these various matters, the Subcommittee convened a mini-conference attended by about two dozen experienced lawyers to review and evaluate the various amendment ideas. Building on that foundation (and with further input from some bar groups), the Advisory Committee eventually decided to adopt the most modest form of rule simplification it had considered and to adopt some but not all of the specific rule amendments that were proposed during its study of the rule. Four specific changes will be made by the proposed amendments.

Simplification: Current Rule 45 creates what the Advisory Committee came to call a "three-ring circus" of challenges for the lawyer seeking to use a subpoena. First, the lawyer would have to choose the right "issuing court," then she would have to ensure that the subpoena was served within that district, or outside of the district but within 100 miles of where performance was required, or within the state if state law allowed, and then she would have to determine where compliance could be required, a project made challenging in part by the scattered provisions bearing on place of compliance found in different provisions of the rule.

The amendment package sought to eliminate this three-ring circus by making the court where the action is pending the issuing court, permitting service throughout the United States (as is currently authorized under Fed. R. Crim. P. 17(e)), and combining all provisions on place of compliance in a new Rule 45(c). New Rule 45(c) preserves the various place-of-compliance provisions of the current rule (except that the reference to state law is eliminated and the "*Vioxx*" issue is addressed as discussed below).

The simplification proposals received broad support in the public commentary, and only one change has been proposed to those amendments. The published proposal permitted the place of compliance for document subpoenas under Rule 45(c)(2)(A) to be any place "reasonably convenient for the person who is commanded to produce." The premise of this provision was that,

particularly with electronically stored information, place of production should not be a problem and should be handled flexibly. But it was noted that Rule 45(d)(2)(B)(i) directs the party that served the subpoena to file a motion to compel compliance in "the district where compliance is required." That could lead to mischief, if the lawyer serving the subpoena designates her office as the place for production and a distant nonparty served with the subpoena objects on some ground. The objecting nonparty should not have to *litigate* in the lawyer's home jurisdiction just because *production* there would be "reasonably convenient," as it might well be. Accordingly, Rule 45(c)(2)(A) was changed to call for production "within 100 miles of where the person [subject to the subpoena] resides, is employed, or regularly transacts business in person." This change should ensure -- as Rule 45(c) is generally designed to ensure -- that if litigation about the subpoena is necessary it will occur at a location convenient for the nonparty.

At the same time, agreement on place of production is a desirable thing, and the Committee Note is therefore modified to recognize that the rule amendments do not limit the ability of parties to make such agreements. We expect that the current practice of parties agreeing to produce electronically stored information by email or by simply sending a CD will continue.

A clarifying amendment to the Committee Note on Rule 45(c) addresses concerns expressed in the comments. One is the risk some would read the amended rule to require a subpoena for all depositions -- even of parties or party officers, directors, or managing agents. The Note has been clarified to remind readers that no subpoena is required for depositions of such witnesses, and that the geographical limitations that apply to subpoenas do not apply when such depositions are simply noticed. Another Committee Note clarification confirms that, when the issuing court has made an order for remote testimony under Rule 43(a), a subpoena may be used to command the distant witness to attend and testify within the geographical limits of Rule 45(c).

Transfer of subpoena-related motions: New Rule 45(c) essentially retains the existing rule requirement that motions to quash or enforce a subpoena should be made in the district where compliance with the subpoena is required, with the result that the "enforcement court" may often be different from the "issuing court."

Existing authority has recognized that some matters are better decided by the issuing court. Rule 26(c)(1), for example, permits a nonparty from whom discovery is sought to seek relief in the court where the action is pending. The Committee Note to the 1970 amendment adding subdivision (c) to Rule 26 also recognized that "[t]he court in the district where the deposition is being taken may, and frequently will, remit the deponent or party to the court where the action is pending."

This amendment package adds Rule 45(f), which explicitly authorizes transfer of subpoena-related motions from the enforcement court to the issuing court, including not only motions for a protective order but also motions to enforce the subpoena.

The published draft permitted transfer only upon consent of the nonparty and the parties, or in "exceptional circumstances." After public comment, the Advisory Committee concluded that party consent should not be required; if the person subject to the subpoena consents to transfer then the enforcement court may transfer. The Committee felt that the person whose convenience should be of primary concern is the person subject to the subpoena, and that transfer of a dispute to the court presiding over the action should be authorized whenever that person agrees. The Committee also felt that parties to an action can never justifiably complain when they are required to litigate an issue before the judge presiding over the action, and that requiring their consent to a transfer might in some cases encourage parties to refuse to consent in the hope of getting a different judge to rule on the dispute -- a kind of mid-case forum shopping.

Whether the "exceptional circumstances" standard should be retained when the nonparty witness does not consent was the focus of considerable public comment. Some urged that a more flexible standard be adopted. Others argued that the protection of the nonparty subject to the subpoena should be paramount, and therefore that the "exceptional circumstances" standard should remain when the nonparty does not consent. Eventually the Advisory Committee decided to retain the "exceptional circumstances" standard. The Committee is concerned that a lower standard could result in too-frequent transfers that force nonparties to litigate in distant fora to protect their interests.

The Committee Note has been revised to clarify that the prime concern should be avoiding undue burdens on the local nonparty, and also to identify considerations that might warrant transfer nonetheless, emphasizing that such concerns warrant transfer only if they outweigh the interests of the local nonparty in local resolution of the motion. It also suggests that the judge in the compliance court might consult with the judge in the issuing court, and encourages use of telecommunications methods to minimize the burden on the nonparty when transfer does occur.

Trial subpoenas for distant parties and party officers: There is a distinct split in existing authority about whether a subpoena may command a distant party or party officer to testify at trial. One view is that the geographical limits that apply to other witnesses do not apply to such witnesses. See *In re Vioxx Products Liability Litigation*, 438 F.Supp.2d 664 (E.D. La. 2006) (requiring an officer of the defendant corporation, who lived and worked in New Jersey, to testify at trial in New Orleans even though he was not served within Louisiana under Rule 45(b)(2)). The alternative view is that the rule sets forth the same geographical limits for all trial witnesses. See *Johnson v. Big Lots Stores, Inc.*, 251 F.R.D. 213 (E.D. La. 2008) (holding that opt-in plaintiffs in Fair Labor Standards Act action could not be compelled to travel long distances from outside the state to attend trial because they were not served with subpoenas within the state as required by Rule 45(b)(2)).

The division of authority resulted from differing interpretations of the 1991 amendments to Rule 45. The Advisory Committee concluded that those amendments were not intended to create the expanded subpoena power recognized in *Vioxx* and its progeny, and decided to restore the original meaning of the rule. The Committee was concerned also that such expanded power could invite tactical use of a subpoena to apply inappropriate pressure to the adverse party. Party officers subject to such subpoenas might often be able to secure protective orders, but the motions would burden the courts and the parties and there might be some *in terrorem* value despite the protective-order route to relief. Moreover, with large organizations it will often be true that the best witnesses are not officers but other employees. To the extent testimony of such party witnesses is important there are alternatives to attending trial. See, e.g., Rule 30(b)(3) (authorizing audiovisual recording of deposition testimony) and 43(a) (permitting the court to order testimony by contemporaneous transmission).

The amendments therefore provide in Rule 45(c)(1) that a subpoena can command any person to testify only within the limits that apply to all witnesses. As noted above, Committee Note language was added to recognize that this provision does not affect existing law on the location for a deposition of a party or party's officer, director, or managing agent, for which a subpoena is not needed.

For purposes of inviting public comment, the Rule 45 publication package included an Appendix adding authority for the court to order testimony at trial by parties or party officers in specified circumstances. The published draft made clear that the Advisory Committee did not propose the addition of such authority. The public comment on this proposal was mixed, and the Advisory Committee did not change its view that this authority should not be added to the rule. The Appendix is therefore not included in this package.

Notice of service of "documents only" subpoena: The 1991 amendments introduced the "documents only" subpoena. The deposition notice requirements of Rule 30 did not apply to such subpoenas. Rule 45(b)(1) was therefore added to require that notice be given of service of such subpoenas. In the restyling of 2007, the rule provision was clarified to direct that notice be provided before service of the subpoena.

As it examined Rule 45 issues, the Committee was repeatedly informed that this notice provision is frequently not obeyed. Parties often obtain documents by subpoena without notifying other parties that the subpoena has been served. The result can be that there are serious problems at or before trial when "surprise" documents emerge and arguments may be made that they should not be admissible or that further discovery is warranted.

The amendment package attempts to solve these problems by moving the existing provision to become a new Rule 45(a)(4) with a heading that calls attention to the requirement -- "Notice to Other Parties Before Service." The relocated provision also slightly modifies the existing provision by directing that a copy of the subpoena be provided along with the notice. That should assist the other parties in knowing what is being sought and determining whether they have objections to production of any of the materials sought or wish to subpoena additional materials.

The effort to call attention to the notice requirement was supported during the public comment period. The Department of Justice raised a concern, however, about the proposal to remove the phrase "before trial" from the current rule. It noted that removal of that phrase could complicate its efforts (and the efforts of other judgment creditors) to locate assets subject to seizure pursuant to judgments. For the Department, those judgments include restitution in favor of crime victims. Giving advance notice in such situations could frustrate enforcement of judgments or make it considerably more cumbersome.

At the same time, it appeared that the value of notice of trial subpoenas (the concern that led to the proposal for removal of the phrase in the first place) was limited or nonexistent because usually any such documents would be listed in the Rule 26(a)(3) disclosures or otherwise identified during pretrial preparations. Indeed, the parties may often cooperate to subpoena needed exhibits for trial.

After considering alternatives, the solution adopted was to restore the phrase "before trial" to the rule, with the clarifying addition of "pretrial" before "inspection of premises" to make clear that the rule does not intrude on the court's authority to order such an inspection during trial without regard to such notice. The Committee Note explanation for removal of "before trial" has been removed.

Another issue that has been raised repeatedly since early in the Advisory Committee's consideration of Rule 45 has been that additional notices should be required as subpoenaed materials are produced, and perhaps also when subpoenas are modified. There have also been suggestions that the rule should require that access be provided to materials produced in response to a subpoena. In particular, it has been noted (and repeated in the public comment period) that a number of states direct that the party serving the subpoena give notice upon receipt of produced materials, and that some states also require access to the materials.

Both the Subcommittee and the Advisory Committee have repeatedly discussed these proposals for additional notice provisions. All agree that cooperation and transparency in relation to subpoenas are desirable. All expect that judges would insist on such behavior in cases in which the parties did not do so without court intervention. But the Subcommittee and the full Committee have repeatedly concluded that adding notice requirements or an access requirement to the rule would not, overall, produce desirable effects.

A staring point is to recognize the reason for relocation of the existing notice requirement -- the frequent failure of lawyers to obey it. The requirement has been in the rule for over 20 years; the amendment is based on the optimistic expectation that relocation and addition of a heading will prompt much broader compliance. It also expands the requirement slightly, by insisting that the notice include the subpoena itself.

The Committee believes that this change will result in all parties being made aware when a subpoena is served -- a marked change from actual current practice -- and that this awareness will enable parties adequately to protect their interests. The Committee is concerned that requiring notice of receipt of documents could create new complications. Production of documents in response to a subpoena often occurs on a "rolling" basis, with documents being produced over time as they are found. Requiring a new notice every time additional documents are received could be burdensome, especially in large document cases, and failure to give notice on one or more occasions of a rolling production would likely spawn satellite litigation on the effect of the missed notice, with parties asking that documents not noticed be excluded from use in the litigation. As one member of the Advisory Committee noted during the Committee's Spring meeting: "Less compliance with more rules breeds satellite litigation." The "gotcha" possibilities of additional requirements can be considerable. Because we believe that clarifying the notice requirement will resolve most of the notice problems presently occurring under Rule 45, we have concluded that additional notice requirements, with their potential problems, should not be included.

The Committee has repeatedly been told that, having received the notice called for by the existing rule, lawyers can take action to guard themselves. They can be persistent in pursuit of information about the fruits of the subpoena. They can seek assistance from the court if needed. The Committee Note recognizes that lawyers can follow up in these manners. In response to these concerns, it has been expanded to note that parties can seek the assistance of the court, either in the scheduling order or otherwise, to obtain access.

Having reconsidered these issues yet again after the public comment period, the Discovery Subcommittee decided not to expand what is in the rule at present. The full Advisory Committee concurred. Accordingly, although the Committee Note has been amplified on these points, the rule provision itself has not been changed from what is currently in Rule 45(b)(1).

"Dirty" Version of Rule 45

Rule 45. Subpoena

(a) In General.

(1) ***Form and Contents.***

(A) *Requirements — In General.* Every subpoena must:

(i) state the court from which it issued;

(ii) state the title of the action~~, the court in which it is pending,~~ and its civil-action number;

(iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and

(iv) set out the text of Rule 45(d~~c~~) and (e~~d~~).

(B) *Command to Attend a Deposition — Notice of the Recording Method.* A subpoena commanding attendance at a deposition must state the method for recording the testimony.

(C) *Combining or Separating a Command to Produce or to Permit Inspection; Specifying the Form for Electronically Stored Information.* A command to produce documents, electronically stored information, or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(D) *Command to Produce; Included Obligations.* A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding person ~~party~~ to permit inspection, copying, testing, or sampling of the materials.

(2) ***Issuing*** ~~***Issued from Which***~~ ***Court.*** A subpoena must issue from the court where the action is pending. ~~as follows:~~

~~**(A)** for attendance at a hearing or trial, from the court for the district where the hearing or trial is to be held;~~

~~**(B)** for attendance at a deposition, from the court for the district where the deposition is to be taken; and~~

~~**(C)** for production or inspection, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.~~

(3) ***Issued by Whom.*** The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney also may issue and sign a subpoena if the attorney is authorized to practice in the issuing court. ~~as an officer of:~~

~~**(A)** a court in which the attorney is authorized to practice; or~~

~~**(B)** a court for a district where a deposition is to be taken or production is to be made, if the attorney is authorized to practice in the court where the action is pending.~~

(4) ***Notice to Other Parties Before Service.*** If the subpoena commands the production before trial of documents, electronically stored information, or tangible things or the pretrial inspection of premises, then before it is served on the person to whom it is directed, a notice and a copy of the subpoena must be served on each party ~~before the subpoena is served on the person to whom it is directed.~~

(b) Service.

(1) ***By Whom and How; Tendering Fees;*** ~~***Serving a Copy of Certain Subpoenas.***~~ Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need

not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies. ~~If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served, a notice must be served on each party.~~

(2) ***Service in the United States.*** A subpoena may be served at any place within the United States. ~~Subject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any place:~~

~~**(A)** within the district of the issuing court;~~

~~**(B)** outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection;~~

~~**(C)** within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; or~~

~~**(D)** that the court authorizes on motion and for good cause, if a federal statute so provides.~~

(3) ***Service in a Foreign Country.*** 28 U.S.C. § 1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country.

(4) ***Proof of Service.*** Proving service, when necessary, requires filing with the issuing court a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

(c) Place of compliance.

(1) ***For a Trial, Hearing, or Deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) ~~the person~~ is a party or a party's officer; or

(ii) ~~the person~~ is commanded to attend a trial and would not incur substantial expense.

(2) ***For Other Discovery.*** A subpoena may command:

(A) production of documents, ~~tangible things, or~~ electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person ~~reasonably convenient for the person who is commanded to produce~~; and

(B) inspection of premises~~,~~ at the premises to be inspected.

(d) ~~**(c)**~~ **Protecting a Person Subject to a Subpoena; Enforcement.**

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The ~~issuing~~ court for the district where compliance is required ~~under Rule 45(c)~~ must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises — or

131 to producing electronically stored information in the form
132 or forms requested. The objection must be served before the
133 earlier of the time specified for compliance or 14 days
134 after the subpoena is served. If an objection is made, the
135 following rules apply:
136 **(i)** At any time, on notice to the commanded person, the
137 serving party may move the ~~issuing~~ court for the
138 district where compliance is required ~~under Rule 45(c)~~
139 for an order compelling production or inspection.
140 **(ii)** These acts may be required only as directed in the
141 order, and the order must protect a person who is
142 neither a party nor a party's officer from significant
143 expense resulting from compliance.
144 **(3)** ***Quashing or Modifying a Subpoena.***
145 **(A)** *When Required*. On timely motion, the ~~issuing~~ court for the
146 district where compliance is required ~~under Rule 45(c)~~ must
147 quash or modify a subpoena that:
148 **(i)** fails to allow a reasonable time to comply;
149 **(ii)** requires a person to comply beyond the geographical
150 limits specified in Rule 45(c); ~~who is neither a party~~
151 ~~nor a party's officer to travel more than 100 miles~~
152 ~~from where that person resides, is employed, or~~
153 ~~regularly transacts business in person — except that,~~
154 ~~subject to Rule 45(c)(3)(B)(iii), the person may be~~
155 ~~commanded to attend a trial by traveling from any such~~
156 ~~place within the state where the trial is held;~~
157 **(iii)** requires disclosure of privileged or other protected
158 matter, if no exception or waiver applies; or
159 **(iv)** subjects a person to undue burden.
160 **(B)** *When Permitted*. To protect a person subject to or affected
161 by a subpoena, the ~~issuing~~ court for the district where
162 compliance is required ~~under Rule 45(c)~~ may, on motion,
163 quash or modify the subpoena if it requires:
164 **(i)** disclosing a trade secret or other confidential
165 research, development, or commercial information; or
166 **(ii)** disclosing an unretained expert's opinion or
167 information that does not describe specific
168 occurrences in dispute and results from the expert's
169 study that was not requested by a party.~~; or~~
170 ~~**(iii)** a person who is neither a party nor a party's officer~~
171 ~~to incur substantial expense to travel more than 100~~
172 ~~miles to attend trial.~~
173 **(C)** *Specifying Conditions as an Alternative*. In the
174 circumstances described in Rule 45(d~~c~~)(3)(B), the court may,
175 instead of quashing or modifying a subpoena, order
176 appearance or production under specified conditions if the
177 serving party:
178 **(i)** shows a substantial need for the testimony or material
179 that cannot be otherwise met without undue hardship;
180 and
181 **(ii)** ensures that the subpoenaed person will be reasonably
182 compensated.
183 **(e~~d~~) Duties in Responding to a Subpoena.**
184 **(1)** ***Producing Documents or Electronically Stored Information.*** These
185 procedures apply to producing documents or electronically stored
186 information:
187 **(A)** *Documents*. A person responding to a subpoena to produce
188 documents must produce them as they are kept in the ordinary
189 course of business or must organize and label them to
190 correspond to the categories in the demand.
191 **(B)** *Form for Producing Electronically Stored Information Not*
192 *Specified*. If a subpoena does not specify a form for
193 producing electronically stored information, the person
194 responding must produce it in a form or forms in which it is

195 ordinarily maintained or in a reasonably usable form or
196 forms.
197 **(C)** *Electronically Stored Information Produced in Only One Form*.
198 The person responding need not produce the same
199 electronically stored information in more than one form.
200 **(D)** *Inaccessible Electronically Stored Information*. The person
201 responding need not provide discovery of electronically
202 stored information from sources that the person identifies
203 as not reasonably accessible because of undue burden or
204 cost. On motion to compel discovery or for a protective
205 order, the person responding must show that the information
206 is not reasonably accessible because of undue burden or
207 cost. If that showing is made, the court may nonetheless
208 order discovery from such sources if the requesting party
209 shows good cause, considering the limitations of Rule
210 26(b)(2)(C). The court may specify conditions for the
211 discovery.
212 **(2)** ***Claiming Privilege or Protection.***
213 **(A)** *Information Withheld*. A person withholding subpoenaed
214 information under a claim that it is privileged or subject
215 to protection as trial-preparation material must:
216 **(i)** expressly make the claim; and
217 **(ii)** describe the nature of the withheld documents,
218 communications, or tangible things in a manner that,
219 without revealing information itself privileged or
220 protected, will enable the parties to assess the
221 claim.
222 **(B)** *Information Produced*. If information produced in response
223 to a subpoena is subject to a claim of privilege or of
224 protection as trial-preparation material, the person making
225 the claim may notify any party that received the information
226 of the claim and the basis for it. After being notified, a
227 party must promptly return, sequester, or destroy the
228 specified information and any copies it has; must not use or
229 disclose the information until the claim is resolved; must
230 take reasonable steps to retrieve the information if the
231 party disclosed it before being notified; and may promptly
232 present the information under seal to the court for the
233 district where compliance is required ~~under Rule 45(c)~~ ~~under~~
234 ~~seal~~ for a determination of the claim. The person who
235 produced the information must preserve the information until
236 the claim is resolved.
237 **(f)** **Transferring a Subpoena-Related Motion.** When the court where compliance
238 is required did not issue the subpoena, it may transfer a motion under
239 this rule to the issuing court if ~~the parties and~~ the person subject to
240 the subpoena consents or if the court finds exceptional circumstances.
241 Then, if the attorney for a person subject to a subpoena is authorized
242 to practice in the court where the motion was made, the attorney may
243 file papers and appear on the motion as an officer of the issuing court.
244 To enforce its order, the issuing court may transfer the order to the
245 court where the motion was made.
246 **(~~g~~e)** **Contempt.** The court for the district where compliance is required ~~under~~
247 ~~Rule 45(c)~~ — and also, after a motion is transferred, the issuing court
248 — may hold in contempt a person who, having been served, fails without
249 adequate excuse to obey the subpoena or an order related to it. ~~A~~
250 ~~nonparty's failure to obey must be excused if the subpoena purports to~~
251 ~~require the nonparty to attend or produce at a place outside the limits~~
252 ~~of Rule 45(c)(3)(A)(ii).~~

Committee Note

1
2 Rule 45 was extensively amended in 1991. The goal of the present
3 amendments is to clarify and simplify the rule. The amendments recognize the
4 court where the action is pending as the issuing court, permit nationwide
5 service of a subpoena, and collect in a new subdivision (c) the previously

scattered provisions regarding place of compliance. These changes resolve a conflict that arose after the 1991 amendment about a court's authority to compel a party or party officer to travel long distances to testify at trial; such testimony may now be required only as specified in new Rule 45(c). In addition, the amendments introduce authority in new Rule 45(f) for the court where compliance is required to transfer a subpoena-related motion to the court where the action is pending ~~in exceptional circumstances or~~ on consent ~~by agreement~~ of ~~the parties and~~ the person subject to the subpoena or in exceptional circumstances.

Subdivision (a). This subdivision is amended to provide that a subpoena issues from the court where ~~in which~~ the action is pending. Subdivision (a)(3) specifies that an attorney authorized to practice in that court may issue a subpoena, which is consistent with current practice.

In Rule 45(a)(1)(D), "person" is substituted for "party" because the subpoena may be directed to a nonparty.

Rule 45(a)(4) is added to highlight and slightly modify a notice requirement first included in the rule in 1991. Under the 1991 amendments, Rule 45(b)(1) required prior notice of the service of a "documents only" subpoena to the other parties. Rule 45(b)(1) was clarified in 2007 to specify that this notice must be served before the subpoena is served on the witness.

The Committee has been informed that parties serving subpoenas frequently fail to give the required notice to the other parties. The amendment moves the notice requirement to a new provision in Rule 45(a) and requires that the notice include a copy of the subpoena. The amendments are intended to achieve the original purpose of enabling the other parties to object or to serve a subpoena for additional materials. ~~The amendment also deletes the words "before trial" that appear in the current rule; notice of trial subpoenas for documents is as important as notice of discovery subpoenas.~~

Parties desiring access to information produced in response to the subpoena will need to follow up with the party serving it or the person served to obtain such access. The rule does not limit the court's authority to order notice of receipt of produced materials or access to them, and the parties may ask that such directions be included in the scheduling order. The party serving the subpoena should in any event make reasonable provision for prompt access.

Subdivision (b). The former notice requirement in Rule 45(b)(1) has been moved to new Rule 45(a)(4).

Rule 45(b)(2) is amended to provide that a subpoena may be served at any place within the United States, removing the complexities prescribed in prior versions.

Subdivision (c). Subdivision (c) is new. It collects the various provisions on where compliance can be required and simplifies them. Unlike the prior rule, place of service is not critical to place of compliance. Although Rule 45(a)(1)(A)(iii) permits the subpoena to direct a place of compliance, that place must be selected under Rule 45(c).

Rule 45(c)(1) addresses a subpoena to testify at a trial, hearing, or deposition. Rule 45(c)(1)(A) provides that compliance may be required within 100 miles of where the person subject to the subpoena resides, is employed, or regularly conducts business in person. For parties and party officers, Rule 45(c)(1)(B)(i) provides that compliance may be required anywhere in the state where the person resides, is employed, or regularly conducts business in person. When an order under Rule 43(a) authorizes testimony from a remote location, the witness can be commanded to testify from any place described in Rule 45(c)(1).

71 Under Rule 45(c)(1)(B)(ii), nonparty witnesses can be required to travel
72 more than 100 miles within the state where they reside, are employed, or
73 regularly transact ~~conduct~~ business in person only if they would not, as a
74 result, incur "substantial expense." When travel over 100 miles could impose
75 substantial expense on the witness, the party that served the subpoena may pay
76 that expense and the court can ~~could~~ condition enforcement of the subpoena on
77 such payment.
78
79 Because Rule 45(c) directs that compliance may be commanded only as it
80 provides, these amendments resolve a split in interpreting Rule 45's
81 provisions for subpoenaing parties and party officers. *Compare In re Vioxx*
82 *Products Liability Litigation*, 438 F. Supp. 2d 664 (E.D. La. 2006) (finding
83 authority to compel a party officer from New Jersey to testify at trial in New
84 Orleans), with *Johnson v. Big Lots Stores, Inc.*, 251 F.R.D. 213 (E.D. La.
85 2008) (holding that Rule 45 did not require attendance of plaintiffs at trial
86 in New Orleans when they would have to travel more than 100 miles from outside
87 the state). Rule 45(c)(1)(A) does not authorize a subpoena for trial to
88 require a party or party officer to travel more than 100 miles unless the
89 party or party officer resides, is employed, or regularly transacts ~~conducts~~
90 business in person in the state.
91
92 Depositions of parties, and officers, directors, and managing agents of
93 parties need not involve use of a subpoena. Under Rule 37(d)(1)(A)(i),
94 failure of such a witness whose deposition was properly noticed to appear for
95 the deposition can lead to Rule 37(b) sanctions (including dismissal or
96 default but not contempt) without regard to service of a subpoena and without
97 regard to the geographical limitations on compliance with a subpoena. These
98 amendments do not change that existing law; the courts retain their authority
99 to control the place of party depositions and impose sanctions for failure to
100 appear under Rule 37(b).
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102 For other discovery, Rule 45(c)(2) directs that inspection of premises
103 occur at those premises, and that production of documents, tangible things,
104 and electronically stored information may be commanded to occur at a place
105 within 100 miles of where the person subject to the subpoena resides, is
106 employed, or regularly conducts business in person ~~reasonably convenient for~~
107 ~~the person commanded to produce~~. Under the current rule, parties often agree
108 that production, particularly of electronically stored information, be
109 transmitted by electronic means. Such arrangements facilitate discovery, and
110 nothing in these amendments limits the ability of parties to make such
111 arrangements ~~the place of production has not presented difficulties. The~~
112 ~~provisions on the reasonable place for production are intended to be applied~~
113 ~~with flexibility, keeping in mind the assurance of Rule 45(d)(1) that undue~~
114 ~~expense or burden must not be imposed on the person subject to the subpoena~~.
115
116 Rule 45(d)(3)(A)(ii) directs the court to quash any subpoena that
117 purports to compel compliance beyond the geographical limits specified in Rule
118 45(c).
119
120 **Subdivision (d)**. Subdivision (d) contains the provisions formerly in
121 subdivision (c). It is revised to recognize the court where the action is
122 pending as the issuing court, and to take account of the addition of Rule
123 45(c) to specify where compliance with a subpoena is required.
124
125 **Subdivision (f).** Subdivision (f) is new. Under Rules 45(d)(2)(B),
126 45(d)(3), and 45(e)(2)(B), subpoena-related motions and applications are to be
127 made to the court where compliance is required under Rule 45(c). Rule 45(f)
128 provides authority for that court to transfer the motion to the court where
129 the action is pending. It applies to all motions under this rule, including
130 an application under Rule 45(e)(2)(B) for a privilege determination.
131
132 Subpoenas are essential to obtain discovery from nonparties. To protect
133 local nonparties, local resolution of disputes about subpoenas is assured by
134 the limitations of Rule 45(c) and the requirements in Rules 45(d) and (e) that
135 motions be made in the court in which compliance is required under Rule 45(c).

But transfer to the court where the action is pending is sometimes warranted. If ~~the parties and~~ the person subject to the subpoena consents to transfer, Rule 45(f) provides that the court where compliance is required may do so.

In the absence of consent, the court may transfer in exceptional circumstances. The rule contemplates that s~~S~~uch circumstances will be truly rare, and the proponent of transfer bears the burden of showing that they are presented. The prime concern should be avoiding burdens on local nonparties subject to subpoenas, and it should not be assumed that the issuing court is in a superior position to resolve subpoena-related motions. In some circumstances, however, transfer may be warranted in order to avoid disrupting the issuing court's management of the underlying litigation, as when that court has already ruled on issues presented by the motion or the same issues are likely to arise in discovery in many districts. Transfer is appropriate only if such interests outweigh the interests of the nonparty served with the subpoena in obtaining local resolution of the motion. Judges in compliance districts may find it helpful to consult with the judge in the issuing court presiding over the underlying case while addressing subpoena-related motions.

~~A precise definition of "exceptional circumstances" authorizing transfer is not feasible. Generally, if the dispute about the subpoena is focused on issues involved in the underlying action — for example, if these issues have already been presented to the issuing court or bear significantly on its management of the underlying action, or if there is a risk of inconsistent rulings on subpoenas served in multiple districts, or if the issues presented by the subpoena-related motion overlap with the merits of the underlying action — transfer may be warranted. If, on the other hand, the dispute is focused on the burden or expense on the local nonparty, transfer should not occur. The rule contemplates that transfers will be truly rare events.~~

If the motion is transferred, judges are encouraged to permit telecommunications methods to ~~can~~ minimize the burden a transfer imposes on nonparties, if it is necessary for attorneys admitted in the court where the motion is made to appear in the court in which the action is pending. The rule provides that if these attorneys are authorized to practice in the court where the motion is made, they may file papers and appear in the court in which the action is pending in relation to the motion as officers of that court.

After transfer, the court where the action is pending will decide the motion. If the court rules that discovery is not justified, that should end the matter. If the court orders further discovery, it is possible that retransfer may be important to enforce the order. One consequence of failure to obey such an order is contempt, addressed in Rule 45(g). Rule 45(g) and Rule 37(b)(1) are both amended to provide that disobedience of an order enforcing a subpoena after transfer is contempt of the issuing court and the court where compliance is required under Rule 45(c). In some instances, however, there may be a question about whether the issuing court can impose contempt sanctions on a distant nonparty. If such circumstances arise, or if it is better to supervise compliance in the court where compliance ~~it~~ is required, the rule provides authority for retransfer for enforcement. Although changed circumstances may prompt a modification of such an order, it is not expected that the compliance court will reexamine the resolution of the underlying motion.

Subdivision (g). Subdivision (g) carries forward the authority of former subdivision (e) to punish disobedience of subpoenas as contempt. It is amended to make clear that, in the event of transfer of a subpoena-related motion, such disobedience constitutes contempt of both the court where compliance is required under Rule 45(c) and the court where the action is pending. If necessary for effective enforcement, Rule 45(f) authorizes the issuing court to transfer its order after the motion is resolved.

200 The rule is also amended to clarify that contempt sanctions may be
201 applied to a person who disobeys a subpoena-related order, as well as one who
202 fails entirely to obey a subpoena. In civil litigation, it would be rare for
203 a court to use contempt sanctions without first ordering compliance with a
204 subpoena, and the order might not require all the compliance sought by the
205 subpoena. Often contempt proceedings will be initiated by an order to show
206 cause, and an order to comply or be held in contempt may modify the subpoena's
207 command. Disobedience of such an order may be treated as contempt.
208
209 The second sentence of former subdivision (e) is deleted as unnecessary.

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

* * * * *

1 **(b) Failure to Comply with a Court Order.**

2 **(1)** ***Sanctions <u>Sought</u> in the District Where the Deposition Is Taken.***

3 If the court where the discovery is taken orders a deponent to be
4 sworn or to answer a question and the deponent fails to obey, the
5 failure may be treated as contempt of court. <u>If a deposition-</u>
6 <u>related motion is transferred to the court where the action is</u>
7 <u>pending, and that court orders a deponent to be sworn or to answer</u>
8 <u>a question and the deponent fails to obey, the failure may be</u>
9 <u>treated as contempt of either the court where the discovery is</u>
10 <u>taken or the court where the action is pending.</u>

11 **(2)** ***Sanctions <u>Sought</u> in the District Where the Action Is Pending.***

* * * * *

Committee Note

1
2 Rule 37(b) is amended to conform to amendments made to Rule 45,
3 particularly the addition of Rule 45(f) providing for transfer of a subpoena-
4 related motion to the court where the action is pending. A second sentence is
5 added to Rule 37(b)(1) to deal with contempt of orders entered after such a
6 transfer. The Rule 45(f) transfer provision is explained in the Committee
Note to Rule 45.

"Clean" Version of Rule 45

Rule 45. Subpoena

(a) In General.

(1) ***Form and Contents.***

(A) *Requirements — In General.* Every subpoena must:

(i) state the court from which it issued;

(ii) state the title of the action and its civil-action number;

(iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and

(iv) set out the text of Rule 45(d) and (e).

(B) *Command to Attend a Deposition — Notice of the Recording Method.* A subpoena commanding attendance at a deposition must state the method for recording the testimony.

(C) *Combining or Separating a Command to Produce or to Permit Inspection; Specifying the Form for Electronically Stored Information.* A command to produce documents, electronically stored information, or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(D) *Command to Produce; Included Obligations.* A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding person to permit inspection, copying, testing, or sampling of the materials.

(2) ***Issuing Court.*** A subpoena must issue from the court where the action is pending.

(3) ***Issued by Whom.*** The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney also may issue and sign a subpoena if the attorney is authorized to practice in the issuing court.

(4) ***Notice to Other Parties Before Service.*** If the subpoena commands the production before trial of documents, electronically stored information, or tangible things or the pretrial inspection of premises, then before it is served on the person to whom it is directed, a notice and a copy of the subpoena must be served on each party.

(b) Service.

(1) ***By Whom and How; Tendering Fees.*** Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies.

(2) ***Service in the United States.*** A subpoena may be served at any place within the United States.

(3) ***Service in a Foreign Country.*** 28 U.S.C. § 1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country.

(4) ***Proof of Service.*** Proving service, when necessary, requires filing with the issuing court a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

(c) Place of compliance.

64 (1) ***For a Trial, Hearing, or Deposition.*** A subpoena may command a
65 person to attend a trial, hearing, or deposition only as follows:
66 **(A)** within 100 miles of where the person resides, is employed,
67 or regularly transacts business in person; or
68 **(B)** within the state where the person resides, is employed, or
69 regularly transacts business in person, if the person
70 **(i)** is a party or a party's officer; or
71 **(ii)** is commanded to attend a trial and would not incur
72 substantial expense.
73 (2) ***For Other Discovery.*** A subpoena may command:
74 **(A)** production of documents, electronically stored information,
75 or tangible things at a place within 100 miles of where the
76 person resides, is employed, or regularly transacts business
77 in person; and
78 **(B)** inspection of premises at the premises to be inspected.
79 **(d) Protecting a Person Subject to a Subpoena; Enforcement.**
80 (1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney
81 responsible for issuing and serving a subpoena must take
82 reasonable steps to avoid imposing undue burden or expense on a
83 person subject to the subpoena. The court for the district where
84 compliance is required must enforce this duty and impose an
85 appropriate sanction — which may include lost earnings and
86 reasonable attorney's fees — on a party or attorney who fails to
87 comply.
88 (2) ***Command to Produce Materials or Permit Inspection.***
89 **(A)** *Appearance Not Required.* A person commanded to produce
90 documents, electronically stored information, or tangible
91 things, or to permit the inspection of premises, need not
92 appear in person at the place of production or inspection
93 unless also commanded to appear for a deposition, hearing,
94 or trial.
95 **(B)** *Objections.* A person commanded to produce documents or
96 tangible things or to permit inspection may serve on the
97 party or attorney designated in the subpoena a written
98 objection to inspecting, copying, testing, or sampling any
99 or all of the materials or to inspecting the premises — or
100 to producing electronically stored information in the form
101 or forms requested. The objection must be served before the
102 earlier of the time specified for compliance or 14 days
103 after the subpoena is served. If an objection is made, the
104 following rules apply:
105 **(i)** At any time, on notice to the commanded person, the
106 serving party may move the court for the district
107 where compliance is required for an order compelling
108 production or inspection.
109 **(ii)** These acts may be required only as directed in the
110 order, and the order must protect a person who is
111 neither a party nor a party's officer from significant
112 expense resulting from compliance.
113 (3) ***Quashing or Modifying a Subpoena.***
114 **(A)** *When Required.* On timely motion, the court for the district
115 where compliance is required must quash or modify a subpoena
116 that:
117 **(i)** fails to allow a reasonable time to comply;
118 **(ii)** requires a person to comply beyond the geographical
119 limits specified in Rule 45(c);
120 **(iii)** requires disclosure of privileged or other protected
121 matter, if no exception or waiver applies; or
122 **(iv)** subjects a person to undue burden.
123 **(B)** *When Permitted.* To protect a person subject to or affected
124 by a subpoena, the court for the district where compliance
125 is required may, on motion, quash or modify the subpoena if
126 it requires:
127 **(i)** disclosing a trade secret or other confidential
128 research, development, or commercial information; or

129 **(ii)** disclosing an unretained expert's opinion or
130 information that does not describe specific
131 occurrences in dispute and results from the expert's
132 study that was not requested by a party.
133 **(C)** *Specifying Conditions as an Alternative*. In the
134 circumstances described in Rule 45(d)(3)(B), the court may,
135 instead of quashing or modifying a subpoena, order
136 appearance or production under specified conditions if the
137 serving party:
138 **(i)** shows a substantial need for the testimony or material
139 that cannot be otherwise met without undue hardship;
140 and
141 **(ii)** ensures that the subpoenaed person will be reasonably
142 compensated.
143 **(e) Duties in Responding to a Subpoena.**
144 **(1)** ***Producing Documents or Electronically Stored Information.*** These
145 procedures apply to producing documents or electronically stored
146 information:
147 **(A)** *Documents*. A person responding to a subpoena to produce
148 documents must produce them as they are kept in the ordinary
149 course of business or must organize and label them to
150 correspond to the categories in the demand.
151 **(B)** *Form for Producing Electronically Stored Information Not*
152 *Specified*. If a subpoena does not specify a form for
153 producing electronically stored information, the person
154 responding must produce it in a form or forms in which it is
155 ordinarily maintained or in a reasonably usable form or
156 forms.
157 **(C)** *Electronically Stored Information Produced in Only One Form*.
158 The person responding need not produce the same
159 electronically stored information in more than one form.
160 **(D)** *Inaccessible Electronically Stored Information*. The person
161 responding need not provide discovery of electronically
162 stored information from sources that the person identifies
163 as not reasonably accessible because of undue burden or
164 cost. On motion to compel discovery or for a protective
165 order, the person responding must show that the information
166 is not reasonably accessible because of undue burden or
167 cost. If that showing is made, the court may nonetheless
168 order discovery from such sources if the requesting party
169 shows good cause, considering the limitations of Rule
170 26(b)(2)(C). The court may specify conditions for the
171 discovery.
172 **(2)** ***Claiming Privilege or Protection.***
173 **(A)** *Information Withheld*. A person withholding subpoenaed
174 information under a claim that it is privileged or subject
175 to protection as trial-preparation material must:
176 **(i)** expressly make the claim; and
177 **(ii)** describe the nature of the withheld documents,
178 communications, or tangible things in a manner that,
179 without revealing information itself privileged or
180 protected, will enable the parties to assess the
181 claim.
182 **(B)** *Information Produced*. If information produced in response
183 to a subpoena is subject to a claim of privilege or of
184 protection as trial-preparation material, the person making
185 the claim may notify any party that received the information
186 of the claim and the basis for it. After being notified, a
187 party must promptly return, sequester, or destroy the
188 specified information and any copies it has; must not use or
189 disclose the information until the claim is resolved; must
190 take reasonable steps to retrieve the information if the
191 party disclosed it before being notified; and may promptly
192 present the information under seal to the court for the
193 district where compliance is required for a determination of

194 the claim. The person who produced the information must
195 preserve the information until the claim is resolved.
196 (f) **Transferring a Subpoena-Related Motion.** When the court where compliance
197 is required did not issue the subpoena, it may transfer a motion under
198 this rule to the issuing court if the person subject to the subpoena
199 consents or if the court finds exceptional circumstances. Then, if the
200 attorney for a person subject to a subpoena is authorized to practice in
201 the court where the motion was made, the attorney may file papers and
202 appear on the motion as an officer of the issuing court. To enforce its
203 order, the issuing court may transfer the order to the court where the
204 motion was made.
205 (g) **Contempt.** The court for the district where compliance is required — and
206 also, after a motion is transferred, the issuing court — may hold in
207 contempt a person who, having been served, fails without adequate excuse
208 to obey the subpoena or an order related to it.

Committee Note

1
2 Rule 45 was extensively amended in 1991. The goal of the present
3 amendments is to clarify and simplify the rule. The amendments recognize the
4 court where the action is pending as the issuing court, permit nationwide
5 service of a subpoena, and collect in a new subdivision (c) the previously
6 scattered provisions regarding place of compliance. These changes resolve a
7 conflict that arose after the 1991 amendment about a court's authority to
8 compel a party or party officer to travel long distances to testify at trial;
9 such testimony may now be required only as specified in new Rule 45(c). In
10 addition, the amendments introduce authority in new Rule 45(f) for the court
11 where compliance is required to transfer a subpoena-related motion to the
12 court where the action is pending on consent of the person subject to the
13 subpoena or in exceptional circumstances.
14
15 **Subdivision (a)**. This subdivision is amended to provide that a subpoena
16 issues from the court where the action is pending. Subdivision (a)(3)
17 specifies that an attorney authorized to practice in that court may issue a
18 subpoena, which is consistent with current practice.
19
20 In Rule 45(a)(1)(D), "person" is substituted for "party" because the
21 subpoena may be directed to a nonparty.
22
23 Rule 45(a)(4) is added to highlight and slightly modify a notice
24 requirement first included in the rule in 1991. Under the 1991 amendments,
25 Rule 45(b)(1) required prior notice of the service of a "documents only"
26 subpoena to the other parties. Rule 45(b)(1) was clarified in 2007 to specify
27 that this notice must be served before the subpoena is served on the witness.
28
29 The Committee has been informed that parties serving subpoenas
30 frequently fail to give the required notice to the other parties. The
31 amendment moves the notice requirement to a new provision in Rule 45(a) and
32 requires that the notice include a copy of the subpoena. The amendments are
33 intended to achieve the original purpose of enabling the other parties to
34 object or to serve a subpoena for additional materials.
35
36 Parties desiring access to information produced in response to the
37 subpoena will need to follow up with the party serving it or the person served
38 to obtain such access. The rule does not limit the court's authority to order
39 notice of receipt of produced materials or access to them, and the parties may
40 ask that such directions be included in the scheduling order. The party
41 serving the subpoena should in any event make reasonable provision for prompt
42 access.
43
44 **Subdivision (b)**. The former notice requirement in Rule 45(b)(1) has
45 been moved to new Rule 45(a)(4).
46

47 Rule 45(b)(2) is amended to provide that a subpoena may be served at any
48 place within the United States, removing the complexities prescribed in prior
49 versions.
50
51 **Subdivision (c)**. Subdivision (c) is new. It collects the various
52 provisions on where compliance can be required and simplifies them. Unlike
53 the prior rule, place of service is not critical to place of compliance.
54 Although Rule 45(a)(1)(A)(iii) permits the subpoena to direct a place of
55 compliance, that place must be selected under Rule 45(c).
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59 100 miles of where the person subject to the subpoena resides, is employed, or
60 regularly conducts business in person. For parties and party officers, Rule
61 45(c)(1)(B)(i) provides that compliance may be required anywhere in the state
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63 person. When an order under Rule 43(a) authorizes testimony from a remote
64 location, the witness can be commanded to testify from any place described in
65 Rule 45(c)(1).
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67 Under Rule 45(c)(1)(B)(ii), nonparty witnesses can be required to travel
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69 regularly transact business in person only if they would not, as a result,
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104 information, be transmitted by electronic means. Such arrangements facilitate
105 discovery, and nothing in these amendments limits the ability of parties to
106 make such arrangements.
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120 provides authority for that court to transfer the motion to the court where
121 the action is pending. It applies to all motions under this rule, including
122 an application under Rule 45(e)(2)(B) for a privilege determination.
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125 local nonparties, local resolution of disputes about subpoenas is assured by
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133 circumstances. The rule contemplates that such circumstances will be truly
134 rare, and the proponent of transfer bears the burden of showing that they are
135 presented. The prime concern should be avoiding burdens on local nonparties
136 subject to subpoenas, and it should not be assumed that the issuing court is
137 in a superior position to resolve subpoena-related motions. In some
138 circumstances, however, transfer may be warranted in order to avoid disrupting
139 the issuing court's management of the underlying litigation, as when that
140 court has already ruled on issues presented by the motion or the same issues
141 are likely to arise in discovery in many districts. Transfer is appropriate
142 only if such interests outweigh the interests of the nonparty served with the
143 subpoena in obtaining local resolution of the motion. Judges in compliance
144 districts may find it helpful to consult with the judge in the issuing court
145 presiding over the underlying case while addressing subpoena-related motions.
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147 If the motion is transferred, judges are encouraged to permit
148 telecommunications methods to minimize the burden a transfer imposes on
149 nonparties, if it is necessary for attorneys admitted in the court where the
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153 which the action is pending in relation to the motion as officers of that
154 court.
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156 After transfer, the court where the action is pending will decide the
157 motion. If the court rules that discovery is not justified, that should end
158 the matter. If the court orders further discovery, it is possible that
159 retransfer may be important to enforce the order. One consequence of failure
160 to obey such an order is contempt, addressed in Rule 45(g). Rule 45(g) and
161 Rule 37(b)(1) are both amended to provide that disobedience of an order
162 enforcing a subpoena after transfer is contempt of the issuing court and the
163 court where compliance is required under Rule 45(c). In some instances,
164 however, there may be a question about whether the issuing court can impose
165 contempt sanctions on a distant nonparty. If such circumstances arise, or if
166 it is better to supervise compliance in the court where compliance is
167 required, the rule provides authority for retransfer for enforcement.
168 Although changed circumstances may prompt a modification of such an order, it
169 is not expected that the compliance court will reexamine the resolution of the
170 underlying motion.
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175 motion, such disobedience constitutes contempt of both the court where
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178 issuing court to transfer its order after the motion is resolved.
179
180 The rule is also amended to clarify that contempt sanctions may be
181 applied to a person who disobeys a subpoena-related order, as well as one who
182 fails entirely to obey a subpoena. In civil litigation, it would be rare for
183 a court to use contempt sanctions without first ordering compliance with a
184 subpoena, and the order might not require all the compliance sought by the
185 subpoena. Often contempt proceedings will be initiated by an order to show
186 cause, and an order to comply or be held in contempt may modify the subpoena's
187 command. Disobedience of such an order may be treated as contempt.
188
189 The second sentence of former subdivision (e) is deleted as unnecessary.

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

* * * * *

1 **(b) Failure to Comply with a Court Order.**

2 **(1)** ***Sanctions Sought in the District Where the Deposition Is Taken.***

3 If the court where the discovery is taken orders a deponent to be
4 sworn or to answer a question and the deponent fails to obey, the
5 failure may be treated as contempt of court. If a deposition-
6 related motion is transferred to the court where the action is
7 pending, and that court orders a deponent to be sworn or to answer
8 a question and the deponent fails to obey, the failure may be
9 treated as contempt of either the court where the discovery is
10 taken or the court where the action is pending.

11 **(2)** ***Sanctions Sought in the District Where the Action Is Pending.***

* * * * *

Committee Note

1
2 Rule 37(b) is amended to conform to amendments made to Rule 45,
3 particularly the addition of Rule 45(f) providing for transfer of a subpoena-
4 related motion to the court where the action is pending. A second sentence is
5 added to Rule 37(b)(1) to deal with contempt of orders entered after such a
6 transfer. The Rule 45(f) transfer provision is explained in the Committee
Note to Rule 45.

GAP REPORT

As described in the Report, the published preliminary draft was modified in several ways after the public comment period. The words "before trial"

were restored to the notice provision that was moved to new Rule 45(a)(4). The place of compliance in new Rule 45(c)(2)(A) was changed to a place "within 100 miles of where the person resides, is employed, or regularly conducts business." In new Rule 45(f), the party consent feature was removed, meaning consent of the person subject to the subpoena is sufficient to permit transfer to the issuing court. In addition, style changes were made after consultation with the Standing Committee's Style Consultant. In the Committee Note, clarifications were made in response to points raised during the public comment period.

Summary of comments on Rule 45 amendments, 2011-12

Overall simplification

[Note that the Invitation for Public Comment specifically requested comments "on whether the efforts at simplification are successful, and whether further simplification of the rule might properly be considered."]

Jody Smith, Tyler Laughinghouse, Jon Burtard, Sabina Thaler (11-CV-001) (these commenters prepared their comments as part of a Federal Civil Litigation course at Washington & Lee Law School, seemingly before the actual publication of the preliminary draft of proposed amendments): The decision not to rely on cross-references to provisions in Rules 26-37 is wise, as is the decision not to remove details from Rule 45 and rely instead on judicial discretion. Removing the "three-ring circus" elements of the current rule is desirable to take out a source of complexity and confusion. But it may be that no change is really needed at all. Attorneys with experience using Rule 45 do not seem to have encountered difficulty employing it. Because nonlawyers served with a subpoena are likely to enlist the services of an attorney, making the rule understandable to the lay reader is a low priority. In particular, the removal of the mandatory quash directive in current Rule 45(c)(3)(ii) would not be desirable.

Michael A. Roddy (11-CV-006) (Executive Officer of the Superior Court of California, County of San Diego): The amendment to Rule 45 changing the "issuing court" from the court located where the nonparty witness is found to the court where the action is pending could impose substantial costs on the California judicial branch. The Superior Court receives hundreds of subpoenas every year. It cannot afford the attorney fees to hire lawyers around the country to address these subpoenas. This court therefore requests that the rule be modified to exempt state courts expressly, based on principles of sovereign immunity, comity, and a court's inherent power to control its own records. [Note: This amendment was meant not to alter the place where any litigation about the enforcement of a subpoena should occur. See proposed Rule 45(c).]

N.Y. State Bar Ass'n Commercial & Fed. Litigation Section (11-CV-010): We applaud the simplification of the rule. Consolidating all aspects of the duty to comply in one place -- new Rule 45(c) -- is a welcome change. We also support the change to make the court where the underlying action is pending the "issuing court." "Many lawyers do not believe it makes intuitive sense for the Federal Rules to require a subpoena to be issued by the court in the jurisdiction in which compliance will occur." The amendment eliminates this confusion.

Robert L. Byman (11-CV-013) (submitting copy of article from National Law Journal): "The proposed amendments are excellent. They greatly eliminate confusion and simplify issues on the issuance, service and compliance with subpoenas."

American College of Trial Lawyers, Federal Civil Procedure Committee (11-CV-014): "The proposed amendment's great attribute is its simplicity. The drafters have done a wonderful job of simplifying Rule 45's confusing language and converting its impenetrable structure into something that can now be readily understood."

Litigation Section, L.A. County Bar Ass'n (11-CV-016): Although we applaud the effort to simplify the rule, we think that making the "issuing court" the court in which the action is pending is a mistake for jurisdictional reasons. A subpoena is an exercise of the jurisdiction of the issuing court. Particularly in diversity cases, there may be a question about whether that court can exercise jurisdiction over a witness who does not have minimum contacts with the state in which the court sits. As a consequence,

the enforcing court might have to quash the subpoena on the ground the issuing court did not have jurisdiction to summon this witness to testify, even though the testimony will be near the witness's home. The benefits of having all subpoenas issue from the court presiding over the underlying action are minimal, and the potential jurisdictional issues make that change unwarranted.

Federal Magistrate Judges Association (11-CV-018): The Association generally endorses the simplification. But it is concerned that the amended rule uses similar but not identical terms in a number of places, and that these terms should either be replaced by a single term if they are meant to be identical or defined with clarity if they are not meant to be identical. Thus, proposed Rule 45(c)(1)(B)(ii) speaks of "substantial expense," but proposed 45(d)(3)(A)(iv) refers to "undue burden." Rule 45(d)(1), meanwhile, speaks of "undue burden or expense," and 45(d)(2)(B)(ii) protects a nonparty from "significant expense." We are uncertain what the difference is supposed to be between "substantial" and "significant" expense. More generally, the use of different terms in different places may invite disputes about whether they are really different standards. If they are different, the Note should explain how they are to be differentiated. If they are not different, the same term should be used throughout. [Note: Most of these terms are holdovers from the current rule. Thus, current 45(c)(1) refers to "undue burden or expense," 45(c)(2)(B)(ii) refers to "significant expense," 45(c)(3)(A)(iv) refers to "undue burden," and 45(c)(3)(B)(iii) refers to "substantial expense." No submissions have indicated that this divergence in terminology has caused problems in the past.]

More important, the rule does not say who bears the burden of establishing whether "substantial expense" has been established. The rule suggests that the issuing party must make the showing, but the subpoena target would be better positioned to do so. [Note: Current 45(c)(3)(B)(iii) permits the court to quash the subpoena if it requires "a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial." Proposed 45(c)(1)(B)(ii) permits a subpoenas to require a person to attend trial within the state where he resides, is employed, or regularly transacts business in person if "the person * * * would not incur substantial expense." Proposed 45(d)(3) then requires that the subpoena be quashed if it requires a person "to comply beyond the geographical limits specified in Rule 45(c)."]

U.S. Equal Opportunity Commission (11-CV-020): EEOC believes the amended rule is better organized and easier to understand than the current rule.

U.S. Department of Justice (11-CV-021): We support amending the rule to make the forum court the "issuing court" for subpoenas and providing nationwide service of subpoenas from that court. We believe that the amendment provides sufficient protections for nonparty witnesses.

Managing Attorneys' and Clerks' Association (11-CV-022): Proposed Rule 45(c)(2)'s "reasonably convenient" standard for where a subpoena can compel production of documents would afford undue discretion to the party serving the subpoena. It could lead to forum shopping because it would determine which court would hear disputes about the subpoena. In a significant number of cases, issuing parties and subpoenaed persons would differ as to where it is reasonably convenient to produce documents or data. We have not found that the current rule produces problems, and we therefore urge that proposed (c)(2) be dropped and (c)(1) be used for place of production. In addition, Rule 45 should allow litigants the same flexibility in selecting where a motion to quash or modify is heard like the flexibility permitted by Rule 30(d)(3)(A), which permits a motion in the court where the underlying action is pending or in the court where the deposition is being taken.

Defense Research Institute (11-CV-023): DRI supports the clarification that the court issuing subpoenas is the court where the action is pending regardless of the location of compliance with the subpoena. We also agree

that disputes relating to subpoenas should be resolved by the court where the compliance is sought.

Ronald Marmer (and 35 other "individual members of leadership" of the ABA Section of Litigation) (11-CV-025: "We applaud the changes reflected in the proposed amendments." The group does, however, have some uneasiness about a number of specifics.

Notice of service of subpoena

[Note that the Invitation for Public Comment specifically requested comments on "whether additional notices should be required beyond the one specified in Rule 45(a)(4)."]

Jody Smith, Tyler Laughinghouse, Jon Burtard, Sabina Thaler (11-CV-001) (these commenters prepared their comments as part of a Federal Civil Litigation course at Washington & Lee Law School, seemingly before the actual publication of the preliminary draft of proposed amendments): We agree that notice is important because it provides for greater transparency in the justice system, but are concerned that moving the existing provision will do little to cure notice problems. It is not clear that failures to give required notice in the past resulted from ignorance of the notice requirement; moving the provision will only solve the problem if it was a problem of awareness. The revised provision also lacks sanctions for failure to give the required notice; without sanctions the change may not be effective. The actual reason for noncompliance with the current rule's notice requirement should be determined before a solution is adopted.

Kenneth A. Lazarus (11-CV-005) (on behalf of American Medical Ass'n and several related physician associations): We recognize that the proposed notice provision -- limited to "documents only" subpoenas -- reflects current law, but feel that it should not. When a subpoena is served on a doctor, the physician-patient privilege and patient privacy rights belong to the patient. Those rights apply with equal force to document productions and deposition testimony. Normally, the patient or the attending physician or hospital is a party to the litigation, and their interests are fairly met only if they are put on notice of a possible threat to their rights due to the subpoena. [Note that Rule 30 appears to require notice to all parties for a deposition, whether or not attendance of the witness is obtained by subpoena, and whether or not the witness is directed to bring along documents. Nonparty document discovery -- first authorized in the absence of a deposition subpoena by the 1991 amendments to Rule 45 -- did not have a parallel notice requirement.]

Wayne E. Uhl (11-CV-007): The requirement that notice be given to other parties "before" the subpoena is served is vague. It could be read to mean one day before, or less. As service is complete upon mailing, the rule can be complied with by mailing a copy to the other parties, and then serving the nonparty witness the same day, or the following day. If the purpose of the notice is to give the other parties a meaningful opportunity to object, then a specific period of time should be built in, plus the opportunity for the other parties to waive that period. I have not read the cases that triggered the 2007 amendment from "prior" to "before," but I can tell you that this vagueness is already causing problems in practice. In Indiana, the state-court rules have long required a 15-day notice period before service of a nonparty subpoena. This time period is waivable, and in most cases is waived. The Indiana rule also requires the requesting party to produce copies of all the documents to the other parties. Although this provision has its benefits, it may not be appropriate for the federal rule.

Hon. Michael M. Baylson (11-CV-008) (This comment is in the form of a skit that was presented at the Univ. of Penn. Inn of Court): Under Pennsylvania state-court practice, before serving a nonparty subpoena a party must give 20 days' notice to the other parties, who have an opportunity to object. The proposed amendment is silent on how much advance notice must be given. Under the Pennsylvania rule, a party is required to give notice to the other parties that it has received documents, and offer to make them copies at their expense. Under the amended rule, could a party that serves a subpoena request that the nonparty recipient refuse to provide the same documents to the other parties unless they also serve subpoenas?

Lawyers for Civil Justice (11-CV-009): LCJ agrees with the addition of new Rule 45(a)(4). This relocation will achieve the Committee's goal of providing other parties with the opportunity to object to a subpoena. No

further notices should be required beyond the one specified in proposed Rule 45(a)(4).

N.Y. State Bar Ass'n Commercial & Fed. Litigation Section (11-CV-010): We support the inclusion in the notice provision of a requirement to provide a copy of the subpoena. That is not burdensome, and would keep the parties apprised of what is being sought. The current rule and proposed amendment call for notice "before" a subpoena is served. We think this should be changed to require notice "simultaneous" with service. The parties would then have the same opportunity to challenge the subpoena, but this change would limit the ability of a party to facilitate evasion of service by the person subpoenaed. The rule should also be enhanced to require that the party issuing the subpoena notify the other parties if it negotiates a modification of the subpoena.

American College of Trial Lawyers, Federal Civil Procedure Committee (11-CV-014): The ABA Section of Litigation proposed that the amendment require additionally that the party serving the subpoena give notice of any modification of the subpoena and make available the documents or other material produced in response to the subpoena. We agree that these additional requirements should be included. At least the requirement of making the produced materials available should be included in the rule; presently that concept is only in the Committee Note. The burden of providing that notice of the production should be placed on the party that obtained the documents. Of the 35 states that authorize document subpoenas, 17 have a requirement along the lines suggested, and 18 do not require a notice beyond what is in current Rule 45(b)(1) and in the new 45(a)(4).

Steven M. Puiszis (11-CV-015): The clarification about the notice requirement is a welcome improvement of the existing rule. It will enhance a party's ability to object to a subpoena or to seek additional information from the subpoenaed person. But the amendment would allow a party to issue a subpoena immediately after issuing the required notice. The Committee should consider a minimum time requirement between issuance of the notice to all parties and when the subpoena may be served on the person directed to comply. This timing requirement would enable the parties to determine whether to challenge the subpoena before it is served. The Committee should also consider requiring additional notices in two circumstances -- when an objection is made and when an agreement is made to modify the subpoena. Although good practice should lead lawyers to do this anyway, experience shows that it does not always work that way. Requiring such notice is not burdensome. Giving the notice will enable the other parties to join in the objection or in efforts to resolve the objection prior to the need to apply to the court for relief. Similarly, giving notice of modifications of the subpoena would provide other interested parties the opportunity to determine if they will accept the revised scope of the subpoena or seek additional documents without the need for issuing an additional subpoena.

Litigation Section, L.A. County Bar Ass'n (11-CV-016): Additional notices should be required. The failure to inform other parties that production has occurred is a common source of disagreement, and the failure of the issuing party to share the fruits of the subpoena often gives rise to unnecessary discovery disputes. The rules should clearly specify that the party who issues a subpoena should be required to notify the other parties when a production has been made and to make available copies of the material produced. The issuing party should also be required to notify the other parties of any agreement to narrow the subpoena or otherwise alter its scope.

U.S. Equal Opportunity Commission (11-CV-020): EEOC believes the revised notice provision in 45(a)(4) should also require notice of modifications to the subpoena and notice of initial receipt of any materials produced. Contrary to the concerns reflected in the minutes of the Advisory Committee's April, 2011, meeting, we view these as very slight burdens on the party serving the subpoena, particularly when compared to the burdens on the other parties of making repeated requests for such information. Requiring

notice of only the initial production eliminates any concern over how to apply the requirement to "rolling production," while alerting other parties to the fact that production is occurring. The statement in the Committee Note about giving access to produced materials will do little,in our view, to alleviate what we believe will be the major problem faced by the nonserving parties -- the failure of the serving party to respond to inquiries regarding whether production has occurred. There is no apparent remedy for such nonresponsiveness, but a requirement in the rule that notice of initial production be provided could easily be enforced. We suggest that the requirement could be that notice be given "__ calendar days from first receipt of production [modification of the subpoena]."

U.S. Department of Justice (11-CV-021): We generally support the amendment to make the notice requirement more prominent. We are troubled, however, by the removal of the words "before trial" that appear in the current rule. The removal of those words seems to be designed to make the notice provision apply to trial subpoenas. But we are concerned that the removal of "before trial" could interfere with using a subpoena for post-judgment discovery under Rule 69(a)(2). We don't doubt that there is a value to giving notice of trial subpoenas. But in the post-judgment context any such concerns would be outweighed by the potential for dissipation of assets by the judgment debtor who receives notice of the discovery. Accordingly, we suggest that the words "before judgment" should be inserted into the revised rule, and a brief explanation should be provided in the Committee Note to confirm that prior notice need not be given for post-judgment subpoenas. The Department has considered whether there should be a further notice requirement -- for modification of the subpoena's terms or other matters. The Department is not convinced that a need has been shown for any such requirements.

Managing Attorneys' and Clerks' Association (11-CV-022): The timing of the notice should be changed so notice need not be given until after service of the subpoena. We suggest that it be within three days after service, or at least one day prior to the date of production. In addition, the issuing party should be required to give a second notice within five days after records are produced. Notice before service of the subpoena is not necessary, and can be a problem when time is of the essence for service of the subpoena. There is, also, the risk that a friendly party will give the person to be subpoenaed a tip and cause service to become difficult. That problem should be avoided. Another problem is that the other parties have difficulties gaining access to documents after production. Several years ago New York Civil Practice & Rules § 3120(3) was adopted, requiring that the subpoenaing party to notify the other parties within five days of compliance that the subpoenaed records are available for inspection and copying. This has produced cost savings and dispelled much confusion.

Defense Research Institute (11-CV-023): DRI supports that amendment to the rule to provide for notice to other parties, which will allow an opportunity to object to the subpoena.

Ronald Marmer (and 35 other "individual members of leadership" of the ABA Section of Litigation) (11-CV-025: Before publication, the ABA Section of Litigation leadership urged that additional notices and a rule provision requiring access to produced materials be included. We continue to believe that such provisions would improve the rule. This is our main concern about the proposed amendments. We have four basic concerns:

Notice before service: We think that there should be a minimum period of seven days' notice before service, because saying only that the notice must be "before" service does not allow a meaningful amount of time to seek protection. And there are litigants who use subpoenas to harass customers or suppliers of adverse parties. Because there could be circumstances in which there is a "demonstrable" risk that the subpoena recipient will evade service or destroy documents, we also propose that in "exceptional circumstances" a party be allowed to serve a subpoena before giving notice. The initiating party would not have to

seek a court ruling in advance of such expedited service, but it would have to be prepared to prove later that truly "exceptional circumstances" existed to justify lack of notice.

Notice of objections and modifications: In practice, parties notified that another party has served a subpoena do not burden the nonparties with identical or similar subpoenas. But that behavior can be frustrated when the party that issued the subpoena, perhaps in response to objections by the nonparty, changes the scope, return date or other terms of the subpoena without telling the other parties. We proposed that the issuing party be required to send an email notification of all such changes.

Notice of receipt and opportunity to inspect: The Committee Note properly says that best practice is to allow inspection, but our experience is that a significant portion of the bar does not always adhere to this best practice. One of us recently confronted an opponent who challenged our member to show where in Rule 45 there was a requirement to provide access to the produced materials. Many states (such as Pennsylvania and New Jersey) require explicitly that such access be granted. The federal rule should also. We note that the S.D.N.Y. has recently adopted a provision for complex cases saying that "the party responsible for issuing and serving the subpoena shall promptly produce [materials so obtained] to, or make them available for inspection and copying by, all parties to the action." We do not see how spelling out these requirements in the rule will cause more problems.

Use of e-filing: Because e-filing is now the rule rather than the exception, we suggest that it can be used to achieve several of the goals mentioned above. All notices could be delivered by e-filing, and the parties would thereby be put on an even playing field.

Overall: If our proposals were accepted, they would result in a revised rule provision somewhat as follows:

If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises:

(A) a copy of the subpoena must be served on each party seven days before the subpoena is served on the person to whom it is directed, except in exceptional circumstances;

(B) reasonable notice must be given to each party of any modifications of the subpoena, including any new date and time of inspection or production; and

(C) reasonable notice must be given to each party of the receipt of documents, electronically stored information, or tangible things,and such material must be made available to each party for inspection and copying in a timely manner.

Transfer

[Note that the Invitation for Public Comment specifically requested comments on whether the proposed standard for transfer ("exceptional circumstances") is too confining, and also whether party consent should be required, or only the consent of the person subject to the subpoena.]

Jody Smith, Tyler Laughinghouse, Jon Burtard, Sabina Thaler (11-CV-001) (these commenters prepared their comments as part of a Federal Civil Litigation course at Washington & Lee Law School, seemingly before the actual publication of the preliminary draft of proposed amendments): Although the Committee should research further the question of pro hac vice admission and potential jurisdictional issues, the transfer proposal strikes an appropriate balance between safeguarding burdensome discovery requests and ensuring efficient and just resolution of the merits of the underlying suit. Protection of the interests of nonparties served with subpoenas is important, but courts should be able to guard against overburdening them.

Hon. Bernard Zimmerman (N.D. Cal.) (11-CV-004): Judge Zimmerman has transferred subpoena-enforcement motions to the court presiding over the underlying action on a number of occasions. From his experience, transfer is a valuable tool. The requirement of "exceptional circumstances" to justify such a transfer may not provide the enforcement judge with sufficient flexibility. Objections to subpoenas usually fall into one of two broad categories. One category is objections that come principally from the witness. These issues are best handled in the compliance district because it would generally be inconvenient and expensive for the witness to address these issues in the litigation district. Another category is objections which come from one of the parties, not from the witness. One common objection is lack of relevance. Another is that the subpoena is inconsistent with, or even violates, an order issued by the litigation court. "In my judgment, such objections should be, for the most part, transferred to the litigation court. While it is true that the compliance court can make its own determination of what is relevant or whether the subpoena violates the litigation court's rulings, those determinations can more expeditiously be made by the litigation court. And the possibility of inconsistent rulings would be eliminated. * * * Since in my experience appropriate enforcement motions should be regularly transferred to the litigation district, I believe that a good cause standard would work better than an 'exceptional circumstances' standard."

Kenneth A. Lazarus (11-CV-005) (on behalf of American Medical Ass'n and several related physician associations): We see no need to alter Rule 45's current provisions regarding the "issuing court." We urge the Committee to give even greater deference to the needs of nonparty witnesses. In the majority of cases, physicians in receipt of a subpoena would much prefer to protect their interests and the interests of others whom they are duty-bound to protect in the district in which they reside and practice. Therefore, the preference of the nonparty subject to the subpoena should be respected; transfer should only occur when that person consents. If transfer is permitted without the consent of the nonparty recipient, the rule should provide that it may occur only in exceptional circumstances and where transfer will not result in any substantial inconvenience to the nonparty recipient.

Hon. Michael M. Baylson (11-CV-008): Judge Baylson is concerned that proposed Rule 45(f) allows "transfer" of an "order," and is concerned that this is a very novel concept that may need more discussion.

Lawyers for Civil Justice (11-CV-009): LCJ supports the "exceptional circumstances" standard for transfer. It agrees that in certain extraordinary situations Rule 45 should allow a subpoena dispute to be transferred, such as when the decision of to enforce the subpoena would go to the merits of the case or would be case dispositive. But such transfers should be rare.

N.Y. State Bar Ass'n Commercial & Fed. Litigation Section (11-CV-010): We support the addition of authority to transfer, but would change the standard because the "exceptional circumstances" standard is too strict. The examples mentioned in the Committee Note ("if these issues have already been presented to the issuing court or bear significantly on its management of the underlying action, or if there is a risk of inconsistent rulings on subpoenas served in multiple districts, or if the issues presented by the subpoena-related motion overlap with the merits of the underlying action") are not exceptional. A better standard would be "good cause," and we recommend modifying the standard to "good cause." In addition, and in keeping with concern for the interests of the person subject to the subpoena, we recommend that transfer be permitted on request of that person, provided that notice is given to all parties prior to transfer.

George A. Davidson, Esq. (11-CV-011): It would be a serious mistake to limit transfer to "exceptional circumstances" (as the proposed rule provision says) or to ensure that transfers are "truly rare" (as the Committee Note says). Transfer should be frequent. The court in which the action is pending is in much the better position to determine the merits of a compliance motion. Even if the focus of the subpoena-related motion is on the burdens the proposed discovery would impose on the nonparty, that judgment would best be made by the judge presiding over the underlying action. Burden is always relative; the judge presiding over the underlying case is best situated to determine whether the information sought has value to the case sufficient to justify that burden. The burden on the nonparty witness of resolution of the subpoena-related motion in the issuing court should not be great due to the ease of electronic communications. Accordingly, the standard should be that transfer should be allowed if it would promote efficiency and not unduly prejudice the witness, not only in exceptional circumstances.

American College of Trial Lawyers, Federal Civil Procedure Committee (11-CV-014): We believe that consent of the nonparty subject to the subpoena should suffice to support transfer and that, absent such consent, transfer should occur only in "exceptional circumstances," as provided in proposed Rule 45(f). The nonparty is the one most affected by enforcement of the subpoena. If that nonparty consents to transfer, the compliance district court should have broad discretion to make the transfer. The "exceptional circumstances" language should remain for situations in which the nonparty does not consent to the transfer; in those circumstances, the nonparty's interests should be respected unless there are exceptional circumstances that nevertheless support a transfer.

Steven M. Puiszis (11-CV-015): The proposed standard sets the appropriate threshold in light of the goal of reducing the burdens of Rule 45 on nonparties. It should be a rare case in which a subpoena-related motion is transferred over the objection of the party subject to the subpoena. The exceptional circumstances standard is not overly restrictive and the examples provided by the Committee in the Note are illustrative of how the standard should be applied in practice.

Litigation Section, L.A. County Bar Ass'n (11-CV-016): The transfer standard should be changed to make transfer easier. Specifically, the consent of the parties should not be required; so long as the person subject to the subpoena consents to transfer, that should suffice. In addition, the "exceptional circumstances" standard in the absence of such consent to transfer is too limiting; we believe "good cause" should be used. There are many common circumstances in which the court handling the underlying case will be in the best position to rule on a subpoena-related motion, and the judge in the enforcement forum will often prefer to have the judge familiar with the case make the ruling. This may even be true if there is objection that the subpoena is unduly burdensome, for that requires that court to weigh the burden against the likely importance of the information sought to the case. The "exceptional circumstances" standard would prevent transfer in these common circumstances, and that is too narrow.

Federal Magistrate Judges Association (11-CV-018): The Association believes strongly that the decision whether to transfer should not be hobbled by the "exceptional circumstances" standard. "In fact, the FMJA believes that transfer of such disputes should be the preferred practice." The requirement of party consent to permit a transfer is not appropriate. Neither party should have a veto power on this subject. Having that power will lead to forum shopping by a party unhappy with the previous rulings of the issuing court. Indeed, the Association would not even give the person subject to the subpoena a veto power, although that person's concerns clearly deserve substantial respect. In most cases, a transfer will significantly advance the just and efficient resolution of the dispute. Accordingly, the transfer standard should invoke the court's discretion and direct attention to the interests of the person subpoenaed and the interests of justice. The Note can then elaborate on the importance of guarding against imposition on the person subject to the subpoena, but also recognize that electronic communications are likely to minimize the burdens resulting from a transfer.

State Bar of California Committee on Federal Courts (11-CV-019): We agree with the Committee Note's conclusion that "exceptional circumstances" cannot be defined precisely. But we believe that it would benefit from further elucidation in the Note. In particular, we believe a nonparty's close relationship with a party should be identified in the Note as a factor supporting transfer. For example, if a nonparty is a consultant or employee of a party, this relationship should favor transfer. In contrast, the absence of a relationship between the nonparty and any party should weigh against transfer.

We are also concerned that although proposed Rule 45(f) says that an attorney authorized to practice in the compliance court may file papers and appear in the issuing court after transfer, nothing says that the attorney who served the subpoena can appear in the compliance court for purpose of a subpoena-related motion. Our committee takes no position on this issue, but believes that it may warrant further study. [Note: Although current Rule 45(a)(3) says an attorney may issue and sign a subpoena as an officer of the court for the district where the discovery is to be done, it does not speak directly to the question whether that attorney is authorized to appear and argue subpoena-related motions in that court. Proposed 45(a)(3) says that an attorney may issue and sign a subpoena if authorized to practice in the issuing court. It does not say that the attorney does so "as an officer of" that court or another court.]

U.S. Equal Opportunity Commission (11-CV-020): We believe that the consent of the person subpoenaed should be sufficient to permit transfer without any additional showing. Although there may be situations in which a party has close connections with the district in which compliance is required, generally local interests will relate only to the person subpoenaed. And a party's connection with the area where compliance is required is a fortuitous circumstance that shouldn't be a factor in the determination of which court should decide a matter that would be decided by the court presiding over the action but for the fortuity of where the person subpoenaed is located. We believe that the "exceptional circumstances" standard should be replaced by considerations like the prior draft -- "the convenience of the person subject to the subpoena, the interest of the parties, and the interests of effective case management." The case-management factor should be the primary consideration. The parties by definition have a connection to the issuing court, and the party seeking the transfer can be required to compensate the person subpoenaed for any additional expense incurred. The EEOC often finds, for example, that the same issues arise in various districts due to subpoenas. The "exceptional circumstances" standard is too limiting if the phrase is used in the same way it is used where it appears in other rules. For example, Rule 256(b)(4)(D) says that "exceptional circumstances" must be shown to justify production of work done by a nontestifying expert, and in our experience that is almost never granted. We fear that the same will be likely to result if that phrase is used in this rule -- transfer will almost never be granted except upon consent.

U.S. Department of Justice (11-CV-021): We support the addition of new Rule 45(f) to provide greater protections to those persons or entities who might be subject to burdensome subpoenas. We believe that the transfer standard should look to consent of the nonparty subject to the subpoena or "exceptional circumstances." But the consent of the parties should not be required to permit transfer if the nonparty consents. Permitting any one of the parties to "veto" what would otherwise be a consensual transfer could cause delay and frustrate the purpose of the amendment. The Department also endorses the provision authorizing the attorney for the person subject to the subpoena to appear in the issuing court after transfer. We suggest that either the rule or the Committee Note specifically explain that this provision supersedes any contrary local rules of a district court.

Managing Attorneys' and Clerks' Association (11-CV-022): The proposed amendments do not address the existing problem of forcing subpoenaed persons who are commanded to respond in a jurisdiction other than where they live or work to retain unfamiliar counsel to represent them. A person subpoenaed to respond out of state, which can happen within the 100-mile rule fairly frequently, must retain a lawyer in an unfamiliar legal market within a tight time frame. This is an unfair burden on uninvolved nonparties served with subpoenas. Although Rule 45(f) touches in this issue, and the rule therefore defaults to the ordinary rule that one be admitted in the district where the motion is to be filed. That may mean that even the lawyer who served the subpoena cannot file a motion to compel in that court. This weakness in federal subpoena practice could be eliminated with the simple provision that the issuing lawyer may litigate subpoena-related disputes in any federal district court without formally being admitted in that court. A similar provision already exists in Rule 2.1(c) of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation.

Defense Research Institute (11-CV-023): DRI agrees that the parties and the person responding to the subpoenas should be required to consent before transfer, and that the subpoena-related motion otherwise cannot be transferred absent extraordinary circumstances. We do not believe that is too demanding a standard for transfer in the absence of consent.

Ronald Marmer (and 35 other "individual members of leadership" of the ABA Section of Litigation) (11-CV-025: We applaud the selection of the "exceptional circumstances" standard for transfer when the person served with the subpoena does not consent to transfer. It is not necessary to require consent also of the parties; consent of the person subject to the subpoena should suffice. But when that person does not consent, a lesser standard for transfer -- such as "good cause" or the "interests of justice" would not give sufficient weight to protecting nonparties from undue burden or expense. Such a lower standard could quickly make transfer the rule, as judges might be inclined to assume that the issuing court supervising the litigation would usually be best suited to resolve all issues raised by compliance with its subpoena.

Authority to Compel Attendance at Trial
of Parties and Party Officers

[Note that the Invitation for Public Comment specifically requested comments on whether allowing courts authority would be desirable, and if so whether language included in an Appendix to the preliminary draft would be appropriate.]

Jody Smith, Tyler Laughinghouse, Jon Burtard, Sabina Thaler (11-CV-001) (these commenters prepared their comments as part of a Federal Civil Litigation course at Washington & Lee Law School, seemingly before the actual publication of the preliminary draft of proposed amendments): The *Vioxx* court's reading of existing Rule 45 is not correct, but its criticism of the 100-mile limit has force in the 21st century. The best solution would be to increase the mileage limitation from 100 to 500 miles, but also to require a court order when the witness is required to travel more than 100 miles and assure that the witness will be reimbursed for travel costs in this situation.

Matthew J. Walko (11-CV-003): The Rule 45 proposals "further undermine the fundamental purpose of the Seventh Amendment's guarantee of trial by jury, in favor of trial by deposition." If the court has personal jurisdiction over the parties, then either side should be able to require his opponent to stand before the jury at trial and be judged. Under Rule 16(a), the court can require "unrepresented parties" to appear before it for a pretrial conference, and Rule 16(c)(1) permits the court to command even represented parties to appear before the court to discuss settlement. The handling of nonparties, such as party officers, should be treated as a separate concern. But as to corporate parties, they should be required (as under Rule 30(b)(6)) to designate a live person to testify at trial, just as they have to designate a person to testify by deposition. [Note: Several years ago the Committee looked carefully at possible amendments to Rule 30(b)(6) and concluded that its balancing of various considerations did not call for adjustment.]

Kenneth A. Lazarus (11-CV-005) (on behalf of American Medical Ass'n and several related physician associations): We take no position on whether corporate party officers should be made to travel more than 100 miles to testify, but strongly support the Committee's retention of the 100-mile rule for nonparty witnesses. Nonparty physicians have no stake whatsoever in the litigation and should not be required to travel long distances for purposes of either deposition or trial.

Lawyers for Civil Justice (11-CV-009): LCJ supports the decision not to compel nationwide subpoena power for parties and party officers. The traditional justifications for the 100 mile rule -- protecting witnesses from harassment and minimizing litigation costs -- remain viable today. Alternatives to live testimony, such as videotaped depositions, provide the necessary tools for finding the truth. Accordingly, LCJ opposes the alternative included in the Appendix.

N.Y. State Bar Ass'n Commercial & Fed. Litigation Section (11-CV-010): The revised rule has the beneficial effect of describing the jurisdictional boundaries of a subpoena in a single provision, new Rule 45(c). It also resolves the divergence in case law on whether the court can compel an out-of-state party or party's officer to travel more than 100 miles to testify. We have some concern that this change still leaves such witnesses subject to extensive and costly intra-state travel, but believe proposed Rule 45(d)(1) should adequately protect against such problems. We support the addition of Rule 45(c)(3) as set forth in the Appendix. It would be helpful for the court to have the power to order an out-of-state party or party officer to testify at trial. We think that Rule 45(c)(3) should also caution the courts to consider not only whether an audio deposition or testimony by contemporaneous transmission could suffice, but also to weigh those considerations against other factors, such as whether the trial is a jury or court trial, the expected length of the testimony, and the extent to which the testimony will be contested. We think the standard for ordering such testimony should be

"good cause." Any attempt at drafting more precise language is likely to cause problems.

Robert L. Byman (11-CV-013) (submitting copy of article from National Law Journal): The rule should say that the issuing court can compel attendance by parties -- at least by plaintiffs -- in the forum for deposition or trial. "All we need is a provision in Rule 45 (or in Rule 30 or anywhere else) that says, 'A Party's attendance at deposition or trial may be compelled by notice without any requirement for a subpoena.'"

American College of Trial Lawyers, Federal Civil Procedure Committee (11-CV-014): A majority of our Committee opposes authorizing national subpoena power as provided in the Appendix, but there was a wide difference of opinion among our members and substantial support for the proposal in the Appendix. The proposed amendment clearly shows that the rule does not, without the addition of the provision in the Appendix, authorize trial subpoenas for parties or party officers beyond the "100 mile rule." The possibility of using trial subpoenas for strategic advantage is substantial. Although there are strong arguments on the other side of the issue, on balance a majority of our Committee prefers the proposal recommended by the Advisory Committee without the addition of the provision in the Appendix.

Steven M. Puiszis (11-CV-015): The amendment confirming that parties and party officers are protected by the 100-mile limit is a welcome clarification of the existing rule. Even though modern modes of transportation have reduced travel time, they have not eliminated the inconvenience of travel; the time that senior officers spend travelling to testify at trial imposes an opportunity cost on the company that is one of the hidden costs of litigation. The amendment protects against that drain, and guards against the potential for harassment unfettered subpoena power would otherwise create. Due to the availability of videotaped depositions, the amendment will not negatively impact a jury's truth-seeking function.

Litigation Section, L.A. County Bar Ass'n (11-CV-016): We agree that the existing rule and should be clarified, but we favor including the power to order a party or party officer to attend and testify at trial. We therefore favor including the provision in the Appendix, although we would remove one feature of that proposal. It is not appropriate to apply the geographic limits of Rule 45 to parties, for parties have a great interest in the outcome of a case. In addition, other parties and the court have a strong interest in live testimony at trial to make an accurate decision. To deny the court the power to order a party to testify at trial undermines the jurisdiction of the courts. By the time this issue arises, the court has already obtained jurisdiction over the parties, and for this reason no subpoena should even be needed to compel attendance at trial. The court can order a party to appear for a settlement conference or a deposition without any new process; why should a subpoena be necessary to obtain live testimony at trial? Although the court does not automatically obtain jurisdiction over corporate officers just because it has jurisdiction over the company, corporations subject to the jurisdiction of a court are often required to produce officers or managing agents for depositions in the forum. A court's power to order a party to produce officers at trial should be at least as great as its power to order such a person to appear in the forum for a deposition. The risk of harassment cited as a reason for declining such authority is not distinctive; such a risk exists with every procedural tool. That risk does not justify a blanket refusal to authorize orders to testify at trial. The provision in the Appendix should therefore be included. But it should not require the court to consider the alternatives of a videotaped deposition or remote transmission of live testimony. Those are simply two of a multitude of considerations that court should consider,including as well the importance of the witness's testimony, the burden on the witness to travel to the forum, the witness's contacts with the forum, the extent of the witness's involvement in the litigation, and the length and complexity of the witness's testimony. The references to videotaped testimony and remote transmission should be removed; highlighting those factors would not be appropriate.

State Bar of Michigan U.S. Courts Committee (11-CV-017): The Committee considered a variety of topics, but concluded that it wanted to submit a comment on only one -- whether to grant the court authority to order that a party or party officer appear at trial to testify without regard to the geographical limits that apply generally at subpoenas. The Committee favors including such authority, because otherwise the rules would unduly restrict the ability of trial judges to exercise discretion. Our members envision a variety of situations in which testimony from such witnesses would be sufficiently important to the fair disposition of a matter so that compelling live testimony would be justified. Examples include circumstances in which the credibility of the testimony of a party or party's officer is critical and thus is more fully and fairly judged live, and document-intensive examinations where necessary shuffling back and forth between multiple complex documents and exhibits can lead to confusion and misidentification. The Committee therefore unanimously concluded that the language of proposed (c)(3) in the Appendix should be included in the amended rule.

U.S. Equal Opportunity Commission (11-CV-020): We believe the Appendix Rule 45(c)(3) provision should be included in the rule. The "good cause" standard in proposed 45(c)(3) should obviate any concern that such authority will be abused. The Committee Note seems to assume that there is a significant risk that parties will subpoena a party's officers for improper reasons, but we do not see a reason to make that assumption. We note that the proposed rule directs the court to consider the alternative of remote testimony pursuant to Rule 43(a). We think that requiring that in the rule may be unwise; it is important to give appropriate weight to the reasons stated in the Committee Note to the 1996 amendments to Rule 43 (particularly in the third paragraph of that Note) regarding the importance of in-person testimony at trial. Our experience is that plaintiffs often want to call adverse parties or their officers as witnesses a trial, sometimes as the very first witnesses. This is an appropriate decision for the party with the burden of proof, but it cannot be used unless those witnesses are in the courtroom.

U.S. Department of Justice (11-CV-021): The Department has evaluated the proposed 45(c)(3) in the Appendix, and has ultimately decided to remain neutral on this issue.

Defense Research Institute (11-CV-023): DRI wholeheartedly agrees with the amendment to clarify that the issuing court cannot issue nationwide trial subpoenas. We also agree with providing that a party or party's officer may be subpoenaed within 100 miles of his residence or within the state where he personally transacts business. This amendment, as well as the amendment which requires that disputes relating to subpoenas be resolved in the compliance court, combine to focus on the inconvenience that they can cause to party officers and to nonparties.

Steven Susser (11-CV-024): I would not require parties or party officers to travel more than 100 miles to appear for trial. These individuals can be deposed by video or de bene esse deposition can be arranged.

Ronald Marmer (and 35 other "individual members of leadership" of the ABA Section of Litigation) (11-CV-025: We strongly support the decision to reverse the so-called *Vioxx* rule. We believe that permitting subpoenas to compel testimony at trial from distant parties or party officers would invite abuse. Courts already have sufficient tools available to obtain the testimony of such persons, by video deposition or otherwise, when their testimony is truly relevant.

Other matters

Lawyers for Civil Justice (11-CV-002): (This comment is entitled "A Prescription for Stronger Discovery Medicine: The Danger of Tinkering Change and the Need for Meaningful Action." It seems mainly concerned with more general matters and not Rule 45.) The explosion of discovery of electronically stored information has markedly increased the cost, waste, and delay that attend the discovery process. Modest amendments to the discovery rules have done little to solve these problems. A number of measures should now be taken: (1) Rule 26 should be amended to narrow the scope of discovery; (2) Rule 26(b)(2)(B) should be amended to identify categories of electronically stored information that are presumptively excluded from discovery; (3) Rule 26(b)(2)(C) should be amended to explicitly include its requirements to limit the scope of discovery; (4) Rule 34 should be amended to limit the number of requests absent stipulation of the parties or court order. Instead, Daniel Girard, a former member of the Advisory Committee, has proposed changes that will further fuel the development of a "sanctions tort" premised on "gotcha" behavior during discovery. These proposals do not promise to solve problems, but to create additional problems.

Lawyers for Civil Justice (11-CV-009): (The submission included a Nov. 5, 2010, letter to the Judge Campbell that included the following point, not repeated in the submission in response to the invitation for public comment.) Rule 45 should be amended to allow 30 days to object to subpoenas. As currently written, the rule could lead a party to waive its objections accidentally by relying on the 30-day return date. The deadline to object and the return date should be the same to avoid confusion.

George A. Davidson, Esq. (11-CV-011): This rule change will make things somewhat better regarding use of subpoenas for arbitration, but will not solve other problems. I have served as an arbitrator in both domestic and international arbitrations. Section 7 of the Federal Arbitration Act authorizes arbitrators to "summon" any person to attend before them as a witness. It says that such summons "shall be served in the same manner as subpoenas to testify before the court," and authorizes the court to enforce the order and compel the attendance of the person involved. The problem of witnesses located more than 100 miles from the seat of the arbitration has arisen under current Rule 45. The problem arises when the witness is located too far from the location where the arbitration is proceeding. Unlike a civil case, there is no option in an arbitration to take the deposition of the witness and use that as evidence. Both the Second and Third Circuits have held that arbitrators may not subpoena witnesses for depositions. Some arbitration panels have responded to the problem by travelling to the witness to obtain the desired testimony; the threat to do that sometimes prompts the witness to be willing to travel to the place of arbitration. It is unclear whether the arbitral panel could count on a local court to enforce such a subpoena; arguably the drafters of the Arbitration Act were not contemplating a peripatetic tribunal, and had in mind only the court in the tribunal's usual seat. But that court is still without power to summon the distant witness to attend in this district. There is accordingly a gap -- there may be no court capable of enforcing a validly issued subpoena. Unless (a) the court where the arbitrators "are sitting" under Section 7 is construed to be the court in which they are seeking to sit for purposes of hearing the subpoenaed witness, or (b) Rule 45 is drafted to make the court in the arbitration tribunal's seat the enforcement court of a compliance motion, this gap will persist even after the amendments.

In addition, I note that Rule 43(a) could be utilized much more often. Presently it provides only "grudgingly" for live testimony transmitted from a remote location. At least it should be clear that a subpoena could be used to summon a witness to appear for such live testimony within 100 miles of his residence. It would be helpful for the Committee Note to say so. Sometime soon, Rule 43(a) could be liberalized to permit much broader use of telecommunications for testimony. Until then, at least this method should be endorsed.

Paul Alston (11-CV-012): I urge that Rule 45 be amended to allow subpoenas to be issued for the taking of testimony by video conference from a witness outside the jurisdiction of the trial court. I practice in Hawaii, and the problem of absent witnesses is particularly acute here because many cases involve people who have only a transient presence here. With improved video conference capabilities now available throughout the country, it is possible to have distant witnesses appear at little cost and with high-quality video and audio fidelity that was unimaginable when the current rules were drafted. Taking testimony in this manner eliminates both the prejudice suffered by the party who would otherwise have to read a deposition excerpt into the record or show choppy fragments of a discovery deposition. It would also eliminate the gamesmanship that can occur when one party keeps witnesses "offshore." The trial court is in the best position to decide when or whether video testimony should be taken, and any such arrangements would have to be made with the trial court's approval. But when the court determines that is desirable, use of a subpoena to accomplish it should be available. I had an experience in which that proved impossible under current Rule 45. In a multi-million dollar securities fraud case in Hawaii, I sought (with the blessing of the trial court here) to subpoena a witness in the SDNY for video testimony, but the SDNY quashed the subpoena on the ground this is not allowed. It should be allowed under Rule 45.

Robert L. Byman (11-CV-013) (submitting copy of article from National Law Journal): Although the amendments are excellent as far as they go, they do not clear up something that should be cleared up, and could even become worse under the amended rule. It should be clear that no subpoena is necessary to compel a party to attend a deposition or trial in the forum, now the "issuing court." Presently, a plaintiff's deposition can be set in the district in which the case he filed is pending, and no subpoena is necessary to compel that attendance. But a subpoena seemingly could not, under the amended rule (or the current rule) compel such attendance if plaintiff were located out of state and had to travel more than 100 miles for the deposition. And Rule 45 at present clearly does contemplate subpoenas on party witnesses, so there is at least an argument that the power to compel attendance by party witnesses is limited to the scope of the subpoena power. At least one judge found the pre-1991 rule unclear on these issues. See Howell v. Morven Area Medical Center, Inc., 138 F.R.D. 70, 71 (W.D.N.C. 1991).

American College of Trial Lawyers, Federal Civil Procedure Committee (11-CV-014): Although comment was not invited on this subject, we are concerned that the revision of Rule 45 may produce an unintended change in practice on the location of party depositions. Currently, it is widely recognized that Rule 30 requires a party to appear for deposition at the location selected by the opposing party, and does not require a subpoena to require the party's attendance. Thus, Rule 30(g) provides that the noticing party may be sanctioned for failure to subpoena a non-party deponent, and case law recognizes that ordinarily the plaintiff's deposition may be noticed in the forum, and that the plaintiff must appear there, since plaintiff chose the forum, unless that would produce unreasonable hardship. Similarly, Rule 37(d)(1)(A)(i) permits imposition of Rule 37(b) sanctions on a party who fails to appear at a deposition after proper notice; no motion to compel is required, much less a subpoena. Proposed Rule 45(c)(1), however, includes commanding a person to attend a deposition. And it clearly includes subpoenas on parties, since proposed Rule 45(c)(1)(B)(i) refers to a person who is "a party or a party's officer." This provision might be read to supersede the existing rule provisions regarding the place of taking a party's deposition. Actually, Rule 45 has long provided for deposition subpoenas on party witnesses, but it seems few have realized that, perhaps due to "the impenetrable structure of current Rule 45 as a whole." The simplicity of the revised rule could cause problems because proposed Rule 45(c)(1) is easy to understand. There is a risk that Rule 45 might be read to repeal the provisions of Rule 30 by implication, but the court might ask itself "Why would the * * * new rule so clearly provide for subpoenas on party deponents if the drafters intended to retain existing Rule 30 jurisprudence?" The

solution, we believe, is to revise Rule 45 to remove parties entirely from proposed Rule 45(c)(1), and add a new provision as follows:

> (3) ***Subpoena of a Party.*** The place of compliance for the deposition of a party is governed by Rule 30. A party may be commanded to appear at trial only if the party is served with a subpoena that complies with the provisions of subparagraph (1).

Federal Magistrate Judges Association (11-CV-018): The Association offers an unsolicited suggestion to establish a presumptive time for the target of a subpoena to comply with a subpoena. Proposed 45(d)(3)(A)(i) authorizes quashing a subpoena if it "fails to allow a reasonable time to comply." It would be better for the rule to specify a time for compliance, rather than leaving the decision to a judicial officer's assessment of a "reasonable time." Many district have invoked presumptive time periods to lend some consistency to the handling of this question. We suggest setting one time to govern nationwide, such as fourteen days.

Also, while we endorse the purpose behind the amendment of Rule 37(b)(1), we suggest that it should be worded differently so it conforms to the terminology of Rule 45. The following language could be used:

> If a motion is transferred pursuant to Rule 45(f), and the deponent fails to obey an order by the issuing court to be sworn or to answer a question, the failure may be treated as contempt of either the issuing court or the court where the motion was brought.

U.S. Department of Justice (11-CV-021): The Department is concerned that the proposed amendment to Rule 45(g) and 37(b) may be interpreted to permit simultaneous contempt jurisdiction in both the forum court and the compliance court. Proposed 45(g) says that "the court for the district where compliance is required under Rule 45(c) -- and also, after a motion is transferred, the issuing court" may hold a person in contempt. The words "and also" create that ambiguity, which we assume the Committee did not intend, possibly because it contemplates the re-transfer of the dispute. To alleviate due process concerns, the Committee should state more explicitly in the Note that it understands that the forum court and the compliance court will exercise their enforcement and contempt powers consistently with due process considerations and with due regard for the interests of nonparty witnesses.

Ronald Marmer (and 35 other "individual members of leadership" of the ABA Section of Litigation) (11-CV-025: We believe that the time to object to a subpoena should be extended to 30 days, the time allowed for a party to respond to a Rule 34 request for documents. The corporate world has become more complex in the 20 years since Rule 45 was last reviewed. Corporate counsel tell us that a subpoena might not even arrive in the correct corporate office for almost 14 days, and making a determination whether to object on grounds of privilege or burden is difficult to do in this time frame. If the time to object is not extended, at least failure to object within that time should not work a forfeiture of rights.

We are also concerned that the "reasonably convenient" place for production will be subject to abuse. The current rule links compliance to a rule-dictated place of service and subjects it to a geographic limit. The nonparty served with the subpoena can seek the aid of the local court there. Although focusing on a convenient place for production seems sensible in an age when so much document discovery is conducted electronically, we think that this is subject to abuse. Under the proposed rule, a Seattle lawyer may think that production in his office in Seattle is "reasonably convenient" when a subpoena is directed to a witness in Miami, and it seems that the Miami witness will then have to apply for relief in Seattle, since that is the court where compliance is required under proposed Rule 45(c). That is an undue burden for the Miami nonparty. We propose instead that production occur "at a place *within the district where the subpoena was served* and reasonably convenient for the person commanded to produce." If this were thought unduly

restrictive, the rule could provide that a protective order motion or enforcement motion must be made in the district where service was made.

Finally, think that switching the "issuing court" to the court where the action is pending calls for an added explanation in the standard form of subpoena. We note that businesses often generate documents that look a lot like "official" documents, and there is a risk that nonparties will so regard subpoenas. A subpoena from a distant court is likely to cause people to conclude it is a fake. We propose that Rule 45(a)(1)(A)(iv) (which already requires that the subpoena include the text of Rules 45(d) and (e)) also require the addition of something like the following:

> NOTE: Rule 45 authorizes nationwide service of subpoenas. If this subpoena was issued by a court in a federal district other than the one in which you reside or were served, you mist still must comply with the subpoena, as described above. Your compliance with the subpoena must be at a location reasonably convenient for you. If you have objections to this subpoena, they should be filed in the United States District Court for the district [where you were served] {where compliance is called for}.

II. Information and Discussion Items

A. Preservation for Discovery; Spoliation

The Advisory Committee's Discovery Subcommittee has been intensely studying issues relating to preservation of electronically stored information and sanctions for failure to preserve such material since the E-Discovery Panel at the 2010 Duke Conference recommended further rulemaking to deal with pressing challenges resulting from preservation problems.

Despite this two-year effort, the project remains in a process of evolution. This evolution is a result of the difficulty of the legal issues involved, the changing nature of the technological issues involved, consideration of suggestions and studies provided by numerous groups and individuals, and the evolving reality of the caselaw. As a result, this report provides only an interim view of a very active and ongoing process.

During this two-year period, the Subcommittee has held numerous conference calls and some meetings, and the full Advisory Committee has discussed the resulting issues in four meetings, most recently in Ann Arbor in March, 2012. At the Advisory Committee's request, the Federal Judicial Center did research on the frequency and nature of sanctions litigation. The results of this research were presented to the Standing Committee during its January, 2011, meeting, which also included a panel on preservation and sanctions. In September, 2011, the Subcommittee had a well-attended and very informative mini-conference about these issues with approximately two dozen judges, practicing lawyers, technical experts, and academics. Many papers and suggestions were submitted to the Committee in connection with this event. Together with the notes reflecting comments during the event itself, these submissions can be found at a website maintained by the A.O.:

www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Overview/DallasMiniConfSept2011/aspx

Some participants continue regularly to submit papers and suggestions to the Committee.

As described below, this work has identified some possible amendment efforts as more promising than others. But it has also revealed intense disagreement about whether any rule amendments are warranted, and almost as much disagreement about what those amendments should be if they are pursued.

At the same time, others have been studying aspects of these problems. Even before the Duke Conference, the RAND Corporation's Institute for Civil Justice began a study of the costs of E-Discovery. That effort produced a substantial report published in April, 2012. See Nicholas M. Pace & Laura Zakaras, Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery (April, 2012). In May, 2012, the Seventh Circuit Electronic Discovery Pilot Program Final Report on Phase Two (May 2010 - May 2012) was published. Additionally, a Working Group of the Sedona Conference has for the past six months been engaged in trying to reach consensus on possible rule-amendment ideas to address these issues. During Fall 2011, Chief Judge Rader of the Federal Circuit also announced a model order for email discovery in patent cases which can be found at:

www.cafc.uscourts.gov/images/stories/announcements/Ediscovery_Model_Order.pdf

Finally, on December 13, 2011, the Subcommittee on the Constitution of the House Judiciary Committee held a hearing regarding "The Costs and Burdens of Civil Discovery" that included much discussion of E-Discovery issues. The papers submitted and a video version of the testimony can be found at:

http://judiciary.house.gov/hearings/hear_12132011_2.html

In short, much has been happening that bears generally on this topic. Over time, the Discovery Subcommittee's work has evolved. It focused initially on three alternative formulations of rule responses to these concerns. The first two directly addressed preservation obligations. One proposed a new Rule 26.1 that attempted to provide highly specific directives on what events would trigger a duty to preserve and what would have to be preserved when such a duty is triggered, including exclusions from that obligation to preserve, duration of the duty to preserve, and other specifics. A second approach proposed a new Rule 26.1 containing general directions to behave reasonably about preservation but not the sorts of specifics included in the first category. In each instance, a companion amendment to Rule 37 would permit sanctions only for violation of the preservation prescriptions, and would also provide additional directions about the proper handling of sanctions.

Although some favor the development of a detailed rule similar to the Committee's first proposed approach, both approaches to preservation rules prompted strong opposition on the merits from those who thought they would either worsen preservation problems instead of solving them or would permit the destruction of relevant information that should be preserved for litigation. Both also prompted some concerns about whether a rule addressing pre-litigation preservation activity would exceed the limits of Rules Enabling Act authority.

The third approach the Subcommittee developed focused only on Rule 37, and sought to ensure uniformity and constraint in the imposition of sanctions for failure to preserve. The current draft has many areas for further development, so any description is tentative. Nonetheless, the broad outlines have emerged:

(1) The draft would address a party's failure to preserve information "that reasonably should be preserved," which focuses the inquiry on whether the party in question took reasonable measures under the circumstances.

(2) When a party fails to take reasonable preservation measures, the draft would recognize that the court may respond to that failure with appropriate "remedial" or "curative" measures.

(3) The draft would preclude the court from imposing Rule 37(b) sanctions or an adverse inference instruction unless the failure to preserve was willful or in bad faith and caused prejudice. It also proposes a variety of factors to be considered in deciding whether the party failed to take reasonable preservation measures and whether failure to preserve was willful or in bad faith.

(4) Like Rule 37(e), the draft would permit imposition of sanctions in the absence of willfulness or bad faith in "exceptional circumstances."

This approach is designed to do several things while avoiding several problems. The things it is designed to do include (a) providing a uniform standard for imposition of sanctions; (b) ensuring that the court may take failure to preserve into account in supervising discovery and making decisions such as whether to order restoration of backup tapes whether or not bad faith is proven; (c) instructing the court to consider various factors that would bear on the finding of bad faith and, therefore, guide those subject to a duty to preserve in complying with their responsibilities; and (d) leave open the possibility that in exceptional circumstances -- such as when the failure to preserve completely deprives the other side of the ability to prepare its case -- the court could take serious merits-related measures even in the absence of bad faith.

This approach is designed to avoid some problems that might haunt an effort to promulgate a preservation rule directly, such as (a) attempting directly to regulate behavior before any lawsuit is filed; (b) devising

precise criteria -- for matters such as trigger, scope of preservation, and the exact duration of preservation -- that can apply to the wide variety of cases filed in federal court; (c) including "proportionality" considerations in such precise directives; (d) attempting to change the existing common law on when the duty to preserve attaches (as some have urged); and (e) reinforcing arguments that no judicial response at all is permitted if a party has complied with specific rule directives.

An Appendix to this report sets out the current draft of this third approach, along with the multiple footnoted questions that have yet to be resolved.

In reaching this point, the Subcommittee has encountered one basic question that has yet to be answered with confidence -- should any amendment effort be focused solely on electronically stored information or apply to all discoverable information? The full Advisory Committee discussed this question during its Ann Arbor meeting and the question has not been finally resolved.

One view is that preservation of electronically stored information is the source of the current anguish and therefore should also be the focus of rulemaking activity. In that sense, it builds on existing Rule 37(e), which limits sanctions under the rules for loss of electronically stored information if it was lost due to the good faith routine operation of an electronic information system. The Committee Note to that rule recognized that when litigation becomes reasonably likely a potential party should impose a "litigation hold." The litigation hold process is the focus of much of the current concern about overbroad preservation obligations. From this view, the right approach to the current problem would be to amplify current Rule 37(e)'s provisions for electronically stored information. Preservation of hard-copy information has not presented similar difficulties, and special provisions are not needed to deal with it. Indeed, as time goes by hard-copy material is likely to be less and less important because electronically stored information is likely to be the more important (and sometimes the only) evidence.

One way of reinforcing this view is to note that a significant feature of the difficulty produced by preservation of electronically stored information has been the exploding use of hand-held and other remote devices, each of which is capable of holding a large volume of electronically stored information. In the paper world, a litigation hold was not that difficult to implement because the "file room" was the focus of the effort. Now it could be that every employee is the possessor of multiple "file room" equivalents; gathering and storing all this information (and de-duplicating the mass of digital data) presents a difficulty that did not exist before. Both in terms of volume and complexity, this difficulty may warrant a special provision in the rules.

Another way of reinforcing this view is to consider the relative importance of electronically stored information and "real" evidence. The question of permitting severe sanctions in "exceptional circumstances" illustrates the point. Dispensing with proof of bad faith to justify serious sanctions in exceptional circumstances seems appropriate if the key evidence was lost. The example often used is Silvestri v. General Motors, 271 F.3d 581 (4th Cir. 2001), in which plaintiff claimed that the air bag did not properly deploy, causing him great injury. The court affirmed dismissal of plaintiff's suit because he had not arranged to preserve the air bag so G.M. could examine it, even though experts hired by his first lawyer did examine it and would testify that it was defective. But it is very difficult to say that plaintiff's failure to preserve was culpable. He was still in the hospital when the air bag was inspected, the car belonged to his landlady, and he did not proceed with the lawyer his parents first hired and instead filed suit much later using a different lawyer. One could argue that failure to preserve deprived G.M. of any meaningful opportunity to defend, and that a rule like the one under discussion would therefore be overbroad if it deprived the court of the power to take strong action in such circumstances.

How often would loss of electronically stored information present similar "exceptional circumstances"? One answer is that such circumstances are likely limited to "real" evidence because the abundance of electronically stored information and its frequent duplication will mean that the loss of a single piece of that information rarely will be case-dispositive. But given the growing centrality of electronically stored information as the only record of important events like medical treatment, is that really true? And if we are to draw a line between electronically stored information and other discoverable information, how easily can that line be applied? If somebody prints off an email, is that still "electronically stored information," or has it become something else? Should the answer depend on whether there remains an electronic version? Does the fact it was printed off affect duties to retain the electronic version?

In recent years, rulemaking has focused solely on electronically stored information on occasion and lumped it together with other discoverable information on other occasions. Like Rule 37(e), most of the 2006 amendments to the discovery rules were limited to electronically stored information, providing a precedent for limiting the current effort in the same way. Indeed, a major consideration for some time in regard to what became the 2006 amendments was the question whether a new technology warranted new rules tailored to the new technology. For example, the photocopier had a very large impact on document discovery under Rule 34, but nobody suggested revising the rule because of this technological development.

Eventually, the Advisory Committee was persuaded that the digital age was sufficiently different to warrant special rules to deal with those differences. The idea of specifying a form for production did not really bear on Rule 34 practice until electronically stored information came along; the most that might be in issue was whether the inspecting party got to look at originals or contented itself with copies. The question of whether Rule 34's reference to "documents" was adequate to capture the various forms of electronically stored information raised serious difficulties if one considered a relational database that was constantly being updated and created "documents" only when queried. So there is by now a considerable basis for rulemaking limited to electronically stored information. Indeed, law schools are increasingly offering a course in E-Discovery.

But on the topic of preservation (unlike sanctions) the rules do not generally distinguish between electronically stored information and other discoverable information. Thus, Rule 26(f) directs the parties at their initial conference to prepare a discovery plan for submission to the court and to "discuss any issues about preserving discoverable information." The FJC research described above indicated that, at least presently, sanctions motions for failure to preserve involve electronically stored information only about half the time, and failure to preserve conventional evidence is the focus of motions more often than electronically stored information (since some motions allege both types of failures). Some even suggest that singling out electronically stored information might seem to dilute protections against loss of other sorts of evidence, although that should not follow given that the basic thrust of the proposal is to limit (or at least to channel) courts' sanctions where a new rule would apply; no such limits would be placed on sanctions where the rule would not apply.

As noted above, the question whether to limit any rulemaking to electronically stored information or attempt to draft a rule that applies to all discoverable information remains open. Without necessarily resolving that question, the Discovery Subcommittee is likely to attempt instead to resolve drafting questions with its ongoing draft sanctions rule as indicated in the Appendix. Not only is this activity necessary, but it also may provide insights about resolution of the question whether to try to include all discoverable information within any rule proposal.

Technological development has continued during the time the Subcommittee worked on preservation, and at least one development should be mentioned. The

enormous growth of digital information subject to review has magnified the cost of responding to discovery, but recently "predictive coding" has emerged as a possible improvement in the handling of that problem. It is not possible to say that predictive coding has one fixed meaning, but the idea is to "train" a computer program to make responsiveness determinations by feeding it documents that are relevant and relying on it to discern which documents are or are not similar to the "seed set" pre-selected as relevant. In this sense, it operates somewhat like a spam filter, which does the reverse job and segregates those incoming items that should be excluded.

Predictive coding has gotten a lot of attention recently. The recent RAND report mentioned above, for example, reported that 73% of the cost of responding to E-Discovery results from the cost of reviewing collected digital data, and forecast that the only way to reduce that cost significantly is some version of predictive coding. Courts and lawyers have been cautious about embracing this substitute for laborious individual review of materials by human beings. Magistrate Judge Peck has approved use of predictive coding in da Silva Moore v. Publicis Groupe, 11 Civ. 1279 (ALC) (AJP), 2012 WL 607412 (S.D.N.Y., Feb. 22, 2012), but the matter has been appealed to the district court. Meanwhile, some other courts have reportedly followed Judge Peck's lead. The eventual outcome in the courts remains uncertain.

Whether predictive coding bears directly on preservation is uncertain. It might point toward improving methods for identifying what must be preserved. But it also might suggest that preservation of huge quantities of digital information is more acceptable because predictive coding makes it more digestible if it must later be reviewed for possible production in discovery.

Two further rulemaking developments also deserve mention. The first is an idea partly modeled on the Federal Circuit's model order for email discovery in patent cases. An abiding difficulty in discussing preservation of electronically stored information has been a suggestion that the preservation obligation should be narrower than the very broad scope of discovery. That would not fit with the existing directive in Rule 26(f) that the parties discuss any issues regarding preservation of discoverable information. But it would respond to the rapid growth in the magnitude of digital data, which threatens to make the idea of seeking all information about any topic unrealistic.

A possible response would be to devise a new approach to the scope of discovery for electronically stored information that would take account of the impossibility of producing it all. The Federal Circuit model rule offers a possible model for that, by limiting discovery to a specified number of custodians and a specified number of search terms. Inspired by that effort, the Subcommittee has begun very tentative consideration of a revision of Rule 26(b)(1) to specify limits for the scope of discovery of electronically stored information. This effort is tentative not only because it has yet to receive substantial attention, but also because any modification of the scope of discovery is a very delicate matter. Beyond that, the viability of limits along the lines discussed is quite uncertain. It may be, for example, that use of search terms will be eclipsed by something like predictive coding, so enshrining search terms in a rule could produce problems but not advantages.

The other development worth noting is that another subcommittee of the Advisory Committee (the Duke Subcommittee) is presently considering possible rule changes that might bear on the preservation questions discussed here. One set of changes would address preservation more directly through Rule 26(f) and 16(b). Another would address cost bearing in ways that might have implications for the costs of preservation as well as discovery.

In sum, there is very active ongoing work reflected in the draft in the Appendix to this report, but some uncertainty about where that work will ultimately lead.

APPENDIX

The following is the current draft the Discovery Subcommittee has discussed and presented for discussion at its mini-conference on preservation. Many drafting choices remain to be made, and questions noted below remain to be answered. It is hoped that much of this work will be done in the coming months. The draft Committee Note below has not yet been discussed at all by the Subcommittee. Nonetheless, this ongoing draft may be informative about the kinds of issues presently under consideration.

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

* * * * *

(g) FAILURE TO PRESERVE DISCOVERABLE [ELECTRONICALLY STORED] INFORMATION; REMEDIES

(1) If a party fails to preserve discoverable [electronically stored][1] information that reasonably should be preserved[2] in the anticipation or conduct of litigation, the court may:

(A) permit additional discovery;

(B) order the party to undertake curative [other remedial][3] measures; or

(C) require the party to pay the reasonable expenses, including attorney's fees,[4] caused by the failure.

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[1] This could be added if we wanted to limit this rule to electronically stored information.

[2] Note that the phrase "discoverable information that reasonably should be preserved" has an inherent premise about trigger and scope that provide a basis for Committee Note discussion of those topics.

[3] Does "curative" have a commonly understood meaning? Would "other remedial" give greater flexibility? The goal here is to emphasize that orders that otherwise not be made are justified due to the loss of data. Again, this is not a "sanction," but an effort by the court to minimize the possible harm to a litigant's case resulting from another party's loss of data.

[4] Would this possibility tend to encourage claims of spoliation? It might be that one could, by succeeding on a spoliation argument, get a "free ride" for discovery one would otherwise be doing at one's own expense. Hopefully, it should be clear that discovery is made necessary by the loss of data ("caused by the failure"), and not something that would happen in the ordinary course. But will there be many instances in which that is not clear? The notion is that it should justify imposing on the spoliator the costs of discovery and other litigation activity made necessary by the spoliation. For a recent example, see E.I. du Pont de Nemours and Co. v. Kolon Indus., Inc., 803 F.Supp.2d 469 (E.D. Va. 2011), in which the court imposed on defendant the costs of plaintiff's discovery efforts that led to some five days of evidentiary hearings about spoliation. The judge explained (id. at 509-10):

> DuPont was thus forced by the spoliation to incur attorneys' fees, investigative expense, and the expense of a hearing and briefing. That was made necessary by Kolon's violation of its obligation not to spoliate evidence. It is proper to afford DuPont recompense for the consequences of that violation in the form of an award of expenses, costs and attorney's fees.

(2) Absent exceptional circumstances [irreparable prejudice],[5] the court may not impose any of the sanctions listed in Rule 37(b)(2) or give an adverse-inference jury instruction[6] unless [the court finds] {the party seeking sanctions proves}[7] that the other party's failure to preserve discoverable information was willful or in bad faith and caused [substantial] prejudice in the litigation. [A court that imposes a sanction must [should][8]

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[5] This proviso is designed to authorize sanctions in the absence of fault in cases like Silvestri v. General Motors Corp., 271 F.3d 583 (4th Cir. 2001), where the loss of the data essentially precluded effective litigation by the innocent party. One question is whether such instances are truly exceptional. If they happen with some frequency, this may be the wrong phrase.

The term irreparable prejudice may be preferable to focus on the real concern here. It would be important, however, to ensure that this be limited to extremely severe prejudice. Most or all sanctions depend on some showing of prejudice. Often that will be irreparable unless the "curative" measures identified in (g)(1) above clearly solve the whole problem. The focus should be on whether the lost evidence is so central to the case that no cure can be found.

[6] Is this too broad? Adverse inference instructions can vary greatly. General jury instructions, for example, might tell the jury that it could infer that evidence not produced by a party even though it should have had access to the evidence supports an inference that the evidence would have weakened the party's case. Is that sort of general instruction, not focusing on any specific topic, forbidden? How about the judge's "comment on the evidence" concerning lost evidence but not in the form of a jury instruction? Perhaps that's different from an "instruction" on what the jury should do, but many might think that the judge's comment is pretty close to an instruction. (In some states, judges have on occasion been forbidden to comment on the evidence because such comments were thought to intrude into the jury's function.) Would this rule forbid attorney argument to the jury inviting to make an adverse inference if there were no instruction at all on the subject?

[7] Presently the rule does not seem to allocate burdens of proof. The draft Committee Note presumes that the party seeking sanctions has the burden of showing both bad faith (or willfulness) and prejudice. If that is correct, should it be in the rule? The bracketed language is one way to do that. Perhaps this should be revised to take account of the possibility that the court is acting on its own; does it bear a burden of proof?

[8] Using "should" here may make "ordinarily" unnecessary, and also avoid the question whether certain sanctions are less severe than others as a matter of law. That question is likely in some cases to be a close call. But the softer the directive, the greater the possibility that the court will decide to go beyond what is needed to cure the demonstrated prejudice. Remember that in National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976), the Court held that "general deterrence" was a valid ground for dismissing plaintiff's case for being three days late in serving some supplemental interrogatory answers. The Third Circuit had reversed the dismissal on the ground the penalty did not fit the crime, and the Court said it overstepped its appellate authority in doing so.

The draft Committee Note attempts to introduce the notion that courts should calibrate the sanction to the harm, but that may not suffice. On the other hand, is this a desirable limitation? Perhaps in some instances the general deterrence attitude of the Supreme Court in 1976 is appropriate. Consider the party that acts in extreme bad faith (using Evidence Eliminator at 3:00 a.m. the day before inspection of his system) but bungles the effort.

{ordinarily} use the least severe sanction necessary to cure the demonstrated prejudice.]

(3) In determining whether a party failed to preserve discoverable information that reasonably should have been preserved, and whether the failure was willful or in bad faith,[9] the court may [must] {should}[10] consider all relevant factors, including:

(A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable;[11]

(B) the reasonableness of the party's efforts to preserve the information, including the use of a litigation hold and the scope of the preservation efforts;[12]

(C) whether the party received a request that information be preserved, the clarity and reasonableness[13] of the request, and — if a request was made — whether the person who made the request or the party offered to engage in good-faith consultation regarding the scope of preservation;

(D) the party's resources and sophistication in matters of litigation;[14]

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[9] Combining an evaluation of reasonableness and willfulness or bad faith in one set of factors is attractive. Often the circumstances that bear on reasonableness also will bear on intent. Would it help to add other factors that bear directly on intent, but also may bear on reasonableness? Examples might include departure from independent legal requirements to preserve, departure from the party's own regular preservation practices, or deliberate destruction.

[10] It may be that "must" or "should" is more appropriate than "may" here. Since the rule only talks about "considering" factors, the difference may not matter, but the idea seems to be to press the judge to consider at least the listed factors.

[11] Is this treatment sufficient to substitute for provisions about trigger? The draft Committee Note attempts to add detail.

[12] The use of "scope" is designed to permit consideration of a variety of factors. The draft Committee Note attempts to elaborate.

[13] Does this mean that an unreasonable request imposes a narrower duty than a reasonable request? Should clarity be the test here, since reasonableness of preservation efforts is already addressed in (B)? On the other hand, the overall thrust is toward encouraging reasonable behavior, so stressing that objective here may be desirable.

[14] This consideration seems important to address the potential problem of spoliation by potential plaintiffs who may realize that they could have a claim, but not that they should keep their notes, etc., for the potential litigation. Are resources a useful consideration here? A wealthy individual might be quite unfamiliar with litigation. Is this somewhat at war with considering whether the party obeyed its own preservation standards? Making those relevant to the question of whether preservation should have occurred may be seen to deter organizations from having preservation standards. It is unclear how many organizational litigants -- corporate or governmental -- actually have such standards. Does the fact they exist prove that this litigant is "sophisticated"?

(E) the proportionality[15] of the preservation efforts to any[16] anticipated or ongoing litigation; and

(F) whether the party sought timely guidance from the court[17] regarding any unresolved disputes concerning the preservation of discoverable information.

DRAFT COMMITTEE NOTE

In 2006, Rule 37(e) was added to address issues peculiar to the operation of electronic information systems, which may appropriately be configured to alter or delete information as a feature of their routine operation. That rule forbids imposition of sanctions when such routine operation prevents discovery of such lost information, provided the system was operated in good faith. One issue bearing on good faith operation is whether the party took action to alter its routine operation upon learning of possible litigation, commonly called a "litigation hold."

Since 2006, there has been much concern about the scope and burden of litigation holds, and the possibility that sanctions would be imposed for failure to impose them, or failure to impose a sufficiently broad hold. The Committee has been informed that some potential litigants have adopted extremely expensive practices that overpreserve electronically stored information without providing significant improvements in access to needed evidence. In part, this activity has resulted from the remarkable growth of digital data, and the increasing use of a variety of handheld and other devices that did not exist at the time Rule 37(e) was drafted. In addition, social media -- which were not used by a significant number of people when Rule 37(e) was drafted -- have attracted an enormous following and are now used to create a very large volume of electronically stored information. Taken together, these developments have presented preservation challenges that can produce excessive expense.

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[15] This unadorned invocation of "proportionality" might be a source of mischief. Is the directive to consider and apply Rule 26(b)(2)(C)? Is that rule really about the same things that proportionality addresses here? The question there is the cost of responding to discovery. The question here is the cost and burden of preserving. Although all seem to agree that proportionality concepts should loom over the judgment about the adequacy of preservation, there are abiding questions about how to say that and how to do it.

[16] This is broad, but probably the right choice. If the party reasonably anticipates multiple actions, proportionality is measured in contemplating all of them. A party to any individual action should be able to invoke the duty of preservation that is owed to the entire set of reasonably anticipated parties.

[17] This implicitly applies only when there is an ongoing action. Do we need anything more than a Committee Note to recognize that it is difficult to seek guidance from a court before there is a pending action? What if there is a pending action, and the party reasonably should anticipate further actions — is it fair to consult with one court (perhaps chosen from among many), and then invoke that court's guidance when addressing other courts? Is this a reasonable concern? Shouldn't following a court's directions count for something? Can others later accuse the party that followed the court's direction of failing to acquaint the judge with all the needed facts, such as the pendency of 99 other similar cases?

Rule 37(g) addresses these concerns. It is designed to ensure that potential litigants who make reasonable efforts to satisfy their litigation hold responsibilities may do so with confidence that they will not be subjected to serious sanctions should information be lost despite those efforts. It does not provide "bright line" preservation directives because such bright lines seem unsuited to a set of problems that is intensely context-specific. It does seek to assure that the court retains authority to manage litigation appropriately in light of loss of information that should have been retained, and to guard potential litigants against serious sanctions unless it is established that they acted willfully or in bad faith. Rather than prescribe a set of "bright line" preservation directives, the rule focuses on a variety of considerations that the court may [must] {should} consider in determining its response once it is established that information that should have been retained was not.

Subdivision (g)(1). Rule 37(g) applies to discoverable information "that reasonably should be preserved in the anticipation or conduct of litigation." This preservation obligation arises from the common law, and may in some cases be implemented by a court order in the case. [It is ultimately a duty owed to the court.[18]] Such a duty may be triggered by a variety of occurrences that indicate that the party is likely to become a party to litigation.[19] Examples of such triggering events include service of a pleading or other document asserting a claim; receipt of a notice of claim indicating an intention to assert a claim; service of a subpoena or similar demand for information; retention of counsel or of an expert witness or taking similar action in anticipation of litigation; or receipt of a notice or demand to preserve discoverable information in anticipation of litigation.[20] This rule provision is not intended to alter the longstanding and evolving common law regarding the duty to preserve in anticipation of litigation.[21]

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[18] Do we want to say this? Embracing the duty as one owed to the court may be at odds with encouraging parties to reach agreement on preservation specifics, but perhaps the pertinent difference is between the general duty to the court and the precise specifics by which it is applied in a given case. Particularly in light of the possibility that a given defendant may foresee multiple claims, that defendant's duty to the court is not entirely excused because the first plaintiff's lawyer does not appreciate the importance of preservation. Moreover, if we consider the presuit situation, it may seem that the duty then runs to <u>all</u> courts. Is that right?

[19] This paragraph is an effort in the Note to provide guidance on what triggers the duty to preserve. It could be made more precise or more general.

[20] This listing is derived from the listing in our Category 1 for the Dallas mini-conference. It does not include one example that was included there -- the occurrence of an event that results in a duty to preserve information under a statute, regulation, contract, or the person's own retention program. The reason for omitting this trigger is that it seems too broad and that it might deter adoption of appropriately broad preservation policies. Regulatory preservation requirements may exist for a great variety of reasons having nothing to do with prospective litigation; making all of them sufficient to trigger a preservation duty as meant here is debatable. Regarding party-designed preservation policies, it may be that including them would seem a "tax" on those who have broad policies. On the other hand, either such example might be urged even though not listed because the listed example are just that.

[21] This sentence seems useful to show that it is not our goal to make substantial changes in existing precedent. Assuming that's desirable, does it undermine the effort of the paragraph to provide at least examples of what might often trigger the duty to preserve? To the extent that the description

The rule applies to situations in which, after such a triggering event, information that should be preserved is not. The question what information should be preserved depends on the circumstances of each case; the goal of the rule is that the litigation hold[22] be reasonable in the circumstances. The determination whether a party failed to preserve information as it should must be made under Rule 37(g)(3).

When the court concludes that a party failed to preserve information it should have preserved, it has available a number of remedies that are not sanctions. One is to permit additional discovery that would not have been allowed had the party preserved information as it should have. A party's failure to preserve information that should have been preserved may affect the judgment whether certain discovery should be allowed. For example, discovery might be ordered from sources of electronically stored information that might otherwise not be reasonably accessible under Rule 26(b)(2)(B). More generally, the fact that a party has failed to preserve information may affect the determination of the appropriate scope of discovery under Rule 26(b)(2)(C).

Of course, the court always has authority to permit additional discovery within the scope of Rule 26(b)(1). The fact that a party has properly preserved evidence does not constitute an argument for a narrowed scope of discovery. This rule does not confine the court's latitude to order discovery from a party that has properly preserved evidence, providing that such discovery comports with Rule 26(b)(2)(C).

Another remedy may be to order the party that failed to preserve information to take curative [other remedial] measures to restore or obtain the lost information, or to develop substitute information that the court would not have ordered the party to create but for the failure to preserve.

The court may also require the party that failed to preserve information to pay another party's reasonable expenses, including attorney's fees, caused by the failure to preserve. Such expenses might include, for example, discovery efforts made necessary by the failure to preserve information. In making such orders, the court may consider whether the discovery sought would have been done without regard to the failure to preserve; if so, the expense may not have been caused by the failure to preserve. This rule is not intended to provide broad cost-shifting sanction against parties that have failed to preserve; the costs addressed are those caused by the failure to preserve.

Subdivision (g)(2). This provision provides protection for a party that has behaved reasonably in relation to preserving information that may be relevant to pending or impending litigation. Despite reasonable efforts to preserve, it may happen that some information that should have been preserved was not, and some parties may not have taken sufficient measures to preserve information. In those circumstances, the court may address the failure to preserve under Rule 37(g)(1). But the court may impose an adverse-inference

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reflects what can be found in the cases, it seems consistent with the cases, and not to supersede them.

[22] Does this use of the term "litigation hold" go beyond what is usually meant by the term?

jury instruction or a sanction listed in Rule 37(b)(2) only in circumstances that satisfy Rule 37(g)(2).

A threshold matter is that [the court must find] {a party seeking to justify a sanction under Rule 37(b)(2) or an adverse-inference instruction for failure to preserve information must show} that the information should have been preserved.[23] In addition, this party must make two further showings required by Rule 37(g)(2):

First, it must be established that party that failed to preserve did so willfully or in bad faith. This determination should be made with reference to the factors identified in Rule 37(g)(3), which emphasize both reasonableness and proportionality. Under Rule 37(e), a party is protected against sanctions under these rules for loss of information due to the good faith routine operation of its information system. But good faith may call for efforts to avoid loss of electronically stored information, and similar efforts should be made for other discoverable information. Reasonable efforts ordinarily would not require that a party "keep everything forever." And under some circumstances -- perhaps often with potential litigants not familiar with the demands of litigation -- failure to make immediate efforts to preserve potentially discoverable information would not show bad faith or willfulness. Each case must be judged on its own facts under the factors in Rule 37(g)(3).

Second, [the court must also find] {the party seeking sanctions must also show} that the loss of information caused [substantial] prejudice in the litigation. One of the consequences of the growth of digital data is that there is now a much greater volume of information than was available in the past. Much of that data duplicates other data, and substitute evidence is often available. Although it is impossible to demonstrate with certainty what lost information would prove, the party seeking sanctions must show that it has been prejudiced by the loss. Among other things, the court may consider the measures identified in Rule 37(g)(1) in making this determination; if curative measures can cure the problem, sanctions would ordinarily be inappropriate.[24]

The rule does provide, however, that the showing of willfulness or bad faith need not be made in "exceptional circumstances" [when "irreparable prejudice" results from the loss of the information]. This exception builds on the concept of prejudice in the litigation; in some circumstances the loss of the information may cripple another party's ability to present its case. Although such a result may occur due to loss of electronically stored information in some exceptional instances, it is more likely in situations in

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[23] This is an effort to introduce a burden of proof concept. Is it appropriate? Should there be an effort to incorporate that into the rule itself?

[24] The word "ordinarily" recognizes that in some cases of outrageously bad-faith actions sanctions may be justified even if the bad-faith actor was unsuccessful in deleting the information. Should we explain this qualification in the Note? One reaction is that this disinters the notion that the duty is owed to the court, and perhaps all courts (in the presuit stage). Another is to recall that the Supreme Court said in the National Hockey League case in 1976 that "general deterrence" is a sufficient justification for case-ending sanctions. Flagrant disregard of duty may be just the situation that is suitable for general deterrence.

which tangible or "real" evidence -- such as an injury-producing agent -- is lost before some parties are able to examine it.[25] It is expected that such cases will be very rare. But when such crippling prejudice is shown, a court may impose sanctions on a party that did not act willfully or in bad faith.

In any given case in which imposition of a sanction has been properly supported under this rule, the expectation is that the court will limit itself to the least severe sanction needed to repair the prejudice resulting from loss of the information. The various sanctions listed in Rule 37(b)(2) -- and adverse inferences -- can often be arranged in a hierarchy from least to most severe. The thrust of this rule is that the court should incline toward the least severe sanction that will substantially cure the proven prejudice resulting from the failure to preserve. Because a categorical listing of sanctions by "severity" cannot reliably determine which would actually be more or less so in a given case, the rule does not attempt to do that. Courts can make commonsense determinations in the cases before them.

Subdivision (g)(3). These factors guide the court when asked to adopt measures under Rule 37(g)(1) due to loss of information or to impose sanctions consistent with Rule 37(g)(2). These factors may inform the decision whether a party failed to preserve information that reasonably should have been preserved, and also whether that failure was willful or in bad faith. The listing of factors is not meant to be exhaustive; other considerations may bear on these decisions.

The first factor is the extent to which the party was on notice that litigation was likely and that the information lost would be discoverable in that litigation. As noted above, a variety of events may alert a party to the prospect of litigation. But often these events provide only limited information about the nature or contours of claims or defenses in that prospective litigation. As a consequence, it may be that the scope of discoverable information will not be apparent for some time after the prospect of litigation itself has become reasonably clear. Depending on the circumstances, the scope of preservation will need to be expanded as the scope of the litigation becomes clearer; on some occasions, it may become apparent that the scope of preservation can be reduced.

The second factor focuses on what the party did to preserve information after the prospect of litigation arose. One factor that is often important is whether the party used a litigation hold, although it cannot be said that any particular litigation hold, or method of implementing one, is invariably required.[26] More generally, the scope of the overall preservation efforts

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[25] Is this assertion really true, and will it remain true even if it is now? If one is talking about "real" evidence, like the airbag in the Silvestri case, it seems that electronically stored information is less likely to be as important. But consider medical records or design records for a car. Those are likely to be electronic, and the complete loss of them could be crippling to a case. Perhaps one idea would be that there is greater chance by forensic means to find substitute electronically stored information than a substitute airbag. But that really seems to talk more to curative measures than the question of whether sanctions should be imposed if those measures don't cure the problem.

[26] This sentence in part addresses the notion that a written litigation hold is always required. Beyond doubt, a written litigation hold will often be a good idea to ensure that there is no dispute about what the hold said.

made by the party should be scrutinized. One consideration may be what it knew, or should have known, about the likelihood of loss of information if it did not take measures to preserve the information. Another may be the extent to which it could appreciate that certain types of information might be discoverable in the litigation. With regard to all these matters, the court's focus should be on reasonableness. The fact that some information was lost does not itself prove that the efforts to preserve were not reasonable.

The third factor looks to whether the party received a request to preserve information. Such a request should often bring home to a prospective litigant the need to preserve information, and it may provide useful guidance on what types of information would be relevant to that litigation. But this factor is not meant to compel compliance with all such demands. To the contrary, the focus is on reasonable behavior in light of known circumstances. Thus, an unreasonably broad preservation demand may be self-defeating, for the party presented with it can make its own determination what is appropriate preservation in relation to the likely claims.

One important matter may be whether the person making the preservation demand was willing to engage in good faith consultation about the scope of the desired preservation. After litigation commences, such discussion is required under Rule 26(f). As noted above, the dimensions of unfiled litigation may be difficult to discern in advance. Even after litigation commences, there may be considerable uncertainty. Particularly given the importance of the fifth factor -- proportionality -- parties must be flexible about their preservation demands and efforts. At the same time, it may happen that a party demanding preservation omits from the list of things to be preserved some items that the recipient of the demand does or should recognize as important; in those circumstances, the absence of those items from the request to preserve does not excuse preservation if otherwise reasonably required.

The fourth factor looks to the party's resources and sophistication in relation to litigation. Prospective litigants may have very different levels of sophistication regarding what litigation entails, and about their electronic information systems and what electronically stored information they have created. Ignorance alone does not excuse a party that fails to preserve important information, but this sophistication may bear on whether failure to do so was either willful or in bad faith.[27] A possibly related consideration

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[27] This language is particularly concerned with preservation claims regarding plaintiffs. It does seem that defendants are waking up to the reality that preservation arguments can be directed to plaintiffs. For example, in "Plaintiffs Have Their Own Duty to Preserve," Nat. L.J., Dec. 19, 2011, Paul Weiner of the management firm Littler Mendelson emphasizes that "e-discovery is a two-way street, and obligations apply just as forcefully to plaintiffs -- who often anticipate litigation well in advance of any defendant." Weiner urges that plaintiffs should be required not only to retain email, but also social media activity, cellphone records, text messages, and tweets. He recommends that defense counsel inquire into a wide variety of sources of information during Rule 26(f) conferences: home or other email accounts; any device used for sending or receiving text messages; blogs or other online discussion forums; accounts with Google+, MySpace, Facebook, Twitter and equivalent services; LinkedIn, Monster.com, Career-Builder.com or similar accounts; and cloud-based services to store documents or data. He concludes: "It is no longer acceptable to give short shrift to plaintiffs' e-discovery obligations -- they are well established."

may be whether the party has a realistic ability to control or preserve some electronically stored information.[28]

The fifth factor emphasizes a central concern -- proportionality. Because there is so much electronically stored information, and because the amount is growing rapidly, the effort involved in trying to preserve all of it can be very great. The volume of such information also means that there may often be limited need to attempt to preserve "all" information on a subject. Instead, the focus should be on the information needs of the litigation at hand. That may be only a single case, or multiple cases. Rule 26(b)(2)(C) provides guidance particularly applicable to calibrating a reasonable preservation regime. Rule 37(g)(3)(E) explains that this calculation should be made with regard to "any anticipated or ongoing litigation." Prospective litigants who call for preservation efforts by others (the third factor) should keep those proportionality principles in mind. Parties complying with their obligation under Rule 26(f) to discuss preservation of discoverable information should similarly keep proportionality in mind.

Making a proportionality determination often depends in part on specifics about various types of information involved, and the costs of various forms of preservation. A party may act reasonably by choosing the least costly form of information preservation, providing that it is substantially similar to more costly forms. It is important that counsel become familiar with their clients' information systems and digital data -- including social media -- to address these issues. A party urging that preservation requests are disproportionate may need to provide specifics about these matters in order to enable meaningful discussion of the appropriate preservation regime.

Finally, the sixth factor looks to whether the party alleged to have failed to preserve as required sought guidance from the court if agreement could not be reached with the other parties. Until litigation commences, reference to the court is not possible. In any event, this is not meant to encourage premature resort to the court; Rule 26(f) directs the parties to discuss and to attempt to resolve issues concerning preservation before presenting them to the court. Ordinarily the parties' arrangements are to be preferred to those imposed by the court.[29] But if the parties cannot reach agreement, they should not forgo available opportunities to obtain prompt resolution of the differences from the court. Although judicial resolution of differences is obviously important to the party attempting to design an appropriate preservation regime for itself, it must be remembered that the other parties can also seek guidance from the court. An unresolved disagreement about preservation could lead to loss of information that judicial resolution could have avoided; if it becomes apparent that agreement cannot be reached, a party desiring broader preservation ought not unduly delay applying to the court for guidance.

In sum, the goal of Rule 37(g) is to provide a framework for realistic preservation arrangements to be made in given cases. Because one size does not fit all, it cannot prescribe a precise regime for most or all cases. But

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[28] The idea here is to suggest that -- particularly as to information in the cloud or on Facebook or other sources -- the party may not be able to exercise complete control over the preservation of the information.

[29] This point speaks to the notion that the duty to preserve is owed to the court.

it does attempt to guide the parties and the court as they address these important matters.[30]

[30] This concluding paragraph probably does not add significantly to the guidance already provided in the Note, but it may be useful to stress the overall theme.

B. Duke Conference Subcommittee

The Duke Conference Subcommittee was formed to respond to the welter of ideas produced at the Duke Conference sponsored by the Civil Rules Committee in May, 2010. The report for the Standing Committee meeting last January described ongoing efforts to advance the lessons provided by the Conference through judicial education and materials such as the new benchbook for judges; encouragement of empirical research, including pilot projects framed in ways that will facilitate evaluation by the Federal Judicial Center; and a protocol devised to accelerate discovery in employment cases. These efforts continue apace.

The Subcommittee has also been considering a package of potential rules amendments that might reduce cost and delay in civil litigation. The aim is to develop a set of coordinated provisions that, taken together, will achieve a whole greater than the sum of the parts. All provisions fit within the core principles of the present rules. Several participants in the Duke Conference observed that present rules provide adequate tools to constrain the excessive costs and delay that are encountered in some litigation. The challenge is to develop changes that will facilitate more consistent realization of the goals that can be reached within the current framework.

The package of draft rules amendments is meant to be neutral between plaintiffs and defendants. It illustrates suggestions from all sides of the bar, from the bench, and from Congress. And it remains open. New topics may be added, matters once considered and dropped may be restored, and some drafts carried forward for further consideration may be abandoned. The next step is to refine the concepts, express them clearly in draft rule text, and develop Committee Notes. Much of the focus is on advancing cooperation, proportionality, and active case management.

It is too early to request advice on the details of the initial drafts. The Subcommittee has significant work to do in improving initial models that at many points are designed more to identify issues that must be resolved than to offer even tentative resolutions. What follows is a sketch of the basic framework.

Delay often occurs early in the life of an action. One set of proposals considers shortening the time allowed to serve a summons and complaint under Rule 4(m) and accelerating the time to issue a Rule 16(b) scheduling order. These proposals also emphasize the value an actual scheduling-order conference in person or by telephone. In addition, they would establish a uniform set of exemptions from the scheduling-order requirement by substituting the initial disclosure exemptions in Rule 26(a)(1)(B) for the local rule exemptions now authorized by Rule 16(b)(1).

Discovery questions always loom large in any discussion of cost and delay. The Discovery Subcommittee is responsible for many of these issues, most notably the problems of preservation and spoliation that have been brought to the fore by the explosion of electronically stored information. Other discovery-related issues, however, can be fit within the focus of the present package. Ongoing responsibility for particular issues may shift between the Subcommittees as drafts are developed.

The Rule 26(d) discovery moratorium raises one question. The quality of the discussion at a Rule 26(f) conference can be enhanced by having specific discovery requests to focus on. A draft would permit requests to be served at some point after the action is commenced but before the Rule 26(f) conference. Responses would be due at a time agreed upon, set by the scheduling order, or geared to issuance of the scheduling order.

Discovery motion practice may be improved by an informal conference with the court before a motion is filed. Many judges already require such conferences. One draft sketches a mild version that would add to Rule 16(b)(3) encouragement for a pre-motion conference provision in the scheduling order. A more aggressive version, not currently favored, would direct that a

movant request a pre-motion conference; the motion could be filed only if the request is denied or the conference fails to resolve the problem.

Continuing concerns about the need for proportionality in discovery underlie a number of alternative drafts. The more modest sketches incorporate present Rule 26(b)(2)(C)'s limits — essentially proportionality without the name — in the Rule 26(b)(1) definition of the scope of discovery. Others, including one favored by the Subcommittee, would expressly refer to "proportionality," but present the risks that attend adoption of a new term, particularly in an area as fraught with contentiousness as discovery.

Proportionality also is approached by a different and familiar method. The present numerical limits on the numbers of Rule 30 and 31 depositions, and the presumptive "1 day of 7 hours" duration, could be reduced. The Rule 33 limit on the number of interrogatories also could be reduced. Numerical limits could be added for Rule 34 requests for production or inspection, and for Rule 36 requests for admissions. The Committee Notes would emphasize that the limits are merely presumptive, geared to the mine-run of cases but subject to modification when appropriate, ideally by agreement of the parties.

The value of interrogatories and requests to admit addressing the parties' contentions was questioned by some of the participants in the Duke Conference. Draft revisions would encourage postponing contention discovery to a point following the completion of fact discovery.

Discovery problems are not confined to excessive demands. There is room to be dissatisfied with obstructionist and evasive responses. Draft provisions address these concerns. Perhaps the simplest would require a party who states an objection under Rule 34 to state the objection "with specificity," the language of present Rule 33(b)(4), and also to state whether materials are being withheld under the objection.

One more discovery issue, cost-sharing, is being carried forward for the purpose of stimulating discussion by observers outside the Advisory Committee, but without any present recommendation. The most sweeping proposal that has been advanced by an outside group is that the presumption should be that the party requesting discovery should bear the cost of responding. More modest proposals would add rule text emphasizing the authority courts now have to condition discovery in particular cases on shifting part or all of response costs. The Subcommittee is not persuaded that the time has come to address practices so deeply embedded in the balance between the parties struck by current civil practice. Still, the issue warrants further inquiry.

The value of the initial disclosures required by Rule 26(a)(1)(A) also is carried forward on the Subcommittee agenda, but without even sketches of new rule text. Both at the Duke Conference and elsewhere, mixed views have been expressed about the current rule. Some think it useless. Others think it helpful. Still others think it could be made useful by reverting to the more expansive disclosures required by the initial 1993 version, only to be diluted for tangential reasons by the 2000 amendments.

Yet another possible discovery issue has been considered and put aside. Concern about the difficulty of pleading with the level of fact specificity that may be required by still developing pleading practice, particularly in cases of asymmetrical information, leads to disputes whether discovery should be stayed pending decision on a motion to dismiss for failure to state a claim. The Subcommittee believes that courts are generally exercising sound judgment in determining whether to stay discovery.

The great value of cooperation among the parties is frequently lauded in discussions of discovery, but it extends to all phases of litigation. There may be real value in adopting an aspirational rule expressing an obligation to cooperate. Present drafts focus on Rule 1, adding a direction that the parties cooperate to achieve the just, speedy, and inexpensive determination of the action. The question is whether a rule can be crafted that will do some good without encouraging collateral disputes about perceived failures to satisfy this elusive goal.

These ideas were presented to the full Committee in March, and received a very favorable response. After the drafts are refined, the Subcommittee hopes to convene a miniconference to elicit the views of judges, experienced lawyers, and academics. A small beginning was made on this project by holding a Subcommittee meeting over breakfast on the second day of the March Committee meeting — observers attended the Subcommittee meeting and offered useful suggestions.

The current Subcommittee draft is attached as an appendix at the end of this report.

C. Pleading

The Committee continues to pay close attention to evolving pleading practices. The development of pleading practices over the first five years following the decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) continues along paths that do not suggest an urgent need for response. Much remains to be learned about what pleading standards will be when practices are better settled.

Ongoing empirical work provides additional reason for caution. The Federal Judicial Center is extending its already invaluable work with a project that will seek to measure experience with all forms of pretrial adjudication, including not only Rule 12 motions but also summary judgment. It also is helping the Committee to digest the increasing number of empirical studies undertaken by independent scholars. All of this work will provide valuable lessons. At the same time, there are events — and most especially non-events — that cannot be counted through an empirical study. Opponents of elevated pleading standards regularly observe that it is difficult to develop rigorous information about the numbers of would-be plaintiffs who, facing the expense of resisting a motion to dismiss and the fear of dismissal, choose not to bring an action.

As important as the empirical work is, in the end it can inform, but cannot direct, the critical value judgments that must be made. There are indications that changed pleading practices have indeed led to an increase in the number of actions that are dismissed on the pleadings. To many observers, these are data enough to demonstrate the need to back away from higher pleading standards. Others, however, are not so sure.

The Committee has before it many drafts that illustrate the number of choices that might be made and the difficulty of choosing which, if any, may prove desirable. Some focus directly on the Rule 8(a)(2) standard. Others explore the prospects of identifying specific categories of claims for heightened pleading in a regime that generally relies on "notice" pleading, or for relaxed pleading in a regime that generally relies on heightened pleading. Some address the question whether defendants should be required to plead with greater specificity, at least when advancing affirmative defenses. Others approach the task indirectly, by modifying the purposes of a Rule 12(e) motion for a more definite statement. Yet others explore a variety of means of integrating heightened pleading standards with discovery in aid of pleading. Foundations are available to support prompt development when the time comes to decide whether to move toward revised rules or to accept the wisdom generated by the common-law process of responding to the Supreme Court's prompting in thousands, even tens of thousands, of cases.

D. Rule 84 Forms

Rule 84: "The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate."

Rule 84 has been thrust into the spotlight by the seeming incongruity between many of the illustrative pleading forms and current pleading standards, never mind that a footnote in the *Twombly* opinion seems to approve the form motor vehicle negligence complaint. This set of problems, if problems they be, could be addressed by deleting the pleading forms and retaining the other forms as they are. Or the pleading forms could be painstakingly evaluated and, almost certainly, thoroughly revised, perhaps with selective deletions or additions. But even that prospect focuses attention on the means of adopting the forms and maintaining them over time. In turn, the process questions raise broader questions about the role of all the forms.

The first step beyond that point is familiar. A subcommittee of representatives from the advisory committees, chaired by Judge Gene E.K. Pratter, was formed to consider the approaches taken to official forms by the different sets of rules and advisory committees. Two central points emerged. First, different advisory committees have taken different approaches to adopting forms. The Civil Rules and Appellate Rules Committees have put forms through the full Enabling Act process. The Bankruptcy Rules Committee process concludes with adoption of forms by the Judicial Conference. And the Criminal Rules Committee does not actively engage in the forms process, choosing instead to offer advice to the Administrative Office as the Office develops forms. Second, the forms play quite different roles in practice under the different sets of rules.

The upshot of that subcommittee process was that there is no apparent reason to establish uniform approaches across the different advisory committees. Each should remain free to approach official forms as best suits the areas of practice governed by a particular rules set. The benefits of mutual consultation can be achieved as proposals are presented to the Standing Committee.

A new Rule 84 Civil Rules Subcommittee has been created to carry forward consideration of the Rule 84 forms. All possible approaches remain open and will be considered.

An initial task will be to seek information about actual use of the Rule 84 Forms. Lawyers rely on many sources in seeking forms. Many of these sources provide very good forms, in far greater variety and scope than ever could be managed in the Enabling Act process. Whether most of the Rule 84 forms are of any real use is an open and important question.

A different practical concern looms even larger. Propounding official forms that "suffice under these rules" carries with it responsibility to develop good forms and to include them within the continuing responsibilities of the rules committees. The present set of Rule 84 forms is far from comprehensive, but ongoing responsibility even for this set would require a heavy commitment of committee resources, particularly at the advisory committee level. It is fair to ask whether the advisory committee has actually devoted as much of its energies to the forms as should be if they actually are an important part of the rules.

The questions that remain open within this framework are legion.

One approach, no doubt the simplest, would be to abrogate Rule 84, or retain it as a shrunken presence that simply reminds bench and bar that the rules place a high value on simplicity and brevity. This approach need not eliminate all official forms. A perfect illustration is provided by Rule 4(d)(1)(D), which directs that a notice and request to waive service of process use the text prescribed in Form 5. If there are to be no other forms

required by Rule, or only a few, it would be possible to attach them to the relevant rule, although probably not as part of rule text.

The most complicated approach lies at the other end of the spectrum. The full Enabling Act process could be deployed to study all of the Forms, revising them as appropriate, and adding new forms to address matters not now represented. There is little enthusiasm for this approach.

Intermediate approaches abound. A relatively small number of forms could be carried forward under Rule 84. The most likely reasons to maintain some forms would be a special need to fulfill the purposes of the related rule — Rule 4(d)(1)(D) and Form 5 provide a clear example — or a special need for uniformity.

Whatever the value of "official" forms, it remains important to settle on the best means of generating them. The Administrative Office bears the primary burden of developing forms for use in criminal cases. It also has generated forms for use in civil actions, some of them overlapping subjects covered by Rule 84 forms. Preliminary inspection of some of the AO's civil forms suggests that they are quite good. Although the rules committees likely should not delegate primary responsibility for developing forms that are to be put through the Enabling Act process to become sufficient under the rules, the matter stands quite differently if the forms are to be demoted from official status. The Administrative Office, consulting periodically with the advisory committee, may be a good resource for developing good forms that will win their way in practice in measure of their quality.

The Rule 84 Subcommittee will consider these issues initially, looking toward Advisory Committee deliberations next fall.

E. Rule 23 Subcommittee

The Committee appointed a Rule 23 Subcommittee last November to begin studying current trends in class-action practice. Their work has been advanced by the panel discussion at the January meeting of the Standing Committee. The project begins with the question whether Rule 23 should be taken up for present consideration. Any revisions of Rule 23 will require hard work over a long period. Any proposal is likely to spark controversy. And in the life cycle of class action work, the 2003 amendments are relatively recent. Yet there are good reasons to ask whether a new Rule 23 project should be launched.

The Class Action Fairness Act has been in effect for seven years. It has brought more class actions into the federal courts; the influx may have affected the ways in which Rule 23 is administered. The Supreme Court has recently decided several class-action cases in ways that may have important consequences. And lower courts have continued to develop their approaches to questions that, in one form or another, have occupied the core of class-action practice. In all, these developments prompt a careful survey of the field to decide whether to go forward with concrete rules proposals.

No more than a brief summary of the initial lines of inquiry seems warranted in light of the preliminary stage of the Rule 23 project. The following list of potential topics is not ranked by importance or difficulty. Nor does it reflect a closed set of subjects for inquiry. To the contrary, it remains important to identify all significant candidates for study. Only then can a decision be made whether to proceed at all, and only then can choices be made for any revision project in light of importance and feasibility.

The new and uncertain emphasis on Rule 23(a)(2) "commonality" stemming from the *Wal-Mart* decision is an obvious topic for study, in part because it flows directly from interpreting the present rule. It overlaps other questions, particularly the relationship of "issues classes" with commonality and the predominance requirement of Rule 23(b)(3). Some observers have expressed concern that serious inroads are being made, or will be made, on the once common practice of using class actions to resolve common questions of liability, to be followed by a claims procedure for resolving disputes about individual relief for class members. Similar questions arise from concern that some courts are insisting on class definitions that verge on limiting the class to members who have claims that will prevail on the merits, at times invoking concepts of standing. All of these questions warrant close study.

Another major group of issues arises from administration of the "predominance" requirement in Rule 23(b)(3). The 2003 Committee Note observed that courts may properly insist at the certification stage on a trial plan that shows that questions of law or fact common to class members actually will predominate at trial. The Supreme Court has recognized that assessment of the role to be played by common questions warrants inquiry into the merits of class claims. Practice seems to be evolving in directions that exact ever greater preliminary scrutiny of the merits at the certification stage. Exploration of the merits in turn leads to discovery on the merits, and attempts to bifurcate discovery between certification issues and trial issues have become increasingly difficult. Discovery of electronically stored information may present especially difficult challenges because available search techniques may not support practicable distinctions between certification and merits discovery. Similar issues arise from expert testimony. It is increasingly common to rely on expert witnesses to establish theories that enable common treatment at trial, and in turn to insist that the court qualify experts on all sides under *Daubert* standards as part of the certification process. Some observers believe there has been a sea change in certification practices.

Long-ago efforts to generate specific rules provisions for settlement classes were put aside on the eve of the *Amchem* decision and, after a few years, shelved indefinitely. There is renewed interest in exploring adoption

of express rules provisions providing directions for certifying settlement classes. One quite specific suggestion is that the rule might incorporate the cy pres provisions of the ALI Principles of Aggregate Litigation, provisions that already have been adopted by some courts. More generally, there is interest in reconsidering earlier efforts to add specific criteria to the Rule 23(e) provisions for reviewing proposed class settlements.

The role of Rule 23(b)(2) mandatory classes for injunctive or declaratory relief also has been advanced as a subject for renewed consideration after the *Wal-Mart* decision. At least one focus is on the opportunity to opt out — either under the aegis of Rule 23(b)(2) or by a combination of certifications under (b)(2) and (b)(3), class members might be afforded the right to opt out as to individual relief but not as to the underlying issues of liability. Or some clarification could be provided as to the extent of claims to "incidental" relief that might be resolved on a mandatory basis.

The dimensions of Rule 23(b)(2) class relief relate to notice of the class action. One purpose served by notice is to facilitate exercise of the right to opt out. But other purposes also are important — members of a potential class may wish, among other things, to oppose any certification, to propose certification of a differently defined class, to participate in identifying class representatives and class counsel, to monitor or participate in the proceedings, and to object to proposed settlements. The 2003 amendments modified the notice provisions to some extent, but it may be useful to reconsider the compromises reached at that time.

The role of objectors remains a nagging problem. Objections to proposed settlements can be vitally important to protect class interests. They also can be infernally self-serving and contrary to class interests. There may be some room to consider objectors further.

The next important step will be to sort through these and perhaps other potential topics. The books must remain open, at least for a while. But it is not likely that every worthy topic can be embraced all at once. Choices likely will be necessary. And it will be important to make the choices, perhaps mostly at the outset, but at any rate progressively so that the process of gathering information can be focused on a manageable set of proposals.

F. Other Matters

(1) Rule 55(c)

The Committee will recommend for publication a minor amendment of Rule 55(c) to read: "The court * * * may set aside a final default judgment under Rule 60(b)." The purpose is to state more clearly what the rule means now. Before entry of a final judgment, either under Rule 54(b) as to the default judgment or as to the entire action, Rule 60(b) does not apply. Courts have worked their way through to this conclusion, but with some difficulty.

The Committee believes that this proposal should be held for publication when there is a suitable package of proposals. It does not seem urgent enough to be published as a solo recommendation. For that reason the Committee is not now asking approval for publication. The proposal will be presented, with more elaborate justification, at a later meeting of the Standing Committee.

(2) Style Project Misadventures

Only a gratifyingly small number of questions have been raised as to possible misadventures in the Style Project. Some of them have been resolved by concluding that the restyled rule in fact does what it was intended to do, and does so with sufficient clarity. A few remain to be resolved.

Rule 6(d) was discussed last June. The style version adds 3 days "when a party may or must act within a specified time after service" and service is made by various described means. The snag arises from rules that specify times for acting after making service. The rule could easily be read to enable a party to, for example, extend the time available to amend a pleading as a matter of course by choosing to make service by one of the means that provides 3 added days. The fix is easy: "within a specified time after ~~service~~ being served * * *." The question is not whether to make the change, but when. Rule 6(d) remains open to reconsideration, at least with respect to adding 3 days after being served by e-mail. That has afforded a reason for withholding immediate action, in part because there is no indication that any mischief has occurred in practice.

Two other possible style glitches are on the current agenda. One involves Rule 15(a)(3) — it sets the time for "any required response to an amended pleading," but does not say when an amended pleading requires a response. That may or may not call for any revision. The other presents a knotty question whether something has been changed by the Rule 4(f)(2) provision for making service in a foreign country "if there is no internationally agreed means, or if an international agreement allows *but does not specify* other means * * *."

Other possible glitches may yet appear. In some ways it will be surprising to find no more. None of those that have appeared seem to call for urgent action. Perhaps as a matter of coincidence, those that may prove suitable occasions for correction have emerged from the academy as abstract propositions, not from courts or lawyers confronting real problems. Absent further direction, the Committee will treat these matters in the same way as other agenda items that are worthy of further consideration when that can be fit into the press of more complex projects.

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APPENDIX: DUKE SUBCOMMITTEE RULES SKETCHES

The most prominent themes developed at the 2010 Duke Conference are frequently summarized in two words and a phrase: cooperation, proportionality, and "early, hands-on case management." Most participants felt that these goals can be pursued effectively within the basic framework of the Civil Rules as they stand. There was little call for drastic revision, and it was recognized that the rules can be made to work better by renewing efforts to educate lawyers and judges in the opportunities already available. It also was recognized that many possible rules reforms should be guided by empirical work, both in the form done by the Federal Judicial Center and other investigators and also in the form of pilot projects. Many initiatives have been launched in those directions. Rules amendments remain for consideration. Some of them are being developed independently. The Discovery Subcommittee has come a long way in considering preservation of information for discovery and possible sanctions. Pleading standards are the subject of continual study. Other rules, however, can profitably be considered for revision. The sketches set out here reflect work by the Duke Conference Subcommittee after the Conference concluded. The early stages generated a large number of possible changes, both from direct suggestions at the Conference and from further consideration of the broad themes. More recently the Subcommittee has started to narrow the list, discarding possible changes that, for one reason or another, do not seem ripe for present consideration.

The proposals presently being considered are grouped in three roughly defined sets. They involve several rules and different parts of some of those rules. Standing alone, some may seem relatively inconsequential. But they have been developed as part of an integrated package, with the thought that in combination they may encourage significant reductions in cost and delay. The package can survive without all of the parts — indeed, choices must eventually be made among a number of alternatives included for purposes of further discussion.

The first topics look directly to the early stages of establishing case management. These changes would shorten the time for making service after filing an action; reduce the time for issuing a scheduling order; emphasize the value of holding an actual conference of court and parties before issuing a scheduling order; and establish a nationally uniform set of exceptions from the requirements for issuing a scheduling order, making initial disclosures, holding a Rule 26(f) conference, and observing the discovery moratorium. They also would look toward encouraging an informal conference with the court before making a discovery motion. The last item in this set would modify the Rule 26(d) discovery moratorium by allowing discovery requests to be served at some interval after the action is begun, but deferring the time to answer for an interval after the scheduling order issues.

The next set of changes look more directly to the reach of discovery. They begin with alternative means of emphasizing the principles of proportionality already built into the rules. More specific means of encouraging proportionality are illustrated by models that reduce the presumptive number of depositions and interrogatories, and for the first time incorporate presumptive limitations on the number of requests to produce and requests for admissions. Another approach is a set of provisions to improve the quality of discovery objections and the clarity of responses. Other approaches do not rank as important parts of the overall package and are set out more tentatively. They can survive or fall away based on individual merit. These include emphasizing the value of deferring contention discovery to the end of the discovery period; reexamining the role of initial disclosures; a more express recognition of cost-shifting as a condition of discovery; and adding preservation to the provisions of Rules 16(b)(B)(3)(iii) and 26(f)(3)(C) that refer to electronically stored information.

The last proposal is really one item — a reflection on the possibility of establishing cooperation among the parties as one of the aspirational goals identified in Rule 1.

These proposals are illustrated by sketches of possible rules text. The sketches are just that, sketches. Variations are presented for several of

them, and footnotes identify some of the more obvious questions that will need to be addressed as the sketches develop into specific recommendations for adoption.

These proposals have benefited from guidance provided in discussions with the full Advisory Committee. Both Committee and Subcommittee have devoted more time to some of these proposals than to others. Some will deserve further refinement, while others will deserve to be discarded. And the books remain open for additions of new topics. Suggestions are welcome.

The Subcommittee will continue to refine these sketches. The next step is likely to involve some form of informal outreach to bar groups, perhaps including a miniconference, to gather perspectives on how the proposals are likely to play out in the trenches of adversary litigation. If all goes well, a package of proposals will be presented to the Advisory Committee with a recommendation that it seek the Standing Committee's approval for publication.

I. Scheduling Orders and Managing Discovery

A. Rules 16(b) and 4(m): Scheduling Order Timing & Conference

Two changes in Rule 16(b) scheduling-order practice can be presented together in one draft, along with a parallel change in Rule 4(m). The purpose of these changes is to reduce delay and enhance the process of managing a case.

One change is to accelerate the time when the court enters a scheduling order. The purpose is to speed the progress of a case. The change is illustrated by two provisions, one shortening the time allowed by Rule 4(m) to serve process, the other shortening the time to enter the order after service (or appearance).

The other change emphasizes the value of holding an actual conference, at least by telephone, before issuing a scheduling order. There has been some discussion of eliminating Rule 16(b)(1)(A), foreclosing entry of a scheduling order based on the parties' Rule 26(f) report without a conference. Subcommittee members believe a conference should be held in every case. "Effective management requires a conference." Even if the parties agree on a scheduling order, the court may wish to change some provisions, and it may be important to address issues not included in the report. But there are counter-arguments that the court should be free, if it finds it appropriate, to dispense with the conference. The thought is that although in most cases there are important advantages to having a conference even after the parties have presented an apparently sound discovery plan, there may be cases in which the court is satisfied that an effective management order can be crafted without a conference.[31]

Whether or not Rule 16(b)(1)(A) is carried forward, it is desirable to eliminate the (b)(1)(B) provision allowing a conference to be held by "mail, or other means." Whatever "other means" are contemplated, it is better to require an actual face-to-face or voice-to-voice conference.

Rule 4(m)

(m) ***Time Limit for Service.*** If a defendant is not served within ~~120~~ 60 days after the complaint is filed, the court * * * must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause * * *.

Rule 16(b)

(b) Scheduling.

(1) *Scheduling Order.* Except in categories of actions exempted by local rule,[32] the district judge — or a magistrate judge when authorized by local rule — must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

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[31] Peter Keisler "would be disinclined to eliminate Rule 16(b)(1)(A)." The judge may not see any need for a conference, particularly if the Rule 26(f) report is prepared by attorneys known to be reliable and seems sound. The judge might ignore a requirement that a conference be held in all cases, or might hold a pro forma conference.

[32] The question whether to adopt a uniform national set of exemptions modeled on Rule 26(a)(1)(B) is addressed in part I B.

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference ~~by telephone, mail, or other means~~.[33]

(2) *Time to Issue.* The judge must issue the scheduling order as soon as practicable, but in any event within the earlier of ~~120~~ 60 days after any defendant has been served with the complaint or ~~90~~ 45 days after any defendant has appeared.

The Department of Justice has expressed concern about accelerating the times in this fashion, advancing the reasons that allow it extra time to answer under Rule 12(a)(2) and (3). Similar reasons might be urged as part of the incentives to waive service, reflected in 12(a)(1)(A)(ii). The following alternative draft is written in terms of a defendant who is allowed 60 days to answer, picking up all of these variations.[34]

(2) *Time to Issue.* The judge must issue the scheduling order as soon as practicable, but in any event:

(A) within the earlier of 60 days after any defendant has been served with the complaint or 45 days after any defendant has appeared; or

(B) in a case in which these rules[35] allow a defendant 60 days to answer the complaint, within 100 days after that[36] defendant has been served with the complaint or 45 days after that defendant has appeared.

Resetting the time to issue the scheduling order invites trouble when the time comes before all defendants are served. Later service on additional defendants may lead to another conference and order. Revising Rule 4(m) to shorten the presumptive time for making service reduces this risk. Shortening the Rule 4(m) time may also be desirable for independent reasons, encouraging plaintiffs to be diligent in attempting service and getting the case under

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[33] The provision that the conference may be "by telephone, mail, or other means" is deleted. The intent is to require that the conference involve direct contemporaneous communication among the parties and court. "Conference" is used to imply such communication. The Committee Note can observe that telephone, videoconferencing, Skype, or other means of direct communication are proper.

An alternative would be to adopt rule text that specifies direct contemporaneous communication. Something like: "at a scheduling conference with the court [in person] or by a means of contemporaneous communication."

[34] The 60 and 45 day periods have been adopted only for illustration. Each period has an impact on timing the Rule 26(f) conference. Rule 26(f)(1) sets the conference "as soon as practicable — and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b)." It seems likely that the parties should have more time to prepare for the 26(f) conference. That could be accomplished by setting the time for the conference, and for the 26(f) report, closer to the time for the scheduling order. The need to consider a longer period in cases that allow a defendant 60 days to answer is framed by the illustrative 60- and 45-day periods. If they are lengthened, there may be less reason to make specific provision for cases with a longer period to answer.

[35] This could be "in which a defendant is allowed 60 days." That might seem ambiguous because a defendant normally allowed 21 days might win an extension. The time for issuing a scheduling order might better be addressed when the extension of time to answer is granted.

[36] "that" defendant is used deliberately. Even with a reduced Rule 4(m) period, one defendant might be served on the day of filing, while the 60-days-to-answer defendant might be served on the 60th day, or even later. But there may be complications when there is more than one 60-days-to-answer defendant. Is this good enough?

way. There may be some collateral consequences — Rule 15(c)(1)(C) invokes the time provided by Rule 4(m) for determining relation back of pleading amendments that change the party against whom a claim is asserted. But that may not deter the change.

B. Uniform Exemptions: Rules 16(b), 26(a)(1)(B), 26(d), 26(f)

Rule 16(b) provides that scheduling orders are not required "in categories of actions exempted by local rule." This bow to local practices may have been important when the rule was adopted in 1983, a time when active case management was less familiar than it is today. A survey of the local rules was made in developing the 2000 amendments that, by Rule 26(a)(1)(B), added exemptions that excuse nine categories of proceedings from the initial disclosure requirements. Cases exempted from initial disclosure are further exempted from the Rule 26(f) conference and from the Rule 26(d) discovery moratorium, which is geared to the 26(f) conference. The FJC reported at the time that the exempted categories accounted for 30% of the federal docket.

It may be time to substitute a uniform set of exemptions from Rule 16(b) for the present reliance on local rules. There are obvious advantages in integrating exemption from the scheduling order requirement with the exemptions from initial disclosure, parties' planning conference, and discovery moratorium. Even if most local rules have come into close congruence with Rule 26(a)(1)(B), it could be useful to have a uniform national standard.[37] At the same time, it is not yet apparent whether any serious losses flow from whatever degree of disuniformity persists.

If a uniform set of exemptions is to be adopted, it seems sensible simply to rely on the initial disclosure exemptions now in place. No dissatisfaction with the list has appeared, although that may be in part a function of ambivalence about initial disclosure practice. The main question may be location: should the list remain where it has been for several years, relying on incorporation by cross-reference in Rule 16(b)? That may be the conservative approach. On the other hand, there is an aesthetic attraction to placing the list in Rule 16(b), so all cross-references are backward. But several counters appear. The first is familiarity — people are accustomed to the present system. Changing Rule 16(b) to adopt a cross-reference is simple, and avoids amending Rules 26(a)(1)(B), (d), and (f) to cross-refer to Rule 16(b). And little harm is done — indeed some good may come of it — if a court inadvertently enters a scheduling order where none is required. If pursued, the change would look like this:

(b) SCHEDULING.

(1) *Scheduling Order*. Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) ~~categories of actions exempted by local rule~~, the district judge — or a magistrate judge when authorized by local rule — must issue a scheduling order: * * *

[37] The uniform standard might be supplemented by allowing for additional exemptions by local rule to account for local variations in discovery practice. If local experience shows little discovery and little need for management in a category of cases, an additional exemption might not seem to be a threat to uniformity. It is easy to add a local-rule option to Rule 16(b). But that might add clutter to Rules 26(d) and (f) if the categories exempt from scheduling orders by local rule are also to be exempt from the discovery moratorium and the parties' conference.

C. Informal Conference With Court Before Discovery Motion

Participants at the Duke Conference repeated the running lament that some judges — too many from their perspective — fail to take an active interest in managing discovery disputes. They repeated the common observation that judges who do become involved can make the process work well. Many judges tell the parties to bring discovery disputes to the judge by telephone, without formal motions. This prompt availability to resolve disputes produces good results. There are not many calls; the parties work out most potential disputes knowing that pointless squabbles should not be taken to the judge. Legitimate disputes are taken to the judge, and ordinarily can be resolved expeditiously. Simply making the judge available to manage accomplishes effective management. A survey of local rules showed that at least a third of all districts have local rules that implement this experience by requiring that the parties hold an informal conference with the court before filing a discovery motion.

It will be useful to promote the informal pre-motion conference for discovery motions. The central question is whether to encourage it or to make it mandatory. Encouragement is not likely to encounter significant resistance. Making it mandatory, even with an escape clause, is likely to encounter substantial resistance from some judges. Both approaches are sketched here, although the mandatory approach drew little support in Subcommittee discussion. The first illustration adds the conference to the Rule 16(b)(3) list of subjects that may be included in a scheduling order. This reminder could serve as a gentle but potentially effective encouragement, particularly when supplemented by coverage in judicial education programs. The second illustration imposes on the parties an obligation to request a pre-motion conference, but leaves the court free to deny the request. This approach could be strengthened further by requiring the court to hold the conference, but it likely is not wise to mandate an informal procedure against a judge's preferred management style. The sketch places this approach in Rule 7, but it could instead be added to Rule 26, perhaps as a new subdivision (h). That choice need not be made now.

Rule 16(b)(3)(B)(v)

(3) * * *
(B) *Permitted Contents.* The scheduling order may: * * *
(v) direct that before filing a motion for an order relating to discovery the movant must request an informal conference with the court.
[present (v) and (vi) would be renumbered]

Rule 7(b)(3) [or 26(h)]

(3) *Conference for Discovery Motion.* Before filing a motion for an order relating to [disclosure or] discovery[38] the movant must

[38] Many rules refer to "discovery" without embellishment. It may be better to use this generic term than to attempt to refer to the discovery rules by number — e.g., "a motion under Rules 26 through 37 or 45." A Rule 27 proceeding to perpetuate testimony, for example, is commenced by a "petition." At the same time, it expressly provides for a motion to perpetuate testimony pending appeal, Rule 27(b). A catalogue of discovery rules would also have to wrestle with such matters as Rule 69(a)(2) discovery in aid of execution, which may invoke "the procedure of the state where the court is located." On the other hand, a generic reference to "discovery" might seem to invoke procedures for getting information from persons in foreign countries, or for providing discovery in aid of foreign proceedings. E.g., 28 U.S.C. §§ 1782, 1783. This might be "discovery under these rules." In a related vein, RLM asks whether these puzzles justify reconsideration of the decision in the Style Project to abandon the index section, most recently Rule 26(a)(5), that provided a list of discovery methods. That would provide an indirect

[attempt to resolve the questions raised by the motion by meeting and conferring with other parties when required by these Rules and][39] request [an informal conference with the court][a Rule 16 conference with the court]. The motion may be filed if the request is denied or if the conference fails to resolve the issues [that would be] raised by the motion.[40]

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definition, distinguishing discovery from disclosure and shortcircuiting arguments that, for example, Rule 36 requests to admit are not a "discovery" device.

RLM also asks whether this language covers submission to the court for a determination of privilege or protection as trial-preparation material after receiving the information in discovery and then receiving a Rule 26(b)(5) notice of the claimed protection. If Rule 26(b)(5) contemplates that the "determination" is itself an order, then the submission is a request for an order and, by Rule 7(b)(1), is a "motion." If the "determination" is something less than an order, then we need decide whether we want to require a pre-submission conference.

[39] RLM asks how this relates to the requirement that parties meet and confer before making a discovery motion. There is much to be said for requiring the meet-and-confer before the pre-motion conference. This presents a tricky drafting issue. The attempt in rule text is a place-keeper, no more. Some motions relating to discovery do not seem to require a pre-motion "meet and confer." In addition to Rule 26(b)(5)(B), noted above, Rule 26(b)(3)(C) provides a request to produce a witness statement and a motion to compel if the request is refused.

[40] There may be an ambiguity in "resolve." What should a "losing party who feels the need to protect the record on appeal by filing something in writing justifying its position" do? As framed, this describes a situation in which one party is dissatisfied with the disposition offered by the judge at the conference but — apart from the desire to preserve the issue for appeal — would accept it rather than risk offending the judge by pressing ahead with a motion. It may be that the losing party should be forced to the choice. It can accept its position as loser, reject the resolution, and make a motion. Or it can surrender the issue, abandoning any hope of appeal. Why allow a tactical choice to carry ahead with the litigation without a formal challenge, but planning to resurrect the issue on appeal in the event of defeat?

D. Discovery Before Parties' Conference

These changes would enable a party to launch discovery requests before the Rule 26(f) conference, but defer the obligation to respond to a time after the conference. The idea is that the conference may work better if the parties have some idea of what the actual first wave of discovery will be. In addition, there are signs that at least some lawyers simply ignore the Rule 26(d) moratorium, perhaps because of ignorance or possibly because of tacit agreement that it is unnecessary. The Subcommittee has rejected an approach that would enable a party to serve a deposition notice, interrogatories, production requests, and requests to admit with the complaint. That form might operate primarily for the advantage of plaintiffs; defendants might not have enough time to develop discovery requests, particularly if the times for the Rule 26(f) conference and Rule 16(b) conference and order are shortened. The surviving approach introduces some delay between filing — or, more likely, service or appearance by a defendant — and the first discovery requests. Drawing careful time lines will be an important part of this approach.

Rule 26(d): Waiting Period

(d) Timing and Sequence of Discovery.

(1) Timing. A party may not seek discovery from any source before [20 days after service of the summons and complaint on any defendant,]{45 days after the complaint is filed or 20 days after any defendant appears, whichever is later}[41] ~~the parties have conferred as required by Rule 26(f),~~ except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) Sequence. Unless the parties stipulate, or~~, on motion,~~[42] the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

Rule 30(a)

* * *

(2) ***With Leave.*** A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than [10] [5] depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take the deposition at a time before ~~the time specified in Rule 26(d)~~ a scheduling order enters under Rule 16(b), unless the proceeding is exempted from initial disclosure under Rule 26(b)(1)(B) or unless the party certifies in the

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[41] The suggested periods are first approximations. If we set the scheduling conference at 60 days after any defendant is served, and set the Rule 26(f) conference 14 days before the scheduling conference, the window for initiating discovery requests is reduced. Some workable compromise must be found.

[42] This change was suggested during general discussion of discovery before the Rule 26(f) conference. The only purpose is to make clear the general understanding that ordinarily parties may stipulate to something the court can order.

notice, with supporting facts, that the deponent is expected to leave the United States and to be unavailable for examination in this country after that time; or * * * [43]

Rule 31(a)(2)(A)(iii)

Rule 31(a)(2)(A) would, as now, mirror Rule 30(a)(2)(A), except that, as now, Rule 31 would not include a provision for deponents departing the country. A party must obtain leave of court if:

(iii) the party seeks to ~~take the deposition before the time specified in Rule 26(d)~~ commence the process for serving additional questions under Rule 31(a)(5) before a scheduling order is entered under Rule 16(b), unless the proceeding is exempted from initial disclosure under Rule 26(a)(1)(B);[44] or * * *

Rule 33(b)(2)

(2) ***Time to Respond.*** The responding party must serve its answers and any objections within 30 days after being served with the interrogatories or within 30 days after any scheduling order is

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[43] These choices suggest several questions. Early drafts provided that "A party must obtain leave of court * * * if * * * the party seeks to take the deposition less than 14 days after a scheduling order is entered under Rule 16(b) * * *." The snag is that a notice of deposition served before the Rule 26(f) conference and before the scheduling order cannot identify a date that will be at least 14 days after the scheduling order. The current draft text seeks to circumvent that problem, bypassing any attempt to specify the means of setting the date for the deposition. The thought is that the parties should be able to work this out at the 26(f) conference, at the scheduling conference, or after the scheduling order is entered. The Committee Note could point this out.

An alternative could be a bit more direct, but also more than a bit more awkward: "if * * * before a scheduling order is entered under Rule 16(b), the party seeks to set the date for the deposition, unless * * *." This alternative says directly that court permission is required to set any specific date in an early deposition notice.

The draft does not set any specific delay after the scheduling order enters. It would be possible to set a specific period — the deposition may not be taken until [14] days after the scheduling order is entered. But this complication may not be necessary. In many circumstances the parties will prefer to defer depositions until after substantial discovery by other means, particularly Rule 34 document discovery. And depositions used to identify the subjects and sources of other discovery may be useful at an early time. (Under present practice, a notice of deposition can be served at any time after the Rule 26(f) conference, setting a reasonable time to comply if a Rule 45 subpoena is used.)

A proceeding exempted from initial disclosures by Rule 26(a)(1)(B) is exempt from the discovery moratorium in present Rule 26(d). That exemption is carried forward in the draft. Those proceedings also are exempt from the Rule 26(f) parties' conference and would be exempt from the scheduling order requirement under proposed Rule 16(b). The same exemption appears in proposed Rules 31. The current sketches propose a simpler drafting approach to Rules 33, 34, and 36, but that requires further thought.

[44] This is a first attempt to integrate the Rule 31 process for framing cross questions, redirect questions, and recross questions with early discovery requests. Focusing on the time for taking the deposition seems awkward in this context. Forcing the other parties to frame cross questions, and so on, before the 26(f) conference or the scheduling order, seems out of keeping with the general plan to permit early requests as a means of enhancing early cooperation and management without forcing premature responses.

entered under Rule 16(b), whichever is later.[45] A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

Rule 34(b)(2)(A)

(2) ***Responses and Objections.***

(A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served or within 30 days after any scheduling order is entered under Rule 16(b), whichever is later. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

Rule 35

There is no apparent need to revise Rule 35 for this purpose.

Rule 36(a)(3)

(3) ***Time to Respond; Effect of Not Responding.*** A matter is admitted unless, within 30 days after being served or within 30 days after any scheduling order is entered under Rule 16(b), whichever is later, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court.

Rule 45

Earlier drafts asked whether Rule 45 should be amended in parallel with the provisions for discovery between the parties. One parallel would be to set limits on the time to respond to early discovery requests authorized by draft Rule 26(d)(1). Another would be to impose numerical limits on the number of requests, similar to those proposed for requests to produce documents. The Subcommittee has concluded that there is no apparent need to add these complications to Rule 45. Courts know how to prevent a party from resorting to Rule 45 as a means of attempting to shorten the time to respond to Rule 34 requests to produce. Rule 45 subpoenas addressed to nonparties seem to be more clearly focused than the broad or overbroad requests that sometimes characterize Rule 34 practice. And Rule 45 specifically protects a nonparty who objects against significant expense resulting from compliance.

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[45] The reference to "any" scheduling order is a questionable attempt to simplify the drafting. Present Rule 26(d) clearly exempts all modes of discovery from the discovery moratorium in cases exempt from initial disclosures. The drafts for Rule 30 and 31 explicitly adopt this exemption. The drafts of Rules 33, 34, and 36 short-circuit this formula, on the premise that if there is no scheduling order there is no reason for setting a time to respond measured by a scheduling order. But there is at least one potential complication: a court may enter a scheduling order even though not required to do so. If that happens after Rule 33, 34, or 36 requests are served — whether before or after the initial 30-day period has expired — questions could arise as to the time to respond. The scheduling order should resolve those questions. But it may not.

One alternative: "answers and objections must be served within 30 days after being served with the interrogatories or — in a proceeding not exempt from Rule 16(b)(1) — within 30 days after a scheduling order is entered, whichever is later."

II. Other Discovery Issues

A. Proportionality: Rule 26(b)(1)

Both at the Duke Conference and otherwise, laments are often heard that although discovery in most cases is conducted in reasonable proportion to the nature of the case, discovery runs out of control in an important fraction of all cases. The rules provide for this. Rule 26(b)(2) is the most explicit provision, and also the most general. Rule 26(b)(2)(C) says that "On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed * * * if it determines * * * that the burden or expense outweigh the likely benefit." Rule 26(g)(1)(B)(iii) provides that signing a discovery request, response, or objection certifies that it is "neither unreasonable nor unduly burdensome or expensive," considering factors that parallel Rule 26(b)(2)(C). Rule 26(b)(1), after describing the general scope of discovery, concludes: "All discovery is subject to the limitations imposed by Rule 26(b)(2)(C)." This sentence was adopted as a deliberate redundancy, and preserved in the Style Project despite valiant efforts by the style consultants to delete it. Rules 30, 31, 33, and 34 expressly incorporate Rule 26(b)(2). Rule 26(c), in addition, provides for an order that protects against "undue burden or expense."

The question is whether still greater prominence should be accorded the proportionality limit, hoping that somehow one more rule behest to behave reasonably will revive a faltering principle. There is ample reason to doubt the efficacy of revising or adding to concepts that already are belabored in deliberately redundant rule text. And there is always a risk that any variation in rule language will provoke arguments — even successful arguments — that the meaning has changed. Adding an express reference to "proportionality," moreover, could easily lead to one more class of blanket objections and an increase in nonproportional arguments about proportionality. If "proportionality" is added to rule text, it will be important to state in the Committee Note that a proportionality objection must be supported by specific reasons informed by the calculus of Rule 26(b)(2)(C).

Despite these possible grounds for pessimism, the Subcommittee believes that it is important to attempt to give proportionality a more prominent role in defining the scope of discovery. The concept is important, and should be more vigorously implemented in practice.

Many approaches are possible, ranging from simple attempts to incorporate Rule 26(b)(2)(C) concepts more prominently in Rule 26(b)(1) to adding explicit references to "proportionality" in rule text. It is even possible to think about revising Rule 26(b)(2)(C) itself, although the present text seems a good expression of the factors that shape the calculus of proportionality.

The fate of earlier efforts to emphasize Rule 26(b)(2)(C), including the deliberately redundant cross-reference retained as the final sentence of Rule 26(b)(1), suggests that a relatively bold approach may be needed to accomplish much. The Subcommittee is attracted to a revision of Rule 26(b)(1) that would introduce "proportionality" as an express limit on the scope of discovery:

> (1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery<u>, proportional to the reasonable needs of the case,</u> regarding any nonprivileged matter that is relevant to any party's claim or defense * * *.

This approach courts the risks that inhere in adopting any new word in rule text. It seems likely that the new word will provoke litigation about its meaning, and litigation about discovery is seldom a good thing. But the Committee Note can note the relationship to Rule 26(b)(2)(C) concepts, drawing from the express incorporation of (b)(2)(C) at the end of (b)(1).

The mildest approaches considered by the Subcommittee would emphasize the principles of Rule 26(b)(2)(C) without seeking to add "proportionality" to rule text. The first alternative sketched below seems the mildest and may be desirable for that reason. Other sketches are preserved, however, to prompt further discussion.

The simplest strategy is to move proportionality into a more prominent place in Rule 26(b)(1). That could be done in many ways. The simple cross-reference could be moved up, perhaps to the first sentence:

> Unless otherwise limited by court order, and subject to [the limitations imposed by] Rule 26(b)(2)(C),[46] the scope of discovery is as follows:

This approach could be seen as no more than a style change. But it is more. It expressly qualifies the broad general scope of discovery. Invoking present (b)(2)(C) reduces the risk of unintended consequences. But it may stand a good chance of producing the intended consequences.

Much the same thing could be done in a slightly different style form, and with the same observations:

> * * * the scope of discovery is as follows: Parties may obtain discovery, within the limitations imposed by Rule 26(b)(2)(C), regarding any nonprivileged matter that is relevant to any party's claim or defense * * *.

This approach seems to tie (b)(2)(C) more directly to the scope of discovery. Either alternative could encourage courts to view proportionality as an essential element in defining the proper scope of discovery.

"Proportionality" also could be added to the text of Rule 26(b)(2)(C)(iii):

> The burden or expense of the proposed discovery outweighs its likely benefit and is not proportional to the reasonable needs of the case,[47] considering ~~the needs of the case,~~ the amount in controversy, * * *

If 26(b)(2)(C)(iii) were revised this way, it likely would be desirable to make a parallel change in Rule 26(g)(1)(B)(iii), so that signing a discovery request, objection, or response certifies that it is

> proportional to the reasonable needs of the case, and is neither unreasonable nor unduly burdensome or expensive, considering ~~the reasonable needs of the case,~~ prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.[48]

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[46] It might be objected that it is the judge, not Rule 26(b)(2)(C) itself, that imposes proportionality limits. More importantly, merely moving around the clause that refers generally to 'the limitations' may not seem adequate to address the problem of widespread misunderstanding.

[47] This may be no more than another way of saying what is already in the rule.

[48] Should "the parties' resources" or "and the importance of the discovery in resolving the issues" be added to complete the parallel to (b)(2)(C)(iii)?

B. Limiting the Number of Discovery Requests

The Duke Conference included observations about approaching proportionality indirectly by tightening present presumptive numerical limits on the number of discovery requests and adding new limits. These issues deserve serious consideration.

Many studies over the years, many of them by the FJC, show that most actions in the federal courts are conducted with a modest level of discovery. Only a relatively small fraction of cases involve extensive discovery, and in some of those cases extensive discovery may be reasonably proportional to the needs of the case. But the absolute number of cases with extensive discovery is high, and there are strong reasons to fear that many of them involve unreasonable discovery requests. Many reasons may account for unreasonable discovery behavior — ineptitude, fear of claims of professional incompetence, strategic imposition, profit from hourly billing, and other inglorious motives. It even is possible that the presumptive limits now built into Rules 30, 31, and 33 operate for some lawyers as a target, not a ceiling.

Various proposals have been made to tighten the presumptive limits presently established in Rules 30, 31, and 33, and to add new presumptive limits to Rule 34 document requests and Rule 36 requests to admit. The actual numbers chosen for any rule will be in part arbitrary, but they can reflect actual experience with the needs of most cases. Setting limits at a margin above the discovery actually conducted in most cases may function well, reducing unwarranted discovery but leaving appropriate discovery available by agreement of the parties or court order.

Illustration is easy for Rules 30(a)(2)(A)(i) and 30(d)(1):

(a) When a Deposition May Be Taken. * * *
(2) *With Leave.* A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2):
(A) if the parties have not stipulated to the deposition and:
(i) the deposition would result in more than ~~10~~ 5 depositions being taken under this rule or Rule 31 or by the plaintiffs, or by the defendants, or by the third-party defendants; * * *

(d) Duration; Sanction; Motion to Terminate or Limit
(1) *Duration.* Unless otherwise stipulated or ordered by the court, a deposition is limited to [~~one day of 7~~ 4 hours in a single day][one day of ~~7~~ 4 hours].

A parallel change would be made in Rule 31(a)(2)(A)(i) as to the number of depositions. Rule 31 does not have a provision parallel to the "one day of 7 hours" provision in Rule 30(d)(1).

Rule 33(a)(1) is even simpler:

(1) Unless otherwise stipulated or ordered by the court, a party may serve on another party no more than ~~25~~ 15 interrogatories, including all discrete subparts.

(This could be made more complicated by adding a limit for multiparty cases — for example, no more than 15 addressed to any single party, and no more than 30 in all. No one seems to have suggested that. The complication is not likely to be worth the effort.)

Things are not so simple for Rule 34. It may not be as easy to apply a numerical limit on the number of requests; "including all discrete subparts," as in Rule 33, may not work. This question ties to the Rule 34(b)(1)(A) requirement that the request "must describe with reasonable particularity each

item or category of items to be inspected." Counting the number of requests could easily degenerate into a parallel fight over the reasonable particularity of a category of items. But concern may be overdrawn. Actual experience with scheduling orders that impose numerical limits on the number of Rule 34 requests suggests that parties can adjust to counting without any special difficulty. If this approach is followed, the limit might be located in the first lines of Rule 34(a):

> **(a) In General.** A party may serve on any other party ~~a~~ no more than [25] requests within the scope of Rule 26(b): * * *
> **(3)** Leave to serve additional requests may be granted to the extent consistent with Rule 26(b)(2).

This form applies to all the various items that can be requested — documents, electronically stored information, tangible things, premises. It would be possible to draft a limit that applies only to documents and electronically stored information, the apparent subject of concern. But either way, there is a manifest problem in setting numerical limits. If a car is dismembered in an accident, is it only one request to ask to inspect all remaining parts? More importantly, what effect would numerical limits have on the ways in which requests are framed? "All documents, electronically stored information, and tangible things relevant to the claims or defenses of any party?" Or, with court permission, "relevant to the subject matter involved in this action"? Or at least "all documents and electronically stored information relating to the design of the 2008 model Huppmobile"? For that matter, suppose a party has a single integrated electronic storage system, while another has ten separate systems: does that affect the count? Still, the experience of judges who adopt such limits in scheduling orders suggests that disputes about counting seldom present real problems.

(As noted above, the Subcommittee has concluded there is no apparent need to attempt to revise Rule 45 to mirror the limits proposed for Rule 34.)

Rule 36 requests to admit could be limited by a model that conforms to Rule 33. Rule 36(a)(1) would begin:

> **(1)** *Scope.* A party may serve on any other party ~~a~~ no more than [25] requests to admit, including all discrete subparts, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to: * * *

That simple version lacks grace, and also lacks any provision to change the number by agreement or court order. Adding that wrinkle suggests that the limit might better be adopted as a new paragraph, probably (2):

> **(2)** *Number.* Unless otherwise stipulated or ordered by the court, a party may serve no more than 25 requests to admit on any other party, including all discrete subparts [, and no more than 50 requests to admit in all].

An all-encompassing limit to 25 requests may go too far with respect to Rule 36(a)(1)(B) requests to admit the genuineness of any described documents. Applying a numerical limit only to Rule 36(a)(1)(A) requests to admit the truth of facts, the application of law to fact, or opinions about either, suggests different drafting approaches. One that should not be ambiguous, but may seem that way to some:

> **(1)** *Scope.* A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to:
> **(A)** no more than 25 matters of facts, the application of law to fact, or opinions about either; and
> **(B)** the genuineness of any described documents.

If there is a risk that hasty readers might extend the limit from (A) to (B), cross-referencing might do the job, leaving all of paragraph (1) as it is now and adding a new (2):

> **(2)** *Number.* Unless otherwise stipulated or ordered by the court, a party may serve no more than 25 requests to admit under Rule 36(a)(1)(A)[49] on any other party, including all discrete subparts.

[49] This would be "(A) and (B)" if the more elaborate proposal to defer the time to respond described below is adopted.

C. Discovery Objections and Responses

The common laments about excessive discovery requests are occasionally met by protests that discovery responses often are incomplete, evasive, dilatory, and otherwise out of keeping with the purposes of the rules. Several proposals have been made to address these problems. The Subcommittee believes these proposals deserve serious consideration.

RULE 34: SPECIFIC OBJECTIONS

Two proposals have been advanced to improve the quality of discovery objections. The first would incorporate in Rule 34 the Rule 33 requirement that objections be stated with specificity. The second would require a statement whether information has been withheld on the basis of the objection.

Rule 33(b)(4) begins: "The grounds for objecting to an interrogatory must be stated with specificity." Two counterparts appear in Rule 34(b)(2). (B) says that the response to a request to produce must state that inspection will be permitted "or state an objection to the request, including the reasons." (C) says: "An objection to part of a request must specify the part and permit inspection of the rest." "[I]ncluding the reasons" in Rule 34(b)(2)(B) may not convey as clearly as should be a requirement that the reasons "be stated with specificity." If the objection rests on privilege, Rule 26(b)(5)(A) should control. But for other objections, it is difficult to understand why specificity is not as important for documents, tangible things, and entry on premises as it is for answering an interrogatory. Even if the objection is a lack of "possession, custody, or control," the range of possible grounds is wide.

It would be easy to draft Rule 34(b)(2)(B) to parallel Rule 33(b)(4):

(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state <u>[the grounds for objecting {to the request} with specificity]</u> [an objection to the request, including the <u>specific</u> reasons.]

RULE 34: STATE WHAT IS WITHHELD

Many Conference participants, both at the time of the Conference and since, have observed that responding parties often begin a response with a boilerplate list of general objections, and often repeat the same objections in responding to each individual request. At the same time, they produce documents in a way that leaves the requesting party guessing whether responsive documents have been withheld under cover of the general objections. (The model Rule 16(b) scheduling order in the materials provided by the panel on Eastern District of Virginia practices reflects a similar concern: " * * * general objections may not be asserted to discovery demands. Where specific objections are asserted to a demand, the answer or response must not be ambiguous as to what if anything is being withheld in reliance on the objection.)

This problem might be addressed by adding a new sentence to Rule 34(b)(2)(C):

(C) *Objections.* An objection to part of a request must specify the part and permit inspection of the rest. <u>An objection [to a request or part of a request] must state whether any responsive [materials]{documents, electronically stored information, or tangible things <or premises?>} are being withheld [under]{on the basis of} the objection</u>.[50]

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[50] Could this be simplified: "An objection must state whether anything is being withheld on the basis of the objection"?

RULES 34 AND 37: FAILURE TO PRODUCE

Rule 34 is somewhat eccentric in referring at times to stating that inspection will be permitted, and at other times to "producing" requested information. Common practice is to produce documents and electronically stored information, rather than make it available for inspection. Two amendments have been proposed to clarify the role of actual production, one in Rule 34, the other in Rule 37.

Rule 34(b)(2)(B) would be expanded by adding a new sentence:

> **(B)** *Responding to Each Item*. For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons.[51] <u>If the responding party elects to produce copies of documents or electronically stored information [in lieu of]{rather than} permit inspection, the response must state that copies will be produced, and the production must be completed no later than the date for inspection stated in the request.</u>[52]

Rule 37(a)(3)(B)(iv) would be amended to provide that a party seeking discovery may move for an order compelling an answer if:

> **(iv)** a party <u>fails to produce documents or</u> fails to respond that inspection will be permitted — or fails to permit inspection — as requested under Rule 34.

RULE 26(G): EVASIVE RESPONSES

Rule 26(g) provides the counterpart of Rule 11 for discovery. Signing a discovery request, response, or objection certifies that it is consistent with the Rules. It also certifies that a request, response, or objection is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation. Those strictures might seem to reach evasive responses. And it has been protested that adding an explicit prohibition of evasive responses will simply provide one more occasion to litigate about discovery practices, not about the merits. Nonetheless, it may be useful to add an explicit prohibition to 26(b)(1)(B)(i). By signing, an attorney or party certifies that the request, response, or objection is:

> **(i)** <u>not evasive,</u> consistent with these rules<u>,</u> and warranted * * *.

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[51] This sentence would be amended to include a specificity requirement under the proposal described earlier in this section.

[52] Requiring complete production by the time stated for inspection may give a slight advantage to the requesting party — work with the produced copies often will be easier than inspection. But that seems a quibble.

D. Rules 33 and 36: Contention Discovery

Discussion at the Conference and elsewhere suggests that contention discovery can be misused. Some observations doubt the value of any contention discovery. Others reflect concern with the timing of contention discovery, arguing that it should be postponed to a time when the completion of other discovery makes it feasible to frame contentions with some assurance. The proposals sketched here focus on the timing question.

Contention discovery was added to Rules 33 and 36 in 1970. What has become Rule 33(a)(2) provides:

> An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.

The 1970 Committee Note elaborated on the timing question:

> Since interrogatories involving mixed questions of law and fact may create disputes between the parties which are best resolved after much or all of the other discovery has been completed, the court is expressly authorized to defer an answer. Likewise, the court may delay determination until pretrial conference, if it believes that the dispute is best resolved in the presence of the judge.

Similarly, Rule 36(a)(1)(A) provides for requests to admit the truth of "facts, the application of law to fact, or opinions about either." The Committee Note is similar to the Rule 33 Note:

> Requests for admission involving the application of law to fact may create disputes between the parties which are best resolved in the presence of the judge after much or all of the other discovery has been completed. Power is therefore expressly conferred upon the court to defer decision until a pretrial conference is held or until a designated time prior to trial. On the other hand, the court should not automatically defer decision; in many instances, the importance of the admission lies in enabling the requesting party to avoid the burdensome accumulation of proof prior to the pretrial conference.

It has been suggested that this open-ended approach to timing should be tightened up by requiring court permission to submit contention interrogatories or requests to admit until the close of all other discovery. That would preserve the opportunity for early contention discovery, but not permit it as freely as the present rules.

The question is whether early contention discovery is so often misused as to justify a change. An illustration of the potential values of early contention discovery is provided by one of the cases cited in the 1970 Committee Note to Rule 33. The FELA plaintiff in Zinsky v. New York Central R.R., 36 F.R.D. 680 (N.D. Ohio 1964), alleged that at the time of his injury his duties were in furtherance of interstate commerce. The railroad defendant denied all allegations of the complaint. The plaintiff then served an interrogatory asking whether at the time of the accident, etc. There is a very real prospect that the denial of the commerce element was pro forma. Confronted with the interrogatory, there is a reasonable chance the railroad will admit the commerce element, putting that issue out of the case. Alternative forms of discovery aimed at showing that the New York Central really is engaged in commerce, at the nature of the plaintiff's duties in relation to the defendant's commerce, and so on, would impose substantial burdens, often serving little purpose.

As the Committee recognized in generating the 1970 amendments, the other side is equally clear. There may be no point in using contention discovery to supplement the pleadings until discovery is complete as to the issues underlying the contention discovery. Developing pleading practice may have a bearing — to the extent that fact pleading increases, there may be still better reason to defer the switch from pleading to discovery as a means of framing the parties' contentions.

Practical experience and judgment are called for. If early contention discovery is misused often enough to be a problem, either because it makes too much supervisory work for the courts or because the parties suffer through the battle without court intervention, it may be time to revise the rules.

One other difficulty must be noted. The 1970 Committee Note to Rule 33 observed: "Efforts to draw sharp lines between facts and opinions have invariably been unsuccessful * * *." The Note to Rule 36 was similar: "it is difficult as a practical matter to separate 'fact' from 'opinion' * * *." The Notes seem to assume that it is easier to separate law-application issues from fact or opinion, but that depends on clear analysis. Remember that "negligence" is treated as a question of fact to be decided by a jury, and to be reviewed for clear error when decided in a bench trial. The drafts that follow make no attempt to depart from the vocabulary adopted in 1970. They are offered without taking any position on the question whether it is better to leave the present rules unchanged, relying on specific case management to achieve proper timing in relation to the needs and opportunities presented by specific cases.

Revising Rule 33(a)(2) can be done directly, or it might be done in combination with Rule 33(b)(2) so as to avoid the need to resolve a seeming inconsistency.

Rules 33(a)(2), (b)(2) Together

(a)(2) *Scope.* * * * An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the interrogatory need not be answered until the time set under Rule 33(b)(2) ~~until designated discovery is complete, or until a pretrial conference or some other time~~.

(b)(2) *Time to Respond.* The responding party must serve its answers and any objections within 30 days after being served with the interrogatories, but an answer to an interrogatory asking for an opinion or contention relating to fact or the application of law to fact need not be served until [all other discovery is complete][the close of discovery on the facts related to the opinion or contention]. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

Rule 36

Rule 36 time provisions make for more difficult drafting. A temporary illustration may suffice. Rule 36(a)(1) is amended to enable cross-reference in (a)(3):

(a)(1) *Scope.* A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(2) relating to:
(A) facts or opinions about fact~~,~~;
(B) the application of law to fact, or opinions about facts or the application of law to fact ~~either~~; and

(~~B~~C) the genuineness of any described documents.

(a)(3) *Time to Respond; Effect of Not Responding.* A matter is admitted unless, within 30 days after being served — or for a request under Rule 36(a)(1)(B){within 30 days after}[all other discovery is complete][the close of discovery on the facts relevant to the request] —[53] the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court.

(Remember the interplay of numerical limits on the number of requests to admit. One of the alternatives sketched above would set a limit of 25 requests for admissions of fact or contentions, but no limit on the number of requests to admit the genuineness of documents.)

[53] This may need more work. Expert trial witness discovery is governed by the time set for disclosure under Rule 26(a)(2), and deposition of an expert trial witness comes after the report.

E. Initial Disclosures

Conference reactions to Rule 26(a)(1) initial disclosures can be roughly described. Many participants thought the practice innocuous — it does not accomplish much, but does not impose great burdens. Some believe that any burden is too great, since so little is accomplished; given the limited nature of the disclosures, discovery is not reduced. And there is always the risk that an absent-minded failure to disclose will lead to exclusion of a witness or information. Still others believe that there is a real opportunity for good if the disclosure requirement is expanded back to resemble the form that was reflected in the rules from 1993 to 2000. They point out that the scope of initial disclosures was reduced only as a compromise to help win approval of the amendment that deleted the opportunity to opt out of initial disclosure requirements by local rule.

The starting point of any effort to reinvigorate initial disclosures likely would be the 1993 version. As to witnesses, it required disclosure "of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information." The provision for documents was similar, but limited to those within the possession, custody, or control of the party. That went far beyond the present rule, which covers only witnesses and documents "the disclosing party may use to support its claims or defenses." One hope for the 1993 version was that it would encourage particularized pleading for the purpose of forcing broader disclosures. Whether or not that function was served, developing pleading practices may lower any hopes in this direction. The broader purpose was to anticipate the first wave of inevitable discovery, simplifying and expediting the process. The list of exemptions added in 2000 could work to improve this substitute for discovery by reducing the number of cases in which disclosure is required even though the parties would have pursued less, or even no, discovery. Still, the 1993 version would provide no more than a starting point. More work would need to be done before attempting even a sketch of a new disclosure regime.

The Subcommittee has not found much reason to take up initial disclosure practice at present. But the question deserves to be carried forward for broader comment.

F. Cost Shifting (Discovery only)

Both at the Duke Conference and otherwise, suggestions continue to be made that the discovery rules should be amended to include explicit provisions requiring the requesting party to bear the costs of responding. Cost-bearing could indeed reduce the burdens imposed by discovery, in part by compensating the responding party and in part by reducing the total level of requests. But any expansion of this practice runs counter to deeply entrenched views that every party should bear the costs of sorting through and producing the discoverable information in its possession. The Subcommittee is not enthusiastic about cost-shifting, and does not propose adoption of new rules. But the topic is both prominent and important. These sketches are carried forward — and may deserve to be carried forward for some time — to elicit broader discussion.

Rule 26(c) authorizes "an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: * * *." The list of examples does not explicitly include cost shifting. Paragraph (B) covers an order "specifying terms, including time and place, for the disclosure or discovery." "Terms" could easily include cost shifting, but may be restrained by its association with the narrow examples of time and place. More importantly, "including" does not exclude — the style convention treats examples as only illustrations of a broader power. Rule 26(b)(2)(B), indeed, covers the idea of cost shifting when the court orders discovery of electronically stored information that is not reasonably accessible by saying simply that "[t]he court may specify conditions for the discovery." The authority to protect against undue expense includes authority to deny discovery unless the requesting party pays part or all of the costs of responding.

Notwithstanding the conclusion that Rule 26(c) now authorizes cost shifting in discovery, this authority is not prominent on the face of the rules. Nor does it figure prominently in reported cases. If it is desirable to encourage greater use of cost shifting, a more explicit provision could be useful. Rule 26(b)(2)(B) recognizes cost shifting for discovery of electronically stored information that is not reasonably accessible from concern that Rule 26(c) might not be equal to the task. So it may also be desirable to supplement Rule 26(c) with a more express provision.

The suggestion that more explicit provisions would advance the use of cost shifting does not answer the question whether advance is desirable. Cost shifting will be highly controversial, given the still strong tradition that a party who has discoverable information should bear the cost of retrieving it. (Rule 45(c)(2)(B)(iii) protects a nonparty against significant expense in responding to a subpoena to produce.) Becoming accustomed to cost shifting in the realm of electronically stored information may not reduce the controversy, in part because the fear of computer-based discovery makes it easier to appreciate the risks of overreaching discovery requests.

If a cost-shifting order enters, it is important to consider the consequences if the party ordered to bear an adversary's response costs prevails on the merits. Prevailing on the merits does not of itself mean that the discovery was justified. It may be that none of the discovered information was used, or even usable. Or it may have had only marginal value. On the other hand, the fact that discovery materials were not used, whether to support motions, summary judgment, or at trial, does not mean the discovery was unjustified. The materials may have had value for many pretrial purposes, and may have been winnowed out only to focus on the most compelling materials. Or the discovered information may have led a party to abandon a position that otherwise would have been pursued further, at additional cost. The most likely outcome is discretion to excuse part or all of the costs initially shifted to the requesting party. Rather than characterize the shifted costs as "costs" for Rule 54(d), this discretion can be directly built into the cost-shifting rule. The discretion could easily defer actual payment of the

shifted costs to a time well after the discovery is provided and a bill is presented.

A conservative approach might do no more than add an express reference to cost shifting in present Rule 26(c)(1)(B):

> **(1)** *In General.* * * * The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: * * *
> **(B)** specifying terms, including time and place <u>or the allocation of expenses</u>, for the disclosure or discovery; * * *

A more elaborate approach might add a new paragraph I:

> **(I)** <u>requiring that the requesting party bear part or all of the expenses reasonably incurred in responding [to a discovery request],</u>[54] <u>including terms for payment and subject to reconsideration [at any time before final judgment].</u>[55]

Still greater elaboration is possible, attempting to list factors that bear on a cost-bearing order. A relatively safe approach to that would be to build cost-bearing into Rule 26(b)(2)(C), adopting all of the factors in that rule:

> **(C)** *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule <u>— or require the requesting party to bear all or part of the expenses reasonably incurred in responding —</u> if it determines that: * * *

None of these sketches approach the more radical idea that has been taken up by some close observers of the rules. This idea is that the discovery rules were adopted without the slightest inkling of the expenses that would become involved as the practice evolved, and without any consideration of the effects of a default assumption that a party asked to

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[54] One reason to add the language in brackets is to avoid any confusion as to disclosure; Rule 26(c) seems haphazard in alternating between "disclosure or discovery" and simply "discovery."

[55] The bracketed phrase is a place-keeper. Reconsideration may be appropriate even as the discovery continues — the yield of important information may justify reverting to the assumption that a party who has discoverable information must bear the costs of uncovering it and providing it. And the allocation of expenses may be strongly influenced by the outcome on the merits. Perhaps the deadline should extend beyond entry of final judgment — a Rule 59(e) motion to alter or amend the judgment might be appropriate. If so, it might help to include an express cross-reference.

It may not be necessary to add a provision for reassessment after appeal. Certainly the appellate court can review the order. And a remand that does not address the issue should leave the way open for reconsideration by the trial court in light of the outcome on appeal.

RLM adds this question, by analogy to a division of opinions under Rule 11. Some courts impose sanctions for filing an action without reasonable inquiry, even though subsequent proceedings show support for the positions taken. Might a comparable approach be justified when the response to an unreasonable discovery request yields information that could properly be requested? Something may turn on an ex post diagnosis of the difficulty of reaching the responsive information by a better-focused request, including an attempt to guess whether a better-focused request could have been framed in terms that would defeat a narrowing interpretation and result in failure to produce the proper material.

provide discovery should bear the costs of responding. The proposal is that each party should bear the costs another party incurs in responding to the discovery it requests. Any change as fundamental as this one should be taken up, either by this Subcommittee or the Discovery Subcommittee, only under direction of the Advisory Committee.

G. Preservation in Rules 16(b)(3), 26(f)

Because the Conference provided many suggestions for discovery reform, many topics are suitable for the agendas of both Subcommittees. A particular illustration is the rather modest suggestion that preservation of electronically stored information be added to the topics appropriate for a scheduling order and for inclusion in the parties' Rule 26(f) discovery plan. Without yet attempting to map a plan for coordination between the Subcommittees, these drafts illustrate the relative simplicity of possible amendments. Whether there is any need to add this particular detail to the general provisions in the present rules is a fair question. It is particularly a fair question because present Rule 26(f)(2) includes "discuss any issues about preserving discoverable information * * *." The only apparent place for further reinforcement is in the (f)(3) description of the mandatory items for a discovery plan.

Rule 16(b)(3)(B)(iii)

(B) *Permitted Contents.* The scheduling order may:

(iii) provide for disclosure, ~~or~~ discovery, or preservation of electronically stored information; * * *

Rule 26(f)(3)(C)

(C) any issues about disclosure, ~~or~~ discovery, or preservation of electronically stored information, including the form or forms in which it should be produced; * * *[56]

[56] Note that Rule 26(f)(2) deliberately requires discussion of issues about preserving "discoverable information"; it is not limited to electronically stored information. The (f)(3) discovery plan provisions are more detailed than the (f)(2) subjects for discussion, so the discontinuity may not be a problem.

III. COOPERATION: RULE 1

The wish for reasonable proportionality in discovery overlapped with a broader theme explored at the Conference. Cooperation among the parties can go a long way toward achieving proportional discovery efforts and reducing the need for judicial management. But cooperation is important for many other purposes. Discovery is not the only arena for tactics that some litigants lament as tactics in a war of attrition. Ill-founded motions to dismiss — whether for failure to state a claim or any other Rule 12(b) ground, motions for summary judgment, or other delaying tactics are examples.

It is easy enough to draft a rule that mandates reasonable cooperation within a framework that remains appropriately adversarial. It is difficult to know whether any such rule can be more than aspirational. Rule 11 already governs unreasonable motion practice, and there is little outcry for changing the standards defined by Rule 11.[57] And there is always the risk that the ploy of adding an open-ended duty to cooperate will invite its own defeat by encouraging tactical motions, repeating the sorry history of the 1983 Rule 11 amendments.

Despite these reservations, the Subcommittee is interested in adding rule language that encourages cooperation. Initial discussion in the Advisory Committee reflects similar interest, even a measure of enthusiasm. The aspiration of the Civil Rules is articulated in Rule 1. Rule 1 now addresses the courts, but it could be amended to include the parties.

An illustration of a Rule 1 approach can be built out of the ACTL/IAALS pilot project rules:

> * * * [These rules] should be construed, ~~and~~ administered, and employed by the court and parties to secure the just, speedy, and inexpensive[58] determination of every action and proceeding[, and the parties should cooperate to achieve these ends].[59]
>
> or:
>
> * * * [These rules] should be construed and administered by the court to achieve the just, speedy, and inexpensive determination of every action and proceeding. The parties should cooperate to achieve these ends.

There is something to be said for a purely aspirational rule. But extending it to the parties — and thus to counsel — may be an invitation to

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[57] Nor is there any sense that the 1993 amendments softening the role of sanctions should be revisited, despite the continuing concern reflected in proposed legislation currently captioned as the Lawsuit Abuse Reduction Act.

[58] Here the ACTL/IAALS proposal would ratchet down the expectations of Rule 1: "~~speedy, and inexpensive~~ timely, efficient, and cost-effective determination * * *."

[59] The ACTL/IAALS version is much longer. The court and parties are directed to "assure that the process and costs are proportionate to the amount in controversy and the complexity and importance of the issue. The factors to be considered by the court * * * include, without limitation: needs of the case, amount in controversy, parties' resources, and complexity and importance of the issues at stake in the litigation."

RLM adds a healthy note of skepticism. Does a duty to cooperate include some obligation to sacrifice procedural opportunities that are provided by the Rules? How much sacrifice? Is the obligation to forgo available procedures deepened if an adversary forgoes many opportunities, and defeated if an adversary indulges scorched-earth tactics? Is it conceivable that an open-ended rule could be read to impose an obligation to settle on reasonable terms — that is, terms considered reasonable by the court?

sanctions, beginning with admonishments from the bench. Moving beyond that to more severe consequences should be approached with real caution.

APPENDIX

Various parts of the same rules are affected by proposals made for different purposes. This appendix lays out the full set of changes rule by rule, leaving alternative sketches to footnotes in an effort to improve clarity of illustration.

Rule 1

* * * [These rules] should be construed, ~~and~~ administered, and employed by the court and parties to secure the just, speedy, and inexpensive determination of every action and proceeding [, and the parties should cooperate to achieve these ends].[60]

Rule 4

(m) ***Time Limit for Service.*** If a defendant is not served within ~~120~~ 60 days after the complaint is filed, the court * * * must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause * * *.

Rule 7(b)(3) [or 26(h)]

(3) *Conference for Discovery Motion.* Before filing a motion for an order relating to [disclosure or] discovery the movant must [attempt to resolve the questions raised by the motion by meeting and conferring with other parties when required by these Rules and] request [an informal conference with the court][a Rule 16 conference with the court]. The motion may be filed if the request is denied or if the conference fails to resolve the issues [that would be] raised by the motion.[61]

Rule 16

(b) SCHEDULING.

(1) *Scheduling Order.* Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B)[62] ~~categories of actions exempted by local rule~~, the district judge — or a magistrate judge when authorized by local rule — must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference ~~by telephone, mail, or other means~~.

(2) *Time to Issue.* The judge must issue the scheduling order as soon as practicable, but in any event:

(A) within the earlier of ~~120~~ 60 days after any defendant has been served with the complaint or ~~90~~ 45 days after any defendant has appeared; or

(B) in any case in which these rules allow a defendant 60 days to answer the complaint, within 100 days after that defendant has been served with the complaint or 45 days after that defendant has appeared.[63]

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[60] A simpler alternative is sketched in Part III.

[61] A simpler and milder version, clearly preferred by the Subcommittee, is set out as Rule 16(b)(3)(B)(v) below. This sketch is carried forward only for purposes of discussion.

[62] As noted above, the Rule 26(a)(1)(B) exemptions could be moved to Rule 16(b), changing later references accordingly.

[63] This is the alternative version that responds to Department of Justice concerns. The simpler version is easy to derive.

(3) * * *

(B) *Permitted Contents.* The scheduling order may: * * *

(iii) provide for disclosure, ~~or~~ discovery, or preservation of electronically stored information; * * *

(v) direct that before filing a motion for an order relating to discovery the movant must request an informal conference with the court.[64]

[present (v) and (vi) would be renumbered] * * *

Rule 26

(a)(1)(A) *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must * * *

(b)(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery, proportional to the reasonable needs of the case, regarding any nonprivileged matter that is relevant to any party's claim or defense * * *.[65]

(c)(1) *In General.* * * * The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: * * *

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery; * * *[66]

(d) Timing and Sequence of Discovery.

(1) Timing. A party may not seek discovery from any source before [20 days after service of the summons and complaint on any defendant,]{45 days after the complaint is filed or 20 days after any defendant appears, whichever is later} ~~the parties have conferred as required by Rule 26(f),~~ except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) Sequence. Unless the parties stipulate, or~~, on motion,~~ the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

(f)(1) *Conference Timing.* Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or * * *"

(3) *Discovery Plan.* A discovery plan must state the parties' views and proposals on: * * *

(C) any issues about disclosure, ~~or~~ discovery, or preservation of electronically stored information, including the form or forms in which it should be produced; * * *

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[64] A more complex and nearly mandatory alternative is set out as Rule 7(b)(3) above. The Rule 7(b)(3) draft is carried forward only for purposes of discussion.

[65] Several alternatives are described in Part II A.

[66] The alternatives sketched in Part II F are intriguing: One would add a new paragraph to Rule 26(c)(1), describing an order

(I) requiring that the requesting party bear part or all of the expenses reasonably incurred in responding [to a discovery request], including terms for payment and subject to reconsideration [at any time before final judgment].

The other would include cost sharing in the general proportionality provisions of Rule 26(b)(2)(C):

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule — or require the requesting party to bear all or part of the expenses reasonably incurred in responding — if it determines that: * * *

(g)(1)(B)(i) *Signature Required; Effect of Signature.* [By signing, an attorney or party certifies that a discovery request, response, or objection is:] not evasive, consistent with these rules, and warranted * * *.

Rule 30

(a)(2) ***With Leave.*** A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than ~~10~~ 5 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take the deposition at a time before ~~the time specified in Rule 26(d)~~ a scheduling order enters under Rule 16(b), unless the proceeding is exempted from initial disclosure under Rule 26(b)(1)(B) or unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and to be unavailable for examination in this country after that time; or * * *

(d) Duration; Sanction; Motion to Terminate or Limit

(1) *Duration.* Unless otherwise stipulated or ordered by the court, a deposition is limited to [~~one day of 7~~ 4 hours in a single day][one day of ~~7~~ 4 hours].

Rule 31

(a)(2) *With Leave.* A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than ~~10~~ 5 depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by the third-party defendants; * * * or

(iii) the party seeks to ~~take the deposition before the time specified in Rule 26(d)~~ commence the process for serving additional questions under Rule 31(a)(5) before a scheduling order is entered under Rule 16(b), unless the proceeding is exempted from initial disclosure under Rule 26(a)(1)(B); or * * *

Rule 33

(a)(1) *Number.* Unless otherwise stipulated or ordered by the court, a party may serve on another party no more than ~~25~~ 15 interrogatories, including all discrete subparts.

(a)(2) *Scope.* * * * An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the interrogatory need not be answered until the time set under Rule 33(b)(2) ~~until designated discovery is complete, or until a pretrial conference or some other time~~.

(b)(2) ***Time to Respond.*** The responding party must serve its answers and any objections within 30 days after being served with the interrogatories or within 30 days after any scheduling order is entered under Rule 16(b), whichever is later, but an answer to an interrogatory asking for an opinion or contention relating to fact or the application of law to fact need not be served until [all other discovery is complete][the close of discovery on the facts related to the opinion or contention]. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

Rule 34

(a) In General. A party may serve on any other party ~~a~~ no more than [25] requests within the scope of Rule 26(b): * * *

(3) Leave to serve additional requests may be granted to the extent consistent with Rule 26(b)(2).

(b)(2) *Responses and Objections.*

(A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served or within 30 days after a scheduling order is entered under Rule 16(b), whichever is later. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state [the grounds for objecting {to the request} with specificity] [an objection to the request, including the specific reasons.] If the responding party elects to produce copies of documents or electronically stored information [in lieu of]{rather than} permit inspection, the response must state that copies will be produced, and the production must be completed no later than the date for inspection stated in the request.

(C) *Objections.* An objection to part of a request must specify the part and permit inspection of the rest. An objection [to a request or part of a request] must state whether any responsive [materials]{documents, electronically stored information, or tangible things <or premises?>} are being withheld [under]{on the basis of} the objection.

Rule 36

(a)(1) *Scope.* A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to:

(A) facts or opinions about fact~~,~~;

(B) the application of law to fact, or opinions about facts or the application of law to fact ~~either~~; and

(~~B~~C) the genuineness of any described documents.

(2) *Number.* Unless otherwise stipulated or ordered by the court, a party may serve no more than 25 requests to admit under Rule 36(a)(1)(A) and (B) on any other party, including all discrete subparts.[67] * * *

(~~3~~4) *Time to Respond; Effect of Not Responding.* A matter is admitted unless, within 30 days after being served or within 30 days after a scheduling order is entered under Rule 16(b), whichever is later, — or for a request under Rule 36(a)(1)(B){within 30 days after}[all other discovery is complete][the close of discovery on the facts relevant to the request] — the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court.[68]

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[67] Alternative sketches of this numerical limit are set out in Part II B. One version would set a limit of 25 contention and fact requests, but unlimited requests to admit the genuineness of documents.

[68] If all of these provisions are adopted, it may be better to depart from the order of provisions in the present rule, setting the times for responding after the provision for a written answer or objection:

A matter is admitted unless the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney within 30 days after being served or within 30 days after a scheduling order is entered under Rule 16(b), whichever is later, — or for a request under Rule 36(a)(1)(B){within 30 days

Rule 37

(a)(3)(B)(iv) [A party seeking discovery may move for an order compelling an answer if:] a party fails to produce documents or fails to respond that inspection will be permitted — or fails to permit inspection — as requested under Rule 34.

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after}[all other discovery is complete][the close of discovery on the facts relevant to the request]. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court.

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TAB 2B

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DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

MARCH 22-23, 2012

1 The Civil Rules Advisory Committee met at the University of
2 Michigan Law School in Ann Arbor, Michigan, on March 22-23, 2012.
3 Judge David G. Campbell, Committee Chair, attended by telephone.
4 The Committee members who attended are John Barkett, Esq.;
5 Elizabeth Cabraser, Esq.; Judge Steven M. Colloton; Hon. Stuart F.
6 Delery; Judge Paul S. Diamond; Judge Paul W. Grimm; Peter D.
7 Keisler, Esq.; Dean Robert H. Klonoff; Judge John G. Koeltl; Judge
8 Michael W. Mosman; Judge Solomon Oliver, Jr.; Judge Gene E.K.
9 Pratter; Justice Randall T. Shepard; and Anton R. Valukas, Esq.
10 Professor Edward H. Cooper was present as Reporter, and Professor
11 Richard L. Marcus was present as Associate Reporter. Judge Mark R.
12 Kravitz (by telephone), Chair, Judge Diane P. Wood, and Professor
13 Daniel R. Coquillette, Reporter, represented the Standing
14 Committee. Judge Arthur I. Harris attended as liaison from the
15 Bankruptcy Rules Committee. Laura A. Briggs, Esq., the court-clerk
16 representative, attended by telephone. Peter G. McCabe, Jonathan
17 C. Rose, Benjamin J. Robinson, Julie Wilson, Julie Yap, and Andrea
18 Kuperman, Chief Counsel to the Rules Committees, represented the
19 Administrative Office. Emery Lee represented the Federal Judicial
20 Center. Ted Hirt, Esq., and Allison Stanton, Esq., Department of
21 Justice, were present. Observers included Alfred W. Cortese, Jr.,
22 Esq.; Ellen Messing, Esq. (National Employment Lawyers Association
23 liaison); Kenneth Lazarus, Esq.; John Vail, Esq. (American
24 Association for Justice); Thomas Y. Allman, Esq.; Ariana J. Tadler,
25 Esq.; William P. Butterfield, Esq.; John K. Rabiej, Esq.; Jerry
26 Scanlon (EEOC liaison); Henry J. Kelston, Esq.; and others.

27 The meeting also was attended by several of the contributors
28 to a forthcoming set of articles celebrating Professor Cooper's 20
29 years of service as Reporter for the Committee. They included
30 Judge Lee H. Rosenthal (former chair of the Civil Rules and
31 Standing Committees); Gregory Joseph, Esq., and Professors Stephen
32 B. Burbank; Paul D. Carrington; Daniel R. Coquillette; Steven S.
33 Gensler; Geoffrey C. Hazard, Jr.; Mary Kay Kane; Richard L. Marcus;
34 Linda S. Mullenix; Thomas D. Rowe, Jr.; and Catherine T. Struve.

35 Judge Grimm opened the meeting by reporting that Judge
36 Campbell was attending the meeting by telephone because his wife's
37 recent and successful back surgery required that he remain at home.

38 Judge Grimm read the March 12 letter to Chief Justice Roberts
39 in which Judge Kravitz stated that for reasons of health he would
40 take leave of the Standing Committee on October 1, 2012. Judge
41 Grimm spoke for all in recognizing the letter as "classic Mark
42 Kravitz, the man we all admire and love."

43 Dean Evan Caminker welcomed the Committee to Ann Arbor, giving
44 it credit for the glorious early summer weather. He noted that for
45 many years now, the Law School curriculum has evolved continually
46 toward an ever-increasing array of classroom, simulation,
47 practicum, and clinical offerings designed to prepare students for
48 the practice of law. At the same time, all the traditional
49 national and international courses continue to thrive, and
50 interdisciplinary offerings continue to grow both in the classroom
51 and in the clinics. The rich combination of theory and practical
52 knowledge that informs the Committee's work runs parallel to this
53 educational mission.

54 Judge Grimm introduced two new Committee members. Stuart
55 Delery is the Acting Assistant Attorney General for the Civil
56 Division. General Delery came from private practice at Wilmer Hale
57 to the Department of Justice in 2009, moving through several
58 positions before taking his present position. He graduated from
59 the University of Virginia and Yale Law School, then clerked for
60 Judge Tjoflat and Justices White and O'Connor.

61 John Barkett has attended several Committee meetings as
62 liaison from the ABA Litigation Section, and participated in the
63 Duke Conference. He practices as a litigator in the Shook Hardy
64 office in Miami. He devotes increasing amounts of time to serving
65 as mediator, conciliator, and special master. He also teaches a
66 law school course in electronic discovery.

67 John Grimm also noted that Judge Campbell reported the
68 Committee's work to the Standing Committee in January. The January
69 meeting included a panel discussion of class actions under Civil
70 Rule 23, aiming to identify the most important problems that have
71 emerged in practice and to advance consideration of the need to
72 begin studying possible amendments. It was recognized that any
73 Rule 23 project will require several years of hard and dedicated
74 work if it is launched.

75 Judge Kravitz attended the Judicial Conference earlier this
76 month. No items involving the Rules Committees were presented.
77 There was a meeting of the mass torts group in conjunction with the
78 Conference.

79 *November 2011 Minutes*

80 The draft minutes of the November 2011 Committee meeting were
81 approved without dissent, subject to correction of typographical
82 and similar errors.

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83 *Legislative Activity*

84 Benjamin Robinson reported on legislative activity. Since the
85 November meeting two more bills have appeared that bear attention
86 because of possible implications for the Civil Rules. They are the
87 Federal Consent Decree Fairness Act and the Sunshine in Regulatory
88 Decrees Act. They may raise questions whether Civil Rule 60 is
89 adequate to the occasional need to revise long-term institutional
90 reform decrees, particularly when interest groups may align with
91 agencies to secure results that they cannot obtain from a
92 legislative body. There is a provision requiring an expeditious
93 ruling on a motion to terminate a consent decree, and setting
94 specific times for scheduling orders. The Judicial Conference has
95 taken no position on these bills. The Federal-State Jurisdiction
96 Committee is monitoring them closely.

97 House Bill 3487 is similar to the Lawsuit Abuse Reduction Act.
98 It would amend Civil Rule 11 in several respects. It would require
99 an award of reasonable expenses and attorney fees to the party who
100 prevails on a Rule 11 motion; abolish the 21-day safe harbor;
101 require state courts to apply Rule 11 in actions that affect
102 commerce; and require special sanctions when an attorney
103 accumulates three Rule 11 violations.

104 The Appeal Time Clarification Act has been signed. It grew
105 out of the need to conform 28 U.S.C. § 2107 with amendments to
106 Appellate Rule 4. It was signed one day before the effective date
107 of the Rule 4 amendments, maintaining consistency between rule and
108 statute.

109 The Federal Courts Jurisdiction and Venue Clarification Act
110 also has been enacted. It does not appear to affect any of the
111 Rules.

112 *Rule 45*

113 Proposed amendments to Rule 45 were published for comment in
114 August 2011. The project began as an effort to simplify and
115 clarify a rule that was difficult to navigate, particularly for
116 those who used it infrequently. A number of significant changes
117 also were made. The Committees invited comment on four specific
118 topics. Is the effort to simplify successful? Should the proposal
119 to emphasize notice requirements be expanded to require notice of
120 events after the subpoena is served? What should be the standard
121 that limits the newly added authority to transfer a motion related
122 to a subpoena from the court where compliance is required to the
123 court that issued the subpoena? Is it wise to apply to a party or

124 its officer the same geographic limits on the reach of subpoenas to
125 testify at trial as apply to nonparties?

126 Three hearings were scheduled. Each was cancelled for want of
127 interest. No one sought to testify at either of the first two.
128 The two witnesses who planned to testify at the final hearing
129 agreed to submit their comments in writing. In all, 25 written
130 comments were received. The Discovery Subcommittee held conference
131 calls to discuss the issues raised by the comments. The
132 Subcommittee recommends modest changes in the published proposal on
133 the basis of the comments. Professor Kimble, the Style Consultant,
134 suggested several style changes. The Subcommittee adopted some of
135 them, and Professor Kimble accepted the Subcommittee's reasons for
136 not adopting the others.

137 The remaining task is to agree on the precise version of Rule
138 45 that should be transmitted to the Standing Committee for its
139 recommendation for adoption.

140 RULE 45: SIMPLIFICATION

141 The simplification of Rule 45 begins by providing that all
142 Rule 45 subpoenas issue from the court where the action is pending.
143 The present rules that limit the place where the person served with
144 the subpoena is required to comply are divorced from the place of
145 service, and carried forward without other substantial change. The
146 place to enforce the subpoena, or to seek relief from it, is the
147 court where compliance is required.

148 The comments generally supported the simplification aspects of
149 the Rule 45 proposal. It does not require further discussion.

150 RULE 45: NOTICE

151 As published, Rule 45 transfers to a new subdivision (a)(4)
152 the requirement that notice be given to all parties before a
153 subpoena is served on a nonparty. Many lawyers complain that the
154 notice requirement is often ignored. The hope is that the transfer
155 will give it a more prominent place and engender better compliance.
156 In addition, it is made clear that a copy of the subpoena must be
157 served with the notice. Finally, the provision in present Rule
158 45(b)(1) is changed by deleting "before trial," so that notice must
159 be given before serving a subpoena to produce at trial as well as
160 before serving a subpoena to produce in pretrial discovery.

161 Several questions have been raised as to notice. Some
162 comments urged that notice should be served on the parties at a set
163 interval — perhaps 15 or 20 days — before the subpoena is served on

164 the witness. Without this advance period, service on the parties
165 could be made by means — most likely mail — that actually reach
166 them after the subpoena is actually served on the witness, perhaps
167 leading to production before the other parties have any opportunity
168 to object or seek protection. Other comments urged that there
169 should not be any advance notice to other parties, for fear of
170 collusion that enables the nonparty witness to avoid service or
171 otherwise thwart production. The Subcommittee does not recommend
172 any change. The Committee accepted the Subcommittee position.

173 Post-judgment Enforcement Proceedings. A separate question has
174 been raised by the Department of Justice. Their concern is that in
175 post-judgment enforcement proceedings notice to a party before a
176 subpoena is served will enable the party to conceal assets. These
177 problems arise in many enforcement settings, particularly in
178 attempting to enforce restitution in favor of a crime victim.
179 Although the debtor typically has notice of enforcement
180 proceedings, there is no notice of the subpoena before it is
181 served. Remember that present Rule 45(b)(1) applies only to a
182 subpoena to produce before trial. Generally the subpoena is
183 directed to a financial institution. "When we find a bank account,
184 we freeze it." If the debtor gets advance notice of the subpoena,
185 "we have trouble."

186 The Department initially proposed amending the rule by
187 limiting advance notice to subpoenas commanding production "before
188 judgment." But if the Rule 54(a) definition of "judgment" could
189 create ambiguities in this formulation, then some other formulation
190 might be found. The desire to have advance notice of trial
191 subpoenas, for example, might be accommodated by referring to
192 subpoenas commanding production "before [trial] or at trial."

193 It was asked why notice that a subpoena will be served
194 aggravates the risk of concealment. Serving the subpoena does not
195 of itself freeze the assets; the person served can notify the
196 judgment debtor before execution. And there are statutory devices
197 enabling the Department to freeze assets it knows of before
198 launching discovery for other assets. The Department explained
199 that it serves subpoenas, often on financial institutions, to
200 discover assets, and then acts to freeze the assets once they are
201 found. If notice of the subpoena must be given to the judgment
202 debtor, the debtor may well move or conceal the assets before they
203 can be frozen. It was suggested that the Department could apply
204 for an ex parte order suspending a Rule 45 notice requirement on
205 showing reason to fear concealment. The Department, however, views
206 the need to apply for an ex parte order as a burdensome extra step.

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207 It was suggested that perhaps the Committee Note could deal
208 with this by observing that the notice requirement is not intended
209 to apply in post-judgment enforcement proceedings. But that might
210 well cross over the line into the forbidden territory of rulemaking
211 by Note. This concern was underscored. The Committee has not
212 focused on the departure from present judgment enforcement practice
213 that would result from striking "before judgment" from the present
214 rule. Providing for advance notice of trial subpoenas seemed a
215 good idea, but it may not be so important as to disrupt the
216 opportunity to discover assets before they can be concealed. This
217 problem is important to all judgment creditors, not the government
218 alone.

219 It was observed that advance notice of a trial subpoena might
220 be preserved without jeopardizing post-judgment enforcement
221 proceedings. One possibility would be to require notice of a
222 subpoena to produce before trial or at trial. That rule text would
223 support a Committee Note observation that the rule does not apply
224 to post-judgment proceedings to discover assets. "It is common for
225 a Note to say what a rule does not do."

226 It was agreed, with no contrary vote, that the Subcommittee
227 would draft rule text to ensure that notice need not be given of
228 discovery in aid of execution. The language will be reviewed by e-
229 mail communication with the full Committee.

230 Later Notices: Modify Subpoena, Documents Produced. Throughout the
231 process of developing Rule 45 amendments, suggestions have been
232 made that notice should be required of events after the subpoena is
233 served. The party who served the subpoena often negotiates
234 modifications with the person served. Notice of the modifications
235 to other parties would enable them to serve their own subpoenas for
236 information negotiated away by the party who first served a
237 subpoena. As materials are produced in response to the subpoena,
238 other parties are likely to want to inspect them. But the task of
239 asking for access can be burdensome, particularly when "rolling
240 production" involves production in installments over an
241 indeterminate period of time. And some lawyers refuse requests for
242 access, taking the position that nothing in Rule 45 directs that
243 other parties be given access to subpoenaed materials. The
244 Subcommittee discussed these problems repeatedly and at length. It
245 concluded that requiring notice of modifications or production
246 would create unnecessary problems. There is an all-too-real danger
247 of "gotcha" motions seeking to exclude evidence for failure to
248 comply with a notice obligation. "Less compliance with more rules
249 breeds satellite litigation." The notice changes were prompted by
250 the complaints that many lawyers do not comply even with the simple
251 notice requirement in present Rule 45(b)(1). Notice of production,

252 further, could become a substantial burden when rolling production
253 requires multiple notices, increasing the risk of inadvertent
254 notice failures and motions for sanctions. Even limiting the
255 requirement to notice of the first production, alerting other
256 parties to the need to begin monitoring for subsequent production,
257 could be a problem. The result of these deliberations was a
258 statement in the Committee Note that parties desiring access to
259 subpoena materials need to follow up with the party who served the
260 subpoena, and that the party serving it should make reasonable
261 provision for prompt access.

262 Discussion of the multiple notices issue began by noting that
263 notice of receipt of documents is useful. To be sure, there is a
264 danger of "gotcha" disputes, and good lawyers work out access to
265 produced materials now. "But it is inescapably clear that many
266 lawyers do not let their adversaries know" when production occurs.
267 It is simple to add "and also give notice of receipt" to the rule.
268 "We should expect this in practice, but it is not happening."

269 The response was that these issues have been discussed several
270 times, both in the Subcommittee and in the Committee. The
271 Subcommittee concluded that other parties have an obligation, once
272 they know of the subpoena, to ask for access to materials produced
273 in compliance. If cooperation is denied, the court can order that
274 access be allowed.

275 An observer commented that some states require notice of
276 production. Omitting a notice requirement is a mistake. At the
277 least, the Committee Note should state there is an obligation to
278 give notice. Otherwise, as now, we have trial by ambush. Key
279 documents appear for the first time in the pretrial order.

280 But it was rejoined that "lawyers should pay attention." On
281 the other hand, lawyers are concerned about the lack of notice when
282 documents are produced. Still, "this is complicated." Production
283 often occurs on a rolling basis: do you have to give multiple
284 notices, generating multiple opportunities for collateral disputes?
285 Would it help to say in the Committee Note that other parties can
286 ask for access, and seek a court order if access is not given? Or
287 is this question so important that a Committee Note is not
288 protection enough, particularly given the limit that a Note cannot
289 make a rule?

290 It was agreed that the Subcommittee should prepare language
291 for the Committee Note, again in the vein of stating what the rule
292 text does not do. The rule does not cut off the court's power to
293 order that a party provide access to subpoenaed materials. The
294 Note might also quote from the Note to the 2000 amendments: "In

295 general, it is hoped that reasonable lawyers can cooperate to
296 manage discovery without the need for judicial intervention." The
297 Subcommittee draft will be included in the Rule 45 e-mail review by
298 the Committee.

299 RULE 45: PARTY AND PARTY OFFICERS AS TRIAL WITNESSES

300 Present Rule 45 governs the place of compliance with a
301 subpoena by two subdivisions. Rule 45(b) defines the places where
302 a subpoena can be served. Rule 45(c) defines limits on the places
303 where compliance can be required. Rule 45(c)(3)(A)(ii) directs
304 that a court must quash or modify a subpoena that "requires a
305 person who is neither a party nor a party's officer to travel more
306 than 100 miles" from designated places, or to incur substantial
307 expense to travel more than 100 miles to attend trial. The Vioxx
308 decision described in the Committee Note found a negative
309 implication in this provision allowing a court to require a party
310 or a party's officer to attend as a trial witness no matter where
311 served. The Committee agrees that this is an incorrect reading of
312 the present rule. The proposed amendments published Rule 45 text
313 that simply overrules the Vioxx interpretation. Recognizing that
314 there is substantial support for something like the Vioxx result as
315 a matter of policy, however, the publication package included an
316 alternative that was expressly identified as not recommended. The
317 alternative would not restore the Vioxx ruling. It would not
318 authorize a party to subpoena another party or its officer to
319 attend trial. Instead, it would authorize the court to order a
320 party to appear, or to produce its officer to appear, as a trial
321 witness. The order could issue only for good cause and after
322 considering the alternatives of audiovisual deposition or testimony
323 by contemporaneous transmission under Rule 43(a). The court could
324 order reasonable compensation for expenses incurred to attend
325 trial. And sanctions could be imposed only on the party, not on
326 its officer.

327 Some of the public comments supported adoption of the "Vioxx
328 alternative." One Subcommittee member spoke in favor. There are
329 categories of cases that present choices in designating the place
330 of trial. Multidistrict litigation and CAFA class actions are the
331 prime examples. The defendants have an opportunity to argue for
332 trial in a place that is not "home town," and that is beyond the
333 limits on subpoenas for nonparty witnesses. Choice of the location
334 for a "bellwether" trial can be similarly affected. Some of the
335 comments, including those from employment lawyers, support the
336 alternative. The "good cause" standard in the alternative does not
337 call for exceptional circumstances, but it is likely that courts
338 will seldom use it to order a party or its officer to attend trial
339 from a distant place. Often the parties will agree, or the court

340 will decide, that some other form of testimony is a satisfactory
341 substitute for live testimony at trial. But the option for live
342 testimony is important to fair management of complex cases.
343 Concerns about misuse or overuse are not warranted.

344 Another reaction was that all Committee members agree that
345 Vioxx misreads the present rule. Many participants in the 2010
346 miniconference that preceded formulation of the published proposal
347 agreed. The concerns expressed by those who support the
348 alternative are understandable. But there were not many comments
349 on the published proposal and alternative, and these comments were
350 split. Among others, the American College of Trial Lawyers and the
351 Lawyers for Civil Justice oppose the alternative. Before Vioxx was
352 decided, decades of litigation were conducted without the option of
353 compelling a party or its officer to travel beyond the Rule 45
354 limits for nonparties to testify at trial. No one thought trials
355 conducted in this regime were unfair. "Vioxx changed the
356 landscape." And experience showed that it could be used for
357 strategic purposes, threatening to drag to trial high-level
358 officers who in fact are not important witnesses. And video
359 depositions, or testimony by contemporaneous transmission from a
360 distant place, are usually as good as live testimony at trial. A
361 party will want to produce at trial any witness whose testimony is
362 truly important. "We should go back to the history."

363 Judge Kravitz noted that he had urged the Judicial Panel on
364 Multidistrict Litigation to adopt a rule that would enable a
365 multidistrict court to order an executive to travel to attend
366 trial. He has done it himself twice. "Most of the travel cases are
367 multidistrict litigation cases." Adoption of such a rule by the
368 panel would go a long way toward meeting any need for similar and
369 more general provision in Rule 45.

370 Further support was offered for the alternative. It is true
371 that historically litigation proceeded without any distinctive
372 power to compel trial testimony by a party or its officer. Parties
373 decided whether to produce witnesses on calculations of self-
374 advantage. But Vioxx is not so much a departure from history as
375 recognition of the new realities of centralization of federal court
376 litigation. Judges should have the discretionary power proposed by
377 the alternative. It is not clear that the Panel has authority to
378 adopt a rule without support in a Federal Rule of Civil Procedure.
379 The alternative provides ample protection in focusing attention on
380 the need to consider audiovisual depositions or contemporary
381 transmission as satisfactory substitutes for live trial testimony.
382 Added protection is provided in the authority to award expenses
383 incurred to attend trial.

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384 The Committee voted to recommend the published rule for
385 adoption, without the alternative proposal, with two dissents.

386 RULE 45: TRANSFER OF MOTIONS AND ORDERS

387 The separation of the place where compliance is required from
388 the court where the action is pending is not new. But it focuses
389 attention on a set of problems that arise in present practice.
390 Motions directed to the subpoena may raise issues closely tied to
391 the merits of the pending action, or significantly affecting
392 management of the action by the court where it is pending. Or a
393 single action may give rise to discovery subpoenas calling for
394 compliance in several different courts. It may be that the same
395 compliance questions arise in more than one court. The published
396 proposal provides for transfer of subpoena-related motions from the
397 court where compliance is required to the court where the action is
398 pending. The standard requires "exceptional circumstances" or the
399 consent of the parties and the person subject to the subpoena. One
400 important issue is the standard for transfer.

401 A simple illustration is provided by an action pending in the
402 Eastern District of Michigan and a discovery subpoena issued by
403 that court to a nonparty witness in the Southern District of New
404 York. A motion directed to the subpoena is made in the Southern
405 District of New York. In light of suggestions in several of the
406 public comments, the Subcommittee decided to recommend that the
407 consent of the parties should not be required to support transfer.
408 Consent of the nonparty served with the subpoena enables — but does
409 not require — the court to transfer a motion to the Eastern
410 District of Michigan. It seems appropriate to subject the parties
411 to the jurisdiction of the court in Michigan if the nonparty
412 consents.

413 Absent the nonparty's consent, the exceptional circumstances
414 criterion generated much disagreement in the comments. Several
415 alternatives were suggested: "good cause"; the version in the draft
416 prepared for the April 2011 meeting, "considering the convenience
417 of the person subject to the subpoena, the interests of the
418 parties, and the interests of effective case management"; or "finds
419 that the interests favoring transfer outweigh the interests of the
420 person subject to the subpoena [or any party opposing transfer]."
421 Support for the "exceptional circumstances" criterion focused
422 primarily on protecting a nonparty against the burdens of
423 contesting discovery issues in the often distant court where the
424 action is pending. Support for a more permissive standard began
425 with suggestions that the illustrations of "exceptional
426 circumstances" in the Committee Note are not exceptional at all.
427 The Magistrate Judges Association urged that transfer should be

428 more freely available, and another comment suggested that transfer
429 should be virtually routine when the dispute focuses not on the
430 circumstances of the nonparty subject to the subpoena but on the
431 merits of the action or the relative importance of the information
432 in relation to other discovery in the action and the merits. The
433 Subcommittee divided on the standard, but did not recommend a
434 change.

435 Discussion began with support for the exceptional
436 circumstances test. Practical experience suggests focus on the
437 nonparty as the person we should be concerned about. "The nonparty
438 'has no skin in the game.'" In determining whether exceptional
439 circumstances warrant transfer, the court can take account of any
440 showing that the nonparty in fact has a close relationship with a
441 party, and even may be acting in order to increase burdens on other
442 parties. The parties would like to litigate where it is convenient
443 for them. The judge in the court where compliance is required also
444 has an interest in transfer, to avoid the inconvenience of being
445 involved with disputes arising from an action in another court.
446 "Courts often have an interest that favors transfer." Although
447 some comments favored a more lenient standard, there were not many
448 of them. Remember there was so little interest in the entire
449 proposal that the hearings were cancelled. The American Medical
450 Association, representing doctors who are often subjected to
451 nonparty discovery, strongly favors the exceptional circumstances
452 test. So do other groups. "Lawyers can take care of themselves."
453 Any lesser standard makes it too easy to transfer. "My experience
454 is that this issue can be resolved by focusing on the interests of
455 the nonparty. If there is a need for a ruling by the court where
456 the action is pending, transfer will happen."

457 This position was tested by drawing from illustrations in the
458 Committee Note. Is it an exceptional circumstance that the court
459 where the action is pending has resolved a substantive dispute, and
460 a party is asking for a different resolution of the dispute by the
461 court where compliance is required? Or if subpoenas are served
462 that require compliance by nonparties in fifteen different states,
463 all presenting the same issues of compliance? The response was
464 that multiple subpoenas are not an exceptional circumstance. And
465 if there has been a substantive ruling by the court where the
466 action is pending, that ruling will be taken into account by the
467 court where compliance is required.

468 It was noted that the American Bar Association Litigation
469 Section proposed the exceptional circumstances test, and continues
470 to support it. The Department of Justice also supports it.
471 Parties often seek discovery from nonparty government witnesses.
472 It is better to litigate the disputes where the witnesses are.

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473 In response to a question whether any Committee member favors
474 relaxing the exceptional circumstances test, it was observed that
475 it is "incoherent" to offer examples in the Committee Note of
476 circumstances that many observers describe as not exceptional,
477 indeed nearly routine. Reliance on "exceptional" as a standard
478 seems to raise an empirical question: how common are the
479 "circumstances" offered to support transfer? And the empirical
480 response seems to be that these illustrations are not exceptional.
481 On the other hand, it was suggested that "in the full federal
482 caseload," not many cases will present the problems. This view was
483 repeated from a slightly different perspective. In the overall
484 federal caseload, not many cases involve discovery from nonparties
485 away from the court where the action is pending. Distant nonparty
486 discovery is itself exceptional. Circumstances that warrant
487 transfer will themselves be exceptional even within this category
488 of exceptional cases.

489 An observer suggested that the Subcommittee report seemed to
490 favor relaxing the exceptional circumstances test, and asked what
491 happened? It was responded that the Subcommittee had not really
492 decided to support one view or the other. The seeming unanimity of
493 the discussion with the Committee was not anticipated.

494 The focus on the Committee Note examples led to asking how to
495 integrate the task of articulating a transfer standard in rule text
496 with the task of offering helpful illustrations in the Committee
497 Note. If there is to be a transfer text, "transfer should at least
498 be possible. Judges who encounter these problems find it difficult
499 to deal with a piece of a broader picture."

500 It was suggested that the Committee Note must be changed. The
501 paragraph that begins by stating that it is difficult to define
502 exceptional circumstances should be revised, first, by moving the
503 final sentence to become the first sentence: "The rule contemplates
504 that transfers will be truly rare events." Beyond that, the Note
505 should attempt to reduce the risk that transfer will "become the
506 rule." The standard might be explained as involving circumstances
507 so compelling as to make it contrary to the interests of justice to
508 resolve the dispute in the court where compliance is required.
509 That could reduce the perceived incoherence between the rule
510 standard and the present examples.

511 One reaction to this discussion was that if transfer is to be
512 so tightly circumscribed it may not be right to say only that the
513 court "may" transfer. If the case for transfer is so compelling,
514 why not say that it must be transferred? An immediate response was
515 that "any judge will transfer if there are exceptional reasons to
516 transfer." A related suggestion by an observer was put as a

517 question — can a judge of the court where the action is pending
518 arrange to be designated to sit in the court where compliance is
519 required so as to protect the nonparty's interests while also
520 achieving the benefits of transfer? Another suggestion was that
521 judges will manage to confer with each other when there is a
522 substantial need for coordination, and reduce the costs of separate
523 proceedings by informal arrangements.

524 It was agreed that the exceptional circumstances test should
525 remain in rule text, and that the Committee Note should be revised
526 to reflect better the exacting standard that is intended. One
527 possibility would be to suggest a distinction between disputes that
528 focus on considerations specific to the local witness and disputes
529 that focus on the main action. But it was responded that the
530 nonparty witness should not be subjected to this distinction. A
531 nonparty should not be dragged around the country merely because
532 the dispute is between the parties and focuses on the merits of the
533 action. It was left to the Subcommittee to prepare a revised
534 Committee Note, to be circulated to the full Committee for review
535 and approval.

536 RULE 45: PLACE OF COMPLIANCE

537 The published proposal, Rule 45(c)(2)(A), provided that a
538 subpoena may command production of documents, tangible things, or
539 electronically stored information at a place reasonably convenient
540 for the person who is commanded to produce. As in the present
541 rule, the place is designated by the party serving the subpoena,
542 not the person subject to the subpoena. This formulation reflected
543 at least two concerns. The more prominent concern was that
544 discovery increasingly includes production of electronically stored
545 information by transmission to the requesting party. Production by
546 transmission is equally convenient to any electronic address. A
547 subsidiary concern was the ambiguity of applying present Rule 45 to
548 nonparty entities who are subject to service, and who transact
549 business, in many places. So far, so good. But it was asked how
550 this provision plays into the provisions in proposed Rule 45(d)
551 that call for motions to enforce a subpoena, or for relief from it,
552 in the court where compliance is required.

553 A simple illustration was proposed. A New York law firm is
554 litigating an action in Arizona. It serves a subpoena on an
555 Arizona nonparty to produce documents at the law firm offices in
556 New York. The nonparty wishes to protest that production in New
557 York is not reasonably convenient within the meaning of Rule
558 45(c)(2)(A). As the rule is structured, the Arizona nonparty must
559 seek relief by motion in the court in New York. Or, to make it one

560 step more complicated, the subpoena requests production of
561 documents that in fact are stored in a warehouse in Oregon.

562 The Committee agreed that Rule 45(c)(2)(A) should be revised
563 to delete the published provision looking for production at a place
564 reasonably convenient for the person who is commanded to produce.
565 The starting point will be to adopt the 100-mile provisions that
566 apply to nonparty depositions, unless the parties agree on a
567 different place for production. Agreement is very likely to be
568 reached as to electronically stored materials. The Subcommittee
569 will propose new language to be included in the package of Rule 45
570 revisions for e-mail review by the Committee.

571 RULE 45: OTHER ISSUES

572 One of the comments, from a lawyer in Hawaii, observed that
573 difficulty had been encountered in persuading courts on the
574 mainland to enforce subpoenas to testify at trials in Hawaii by
575 means of contemporaneous transmission under Rule 43(a). The
576 Subcommittee agrees that a Rule 45 subpoena is properly used for
577 this purpose — a witness outside the reach of a subpoena from the
578 court where the action is pending can be compelled to testify from
579 a place within the limits imposed by Rule 45. The Committee agreed
580 that the Committee Note should be revised to confirm this plain
581 reading of the revised Rule 45 text.

582 The comments also raised a concern that Rule 45 will somehow
583 be read to limit the present practice that supports discovery from
584 parties outside the Rule 45 limits. Rule 37(d) authorizes
585 sanctions when a party or its officer, director, or managing agent
586 fails to appear for a deposition after being served proper notice.
587 Rule 37(d) extends as well to Rule 33 and Rule 34 requests. There
588 is no need for a subpoena. Limits are imposed as a matter of
589 reasonableness. The Subcommittee and Committee agreed that the
590 Committee Note should be revised to include a reminder that the
591 revisions do not change this established practice.

592 Other changes made to the published Committee Note were
593 identified and accepted.

594 RULE 45: RECOMMENDATION

595 The Committee voted, without dissent, to recommend to the
596 Standing Committee that revised Rule 45 be recommended for adoption
597 upon Committee approval by e-mail submission of the revisions
598 adopted at this meeting.

599 *Discovery: Preservation and Spoliation*

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600 Judge Grimm introduced the Discovery Subcommittee report of
601 its work on preservation of materials for future discovery requests
602 and spoliation sanctions for failure to preserve. The report
603 describes the status of Subcommittee deliberations and requests
604 guidance.

605 The immediate source of concern is the costs associated with
606 the duty to preserve evidence relevant to a claim, particularly
607 when a foreseeable claim has not yet become the subject of
608 litigation. This concern was brought to the fore by panel
609 discussion at the Duke Conference. Initial Subcommittee work was
610 considered at a miniconference in September 2011, and the Committee
611 reviewed the topic at its November 2011 meeting. In December the
612 Subcommittee on the Constitution of the House Judiciary Committee
613 held a hearing. Congressman Franks has submitted a letter on the
614 costs of discovery and preservation that will be considered by the
615 Advisory Committee at this meeting and in future deliberations.
616 Others also have provided valuable information, including Lawyers
617 for Civil Justice, the RAND Institute for Civil Justice, the
618 Department of Justice, and regular observers Allman, Butterfield,
619 and Tadler, all present today. The Sedona Conference continues to
620 work on these issues. The Subcommittee has continued to work by
621 conference call.

622 The difficulties of the underlying questions are highlighted
623 by the number of comments from outside and by the disparity of
624 views expressed by the comments. The Department of Justice letter
625 suggests that it is premature to attempt to develop new rules
626 provisions. The ongoing studies by several groups will, when
627 complete, provide a better foundation. The Department itself has
628 carried out a survey but will extend the survey.

629 These sources of information are valuable. But it is
630 difficult to locate them along the line from anecdote to an
631 accumulation of anecdotes to hard numbers. "Getting numbers in a
632 helpful way is hard." The Department of Justice survey shows that
633 few adversaries request — or even threaten to request — sanctions
634 against Department lawyers or against the United States, and that
635 Department lawyers seldom threaten to request or actually request
636 sanctions against their adversaries. Most cases do not seem to
637 involve the sanctions that are said to drive many institutional
638 litigants to overpreserve in costly and disruptive ways.

639 These uncertainties about actual current problems are
640 compounded by the common concerns about making new rules. Will
641 litigants comply with a new rule? What unintended consequences may
642 follow — including impact on state tort law, and interaction with
643 obligations to preserve evidence imposed by rules of professional

644 responsibility? Remember that there are many constraints that
645 require preservation of vast amounts of information quite without
646 regard to the prospect of litigation. It may be that the increase
647 in total preservation caused by a duty to preserve for reasonably
648 anticipated litigation would be quite small.

649 The Subcommittee initially developed draft rules to illustrate
650 three different approaches. The first set included detailed
651 provisions governing the events that trigger a duty to preserve;
652 the scope of the information that must be preserved in terms of
653 subject matter, number of sources or "key custodians" that must be
654 drafted into the preservation, the reach back in time for
655 information to be preserved, the duration of the duty to preserve;
656 and more. The second set described the same dimensions of the
657 duty, but in general terms that mostly exhorted reasonable
658 behavior. The third set focuses on the occasions for remedies and
659 sanctions, affecting the duty to preserve only by reflection from
660 the circumstances that justify remedies or sanctions. The approach
661 by way of remedies and sanctions derives from the legions of
662 statements that the fear of sanctions leads to vast over-
663 preservation, at great cost. This approach aims "to give some
664 shelter from the storm."

665 The Subcommittee consensus, although not a unanimous view, is
666 that it would be difficult to create good rules that seek to define
667 the duty to preserve, either in detail or by simply exhorting
668 reasonable behavior. Detailed provisions, further, could easily be
669 superseded by advances in technology. Social media offer an
670 example of complex sources of information that likely would have
671 been overlooked in a detailed rule drafted even a few years ago.
672 It cannot be guessed what new sources of information will develop,
673 and become important, even in the near future. Work on the drafts
674 now presented looked to describing the basic concept, developing a
675 bedrock concept of proportionality, and such. Much of the focus is
676 on shaping a distinction between remedies designed to cure the loss
677 of information that should have been preserved by searching for
678 substitutes, and sanctions designed to provide some substitute for
679 vanished information in cases of serious fault and serious
680 prejudice.

681 Other questions have been considered. Should new rules
682 address the scope of discovery? There is general agreement that
683 the volume of information available for discovery, and thus
684 preservation, has exploded. The explosion is in the form of
685 electronically stored information; should any new rule address only
686 ESI? The Subcommittee reached no consensus on this question. It
687 considered the Federal Circuit presumptive limits on e-mail
688 discovery, but only asks the question whether this should be

689 considered. The work of the Duke Subcommittee overlaps the work of
690 the Discovery Subcommittee in these dimensions. The two
691 subcommittees are working in tandem.

692 The Subcommittee has real reservations about some of the
693 details that are regularly suggested for new discovery rules.
694 Drafting in terms of limiting the number of "key words" for
695 searches, for example, could easily lead to choices that will yield
696 "100% recall and 0% precision." Predictive coding offers promise
697 as a means of sharpening the focus of search and preservation
698 efforts, but it is not yet fully developed — RAND is exploring this
699 approach. One RAND finding is not surprising: reviewing available
700 information for relevance, responsiveness, and privilege or other
701 grounds of protection accounts for 70% of the cost of preservation
702 and discovery.

703 One of the current drafts pursues an approach urged by Thomas
704 Allman, focusing a preservation sanctions rule on ESI alone.
705 Drafting may be easier on this approach, which can be framed as a
706 revision of Rule 37(e) rather than a new Rule 37(g). Some
707 Subcommittee members are attracted to this approach, while others
708 think litigants should not be forced into the nightmare of
709 different preservation regimes for ESI and all other information.

710 Professor Marcus said that after the November 2011 Committee
711 meeting further work was devoted to developing a rule with more
712 "hard specifics," but that approach presented problems and is not
713 illustrated in the agenda materials for this meeting. Nor is there
714 full agreement whether to frame rules amendments by focusing on ESI
715 alone. For many years, many observers believed that the general
716 discovery rules provided all the tools needed to manage discovery
717 of ESI. But the 2006 amendments reflect a judgment that some
718 specific provisions for ESI are necessary. ESI is different both
719 in its nature and its extensiveness. Rule 37(e) is an example of
720 an ESI-specific rule. On the other hand, Rule 26(f) addresses all
721 discoverable information, and there continues to be a great deal of
722 discoverable information that is not stored in electronic form.
723 Non-ESI information likely continues to be important in many cases,
724 but this is an uncertain proposition and the situation may change
725 in the future. If the next set of amendments is limited to a focus
726 on ESI, they can be fit into the more recent amendments.

727 The choice of focus will affect how the rules are shaped, and
728 perhaps also when they should be adopted. The development of
729 concept searching by such means as predictive coding, for example,
730 is difficult to predict.

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731 Beyond these now familiar questions, another question
732 persists: can a duty to preserve be defined in terms that limit the
733 obligation to preserve by allowing destruction of information that
734 would be discoverable if litigation were actually in being? And
735 should the Subcommittee continue to work on rule provisions that
736 would define specific limits on the scope of ESI discovery, along
737 the lines sketched in the informal discussion draft Rule
738 26(b)(1)(B) set out in the agenda materials at p. 275?

739 The first of these questions to be discussed was whether
740 preservation provisions should focus only on ESI, or should
741 encompass all discoverable information. Some Subcommittee members
742 think ESI presents all the significant problems, that only minor
743 problems are presented by other forms of information. Others think
744 it unwise to focus on ESI alone.

745 The first question asked how to draw a line between ESI and
746 other information. What is a print-out copy of ESI? Many people
747 recycle the hard copy, relying on the electronic storage. But
748 where would this fall within an ESI rule: must it be preserved as
749 one form of the ESI? Under present rules, preservation in one form
750 should suffice. But if the rules start to distinguish between ESI
751 and other forms of information, the distinction could become
752 difficult. This is an aggravation of a current problem — if you
753 have both hard-copy and ESI forms, can you satisfy a request for
754 ESI by producing only in the hard-copy form? If a rule is drafted
755 to protect against adverse consequences from a failure to produce,
756 it does not say you can discard other forms of the same
757 information. But the Subcommittee does not intend or recommend
758 creation of more onerous preservation requirements. The focus is
759 on relevance and prejudice. If the information remains available
760 in one form, there is no problem. But then it was asked whether
761 creating a safe harbor for some kinds of destruction — most
762 apparently ESI — may cause difficulty for other kinds of
763 information outside the safe harbor category.

764 Another question was whether anyone has done a survey to
765 determine whether preserving ESI is qualitatively different from
766 preserving paper, and why? One current debate is whether the §
767 1920 provision that allows recovery of costs for "exemplification
768 * * * of any materials where the copies are necessarily obtained
769 for use in the case" extends to the expense of producing ESI.

770 Turning to the relationship between severity of sanctions and
771 the degree of culpability in failing to preserve, should "case-
772 ending sanctions" be limited to cases of intentional destruction?
773 What of gross negligence? And what of merely negligent, or perhaps
774 innocent, loss of critically important information — the running

775 example is compacting a wrecked automobile before the defendant has
776 an opportunity to examine it for claimed defects? The Lawyers for
777 Civil Justice suggest the test should be an intent to make
778 information unavailable for trial. That would prohibit an adverse
779 inference, or stronger sanctions, even when a non-intentional loss
780 of information defeats an adversary's ability to litigate the case.
781 Loss of ESI can have the same consequences as loss of physical
782 evidence.

783 The FJC survey found that about half of sanctions motions
784 involve loss of ESI. Half involve loss of other forms of
785 information. That suggests an attempt should be made to address
786 all forms of information. And there is sufficient controversy
787 about preservation obligations and sanctions to warrant continuing
788 work now. The continuing development of information in various
789 projects, including the Seventh Circuit e-discovery work, the
790 Southern District of New York complex litigation project, and the
791 like, will provide help as the drafts mature, but the work will be
792 prolonged in any event. Ongoing work elsewhere weighs against
793 precipitous action, but precipitous action is not likely in this
794 project.

795 It was further urged that new provisions should not be limited
796 to ESI. "The problems are shared." For that matter, the very
797 concept of ESI is bound to change.

798 A distinctive consequence of ESI was then urged. "Everyone is
799 a filekeeper in the era of ESI. There is no central file as in a
800 paper world." The culpability standard, however, should be the
801 same. "It is easy to delete very quickly." Identifying the
802 trigger for preservation before litigation is filed is important,
803 especially for individuals.

804 An observer noted that there clearly are differences between
805 ESI and other forms of information. The rulemaking question is
806 whether rules that do not distinguish between ESI and other forms
807 of information provide sufficient guidance. The 2006 amendments
808 were shaped in light of information suggesting that judges were not
809 aware of distinctions that make a huge difference for sanctions,
810 and did not understand the loss of information in the routine
811 operation of ESI systems. Are we sufficiently confident now in the
812 case law, and in awareness of computers, to be able to go back to
813 an overarching rule that does not distinguish ESI from "physical
814 stuff"? If not confident, it may be better to distinguish ESI,
815 and not go for a generally applicable approach.

816 A related perspective was offered. Traditionally, common law
817 adapted to evolving technology through decisions. But sanctions

818 affect professional careers. "This affects professional
819 responsibility by sanctions." We want rules that provide guidance.
820 Without rule guidance, lawyers will be very careful. And that can
821 mean costly over-preservation.

822 Another observer reported urging the ABA Business Law section
823 to set up standards of good preservation practice. What
824 preservation features should be incorporated as an entity develops
825 an overall efficient information system? This is a very dynamic
826 field. "The techniques for penetrating into systems to get
827 information are evolving and unstable." A focus on the sanctions
828 problem seems appropriate. Gross negligence may be the right
829 standard for ESI and other forms of information. A general
830 standard can adjust to changing technology.

831 Agreement with this view was expressed. The culpability
832 standard should be the same for ESI and other forms of information.
833 Today we can identify four or five different standards in different
834 circuits. "We need a rule to give us a uniform standard. We can
835 do that more readily than a rule defining trigger and scope."
836 "Residential Funding changed the rules of the game." And the
837 culpability standards should be consistent across all information
838 forms. To be sure, attention to these issues increased
839 exponentially with ESI. But a lot of cases "focus on what
840 individuals have done, and they were things that might have been
841 done with paper files." The ESI cases have simply magnified the
842 disparities around the country. Consider a personal injury victim.
843 To be careful, the victim would have to consider how to respond to
844 inquiries from friends and relatives: is it safe to put a brave
845 face on it, to say "I'm much improved," when the e-mail record may
846 be used to challenge the seriousness of the injury? It will be
847 important to define a culpability standard.

848 It was agreed that harmonizing the approaches to sanctions
849 will not solve all the problems, "but it can improve the
850 situation." And this can leave time for ongoing studies that may
851 help define and resolve some of the other problems. A like comment
852 was that "we may not be able to deal with trigger and scope any
853 time soon. These are difficult problems that cannot be solved as
854 quickly" as sanctions.

855 An observer noted that many kinds of actors are involved in
856 preservation. There is the lawyer in court, house counsel,
857 corporate staff, "the e-mail sitter." It can be hard to figure out
858 who is in a position to do something. The Qualcomm case shows how
859 difficult it can be to pinpoint responsibility.

860 Judge Grimm summarized the discussion by suggesting an
861 apparent Committee view that the Subcommittee should focus first on
862 sanctions, and should focus on tangible as well as intangible
863 information. And the tentative exploration of a separate discovery
864 standard for ESI should be deferred.

865 It was noted that the Department of Justice continues to
866 believe that it is premature to undertake rule revisions even with
867 regard to sanctions. "The time may come for sanctions, but not too
868 soon." In response it was asked whether the desire for more pilot
869 projects reflects a view that the Department encounters problems
870 different from other litigants. The United States is plaintiff or
871 defendant in about one-third of all cases in federal courts. "The
872 jury is still out on exactly what are the problems we need to
873 address. Ongoing studies may shed light. But the United States is
874 not in a distinctive position as compared to other litigants."

875 Observing that some districts have local e-discovery rules, it
876 was asked whether we know about experience with those rules? The
877 Discovery Subcommittee is aware of them, but has not yet attempted
878 to look for a synthesis of experience. It will be good to look
879 when there seems to be a sufficient basis of experience. The
880 Seventh Circuit project, which focuses heavily on cooperation among
881 lawyers by conferring at the beginning of a case, is being studied
882 by the FJC. The FJC also is studying the still young complex
883 litigation project in the Southern District of New York.
884 Eventually there will be information more rigorous than an
885 accumulation of anecdotes. But in the meantime it is useful to
886 continue working on a sanctions rule. A rule will not be developed
887 overnight. The Duke Conference panel said this is an area where
888 the bar really needs guidance. They urged the Committee to take
889 courage. But it also takes time. The Sedona Conference, for
890 example, has been working on these problems for a long time.
891 Meanwhile, "the Subcommittee is doing a great job and should
892 continue."

893 An observer noted that the letter from the Sedona Conference
894 reflects hard and continuing work on these problems. "This
895 demonstrates just how difficult this is." The working group
896 includes people from all sides, from all areas of practice, and is
897 finding it difficult even to find points of agreement. "The
898 process needs to be completely informed." "People have a sense the
899 Committee is about to do something. It would help for people in
900 the bar to hear it's a process."

901 Another observer agreed that it is a process. People have
902 thought the Committee is on the verge of action since the Duke
903 Conference two years ago. The Committee has an obligation to act

904 to clarify when there are clear conflicts in cases purporting to
905 interpret a Federal Rule of Civil Procedure. When conflicts appear
906 in addressing questions not directly addressed by a Rule, the
907 Committee also should consider acting. There is a clear conflict
908 in correlating sanctions with levels of culpability in failing to
909 preserve discoverable information. The Committee must determine
910 whether it would be good to address this conflict while other
911 problems percolate and are studied further.

912 This question was fit into a broader framework. The Committee
913 is charged by § 331 to carry on a continuous study of the operation
914 of Enabling Act rules. "We can study local rules. We can learn
915 from them. But there is a problem. It is difficult to get rid of
916 deeply rooted local rules."

917 Judge Kravitz echoed these views. The law is inconsistent as
918 to sanctions. We know that the Second Circuit has one approach,
919 while other circuits take different approaches. There is no reason
920 not to have a uniform rule. Sanctions — as compared to remedial or
921 curative measures — should be available only for bad behavior.
922 This work was started in 2010. We should be able to continue
923 working toward a rule on sanctions that establishes uniformity,
924 displacing a circuit-by-circuit regime.

925 A Committee member agreed that the primary focus should first
926 be on sanctions. "It will take time." It may be possible to fold
927 the lessons of ongoing studies into the process. "Trigger and
928 scope are not going to go away," but they are not problems for now.

929 Another Committee member also urged a "look at sanctions.
930 Human nature is constant. Duties of lawyers and clients should be
931 constant. Cooperation should be constant." But ESI has a
932 relationship to this. The ongoing studies by the Sedona
933 Conference, the Department of Justice, and others are valuable.
934 For a long time we thought there is a problem of symmetry, that
935 some categories of litigants have far greater stores of information
936 than others have. "But all of us have lots of information." It
937 would be good to focus, through sanctions, on preserving the
938 information that is needed to present a case. "This topic
939 addresses the totality of what happens in court today. The
940 Subcommittee should not work on sanctions in isolation."

941 Judge Grimm expressed the Subcommittee's gratitude for the
942 helpful Committee discussion.

943 *Duke Subcommittee*

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944 Judge Koeltl reported that the Duke Subcommittee has made
945 substantial progress in developing a set of rules sketches to
946 advance the primary goals identified at the Duke Conference.
947 Proportionality, cooperation, and early hands-on case management
948 are central to reducing cost and delay. One initiative encouraged
949 by the Subcommittee was the development of the protocols for
950 initial discovery in employment cases. The protocols call for an
951 exchange of information 30 days after the defendant's responsive
952 pleading or motion. Every judge on the Committee has adopted the
953 protocols, and has urged their colleagues to adopt them. They work
954 extremely well.

955 Ellen Messing, who was involved in drafting the protocols,
956 observed that the protocols, shaped with great help from Judge
957 Koeltl, provide a great boost in streamlining employment actions.
958 They replace current initial disclosures under Rule 26(a)(1),
959 providing information expected to have a significant effect on the
960 parties' ability to get through a case with better focus and
961 efficiency. But there has not been as widespread adoption "as we
962 had fantasized." Direct judicial involvement in promoting use of
963 the protocols will be helpful. Judge Koeltl responded that he and
964 Judge Rosenthal had urged adoption of the protocols to a group of
965 some 70 judges at a recent program at NYU. And the FJC has
966 informed all chief judges of the protocols.

967 Judge Koeltl continued by noting that the Subcommittee would
968 meet the next morning, and would welcome both general and specific
969 discussion of the rules sketches. Are they wise or unwise? Do
970 they go too far, or not far enough? "The book is open." The
971 sketches fall into three categories, focusing on the beginning
972 stages of an action; revising discovery rules; and cooperation.

973 Beginning-stage. One issue is the length of time it takes to get
974 actual litigation started in an action. The 120 days allowed by
975 Rule 4(m) to serve process, the 120- or 90-day periods set for a
976 scheduling order in Rule 16(b), draw things out. The first set of
977 proposals reduce the period in Rule 4(m) to 60 days, and likewise
978 reduce the Rule 16(b) periods by half, to 60 days after service or
979 45 days after an appearance. These periods were chosen simply for
980 illustration; the actual choice may be rather different.

981 Another set of questions addresses how the scheduling order
982 should be developed. The sketches carry forward current Rule
983 16(b)(1)(A), which allows the court to adopt an order after
984 receiving the parties' report under Rule 26(f) without an actual
985 conference. But otherwise, the means of holding a conference are
986 sharpened to require an in-person conference or contemporaneous
987 communication; the provision for consulting by "mail, or other

988 means" would be deleted. Another aspect of scheduling-order
989 practice addressed by the sketches is the provision in Rule
990 16(b)(1) that allows categories of actions to be exempted by local
991 rule. Local-rule exemptions may differ from the exemptions
992 enumerated in Rule 26(a)(1)(B). Rule 26(a)(1)(B) exemptions also
993 apply to the Rule 26(f) meeting of the parties and the Rule 26(d)
994 discovery moratorium. It seems desirable to establish a uniform
995 set of exemptions. The simplest way to do this would be to
996 eliminate the present provision for local-rule exemptions and
997 replace it with adoption of the Rule 26(a)(1)(B) exemptions by
998 cross-reference.

999 The sketches also include alternative provisions aiming at
1000 encouraging a conference with the court before filing a discovery
1001 motion. The more modest approach would add to Rule 16(b)(3) a new
1002 item, providing that a scheduling order may direct the movant to
1003 request an informal conference with the court before filing a
1004 discovery motion. The more ambitious approach would add a new
1005 provision — perhaps in Rule 7 governing motions, or perhaps
1006 somewhere in Rule 26 — directing that the movant must request the
1007 informal conference before filing a discovery motion. It appears
1008 that about two-thirds of federal judges do not now require a pre-
1009 motion conference, so it can be anticipated that many would resist
1010 a rule making it mandatory.

1011 The Rule 26(d) discovery moratorium is addressed by another
1012 set of sketches. Many lawyers seem unaware of the moratorium now,
1013 as witnessed by frequent requests to determine whether discovery
1014 should be suspended pending disposition of a motion to dismiss made
1015 by lawyers who are subject to the moratorium because they have not
1016 yet had a Rule 26(f) meeting. The moratorium may make it more
1017 difficult to have an effective discussion at the Rule 26(f)
1018 meeting. These sketches provide that any party can make discovery
1019 requests at a stated time after service or after some other event,
1020 but defer the time to respond until a stated period after a
1021 scheduling order enters. The idea is that the parties can plan
1022 discovery more effectively at the 26(f) meeting if they have actual
1023 discovery requests to consider. This system is not intended to
1024 support arguments that the first party to serve requests is
1025 entitled to priority in discovery. The only purpose is to make the
1026 26(f) conference more productive. The hope is to expedite
1027 discovery at the outset and to make both the 26(f) meeting and the
1028 scheduling order conference more productive.

1029 Discovery proposals. The need for proportionality in discovery was
1030 repeatedly emphasized at the Duke Conference. The word
1031 "proportionality" does not now appear in the rules. Rule
1032 26(b)(2)(C) does impose proportionality limits, but parties and

1033 courts continue to speak of discovery in terms of the full sweep of
1034 the Rule 26(b)(1) scope provisions. Even appellate courts do this.
1035 The cross-reference to 26(b)(2)(C) at the end of present 26(b)(1)
1036 does not seem to have any real effect.

1037 "Proportionality is important." The Subcommittee prefers to
1038 incorporate the concepts of present 26(b)(2)(C) into the (b)(1)
1039 definition of the scope of discovery. This can be done in various
1040 ways, as illustrated by alternative sketches. Still other sketches
1041 expressly incorporate "proportionality" into the (b)(1) scope
1042 provision, but this seems risky. It would introduce a new concept;
1043 with or without an attempt at further definition, the new concept
1044 would generate uncertainty and corresponding contention.

1045 Proportionality also is approached by reducing the numerical
1046 limits on the presumptively available numbers and length of
1047 depositions, and on the number of interrogatories. Numerical
1048 limits would be added for the first time to Rule 34 requests to
1049 produce and Rule 36 requests for admission. It is possible that
1050 the presumptive limits now in Rules 30, 31, and 33 encourage some
1051 lawyers to engage in more discovery than they would seek without
1052 these targets. The proposed numbers still exceed the level of
1053 discovery activity in the median of federal cases as reported by
1054 the FJC study for the Duke Conference. If lower presumptive limits
1055 encourage the parties to rein in unnecessary discovery, so much the
1056 better.

1057 Discovery problems are not confined to requests.
1058 Inappropriate objection behavior also can be a problem. The
1059 sketches aim to deal with evasive responses, particularly with
1060 respect to document requests. Rule 34 is drawn to require a
1061 response within 30 days, but the response may be either a statement
1062 that inspection and related activities will be permitted as
1063 requested or an objection to the request, "including the reasons."
1064 One narrow proposal is to add to Rule 34 the explicit statement in
1065 Rule 33 that an objection must be stated with specificity. A
1066 broader proposal addresses the common practice of framing a
1067 response to begin with broad boilerplate objections, followed by
1068 producing documents with a statement that the objections are not
1069 waived. This leaves the requesting party uncertain whether
1070 anything has in fact been withheld under the objections. A sketch
1071 addresses this phenomenon by directing that an objection must state
1072 whether anything is being withheld on the basis of the objection.

1073 Contention interrogatories have become a subject of some
1074 contention, particularly with respect to the time when answers
1075 should be provided. The sketches would emphasize a presumption

1076 that ordinarily answers need not be made until other discovery has
1077 been completed.

1078 The value of Rule 26(a)(1) initial disclosures was discussed
1079 inconclusively at the Duke Conference. Some participants think the
1080 practice is useless. Others think it has some small value. Still
1081 others think it could be made truly useful if greater disclosures
1082 were required, perhaps going back to some version of the broader
1083 requirements in place from 1993 to 2000. The Subcommittee is
1084 agnostic on this subject; no sketches have been prepared to
1085 illustrate possible changes. But it is to be noted that the
1086 employment case protocols are designed to displace Rule 26(a)(1) by
1087 providing for initial disclosure of the materials each side
1088 routinely seeks in the first wave of discovery.

1089 The sketches also illustrate possible approaches to shifting
1090 discovery costs from the responding party to the requesting party.
1091 Congress has shown an interest in this topic. Cost shifting
1092 commands a continuing place on the Subcommittee agenda, and remains
1093 an open issue. The Subcommittee is convinced that judges have the
1094 power to order cost shifting now in appropriate cases, and doubts
1095 the need to add emphasis by new rule provisions, but will continue
1096 to consider these questions.

1097 Cooperation. It is difficult to legislate cooperation among
1098 adversary parties. But the sketches provide illustrations of ways
1099 in which parties could be brought into the aspirational provisions
1100 of Rule 1 by a direction to cooperate in seeking the just, speedy,
1101 and inexpensive determination of every action. The importance of
1102 cooperation is continually emphasized in Committee discussions of
1103 preserving discovery materials and shaping discovery more
1104 generally. Professor Gensler has long supported this Rule 1
1105 approach.

1106 Package. The sketches address many separate rules provisions. But
1107 they have been developed as a coherent package of interdependent
1108 changes that are designed to produce a whole greater than the sum
1109 of the parts. That is not to suggest that each part of the package
1110 is indispensable. Far from it. Specific sketches may deserve to
1111 be abandoned. Others may deserve to be added. But the target will
1112 continue to be a comprehensive package that advances the goals so
1113 clearly and repeatedly expressed at the Duke Conference.

1114 One distinct question is how to seek review by a broader
1115 audience. One possibility would be to attempt to recreate the Duke
1116 Conference by a similar, broad-gauged "Duke II." But it may be
1117 wiser to frame a more limited undertaking, perhaps a miniconference
1118 designed to focus specifically on a package of rules proposals

1119 somewhat like the current package. The Committee benefits
1120 continually from input from the bar and organized bar groups. It
1121 seems likely that real benefits would accrue to a conference held
1122 in some form before preparing rules proposals for publication and
1123 general public comment.

1124 Cooperation became the first subject of Committee discussion.
1125 It was asked how litigation is possible without real efforts by
1126 lawyers to work together, to join in solving litigation problems.
1127 Cooperation is especially needed in discovery. Good lawyers
1128 cooperate automatically, without sacrificing representation of
1129 their clients. Courts insist on cooperation. Emphasizing the duty
1130 to cooperate in Rule 1 is a good idea. Another Committee member
1131 agreed that it will be useful to add party cooperation to Rule 1 —
1132 now it is common to find efforts to cooperate rebuffed by arguments
1133 that the Rules nowhere require it.

1134 More general enthusiasm was expressed for "what the
1135 Subcommittee is attempting to do. Judicial involvement at the
1136 earliest possible time is important." Judges who do this now get
1137 good results. Without judge involvement, delay and expense are
1138 increased by "weeks of letter writing" to iron out disputes. When
1139 there is judicial involvement, "you lose all credibility with the
1140 court by taking a bad position."

1141 Another Committee member offered similar support. "There is
1142 a sense of embarrassment that some judges are not doing their
1143 jobs." Time limits, and the reductions in the numbers of discovery
1144 requests, "are to be applauded."

1145 Another judge expressed support for adding cooperation among
1146 the parties to Rule 1. "If the court puts its weight and prestige
1147 behind cooperation, with a representative who is responsible, it
1148 can work."

1149 Further support for the package was expressed by describing it
1150 as "impressive." There is reason to worry about limiting the
1151 number of depositions in "megacases," but lawyers and the court can
1152 determine what is appropriate relief from the presumptive limit.
1153 "Complex litigation should not drive the train too much." The
1154 sketches incorporate a sufficient degree of flexibility.

1155 An observer agreed, but emphasized the need to be clear that
1156 the presumptive limits on discovery are only presumptive, and can
1157 be changed to meet the needs of particular litigation. This can be
1158 dealt with in the Committee Note.

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1159 Another observer suggested that it makes sense to hold a
1160 conference on a specific set of proposals, more sense than another
1161 broad and general conference in the model of the Duke Conference.

1162 The same observer suggested that it would be useful to explore
1163 the value of outside facilitators in the discovery process. Not an
1164 arbitrator, but a mediator, conciliator, or special master. The
1165 effort would be to help the parties toward agreed solutions. "The
1166 business of mediation has become very much part of our profession."
1167 A Committee member extended this observation by noting the
1168 formation of a new American College of e-Neutrals. He added that
1169 when he acts as special master in discovery matters he asks the
1170 court for authority to reapportion allocation of his fees by
1171 assessing more against a party who is unreasonable. This works.
1172 The parties do behave reasonably.

1173 The Committee was reminded that possible rules changes are
1174 only one focus of the Duke Subcommittee's work. It is important
1175 that judges be schooled in best practices, and reminded of them.
1176 Judge Fogel has incorporated case management into conferences for
1177 judges, and they will be emphasized in new judges school. The
1178 benchbook has been revised by adding a detailed explanation of
1179 Rules 16(b) and 26(f) prepared by Committee members, with an
1180 emphasis on the importance of management.

1181 An observer offered special support for the case-management
1182 proposals. "The bar is thirsting for this." The informal
1183 conference before any discovery motion is especially important. it
1184 avoids paperwork and saves time. But she expressed concern about
1185 reducing the presumptive number of depositions and Rule 34 requests
1186 to produce. There is not a significant problem now with excess
1187 numbers of depositions. The presumptive limit to 5 depositions of
1188 4 hours each is insufficient, especially when one party has all the
1189 information and the events in suit cover a broad period of time.
1190 One reaction in employment litigation will be to bring more cases,
1191 so as to be able to multiply the presumptive number of permitted
1192 depositions. In response to a question, she added that the
1193 employment case protocols focus primarily on exchanging documents.
1194 That diminishes the need for Rule 34 requests, and can help
1195 identify the persons who should be deposed, but it is not likely to
1196 reduce the number of depositions that should be taken. Many
1197 employment actions focus on more than one action against the
1198 employee — first discipline, then demotion, then discharge.
1199 Although the proposals allow a request for more depositions, "why
1200 should I have to go to court to get it?" A response was that this
1201 is the beauty of Rule 1 cooperation, and the informal conference
1202 before a discovery motion: if you need 12 depositions, cooperation
1203 should generate authorization for them.

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1204 A final question from an observer asked whether the
1205 Subcommittee had considered amending Rule 26(c) to focus on
1206 disproportionate preservation demands, or amending Rule 27 to allow
1207 prefiling requests for a preservation order. "Prelitigation
1208 preservation is a hugely difficult problem. Consideration should
1209 be given to means of securing pre-litigation guidance from the
1210 court." Judge Koeltl responded that those questions are for the
1211 Discovery Subcommittee, or perhaps in some measure for the
1212 continuing study of pleading in the wake of the *Twombly* and *Iqbal*
1213 decisions. In this vein, it was added that two pre-litigation
1214 problems should be clearly distinguished. The preservation problem
1215 may seem analogous to a Rule 27 petition to preserve testimony, but
1216 there are great differences that suggest any rule-based solution
1217 should be approached independently. The problem of discovering
1218 information needed to frame a pleading with the fact specificity
1219 that may be required by new pleading standards is distinct from
1220 both these problems, and might be addressed by providing discovery
1221 in aid of a complaint already filed rather than discovery before
1222 any action is filed. In whatever form, however, these problems
1223 will not be lost from sight.

1224 *Panel Discussions: Professor Cooper's 20 Years as Reporter*

1225 The afternoon portion of the meeting was devoted to
1226 presentations of outlines of ten of the papers in a set celebrating
1227 the 75th birthday of the Civil Rules in 2013 and Professor Cooper's
1228 twenty years of service as Reporter for the Civil Rules Advisory
1229 Committee. The tribute was organized and carried out by present
1230 and former members of the Committee. The papers will be published
1231 in the Michigan Journal of Law Reform.

1232 Professor Marcus presided over the first panel. Papers were
1233 presented by Professors Burbank, Coquillette, Gensler, Rowe, and
1234 Struve. Collectively, they traced the concept of formal rules of
1235 procedure as far back as Francis Bacon and forward to such issues
1236 as the need to take advantage of what may be ever-increasing
1237 opportunities for rigorous empirical evaluation of the operation of
1238 rules in practice. The difficulties of matching rule direction to
1239 the importance of case-specific discretion were explored, as well
1240 as the difficulties of separating substance from procedure and the
1241 corresponding challenge of framing rules of procedure designed to
1242 transcend any particular substantive field and to be transported
1243 across all substantive subjects of litigation. It was urged that
1244 rulesmakers need to be particularly careful when framing rules that
1245 affect access to court.

1246 Judge Mosman presided over the second panel. Papers were
1247 presented by Judge Rosenthal and Professors Carrington, Kane,

1248 Marcus, and Mullenix. Again a broad range of topics was covered,
1249 beginning with the efforts to confirm the openness of Committee
1250 proceedings by legislation in 1988, and ranging through more recent
1251 and continuing work on class actions, discovery, and the Style
1252 Project.

1253 Detailed summaries of the summaries presented in the panel
1254 discussions would be premature. The finished papers, along with
1255 other papers assessing the ways in which Rules Enabling Act
1256 responsibilities are being carried out, will provide far better
1257 accountings.

1258 *FJC: Early Stages of Litigation Attorney Survey*

1259 Emery Lee presented a summary of his closed-case study of
1260 cases terminated in the last quarter of 2011. The study focused on
1261 categories of cases likely to have discovery activity. It excluded
1262 cases terminated less than 90 days after filing. A survey was sent
1263 to nearly 10,000 lawyers identified from the case files, divided
1264 equally between plaintiffs' lawyers and defendants' lawyers. About
1265 3,500 replied, giving a 36% response rate.

1266 The purpose was to explore actual timing, duration, and use of
1267 Rule 16(b)(2) scheduling conferences and orders, and of parties'
1268 Rule 26(f) meetings. The preliminary findings include these:

1269 Seventy-two percent of respondents reported that they met and
1270 conferred as required by Rule 26(f). But it is tricky to know just
1271 what this figure means, remembering that cases not likely to have
1272 any discovery were winnowed out of the survey sample. Seven
1273 percent could not answer this question — it may be that the "wrong"
1274 attorneys were asked because those who appeared in the docket had
1275 not been involved in the early stages of the litigation. The
1276 figure increased among attorneys involved in cases that had a
1277 scheduling conference with the judge — in those cases, 92% of the
1278 attorneys reported a Rule 26(f) meeting. (The 2009 case study
1279 found 26(f) meetings in 86% of the cases that had any discovery.
1280 The complex litigation survey in SDNY had only a 68% meeting rate;
1281 it is hard to be sure, but one reason for part of the lower rate
1282 may be a high rate of Private Security Litigation Reform Act cases
1283 in which discovery is suspended pending disposition of a motion to
1284 dismiss. The survey of the Seventh Circuit pilot e-discovery
1285 project has no direct question, but it may be possible to back out
1286 a 54% rate.)

1287 Rule 26(f) conferences were most often held by telephone or
1288 videoconference. 86% of the respondents who reported meeting used
1289 one of these means. 9% of the respondents reported in-person

1290 meetings. 25% reported there was some correspondence. 6% reported
1291 there was only correspondence or e-mail exchanges. 74% concluded
1292 the meeting in a single conversation. 96% reported that the
1293 meeting was held far enough in advance of the Rule 16(b) conference
1294 to plan discovery. The modal response indicated that the 26(f)
1295 meeting took from 10 to 30 minutes. Only 8% lasted more than an
1296 hour. The meetings that discuss ESI tend to take longer. These
1297 responses suggest that whatever may be the failings of memory, the
1298 participants do not perceive that 26(f) meetings take a lot of
1299 time.

1300 The reasons for not having a 26(f) conference in cases where
1301 there were none varied. Some of the responses suggest behavior in
1302 defiance of the rule — "we agreed not to," "one side refused," or
1303 "I don't do that." 45% of the answers were "other"; perhaps not
1304 surprisingly, cases in the "other" category had the highest rate of
1305 "other" responses. "Probably Rule 26(f) is honored in most cases
1306 where it should be."

1307 Other questions asked whether the 26(f) meeting served various
1308 ends. 71% reported that the meeting assisted in making
1309 arrangements for initial disclosure; 60% reported it helped to
1310 develop a proportional discovery plan; 50% reported it helped
1311 better understand the opposing party's claims or defenses; 40%
1312 discussed discovery of ESI; and 30% reported that the meeting
1313 increased the likelihood of prompt resolution. Of the 40% that
1314 discussed discovery of ESI, 60% discussed preservation obligations.
1315 These rates suggest there is a lot of room to encourage parties to
1316 discuss ESI discovery and to clarify preservation obligations.
1317 They compare to the Department of Justice survey indicating that
1318 preservation was discussed in 48% of conferences; the rate in the
1319 Seventh Circuit project is 62%, but the project involves cases
1320 expected to have discovery issues. Lower rates were reported in
1321 the survey undertaken to establish a basis of comparison for
1322 studying the new Southern District of New York project for complex
1323 litigation.

1324 Fifty percent of all respondents reported a Rule 16(b)
1325 scheduling conference, either in person or by phone; the rate
1326 increased to 60% of those who had a Rule 26(f) meeting. 94% of
1327 those who reported a Rule 16(b) conference also reported a
1328 scheduling order. Table 12 of the report shows responses to a
1329 question asking the reasons for responses indicating that the Rule
1330 26(f) meeting did not clarify your client's preservation
1331 obligations. 89% answered that their clients' preservation
1332 obligations were clear prior to the conference. Only 7% of the
1333 answers were that opposing counsel was not adequately prepared to

1334 discuss preservation, and 4% reported opposing counsel was not
1335 cooperative.

1336 The cases that did not have a Rule 16(b) conference in person
1337 or by telephone involved various explanations. Of them, 40% stated
1338 that the case was resolved before the conference took place. 12%
1339 reported that the conference was conducted by correspondence. 24%
1340 were cases exempted from the conference by local rule or judicial
1341 order. And 24% gave "other" as the reason.

1342 Proportionality of discovery requests relative to the stakes
1343 in litigation was discussed by the judge in 24% of the Rule 16(b)
1344 conferences, and not discussed in 76%.

1345 The parties' proposed discovery plan was approved without
1346 modification in 39% of the cases, with minor modifications in 57%,
1347 and with major modifications in 4%. But it is difficult to know
1348 how respondents drew the line between minor and major changes. The
1349 most common change appears to involve the time for discovery — are
1350 such changes major or minor?

1351 It has not been done yet, but it will be possible to correlate
1352 the length of the Rule 26(f) meeting with the respondents' views of
1353 how helpful the conference was. It also will be possible to
1354 correlate the length of the meeting with the amount of discovery.

1355 An attempt was made to separate complex cases from other
1356 cases. 25% of those who were asked reported that cases the
1357 researchers expected to be complex were not.

1358 It is not clear how much information can be drawn from the
1359 survey about the topics that were discussed in the Rule 26(f)
1360 meetings that did discuss discovery of ESI. The most commonly
1361 discussed question was the format of production.

1362 *Pleading*

1363 Pleading occupies less than one page in the agenda book. The
1364 page puts a single question. The Committee continues to pay close
1365 attention to the evolution of pleading practices as lower courts
1366 continue to work through the implications of the *Twombly* and *Iqbal*
1367 decisions. Although there is a sense that practices are converging
1368 and settling down, there also is a sense that there may be still
1369 closer convergence over the next year or two. In addition,
1370 empirical studies of pleading and motions to dismiss continue. The
1371 FJC, through Joe Cecil, is about to begin a comprehensive study of
1372 motions to dismiss that will extend beyond Rule 12(b)(6) motions to
1373 include other Rule 12 motions, and to extend beyond that to summary

1374 judgment. The study will be designed to facilitate comparison with
1375 the findings in earlier FJC studies, and to integrate findings on
1376 case terminations by all dispositive pretrial motions. The study
1377 is designed to involve members of the academic community, and to
1378 generate a data base that will be freely available for scholarly
1379 use. This integration with the academic community was lauded as a
1380 very good development.

1381 A second impression supplements the potential values of
1382 deferring any decision whether to begin work toward publication of
1383 possible rules revisions. The potential advantages of delay are
1384 apparent. The potential costs must also be counted. The sense is
1385 that there is no present crisis in federal pleading practice.
1386 Hasty action is not compelled by a need to forestall frequent
1387 unwarranted denial of access to press worthy claims before the
1388 courts. There appears to be an increase in the frequency of
1389 motions to dismiss for failure to state a claim. There may be some
1390 increase in the number of cases terminated by these motions. But
1391 it is not clear whether, if so, the outcomes are good, bad, or
1392 neutral.

1393 So the question put to the Committee was whether this
1394 assessment is wrong. Is there reason to begin immediate work to
1395 refine the many possible alternatives that have been outlined in
1396 earlier meetings? Many of the alternatives focus directly on
1397 pleading standards. Some focus on motions practice. And some
1398 describe different approaches to discovery in aid of framing a
1399 complaint. Models abound and can proliferate. Should they be
1400 advanced now?

1401 Brief discussion concluded that while it is vitally important
1402 to maintain careful and continual study of pleading standards and
1403 practices, the topic is paradoxically too important to justify
1404 present action. It will continue to command a regular place in
1405 agenda materials.

1406 *Rule 23 Subcommittee*

1407 Judge Mosman, Subcommittee chair, led discussion of the Rule
1408 23 Subcommittee's initial work. The Subcommittee, helped by
1409 discussion at the November Committee meeting and the panel
1410 discussion at the January Standing Committee meeting, has
1411 identified five major topics for study. The most important present
1412 question is whether all five of them warrant further work, and
1413 whether there are other topics that also should be considered.
1414 Another question is timing: the Committee has a rather full agenda.
1415 And it will be important to decide on means of gathering
1416 information from outside the Subcommittee and Committee.

1417 The five topics at the front of the present agenda are these:
1418 (1) The role of considering the merits in ruling on class
1419 certification, as illuminated by Ellis v. Costco, Hydrogen
1420 Peroxide, and some parts of WalMart v. Dukes. Is there confusion,
1421 or are there differences, in the role of rigorous analysis? (2)
1422 Should there be criteria for certifying a settlement class
1423 different from the criteria for certifying a litigation class? (3)
1424 What about issues classes, and the relationship between Rule
1425 23(b)(3) and (c)(4)? Is predominance always required, so (c)(4) is
1426 only a trial tool? (4) Are settlement reviews working properly
1427 under the 2003 revision of Rule 23(e)? (5) What is the proper role
1428 of individual monetary awards in Rule 23(b)(2) mandatory classes?

1429 Subcommittee members Klonoff and Cabraser were asked to
1430 describe their views on these subjects.

1431 Dean Klonoff began with the observation that "Hydrogen
1432 Peroxide has caused a sea change in conduct of the class-
1433 certification stage." Courts look to the merits and resolve fact
1434 disputes relevant to determining certification requirements.
1435 Hydrogen Peroxide directs the court to decide which parties'
1436 experts are more credible. Bifurcating class-certification
1437 discovery from merits discovery is more difficult.

1438 As to settlement, the Amchem decision says that certification
1439 of a settlement class does not require finding that the same class
1440 would be manageable as a litigation class. But all other class-
1441 action requirements must be satisfied. Courts refuse
1442 certification, for example, for want of predominance. As Judge
1443 Scirica noted in his opinion concurring in the DeBeers case, the
1444 Amchem decision has caused lawyers to shift to settling claims in
1445 non-class ways without any of the oversight that applies to class
1446 settlements. This development is troubling.

1447 As to issues classes, the Castano decision in the Fifth
1448 Circuit requires predominance for the case as a whole. The Second
1449 and Seventh Circuits, on the other hand, find certification proper
1450 if class disposition "materially advances the case as a whole."

1451 The ALI Principles of Aggregate Litigation attempted to refine
1452 the criteria for reviewing class settlements. Judicial opinions
1453 list a dozen factors or more to be considered, without assigning
1454 relative weights to the different factors. Courts have seized on
1455 the ALI Principles precepts for cy pres settlements, including a
1456 wonderful recent opinion by Judge Rosenthal. Section 3.07 has been
1457 adopted by a couple of courts.

1458 As to Rule 23(b)(2) classes, it would be premature to attempt
1459 to measure the impact of WalMart on some things. WalMart conflates
1460 commonality with predominance, but it is difficult to know how
1461 seriously lower courts will take all statements in the opinion.
1462 There is some question how far Rule 23 can be amended to allow
1463 determination of individual backpay awards in a (b)(2) class, given
1464 the discussion of due process in WalMart. So the role of
1465 individual damages claims remains unsettled.

1466 Any attempt to reformulate the categories of Rule 23(b),
1467 whether along the lines sketched twenty years ago or some other
1468 lines, would be an aggressive move.

1469 In response to a question, Dean Klonoff expressed uncertainty
1470 whether due process can be satisfied by notice on a web site, or by
1471 e-mail. "Individual notice seems too expensive.

1472 Elizabeth Cabraser observed that the "jurisprudence is very
1473 active" in attempting to work through the extent to which the
1474 merits should be considered in deciding on certification. Berry v.
1475 Comcast in the Third Circuit, 655 F.3d 182, formulates a
1476 distinction between looking at the merits for certification and
1477 decision at trial. There are huge issues on how this affects expert
1478 analysis. Must it be done twice? Must discovery be done twice?
1479 The courts are attempting to clarify these issues, but they deserve
1480 Committee study. There is an extreme position that a class can
1481 include only those people who will win at trial; that asks for too
1482 much consideration of the merits at the certification stage.

1483 The developing law, such as the Sullivan case, suggests that
1484 courts can navigate the certification of settlement classes, but it
1485 would be good to develop express rule provisions.

1486 As to issues classes, some courts now fail to navigate the
1487 rule. A recent Seventh Circuit decision, McReynolds v. Merrill
1488 Lynch, is very good, an interesting source on Rule 23(c)(4). The
1489 central perception is that (c)(4) plays different roles at
1490 different stages of a case.

1491 As to settlement review, it would be good to have a "unified
1492 field theory," identifying the factors that can be considered. And
1493 it would be useful to clarify the role of cy pres settlements.

1494 Employment lawyers and civil rights groups are interested in
1495 clarifying Rule 23(b)(2). One approach is to view backpay as
1496 equitable relief. Or it may be that an opportunity to opt out
1497 should be provided; the issue may be the cost of notice. This
1498 could be combined with the issue-class question, recognizing a

1499 (b)(2) class for common issues, with a right to opt out for
1500 individual remedies.

1501 Professor Marcus, Reporter for the Subcommittee, offered
1502 comments on where the Committee has been in the past.

1503 The first observation is that it takes a long time to become
1504 familiar, and then comfortable, with class-action issues. It will
1505 be useful to get to work now. But the WalMart decision is still
1506 recent. Its impact will be worked out only over time.

1507 The Hydrogen Peroxide decision "is a big, big deal," but it
1508 continues to evolve. It may develop into a terrific idea. Or it
1509 may lead to putting the entire cart before the horse, and lead to
1510 litigating the merits in full twice.

1511 Amchem says that the prerequisites to class certification
1512 cannot be bypassed in order to approve a good settlement. Perhaps
1513 that deserves consideration.

1514 There may be an inherent tension between Rules 23(b)(3) and
1515 (c)(4) on issues classes. The circuits have divided. That may be
1516 sufficient reason to take on this subject.

1517 Rule 23(e) as amended in 2003 provides more guidance on
1518 settlement review than its earlier form. Coming to agreement on a
1519 list of the real concerns that should shape review may be a
1520 challenge.

1521 The question of damages in a (b)(2) class is important, but it
1522 is too early to know what the impact of WalMart will be.

1523 Finally, "an academic might want to rethink the categories of
1524 (b)(3), but this would stir controversy."

1525 Discussion began with an observation that review of Rule 23 is
1526 good to the extent of "real legal issues that we can nail down."
1527 The role of issues classes under Rule 23(c)(4) is an example. The
1528 five topics identified by the Subcommittee reflect what is going on
1529 in the courts. It will be useful to study settlement classes and
1530 issues classes. It is not so clear whether there is much for the
1531 Committee to do about Hydrogen Peroxide.

1532 A committee member suggested that it would be useful to
1533 address settlement classes. If often happens that defendants argue
1534 that class certification is impossible, and then switch and want to
1535 certify a class with a settlement already worked out. There is a

1536 temptation to get rid of the case by certifying a class for
1537 settlement.

1538 An observer suggested that the direction to decide on
1539 certification "as soon as practicable" generates enormously complex
1540 issues that make it difficult to decide when to propose Rule 23
1541 revisions. The requirement of strict scrutiny of all the Rule 23
1542 factors before making a certification decision, combined with
1543 uncertainties as to the scope of pre-certification discovery, may
1544 contribute to an urge to settle without doing all the work needed
1545 to satisfy Hydrogen Peroxide standards. "Hydrogen Peroxide has
1546 made a huge difference in the amount of work before certification."
1547 Even if discovery begins with an attempt to bifurcate certification
1548 discovery from merits discovery, you find the plaintiff needs more
1549 information and defendants resist requests for more as involving
1550 merits discovery.
1551
1552 Another observer noted that he had been involved in the
1553 Hydrogen Peroxide litigation. The aftermath is that there is
1554 really no such thing as bifurcated discovery. This is particularly
1555 true as to ESI — it is not feasible to search only for information
1556 bearing on class certification. And much money is being spent on
1557 full expert damages analysis. It takes six months to a year longer
1558 to reach a certification decision than was required before Hydrogen
1559 Peroxide. In response to a question whether all that pre-
1560 certification discovery makes it easier to be ready for trial after
1561 certification, the observer stated that judges allow 90% of
1562 discovery before the certification decision. "Only clean-up is
1563 left."

1564 The first observer described experience in a current case with
1565 bifurcated certification discovery. The schedule sets a 2-month
1566 deadline. The information has not yet been provided. When it
1567 comes, it will be an "information dump." More time will be needed
1568 to explore it. Clarification of what is needed for certification
1569 is important. This is not an argument to delete the "as soon as
1570 practicable" requirement, but is an argument to clarify for the
1571 courts what it is that you need to win certification, and how you
1572 are to gather that information.

1573 When asked, these two observers said that these problems are
1574 both problems of discretion and problems of confusion about legal
1575 standards. The issues are resolved when an experienced judge has
1576 the case, but it takes too long. "Then there are judges who do not
1577 understand." The legal issues need to be clarified to guide them.

1578 Another observer suggested that the question whether rules can
1579 help depends on the source of the problems. If it is lack of

1580 clarity in the standard of proof — a preponderance of the evidence
1581 required for all certification elements, as in Hydrogen Peroxide —
1582 a rule might help. If the problem is that cases vary in case-
1583 specific ways, such as defining the scope of the class, the issues
1584 for certification, claims, or defenses, there is less room for
1585 rulemaking.

1586 Objectors have been a source of concern in the past,
1587 especially as they affect the appeal process. Is this still a
1588 problem? If it is, can it be effectively addressed by a rule? One
1589 response was that this still is a problem.

1590 A different observer said that civil rights plaintiffs "are
1591 clamoring about (b)(2)." They do not know how to handle Title VII
1592 classes. The Seventh Circuit has provided some help. And it may
1593 help to make use of (c)(4) issues classes.

1594 This observation led to a statement that backpay "is a subset
1595 of a bigger problem." Class actions have been used for a long time
1596 to resolve liability, with follow-on individual proceedings. How
1597 does this work after WalMart? The question of commonality involves
1598 far more than (b)(2) classes and backpay. An extreme position
1599 would be that class actions cannot be certified when individual
1600 follow-on proceedings are needed. The observer agreed that Title
1601 VII cases can be seen as a subset. This also relates to scrutiny
1602 of the merits at the certification stage. One approach has been to
1603 require that each class member have "standing," and to limit
1604 standing to those who have valid claims on the merits. That could
1605 be crippling.

1606 A different approach to the issue-class question was
1607 suggested. The WalMart opinion makes assertions about the
1608 preclusive effects of class decisions on individual actions. This
1609 is a thorny set of problems. Will lower courts say that all
1610 individual claims must be resolved in full, so as to achieve claim
1611 preclusion foreclosing any later individual actions? Or will a
1612 narrower scope of preclusion suffice, as with a (c)(4) issue class?

1613 Returning to an earlier observation, it was said again that
1614 there have been many class certifications, such as those involving
1615 pharmaceuticals or other mass torts, that look for resolution of
1616 central liability issues on a class basis — something of an issue
1617 class, although often not conceived that way — to be followed by a
1618 claims resolution mechanism to determine individual awards. "What
1619 have we done with this structure"?

1620 One observer responded that, putting aside dicta on due
1621 process, the WalMart decision is, on its face, an interpretation of

1622 Rule 23. The biggest due process concern arises from issue and
1623 claim preclusion. Current Rule 23(b)(2) is cast in equitable terms
1624 because the cases finding it fair to bind an individual not
1625 personally present were decided in equity. It may be possible to
1626 fit into (b)(2) low-value consumer cases, cases with formulaic
1627 relief, cases in which individual awards can be determined by a
1628 spreadsheet.

1629 A Committee member said that many courts use (b)(3) the same
1630 way others use (c)(4). A class is certified to deal with common
1631 issues, then the follow-on issues. There need not be an
1632 inescapable tension, a choice. Rule 23(c) requires definition of
1633 class claims, issues, or defenses, and the definition must be
1634 included in the class notice. This addresses due process concerns.
1635 So it would be possible to amplify (b)(2) notice requirements for
1636 some purposes.

1637 An observer suggested that "notice is something you can do
1638 quickly. Paper notice is not practical. People toss out the mail
1639 as junk."

1640 Judge Mosman asked how the Subcommittee should proceed in its
1641 next steps. One Committee member responded that these issues
1642 attract great attention. The Subcommittee should ask at the
1643 beginning what the questions will be, so that everyone can
1644 participate in providing information and points of view. The
1645 Subcommittee should reach out to groups that represent
1646 practitioners — the ABA, the American College, the American
1647 Association for Justice, and so on. It should describe the issues
1648 that are being considered, and ask whether there are other issues
1649 that should be considered. "There will be people with real
1650 information, and different views." And beyond the beginning, we
1651 want involvement in an ongoing way, so we can consider all the
1652 things that we are most likely to hear later if we do not hear them
1653 and react to them earlier.

1654 Another Committee member recalled the very useful initial Rule
1655 56 miniconference that was held while the drafts were still in a
1656 preliminary stage.
1657
1658 An observer suggested that a miniconference would be good.
1659 She also noted that the Sedona Conference is hard at work on these
1660 issues.

1661 Judge Koeltl thanked the Rule 23 Subcommittee for all its hard
1662 work, and urged that further comments be sent to them.

1663 *Rule 55*

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1664 At the November meeting Judge Harris described a problem that
1665 some courts have encountered in understanding the
1666 interrelationships between Rules 54(b), 55(c), and Rule 60(b).
1667 Rule 55(c) states that a court may set aside a default judgment
1668 under Rule 60(b). The issue arises when a court enters a default
1669 "judgment" that disposes of less than all of the claims among all
1670 the parties in the case. Unless the court specifically directs
1671 entry of final judgment, the default judgment is not final. Rule
1672 54(b) provides that the judgment may be revised at any time before
1673 entry of a judgment "adjudicating all the claims and all the
1674 parties' rights and liabilities." Rule 60(b), which sets demanding
1675 standards for relief from a final judgment, applies only to final
1676 judgments. A proper understanding of Rule 55(c) is that it invokes
1677 Rule 60(b) only as to a final default judgment. But some courts
1678 have had to struggle to reach this understanding.

1679 The proposal is to revise Rule 55(c) by adding a single word:
1680 "The court * * * may set aside a <u>final</u> default judgment under Rule
1681 60(b)."

1682 The proposal was described as "a simple fix." It adds
1683 clarity, and will spare confusion in the future.

1684 Agreement was expressed. This is a perfectly reasonable
1685 change, in keeping with the Style Project approach to adding
1686 clarity that merely expresses the rule's present meaning.

1687 The Committee unanimously approved a recommendation to publish
1688 this amendment of Rule 55(c) for comment. Because it is a simple
1689 clarification, there is no urgency about rushing to publication.
1690 It should be held until it can be included in a package with other
1691 published proposals.

1692 The draft Committee Note included three paragraphs. The second
1693 and third were enclosed in brackets, to indicate that they are
1694 subject to challenge as offering advice about practice in ways
1695 better avoided in Committee Notes. The Committee agreed. Only the
1696 first paragraph, explaining the "purpose to make plain the
1697 interplay between Rules 54(b), 55(c), and 60(b)," will remain.

1698 *Rule 84*

1699 Judge Pratter introduced the Subcommittee Report on Rule 84.
1700 Questions about the role of Rule 84 forms arose with the perception
1701 that the pleading forms seem inconsistent with the pleading
1702 standards described in the *Twombly* and *Iqbal* decisions. At the
1703 same time, concerns were expressed that it might be better to
1704 explore not only the pleading forms, but more general questions as

1705 to the continuing role of the full Enabling Act process in
1706 promulgating forms that "suffice under these rules."

1707 A subcommittee was formed with representatives from each of
1708 the advisory committees for rules that are in some way connected to
1709 forms. The Appellate Rules Committee and the Civil Rules
1710 Committees are the only committees that adopt forms through the
1711 full Enabling Act process. Bankruptcy forms are approved by the
1712 Judicial Conference and do not proceed further in the Enabling Act
1713 process. Criminal Rules forms are developed by the Administrative
1714 Office; the Administrative Office occasionally consults with the
1715 Criminal Rules Committees.

1716 More importantly, it was decided that forms play different
1717 roles with respect to different sets of rules. There are only a
1718 few Appellate Rules forms. The bankruptcy forms play an integral
1719 role with much bankruptcy administration. The criminal forms are
1720 seldom used by defendants.

1721 More importantly still, it was concluded that — in light of
1722 different histories, present practices, and differing uses of
1723 rules-annexed forms — there is no need to adopt a common approach
1724 to forms among all of the advisory committees. Each advisory
1725 committee should be free to determine the approach most suitable
1726 for its set of rules, keeping the other advisory committees
1727 informed of any changes in basic approach.

1728 There are a lot of Rule 84 pleading forms. The beginning
1729 question was whether an attempt should be made to revise them to
1730 accord with new pleading standards. "We could choose to do nothing.
1731 that would make some people very unhappy. There is real concern
1732 that pleading forms — especially Form 18 for patent infringement
1733 cases — do not fit with *Twombly* and *Iqbal*."

1734 One approach would be to "manicure" the collection of forms.
1735 One possibility would be to cut off the pleading forms, retaining
1736 the others. (The alternative of drafting revised pleading forms is
1737 unattractive.)

1738 Another alternative would be to drop Rule 84 entirely. Or it
1739 could be retained, but modified to delete the statement that the
1740 forms suffice under the rules. The forms would become mere
1741 illustrations of possibilities.

1742 Or the Civil Rules Committee could adopt the approach followed
1743 for the Criminal Rules, relying on the Administrative Office as the
1744 primary source of forms. "Wonderful forms abound. The least
1745 wonderful are the Rule 84 forms." The Administrative Office rules

1746 group will meet next fall; the meeting could be scheduled next to
1747 the Civil Rules Committee meeting, affording an opportunity for
1748 Committee members to observe if that seems useful.

1749 Or the Committee could review the forms and decide which forms
1750 deserve to be retained in some form, apart from pleading. Forms
1751 may be desirable when addressing topics that seem particularly
1752 important, or that seem to present special needs for uniformity.
1753 Forms 5 and 6, dealing with a request to waive service of process
1754 and waiver, are examples of important forms. Rule 4(d), indeed,
1755 requires use of Form 5. The form invitation to consent to trial
1756 before a magistrate judge may be another illustration — it is
1757 important to avoid any hint that the court encourages consent.
1758 Uniformity may be useful in dealing with such things as the caption
1759 of pleadings, the summons served at the beginning of an action, and
1760 possibly some others.

1761 If only a few forms deserve "official" status, they might be
1762 retained. Form 5 is an example of a form made mandatory; perhaps
1763 that approach should be followed for a few other forms. Rule 84
1764 might be used for that purpose, or the requirement could be
1765 expressed in rule text, as in Rule 4(d).

1766 Discussion began with the suggestion that "'do nothing' is not
1767 an option." Case law suggests that the pleading forms do not
1768 suffice under Rule 8, contrary to the statement in Rule 84. "No
1769 one would think we should have Rule 84 if we were starting today.
1770 We should disavow it." The Administrative Office forms can help.
1771 Any really important form can be adopted by specific rule
1772 provisions.

1773 Another Committee member agreed that the best step is to
1774 eliminate Rule 84.

1775 Some concern was expressed about the value of Forms 60 and 61,
1776 the Notice of Condemnation and a Complaint for Condemnation. The
1777 Department of Justice will review them.

1778 It was noted that going through the full Enabling Act process
1779 is time consuming. If the Committee wishes to retain
1780 responsibility for the Forms, it will be necessary to lavish more
1781 time on reviewing and maintaining them than has been devoted to
1782 them in the last many years. Diversion of Committee resources to
1783 this task could exact a high price in discharging more important
1784 responsibilities.

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1785 It was suggested that the forms were adopted in 1938 for
1786 pedagogic purposes, to draw pictures of what the new rules
1787 contemplated. That is not a reason to continue them now.

1788 An observer described Judge Hamilton's dissent in a recent
1789 Seventh Circuit case pointing out the incongruity of the Rule 84
1790 forms with recent pleading decisions. That may suggest the need to
1791 act sooner, not later.

1792 Other Committee members agreed that "people like
1793 simplification," and that it would be good to abrogate Rule 84, and
1794 all the forms with it. "There are other ways of getting forms out
1795 there." But it will remain important to retain, in some way, any
1796 form that is mandated by a specific rule outside Rule 84.

1797 The Rule 84 question has been on the agenda for some time. It
1798 may be that the pleading forms raise questions sufficiently awkward
1799 as to counsel prompt action. The Committee agreed that the Rule 84
1800 Subcommittee should consider these questions promptly, and
1801 determine whether the Committee should recommend publication of a
1802 proposal to the Standing Committee this spring. If the
1803 Subcommittee concludes that a recommendation should be made, it
1804 will circulate a proposal to the Committee. The Committee can then
1805 decide whether to carry the issue forward to the November meeting,
1806 or instead to recommend publication this summer.

1807 *Next Meeting*

1808 The next Committee meeting is scheduled for November 1, and 2
1809 at the Federal Judicial Center in Washington, D.C.

1810 The Committee expressed all best wishes to Judge Kravitz, and
1811 to Judge and Mrs. Campbell. And it noted that the same thoughts
1812 and wishes were expressed in toasts at the Committee dinner.

1813 The Committee also expressed its thanks to all the panel
1814 members who traveled to Ann Arbor to deliver summaries of their
1815 papers. It is important to keep in mind, and to publicize, the
1816 achievements of the Committees over time and the importance of
1817 maintaining the Enabling Act tradition of open, deliberate,
1818 responsible rulemaking.

1819 Respectfully submitted,

1820 Edward H. Cooper
1821 Reporter.

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

MARK R. KRAVITZ
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JEFFREY S. SUTTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

TO: Honorable Mark R. Kravitz, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Eugene R. Wedoff, Chair
Advisory Committee on Bankruptcy Rules

DATE: May 14, 2012

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on March 29 and 30, 2012, in Phoenix, Arizona. The draft minutes of that meeting follow this report in Appendix C.

At the meeting the Advisory Committee took action on the proposed rule and form amendments that were published for comment in August 2011. Fifteen comments were submitted in response to the publication, and the Committee received testimony telephonically. The Committee considered the comments and testimony in a series of subcommittee conference calls and in discussions at the Phoenix meeting. The comments and testimony are summarized below. The Advisory Committee now seeks the Standing Committee's final approval and transmission to the Judicial Conference of the published amendments to five rules and one official form.

The Advisory Committee also took action at the spring meeting on proposed rule and form amendments that resulted from two long-term Committee projects: (1) revision of the

bankruptcy appellate rules (Part VIII of the Rules of Bankruptcy Procedure) and (2) revision of all of the official bankruptcy forms (the Forms Modernization Project). The Committee requests publication for public comment of revised Part VIII and several modernized forms for use in individual-debtor bankruptcy cases.

Other matters considered by the Advisory Committee included suggestions for rule or form amendments that were submitted by members of the bench and bar, including rule amendments proposed in response to the Supreme Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011). The Committee voted to recommend several rule and form amendments in response to these suggestions.

Part II of this report discusses the action items, which are grouped into three categories:

(a) matters published in August 2011 for which the Advisory Committee seeks approval for transmission to the Judicial Conference—amendments to Rules 1007(b), 5009(b), 9006, 9013, and 9014, and Official Form 7;

(b) matters for which the Advisory Committee seeks approval for transmission to the Judicial Conference without publication—technical or conforming amendments to Rule 4004(c) and Official Forms 9A - 9I, 10, and 21; and

(c) matters for which the Advisory Committee seeks approval for publication in August 2012—amendments to Rules 1014, 7004, 7008, 7012, 7016, 8001-8028, 9023, 9024, 9027, and 9033, and Official Forms 3A, 3B, 6I, 6J, 22A-1, 22A-2, 22B, 22C-1, and 22C-2.

After discussing these action items, the report in Part III presents information about the rule and form amendments published for comment last August that the Advisory Committee is not seeking at this meeting to have approved for transmission to the Judicial Conference.

Finally, Part IV discusses the Committee's ongoing work in preparing a model chapter 13 plan with related rule amendment proposals, plans for a September mini-conference on the mortgage forms that went into effect last December, the continuing work of the Forms Modernization Project, and the Committee's decision to consider issues related to the use of electronic signatures in documents filed in the bankruptcy court.

II. Action Items

A. Items for Final Approval

1. Amendments Published for Comment in August 2011. **The Advisory Committee recommends that the proposed rule and form amendments that are summarized below be approved and forwarded to the Judicial Conference. It recommends that the amended form take effect on December 1, 2012.** The texts of the amended rules and form are set out in Appendix A.

Action Item 1. Rules 1007(b)(7) and 5009(b) involve the obligation of individual debtors in chapters 7, 11, and 13 to complete a personal financial management course as a condition of receiving a discharge in bankruptcy. Rule 1007(b)(7) currently requires the debtor to file a "statement of completion of a course concerning personal financial management, prepared as prescribed by the appropriate Official Form." That form is Official Form 23, which requires the debtor to certify completion of an instructional course in personal financial

management. Accordingly, Rule 5009(b) now requires the clerk to send notice to an individual debtor who has not filed Official Form 23 within 45 days after the first date set for the meeting of creditors. Debtors who do not file the necessary statement of completion from their course provider are not given a discharge before their cases are closed. Many of these cases are reopened later, necessitating the payment of an additional fee.

The Advisory Committee sought publication of amendments that would streamline the process of filing statements of the completion of financial management courses. The amendments remove the obligation of the debtor to file Official Form 23 if the financial management course provider has notified the court of the debtor's successful completion of the course. Rule 1007(b)(7) would be amended to authorize providers to file course completion statements directly with the court. Rule 5009(b) would be amended to direct the clerk to send notice to the debtor only if the debtor is required to file the statement and the provider has not already done so. At its June 2011 meeting, the Standing Committee approved the request for publication.

Upon publication, the Advisory Committee received five comments. Three comments expressed support for the amendments. They were submitted by Michael Shklar, Phillip Dy, and Ganna Gudkova. Two comments opposed the amendments. Jeanne E. Hovenden, an attorney in Virginia, urged that the debtor's attorney should be required to file the statement of completion. She expressed concern that allowing a financial course management provider to file the statement directly with the court may lead to a discharge even when it is not in the debtor's best interest. Because the provider is not familiar with all the circumstances of a case, the provider will not know if a particular debtor would be better served by not receiving a discharge. Raymond P. Bell, Jr., of Pennsylvania submitted a comment agreeing with Ms. Hovenden and emphasizing that the debtor's attorney or the debtor should bear responsibility for filing the statement of completion.

The Advisory Committee did not view the concern raised by the negative comments as a substantial one. As Ms. Hovenden's comment recognized, only in rare cases would a debtor want to avoid a discharge. When those cases do arise, the debtor may decline to receive a discharge in other ways. The debtor has the option of waiving the discharge under § 727(a)(10) of the Code or failing to complete plan payments under chapter 11 or 13, which would result in denial of a discharge despite the filing of a notification of course completion by the provider.

Accordingly, the Advisory Committee voted unanimously to recommend approval of the amended rules as published.

Action Item 2. Rules 9006, 9013, and 9014 would be amended to highlight the default deadlines for the service of motions and written responses. Rule 9006, based on Civil Rule 6, contains a subsection regarding the time for service of motions. Rule 9006(d) regulates timing for any motions not addressed elsewhere in the Bankruptcy Rules or by order of the court. Unlike the civil rule, however, Rule 9006 does not indicate in its title that it addresses time periods for motions. Nor is it followed by a rule that addresses the form of motions, as is the case with the civil rule.

The Advisory Committee proposed several amendments to highlight the existence of Rule 9006(d). The title of Rule 9006 would be amended to add a reference to the "time for motion papers." This change, which is consistent with Civil Rule 6, should make it easier to find the provision governing motion practice. Coverage of subdivision (d) would be expanded to

address the timing of the service of any written response to a motion (rather than only opposing affidavits as the rule current states). This change would make the provision as inclusive as possible in order to capture differences in local motion practice. Rule 9013, which addresses the form and service of motions, would be amended to provide a cross-reference to the time periods in Rule 9006(d). This amendment is also intended to call greater attention to the default deadlines for motion practice. In addition, stylistic changes would be made to Rule 9013 to add greater clarity. Rule 9014, which addresses contested matters in bankruptcy, would similarly be amended to provide a cross-reference to the times under Rule 9006(d) for serving motions and responses.

No comment was received on these amendments. The Advisory Committee voted unanimously to recommend approval of the proposed amendments to Rules 9006, 9013, and 9014 as published.

Action Item 3. Official Form 7 is the debtor's Statement of Financial Affairs. The form requires debtors to disclose certain payments made to or for the benefit of insiders. The current version of the form contains a definition of "insider" that differs from the Bankruptcy Code's definition of the term. As used in the form, the term includes "any owner of 5 percent or more of the voting or equity securities of a corporate debtor and their relatives." The Code definition of "insider" lists other qualifying relationships, including a "person in control" of a corporate debtor, but makes no reference to a five-percent shareholder. 11 U.S.C. § 101(31). Although the Code gives a nonexclusive definition of an insider, the Advisory Committee found no basis for concluding that § 101(31) provides authority for the current definition used in the form. The Code does not contain a bright-line test that invariably makes a five-percent shareholder an insider. That language was added to the form in 2000, but no explanation for the addition appears in the Committee Note, the Advisory Committee's report to the Standing Committee, or the Advisory Committee minutes.

As amended, the definition of insider in Form 7 would adhere more closely to the Code. The language regarding a five-percent shareholder of a corporate debtor would be deleted. In its place, the definition would include "any persons in control of a corporate debtor." The statutory reference following the definition would also be updated to give a pinpoint citation to the definition of insider in the Code.

Upon publication, no comment was received on this amendment. The Advisory Committee voted unanimously to recommend approval of the proposed amendment to Official Form 7 as published.

2. Amendments for Which Final Approval Is Sought Without Publication. **The Advisory Committee recommends that the proposed amendments that are summarized below be approved and forwarded to the Judicial Conference. It recommends that the amended forms become effective on December 1, 2012.** Because the proposed amendments are technical or conforming in nature, the Committee concluded that publication for comment is not required. The texts of the amended rules and forms are set out in Appendix A.

Action Item 4. Rule 4004(c)(1) would be amended to conform to the simultaneous amendment of Rule 1007(b)(7) and to state in more precise language other provisions of the subdivision.

As discussed above, the Advisory Committee is recommending that the Standing Committee forward to the Judicial Conference an amendment to Rule 1007(b)(7) that would allow providers of courses on personal financial management to notify a bankruptcy court directly that a debtor had completed the course. Notification by the provider would relieve the debtor of the obligation to file a certificate of completion. Consistent with that change, Rule 4004(c)(1)(H) would be amended to provide that the court must delay entering a discharge for a debtor who has not filed a certificate of completion only if the debtor was in fact required to do so under Rule 1007(b)(7).

The other two changes to Rule 4004(c)(1) are clarifications. One makes clear that the circumstances listed in the paragraph prevent the court from entering a discharge. The other states specifically that the prohibition on entering a discharge under subdivision (c)(1)(K) ceases when a presumption of undue hardship expires or the court concludes a hearing on the presumption.

Because the latter amendments would simply state more precisely the existing meaning of the provision and because the first one is conforming, the Committee voted unanimously to recommend that they be approved without publication.

Action Item 5. Official Forms 9A-9I and 21 would be amended to reduce the risk that a debtor's Social Security number will be inadvertently disclosed publicly in a bankruptcy case. The Advisory Committee would add prominent warnings about proper submission of the forms, which may contain a debtor's Social Security information.

Official Form 9 is directed at creditors. A particular version of the form (denoted Form 9A through Form 9I) applies depending on the nature of the bankruptcy case, but all serve the same function. The form gives notice to potential creditors of the debtor's bankruptcy case and provides important information, such as the date of the meeting of creditors and the deadline to object to an individual debtor's discharge. The form includes identifying information to allow a recipient to determine whether it is a creditor of the debtor. For individual debtors, that identifying information includes the debtor's Social Security information. A redacted version of Form 9 is included in the court files. Official Form 21 is directed at the debtor. The form requires debtors to disclose, under penalty of perjury, their Social Security numbers. Neither the unredacted version of Form 9 sent to creditors nor Form 21 is intended to be placed on the public docket of a bankruptcy case.

The Judicial Conference's Committee on Court Administration and Case Management raised the concern that bankruptcy forms may be mistakenly filed in ways that publicly reveal debtors' private identifying information. To respond to that concern, the Advisory Committee would amend Form 9 to make clear that a creditor should not attach a copy of the form when filing a proof of claim. Stylistic changes have also been made to the form. Similarly, the Advisory Committee would add to Form 21 a prominent warning about proper submission of the form, so as to avoid its inadvertent inclusion on the court's public docket.

Because the changes to the forms do not alter their function or purpose, the Advisory Committee voted unanimously to recommend that the amended forms be approved without publication.

Action Item 6. Official Form 10 would be amended (1) to eliminate a reference to filing a power of attorney with a proof of claim, thereby conforming to Rule 9010(c), and (2) to include statements about the attachment of required documentation for certain types of claims.

Rule 9010(c) generally requires an agent to give evidence of its authority to act on behalf of a creditor in a bankruptcy case by providing a power of attorney. This requirement, however, does not apply when an agent files a proof of claim. The Committee therefore voted unanimously to remove from the signature box of Form 10 the instruction that an authorized agent "attach copy of power of attorney, if any."

The Committee voted unanimously at its spring 2011 meeting to include in line 7 of Form 10 statements that certain required documentation is attached. For claims secured by the debtor's principal residence, the form would state that the Mortgage Proof of Claim Attachment—required as of December 1, 2011—is being filed with the claim. For claims based on an open-end or revolving consumer credit agreement, the form would state that the information required by Rule 3001(c)(3)(A)—scheduled to take effect on December 1, 2012—is attached.

B. Items for Publication in August 2012

The Advisory Committee recommends that the proposed amendments that are summarized below be published for public comment. The texts of the amended rules and official forms are set out in Appendix B.

Action Item 7. Rule 1014(b) would be amended to clarify the proper course of action when bankruptcy petitions involving the same or related debtors are filed in different districts. The current rule provides that, upon a motion, the court in which the first-filed petition is pending may determine—in the interest of justice or for the convenience of the parties—the district or districts in which the cases will proceed. Courts in the other districts must stay proceedings in later-filed cases until the first court makes its determination, unless that court orders otherwise. By default, the later cases are therefore stayed while the venue question is pending before the first court.

The Advisory Committee voted to seek publication of an amendment to Rule 1014(b) that alters this default requirement. The amendment provides that proceedings in subsequently filed cases are stayed only upon order of the court in which the first-filed petition is pending. This change is intended to prevent disruption of the other cases unless there is a judicial determination that a stay of a related case is needed while the first court makes its venue determination. The amendment will also clarify who should receive notice of the hearing on the venue motion by incorporating by reference the entities entitled to notice under Rule 2002(a). In addition, stylistic changes have been made to the rule.

Action Item 8. Rule 7004(e) would be amended to change the time in which a summons remains valid after it is issued. The amendment reduces that period from fourteen days to seven days. This change is intended to ensure that a defendant has sufficient time to respond to a complaint in bankruptcy litigation. The Civil Rules and Bankruptcy Rules use different methods to calculate a defendant's time to respond to a complaint. Under the Civil Rules, the defendant's time to respond begins when the summons and complaint are served. The Bankruptcy Rules, however, calculate the defendant's response time from the date the summons is issued. Although Rule 7012(a) of the Bankruptcy Rules gives a defendant (other than a United States

officer or agency) thirty days to answer a complaint, a lengthy delay between issuance and service of the summons may unduly shorten the defendant's time to respond in a bankruptcy proceeding.

Concluding that a seven-day window of time is sufficient for service of the summons, the Advisory Committee voted unanimously to seek publication of an amendment to shorten the period of time in which a summons remains valid. The amendment is intended to encourage prompt service after issuance of a summons.

Action Item 9. Rules 7008, 7012, 7016, 9027, and 9033 would be amended to respond to the Supreme Court's recent decision in *Stern v. Marshall,* 131 S. Ct. 2594 (2011). In *Stern*, the Court held that a non-Article III bankruptcy judge could not enter final judgment on a debtor's common law counterclaim brought against a creditor of the bankruptcy estate. Although the Judicial Code, 28 U.S.C. § 157(b), deemed the counterclaim a "core" proceeding that a bankruptcy judge could hear and determine, the Court found Congress's assignment of final adjudicatory authority to the bankruptcy judge in the proceeding to be unconstitutional.

The Bankruptcy Rules follow the Judicial Code's division between core and non-core proceedings. The current rules contemplate that a bankruptcy judge's adjudicatory authority is more limited in non-core proceedings than in core proceedings. For example, parties are required to state whether they do or do not consent to final adjudication by the bankruptcy judge in non-core proceedings. There is no comparable requirement for core proceedings. *Stern* has introduced the possibility, however, that a proceeding defined as core under the Judicial Code may nevertheless lie beyond the constitutional power of a bankruptcy judge to adjudicate finally. Accordingly, a proceeding could be "core" as a statutory matter but "non-core" as a constitutional matter.

The Advisory Committee voted unanimously to seek publication of amendments to the Bankruptcy Rules that address this concern. The proposed amendments will alter the Bankruptcy Rules in three respects. First, the terms core and non-core will be removed from Rules 7008, 7012, 9027, and 9033 to avoid possible confusion in light of *Stern*. Second, parties in all bankruptcy proceedings (including removed actions) will be required to state whether they do or do not consent to entry of final orders or judgment by the bankruptcy judge. Third, Rule 7016, which governs pretrial procedures, will be amended to direct bankruptcy courts to decide the proper treatment of proceedings.

These amendments are not intended to take a position on the question whether party consent is sufficient to permit a bankruptcy judge to enter final judgment in a proceeding that would otherwise lie beyond the judge's adjudicatory authority. Instead, the proposed changes to the Bankruptcy Rules are designed to frame the question of adjudicatory authority and allow the bankruptcy judge to determine the appropriate course of action. The court must decide whether to hear and finally adjudicate the proceeding, whether to hear it and issue proposed findings and conclusions, or whether to take some other action.

Action Item 10. Rules 8001-8028 (Part VIII of the Bankruptcy Rules) are the proposed revision of the bankruptcy appellate rules. They result from a multi-year project to bring the bankruptcy appellate rules into closer alignment with the Federal Rules of Appellate Procedure; to incorporate a presumption favoring the electronic transmission, filing, and service of court documents; and to adopt a clearer style. At the outset of the project, the Committee hosted two mini-conferences on the subject of the bankruptcy appellate rules. Judges, lawyers, court

personnel, and academics who had substantial experience with bankruptcy appeals attended. Subsequent drafting, review, and refinement of the proposed rules received the benefit of input from the Appellate Rules Committee and its reporter, Professor Struve. The Committee also incorporated style suggestions of the Standing Committee's style consultant, Professor Kimble.

The Advisory Committee presented the first half of the Part VIII revision (Rule 8001-8012) to the Standing Committee at its January 2012 meeting for preliminary review. The Committee later made revisions to the draft in response to the Standing Committee's comments.

The Advisory Committee unanimously approved the entire draft of revised Part VIII at its spring meeting and approved some additional revisions by a later email vote. It now requests approval of the publication of revised Part VIII for public comment in August. The text of the proposed rules and their committee notes are set out in Appendix B.2.

As the Committee explained in January, the revision of Part VIII is comprehensive. Existing rules have been reorganized and renumbered, some rules have been combined, and provisions of other rules have been moved to new locations. Much of the language of the existing rules has been restyled. Because of the comprehensive nature of the proposed revision, it is not possible to present the amendments in a redlined version that points out changes to the existing rules. Nor can the proposed revision be presented in a comparative format like the one used for the restyled Evidence Rules.

This part of the report instead discusses substantive changes that were made to the first half of the Part VIII rules after the January meeting, and then, following the same approach as in the Committee's last report, it addresses individually the rules not previously presented to the Standing Committee (Rules 8013-8028). For each rule, the report notes significant changes from the existing Bankruptcy Rules and decisions to depart from the Appellate Rules.

Rule 8001 (Scope of the Part VIII Rules; Definition of "BAP"; Method of Transmission). In response to comments at the Standing Committee meeting, the Advisory Committee revised this rule to eliminate the definitions of "appellate court" and "transmit." Prior drafts of Part VIII used the term "appellate court" to mean only a district court or BAP. Some members of the Standing Committee pointed out that this narrow definition of "appellate court," which excludes courts of appeals, would be confusing to a reader who did not first consult Rule 8001. The proposed rules now refer to all courts by name: bankruptcy court, district court, BAP, and court of appeals. Because the term "appellate court" is no longer used, its definition in Rule 8001 was removed. Due to the repeated references to "district court or BAP," the acronym for bankruptcy appellate panel, well known by bankruptcy judges and lawyers, was retained, and its definition remains in this rule.

The Committee changed what had been a definition of "transmit" in this rule to a provision that directly addresses the method of transmitting documents. This change responds to the concern raised at the Standing Committee meeting about treating only in a definition the important presumption favoring filing, serving, and sending documents by electronic means. The title of this rule has also been revised to highlight the fact that it addresses the method of transmission. The presumption in favor of electronic transmission now includes an exception for pro se individuals.

Rule 8007 (Stay Pending Appeal; Bonds; Suspension of Proceedings). The Committee corrected the omission of a reference to the court of appeals in subdivision (c).

Rule 8010 (Completion and Transmission of the Record). The Committee made several changes to the draft of this rule after consulting with clerks of bankruptcy courts, the clerk of a BAP, and representatives of the Administrative Office of the U.S. Courts. These sources advised the Committee that court reporters should be required to file documents only in a bankruptcy court and that all duties associated with preparing and filing transcripts should be carried out by reporters and transcription services, not the clerk's office.

The proposed rule now clarifies that in courts that record proceedings without a reporter present in the courtroom, the term "reporter" includes the person or service designated by the court to transcribe the recording. Unlike FRAP 11, proposed Rule 8010 does not require the reporter to send anything to an appellate court. And in a change from current bankruptcy practice, the clerk of the appellate court will no longer docket the appeal when the complete record is received. Docketing will occur upon receipt of the notice of appeal (proposed Rules 8003(d) and 8004(c)). The appellate-court clerk will still provide notice to the parties of the date on which the transmission of the record was received, because under proposed Rule 8018(a) that date generally commences the briefing schedule.

Rule 8013 (Motions; Intervention). In a change from current bankruptcy practice, the proposed rule does not permit briefs to be filed in support of or in response to motions. Instead, like the practice under FRAP 27, legal arguments must be included in the motion or response.

Proposed subdivision (g) permits motions for intervention in a bankruptcy appeal pending in a district court or BAP. The current Part VIII rules do not address intervention, and the appellate rules provide for intervention only with respect to the review of agency decisions. Someone seeking to intervene in a bankruptcy appeal must explain whether intervention was sought in the bankruptcy court and why intervention is being sought at the appellate stage.

Rule 8014 (Briefs). Proposed subdivision (a)(6) regarding the statement of the case adopts the language of the proposed amendment of FRAP 28(a)(6) for which the Appellate Rules Committee is seeking final approval at this meeting. In a change from existing bankruptcy practice, proposed subdivision (a)(7) would require appellants' and appellees' briefs to contain a summary of the argument. This requirement is consistent with current FRAP 28(a)(8).

The proposed rule departs from the requirements of FRAP 28 by not including provisions regarding references to parties and references to the record. The Committee concluded that this level of detail in the bankruptcy appellate rules is unnecessary.

Subdivision (f) adopts the provision of FRAP 28(j) regarding the submission of supplemental authorities. Unlike the FRAP provision, the proposed rule imposes a definite time limit (seven days) for any response, unless the court orders otherwise.

Rule 8015 (Form and Length of Briefs; Form of Appendices and Other Papers). The proposed rule is modeled on FRAP 32. The title was changed to call attention to the fact that this rule governs the length of briefs. Unlike FRAP 32(a)(2), subdivision (a)(2) of the proposed rule does not prescribe colors for brief covers.

Subdivision (a)(7) decreases the length of principal and reply briefs currently permitted by Rule 8010. This change imposes on briefs filed in a district court or BAP the same page limits that apply to briefs filed in a court of appeals.

Rule 8016 (Cross-Appeals). This provision is new to Part VIII. It is modeled on FRAP 28.1.

Rule 8017 (Brief of an Amicus Curiae). The current Part VIII rules do not provide for amicus briefs. The proposed rule is modeled on FRAP 29. Unlike FRAP 29(a), subdivision (a) of this rule permits the court to request amicus participation.

Rule 8018 (Serving and Filing Briefs; Appendices). The proposed rule continues the existing bankruptcy practice of allowing the appellee to file a separate appendix. It differs in this respect from FRAP 30, which requires the filing of a single appendix by all parties.

The time periods for the appellant and appellee to file their initial briefs are lengthened from 14 to 30 days. For the appellant, that period will still be shorter than the 40-day period prescribed by FRAP 31.

Rule 8019 (Oral Argument). Subdivision (a) alters existing Rule 8012 by (1) authorizing the court to require the parties to submit a statement about the need for oral argument and (2) permitting statements to explain why oral argument is not needed, rather than only why it should be allowed. The proposed rule tracks FRAP 34(a)(1).

Subdivision (f) differs from FRAP 34(e) by giving the court discretion, when the appellee fails to appear for oral argument, either to hear the appellant's argument or postpone argument.

Rule 8020 (Frivolous Appeal and Other Misconduct). Subdivision (a) of the proposed rule is derived from existing Rule 8020, which in turn is modeled on FRAP 38. Subdivision (b) is derived from FRAP 46(c). It expands the FRAP provision to apply to misconduct by parties as well as by attorneys.

Rule 8021 (Costs). FRAP 39 requires both the court of appeals and the district court to be involved in the taxing of costs. The court of appeals fixes maximum rates for producing copies of documents, and the clerk of the court of appeals prepares and certifies an itemized statement of costs for insertion in the mandate. Additional costs on appeal are taxable in the district court. The proposed rule, by contrast, is intended to continue the practice under current Rule 8014 of giving the bankruptcy clerk the entire responsibility for taxing the costs of appeal.

Subdivision (b) adds a provision regarding the taxing of costs against the United States. This provision, which is not included in current Rule 8014, is derived from FRAP 39(b).

Rule 8022 (Motion for Rehearing). Subdivision (a)(1) retains the requirement of current Rule 8015 that in all cases parties must file a motion for rehearing within 14 days after the judgment is entered. It differs from FRAP 40(a)(1), which allows 45 days for filing the motion in a civil case if the United States is a party.

The provision in existing Rule 8015 that specifies when the time for appeal to the court of appeals begins to run is not retained because the matter is addressed by FRAP 6(b)(2).

Rule 8023 (Voluntary Dismissal). The provision of current Rule 8001(c)(1) for dismissal by the bankruptcy court prior to the docketing of the appeal has been omitted. Under

the proposed rules, appeals would be docketed shortly after the notice of appeal is filed—a period likely to be especially short if the notice of appeal is transmitted electronically. The Committee therefore thought it unlikely that a voluntary dismissal of the appeal would be sought after the appellant filed the notice of appeal but before the appeal had been docketed. It noted, however, that FRAP 42 has a provision for dismissal by the district court prior to docketing, even though docketing under FRAP 12 also occurs upon receipt by the circuit clerk of the notice of appeal (and docket entries).

FRAP 42(b) provides that the circuit clerk "may" dismiss an appeal if the parties (1) file a signed dismissal agreement specifying how costs are to be paid and (2) pay any fees that are due. The proposed rule requires the clerk of the district court or BAP to dismiss under those circumstances. That requirement is consistent with current Rule 8001(c)(2).

Rule 8024 (Clerk's Duties on Disposition of the Appeal). The only change from existing Rule 8016, other than stylistic ones, is the recognition that in some cases no original documents may have been transmitted to the appellate court.

Rule 8025 (Stay of District Court or BAP Judgment). The proposed rule is derived from current Rule 8017. Only subdivision (c) is new. It provides for the stay of a bankruptcy court's order, judgment, or decree that is affirmed on appeal for the duration of any stay of the appellate judgment.

Rule 8026 (Rules by Circuit Councils and District Courts; Procedure When There Is No Controlling Law). The only changes from current Rule 8018 are stylistic.

Rule 8027 (Mediation). This rule is new and has no counterpart in the Appellate Rules. It provides that if a district court or BAP has a mediation procedure that is applicable to bankruptcy appeals, the clerk must advise the parties—promptly after the docketing of the appeal—that the procedure applies, what its requirements are, and how the procedure affects the time for filing briefs in the appeal.

Rule 8028 (Suspension of Rules in Part VIII). The proposed rule provides a more expansive list of rules that may not be suspended than either current Rule 8019 or FRAP 2.

Deletion of Current Rule 8013. The proposed Part VIII rules do not include a rule similar to current Rule 8013 (Disposition of Appeal; Weight Accorded Bankruptcy Judge's Findings of Fact). The Committee concluded that no rule is needed to specify the actions that a district court or BAP may take (affirm, modify, reverse, or remand with instructions) in ruling on bankruptcy appeals. It further concluded that the remainder of the rule—prescribing the weight to be accorded the bankruptcy court's findings of fact—duplicates Rule 7052, which applies in adversary proceedings and is made applicable to contested matters by Rule 9014. The Appellate Rules do not contain a similar rule. The Committee's decision not to include in revised Part VIII a rule similar to current Rule 8013 is not intended to change existing law. It merely reflects a determination that the rule is unnecessary.

Action Item 11. Rules 9023 and 9024 would be amended to refer to the procedure in proposed new Rule 8008 governing indicative rulings. Unlike the Civil and Appellate Rules, the Bankruptcy Rules would include a single rule prescribing the procedure for indicative rulings in both the bankruptcy and appellate courts. Proposed Rule 8008 would govern the issuance of

indicative rulings by bankruptcy judges and the corresponding procedures applicable in district courts and bankruptcy appellate panels. In order to remind litigants who file postjudgment motions of the possibility of seeking an indicative ruling from a bankruptcy court that lacks jurisdiction to grant relief due to the pendency of an appeal, the Committee voted at its fall 2008 meeting to amend Rules 9023 and 9024 to add a cross-reference to Rule 8008. The Committee delayed seeking publication of these proposed amendments until the completion of the Part VIII revision project.

Action Items 12-14. Initial revised forms for individual debtors.

The nine forms proposed for publication in these action items are the initial products of the Forms Modernization Project or FMP, a multi-year endeavor of the Advisory Committee, working in conjunction with the Federal Judicial Center and the Administrative Office. The dual goals of the FMP are to improve the official bankruptcy forms and to improve the interface between the forms and available technology. The judiciary is in the process of developing "the next generation" of CM/ECF (NextGen), and the modernized forms are being designed to use enhanced technology that will become available through NextGen. From a forms perspective, the major change in NextGen will be the ability to store all information on forms as data so that authorized users can produce customized reports containing the information they want from the forms, displayed in whatever format they choose.

The FMP made a preliminary decision that the debtor forms for individuals and entities other than individuals should be separated. There is a greater need for the forms submitted by individuals to be less technical, because individuals are generally less sophisticated than other entities and because individuals may not have the assistance of counsel. Accordingly, the forms for individual debtors are designed to use language more common in ordinary conversation, to employ more intuitive layouts, and to include both clearer instructions, examples within the forms, and more extensive separate instruction sheets.

This approach in form drafting was followed in the new forms adopted in connection with proofs of claim for certain mortgages in chapter 13 cases—Official Forms 10 (Attachment A), 10 (Supplement 1), and 10 (Supplement 2)—that went into effect on December 1, 2011. The format of these new forms has generally been well accepted.

The nine forms now being submitted for publication are among those that an individual debtor would file at the outset of a case.

Before adoption by the Advisory Committee, drafts of all of the individual debtor forms were circulated to organizations representing a range of users and to other reviewers. A concern expressed by some of the user groups was that the new format resulted in forms of greater length, creating additional difficulty in locating the information needed by the users. This problem would be addressed by allowing extraction of data from the forms, which could be reported in formats tailored to the users' needs, but the availability of such access depends in part on the timing of the development of NextGen, which is not certain.

Accordingly, the Advisory Committee has suggested an incremental approach. The nine forms now being proposed for publication—the fee waiver and installment fee forms, the income and expense forms, and the means test forms—reflect the FMP approach to form-drafting without imposing major changes in utility. These particular forms make no change in the substantive content and simply replace existing forms. They are not significantly longer than the

forms they replace, they all involve the debtors' income and expenses, and they are employed by a range of users: the courts, U.S. Trustees, and case trustees, for varied purposes. Their publication and, if adopted, their use, will provide a useful gauge of the effectiveness of the FMP approach.

The text of the nine new forms is set out in Appendix B.3 to this report. The separate instructions for the forms are also included, even though the Advisory Committee does not anticipate requesting that the instructions be approved as Official Forms, and debtors are instructed not to file the instructions with the forms. The inclusion of the instructions with the published forms is to illustrate the manner in which the new forms will be presented to debtors. Setting out detailed instructions on a separate document will reduce the need for lengthy instructions in the forms themselves.

Action Item 12. Official Forms 3A and 3B

These forms both deal with payment of the filing fee for an individual's bankruptcy case, and replace current Official Forms 3A and 3B. Form 3A is the application for paying the filing fee installments; Form 3B is the application for waiver of the filing fee in a chapter 7 case. Because these forms are most frequently completed by unrepresented debtors, the Advisory Committee concluded that the additional clarity of the FMP approach may be of particular value here. The only changes in Form 3A are stylistic, consistent with the overall approach of the project.

Official Form 3B also includes three technical changes. First, Line 1 of the form asks the size of the debtor's family. Because the debtor's dependents are now proposed to be listed in revised Official Form 6J, rather than in Official Form 6I, as done presently, the reference to the number of dependents changed from Schedule I to Schedule J. Second, consistent with the Judicial Conference Interim Procedures For Waiver of Chapter 7 Fees, proposed Official Form 3B specifies that non-cash governmental assistance (such as food stamps or housing subsidies) should not be included in stating the debtor's income level for purposes of determining eligibility for a fee waiver, although it continues to be reported for purposes of determining the debtor's ability to pay the filing fee. Third, the declaration and signature section for a non-attorney bankruptcy petition preparer (BPP) has been removed as unnecessary. The same declaration, required under 11 U.S.C. § 110, is contained in Official Form 19. That form must be completed and signed by the BPP, and filed with each document for filing prepared by a BPP.

Action Item 13. Official Forms 6I and 6J

Official Forms 6I and 6J—usually referred to as Schedules I and J—set out the income and expenses of an individual debtor. In addition to the stylistic changes made as part of the Forms Modernization Project, the revised versions of the forms contain several changes intended to provide more accurate and useful information.

The revised forms address the situation of a debtor who lives with and pools assets with other people who are not related by blood or marriage to debtor. Schedule I now includes as income any contributions made by someone else to the expenses listed on Schedule J, and the debtor is instructed to include contributions from an unmarried partner, members of the debtor's household, dependents, roommates, and other friends or relatives.

Revised Schedule J now requests separate information on dependents who live with the debtor, dependents who live separately, and other members of the household.

In chapter 13 cases, revised Schedule J asks for expenses at two different points in time—the date the debtor files bankruptcy (Column A) and the date a proposed 13 plan is confirmed (Column B). This allows Schedule J to state what the debtor's expenses will be as a result of the confirmed plan, thus facilitating a determination of the plan's feasibility.

A new line 23 is added to Schedule J, setting out a calculation of the debtor's monthly net income.

Action Item 14. Official Forms 22A-1, 22A-2, 22B, 22C-1, 22C-2

These forms are used in determining a debtor's current monthly income under 11 U.S.C. § 110(10A), and—in chapter 7 and 13 cases—in determining income remaining after deduction of expenses specified in statutes governing those chapters. The forms for chapter 7 and 13 cases are generally referred to as the "means test" forms. In Official Form 22B, the statement of current monthly income in chapter 11 cases filed by individuals, the only changes are stylistic, conforming to the overall approach of the Forms Modernization Project. For chapters 7 and 13, however, the means test forms have been revised in several additional ways.

First, and most significantly, the means test forms have been divided into two separate forms: one for income (Official Form 22A-1 in chapter 7, Official Form 22C-1 in chapter 13), and the other for expenses (Official Form 22A-2 in chapter 7, Official Form 22C-2 in chapter 13). Because expense information is only required of debtors whose currently monthly income exceeds the applicable state median income, most debtors will not have to complete the expense forms, thereby reducing the volume of the filed forms.

Second, in both the chapter 7 and chapter 13 forms, the deduction for cell phone and internet expenses is modified to reflect more accurately the IRS allowances incorporated by the Bankruptcy Code. Under the applicable IRS "other necessary expense" standard, cell phone and other optional telecommunication services expenses are deductible not only if necessary for the health and welfare of the debtor and the debtor's dependents, as stated in the current forms, but also if necessary for the production of income if not reimbursed by the debtor's employer or deducted by the debtor in calculating net self-employment income. Revised Official Form 22A-2 (in line 23) and Official Form 22C-2 (in line 19) make this correction. On the other hand, unlike their counterparts in the current forms, these lines do not permit deduction of basic home internet expenses, because under IRS guidelines adopted in 2011, these expenses are included in the Local Standards for housing and utilities.

Third, line 60 of current Official Form 22C has not been repeated in Official Form 22C-2. Line 60 allows debtors to list, but not deduct from income, "Other Necessary Expense" items that are not included within the categories specified by the Internal Revenue Service. Because debtors are separately allowed to list—and deduct—any expenses arising from special circumstances, former Line 60 was rarely used.

Finally, Form 22C-2 also reflects the Supreme Court's decision in *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010). Adopting a forward-looking approach, the Court stated in *Lanning* that the calculation of a chapter 13 debtor's projected disposable income under 11 U.S.C. § 1325(b)

requires consideration of changes to income or expenses that, at the time of plan confirmation, have occurred or are virtually certain to occur. Such changes could result in either an increased or decreased projected disposable income. Because only debtors whose annualized current monthly income exceeds the applicable median family income have their projected disposable income determined by the information provided on Official Form 22C-2, only these debtors are required to provide the information about changes to income and expenses on Official Form 22C-2. Part 3 of Official Form 22C-2 provides for the reporting of those changes.

III. Items Published in August 2011 for which Final Approval Is Not Being Sought

A. Rule 3007(a). An amendment of this rule, which addresses the time and manner of serving objections to claims, was published for public comment last August. The Advisory Committee proposed the amendment in response to two suggestions submitted on behalf of the Administrative Office's Bankruptcy Judges Advisory Group. The first suggestion proposed that Rule 3007(a) be amended to permit the use of a negative notice procedure for objections to claims. The second suggestion sought clarification of the proper method of serving objections to claims.

To accomplish these goals, the preliminary draft of amended Rule 3007(a) would have no longer required notice of a claim objection to be provided at least 30 days before "the hearing" on the objection. Instead, it would have required notice of the objection to be provided at least 30 days before "any scheduled hearing on the objection or any deadline for the claimant to request a hearing." It also would have specified how and on whom an objecting party must serve the objection and notice of objection.

Two comments were submitted in response to the publication of the proposed amendment. Bankruptcy Judge Eric Frank (E.D. Pa.) questioned whether a negative notice procedure is generally appropriate for an objection to a claim, since Rule 3001(f) provides that a properly executed and filed proof of claim is entitled to be treated as prima facie evidence of the validity and amount of the claim. Given this evidentiary effect of a proof of claim, Judge Frank suggested that in many situations a claim should not be disallowed by default and without a hearing. Raymond P. Bell, Jr., submitted a comment agreeing with Judge Frank.

At its spring meeting, the Advisory Committee concluded that the proposed amendment to Rule 3007(a) should be withdrawn for the time being so that it can be considered along with rule amendments that are being studied in connection with the drafting of a national chapter 13 form plan. Under consideration are possible rule amendments that would permit the allowed amount of certain types of claims to be determined in a chapter 13 plan, as well as by motion or claim objection. The Committee decided that the method of service on a claimant should be the same regardless of the method used for seeking the determination of a claim amount. Rather than proceed with the published amendment of Rule 3007(a), which generally allows service by mail on the person designated on the proof of claim, the Committee voted to postpone further action on the amendment of Rule 3007(a) until a unified approach to the service of claim objections and claim modifications in plans can be proposed. The Committee will also give further consideration to the appropriateness of a negative notice procedure for claim objections.

B. Official Form 6C. The proposed amendment to Form 6C—the debtor's schedule of property claimed as exempt—was intended to reflect the Supreme Court's decision in *Schwab v. Reilly*, 130 S. Ct. 2652 (2010), by providing an option for the debtor to state the value of the claimed exemption as the "full fair market value of the exempted property." The *Schwab* opinion explained that if the debtor used the quoted language to claim an exemption and "the trustee fails to object, or . . . the trustee objects and the objection is overruled, the debtor will be entitled to exclude the full value of the asset." 130 S. Ct. at 2668.

The proposed amendment of Schedule C prompted seven written comments and testimony during a telephonic hearing.

Opponents—including representatives of the chapter 7 and chapter 13 trustee associations—asserted that the proposed amendment would encourage debtors to claim the full market value when invoking exemptions that are capped at a dollar amount. This, they said, would lead to a "plethora of objections" and increased gamesmanship in claiming exemptions. The trustees stated that they would be forced to spend additional time analyzing exemption claims and litigating claims to exempt the full market value.

Supporters of amendment—including the National Association of Consumer Bankruptcy Attorneys—disputed the trustees' prediction of a "plethora of objections" and contended that the amendment is consistent with the *Schwab* decision. The supporters asserted that debtors need to know promptly whether property claimed exempt is exempt and thus is available for the debtor's use, sale, or other disposition.

The Advisory Committee considered the comments and testimony, debated the merits of the proposed amendment, and explored the alternative of rules amendments to require trustees to make prompt decisions on abandonment of property. The Committee concluded, however, that potential rule amendments would be inconsistent with either § 554 of the Bankruptcy Code or the *Schwab* decision.

After a further discussion, the Advisory Committee voted, with two dissents, to withdraw the Form 6C amendment and refer the revision of Schedule C to the Forms Modernization Project. The Committee's decision was based on two factors. First, debtors are incorporating into existing Schedule C the language suggested by the Supreme Court in *Schwab*. The need to amend the form in response to that decision therefore appears to be less compelling than the Committee initially thought. Second, courts are divided on whether it is always improper for a debtor to claim an exemption of full fair market value when the exemption in question is capped at a specific dollar amount. The Committee decided that any amendment of Schedule C should await further development of the case law. The recommendation to withdraw the published amendment is therefore intended to maintain the status quo and does not signal the Committee's rejection of the permissibility of claiming as exempt the full fair market value of property.

C. <u>Official Forms 22A and 22C</u>. The proposed amendments to both Forms 22A and 22C reflected changes in the IRS collection financial standards regarding telecommunication expenses, and an additional amendment to Form 22C responded to the Supreme Court's decision in *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010).

Two comments were submitted regarding the proposed *Hamilton v. Lanning* amendment. The first, from California attorney Peter M. Lively, objected to the amendment on the ground that its one-year period for reporting expected changes in income or expenses conflicts with a Ninth Circuit decision. The other comment was from attorney Henry J. Sommer, writing on behalf of the National Association of Consumer Bankruptcy Attorneys. He stated that the proposed amendment is unnecessary and confusing, since changes in income and expenses in the year after filing are already required to be reported on Schedules I and J and can be addressed by motions to modify a confirmed Chapter 13 plan.

The Committee concluded that neither comment provided grounds for reconsidering the proposed amendment of Form 22C. The Committee found that the proposed amendment, by

requiring debtors to provide information about changes in income and expenses, does not prevent the debtor from arguing that there is no applicable commitment period if the debtor has no projected disposable income. In this respect, the proposed revised form continues to apply the rule that the applicable commitment period is determined by the debtor's current monthly income, pursuant to 11 U.S.C. § 1325(b)(4), rather than by the debtor's projected disposable income, determined under 11 U.S.C. § 1325(b)(2).

The Committee was also unpersuaded by Mr. Sommer's comments. Schedules I and J report different income and expenses than those called for in calculating projected disposable income under Form 22C. And modification of a confirmed plan is not an appropriate method for dealing with changes of the kind involved in *Lanning*. Proper treatment of projected disposable income is a requirement for plan confirmation in the first instance.

Despite its continued support for the published amendments to Forms 22A and 22C, the Committee is not seeking final approval of them at this meeting. In order to avoid having the previously published amendments take effect in 2012 and then reformatted versions of the forms designed by the Forms Modernization Project take effect in 2013, the Advisory Committee incorporated all of the proposed amendments to the two forms into the "modernized" forms that the Committee is seeking to have published this summer.

IV. Information Items

A. <u>Official form for chapter 13 plan and related amended rules</u>. During the past year, on the basis of suggestions received from a bankruptcy judge and an organization of state attorneys general, the Advisory Committee has been exploring the adoption of an official form for chapter 13 plans. The adoption of an official form would have several benefits. First, it would make more uniform the practice of plan confirmation, which now varies substantially among the districts. Many districts require the use of local model plans containing distinctive features. These differences impose substantial costs on both on creditors with regional or national businesses and on software vendors, whose products must accommodate all of the local variations. Second, a national form would also allow for earlier resolution of differences in interpretation. And finally, a national form could provide a specific location within the form for any variances from its standard provisions, allowing for easier review by the court, trustees, and creditors, consistent with the Supreme Court's direction in *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (March 23, 2010), that bankruptcy judges independently review chapter 13 plans for conformity with applicable law.

A survey of the bankruptcy bench established widespread support for a national form plan, and the Advisory Committee has established a working group to develop one. The working group has discussed an initial draft and expects soon to have a draft that can be informally circulated for comments. Additionally, in the course of the group's work, it became apparent that the effectiveness of a national form plan would depend, to a large extent, on amendments to the Bankruptcy Rules harmonizing practice among the local courts and eliminating ambiguity about the extent to which official forms may be modified locally. The working group has drafted several such amendments, governing the need to file proofs of secured claims, establishing shortened filing deadlines, and clarifying procedures for treatment of claims, which the Advisory Committee will consider in the coming year. The Committee expects to be able to propose an official form for a Chapter 13 plan, with accompanying rule amendments, during 2013.

B. <u>September mini-conference on the new mortgage forms</u>. The Advisory Committee is planning a mini-conference on the effectiveness of new Official Forms 10 (Attachment A), 10 (Supplement 1), and 10 (Supplement 2), which were designed to implement the new mortgage claim disclosure requirements in Rules 3001(c) and 3002.1. The rules and forms went into effect on December 1, 2011.

When the Advisory Committee gave final approval to the forms at the spring 2011 meeting, it considered written comments and hearing testimony that suggested the need for a detailed loan history, rather than just an itemization of prepetition fees, expenses, and charges. It also considered questions about the sufficiency of the information sought regarding escrow accounts. The Committee concluded that it was important for the forms to go into effect simultaneously with the new rules, which it had approved the year before, but that it would be useful to convene a mini-conference on the effectiveness of the forms after a period of experience with them.

The purpose of the mini-conference is to ensure that the new forms are enabling debtors and trustees to obtain the information they need to deal properly with home mortgages in bankruptcy, particularly in chapter 13 cases, and that the disclosure requirements are not imposing an undue burden on mortgage creditors or costs on the debtors not commensurate with the benefits. The specific goals of the mini-conference are to learn how the forms are operating in actual practice and to determine whether any modifications are needed.

The mini-conference will be held on September 19, 2012, in conjunction with the Advisory Committee's fall meeting in Portland, Oregon. Home mortgage servicers and attorneys (or others who are actually filing the documents), consumer debtor attorneys, chapter 13 trustees, bankruptcy judges, and clerks of court will be invited to attend.

C. <u>Forms Modernization Project</u>. As discussed above, the Forms Modernization Project began its work by revising forms used in cases of individual debtors, and several of these forms are now being recommended for publication and comment. The FMP's work on all of the individual debtor forms is now nearly complete, and the FMP has begun revision of forms for non-individual cases.

As with its initial work, the FMP discussed the format of non-individual forms with a variety of professionals who use them, including attorneys, software providers, claims managers, trustees, and staff of the United States Trustee Program. These discussions resulted in the FMP's adoption of several goals for revision of the non-individual forms. Among the principal goals that emerged from these discussion were:

- revising the forms to eliminate unnecessary requests for information (such as questions relevant only in the cases of individuals),

- seeking information in the form that businesses commonly keep their financial records, and

- providing clear direction for reporting information that departs from the data maintained according to standard accounting practices.

Drafting of revised non-individual forms has begun, and the initial drafts will be tested and modified, as necessary, before being recommended for publication. In this process, the FMP continues to have the assistance of its forms consultant.

Through the FMP's work, the Advisory Committee expects to recommend adoption of the remaining revised forms for both individual and non-individual cases.

D. Electronic signatures. As part of the Forms Modernization Project, the Advisory Committee has considered the use of electronic signatures. Two initial questions were presented. The first is whether and under what circumstances bankruptcy courts should accept for filing documents signed electronically without requiring the retention of a paper copy containing a "wet" or original signature. If retention of an original signature is required, the second question is who should be required to maintain the paper document bearing the signature.

The Advisory Committee was presented with three alternative approaches in response. One is set out in a model local rule adopted by several bankruptcy courts, which requires retention of original documents with wet signatures, and imposes the duty of retention on the entity—most commonly the debtor's attorney— that files the document electronically. Another approach, used in at least two other bankruptcy courts, does not require retention of paper documents with original signatures. Instead, these courts require that, for any electronically-filed document signed by someone other than the filing attorney, the document be accompanied by a declaration of authenticity wet-signed by the non-attorney. That declaration is scanned and maintained, in electronic form, by the clerk's office. A third approach is taken by the Internal Revenue Service, pursuant to 26 U.S.C. § 6061(b)(2), which validates electronic signatures on tax returns. The IRS uses personal identification numbers as electronic signatures, with no requirement for any original wet-signed document.

The Advisory Committee has been informed that, although the issue will arise in the context of the procedures of other federal courts, it would be appropriate for electronic signatures to be addressed initially in the bankruptcy context. Accordingly, the Advisory Committee will continue to examine the issue with the goal of recommending an amendment to the bankruptcy rules that establishes a uniform procedure for electronic signatures.

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APPENDIX A-1

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Appendix A.1

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

For Final Approval and Transmittal to the Judicial Conference

Rule 1007. Lists, Schedules, Statements, and Other Documents; Time Limits**

* * * * *

1 (b) SCHEDULES, STATEMENTS, AND OTHER
2 DOCUMENTS REQUIRED.
3 * * * * *
4 (7) Unless an approved provider of an instructional
5 course concerning personal financial management has notified the
6 court that a debtor has completed the course after filing the
7 petition:
8 (A) An individual debtor in a chapter 7 or
9 chapter 13 case shall file a statement of completion of the ~~a~~ course
10 ~~concerning personal financial management~~, prepared as prescribed
11 by the appropriate Official Form~~.~~; and
12 (B) An individual debtor in a chapter 11

---

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

** In addition to the amendment of Rules 1007(b) and 5009(b), Official Form 23 would be amended to clarify that the debtor should not file the form if the provider of a personal financial management course has already notified the court of the debtor's completion of the course.

13 case shall file the statement ~~in a chapter 11 case in which~~ if

14 § 1141(d)(3) applies.

15 * * * * *

COMMITTEE NOTE

Subdivision (b)(7) is amended to relieve an individual debtor of the obligation to file a statement of completion of a personal financial management course if the course provider notifies the court that the debtor has completed the course. Course providers approved under § 111 of the Code may be permitted to file this notification electronically with the court immediately upon the debtor's completion of the course. If the provider does not notify the court, the debtor must file the statement, prepared as prescribed by the appropriate Official Form, within the time period specified by subdivision (c).

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

11-BK-001. Michael C. Shklar (Elliott Jasper Auten Shklar & Wellman-Ally LLP). The proposed amendment relieves the debtor of the obligation to file Form 23 if the counseling agency files proof of completion of the financial management course. It would make sense if the rule also expressly permitted the debtor or debtor's counsel to file the certificate of completion in lieu of Form 23.

11-BK-002. Phillip Dy. The amended rule will be very helpful. Financial management course providers should assist debtors with their cases.

11-BK-003. Ganna L. Gudkova. I support the amendment to Rule 1007 and the related amendment to Rule 5009.

11-BK-008. Jeanne E. Hovenden. I oppose the amendment. The financial management course provider is not an attorney and has no specific knowledge of the debtor's situation during a case. There are rare circumstances in which a discharge injures the debtor due to unforseen events that occur after the filing of the case. The course provider will not

know when a discharge is no longer in the debtor's best interest. The debtor's attorney should ensure that the certificate of completion is filed. If the course provider fails to file the certificate, the attorney will be held responsible by the debtor and will bear the burden of paying to reopen the case.

11-BK-015. Raymond P. Bell, Jr. (Mercantile Adjustment Bureau LLC). I agree with Jeanne Hovenden's comment. The responsibility for filing the certificate of completion of a course in financial management should lie with the debtor's attorney or the debtor acting pro se. Otherwise, creditors will be faced with uncertainty about whom to contact when a case is terminated without a discharge due to the failure to file a certificate of completion.

Rule 4004. Grant or Denial of Discharge

1 * * * * *

2 (c) GRANT OF DISCHARGE.

3 (1) In a chapter 7 case, on expiration of the times

4 fixed for objecting to discharge and for filing a motion to

5 dismiss the case under Rule 1017(e), the court shall

6 forthwith grant the discharge ~~unless~~, except that the court

7 shall not grant the discharge if:

8 (A) the debtor is not an individual;

9 (B) a complaint, or a motion under

10 § 727(a)(8) or (a)(9), objecting to the discharge has

11 been filed and not decided in the debtor's favor;

12 (C) the debtor has filed a waiver under

13 § 727(a)(10);

(D) a motion to dismiss the case under § 707 is pending;

(E) a motion to extend the time for filing a complaint objecting to the discharge is pending;

(F) a motion to extend the time for filing a motion to dismiss the case under Rule 1017(e)(1) is pending;

(G) the debtor has not paid in full the filing fee prescribed by 28 U.S.C. § 1930(a) and any other fee prescribed by the Judicial Conference of the United States under 28 U.S.C. § 1930(b) that is payable to the clerk upon the commencement of a case under the Code, unless the court has waived the fees under 28 U.S.C. § 1930(f);

(H) the debtor has not filed with the court a statement of completion of a course concerning personal financial management ~~as~~ if required by Rule 1007(b)(7);

(I) a motion to delay or postpone discharge under § 727(a)(12) is pending;

(J) a motion to enlarge the time to file a reaffirmation agreement under Rule 4008(a) is

36 pending;

37 (K) a presumption ~~has arisen~~ is in effect

38 under § 524(m) that a reaffirmation agreement is an

39 undue hardship and the court has not concluded a

40 hearing on the presumption; or

41 (L) a motion is pending to delay discharge~~,~~

42 because the debtor has not filed with the court all

43 tax documents required to be filed under § 521(f).

44 * * * * *

COMMITTEE NOTE

Subdivision (c)(1) is amended in several respects. The introductory language of paragraph (1) is revised to emphasize that the listed circumstances do not just relieve the court of the obligation to enter the discharge promptly but that they prevent the court from entering a discharge.

Subdivision (c)(1)(H) is amended to reflect the simultaneous amendment of Rule 1007(b)(7). The amendment of the latter rule relieves a debtor of the obligation to file a statement of completion of a course concerning personal financial management if the course provider notifies the court directly that the debtor has completed the course. Subparagraph (H) now requires postponement of the discharge when a debtor fails to file a statement of course completion only if the debtor has an obligation to file the statement.

Subdivision (c)(1)(K) is amended to make clear that the prohibition on entering a discharge due to a presumption of undue hardship under

§ 524(m) of the Code ceases when the presumption expires or the court concludes a hearing on the presumption.

Because this amendment is being made to conform to a simultaneous amendment of Rule 1007(b)(7) and is otherwise technical in nature, final approval is sought without publication.

Rule 5009. Closing Chapter 7 Liquidation, Chapter 12 Family Farmer's Debt Adjustment, Chapter 13 Individual's Debt Adjustment, and Chapter 15 Ancillary and Cross-Border Cases

* * * * *

1 (b) NOTICE OF FAILURE TO FILE RULE 1007(b)(7)

2 STATEMENT. If an individual debtor in a chapter 7 or 13 case is

3 required to ~~has not~~ file~~d~~ ~~the~~ a statement under ~~required by~~ Rule

4 1007(b)(7) and fails to do so within 45 days after the first date set

5 for the meeting of creditors under § 341(a) of the Code, the clerk

6 shall promptly notify the debtor that the case will be closed

7 without entry of a discharge unless the required statement is filed

8 within the applicable time limit under Rule 1007(c).

* * * * *

COMMITTEE NOTE

Subdivision (b) is amended to conform to the amendment of Rule 1007(b)(7). Rule 1007(b)(7) relieves an individual debtor of the obligation to file a statement of completion of a personal financial management course if the course provider notifies the court that the debtor has completed the course. The clerk's duty under subdivision (b) to notify the debtor of the possible closure of the case without discharge if the statement is not timely

filed therefore applies only if the course provider has not already notified the court of the debtor's completion of the course.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

11-BK-003. Ganna L. Gudkova. I support the amendment to Rule 1007 and the related amendment to Rule 5009.

Rule 9006. Computing and Extending Time; Time for Motion Papers

* * * * *

(d) ~~FOR~~ MOTION~~S~~ PAPERS~~ AFFIDAVITS~~. A written motion, other than one which may be heard ex parte, and notice of any hearing shall be served not later than seven days before the time specified for such hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion. ~~and, e~~Except as otherwise provided in Rule 9023, ~~opposing affidavits~~ any written response shall ~~may~~ be served not

later than one day before the hearing, unless the court permits otherwise~~them to be served at some other time~~.

* * * * *

COMMITTEE NOTE

The title of this rule is amended to draw attention to the fact that it prescribes time limits for the service of motion papers. These time periods apply unless another Bankruptcy Rule or a court order, including a local rule, prescribes different time periods. Rules 9013 and 9014 should also be consulted regarding motion practice. Rule 9013 governs the form of motions and the parties who must be served. Rule 9014 prescribes the procedures applicable to contested matters, including the method of serving motions commencing contested matters and subsequent papers. Subdivision (d) is amended to apply to any written response to a motion, rather than just to opposing affidavits. The caption of the subdivision is amended to reflect this change. Other changes are stylistic.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

No comments were submitted on this amendment.

Rule 9013. Motions: Form and Service

A request for an order, except when an application is authorized by the rules, shall be by written motion, unless made during a hearing. The motion shall state with particularity the grounds therefor, and shall set forth the relief or order sought. Every written motion, other than one which may be considered ex

1 parte, shall be served by the moving party within the time

2 determined under Rule 9006(d). The moving party shall serve the

3 motion on:

4 (a) the trustee or debtor in possession and on those entities

5 specified by these rules; or

6 (b) the entities the court directs if these rules do not require

7 service or specify the entities to be served ~~if service is not required~~

8 ~~or the entities to be served are not specified by these rules, the~~

9 ~~moving party shall serve the entities the court directs~~.

COMMITTEE NOTE

A cross-reference to Rule 9006(d) is added to this rule to call attention to the time limits for the service of motions, supporting affidavits, and written responses to motions. Rule 9006(d) prescribes time limits that apply unless other limits are fixed by these rules, a court order, or a local rule. The other changes are stylistic.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

No comments were submitted on this amendment.

Rule 9014. Contested Matters

* * * * *

1 (b) SERVICE. The motion shall be served in the manner

1 provided for service of a summons and complaint by Rule 7004

2 and within the time determined under Rule 9006(d). Any written

3 response to the motion shall be served within the time determined

4 under Rule 9006(d). Any paper served after the motion shall be

5 served in the manner provided by Rule 5(b) F.R. Civ. P.

* * * * *

COMMITTEE NOTE

A cross-reference to Rule 9006(d) is added to subdivision (b) to call attention to the time limits for the service of motions, supporting affidavits, and written responses to motions. Rule 9006(d) prescribes time limits that apply unless other limits are fixed by these rules, a court order, or a local rule.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

No comments were submitted on this amendment.

APPENDIX A-2

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APPENDIX A.2

PROPOSED AMENDMENTS TO OFFICIAL FORMS 7, 9A – 9I, 10, and 21

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UNITED STATES BANKRUPTCY COURT

_____ DISTRICT OF _____

In re:_____ _____, Case No. _____
Debtor (if known)

STATEMENT OF FINANCIAL AFFAIRS

This statement is to be completed by every debtor. Spouses filing a joint petition may file a single statement on which the information for both spouses is combined. If the case is filed under chapter 12 or chapter 13, a married debtor must furnish information for both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed. An individual debtor engaged in business as a sole proprietor, partner, family farmer, or self-employed professional, should provide the information requested on this statement concerning all such activities as well as the individual's personal affairs. To indicate payments, transfers and the like to minor children, state the child's initials and the name and address of the child's parent or guardian, such as "A.B., a minor child, by John Doe, guardian." Do not disclose the child's name. See, 11 U.S.C. §112 and Fed. R. Bankr. P. 1007(m).

Questions 1 - 18 are to be completed by all debtors. Debtors that are or have been in business, as defined below, also must complete Questions 19 - 25. **If the answer to an applicable question is "None," mark the box labeled "None."** If additional space is needed for the answer to any question, use and attach a separate sheet properly identified with the case name, case number (if known), and the number of the question.

DEFINITIONS

"In business." A debtor is "in business" for the purpose of this form if the debtor is a corporation or partnership. An individual debtor is "in business" for the purpose of this form if the debtor is or has been, within six years immediately preceding the filing of this bankruptcy case, any of the following: an officer, director, managing executive, or owner of 5 percent or more of the voting or equity securities of a corporation; a partner, other than a limited partner, of a partnership; a sole proprietor or self-employed full-time or part-time. An individual debtor also may be “in business” for the purpose of this form if the debtor engages in a trade, business, or other activity, other than as an employee, to supplement income from the debtor’s primary employment.

"Insider." The term "insider" includes but is not limited to: relatives of the debtor; general partners of the debtor and their relatives; corporations of which the debtor is an officer, director, or person in control; officers, directors, and any ~~owner of 5 percent or more of the voting or equity securities~~ persons in control of a corporate debtor and their relatives; affiliates of the debtor and insiders of such affiliates; and any managing agent of the debtor. 11 U.S.C. § 101(2), (31).

---

1. Income from employment or operation of business

None ☐ State the gross amount of income the debtor has received from employment, trade, or profession, or from operation of the debtor's business, including part-time activities either as an employee or in independent trade or business, from the beginning of this calendar year to the date this case was commenced. State also the gross amounts received during the **two years** immediately preceding this calendar year. (A debtor that maintains, or has maintained, financial records on the basis of a fiscal rather than a calendar year may report fiscal year income. Identify the beginning and ending dates of the debtor's fiscal year.) If a joint petition is filed, state income for each spouse separately. (Married debtors filing under chapter 12 or chapter 13 must state income of both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

AMOUNT SOURCE

* * * * *

COMMITTEE NOTE

The definition of "insider" is amended to conform to the statutory definition of the term. See 11 U.S.C. § 101(31). Under the Code definition, ownership of 5% or more of the voting shares of a corporate debtor does not automatically make the owner an insider of the corporation. And in order to be an affiliate of the debtor and an insider on that basis, ownership or control of at least 20% of the outstanding voting securities of the debtor is required. 11 U.S.C. § 101(2). The phrase "any owner of 5% or more of the voting or equity securities" is therefore deleted. Because § 101(31) provides that a person in control of a debtor corporation is an insider, that term is substituted for the deleted phrase.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

No comments were submitted on this amendment.

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UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 7 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____(date) and was converted to a case under chapter 7 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

Creditors -- Do not file this notice in connection with any proof of claim you submit to the court.
See Reverse Side for Important Explanations.

Debtor(s) (name(s) and address):	Case Number: Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include married, maiden, and trade names):	Bankruptcy Trustee (name and address):
Attorney for Debtor(s) (name and address): Telephone number:	Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Presumption of Abuse under 11 U.S.C. § 707(b)
See "Presumption of Abuse" on the reverse side.

Depending on the documents filed with the petition, one of the following statements will appear.

The presumption of abuse does not arise.
Or
The presumption of abuse arises.
Or
Insufficient information has been filed to date to permit the clerk to make any determination concerning the presumption of abuse. If more complete information, when filed, shows that the presumption has arisen, creditors will be notified.

Deadlines:
Papers must be *received* by the bankruptcy clerk's office by the following deadlines:
Deadline to Object to Debtor's Discharge or to Challenge Dischargeability of Certain Debts:

Deadline to Object to Exemptions:
Thirty (30) days after the *conclusion* of the meeting of creditors.

Creditors May Not Take Certain Actions:
In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Please Do Not File a Proof of Claim Unless You Receive a Notice To Do So.

Creditor with a Foreign Address:
A creditor to whom this notice is sent at a foreign address should read the information under "Do Not File a Proof of Claim at This Time" on the reverse side.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

12b-005831

Filing of Chapter 7 Bankruptcy Case	A bankruptcy case under Chapter 7 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Presumption of Abuse	If the presumption of abuse arises, creditors may have the right to file a motion to dismiss the case under § 707(b) of the Bankruptcy Code. The debtor may rebut the presumption by showing special circumstances.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court.
Do Not File a Proof of Claim at This Time	There does not appear to be any property available to the trustee to pay creditors. *You therefore should not file a proof of claim at this time.* If it later appears that assets are available to pay creditors, you will be sent another notice telling you that you may file a proof of claim, and telling you the deadline for filing your proof of claim. If this notice is mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline. *Do not include this notice with any filing you make with the court.*
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that the debtor is not entitled to receive a discharge under Bankruptcy Code § 727(a) *or* that a debt owed to you is not dischargeable under Bankruptcy Code § 523(a)(2), (4), or (6), you must file a complaint -- or a motion if you assert the discharge should be denied under § 727(a)(8) or (a)(9) -- in the bankruptcy clerk's office by the "Deadline to Object to Debtor's Discharge or to Challenge the Dischargeability of Certain Debts" listed on the front of this form. The bankruptcy clerk's office must receive the complaint or motion and any required filing fee by that deadline.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors. The debtor must file a list of all property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objections by the "Deadline to Object to Exemptions" listed on the front side.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

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UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 7 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____(date) and was converted to a case under chapter 7 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

Creditors -- Do not file this notice in connection with any proof of claim you submit to the court.
See Reverse Side for Important Explanations.

Debtor(s) (name(s) and address):	Case Number:
	Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the debtor(s) in the last 8 years (include trade names):	Bankruptcy Trustee (name and address):
Attorney for Debtor(s) (name and address): Telephone number:	 Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Please Do Not File a Proof of Claim Unless You Receive a Notice To Do So.

Creditor with a Foreign Address:

A creditor to whom this notice is sent at a foreign address should read the information under "Do Not File a Proof of Claim at This Time" on the reverse side.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

12b-005835

Filing of Chapter 7 Bankruptcy Case	A bankruptcy case under Chapter 7 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; and starting or continuing lawsuits or foreclosures. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor's representative must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court.
Do Not File a Proof of Claim at This Time	There does not appear to be any property available to the trustee to pay creditors. *You therefore should not file a proof of claim at this time.* If it later appears that assets are available to pay creditors, you will be sent another notice telling you that you may file a proof of claim, and telling you the deadline for filing your proof of claim. If this notice is mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline. *Do not include this notice with any filing you make with the court.*
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

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UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 7 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____(date) and was converted to a case under chapter 7 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

Creditors -- Do not file this notice in connection with any proof of claim you submit to the court.
See Reverse Side for Important Explanations.

Debtor(s) (name(s) and address):	Case Number:
	Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include married, maiden, and trade names):	Bankruptcy Trustee (name and address):
Attorney for Debtor(s) (name and address): Telephone number:	Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. Location:
( ) P. M.

Presumption of Abuse under 11 U.S.C. § 707(b)
See "Presumption of Abuse" on the reverse side.

Depending on the documents filed with the petition, one of the following statements will appear.

The presumption of abuse does not arise.

Or

The presumption of abuse arises.

Or

Insufficient information has been filed to date to permit the clerk to make any determination concerning the presumption of abuse. If more complete information, when filed, shows that the presumption has arisen, creditors will be notified.

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors (except a governmental unit): For a governmental unit:

Creditor with a Foreign Address:

A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to Object to Debtor's Discharge or to Challenge Dischargeability of Certain Debts:

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

12b-005839

Filing of Chapter 7 Bankruptcy Case	A bankruptcy case under Chapter 7 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim from other assets in the bankruptcy case. To be paid, you must file a Proof of Claim even if your claim is listed in the schedules filed by the debtor. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Creditor with a Foreign Address:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline. *Do not include this notice with any filing you make with the court.*
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that the debtor is not entitled to receive a discharge under Bankruptcy Code § 727(a) *or* that a debt owed to you is not dischargeable under Bankruptcy Code § 523(a)(2), (4), or (6), you must file a complaint -- or a motion if you assert the discharge should be denied under § 727(a)(8) or (a)(9) -- in the bankruptcy clerk's office by the "Deadline to Object to Debtor's Discharge or to Challenge the Dischargeability of Certain Debts" listed on the front of this form. The bankruptcy clerk's office must receive the complaint or motion and any required filing fee by that deadline.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors. The debtor must file a list of all property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objections by the "Deadline to Object to Exemptions" listed on the front side.
Presumption of Abuse	If the presumption of abuse arises, creditors may have the right to file a motion to dismiss the case under § 707(b) of the Bankruptcy Code. The debtor may rebut the presumption by showing special circumstances.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Liquidation of the Debtor's Property and Payment of Creditors' Claims	The bankruptcy trustee listed on the front of this notice will collect and sell the debtor's property that is not exempt. If the trustee can collect enough money, creditors may be paid some or all of the debts owed to them, in the order specified by the Bankruptcy Code. To make sure you receive any share of that money, you must file a Proof of Claim, as described above.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.
Refer To Other Side For Important Deadlines and Notices	

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UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 7 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____(date) and was converted to a case under chapter 7 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

Creditors -- Do not file this notice in connection with any proof of claim you submit to the court.
See Reverse Side for Important Explanations.

Debtor(s) (name(s) and address):	Case Number:
	Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include trade names):	Bankruptcy Trustee (name and address):
Attorney for Debtor(s) (name and address): Telephone number:	Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadline to File a Proof of Claim

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

For all creditors (except a governmental unit): For a governmental unit:

Creditor with a Foreign Address:
A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

12b-005843

Filing of Chapter 7 Bankruptcy Case	A bankruptcy case under Chapter 7 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; and starting or continuing lawsuits or foreclosures. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor's representative must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim from other assets in the bankruptcy case. To be paid, you must file a Proof of Claim even if your claim is listed in the schedules filed by the debtor. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Creditor with a Foreign Address:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline. *Do not include this notice with any filing you make with the court.*
Liquidation of the Debtor's Property and Payment of Creditors' Claims	The bankruptcy trustee listed on the front of this notice will collect and sell the debtor's property that is not exempt. If the trustee can collect enough money, creditors may be paid some or all of the debts owed to them, in the order specified by the Bankruptcy Code. To make sure you receive any share of that money, you must file a Proof of Claim, as described above.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

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UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 11 bankruptcy case concerning the debtor(s) listed below was filed on _____ (date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____ (date) and was converted to a case under chapter 11 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice

Creditors -- Do not file this notice in connection with any proof of claim you submit to the court.
See Reverse Side for Important Explanations.

Debtor(s) (name(s) and address):	Case Number: Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include married, maiden, and trade names):	Attorney for Debtor(s) (name and address): Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadlines:
Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:
Notice of deadline will be sent at a later time.

Creditor with a Foreign Address:
A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Deadline to File a Complaint Objecting to Discharge of the Debtor:

First date set for hearing on confirmation of plan
Notice of that date will be sent at a later time.

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Creditors May Not Take Certain Actions:
In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: **Telephone number:**	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

12b-005847

Filing of Chapter 11 Bankruptcy Case	A bankruptcy case under Chapter 11 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 11 allows a debtor to reorganize or liquidate pursuant to a plan. A plan is not effective unless confirmed by the court. You may be sent a copy of the plan and a disclosure statement telling you about the plan, and you might have the opportunity to vote on the plan. You will be sent notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. Unless a trustee is serving, the debtor will remain in possession of the debtor's property and may continue to operate any business.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court. The court, after notice and a hearing, may order that the United States trustee not convene the meeting if the debtor has filed a plan for which the debtor solicited acceptances before filing the case.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. You may look at the schedules that have been or will be filed at the bankruptcy clerk's office. If your claim is scheduled and is *not* listed as disputed, contingent, or unliquidated, it will be allowed in the amount scheduled unless you filed a Proof of Claim or you are sent further notice about the claim. Whether or not your claim is scheduled, you are permitted to file a Proof of Claim. If your claim is not listed at all *or* if your claim is listed as disputed, contingent, or unliquidated, then you must file a Proof of Claim or you might not be paid any money on your claim and may be unable to vote on a plan. The court has not yet set a deadline to file a Proof of Claim. If a deadline is set, you will be sent another notice. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Creditor with a Foreign Address:** The deadline for filing claims will be set in a later court order and will apply to all creditors unless the order provides otherwise. If notice of the order setting the deadline is sent to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline. *Do not include this notice with any filing you make with the court.*
Discharge of Debts	Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of your debt. *See* Bankruptcy Code § 1141 (d). Unless the court orders otherwise, however, the discharge will not be effective until completion of all payments under the plan. A discharge means that you may never try to collect the debt from the debtor except as provided in the plan. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 523 (a) (2), (4), or (6), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and any required filing fee by that Deadline. If you believe that the debtor is not entitled to receive a discharge under Bankruptcy Code § 1141 (d) (3), you must file a complaint with the required filing fee in the bankruptcy clerk's office not later than the first date set for the hearing on confirmation of the plan. You will be sent another notice informing you of that date.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors, even if the debtor's case is converted to chapter 7. The debtor must file a list of property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.
Refer To Other Side For Important Deadlines and Notices	

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UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 11 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____(date) and was converted to a case under chapter 11 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

Creditors -- Do not file this notice in connection with any proof of claim you submit to the court.
See Reverse Side for Important Explanations.

Debtor(s) (name(s) and address):	Case Number:
	Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include married, maiden, and trade names):	Attorney for Debtor(s) (name and address): Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors (except a governmental unit): For a governmental unit:

Creditor with a Foreign Address:
A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Deadline to File a Complaint Objecting to Discharge of the Debtor:

First date set for hearing on confirmation of plan
Notice of that date will be sent at a later time.

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Creditors May Not Take Certain Actions:
In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: **Telephone number:**	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

12b-005851

Filing of Chapter 11 Bankruptcy Case	A bankruptcy case under Chapter 11 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 11 allows a debtor to reorganize or liquidate pursuant to a plan. A plan is not effective unless confirmed by the court. You may be sent a copy of the plan and a disclosure statement telling you about the plan, and you might have the opportunity to vote on the plan. You will be sent notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. Unless a trustee is serving, the debtor will remain in possession of the debtor's property and may continue to operate any business.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court. The court, after notice and a hearing, may order that the United States trustee not convene the meeting if the debtor has filed a plan for which the debtor solicited acceptances before filing the case.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. You may look at the schedules that have been or will be filed at the bankruptcy clerk's office. If your claim is scheduled and is *not* listed as disputed, contingent, or unliquidated, it will be allowed in the amount scheduled unless you filed a Proof of Claim or you are sent further notice about the claim. Whether or not your claim is scheduled, you are permitted to file a Proof of Claim. If your claim is not listed at all *or* if your claim is listed as disputed, contingent, or unliquidated, then you must file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side or you might not be paid any money on your claim and may be unable to vote on a plan. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Creditor with a Foreign Address:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline. *Do not include this notice with any filing you make with the court.*
Discharge of Debts	Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of your debt. *See* Bankruptcy Code § 1141 (d). Unless the court orders otherwise, however, the discharge will not be effective until completion of all payments under the plan. A discharge means that you may never try to collect the debt from the debtor except as provided in the plan. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 523 (a) (2), (4), or (6), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and any required filing fee by that Deadline. If you believe that the debtor is not entitled to receive a discharge under Bankruptcy Code § 1141 (d) (3), you must file a complaint with the required filing fee in the bankruptcy clerk's office not later than the first date set for the hearing on confirmation of the plan. You will be sent another notice informing you of that date.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors, even if the debtor's case is converted to chapter 7. The debtor must file a list of property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.
Refer To Other Side For Important Deadlines and Notices	

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UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 11 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____(date) and was converted to a case under chapter 11 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

Creditors -- Do not file this notice in connection with any proof of claim you submit to the court.
See Reverse Side for Important Explanations.

Debtor(s) (name(s) and address):	Case Number: Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include trade names):	Attorney for Debtor(s) (name and address): Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadline to File a Proof of Claim

Proof of Claim must be *received* by the bankruptcy clerk's office by the following deadline:

Notice of deadline will be sent at a later time.

Creditor with a Foreign Address:
A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Creditors May Not Take Certain Actions:
In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: **Telephone number:**	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

Filing of Chapter 11 Bankruptcy Case	A bankruptcy case under Chapter 11 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 11 allows a debtor to reorganize or liquidate pursuant to a plan. A plan is not effective unless confirmed by the court. You may be sent a copy of the plan and a disclosure statement telling you about the plan, and you might have the opportunity to vote on the plan. You will be sent notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. Unless a trustee is serving, the debtor will remain in possession of the debtor's property and may continue to operate any business.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; and starting or continuing lawsuits or foreclosures. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor's representative must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court. The court, after notice and a hearing, may order that the United States trustee not convene the meeting if the debtor has filed a plan for which the debtor solicited acceptances before filing the case.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. You may look at the schedules that have been or will be filed at the bankruptcy clerk's office. If your claim is scheduled and is *not* listed as disputed, contingent, or unliquidated, it will be allowed in the amount scheduled unless you filed a Proof of Claim or you are sent further notice about the claim. Whether or not your claim is scheduled, you are permitted to file a Proof of Claim. If your claim is not listed at all *or* if your claim is listed as disputed, contingent, or unliquidated, then you must file a Proof of Claim or you might not be paid any money on your claim and may be unable to vote on a plan. The court has not yet set a deadline to file a Proof of Claim. If a deadline is set, you will be sent another notice. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Creditor with a Foreign Address:** The deadline for filing claims will be set in a later court order and will apply to all creditors unless the order provides otherwise. If notice of the order setting the deadline is sent to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline. *Do not include this notice with any filing you make with the court.*
Discharge of Debts	Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of your debt. *See* Bankruptcy Code § 1141 (d). A discharge means that you may never try to collect the debt from the debtor, except as provided in the plan. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 1141 (d) (6) (A), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and any required filing fee by that deadline.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

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UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 11 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____(date) and was converted to a case under chapter 11 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

Creditors -- Do not file this notice in connection with any proof of claim you submit to the court.
See Reverse Side for Important Explanations.

Debtor(s) (name(s) and address):	Case Number: Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include trade names):	Attorney for Debtor(s) (name and address): Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadline to File a Proof of Claim

Proof of Claim must be *received* by the bankruptcy clerk's office by the following deadline:

For all creditors (except a governmental unit): For a governmental unit:

Creditor with a Foreign Address:
A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Creditors May Not Take Certain Actions:
In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: **Telephone number:**	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

Filing of Chapter 11 Bankruptcy Case	A bankruptcy case under Chapter 11 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 11 allows a debtor to reorganize or liquidate pursuant to a plan. A plan is not effective unless confirmed by the court. You may be sent a copy of the plan and a disclosure statement telling you about the plan, and you might have the opportunity to vote on the plan. You will be sent notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. Unless a trustee is serving, the debtor will remain in possession of the debtor's property and may continue to operate any business.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; and starting or continuing lawsuits or foreclosures. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor's representative must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court. The court, after notice and a hearing, may order that the United States trustee not convene the meeting if the debtor has filed a plan for which the debtor solicited acceptances before filing the case.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. You may look at the schedules that have been or will be filed at the bankruptcy clerk's office. If your claim is scheduled and is *not* listed as disputed, contingent, or unliquidated, it will be allowed in the amount scheduled unless you filed a Proof of Claim or you are sent further notice about the claim. Whether or not your claim is scheduled, you are permitted to file a Proof of Claim. If your claim is not listed at all *or* if your claim is listed as disputed, contingent, or unliquidated, then you must file a Proof of Claim by the "Deadline to File Proof of Claim" listed on the front side, or you might not be paid any money on your claim and may be unable to vote on a plan. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Creditor with a Foreign Address:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline. *Do not include this notice with any filing you make with the court.*
Discharge of Debts	Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of your debt. *See* Bankruptcy Code § 1141 (d). A discharge means that you may never try to collect the debt from the debtor, except as provided in the plan. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 1141 (d) (6) (A), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and any required filing fee by that deadline.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

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UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 12 Bankruptcy Case, Meeting of Creditors, & Deadlines

[The debtor(s) listed below filed a chapter 12 bankruptcy case on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____ (date) and was converted to a case under chapter 12 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

Creditors -- Do not file this notice in connection with any proof of claim you submit to the court.
See Reverse Side for Important Explanations.

Debtor(s) (name(s) and address):	Case Number: Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include married, maiden, and trade names): Attorney for Debtor(s) (name and address): Telephone number:	Bankruptcy Trustee (name and address): Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors(except a governmental unit): For a governmental unit:

Creditor with a Foreign Address:
A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Deadline to Object to Exemptions:
Thirty (30) days after the *conclusion* of the meeting of creditors.

Filing of Plan, Hearing on Confirmation of Plan

[The debtor has filed a plan. The plan or a summary of the plan is enclosed. The hearing on confirmation will be held:
Date:_____Time:_____Location:_____]
or [The debtor has filed a plan. The plan or a summary of the plan and notice of confirmation hearing will be sent separately.]
or [The debtor has not filed a plan as of this date. You will be sent separate notice of the hearing on confirmation of the plan.]

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor, the debtor's property, and certain codebtors. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: **Telephone number:**	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

Filing of Chapter 12 Bankruptcy Case	A bankruptcy case under Chapter 12 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 12 allows family farmers and family fishermen to adjust their debts pursuant to a plan. A plan is not effective unless confirmed by the court. You may object to confirmation of the plan and appear at the confirmation hearing. A copy or summary of the plan [is included with this notice] *or* [will be sent to you later], and [the confirmation hearing will be held on the date indicated on the front of this notice] *or* [you will be sent notice of the confirmation hearing]. The debtor will remain in possession of the debtor's property and may continue to operate the debtor's business unless the court orders otherwise.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions against the debtor and certain codebtors are listed in Bankruptcy Code § 362 and § 1201. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages. Under certain circumstances, the stay may be limited in duration or not exist at all, although the debtor may have the right to request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim from other assets in the bankruptcy case. To be paid, you must file a Proof of Claim even if your claim is listed in the schedules filed by the debtor. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Creditor with a Foreign Address:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline. *Do not include this notice with any filing you make with the court.*
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 523 (a) (2), (4), or (6), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and any required filing fee by that Deadline.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors, even if the debtor's case is converted to chapter 7. The debtor must file a list of all property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

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UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 12 Bankruptcy Case, Meeting of Creditors, & Deadlines

[The debtor [corporation] *or* [partnership] listed below filed a chapter 12 bankruptcy case on _____ (date).]
or [A bankruptcy case concerning the debtor [corporation] *or* [partnership] listed below was originally filed under chapter_____
on _____ (date) and was converted to a case under chapter 12 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

Creditors -- Do not file this notice in connection with any proof of claim you submit to the court.
See Reverse Side for Important Explanations.

Debtor(s) (name(s) and address):	Case Number: Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include trade names): Attorney for Debtor(s) (name and address): Telephone number:	Bankruptcy Trustee (name and address): Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors(except a governmental unit): For a governmental unit:

Creditor with a Foreign Address:

A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Filing of Plan, Hearing on Confirmation of Plan

[The debtor has filed a plan. The plan or a summary of the plan is enclosed. The hearing on confirmation will be held:
Date:_____Time:_____Location:_____]
or [The debtor has filed a plan. The plan or a summary of the plan and notice of confirmation hearing will be sent separately.]
or [The debtor has not filed a plan as of this date. You will be sent separate notice of the hearing on confirmation of the plan.]

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: **Telephone number:**	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

12b-005867

Filing of Chapter 12 Bankruptcy Case	A bankruptcy case under Chapter 12 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by the debtor listed on the front side, and an order for relief has been entered. Chapter 12 allows family farmers and family fishermen to adjust their debts pursuant to a plan. A plan is not effective unless confirmed by the court. You may object to confirmation of the plan and appear at the confirmation hearing. A copy or summary of the plan [is included with this notice] *or* [will be sent to you later], and [the confirmation hearing will be held on the date indicated on the front of this notice] *or* [you will be sent notice of the confirmation hearing]. The debtor will remain in possession of the debtor's property and may continue to operate the debtor's business unless the court orders otherwise.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions against the debtor and certain codebtors are listed in Bankruptcy Code § 362 and § 1201. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; and starting or continuing lawsuits or foreclosures. Under certain circumstances, the stay may be limited in duration or not exist at all, although the debtor may have the right to request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor's representative must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim from other assets in the bankruptcy case. To be paid, you must file a Proof of Claim even if your claim is listed in the schedules filed by the debtor. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Creditor with a Foreign Address:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline. *Do not include this notice with any filing you make with the court.*
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 523 (a) (2), (4), or (6), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and any required filing fee by that Deadline.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

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UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 13 Bankruptcy Case, Meeting of Creditors, & Deadlines

[The debtor(s) listed below filed a chapter 13 bankruptcy case on _____ (date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____
on _____ (date) and was converted to a case under chapter 13 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

Creditors -- Do not file this notice in connection with any proof of claim you submit to the court.
See Reverse Side for Important Explanations.

Debtor(s) (name(s) and address):	Case Number: Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include married, maiden, and trade names): Attorney for Debtor(s) (name and address): Telephone number:	Bankruptcy Trustee (name and address): Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors (except a governmental unit):

For a governmental unit (except as otherwise provided in Fed. R. Bankr. P. 3002(c)(1)):

Creditor with a Foreign Address:

A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to Object to Debtor's Discharge or to Challenge Dischargeability of Certain Debts:

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Filing of Plan, Hearing on Confirmation of Plan

[The debtor has filed a plan. The plan or a summary of the plan is enclosed. The hearing on confirmation will be held:
Date:_____Time:_____Location:_____]
or [The debtor has filed a plan. The plan or a summary of the plan and notice of confirmation hearing will be sent separately.]
or [The debtor has not filed a plan as of this date. You will be sent separate notice of the hearing on confirmation of the plan.]

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor, the debtor's property, and certain codebtors. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: **Telephone number:**	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

Filing of Chapter 13 Bankruptcy Case	A bankruptcy case under Chapter 13 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 13 allows an individual with regular income and debts below a specified amount to adjust debts pursuant to a plan. A plan is not effective unless confirmed by the bankruptcy court. You may object to confirmation of the plan and appear at the confirmation hearing. A copy or summary of the plan [is included with this notice] *or* [will be sent to you later], and [the confirmation hearing will be held on the date indicated on the front of this notice] *or* [you will be sent notice of the confirmation hearing]. The debtor will remain in possession of the debtor's property and may continue to operate the debtor's business, if any, unless the court orders otherwise.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions against the debtor and certain codebtors are listed in Bankruptcy Code § 362 and § 1301. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to exceed or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim from other assets in the bankruptcy case. To be paid, you must file a Proof of Claim even if your claim is listed in the schedules filed by the debtor. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Creditor with a Foreign Address:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline. *Do not include this notice with any filing you make with the court.*
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that the debtor is not entitled to a discharge under Bankruptcy Code § 1328(f), you must file a motion objecting to discharge in the bankruptcy clerk's office by the "Deadline to Object to Debtor's Discharge or to Challenge the Dischargeability of Certain Debts" listed on the front of this form. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 523(a)(2) or (4), you must file a complaint in the bankruptcy clerk's office by the same deadline. The bankruptcy clerk's office must receive the motion or the complaint and any required filing fee by that deadline.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors, even if the debtor's case is converted to chapter 7. The debtor must file a list of all property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

COMMITTEE NOTE

All versions of the form have been updated on the first page and in the claims box on the explanation page to remind creditors that the form should not be included with or attached to any proof of claim or other filing in the case. Stylistic changes to the form are also made.

Final approval of these conforming and stylistic amendments is sought without publication.

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UNITED STATES BANKRUPTCY COURT _____ DISTRICT OF _____

PROOF OF CLAIM

Name of Debtor:

Case Number:

NOTE: *Do not use this form to make a claim for an administrative expense that arises after the bankruptcy filing. You may file a request for payment of an administrative expense according to 11 U.S.C. § 503.*

Name of Creditor (the person or other entity to whom the debtor owes money or property):

COURT USE ONLY

Name and address where notices should be sent:

Telephone number: email:

❒ Check this box if this claim amends a previously filed claim.

Court Claim Number:_____
(*If known*)

Filed on:_____

Name and address where payment should be sent (if different from above):

Telephone number: email:

❒ Check this box if you are aware that anyone else has filed a proof of claim relating to this claim. Attach copy of statement giving particulars.

1. Amount of Claim as of Date Case Filed: $_____

If all or part of the claim is secured, complete item 4.

If all or part of the claim is entitled to priority, complete item 5.

❒Check this box if the claim includes interest or other charges in addition to the principal amount of the claim. Attach a statement that itemizes interest or charges.

2. Basis for Claim: _____
(See instruction #2)

3. Last four digits of any number by which creditor identifies debtor:

___ ___ ___ ___

3a. Debtor may have scheduled account as:

_____
(See instruction #3a)

3b. Uniform Claim Identifier (optional):

_ _
(See instruction #3b)

4. Secured Claim (See instruction #4)
Check the appropriate box if the claim is secured by a lien on property or a right of setoff, attach required redacted documents, and provide the requested information.

Nature of property or right of setoff: ❒Real Estate ❒Motor Vehicle ❒Other
Describe:

Value of Property: $_____

Annual Interest Rate_____**%** ❒Fixed or ❒Variable
(when case was filed)

Amount of arrearage and other charges, as of the time case was filed, included in secured claim, if any:

$_____

Basis for perfection: _____

Amount of Secured Claim: **$**_____

Amount Unsecured: **$**_____

5. Amount of Claim Entitled to Priority under 11 U.S.C. § 507 (a). If any part of the claim falls into one of the following categories, check the box specifying the priority and state the amount.

❒ Domestic support obligations under 11 U.S.C. § 507 (a)(1)(A) or (a)(1)(B).

❒ Wages, salaries, or commissions (up to $11,725*) earned within 180 days before the case was filed or the debtor's business ceased, whichever is earlier – 11 U.S.C. § 507 (a)(4).

❒ Contributions to an employee benefit plan – 11 U.S.C. § 507 (a)(5).

Amount entitled to priority:

$_____

❒ Up to $2,600* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. § 507 (a)(7).

❒ Taxes or penalties owed to governmental units – 11 U.S.C. § 507 (a)(8).

❒ Other – Specify applicable paragraph of 11 U.S.C. § 507 (a)(__).

**Amounts are subject to adjustment on 4/1/13 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.*

6. Credits. The amount of all payments on this claim has been credited for the purpose of making this proof of claim. (See instruction #6)

12b-005877

7. Documents: Attached are **redacted** copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, ~~and~~ security agreements, or, in the case of a claim based on an open-end or revolving consumer credit agreement, a statement providing the information required by FRBP 3001(c)(3)(A). If the claim is secured, box 4 has been completed, and **redacted** copies of documents providing evidence of perfection of a security interest are attached. If the claim is secured by the debtor's principal residence, the Mortgage Proof of Claim Attachment is being filed with this claim. *(See instruction #7, and the definition of "**redacted**".)*

DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.

If the documents are not available, please explain:

8. Signature: (See instruction #8)

Check the appropriate box.

❒ I am the creditor. ❒ I am the creditor's authorized agent. ~~(Attach copy of power of attorney, if any.)~~ ❒ I am the trustee, or the debtor, or their authorized agent. (See Bankruptcy Rule 3004.) ❒ I am a guarantor, surety, indorser, or other codebtor. (See Bankruptcy Rule 3005.)

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

Print Name: _____
Title: _____
Company: _____
Address and telephone number (if different from notice address above):
_____
_____
_____
Telephone number: email:

_____
(Signature) (Date)

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

INSTRUCTIONS FOR PROOF OF CLAIM FORM

The instructions and definitions below are general explanations of the law. In certain circumstances, such as bankruptcy cases not filed voluntarily by the debtor, exceptions to these general rules may apply.

Items to be completed in Proof of Claim form

Court, Name of Debtor, and Case Number:
Fill in the federal judicial district in which the bankruptcy case was filed (for example, Central District of California), the debtor's full name, and the case number. If the creditor received a notice of the case from the bankruptcy court, all of this information is at the top of the notice.

Creditor's Name and Address:
Fill in the name of the person or entity asserting a claim and the name and address of the person who should receive notices issued during the bankruptcy case. A separate space is provided for the payment address if it differs from the notice address. The creditor has a continuing obligation to keep the court informed of its current address. See Federal Rule of Bankruptcy Procedure (FRBP) 2002(g).

1. Amount of Claim as of Date Case Filed:
State the total amount owed to the creditor on the date of the bankruptcy filing. Follow the instructions concerning whether to complete items 4 and 5. Check the box if interest or other charges are included in the claim.

2. Basis for Claim:
State the type of debt or how it was incurred. Examples include goods sold, money loaned, services performed, personal injury/wrongful death, car loan, mortgage note, and credit card. If the claim is based on delivering health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information. You may be required to provide additional disclosure if an interested party objects to the claim.

3. Last Four Digits of Any Number by Which Creditor Identifies Debtor:
State only the last four digits of the debtor's account or other number used by the creditor to identify the debtor.

3a. Debtor May Have Scheduled Account As:
Report a change in the creditor's name, a transferred claim, or any other information that clarifies a difference between this proof of claim and the claim as scheduled by the debtor.

3b. Uniform Claim Identifier:
If you use a uniform claim identifier, you may report it here. A uniform claim identifier is an optional 24-character identifier that certain large creditors use to facilitate electronic payment in chapter 13 cases.

4. Secured Claim:
Check whether the claim is fully or partially secured. Skip this section if the claim is entirely unsecured. (See Definitions.) If the claim is secured, check the box for the nature and value of property that secures the claim, attach copies of lien documentation, and state, as of the date of the bankruptcy filing, the annual interest rate (and whether it is fixed or variable), and the amount past due on the claim.

5. Amount of Claim Entitled to Priority Under 11 U.S.C. § 507 (a).
If any portion of the claim falls into any category shown, check the appropriate box(es) and state the amount entitled to priority. (See Definitions.) A claim may be partly priority and partly non-priority. For example, in some of the categories, the law limits the amount entitled to priority.

6. Credits:
An authorized signature on this proof of claim serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

7. Documents:
Attach redacted copies of any documents that show the debt exists and a lien secures the debt. You must also attach copies of documents that evidence perfection of any security interest and documents required by FRBP 3001(c) for claims based on an open-end or revolving consumer credit agreement or secured by a security interest in the debtor's principal residence. You may also attach a summary in addition to the documents themselves. FRBP 3001(c) and (d). If the claim is based on delivering health care goods or services, limit disclosing confidential health care information. Do not send original documents, as attachments may be destroyed after scanning.

8. Date and Signature:
The individual completing this proof of claim must sign and date it. FRBP 9011. If the claim is filed electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what constitutes a signature. If you sign this form, you declare under penalty of perjury that the information provided is true and correct to the best of your knowledge, information, and reasonable belief. Your signature is also a certification that the claim meets the requirements of FRBP 9011(b). Whether the claim is filed electronically or in person, if your name is on the signature line, you are responsible for the declaration. Print the name and title, if any, of the creditor or other person authorized to file this claim. State the filer's address and telephone number if it differs from the address given on the top of the form for purposes of receiving notices. If the claim is filed by an authorized agent, ~~attach a complete copy of any power of attorney, and~~ provide both the name of the individual filing the claim and the name of the agent. If the authorized agent is a servicer, identify the corporate servicer as the company. Criminal penalties apply for making a false statement on a proof of claim.

12b-005878

DEFINITIONS

Debtor
A debtor is the person, corporation, or other entity that has filed a bankruptcy case.

Creditor
A creditor is a person, corporation, or other entity to whom debtor owes a debt that was incurred before the date of the bankruptcy filing. See 11 U.S.C. §101 (10).

Claim
A claim is the creditor's right to receive payment for a debt owed by the debtor on the date of the bankruptcy filing. See 11 U.S.C. §101 (5). A claim may be secured or unsecured.

Proof of Claim
A proof of claim is a form used by the creditor to indicate the amount of the debt owed by the debtor on the date of the bankruptcy filing. The creditor must file the form with the clerk of the same bankruptcy court in which the bankruptcy case was filed.

Secured Claim Under 11 U.S.C. § 506 (a)
A secured claim is one backed by a lien on property of the debtor. The claim is secured so long as the creditor has the right to be paid from the property prior to other creditors. The amount of the secured claim cannot exceed the value of the property. Any amount owed to the creditor in excess of the value of the property is an unsecured claim. Examples of liens on property include a mortgage on real estate or a security interest in a car. A lien may be voluntarily granted by a debtor or may be obtained through a court proceeding. In some states, a court judgment is a lien. A claim also may be secured if the creditor owes the debtor money (has a right to setoff).

Unsecured Claim
An unsecured claim is one that does not meet the requirements of a secured claim. A claim may be partly unsecured if the amount of the claim exceeds the value of the property on which the creditor has a lien.

Claim Entitled to Priority Under 11 U.S.C. § 507 (a)
Priority claims are certain categories of unsecured claims that are paid from the available money or property in a bankruptcy case before other unsecured claims.

Redacted
A document has been redacted when the person filing it has masked, edited out, or otherwise deleted, certain information. A creditor must show only the last four digits of any social-security, individual's tax-identification, or financial-account number, only the initials of a minor's name, and only the year of any person's date of birth. If the claim is based on the delivery of health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information.

Evidence of Perfection
Evidence of perfection may include a mortgage, lien, certificate of title, financing statement, or other document showing that the lien has been filed or recorded.

INFORMATION

Acknowledgment of Filing of Claim
To receive acknowledgment of your filing, you may either enclose a stamped self-addressed envelope and a copy of this proof of claim or you may access the court's PACER system (www.pacer.psc.uscourts.gov) for a small fee to view your filed proof of claim.

Offers to Purchase a Claim
Certain entities are in the business of purchasing claims for an amount less than the face value of the claims. One or more of these entities may contact the creditor and offer to purchase the claim. Some of the written communications from these entities may easily be confused with official court documentation or communications from the debtor. These entities do not represent the bankruptcy court or the debtor. The creditor has no obligation to sell its claim. However, if the creditor decides to sell its claim, any transfer of such claim is subject to FRBP 3001(e), any applicable provisions of the Bankruptcy Code (11 U.S.C. § 101 *et seq*.), and any applicable orders of the bankruptcy court.

COMMITTEE NOTE

Section 7 of the form is amended to remind filers of the need to attach documents required by Rule 3001(c) for claims based on an open-end or revolving consumer credit agreement or claims secured by a security interest in the debtor's principal residence.

Section 8 is revised to delete the direction that an authorized agent attach a power of attorney if one exists. Rule 9010(c) does not require that an agent's authority to file a proof of claim be evidenced by a power of attorney.

Final approval of these conforming and stylistic amendments is sought without publication.

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Do not file this form as part of the public case file. This form must be submitted separately and must not be included in the court's public electronic records. Please consult local court procedures for submission requirements.

United States Bankruptcy Court

_____ District Of _____

In re _____,	)	
[Set forth here all names including married, maiden, and trade names used by debtor within last 8 years]	)	
Debtor	)	Case No. _____
Address _____	)	
_____	)	Chapter _____
Last four digits of Social-Security or Individual Taxpayer-Identification (ITIN) No(s).,(if any): _____	)	
_____	)	
Employer Tax-Identification (EIN) No(s).(if any): _____	)	
_____	)	

STATEMENT OF SOCIAL-SECURITY NUMBER(S)

*(or other Individual Taxpayer-Identification Number(s) (ITIN(s)))**

1.Name of Debtor (Last, First, Middle):_____

(Check the appropriate box and, if applicable, provide the required information.)

☐ Debtor has a Social-Security Number and it is:_____
(If more than one, state all.)

☐ Debtor does not have a Social-Security Number but has an Individual Taxpayer-Identification Number (ITIN), and it is: _____
(If more than one, state all.)

☐ Debtor does not have either a Social-Security Number or an Individual Taxpayer-Identification Number (ITIN).

2.Name of Joint Debtor (Last, First, Middle):_____

(Check the appropriate box and, if applicable, provide the required information.)

☐ Joint Debtor has a Social-Security Number and it is: _____
(If more than one, state all.)

☐ Joint Debtor does not have a Social-Security Number but has an Individual Taxpayer-Identification Number (ITIN) and it is: _____
(If more than one, state all.)

☐ Joint Debtor does not have either a Social-Security Number or an Individual Taxpayer-Identification Number (ITIN).

I declare under penalty of perjury that the foregoing is true and correct.

X _____
Signature of Debtor Date

X _____
Signature of Joint Debtor Date

**Joint debtors must provide information for both spouses.*

Penalty for making a false statement: Fine of up to $250,000 or up to 5 years imprisonment or both. 18 U.S.C. §§ 152 and 3571.

COMMITTEE NOTE

The form is amended to remind debtors that, in accordance with Rule 1007(f), it should be submitted to the court, but not filed on the public docket. This rule protects an individual debtor's social-security number or taxpayer-identification number from becoming accessible to the public.

Final approval of the conforming amendment is sought without publication.

APPENDIX B-1

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Appendix B.1

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

For Publication for Public Comment

Rule 1014. Dismissal and Change of Venue

1 * * * * *

2 (b) PROCEDURE WHEN PETITIONS INVOLVING
3 THE SAME OR RELATED DEBTORS ARE FILED IN
4 DIFFERENT COURTS. If petitions commencing cases under the
5 Code or seeking recognition under chapter 15 are filed in different
6 districts by, regarding, or against (1) the same debtor, (2) a
7 partnership and one or more of its general partners, (3) two or
8 more general partners, or (4) a debtor and an affiliate, ~~on motion~~
9 ~~filed~~ the court in the district in which the first-filed petition ~~filed~~
10 ~~first~~ is pending ~~and after hearing on notice to the petitioners, the~~
11 ~~United States trustee, and other entities as directed by the court,~~
12 ~~the court~~ may determine, in the interest of justice or for the
13 convenience of the parties, the district or districts in which ~~the case~~
14 ~~or~~ any of the cases should proceed. The court may so determine
15 on motion and after a hearing, with notice to the following entities
16 in these cases: the United States trustee, entities entitled to notice

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

17 under Rule 2002(a), and other entities as the court directs. ~~Except~~

18 ~~as otherwise ordered by t~~ The court ~~in the district in which the~~

19 ~~petition filed first is pending,~~ may order the parties to the later-

20 filed cases not to proceed further ~~the proceedings on the other~~

21 ~~petitions shall be stayed by the courts in which they have been~~

22 ~~filed~~ until it makes the determination ~~is made~~.

COMMITTEE NOTE

Subdivision (b) provides a practical solution for resolving venue issues when related cases are filed in different districts. It designates the court in which the first-filed petition is pending as the decision maker if a party seeks a determination of where the related cases should proceed. Subdivision (b) is amended to clarify when proceedings in the subsequently filed cases are stayed. It requires an order of the court in which the first-filed petition is pending to stay proceedings in the related cases. Requiring a court order to trigger the stay will prevent the disruption of other cases unless there is a judicial determination that this subdivision of the rule applies and that a stay of related cases is needed while the court makes its venue determination.

Notice of the hearing must be given to all debtors, trustees, creditors, indenture trustees, and United States trustees in the affected cases, as well as any other entity that the court directs. Because the clerk of the court that makes the determination often may lack access to the names and addresses of entities in other cases, a court may order the moving party to provide notice.

The other changes to subdivision (b) are stylistic.

Rule 7004. Process; Service of Summons, Complaint

* * * * *

(e) SUMMONS: TIME LIMIT FOR SERVICE WITHIN THE UNITED STATES. Service made under Rule 4(e), (g), (h)(1), (i), or (j)(2) F.R. Civ. P. shall be by delivery of the summons and complaint within ~~14~~ 7 days after the summons is issued. If service is by any authorized form of mail, the summons and complaint shall be deposited in the mail within ~~14~~ 7 days after the summons is issued. If a summons is not timely delivered or mailed, another summons shall be issued and served. This subdivision does not apply to service in a foreign country.

* * * * *

COMMITTEE NOTE

Subdivision (e) is amended to alter the period of time during which service of the summons and complaint must be made. The amendment reduces that period from fourteen days to seven days after issuance of the summons. Because Rule 7012 provides that the defendant's time to answer the complaint is calculated from the date the summons is issued, a lengthy delay between issuance and service of the summons may unduly shorten the defendant's time to respond. The amendment is therefore intended to encourage prompt service after issuance of a summons.

Rule 7008. General Rules of Pleading[**]

1 ~~(a) APPLICABILITY OF RULE 8 F.R.CIV.P.~~ Rule 8
2 F.R.Civ.P. applies in adversary proceedings. The allegation of
3 jurisdiction required by Rule 8(a) shall also contain a reference to
4 the name, number, and chapter of the case under the Code to which
5 the adversary proceeding relates and to the district and division
6 where the case under the Code is pending. In an adversary
7 proceeding before a bankruptcy ~~judge~~ court, the complaint,
8 counterclaim, cross-claim, or third-party complaint shall contain a
9 statement ~~that the proceeding is core or noncore and, if non-core~~
10 that the pleader does or does not consent to entry of final orders or
11 judgment by the bankruptcy ~~judge~~ court.
12 ~~(b) ATTORNEY'S FEES. A request for an award of~~
13 ~~attorney's fees shall be pleaded as a claim in a complaint, cross-~~
14 ~~claim, third-party complaint, answer, or reply as may be~~
15 ~~appropriate.~~

COMMITTEE NOTE

Former subdivision (a) is amended to remove the requirement that the pleader state whether the proceeding is core or non-core and to require in all proceedings that the pleader state whether the party does or does not consent to the entry of final orders or judgment by the bankruptcy court. Some proceedings that satisfy the statutory definition of core proceedings,

[**] In addition to newly proposed amendments, this draft includes amendments that the Standing Committee approved for publication at the January 2012 meeting.

28 U.S.C. § 157(b)(2), may remain beyond the constitutional power of a bankruptcy judge to adjudicate finally. The amended rule calls for the pleader to make a statement regarding consent, whether or not a proceeding is termed non-core. Rule 7012(b) has been amended to require a similar statement in a responsive pleading. The bankruptcy judge will then determine the appropriate course of proceedings under Rule 7016.

The rule is also amended to delete subdivision (b), which required a request for attorney's fees always to be pleaded as a claim in an allowed pleading. That requirement, which differed from the practice under the Federal Rules of Civil Procedure, had the potential to serve as a trap for the unwary.

The procedures for seeking an award of attorney's fees are now set out in Rule 7054(b)(2), which makes applicable most of the provisions of Rule 54(d)(2) F.R. Civ. P. As specified by Rule 54(d)(2)(A) and (B) F.R. Civ. P., a claim for attorney's fees must be made by a motion filed no later than 14 days after entry of the judgment unless the governing substantive law requires those fees to be proved at trial as an element of damages. When fees are an element of damages, such as when the terms of a contract provide for the recovery of fees incurred prior to the instant adversary proceeding, the general pleading requirements of this rule still apply.

Rule 7012. Defenses and Objections—When and How Presented— By Pleading or Motion—Motion for Judgment on the Pleadings

1 * * * * *

2 (b) APPLICABILITY OF RULE 12(b)-(I) F.R. CIV. P.

3 Rule 12(b)-(i) F.R. Civ. P. applies in adversary proceedings. A

4 responsive pleading ~~shall admit or deny an allegation that the~~

5 ~~proceeding is core or non-core. If the~~ ~~response is that the~~

6 ~~proceeding is non-core it~~ shall include a statement that the party

7 does or does not consent to entry of final orders or judgment by the

8 bankruptcy ~~judge~~ court. ~~In non-core proceedings, final orders and~~

9 ~~judgments shall not be entered on the bankruptcy judge's order~~

10 ~~except with the express consent of the parties~~.

COMMITTEE NOTE

Subdivision (b) is amended to remove the requirement that the pleader state whether the proceeding is core or non-core and to require in all proceedings that the pleader state whether the party does or does not consent to the entry of final orders or judgment by the bankruptcy court. The amended rule also removes the provision requiring express consent before the entry of final orders and judgments in non-core proceedings. Some proceedings that satisfy the statutory definition of core proceedings, 28 U.S.C. § 157(b)(2), may remain beyond the constitutional power of a bankruptcy judge to adjudicate finally. The amended rule calls for the pleader to make a statement regarding consent, whether or not a proceeding is termed non-core. This amendment complements the requirements of amended Rule 7008(a). The bankruptcy judge's subsequent determination of the appropriate course of proceedings, including whether to enter final orders and judgments or to issue proposed findings of fact and conclusions of law, is a pretrial matter now provided for in amended Rule 7016.

Rule 7016. Pre-~~T~~trial Procedures~~; Formulating Issues~~

1 (a) PRETRIAL CONFERENCES; SCHEDULING;

2 MANAGEMENT. Rule 16 F.R.Civ.P. applies in adversary

3 proceedings.

4 (b) DETERMINING PROCEDURE. The bankruptcy

5 court shall decide, on its own motion or a party's timely motion,

6 whether:

7 (1) to hear and determine the proceeding;

8 (2) to hear the proceeding and issue proposed

9 findings of fact and conclusions of law; or

10 (3) to take some other action.

COMMITTEE NOTE

This rule is amended to create a new subdivision (b) that provides for the bankruptcy court to enter final orders and judgment, issue proposed findings and conclusions, or take some other action in a proceeding. The rule leaves the decision as to the appropriate course of proceedings to the bankruptcy court. The court's decision will be informed by the extent of the district court's order of reference to the bankruptcy court and by the parties' statements, required under Rules 7008(a), 7012(b), and 9027(a) and (e), regarding consent to the entry of final orders and judgment. If the bankruptcy court chooses to issue proposed findings of fact and conclusions of law, Rule 9033 applies.

Rule 9023. New Trials; Amendment of Judgments

1 Except as provided in this rule and Rule 3008, Rule 59

2 F.R.Civ.P. applies in cases under the Code. A motion for a new

3 trial or to alter or amend a judgment shall be filed, and a court may

4 on its own order a new trial, no later than 14 days after entry of

5 judgment. In some circumstances, Rule 8008 governs post-

6 judgment motion practice after an appeal has been docketed and is

7 pending.

COMMITTEE NOTE

This rule is amended to include a cross-reference to Rule 8008. That rule governs the issuance of an indicative ruling when relief is sought that the court lacks authority to grant because of an appeal that has been docketed and is pending.

Rule 9024. Relief from Judgment or Order

1 Rule 60 F.R.Civ.P. applies in cases under the Code except
2 that (1) a motion to reopen a case under the Code or for the
3 reconsideration of an order allowing or disallowing a claim against
4 the estate entered without a contest is not subject to the one-year
5 limitation prescribed in Rule 60(c), (2) a complaint to revoke a
6 discharge in a chapter 7 liquidation case may be filed only within
7 the time allowed by § 727(e) of the Code, and (3) a complaint to
8 revoke an order confirming a plan may be filed only within the
9 time allowed by § 1144, § 1230, or § 1330. <u>In some</u>
10 <u>circumstances, Rule 8008 governs post-judgment motion practice</u>
11 <u>after an appeal has been docketed and is pending.</u>

COMMITTEE NOTE

This rule is amended to include a cross-reference to Rule 8008. That rule governs the issuance of an indicative ruling when relief is sought that the court lacks authority to grant because of an appeal that has been docketed and is pending.

Rule 9027. Removal

1 (a) NOTICE OF REMOVAL.

(1) *Where filed; form and content*. A notice of removal shall be filed with the clerk for the district and division within which is located the state or federal court where the civil action is pending. The notice shall be signed pursuant to Rule 9011 and contain a short and plain statement of the facts which entitle the party filing the notice to remove, contain a statement that upon removal of the claim or cause of action ~~the proceeding is core or non-core and, if non-core~~, ~~that~~ the party filing the notice does or does not consent to entry of final orders or judgment by the bankruptcy ~~judge~~ court, and be accompanied by a copy of all process and pleadings.

* * * * *

(e) PROCEDURE AFTER REMOVAL.

* * * * *

(3) Any party who has filed a pleading in connection with the removed claim or cause of action, other than the party filing the notice of removal, shall file a statement ~~admitting or denying any allegation in the notice of removal that upon removal of the claim or cause of action the proceeding is core or non-core. If the statement alleges that the proceeding is non-core, it shall state~~ that the

24 party does or does not consent to entry of final orders or

25 judgment by the bankruptcy ~~judge~~ court. A statement

26 required by this paragraph shall be signed pursuant to Rule

27 9011 and shall be filed not later than 14 days after the filing

28 of the notice of removal. Any party who files a statement

29 pursuant to this paragraph shall mail a copy to every other

30 party to the removed claim or cause of action.

31 * * * * *

COMMITTEE NOTE

Subdivisions (a)(1) and (e)(3) are amended to delete the requirement for a statement that the proceeding is core or non-core and to require in all removed actions a statement that the party does or does not consent to the entry of final orders or judgment by the bankruptcy court. Some proceedings that satisfy the statutory definition of core proceedings, 28 U.S.C. § 157(b)(2), may remain beyond the constitutional power of a bankruptcy judge to adjudicate finally. The amended rule calls for a statement regarding consent at the time of removal, whether or not a proceeding is termed non-core.

The party filing the notice of removal must include a statement regarding consent in the notice, and the other parties who have filed pleadings must respond in a separate statement filed within 14 days after removal. If a party to the removed claim or cause of action has not filed a pleading prior to removal, however, there is no need to file a separate statement under subdivision (e)(3), because a statement regarding consent must be included in a responsive pleading filed pursuant to Rule 7012(b). Rule 7016 governs the bankruptcy court's decision whether to hear and determine the proceeding, issue proposed findings of fact and conclusions of law, or take some other action in the proceeding.

Rule 9033. ~~Review of~~ Proposed Findings of Fact and Conclusions of Law ~~in Non-Core Proceedings~~

(a) SERVICE. ~~In non-core proceedings heard pursuant to 28 U.S.C. § 157(c)(1)~~In a proceeding in which the bankruptcy court has issued ~~the bankruptcy judge shall file~~ proposed findings of fact and conclusions of law.~~.~~ ~~T~~the clerk shall serve forthwith copies on all parties by mail and note the date of mailing on the docket.

* * * * *

COMMITTEE NOTE

Subdivision (a) is amended to delete language limiting this provision to non-core proceedings. Some proceedings that satisfy the statutory definition of core proceedings, 28 U.S.C. § 157(b)(2), may remain beyond the constitutional power of a bankruptcy judge to adjudicate finally. If the bankruptcy court decides, pursuant to Rule 7016, that it is appropriate to issue proposed findings of fact and conclusions of law in a proceeding, this rule governs the subsequent procedures.

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APPENDIX B-2

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Appendix B.2

FEDERAL RULES OF BANKRUPTCY PROCEDURE

PART VIII. BANKRUPTCY APPEALS

Rule

8001. Scope of Part VIII Rules; Definition of "BAP"; Method of Transmission

8002. Time for Filing Notice of Appeal

8003. Appeal as of Right—How Taken; Docketing the Appeal

8004. Appeal by Leave—How Taken; Docketing the Appeal

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8008. Indicative Rulings

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8025. Stay of a District Court or BAP Judgment

8026. Rules by Circuit Councils and District Courts; Procedure When There is No Controlling Law

8027. Notice of a Mediation Procedure

8028. Suspension of Rules in Part VIII

Rule 8001. Scope of Part VIII Rules; Definition of "BAP"; Method of Transmission

1 (a) GENERAL SCOPE. These Part VIII rules govern the
2 procedure in a United States district court and a bankruptcy
3 appellate panel on appeal from a judgment, order, or decree of a
4 bankruptcy court. They also govern certain procedures on appeal
5 to a United States court of appeals under 28 U.S.C. § 158(d).
6 (b) DEFINITION OF "BAP." "BAP" means a bankruptcy
7 appellate panel established by a circuit's judicial council and
8 authorized to hear appeals from a bankruptcy court under 28
9 U.S.C. § 158.
10 (c) METHOD OF TRANSMITTING DOCUMENTS. A
11 document must be sent electronically under these Part VIII rules,
12 unless it is being sent by or to an individual who is not represented
13 by counsel or the court's governing rules permit or require mailing
14 or other means of delivery.

COMMITTEE NOTE

These Part VIII rules apply to appeals under 28 U.S.C. § 158(a) from bankruptcy courts to district courts and BAPs. The Federal Rules of Appellate Procedure generally govern bankruptcy appeals to courts of appeals.

Eight of the Part VIII rules do, however, relate to appeals to courts of appeals. Rule 8004(e) provides that the authorization by a court of appeals of a direct appeal of a bankruptcy court's interlocutory order or decree constitutes a grant of leave to appeal. Rule 8006 governs the procedure for certification under 28 U.S.C. § 158(d)(2) of a direct appeal

from a judgment, order, or decree of a bankruptcy court to a court of appeals. Rule 8007 addresses stays pending a direct appeal to a court of appeals. Rule 8008 authorizes a bankruptcy court to issue an indicative ruling while an appeal is pending in a court of appeals. Rules 8009 and 8010 govern the record on appeal in a direct appeal to a court of appeals. Rule 8025 governs the granting of a stay of a district court or BAP judgment pending an appeal to the court of appeals. And Rule 8028 authorizes the court of appeals to suspend applicable Part VIII rules in a particular case, subject to certain enumerated exceptions.

These rules take account of the evolving technology in the federal courts for the electronic filing, storage, and transmission of documents. Except as applied to pro se parties, the Part VIII rules require documents to be sent electronically, unless applicable court rules or orders expressly require or permit another means of sending a particular document.

Rule 8002. Time for Filing Notice of Appeal

1 (a) IN GENERAL.

2 (1) *Fourteen-Day Period*. Except as provided in
3 subdivisions (b) and (c), a notice of appeal must be filed
4 with the bankruptcy clerk within 14 days after entry of the
5 judgment, order, or decree being appealed.

6 (2) *Filing Before the Entry of Judgment*. A notice
7 of appeal filed after the bankruptcy court announces a
8 decision or order—but before entry of the judgment, order,
9 or decree—is treated as filed on the date of and after the
10 entry.

11 (3) *Multiple Appeals*. If one party files a timely
12 notice of appeal, any other party may file a notice of appeal
13 within 14 days after the date when the first notice was filed,
14 or within the time otherwise allowed by this rule,
15 whichever period ends later.

16 (4) *Mistaken Filing in Another Court*. If a notice
17 of appeal is mistakenly filed in a district court, BAP, or
18 court of appeals, the clerk of that court must state on the
19 notice the date on which it was received and transmit it to
20 the bankruptcy clerk. The notice of appeal is then

21 considered filed in the bankruptcy court on the date so
22 stated.
23 (b) EFFECT OF A MOTION ON THE TIME TO
24 APPEAL.
25 (1) *In General*. If a party timely files in the
26 bankruptcy court any of the following motions, the time to
27 file an appeal runs for all parties from the entry of the order
28 disposing of the last such remaining motion:
29 (A) to amend or make additional findings
30 under Rule 7052, whether or not granting the
31 motion would alter the judgment;
32 (B) to alter or amend the judgment under
33 Rule 9023;
34 (C) for a new trial under Rule 9023; or
35 (D) for relief under Rule 9024 if the motion
36 is filed within 14 days after the judgment is entered.
37 (2) *Filing an Appeal Before the Motion is Decided*.
38 If a party files a notice of appeal after the court announces
39 or enters a judgment, order, or decree—but before it
40 disposes of any motion listed in subdivision (b)(1)—the
41 notice becomes effective when the order disposing of the
42 last such remaining motion is entered.

43 (3) *Appealing the Motion*. If a party intends to
44 challenge an order disposing of any motion listed in
45 subdivision (b)(1)—or the alteration or amendment of a
46 judgment, order, or decree upon the motion—the party
47 must file a notice of appeal or an amended notice of appeal.
48 The notice or amended notice must comply with Rule 8003
49 or 8004 and be filed within the time prescribed by this rule,
50 measured from the entry of the order disposing of the last
51 such remaining motion.
52 (4) *No Additional Fee*. No additional fee is
53 required to file an amended notice of appeal.
54 (c) APPEAL BY AN INMATE CONFINED IN AN
55 INSTITUTION.
56 (1) *In General*. If an inmate confined in an
57 institution files a notice of appeal from a judgment, order,
58 or decree of a bankruptcy court to a district court or BAP,
59 the notice is timely if it is deposited in the institution's
60 internal mail system on or before the last day for filing. If
61 the institution has a system designed for legal mail, the
62 inmate must use that system to receive the benefit of this
63 rule. Timely filing may be shown by a declaration in
64 compliance with 28 U.S.C. § 1746 or by a notarized

65 statement, either of which must set forth the date of deposit
66 and state that first-class postage has been prepaid.
67 (2) *Multiple Appeals*. If an inmate files under this
68 subdivision the first notice of appeal, the 14-day period
69 provided in subdivision (a)(3) for another party to file a
70 notice of appeal runs from the date when the bankruptcy
71 clerk dockets the first notice.
72 (d) EXTENDING THE TIME TO APPEAL.
73 (1) *When the Time May be Extended*. Except as
74 provided in subdivision (d)(2), the bankruptcy court may
75 extend the time to file a notice of appeal upon a party's
76 motion that is filed:
77 (A) within the time prescribed by this rule;
78 or
79 (B) within 21 days after that time, if the
80 party shows excusable neglect.
81 (2) *When the Time May Not be Extended*. The
82 bankruptcy court may not extend the time to file a notice of
83 appeal if the judgment, order, or decree appealed from:
84 (A) grants relief from an automatic stay
85 under § 362, 922, 1201, or 1301 of the Code;
86 (B) authorizes the sale or lease of property

87 or the use of cash collateral under § 363 of the
88 Code;
89 (C) authorizes the obtaining of credit under
90 § 364 of the Code;
91 (D) authorizes the assumption or
92 assignment of an executory contract or unexpired
93 lease under § 365 of the Code;
94 (E) approves a disclosure statement under
95 § 1125 of the Code; or
96 (F) confirms a plan under § 943, 1129,
97 1225, or 1325 of the Code.
98 (3) *Time Limits on an Extension*. No extension of
99 time may exceed 21 days after the time prescribed by this
100 rule, or 14 days after the order granting the motion to
101 extend time is entered, whichever is later.

COMMITTEE NOTE

This rule is derived from former Rule 8002 and F.R.App.P. 4(a) and (c). With the exception of subdivision (c), the changes to the former rule are stylistic. The rule retains the former rule's 14-day time period for filing a notice of appeal, as opposed to the longer periods permitted for appeals in civil cases under F.R.App.P. 4(a).

Subdivision (a) continues to allow any other party to file a notice of appeal within 14 days after the first notice of appeal is filed, or thereafter to the extent otherwise authorized by this rule. Subdivision (a) also retains provisions of the former rule that prescribe the date the notice of appeal is deemed filed if the appellant files it prematurely or in the wrong court.

Subdivision (b), like former Rule 8002(b) and F.R.App.P. 4(a), tolls the time for filing a notice of appeal when certain postjudgment motions are filed, and it prescribes the effective date of a notice of appeal that is filed before the court disposes of all of the specified motions. As under the former rule, a party that wants to appeal the court's disposition of the motion or the alteration or amendment of a judgment, order, or decree in response to such a motion must file a notice of appeal or, if it has already filed one, an amended notice of appeal.

Although Rule 8003(a)(3)(C) requires a notice of appeal to be accompanied by the required fee, no additional fee is required for the filing of an amended notice of appeal.

Subdivision (c) mirrors the provisions of F.R.App.P. 4(c)(1) and (2), which specify timing rules for a notice of appeal filed by an inmate confined in an institution.

Subdivision (d) continues to allow the court to grant an extension of time to file a notice of appeal, except with respect to certain specified judgments, orders, and decrees.

Rule 8003. Appeal as of Right—How Taken; Docketing the Appeal

1 (a) FILING THE NOTICE OF APPEAL.

2 (1) *In General*. An appeal from a judgment, order,
3 or decree of a bankruptcy court to a district court or BAP
4 under 28 U.S.C. § 158(a)(1) or (a)(2) may be taken only by
5 filing a notice of appeal with the bankruptcy clerk within
6 the time allowed by Rule 8002.

7 (2) *Effect of Not Taking Other Steps*. An
8 appellant's failure to take any step other than the timely
9 filing of a notice of appeal does not affect the validity of
10 the appeal, but is ground only for the district court or BAP
11 to act as it considers appropriate, including dismissing the
12 appeal.

13 (3) *Contents*. The notice of appeal must:

14 (A) conform substantially to the appropriate
15 Official Form;

16 (B) be accompanied by the judgment, order,
17 or decree, or the part of it, being appealed; and

18 (C) be accompanied by the prescribed fee.

19 (4) *Additional Copies*. If requested to do so, the
20 appellant must furnish the bankruptcy clerk with enough
21 copies of the notice to enable the clerk to comply with

22 subdivision (c).

23 (b) JOINT OR CONSOLIDATED APPEALS.

24 (1) *Joint Notice of Appeal*. When two or more

25 parties are entitled to appeal from a judgment, order, or

26 decree of a bankruptcy court and their interests make

27 joinder practicable, they may file a joint notice of appeal.

28 They may then proceed on appeal as a single appellant.

29 (2) *Consolidating Appeals*. When parties have

30 separately filed timely notices of appeal, the district court

31 or BAP may join or consolidate the appeals.

32 (c) SERVING THE NOTICE OF APPEAL.

33 (1) *Transmitting to the United States Trustee and*

34 *Other Parties*. The bankruptcy clerk must transmit the

35 notice of appeal to the United States trustee and to counsel

36 of record for each party to the appeal, excluding the

37 appellant. If a party is proceeding pro se, the clerk must

38 send the notice of appeal to the party's last known address.

39 The clerk must note, on each copy, the date when the notice

40 of appeal was filed.

41 (2) *Effect of Failing to Transmit Notice*. The

42 bankruptcy clerk's failure to transmit notice to a party or

43 the United States trustee does not affect the validity of

44 the appeal.

45 (3) *Noting Service on the Docket*. The clerk must

46 note on the docket the names of the parties served and the

47 date and method of the service.

48 (d) TRANSMITTING THE NOTICE OF APPEAL TO

49 THE DISTRICT COURT OR BAP; DOCKETING THE APPEAL.

50 (1) *Transmitting the Notice*. The bankruptcy clerk

51 must promptly transmit the notice of appeal to the BAP

52 clerk if a BAP has been established for appeals from that

53 district and the appellant has not elected to have the district

54 court hear the appeal. Otherwise, the bankruptcy clerk

55 must promptly transmit the notice to the district clerk.

56 (2) *Docketing in the District Court or BAP*. Upon

57 receiving the notice of appeal, the district or BAP clerk

58 must docket the appeal under the title of the bankruptcy

59 court action and must identify the appellant, adding the

60 appellant's name if necessary.

COMMITTEE NOTE

This rule is derived from several former Bankruptcy Rule and Appellate Rule provisions. It addresses appeals as of right, joint and consolidated appeals, service of the notice of appeal, and the timing of the docketing of an appeal in the district court or BAP.

Subdivision (a) incorporates, with stylistic changes, much of the content of former Rule 8001(a) regarding the taking of an appeal as of right

under 28 U.S.C. § 158(a)(1) or (2). The rule now requires that the judgment, order, or decree being appealed be attached to the notice of appeal.

Subdivision (b), which is an adaptation of F.R.App.P. 3(b), permits the filing of a joint notice of appeal by multiple appellants that have sufficiently similar interests that their joinder is practicable. It also allows the district court or BAP to consolidate appeals taken separately by two or more parties.

Subdivision (c) is derived from former Rule 8004 and F.R.App.P. 3(d). Under Rule 8001(c), the former rule's requirement that service of the notice of appeal be accomplished by mailing is generally modified to require that the bankruptcy clerk serve counsel by electronic means. Service on pro se parties must be made by sending the notice to the address most recently provided to the court.

Subdivision (d) modifies the provision of former Rule 8007(b), which delayed the docketing of an appeal by the district court or BAP until the record was complete and the bankruptcy clerk transmitted it. The new provision, adapted from F.R.App.P. 3(d) and 12(a), requires the bankruptcy clerk to promptly transmit the notice of appeal to the clerk of the district court or BAP. Upon receipt of the notice of appeal, the district or BAP clerk must docket the appeal. Under this procedure, motions filed in the district court or BAP prior to completion and transmission of the record can generally be placed on the docket of an already pending appeal.

Rule 8004. Appeal by Leave—How Taken; Docketing the Appeal

1 (a) NOTICE OF APPEAL AND MOTION FOR LEAVE
2 TO APPEAL. To appeal from an interlocutory order or decree of a
3 bankruptcy court under 28 U.S.C. § 158(a)(3), a party must file
4 with the bankruptcy clerk a notice of appeal as prescribed by Rule
5 8003(a). The notice must:
6 (1) be filed within the time allowed by Rule 8002;
7 (2) be accompanied by a motion for leave to appeal
8 prepared in accordance with subdivision (b); and
9 (3) unless served electronically using the court's
10 transmission equipment, include proof of service in
11 accordance with Rule 8011(d).
12 (b) CONTENTS OF THE MOTION; RESPONSE.
13 (1) *Contents*. A motion for leave to appeal under
14 28 U.S.C. § 158(a)(3) must include the following:
15 (A) the facts necessary to understand the
16 question presented;
17 (B) the question itself;
18 (C) the relief sought;
19 (D) the reasons why leave to appeal should
20 be granted; and
21 (E) a copy of the interlocutory order or

22 decree and any related opinion or memorandum.

23 (2) *Response*. A party may file with the district or
24 BAP clerk a response in opposition or a cross-motion
25 within 14 days after the motion is served.

26 (c) TRANSMITTING THE NOTICE OF APPEAL AND
27 THE MOTION; DOCKETING THE APPEAL; DETERMINING
28 THE MOTION.

29 (1) *Transmitting to the District Court or BAP*. The
30 bankruptcy clerk must promptly transmit the notice of
31 appeal and the motion for leave to the BAP clerk if a BAP
32 has been established for appeals from that district and the
33 appellant has not elected to have the district court hear the
34 appeal. Otherwise, the bankruptcy clerk must promptly
35 transmit the notice and motion to the district clerk.

36 (2) *Docketing in the District Court or BAP*. Upon
37 receiving the notice and motion, the district or BAP clerk
38 must docket the appeal under the title of the bankruptcy
39 court action and must identify the appellant, adding the
40 appellant's name if necessary.

41 (3) *Oral Argument Not Required*. The motion and
42 any response or cross-motion are submitted without oral
43 argument unless the district court or BAP orders otherwise.

44 If the motion is denied, the district court or BAP must
45 dismiss the appeal.
46 (d) FAILURE TO FILE A MOTION WITH A NOTICE
47 OF APPEAL. If an appellant timely files a notice of appeal under
48 this rule but does not include a motion for leave, the district court
49 or BAP may order the appellant to file a motion for leave, or treat
50 the notice of appeal as a motion for leave and either grant or deny
51 it. If the court orders that a motion for leave be filed, the appellant
52 must do so within 14 days after the order is entered, unless the
53 order provides otherwise.
54 (e) DIRECT APPEAL TO A COURT OF APPEALS. If
55 leave to appeal an interlocutory order or decree is required under
56 28 U.S.C. § 158(a)(3), an authorization of a direct appeal by the
57 court of appeals under 28 U.S.C. § 158(d)(2) satisfies the
58 requirement.

COMMITTEE NOTE

This rule is derived from former Rules 8001(b) and 8003 and F.R.App.P. 5. It retains the practice for interlocutory bankruptcy appeals of requiring a notice of appeal to be filed along with a motion for leave to appeal. Like current Rule 8003, it alters the timing of the docketing of the appeal in the district court or BAP.

Subdivision (a) requires a party seeking leave to appeal under 28 U.S.C. § 158(a)(3) to file with the bankruptcy clerk both a notice of appeal and a motion for leave to appeal.

Subdivision (b) prescribes the contents of the motion, retaining the

requirements of former Rule 8003(a). It also continues to allow another party to file a cross-motion or response to the appellant's motion. Because of the prompt docketing of the appeal under the current rule, the cross-motion or response must be filed in the district court or BAP, rather than in the bankruptcy court as the former rule required.

Subdivision (c) requires the bankruptcy clerk to transmit promptly to the district court or BAP the notice of appeal and the motion for leave to appeal. Upon receipt of the notice and the motion, the district or BAP clerk must docket the appeal. Unless the district court or BAP orders otherwise, no oral argument will be held on the motion.

Subdivision (d) retains the provisions of former Rule 8003(c). It provides that if the appellant timely files a notice of appeal, but fails to file a motion for leave to appeal, the court can either direct that a motion be filed or treat the notice of appeal as the motion and either grant or deny leave.

Subdivision (e), like former Rule 8003(d), treats the authorization of a direct appeal by the court of appeals as a grant of leave to appeal under 28 U.S.C. § 158(a)(3) if the district court or BAP has not already granted leave. Thus, a separate order granting leave to appeal is not required. If the court of appeals grants permission to appeal, the record must be assembled and transmitted in accordance with Rules 8009 and 8010.

Rule 8005. Election to Have an Appeal Heard by the District Court Instead of the BAP

1 (a) FILING OF A STATEMENT OF ELECTION. To
2 elect to have an appeal heard by the district court, a party must:
3 (1) file a statement of election that conforms
4 substantially to the appropriate Official Form; and
5 (2) do so within the time prescribed by 28 U.S.C.
6 § 158(c)(1).
7 (b) TRANSFERRING THE DOCUMENTS RELATED
8 TO THE APPEAL. Upon receiving an appellant's timely
9 statement of election, the bankruptcy clerk must transmit to the
10 district clerk all documents related to the appeal. Upon receiving a
11 timely statement of election by a party other than the appellant, the
12 BAP clerk must transmit to the district clerk all documents related
13 to the appeal.
14 (c) DETERMINING THE VALIDITY OF AN
15 ELECTION. A party seeking a determination of the validity of an
16 election must file a motion in the court where the appeal is then
17 pending. The motion must be filed within 14 days after the
18 statement of election is filed.
19 (d) MOTION FOR LEAVE WITHOUT A NOTICE OF
20 APPEAL—EFFECT ON THE TIMING OF AN ELECTION. If
21 an appellant moves for leave to appeal under Rule 8004 but fails to

22 file a separate notice of appeal with the motion, the motion must be

23 treated as a notice of appeal for purposes of determining the

24 timeliness of a statement of election.

COMMITTEE NOTE

This rule, which implements 28 U.S.C. § 158(c)(1), is derived from former Rule 8001(e).

As the former rule required, subdivision (a) provides that an appellant that elects to have a district court, rather than a BAP, hear its appeal must file with the bankruptcy clerk a statement of election when it files its notice of appeal. The statement must conform substantially to the appropriate Official Form. If a BAP has been established for appeals from the bankruptcy court and the appellant does not file a timely statement of election, any other party that elects to have the district court hear the appeal must file a statement of election with the BAP clerk no later than 30 days after service of the notice of appeal.

Subdivision (b) requires the bankruptcy clerk to transmit all appeal documents to the district clerk if the appellant files a timely statement of election. If the appellant does not make that election, the bankruptcy clerk must transmit those documents to the BAP clerk, and upon a timely election by any other party, the BAP clerk must promptly transmit the appeal documents to the district clerk.

Subdivision (c) provides a new procedure for the resolution of disputes regarding the validity of an election. A motion seeking the determination of the validity of an election must be filed no later than 14 days after the statement of election is filed. Nothing in this rule prevents a court from determining the validity of an election on its own motion.

Subdivision (d) provides that, in the case of an appeal by leave, if the appellant files a motion for leave to appeal but fails to file a notice of appeal, the filing and service of the motion will be treated for timing purposes under this rule as the filing and service of the notice of appeal.

Rule 8006. Certifying a Direct Appeal to the Court of Appeals

1 (a) EFFECTIVE DATE OF A CERTIFICATION. A
2 certification of a judgment, order, or decree of a bankruptcy court
3 for direct review in a court of appeals under 28 U.S.C. § 158(d)(2)
4 is effective when:
5 (1) the certification has been filed;
6 (2) a timely appeal has been taken under Rule 8003
7 or 8004; and
8 (3) the notice of appeal has become effective under
9 Rule 8002.
10 (b) FILING THE CERTIFICATION. The certification
11 must be filed with the clerk of the court where the matter is
12 pending. For purposes of this rule, a matter remains pending in the
13 bankruptcy court for 30 days after the effective date of the first
14 notice of appeal from the judgment, order, or decree for which
15 direct review is sought. A matter is pending in the district court or
16 BAP thereafter.
17 (c) JOINT CERTIFICATION BY ALL APPELLANTS
18 AND APPELLEES. A joint certification by all the appellants and
19 appellees under 28 U.S.C. § 158(d)(2)(A) must be made by using
20 the appropriate Official Form. The parties may supplement the
21 certification with a short statement of the basis for the certification,

22 which may include the information listed in subdivision (f)(2).

23 (d) THE COURT THAT MAY MAKE THE

24 CERTIFICATION. Only the court where the matter is pending, as

25 provided in subdivision (b), may certify a direct review on request

26 of parties or on its own motion.

27 (e) CERTIFICATION ON THE COURT'S OWN

28 MOTION.

29 (1) *How Accomplished*. A certification on the

30 court's own motion must be set forth in a separate

31 document. The clerk of the certifying court must serve it

32 on the parties to the appeal in the manner required for

33 service of a notice of appeal under Rule 8003(c)(1). The

34 certification must be accompanied by an opinion or

35 memorandum that contains the information required by

36 subdivision (f)(2)(A)-(D).

37 (2) *Supplemental Statement by a Party*. Within 14

38 days after the court's certification, a party may file with the

39 clerk of the certifying court a short supplemental statement

40 regarding the merits of certification.

41 (f) CERTIFICATION BY THE COURT ON REQUEST.

42 (1) *How Requested*. A request by a party for

43 certification that a circumstance specified in 28 U.S.C.

44 §158(d)(2)(A)(i)-(iii) applies—or a request by a majority of
45 the appellants and a majority of the appellees—must be
46 filed with the clerk of the court where the matter is pending
47 within 60 days after the entry of the judgment, order, or
48 decree.
49 (2) *Service and Contents*. The request must be
50 served on all parties to the appeal in the manner required
51 for service of a notice of appeal under Rule 8003(c)(1), and
52 it must include the following:
53 (A) the facts necessary to understand the
54 question presented;
55 (B) the question itself;
56 (C) the relief sought;
57 (D) the reasons why the direct appeal
58 should be allowed, including which circumstance
59 specified in 28 U.S.C. § 158(d)(2)(A)(i)-(iii)
60 applies; and
61 (E) a copy of the judgment, order, or decree
62 and any related opinion or memorandum.
63 (3) *Time to File a Response or a Cross-Request*. A
64 party may file a response to the request within 14 days after
65 the request is served, or such other time as the court where

66 the matter is pending allows. A party may file a cross-
67 request for certification within 14 days after the request is
68 served, or within 60 days after the entry of the judgment,
69 order, or decree, whichever occurs first.
70 (4) *Oral Argument Not Required*. The request,
71 cross-request, and any response are not governed by Rule
72 9014 and are submitted without oral argument unless the
73 court where the matter is pending orders otherwise.
74 (5) *Form and Service of the Certification*. If the
75 court certifies a direct appeal in response to the request, it
76 must do so in a separate document. The certification must
77 be served on the parties to the appeal in the manner
78 required for service of a notice of appeal under Rule
79 8003(c)(1).
80 (g) PROCEEDING IN THE COURT OF APPEALS
81 FOLLOWING A CERTIFICATION. Within 30 days after the
82 date the certification becomes effective under subdivision (a), a
83 request for permission to take a direct appeal to the court of
84 appeals must be filed with the circuit clerk.

COMMITTEE NOTE

This rule is derived from former Rule 8001(f), and it provides the

procedures for the certification of a direct appeal of a judgment, order, or decree of a bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2). Once a case has been certified in the bankruptcy court, the district court, or the BAP for direct appeal and a request for permission to appeal has been timely filed, the Federal Rules of Appellate Procedure govern further proceedings in the court of appeals.

Subdivision (a), like the former rule, requires that an appeal be properly taken—now under Rule 8003 or 8004—before a certification for direct review in the court of appeals takes effect. This rule requires the timely filing of a notice of appeal under Rule 8002 and accounts for the delayed effectiveness of a notice of appeal under the circumstances specified in that rule. Ordinarily, a notice of appeal is effective when it is filed in the bankruptcy court. Rule 8002, however, delays the effectiveness of a notice of appeal when (1) it is filed after the announcement of a decision or order but prior to the entry of the judgment, order, or decree; or (2) it is filed after the announcement or entry of a judgment, order, or decree but before the bankruptcy court disposes of certain postjudgment motions.

When the bankruptcy court enters an interlocutory order or decree that is appealable under 28 U.S.C. § 158(a)(3), certification for direct review in the court of appeals may take effect before the district court or BAP grants leave to appeal. The certification is effective when the actions specified in subdivision (a) have occurred. Rule 8004(e) provides that if the court of appeals grants permission to take a direct appeal before leave to appeal an interlocutory ruling has been granted, the authorization by the court of appeals is treated as the granting of leave to appeal.

Subdivision (b) provides that a certification must be filed in the court where the matter is pending, as determined by this subdivision. This provision modifies the former rule. Because of the prompt docketing of appeals in the district court or BAP under Rules 8003 and 8004, a matter is deemed—for purposes of this rule only—to remain pending in the bankruptcy court for 30 days after the effective date of the notice of appeal. This provision will in appropriate cases give the bankruptcy judge, who will be familiar with the matter being appealed, an opportunity to decide whether certification for direct review is appropriate. Similarly, subdivision (d) provides that only the court where the matter is then pending according to subdivision (b) may make a certification on its own motion or on the request of one or more parties.

Section 158(d)(2) provides three different ways in which an appeal may be certified for direct review. Implementing these options, the rule

provides in subdivision (c) for the joint certification by all appellants and appellees; in subdivision (e) for the bankruptcy court's, district court's, or BAP's certification on its own motion; and in subdivision (f) for the bankruptcy court's, district court's, or BAP's certification on request of a party or a majority of appellants and a majority of appellees.

Subdivision (g) requires that, once a certification for direct review is made, a request to the court of appeals for permission to take a direct appeal to that court must be filed with the clerk of the court of appeals no later than 30 days after the effective date of the certification. Federal Rule of Appellate Procedure 6(c), which incorporates all of F.R.App.P. 5 except subdivision (a)(3), prescribes the procedure for requesting the permission of the court of appeals and governs proceedings that take place thereafter in that court.

Rule 8007. Stay Pending Appeal; Bonds; Suspension of Proceedings

1 (a) INITIAL MOTION IN THE BANKRUPTCY COURT.

2 (1) *In General*. Ordinarily, a party must move first

3 in the bankruptcy court for the following relief:

4 (A) a stay of a judgment, order, or decree of

5 the bankruptcy court pending appeal;

6 (B) the approval of a supersedeas bond;

7 (C) an order suspending, modifying,

8 restoring, or granting an injunction while an appeal

9 is pending; or

10 (D) the suspension or continuation of

11 proceedings in a case or other relief permitted by

12 subdivision (e).

13 (2) *Time to File*. The motion may be made either

14 before or after the notice of appeal is filed.

15 (b) MOTION IN THE COURT OF APPEALS ON

16 DIRECT APPEAL, THE DISTRICT COURT, OR THE BAP.

17 (1) *Request for Relief*. A motion for the relief

18 specified in subdivision (a)(1)—or to vacate or modify a

19 bankruptcy court's order granting such relief—may be

20 made in the court where the appeal is pending or where it

21 will be taken.

22 (2) *Showing or Statement Required*. The motion
23 must:
24 (A) show that moving first in the
25 bankruptcy court would be impracticable; or
26 (B) if a motion was made in the bankruptcy
27 court, either state that the court has not yet ruled on
28 the motion, or state that the court has ruled and set
29 out any reasons given for the ruling.
30 (3) *Additional Content*. The motion must also
31 include:
32 (A) the reasons for granting the relief
33 requested and the facts relied upon;
34 (B) affidavits or other sworn statements
35 supporting facts subject to dispute; and
36 (C) relevant parts of the record.
37 (4) *Serving Notice*. The movant must give
38 reasonable notice of the motion to all parties.
39 (c) FILING A BOND OR OTHER SECURITY. The
40 district court, BAP, or court of appeals may condition relief on
41 filing a bond or other appropriate security with the bankruptcy
42 court.
43 (d) BOND FOR A TRUSTEE OR THE UNITED

44 STATES. The court may require a trustee to file a bond or other
45 appropriate security when the trustee appeals. A bond or other
46 security is not required when an appeal is taken by the United
47 States, its officer, or its agency or by direction of any department
48 of the federal government.
49 (e) CONTINUED PROCEEDINGS IN THE
50 BANKRUPTCY COURT. Despite Rule 7062 and subject to the
51 authority of the district court, BAP, or court of appeals, the
52 bankruptcy court may:
53 (1) suspend or continue other proceedings in the
54 case; or
55 (2) issue any other appropriate orders during the
56 pendency of an appeal to protect the rights of all parties in
57 interest.

COMMITTEE NOTE

This rule is derived from former Rule 8005 and F.R.App.P. 8. It now applies to direct appeals in courts of appeals.

Subdivision (a), like the former rule, requires a party ordinarily to seek relief pending an appeal in the bankruptcy court. Subdivision (a)(1) expands the list of relief enumerated in F.R.App.P. 8(a)(1) to reflect bankruptcy practice. It includes the suspension or continuation of other proceedings in the bankruptcy case, as authorized by subdivision (e). Subdivision (a)(2) clarifies that a motion for a stay pending appeal, approval of a supersedeas bond, or any other relief specified in paragraph (1) may be made in the bankruptcy court before or after the filing of a notice of appeal.

Subdivision (b) authorizes a party to seek the relief specified in (a)(1), or the vacation or modification of the granting of such relief, by means of a motion filed in the court where the appeal is pending or will be taken—district court, BAP, or the court of appeals on direct appeal. Accordingly, a notice of appeal need not be filed with respect to a bankruptcy court's order granting or denying such a motion. The motion for relief in the district court, BAP, or court of appeals must state why it was impracticable to seek relief initially in the bankruptcy court, if a motion was not filed there, or why the bankruptcy court denied the relief sought.

Subdivisions (c) and (d) retain the provisions of the former rule that permit the district court or BAP—and now the court of appeals—to condition the granting of relief on the posting of a bond by the appellant, except when that party is a federal government entity. Rule 9025 governs proceedings against sureties.

Rule 8008. Indicative Rulings

(a) RELIEF PENDING APPEAL. If a party files a timely motion in the bankruptcy court for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the bankruptcy court may:

(1) defer considering the motion;

(2) deny the motion; or

(3) state that the court would grant the motion if the court where the appeal is pending remands for that purpose, or state that the motion raises a substantial issue.

(b) NOTICE TO THE COURT WHERE THE APPEAL IS PENDING. The movant must promptly notify the clerk of the court where the appeal is pending if the bankruptcy court states that it would grant the motion or that the motion raises a substantial issue.

(c) REMAND AFTER AN INDICATIVE RULING. If the bankruptcy court states that it would grant the motion or that the motion raises a substantial issue, the district court or BAP may remand for further proceedings, but it retains jurisdiction unless it expressly dismisses the appeal. If the district court or BAP remands but retains jurisdiction, the parties must promptly notify

21 the clerk of that court when the bankruptcy court has decided the

22 motion on remand.

COMMITTEE NOTE

This rule is an adaptation of F.R.Civ.P. 62.1 and F.R.App.P. 12.1. It provides a procedure for the issuance of an indicative ruling when a bankruptcy court determines that, because of a pending appeal, the court lacks jurisdiction to grant a request for relief that the court concludes is meritorious or raises a substantial issue. The rule does not attempt to define the circumstances in which an appeal limits or defeats the bankruptcy court's authority to act in the face of a pending appeal. In contrast, Rule 8002(b) identifies motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before the last such motion is resolved. In those circumstances, the bankruptcy court has authority to resolve the motion without resorting to the indicative ruling procedure.

Subdivision (b) requires the movant to notify the court where an appeal is pending if the bankruptcy court states that it would grant the motion or that it raises a substantial issue. This provision applies to appeals pending in the district court, the BAP, or the court of appeals.

Federal Rules of Appellate Procedure 6 and 12.1 govern the procedure in the court of appeals following notification of the bankruptcy court's indicative ruling.

Subdivision (c) of this rule governs the procedure in the district court or BAP upon notification that the bankruptcy court has issued an indicative ruling. The district court or BAP may remand to the bankruptcy court for a ruling on the motion for relief. The district court or BAP may also remand all proceedings, thereby terminating the initial appeal, if it expressly states that it is dismissing the appeal. It should do so, however, only when the appellant has stated clearly its intention to abandon the appeal. Otherwise, the district court or BAP may remand for the purpose of ruling on the motion, while retaining jurisdiction to proceed with the appeal after the bankruptcy court rules, provided that the appeal is not then moot and a party wishes to proceed.

Rule 8009. Record on Appeal; Sealed Documents

1 (a) DESIGNATING THE RECORD ON APPEAL;
2 STATEMENT OF THE ISSUES.
3 (1) *Appellant*.
4 (A) The appellant must file with the
5 bankruptcy clerk and serve on the appellee a
6 designation of the items to be included in the record
7 on appeal and a statement of the issues to be
8 presented.
9 (B) The appellant must file and serve the
10 designation and statement within 14 days after:
11 (i) the appellant's notice of appeal as
12 of right becomes effective under Rule 8002;
13 or
14 (ii) an order granting leave to appeal
15 is entered.
16 A designation and statement served prematurely
17 must be treated as served on the first day on which
18 filing is timely.
19 (2) *Appellee and Cross-Appellant.* Within 14 days
20 after being served, the appellee may file and serve on the
21 appellant a designation of additional items to be included in

22 the record. An appellee who files a cross-appeal must file
23 and serve a designation of additional items to be included
24 in the record and a statement of the issues to be presented
25 on the cross-appeal.
26 (3) *Cross-Appellee*. Within 14 days after service of
27 the cross-appellant's designation and statement, a cross-
28 appellee may file and serve on the cross-appellant a
29 designation of additional items to be included in the record.
30 (4) *Record on Appeal*. The record on appeal must
31 include the following:
32 • items designated by the parties;
33 • the notice of appeal;
34 • the judgment, order, or decree being
35 appealed;
36 • any order granting leave to appeal;
37 • any certification required for a direct appeal
38 to the court of appeals;
39 • any opinion, findings of fact, and
40 conclusions of law relating to the issues on appeal,
41 including transcripts of all oral rulings;
42 • any transcript ordered under subdivision (b);

43 • any statement required by subdivision (c);

44 and

45 • any additional items from the record that the

46 court where the appeal is pending orders.

47 (5) *Copies for the Bankruptcy Clerk*. If paper

48 copies are needed, a party filing a designation of items

49 must provide a copy of any of those items that the

50 bankruptcy clerk requests. If the party fails to do so, the

51 bankruptcy clerk must prepare the copy at the party's

52 expense.

53 (b) TRANSCRIPT OF PROCEEDINGS.

54 (1) *Appellant's Duty to Order*. Within the time

55 period prescribed by subdivision (a)(1), the appellant must:

56 (A) order in writing from the reporter, as

57 defined in Rule 8010(a)(1), a transcript of such

58 parts of the proceedings not already on file as the

59 appellant considers necessary for the appeal, and

60 file a copy of the order with the bankruptcy clerk;

61 or

62 (B) file with the bankruptcy clerk a

63 certificate stating that the appellant is not ordering a

64 transcript.

65 (2) *Cross-Appellant's Duty to Order*. Within 14
66 days after the appellant files a copy of the transcript order
67 or a certificate of not ordering a transcript, the appellee as
68 cross-appellant must:
69 (A) order in writing from the reporter, as
70 defined in Rule 8010(a)(1), a transcript of such
71 additional parts of the proceedings as the cross-
72 appellant considers necessary for the appeal, and
73 file a copy of the order with the bankruptcy clerk;
74 or
75 (B) file with the bankruptcy clerk a
76 certificate stating that the cross-appellant is not
77 ordering a transcript.
78 (3) *Appellee's or Cross-Appellee's Right to Order*.
79 Within 14 days after the appellant or cross-appellant files a
80 copy of a transcript order or certificate of not ordering a
81 transcript, the appellee or cross-appellee may order in
82 writing from the reporter a transcript of such additional
83 parts of the proceedings as the appellee or cross-appellee
84 considers necessary for the appeal. A copy of the order
85 must be filed with the bankruptcy clerk.
86 (4) *Payment*. At the time of ordering, a party must

87 make satisfactory arrangements with the reporter for paying
88 the cost of the transcript.
89 (5) *Unsupported Finding or Conclusion.* If the
90 appellant intends to argue on appeal that a finding or
91 conclusion is unsupported by the evidence or is contrary to
92 the evidence, the appellant must include in the record a
93 transcript of all relevant testimony and copies of all
94 relevant exhibits.
95 (c) STATEMENT OF THE EVIDENCE WHEN A
96 TRANSCRIPT IS UNAVAILABLE. If a transcript of a hearing or
97 trial is unavailable, the appellant may prepare a statement of the
98 evidence or proceedings from the best available means, including
99 the appellant's recollection. The statement must be filed within
100 the time prescribed by subdivision (a)(1) and served on the
101 appellee, who may serve objections or proposed amendments
102 within 14 days after being served. The statement and any
103 objections or proposed amendments must then be submitted to the
104 bankruptcy court for settlement and approval. As settled and
105 approved, the statement must be included by the bankruptcy clerk
106 in the record on appeal.
107 (d) AGREED STATEMENT AS THE RECORD ON
108 APPEAL. Instead of the record on appeal as defined in

109 subdivision (a), the parties may prepare, sign, and submit to the
110 bankruptcy court a statement of the case showing how the issues
111 presented by the appeal arose and were decided in the bankruptcy
112 court. The statement must set forth only those facts alleged and
113 proved or sought to be proved that are essential to the court's
114 resolution of the issues. If the statement is accurate, it—together
115 with any additions that the bankruptcy court may consider
116 necessary to a full presentation of the issues on appeal—must be
117 approved by the bankruptcy court and must then be certified to the
118 court where the appeal is pending as the record on appeal. The
119 bankruptcy clerk must then transmit it to the clerk of that court
120 within the time provided by Rule 8010. A copy of the agreed
121 statement may be filed in place of the appendix required by Rule
122 8018(b) or, in the case of a direct appeal to the court of appeals, by
123 F.R.App.P. 30.
124 (e) CORRECTING OR MODIFYING THE RECORD.
125 (1) *Submitting to the Bankruptcy Court*. If any
126 difference arises about whether the record accurately
127 discloses what occurred in the bankruptcy court, the
128 difference must be submitted to and settled by the
129 bankruptcy court and the record conformed accordingly. If
130 an item has been improperly designated as part of the

131 record on appeal, a party may move to strike that item.

132 (2) *Correcting in Other Ways*. If anything material

133 to either party is omitted from or misstated in the record by

134 error or accident, the omission or misstatement may be

135 corrected, and a supplemental record may be certified and

136 transmitted:

137 (A) on stipulation of the parties;

138 (B) by the bankruptcy court before or after

139 the record has been forwarded; or

140 (C) by the court where the appeal is

141 pending.

142 (3) *Remaining Questions*. All other questions as to

143 the form and content of the record must be presented to the

144 court where the appeal is pending.

145 (f) SEALED DOCUMENTS. A document placed under

146 seal by the bankruptcy court may be designated as part of the

147 record on appeal. In doing so, a party must identify it without

148 revealing confidential or secret information, but the bankruptcy

149 clerk must not transmit it to the clerk of the court where the appeal

150 is pending as part of the record. Instead, a party must file a motion

151 with the court where the appeal is pending to accept the document

152 under seal. If the motion is granted, the movant must notify the

153 bankruptcy court of the ruling, and the bankruptcy clerk must

154 promptly transmit the sealed document to the clerk of the court

155 where the appeal is pending.

156 (g) OTHER NECESSARY ACTIONS. All parties to an

157 appeal must take any other action necessary to enable the

158 bankruptcy clerk to assemble and transmit the record.

COMMITTEE NOTE

This rule is derived from former Rule 8006 and F.R.App.P. 10 and 11(a). The provisions of this rule and Rule 8010 are applicable to appeals taken directly to a court of appeals under 28 U.S.C. § 158(d)(2), as well as to appeals to a district court or BAP. See F.R.App.P. 6(c)(2)(A) and (B).

The rule retains the practice of former Rule 8006 of requiring the parties to designate items to be included in the record on appeal. In this respect, the bankruptcy rule differs from the appellate rule. Among other things, F.R.App.P. 10(a) provides that the record on appeal consists of all the documents and exhibits filed in the case. This requirement would often be unworkable in a bankruptcy context because thousands of items might have been filed in the overall bankruptcy case.

Subdivision (a) provides the time period for an appellant to file a designation of items to be included in the record on appeal and a statement of the issues to be presented. It then provides for the designation of additional items by the appellee, cross-appellant, and cross-appellee, as well as for the cross-appellant's statement of the issues to be presented in its appeal. Subdivision (a)(4) prescribes the content of the record on appeal. Ordinarily, the bankruptcy clerk will not need to have paper copies of the designated items because the clerk will either transmit them to the appellate court electronically or otherwise make them available electronically. If the bankruptcy clerk requires a paper copy of some or all of the items designated as part of the record, the clerk may request the party that designated the item to provide the necessary copies, and the party must comply with the request or bear the cost of the clerk's copying.

Subdivision (b) governs the process for ordering a complete or partial transcript of the bankruptcy court proceedings. In situations in

which a transcript is unavailable, subdivision (c) allows for the parties' preparation of a statement of the evidence or proceedings, which must be approved by the bankruptcy court.

Subdivision (d) adopts the practice of F.R.App.P. 10(d) of permitting the parties to agree on a statement of the case in place of the record on appeal. The statement must show how the issues on appeal arose and were decided in the bankruptcy court. It must be approved by the bankruptcy court in order to be certified as the record on appeal.

Subdivision (e), modeled on F.R.App.P. 10(e), provides a procedure for correcting the record on appeal if an item is improperly designated, omitted, or misstated.

Subdivision (f) is a new provision that governs the handling of any document that remains sealed by the bankruptcy court and that a party wants to include in the record on appeal. The party must request the court where the appeal is pending to accept the document under seal, and that motion must be granted before the bankruptcy clerk may transmit the sealed document to the district, BAP, or circuit clerk.

Subdivision (g) requires the parties' cooperation with the bankruptcy clerk in assembling and transmitting the record. It retains the requirement of former Rule 8006, which was adapted from F.R.App.P. 11(a).

Rule 8010. Completing and Transmitting the Record

1 (a) REPORTER'S DUTIES.

2 (1) *Proceedings Recorded Without a Reporter*
3 *Present.* If proceedings were recorded without a reporter
4 being present, the person or service that the bankruptcy
5 court designates to transcribe the recording is the reporter
6 for purposes of this rule.

7 (2) *Preparing and Filing the Transcript*. The
8 reporter must prepare and file a transcript as follows:

9 (A) Upon receiving an order for a
10 transcript, the reporter must file in the bankruptcy
11 court an acknowledgment of the request that shows
12 when it was received, and when the reporter expects
13 to have the transcript completed.

14 (B) After completing the transcript, the
15 reporter must file it with the bankruptcy clerk, who
16 will notify the district, BAP, or circuit clerk of its
17 filing.

18 (C) If the transcript cannot be completed
19 within 30 days after receiving the order, the reporter
20 must request an extension of time from the
21 bankruptcy clerk. The clerk must enter on the

22 docket and notify the parties whether the extension
23 is granted.
24 (D) If the reporter does not file the
25 transcript on time, the bankruptcy clerk must notify
26 the bankruptcy judge.
27 (b) CLERK'S DUTIES.
28 (1) *Transmitting the Record—In General*. Subject
29 to Rule 8009(f) and subdivision (b)(5) of this rule, when
30 the record is complete, the bankruptcy clerk must transmit
31 to the clerk of the court where the appeal is pending either
32 the record or a notice that the record is available
33 electronically.
34 (2) *Multiple Appeals*. If there are multiple appeals
35 from a judgment, order, or decree, the bankruptcy clerk
36 must transmit a single record.
37 (3) *Receiving the Record*. Upon receiving the
38 record or notice that it is available electronically, the
39 district, BAP, or circuit clerk must enter that information
40 on the docket and promptly notify all parties to the appeal.
41 (4) *If Paper Copies Are Ordered*. If the court
42 where the appeal is pending directs that paper copies of the
43 record be provided, the clerk of that court must so notify

44 the appellant. If the appellant fails to provide them, the
45 bankruptcy clerk must prepare them at the appellant's
46 expense.
47 (5) *When Leave to Appeal is Requested*. Subject to
48 subdivision (c), if a motion for leave to appeal has been
49 filed under Rule 8004, the bankruptcy clerk must prepare
50 and transmit the record only after the district court, BAP, or
51 court of appeals grants leave.
52 (c) RECORD FOR A PRELIMINARY MOTION IN THE
53 DISTRICT COURT, BAP, OR COURT OF APPEALS. This
54 subdivision (c) applies if, before the record is transmitted, a party
55 moves in the district court, BAP, or court of appeals for any of the
56 following relief:
57 • leave to appeal;
58 • dismissal;
59 • a stay pending appeal;
60 • approval of a supersedeas bond, or additional
61 security on a bond or undertaking on appeal; or
62 • any other intermediate order.
63 The bankruptcy clerk must then transmit to the clerk of the court
64 where the relief is sought any parts of the record designated by a

65 party to the appeal or a notice that those parts are available

66 electronically.

COMMITTEE NOTE

This rule is derived from former Rule 8007 and F.R.App. P 11. It applies to an appeal taken directly to a court of appeals under 28 U.S.C. § 158(d)(2), as well as to an appeal to a district court or BAP.

Subdivision (a) generally retains the procedure of former Rule 8007(a) regarding the reporter's duty to prepare and file a transcript if a party requests one. It clarifies that the person or service that transcribes the recording of a proceeding is considered the reporter under this rule if the proceeding is recorded without a reporter being present in the courtroom. It also makes clear that the reporter must file with the bankruptcy court the acknowledgment of the request for a transcript and statement of the expected completion date, the completed transcript, and any request for an extension of time beyond 30 days for completion of the transcript.

Subdivision (b) requires the bankruptcy clerk to transmit the record to the district, BAP or circuit clerk when the record is complete and, in the case of appeals under 28 U.S.C. §158(a)(3), leave to appeal has been granted. This transmission will be made electronically, either by sending the record itself or sending notice that the record can be accessed electronically. The court where the appeal is pending may, however, require that a paper copy of some or all of the record be furnished, in which case the clerk of that court will direct the appellant to provide the copies. If the appellant does not do so, the bankruptcy clerk must prepare the copies at the appellant's expense.

In a change from former Rule 8007(b), subdivision (b) of this rule no longer directs the clerk of the appellate court to docket the appeal upon receipt of the record from the bankruptcy clerk. Instead, under Rules 8003(d) and 8004(c) and F.R.App.P. 12(a), the district, BAP, or circuit clerk dockets the appeal upon receipt of the notice of appeal or, in the case of appeals under 28 U.S.C. § 158(a)(3), the notice of appeal and the motion for leave to appeal. Accordingly, by the time the district, BAP, or circuit clerk receives the record, the appeal will already be docketed in that court. The clerk of the appellate court must indicate on the docket and give notice to the parties to the appeal when the transmission of the record is received.

Under Rule 8018(a) and F.R.App.P. 31, the briefing schedule is generally based on that date.

Subdivision (c) is derived from former Rule 8007(c) and F.R.App.P. 11(g) . It provides for the transmission of parts of the record that the parties designate for consideration by the district court, BAP, or court of appeals in ruling on specified preliminary motions filed prior to the preparation and transmission of the record on appeal.

Rule 8011. Filing and Service; Signature

1 (a) FILING.

2 (1*) With the Clerk*. A document required or

3 permitted to be filed in a district court or BAP must be filed

4 with the clerk of that court.

5 (2) *Method and Timeliness*.

6 (A) *In general*. Filing may be

7 accomplished by transmission to the clerk of the

8 district court or BAP. Except as provided in

9 subdivision (a)(2)(B) and (C), filing is timely only

10 if the clerk receives the document within the time

11 fixed for filing.

12 (B) *Brief or Appendix*. A brief or appendix

13 is also timely filed if, on or before the last day for

14 filing, it is:

15 (i) mailed to the clerk by first-class

16 mail—or other class of mail that is at least

17 as expeditious—postage prepaid, if the

18 district court's or BAP's procedures permit

19 or require a brief or appendix to be filed by

20 mailing; or

21 (ii) dispatched to a third-party

22 commercial carrier for delivery within 3
23 days to the clerk, if the court's procedures so
24 permit or require.
25 (C) *Inmate Filing*. A document filed by an
26 inmate confined in an institution is timely if
27 deposited in the institution's internal mailing
28 system on or before the last day for filing. If the
29 institution has a system designed for legal mail, the
30 inmate must use that system to receive the benefit
31 of this rule. Timely filing may be shown by a
32 declaration in compliance with 28 U.S.C. § 1746 or
33 by a notarized statement, either of which must set
34 forth the date of deposit and state that first-class
35 postage has been prepaid.
36 (D) *Copies*. If a document is filed
37 electronically, no paper copy is required. If a
38 document is filed by mail or delivery to the district
39 court or BAP, no additional copies are required.
40 But the district court or BAP may require by local
41 rule or by order in a particular case the filing or
42 furnishing of a specified number of paper copies.
43 (3) *Clerk's Refusal of Documents*. The court's

44 clerk must not refuse to accept for filing any document
45 transmitted for that purpose solely because it is not
46 presented in proper form as required by these rules or by
47 any local rule or practice.
48 (b) SERVICE OF ALL DOCUMENTS REQUIRED.
49 Unless a rule requires service by the clerk, a party must, at or
50 before the time of the filing of a document, serve it on the other
51 parties to the appeal. Service on a party represented by counsel
52 must be made on the party's counsel.
53 (c) MANNER OF SERVICE.
54 (1) *Methods*. Service must be made electronically,
55 unless it is being made by or on an individual who is not
56 represented by counsel or the court's governing rules
57 permit or require service by mail or other means of
58 delivery. Service may be made by or on an unrepresented
59 party by any of the following methods:
60 (A) personal delivery;
61 (B) mail; or
62 (C) third-party commercial carrier for
63 delivery within 3 days.
64 (2) *When Service Is Complete*. Service by
65 electronic means is complete on transmission, unless the

66 party making service receives notice that the document was
67 not transmitted successfully. Service by mail or by
68 commercial carrier is complete on mailing or delivery to
69 the carrier.
70 (d) PROOF OF SERVICE.
71 (1) *What Is Required*. A document presented for
72 filing must contain either:
73 (A) an acknowledgment of service by the
74 person served; or
75 (B) proof of service consisting of a
76 statement by the person who made service
77 certifying:
78 (i) the date and manner of service;
79 (ii) the names of the persons served;
80 and
81 (iii) the mail or electronic address,
82 the fax number, or the address of the place
83 of delivery, as appropriate for the manner of
84 service, for each person served.
85 (2) *Delayed Proof*. The district or BAP clerk may
86 permit documents to be filed without acknowledgment or
87 proof of service, but must require the acknowledgment or

88 proof to be filed promptly thereafter.

89 (3) *Brief or Appendix*. When a brief or appendix is

90 filed, the proof of service must also state the date and

91 manner by which it was filed.

92 (e) SIGNATURE. Every document filed electronically

93 must include the electronic signature of the person filing it or, if

94 the person is represented, the electronic signature of counsel. The

95 electronic signature must be provided by electronic means that are

96 consistent with any technical standards that the Judicial

97 Conference of the United States establishes. Every document filed

98 in paper form must be signed by the person filing the document or,

99 if the person is represented, by counsel.

COMMITTEE NOTE

This rule is derived from former Rule 8008 and F.R.App.P. 25. It adopts some of the additional details of the appellate rule, and it provides greater recognition of the possibility of electronic filing and service.

Subdivision (a) governs the filing of documents in the district court or BAP. Consistent with other provisions of these Part VIII rules, subdivision (a)(2) requires electronic filing of documents, including briefs and appendices, unless the district court's or BAP's procedures permit or require other methods of delivery to the court. An electronic filing is timely if it is received by the district or BAP clerk within the time fixed for filing. No additional copies need to be submitted when documents are filed electronically, by mail, or by delivery unless the district court or BAP requires them.

Subdivision (a)(3) provides that the district or BAP clerk may not refuse to accept a document for filing solely because its form does not comply with these rules or any local rule or practice. The district court or

BAP may, however, direct the correction of any deficiency in any document that does not conform to the requirements of these rules or applicable local rules, and may prescribe such other relief as the court deems appropriate.

Subdivisions (b) and (c) address the service of documents in the district court or BAP. Except for documents that the district or BAP clerk must serve, a party that makes a filing must serve copies of the document on the other parties to the appeal. Service on represented parties must be made on counsel. Subdivision (c) expresses the general requirement under these Part VIII rules that documents be sent electronically. *See* Rule 8001(c). Local court rules, however, may provide for other means of service, and subdivision (c) specifies non-electronic methods of service by or on an unrepresented party. Electronic service is complete upon transmission, unless the party making service receives notice that the transmission did not reach the person intended to be served in a readable form.

Subdivision (d) retains the former rule's provisions regarding proof of service of a document filed in the district court or BAP. In addition, it provides that a certificate of service must state the mail or electronic address or fax number to which service was made.

Subdivision (e) is a new provision that requires an electronic signature of counsel or an unrepresented filer for documents that are filed electronically in the district court or BAP. A local rule may specify a method of providing an electronic signature that is consistent with any standards established by the Judicial Conference of the United States. Paper copies of documents filed in the district court or BAP must bear an actual signature of counsel or the filer. By requiring a signature, subdivision (e) ensures that a readily identifiable attorney or party takes responsibility for every document that is filed.

Rule 8012. Corporate Disclosure Statement

1 (a) WHO MUST FILE. Any nongovernmental corporate
2 party appearing in the district court or BAP must file a statement
3 that identifies any parent corporation and any publicly held
4 corporation that owns 10% or more of its stock or states that there
5 is no such corporation.
6 (b) TIME TO FILE; SUPPLEMENTAL FILING. A party
7 must file the statement with its principal brief or upon filing a
8 motion, response, petition, or answer in the district court or BAP,
9 whichever occurs first, unless a local rule requires earlier filing.
10 Even if the statement has already been filed, the party's principal
11 brief must include a statement before the table of contents. A party
12 must supplement its statement whenever the required information
13 changes.

COMMITTEE NOTE

This rule is derived from F.R.App.P. 26.1. It requires the filing of corporate disclosure statements and supplemental statements in order to assist district court and BAP judges in determining whether they should recuse themselves. If filed separately from a brief, motion, response, petition, or answer, the statement must be filed and served in accordance with Rule 8011. Under Rule 8015(a)(7)(B)(iii), the corporate disclosure statement is not included in calculating applicable word-count limitations.

Rule 8013. Motions; Intervention

1 (a) CONTENTS OF A MOTION; RESPONSE; REPLY.

2 (1) *Request for Relief.* A request for an order or
3 other relief is made by filing a motion with the district or
4 BAP clerk, with proof of service on the other parties to the
5 appeal.

6 (2) *Contents of a Motion*.

7 (A) *Grounds and the Relief Sought.* A
8 motion must state with particularity the grounds for
9 the motion, the relief sought, and the legal argument
10 necessary to support it.

11 (B) *Motion to Expedite an Appeal*. A
12 motion to expedite an appeal must explain what
13 justifies considering the appeal ahead of other
14 matters. If the district court or BAP grants the
15 motion, it may accelerate the time to transmit the
16 record, the deadline for filing briefs and other
17 documents, oral argument, and the resolution of the
18 appeal. A motion to expedite an appeal may be
19 filed as an emergency motion under subdivision (d).

20 (C) *Accompanying Documents.*

21 (i) Any affidavit or other document

22 necessary to support a motion must be
23 served and filed with the motion.
24 (ii) An affidavit must contain only
25 factual information, not legal argument.
26 (iii) A motion seeking substantive
27 relief must include a copy of the bankruptcy
28 court's judgment, order, or decree, and any
29 accompanying opinion as a separate exhibit.
30 (D) *Documents Barred or Not Required.*
31 (i) A separate brief supporting or
32 responding to a motion must not be filed.
33 (ii) A notice of motion is not
34 required.
35 (iii) A proposed order is not
36 required.
37 (3) *Response and Reply; Time to File*. Unless the
38 district court or BAP orders otherwise,
39 (A) any party to the appeal may file a
40 response to the motion within 7 days after service of
41 the motion; and
42 (B) the movant may file a reply to a
43 response within 7 days after service of the response,

44 but may only address matters raised in the response.

45 (b) DISPOSITION OF A MOTION FOR A

46 PROCEDURAL ORDER. The district court or BAP may rule on a

47 motion for a procedural order—including a motion under Rule

48 9006(b) or (c)—at any time without awaiting a response. A party

49 adversely affected by the ruling may move to reconsider, vacate, or

50 modify it within 7 days after the procedural order is served.

51 (c) ORAL ARGUMENT. A motion will be decided

52 without oral argument unless the district court or BAP orders

53 otherwise.

54 (d) EMERGENCY MOTION.

55 (1) *Noting the Emergency*. When a movant

56 requests expedited action on a motion because irreparable

57 harm would occur during the time needed to consider a

58 response, the movant must insert the word "Emergency"

59 before the title of the motion.

60 (2) *Contents of the Motion*. The emergency motion

61 must

62 (A) be accompanied by an affidavit setting

63 out the nature of the emergency;

64 (B) state whether all grounds for it were

65 submitted to the bankruptcy court and, if not, why

66 the motion should not be remanded for the
67 bankruptcy court to reconsider;
68 (C) include the e-mail addresses, office
69 addresses, and telephone numbers of moving
70 counsel and, when known, of opposing counsel and
71 any unrepresented parties to the appeal; and
72 (D) be served as prescribed by Rule 8011.
73 (3) *Notifying Opposing Parties*. Before filing an
74 emergency motion, the movant must make every
75 practicable effort to notify opposing counsel and any
76 unrepresented parties in time for them to respond. The
77 affidavit accompanying the emergency motion must state
78 when and how notice was given or state why giving it was
79 impracticable.
80 (e) POWER OF A SINGLE BAP JUDGE TO
81 ENTERTAIN A MOTION.
82 (1) *Single Judge's Authority*. A BAP judge may
83 act alone on any motion, but may not dismiss or otherwise
84 determine an appeal, deny a motion for leave to appeal, or
85 deny a motion for a stay pending appeal if denial would
86 make the appeal moot.
87 (2) *Reviewing a Single Judge's Action*. The BAP

88 may review a single judge's action, either on its own
89 motion or on a party's motion.
90 (f) FORM OF DOCUMENTS; PAGE LIMITS; NUMBER
91 OF COPIES.
92 (1) *Format of a Paper Document*. Rule 27(d)(1)
93 F.R.App.P. applies in the district court or BAP to a paper
94 version of a motion, response, or reply.
95 (2) *Format of an Electronically Filed Document*.
96 A motion, response, or reply filed electronically must
97 comply with the requirements for a paper version regarding
98 covers, line spacing, margins, typeface, and type style. It
99 must also comply with the page limits under paragraph (3).
100 (3) *Page Limits*. Unless the district court or BAP
101 orders otherwise:
102 (A) a motion or a response to a motion must
103 not exceed 20 pages, exclusive of the corporate
104 disclosure statement and accompanying documents
105 authorized by subdivision (a)(2)(C); and
106 (B) a reply to a response must not exceed
107 10 pages.
108 (4) *Paper Copies*. Paper copies must be provided

109 only if required by local rule or by an order in a particular

110 case.

111 (g) INTERVENING IN AN APPEAL. Unless a statute

112 provides otherwise, an entity that seeks to intervene in an appeal

113 pending in the district court or BAP must move for leave to

114 intervene and serve a copy of the motion on the parties to the

115 appeal. The motion or other notice of intervention authorized by

116 statute must be filed within 30 days after the appeal is docketed. It

117 must concisely state the movant's interest, the grounds for

118 intervention, whether intervention was sought in the bankruptcy

119 court, why intervention is being sought at this stage of the

120 proceeding, and why participating as an amicus curiae would not

121 be adequate.

COMMITTEE NOTE

This rule is derived from former Rule 8011 and F.R.App.P. 15(d) and 27. It adopts many of the provisions of the appellate rules that specify the form and page limits of motions and accompanying documents, while also adjusting those requirements for electronic filing. In addition, it prescribes the procedure for seeking to intervene in the district court or BAP.

Subdivision (a) retains much of the content of former Rule 8011(a) regarding the contents of a motion, response, and reply. It also specifies the documents that may accompany a motion. Unlike the former rule, which allowed the filing of separate briefs supporting a motion, subdivision (a) now adopts the practice of F.R.App.P. 27(a) of prohibiting the filing of briefs supporting or responding to a motion. The motion or response itself must include the party's legal arguments.

Subdivision (a)(2)(B) clarifies the procedure for seeking to expedite

an appeal. A motion under this provision seeks to expedite the time for the disposition of the appeal as a whole, whereas an emergency motion—which is addressed by subdivision (d)—typically involves an urgent request for relief short of disposing of the entire appeal (for example, an emergency request for a stay pending appeal to prevent imminent mootness). In appropriate cases—such as when there is an urgent need to resolve the appeal quickly to prevent harm—a party may file a motion to expedite the appeal as an emergency motion.

Subdivision (b) retains the substance of former Rule 8011(b). It authorizes the district court or BAP to act on a motion for a procedural order without awaiting a response to the motion. It specifies that a party seeking reconsideration, vacation, or modification of the order must file a motion within 7 days after service of the order.

Subdivision (c) continues the practice of former Rule 8011(c) and F.R.App.P. 27(e) of dispensing with oral argument of motions in the district court or BAP unless the court orders otherwise.

Subdivision (d), which carries forward the content of former Rule 8011(d), governs emergency motions that the district court or BAP may rule on without awaiting a response when necessary to prevent irreparable harm. A party seeking expedited action on a motion in the district court or BAP must explain the nature of the emergency, whether all grounds in support of the motion were first presented to the bankruptcy court, and, if not, why the district court or BAP should not remand for reconsideration. The moving party must also explain the steps taken to notify opposing counsel and any unrepresented parties in advance of filing the emergency motion and, if they were not notified, why it was impracticable to do so.

Subdivision (e), like former Rule 8011(e) and similar to F.R.App.P. 27(c), authorizes a single BAP judge to rule on certain motions. This authority, however, does not extend to issuing rulings that would dispose of the appeal. For that reason, the rule now prohibits a single BAP judge from denying a motion for a stay pending appeal when the effect of that ruling would be to require dismissal of the appeal as moot. A ruling by a single judge is subject to review by the BAP.

Subdivision (f) incorporates by reference the formatting and appearance requirements of F.R.App.P. 27(d)(1). When paper versions of the listed documents are filed, they must comply with the requirements of the specified rules regarding reproduction, covers, binding, appearance, and format. When these documents are filed electronically, they must comply with the relevant requirements of the specified rules regarding covers and

format. Subdivision (f) also specifies page limits for motions, responses, and replies, which is a matter that former Rule 8011 did not address.

Subdivision (g) clarifies the procedure for seeking to intervene in a proceeding that has been appealed. It is based on F.R.App.P. 15(d), but it also requires the moving party to explain why intervention is being sought at the appellate stage. The former Part VIII rules did not address intervention.

Rule 8014. Briefs

1 (a) APPELLANT'S BRIEF. The appellant's brief must
2 contain the following under appropriate headings and in the order
3 indicated:
4 (1) a corporate disclosure statement, if required by
5 Rule 8012;
6 (2) a table of contents, with page references;
7 (3) a table of authorities—cases (alphabetically
8 arranged), statutes, and other authorities—with references
9 to the pages of the brief where they are cited;
10 (4) a jurisdictional statement, including:
11 (A) the basis for the bankruptcy court's
12 subject-matter jurisdiction, with citations to
13 applicable statutory provisions and stating relevant
14 facts establishing jurisdiction;
15 (B) the basis for the district court's or
16 BAP's jurisdiction, with citations to applicable
17 statutory provisions and stating relevant facts
18 establishing jurisdiction;
19 (C) the filing dates establishing the
20 timeliness of the appeal; and
21 (D) an assertion that the appeal is from a

22 final judgment, order, or decree, or information
23 establishing the district court's or BAP's
24 jurisdiction on another basis;
25 (5) a statement of the issues presented and, for each
26 one, a concise statement of the applicable standard of
27 appellate review;
28 (6) a concise statement of the case setting out the
29 facts relevant to the issues submitted for review, describing
30 the relevant procedural history, and identifying the rulings
31 presented for review, with appropriate references to the
32 record;
33 (7) a summary of the argument, which must contain
34 a succinct, clear, and accurate statement of the arguments
35 made in the body of the brief, and which must not merely
36 repeat the argument headings;
37 (8) the argument, which must contain the
38 appellant's contentions and the reasons for them, with
39 citations to the authorities and parts of the record on which
40 the appellant relies;
41 (9) a short conclusion stating the precise relief
42 sought; and
43 (10) the certificate of compliance, if required by

44 Rule 8015(a)(7) or (b).

45 (b) APPELLEE'S BRIEF. The appellee's brief must
46 conform to the requirements of subdivision (a)(1)-(8) and (10),
47 except that none of the following need appear unless the appellee
48 is dissatisfied with the appellant's statement:

49 (1) the jurisdictional statement;

50 (2) the statement of the issues and the applicable
51 standard of appellate review; and

52 (3) the statement of the case.

53 (c) REPLY BRIEF. The appellant may file a brief in reply
54 to the appellee's brief. A reply brief must comply with the
55 requirements of subdivision (a)(2)-(3).

56 (d) STATUTES, RULES, REGULATIONS, OR
57 SIMILAR AUTHORITY. If the court's determination of the
58 issues presented requires the study of the Code or other statutes,
59 rules, regulations, or similar authority, the relevant parts must be
60 set out in the brief or in an addendum.

61 (e) BRIEFS IN A CASE INVOLVING MULTIPLE
62 APPELLANTS OR APPELLEES. In a case involving more than
63 one appellant or appellee, including consolidated cases, any
64 number of appellants or appellees may join in a brief, and any
65 party may adopt by reference a part of another's brief. Parties may

66 also join in reply briefs.

77 (f) CITATION OF SUPPLEMENTAL AUTHORITIES.

78 If pertinent and significant authorities come to a party's attention

79 after the party's brief has been filed—or after oral argument but

80 before a decision—a party may promptly advise the district or

81 BAP clerk by a signed submission setting forth the citations. The

82 submission, which must be served on the other parties to the

83 appeal, must state the reasons for the supplemental citations,

84 referring either to the pertinent page of a brief or to a point argued

85 orally. The body of the submission must not exceed 350 words.

86 Any response must be made within 7 days after the party is served,

87 unless the court orders otherwise, and must be similarly limited.

COMMITTEE NOTE

This rule is derived from former Rule 8010(a) and (b) and F.R.App.P. 28. Adopting much of the content of Rule 28, it provides greater detail than former Rule 8010 contained regarding appellate briefs.

Subdivision (a) prescribes the content and structure of the appellant's brief. It largely follows former Rule 8010(a)(1), but, to ensure national uniformity, it eliminates the provision authorizing a district court or BAP to alter these requirements. Subdivision (a)(1) provides that when Rule 8012 requires an appellant to file a corporate disclosure statement, it must be placed at the beginning of the appellant's brief. Subdivision (a)(10) is new. It implements the requirement under Rule 8015(a)(7)(C) and (b) for the filing of a certificate of compliance with the limit on the number of words or lines allowed to be in a brief.

Subdivision (b) carries forward the provisions of former Rule 8010(a)(2).

Subdivision (c) is derived from F.R.App.P. 28(c). It authorizes an appellant to file a reply brief, which will generally complete the briefing process.

Subdivision (d) is similar to former Rule 8010(b), but it is reworded to reflect the likelihood that briefs will generally be filed electronically rather than in paper form.

Subdivision (e) mirrors F.R.App.P. 28(i). It authorizes multiple appellants or appellees to join in a single brief. It also allows a party to incorporate by reference portions of another party's brief.

Subdivision (f) adopts the procedures of F.R.App.P. 28(j) with respect to the filing of supplemental authorities with the district court or BAP after a brief has been filed or after oral argument. Unlike the appellate rule, it specifies a period of 7 days for filing a response to a submission of supplemental authorities. The supplemental submission and response must comply with the signature requirements of Rule 8011(e).

Rule 8015. Form and Length of Briefs; Form of Appendices and Other Papers.

1 (a) PAPER COPIES OF A BRIEF. If a paper copy of a
2 brief may or must be filed, the following provisions apply:
3 (1) *Reproduction*.
4 (A) A brief may be reproduced by any
5 process that yields a clear black image on light
6 paper. The paper must be opaque and unglazed.
7 Only one side of the paper may be used.
8 (B) Text must be reproduced with a clarity
9 that equals or exceeds the output of a laser printer.
10 (C) Photographs, illustrations, and tables
11 may be reproduced by any method that results in a
12 good copy of the original. A glossy finish is
13 acceptable if the original is glossy.
14 (2) *Cover*. The front cover of a brief must contain:
15 (A) the number of the case centered at the
16 top;
17 (B) the name of the court;
18 (C) the title of the case as prescribed by
19 Rule 8003(d)(2) or 8004(c)(2);
20 (D) the nature of the proceeding and the
21 name of the court below;

22 (E) the title of the brief, identifying the
23 party or parties for whom the brief is filed; and
24 (F) the name, office address, telephone
25 number, and e-mail address of counsel representing
26 the party for whom the brief is filed.
27 (3) *Binding*. The brief must be bound in any
28 manner that is secure, does not obscure the text, and
29 permits the brief to lie reasonably flat when open.
30 (4) *Paper Size, Line Spacing, and Margins*. The
31 brief must be on 8½-by-11 inch paper. The text must be
32 double-spaced, but quotations more than two lines long
33 may be indented and single-spaced. Headings and
34 footnotes may be single-spaced. Margins must be at least
35 one inch on all four sides. Page numbers may be placed in
36 the margins, but no text may appear there.
37 (5) *Typeface*. Either a proportionally spaced or
38 monospaced face may be used.
39 (A) A proportionally spaced face must
40 include serifs, but sans-serif type may be used in
41 headings and captions. A proportionally spaced
42 face must be 14-point or larger.
43 (B) A monospaced face may not contain

more than 10½ characters per inch.

(6) *Type Styles*. A brief must be set in plain, roman style, although italics or boldface may be used for emphasis. Case names must be italicized or underlined.

(7) *Length*.

(A) *Page limitation*. A principal brief must not exceed 30 pages, or a reply brief 15 pages, unless it complies with (B) and (C).

(B) *Type-volume limitation*.

(i) A principal brief is acceptable if:

- it contains no more than 14,000 words; or
- it uses a monospaced face and contains no more than 1,300 lines of text.

(ii) A reply brief is acceptable if it contains no more than half of the type volume specified in item (i).

(iii) Headings, footnotes, and quotations count toward the word and line limitations. The corporate disclosure statement, table of contents, table of

citations, statement with respect to oral argument, any addendum containing statutes, rules, or regulations, and any certificates of counsel do not count toward the limitation.

(C) *Certificate of Compliance*.

(i) A brief submitted under subdivision (a)(7)(B) must include a certificate signed by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either:

- the number of words in the brief; or
- the number of lines of monospaced type in the brief.

(ii) The certification requirement is satisfied by a certificate of compliance that conforms substantially to the appropriate

88 Official Form.

89 (b) ELECTRONICALLY FILED BRIEFS. A brief filed
90 electronically must comply with subdivision (a), except for (a)(1),
91 (a)(3), and the paper requirement of (a)(4).

92 (c) PAPER COPIES OF APPENDICES. A paper copy of
93 an appendix must comply with subdivision (a)(1), (2), (3), and (4),
94 with the following exceptions:

95 (1) An appendix may include a legible photocopy
96 of any document found in the record or of a printed
97 decision.

98 (2) When necessary to facilitate inclusion of odd-
99 sized documents such as technical drawings, an appendix
100 may be a size other than 8½-by-11 inches, and need not lie
101 reasonably flat when opened.

102 (d) ELECTRONICALLY FILED APPENDICES. An
103 appendix filed electronically must comply with subdivision (a)(2)
104 and (4), except for the paper requirement of (a)(4).

105 (e) OTHER DOCUMENTS.

106 (1) *Motion*. Rule 8013(f) governs the form of a
107 motion, response, or reply.

108 (2) *Paper Copies of Other Documents*. A paper
109 copy of any other document, other than a submission under

110 Rule 8014(f), must comply with subdivision (a), with the
111 following exceptions:
112 (A) A cover is not necessary if the caption
113 and signature page together contain the information
114 required by subdivision (a)(2).
115 (B) Subdivision (a)(7) does not apply.
116 (3) *Other Documents Filed Electronically*. Any
117 other document filed electronically, other than a
118 submission under Rule 8014(f), must comply with the
119 appearance requirements of paragraph (2).
120 (f) LOCAL VARIATION. A district court or BAP must
121 accept documents that comply with the applicable requirements of
122 this rule. By local rule or order in a particular case, a district court
123 or BAP may accept documents that do not meet all of the
124 requirements of this rule.

COMMITTEE NOTE

This rule is derived primarily from F.R.App.P. 32. Former Rule 8010(c) prescribed page limits for principal briefs and reply briefs. Those limits are now addressed by subdivision (a)(7) of this rule. In addition, the rule incorporates most of the detail of F.R.App.P. 32 regarding the appearance and format of briefs, appendices, and other documents, along with new provisions that apply when those documents are filed electronically.

Subdivision (a) prescribes the form requirements for briefs that are filed in paper form. It incorporates F.R.App.P. 32(a), except it does not include color requirements for brief covers, it requires the cover of a brief to

include counsel's e-mail address, and cross-references to the appropriate bankruptcy rules are substituted for references to the Federal Rules of Appellate Procedure.

Subdivision (a)(7) decreases the page limits that were permitted by former Rule 8010(c)—from 50 to 30 pages for a principal brief and from 25 to 15 for a reply brief—to achieve consistency with F.R.App.P. 32(a)(7). It also permits the limits on the length of a brief to be measured by a word or line count, as an alternative to a page limit. By adopting the same limits on brief length that the Federal Rules of Appellate Procedure impose, the amendment seeks to prevent a party whose case is eventually appealed to the court of appeals from having to substantially reduce the length of its brief in that court.

Subdivision (b) adapts for briefs that are electronically filed subdivision (a)'s form requirements. With the use of electronic filing, the method of reproduction, method of binding, and use of paper become irrelevant. But information required on the cover, formatting requirements, and limits on brief length remain the same.

Subdivisions (c) and (d) prescribe the form requirements for appendices. Subdivision (c), applicable to paper appendices, is derived from F.R.App.P. 32(b), and subdivision (d) adapts those requirements for electronically filed appendices.

Subdivision (e), which is based on F.R.App.P. 32(c), addresses the form required for documents—in paper form or electronically filed—that these rules do not otherwise cover.

Subdivision (f), like F.R.App.P. 32(e), provides assurance to lawyers and parties that compliance with this rule's form requirements will allow a brief or other document to be accepted by any district court or BAP. A court may, however, by local rule or by order in a particular case choose to accept briefs and documents that do not comply with all of this rule's requirements.

Under Rule 8011(e), the party filing the document or, if represented, its counsel must sign all briefs and other submissions. If the document is filed electronically, an electronic signature must be provided in accordance with Rule 8011(e).

Rule 8016. Cross-Appeals

1 (a) APPLICABILITY. This rule applies to a case in which
2 a cross-appeal is filed. Rules 8014(a)-(c), 8015(a)(7)(A)-(B), and
3 8018(a) do not apply to such a case, except as otherwise provided
4 in this rule.
5 (b) DESIGNATION OF APPELLANT. The party who
6 files a notice of appeal first is the appellant for purposes of this
7 rule and Rules 8018(b) and 8019. If notices are filed on the same
8 day, the plaintiff, petitioner, applicant, or movant in the proceeding
9 below is the appellant. These designations may be modified by the
10 parties' agreement or by court order.
11 (c) BRIEFS. In a case involving a cross-appeal:
12 (1) *Appellant's Principal Brief*. The appellant must
13 file a principal brief in the appeal. That brief must comply
14 with Rule 8014(a).
15 (2) *Appellee's Principal and Response Brief*. The
16 appellee must file a principal brief in the cross-appeal and
17 must, in the same brief, respond to the principal brief in the
18 appeal. That brief must comply with Rule 8014(a), except
19 that the brief need not include a statement of the case
20 unless the appellee is dissatisfied with the appellant's
21 statement.

22 (3) *Appellant's Response and Reply Brief*. The
23 appellant must file a brief that responds to the principal
24 brief in the cross-appeal and may, in the same brief, reply
25 to the response in the appeal. That brief must comply with
26 Rule 8014(a)(2)-(8) and (10), except that none of the
27 following need appear unless the appellant is dissatisfied
28 with the appellee's statement in the cross-appeal:
29 (A) the jurisdictional statement;
30 (B) the statement of the issues and the
31 applicable standard of appellate review; and
32 (C) the statement of the case.
33 (4) *Appellee's Reply Brief*. The appellee may file a
34 brief in reply to the response in the cross-appeal. That brief
35 must comply with Rule 8014(a)(2)-(3) and (10) and must
36 be limited to the issues presented by the cross-appeal.
37 (d) LENGTH.
38 (1) *Page Limitation*. Unless it complies with
39 paragraphs (2) and (3), the appellant's principal brief must
40 not exceed 30 pages; the appellee's principal and response
41 brief, 35 pages; the appellant's response and reply brief, 30
42 pages; and the appellee's reply brief, 15 pages.
43 (2) *Type-Volume Limitation*.

44 (A) The appellant's principal brief or the
45 appellant's response and reply brief is acceptable if:
46 (i) it contains no more than 14,000
47 words; or
48 (ii) it uses a monospaced face and
49 contains no more than 1,300 lines of text.
50 (B) The appellee's principal and response
51 brief is acceptable if:
52 (i) it contains no more than 16,500
53 words; or
54 (ii) it uses a monospaced face and
55 contains no more than 1,500 lines of text.
56 (C) The appellee's reply brief is acceptable
57 if it contains no more than half of the type volume
58 specified in subparagraph (A).
59 (3) *Certificate of Compliance*. A brief submitted
60 either electronically or in paper form under paragraph (2)
61 must comply with Rule 8015(a)(7)(C).
62 (e) TIME TO SERVE AND FILE A BRIEF. Briefs must
63 be served and filed as follows, unless the district court or BAP by
64 order in a particular case excuses the filing of briefs or specifies
65 different time limits:

66 (1) the appellant's principal brief, within 30 days
67 after the docketing of notice that the record has been
68 transmitted or is available electronically;
69 (2) the appellee's principal and response brief,
70 within 30 days after the appellant's principal brief is
71 served;
72 (3) the appellant's response and reply brief, within
73 30 days after the appellee's principal and response brief is
74 served; and
75 (4) the appellee's reply brief, within 14 days after
76 the appellant's response and reply brief is served, but at
77 least 7 days before scheduled argument unless the district
78 court or BAP, for good cause, allows a later filing.
79 (f) FAILURE TO FILE ON TIME. If an appellant or
80 appellee fails to file a principal brief on time, or within an
81 extended time authorized by the district court or BAP, the appeal
82 or cross-appeal may be dismissed. Unless the district court or
83 BAP orders otherwise, an appellee who fails to file a responsive
84 brief will not be heard at oral argument on the appeal, and an
85 appellant who fails to file a responsive brief will not be heard at
86 oral argument on the cross-appeal.

COMMITTEE NOTE

This rule is derived from F.R.App.P. 28.1. It governs the timing, content, length, filing, and service of briefs in bankruptcy appeals in which there is a cross-appeal. The former Part VIII rules did not separately address the topic of cross-appeals.

Subdivision (b) prescribes which party is designated the appellant when there is a cross-appeal. Generally, the first to file a notice of appeal will be the appellant.

Subdivision (c) specifies the briefs that the appellant and the appellee may file. Because of the dual role of the parties to the appeal and cross-appeal, each party is permitted to file a principal brief and a response to the opposing party's brief, as well as a reply brief. For the appellee, the principal brief in the cross-appeal and the response in the appeal are combined into a single brief. The appellant, on the other hand, initially files a principal brief in the appeal and later files a response to the appellee's principal brief in the cross-appeal, along with a reply brief in the appeal. The final brief that may be filed is the appellee's reply brief in the cross-appeal.

Subdivision (d), which prescribes page limits for briefs, is adopted from F.R.App.P. 28.1(e). It applies to briefs that are filed electronically, as well as to those filed in paper form. Like Rule 8015(a)(7), it imposes limits measured by either the number of pages or the number of words or lines of text.

Subdivision (e) governs the time for filing briefs in cases in which there is a cross-appeal. It adapts the provisions of F.R.App.P. 28.1(f).

Subdivision (f) authorizes the dismissal of an appeal or cross-appeal if the appellant or cross-appellant fails to timely file a principal brief, and it denies oral argument to a party who fails to file a responsive brief unless the district court or BAP orders otherwise.

Rule 8017. Brief of an Amicus Curiae

1 (a) WHEN PERMITTED. The United States or its officer
2 or agency or a state may file an amicus-curiae brief without the
3 consent of the parties or leave of court. Any other amicus curiae
4 may file a brief only by leave of court or if the brief states that all
5 parties have consented to its filing. On its own motion, and with
6 notice to all parties to an appeal, the district court or BAP may
7 request a brief by an amicus curiae.
8 (b) MOTION FOR LEAVE TO FILE. The motion must
9 be accompanied by the proposed brief and state:
10 (1) the movant's interest; and
11 (2) the reason why an amicus brief is desirable and
12 why the matters asserted are relevant to the disposition of
13 the appeal.
14 (c) CONTENTS AND FORM. An amicus brief must
15 comply with Rule 8015. In addition to the requirements of Rule
16 8015, the cover must identify the party or parties supported and
17 indicate whether the brief supports affirmance or reversal. If an
18 amicus curiae is a corporation, the brief must include a disclosure
19 statement like that required of parties by Rule 8012. An amicus
20 brief need not comply with Rule 8014, but must include the
21 following:

22 (1) a table of contents, with page references;

23 (2) a table of authorities—cases (alphabetically
24 arranged), statutes, and other authorities—with references
25 to the pages of the brief where they are cited;

26 (3) a concise statement of the identity of the amicus
27 curiae, its interest in the case, and the source of its
28 authority to file;

29 (4) unless the amicus curiae is one listed in the first
30 sentence of subdivision (a), a statement that indicates
31 whether:

32 (A) a party's counsel authored the brief in
33 whole or in part;

34 (B) a party or a party's counsel contributed
35 money that was intended to fund preparing or
36 submitting the brief; and

37 (C) a person—other than the amicus curiae,
38 its members, or its counsel—contributed money that
39 was intended to fund preparing or submitting the
40 brief and, if so, identifies each such person;

41 (5) an argument, which may be preceded by a
42 summary and need not include a statement of the applicable
43 standard of review; and

44 (6) a certificate of compliance, if required by Rule
45 8015(a)(7)(C) or 8015(b).
46 (d) LENGTH. Except by the district court's or BAP's
47 permission, an amicus brief must be no more than one-half the
48 maximum length authorized by these rules for a party's principal
49 brief. If the court grants a party permission to file a longer brief,
50 that extension does not affect the length of an amicus brief.
51 (e) TIME FOR FILING. An amicus curiae must file its
52 brief, accompanied by a motion for filing when necessary, no later
53 than 7 days after the principal brief of the party being supported is
54 filed. An amicus curiae that does not support either party must file
55 its brief no later than 7 days after the appellant's principal brief is
56 filed. The district court or BAP may grant leave for later filing,
57 specifying the time within which an opposing party may answer.
58 (f) REPLY BRIEF. Except by the district court's or
59 BAP's permission, an amicus curiae may not file a reply brief.
60 (g) ORAL ARGUMENT. An amicus curiae may
61 participate in oral argument only with the district court's or BAP's
62 permission.

COMMITTEE NOTE

This rule is derived from F.R.App.P. 29. The former Part VIII rules did not address the participation by an amicus curiae in a bankruptcy appeal.

Subdivision (a) adopts the provisions of F.R.App.P. 29(a). In addition, it authorizes the district court or BAP on its own motion— with notice to the parties—to request the filing of a brief by an amicus curiae.

Subdivisions (b)-(g) adopt F.R.App.P. 29(b)-(g).

Rule 8018. Serving and Filing Briefs; Appendices

1 (a) TIME TO SERVE AND FILE A BRIEF. The
2 following rules apply unless the district court or BAP by order in a
3 particular case excuses the filing of briefs or specifies different
4 time limits:
5 (1) The appellant must serve and file a brief within
6 30 days after the docketing of notice that the record has
7 been transmitted or is available electronically.
8 (2) The appellee must serve and file a brief within
9 30 days after service of the appellant's brief.
10 (3) The appellant may serve and file a reply brief
11 within 14 days after service of the appellee's brief, but a
12 reply brief must be filed at least 7 days before scheduled
13 argument unless the district court or BAP, for good cause,
14 allows a later filing.
15 (4) If an appellant fails to file a brief on time or
16 within an extended time authorized by the district court or
17 BAP, the appeal may be dismissed. An appellee who fails
18 to file a brief will not be heard at oral argument unless the
19 district court or BAP grants permission.
20 (b) DUTY TO SERVE AND FILE AN APPENDIX TO
21 THE BRIEF.

22 (1) *Appellant*. Subject to subdivision (e) and Rule
23 8009(d), the appellant must serve and file with its principal
24 brief excerpts of the record as an appendix. It must contain
25 the following:
26 (A) the relevant entries in the bankruptcy
27 docket;
28 (B) the complaint and answer, or other
29 equivalent filings;
30 (C) the judgment, order, or decree from
31 which the appeal is taken;
32 (D) any other orders, pleadings, jury
33 instructions, findings, conclusions, or opinions
34 relevant to the appeal;
35 (E) the notice of appeal; and
36 (F) any relevant transcript or portion of it.
37 (2) *Appellee*. The appellee may also serve and file
38 with its brief an appendix that contains material required to
39 be included by the appellant or relevant to the appeal or
40 cross-appeal, but omitted by the appellant.
41 (3) *Cross-Appellee*. The appellant as cross-
42 appellee may also serve and file with its response an
43 appendix that contains material relevant to matters raised

44 initially by the principal brief in the cross-appeal, but
45 omitted by the cross-appellant.
46 (c) FORMAT OF THE APPENDIX. The appendix must
47 begin with a table of contents identifying the page at which each
48 part begins. The relevant docket entries must follow the table of
49 contents. Other parts of the record must follow chronologically.
50 When pages from the transcript of proceedings are placed in the
51 appendix, the transcript page numbers must be shown in brackets
52 immediately before the included pages. Omissions in the text of
53 documents or of the transcript must be indicated by asterisks.
54 Immaterial formal matters (captions, subscriptions,
55 acknowledgments, and the like) should be omitted.
56 (d) EXHIBITS. Exhibits designated for inclusion in the
57 appendix may be reproduced in a separate volume or volumes,
58 suitably indexed.
59 (e) APPEAL ON THE ORIGINAL RECORD WITHOUT
60 AN APPENDIX. The district court or BAP may, either by rule for
61 all cases or classes of cases or by order in a particular case,
62 dispense with the appendix and permit an appeal to proceed on the
63 original record, with the submission of any relevant parts of the
64 record that the district court or BAP orders the parties to file.

COMMITTEE NOTE

This rule is derived from former Rule 8009 and F.R.App.P. 30 and 31. Like former Rule 8009, it addresses the timing of serving and filing briefs and appendices, as well as the content and format of appendices. Rule 8011 governs the methods of filing and serving briefs and appendices.

The rule retains the bankruptcy practice of permitting the appellee to file its own appendix, rather than requiring the appellant to include in its appendix matters designated by the appellee. Rule 8016 governs the timing of serving and filing briefs when a cross-appeal is taken. This rule's provisions about appendices apply to all appeals, including cross-appeals.

Subdivision (a) retains former Rule 8009's provision that allows the district court or BAP to dispense with briefing or to provide different time periods than this rule specifies. It increases some of the time periods for filing briefs from the periods prescribed by the former rule, while still retaining shorter time periods than some provided by F.R.App.P. 31(a). The time for filing the appellant's brief is increased from 14 to 30 days after the docketing of the notice of the transmission of the record or notice of the availability of the record. That triggering event is equivalent to docketing the appeal under former Rule 8007. Appellate Rule 31(a)(1), by contrast, provides the appellant 40 days after the record is filed to file its brief. The shorter time period for bankruptcy appeals reflects the frequent need for greater expedition in the resolution of bankruptcy appeals, while still providing the appellant more time to prepare its brief than the former rule provided.

Subdivision (a)(2) similarly expands the time period for filing the appellee's brief from 14 to 30 days after the service of the appellant's brief. This period is the same as F.R. App. 31(a)(1) provides.

Subdivision (a)(3) retains the 14-day time period for filing a reply brief that the former rule prescribed, but it qualifies that period to ensure that the final brief is filed at least 7 days before oral argument.

If a district court or BAP has a mediation procedure for bankruptcy appeals, that procedure could affect when briefs must be filed. *See* Rule 8027.

Subdivision (a)(4) is new. Based on F.R.App.P. 31(c), it provides for actions that may be taken—dismissal of the appeal or denial of participation in oral argument—if the appellant or appellee fails to file its brief.

Subdivisions (b) and (c) govern the content and format of the appendix to a brief. Subdivision (b) is similar to former Rule 8009(b), and subdivision (c) is derived from F.R.App.P. 30(d).

Subdivision (d), which addresses the inclusion of exhibits in the appendix, is derived from F.R.App.P. 30(e).

Rule 8019. Oral Argument

1 (a) PARTY'S STATEMENT. Any party may file, or a
2 district court or BAP may require, a statement explaining why oral
3 argument should, or need not, be permitted.
4 (b) PRESUMPTION OF ORAL ARGUMENT AND
5 EXCEPTIONS. Oral argument must be allowed in every case
6 unless the district judge—or all the BAP judges assigned to hear
7 the appeal—examine the briefs and record and determine that oral
8 argument is unnecessary because
9 (1) the appeal is frivolous;
10 (2) the dispositive issue or issues have been
11 authoritatively decided; or
12 (3) the facts and legal arguments are adequately
13 presented in the briefs and record, and the decisional
14 process would not be significantly aided by oral argument.
15 (c) NOTICE OF ARGUMENT; POSTPONEMENT. The
16 district court or BAP must advise all parties of the date, time, and
17 place for oral argument, and the time allowed for each side. A
18 motion to postpone the argument or to allow longer argument must
19 be filed reasonably in advance of the hearing date.
20 (d) ORDER AND CONTENTS OF ARGUMENT. The
21 appellant opens and concludes the argument. Counsel must not

22 read at length from briefs, the record, or authorities.

23 (e) CROSS-APPEALS AND SEPARATE APPEALS. If
24 there is a cross-appeal, Rule 8016(b) determines which party is the
25 appellant and which is the appellee for the purposes of oral
26 argument. Unless the district court or BAP directs otherwise, a
27 cross-appeal or separate appeal must be argued when the initial
28 appeal is argued. Separate parties should avoid duplicative
29 argument.

30 (f) NONAPPEARANCE OF A PARTY. If the appellee
31 fails to appear for argument, the district court or BAP may hear the
32 appellant's argument. If the appellant fails to appear for argument,
33 the district court or BAP may hear the appellee's argument. If
34 neither party appears, the case will be decided on the briefs unless
35 the district court or BAP orders otherwise.

36 (g) SUBMISSION ON BRIEFS. The parties may agree to
37 submit a case for decision on the briefs, but the district court or
38 BAP may direct that the case be argued.

39 (h) USE OF PHYSICAL EXHIBITS AT ARGUMENT;
40 REMOVAL. Counsel intending to use physical exhibits other than
41 documents at the argument must arrange to place them in the
42 courtroom on the day of the argument before the court convenes.
43 After the argument, counsel must remove the exhibits from the

44 courtroom unless the district court or BAP directs otherwise. The

45 clerk may destroy or dispose of the exhibits if counsel does not

46 reclaim them within a reasonable time after the clerk gives notice

47 to remove them.

COMMITTEE NOTE

This rule generally retains the provisions of former Rule 8012 and adds much of the additional detail of F.R.App.P. 34. By incorporating the more detailed provisions of the appellate rule, Rule 8019 promotes national uniformity regarding oral argument in bankruptcy appeals.

Subdivision (a), like F.R.App.P. 34(a)(1), now allows a party to submit a statement explaining why oral argument is or is not needed. It also authorizes a court to require this statement. Former Rule 8012 only authorized statements explaining why oral argument should be allowed.

Subdivision (b) retains the reasons set forth in former Rule 8012 for the district court or BAP to conclude that oral argument is not needed.

The remainder of this rule adopts the provisions of F.R.App.P. 34(b)-(g), with one exception. Rather than requiring the district court or BAP to hear appellant's argument if the appellee does not appear, subdivision (e) authorizes the district court or BAP to go forward with the argument in the appellee's absence. Should the court decide, however, to postpone the oral argument in that situation, it would be authorized to do so.

Rule 8020. Frivolous Appeal and Other Misconduct

1 (a) FRIVOLOUS APPEAL—DAMAGES AND COSTS.
2 If the district court or BAP determines that an appeal is frivolous,
3 it may, after a separately filed motion or notice from the court and
4 reasonable opportunity to respond, award just damages and single
5 or double costs to the appellee.
6 (b) OTHER MISCONDUCT. The district court or BAP
7 may discipline or sanction an attorney or party appearing before it
8 for other misconduct, including failure to comply with any court
9 order. First, however, the court must afford the attorney or party
10 reasonable notice, an opportunity to show cause to the contrary,
11 and, if requested, a hearing.

COMMITTEE NOTE

This rule is derived from former Rule 8020 and F.R.App.P. 38 and 46(c). Subdivision (a) permits an award of damages and costs to an appellee for a frivolous appeal. Subdivision (b) permits the district court or BAP to impose on parties as well as their counsel sanctions for misconduct other than taking a frivolous appeal. Failure to comply with a court order, for which sanctions may be imposed, may include a failure to comply with a local court rule.

Rule 8021. Costs

1 (a) AGAINST WHOM ASSESSED. The following rules
2 apply unless the law provides or the district court or BAP orders
3 otherwise:
4 (1) if an appeal is dismissed, costs are taxed against
5 the appellant, unless the parties agree otherwise;
6 (2) if a judgment, order, or decree is affirmed, costs
7 are taxed against the appellant;
8 (3) if a judgment, order, or decree is reversed, costs
9 are taxed against the appellee;
10 (4) if a judgment, order, or decree is affirmed or
11 reversed in part, modified, or vacated, costs are taxed only
12 as the district court or BAP orders.
13 (b) COSTS FOR AND AGAINST THE UNITED
14 STATES. Costs for or against the United States, its agency, or its
15 officer may be assessed under subdivision (a) only if authorized
16 by law.
17 (c) COSTS ON APPEAL TAXABLE IN THE
18 BANKRUPTCY COURT. The following costs on appeal are
19 taxable in the bankruptcy court for the benefit of the party entitled
20 to costs under this rule:
21 (1) the production of any required copies of a brief,

22 appendix, exhibit, or the record;

23 (2) the preparation and transmission of the record;

24 (3) the reporter's transcript, if needed to determine

25 the appeal;

26 (4) premiums paid for a supersedeas bond or other

27 bonds to preserve rights pending appeal; and

28 (5) the fee for filing the notice of appeal.

29 (d) BILL OF COSTS; OBJECTIONS. A party who wants

30 costs taxed must, within 14 days after entry of judgment on appeal,

31 file with the bankruptcy clerk, with proof of service, an itemized

32 and verified bill of costs. Objections must be filed within 14 days

33 after service of the bill of costs, unless the bankruptcy court

34 extends the time.

COMMITTEE NOTE

This rule is derived from former Rule 8014 and F.R.App.P. 39. It retains the former rule's authorization for taxing appellate costs against the losing party and its specification of the costs that may be taxed. The rule also incorporates some of the additional details regarding the taxing of costs contained in F.R.App.P. 39. Consistent with former Rule 8014, the bankruptcy clerk has the responsibility for taxing all costs. Subdivision (b), derived from F.R.App.P. 39(b), clarifies that additional authority is required for the taxation of costs by or against federal governmental parties.

Rule 8022. Motion for Rehearing.

1 (a) TIME TO FILE; CONTENTS; RESPONSE; ACTION
2 BY THE DISTRICT COURT OR BAP IF GRANTED.
3 (1) *Time.* Unless the time is shortened or extended
4 by order or local rule, any motion for rehearing by the
5 district court or BAP must be filed within 14 days after
6 entry of judgment on appeal.
7 (2) *Contents*. The motion must state with
8 particularity each point of law or fact that the movant
9 believes the district court or BAP has overlooked or
10 misapprehended and must argue in support of the motion.
11 Oral argument is not permitted.
12 (3) *Response*. Unless the district court or BAP
13 requests, no response to a motion for rehearing is
14 permitted. But ordinarily, rehearing will not be granted in
15 the absence of such a request.
16 (4) *Action by the District Court or BAP*. If a
17 motion for rehearing is granted, the district court or BAP
18 may do any of the following:
19 (A) make a final disposition of the appeal
20 without reargument;
21 (B) restore the case to the calendar for

22 reargument or resubmission; or

23 (C) issue any other appropriate order.

24 (b) FORM OF THE MOTION; LENGTH. The motion

25 must comply in form with Rule 8013(f)(1) and (2). Copies must

26 be served and filed as provided by Rule 8011. Unless the district

27 court or BAP by local rule or order provides otherwise, a motion

28 for rehearing must not exceed 15 pages.

COMMITTEE NOTE

This rule is derived from former Rule 8015 and F.R.App.P. 40. It deletes the provision of former Rule 8015 regarding the time for appeal to the court of appeals because the matter is addressed by F.R.App.P. 6(b)(2)(A).

Rule 8023. Voluntary Dismissal

1 The clerk of the district court or BAP must dismiss an
2 appeal if the parties file a signed dismissal agreement specifying
3 how costs are to be paid and pay any fees that are due. An appeal
4 may be dismissed on the appellant's motion on terms agreed to by
5 the parties or fixed by the district court or BAP.

COMMITTEE NOTE

This rule is derived from former Rule 8001(c) and F.R.App.P. 42. The provision of the former rule regarding dismissal of appeals in the bankruptcy court prior to docketing of the appeal has been deleted. Now that docketing occurs promptly after a notice of appeal is filed, *see* Rules 8003(d) and 8004(c), an appeal likely will not be voluntarily dismissed before docketing.

The rule retains the provision of the former rule that the district or BAP clerk must dismiss an appeal upon the parties' agreement. District courts and BAPs continue to have discretion to dismiss an appeal on an appellant's motion. Nothing in the rule prohibits a district court or BAP from dismissing an appeal for other reasons authorized by law, such as the failure to prosecute an appeal.

Rule 8024. Clerk's Duties on Disposition of the Appeal

1 (a) JUDGMENT ON APPEAL. The district or BAP clerk
2 must prepare, sign, and enter the judgment after receiving the
3 court's opinion or, if there is no opinion, as the court instructs.
4 Noting the judgment on the docket constitutes entry of judgment.
5 (b) NOTICE OF A JUDGMENT. Immediately upon the
6 entry of a judgment, the district or BAP clerk must:
7 (1) transmit a notice of the entry to each party to
8 the appeal, to the United States trustee, and to the
9 bankruptcy clerk, together with a copy of any opinion; and
10 (2) note the date of the transmission on the docket.
11 (c) RETURNING ORIGINAL DOCUMENTS. If any
12 original documents were transmitted as the record on appeal, they
13 must be returned to the bankruptcy clerk on disposition of the
14 appeal.

COMMITTEE NOTE

This rule is derived from former Rule 8016, which was adapted from F.R.App.P. 36 and 45(c) and (d). The rule is reworded to reflect that the record often will not be physically transmitted to the district court or BAP and thus there will be no documents to return to the bankruptcy clerk. Other changes to the former rule are stylistic.

Rule 8025. Stay of a District Court or BAP Judgment

1 (a) AUTOMATIC STAY OF JUDGMENT ON APPEAL.
2 Unless the district court or BAP orders otherwise, its judgment is
3 stayed for 14 days after entry.
4 (b) STAY PENDING APPEAL TO THE COURT OF
5 APPEALS.
6 (1) *In General*. On a party's motion and notice to
7 all other parties to the appeal, the district court or BAP may
8 stay its judgment pending an appeal to the court of appeals.
9 (2) *Time Limit*. The stay must not exceed 30 days
10 after the judgment is entered, except for cause shown.
11 (3) *Stay Continued*. If, before a stay expires, the
12 party who obtained the stay appeals to the court of appeals,
13 the stay continues until final disposition by the court of
14 appeals.
15 (4) *Bond or Other Security*. A bond or other
16 security may be required as a condition for granting or
17 continuing a stay of the judgment. A bond or other security
18 may be required if a trustee obtains a stay, but not if a stay
19 is obtained by the United States or its officer or agency or
20 at the direction of any department of the United States
21 government.

22 (c) AUTOMATIC STAY OF AN ORDER, JUDGMENT,
23 OR DECREE OF A BANKRUPTCY COURT. If the district court
24 or BAP enters a judgment affirming an order, judgment, or decree
25 of the bankruptcy court, a stay of the district court's or BAP's
26 judgment automatically stays the bankruptcy court's order,
27 judgment, or decree for the duration of the appellate stay.
28 (d) POWER OF A COURT OF APPEALS NOT
29 LIMITED. This rule does not limit the power of a court of appeals
30 or any of its judges to do the following:
31 (1) stay a judgment pending appeal;
32 (2) stay proceedings while an appeal is pending;
33 (3) suspend, modify, restore, vacate, or grant a stay
34 or an injunction while an appeal is pending; or
35 (4) issue any order appropriate to preserve the
36 status quo or the effectiveness of any judgment to be
37 entered.

COMMITTEE NOTE

This rule is derived from former Rule 8017. Most of the changes to the former rule are stylistic. Subdivision (c) is new. It provides that if a district court or BAP affirms the bankruptcy court ruling and the appellate judgment is stayed, the bankruptcy court's order, judgment, or decree that is affirmed on appeal is automatically stayed to the same extent as the stay of the appellate judgment.

Rule 8026. Rules by Circuit Councils and District Courts; Procedure When There is No Controlling Law

1 (a) LOCAL RULES BY CIRCUIT COUNCILS AND
2 DISTRICT COURTS.
3 (1) *Adopting Local Rules*. A circuit council that
4 has authorized a BAP under 28 U.S.C. § 158(b) may make
5 and amend rules governing the practice and procedure on
6 appeal from a judgment, order, or decree of a bankruptcy
7 court to the BAP. A district court may make and amend
8 rules governing the practice and procedure on appeal from
9 a judgment, order, or decree of a bankruptcy court to the
10 district court. Local rules must be consistent with, but not
11 duplicative of, Acts of Congress and these Part VIII rules.
12 Rule 83 F.R.Civ.P. governs the procedure for making and
13 amending rules to govern appeals.
14 (2) *Numbering*. Local rules must conform to any
15 uniform numbering system prescribed by the Judicial
16 Conference of the United States.
17 (3) *Limitation on Imposing Requirements of Form*.
18 A local rule imposing a requirement of form must not be
19 enforced in a way that causes a party to lose any right
20 because of a nonwillful failure to comply.
21 (b) PROCEDURE WHEN THERE IS NO

22 CONTROLLING LAW.

23 (1) *In General*. A district court or BAP may

24 regulate practice in any manner consistent with federal law,

25 applicable federal rules, the Official Forms, and local rules.

26 (2) *Limitation on Sanctions*. No sanction or other

27 disadvantage may be imposed for noncompliance with any

28 requirement not in federal law, applicable federal rules, the

29 Official Forms, or local rules unless the alleged violator has

30 been furnished in the particular case with actual notice of

31 the requirement.

COMMITTEE NOTE

This rule is derived from former Rule 8018. The changes to the former rule are stylistic.

Rule 8027. Notice of a Mediation Procedure

1 If the district court or BAP has a mediation procedure
2 applicable to bankruptcy appeals, the clerk must notify the parties
3 promptly after docketing the appeal of:
4 (a) the requirements of the mediation procedure; and
5 (b) any effect the mediation procedure has on the time to
6 file briefs.

COMMITTEE NOTE

This rule is new. It requires the district or BAP clerk to advise the parties promptly after an appeal is docketed of any court mediation procedure that is applicable to bankruptcy appeals. The notice must state what the mediation requirements are and how the procedure affects the time for filing briefs.

Rule 8028. Suspension of Rules in Part VIII

1 In the interest of expediting decision or for other cause in a
2 particular case, the district court or BAP, or where appropriate the
3 court of appeals, may suspend the requirements or provisions of
4 the rules in Part VIII, except Rules 8001, 8002, 8003, 8004, 8005,
5 8006, 8007, 8012, 8020, 8024, 8025, 8026, and 8028.

COMMITTEE NOTE

This rule is derived from former Rule 8019 and F.R.App.P. 2. To promote uniformity of practice and compliance with statutory authority, the rule includes a more extensive list of requirements that may not be suspended than either the former rule or the Federal Rules of Appellate Procedure provide. Rules governing the following matters may not be suspended:

- scope of the rules; definition of "BAP"; method of transmission;
- time for filing a notice of appeal;
- taking an appeal as of right;
- taking an appeal by leave;
- election to have an appeal heard by a district court instead of a BAP;
- certification of direct appeal to a court of appeals;
- stay pending appeal;
- corporate disclosure statement;
- sanctions for frivolous appeals and other misconduct;
- clerk's duties on disposition of an appeal;
- stay of a district court's or BAP's judgment;
- local rules; and
- suspension of the Part VIII rules.

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APPENDIX B-3

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Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 3A

Application for Individuals to Pay the Filing Fee in Installments

12/13

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information.

Part 1: Specify Your Proposed Payment Timetable

1. Which chapter of the Bankruptcy Code are you choosing to file under?

❑ Chapter 7 ..... *Fee*: **$306**
❑ Chapter 11 ..... *Fee*: **$1,046**
❑ Chapter 12 ..... *Fee*: **$246**
❑ Chapter 13 ..... *Fee*: **$281**

2. You may apply to pay the filing fee in up to four installments. Fill in the amounts you propose to pay and the dates you plan to pay them. Be sure all dates are business days. Then add the payments you propose to pay.

You must propose to pay the entire fee no later than 120 days after you first file for bankruptcy. If necessary, you may ask the court to extend the deadline to 180 days after you file. In that case, you must explain why you need the extension.

If the court approves your application, the court will set your final payment timetable.

You propose to pay…		
$_____	❑ With the filing of the petition ❑ On or before this date.....	_____ MM / DD / YYYY
$_____	On or before this date.....	_____ MM / DD / YYYY
$_____	On or before this date.....	_____ MM / DD / YYYY
+ $_____	On or before this date.....	_____ MM / DD / YYYY
Total $_____	◀ Your total must equal the entire fee for the chapter you checked in line 1.	

Part 2: Sign Here

By signing here, you state that you are unable to pay the full filing fee at once, that you want to pay the fee in installments, and that you understand that:

- You must pay your entire filing fee before you make any more payments or transfer any more property to an attorney, bankruptcy petition preparer, or anyone else in connection with your bankruptcy case.
- You must pay the entire fee no later than 120 days after you first file for bankruptcy, unless the court extends your deadline to 180 days. Your debts will not be discharged until your entire fee is paid.
- If you do not make any payment when it is due, your bankruptcy case may be dismissed, and your rights in other bankruptcy proceedings may be affected.

_____	_____	_____
Signature of Debtor 1	Signature of Debtor 2	Your attorney's name and signature, if you used one
Date _____ MM / DD / YYYY	Date _____ MM / DD / YYYY	Date _____ MM / DD / YYYY

12b-006007

Fill in this information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number (*If known*): _____

- ❑ Chapter 7
- ❑ Chapter 11
- ❑ Chapter 12
- ❑ Chapter 13

Order Approving Payment of Filing Fee in Installments

After considering the *Application for Individuals to Pay the Filing Fee in Installments* (Official Form 3A), the court orders that:

[ ] The debtor(s) may pay the filing fee in installments on the terms proposed in the application.

[ ] The debtor(s) must pay the filing fee according to the following terms:

	You must pay…	**On or before this date…**
	$_____	_____ Month / day / year
	$_____	_____ Month / day / year
	$_____	_____ Month / day / year
+	$_____	_____ Month / day / year
Total		

Until the filing fee is paid in full, the debtor(s) must not make any additional payment or transfer any additional property to an attorney or to anyone else for services in connection with this case.

_____ **By the court:** _____
Month / day / year United States Bankruptcy Judge

12b-006008

Official Form 3A

Instructions for the Application for Individuals to Pay the Filing Fee in Installments

United States Bankruptcy Court 12/01/13

How to Fill Out the Application

If you cannot afford to pay the full filing fee when you first file for bankruptcy, you may pay the fee in installments. However, in most cases, you must pay the entire fee within 120 days after you file, and the court must approve your payment timetable. Your debts will not be discharged until you pay your entire fee.

Do not file this form if you can afford to pay your full fee when you file.

If you are filing under chapter 7 and cannot afford to pay the full filing fee at all, you may be qualified to ask the court to waive your filing fee. See *Application to Have Your Chapter 7 Filing Fee Waived* (Official Form 3B).

If a bankruptcy petition preparer helped you complete this form, make sure that person fills out the *Declaration and Signature of Non-Attorney Bankruptcy Petition Preparer* (Official Form 19); include a copy of it in this package.

Things to remember when filling out this form

- Be as complete and accurate as possible.
- If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known).
- If two married people are filing together, both are equally responsible for supplying correct information.

Do not file these instructions with your bankruptcy filing package. Keep them for your records.

12b-006009

COMMITTEE NOTE

This form, which applies only in cases of individual debtors, has been revised as part of the Forms Modernization Project, making the form easier to read and, as a result, likely to generate more complete and accurate responses. Also, the declaration and signature section for a non-attorney bankruptcy petition preparer (BPP) has been removed as unnecessary. The same declaration, required under 11 U.S.C. § 110, is contained in Official Form 19. That form must be completed and signed by the BPP, and filed with each document for filing prepared by a BPP.

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Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 3B

Application to Have the Chapter 7 Filing Fee Waived

12/13

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Tell the Court About Your Family and Your Family's Income

1. What is the size of your family?

Your family includes you, your spouse, and any dependents listed on *Schedule J: Current Expenditures of Individual Debtor(s)* (Official Form 6J).

_____
Number of people

Check all that apply.

❑ You
❑ Your spouse
❑ Your dependents _____
How many dependents?

2. Fill in your family's average monthly income.

Include your spouse's income if your spouse is living with you, even if your spouse is not filing.

Do not include your spouse's income if you are separated and your spouse is not filing with you.

Do not include non-cash governmental assistance such as food stamps or housing subsidies.

Person in your family	That person's average monthly net income (take-home pay)
You	$_____
Your spouse	+ $_____
Total	$_____

Add your income and your spouse's income or copy line 10 of *Schedule I: Your Income,* if you have already filled it out.

Your family's average monthly net income

3. Do you receive any non-cash governmental assistance not included in your answer on line 2?

❑ No
❑ Yes. Explain. .....

Type of assistance	Monthly dollar value
	$_____

4. Do you expect your family's average monthly net income to increase or decrease by more than 10% during the next 6 months?

❑ No
❑ Yes. Explain. .....

5. Tell the court why you are unable to pay the filing fee in installments within 120 days.

Part 2: Tell the Court About Your Monthly Expenses

6. Estimate your average monthly expenses. $_____

You may use *Schedule J: Your Expenses* to determine your estimation. If you have already filled out *Schedule J,* copy line 22.

7. Do these expenses cover anyone who is not included in your family as reported in line 1?

❑ No
❑ Yes. Identify who....

8. Does anyone other than you regularly pay any of these expenses?

❑ No
❑ Yes. Identify who.....

How much does this person regularly pay? $_____ monthly

List any contributions to expenses you have or will list in line 11 of *Schedule I: Your Income.*

9. Do you expect your average monthly expenses to increase or decrease by more than 10% during the next 6 months?

❑ No
❑ Yes. Explain .....

Part 3: Tell the Court About Your Property

If you have already filled out *Schedule A: Real Property (Official Form 6A)* and *Schedule B: Personal Property (Official Form 6B)*, attach copies to this application and go to Part 4.

10. How much cash do you have?
Examples: Money you have in your wallet, in your home, and on hand when you file this application

Cash: $_____

11. Bank accounts and other deposits of money?
Examples: Checking, savings, money market, or other financial accounts; certificates of deposit; shares in banks, credit unions, brokerage houses, and other similar institutions. If you have more than one account with the same institution, list each. Do not include 401(k) and IRA accounts.

	Institution name:	Amount:
Checking account:	_____	$_____
Savings account:	_____	$_____
Other financial accounts:	_____	$_____
Other financial accounts:	_____	$_____

12. Your home? (if you own it outright or are purchasing it)
Examples: House, condominium, manufactured home, or mobile home

_____
Number Street
_____
City State ZIP Code

Current value: $_____
Amount you owe on mortgage and liens: $_____

13. Other real estate?

_____
Number Street
_____
City State ZIP Code

Current value: $_____
Amount you owe on mortgage and liens: $_____

14. The vehicles you own?
Examples: Cars, vans, trucks, sports utility vehicles, motorcycles, tractors, boats

Make: _____
Model: _____
Year: _____
Mileage _____

Current value: $_____
Amount you owe on liens: $_____

Make: _____
Model: _____
Year: _____
Mileage _____

Current value: $_____
Amount you owe on liens: $_____

15. Other assets? Do not include household items and clothing.	**Describe the other assets:**	Current value: $_____ Amount you owe on liens: $_____

16. Money or property due you? *Examples*: Tax refunds, past due or lump sum alimony, spousal support, child support, maintenance, divorce or property settlements, Social Security benefits, Workers' compensation, personal injury recovery	**Who owes you the money or property?** _____ _____	**How much is owed?** $_____ $_____	Do you believe you will likely receive payment in the next 3 or 4 months? ☐ No ☐ Yes. Explain:

Part 4: Answer These Additional Questions

17. Have you paid anyone for services for this case, including filling out this application, the bankruptcy filing package, or the schedules?

- ☐ No
- ☐ Yes. **Whom did you pay?**
  - ☐ An attorney
  - ☐ A bankruptcy petition preparer, paralegal, or typing service
  - ☐ Someone else _____

How much did you pay? $_____

18. Have you promised to pay or do you expect to pay someone for services for your bankruptcy case?

- ☐ No
- ☐ Yes. **Whom do you expect to pay?**
  - ☐ An attorney
  - ☐ A bankruptcy petition preparer, paralegal, or typing service
  - ☐ Someone else _____

How much do you expect to pay? $_____

19. Has anyone paid someone on your behalf for services for this case?

- ☐ No
- ☐ Yes. **Who was paid on your behalf?**
  - ☐ An attorney
  - ☐ A bankruptcy petition preparer, paralegal, or typing service
  - ☐ Someone else _____

Who paid?
- ☐ Parent
- ☐ Brother or sister
- ☐ Friend
- ☐ Pastor or clergy
- ☐ Someone else _____

How much did someone else pay? $_____

20. Have you, your spouse, or both of you filed for bankruptcy within the last 8 years?

- ☐ No
- ☐ Yes. District _____ When _____ (MM/DD/YYYY) Case number _____
  District _____ When _____ (MM/DD/YYYY) Case number _____
  District _____ When _____ (MM/DD/YYYY) Case number _____

Part 5: Sign Here

By signing here under penalty of perjury, I declare that I cannot afford to pay the filing fee either in full or in installments. I also declare that the information I provided in this application is true and correct.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

Fill in this information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Order on the Application to Have the Chapter 7 Filing Fee Waived

After considering the debtor's *Application to Have the Chapter 7 Filing Fee Waived* (Official Form 3B), the court orders that the application is:

[ ] Granted. However, the court may order the debtor to pay the fee in the future if developments in administering the bankruptcy case show that the waiver was unwarranted.

[ ] Denied. The debtor must pay the $306 filing fee according to the following terms:

	You must pay…	On or before this date…
	$_____.____	_____ Month / day / year
	$_____.____	_____ Month / day / year
	$_____.____	_____ Month / day / year
+	$_____.____	_____ Month / day / year
Total	$ 306.00	

If the debtor would like to propose a different payment timetable, the debtor must file a motion promptly with a payment proposal. The debtor may use *Application for Individuals to Pay the Filing Fee in Installments* (Official Form 3A) for this purpose. The court will consider it.

The debtor must pay the entire filing fee before making any more payments or transferring any more property to an attorney, bankruptcy petition preparer, or anyone else in connection with the bankruptcy case. The debtor must also pay the entire filing fee to receive a discharge. If the debtor does not make any payment when it is due, the bankruptcy case may be dismissed and the debtor's rights in future bankruptcy cases may be affected.

[ ] Scheduled for hearing.

A hearing to consider the debtor's application will be held

on _____ at ____:____ AM/PM at _____.
Month / day / year Address of courthouse

If the debtor does not appear at this hearing, the court may deny the application.

_____ **By the court:** _____
Month / day / year United States Bankruptcy Judge

12b-006016

Official Form 3B

Instructions for the Application to Have the Chapter 7 Filing Fee Waived

United States Bankruptcy Court 12/01/2013

How to Fill Out the Application

The fee for filing a bankruptcy case under Chapter 7 is $306. If you cannot afford to pay the entire fee now in full or in installments within 120 days, use this form. If you can afford to pay your filing fee in installments, see *Application for Individuals to Pay the Filing Fee in Installments* (Official Form 3A).

If you file this form, you are asking the court to waive your fee. After reviewing your application, the court may waive your fee, set a hearing for further investigation, or require you to pay the fee in installments or in full.

For your fee to be waived, all of these statements must be true:

- You are filing for bankruptcy under Chapter 7.
- You are an individual.
- The total combined monthly income for your family is less than 150% of the official poverty guideline last published by the U.S. Department of Health and Human Services (DHHS). (For more information about the guidelines, go to http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyResources/PovertyGuidelines.aspx.)
- You cannot afford to pay the fee in installments.

Your family includes you, your spouse, and any dependents listed on *Schedule J*. Your family may be different from your *household*, referenced on *Schedules I* and *J*. Your household may include your unmarried partner and others who live with you and with whom you share income and expenses.

If a bankruptcy petition preparer helped you complete this form, make sure that person fills out *Declaration and Signature of Non-Attorney Bankruptcy Petition Preparer* (Official Form 19); include a copy of it in this package.

If you have already completed the following forms, the information on them may help you when you fill out this application:

- *Schedule A: Real Property* (Official Form 6A)
- *Schedule I: Your Income* (Official Form 6I)
- *Schedule J: Your Expenses* (Official Form J)

Understand the terms used in this form

The *Application to Have the Chapter 7 Filing Fee Waived* (Official Form 3B) uses *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, this form uses *you* to ask for information from both debtors. For example, if the form asks, "Do you own a car?" the answer would be *yes* if either debtor owns a car. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Things to remember when filling out this form

- Be as complete and accurate as possible.
- If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known).
- If two married people are filing together, both are equally responsible for supplying correct information.

Do not file these instructions with your bankruptcy filing package. Keep them for your records.

12b-006017

COMMITTEE NOTE

This form, which applies only in cases of individual debtors, has been revised as part of the Forms Modernization Project, making the form easier to read and, as a result, likely to generate more complete and accurate responses. Additionally, in calculating the income that determines the debtor's initial eligibility for a fee waiver, line 2 of the form now directs the debtor to exclude non-cash governmental assistance, such as food stamps and housing subsidies. However, because non-cash governmental assistance may be relevant in evaluating the additional requirement that the debtor be unable to pay the filing fee, the nature and amount of any such assistance is to be reported separately on line 3. Also, the declaration and signature section for a non-attorney bankruptcy petition preparer (BPP) has been removed as unnecessary. The same declaration, required under 11 U.S.C. § 110, is contained in Official Form 19. That form must be completed and signed by the BPP, and filed with each document for filing prepared by a BPP.

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Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 6I

Schedule I: Your Income

12/13

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Describe Employment

1. **Fill in your employment information.**

If you have more than one job, attach a separate page with information about additional employers.

Include employment information about a non-filing spouse unless you are separated.

Include part-time, seasonal, or self-employed work.

Occupation should Include student or homemaker, if it applies.

	Debtor 1	Debtor 2 or non-filing spouse
Employment status	Employed Not employed	Employed Not employed
Occupation	_____	_____
Employer's name	_____	_____
Employer's address	_____ Number Street _____ _____ _____ City State ZIP Code	_____ Number Street _____ _____ _____ City State ZIP Code
How long employed there?	_____	_____

Part 2: Give Details About Monthly Income

Estimate monthly income as of the date you file this form. If you have nothing to report for any line, write $0 in the space. Include your non-filing spouse unless you are separated.

If you or your non-filing spouse have more than one employer, combine the information for all employers for that person on the lines below. If you need more space, attach a separate sheet to this form.

		For Debtor 1	For Debtor 2 or non-filing spouse
2. **List monthly gross wages, salary, and commissions** (before all payroll deductions). If not paid monthly, calculate what the monthly wage would be.	2.	$_____	$_____
3. **Estimate and list monthly overtime pay, if any.**	3.	+ $_____	+ $_____
4. **Calculate gross income.** Add line 2 + line 3.	4.	$_____	$_____

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

		For Debtor 1	For Debtor 2 or non-filing spouse
Copy line 4 here..... ➔	4.	$_____	$_____
5. **List all payroll deductions:**			
5a. **Payroll taxes and social security payments**	5a.	$_____	$_____
5b. **Contributions for retirement plans**	5b.	$_____	$_____
5c. **Required repayments of retirement fund loans**	5c.	$_____	$_____
5d. **Insurance**	5d.	$_____	$_____
5e. **Union dues**	5e.	$_____	$_____
5f. **Other deductions.** Specify: _____	5f.	$_____	$_____
5g. **Other deductions.** Specify: _____	5g.	$_____	$_____
5h. **Other deductions.** Specify: _____	5h.	+ $_____	+ $_____
6. **Add the payroll deductions**. Add lines 5a + 5b + 5c + 5d + 5e +5f + 5g +5h.	6.	$_____	$_____
7. **Calculate total monthly take-home pay.** Subtract line 6 from line 4.	7.	$_____	$_____
8. **List all other income regularly received:**			
8a. **Net income from rental property and from operating a business, profession, or farm** Attach a statement for each property and business showing gross receipts, ordinary and necessary business expenses, and the total monthly net income.	8a.	$_____	$_____
8b. **Interest and dividends**	8b.	$_____	$_____
8c. **Family support payments that you, a non-filing spouse, or a dependent regularly receive** Include alimony, spousal support, child support, maintenance, divorce settlement, and property settlement.	8c.	$_____	$_____
8d. **Unemployment compensation**	8d.	$_____	$_____
8e. **Social Security**	8e.	$_____	$_____
8f. **Other government assistance.** Specify: _____	8f.	$_____	$_____
8g. **Pension or retirement income**	8g.	$_____	$_____
8h. **Other monthly income.** Specify: _____	8h.	+ $_____	+ $_____
9. **Add all other income**. Add lines 8a + 8b + 8c + 8d + 8e + 8f +8g + 8h.	9.	$_____	$_____
10. **Calculate monthly income.** Add line 7 + line 9. Add the entries in line 10 for Debtor 1 and Debtor 2 or non-filing spouse.	10.	$_____ +	$_____ = $_____

11. **List all contributions to the expenses that you list in *Schedule J* that anyone else makes.**
Include contributions from an unmarried partner, members of your household, your dependents, your roommates, and other friends or relatives**.**
Do not include any amounts already included in lines 2-10 or amounts that are not available to pay expenses listed in *Schedule J*.
Specify: _____ 11. + $_____

12. **Add the amount in last column of line 10 to the amount in line 11.** The result is the combined monthly income. 12. $_____
Write that amount on the *Summary of Schedules* and the *Statistical Summary of Certain Liabilities and Related Data,* if it applies.
Combined monthly income

13. **Do you expect an increase or decrease within the year after you file this form?**
- ❑ No.
- ❑ Yes. Explain:

Official Form 6I

Instructions for Schedule I: Your Income

United States Bankruptcy Court 12/01/13

How to fill out Schedule I

In *Schedule I: Your Income* (Official Form 6I), you will give the details about your employment and monthly income as of the date you file this form. If you are married and your spouse is living with you, include information about your spouse even if your spouse is not filing with you. If you are separated and your spouse is not filing with you, do not include information about your spouse.

How to report employment and income

If you have nothing to report for a line, write $0.

In Part 1, line 1, fill in employment information for you and, if appropriate, for a non-filing spouse. If either person has more than one employer, attach a separate page with information about the additional employment.

In Part 2, give details about the monthly income you currently expect to receive. Show all totals as monthly payments, even if income is not received in monthly payments.

If your income is received in another time period, such as daily, weekly, quarterly, annually, or irregularly, calculate how much income would be by month, as described below.

If either you or a non-filing spouse has more than one employer, calculate the monthly amount for each employer separately, and then combine the income information for all employers for that person on lines 2-7.

One easy way to calculate how much income would be per month is to total the payments earned in a year, then divide by 12 to get a monthly figure. For example, if you are paid annually, you would simply divide your annual salary by 12 to get the monthly amount.

Below are other examples of how to calculate monthly amount.

Example for quarterly payments:

If you are paid $15,000 every quarter, figure your monthly income in this way:

	$15,000	*income every quarter*
X	4	*pay periods in the year*
	$60,000	*total income for the year*

$60,000 (*income for year*) = $5,000 *monthly income*
12 (*number of months in year*)

Example for bi-weekly payments:

If you are paid $2,500 every other week, figure your monthly income in this way:

	$2,500	*income every other week*
X	26	*number of pay periods in the year*
	$65,000	*total income for the year*

$65,000 (*income for year*) = $5,417 *monthly income*
12 (*number of months in year*)

Example for weekly payment:

If you are paid $1,000 every week, figure your monthly income in this way:

	$1,000	*income every week*
X	52	*number of pay periods in the year*
	$52,000	*total income for the year*

$52,000 (*income for year*) = $4,333 *monthly income*
12 (*number of months in year*)

12b-006023

Example for irregular payments:

If you are paid $4,000 8 times a year, figure your monthly income in this way:

$4,000 *income a payment*
X 8 *payments a year*
$32,000 *income for the* year

$32,000 (*income for year*) = $2,667 *monthly income*
12 (*number of months in year*)

Example for daily payments:

If you are paid $75 a day and you work about 8 days a month, figure your monthly income in this way:

$75 *income a day*
X 96 *days a year*
$7,200 *total income for the year*

$7,200 (*income for year*) = $600 *monthly income*
12 (*number of months in year*)

or this way:

$75 *income a day*
X 8 *payments a month*
$600 *income for the* month

In Part 2, line 11, fill in amounts that other people provide to pay the expenses you list on *Schedule J: Your Expenses*. For example, if you and a person to whom you are not married deposit the income from both of your jobs into a single bank account and pay all household expenses and you list all your joint household expenses on *Schedule J*, you must list the amounts that person contributes monthly to pay the household expenses on line 11. If you have a roommate and you divide the rent and utilities, do not list the amounts your roommate pays on line 11 if you have listed only your share of those expenses on *Schedule J*. However, if you have listed the cost of the rent and utilities for your entire house or apartment on *Schedule J*, you must list your roommate's contribution to those expenses on *Schedule I*, line 14. Do not list line 11 contributions that you already disclosed on line 5.

Note that the income you report on *Schedule I* may be different from the income you report on other bankruptcy forms. For example, the *Chapter 7 Statement of Your Current Monthly Income* (Official Form 22A-1), *Chapter 11 Statement of Your Current Monthly Income* (Official Form 22B), and the *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period* (Official Form 22C-1) all use a different definition of income and apply that definition to a different period of time. *Schedule I* asks about the income that you are now receiving, while the other forms ask about income you received in the applicable time period before filing. So the amount of income reported in any of those forms may be different from the amount reported here.

Understand the terms used in this form

This form uses *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, this form uses *you* to ask for information from both debtors. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Things to remember when filling out this form

- Be as complete and accurate as possible.
- If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known).
- If two married people are filing together, both are equally responsible for supplying correct information.

Do not file these instructions with your bankruptcy filing package. Keep them for your records.

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Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 6J

Schedule J: Your Expenses

12/13

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Describe Your Household

1. **Do you have dependents who live with you?**

   Do not list Debtor 1 and Debtor 2.

   If you are filing jointly and live in separate households, list dependents who live in either household.

❑ No
❑ Yes. Fill out this information.

Each dependent who lives in the household	That person's relationship to Debtor 1 or Debtor 2	That person's age
Person 1	_____	_____
Person 2	_____	_____
Person 3	_____	_____
Person 4	_____	_____
Person 5	_____	_____

2. **Do you have dependents who do not live with you?**

   Do not list anyone listed in line 1.

❑ No
❑ Yes. Fill out this information:

Each dependent who does not live in the household	That person's relationship to Debtor 1 or Debtor 2	That person's age
Person 1	_____	_____
Person 2	_____	_____

3. **Does anyone else live in your household?**

   Do not list Debtor 1, Debtor 2, and any dependents listed on lines 1 and 2.

   If you are filing jointly and live in separate households, list everyone else who lives in either household.

❑ No
❑ Yes. Fill out this information

Each other person who lives in the household	That person's relationship to Debtor 1 or Debtor 2
Person 1	_____
Person 2	_____
Person 3	_____

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

Part 2: Estimate Your Ongoing Monthly Expenses

		Column A *For all individuals* **Your expenses as of the date you file for bankruptcy**	Column B *For Chapter 13 ONLY* **What your expenses will be if your current plan is confirmed**
4. **The rental or home ownership expenses for your residence.** Include first mortgage payments and any rent for the ground or lot.	4.	$_____	$_____
If not included in line 4:			
4a. Real estate taxes	4a.	$_____	$_____
4b. Property, homeowner's, or renter's insurance	4b.	$_____	$_____
4c. Home maintenance, repair, and upkeep expenses	4c.	$_____	$_____
4d. Homeowner's association or condominium dues	4d.	$_____	$_____
5. **Additional mortgage payments for your residence**, such as home equity loans	5.	$_____	$_____
6. **Utilities:**			
6a. Electricity, heat, natural gas	6a.	$_____	$_____
6b. Water, sewer, garbage collection	6b.	$_____	$_____
6c. Telephone, cell phone, Internet, satellite, and cable services	6c.	$_____	$_____
6d. Other. Specify: _____	6d.	$_____	$_____
7. **Food and housekeeping supplies**	7.	$_____	$_____
8. **Childcare and children's education costs**	8.	$_____	$_____
9. **Clothing, laundry, and dry cleaning**	9.	$_____	$_____
10. **Personal care products and services**	10.	$_____	$_____
11. **Medical and dental expenses**	11.	$_____	$_____
12. **Transportation.** Include gas, maintenance, bus or train fare. Do not include car payments.	12.	$_____	$_____
13. **Entertainment, clubs, recreation, newspapers, magazine, and books**	13.	$_____	$_____
14. **Charitable contributions and religious donations**	14.	$_____	$_____
15. **Insurance.** Do not include insurance deducted from your pay or included in lines 4 or 20.			
15a. Life insurance	15a.	$_____	$_____
15b. Health insurance	15b.	$_____	$_____
15c. Vehicle insurance	15c.	$_____	$_____
15d. Other insurance. Specify:_____	15d.	$_____	$_____
16. **Taxes.** Do not include taxes deducted from your pay or included in lines 4 or 20. Specify: _____	16.	$_____	$_____
17. **Installment or lease payments:**			
17a. Car payments for Vehicle 1	17a.	$_____	$_____
17b. Car payments for Vehicle 2	17b.	$_____	$_____
17c. Student loan payments	17c.	$_____	$_____
17d. Other. Specify:_____	17d.	$_____	$_____
17e. Other. Specify:_____	17e.	$_____	$_____

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

		Column A *For all individuals* **Your expenses as of the date you file for bankruptcy**	Column B *For Chapter 13 ONLY* **What your expenses will be if your current plan is confirmed**
18. **Alimony, maintenance, and support that you pay to others**	18.	$_____	$_____
19. **Other payments you make to support others who do not live with you.** Specify:_____	19.	$_____	$_____
20. **Other real property expenses not included in lines 4 or 5 of this form or on *Schedule I*: *Your Income* (Official Form 6I)**			
20a. Mortgages on other property	20a.	$_____	$_____
20b. Real estate taxes	20b.	$_____	$_____
20c. Property, homeowner's, or renter's insurance	20c.	$_____	$_____
20d. Maintenance, repair, and upkeep expenses	20d.	$_____	$_____
20e. Homeowner's association or condominium dues	20e.	$_____	$_____
21. **Other**. Specify: _____	21.	+ $_____	+ $_____
22. **Your monthly expenses.** Add lines 4 through 21. The result is your monthly expenses.	22.	$_____	$_____
23. **Calculate your monthly net income.**			
23a. Copy line 12 (*your combined monthly income*) from *Schedule I.*	23a.	$_____	$_____
23b. Copy your monthly expenses from line 22 above.	23b.	– $_____	–$_____
23c. Subtract your monthly expenses from your monthly income. The result is your *monthly net income*.	23c.	$_____	$_____

24. **Do you expect an increase or decrease in your expenses within the year after you file this form?**

For example, do you expect to finish paying for your car loan within the year or do you expect your mortgage payment to increase or decrease because of a modification to the terms of your mortgage?

- ❑ No.
- ❑ Yes.

Explain here:

Official Form 6J

Instructions for Schedule J: Your Expenses

United States Bankruptcy Court 12/01/13

How to Fill Out Schedule J

Use Column A of *Schedule J: Your Expenses* (Official Form 6J) to estimate the monthly expenses, as of the date you file for bankruptcy, for you, your dependents, and the other people in your household whose income is included on *Schedule I: Your Income* (Official Form 6I).

If you are filing under chapter 13, you must also complete Column B. In Column B, itemize what your monthly expenses would be under the plan that you are submitting with this schedule or, if no plan is being submitted now, under the most recent plan you previously submitted.

Include your non-filing spouse's expenses unless you are separated. If one of you keeps a separate household, fill out separate *Schedule J* for Debtor 1 and Debtor 2 and write *Debtor 1* or *Debtor 2* at the top of page 1 of the form.

Do not include expenses that other members of your household pay directly from their income if you did not include that income on *Schedule I*. For example, if you have a roommate and you divide the rent and utilities and you have not listed your roommate's contribution to household expenses in line 11 of *Schedule I*, you would list only your share of these expenses on *Schedule J*.

Show all totals as monthly payments. If you have weekly, quarterly, or annual payments, calculate how much you would spend on those items every month.

Do not list as expenses any payments on credit card debts incurred before filing bankruptcy.

Do not include business expenses on this form. You have already accounted for those expenses as part of determining net business income on *Schedule I*.

On line 20, do not include expenses for your residence or for any rental or business property. You have already listed expenses for your residence on lines 4 and 5 of this form. You listed the expenses for your rental and business property as part of the process of determining your net income from that property on *Schedule I* (line 8a).

If you have nothing to report for a line, write $0.

Understand the terms used in this form

This form uses *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, this form uses *you* to ask for information from both debtors. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Things to remember when filling out this form

- Be as complete and accurate as possible.
- If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known).
- If two married people are filing together, both are equally responsible for supplying correct information.
- Do not list a minor child's full name. Instead, fill in only the child's initials and the full name and address of the child's parent or guardian. For example, write A.B., a minor child (*John Doe, parent, 123 Main St., City, State*). 11 U.S.C. § 112; Fed. R. Bankr. P. 1007(m) and 9037.

Do not file these instructions with your bankruptcy filing package. Keep them for your records.

12b-006030

COMMITTEE NOTE

Schedule I: Your Income (Official Form 6I) and *Schedule J: Your Expenses* (Official Form 6J), which apply only in cases of individual debtors, have been revised as part of the Forms Modernization Project, making the forms easier to read and, as a result, likely to generate more complete and accurate responses.

Revised Schedules I and J seek to obtain a full picture of debtor's economic situation—to the extent that debtor receives income or has expenses. The revised forms are intended to avoid the situation that frequently happens with the current forms where debtor lives with and pools assets with other people and the household provides support to dependents who may not be related by blood or marriage to debtor.

The amendments seek to avoid the situation where the expenses listed on Schedule J are for the entire household, but the income listed on Schedule I is only for the debtor. Line 11 on revised Schedule I, now includes contributions made by someone else to the expenses on Schedule J and the debtor is instructed to include contributions from an unmarried partner, members of the debtor's household, dependents, roommates, and other friends or relatives.

As revised, Schedule J asks for expenses at two different points in time in chapter 13 cases—as of the date the debtor files bankruptcy (Column A) and as of the date a proposed 13 plan is confirmed (Column B).

In drafting the form it became apparent that at least some courts are using Schedules I and J in analyzing proposed chapter 13 plans and potential modification of those plans. Sometimes amended Schedules I and J are required when a debtor's financial circumstances change. To avoid a lack of clarity on the form regarding the date to be used in computing expenses, and in order to allow Schedule J to continue to serve the plan feasibility function, the revised form requests information on both time bases in chapter 13 cases.

New lines 1, 2, and 3 on revised Schedule J request information on dependents who live with the debtor, dependents who live separately, and other members of the household. In addition, new line 23 on the form includes a calculation of the debtor's monthly net income.

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Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number _____
(If known)

Check one only as directed in lines 1, 2, 3, or 17:

According to the calculations required by this Statement:

❑ 1. There is no presumption of abuse.

❑ 2. The presumption of abuse is determined by Form 22A–2.

❑ 3. The Means Test does not apply now because of qualified military service but it could apply later.

❑ Check if this is an amended filing

Official Form 22A–1

Chapter 7 Statement of Your Current Monthly Income

12/13

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for being accurate. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).

Part 1: Identify the Kind of Debts You Have

1. **Are your debts primarily consumer debts?** *Consumer debts* are defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose." Make sure that your answer is consistent with the "Nature of Debts" box on page one of the *Voluntary Petition* (Official Form 1).

   ❑ No. On the top of this page, check box 1, *There is no presumption of abuse.* ..... Go to Part 5.

   ❑ Yes ..... Go to Part 2.

Part 2: Determine Whether Military Service Provisions Apply to You

If you are filing this case jointly and any of the exclusions in Part 2 applies to only one of you, the other person should complete a separate *Chapter 7 Statement of Your Current Monthly Income* (Official Form 22A-1) if you believe that this is required by 11 U.S.C. § 707(b)(2)(C).

2. **Are you a disabled veteran** (as defined in 38 U.S.C. § 3741(1))**?**

   ❑ No. Go to line 3.

   ❑ Yes. Did you incur debts mostly while you were on active duty or while you were performing a homeland defense activity? 11 U.S.C. § 101(d)(1)); 32 U.S.C. § 901(1)

   ❑ No. Go to line 3.

   ❑ Yes. On the top of this page, check box 1, *There is no presumption of abuse.* ..... Go to Part 5.

3. **Are you or have you been a Reservist or member of the National Guard?**

   ❑ No. Go to Part 3.

   ❑ Yes. Were you called to active duty or did you perform a homeland defense activity? 10 U.S.C. § 101(d)(1); 32 U.S.C. § 901(1)

   ❑ No. Go to Part 3.

   ❑ Yes. Check any one of the following categories that applies:

   ❑ **I was called to active duty after September 11, 2001**, for at least 90 days and remain on active duty**.**

   ❑ **I was called to active duty after September 11, 2001,** for at least 90 days and was released from active duty on _____, which is fewer than 540 days before I file this bankruptcy case.

   ❑ **I am performing a homeland defense activity for at least 90 days.**

   ❑ **I performed a homeland defense activity for at least 90 days**, ending on _____, which is fewer than 540 days before I file this bankruptcy case.

If you did not check any of these categories, go to Part 3.

If you checked one of the categories, go to the top of this page. Check box 3, *The Means Test does not apply now because of qualified military service but it could apply later;* then go to Part 5. You are not required to fill out the rest of this form during the exclusion period. The *exclusion period* means the time you are on active duty or are performing a homeland defense activity, and for 540 days afterward. 11 U.S.C. § 707(b)(2)(D)(ii). If your exclusion period ends before your case is closed, you may have to file an amended form later.

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

Part 3: Calculate Your Current Monthly Income

4. **What is your marital and filing status?** Check one only.

- ❑ **Not married.** Fill out Column A, lines 5-14.
- ❑ **Married and your spouse is filing with you.** Fill out both Columns A and B, lines 5-14.

Married and your spouse is NOT filing with you. You and your spouse are:

- ❑ **Living in the same household and are not legally separated.** Fill out both Columns A and B, lines 5-14.
- ❑ **Living separately or are legally separated**. Fill out Column A, lines 5-14; do not fill out Column B. By checking this box, you declare under penalty of perjury that you and your spouse are legally separated under nonbankruptcy law that applies or that you and your spouse are living apart for reasons that do not include evading the Means Test requirements. 11 U.S.C. § 707(b)(7)(B).

Fill in the average monthly income that you received from all sources, derived during the 6 full months before you file this bankruptcy case. 11 U.S.C. § 101(10A). For example, if you are filing on September 15, the 6-month period would be March 1 through August 31. If the amount of your monthly income varied during the 6 months, add the income for all 6 months and divide the total by 6. Fill in the result. Do not include any income amount more than once. For example, if both spouses own the same rental property, put the income from that property in one column only. If you have nothing to report for any line, write $0 in the space.

			Column A **For you**	*Column B* **Debtor 2 or non-filing spouse**
5. **Your gross wages, salary, tips, bonuses, overtime, and commissions** (before all payroll deductions).			$_____	$_____
6. **Alimony and maintenance payments**			$_____	$_____
7. **All amounts from any source which are regularly paid for household expenses of you or your dependents, including child support.** Include regular contributions from an unmarried partner, members of your household, your dependents, parents, and roommates. Also, include regular contributions from a spouse if Column B is not filled in. Do not include payments you listed on line 6.			$_____	$_____
8. **Net income from operating a business, profession, or farm**				
Gross receipts (before all deductions)	$_____			
Ordinary and necessary operating expenses	– $_____			
Net monthly income from a business, profession, or farm	$_____	**Copy here➔**	$_____	$_____
9. **Net income from rental and other real property**				
Gross receipts (before all deductions)	$_____			
Ordinary and necessary operating expenses	– $_____			
Net monthly income from rental or other real property	$_____	**Copy here➔**	$_____	$_____
10. **Interest, dividends, and royalties**			$_____	$_____
11. **Unemployment compensation**			$_____	$_____
Do not enter the amount if you contend that the amount received was a benefit under the Social Security Act. Instead, list it here: ..... ➔				
For you	$_____			
For your spouse	$_____			
12. **Pension or retirement income.** Do not include any amount received that was a benefit under the Social Security Act.			$_____	$_____
13. **Income from all other sources not listed above.** Specify the source and amount. Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, a crime against humanity, or international or domestic terrorism. If necessary, list other sources on a separate page and put the total on line 13c.				
13a.			$_____	$_____
13b.			$_____	$_____
13c. Total amounts from separate pages, if any.			+ $_____	+ $_____
14. **Calculate your total current monthly income.** Add lines 5 through 13 for each column. Then add the total for Column A to the total for Column B.			$_____ +	$_____ = $_____ **Total current monthly income**

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

Part 4: Determine Whether the Means Test Applies to You

15. **Calculate your annual income using your total current monthly income from Part 3.** Follow these steps:

15a. Copy your total current monthly income from line 14..... **Copy line 14 here➔** 15a. $_____

Multiply by 12 (the number of months in a year). **x** 12

15b. The result is your annual income for this part of the form. 15b. $_____

16. **Calculate the median family income that applies to you.** Follow these steps:

Fill in the state in which you live.

Fill in the number of people in your household.

Fill in the median family income for your state and size of household. ..... 16. $_____

To find that information, either go to the Means Test information at http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm or ask for help at the clerk's office of the bankruptcy court.

17. **How do the lines compare?**

17a. ❑ Line 15b is less than or equal to line 16. On the top of page 1, check box 1, *There is no presumption of abuse.* Go to Part 5.

17b. ❑ Line 15b is more than line 16. On the top of page 1, check box 2, *The presumption of abuse is determined by Form 22A–2*. Go to Part 5 and fill out Form 22A–*2.*

Part 5: Sign Here

By signing here, I declare under penalty of perjury that the information on this statement and in any attachments is true and correct.

✘ _____
Signature of Debtor 1

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

Date _____
MM / DD / YYYY

If you checked 17a, do NOT fill out or file Official Form 22A–2, *Chapter 7 Means Test Calculation*.

If you checked line 17b, fill out Official Form 22A–2, *Chapter 7 Means Test Calculation* and file it with this form.

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Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Check one only as directed in lines 40 or 42:

According to the calculations required by this Statement:

❑ 1. There is no presumption of abuse.

❑ 2. There is a presumption of abuse.

❑ Check if this is an amended filing

Official Form 22A–2

Chapter 7 Means Test Calculation

12/13

To fill out this form, you will need your completed copy of Form 22A–1:*Chapter 7 Statement of Your Current Monthly Income (Official Form 22A-1)*.

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for being accurate. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).

Part 1: Determine Your Adjusted Income

1. **Copy your total current monthly income.** .....**Copy line 14 from Official Form 22A-1 here➔** 1. $_____

2. **Did you fill out Column B in Part 3 of Official Form 22A–1?**

❑ No. Fill in $0 on line 3d.

❑ Yes. Is your spouse filing with you?

❑ No. Go to line 3.

❑ Yes. Fill in $0 on line 3d.

3. **Adjust your current monthly income by subtracting any part of your spouse's income not used to pay for the household expenses of you or your dependents.** Follow these steps:

On line 14, Column B of Form 22A–1, was any amount of the income you reported for your spouse NOT regularly used for the household expenses of you or your dependents?

❑ No. Fill in 0 on line 3d.

❑ Yes. Fill in the information below:

State each purpose for which the income was used For example, the income is used to pay your spouse's tax debt or to support people other than you or your dependents	**Fill in the amount you are subtracting from your spouse's income**
3a.	$_____
3b.	$_____
3c.	+ $_____
3d. **Total.** Add lines 3a, 3b, and 3c.	$_____

Copy total here ➔ 3d. – $_____

4. **Adjust your current monthly income.** Subtract line 3d from line 1. $_____

Part 2: Calculate Your Deductions from Your Income

The Internal Revenue Service (IRS) issues National and Local Standards for certain expense amounts. Use these amounts to answer the questions in lines 5-14. To find the IRS standards, either go to http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm or ask for help at the clerk's office of the bankruptcy court.

Deduct the expense amounts set out in lines 6-15 regardless of your actual expense. In later parts of the form, you will use some of your actual expenses if they are higher than the standards. Do not deduct any amounts that you subtracted from your spouse's income in line 3 and do not deduct any operating expenses that you subtracted from income in lines 8 and 9 of Form 22A–1.

If your expenses differ from month to month, enter the average expense.

Whenever this part of the form refers to *you*, it means both you and your spouse if Column B of Form 22A–1 is filled in.

5. **The number of people used in determining your deductions from income**
Fill in the number of people who could be claimed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support. This number may be different from the number of people in your household. [ ]

National Standards You must use the IRS National Standards to answer the questions in lines 6-7.

6. **Food, clothing, and other items:** Using the number of people you entered in line 5 and the IRS National Standards, fill in the dollar amount for food, clothing, and other items. $_____

7. **Out-of-pocket health care allowance:** Using the number of people you entered in line 5 and the IRS National Standards, fill in the dollar amount for out-of-pocket health care. The number of people is split into two categories — people who are under 65 and people who are 65 or older — because older people have a higher IRS allowance for health care costs. If your actual expenses are higher than this IRS amount, you may deduct the additional amount on line 22.

People who are under 65 years of age			
7a. Out-of-pocket health care allowance per person	$_____		
7b. Number of people who are under 65	X _____		
7c. **Subtotal.** Multiply line 7a by line 7b.	$_____	**Copy line 7c here➔**	$_____

People who are 65 years of age or older			
7d. Out-of-pocket health care allowance per person	$_____		
7e. Number of people who are 65 or older	X _____		
7f. **Subtotal.** Multiply line 7d by line 7e.	$_____	**Copy line 7f here➔**	+ $_____

7g. **Total**. Add lines 7c and 7f. ..... $_____ **Copy total here➔** 7g. $_____

Local Standards You must use the IRS Local Standards to answer the questions in lines 8-15.

Based on information from the IRS, the U.S. Trustee Program has divided the IRS Local Standard for housing for bankruptcy purposes into two parts:

- **Housing and utilities – Insurance and operating expenses**
- **Housing and utilities – Mortgage or rent expenses**

Use the U.S. Trustee Program chart to answer the questions in lines 8-9. Go to http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm or ask for help at the clerk's office of the bankruptcy court.

8. **Housing and utilities – Insurance and operating expenses:** Using the number of people you entered in line 5, fill in the dollar amount listed for your county for insurance and operating expenses. $_____

9. **Housing and utilities – Mortgage or rent expenses:**

9a. Using the number of people you entered in line 5, fill in the dollar amount listed for your county for mortgage or rent expenses. 9a. $_____

9b. Total average monthly payment for all mortgages and other debts secured by your home.

To calculate the total average monthly payment, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Then divide by 60.

Name of the creditor	Does payment include taxes or insurance?	Average monthly payment
	❑ No ❑ Yes	$_____
	❑ No ❑ Yes	$_____
	❑ No ❑ Yes	+ $_____
9b. Total average monthly payment		$_____

Copy line 9b here➔ — $_____ Repeat this amount on line 33a.

9c. Net mortgage or rent expense.
Subtract line 9b (*total average monthly payment*) from line 9a (*mortgage or rent expense*). If this amount is less than $0, enter $0. 9c. $_____ **Copy line 9c here➔** $_____

10. **If you claim that the U.S. Trustee Program's division of the IRS Local Standard for housing does not accurately compute the amount that applies to you, fill in any additional amount you claim.** $_____

Explain why:

11. **Local transportation expenses:** Check the number of vehicles for which you claim an ownership or operating expense.
- ❑ 0. Go to line 14.
- ❑ 1. Go to line 12.
- ❑ 2 or more. Go to line 12.

12. **Vehicle operation expense:** Using the IRS Local Standards and the number of vehicles for which you claim the operating expenses, fill in the *Operating Costs* that apply for your Census region or metropolitan statistical area. $_____

13. **Vehicle ownership or lease expense:** Using the IRS Local Standards, calculate the net ownership or lease expense for each vehicle below. You may not claim the expense if you do not make any loan or lease payments on the vehicle. In addition, you may not claim the expense for more than two vehicles.

Vehicle 1	**Describe Vehicle 1:**

13a. Ownership or leasing costs using IRS Local Standard — 13a. $_____

13b. Average monthly payment for all debts secured by Vehicle 1.
Do not include installment payments for leased vehicles.

To calculate the average monthly payment here and on line 13e, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Then divide by 60.

Name of each creditor for Vehicle 1	Average monthly payment
	$_____

Copy 13b here ➔ — $_____ Repeat this amount on line 33b.

13c. Net Vehicle 1 ownership or lease expense
Subtract line 13b from line 13a. If this amount is less than $0, enter $0.
13c. $_____ **Copy net Vehicle 1 expense here** ➔ $_____

Vehicle 2	**Describe Vehicle 2:**

13d. Ownership or leasing costs using IRS Local Standard — 13d. $_____

13e. Average monthly payment for all debts secured by Vehicle 2. Do not include costs for leased vehicles.

Name of each creditor for Vehicle 2	Average monthly payment
	$_____

Copy here ➔ — $_____ Repeat this amount on line 33c.

13f. Net Vehicle 2 ownership or lease expense
Subtract line 13e from 13d. If this amount is less than $0, enter $0. — 13f. $_____ **Copy net Vehicle 2 expense here** ➔ $_____

14. **Public transportation expense**: If you claimed 0 vehicles in line 11, using the IRS Local Standards, fill in the *Public Transportation* expense allowance regardless of whether you use public transportation. $_____

15. **Additional public transportation expense:** If you claimed 1 or more vehicles in line 11 and if you claim that you may also deduct a public transportation expense, you may fill in what you believe is the appropriate expense, but you may not claim more than the IRS Local Standard for *Public Transportation*. $_____

Other Necessary Expenses In addition to the expense deductions listed above, you are allowed your monthly expenses for the following IRS categories.

16. **Taxes:** The total monthly amount that you will actually owe for federal, state and local taxes, such as income taxes, self-employment taxes, social security taxes, and Medicare taxes. You may include the monthly amount withheld from your pay for these taxes. However, if you expect to receive a tax refund, you must divide the expected refund by 12 and subtract that number from the total monthly amount that is withheld to pay for taxes.
    Do not include real estate, sales, or use taxes. $_____

17. **Involuntary deductions:** The total monthly payroll deductions that your job requires, such as retirement contributions, union dues, and uniform costs.
    Do not include amounts that are not required by your job, such as voluntary 401(k) contributions or payroll savings. $_____

18. **Life insurance:** The total monthly premiums that you pay for your term life insurance.
    Do not include premiums for insurance on your dependents, for whole life, or for any other form of life insurance. $_____

19. **Court-ordered payments:** The total monthly amount that you pay as required by the order of a court or administrative agency, such as spousal or child support payments.
    Do not include payments on past due obligations for spousal or child support. You will list these obligations in line 35. $_____

20. **Education:** The total monthly amount that you pay for education that is either required:
    - as a condition for your job, or
    - for your physically or mentally challenged dependent child if no public education is available for similar services.

    $_____

21. **Childcare:** The total monthly amount that you pay for childcare, such as babysitting, daycare, nursery, and preschool.
    Do not include payments for any elementary or secondary school education. $_____

22. **Additional health care expenses, excluding insurance costs:** The monthly amount that you pay for health care that is required for the health and welfare of you or your dependents and that is not reimbursed by insurance or paid by a health savings account. Include only the amount that is more than the total entered in line 7.
    Payments for health insurance or health savings accounts should be listed only in line 25. $_____

23. **Telecommunication services:** The total monthly amount that you pay for telecommunication services, such as pagers, call waiting, caller identification, special long distance, business internet service, and business cell phone service, to the extent necessary for your health and welfare or that of your dependents or for the production of income, if it is not reimbursed by your employer.
    Do not include payments for basic home telephone, internet and cell phone service. Do not include self-employment expenses, such as those reported on line 8 of *Official Form 22A-1*, or any amount you previously deducted. + $_____

24. **Add all of the expenses allowed under the IRS expense allowances.**
    Add lines 16 through 23. $_____

Additional Expense Deductions

These are additional deductions allowed by the Means Test.
Note: Do not include any expense allowances listed in lines 6-24.

25. **Health insurance, disability insurance, and health savings account expenses.** The monthly expenses for health insurance, disability insurance, and health savings accounts that are reasonably necessary for yourself, your spouse, or your dependents.

Health insurance	$_____	
Disability insurance	$_____	
Health savings account	+ $_____	
Total	$_____	**Copy total here➔** ..... $_____

Do you actually spend this total amount?

❑ No. How much do you actually spend? $_____
❑ Yes

26. **Continued contributions to the care of household or family members.** The actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses. $_____

27. **Protection against family violence.** The reasonably necessary monthly expenses that you incur to maintain the safety of you and your family under the Family Violence Prevention and Services Act or other federal laws that apply. $_____

By law, the court must keep the nature of these expenses confidential.

28. **Additional home energy costs.** Your home energy costs are included in your non-mortgage housing and utilities allowance on line 8.

If you believe that you have home energy costs that are more than the home energy costs included in the non-mortgage housing and utilities allowance, then fill in the excess amount of home energy costs. $_____

You must give your case trustee documentation of your actual expenses, and you must show that the additional amount claimed is reasonable and necessary.

29. **Education expenses for dependent children who are younger than 18.** The monthly expenses (not more than $147* per child) that you pay for your dependent children who are younger than 18 years old to attend a private or public elementary or secondary school. $_____

You must give your case trustee documentation of your actual expenses, and you must explain why the amount claimed is reasonable and necessary and not already accounted for in lines 6-23.

* Subject to adjustment on 4/01/13, and every 3 years after that for cases begun on or after the date of adjustment.

30. **Additional food and clothing expense.** The monthly amount by which your actual food and clothing expenses are higher than the combined food and clothing allowances in the IRS National Standards. That amount cannot be more than 5% of the food and clothing allowances in the IRS National Standards. $_____

To find the maximum additional allowance, either go to http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm or ask for help at the clerk's office of the bankruptcy court.

You must show that the additional amount claimed is reasonable and necessary.

31. **Continuing charitable contributions.** The amount that you will continue to contribute in the form of cash or financial instruments to a religious or charitable organization. 11 U.S.C. § 548(d)(3) and (4). $_____

32. **Add all of the additional expense deductions.** $_____

Add lines 25 through 31.

Deductions for Debt Payment

33. **For debts that are secured by an interest in property that you own, including home mortgages, vehicle loans, and other secured debt, fill in lines 33a through 33g.**

To calculate the total average monthly payment, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Then divide by 60.

	Average monthly payment
Mortgages on your home	
33a. Copy line 9b here	$_____
Loans on your first two vehicles	
33b. Copy line 13b here.	$_____
33c. Copy line 13e here.	$_____

Name of each creditor for other secured debt	Identify property that secures the debt	Does payment include taxes or insurance?	
33d.		❑ No ❑ Yes	$_____
33e.		❑ No ❑ Yes	$_____
33f.		❑ No ❑ Yes	+ $_____
33g. Total average monthly payment. Add lines 33a through 33f.			$_____

Copy total here➔ $_____

34. **Are any debts that you listed in line 33 secured by your primary residence, a vehicle, or other property necessary for your support or the support of your dependents?**

❑ No. Go to line 35.

❑ Yes. State any amount that you must pay to a creditor, in addition to the payments listed in line 34, to keep possession of your property (called the *cure amount*). Next, divide by 60 and fill in the information below.

Name of the creditor	Identify property that secures the debt	Total cure amount		Monthly cure amount
		$_____	÷ 60 =	$_____
		$_____	÷ 60 =	$_____
		$_____	÷ 60 =	+ $_____
			Total	$_____

Copy total here➔ $_____

35. **Do you owe any priority claims — such as a priority tax, child support, or alimony — that are past due as of the filing date of your bankruptcy case?** 11 U.S.C. § 507

❑ No. Go to line 36.

❑ Yes. Fill in the total amount of all of these priority claims. Do not include current or ongoing priority claims, such as those you listed in line 19.

Total amount of all past-due priority claims. $_____ ÷ 60 = $_____

36. **Are you eligible to file a case under Chapter 13?** 11 U.S.C. § 109(e). For more information, go to www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter13.aspx

❑ No. Go to line 37.

❑ Yes. Fill in the following information.

Projected monthly plan payment if you were filing under Chapter 13	$_____		
Current multiplier for your district as determined under schedules issued by the Executive Office for United States Trustees. To find this information, go to http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm or ask for help at the clerk's office of the bankruptcy court.	x _____		
Average monthly administrative expense if you were filing under Chapter 13	$_____	**Copy total here➔**	$_____

37. **Add all of the deductions for debt payment.**
Add lines 33g through 36. $_____

Total Deductions from Income

38. **Add all of the allowed deductions.**

Copy line 24, *All of the expenses allowed under IRS expense allowances*	$_____		
Copy line 32, *All of the additional expense deductions*	$_____		
Copy line 37, *All of the deductions for debt payment*	+ $_____		
Total deductions	$_____	**Copy total here ➔**	$_____

Part 3: Determine Whether There Is a Presumption of Abuse

39. **Calculate monthly disposable income for 60 months**

39a.	Copy line 4, *adjusted current monthly income*	$_____		
39b.	Copy line 38, *Total deductions*	−$_____		
39c.	Monthly disposable income 11 U.S.C. § 707(b)(2) Subtract line 39b from line 39a.	$_____	**Copy line 39c here➔**	$_____
		For the next 60 months (5 years)	x 60	
39d.	**Total**. Multiply line 39c by 60.		$_____	**Copy line 39d here➔** $_____

40. **Find out whether there is a presumption of abuse.** Check the box that applies:

❑ **The line 39d is less than $7,025*.** On the top of page 1 of this form, check box 1, *There is no presumption of abuse.* Go to Part 5.

❑ **The line 39d is more than $11,725*.** On the top of page 1 of this form, check box 2, *There is a presumption of abuse.* You may fill out Part 4 if you claim special circumstances. Then go to Part 5.

❑ **The line 39d is at least $7,025*, but not more than $11,725*.** Go to line 42.

* Subject to adjustment on 4/01/13, and every 3 years after that for cases filed on or after the date of adjustment.

41. 41a. **Fill in the amount of your total nonpriority unsecured debt.** If you filled out the *Statistical Summary of Certain Liabilities and Related Data* (Official Form 6), you may refer to line 5 at the bottom of that form. $_____

x .25

41b. **25% of your total nonpriority unsecured debt.** 11 U.S.C. § 707(b)(2)(A)(i)(I)
Multiply line 41a by 0.25. $_____ **Copy here➔** $_____

42. **Determine whether the income you have left over after subtracting all allowed deductions is enough to pay 25% of your unsecured, nonpriority debt.**
Check the box that applies:

❑ **Line 39d is less than line 41b.** On the top of page 1 of this form, check box 1, *There is no presumption of abuse.* Go to Part 5.

❑ **Line 39d is equal to or more than line 41b.** On the top of page 1 of this form, check box 2, *There is a presumption of abuse.* You may fill out Part 4 if you claim special circumstances. Then go to Part 5.

43. **Do you have any special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative?** 11 U.S.C. § 707(b)(2)(B)

❑ No. Go to Part 5.

❑ Yes. Fill in the following information. All figures should reflect your average monthly expense or income adjustment for each item. You may include expenses you listed in line 25.

You must give a detailed explanation of the special circumstances that make the expenses or income adjustments necessary and reasonable. You must also give your case trustee documentation of your actual expenses or income adjustments.

Give a detailed explanation of the special circumstances	**Average monthly expense or income adjustment**
	$_____
	$_____
	$_____
	$_____

By signing here, I declare under penalty of perjury that the information on this statement and in any attachments is true and correct.

✘ _____
Signature of Debtor 1

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

Date _____
MM / DD / YYYY

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Official Forms 22A–1 and 22A–2

Instructions for the Chapter 7 Statement of Your Current Monthly Income and Means Test Calculation

United States Bankruptcy Court 12/01/13

How to fill out these forms

Official Forms 22A–1 and 22A –2 determine whether your income and expenses create a presumption of abuse that may prevent you from obtaining relief from your debts under chapter 7 of the Bankruptcy Code. Chapter 7 relief can be denied to a person who has primarily consumer debts if the court finds that the person has enough income to repay creditors a portion of their claims set out in the Bankruptcy Code.

You must file 22A –1, the *Chapter 7 Statement of Your Current Monthly Income* (Official Form 22A –1) if you are an individual filing for bankruptcy under chapter 7. This form will determine your current monthly income and compare whether your income is more than the median income for households of the same size in your state. If your income is not above the median, there is no presumption of abuse and you will not have to fill out the second form.

If your income is above the median, you must file the second form, 22A –2, *Chapter 7 Means Test Calculation* (Official Form 22A –2). The calculations on this form—sometimes called the *Means Test*—reduce your income by living expenses and payment of certain debts, resulting in an amount available to pay other debts. If this amount is high enough, it will give rise to a *presumption of abuse*. A presumption of abuse does not mean you are actually trying to abuse the bankruptcy system. Rather, the presumption simply means that you may have enough income that you should not be granted relief under chapter 7. You may overcome the presumption by showing special circumstances that reduce your income or increase your expenses.

If you cannot obtain relief under chapter 7, you may be eligible to continue under another chapter of the Bankruptcy Code and pay creditors over a period of time.

Read each question carefully. You may not be required to answer every question on this form. For example, your military status may determine whether you must fill out the entire form. The instructions will alert you if you may skip questions.

If you have nothing to report for a line, write $0.

Some of the questions require you to go to other sources for information. In those cases, the form has instructions for where to find the information you need.

If you and your spouse are filing together, you and your spouse may file a single statement. However, if an exclusion in Parts 1 or 2 applies to either of you, separate statements may be required. 11 U.S.C. § 707(b)(2)(C).

Understand the terms used in the form

This form uses *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, this form uses *you* to ask for information from both debtors. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Things to remember when filling out these forms

- Be as complete and accurate as possible.
- If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known).
- If two married people are filing together, both are equally responsible for supplying correct information.

Do not file these instructions with your bankruptcy filing package. Keep them for your records.

12b-006049

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Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❒ Check if this is an amended filing

Official Form 22B

Chapter 11 Statement of Your Current Monthly Income

12/13

You must file this form if you are an individual and are filing for bankruptcy under Chapter 11. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).

Part 1: Calculate Your Current Monthly Income

1. **What is your marital and filing status?** Check one only.
   - ❑ **Not married.** Fill out Column A, lines 2-11.
   - ❑ **Married and your spouse is filing with you.** Fill out both Columns A and B, lines 2-11.
   - ❑ **Married and your spouse is NOT filing with you.** Fill out Column A, lines 2-11.

Fill in the average monthly income that you received from all sources during the 6 full months before you filed for bankruptcy. 11 U.S.C. § 101(10A). For example, if you are filing on September 15, the 6-month period would be March 1 through August 31. If the amount of your monthly income varied during the 6 months, add the income for all 6 months and divide the total by 6. Fill in the result.
Do not include any income amount more than once. For example, if both spouses own the same rental property, put the income from that property in one column only. If you have nothing to report for any line, write $0 in the space.

			Column A **For Debtor 1**	*Column B* **Debtor 2 or non-filing spouse**
2. **Your gross wages, salary, tips, bonuses, overtime, and commissions** (before all payroll deductions).			$_____	$_____
3. **Alimony and maintenance payments**			$_____	$_____
4. **All amounts from any source which are regularly paid for household expenses of you or your dependents, including child support.** Include regular contributions from an unmarried partner, members of your household, your dependents, parents, and roommates. Also, include regular contributions from a spouse if Column B is not filled in. Do not include payments you listed on line 3.			$_____	$_____
5. **Net income from operating a business, profession, or farm**				
Gross receipts (before all deductions)	$_____			
Ordinary and necessary operating expenses	– $_____			
Net monthly income from a business, profession, or farm	$_____	**Copy here➔**	$_____	$_____
6. **Net income from rental and other real property**				
Gross receipts (before all deductions)	$_____			
Ordinary and necessary operating expenses	– $_____			
Net monthly income from rental or other real property	$_____	**Copy here➔**	$_____	$_____

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

	Column A **For Debtor 1**	Column B **Debtor 2 or non-filing spouse**
7. **Interest, dividends, and royalties**	$_____	$_____
8. **Unemployment compensation.** Do not enter the amount if you contend that the amount received was a benefit under the Social Security Act. Instead, list it here: ..... ↓ For you ..... $_____ For your spouse ..... $_____	$_____	$_____
9. **Pension or retirement income.** Do not include any amount received that was a benefit under the Social Security Act.	$_____	$_____
10. **Income from all other sources not listed above.** Specify the source and amount. Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, a crime against humanity, or international or domestic terrorism. If necessary, list other sources on a separate page and put the total on line 10c.		
10a.	$_____	$_____
10b.	$_____	$_____
10c. Total amounts from separate pages, if any.	+ $_____	+ $_____
11. **Calculate your total current monthly income.** Add lines 2 through 10 for each column. Then add the total for Column A to the total for Column B.	$_____ +	$_____ = $_____
		Total current monthly income

Part 2: Sign Here

By signing here, under penalty of perjury I declare that the information on this statement or in any attachments is true and correct.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

Official Form 22B

Instructions for the Chapter 11 Statement of Your Current Monthly Income

United States Bankruptcy Court 12/01/13

How to Fill Out this Form

You must file the *Chapter 11 Statement of Your Current Monthly Income* (Official Form 22B) if you are an individual filing for bankruptcy under Chapter 11.

If you have nothing to report for a line, write $0.

Understand the terms used in the form

This form uses *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, this form uses *you* to ask for information from both debtors. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Things to remember when filling out this form

- Be as complete and accurate as possible.
- If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies On the top of any additional pages, write your name and case number (if known).
- If two married people are filing together, both are equally responsible for supplying correct information.

Do not file these instructions with your bankruptcy filing package. Keep them for your records.

12b-006053

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Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Check as directed in lines 17 and 21:

According to the calculations required by this Statement:

- ❑ 1. Disposable income is not determined under 11 U.S.C. § 1325(b)(3).
- ❑ 2. Disposable income is determined under 11 U.S.C. § 1325(b)(3).
- ❑ 3. The commitment period is 3 years.
- ❑ 4. The commitment period is 5 years.

❑ Check if this is an amended filing

Official Form 22C–1

Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period

12/13

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for being accurate. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).

Part 1: Calculate Your Average Monthly Income

1. **What is your marital and filing status?** Check one only.
   - ❑ **Not married.** Fill out Column A, lines 2-11.
   - ❑ **Married.** Fill out both Columns A and B, lines 2-11.

Fill in the average monthly income that you received from all sources, derived during the 6 full months before you file this bankruptcy case. 11 U.S.C. § 101(10A). For example, if you are filing on September 15, the 6-month period would be March 1 through August 31. If the amount of your monthly income varied during the 6 months, add the income for all 6 months and divide the total by 6. Fill in the result. Do not include any income amount more than once. For example, if both spouses own the same rental property, put the income from that property in one column only. If you have nothing to report for any line, write $0 in the space.

			Column A **For Debtor 1**	*Column B* **Debtor 2 or non-filing spouse**
2. **Your gross wages, salary, tips, bonuses, overtime, and commissions** (before all payroll deductions).			$_____	$_____
3. **Alimony and maintenance payments**			$_____	$_____
4. **All amounts from any source which are regularly paid for household expenses of you or your dependents, including child support.** Include regular contributions from an unmarried partner, members of your household, your dependents, parents, and roommates. Also, include regular contributions from a spouse if Column B is not filled in. Do not include payments you listed on line 3.			$_____	$_____
5. **Net income from operating a business, profession, or farm**				
Gross receipts (before all deductions)		$_____		
Ordinary and necessary operating expenses		− $_____		
Net monthly income from a business, profession, or farm		$_____	$_____	$_____

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

			Column A For Debtor 1	Column B Debtor 2 or non-filing spouse	
6. **Net income from rental and other real property**					
Gross receipts (before all deductions)	$_____				
Ordinary and necessary operating expenses	− $_____				
Net monthly income from rental or other real property	$_____	**Copy here** ➔	$_____	$_____	
7. **Interest, dividends, and royalties**			$_____	$_____	
8. **Unemployment compensation**			$_____	$_____	
Do not enter the amount if you contend that the amount received was a benefit under the Social Security Act. Instead, list it here:..... ➔					
For you.....	$_____				
For your spouse.....	$_____				
9. **Pension or retirement income.** Do not include any amount received that was a benefit under the Social Security Act.			$_____	$_____	
10. **Income from all other sources not listed above.** Specify the source and amount. Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, a crime against humanity, or international or domestic terrorism. If necessary, list other sources on a separate page and put the total on line 10c.					
10a.			$_____	$_____	
10b.			$_____	$_____	
10c. Total amounts from separate pages, if any.			+ $_____	+ $_____	
11. **Calculate your total average monthly income.** Add lines 2 through 10 for each column. Then add the total for Column A to the total for Column B.			$_____ +	$_____ =	$_____ **Total average monthly income**

Part 2. Determine How to Measure Your Deductions from Income

12. **Copy your total average monthly income from line 11.** ..... $_____

13. **Calculate the marital adjustment.** Check one:

- ❑ You are not married. Fill in 0 in line 13d.
- ❑ You are married and your spouse is filing with you. Fill in 0 in line 13d.
- ❑ You are married and your spouse is not filing with you.
  Fill in the amount of the income listed in line 11, Column B, that was NOT regularly paid for the household expenses of you or your dependents, such as payment of the spouse's tax liability or the spouse's support of someone other than you or your dependents.

  In lines 13a-c, specify the basis for excluding this income and the amount of income devoted to each purpose. If necessary, list additional adjustments on a separate page.

  If this adjustment does not apply, enter 0 on line 13d.

13a.	$_____
13b.	$_____
13c.	+ $_____
Total	$_____

Copy here. ➔ 13d. — $_____

14. **Your current monthly income.** Subtract line 13d from line 12. 14. $ _____

15. **Calculate your current monthly income for the year.** Follow these steps:

15a. Copy line 14 here ➔ ..... 15a. $ _____

Multiply line 15a by 12 (the number of months in a year). **x** 12

15b. The result is your current monthly income for the year for this part of the form. 15b. $_____

16. **Calculate the median family income that applies to you.** Follow these steps:

16a. Fill in the state in which you live.

16b. Fill in the number of people in your household.

16c. Fill in the median family income for your state and size of household. ..... 16c. $_____

To find that information, either go to the Means Test information at http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm or ask for help at the clerk's office of the bankruptcy court .

17. **How do the lines compare?**

17a. ❑ Line 15b is less than or equal to line 16c. On the top of page 1 of this form, check box 1, *Disposable income is not determined under 11 U.S.C. § 1325(b)(3)*. **Go to Part 3.** Do NOT fill out Official Form 22C–2: *Calculation of Disposable Income.*

17b. ❑ Line 15b is more than line 16c. On the top of page 1 of this form, check box 2, *Disposable income is determined under 11 U.S.C. § 1325(b)(3).* **Go to Part 3 and fill out Official Form 22C–2: Calculation of Disposable Income.** On line 35 of that form, copy your current monthly income from line 14 above.

Part 3: Calculate Your Commitment Period Under 11 U.S.C. § 1325(b)(4)

18. **Copy your total average monthly income from line 11.** ..... 18. $_____

19. **Deduct the marital adjustment if it applies.** If you are married, your spouse is not filing with you, and you contend that calculating the commitment period under 11 U.S.C. § 1325(b)(4) allows you to deduct part of your spouse's income, copy the amount from line 13d.

If the marital adjustment does not apply, fill in 0 on line 19a. 19a. — $_____

Subtract line 19a from line 18. 19b. $_____

20. **Calculate your current monthly income for the year.** Follow these steps:

20a. Copy line 19b.. ..... 20a. $_____

Multiply by 12 (the number of months in a year). **x** 12

20b. The result is your current monthly income for the year for this part of the form. 20b. $_____

20c. Copy the median family income for your state and size of household from line 16c. ..... $_____

21. **How do the lines compare?**

❑ Line 20b is less than line 20c. On the top of page 1 of this form, check box 3, *The commitment period is 3 years*. Go to Part 4.

❑ Line 20b is more than or equal to line 20c. On the top of page 1 of this form, check box 4, *The commitment period is 5 years*. Go to Part 4.

Part 4: Sign Here

By signing here, under penalty of perjury I declare that the information on this statement and in any attachments is true and correct.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

If you checked 17a, do NOT fill out or file Official Form 22C–2: *Calculation of Disposable Income*.

If you checked 17b, fill out Official Form 22C–2: *Calculation of Disposable Income* and file it with this form. On line 35 of that form, copy your current monthly income from line 14 above.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 22C–2

Chapter 13 Calculation of Your Disposable Income

12/13

To fill out this form, you will need your completed copy of Form 22C–1*: Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period*.

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for being accurate. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).

Part 1: Calculate Your Deductions from Your Income

The Internal Revenue Service (IRS) issues National and Local Standards for certain expense amounts. Use these amounts to answer the questions in lines 1-11. To find the IRS standards, either go to http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm or ask for help at the clerk's office of the bankruptcy court.

Deduct the expense amounts set out in lines 1-11 regardless of your actual expense. In later parts of the form, you will use some of your actual expenses if they are higher than the standards. Do not include any operating expenses that you subtracted from income in lines 5 and 6 of Official Form 22C–1, and do not deduct any amounts that you subtracted from your spouse's income in line 13 of Form 22C–1.

If your expenses differ from month to month, enter the average expense.

Whenever this part of the form refers to *you*, it means both you and your spouse if Column B is filled in.

1. **The number of people used in determining your deductions from income**
   Fill in the number of people who could be claimed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support. This number may be different from the number of people in your household.

National Standards You must use the IRS National Standards to answer the questions in lines 2-3.

2. **Food, clothing, and other items:** Using the number of people you entered in line 1 and the IRS National Standards, fill in the dollar amount for food, clothing, and other items. $_____

3. **Out-of-pocket health care allowance:** Using the number of people you entered in line 1 and the IRS National Standards, fill in the dollar amount for out-of-pocket health care. The number of people is split into two categories—people who are under 65 and people who are 65 or older—because older people have a higher IRS allowance for health care costs. If your actual expenses are higher than this IRS amount, you may deduct the additional amount on line 18.

People who are under 65 years of age			
3a. Out-of-pocket health care allowance per person	$_____		
3b. Number of people who are under 65	X _____		
3c. **Subtotal**. Multiply line 3a by line 3b.	$_____	**Copy line 3c here➔**	$_____

People who are 65 years of age or older			
3d. Out-of-pocket health care allowance per person	$_____		
3e. Number of people who are 65 or older	X _____		
3f. **Subtotal**. Multiply line 3d by 3e.	$_____	**Copy line 3f here➔**	+ $_____

3g. **Total**. Add lines 3c and 3f. ..... $_____ **Copy total here➔** 3g. $_____

Local Standards You must use the IRS Local Standards to answer the questions in lines 5-11.

Based on information from the IRS, the U.S. Trustee Program has divided the IRS Local Standard for housing for bankruptcy purposes into two parts:

- **Housing and utilities – Insurance and operating expenses**
- **Housing and utilities – Mortgage or rent expenses**

Refer to the U.S. Trustee website to answer the questions in lines 4-5. Go to http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm or ask for help at the clerk's office of the bankruptcy court.

4. **Housing and utilities – Insurance and operating expenses:** Using the number of people you entered in line 1, fill in the dollar amount listed for your county for insurance and operating expenses. $_____

5. **Housing and utilities – Mortgage or rent expenses:**

5a. Using the number of people you entered in line 1, fill in the dollar amount listed for your county for mortgage or rent expenses. $_____

5b. Total average monthly payment for all mortgages and other debts secured by your home.

To calculate the total average monthly payment, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Next divide by 60.

Name of the creditor	Average monthly payment
	$_____
	$_____
	+ $_____
5b. Total average monthly payment	$_____

Copy line 5b here➔ — $_____ Repeat this amount on line 29a.

5c. Net mortgage or rent expense.

Subtract line 5b (*total average monthly payment*) from line 5a (*mortgage or rent expense*). If this number is less than $0, enter $0. $_____ **Copy 5c here➔** $_____

6. **If you claim that the U.S. Trustee Program's division of the IRS Local Standard for housing does not accurately compute the amount that applies to you, fill in any additional amount you claim.** $_____

Explain why: _____

7. **Local transportation expenses:** Check the number of vehicles for which you claim an ownership or operating expense.

- ❑ 0. Go to line 10.
- ❑ 1. Go to line 8.
- ❑ 2 or more. Go to line 8.

8. **Vehicle operation expense:** Using the IRS Local Standards and the number of vehicles for which you claim the operating expenses, fill in the *Operating Costs* that apply for your Census region or metropolitan statistical area. $_____

9. **Vehicle ownership or lease expense:** Using the IRS Local Standards, calculate the net ownership or lease expense for each vehicle below. You may not claim the expense if you do not make any loan or lease payments on the vehicle. In addition, you may not claim the expense for more than two vehicles.

Vehicle 1 **Describe Vehicle 1:**

9a. Ownership or leasing costs using IRS Local Standard 9a. $_____

9b. Average monthly payment for all debts secured by Vehicle 1.
Do not include costs for leased vehicles.
To calculate the average monthly payment here and on line 9e, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Then divide by 60.

Name of each creditor for Vehicle 1	Average monthly payment
	$_____

Copy 9b here➔ — $_____ Repeat this amount on line 29b.

9c. Net Vehicle 1 ownership or lease expense
Subtract line 9b from line 9a. If this number is less than $0, enter $0. 9c. $_____ **Copy net Vehicle 1 expense here➔** $_____

Vehicle 2 **Describe Vehicle 2:**

9d. Ownership or leasing costs using IRS Local Standard 9d. $_____

9e. Average monthly payment for all debts secured by Vehicle 2. Do not include costs for leased vehicles.

Name of each creditor for Vehicle 2	Average monthly payment
	$_____

Copy here➔ — $_____ Repeat this amount on line 29c.

9f. Net Vehicle 2 ownership or lease expense
Subtract line 9e from 9d. If this number is less than $0, enter $0. 9f. $_____ **Copy net Vehicle 2 expense here ➔** $_____

10. **Public transportation expense**: If you claimed 0 vehicles in line 7, using the IRS Local Standards, fill in the *Public Transportation* expense allowance regardless of whether you use public transportation. $_____

11. **Additional public transportation expense:** If you claimed 1 or more vehicles in line 7 and if you claim that you may also deduct a public transportation expense, you may fill in what you believe is the appropriate expense, but you may not claim more than the IRS Local Standard for *Public Transportation*. $_____

Other Necessary Expenses In addition to the expense deductions listed above, you are allowed your monthly expenses for the following IRS categories.

12. **Taxes:** The total monthly amount that you actually pay for federal, state and local taxes, such as income taxes, self-employment taxes, social security taxes, and Medicare taxes. You may include the monthly amount withheld from your pay for these taxes. If you expect to receive a tax refund, you must divide the refund by 12 and subtract that number from the total monthly amount you actually pay for taxes.
    Do not include real estate or sales taxes. $_____

13. **Involuntary deductions:** The total monthly payroll deductions that your job requires, such as retirement contributions, union dues, and uniform costs.
    Do not include amounts that are not required by your job, such as voluntary 401(k) contributions or payroll savings. $_____

14. **Life insurance:** The total monthly premiums that you pay for your term life insurance.
    Do not include premiums for insurance on your dependents, for whole life, or for any other form of life insurance. $_____

15. **Court-ordered payments:** The total monthly amount that you pay as required by the order of a court or administrative agency, such as spousal or child support payments.
    Do not include payments on past due obligations for spousal or child support. You will list these obligations in line 31. $_____

16. **Education:** The total monthly amount that you pay for education that is either required:
    - as a condition for your job, or
    - for your physically or mentally challenged dependent child if no public education is available for similar services. $_____

17. **Childcare:** The total monthly amount that you pay for childcare, such as babysitting, daycare, nursery, and preschool.
    Do not include payments for any elementary or secondary school education. $_____

18. **Additional health care expenses, excluding insurance costs:** The monthly amount that you pay for health care that is required for the health and welfare of you or your dependents and that is not reimbursed by insurance or paid by a health savings account. Include only the amount that is more than the total entered in line 3.
    Payments for health insurance or health savings accounts should be listed only in line 21. $_____

19. **Telecommunication services:** The total monthly amount that you pay for telecommunication services, such as pagers, call waiting, caller identification, special long distance, business internet service, and business cell phone service, to the extent necessary for your health and welfare or that of your dependents or for the production of income, if it is not reimbursed by your employer.
    Do not include payments for basic home telephone, internet and cell phone service. Do not include self-employment expenses, such as those reported on line 5 of *Official Form 22C-1*, or any amount you previously deducted. + _____

20. **Add all of the expenses allowed under the IRS expense allowances.**
    Add lines 2 through 19. $_____

Additional Expense Deductions These are additional deductions allowed by the Means Test.
Note: Do not include any expense allowances listed in lines 2-20.

21. **Health insurance, disability insurance, and health savings account expenses.** The monthly expenses for health insurance, disability insurance, and health savings accounts that are reasonably necessary for yourself, your spouse, or your dependents.

Health insurance	$_____
Disability insurance	$_____
Health savings account	+ $_____
Total	$_____

Copy total here➔ ..... $_____

Do you actually spend this total amount?

❑ No. How much do you actually spend? $_____
❑ Yes

22. **Continuing contributions to the care of household or family members.** The actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses. $_____

23. **Protection against family violence.** The reasonably necessary monthly expenses that you incur to maintain the safety of you and your family under the Family Violence Prevention and Services Act or other federal laws that apply. $_____

By law, the court must keep the nature of these expenses confidential.

24. **Additional home energy costs.** Your home energy costs are included in your non-mortgage housing and utilities allowance on line 4.

If you believe that you have home energy costs that are more than the home energy costs included in the non-mortgage housing and utilities allowance, then fill in the excess amount of home energy costs. $_____

You must give your case trustee documentation of your actual expenses, and you must show that the additional amount claimed is reasonable and necessary.

25. **Education expenses for dependent children who are younger than 18.** The monthly expenses (not more than $147* per child) that you pay for your dependent children who are younger than 18 years old to attend a private or public elementary or secondary school. $_____

You must give your case trustee documentation of your actual expenses, and you must explain why the amount claimed is reasonable and necessary and not already accounted for in lines 2-19.

* Subject to adjustment on 4/01/13, and every 3 years after that for cases begun on or after the date of adjustment.

26. **Additional food and clothing expense.** The monthly amount by which your actual food and clothing expenses are higher than the combined food and clothing allowances in the IRS National Standards. That amount cannot be more than 5% of the food and clothing allowances in the IRS National Standards. $_____

To find the maximum additional allowance, either go to http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm or ask for help at the clerk's office of the bankruptcy court.

You must show that the additional amount claimed is reasonable and necessary.

27. **Continuing charitable contributions.** The amount that you will continue to contribute in the form of cash or financial instruments to a religious or charitable organization. 11 U.S.C. § 548(d)(3) and (4). + _____

Do not include any amount more than 15% of your gross monthly income.

28. **Add all of the additional expense deductions.**
Add lines 21 through 27. $_____

Deductions for Debt Payment

29. **For debts that are secured by an interest in property that you own, including home mortgages, vehicle loans, and other secured debt, fill in lines 29a through 29g.**

To calculate the total average monthly payment, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Then divide by 60.

	Average monthly payment
Mortgages on your home	
29a. Copy line 5b here	$_____
Loans on your first two vehicles	
29b. Copy line 9b here.	$_____
29c. Copy line 9e here.	$_____

Name of each creditor for other secured debt	Identify property that secures the debt	Does payment include taxes or insurance?	
29d.		❑ No ❑ Yes	$_____
29e.		❑ No ❑ Yes	$_____
29f.		❑ No ❑ Yes	+ $_____
29g. Total average monthly payment. Add lines 29a through 29f.			$_____

Copy total here➔ $_____

30. **Are any debts that you listed in line 29 secured by your primary residence, a vehicle, or other property necessary for your support or the support of your dependents?**

❑ No. Go to line 31.

❑ Yes. State any amount that you must pay to a creditor, in addition to the payments listed in line 29, to keep possession of your property (called the *cure amount*). Next, divide by 60 and fill in the information below.

Name of the creditor	Identify property that secures the debt	Total cure amount		Monthly cure amount
		$_____	÷ 60 =	$_____
		$_____	÷ 60 =	$_____
		$_____	÷ 60 =	+ $_____
			Total	$_____

Copy total here➔ $_____

31. **Do you owe any priority claims — such as a priority tax, child support, or alimony — that are past due as of the filing date of your bankruptcy case?** 11 U.S.C. § 507

❑ No. Go to line 32.

❑ Yes. Fill in the total amount of all of these priority claims. Do not include current or ongoing priority claims, such as those you listed in line 15.

Total amount of all past-due priority claims. $_____ ÷ 60 = $_____

32. **Projected monthly Chapter 13 plan payment** $_____

Current multiplier for your district as determined under schedules issued by the Executive Office for United States Trustees. To find this information, go to http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm or ask for help at the clerk's office x _____

Average monthly administrative expense $_____ **Copy total here** ➔ $_____

33. **Add all of the deductions for debt payment.** Add lines 29 through 32. $_____

Total Deductions from Income

34. **Add all of the allowed deductions.**

Copy line 20, *All of the expenses allowed under IRS expense allowances* ..... $_____

Copy line 28, *All of the additional expense deductions* ..... $_____

Copy line 33, *All of the deductions for debt payment* ..... + $_____

Total deductions $_____ **Copy total here** ➔ $_____

Part 2: Determine Your Disposable Income Under 11 U.S.C. § 1325(b)(2)

35. **Copy your total current monthly income from line 14 of Form 22C-1, *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period*.**..... $_____

36. **Fill in any reasonably necessary income you receive for support for dependent children.** The monthly average of any child support payments, foster care payments, or disability payments for a dependent child, reported in Part I of Form 22C –1, that you received in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child. $_____

37. **Fill in all qualified retirement deductions.** The monthly total of all amounts that your employer withheld from wages as contributions for qualified retirement plans, as specified in § 541(b)(7) plus all required repayments of loans from retirement plans, as specified in § 362(b)(19). $_____

38. **Total of all deductions allowed under 11 U.S.C. § 707(b)(2)(A).** Copy line 34. ..... $_____

39. **Deduction for special circumstances.** If special circumstances justify additional expenses and you have no reasonable alternative, describe the special circumstances and their expenses. You must give your case trustee a detailed explanation of the special circumstances and documentation for the expenses.

Describe the special circumstance	Amount of expense
39a.	$_____
39b.	$_____
39c.	+ $_____
39d. **Total**. Add lines 39a through 39c ..... 39d.	$_____

Copy 39d here ➔ + $_____

40. **Total adjustments.** Add lines 36 through 39d. $_____ **Copy total here** ➔ — $_____

41. **Calculate your monthly disposable income under § 1325(b)(2).** Subtract line 40 from line 35. $_____

Part 3: Change in Income or Expenses

42. **Change in income or expenses.** If the income in Form 22C-1 or the expenses you reported in this form has changed or is virtually certain to change during the 12 months after the date you filed your bankruptcy petition, fill in the information below. For example, if the wages reported increased after you filed your petition, check *22C-1* in the first column, enter line 2 in the second column, explain why the wages increased, fill in when the increase occurred, and fill in the amount of the increase.

Form	Line	Reason for change	Date of change	Increase or decrease?	Amount of change
❑ B22C–1 ❑ B22C –2	____		_____	❑ Increase ❑ Decrease	$_____
❑ B22C–1 ❑ B22C –2	____		_____	❑ Increase ❑ Decrease	$_____
❑ B22C–1 ❑ B22C –2	____		_____	❑ Increase ❑ Decrease	$_____
❑ B22C–1 ❑ B22C –2	____		_____	❑ Increase ❑ Decrease	$_____

Part 4: Sign Here

By signing here, under penalty of perjury you declare that the information on this statement and in any attachments is true and correct.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

Official Forms 22C–1 and 22C–2

Instructions for the Chapter 13 Statement of Your Current Monthly Income, Calculation of Commitment Period and Chapter 13 Calculation of Your Disposable Income

United States Bankruptcy Court 12/01/13

How to Fill Out these Forms

Official Forms 22C─1 and 22C─2 determine the period for your payments to creditors, how the amount you may be required to pay to creditors is established, and, in some situations, how much you must pay.

You must file 22C ─1, the *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period* (Official Form 22C ─1) if you are an individual and you are filing under chapter 13. This form will determine your current monthly income and determine whether your income is below the median income for households of the same size in your state. If your income is not above the median, you will not have to fill out the second form. Form 22C -1 also will determine your applicable commitment period─the time period for making payments to your creditors.

If your income is above the median, you must file the second form, 22C ─2, *Chapter13 Calculation of Your Disposable Income*. The calculations on this form—sometimes called the *Means Test*—reduce your income by living expenses and payment of certain debts, resulting in an amount available to pay unsecured debts. Your chapter 13 plan may be required to provide for payment of this amount toward unsecured debts.

Read each question carefully. You may not be required to answer every question on this form. The instructions will alert you if you may skip questions.

Some of the questions require you to go to other sources for information. In those cases, the form has instructions for where to find the information you need.

If you and your spouse are filing together, you and your spouse must file a single statement.

Understand the terms used in these form

These forms use *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, these forms use *you* to ask for information from both debtors. When information is needed about the spouses separately, the forms use *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Things to remember when filling out this form

- Be as complete and accurate as possible.
- If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).
- If two married people are filing together, both are equally responsible for supplying correct information.

Do not file these instructions with your bankruptcy filing package. Keep them for your records.

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COMMITTEE NOTE

Official Forms 22A-1, 22A-2, 22C-1, and 22C-2 are new versions of the "means test" forms used by individuals in chapter 7 and 13, formerly Official Forms 22A and 22C. The original forms were substantially revised as part of the Forms Modernization Project. Official Form 22B, used by individuals in chapter 11, has also been revised as part of the project, which was designed so that the individuals completing the forms would do so more accurately and completely.

The revised versions of the means test forms present the relevant information in a format different from the original forms. For chapter 7, former Official Form 22A has been split into two forms: 22A-1 and 22A-2. The first form, Official Form 22A-1, *Chapter 7 Statement of Your Current Monthly Income*, is to be completed by all chapter 7 debtors. It calculates a debtor's current monthly income and compares that calculation to the median income for households of the same size in the debtor's state. The second form, Official Form 22A-2, *Chapter 7 Means Test Calculation*, is to be completed only by those chapter 7 debtors whose income is above the applicable state median.

For chapter 13, there is a similar split of income and expense calculations. All chapter 13 debtors must complete Official Form 22C-1, *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period*, which calculates current monthly income and the plan commitment period. Debtors only need to complete the second form, Official Form 22C-2, *Chapter13 Calculation of Your Disposable Income***,** if their current monthly income exceeds the applicable median. Form 22C-2 calculates disposable income under 11 U.S.C. § 1325(b)(3), through a report of allowed expense deductions.

Line 60 of former Official Form 22C has not been repeated in Official Form 22C-2. This line allowed debtors to list, but not deduct from income, "Other Necessary Expense" items that are not included within the categories specified by the Internal Revenue Service. Because debtors are separately allowed to list—and deduct—any expenses arising from special circumstances, former Line 60 was rarely used.

Form 22C-2 also reflects the Supreme Court's decision in *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010). Adopting a forward-looking approach, the Court held in *Lanning* that the calculation of a chapter 13 debtor's projected disposable income under § 1325(b)

required consideration of changes to income or expenses reported elsewhere on former Official Form 22C that, at the time of plan confirmation, had occurred or were virtually certain to occur. Those changes could result in either an increased or decreased projected disposable income. Because only debtors whose annualized current monthly income exceeds the applicable median family income have their projected disposable income determined by the information provided on Official Form 22C-2, only these debtors are required to provide the information about changes to income and expenses on Official Form 22C-2. Part 3 of Official Form 22C-2 provides for the reporting of those changes.

In reporting changes to income a debtor must indicate whether the amounts reported in Official Form 22C-1—which are monthly averages of various types of income received during the six months prior to the filing of the bankruptcy case—have already changed or are virtually certain to change during the 12 months following the filing of the bankruptcy petition. For each change, the debtor must indicate the line of Official Form 22C-1 on which the amount to be changed was reported, the reason for the change, the date of its occurrence, whether the change is an increase or decrease of income, and the amount of the change. Similarly, in reporting changes to expenses, a debtor must list changes to the debtor's actual expenditures reported in Part 1 of Official Form C-2 that are virtually certain to occur during the 12 months following the filing of the bankruptcy petition. With respect to the deductible amounts reported in Part 1 that are determined by the IRS national and local standards, only changed amounts that result from changed circumstances in the debtor's life—such as the addition of a family member or the surrender of a vehicle—should be reported. For each change in expenses, the same information required to be provided for income changes must be reported.

Unlike former Official Forms 22A and 22C, line 23 of Official Form 22A-2 and line 19 of Official Form 22C-2 permit the deduction of cell phone expenses necessary for the production of income if those expenses have not been reimbursed by the debtor's employer or deducted by the debtor in calculating net self-employment income. The same lines also state that expenses for internet service may be deducted as a telecommunication services expense only if necessary for the production of income. Under IRS guidelines adopted in 2011, expenses for home internet service used for other purposes are included in the Local Standards for Housing and utilities—Insurance and operating expenses.

APPENDIX C

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APPENDIX C

DRAFT MINUTES OF THE MEETING OF MARCH 29 - 30, 2012

The draft minutes will be distributed separately.

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TAB 4A

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

MARK R. KRAVITZ
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JEFFREY S. SUTTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

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

FROM: **Honorable Sidney A. Fitzwater, Chair**
Advisory Committee on Evidence Rules

DATE: **May 3, 2012**

RE: **Report of the Advisory Committee on Evidence Rules**

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on April 4, 2012 in Dallas at the SMU Dedman School of Law.

The Committee seeks final Standing Committee approval and transmittal to the Judicial Conference of the United States of one proposal: an amendment to Evidence Rule 803(10)—the hearsay exception for absence of public record or entry—to address a constitutional infirmity in light of the Supreme Court's decision in *Melendez-Diaz v. Massachusetts*.

The Committee also seeks approval of four proposals (three of which are related) for release for public comment. The first is an amendment to Rule 801(d)(1)(B)—the hearsay exemption for certain prior consistent statements—to provide that prior consistent statements are admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility. The other three proposals amend Rules 803(6)-(8)—the hearsay exceptions for business records, absence of business records, and public records—to eliminate an ambiguity uncovered during the restyling project and clarify that the opponent has the burden of showing that the proffered record is untrustworthy.

Complete discussions of these proposals can be found in the draft minutes of the Spring 2012 meeting, attached as an appendix to this Report.

II. Action Items

A. Proposed Amendment to Evidence Rule 803(10)

At its June 2011 meeting, the Standing Committee approved releasing for public comment an amendment to Rule 803(10). Rule 803(10) currently allows the government to prove in a criminal case, through the introduction of a certificate, that a public record does not exist. Under *Melendez-Diaz v. Massachusetts* such a certificate would be "testimonial" within the meaning of the Confrontation Clause, as construed by *Crawford v. Washington*. Therefore, the admission of such certificates (in lieu of testimony) violates the accused's right of confrontation. The proposed amendment to Rule 803(10) addresses the Confrontation Clause problem in the current rule by adding a "notice-and-demand" procedure. In *Melendez-Diaz* the Court stated that the use of a notice-and-demand procedure (and the defendant's failure to demand production under that procedure) would cure an otherwise unconstitutional use of testimonial certificates. As amended, Rule 803(10) would permit a prosecutor who intends to offer a certification to provide written notice of that intent at least 14 days before trial. If the defendant does not object in writing within 7 days of receiving the notice, the prosecutor would be permitted to introduce a certification that a diligent search failed to disclose a public record or statement rather than produce a witness to so testify. The amended Rule would allow the court to set a different time for the notice or the objection.

At its Spring 2012 meeting, the Committee considered the two comments received on the proposed amendment. The Magistrate Judges' Association favors the proposal. The National Association of Criminal Defense Lawyers ("NACDL") agrees in principle with a notice-and-demand solution, but it has several objections to the proposed amendment. The Committee unanimously voted to amend Rule 803(10) by adopting the language published for public comment, and to transmit the proposed rule to the Standing Committee with the recommendation that it be approved and sent to the Judicial Conference. The proposed Rule and Committee Note are set out in an appendix to this Report.

Recommendation: The Committee recommends that the proposed amendment to Evidence Rule 803(10) be approved and transmitted to the Judicial Conference of the United States.

B. Proposed Amendment to Evidence Rule 801(d)(1)(B)

After receiving guidance from the Standing Committee at its January 2012 meeting regarding whether to consider further a proposal to amend Rule 801(d)(1)(B)—the hearsay exemption for certain prior consistent statements—the Committee considered this matter at its Spring 2012 meeting. With one member abstaining, the Committee approved an amendment to Rule 801(d)(1)(B) and voted to recommend to the Standing Committee that it be released for public comment. The Committee also approved an addition to the Committee Note to emphasize that the amended Rule is not to be used to expand the admissibility of prior consistent statements or to allow the admission of cumulative consistent statements.

The proposal to amend Rule 801(d)(1)(B) originated with Judge Frank W. Bullock, Jr., when he was a member of the Standing Committee. Judge Bullock proposed that Rule 801(d)(1)(B) be amended to provide that prior consistent statements are admissible under the hearsay exemption whenever they would be admissible to rehabilitate the witness's credibility. Under the current Rule, some prior consistent statements offered to rehabilitate a witness's credibility—specifically, those that rebut a charge of recent fabrication or improper influence or motive—are also admissible substantively. But other rehabilitative statements—such as those that explain a prior inconsistency or rebut a charge of faulty recollection—are not admissible under the hearsay exemption, but only for rehabilitation. There are two basic practical problems in distinguishing between substantive and credibility use as applied to prior consistent statements. First, the necessary jury instruction is almost impossible for jurors to follow. The prior consistent statement is of little or no use for credibility unless the jury believes it to be true. Second, and for similar reasons, the distinction between substantive and impeachment use of prior consistent statements has little, if any, practical effect. The proponent has already presented the witness's trial testimony, so the prior consistent statement ordinarily adds no real substantive effect to the proponent's case.

At its Spring 2011 meeting, the Committee unanimously agreed that the current distinction between substantive and impeachment use of prior consistent statements is impossible for jurors to follow. But some members were concerned that any expansion of the hearsay exemption to cover all prior consistent statements admissible for rehabilitation might be taken as a signal that the Rules were taking a more liberal attitude toward admitting prior consistent statements generally. The Committee resolved to consider the amendment further, and also to seek the input of Public Defenders, the Department of Justice, and state court judges on the merits of amending Rule 801(d)(1)(B). Before the Fall 2011 meeting, the Department of Justice submitted a letter favoring the amendment, and the Public Defender submitted a letter opposing the amendment.

At its Fall 2011 meeting, the Committee again considered the proposed amendment and resolved to seek further input. Pursuant to the Committee's recommendation, the Reporter worked with Dr. Timothy Reagan, the FJC representative, to prepare a survey of district judges concerning the need for and merits of the proposed amendment. The proposal was also sent to the ABA Litigation Section, the American College of Trial Lawyers, the NACDL, and other interested groups. And, as noted, the Committee sought guidance from the Standing Committee at its January 2012 meeting.

At its Spring 2012 meeting, the Committee voted unanimously, with one member abstaining, to approve an alternate draft amendment to Rule 801(d)(1)(B) and to recommend to the Standing Committee that it be released for public comment. The Reporter prepared the alternate draft based on a suggestion from a district judge who had responded to the FJC survey. The judge had encouraged the Committee to retain language familiar and comfortable to judges and practitioners, such as the phrase "motive to fabricate." The Committee also approved an addition to the Committee Note to emphasize that the amended Rule is not to be used to expand the admissibility of prior consistent statements or to allow the admission of cumulative consistent statements. The proposed Rule and Committee Note are set out in an appendix to this Report.

Recommendation: The Committee recommends that the proposed amendment to Evidence Rule 801(d)(1)(B) be approved for release for public comment.

C. Proposed Amendments to Evidence Rules 803(6)-(8)

The restyling project uncovered an ambiguity in Rules 803(6)-(8)—the hearsay exceptions for business records, absence of business records, and public records. These exceptions originally set out admissibility requirements and then provided that a record that met these requirements, although hearsay, was admissible "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." The Rules did not specifically state which party had the burden of showing trustworthiness or untrustworthiness.

The restyling project initially sought to clarify this ambiguity by providing that a record that fit the other admissibility requirements would satisfy the exception if "the opponent does not show that" the source of information or the method or circumstances of preparation indicate lack of trustworthiness. But this proposal did not go forward as part of restyling because research into the case law indicated that the change would be substantive. While most courts impose the burden of proving untrustworthiness on the opponent, a few courts require the proponent to prove that the record is trustworthy. Because the proposal would have changed the law in at least one court, it was deemed substantive and therefore outside the scope of the restyling project.

When the Standing Committee approved the Restyled Rules, several members suggested that this Committee consider making the minor substantive change to clarify that the opponent has the burden of showing untrustworthiness. At the Committee's Spring 2011 meeting, however, a majority opposed amending these Rules, concluding that most courts were construing the Rules as they were intended to be read, i.e., placing the burden of proving untrustworthiness on the opponent.

But at the Committee's Spring 2012 meeting, the Reporter informed the Committee that the Texas restyling committee had unanimously concluded that restyled Rules 803(6) and (8) could be interpreted as making substantive changes by placing the burden on the *proponent* of the evidence to show trustworthiness. The Committee voted unanimously, with one member abstaining, to recommend to the Standing Committee that the proposed amendments to Rules 803(6)-(8) be published for public comment. The proposed Rules and Committee Notes are set out in an appendix to this Report.

Recommendation: The Committee recommends that the proposed amendments to Evidence Rules 803(6)-(8) be approved for release for public comment.

III. Information Items

A. Symposium on Rule of Evidence 502

Prior to commencement of the Fall 2012 meeting, the Committee will host a Symposium on Rule 502. The goal of the Symposium is to review the current use of Rule 502 by courts and litigants, and to discuss ways in which Rule 502 can be better known and understood, with the intent of promoting its use as a mechanism for reducing the costs of preproduction privilege review. The Committee has invited a number of distinguished judges, practitioners, and academics to make presentations. The Symposium proceedings will be published in the *Fordham Law Review*.

B. "Continuous Study" of the Evidence Rules

The Committee is responsible for engaging in a "continuous study" of the need for any amendments to the Federal Rules of Evidence. The grounds for possible amendments include (1) a split in authority about the meaning of a rule; (2) a disparity between the text of a rule and the way that the Rule is actually being applied in courts; and (3) difficulties in applying a rule, as experienced by courts, practitioners, and academic commentators.

Under this standard, the Reporter has raised the following possible amendments for the Committee's consideration: (1) amending Rule 106 to provide that statements may be used for completion even if they are hearsay; (2) clarifying that Rule 607 does not permit a party to impeach its own witness if the only reason for calling the witness is to present otherwise inadmissible evidence to the jury; (3) clarifying that Rule 803(5) can be used to admit statements made by one person and recorded by another; (4) clarifying the business duty requirement in Rule 803(6); and (5) resolving a dispute in the courts over whether prior testimony in a civil case may be admitted against one who was not a party at the time the testimony was given.

At the Committee's Spring 2012 meeting, the Reporter introduced one additional area of emerging difficulties in applying the Evidence Rules. Professor Jeffrey Bellin's recent article, *Facebook, Twitter, and the Uncertain Future of Present Sense Impressions*, contends that the increasing admission of electronic present sense impressions based on social media communications signals a departure from the traditional rationale for the present sense impression exception. Professor Bellin proposes that Rule 803(1) be amended to explicitly require corroboration from an equally percipient witness. The Reporter stated that Professor Liesa Ricter has published a rebuttal in which she encourages the Committee to abstain from amending the Evidence Rules while social media communications remain nascent.

The Committee resolved to continue its continuous study of the Evidence Rules without recommending action on any particular possible amendment. The Committee is considering holding a symposium in conjunction with its Fall 2013 meeting to consider the intersection of the Evidence Rules and emerging technologies.

C. *Crawford v. Washington* and the Hearsay Exceptions in the Evidence Rules

As previous reports have noted, the Committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*, in which the Court held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to confront and cross-examine the declarant.

The Reporter regularly provides the Committee a case digest of all federal circuit cases discussing *Crawford* and its progeny. The goal of the digest is to enable the Committee to keep current on developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions.

With the exception of Rule 803(10), nothing in the developing case law appears to mandate an amendment to the Evidence Rules at this time. The Supreme Court is currently considering the case of *Williams v. Illinois*, in which it will address whether an expert witness can testify to the results of a laboratory test where the certificate of the test is not itself admitted at trial. The Court's

decision in *Williams* may have an effect on the application of Rule 703. The Committee will monitor developments on the relationship between the Federal Rules of Evidence and the accused's right to confrontation.

D. Privileges Project

At the Spring 2012 meeting, Professor Kenneth S. Broun, the Committee's consultant on privileges, apprised the Committee of developments in the area of privileges, submitting materials on the marital testimonial privileges and describing the limited and conflicting federal case law on the subject. Professor Broun plans to continue his research with a focus on cases concerning the journalists' privilege and related shield laws. His work for the Committee on privileges is informational. It neither represents the work of the Committee itself nor suggests explicit or implicit approval by the Standing Committee or the Committee.

IV. Minutes of the Spring 2012 Meeting

The Reporter's draft of the minutes of the Committee's April 2012 meeting is attached to this report. These minutes have not yet been approved by the Committee.

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Appendix to Report to the Standing Committee from the Advisory Committee on Evidence Rules

June 2012

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 803(10)

Rule 803. Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

* * *

(10) ***Absence of a Public Record.*** Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record or statement if ~~the testimony or certification is admitted to prove that~~:

(A) the testimony or certification is admitted to prove that

(~~A~~ i) the record or statement does not exist; or

(~~B~~ ii) a matter did not occur or exist, if a public office regularly kept a record or

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19 statement for a matter of that kind; and

20 (B) in a criminal case, a prosecutor who intends to

21 offer a certification provides written notice of that

22 intent at least 14 days before trial, and the defendant

23 does not object in writing within 7 days of receiving

24 the notice — unless the court sets a different time for

25 the notice or the objection.

26

27

28 **Committee Note**

29 Rule 803(10) has been amended in response to *Melendez-*
30 *Diaz v. Massachusetts*, 557 U.S. 305 (2009). The *Melendez-Diaz*
31 Court declared that a testimonial certificate could be admitted if the
32 accused is given advance notice and does not timely demand the
33 presence of the official who prepared the certificate. The amendment
34 incorporates, with minor variations, a "notice-and-demand"
35 procedure that was approved by the *Melendez-Diaz* Court. See Tex.
36 Code Crim. P. Ann., art. 38.41.
37
38
39
40 **CHANGES MADE AFTER PUBLICATION AND COMMENTS**
41
42 No changes were made to the proposed amendment or
43 Committee Note as they were issued for public comment.
44
45
46
47
48
49 **SUMMARY OF PUBLIC COMMENTS**
50
51
52
53 **The Federal Magistrate Judges Association (11-EV-001)**

approves the proposed amendment.

The National Association of Criminal Defense Lawyers (11-EV-002) is not opposed in principle to the addition of a notice-and-demand procedure to Rule 803(1). The Association recommends, however, that: 1) the obligation to provide notice be placed on the "government" rather than the prosecutor; 2) the obligation to provide notice should be an objective standard; 3) the notice period should be tied to the government's discovery obligations under Fed. R. Crim. P. 16.

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Appendix to Report to the Standing Committee from the Advisory Committee on Evidence Rules

June 2012

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 801(d)(1)(B)

1 **Rule 801. Definitions That Apply to This Article; Exclusions from**
2 **Hearsay**

3 * * *

4 **(d) Statements That Are Not Hearsay.** A statement that
5 meets the following conditions is not hearsay:

6 **(1)** ***A Declarant-Witness's Prior Statement.*** The
7 declarant testifies and is subject to cross-examination
8 about a prior statement, and the statement:

9 * * *

10 **(B)** is consistent with the declarant's
11 testimony and
12 (i) is offered to rebut an express or
13 implied charge that the declarant
14 recently fabricated it or acted from a
15 recent improper influence or motive in
16 so testifying; or
17 (ii) otherwise rehabilitates the
18 declarant's credibility as a witness;

19 * * *

20 **Committee Note**

21

22 Rule 801(d)(1)(B), as originally adopted, provided for
23 substantive use of certain prior consistent statements of a witness
24 subject to cross-examination. As the Advisory Committee noted,
25 "[t]he prior statement is consistent with the testimony given on the
26 stand, and, if the opposite party wishes to open the door for its
27 admission in evidence, no sound reason is apparent why it should not
28 be received generally."

29

30 Though the original Rule 801(d)(1)(B) provided for
31 substantive use of certain prior consistent statements, the scope of
32 that Rule was limited. The Rule covered only those consistent
33 statements that were offered to rebut charges of recent fabrication or
34 improper motive or influence. The Rule did not provide for
35 admissibility of, for example, consistent statements that are
36 probative to explain what otherwise appears to be an inconsistency
37 in the witness's testimony. Nor did it include consistent statements
38 that would be probative to rebut a charge of faulty recollection. Thus,
39 the Rule left many prior consistent statements potentially admissible
40 only for the limited purpose of rehabilitating a witness's credibility.
41 The original Rule also led to some conflict in the cases; some courts
42 distinguished between substantive and rehabilitative use for prior
43 consistent statements, while others appeared to hold that prior
44 consistent statements must be admissible under Rule 801(d)(1)(B) or
45 not at all.

46

47 The amendment provides that prior consistent statements are
48 exempt from the hearsay rule whenever they are admissible to
49 rehabilitate the witness. It extends the argument made in the original
50 Advisory Committee Note to its logical conclusion. As commentators
51 have stated, "[d]istinctions between the substantive and
52 nonsubstantive use of prior consistent statements are normally
53 distinctions without practical meaning," because "[j]uries have a very
54 difficult time understanding an instruction about the difference
55 between substantive and nonsubstantive use." Hon. Frank W.
56 Bullock, Jr. and Steven Gardner, *Prior Consistent Statements and the*
57 *Premotive Rule*, 24 Fla.St. L.Rev. 509, 540 (1997). *See also United*
58 *States v. Simonelli*, 237 F.3d 19, 27 (1st Cir. 2001) ("the line between
59 substantive use of prior statements and their use to buttress credibility
60 on rehabilitation is one which lawyers and judges draw but which
61 may well be meaningless to jurors").

62

63 The amendment does not change the traditional and well-

64 accepted limits on bringing prior consistent statements before the
65 factfinder for credibility purposes. It does not allow impermissible
66 bolstering of a witness. As before, prior consistent statements under
67 the amendment may only be brought before the factfinder if they
68 properly rehabilitate a witness whose credibility has been attacked.
69 As before, to be admissible for rehabilitation, a prior consistent
70 statement must satisfy the strictures of Rule 403. As before, the trial
71 court has ample discretion to exclude prior consistent statements that
72 do no more than provide cumulative accounts of the witness's prior
73 statements. The amendment does not make any consistent statement
74 admissible that was not admissible previously — the only difference
75 is that all prior consistent statements otherwise admissible for
76 rehabilitation are now admissible substantively as well.

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Appendix to Report to the Standing Committee from the Advisory Committee on Evidence Rules

June 2012

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 803(6)

1 **Rule 803. Exceptions to the Rule Against Hearsay— Regardless**
2 **of Whether the Declarant is Available as a Witness**
3 The following are not excluded by the rule against hearsay,
4 regardless of whether the declarant is available as a witness.
5 * * *
6 **(6)** ***Records of a Regularly Conducted Activity.*** A record
7 of an act, event, condition, opinion, or diagnosis if:
8 **(A)** the record was made at or near the time by -
9 or from information transmitted by - someone
10 with knowledge;
11 **(B)** the record was kept in the course of a
12 regularly conducted activity of a business,
13 organization, occupation, or calling, whether
14 or not for profit;
15 **(C)** making the record was a regular practice of
16 that activity;
17 **(D)** all these conditions are shown by the
18 testimony of the custodian or another

qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) ~~neither~~ the opponent does not show that the source of information ~~nor~~ or the method or circumstances of preparation indicate a lack of trustworthiness.

* * *

Committee Note

The Rule has been amended to clarify that if the proponent has established the stated requirements of the exception — regular business with regularly kept record, source with personal knowledge, record made timely, and foundation testimony or certification — then the burden is on the opponent to show a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. It is appropriate to impose the burden of proving untrustworthiness on the opponent, as the basic admissibility requirements are sufficient to establish a presumption that the record is reliable.

The opponent, in meeting its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. A determination of untrustworthiness necessarily depends on the circumstances.

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Appendix to Report to the Standing Committee from the Advisory Committee on Evidence Rules

June 2012

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 803(7)

Rule 803. Exceptions to the Rule Against Hearsay— Regardless of Whether the Declarant is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness.

* * *

(7) ***Absence of a Record of a Regularly Conducted Activity.*** Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) ~~neither~~ the opponent does not show that the possible source of the information ~~nor~~ or other circumstances indicate a lack of trustworthiness.

19 * * *

20 **Committee Note**

21

22 The Rule has been amended to clarify that if the proponent
23 has established the stated requirements of the exception — set forth
24 in Rule 803(6) — then the burden is on the opponent to show a lack
25 of trustworthiness. The amendment maintains consistency with the
26 proposed amendment to the trustworthiness clause of Rule 803(6).

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Appendix to Report to the Standing Committee from the Advisory Committee on Evidence Rules

June 2012

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 803(8)

1 **Rule 803. Exceptions to the Rule Against Hearsay— Regardless**
2 **of Whether the Declarant is Available as a Witness**
3 The following are not excluded by the rule against hearsay,
4 regardless of whether the declarant is available as a witness.
5 * * *
6 **(8)** ***Public Records.*** A record or statement of a public
7 office if:
8 **(A)** it sets out:
9 **(i)** the office's activities;
10 **(ii)** a matter observed while under a legal
11 duty to report, but not including, in a
12 criminal case, a matter observed by
13 law-enforcement personnel; or
14 **(iii)** in a civil case or against the
15 government in a criminal case, factual
16 findings from a legally authorized
17 investigation; and
18

19 **(B)** ~~neither~~ the opponent does not show that the

20 source of information ~~nor~~ or other

21 circumstances indicate a lack of

22 trustworthiness.

23 * * *

24

25 **Committee Note**

26

27 The Rule has been amended to clarify that if the proponent
28 has established that the record meets the stated requirements of the
29 exception — prepared by a public office and setting out information
30 as specified in the Rule — then the burden is on the opponent to
31 show a lack of trustworthiness. While most courts have imposed that
32 burden on the opponent, some have not. Public records have
33 justifiably carried a presumption of reliability and it should be up to
34 the proponent to "demonstrate why a time-tested and carefully
35 considered presumption is not appropriate." *Ellis v. International*
36 *Playtex, Inc.*, 745 F.2d 292, 301 (4th Cir. 1984). The amendment
37 maintains consistency with the proposed amendment to the
38 trustworthiness clause of Rule 803(6).

39

40 The opponent, in meeting its burden, is not necessarily
41 required to introduce affirmative evidence of untrustworthiness. A
42 determination of untrustworthiness necessarily depends on the
43 circumstances.

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Advisory Committee on Evidence Rules

Minutes of the Meeting of April 3, 2012

Dallas, Texas

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on April 4, 2012, at the SMU Dedman School of Law, in Dallas, Texas.

The following members of the Committee were present:

Hon. Sidney A. Fitzwater, Chair
Hon. Brent R. Appel
Hon. Anita B. Brody
Hon. John A. Woodcock, Jr.
William T. Hangley, Esq.
Marjorie A. Meyers, Esq.
Elizabeth J. Shapiro, Esq., Department of Justice

Also present were:

Hon. Richard Wesley, Liaison from the Standing Committee
Hon. Paul Diamond, Liaison from the Civil Rules Committee
Hon. Judith H. Wizmur, Liaison from the Bankruptcy Rules Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Kenneth S. Broun, Consultant to the Committee
Timothy Reagan, Esq., Federal Judicial Center
Peter McCabe, Esq., Secretary to the Standing Committee
Jonathan Rose, Chief, Rules Committee Support Office
Benjamin Robinson, Esq., Rules Committee Support Office
Dean John B. Attanasio, SMU Dedman School of Law
Professor Jeffrey Bellin, SMU Dedman School of Law
Professor Jeffrey Kahn, SMU Dedman School of Law
Professor Nathan Cortez, SMU Dedman School of Law
Tina Hoang, Law Clerk to Judge Fitzwater
Roger A. Sharpe, Law Clerk to Judge Fitzwater

I. Opening Business

Introductory Matters

Judge Fitzwater, the Chair of the Committee, welcomed the members and thanked Dean Attanasio for hosting the Committee. Dean Attanasio greeted the members and observers, and expressed his thanks for holding the Committee meeting at the law school. He highlighted recent events and distinguished speakers on campus.

Judge Fitzwater observed that the forthcoming edition of the William & Mary Law Review will collect the proceedings of the October 2011 Symposium on the Restyled Federal Rules of Evidence. He encouraged those who were unable to attend the events to obtain a copy of the Symposium edition.

The minutes of the Fall 2011 Committee meeting were approved.

Judge Fitzwater reported on the January meeting of the Standing Committee. He summarized the Committee's report and his presentation to the Standing Committee including the Committee's consideration of Rule 801(d)(1)(B). Several members of the Standing Committee expressed support for the Committee's consideration of Rule 801(d)(1)(B) and none discouraged the Committee's continued work. Judge Fitzwater also updated the Standing Committee on the status of Professor Broun's privileges project. He received and conveyed a clear preference from Judge Kravitz, the Chair of the Standing Committee, that the Committee avoid any role in approving or otherwise placing the Judicial Conference's imprimatur on published work in the area of privileges. Professor Broun expressed his full agreement with this approach, and several members thanked him for his significant and ongoing research. Judge Wesley echoed the thanks given and counseled the Committee to avoid even the slightest appearance of endorsing publications in the area of privileges.

II. Proposed Amendment to Rule 803(10)

In *Melendez-Diaz v. Massachusetts*, the Supreme Court held that certificates reporting the results of forensic tests conducted by analysts were "testimonial" and therefore the admission of such certificates (in lieu of testimony) violated the accused's right to confrontation. The Court reasoned that the certificates were prepared exclusively for use in a criminal trial, as substitutes for trial testimony, and so were testimonial within the meaning of the Confrontation Clause as construed by *Crawford v. Washington.*

The Advisory Committee at its Spring 2011 meeting proposed an amendment to Rule 803(10), which currently allows the government to introduce a certificate to prove that a public record does not exist. A certificate of the absence of public record is ordinarily prepared for use in a criminal case, and so under *Melendez-Diaz*, such a certificate would be testimonial — and lower courts after *Melendez-Diaz* have so found. The proposed amendment to Rule 803(10) adds a

"notice-and-demand" procedure to the Rule: requiring production of the person who prepared the certificate only if, after receiving notice from the government of intent to introduce a certificate, the defendant makes a timely pretrial demand for production of the witness. In *Melendez-Diaz*, the Court declared that the use of a notice-and-demand procedure (and the defendant's failure to demand production under that procedure) would cure an otherwise unconstitutional use of testimonial certificates. The Advisory Committee's proposed amendment was approved for release for public comment.

At the Spring meeting, the Committee reviewed the comments received on the proposed amendment. Only two comments were received. The Magistrate Judges' Association is in favor of the proposal. The National Association of Criminal Defense Lawyers commented that it agreed in principle with a notice-and-demand solution to the Confrontation problem inherent in Rule 803(10), but it had several objections to the Committee's proposal. The Reporter provided a memorandum for the meeting that considered the NACDL suggestions in detail, and suggested that the proposed changes were unnecessary and in fact several would raise problems in the application of other rules. A member of the Committee observed that the comments submitted were insubstantial and unpersuasive, and that the rule is very much needed. No member expressed support for the alternative recommendations received from the National Association of Criminal Defense Lawyers.

The Committee unanimously decided by voice vote to amend Rule 803(10) by adopting the language published for public comment, and to transmit the matter to the Standing Committee with the recommendation that the proposed amendment be approved and sent to the Judicial Conference. The full text of the proposed amendment and Committee Note provides as follows:

Rule 803. Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

* * *

(10) ***Absence of a Public Record.*** Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record or statement if ~~the testimony or certification is admitted to prove that~~:

(A) the testimony or certification is admitted to prove that

(~~A~~ i) the record or statement does not exist; or

(~~B~~ ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

(B) in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice — unless the court sets a

different time for the notice or the objection.

Committee Note

Rule 803(10) has been amended in response to *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). The *Melendez-Diaz* Court declared that a testimonial certificate could be admitted if the accused is given advance notice and does not timely demand the presence of the official who prepared the certificate. The amendment incorporates, with minor variations, a "notice-and-demand" procedure that was approved by the *Melendez-Diaz* Court. See Tex. Code Crim. P. Ann., art. 38.41.

III. Possible Amendment to Rule 801(d)(1)(B)

At the Spring 2011 meeting the Committee considered a proposal to amend Evidence Rule 801(d)(1)(B), the hearsay exemption for certain prior consistent statements. Under the proposal, Rule 801(d)(1)(B) would be amended to provide that prior consistent statements are admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility. The justification for the amendment is that there is no meaningful distinction between substantive and rehabilitative use of prior consistent statements.

Under the current rule, some prior consistent statements offered to rehabilitate a witness's credibility — specifically those that rebut a charge of recent fabrication or improper influence or motive — are also admissible substantively. In contrast, other rehabilitative statements — such as those that explain a prior inconsistency or rebut a charge of faulty recollection — are not admissible under the hearsay exemption but only for rehabilitation. There are two basic practical problems in the distinction between substantive and credibility use as applied to prior consistent statements. First, the necessary jury instruction is almost impossible for jurors to follow. The prior consistent statement is of little or no use for credibility unless the jury believes it to be true. Second, and for similar reasons, the distinction between substantive and impeachment use of prior consistent statements has little, if any, practical effect. The proponent has already presented the witness's trial testimony, so the prior consistent statement ordinarily adds no real substantive effect to the proponent's case.

At the Spring 2011 meeting the Committee unanimously agreed that the current distinction between substantive and impeachment use of prior consistent statements is impossible for jurors to follow. But some members were concerned that any expansion of the hearsay exemption to cover all prior consistent statements admissible for rehabilitation might be taken as a signal that the Rules were taking a more liberal attitude toward admitting prior consistent statements generally. Members opined that parties might seek to use the exemption as a means to bolster the credibility of their

witnesses. The Committee at the Spring meeting resolved to consider the amendment further, and also to seek the input of Public Defenders, the Department of Justice, and state court judges on the merits of amending Rule 801(d)(1)(B). Before the Fall 2011 meeting, the Department of Justice submitted a letter in favor of the amendment and the Public Defender submitted a letter opposed to the amendment.

At the Fall 2011 meeting, the Committee again considered the proposed amendment and resolved to seek further input. Pursuant to the Committee's recommendation, the Reporter worked with Dr. Reagan, the FJC representative, to send out a survey to district judges to seek their views on the need for and merits of the proposed amendment. The proposal was also sent to the ABA Litigation Section, the American College of Trial Lawyers, the NACDL, and other interested groups for their views. The Chair also raised the proposal as an information item at the January, 2012 Standing Committee meeting, to seek guidance on whether the amendment was worth pursuing.

As might have been expected from asking the views of so many sources, the responses were mixed. The Standing Committee, in its discussion at the January 2012 meeting, appeared to favor the amendment on the ground that the instruction required under the current rule is impossible for jurors to follow. The lawyers' groups were of two minds — some lawyers agreed with the premise of the amendment and some thought it would increase the use of prior consistent statements and might lead to impermissible bolstering. The majority of judges surveyed appeared to favor the amendment but there was no unanimity.

At the Spring 2012 meeting, Judge Fitzwater queried whether any members, regardless of discussion, planned to vote against a recommendation to the Standing Committee that a proposed amendment be published for public comment. A member indicated opposition to publication because of the momentum generated merely by soliciting public comments. Another member indicated skepticism but encouraged further discussion. The Reporter invited Dr. Reagan to summarize the responses to the email questionnaire, which the Federal Judicial Center sent to district judges in January 2012.

Dr. Reagan observed that there was support for the feeling that jurors find the instruction difficult. The survey showed substantial support for the idea that the proposed amendment to Rule 801(d)(1)(B) would have a positive practical effect, but also some support for the empirical prediction that the amendment would lead to an increase in prior consistent statements coming into evidence. Two rebuttals to this concern–that more prior consistent statements would be good or that Rule 403 would mitigate any trend toward increased admission of prior consistent statements–received lukewarm support.

The Committee discussed whether to use the word "rehabilitates" as opposed to "supports" credibility if the rule were to be proposed. The Committee ultimately determined that the word "rehabilitates" was preferable because "supports" might be read too broadly to admit almost any prior consistent statement, and it could mean that a consistent statement might be admitted under the rule even though the declarant's credibility had ever been attacked — an expansion that the Committee rejected.

The Reporter then introduced an alternate draft of the rule, which was developed after distributing the agenda materials based on a suggestion from a respondent to the FJC questionnaire. The survey respondent had encouraged the Committee to retain language familiar and comfortable to judges and practitioners, such as the phrase "motive to fabricate." The Reporter welcomed this suggestion as did several members.

A member suggested that the better way to treat prior consistent statements would be to provide that none of them are admissible for their truth, i.e., to abrogate Rule 801(d)(1)(B). Such a result would alleviate the problem of giving incomprehensible jury instructions. The member suggested that there was no reason why prior consistent statements should ever be exempt from the hearsay rule.

The Reporter responded that the hearsay rule exists as a safeguard against admitting testimonial evidence not subject to cross-examination, but that in the cases of both prior consistent and prior inconsistent testimony, the declarant is present and subject to cross examination. Thus, there is every reason to admit prior consistent statements for their truth and the only real concern is to prohibit impermissible bolstering and unnecessary padding of a witness's credibility. Thus, the proposal to abrogate Rule 801(d)(1)(B) cut against the theory of and the reason for the hearsay rule. The Reporter also noted that the Committee had never proposed an amendment that would completely remove one of the initial rules from the Federal Rules of Evidence — thus the proposal was fairly radical and needed to be substantially supported.

The Public Defender reiterated concerns that more prior consistent statements would be admitted than have been in the past. She expressed concerns about "evidence shaping" and the incentive to package prior statements in an effort to shore up a witness's performance on the stand. She explained the common scenario of child witnesses "falling apart" in sexual abuse cases, and suggested that the amended rule may incentivize the prosecution to introduce the reports of child assessment interviews (at which the defendant is obviously not present). There may be an effort to build up "insurance in case the witness crumbles on the stand." A liaison responded that rulemaking should not be based on an assumption that lawyers will violate their professional responsibilities.

The DOJ representative stated that Rule 801(d)(1)(B) is particularly impervious to a limiting instruction, and used as an example *United States v. Frazier*, 469 F.3d 85, 88 (3d Cir. 2006). She repeated a consensus view that there can be no intellectually honest way to distinguish between accepting a prior consistent statement for the purpose of assessing credibility and accepting it substantively. She resisted any notion that the Department might want to have more prior statements come in or win a tactical advantage through a rules amendment.

Several members noted the temptation to bolster, but ultimately agreed that a rule change would have no effect on the prohibition against bolstering.

A member expressed concern that the cure may be worse than the problem and that any issue could be cured up front through the pretrial conference. Another member mentioned the risk of unintended consequences, noting the significant number of respondents to the survey who believe

that more evidence of prior consistent statements will be admitted.

A member concluded that while the amendment might have a disproportionate impact on the criminal defendant, the change should be pursued. The member stated that the distinction between substantive and rehabilitative evidence in prior consistent statements is "mind numbing" for a jury and thus adds to the burdens of jurors. From the judicial perspective, prior consistent statements are typically cumulative and are almost always considered harmless error. The member remarked that the rule would bring much-needed clarity and uniformity to the circuit courts of appeal. The member also expressed a strong preference for the updated draft that included familiar language, but also encouraged the Reporter to bolster the accompanying note to emphasize the importance of applying Rule 403. Other members agreed that the updated draft was a step forward and that the note should be fortified, with a particular emphasis on the danger of admitting cumulative evidence.

After this extensive discussion, the Committee approved the proposed amendment to Rule 801(d)(1)(B) (as revised), and voted to recommend to the Standing Committee that it be released for public comment. One Committee member abstained. The Committee also agreed with an addition to the Committee Note emphasizing that the Rule is not to be used to expand the admissibility of prior consistent statements or to allow cumulative consistent statements to be admitted.

What follows is the full text of the proposed amendment to Rule 801(d)(1)(B), and the Committee Note, both as approved by the Committee with the recommendation that they be released for public comment:

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

* * *

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

* * *

(B) is consistent with the declarant's testimony and

(i) is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(ii) otherwise rehabilitates the declarant's credibility as a witness;

* * *

Committee Note

Rule 801(d)(1)(B), as originally adopted, provided for substantive use of certain prior consistent statements of a witness subject to cross-examination. As the Advisory Committee noted, "[t]he prior statement is consistent with the testimony given on the stand, and, if the

opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally."

Though the original Rule 801(d)(1)(B) provided for substantive use of certain prior consistent statements, the scope of that Rule was limited. The Rule covered only those consistent statements that were offered to rebut charges of recent fabrication or improper motive or influence. The Rule did not provide for admissibility of, for example, consistent statements that are probative to explain what otherwise appears to be an inconsistency in the witness's testimony. Nor did it include consistent statements that would be probative to rebut a charge of faulty recollection. Thus, the Rule left many prior consistent statements potentially admissible only for the limited purpose of rehabilitating a witness's credibility. The original Rule also led to some conflict in the cases; some courts distinguished between substantive and rehabilitative use for prior consistent statements, while others appeared to hold that prior consistent statements must be admissible under Rule 801(d)(1)(B) or not at all.

The amendment provides that prior consistent statements are exempt from the hearsay rule whenever they are admissible to rehabilitate the witness. It extends the argument made in the original Advisory Committee Note to its logical conclusion. As commentators have stated, "[d]istinctions between the substantive and nonsubstantive use of prior consistent statements are normally distinctions without practical meaning," because "[j]uries have a very difficult time understanding an instruction about the difference between substantive and nonsubstantive use." Hon. Frank W. Bullock, Jr. and Steven Gardner, *Prior Consistent Statements and the Premotive Rule*, 24 Fla.St. L.Rev. 509, 540 (1997). *See also United States v. Simonelli*, 237 F.3d 19, 27 (1st Cir. 2001) ("the line between substantive use of prior statements and their use to buttress credibility on rehabilitation is one which lawyers and judges draw but which may well be meaningless to jurors").

The amendment does not change the traditional and well-accepted limits on bringing prior consistent statements before the factfinder for credibility purposes. It does not allow impermissible bolstering of a witness. As before, prior consistent statements under the amendment may only be brought before the factfinder if they properly rehabilitate a witness whose credibility has been attacked. As before, to be admissible for rehabilitation, a prior consistent statement must satisfy the strictures of Rule 403. As before, the trial court has ample discretion to exclude prior consistent statements that do no more than provide cumulative accounts of the witness's prior statements. The amendment does not make any consistent statement admissible that was not admissible previously — the only difference is that all prior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well.

IV. Possible Amendment to Rules 803(6)-(8)

The restyling project uncovered an ambiguity in Rules 803(6)-(8), the hearsay exceptions

for business records, absence of business records, and public records. Those exceptions in original form set forth admissibility requirements and then provide that a record meeting those requirements is admissible despite the fact it is hearsay "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." The rules do not specifically state which party has the burden of showing trustworthiness or untrustworthiness.

The restyling sought to clarify the ambiguity by providing that a record fitting the other admissibility requirements would satisfy the exception if "the opponent does not show that" the source of information, etc., indicate a lack of trustworthiness. But the Committee did not submit this proposal as part of restyling because research into the case law indicated that the change would be substantive. While most courts impose the burden of proving untrustworthiness on the opponent, a few courts require the proponent to prove that the record is trustworthy. Thus the proposal would have changed the law in at least one court, and so was substantive under the restyling protocol.

When the Standing Committee approved the Restyled Rules, several members suggested that the Evidence Rules Committee consider making the minor substantive change that would clarify what is implicit in Rules 803(6)-(8) — that the opponent has the burden of showing untrustworthiness. Those members believed that allocating the burden to the opponent made sense for a number of reasons, including: 1) the Rules' reference to a "lack of trustworthiness" suggests strongly that the burden is on the opponent, as it is the opponent who would want to prove the lack of trustworthiness; 2) almost all the case law imposes the burden on the opponent; and 3) if the other admissibility requirements are met, the qualifying record is entitled to a presumption of trustworthiness, and adding an additional requirement of proving trustworthiness would unduly limit these records-based exceptions.

But at the Spring 2011 Advisory Committee meeting, a majority of Committee members was opposed to any amendment to the trustworthiness language of Rules 803(6)-(8). Members stated that any problem in the application of the rule was caused by a few wayward cases; that parties understand that the burden of proving untrustworthiness is on the opponent; and that the restyling did nothing to change that basic understanding.

At the Spring 2012 meeting, the Reporter informed the Committee that the Texas restyling committee was unanimously of the view that the restyled Rule 803(6) and (8) could be interpreted as making a substantive change to the Rule: by putting the burden on the *proponent* of the evidence to show trustworthiness. In light of this report from the Texas restyling committee, the Reporter suggested that the Committee might wish to discuss whether the previously proposed amendment to Rules 803(6) and (8) should be reconsidered.

At the meeting, several members expressed support for the amendments to clarify that the opponent has the burden of showing that the proffered record is untrustworthy. The Public Defender expressed concern that it may be difficult to access the information needed to demonstrate that the record at issue is untrustworthy. But other members responded that the restyled rule may be read to constitute a substantive change even where none was intended. Several members dismissed the suggestion that the restyling worked a substantive change upon these rules, but they agreed that a

clarifying amendment would be helpful.

The Committee unanimously decided by voice vote, with one abstention, to recommend to the Standing Committee that the proposed amendments to Rules 803(6)-(8) be published for public comment.

What follows are the proposed amendments to Rules 803(6)-(8), together with the Committee Notes, as approved by the Committee with the recommendation that they be released for public comment.

Rule 803. Exceptions to the Rule Against Hearsay— Regardless of Whether the Declarant is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness.

* * *

(6) ***Records of a Regularly Conducted Activity.*** A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by - or from information transmitted by - someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) ~~neither~~ the opponent does not show that the source of information ~~nor~~ or the method or circumstances of preparation indicate a lack of trustworthiness.

* * *

Committee Note

The Rule has been amended to clarify that if the proponent has established the stated requirements of the exception — regular business with regularly kept record, source with personal knowledge, record made timely, and foundation testimony or certification — then the burden is on the opponent to show a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. It is appropriate to impose the burden of proving untrustworthiness on the opponent, as the basic admissibility requirements are sufficient to establish a presumption that the record is reliable.

The opponent, in meeting its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. A determination of untrustworthiness necessarily depends on the circumstances.

Rule 803. Exceptions to the Rule Against Hearsay— Regardless of Whether the Declarant is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness.

* * *

(7) ***Absence of a Record of a Regularly Conducted Activity.*** Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) ~~neither~~ the opponent does not show that the possible source of the information ~~nor~~ or other circumstances indicate a lack of trustworthiness.

* * *

Committee Note

The Rule has been amended to clarify that if the proponent has established the stated requirements of the exception — set forth in Rule 803(6) — then the burden is on the opponent to show a lack of trustworthiness. The amendment maintains consistency with the proposed amendment to the trustworthiness clause of Rule 803(6).

Rule 803. Exceptions to the Rule Against Hearsay— Regardless of Whether the Declarant is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness.

* * *

(8) ***Public Records.*** A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) ~~neither~~ the opponent does not show that the source of information ~~nor~~ or other circumstances indicate a lack of trustworthiness.

* * *

Committee Note

The Rule has been amended to clarify that if the proponent has established that the record meets the stated requirements of the exception — prepared by a public office and setting out information as specified in the Rule — then the burden is on the opponent to show a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. Public records have justifiably carried a presumption of reliability and it should be up to the proponent to "demonstrate why a time-tested and carefully considered presumption is not appropriate." *Ellis v. International Playtex, Inc.*, 745 F.2d 292, 301 (4th Cir. 1984). The amendment maintains consistency with the proposed amendment to the trustworthiness clause of Rule 803(6).

The opponent, in meeting its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. A determination of untrustworthiness necessarily depends on the circumstances.

V. "Continuous Study" of the Evidence Rules

The Procedures for the Standing Committee require the Evidence Rules Committee to engage in a "continuous study" of the need for any amendment to the Rules. At the Chair's request, the Reporter prepared a memorandum setting forth the history of the studies that have already been undertaken by the Advisory Committee, and providing some suggestions of possible amendments for consideration by the Committee. The grounds for a possible amendment included: 1) a split in authority about the meaning of an Evidence Rule; 2) a disparity between the text of a rule and the way that the rule is actually being applied in courts; 3) difficulties in applying a rule, as indicated by courts, practitioners, or academic commentators.

Possible amendments raised by the Reporter included: 1) amending Rule 106 to provide that statements may be used for completion even if they are hearsay; 2) clarifying that Rule 607 does not permit a party to impeach its own witness if the only reason for calling the witness is to present otherwise inadmissible evidence to the jury; 3) clarifying that Rule 803(5) can be used to admit statements made by one person and recorded by another; 4) clarifying the business duty requirement in Rule 803(6); and 5) resolving the dispute in the courts over whether prior testimony in a civil case may be admitted against one who was not a party at the time the testimony was given.

At the meeting, the Reporter introduced one additional area of emerging difficulties in applying the evidence rules. Professor Jeffrey Bellin's recent article, *Facebook, Twitter, and the Uncertain Future of Present Sense Impressions*, contends that the increasing admission of electronic present sense impressions based on social media communications signals a departure from the traditional rationale for the present sense impression exception. Professor Bellin proposes that Rule 803(1) be amended to explicitly require corroboration from an equally percipient witness. The Reporter stated that Professor Liesa Ricter has published a rebuttal that rejects Professor Bellin's proposal and encourages the Committee to abstain from tinkering with the evidence rules while social media communications remain nascent.

The Committee resolved to continue its continuous study of the Evidence Rules without recommending action on any particular possible amendment. The Chair suggested that the Committee hold a symposium in the Fall of 2013 to consider the intersection of the evidence rules and emerging technologies. The members expressed strong support and briefly discussed prospective panelists and topics.

VI. *Crawford* Developments

The Reporter provided the Committee with a case digest of all federal circuit cases discussing *Crawford v. Washington* and its progeny. The digest was grouped by subject matter. The goal of the digest is to allow the Committee to keep apprised of developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions.

The Committee reviewed the memo and the Reporter noted that — with the exception of Rule 803(10), the proposed amendment published for public comment in August 2011 — nothing in the developing case law mandated an amendment to the Evidence Rules at this time. The Reporter observed that the Supreme Court is currently considering the case of *Williams v. Illinois*, in which it will address whether an expert witness can testify to the results of a lab test where the certificate of the test is not itself admitted at trial. The Court's decision in *Williams* may have an effect on the application of Rule 703. Currently the lower courts are allowing experts to testify on the basis of testimonial hearsay where 1) the hearsay itself is not admitted into evidence, and 2) the expert is testifying to her own opinion and is not just testifying to the opinion of the underlying expert who rendered the testimonial hearsay.

At the meeting, the Reporter also noted that some recent lower court decisions have found autopsy reports to be testimonial when prepared with the participation of law enforcement — though this might not raise a rulemaking problem because, if a law enforcement report is prepared for purposes of litigation, it is inadmissible under Rule 803(8)(A).

The Committee resolved to continue monitoring developments on the relationship between the Federal Rules of Evidence and the accused's right to confrontation.

VII. Symposium on Rule 502

The Committee is planning a symposium on Rule 502. The goal of the symposium is to review the current use of Rule 502 by courts and litigants, and to discuss ways in which Rule 502 can be better known and understood, so that it can fulfil its original promise — to reduce the cost of preproduction privilege review. The symposium will take place on October 5, 2012 before the Committee's Fall meeting in Charleston. The Committee has already invited a number of distinguished judges, practitioners and academics to make presentations at the symposium. The proceedings of the symposium will be published in Fordham Law Review.

At the Spring 2012 meeting the Committee discussed the goals of the symposium and whether other participants should be invited. A member noted the need to energize the application of Rule 502. The Reporter observed that the developing case law tended to focus on the reasonableness of steps taken to prevent inadvertent disclosure and subject matter waiver.

The Reporter noted that Judge John M. Facciola plans to participate and he invited suggestions from the members for other symposium panelists. One member suggested Arizona Vice Chief Justice Andrew D. Hurwitz. The Committee resolved to continue discussion of potential panelists leading up to the symposium.

VIII. Privilege Project

At the Spring meeting Professor Broun, the Committee's consultant on privileges, submitted materials on the marital testimonial privileges and described the limited and conflicting federal case law on the subject. This submission is part of Professor Broun's continuing project to develop an article on the federal common law of privileges. Professor Broun's work, when it is published, will neither represent the work of the Committee nor suggest explicit nor implicit approval by the Standing Committee or the Advisory Committee. Committee members expressed gratitude to Professor Broun for keeping the Committee apprised of developments in the area of privileges.

Professor Broun stated that he planned to continue his research with a focus on cases concerning the journalists' privilege and related shield laws.

VII. Next Meeting

The Fall 2012 meeting of the Committee is scheduled for Friday October 5 in Charleston — to take place after the Symposium on Rule 502.

Respectfully submitted,

Benjamin Robinson
Daniel J. Capra

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

MARK R. KRAVITZ
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PETER G. McCABE
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CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

DATE: May 8, 2012

TO: Judge Mark R. Kravitz, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Jeffrey S. Sutton, Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on April 12, 2012, in Washington, DC. The Committee gave final approval to proposed amendments to Appellate Rules 13, 14, 24, 28, and 28.1 and to Form 4. The Committee approved for publication proposed amendments to Appellate Rule 6. The Committee removed one item (concerning introductions in briefs) from its study agenda; reached consensus on an approach to another item (concerning amicus filings by Indian tribes); and discussed various other agenda items.

Part II of this Report discusses the proposed amendments for which the Committee seeks final approval. Part II.A discusses the proposed amendments to Rules 13, 14, and 24, which relate to appeals from the United States Tax Court. Part II.B covers the proposed amendments to Rules 28 and 28.1, concerning the required contents of briefs. Part II.C summarizes the proposed amendments to Form 4, concerning appeals in forma pauperis ("IFP"). Part III of this Report discusses the proposed amendments to Rule 6 (concerning bankruptcy appeals), which the Committee seeks approval to publish for comment. Part IV discusses other matters.

The Committee has scheduled its next meeting for September 27 and 28, 2012, in Philadelphia.

Detailed information about the Committee's activities can be found in the Reporter's draft of the minutes of the April meeting[1] and in the Committee's study agenda, both of which are attached to this report.

II. Action items for final approval

The Committee presents the following proposals for final approval.

A. Proposed amendments to Rules 13, 14, and 24

The proposed amendments to Rules 13, 14, and 24 concern appeals from the United States Tax Court. The proposed amendments to Rules 13 and 14 revise those rules to address permissive interlocutory appeals from the Tax Court under 26 U.S.C. § 7482(a)(2). The Committee developed these proposals in consultation with the Tax Court and with the Tax Division of the Department of Justice. The proposed amendment to Rule 24 grows out of a suggestion by the Tax Court that Rule 24(b)'s reference to the Tax Court be revised to remove a possible source of confusion concerning the Tax Court's legal status.

1. Text of proposed amendments and Committee Notes

The Committee recommends final approval of the proposed amendments to Rules 13, 14, and 24, as set out in the enclosure to this report.

2. Changes made after publication and comment

The Committee did not make any changes to the proposed amendments to Rules 13, 14, and 24 after publication. (It received no comments on these proposed amendments.)

B. Proposed amendments to Rules 28 and 28.1

The proposed amendment to Rule 28 revises Rule 28(a)'s list of the contents of the appellant's brief by removing the requirement of separate statements of the case and of the facts, and makes conforming changes to Rule 28(b) (concerning the appellee's brief). The proposed amendment to Rule 28.1 makes conforming changes to Rule 28.1 (concerning cross-appeals).

Current Rule 28(a)(6) requires "a statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below." Current Rule 28(a)(7) requires that the brief include "a statement of facts." Rule 28(a) requires these items to appear "in the order indicated." These dual requirements have confused practitioners. It seems intuitively more sensible to permit the appellant to weave those two statements together and present the relevant

[1] These minutes have not yet been approved by the Committee.

events in chronological order. As a point of comparison, Supreme Court Rule 24 does not separate the two requirements; rather, Supreme Court Rule 24.1(g) requires "[a] concise statement of the case, setting out the facts material to the consideration of the questions presented, with appropriate references to the joint appendix, e.g., App. 12, or to the record, e.g., Record 12."

The proposed amendment to Rule 28(a) consolidates subdivisions (a)(6) and (a)(7) into a new subdivision (a)(6) that provides for one "statement." The proposed new Rule 28(a)(6) allows the lawyer to present the factual and procedural history chronologically, but also provides flexibility to depart from chronological ordering. Conforming changes renumber Rules 28(a)(8) through (11) as Rules 28(a)(7) through (10), revise Rule 28(b)'s discussion of the appellee's brief, and revise Rule 28.1's discussion of briefing on cross-appeals.

1. Text of proposed amendments and Committee Notes

The Committee recommends final approval of the proposed amendments to Rules 28 and 28.1 as set out in the enclosure to this report.

2. Changes made after publication and comment

The comments that the Committee received on the proposed amendments to Rules 28 and 28.1 are described in the enclosure to this report. Four of the six sets of comments supported the proposed amendments' goal. Among those supportive comments, two sets of comments proposed drafting changes; a number of those proposals sprang from a concern that deletion of some of the current language of Rule 28(a)(6) could be problematic. At its spring meeting, the Committee carefully reviewed both the concerns expressed by the two commenters who argued against the proposed amendments and also the suggestions submitted by the two commenters who proffered alternative language for the amendments. A detailed account of the Committee's discussions can be found in the draft minutes of the Committee meeting. To address the concerns expressed by the commenters, the Committee revised the text of proposed Rule 28(a)(6) and added a new paragraph to the Committee Note.

As published, proposed Rule 28(a)(6) referred to "a concise statement of the case setting out the facts relevant to the issues submitted for review and identifying the rulings presented for review, with appropriate references to the record (see Rule 28(e))." In response to commenters' concerns that this language omitted to mention procedural history, the Committee revised the proposed Rule to refer to "a concise statement of the case setting out the facts relevant to the issues submitted for review<u>, describing the relevant procedural history,</u> and identifying the rulings presented for review, with appropriate references to the record (see Rule 28(e))." The Committee hopes that the amended Rule's reference to "the relevant procedural history" – rather than to "the course of proceedings" – will discourage the unnecessary detail with which some briefs currently describe the procedural history of the case. The Committee added a second paragraph to the Committee Note to Rule 28(a) that describes the contents of the statement of the case and that notes the permissibility of including subheadings. The latter point responds to one commenter's concern that judges and clerks need a way to locate quickly, in the brief, a description of the rulings presented for review. The Committee also added, in the Committee

Note, a reference to Supreme Court Rule 24.1(g), on which the amended Rule text is loosely modeled.

C. Proposed amendments to Form 4

The proposed amendments to Form 4 concern applications to proceed IFP on appeal. Appellate Rule 24 requires a party seeking to proceed IFP in the court of appeals to provide an affidavit that, inter alia, "shows in the detail prescribed by Form 4 ... the party's inability to pay or to give security for fees and costs." (Likewise, a party seeking to proceed IFP in the Supreme Court must use Form 4. *See* Supreme Court Rule 39.1.) The proposed amendments would substitute one revised question for two of the questions on the current Form 4: Question 10 – which requests the name of any attorney whom the litigant has paid (or will pay) for services in connection with the case, as well as the amount of such payments – and Question 11 – which inquires about payments for non-attorney services in connection with the case.

Questions 10 and 11 have been criticized by commentators for seeking information that seems unnecessary to the IFP determination. Some commentators have suggested that Questions 10 and 11 might in some circumstances seek disclosure of information protected by attorney-client privilege and/or work product immunity. Research by the Committee's reporter suggested that though the information solicited by Questions 10 and 11 is relatively unlikely to be subject to attorney-client privilege, it may sometimes constitute protected work product. The Committee also discussed the possibility that even if the information solicited by Questions 10 and 11 is not privileged or protected, its disclosure could as a practical matter disadvantage some IFP litigants. In any event, the function of Form 4 is to provide the information necessary to determine whether the applicant is unable "to pay or to give security for fees and costs," Fed. R. App. P. 24(a)(1)(A). Neither the Committee's own deliberations and research nor informal discussions with the Supreme Court Clerk's Office have disclosed any reason to think that it is necessary to obtain all of the information currently sought by Questions 10 and 11. Accordingly, the proposed amendment would replace Questions 10 and 11 with a new Question 10 that would read: "Have you spent – or will you be spending – any money for expenses or attorney fees in connection with this lawsuit? If yes, how much?"

The proposed amendments would also make certain technical amendments to Form 4, to bring the official Form into conformity with changes that were approved by the Judicial Conference in fall 1997 but were not subsequently transmitted to Congress. The proposed technical amendments would add columns in Question 1 to permit the applicant to list the applicant's spouse's income; would limit the requests for employment history in Questions 2 and 3 to the past two years; and would specify that the requirement for inmate account statements applies to civil appeals.

1. Text of proposed amendments

The Committee recommends final approval of the proposed amendments to Form 4 as set out in the enclosure to this report.

2. Changes made after publication and comment

The single comment received on the proposed amendments to Form 4 is summarized in the enclosure to this report. The comment – from the National Association of Criminal Defense Lawyers ("NACDL") – suggests a revision to the Form's discussion of inmate account statements. The Committee decided not to incorporate this comment into the current proposed amendments, but has added it to the Committee's study agenda as a new item. Further detail on this matter can be found in the draft minutes of the Committee's spring meeting.

III. Action item for publication (proposed amendments to Rule 6)

As discussed in the report of the Bankruptcy Rules Committee, that Committee is seeking approval to publish for comment proposed amendments to Part VIII of the Bankruptcy Rules – the rules that govern appeals from bankruptcy court to a district court or bankruptcy appellate panel ("BAP"). In tandem with that project, the Appellate Rules Committee seeks permission to publish for comment proposed amendments to Appellate Rule 6 (concerning appeals to the court of appeals in a bankruptcy case).

The proposed amendments to Appellate Rule 6 (which are set out in the enclosure to this report) would update that Rule's cross-references to the Bankruptcy Part VIII Rules; would amend Rule 6(b)(2)(A)(ii) to remove an ambiguity dating from the 1998 restyling; would add a new Rule 6(c) to address permissive direct appeals from the bankruptcy court under 28 U.S.C. § 158(d)(2); and would revise Rule 6 to take account of the range of methods available now or in the future for dealing with the record on appeal.

The Appellate Rules do not currently address in explicit terms the topic of permissive direct appeals from a bankruptcy court to a court of appeals under 28 U.S.C. § 158(d)(2). At the time that Section 158(d)(2) came into being as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), the Appellate Rules Committee decided that no immediate action was necessary with respect to the Appellate Rules, because BAPCPA put in place interim procedures for administering the new direct appeals mechanism. Some of those interim procedures were subsequently displaced by the 2008 addition of subdivision (f) in Bankruptcy Rule 8001. The Committee now considers it worthwhile to specify in more detail the way in which the Appellate Rules apply to direct appeals under Section 158(d)(2), and the Bankruptcy Rules Committee's Part VIII project provides an opportune context in which to obtain input and guidance on this question.

Proposed Appellate Rule 6(c) would treat the record on direct appeals differently than existing Rule 6(b) treats the record on bankruptcy appeals from a district court or BAP. Rule 6(b) contains a streamlined procedure for redesignating and forwarding the record on appeal, because in the appeals covered by Rule 6(b) the appellate record will already have been compiled for purposes of the appeal to the district court or the BAP. In the context of a direct appeal, the record will generally require compilation from scratch. The closest model for the compilation and transmission of the bankruptcy court record would appear to be the rules chosen by the Part VIII project for appeals from the bankruptcy court to the district court or the BAP. Thus, proposed Rule 6(c) incorporates the relevant Part VIII rules by reference while making some adjustments to account for the particularities of direct appeals to the court of appeals.

Both the Bankruptcy Rules Part VIII project and the project to revise Appellate Rule 6 have highlighted changes in the treatment of the record. The Appellate Rules as they currently exist were drafted on the assumption that the record on appeal would be available only in paper form. Reflecting the fact that the bankruptcy courts are ahead of other federal courts in making the transition to electronic filing, the proposed Part VIII Rules are drafted with a contrary presumption in mind: The default principle under those Rules is that the record will be made available in electronic form. In revising Rule 6(b) and in drafting new Rule 6(c), the Appellate Rules Committee's goal is to adopt language that can accommodate the various ways in which the lower-court record could be made available to the court of appeals – e.g., in paper form; or in electronic files that can be sent to the court of appeals; or by means of electronic links. Adopting such language seems generally advisable in the light of the shift to electronic filing; and such language seems particularly salient in the case of proposed Rule 6(c) because that Rule will incorporate by reference the Part VIII Rules that deal with the record on appeal.

The Committee considered a number of possible ways to allude to the provision of the record on appeal by the lower court to the court of appeals. Those deliberations are described in the draft minutes of the Committee's spring 2012 meeting. The Committee determined that neither "transmit" nor "furnish" nor "provide" captured the range of methods for making the record available; in particular, none of these terms encompassed the provision of a set of electronic links by which to access the documents in the record. After extensive discussions, the Committee decided to refer to the lower-court clerk's "making the record available to" the court of appeals. This language describes the action in question with the requisite clarity while also leaving room for developments in technology and practice. The Committee welcomes the Standing Committee's thoughts on this choice, as well as the reactions of the Bankruptcy Rules Committee and of the Subcommittee, chaired by Judge Gorsuch, that has been formed to consider this and similar questions of terminology relating to electronic filing.

One other linguistic question bears mention. As noted above, the proposed amendments would revise Rule 6(b)(2)(A)(ii) to remove an ambiguity arising from the 1998 restyling of the Appellate Rules. Specifically, for reasons explained at further length in the Committee Note, the proposed amendment would remove Rule 6(b)(2)(A)(ii)'s reference to challenging "an altered or amended judgment, order, or decree"; the amended Rule would refer instead to challenging "the alteration or amendment of a judgment, order, or decree." The amended Rule would state:

> If a party intends to challenge the order disposing of [a tolling] motion – or the alteration or amendment of a judgment, order, or decree upon the motion – then the party, in compliance with Rules 3(c) and 6(b)(1)(B), must file a notice of appeal or amended notice of appeal. The notice or amended notice must be filed within the time prescribed by Rule 4 – excluding Rules 4(a)(4) and 4(b) – measured from the entry of the order disposing of the motion.

Professor Kimble advised the Committee that, in the second sentence, "It" should replace "The notice or amended notice." The Committee carefully discussed Professor Kimble's advice during both its fall 2011 and spring 2012 meetings, and decided not to adopt this suggestion. Committee members believe that the longer phrase is clearer; that clarity and specificity are particularly key for rules that govern the taking of an appeal; and that this is especially true in

the context of bankruptcy appeals given that so many debtors are pro se. These concerns over access to court for unrepresented debtors led the Committee to conclude that this question is one of substance rather than style.

IV. Information Items

The Committee reached consensus on an approach to the proposal that Appellate Rule 29 be amended to treat federally recognized Native American tribes the same as states for purposes of the provisions that authorize states to make amicus filings as of right and that exempt states from Rule 29's authorship-and-funding disclosure requirement. The Committee reviewed its research concerning this proposal. Based on a report by the Federal Judicial Center ("FJC") showing that most tribal amicus filings occur in the Eighth, Ninth, and Tenth Circuits, the Committee first consulted the Chief Judges of those circuits for their circuits' views on the proposal. The responses varied: The Ninth Circuit supports adoption of a national rule authorizing tribal amicus filings, the Tenth Circuit opposes adoption of such a national rule, and judges in the Eighth Circuit have voiced a variety of views. More recently, the Committee consulted the Chief Judges of the remaining circuits for their circuits' views on a proposal that would treat both tribes and municipalities the same as states for purposes of amicus filings. Among the responses received so far from those circuits, Committee members found it noteworthy that while the First Circuit seemed supportive of the inclusion of tribes on the list of entities that can make amicus filings as of right, that circuit also expressed concern that expanding that list could heighten the risk that amicus filings could give rise to recusal issues (especially if the expanded list included municipalities).

During the Committee's discussions of the tribal-amicus issue, members expressed various points of view. A number of Committee members argued that dignity concerns weighed in favor of adding tribes to the list of entities that can make amicus filings as of right. Other Committee members wondered whether the proposed amendment is needed – because the FJC's study indicated that tribes' requests to make amicus filings are generally granted – and argued that if tribes were added to the list of exempt filers, municipalities should be added as well. Most recently, in the light of the possibility that expanding the list of exempt filers could heighten the risk of recusal issues, concerns were voiced about the wisdom of adopting a national rule amendment at the present time. Instead, the Committee decided to maintain this item on its agenda and to revisit it in five years. In the meantime, the Committee asked me to write to the Chief Judges of each circuit to report on the Committee's discussions of this issue and to explain that the Committee thinks the issue warrants serious consideration. Although the letter will not urge the circuits to consider adopting local rules on the issue, if any circuits do decide to adopt a local rule, a few years of experience under such a local provision could inform the Committee's later discussions.

The Committee removed from its agenda an item relating to introductions in briefs. During the Committee's discussions of the proposed amendment to Rule 28(a) concerning the statement of the case, it had been suggested that Rule 28(a) might usefully be amended to take account of the possibility of including an introduction in the brief. Members noted that – if the currently proposed amendment to Rule 28(a) is adopted – Rule 28(a)(6) will be sufficiently

flexible to permit the inclusion of an introduction as part of the statement of the case, and that experienced lawyers sometimes include an introduction either as the first substantive item in the brief or as part of the statement of the case. Some members argued that mentioning an introduction in the text of the Rule would helpfully alert inexperienced lawyers to the possibility of including an introduction. Others worried that it would be difficult to draft Rule text that would indicate the appropriate contents of an introduction, and that it would not be useful to encourage the proliferation of poorly drafted introductions. A member suggested that it might be useful to wait and see how practice develops under amended Rule 28(a)(6) before giving any further consideration to the question of introductions. Based on this discussion, the Committee decided to remove the item concerning introductions from its agenda for the present.

The Committee discussed a number of new or existing agenda items. Over the summer, further study will be conducted concerning a proposal to amend the Appellate Rules to address redaction and sealing of appellate filings. The issue of sealed filings intersects with past and ongoing discussions in several other Judicial Conference committees. In the light of the varying approaches that circuits currently take to sealed filings on appeal, the Committee intends to consider whether it would be appropriate to try to adopt a national rule on the subject or whether the issue could be addressed through alternative means. The Committee held an initial discussion of a proposal to lengthen Appellate Rule 4(b)'s 14-day deadline for appeals by criminal defendants; participants noted that it would be useful to consult the Criminal Rules Committee for its views on the proposal and to obtain further detail concerning the Appellate Rules Committee's prior discussion of a similar proposal (which it considered and rejected roughly a decade ago). Members suggested two new topics for consideration: first, whether it would be useful to clarify appeal bond practices under Civil Rule 62 and Appellate Rule 8; and second, whether the Committee should revisit the way that length limits are specified in Rule 35's treatment of petitions for rehearing en banc (a topic that would also encompass Rule 40's treatment of petitions for panel rehearing).

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE**

TITLE III. ~~REVIEW OF A DECISION OF~~ APPEALS FROM THE UNITED STATES TAX COURT

Rule 13. ~~Review of a Decision of~~ Appeals from the Tax Court

(a) ~~How Obtained; Time for Filing Notice of Appeal~~ Appeal as of Right.

(1) **How Obtained; Time for Filing a Notice of Appeal.**

~~(1) Review of a decision of~~ (A) An appeal as of right from the United States Tax Court is commenced by filing a notice of appeal with the Tax Court clerk within 90 days after the entry of the Tax Court's decision. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d). If one party files a timely notice of appeal, any other party may file a notice of appeal within 120 days after the Tax Court's decision is entered.

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

~~(2)~~ (B) If, under Tax Court rules, a party makes a timely motion to vacate or revise the Tax Court's decision, the time to file a notice of appeal runs from the entry of the order disposing of the motion or from the entry of a new decision, whichever is later.

~~**(b)**~~ **(2) Notice of Appeal; How Filed.** The notice of appeal may be filed either at the Tax Court clerk's office in the District of Columbia or by mail addressed to the clerk. If sent by mail the notice is considered filed on the postmark date, subject to § 7502 of the Internal Revenue Code, as amended, and the applicable regulations.

~~**(c)**~~ **(3) Contents of the Notice of Appeal; Service; Effect of Filing and Service.** Rule 3 prescribes the contents of a notice of appeal, the manner of service, and the effect of its filing and service. Form 2 in the Appendix of Forms is a suggested form of a notice of appeal.

~~**(d)**~~ **(4) The Record on Appeal; Forwarding; Filing.**

~~(1)~~ (A) Except as otherwise provided under Tax Court rules for the transcript of proceedings,

the ~~An~~ appeal ~~from the Tax Court~~ is governed by the parts of Rules 10, 11, and 12 regarding the record on appeal from a district court, the time and manner of forwarding and filing, and the docketing in the court of appeals. ~~References in those rules and in Rule 3 to the district court and district clerk are to be read as referring to the Tax Court and its clerk.~~

~~(2)~~ (B) If an appeal ~~from a Tax Court decision~~ is taken to more than one court of appeals, the original record must be sent to the court named in the first notice of appeal filed. In an appeal to any other court of appeals, the appellant must apply to that other court to make provision for the record.

(b) Appeal by Permission. An appeal by permission is governed by Rule 5.

Committee Note

Rules 13 and 14 are amended to address the treatment of permissive interlocutory appeals from the Tax Court under 26 U.S.C. § 7482(a)(2). Rules 13 and 14 do not currently address such appeals; instead, those Rules address only appeals as of right from the Tax Court. The existing Rule 13 – governing appeals as of right – is revised and becomes Rule 13(a). New subdivision (b) provides that Rule 5 governs appeals by permission. The definition of district court and district clerk in current subdivision (d)(1) is deleted; definitions are now addressed in Rule 14. The caption of Title III is amended to reflect the broadened application of this Title.

CHANGES MADE AFTER PUBLICATION AND COMMENT

No changes were made after publication and comment.

SUMMARY OF PUBLIC COMMENTS

No comments were received on the proposed amendment to Rule 13.

Rule 14. Applicability of Other Rules to ~~the Review of a~~ Appeals from the Tax Court ~~Decision~~

All provisions of these rules, except Rules ~~4-9~~ 4, 6-9, 15-20, and 22-23, apply to ~~the review of a~~ appeals from the Tax Court ~~decision~~. References in any applicable rule (other than Rule 24(a)) to the district court and district clerk are to be read as referring to the Tax Court and its clerk.

Committee Note

Rule 13 currently addresses appeals as of right from the Tax Court, and Rule 14 currently addresses the applicability of the Appellate Rules to such appeals. Rule 13 is amended to add a new subdivision (b) treating permissive interlocutory appeals from the Tax Court under 26 U.S.C. § 7482(a)(2). Rule 14 is amended to address the applicability of the Appellate Rules to both appeals as of right and appeals by permission. Because the latter are governed by Rule 5, that rule is deleted from Rule 14's list of inapplicable provisions. Rule 14 is amended to define the terms “district court” and “district clerk” in applicable rules (excluding Rule 24(a)) to include the Tax Court and its clerk. Rule 24(a) is excluded from this definition because motions to appeal from the Tax Court in forma pauperis are governed by Rule 24(b), not Rule 24(a).

CHANGES MADE AFTER PUBLICATION AND COMMENT

No changes were made after publication and comment.

SUMMARY OF PUBLIC COMMENTS

No comments were received on the proposed amendment to Rule 14.

Rule 24. Proceeding in Forma Pauperis

(a) Leave to Proceed in Forma Pauperis.

(1) **Motion in the District Court.** Except as stated in Rule 24(a)(3), a party to a district-court action who desires to appeal in forma pauperis must file a motion in the district court. The party must attach an affidavit that:

(A) shows in the detail prescribed by Form 4 of the Appendix of Forms the party's inability to pay or to give security for fees and costs;

(B) claims an entitlement to redress; and

(C) states the issues that the party intends to present on appeal.

(2) **Action on the Motion.** If the district court grants the motion, the party may proceed on appeal without prepaying or giving security for fees and costs, unless a statute provides otherwise. If the district court denies the motion, it must state its reasons in writing.

(3) **Prior Approval.** A party who was permitted to proceed in forma pauperis in the district-court action, or who was determined to be financially unable to obtain

an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization, unless:

(A) the district court – before or after the notice of appeal is filed – certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis and states in writing its reasons for the certification or finding; or

(B) a statute provides otherwise.

(4) **Notice of District Court's Denial.** The district clerk must immediately notify the parties and the court of appeals when the district court does any of the following:

(A) denies a motion to proceed on appeal in forma pauperis;

(B) certifies that the appeal is not taken in good faith; or

(C) finds that the party is not otherwise entitled to proceed in forma pauperis.

(5) **Motion in the Court of Appeals.** A party may file a motion to proceed on appeal in forma pauperis in the court of appeals within 30 days after service of the

43 notice prescribed in Rule 24(a)(4). The motion must
44 include a copy of the affidavit filed in the district court
45 and the district court's statement of reasons for its
46 action. If no affidavit was filed in the district court, the
47 party must include the affidavit prescribed by Rule
48 24(a)(1).

49 **(b) Leave to Proceed in Forma Pauperis on Appeal**
50 **from the United States Tax Court or on Appeal or Review**
51 **of an Administrative-Agency Proceeding.** ~~When an appeal~~
52 ~~or review of a proceeding before an administrative agency,~~
53 ~~board, commission, or officer (including for the purpose of~~
54 ~~this rule the United States Tax Court) proceeds directly in a~~
55 ~~court of appeals, a~~ A party may file in the court of appeals a
56 motion for leave to proceed on appeal in forma pauperis with
57 an affidavit prescribed by Rule 24(a)(1):

58 (1) in an appeal from the United States Tax Court;
59 and

60 (2) when an appeal or review of a proceeding
61 before an administrative agency, board, commission, or
62 officer proceeds directly in the court of appeals.

63 **(c) Leave to Use Original Record.** A party allowed to
64 proceed on appeal in forma pauperis may request that the

65 appeal be heard on the original record without reproducing

66 any part.

Committee Note

Rule 24(b) currently refers to review of proceedings "before an administrative agency, board, commission, or officer (including for the purpose of this rule the United States Tax Court)." Experience suggests that Rule 24(b) contributes to confusion by fostering the impression that the Tax Court is an executive branch agency rather than a court. (As a general example of that confusion, appellate courts have returned Tax Court records to the Internal Revenue Service, believing the Tax Court to be part of that agency.) To remove this possible source of confusion, the quoted parenthetical is deleted from subdivision (b) and appeals from the Tax Court are separately listed in subdivision (b)'s heading and in new subdivision (b)(1).

CHANGES MADE AFTER PUBLICATION AND COMMENT

No changes were made after publication and comment.

SUMMARY OF PUBLIC COMMENTS

No comments were received on the proposed amendment to Rule 24.

Rule 28. Briefs

1 **(a) Appellant's Brief.** The appellant's brief must

2 contain, under appropriate headings and in the order

3 indicated:

4 (1) a corporate disclosure statement if required by

5 Rule 26.1;

6 (2) a table of contents, with page references;

(3) a table of authorities — cases (alphabetically arranged), statutes, and other authorities — with references to the pages of the brief where they are cited;

(4) a jurisdictional statement, including:

(A) the basis for the district court's or agency's subject-matter jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(B) the basis for the court of appeals' jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(C) the filing dates establishing the timeliness of the appeal or petition for review; and

(D) an assertion that the appeal is from a final order or judgment that disposes of all parties' claims, or information establishing the court of appeals' jurisdiction on some other basis;

(5) a statement of the issues presented for review;

(6) a concise statement of the case ~~briefly indicating the nature of the case, the course of proceedings, and the disposition below;~~

~~(7) a statement of~~ setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record (see Rule 28(e));

~~(8)~~(7) a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings;

~~(9)~~ (8) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and

(B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues);

~~(10)~~ (9) a short conclusion stating the precise relief sought; and

~~(11)~~ (10) the certificate of compliance, if required by Rule 32(a)(7).

(b) Appellee's Brief. The appellee's brief must conform to the requirements of Rule 28(a)(1)-~~(9)~~ (8) and ~~(11)~~

52 (10), except that none of the following need appear unless the

53 appellee is dissatisfied with the appellant's statement:

54 (1) the jurisdictional statement;

55 (2) the statement of the issues;

56 (3) the statement of the case;

57 ~~(4) the statement of the facts;~~ and

58 ~~(5)~~ (4) the statement of the standard of review.

59 * * * * *

Committee Note

Subdivision (a). Rule 28(a) is amended to remove the requirement of separate statements of the case and of the facts. Currently Rule 28(a)(6) provides that the statement of the case must "indicat[e] the nature of the case, the course of proceedings, and the disposition below," and it precedes Rule 28(a)(7)'s requirement that the brief include "a statement of facts." Experience has shown that these requirements have generated confusion and redundancy. Rule 28(a) is amended to consolidate subdivisions (a)(6) and (a)(7) into a new subdivision (a)(6) that provides for one "statement," much like Supreme Court Rule 24.1(g) (which requires "[a] concise statement of the case, setting out the facts material to the consideration of the questions presented, with appropriate references to the joint appendix...."). This permits but does not require the lawyer to present the factual and procedural history chronologically. Conforming changes are made by renumbering Rules 28(a)(8) through (11) as Rules 28(a)(7) through (10).

The statement of the case should describe the nature of the case, which includes (1) the facts relevant to the issues submitted for review; (2) those aspects of the case's procedural history that are necessary to understand the posture of the appeal or are relevant to the issues submitted for review; and (3) the rulings presented for review. The statement should be concise, and can include subheadings, particularly for the purpose of highlighting the rulings presented for review.

Subdivision (b). Rule 28(b) is amended to accord with the amendment to Rule 28(a). Current Rules 28(b)(3) and (4) are

consolidated into new Rule 28(b)(3), which refers to "the statement of the case." Rule 28(b)(5) becomes Rule 28(b)(4). And Rule 28(b)'s reference to certain subdivisions of Rule 28(a) is updated to reflect the renumbering of those subdivisions.

CHANGES MADE AFTER PUBLICATION AND COMMENT

After publication and comment, the Committee made one change to the text of the proposal and two changes to the Committee Note.

During the comment period, concerns were raised that the deletion of current Rule 28(a)(6)'s reference to "the nature of the case, the course of proceedings, and the disposition below" might lead readers to conclude that those items may no longer be included in the statement of the case. The Committee rejected that concern with respect to the "nature of the case" and the "disposition below," because the Rule as published would naturally be read to permit continued inclusion of those items in the statement of the case. The Committee adhered to its view that the deletion of "course of proceedings" is useful because that phrase tends to elicit unnecessary detail; but to address the commenters' concerns, the Committee added, to the revised Rule text, the phrase "describing the relevant procedural history."

The Committee augmented the Note to Rule 28(a) in two respects. It added a reference to Supreme Court Rule 24.1(g), upon which the proposed revision to Rule 28(a)(6) is modeled. And it added – as a second paragraph in the Note – a discussion of the contents of the statement of the case.

SUMMARY OF PUBLIC COMMENTS

The following comments were received on the jointly published proposals to amend Rules 28 and 28.1.

Judge Jon O. Newman. In an email to Judge Sutton, Judge Newman argued that there is no reason to amend Rule 28. He noted that the Second Circuit's Clerk sought the views of her colleagues in other circuits and learned that they had not noticed any confusion on the part of lawyers concerning the statement of the case. Judge Newman stated that the statements of the case and of the facts should remain separate because "[j]udges should not have to comb through one consolidated statement that sets forth all the facts in great detail, often several pages, to find the key procedural step – what ruling (or

rulings) the lower court made." He urged that if the statements of the case and of the facts were to be consolidated, the rule should "at least allow any circuit to maintain the current separation by a local rule."

11-AP-001: M. Elizabeth Egbers. M. Elizabeth Egbers, of Becker Gallagher Legal Publishing, Inc., in Cincinnati, Ohio, wrote in opposition to the proposed amendments. She stated that the amendments are unneeded, and she predicted that they will inconvenience lawyers, engender confusion, and require changes to local court rules and checklists.

11-AP-002: Jack Schisler. Jack Schisler, the Fayetteville Chief of the Arkansas Federal Defender Organization, wrote to support the proposed amendments, stating that they will "streamline the process."

11-AP-003: The National Association of Criminal Defense Lawyers. Peter Goldberger wrote on behalf of the National Association of Criminal Defense Lawyers ("NACDL") to express general support for the proposed amendments and to suggest two revisions to them.

One such proposed revision concerned the use of the word "relevant." NACDL argued that the term "relevant" in proposed Rule 28(a)(6) might lead lawyers to think that the statement of the case must contain "all the facts pertinent [to] an argument." NACDL suggested revising the Committee Note "to make clear that a brief overview of the facts may be sufficient in the Statement, where additional necessary details are set forth in the Argument portion of the brief, showing how the issues raised and argument ... arise[] out of the factual history of the case."

NACDL's other suggestion concerned the proposal's elimination of the words "briefly indicating the nature of the case, the course of proceedings, and the disposition below." NACDL was concerned that the elimination of this language might be taken to imply "that these basic 'facts' are not appropriate for inclusion in an appellate brief." NACDL's comments suggested that it would prefer that this language not be deleted from the Rule text; failing that, NACDL argued that "at least the Note should be amended" to forestall such an implication. NACDL proposed the following language: "a concise statement setting forth the nature of the case, the essential procedural history (including reference to the rulings presented for review), and the key facts giving rise to the claims or charges as well as those relevant to the issues submitted for review …."

11-AP-004: The ABA Council of Appellate Lawyers. Steven Finell wrote on behalf of the Council of Appellate Lawyers of the Appellate Judges Conference of the American Bar Association's Judicial Division. The Council supported the goals of the proposed amendments, noting that combining the statements of the case and of the facts will reduce confusion and redundancy, and observing that this consolidation is "favored by a substantial majority of experienced appellate lawyers who responded to our survey." However, the Council believed that the amendments as drafted will mislead attorneys, and it submitted a different proposed formulation.

The Council warned against the deletion of current Rule 28(a)(6)'s reference to "the nature of the case." The Council observed that it is useful for the brief to state the nature of the case (e.g., a medical malpractice action), and feared that deleting this wording would "at least arguably" ban lawyers from describing the nature of the case (because "the preamble of Rule 28(a) states that a 'brief must contain' the contents prescribed by the numbered subdivisions 'in the order indicated'").

The Council also warned against deleting the reference to "the course of proceedings." The Council argued that a well-drafted rule would not "banish *all* procedural history" but rather would "make clear that procedural history should be limited to that which is necessary to inform the court of the posture of the case and give context to the issues presented for review."

The Council objected on style grounds to the phrase "a concise statement of the case setting out the facts relevant to the issues submitted for review" because "setting out the facts" is a verb construction that contrasts with noun constructions elsewhere in Rule 28(a).

The Council viewed the phrase "identifying the rulings presented for review" as undesirable because "identifying" could mean providing page cites, docket numbers, or titles and dates of rulings, "*none* of which is what the rule intends."

The Council proposed "amending Rule 28(e) to require a pinpoint citation to the appendix or record to support each statement of fact and procedural history anywhere in every brief," rather than "only in the statement of facts."

Finally, the Council suggested "amending Rule 28 to caution parties against repeating the same material in more than one of the sections of the brief that precede the summary of argument."

11-AP-005: DRI. Henry M. Sneath wrote on behalf of DRI–The Voice of the Defense Bar. DRI supports the proposed amendments because they will "allow[] the brief to present the factual and procedural history chronologically and eliminate[] any overlap or repetition between the two sections."

Rule 28.1. Cross-Appeals

1 * * * * *

2 **(c) Briefs.** In a case involving a cross-appeal:

3 (1) **Appellant's Principal Brief.** The appellant
4 must file a principal brief in the appeal. That brief must
5 comply with Rule 28(a).

6 (2) **Appellee's Principal and Response Brief.**
7 The appellee must file a principal brief in the
8 cross-appeal and must, in the same brief, respond to the
9 principal brief in the appeal. That appellee's brief must
10 comply with Rule 28(a), except that the brief need not
11 include a statement of the case ~~or a statement of the~~
12 ~~facts~~ unless the appellee is dissatisfied with the
13 appellant's statement.

14 (3) **Appellant's Response and Reply Brief.** The
15 appellant must file a brief that responds to the principal
16 brief in the cross-appeal and may, in the same brief,
17 reply to the response in the appeal. That brief must
18 comply with Rule 28(a)(2)-~~(9)~~ (8) and ~~(11)~~ (10), except
19 that none of the following need appear unless the

20 appellant is dissatisfied with the appellee's statement in
21 the cross-appeal:
22 (A) the jurisdictional statement;
23 (B) the statement of the issues;
24 (C) the statement of the case;
25 ~~(D) the statement of the facts;~~ and
26 ~~(E)~~ (D) the statement of the standard of
27 review.
28 (4) **Appellee's Reply Brief.** The appellee may
29 file a brief in reply to the response in the cross-appeal.
30 That brief must comply with Rule 28(a)(2)-(3) and ~~(11)~~
31 (10) and must be limited to the issues presented by the
32 cross-appeal.
33 * * * * *

Committee Note

Subdivision (c). Subdivision (c) is amended to accord with the amendments to Rule 28(a). Rule 28(a) is amended to consolidate subdivisions (a)(6) and (a)(7) into a new subdivision (a)(6) that provides for one "statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review. . . ." Rule 28.1(c) is amended to refer to that consolidated "statement of the case," and references to subdivisions of Rule 28(a) are revised to reflect the re-numbering of those subdivisions.

CHANGES MADE AFTER PUBLICATION AND COMMENT

No changes were made to the text of the proposed amendment to Rule 28.1 after publication and comment. The Committee revised

a quotation in the Committee Note to Rule 28.1(c) to conform to the changes (described above) to the text of proposed Rule 28(a)(6).

SUMMARY OF PUBLIC COMMENTS

The comments received on the jointly published proposals to amend Rules 28 and 28.1 are described above. None of those comments related specifically to the proposed amendments to Rule 28.1.

Form 4. Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis

* * * * *

1. *For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.*

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$_____	$_____	$_____	$_____
Self-employment	$_____	$_____	$_____	$_____
Income from real property (such as rental income)	$_____	$_____	$_____	$_____
Interest and dividends	$_____	$_____	$_____	$_____
Gifts	$_____	$_____	$_____	$_____
Alimony	$_____	$_____	$_____	$_____
Child support	$_____	$_____	$_____	$_____
Retirement (such as social security, pensions, annuities, insurance)	$_____	$_____	$_____	$_____
Disability (such as social security, insurance payments)	$_____	$_____	$_____	$_____
Unemployment payments	$_____	$_____	$_____	$_____
Public-assistance (such as welfare)	$_____	$_____	$_____	$_____
Other (specify): _____	$_____	$_____	$_____	$_____
Total monthly income:	$_____	$_____	$_____	$_____

2. *List your employment history <u>for the past two years</u>, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

Employer	Address	Dates of employment	Gross monthly pay
_____	_____	_____	_____

_____	_____	_____	_____
_____	_____	_____	_____

3. *List your spouse's employment history <u>for the past two years</u>, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

Employer	Address	Dates of employment	Gross monthly pay
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

4. *How much cash do you and your spouse have? $_____*
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
_____	_____	$_____	$_____
_____	_____	$_____	$_____
_____	_____	$_____	$_____

If you are a prisoner <u>seeking to appeal a judgment in a civil action or proceeding</u>, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

* * * * *

~~*10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form?* ☐ Yes ☐ No~~

~~If yes, how much? $_____~~
~~If yes, state the attorney's name, address, and telephone number:~~
_____
_____
_____

~~*11. Have you paid – or will you be paying – anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?*~~

~~☐ Yes ☐ No~~
~~If yes, how much? $_____~~
~~If yes, state the person's name, address, and telephone number:~~
_____
_____
_____

70 10. *Have you spent – or will you be spending – any money for expenses or attorney fees in*
71 *connection with this lawsuit?*

72 ☐ Yes ☐ No
73 If yes, how much? $ _____

74 ~~12.~~ 11. *Provide any other information that will help explain why you cannot pay the docket*
75 *fees for your appeal.*

76 ~~13.~~ 12. *State the city and state of your legal residence.*
77 _____
78 Your daytime phone number: (____) _____
79 Your age: _____ Your years of schooling: _____
80 Last four digits of your social-security number: _____

CHANGES MADE AFTER PUBLICATION AND COMMENT

No changes were made to the proposed amendments to Form 4 after publication and comment.

SUMMARY OF PUBLIC COMMENTS

The following comment was received on the proposal to amend Form 4.

11-AP-003: The National Association of Criminal Defense Lawyers. Peter Goldberger wrote on behalf of the National Association of Criminal Defense Lawyers ("NACDL") to propose a modification of one aspect of the published amendment to Form 4. The relevant portion of the proposed amendment, as published, would clarify that an institutional-account statement must be filed by a prisoner "seeking to appeal a judgment in a civil action or proceeding" in forma pauperis. NACDL suggested that the quoted language "be clarified to reflect more accurately the coverage of the Prison Litigation Reform Act, by adding '(not including a decision in a habeas corpus proceeding or a proceeding under 28 U.S.C. § 2255).'" The Committee decided not to incorporate this change into the currently proposed amendment, but has added it to its study agenda as a separate item.

Rule 6. Appeal in a Bankruptcy Case ~~From a Final Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel~~

(a) Appeal From a Judgment, Order, or Decree of a District Court Exercising Original Jurisdiction in a Bankruptcy Case. An appeal to a court of appeals from a final judgment, order, or decree of a district court exercising jurisdiction under 28 U.S.C. § 1334 is taken as any other civil appeal under these rules.

(b) Appeal From a Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel Exercising Appellate Jurisdiction in a Bankruptcy Case.

(1) Applicability of Other Rules. These rules apply to an appeal to a court of appeals under 28 U.S.C. § 158(d)(1) from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction under 28 U.S.C. § 158(a) or (b)~~.~~ ~~But there are 3 exceptions~~, but with these qualifications:

(A) Rules 4(a)(4), 4(b), 9, 10, 11, ~~12(b)~~ 12(c), 13-20, 22-23, and 24(b) do not apply;

(B) the reference in Rule 3(c) to "Form 1 in the Appendix of Forms" must be read as a reference to Form 5; ~~and~~

(C) when the appeal is from a bankruptcy appellate panel, ~~the term~~ "district court," as used in any applicable rule, means "appellate panel~~.~~"; and

(D) in Rule 12.1, "district court" includes a bankruptcy court or bankruptcy appellate panel.

(2) Additional Rules. In addition to the rules made applicable by Rule 6(b)(1), the following rules apply:

(A) Motion for r~~r~~Rehearing.

(i) If a timely motion for rehearing under Bankruptcy Rule ~~8015~~ 8022 is filed, the time to appeal for all parties runs from the entry of the order disposing of the motion. A notice of appeal filed after the district court or bankruptcy appellate panel announces or enters a judgment, order, or decree – but before disposition of the motion for rehearing – becomes effective when the order disposing of the motion for rehearing is entered.

(ii) ~~Appellate review of~~ If a party intends to challenge the order disposing of the motion – or the alteration or amendment of a judgment, order, or decree upon the motion – then ~~requires~~ the party, in

compliance with Rules 3(c) and 6(b)(1)(B), ~~to amend a previously filed notice of appeal. A party intending to challenge an altered or amended judgment, order, or decree~~ must file a notice of appeal or amended notice of appeal. The notice or amended notice must be filed within the time prescribed by Rule 4 – excluding Rules 4(a)(4) and 4(b) – measured from the entry of the order disposing of the motion.

(iii) No additional fee is required to file an amended notice.

(B) The r~~R~~ecord on a~~A~~ppeal.

(i) Within 14 days after filing the notice of appeal, the appellant must file with the clerk possessing the record assembled in accordance with Bankruptcy Rule ~~8006~~ 8009 – and serve on the appellee – a statement of the issues to be presented on appeal and a designation of the record to be certified and ~~sent~~ made available to the circuit clerk.

(ii) An appellee who believes that other parts of the record are necessary must, within

14 days after being served with the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included.

(iii) The record on appeal consists of:

• the redesignated record as provided above;

• the proceedings in the district court or bankruptcy appellate panel; and

• a certified copy of the docket entries prepared by the clerk under Rule 3(d).

(C) ~~Forwarding~~ Making the r~~R~~ecord Available.

(i) When the record is complete, the district clerk or bankruptcy-appellate-panel clerk must number the documents constituting the record and ~~send~~ promptly make it available ~~them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified~~ to the circuit clerk. ~~Unless directed to do so by a party or the circuit clerk~~ If the clerk makes the record available in paper

form, the clerk will not send ~~to the court of appeals~~ documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals, unless directed to do so by a party or the circuit clerk. If ~~the exhibits are~~ unusually bulky or heavy exhibits are to be made available in paper form, a party must arrange with the clerks in advance for their transportation and receipt.

(ii) All parties must do whatever else is necessary to enable the clerk to assemble the record and ~~forward the record~~ make it available. When the record is made available in paper form, t~~T~~he court of appeals may provide by rule or order that a certified copy of the docket entries be ~~sent~~ made available in place of the redesignated record~~;~~ ~~b~~. But any party may request at any time during the pendency of the appeal that the redesignated record be ~~sent~~ made available.

(D) Filing the r<u>R</u>ecord. ~~Upon receiving the record – or a certified copy of the docket entries sent in place of the redesignated record – the circuit clerk must file it and immediately notify all parties of the filing date~~ When the district clerk or bankruptcy-appellate-panel clerk has made the record available, the circuit clerk must note that fact on the docket. The date noted on the docket serves as the filing date of the record. The circuit clerk must immediately notify all parties of the filing date.

(c) Direct Review by Permission Under 28 U.S.C. § 158(d)(2).

(1) Applicability of Other Rules. These rules apply to a direct appeal by permission under 28 U.S.C. § 158(d)(2), but with these qualifications:

(A) Rules 3-4, 5(a)(3), 6(a), 6(b), 8(a), 8(c), 9-12, 13-20, 22-23, and 24(b) do not apply;

(B) as used in any applicable rule, "district court" or "district clerk" includes – to the extent appropriate – a bankruptcy court or bankruptcy appellate panel or its clerk; and

134 (C) the reference to "Rules 11 and 12(c)" in
135 Rule 5(d)(3) must be read as a reference to Rules
136 6(c)(2)(B) and (C).
137 **(2) Additional Rules.** In addition, the following
138 rules apply:
139 (A) **The Record on Appeal.** Bankruptcy
140 Rule 8009 governs the record on appeal.
141 (B) **Making the Record Available.**
142 Bankruptcy Rule 8010 governs completing the
143 record and making it available.
144 (C) **Stays Pending Appeal.** Bankruptcy
145 Rule 8007 applies to stays pending appeal.
146 (D) **Duties of the Circuit Clerk.** When the
147 bankruptcy clerk has made the record available,
148 the circuit clerk must note that fact on the docket.
149 The date noted on the docket serves as the filing
150 date of the record. The circuit clerk must
151 immediately notify all parties of the filing date.
152 (E) **Filing a Representation Statement**.
153 Unless the court of appeals designates another
154 time, within 14 days after entry of the order
155 granting permission to appeal, the attorney who
156 sought permission must file a statement with the

157 circuit clerk naming the parties that the attorney

158 represents on appeal.

Committee Note

Subdivision (b)(1). Subdivision (b)(1) is updated to reflect the renumbering of 28 U.S.C. § 158(d) as 28 U.S.C. § 158(d)(1). Subdivision (b)(1)(A) is updated to reflect the renumbering of Rule 12(b) as Rule 12(c). New subdivision (b)(1)(D) provides that references in Rule 12.1 to the "district court" include – as appropriate – a bankruptcy court or bankruptcy appellate panel.

Subdivision (b)(2). Subdivision (b)(2)(A)(i) is amended to refer to Bankruptcy Rule 8022 (in accordance with the renumbering of Part VIII of the Bankruptcy Rules).

Subdivision (b)(2)(A)(ii) is amended to address problems that stemmed from the adoption — during the 1998 restyling project — of language referring to challenges to "an altered or amended judgment, order, or decree." Current Rule 6(b)(2)(A)(ii) states that "[a] party intending to challenge an altered or amended judgment, order, or decree must file a notice of appeal or amended notice of appeal …." Before the 1998 restyling, the comparable subdivision of Rule 6 instead read "[a] party intending to challenge an alteration or amendment of the judgment, order, or decree shall file an amended notice of appeal …." The 1998 restyling made a similar change in Rule 4(a)(4). One court has explained that the 1998 amendment introduced ambiguity into that Rule: "The new formulation could be read to expand the obligation to file an amended notice to circumstances where the ruling on the post-trial motion alters the prior judgment in an insignificant manner or in a manner favorable to the appellant, even though the appeal is not directed against the alteration of the judgment." *Sorensen v. City of New York*, 413 F.3d 292, 296 n.2 (2d Cir. 2005). Though the *Sorensen* court was writing of Rule 4(a)(4), a similar concern arises with respect to Rule 6(b)(2)(A)(ii). Rule 4(a)(4) was amended in 2009 to remove the ambiguity identified by the *Sorensen* court. The current amendment follows suit by removing Rule 6(b)(2)(A)(ii)'s reference to challenging "an altered or amended judgment, order, or decree," and referring instead to challenging "the alteration or amendment of a judgment, order, or decree."

Subdivision (b)(2)(B)(i) is amended to refer to Rule 8009 (in accordance with the renumbering of Part VIII of the Bankruptcy Rules).

Due to the shift to electronic filing, in some appeals the record will no longer be transmitted in paper form. Subdivisions (b)(2)(B)(i), (b)(2)(C), and (b)(2)(D) are amended to reflect the fact that the record sometimes will be made available electronically.

Subdivision (b)(2)(D) sets the duties of the circuit clerk when the record has been made available. Because the record may be made available in electronic form, subdivision (b)(2)(D) does not direct the clerk to "file" the record. Rather, it directs the clerk to note on the docket the date when the record was made available and to notify the parties of that date, which shall serve as the date of filing the record for purposes of provisions in these Rules that calculate time from that filing date.

Subdivision (c). New subdivision (c) is added to govern permissive direct appeals from the bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2). For further provisions governing such direct appeals, see Bankruptcy Rule 8006.

Subdivision (c)(1). Subdivision (c)(1) provides for the general applicability of the Federal Rules of Appellate Procedure, with specified exceptions, to appeals covered by subdivision (c) and makes necessary word adjustments.

Subdivision (c)(2). Subdivision (c)(2)(A) provides that the record on appeal is governed by Bankruptcy Rule 8009. Subdivision (c)(2)(B) provides that the record shall be made available as stated in Bankruptcy Rule 8010. Subdivision (c)(2)(C) provides that Bankruptcy Rule 8007 applies to stays pending appeal; in addition, Appellate Rule 8(b) applies to sureties on bonds provided in connection with stays pending appeal.

Subdivision (c)(2)(D), like subdivision (b)(2)(D), directs the clerk to note on the docket the date when the record was made available and to notify the parties of that date, which shall serve as the date of filing the record for purposes of provisions in these Rules that calculate time from that filing date.

Subdivision (c)(2)(E) is modeled on Rule 12(b), with appropriate adjustments.

TAB 5B

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Advisory Committee on Appellate Rules
Table of Agenda Items — May 2012

FRAP Item	Proposal	Source	Current Status
05-01	Amend FRAP 21 & 27(c) to conform to Justice for All Act of 2004.	Advisory Committee	Discussed and retained on agenda 04/05; awaiting proposal from Department of Justice Discussed and retained on agenda 04/06; Department of Justice will monitor practice under the Act
07-AP-E	Consider possible FRAP amendments in response to Bowles v. Russell (2007).	Mark Levy, Esq.	Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 04/11
07-AP-H	Consider issues raised by Warren v. American Bankers Insurance of Florida, 2007 WL 3151884 (10th Cir. 2007), concerning the operation of the separate document rule.	Appellate Rules Committee	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08
07-AP-I	Consider amending FRAP 4(c)(1) to clarify the effect of failure to prepay first-class postage.	Hon. Diane Wood	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08
08-AP-C	Abolish FRAP 26(c)'s three-day rule.	Hon. Frank H. Easterbrook	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09
08-AP-G	Consider substantive and style changes to FRAP Form 4	Appellate Rules Committee	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 10/10 Draft approved 04/11 for submission to Standing Committee Approved for publication by Standing Committee 06/11 Published for comment 08/11 Draft approved 04/12 for submission to Standing Committee

FRAP Item	Proposal	Source	Current Status
08-AP-H	Consider issues of "manufactured finality" and appealability	Mark Levy, Esq.	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 10/10 Discussed and retained on agenda 04/11
08-AP-J	Consider FRAP implications of conflict screening	Committee on Codes of Conduct	Discussed and retained on agenda 11/08
08-AP-L	Amend FRAP 6(b)(2)(A)(ii) to remove ambiguity	Reporter	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09 Discussed and retained on agenda 10/10 Discussed jointly with Bankruptcy Rules Committee and retained on agenda 04/11 Discussed and retained on agenda 10/11 Draft approved 04/12 for submission to Standing Committee
08-AP-M	Consider FRAP implications of interlocutory appeals in tax cases	Reporter	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Draft approved 10/10 for submission to Standing Committee Approved for publication by Standing Committee 01/11 Published for comment 08/11 Draft approved 04/12 for submission to Standing Committee
08-AP-N	Amend FRAP 5 to allow parties to submit an appendix of key documents from the record along with petitions and answers	Peder K. Batalden, Esq.	Discussed and retained on agenda 04/09
08-AP-P	Amend FRAP 32 to change from double line-spacing to 1.5 line-spacing for briefs	Peder K. Batalden, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09
08-AP-Q	Consider amending FRAP 10(b) to permit the use of digital audio recordings in place of written transcripts	Hon. Michael M. Baylson	Discussed and retained on agenda 04/09 Discussed and retained on agenda 10/10
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09
09-AP-A	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	ABA Council of Appellate Lawyers	Discussed and retained on agenda 04/09

FRAP Item	Proposal	Source	Current Status
09-AP-B	Amend FRAP 1(b) to include federally recognized Indian tribes within the definition of "state"	Daniel I.S.J. Rey-Bear, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed and retained on agenda 10/11 Discussed and retained on agenda 04/12
09-AP-C	Consider possible FRAP amendments in the light of project to revise Part VIII of the Bankruptcy Rules	Bankruptcy Rules Committee	Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed jointly with Bankruptcy Rules Committee and retained on agenda 04/11 Discussed and retained on agenda 10/11 Draft approved 04/12 for submission to Standing Committee
09-AP-D	Consider implications of Mohawk Industries, Inc. v. Carpenter	John Kester, Esq.	Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10
10-AP-B	Consider FRAP 28's treatment of statements of the case and of the facts	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Draft approved 04/11 for submission to Standing Committee Approved for publication by Standing Committee 06/11 Published for comment 08/11 Draft approved 04/12 for submission to Standing Committee
10-AP-D	Consider factors to be taken into account when taxing costs under FRAP 39	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/10 Discussed and retained on agenda 04/11 Discussed and retained on agenda 10/11
10-AP-H	Consider issues relating to appellate review of remand orders	Committee on Federal-State Jurisdiction	Discussed and retained on agenda 10/10
10-AP-I	Consider issues raised by redactions in appellate briefs	Paul Alan Levy, Esq.	Discussed and retained on agenda 04/11 Discussed and retained on agenda 10/11 Discussed and retained on agenda 04/12
11-AP-C	Amend FRAP 3(d)(1) to take account of electronic filing	Harvey D. Ellis, Jr., Esq.	Awaiting initial discussion
11-AP-D	Consider changes to FRAP in light of CM/ECF	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/11

FRAP Item	Proposal	Source	Current Status
11-AP-E	Consider amendment to FRAP 4(b)	Roger I. Roots, Esq.	Discussed and retained on agenda 04/12
11-AP-F	Consider amendment authorizing discretionary interlocutory appeals from attorney-client privilege rulings	Amy M. Smith, Esq.	Awaiting initial discussion
12-AP-B	Consider amending FRAP Form 4's directive concerning institutional-account statements for IFP applicants	Peter Goldberger, Esq., on behalf of the National Association of Criminal Defense Lawyers (NACDL)	Awaiting initial discussion
12-AP-C	Consider amending Rule 28(e) to require pinpoint citations to the appendix or record throughout briefs	Steven Finell, Esq., on behalf of the Council of Appellate Lawyers of the Appellate Judges Conference of the American Bar Association's Judicial Division	Awaiting initial discussion
12-AP-D	Consider the treatment of appeal bonds under Civil Rule 62 and Appellate Rule 8	Kevin C. Newsom, Esq.	Awaiting initial discussion
12-AP-E	Consider treatment of length limits for petitions for rehearing en banc under Rule 35	Professor Neal K. Katyal	Awaiting initial discussion

TAB 5C

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Minutes of Spring 2012 Meeting of
Advisory Committee on Appellate Rules
April 12, 2012
Washington, D.C.

I. Introductions

Judge Jeffrey S. Sutton called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, April 12, 2012, at 9:00 a.m. at the Administrative Office of the United States Courts in Washington, D.C. The following Advisory Committee members were present: Judge Michael A. Chagares, Judge Robert Michael Dow, Jr., Justice Allison H. Eid, Judge Peter T. Fay, Professor Neal K. Katyal, Mr. Kevin C. Newsom, and Mr. Richard G. Taranto. Mr. Douglas Letter, Appellate Staff Director and Senior Counselor to the Attorney General, and Mr. H. Thomas Byron III, Civil Division, U.S. Department of Justice ("DOJ"), were present representing the Solicitor General. Also present were Ralph W. Johnson III, Counsel to Senator Chuck Grassley (the Ranking Member of the Senate Judiciary Committee); Judge Jeremy Fogel, Director of the Federal Judicial Center ("FJC"); Mr. Peter G. McCabe, Secretary to the Standing Committee; Mr. Jonathan C. Rose, Rules Committee Officer in the Administrative Office ("AO"); Benjamin Robinson, Deputy Rules Committee Officer and Counsel to the Rules Committees; Julie Wilson, Attorney Advisor in the AO; Mr. Leonard Green, liaison from the appellate clerks; Ms. Marie Leary from the FJC; Holly Sellers, Attorney Advisor in the AO; Julie Yap, Supreme Court Fellow assigned to the AO; Milena Sanchez de Boado, Supreme Court Fellow assigned to the FJC; Michael Duggan, Supreme Court Fellow assigned to the Supreme Court; Judge Fausto Martin de Sanctis, a Visiting Foreign Judicial Fellow at the FJC; and Dr. Roger I. Roots. Professor Daniel R. Coquillette, Reporter for the Standing Committee, participated by telephone.

Judge Sutton welcomed the meeting participants. He introduced one of the Committee's new members, Professor Katyal, who replaces former Committee member Maureen Mahoney. Professor Katyal served as Acting Solicitor General of the United States, and now is both a partner at Hogan Lovells and a professor at Georgetown University. Judge Sutton also informed the Committee that Mr. Letter – long an indispensable member of the Committee – has been promoted to Appellate Staff Director of the Civil Division of the DOJ, and is also serving as Senior Counselor to the Attorney General. Mr. Letter introduced Mr. Byron – his colleague from the Appellate Staff of the Civil Division of the DOJ – who has long experience working on matters relating to the Appellate Rules Committee's agenda, and who was a classmate of Justice Eid.

During the meeting, Judge Sutton thanked Mr. McCabe, Mr. Rose, Mr. Robinson, and the

AO staff for their preparations for and participation in the meeting.

II. Approval of Minutes of October 2011 Meeting

A motion was made and seconded to approve the minutes of the Committee's October 2011 meeting. The motion passed by voice vote without dissent.

III. Report on January 2012 Meeting of Standing Committee

Judge Sutton summarized relevant events at the Standing Committee's January 2012 meeting. The meeting included a very interesting panel presentation on class actions. Also at the meeting, Judge Kravitz appointed Judge Gorsuch to chair a Subcommittee that will consider the choice of language in the national Rules to describe activities relating to electronic filing and service; Professor Struve will serve as the subcommittee's reporter. It seems likely that the Subcommittee will consider, among other things, the language that the Appellate Rules Committee proposes for Appellate Rule 6's treatment of the record in bankruptcy appeals.

Judge Sutton noted that, on December 1, 2011, the amendments to Appellate Rules 4 and 40 and to 28 U.S.C. § 2107 took effect. He observed that Mr. Johnson's work on the amendment to Section 2107 was invaluable. The process of amending Section 2107 was challenging because Congress's agenda was so full.

IV. Action Items

A. For final approval

1. Item No. 08-AP-G (FRAP Form 4)

Judge Sutton invited the Reporter to introduce this item, which concerns proposed amendments to Form 4 (relating to applications to proceed in forma pauperis ("IFP")). The proposed amendments will remove the current Form's requirement that the applicant provide detailed information concerning the applicant's expenditures for legal and other services in connection with the case. In addition, the amendments make technical changes to incorporate amendments that were approved by the Judicial Conference in fall 1997 but were not transmitted to Congress. During the public comment period, the Committee received only one comment on Form 4. This comment – from the National Association of Criminal Defense Lawyers ("NACDL") – focused on an aspect of the technical changes approved in fall 1997. The current Form 4 directs "prisoner[s]" to attach an institutional account statement to their IFP applications. The proposed amendment, as published, would specify that this requirement applies only to prisoners who are "seeking to appeal a judgment in a civil action or proceeding"; this more specific language tracks the wording in 28 U.S.C. § 1915(a)(2) (a provision added to Section 1915 by the Prison Litigation Reform Act ("PLRA")). NACDL suggests that Form 4 should further specify that the requirement of the institutional-account statement applies to prisoners "seeking to appeal a judgment in a civil action or proceeding (not including a decision in a

habeas corpus proceeding or a proceeding under 28 U.S.C. § 2255)."

The Reporter observed that the premise of NACDL's suggestion appears to be accurate, though there are a few doctrinal complexities. Caselaw in all twelve of the relevant circuits states that the PLRA's provisions concerning IFP litigation do not apply to state-prisoner habeas petitions under 28 U.S.C. § 2254. Seven circuits have, likewise, held the PLRA's IFP provisions inapplicable to federal-prisoner proceedings under 28 U.S.C. § 2255. Similarly, holdings in five circuits and dicta in two other circuits state that the PLRA's IFP provisions do not apply to habeas proceedings under 28 U.S.C. § 2241. An additional issue concerns how to categorize mandamus petitions arising in connection with habeas or Section 2255 proceedings. Caselaw in some circuits provides that the applicability of the PLRA's IFP provisions to mandamus petitions depends on whether the underlying proceeding is one to which those provisions would apply, but some cases suggest other possible approaches.

The Reporter stated that the caselaw refusing to apply the PLRA's IFP provisions to habeas and Section 2255 proceedings advances persuasive arguments for that refusal. Applying those provisions to such proceedings would run counter to the tradition of access to court for habeas petitioners. Moreover, the PLRA was directed toward suits challenging prison conditions, and habeas suits are not generally the proper vehicle for such challenges. And the Antiterrorism and Effective Death Penalty Act ("AEDPA"), enacted within days of the PLRA, addresses habeas and Section 2255 litigation (and specifically addresses the issue of successive petitions).

The Reporter suggested that though the doctrinal premise of NACDL's suggestion appears sound, there are reasons to consider the proposal further before deciding whether to adopt it. The change proposed by NACDL might itself cause confusion for some applicants. For example, if an IFP applicant (erroneously or not) styled a challenge to prison conditions as a habeas petition, NACDL's proposed language would suggest to that applicant that he or she need not provide an institutional-account statement – yet that suggestion would likely be inaccurate. Admittedly, a litigant's confusion as to the nature of his or her suit is likely to have been dispelled by the trial judge prior to the time that the litigant attempts to take an appeal. But it bears noting that some district courts use a form – promulgated by the AO – that tracks Form 4 quite closely. In addition, the Supreme Court's rules direct the use of Form 4 in connection with applications to proceed IFP in the Supreme Court. Accordingly, the Reporter suggested that the Committee approve the amendments to Form 4 as published and add NACDL's suggestion to the Committee's agenda as a new item.

An appellate judge member noted that the relevant language of Form 4 as reflected in the published amendments had been fully considered in the rulemaking process in 1997. A motion was made to approve the amendments as published and to place NACDL's suggestion on the study agenda. The motion was seconded and passed by voice vote without dissent.

2. Item No. 08-AP-M (FRAP 13, 14, and 24 / tax appeals)

Judge Sutton invited the Reporter to present this item, which concerns certain amendments relating to appeals in tax cases. The proposed amendments to Rules 13 and 14 will update those Rules to take account of permissive interlocutory appeals from the United States Tax Court under 26 U.S.C. § 7482(a)(2). Those amendments were developed in consultation with the Tax Court and the DOJ's Tax Division. In the course of those discussions, the Tax Court proposed a further amendment to Rule 24 (concerning applications to proceed IFP); that amendment revises Rule 24(b) to reflect the Tax Court's status as a court rather than an agency.

No comments were received on these proposed amendments. The Reporter suggested that the Committee approve them as published. A motion was made and seconded to approve the amendments to Rules 13, 14, and 24 as published. The motion passed by voice vote without dissent.

3. Item No. 10-AP-B (FRAP 28 & 28.1 / statement of the case)

Judge Sutton introduced this item, which concerns proposed amendments to Rule 28's list of the required contents of briefs (as well as a conforming amendment to Rule 28.1 concerning cross-appeals). During the comment period, only two commenters argued that the amendments should be abandoned; the other commenters agreed with the general purpose of the amendments. Judge Sutton noted that it makes sense to amend the rules so that briefs can present matters chronologically. However, some commenters expressed concern that the removal of some of Rule 28(a)(6)'s current language might be taken to suggest that the matters referred to in the deleted language can no longer be included in the brief.

Judge Sutton observed that the agenda materials proffered three options for the Committee's consideration. One approach would augment the Committee Note to address the commenters' concerns. Another approach would revise the amendment to the Rule text. And a third approach would simply revert to a different option previously considered by the Committee – namely, reversing the order of current Rules 28(a)(6) and 28(a)(7). That third approach has some appeal, but on the other hand there is much to recommend an approach that would bring Rule 28 into closer parallel with the Supreme Court's analogous rule. Lawyers have not had trouble understanding the requirements of the Supreme Court's rule. Judge Sutton recalled that a former attorney member of the Committee had argued in favor of keeping the Rule text relatively spare, in order to preserve flexibility for lawyers in drafting briefs. He observed that some of the specificity that commentators had proposed for the Rule text might be counterproductive; for example, a requirement that the brief specify the key facts giving rise to the claim would not make sense in the context of an appeal that concerns a purely procedural issue. Judge Sutton noted that Judge Newman had expressed the view that no amendment was needed, and also that Judge Newman had pointed out that judges and clerks want a place in the brief, with a heading, where they can quickly look to identify the rulings that are being appealed.

An attorney member observed that there are two different sorts of lawyers to consider; experienced appellate lawyers prefer flexibility, and for them, a simpler rule is better. Less-experienced lawyers may need a provision that spells things out. This member recalled that

Professor Coquillette had stated that matters of substance should not be addressed in the Notes. Mr. Letter agreed that if the Committee wishes to specify more detail, that detail should go in the Rule text rather than the Note. Some lawyers handle appeals only occasionally; and rules pamphlets usually do not include Committee Notes. Mr. Letter reiterated that it is important for briefs to be helpful to judges, and he noted that he has heard judges complain that briefs are not meeting this standard. He asked what the judge members of the Committee thought. An appellate judge member stated that he did not share Judge Newman's concern, and that he favored approving the proposal as published. Another appellate judge member agreed that the proposal should be approved as published; in his view, statements of the case under the existing Rule 28 are not helpful.

Judge Sutton asked whether it is inappropriate for a Committee Note to explain the intent of the amendment in the context of the prior rule – for example by explaining that the removal of a specific textual reference to a certain component is not meant to outlaw inclusion of that component. An attorney member questioned what aspects of the proposed augmented Committee Note would be substantive. The one change that he could see as possibly substantive would be the removal of a reference to the "course of proceedings"; the other changes seemed more like reordering and clarifying the present rule. He asked whether omission of any reference to procedural history might cause briefs to omit something that is important for understanding; but he noted that it would be almost impossible to indicate the "rulings presented for review" without discussing the relevant procedural history.

Turning to specific drafting issues, an attorney member questioned whether it is really appropriate to use the term "concise" in the proposed provision that combines the former Rules 28(a)(6) and 28(a)(7). He suggested deleting "concise." Judge Sutton observed that there is little risk that briefs will end up being too short, but he agreed that the use of the term "concise," coupled with the removal of references to specific components in a brief, might lead to an overly minimalist approach. An appellate judge member disagreed, predicting that there is no risk of undue minimalism in briefs; another appellate judge member concurred in this view. A participant asked whether the inclusion of the word "concise" in amended Rule 28(a)(6) would suggest – by negative implication – that other portions of the brief need not be concise. Members responded that similar words are employed in a number of the subsections of Rule 28(a).

The attorney member also stated that he understood a commentator's concern about the published rule's use of the term "relevant" as centering on the fact that the published language refers to "*the* facts relevant to the issues submitted for review" – that is to say, the use of the word "the" might cause a reader to conclude that facts not mentioned in the statement may not be relied upon in the brief. He noted, on the other hand, that such an argument is not strong and that similar language appears in the Supreme Court's rule.

With respect to the question of procedural history, participants recalled that the Committee's motivation for proposing to delete Rule 28(a)(6)'s reference to "the course of proceedings" had been a concern that briefs discuss the procedural history in inordinate detail.

Judge Sutton asked whether this concern could be addressed by referring, in the Rule text, to "the relevant procedural history." An appellate judge member stressed that procedural history is important, but only as to the issues presented in the appeal. Judge Sutton agreed with a member's earlier observation that lawyers are likely to mention the procedural history when describing the rulings presented for review.

Judge Sutton asked for Committee members' views on the published proposal's use of the term "identifying" in the phrase "identifying the rulings presented for review." Would it be better to say "describing the rulings presented for review"? An appellate judge member stated that "identifying" was useful because it is likely to prompt a more concise description.

Judge Sutton asked Professor Coquillette for his views on the proposed augmented Committee Note. Professor Coquillette stated that he was concerned by the inclusion of detail in that version of the Committee Note, because some lawyers use rule books that do not include Notes. The Standing Committee prefers to avoid placing in the Committee Note anything that actually changes the operation of the Rule. A member asked whether the augmented Note changed the operation of the Rule or whether it merely directed readers not to draw a negative inference based on the changes made to the Rule. Professor Coquillette responded that the augmented Note language fell in a gray area and was not an obvious abuse of the Note. An attorney member stated that Professor Coquillette's guidance made him wary of placing in a Note something that could be placed in the Rule text. Judge Sutton asked whether the Note can be used, not to modify the Rule text, but rather to address a possible negative inference that might be drawn by a reader who was comparing the amended Rule text to the previous version of the Rule. Professor Coquillette responded that that could be a valid use of a Note.

An attorney member suggested that the question of whether the Rule should mention procedural history was potentially significant; by contrast, he suggested, the Rule need not mention the nature of the case because the components of the brief (e.g., the statement of the issues) will make clear the nature of the case. This member noted that the Committee cannot predict how lawyers will respond to the deletion, from Rule 28(a)(6), of the reference to "the course of proceedings." He suggested that it might be useful to include a phrase such as "any procedural history necessary to understand the posture of the appeal or the issues submitted for review." He asked whether participants could think of a more concise substitute for that language. Judge Sutton responded that his concern about that language would not solely relate to its unwieldiness; he would also be concerned that the language could lead brief-writers to be over-inclusive. However, he added that he did not feel strongly about this, and that the main goals of the amendments, in his view, were to provide that the statements of the case and the facts could proceed in chronological order and to give flexibility to lawyers in drafting their briefs. He asked participants whether they would suggest adding language to the proposed Rule text. Mr. Byron asked whether one might add to the Rule a reference to "relevant" procedural history and leave the detailed explanation to the Committee Note. An appellate judge member suggested that "necessary" is a more limiting word than "relevant." Judge Sutton observed that the proposed Rule would continue to use the word "concise" to modify "statement of the case."

Judge Sutton suggested that there appeared to be an emerging consensus that the best way to address the commentators' concerns was to augment the Committee Note, but that it would be useful to amend the Rule text to refer to the relevant (or necessary) procedural history.

The Committee returned to this item after lunch; during lunch, the Reporter produced a revised draft that reflected the Committee's discussions prior to lunch. The revised draft would amend Rule 28(a)(6) to refer to "a concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record (see Rule 28(e))." A member suggested a conforming change to the Committee Note. A motion was made to approve the revised draft (as circulated at the meeting), subject to the change to the Committee Note. The motion was seconded and passed by voice vote without dissent.

B. For publication: Item No. 09-AP-C (FRAP 6 / direct bankruptcy appeals) and Item No. 08-AP-L (FRAP 6(b)(2)(A) / *Sorensen* issue)

Judge Sutton invited the Reporter to introduce these items, which concern proposed amendments to Appellate Rule 6 concerning bankruptcy appeals. The Reporter observed that the proposed amendments to Rule 6 have been developed jointly with the Bankruptcy Rules Committee, in the context of that Committee's discussions of proposed revisions to Part VIII of the Bankruptcy Rules. As part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Congress created an avenue for direct permissive appeals from the bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2). Initially those appeals were governed by interim procedures contained within BAPCPA, but some of those procedures have subsequently been displaced by an amendment to the Bankruptcy Rules, and it now seems worthwhile to amend Appellate Rule 6 to address the topic.

The Reporter noted that the Committee had already discussed the proposed amendments to Rule 6 in some detail at its fall 2011 meeting. She observed that several aspects of the proposed amendments seemed uncontroversial. The proposals would amend Rule 6's title, slightly restyle the Rule, update cross-references within the Rule, account for new Appellate Rule 12.1 (concerning indicative rulings), remove an ambiguity in Rule 6(b)(2), and add a new Rule 6(c) concerning permissive direct appeals. The Reporter observed that the draft Part VIII rules were included in the Committee's agenda materials and predicted that the Bankruptcy Rules Committee would welcome any suggestions that Appellate Rules Committee members might have on the Part VIII draft.

The Reporter suggested that one of the most significant decisions still facing the Committee was whether to attempt to tackle, in the proposed amendments to Rule 6, the question of the terminology that should describe the treatment of a record that is in electronic form. The Rule 6 draft presented to the Committee in fall 2011 had attempted to account for the shift to electronic records by using the term "transmit" (instead of "forward" or "send") to refer to the treatment of both electronic and paper records and using the term "send" to refer to the treatment of paper records. Members had quickly noted flaws in this approach, and the discussion during

and after the fall 2011 meeting had focused on the possibility of using either the term "furnish" or the term "provide."

The Committee's spring agenda materials presented two versions of the proposed amendments to Rule 6. The first version showed the terms "furnish" and "provide" as bracketed alternatives in each place where the Rule discussed the provision of the record to the court of appeals. If this alternative were to be adopted, the Committee would face further choices concerning whether to specify in the text of Rule 6(b) what acts constitute "furnishing" or "providing"; or whether to add in Rules 6(b) and 6(c) provisions inviting the courts of appeals to adopt local rules concerning the mode of provision of the record; or whether to place the detailed discussion of that issue in the Committee Note. The second alternative version made no attempt to update the terminology used to describe the treatment of the record, except where updating was absolutely necessary; this approach would leave for another day the question of the terminology that the Appellate Rules should employ to account for records (and other documents) in electronic form.

Judge Sutton recalled that, when the Committee discussed the question of word choice, it had focused on the fact that a record could be provided to the court of appeals in paper form, or as one or more electronic records, or in the form of links that enable a user to access the record in electronic form; the difficulty arose concerning the choice of a term that would encompass the third of these possibilities. Judge Sutton noted that the Appellate Rules Committee has commenced a project concerning possible amendments to the Appellate Rules, generally, in the light of the shift to electronic filing; but that project may not proceed as quickly as the proposed amendments to Appellate Rule 6. He observed that even when the shift to electronic filing is complete, the courts will still need to handle paper filings by some litigants. Professor Coquillette predicted that the Standing Committee would need to undertake a project, involving all the advisory committees, concerning the implications of the shift to electronic filing. Because technology is developing so rapidly, that will require some serious study and coordination.

Returning to the question of terminology, Judge Sutton stated that he did not think either "furnish" or "provide" fully addressed the question that had been troubling the Committee. An attorney member stated that he was indifferent as between "furnish" and "provide"; in his view, the key was to include a sentence defining the meaning of the term that was chosen. An appellate judge suggested that "transmit" was a good choice.

After further discussion, Mr. Green suggested a different word choice: Rather than referring to the lower-court clerk's "furnishing" or "providing" the record to the court of appeals, the rule could direct the lower-court clerk to "make the record available" to the court of appeals, and could direct the circuit clerk to "obtain" the record. An attorney member agreed that Mr. Green's proposed language would address his concern about instances in which access to the record is provided by means of electronic links. Professor Coquillette observed that it would be better not to include Rule text that invites local rulemaking. Judge Sutton suggested that it could make sense to modify the first alternative shown in the agenda materials as suggested by Mr. Green. An attorney member agreed that that was a promising approach.

Next, the Reporter sought the Committee's views on a point previously discussed by the Committee at its fall 2011 meeting. Proposed Rule 6(b)(2), as amended, would provide that "[i]f a party intends to challenge the order disposing of [a tolling] motion – or the alteration or amendment of a judgment, order, or decree upon the motion – then the party, in compliance with Rules 3(c) and 6(b)(1)(B), must file a notice of appeal or amended notice of appeal." The next sentence, as shown in the Committee's fall 2011 agenda materials, read: "The notice or amended notice must be filed within the time prescribed by Rule 4 – excluding Rules 4(a)(4) and 4(b) – measured from the entry of the order disposing of the motion." At the fall 2011 meeting, the Committee discussed Professor Kimble's advice that "The notice or amended notice" in this second sentence should be replaced by "It." Some members believed that the longer formulation was clearer. After the fall meeting, Professor Kimble reviewed the Rule 6 draft and continued to maintain strongly that this was purely a question of style and that "It" was preferable. Thus, the Reporter asked the Committee to consider the issue once again.

A participant asked whether the issue could be addressed by using the formulation "That notice ..."; but the Reporter responded that referring only to a "notice" might cause confusion by omitting reference to an amended notice. Mr. Letter observed that the concern over confusion arises because a reader might wonder whether "It" referred to the notice (or amended notice) of appeal or to the order disposing of the tolling motion. The Reporter agreed that this accurately described the concern. She noted that a litigant would have to be relatively confused in order to take "It" to refer to the order rather than the notice of appeal, but she observed that the Committee often worries (when drafting) about litigants who are easily confused. And she noted that such concerns are heightened with respect to provisions that concern potentially jurisdictional deadlines. A participant suggested that the problem under discussion arose because the proposed amendment adds a period in the midst of what previously had been a single sentence, and he wondered whether a solution could be found by removing the period and merging the two sentences into one. Another participant responded that the resulting single sentence would be quite complex. A member asked whether the problem could be avoided by revising the second sentence to use an active rather than passive formulation ("The party must file ..."); that would make it less likely that a reader would believe "it" referred to a court order. A participant stated that the difference in length between the longer and shorter formulations was small, and that if there is a nontrivial chance that the shorter formulation might confuse some readers, he favored the longer formulation. A district judge member observed that bankruptcy proceedings often involve pro se debtors, and that for those litigants it is best for the rules to be very specific. An attorney member stated that he favored the longer formulation; an appellate judge member agreed. Professor Coquillette observed that the question was whether the choice was substantive or purely one of style. The Reporter suggested that the district judge member's concern about access to courts for pro se debtors sounded like a substantive concern. A motion was made to retain the longer formulation on the ground that the difference was one of substance rather than style; the motion was seconded and passed by voice vote without opposition.

The Committee next turned to the text of proposed Rules 6(b)(2)(D) and 6(c)(2)(D). As shown in the agenda materials, those provisions direct the circuit clerk to note on the docket the fact that the lower-court clerk has furnished the record, and the provisions state that "The date

noted on the docket serves as the filing date of the record for purposes of [these Rules] [Rules 28.1(f), 30(b)(1), 31(a)(1), and 44]." Judge Sutton suggested that general wording was preferable in this instance. The Reporter asked whether that would counsel in favor of ending the relevant sentence after "the record" – or whether truncating the sentence in that way might lead to unanticipated effects if the revised Rule is taken to define the record's filing date for purposes of, for example, a local rule. On the other hand, a participant suggested that if the provision defines the filing date "for purposes of these Rules," this wording might lead readers to wonder whether that definition in Rule 6 modifies the treatment of the record's filing date under Rule 12(c) (which will continue to apply to non-bankruptcy appeals). The Reporter noted that if the Committee chose to truncate the sentence after "the record," it could seek input (during the comment period) on whether that would create problems in any area of practice; on the other hand, she observed, this would be a relatively detailed point on which to seek specific comment. A district judge member stated that he expected that the definition in Rule 6 could technically affect provisions in local rules, but he also stated that he did not think this would cause a problem because, in practice, the same definition would likely be used anyway. Judge Sutton suggested that it would make sense to truncate the sentence after "the record" for purposes of publication, and that it would be useful to solicit comment on that choice. For example, he suggested, it would be very useful to learn what bankruptcy clerks think about the question.

After lunch, the Committee considered a revised draft of the Rule 6 proposal – prepared and circulated during lunch – that incorporated the Committee's discussions during the morning session. An attorney member suggested some conforming changes to the Committee Note. Mr. Byron asked whether the proposal would be circulated to the Bankruptcy Rules Committee for its views; the Reporter stated that it would be circulated to the Bankruptcy Rules Committee and also to the Standing Committee's subcommittee that will consider questions of terminology relating to electronic filing. Mr. Robinson suggested a wording change to the revised Rule 6 draft; members concurred in the change.

A motion was made to approve the revised language circulated to the Committee members, with Mr. Robinson's change to the Rule text and with the revisions a member had suggested to the Committee Note. The motion was seconded and passed by voice vote without dissent.

V. Discussion Items

A. Item No. 09-AP-B (definition of "state" and Indian tribes)

Judge Sutton invited Justice Eid to introduce this issue, which concerns a proposal that Appellate Rule 29 be revised to treat federally recognized Native American tribes the same as states for purpose of amicus filings.

Justice Eid reminded the Committee that this item came to the Committee at the suggestion of Daniel Rey-Bear, who asked the Committee to consider adding Indian tribes to the list of entities that can file amicus briefs as of right. The Committee received letters in support

of Mr. Rey-Bear's proposal from a number of groups. The Committee further benefited from a report by Ms. Leary, who examined the frequency of tribal amicus filings and the rate at which leave to file was granted. Ms. Leary found that most such filings occur in the Eighth, Ninth, and Tenth Circuits and that leave to file is typically granted. At the Committee's request, Judge Sutton wrote to the Chief Judges of those three circuits to ask for those circuits' views on the adoption of a local or national rule authorizing filings as of right by tribal amici. The three circuits' responses varied, with the Ninth Circuit expressing support for a national rule, the Tenth Circuit expressing a contrary view, and the Eighth Circuit evincing mixed views. More recently, Judge Sutton wrote to the Chief Judges of the remaining circuits to solicit their views on a possible rule change that would add both tribes and municipalities to the list of entities that can file amicus briefs as of right. Among the circuits that have thus far responded to that letter, the views have been mixed. The Eleventh Circuit appears ambivalent; the First Circuit is more supportive of the idea of authorizing amicus filings by tribes, but also expresses concern about the possible effects of the change on recusal issues (especially if municipalities are included along with tribes); the Seventh Circuit has not expressed a view and does not receive many amicus filings from tribes.

Justice Eid observed that in the Committee's previous discussions, participants have expressed varying views. Justice Eid favors the proposal and views it as a question of dignity for tribes. She noted that she had practiced in the field of federal Indian law, that she lives in a state where two large tribes are located, and that her husband practices federal Indian law. She observed that some participants in the discussion had asked whether the inclusion of tribes on the list of those who can file amicus briefs as of right would place the Committee on a slippery slope by leading to requests to include other types of entities. Participants had suggested, for example, that if the Rule is amended to treat tribes the same as states then the expanded category should include municipalities as well as tribes. Participants had also asked what, if anything, the addition of tribes to the list would suggest about tribal sovereignty generally. Justice Eid suggested that, at this point, the Committee may wish to consider whether it has done all the research that can be done on this issue. Perhaps the Committee could ask Judge Sutton to write to the circuits, summarizing the Committee's research and discussions and leaving the question, for the moment, to each circuit for treatment on a local basis.

Judge Sutton observed that one reason the Committee's discussions expanded to encompass municipalities as well as states was that the Supreme Court's rule authorizes amicus filings (without court permission or party consent) by municipalities but not tribes. He noted that, if municipalities as well as tribes were added to the list of entities that can make amicus filings as of right, the change would not correlate with sovereignty issues because municipalities are not sovereign. Thus far, he observed, there did not appear to be support for adding foreign governments to the list. He noted that, when the Standing Committee has previously discussed this item, participants expressed varying views. Among the responses that the Committee has received thus far from the circuits, a negative response has been received from the Tenth Circuit; and the First Circuit has expressed concern about recusal issues (though that concern arose more with respect to the possible inclusion of municipalities). An attorney member asked whether the Committee knows what, exactly, the recusal practices are in each circuit. Mr. Letter responded

that the practices vary from circuit to circuit, but that he can think of instances when a request to file an amicus brief has been denied because of a recusal issue, and other instances in which a judge has recused from a case because of an amicus filing.

Judge Sutton asked whether – as an interim approach – Committee members favored writing to the circuits to report on the Committee's discussions to date. The letter would explain that the Committee thinks the issue warrants serious consideration but that the Committee is not sure that now is the time to adopt a national rule change on this issue, and that the Committee plans to revisit the issue in five years. A member stated that this approach sounds right to him, and that he would be very concerned about proceeding with a national rule in the light of the possible recusal issues mentioned by the First Circuit. Mr. Letter noted that the DOJ urges that the Committee consult tribes for their views on this issue. The DOJ, he stated, favors the proposed national rule change for tribes but not for municipalities; the DOJ considers this to be an issue relating to sovereignty and believes that the change would not burden the courts because tribes' requests to file amicus briefs are usually granted. On the other hand, Mr. Letter observed, the Committee's discussions have raised some very real practical considerations. The DOJ would not oppose a proposal that would allow circuits to study the issue and adopt a local rule on the subject if they would like. An appellate judge member expressed support for the approach suggested by Judge Sutton; another appellate judge member agreed. Professor Coquillette observed that, in the past, other committees have dealt with some issues in a similar way.

Mr. Letter suggested that Judge Sutton's letter should note that there is substantial support, within the Committee, for the proposal. Judge Sutton suggested that the letter could say that all members of the Committee believe that the proposal implicates serious dignity issues and think that the proposal warrants serious consideration. Mr. Letter asked whether the letter should say that the Committee believes that the idea of a local rule on the subject is worthy of consideration. Judge Sutton responded that it would be problematic to set a precedent of urging circuits to adopt local rules. A district judge member predicted that a letter from Judge Sutton, representing the sense of the Committee, would usefully generate discussion in circuits where the judges have not previously considered the issue.

A motion was made in support of the proposal that Judge Sutton write to the Chief Judges of each circuit. The motion was seconded and passed by voice vote without opposition. Judge Sutton promised to circulate a draft letter to the Committee members for their feedback during the spring.

B. Item No. 10-AP-I (redactions in briefs)

Judge Sutton invited Judge Dow to report on this item, which concerns a proposal by Paul Levy of Public Citizen Litigation Group that the Committee consider questions relating to the sealing or redaction of appellate briefs. Judge Dow summarized the variety of approaches among the circuits. In some circuits there is a presumption that documents that were sealed below remain sealed on appeal. In the Seventh Circuit (and to some extent, apparently, the Third Circuit) there is a presumption that documents will be unsealed on appeal, so that a party must

file a motion if it wants to maintain sealing on appeal. The Federal Circuit and the D.C. Circuit direct the attorneys to review the sealed portions of the record and identify the portions that need not remain sealed on appeal.

Judge Dow observed that it may make sense to distinguish, for purposes of the treatment of sealing, between materials exchanged in discovery and materials that become part of the court record. It would be useful, he noted, to consult the circuit clerks in selected circuits – perhaps the Seventh Circuit, the D.C. Circuit, the Federal Circuit, and a circuit in which items sealed below presumptively remain sealed on appeal. He observed that evolutions in technology will affect these issues; relevant questions include, for example, how the Next Generation CM/ECF software will address sealing. He also noted that there may be differences in the approaches that one would adopt in civil and criminal cases. An overarching question, Judge Dow suggested, is whether a national rule would be appropriate, given that the circuits currently take at least three different approaches to sealing on appeal.

Judge Dow noted that Mr. Letter had volunteered to work with him and the Reporter on this project. Judge Sutton thanked Judge Dow for his work.

C. Item No. 11-AP-B (FRAP 28 / introductions in briefs)

Judge Sutton invited the Reporter to introduce this item, which concerns whether Rule 28 should be amended to mention the possibility of including introductions in briefs. This question dovetails with the Committee's earlier discussions – in connection with the pending proposal concerning the statement of the case – about the different constituencies that use the Rules. Experienced appellate litigators are well aware that they can include introductions in their briefs, and they do so to good effect. The question might be whether to amend the Rule to provide guidance for young lawyers or other lawyers with less appellate experience. A former Committee member had pointed out to the Committee that the proposed amendment concerning the statement of the case would make Rule 28(a)(6) flexible enough to permit a lawyer to include an introduction as part of the statement of the case. On the other hand, the flexibility provided by amended Rule 28(a)(6) would not serve the function of giving notice to less-experienced lawyers. Some participants in the discussion have questioned whether it would be practicable to provide guidance, in the Rule text, concerning the nature and function of the introduction. One possibility that had been floated – providing guidance in the Committee Note – would appear to run afoul of the principle, discussed earlier in the day, that Committee Notes should not be used for the purpose of providing advice to lawyers.

Judge Sutton observed that it would be hard to devise a rule that specifies what an introduction should do, and how to distinguish the introduction from the summary of argument. Professor Coquillette noted that traditionally, neither Rules nor Notes include advice for practitioners. An attorney member suggested that one would not necessarily wish to place the introduction within the statement of the case. On the other hand, if and when the proposed amendments to Rule 28(a)(6) take effect, that Rule will give lawyers flexibility in drafting the statement of the case – which diminishes the reasons to amend the Rules specifically to address

the topic of introductions. A member noted that a bad introduction is worse than no introduction.

Mr. Byron suggested that the Committee Note to the pending amendments to Rule 28(a) could be revised to include a discussion of introductions. The Note could state that an introduction is not prohibited under the Rules and can be included either as the first item in the brief or in the statement of the case. (Mr. Byron noted that in his own practice he has alternated between those two placements for the introduction, depending on the circumstances of the case.) Judge Sutton noted that the benefit of mentioning those considerations in the Note would be to inform lawyers about the topic; the risk would be that this information would encourage the inclusion of poorly written introductions. A participant observed that – because the Standing Committee has the ability to make changes to Committee Notes when proposed amendments are presented to it for approval – one could be confident that the language of the Committee Note would be reviewed by the Standing Committee.

An appellate judge member said that introductions are helpful but not indispensable. Another appellate judge member noted that if the Rules invited the inclusion of introductions, they might elicit introductions that are similar to arguments to a jury. A member suggested that it might be preferable to wait and see how practice develops under the pending amendments to Rule 28(a). An attorney member stated that he would oppose adding language to the Rule 28(a) Committee Note to mention introductions.

A motion was made to remove this item from the Committee's agenda for the present. The motion was seconded and passed by voice vote without opposition.

VI. Additional Old Business and New Business

A. Item No. 11-AP-E (FRAP 4(b) / criminal appeal deadlines)

Judge Sutton invited the Reporter to introduce this item, which concerned a suggestion by Dr. Roger Roots that Appellate Rule 4(b) be amended to accord criminal defendants the same 30-day appeal period that applies to government appeals in criminal cases. The Reporter suggested that it would be difficult to argue that the difference between the defendant's and the government's appeal time is unconstitutional. A more significant question is whether the current 14-day appeal time period poses a hardship for defendants. Another question arises from the fact that the appeal times in Rule 4 depend on the categorization of the appeal as civil or criminal; at the margins, there is the possibility that the differential in appeal times between civil and criminal cases could give rise to difficulties if there is uncertainty over how to categorize a particular appeal. A third question is whether there should be symmetry between the appeal times that apply to the opposing parties in a given type of case.

As to the question of hardship, the Reporter suggested a few considerations. Fourteen days is a short period, and it is shorter than the period for civil appeals. The notice of appeal is a simple document. In some cases there may be challenges involved in identifying colorable

issues for appeal, or difficult strategic questions where a defendant has received a lower sentence than he or she might receive if re-sentenced; but setting such instances aside, ordinarily the decision whether to appeal should not be a difficult one. Additionally, some safeguards exist. In cases where there is a difficulty the defendant can seek an extension of the time to appeal under Rule 4(b)(4). At sentencing, the district court must advise the defendant of his or her right to take an appeal, and if the defendant requests, the clerk will file the notice of appeal on the defendant's behalf. When an incarcerated defendant files the notice of appeal himself or herself, Rule 4(c)'s inmate-filing provision would apply. These features, the Reporter suggested, might alleviate possible hardships. But she noted her lack of experience in criminal law; those with such experience are better situated to assess this question.

With respect to the question of categorization, it turns out that, at the margins, there are some cases that may be difficult to categorize as civil or criminal. If a defendant errs by viewing the case as criminal when it is actually civil, then the harm would be that the defendant files a notice of appeal earlier than is actually necessary. A defendant who is aware of a difficult categorization question and is unsure whether the case counts as civil or criminal can protect himself or herself by filing within the deadline set by Rule 4(b). But a litigant who wrongly assumes that a case is civil when it is actually criminal could lose his or her appeal rights by filing too late. The Reporter observed that this concern had surfaced a decade ago, when the Committee last discussed a proposal to lengthen Rule 4(b)'s appeal deadline for criminal defendants.

As to the question of symmetry between litigants, the Reporter observed that there is an attraction to the idea that if one litigant receives additional time to appeal, their opponent should also have the benefit of the longer period. That principle is applied in Appellate Rule 4(a), which provides additional time to all litigants when one of the litigants is a United States government entity. Perhaps counterbalancing that, there are a number of asymmetries in criminal practice – such as asymmetries in discovery and asymmetries in rights to take an appeal.

The Reporter observed that if the Committee were to be interested in proceeding with this item, it would be important to consult the Criminal Rules Committee. Moreover, if one were to amend Rule 4(b) on grounds of symmetry, that might also raise a question about Civil Rule 12(a) (which provides federal government defendants with additional time to respond to the complaint).

A member stated that he was unpersuaded by the constitutional arguments and the arguments concerning symmetry. However, he suggested that it would be useful for the Committee to obtain data that would bear on the hardship argument. How often do criminal defendants fail to take an appeal, and why? For example, are appeals foregone for strategic reasons or are they forfeited due to lawyer incompetence? This member noted that there might be an alternative approach to protecting appeal rights; one could adopt a system in which the default is that there will be an appeal, and leave it up to the litigant to opt out if he or she does not wish to take an appeal.

Mr. Byron reported that he had discussed this item with Mr. Letter prior to the meeting; Mr. Letter had discussed the issue of hardship with a friend who is a federal public defender in the District of Columbia, who reported that in the experience of that office this typically is not a problem. Most criminal defendants who wish to file appeals tend to do so expeditiously. A district judge member stated that he would have no objection to a rule that gave criminal defendants 30 days to appeal. He observed, though, that all criminal defendants are represented by counsel unless they decide, after a waiver, that they don't want a lawyer. And by the time of sentencing, the defendant and the lawyer have already had time (often, a lot of time) to consider possible issues of trial error. So the only issues that would arise shortly before the appeal deadline would relate to possible sentencing error. And, as noted, the judge informs the defendant at sentencing concerning the right to take an appeal. In sum, this member stated, he did not see the 14-day appeal time period posing a problem in his district; but, he suggested, a 30-day appeal time period could be useful if the defendant needs to think through a tricky sentencing issue. On the other hand, he noted, the latter sort of difficulty can be addressed under the current rules if the judge grants a request to extend the appeal time.

An attorney member asked why it is important to require the defendant to decide within 14 days whether to appeal; what events, this member wondered, turn on the date on which the defendant's appeal time runs out? A district judge member queried whether the timing had any implications for speedy trial requirements. The attorney member asked whether the expiration of the time to appeal would have implications for the timing of a remand to custody, or whether there is any similar systemic interest in getting the defendant's punishment started sooner rather than later. The district judge member responded that he did not think so; he observed that the question of whether the defendant can stay out on bond after sentencing is governed by statute. He noted that in a given circuit, the timing of the notice of appeal might affect the appellate briefing schedule.

Mr. Byron observed that the DOJ has an interest in the speedy resolution of criminal cases. Even the government's appeal time period in criminal cases, he noted, is shorter than the government's appeal time period in civil cases. An attorney member asked why one would not adopt a system in which the 14-day appeal time period applied to both sides in criminal cases; the government could file protective notices of appeal and then withdraw the notices if it decided not to appeal. Another member responded that there would be serious costs to a system that required the government to file a notice of appeal before it had had time to fully consider whether it wished to take an appeal. This member observed that to the public, the government's filing of a notice of appeal is not treated as merely an administrative act; it would be counter-productive if the government either had to decide whether to appeal within a very short time period or else withdraw a protective notice of appeal that it had previously filed. The attorney member who raised the question about applying the 14-day period to both sides suggested that if the 14-day deadline would impose those sorts of costs on the government, it was worth considering whether that deadline imposes similar costs on the defendant. The other member responded that he viewed those costs as asymmetric; when a criminal defendant files a notice of appeal it does not trigger the same sorts of public, institutional concerns that arise when the government files a notice of appeal.

An appellate judge stated that, in his experience, defendants in the Eleventh Circuit are not denied the right to an appeal due to a late notice. If the defendant asked his lawyer to file the notice and the lawyer did not do so, then the court of appeals sends the case back to the district court for resentencing and the entry of a new judgment. He suggested that the Committee should be cautious about altering a time period that is so long-established.

Returning to the fact that the Committee had considered a similar proposal a decade earlier, Judge Sutton asked who had submitted the proposal on that earlier occasion. An attorney member asked what reasons had been given for the Committee's rejection of that prior proposal. Mr. Byron agreed to provide the Committee with the materials that Mr. Letter had submitted to the Committee in connection with that earlier discussion. The Reporter noted that she would locate the initial proposal that triggered the earlier discussion, and that she would update the Criminal Rules Committee Chair and Reporters concerning the Committee's discussion. By consensus, the Committee decided to retain this item on its study agenda. Judge Sutton thanked Dr. Roots for raising this issue with the Committee.

B. Other possible items for consideration by the Committee

Judge Sutton invited Committee members to suggest items for the Committee's consideration.

An attorney member suggested that it might be useful to clarify practice under Appellate Rule 8 and Civil Rule 62 concerning procedures for appeal bonds. The bonding process unfolds quickly and can be confusing. For example, Civil Rule 62(b) provides that "[o]n appropriate terms" the court may stay execution of a judgment pending disposition of a postjudgment motion, while Civil Rule 62(d) discusses the obtaining of a supersedeas bond to secure a stay of the judgment pending appeal. So there are two different episodes as to which security is an issue, and the would-be appellant will likely need to provide security both with respect to the time period when the postjudgment motions are pending and then also with respect to the time period of the appeal. Moreover, a would-be appellant, he observed, might not always get a bond; it might use a letter of credit, or let the other side hold a check, or pay the other side a sum of money. So the way that bonding occurs in practice will depend on what method is both cost-effective for the would-be appellant and satisfactory to the prospective appellee. Perhaps there is no reason to amend the Rules to reflect the variety of actual practices, but even an experienced practitioner can find the process opaque. An amendment to the Rules might bring greater order to this area of practice. The Reporter stated that she would consult Professor Cooper in order to determine when the Civil Rules Committee had last considered the question. The attorney member noted that in some state court systems the amount of the bond is specified by law (for example, a provision might set the bond at a certain percentage of the judgment); by contrast, he observed, in federal litigation no provision specifies the amount of the bond and thus the issue sometimes ends up getting litigated.

A member asked why Rule 35(b)(2) sets the length limit for a petition for rehearing en banc in pages rather than words. The Reporter undertook to investigate this question.

VII. Other Information Items

A. *Gonzalez v. Thaler*, 132 S. Ct. 641 (2012)

Judge Sutton invited Mr. Newsom to introduce this item, which concerns the Supreme Court's recent decision in *Gonzalez v. Thaler*, 132 S. Ct. 641 (2012). In this 8-1 decision, the Court held that 28 U.S.C. § 2253(c)(3)'s requirement that a certificate of appealability ("COA") indicate which issue or issues meet the statutory test for issuance of a COA is not a jurisdictional requirement. Thus, the COA's failure to include that specification did not deprive the court of appeals of jurisdiction.

Mr. Newsom reviewed for the Committee the structure of Section 2253(c). Section 2253(c)(1) provides that "[u]nless a circuit justice or judge issues a [COA], an appeal may not be taken to the court of appeals" in a habeas or Section 2255 proceeding. Everyone recognizes that this provision sets a jurisdictional requirement because it meets the clear statement test set out in *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006). Section 2253(c)(2) states that the COA "may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." That provision was not squarely at issue in *Gonzalez*. And then Section 2253(c)(3) states that the COA "shall indicate which specific issue or issues satisfy the showing required by" Section 2253(c)(2).

Mr. Gonzalez's federal habeas petition raised a Sixth Amendment issue. The district court denied the petition as untimely. Gonzalez sought a COA on both the timeliness issue and the underlying Sixth Amendment issue. A court of appeals judge granted the COA, mentioning timeliness but not the Sixth Amendment issue. The question was whether the COA's failure to mention the Sixth Amendment issue (as required by Section 2253(c)(3)) deprived the court of appeals of jurisdiction. The state first raised this issue in response to Gonzalez's petition for certiorari.

The Supreme Court – contrasting Section 2253(c)(3)'s wording with that of Section 2253(c)(1) – held that Section 2253(c)(3)'s requirement is mandatory but not jurisdictional. Justice Scalia, writing in dissent, argued that the relationship between Sections 2253(c)(3) and 2253(c)(1) was similar to the relationship between Appellate Rules 3 and 4. Rule 4 sets the deadline for filing the notice of appeal, and Rule 3 specifies the contents of the notice of appeal. In *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), the Court held that Rule 3 – the content provision – was jurisdictional because of its relationship to Rule 4's jurisdictional deadline. In response, the Court stated that *Torres* presented a different question; in part, the Court observed that it had relied on the Committee Note to Rule 3.

One question raised by this case is whether the approach that the *Gonzalez* Court took to Section 2253(c) signals a retrenchment from the *Torres* rule. Another question is whether the *Gonzalez* Court's approach will affect the courts' views on whether Appellate Rule 4(a)(4)'s requirement of a "timely" tolling motion is jurisdictional.

B. D.C. Circuit Rule 35(a)

Judge Sutton invited the Reporter to introduce this topic, which was drawn to the Committee's attention by Mr. Letter. Mr. Letter pointed out that D.C. Circuit Rule 35(a) alters the time to seek rehearing. For criminal appeals, it lengthens the time from 14 days to 45 days, and for civil appeals in cases involving no federal parties, it lengthens the time from 14 to 30 days. Two other circuits also have rules that lengthen the time to seek rehearing to some extent. For appeals generally (other than civil appeals in cases involving federal parties), Eleventh Circuit Rule 35-2 lengthens the time period from 14 days to 21 days while Federal Circuit Rule 40(e) lengthens the time period from 14 days to 30 days. Perhaps these circuits feel that lengthening these deadlines will lead parties to be more judicious in their decision whether to seek rehearing; or perhaps these circuits prefer to avoid the need to resolve motions to extend the time to seek rehearing. At least two circuits (the Fourth and Fifth Circuits) have local rules that suggest a reluctance to extend the time to seek rehearing.

Mr. Byron explained that the DOJ has an interest in uniformity, because inter-circuit variations can pose pitfalls for those who practice in multiple circuits. A longer period for seeking rehearing would have the benefit of removing the need to seek extension of that period by motion. On the other hand, he said, the DOJ does not have a strong position on this issue and it defers to the views of judges and circuit clerks, who have to deal with these issues more directly. An appellate judge member observed that the Eleventh Circuit is willing to grant extension motions if there is a reason for the motion, and that the Eleventh Circuit's local rules include a provision stating that an attorney is not obligated to seek rehearing, and that lawyers should think before filing a petition for rehearing. Judge Sutton observed that some circuits might wish to expedite the time from the filing of an appeal to decision of the appeal. The Fourth and Eleventh Circuits, for example, are known to dispose of appeals swiftly. He asked whether the question of deadlines for seeking rehearing is one that implicates issues specific to local circuit culture, and he questioned whether judges would favor a rule that required national uniformity on this issue. An attorney member suggested that the question of time to disposition might not be affected by deadlines for seeking rehearing, because it depends on how one counts the time to disposition. Mr. Green observed that the usual calculus looks at the time when the case is finally disposed of after the disposition of any timely petition for rehearing. An appellate judge member suggested that there was no reason for the Committee to take action on the question of deadlines for seeking rehearing.

By consensus, the Committee decided not to add this item to its study agenda.

VIII. Date and Location of Fall 2012 Meeting

Judge Sutton reminded the Committee that it will next meet in Philadelphia, Pennsylvania on September 27 and 28, 2012.

IX. Adjournment

The Committee adjourned at 2:30 p.m. on April 12, 2012.

Respectfully submitted,

_____

Catherine T. Struve
Reporter

TAB 6A

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

MARK R. KRAVITZ
CHAIR

PETER G. McCABE
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REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

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

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

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

Date: **May 17, 2012**

I. Introduction

The Advisory Committee on the Federal Rules of Criminal Procedure ("the Committee") met on April 22-23, 2012, in San Francisco, California, and took action on a number of proposals. The Draft Minutes are attached.

This report presents two action items. The Committee recommends that:

(1) a proposed amendment to Rule 11 (advice regarding immigration consequences of guilty plea), previously published for public comment, be approved as amended and transmitted to the Judicial Conference, and

(2) proposed amendments to Rules 5(d) and 58 (advice regarding consular notification at initial appearance), previously transmitted to the Supreme Court and returned, be approved as amended.

The report also includes information items concerning the proposed amendments to Rules 12 and 34, which were published for public comment and are being studied further by the Committee, as well as proposed amendments to Rules 6 and 16, which the Committee has decided not to pursue.

II. Action Items

A. Rule 11 (advice re immigration consequences of guilty plea)

Following publication, the Advisory Committee decided to maintain the language of the proposed amendment to Rule 11 as drafted, but adopted several changes in the Committee Note that respond to issues raised in the public comments. The Advisory Committee now recommends that the Standing Committee approve the amendment to Rule 11 and transmit it to the Judicial Conference.

1. <u>The purpose of the proposed amendment</u>

In light of the Supreme Court's ineffective assistance of counsel decision in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), the Advisory Committee concluded that a judicial warning regarding possible immigration consequences should be required as a uniform practice at the plea allocution. *Padilla* held that a defense attorney's failure to advise the defendant concerning the risk of deportation fell below the objective standard of reasonable professional assistance guaranteed by the Sixth Amendment. The Court stated that in light of changes in immigration law "deportation is an integral part–indeed, sometimes the most important part–of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." 130 S.Ct. at 1480 (footnote omitted). It also noted that "because of its close connection to the criminal process," deportation as a consequence of conviction is "uniquely difficult to classify as either a direct or a collateral consequence" of a plea. *Id*. at 1482. The Committee concluded that the Supreme Court's decision provides an appropriate basis for adding advice concerning immigration consequences to the required colloquy under Rule 11, leaving the question whether

to provide advice concerning other adverse collateral consequences to the discretion of the district courts.

In the Committee's initial deliberations, a minority of members opposed the amendment on the grounds that it was unwise and unnecessary to add further requirements to the already lengthy plea colloquy now required under Rule 11. *Padilla* was based solely on the constitutional duty of defense counsel, and it did not speak to the duty of judges. The list of matters that must be addressed in the plea colloquy is already lengthy, and these members expressed concern that adding immigration consequences would open the door to future amendments. This could eventually turn a plea colloquy into a minefield for a judge and expand litigation challenges to pleas despite the rule's harmless error provision.

A majority of the Committee concluded, however, that deportation is qualitatively different from the other collateral consequences that may follow from a guilty plea, and it therefore warrants inclusion on the list of matters that must be discussed during a plea colloquy. Although *Padilla* speaks only to the duty of defense counsel to warn a defendant about immigration consequences, the Supreme Court's recognition of the distinctive nature of such consequences also supports requiring a judicial warning. This would be consistent with the practice of the Department of Justice, which now advises prosecutors to include a discussion of those consequences in plea agreements. Thus, judges should warn a defendant who pleads guilty that the plea could implicate his or her right to remain in the United States or to become a U.S. citizen.

The proposed amendment mandates a generic warning rather than specific advice concerning the defendant's individual situation. The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without first attempting to determine the defendant's citizenship. In drafting its proposal, the Committee was cognizant of the complexity of immigration law, which likely will be subject to legislative changes. Accordingly, the Committee's proposal uses non-technical language that is designed to be understood by lay persons and will avoid the need to amend the rule if there are legislative changes altering more specific terms of art.

2. <u>The public comments</u>

Six written comments were received. Only one comment disagreed with the decision to add advice concerning possible immigration consequences to the plea colloquy; it recommended that the amendment be withdrawn or at least substantially narrowed.

The remaining comments–which came from immigration specialists, a federal defender, and the National Association of Criminal Defense Lawyers–agreed with the concept of amending Rule 11 to add advice concerning immigration consequences. Two comments supported the amendment as published. Two other comments suggested modifications to the Committee Note. The final comment, from the National Association of Criminal Defense Lawyers, urged the Advisory Committee to withdraw the amendment and pursue a different strategy, placing the burden of providing warnings and advice at the plea colloquy upon the prosecution, rather than the court.

3. The Advisory Committee's recommendation

After publication, the Rule 11 Subcommittee and the Advisory Committee both reconsidered the foundational question whether Rule 11 should be amended to require advice concerning immigration consequences in all plea colloquies. Members considered prior concerns about lengthening the plea colloquy, as well as the argument that not all defendants are aliens and conscientious judges do not need a rule to require them to give warnings in appropriate cases. After hearing the report of the Rule 11 Subcommittee and full discussion, the Advisory Committee reiterated its support for adding immigration consequences to the plea colloquy. A majority of the Committee agreed that the immigration consequences covered by the proposed amendment–removal from the U.S. and denial of citizenship and reentry–are qualitatively different than other collateral consequences, and that they warrant inclusion in the plea colloquy. As the Supreme Court noted in *Padilla*, "deportation is an integral part–indeed, sometimes the most important part–of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." 130 S.Ct. at 1480 (footnote omitted). Although the Supreme Court's decision does not require the proposed amendment, it does provide an appropriate basis for distinguishing advice concerning immigration consequences from other collateral consequences.

There was also support for the requirement that the court provide the general statement of possible immigration consequences in every case. Members emphasized that immigration consequences are an issue in nearly one half of all criminal cases. In fiscal year 2011, 48% of defendants for whom sentencing data were available were non-citizens.[1] Moreover, as

[1]U. S. Sentencing Commission, 2011 Sourcebook of Federal Sentencing Statistics, Table 9, *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/Table09.pdf .

emphasized in several of the public comments, attempts to determine the immigration status of individual defendants could raise self-incrimination issues.

The Advisory Committee accepted the Rule 11 Subcommittee's recommendation to make several small modifications in the Committee Note to address concerns raised in the public comments. The changes emphasize that the court should provide only a general statement that there may be immigration consequences of conviction, and not seek to give specific advice concerning a defendant's individual situation. The National Immigration Project argued persuasively that it is neither appropriate nor feasible for judges to give individualized advice, and it provided examples of cases in which courts gave erroneous advice. See 11-CR-005 at 2 n.2. Moreover, attempts to elicit information that would provide the basis for individual advice could raise self-incrimination concerns.

The Committee Note as published and the changes recommended by the Subcommittee are shown below:

> **Subdivision (b)(1)(O).** The amendment requires the court to include a general statement ~~concerning the potential~~ that there may be immigration consequences of conviction in the advice provided to the defendant before the court accepts a plea of guilty or nolo contendere.
>
> For a defendant who is not a citizen of the United States, a criminal conviction may lead to removal, exclusion, and the inability to become a citizen. In *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), the Supreme Court held that a defense attorney's failure to advise the defendant concerning the risk of deportation fell below the objective standard of reasonable professional assistance guaranteed by the Sixth Amendment.
>
> The amendment mandates a generic warning, ~~and does not require the judge to provide~~ not specific advice concerning the defendant's individual situation. Judges in many districts already include a warning about immigration consequences in the plea colloquy, and the amendment adopts this practice as good policy. The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without ~~first~~ attempting to determine the defendant's citizenship.

By a vote of nine in favor and three opposed, the Advisory Committee agreed to adopt the proposed changes in the Committee Note, and to transmit the proposed amendment to the

Standing Committee with the recommendation that it be approved and sent to the Judicial Conference.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 11 be approved as amended and transmitted to the Judicial Conference.

1 **Rule 11. Pleas.**

2 * * * * *

3 **(b) Considering and Accepting a Guilty or Nolo**
4 **Contendere Plea.**

5 **(1) Advising and Questioning the**
6 **Defendant**. Before the court accepts a plea of guilty
7 or nolo contendere, the defendant may be placed
8 under oath, and the court must address the
9 defendant personally in open court. During this
10 address, the court must inform the defendant of, and
11 determine that the defendant understands, the
12 following:

13 * * * * *

14 (M) in determining a sentence, the court's
15 obligation to calculate the applicable
16 sentencing-guideline range and to consider
17 that range, possible departures under the
18 Sentencing Guidelines, and other sentencing
19 factors under 18 U.S.C. § 3553(a); ~~and~~

20 (N) the terms of any plea-agreement
21 provision waiving the right to appeal or to
22 collaterally attack the sentence; and~~.~~
23 (O) that, if convicted, a defendant who is
24 not a United States citizen may be removed
25 from the United States, denied citizenship,
26 and denied admission to the United States in
27 the future.

Committee Note

Subdivision (b)(1)(O). The amendment requires the court to include a general statement that there may be immigration consequences of conviction in the advice provided to the defendant before the court accepts a plea of guilty or nolo contendere.

For a defendant who is not a citizen of the United States, a criminal conviction may lead to removal, exclusion, and the inability to become a citizen. In *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), the Supreme Court held that a defense attorney's failure to advise the defendant concerning the risk of deportation fell below the objective standard of reasonable professional assistance guaranteed by the Sixth Amendment.

The amendment mandates a generic warning, not specific advice concerning the defendant's individual situation. Judges in many districts already include a warning about immigration consequences in the plea colloquy, and the amendment adopts this practice as good policy. The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without attempting to determine the defendant's citizenship.

CHANGES MADE AFTER PUBLICATION

The Committee Note was revised to make it clear that the court is to give a general statement that there may be immigration consequences, not specific advice concerning a defendant's individual situation.

PUBLIC COMMENTS

11-CR-001. Judge Hayden Head (SD TX). Judge Head opposed the amendment and suggested that it be withdrawn or narrowed. He emphasized that "Rule 11 has served well by wisely excluding collateral consequences." No amendment addressing immigration consequences in the plea colloquy is required because the Supreme Court's decision in *Padilla v. Kentucky*, 130 U.S. 1473 (2010), addressed the duty of counsel, not the courts. However, if the Committee does choose to proceed with the amendment, it should be revised to narrow its scope to the facts of *Padilla*, which concerned a person with a documented right to be in the United States.

11-CR-002. **Jack Schisler, Fayetteville Chief of the Arkansas Federal Defender Organization.** Mr. Schisler supported the proposed amendment. It is "good practice" to include this information, a practice that is now followed in the Western District of Arkansas. He saw no harm in the admonition being given to all defendants.

11-CR-004. The Federal Magistrate Judges Association. FMJA endorsed the proposed amendment.

11-CR-005. Sejal Zota and Dan Kesselbrenner of the National Immigration Project of the National Lawyers Guild. The National Immigration Project proposed changes to the Committee Note to clarify that the court should neither attempt to provide specific advice to individual defendants nor to determine their citizenship, as well as additional notes regarding the appointment of immigration counsel and the withdrawal of pleas if the defendant was not advised of immigration consequences.

Peter Goldberger of the National Association of Criminal Defense Lawyers (NACDL) (11-CR-009). NACDL suggested that the Committee withdraw the current proposal and develop an alternative proposal that would place the burden on the prosecutor to "make an affirmative and well informed representation as to what

immigration consequences will likely flow from conviction on the tendered plea" when the government's records indicate that the defendant is not a citizen.

11-CR-011. Alina Das, co-director of the Immigrant Rights Clinic at NYU School of Law. Ms. Das suggested that the Committee Note be amended to refer to or draw from two online reports co-authored by the Clinic and the Immigrant Defense Project.

B. Rule 5 (providing that non-citizen defendants in felony cases be advised at initial appearance regarding consular notification)

Rule 58 (providing that non-citizen defendants in petty offense and misdemeanor cases be advised at initial appearance regarding consular notification)

1. The purpose of the amendments

These parallel amendments were proposed by the Assistant Attorney General Lanny Breuer, who explained the relationship between the proposed rules and the treaty obligations of the United States. The Vienna Convention on Consular Relations is a multilateral treaty that sets forth basic obligations that a country has towards foreign nationals arrested within its jurisdiction. In order to facilitate the provision of consular assistance, Article 36 provides that detained foreign nationals must be advised of the opportunity to contact the consulate of their home country. Additionally, many bilateral agreements also require consular notification.

There has been substantial litigation over the manner in which Article 36 is to be implemented, whether the Vienna Convention creates rights that may be invoked by individuals in a judicial proceeding, and whether any possible remedy exists for defendants not appropriately notified of possible consular access at an early stage of a criminal prosecution. In *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006), the Supreme Court rejected a claim that suppression of evidence was an appropriate remedy for failure to inform a non-citizen defendant of his ability to have the consulate from his country of nationality notified of his arrest and detention. The United States argued that the Vienna Convention does not create an enforceable individual right, but the Supreme Court did not rule on the preliminary question of whether the Vienna Convention creates an individual right, holding that regardless of the answer to that question, suppression of evidence is not an appropriate remedy for any violation.

General Breuer explained that notwithstanding the Justice Department's position that the Vienna Convention does not create an enforceable individual right, the executive has created policies and taken substantial measures to ensure that the United States fulfills its international obligations to other signatory states with regard to the Article 36 consular provisions. For example, the Justice Department has issued regulations that establish a uniform procedure for consular notification when non-citizens are arrested and detained by officers of the Department. See 28 CFR § 50.5. The Department of State has also undertaken multiple measures. It placed on a public website "Instructions for Federal, State, and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them," which includes 24-hour contact telephone numbers that law enforcement officers can use to obtain advice and assistance. The Department of State published a Consular Notification and Access booklet, a Consular Notification Pocket Card for police use that has a model Vienna Convention consular notice, and a wall poster containing the consular notification in many languages that police can post in their facilities. The State Department regularly provides training about ensuring compliance. When a law enforcement authority fails to give notice to the consulate of a detained foreign national, the United States is committed to immediately informing the consulate, addressing the situation to the extent possible, and preventing a reoccurrence.

Assistant Attorney General Breuer urged that in addition to the measures already taken by the Departments of Justice and State, Rules 5 and 58 should be amended "to provide an additional assurance that the Vienna Convention obligations are satisfied." He characterized the proposed amendments as "responsible procedural means for further fulfilling the obligations of the United States under the Convention, without stepping into important questions of substantive rights that the Court has reserved for a later day."

2. <u>The procedural history of the proposed amendments</u>

At its meeting in April 2010, the Advisory Committee agreed to recommend to the Standing Committee that proposed amendments to Rules 5 and 58 be published for public comment.[2] The Standing Committee approved the amendments for publication in August 2010. After a review of the public comments at its April meeting in 2011, the Advisory Committee voted to forward the amendments to the Standing Committee without change with the recommendation that they be approved and transmitted to the Judicial Conference.

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[2]The proposed amendments submitted to the Supreme Court included not only a change to Rule 5(d) providing for consular notice, but also a change to Rule 5(c) to clarify where an initial appearance should take place for persons who have been surrendered to the United States pursuant to an extradition treaty. The Supreme Court has transmitted the proposed amendment to Rule 5(c) to Congress.

The proposed amendments to Rules 5 and 58 were approved by the Standing Committee and the Judicial Conference in 2011, and subsequently transmitted to the Supreme Court.

In April 2012, the Supreme Court returned the Rule 5(d) and Rule 58 amendments to the Advisory Committee for further consideration.[3]

3. The Advisory Committee's recommendation

At its April 2012 meeting, the Advisory Committee discussed possible concerns that the proposed rules could be construed (1) to intrude on executive discretion in conducting foreign affairs both generally and specifically as it pertains to deciding how to carry out treaty obligations, and (2) to confer on persons other than the sovereign signatories to treaties, specifically, criminal defendants, rights to demand compliance with treaty provisions.

Representatives of the Department of Justice informed the Committee that they had conferred with counterparts at the Department of State, and the Departments jointly proposed some changes to the proposed rule amendments to alleviate these concerns.

After extended discussion, the Committee concluded that Rules 5(d) and 58 should be

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[3]The proposed amendment to Rule 5(d) submitted to the Supreme Court and returned by it provided in pertinent part:

(d) Procedure in a Felony Case.

(1) ***Advice.*** If the defendant is charged with a felony, the judge must inform the defendant of the following:

* * * * *

(F) if the defendant is held in custody and is not a United States citizen, that an attorney for the government or a federal law enforcement officer will:

(i) notify a consular officer from the defendant's country of nationality that the defendant has been arrested if the defendant so requests; or

(ii) make any other consular notification required by treaty or other international agreement.

The proposed amendment to Rule 58(b)(2) contained parallel language. The Supreme Court did not return the proposed amendment to Rule 5(c), which it transmitted to Congress.

amended to address the questions of consular notification, but that the amendments should be redrafted. Revisions to the text were approved unanimously, on the understanding that the language would have to be reviewed by the Standing Committee's style consultant, and that the Reporters would review the Committee Notes to determine whether any changes should be made in light of the return by the Supreme Court and the revised language. The final language for both the rule and committee note would be circulated electronically for Committee approval.

Following the meeting, revised rules and committee notes were circulated electronically to all members of the Advisory Committee, and they received unanimous approval.

As now amended, the proposed rules require the court to inform non-citizen defendants at their initial appearance that (1) they may request that a consular officer from their country of nationality be notified of their arrest, and (2) in some cases international treaties and agreements require consular notification without a defendant's request. The proposed rule does not, however, address the question whether treaty provisions requiring consular notification may be invoked by individual defendants in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36 of the Vienna Convention. More particularly, the proposed rule does not itself create any such rights or remedies.

Although the changes in the text of the proposed rules and committee notes were intended to clarify but not alter the effect of the proposed amendments, members noted at the April meeting that given the return from the Supreme Court it might be appropriate to republish for additional public comment.

Recommendation–The Advisory Committee recommends that the proposed amendments to Rules 5 and 58 be approved as amended.

Rule 5. Initial Appearance

* * * * *

1

2 **(d) Procedure in a Felony Case.**

3 **(1)** ***Advice*.** If the defendant is charged with a
4 felony, the judge must inform the defendant of
5 the following:

6 * * * *

7 (D) any right to a preliminary hearing; ~~and~~

8 (E) the defendant's right not to make a
9 statement, and that any statement made
10 may be used against the defendant; and

11 (F) if the defendant is held in custody and is
12 not a United States citizen:

13 (i) that the defendant may request that an
14 attorney for the government or a
15 federal law enforcement official notify
16 a consular officer from the defendant's
17 country of nationality that the
18 defendant has been arrested; and

19 (ii) that even without the defendant's
20 request, consular notification may be
21 required by a treaty or other
22 international agreement.
23

* * * * *

Committee Note

Subdivision (d)(1)(F). Article 36 of the Vienna Convention on Consular Relations provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention, and bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 requires consular notification advice to be given "without delay," and arresting officers are primarily responsible for providing this advice. See 28 C.F.R. § 50.5 (requiring consular notification advice to arrested foreign nationals by Department of Justice arresting officers).

Providing this advice at the initial appearance is designed, not to relieve law enforcement officers of that responsibility, but to provide additional assurance that U.S. treaty obligations are fulfilled, and to create a judicial record of that action.

At the time of this amendment, many questions remain unresolved by the courts concerning Article 36, including whether it creates individual rights that may be invoked in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). This amendment does not address those questions. More particularly, it does not create any such rights or remedies.

CHANGES MADE FOLLOWING PUBLICATION

Following the return of the proposed amendment by the Supreme Court, the rule and note were revised to clarify the advice to be provided and the limited purpose of the amendment. Note language was added referencing the regulations requiring arresting officers to provide consular notification without delay, and stating that the amendment does not create rights and remedies for any violation of the Vienna Convention.

PUBLIC COMMENTS CONCERNING RULE 5(d)

10-CR-001. Peter Goldberger on behalf of the National Association of Criminal Defense Lawyers. NACDL agreed with the amendment in principle, but suggested amendments to (1) clarify the meaning of "held in custody," (2) make clear that consular warnings may not be delayed until the initial hearing.

10-CR-002. Federal Magistrate Judges Association. FMJA (1) expressed some reservations about imposing upon courts the executive function of giving consular notification, and (2) noted that great care would have to be taken to ensure that defendants who are given this notice do not incriminate themselves.

1 **Rule 58. Petty Offenses and Other Misdemeanors**

2 * * * * *

3 **"(b) Pretrial Procedure.**

4 * * * * *

5 **(2) Initial Appearance.** At the defendant's initial
6 appearance on a petty offense or other misdemeanor
7 charge, the magistrate judge must inform the defendant
8 of the following:

9 * * * * *

10 (F) the right to a jury trial before either
11 a magistrate judge or a district judge –
12 unless the charge is a petty offense; ~~and~~

13 (G) any right to a preliminary hearing
14 under Rule 5.1, and the general
15 circumstances, if any, under which the
16 defendant may secure pretrial release~~.~~; and

17 (H) if the defendant is held in custody
18 and is not a United States citizen:

19 (i) that the defendant may request that an
20 attorney for the government or a federal law

21 enforcement officer notify a consular officer

22 from the defendant's country of nationality that

23 the defendant has been arrested; and

24 (ii) that even without the defendant's request,

25 consular notification may be required by a

26 treaty or other international agreement.

COMMITTEE NOTE

Section (b)(2)(H) Article 36 of the Vienna Convention on Consular Relations provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention, and bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 requires consular notification advice to be given "without delay," and arresting officers are primarily responsible for providing this advice. See 28 C.F.R. § 50.5 (requiring consular notification advice to arrested foreign nationals by Department of Justice arresting officers).

Providing this advice at the initial appearance is designed, not to relieve law enforcement officers of that responsibility, but to provide additional assurance that our treaty obligations are fulfilled, and to create a judicial record of that action.

At the time of this amendment, many questions remain unresolved by the courts concerning Article 36, including whether it creates individual rights that may be invoked in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). This amendment does not address those questions. More particularly, it does not create any such rights or remedies.

CHANGES MADE FOLLOWING PUBLICATION

Following the return of the proposed amendment by the Supreme Court, the rule and note were revised to clarify the advice to be provided and the limited purpose of the amendment. Note language was added referencing the regulations requiring arresting officers to provide consular notification without delay, and stating that the amendment does not create rights and remedies for any violation of the Vienna Convention.

PUBLIC COMMENTS CONCERNING RULE 58

10-CR-001. Peter Goldberger on behalf of the National Association of Criminal Defense Lawyers. NACDL agrees with the amendment in principle, but suggested amendments to (1) clarify the meaning of "held in custody," (2) make clear that consular warnings may not be delayed until the initial hearing.

10-CR-002. Federal Magistrate Judges Association. FMJA (1) expressed some reservations about imposing upon courts the executive function of giving consular notification, and (2) noted that great care would have to be taken to ensure that defendants who are given this notice do not incriminate themselves.

III. Information Items

A. Rules 12 and 34

Proposed amendments to Rule 12 and conforming changes to Rule 34 were published for public comment in August 2011, and numerous submissions were received, including detailed objections and suggestions from defense bar organizations. The Reporters prepared an extensive memorandum, totaling more than 80 pages, analyzing the comments and discussing possible changes in the amendments as published.

The Rule 12 Subcommittee concluded that the concerns raised by the public comments should be considered at a face-to-face meeting, which was held in conjunction with the full Committee's April meeting in San Francisco.

The half-day meeting in San Francisco was very productive, and the Subcommittee expects to complete its work over the summer and present its recommendation at the Advisory Committee's October meeting.

B. Rule 6

The Advisory Committee decided not to proceed with Attorney General Eric Holder's proposal to amend Rule 6(e) to establish procedures for the disclosure of historically significant grand jury materials. The Attorney General proposed an amendment that would (1) allow district courts to permit disclosure, in appropriate circumstances and subject to required procedures, of archival grand jury materials of great historical significance, and (2) provide a temporal end point for the presumption of secrecy of grand jury materials that had become part of the National Archives.

A subcommittee, chaired by Judge John Keenan, held two lengthy teleconferences to discuss the Attorney General's proposal and reviewed written and oral comments from (1) Public Citizen Litigation Group (which litigated cases on behalf of historians seeking access to grand jury materials), (2) District Judge D. Lowell Jensen (former chair of the Advisory Committee on Criminal Rules), (3) former Attorney General and District Judge Michael Mukasey, and (4) former U.S. Attorneys for the Southern District of New York, Robert Fiske (a former member of the Advisory Committee) and Otto Obermaier. Further, the Reporters prepared a research memorandum exploring general principles governing the relationship between the court and the grand jury, precedents relating to inherent judicial authority to disclose grand jury material, and background materials regarding past amendments to Rule 6(e). At the close of the second teleconference, all members of the Subcommittee–other than those representing the Department of Justice–voted to recommend that the Committee not pursue the proposed amendment.

After a report from the Rule 6 Subcommittee, discussion among the full Committee revealed consensus that in the rare cases where disclosure of historically significant materials had been sought, district judges had reasonably resolved applications by reference to their inherent authority, and that it would be premature to set out standards for the release of historical grand jury materials in a national rule. Representatives of the Department of Justice thanked the Committee for its careful consideration of the Attorney General's suggestion.

C. Rule 16

The Committee discussed correspondence from Judge Christina Reiss of the District of Vermont suggesting that Rule 16(a) be amended to require pretrial disclosure of all of a defendant's prior statements. Discussion revealed a consensus among members that no serious problem exists warranting the proposed amendment, which could produce unintended, adverse consequences in cases involving long-term investigations into large-scale criminal organizations.

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TAB 6B

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ADVISORY COMMITTEE ON CRIMINAL RULES
DRAFT MINUTES
April 22-23, San Francisco, California

I. ATTENDANCE AND PRELIMINARY MATTERS

The Criminal Rules Advisory Committee ("Committee") met in San Francisco, California on April 22-23, 2012. The following persons were in attendance:

Judge Reena Raggi, Chair
Rachel Brill, Esq.
Carol A. Brook, Esq.
Leo P. Cunningham, Esq.
Kathleen Felton, Esq.
Judge Morrison C. England, Jr.
Chief Justice David E. Gilbertson (by telephone)
James N. Hatten, Esq.
Judge John F. Keenan
Judge David M. Lawson
Professor Andrew D. Leipold
Judge Donald W. Molloy
Judge Timothy R. Rice
Jonathan Wroblewski, Esq.
Judge James B. Zagel
Professor Sara Sun Beale, Reporter
Professor Nancy King, Reporter

Judge Mark R. Kravitz, Chair of the Committee on Rules of Practice and Procedure (Standing Committee)
Judge Marilyn L. Huff, Standing Committee Liaison

The following persons were absent:

Assistant Attorney General Lanny A. Breuer

The following persons were present to support the Committee:

Andrea L. Kuperman, Esq. (by telephone)
Laural L. Hooper, Esq.
Peter G. McCabe, Esq.
Jonathan C. Rose, Esq.
Benjamin J. Robinson, Esq.

The following individuals were also present:

Andrew D. Goldsmith, Esq.
(on Tuesday, April 23, 2012, on behalf of the Department of Justice)

Peter Goldberger, Esq.
(on behalf of the National Association of Criminal Defense Lawyers)

II. CHAIR'S REMARKS AND OPENING BUSINESS

A. Chair's Remarks

Judge Raggi welcomed the members and, on behalf of the entire Committee, thanked Judge Richard C. Tallman, the Committee's previous Chair, for arranging the meeting at the James R. Browning United States Courthouse in San Francisco.

B. Review and Approval of Minutes of October 2011 Meeting

A motion to approve the minutes of the October 2011 Committee meeting in St. Louis, Missouri, having been moved and seconded,

The Committee unanimously approved the October 2011 meeting minutes by voice vote.

C. Other Opening Business

The members indicated their review of the Draft Minutes of the January 2012 Meeting of the Standing Committee and the Report of the September 2011 Proceedings of the Judicial Conference.

III. CRIMINAL RULES UNDER CONSIDERATION

A. Proposed Amendments Approved by the Judicial Conference

Judge Raggi reported that the following proposed amendments, approved by the Judicial Conference, were likely also to be approved by the Supreme Court and transmitted to Congress before May 1, 2012, whereupon they would take effect on December 1, 2012, unless Congress acts to the contrary:

1. Rule 5. Initial Appearance. Proposed amendment providing that initial appearance for extradited defendants shall take place in the district in which defendant was charged.

2. Rule 15. Depositions. Proposed amendment authorizing deposition in foreign countries when the defendant is not physically present if the court makes case-specific findings regarding (1) the importance of the witness's testimony, (2) the likelihood that the witness's attendance at trial cannot be obtained, and (3) why it is not feasible to have face-to-face confrontation by either (a) bringing the witness

to the United States for a deposition at which the defendant can be present or (b) transporting the defendant to the deposition outside the United States.

3. Rule 37. Indicative Rulings. Proposed amendment authorizing district court to make indicative rulings when it lacks authority to grant belief because appeal has been docketed.

Judge Raggi reported that the following proposed amendment was approved by the Judicial Conference at its March 2012 meeting, and would be transmitted to the Supreme Court for review this fall, as part of a larger package of proposed Rules amendments:

1. Rule 16. Proposed technical and conforming amendment clarifying protection of government work product.

B. Proposed Amendments Recommitted by the Supreme Court for Further Consideration

Judge Raggi informed members that two proposed rule amendments had been recommitted by the Supreme Court for further consideration:

1. Rule 5(d). Initial Appearance. Proposed amendment providing that in felony cases non-citizen defendants in U.S. custody shall be informed that upon request a consular official from the defendant's country of nationality will be notified, and that the government will make any other consular notification required by its international obligations.

2. Rule 58. Initial Appearance. Proposed amendment providing that in petty offense and misdemeanor cases non-citizen defendants in U.S. custody shall be informed that upon request a consular official from the defendant's country of nationality will be notified, and that the government will make any other consular notification required by its international obligations.

At the meeting, Judge Raggi identified possible concerns that the proposed amended rules could be construed (1) to intrude on executive discretion in conducting foreign affairs both generally and specifically as it pertains to deciding how to carry out treaty obligations, and (2) to confer on persons other than the sovereign signatories to treaties, specifically, criminal defendants, rights to demand compliance with treaty provisions.

Ms. Felton and Mr. Wroblewski stated that, on behalf of the Justice Department, they had conferred with counterparts at the Department of State, and the departments now jointly proposed some changes to the proposed rule amendments to alleviate concerns such as those identified by Judge Raggi.

After extended discussions, the Committee agreed that Rules 5(d) and 58 should still be amended to address the questions of consular notification, but that the amendments should be redrafted as illustrated in the following version of Rule 5. Judge Raggi noted that, as redrafted, the amendments are a substantive departure from what was published and that it might be prudent to republish them. Judge Raggi further noted that this language would have to be

reviewed by the Standing Committee's style consultant, and that the Reporters would review the Committee Notes to determine whether any changes should be made in light of the return by the Supreme Court and the new language approved by the Committee. She stated that the Reporters would circulate the final language (with any style changes) as well as the accompanying Committee Notes for approval before submission to the Standing Committee.

Rule 5. Initial Appearance

* * * * *

(d) **Procedure in a Felony Case**.

(1) Advice. If the defendant is charged with a felony, the judge must inform the defendant of the following:

* * * * *

(F) if the defendant is held in custody and is not a United States citizen:

(i) that the defendant may request that an attorney for the government or a federal law enforcement officer notify a consular officer from the defendant's country of nationality that the defendant has been arrested; and

(ii) that in the absence of a defendant's request, consular notification may nevertheless be required by treaty or other international agreement.

* * * * *

A motion being made and seconded,

With the proviso that final language after restyling and any accompanying changes to the Committee Notes would be circulated for final approval, the Committee unanimously decided by voice vote to adopt the proposed amendments to Rules 5(d) and 58 and to transmit the matter to the Standing Committee.

C. Proposed Amendments Approved by the Standing Committee for Publication in August 2011

Judge Raggi reported that the following proposed amendments had been published for notice and public comment with the approval of the Standing Committee:

1. Rule 11. Advice re Immigration Consequences of Guilty Plea.

Judge Raggi reported that the August 2011 publication of the Committee's proposal to amend Rule 11 had prompted six written comments. Judge Rice, Chair of the Rule 11 Subcommittee, stated that the subcommittee had reviewed and discussed these comments at

length. A majority continued to endorse the language of the proposed amendment as published. In discussion among the full Committee, some members voiced concern that the amendment shifts a burden that belongs to defense counsel onto the court, creates a "slippery slope" for expanding Rule 11 procedures in ways that distract from the key trial rights being waived, and is overbroad. A majority nevertheless remained of the view that deportation is qualitatively different from other collateral consequences that may follow from a guilty plea and, therefore, should be included on the list of matters that must be discussed during a plea colloquy. Mr. Wroblewski stated that the Department of Justice supported the proposed amendment as published and had already begun to instruct its prosecutors to include appropriate language in plea agreements concerning the collateral immigration consequences of a guilty plea.

Members agreed that the Committee Note should be modified to address certain concerns raised in the public comments. The Reporters were asked to add language emphasizing that courts should use general statements rather than targeted advice to inform defendants that there may be immigration consequences from conviction.

The full text of the proposed amendment and revisions to the Committee Note follow:

Rule 11. Pleas.

* * * * *

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) Advising and Questioning the Defendant. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

* * * * *

(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a); ~~and~~

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence; and~~.~~

(O) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

* * * * *

Committee Note

Subdivision (b)(1)(O). The amendment requires the court to include a general statement that there may be immigration consequences of conviction in the advice provided to the defendant before the court accepts a plea of guilty or nolo contendere.

For a defendant who is not a citizen of the United States, a criminal conviction may lead to removal, exclusion, and the inability to become a citizen. In *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), the Supreme Court held that a defense attorney's failure to advise the defendant concerning the risk of deportation fell below the objective standard of reasonable professional assistance guaranteed by the Sixth Amendment.

The amendment mandates a generic warning, not specific advice concerning the defendant's individual situation. Judges in many districts already include a warning about immigration consequences in the plea colloquy, and the amendment adopts this practice as good policy. The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without attempting to determine the defendant's citizenship.

A motion being made and seconded,

The Committee decided, with nine votes in favor and three opposed, to amend Rule 11 by adopting the language published for public comment with the Reporters' suggested revisions to the Committee Note, and to transmit the matter to the Standing Committee with the recommendation that the proposed amendment be approved and sent to the Judicial Conference.

2. Rule 12(b). Clarifying Motions that Must Be Made Before Trial; Addresses Consequences of Motion; Provides Rule 52 Does Not Apply To Consideration Of Untimely Motion.

3. Rule 34, Arresting Judgment: Conforming Changes To Implement Amendment to Rule 12.

Judge Raggi reported that the proposed amendment to Rule 12 and the conforming changes to Rule 34 were published for public comment in August 2011, and that numerous submissions were received, including detailed objections and suggestions from defense bar organizations. Judge England, Chair of the Rule 12 Subcommittee, reported that, after a lengthy teleconference, subcommittee members unanimously determined that the concerns raised by the public comments should be considered at a face-to-face meeting, which would be held in conjunction with the full Committee's April meeting in San Francisco. To assist the subcommittee, Professors Beale and King prepared a comprehensive memorandum analyzing the history of the proposed amendment, the relevant law, and each comment received. Judge England and several members praised the Reporters' substantial research and thanked them for their analytical support.

Judge England informed members that the subcommittee would continue to work on the matter over the summer and expected to present its recommendation to the Committee at its fall meeting.

D. Proposed Amendment Referred for Review by Subcommittee

1. Rule 6. Grand Jury Secrecy.

Judge Keenan, Chair of the Rule 6 Subcommittee, reported on its review of Attorney General Eric Holder's October 18, 2011 proposal to amend Rule 6(e) to establish procedures for the disclosure of historically significant grand jury materials. The amendment (as proposed by the Department of Justice) would (1) allow district courts to permit disclosure, in appropriate circumstances, of archival grand jury materials of great historical significance, and (2) provide a temporal end point for grand jury materials that had become part of the National Archives.

Judge Keenan stated that the subcommittee had held two lengthy teleconferences to discuss the Attorney General's proposal. It also reviewed written and oral comments from (1) Public Citizen Litigation Group (PCLG) (which litigated *In re Kutler* and other cases on behalf of historians seeking access to grand jury materials), (2) District Judge D. Lowell Jensen (former chair of the Advisory Committee on Criminal Rules), (3) former Attorney General and District Judge Michael Mukasey, and (4) former U.S. Attorneys for the Southern District of New York, Robert Fiske (a former member of the Advisory Committee) and Otto Obermaier. Further, the Reporters prepared a research memorandum exploring general principles governing the relationship between the court and the grand jury, precedents relating to inherent judicial authority to disclose grand jury material, and background materials to the Committee's past amendments to Rule 6(e). Judge Keenan reported that, at the close of the second teleconference, all members of the subcommittee–other than those representing the Department of Justice–voted to recommend that the Committee not pursue the proposed amendment.

Discussion among the full Committee revealed consensus that, in the rare cases where disclosure of historically significant materials had been sought, district judges had reasonably resolved applications by reference to their inherent authority, and that it would be premature to set out standards for the release of historical grand jury materials in a national rule.

Judge Raggi summarized a telephone conversation she had with Counsel for the Archivist of the United States, the Chief Administrator for the National Archives and Records Administration (NARA), and a supporter of the proposed rule. She explained that a rule amendment providing for a presumption that grand jury materials would be disclosed after a specified number of years—seventy-five in the case of the proposal—would significantly recalibrate the balance that had long been applied to grand jury proceedings, which presumed that proceedings would forever remain secret absent an extraordinary showing in a particular case. Judge Raggi explained that the Committee might not be inclined to effect such a historic change by a procedural rule, particularly in the absence of a strong showing of need. Judge Keenan added that subcommittee members generally agreed that NARA should not become the gatekeeper for grand jury materials. Several members agreed that no real problem exists that presently warrants a rule amendment.

Mr. Wroblewski thanked Judge Keenan and the subcommittee members for the careful consideration given to the Attorney General's suggestion. He explained that the Department will continue to object to requests for disclosure based on Supreme Court precedent that the Department interprets as establishing a rule that rejects district judges' assertions of inherent authority to release historically significant grand jury materials. Mr. Wroblewski made clear, however, that the Department does think the prudent policy is to permit release under appropriate circumstances.

Judge Kravitz observed that Congress may weigh in on this issue, which also counsels against pursuing further action by rule.

A motion being made and seconded,

The Committee unanimously decided by voice vote to take no further action on the proposal and to remove it from the Committee's agenda.

IV. NEW PROPOSALS FOR DISCUSSION

A. Rule 16 (a)(1)(A)-(C), Pretrial Disclosure of Defendant's Statements

The Committee discussed correspondence from Judge Christina Reiss of the District of Vermont suggesting that Rule 16(a) be amended to require pretrial disclosure of a broader range of defendants' prior statements. Discussion revealed consensus among members that no serious problem exists warranting the proposed amendment, which could produce unintended, adverse consequences in cases involving long-term investigations into large-scale criminal organizations.

A motion being made and seconded,

The Committee unanimously decided by voice vote to take no further action on the proposal and to remove it from the Committee's agenda.

V. INFORMATION ITEMS

A. Report of the Rules Committee Support Office and Status Report on Legislation Affecting Criminal Rules

1. Mr. Robinson reported on recent congressional hearings concerning the prosecution of the late Alaska Senator Ted Stevens and the court-ordered investigation into possible prosecutorial misconduct. He advised that legislation introduced by Senator Murkowski would expand prosecutorial disclosure obligations.

2. Judge Raggi reported on the progress of the Federal Judicial Center's Benchbook Committee to identify "best practices" for judges in addressing *Brady*/*Giglio* issues, which would be included in a forthcoming draft of the Federal Judicial Center's *Benchbook for U.S. District Court Judges*.

3. Mr. Robinson reported further on the "Daniel Faulkner Law Enforcement Officers and Judges Protection Act," which would abrogate the application of Civil Rule 60(b)(6) in petitions brought under 28 U.S.C § 2254.

4. Mr. Wroblewski noted that the Justice Department planned to monitor an upcoming hearing on crime victims' rights before the House Judiciary Committee, and would report any issues pertaining to the work of the Committee following the hearing.

VI. ELECTRONIC DISCOVERY

At the Committee's October 2011 meeting, Mr. Wroblewski reported that the Justice Department was participating in a Joint Electronic Technology Working Group (JETWG) with Federal Defenders, the Administrative Office, and the Federal Judicial Center to develop a protocol for discovery of electronically stored information (ESI) in federal criminal cases. The Committee invited Andrew D. Goldsmith, National Criminal Discovery Coordinator for the Department of Justice and a co-chair of the JETWG, to attend its April 2012 meeting to discuss the protocol, which was released in February.

Mr. Goldsmith recounted the formation of the JETWG and development of the protocol, which is intended to encourage early discussion of electronic discovery issues, the exchange of data in industry standard or reasonably usable formats, notice to the court of potential discovery issues, and resolution of disputes without court involvement wherever possible. He reviewed with the Committee the four parts of the protocol: (1) an introductory section, which describes several basic discovery principles; (2) a set of recommendations for ESI discovery; (3) strategies and commentary on ESI discovery; and (4) an ESI discovery checklist. Following questions, observations, and suggestions from members, Judge Raggi thanked Mr. Goldsmith and noted that future discussion of the protocol may be warranted after it becomes widely deployed and implemented.

VII. FUTURE MEETINGS AND CLOSING BUSINESS

The Committee mourned the loss of former member Donald J. Goldberg, a well respected private attorney who had contributed significantly to the work of the Committee and became a good friend to many members. Professor Beale recalled with fondness Mr. Goldberg's leadership of the Rule 16 Subcommittee. Other members expressed their condolences.

Judge Raggi also expressed the Committee's deep appreciation for the many contributions of Rachel Brill and Leo P. Cunningham, two distinguished members whose terms will expire before the fall meeting. Members added their sincere thanks for the hard work performed by and friendships forged with Ms. Brill and Mr. Cunningham. Judge Raggi invited Ms. Brill and Mr. Cunningham to attend the fall meeting as guests of the Committee.

Judge Raggi announced that the Committee will next meet on Monday and Tuesday, October 29-30, 2012, at the Thurgood Marshall Federal Judiciary Building in Washington, D.C.

All business being concluded, Judge Raggi adjourned the meeting.

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TAB 7A

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MEMORANDUM

DATE: May 8, 2012

TO: Synonyms Subcommittee members and reporters

FROM: Judge Neil M. Gorsuch
Catherine T. Struve

RE: Subcommittee conference call agenda

Thank you for agreeing to serve on this subcommittee. We look forward to working with you. This memorandum outlines some issues for discussion on our initial conference call. Subject, of course, to your input and further guidance from the Standing Committee, we envision this Subcommittee as a forum for discussions among the Rules Committees concerning the choice of terms to describe activities that previously involved paper documents and now involve electronic files. In our initial call, we hope that you will mention any issues that your Committees are facing that involve such questions and as to which the Subcommittee could provide assistance. Such assistance could, for example, take the form of Subcommittee review of, and comments on, a proposed draft rule amendment.

As context for our discussions, Part I of this memo briefly surveys terminology, employed in one or more sets of national Rules, that might implicate questions of interest to the Subcommittee. This survey is not intended to suggest that a project is called for to overhaul the Rules' use of all (or any) of these terms. Rather, we hope to stimulate discussion concerning the contexts in which deliberations about terminology – coordinated through this Subcommittee – could assist committees that are in the process of considering rule amendments that may implicate choices about the ways in which the Rules refer to or encompass electronic filing and service.

Part II of this memo sets out the Subcommittee's first specific agenda item: the proposed amendments to Appellate Rule 6 that the Appellate Rules Committee will seek permission to publish this summer. It was during the presentation to the Standing Committee of a prior draft of this proposal that the idea of this Subcommittee arose. Thus, it seems appropriate for the Subcommittee to commence its work by providing input to the Appellate Rules Committee and the Standing Committee concerning the Appellate Rule 6 proposal.

I. Relevant terminology

After the Standing Committee – at its January 2012 meeting – decided to create this Subcommittee, Andrea Kuperman provided us with very helpful and thorough research

concerning the terms used in each set of national Rules for describing the treatment of the record (or of other materials that could be handled in both paper and electronic form). She compiled a list of provisions in the national rules that discuss activities that would previously have involved (and may still involve) sharing paper documents[1] – e.g., filing by a party or a court reporter, service by a party, transmission from one clerk's office to another, or transmission from the clerk's office to a litigant – and that may now or in the future involve accomplishing substantially the same result by electronic means.

Her findings concerning each set of Rules are enclosed. Also enclosed is a list of omitted terms, which Andrea compiled in order to memorialize the items that appeared to fall outside the scope of her search. In considering the implications of Andrea's careful and comprehensive research, it may be helpful to reorganize these data to show which terms appear in which sets of rules. Here is a table showing a rough analysis of that question. For the sake of simplicity, the table employs the simplest form as short-hand for related terms (e.g., "sent," "sending," or the like are listed as "send").

Term	Appellate	Bankruptcy	Civil	Criminal	Evidence
Communicate [information] by telephone or other reliable electronic means				Y	
Deliver	Y	Y	Y	Y	Y
Personal delivery			Y		
Deposit	Y	Y	Y	Y	
Disclose	Y	Y	Y	Y	Y
Dispatch	Y				

[1] As participants in our discussions have noted, in choosing terminology that reflects the adjustment to electronic filing, drafters should keep in mind that – for the foreseeable future – some litigants will continue to make paper filings.

Term	Appellate	Bankruptcy	Civil	Criminal	Evidence
Electronic access / remote electronic access		Y	Y	Y	
File	Y	Y	Y	Y	Y
File ... by electronic means / electronic filing	Y	Y	Y	Y	
File ... by mailing or dispatch	Y				
Forward	Y			Y	
Furnish	Y	Y	Y	Y	
Give	Y	Y	Y	Y	Y
Hand			Y		
Issue	Y	Y	Y	Y	Y
Issue ... electronically		Y			
Leave			Y	Y	
Mail	Y	Y	Y	Y	
Make available		Y	Y	Y	Y
Notice by electronic transmission		Y			
Notice / notify by mail		Y			
Notice by publication		Y	Y	Y	

Term	Appellate	Bankruptcy	Civil	Criminal	Evidence
Post		Y			
Post a notice on an official internet government forfeiture site			Y		
Present	Y	Y	Y	Y	
Produce		Y	Y	Y	Y
Provide	Y	Y	Y	Y	Y
Publish		Y	Y	Y	
Report		Y	Y	Y	
Return	Y	Y	Y	Y	
Return by reliable electronic means				Y	
Send	Y	Y	Y	Y	
Send by electronic mail			Y		
Serve	Y	Y	Y	Y	Y
Serve ... by sending to electronic address			Y		
Serve by mail	Y	Y	Y	Y	
Personal service	Y	Y	Y	Y	
Serve by ... publication		Y	Y		

Term	Appellate	Bankruptcy	Civil	Criminal	Evidence
Serve ... in a sealed envelope			Y		
Submit	Y	Y	Y	Y	Y
Submit by reliable electronic means				Y	
Supply	Y	Y			
Transfer	Y				
Transmit	Y	Y	Y	Y	
Transmit by reliable electronic means				Y	
Transmission facilities			Y		
Turn over		Y			

This table suggests a few tentative observations. First, the Rules currently employ a large and diverse set of terms to describe activities that might be affected by the shift to electronic filing. Multiple terms are used to describe potentially similar concepts within a given set of rules. Some terms recur across multiple sets of rules. Some features are distinctive to a particular set of rules. For instance, the Bankruptcy Rules' use of the term "transmit" often occurs during discussions of transmission to the United States Trustee. For another example, the Criminal Rules confront a distinctive set of issues concerning communications between the government and the court (e.g., in the context of warrant applications or the like). Moreover, even where two sets of Rules use the same term, context and practice may imbue that term with different meanings for different sets of Rules.

II. The Appellate Rule 6 proposal

The Bankruptcy Rules Committee has prepared proposed amendments to Part VIII of the Bankruptcy Rules – the rules that govern appeals from bankruptcy court to a district court or bankruptcy appellate panel ("BAP"). In tandem with that project, the Appellate Rules Committee is at work on proposed amendments to Appellate Rule 6 (concerning appeals to the court of

appeals in a bankruptcy case). Both sets of proposed amendments will be placed before the Standing Committee this June for approval for publication.

The proposed amendments to Appellate Rule 6 would update the Rule's cross-references to the Bankruptcy Part VIII Rules; would amend Rule 6(b)(2)(A)(ii) to remove an ambiguity dating from the 1998 restyling; would add a new Rule 6(c) to address permissive direct appeals from the bankruptcy court under 28 U.S.C. § 158(d)(2); and – of most salience to this Subcommittee – would revise Rule 6 to take account of the range of methods available now or in the future for dealing with the record on appeal.

Both the Bankruptcy Rules Part VIII project and the project to revise Appellate Rule 6 have highlighted changes in the treatment of the record. The Appellate Rules as they currently exist were drafted on the assumption that the record on appeal would be available only in paper form. Reflecting the fact that the bankruptcy courts were ahead of other federal courts in making the transition to electronic filing, the proposed Part VIII Rules are drafted with a contrary presumption in mind: The default principle under those Rules is that the record will be made available in electronic form.

In revising Rule 6(b) and in drafting proposed new Rule 6(c), the Appellate Rules Committee sought to adopt language that could accommodate the various ways in which the lower-court record could be made available to the court of appeals – e.g., in paper form; or in electronic files that can be sent to the court of appeals; or by means of electronic links. The Committee considered a number of possible word choices, and concluded that neither "transmit" nor "furnish" nor "provide" captured the full range of methods for making the record available; in particular, none of these terms encompassed the provision of a set of electronic links by which to access the documents in the record. Ultimately, the Committee decided to refer to the lower-court clerk's "making the record available to" the court of appeals.

Part II.A below sets out the Rule 6 proposal. Part II.B surveys other places, in the sets of national Rules, where one can find references to "making" items "available." Part II.C. notes existing and proposed provisions (in the Appellate and Bankruptcy Rules) that discuss the transmission of the record from a lower court to an appellate court. With this information as background, we would like to seek your input – during the May 15 conference call – concerning the Appellate Rule 6 draft.

A. The Appellate Rule 6 draft

Here is the draft that the Appellate Rules Committee will submit for approval for publication at the Standing Committee's June meeting:

Rule 6. Appeal in a Bankruptcy Case ~~From a Final Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel~~

1 **(a) Appeal From a Judgment, Order, or Decree of a District Court Exercising Original**

Jurisdiction in a Bankruptcy Case. An appeal to a court of appeals from a final judgment, order, or decree of a district court exercising jurisdiction under 28 U.S.C. § 1334 is taken as any other civil appeal under these rules.

(b) Appeal From a Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel Exercising Appellate Jurisdiction in a Bankruptcy Case.

(1) Applicability of Other Rules. These rules apply to an appeal to a court of appeals under 28 U.S.C. § 158(d)(1) from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction under 28 U.S.C. § 158(a) or (b)~~.~~ ~~But there are 3 exceptions~~, but with these qualifications:

(A) Rules 4(a)(4), 4(b), 9, 10, 11, ~~12(b)~~ 12(c), 13-20, 22-23, and 24(b) do not apply;

(B) the reference in Rule 3(c) to "Form 1 in the Appendix of Forms" must be read as a reference to Form 5; ~~and~~

(C) when the appeal is from a bankruptcy appellate panel, ~~the term~~ "district court," as used in any applicable rule, means "appellate panel~~.~~"; and

(D) in Rule 12.1, "district court" includes a bankruptcy court or bankruptcy appellate panel.

(2) Additional Rules. In addition to the rules made applicable by Rule 6(b)(1), the following rules apply:

(A) Motion for r~~R~~ehearing.

(i) If a timely motion for rehearing under Bankruptcy Rule ~~8015~~ 8022 is filed, the time to appeal for all parties runs from the entry of the order

disposing of the motion. A notice of appeal filed after the district court or bankruptcy appellate panel announces or enters a judgment, order, or decree – but before disposition of the motion for rehearing – becomes effective when the order disposing of the motion for rehearing is entered.

(ii) ~~Appellate review of~~ If a party intends to challenge the order disposing of the motion – or the alteration or amendment of a judgment, order, or decree upon the motion – then ~~requires~~ the party, in compliance with Rules 3(c) and 6(b)(1)(B), ~~to amend a previously filed notice of appeal. A party intending to challenge an altered or amended judgment, order, or decree~~ must file a notice of appeal or amended notice of appeal. The notice or amended notice must be filed within the time prescribed by Rule 4 – excluding Rules 4(a)(4) and 4(b) – measured from the entry of the order disposing of the motion.

(iii) No additional fee is required to file an amended notice.

(B) The ~~r~~Record on ~~a~~Appeal.

(i) Within 14 days after filing the notice of appeal, the appellant must file with the clerk possessing the record assembled in accordance with Bankruptcy Rule ~~8006~~ 8009 – and serve on the appellee – a statement of the issues to be presented on appeal and a designation of the record to be certified and ~~sent~~ made available to the circuit clerk.

(ii) An appellee who believes that other parts of the record are necessary must, within 14 days after being served with the appellant's

designation, file with the clerk and serve on the appellant a designation of additional parts to be included.

(iii) The record on appeal consists of:

• the redesignated record as provided above;

• the proceedings in the district court or bankruptcy appellate panel; and

• a certified copy of the docket entries prepared by the clerk under Rule 3(d).

(C) ~~Forwarding~~ Making the ~~r~~Record Available.

(i) When the record is complete, the district clerk or bankruptcy-appellate-panel clerk must number the documents constituting the record and ~~send~~ promptly make it available ~~them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified~~ to the circuit clerk. ~~Unless directed to do so by a party or the circuit clerk~~ If the clerk makes the record available in paper form, the clerk will not send ~~to the court of appeals~~ documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals, unless directed to do so by a party or the circuit clerk. If ~~the exhibits are~~ unusually bulky or heavy exhibits are to be made available in paper form, a party must arrange with the clerks in advance for their transportation and receipt.

(ii) All parties must do whatever else is necessary to enable the clerk

to assemble the record and ~~forward the record~~ make it available. When the record is made available in paper form, t~~T~~he court of appeals may provide by rule or order that a certified copy of the docket entries be ~~sent~~ made available in place of the redesignated record~~, b~~. But any party may request at any time during the pendency of the appeal that the redesignated record be ~~sent~~ made available.

(D) Filing the r~~R~~ecord. ~~Upon receiving the record – or a certified copy of the docket entries sent in place of the redesignated record – the circuit clerk must file it and immediately notify all parties of the filing date~~ When the district clerk or bankruptcy-appellate-panel clerk has made the record available, the circuit clerk must note that fact on the docket. The date noted on the docket serves as the filing date of the record. The circuit clerk must immediately notify all parties of the filing date.

(c) Direct Review by Permission Under 28 U.S.C. § 158(d)(2).

(1) Applicability of Other Rules. These rules apply to a direct appeal by permission under 28 U.S.C. § 158(d)(2), but with these qualifications:

(A) Rules 3-4, 5(a)(3), 6(a), 6(b), 8(a), 8(c), 9-12, 13-20, 22-23, and 24(b) do not apply;

(B) as used in any applicable rule, "district court" or "district clerk" includes – to the extent appropriate – a bankruptcy court or bankruptcy appellate panel or its clerk; and

(C) the reference to "Rules 11 and 12(c)" in Rule 5(d)(3) must be read as a reference to Rules 6(c)(2)(B) and (C).

90 **(2) Additional Rules.** In addition, the following rules apply:

91 (A) **The Record on Appeal.** Bankruptcy Rule 8009 governs the record on
92 appeal.

93 (B) **Making the Record Available.** Bankruptcy Rule 8010 governs
94 completing the record and making it available.

95 (C) **Stays Pending Appeal.** Bankruptcy Rule 8007 applies to stays pending
96 appeal.

97 (D) **Duties of the Circuit Clerk.** When the bankruptcy clerk has made the
98 record available, the circuit clerk must note that fact on the docket. The date noted
99 on the docket serves as the filing date of the record. The circuit clerk must
100 immediately notify all parties of the filing date.

101 (E) **Filing a Representation Statement**. Unless the court of appeals
102 designates another time, within 14 days after entry of the order granting permission
103 to appeal, the attorney who sought permission must file a statement with the circuit
104 clerk naming the parties that the attorney represents on appeal.

Committee Note

Subdivision (b)(1). Subdivision (b)(1) is updated to reflect the renumbering of 28 U.S.C. § 158(d) as 28 U.S.C. § 158(d)(1). Subdivision (b)(1)(A) is updated to reflect the renumbering of Rule 12(b) as Rule 12(c). New subdivision (b)(1)(D) provides that references in Rule 12.1 to the "district court" include – as appropriate – a bankruptcy court or bankruptcy appellate panel.

Subdivision (b)(2). Subdivision (b)(2)(A)(i) is amended to refer to Bankruptcy Rule 8022 (in accordance with the renumbering of Part VIII of the Bankruptcy Rules).

Subdivision (b)(2)(A)(ii) is amended to address problems that stemmed from the adoption — during the 1998 restyling project — of language referring to challenges to "an altered or amended judgment, order, or decree." Current Rule 6(b)(2)(A)(ii) states that "[a] party intending to challenge

an altered or amended judgment, order, or decree must file a notice of appeal or amended notice of appeal ….” Before the 1998 restyling, the comparable subdivision of Rule 6 instead read “[a] party intending to challenge an alteration or amendment of the judgment, order, or decree shall file an amended notice of appeal ….” The 1998 restyling made a similar change in Rule 4(a)(4). One court has explained that the 1998 amendment introduced ambiguity into that Rule: “The new formulation could be read to expand the obligation to file an amended notice to circumstances where the ruling on the post-trial motion alters the prior judgment in an insignificant manner or in a manner favorable to the appellant, even though the appeal is not directed against the alteration of the judgment.” *Sorensen v. City of New York*, 413 F.3d 292, 296 n.2 (2d Cir. 2005). Though the *Sorensen* court was writing of Rule 4(a)(4), a similar concern arises with respect to Rule 6(b)(2)(A)(ii). Rule 4(a)(4) was amended in 2009 to remove the ambiguity identified by the *Sorensen* court. The current amendment follows suit by removing Rule 6(b)(2)(A)(ii)’s reference to challenging “an altered or amended judgment, order, or decree,” and referring instead to challenging “the alteration or amendment of a judgment, order, or decree.”

Subdivision (b)(2)(B)(i) is amended to refer to Rule 8009 (in accordance with the renumbering of Part VIII of the Bankruptcy Rules).

Due to the shift to electronic filing, in some appeals the record will no longer be transmitted in paper form. Subdivisions (b)(2)(B)(i), (b)(2)(C), and (b)(2)(D) are amended to reflect the fact that the record sometimes will be made available electronically.

Subdivision (b)(2)(D) sets the duties of the circuit clerk when the record has been made available. Because the record may be made available in electronic form, subdivision (b)(2)(D) does not direct the clerk to “file” the record. Rather, it directs the clerk to note on the docket the date when the record was made available and to notify the parties of that date, which shall serve as the date of filing the record for purposes of provisions in these Rules that calculate time from that filing date.

Subdivision (c). New subdivision (c) is added to govern permissive direct appeals from the bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2). For further provisions governing such direct appeals, see Bankruptcy Rule 8006.

Subdivision (c)(1). Subdivision (c)(1) provides for the general applicability of the Federal Rules of Appellate Procedure, with specified exceptions, to appeals covered by subdivision (c) and makes necessary word adjustments.

Subdivision (c)(2). Subdivision (c)(2)(A) provides that the record on appeal is governed by Bankruptcy Rule 8009. Subdivision (c)(2)(B) provides that the record shall be made available as stated in Bankruptcy Rule 8010. Subdivision (c)(2)(C) provides that Bankruptcy Rule 8007 applies to stays pending appeal; in addition, Appellate Rule 8(b) applies to sureties on bonds provided in connection with stays pending appeal.

Subdivision (c)(2)(D), like subdivision (b)(2)(D), directs the clerk to note on the docket the

date when the record was made available and to notify the parties of that date, which shall serve as the date of filing the record for purposes of provisions in these Rules that calculate time from that filing date.

Subdivision (c)(2)(E) is modeled on Rule 12(b), with appropriate adjustments.

B. Other references to "making" an item "available"

The following list points out other places where the Rules employ the idea of "making" something "available":[2]

- Bankruptcy Rule 4002(b)(2): "Every individual debtor shall bring to the meeting of creditors under § 341, and make available to the trustee, the following documents or copies of them, or provide a written statement that the documentation does not exist or is not in the debtor's possession:"

- Criminal Rule 5.1(g): "The preliminary hearing must be recorded by a court reporter or by a suitable recording device. A recording of the proceeding may be made available to any party upon request. A copy of the recording and a transcript may be provided to any party upon request and upon any payment required by applicable Judicial Conference regulations."

- Criminal Rule 16(a)(1)(B): "Upon a defendant's request, the government must disclose to the defendant, and make available for inspection, copying, or photographing, all of the following:"

- Criminal Rule 32(i)(4)(C): "At sentencing, the court: … (C) must append a copy of the court's determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons."

- Criminal Rule 57(c): "Copies of local rules and their amendments, when promulgated, must be furnished to the judicial council and the Administrative Office of the United States Courts and must be made available to the public."

    - See also Civil Rule 83(a)(1): "Copies of [local] rules and amendments must, on their adoption, be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public."

- Criminal Rule 58(g)(2)(C): "The record consists of the original papers and exhibits in the case; any transcript, tape, or other recording of the proceedings; and a certified copy of the

[2] This list was compiled by running the following search in the USC database on Westlaw: pr,ci,ti(rule! & (appellate bankruptcy criminal evidence civil)) & (((make made) /6 available) "make available" "made available").

docket entries. For purposes of the appeal, a copy of the record of the proceedings must be made available to a defendant who establishes by affidavit an inability to pay or give security for the record."

- Civil Rule 26(a)(1)(A)(iii): "Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties: … (iii) a computation of each category of damages claimed by the disclosing party--who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered;"

- Civil Rule 36(a)(2): "Each matter must be separately stated. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying."

- Evidence Rule 902(11): "Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record--and must make the record and certification available for inspection--so that the party has a fair opportunity to challenge them."

- Evidence Rule 1006: "The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court."

This survey of the existing uses of "make available" shows that the term is currently employed to denote:

- Debtors making documents available to a trustee
- A recording being made available to a party
- Items being made available for inspection, copying, and the like
- A presentence report being made available to the Bureau of Prisons
- Circuits making local rules available to the public
- A copy of the record being made available to an indigent defendant
- A litigant making a record available to an opponent before offering it into evidence

C. Other references to the treatment of the record on appeal

A search in the national Rules for discussions of the transmission of the record on appeal from a lower court to an appellate court reveals that this topic is currently treated in the Appellate and Bankruptcy Rules but not in the other sets of Rules. Here is a summary of the relevant Appellate and Bankruptcy Rules (and proposed Bankruptcy Rules):

- The current Appellate Rules

- The current Appellate Rules tend to use "forward" to denote the treatment of the record, though they occasionally use other terms instead or in addition.

- See Appellate Rule 5(d)(3) (providing, for appeals by permission, that "The record must be forwarded and filed in accordance with Rules 11 and 12(c)"); Appellate Rule 6(b)(2)(B); Appellate Rule 11 (treating "Forwarding the Record").[3]

- See also Appellate Rule 12(c) (referring to the circuit clerk "receiving" the record); Appellate Rule 13(d) (addressing Tax Court appeals and using both "forward[]" and "sen[d]"); Appellate Rule 16(b) (referring to the "fil[ing]" of a supplemental record on review of an agency determination); Appellate Rule 17 (in the context of review of agency determinations, using both "file" and "sen[d]"); Appellate Rule 39(e)(1) (discussing costs of "transmission of the record"); Appellate Rule 45(d) (discussing the "return[]" of "original papers constituting the record ... to the court or agency from which they were received").

- The current Bankruptcy Rules

  - The current Part VIII rules use "transmit" and its cognates to denote the treatment of the record. See Bankruptcy Rule 8006 ("All parties shall take any other action necessary to enable the clerk to assemble and transmit the record."); Bankruptcy Rule 8007 (discussing, inter alia, "Completion and Transmission of the Record");[4] Bankruptcy Rule 8014 (referring to "[c]osts incurred ... in the preparation and transmission of the record"); Bankruptcy Rule 8016(b) ("Original papers transmitted as the record on appeal shall be returned to the clerk on disposition of the appeal.").

  - Bankruptcy Rule 9027(h) refers to "deliver[ing]" or "suppl[ying]" court records in a removed case.

- The proposed Bankruptcy Part VIII Rules

  - The proposed Bankruptcy Part VIII rules continue to use the term "transmit," and operate on a presumption that the transmission will ordinarily be in electronic rather than paper form.

There are two questions that warrant particular attention in this context. First, will proposed

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[3] Appellate Rule 11 also refers (variously) to the district clerk "retain[ing]" the record and to the district clerk "send[ing]" the record to the circuit clerk

[4] Rule 8007(b) also refers to the possibility of "additional copies of the record be[ing] furnished").

Appellate Rule 6's discussion of "making the record available" to the court of appeals fit well with the terms used elsewhere in the Appellate Rules? And second, with that usage fit well with the treatment of the record in the proposed Part VIII Rules? The Appellate Rules Committee believes that the answer to these two questions is yes, but it also is very interested in obtaining the views of this Subcommittee and of the Bankruptcy Rules Committee.

The Appellate Rules Committee noted that proposed Appellate Rule 6's references to "making the record available" would diverge from references, in other Appellate Rules, to "forwarding" the record. That divergence is not surprising given the idiosyncracies of appellate practice in bankruptcy cases. Rule 6(b) already makes special provision for direct appeals from a district court or BAP in a bankruptcy case; in that context, the record on appeal to the district court or BAP forms the basis for a redesignated record for purposes of the appeal to the court of appeals. Practitioners are unlikely to expect perfect parallelism between the terms used in Appellate Rule 6 and the terms used elsewhere in the Appellate Rules.

Perhaps more important, in practice, will be the question whether the procedures described in proposed Appellate Rule 6(c) – governing permissive direct appeals in bankruptcy cases – will dovetail with the relevant provisions in the proposed Part VIII Rules. Because the record in a bankruptcy case differs from trial-court records in other types of cases, it is necessary to treat specially the compilation of the record on appeal. Moreover, because – in a direct appeal – there will not have been a prior appeal, it is not possible to employ the redesignation approach currently used in Appellate Rule 6(b). Instead, the Appellate Rules Committee decided to incorporate by reference the Part VIII provisions that govern the treatment of the record on appeal. Thus, for example, proposed Appellate Rule 6(c)(2)(B) provides that "Bankruptcy Rule 8010 governs completing the record and making it available." Bankruptcy Rule 8010, in turn, refers to the "transmission" of the record. Although these terms are not identical, the Appellate Rules Committee believes that they are compatible. That seemed particularly true given that – in the draft of the Part VIII Rules that the Appellate Rules Committee had before it – the proposed Part VIII Rules defined "transmission" to mean electronic sending unless a pro se litigant is involved or "or the governing rules of the court expressly permit or require mailing or other means of delivery." Such a provision, the Committee believes, leaves room for a court of appeals to adopt a local rule directing a particular manner for making the record available to the court of appeals. Our upcoming conference call will provide an opportunity to seek input on this question from the Bankruptcy Rules Committee's representatives and other Subcommittee members.

III. Conclusion

To summarize, we are hoping that the Subcommittee's May 15 conference call will provide an opportunity for us to learn about topics that you believe the Subcommittee could usefully address. And we hope to discuss with you the pending Appellate Rules Committee proposal that is sketched in Part II of this memo. Thank you in advance for your participation.

Encls.

TAB 7B

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Memorandum

To: Professor Kimble

From: Thomas Myers

Date: December 13, 2011

Re: Research on whether the restyled rules created a substantive change

Organization of this memo

This memo is broken up into three parts.

- First, the rules are set out one at a time (pages 2-10). Under each rule, you'll find: (1) an argument that the restyled rule created a change that might be considered substantive; (2) any action that was taken on the rule or the current status; and (3) a side-by-side comparison of the rule before and after restyling.
- Second, you'll see cases noting and following the intent of the Advisory Committees — that the restyled rules were intended to be stylistic only (pages 11-13). I included a small sampling of those cases, but there are many more that followed the Advisory Committees' intent.
- Third, you'll see relevant information from published articles (pages 14-19). This section includes mostly quotes that the restyled rules are clearer and easier to understand. Even the most vocal critics have agreed that the restyled rules are much better.

Overall

From my research, there are essentially three unintended substantive changes that have prompted amendments or pending amendments to the rules. But the last one was caught by the Advisory Committees and has not caused any known trouble in practice.

- The first two changes were identified in cases (see pages 2 & 3). One rule has been amended (with a corresponding change now under consideration). And a possible amendment to the other rule was approved at the Advisory Committee's fall meeting.
- The third change involved the same incorrect cross-reference in two rules (see page 4). They have been amended.

Beyond that, an argument has been made that six other restyled rules might have created a substantive change (see pages 5-10). But no amendment has been made to any of those rules. In one instance (see page 5), the argument was made to the Advisory Committee by an attorney, and the Advisory Committee decided not to change the restyled rule. In a case (see page 6), the court raised the argument on its own and dismissed it. In another case (see page 7), the party raised the argument, and the court dismissed it. In the other three instances (pages 8-10), the arguments were raised in law-review articles.

I tried to be thorough when researching. It's possible, of course, that there are more cases where a party argued that the restyled rules inadvertently created a substantive change. But I didn't find any.

PART 1-A: RULES THAT HAVE BEEN AMENDED OR HAVE AN AMENDMENT UNDER CONSIDERATION

1. Fed. R. App. P. 4(a)(4)(B)(ii) — *Sorenson* issue

Before 1998, the rule provided that "[a] party intending to challenge *an alteration or amendment of the judgment* shall file a notice, or amended notice, of appeal . . . ." The relevant language was altered during the 1998 restyling: "A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or *a judgment altered or amended* upon such a motion, must file a notice of appeal, or an amended notice of appeal . . . ."

The problem was originally identified by Judge Leval in *Sorenson v. City of New York*, 413 F.3d 292, 296 n. 2 (2d Cir. 2005): "The new formulation could be read to expand the obligation to file an amended notice to circumstances where the ruling on the post-trial motion alters the prior judgment in an insignificant manner or in a manner favorable to the appellant, even though the appeal is not directed against the alteration of the judgment." In other words, the restyled rule changed the substance of the pre-1998 rule because a court might read the rule to require an appellant to amend an earlier notice of appeal after the district court amends the judgment in the appellant's favor.

The problem was discussed at several of the Appellate Rules Committee meetings from 2006 to 2009. The committee ultimately amended the rule.

Current Fed. R. App. P. 4(a)(4)(B)(ii)

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

Related change in Fed. R. App. P. 6(b)(2)(A)(ii)

Rule 6(b)(2)(A)(ii) contains an issue identical to the issue in Rule 4(a)(4) that was pointed out in *Sorenson*.

Before 1998, the rule provided that "A party intending to challenge an *alteration or amendment of the* judgment, order, or decree shall file an amended notice of appeal . . . ." The 1998 restyled rule read in relevant part: "A party intending to challenge an *altered or amended* judgment, order, or decree must file a notice of appeal or amended notice of appeal within the time prescribed by Rule 4 . . . measured from the entry of the order disposing of the motion."

The Advisory Committee is considering an amendment to this rule.

Fed. R. App. P. 4(a)(4) Before Restyling	Fed. R. App. P. 4(a)(4)(B)(ii) After Restyling (since amended; see page 2)
A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above motions requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment shall file a notice, or amended notice, of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding. No additional fees will be required for filing an amended notice.	(B) (i) If a party files a notice of appeal after the court announces or enters a judgment — but before it disposes of any motion listed in Rule 4(a)(4)(A) — the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered. (ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal — in compliance with Rule 3(c) — within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion. (iii) No additional fee is required to file an amended notice.

2-A

12b-006249

Fed. R. App. P. 6(b)(2)(i) Before Restyling	Fed. R. App. P. 6(b)(2)(A)(ii) After Restyling
(i) Effect of a Motion for Rehearing on the Time for Appeal. If any party files a timely motion for rehearing under Bankruptcy Rule 8015 in the district court or the bankruptcy appellate panel, the time for appeal to the court of appeals for all parties runs from the entry of the order disposing of the motion. A notice of appeal filed after announcement or entry of the district court's or bankruptcy appellate panel's judgment, order, or decree, but before disposition of the motion for rehearing, is ineffective until the date of the entry of the order disposing of the motion for rehearing. Appellate review of the order disposing of the motion requires the party, in compliance with Appellate Rules 3(c) and 6(b)(1)(ii), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment, order, or decree shall file an amended notice of appeal within the time prescribed by Rule 4, excluding 4(a)(4) and 4(b), measured from the entry of the order disposing of the motion. No additional fees will be required for filing the amended notice.	(A) Motion for rehearing. (i) If a timely motion for rehearing under Bankruptcy Rule 8015 is filed, the time to appeal for all parties runs from the entry of the order disposing of the motion. A notice of appeal filed after the district court or bankruptcy appellate panel announces or enters a judgment, order, or decree — but before disposition of the motion for rehearing — becomes effective when the order disposing of the motion for rehearing is entered. (ii) Appellate review of the order disposing of the motion requires the party, in compliance with Rules 3(c) and 6(b)(1)(B), to amend a previously filed notice of appeal. A party intending to challenge an altered or amended judgment, order, or decree must file a notice of appeal or amended notice of appeal within the time prescribed by Rule 4 — excluding Rules 4(a)(4) and 4(b) — measured from the entry of the order disposing of the motion. (iii) No additional fee is required to file an amended notice.

2-B

12b-006250

2. Fed. R. Crim. P. 16(a)(2), 16(a)(1)(C) & 16(a)(1)(E) — *Rudolph* case

This possible substantive change was discussed in *U.S. v. Rudolph*, 224 F.R.D. 503, 505-511 (N.D. Ala. 2004). One of the parties presented the argument in this case — that the restyled rule might have created a substantive change.

In 2002, Rule 16 was restyled, redesignating Rule 16(a)(1)(C) as 16(a)(1)(E), and revising the opening clause from Rule 16(a)(2).

Former Rule 16(a)(2) began with "*Except as provided in paragraphs (A), (B), (D), and (E) of subdivision (a)(1) . . .*" In contrast, restyled Rule 16(a)(2) began with "*Except as Rule 16(a)(1) provides otherwise . . .*" Thus, the *except*-clause in Rule 16(a)(2) no longer explicitly protected the items described in restyled Rule 16(a)(1)(E) [formerly Rule 16(a)(1)(C)] from compelled disclosure.

The defendant in *Rudolph* argued that restyled Rule 16(a)(2) gives the defendant more discovery rights than the previous rule. In contrast, the government argued that Rule 16 continues to limit the defendant's discovery rights, as it did before the 2002 amendment.

The court concluded that the restyled rule did not create a substantive change. Instead, the amended rules were intended to be stylistic only. The court added that the defendant's interpretation of Rule 16(a)(2) is perhaps literally correct, but it would go against the stated purpose of the Advisory Committee and Congress.

The court suggested that Rule 16(a)(2) should begin with this clause: "*Except as Rule 16(a)(1)(A), (B), (C), (D), (F), and (G) provide otherwise . . .*" The court concluded that it hoped that the Advisory Committee would correct this error in the near future.

The Advisory Committee, at its fall meeting, decided to recommend amending the rule.

Current Fed. R. Crim. P. 16(a)(2)

(2) Information Not Subject to Disclosure.

Except as Rule 16(a)(1) provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.

Fed. R. Crim. P. 16
Before Restyling

Fed. R. Crim. P 16
After Restyling

Rule 16. Discovery and Inspection	Rule 16. Discovery and Inspection
(a) Governmental Disclosure of Evidence. **(1) Information Subject to Disclosure.** **(A) Statement of Defendant.** Upon request of a defendant the government must disclose to the defendant and make available for inspection, copying, or photographing: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. The government must also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a government agent if the government intends to use that statement at trial. Upon request of a defendant which is an organization such as a corporation, partnership, association, or labor union, the government must disclose to the defendant any of the foregoing statements made by a person who the government contends (1) was, at the time of making the statement, so situated as a director, officer, employee or agent as to have been able legally to bind the defendant in respect to the subject of the statement, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as a director, officer, employee, or agent as to have been able legally to bind the defendant in respect to that alleged conduct in which the person was involved.	**(a) Government's Disclosure.** **(1) *Information Subject to Disclosure.*** **(A)** *Defendant's Oral Statement.* Upon a defendant's request, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial. **(B)** *Defendant's Written or Recorded Statement.* Upon a defendant's request, the government must disclose to the defendant, and make available for inspection, copying, or photographing, all of the following: **(i)** any relevant written or recorded statement by the defendant if: **(a)** the statement is within the government's possession, custody, or control; and **(b)** the attorney for the government knows — or through due diligence could know — that the statement exists; **(ii)** the portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent; and **(iii)** the defendant's recorded testimony before a grand jury relating to the charged offense.

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12b-006252

Fed. R. Crim. P. 16(a)(1)(C) Before Restyling	Fed. R. Crim. P. 16(a)(1)(E) After Restyling
	(C) *Organizational Defendant.* Upon a defendant's request, if the defendant is an organization, the government must disclose to the defendant any statement described in Rule 16(a)(1)(A) and (B) if the government contends that the person making the statement:
	(i) was legally able to bind the defendant regarding the subject of the statement because of that person's position as the defendant's director, officer, employee, or agent; or (ii) was personally involved in the alleged conduct constituting the offense and was legally able to bind the defendant regarding that conduct because of that person's position as the defendant's director, officer, employee, or agent.
(B) Defendant's Prior Record. Upon request of the defendant, the government shall furnish to the defendant such copy of the defendant's prior criminal record, if any, as is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.	(D) *Defendant's Prior Record.* Upon a defendant's request, the government must furnish the defendant with a copy of the defendant's prior criminal record that is within the government's possession, custody, or control if the attorney for the government knows — or through due diligence could know — that the record exists.
(C) Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.	(E) *Documents and Objects.* Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and: (i) the item is material to preparing the defense; (ii) the government intends to use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendant.

3-B

12b-006253

Fed. R. Crim. P. 16(a)(2) Before Restyling	Fed. R. Crim. P. 16(a)(2) After Restyling
(D) Reports of Examinations and Tests. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.	(F) *Reports of Examinations and Tests.* Upon a defendant's request, the government must permit a defendant to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if: (i) the item is within the government's possession, custody, or control; (ii) the attorney for the government knows — or through due diligence could know — that the item exists; and (iii) the item is material to preparing the defense or the government intends to use the item in its case-in-chief at trial.
(E) Expert Witnesses. At the defendant's request, the government shall disclose to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case in chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) of this rule and the defendant complies, the government shall, at the defendant's request, disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, or 705 as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subdivision shall describe the witnesses' opinions, the bases and the reasons for those opinions, and the witnesses' qualifications.	(G) *Expert Testimony.* Upon a defendant's request, the government must give the defendant a written summary of any testimony the government intends to use in its case-in-chief at trial under Federal Rules of Evidence 702, 703, or 705. The summary must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.
(2) Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), (D), and (E) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or any other government agent investigating or prosecuting the case. Nor does the rule authorize the discovery or inspection of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.	(2) ***Information Not Subject to Disclosure.*** Except as Rule 16(a)(1) provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.

3-C

12b-006254

3. Fed. R. App. P. 5(c) — Permission to Appeal

Restyled Rule 5(c) required that a petition for permission to appeal "must conform to Rule 32(a)(1)." Rule 32(c)(2) required that "other papers" — which includes petitions for permission to appeal — must conform to "Rule 32(a)" (with two exceptions). It was thus not clear whether petitions for permission to appeal must conform only with the requirements of Rule 32(a)(1) (as Rule 5(c) seemed to say) or with all of the requirements of Rule 32(a), except two (as Rule 32(c)(2) seemed to say).

The problem was originally identified by the Reporter. The issue was characterized as an "obvious mistake," the result of a "typographical error that arose during the restyling of the appellate rules."

Notice that the two pre-1998 rules did not contain cross-references to Rule 32.

The problem was discussed at several of the Advisory Committee meetings from 1999 to 2001. The committee ultimately amended the rule.

Current Fed. R. App. P. 5(c)

All papers must conform to Rule 32(c)(2). Except by the court's permission, a paper must not exceed 20 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 5(b)(1)(E). An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case.

Fed. R. App. P. 21(d) — Form of Papers

The mistake that appeared in Rule 5(c) also appeared in Rule 21(d).

The committee ultimately amended the rule.

Current Fed. R. App. P. 21(d)

All papers must conform to Rule 32(c)(2). Except by the court's permission, a paper must not exceed 30 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 21(a)(2)(C). An original and 3 copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

Fed. R. App. P. 5(c) Before Restyling	Fed. R. App. P. 5(c) After Restyling (since amended; see page 4)
(b) Content of petition; answer. — The petition shall contain a statement of the facts necessary to an understanding of the controlling question of law determined by the order of the district court; a statement of the question itself; and a statement of the reasons why a substantial basis exists for a difference of opinion on the question and why an immediate appeal may materially advance the termination of the litigation. The petition shall include or have annexed thereto a copy of the order from which appeal is sought and of any findings of fact, conclusions of law and opinion relating thereto. Within 7 days after service of the petition, an adverse party may file an answer in opposition. The application and answer shall be submitted without oral argument unless otherwise ordered.	**(b) Contents of the Petition; Answer or Cross-Petition; Oral Argument.** (1) The petition must include the following: (A) the facts necessary to understand the question presented; (B) the question itself; (C) the relief sought; (D) the reasons why the appeal should be allowed and is authorized by a statute or rule; and (E) an attached copy of: (i) the order, decree, or judgment complained of and any related opinion or memorandum, and (ii) any order stating the district court's permission to appeal or finding that the necessary conditions are met. (2) A party may file an answer in opposition or a cross-petition within 7 days after the petition is served. (3) The petition and answer will be submitted without oral argument unless the court of appeals orders otherwise.
(c) Form of Papers; Number of Copies. — All papers may be typewritten. An original and three copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.	**(c) Form of Papers; Number of Copies.** All papers must conform to Rule 32(a)(1). An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case.

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12b-006256

Fed. R. App. P. 21(d) Before Restyling	Fed. R. App. P. 21(d) After Restyling (since amended; see page 4)
(d) Form of Papers; Number of Copies. All papers may be typewritten. An original and three copies shall be filed unless the court requires the filing of a different number by local rule or by order in a particular case.	**(d) Form of Papers; Number of Copies.** All papers must conform to Rule 32(a)(1). An original and 3 copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

4-B

Fed. R. App. P. 32(b) Before Restyling	Fed. R. App. P. 32(c)(2) After Restyling
(b) Form of other papers. — Petitions for rehearing shall be produced in a manner prescribed by subdivision (a). Motions and other papers may be produced in like manner, or they may be typewritten upon opaque, unglazed paper 8 ½ by 11 inches in size. Lines of typewritten text shall be double spaced. Consecutive sheets shall be attached at the left margin. Carbon copies may be used for filing and service if they are legible. A motion or other paper addressed to the court shall contain a caption setting forth the name of the court, the title of the case, the file number, and a brief descriptive title indicating the purpose of the paper.	(c) **Form of Other Papers.** (1) **Motion.** The form of a motion is governed by Rule 27(d). (2) **Other Papers.** Any other paper, including a petition for rehearing and a petition for rehearing en banc, and any response to such a petition, must be reproduced in the manner prescribed by Rule 32(a), with the following exceptions: (A) a cover is not necessary if the caption and signature page of the paper together contain the information required by Rule 32(a)(2); and (B) Rule 32(a)(7) does not apply. (d) **Local Variation.** Every court of appeals must accept documents that comply with the form requirements of this rule. By local rule or order in a particular case a court of appeals may accept documents that do not meet all of the form requirements of this rule.

4-C

PART 1-B: RULES THAT HAVE BEEN QUESTIONED BUT NOT AMENDED

4. Fed. R. App. P. 15(b) — Cross-Application for Enforcement

Michael Powell, an attorney in Dallas, suggested this change, but the Appellate Rules Committee ultimately removed the item from its agenda.

Before it was restyled, Rule 15(b) stated that if a petition for review of an agency order was filed, "*the respondent* may file a cross-application for enforcement." As then written, Rule 15(b) seemed to contemplate that only the agency — which is always "the respondent" to a petition for review — could file a cross-application for enforcement.

As restyled, Rule 15(b)(1) now states that, if a petition for review of an agency order is filed, "*a party opposing the petition* may file a cross-application for enforcement."

Apparently, in at least one case, the question arose whether Rule 15(b) now permits cross-applications for enforcement to be filed not only by the agency, but by *any* party who opposes the petition for review (whether or not the agency itself has chosen to file a cross-application for enforcement). Mr. Powell suggested that the rule should be amended to clarify this ambiguity.

At the Committee Chair's request, the Department of Justice consulted with several federal agencies about Mr. Powell's concern. The agencies said that they had not experienced a problem and did not expect to experience a problem in the future. The agencies stressed that Rule 15 does not give a court jurisdiction over any application for enforcement; such jurisdiction must come from an underlying statute, and no underlying statute permits a private party to file an application for enforcement.

The item was removed. The rule has not been amended.

I could not find the case that these minutes refer to.

Fed. R. App. P. 15(b) Before Restyling	Fed. R. App. P. 15(b)(1) After Restyling
(b) Application for enforcement of order; answer; default; cross-application for enforcement. — An application for enforcement of an order of an agency shall be filed with the clerk of a court of appeals which is authorized to enforce the order. The application shall contain a concise statement of the proceedings in which the order was entered, the facts upon which venue is based, and the relief prayed. Within 20 days after the application is filed, the respondent shall serve on the petitioner and file with the clerk an answer to the application. If the respondent fails to file an answer within such time, judgment will be awarded for the relief prayed. If a petition is filed for review of an order which the court has jurisdiction to enforce, the respondent may file a cross-application for enforcement.	**(b) Application or Cross-Application to Enforce an Order; Answer; Default.** (1) An application to enforce an agency order must be filed with the clerk of a court of appeals authorized to enforce the order. If a petition is filed to review an agency order that the court may enforce, a party opposing the petition may file a cross-application for enforcement. (2) Within 20 days after the application for enforcement is filed, the respondent must serve on the applicant an answer to the application and file it with the clerk. If the respondent fails to answer in time, the court will enter judgment for the relief requested. (3) The application must contain a concise statement of the proceedings in which the order was entered, the facts upon which venue is based, and the relief requested.

5-A

5. Fed. R. Civ. P. 4(i)

This possible substantive change was discussed in *Constien v. U.S.*, 628 F.3d 1207, 1213-1215 (10th Cir. 2010). Neither party made this argument; rather, the court discussed this issue on its own.

The court said that the restyled language of Rule 4(i) — "a party must" — could literally be read to permit a party herself, and not the process server, to mail process to the Attorney General. But the court easily dismissed this possible argument for two main reasons: (1) the 2007 styled revisions were intended "to be stylistic only"; and (2) the court was "confident that the revision was not intended to change the long-recognized requirement that only a process server, not the party, can serve process by personally delivering the documents." The court discussed and relied on Rule 4(c), which requires that process be served by a non-party or, in limited circumstances, by a U.S. marshal or deputy marshal or by a person specially appointed by the court.

The rule has not been amended.

Fed. R. Civ. P. 4(i)(1)
Before Restyling

Fed. R. Civ. P. 4(i)(1)
After Restyling

(i) Serving the United States and Its Agencies, Corporations, Officers, or Employees.

(1) Service upon the United States shall be effected

(A) by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court or by sending a copy of the summons and of the complaint by registered or certified mail addressed to the civil process clerk at the office of the United States attorney and

(B) by also sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and

(C) in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to the officer or agency.

(2) (A) Service on an agency or corporation of the United States, or an officer or employee of the United States sued only in an official capacity, is effected by serving the United States in the manner prescribed by Rule 4(i)(1) and by also sending a copy of the summons and complaint by registered or certified mail to the officer, employee, agency, or corporation.

(B) Service on an officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States — whether or not the officer or employee is sued also in an official capacity — is effected by serving the United States in the manner prescribed by Rule 4(i)(1) and by serving the officer or employee in the manner prescribed by Rule 4(e), (f), or (g).

(3) The court shall allow a reasonable time to serve process under Rule 4(i) for the purpose of curing the failure to serve:

(A) all persons required to be served in an action governed by Rule 4(i)(2)(A), if the plaintiff has served either the United States attorney or the Attorney General of the United States, or

(B) the United States in an action governed by Rule 4(i)(2)(B), if the plaintiff has served an officer or employee of the United States sued in an individual capacity.

(i) Serving the United States and Its Agencies, Corporations, Officers, or Employees.

(1) *United States.* To serve the United States, a party must:

(A) (i) deliver a copy of the summons and of the complaint to the United States attorney for the district where the action is brought — or to an assistant United States attorney or clerical employee whom the United States attorney designates in a writing filed with the court clerk — or

(ii) send a copy of each by registered or certified mail to the civil-process clerk at the United States attorney's office;

(B) send a copy of each by registered or certified mail to the Attorney General of the United States at Washington, D.C.; and

(C) if the action challenges an order of a nonparty agency or officer of the United States, send a copy of each by registered or certified mail to the agency or officer.

(2) *Agency; Corporation; Officer or Employee Sued in an Official Capacity.* To serve a United States agency or corporation, or a United States officer or employee sued only in an official capacity, a party must serve the United States and also send a copy of the summons and of the complaint by registered or certified mail to the agency, corporation, officer, or employee.

(3) *Officer or Employee Sued Individually.* To serve a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf (whether or not the officer or employee is also sued in an official capacity), a party must serve the United States and also serve the officer or employee under Rule 4(e), (f), or (g).

(4) *Extending Time.* The court must allow a party a reasonable time to cure its failure to:

(A) serve a person required to be served under Rule 4(i)(2), if the party has served either the United States attorney or the Attorney General of the United States; or

(B) serve the United States under Rule 4(i)(3), if the party has served the United States officer or employee.

6-A

12b-006262

Fed. R. Civ. P. 4(c)
Before Restyling

Fed. R. Civ. P. 4(c)(2)
After Restyling

Rule 4. Summons	Rule 4. Summons
(a) Form. The summons shall be signed by the clerk, bear the seal of the court, identify the court and the parties, be directed to the defendant, and state the name and address of the plaintiff's attorney or, if unrepresented, of the plaintiff. It shall also state the time within which the defendant must appear and defend, and notify the defendant that failure to do so will result in a judgment by default against the defendant for the relief demanded in the complaint. The court may allow a summons to be amended.	**(a) Contents; Amendments.** (1) *Contents.* A summons must: (A) name the court and the parties; (B) be directed to the defendant; (C) state the name and address of the plaintiff's attorney or — if unrepresented — of the plaintiff; (D) state the time within which the defendant must appear and defend; (E) notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint; (F) be signed by the clerk; and (G) bear the court's seal. (2) *Amendments.* The court may permit a summons to be amended.
(b) Issuance. Upon or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is in proper form, the clerk shall sign, seal, and issue it to the plaintiff for service on the defendant. A summons, or a copy of the summons if addressed to multiple defendants, shall be issued for each defendant to be served.	**(b) Issuance.** On or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant. A summons — or a copy of a summons that is addressed to multiple defendants — must be issued for each defendant to be served.
(c) Service with Complaint; by Whom Made. (1) A summons shall be served together with a copy of the complaint. The plaintiff is responsible for service of a summons and complaint within the time allowed under subdivision (m) and shall furnish the person effecting service with the necessary copies of the summons and complaint. (2) Service may be effected by any person who is not a party and who is at least 18 years of age. At the request of the plaintiff, however, the court may direct that service be effected by a United States marshal, deputy United States marshal, or other person or officer specially appointed by the court for that purpose. Such an appointment must be made when the plaintiff is authorized to proceed in forma pauperis pursuant to 28 U.S.C. § 1915 or is authorized to proceed as a seaman under 28 U.S.C. § 1916.	**(c) Service.** (1) *In General.* A summons must be served with a copy of the complaint. The plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m) and must furnish the necessary copies to the person who makes service. (2) *By Whom.* Any person who is at least 18 years old and not a party may serve a summons and complaint. (3) *By a Marshal or Someone Specially Appointed.* At the plaintiff's request, the court may order that service be made by a United States marshal or deputy marshal or by a person specially appointed by the court. The court must so order if the plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. §1915 or as a seaman under 28 U.S.C. § 1916.

6-B

12b-006263

6. Fed. R. Civ. P. 6(b)

This possible substantive change was discussed in *Argentine Republic v. Nat'l Grid Plc*, 637 F.3d 365, 367-369 (D.C. Cir. 2011). One of the parties presented the argument in this case — that the restyled rule might have created a substantive change.

Former Rule 6(b) dealt with extending time limits set "by these rules" or "by order of court." The restyled rule refers generally to any "specified time." The party argued that restyled 6(b) might be used to extend time limits *by statute*. But the court fairly easily dismissed the argument.

Here is the language from the case (from page 368):

> "National Grid argues that the district court could not, as a matter of law, have granted the motion because Rule 6(b) may not be used to extend periods of time dictated by statute. We agree. Every court to have considered this question has held that Rule 6(b) may be used only to extend time limits imposed by the court itself or by other Federal Rules, but not by statute. . . . To be sure, the language of Rule 6(b) on which the Sixth Circuit relied, i.e., the specific reference to time periods set out in the Federal Rules or by court order, was eliminated in the 2007 restyling of the Rules. The current language merely requires that "When an act may or must be done within a specified time, the court may, for good cause, extend the time." But the 2007 revision was meant to be stylistic only, so the pre-revision language remains relevant.
>
> . . .
>
> We see three reasons for following the lead of the other courts that have addressed this issue. First, like the Sixth Circuit, we believe that Rule 6(b)'s pre–2007 text clearly limits the rule's application to deadlines established by other Federal Rules and by court orders. Second, a comparison of the current Rule 6(b) with Rule 6(a), which governs methods for computing time, supports this reading. Rule 6(a) expressly applies to statutory time periods, suggesting by negative implication that Rule 6(b), which contains no parallel specification, does not. Finally, where Congress has set out a specific deadline that courts have consistently construed to prohibit extension on equitable grounds, we think that it would be incongruous to allow courts to circumvent the congressional directive through the use of Rule 6(b)."

The rule has not been amended.

Fed. R. Civ. P. 6(b)
Before Restyling

Fed. R. Civ. P. 6(b)(1)
After Restyling

Rule 6. Time	Rule 6. Computing and Extending Time; Time for Motion Papers
(a) **Computation.** In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule and in Rule 77(c), "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.	(a) **Computing Time.** The following rules apply in computing any time period specified in these rules or in any local rule, court order, or statute: (1) ***Day of the Event Excluded.*** Exclude the day of the act, event, or default that begins the period. (2) ***Exclusions from Brief Periods.*** Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days. (3) ***Last Day.*** Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or — if the act to be done is filing a paper in court — a day on which weather or other conditions make the clerk's office inaccessible. When the last day is excluded, the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible. (4) ***"Legal Holiday" Defined.*** As used in these rules, "legal holiday" means: (A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and (B) any other day declared a holiday by the President, Congress, or the state where the district court is located.
(b) **Enlargement.** When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.	(b) **Extending Time.** (1) ***In General.*** When an act may or must be done within a specified time, the court may, for good cause, extend the time: (A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or (B) on motion made after the time has expired if the party failed to act because of excusable neglect. (2) ***Exceptions.*** A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b), except as those rules allow.

7-A

12b-006265

7. Fed. R. Civ. P. 26(a)(5)

[from Counseller article]

During the 2007 restyling, Rule 26(a)(5) was deleted. This rule indexed the various discovery instruments. Professor Jeremy Counseller discussed this possible substantive change in his article "Rooting for the Restyled Rules (Even Though I Opposed Them)." 78 Miss. L.J. 519, 552-554 (Spring 2009).

Counseller argues that deleting Rule 26(a)(5) is a substantive change because courts relied upon it to overcome arguments that certain procedures did not constitute discovery devices and, therefore, did not need to be offered within the discovery period.

While Counseller notes the restylists' position that Rule 26(a)(5) is merely redundant when examining the language of the rule in isolation, he states that case law has assigned 26(a)(5) an importance beyond a mere redundant index of discovery devices.

Professor Counseller suggests that the Advisory Committee reinsert former Rule 26(a)(5).

The rule has not been amended.

Fed. R. Civ. P. 26(a)(5) Before Restyling

Fed. R. Civ. P. 26(a)(5) After Restyling

(3) Pretrial Disclosures. In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to other parties and promptly file with the court the following information regarding the evidence that it may present at trial other than solely for impeachment: (A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises; (B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and (C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises. Unless otherwise directed by the court, these disclosures must be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and promptly file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(B), and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under Rule 26(a)(3)(C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Federal Rules of Evidence, are waived unless excused by the court for good cause.	**(3)** ***Pretrial Disclosures.*** **(A)** ***In General.*** In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment: (i) the name and, if not previously provided, the address and telephone number of each witness — separately identifying those the party expects to present and those it may call if the need arises; (ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and (iii) an identification of each document or other exhibit, including summaries of other evidence — separately identifying those items the party expects to offer and those it may offer if the need arises. **(B)** ***Time for Pretrial Disclosures; Objections.*** Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made — except for one under Federal Rule of Evidence 402 or 403 — is waived unless excused by the court for good cause.
(4) Form of Disclosures. Unless the court orders otherwise, all disclosures under Rules 26(a)(1) through (3) must be made in writing, signed, and served. **(5) Methods to Discover Additional Matter.** Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admission.	**(4)** ***Form of Disclosures.*** Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served. [Current Rule 26(a)(5) is deleted.]

8-A

8. Discovery Rules — Civil Rules 29, 30(a)(2)(A), 30(b)(4), 31(a)(2)(A), 33(a)(1), 33(b)(2), 34(b)(2)(A), 36(a)(3), 39(a)(1), and 59(c)

[from Counseller article]

During the 2007 restyling, the word "stipulation" was substituted for the words "written stipulation" in a number of rules. Professor Jeremy Counseller discussed this possible substantive change in his article "Rooting for the Restyled Rules (Even Though I Opposed Them)." 78 Miss. L.J. 519, 554-558 (Spring 2009).

Counseller specifically lists and discusses the following restyled rules that contained "written stipulation" before restyling: 29, 30(a)(2)(A), 30(b)(4), 31(a)(2)(A), 33(a)(1), 33(b)(2), 36(a)(3), and 59(c). Although not specifically discussed in Counseller's article, the words "written stipulation" also appeared in restyled Rules 34(b)(2)(A) and 39(a)(1) before restyling.

Counseller argues that changing "written stipulation" to merely "stipulation" caused a substantive change. He suggests that deleting "written" is the result of the effort to "reduce inconsistencies by using the same words to express the same meaning." And, indeed, pre-2007 Rules 16(c)(3), 26(a), 26(a)(2)(C), 30(b)(4), 41(a)(1)(ii), 65.1, 71.1(i)(2), and 71.1(i)(4) all use the word "stipulation" but not "written." (These eight rules are not included in the side-by-sides that follow.) Thus, the Advisory Committee may have concluded that all stipulations are written unless otherwise specified — or at least concluded that the word "written" in some rules and not others was not meant to be a substantive difference in the first place.

Counseller concludes that the Advisory Committee should restore the written-stipulation requirement in the discovery rules.

The rules have not been amended.

Fed. R. Civ. P. 29
Before Restyling

Fed. R. Civ. P. 29
After Restyling

Rule 29. Stipulations Regarding Discovery Procedure	Rule 29. Stipulations About Discovery Procedure
Unless otherwise directed by the court, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify other procedures governing or limitations placed upon discovery, except that stipulations extending the time provided in Rules 33, 34, and 36 for responses to discovery may, if they would interfere with any time set for completion of discovery, for hearing of a motion, or for trial, be made only with the approval of the court.	Unless the court orders otherwise, the parties may stipulate that: (a) a deposition may be taken before any person, at any time or place, on any notice, and in the manner specified — in which event it may be used in the same way as any other deposition; and (b) other procedures governing or limiting discovery be modified — but a stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial.

9-A

Fed. R. Civ. P. 30(a)(2)
Before Restyling

Fed. R. Civ. P. 30(a)(2)(A)
After Restyling

Rule 30. Depositions Upon Oral Examination	Rule 30. Depositions by Oral Examination
(a) When Depositions May Be Taken; When Leave Required. (1) A party may take the testimony of any person, including a party, by deposition upon oral examination without leave of court except as provided in paragraph (2). The attendance of witnesses may be compelled by subpoena as provided in Rule 45. (2) A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(2), if the person to be examined is confined in prison or if, without the written stipulation of the parties, (A) a proposed deposition would result in more than ten depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by third-party defendants; (B) the person to be examined already has been deposed in the case; or (C) a party seeks to take a deposition before the time specified in Rule 26(d) unless the notice contains a certification, with supporting facts, that the person to be examined is expected to leave the United States and be unavailable for examination in this country unless deposed before that time.	**(a) When a Deposition May Be Taken.** (1) *Without Leave.* A party may, by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45. (2) *With Leave.* A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2): (A) if the parties have not stipulated to the deposition and: (i) the deposition would result in more than 10 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants; (ii) the deponent has already been deposed in the case; or (iii) the party seeks to take the deposition before the time specified in Rule 26(d), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in this country after that time; or (B) if the deponent is confined in prison.
(b) Notice of Examination: General Requirements; Method of Recording; Production of Documents and Things; Deposition of Organization; Deposition by Telephone. (1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to, or included in, the notice.	**(b) Notice of the Deposition; Other Formal Requirements.** (1) *Notice in General.* A party who wants to depose a person by oral questions must give reasonable written notice to every other party. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs. (2) *Producing Documents.* If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. The notice to a party deponent may be accompanied by a request under Rule 34 to produce documents and tangible things at the deposition.

9-B

Fed. R. Civ. P. 30(b)(7)
Before Restyling

Fed. R. Civ. P. 30(b)(4)
After Restyling

(2) The party taking the deposition shall state in the notice the method by which the testimony shall be recorded. Unless the court orders otherwise, it may be recorded by sound, sound-and-visual, or stenographic means, and the party taking the deposition shall bear the cost of the recording. Any party may arrange for a transcription to be made from the recording of a deposition taken by nonstenographic means. (3) With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the method specified by the person taking the deposition. The additional record or transcript shall be made at that party's expense unless the court otherwise orders.	(3) *Method of Recording.* (A) *Method Stated in the Notice.* The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition that was taken nonstenographically. (B) *Additional Method.* With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise. (4) *By Remote Means.* The parties may stipulate — or the court may on motion order — that a deposition be taken by telephone or other remote means. For the purpose of this rule and Rules 28(a), 37(a)(2), and 37(b)(1), the deposition takes place where the deponent answers the questions.

(b)(4) and (b)(5)
intentionally omitted

(b)(5)
intentionally omitted

(6) A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules. (7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone or other remote electronic means. For the purposes of this rule and Rules 28(a), 37(a)(1), and 37(b)(1), a deposition taken by such means is taken in the district and at the place where the deponent is to answer questions.	(6) *Notice or Subpoena Directed to an Organization.* In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, or a governmental agency and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

9-C

12b-006271

Fed. R. Civ. P. 31(a)(2) Before Restyling

Fed. R. Civ. P. 31(a)(2)(A) After Restyling

Rule 31. Depositions Upon Written Questions	Rule 31. Depositions by Written Questions
(a) Serving Questions; Notice. (1) A party may take the testimony of any person, including a party, by deposition upon written questions without leave of court except as provided in paragraph (2). The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. (2) A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(2), if the person to be examined is confined in prison or if, without the written stipulation of the parties, (A) a proposed deposition would result in more than ten depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by third-party defendants; (B) the person to be examined has already been deposed in the case; or (C) a party seeks to take a deposition before the time specified in Rule 26(d).	**(a) When a Deposition May Be Taken.** (1) *Without Leave.* A party may, by written questions, depose any person, including a party, without leave of court except as provided in Rule 31(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45. (2) *With Leave.* A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2): (A) if the parties have not stipulated to the deposition and: (i) the deposition would result in more than 10 depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by the third-party defendants; (ii) the deponent has already been deposed in the case; or (iii) the party seeks to take a deposition before the time specified in Rule 26(d); or (B) if the deponent is confined in prison.
(3) A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 30(b)(6). (4) Within 14 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 7 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 7 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.	(3) *Service; Required Notice.* A party who wants to depose a person by written questions must serve them on every other party, with a notice stating, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs. The notice must also state the name or descriptive title and the address of the officer before whom the deposition will be taken. (4) *Questions Directed to an Organization.* A public or private corporation, a partnership, an association, or a governmental agency may be deposed by written questions in accordance with Rule 30(b)(6). (5) *Questions from Other Parties.* Any questions to the deponent from other parties must be served on all parties as follows: cross-questions, within 14 days after being served with the notice and direct questions; redirect questions, within 7 days after being served with cross-questions; and recross-questions, within 7 days after being served with redirect questions. The court may, for good cause, extend or shorten these times.

9-D

12b-006272

Fed. R. Civ. P. 33(a)
Before Restyling

Fed. R. Civ. P. 33(a)(1)
After Restyling

Rule 33. Interrogatories to Parties	Rule 33. Interrogatories to Parties
(a) Availability. Without leave of court or written stipulation, any party may serve upon any other party written interrogatories, not exceeding 25 in number including all discrete subparts, to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Rule 26(b)(2). Without leave of court or written stipulation, interrogatories may not be served before the time specified in Rule 26(d).	**(a) In General.** **(1)** *Number.* Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(2). **(2)** *Scope.* An interrogatory may relate to any matter that may be inquired into under Rule 26(b). An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.
(b) Answers and Objections. (1) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectioneble. (2) The answers are to be signed by the person making them, and the objections signed by the attorney making them. (3) The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties subject to Rule 29. (4) All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown. (5) The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.	**(b) Answers and Objections.** **(1)** *Responding Party.* The interrogatories must be answered: **(A)** by the party to whom they are directed; or **(B)** if that party is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who must furnish the information available to the party. **(2)** *Time to Respond.* The responding party must serve its answers and any objections within 30 days after being served with the interrogatories. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court. **(3)** *Answering Each Interrogatory.* Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath. **(4)** *Objections.* The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure. **(5)** *Signature.* The person who makes the answers must sign them, and the attorney who objects must sign any objections.

9-E

12b-006273

Fed. R. Civ. P. 33(b)(3) Before Restyling

Fed. R. Civ. P. 33(b)(2) After Restyling

Rule 33. Interrogatories to Parties	Rule 33. Interrogatories to Parties
(a) Availability. Without leave of court or written stipulation, any party may serve upon any other party written interrogatories, not exceeding 25 in number including all discrete subparts, to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Rule 26(b)(2). Without leave of court or written stipulation, interrogatories may not be served before the time specified in Rule 26(d).	**(a) In General.** (1) *Number.* Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(2). (2) *Scope.* An interrogatory may relate to any matter that may be inquired into under Rule 26(b). An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.
(b) Answers and Objections. (1) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable. (2) The answers are to be signed by the person making them, and the objections signed by the attorney making them. (3) The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties subject to Rule 29. (4) All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown. (5) The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.	**(b) Answers and Objections.** (1) *Responding Party.* The interrogatories must be answered: (A) by the party to whom they are directed; or (B) if that party is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who must furnish the information available to the party. (2) *Time to Respond.* The responding party must serve its answers and any objections within 30 days after being served with the interrogatories. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court. (3) *Answering Each Interrogatory.* Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath. (4) *Objections.* The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure. (5) *Signature.* The person who makes the answers must sign them, and the attorney who objects must sign any objections.

9-F

12b-006274

Fed. R. Civ. P. 34(b)
Before Restyling

Fed. R. Civ. P. 34(b)(2)(A)
After Restyling

Rule 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes	Rule 34. Producing Documents and Tangible Things, or Entering onto Land, for Inspection and Other Purposes
(a) **Scope.** Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).	(a) **In General.** A party may serve on any other party a request within the scope of Rule 26(b): (1) to produce and permit the requesting party or its representative to inspect and copy the following items in the responding party's possession, custody, or control: (A) any designated documents — including writings, drawings, graphs, charts, photographs, recordings, and other data compilations from which information can be obtained either directly or after the responding party translates them into a reasonably usable form; or (B) any tangible things — and to test or sample these things; or (2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.
(b) **Procedure.** The request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. Without leave of court or written stipulation, a request may not be served before the time specified in Rule 26(d). The party upon whom the request is served shall serve a written response within 30 days after the service of the request. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested. A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.	(b) **Procedure.** (1) *Contents of the Request.* The request must: (A) describe with reasonable particularity each item or category of items to be inspected; and (B) specify a reasonable time, place, and manner for the inspection and for performing the related acts. (2) *Responses and Objections.* (A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court. (B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons. (C) *Objections.* An objection to part of a request must specify the part and permit inspection of the rest. (D) *Producing the Documents.* A party producing documents for inspection must produce them as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request.

9-G

12b-006275

Fed. R. Civ. P. 36(a) Before Restyling

Fed. R. Civ. P. 36(a)(3) After Restyling

Rule 36. Requests for Admission	Rule 36. Requests for Admission
(a) Request for Admission. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b)(1) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Without leave of court or written stipulation, requests for admission may not be served before the time specified in Rule 26(d). Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow or as the parties may agree to in writing, subject to Rule 29, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why the party cannot admit or deny it.	**(a) Scope and Procedure.** (1) *Scope.* A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to: (A) facts, the application of law to fact, or opinions about either; and (B) the genuineness of any described documents. (2) *Form; Copy of a Document.* Each matter must be separately stated. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying. (3) *Time to Respond; Effect of Not Responding.* A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court. (4) *Answer.* If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.
The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.	(5) *Objections.* The grounds for objecting to a request must be stated. A party must not object solely on the ground that the request presents a genuine issue for trial. (6) *Motion Regarding the Sufficiency of an Answer or Objection.* The requesting party may move to determine the sufficiency of an answer or objection. Unless the court finds an objection justified, it must order that an answer be served. On finding that an answer does not comply with this rule, the court may order either that the matter is admitted or that an amended answer be served. The court may defer its final decision until a pretrial conference or a specified time before trial. Rule 37(a)(5) applies to an award of expenses.

9-H

12b-006276

Fed. R. Civ. P. 39(a)(1) Before Restyling

Fed. R. Civ. P. 39(a)(1) After Restyling

Rule 39. Trial by Jury or by the Court	Rule 39. Trial by Jury or by the Court
(a) **By Jury.** When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.	(a) **When a Demand Is Made.** When a jury trial has been demanded under Rule 38, the action must be designated on the docket as a jury action. The trial on all issues so demanded must be by jury unless: (1) the parties or their attorneys file a stipulation to a nonjury trial or so stipulate on the record; or (2) the court, on motion or on its own, finds that on some or all of those issues there is no federal right to a jury trial.
(b) **By the Court.** Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.	(b) **When No Demand Is Made.** Issues on which a jury trial is not properly demanded are to be tried by the court. But the court may, on motion, order a jury trial on any issue for which a jury might have been demanded.
(c) **Advisory Jury and Trial by Consent.** In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.	(c) **Advisory Jury; Jury Trial by Consent.** In an action not triable of right by a jury, the court, on motion or on its own: (1) may try any issue with an advisory jury; or (2) may, with the parties' consent, try any issue by a jury whose verdict has the same effect as if a jury trial had been a matter of right, unless the action is against the United States and a federal statute provides for a nonjury trial.

9-I

12b-006277

Fed. R. Civ. P. 59(c) Before Restyling

Fed. R. Civ. P. 59(c) After Restyling

Rule 59. New Trials; Amendment of Judgments	Rule 59. New Trial; Altering or Amending a Judgment
(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.	**(a) In General.** **(1)** *Grounds for New Trial.* The court may, on motion, grant a new trial on all or some of the issues — and to any party — as follows: **(A)** after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; or **(B)** after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court. **(2)** *Further Action After a Nonjury Trial.* After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.
(b) Time for Motion. Any motion for a new trial shall be filed no later than 10 days after entry of the judgment.	**(b) Time to File a Motion for a New Trial.** A motion for a new trial must be filed no later than 10 days after the entry of judgment.
(c) Time for Serving Affidavits. When a motion for new trial is based on affidavits, they shall be filed with the motion. The opposing party has 10 days after service to file opposing affidavits, but that period may be extended for up to 20 days, either by the court for good cause or by the parties' written stipulation. The court may permit reply affidavits.	**(c) Time to Serve Affidavits.** When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has 10 days after being served to file opposing affidavits; but that period may be extended for up to 20 days, either by the court for good cause or by the parties' stipulation. The court may permit reply affidavits.

9-J

12b-006278

9. Fed. R. Civ. P. 68

[from Hartnett article]

Professor Edward Hartnett discussed this possible substantive change in his article *Against (Mere) Restyling*, 82 Notre Dame L. Rev. 155, 166 (Nov. 2006). He discussed a possible substantive change to Rule 68 that he contended would be caused by the restyled rules (which had been published for comment at that time).

Professor Hartnett states that the change from "judgment . . . for the money or property or to the effect specified in the offer" to "judgment on specified terms" makes it more difficult to contend that (1) an offer cannot be conditioned on acceptance by all plaintiffs; and (2) the rule does not apply to offers to accept a particular equitable decree.

The rule has not been amended.

Fed. R. Civ. P. 68
Before Restyling

Fed. R. Civ. P. 68(a)
After Restyling

Rule 68. Offer of Judgment	Rule 68. Offer of Judgment
At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.	**(a) Making an Offer; Judgment on an Accepted Offer.** More than 10 days before the trial begins, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 10 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment. **(b) Unaccepted Offer.** An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs. **(c) Offer After Liability Is Determined.** When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time — but at least 10 days — before a hearing to determine the extent of liability. **(d) Paying Costs After an Unaccepted Offer.** If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

10-A

12b-006280

PART 2: CASES FOLLOWING THE INTENT OF THE ADVISORY COMMITTEES — THAT THE RESTYLED RULES WERE INTENDED TO BY STYLISTIC ONLY

Many cases state that the changes to the rules were intended to be stylistic only. Here is a small sampling of those cases. In each case, the court seemed to make the quoted statement in passing; there was no issue about substantive change.

Republic of Philippines v. Pimentel, 553 U.S. 851 (2008)

. . . after the case was in the Court of Appeals and before it came here, the text of the Rule changed. The Rules Committee advised the changes were stylistic only, see Advisory Committee's Notes on 2007 Amendment to Fed. Rule Civ. Proc. 19, 28 U.S.C. A., p. 168 (2008); and we agree.

In re Railworks Corp., 401 B.R. 196 (Bankr. D. Md. 2008)

From FN 5

When Rule 15 was rewritten in 2007 as part of a larger stylistic overhaul of the Federal Rules of Civil Procedure, no substantive changes were made.

U.S. v. Soto-Diarte, 402 Fed. Appx. 388 (10th Cir. 2010)

From FN 1

Prior to amendments in 2002, the substance of Rule 41(g) was contained in former Rule 41(e). The changes made in these amendments were stylistic only. See *United States v. Copeman*, 458 F.3d 1070, 1071 n. 1 (10th Cir.2006) ("What was formerly Rule 41(e) is now Rule 41(g), with only stylistic changes.").

Marks v. Tenn., 2008 WL 4372764 (M.D. Tenn. Sept. 18, 2008)

*This is an unpublished case, but it states that the restyled rule "removed some of the ambiguity."

From FN 1

It is perhaps significant that the court reached this conclusion after noting the ambiguity of Rule 71's application to orders "made in favor of" nonparties. The language of the rule was changed with the 2007 amendments to the Federal Rules, so that it now applies "[w]hen an order grants relief for a nonparty ..." This change was intended to be stylistic only, but appears to have removed some of the ambiguity from the situation here, in the undersigned's view.

Thompson v. RelationServe Media, 610 F.3d 628 (11th Cir. 2010)

Rule 11 was amended in 2007 "as part of the general restyling of the Civil Rules," this amendment was "intended to be stylistic only." Fed.R.Civ.P. 11 advisory committee's note, 2007 amendment. Nevertheless, I refer to the 2006 version of the Rule.

Neiberger v. Fed Ex Ground Package Sys., 566 F.3d 1184 (10th Cir. 2009)

From FN 2

The language of the rule in force at the time of trial has since been revised, but only for stylistic purposes. See Fed.R.Civ.P. 26 advisory committee's note (2007 amend.). For convenience, we use the revised language. The same is true of Rule 37, see Fed.R.Civ.P. 37 advisory committee's note (2007 amend.), and we likewise employ the revised language of that rule in our discussion.

U.S. v. Penev, 362 Fed. Appx. 170 (2d Cir. 2010)

From FN 3

Federal Rule of Criminal Procedure 11(e)(1)(C) is Rule 11(c)(1)(C)'s predecessor, and was revised and renumbered in 2002 with only stylistic changes. Fed.R.Crim.P. 11 advisory committee's notes.

U.S. v. Main, 579 F.3d 200 (2d Cir. 2009)

From FN 2

Federal Rule of Criminal Procedure 11(e)(1)(C) is Rule 11(c)(1)(C)'s predecessor, and was revised and renumbered in 2002 with only stylistic changes. Fed.R.Crim.P. 11 advisory committee's notes.

Great Am. Ins. Co. of N.Y. v. Vegas Const. Co., 251 F.R.D. 534 (D. Nev. 2008)

From FN 1

Effective December 1, 2007, the language of Rule 30 was amended to make style and terminology changes consistent throughout the Federal Rules of Civil Procedure.

Sweitzer v. Am. Express Centurion Bank, 554 F. Supp. 2d 788 (S.D. Ohio 2008)

From FN 1

Rule 25 of the Federal Rules of Civil Procedure was amended in 2007 to reflect stylistic changes. This does not have any effect on the parties' arguments or the Court's analysis. See 7C Charles A. Wright, Arthur R. Miller and Mary Kay Kane, Federal Practice & Procedure § 1951 (3d ed.2007).

PART 3: COMMENTS FROM ARTICLES

Edward A. Hartnett, *Against (Mere) Restyling*, 82 Notre Dame L. Rev. 155, 157 (Nov. 2006)

Support for the Restyled Rules

"The restyled rules are clearer and easier to understand."

James J. Duane, *The Federal Rule of Civil Procedure that Was Changed by Accident: A Lesson in the Perils of Stylistic Revision*, 62 S.C. L. Rev. 41, 42 (Fall 2010)

Support for the Restyled Rules

"These stylistic revisions have resulted in a tremendous improvement in the clarity and elegance of many of the Federal Rules of Civil Procedure."

Fed. R. Civ. P. 6 — Criticism

Professor Duane identified that, since 1938, Rule 6 provided three extra days when calculating certain deadlines that begin to run with service by mail. The three extra days were granted *to the party to whom service was sent through the mail.*

He claims that restyled Rule 6 created a substantive change because it now can be interpreted to mean that *either* party has three extra days.

But the issue that Professor Duane raised was not caused by the 2007 restyled rules. Instead, it stems from an amendment that took effect in 2005, reflecting work on time-computation rules that began in 2002 and involved collaboration with the Appellate, Bankruptcy, and Criminal Rules Committees. (See Judge Kravitz's letter to Professor Duane, Jan. 11, 2011.)

No amendment has been made to Rule 6. But it has been discussed by the Committee and deferred for now, although it remains on the Committee's agenda.

Jeremy Counseller, *Rooting for the Restyled Rules (Even Though I Opposed Them)*, 78 Miss. L.J. 519 (Spring 2009)

Support for the Restyled Rules

"My optimism comes from the fact that the Restyled Rules are clearer than the old rules. In most cases, the Restyled Rules undoubtedly express the same meaning as the old rules but do so in shorter, crisper sentences that avoid antiquated legalese and near impenetrable syntax." (pg 522)

"The Rule 14 comparison Kimble urges reveals convincingly the benefits of the Restylists' formatting conventions. The old Rule 14(a) was a single paragraph of nearly 400 words that contained numerous, distinct joinder rules. The Restylists subdivided Rule 14(a) into a vertical list numbered one through six and added subtitles to each numbered item in the list, making it easier to understand the various functions of the rules." (pgs 532-533)

"For the most part, the Restylists simply applied widely-accepted principles of good drafting. Consequently, the rules are clearer and more readable. No critic claims that the Restyled Rules are less clear or less readable than they were before the Style Project." (pg 534)

"On the whole, the restyled federal rules are clearer and more readable than their predecessors. As someone who has already presented the Restyled Rules to a group of first-year law students, I can tell you that students overwhelmingly prefer the Restyled Rules. One student's comment is representative: "they're easier to read and they're already outlined for us."" (pg 536-537)

"It should come as no surprise that the restyled federal rules are clearer and easier to read. After all, they are the result of the application of accepted principles of good writing--short sentences, no redundancy, avoid the passive voice, etc. Consider the example Professor Kimble provides comparing Rule 8(e)(2) with the restyled rule.

> Rule 8(e)(2): When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements.
>
> Restyled: If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

No one has complained that the restyling of this particular provision of Rule 8 has caused a substantive change, and it is hard to argue that the old version is clearer than the new, restyled provision. This example is not an isolated one. The Restyled Rules are consistently more readable than the old rules. Even critics of the rules were impressed with the readability of the Restyled Rules. Professor Hartnett opposed the Restyled Rules, but even he was impressed with their clarity and readability. Without question, the Restyled Rules give us clearer words . . ." (pg 537)

Lisa Eichhorn, *Clarity and the Federal Rules of Civil Procedure: A Lesson from the Style Project*, 5 J. Ass'n Legal Writing Dirs. 1 (Fall 2008)

Support for the Restyled Rules

"Comparisons of old and restyled rule language reveal that plain language techniques can play a beneficial role in the ordinary rule-drafting process." (pg 2)

"A side-by-side comparison reveals how streamlined organization and inclusion of more, and more helpful, subheadings facilitate readability while not compromising the precision or completeness of the information conveyed." (pg 15)

"In addition, thanks to cutting some unnecessary words — why should "a deposition on oral examination" not become "an oral deposition"? — the restyled version is not only clearer, but shorter." (pg 15)

"Again, a side-by-side comparison of the old and restyled rule language reveals that more logical organization of the rule's content, along with helpful subheadings, allows the reader to understand the restyled rule much more quickly and easily, even though the substantive meaning remains the same." (pg 17)

"Indeed, thanks to the subheadings, the reader of the restyled rule can see immediately that both plaintiffs and defendants may use the interpleader device and that this joinder mechanism has some relation to other rules and statutes." (pg 18)

"And apart from the subheadings, the further division of the text into paragraphs (denoted by numerals) and subparagraphs (denoted by uppercase letters) clarifies the circumstances in which interpleader is permitted. (pgs 18-19)

"As in Rule 37, the subheadings and divisions allow the reader to navigate long sentences with ease." (pg 19)

"Indeed, the second sentence of restyled Rule 22 weighs in at a relatively hefty fifty words, but it has the virtue of describing very precisely two specific circumstances that will not negate the availability of interpleader. Again, like the single sentence of Rule 37(a)(3)(B), this sentence represents a common-sense trade-off between sentence length and the need to express a complete, complex idea in one place. Both sentences illustrate that plain language guidelines—like the preference for shorter sentences—can bend in the interest of expressing complicated content precisely and accurately." (pg 19)

"Another way to increase the clarity of a complex rule is to replace gratuitously confusing sentence structure with more straightforward structure that emphasizes the point of the legal test or the exception described. For example, Rule 26(b)(3), commonly known as the work product rule, generally prohibits parties from discovering trial preparation materials of their opponents, with a few limited exceptions. In the following side-by-side comparison, note how the first two sentences of the restyled rule quickly and simply set up the idea of an exception to the general discoverability of relevant information ("Ordinarily, a party may not discover"), while the first sentence of the old rule takes its time revealing that trial

preparation materials are not generally discoverable. Indeed, the old rule does not signal to the reader that it is describing an exception ("only upon showing") until its sixty-second word." (pg 19)

"Also within Rule 26, the provision explaining the protection of non-testifying experts from discovery presents a similar example of the older rule language starting out in an unnecessarily confusing manner while the restyled language immediately tells the reader that the protection involves a general rule with some exceptions. Again, the reader of the old rule must wade through more than half of a lengthy sentence before arriving at the word "only," which signals that the sentence has been describing an exception all along." (pg 20)

"The two comparisons above, regarding the work product protection and the non-testifying expert protection, also point to the importance of the plain language technique of focusing one's sentences on a subject, verb, and object that convey the real point to be communicated. . . . Thus, the most important grammatical parts of the restyled sentences convey the most important aspects of the provisions' substance." (pg 21)

"An additional technique that helps to clarify complex subject matter is the elimination of unnecessary words in the form of needless intensifiers. . . . By eliminating these and other unnecessary intensifiers, the restyling has not only made the rule text a bit more concise, but also prevented some possible misreadings." (pgs 21-22)

"The above techniques, as well as others, were aimed at allowing the rules to retain their complex content while becoming much easier to read." (pg 22)

"[t]he restyled rules aim for, and for the most part achieve, plain, easy-to-understand English." (pgs 29-30) (quoting Michael C. Dorf, *Meet the New Federal Rules of Civil Procedure: Same as the Old Rules?*, http://writ.news.findlaw.com/dorf/20070718.html (July 18,2007)).

"Having seized a unique opportunity to clarify the entire code of civil rules, the Style Project drafters have not only made today's rules easier to comprehend but have also paved the way for clearer drafting of future substantive rule amendments. Rather than becoming "progressively more difficult to understand," the civil rules are likely to retain the clarity of the restyled language because substantive amendments will no longer have to mesh with the convoluted sentence structure and ineffective word choice of the pre-restyling language." (pg 30)

"In addition, the Style Project has generated, as a by-product, some excellent drafting guidance on plain language techniques. This guidance can aid drafters not only of future federal rule amendments but also any of rule or statutory provision. The dissemination of this guidance throughout the American legal community may prove as valuable as the actual restyling of the civil rules themselves." (pg 30)

"Plain language drafting techniques have allowed the restyling to accomplish the first part of this charge; the restyled rules are decidedly clearer, thanks to more effective organization, sentence structure, and word choice, among other changes." (pgs 30-31)

" . . . the restyling, as a case study, demonstrates that plain language techniques can allow drafters to meet the sophisticated demands that complex content, legal context, and a varied audience place upon a code of procedural rules." (pg 31)

William F. Stute, *Amendments to Civil Rules Proposed*, 30 Litigation News 5 (July 2005)

Support for the Restyled Rules

"Overall, leaders of the Section of Litigation strongly support the changes. 'Anyone who has attempted to walk through the rules will tell you that they are fraught with arcane language and inconsistencies. The amended rules, on the other hand, are written in a clear, useful style,' says Dennis J. Drasco, Roseland, NJ, Chair of the Section of Litigation."

"'The Committee has done an excellent job of making the rules simpler and easier to read, without any apparent change in meaning. It's about time," agrees W. Reece Bader, Menlo Park, CA, member of the Section's Federal Practice Task Force."

"'The amended rules are much more user friendly and easier to understand. . . .' notes Martha K. Gooding, Irvine, CA, Co-Chair of the Section's Commercial and Business Litigation Committee."

"She [Ms. Gooding] points out that the amended rules 'are drafted in a way that you would expect a brief to be written—clear, concise, and visually appealing. I appreciate the short paragraphs, headings, and clear layout of subdivisions. It takes less energy to read them. The changes are terrific, and long overdue.'"

"'Reaction to the restyled appellate and criminal rules has been overwhelmingly positive,' adds Drasco."

Mark Aronchick, Chairman of the ACTL Federal Rules of Evidence Committee, Comments of the Committee on the Federal Rules of Evidence of the American College of Trial Lawyers (Aug. 17, 2009), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Evidence/EV2010-04.pdf, p. 269.

"Our Committee members commented, time and again, on the excellent work of the restyling sub-committee."

Letter to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure, written by officers and members of the American Bar Association's Litigation Section (March 3, 2010), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Evidence/EV2010-04.pdf, p. 347

"We commend the Advisory Committee on their excellent and careful work. The overwhelming majority of the proposed changes will lead to clearer rules that will be of great benefit to the practicing bar and the public."

Joseph Kimble, *Lessons in Drafting from the New Federal Rules of Civil Procedure*, 12 Scribes J. Legal Writing 25 (2008-2009).

Joseph Kimble, *Drafting Examples from the Proposed New Federal Rules of Evidence*, 88 Mich. B.J. 52 (Aug. 2009); 88 Mich. B.J. 46 (Sept. 2009); 88 Mich. B.J. 54 (Oct. 2009); 88 Mich. B.J. 50 (Nov. 2009).

In the first article, Professor Kimble includes scores of side-by-side comparisons of the pre-2007 Civil Rules and the restyled rules. In the second — actually a series of four articles — he identifies dozens of drafting deficiencies in each of four sample evidence rules before the restyling.

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TAB 7C

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

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CHAIR

PETER G. McCABE
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DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

TO: Members, Committee on Rules of Practice and Procedure

FROM: Mark R. Kravitz

DATE: May 18, 2012

RE: IMPLEMENTATION OF THE STRATEGIC PLAN FOR THE FEDERAL JUDICIARY

Attached to this memorandum is an April 10, 2012 memorandum from Judge Charles Breyer, the Judiciary Planning Coordinator, requesting a report on the Standing Committee's progress in implementing the *Strategic Plan for the Federal Judiciary*.

By way of background, on September 14, 2010, the Judicial Conference approved the *Strategic Plan* as well as an approach to strategic planning in which Conference committees assume a great deal of responsibility for its implementation. (JCUS-SEP 10, pp. 5-6). As you will recall, in January 2011, in response to a request by the Advisory Committee on Judiciary Planning, the Standing Committee submitted a memorandum identifying the following two strategic initiatives: (1) work with the Advisory Committee on Civil Rules in implementing the results of the May 2010 conference held at the Duke University School of Law; and (2) work with the Advisory Committee on Criminal Rules on its ongoing analysis of whether the present rules and related materials adequately support the disclosure obligations of prosecutors. The Standing Committee also identified one strategy and one goal from the *Strategic Plan* that it recommended the Executive Committee consider a judiciary-wide priority—specifically, the development and implementation of a comprehensive approach to enhancing relations between the judiciary and Congress.

Judge Breyer reported on the efforts of the Judicial Conference committees to implement the *Strategic Plan* at the February 2011 meeting of the Executive Committee. On March 14, 2011, after considering the suggestions of the various Judicial Conference committees, the Executive Committee selected the following four strategies and one goal from the *Strategic Plan* as priorities for the next two years: (1) improve the delivery of justice; (2) secure sufficient resources; (3)

manage and allocate resources efficiently and effectively; (4) harness technology's potential; and (5) work with outside organizations to improve public understanding of the judiciary.

The Executive Committee has asked Judge Breyer to submit an interim assessment of the judiciary's progress in implementing the *Strategic Plan* by September 2012. To assist in the preparation of this report, in a letter to Judge Lee Rosenthal dated May 5, 2011, Judge Breyer requested that the Standing Committee both verify and update the information previously provided about its strategic initiatives and identify desired outcomes for each. Judge Breyer further asked that the Standing Committee begin considering how to measure or assess its progress in implementing the *Strategic Plan*. At the June 2011 meeting, the Standing Committee unanimously approved by voice vote a responsive memorandum prepared by Judge Rosenthal. That memorandum provided updates on the two strategic initiatives previously identified and identified two additional initiatives, namely, (1) the effort by all of the Advisory Committees to assess the impact of electronic filing and to identify ways to take advantage of technological advances; and (2) the Forms Modernization Project undertaken by the Advisory Committee on the Bankruptcy Rules.

In his most recent memorandum, Judge Breyer requests another interim report on the status and planned assessment approach for each of our initiatives as well as our perspective on whether our efforts are achieving their desired effects. Judge Breyer additionally requests that the Standing Committee comment on whether its work is helping to preserve the judiciary's core values and address critical strategic planning issues.

Judge Breyer will prepare his report to the Executive Committee over the summer and has therefore requested a response by June 30, 2012. We are working to meet that deadline so that Judge Breyer, in turn, may meet his September deadline.

> **RECOMMENDATION:** That the members delegate to the Chair and Reporter the task of preparing and transmitting to the Judiciary Planning Coordinator a report on the Standing Committee's progress in implementing the *Strategic Plan for the Federal Judiciary*.

Attachment

United States District Court
Northern District of California
United States Courthouse
San Francisco, California 94102

Chambers of
Charles R. Breyer
United States District Judge

April 10, 2012

MEMORANDUM

To: Chairs of Judicial Conference Committees

From: Charles R. Breyer
Judiciary Planning Coordinator

RE: INTERIM ASSESSMENT OF THE IMPLEMENTATION OF THE *STRATEGIC PLAN FOR THE FEDERAL JUDICIARY*

This summer, I will prepare a report for the Executive Committee on the judiciary's progress achieving the goals set forth in the *Strategic Plan for the Federal Judiciary*.

I ask for your assistance in preparing this report. Since the approval of the *Strategic Plan*, each committee has identified projects and initiatives related to the plan's strategies and goals. Committees have also identified the outcomes that these projects are intended to achieve. By June 30, 2012, please provide me with an account of the judiciary's progress in achieving these outcomes. This account might include quantitative measures, qualitative assessments, evaluation studies, survey results, or other information.

The report to the Executive Committee will be an interim assessment, and I fully understand that some initiatives may be in progress. For these efforts, a description of the status of the initiative and the planned assessment approach would be most helpful. I also understand that many outcomes are inherently difficult to measure. Your committee's perspective on whether these efforts are achieving their desired effects would also be very helpful.

Finally, I ask that each committee take some time for a broader discussion about the extent to which its work is helping to preserve the judiciary's core values and address critical strategic planning issues. Please let me know your committee's ideas about planning issues that the judiciary should address, and improvements to the judiciary's planning approach.

I anticipate that a draft of the interim assessment will be completed in time for the September Judicial Conference session. As always, I am very grateful for your efforts to implement the *Strategic Plan*. Please contact me or Brian Lynch, the AO's Long-Range Planning Officer, if you have any questions or suggestions.

cc: Executive Committee
Committee Staff

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 11-12, 2012
Washington, D.C.
Minutes

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C., on Monday and Tuesday, June 11 and 12, 2012. The following members were present:

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

Deputy Attorney General James M. Cole was unable to attend. The Department of Justice was represented throughout the meeting by Elizabeth J. Shapiro, Esquire, and at various points by Kathleen A. Felton, Esquire; H. Thomas Byron III, Esquire; Jonathan J. Wroblewski, Esquire; Ted Hirt, Esquire; and J. Christopher Kohn, Esquire.

Judge Jeremy D. Fogel, Director of the Federal Judicial Center, participated in the meeting, as did the committee's consultants – Professor Geoffrey C. Hazard, Jr.; Professor R. Joseph Kimble; and Joseph F. Spaniol, Jr., Esquire.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Peter G. McCabe	The committee's secretary
Jonathan C. Rose	Chief, Rules Committee Support Office
Benjamin J. Robinson	Deputy Chief, Rules Committee Support Office
Julie Wilson	Attorney, Rules Committee Support Office
Andrea L. Kuperman	Rules law clerk to Judge Kravitz
Joe Cecil	Research Division, Federal Judicial Center

Also attending were Administrative Office attorneys James H. Wannamaker III, Bridget M. Healy, and Holly T. Sellers, and the judiciary's Supreme Court fellows.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
- Judge Jeffrey S. Sutton, Chair
- Professor Catherine T. Struve, Reporter

Advisory Committee on Bankruptcy Rules —
- Judge Eugene R. Wedoff, Chair
- Professor S. Elizabeth Gibson, Reporter
- Professor Troy A. McKenzie, Associate Reporter

Advisory Committee on Civil Rules —
- Judge David G. Campbell, Chair
- Professor Edward H. Cooper, Reporter
- Professor Richard L. Marcus, Associate Reporter

Advisory Committee on Criminal Rules —
- Judge Reena Raggi, Chair
- Professor Sara Sun Beale, Reporter

Advisory Committee on Evidence Rules —
- Judge Sidney A. Fitzwater, Chair
- Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Kravitz reported that he would retire as committee chair on September 30, 2012, and the Chief Justice had nominated Judge Sutton to succeed him. He congratulated Judge Sutton and thanked the Chief Justice for making an excellent selection.

Judge Kravitz reported that the Supreme Court in April 2012 had adopted proposed amendments to the bankruptcy and criminal rules recommended by the Conference at its September 2011 session. The changes will take effect by operation of law on December 1, 2012, unless Congress acts to reject, modify, or defer them.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Robinson reported that there had been no further significant legislative action related to electronic discovery since the committee's January 2012 meeting.

He said that the House Judiciary Committee had held a hearing on the Class Action Fairness Act, at which no calls were made either for an overhaul of FED. R. CIV. P. 23 (class actions) or for dramatic changes to the rule. One witness, though, criticized the continuing reliance on cy près in class actions.

Mr. Robinson said that there had been no recent action on legislation addressing sunshine in regulatory decrees and settlements. He suggested that legislative attention now seemed to focus more on the criminal rules. A hearing, he reported, had been held before the Senate Judiciary Committee in June 2012 addressing the obligations of prosecutors to disclose exculpatory materials to the defense. At the hearing Senator Murkowski summarized her legislation on the subject, introduced in the wake of the prosecution of the late Senator Stevens and the ultimate dismissal of the criminal case.

Mr. Robinson reported that Judge Raggi had submitted a letter in connection with the hearing, in which she set out in broad terms the extensive work of the Advisory Committee on Criminal Rules over the last decade on FED. R. CRIM. P. 16 (discovery and inspection in criminal cases). The letter, he said, had a 909-page attachment describing that work in detail. In addition, Carol Brook, the federal defender for the Northern District of Illinois and a member of the advisory committee, testified at the hearing. He added that the legislators and witnesses appeared to agree that there were problems with non-disclosure of *Brady* materials that should be addressed, but most concluded that the pending legislation did not offer the right solution to the problems.

He reported that Senator Leahy had introduced legislation underscoring the nation's obligations under article 36 of the Vienna Convention to provide consular notification when foreign nationals are arrested. The legislation, he said, had been added to a State Department appropriations bill. He pointed out that language had been removed from the bill that would have duplicated the substance of proposed amendments to FED. R. CRIM. P. 5 and 58. The committee report accompanying the bill, moreover, encouraged the ongoing work of the rules committees and the Uniform Law Commission in facilitating compliance with the Vienna Convention by federal, state, and local law-enforcement officials. Mr. Robinson thanked the Judicial Conference's Federal-State Jurisdiction Committee for monitoring the legislation and informing the Senate of the activities of the rules committees.

He reported that the House Judiciary Committee had favorably reported out legislation to require bankruptcy asbestos trusts to report claimant filing information to the bankruptcy courts on a quarterly basis. The substance of the legislation, he noted, had previously been proposed as an amendment to the bankruptcy rules, but was not adopted by the Advisory Committee on Bankruptcy Rules. He added that the legislation would continue to be monitored.

Mr. Robinson noted that Magistrate Judge Paul W. Grimm, a member of the Advisory Committee on Civil Rules, had testified at the Senate hearing on his nomination to a district judgeship on the U.S. District Court for the District of Maryland. In addition, a Senate vote was expected shortly to confirm the nomination of Justice Andrew D. Hurwitz, a recent alumnus of the Advisory Committee on Evidence Rules, to a judgeship on the U.S. Court of Appeals for the Ninth Circuit.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of the last meeting, held on January 5 and 6, 2012.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Sutton and Professor Struve presented the report of the advisory committee, as set forth in Judge Sutton's memorandum and attachments of May 8, 2012 (Agenda Item 7).

Amendments for Final Approval

FED. R. APP. P. 13, 14, 24(b)

Judge Sutton reported that 26 U.S.C. § 7482(a)(2), enacted in 1986, authorizes permissive interlocutory appeals from the United States Tax Court to the courts of appeals. The Federal Rules of Appellate Procedure, however, were never amended to reflect this avenue for appellate review.

The proposed changes to FED. R. APP. P. 13 (review of a Tax Court decision) and FED. R. APP. P. 14 (applicability of other appellate rules to review of a Tax Court decision) would remedy this omission. The proposed change to FED. R. APP. P. 24(b) (leave to proceed in forma pauperis) would clarify the rule by recognizing that the Tax Court is not an administrative agency.

Judge Sutton reported that the advisory committee had consulted closely with the Tax Court and the Tax Division of the Department of Justice in developing the proposals. He added that no public comments had been received and no changes made in the proposals following publication.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

FED. R. APP. P. 28 and 28.1(c)

Judge Sutton explained that the proposed change to FED. R. APP. P. 28(a) (appellant's brief) would revise the list of the required contents of an appellant's brief by combining paragraphs 28(a)(6) and 28(a)(7). Paragraph (a)(6) now requires a statement of the case, and (a)(7) a statement of the facts. The new, combined provision, numbered Rule 28(a)(6), would require "a concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record (see Rule 28(e))." Conforming changes would be made in Rule 28(b), governing appellees' briefs, and Rule 28.1(c), governing briefs in cross-appeals.

Judge Sutton pointed out that most lawyers will choose to present the factual and procedural history of a case chronologically. The revised rule, though, gives them the flexibility to follow a different order. In addition, the committee note specifies that a statement of the case may include subheadings, particularly to highlight the rulings presented for review.

He reported that the proposed amendments had attracted six public comments, four of them favorable. Some comments expressed concern that deleting the current rule's reference to "the nature of the case, the course of proceedings, and the disposition below" might lead some to conclude that the procedural history of a case may no longer be included in the statement of the case. Therefore, after publication, the committee inserted into proposed Rule 28(a)(6)'s statement of the case the phrase "describing the relevant procedural history." The committee note was also modified to reflect the addition. He noted, too, that the Supreme Court's rule – which similarly requires a single, combined statement – appears to have worked well.

A member noted that a prominent judge had argued in favor of maintaining separate statements of the case and of the facts, predicting that combined statements will require judges to comb through a great deal of detail to find the key procedural steps in a case – the pertinent rulings made by the lower court. She suggested that the judge's concern might be addressed by requiring that the combined statement begin with the ruling below.

Judge Sutton said that the committee note contemplates that approach, emphasizing that lawyers are given flexibility in presenting their statements. Most, he said, will state the facts first and then the issues for review. He suggested that the judge would have been pleased with simply reversing the order of current paragraphs (a)(6) and (a)(7) to set out the statement of facts first, followed by the statement of the case. Professor Struve added that a circuit could have a local rule that specifies a particular order of subheadings.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

FORM 4

Judge Sutton explained that Questions 10 and 11 on the current version of Form 4 (affidavit accompanying a motion for permission to appeal in forma pauperis) require an IFP applicant to provide the details of all payments made to an attorney or other person for services in connection with the case. The questions, he said, ask for more information than needed to make an IFP determination. In addition, some have argued that the form's disclosures implicate the attorney-client privilege. But, he said, research shows that the payment information is very unlikely to be subject to the privilege. Sometimes, though, it might constitute protected work product.

The proposed amendments, he pointed out, combine the two questions into one. The new question asks broadly whether the applicant has spent, or will spend, any money for expenses or attorney fees in connection with the lawsuit – and if so, how much. Only

one public comment was received, which proposed an additional modification to the form to deal with the Prison Litigation Reform Act. The committee, he said, decided not to incorporate the suggestion into the current amendment, but to add the matter to its study agenda as a separate item.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

Amendments for Publication

FED. R. APP. P. 6

Professor Struve noted that the advisory committee was proposing several amendments to FED. R. APP. P. 6 (appeals in bankruptcy cases from a district court or bankruptcy appellate panel to a court of appeals). The modifications dovetail with the simultaneous amendments being proposed to Part VIII of the Federal Rules of Bankruptcy Procedure, which govern appeals from a bankruptcy court to a district court or bankruptcy appellate panel.

Revised FED. R. APP. P. 6 would update the rule's cross-references to the new, renumbered Part VIII bankruptcy rules. New subdivision 6(c) will govern permissive direct appeals from a bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2), enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. It specifies that the record on a direct appeal from a bankruptcy court will be governed by FED. R. BANKR. P. 8009 (record on appeal and sealed documents) and FED. R. BANKR. P. 8010 (completing and transmitting the record). New Rule 6(c) takes a different approach from Rule 6(b), where the record on appeal from a district court or bankruptcy appellate panel is essentially based upon the record in the mid-level appeal to the district court or panel.

She noted that proposed new Bankruptcy Rule 8010(b) deals with transmitting the record from the bankruptcy court. It specifies that the bankruptcy clerk must transmit to the clerk of the court where an appeal is pending "either the record or a notice that the record is available electronically."

In the proposed amendments to FED. R. APP. P. 6(b)(2)(C), she said, the clerk of the district court or bankruptcy appellate panel must number the documents constituting the record and "promptly make it available." The amended appellate rule, she said, is very flexible and works well with the revised Part VIII bankruptcy rules. It allows the clerk to make the record available either in paper form or electronically.

The committee without objection by voice vote approved the proposed amendments for publication.

Informational Items

Judge Sutton reported that he had sent a letter to each chief circuit judge explaining that the advisory committee had decided to take no action at the present time to amend FED. R. APP. P. 29 (amicus briefs) to treat federally recognized Native American tribes the same as states. The proposal would allow tribes to file amicus briefs as of right and exempt them from the rule's authorship-and-funding disclosure requirement. The committee, he said, had informed the chief judges that the issue warrants serious consideration, will be maintained on the committee's agenda, and will be revisited in five years.

He noted that the advisory committee had removed from its agenda an item providing for introductions in briefs. Many of the best practitioners, he said, currently include introductions in their briefs to lay out the key themes of their argument. The committee's proposed amendment to FED. R. APP. P. 28(a)(6), he said, was sufficiently flexible to permit inclusion of an introduction as part of a brief's statement of the case. Moreover, it would be difficult to specify how an introduction differs from the statement of the issues presented for review in FED. R. APP. P. 28(a)(5).

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Wedoff and Professor Gibson presented the report of the advisory committee, as set forth in Judge Wedoff's memorandum and attachments of May 14, 2012 (Agenda Item 5).

Judge Wedoff noted that the advisory committee had 14 action items to present, six of them for final approval by the Judicial Conference and eight for publication. He suggested that the most important were the amendments dealing with the Supreme Court's decision in *Stern v. Marshall*, the revision of the Part VIII bankruptcy appellate rules, and the modernization of the bankruptcy forms.

Amendments for Final Approval

FED. R. BANKR. P. 1007(b)(7) and 5009(b) and 4004(c)(1)

Judge Wedoff explained that the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 has required virtually all individual debtors to complete a personal course in financial management as a pre-condition for receiving a discharge. He noted that FED. R. BANKR. P. 1007(b)(7) (required schedules and statements) and 5009(b) (case closing) implement the statute by requiring individual debtors to file an official form (Official Form 23) certifying that they completed the course before filing their petition.

FED. R. BANKR. P. 1007(c) imposes deadlines for filing the certification. In Chapter 7 cases, for example, the debtor must file it within 60 days after the first date set for the meeting of creditors under 11 U.S.C. § 341.

If the debtor has not filed the form within 45 days after the first meeting of creditors, FED. R. BANKR. P. 5009(b) instructs the bankruptcy clerk to warn the debtor that the case will be closed without a discharge unless the certification is filed within Rule 1007's time limits. FED. R. BANKR. P. 4004(c) then specifies that the court may not grant a discharge if the debtor has not filed the certificate.

Judge Wedoff reported that the advisory committee recommended amending FED. R. BANKR. P. 1007(b) to allow the provider of the financial-management course to notify the court directly that the debtor has completed the course. This action would relieve the debtor of the obligation to file Official Form 23. FED. R. BANKR. P. 5009(b) would be amended to require the bankruptcy clerk to send the warning notice only if: (1) the debtor has not filed the certification; and (2) the course provider has not notified the court that the debtor has completed the course.

A conforming amendment to FED. R. BANKR. P. 4004(c)(1) (grant of discharge) specifies that the court does not have to deny a discharge if the debtor has been relieved of the duty to file the certification. In addition, language improvements would be made in the rule. Paragraph (c)(1) currently instructs a court to grant a discharge promptly <u>unless</u> certain acts have occurred. The amendment reformulates the text to instruct the court affirmatively <u>not</u> to grant a discharge if those acts have occurred.

Section 524(m) of the Bankruptcy Code, added in 2005, specifies that when a debtor files a reaffirmation agreement, the court must determine whether the statutory presumption that the agreement is an undue hardship for the debtor has been rebutted, *i.e.,* by finding that the debtor is apparently able to make payments under the agreement. A judge needs to make that determination before a discharge is granted. Therefore, FED. R. BANKR. P. 4004(c)(1)(K) tells the court to delay the discharge until the judge considers the debtor's ability to make the payments.

The proposed amendment to FED. R. BANKR. P. 4004(c)(1)(K) would make it clear that the rule's prohibition on entering a discharge due to a presumption of undue hardship ends when the presumption expires or the court concludes a hearing on the presumption. As a result, there would be no delay if the judge has already ruled on the matter.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference. The proposed amendments to FED. R. BANKR. P. 4004(c)(1) were approved without publication.

FED. R. BANKR. P. 9006(d), 9013, and 9014

Judge Wedoff noted that FED. R. BANKR. P. 9006 is entitled "computing and extending time," but it also specifies the default time for filing motions and affidavits in response to motions. Unlike FED. R. CIV. P. 6 (computing and extending time; time for motion papers), the civil rules counterpart on which it is based, FED. R. BANKR. P. 9006 does not indicate by its title that it also addresses time periods for motions. Nor is it followed immediately by another rule that addresses the form of motions, as the civil rules do. FED. R. CIV. P. 7 (pleadings, motions, and other papers) specifies the pleadings allowed and the form of motions and other papers.

The advisory committee, he said, was proposing amendments to highlight Rule 9006(d). First, the rule's title would be expanded to add a reference to "time for motion papers." Second, cross-references to Rule 9006(d) would be added to both FED. R. BANKR. P. 9013 (form and service of motions) and FED. R. BANKR. P. 9014 (contested matters) to specify that motions must be filed "within the time determined under FED. R. BANKR. P. 9006(d)."

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

OFFICIAL FORM 7

Judge Wedoff explained that Official Form 7 (statement of financial affairs) is a lengthy form that details many of the debtor's financial transactions. It makes frequent references to "insiders." The current definition of "insider" on the form refers to any owner of 5% of more of the voting or equity securities of a corporate debtor. That definition, though, has no basis in law, and it is not clear why it was adopted. The advisory committee would replace it with the Bankruptcy Code's definition of "insider," which includes any "person in control" of a corporate debtor.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

Amendments for Final Approval Without Publication

OFFICIAL FORMS 9A-I and 21

Professor McKenzie noted that there are several variations of Official Form 9 (notice of a bankruptcy filing, meeting of creditor, and deadlines), based on the nature of the debtor and the chapter of the Bankruptcy Code under which a case is filed. Form 9 is directed at creditors, notifying them that a bankruptcy case has been filed and informing

them of upcoming case events and what steps they need to take. The form includes identifying information about the debtor that allows recipients of the notice to determine whether they are in fact a creditor of the debtor. In the case of individual debtors, the identifying information includes the debtor's social security number.

Debtors are required to provide their social security numbers to the bankruptcy clerk on Official Form 21 (statement of social security number). That form is submitted separately and not included in the court's public electronic records. The social security number is revealed to creditors on their personal copies of Form 9 purely for identification purposes, but only a redacted version of Form 9 is included in the case file.

The Court Administration and Case Management Committee expressed concern that bankruptcy forms may be mistakenly filed with the courts in ways that publicly reveal debtors' private identifying information. In some cases, creditors may file a copy of their unredacted Form 9 with their proofs of claim without redacting the debtor's social security number. Debtors, moreover, may file Form 21 with other case papers, rather than submit it to the clerk separately.

Professor McKenzie explained that the advisory committee would add prominent warnings on both Form 9 and Form 21 alerting users that the forms should not be filed with the court in a way that makes them publicly available. He pointed out that the advisory committee had made two minor changes in the language of Form 21's warning after the agenda book had been distributed. A corrected version was circulated to the members.

Judge Wedoff reported that the Court Administration and Case Management Committee had suggested that the debtor's full social security number be eliminated entirely from the forms to prevent any problems of inadvertent disclosure. But, he said, the advisory committee was convinced that social security numbers are still needed for some creditors to be able to identify the debtors. The full number, for example, is essential for the Internal Revenue Service. He added, though, that the committee will revisit the matter if the situation changes in the future.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference without publication.

OFFICIAL FORM 10

Professor McKenzie pointed out that the current version of Official Form 10 (proof of claim) contains a requirement at odds with FED. R. BANKR. P. 9010(c) (power of attorney). The form instructs an authorized agent of a creditor filing a proof of claim to attach to the claim a copy of its power of attorney. Rule 9010(c) generally requires an

agent to give evidence of its authority to act on behalf of a creditor in a bankruptcy case by providing a power of attorney. But it does not apply when an agent files a proof of claim.

In addition, Form 10 would be amended to require additional documentation in certain cases. For claims based on an open-end or revolving consumer-credit agreement, the filer of the proof of claim will have to attach the information required by FED. R. BANKR. P. 3001(c)(3)(A) (proof of claim based on open-end or revolving consumer credit agreement), scheduled to take effect on December 1, 2012. If a claim is secured by the debtor's principal residence, the filer will have to attach the Mortgage Proof of Claim Attachment (Official Form 10, Attachment A), required as of December 1, 2011.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference without publication.

Amendments for Publication

FED. R. BANKR. P. 1014(b)

Professor McKenzie explained that Rule 1004(b) (dismissal and change of venue) deals with the procedure when petitions involving the same debtor or related debtors are filed in different districts. The current rule specifies that, upon motion, the court in which the petition is filed first may determine the district or districts in which the cases will proceed. All other courts must stay proceedings in later-filed cases until the first court makes its venue determination, unless the first court orders otherwise. As a result, later cases are stayed by default while the venue question is pending before the first court.

The rule, he said, has been the subject of game playing because it allows an attorney who wants to stay all further proceedings to do so by filing a motion, or threatening to file a motion, in the first case. Therefore, the advisory committee proposal would change the default requirement to state that proceedings in later-filed cases are stayed only on express order of the first court. The change, he said, will prevent disruption of the other cases unless the judge in the first court determines affirmatively that a stay of a related case is needed while he or she makes the venue determination. In addition, the advisory committee made style changes in the rule.

The committee without objection by voice vote approved the proposed amendments for publication.

FED. R. BANKR. P. 7004(e)

Professor McKenzie reported that the proposed amendment to FED. R. BANKR. P. 7004(e) would reduce the amount of time that a summons remains valid after it is issued. Currently, a summons must be served within 14 days after issuance. The proposed amendment to Rule 7004(e) would reduce that time to seven days.

Under the civil rules, a defendant's time to respond to a summons and complaint (30 days) begins when the summons and complaint are actually served. Under the bankruptcy rules, however, the defendant's response time is calculated from the date that the summons is issued.

He noted that concern had been expressed that seven days may be too short a period to effect service. Nevertheless, he said, the advisory committee believed that the time is sufficient and will encourage prompt service after issuance of a summons. He added that bankruptcy service is relatively easy and may be effected anywhere in the United States by first-class mail. Moreover, the necessary paperwork is usually generated by computer.

He added that the bankruptcy system has a strong objective in favor of moving cases quickly. In addition, calculating the time for service from the date of issuance, rather than service, provides clarity because issuance is noted on the court's docket. Finally, he explained that the time for service had traditionally been 10 days in the bankruptcy rules, but was increased to 14 days as a result of the omnibus 2009 time-computation amendments.

The committee without objection by voice vote approved the proposed amendments for publication.

FED. R. BANKR. P. 7008, 7012(b), 7016, 9027, and 9033(a)

Professor McKenzie reported that the advisory committee was recommending publishing proposed amendments to five bankruptcy rules to deal with the recent Supreme Court decision in *Stern v. Marshall,* 564 U.S. ___, 131 S.Ct. 2594 (2011). In *Stern,* the Court held that a non-Article III bankruptcy judge could not enter final judgment on a debtor's state common-law counterclaim against a creditor of the bankruptcy estate. Even though the governing statute, 28 U.S.C. § 157(b), specifies that the counterclaim is a "core proceeding" that a bankruptcy judge may hear and determine with finality, the Court held that it was unconstitutional for Congress to assign final adjudicatory authority over the matter to a bankruptcy judge.

Professor McKenzie noted that the Federal Rules of Bankruptcy Procedure incorporate the statutory distinction between "core" and "non-core" proceedings and recognize that a bankruptcy judge's authority is much more limited in non-core proceedings than in core proceedings. Under the current rules, a party filing a motion has to state whether the proceeding is core or non-core, and a response must do the same.

Since *Stern,* however, a core proceeding under the statute may not be a core proceeding under the Constitution. Therefore, the advisory committee, he said, decided that it was necessary to remove the words "core" and "non-core" from the rules entirely.

Instead, the advisory committee would amend FED. R. BANKR. P. 7016 (pretrial procedures and formulating issues) to make clear that a bankruptcy judge must consider his or her authority to enter final orders and judgment in all adversary proceedings. The judge's decision, moreover, will be informed by the allegations of the parties as to whether the judge has that authority. This broad approach, he said, will allow the law to continue to develop without having to change the rules again in the future.

Judge Wedoff reported that it is unclear since *Stern* whether a bankruptcy judge may enter a final judgment in a preference action or avoidance action. He pointed out that under the proposed amendments, however, there will be no need to distinguish between core and non-core proceedings. Rather, the parties will only have to decide whether they consent to entry of final orders or judgment by the bankruptcy judge. The judge will then decide whether to: (1) hear and determine the proceeding; (2) hear it and issue proposed findings of fact and conclusions of law; or (3) take some other action.

A member commended the advisory committee for an elegant solution to a difficult problem. He suggested that the revised heading to revised Rule 7016 ("procedure") may be too limited.

The committee without objection by voice vote approved the proposed amendments for publication.

FED. R. BANKR. P. 8001-8028

Judge Wedoff explained that the advisory committee's thorough revision of Part VIII of the Federal Rules of Bankruptcy Procedure – the bankruptcy appellate rules – was the result of a multi-year project to bring the rules into closer alignment with the Federal Rules of Appellate Procedure, to make the rules simpler and clearer, and to recognize that bankruptcy documents today are normally filed, served, and transmitted electronically, rather than in paper form.

He thanked Professor Gibson, emphasizing that she deserved enormous credit for having coordinated the huge forms project. He noted that she had immersed herself in all the details of appellate practice, had conducted considerable research, and had drafted a great many documents for the committee. He also thanked James Wannamaker and Bridget Healy, attorneys in the Bankruptcy Judges Division of the Administrative Office, for their dedication and professional assistance to the project. In addition, he expressed the committee's appreciation to Professor Struve, Professor Kimble, and Mr. Spaniol for their incisive and important contributions to the project, often made on very short notice.

He and Professor Gibson proceeded to describe each Part VIII rule not previously presented to the Standing Committee (Rules 8013-8028) and some additional changes made in the rules presented at the January 2012 meeting (Rules 8001-8012).

Fed. R. Bankr. P. 8001

Professor Gibson reported that since the January 2012 Standing Committee meeting, the advisory committee had made two additional changes in Rule 8001 (scope of Part VIII, definition of "BAP," and method of transmitting documents). The draft rule presented in January had included a general definition of the term "appellate court" to mean either the district court or the bankruptcy appellate panel – the court in which the first-level bankruptcy appeal is pending or will be taken. It did not, though, include the court of appeals.

It was suggested at the last meeting that the term is misleading because "appellate court" in common parlance generally refers to the court of appeals. As a result, she said, the advisory committee had eliminated the general definition. Each of the revised rules now refers specifically to the district court or the "BAP." Despite the objections of the style consultants, she added, the advisory committee decided to use the universally recognized abbreviation for a bankruptcy appellate panel and to define BAP in Rule 8001(b).

She said that there was a need to highlight a strong presumption in the revised rule in favor of electronic transmission of documents. Accordingly, revised Rule 8001(c) states specifically that a document must be sent electronically under the Part VIII rules, unless: (1) it is being sent by or to a pro se individual; or (2) a local court's rule permits or requires mailing or other means of delivery. She added that the advisory committee was comfortable with using the term "transmitting."

Fed. R. Bankr. P. 8007

Professor Gibson stated that Rule 8007 (stay pending appeal, bonds, and suspension of proceedings) had been restyled and subheadings added. In addition, the

advisory committee corrected the omission of a reference to the court of appeals in subdivision (c).

A member pointed out that under proposed Rule 8007(b), the showing required for making a motion for relief in the appellate court deals with two situations: (1) where moving first in the bankruptcy court would be impracticable; and (2) where the bankruptcy court has already ruled. But, he said, the Federal Rules of Appellate Procedure cover a third possibility – where a motion was filed below but not ruled on.

Judge Wedoff agreed to revise Rule 8007(b)(2)(B) to require the moving party to state whether the bankruptcy court has ruled on the motion, and, if so, what the reasons were for the ruling.

Fed. R. Bankr. P. 8009

Professor Gibson noted that proposed Rule 8009 (record on appeal and sealed documents) was incorporated by reference in the proposed new FED. R. APP. P. 6(c), which will govern permissive direct appeals from a bankruptcy court to a court of appeals.

Fed. R. Bankr. P. 8010

Professor Gibson reported that the advisory committee had made several changes in Rule 8010 (completing and transmitting the record) since the January 2012 meeting after conferring with clerks of the bankruptcy courts, the clerk of a bankruptcy appellate panel, and Administrative Office staff. She noted that bankruptcy courts generally use recording devices to take the record. If a transcript of a proceeding is ordered, it is produced for the court from the electronic record, usually by a contract service provider.

The rule requires the "reporter" to prepare and file the transcript with the bankruptcy clerk, but there is some question as to the identity of the reporter when a recording device is used. The advisory committee, she said, decided that the "reporter" should be defined in Rule 8010(a) as the person or service that the bankruptcy court designates to transcribe the recording.

In addition, the rule requires reporters to file all documents with the bankruptcy clerk. In the Federal Rules of Appellate Procedure, by contrast, reporters file certain documents in the appellate court and others in the district court. The reporter in a bankruptcy case, though, may not know where an appeal is pending.

Fed. R. Bankr. P. 8011

Professor Gibson reported that a minor typographical error had been corrected in Rule 8011 (filing, service, and signature) since the last Standing Committee meeting.

With regard to proof of service, a member questioned whether affidavits of service still serve a useful purpose in light of the universal use of CM/ECF in the federal courts. He noted that service in virtually all his civil cases is accomplished through CM/ECF, and there is no need to make the parties file an affidavit of service. He suggested that the Advisory Committee on Civil Rules consider removing the requirement of a certificate of service in the future.

Fed. R. Bankr. P. 8013

Professor Gibson noted that proposed Rule 8013 (motions and intervention) would change current bankruptcy practice. Currently, a person filing a motion or response may file a separate brief. The new rule, however, would not permit briefs to be filed in support of or in response to motions. Instead, it adopts the practice in FED. R. APP. P. 27 (motions), requiring that legal arguments be included in the motion or response.

She reported that proposed FED. R. BANKR. P. 8013(g) is a new provision for the bankruptcy rules. It is also not included in the Federal Rules of Appellate Procedure. It will authorize motions for intervention in an appeal pending in a district court or bankruptcy appellate panel. The party seeking to intervene must state in its motion why it did not intervene below.

Fed. R. Bankr. P. 8014

Professor Gibson explained that Rule 8014 (briefs) largely tracks the Federal Rules of Appellate Procedure and incorporates the proposed amendment to FED. R. APP. P. 28(a)(6) (briefs), which combines the statements of the case and of the facts into a single statement. (See pages 5 and 6 of these minutes.) In a change from current bankruptcy practice, revised Rule 8014 follows the Federal Rules of Appellate Procedure and requires inclusion of a summary of argument in the briefs. New Rule 8014(f) adopts the provision of FED. R. APP. P. 28(j) regarding the submission of supplemental authorities. Unlike the appellate rule, the proposed Rule 8014(f) proposes a definite time limit of seven days for any response, unless the court orders otherwise.

She emphasized that the advisory committee was attempting to make the bankruptcy rules as similar as practicable to the Federal Rules of Appellate Procedure to

make it easier for the bar to handle double appeals, *i.e.,* an appeal first to a district court or bankruptcy appellate panel, and then to the court of appeals.

Fed. R. Bankr. P. 8015

Professor Gibson noted that Rule 8015 (form and length of briefs, appendices, and other papers) was modeled on FED. R. APP. P. 32 (form and length of briefs, appendices, and other papers). The new bankruptcy rule adopts the provisions of the appellate rule governing the length of briefs, but not those prescribing the colors for brief covers. She added that the change is likely to attract comments during the publication period because new Rule 8015(a)(7) reduces the length of principal and reply briefs currently permitted in the bankruptcy rules. To achieve consistency with FED. R. APP. P. 32(a)(7), it reduces the page limits for a principal brief from 50 pages to 30, and those for a reply brief from 25 to 15.

Fed. R. Bankr. P. 8016

Professor Gibson reported that Rule 8016 (cross-appeals) was new to bankruptcy and modeled on FED. R. APP. P. 28.1 (cross-appeals). A member noted, though, that proposed Rule 8016(e) does not exactly parallel the appellate rule. Moreover, it does not include a provision, similar to that in Rule 8018(a), allowing a district court or bankruptcy appellate panel by local rule or order to modify the rule's time limits.

Judge Wedoff suggested that it would be possible to incorporate the Rule 8018 language on local court modifications into Rule 8016. He added that Rules 8016 and 8018 should be internally consistent, even though there may be some differences between them and the counterpart appellate rules. A participant recommended making both the bankruptcy and appellate rules internally consistent and consistent with each other. The same provisions should apply in both sets of rules.

Another participant recommended not including any provision in the bankruptcy rules allowing a local court to extend the time limits of the national rules. He suggested that it will only encourage extensions.

Fed. R. Bankr. P. 8017

Professor Gibson reported that Rule 8017 (amicus briefs) was new to bankruptcy and was derived from FED. R. APP. P. 29 (amicus briefs). She pointed out that proposed Rule 8017(a) would allow a bankruptcy court on its own motion to request an amicus brief.

Fed. R. Bankr. P. 8018

Professor Gibson reported that Rule 8018 (serving and filing briefs) would continue the existing bankruptcy practice that allows an appellee to file a separate appendix. It differs from FED. R. APP. P. 30 (appendix to briefs), which requires all the parties to file a single appendix. Rule 8018(a) lengthens the period for filing initial briefs from the current 14 days to 30. Since requests for extensions of time are very common, she said, it just makes sense to increase the deadline to 30 days.

Fed. R. Bankr. P. 8019

Professor Gibson noted that proposed Rule 8019 (oral argument) tracks FED. R. APP. P. 34(a)(1) (oral argument) and is more detailed than the current bankruptcy rule. Rule 8019(a) would alter the existing bankruptcy rule by: (1) authorizing the court to require the parties to submit a statement about the need for oral argument; and (2) permitting a statement to explain why oral argument is not needed, rather than only why it should be allowed. Rule 8019(f) gives the court discretion, when the appellee fails to appear for oral argument, either to hear the appellant's argument or to postpone it.

Fed. R. Bankr. P. 8020

Professor Gibson reported that Rule 8020 (frivolous appeal and other misconduct) was derived from FED. R. APP. P. 38 (frivolous appeals, damages and costs) and FED. R. APP. P. 46(c) (attorney discipline). It applies to misconduct both by parties and attorneys.

Fed. R. Bankr. P. 8021

Professor Gibson noted that Rule 8021 (costs) would continue the existing bankruptcy practice that gives the bankruptcy clerk the entire responsibility for taxing costs on appeal. The practice under FED. R. APP. P. 39 (costs), on the other hand, involves both the court of appeals and the district court in taxing costs.

Rule 8021(b) was added to govern costs assessed against the United States. Derived from FED. R. APP. P. 39(b), it is not included in the current bankruptcy rules.

Fed. R. Bankr. P. 8022

Professor Gibson reported that Rule 8022 (motion for rehearing) would continue the current bankruptcy practice of requiring that a motion for rehearing be filed within 14 days after entry of judgment on appeal. It differs from FED. R. APP. P. 40(a)(1) (time to file a petition for rehearing), which gives parties 45 days to file a rehearing motion in any civil case in which the United States is a party. She added that the Department of Justice reported that it had no problem with the rule.

Fed. R. Bankr. P. 8023

Professor Gibson reported that proposed Rule 8023 (voluntary dismissal) deviates from both the existing bankruptcy rule and the Federal Rules of Appellate Procedure. It would allow a voluntary dismissal while a case is still pending. Under the current rules, a case on appeal from a bankruptcy judge is not docketed in the district court or bankruptcy appellate panel until the record is transmitted. But under the new Rule 8023, the appeal will be docketed immediately after the notice of appeal is filed. The notice, moreover, will normally be transmitted electronically to the district court or bankruptcy appellate panel. The advisory committee, she said, concluded that it is very unlikely that an appeal will be voluntarily dismissed before it is docketed.

Fed. R. Bankr. P. 8024

Professor Gibson reported that Rule 8024 (clerk's duties on disposition of an appeal) contained virtually no changes, other than stylistic, from the current bankruptcy rule.

Fed. R. Bankr. P. 8025

Professor Gibson reported that Rule 8025 (stay of a district court or BAP judgment) contained only stylistic changes from the existing bankruptcy rule. She pointed out, though, that subdivision (c) was new. It specifies that if the district court or BAP affirms a bankruptcy court ruling and the appellate judgment is stayed, the bankruptcy court's order, judgment, or decree will be automatically stayed to the same extent as the stay of the appellate judgment.

Fed. R. Bankr. P. 8026

Professor Gibson reported that Rule 8026 (rules by circuit councils and district courts, and procedure when there is no controlling law) contained only stylistic changes from the current bankruptcy rule.

Fed. R. Bankr. P. 8027

Professor Gibson reported that Rule 8027 (notice of mediation procedure) was a new rule with no counterpart in the Federal Rules of Appellate Procedure. It provides that if a district court or bankruptcy appellate panel has a mediation procedure applicable to bankruptcy appeals, the clerk of the district court or the panel must notify the parties promptly after the appeal is docketed whether the mediation procedure applies, what its requirements are, and how it affects the time for filing briefs in the appeal.

Fed. R. Bankr. P. 8028

Professor Gibson explained that Rule 8028 (suspension of rules in Part VIII) was derived from current FED. R. BANKR. P. 8019 (suspension of rules in Part VIII) and FED. R. APP. P. 2 (suspension of rules). It authorizes a district court, bankruptcy appellate panel, or court of appeals to suspend the requirements or provisions of the Part VIII rules, except for certain enumerated rules. The new rule expands the current list of rules that may not be suspended.

Professor Gibson reported that the current FED. R. BANKR. P. 8013 (disposition of appeal and weight accorded fact findings) would be eliminated. The first part of that rule specifies what a district court or BAP may do on an appeal, *i.e.,* affirm, modify, reverse, or remand. She noted that there is no similar provision in the Federal Rules of Appellate Procedure. The second part of the current rule specifies the weight that must be given to a bankruptcy judge's findings of fact. She explained that the provision is not needed because it is already covered by FED. R. CIV. P. 52 (findings and conclusions) and incorporated by FED. R. BANKR. P. 7052 (findings by the court).

The committee without objection by voice vote approved the proposed amendments for publication.

FED. R. BANKR. P. 9023 and 9024

Judge Wedoff explained that FED. R. BANKR. P. 9023 (new trials and amendment of judgments) and FED. R. BANKR. P. 9024 (relief from a judgment or order) would be amended to add a cross-reference in each rule to the procedure set forth in proposed new Rule 8008, governing indicative rulings.

The committee without objection by voice vote approved the proposed amendments for publication.

MODERNIZATION OF THE OFFICIAL FORMS

Judge Wedoff explained that the bankruptcy process is driven in large measure by forms. Several of the current forms, however, are difficult to complete, especially for people unfamiliar with the bankruptcy system. In addition, the forms take little cognizance of electronic filing in the bankruptcy courts.

He explained that forms modernization has been a major, multi-year project of the advisory committee, working under the leadership of Judge Elizabeth L. Perris and in close coordination with the Administrative Office and the Federal Judicial Center. The major goals of the project have been: (1) to improve the quality and clarity of the forms in

order to elicit more complete and accurate information from debtors and creditors; and (2) to enhance the interface between the forms and modern technology, especially the "next generation" of CM/ECF currently under development.

He said that the advisory committee and the forms-project team had reached out extensively to users of the bankruptcy system to seek their input in redesign and testing of the forms. In addition, the committee had made an important policy decision at the outset to separate the forms used by individual debtors from those used by entities other than individuals.

He explained that the first nine forms, now presented for authority to publish, are a subset of the larger package of individual forms filed by debtors at the beginning of a case. He emphasized that the forms used by individuals need to be less technical in language because individuals are generally less sophisticated than other entities and may not have the assistance of experienced bankruptcy counsel. As a result, he said, the revised individual forms are written in more conversational language, have a more approachable format, and contain substantially more instructions.

OFFICIAL FORMS 3A AND 3B

Judge Wedoff explained that debtors who cannot pay the filing fee have two options – either to ask the court for permission to pay the fee in installments (Form 3A) or to waive the fee (Form 3B). The latter option is available only to individuals whose combined family monthly income is less than 150% of the official poverty guideline last published by the Department of Health and Human Services.

In addition to major stylistic and formatting changes common to all the new forms, three minor substantive changes were made in Form 3B. First, the opening question asks for the size of the debtor's family, as listed on Schedule J. That information is currently required on Schedule I. Second, the income portion of the form was changed to specify that non-cash governmental assistance, such as food stamps or housing subsidies, will not count against the debtor as income in determining eligibility for a fee waiver. The information, though, will continue to be reported for purposes of determining the debtor's ability to pay the filing fee. Third, the new form eliminates the declaration and signature section for non-attorney bankruptcy petition preparers because the same declaration is already required on Official Form 19.

The committee without objection by voice vote approved the proposed forms for publication.

OFFICIAL FORMS 6I and 6J

Judge Wedoff noted that some substantive changes had been made on Forms 6I (statement of the debtor's income) and 6J (statement of the debtor's expenses) to elicit more accurate and useful information from individual debtors. First, the debtor will have to provide more information on Form 6J about non-traditional living arrangements, such as living with an unmarried partner or living and sharing expenses in a household with non-relatives. The form asks for all financial contributions to the household. Second, Form 6J asks for separate information on dependents who live with the debtor, dependents who live separately, and other members of the household. Third, in Chapter 13 cases, Form 6J asks for the debtor's expenses at two different points in time – when the debtor files the bankruptcy petition and when the proposed Chapter 13 plan is confirmed. Fourth, a line has been added to the form setting out a calculation of the debtor's monthly net income.

The committee without objection by voice vote approved the proposed forms for publication.

OFFICIAL FORMS 22A-1, 22A-2, 22B, 22C-1, and 22C-2

Judge Wedoff explained that Form 22, commonly referred to as the "means test" form, has five variations. It is used to determine a debtor's "current monthly income" under 11 U.S.C. § 101(10A) and, in Chapter 7 and Chapter 13 cases, to determine the debtor's income remaining after deducting certain specified expenses.

In Chapter 7 cases, the form is used to assess whether the debtor qualifies under the statute to file a petition under Chapter 7. In Chapter 13, cases, it determines how much the debtor is able to pay under the plan. Other than stylistic changes, no changes were made in the form's Chapter 11 version (Form 22B). But four changes would be made in the Chapter 7 and Chapter 13 versions.

First, the advisory committee separated both the Chapter 7 and Chapter 13 forms into two distinct forms each because debtors with income below the median of their state do not have to list their expenses. As a result, the vast majority of debtors will only have to fill out the income portion. Thus, all debtors will complete an income form (Form 22A-1 or 22C-1), but only some will have to file the expense form (Form 22A-2 or 22C-2).

Second, the revised forms modify the deduction for cell phone and internet expenses to reflect more accurately the Internal Revenue Service allowances incorporated by the Bankruptcy Code.

Third, line 60 on the Chapter 13 expense form (Form 22C-2)) would be removed because it is rarely used. It allows debtors to list, but not deduct from income, "other necessary expense" items not included within the categories specified by IRS.

Fourth, Form 22C-2 reflects the Supreme Court's decision in *Hamilton v. Lanning,* 560 U.S. ___, 130 S. Ct. 2464 (2010). *Lanning* requires taking a "forward-looking approach" in calculating a Chapter 13 debtor's projected disposable income by considering changes in income or expenses that have occurred or are virtually certain to occur by the time the plan is confirmed. The changes may either increase or decrease the debtor's disposable income. Part 3 of Form 22C-2 will require the debtor to report those changes.

The committee without objection by voice vote approved the proposed forms for publication.

Information Items

FED. R. BANKR. P. 3007(a)

Judge Wedoff reported that proposed amendments to FED. R. BANKR. P. 3007(a) (objections to claims), published in August 2011, would have specified the time and manner of serving objections to claims. The rule currently requires that notice of an objection be provided at least 30 days "prior to the hearing" on the objection. The proposal would have authorized a negative notice procedure – requiring notice of an objection to be made at least 30 days before "any scheduled hearing on the objection or any deadline for the claimant to request a hearing."

He noted that at its March 2012 meeting, the advisory committee decided to withdraw the proposed amendments temporarily and consider them as part of its project to draft a national Chapter 13 form plan.

OFFICIAL FORM 6C

Judge Wedoff reported that the advisory committee had decided not to proceed with amending Form 6C (property claimed as exempt) by adding a box to give debtors the option of declaring that the value of property claimed as exempt is the "full fair market value of the exempted property." The amendment, published in August 2011, was intended to reflect the Supreme Court's decision in *Schwab v. Reilly,* 560 U.S. ___, 130 S. Ct. 2652 (2010).

He said that representatives of the Chapter 7 and Chapter 13 trustee associations had objected to the change on the grounds that it would encourage debtors to claim the

full market value of property even when the exemption is capped by statute at a specific dollar amount. They predicted that the revision would lead to gamesmanship and a "plethora of objections." On the other hand, supporters of the amendment, including representatives of the consumer bankruptcy attorneys' association, disputed the prediction. They argued that it was consistent with *Schwab* and would be beneficial to debtors.

Judge Wedoff reported that the advisory committee decided not to proceed with the amendment because: (1) it is unnecessary since debtors already incorporate the *Schwab* language into the existing form; and (2) courts are divided on whether it is always improper for a debtor to claim as exempt the full fair market value of property when the exemption is capped at a specific dollar amount. The advisory committee decided, therefore, that any amendment to the form should await further case law development. It might also be considered as part of the forms modernization project.

OFFICIAL FORMS 22A AND 22C

Judge Wedoff reported that the advisory committee had decided to defer final approval of proposed amendments to Forms 22A and 22C (the means test forms) that would have: (1) reflected changes in the IRS standards on telecommunication expenses; and (2) changed the Chapter 13 version of the form to respond to the Supreme Court's decision in *Hamilton v. Lanning,* 560 U.S. ___, 130 S. Ct. 2464 (2010).

He said that it would be better to avoid having the proposed amendments take effect in 2012, only to have substantially reformatted versions of the same forms take effect in 2013 as part of the forms modernization project. The proposed amendments, he added, had been incorporated into the first set of modernized forms to be published for comment in August 2012. (See pages 21-23 of these minutes.)

OFFICIAL FORM FOR CHAPTER 13 PLAN AND RELATED RULE AMENDMENTS

Judge Wedoff explained that the advisory committee was working on drafting a national form for Chapter 13 plans. He pointed out that a wide variety of local forms and model plans are currently used in the bankruptcy courts. They impose different requirements and distinctive features from district to district. The lack of a national form, he said, makes it difficult for lawyers who practice in several districts, and it adds transactional costs that are passed on to debtors.

He reported that a recent survey of the bankruptcy bench had established that a majority of chief bankruptcy judges support developing a national form plan. Therefore, he said, the advisory committee had established a working group that expects to have a draft ready soon for informal circulation and comment. He added that it became apparent

during the course of the group's work that the effectiveness of a national form plan will depend on making some simultaneous amendments to the bankruptcy rules to harmonize practice among the courts and clarify certain procedures.

MINI-CONFERENCE ON NEW MORTGAGE FORMS

Judge Wedoff reported that the advisory committee will hold a mini-conference in conjunction with its September 2012 meeting to discuss the effectiveness of the new mortgage-information disclosure forms that took effect on December 1, 2011.

ELECTRONIC SIGNATURES

Judge Wedoff noted that the advisory committee was considering the use of electronic signatures as part of its forms modernization project. In particular, it was focusing on whether, and under what circumstances, bankruptcy courts should accept for filing documents signed electronically without also requiring retention of a paper copy with an original signature. If retention of an original signature is required, moreover, who should maintain it? He noted that the committee was exploring a range of options and contemporary practices.

FORMS MODERNIZATION PROJECT

Judge Wedoff reported that the forms modernization project had nearly completed its work on all the individual-debtor forms and had begun its work on revising the non-individual forms.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell and Professor Cooper presented the report of the advisory committee, as set forth in Judge Campbell's memorandum and attachments of May 8, 2012 (Agenda Item 4).

Amendments for Final Approval

FED. R. CIV. P. 45 and 37

Judge Campbell reported that the advisory committee had undertaken a multi-year project to revise Rule 45 (subpoenas) by simplifying the rule and addressing several problems brought to its attention. He noted that during the course of its study, the advisory committee came to appreciate that Rule 45 is an important workhorse in civil litigation that governs virtually all discovery involving non-parties and accomplishes several other important procedural purposes.

After reviewing the pertinent literature on the rule and canvassing the bar, the committee developed a list of 17 concerns that might potentially be addressed through rule amendments. The list was eventually pared down to four proposed changes: (1) simplification of the rule; (2) transfer of subpoena-related motions; (3) trial subpoenas for distant parties and party witnesses; and (4) notice of service of documents-only subpoenas. A revised rule incorporating those changes was published for public comment in August 2011, and some minor modifications were made after publication. The revised rule, he said, was now ready for final approval by the Judicial Conference.

1. Simplification of the rule

He noted that the first category of proposed changes would simplify an overly complex rule. As Rule 45 is now written, he explained, a lawyer has to look in three different parts of the rule to determine where a subpoena may be issued, where it may be served, and where performance may be required.

First, Rule 45(a)(2) specifies which court may issue a subpoena. It may be a different court for trial, for deposition discovery, or for document discovery. Second, Rule 45(b)(2) specifies four different possibilities for the place where a subpoena may be served. It may be within the district, outside the district but within 100 miles of the place of compliance, anywhere in the state where the district sits if state law permits, or anywhere in the United States if federal law authorizes it. Third, Rule 45(c) imposes limits on the place of enforcement. A non-party, for example, cannot be required to travel more than 100 miles to comply with a subpoena, except to attend a trial. In that case, attendance may be anywhere in the state if the person does not have to incur "substantial expense" to travel. He said that it was the experience of all the judges on the advisory committee that even good lawyers get the various provisions of the rule wrong from time to time.

The advisory committee's proposed simplification addresses those problems and should eliminate most of the confusion. First, revised Rule 45(a)(2) specifies that the court that issues a subpoena is the court that presides over the case. There are no other possibilities. Second, Rule 45(b)(2) specifies that a subpoena may be served at any place in the United States. Third, Rule 45(c)(3) specifies where performance may be required. Essentially, it preserves the performance requirements of the current rule, but eliminates its reference to state law.

There is, he said, precedent in the rules for authorizing nationwide service. Rule 45(b)(2)(D), he noted, currently authorizes service in another state if there is a federal statute that authorizes it. In addition, the Federal Rules of Criminal Procedure authorize nationwide service (FED. R. CRIM. P. 17)(e)).

Professor Marcus said that the public comments on simplification of the rule had been very favorable, and some offered suggestions for additional clarification. As a result, the committee made some changes in the committee note, dealing with depositions of party witnesses and subpoenas for remote testimony. In essence, though, the changes made after publication were very minor.

Professor Marcus pointed out that under the committee's proposal, as published, Rule 45(c)(2) would have left it essentially to the parties to designate the place for production of Rule 34 discovery materials. It provided that a subpoena could command production "at a place reasonably convenient for the person who is commanded to produce." But, he explained, that simplification did not work and could lead to mischief. Accordingly, the committee revised Rule 45(c)(2) to specify that a subpoena may command production "at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person." That formulation essentially preserves the current arrangements, but states them more clearly.

2. Transfer of subpoena-related motions

Judge Campbell explained that the modified rule, like the current rule, specifies that a party receiving a subpoena typically has to litigate the enforceability of the subpoena in the court in the district where the performance is required. The producing party, thus, enjoys the convenience of having its dispute handled locally and does not have to travel to a different part of the country to litigate.

Rule 45, however, does not currently allow the court where production is required to transfer a dispute back to the court having jurisdiction over the case. Yet, there are certain situations in which the court in the district of performance should be allowed to refer a dispute to the judge presiding over the case. There is, he said, a split in the case law on the matter, and some courts in fact transfer disputes. The current rule, though, does not authorize the practice expressly.

The proposed new Rule 45(f) would resolve the matter and explicitly allow certain disputes to be resolved by the judge presiding over the case. It would allow the local court to transfer the case either on the consent of the person subject to the subpoena or if the court finds "exceptional circumstances." He reported that some public comments had questioned whether exceptional circumstances was the appropriate standard for authorizing a transfer, but the advisory committee ultimately concluded unanimously that it was.

The proposed amendment to FED. R. CIV. P. 37 (failure to make disclosures or cooperate in discovery) would conform that rule to the proposed amendments to Rule 45(f). A new second sentence in Rule 37(b)(1) deals with contempt of orders entered after a transfer. It provides that failure to comply with a transferee court's deposition-

related order may be treated as contempt of either the court where the discovery is taken or the court where the action is pending.

Professor Marcus pointed out that the August 2011 publication had highlighted the new transfer provision and expressly invited comment on two questions: (1) whether consent of the parties should be required in addition to consent by the person served with the subpoena; and (2) whether "exceptional circumstances" should be the standard for transfer if the non-party does not consent. Considerable public comment argued that it was inappropriate to require party consent. As long as the recipient of the subpoena consents to the transfer, the parties should have no veto over the matter. The advisory committee, he said, revised the rule to remove the party-consent feature.

With regard to the appropriate standard for authorizing a transfer in the absence of consent, considerable public support was voiced for a more flexible, less demanding standard. But formulating an appropriate lesser standard, while still protecting the primary interests of the producing party, had been very challenging. The advisory committee and its discovery subcommittee discussed the matter at considerable length and decided to retain the exceptional circumstances standard, but add some clarifying language to the committee note. The note was recast to state that if the local non-party served with a subpoena does not consent to a transfer, the court's prime concern should be to avoid imposing burdens on that person. In some circumstances, though, a transfer may be warranted to avoid disrupting the issuing court's management of the underlying litigation. In short, transfer is appropriate only if those case-management interests outweigh the interests of the producing party in obtaining local resolution of the dispute.

A member praised the work of the advisory committee and said that the proposed changes were long overdue. He noted that few rules of procedure are used more often, yet are harder to work with, than Rule 45. Nevertheless, he said, the "exceptional circumstances" standard may be too high. It may underestimate the needs of a judge presiding over a big, hotly disputed civil case to have flexibility in controlling the case. It may also underestimate how easy it is today to conduct hearings and resolve disputes by telephone or video-conference. He noted that when subpoena disputes arise, it is common for the judge in the district of compliance to call the judge having jurisdiction over the underlying case to discuss the matter.

In addition, he said, the language in the committee note stating that transfers should be "truly rare" events is much too restrictive. It tells judges, in essence, that transfers should almost never occur. He added that a more generous standard is warranted, and "good cause" should be considered as a substitute. He recommended combining a good cause standard with an appropriate explanation in the committee note to give judges the flexibility they need to decide what is best in each case.

Judge Campbell explained that some public comments had suggested a good cause standard, and the advisory committee had considered them carefully. But it ultimately concluded that it had to err in favor of protecting third parties who receive subpoenas and spare them from assuming undue burdens and hiring counsel in other parts of the country. The exceptional circumstances standard, he said, will afford them more protection than the good cause standard.

He said that the committee was concerned that if the rule were to contain a "good cause" standard, many busy district judges faced with subpoena disputes in out-of-district cases would be readily inclined to transfer them routinely to the issuing court. The rule, he said, should make those busy district judges pause and carefully balance the reasons for a transfer against the burdens imposed on the subject of the subpoena. In essence, he explained, the committee concluded that it was essential to have a higher threshold than mere good cause.

Professor Marcus added that it is very difficult to achieve just the right balance in the rule. It is, he said, particularly difficult to draft a standard that falls somewhere between "exceptional circumstances," which is very difficult to satisfy, and "good cause," which is quite easy to satisfy. He added that the comments from the ABA Section on Litigation were very supportive of retaining the exceptional circumstances standard in order to protect non-party witnesses.

A member argued in favor of retaining the exceptional circumstances standard, and emphasized that it was important to resolve the current conflict in the law and explicitly authorize transfers in appropriate, limited circumstances. She added that the rule should be designed for the average civil case, not the exceptional case. The great majority of subpoena disputes, she said, involve local issues and should be resolved locally. As a practical matter, a good cause standard would lead to excessive transfers.

A participant spoke in favor of the good cause standard, but recommended that if the exceptional circumstances standard were retained, the committee note should be toned down and revised to eliminate the current language stating that transfers should be "truly rare." In addition, it would be useful to refer in the note to the difference between the average case with a local third party and complex litigation in which the lawyers hotly dispute every aspect of a case, including the subpoenas. He added that not all subpoenaed persons are in fact uninvolved, uninterested third parties. Often, the subpoenaed person, although not a party to the case, may well have a direct financial interest in the litigation.

A member agreed that the word "truly" should be eliminated from the note, but supported the advisory committee's decision to retain the exceptional circumstances standard. A member recommended resolving the matter by eliminating the second sentence in the third paragraph of the portion of the committee note dealing with Rule 45(f). As revised, it would read: "In the absence of consent, the court may transfer in

exceptional circumstances, and the proponent of transfer bears the burden of showing that such circumstances are presented."

A member expressed concern about the language added to the committee note after publication regarding the issuance of subpoenas to require testimony from a remote location. He suggested that the committee should consider amending Rule 45(c)(1) itself to clarify that it applies both to attendance at trial and testimony by contemporary transmission from a different location under Rule 43(a).

3. Trial subpoenas for distant parties and party officers

Judge Campbell explained that the third change in the rule resolves the split in the case law in the wake of *In re Vioxx Products Liability Litigation,* 438 F. Supp. 2d 664 (E.D. La. 2006). The district court in that case read Rule 45 as permitting a subpoena to compel a party's officer to testify at a trial at a distant location. Other courts, though, have ruled that parties cannot be compelled to travel long distances from outside the state to attend trial because they have not been served with subpoenas within the state, as required by Rule 45(b)(2).

The advisory committee, he said, was of the view that *Vioxx* had misread Rule 45, in part because the current rule is overly complex. The proposed amendments, he said, would overrule the *Vioxx* line of cases and confirm that party officers can only be compelled to testify at trial within the geographical limits that apply to all witnesses. He noted that the committee had highlighted the matter when it published the rule by including in the publication an alternative draft text that would have codified the *Vioxx* approach.

The public comments, he said, were split, with no consensus emerging for either position. The advisory committee decided ultimately that it should not change the original intent of a rule that has worked well for decades. Professor Marcus added that the committee's concern was that if the rule were amended to codify *Vioxx,* subpoenas could be used to exert undue pressures on a party and its officers. Moreover, there are alternate ways of dealing with the problems of obtaining testimony from party witnesses, including the use of remote testimony under Rule 43(a).

4. Notice of service of documents-only subpoenas

Judge Campbell explained that the current Rule 45 requires parties to notice other parties that they are serving a subpoena. But the provision is hidden as the last sentence of Rule 45(b)(1), and many lawyers are unaware of it. The advisory committee proposal, he said, relocates the provision to a more prominent place as a separate new paragraph 45(a)(4), entitled "notice to other parties before service." In addition, the revised rule requires that a copy of the subpoena be attached to the notice.

Judge Campbell said that the advisory committee realized that many other reasonable notice provisions might have been added to the rule. For example, it could have required that: notice be given a specific number of days in advance of service of the subpoena; additional notice be given if the subpoena is modified by agreement; notice be given when documents are received; and copies of documents be provided by the receiving party to the other parties in the litigation. The rule could also have specified the sanctions for non-compliance with the notice requirements.

The advisory committee, however, concluded that those provisions, though sensible, should not be included because the primary purpose of the amendments is to get parties to give notice of subpoenas. Just accomplishing that objective should resolve most of the current problems. The remaining issues can generally be worked out if lawyers are left to their own devices to consult with opposing counsel to obtain copies of whatever documents they need. The committee, he said, was concerned about the length and complexity of the current rule and did not want to add to that length and complexity by dictating additional details. He added, though, that the committee could return to the rule in the future if problems persist.

Professor Marcus said that many competing suggestions had been received for additional provisions. He added that, at the urging of the Department of Justice, the committee had made a change in the rule following publication to restore the words "before trial" to the notice provision. It also added in Rule 45(c)(4) the word "pretrial" before "inspection of premises."

Judge Campbell noted that the advisory committee had considered whether the time limit in current Rule 45(c) for serving objections to subpoenas was too short, but decided not to change it. He added that the matter rarely results in litigation, as courts allow extensions of time when appropriate. He agreed to a member's suggestion that language in lines 43 and 44 of the committee note be deleted. It had suggested that parties may ask that additional notice requirements be included in a court's scheduling order.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

Information Items

PRESERVATION AND SPOLIATION

Judge Campbell reported that one of the panels at the committee's 2010 Duke Law School conference had urged the committee to approve a detailed civil rule specifying when an obligation to preserve information for litigation is triggered, the scope of that obligation, the number of custodians who should preserve information, and the

sanctions to be imposed for various levels of culpability. After the conference, Judge Kravitz, then chair of the advisory committee, tasked the committee's discovery subcommittee with following up on the recommendations.

The subcommittee began its work in September 2010 by asking the Federal Judicial Center to study the frequency and nature of sanctions litigation in the district courts. The Center's research found that litigation is rare, as only 209 spoliation motions had been filed in more than 130,000 civil cases studied, and only about half the motions involved electronic discovery. The subcommittee also studied a large number of federal and state laws that impose various preservation obligations.

The subcommittee, he said, then drafted three possible rules to address preservation. The first was a very detailed rule that provided specific directives and attempted to prescribe which events trigger a duty to preserve, what the scope of the preservation duty is, and what sanctions may be imposed for a failure to preserve. The committee, however, found it exceedingly difficult to draft a detailed rule that could be applied across all the broad variety of potential cases and give any meaningful certainty to the parties.

The second rule also addressed the triggering events for preservation, the scope of retention obligations, and sanctions for violations, but it did so in a much more general way. Essentially it provided broad directions to behave reasonably and preserve information in reasonable anticipation of litigation.

The third rule focused just on sanctions under Rule 37 in order to promote national uniformity and constraint in imposing sanctions. Currently, there is substantial dispute among the circuits on what level of culpability gives rise to sanctions for failure to preserve. The prevailing standards now range from mere negligence to wilfulness or bad faith.

The third rule specified that a court may order curative or remedial measures without finding culpability. Imposition of sanctions of the kind listed in Rule 37(b), on the other hand, would require wilfulness or bad faith. The proposed rule identified the factors that a court should consider in assessing the need for sanctions. Those factors, moreover, should also provide helpful guidance to parties at the time they are considering their preservation decisions.

Judge Campbell said that the three draft rules had been discussed with about 25 very knowledgeable people at the committee's September 2011 mini-conference in Dallas. A wide range of views was expressed, but no consensus emerged. Many written comments were received by the committee and posted on the judiciary's website. They embrace a full range of proposals. Some groups argued that there is an urgent need for a very detailed rule on preservation and spoliation with bright-line standards. One, for

example, suggested that a duty to preserve should only be triggered by the actual commencement of litigation. Others contended that no rule is needed at all, and the common law should continue its development. The Department of Justice, he said, took the position that it is premature to write a rule on these subjects.

The subject area, he said, continues to be very dynamic. In April 2012, the RAND Corporation completed a study of large corporations, documenting that they spend millions of dollars in trying to comply with preservation obligations. About 73% of the costs are spent on lawyers reviewing materials and 27% on the preservation of information itself. A recent in-house study by the Department of Justice generally corroborated the conclusion of the Federal Judicial Center that spoliation disputes in court are rare. Another recent study, by Professor William Hubbard, found that the problem arises only in a small percentage of cases, but when it does it can be extraordinarily expensive.

Judge Campbell pointed out that the Seventh Circuit was conducting a pilot program on electronic discovery and preservation that emphasizes the need for the parties to cooperate and discuss preservation early in the litigation. The pilot, he said, was entering its third phase and producing a good deal of helpful information. The Southern District of New York recently launched a complex-case pilot program that also includes preservation as an element. The Federal Circuit promulgated clear guidelines on discovery of electronically stored information and has placed some important limits on discovery in patent cases. A Sedona Conference working group has been working for months on a consensus rule for the committee's consideration. The group, he noted, had not yet reached consensus on potential rule amendments. Finally, he said, the case law continues to evolve, as trial judges are taking imaginative steps to deal with preservation problems and restrain unnecessary costs.

Judge Campbell reported that the advisory committee was still leaning towards a sanctions-only rule, rather than a rule that tries to define trigger and scope. Nevertheless, the subcommittee was still absorbing and discussing the many sources of information coming before it. He suggested that the subcommittee may have a more concrete draft available for the advisory committee's consideration at its November 2012 meeting.

He noted that the advisory committee was aware that some are frustrated with the pace of the project. But, he said, the delay in producing a rule has not been for lack of effort. Rather, the issues are particularly difficult, and the views expressed to the subcommittee have been very far apart. He noted that even if the committee were to approve a rule at its next meeting, it could not take effect before December 2015.

He reported that in December 2011, the House Judiciary Subcommittee on the Constitution had held a hearing on the costs and burdens of civil discovery. The proceedings included substantial discussion on electronic discovery issues. The basic

message from the majority was that preservation obligations and electronic discovery cost corporations substantial money and are a drain on innovation and jobs. He pointed out that the witnesses testified that the federal rules process works well, and the rules committees should continue their efforts to solve the current problems. After the hearings, the subcommittee chair wrote a letter urging the advisory committee to approve a strong rule. The subcommittee minority, though, followed with a letter asking the committee to proceed slowly and let the common law work its course.

Professor Marcus pointed out that the advisory committee had not resolved two critical policy questions and invited input on them from the members. First, he said, a decision must be made on whether a new rule should be confined just to electronic discovery or apply to all discoverable information. Second, in light of the strikingly divergent views expressed to the committee on the subject, a basic decision must be made on how urgently a new rule is needed and how aggressive it should be.

A member argued that national uniformity is very important because preservation practices and litigation holds cost parties a great deal of money. The precise contents of the new rule may not be clear at this point, but the advisory committee should continue to proceed deliberately and carefully study the various pilot projects underway in the courts. Eventually, however, it needs to produce a national rule. A participant added that the primary risk of moving too slowly is that courts will develop their own local rules and become attached to them, making it more difficult to impose a uniform national rule.

A participant pointed out that efforts have been made, without much result so far, to prod the corporate community into developing a series of best practices to deal with preservation of information. Corporations, he said, need to balance their legitimate need to get rid of information in the normal course of business against the competing need to preserve certain information in anticipation of eventual litigation. There is, he said, reluctance on the part of corporate management even to consider the matter, but there may be some movement in that direction in the future.

He suggested that a sanctions-only rule is appropriate. It would also be desirable, he said, to include a more emphatic emphasis in Rules 16 and 26 on getting the parties and the judge to address preservation obligations more directly at the outset of a case.

A member expressed great appreciation for the advisory committee's work and agreed with its inclination to pursue a narrow rule that focuses just on Rule 37 sanctions. He emphasized that the Rules Enabling Act restricts the rules committees' authority to matters of procedure only. Preservation duties, though, generally go beyond procedure and simply cannot be fixed by a rule.

Moreover, he said, the committee cannot solve all preservation problems because most litigation is conducted in the state courts, not the federal courts. He suggested that

the more the committee sticks to procedure and avoids matters of substantive conduct, the more likely the states will follow its lead. A member added that there is an important opportunity for the committee to achieve greater national uniformity by working with the state courts. If the committee produces a good rule, he said, effective complementary state-court rules could be promoted with the support and encouragement of the Conference of Chief Justices.

DUKE CONFERENCE SUBCOMMITTEE

Judge Campbell pointed out that it is difficult to speak about preservation without considering more broadly what information should be permitted in the discovery process, especially electronically stored information. He reported that the advisory committee had established a separate subcommittee, chaired by Judge John G. Koeltl, to evaluate the many helpful ideas for discovery reform raised at the Duke conference and to recommend which should be proposed as rule amendments. Eventually, he said, the advisory committee will marry the work of the Duke Conference subcommittee with that of the discovery subcommittee on spoliation because the two are closely related.

He reported that Professor Cooper had produced very helpful and thought-provoking drafts of several potential rule amendments to implement the Duke recommendations. The proposals, he explained, can be categorized as falling into three sets of proposed changes.

The first set of proposals was designed to promote early and active case management. They include: reducing the time for service of a complaint from 120 days to 60; reducing the time for holding a scheduling conference from 120 days to 60 or 45; requiring judges to actually hold a scheduling conference in person or by telephone; no longer allowing local court rules to exempt cases from the initial case-management requirements; requiring parties to hold a conference with the court before filing discovery motions; and allowing written discovery to be sought before the Rule 26(f) conference is held, but providing that requests do not have to be answered until after the case-management conference. The latter provision would let the parties know what discovery is contemplated when they meet with the judge to discuss a discovery schedule. Those and other ideas were designed to get the courts more actively involved in the management of cases and at an earlier stage.

Judge Campbell noted that the second category of possible changes was designed to curtail the discovery process and make it more efficient. One set of proposals would take the concept of proportionality and move it into Rule 26(b)((1)'s definition of discoverable information. It is already there by cross-reference in the last sentence of that provision, but the proposals would make it more prominent. In essence, the revised definition would define discoverable information as relevant, non-privileged information that is proportional to the reasonable needs of the case.

In addition, he said, the subcommittee was considering limiting discovery requests by lowering presumptive numbers and time limits, such as reducing the number of depositions from 10 to 5, the time of depositions from 7 hours to 4, and the number of interrogatories from 25 to 15, and by imposing caps of 25 requests for production and 25 requests for admissions. Although courts may alter them, just reducing the presumptive limits may reduce the amount of discovery that occurs and change the prevailing ethic that lawyers must seek discovery of everything.

Another proposal, he noted, would require parties objecting to a request for production to specify in their objection whether they are withholding documents. A responding party electing to produce copies of electronically stored information, rather than permitting inspection, would have to complete the production no later than the inspection date in the discovery request. Rule 26(g) would be amended to require the attorney of record to sign a discovery response to attest that the response is not evasive. Another proposal would defer contention interrogatories and requests to admit until after the close of all other discovery. The subcommittee, he said, was also considering cost-shifting provisions and may make cost shifting a more prominent part of discovery. All these changes are designed to streamline the discovery process and reduce the expenses complained about at the Duke conference.

Judge Campbell reported that a third category of proposals was designed to emphasize cooperation among the attorneys. One amendment would make cooperation an integral part of Rule 1. The rule, thus, might specify that the civil rules are to be construed and used to secure the just, speedy, and inexpensive determination of cases, and the parties should cooperate to achieve these ends.

Judge Campbell said that the advisory committee will study these drafts at its November 2012 meeting. It will likely marry them with the proposed rule on preservation to produce a package of rule amendments to make litigation more efficient. Professor Cooper added that it would be very beneficial for the Standing Committee members to review the proposed drafts carefully and point out any flaws and make additional suggestions that the advisory committee might consider.

A member praised the comprehensive and impressive efforts of the committee. She noted, though, that several corporate counsel had expressed concern about giving proportionality a more prominent place in the rules. They fear that it would give attorneys an excuse to litigate more discovery disputes.

A participant pointed out that the objective of fostering cooperation among the parties is excellent, but specifying a cooperation requirement in the text of the rules is troublesome. Cooperation inevitably is entwined with attorney conduct, an area on the edge of the Rules Enabling Act that may impinge on the role of the states in regulating attorney conduct.

Another participant suggested that consideration be given to appointing special masters to handle discovery in complex cases because busy judges often do not have the time to devote undivided attention to overseeing discovery. Some way would have to be found to pay for masters, but at least in large corporate cases, the parties may be able to work it out. He also recommended reducing the presumptive limit for expert-witness depositions to 4 hours.

A member commended the advisory committee for undertaking the discovery project. He suggested that anything the committee can do to limit the number of discovery requests and reduce discovery time periods, at least in the average case, will be beneficial. He also commended the proposed modest recommendations on cost-shifting and proportionality. He urged the committee to carry on the work and move as quickly as possible.

His only reservation, he said, concerned adding a cooperation requirement to the rules. The concept, he said, was fine, but it may conflict with an attorney's ethical duty to pursue a client's interests zealously. He asked how much lawyers can be reasonably expected to cooperate in discovery when they are not expected to cooperate very much in other areas. The adversarial process, he said, is a highly valued attribute of the legal system, and the committee should avoid intruding into the states' authority over attorney conduct.

Members noted that some states have imposed effective, stricter limits on depositions that led lawyers to reassess how long they really need to take a deposition. A member added that depositions of expert witnesses have been eliminated completely in his state. It was noted that the original intent of Rule 26(a)(2)'s report requirement was to reduce the length of depositions of expert witnesses or even to eliminate them in many cases. That benefit, however, has not been realized.

PLEADING STANDARDS

Professor Cooper reported that the advisory committee was continuing to monitor case law developments in the wake of the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007) and *Iqbal v. Ashcroft,* 556 U.S. 662 (2009). There is, he said, no sense that the lower courts have unified around a single, identifiable pleadings standard for civil cases, but there is also no sense of a crisis or emergency. The committee, he said, was essentially biding its time and did not plan to move forward quickly. It has several potential proposals on the table, including directly revising the pleading standards in FED. R. CIV. P. 8 (general rules of pleading), addressing pleading indirectly through Rule 12(e) motions for a more definite statement, or integrating pleading more closely with discovery, particularly in cases where there is an asymmetry of information.

Dr. Cecil reported that the Federal Judicial Center had begun pilot work on its new study of all case-dispositive motions in the district courts. The study, he said, will be different from earlier studies because it will take a more comprehensive, holistic look at all Rule 12 motions and summary judgment issues and explore whether there are any tradeoffs, such as whether an increase in motions to dismiss has led to a reduction in motions for summary judgment. In addition, the Center is collaborating closely with several civil procedure scholars and hopes to reach a consensus with them about what is actually going on in the courts regarding dispositive motions. The study, he said, will be launched in September 2012 with the help of law professors and students in several schools.

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FED. R. CIV. P. 84 AND FORMS

Judge Campbell reported that the advisory committee was examining FED. R. CIV. P. 84 (forms), which states that the forms appended to the rules "suffice" and illustrate the simplicity and brevity that the rules contemplate. He explained that many of the forms are outdated, and some are legally inadequate.

Professor Cooper pointed out that the Standing Committee had appointed an ad hoc forms subcommittee, chaired by Judge Gene E. K. Pratter of the civil committee, to review how the advisory committees develop and approve forms. The subcommittee, he said, made two basic observations: (1) in practice, the civil, criminal, bankruptcy, and appellate forms are used in widely divergent ways; and (2) the process for generating and approving forms differs substantially among the advisory committees.

The civil and appellate forms, for example, adhere to the full Rules Enabling Act process, including publication, approval by the Judicial Conference and the Supreme Court, and submission to Congress. The bankruptcy rules, on the other hand, follow the process partly, only up through approval by the Judicial Conference. At the other extreme, the criminal rules have no forms at all. Instead, the Administrative Office drafts the criminal forms, sometimes in consultation with the criminal advisory committee. He said that the subcommittee ultimately concluded that there is no overriding need for the advisory committees to adopt a uniform approach.

Professor Cooper explained that the civil advisory committee was now in the second phase of the forms project and was focusing on what to do specifically with the civil forms. He noted that the project had received an impetus from the Supreme Court's *Twombly* and *Iqbal* decisions on pleading requirements and from the widely held perception that the illustrative civil complaint forms are legally insufficient. There is, he said, a clear tension between the simplicity of those forms and the pleading requirements announced in the Supreme Court decisions.

He noted that the advisory committee was considering several different options. One would be just to eliminate the pleading forms. An alternate would be to develop a set of new, enhanced pleading forms for each category of civil cases consistent with *Twombly* and *Iqbal*. There was, though, no enthusiasm in the committee for that approach. Going further, the committee could consider getting back into the forms business full-bore and spend substantial amounts of time on improving and maintaining all the forms. At the other extreme, the committee could eliminate all the forms and allow the Administrative Office to generate the forms, with appropriate committee consultation.

CLASS ACTIONS AND RULE 23 SUBCOMMITTEE

Judge Campbell reported that the advisory committee had appointed a Rule 23 subcommittee to consider several topics involving class-action litigation and whether certain amendments to the class-action rule were appropriate.

Professor Marcus said that the subcommittee had begun its work and was examining a variety of controversial issues that have emerged as a result of several Supreme Court decisions in the past couple of years, recent litigation developments, and experience under the Class Action Fairness Act. Among the topics being considered are: (1) the relationship between considering the merits of a case and determining class action certification, particularly with regard to the predominance of common questions; (2) the viability of issues classes under Rule 23(c)(4); (3) monetary relief in a Rule 23(b)(2) class action; (4) specifying settlement criteria in the rule; and (5) revising Rule 23 to address the Supreme Court's announcement in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), that the fairness and adequacy of a settlement are no substitute for full-dress consideration of predominance.

Professor Marcus noted that the list of issues continues to evolve and many were discussed at the panel discussion during the Standing Committee's January 2012 meeting. He pointed out that the project to consider appropriate revisions to Rule 23 will take time, since several topics are controversial and will pose drafting difficulties.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raggi and Professor Beale presented the report of the advisory committee, as set forth in Judge Raggi's memorandum and attachments of May 17, 2012 (Agenda Item 8).

Amendment for Final Approval

FED. R. CRIM. P. 11(b)

Judge Raggi reported that the proposed amendment to FED. R. CRIM. P. 11(b)(1) (pleas) would add a new subsection (o) to the colloquy that a court must conduct before accepting a defendant's guilty plea. It would require a judge to advise defendants who are not United States citizens that they may face immigration consequences if they plead guilty.

She noted that at every stage of the advisory committee's deliberations, a minority of members questioned whether it is wise or necessary to add further requirements to the already lengthy Rule 11 plea colloquy. Moreover, the Supreme Court's decision in *Padilla v. Kentucky*, 559 U.S. ___, 130 S. Ct. 1473 (2010), addressed the duty of defense counsel, not the duty of courts, to provide information on immigration consequences to the defendant. Nevertheless, a majority of the advisory committee concluded that immigration is qualitatively different from other collateral consequences that may flow from a conviction. Moreover, a large number of criminal defendants in the federal courts are aliens who are affected by immigration consequences.

The committee, she said, recognized the importance of not allowing Rule 11(b) to become such a laundry list of every possible consequence of a guilty plea that the most critical factors bearing on the voluntariness of a plea do not get lost, *i.e.,* knowledge of the important constitutional rights that the defendant is waiving. She added that the only change made after publication was a modest change in the committee note.

The committee unanimously by voice vote approved the proposed amendment for final approval by the Judicial Conference.

Amendments for Publication

FED. R. CRIM. P. 5(d) and 58(b)

Judge Raggi explained that the proposed amendments to FED. R. CRIM. P. 5(d) (initial appearance) and FED. R. CRIM. P. 58(b)(2) (initial appearance in a misdemeanor) dealt with advising detained foreign nationals that they may have their home country's consulate notified of their arrest.

The amendments had been approved by the Judicial Conference in September 2011, but returned by the Supreme Court in April 2012. The advisory committee then discussed possible concerns that the Court may have had, such as that the possibility that the language of the amendments could be construed to intrude on executive discretion or confer personal rights on a defendant. She suggested that there may have been concern

over the proposed language in Rule 5(d)(1)(F), which specified that a detained non-citizen be advised that an attorney for the government or law-enforcement officer *will* do either of two things: (1) notify a consular office of the defendant's country, or (2) make any other consular notification required by treaty or international agreement.

She suggested that use of the word "will" might have been seen as potentially tying the hands of the executive in conducting foreign affairs. In addition, despite language in the committee note that the rule did not create any individual rights that a defendant may enforce in a federal court, the rule might have been seen as taking a step in that direction,

After the rule was returned by the Court, the advisory committee went back to the drawing board and produced a revised draft of the amendments. As revised, the first part provides that the defendant must be told only that if in custody, he or she "may request" that an attorney for the government or law-enforcement officer notify a consular office. It does not guarantee that the notification will in fact be made. The second part of the amendments was not changed. It specifies that even without the defendant's request, consultation notification may be required by a treaty or other international agreement.

Judge Raggi pointed out that the primary concern in revising the amendments was to assuage any concerns that the Supreme Court may have had with the amendments as originally presented. She noted that the Department of Justice had been consulting closely with the Department of State, which is very eager to have a rule as an additional demonstration to the international community of the nation's compliance with its treaty obligations.

A member noted that the Vienna Convention only requires notification of a consular office if a defendant requests it. She said that the Supreme Court might have found the original language of proposed Rule 5(d)(1)(F)(i) too strong in stating that the government *will* notify a consular office if the defendant requests. But the new language in Rule 5(d)(1)(F)(ii) may go too far in the other direction by requiring notification without the defendant's request if required by a treaty or international agreement.

Ms. Felton explained that several bilateral treaties, separate from the Vienna Convention, require notification regardless of the defendant's request. She added that the Departments of Justice and State had proposed the amendments to Rules 5 and 58 primarily as additional, back-up insurance that consular notification will in fact be made.

The main thrust of the amendments, she said, was to inform defendants of their option to request consular notification. In the vast majority of cases, however, the notification will already have been made by a law-enforcement officer or government attorney at the time of arrest. That is what the Vienna Convention contemplates. The

proposed amendments, which apply at initial appearance proceedings, will help catch any cases that may have slipped through the cracks.

Judge Raggi noted that this factor was part of the discussion on whether a rule is needed at all because there are no court obligations under the Convention and treaties. The rule, essentially, is a belt-and-suspenders provision designed to cover the rare cases when a defendant has not been advised properly. It only states that a defendant may request notification, and that is as far as it can go. If were to imply that the notice will in fact be given, which is what some treaties actually require, there would be concern that the rule itself was creating an enforceable individual right in the defendant.

Professor Beale added that the revised amendments were acceptable to the Departments of Justice and State. They may be more acceptable to the Supreme Court because they do not in any way tie the hands of the executive and avoid creating any individual rights or remedies. A member noted that the last part of the committee notes makes that point explicitly.

Judge Raggi pointed out that it was up to the Standing Committee to decide whether to republish the rule. Although the changes made after the return from the Supreme Court simply clarify the intent of the amendments, the advisory committee had reason to think that they were different enough to warrant publishing the rule again for further comment.

The committee unanimously by voice vote approved the proposed amendments for republication.

Information Items

FED. R. CRIM. P. 12 and 34

Judge Raggi explained that the proposed amendments to FED. R. CRIM. P. 12 (pleadings and pretrial motions) and the conforming amendment to FED. R. CRIM. P. 34 (arresting judgment) deal with motions that have to be made before trial and the consequences of an untimely motion. The amendments, she said, had been prompted by a proposal by the Department of Justice to include motions objecting to a defect in the indictment in the list of motions that must be made before trial.

The proposal, she said, had now come to the Standing Committee for the third time. The last draft was published for public comment in August 2011. It generated many thoughtful comments, which led the advisory committee to make some additional changes. It is expected that the ad hoc subcommittee reviewing the rule will present a final draft to the advisory committee in October 2012, and it may be presented to the Standing Committee for final approval in January 2013.

FED. R. CRIM. P. 6(e)

Judge Raggi reported that the advisory committee had received a letter from the Attorney General in October 2011 recommending that FED. R. CRIM. P. 6(e) (grand jury secrecy) be amended to establish procedures for disclosing historically significant grand jury materials. She noted that applications to release historic grand jury materials had been presented to the district courts on rare occasions, and the courts had resolved them by reference to their inherent supervisory authority over the grand jury.

The Department of Justice, however, questioned whether that inherent authority existed in light of Rule 6(e)'s clear prohibition on disclosure of grand jury materials. Instead, it recommended that disclosure should be permitted, but only under procedures and standards established in the rule itself. The Department submitted a very thoughtful memo and proposed rule amendments that would: (1) allow district courts to permit disclosure of grand jury materials of historical significance in appropriate circumstances and subject to required procedures; and (2) provide a specific point in time at which it is presumed that materials may be released.

She noted that a subcommittee, chaired by Judge John F. Keenan, had examined the proposal and consulted with several very knowledgeable people on the matter. In addition, the advisory committee reporters prepared a research memorandum on the history of Rule 6(e), the relationship between the court and the grand jury and case law precedents on the inherent authority of a judge to disclose grand jury material. After examining the research and discussing the proposal, all members of the subcommittee, other than the Department of Justice representatives, recommended that the proposed amendment not be pursued.

The full advisory committee concurred in the recommendation and concluded that in the rare cases where disclosure of historic materials had been sought, the district judges acted reasonably in referring to their inherent authority. Therefore, there is no need for a rule on the subject.

Judge Raggi added that she had received a letter from the Archivist of the United States strongly supporting the Department of Justice proposal. She spoke with him at length about the matter and explained that it would be a radical change to go from a presumption of absolute secrecy, which is how grand juries have always operated, to a presumption that grand jury materials should be presumed open after a certain number of years. A change of that magnitude, she said, would have to be accomplished through legislation, rather than a rule change. She noted that the archivist has a natural, institutional inclination towards eventually releasing historical archived documents and might consider supporting a legislative change.

FED. R. CRIM. P. 16

Judge Raggi reported that a suggestion had been received from a district judge to amend FED. R. CRIM. P. 16(a) (government's disclosure) to require pretrial disclosure of all the defendant's prior statements. There was, however, a strong consensus on the advisory committee that there are no real problems in criminal practice that warrant making the change. The committee, accordingly, decided not to pursue an amendment.

Judge Raggi reported that the Senate Judiciary Committee was considering legislation addressing the government's obligations to disclose exculpatory materials under *Brady v. Maryland* and *Giglio v. United States*. The committee had asked the judiciary for comments and a witness at the hearings. She said that she had decided not to testify but wrote to the committee to document the work of the advisory committee and the Standing Committee on the subject over the last decade. Attached to the letter were 900 pages of the public materials that the committee had produced.

She explained in the letter that the advisory committee had tried to write a rule that would codify all the government's disclosure obligations under case law and statute, but concluded that it could not produce a rule that fully captures the obligations across the wide range of federal criminal cases. In addition, she said, her letter alluded to a Federal Judicial Center survey of federal judges showing, among other things, that judges see non-disclosure as a problem that only arises infrequently. Although the advisory committee decided not to pursue a rule change, she added, the subject is being addressed in revisions to the *Bench Book for U.S. District Court Judges*. She noted that the Federal Judicial Center's Bench Book Committee was close to completing that work.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Fitzwater and Professor Capra presented the report of the advisory committee, as set forth in Judge Fitzwater's memorandum and attachments of May 3, 2012 (Agenda Item 6). Judge Fitzwater noted that the advisory committee had no action items to present.

Amendments for Final Approval

FED. R. EVID. 803(10)

Judge Fitzwater reported that the proposed amendment to FED. R. EVID. 803(10) (hearsay exception for the absence of a public record) was needed to address a constitutional infirmity as a result of the Supreme Court's decisions in *Melendez-Diaz v. Massachusetts,* 557 U.S. 305 (2009). It raised the concern that "testimonial" evidence is being allowed when a certificate that a public record does not exist is introduced in

evidence without the presence of the official who prepared the certificate. The proposed amendment would create a notice-and-demand procedure that lets the prosecution give written notice of its intention to use the information. Unless the defendant objects and demands that the witness be produced, the certificate may be introduced.

The proposed procedure, he said, had been approved in *Melendez-Diaz*. The advisory committee received two comments on the amendment, one of which endorsed it and the other approved it in principle with some comments.

The committee unanimously by voice vote approved the proposed amendment for final approval by the Judicial Conference.

Amendments for Publication

FED. R. EVID. 801(d)(1)(B)

Judge Fitzwater reported that FED. R. EVID. 801(d) (declarant-witness's prior statement) specifies that certain prior statements are not hearsay. Under Rule 801(d)((1)(B), the proponent of testimony may introduce a prior consistent statement for its truth, *i.e*. to be admitted substantively, but not for another rehabilitative purpose, such as faulty recollection.

He said that two problems have been cited with the way the rule is now written. First, the prior consistent statement of the witness is of little or no use for credibility unless the jury actually believes the testimony to be true anyway. The jury instruction, moreover, is very difficult for jurors to follow, as it asks them to distinguish between prior consistent statements admissible for the truth and those that are not. Second, the distinction has little, if any, practical effect because the proponent of the testimony has already testified in the presence of the trier of fact.

The proposed amendment would allow a prior consistent statement to be admitted substantively if it otherwise rehabilitates the witness' credibility.

The committee without objection by voice vote approved the proposed amendment for publication.

FED. R. EVID. 803(6)-(8)

Judge Fitzwater noted that FED. R. EVID. 803(6), (7), and (8) are the hearsay exceptions, respectively, for business records, the absence of business records, and public records. When the admissibility requirements of the rule are met, the evidence is admitted as an exception to the hearsay rule unless the source, method, or circumstances indicate a lack of trustworthiness.

During the restyling of the rules, he said, a question arose as to who has the burden on the issue of lack of trustworthiness. By far the vast majority of court decisions have held that the burden is on the opponent of the evidence, not the proponent. But a few decisions have placed the burden on the proponent. Since the case law was not unanimous, the advisory committee decided that it could not clarify the matter as part of the restyling project because a change would constitute a matter of substance.

Although the ambiguity was not resolved during the restyling project, the Standing Committee suggested that the advisory committee revisit the rule. The advisory committee initially was of the view that no further action was needed until it was informed that the State of Texas, during its own restyling project, had looked at the restyled federal rules and concluded that FED. R. EVID. 803(6)-(8) had placed the burden on the proponent of the evidence. This, clearly, was not the advisory committee's intention. At that point, it decided to make a change in the rules to make it clear that the burden is on the opponent of the evidence.

At members' suggestions, minor changes were made in the proposed committee notes. Line 34 of the note to Rule 806(8) was corrected to conform to the text of the rule, and an additional sentence was added to the second paragraph of the note to Rule 806(6).

The committee without objection by voice vote approved the proposed amendments for publication.

Information Items

SYMPOSIUM ON FED. R. EVID. 502

Judge Fitzwater noted that the advisory committee's next meeting will be held on October 4 and 5, 2012, in Charleston, South Carolina. A symposium on Rule 502 will be held in conjunction with the meeting, with judges, litigators, and academics in attendance. There is concern, he said, that Rule 502 (limitations on waiver of attorney-client privilege and work product) is not being used as widely as it should be as a means of reducing litigation costs. He noted that Professor Marcus will be one of the speakers at the program, and he invited the members of the Standing Committee to attend.

REPORT OF THE E-FILING SUBCOMMITTEE

Judge Gorsuch noted that the ad hoc committee, which he chaired, was comprised of representatives from all the advisory committees. It was convened to consider appropriate terminology that the rules might use to describe activities that previously had only involved paper documents but now are often processed electronically. Although the

impetus for the subcommittee's formation arose in connection with the appropriate terminology to use in the pending amendments to Part VII of the bankruptcy rules and FED. R. APP. P. 6, the subcommittee took a comprehensive look at all the federal rules. Professor Struve served as the subcommittee reporter, and Ms. Kuperman compiled a comprehensive list of all the terms used in each set of federal rules to describe the treatment of the record and other materials that may be either in paper or electronic form.

He noted that the subcommittee had identified four possibilities for defining its work and listed them from the most aggressive to the least. First, he said, it could conduct a major review of all the federal rules in order to achieve uniformity in terminology across all the rules. That major project would be conducted along the lines of the recent restyling efforts. Second, the subcommittee could compile a glossary of preferred terms. Third, it could serve as a screen for all future rule amendments, and advisory committees would have to run their proposals through the subcommittee. And fourth, the subcommittee could simply make itself available for assistance at the request of the advisory committees.

He reported that the subcommittee opted for the last alternative, largely because the others would all take a great deal of time and effort. Moreover, it recognized that technology is changing so rapidly that it may not be timely to undertake a more aggressive approach at this juncture. At some point in the future, though, terminology will have to be addressed more comprehensively. He added that the most valuable result of the subcommittee's work was to make the reporters cognizant of the extraordinary number of synonyms currently in use in the rules and to encourage them to coordinate with each other on terminology.

INTERIM ASSESSMENT OF THE JUDICIARY'S STRATEGIC PLAN

Judge Kravitz noted that he would work with the advisory committees to prepare a response to Judge Charles R. Breyer, the Judicial Planning Coordinator, on the committee's progress in implementing the *Strategic Plan for the Federal Judiciary.*

NEXT MEETING

The committee will hold its next meeting on Thursday and Friday, January 3 and 4, 2013 in Boston, Massachusetts.

Respectfully submitted,

Peter G. McCabe,
Secretary

Agenda E-19 (Summary)
Rules
September 2012

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

1. Approve the proposed amendments to Appellate Rules 13, 14, 24, 28, and 28.1, and to Form 4, and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law. . . . . pp. 2-5

2. a. Approve the proposed amendments to Bankruptcy Rules 1007(b)(7), 4004(c)(1), 5009(b), 9006(d), 9013, and 9014, and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and

   b. Approve the proposed revisions of Official Bankruptcy Forms 7, 9A–9I, 10, and 21, to take effect on December 1, 2012. . . . . pp. 7-11

3. Approve the proposed amendments to Civil Rules 37 and 45, and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law. . . . . pp. 19-24

4. Approve the proposed amendment to Criminal Rule 11, and transmit it to the Supreme Court for its consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law. . . . . pp. 26-29

5. Approve the proposed amendment to Evidence Rule 803(10), and transmit it to the Supreme Court for its consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law. . . . . pp. 33-35

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

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

- Federal Rules of Appellate Procedure. . . . . pp. 5-6
- Federal Rules of Bankruptcy Procedure.. . . . . pp. 11-19
- Federal Rules of Civil Procedure. . . . . pp. 24-26
- Federal Rules of Criminal Procedure.. . . . . pp. 29-33
- Federal Rules of Evidence. . . . . pp. 35-39
- Judiciary Strategic Planning.. . . . . p. 39

Agenda E-19
Rules
September 2012

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure (the "Committee") met on June 11, 2012. All members attended, except ex officio member Deputy Attorney General James M. Cole.

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

Participating in the meeting were Professor Daniel R. Coquillette, the Committee's Reporter; Peter G. McCabe, the Committee's Secretary; Professor Geoffrey C. Hazard, Jr., Professor R. Joseph Kimble, and Joseph F. Spaniol, Jr., consultants to the Committee; Jonathan C. Rose, Chief of the Administrative Office's Rules Committee Support Office; Benjamin J.

NOTICE
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Robinson, Counsel and Deputy Chief of the Rules Committee Support Office; Julie Wilson, Attorney Advisor in the Rules Committee Support Office; Andrea L. Kuperman, Chief Counsel to the Rules Committees; James H. Wannamaker III, Senior Attorney in the Administrative Office's Bankruptcy Judges Division; Bridget M. Healy, Attorney Advisor in the Bankruptcy Judges Division; Holly T. Sellers, Attorney Advisor in the Administrative Office's Office of Judges Programs; Julie G. Yap, Supreme Court Fellow; and Judge Jeremy D. Fogel, Director, and Dr. Joe Cecil, Senior Research Associate, of the Federal Judicial Center. Elizabeth J. Shapiro, Ted Hirt, J. Christopher Kohn, H. Thomas Byron III, and Kathleen A. Felton attended on behalf of the Department of Justice.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 13, 14, 24, 28, and 28.1, and to Form 4, with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments were circulated to the bench, bar, and public for comment in August 2011.

Rules 13, 14, and 24

The proposed amendments to Rules 13, 14, and 24 concern appeals from the United States Tax Court. The proposed amendments to Rules 13 and 14 revise those rules to address permissive interlocutory appeals from the Tax Court under 26 U.S.C. § 7482(a)(2). The advisory committee developed the proposals in consultation with the Tax Court and the Tax Division of the Department of Justice. The proposed amendment to Rule 24 more accurately reflects the status of the Tax Court as a court. No comments were received and the advisory committee recommended approval of the proposed amendments to Rules 13, 14, and 24, as published.

Rules 28 and 28.1

The proposed amendment to Rule 28 revises Rule 28(a)'s list of the required contents of an appellant's brief by removing the requirement of separate statements of the case and of the facts. Current Rule 28(a)(6) requires "a statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below." Current Rule 28(a)(7) requires "a statement of facts." Rule 28(a) further requires these items to appear "in the order indicated." The proposed amendment to Rule 28(a) consolidates subdivisions (a)(6) and (a)(7) into a new subdivision (a)(6) that provides for one "statement of the case." It allows a lawyer to present the factual and procedural history of a case chronologically, but also provides flexibility to depart from chronological ordering. Conforming changes renumber Rules 28(a)(8) through (11) as Rules 28(a)(7) through (10), revise Rule 28(b)'s discussion of the appellee's brief, and revise Rule 28.1's discussion of briefing on cross-appeals.

Six sets of comments were received, four of which supported the proposed amendments' goal. Among the supportive comments, two proposed drafting changes to address a concern that deletion of some of the current language of Rule 28(a)(6) could be problematic. The advisory committee carefully reviewed all the comments, including those arguing against the proposed amendments. To address the concerns of the commenters, the advisory committee revised the text of proposed Rule 28(a)(6) and added a new paragraph to the Committee Note.

As published, proposed Rule 28(a)(6) had referred to "a concise statement of the case setting out the facts relevant to the issues submitted for review and identifying the rulings presented for review, with appropriate references to the record (*see* Rule 28(e))." In response to commenters' concerns that this language did not mention procedural history, the advisory committee revised the proposed rule to refer to "a concise statement of the case setting out the

facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record (*see* Rule 28(e))." The advisory committee added a second paragraph to the proposed Committee Note that describes the contents of the statement of the case and notes the permissibility of including subheadings. The latter point responds to one commenter's concern that judges and clerks need a way to locate quickly, in the brief, a description of the rulings presented for review. The advisory committee also added a reference in the Committee Note to Supreme Court Rule 24.1(g), on which the amended Rule text is loosely modeled. With these changes, the advisory committee recommended approval of the proposed amendments to Rules 28 and 28.1.

Form 4

The proposed amendments to Form 4 concern applications to proceed *in forma pauperis* (IFP) on appeal. Appellate Rule 24 requires a party seeking to proceed IFP in the court of appeals to provide an affidavit that, among other things, "shows in the detail prescribed by Form 4 . . . the party's inability to pay or to give security for fees and costs." (Likewise, a party seeking to proceed IFP in the Supreme Court must use Form 4. *See* Supreme Court Rule 39.1.) Questions 10 and 11 on the current Form 4 have been criticized by commentators for seeking information unnecessary to the IFP determination. Some commentators have suggested that Questions 10 and 11 might in some circumstances seek disclosure of information protected by attorney-client privilege and/or work product immunity. Though research by the advisory committee's reporter suggested that the information solicited is relatively unlikely to be subject to privilege, it may sometimes constitute protected work product. Even if not privileged or protected, the advisory committee determined that the disclosure of some information solicited could disadvantage some IFP litigants and may be requesting information not necessary to the

IFP determination. Accordingly, the proposed amendment replaces Questions 10 and 11 with a new Question 10 that reads: "Have you spent – or will you be spending – any money for expenses or attorney fees in connection with this lawsuit? If yes, how much?"

The proposed amendments also include technical amendments to Form 4, to bring the form into conformity with changes approved by the Judicial Conference in Fall 1997, but (apparently due to an oversight) not subsequently transmitted to Congress.

The Committee concurred with the advisory committee's recommendations.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Appellate Rules 13, 14, 24, 28, and 28.1, and to Form 4, and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

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

Rules Approved for Publication and Comment

The advisory committee submitted proposed amendments to Rule 6 with a request that they be published for comment. Rule 6 concerns appeals to the court of appeals in a bankruptcy case. The proposed amendments update that rule's cross-reference to the Bankruptcy Part VIII Rules; amend Rule 6(b)(2)(A)(ii) to remove an ambiguity dating from the 1998 restyling of the Appellate Rules; add a new Rule 6(c) to address permissive direct appeals from a bankruptcy court under 28 U.S.C. § 158(d)(2); and revise Rule 6 to take account of the range of methods available now or in the future for dealing with the record on appeal. The Committee approved the advisory committee's recommendation to publish the proposed amendments for public comment.

Informational Items

At its Spring 2012 meeting, the advisory committee reached consensus on an approach to a proposal that Rule 29 be amended to treat federally recognized Native American tribes the same as states, allowing them to file amicus briefs as of right and exempting them from Rule 29's authorship-and-funding disclosure requirement. In the end, the advisory committee decided to maintain this item on its agenda and to revisit it in five years. In the meantime, the chair of the advisory committee sent a letter to each of the chief circuit judges reporting on the advisory committee's discussions of this issue.

At its Spring 2012 meeting, the advisory committee discussed a proposal to amend Rule 28(a) to take account of the possibility of including an introduction in a brief. During the discussion, it was noted that, if the proposed amendment to Rule 28(a) is adopted, Rule 28(a)(6) will be sufficiently flexible to permit inclusion of an introduction as part of the statement of the case. It was also suggested that the advisory committee wait and see how practice develops under amended Rule 28(a)(6) before giving further consideration to addressing introductions. Based on this suggestion, the advisory committee removed the item from its present agenda.

The advisory committee is examining several other issues, including a proposal to amend the rules to address redaction and sealing of appellate filings. The issue of sealed filings intersects with past and ongoing discussions in several other Judicial Conference committees. In light of the varying approaches that circuits currently take to sealed filings on appeal, the advisory committee will consider the advisability of adopting a national rule or addressing the matter through alternative means.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 1007(b), 4004(c)(1), 5009(b), 9006, 9013, and 9014, and Official Forms 7, 9A-9I, 10, and 21, with a recommendation that they be approved and transmitted to the Judicial Conference. Except as noted below, the proposed changes were circulated to the bench, bar, and public for comment in August 2011. In all, 15 comments were submitted and the advisory committee received testimony telephonically from one interested bar association. The comments and testimony were considered by the appropriate subcommittees and in discussions at the advisory committee's Spring 2012 meeting.

Rules 1007 and 5009

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 conditioned the receipt of a discharge for individual debtors on their completing a personal financial management course, with some exceptions. Rule 1007(b) requires individual debtors to file a statement with the court certifying that they have completed the course. Official Form 23 is prescribed for this purpose. The proposed amendment to Rule 1007(b)(7) would relieve individual debtors of the obligation to file Official Form 23 if the provider of an instructional course concerning personal financial management directly notifies the court that the debtor has completed the course.

The proposed amendment to Rule 5009(b) reflects the proposed amendment of Rule 1007(b)(7). Rule 5009(b) currently requires the clerk to send a warning notice to an individual debtor who has not filed Official Form 23 within 45 days after the first date set for the meeting of creditors. The proposed amendment would require the clerk to send the notice only if

the course provider has not already notified the court of the debtor's completion of the course and the debtor has failed to file the statement in 45 days.

The advisory committee received five comments, three expressing support for the amendments, and two opposing them. The advisory committee carefully considered the comments and concluded that the concerns raised by the negative comments did not justify modifications to the published amendments.

Rule 4004

The proposed amendments to Rule 4004(c)(1) conform to the simultaneous amendment of Rule 1007(b)(7) and to state in more precise language other provisions of subdivision (c)(1). Rule 4004(c)(1)(H) would be amended to provide that the court must delay entering a discharge for a debtor who has not filed a certificate of completion only if the debtor was in fact required to do so under Rule 1007(b)(7).

The other two changes to Rule 4004(c)(1) are clarifications. One makes clear that the circumstances listed in the paragraph prevent the court from entering a discharge. The other specifically states that the prohibition on entering a discharge under subdivision (c)(1)(K) ceases when a presumption of undue hardship expires or the court concludes a hearing on the presumption.

Because the latter amendments would simply state more precisely the existing meaning of the provision and because the first is a conforming amendment, publication for public comment was unnecessary.

Rules 9006, 9013, and 9014

Rule 9006(d) prescribes time limits for the service of written motions and responses. The proposed amendments to this subsection draw attention to the rule's default deadlines for the

service of motions and written responses by amending the title to add a reference to the "time for motion papers." This change is consistent with Civil Rule 6 and should make it easier to find the provision governing motion practice. Rule 9006(d) currently covers only the timing of serving opposing affidavits. The proposed amendments would expand the coverage of subdivision (d) to address the timing of the service of any written response to a motion. The change would make the provision as inclusive as possible to make local motion practice more consistent.

Rule 9013, which addresses the form and service of motions, is amended to provide a cross-reference to the time periods in Rule 9006(d). The amendment also calls greater attention to the default deadlines for motion practice. In addition, stylistic changes are made to Rule 9013 to add greater clarity. Rule 9014, which addresses contested matters in bankruptcy, is similarly amended to provide a cross-reference to the times under Rule 9006(d) for serving motions and responses. No comments were submitted on these amendments.

Official Forms

Official Form 7 (Statement of Financial Affairs) requires debtors to disclose certain payments made to or for the benefit of "insiders." The current version of the form contains a definition of "insider" that differs from the definition in the Bankruptcy Code. The proposed amendment amends the definition in Form 7 to conform to the statutory definition which includes "any persons in control of a corporate debtor." The statutory reference on the form following the definition is also updated to include a pinpoint citation to the definition of insider in the Code. No comments were submitted on the amendment.

Official Forms 9A-9I (Notice of Meeting of Creditors & Deadlines) and 21 (Statement of Social-Security Number(s)) are amended to reduce the risk that a debtor's Social Security number may be inadvertently disclosed publicly in a bankruptcy case. The amendments respond

to a concern of the Committee on Court Administration and Case Management that bankruptcy forms may be mistakenly filed in ways that publicly reveal debtors' private identifying information.

The proposed amendments to Form 9 make clear that a creditor should not attach a copy of the form when filing a proof of claim. Stylistic changes have also been made. Similarly, the proposed amendments add to Form 21 a prominent warning about proper submission of the form, in order to avoid its inadvertent inclusion on the court's public docket. Because the changes to the forms do not alter their function or purpose, publication for public comment was unnecessary.

The proposed amendments to Official Form 10 (Proof of Claim) eliminate a reference to filing a power of attorney with a proof of claim, thereby conforming to Rule 9010(c). The rule generally requires that an agent give evidence of its authority to act on behalf of a creditor in a bankruptcy case by providing a power of attorney. This requirement, however, does not apply when an agent files a proof of claim. The amendment removes from the signature box of Form 10 the instruction that an authorized agent "attach copy of power of attorney, if any."

The proposed amendments also include in Line 7 statements that certain required documentation is attached. For claims secured by the debtor's principal residence, the form will state that the Mortgage Proof of Claim Attachment – required as of December 1, 2011 – is being filed with the claim. For claims based on an open-end or revolving consumer credit agreement, the form will state that the information required by Rule 3001(c)(3)(A) – scheduled to take effect on December 1, 2012 – is attached. Because the proposed amendments are technical and conforming amendments, publication for public comment was unnecessary.

The advisory committee recommended that all proposed amendments to the Official Forms go into effect on December 1, 2012.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference–

a. Approve the proposed amendments to Bankruptcy Rules 1007(b)(7), 4004(c)(1), 5009(b), 9006(d), 9013, and 9014, and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and

b. Approve the proposed revisions of Official Bankruptcy Forms 7, 9A-9I, 10, and 21, to take effect on December 1, 2012.

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

Rules Approved for Publication and Comment

The advisory committee submitted proposed amendments to Rules 1014, 7004, 7008, 7012, 7016, 8001-8028, 9023, 9024, 9027, and 9033, and Official Forms 3A, 3B, 6I, 6J, 22A-1, 22A-2, 22B, 22C-1, and 22C-2, with a request that they be published for comment. The Committee approved the advisory committee's recommendation.

Rule 1014

The proposed amendment to Rule 1014(b) clarifies the proper course of action when bankruptcy petitions involving the same or related debtors are filed in different districts. The current rule provides that, upon motion, the court in which the first-filed petition is pending may determine – in the interest of justice or for the convenience of the parties – the district or districts in which the cases will proceed. Other courts must stay proceedings in later-filed cases until the first court makes its determination, unless that court orders otherwise. Therefore, by default, the later cases are stayed while the venue question is pending before the first court.

The proposed amendment alters this default requirement. It specifies that proceedings in later filed cases are stayed only on order of the court in which the first-filed petition is pending. The change is intended to prevent disruption of the other cases unless there is a judicial determination that a stay of a related case is needed while the first court makes its venue determination. The amendment also clarifies who should receive notice of the hearing on the venue motion by incorporating by reference the entities entitled to notice under Rule 2002(a). In addition, stylistic changes have been made to improve the rule.

Rule 7004

The proposed amendment to Rule 7004(e) shortens the period in which a summons remains valid from 14 days to 7. The change is intended to ensure that a defendant has sufficient time to respond to a complaint in bankruptcy litigation. Under the Bankruptcy Rules, unlike the Civil Rules, the time for a defendant to respond is calculated from the date the summons is issued, rather than when it is served. Although Rule 7012(a) gives a defendant (other than a United States officer or agency) 30 days to answer a complaint, a lengthy delay between issuance and service of a summons may unduly shorten a defendant's time to respond in a bankruptcy proceeding.

Rules 7008, 7012, 7016, 9027, and 9033

The proposed amendments to Rules 7008, 7012, 7016, 9027, and 9033 respond to the Supreme Court's decision in *Stern v. Marshall,* 131 S. Ct. 2594 (2011). In *Stern*, the Court held that a non-Article III bankruptcy judge could not enter final judgment on a debtor's state common law counterclaim brought against a creditor of the bankruptcy estate. Although 28 U.S.C. § 157(b) specifies that counterclaims by the estate against persons filing claims against the estate are "core" proceedings that a bankruptcy judge may hear and determine, the Court

found Congress's assignment of final adjudicatory authority to a bankruptcy judge in the particular proceeding in *Stern* to be unconstitutional.

The Bankruptcy Rules follow the division in 28 U.S.C. § 157(b) between core and non-core proceedings and recognize that a bankruptcy judge's adjudicatory authority is more limited in non-core proceedings than in core proceedings. *Stern* has introduced the possibility, however, that a proceeding defined as core under the statute may nevertheless lie beyond the constitutional power of a bankruptcy judge to adjudicate finally. Accordingly, a proceeding could be "core" as a statutory matter, but "non-core" as a constitutional matter.

The proposed amendments alter the Bankruptcy Rules in three respects. First, the terms core and non-core are removed from Rules 7008, 7012, 9027, and 9033 to avoid possible confusion in light of *Stern*. Second, parties in all bankruptcy proceedings (including removed actions) are required to state whether they consent to entry of final orders or judgment by the bankruptcy judge. Third, Rule 7016, which governs pretrial procedures, would direct bankruptcy courts to decide the proper treatment of proceedings.

Rules 8001-8028 (Part VIII of the Bankruptcy Rules)

The proposed amendments to Part VIII of the Bankruptcy Rules – the rules governing appeals to district courts and bankruptcy appellate panels – are the product of a multi-year project to: (1) bring the bankruptcy appellate rules into closer alignment with the Federal Rules of Appellate Procedure; (2) incorporate a presumption favoring the electronic transmission, filing, and service of court documents; and (3) adopt a clearer and simpler style.

The advisory committee presented the first half of the Part VIII revision (Rules 8001-8012) for preliminary review at the Committee's January 2012 meeting. At its Spring 2012 meeting, the advisory committee made revisions responsive to the Committee's comments, and

considered the entire draft of revised Part VIII. At the June 2012 meeting, the advisory committee presented to the Committee both additional changes in the first half of the Part VIII revision and the entire second half of the Part VIII revision, not previously presented to the Committee (Rules 8013-8028).

Rules 9023 and 9024

The proposed amendments to Rules 9023 and 9024 add references to the procedure in proposed new Rule 8008 governing indicative rulings. Unlike the Civil and Appellate Rules, the Bankruptcy Rules would have a single rule prescribing the procedure for indicative rulings. Proposed Rule 8008 would govern the issuance of indicative rulings by bankruptcy judges and the corresponding procedures applicable on appeals in district courts and bankruptcy appellate panels.

Official Forms

The advisory committee submitted for publication nine forms which are the initial product of the forms modernization project, a multi-year endeavor of the advisory committee, working in conjunction with the Federal Judicial Center and the Administrative Office. The dual goals of the project are to improve the official bankruptcy forms and to improve the interface between the forms and the latest technology. Working incrementally, the project made a preliminary decision that the debtor forms for individuals and entities other than individuals should be separated, recognizing that individuals are generally less sophisticated than other entities and may not have the assistance of counsel. Publication of the following nine forms and, if adopted, their use, will provide a useful gauge of the effectiveness of the project's approach.

Proposed Official Forms 3A and 3B address payment of the filing fee in an individual's bankruptcy case. Form 3A is the application for paying the filing fee in installments, and Form

3B is the application for waiver of the filing fee in a chapter 7 case. Because these forms are most frequently completed by unrepresented debtors, the advisory committee concluded that the additional clarity would be particularly valuable.

The only changes in proposed Form 3A are stylistic, consistent with the overall approach of the project. Proposed Official Form 3B also has stylistic changes and includes three technical changes. First, Line 1 asks the size of the debtor's family. Because the debtor's dependents are now proposed to be listed in revised Official Form 6J, rather than in Official Form 6I as done presently, the reference to the number of dependents is changed from Schedule I to Schedule J. Second, consistent with the Judicial Conference Interim Procedures For Waiver of Chapter 7 Fees, proposed Official Form 3B specifies that non-cash governmental assistance (such as food stamps or housing subsidies) should not be included in stating the debtor's income level for purposes of determining eligibility for a fee waiver, although it continues to be reported for purposes of determining the debtor's ability to pay the filing fee. Third, the declaration and signature section for a non-attorney bankruptcy petition preparer has been removed as unnecessary. The same declaration, required under 11 U.S.C. § 110, is contained in Official Form 19, which must be completed and signed by the bankruptcy petition preparer, and filed with each document for filing that it prepares.

Official Forms 6I and 6J – usually referred to as Schedules I and J – set out the income and expenses of an individual debtor. In addition to the stylistic changes made as part of the forms modernization project, the revised versions contain several changes intended to provide more accurate and useful information. First, the revisions address the situation of a debtor who lives with and pools assets with other people who are not related to the debtor by blood or marriage. Second, in chapter 13 cases, proposed Schedule J asks for expenses at two different

points – the date that the debtor files bankruptcy (Column A) and the date that a proposed 13 plan is confirmed (Column B). This allows Schedule J to state what the debtor's expenses will be as a result of the confirmed plan, thus facilitating a determination of the plan's feasibility. Finally, a new Line 23 is added to Schedule J, setting out a calculation of the debtor's monthly net income.

Official Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2 are used in determining a debtor's current monthly income under 11 U.S.C. § 110(10A), and – in chapter 7 and 13 cases – in determining income remaining after deduction of expenses specified in statutes governing those chapters. The forms for chapter 7 and 13 cases are generally referred to as the "means test" forms. In proposed Official Form 22B – the statement of current monthly income in chapter 11 cases filed by individuals – the only changes are stylistic, conforming to the overall forms modernization project approach.

For chapters 7 and 13, however, the proposed means test forms are revised in several additional ways. First, and most significantly, they have been divided into two separate forms: one for income (Official Form 22A-1 in chapter 7, Official Form 22C-1 in chapter 13), and the other for expenses (Official Form 22A-2 in chapter 7, Official Form 22C-2 in chapter 13). Because expense information is only required of debtors whose current monthly income exceeds the applicable state median income, most debtors will not have to complete the expense forms, thereby reducing the volume of the filed forms.

Second, in both the proposed chapter 7 and chapter 13 forms, the deduction for cell phone and internet expenses is modified to reflect more accurately the IRS allowances incorporated by the Bankruptcy Code. Under the applicable IRS "other necessary expense" standard, cell phone and other optional telecommunication services expenses are deductible not only if necessary for

the health and welfare of the debtor and the debtor's dependents, as stated in the current forms, but also if necessary for the production of income if not reimbursed by the debtor's employer or deducted by the debtor in calculating net self-employment income. Proposed Official Form 22A-2 (in Line 23) and Official Form 22C-2 (in Line 19) make this correction. On the other hand, unlike their counterparts in the current forms, these lines do not permit deduction of basic home internet expenses because, under IRS guidelines adopted in 2011, these expenses are included in the Local Standards for housing and utilities.

Third, Line 60 of current Official Form 22C has not been repeated in proposed Official Form 22C-2. It allows debtors to list, but not deduct from income, "Other Necessary Expense" items not included within the categories specified by the IRS. Because debtors are separately allowed to list – and deduct – any expenses arising from special circumstances, former Line 60 was rarely used.

Finally, proposed Form 22C-2 reflects the Supreme Court's decision in *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010). Adopting a forward-looking approach, the Court stated in *Lanning* that calculation of a chapter 13 debtor's projected disposable income under 11 U.S.C. § 1325(b) requires consideration of changes to income or expenses that, at the time of plan confirmation, have occurred or are virtually certain to occur. The changes could result in either an increased or decreased projected disposable income. Because only debtors whose annualized current monthly income exceeds the applicable median family income have their projected disposable income determined by the information provided on Official Form 22C-2, only these debtors are required to provide the information about changes to income and expenses on that form. Part 3 of proposed Official Form 22C-2 provides for the reporting of those changes.

Informational Items

For the various reasons set out in Appendix B, the advisory committee determined not to seek final approval for four amendments published for public comment in August 2011: Rule 3007(a), and Official Forms 6C, 22A, and 22C.

The advisory committee is currently exploring the adoption of an official form for chapter 13 plans. A survey of the bankruptcy bench established widespread support for a national form, and the advisory committee has established a working group to develop one. The working group has discussed an initial draft and expects to soon have a draft that can be informally circulated for comments. Additionally, in the course of the group's work, it became apparent that the effectiveness of a national chapter 13 form plan would depend, to a large extent, on amendments to the Bankruptcy Rules aimed at harmonizing practice among the local courts and eliminating ambiguity about the extent to which official forms may be modified locally. The working group has drafted several amendments (e.g., governing the need to file proofs of secured claims, establishing shortened filing deadlines, and clarifying procedures for treatment of claims) that the advisory committee will consider in the coming year.

As discussed above, the forms modernization project began its work by revising the forms used in cases of individual debtors. Drafting of revised non-individual forms has begun, and the initial drafts will be tested and modified as necessary before being recommended for publication. The advisory committee expects to recommend adoption of the remaining revised forms for both individual and non-individual cases.

As part of the forms modernization project, the advisory committee is considering the use of electronic signatures. It will continue to examine the issue with the goal of recommending an

amendment to the Bankruptcy Rules that establishes a uniform procedure for electronic signatures across all the rules.

Finally, the advisory committee is planning a mini-conference on the effectiveness of new Official Forms 10 (Attachment A), 10 (Supplement 1), and 10 (Supplement 2), which took effect on December 1, 2011, and were designed to implement the new mortgage claim disclosure requirements in Rules 3001(c) and 3002.1. The mini-conference will be held in conjunction with the advisory committee's fall meeting. Home mortgage servicers and attorneys (or others who are actually filing the documents), consumer debtor attorneys, chapter 13 trustees, bankruptcy judges, and clerks of court will be invited and encouraged to attend.

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted proposed amendments to Rule 45, the subpoena rule, and a conforming amendment to Rule 37, the rule dealing with failure to cooperate in discovery, with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments were circulated to the bench, bar, and public for comment in August 2011. Three public hearings were scheduled, but all were cancelled because the two parties who asked to testify opted instead to submit written comments.

The advisory committee received 25 written comments. Its discovery subcommittee met by conference call to consider them and, based on that discussion, suggested some modifications to the proposed amendments. At the advisory committee's Spring 2012 meeting, those modifications were reviewed, and a few topics were identified for additional consideration. A revised Rule 45 package was then circulated to the full advisory committee and received unanimous support. The changes recommended to the Rule 45 package since publication are

minor and are summarized below. The modified version of the amendment package also includes style changes recommended by the Committee's style consultant.

The proposed amendments to Rule 45 result from a multi-year study of subpoena practice culminating in a decision by the advisory committee to adopt the most modest form of rule simplification considered and to adopt some but not all of the specific rule amendments proposed during the study of the rule. Four specific changes are being proposed.

First, the amendments seek to simplify Rule 45 by making the court where an action is pending the issuing court, permitting service throughout the United States (as is currently authorized under Criminal Rule 17(e)), and combining all provisions on the place of compliance into a new Rule 45(c). It preserves the various place-of-compliance provisions of the current rule except its reference to state law. The "*Vioxx* issue" is addressed separately below.

The simplification proposals received broad support in the public commentary, and only one change was made following publication. Proposed Rule 45(c)(2)(A) was changed to call for production "within 100 miles of where the person [subject to the subpoena] resides, is employed, or regularly transacts business in person." This change should ensure that if litigation about a subpoena is necessary it will occur at a location convenient for the nonparty being subpoenaed. Recognizing that agreement on the place of production is desirable, the proposed Committee Note was modified to recognize that the amendments do not limit the ability of parties to make such agreements.

A clarifying amendment to the proposed Committee Note on Rule 45(c) addresses concerns expressed in the comments that the amended rule might be read to require a subpoena for all depositions, even of parties or party officers, directors, or managing agents. The proposed Committee Note was clarified to remind readers that no subpoena is required for depositions of

these witnesses, and that the geographical limitations applicable to subpoenas do not apply when such depositions are simply noticed. Another Committee Note clarification confirms that, when the issuing court has made an order for remote testimony under Rule 43(a), a subpoena may be used to command the distant witness to attend and testify within the geographical limits of Rule 45(c).

Second, the proposed amendments address the transfer of subpoena-related motions. New Rule 45(c) essentially retains the existing rule requirement that motions to quash or enforce a subpoena be made in the district where compliance with the subpoena is required. The result is that the "enforcement court" may often be different from the "issuing court." Existing authority has recognized that some disputes over subpoena enforcement are better decided by the issuing court. The proposed amendments therefore add Rule 45(f), which explicitly authorizes transfer of subpoena-related motions from the enforcement court to the issuing court, including not only motions for a protective order but also motions to enforce the subpoena.

The published draft had permitted transfer only upon consent of the nonparty and the parties, or in "exceptional circumstances." After public comment, the advisory committee concluded that party consent should not be required. If the person subject to the subpoena consents to transfer, the enforcement court may transfer it. Whether the "exceptional circumstances" standard should be retained when the nonparty witness does not consent was the focus of considerable public comment. After considering all of the comments, the advisory committee decided to retain the "exceptional circumstances" standard.

The proposed Committee Note was revised to clarify that the prime concern should be avoiding undue burdens on the local nonparty. It also identifies considerations that might still warrant transfer, emphasizing that those considerations warrant transfer only if they outweigh the

interests of the local nonparty in local resolution of the motion. The proposed Committee Note also suggests that the judge in the compliance court might consult with the judge in the issuing court, and encourages the use of telecommunications to minimize the burden on the nonparty when transfer does occur.

Third, the proposed amendments resolve conflicting interpretations of the current rule as to whether a party or party officer can be compelled by subpoena to travel more than 100 miles to attend trial. One interpretation is that the geographical limits applicable to other witnesses do not apply to a party or party officer. *See In re Vioxx Products Liability Litigation*, 438 F. Supp. 2d 664 (E.D. La. 2006) (requiring an officer of the defendant corporation, who lived and worked in New Jersey, to testify at trial in New Orleans even though he was not served within Louisiana under Rule 45(b)(2)). The alternative interpretation is that the rule sets forth the same geographical limits for all trial witnesses. *See Johnson v. Big Lots Stores, Inc.*, 251 F.R.D. 213 (E.D. La. 2008) (holding that opt-in plaintiffs in Fair Labor Standards Act action could not be compelled to travel long distances from outside the state to attend trial because they were not served with subpoenas within the state as required by Rule 45(b)(2)).

The division in the caselaw resulted from differing interpretations of the 1991 amendments to Rule 45. The advisory committee concluded that those amendments were not intended to create the expanded subpoena power recognized in the *Vioxx* line of cases, and it decided to restore the original meaning of the rule. The proposed new amendments therefore provide in Rule 45(c)(1) that a subpoena may command any person to testify only within the limits that apply to all witnesses. As noted above, proposed Committee Note language was added to recognize that this provision does not affect existing law on the location for a deposition of a party or party's officer, director, or managing agent, for which a subpoena is not needed.

Finally, the 1991 amendments introduced the "documents only" subpoena, and added a requirement in Rule 45(b)(1) that each party be given notice of a subpoena that requires document production. In the 2007 restyling of the Civil Rules, the rule was clarified to direct that notice be provided before service of the subpoena, but experience has shown that many lawyers do not comply with the notice requirement. Therefore, the proposed amendments move the notice provision to a more prominent position, and also require that the notice include a copy of the subpoena. As published for public comment, the preliminary draft proposed to extend the notice requirement to trial subpoenas by removing the phrase "before trial" from the rule.

The effort to call attention to the notice requirement was supported during the public comment period. The Department of Justice was concerned, however, that removal of the phrase "before trial" from the rule could complicate its efforts (and the efforts of other judgment creditors) to locate assets subject to seizure pursuant to judgments. For the Department, those judgments include restitution in favor of crime victims. Giving advance notice in those situations could frustrate enforcement of judgments or make it considerably more cumbersome.

At the same time, it appeared that the value of notice of trial subpoenas (the concern that led to the proposal for removal of the phrase in the first place) was limited or nonexistent because usually the pertinent documents would be listed in the Rule 26(a)(3) disclosures or otherwise identified during pretrial preparations. Indeed, the parties may often cooperate to subpoena needed exhibits for trial. After considering alternatives, the advisory committee decided to restore the phrase "before trial" to the rule.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed amendments to Civil Rules 37 and 45, and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

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

Informational Items

The advisory committee's discovery subcommittee continues its study of issues relating to preservation of electronically stored information and sanctions for failure to preserve material. The project was prompted by presentations and discussions at the advisory committee's May 2010 Conference on Civil Litigation held at Duke University School of Law. Since the Duke Conference, the subcommittee has held numerous conference calls and some meetings, and the full advisory committee has discussed the resulting issues at four meetings, most recently at its Spring 2012 meeting. At the advisory committee's request, the Federal Judicial Center conducted research on the frequency and nature of sanctions litigation. The results of this research were presented to the advisory committee during its Spring 2011 meeting. As previously reported, in September 2011, the subcommittee held a well-attended and very informative mini-conference about these issues with approximately two dozen judges, practicing lawyers, technical experts, and academics.

The subcommittee's work has identified some possible rule amendment efforts as more promising than others. But it has also revealed intense disagreement as to whether any rule amendments are warranted, and almost as much disagreement about what those amendments should be. In addition, the subcommittee is not the only body studying these issues. For example, on December 13, 2011, the Subcommittee on the Constitution of the House Judiciary

Committee held a hearing regarding "The Costs and Burdens of Civil Discovery" that included much discussion of e-discovery issues.

In short, much has been happening that bears generally on this topic. Over time, the discovery subcommittee's work has evolved. It focused initially on three alternative formulations of rule responses. The first two directly addressed preservation obligations. The third focused only on Rule 37, and sought to ensure uniformity and constraint in the imposition of sanctions for failure to preserve. In reaching this point, the subcommittee has encountered one basic question that has yet to be answered with confidence: whether potential rule amendments should be focused solely on electronically stored information or apply to all discoverable information. The full advisory committee discussed this question during its Spring 2012 meeting and the question has not been finally resolved. In sum, there is very active and ongoing work, but some uncertainty about where that work will ultimately lead.

A subcommittee formed after the 2010 Duke Conference is continuing to implement and oversee further work on ideas resulting from that conference. In addition to the ongoing efforts described in the Committee's January 2011 report to the Judicial Conference, the subcommittee is considering a package of various potential rules amendments aimed at reducing the costs and delay in civil litigation. The initial drafts were presented to the full advisory committee at its Spring 2012 meeting and received a very favorable response. After the drafts are refined, the subcommittee plans to convene a mini-conference in the fall to elicit the views of judges, experienced lawyers, and academics.

The advisory committee continues to pay close attention to evolving pleading practices following the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

It appears that there is no urgent need for a rules response. Much remains to be learned about what pleading standards will be when practices are better settled.

In recent years, Rule 84 has been thrust into the spotlight by the seeming incongruity between many of the illlustrative pleading forms and current pleading standards. A subcommittee made up of representatives from the advisory committees determined that, for various reasons, there is no apparent reason to establish uniform approaches to illustrative forms across the different advisory committees. The Advisory Committee on Civil Rules then created a Rule 84 subcommittee to carry forward consideration of the illustrative civil forms. All possible approaches remain open and will be considered, including abrogating Rule 84 completely, reducing the number of illustrative forms, or removing the civil forms from the Rules Enabling Act process and turning over the development of forms to the Administrative Office. An initial task will be to seek information about actual use of the Rule 84 Forms and report to the advisory committee at its Fall 2012 meeting.

The advisory committee created a Rule 23 subcommittee last November to begin studying current trends in class action practice. The Rule 23 project is in its preliminary stage, with the subcommittee considering whether Rule 23 should be taken up for consideration.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted a proposed amendment to Rule 11, with a recommendation that it be approved and transmitted to the Judicial Conference. The proposed amendment was circulated to the bench, bar, and public for comment in August 2011.

The proposed amendment expands the colloquy under Rule 11 to require advising a defendant of possible immigration consequences when a judge accepts a guilty plea. The

amendment was undertaken in light of the Supreme Court's decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), which held that a defense attorney's failure to advise the defendant concerning the risk of removal fell below the objective standard of reasonable professional assistance guaranteed by the Sixth Amendment. In light of *Padilla*, the advisory committee concluded that a judicial warning regarding possible immigration consequences should be required as a uniform practice at the plea allocution.

In the advisory committee's initial deliberations, a minority of members opposed the amendment on the grounds that it was unwise and unnecessary to add further requirements to the already lengthy plea colloquy now required under Rule 11. A majority of the advisory committee concluded, however, that deportation is qualitatively different from the other collateral consequences that may follow from a guilty plea, and it therefore warrants inclusion on the list of matters that must be discussed during a plea colloquy. Although *Padilla* speaks only to the duty of defense counsel to warn a defendant about immigration consequences, the Supreme Court's recognition of the distinctive nature of those consequences also supports requiring a judicial warning. The warning would be consistent with the practice of the Department of Justice, which now advises prosecutors to include a discussion of those consequences in plea agreements.

The proposed amendment mandates a generic warning rather than specific advice concerning the defendant's individual situation. The advisory committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without first attempting to determine the defendant's citizenship. In drafting its proposal, the advisory committee was cognizant of the complexity of immigration law, which likely will be subject to legislative changes. Accordingly, its proposal uses non-technical language designed to

be understood by lay persons and will avoid the need to amend the rule further if there are legislative changes.

Six written comments were received. Only one disagreed with the decision to add advice concerning possible immigration consequences to the plea colloquy. After publication and receipt of written comments, both the Rule 11 subcommittee and the advisory committee reconsidered the foundational question of whether Rule 11 should be amended to require advice concerning immigration consequences in all plea colloquies. Members considered prior concerns about lengthening the plea colloquy, as well as the argument that not all defendants are aliens and the notion that conscientious judges do not need a rule to require them to give warnings in appropriate cases.

After hearing the report of its Rule 11 subcommittee and full discussion, the advisory committee reiterated its support for adding immigration consequences to the plea colloquy. A majority of the advisory committee agreed that the immigration consequences covered by the proposed amendment–removal from the U.S. and denial of citizenship and reentry–are qualitatively different from other collateral consequences, and warrant inclusion in the plea colloquy. As the Supreme Court noted in *Padilla*, "deportation is an integral part–indeed, sometimes the most important part–of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." 130 S. Ct. at 1480 (footnote omitted). Although the Court's decision does not require the proposed amendment, it does provide an appropriate basis for distinguishing advice concerning immigration consequences from other collateral consequences.

The advisory committee accepted the Rule 11 subcommittee's recommendation to make several small modifications in the proposed Committee Note to address concerns raised in the

public comments. The changes emphasize that the court should provide only a general statement that there may be immigration consequences of conviction, and not seek to give specific advice concerning a defendant's individual situation. With these changes, the advisory committee recommended approval of the proposed amendment to Rule 11.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed amendment to Criminal Rule 11, and transmit it to the Supreme Court for its consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendment to Federal Rule of Criminal Procedure 11 is in Appendix D, with an excerpt from the advisory committee report.

Rules Approved for Publication and Comment

The advisory committee on Criminal Rules submitted proposed amendments to Rules 5(d) and 58, with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments were circulated to the bench, bar, and public for comment in August 2010. Following publication, the proposed amendments were approved by the Committee and the Judicial Conference in 2011, and subsequently transmitted to the Supreme Court.

The amendments submitted to the Court included not only a change to Rule 5(d) providing for consular notice, but also a change to Rule 5(c) to clarify where an initial appearance should take place for persons who have been surrendered to the United States pursuant to an extradition treaty. In April 2012, the Court approved and transmitted to Congress only the proposed amendment to Rule 5(c). It then recommitted the amendments to the advisory committee for further consideration. As discussed below, the Committee voted to republish the proposed amendments for public comment.

The proposed parallel amendments to Rules 5(d) and 58(b) are designed to help ensure that the United States fulfills its international obligations under both Article 36 of the Vienna Convention on Consular Relations and bilateral treaties. The Vienna Convention is a multilateral treaty that sets forth basic obligations that a country has towards foreign nationals arrested within its jurisdiction. In order to facilitate the provision of consular assistance, Article 36 provides that detained foreign nationals must be advised of the opportunity to contact the consulate of their home country. Additionally, many bilateral agreements also require consular notification.

There has been substantial litigation over the manner in which Article 36 is to be implemented, whether the Vienna Convention creates rights that may be invoked by individuals in a judicial proceeding, and whether any possible remedy exists for defendants not appropriately notified of possible consular access at an early stage of a criminal prosecution. In *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006), the Supreme Court rejected a claim that suppression of evidence was an appropriate remedy for failure to inform a non-citizen defendant of his ability to have the consulate from his country of nationality notified of his arrest and detention. In that decision, the Court did not rule on the preliminary question of whether the Vienna Convention creates an individual right, holding that regardless of the answer to that question, suppression of evidence is not an appropriate remedy for any violation.

Notwithstanding the Justice Department's position that the Vienna Convention does not create an enforceable individual right, the executive branch has created policies and taken substantial measures to ensure that the United States fulfills its international obligations to other signatory states with regard to the Article 36 consular provisions. In addition, the Assistant Attorney General for the Criminal Division (who originally proposed the amendments) urged that, in addition to the measures already taken by the Departments of Justice and State, Rules 5

and 58 should be amended "to provide an additional assurance that the Vienna Convention obligations are satisfied." He characterized the proposed amendments as "responsible procedural means for further fulfilling the obligations of the United States under the Convention, without stepping into important questions of substantive rights that the Court has reserved for a later day."

At its April 2012 meeting, the advisory committee discussed the Supreme Court's return of the amendments and possible concerns that the proposed rules could be construed to: (1) intrude on executive discretion in conducting foreign affairs both generally and specifically as it pertains to deciding how to carry out treaty obligations; and (2) confer on persons other than the sovereign signatories to treaties, specifically criminal defendants, rights to demand compliance with treaty provisions. At that meeting, representatives of the Department of Justice informed the advisory committee that they had conferred with counterparts at the Department of State, and the two departments jointly proposed some changes to the proposed rule amendments to alleviate these concerns.

After extended discussion, the advisory committee concluded that Rules 5(d) and 58 should be amended to address the questions of consular notification, but that the amendments should be redrafted. Subsequent revisions to the text were unanimously approved. As now amended, the proposed rules require the court to inform non-citizen defendants at their initial appearance that: (1) they may request that a consular officer from their country of nationality be notified of their arrest; and (2) in some cases international treaties and agreements require consular notification without a defendant's request. The proposed rules do not, however, address whether treaty provisions requiring consular notification may be invoked by individual defendants in a judicial proceeding and what, if any, remedy may exist for a violation of Article

36 of the Vienna Convention. More particularly, the proposed rules alone do not create any such rights or remedies.

Informational Items

Proposed amendments to Rule 12, the rule addressing pleadings and pretrial motions in criminal proceedings, and conforming amendments to Rule 34, arresting judgment, were published for public comment in August 2011. The amendments clarify which motions must be raised before trial and the consequences if motions are not timely filed. After receiving numerous comments, including detailed objections and suggestions from various bar organizations, the advisory committee's reporters prepared an extensive memorandum analyzing the comments and discussing possible changes in the amendments as published. The Rule 12 subcommittee convened to discuss the comments at the advisory committee's Spring 2012 meeting. The subcommittee expects to complete its work over the summer and will present its recommendation at the advisory committee's Fall 2012 meeting.

At the Committee's last meeting, the advisory committee informed the Committee that it was analyzing a proposal from the Attorney General to amend Rule 6(e) regarding grand jury secrecy to authorize the disclosure of historically significant grand jury materials after a suitable period of years, subject to various limitations and procedural protections.

A Rule 6 subcommittee was formed and held two lengthy teleconferences to discuss the Attorney General's proposal, and it reviewed written and oral comments received as well as a research memorandum prepared by the advisory committee's reporters. At the close of the second teleconference, all members of the subcommittee other than those representing the Department of Justice voted to recommend that the advisory committee not pursue the proposed amendment.

After a report from the subcommittee, discussion among the full advisory committee revealed consensus that in the rare cases where disclosure of historically significant materials were sought, district judges had reasonably resolved applications by reference to their inherent authority, and that it would be premature to set out standards for the release of historical grand jury materials in a national rule. Accordingly, the advisory committee decided not to proceed with the Attorney General's proposal.

Finally, on June 6, 2012, the Senate Judiciary Committee held a hearing to examine whether a need exists for legislative action on the issue of discovery reform in federal criminal cases. This was the second hearing held on the subject and focused on the reports of investigations of the prosecution of former Senator Ted Stevens and legislation introduced by Senator Lisa Murkowski. Before the hearing, Senator Patrick J. Leahy requested that the Judicial Conference submit written testimony detailing its work on the subject of disclosure obligations. The Conference declined to submit written testimony; however, on behalf of the Secretary of the Judicial Conference and the Committee's chair, the chair of the advisory committee submitted a letter and a lengthy attachment detailing the advisory committee's past work on Rule 16.

FEDERAL RULES OF EVIDENCE

Rule Recommended for Approval and Transmission

The Advisory Committee on Evidence Rules submitted a proposed amendment to Rule 803(10), with a recommendation that it be approved and transmitted to the Judicial Conference. The proposed amendment was circulated to the bench, bar, and public for comment in August 2011. Scheduled public hearings on the amendment were canceled because no one asked to testify.

The proposed amendment revises the hearsay exception for the absence of a public record or entry to avoid a constitutional infirmity in the current rule in light of the Supreme Court's decision in *Melendez-Diaz v. Massachusetts,* 557 U.S. 305 (2009). Rule 803(10) currently allows the government to prove in a criminal case, through the introduction of a certificate, that a public record does not exist. Under *Melendez-Diaz*, the certificate would often be "testimonial" within the meaning of the Confrontation Clause, as construed by *Crawford v. Washington*, 541 U.S. 36 (2004). Therefore, the admission of certificates (in lieu of testimony) violates the accused's right of confrontation. The proposed amendment to Rule 803(10) addresses the Confrontation Clause problem in the current rule by adding a "notice-and-demand" procedure.

In *Melendez-Diaz*, the Court stated that the use of a notice-and-demand procedure (and the defendant's failure to demand production under that procedure) would cure an otherwise unconstitutional use of testimonial certificates. As amended, Rule 803(10) would permit a prosecutor who intends to offer a certification to provide written notice of that intent at least 14 days before trial. If the defendant does not object in writing within seven days of receiving the notice, the prosecutor would be permitted to introduce a certification that a diligent search failed to disclose a public record or statement and would not have to produce a witness to so testify. The amended rule would allow the court to set a different time for the notice or the objection. After considering the two public comments it received, the advisory committee recommended approval of the proposed amendment as published.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed amendment to Evidence Rule 803(10), and transmit it to the Supreme Court for its consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendment to Federal Rules of Evidence 803(10) is in Appendix E, with an excerpt from the advisory committee report.

Rules Approved for Publication and Comment

The Advisory Committee on Evidence Rules submitted proposed amendments to Rules 801(d)(1)(B) and 803(6)-(8), with a request that they be published for comment. The Committee approved the advisory committee's recommendation to publish the proposed amendments for public comment.

Rule 801(d)(1)(B)

Rule 801(d)(1)(B) is the hearsay exemption for certain prior consistent statements. It would be amended to provide that prior consistent statements are admissible under the hearsay exemption whenever admissible to rehabilitate the witness's credibility. Under the current rule, some prior consistent statements offered to rehabilitate a witness's credibility – specifically, those that rebut a charge of recent fabrication or improper influence or motive – are also admissible substantively under the hearsay exemption. In contrast, other rehabilitative statements – such as those that explain a prior inconsistency or rebut a charge of faulty recollection – are admissible only for rehabilitation but not substantively. There are two basic practical problems in distinguishing between substantive and credibility use as applied to prior consistent statements. First, the necessary jury instruction is almost impossible for jurors to follow. The prior consistent statement is of little or no use for credibility unless the jury believes it to be true. Second, and for similar reasons, the distinction between substantive and impeachment use of prior consistent statements has little, if any, practical effect. The proponent has already presented the witness's trial testimony, so the prior consistent statement ordinarily adds no real substantive effect to the proponent's case.

At its Spring 2011 meeting, the advisory committee unanimously agreed that the current distinction between substantive and impeachment use of prior consistent statements is impossible for jurors to follow. But some members were concerned that any expansion of the hearsay exemption to cover all prior consistent statements admissible for rehabilitation might be taken as a signal that the rules are taking a more liberal attitude toward admitting prior consistent statements generally. The advisory committee resolved to consider the amendment further and to seek the input of federal public defenders, the Department of Justice, and state court judges on the merits of amending Rule 801(d)(1)(B). Before the Fall 2011 meeting, the Department of Justice submitted a letter favoring the amendment, and the federal public defenders submitted a letter opposing the amendment.

At its Fall 2011 meeting, the advisory committee again considered the proposed amendment and resolved to seek further input. Its reporter worked with the Federal Judicial Center to prepare a survey of district judges on the need for and merits of the proposed amendment. The proposal was also shared with the ABA Litigation Section, the American College of Trial Lawyers, the National Association of Criminal Defense Lawyers, and other interested groups.

At its Spring 2012 meeting, the advisory committee voted unanimously, with one member abstaining, to approve an amendment to Rule 801(d)(1)(B) and to recommend to the Committee that it be released for public comment. The advisory committee approved a draft retaining the phrase "motive to fabricate," language familiar and comfortable to judges and practitioners. It also fortified the proposed Committee Note to emphasize that the amended rule is not to be used to expand the admissibility of prior consistent statements or to allow the admission of cumulative consistent statements.

Rules 803(6)-(8)

The recent restyling project uncovered an ambiguity in Rules 803(6)-(8) – the hearsay exceptions for business records, absence of business records, and public records. The exceptions originally set out admissibility requirements and then provided that a record that met these requirements, although hearsay, was admissible "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." The rules did not specifically state which party had the burden of showing trustworthiness or untrustworthiness.

The restyling project initially sought to clarify this ambiguity by providing that a record that fit the other admissibility requirements would satisfy the exception if "the opponent does not show that" the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. But the proposal did not go forward as part of restyling because research into the case law indicated that the change would be substantive. Most courts impose the burden of proving untrustworthiness on the opponent, but a few require the proponent to prove that a record is trustworthy. Because the proposal would have changed the law in at least one court, it was deemed substantive and therefore outside the scope of the restyling project.

When the Committee approved the restyled Evidence Rules, several members suggested that the advisory committee consider making the minor substantive change to clarify that the opponent has the burden of showing untrustworthiness. At the advisory committee's Spring 2011 meeting, however, a majority opposed amending Rules 803(6)-(8), concluding that most courts were construing them as they were intended to be read (i.e., placing the burden of proving untrustworthiness on the opponent). However, at the Spring 2012 meeting, the reporter informed the advisory committee that a Texas committee restyling the state's rules of evidence had unanimously concluded that restyled Federal Rules of Evidence 803(6)-(8) could be interpreted

as making substantive changes by placing the burden on the *proponent* of the evidence to show trustworthiness. The advisory committee voted unanimously, with one member abstaining, to recommend to the Committee that the proposed amendments to Rules 803(6)-(8) be published for public comment.

Informational Items

As part of the advisory committee's ongoing responsibility to engage in a "continuous study" of the need for any amendments to the Evidence Rules, the reporter has raised the following possible amendments for the advisory committee's consideration: (1) amending Rule 106 to provide that statements may be used for completion even if they are hearsay; (2) clarifying that Rule 607 does not permit a party to impeach its own witness if the only reason for calling the witness is to present otherwise inadmissible evidence to the jury; (3) clarifying that Rule 803(5) can be used to admit statements made by one person and recorded by another; (4) clarifying the business duty requirement in Rule 803(6); and (5) resolving a dispute in the courts over whether prior testimony in a civil case may be admitted against one who was not a party at the time the testimony was given. At the advisory committee's Spring 2012 meeting, it also considered a suggestion made in an article by Professor Jeffery Bellin to amend Rule 803(1) to explicitly require corroboration from an equally percipient witness. The reporter stated that Professor Liesa Ricter has published a rebuttal to the suggestion in which she encourages the advisory committee to abstain from amending the Evidence Rules while social media communications remain nascent. The advisory committee is considering holding a symposium in conjunction with its Fall 2013 meeting to consider the intersection of the Evidence Rules and emerging technologies.

As previous reports have noted, the advisory committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36

(2004), in which the Court held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to confront and cross-examine the declarant. The advisory committee also continues to monitor developments on the relationship between the Evidence Rules and an accused's right to confrontation.

Finally, in conjunction with its Fall 2012 meeting, the advisory committee will host a symposium on Rule 502 (Attorney-Client Privilege and Work Product; Limitations on Waiver). The goal is to review the current use of Rule 502 by courts and litigants, and to discuss ways in which Rule 502 can be better known and understood. The intent is to promote its use as a mechanism for reducing the costs of preproduction privilege review. The advisory committee has invited a number of distinguished judges, practitioners, and academics to make presentations. The symposium proceedings will be published in the *Fordham Law Review*.

JUDICIARY STRATEGIC PLANNING

On April 10, 2012, Judge Charles Breyer, the judiciary's planning coordinator, requested that the Committee submit a report detailing its progress in implementing the *Strategic Plan for the Federal Judiciary.* The Committee delegated to the chair and reporter the task of preparing and transmitting a report to Judge Breyer. The report was submitted on July 2, 2012.

Respectfully submitted,

Mark R. Kravitz, Chair

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

Appendix A – Proposed Amendments to the Federal Rules of Appellate Procedure
Appendix B – Proposed Amendments to the Federal Rules of Bankruptcy Procedure
Appendix C – Proposed Amendments to the Federal Rules of Civil Procedure
Appendix D – Proposed Amendment to the Federal Rules of Criminal Procedure
Appendix E – Proposed Amendment to the Federal Rules of Evidence

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

Agenda E-19 (Appendix A)
Rules
September 2012

MARK R. KRAVITZ
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JEFFREY S. SUTTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

TO: Judge Mark R. Kravitz, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Jeffrey S. Sutton, Chair
Advisory Committee on Appellate Rules

DATE: May 8, 2012

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on April 12, 2012, in Washington, DC. The Committee gave final approval to proposed amendments to Appellate Rules 13, 14, 24, 28, and 28.1 and to Form 4.

* * * * *

II. Action items for final approval

The Committee presents the following proposals for final approval.

A. Proposed amendments to Rules 13, 14, and 24

The proposed amendments to Rules 13, 14, and 24 concern appeals from the United States Tax Court. The proposed amendments to Rules 13 and 14 revise those rules to address permissive interlocutory appeals from the Tax Court under 26 U.S.C. § 7482(a)(2). The Committee developed these proposals in consultation with the Tax Court and with the Tax Division of the Department of Justice. The proposed amendment to Rule 24 grows out of a suggestion by the Tax Court that Rule 24(b)'s reference to the Tax Court be revised to remove a possible source of confusion concerning the Tax Court's legal status.

1. Text of proposed amendments and Committee Notes

The Committee recommends final approval of the proposed amendments to Rules 13, 14, and 24, as set out in the enclosure to this report.

2. Changes made after publication and comment

The Committee did not make any changes to the proposed amendments to Rules 13, 14, and 24 after publication. (It received no comments on these proposed amendments.)

B. Proposed amendments to Rules 28 and 28.1

The proposed amendment to Rule 28 revises Rule 28(a)'s list of the contents of the appellant's brief by removing the requirement of separate statements of the case and of the facts, and makes conforming changes to Rule 28(b) (concerning the appellee's brief). The proposed amendment to Rule 28.1 makes conforming changes to Rule 28.1 (concerning cross-appeals).

Current Rule 28(a)(6) requires "a statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below." Current Rule 28(a)(7) requires that the brief include "a statement of facts." Rule 28(a) requires these items to appear "in the order indicated." These dual requirements have confused practitioners. It seems intuitively more sensible to permit the appellant to weave those two statements together and present the relevant events in chronological order. As a point of comparison, Supreme Court Rule 24 does not separate the two requirements; rather, Supreme Court Rule 24.1(g) requires "[a] concise statement of the case, setting out the facts material to the consideration of the questions presented, with appropriate references to the joint appendix, e.g., App. 12, or to the record, e.g., Record 12."

The proposed amendment to Rule 28(a) consolidates subdivisions (a)(6) and (a)(7) into a new subdivision (a)(6) that provides for one "statement." The proposed new Rule 28(a)(6) allows the lawyer to present the factual and procedural history chronologically, but also provides flexibility to depart from chronological ordering. Conforming changes renumber Rules 28(a)(8) through (11) as Rules 28(a)(7) through (10), revise Rule 28(b)'s discussion of the appellee's brief, and revise Rule 28.1's discussion of briefing on cross-appeals.

1. Text of proposed amendments and Committee Notes

The Committee recommends final approval of the proposed amendments to Rules 28 and 28.1 as set out in the enclosure to this report.

2. Changes made after publication and comment

The comments that the Committee received on the proposed amendments to Rules 28 and 28.1 are described in the enclosure to this report. Four of the six sets of comments supported the proposed amendments' goal. Among those supportive comments, two sets of comments proposed drafting changes; a number of those proposals sprang from a concern that deletion of some of the current language of Rule 28(a)(6) could be problematic. At its spring meeting, the Committee carefully reviewed both the concerns expressed by the two commenters who argued against the proposed amendments and also the suggestions submitted by the two commenters who proffered alternative language for the amendments. A detailed account of the Committee's discussions can be found in the draft minutes of the Committee meeting. To address the concerns expressed by the commenters, the Committee revised the text of proposed Rule 28(a)(6) and added a new paragraph to the Committee Note.

As published, proposed Rule 28(a)(6) referred to "a concise statement of the case setting out the facts relevant to the issues submitted for review and identifying the rulings presented for review, with appropriate references to the record (see Rule 28(e))." In response to commenters' concerns that this language omitted to mention procedural history, the Committee revised the proposed Rule to refer to "a concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record (see Rule 28(e))." The Committee hopes that the amended Rule's reference to "the relevant procedural history" – rather than to "the course of proceedings" – will discourage the unnecessary detail with which some briefs currently describe the procedural history of the case. The Committee added a second paragraph to the Committee Note to Rule 28(a) that describes the contents of the statement of the case and that notes the permissibility of including subheadings. The latter point responds to one commenter's concern that judges and clerks need a way to locate quickly, in the brief, a description of the rulings presented for review. The Committee also added, in the Committee Note, a reference to Supreme Court Rule 24.1(g), on which the amended Rule text is loosely modeled.

C. Proposed amendments to Form 4

The proposed amendments to Form 4 concern applications to proceed IFP on appeal. Appellate Rule 24 requires a party seeking to proceed IFP in the court of appeals to provide an affidavit that, inter alia, "shows in the detail prescribed by Form 4 ... the party's inability to pay or to give security for fees and costs." (Likewise, a party seeking to proceed IFP in the Supreme Court must use Form 4. *See* Supreme Court Rule 39.1.) The proposed amendments would substitute one revised question for two of the questions on the current Form 4: Question 10 – which requests the name of any attorney whom the litigant has paid (or will pay) for services in

connection with the case, as well as the amount of such payments – and Question 11 – which inquires about payments for non-attorney services in connection with the case.

Questions 10 and 11 have been criticized by commentators for seeking information that seems unnecessary to the IFP determination. Some commentators have suggested that Questions 10 and 11 might in some circumstances seek disclosure of information protected by attorney-client privilege and/or work product immunity. Research by the Committee's reporter suggested that though the information solicited by Questions 10 and 11 is relatively unlikely to be subject to attorney-client privilege, it may sometimes constitute protected work product. The Committee also discussed the possibility that even if the information solicited by Questions 10 and 11 is not privileged or protected, its disclosure could as a practical matter disadvantage some IFP litigants. In any event, the function of Form 4 is to provide the information necessary to determine whether the applicant is unable "to pay or to give security for fees and costs," Fed. R. App. P. 24(a)(1)(A). Neither the Committee's own deliberations and research nor informal discussions with the Supreme Court Clerk's Office have disclosed any reason to think that it is necessary to obtain all of the information currently sought by Questions 10 and 11. Accordingly, the proposed amendment would replace Questions 10 and 11 with a new Question 10 that would read: "Have you spent – or will you be spending – any money for expenses or attorney fees in connection with this lawsuit? If yes, how much?"

The proposed amendments would also make certain technical amendments to Form 4, to bring the official Form into conformity with changes that were approved by the Judicial Conference in fall 1997 but were not subsequently transmitted to Congress. The proposed technical amendments would add columns in Question 1 to permit the applicant to list the applicant's spouse's income; would limit the requests for employment history in Questions 2 and 3 to the past two years; and would specify that the requirement for inmate account statements applies to civil appeals.

1. Text of proposed amendments

The Committee recommends final approval of the proposed amendments to Form 4 as set out in the enclosure to this report.

2. Changes made after publication and comment

The single comment received on the proposed amendments to Form 4 is summarized in the enclosure to this report. The comment – from the National Association of Criminal Defense Lawyers ("NACDL") – suggests a revision to the Form's discussion of inmate account statements. The Committee decided not to incorporate this comment into the current proposed amendments, but has added it to the Committee's study agenda as a new item. Further detail on this matter can be found in the draft minutes of the Committee's spring meeting.

* * * * *

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

TITLE III. ~~REVIEW OF A DECISION OF~~ APPEALS FROM THE UNITED STATES TAX COURT

Rule 13. ~~Review of a Decision of~~ Appeals from the Tax Court

1 **(a) ~~How Obtained; Time for Filing Notice of Appeal~~**
2 **Appeal as of Right.**
3 (1) **How Obtained; Time for Filing a Notice of**
4 **Appeal.**
5 ~~(1) Review of a decision of~~ (A) An appeal as
6 of right from the United States Tax Court is
7 commenced by filing a notice of appeal with the
8 Tax Court clerk within 90 days after the entry of
9 the Tax Court's decision. At the time of filing, the
10 appellant must furnish the clerk with enough
11 copies of the notice to enable the clerk to comply
12 with Rule 3(d). If one party files a timely notice of
13 appeal, any other party may file a notice of appeal
14 within 120 days after the Tax Court's decision is
15 entered.

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

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16 ~~(2)~~ (B) If, under Tax Court rules, a party
17 makes a timely motion to vacate or revise the Tax
18 Court's decision, the time to file a notice of appeal
19 runs from the entry of the order disposing of the
20 motion or from the entry of a new decision,
21 whichever is later.

22 ~~(b)~~ (2) **Notice of Appeal; How Filed.** The notice
23 of appeal may be filed either at the Tax Court clerk's
24 office in the District of Columbia or by mail addressed
25 to the clerk. If sent by mail the notice is considered filed
26 on the postmark date, subject to § 7502 of the Internal
27 Revenue Code, as amended, and the applicable
28 regulations.

29 ~~(c)~~ (3) **Contents of the Notice of Appeal;**
30 **Service; Effect of Filing and Service.** Rule 3 prescribes
31 the contents of a notice of appeal, the manner of service,
32 and the effect of its filing and service. Form 2 in the
33 Appendix of Forms is a suggested form of a notice of
34 appeal.

35 ~~(d)~~ (4) **The Record on Appeal; Forwarding;**
36 **Filing.**

37 ~~(1)~~ (A) Except as otherwise provided under
38 Tax Court rules for the transcript of proceedings,
39 the ~~An~~ appeal ~~from the Tax Court~~ is governed by
40 the parts of Rules 10, 11, and 12 regarding the
41 record on appeal from a district court, the time and
42 manner of forwarding and filing, and the docketing
43 in the court of appeals. ~~References in those rules~~
44 ~~and in Rule 3 to the district court and district clerk~~
45 ~~are to be read as referring to the Tax Court and its~~
46 ~~clerk.~~
47 ~~(2)~~ (B) If an appeal ~~from a Tax Court~~
48 ~~decision~~ is taken to more than one court of appeals,
49 the original record must be sent to the court named
50 in the first notice of appeal filed. In an appeal to
51 any other court of appeals, the appellant must
52 apply to that other court to make provision for the
53 record.
54 **(b) Appeal by Permission.** An appeal by permission is
55 governed by Rule 5.

Committee Note

Rules 13 and 14 are amended to address the treatment of permissive interlocutory appeals from the Tax Court under 26 U.S.C. § 7482(a)(2). Rules 13 and 14 do not currently address such appeals;

instead, those Rules address only appeals as of right from the Tax Court. The existing Rule 13 – governing appeals as of right – is revised and becomes Rule 13(a). New subdivision (b) provides that Rule 5 governs appeals by permission. The definition of district court and district clerk in current subdivision (d)(1) is deleted; definitions are now addressed in Rule 14. The caption of Title III is amended to reflect the broadened application of this Title.

CHANGES MADE AFTER PUBLICATION AND COMMENT

No changes were made after publication and comment.

* * * * *

Rule 14. Applicability of Other Rules to ~~the Review of a~~ Appeals from the Tax Court ~~Decision~~

All provisions of these rules, except Rules ~~4-9~~ 4, 6-9, 15-20, and 22-23, apply to ~~the review of a~~ appeals from the Tax Court ~~decision~~. References in any applicable rule (other than Rule 24(a)) to the district court and district clerk are to be read as referring to the Tax Court and its clerk.

Committee Note

Rule 13 currently addresses appeals as of right from the Tax Court, and Rule 14 currently addresses the applicability of the Appellate Rules to such appeals. Rule 13 is amended to add a new subdivision (b) treating permissive interlocutory appeals from the Tax Court under 26 U.S.C. § 7482(a)(2). Rule 14 is amended to address the applicability of the Appellate Rules to both appeals as of right and appeals by permission. Because the latter are governed by Rule 5, that rule is deleted from Rule 14's list of inapplicable provisions. Rule 14 is amended to define the terms “district court” and “district clerk” in applicable rules (excluding Rule 24(a)) to include the Tax Court and its clerk. Rule 24(a) is excluded from this definition because motions to appeal from the Tax Court in forma pauperis are governed by Rule 24(b), not Rule 24(a).

CHANGES MADE AFTER PUBLICATION AND COMMENT

No changes were made after publication and comment.

* * * * *

Rule 24. Proceeding in Forma Pauperis

1 **(a) Leave to Proceed in Forma Pauperis.**

2 (1) **Motion in the District Court.** Except as stated
3 in Rule 24(a)(3), a party to a district-court action who
4 desires to appeal in forma pauperis must file a motion in
5 the district court. The party must attach an affidavit that:

6 (A) shows in the detail prescribed by Form 4
7 of the Appendix of Forms the party's inability to
8 pay or to give security for fees and costs;

9 (B) claims an entitlement to redress; and

10 (C) states the issues that the party intends to
11 present on appeal.

12 (2) **Action on the Motion.** If the district court
13 grants the motion, the party may proceed on appeal
14 without prepaying or giving security for fees and costs,
15 unless a statute provides otherwise. If the district court
16 denies the motion, it must state its reasons in writing.

17 (3) **Prior Approval.** A party who was permitted to
18 proceed in forma pauperis in the district-court action, or

19 who was determined to be financially unable to obtain
20 an adequate defense in a criminal case, may proceed on
21 appeal in forma pauperis without further authorization,
22 unless:
23 (A) the district court – before or after the
24 notice of appeal is filed – certifies that the appeal
25 is not taken in good faith or finds that the party is
26 not otherwise entitled to proceed in forma pauperis
27 and states in writing its reasons for the certification
28 or finding; or
29 (B) a statute provides otherwise.
30 (4) **Notice of District Court's Denial.** The district
31 clerk must immediately notify the parties and the court
32 of appeals when the district court does any of the
33 following:
34 (A) denies a motion to proceed on appeal in
35 forma pauperis;
36 (B) certifies that the appeal is not taken in
37 good faith; or
38 (C) finds that the party is not otherwise
39 entitled to proceed in forma pauperis.

40 (5) **Motion in the Court of Appeals.** A party may
41 file a motion to proceed on appeal in forma pauperis in
42 the court of appeals within 30 days after service of the
43 notice prescribed in Rule 24(a)(4). The motion must
44 include a copy of the affidavit filed in the district court
45 and the district court's statement of reasons for its
46 action. If no affidavit was filed in the district court, the
47 party must include the affidavit prescribed by Rule
48 24(a)(1).
49 **(b) Leave to Proceed in Forma Pauperis on Appeal**
50 **from the United States Tax Court or on Appeal or Review**
51 **of an Administrative-Agency Proceeding.** ~~When an appeal~~
52 ~~or review of a proceeding before an administrative agency,~~
53 ~~board, commission, or officer (including for the purpose of~~
54 ~~this rule the United States Tax Court) proceeds directly in a~~
55 ~~court of appeals, a~~ A party may file in the court of appeals a
56 motion for leave to proceed on appeal in forma pauperis with
57 an affidavit prescribed by Rule 24(a)(1):
58 (1) in an appeal from the United States Tax Court;
59 and
60 (2) when an appeal or review of a proceeding
61 before an administrative agency, board, commission, or
62 officer proceeds directly in the court of appeals.

63 **(c) Leave to Use Original Record.** A party allowed to
64 proceed on appeal in forma pauperis may request that the
65 appeal be heard on the original record without reproducing
66 any part.

Committee Note

Rule 24(b) currently refers to review of proceedings "before an administrative agency, board, commission, or officer (including for the purpose of this rule the United States Tax Court)." Experience suggests that Rule 24(b) contributes to confusion by fostering the impression that the Tax Court is an executive branch agency rather than a court. (As a general example of that confusion, appellate courts have returned Tax Court records to the Internal Revenue Service, believing the Tax Court to be part of that agency.) To remove this possible source of confusion, the quoted parenthetical is deleted from subdivision (b) and appeals from the Tax Court are separately listed in subdivision (b)'s heading and in new subdivision (b)(1).

CHANGES MADE AFTER PUBLICATION AND COMMENT

No changes were made after publication and comment.

* * * * *

Rule 28. Briefs

1 **(a) Appellant's Brief.** The appellant's brief must
2 contain, under appropriate headings and in the order
3 indicated:
4 (1) a corporate disclosure statement if required by
5 Rule 26.1;
6 (2) a table of contents, with page references;

7 (3) a table of authorities — cases (alphabetically
8 arranged), statutes, and other authorities — with
9 references to the pages of the brief where they are cited;
10 (4) a jurisdictional statement, including:
11 (A) the basis for the district court's or
12 agency's subject-matter jurisdiction, with citations
13 to applicable statutory provisions and stating
14 relevant facts establishing jurisdiction;
15 (B) the basis for the court of appeals'
16 jurisdiction, with citations to applicable statutory
17 provisions and stating relevant facts establishing
18 jurisdiction;
19 (C) the filing dates establishing the
20 timeliness of the appeal or petition for review; and
21 (D) an assertion that the appeal is from a
22 final order or judgment that disposes of all parties'
23 claims, or information establishing the court of
24 appeals' jurisdiction on some other basis;
25 (5) a statement of the issues presented for review;
26 (6) a concise statement of the case ~~briefly~~
27 ~~indicating the nature of the case, the course of~~
28 ~~proceedings, and the disposition below;~~

29 ~~(7) a statement of~~ setting out the facts relevant to
30 the issues submitted for review, describing the relevant
31 procedural history, and identifying the rulings presented
32 for review, with appropriate references to the record (see
33 Rule 28(e));
34 ~~(8)~~(7) a summary of the argument, which must
35 contain a succinct, clear, and accurate statement of the
36 arguments made in the body of the brief, and which
37 must not merely repeat the argument headings;
38 ~~(9)~~ (8) the argument, which must contain:
39 (A) appellant's contentions and the reasons
40 for them, with citations to the authorities and parts
41 of the record on which the appellant relies; and
42 (B) for each issue, a concise statement of the
43 applicable standard of review (which may appear
44 in the discussion of the issue or under a separate
45 heading placed before the discussion of the issues);
46 ~~(10)~~ (9) a short conclusion stating the precise relief
47 sought; and
48 ~~(11)~~ (10) the certificate of compliance, if required
49 by Rule 32(a)(7).

50 **(b) Appellee's Brief.** The appellee's brief must

51 conform to the requirements of Rule 28(a)(1)-~~(9)~~ (8) and ~~(11)~~

52 (10), except that none of the following need appear unless the

53 appellee is dissatisfied with the appellant's statement:

54 (1) the jurisdictional statement;

55 (2) the statement of the issues;

56 (3) the statement of the case;

57 ~~(4) the statement of the facts;~~ and

58 ~~(5)~~ (4) the statement of the standard of review.

59 * * * * *

Committee Note

Subdivision (a). Rule 28(a) is amended to remove the requirement of separate statements of the case and of the facts. Currently Rule 28(a)(6) provides that the statement of the case must "indicat[e] the nature of the case, the course of proceedings, and the disposition below," and it precedes Rule 28(a)(7)'s requirement that the brief include "a statement of facts." Experience has shown that these requirements have generated confusion and redundancy. Rule 28(a) is amended to consolidate subdivisions (a)(6) and (a)(7) into a new subdivision (a)(6) that provides for one "statement," much like Supreme Court Rule 24.1(g) (which requires "[a] concise statement of the case, setting out the facts material to the consideration of the questions presented, with appropriate references to the joint appendix...."). This permits but does not require the lawyer to present the factual and procedural history chronologically. Conforming changes are made by renumbering Rules 28(a)(8) through (11) as Rules 28(a)(7) through (10).

The statement of the case should describe the nature of the case, which includes (1) the facts relevant to the issues submitted for review; (2) those aspects of the case's procedural history that are necessary to understand the posture of the appeal or are relevant to the issues submitted for review; and (3) the rulings presented for review. The statement should be concise, and can include

subheadings, particularly for the purpose of highlighting the rulings presented for review.

Subdivision (b). Rule 28(b) is amended to accord with the amendment to Rule 28(a). Current Rules 28(b)(3) and (4) are consolidated into new Rule 28(b)(3), which refers to "the statement of the case." Rule 28(b)(5) becomes Rule 28(b)(4). And Rule 28(b)'s reference to certain subdivisions of Rule 28(a) is updated to reflect the renumbering of those subdivisions.

CHANGES MADE AFTER PUBLICATION AND COMMENT

After publication and comment, the Committee made one change to the text of the proposal and two changes to the Committee Note.

During the comment period, concerns were raised that the deletion of current Rule 28(a)(6)'s reference to "the nature of the case, the course of proceedings, and the disposition below" might lead readers to conclude that those items may no longer be included in the statement of the case. The Committee rejected that concern with respect to the "nature of the case" and the "disposition below," because the Rule as published would naturally be read to permit continued inclusion of those items in the statement of the case. The Committee adhered to its view that the deletion of "course of proceedings" is useful because that phrase tends to elicit unnecessary detail; but to address the commenters' concerns, the Committee added, to the revised Rule text, the phrase "describing the relevant procedural history."

The Committee augmented the Note to Rule 28(a) in two respects. It added a reference to Supreme Court Rule 24.1(g), upon which the proposed revision to Rule 28(a)(6) is modeled. And it added – as a second paragraph in the Note – a discussion of the contents of the statement of the case.

* * * * *

Rule 28.1. Cross-Appeals

1 * * * * *

2 **(c) Briefs.** In a case involving a cross-appeal:

(1) **Appellant's Principal Brief.** The appellant must file a principal brief in the appeal. That brief must comply with Rule 28(a).

(2) **Appellee's Principal and Response Brief.** The appellee must file a principal brief in the cross-appeal and must, in the same brief, respond to the principal brief in the appeal. That appellee's brief must comply with Rule 28(a), except that the brief need not include a statement of the case ~~or a statement of the facts~~ unless the appellee is dissatisfied with the appellant's statement.

(3) **Appellant's Response and Reply Brief.** The appellant must file a brief that responds to the principal brief in the cross-appeal and may, in the same brief, reply to the response in the appeal. That brief must comply with Rule 28(a)(2)-~~(9)~~ (8) and ~~(11)~~ (10), except that none of the following need appear unless the appellant is dissatisfied with the appellee's statement in the cross-appeal:

(A) the jurisdictional statement;

(B) the statement of the issues;

(C) the statement of the case;

~~(D) the statement of the facts;~~ and

26 ~~(E)~~ (D) the statement of the standard of

27 review.

28 (4) **Appellee's Reply Brief.** The appellee may

29 file a brief in reply to the response in the cross-appeal.

30 That brief must comply with Rule 28(a)(2)-(3) and ~~(11)~~

31 (10) and must be limited to the issues presented by the

32 cross-appeal.

33 * * * * *

Committee Note

Subdivision (c). Subdivision (c) is amended to accord with the amendments to Rule 28(a). Rule 28(a) is amended to consolidate subdivisions (a)(6) and (a)(7) into a new subdivision (a)(6) that provides for one "statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review. . . ." Rule 28.1(c) is amended to refer to that consolidated "statement of the case," and references to subdivisions of Rule 28(a) are revised to reflect the re-numbering of those subdivisions.

CHANGES MADE AFTER PUBLICATION AND COMMENT

No changes were made to the text of the proposed amendment to Rule 28.1 after publication and comment. The Committee revised a quotation in the Committee Note to Rule 28.1(c) to conform to the changes (described above) to the text of proposed Rule 28(a)(6).

* * * * *

Form 4. Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis

1 * * * * *

2 1. *For both you and your spouse estimate the average amount of money received from each of*
3 *the following sources during the past 12 months. Adjust any amount that was received*
4 *weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross*
5 *amounts, that is, amounts before any deductions for taxes or otherwise.*

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$_____	$_____	$_____	$_____
Self-employment	$_____	$_____	$_____	$_____
Income from real property (such as rental income)	$_____	$_____	$_____	$_____
Interest and dividends	$_____	$_____	$_____	$_____
Gifts	$_____	$_____	$_____	$_____
Alimony	$_____	$_____	$_____	$_____
Child support	$_____	$_____	$_____	$_____
Retirement (such as social security, pensions, annuities, insurance)	$_____	$_____	$_____	$_____
Disability (such as social security, insurance payments)	$_____	$_____	$_____	$_____
Unemployment payments	$_____	$_____	$_____	$_____
Public-assistance (such as welfare)	$_____	$_____	$_____	$_____
Other (specify): _____	$_____	$_____	$_____	$_____
Total monthly income:	$_____	$_____	$_____	$_____

2. *List your employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

Employer	Address	Dates of employment	Gross monthly pay
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

3. *List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

Employer	Address	Dates of employment	Gross monthly pay
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

4. *How much cash do you and your spouse have? $_____*
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
_____	_____	$_____	$_____
_____	_____	$_____	$_____

_____ _____ $_____ $_____

If you are a prisoner seeking to appeal a judgment in a civil action or proceeding, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

* * * * *

~~*10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form?* ☐ Yes ☐ No~~

~~If yes, how much? $_____~~
~~If yes, state the attorney's name, address, and telephone number:~~
_____
_____
_____

~~*11. Have you paid – or will you be paying – anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?*~~

~~☐ Yes ☐ No~~
~~If yes, how much? $_____~~
~~If yes, state the person's name, address, and telephone number:~~
_____
_____
_____

10. *Have you spent – or will you be spending – any money for expenses or attorney fees in connection with this lawsuit?*

☐ Yes ☐ No
If yes, how much? $_____

~~12.~~ 11. *Provide any other information that will help explain why you cannot pay the docket fees for your appeal.*

~~13.~~ 12. *State the city and state of your legal residence.*

_____
Your daytime phone number: (____) _____
Your age: _____ Your years of schooling: _____
Last four digits of your social-security number: _____

CHANGES MADE AFTER PUBLICATION AND COMMENT

No changes were made to the proposed amendments to Form 4 after publication and comment.

* * * * *

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

Agenda E-19 (Appendix B)
Rules
September 2012

MARK R. KRAVITZ
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

TO: Honorable Mark R. Kravitz, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Eugene R. Wedoff, Chair
Advisory Committee on Bankruptcy Rules

DATE: May 14, 2012

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on March 29 and 30, 2012, in Phoenix, Arizona.

* * * * *

II. Action Items

A. Items for Final Approval

1. Amendments Published for Comment in August 2011. **The Advisory Committee recommends that the proposed rule and form amendments that are summarized below be approved and forwarded to the Judicial Conference. It recommends that the amended form take effect on December 1, 2012.** The texts of the amended rules and form are set out in Appendix A.

Action Item 1. Rules 1007(b)(7) and 5009(b) involve the obligation of individual debtors in chapters 7, 11, and 13 to complete a personal financial management course as a condition of receiving a discharge in bankruptcy. Rule 1007(b)(7) currently requires the debtor to file a "statement of completion of a course concerning personal financial management, prepared as prescribed by the appropriate Official Form." That form is Official Form 23, which requires the debtor to certify completion of an instructional course in personal financial management. Accordingly, Rule 5009(b) now requires the clerk to send notice to an individual debtor who has not filed Official Form 23 within 45 days after the first date set for the meeting of creditors. Debtors who do not file the necessary statement of completion from their course provider are not given a discharge before their cases are closed. Many of these cases are reopened later, necessitating the payment of an additional fee.

The Advisory Committee sought publication of amendments that would streamline the process of filing statements of the completion of financial management courses. The amendments remove the obligation of the debtor to file Official Form 23 if the financial management course provider has notified the court of the debtor's successful completion of the course. Rule 1007(b)(7) would be amended to authorize providers to file course completion statements directly with the court. Rule 5009(b) would be amended to direct the clerk to send notice to the debtor only if the debtor is required to file the statement and the provider has not already done so. At its June 2011 meeting, the Standing Committee approved the request for publication.

Upon publication, the Advisory Committee received five comments. Three comments expressed support for the amendments. They were submitted by Michael Shklar, Phillip Dy, and Ganna Gudkova. Two comments opposed the amendments. Jeanne E. Hovenden, an attorney in Virginia, urged that the debtor's attorney should be required to file the statement of completion. She expressed concern that allowing a financial course management provider to file the statement directly with the court may lead to a discharge even when it is not in the debtor's best interest. Because the provider is not familiar with all the circumstances of a case, the provider will not know if a particular debtor would be better served by not receiving a discharge. Raymond P. Bell, Jr., of Pennsylvania submitted a comment agreeing with Ms. Hovenden and emphasizing that the debtor's attorney or the debtor should bear responsibility for filing the statement of completion.

The Advisory Committee did not view the concern raised by the negative comments as a substantial one. As Ms. Hovenden's comment recognized, only in rare cases would a debtor want to avoid a discharge. When those cases do arise, the debtor may decline to receive a discharge in other ways. The debtor has the option of waiving the discharge under § 727(a)(10) of the Code or failing to complete plan payments under chapter 11 or 13, which would result in denial of a discharge despite the filing of a notification of course completion by the provider.

Accordingly, the Advisory Committee voted unanimously to recommend approval of the amended rules as published.

Action Item 2. Rules 9006, 9013, and 9014 would be amended to highlight the default deadlines for the service of motions and written responses. Rule 9006, based on Civil Rule 6, contains a subsection regarding the time for service of motions. Rule 9006(d) regulates timing for any motions not addressed elsewhere in the Bankruptcy Rules or by order of the court. Unlike the civil rule, however, Rule 9006 does not indicate in its title that it addresses time periods for motions. Nor is it followed by a rule that addresses the form of motions, as is the case with the civil rule.

The Advisory Committee proposed several amendments to highlight the existence of Rule 9006(d). The title of Rule 9006 would be amended to add a reference to the "time for motion papers." This change, which is consistent with Civil Rule 6, should make it easier to find the provision governing motion practice. Coverage of subdivision (d) would be expanded to address the timing of the service of any written response to a motion (rather than only opposing affidavits as the rule current states). This change would make the provision as inclusive as possible in order to capture differences in local motion practice. Rule 9013, which addresses the form and service of motions, would be amended to provide a cross-reference to the time periods in Rule 9006(d). This amendment is also intended to call greater attention to the default deadlines for motion practice. In addition, stylistic changes would be made to Rule 9013 to add greater clarity. Rule 9014, which addresses contested matters in bankruptcy, would similarly be amended to provide a cross-reference to the times under Rule 9006(d) for serving motions and responses.

No comment was received on these amendments. The Advisory Committee voted unanimously to recommend approval of the proposed amendments to Rules 9006, 9013, and 9014 as published.

Action Item 3. Official Form 7 is the debtor's Statement of Financial Affairs. The form requires debtors to disclose certain payments made to or for the benefit of insiders. The current version of the form contains a definition of "insider" that differs from the Bankruptcy Code's definition of the term. As used in the form, the term includes "any owner of 5 percent or more of the voting or equity securities of a corporate debtor and their relatives." The Code definition of "insider" lists other qualifying relationships, including a "person in control" of a corporate debtor, but makes no reference to a five-percent shareholder. 11 U.S.C. § 101(31). Although the

Code gives a nonexclusive definition of an insider, the Advisory Committee found no basis for concluding that § 101(31) provides authority for the current definition used in the form. The Code does not contain a bright-line test that invariably makes a five-percent shareholder an insider. That language was added to the form in 2000, but no explanation for the addition appears in the Committee Note, the Advisory Committee's report to the Standing Committee, or the Advisory Committee minutes.

As amended, the definition of insider in Form 7 would adhere more closely to the Code. The language regarding a five-percent shareholder of a corporate debtor would be deleted. In its place, the definition would include "any persons in control of a corporate debtor." The statutory reference following the definition would also be updated to give a pinpoint citation to the definition of insider in the Code.

Upon publication, no comment was received on this amendment. The Advisory Committee voted unanimously to recommend approval of the proposed amendment to Official Form 7 as published.

2. Amendments for Which Final Approval Is Sought Without Publication. **The Advisory Committee recommends that the proposed amendments that are summarized below be approved and forwarded to the Judicial Conference. It recommends that the amended forms become effective on December 1, 2012.** Because the proposed amendments are technical or conforming in nature, the Committee concluded that publication for comment is not required. The texts of the amended rules and forms are set out in Appendix A.

Action Item 4. Rule 4004(c)(1) would be amended to conform to the simultaneous amendment of Rule 1007(b)(7) and to state in more precise language other provisions of the subdivision.

As discussed above, the Advisory Committee is recommending that the Standing Committee forward to the Judicial Conference an amendment to Rule 1007(b)(7) that would allow providers of courses on personal financial management to notify a bankruptcy court directly that a debtor had completed the course. Notification by the provider would relieve the debtor of the obligation to file a certificate of completion. Consistent with that change, Rule 4004(c)(1)(H) would be amended to provide that the court must delay entering a discharge for a debtor who has not filed a certificate of completion only if the debtor was in fact required to do so under Rule 1007(b)(7).

The other two changes to Rule 4004(c)(1) are clarifications. One makes clear that the circumstances listed in the paragraph prevent the court from entering a discharge. The other states specifically that the prohibition on entering a discharge under subdivision (c)(1)(K) ceases when a presumption of undue hardship expires or the court concludes a hearing on the presumption.

Because the latter amendments would simply state more precisely the existing meaning of the provision and because the first one is conforming, the Committee voted unanimously to recommend that they be approved without publication.

Action Item 5. Official Forms 9A-9I and 21 would be amended to reduce the risk that a debtor's Social Security number will be inadvertently disclosed publicly in a bankruptcy case. The Advisory Committee would add prominent warnings about proper submission of the forms, which may contain a debtor's Social Security information.

Official Form 9 is directed at creditors. A particular version of the form (denoted Form 9A through Form 9I) applies depending on the nature of the bankruptcy case, but all serve the same function. The form gives notice to potential creditors of the debtor's bankruptcy case and provides important information, such as the date of the meeting of creditors and the deadline to object to an individual debtor's discharge. The form includes identifying information to allow a recipient to determine whether it is a creditor of the debtor. For individual debtors, that identifying information includes the debtor's Social Security information. A redacted version of Form 9 is included in the court files. Official Form 21 is directed at the debtor. The form requires debtors to disclose, under penalty of perjury, their Social Security numbers. Neither the unredacted version of Form 9 sent to creditors nor Form 21 is intended to be placed on the public docket of a bankruptcy case.

The Judicial Conference's Committee on Court Administration and Case Management raised the concern that bankruptcy forms may be mistakenly filed in ways that publicly reveal debtors' private identifying information. To respond to that concern, the Advisory Committee would amend Form 9 to make clear that a creditor should not attach a copy of the form when filing a proof of claim. Stylistic changes have also been made to the form. Similarly, the Advisory Committee would add to Form 21 a prominent warning about proper submission of the form, so as to avoid its inadvertent inclusion on the court's public docket.

Because the changes to the forms do not alter their function or purpose, the Advisory Committee voted unanimously to recommend that the amended forms be approved without publication.

Action Item 6. Official Form 10 would be amended (1) to eliminate a reference to filing a power of attorney with a proof of claim, thereby conforming to Rule 9010(c), and (2) to include statements about the attachment of required documentation for certain types of claims.

Rule 9010(c) generally requires an agent to give evidence of its authority to act on behalf of a creditor in a bankruptcy case by providing a power of attorney. This requirement, however, does not apply when an agent files a proof of claim. The Committee therefore voted unanimously to remove from the signature box of Form 10 the instruction that an authorized agent "attach copy of power of attorney, if any."

The Committee voted unanimously at its spring 2011 meeting to include in line 7 of Form 10 statements that certain required documentation is attached. For claims secured by the debtor's principal residence, the form would state that the Mortgage Proof of Claim Attachment—required as of December 1, 2011—is being filed with the claim. For claims based on an open-end or revolving consumer credit agreement, the form would state that the information required by Rule 3001(c)(3)(A)—scheduled to take effect on December 1, 2012—is attached.

* * * * *

III. Items Published in August 2011 for which Final Approval Is Not Being Sought

A. Rule 3007(a). An amendment of this rule, which addresses the time and manner of serving objections to claims, was published for public comment last August. The Advisory Committee proposed the amendment in response to two suggestions submitted on behalf of the Administrative Office's Bankruptcy Judges Advisory Group. The first suggestion proposed that Rule 3007(a) be amended to permit the use of a negative notice procedure for objections to claims. The second suggestion sought clarification of the proper method of serving objections to claims.

To accomplish these goals, the preliminary draft of amended Rule 3007(a) would have no longer required notice of a claim objection to be provided at least 30 days before "the hearing" on the objection. Instead, it would have required notice of the objection to be provided at least 30 days before "any scheduled hearing on the objection or any deadline for the claimant to request a hearing." It also would have specified how and on whom an objecting party must serve the objection and notice of objection.

Two comments were submitted in response to the publication of the proposed amendment. Bankruptcy Judge Eric Frank (E.D. Pa.) questioned whether a negative notice procedure is generally appropriate for an objection to a claim, since Rule 3001(f) provides that a properly executed and filed proof of claim is entitled to be treated as prima facie evidence of the validity and amount of the claim. Given this evidentiary effect of a proof of claim, Judge Frank suggested that in many situations a claim should not be disallowed by default and without a hearing. Raymond P. Bell, Jr., submitted a comment agreeing with Judge Frank.

At its spring meeting, the Advisory Committee concluded that the proposed amendment to Rule 3007(a) should be withdrawn for the time being so that it can be considered along with rule amendments that are being studied in connection with the drafting of a national chapter 13 form plan. Under consideration are possible rule amendments that would permit the allowed amount of certain types of claims to be determined in a chapter 13 plan, as well as by motion or claim objection. The Committee decided that the method of service on a claimant should be the

same regardless of the method used for seeking the determination of a claim amount. Rather than proceed with the published amendment of Rule 3007(a), which generally allows service by mail on the person designated on the proof of claim, the Committee voted to postpone further action on the amendment of Rule 3007(a) until a unified approach to the service of claim objections and claim modifications in plans can be proposed. The Committee will also give further consideration to the appropriateness of a negative notice procedure for claim objections.

B. Official Form 6C. The proposed amendment to Form 6C—the debtor's schedule of property claimed as exempt—was intended to reflect the Supreme Court's decision in *Schwab v. Reilly*, 130 S. Ct. 2652 (2010), by providing an option for the debtor to state the value of the claimed exemption as the "full fair market value of the exempted property." The *Schwab* opinion explained that if the debtor used the quoted language to claim an exemption and "the trustee fails to object, or . . . the trustee objects and the objection is overruled, the debtor will be entitled to exclude the full value of the asset." 130 S. Ct. at 2668.

The proposed amendment of Schedule C prompted seven written comments and testimony during a telephonic hearing.

Opponents—including representatives of the chapter 7 and chapter 13 trustee associations—asserted that the proposed amendment would encourage debtors to claim the full market value when invoking exemptions that are capped at a dollar amount. This, they said, would lead to a "plethora of objections" and increased gamesmanship in claiming exemptions. The trustees stated that they would be forced to spend additional time analyzing exemption claims and litigating claims to exempt the full market value.

Supporters of amendment—including the National Association of Consumer Bankruptcy Attorneys—disputed the trustees' prediction of a "plethora of objections" and contended that the amendment is consistent with the *Schwab* decision. The supporters asserted that debtors need to know promptly whether property claimed exempt is exempt and thus is available for the debtor's use, sale, or other disposition.

The Advisory Committee considered the comments and testimony, debated the merits of the proposed amendment, and explored the alternative of rules amendments to require trustees to make prompt decisions on abandonment of property. The Committee concluded, however, that potential rule amendments would be inconsistent with either § 554 of the Bankruptcy Code or the *Schwab* decision.

After a further discussion, the Advisory Committee voted, with two dissents, to withdraw the Form 6C amendment and refer the revision of Schedule C to the Forms Modernization Project. The Committee's decision was based on two factors. First, debtors are incorporating into existing Schedule C the language suggested by the Supreme Court in *Schwab*. The need to amend the form in response to that decision therefore appears to be less compelling than the Committee initially thought. Second, courts are divided on whether it is always improper for a

debtor to claim an exemption of full fair market value when the exemption in question is capped at a specific dollar amount. The Committee decided that any amendment of Schedule C should await further development of the case law. The recommendation to withdraw the published amendment is therefore intended to maintain the status quo and does not signal the Committee's rejection of the permissibility of claiming as exempt the full fair market value of property.

C. Official Forms 22A and 22C. The proposed amendments to both Forms 22A and 22C reflected changes in the IRS collection financial standards regarding telecommunication expenses, and an additional amendment to Form 22C responded to the Supreme Court's decision in *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010).

Two comments were submitted regarding the proposed *Hamilton v. Lanning* amendment. The first, from California attorney Peter M. Lively, objected to the amendment on the ground that its one-year period for reporting expected changes in income or expenses conflicts with a Ninth Circuit decision. The other comment was from attorney Henry J. Sommer, writing on behalf of the National Association of Consumer Bankruptcy Attorneys. He stated that the proposed amendment is unnecessary and confusing, since changes in income and expenses in the year after filing are already required to be reported on Schedules I and J and can be addressed by motions to modify a confirmed Chapter 13 plan.

The Committee concluded that neither comment provided grounds for reconsidering the proposed amendment of Form 22C. The Committee found that the proposed amendment, by requiring debtors to provide information about changes in income and expenses, does not prevent the debtor from arguing that there is no applicable commitment period if the debtor has no projected disposable income. In this respect, the proposed revised form continues to apply the rule that the applicable commitment period is determined by the debtor's current monthly income, pursuant to 11 U.S.C. § 1325(b)(4), rather than by the debtor's projected disposable income, determined under 11 U.S.C. § 1325(b)(2).

The Committee was also unpersuaded by Mr. Sommer's comments. Schedules I and J report different income and expenses than those called for in calculating projected disposable income under Form 22C. And modification of a confirmed plan is not an appropriate method for dealing with changes of the kind involved in *Lanning*. Proper treatment of projected disposable income is a requirement for plan confirmation in the first instance.

Despite its continued support for the published amendments to Forms 22A and 22C, the Committee is not seeking final approval of them at this meeting. In order to avoid having the previously published amendments take effect in 2012 and then reformatted versions of the forms designed by the Forms Modernization Project take effect in 2013, the Advisory Committee incorporated all of the proposed amendments to the two forms into the "modernized" forms that the Committee is seeking to have published this summer.

* * * * *

Appendix A.1

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

For Final Approval and Transmittal to the Judicial Conference

Rule 1007. Lists, Schedules, Statements, and Other Documents; Time Limits**

* * * * *

1 (b) SCHEDULES, STATEMENTS, AND OTHER
2 DOCUMENTS REQUIRED.
3 * * * * *
4 (7) Unless an approved provider of an
5 instructional course concerning personal financial
6 management has notified the court that a debtor has
7 completed the course after filing the petition:
8 (A) An individual debtor in a chapter
9 7 or chapter 13 case shall file a statement of completion of the
10 ~~a~~ course ~~concerning personal financial management~~, prepared
11 as prescribed by the appropriate Official Form~~.~~; and

---

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

** In addition to the amendment of Rules 1007(b) and 5009(b), Official Form 23 would be amended to clarify that the debtor should not file the form if the provider of a personal financial management course has already notified the court of the debtor's completion of the course.

12 (B) An individual debtor in a chapter

13 11 case shall file the statement ~~in a chapter 11 case in which~~

14 if § 1141(d)(3) applies.

15 * * * * *

Committee Note

Subdivision (b)(7) is amended to relieve an individual debtor of the obligation to file a statement of completion of a personal financial management course if the course provider notifies the court that the debtor has completed the course. Course providers approved under § 111 of the Code may be permitted to file this notification electronically with the court immediately upon the debtor's completion of the course. If the provider does not notify the court, the debtor must file the statement, prepared as prescribed by the appropriate Official Form, within the time period specified by subdivision (c).

CHANGES MADE AFTER PUBLICATION

No changes were made after publication.

* * * * *

Rule 4004. Grant or Denial of Discharge

1 * * * * *

2 (c) GRANT OF DISCHARGE.

3 (1) In a chapter 7 case, on expiration of the

4 times fixed for objecting to discharge and for filing a

5 motion to dismiss the case under Rule 1017(e), the

6 court shall forthwith grant the discharge ~~unless~~,

7 except that the court shall not grant the discharge if:

8 (A) the debtor is not an individual;

9 (B) a complaint, or a motion under
10 § 727(a)(8) or (a)(9), objecting to the
11 discharge has been filed and not decided in
12 the debtor's favor;

13 (C) the debtor has filed a waiver under
14 § 727(a)(10);

15 (D) a motion to dismiss the case under
16 § 707 is pending;

17 (E) a motion to extend the time for
18 filing a complaint objecting to the discharge is
19 pending;

20 (F) a motion to extend the time for
21 filing a motion to dismiss the case under Rule
22 1017(e)(1) is pending;

23 (G) the debtor has not paid in full the
24 filing fee prescribed by 28 U.S.C. § 1930(a)
25 and any other fee prescribed by the Judicial
26 Conference of the United States under 28
27 U.S.C. § 1930(b) that is payable to the clerk
28 upon the commencement of a case under the
29 Code, unless the court has waived the fees
30 under 28 U.S.C. § 1930(f);

31 (H) the debtor has not filed with the
32 court a statement of completion of a course
33 concerning personal financial management ~~as~~
34 if required by Rule 1007(b)(7);
35 (I) a motion to delay or postpone
36 discharge under § 727(a)(12) is pending;
37 (J) a motion to enlarge the time to file
38 a reaffirmation agreement under Rule 4008(a)
39 is pending;
40 (K) a presumption ~~has arisen~~ is in
41 effect under § 524(m) that a reaffirmation
42 agreement is an undue hardship and the court
43 has not concluded a hearing on the
44 presumption; or
45 (L) a motion is pending to delay
46 discharge~~,~~ because the debtor has not filed
47 with the court all tax documents required to be
48 filed under § 521(f).
49 * * * * *

Committee Note

Subdivision (c)(1) is amended in several respects. The introductory language of paragraph (1) is revised to emphasize that the listed circumstances do not just relieve the court of the obligation

to enter the discharge promptly but that they prevent the court from entering a discharge.

Subdivision (c)(1)(H) is amended to reflect the simultaneous amendment of Rule 1007(b)(7). The amendment of the latter rule relieves a debtor of the obligation to file a statement of completion of a course concerning personal financial management if the course provider notifies the court directly that the debtor has completed the course. Subparagraph (H) now requires postponement of the discharge when a debtor fails to file a statement of course completion only if the debtor has an obligation to file the statement.

Subdivision (c)(1)(K) is amended to make clear that the prohibition on entering a discharge due to a presumption of undue hardship under § 524(m) of the Code ceases when the presumption expires or the court concludes a hearing on the presumption.

Because this amendment is being made to conform to a simultaneous amendment of Rule 1007(b)(7) and is otherwise technical in nature, final approval is sought without publication.

Rule 5009. Closing Chapter 7 Liquidation, Chapter 12 Family Farmer's Debt Adjustment, Chapter 13 Individual's Debt Adjustment, and Chapter 15 Ancillary and Cross-Border Cases

* * * * *

1 (b) NOTICE OF FAILURE TO FILE RULE
2 1007(b)(7) STATEMENT. If an individual debtor in a
3 chapter 7 or 13 case is required to ~~has not~~ file~~d the~~ a statement
4 under ~~required by~~ Rule 1007(b)(7) and fails to do so within 45
5 days after the first date set for the meeting of creditors under
6 § 341(a) of the Code, the clerk shall promptly notify the
7 debtor that the case will be closed without entry of a

8 discharge unless the required statement is filed within the

9 applicable time limit under Rule 1007(c).

* * * * *

Committee Note

Subdivision (b) is amended to conform to the amendment of Rule 1007(b)(7). Rule 1007(b)(7) relieves an individual debtor of the obligation to file a statement of completion of a personal financial management course if the course provider notifies the court that the debtor has completed the course. The clerk's duty under subdivision (b) to notify the debtor of the possible closure of the case without discharge if the statement is not timely filed therefore applies only if the course provider has not already notified the court of the debtor's completion of the course.

CHANGES MADE AFTER PUBLICATION

No changes were made after publication.

* * * * *

Rule 9006. Computing and Extending Time; Time for Motion Papers

* * * * *

1 (d) ~~FOR~~ MOTION~~S~~ PAPERS~~ AFFIDAVITS~~. A

2 written motion, other than one which may be heard ex parte,

3 and notice of any hearing shall be served not later than seven

4 days before the time specified for such hearing, unless a

5 different period is fixed by these rules or by order of the court.

6 Such an order may for cause shown be made on ex parte

7 application. When a motion is supported by affidavit, the

8 affidavit shall be served with the motion. ~~and, e~~Except as

9 otherwise provided in Rule 9023, ~~opposing affidavits~~ any

10 written response shall ~~may~~ be served not later than one day

11 before the hearing, unless the court permits otherwise~~them to~~

12 ~~be served at some other time~~.

* * * * *

Committee Note

The title of this rule is amended to draw attention to the fact that it prescribes time limits for the service of motion papers. These time periods apply unless another Bankruptcy Rule or a court order, including a local rule, prescribes different time periods. Rules 9013 and 9014 should also be consulted regarding motion practice. Rule 9013 governs the form of motions and the parties who must be served. Rule 9014 prescribes the procedures applicable to contested matters, including the method of serving motions commencing contested matters and subsequent papers. Subdivision (d) is amended to apply to any written response to a motion, rather than just to opposing affidavits. The caption of the subdivision is amended to reflect this change. Other changes are stylistic.

CHANGES MADE AFTER PUBLICATION

No changes were made after publication.

* * * * *

Rule 9013. Motions: Form and Service

1 A request for an order, except when an application is

2 authorized by the rules, shall be by written motion, unless

12b-006422

3 made during a hearing. The motion shall state with
4 particularity the grounds therefor, and shall set forth the relief
5 or order sought. Every written motion, other than one which
6 may be considered ex parte, shall be served by the moving
7 party within the time determined under Rule 9006(d). The
8 moving party shall serve the motion on:

9 (a) the trustee or debtor in possession and on those
10 entities specified by these rules; or

11 (b) the entities the court directs if these rules do not
12 require service or specify the entities to be served ~~if service is~~
13 ~~not required or the entities to be served are not specified by~~
14 ~~these rules, the moving party shall serve the entities the court~~
15 ~~directs~~.

Committee Note

A cross-reference to Rule 9006(d) is added to this rule to call attention to the time limits for the service of motions, supporting affidavits, and written responses to motions. Rule 9006(d) prescribes time limits that apply unless other limits are fixed by these rules, a court order, or a local rule. The other changes are stylistic.

CHANGES MADE AFTER PUBLICATION

No changes were made after publication.

* * * * *

Rule 9014. Contested Matters

* * * * *

1 (b) SERVICE. The motion shall be served in the
2 manner provided for service of a summons and complaint by
3 Rule 7004 <u>and within the time determined under Rule</u>
4 <u>9006(d). Any written response to the motion shall be served</u>
5 <u>within the time determined under Rule 9006(d).</u> Any paper
6 served after the motion shall be served in the manner
7 provided by Rule 5(b) F.R. Civ. P.

* * * * *

Committee Note

A cross-reference to Rule 9006(d) is added to subdivision (b) to call attention to the time limits for the service of motions, supporting affidavits, and written responses to motions. Rule 9006(d) prescribes time limits that apply unless other limits are fixed by these rules, a court order, or a local rule.

CHANGES MADE AFTER PUBLICATION

No changes were made after publication.

* * * * *

UNITED STATES BANKRUPTCY COURT

_____ DISTRICT OF _____

In re:_____ _____, Case No. _____
Debtor (if known)

STATEMENT OF FINANCIAL AFFAIRS

This statement is to be completed by every debtor. Spouses filing a joint petition may file a single statement on which the information for both spouses is combined. If the case is filed under chapter 12 or chapter 13, a married debtor must furnish information for both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed. An individual debtor engaged in business as a sole proprietor, partner, family farmer, or self-employed professional, should provide the information requested on this statement concerning all such activities as well as the individual's personal affairs. To indicate payments, transfers and the like to minor children, state the child's initials and the name and address of the child's parent or guardian, such as "A.B., a minor child, by John Doe, guardian." Do not disclose the child's name. See, 11 U.S.C. §112 and Fed. R. Bankr. P. 1007(m).

Questions 1 - 18 are to be completed by all debtors. Debtors that are or have been in business, as defined below, also must complete Questions 19 - 25. **If the answer to an applicable question is "None," mark the box labeled "None."** If additional space is needed for the answer to any question, use and attach a separate sheet properly identified with the case name, case number (if known), and the number of the question.

DEFINITIONS

"In business." A debtor is "in business" for the purpose of this form if the debtor is a corporation or partnership. An individual debtor is "in business" for the purpose of this form if the debtor is or has been, within six years immediately preceding the filing of this bankruptcy case, any of the following: an officer, director, managing executive, or owner of 5 percent or more of the voting or equity securities of a corporation; a partner, other than a limited partner, of a partnership; a sole proprietor or self-employed full-time or part-time. An individual debtor also may be "in business" for the purpose of this form if the debtor engages in a trade, business, or other activity, other than as an employee, to supplement income from the debtor's primary employment.

"Insider." The term "insider" includes but is not limited to: relatives of the debtor; general partners of the debtor and their relatives; corporations of which the debtor is an officer, director, or person in control; officers, directors, and any ~~owner of 5 percent or more of the voting or equity securities~~ persons in control of a corporate debtor and their relatives; affiliates of the debtor and insiders of such affiliates; and any managing agent of the debtor. 11 U.S.C. § 101(2), (31).

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1. Income from employment or operation of business

None ☐ State the gross amount of income the debtor has received from employment, trade, or profession, or from operation of the debtor's business, including part-time activities either as an employee or in independent trade or business, from the beginning of this calendar year to the date this case was commenced. State also the gross amounts received during the **two years** immediately preceding this calendar year. (A debtor that maintains, or has maintained, financial records on the basis of a fiscal rather than a calendar year may report fiscal year income. Identify the beginning and ending dates of the debtor's fiscal year.) If a joint petition is filed, state income for each spouse separately. (Married debtors filing under chapter 12 or chapter 13 must state income of both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

AMOUNT SOURCE

* * * * *

COMMITTEE NOTE

The definition of "insider" is amended to conform to the statutory definition of the term. See 11 U.S.C. § 101(31). Under the Code definition, ownership of 5% or more of the voting shares of a corporate debtor does not automatically make the owner an insider of the corporation. And in order to be an affiliate of the debtor and an insider on that basis, ownership or control of at least 20% of the outstanding voting securities of the debtor is required. 11 U.S.C. § 101(2). The phrase "any owner of 5% or more of the voting or equity securities" is therefore deleted. Because § 101(31) provides that a person in control of a debtor corporation is an insider, that term is substituted for the deleted phrase.

Changes Made After Publication

No changes were made after publication.

* * * * *

UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 7 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____(date) and was converted to a case under chapter 7 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

Creditors -- Do not file this notice in connection with any proof of claim you submit to the court.
See Reverse Side for Important Explanations.

Debtor(s) (name(s) and address):	Case Number:
	Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include married, maiden, and trade names):	Bankruptcy Trustee (name and address):
Attorney for Debtor(s) (name and address): Telephone number:	Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Presumption of Abuse under 11 U.S.C. § 707(b)
See "Presumption of Abuse" on the reverse side.

Depending on the documents filed with the petition, one of the following statements will appear.

The presumption of abuse does not arise.
Or
The presumption of abuse arises.
Or
Insufficient information has been filed to date to permit the clerk to make any determination concerning the presumption of abuse. If more complete information, when filed, shows that the presumption has arisen, creditors will be notified.

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to Object to Debtor's Discharge or to Challenge Dischargeability of Certain Debts:

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Please Do Not File a Proof of Claim Unless You Receive a Notice To Do So.

Creditor with a Foreign Address:

A creditor to whom this notice is sent at a foreign address should read the information under "Do Not File a Proof of Claim at This Time" on the reverse side.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

12b-006427

Filing of Chapter 7 Bankruptcy Case	A bankruptcy case under Chapter 7 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Presumption of Abuse	If the presumption of abuse arises, creditors may have the right to file a motion to dismiss the case under § 707(b) of the Bankruptcy Code. The debtor may rebut the presumption by showing special circumstances.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court.
Do Not File a Proof of Claim at This Time	There does not appear to be any property available to the trustee to pay creditors. *You therefore should not file a proof of claim at this time.* If it later appears that assets are available to pay creditors, you will be sent another notice telling you that you may file a proof of claim, and telling you the deadline for filing your proof of claim. If this notice is mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline. *Do not include this notice with any filing you make with the court.*
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that the debtor is not entitled to receive a discharge under Bankruptcy Code § 727(a) *or* that a debt owed to you is not dischargeable under Bankruptcy Code § 523(a)(2), (4), or (6), you must file a complaint -- or a motion if you assert the discharge should be denied under § 727(a)(8) or (a)(9) -- in the bankruptcy clerk's office by the "Deadline to Object to Debtor's Discharge or to Challenge the Dischargeability of Certain Debts" listed on the front of this form. The bankruptcy clerk's office must receive the complaint or motion and any required filing fee by that deadline.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors. The debtor must file a list of all property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objections by the "Deadline to Object to Exemptions" listed on the front side.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 7 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____(date) and was converted to a case under chapter 7 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

Creditors -- Do not file this notice in connection with any proof of claim you submit to the court.
See Reverse Side for Important Explanations.

Debtor(s) (name(s) and address):	Case Number:
	Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the debtor(s) in the last 8 years (include trade names):	Bankruptcy Trustee (name and address):
Attorney for Debtor(s) (name and address): Telephone number:	Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Please Do Not File a Proof of Claim Unless You Receive a Notice To Do So.

Creditor with a Foreign Address:

A creditor to whom this notice is sent at a foreign address should read the information under "Do Not File a Proof of Claim at This Time" on the reverse side.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

12b-006429

Filing of Chapter 7 Bankruptcy Case	A bankruptcy case under Chapter 7 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; and starting or continuing lawsuits or foreclosures. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor's representative must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court.
Do Not File a Proof of Claim at This Time	There does not appear to be any property available to the trustee to pay creditors. *You therefore should not file a proof of claim at this time.* If it later appears that assets are available to pay creditors, you will be sent another notice telling you that you may file a proof of claim, and telling you the deadline for filing your proof of claim. If this notice is mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline. *Do not include this notice with any filing you make with the court.*
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 7 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____(date) and was converted to a case under chapter 7 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

Creditors -- Do not file this notice in connection with any proof of claim you submit to the court.
See Reverse Side for Important Explanations.

Debtor(s) (name(s) and address):	Case Number:
	Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include married, maiden, and trade names):	Bankruptcy Trustee (name and address):
Attorney for Debtor(s) (name and address): Telephone number:	Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Presumption of Abuse under 11 U.S.C. § 707(b)
See "Presumption of Abuse" on the reverse side.

Depending on the documents filed with the petition, one of the following statements will appear.

The presumption of abuse does not arise.

Or

The presumption of abuse arises.

Or

Insufficient information has been filed to date to permit the clerk to make any determination concerning the presumption of abuse. If more complete information, when filed, shows that the presumption has arisen, creditors will be notified.

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors (except a governmental unit): For a governmental unit:

Creditor with a Foreign Address:

A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to Object to Debtor's Discharge or to Challenge Dischargeability of Certain Debts:

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

12b-006431

Filing of Chapter 7 Bankruptcy Case	A bankruptcy case under Chapter 7 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim from other assets in the bankruptcy case. To be paid, you must file a Proof of Claim even if your claim is listed in the schedules filed by the debtor. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Creditor with a Foreign Address:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline. *Do not include this notice with any filing you make with the court.*
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that the debtor is not entitled to receive a discharge under Bankruptcy Code § 727(a) *or* that a debt owed to you is not dischargeable under Bankruptcy Code § 523(a)(2), (4), or (6), you must file a complaint -- or a motion if you assert the discharge should be denied under § 727(a)(8) or (a)(9) -- in the bankruptcy clerk's office by the "Deadline to Object to Debtor's Discharge or to Challenge the Dischargeability of Certain Debts" listed on the front of this form. The bankruptcy clerk's office must receive the complaint or motion and any required filing fee by that deadline.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors. The debtor must file a list of all property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objections by the "Deadline to Object to Exemptions" listed on the front side.
Presumption of Abuse	If the presumption of abuse arises, creditors may have the right to file a motion to dismiss the case under § 707(b) of the Bankruptcy Code. The debtor may rebut the presumption by showing special circumstances.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Liquidation of the Debtor's Property and Payment of Creditors' Claims	The bankruptcy trustee listed on the front of this notice will collect and sell the debtor's property that is not exempt. If the trustee can collect enough money, creditors may be paid some or all of the debts owed to them, in the order specified by the Bankruptcy Code. To make sure you receive any share of that money, you must file a Proof of Claim, as described above.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.
Refer To Other Side For Important Deadlines and Notices	

UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 7 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____(date) and was converted to a case under chapter 7 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

Creditors -- Do not file this notice in connection with any proof of claim you submit to the court.
See Reverse Side for Important Explanations.

Debtor(s) (name(s) and address):	Case Number:
	Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include trade names):	Bankruptcy Trustee (name and address):
Attorney for Debtor(s) (name and address): Telephone number:	Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadline to File a Proof of Claim

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

For all creditors (except a governmental unit): For a governmental unit:

Creditor with a Foreign Address:
A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

12b-006433

Filing of Chapter 7 Bankruptcy Case	A bankruptcy case under Chapter 7 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; and starting or continuing lawsuits or foreclosures. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor's representative must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim from other assets in the bankruptcy case. To be paid, you must file a Proof of Claim even if your claim is listed in the schedules filed by the debtor. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Creditor with a Foreign Address:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline. *Do not include this notice with any filing you make with the court.*
Liquidation of the Debtor's Property and Payment of Creditors' Claims	The bankruptcy trustee listed on the front of this notice will collect and sell the debtor's property that is not exempt. If the trustee can collect enough money, creditors may be paid some or all of the debts owed to them, in the order specified by the Bankruptcy Code. To make sure you receive any share of that money, you must file a Proof of Claim, as described above.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 11 bankruptcy case concerning the debtor(s) listed below was filed on _____ (date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____ (date) and was converted to a case under chapter 11 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice

Creditors -- Do not file this notice in connection with any proof of claim you submit to the court.
See Reverse Side for Important Explanations.

Debtor(s) (name(s) and address):	Case Number: Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include married, maiden, and trade names):	Attorney for Debtor(s) (name and address): Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadlines:
Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:
Notice of deadline will be sent at a later time.

Creditor with a Foreign Address:
A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Deadline to File a Complaint Objecting to Discharge of the Debtor:

First date set for hearing on confirmation of plan
Notice of that date will be sent at a later time.

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Creditors May Not Take Certain Actions:
In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: **Telephone number:**	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

12b-006435

Filing of Chapter 11 Bankruptcy Case	A bankruptcy case under Chapter 11 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 11 allows a debtor to reorganize or liquidate pursuant to a plan. A plan is not effective unless confirmed by the court. You may be sent a copy of the plan and a disclosure statement telling you about the plan, and you might have the opportunity to vote on the plan. You will be sent notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. Unless a trustee is serving, the debtor will remain in possession of the debtor's property and may continue to operate any business.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court. The court, after notice and a hearing, may order that the United States trustee not convene the meeting if the debtor has filed a plan for which the debtor solicited acceptances before filing the case.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. You may look at the schedules that have been or will be filed at the bankruptcy clerk's office. If your claim is scheduled and is *not* listed as disputed, contingent, or unliquidated, it will be allowed in the amount scheduled unless you filed a Proof of Claim or you are sent further notice about the claim. Whether or not your claim is scheduled, you are permitted to file a Proof of Claim. If your claim is not listed at all *or* if your claim is listed as disputed, contingent, or unliquidated, then you must file a Proof of Claim or you might not be paid any money on your claim and may be unable to vote on a plan. The court has not yet set a deadline to file a Proof of Claim. If a deadline is set, you will be sent another notice. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Creditor with a Foreign Address:** The deadline for filing claims will be set in a later court order and will apply to all creditors unless the order provides otherwise. If notice of the order setting the deadline is sent to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline. *Do not include this notice with any filing you make with the court.*
Discharge of Debts	Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of your debt. *See* Bankruptcy Code § 1141 (d). Unless the court orders otherwise, however, the discharge will not be effective until completion of all payments under the plan. A discharge means that you may never try to collect the debt from the debtor except as provided in the plan. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 523 (a) (2), (4), or (6), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and any required filing fee by that Deadline. If you believe that the debtor is not entitled to receive a discharge under Bankruptcy Code § 1141 (d) (3), you must file a complaint with the required filing fee in the bankruptcy clerk's office not later than the first date set for the hearing on confirmation of the plan. You will be sent another notice informing you of that date.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors, even if the debtor's case is converted to chapter 7. The debtor must file a list of property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.
Refer To Other Side For Important Deadlines and Notices	

UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 11 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____(date) and was converted to a case under chapter 11 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

Creditors -- Do not file this notice in connection with any proof of claim you submit to the court.
See Reverse Side for Important Explanations.

Debtor(s) (name(s) and address):	Case Number:
	Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include married, maiden, and trade names):	Attorney for Debtor(s) (name and address): Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors (except a governmental unit): For a governmental unit:

Creditor with a Foreign Address:
A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Deadline to File a Complaint Objecting to Discharge of the Debtor:

First date set for hearing on confirmation of plan
Notice of that date will be sent at a later time.

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Creditors May Not Take Certain Actions:
In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: **Telephone number:**	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

12b-006437

Filing of Chapter 11 Bankruptcy Case	A bankruptcy case under Chapter 11 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 11 allows a debtor to reorganize or liquidate pursuant to a plan. A plan is not effective unless confirmed by the court. You may be sent a copy of the plan and a disclosure statement telling you about the plan, and you might have the opportunity to vote on the plan. You will be sent notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. Unless a trustee is serving, the debtor will remain in possession of the debtor's property and may continue to operate any business.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court. The court, after notice and a hearing, may order that the United States trustee not convene the meeting if the debtor has filed a plan for which the debtor solicited acceptances before filing the case.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. You may look at the schedules that have been or will be filed at the bankruptcy clerk's office. If your claim is scheduled and is *not* listed as disputed, contingent, or unliquidated, it will be allowed in the amount scheduled unless you filed a Proof of Claim or you are sent further notice about the claim. Whether or not your claim is scheduled, you are permitted to file a Proof of Claim. If your claim is not listed at all *or* if your claim is listed as disputed, contingent, or unliquidated, then you must file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side or you might not be paid any money on your claim and may be unable to vote on a plan. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Creditor with a Foreign Address:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline. *Do not include this notice with any filing you make with the court.*
Discharge of Debts	Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of your debt. *See* Bankruptcy Code § 1141 (d). Unless the court orders otherwise, however, the discharge will not be effective until completion of all payments under the plan. A discharge means that you may never try to collect the debt from the debtor except as provided in the plan. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 523 (a) (2), (4), or (6), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and any required filing fee by that Deadline. If you believe that the debtor is not entitled to receive a discharge under Bankruptcy Code § 1141 (d) (3), you must file a complaint with the required filing fee in the bankruptcy clerk's office not later than the first date set for the hearing on confirmation of the plan. You will be sent another notice informing you of that date.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors, even if the debtor's case is converted to chapter 7. The debtor must file a list of property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 11 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____(date) and was converted to a case under chapter 11 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

Creditors -- Do not file this notice in connection with any proof of claim you submit to the court.
See Reverse Side for Important Explanations.

Debtor(s) (name(s) and address):	Case Number: Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include trade names):	Attorney for Debtor(s) (name and address): Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadline to File a Proof of Claim

Proof of Claim must be *received* by the bankruptcy clerk's office by the following deadline:

Notice of deadline will be sent at a later time.

Creditor with a Foreign Address:
A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Creditors May Not Take Certain Actions:
In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: **Telephone number:**	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

12b-006439

Filing of Chapter 11 Bankruptcy Case	A bankruptcy case under Chapter 11 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 11 allows a debtor to reorganize or liquidate pursuant to a plan. A plan is not effective unless confirmed by the court. You may be sent a copy of the plan and a disclosure statement telling you about the plan, and you might have the opportunity to vote on the plan. You will be sent notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. Unless a trustee is serving, the debtor will remain in possession of the debtor's property and may continue to operate any business.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; and starting or continuing lawsuits or foreclosures. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor's representative must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court. The court, after notice and a hearing, may order that the United States trustee not convene the meeting if the debtor has filed a plan for which the debtor solicited acceptances before filing the case.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. You may look at the schedules that have been or will be filed at the bankruptcy clerk's office. If your claim is scheduled and is *not* listed as disputed, contingent, or unliquidated, it will be allowed in the amount scheduled unless you filed a Proof of Claim or you are sent further notice about the claim. Whether or not your claim is scheduled, you are permitted to file a Proof of Claim. If your claim is not listed at all *or* if your claim is listed as disputed, contingent, or unliquidated, then you must file a Proof of Claim or you might not be paid any money on your claim and may be unable to vote on a plan. The court has not yet set a deadline to file a Proof of Claim. If a deadline is set, you will be sent another notice. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Creditor with a Foreign Address:** The deadline for filing claims will be set in a later court order and will apply to all creditors unless the order provides otherwise. If notice of the order setting the deadline is sent to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline. *Do not include this notice with any filing you make with the court.*
Discharge of Debts	Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of your debt. *See* Bankruptcy Code § 1141 (d). A discharge means that you may never try to collect the debt from the debtor, except as provided in the plan. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 1141 (d) (6) (A), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and any required filing fee by that deadline.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 11 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____(date) and was converted to a case under chapter 11 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

Creditors -- Do not file this notice in connection with any proof of claim you submit to the court.
See Reverse Side for Important Explanations.

Debtor(s) (name(s) and address):	Case Number:
	Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include trade names):	Attorney for Debtor(s) (name and address): Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadline to File a Proof of Claim

Proof of Claim must be *received* by the bankruptcy clerk's office by the following deadline:

For all creditors (except a governmental unit): For a governmental unit:

Creditor with a Foreign Address:
A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: **Telephone number:**	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

12b-006441

Filing of Chapter 11 Bankruptcy Case	A bankruptcy case under Chapter 11 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 11 allows a debtor to reorganize or liquidate pursuant to a plan. A plan is not effective unless confirmed by the court. You may be sent a copy of the plan and a disclosure statement telling you about the plan, and you might have the opportunity to vote on the plan. You will be sent notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. Unless a trustee is serving, the debtor will remain in possession of the debtor's property and may continue to operate any business.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; and starting or continuing lawsuits or foreclosures. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor's representative must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court. The court, after notice and a hearing, may order that the United States trustee not convene the meeting if the debtor has filed a plan for which the debtor solicited acceptances before filing the case.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. You may look at the schedules that have been or will be filed at the bankruptcy clerk's office. If your claim is scheduled and is *not* listed as disputed, contingent, or unliquidated, it will be allowed in the amount scheduled unless you filed a Proof of Claim or you are sent further notice about the claim. Whether or not your claim is scheduled, you are permitted to file a Proof of Claim. If your claim is not listed at all *or* if your claim is listed as disputed, contingent, or unliquidated, then you must file a Proof of Claim by the "Deadline to File Proof of Claim" listed on the front side, or you might not be paid any money on your claim and may be unable to vote on a plan. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Creditor with a Foreign Address:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline. *Do not include this notice with any filing you make with the court.*
Discharge of Debts	Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of your debt. *See* Bankruptcy Code § 1141 (d). A discharge means that you may never try to collect the debt from the debtor, except as provided in the plan. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 1141 (d) (6) (A), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and any required filing fee by that deadline.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 12 Bankruptcy Case, Meeting of Creditors, & Deadlines

[The debtor(s) listed below filed a chapter 12 bankruptcy case on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____ (date) and was converted to a case under chapter 12 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

Creditors -- Do not file this notice in connection with any proof of claim you submit to the court.
See Reverse Side for Important Explanations.

Debtor(s) (name(s) and address):	Case Number: Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include married, maiden, and trade names): Attorney for Debtor(s) (name and address): Telephone number:	Bankruptcy Trustee (name and address): Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors(except a governmental unit): For a governmental unit:

Creditor with a Foreign Address:
A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Deadline to Object to Exemptions:
Thirty (30) days after the *conclusion* of the meeting of creditors.

Filing of Plan, Hearing on Confirmation of Plan

[The debtor has filed a plan. The plan or a summary of the plan is enclosed. The hearing on confirmation will be held:
Date:_____Time:_____Location:_____]
or [The debtor has filed a plan. The plan or a summary of the plan and notice of confirmation hearing will be sent separately.]
or [The debtor has not filed a plan as of this date. You will be sent separate notice of the hearing on confirmation of the plan.]

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor, the debtor's property, and certain codebtors. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: **Telephone number:**	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

12b-006443

Filing of Chapter 12 Bankruptcy Case	A bankruptcy case under Chapter 12 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 12 allows family farmers and family fishermen to adjust their debts pursuant to a plan. A plan is not effective unless confirmed by the court. You may object to confirmation of the plan and appear at the confirmation hearing. A copy or summary of the plan [is included with this notice] *or* [will be sent to you later], and [the confirmation hearing will be held on the date indicated on the front of this notice] *or* [you will be sent notice of the confirmation hearing]. The debtor will remain in possession of the debtor's property and may continue to operate the debtor's business unless the court orders otherwise.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions against the debtor and certain codebtors are listed in Bankruptcy Code § 362 and § 1201. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages. Under certain circumstances, the stay may be limited in duration or not exist at all, although the debtor may have the right to request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim from other assets in the bankruptcy case. To be paid, you must file a Proof of Claim even if your claim is listed in the schedules filed by the debtor. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Creditor with a Foreign Address:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline. *Do not include this notice with any filing you make with the court.*
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 523 (a) (2), (4), or (6), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and any required filing fee by that Deadline.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors, even if the debtor's case is converted to chapter 7. The debtor must file a list of all property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 12 Bankruptcy Case, Meeting of Creditors, & Deadlines

[The debtor [corporation] *or* [partnership] listed below filed a chapter 12 bankruptcy case on _____ (date).]
or [A bankruptcy case concerning the debtor [corporation] *or* [partnership] listed below was originally filed under chapter_____
on _____ (date) and was converted to a case under chapter 12 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

Creditors -- Do not file this notice in connection with any proof of claim you submit to the court.
See Reverse Side for Important Explanations.

Debtor(s) (name(s) and address):	Case Number: Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include trade names): Attorney for Debtor(s) (name and address): Telephone number:	Bankruptcy Trustee (name and address): Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors(except a governmental unit): For a governmental unit:

Creditor with a Foreign Address:
A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Filing of Plan, Hearing on Confirmation of Plan

[The debtor has filed a plan. The plan or a summary of the plan is enclosed. The hearing on confirmation will be held:
Date:_____Time:_____Location:_____]
or [The debtor has filed a plan. The plan or a summary of the plan and notice of confirmation hearing will be sent separately.]
or [The debtor has not filed a plan as of this date. You will be sent separate notice of the hearing on confirmation of the plan.]

Creditors May Not Take Certain Actions:
In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: **Telephone number:**	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

12b-006445

Filing of Chapter 12 Bankruptcy Case	A bankruptcy case under Chapter 12 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by the debtor listed on the front side, and an order for relief has been entered. Chapter 12 allows family farmers and family fishermen to adjust their debts pursuant to a plan. A plan is not effective unless confirmed by the court. You may object to confirmation of the plan and appear at the confirmation hearing. A copy or summary of the plan [is included with this notice] *or* [will be sent to you later], and [the confirmation hearing will be held on the date indicated on the front of this notice] *or* [you will be sent notice of the confirmation hearing]. The debtor will remain in possession of the debtor's property and may continue to operate the debtor's business unless the court orders otherwise.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions against the debtor and certain codebtors are listed in Bankruptcy Code § 362 and § 1201. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; and starting or continuing lawsuits or foreclosures. Under certain circumstances, the stay may be limited in duration or not exist at all, although the debtor may have the right to request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor's representative must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim from other assets in the bankruptcy case. To be paid, you must file a Proof of Claim even if your claim is listed in the schedules filed by the debtor. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Creditor with a Foreign Address:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline. *Do not include this notice with any filing you make with the court.*
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 523 (a) (2), (4), or (6), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and any required filing fee by that Deadline.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

UNITED STATES BANKRUPTCY COURT_____**District of**_____

Notice of
Chapter 13 Bankruptcy Case, Meeting of Creditors, & Deadlines

[The debtor(s) listed below filed a chapter 13 bankruptcy case on _____ (date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____
on _____ (date) and was converted to a case under chapter 13 on_____(date).]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

Creditors -- Do not file this notice in connection with any proof of claim you submit to the court.
See Reverse Side for Important Explanations.

Debtor(s) (name(s) and address):	Case Number: Last four digits of Social-Security or Individual Taxpayer-ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include married, maiden, and trade names): Attorney for Debtor(s) (name and address): Telephone number:	Bankruptcy Trustee (name and address): Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors (except a governmental unit):

For a governmental unit (except as otherwise provided in Fed. R. Bankr. P. 3002(c)(1)):

Creditor with a Foreign Address:

A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to Object to Debtor's Discharge or to Challenge Dischargeability of Certain Debts:

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Filing of Plan, Hearing on Confirmation of Plan

[The debtor has filed a plan. The plan or a summary of the plan is enclosed. The hearing on confirmation will be held:
Date:_____Time:_____Location:_____]
or [The debtor has filed a plan. The plan or a summary of the plan and notice of confirmation hearing will be sent separately.]
or [The debtor has not filed a plan as of this date. You will be sent separate notice of the hearing on confirmation of the plan.]

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor, the debtor's property, and certain codebtors. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: **Telephone number:**	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

12b-006447

Filing of Chapter 13 Bankruptcy Case	A bankruptcy case under Chapter 13 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 13 allows an individual with regular income and debts below a specified amount to adjust debts pursuant to a plan. A plan is not effective unless confirmed by the bankruptcy court. You may object to confirmation of the plan and appear at the confirmation hearing. A copy or summary of the plan [is included with this notice] *or* [will be sent to you later], and [the confirmation hearing will be held on the date indicated on the front of this notice] *or* [you will be sent notice of the confirmation hearing]. The debtor will remain in possession of the debtor's property and may continue to operate the debtor's business, if any, unless the court orders otherwise.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions against the debtor and certain codebtors are listed in Bankruptcy Code § 362 and § 1301. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to exceed or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date specified in a notice filed with the court.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim from other assets in the bankruptcy case. To be paid, you must file a Proof of Claim even if your claim is listed in the schedules filed by the debtor. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Creditor with a Foreign Address:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline. *Do not include this notice with any filing you make with the court.*
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that the debtor is not entitled to a discharge under Bankruptcy Code § 1328(f), you must file a motion objecting to discharge in the bankruptcy clerk's office by the "Deadline to Object to Debtor's Discharge or to Challenge the Dischargeability of Certain Debts" listed on the front of this form. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 523(a)(2) or (4), you must file a complaint in the bankruptcy clerk's office by the same deadline. The bankruptcy clerk's office must receive the motion or the complaint and any required filing fee by that deadline.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors, even if the debtor's case is converted to chapter 7. The debtor must file a list of all property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Creditor with a Foreign Address	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

COMMITTEE NOTE

All versions of the form have been updated on the first page and in the claims box on the explanation page to remind creditors that the form should not be included with or attached to any proof of claim or other filing in the case. Stylistic changes to the form are also made.

Final approval of these conforming and stylistic amendments is sought without publication.

UNITED STATES BANKRUPTCY COURT _____ DISTRICT OF _____

PROOF OF CLAIM

Name of Debtor:

Case Number:

NOTE: *Do not use this form to make a claim for an administrative expense that arises after the bankruptcy filing. You may file a request for payment of an administrative expense according to 11 U.S.C. § 503.*

Name of Creditor (the person or other entity to whom the debtor owes money or property):

COURT USE ONLY

Name and address where notices should be sent:

Telephone number: email:

❒ Check this box if this claim amends a previously filed claim.

Court Claim Number:_____
(*If known*)

Filed on:_____

Name and address where payment should be sent (if different from above):

Telephone number: email:

❒ Check this box if you are aware that anyone else has filed a proof of claim relating to this claim. Attach copy of statement giving particulars.

1. Amount of Claim as of Date Case Filed: $_____

If all or part of the claim is secured, complete item 4.

If all or part of the claim is entitled to priority, complete item 5.

❒Check this box if the claim includes interest or other charges in addition to the principal amount of the claim. Attach a statement that itemizes interest or charges.

2. Basis for Claim: _____
(See instruction #2)

3. Last four digits of any number by which creditor identifies debtor:

___ ___ ___ ___

3a. Debtor may have scheduled account as:

_____
(See instruction #3a)

3b. Uniform Claim Identifier (optional):

_ _
(See instruction #3b)

4. Secured Claim (See instruction #4)
Check the appropriate box if the claim is secured by a lien on property or a right of setoff, attach required redacted documents, and provide the requested information.

Nature of property or right of setoff: ❒Real Estate ❒Motor Vehicle ❒Other
Describe:

Value of Property: $_____

Annual Interest Rate_____**%** ❒Fixed or ❒Variable
(when case was filed)

Amount of arrearage and other charges, as of the time case was filed, included in secured claim, if any:

$_____

Basis for perfection: _____

Amount of Secured Claim: $_____

Amount Unsecured: $_____

5. Amount of Claim Entitled to Priority under 11 U.S.C. § 507 (a). If any part of the claim falls into one of the following categories, check the box specifying the priority and state the amount.

❒ Domestic support obligations under 11 U.S.C. § 507 (a)(1)(A) or (a)(1)(B).

❒ Wages, salaries, or commissions (up to $11,725*) earned within 180 days before the case was filed or the debtor's business ceased, whichever is earlier – 11 U.S.C. § 507 (a)(4).

❒ Contributions to an employee benefit plan – 11 U.S.C. § 507 (a)(5).

Amount entitled to priority:

$_____

❒ Up to $2,600* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. § 507 (a)(7).

❒ Taxes or penalties owed to governmental units – 11 U.S.C. § 507 (a)(8).

❒ Other – Specify applicable paragraph of 11 U.S.C. § 507 (a)(__).

**Amounts are subject to adjustment on 4/1/13 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.*

6. Credits. The amount of all payments on this claim has been credited for the purpose of making this proof of claim. (See instruction #6)

12b-006450

7. Documents: Attached are **redacted** copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, ~~and~~ security agreements, or, in the case of a claim based on an open-end or revolving consumer credit agreement, a statement providing the information required by FRBP 3001(c)(3)(A). If the claim is secured, box 4 has been completed, and **redacted** copies of documents providing evidence of perfection of a security interest are attached. If the claim is secured by the debtor's principal residence, the Mortgage Proof of Claim Attachment is being filed with this claim. *(See instruction #7, and the definition of "**redacted**".)*

DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.

If the documents are not available, please explain:

8. Signature: (See instruction #8)

Check the appropriate box.

❒ I am the creditor. ❒ I am the creditor's authorized agent. ~~(Attach copy of power of attorney, if any.)~~ ❒ I am the trustee, or the debtor, or their authorized agent. (See Bankruptcy Rule 3004.) ❒ I am a guarantor, surety, indorser, or other codebtor. (See Bankruptcy Rule 3005.)

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

Print Name: _____
Title: _____
Company: _____
Address and telephone number (if different from notice address above):
_____
_____
_____
Telephone number: email:

(Signature) (Date)

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

INSTRUCTIONS FOR PROOF OF CLAIM FORM

The instructions and definitions below are general explanations of the law. In certain circumstances, such as bankruptcy cases not filed voluntarily by the debtor, exceptions to these general rules may apply.

Items to be completed in Proof of Claim form

Court, Name of Debtor, and Case Number:
Fill in the federal judicial district in which the bankruptcy case was filed (for example, Central District of California), the debtor's full name, and the case number. If the creditor received a notice of the case from the bankruptcy court, all of this information is at the top of the notice.

Creditor's Name and Address:
Fill in the name of the person or entity asserting a claim and the name and address of the person who should receive notices issued during the bankruptcy case. A separate space is provided for the payment address if it differs from the notice address. The creditor has a continuing obligation to keep the court informed of its current address. See Federal Rule of Bankruptcy Procedure (FRBP) 2002(g).

1. Amount of Claim as of Date Case Filed:
State the total amount owed to the creditor on the date of the bankruptcy filing. Follow the instructions concerning whether to complete items 4 and 5. Check the box if interest or other charges are included in the claim.

2. Basis for Claim:
State the type of debt or how it was incurred. Examples include goods sold, money loaned, services performed, personal injury/wrongful death, car loan, mortgage note, and credit card. If the claim is based on delivering health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information. You may be required to provide additional disclosure if an interested party objects to the claim.

3. Last Four Digits of Any Number by Which Creditor Identifies Debtor:
State only the last four digits of the debtor's account or other number used by the creditor to identify the debtor.

3a. Debtor May Have Scheduled Account As:
Report a change in the creditor's name, a transferred claim, or any other information that clarifies a difference between this proof of claim and the claim as scheduled by the debtor.

3b. Uniform Claim Identifier:
If you use a uniform claim identifier, you may report it here. A uniform claim identifier is an optional 24-character identifier that certain large creditors use to facilitate electronic payment in chapter 13 cases.

4. Secured Claim:
Check whether the claim is fully or partially secured. Skip this section if the claim is entirely unsecured. (See Definitions.) If the claim is secured, check the box for the nature and value of property that secures the claim, attach copies of lien documentation, and state, as of the date of the bankruptcy filing, the annual interest rate (and whether it is fixed or variable), and the amount past due on the claim.

5. Amount of Claim Entitled to Priority Under 11 U.S.C. § 507 (a).
If any portion of the claim falls into any category shown, check the appropriate box(es) and state the amount entitled to priority. (See Definitions.) A claim may be partly priority and partly non-priority. For example, in some of the categories, the law limits the amount entitled to priority.

6. Credits:
An authorized signature on this proof of claim serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

7. Documents:
Attach redacted copies of any documents that show the debt exists and a lien secures the debt. You must also attach copies of documents that evidence perfection of any security interest and documents required by FRBP 3001(c) for claims based on an open-end or revolving consumer credit agreement or secured by a security interest in the debtor's principal residence. You may also attach a summary in addition to the documents themselves. FRBP 3001(c) and (d). If the claim is based on delivering health care goods or services, limit disclosing confidential health care information. Do not send original documents, as attachments may be destroyed after scanning.

8. Date and Signature:
The individual completing this proof of claim must sign and date it. FRBP 9011. If the claim is filed electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what constitutes a signature. If you sign this form, you declare under penalty of perjury that the information provided is true and correct to the best of your knowledge, information, and reasonable belief. Your signature is also a certification that the claim meets the requirements of FRBP 9011(b). Whether the claim is filed electronically or in person, if your name is on the signature line, you are responsible for the declaration. Print the name and title, if any, of the creditor or other person authorized to file this claim. State the filer's address and telephone number if it differs from the address given on the top of the form for purposes of receiving notices. If the claim is filed by an authorized agent, ~~attach a complete copy of any power of attorney, and~~ provide both the name of the individual filing the claim and the name of the agent. If the authorized agent is a servicer, identify the corporate servicer as the company. Criminal penalties apply for making a false statement on a proof of claim.

12b-006451

DEFINITIONS

Debtor
A debtor is the person, corporation, or other entity that has filed a bankruptcy case.

Creditor
A creditor is a person, corporation, or other entity to whom debtor owes a debt that was incurred before the date of the bankruptcy filing. See 11 U.S.C. §101 (10).

Claim
A claim is the creditor's right to receive payment for a debt owed by the debtor on the date of the bankruptcy filing. See 11 U.S.C. §101 (5). A claim may be secured or unsecured.

Proof of Claim
A proof of claim is a form used by the creditor to indicate the amount of the debt owed by the debtor on the date of the bankruptcy filing. The creditor must file the form with the clerk of the same bankruptcy court in which the bankruptcy case was filed.

Secured Claim Under 11 U.S.C. § 506 (a)
A secured claim is one backed by a lien on property of the debtor. The claim is secured so long as the creditor has the right to be paid from the property prior to other creditors. The amount of the secured claim cannot exceed the value of the property. Any amount owed to the creditor in excess of the value of the property is an unsecured claim. Examples of liens on property include a mortgage on real estate or a security interest in a car. A lien may be voluntarily granted by a debtor or may be obtained through a court proceeding. In some states, a court judgment is a lien. A claim also may be secured if the creditor owes the debtor money (has a right to setoff).

Unsecured Claim
An unsecured claim is one that does not meet the requirements of a secured claim. A claim may be partly unsecured if the amount of the claim exceeds the value of the property on which the creditor has a lien.

Claim Entitled to Priority Under 11 U.S.C. § 507 (a)
Priority claims are certain categories of unsecured claims that are paid from the available money or property in a bankruptcy case before other unsecured claims.

Redacted
A document has been redacted when the person filing it has masked, edited out, or otherwise deleted, certain information. A creditor must show only the last four digits of any social-security, individual's tax-identification, or financial-account number, only the initials of a minor's name, and only the year of any person's date of birth. If the claim is based on the delivery of health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information.

Evidence of Perfection
Evidence of perfection may include a mortgage, lien, certificate of title, financing statement, or other document showing that the lien has been filed or recorded.

INFORMATION

Acknowledgment of Filing of Claim
To receive acknowledgment of your filing, you may either enclose a stamped self-addressed envelope and a copy of this proof of claim or you may access the court's PACER system (www.pacer.psc.uscourts.gov) for a small fee to view your filed proof of claim.

Offers to Purchase a Claim
Certain entities are in the business of purchasing claims for an amount less than the face value of the claims. One or more of these entities may contact the creditor and offer to purchase the claim. Some of the written communications from these entities may easily be confused with official court documentation or communications from the debtor. These entities do not represent the bankruptcy court or the debtor. The creditor has no obligation to sell its claim. However, if the creditor decides to sell its claim, any transfer of such claim is subject to FRBP 3001(e), any applicable provisions of the Bankruptcy Code (11 U.S.C. § 101 *et seq.*), and any applicable orders of the bankruptcy court.

COMMITTEE NOTE

Section 7 of the form is amended to remind filers of the need to attach documents required by Rule 3001(c) for claims based on an open-end or revolving consumer credit agreement or claims secured by a security interest in the debtor's principal residence.

Section 8 is revised to delete the direction that an authorized agent attach a power of attorney if one exists. Rule 9010(c) does not require that an agent's authority to file a proof of claim be evidenced by a power of attorney.

Final approval of these conforming and stylistic amendments is sought without publication.

Do not file this form as part of the public case file. This form must be submitted separately and must not be included in the court's public electronic records. Please consult local court procedures for submission requirements.

United States Bankruptcy Court

_____ District Of _____

In re _____,)
[Set forth here all names including married, maiden,)
and trade names used by debtor within last 8 years])
)
Debtor) Case No. _____
Address _____)
_____) Chapter _____
)
Last four digits of Social-Security or Individual Taxpayer-)
Identification (ITIN) No(s).,(if any): _____)
_____)
Employer Tax-Identification (EIN) No(s).(if any): _____)
_____)

STATEMENT OF SOCIAL-SECURITY NUMBER(S)

*(or other Individual Taxpayer-Identification Number(s) (ITIN(s)))**

1.Name of Debtor (Last, First, Middle):_____
(Check the appropriate box and, if applicable, provide the required information.)

☐ Debtor has a Social-Security Number and it is:_____
(If more than one, state all.)
☐ Debtor does not have a Social-Security Number but has an Individual Taxpayer-Identification Number (ITIN), and it is: _____
(If more than one, state all.)
☐ Debtor does not have either a Social-Security Number or an Individual Taxpayer-Identification Number (ITIN).

2.Name of Joint Debtor (Last, First, Middle):_____
(Check the appropriate box and, if applicable, provide the required information.)

☐ Joint Debtor has a Social-Security Number and it is: _____
(If more than one, state all.)
☐ Joint Debtor does not have a Social-Security Number but has an Individual Taxpayer-Identification Number (ITIN) and it is: _____
(If more than one, state all.)
☐ Joint Debtor does not have either a Social-Security Number or an Individual Taxpayer-Identification Number (ITIN).

I declare under penalty of perjury that the foregoing is true and correct.

X _____
Signature of Debtor Date
X _____
Signature of Joint Debtor Date

**Joint debtors must provide information for both spouses.*
Penalty for making a false statement: Fine of up to $250,000 or up to 5 years imprisonment or both. 18 U.S.C. §§ 152 and 3571.

COMMITTEE NOTE

The form is amended to remind debtors that, in accordance with Rule 1007(f), it should be submitted to the court, but not filed on the public docket. This rule protects an individual debtor's social-security number or taxpayer-identification number from becoming accessible to the public.

Final approval of the conforming amendment is sought without publication.

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

Agenda E-19 (Appendix C)
Rules
September 2012

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MEMORANDUM

TO: Honorable Mark R. Kravitz, Chair
Standing Committee on Rules of Practice and Procedure

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

DATE: May 8, 2012

RE: Report of the Civil Rules Advisory Committee

Introduction

The Civil Rules Advisory Committee met at the University of Michigan Law School in Ann Arbor on March 22 and 23, 2012. Draft Minutes of this meeting are attached.

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Part I of this Report presents for action a proposal to amend Civil Rule 45. The proposal was published in August, 2011. Some modest changes are recommended in light of the public comments and further Subcommittee and Committee deliberations. It is recommended that the revised Rule 45 be recommended to the Judicial Conference for transmission to the Supreme Court for adoption.

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I. RULES 45 & 37: ACTION TO RECOMMEND ADOPTION OF REVISED RULES 45 & 37

ACTION ITEM: RULE 45

A preliminary draft of proposed amendments to Rule 45 was published for comment in August, 2011. Three public hearings were scheduled, but all were eventually cancelled. Nobody indicated an interest in testifying at either the first or the second, and the two who indicated an interest in testifying at the last hearing decided to submit written comments instead. The Advisory Committee received 25 written comments; a summary of those comments is attached.

After the public comments were in, the Discovery Subcommittee of the Advisory Committee met by conference call to consider them, and based on that discussion suggested some modifications to the proposed amendments. At the Advisory Committee's Spring meeting, those modifications were reviewed, and a few topics were identified for additional consideration. After the Advisory Committee's meeting and review by the Subcommittee, a revised Rule 45 package was circulated to the full Advisory Committee and received unanimous support from the Advisory Committee. The changes recommended to the Rule 45 package since publication are very minor, and will be summarized below. The modified version of the amendment package also includes style changes recommended by the Standing Committee's Style Consultant.

The proposed amendments to Rule 45 result from a multi-year study conducted by the Advisory Committee that began with a literature search and an effort to canvass bar groups to identify issues possibly warranting amendments to the rule. That activity initially produced a list of some 17 specific possible amendments that was winnowed to a much shorter list. Meanwhile, overall concerns about the length and complexity of Rule 45 produced a variety of ideas about ways to simplify the rule, in addition to amendments targeting specific concerns. After much work had been done on these various matters, the Subcommittee convened a mini-conference attended by about two dozen experienced lawyers to review and evaluate the various amendment ideas. Building on that foundation (and with further input from some bar groups), the Advisory Committee eventually decided to adopt the most modest form of rule simplification it had considered and to adopt some but not all of the specific rule amendments that were proposed during its study of the rule. Four specific changes will be made by the proposed amendments.

Simplification: Current Rule 45 creates what the Advisory Committee came to call a "three-ring circus" of challenges for the lawyer seeking to use a subpoena. First, the lawyer would have to choose the right "issuing court," then she would have to ensure that the subpoena was served within that district, or outside of the district but within 100 miles of where performance was required, or within the state if state law allowed, and then she would have to determine where compliance could be required, a project made challenging in part by the scattered provisions bearing on place of compliance found in different provisions of the rule.

The amendment package sought to eliminate this three-ring circus by making the court where the action is pending the issuing court, permitting service throughout the United States (as is currently authorized under Fed. R. Crim. P. 17(e)), and combining all provisions on place of compliance in a new Rule 45(c). New Rule 45(c) preserves the various place-of-compliance

provisions of the current rule (except that the reference to state law is eliminated and the "*Vioxx*" issue is addressed as discussed below).

The simplification proposals received broad support in the public commentary, and only one change has been proposed to those amendments. The published proposal permitted the place of compliance for document subpoenas under Rule 45(c)(2)(A) to be any place "reasonably convenient for the person who is commanded to produce." The premise of this provision was that, particularly with electronically stored information, place of production should not be a problem and should be handled flexibly. But it was noted that Rule 45(d)(2)(B)(i) directs the party that served the subpoena to file a motion to compel compliance in "the district where compliance is required." That could lead to mischief, if the lawyer serving the subpoena designates her office as the place for production and a distant nonparty served with the subpoena objects on some ground. The objecting nonparty should not have to *litigate* in the lawyer's home jurisdiction just because *production* there would be "reasonably convenient," as it might well be. Accordingly, Rule 45(c)(2)(A) was changed to call for production "within 100 miles of where the person [subject to the subpoena] resides, is employed, or regularly transacts business in person." This change should ensure -- as Rule 45(c) is generally designed to ensure -- that if litigation about the subpoena is necessary it will occur at a location convenient for the nonparty.

At the same time, agreement on place of production is a desirable thing, and the Committee Note is therefore modified to recognize that the rule amendments do not limit the ability of parties to make such agreements. We expect that the current practice of parties agreeing to produce electronically stored information by email or by simply sending a CD will continue.

A clarifying amendment to the Committee Note on Rule 45(c) addresses concerns expressed in the comments. One is the risk some would read the amended rule to require a subpoena for all depositions -- even of parties or party officers, directors, or managing agents. The Note has been clarified to remind readers that no subpoena is required for depositions of such witnesses, and that the geographical limitations that apply to subpoenas do not apply when such depositions are simply noticed. Another Committee Note clarification confirms that, when the issuing court has made an order for remote testimony under Rule 43(a), a subpoena may be used to command the distant witness to attend and testify within the geographical limits of Rule 45(c).

<u>Transfer of subpoena-related motions</u>: New Rule 45(c) essentially retains the existing rule requirement that motions to quash or enforce a subpoena should be made in the district where compliance with the subpoena is required, with the result that the "enforcement court" may often be different from the "issuing court."

Existing authority has recognized that some matters are better decided by the issuing court. Rule 26(c)(1), for example, permits a nonparty from whom discovery is sought to seek relief in the court where the action is pending. The Committee Note to the 1970 amendment adding subdivision (c) to Rule 26 also recognized that "[t]he court in the district where the

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deposition is being taken may, and frequently will, remit the deponent or party to the court where the action is pending."

This amendment package adds Rule 45(f), which explicitly authorizes transfer of subpoena-related motions from the enforcement court to the issuing court, including not only motions for a protective order but also motions to enforce the subpoena.

The published draft permitted transfer only upon consent of the nonparty and the parties, or in "exceptional circumstances." After public comment, the Advisory Committee concluded that party consent should not be required; if the person subject to the subpoena consents to transfer then the enforcement court may transfer. The Committee felt that the person whose convenience should be of primary concern is the person subject to the subpoena, and that transfer of a dispute to the court presiding over the action should be authorized whenever that person agrees. The Committee also felt that parties to an action can never justifiably complain when they are required to litigate an issue before the judge presiding over the action, and that requiring their consent to a transfer might in some cases encourage parties to refuse to consent in the hope of getting a different judge to rule on the dispute -- a kind of mid-case forum shopping.

Whether the "exceptional circumstances" standard should be retained when the nonparty witness does not consent was the focus of considerable public comment. Some urged that a more flexible standard be adopted. Others argued that the protection of the nonparty subject to the subpoena should be paramount, and therefore that the "exceptional circumstances" standard should remain when the nonparty does not consent. Eventually the Advisory Committee decided to retain the "exceptional circumstances" standard. The Committee is concerned that a lower standard could result in too-frequent transfers that force nonparties to litigate in distant fora to protect their interests.

The Committee Note has been revised to clarify that the prime concern should be avoiding undue burdens on the local nonparty, and also to identify considerations that might warrant transfer nonetheless, emphasizing that such concerns warrant transfer only if they outweigh the interests of the local nonparty in local resolution of the motion. It also suggests that the judge in the compliance court might consult with the judge in the issuing court, and encourages use of telecommunications methods to minimize the burden on the nonparty when transfer does occur.

Trial subpoenas for distant parties and party officers: There is a distinct split in existing authority about whether a subpoena may command a distant party or party officer to testify at trial. One view is that the geographical limits that apply to other witnesses do not apply to such witnesses. See *In re Vioxx Products Liability Litigation*, 438 F.Supp.2d 664 (E.D. La. 2006) (requiring an officer of the defendant corporation, who lived and worked in New Jersey, to testify at trial in New Orleans even though he was not served within Louisiana under Rule 45(b)(2)). The alternative view is that the rule sets forth the same geographical limits for all trial witnesses. See *Johnson v. Big Lots Stores, Inc.*, 251 F.R.D. 213 (E.D. La. 2008) (holding that opt-in plaintiffs in Fair Labor Standards Act action could not be compelled to travel long distances from

outside the state to attend trial because they were not served with subpoenas within the state as required by Rule 45(b)(2)).

The division of authority resulted from differing interpretations of the 1991 amendments to Rule 45. The Advisory Committee concluded that those amendments were not intended to create the expanded subpoena power recognized in *Vioxx* and its progeny, and decided to restore the original meaning of the rule. The Committee was concerned also that such expanded power could invite tactical use of a subpoena to apply inappropriate pressure to the adverse party. Party officers subject to such subpoenas might often be able to secure protective orders, but the motions would burden the courts and the parties and there might be some *in terrorem* value despite the protective-order route to relief. Moreover, with large organizations it will often be true that the best witnesses are not officers but other employees. To the extent testimony of such party witnesses is important there are alternatives to attending trial. See, e.g., Rule 30(b)(3) (authorizing audiovisual recording of deposition testimony) and 43(a) (permitting the court to order testimony by contemporaneous transmission).

The amendments therefore provide in Rule 45(c)(1) that a subpoena can command any person to testify only within the limits that apply to all witnesses. As noted above, Committee Note language was added to recognize that this provision does not affect existing law on the location for a deposition of a party or party's officer, director, or managing agent, for which a subpoena is not needed.

For purposes of inviting public comment, the Rule 45 publication package included an Appendix adding authority for the court to order testimony at trial by parties or party officers in specified circumstances. The published draft made clear that the Advisory Committee did not propose the addition of such authority. The public comment on this proposal was mixed, and the Advisory Committee did not change its view that this authority should not be added to the rule. The Appendix is therefore not included in this package.

<u>Notice of service of "documents only" subpoena</u>: The 1991 amendments introduced the "documents only" subpoena. The deposition notice requirements of Rule 30 did not apply to such subpoenas. Rule 45(b)(1) was therefore added to require that notice be given of service of such subpoenas. In the restyling of 2007, the rule provision was clarified to direct that notice be provided before service of the subpoena.

As it examined Rule 45 issues, the Committee was repeatedly informed that this notice provision is frequently not obeyed. Parties often obtain documents by subpoena without notifying other parties that the subpoena has been served. The result can be that there are serious problems at or before trial when "surprise" documents emerge and arguments may be made that they should not be admissible or that further discovery is warranted.

The amendment package attempts to solve these problems by moving the existing provision to become a new Rule 45(a)(4) with a heading that calls attention to the requirement -- "Notice to Other Parties Before Service." The relocated provision also slightly modifies the existing provision by directing that a copy of the subpoena be provided along with the notice.

That should assist the other parties in knowing what is being sought and determining whether they have objections to production of any of the materials sought or wish to subpoena additional materials.

The effort to call attention to the notice requirement was supported during the public comment period. The Department of Justice raised a concern, however, about the proposal to remove the phrase "before trial" from the current rule. It noted that removal of that phrase could complicate its efforts (and the efforts of other judgment creditors) to locate assets subject to seizure pursuant to judgments. For the Department, those judgments include restitution in favor of crime victims. Giving advance notice in such situations could frustrate enforcement of judgments or make it considerably more cumbersome.

At the same time, it appeared that the value of notice of trial subpoenas (the concern that led to the proposal for removal of the phrase in the first place) was limited or nonexistent because usually any such documents would be listed in the Rule 26(a)(3) disclosures or otherwise identified during pretrial preparations. Indeed, the parties may often cooperate to subpoena needed exhibits for trial. After considering alternatives, the solution adopted was to restore the phrase "before trial" to the rule. The Committee Note explanation for removal of "before trial" has been removed.

Another issue that has been raised repeatedly since early in the Advisory Committee's consideration of Rule 45 has been that additional notices should be required as subpoenaed materials are produced, and perhaps also when subpoenas are modified. There have also been suggestions that the rule should require that access be provided to materials produced in response to a subpoena. In particular, it has been noted (and repeated in the public comment period) that a number of states direct that the party serving the subpoena give notice upon receipt of produced materials, and that some states also require access to the materials.

Both the Subcommittee and the Advisory Committee have repeatedly discussed these proposals for additional notice provisions. All agree that cooperation and transparency in relation to subpoenas are desirable. All expect that judges would insist on such behavior in cases in which the parties did not do so without court intervention. But the Subcommittee and the full Committee have repeatedly concluded that adding notice requirements or an access requirement to the rule would not, overall, produce desirable effects.

A starting point is to recognize the reason for relocation of the existing notice requirement -- the frequent failure of lawyers to obey it. The requirement has been in the rule for over 20 years; the amendment is based on the optimistic expectation that relocation and addition of a heading will prompt much broader compliance. It also expands the requirement slightly, by insisting that the notice include the subpoena itself.

The Committee believes that this change will result in all parties being made aware when a subpoena is served -- a marked change from actual current practice -- and that this awareness will enable parties adequately to protect their interests. The Committee is concerned that requiring notice of receipt of documents could create new complications. Production of

documents in response to a subpoena often occurs on a "rolling" basis, with documents being produced over time as they are found. Requiring a new notice every time additional documents are received could be burdensome, especially in large document cases, and failure to give notice on one or more occasions of a rolling production would likely spawn satellite litigation on the effect of the missed notice, with parties asking that documents not noticed be excluded from use in the litigation. As one member of the Advisory Committee noted during the Committee's Spring meeting: "Less compliance with more rules breeds satellite litigation." The "gotcha" possibilities of additional requirements can be considerable. Because we believe that clarifying the notice requirement will resolve most of the notice problems presently occurring under Rule 45, we have concluded that additional notice requirements, with their potential problems, should not be included.

The Committee has repeatedly been told that, having received the notice called for by the existing rule, lawyers can take action to guard themselves. They can be persistent in pursuit of information about the fruits of the subpoena. They can seek assistance from the court if needed. The Committee Note recognizes that lawyers can follow up in these manners. In response to these concerns, it has been expanded to note that parties can seek the assistance of the court, either in the scheduling order or otherwise, to obtain access.

Having reconsidered these issues yet again after the public comment period, the Discovery Subcommittee decided not to expand what is in the rule at present. The full Advisory Committee concurred. Accordingly, although the Committee Note has been amplified on these points, the rule provision itself has not been changed from what is currently in Rule 45(b)(1).

1 * * * * *

2

3 **Rule 45. Subpoena**

4 **(a) In General.**

5 **(1)** ***Form and Contents.***

6 **(A)** *Requirements — In General*. Every subpoena

7 must:

8 **(i)** state the court from which it issued;

9 **(ii)** state the title of the action~~, the court in~~

10 ~~which it is pending,~~ and its civil-action

11 number;

12 **(iii)** command each person to whom it is

13 directed to do the following at a

14 specified time and place: attend and

15 testify; produce designated documents,

16 electronically stored information, or

17 tangible things in that person's

18 possession, custody, or control; or

19 permit the inspection of premises; and

20 **(iv)** set out the text of Rule 45(d~~c~~) and (e~~d~~).

21 **(B)** *Command to Attend a Deposition — Notice*

22 *of the Recording Method*. A subpoena

23 commanding attendance at a deposition must
24 state the method for recording the testimony.
25 **(C)** *Combining or Separating a Command to*
26 *Produce or to Permit Inspection; Specifying*
27 *the Form for Electronically Stored*
28 *Information*. A command to produce
29 documents, electronically stored information,
30 or tangible things or to permit the inspection
31 of premises may be included in a subpoena
32 commanding attendance at a deposition,
33 hearing, or trial, or may be set out in a
34 separate subpoena. A subpoena may specify
35 the form or forms in which electronically
36 stored information is to be produced.
37 **(D)** *Command to Produce; Included Obligations*.
38 A command in a subpoena to produce
39 documents, electronically stored information,
40 or tangible things requires the responding
41 person ~~party~~ to permit inspection, copying,
42 testing, or sampling of the materials.
43 **(2)** ***Issuing*** ~~***Issued from Which***~~ ***Court.*** A subpoena
44 must issue from the court where the action is
45 pending. ~~as follows:~~

46 ~~**(A)** for attendance at a hearing or trial, from the~~
47 ~~court for the district where the hearing or trial~~
48 ~~is to be held;~~
49 ~~**(B)** for attendance at a deposition, from the court~~
50 ~~for the district where the deposition is to be~~
51 ~~taken; and~~
52 ~~**(C)** for production or inspection, if separate from~~
53 ~~a subpoena commanding a person's~~
54 ~~attendance, from the court for the district~~
55 ~~where the production or inspection is to be~~
56 ~~made.~~
57 **(3)** ***Issued by Whom.*** The clerk must issue a
58 subpoena, signed but otherwise in blank, to a party
59 who requests it. That party must complete it
60 before service. An attorney also may issue and
61 sign a subpoena <u>if the attorney is authorized to</u>
62 <u>practice in the issuing court.</u> ~~as an officer of:~~
63 ~~**(A)** a court in which the attorney is authorized to~~
64 ~~practice; or~~
65 ~~**(B)** a court for a district where a deposition is to~~
66 ~~be taken or production is to be made, if the~~
67 ~~attorney is authorized to practice in the court~~
68 ~~where the action is pending.~~

69 **(4)** ***Notice to Other Parties Before Service.*** If the
70 subpoena commands the production of documents,
71 electronically stored information, or tangible things
72 or the inspection of premises before trial, then
73 before it is served on the person to whom it is
74 directed, a notice and a copy of the subpoena must
75 be served on each party ~~before the subpoena is~~
76 ~~served on the person to whom it is directed~~.
77 **(b) Service.**
78 **(1)** ***By Whom and How; Tendering Fees; ~~Serving a~~***
79 ***~~Copy of Certain Subpoenas~~.*** Any person who is
80 at least 18 years old and not a party may serve a
81 subpoena. Serving a subpoena requires delivering
82 a copy to the named person and, if the subpoena
83 requires that person's attendance, tendering the
84 fees for 1 day's attendance and the mileage
85 allowed by law. Fees and mileage need not be
86 tendered when the subpoena issues on behalf of the
87 United States or any of its officers or agencies. ~~If~~
88 ~~the subpoena commands the production of~~
89 ~~documents, electronically stored information, or~~
90 ~~tangible things or the inspection of premises before~~

91 ~~trial, then before it is served, a notice must be~~

92 ~~served on each party.~~

93 **(2)** ***Service in the United States.*** A subpoena may be

94 served at any place within the United States.

95 ~~Subject to Rule 45(c)(3)(A)(ii), a subpoena may be~~

96 ~~served at any place:~~

97 ~~**(A)** within the district of the issuing court;~~

98 ~~**(B)** outside that district but within 100 miles of~~

99 ~~the place specified for the deposition,~~

100 ~~hearing, trial, production, or inspection;~~

101 ~~**(C)** within the state of the issuing court if a state~~

102 ~~statute or court rule allows service at that~~

103 ~~place of a subpoena issued by a state court of~~

104 ~~general jurisdiction sitting in the place~~

105 ~~specified for the deposition, hearing, trial,~~

106 ~~production, or inspection; or~~

107 ~~**(D)** that the court authorizes on motion and for~~

108 ~~good cause, if a federal statute so provides.~~

109 **(3)** ***Service in a Foreign Country.*** 28 U.S.C. § 1783

110 governs issuing and serving a subpoena directed to

111 a United States national or resident who is in a

112 foreign country.

113 **(4)** ***Proof of Service.*** Proving service, when
114 necessary, requires filing with the issuing court a
115 statement showing the date and manner of service
116 and the names of the persons served. The
117 statement must be certified by the server.

118 **(c)** **Place of compliance.**

119 **(1)** ***For a Trial, Hearing, or Deposition.*** A subpoena
120 may command a person to attend a trial, hearing, or
121 deposition only as follows:

122 **(A)** within 100 miles of where the person resides,
123 is employed, or regularly transacts business in
124 person; or

125 **(B)** within the state where the person resides, is
126 employed, or regularly transacts business in
127 person, if the person

128 **(i)** ~~the person~~ is a party or a party's officer;
129 or

130 **(ii)** ~~the person~~ is commanded to attend a
131 trial and would not incur substantial
132 expense.

133 **(2)** ***For Other Discovery.*** A subpoena may command:

134 **(A)** production of documents, ~~tangible things, or~~
135 electronically stored information, or tangible

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136 things at a place within 100 miles of where
137 the person resides, is employed, or regularly
138 transacts business in person ~~reasonably~~
139 ~~convenient for the person who is commanded~~
140 ~~to produce~~; and
141 **(B)** inspection of premises~~,~~ at the premises to be
142 inspected.
143 **(d)~~(c)~~ Protecting a Person Subject to a Subpoena;**
144 **Enforcement.**
145 **(1)** ***Avoiding Undue Burden or Expense; Sanctions.***
146 A party or attorney responsible for issuing and
147 serving a subpoena must take reasonable steps to
148 avoid imposing undue burden or expense on a
149 person subject to the subpoena. The ~~issuing~~ court
150 for the district where compliance is required ~~under~~
151 ~~Rule 45(c)~~ must enforce this duty and impose an
152 appropriate sanction — which may include lost
153 earnings and reasonable attorney's fees — on a
154 party or attorney who fails to comply.
155 **(2)** ***Command to Produce Materials or Permit***
156 ***Inspection.***
157 **(A)** *Appearance Not Required.* A person
158 commanded to produce documents,

159 electronically stored information, or tangible
160 things, or to permit the inspection of
161 premises, need not appear in person at the
162 place of production or inspection unless also
163 commanded to appear for a deposition,
164 hearing, or trial.

165 **(B)** *Objections*. A person commanded to produce
166 documents or tangible things or to permit
167 inspection may serve on the party or attorney
168 designated in the subpoena a written
169 objection to inspecting, copying, testing, or
170 sampling any or all of the materials or to
171 inspecting the premises — or to producing
172 electronically stored information in the form
173 or forms requested. The objection must be
174 served before the earlier of the time specified
175 for compliance or 14 days after the subpoena
176 is served. If an objection is made, the
177 following rules apply:

178 **(i)** At any time, on notice to the
179 commanded person, the serving party
180 may move the ~~issuing~~ court <u>for the</u>
181 <u>district where compliance is required</u>

182 ~~under Rule 45(c)~~ for an order
183 compelling production or inspection.
184 **(ii)** These acts may be required only as
185 directed in the order, and the order must
186 protect a person who is neither a party
187 nor a party's officer from significant
188 expense resulting from compliance.
189 **(3)** ***Quashing or Modifying a Subpoena.***
190 **(A)** *When Required.* On timely motion, the
191 ~~issuing~~ court for the district where
192 compliance is required ~~under Rule 45(c)~~ must
193 quash or modify a subpoena that:
194 **(i)** fails to allow a reasonable time to
195 comply;
196 **(ii)** requires a person to comply beyond the
197 geographical limits specified in Rule
198 45(c); ~~who is neither a party nor a~~
199 ~~party's officer to travel more than 100~~
200 ~~miles from where that person resides, is~~
201 ~~employed, or regularly transacts~~
202 ~~business in person — except that,~~
203 ~~subject to Rule 45(c)(3)(B)(iii), the~~
204 ~~person may be commanded to attend a~~

205 ~~trial by traveling from any such place~~

206 ~~within the state where the trial is held;~~

207 **(iii)** requires disclosure of privileged or other

208 protected matter, if no exception or

209 waiver applies; or

210 **(iv)** subjects a person to undue burden.

211 **(B)** *When Permitted*. To protect a person subject

212 to or affected by a subpoena, the ~~issuing~~ court

213 for the district where compliance is required

214 ~~under Rule 45(c)~~ may, on motion, quash or

215 modify the subpoena if it requires:

216 **(i)** disclosing a trade secret or other

217 confidential research, development, or

218 commercial information; or

219 **(ii)** disclosing an unretained expert's

220 opinion or information that does not

221 describe specific occurrences in dispute

222 and results from the expert's study that

223 was not requested by a party.~~; or~~

224 ~~**(iii)** a person who is neither a party nor a~~

225 ~~party's officer to incur substantial~~

226 ~~expense to travel more than 100 miles~~

227 ~~to attend trial.~~

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228 **(C)** *Specifying Conditions as an Alternative*. In
229 the circumstances described in Rule
230 45(d~~c~~)(3)(B), the court may, instead of
231 quashing or modifying a subpoena, order
232 appearance or production under specified
233 conditions if the serving party:
234 **(i)** shows a substantial need for the
235 testimony or material that cannot be
236 otherwise met without undue hardship;
237 and
238 **(ii)** ensures that the subpoenaed person will
239 be reasonably compensated.
240 **(e~~d~~) Duties in Responding to a Subpoena.**
241 **(1)** ***Producing Documents or Electronically Stored***
242 ***Information.*** These procedures apply to
243 producing documents or electronically stored
244 information:
245 **(A)** *Documents*. A person responding to a
246 subpoena to produce documents must
247 produce them as they are kept in the ordinary
248 course of business or must organize and label
249 them to correspond to the categories in the
250 demand.

251 **(B)** *Form for Producing Electronically Stored*
252 *Information Not Specified*. If a subpoena
253 does not specify a form for producing
254 electronically stored information, the person
255 responding must produce it in a form or
256 forms in which it is ordinarily maintained or
257 in a reasonably usable form or forms.
258 **(C)** *Electronically Stored Information Produced*
259 *in Only One Form*. The person responding
260 need not produce the same electronically
261 stored information in more than one form.
262 **(D)** *Inaccessible Electronically Stored*
263 *Information*. The person responding need not
264 provide discovery of electronically stored
265 information from sources that the person
266 identifies as not reasonably accessible
267 because of undue burden or cost. On motion
268 to compel discovery or for a protective order,
269 the person responding must show that the
270 information is not reasonably accessible
271 because of undue burden or cost. If that
272 showing is made, the court may nonetheless
273 order discovery from such sources if the

274 requesting party shows good cause,
275 considering the limitations of Rule
276 26(b)(2)(C). The court may specify
277 conditions for the discovery.

278 **(2)** ***Claiming Privilege or Protection.***

279 **(A)** *Information Withheld*. A person withholding
280 subpoenaed information under a claim that it
281 is privileged or subject to protection as trial-
282 preparation material must:

283 **(i)** expressly make the claim; and

284 **(ii)** describe the nature of the withheld
285 documents, communications, or
286 tangible things in a manner that, without
287 revealing information itself privileged
288 or protected, will enable the parties to
289 assess the claim.

290 **(B)** *Information Produced*. If information
291 produced in response to a subpoena is subject
292 to a claim of privilege or of protection as
293 trial-preparation material, the person making
294 the claim may notify any party that received
295 the information of the claim and the basis for
296 it. After being notified, a party must

297 promptly return, sequester, or destroy the
298 specified information and any copies it has;
299 must not use or disclose the information until
300 the claim is resolved; must take reasonable
301 steps to retrieve the information if the party
302 disclosed it before being notified; and may
303 promptly present the information under seal
304 to the court for the district where compliance
305 is required ~~under Rule 45(c)~~ ~~under seal~~ for a
306 determination of the claim. The person who
307 produced the information must preserve the
308 information until the claim is resolved.
309 **(f)** **Transferring a Subpoena-Related Motion.** When the
310 court where compliance is required did not issue the
311 subpoena, it may transfer a motion under this rule to the
312 issuing court if ~~the parties and~~ the person subject to the
313 subpoena consents or if the court finds exceptional
314 circumstances. Then, if the attorney for a person subject
315 to a subpoena is authorized to practice in the court
316 where the motion was made, the attorney may file
317 papers and appear on the motion as an officer of the
318 issuing court. To enforce its order, the issuing court

319 may transfer the order to the court where the motion was

320 made.

321 **(~~g~~e) Contempt.** The court for the district where compliance

322 is required ~~under Rule 45(c)~~ — and also, after a motion

323 is transferred, the issuing court — may hold in contempt

324 a person who, having been served, fails without

325 adequate excuse to obey the subpoena or an order

326 related to it. ~~A nonparty's failure to obey must be~~

327 ~~excused if the subpoena purports to require the nonparty~~

328 ~~to attend or produce at a place outside the limits of Rule~~

329 ~~45(c)(3)(A)(ii).~~

Committee Note

Rule 45 was extensively amended in 1991. The goal of the present amendments is to clarify and simplify the rule. The amendments recognize the court where the action is pending as the issuing court, permit nationwide service of a subpoena, and collect in a new subdivision (c) the previously scattered provisions regarding place of compliance. These changes resolve a conflict that arose after the 1991 amendment about a court's authority to compel a party or party officer to travel long distances to testify at trial; such testimony may now be required only as specified in new Rule 45(c). In addition, the amendments introduce authority in new Rule 45(f) for the court where compliance is required to transfer a subpoena-related motion to the court where the action is pending ~~in exceptional circumstances or~~ on consent ~~by agreement~~ of ~~the parties and~~ the person subject to the subpoena or in exceptional circumstances.

Subdivision (a). This subdivision is amended to provide that a subpoena issues from the court where ~~in which~~ the action is pending. Subdivision (a)(3) specifies that an attorney authorized to practice in that court may issue a subpoena, which is consistent with current practice.

In Rule 45(a)(1)(D), "person" is substituted for "party" because the subpoena may be directed to a nonparty.

Rule 45(a)(4) is added to highlight and slightly modify a notice requirement first included in the rule in 1991. Under the 1991 amendments, Rule 45(b)(1) required prior notice of the service of a "documents only" subpoena to the other parties. Rule 45(b)(1) was clarified in 2007 to specify that this notice must be served before the subpoena is served on the witness.

The Committee has been informed that parties serving subpoenas frequently fail to give the required notice to the other parties. The amendment moves the notice requirement to a new provision in Rule 45(a) and requires that the notice include a copy of the subpoena. The amendments are intended to achieve the original purpose of enabling the other parties to object or to serve a subpoena for additional materials. ~~The amendment also deletes the words "before trial" that appear in the current rule; notice of trial subpoenas for documents is as important as notice of discovery subpoenas.~~

Parties desiring access to information produced in response to the subpoena will need to follow up with the party serving it or the person served to obtain such access. The rule does not limit the court's authority to order notice of receipt of produced materials or access to them. The party serving the subpoena should in any event make reasonable provision for prompt access.

Subdivision (b). The former notice requirement in Rule 45(b)(1) has been moved to new Rule 45(a)(4).

Rule 45(b)(2) is amended to provide that a subpoena may be served at any place within the United States, removing the complexities prescribed in prior versions.

Subdivision (c). Subdivision (c) is new. It collects the various provisions on where compliance can be required and simplifies them. Unlike the prior rule, place of service is not critical to place of compliance. Although Rule 45(a)(1)(A)(iii) permits the subpoena to direct a place of compliance, that place must be selected under Rule 45(c).

Rule 45(c)(1) addresses a subpoena to testify at a trial, hearing, or deposition. Rule 45(c)(1)(A) provides that compliance may be required within 100 miles of where the person subject to the subpoena resides, is employed, or regularly conducts business in person. For parties and party officers, Rule 45(c)(1)(B)(i) provides that

compliance may be required anywhere in the state where the person resides, is employed, or regularly conducts business in person. When an order under Rule 43(a) authorizes testimony from a remote location, the witness can be commanded to testify from any place described in Rule 45(c)(1).

Under Rule 45(c)(1)(B)(ii), nonparty witnesses can be required to travel more than 100 miles within the state where they reside, are employed, or regularly transact ~~conduct~~ business in person only if they would not, as a result, incur "substantial expense." When travel over 100 miles could impose substantial expense on the witness, the party that served the subpoena may pay that expense and the court can ~~could~~ condition enforcement of the subpoena on such payment.

Because Rule 45(c) directs that compliance may be commanded only as it provides, these amendments resolve a split in interpreting Rule 45's provisions for subpoenaing parties and party officers. *Compare In re Vioxx Products Liability Litigation*, 438 F. Supp. 2d 664 (E.D. La. 2006) (finding authority to compel a party officer from New Jersey to testify at trial in New Orleans), with *Johnson v. Big Lots Stores, Inc.*, 251 F.R.D. 213 (E.D. La. 2008) (holding that Rule 45 did not require attendance of plaintiffs at trial in New Orleans when they would have to travel more than 100 miles from outside the state). Rule 45(c)(1)(A) does not authorize a subpoena for trial to require a party or party officer to travel more than 100 miles unless the party or party officer resides, is employed, or regularly transacts ~~conducts~~ business in person in the state.

Depositions of parties, and officers, directors, and managing agents of parties need not involve use of a subpoena. Under Rule 37(d)(1)(A)(i), failure of such a witness whose deposition was properly noticed to appear for the deposition can lead to Rule 37(b) sanctions (including dismissal or default but not contempt) without regard to service of a subpoena and without regard to the geographical limitations on compliance with a subpoena. These amendments do not change that existing law; the courts retain their authority to control the place of party depositions and impose sanctions for failure to appear under Rule 37(b).

For other discovery, Rule 45(c)(2) directs that inspection of premises occur at those premises, and that production of documents, tangible things, and electronically stored information may be commanded to occur at a place within 100 miles of where the person subject to the subpoena resides, is employed, or regularly conducts business in person ~~reasonably convenient for the person commanded to produce~~. Under the current rule, parties often agree that

production, particularly of electronically stored information, be transmitted by electronic means. Such arrangements facilitate discovery, and nothing in these amendments limits the ability of parties to make such arrangements ~~the place of production has not presented difficulties. The provisions on the reasonable place for production are intended to be applied with flexibility, keeping in mind the assurance of Rule 45(d)(1) that undue expense or burden must not be imposed on the person subject to the subpoena~~.

Rule 45(d)(3)(A)(ii) directs the court to quash any subpoena that purports to compel compliance beyond the geographical limits specified in Rule 45(c).

Subdivision (d). Subdivision (d) contains the provisions formerly in subdivision (c). It is revised to recognize the court where the action is pending as the issuing court, and to take account of the addition of Rule 45(c) to specify where compliance with a subpoena is required.

Subdivision (f). Subdivision (f) is new. Under Rules 45(d)(2)(B), 45(d)(3), and 45(e)(2)(B), subpoena-related motions and applications are to be made to the court where compliance is required under Rule 45(c). Rule 45(f) provides authority for that court to transfer the motion to the court where the action is pending. It applies to all motions under this rule, including an application under Rule 45(e)(2)(B) for a privilege determination.

Subpoenas are essential to obtain discovery from nonparties. To protect local nonparties, local resolution of disputes about subpoenas is assured by the limitations of Rule 45(c) and the requirements in Rules 45(d) and (e) that motions be made in the court in which compliance is required under Rule 45(c). But transfer to the court where the action is pending is sometimes warranted. If ~~the parties and~~ the person subject to the subpoena consents to transfer, Rule 45(f) provides that the court where compliance is required may do so.

In the absence of consent, the court may transfer in exceptional circumstances, and the proponent of transfer bears the burden of showing that such circumstances are present. The prime concern should be avoiding burdens on local nonparties subject to subpoenas, and it should not be assumed that the issuing court is in a superior position to resolve subpoena-related motions. In some circumstances, however, transfer may be warranted in order to avoid disrupting the issuing court's management of the underlying litigation, as when that court has already ruled on issues presented by the motion or the same issues are likely to arise in discovery in many districts. Transfer is

appropriate only if such interests outweigh the interests of the nonparty served with the subpoena in obtaining local resolution of the motion. Judges in compliance districts may find it helpful to consult with the judge in the issuing court presiding over the underlying case while addressing subpoena-related motions.

~~A precise definition of "exceptional circumstances" authorizing transfer is not feasible. Generally, if the dispute about the subpoena is focused on issues involved in the underlying action — for example, if these issues have already been presented to the issuing court or bear significantly on its management of the underlying action, or if there is a risk of inconsistent rulings on subpoenas served in multiple districts, or if the issues presented by the subpoena-related motion overlap with the merits of the underlying action — transfer may be warranted. If, on the other hand, the dispute is focused on the burden or expense on the local nonparty, transfer should not occur. The rule contemplates that transfers will be truly rare events.~~

If the motion is transferred, judges are encouraged to permit telecommunications methods to ~~can~~ minimize the burden a transfer imposes on nonparties, if it is necessary for attorneys admitted in the court where the motion is made to appear in the court in which the action is pending. The rule provides that if these attorneys are authorized to practice in the court where the motion is made, they may file papers and appear in the court in which the action is pending in relation to the motion as officers of that court.

After transfer, the court where the action is pending will decide the motion. If the court rules that discovery is not justified, that should end the matter. If the court orders further discovery, it is possible that retransfer may be important to enforce the order. One consequence of failure to obey such an order is contempt, addressed in Rule 45(g). Rule 45(g) and Rule 37(b)(1) are both amended to provide that disobedience of an order enforcing a subpoena after transfer is contempt of the issuing court and the court where compliance is required under Rule 45(c). In some instances, however, there may be a question about whether the issuing court can impose contempt sanctions on a distant nonparty. If such circumstances arise, or if it is better to supervise compliance in the court where compliance ~~it~~ is required, the rule provides authority for retransfer for enforcement. Although changed circumstances may prompt a modification of such an order, it is not expected that the compliance court will reexamine the resolution of the underlying motion.

Subdivision (g). Subdivision (g) carries forward the authority of former subdivision (e) to punish disobedience of subpoenas as contempt. It is amended to make clear that, in the event of transfer of a subpoena-related motion, such disobedience constitutes contempt of both the court where compliance is required under Rule 45(c) and the court where the action is pending. If necessary for effective enforcement, Rule 45(f) authorizes the issuing court to transfer its order after the motion is resolved.

The rule is also amended to clarify that contempt sanctions may be applied to a person who disobeys a subpoena-related order, as well as one who fails entirely to obey a subpoena. In civil litigation, it would be rare for a court to use contempt sanctions without first ordering compliance with a subpoena, and the order might not require all the compliance sought by the subpoena. Often contempt proceedings will be initiated by an order to show cause, and an order to comply or be held in contempt may modify the subpoena's command. Disobedience of such an order may be treated as contempt.

The second sentence of former subdivision (e) is deleted as unnecessary.

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

* * * * *

1 **(b) Failure to Comply with a Court Order.**

2 **(1)** ***Sanctions <u>Sought</u> in the District Where the***

3 ***Deposition Is Taken.*** If the court where the

4 discovery is taken orders a deponent to be sworn or

5 to answer a question and the deponent fails to

6 obey, the failure may be treated as contempt of

7 court. <u>If a deposition-related motion is transferred</u>

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8 to the court where the action is pending, and that

9 court orders a deponent to be sworn or to answer a

10 question and the deponent fails to obey, the failure

11 may be treated as contempt of either the court

12 where the discovery is taken or the court where the

13 action is pending.

14 **(2)** ***Sanctions Sought in the District Where the***

15 ***Action Is Pending.***

* * * * *

Committee Note

Rule 37(b) is amended to conform to amendments made to Rule 45, particularly the addition of Rule 45(f) providing for transfer of a subpoena-related motion to the court where the action is pending. A second sentence is added to Rule 37(b)(1) to deal with contempt of orders entered after such a transfer. The Rule 45(f) transfer provision is explained in the Committee Note to Rule 45.

* * * * *

CHANGES MADE AFTER PUBLICATION AND COMMENT

As described in the Report, the published preliminary draft was modified in several ways after the public comment period. The words "before trial" were restored to the notice provision that was moved to new Rule 45(a)(4). The place of compliance in new Rule 45(c)(2)(A) was changed to a place "within 100 miles of where the person resides, is employed, or regularly conducts business." In new Rule 45(f), the party consent feature was removed, meaning consent of the person subject to the subpoena is sufficient to permit transfer to the issuing court. In addition, style changes were made after consultation with the Standing Committee's Style Consultant. In the Committee Note, clarifications were made in response to points raised during the public comment period.

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

Agenda E-19 (Appendix D)
Rules
September 2012

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CHAIR

PETER G. McCABE
SECRETARY

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APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

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CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

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

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

DATE: May 17, 2012

RE: Report of the Advisory Committee on Criminal Rules

I. Introduction

The Advisory Committee on the Federal Rules of Criminal Procedure ("the Committee") met on April 22-23, 2012, in San Francisco, California, and took action on a number of proposals.

* * * * *

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II. Action Items

A. Rule 11 (advice re immigration consequences of guilty plea)

Following publication, the Advisory Committee decided to maintain the language of the proposed amendment to Rule 11 as drafted, but adopted several changes in the Committee Note that respond to issues raised in the public comments. The Advisory Committee now recommends that the Standing Committee approve the amendment to Rule 11 and transmit it to the Judicial Conference.

1. The purpose of the proposed amendment

In light of the Supreme Court's ineffective assistance of counsel decision in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), the Advisory Committee concluded that a judicial warning regarding possible immigration consequences should be required as a uniform practice at the plea allocution. *Padilla* held that a defense attorney's failure to advise the defendant concerning the risk of deportation fell below the objective standard of reasonable professional assistance guaranteed by the Sixth Amendment. The Court stated that in light of changes in immigration law "deportation is an integral part–indeed, sometimes the most important part–of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." 130 S.Ct. at 1480 (footnote omitted). It also noted that "because of its close connection to the criminal process," deportation as a consequence of conviction is "uniquely difficult to classify as either a direct or a collateral consequence" of a plea. *Id*. at 1482. The Committee concluded that the Supreme Court's decision provides an appropriate basis for adding advice concerning immigration consequences to the required colloquy under Rule 11, leaving the question whether to provide advice concerning other adverse collateral consequences to the discretion of the district courts.

In the Committee's initial deliberations, a minority of members opposed the amendment on the grounds that it was unwise and unnecessary to add further requirements to the already lengthy plea colloquy now required under Rule 11. *Padilla* was based solely on the constitutional duty of defense counsel, and it did not speak to the duty of judges. The list of matters that must be addressed in the plea colloquy is already lengthy, and these members expressed concern that adding immigration consequences would open the door to future amendments. This could eventually turn a plea colloquy into a minefield for a judge and expand litigation challenges to pleas despite the rule's harmless error provision.

A majority of the Committee concluded, however, that deportation is qualitatively different from the other collateral consequences that may follow from a guilty plea, and it therefore warrants inclusion on the list of matters that must be discussed during a plea colloquy. Although *Padilla* speaks only to the duty of defense counsel to warn a defendant about immigration consequences, the Supreme Court's recognition of the distinctive nature of such consequences also supports requiring a judicial warning. This would be consistent with the practice of the Department of Justice, which now advises prosecutors to include a discussion of those consequences in plea agreements. Thus, judges should warn a defendant who pleads guilty that the plea could implicate his or her right to remain in the United States or to become a U.S. citizen.

The proposed amendment mandates a generic warning rather than specific advice concerning the defendant's individual situation. The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without first attempting to determine the defendant's citizenship. In drafting its proposal, the Committee was cognizant of the complexity of immigration law, which likely will be subject to legislative changes. Accordingly, the Committee's proposal uses non-technical language that is designed to be understood by lay persons and will avoid the need to amend the rule if there are legislative changes altering more specific terms of art.

2. <u>The public comments</u>

Six written comments were received. Only one comment disagreed with the decision to add advice concerning possible immigration consequences to the plea colloquy; it recommended that the amendment be withdrawn or at least substantially narrowed.

The remaining comments–which came from immigration specialists, a federal defender, and the National Association of Criminal Defense Lawyers–agreed with the concept of amending Rule 11 to add advice concerning immigration consequences. Two comments supported the amendment as published. Two other comments suggested modifications to the Committee Note. The final comment, from the National Association of Criminal Defense Lawyers, urged the Advisory Committee to withdraw the amendment and pursue a different strategy, placing the burden of providing warnings and advice at the plea colloquy upon the prosecution, rather than the court.

3. The Advisory Committee's recommendation

After publication, the Rule 11 Subcommittee and the Advisory Committee both reconsidered the foundational question whether Rule 11 should be amended to require advice concerning immigration consequences in all plea colloquies. Members considered prior concerns about lengthening the plea colloquy, as well as the argument that not all defendants are aliens and conscientious judges do not need a rule to require them to give warnings in appropriate cases. After hearing the report of the Rule 11 Subcommittee and full discussion, the Advisory Committee reiterated its support for adding immigration consequences to the plea colloquy. A majority of the Committee agreed that the immigration consequences covered by the proposed amendment–removal from the U.S. and denial of citizenship and reentry–are qualitatively different than other collateral consequences, and that they warrant inclusion in the plea colloquy. As the Supreme Court noted in *Padilla*, "deportation is an integral part–indeed, sometimes the most important part–of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." 130 S.Ct. at 1480 (footnote omitted). Although the Supreme Court's decision does not require the proposed amendment, it does provide an appropriate basis for distinguishing advice concerning immigration consequences from other collateral consequences.

There was also support for the requirement that the court provide the general statement of possible immigration consequences in every case. Members emphasized that immigration consequences are an issue in nearly one half of all criminal cases. In fiscal year 2011, 48% of defendants for whom sentencing data were available were non-citizens.[1] Moreover, as emphasized in several of the public comments, attempts to determine the immigration status of individual defendants could raise self-incrimination issues.

The Advisory Committee accepted the Rule 11 Subcommittee's recommendation to make several small modifications in the Committee Note to address concerns raised in the public comments. The changes emphasize that the court should provide only a general statement that there may be immigration consequences of conviction, and not seek to give specific advice concerning a defendant's individual situation. The National Immigration Project argued persuasively that it is neither appropriate nor feasible for judges to give individualized advice, and it provided examples of cases in which courts gave erroneous advice. See 11-CR-005 at 2 n.2. Moreover, attempts to elicit information that would provide the basis for individual advice could raise self-incrimination concerns.

---

[1]U. S. Sentencing Commission, 2011 Sourcebook of Federal Sentencing Statistics, Table 9, *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/Table09.pdf .

The Committee Note as published and the changes recommended by the Subcommittee are shown below:

> **Subdivision (b)(1)(O).** The amendment requires the court to include a general statement ~~concerning the potential~~ that there may be immigration consequences of conviction in the advice provided to the defendant before the court accepts a plea of guilty or nolo contendere.
>
> For a defendant who is not a citizen of the United States, a criminal conviction may lead to removal, exclusion, and the inability to become a citizen. In *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), the Supreme Court held that a defense attorney's failure to advise the defendant concerning the risk of deportation fell below the objective standard of reasonable professional assistance guaranteed by the Sixth Amendment.
>
> The amendment mandates a generic warning~~, and does not require the judge to provide~~ not specific advice concerning the defendant's individual situation. Judges in many districts already include a warning about immigration consequences in the plea colloquy, and the amendment adopts this practice as good policy. The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without ~~first~~ attempting to determine the defendant's citizenship.

By a vote of nine in favor and three opposed, the Advisory Committee agreed to adopt the proposed changes in the Committee Note, and to transmit the proposed amendment to the Standing Committee with the recommendation that it be approved and sent to the Judicial Conference.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 11 be approved as amended and transmitted to the Judicial Conference.

Rule 11. Pleas.

* * * * *

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) ***Advising and Questioning the Defendant***. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

* * * * *

(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a); ~~and~~

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence; and~~.~~

(O) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

* * * * *

Committee Note

Subdivision (b)(1)(O). The amendment requires the court to include a general statement that there may be immigration consequences of conviction in the advice provided to the defendant before the court accepts a plea of guilty or nolo contendere.

For a defendant who is not a citizen of the United States, a criminal conviction may lead to removal, exclusion, and the inability to become a citizen. In *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), the Supreme Court held that a defense attorney's failure to advise the defendant concerning the risk of deportation fell below the objective standard of reasonable professional assistance guaranteed by the Sixth Amendment.

The amendment mandates a generic warning, not specific advice concerning the defendant's individual situation. Judges in many districts already include a warning about immigration consequences in the plea colloquy, and the amendment adopts this practice as good policy. The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without attempting to determine the defendant's citizenship.

CHANGES MADE AFTER PUBLICATION AND COMMENT

The Committee Note was revised to make it clear that the court is to give a general statement that there may be immigration consequences, not specific advice concerning a defendant's individual situation.

* * * * *

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

Agenda E-19 (Appendix E)
Rules
September 2012

MARK R. KRAVITZ
CHAIR

PETER G. McCABE
SECRETARY

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REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

TO: Honorable Mark R. Kravitz, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Sidney A. Fitzwater, Chair
Advisory Committee on Evidence Rules

DATE: May 3, 2012

RE: Report of the Advisory Committee on Evidence Rules

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on April 4, 2012 in Dallas at the SMU Dedman School of Law.

The Committee seeks final Standing Committee approval and transmittal to the Judicial Conference of the United States of one proposal: an amendment to Evidence Rule 803(10)—the hearsay exception for absence of public record or entry—to address a constitutional infirmity in light of the Supreme Court's decision in *Melendez-Diaz v. Massachusetts*.

* * * * *

II. Action Items

A. Proposed Amendment to Evidence Rule 803(10)

At its June 2011 meeting, the Standing Committee approved releasing for public comment an amendment to Rule 803(10). Rule 803(10) currently allows the government to prove in a criminal case, through the introduction of a certificate, that a public record does not exist. Under *Melendez-Diaz v. Massachusetts* such a certificate would be "testimonial" within the meaning of the Confrontation Clause, as construed by *Crawford v. Washington*. Therefore, the admission of such certificates (in lieu of testimony) violates the accused's right of confrontation. The proposed amendment to Rule 803(10) addresses the Confrontation Clause problem in the current rule by adding a "notice-and-demand" procedure. In *Melendez-Diaz* the Court stated that the use of a notice-and-demand procedure (and the defendant's failure to demand production under that procedure) would cure an otherwise unconstitutional use of testimonial certificates. As amended, Rule 803(10) would permit a prosecutor who intends to offer a certification to provide written notice of that intent at least 14 days before trial. If the defendant does not object in writing within 7 days of receiving the notice, the prosecutor would be permitted to introduce a certification that a diligent search failed to disclose a public record or statement rather than produce a witness to so testify. The amended Rule would allow the court to set a different time for the notice or the objection.

At its Spring 2012 meeting, the Committee considered the two comments received on the proposed amendment. The Magistrate Judges' Association favors the proposal. The National Association of Criminal Defense Lawyers ("NACDL") agrees in principle with a notice-and-demand solution, but it has several objections to the proposed amendment. The Committee unanimously voted to amend Rule 803(10) by adopting the language published for public comment, and to transmit the proposed rule to the Standing Committee with the recommendation that it be approved and sent to the Judicial Conference. The proposed Rule and Committee Note are set out in an appendix to this Report.

Recommendation: The Committee recommends that the proposed amendment to Evidence Rule 803(10) be approved and transmitted to the Judicial Conference of the United States.

* * * * *

Appendix to Report to the Standing Committee from the Advisory Committee on Evidence Rules

June 2012

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 803(10)

1 **Rule 803. Exceptions to the Rule Against Hearsay —**
2 **Regardless of Whether the Declarant Is Available as a**
3 **Witness**
4
5 The following are not excluded by the rule against
6 hearsay, regardless of whether the declarant is available as a
7 witness:
8 * * * * *
9 **(10)** ***Absence of a Public Record.*** Testimony — or
10 a certification under Rule 902 — that a diligent search failed
11 to disclose a public record or statement if ~~the testimony or~~
12 ~~certification is admitted to prove that~~:
13 (A) the testimony or certification is admitted
14 to prove that
15 (~~A~~ i) the record or statement does
16 not exist; or

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17 (~~B~~ ii) a matter did not occur or exist,

18 if a public office regularly kept a

19 record or statement for a matter of that

20 kind; and

21 (B) in a criminal case, a prosecutor who

22 intends to offer a certification provides written

23 notice of that intent at least 14 days before

24 trial, and the defendant does not object in

25 writing within 7 days of receiving the notice

26 — unless the court sets a different time for

27 the notice or the objection.

28 * * * * *

Committee Note

Rule 803(10) has been amended in response to *Melendez-Diaz v. Massachusetts,* 557 U.S. 305 (2009). The *Melendez-Diaz* Court declared that a testimonial certificate could be admitted if the accused is given advance notice and does not timely demand the presence of the official who prepared the certificate. The amendment incorporates, with minor variations, a "notice-and-demand" procedure that was approved by the *Melendez-Diaz* Court. See Tex. Code Crim. P. Ann., art. 38.41.

CHANGES MADE AFTER PUBLICATION AND COMMENT

No changes were made to the proposed amendment or Committee Note as they were issued for public comment.

* * * * *

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Cambridge, MA
January 3-4, 2013

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AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
January 3-4, 2013

1. Welcome and Opening Remarks

A. Welcome and opening remarks by Chair

B. Report on September 2012 Judicial Conference session

C. Transmission of Judicial Conference-approved proposed rules amendments to Supreme Court

2. ACTION – Approving Minutes of June 2012 Committee Meeting

3. Report of the Advisory Committee on Civil Rules – Judge David G. Campbell

A. **ACTION** – Approving publishing for public comment proposed amendments to Rules 37(e), 6(d), and 55(c)

B. **ACTION** – Approving and transmitting to the Judicial Conference a proposed amendment to Rule 77(c)(1)

C. 2010 Duke Conference rules drafts

D. Rule 84 forms

E. Rule 23 subcommittee work

F. Minutes and other informational items

4. Report of the Advisory Committee on Evidence Rules – Chief Judge Sidney A. Fitzwater

A. Symposium on Rule 502

B. Rules published for public comment

C. Minutes and other informational items

5. Panel Discussion – Civil Litigation Reform Initiatives

6. Report of the Advisory Committee on Appellate Rules – Judge Steven M. Colloton

A. Rules published for public comment

B. Minutes and other informational items

7. Report of the Advisory Committee on Bankruptcy Rules – Judge Eugene R. Wedoff

A. Revised bankruptcy forms for individual debtor cases

B. Mini-conference on home mortgage forms and related rules

C. Development of an official form for chapter 13 plans and related rule amendments

D. Electronic signatures of non-CM/ECF users

E. Rules published for public comment

F. Minutes and other informational items

8. Report of the Advisory Committee on Criminal Rules – Judge Reena Raggi

A. Continued work on proposals to amend Rules 12 and 34

B. Rules published for public comment

C. Minutes and other informational items

9. Report of the Administrative Office

A. Proposals to simplify the rulemaking cycle and separate amendment packages

B. Legislative Report

10. Next meeting in Washington, D.C. on June 3-4, 2013

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Committee on Rules of Practice and Procedure

To carry on a continuous study of the operation and effect of the general rules of practice and procedure.

Members	Position	District/Circuit	Start Date	End Date
Jeffrey S. Sutton Chair	C	Sixth Circuit	2012	2015
James Cole*	DOJ	Washington, DC	----	Open
Dean C. Colson	ESQ	Florida	2009	2015
Roy T. Englert, Jr.	ESQ	Washington, DC	2010	2013
Gregory G. Garre	ESQ	Washington, DC	2011	2014
Neil M. Gorsuch	C	Tenth Circuit	2010	2013
Marilyn L. Huff	D	California (Southern)	2007	2013
Wallace B. Jefferson	CJUST	Texas	2010	2013
David F. Levi	ACAD	North Carolina	2009	2015
Patrick J. Schiltz	D	Minnesota	2010	2013
Larry A. Thompson	ESQ	Georgia	2011	2014
Richard C. Wesley	C	Second Circuit	2011	2014
Diane P. Wood	C	Seventh Circuit	2007	2013
Daniel Coquillette Reporter	ACAD	Massachusetts	1985	Open
Secretary and Principal Staff:	Jonathan C. Rose	202-502-1820		

* Ex-officio

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Liaison for the Advisory Committee on Bankruptcy Rules		***(Standing)***
Liaison for the Advisory Committee on Civil Rules	**Judge Arthur I. Harris**	***(Bankruptcy)***
Liaison for the Advisory Committee on Civil Rules	**Judge Diane P. Wood**	***(Standing)***
Liaison for the Advisory Committee on Criminal Rules	**Judge Marilyn L. Huff**	***(Standing)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Judith H. Wizmur**	***(Bankruptcy)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Paul S. Diamond**	***(Civil)***
Liaison for the Advisory Committee on Evidence Rules	**Judge John F. Keenan**	***(Criminal)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Richard C. Wesley**	***(Standing)***

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TAB 1

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TAB 1A

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE *Nov. 5, 2012*
Meeting of June 11-12, 2012
Washington, D.C.
Draft Minutes

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ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C., on Monday and Tuesday, June 11 and 12, 2012. The following members were present:

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

Deputy Attorney General James M. Cole was unable to attend. The Department of Justice was represented throughout the meeting by Elizabeth J. Shapiro, Esquire, and at various points by Kathleen A. Felton, Esquire; H. Thomas Byron III, Esquire; Jonathan J. Wroblewski, Esquire; Ted Hirt, Esquire; and J. Christopher Kohn, Esquire.

Judge Jeremy D. Fogel, Director of the Federal Judicial Center, participated in the meeting, as did the committee's consultants – Professor Geoffrey C. Hazard, Jr.; Professor R. Joseph Kimble; and Joseph F. Spaniol, Jr., Esquire.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Peter G. McCabe	The committee's secretary
Jonathan C. Rose	Chief, Rules Committee Support Office
Benjamin J. Robinson	Deputy Chief, Rules Committee Support Office
Julie Wilson	Attorney, Rules Committee Support Office
Andrea L. Kuperman	Rules law clerk to Judge Kravitz
Joe Cecil	Research Division, Federal Judicial Center

Also attending were Administrative Office attorneys James H. Wannamaker III, Bridget M. Healy, and Holly T. Sellers, and the judiciary's Supreme Court fellows.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
- Judge Jeffrey S. Sutton, Chair
- Professor Catherine T. Struve, Reporter

Advisory Committee on Bankruptcy Rules —
- Judge Eugene R. Wedoff, Chair
- Professor S. Elizabeth Gibson, Reporter
- Professor Troy A. McKenzie, Associate Reporter

Advisory Committee on Civil Rules —
- Judge David G. Campbell, Chair
- Professor Edward H. Cooper, Reporter
- Professor Richard L. Marcus, Associate Reporter

Advisory Committee on Criminal Rules —
- Judge Reena Raggi, Chair
- Professor Sara Sun Beale, Reporter

Advisory Committee on Evidence Rules —
- Judge Sidney A. Fitzwater, Chair
- Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Kravitz reported that he would retire as committee chair on September 30, 2012, and the Chief Justice had nominated Judge Sutton to succeed him. He congratulated Judge Sutton and thanked the Chief Justice for making an excellent selection.

Judge Kravitz reported that the Supreme Court in April 2012 had adopted the proposed amendments to the bankruptcy and criminal rules recommended by the Conference at its September 2011 session. The changes will take effect by operation of law on December 1, 2011, unless Congress acts to reject, modify, or defer them.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Robinson reported that there had been no further significant legislative action related to electronic discovery since the committee's January 2012 meeting.

He said that the House Judiciary Committee had held a hearing on the Class Action Fairness Act, at which no calls were made either for an overhaul of FED. R. CIV. P. 23 (class actions) or for dramatic changes to the rule. One witness, though, criticized the continuing reliance on cy près in class actions.

Mr. Robinson said that there had been no recent action on legislation addressing sunshine in regulatory decrees and settlements. He suggested that legislative attention now seemed to focus more on the criminal rules. A hearing, he reported, had been held before the Senate Judiciary Committee in June 2012 addressing the obligations of prosecutors to disclose exculpatory materials to the defense. At the hearing Senator Murkowski summarized her legislation on the subject, introduced in the wake of the prosecution of the late Senator Stevens and the ultimate dismissal of the criminal case.

Mr. Robinson reported that Judge Raggi had submitted a letter in connection with the hearing, in which she set out in broad terms the extensive work of the Advisory Committee on Criminal Rules over the last decade on FED. R. CRIM. P. 16 (discovery and inspection in criminal cases). The letter, he said, had a 909-page attachment describing that work in detail. In addition, Carol Brook, the federal defender for the Northern District of Illinois and a member of the advisory committee, testified at the hearing. He added that the legislators and witnesses appeared to agree that there were problems with non-disclosure of *Brady* materials that should be addressed, but most concluded that the pending legislation did not offer the right solution to the problems.

He reported that Senator Leahy had introduced legislation underscoring the nation's obligations under article 36 of the Vienna Convention to provide consular notification when foreign nationals are arrested. The legislation, he said, had been added to a State Department appropriations bill. He pointed out that language had been removed from the bill that would have duplicated the substance of proposed amendments to FED. R. CRIM. P. 5 and 58. The committee report accompanying the bill, moreover, encouraged the ongoing work of the rules committees and the Uniform Law Commission in facilitating compliance with the Vienna Convention by federal, state, and local law-enforcement officials. Mr. Robinson thanked the Judicial Conference's Federal-State Jurisdiction Committee for monitoring the legislation and informing the Senate of the activities of the rules committees.

He reported that the House Judiciary Committee had favorably reported out legislation to require bankruptcy asbestos trusts to report claimant filing information to the bankruptcy courts on a quarterly basis. The substance of the legislation, he noted, had previously been proposed as an amendment to the bankruptcy rules, but was not adopted by the Advisory Committee on Bankruptcy Rules. He added that the legislation would continue to be monitored.

Mr. Robinson noted that Magistrate Judge Paul W. Grimm, a member of the Advisory Committee on Civil Rules, had testified at the Senate hearing on his nomination to a district judgeship on the U.S. District Court for the District of Maryland. In addition, a Senate vote was expected shortly to confirm the nomination of Justice Andrew D. Hurwitz, a recent alumnus of the Advisory Committee on Evidence Rules, to a judgeship on the U.S. Court of Appeals for the Ninth Circuit.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of the last meeting, held on January 5 and 6, 2012.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Sutton and Professor Struve presented the report of the advisory committee, as set forth in Judge Sutton's memorandum and attachments of May 8, 2012 (Agenda Item 7).

Amendments for Final Approval

FED. R. APP. P. 13, 14, 24(b)

Judge Sutton reported that 26 U.S.C. § 7482(a)(2), enacted in 1986, authorizes permissive interlocutory appeals from the United States Tax Court to the courts of appeals. The Federal Rules of Appellate Procedure, however, were never amended to reflect this avenue for appellate review.

The proposed changes to FED. R. APP. P. 13 (review of a Tax Court decision) and FED. R. APP. P. 14 (applicability of other appellate rules to review of a Tax Court decision) would remedy this omission. The proposed change to FED. R. APP. P. 24(b) (leave to proceed in forma pauperis) would clarify the rule by recognizing that the Tax Court is not an administrative agency.

Judge Sutton reported that the advisory committee had consulted closely with the Tax Court and the Tax Division of the Department of Justice in developing the proposals. He added that no public comments had been received and no changes made in the proposals following publication.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

FED. R. APP. P. 28 and 28.1(c)

Judge Sutton explained that the proposed change to FED. R. APP. P. 28(a) (appellant's brief) would revise the list of the required contents of an appellant's brief by combining paragraphs 28(a)(6) and 28(a)(7). Paragraph (a)(6) now requires a statement of the case, and (a)(7) a statement of the facts. The new, combined provision, numbered Rule 28(a)(6), would require "a concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record (see Rule 28(e))." Conforming changes would be made in Rule 28(b), governing appellees' briefs, and Rule 28.1(c), governing briefs in cross-appeals.

Judge Sutton pointed out that most lawyers will choose to present the factual and procedural history of a case chronologically. The revised rule, though, gives them the flexibility to follow a different order. In addition, the committee note specifies that a statement of the case may include subheadings, particularly to highlight the rulings presented for review.

He reported that the proposed amendments had attracted six public comments, four of them favorable. Some comments expressed concern that deleting the current rule's reference to "the nature of the case, the course of proceedings, and the disposition below" might lead some to conclude that the procedural history of a case may no longer be included in the statement of the case. Therefore, after publication, the committee inserted into proposed Rule 28(a)(6)'s statement of the case the phrase "describing the relevant procedural history." The committee note was also modified to reflect the addition. He noted, too, that the Supreme Court's rule – which similarly requires a single, combined statement – appears to have worked well.

A member noted that a prominent judge had argued in favor of maintaining separate statements of the case and of the facts, predicting that combined statements will require judges to comb through a great deal of detail to find the key procedural steps in a case – the pertinent rulings made by the lower court. She suggested that the judge's concern might be addressed by requiring that the combined statement begin with the ruling below.

Judge Sutton said that the committee note contemplates that approach, emphasizing that lawyers are given flexibility in presenting their statements. Most, he said, will state the facts first and then the issues for review. He suggested that the judge would have been pleased with simply reversing the order of current paragraphs (a)(6) and (a)(7) to set out the statement of facts first, followed by the statement of the case. Professor Struve added that a circuit could have a local rule that specifies a particular order of subheadings.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

FORM 4

Judge Sutton explained that Questions 10 and 11 on the current version of Form 4 (affidavit accompanying a motion for permission to appeal in forma pauperis) require an IFP applicant to provide the details of all payments made to an attorney or other person for services in connection with the case. The questions, he said, ask for more information than needed to make an IFP determination. In addition, some have argued that the form's disclosures implicate the attorney-client privilege. But, he said, research shows that the payment information is very unlikely to be subject to the privilege. Sometimes, though, it might constitute protected work product.

The proposed amendments, he pointed out, combine the two questions into one. The new question asks broadly whether the applicant has spent, or will spend, any money for expenses or attorney fees in connection with the lawsuit – and if so, how much. Only

one public comment was received, which proposed an additional modification to the form to deal with the Prison Litigation Reform Act. The committee, he said, decided not to incorporate the suggestion into the current amendment, but to add the matter to its study agenda as a separate item.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

Amendments for Publication

FED. R. APP. P. 6

Professor Struve noted that the advisory committee was proposing several amendments to FED. R. APP. P. 6 (appeals in bankruptcy cases from a district court or bankruptcy appellate panel to a court of appeals). The modifications dovetail with the simultaneous amendments being proposed to Part VIII of the Federal Rules of Bankruptcy Procedure, which govern appeals from a bankruptcy court to a district court or bankruptcy appellate panel.

Revised FED. R. APP. P. 6 would update the rule's cross-references to the new, renumbered Part VIII bankruptcy rules. New subdivision 6(c) will govern permissive direct appeals from a bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2), enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. It specifies that the record on a direct appeal from a bankruptcy court will be governed by FED. R. BANKR. P. 8009 (record on appeal and sealed documents) and FED. R. BANKR. P. 8010 (completing and transmitting the record). New Rule 6(c) takes a different approach from Rule 6(b), where the record on appeal from a district court or bankruptcy appellate panel is essentially based upon the record in the mid-level appeal to the district court or panel.

She noted that proposed new Bankruptcy Rule 8010(b) deals with transmitting the record from the bankruptcy court. It specifies that the bankruptcy clerk must transmit to the clerk of the court where an appeal is pending "either the record or a notice that the record is available electronically."

In the proposed amendments to FED. R. APP. P. 6(b)(2)(C), she said, the clerk of the district court or bankruptcy appellate panel must number the documents constituting the record and "promptly make it available." The amended appellate rule, she said, is very flexible and works well with the revised Part VIII bankruptcy rules. It allows the clerk to make the record available either in paper form or electronically.

The committee without objection by voice vote approved the proposed amendments for publication.

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Informational Items

Judge Sutton reported that he had sent a letter to each chief circuit judge explaining that the advisory committee had decided to take no action at the present time to amend FED. R. APP. P. 29 (amicus briefs) to treat federally recognized Native American tribes the same as states. The proposal would allow tribes to file amicus briefs as of right and exempt them from the rule's authorship-and-funding disclosure requirement. The committee, he said, had informed the chief judges that the issue warrants serious consideration, will be maintained on the committee's agenda, and will be revisited in five years.

He noted that the advisory committee had removed from its agenda an item providing for introductions in briefs. Many of the best practitioners, he said, currently include introductions in their briefs to lay out the key themes of their argument. The committee's proposed amendment to FED. R. APP. P. 28(a)(6), he said, was sufficiently flexible to permit inclusion of an introduction as part of a brief's statement of the case. Moreover, it would be difficult to specify how an introduction differs from the statement of the issues presented for review in FED. R. APP. P. 28(a)(5).

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Wedoff and Professor Gibson presented the report of the advisory committee, as set forth in Judge Wedoff's memorandum and attachments of May 14, 2012 (Agenda Item 5).

Judge Wedoff noted that the advisory committee had 14 action items to present, six of them for final approval by the Judicial Conference and eight for publication. He suggested that the most important were the amendments dealing with the Supreme Court's decision in *Stern v. Marshall*, the revision of the Part VIII bankruptcy appellate rules, and the modernization of the bankruptcy forms.

Amendments for Final Approval

FED. R. BANKR. P. 1007(b)(7) and 5009(b) and 4004(c)(1)

Judge Wedoff explained that the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 has required virtually all individual debtors to complete a personal course in financial management as a pre-condition for receiving a discharge. He noted that FED. R. BANKR. P. 1007(b)(7) (required schedules and statements) and 5009(b) (case closing) implement the statute by requiring individual debtors to file an official form

(Official Form 23) certifying that they completed the course before filing their petition. FED. R. BANKR. P. 1007(c) imposes deadlines for filing the certification. In Chapter 7 cases, for example, the debtor must file it within 60 days after the first date set for the meeting of creditors under 11 U.S.C. § 341.

If the debtor has not filed the form within 45 days after the first meeting of creditors, FED. R. BANKR. P. 5009(b) instructs the bankruptcy clerk to warn the debtor that the case will be closed without a discharge unless the certification is filed within Rule 1007's time limits. FED. R. BANKR. P. 4004(c) then specifies that the court may not grant a discharge if the debtor has not filed the certificate.

Judge Wedoff reported that the advisory committee recommended amending FED. R. BANKR. P. 1007(b) to allow the provider of the financial-management course to notify the court directly that the debtor has completed the course. This action would relieve the debtor of the obligation to file Official Form 23. FED. R. BANKR. P. 5009(b) would be amended to require the bankruptcy clerk to send the warning notice only if: (1) the debtor has not filed the certification; and (2) the course provider has not notified the court that the debtor has completed the course.

A conforming amendment to FED. R. BANKR. P. 4004(c)(1) (grant of discharge) specifies that the court does not have to deny a discharge if the debtor has been relieved of the duty to file the certification. In addition, language improvements would be made in the rule. Paragraph (c)(1) currently instructs a court to grant a discharge promptly <u>unless</u> certain acts have occurred. The amendment reformulates the text to instruct the court affirmatively <u>not</u> to grant a discharge if those acts have occurred.

Section 524(m) of the Bankruptcy Code, added in 2005, specifies that when a debtor files a reaffirmation agreement, the court must determine whether the statutory presumption that the agreement is an undue hardship for the debtor has been rebutted, *i.e.,* by finding that the debtor is apparently able to make payments under the agreement. A judge needs to make that determination before a discharge is granted. Therefore, FED. R. BANKR. P. 4004(c)(1)(K) tells the court to delay the discharge until the judge considers the debtor's ability to make the payments.

The proposed amendment to FED. R. BANKR. P. 4004(c)(1)(K) would make it clear that the rule's prohibition on entering a discharge due to a presumption of undue hardship ends when the presumption expires or the court concludes a hearing on the presumption. As a result, there would be no delay if the judge has already ruled on the matter.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference. The proposed amendments to FED. R. BANKR. P. 4004(c)(1) were approved without publication.

FED. R. BANKR. P. 9006(d), 9013, and 9014

Judge Wedoff noted that FED. R. BANKR. P. 9006 is entitled "computing and extending time," but it also specifies the default time for filing motions and affidavits in response to motions. Unlike FED. R. CIV. P. 6 (computing and extending time; time for motion papers), the civil rules counterpart on which it is based, FED. R. BANKR. P. 9006 does not indicate by its title that it also addresses time periods for motions. Nor is it followed immediately by another rule that addresses the form of motions, as the civil rules do. FED. R. CIV. P. 7 (pleadings, motions, and other papers) specifies the pleadings allowed and the form of motions and other papers.

The advisory committee, he said, was proposing amendments to highlight Rule 9006(d). First, the rule's title would be expanded to add a reference to "time for motion papers." Second, cross-references to Rule 9006(d) would be added to both FED. R. BANKR. P. 9013 (form and service of motions) and FED. R. BANKR. P. 9014 (contested matters) to specify that motions must be filed "within the time determined under FED. R. BANKR. P. 9006(d)."

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

OFFICIAL FORM 7

Judge Wedoff explained that Official Form 7 (statement of financial affairs) is a lengthy form that details many of the debtor's financial transactions. It makes frequent references to "insiders." The current definition of "insider" on the form refers to any owner of 5% of more of the voting or equity securities of a corporate debtor. That definition, though, has no basis in law, and it is not clear why it was adopted. The advisory committee would replace it with the Bankruptcy Code's definition of "insider," which includes any "person in control" of a corporate debtor.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

Amendments for Final Approval Without Publication

OFFICIAL FORMS 9A-I and 21

Professor McKenzie noted that there are several variations of Official Form 9 (notice of a bankruptcy filing, meeting of creditor, and deadlines), based on the nature of the debtor and the chapter of the Bankruptcy Code under which a case is filed. Form 9 is directed at creditors, notifying them that a bankruptcy case has been filed and informing

them of upcoming case events and what steps they need to take. The form includes identifying information about the debtor that allows recipients of the notice to determine whether they are in fact a creditor of the debtor. In the case of individual debtors, the identifying information includes the debtor's social security number.

Debtors are required to provide their social security numbers to the bankruptcy clerk on Official Form 21 (statement of social security number). That form is submitted separately and not included in the court's public electronic records. The social security number is revealed to creditors on their personal copies of Form 9 purely for identification purposes, but only a redacted version of Form 9 is included in the case file.

The Court Administration and Case Management Committee expressed concern that bankruptcy forms may be mistakenly filed with the courts in ways that publicly reveal debtors' private identifying information. In some cases, creditors may file a copy of their unredacted Form 9 with their proofs of claim without redacting the debtor's social security number. Debtors, moreover, may file Form 21 with other case papers, rather than submit it to the clerk separately.

Professor McKenzie explained that the advisory committee would add prominent warnings on both Form 9 and Form 21 alerting users that the forms should not be filed with the court in a way that makes them publicly available. He pointed out that the advisory committee had made two minor changes in the language of Form 21's warning after the agenda book had been distributed. A corrected version was circulated to the members.

Judge Wedoff reported that the Court Administration and Case Management Committee had suggested that the debtor's full social security number be eliminated entirely from the forms to prevent any problems of inadvertent disclosure. But, he said, the advisory committee was convinced that social security numbers are still needed for some creditors to be able to identify the debtors. The full number, for example, is essential for the Internal Revenue Service. He added, though, that the committee will revisit the matter if the situation changes in the future.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference without publication.

OFFICIAL FORM 10

Professor McKenzie pointed out that the current version of Official Form 10 (proof of claim) contains a requirement at odds with FED. R. BANKR. P. 9010(c) (power of attorney). The form instructs an authorized agent of a creditor filing a proof of claim to attach to the claim a copy of its power of attorney. Rule 9010(c) generally requires an

agent to give evidence of its authority to act on behalf of a creditor in a bankruptcy case by providing a power of attorney. But it does not apply when an agent files a proof of claim.

In addition, Form 10 would be amended to require additional documentation in certain cases. For claims based on an open-end or revolving consumer-credit agreement, the filer of the proof of claim will have to attach the information required by FED. R. BANKR. P. 3001(c)(3)(A) (proof of claim based on open-end or revolving consumer credit agreement), scheduled to take effect on December 1, 2012. If a claim is secured by the debtor's principal residence, the filer will have to attach the Mortgage Proof of Claim Attachment (Official Form 10, Attachment A), required as of December 1, 2011.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference without publication.

Amendments for Publication

FED. R. BANKR. P. 1014(b)

Professor McKenzie explained that Rule 1004(b) (dismissal and change of venue) deals with the procedure when petitions involving the same debtor or related debtors are filed in different districts. The current rule specifies that, upon motion, the court in which the petition is filed first may determine the district or districts in which the cases will proceed. All other courts must stay proceedings in later-filed cases until the first court makes its venue determination, unless the first court orders otherwise. As a result, later cases are stayed by default while the venue question is pending before the first court.

The rule, he said, has been the subject of game playing because it allows an attorney who wants to stay all further proceedings to do so by filing a motion, or threatening to file a motion, in the first case. Therefore, the advisory committee proposal would change the default requirement to state that proceedings in later-filed cases are stayed only on express order of the first court. The change, he said, will prevent disruption of the other cases unless the judge in the first court determines affirmatively that a stay of a related case is needed while he or she makes the venue determination. In addition, the advisory committee made style changes in the rule.

The committee without objection by voice vote approved the proposed amendments for publication.

FED. R. BANKR. P. 7004(e)

Professor McKenzie reported that the proposed amendment to FED. R. BANKR. P. 7004(e) would reduce the amount of time that a summons remains valid after it is issued. Currently, a summons must be served within 14 days after issuance. The proposed amendment to Rule 7004(e) would reduce that time to seven days.

Under the civil rules, a defendant's time to respond to a summons and complaint (30 days) begins when the summons and complaint are actually served. Under the bankruptcy rules, however, the defendant's response time is calculated from the date that the summons is issued.

He noted that concern had been expressed that seven days may be too short a period to effect service. Nevertheless, he said, the advisory committee believed that the time is sufficient and will encourage prompt service after issuance of a summons. He added that bankruptcy service is relatively easy and may be effected anywhere in the United States by first-class mail. Moreover, the necessary paperwork is usually generated by computer.

He added that the bankruptcy system has a strong objective in favor of moving cases quickly. In addition, calculating the time for service from the date of issuance, rather than service, provides clarity because issuance is noted on the court's docket. Finally, he explained that the time for service had traditionally been 10 days in the bankruptcy rules, but was increased to 14 days as a result of the omnibus 2009 time-computation amendments.

The committee without objection by voice vote approved the proposed amendments for publication.

FED. R. BANKR. P. 7008, 7012(b), 7016, 9027, and 9033(a)

Professor McKenzie reported that the advisory committee was recommending publishing proposed amendments to five bankruptcy rules to deal with the recent Supreme Court decision in *Stern v. Marshall,* 564 U.S. ___, 131 S.Ct. 2594 (2011). In *Stern,* the Court held that a non-Article III bankruptcy judge could not enter final judgment on a debtor's state common-law counterclaim against a creditor of the bankruptcy estate. Even though the governing statute, 28 U.S.C. § 157(b), specifies that the counterclaim is a "core proceeding" that a bankruptcy judge may hear and determine with finality, the Court held that it was unconstitutional for Congress to assign final adjudicatory authority over the matter to a bankruptcy judge.

Professor McKenzie noted that the Federal Rules of Bankruptcy Procedure incorporate the statutory distinction between "core" and "non-core" proceedings and recognize that a bankruptcy judge's authority is much more limited in non-core proceedings than in core proceedings. Under the current rules, a party filing a motion has to state whether the proceeding is core or non-core, and a response must do the same.

Since *Stern,* however, a core proceeding under the statute may not be a core proceeding under the Constitution. Therefore, the advisory committee, he said, decided that it was necessary to remove the words "core" and "non-core" from the rules entirely.

Instead, the advisory committee would amend FED. R. BANKR. P. 7016 (pretrial procedures and formulating issues) to make clear that a bankruptcy judge must consider his or her authority to enter final orders and judgment in all adversary proceedings. The judge's decision, moreover, will be informed by the allegations of the parties as to whether the judge has that authority. This broad approach, he said, will allow the law to continue to develop without having to change the rules again in the future.

Judge Wedoff reported that it is unclear since *Stern* whether a bankruptcy judge may enter a final judgment in a preference action or avoidance action. He pointed out that under the proposed amendments, however, there will be no need to distinguish between core and non-core proceedings. Rather, the parties will only have to decide whether they consent to entry of final orders or judgment by the bankruptcy judge. The judge will then decide whether to: (1) hear and determine the proceeding; (2) hear it and issue proposed findings of fact and conclusions of law; or (3) take some other action.

A member commended the advisory committee for an elegant solution to a difficult problem. He suggested that the revised heading to revised Rule 7016 ("procedure") may be too limited.

The committee without objection by voice vote approved the proposed amendments for publication.

FED. R. BANKR. P. 8001-8028

Judge Wedoff explained that the advisory committee's thorough revision of Part VIII of the Federal Rules of Bankruptcy Procedure – the bankruptcy appellate rules – was the result of a multi-year project to bring the rules into closer alignment with the Federal Rules of Appellate Procedure, to make the rules simpler and clearer, and to recognize that bankruptcy documents today are normally filed, served, and transmitted electronically, rather than in paper form.

He thanked Professor Gibson, emphasizing that she deserved enormous credit for having coordinated the huge forms project. He noted that she had immersed herself in all the details of appellate practice, had conducted considerable research, and had drafted a great many documents for the committee. He also thanked James Wannamaker and Bridget Healy, attorneys in the Bankruptcy Judges Division of the Administrative Office, for their dedication and professional assistance to the project. In addition, he expressed the committee's appreciation to Professor Struve, Professor Kimble, and Mr. Spaniol for their incisive and important contributions to the project, often made on very short notice.

He and Professor Gibson proceeded to describe each Part VIII rule not previously presented to the Standing Committee (Rules 8013-8028) and some additional changes made in the rules presented at the January 2012 meeting (Rules 8001-8012).

Fed. R. Bankr. P. 8001

Professor Gibson reported that since the January 2012 Standing Committee meeting, the advisory committee had made two additional changes in Rule 8001 (scope of Part VIII, definition of "BAP," and method of transmitting documents). The draft rule presented in January had included a general definition of the term "appellate court" to mean either the district court or the bankruptcy appellate panel – the court in which the first-level bankruptcy appeal is pending or will be taken. It did not, though, include the court of appeals.

It was suggested at the last meeting that the term is misleading because "appellate court" in common parlance generally refers to the court of appeals. As a result, she said, the advisory committee had eliminated the general definition. Each of the revised rules now refers specifically to the district court or the "BAP." Despite the objections of the style consultants, she added, the advisory committee decided to use the universally recognized abbreviation for a bankruptcy appellate panel and to define BAP in Rule 8001(b).

She said that there was a need to highlight a strong presumption in the revised rule in favor of electronic transmission of documents. Accordingly, revised Rule 8001(c) states specifically that a document must be sent electronically under the Part VIII rules, unless: (1) it is being sent by or to a pro se individual; or (2) a local court's rule permits or requires mailing or other means of delivery. She added that the advisory committee was comfortable with using the term "transmitting."

Fed. R. Bankr. P. 8007

Professor Gibson stated that Rule 8007 (stay pending appeal, bonds, and suspension of proceedings) had been restyled and subheadings added. In addition, the

advisory committee corrected the omission of a reference to the court of appeals in subdivision (c).

A member pointed out that under proposed Rule 8007(b), the showing required for making a motion for relief in the appellate court deals with two situations: (1) where moving first in the bankruptcy court would be impracticable; and (2) where the bankruptcy court has already ruled. But, he said, the Federal Rules of Appellate Procedure cover a third possibility – where a motion was filed below but not ruled on.

Judge Wedoff agreed to revise Rule 8007(b)(2)(B) to require the moving party to state whether the bankruptcy court has ruled on the motion, and, if so, what the reasons were for the ruling.

Fed. R. Bankr. P. 8009

Professor Gibson noted that proposed Rule 8009 (record on appeal and sealed documents) was incorporated by reference in the proposed new FED. R. APP. P. 6(c), which will govern permissive direct appeals from a bankruptcy court to a court of appeals.

Fed. R. Bankr. P. 8010

Professor Gibson reported that the advisory committee had made several changes in Rule 8010 (completing and transmitting the record) since the January 2012 meeting after conferring with clerks of the bankruptcy courts, the clerk of a bankruptcy appellate panel, and Administrative Office staff. She noted that bankruptcy courts generally use recording devices to take the record. If a transcript of a proceeding is ordered, it is produced for the court from the electronic record, usually by a contract service provider.

The rule requires the "reporter" to prepare and file the transcript with the bankruptcy clerk, but there is some question as to the identity of the reporter when a recording device is used. The advisory committee, she said, decided that the "reporter" should be defined in Rule 8010(a) as the person or service that the bankruptcy court designates to transcribe the recording.

In addition, the rule requires reporters to file all documents with the bankruptcy clerk. In the Federal Rules of Appellate Procedure, by contrast, reporters file certain documents in the appellate court and others in the district court. The reporter in a bankruptcy case, though, may not know where an appeal is pending.

12b-006539

Fed. R. Bankr. P. 8011

Professor Gibson reported that a minor typographical error had been corrected in Rule 8011 (filing, service, and signature) since the last Standing Committee meeting.

With regard to proof of service, a member questioned whether affidavits of service still serve a useful purpose in light of the universal use of CM/ECF in the federal courts. He noted that service in virtually all his civil cases is accomplished through CM/ECF, and there is no need to make the parties file an affidavit of service. He suggested that the Advisory Committee on Civil Rules consider removing the requirement of a certificate of service in the future.

Fed. R. Bankr. P. 8013

Professor Gibson noted that proposed Rule 8013 (motions and intervention) would change current bankruptcy practice. Currently, a person filing a motion or response may file a separate brief. The new rule, however, would not permit briefs to be filed in support of or in response to motions. Instead, it adopts the practice in FED. R. APP. P. 27 (motions), requiring that legal arguments be included in the motion or response.

She reported that proposed FED. R. BANKR. P. 8013(g) is a new provision for the bankruptcy rules. It is also not included in the Federal Rules of Appellate Procedure. It will authorize motions for intervention in an appeal pending in a district court or bankruptcy appellate panel. The party seeking to intervene must state in its motion why it did not intervene below.

Fed. R. Bankr. P. 8014

Professor Gibson explained that Rule 8014 (briefs) largely tracks the Federal Rules of Appellate Procedure and incorporates the proposed amendment to FED. R. APP. P. 28(a)(6) (briefs), which combines the statements of the case and of the facts into a single statement. (See pages 5 and 6 of these minutes.) In a change from current bankruptcy practice, revised Rule 8014 follows the Federal Rules of Appellate Procedure and requires inclusion of a summary of argument in the briefs. New Rule 8014(f) adopts the provision of FED. R. APP. P. 28(j) regarding the submission of supplemental authorities. Unlike the appellate rule, the proposed Rule 8014(f) proposes a definite time limit of seven days for any response, unless the court orders otherwise.

She emphasized that the advisory committee was attempting to make the bankruptcy rules as similar as practicable to the Federal Rules of Appellate Procedure to

make it easier for the bar to handle double appeals, *i.e.,* an appeal first to a district court or bankruptcy appellate panel, and then to the court of appeals.

Fed. R. Bankr. P. 8015

Professor Gibson noted that Rule 8015 (form and length of briefs, appendices, and other papers) was modeled on FED. R. APP. P. 32 (form and length of briefs, appendices, and other papers). The new bankruptcy rule adopts the provisions of the appellate rule governing the length of briefs, but not those prescribing the colors for brief covers. She added that the change is likely to attract comments during the publication period because new Rule 8015(a)(7) reduces the length of principal and reply briefs currently permitted in the bankruptcy rules. To achieve consistency with FED. R. APP. P. 32(a)(7), it reduces the page limits for a principal brief from 50 pages to 30, and those for a reply brief from 25 to 15.

Fed. R. Bankr. P. 8016

Professor Gibson reported that Rule 8016 (cross-appeals) was new to bankruptcy and modeled on FED. R. APP. P. 28.1 (cross-appeals). A member noted, though, that proposed Rule 8016(e) does not exactly parallel the appellate rule. Moreover, it does not include a provision, similar to that in Rule 8018(a), allowing a district court or bankruptcy appellate panel by local rule or order to modify the rule's time limits.

Judge Wedoff suggested that it would be possible to incorporate the Rule 8018 language on local court modifications into Rule 8016. He added that Rules 8016 and 8018 should be internally consistent, even though there may be some differences between them and the counterpart appellate rules. A participant recommended making both the bankruptcy and appellate rules internally consistent and consistent with each other. The same provisions should apply in both sets of rules.

Another participant recommended not including any provision in the bankruptcy rules allowing a local court to extend the time limits of the national rules. He suggested that it will only encourage extensions.

Fed. R. Bankr. P. 8017

Professor Gibson reported that Rule 8017 (amicus briefs) was new to bankruptcy and was derived from FED. R. APP. P. 29 (amicus briefs). She pointed out that proposed Rule 8017(a) would allow a bankruptcy court on its own motion to request an amicus brief.

Fed. R. Bankr. P. 8018

Professor Gibson reported that Rule 8018 (serving and filing briefs) would continue the existing bankruptcy practice that allows an appellee to file a separate appendix. It differs from FED. R. APP. P. 30 (appendix to briefs), which requires all the parties to file a single appendix. Rule 8018(a) lengthens the period for filing initial briefs from the current 14 days to 30. Since requests for extensions of time are very common, she said, it just makes sense to increase the deadline to 30 days.

Fed. R. Bankr. P. 8019

Professor Gibson noted that proposed Rule 8019 (oral argument) tracks FED. R. APP. P. 34(a)(1) (oral argument) and is more detailed than the current bankruptcy rule. Rule 8019(a) would alter the existing bankruptcy rule by: (1) authorizing the court to require the parties to submit a statement about the need for oral argument; and (2) permitting a statement to explain why oral argument is not needed, rather than only why it should be allowed. Rule 8019(f) gives the court discretion, when the appellee fails to appear for oral argument, either to hear the appellant's argument or to postpone it.

Fed. R. Bankr. P. 8020

Professor Gibson reported that Rule 8020 (frivolous appeal and other misconduct) was derived from FED. R. APP. P. 38 (frivolous appeals, damages and costs) and FED. R. APP. P. 46(c) (attorney discipline). It applies to misconduct both by parties and attorneys.

Fed. R. Bankr. P. 8021

Professor Gibson noted that Rule 8021 (costs) would continue the existing bankruptcy practice that gives the bankruptcy clerk the entire responsibility for taxing costs on appeal. The practice under FED. R. APP. P. 39 (costs), on the other hand, involves both the court of appeals and the district court in taxing costs.

Rule 8021(b) was added to govern costs assessed against the United States. Derived from FED. R. APP. P. 39(b), it is not included in the current bankruptcy rules.

Fed. R. Bankr. P. 8022

Professor Gibson reported that Rule 8022 (motion for rehearing) would continue the current bankruptcy practice of requiring that a motion for rehearing be filed within 14 days after entry of judgment on appeal. It differs from FED. R. APP. P. 40(a)(1) (time to file a petition for rehearing), which gives parties 45 days to file a rehearing motion in any civil case in which the United States is a party. She added that the Department of Justice reported that it had no problem with the rule.

Fed. R. Bankr. P. 8023

Professor Gibson reported that proposed Rule 8023 (voluntary dismissal) deviates from both the existing bankruptcy rule and the Federal Rules of Appellate Procedure. It would allow a voluntary dismissal while a case is still pending. Under the current rules, a case on appeal from a bankruptcy judge is not docketed in the district court or bankruptcy appellate panel until the record is transmitted. But under the new Rule 8023, the appeal will be docketed immediately after the notice of appeal is filed. The notice, moreover, will normally be transmitted electronically to the district court or bankruptcy appellate panel. The advisory committee, she said, concluded that it is very unlikely that an appeal will be voluntarily dismissed before it is docketed.

Fed. R. Bankr. P. 8024

Professor Gibson reported that Rule 8024 (clerk's duties on disposition of an appeal) contained virtually no changes, other than stylistic, from the current bankruptcy rule.

Fed. R. Bankr. P. 8025

Professor Gibson reported that Rule 8025 (stay of a district court or BAP judgment) contained only stylistic changes from the existing bankruptcy rule. She pointed out, though, that subdivision (c) was new. It specifies that if the district court or BAP affirms a bankruptcy court ruling and the appellate judgment is stayed, the bankruptcy court's order, judgment, or decree will be automatically stayed to the same extent as the stay of the appellate judgment.

Fed. R. Bankr. P. 8026

Professor Gibson reported that Rule 8026 (rules by circuit councils and district courts, and procedure when there is no controlling law) contained only stylistic changes from the current bankruptcy rule.

Fed. R. Bankr. P. 8027

Professor Gibson reported that Rule 8027 (notice of mediation procedure) was a new rule with no counterpart in the Federal Rules of Appellate Procedure. It provides that if a district court or bankruptcy appellate panel has a mediation procedure applicable to bankruptcy appeals, the clerk of the district court or the panel must notify the parties promptly after the appeal is docketed whether the mediation procedure applies, what its requirements are, and how it affects the time for filing briefs in the appeal.

Fed. R. Bankr. P. 8028

Professor Gibson explained that Rule 8028 (suspension of rules in Part VIII) was derived from current FED. R. BANKR. P. 8019 (suspension of rules in Part VIII) and FED. R. APP. P. 2 (suspension of rules). It authorizes a district court, bankruptcy appellate panel, or court of appeals to suspend the requirements or provisions of the Part VIII rules, except for certain enumerated rules. The new rule expands the current list of rules that may not be suspended.

Professor Gibson reported that the current FED. R. BANKR. P. 8013 (disposition of appeal and weight accorded fact findings) would be eliminated. The first part of that rule specifies what a district court or BAP may do on an appeal, *i.e.,* affirm, modify, reverse, or remand. She noted that there is no similar provision in the Federal Rules of Appellate Procedure. The second part of the current rule specifies the weight that must be given to a bankruptcy judge's findings of fact. She explained that the provision is not needed because it is already covered by FED. R. CIV. P. 52 (findings and conclusions) and incorporated by FED. R. BANKR. P. 7052 (findings by the court).

The committee without objection by voice vote approved the proposed amendments for publication.

FED. R. BANKR. P. 9023 and 9024

Judge Wedoff explained that FED. R. BANKR. P. 9023 (new trials and amendment of judgments) and FED. R. BANKR. P. 9024 (relief from a judgment or order) would be amended to add a cross-reference in each rule to the procedure set forth in proposed new Rule 8008, governing indicative rulings.

The committee without objection by voice vote approved the proposed amendments for publication.

MODERNIZATION OF THE OFFICIAL FORMS

Judge Wedoff explained that the bankruptcy process is driven in large measure by forms. Several of the current forms, however, are difficult to complete, especially for people unfamiliar with the bankruptcy system. In addition, the forms take little cognizance of electronic filing in the bankruptcy courts.

He explained that forms modernization has been a major, multi-year project of the advisory committee, working under the leadership of Judge Elizabeth L. Perris and in close coordination with the Administrative Office and the Federal Judicial Center. The major goals of the project have been: (1) to improve the quality and clarity of the forms in

order to elicit more complete and accurate information from debtors and creditors; and (2) to enhance the interface between the forms and modern technology, especially the "next generation" of CM/ECF currently under development.

He said that the advisory committee and the forms-project team had reached out extensively to users of the bankruptcy system to seek their input in redesign and testing of the forms. In addition, the committee had made an important policy decision at the outset to separate the forms used by individual debtors from those used by entities other than individuals.

He explained that the first nine forms, now presented for authority to publish, are a subset of the larger package of individual forms filed by debtors at the beginning of a case. He emphasized that the forms used by individuals need to be less technical in language because individuals are generally less sophisticated than other entities and may not have the assistance of experienced bankruptcy counsel. As a result, he said, the revised individual forms are written in more conversational language, have a more approachable format, and contain substantially more instructions.

OFFICIAL FORMS 3A AND 3B

Judge Wedoff explained that debtors who cannot pay the filing fee have two options – either to ask the court for permission to pay the fee in installments (Form 3A) or to waive the fee (Form 3B). The latter option is available only to individuals whose combined family monthly income is less than 150% of the official poverty guideline last published by the Department of Health and Human Services.

In addition to major stylistic and formatting changes common to all the new forms, three minor substantive changes were made in Form 3B. First, the opening question asks for the size of the debtor's family, as listed on Schedule J. That information is currently required on Schedule I. Second, the income portion of the form was changed to specify that non-cash governmental assistance, such as food stamps or housing subsidies, will not count against the debtor as income in determining eligibility for a fee waiver. The information, though, will continue to be reported for purposes of determining the debtor's ability to pay the filing fee. Third, the new form eliminates the declaration and signature section for non-attorney bankruptcy petition preparers because the same declaration is already required on Official Form 19.

The committee without objection by voice vote approved the proposed forms for publication.

OFFICIAL FORMS 6I and 6J

Judge Wedoff noted that some substantive changes had been made on Forms 6I (statement of the debtor's income) and 6J (statement of the debtor's expenses) to elicit more accurate and useful information from individual debtors. First, the debtor will have to provide more information on Form 6J about non-traditional living arrangements, such as living with an unmarried partner or living and sharing expenses in a household with non-relatives. The form asks for all financial contributions to the household. Second, Form 6J asks for separate information on dependents who live with the debtor, dependents who live separately, and other members of the household. Third, in Chapter 13 cases, Form 6J asks for the debtor's expenses at two different points in time – when the debtor files the bankruptcy petition and when the proposed Chapter 13 plan is confirmed. Fourth, a line has been added to the form setting out a calculation of the debtor's monthly net income.

The committee without objection by voice vote approved the proposed forms for publication.

OFFICIAL FORMS 22A-1, 22A-2, 22B, 22C-1, and 22C-2

Judge Wedoff explained that Form 22, commonly referred to as the "means test" form, has five variations. It is used to determine a debtor's "current monthly income" under 11 U.S.C. § 101(10A) and, in Chapter 7 and Chapter 13 cases, to determine the debtor's income remaining after deducting certain specified expenses.

In Chapter 7 cases, the form is used to assess whether the debtor qualifies under the statute to file a petition under Chapter 7. In Chapter 13, cases, it determines how much the debtor is able to pay under the plan. Other than stylistic changes, no changes were made in the form's Chapter 11 version (Form 22B). But four changes would be made in the Chapter 7 and Chapter 13 versions.

First, the advisory committee separated both the Chapter 7 and Chapter 13 forms into two distinct forms each because debtors with income below the median of their state do not have to list their expenses. As a result, the vast majority of debtors will only have to fill out the income portion. Thus, all debtors will complete an income form (Form 22A-1 or 22C-1), but only some will have to file the expense form (Form 22A-2 or 22C-2).

Second, the revised forms modify the deduction for cell phone and internet expenses to reflect more accurately the Internal Revenue Service allowances incorporated by the Bankruptcy Code.

Third, line 60 on the Chapter 13 expense form (Form 22C-2)) would be removed because it is rarely used. It allows debtors to list, but not deduct from income, "other necessary expense" items not included within the categories specified by IRS.

Fourth, Form 22C-2 reflects the Supreme Court's decision in *Hamilton v. Lanning,* 560 U.S. ___, 130 S. Ct. 2464 (2010). *Lanning* requires taking a "forward-looking approach" in calculating a Chapter 13 debtor's projected disposable income by considering changes in income or expenses that have occurred or are virtually certain to occur by the time the plan is confirmed. The changes may either increase or decrease the debtor's disposable income. Part 3 of Form 22C-2 will require the debtor to report those changes.

The committee without objection by voice vote approved the proposed forms for publication.

Information Items

FED. R. BANKR. P. 3007(a)

Judge Wedoff reported that proposed amendments to FED. R. BANKR. P. 3007(a) (objections to claims), published in August 2011, would have specified the time and manner of serving objections to claims. The rule currently requires that notice of an objection be provided at least 30 days "prior to the hearing" on the objection. The proposal would have authorized a negative notice procedure – requiring notice of an objection to be made at least 30 days before "any scheduled hearing on the objection or any deadline for the claimant to request a hearing."

He noted that at its March 2012 meeting, the advisory committee decided to withdraw the proposed amendments temporarily and consider them as part of its project to draft a national Chapter 13 form plan.

OFFICIAL FORM 6C

Judge Wedoff reported that the advisory committee had decided not to proceed with amending Form 6C (property claimed as exempt) by adding a box to give debtors the option of declaring that the value of property claimed as exempt is the "full fair market value of the exempted property." The amendment, published in August 2011, was intended to reflect the Supreme Court's decision in *Schwab v. Reilly,* 560 U.S. ___, 130 S. Ct. 2652 (2010).

He said that representatives of the Chapter 7 and Chapter 13 trustee associations had objected to the change on the grounds that it would encourage debtors to claim the

full market value of property even when the exemption is capped by statute at a specific dollar amount. They predicted that the revision would lead to gamesmanship and a "plethora of objections." On the other hand, supporters of the amendment, including representatives of the consumer bankruptcy attorneys' association, disputed the prediction. They argued that it was consistent with *Schwab* and would be beneficial to debtors.

Judge Wedoff reported that the advisory committee decided not to proceed with the amendment because: (1) it is unnecessary since debtors already incorporate the *Schwab* language into the existing form; and (2) courts are divided on whether it is always improper for a debtor to claim as exempt the full fair market value of property when the exemption is capped at a specific dollar amount. The advisory committee decided, therefore, that any amendment to the form should await further case law development. It might also be considered as part of the forms modernization project.

OFFICIAL FORMS 22A AND 22C

Judge Wedoff reported that the advisory committee had decided to defer final approval of proposed amendments to Forms 22A and 22C (the means test forms) that would have: (1) reflected changes in the IRS standards on telecommunication expenses; and (2) changed the Chapter 13 version of the form to respond to the Supreme Court's decision in *Hamilton v. Lanning,* 560 U.S. ___, 130 S. Ct. 2464 (2010).

He said that it would be better to avoid having the proposed amendments take effect in 2012, only to have substantially reformatted versions of the same forms take effect in 2013 as part of the forms modernization project. The proposed amendments, he added, had been incorporated into the first set of modernized forms to be published for comment in August 2012. (See pages 21-23 of these minutes.)

OFFICIAL FORM FOR CHAPTER 13 PLAN AND RELATED RULE AMENDMENTS

Judge Wedoff explained that the advisory committee was working on drafting a national form for Chapter 13 plans. He pointed out that a wide variety of local forms and model plans are currently used in the bankruptcy courts. They impose different requirements and distinctive features from district to district. The lack of a national form, he said, makes it difficult for lawyers who practice in several districts, and it adds transactional costs that are passed on to debtors.

He reported that a recent survey of the bankruptcy bench had established that a majority of chief bankruptcy judges support developing a national form plan. Therefore, he said, the advisory committee had established a working group that expects to have a draft ready soon for informal circulation and comment. He added that it became apparent

during the course of the group's work that the effectiveness of a national form plan will depend on making some simultaneous amendments to the bankruptcy rules to harmonize practice among the courts and clarify certain procedures.

MINI-CONFERENCE ON NEW MORTGAGE FORMS

Judge Wedoff reported that the advisory committee will hold a mini-conference in conjunction with its September 2012 meeting to discuss the effectiveness of the new mortgage-information disclosure forms that took effect on December 1, 2011.

ELECTRONIC SIGNATURES

Judge Wedoff noted that the advisory committee was considering the use of electronic signatures as part of its forms modernization project. In particular, it was focusing on whether, and under what circumstances, bankruptcy courts should accept for filing documents signed electronically without also requiring retention of a paper copy with an original signature. If retention of an original signature is required, moreover, who should maintain it? He noted that the committee was exploring a range of options and contemporary practices.

FORMS MODERNIZATION PROJECT

Judge Wedoff reported that the forms modernization project had nearly completed its work on all the individual-debtor forms and had begun its work on revising the non-individual forms.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell and Professor Cooper presented the report of the advisory committee, as set forth in Judge Campbell's memorandum and attachments of May 8, 2012 (Agenda Item 4).

Amendments for Final Approval

FED. R. CIV. P. 45 and 37

Judge Campbell reported that the advisory committee had undertaken a multi-year project to revise Rule 45 (subpoenas) by simplifying the rule and addressing several problems brought to its attention. He noted that during the course of its study, the advisory committee came to appreciate that Rule 45 is an important workhorse in civil litigation that governs virtually all discovery involving non-parties and accomplishes several other important procedural purposes.

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After reviewing the pertinent literature on the rule and canvassing the bar, the committee developed a list of 17 concerns that might potentially be addressed through rule amendments. The list was eventually boiled down to four proposed changes: (1) simplification of the rule; (2) transfer of subpoena-related motions; (3) trial subpoenas for distant parties and party witnesses; and (4) notice of service of documents-only subpoenas. A revised rule incorporating those changes was published for public comment in August 2011, and some minor modifications were made after publication. The revised rule, he said, was now ready for final approval by the Judicial Conference.

1. Simplification of the rule

He noted that the first category of proposed changes would simplify an overly complex rule. As Rule 45 is now written, he explained, a lawyer has to look in three different parts of the rule to determine where a subpoena may be issued, where it may be served, and where performance may be required.

First, Rule 45(a)(2) specifies which court may issue a subpoena. It may be a different court for trial, for deposition discovery, or for document discovery. Second, Rule 45(b)(2) specifies four different possibilities for the place where a subpoena may be served. It may be within the district, outside the district but within 100 miles of the place of compliance, anywhere in the state where the district sits if state law permits, or anywhere in the United States if federal law authorizes it. Third, Rule 45(c) imposes limits on the place of enforcement. A non-party, for example, cannot be required to travel more than 100 miles to comply with a subpoena, except to attend a trial. In that case, attendance may be anywhere in the state if the person does not have to incur "substantial expense" to travel. He said that it was the experience of all the judges on the advisory committee that even good lawyers get the various provisions of the rule wrong from time to time.

The advisory committee's proposed simplification addresses those problems and should eliminate most of the confusion. First, revised Rule 45(a)(2) specifies that the court that issues a subpoena is the court that presides over the case. There are no other possibilities. Second, Rule 45(b)(2) specifies that a subpoena may be served at any place in the United States. Third, Rule 45(c)(3) specifies where performance may be required. Essentially, it preserves the performance requirements of the current rule, but eliminates its reference to state law.

There is, he said, precedent in the rules for authorizing nationwide service. Rule 45(b)(2)(D), he noted, currently authorizes service in another state if there is a federal statute that authorizes it. In addition, the Federal Rules of Criminal Procedure authorize nationwide service (FED. R. CRIM. P. 17)(e)).

Professor Marcus said that the public comments on simplification of the rule were very favorable, and some offered suggestions for additional clarification. As a result, the committee made some changes in the committee note, dealing with depositions of party witnesses and subpoenas for remote testimony. In essence, though, the changes made after publication were very minor.

Professor Marcus pointed out that under the committee's proposal, as published, Rule 45(c)(2) would have left it essentially to the parties to designate the place for production of Rule 34 discovery materials. It provided that a subpoena could command production "at a place reasonably convenient for the person who is commanded to produce." But, he explained, that simplification did not work and could lead to mischief. Accordingly, the committee revised Rule 45(c)(2) to specify that a subpoena may command production "at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person." That formulation essentially preserves the current arrangements, but states them more clearly.

2. Transfer of subpoena-related motions

Judge Campbell explained that the modified rule, like the current rule, specifies that a party receiving a subpoena typically has to litigate the enforceability of the subpoena in the court in the district where the performance is required. The producing party, thus, enjoys the convenience of having its dispute handled locally and does not have to travel to a different part of the country to litigate.

Rule 45, however, does not currently allow the court where production is required to transfer a dispute back to the court having jurisdiction over the case. Yet, there are certain situations in which the court in the district of performance should be allowed to refer a dispute to the judge presiding over the case. There is, he said, a split in the case law on the matter, and some courts in fact transfer disputes. The current rule, though, does not authorize the practice expressly.

The proposed new Rule 45(f) would resolve the matter and explicitly allow certain disputes to be resolved by the judge presiding over the case. It would allow the local court to transfer the case either on the consent of the person subject to the subpoena or if the court finds "exceptional circumstances." He reported that some public comments questioned whether exceptional circumstances was the appropriate standard for authorizing a transfer, but the advisory committee ultimately concluded unanimously that it was.

The proposed amendment to FED. R. CIV. P. 37 (failure to make disclosures or cooperate in discovery) would conform that rule to the proposed amendments to Rule 45(f). A new second sentence in Rule 37(b)(1) deals with contempt of orders entered after a transfer. It provides that failure to comply with a transferee court's deposition-

related order may be treated as contempt of either the court where the discovery is taken or the court where the action is pending..

Professor Marcus pointed out that the August 2011 publication had highlighted the new transfer provision and expressly invited comment on two questions: (1) whether consent of the parties should be required in addition to consent by the person served with the subpoena; and (2) whether "exceptional circumstances" should be the standard for transfer if the non-party does not consent. Considerable public comment argued that it was inappropriate to require party consent. As long as the recipient of the subpoenas consents to the transfer, the parties should have no veto over the matter. The advisory committee, he said, revised the rule to remove the party-consent feature.

With regard to the appropriate standard for authorizing a transfer in the absence of consent, considerable public support was voiced for a more flexible, less demanding standard. But formulating an appropriate lesser standard, while still protecting the primary interests of the producing party, had been very challenging. The advisory committee and its discovery subcommittee discussed the matter at considerable length and decided to retain the exceptional circumstances standard, but add some clarifying language to the committee note. The note was recast to state that if the local non-party served with a subpoena does not consent to a transfer, the court's prime concern should be to avoid imposing burdens on that person. In some circumstances, though, a transfer may be warranted to avoid disrupting the issuing court's management of the underlying litigation. In short, transfer is appropriate only if those case-management interests outweigh the interests of the producing party in obtaining local resolution of the dispute.

A member praised the work of the advisory committee and said that the proposed changes were long overdue. He noted that few rules of procedure are used more often, yet are harder to work with, than Rule 45. Nevertheless, he said, the "exceptional circumstances" standard may be too high. It may underestimate the needs of a judge presiding over a big, hotly disputed civil case to have flexibility in controlling the case. It may also underestimate how easy it is today to conduct hearings and resolve disputes by telephone or video-conference. He noted that when subpoena disputes arise, it is common for the judge in the district of compliance to call the judge having jurisdiction over the underlying case to discuss the matter.

In addition, he said, the language in the committee note stating that transfers should be "truly rare" events is much too restrictive. It tells judges, in essence, that transfers should almost never occur. He added that a more generous standard is warranted, and "good cause" should be considered as a substitute. He recommended combining a good cause standard with an appropriate explanation in the committee note to give judges the flexibility they need to decide what is best in each case.

Judge Campbell explained that some public comments had suggested a good cause standard, and the advisory committee considered them carefully. But it ultimately concluded that it had to err in favor of protecting third parties who receive subpoenas and sparing them from assuming undue burdens and hiring counsel in other parts of the country. The exceptional circumstances standard, he said, will afford them more protection than the good cause standard.

He said that the committee was concerned that if the rule were to contain a "good cause" standard, many busy district judges faced with subpoena disputes in out-of-district cases would be readily inclined to transfer them routinely to the issuing court. The rule, he said, should make those busy district judges pause and carefully balance the reasons for a transfer against the burdens imposed on the subject of the subpoena. In essence, he explained, the committee concluded that it was essential to have a higher threshold than mere good cause.

Professor Marcus added that it is very difficult to achieve just the right balance in the rule. It is, he said, particularly difficult to draft a standard that falls somewhere between "exceptional circumstances," which is very difficult to satisfy, and "good cause," which is quite easy to satisfy. He added that the comments from the ABA Section on Litigation were very supportive of retaining the exceptional circumstances standard in order to protect non-party witnesses.

A member argued in favor of retaining the exceptional circumstances standard, and emphasized that it was important to resolve the current conflict in the law and explicitly authorize transfers in appropriate, limited circumstances. She added that the rule should be designed for the average civil case, not the exceptional case. The great majority of subpoena disputes, she said, involve local issues and should be resolved locally. As a practical matter, a good cause standard would lead to excessive transfers.

A participant spoke in favor of the good cause standard, but recommended that if the exceptional circumstances standard were retained, the committee note should be toned down and revised to eliminate the current language stating that transfers should be "truly rare." In addition, it would be useful to refer in the note to the difference between the average case with a local third party and complex litigation in which the lawyers hotly dispute every aspect of a case, including the subpoenas. He added that not all subpoenaed persons are in fact uninvolved, uninterested third parties. Often, the subpoenaed person, although not a party to the case, may well have a direct financial interest in the litigation.

A member agreed that the word "truly" should be eliminated from the note, but supported the advisory committee's decision to retain the exceptional circumstances standard. A member recommended resolving the matter by eliminating the second sentence in the third paragraph of the portion of the committee note dealing with Rule 45(f). As revised, it would read: "In the absence of consent, the court may transfer in

exceptional circumstances, and the proponent of transfer bears the burden of showing that such circumstances are presented."

A member expressed concern about the language added to the committee note after publication regarding the issuance of subpoenas to require testimony from a remote location. He suggested that the committee should consider amending Rule 45(c)(1) itself to clarify that it applies both to attendance at trial and testimony by contemporary transmission from a different location under Rule 43(a).

3. Trial subpoenas for distant parties and party officers

Judge Campbell explained that the third change in the rule resolves the split in the case law in the wake of *In re Vioxx Products Liability Litigation,* 438 F. Supp. 2d 664 (E.D. La. 2006). The district court in that case read Rule 45 as permitting a subpoena to compel a party's officer to testify at a trial at a distant location. Other courts, though, have ruled that parties cannot be compelled to travel long distances from outside the state to attend trial because they have not been served with subpoenas within the state, as required by Rule 45(b)(2).

The advisory committee, he said, was of the view that *Vioxx* misread Rule 45, in part because the current rule is overly complex. The proposed amendments, he said, would overrule the *Vioxx* line of cases and confirm that party officers can only be compelled to testify at trial within the geographical limits that apply to all witnesses. He noted that the committee had highlighted the matter when it published the rule by including in the publication an alternative draft text that would have codified the *Vioxx* approach.

The public comments, he said, were split, with no consensus emerging for either position. The advisory committee decided ultimately that it should not change the original intent of a rule that has worked well for decades. Professor Marcus added that the committee's concern was that if the rule were amended to codify *Vioxx,* subpoenas could be used to exert undue pressures on a party and its officers. Moreover, there are alternate ways of dealing with the problems of obtaining testimony from party witnesses, including the use of remote testimony under Rule 43(a).

4. Notice of service of documents-only subpoenas

Judge Campbell explained that the current Rule 45 requires parties to notice other parties that they are serving a subpoena. But the provision is hidden as the last sentence of Rule 45(b)(1), and many lawyers are unaware of it. The advisory committee proposal, he said, relocates the provision to a more prominent place as a separate new paragraph 45(a)(4), entitled "notice to other parties before service." In addition, the revised rule requires that a copy of the subpoena be attached to the notice.

Judge Campbell said that the advisory committee realized that many other reasonable notice provisions might have been added to the rule. For example, it could have required that: notice be given a specific number of days in advance of service of the subpoena; additional notice be given if the subpoena is modified by agreement; notice be given when documents are received; and copies of documents be provided by the receiving party to the other parties in the litigation. The rule could also have specified the sanctions for non-compliance with the notice requirements.

The advisory committee, however, concluded that those provisions, though sensible, should not be included because the primary purpose of the amendments is to get parties to give notice of subpoenas. Just accomplishing that objective should resolve most of the current problems. The remaining issues can generally be worked out if lawyers are left to their own devices to consult with opposing counsel to obtain copies of whatever documents they need. The committee, he said, was concerned about the length and complexity of the current rule and did not want to add to that length and complexity by dictating additional details. He added, though, that the committee could return to the rule in the future if problems persist.

Professor Marcus said that many competing suggestions had been received for additional provisions. He added that, at the urging of the Department of Justice, the committee had made a change in the rule following publication to restore the words "before trial" to the notice provision. It also added in Rule 45(c)(4) the word "pretrial" before "inspection of premises."

Judge Campbell noted that the advisory committee had considered whether the time limit in current Rule 45(c) for serving objections to subpoenas was too short, but decided not to change it. He added that the matter rarely results in litigation, as courts allow extensions of time when appropriate. He agreed to a member's suggestion that language in lines 43 and 44 of the committee note be deleted. It had suggested that parties may ask that additional notice requirements be included in a court's scheduling order.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

Information Items

PRESERVATION AND SPOLIATION

Judge Campbell reported that one of the panels at the committee's 2010 Duke Law School conference had urged the committee to approve a detailed civil rule specifying when an obligation to preserve information for litigation is triggered, the scope of that obligation, the number of custodians who should preserve information, and the

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sanctions to be imposed for various levels of culpability. After the conference, Judge Kravitz, then chair of the advisory committee, tasked the committee's discovery subcommittee with following up on the recommendations.

The subcommittee began its work in September 2010 by asking the Federal Judicial Center to study the frequency and nature of sanctions litigation in the district courts. The Center's research found that litigation is rare, as only 209 spoliation motions had been filed in more than 130,000 civil cases studied, and only about half the motions involved electronic discovery. The subcommittee also studied a large number of federal and state laws that impose various preservation obligations.

The subcommittee, he said, then drafted three possible rules to address preservation. The first was a very detailed rule that provided specific directives and attempted to prescribe which events trigger a duty to preserve, what the scope of the preservation duty is, and what sanctions may be imposed for a failure to preserve. The committee, however, found it exceedingly difficult to draft a detailed rule that could be applied across all the broad variety of potential cases and give any meaningful certainty to the parties.

The second rule also addressed the triggering events for preservation, the scope of retention obligations, and sanctions for violations, but it did so in a much more general way. Essentially it provided broad directions to behave reasonably and preserve information in reasonable anticipation of litigation.

The third rule focused just on sanctions under Rule 37 in order to promote national uniformity and constraint in imposing sanctions. Currently, there is substantial dispute among the circuits on what level of culpability gives rise to sanctions for failure to preserve. The prevailing standards now range from mere negligence to wilfulness or bad faith.

The third rule specified that a court may order curative or remedial measures without finding culpability. Imposition of sanctions of the kind listed in Rule 37(b), on the other hand, would require wilfulness or bad faith. The proposed rule identified the factors that a court should consider in assessing the need for sanctions. Those factors, moreover, should also provide helpful guidance to parties at the time they are considering their preservation decisions.

Judge Campbell said that the three draft rules had been discussed with about 25 very knowledgeable people at the committee's September 2011 mini-conference in Dallas. A wide range of views was expressed, but no consensus emerged. Many written comments were received by the committee and posted on the judiciary's website. They embrace a full range of proposals. Some groups argued that there is an urgent need for a very detailed rule on preservation and spoliation with bright-line standards. One, for

example, suggested that a duty to preserve should only be triggered by the actual commencement of litigation. Others contended that no rule is needed at all, as the common law should continue its development. The Department of Justice, he said, took the position that it is premature to write a rule on these subjects.

The subject area, he said, continues to be very dynamic. In April 2012, the RAND Corporation completed a study of large corporations, documenting that they spend millions of dollars in trying to comply with preservation obligations. About 73% of the costs are spent on lawyers reviewing materials and 27% on the preservation of information itself. A recent in-house study by the Department of Justice generally corroborated the conclusion of the Federal Judicial Center that spoliation disputes in court are rare. Another recent study, by Professor William Hubbard, found that the problem arises only in a small percentage of cases, but when it does it can be extraordinarily expensive.

Judge Campbell pointed out that the Seventh Circuit was conducting a pilot program on electronic discovery and preservation that emphasizes the need for the parties to cooperate and discuss preservation early in the litigation. The pilot, he said, was entering its third phase and producing a good deal of helpful information. The Southern District of New York recently launched a complex-case pilot program that also includes preservation as an element. The Federal Circuit promulgated clear guidelines on discovery of electronically stored information and has placed some important limits on discovery in patent cases. A Sedona Conference working group has been working for months on a consensus rule for the committee's consideration. The group, he noted, had not yet reached consensus on potential rule amendments. Finally, he said, the case law continues to evolve, as trial judges are taking imaginative steps to deal with preservation problems and restrain unnecessary costs.

Judge Campbell reported that the advisory committee was still leaning towards a sanctions-only rule, rather than a rule that tries to define trigger and scope. Nevertheless, the subcommittee was still absorbing and discussing the many sources of information coming before it. He suggested that the subcommittee may have a more concrete draft available for the advisory committee's consideration at its November 2012 meeting.

He noted that the advisory committee was aware that some are frustrated with the pace of the project. But, he said, the delay in producing a rule has not been for lack of effort. Rather, the issues are particularly difficult, and the views expressed to the subcommittee have been very far apart. He noted that even if the committee were to approve a rule at its next meeting, it could not take effect before December 2015.

He reported that in December 2011, the House Judiciary Subcommittee on the Constitution had held a hearing on the costs and burdens of civil discovery. The proceedings included substantial discussion on electronic discovery issues. The basic

message from the majority was that preservation obligations and electronic discovery cost corporations substantial money and are a drain on innovation and jobs. He pointed out that the witnesses testified that the federal rules process works well, and the rules committees should continue their efforts to solve the current problems. After the hearings, the subcommittee chair wrote a letter urging the advisory committee to approve a strong rule. The subcommittee minority, though, followed with a letter asking the committee to proceed slowly and let the common law work its course.

Professor Marcus pointed out that the advisory committee had not resolved two critical policy questions and invited input on them from the members. First, he said, a decision must be made on whether a new rule should be confined just to electronic discovery or apply to all discoverable information. Second, in light of the strikingly divergent views expressed to the committee on the subject, a basic decision must be made on how urgently a new rule is needed and how aggressive it should be.

A member argued that national uniformity is very important because preservation practices and litigation holds cost parties a great deal of money. The precise contents of the new rule may not be clear at this point, but the advisory committee should continue to proceed deliberately and carefully study the various pilot projects underway in the courts. Eventually, however, it needs to produce a national rule. A participant added that the primary risk of moving too slowly is that courts will develop their own local rules and become attached to them, making it more difficult to impose a uniform national rule.

A participant pointed out that efforts have been made, without much result so far, to prod the corporate community into developing a series of best practices to deal with preservation of information. Corporations, he said, need to balance their legitimate need to get rid of information in the normal course of business against the competing need to preserve certain information in anticipation of eventual litigation. There is, he said, reluctance on the part of corporate management even to consider the matter, but there may be some movement in that direction in the future.

He suggested that a sanctions-only rule is appropriate. It would also be desirable, he said, to include a more emphatic emphasis in Rules 16 and 26 on getting the parties and the judge to address preservation obligations more directly at the outset of a case.

A member expressed great appreciation for the advisory committee's work and agreed with its inclination to pursue a narrow rule that focuses just on Rule 37 sanctions. He emphasized that the Rules Enabling Act restricts the rules committees' authority to matters of procedure only. Preservation duties, though, generally go beyond procedure and simply cannot be fixed by a rule.

Moreover, he said, the committee cannot solve all preservation problems because most litigation is conducted in the state courts, not the federal courts. He suggested that

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the more the committee sticks to procedure and avoids matters of substantive conduct, the more likely the states will follow its lead. A member added that there is an important opportunity for the committee to achieve greater national uniformity by working with the state courts. If the committee produces a good rule, he said, effective complementary state-court rules could be promoted with the support and encouragement of the Conference of Chief Justices.

DUKE CONFERENCE SUBCOMMITTEE

Judge Campbell pointed out that it is difficult to speak about preservation without considering more broadly what information should be permitted in the discovery process, especially electronically stored information. He reported that the advisory committee had established a separate subcommittee, chaired by Judge John G. Koeltl, to evaluate the many helpful ideas for discovery reform raised at the Duke conference and to recommend which should be proposed as rule amendments. Eventually, he said, the advisory committee will marry the work of the Duke Conference subcommittee with that of the discovery subcommittee on spoliation because the two are closely related.

He reported that Professor Cooper had produced very helpful and thought-provoking drafts of several potential rule amendments to implement the Duke recommendations. The proposals, he explained, can be categorized as falling into three sets of proposed changes.

The first set of proposals was designed to promote early and active case management. They include: reducing the time for service of a complaint from 120 days to 60; reducing the time for holding a scheduling conference from 120 days to 60 or 45; requiring judges to actually hold a scheduling conference in person or by telephone; no longer allowing local court rules to exempt cases from the initial case-management requirements; requiring parties to hold a conference with the court before filing discovery motions; and allowing written discovery to be sought before the Rule 26(f) conference is held, but providing that requests do not have to be answered until after the case-management conference. The latter provision would let the parties know what discovery is contemplated when they meet with the judge to discuss a discovery schedule. Those and other ideas were designed to get the courts more actively involved in the management of cases and at an earlier stage.

Judge Campbell noted that the second category of possible changes was designed to curtail the discovery process and make it more efficient. One set of proposals would take the concept of proportionality and move it into Rule 26(b)((1)'s definition of discoverable information. It is already there by cross-reference in the last sentence of that provision, but the proposals would make it more prominent. In essence, the revised definition would define discoverable information as relevant, non-privileged information that is proportional to the reasonable needs of the case.

In addition, he said, the subcommittee was considering limiting discovery requests by lowering presumptive numbers and time limits, such as reducing the number of depositions from 10 to 5, the time of depositions from 7 hours to 4, and the number of interrogatories from 25 to 15, and by imposing caps of 25 requests for production and 25 requests for admissions. Although courts may alter them, just reducing the presumptive limits may reduce the amount of discovery that occurs and change the prevailing ethic that lawyers must seek discovery of everything.

Another proposal, he noted, would require parties objecting to a request for production to specify in their objection whether they are withholding documents. A responding party electing to produce copies of electronically stored information, rather than permitting inspection, would have to complete the production no later than the inspection date in the discovery request. Rule 26(g) would be amended to require the attorney of record to sign a discovery response to attest that the response is not evasive. Another proposal would defer contention interrogatories and requests to admit until after the close of all other discovery. The subcommittee, he said, was also considering cost-shifting provisions and may make cost shifting a more prominent part of discovery. All these changes are designed to streamline the discovery process and reduce the expenses complained about at the Duke conference.

Judge Campbell reported that a third category of proposals was designed to emphasize cooperation among the attorneys. One amendment would make cooperation an integral part of Rule 1. The rule, thus, might specify that the civil rules are to be construed and used to secure the just, speedy, and inexpensive determination of cases, and the parties should cooperate to achieve these ends.

Judge Campbell said that the advisory committee will study these drafts at its November 2012 meeting. It will likely marry them with the proposed rule on preservation to produce a package of rule amendments to make litigation more efficient. Professor Cooper added that it would be very beneficial for the Standing Committee members to review the proposed drafts carefully and point out any flaws and make additional suggestions that the advisory committee might consider.

A member praised the comprehensive and impressive efforts of the committee. She noted, though, that several corporate counsel had expressed concern about giving proportionality a more prominent place in the rules. They fear that it would give attorneys an excuse to litigate more discovery disputes.

A participant pointed out that the objective of fostering cooperation among the parties is excellent, but specifying a cooperation requirement in the text of the rules is troublesome. Cooperation inevitably is entwined with attorney conduct, an area on the edge of the Rules Enabling Act that may impinge on the role of the states in regulating attorney conduct.

Another participant suggested that consideration be given to appointing special masters to handle discovery in complex cases because busy judges often do not have the time to devote undivided attention to overseeing discovery. Some way would have to be found to pay for masters, but at least in large corporate cases, the parties may be able to work it out. He also recommended reducing the presumptive limit for expert-witness depositions to 4 hours.

A member commended the advisory committee for undertaking the discovery project. He suggested that anything the committee can do to limit the number of discovery requests and reduce discovery time periods, at least in the average case, will be beneficial. He also commended the proposed modest recommendations on cost-shifting and proportionality. He urged the committee to carry on the work and move as quickly as possible.

His only reservation, he said, concerned adding a cooperation requirement to the rules. The concept, he said, was fine, but it may conflict with an attorney's ethical duty to pursue a client's interests zealously. He asked how much lawyers can be reasonably expected to cooperate in discovery when they are not expected to cooperate very much in other areas. The adversarial process, he said, is a highly valued attribute of the legal system, and the committee should avoid intruding into the states' authority over attorney conduct.

Members noted that some states have imposed effective, stricter limits on depositions that led lawyers to reassess how long they really need to take a deposition. A member added that depositions of expert witnesses have been eliminated completely in his state. It was noted that the original intent of Rule 26(a)(2)'s report requirement was to reduce the length of depositions of expert witnesses or even to eliminate them in many cases. That benefit, however, has not been realized.

PLEADING STANDARDS

Professor Cooper reported that the advisory committee was continuing to monitor case law developments in the wake of the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007) and *Iqbal v. Ashcroft,* 556 U.S. 662 (2009). There is, he said, no sense that the lower courts have unified around a single, identifiable pleadings standard for civil cases, but there is also no sense of a crisis or emergency. The committee, he said, was essentially biding its time and did not plan to move forward quickly. It has several potential proposals on the table, including directly revising the pleading standards in FED. R. CIV. P. 8 (general rules of pleading), addressing pleading indirectly through Rule 12(e) motions for a more definite statement, or integrating pleading more closely with discovery, particularly in cases where there is an asymmetry of information.

Dr. Cecil reported that the Federal Judicial Center had begun pilot work on its new study of all case-dispositive motions in the district courts. The study, he said, will be different from earlier studies because it will take a more comprehensive, holistic look at all Rule 12 motions and summary judgment issues and explore whether there are any tradeoffs, such as whether an increase in motions to dismiss has led to a reduction in motions for summary judgment. In addition, the Center is collaborating closely with several civil procedure scholars and hopes to reach a consensus with them about what is actually going on in the courts regarding dispositive motions. The study, he said, will be launched in September 2012 with the help of law professors and students in several schools.

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FED. R. CIV. P. 84 AND FORMS

Judge Campbell reported that the advisory committee was examining FED. R. CIV. P. 84 (forms), which states that the forms appended to the rules "suffice" and illustrate the simplicity and brevity that the rules contemplate. He explained that many of the forms are outdated, and some are legally inadequate.

Professor Cooper pointed out that the Standing Committee had appointed an ad hoc forms subcommittee, chaired by Judge Gene E. K. Pratter of the civil committee, to review how the advisory committees develop and approve forms. The subcommittee, he said, made two basic observations: (1) in practice, the civil, criminal, bankruptcy, and appellate forms are used in widely divergent ways; and (2) the process for generating and approving forms differs substantially among the advisory committees.

The civil and appellate forms, for example, adhere to the full Rules Enabling Act process, including publication, approval by the Judicial Conference and the Supreme Court, and submission to Congress. The bankruptcy rules, on the other hand, follow the process partly, only up through approval by the Judicial Conference. At the other extreme, the criminal rules have no forms at all. Instead, the Administrative Office drafts the criminal forms, sometimes in consultation with the criminal advisory committee. He said that the subcommittee ultimately concluded that there is no overriding need for the advisory committees to adopt a uniform approach.

Professor Cooper explained that the civil advisory committee was now in the second phase of the forms project and was focusing on what to do specifically with the civil forms. He noted that the project had received an impetus from the Supreme Court's *Twombly* and *Iqbal* decisions on pleading requirements and from the widely held perception that the illustrative civil complaint forms are legally insufficient. There is, he said, a clear tension between the simplicity of those forms and the pleading requirements announced in the Supreme Court decisions.

He noted that the advisory committee was considering several different options. One would be just to eliminate the pleading forms. An alternate would be to develop a set of new, enhanced pleading forms for each category of civil cases consistent with *Twombly* and *Iqbal*. There was, though, no enthusiasm in the committee for that approach. Going further, the committee could consider getting back into the forms business full-bore and spend substantial amounts of time on improving and maintaining all the forms. At the other extreme, the committee could eliminate all the forms and allow the Administrative Office to generate the forms, with appropriate committee consultation.

CLASS ACTIONS AND RULE 23 SUBCOMMITTEE

Judge Campbell reported that the advisory committee had appointed a Rule 23 subcommittee to consider several topics involving class-action litigation and whether certain amendments to the class-action rule were appropriate.

Professor Marcus said that the subcommittee had begun its work and was examining a variety of controversial issues that have emerged as a result of several Supreme Court decisions in the past couple of years, recent litigation developments, and experience under the Class Action Fairness Act. Among the topics being considered are: (1) the relationship between considering the merits of a case and determining class action certification, particularly with regard to the predominance of common questions; (2) the viability of issues classes under Rule 23(c)(4); (3) monetary relief in a Rule 23 (b)(2) class action; (4) specifying settlement criteria in the rule; and (5) revising Rule 23 to address the Supreme Court's announcement in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), that the fairness and adequacy of a settlement are no substitute for full-dress consideration of predominance.

Professor Marcus noted that the list of issues continues to evolve and many were discussed at the panel discussion during the Standing Committee's January 2012 meeting. He pointed out that the project to consider appropriate revisions to Rule 23 will take time, since several topics are controversial and will pose drafting difficulties.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raggi and Professor Beale presented the report of the advisory committee, as set forth in Judge Raggi's memorandum and attachments of May 17, 2012 (Agenda Item 8).

Amendment for Final Approval

FED. R. CRIM. P. 11(b)

Judge Raggi reported that the proposed amendment to FED. R. CRIM. P. 11(b)(1) (pleas) would add a new subsection (o) to the colloquy that a court must conduct before accepting a defendant's guilty plea. It would require a judge to advise defendants who are not United States citizens that they may face immigration consequences if they plead guilty.

She noted that at every stage of the advisory committee's deliberations, a minority of members questioned whether it is wise or necessary to add further requirements to the already lengthy Rule 11 plea colloquy. Moreover, the Supreme Court's decision in *Padilla v. Kentucky*, 559 U.S. ___, 130 S. Ct. 1473 (2012), addressed the duty of defense counsel, not the duty of courts, to provide information on immigration consequences to the defendant. Nevertheless, a majority of the advisory committee concluded that immigration is qualitatively different from other collateral consequences that may flow from a conviction. Moreover, a large number of criminal defendants in the federal courts are aliens who are affected by immigration consequences.

The committee, she said, recognized the importance of not allowing Rule 11(b) to become such a laundry list of every possible consequence of a guilty plea that the most critical factors bearing on the voluntariness of a plea do not get lost, *i.e.,* knowledge of the important constitutional rights that the defendant is waiving. She added that the only change made after publication was a modest change in the committee note.

The committee unanimously by voice vote approved the proposed amendment for final approval by the Judicial Conference.

Amendments for Publication

FED. R. CRIM. P. 5(d) and 58(b)

Judge Raggi explained that the proposed amendments to FED. R. CRIM. P. 5(d) (initial appearance) and FED. R. CRIM. P. 58(b)(2) (initial appearance in a misdemeanor) dealt with advising detained foreign nationals that they may have their home country's consulate notified of their arrest.

The amendments had been approved by the Judicial Conference in September 2011, but returned by the Supreme Court in April 2012. The advisory committee then discussed possible concerns that the Court may have had, such as that the possibility that the language of the amendments could be construed to intrude on executive discretion or confer personal rights on a defendant. She suggested that there may have been concern

over the proposed language in Rule 5(d)(1)(F), which specified that a detained non-citizen be advised that an attorney for the government or law-enforcement officer will do either of two things: (1) notify a consular office of the defendant's country, or (2) make any other consular notification required by treaty or international agreement.

She suggested that use of the word "will" might have been seen as potentially tying the hands of the executive in conducting foreign affairs. In addition, despite language in the committee note that the rule did not create any individual rights that a defendant may enforce in a federal court, the rule might have been seen as taking a step in that direction,

After the rule was returned by the Court, the advisory committee went back to the drawing board and produced a revised draft of the amendments. As revised, the first part provides that the defendant must be told only that if in custody, he or she "may request" that an attorney for the government or law-enforcement officer notify a consular office. It does not guarantee that the notification will in fact be made. The second part of the amendments was not changed. It specifies that even without the defendant's request, consultation notification may be required by a treaty or other international agreement.

Judge Raggi pointed out that the primary concern in revising the amendments was to assuage any concerns that the Supreme Court may have had with the amendments as originally presented. She noted that the Department of Justice had been consulting closely with the Department of State, which is very eager to have a rule as an additional demonstration to the international community of the nation's compliance with its treaty obligations.

A member noted that the Vienna Convention only requires notification of a consular office if a defendant requests it. She said that the Supreme Court might have found the original language of proposed Rule 5(d)(1)(F)(i) too strong in stating that the government will notify a consular office if the defendant requests. But the new language in Rule 5(d)(1)(F)(ii) may go too far in the other direction by requiring notification without the defendant's request if required by a treaty or international agreement.

Ms. Felton explained that several bilateral treaties, separate from the Vienna Convention, require notification regardless of the defendant's request. She added that the Departments of Justice and State had proposed the amendments to Rules 5 and 58 primarily as additional, back-up insurance that consular notification will in fact be made.

The main thrust of the amendments, she said, was to inform defendants of their option to request consular notification. In the vast majority of cases, however, the notification will already have been made by a law-enforcement officer or government attorney at the time of arrest. That is what the Vienna Convention contemplates. The

proposed amendments, which apply at initial appearance proceedings, will help catch any cases that may have slipped through the cracks.

Judge Raggi noted that this factor was part of the discussion on whether a rule is needed at all because there are no court obligations under the Convention and treaties. The rule, essentially, is a belt-and-suspenders provision designed to cover the rare cases when a defendant has not been advised properly. It only states that a defendant may request notification, and that is as far as it can go. If were to imply that the notice will in fact be given, which is what some treaties actually require, there would be concern that the rule itself was creating an enforceable individual right in the defendant.

Professor Beale added that the revised amendments were acceptable to the Departments of Justice and State. They may be more acceptable to the Supreme Court because they do not in any way tie the hands of the executive and avoid creating any individual rights or remedies. A member noted that the last part of the committee notes makes that point explicitly.

Judge Raggi pointed out that it was up to the Standing Committee to decide whether to republish the rule. Although the changes made after the return from the Supreme Court simply clarify the intent of the amendments, the advisory committee had reason to think that they were different enough to warrant publishing the rule again for further comment.

The committee unanimously by voice vote approved the proposed amendments for republication.

Information Items

FED. R. CRIM. P. 12 and 34

Judge Raggi explained that the proposed amendments to FED. R. CRIM. P. 12 (pleadings and pretrial motions) and the conforming amendment to FED. R. CRIM. P. 34 (arresting judgment) deal with motions that have to be made before trial and the consequences of an untimely motion. The amendments, she said, had been prompted by a proposal by the Department of Justice to include motions objecting to a defect in the indictment in the list of motions that must be made before trial.

The proposal, she said, had now come to the Standing Committee for the third time. The last draft was published for public comment in August 2011. It generated many thoughtful comments, which led the advisory committee to make some additional changes. It is expected that the ad hoc subcommittee reviewing the rule will present a final draft to the advisory committee in October 2012, and it may be presented to the Standing Committee for final approval in January 2013.

FED. R. CRIM. P. 6(e)

Judge Raggi reported that the advisory committee had received a letter from the Attorney General in October 2011 recommending that FED. R. CRIM. P. 6(e) (grand jury secrecy) be amended to establish procedures for disclosing historically significant grand jury materials. She noted that applications to release historic grand jury materials had been presented to the district courts on rare occasions, and the courts had resolved them by reference to their inherent supervisory authority over the grand jury.

The Department of Justice, however, questioned whether that inherent authority existed in light of Rule 6(e)'s clear prohibition on disclosure of grand jury materials. Instead, it recommended that disclosure should be permitted, but only under procedures and standards established in the rule itself. The Department submitted a very thoughtful memo and proposed rule amendments that would: (1) allow district courts to permit disclosure of grand jury materials of historical significance in appropriate circumstances and subject to required procedures; and (2) provide a specific point in time at which it is presumed that materials may be released.

She noted that a subcommittee, chaired by Judge John F. Keenan, had examined the proposal and consulted with several very knowledgeable people on the matter. In addition, the advisory committee reporters prepared a research memorandum on the history of Rule 6(e), the relationship between the court and the grand jury and case law precedents on the inherent authority of a judge to disclose grand jury material. After examining the research and discussing the proposal, all members of the subcommittee, other than the Department of Justice representatives, recommended that the proposed amendment not be pursued.

The full advisory committee concurred in the recommendation and concluded that in the rare cases where disclosure of historic materials had been sought, the district judges acted reasonably in referring to their inherent authority. Therefore, there is no need for a rule on the subject.

Judge Raggi added that she had received a letter from the Archivist of the United States strongly supporting the Department of Justice proposal. She spoke with him at length about the matter and explained that it would be a radical change to go from a presumption of absolute secrecy, which is how grand juries have always operated, to a presumption that grand jury materials should be presumed open after a certain number of years. A change of that magnitude, she said, would have to be accomplished through legislation, rather than a rule change. She noted that the archivist has a natural, institutional inclination towards eventually releasing historical archived documents and might consider supporting a legislative change.

FED. R. CRIM. P. 16

Judge Raggi reported that a suggestion had been received from a district judge to amend FED. R. CRIM. P. 16(a) (government's disclosure) to require pretrial disclosure of all the defendant's prior statements. There was, however, a strong consensus on the advisory committee that there are no real problems in criminal practice that warrant making the change. The committee, accordingly, decided not to pursue an amendment.

Judge Raggi reported that the Senate Judiciary Committee was considering legislation addressing the government's obligations to disclose exculpatory materials under *Brady* and *Giglio*. The committee had asked the judiciary for comments and a witness at the hearings. She said that she had decided not to testify but wrote to the committee to document the work of the advisory committee and the Standing Committee on the subject over the last decade. Attached to the letter were 900 pages of the public materials that the committee had produced.

She explained in the letter that the advisory committee had tried to write a rule that would codify all the government's disclosure obligations under case law and statute, but concluded that it could not produce a rule that fully captures the obligations across the wide range of federal criminal cases. In addition, she said, her letter alluded to a Federal Judicial Center survey of federal judges showing, among other things, that judges see non-disclosure as a problem that only arises infrequently. Although the advisory committee decided not to pursue a rule change, she added, the subject is being addressed in revisions to the *Bench Book for U.S. District Court Judges*. She noted that the Federal Judicial Center's Bench Book Committee was close to completing that work.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Fitzwater and Professor Capra presented the report of the advisory committee, as set forth in Judge Fitzwater's memorandum and attachments of May 3, 2012 (Agenda Item 6). Judge Fitzwater noted that the advisory committee had no action items to present.

Amendments for Final Approval

FED. R. EVID. 803(10)

Judge Fitzwater reported that the proposed amendment to FED. R. EVID. 803(10) (hearsay exception for the absence of a public record) was needed to address a constitutional infirmity as a result of the Supreme Court's decisions in *Melendez-Diaz v. Massachusetts,* 557 U.S. 305 (2009). It raised the concern that "testimonial" evidence is being allowed when a certificate that a public record does not exist is introduced in

evidence without the presence of the official who prepared the certificate. The proposed amendment would create a notice-and-demand procedure that lets the prosecution give written notice of its intention to use the information. Unless the defendant objects and demands that the witness be produced, the certificate may be introduced.

The proposed procedure, he said, had been approved in *Melendez-Diaz*. The advisory committee received two comments on the amendment, one of which endorsed it and the other approved it in principle with some comments.

The committee unanimously by voice vote approved the proposed amendment for final approval by the Judicial Conference.

Amendments for Publication

FED. R. EVID. 801(d)(1)(B)

Judge Fitzwater reported that FED. R. EVID. 801(d) (declarant-witness's prior statement) specifies that certain prior statements are not hearsay. Under Rule 801(d)((1)(B), the proponent of testimony may introduce a prior consistent statement for its truth, *i.e*. to be admitted substantively, but not for another rehabilitative purpose, such as faulty recollection.

He said that two problems have been cited with the way the rule is now written. First, the prior consistent statement of the witness is of little or no use for credibility unless the jury actually believes the testimony to be true anyway. The jury instruction, moreover, is very difficult for jurors to follow, as it asks them to distinguish between prior consistent statements admissible for the truth and those that are not. Second, the distinction has little, if any, practical effect because the proponent of the testimony has already testified in the presence of the trier of fact.

The proposed amendment would allow a prior consistent statement to be admitted substantively if it otherwise rehabilitates the witness' credibility.

The committee without objection by voice vote approved the proposed amendment for publication.

FED. R. EVID. 803(6)-(8)

Judge Fitzwater noted that FED. R. EVID. 803(6), (7), and (8) are the hearsay exceptions, respectively, for business records, the absence of business records, and public records. When the admissibility requirements of the rule are met, the evidence is admitted as an exception to the hearsay rule unless the source, method, or circumstances indicate a lack of trustworthiness.

During the restyling of the rules, he said, a question arose as to who has the burden on the issue of lack of trustworthiness. By far the vast majority of court decisions have held that the burden is on the opponent of the evidence, not the proponent. But a few decisions have placed the burden on the proponent. Since the case law was not unanimous, the advisory committee decided that it could not clarify the matter as part of the restyling project because a change would constitute a matter of substance.

Although the ambiguity was not resolved during the restyling project, the Standing Committee suggested that the advisory committee revisit the rule. The advisory committee initially was of the view that no further action was needed until it was informed that the State of Texas, during its own restyling project, had looked at the restyled federal rules and concluded that FED. R. EVID. 803(6)-(8) had placed the burden on the proponent of the evidence. This, clearly, was not the advisory committee's intention. At that point, it decided to make a change in the rules to make it clear that the burden is on the opponent of the evidence.

At members' suggestions, minor changes were made in the proposed committee notes. Line 34 of the note to Rule 806(8) was corrected to conform to the text of the rule, and an additional sentence was added to the second paragraph of the note to Rule 806(6).

The committee without objection by voice vote approved the proposed amendments for publication.

Information Items

SYMPOSIUM ON FED. R. EVID. 502

Judge Fitzwater noted that the advisory committee's next meeting will be held on October 4 and 5, 2012, in Charleston, South Carolina. A symposium on Rule 502 will be held in conjunction with the meeting, with judges, litigators, and academics in attendance. There is concern, he said, that Rule 502 (limitations on waiver of attorney-client privilege and work product) is not being used as widely as it should be as a means of reducing litigation costs. He noted that Professor Marcus will be one of the speakers at the program, and he invited the members of the Standing Committee to attend.

REPORT OF THE E-FILING SUBCOMMITTEE

Judge Gorsuch noted that the ad hoc committee, which he chaired, was comprised of representatives from all the advisory committees. It was convened to consider appropriate terminology that the rules might use to describe activities that previously had only involved paper documents but now are often processed electronically. Although the

impetus for the subcommittee's formation arose in connection with the appropriate terminology to use in the pending amendments to Part VII of the bankruptcy rules and FED. R. APP. P. 6, the subcommittee took a comprehensive look at all the federal rules. Professor Struve served as the subcommittee reporter, and Ms. Kuperman compiled a comprehensive list of all the terms used in each set of federal rules to describe the treatment of the record and other materials that may be either in paper or electronic form.

He noted that the subcommittee had identified four possibilities for defining its work and listed them from the most aggressive to the least. First, he said, it could conduct a major review of all the federal rules in order to achieve uniformity in terminology across all the rules. That major project would be conducted along the lines of the recent restyling efforts. Second, the subcommittee could compile a glossary of preferred terms. Third, it could serve as a screen for all future rule amendments, and advisory committees would have to run their proposals through the subcommittee. And fourth, the subcommittee could simply make itself available for assistance at the request of the advisory committees.

He reported that the subcommittee opted for the last alternative, largely because the others would all take a great deal of time and effort. Moreover, it recognized that technology is changing so rapidly that it may not be timely to undertake a more aggressive approach at this juncture. At some point in the future, though, terminology will have to be addressed more comprehensively. He added that the most valuable result of the subcommittee's work was to make the reporters cognizant of the extraordinary number of synonyms currently in use in the rules and to encourage them to coordinate with each other on terminology.

INTERIM ASSESSMENT OF THE JUDICIARY'S STRATEGIC PLAN

Judge Kravitz noted that he would work with the advisory committees to prepare a response to Judge Charles R. Breyer, the Judicial Planning Coordinator, on the committee's progress in implementing the *Strategic Plan for the Federal Judiciary.*

NEXT MEETING

The committee will hold its next meeting on Thursday and Friday, January 3 and 4, 2013 in Boston, Massachusetts.

Respectfully submitted,

Peter G. McCabe,
Secretary

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12b-006573

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE THOMAS F. HOGAN
Secretary

PRELIMINARY REPORT
JUDICIAL CONFERENCE ACTIONS
September 11, 2012
****

All the following matters requiring the expenditure of funds were approved by the Judicial Conference *subject to the availability of funds* and to whatever priorities the Conference might establish for the use of available resources.

****

At its September 11, 2012 session, the Judicial Conference of the United States —

EXECUTIVE COMMITTEE

Approved a resolution in recognition of the substantial contributions made by five Judicial Conference committee chairs whose terms of service end in 2012.

COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM

With regard to continuing need for bankruptcy judgeships:

a. Agreed to recommend to Congress that no existing bankruptcy judgeship be statutorily eliminated; and

b. Agreed to advise the Eighth Circuit Judicial Council with respect to the District of South Dakota and the Northern District of Iowa, and the Ninth Circuit Judicial Council with respect to the District of Alaska, to consider not filling vacancies that currently exist or may occur by reason of resignation, retirement, removal, or death, until there is a demonstrated need to do so.

Approved amendments to its regulations governing the ad hoc and extended service recall of retired bankruptcy judges (*Guide to Judiciary Policy*, Vol. 3, Ch. 9 and Ch. 10) to —

a. Establish national standards for approval of recall of retired bankruptcy judges and for approval of staff for recalled judges;

12b-006574

b. Provide for Bankruptcy Committee approval of any request for funds for a recall of a retired bankruptcy judge that exceeds $10,000 in judicial salary, Office of Personnel Management annuity reimbursement, travel, and subsistence, and any request for staff for a recalled bankruptcy judge.

c. Establish October 1, 2012, as the effective date for the amended regulations and authorize all bankruptcy judges serving on recall at the time the amended regulations become effective, as well as all staff to recalled judges on-board at that time, to complete their current terms, notwithstanding the amendments to the regulations; and

d. Make non-substantive, stylistic changes.

Approved further amendments to the retired bankruptcy judge recall regulations (*Guide to Judiciary Policy*, Vol. 3, Ch. 9 and Ch. 10) to —

a. Require that any retired bankruptcy judge who is eligible and consents to serve on recall, and has been approved for recall service, but has been separated from federal judicial service for more than 1 year but no more than 10 years, be subject to a name and fingerprint check by the FBI, a tax check by the IRS, and a credit check by OPM; and

b. Require that a retired bankruptcy judge who is eligible and consents to serve on recall, and has been approved for recall service, but has been separated from federal judicial service for more than 10 years, be subject to a full-field background investigation by the FBI with a 15-year scope.

Authorized the designation of Sioux Falls, in the District of South Dakota, as the official duty station for Bankruptcy Judge Charles L. Nail, Jr.

COMMITTEE ON THE BUDGET

Approved the Budget Committee's budget request for fiscal year 2014, subject to amendments necessary as a result of (a) new legislation, (b) actions of the Judicial Conference, or (c) any other reason the Executive Committee considers necessary and appropriate.

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT

Agreed to request each individual court unit within each district (district, probation and pretrial services, and bankruptcy) to work together to adopt a Shared Administrative Services plan. The plans should be submitted to the chief judge of the circuit and the circuit executive, and be provided to the Committee on Court Administration and Case Management by February 15, 2013.

Endorsed the elimination of funding for the printing of court of appeals slip opinions, with a one-year exception for courts that have contracted with vendors prior to September 11, 2012, for services to be provided in FY 2013, and agreed to encourage courts to use electronic dissemination in lieu of printing.

Approved the following proposed changes to the miscellaneous fee schedules:

a. For the Bankruptcy Court Miscellaneous Fee Schedule:

(i) Added the following item, effective May 1, 2013:

(20) For filing a transfer of claim, $25 per claim transferred.

(ii) Amended items (11) and (18) for filing a motion to reopen or divide a Chapter 11 case, and amended item (15) for filing a case under Chapter 15 of the Bankruptcy Code, to increase fees from $1,000 to $1,167, effective November 21, 2012.

b. For the District Court Miscellaneous Fee Schedule, added the following item, effective May 1, 2013:

(14) Administrative fee for filing a civil action, suit, or proceeding in a district court, $50. This fee does not apply to persons granted *in forma pauperis* status under 28 U.S.C. § 1915.

c. For the Electronic Public Access Fee Schedule, amended item III to raise the record search fee from $26 to $30, and amended item V to raise the returned check fee from $45 to $53, effective October 1, 2012.

Approved revisions to the legal research materials policy, *Guide to Judiciary Policy*, Vol. 21, Ch. 3, to further encourage cost savings in legal research materials for judges' chambers, and to make other technical, non-substantive changes.

Amended the bankruptcy records disposition schedule to add two new items to address bankruptcy miscellaneous proceedings and records, and attorney disbarment proceedings, and authorized the revised schedule to be transmitted to the National Archives and Records Administration.

Approved national implementation of the program to provide access to court opinions via the Government Printing Office's Federal Digital System and agreed to encourage all courts, at the discretion of the chief judge, to participate in the program.

COMMITTEE ON CRIMINAL LAW

Authorized revisions to Monograph 109, *The Supervision of Federal Offenders*, *Guide to Judiciary Policy*, Volume 8, Part E, Chapter 4, to clarify the type of information that an officer may disclose to law enforcement.

Declined to approve the following recommendation:

> Because the independence of the federal judiciary requires that judges make case-related decisions freely in accordance with the law and without fear or intimidation —
>
> a. Re-affirm its existing positions with regard to the release of judge-specific sentencing data by judicial branch organizations; and
>
> b. With regard to judge-identifying information, specifically oppose any:
>
> i. effort to hold judges individually accountable for their sentencing decisions except through established processes for appellate review;
>
> ii. congressional use of judge-identifying sentencing data for the purpose of singling out individual judges for denigration, harassment, questioning, or retaliation; and
>
> iii. release to Congress of judge-identifying data by the Sentencing Commission in the continuing absence of an articulated legitimate legislative purpose for acquiring such data.

COMMITTEE ON DEFENDER SERVICES

Approved proposed CJA guidelines (to be included in both the capital and non-capital chapters of Volume 7A, *Guide to Judiciary Policy*) pertaining to notification to the presiding judicial authority of familial relationships between (a) counsel and potential service providers and (b) co-counsel.

COMMITTEE ON FINANCIAL DISCLOSURE

Agreed to postpone consideration of a motion to disapprove the report of the Committee on Financial Disclosure and require the Committee to file with the Judicial Conference amended reports that provide information about actions taken pursuant to a delegation of Conference authority under 5 U.S.C. app. § 104(b), so that the Committee may first consider the matter and report back to the Conference.

COMMITTEE ON INFORMATION TECHNOLOGY

Adopted a policy that a single network infrastructure will be installed in new buildings, new annexes, newly leased space, and repair and alterations projects in which new space is being configured for multiple court units. Exceptions to this policy must be approved by the appropriate circuit judicial council and, if approved, any increased costs, including facilities-related costs, resulting from duplicate infrastructure must be funded locally.

Approved the proposed fiscal year 2013 update to the *Long Range Plan for Information Technology in the Federal Judiciary*.

COMMITTEE ON THE JUDICIAL BRANCH

Approved an amendment to section 250.40.20(b) of the Travel Regulations for United States Justices and Judges, *Guide to Judiciary Policy*, Vol. 19, Ch. 2, to clarify that whenever a judge is provided a continental breakfast in connection with a judiciary meeting and the continental breakfast consists of more than "light refreshments" as defined under judiciary policy, the judge's subsistence allowance should be reduced accordingly.

COMMITTEE ON JUDICIAL RESOURCES

Approved new bankruptcy clerk's office staffing formulas starting in fiscal year 2013 as follows:

a. Six separate staffing formulas for bankruptcy courts with one, two, three, four-to-six, seven-to-ten, and 24 authorized judgeships, respectively; and

b. A weighted calculation of staffing formula results that reduces staffing volatility by using 60 percent of workload data from the statistical year (July 1 to June 30) closing immediately prior to the start of the fiscal year of execution and 40 percent of workload data from the statistical year ending 15 months prior to the start of the relevant fiscal year.

Approved a shared administrative services component for use with the new staffing formulas for bankruptcy clerks' offices with the following stipulations:

a. Defer presumed shared administrative services reductions in the staffing formulas for bankruptcy clerks' offices for fiscal year 2013;

b. Presume shared administrative services reductions for fiscal year 2014 in the bankruptcy clerks' offices excluding information technology, budget, and finance functions;

c. Presume shared administrative services reductions for fiscal year 2015 in the bankruptcy clerks' offices excluding budget and finance functions, but including

an appropriate percentage of information technology functions, currently estimated at 19 percent; and

d. Presume shared administrative services reductions for fiscal year 2016 in the bankruptcy clerks' offices excluding budget and finance functions, but including all information technology functions.

With regard to pro se law clerks:

a. Approved establishing a staffing formula for pro se law clerks in fiscal year 2013 based on prisoner cases only, providing a credit of 13.4 hours per civil rights case for nature of suit codes 540 (Mandamus & Other), 550 (Civil Rights), 555 (Prison Condition), and 560 (Civil Detainee - Conditions of Confinement); and a credit of 8.3 hours per habeas corpus case for nature of suit codes 463 (Alien Detainee (Prisoner Petition)), 510 (Motions to Vacate Sentence), 530 (General), and 535 (Death Penalty);

b. Agreed to retain the two-year stabilization policy, which requires prisoner case filings to drop below a staffing threshold for two consecutive years before decreasing staff allocations;

c. Eliminated the one full-time equivalent minimum allocation per district and agreed to allocate pro se law clerk positions in 0.5 full-time equivalent increments;

d. Eliminated grandfathering for pro se law clerks with the implementation of the new formula;

e. Deferred termination of current minimum staffing and grandfathered pro se law clerks until December 31, 2013;

f. Provided no additional resources for cases that do not involve a pro se prisoner-plaintiff, including civil rights and social security cases; and

g. Agreed to encourage sharing or pooling of pro se law clerks and death penalty law clerks to enable the most efficient and effective use of resources.

Authorized a third Judiciary Salary Plan-16 Type II chief deputy clerk position for the district clerk's office of the Central District of California, to be funded only with the court's decentralized funds.

Approved a revision of the highest previous rate rule for courts to permit them to use this pay-setting flexibility prospectively at any time within one year of re-employment, or within one year of the last transfer, reassignment, promotion, demotion, or change in type of appointment. Federal public defender organizations are excluded from the change in this rule.

Modified its March 2007 policy on honorary (non-monetary) awards to allow courts to —

a. Incur the reasonable cost associated with engraving or other personalization of an honorary award;

b. Provide a plaque in addition to a framed certificate or court seal for a retiring employee, subject to the $100 per court employee, per year limitation; and

c. Have probation and pretrial services officers receive their nonfunctional deactivated badges and/or credentials at retirement, subject to the $100 per court employee, per year limitation.

Approved revision of the September 1991 transcript rates policy and guidelines to reflect newer technology.

Amended the 2010 *Model Employment Dispute Resolution Plan* to extend whistleblower protection to employees.

COMMITTEE ON THE ADMINISTRATION OF THE MAGISTRATE JUDGES SYSTEM

Approved recommendations regarding specific magistrate judge positions to: (a) redesignate the location of one full-time magistrate judge position in the Western District of Oklahoma; and (b) reduce the salary of the full-time magistrate judge position at Yellowstone National Park.

Agreed to amend its regulations governing the ad hoc and extended service recall of retired magistrate judges, *Guide to Judiciary Policy*, Vol. 3, Ch. 11 and Ch. 12, to (a) provide for Magistrate Judges Committee approval of any request for staff for recalled magistrate judges and any request for funds for recall of a retired magistrate judge that exceeds $10,000 in judicial salary, Office of Personnel Management annuity reimbursement, travel, and subsistence; (b) provide workload standards for recalled magistrate judges when staff is requested; and (c) make non-substantive, stylistic changes.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Approved proposed amendments to Appellate Rules 13, 14, 24, 28, and 28.1, and to Form 4, and agreed to transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Bankruptcy Rules 1007(b)(7), 4004(c)(1), 5009(b), 9006(d), 9013, and 9014, and agreed to transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed revisions of Official Bankruptcy Forms 7, 9A–9I, 10, and 21, to take effect on December 1, 2012.

Approved proposed amendments to Civil Rules 37 and 45, and agreed to transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved a proposed amendment to Criminal Rule 11, and agreed to transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

Approved a proposed amendment to Evidence Rule 803(10), and agreed to transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

COMMITTEE ON SPACE AND FACILITIES

Endorsed, upon the recommendations of the respective circuit judicial councils and this Committee, the closure of six non-resident facilities in the following locations: (a) Wilkesboro, North Carolina, upon the completion of the renovation of the courthouse in Statesville, North Carolina; (b) Beaufort, South Carolina, at the end of the lease term in 2014; (c) Meridian, Mississippi; (d) Amarillo, Texas, upon the cancellation of the lease for the bankruptcy court space at the earliest point at which it is economically feasible; (e) Pikeville, Kentucky, to release the bankruptcy courtroom and chamber in the leased space; and (f) Gadsden, Alabama.

Approved an exception to the *U.S. Courts Design Guide* for the chambers and courtroom project in Clarksburg, West Virginia subject to the following conditions: design may begin, but (a) no construction can commence until (i) the judge to be replaced provides formal notice that she will take senior status upon a date certain, and (ii) the court commits that a district judge will reside in the chambers being constructed; and (b) Component B funding for design and construction may not be obligated until the beginning of fiscal year 2013.

Approved a change to Circuit Rent Budget Business Rule #1, such that the new rule would make an allotment equal to one year's rental savings available for use within two years, by the chief judge of any district court, bankruptcy court, or court of appeals, on behalf of a court unit that releases space accepted by GSA as marketable. The court would then use those funds to: (a) fund requirements related to space relinquishment, such as tenant alterations or furniture; or (b) fund other activities or items necessary for their operations.

Approved the proposed *Five-Year Courthouse Project Plan for FYs 2014-2018.*

TAB 2

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TAB 2A

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

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
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EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

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

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

Date: December 5, 2012

Re: Report of the Civil Rules Advisory Committee

Introduction

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

Part I of this Report presents for action a proposal recommending publication for comment of a revised Rule 37(e). The revisions provide both remedies and sanctions for failure to preserve discoverable information that reasonably should have been preserved. In addition, they describe factors to be considered both in determining whether information reasonably should have been preserved and also in determining whether a failure was willful or in bad faith.

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

Part II presents several matters on the Committee agenda for information and possible discussion. The 2010 Duke Conference bristled with ideas for reducing cost and delay in civil litigation, including many that seem suitable subjects for incorporation in the rules. Several of these ideas are presented by rules drafts. The Committee hopes it will be possible to have a fairly full discussion of the drafts, aiming toward polished drafts that can be presented in June with a recommendation to publish for comment.

Other topics in Part II include the question whether Rule 84 and the Rule 84 Forms should be abandoned. Brief notes are made on the early stages of the Class-action Subcommittee’s work and on the ongoing empirical work on pleading standards. Finally, there is a report on the Committee’s conclusion that the Enabling Act process is not the arena to pursue proposals to encourage prompt rulings on motions to remand actions removed from state court and to make mandatory an award of fees and expenses whenever an action is remanded.

PART I: ACTION ITEMS

I.A. ACTION TO RECOMMEND PUBLICATION OF REVISED RULE 37(e)

ACTION ITEM: RULE 37(e)

The Civil Rules Advisory Committee has been working on the issues raised by concerns about preservation and sanctions since the May, 2010, Duke Conference. During that conference, the E-Discovery Panel recommended adoption of rule provisions to address these concerns. Very soon thereafter, the Advisory Committee's Discovery Subcommittee began work on these issues. That work has involved one major full-day conference and repeated discussions with the full Advisory Committee. During that time the Standing Committee also had a panel discussion (during its January, 2011, meeting) of these issues. Since the last Standing Committee meeting in June, 2012, the pace of work has quickened.

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Beginning on July 5, 2012, the Discovery Subcommittee held a total of eight conference calls to discuss and develop its proposal. The last of those calls occurred after the Advisory Committee's Nov. 2 meeting, and addressed matters the full Committee remitted to the Subcommittee for further consideration.

At the Nov. 2 meeting, the full Committee voted to recommend approval of a new Rule 37(e) for publication for public comment during the Standing Committee's January, 2013, meeting. It is understood that actual publication would not occur until August, 2013, but the Subcommittee felt that there was no reason to delay submission of the preliminary draft it had developed and the full Committee agreed. The Advisory Committee continues to work on additional case-management amendment ideas with the help of its Duke Subcommittee, and those may be presented to the Standing Committee at its June, 2013, meeting with a recommendation for publication. If that happens, it is hoped that they would form a broad package of amendment ideas with new Rule 37(e). If that does not happen, at least Rule 37(e) would be available to respond to the pressing concerns about preservation and sanctions.

This memorandum provides background on this work and introduces the issues. It contains the Rule 37(e) preliminary draft that the Advisory Committee recommends be published for public comment.

Need for action

The Civil Rules Advisory Committee was first advised of the emerging difficulties presented by discovery of electronically stored information in 1997, but the nature of those problems and the ways in which rules might respond productively to them remained uncertain for some time. After considerable inquiry, the Committee was uncertain whether or how to proceed. Eventually, about a decade ago, it decided to proceed to try to draft rule amendments that addressed a variety of issues on which concern had then focused. Eventually that work led to the 2006 E-Discovery amendments to the Civil Rules.

One of those amendments was a new Rule 37(e), which provided protection against sanctions for loss of electronically stored information due to the "routine, good faith operation of an electronic information system." The Committee Note to that rule provision observed that the routine operation might need to be altered due to the prospect of litigation, and mentioned that a "litigation hold" would sometimes be needed.

The amount and variety of digital information has expanded enormously in the last decade. And the costs and burdens of litigation holds have escalated as well. In December, 2011, the House Judiciary Committee held a hearing on the costs of American discovery that largely focused on the costs of preservation. For details on that hearing, one can visit the following site:

http://judiciary.house.gov/hearings/hear_12132011_2.html

The Discovery Subcommittee developed three general models of possible rule-amendment approaches which it presented to the participants in its mini-conference in September, 2011, and summarized as follows at the time:

Category 1: Preservation proposals incorporating considerable specificity, including specifics regarding digital data that ordinarily need not be preserved, elaborated with great precision. Submissions the Committee received from various interested parties provided a starting point in drafting some such specifics. A basic question is whether a single rule with very specific preservation provisions could reasonably apply to the wide variety of civil cases filed in federal court. A related issue is whether changing technology would render such a rule obsolete by the time it became effective, or soon thereafter. Even worse, it might be counter-productive. For example, a rule that triggers a duty to preserve when a prospective party demands that another prospective party begin preservation measures (among the triggers suggested) could lead to overreaching demands, counter-demands, and produce an impasse that could not be resolved by a court because no action had yet been filed.

Category 2: A more general preservation rule could address a variety of preservation concerns, but only in more general terms. It would, nonetheless, be a "front end" proposal that would attempt to establish reasonableness and proportionality as touchstones for assessing preservation obligations. Compared to Category 1 rules, then, the question would be whether something along these lines would really provide value at all. Would it be too general to be helpful?

Category 3: This approach would address only sanctions, and would in that sense be a "back end" rule. It would likely focus on preservation decisions, making the most serious sanctions unavailable if the party who lost information

acted reasonably. In form, however, this approach would not contain any specific directives about when a preservation obligation arises or the scope of the obligation. By articulating what would be "reasonable," it might cast a long shadow over preservation without purporting directly to regulate it. It could also be seen as offering "carrots" to those who act reasonably, rather than relying mainly on "sticks," as a sanctions regime might be seen to do.

All three categories were presented -- with sketches of possible rule language raising subsidiary questions -- during the Subcommittee's September, 2011, mini-conference on preservation and sanctions. This conference gathered together about 25 practicing lawyers and judges from around the country with extensive experience on these topics. A number of papers were submitted to the Subcommittee before the conference, and they (along with notes of the conference) can be found at the following site:

www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Overview/DallasMiniConfSept2011/aspx

After the mini-conference, the Subcommittee decided to focus on the Category 3 approach, embodied at the time in a proposed Rule 37(g) dealing with sanctions for failure to preserve information. There were many questions about how to refine this proposal. Many of those questions remained when the same proposal was presented to the full Committee and discussed during the March 2012 meeting in Ann Arbor. A further version of that Rule 37(g) approach was presented to the Standing Committee during its June, 2012, meeting. At that time, it included a large number of language choices and footnoted questions that had not been resolved.

Beginning in early July, 2012, the Subcommittee tackled those language choices and footnoted questions. Eventually that task took seven conference calls to prepare a final proposed rule for the full Advisory Committee meeting in November, 2012. The initial effort focused on arriving at rule language that satisfied the entire Subcommittee. That was an extended effort, and on several occasions involved returning to points previously considered and re-evaluating them. Once it was completed, the Subcommittee turned to the draft Note. Finally, it turned to whether this new provision should be a new Rule 37(g), or perhaps should replace current Rule 37(e), and the Subcommittee decided that current 37(e) would not provide any protection beyond that provided by the new rule, so that replacing the current rule seemed more suitable.

A central objective of the proposed new Rule 37(e) is to replace the disparate treatment of preservation/sanctions issues in different circuits with a single standard. In addition, the amended rule makes it clear that -- in all but very exceptional cases in which failure to preserve "irreparably deprived a party of any meaningful opportunity to present a claim or defense" -- sanctions (as opposed to curative measures) could be employed only if the court finds that the failure was willful or in bad faith, and that it caused substantial prejudice in the litigation. The proposed rule therefore rejects Residential Funding Corp. v. DeGeorge Finan. Corp., 306 F.3d 99 (2d Cir. 2002), which stated that negligence is sufficient culpability to support sanctions.

The Subcommittee's proposed new Rule 37(e) was presented to the Advisory Committee at its November, 2012, meeting and discussed at length. Eventually, there were votes on whether to retain certain provisions on which the Subcommittee did not reach consensus, leading to the removal of one factor listed in the draft rule and of a possible paragraph in the Committee Note. All members except the Department of Justice voted in favor of submitting the proposed rule to the Standing Committee at its January meeting. (The Department reported that it had not gathered input from interested parties within the Department and could not vote in favor at the time of the Advisory Committee meeting.)

The full Committee also tasked the Subcommittee with considering and acting on a suggestion by one liaison member for a rewording a factor in the rule and several other minor adjustments, as well as considering concerns about the *Erie* doctrine or rulemaking power that were raised at the full Committee meeting and in a submission received before that meeting. On November 28, the Subcommittee met again by conference call and considered these issues. The preliminary draft presented below implements the decisions made during that conference call.

Erie Doctrine Concerns

In a comment during the Advisory Committee's Nov. 2 meeting, and in a pre-meeting submission, John Vail of AAJ argued that the *Erie* doctrine or the Rules Enabling Act constitute serious obstacles to going forward with 37(e). Based on further discussion on Nov. 28, additional Committee Note language was added to make clear that the rule would have no effect on the cognizability in federal court of a tort claim for spoliation, which is recognized in a few states. With that clarification,

those issues do not appear to be a weighty reason for declining to proceed with the proposed amendments to Rule 37(e).

Certainly the Rules Enabling Act authorizes adoption of rules about how to handle federal-court litigation in relation to failure to provide through discovery materials that would assist in the resolution of the case before the court. Under the Supreme Court's decisions, such a rule is permissible if it is "arguably procedural." Thus, one could say that the issue is what "remedy" the federal court should grant when presented with a failure to respond to discovery on the ground that the material sought no longer exists. Rule 37 addresses exactly that sort of issue, and revising it so it more suitably handles this problem should not tax the Enabling Act authority.

Under 28 U.S.C. § 2072(b), a rule should not be applied if doing so would "abridge, enlarge or modify any substantive right." The Committee Note has been revised to make clear that amended Rule 37(e) has no effect on the cognizability in federal court of a state-law tort claim for spoliation. It appears that a relatively small minority of states (approximately eight) recognize such a claim. For a listing of those eight jurisdictions, see Diana v. NetJets Serv., Inc., 50 Conn.Supp. 655, 657 n.6 (Conn.Super.2007). It appears that intentional spoliation must be proved to support most such claims, but for some claims negligence may suffice.

There might be an argument that -- with regard to litigation in federal court -- a civil rule could nullify such a spoliation claim and treat the matter of responses to failures to preserve evidence as governed solely by the rule. As the Committee Note makes clear, however, that is not what this rule does. The viability of such a tort claim for spoliation must be determined under the applicable law, which will often be state law. This conclusion is consistent with existing federal-court practice. See Naylor v. Rotech HealthCare, Inc., 679 F.Supp.2d 505, 510-11 (D. Vt. 2009) (looking to Vermont law to determine "whether or not spoliation of evidence constitutes an independent cause of action," and deciding it did not).

Providing by rule for a uniform approach to spoliation in all federal-court cases (unless they include a state-law spoliation tort claim) should not present *Erie* or Enabling Act problems. In Burlington Northern R.R. v. Woods, 480 U.S. 1 (1987), the Supreme Court recognized that § 2072(b) was "an additional requirement" when competing state law is invoked against application of a Federal Rule, but the Court's actual holding in that case seems to provide strong support for proposed

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37(e). The Court held that an Alabama statute commanding that 10% always be added to a money judgment if a defendant appealed and lost could not apply in federal court because it conflicted with Fed. R. App. 38, which grants the court of appeals discretion to decide whether or not to impose a sanction for a groundless appeal. The Court explained that § 2072(b) has a limited effect (480 U.S. at 5-6):

> The cardinal purpose of Congress in authorizing the development of a uniform and consistent system of rules governing federal practice and procedure suggests that Rules which incidentally affect litigants' substantive rights do not violate this provision if reasonably necessary to maintain the integrity of that system of rules. Moreover, the study and approval given each proposed Rule by the Advisory Committee, the Judicial Conference, and this Court, and the statutory requirement that the Rule be reported to Congress for a period of review before taking effect, give the Rules presumptive validity under both the constitutional and statutory constraints.

In Business Guides, Inc. v. Chromatic Communications Ent., Inc. 498 U.S. 533 (1991), the Court upheld imposition of Rule 11 sanctions on a party despite Justice Kennedy's argument in dissent that doing so "creates a new tort of 'negligent prosecution' or 'accidental abuse of process.'" The majority concluded that "[t]here is little doubt that Rule 11 is reasonably necessary to maintain the integrity of the system of federal practice and procedure, and that any effect on substantive rights is incidental."

Lower courts have recognized that state law does not control federal-court spoliation sanctions even in the absence of a rule directly addressing the questions addressed by new 37(e). For example, here is the analysis of the Sixth Circuit en banc in Adkins v. Woelever, 554 F.3d 650, 652 (6th Cir. 2008), abandoning that court's prior reference to state law regarding spoliation:

> In contrast to our persistent application of state law in this area, other circuits apply federal law for spoliation sanctions. See, e.g., Silvestri v. Gen. Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001): Reilly v. Natwest Mkts. Group, Inc., 181 F.3d 253, 267 (2d Cir. 1999); Glover v. BIC Corp., 6 F.3d 1318, 1329 (9th Cir. 1993). We believe that this is the correct view for two reasons. First, the authority to impose sanctions for spoliated evidence arises not from substantive law but, rather, "from a court's inherent power to control the judicial process." Silvestri,

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> 271 F.3d at 590. Second, a spoliation ruling is evidentiary in nature and federal courts generally apply their own evidentiary rules in both federal question and diversity matters. These reasons persuade us now to acknowledge the district court's broad discretion in crafting a proper sanction for spoliation.

The goal of amended 37(e) is to achieve uniformity in the federal courts in their handling of failures to preserve. One of the chief stimuli behind the proposed amendment is the diversity of treatment of preservation sanctions across the country. So there seems little reason to expect that it would run afoul of § 2072(b), as interpreted by the Supreme Court.

Replacing Rule 37(e)

In 2006, Rule 37(e) was added to provide some protection against sanctions for failure to preserve. At the time, some objected that it would not provide a significant amount of protection. Since then, as explored in Andrea Kuperman's memorandum (which should be in this agenda book), the rule has been invoked only rarely. Some say it has provided almost no relief from preservation burdens. The question whether this rule provision would serve any ongoing purpose if a better provision could be devised was in the background from the beginning of the Subcommittee's efforts on preservation and sanctions.

The proposed amendment is designed to provide more significant protection against inappropriate sanctions, and also to reassure those who might in its absence be inclined to over-preserve to guard against the risk that they would confront serious sanctions. Thus, Rule 37(e)(2)(A) permits sanctions only if the court finds that the failure to preserve was willful or in bad faith. One goal of this requirement is to overturn the decision of the Second Circuit in Residential Funding Corp. v. DeGeorge Finan. Corp., 306 F.3d 99 (2d Cir. 2002), which authorized sanctions for negligence and has continued to apply despite the adoption in 2006 of current Rule 37(e). Other circuits have reached different conclusions, some requiring that willfulness or bad faith be proved to support spoliation sanctions. These divergences have created particular difficulties for entities that engage in operations throughout the nation and do not know which standard will apply if a suit is filed. Not only is the amendment designed to raise the threshold for sanctions above negligence, it is also meant to provide a uniform standard for federal courts nationwide and thereby to replace this divergent case law cacophony that many have reported causes difficulty for those trying to make preservation

decisions.

Amended Rule 37(e), in short, provides better protection than current Rule 37(e). The Subcommittee has been unable to identify any activity that would be protected by the current Rule 37(e) but not protected under the proposed rule. The proposed rule is significantly broader than the current rule, providing more guidance to those who must make preservation and sanctions decisions. It also applies to all discoverable information, not just electronically stored information.

The Discovery Subcommittee therefore recommended that current Rule 37(e) be replaced with amended Rule 37(e), and the Advisory Committee agreed. The Subcommittee reached this conclusion only after completing the long process of refining its amendment proposal, then called Rule 37(g). Having completed that refinement, it reflected on whether current 37(e) provides any useful protection beyond its proposed amendment and concluded that the current rule does not. The Subcommittee discussed abrogating current Rule 37(e) and also adopting its new proposal as 37(g), but that seems unnecessary and potentially confusing. If useful, the invitation for public comment could call attention to the question whether existing Rule 37(e) would have any ongoing value after adoption of the proposed amendment.

Grant of authority to sanction;
limitation on that authority to
situations involving willfulness or bad faith

The proposed amendment (in 37(e)(2)) says that if a party failed to preserve information that should have been preserved, "the court may impose any of the sanctions listed in Rule 37(b)(2)(A) or give an adverse-inference jury instruction only if the court finds" that the loss was willful or in bad faith. This formulation differs from the formulation in current Rule 37(e) in that it is a grant of authority to impose sanctions of the sort listed in Rule 37(b)(2)(A). There is accordingly no need to worry (as the language of Rule 37(b) might suggest if the sanction were imposed directly under that rule) about whether failure to preserve violated a court order. The new rule provision is not limited (as is current Rule 37(e)) to "sanctions under these rules," so that the grant of authority should make it unnecessary for courts to rely on inherent authority to support sanctions for failure to preserve. At the same time, the limitation to situations involving willfulness or bad faith should correspond to what is normally said to be necessary to support inherent power sanctions. It is important to ensure that looser notions of inherent power are not invoked to circumvent

the protections established by new Rule 37(e).

The limitation to situations in which the party to be sanctioned has acted willfully or in bad faith should provide significantly more protection than current Rule 37(e), as well as providing a uniform national standard.

Some thought was given to whether it would be helpful to try in the Note to define willfulness or bad faith, but the conclusion was that it would not be useful. The courts have considerable experience dealing with these concepts, and efforts to capture that experience in Note language seemed more likely to produce problems than provide help.

Sanctions in the absence of willfulness or bad faith

Rule 37(e)(2)(B) does permit sanctions in the absence of willfulness or bad faith when the loss of the information "irreparably deprived a party of any meaningful opportunity to present a claim or defense." The Subcommittee means this authority to be limited to the truly exceptional case. It functions as something of a safety valve for the general directive that sanctions can only be imposed on one who has acted willfully or in bad faith. The point is that the prejudice is not only irreparable, but also exceptionally severe. Rule 37(e)(2)(B) comports with cases such as Silvestri v. General Motors Corp., 273 F.3d 583 (4th Cir. 2001), which have recognized the need for consequences when one side loses information or evidence that is clearly essential to the other side's case. The Subcommittee spent considerable time refining and discussing the proper way to phrase this authority and ultimately arrived at the recommended formulation.

Precise preservation rules

As mentioned above, the Subcommittee began its analysis of these problems with two possible amendment approaches that sought to provide guidance on when a preservation obligation arises and the scope of that obligation. The amendment recommended below does not contain such a provision.

But Rule 37(e)(3) attempts nonetheless to provide general guidance for parties contemplating their preservation obligations. It lists a variety of considerations that a court should take into account in making a determination both about

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whether the party failed to preserve information "that reasonably should be preserved" and also whether that failure was willful or in bad faith.

The Subcommittee carefully reviewed the catalog of considerations, and it was discussed by the full Committee during its November meeting. The full Committee decided to remove one factor, and remitted the issues to the Subcommittee for a final review. The Subcommittee further clarified another factor during its Nov. 28 conference call. The goal of Rule 37(e)(3) is to provide the parties with guidance on how to approach preservation decisions, and to identify factors that may often be relevant to courts in deciding whether a party failed to preserve information as it should have, and also whether that failure to preserve was willful or in bad faith.

At the same time, the rule does not attempt to prescribe new or different rules on what must be preserved. As the Note states, the question whether given information "reasonably should be preserved" is governed by the common law. Given the wide variety of cases brought in federal court, the Subcommittee concluded that it was not possible to write a single rule that would specify the materials to be preserved in every case. The decision is necessarily case-specific.

In the same vein, the Subcommittee considered whether providing specifics in the Note on what might trigger a duty to preserve would be desirable. Some versions of proposed rules contained very specific specifications of this sort. The Subcommittee's eventual conclusion, however, was that no single rule could be written that would apply fairly and effectively to the wide variety of cases in federal court.

Department of Justice Submission

On December 4, 2012, Principal Deputy Assistant Attorney General Stuart Delery submitted a letter to the Advisory Committee raising concerns about the Rule 37(e) proposal, with the request that these comments be forwarded to the Standing Committee. A copy of this letter should be included in these agenda materials.

As reflected in the minutes of the Advisory Committee's November 2 meeting, the Department raised many of the points included in this letter during that meeting. Some of these points had already been raised by the Department during earlier

discussion of preservation and sanctions problems in earlier meetings of the Advisory Committee. Some of them were also raised during the Discovery Subcommittee's September, 2011, mini-conference, at which the Department was represented. Based on the discussion at the Advisory Committee meeting, the Discovery Subcommittee revisited several of the Department's concerns during its November 28 conference call, as reflected in the notes of that call included in this agenda book. Because the letter did not arrive until December 4, the Subcommittee was not able to review it also. We would be happy to discuss any of these points during the Standing Committee meeting, and expect that the Department's concerns will continue to inform the Advisory Committee's evaluation of the Rule 37(e) proposal.

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

* * * * *

~~**(e) FAILURE TO PROVIDE ELECTRONICALLY STORED INFORMATION.** Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.~~

1

2 **(e) FAILURE TO PRESERVE DISCOVERABLE INFORMATION.** If a party failed to
3 preserve discoverable information that reasonably should
4 have been preserved in the anticipation or conduct of
5 litigation,

6

7 **(1)** The court may permit additional discovery, order the
8 party to undertake curative measures, or require the
9 party to pay the reasonable expenses, including
10 attorney's fees, caused by the failure.

11

12 **(2)** The court may impose any of the sanctions listed in
13 Rule 37(b)(2)(A) or give an adverse-inference jury
14 instruction only if the court finds:

15

16 **(A)** that the failure was willful or in bad faith, and
17 caused substantial prejudice in the litigation; or

18

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19 **(B)** that the failure irreparably deprived a party of
20 any meaningful opportunity to present a claim or
21 defense.

22

23 **(3)** In determining whether a party failed to preserve
24 discoverable information that reasonably should have
25 been preserved, and whether the failure was willful or
26 in bad faith, the court should consider all relevant
27 factors, including:

28

29 **(A)** the extent to which the party was on notice that
30 litigation was likely and that the information
31 would be discoverable;

32

33 **(B)** the reasonableness of the party's efforts to
34 preserve the information;

35

36 **(C)** whether the party received a request that
37 information be preserved, the clarity and
38 reasonableness of the request, and whether the
39 person who made the request and the party engaged
40 in good-faith consultation regarding the scope of
41 preservation;

42

43 **(D)** the proportionality of the preservation efforts to
44 any anticipated or ongoing litigation; and

45

46 **(E)** whether the party sought timely guidance from the
47 court regarding any unresolved disputes concerning
48 the preservation of discoverable information.

49

Draft Committee Note

1

2 In 2006, Rule 37(e) was added to provide protection against
3 sanctions for loss of electronically stored information under
4 certain limited circumstances, but preservation problems have
5 nonetheless increased. The Committee has been repeatedly
6 informed of growing concern about the increasing burden of
7 preserving information for litigation, particularly with regard
8 to electronically stored information. Many litigants and
9 prospective litigants have emphasized their uncertainty about the

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10 obligation to preserve information, particularly before
11 litigation has actually begun. The remarkable growth in the
12 amount of information that might be preserved has heightened
13 these concerns. Significant divergences among federal courts
14 across the country have meant that potential parties cannot
15 determine what preservation standards they will have to satisfy
16 to avoid sanctions. Extremely expensive overpreservation may
17 seem necessary due to the risk that very serious sanctions could
18 be imposed even for merely negligent, inadvertent failure to
19 preserve some information later sought in discovery.

20

21 This amendment to Rule 37(e) addresses these concerns by
22 adopting a uniform set of guidelines for federal courts, and
23 applying them to all discoverable information, not just
24 electronically stored information. It is not limited, as is the
25 current rule, to information lost due to "the routine, good-faith
26 operation of an electronic information system." The amended rule
27 is designed to ensure that potential litigants who make
28 reasonable efforts to satisfy their preservation responsibilities
29 may do so with confidence that they will not be subjected to
30 serious sanctions should information be lost despite those
31 efforts. It does not provide "bright line" preservation
32 directives because bright lines seem unsuited to a set of
33 problems that is intensely context-specific. Instead, the rule
34 focuses on a variety of considerations that the court should
35 weigh in calibrating its response to the loss of information.

36

37 Amended Rule 37(e) applies to loss of discoverable
38 information "that reasonably should have been preserved in the
39 anticipation or conduct of litigation." This preservation
40 obligation arises from the common law, and may in some instances
41 be triggered or clarified by a court order in the case. Rule
42 37(e)(3) identifies many of the factors that should be considered
43 in determining, in the circumstances of a particular case, when a
44 duty to preserve arose and what information should be preserved.

45

46 Except in very rare cases in which the loss of information
47 irreparably deprived a party of any meaningful opportunity to
48 present a claim or defense, sanctions for loss of discoverable
49 information may only be imposed on a finding of willfulness or
50 bad faith, combined with substantial prejudice.

51

52 The amended rule therefore displaces any other law that
53 would authorize imposing litigation sanctions in the absence of a
54 finding of wilfulness or bad faith, including state law in
55 diversity cases. But the rule does not affect the validity of an
56 independent tort claim for relief for spoliation if created by

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57 the applicable law. The law of some states authorizes a tort
58 claim for spoliation. The cognizability of such a claim in
59 federal court is governed by the applicable substantive law, not
60 Rule 37(e).

61

62 Unlike the 2006 version of the rule, amended Rule 37(e) is
63 not limited to "sanctions under these rules." It provides rule-
64 based authority for sanctions for loss of all kinds of
65 discoverable information, and therefore makes unnecessary resort
66 to inherent authority.

67

68 **Subdivision (e)(1)** When the court concludes that a party
69 failed to preserve information it reasonably should have
70 preserved, it may adopt a variety of measures that are not
71 sanctions. One is to permit additional discovery that would not
72 have been allowed had the party preserved information as it
73 should have. For example, discovery might be ordered under Rule
74 26(b)(2)(B) from sources of electronically stored information
75 that are not reasonably accessible. More generally, the fact
76 that a party has failed to preserve information may justify
77 discovery that otherwise would be precluded under the
78 proportionality analysis of Rule 26(b)(2)(C).

79

80 In addition to, or instead of, ordering further discovery,
81 the court may order the party that failed to preserve information
82 to take curative measures to restore or obtain the lost
83 information, or to develop substitute information that the court
84 would not have ordered the party to create but for the failure to
85 preserve. The court may also require the party that failed to
86 preserve information to pay another party's reasonable expenses,
87 including attorney fees, caused by the failure to preserve. Such
88 expenses might include, for example, discovery efforts caused by
89 the failure to preserve information.

90

91 **Subdivision (e)(2)(A).** This subdivision authorizes
92 imposition of the sanctions listed in Rule 37(b)(2)(A) for
93 failure to preserve information, whether or not there was a court
94 order requiring such preservation. Rule 37(e)(2)(A) is designed
95 to provide a uniform standard in federal court for sanctions for
96 failure to preserve. It rejects decisions that have authorized
97 the imposition of sanctions -- as opposed to measures authorized
98 by Rule 37(e)(1) -- for negligence or gross negligence.

99

100 This subdivision protects a party that has made reasonable
101 preservation decisions in light of the factors identified in Rule
102 37(e)(3), which emphasize both reasonableness and

103 proportionality. Despite reasonable efforts to preserve, some
104 discoverable information may be lost. Although loss of
105 information may affect other decisions about discovery, such as
106 those under Rule 26(b)(2)(B) and 26(b)(2)(C), sanctions may be
107 imposed only for willful or bad faith actions, unless the
108 exceptional circumstances described in Rule 37(e)(2)(B) are
109 shown.

110

111 The threshold under Rule 37(e)(2)(A) is that the court find
112 that lost information reasonably should have been preserved; if
113 so, the court may impose sanctions only if it can make two
114 further findings. First, it must be established that the party
115 that failed to preserve did so willfully or in bad faith. This
116 determination should be made with reference to the factors
117 identified in Rule 37(e)(3).

118 Second, the court must also find that the loss of
119 information caused substantial prejudice in the litigation.
120 Because digital data often duplicate other data, substitute
121 evidence is often available. Although it is impossible to
122 demonstrate with certainty what lost information would prove, the
123 party seeking sanctions must show that it has been substantially
124 prejudiced by the loss. Among other things, the court may
125 consider the measures identified in Rule 37(e)(1) in making this
126 determination; if these measures can sufficiently reduce the
127 prejudice, sanctions would be inappropriate even when the court
128 finds willfulness or bad faith. Rule 37(e)(2)(A) authorizes
129 imposition of Rule 37(b)(2) sanctions in the expectation that the
130 court will employ the least severe sanction needed to repair the
131 prejudice resulting from loss of the information.

132

133 **Subdivision (e)(2)(B)**. Rule 37(e)(2)(B) permits the court
134 to impose sanctions without making a finding of either bad faith
135 or willfulness. As under Rule 37(e)(2)(A), the threshold for
136 sanctions is that the court find that lost information reasonably
137 should have been preserved by the party to be sanctioned.

138

139 Even if bad faith or willfulness is shown, sanctions may
140 only be imposed under Rule 37(e)(2)(A) when the loss of
141 information caused substantial prejudice in the litigation. Rule
142 37(e)(2)(B) permits sanctions in the absence of a showing of bad
143 faith or willfulness only if that loss of information deprived a
144 party of any meaningful opportunity to present a claim or
145 defense. Examples might include cases in which the alleged
146 injury-causing instrumentality has been lost before the parties
147 may inspect it, or cases in which the only evidence of a
148 critically important event has been lost. Such situations are
149 extremely rare.

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150

151 Before resorting to sanctions, a court would ordinarily
152 consider lesser measures, including those listed in Rule
153 37(e)(1), to avoid or minimize the prejudice. If such measures
154 substantially cure the prejudice, Rule 37(e)(2)(B) does not
155 apply. Even if such prejudice persists, the court should employ
156 the least severe sanction.

157

158 **Subdivision (e)(3).** These factors guide the court when
159 asked to adopt measures under Rule 37(e)(1) due to loss of
160 information or to impose sanctions under Rule 37(e)(2). The
161 listing of factors is not exclusive; other considerations may
162 bear on these decisions, such as whether the information not
163 retained reasonably appeared to be cumulative with materials that
164 were retained. With regard to all these matters, the court's
165 focus should be on the reasonableness of the parties' conduct.

166

167 The first factor is the extent to which the party was on
168 notice that litigation was likely and that the information lost
169 would be discoverable in that litigation. A variety of events
170 may alert a party to the prospect of litigation. But often these
171 events provide only limited information about that prospective
172 litigation, so that the scope of discoverable information may
173 remain uncertain.

174

175 The second factor focuses on what the party did to preserve
176 information after the prospect of litigation arose. The party's
177 issuance of a litigation hold is often important on this point.
178 But it is only one consideration, and no specific feature of the
179 litigation hold -- for example, a written rather than an oral
180 hold notice -- is dispositive. Instead, the scope and content of
181 the party's overall preservation efforts should be scrutinized.
182 One focus would be on the extent to which a party should
183 appreciate that certain types of information might be
184 discoverable in the litigation, and also what it knew, or should
185 have known, about the likelihood of losing information if it did
186 not take steps to preserve. The court should be sensitive to the
187 party's sophistication with regard to litigation in evaluating
188 preservation efforts; some litigants, particularly individual
189 litigants, may be less familiar with preservation obligations
190 than other litigants who have considerable experience in
191 litigation. The fact that some information was lost does not
192 itself prove that the efforts to preserve were not reasonable.

193

194 The third factor looks to whether the party received a
195 request to preserve information. Although such a request may

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196 bring home the need to preserve information, this factor is not
197 meant to compel compliance with all such demands. To the
198 contrary, reasonableness and good faith may not require any
199 special preservation efforts despite the request. In addition,
200 the proportionality concern means that a party need not honor an
201 unreasonably broad preservation demand, but instead should make
202 its own determination about what is appropriate preservation in
203 light of what it knows about the litigation. The request itself,
204 or communication with the person who made the request, may
205 provide insights about what information should be preserved. One
206 important matter may be whether the person making the
207 preservation request is willing to engage in good faith
208 consultation about the scope of the desired preservation.

209

210 The fourth factor emphasizes a central concern --
211 proportionality. The focus should be on the information needs of
212 the litigation at hand. That may be only a single case, or
213 multiple cases. Rule 26(b)(2)(C) provides guidance particularly
214 applicable to calibrating a reasonable preservation regime. Rule
215 37(e)(3)(D) explains that this calculation should be made with
216 regard to "any anticipated or ongoing litigation." Prospective
217 litigants who call for preservation efforts by others (the third
218 factor) should keep those proportionality principles in mind.

219

220 Making a proportionality determination often depends in part
221 on specifics about various types of information involved, and the
222 costs of various forms of preservation. The court should be
223 sensitive to party resources; aggressive preservation efforts can
224 be extremely costly, and parties (including governmental parties)
225 may have limited resources to devote to those efforts. A party
226 may act reasonably by choosing the least costly form of
227 information preservation, if it is substantially as effective as
228 more costly forms. It is important that counsel become familiar
229 with their clients' information systems and digital data --
230 including social media -- to address these issues. A party
231 urging that preservation requests are disproportionate may need
232 to provide specifics about these matters in order to enable
233 meaningful discussion of the appropriate preservation regime.

234

235 Finally, the fifth factor looks to whether the party alleged
236 to have failed to preserve as required sought guidance from the
237 court if agreement could not be reached with the other parties.
238 Until litigation commences, reference to the court may not be
239 possible. In any event, this is not meant to encourage premature
240 resort to the court; Rule 26(f) directs the parties to discuss
241 and to attempt to resolve issues concerning preservation before
242 presenting them to the court. Ordinarily the parties'
243 arrangements are to be preferred to those imposed by the court.

244 But if the parties cannot reach agreement, they should not forgo
245 available opportunities to obtain prompt resolution of the
246 differences from the court.

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Notes of Conference Call
Discovery Subcommittee
Advisory Committee on Civil Rules
Nov. 28, 2012

On Nov. 28, 2012, the Discovery Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participating were Hon. Paul Grimm (Chair, Discovery Subcommittee); Hon. David Campbell (Chair, Advisory Committee); Hon. John Koeltl (Chair, Duke Subcommittee); Anton Valukas; Elizabeth Cabraser; John Barkett; Peter Keisler; Prof. Edward Cooper (Reporter, Advisory Committee); and Prof. Richard Marcus (Assoc. Reporter, Advisory Committee).

Judge Grimm introduced the call as a follow-up to the full Committee Nov. 2 meeting, convened to resolve issues remaining after that meeting on details left for further Subcommittee consideration in preparation of the Rule 37(e) proposal to the Standing Committee.

Erie Issues

Both before the Nov. 2 meeting and during the meeting, issues about the application of the Erie Doctrine to 37(e) were raised. But an analysis of rulemaking authority seems to make it clear that the authority extends far enough to include what's in proposed 37(e). An initial question, then, is whether there is an Erie Doctrine problem.

A reaction was that the chief concern seems to be with whether adoption of proposed 37(e) would nullify tort claims in states that permit tort-type claims for spoliation. That would be a substantive spoliation doctrine, and there is concern that adoption of 37(e) might raise questions about whether such claims could be asserted in federal court. So it would seem desirable to make clear that the rule provision is not focused on, and does not affect, a cognizable cause of action for spoliation recognized by state law.

A reaction was that the rule is only about sanctions for failure to preserve -- the kind of thing that Rule 37 ordinarily addresses -- not about independent causes of action created by state law.

Another reaction was agreement -- Rule 37(e) does not do anything to limit such state-law claims. There might be an interesting issue about whether state law properly could create a spoliation claim for destruction of evidence that was relevant only to a federal claim, in other words whether state law overreaches when it seeks to implement federal claims in this manner. But that is surely beyond the scope of what we have been discussing doing.

The original speaker agreed, but said that it would be wise

and politic to say something about these points either in the transmittal letter or in the Note.

A reaction was that this probably should be in the Note. If there is a concern that arguments might be made that 37(e) somehow stymies the assertion of a tort claim for spoliation in federal court, the Committee Note is the place to put the answer so that the Note can be used for guidance if the issue arises in a case. A statement in the transmittal memo would likely be too obscure to be used for that sort of guidance.

Another participant elaborated on the existence of such claims. It seems that they are recognized in Alaska, New Mexico, Ohio and possibly Connecticut. In West Virginia, there may be both first-party and third-party claims. As to most of these, however, one must prove intent to support the claim.

A reaction to this catalog was that in California such claims may in some circumstances survive a demurrer.

Another participant observed that we need to deal with these issues in the Note -- to say as clearly as we can that (a) we preempt reliance on state law in the non-tort sanctions setting, and (b) we do not intend to have any effect on the assertion in federal court of a state-law tort claim for spoliation.

This point drew agreement, and the suggestion that it could be expressed as displacing "procedural" but not "substantive" state law. But that characterization drew concerns about the uncertain meaning of those words in different contexts.

A further response was that we need to be clear that the federal-court cases relying on state law to determine the extent or availability of sanctions must be disapproved, but that goal should be distinguished from displacing independent claims created by state law.

A concurring opinion was expressed, noting that states may express this as a matter of common law or by legislative enactment. It should be made clear that Rule 37(e) does not affect the viability of claims, whether based on common law or legislation.

Attention was drawn to two possible locations in the current Note, where possible language dealing with Erie issues was suggested in the materials for the call. The question was whether there was a need to tweak one or the other of those possible additions.

A reaction was that the second addition (accompanying footnote 8) seemed to be the right location, but to be too brief. A suggestion was instead to include a new paragraph at this point

addressing both the positive and negative points. The positive point is that the rule displaces state law on sanctions that is different. The negative point is that the rule has no effect on state-law causes of action for spoliation, whether based on common law or statute and whether considered a separate "tort" or otherwise.

Another expression of agreement emphasized that it would be desirable to avoid entering into the thicket of possible issues about the extent of the Rules Enabling Act authority to define "remedies" in federal court that vary from what state courts might do in similar circumstances. In addition, it was noted that because Rule 37(e) could be applied in situations in which the activity on which the sanctions are based occurred before suit was filed, it might be uncertain at the time the action was taken whether a case would be in state or federal court.

The consensus was that Note language should be added to address both aspects of the Erie concern, and that Professor Marcus should draft this language and circulate the draft to the Subcommittee by email seeking an expedited "last look" (in an effort to deliver agenda materials in to the A.O. on schedule).

Judge Harris's suggested
revision of Rule 37(e)(3)

This issue was introduced as looking desirable at first blush, but raising questions after further consideration. As outlined in Prof. Marcus's memorandum for this conference call (attached hereto as an Appendix), the change would actually seem to raise possible concerns about focusing attention for some matters on factors that really should not be considered pertinent. On balance, it may be that making the change could create risks of mischief.

A first reaction was similar. "I don't quite understand Judge Harris's concern." For example, consider the issue whether (e)(2)(B) might apply in a given case. Is it really true that the factors in (e)(3) should be brought to bear on whether the loss of the information "deprived a party of any meaningful opportunity to present a claim or defense"?

Another participant agreed -- "these factors could be a distraction in addressing (e)(2)(B)."

Another participant noted that (e)(3) was not designed to address all issues that could arise under new 37(e). For example, they are not particularly pertinent to whether to apply a sanction or instead to use a curative measure under (e)(1). If one wanted to identify factors pertinent to that choice, one would probably add a number of things that are not in current (e)(3), such as whether the party that failed to preserve had

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been guilty of other discovery misconduct, the degree of prejudice, etc.

That drew agreement -- this is a "very complicated matrix."

The consensus was to make no change in 37(e)(3).

Judge Pratter's concern

The issue was introduced as pointing out the risk that current (e)(2)(A) might be read to call for reference to the prejudice factor only when bad faith is shown, and not when willfulness is shown. Whether this is a problem might be debated. Prof. Marcus' memo suggested three alternative ways of clarifying to avoid the risk.

The consensus was to adopt alternative one -- adding a comma after "bad faith," to make clear (as the Committee Note does also) that prejudice must be proved to support sanctions even if willfulness is shown.

Adding "when appropriate"
to 37(e)(3)

The issue was introduced as focusing on the language of (e)(3), which says that the court "should consider all relevant factors, including [the listed factors]." The concern is whether the command ("should") could require a court to consider factors that ought not bear on the questions actually before the court. Alternatively, the use of "relevant" and "including" may make it clear that this list does not include all factors that might bear on decisions in a given case, and that some on the list might not be relevant in a given case.

An initial reaction was that adding "when appropriate" is not necessary. Another participant agreed.

Another participant expressed misgivings, however. "Linguistically, when I first read this, I was concerned about whether all factors are always relevant." Might it be better to say "consider all relevant factors, which may include~~ing~~"? Another participant expressed support for this revision.

A reaction to both the use of "when appropriate" and "which may include" was that either would likely raise style questions. The assumption is that judges are to do only appropriate things under the rules, and also that they are to consider only appropriate things.

Another reaction was that, under the current language, any judge going down this list would be likely to react to some as being irrelevant to the particular case before the court. The

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reaction would be "This one does not apply."

Another reaction was that this issue is one on which we might be focused during the public comment period; we could await comments about whether this causes a problem.

Based on this discussion, the participant who originally expressed concerns retracted them; "I'm happy to leave the language as it is, pending public comment."

The consensus was to leave the language as it is.

Reference to litigation hold in 37(e)(3)(B)

The Subcommittee has discussed this issue before and retained the reference in the rule to litigation holds. The issue was raised again by many comments during the Nov. 2 meeting. The question is whether to end the reasonableness of preservation efforts factor at ". . . preserve the information."

The issue was introduced as sparked by the question whether "litigation hold" is something of a lightening rod. Is it too specific and controversial (and perhaps uncertain) to warrant mention in rule language?

An initial reaction was "I think it should stay in. It's a positive factor." People are aware of what a litigation hold is. Putting it into the rule recognizes that such an effort is desirable, and should be acknowledged if sanctions issues arise.

A competing view was "I continue to think that it should go out." Individual litigants don't do things like big companies. "Am I supposed to send myself a written litigation hold?" This participant had recently had extended discussions with several individual clients in which the topic of preservation had been explored at length. But there would be no formal "litigation hold" in these instances. In addition, putting it into the rule raises issues about whether privilege or work-product protection applies to such documents. Is it always required to turn over such a document?

Another participant sees the question as cutting both ways. For large companies, some litigation hold procedure is fairly routine by now. They would perhaps benefit from inclusion of the explicit factor so that they can emphasize "We did what the rule says." But the reference to the litigation hold in (B) is jarring because it is much more specific than the rest of the matters listed in (e)(3), raising the concern that it is receiving disproportional emphasis. Smaller entities and individual litigants are much less likely to have "litigation hold" practices than large entities.

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Attention was drawn to the existing Committee note on the second factor, as expanded a bit by Prof. Marcus to note the relevance of the party's sophistication in matters of litigation. Is there a problem with that reference to a litigation hold, and is there a need to mention it also in the rule provision itself?

A reaction from one concerned with the reference in the rule is that "Having it there in the Note is o.k."

Another participant said there was no problem with mentioning "litigation holds" in the rule. But it would surely suffice to do so in the Note. There is no universally recognized or accepted definition of what a hold involves. Moreover, the greater the emphasis, the greater the pressures on privilege and work product issues.

A summary was that we seem to be reaching the conclusion that the rule's reference to a litigation hold should be removed. If it were, would it not be proper also to continue with the same Committee Note language (expanded as Prof. Marcus did for the removal of former (D))?

A question was raised: There are a number of other issues that could be raised but are not addressed in relation to litigation holds. For example, questions arise about whether counsel must follow up regularly, whether a collection effort must be undertaken, what should be done with computers that are going to be replaced, whether one can entrust collection to the individuals at the company who were involved in the actions that might lead to corporate liability, etc. Should these topics be mentioned?

A reaction was that many of those topics are heavily disputed in given cases, and some of them relate to "cutting edge" questions. Getting into those could be very problematical.

Another reaction was that the revised Note language in Prof. Marcus' memo seems fine. In particular, judges are sensitive to the sophistication of litigants, even governmental litigants. Another point was that some mention of individual litigants seems important. More than once we have been reminded that "People change their Facebook pages and discard their diaries without thinking about preservation." We should acknowledge that somewhere.

It was also noted that, in relation to proportionality, the Note had been augmented to call attention to litigant resources, particularly with regard to governmental litigants.

The consensus was to remove the rule's reference to litigation holds but and to retain the Note as revised by Prof. Marcus in the materials for the conference call.

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Department of Justice concerns

As the time for ending the call was approaching, attention turned to the various concerns raised by the Department of Justice. The Department is certainly an important source of input on civil litigation in federal courts, as it appears in far more cases than any other litigant, and is involved in cases running the gamut of types of litigation. It is unfortunate that the Department was not able to complete its internal review of the rule with all the agencies with which it works in time for the Nov. 2 meeting.

An overall reaction was that although the Department made many comments and raised questions about several aspects of the rule, it was surely not entirely negative. At least four of its comments supported decisions reached in the long drafting process, and four more seemed to seek a more expansive rule. It did urge retention of current Rule 37(e), but the Subcommittee has concluded that the amended rule would provide protection in any instance in which the current rule does so. And Andrea Kuperman's memo shows at length that the current rule is rarely invoked. Moreover, the Committee has actually done one of the things the Department recommended -- removing the reference in proposed 37(e)(3) to the resources and sophistication of a party as bearing on sanctions decisions. And the Committee Note has also been modified to note that governmental entities may actually have limited resources for preservation efforts. Finally, the Committee voted also to delete the draft Note language on failed bad-faith efforts to destroy evidence. On balance, the rule proposal responds to most of the Department's concerns.

One specific was raised, however: The Department expressed concern that proposed (e)(3)(A) might be interpreted to permit a party accused of spoliation to avoid the consequences by claiming lack of knowledge, so that some sort of "should have known" formulation should be used instead. Is that concern troubling?

A reaction was that the current language -- "the extent to which the party was on notice that litigation was likely and that the information would be discoverable" -- should provide a suitable method for dealing with such issues. In particular, "the extent to which the party was on notice" standard seems clearly to adopt a "constructive notice" attitude. It provides no handholds for a litigant trying to escape responsibility because "I did not realize" if the court is persuaded the party should have appreciated that litigation was likely.

A judge agreed: "This objection did not resonate with me; I think the current language is preferable."

Others agreed; the consensus was to retain 37(e)(3)(A) as

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currently written.

APPENDIX

Memo considered by Subcommittee
during Conference call

Nov. 28 Conference Call
Issues after Nov. 2 Committee meeting
Redraft of 37(e)

This memorandum addresses issues remaining after the Nov. 2 meeting of the full Committee, which can be discussed during the Nov. 28 Conference Call. It also presents the version of the rule that was presented to the Committee, with changes responsive to the vote of the Committee. The revised rule proposal shows changes to rule language either with strikeover (for language removed) or double underlining (for language added). In the Note underline and strikeover is used for the same purpose. A couple of very small fixes to the Note that occurred to the Reporter are also so indicated.

The Committee voted (a) to remove our proposed 37(e)(3)(D) factor from the rule, (b) to remove the bracketed paragraph in the Note regarding unsuccessful but heinous efforts to destroy evidence, (c) to retain factor 37(e)(3)(C), and (d) to recommend publication of the rule for public comment. It made this vote subject to the Subcommittee's further consideration of the Erie issues raised by John Vail and Judge Harris's suggested rewording of Rule 37(e)(3). During the meeting, Judge Pratter raised a question about the wording (or punctuation) of 37(e)(2)(A), and that is addressed below as well. Additional issues raised during the meeting discussed below were whether to add a "when appropriate" to Rule 37(e)(3) and whether to remove the reference to a litigation hold from Rule 37(e)(3)(B). These possible changes are discussed below, but the redraft does not currently include them. The Note also includes underlined language reflecting concerns formerly addressed in factor (D).

A set of draft minutes of the Nov. 2 online "meeting" of the full Committee should accompany this memorandum.

This memorandum attempts to introduce the issues remaining for Subcommittee decision. The full Committee's vote was to authorize the Subcommittee to make modest improvements before forwarding the rule to the Standing Committee, and the small changes in the Note below respond to that invitation. The Subcommittee may also decide whether there is any need to poll the full Committee about revisions after reaching conclusions about what more needs to be done now. It's worth noting that, for logistical reasons, that polling might present some difficulties in terms of submitting Standing Committee agenda materials by the beginning of December.

It is also worth noting that the full Committee will certainly have an opportunity to revisit these issues if the Standing Committee authorizes publication at its January meeting. For one thing, if the Duke Subcommittee proposals go forward after the full Committee's Spring meeting, this proposal will need to be integrated with those proposals.[1] For example, one of those proposals is to add emphasis to preservation in the Rule 26(f)/Rule 16(b) process. More importantly, the process of public comment will afford the Subcommittee and the full Committee an abundant opportunity to reflect on the Rule 37(e) amendment proposal before a decision is made whether to recommend adoption to the Judicial Conference. It is likely that this proposal will draw much more interest than our Rule 45 amendment proposal; there will be abundant commentary.

Transmittal to Standing Committee

Eventually we will need to prepare an memorandum for the Standing Committee transmitting the rule proposal. That will likely be done by the Chairs and the Reporters, so it seems useful to preface the discussion of remaining issues for the Subcommittee with some mention of what that transmittal memorandum would likely contain.

It would likely contain an introduction like the introduction presented to the full Committee in the agenda materials at pp. 121-26. Among other things, that makes clear that the goal is to displace Residential Funding.

It would also report the full Committee's action, and any revisions made by the Subcommittee after the meeting in light of the full Committee discussion.

Erie Doctrine Concerns

John Vail has argued that the Erie Doctrine or the Rules Enabling Act constitute serious obstacles to going forward with 37(e). Frankly, those issues do not appear to be weighty. Certainly the Rules Enabling Act authorizes adoption of rules about how to handle federal-court litigation in relation to failure to provide through discovery materials that would assist in the resolution of the case before the court. Under the Supreme Court's decisions, such a rule is permissible if it is "arguably procedural." Thus, one could say that the issue is what "remedy" the federal court should grant when presented with a failure to respond to discovery on the ground that the material

[1] As noted again below, to the extent the Duke proposals affect the content to Rule 26(b)(2)(C), that would require another look at this proposal, which refers to 26(b)(2)(C) in the Note.

sought no longer exists. Rule 37 addresses exactly that sort of issue, and revising it so it more suitably handles this problem should not tax the Enabling Act authority.

Under 28 U.S.C. § 2072(b), a rule should not be applied if doing so would "abridge, enlarge or modify any substantive right." It may be that a wholesale effort through a rule to define and limit or expand the duty to preserve could raise concerns on this score. But 37(e) does not do that. And the Supreme Court has been quite circumspect about the application of § 2072(b). In Burlington Northern R.R. v. Woods, 480 U.S. 1 (1987), it recognized that this provision was "an additional requirement" when competing state law is invoked against application of a Federal Rule, but the Court's actual holding in that case seems to provide strong support for our 37(e).

The issue in Burlington Northern was whether an Alabama statute that required that 10% be added to a money judgment if defendant appealed and the judgment was affirmed could be applied to a federal-court diversity judgment entered in Alabama. One could make a fairly strong argument that this right was a "substantive right," perhaps somewhat like postjudgment interest. But the Court held that the Alabama statute conflicted with Fed. R. App. 38, which permits the court of appeals to impose a sanction on a party that brings a groundless appeal and grants the court discretion to decide whether or not to impose a sanction, and also to determine the amount of any sanction. The Court said the mandatory nature of the Alabama statute conflicted with the discretionary operation of Rule 38. That finding of a conflict was also arguable; Alabama had its own Appellate Rule 38, modeled on the federal rule, and seemed perfectly able to apply both without problems of conflict between them.

Nonetheless, the Court's decision was a relatively ringing endorsement of rules adopted pursuant to the Enabling Act, even when they come up against state laws that could be said to create substantive rights (480 U.S. at 5-6):

> The cardinal purpose of Congress in authorizing the development of a uniform and consistent system of rules governing federal practice and procedure suggests that Rules which incidentally affect litigants' substantive rights do not violate this provision if reasonably necessary to maintain the integrity of that system of rules. Moreover, the study and approval given each proposed Rule by the Advisory Committee, the Judicial Conference, and this Court, and the statutory requirement that the Rule be reported to Congress for a period of review before taking effect, give the Rules presumptive validity under both the constitutional and statutory constraints.

In Business Guides, Inc. v. Chromatic Communications Ent.,

Inc. 498 U.S. 533 (1991), the Court upheld imposition of Rule 11 sanctions on a party despite Justice Kennedy's argument in dissent that doing so "creates a new tort of 'negligent prosecution' or 'accidental abuse of process.'" The majority concluded that "[t]here is little doubt that Rule 11 is reasonably necessary to maintain the integrity of the system of federal practice and procedure, and that any effect on substantive rights is incidental."

Lower courts have recognized that state law is not controlling in this area even in the absence of a rule directly addressing the questions addressed by new 37(e). For example, here is the analysis of the Sixth Circuit en banc in Adkins v. Woelever, 554 F.3d 650, 652 (6th Cir. 2008), abandoning that court's prior reference to state law regarding spoliation:

> In contrast to our persistent application of state law in this area, other circuits apply federal law for spoliation sanctions. See, e.g., Silvestri v. Gen. Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001): Reilly v. Natwest Mkts. Group, Inc., 181 F.3d 253, 267 (2d Cir. 1999); Glover v. BIC Corp., 6 F.3d 1318, 1329 (9th Cir. 1993). We believe that this is the correct view for two reasons. First, the authority to impose sanctions for spoliated evidence arises not from substantive law but, rather "from a court's inherent power to control the judicial process. Silvestri, 271 F.3d at 590. Second, a spoliation ruling is evidentiary in nature and federal courts generally apply their own evidentiary rules in both federal question and diversity matters. These reasons persuade us now to acknowledge the district court's broad discretion in crafting a proper sanction for spoliation.

The goal of amended 37(e) is to achieve uniformity in the federal courts in their handling of failures to preserve. One of the chief stimuli behind the proposed amendment is the diversity of treatment of preservation sanctions across the country. So there seems little reason to expect that it would run afoul of § 2072(b), as interpreted by the Supreme Court.

Indeed, one could instead argue that the real problem of judicial power exists now, and that the proposed rule would solve it. Until now, many courts have invoked "inherent authority" to address the handling of these issues. Our Committee Note tries to make clear that new Rule 37(e) would make resort to inherent authority unnecessary. There may be an argument that these judges were overstepping their authority in doing so with regard to pre-litigation preservation.[2] That argument seems strained,

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[2] On this issue, see the recent and yet-unpublished article by Joshua M. Koppel, Federal Common Law and the Courts'

but no more so than the argument that adopting 37(e) would exceed the Enabling Act or transgress Erie (which really has no application to rules adopted pursuant to the Enabling Act). Acting to regularize matters through the Enabling Act process seems preferable in many ways. Indeed, if there were Enabling Act problems, it would seem that they apply relatively equally to current Rule 37(e).

Law professors have an almost insatiable enthusiasm for discussing Erie issues that the rest of the world understandably finds perplexing, so it's best to stop here. It's worth noting, however, that one possibility would be to invite comment on whether any perceive a serious Enabling Act problem. That may, however, be an odd topic on which to invite comment. But if there is reason to foresee that many comments will decry the rule as exceeding Enabling Act authority, it may be useful to invite others to react with contrary views. As noted above, the careful consideration the Advisory Committee gives to rule revision is one of the things that the Supreme Court has cited as contributing to the presumptive validity of rules.

By way of contrast, particularly given some comments during the full Committee meeting, it is likely desirable to invite public comment on whether anything would be lost due to discarding current Rule 37(e). Andrea Kuperman's research and our thorough discussion suggest there is no reason to retain the current rule if our proposal is adopted in its stead. But to be extra certain, specifically inviting comment on that point could be desirable. Whether it is also desirable to invite comments on Enabling Act concerns is perhaps best left to the Standing Committee. But it is dubious to add a more explicit focus to the rule or Note presently.

Judge Harris's suggestion

Judge Arthur Harris suggested revising our proposed Rule 37(e)(3) as follows:

> **(3)** In determining whether to adopt measures under Rule 37(e)(1) or to impose sanctions under Rule 37(e)(2), ~~a party failed to preserve discoverable information that reasonably should have been preserved, and whether the failure was willful or in bad faith,~~ the court should consider all relevant factors, including:

Judge Harris offered the following explanation for this suggestion:

Regulation of Pre-Litigation Preservation, available at http://ssrn.com/abstract=2154484.

> It seems to me that the factors are relevant to more than just the two items listed -- failure to preserve discoverable information and whether failure was willful or in bad faith. For example, the factors could also be relevant in determining whether the failure irreparably deprived a party of any meaningful opportunity to present a claim or defense or what, if any, sanctions should be imposed.

Possibly relevant to this suggestion is the discussion during the Nov. 2 Committee meeting about whether it would be desirable to identify which issues various factors actually address. Thus, some speakers favored more precision directing the reader to employ various factors only with regard to certain criteria important under the rule, seemingly cutting in a direction different from -- possibly opposite to -- the direction of Judge Harris's suggestion.

Turning first to the Nov. 2 discussion of focusing more precisely than we do now, it is worth recalling that some suggestions the Subcommittee has received (the N.Y. State Bar Ass'n submission comes to mind) have urged considerable precision in culpability calibrations, but those efforts at precision have seemed to tend in the direction of trying to create Sanctioning Guidelines. Rule 37(e)(3) was not designed this way.

At the same time, it is not necessarily true that these factors (as revised by the Nov. 2 vote of the full Committee) really bear on everything and anything raised pertinent to decisions under new Rule 37(e).

To take as an example the use suggested by Judge Harris -- determining whether Rule 37(e)(2)(B) applies -- there seems a strong argument that inviting broader use of the factors in (e)(3) would be dubious. True, loss of essential information due to events entirely beyond the control of a party (such as a hurricane) probably does not provide support for the conclusion that "a party failed to preserve information that reasonably should have been preserved." As currently written, 37(e)(3) would make it appropriate to employ its factors on that point. But it's not at all clear whether those factors should be employed in determining whether the loss of the information "irreparably deprived a party of any meaningful opportunity to present a claim or defense." Using them might create rather than solve problems.

To take a different example, consider the question whether to employ measures identified in Rule 37(e)(1). As the Committee Note explains, that decision resembles any case-management discovery decision by a court, with the added ingredient that a party has failed to retain discoverable information it should have retained. The Note therefore addresses how that additional

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factor should come into play; it recognizes that it could alter the calculus under Rule 26(b)(2)(B) or 26(b)(2)(C).[3] But to say that the reasonableness of the party's efforts to preserve (factor B) somehow has more importance than under the normal case-management evaluation because that is on the list in 37(e)(3) seems peculiar. And with regard to Rule 37(e)(2), the Committee Note says that the court should use the least severe measure needed. So it seems that the rule and Note as written adequately address the issues without change.

On the other hand, making the revision recommended by Judge Harris probably would not do mischief, and there may be situations in which leaving the language as we drafted it could seem unduly constraining.

In short, it is probably not a matter of enormous importance either way, but it should be resolved.

Judge Pratter's Suggestion on Rule 37(e)(2)(A)

Judge Pratter (probably a fan of Lynne Truss's book Eats, Shoots & Leaves: The Zero Tolerance Approach to Punctuation) raised an issue about the "or . . . and" sequence in Rule 37(e)(2)(A) as we drafted it:

> **(A)** that the failure was willful or in bad faith and caused substantial prejudice in the litigation; or

She is worried that without at least some further punctuation there may be arguments that the substantial prejudice element applies only to bad faith failures to preserve and not to willful ones.

Whether this is a serious risk might be debated, but several easy solutions seem to exist:

> **(A)** that the failure was willful or in bad faith<u>,</u> and caused substantial prejudice in the litigation; or [Alternative 1]
>
> **(A)** that the failure <u>(i)</u> was willful or in bad faith<u>;</u> and <u>(ii)</u> caused substantial prejudice in the

[3] This brings to mind one possible outcome of Duke Subcommittee proposals. They may affect the content or composition of Rule 26(b)(2)(C). To the extent they do, that might affect what 37(e) should say.

12b-006620

litigation; or [Alternative 2][4]

(A) that the failure caused substantial prejudice in the litigation, and was willful or in bad faith ~~and caused substantial prejudice in the litigation~~; or [Alternative 3]

Alternative 1 seems the simplest solution to the problem, if it is a problem. Alternative 2 should make it absolutely clear that substantial prejudice must be shown separately whether or not willfulness or bad faith is shown. Alternative 3 seems to make that clear, but also to put the less important concern -- substantial prejudice -- before the more important one.

"when appropriate"

During the Nov. 2 meeting, several participants urged that we consider adding "when appropriate" to Rule 37(e)(3) as follows:

(3) In determining whether a party failed to preserve discoverable information that reasonably should have been preserved, and whether the failure was willful or in bad faith, the court should consider all relevant factors, including when appropriate:

It appears that the reason for this suggestion is that the verb in the rule is "should," but that in given cases the court should not consider certain factors. One response to this concern (and a reaction that the Standing Committee's Style Consultant might have) is that all the rules call for judges to do only "appropriate" things. Another response is that the rule as proposed to the Committee does say that the court should consider "all relevant factors," so it takes account of the question whether given factors are relevant. But one reading of the rule is to say that the listed factors must always be considered, while other factors may be considered if relevant.

One possible comparison is Rule 23(g)(1), which lists four factors that the court "must" consider in appointing class

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[4] It may be that this alternative should be presented somewhat differently:

(A) that the failure:

(i) was willful or in bad faith; and

(ii) caused substantial prejudice in the litigation; or

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counsel and then authorizes the court also to consider "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." The original version of this rule published for comment had only three mandatory factors, prompting objection that they were slanted in favor of certain law firms, and eventually a fourth was added. The comparison could stress the use of "must" in 23(g)(1) and "should" in 37(e). But it is valid to argue that what' son a possibly "mandatory" list matters.

In any event, the question whether to add these words to the rule prompted sufficient comment during the meeting to justify including it as a potential topic for discussion during the Nov. 28 conference call.

Removing the reference to litigation holds from 37(e)(3)(B)

The Subcommittee has already discussed this issue at some length, but it is included here because it received considerable attention during the Nov. 2 meeting. The change would be as follows:

> **(B)** the reasonableness of the party's efforts to preserve the information~~, including the use of a litigation hold and the scope of the preservation efforts~~;

One reason for making this change would be that it is undesirable to emphasize litigation holds by referring to them in the rule. The Committee Note to current Rule 37(e) refers to litigation holds, and there seems little doubt that the basic concept is recognized widely. At least some judges may be tempted to insist on specific sorts of litigation holds (e.g., written ones), which may be a different reason for avoiding mention of litigation holds in the rule itself. If this change were made, probably the reference to use of a litigation hold should be retained in the Committee Note; otherwise there might be an argument that litigation holds are irrelevant under new 37(e) because they are nowhere mentioned, while they were mentioned in the Note to the 2006 version of 37(e).

It may be that this worry overemphasizes the importance of including the term "litigation hold" in the rule. The Committee Note tries to defuse worries about the term becoming a talisman:

> The second factor focuses on what the party did to preserve information after the prospect of litigation arose. The party's issuance of a litigation hold is often important on this point. But it is only one consideration, and no specific feature of the litigation hold -- for example, a

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> written rather than an oral hold notice -- is dispositive. Instead, the scope and content of the party's overall preservation efforts should be scrutinized.

The next-to-last sentence quoted above attempts to deflect arguments that only a written hold satisfies preservation responsibilities.

A competing consideration is that including specific reference to a litigation hold is a good thing for parties whose preservation efforts are challenged. All current (B) says is that a litigation hold is a consideration in assessing the party's overall preservation efforts. The inclusion of a specific reference to a litigation hold, coupled with the Note's effort to avoid having the rule's reference mean something specific in all cases, means that parties that do something like a hold can point to that fact and emphasize the rule's recognition that this is responsible behavior of the sort that should dissuade the court from finding that the party was guilty of bad faith or willful destruction of evidence.

So the tradeoff between leaving (B) as currently written and shortening it does not seem invariably to favor or disfavor entities that are called upon to preserve evidence. Indeed, it may be more likely that companies and other organizational litigants than individual litigants would (and do now) in fact undertake some sort of litigation hold.

My understanding is that the Committee authorized us to go to the Standing Committee with (B) as it was, including the reference to the litigation hold. If that paragraph does go forward and is eventually published for public comment, one question that might be illuminated is whether the reference to litigation holds in the rule is likely to do mischief.

12b-006623

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

* * * * *

~~**(e) FAILURE TO PROVIDE ELECTRONICALLY STORED INFORMATION.** Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.~~

(e) FAILURE TO PRESERVE DISCOVERABLE INFORMATION. If a party failed ~~fails~~ to preserve discoverable information that reasonably should have been ~~be~~ preserved in the anticipation or conduct of litigation,[5]

(1) The court may permit additional discovery, order the party to undertake curative measures, or require the party to pay the reasonable expenses, including attorney's fees, caused by the failure.

(2) The court may impose any of the sanctions listed in Rule 37(b)(2)(A) or give an adverse-inference jury instruction only if the court finds:

(A) that the failure was willful or in bad faith and caused substantial prejudice in the litigation; or

(B) that the failure irreparably deprived a party of any meaningful opportunity to present a claim or defense.

(3) In determining whether a party failed to preserve discoverable information that reasonably should have been preserved, and whether the failure was willful or in bad faith, the court should consider all relevant

[5] This revision of verb tense responds to Peter Keisler's comment during the meeting. The verb tenses would, as he noted, now match up with those in Rule 37(e)(3).

27 factors, including:[6]

28

29 **(A)** the extent to which the party was on notice that
30 litigation was likely and that the information
31 would be discoverable;

32

33 **(B)** the reasonableness of the party's efforts to
34 preserve the information, including the use of a
35 litigation hold and the scope of the preservation
36 efforts;

37

38 **(C)** whether the party received a request that
39 information be preserved, the clarity and
40 reasonableness of the request, and whether the
41 person who made the request and the party engaged
42 in good-faith consultation regarding the scope of
43 preservation;

44

45 ~~**(D)** the party's resources and sophistication in~~
46 ~~litigation;~~

47

48 **(D~~E~~)** the proportionality of the preservation efforts
49 to any anticipated or ongoing litigation; and

50

51 **(E~~F~~)** whether the party sought timely guidance from the
52 court regarding any unresolved disputes concerning
53 the preservation of discoverable information.

54

DRAFT COMMITTEE NOTE

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2 In 2006, Rule 37(e) was added to provide protection against
3 sanctions for loss of electronically stored information under
4 certain limited circumstances, but preservation problems have
5 nonetheless increased. The Committee has been repeatedly

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[6] The introductory memorandum discussed Judge Harris' suggestion for amendment to this paragraph. If the Subcommittee decides to adopt that change, the Committee Note may need to be revised as well.

informed of growing concern about the increasing burden of preserving information for litigation, particularly with regard to electronically stored information. Many litigants and prospective litigants have emphasized their uncertainty about the obligation to preserve information, particularly before litigation has actually begun. The remarkable growth in the amount of information that might be preserved has heightened these concerns. Significant divergences among federal courts across the country have meant that potential parties cannot determine what preservation standards they will have to satisfy to avoid sanctions. Extremely expensive overpreservation may seem necessary due to the risk that very serious sanctions could be imposed even for merely negligent, inadvertent failure to preserve some information later sought in discovery.

This amendment to Rule 37(e) addresses these concerns by adopting a uniform set of guidelines for federal courts,[7] and applying them to all discoverable information, not just electronically stored information. It is not limited, as <u>is</u> the current rule, to information lost due to "the routine, good-faith operation of an electronic information system." The amended rule is designed to ensure that potential litigants who make reasonable efforts to satisfy their preservation responsibilities may do so with confidence that they will not be subjected to serious sanctions should information be lost despite those efforts. It does not provide "bright line" preservation directives because bright lines seem unsuited to a set of problems that is intensely context-specific. Instead, the rule focuses on a variety of considerations that the court should weigh in calibrating its response to the loss of information.

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[7] This is a point at which Note language could be added to affirm that adoption of this rule does not raise an *Erie* problem, along the following lines:

> This amendment to Rule 37(e) addresses these concerns by adopting a uniform set of guidelines for federal courts, <u>displacing disparate federal decisions and state law as well. It applies</u> ~~and applying them~~ to all discoverable information, not just electronically stored information.

Another possible place for a comment along these lines is in a later footnote. The question whether including anything along these lines is debatable; it may be best simply to present the Standing Committee with an explanation like the one in the introductory memorandum about why the *Erie* Doctrine does not seem like a problem rather than trying to put something along those lines into the Note.

Amended Rule 37(e) applies to loss of discoverable information "that reasonably should be preserved in the anticipation or conduct of litigation." This preservation obligation arises from the common law, and may in some instances be triggered <u>or clarified</u> by a court order in the case. Rule 37(e)(3) identifies many of the factors that should be considered in determining, in the circumstances of a particular case, when a duty to preserve arose and what information should be preserved.

Except in very rare cases in which the loss of information irreparably deprived a party of any meaningful opportunity to present a claim or defense, sanctions for loss of discoverable information may only be imposed on a finding of willfulness or bad faith<u>, combined with substantial prejudice</u>.[8]

Unlike the 2006 version of the rule, amended Rule 37(e) is not limited to "sanctions under these rules." It provides rule-based authority for sanctions for loss of all kinds of discoverable information, and therefore makes unnecessary resort to inherent authority.

Subdivision (e)(1) When the court concludes that a party failed to preserve information it should have preserved, it may adopt a variety of measures that are not sanctions. One is to permit additional discovery that would not have been allowed had the party preserved information as it should have. For example, discovery might be ordered under Rule 26(b)(2)(B) from sources of electronically stored information that are not reasonably accessible. More generally, the fact that a party has failed to preserve information may justify discovery that otherwise would be precluded under the proportionality analysis of Rule 26(b)(2)(C).

In addition to, or instead of, ordering further discovery, the court may order the party that failed to preserve information to take curative measures to restore or obtain the lost

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[8] This is another point at which additional language could be added to address the question whether there is an *Erie* problem with our rule proposal. For example, we could continue with something like: "The rule therefore displaces any other law that would authorize imposing sanctions in the absence of a showing of willfulness or bad faith, including state law applied in diversity cases." That statement seems like saying "We really mean it." As noted in the prior footnote, it is not clear this adds usefully to the Note.

73 information, or to develop substitute information that the court
74 would not have ordered the party to create but for the failure to
75 preserve. The court may also require the party that failed to
76 preserve information to pay another party's reasonable expenses,
77 including attorney fees, caused by the failure to preserve. Such
78 expenses might include, for example, discovery efforts caused by
79 the failure to preserve information.

80

81 **Subdivision (e)(2)(A).** This subdivision authorizes
82 imposition of the sanctions listed in Rule 37(b)(2)(A) for
83 failure to preserve information, whether or not there was a court
84 order requiring such preservation. Rule 37(e)(2)(A) is designed
85 to provide a uniform standard in federal court for sanctions for
86 failure to preserve. It rejects decisions that have authorized
87 the imposition of sanctions -- as opposed to measures authorized
88 by Rule 37(e)(1) -- for negligence or gross negligence.

89

90 This subdivision protects a party that has made reasonable
91 preservation decisions in light of the factors identified in Rule
92 37(e)(3), which emphasize both reasonableness and
93 proportionality. Despite reasonable efforts to preserve, some
94 discoverable information may be lost. Although loss of
95 information may affect other decisions about discovery, such as
96 those under Rule 26(b)(2)(B) and 26(b)(2)(C), sanctions may be
97 imposed only for willful or bad faith actions, except in the
98 exceptional circumstances described in Rule 37(e)(2)(B).

99

100 The threshold under Rule 37(e)(2)(A) is that the court find
101 that lost information should have been preserved; if so, the
102 court may impose sanctions only if it can make two further
103 findings. First, it must be established that the party that
104 failed to preserve did so willfully or in bad faith. This
105 determination should be made with reference to the factors
106 identified in Rule 37(e)(3).

107

108 Second, the court must also find that the loss of
109 information caused substantial prejudice in the litigation.
110 Because digital data often duplicate other data, substitute
111 evidence is often available. Although it is impossible to
112 demonstrate with certainty what lost information would prove, the
113 party seeking sanctions must show that it has been substantially
114 prejudiced by the loss. Among other things, the court may
115 consider the measures identified in Rule 37(e)(1) in making this
116 determination; if these measures can sufficiently reduce the
117 prejudice, sanctions would be inappropriate even when the court
118 finds willfulness or bad faith. Rule 37(e)(2)(A) authorizes
119 imposition of Rule 37(b)(2) sanctions in the expectation that the

120 court will employ the least severe sanction needed to repair the
121 prejudice resulting from loss of the information.

122

123 ~~[There may be cases in which a party's extreme bad faith~~
124 ~~does not in fact impose substantial prejudice on the opposing~~
125 ~~party, as for example an unsuccessful attempt to destroy crucial~~
126 ~~evidence. Because the rule applies only to sanctions for failure~~
127 ~~to preserve discoverable information, it does not address such~~
128 ~~situations.]~~

129

130 **Subdivision (e)(2)(B).** Rule 37(e)(2)(B) permits the court
131 to impose sanctions without making a finding of either bad faith
132 or willfulness. As under Rule 37(e)(2)(A), the threshold for
133 sanctions is that the court find that lost information should
134 have been preserved by the party to be sanctioned.

135

136 Even if bad faith or willfulness is shown, sanctions may
137 only be imposed under Rule 37(e)(2)(A) when the loss of
138 information caused substantial prejudice in the litigation. Rule
139 37(e)(2)(B) permits sanctions in the absence of a showing of bad
140 faith or willfulness only if that loss of information deprived a
141 party of any meaningful opportunity to present a claim or
142 defense. Examples might include cases in which the alleged
143 injury-causing instrumentality has been lost before the parties
144 may inspect it, or cases in which the only evidence of a
145 critically important event has been lost. Such situations are
146 extremely rare.

147

148 Before resorting to sanctions, a court would ordinarily
149 consider lesser measures, including those listed in Rule
150 37(e)(1), to avoid or minimize the prejudice. If such measures
151 substantially cure the prejudice, Rule 37(e)(2)(B) does not
152 apply. Even if such prejudice persists, the court should employ
153 the least severe sanction.

154

155 **Subdivision (e)(3).** These factors guide the court when
156 asked to adopt measures under Rule 37(e)(1) due to loss of
157 information or to impose sanctions under Rule 37(e)(2). The
158 listing of factors is not exclusive; other considerations may
159 bear on these decisions, such as whether the information not
160 retained reasonably appeared to be cumulative with materials that
161 were retained. With regard to all these matters, the court's
162 focus should be on the reasonableness of the parties' conduct.

163

The first factor is the extent to which the party was on notice that litigation was likely and that the information lost would be discoverable in that litigation. A variety of events may alert a party to the prospect of litigation. But often these events provide only limited information about that prospective litigation, so that the scope of discoverable information may remain uncertain.

The second factor focuses on what the party did to preserve information after the prospect of litigation arose. The party's issuance of a litigation hold is often important on this point. But it is only one consideration, and no specific feature of the litigation hold -- for example, a written rather than an oral hold notice -- is dispositive. Instead, the scope and content of the party's overall preservation efforts should be scrutinized. One focus would be on the extent to which a party should appreciate that certain types of information might be discoverable in the litigation, and also what it knew, or should have known, about the likelihood of losing information if it did not take steps to preserve. <u>The court should be sensitive to the party's sophistication with regard to litigation in evaluating preservation efforts; some litigants, particularly individual litigants, may be less familiar with preservation obligations than other litigants who have considerable experience in litigation.</u>[9] The fact that some information was lost does not itself prove that the efforts to preserve were not reasonable.

The third factor looks to whether the party received a request to preserve information. Although such a request may bring home the need to preserve information, this factor is not meant to compel compliance with all such demands. To the contrary, reasonableness and good faith may not require any special preservation efforts despite the request. In addition, the proportionality concern means that a party need not honor an unreasonably broad preservation demand, but instead should make its own determination about what is appropriate preservation in light of what it knows about the litigation. The request itself, or communication with the person who made the request, may provide insights about what information should be preserved. One important matter may be whether the person making the preservation request is willing to engage in good faith consultation about the scope of the desired preservation.

~~The fourth factor looks to the party's resources and~~

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[9] This is an effort to include in the Note considerations like those in our factor (D).

~~sophistication in relation to litigation. Prospective litigants may have very different levels of sophistication regarding what litigation entails, and about their electronic information systems and what electronically stored information they have created. Ignorance alone does not excuse a party that fails to preserve important information, but a party's sophistication may bear on whether failure to do so was either willful or in bad faith. A possibly related consideration may be whether the party has a realistic ability to control or preserve some electronically stored information.~~

The fourth ~~fifth~~ factor emphasizes a central concern -- proportionality. The focus should be on the information needs of the litigation at hand. That may be only a single case, or multiple cases. Rule 26(b)(2)(C) provides guidance particularly applicable to calibrating a reasonable preservation regime. Rule 37(e)(3)(E) explains that this calculation should be made with regard to "any anticipated or ongoing litigation." Prospective litigants who call for preservation efforts by others (the third factor) should keep those proportionality principles in mind.

Making a proportionality determination often depends in part on specifics about various types of information involved, and the costs of various forms of preservation. The court should be sensitive to party resources; aggressive preservation efforts can be extremely costly, and parties (including governmental parties) may have limited resources to devote to those efforts.[10] A party may act reasonably by choosing the least costly form of information preservation, if it is substantially similar to more costly forms. It is important that counsel become familiar with their clients' information systems and digital data -- including social media -- to address these issues. A party urging that preservation requests are disproportionate may need to provide specifics about these matters in order to enable meaningful discussion of the appropriate preservation regime.

Finally, the fifth ~~sixth~~ factor looks to whether the party alleged to have failed to preserve as required sought guidance from the court if agreement could not be reached with the other parties. Until litigation commences, reference to the court may not be possible. In any event, this is not meant to encourage premature resort to the court; Rule 26(f) directs the parties to discuss and to attempt to resolve issues concerning preservation before presenting them to the court. Ordinarily the parties'

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[10] This is an effort to introduce into the Note considerations raised by what was our factor (D).

252 arrangements are to be preferred to those imposed by the court.
253 But if the parties cannot reach agreement, they should not forgo
254 available opportunities to obtain prompt resolution of the differences from the court.

MEMORANDUM

DATE: August 24, 2012

TO: Discovery Subcommittee

FROM: Andrea L. Kuperman

CC: Judge David G. Campbell
Professor Edward H. Cooper
Professor Daniel R. Coquillette
Judge Mark R. Kravitz
Professor Richard L. Marcus

SUBJECT: Rule 37(e) case law

The Discovery Subcommittee is currently analyzing the best means for addressing growing concerns about preservation for litigation and associated sanctions for failure to preserve. The current thinking of the Subcommittee is to take a sanctions-only approach to addressing these concerns. The Civil Rules were amended in 2006 to address electronic discovery issues. At that time, concerns about preservation and sanctions with respect to electronically stored information ("ESI") were addressed in Rule 37(e),[1] which provides: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." FED. R. CIV. P. 37(e).

To help assess the best course for proceeding on a preservation/sanction rule, the Discovery Subcommittee asked me to look into the case law on Rule 37(e). Specifically, I have been asked to look into the following questions:

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[1]The text now appearing in Rule 37(e) was originally added in 2006 as subsection (f). However, when the Civil Rules were restyled in 2007, the provision became subdivision (e). This memo will refer to the subdivision as Rule 37(e), unless a case or article refers to it as Rule 37(f).

- Has Rule 37(e) made a difference?
- How does the case law interpret "routine, good-faith operation of an electronic information system"? Does it encompass individual decisions to delete information?
- Has the "exceptional circumstances" clause in Rule 37(e) ever been used?
- How has Rule 37(e) been interpreted in terms of litigation holds?
- What is a "sanction" that may not be imposed under Rule 37(e)? Does it include curative measures?

I have reviewed the cases that discuss Rule 37(e), as well as some legal commentary, and I conclude that Rule 37(e) has had very limited impact. There are only a handful of cases that seem to apply it. Many disregard it because it is limited to sanctions under the Rules, and Rule 37(b) only provides for sanctions for violation of a court order. Others find it does not apply because the party failed to institute an adequate litigation hold, which many courts view as required, or at least strongly encouraged, by the advisory committee notes. Still others find it does not apply because the alleged destruction arose before the preservation duty applied (bringing in both the issue of the lack of a court order and the fact that Rule 37(e) is not necessary to address failures to preserve before the duty to do so arises). Many of the cases denying sanctions and citing Rule 37(e) seem likely to have reached the same result even without the provision.

In short, the rule was intended to do something quite limited: to clarify for courts and parties that the world of electronic discovery could not be treated the same in terms of preservation and related sanctions as the world of paper discovery, given the volume of electronic documents and the fact that electronic systems operate in ways that may destroy data unintentionally and often even without a party's knowledge. It was meant to provide limited protection so that parties could be comforted that they would not be sanctioned for good faith destruction done by electronic systems.

As a practical matter, however, this has proven to be a truly narrow area of protection, as most courts seem to find plenty of other reasons for denying sanctions in instances of good-faith destruction. To the extent litigants sought a true safe harbor for failure to preserve, Rule 37(e) does not appear to have provided much comfort.

This memo will first explore the history behind the adoption of Rule 37(e), to gain a better understanding of the Committee's goals in enacting that provision. It will then examine the case law on each of the questions listed above.

I. The History of Rule 37(e)

Amendments to add the provision in Rule 37(e) were published for public comment in August 2004. The brochure accompanying the proposals explained that the proposed amendments to Rule 37 would place a limit on sanctions for the loss of ESI as a result of the routine operation of computer systems. *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE, SUBMITTED FOR PUBLIC COMMENT, A SUMMARY FOR BENCH AND BAR 2 (Aug. 2004), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/comment2005/CompleteBrochure.pdf. The brochure further explained that the new provision would create a limited "safe harbor" that would address "a unique and necessary feature of computer systems — the automatic recycling, overwriting, and alteration of electronically stored information." *Id.* at 3. As published, the rule was meant to address only a small subset of issues involving sanctions for the loss of electronic information. At the time of publication, the Committee seemed to believe that the rule would require reasonable preservation efforts, including, in many instances, a litigation hold. The Committee report stated: "Proposed Rule 37(f) requires that a party seeking to invoke the 'safe harbor' must

have taken reasonable steps to preserve electronically stored information when the party knew or should have known it was discoverable in the action. Such steps are often called a 'litigation hold.'" *See* Memorandum from Hon. Lee H. Rosenthal, Chair, Advisory Committee on Federal Rules of Civil Procedure, to Hon. David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure, Report of the Civil Rules Committee, at 18 (May 17, 2004, rev. Aug. 3, 2004), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/comment2005/CVAug04.pdf [hereinafter Civil Rules 2004 Report].

At the time of publication, the Advisory Committee was continuing to examine the appropriate degree of culpability or fault that would preclude application of the limited safe harbor. *Id.* at 19. The Advisory Committee's report submitting the proposal for public comment noted that "[s]ome have voiced concern that the proposed amendment to Rule 37 is inadequate because it only provides protection from sanctions for conduct unlikely to be sanctioned under the current rules: when information is lost despite a party's reasonable efforts to preserve the information and no court order is violated." *Id.* But "[o]thers have voiced concern that raising the culpability standard would provide inadequate assurance that relevant information is preserved for discovery." *Id.* The Committee requested comments "on whether the standard that makes a party ineligible for a safe harbor should be negligence, or a greater level of culpability or fault, in failing to prevent the loss of electronically stored information as a result of the routine operation of a computer system." *Id.* The published proposal used a negligence standard, but set out a possible alternative amendment that would be framed in terms of intentional or reckless failure to preserve ESI lost as a result of ordinary operation of a computer system. *Id.* The Committee also sought public comment on whether the proposed amendment accurately described the type of automatic computer operations that should be

covered. *Id.* at 20. The Committee explained that it intended "that the phrase, 'the routine operation of the party's electronic information system,' identifies circumstances in which automatic computer functions that are generally applied result in the loss of information." *Id.*

As published, the proposal stated:

> (f) **Electronically Stored Information**. Unless a party violated an order in the action requiring it to preserve electronically stored information, a court may not impose sanctions under these rules on the party for failing to provide such information if:
>
> (1) the party took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action; and
>
> (2) the failure resulted from loss of the information because of the routine operation of the party's electronic information system.

Id. at 51–52.[2]

After considering the extensive public comments, the Advisory Committee ultimately went with an intermediate standard for the degree of culpability — "good faith." The Advisory Committee noted that many comments urged that the negligence standard would provide no meaningful protection, but would only protect against conduct unlikely to be sanctioned in the first place, while others urged that the more restrictive standard in the footnote went too far in the other

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[2]The alternative version that was set out as a possible example of a proposal that would impose a higher degree of culpability before excluding the conduct from the safe harbor stated:

> **(f) Electronically Stored Information**. A court may not impose sanctions under these rules on a party for failing to provide electronically stored information deleted or lost as a result of the routine operation of the party's electronic information system unless:
>
> (1) the party intentionally or recklessly failed to preserve the information; or
>
> (2) the party violated an order issued in the action requiring the preservation of information.

Civil Rules 2004 Report, *supra*, at 53.

direction by insulating conduct that should be subject to sanctions. *See* Memorandum from Hon. Lee H. Rosenthal, Chair, Advisory Comm. on the Federal Rules of Civil Procedure, to Hon. David F. Levi, Chair, Standing Comm. on Rules of Practice and Procedure, Report of the Civil Rules Advisory Committee, at 74 (May 27, 2005, rev. Jul. 25, 2005), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/supct1105/Excerpt_CV_Report.pdf [hereinafter Civil Rules 2005 Report]. The Advisory Committee viewed the "good faith" standard as an intermediate option between the two published options. *See id.* at 74–75. The Advisory Committee's report indicated that it believed that the adequacy of a litigation hold would often bear on whether the party acted in good faith, but the Committee did not view it as a dispositive factor. *See id.* at 75 ("[G]ood faith may require that a party intervene to suspend certain features of the routine operation of an information system to prevent loss of information subject to preservation obligations. . . . The steps taken to implement an effective litigation hold bear on good faith, as does compliance with any agreements that the parties have reached regarding preservation and with any court orders directing preservation."). After publication, the Advisory Committee also decided to add the "exceptional circumstances" provision that appears in the final rule, explaining that it "adds flexibility not included in the published drafts."[3]

[3]No further explanation of the addition of the "exceptional circumstances" provision is provided in the Civil Rules 2005 Report, but there is evidence that the Advisory Committee originally intended it to mean "severe prejudice" and that the Standing Committee revised the committee note to remove that explanation, prompting the Advisory Committee to revise its report to the Standing Committee before it was attached as an appendix to the Standing Committee's report to the Judicial Conference. (It is standard practice for an advisory committee to submit a report to the Standing Committee and then to revise the report to take account of Standing Committee actions after the Standing Committee's meeting and before the report is included as an attachment to the Standing Committee's report to the Judicial Conference.) For example, the original Advisory Committee report to the Standing Committee, before the June 2005 Standing Committee meeting, provided a fuller explanation of the "exceptional circumstances" exception. That report stated, with

respect to the "exceptional circumstances" provision:

> The revised rule also includes a provision that permits sanctions in "exceptional circumstances" even when information is lost because of a party's routine good-faith operation of a computer system. As the Note explains, an important consideration in determining whether exceptional circumstances are present is whether the party seeking sanctions can demonstrate that the loss of the information is highly prejudicial to it. In such circumstances, a court has the discretion to require steps that will remedy such prejudice. The exceptional circumstances provision adds flexibility not included in the published drafts. The Note is revised, also in response to public commentary, to provide further guidance by stating that severe sanctions are ordinarily appropriate only when the party has acted intentionally or recklessly.

Memorandum from Hon. Lee H. Rosenthal, Chair, Advisory Comm. on the Federal Rules of Civil Procedure, to Hon. David F. Levi, Chair, Standing Comm. on Rules of Practice and Procedure, Report of the Civil Rules Committee, at 85 (May 27, 2005), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-2005.pdf [hereinafter May 2005 Civil Rules Report]. The underlined provisions do not appear in the version of the report that was revised after the June 2005 Standing Committee meeting and ultimately submitted to the Judicial Conference.

The committee note that was originally proposed after publication to the Standing Committee for final approval stated: "In exceptional circumstances, sanctions may be imposed for loss of information even though the loss resulted from the routine, good faith operation of the electronic information system. If the requesting party can demonstrate that such a loss is highly prejudicial, sanctions designed to remedy the prejudice, as opposed to punishing or deterring discovery conduct may be appropriate." *Id.* at 88. But at the Standing Committee's June 2005 meeting, there were objections to the note language on severe prejudice. *See, e.g.*, COMM. ON RULES OF PRACTICE AND PROCEDURE, MINUTES, JUN. 15–16, 2005, at 28 (2005), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST06-2005-min.pdf ("One member stated that the amendment was very beneficial, but reiterated that the language of the note is troublesome. The rule focuses on good faith, but the note says there can be sanctions, even if the party acted in good faith, if the opposing party suffers 'severe prejudice.'"). The Standing Committee voted to adopt the amendment, but to delete the parts of the committee note that were troubling some of the members. *Id.* at 29. The deletion of the note language on severe prejudice is likely what led to the revision of the portion of the Advisory Committee's report that originally indicated that prejudice bears heavily on whether exceptional circumstances are present. Notably, the "Changes Made after Publication and Comment Report," or "GAP Report," which was part of the Advisory Committee's report to the Standing Committee and which was part of an appendix to

Id. at 75. Finally, the Advisory Committee decided to remove the provision in the published rule that would have prevented application of the safe harbor if the party had violated a court order requiring preservation, noting that many comments had persuasively argued that the provision would create an incentive to obtain a preservation order to prevent operation of the safe harbor.[4] *Id.*

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the Standing Committee's report to the Judicial Conference that transmitted the rule for final approval, stated, even after the June 2005 Standing Committee meeting, that the "exceptional circumstances" provision "recognizes that in some circumstances a court should provide remedies to protect an entirely innocent party requesting discovery against serious prejudice arising from the loss of potentially important information." *See* Civil Rules 2005 Report, *supra*, at 78; *see also* May 2005 Civil Rules Report, *supra*, at 89 (original, unrevised report of the Civil Rules Committee from May 2005, containing the same language on "exceptional circumstance" in the GAP report as the revised report included as an appendix to the Standing Committee's report to the Judicial Conference).

It is worth noting, however, that it is not clear that the Advisory Committee, even before revision by the Standing Committee, intended exceptional circumstances to be limited to situations involving severe prejudice. The minutes of the Advisory Committee's meeting after the public comment period closed seem to suggest that the "exceptional circumstances" phrase was merely meant to allow for some degree of flexibility. It was added in place of "ordinarily" at the beginning of the proposed rule. As published, the rule began, "Unless a party violated an order in the action requiring it to preserve electronically stored information, a court may not impose sanctions . . . ." After the public comment period, the Advisory Committee decided to abandon the provision excepting violation of a preservation order. During the course of its deliberations, a suggestion was made to have the rule state that "[*o*]*rdinarily*, a court may not impose sanctions . . . ." CIVIL RULES ADVISORY COMMITTEE, MINUTES, APR. 14–15, 2005, at 41 (2005), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CRAC0405.pdf [hereinafter CIVIL RULES MINUTES APR. 2005] (emphasis added). But "[o]rdinarily was questioned as not a good word, either in terms of general rule drafting or in terms of a rule that sets up a presumption." *Id.* at 42. Then, "[d]rawing from Rule 11(c)(1)(A), it was suggested that it may be better to say 'Absent exceptional circumstances.'" *Id.* The minutes to do not mention "absent exceptional circumstances" necessarily meaning "severe prejudice."

[4]Notably, the minutes of the Advisory Committee's meeting following the close of the public comment period emphasize the Committee's decision to have this amendment address the narrow issue of routine operation of an electronic information system, and not preservation issues generally. The minutes state:

> A broader question was introduced: should the rule be revised to protect against sanctions imposed for failure to take reasonable

In its report to the Standing Committee, the Advisory Committee set out examples of current systems that it thought would fall within the limited safe harbor, including: "programs that recycle storage media kept for brief periods against the possibility of a disaster that broadly affects computer operations; automatic overwriting of information that has been 'deleted'; programs that change metadata (automatically created identifying information about the history or management of an electronic file) to reflect the latest access to particular electronically stored information; and programs that automatically discard information that has not been accessed within a defined period or that exists beyond a defined period without an affirmative effort to store it for a longer period." *Id.* at 73. The Advisory Committee's report clearly indicated that the Committee intended to encompass automatic features of electronic systems, rather than individual decisions to delete data. *See, e.g.*, *id.* ("many database programs automatically create, discard, or update information without specific direction from, or awareness of, users"; "the proposed rule recognizes that such automatic features are essential to the operation of electronic information systems."). This was confirmed in the Standing Committee's report to the Judicial Conference, recommending the rule for final approval. *See* COMM. ON RULES OF PRACTICE AND PROCEDURE, EXCERPT FROM THE REPORT OF THE JUDICIAL CONFERENCE COMM. ON RULES OF PRACTICE AND PROCEDURE, TO THE CHIEF JUSTICE OF

> steps to preserve information that was lost for reasons other than routine operation of an electronic storage system? The response was that a rule this broad would directly address the duty to preserve information. As much as many litigants would welcome an explicit preservation rule, the Committee has concluded that the difficulties of drafting a good rule would be so great that there is no occasion even to consider the question whether a preservation rule would be an authorized or wise exercise of Enabling Act authority.

CIVIL RULES MINUTES APR. 2005, *supra*, at 30.

THE UNITED STATES AND THE MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, at 13 (Sept. 2005), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/supct1105/Excerpt_STReport_CV.pdf [hereinafter STANDING COMM. REPORT SEPT. 2005] ("The proposed amendment to Rule 37(f) responds to a distinctive and necessary feature of computer systems — the recycling, overwriting, and alteration of electronically stored information that attends normal use. This is a different problem from that presented by information kept in the static form that paper represents; such information is not destroyed without affirmative, conscious effort. By contrast, computer systems lose, alter, or destroy information as part of routine operations, making the risk of losing information significantly greater than with paper.").

Based on the history, I think it is safe to say that the Advisory Committee and the Standing Committee intended the addition of Rule 37(e) to address a very limited scenario — where the automatic features of an electronic system overwrite or otherwise destroy discoverable information without the party's knowledge — thus providing a limited security to litigants that they will not be sanctioned for such unintentional destruction that would not have occurred in the paper world. *See* STANDING COMM. REPORT SEPT. 2005, *supra*, at 14 ("The proposed amendment provides limited protection against sanctions under the rules for a party's failure to provide electronically stored information in discovery.").[5]

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[5]The "legislative history" of the proposal repeatedly emphasizes that it is meant to protect parties from sanctions due to routine recycling, overwriting, or changed information due to the operation of an electronic storage system. At the same time, the advisory committee notes clearly indicate that litigation holds are often required in order for a party to comply with the good faith requirement. Courts seem to have struggled with reconciling the need for a litigation hold with the safe harbor for routine operation of an electronic information system. One possibility is that the amendment was meant to get at truly mistaken deletion, such as where a party institutes a litigation

II. The Application of Rule 37(e)

There are only a few cases in which Rule 37(e) can be said to have been truly applied by the court. *See* Philip J. Favro, *Sea Change or Status Quo: Has the 37(e) Safe Harbor Advanced Best Practices for Records Management?*, 11 MINN. J. L. SCI. & TECH. 317, 333 (2010) ("In very few instances have courts invoked the rule to shield parties from sanctions."). The commentary published on the rule generally concludes that the rule has not been applied by courts in a way that provides much solace to those concerned about escalating costs associated with electronic discovery. *See, e.g.*, Thomas Y. Allman, *Preservation Rulemaking After the 2010 Litigation Conference*, 11 SEDONA CONF. J. 217, 227–28 (2010) (noting that "some courts have interpreted an ambiguous Committee Note to Rule 37(e) as a mandatory duty to take specific action, regardless of the need to [do] so to effectuate preservation, thereby barring application of [the] Rule when a duty to preserve is identified and the action is not taken," and concluding that "'if the party cannot avail itself of the safe harbor because it had a duty to preserve data in the first instance, then Rule 37 does little to change the state of the pre-existing common law'" (quoting Emily Burns, Michelle Greer Galloway & Jeffrey Gross, *E-Discovery: One Year of the Amended Federal Rules of Civil Procedure*, 64 N.Y.U. ANN. SURV. AM. L. 201, 217 (2008))); Thomas Y. Allman, *Inadvertent Spoliation of ESI After the 2006 Amendments: The Impact of Rule 37(e)*, 3 FED. CTS. L. REV. 25, 26 (2009) [hereinafter Allman, *Impact of Rule 37(e)*] ("To say that Rule 37(e) has been met with intellectual disdain since its enactment is putting it mildly. To many it evokes 'a low standard [which] seems to protect against sanctions only in situations where [they] were unlikely to occur.' . . . Many commentators have characterized Rule 37(e) as 'illusory' and a 'safe' harbor in name only."

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hold, but the electronic system nonetheless overwrites some relevant data.

(alterations in original) (footnotes omitted)); John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 590–91 (2010) ("Although well-intentioned, this rule fails to provide adequate protection for a variety of reasons. First, it does not account for the possibility that even the most careful attempts to locate and preserve electronic data may not succeed in preserving all potentially relevant information. For example, if a party deletes electronic data in good faith but not as part of routine operations, Rule 37(e) would not protect it. Second, the phrase 'routine, good-faith operation of an electronic information system' is too vague to provide clear guidance as to a party's preservation obligations. It is unclear whether sanctions would be available against a party that fails to suspend a deleting or overwriting program that routinely rids the company's information system of data that are not reasonably accessible. Third, the rule fails to explain what exceptional circumstances might warrant the imposition of sanctions even when data are lost through the routine, good-faith operation of a computer system. Finally, the rule applies only to parties, and thus provides no protection to nonparties, who play an increasingly important role in litigation."); Robert Hardaway, Dustin D. Berger & Andrea Defield, *E-Discovery's Threat to Civil Litigation: Reevluating Rule 26 for the Digital Age*, 63 RUTGERS L. REV. 521, 566 (2011) ("[F]ederal courts have all but read this safe harbor provision out of the rules. They have generally concluded that once the duty to preserve arises—and it arises as soon as litigation becomes foreseeable—any deletion of relevant data is, by definition, not in good faith. These safety valve provisions not only fail to adequately control the costs associated with e-discovery, they sometimes increase it by fostering ancillary litigation on the producer's entitlement to the protection of these safety valves.");[6]

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[6]This article suggests several problems with the rule, including that a party seeking to rely on it "must show that it 'act[ed] affirmatively to prevent the system from destroying or altering information, even if such destruction would occur in the regular course of business'"; that the rule

Andrew Hebl, *Spoliation of Electronically Stored Information, Good Faith, and Rule 37(e)*, 29 N. ILL. U. L. REV. 79, 85 (2008) ("Despite the fact that courts should be prohibited from imposing sanctions for spoliation of electronically stored information which occurs after a preservation obligation has arisen, as a result of the good faith, routine operation of a party's electronic information system, this has not been the case. Instead, courts have in some cases limited their analysis to whether a preservation obligation has arisen at all, imposing sanctions per se if one has, and failing to consider the extent to which a party acted in good faith or not." (footnote omitted));[7] John H. Jessen, Charles R. Kellner, Paul M. Robertson & Lawrence T. Stanley, Jr., *Digital Discovery*, MA-CLE 10-1 (2010) (arguing that courts have interpreted the advisory committee notes to mean that the rule is inapplicable once the duty to preserve arises and that "[i]n view of the lack of protection and clarity provided by Rule 37(e) and the cases construing the rule, a litigant is well served to use the procedures currently recognized by the courts as adequate steps for the preservation of electronic data"); Dan H. Willoughby, Jr., Rose Hunter Jones & Gregory R. Antine, *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789, 791, 828 (2010) ("[T]he safe harbor

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contains an exception for exceptional circumstances; that the rule is limited to "'sanctions under these rules'" and therefore probably does not protect a party from sanctions pursuant to inherent authority; and that the term "electronic information system" may limit protection if a litigant, as operator of the system, directed deletion through configuration or programming of the system. Hardaway et al., *supra*, at 586–87.

[7]The author argues that this is "tantamount to strict liability, in that the state of mind of the spoliating party plays no role in determining whether sanctions should be imposed." Hebl, *supra*, at 85. He also notes that "negligent conduct has been sufficient to support the imposition of sanctions, despite the fact that the rule clearly requires a reckless or intentional state of mind. As a result, concerns about the intersection of electronically stored information and spoliation are not being addressed, and Rule 37(e) has been rendered largely superfluous." *Id.* He suggests that "courts have imposed sanctions for considerably less-culpable conduct than the rule was meant to target." *Id.*

provisions of Rule 37(e) of the Federal Rules of Civil Procedure have provided little protection to parties or counsel."; "[T]he safe harbor was intended to provide limited protection, and it has. Parties or counsel seeking refuge from the increasing sanction-motion practice will be able to reach Rule 37(e)'s refuge only in very limited situations. Since the rule's adoption, approximately two cases per year have met its requirements.");[8] Gal Davidovitch, Comment, *Why Rule 37(e) Does Not Create a New Safe Harbor for Electronic Evidence Spoliation*, 38 SETON HALL L. REV. 1131, 1131–32 (2008) ("Rule 37(e) will not, in most cases, offer any protection that the federal rules did not already provide. And in those few cases where 37(e) will deliver a novel safe harbor, it will be the result of a jurisdictional idiosyncrasy rather than the rule drafters' policy.");[9] Nicole D. Wright, Note, *Federal Rule of Civil Procedure 37(e): Spoiling the Spoliation Doctrine*, 38 HOFSTRA L. REV. 793, 815 (2009) ("The language of Rule 37(e) is problematic because, once put into practice, it offers little constructive guidance as to precisely when a party will be relieved from sanctions due to its failure to produce evidence. Additionally, it provides the opportunity for corporate defendants to utilize the Rule's safe harbor provision as a cushion and allow those who are 'inclined to obscure

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[8]The authors found that between the rule's promulgation in 2006 and January 1, 2010, it had been cited in only 30 federal court decisions, three of which did not relate to discovery of ESI in civil cases, two of which involved paper documents, and one of which was a criminal case. Willoughby et al., *supra*, at 825. Of the remaining 25 cases, they found, at most, 7.5 that invoked Rule 37(e) to protect a party from sanctions. *Id.* In two of those cases, the court mentioned 37(e) and denied sanctions, but it was unclear whether the court relied on the rule in making its decision. *Id.* at 825–26.

[9]Davidovitch argues that the circumstances in which Rule 37(e) applies are quite narrow, especially when coupled with the "exceptional circumstances" exception, and that Rule 37 already included various requirements that effectively functioned similarly to the safe harbor created under Rule 37(e). Davidovitch, *supra*, at 1132. Nonetheless, Davidovitch believes that Rule 37(e) "is not entirely irrelevant" because "[i]t organizes the pre-existing exceptions into one rule and thus provides guidance to litigants and judges on how to deal with electronic information loss." *Id.*

or destroy evidence of any sort . . . to hide behind the shield of good faith and undue burden to protect themselves from sanctions.'" (footnote omitted) (omission in original));[10] *cf.* Timothy J. Chorvat, *E-Discovery and Electronic Evidence in the Courtroom*, 17 BUS. L. TODAY 13, 15 (2007) ("Rule 37(f) will protect truly routine deletions of data such as when data in a computer's RAM memory is erased and a file is saved to a hard disk, or when a file is moved from one storage medium to another. But those 'routine, good-faith' actions have not been the source of clients' concern. If Rule 37(f) protects only conduct that never would have been sanctioned, then it is not a safe harbor in any useful sense."); *but see* Favro, *supra*, at 319 ("[O]ne rule is helping to clarify preservation and production burdens for electronically stored information: Federal Rule of Civil Procedure 37(e)."). While the legal commentary has generally concluded that Rule 37(e) has had very minimal impact, Allman notes that "even if it were true that 'Rule 37(e) [does] not, in most cases, offer any protection that the Federal Rules did not already provide,' there is, as a member of the Advisory Committee noted at the time, a 'real benefit in reassuring parties that if they respond to [challenges] reasonably, they will be protected.'" Allman, *Impact of Rule 37(e)*, *supra*, at 37 (alterations in original) (footnote omitted).

A. Cases Applying or Influenced by Rule 37(e)

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[10]Wright concludes that "[t]he absence of guidance for parties that are following document retention policies and for when a party may expect to incur spoliation sanctions leads one to believe parties are, in fact, worse off since Rule 37(e) was enacted." Wright, *supra*, at 816. She argues: "In light of the multitude of factors to be taken into account, Rule 37(e) is ineffective. The considerations that a court must make prior to imposing sanctions on a party already encompass the concern that fueled the implementation of the Rule, rendering it unnecessary. Therefore, Rule 37(e) should be removed from the FRCP." *Id.* at 820. She concludes that "the Rule, as evidenced in its interpretation and application, does no more than reiterate the policies behind the traditional spoliation doctrine," and that as a result "Rule 37(e) should be removed from the FRCP, and the traditional spoliation doctrine should instead govern the imposition of these sanctions." *Id.* at 823–24.

Only a handful of cases seem to have been directly influenced by Rule 37(e) in precluding sanctions.[11] Even in those cases, it is not clear that the result would have been different without the rule. A number of other cases have discussed the rule or been influenced by it, but have not seemed to directly apply it. The cases purporting to directly apply the rule or to have been influenced by it are described below in reverse chronological order.

2012 Cases

In *FTC v. Lights of America Inc.*, No. SACV 10-1333 JVS (MLGx), 2012 WL 695008 (C.D. Cal. Jan. 20, 2012), the court found Rule 37(e) inapplicable because there was no court order, but precluded sanctions pursuant to inherent authority, with reference to Rule 37(e). The defendants sought terminating sanctions or an adverse inference for the plaintiff's failure to institute a litigation hold when litigation became reasonably foreseeable, including failure to suspend the plaintiff's 45-day auto-delete policy for all email. *Id.* at *1, *3. The court noted that the defendants "have not asserted that the FTC failed to obey a discovery order. Absent a failure to obey a discovery order, the Court does not have authority under Rule 37 to sanction a party." *Id.* (citing *Kinnally v. Rogers Corp.*, 2008 WL 4850116 (D. Ariz. Nov. 6, 2008)). The court concluded that the motion was governed by the court's inherent authority to sanction. *Id.* Nonetheless, the court stated that "given that the Rule 37 sanctions and sanctions levied under the Court's inherent power both analyze the same factors, the Court finds case law regarding Rule 37 sanctions persuasive." *Id.* at *2 n.3. The court concluded that the FTC's e-discovery policy, which provides that relevant ESI must be

[11]The cases that seem to have applied Rule 37(e) most directly include *Kermode v. University of Mississippi Medical Center*, No. 3:09-CV-584-DPJ-FKB, 2011 WL 2619096 (S.D. Miss. Jul. 1, 2011), *Miller v. City of Plymouth*, No. 2:09-CV-205 JVB, 2011 WL 1458491 (N.D. Ind. Apr. 15, 2011), and *Olson v. Sax*, No. 09-C-823, 2010 WL 2639853 (E.D. Wis. Jun. 25, 2010).

preserved in an archive, while duplicates must be deleted, was consistent with its duty to preserve relevant material. *Id.* at *5. The court then noted that "to the extent that the auto-delete policy caused the inadvertent loss of any relevant email correspondence, that is not a sanctionable offense," and cited Rule 37(e). *FTC*, 2012 WL 695008, at *5. The court explained that Rule 37(e) "instructs that "'[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the *routine, good-faith operation of an electronic information system*,'" *id.* (alteration in original), and concluded that "[s]imilarly, the inadvertent deletion of some emails due to the good-faith operation of an electronic information system is not a ground for issuing [] sanctions under this Court's inherent power to sanction," *id.* There was no evidence that the plaintiff's retention policy was operated in bad faith, and "[t]he auto-delete system is a function of the computer information system's finite storage capacity and the desire to avoid needless retention of documents, which slows the system." *Id.* The court did not refer to the advisory committee note's reference to the possible need to suspend auto-delete functions if they are likely to result in the destruction of discoverable ESI.

2011 Cases

In *Webb v. Jessamine Cty. Fiscal Court*, No. 5:09-CV-314-JMH, 2011 WL 3652751, at *5 (E.D. Ky. Aug. 19, 2011), the court denied a request for sanctions based on the loss of video recordings because there was no bad faith and the duty to preserve did not arise until the suit was filed a year later. The court found that its decision was further supported by Rule 37(e) because the recordings were overwritten in the normal course of business after three months due to limited storage space, and "[a]s a result, these recordings were lost 'as a result of the routine, good-faith operation of an electronic information system.'" *Id.* at *6. The court then noted, however, that even

assuming the plaintiff could have shown that the defendant had a duty to preserve evidence, the recordings at issue would not have been relevant because they would have captured activity in areas that had no bearing on the plaintiff's claims. *Id.* at *6 n.6.

In *Kermode v. University of Mississippi Medical Center*, No. 3:09-CV-584-DPJ-FKB, 2011 WL 2619096 (S.D. Miss. Jul. 1, 2011), the court relied on Rule 37(e), at least in part, to preclude sanctions for automatic email purging. The plaintiff requested default judgment as a sanction for the defendants' alleged failure to preserve certain email communications, failure to produce others in native format as part of the defendants' pre-discovery disclosures, and failure to produce the emails in response to written discovery requests. *Id.* at *2. The court first noted that the sanctions request faced several procedural hurdles, including that it was raised after the close of discovery and after the motions deadline expired, and that it violated both local and national rules. *Id.* at *2–3. Besides the procedural defects, the court noted that Rule 37(e) presented "a more serious impediment" to the motion for sanctions because "the subject e-mails were apparently deleted as part of the e-mail system before reason existed to preserve them in another format." *Id.* at *3. As a result, the court concluded that "Rule 37(e) sanctions [we]re not available." *Id.* Although the court stated that Rule 37(e) precluded the default judgment, it is unclear that Rule 37(e) necessitated this result. First, since the court noted that the emails were deleted before a reason to preserve them existed, it is unclear that sanctions could be imposed anyway. Rule 37(e) presumably provides some protection after the duty to preserve has arisen; the common law generally precludes sanctions for failure to preserve before the duty to preserve arises. Second, it seems likely that the denial of sanctions would have occurred in any event in this case because of the procedural defects in the plaintiffs' motion.

The *Kermode* court also considered an alternative request for an evidentiary hearing, and ultimately an adverse inference, but concluded that neither prong of the spoliation test in the Fifth Circuit had been met because the plaintiff failed to show either that there were any missing relevant emails or that the defendants acted in bad faith. *Id.* at *4. The court noted that the plaintiff "acknowledges facts establishing that Defendants' duty to preserve electronically stored information did not arise until after much of the information had been automatically deleted from the University's e-mail server." *Kermode*, 2011 WL 2619096, at *5. The potentially missing emails would have been in the time period of June or July 2008, at which time the defendants' email system automatically deleted emails that were not saved after 60 days. *Id.* The court determined that the very earliest the defendants would have anticipated litigation would have been September 2008, and concluded that "it does not appear the e-mails in question—if they ever existed—would have survived the automatic purging." *Id.* The court concluded that even if a litigation hold had been immediately implemented at the time litigation was anticipated, it would only have preserved emails from the end of July 2008 and later. *Id.* The court held that "[s]ince the events of which Park complained transpired prior to this date, the allegedly relevant correspondence would have already been deleted." *Id.* Notably, however, the court's discussion of this automatic deletion was in the context of its determination that there was no bad faith, as required under Fifth Circuit law to impose an adverse inference, and did not reference Rule 37(e). It is unclear that Rule 37(e) could have had much force here, since the court determined that the alleged deletion occurred before a duty to preserve existed. Presumably destruction before the duty to preserve exists is protected behavior with or without Rule 37(e).

In *Miller v. City of Plymouth*, No. 2:09-CV-205 JVB, 2011 WL 1458491 (N.D. Ind. Apr. 15,

2011), Rule 37(e) seemed to make a difference in the court's decision not to impose sanctions. In that case, the plaintiffs filed a suit based on a 2008 incident in which a police officer pulled over and detained the plaintiffs while using a dog to search their car and person for contraband. The court ordered the defendants to produce any reports and audio or video recordings detailing incidents where the officer had ordered his dog to sniff a detained vehicle since January 1, 2004. *Id.* at *2. The police department apparently had a video recording policy that dated back to 1993, when VHS cassettes were still used. *Id.* That policy required officers to retain recordings for at least seven days, after which they could be reused. "If an officer believed the tape would be useful 'in the judicial process,' the officer could choose to save the video." *Id.* In 2006, the police department began using digital recording systems instead of VHS devices, but the digital recording system frequently malfunctioned. *Id.* The officer involved in the incident at issue did preserve a DVD copy of the plaintiff's traffic stop. The system in his car worked by continuously recording onto an embedded hard drive, which automatically burned video footage onto a DVD every time the officer turned on his police lights. *Id.* When the DVD was full, the system asked the user if he wished to save the entries made on the DVD or reformat the disk, which would erase the content and allow the DVD to be reused. *Miller*, 2011 WL 1458491, at *2. Although the hard drive could store up to 30 days of traffic stops, the DVD could be filled in a single shift. *Id.* At some point in 2010, the officer's camera malfunctioned and thereafter only worked off and on. *Id.* The police department installed a new video system, and the officer testified that he did not have any video recordings dating back to 2004. *Id.*

The plaintiffs argued that the magistrate judge's order denying sanctions was erroneous "'because the recording device in this case did not *automatically* record over previously stored

videos. Rather, the hard drive was knowingly and willfully 'reformatted' . . . at the prompting of the equipment operator.'" *Id.* at *3 (omission in original). The plaintiffs further asserted that the defendants were precluded from using Rule 37(e)'s safe harbor because "the choice not to burn relevant video footage to DVD was a policy, practice, or custom of the Defendants, not a routine operation of an electronic information system." *Id.* The court rejected this interpretation of Rule 37(e) as too narrow, noting that the advisory committee's note to Rule 37(e) "explain[s] that the routine operation of computer systems 'includes the alteration and overwriting of information, often without the operator's specific direction or awareness,'" and that "[s]uch features are essential to the operation of electronic information systems." *Miller*, 2011 WL 1458491, at *3 n.1. The court noted that in this case, "it was essential to the operation of Defendants' cameras that the user either save the recordings on the DVD or rewrite the information on it." *Id.* The court found that "by noting that routine operations 'often' occur without the operator's specific direction, the drafters acknowlege[d] that 'routine operations' can still occur despite the direct involvement of a system user." *Id.* The court rejected the plaintiff's argument that the camera user's minimal involvement took the loss of electronic information outside of Rule 37(e). *Id.* The court concluded that the defendants had not acted in bad faith, explaining that they "kept no 'video library' of past police stops, and its policy since the early 1990s had been to record over old footage—except when an individual officer exercised her discretion to preserve the footage. Thus, pursuant to departmental policy, the Defendants recorded over some of the desired footage long before Plaintiffs' stop on May 18, 2008." *Id.* at *4. The court further emphasized that the magistrate judge had noted that the defendants had no control over the fact that the hard drives were recorded over every 30 days and that there was no evidence that any DVD copies were destroyed. *Id.* at *5.

Although the *Miller* court rejected the argument that Rule 37(e) did not apply, it is not clear that the rule was necessary to the result. The opinion indicates that the tape of the incident itself had been preserved (and that there was no evidence that any DVDs were destroyed), so presumably the plaintiffs sought sanctions based on the defendants' inability to comply—due to the automatic overwriting of hard drives every 30 days—with the court's order to produce recordings from incidents dating back to 2004. But it is unclear that there would have been any obligation to preserve recordings before the incident in question, at which time the failure to save the recordings would have arguably been protected behavior even without Rule 37(e).[12] Perhaps Rule 37(e) operated to protect the later destruction of hard drives that occurred after the court's order in 2010, or after a 2009 post-suit letter from the plaintiff requesting any video evidence the department had of the officer and his dog.

2010 Cases

In *Streit v. Electronic Mobility Controls, LLC*, No. 1:09-cv-0865-LJM-TAB, 2010 WL 4687797 (S.D. Ind. Nov. 9, 2010), the court found that Rule 37(e) precluded sanctions where electronic data was inadvertently deleted, without any bad faith. The case involved a car accident in which a vehicle control system manufactured by the defendant allegedly malfunctioned. *Id.* at *1. The vehicle control system had a "black box" that logged data from the system in two different ways.

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[12]The fact that Rule 37(e) operates only for sanctions issued under the rules, which in turn require the violation of a court order, supports the conclusion that Rule 37(e) was not meant to operate before the preservation duty arose. That is, Rule 37(e) seems to come into play only after the violation of a court order, which would not occur before the duty to preserve arose. *See* Civil Rules 2004 Report, *supra*, at 18 ("[P]roposed Rule 37(f) addresses only sanctions under the Civil Rules and applies only to the loss of electronically stored information after commencement of the action in which discovery is sought. The proposed amendment does not define the scope of a duty to preserve and *does not address the loss of electronically stored information that may occur before an action is commenced*." (emphasis added))

> The operations log records all "events," such as a problem with the wiring of the steering system, a low battery, or an impact to a vehicle. The datalogger continuously records all of the vehicle control system's inputs and outputs, including all events recorded in the operations log.
>
> When the datalogger detects an event, it stores the corresponding data on a block. At any time, there are fifteen blocks in which data is stored temporally. The datalogger is refreshed by a three block rotation that consists of 1) the oldest block, which is overwritten, 2) the block that is in use, and 3) the block that was previously in use. If an impact, or "G-event," is detected, the corresponding block is locked, so that it cannot be overwritten.

Id. (internal citations omitted). The defendant's practice after an accident involving a vehicle equipped with the control system was to download the vehicle's datalogger. *Id.* After the incident at issue, one of the defendant's employees attempted to start the vehicle a number of times because the battery was very low. *Id.* However, every time a vehicle with this system starts, the datalogger grabs the oldest of the three blocks in rotation and, if an event occurs, overwrites the oldest block with new data. *Id.* In this case, because the vehicle had a low battery, every time the employee attempted to restart the vehicle, the datalogger recorded the event of the low battery. *Streit*, 2010 WL 4687797, at *1. As a result, the blocks that would have recorded all events and inputs and outputs more than about 2.5 minutes before the accident were overwritten. *Id.* But the block recording any events within 2.5 minutes of the accident and the accident itself were not overwritten. *Id.* It was undisputed that any event that occurred before the accident would have been recorded in the operations log, which was fully preserved and produced. *Id.* There were no events recorded on the operations log before the accident, but the plaintiff alleged that at some point before the accident, she pulled her vehicle over because the steering felt abnormal. *Id.* at *1–2. The plaintiff alleged that the defendants intentionally deleted information from the vehicle's datalogger, specifically the

information from when the plaintiff pulled her vehicle over after feeling a steering abnormality. *Id.* at *2. The defendant argued that the information on the datalogger was overwritten during the ordinary course of recovery procedures and that the only relevant information would have been an "event," which would have been preserved on the operations log. *Streit*, 2010 WL 4687787, at *2.

The court stated that federal law applied and was "mindful" of Rule 37(e). *Id.* at *2. The court stated that bad faith was required to impose sanctions for destruction of ESI, and that bad faith means destruction for the purpose of hiding adverse information, but it was not clear if this was based on Rule 37(e) or the common law. *See id.* The court noted in a footnote after its citation to Rule 37(e) that "[o]f course, the Court's power to sanction is inherent and, therefore, not governed by rule or statute." *Id.* at *2 n.1. The court concluded that the request for sanctions failed because the plaintiffs had not shown bad faith. Specifically, the plaintiffs had not shown that the defendant instructed its employee to start and restart the vehicle, much less that it did so with the intent to overwrite data, or that the datalogger would have recorded the alleged steering malfunction, when it was not recorded in the operations log. *Id.* While the court seemed influenced by Rule 37(e), it seems likely that the court would have reached the same result even without the rule because it implied that it was not bound by the rule and seemed to require bad faith regardless of the safe harbor in the rule.

In *Coburn v. PN II, Inc.*, No 2:07-cv-00662-KJC-LRL, 2010 WL 3895764 (D. Nev. Sept. 30, 2010), the court awarded monetary sanctions for spoliation, but also found that certain behavior did not warrant sanctions, relying in part on Rule 37(e). The plaintiff had engaged in various acts of alleged spoliation. First, in analyzing the plaintiff's home computer pursuant to a court order, the forensic expert found that the computer's operating system had overwritten portions of files and data,

and the expert suggested that some of the files were deleted by CCleaner, but that it was likely that many of the files had been manually deleted. *Id.* at *1. The expert's report indicated that CCleaner was run on the plaintiff's computer two days before the court-ordered forensics examination and that the default configuration settings were manually modified at that time. *Id.* at *2. The program was not set to run automatically and had only been run twice since its installation two years earlier. *Id.* The plaintiff asserted that she did not even know CCleaner existed on her computer until after the forensic exam, after which she learned it was installed as part of service package she purchased. *Id.* The defendants sought sanctions on the basis of the running of CCleaner just before the forensics exam; the existence on the plaintiff's computer of nearly 4,000 "non-standard files" containing keywords relevant to litigation, allegedly indicating that the plaintiff had regularly destroyed evidence; and the alleged destruction of relevant emails on the plaintiff's home computer. *Id.* The plaintiff argued that she never deleted a large volume of files from her computer and that the normal operation of CCleaner would be protected under Rule 37(e). *Coburn*, 2010 WL 3895764, at *2.

The court noted that monetary sanctions are available either under Rule 37(b) or the court's inherent authority, and that willfulness is not required to impose monetary sanctions under Rule 37, but bad faith is required to use inherent authority to sanction. *Id.* at *3. The court noted that Rule 37(e) provides a "safe harbor" for failure to provide ESI, and explained that "[t]he destruction of emails as part of a regular good-faith function of a software application may not be sanctioned absent exceptional circumstances." With respect to the running of CCleaner two days before the forensic exam, the court declined to impose sanctions because there was no evidence that the plaintiff had run it herself or directed someone else to do so, and therefore the court could not conclude that the plaintiff "destroyed relevant evidence 'in bad faith, vexatiously, wantonly, or for oppressive

reasons.'" *Id.* at *4 (citation omitted). The quoted language was from a case the court cited for the prerequisites to using its inherent powers to sanction, and the court did not cite Rule 37(e) in this section of its opinion.

The court also denied sanctions based on the existence of nearly 4,000 irregular files on the plaintiff's computer. The plaintiff submitted expert testimony that "while many such files are technically 'intentionally deleted,' they are not necessarily *volitionally* deleted; meaning that the computer may delete the files without any user intervention." *Id.* at *5. The court concluded that levying sanctions based on the irregular files "would be to levy sanctions on the basis of an evidentiary estimate or 'hunch.'" *Id.* With respect to the deleted emails, the plaintiff testified that she regularly sent email from her work email to her home email, and that her practice was to download whatever files she sent to her home computer and then delete the email and any duplicative files. *Id.* at *6. Although the emails were deleted, it was undisputed that the files themselves were saved and produced. *Coburn*, 2010 WL 3895764, at *6. The court acknowledged that the wiser decision would have been not to delete the emails and that this was a close case, but given that the information was actually produced in the form of the files saved on the plaintiff's hard drive, the court found sanctions to be unwarranted. The court did impose sanctions for the plaintiff's destruction of audio tapes of conversations with co-workers, which was allegedly done because the tapes were of poor quality. *Id.* at *7. The court found no bad faith in the destruction, even though it was done intentionally, and awarded attorneys' fees as a sanction, pursuant to its inherent authority. In sum, although the court discussed Rule 37(e) in its discussion of the legal standards, it did not seem to actually apply it.

In *Olson v. Sax*, No. 09-C-823, 2010 WL 2639853 (E.D. Wis. Jun. 25, 2010), the court

applied Rule 37(e) to preclude sanctions for routine overwriting of surveillance video. In that employment discrimination suit, the plaintiff filed a motion for sanctions, accusing the defendant employer of failing to preserve a video tape, made just over a week before the plaintiff's termination, of her alleged theft of property from the employer. *Id.* at *1. The video tape was created on July 22, 2008; the plaintiff was terminated on July 31, 2008; and the plaintiff requested to see the videotape on the day of her termination. *Id.* Her attorney also requested the tape through formal discovery requests, although the date of that particular request was unclear. *Id.* The plaintiff requested that the defendants be barred from producing any evidence of the alleged theft and an award of expenses incurred in bringing the sanctions motion, unless the defendants showed good cause for the destruction. *Id.* The defendants invoked Rule 37(e), arguing that the court could not impose sanctions where ESI was lost as the result of the routine, good faith operation of an electronic storage system. *Id.* Specifically, the defendants stated that they were not aware of the possibility of litigation until February 24, 2009, when they received a letter from the plaintiff's attorney, but that the video was created using a recorder that recorded footage on a 500 gigabyte hard drive that holds about 29 days of video and records in a loop. *Olson*, 2010 WL 2639853, at *1. Once the hard drive is full, it records over the oldest footage. *Id.* The defendants argued that the alleged theft would have been recorded over around August 20, 2008, well before the letter from the plaintiff's attorney. *Id.* The defendants "assert that the subject video recording was recorded over as a part of Goodwill's routine good faith operation of its video electronic system—a system that is in place at all Goodwill retail stores and is commonly used throughout the retail industry." *Id.*

The *Olson* court noted that the common law required "wilfulness, bad faith or fault" in order to impose sanctions, and that Rule 37(e) precluded sanctions for failing to provide ESI lost as the

result of routine, good-faith operation of an electronic storage system. *Id.* at *2. But after citing Rule 37(e), the court stated that "'[t]he rules do not state the limits of judicial power . . . [j]udges retain authority, long predating the Rules of Civil Procedure.'" *Id.* at *2 n.1 (alterations and omission in original) (citing *Langley by Langley v. Union Elec. Co.*, 107 F.3d 510, 514 n.4 (7th Cir. 1997)). The court then stated that bad faith was required, but did not clarify whether the bad faith was required as a prerequisite to precluding application of Rule 37(e) or as a prerequisite to using inherent authority to sanction under the common law. *See Olson*, 2010 WL 2639853, at *2. The court concluded that the defendants were aware of possible litigation by August 11, 2008, and that as of that date, the video recording had not been overwritten and the defendants had a duty to preserve the evidence. *Id.* But the court denied sanctions because of Rule 37(e), stating:

> Nonetheless, the only evidence before the Court indicates that the recording over of the video record from July 22, 2008, was part of Goodwill's routine good faith operation of its video system. There is no evidence that Goodwill engaged in the "bad faith" destruction of evidence for the purpose of hiding adverse evidence. *See Trask–Morton*, 543 F.3d at 681. Therefore, pursuant to Rule 37(e) of the Federal Rules of Civil Procedure, the Court denies Olson's motion for sanctions. Neither party is awarded the fees and expenses incurred with respect to the motion.

Id. at *3.[13]

2009 Cases

In *Mohrmeyer v. Wal-Mart Stores East, L.P.*, No. 09-69-WOB, 2009 WL 4166996 (E.D. Ky.

[13]Although the court purported to apply Rule 37(e) to preclude sanctions, it is unclear whether the result would have been different in the absence of the rule, given the court's note that it was not bound by the rules in terms of imposing sanctions and its imposition of a bad faith requirement under the common law. On the other hand, perhaps Rule 37(e) operated to preclude sanctions under the rules, while the common law's bad-faith requirement operated to preclude sanctions under inherent authority.

Nov. 20, 2009), the court analogized to Rule 37(e) in finding that the destruction of temporary documents before litigation did not warrant sanctions. The case arose out of a slip-and-fall accident in a Wal-Mart store, which was alleged to have resulted from Wal-Mart's negligent failure to maintain the restroom. *Id.* at *1. Wal-Mart had a practice of maintaining a log or chart of maintenance and inspection of the restroom, but the log was not ordinarily preserved in the ordinary course of business and was destroyed on a weekly basis. *Id.* Wal-Mart asserted that it destroyed the log at issue long before it became aware of the possibility of litigation from the fall. *Id.* The court stated:

> The law does not and should not require businesses to preserve any and all records that may be relevant to future litigation for any accidental injury, customer dispute, employment dispute, or any number of other possible circumstances that may give rise to a claim months or years in the future, when there is absolutely no contemporaneous indication that a claim is likely to result at the time records are destroyed pursuant to a routine records management policy.

Id. at *2. Because the log was a temporary document that was routinely discarded on a weekly basis, the court found no basis for imposing sanctions for its destruction. The court rejected the plaintiff's reliance on a Sixth Circuit case that held: "'It is beyond question that a party to civil litigation has a duty to preserve ESI when that party has notice that the evidence is relevant to litigation or should have known that the evidence may be relevant to future litigation.'" *Id.* at *3 (quoting *John B. v. Goetz*, 531 F.3d 448 (6th Cir. 2008)). The court concluded that "[i]t is debatable whether the principle recently articulated by the Sixth Circuit in *Goetz* concerning ESI can be generalized to establish a broader pre-litigation 'duty to preserve' all evidence no matter how speculative future litigation may be," and that a narrow reading of that case was suggested by Rule 37(e). *Mohrmeyer*, 2009 WL 4166996, at *3. The court held that "[b]y analogy, it would be improper for this court to

impose any type of sanction upon Walmart on the facts presented, where evidence was discarded as a result of its routine good-faith records management practices long before Walmart received any notice of the likelihood of litigation." *Id.* The court emphasized that it was not implying that formal notice of litigation is required in every case before the duty to preserve arises, but was "merely hold[ing] that on the facts presented, the 'trigger date' requiring Walmart to preserve evidence arose well after [the date the log was destroyed]." *Id.* at *3 n.1. While Rule 37(e) seemed to support the court's determination not to award sanctions, it seems likely that the result would have been the same even without that rule. The court seemed to frame its holding in terms of when the duty to preserve arose, not in terms of destruction of ESI after the duty arose, and it is not clear that the log at issue was electronically stored.

In *Southeastern Mechanical Services v. Brody*, No. 8:08-CV-1151-T-30EAJ, 2009 WL 2242395, at *1 (M.D. Fla. Jul. 24, 2009), the defendant alleged spoliation based on the plaintiff's failure to suspend the automatic overwriting of its backup tapes that archive employee emails and other electronic information. The plaintiff's company policy was to retain emails on its server until an employee deletes the emails, to backup the server daily to backup tapes, and to overwrite the backup tapes every two weeks. *Id.* After Brody, a defendant and former employee of the plaintiff, had his last day of employment with the plaintiff, the plaintiff inspected Brody's account and discovered that emails, contacts, and tasks were deleted from his computer. *Id.* The plaintiff waited more than two weeks after Brody's departure before checking the backup tapes of Brody's account. *Id.* The defendants argued that the plaintiff spoliated evidence by failing suspend the automatic overwriting of the backup tapes, which destroyed the only evidence of the plaintiff's claim that Brody improperly deleted data from his work computer before his termination. *Id.* The plaintiff

argued that it did not act in bad faith in failing to retain its backup tapes and that the automatic overwriting was part of its regular data management policy. *Id.* at *2. The court noted that bad faith is required to impose sanctions pursuant to its inherent authority. *S.E. Mech. Servs.*, 2009 WL 2242395, at *2. It also noted that Rule 37 provides authority for imposing sanctions for failure to comply with the court's rules, and that Rule 37(e) provides a limited safe harbor for failure to preserve ESI. *Id.*

The court held that the plaintiff had a duty to turn off the overwriting function at least by the time it received a demand letter a week after Brody's termination. *Id.* at *3. Despite finding it "baffling" that the plaintiff would not have put a litigation hold in place that would have suspended the overwriting of the backup tapes a week after the termination, the court found no sanctions were appropriate because the automatic overwriting did not involve bad faith and "was part of the company's routine document management policy." *Id.* The court then noted that "[i]n accordance with the traditional view that spoliation must be predicated on bad faith, Rule 37(e) sanctions have been deemed inappropriate where 1) electronic communications are destroyed pursuant to a computer system's routine operation and 2) there is no evidence that the system was operated in bad faith." *Id.* (citing *Escobar v. City of Houston*, No. 04-1945, 2007 WL 2900581, at *18 (S.D. Tex. Sept. 29, 2007)).[14] Thus, the court cited Rule 37(e) in support of its conclusion that no sanctions

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[14] *See also Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614, 628 n.13 (D. Colo. 2007) ("Consistent with this general rule [that '[a] litigation hold does not apply to inaccessible back-up tapes . . . which may continue to be recycled on the schedule set forth in the company's policy'], newly enacted Rule 37(f) provides limited protection against sanctions where a party fails to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system" (quoting *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 431 (2007) (alterations and omission in original))). This statement seems to imply that routine deletion of backup tapes amounts to routine operation of an electronic storage system.

were warranted, but it seems to have reached its conclusion first based on the common law requirement in its circuit of bad faith to impose spoliation sanctions, presumably pursuant to inherent authority.

In *In re Kessler*, No. 05 CV 6056(SJF)(AKT), 2009 WL 2603104, at *3 (E.D.N.Y. Mar. 27, 2009), the court implicitly applied Rule 37(e) in rejecting, on de novo review, the magistrate judge's award of attorneys' fees for the negligent destruction of video footage. That case arose out of a fire on a vessel that was docked at a marina. *Id.* at *1. The petitioner sought sanctions based on the marina's destruction of a critical video tape showing the main dock where the vessel was docked just before the fire. *Id.* at *4. The marina used a digital video recorder that recorded data from the camera onto a hard drive. *Id.* at *16. Once the hard drive was full, which occurred every 24 hours, the hard drive overwrote the old data in recording new data. *Id.* The marina did not do anything to preserve the footage from the day of the fire and it was taped over in the normal course of the video camera's operation. *Id.* The magistrate judge noted, without explanation, that Rule 37(e) was not applicable to preclude sanctions where surveillance video had been overwritten in the normal course of business, but found it useful to determine the steps necessary to preserve electronic evidence. *Kessler*, 2009 WL 2603104, at *18. The magistrate judge declined to impose an adverse inference instruction because the proponent had failed to show bad faith, but found that the opponent's negligent conduct warranted monetary sanctions, including an award of attorney's fees in connection with the motion for sanctions and the cost of a forensic examination of the surveillance system to determine if any lost data could be retrieved. *Id.* at *20. The district court rejected the portion of the magistrate judge's report and recommendation that awarded attorney's fees as a sanction. The court concluded: "Petitioner has not met his burden of showing that the Marina 'had an obligation to

preserve [the surveillance footage], acted culpably in destroying it, and that the [surveillance footage] would have been relevant to [Petitioner's] case.'" *Id.* at *3 (alterations in original) (citation omitted). The court further explained that "the surveillance footage from the date of the fire self-destructed approximately twenty-seven (27) hours after it was recorded" "[i]n accordance with the routine operation of the Marina's surveillance system." *Id.* The court did not cite Rule 37(e) in coming to this conclusion, but may have implicitly accepted it in rejecting the portion of the magistrate judge's opinion that rejected the application of the rule. Nonetheless, the court's notation that there was no obligation to preserve, no culpability in destruction, and no showing of relevance, coupled with its lack of citation to Rule 37(e), suggests that the court would have reached the same conclusion even without the existence of Rule 37(e).

2008 Cases

In *Liquidating Supervisor for Riverside Healthcare, Inc. v. Sysco Food Services of San Antonio, LP* (*In re Riverside Healthcare, Inc.*), 393 B.R. 422 (Bankr. M.D. La. 2008), the court declined to sanction the routine deletion of email. In that case, the plaintiff alleged that the defendant's deletion of email relating to the defendant's dealings with the debtors supported an adverse inference sanction. *Id.* at 428. The court noted that the Fifth Circuit requires a showing of bad faith to impose an adverse inference instruction and that the plaintiff did not prove that the defendant intentionally deleted or allowed deletion of email to frustrate litigation. *Id.* Instead, the email was deleted routinely before the lawsuit, pursuant to the computer system's routine deletion of email after 60 to 90 days (and retention of deleted email on the server for an additional 14 days). *Id.* at 429. By the time the defendant had been joined as a party, the email from the relevant time period had been deleted pursuant to the automatic deletion routine. *Id.* The plaintiff also

complained that it could not get email from a particular employee's work station, but because the employee testified that her hard drive had failed and was replaced three times since the relevant bankruptcy filing, the court concluded that the loss of information "was not the result of SSA's 'fraudulent intent and a desire to suppress the truth.'" *Id.* (citing *Consol. Aluminum v. Alcoa*, 244 F.R.D. 335, 343–44 (M.D. La. 2006)). The court also noted that the plaintiff had not shown prejudice. *Riverside Healthcare*, 393 B.R. at 429. Because the plaintiff failed to show bad faith, the court concluded that sanctions were not warranted. *Id.* at 430. The court noted in a footnote that Rule 37(e) limits the ability to sanction "where loss of information results from good faith operation of [an] electronic information system," but did not seem to rely on that provision to preclude sanctions. *See id.* at 429 n.21.

In *Gippetti v. United Parcel Service, Inc.*, No. C07-00812 RMW (HRL), 2008 WL 3264483 (N.D. Cal. Aug. 6, 2008), the court rejected sanctions when certain records were destroyed under the party's routine document retention policy. In that case, the plaintiff sued for employment discrimination and sought production of tachograph records for other UPS drivers, which show a vehicle's speed and the length of time it is moving or stationary. *Id.* at *1. UPS produced some of these, but many had been destroyed under its policy of preserving such records for only 37 days due to the large volume of data. *Id.* The court rejected sanctions for this destruction, finding that the records were not clearly relevant, that there was no clear notice to the defendants to preserve the tachograph records of other employees, and that the plaintiff was not prejudiced by destruction as similar information was available through the production of other employees' time cards. *See id.* at *3–4. The court concluded that the record "shows only that the tachographs were maintained and then destroyed several years ago in the normal course of UPS's business in accordance with the

company's document retention policy." *Id.* at *4. In the "legal standards" section of the opinion, the court mentioned the ability to sanction pursuant to its inherent authority, but did not mention sanctioning power under Rule 37. *See id.* at *2. The court noted that bad faith was not required for sanctions, but that the party's degree of fault was relevant to what sanction should be imposed. *Gippetti*, 2008 WL 3264483, at *2. The court cited common law for these principles, but added a "see also" citation to Rule 37(e) in support of its statement that the degree of fault is relevant to the determination of the sanction imposed. *Id.* The court did not mention Rule 37(e) anywhere else in the opinion. The court may have been influenced by Rule 37(e) in its decision not to impose sanctions where documents were destroyed under a routine document retention policy, but given the court's findings of lack of relevance, prejudice, duty to preserve, and culpability, it seems quite likely that the same result would have occurred without Rule 37(e).

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In another case, the court deferred a sanctions motion based on an entire year's worth of emails lost due to a server move, but noted that Rule 37(e) requires good faith, which depends on the circumstances. *See U&I Corp. v. Adv. Med. Design, Inc.*, No. 8:06-CV-2041-T-17EAJ, 2007 WL 4181900, at *5–6 (M.D. Fla. Nov. 26, 2007). The court deferred a decision on the request for sanctions because it lacked information on whether the computer error that caused the lost emails was made in good faith and whether the emails were truly forever lost. *Id.* Because Rule 37(e) requires good-faith operation, which in turn depends on the circumstances of each case, the court could not yet determine whether sanctions were warranted, although it did leave open the possibility of Rule 37(e) precluding sanctions if the emails were lost in good faith. *Id.* at *6.

In *Escobar v. City of Houston*, No. 04-1945, 2007 WL 2900581 (S.D. Tex. Sept. 29, 2007),

the court denied sanctions for the loss of emails, but it was unclear whether this was based on the Fifth Circuit's requirement of bad faith for imposing an adverse inference or based on Rule 37(e). The lawsuit arose out of a city police officer's deadly shooting of a teenage boy. The plaintiffs alleged that the City failed to preserve records of the police department's electronic communications in the 24 hours after the death. *Id.* at *17. The plaintiffs argued that they notified the City of their claim within 60 days of the shooting and that the police department's policy was to keep "mobile digital terminal transmissions" for 90 days. *Id.* The plaintiffs argued that destruction of electronic communications after their notice constituted spoliation; they requested an adverse inference jury instruction. *Id.* The court noted that the Fifth Circuit requires bad faith before imposing severe spoliation sanctions, including adverse inference instructions. *Id.* The court also noted that federal courts may impose sanctions for failing to obey discovery orders under Rule 37 (and that Rule 37(f) applies to ESI), or they may impose sanctions for conduct that abuses the judicial process pursuant to their inherent authority. *Id.* at *17 n.5. But the court explained that inherent power applies only when the parties' conduct is not controlled by other mechanisms. *Escobar*, 2007 WL 2900581, at *17 n.5. The court concluded that although the duty to preserve existed, an adverse inference instruction was not warranted because there was no showing that relevant electronic communications were destroyed or that the destruction was in bad faith, citing Fifth Circuit case law from before the 2006 e-discovery amendments. *Id.* at *18 (citing *Condrey v. Suntrust Bank of Ga.*, 431 F.3d 191, 203 (5th Cir. 2005); *King v. Ill. Cent. R.R.*, 337 F.3d 550, 556 (5th Cir. 2003)).

The court found further support for its conclusion in Rule 37(e), stating: "And under Rule 37(f) of the Federal Rules of Civil Procedure, if the electronic communications were destroyed in the routine operation of the HPD's computer system, and if there is no evidence of bad faith in the

operation of the system that led to the destruction of the communications, sanctions are not appropriate." *Id.* The court also found a lack of prejudice, noting that "[t]he record shows that the officers involved in the shooting were not likely to have used e-mail to communicate about the event in the day after it occurred. *Id.* at *19. The court concluded that because the plaintiffs had not shown bad faith or the loss of relevant information, no sanctions were warranted, again citing a pre-2006 Fifth Circuit case. *Id.* (citing *Toon v. Wackenhut Corrections Corp.*, 250 F.3d 950, 952 (5th Cir. 2001)). Thus, while Rule 37(e) supported the court's decision, given the lack of bad faith, as required by circuit precedent, and lack of showing of loss of relevant evidence, the court might have reached the same conclusion even without Rule 37(e).[15] *See* Hebl, *supra*, at 110 (arguing that *Escobar* is the only court that has arguably applied Rule 37(e) correctly, but noting that the case is not dispositive on the issue because there were grounds independent of Rule 37(e) for not granting sanctions). Another possibility is that the court ruled out sanctions under Rule 37 because of the safe harbor in Rule 37(e), and ruled out sanctions under inherent authority based on the common law requirement of bad faith.

Finally, in *Columbia Pictures Industries v. Bunnell*, No. 06-1093FMCJCX, 2007 WL 2080419 (C.D. Cal. May 29, 2007), the court denied sanctions for failure to preserve data stored temporarily in RAM because there was no prior preservation order or request for such temporary data. The court noted Rule 37(e), but it was unclear if it specifically applied. The court denied sanctions because the "failure to retain the Server Log Data in RAM was based on a good faith belief that preservation of data temporarily stored only in RAM was not legally required." *Id.* at *14. The

[15]The Fifth Circuit's requirement of bad faith provided an additional layer of protection here that might not have been present in circuits that do not require bad faith. Rule 37(e) might have had a greater impact on the same facts in circuits without a bad faith requirement.

court mentioned that Rule 37(e) precludes sanctions for the good-faith operation of an electronic information system, and that "good faith" may require suspending certain features of routine operation once a duty to preserve arises, but it was not clear if that rule was the basis for the court's decision not to impose sanctions. *See id.* at *13–14.

B. Cases Finding Rule 37(e) Inapplicable

The remaining cases citing Rule 37(e) have either determined that the rule did not apply or mentioned it but did not seem to directly apply it.

Some courts find that Rule 37(e) does not apply because sanctions have been requested pursuant to the court's inherent authority rather than Rule 37 or because there is no prior court order to bring the conduct within Rule 37 sanctions. *See Stanfill v. Talton*, --- F. Supp. 2d ---, No. 5:10-CV-255(MTT), 2012 WL 1035385, at *8 n.12, *9–11 (M.D. Ga. Mar. 29, 2012) (after portions of a video recording were lost because the recording system automatically overwrote old video, the court denied sanctions because even if the duty to preserve existed, it was not clear that it was owed to the plaintiff and there was no showing of bad faith (as required under circuit law); the court noted that Rule 37(e) did not apply because the plaintiff had not moved for sanctions under Rule 37 and it would not have applied anyway because the plaintiff's argument was that the video was not lost as part of the good-faith operation of an electronic storage system, but because of the defendants' knowing failure to preserve the video before it was overwritten); *Tech. Sales Assocs., Inc. v. Ohio Star Forge Co.*, Nos. 07-11745, 08-13365, 2009 WL 728520, at *8 (E.D. Mich. Mar. 19, 2009) (rejecting application of Rule 37(e) both because lost ESI was deleted intentionally and because sanctions were sought under the court's inherent authority); *Arista Records LLC v. Usenet.com, Inc.*, 608 F. Supp. 2d 409, 429 n.30, 431 n.31 (S.D.N.Y. 2009) (Rule 37(e) did not apply because there

was no violation of a previous court order and sanctions were requested under the court's inherent authority);[16] *Johnson v. Wells Fargo Home Mortg., Inc.*, No. 3:05-CV-0321-RAM, 2008 WL 2142219, at *2, *3 n.1 (D. Nev. May 16, 2008) (relying on inherent authority to analyze sanctions because although the defendant brought the motion under Rule 37 and inherent authority, the plaintiff's conduct did not violate any discovery order under Rule 37 because it occurred before the filing of the motion to compel production of the hard drives at issue, and rejecting application of Rule 37(e) for the same reason); *Nucor Corp. v. Bell*, 251 F.R.D. 191, 196 n.3 (D.S.C. 2008) (imposing an adverse inference for intentional destruction of a USB thumb drive with relevant evidence and for allowing employees' continued use of a computer, which resulted in loss of relevant data, and noting that Rule 37(e) did not apply because sanctions were imposed pursuant to inherent authority, not the rules);[17] *see also* Allman, *The Impact of Rule 37(e)*, *supra*, at 27 ("Rule 37(e) applies only to mitigation of 'rule-based' spoliation sanctions, despite the fact that sanctions can also be imposed under the inherent power of courts. Some have concluded that this limitation implies approval to avoid the impact of the Rule by simply relying on a court's inherent powers." (footnote omitted)); *cf. Lee v. Max Int'l, LLC*, 638 F.3d 1318, 1321 (10th Cir. 2011) (affirming dismissal of plaintiff's action for "thrice repeated failure to produce materials that have always been and remain within its control" because such behavior was "strong evidence of willfulness and bad faith, and in

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[16]Although Rule 37(e) did not apply, the court found it instructive in understanding the steps parties should take to preserve electronic evidence. *Arista Records*, 608 F. Supp. 2d at 431 n.31.

[17]The court stated: "Assuming arguendo that defendants['] conduct would be protected under the safe-harbor provision, Rule 37(e)'s plain language states that it only applies to sanctions imposed under the Federal Rules of Civil Procedure (e.g., a sanction made under Rule 37(b) for failing to obey a court order). Thus, the rule is not applicable when the court sanctions a party pursuant to its inherent powers." *Nucor*, 251 F.R.D. at 196 n.3.

any event is easily fault enough," as required under circuit law for severe spoliation sanction, but also noting that Rule 37(e) protects from sanctions those who have discard materials as a result of good-faith business procedures); *Northington v. H&M Int'l*, No. 08-CV-6297, 2011 WL 663055, at *12 (N.D. Ill. Jan. 12, 2011) ("[W]hether or not defendant's conduct is sanctionable under any subdivision of Rule 37 is an academic issue, as the analysis for imposing sanctions under that Rule or our inherent power is 'essentially the same.'" (citations omitted)); *Grubb v. Bd. of Trustees of the Univ. of Ill.*, 730 F. Supp. 2d 860, 865–66 (N.D. Il.. 2010) (denying sanctions where third party destroyed the relevant computer without the plaintiff's knowledge, and where the plaintiff inadvertently altered/destroyed ESI by simply using his computer, because there was no bad faith as required for sanctions in that circuit; the court noted that the request was brought pursuant to inherent authority, but was "mindful" of Rule 37(e), which also seemed to weigh in favor of denying sanctions).

One court explained that the reason many courts might look to inherent authority to impose sanctions for failure to preserve is that Rule 37 sanctions do not easily apply to pre-litigation conduct:

> Several courts have held that Rule 37 sanctions are available even where evidence is destroyed before the issuance of a discovery request, with a few going so far as to apply the rule to conduct that occurred before the lawsuit was filed, provided the party was on notice of a claim. But, the majority view—and the one most easily reconciled with the terms of the rule—is that Rule 37 is narrower in scope and does not apply before the discovery regime is triggered. *See Beil v. Lakewood Eng'g & Mfg. Co.*, 15 F.3d 546, 552 (6th Cir. 1994); *Dillon v. Nissan Motor Co.*, 986 F.2d at 268–69; *Unigard Sec. Ins. Co.*, 982 F.2d at 368; *see also* Iain D. Johnson, "Federal Courts' Authority to Impose Sanctions for Prelitigation or Pre-order Spoliation of Evidence," 156 F.R.D. 313, 318 (1994) ("it is questionable whether Rule 37 provides a federal court with authority to impose sanctions for spoliating evidence prior to a court order

> concerning discovery or a production request being served"). If that is true, the court must look to its inherent authority to impose, if at all, sanctions for evidence destruction that occurs between the time that the duty to preserve attaches and, at the least, the filing of a formal discovery request. But, this approach begs yet another question—what sort of intent requirement ought to apply in this non-rule context?

United Med. Supply Co. v. United States, 77 Fed. Cl. 257, 268 (Fed. Cl. 2007).[18] However, the court

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[18]The court described the complicated circuit split on the degree of culpability required for particular sanctions:

> [A]s startling[] as it might seem, the *mens rea* issue confronting this court appears to be an open question in this circuit. There is, in fact, a division of authority among the circuits on this issue. While the tendency is to view that split in terms of whether *vel non* a showing of bad faith is required, in fact, the diverging views cover a much broader spectrum. On one end of that spectrum, actually representing a distinct minority, are courts that require a showing of bad faith before any form of sanction is applied. Other courts expect such a showing, but only for the imposition of certain more serious sanctions, such as the application of an adverse inference or the entry of a default judgment. Further relaxing the scienter requirement, some courts do not require a showing of bad faith, but do require proof of purposeful, willful or intentional conduct, at least as to certain sanctions, so as not to impose sanctions based solely upon negligent conduct. On the other side of the spectrum, we find courts that do not require a showing of purposeful conduct, at all, but instead require merely that there be a showing of fault, with the degree of fault, ranging from mere negligence to bad faith, impacting the severity of the sanction. If this continuum were not complicated enough, some circuits initially appear to have adopted universal rules, only to later shade their precedents with caveats. Other times, the difference between decisions appear to be more a matter of semantics, perhaps driven by state law, with some courts, for example, identifying as "bad faith" what others would call "recklessness" or even "gross negligence."

United Med. Supply Co., 77 Fed. Cl. at 266–67 (footnotes omitted). The court noted that United States Court of Federal Claims Rule 37, which is modeled after Civil Rule 37, does not require bad faith to impose sanctions. *Id.* at 267. The court explained:

noted that many courts have taken a flexible approach to when Rule 37 sanctions can be triggered. *See id.* at 271 n.26 ("Courts have held that, for purposes of Federal Rule 37(b)(2), a party fails to obey a court 'order' whenever it takes conduct inconsistent with the court's expressed views regarding how discovery should proceed. As such, the court need not issue a written order compelling discovery for RCFC 37 to be triggered." (internal citations omitted)); *see also Domanus v. Lewicki*, --- F.R.D. ----, 2012 WL 2072866, at *4 (N.D. Ill. Jun. 8, 2012) ("'In other words, the Court may sanction a party pursuant to Rule 37 for discovery violations; however these sanctions are limited to circumstances in which a party violates a court order or discovery ruling.' 'Courts have broadly interpreted what constitutes an 'order' for purposes of imposing sanctions.'" (citations omitted));[19] Wright, *supra*, at 816 ("[W]hen a violation of the duty [to preserve] occurs before

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> The omission of any *mens rea* requirement in this rule is not an oversight. Indeed, in 1970, FED.R.CIV.P. 37(d) was modified to eliminate the requirement that the failure to comply with a discovery request be 'willful,' with specific indication in the drafters' notes that, under the modified rule, sanctions could be imposed for negligence. Under the revised rule, wilfullness instead factors only into the selection of the sanction. As such, it is apparent that 'bad faith' need not be shown in order to impose even the most severe of the spoliation sanctions authorized by RCFC 37(b) and (d). And courts construing the Federal rule counterpart to this rule have so held.

Id. at 267–68 (internal citations and footnote omitted).

The court also noted that Rule 37(e)'s safe harbor's protection for good-faith preservation implies that sanctions are permitted under Rule 37 for conduct less culpable than bad faith. *See United Med. Supply Co.*, 77 Fed. Cl. at 270 n.24 ("That the Advisory Committee would need to adopt a limited 'good faith' . . . exception to the imposition of sanctions belies the notion such sanctions should be imposed only upon a more traditional finding of 'bad faith.'").

[19]Some courts note that while Rule 37 requires a court order, the difference between imposing sanctions under Rule 37 or under inherent authority is immaterial because the sanctions analysis is the same under either source of authority. *See Domanus*, 2012 WL 2072866, at *4 ("Nevertheless, the Court need not determine whether it is exercising its statutory or inherent authority. 'Under

litigation commences, it is less clear as to whether or not Rule 37(e) may be invoked. Therefore, Rule 37(e) is problematic in that it 'addresses only sanctions under the federal rules, which generally do not apply prior to commencement of litigation.'" (footnote omitted)).

Other courts have found the rule inapplicable because the conduct did not amount to "routine, good-faith operation of an electronic storage system." *See, e.g.*, *Domanus*, 2012 WL 2072866, at *6 & n.4 (Rule 37(e) did not apply because intentional destruction of a hard drive during litigation (after it crashed and the party had already allegedly recovered and produced what it could) was neither "routine" or "ordinary," and Rule 37(e) does not apply once a preservation duty arises);[20] *Bootheel Ethanol Invest., L.L.C. v. Semo Ethanol Coop.*, No. 1:08-CV-59 SNLJ, 2011 WL 4549626, at *4 (E.D. Mo. Sept. 30, 2011) (rejecting application of Rule 37(e) after the plaintiff threw away a hard drive because Office Depot said it would not start, explaining that "it cannot now be said that information was lost due to routine, good-faith operation of the computer" because it was not even known whether ESI was lost at all, since all that was known was that Office Depot confirmed that the computer would not boot up); *United States v. Universal Health Servs., Inc.*, No. 1:07cv00054,

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either Rule 37 or under the Court's inherent authority, the analysis for imposing sanctions is essentially the same.'" (citation omitted)).

[20]It seems clear that some courts believe that Rule 37(e) does not apply once a duty to preserve arises. This may not comport with the Committee's original intent in enacting Rule 37(e). Since sanctions are not generally available for failing to preserve before the duty to preserve arises, and since Rule 37(e) was meant to alleviate some of the concerns about excessive sanctions for lost ESI, presumably it was meant to apply in some respects after the duty to preserve arises. *See* Allman, *The Impact of Rule 37(e)*, *supra*, at 26 ("[S]ome courts 'have completely ignored the clear implication of Rule 37(e)—namely that it applies after the duty to preserve has arisen,' thereby 'render[ing] the rule largely superfluous.'" (second alteration in original) (footnote omitted)); *id.* at 30 ("The mere fact that the loss occurs after a preservation duty has already attached is, of course, not decisive."); Hebl, *supra*, at 84 ("Rule 37(e) creates a safe harbor for parties after the preservation obligation has arisen, whether it is due to a court order or a party's reasonable anticipation of litigation.").

2011 WL 3426046, at *5 (W.D. Va. Aug. 5, 2011) (Rule 37(e) did not apply when a party's electronic data became much less accessible due to its failure to implement a litigation hold until two years after the duty to preserve arose because this was negligent and not routine, good-faith operation of an electronic storage system);[21] *Wilson v. Thorn Energy, LLC*, No. 08 Civ. 9009(FM), 2010 WL 1712236, at *3 (S.D.N.Y. Mar. 15, 2010) (rejecting Rule 37(e) argument based on loss of flash drive after duty to preserve arose because the Advisory Committee notes explain that "'routine operation' relates to the 'ways in which such systems are designed, programmed, and implemented to meet the party's technical and business needs,'" but "the flash drive was not overridden [sic] or erased as part of a standard protocol; rather it was lost because the Defendants failed to make a copy"; also concluding that the failure to make a copy of the drive meant that the party failed to act in good faith, which also precluded application of Rule 37(e)); *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 642 (S.D. Tex. 2010) ("[A] policy put into place after a duty to preserve had arisen, that applies almost exclusively to emails subject to that duty to preserve, is not a routine, good-faith operation of a computer system"); *KCH Servs., Inc. v. Vanaire, Inc.*, No 05-777-C, 2009 WL 2216601, at *1 (W.D. Ky. Jul. 22, 2009) (after the plaintiff accused the defendant of misappropriating the plaintiff's software (pre-litigation), the defendant instructed employees to delete all such software from their computers; this, coupled with failure to put a litigation hold on any electronic correspondence, led the court to conclude there was not routine, good-faith operation, and to impose an adverse inference instruction); *Stratienko v. Chattanooga-Hamilton Cty. Hosp. Auth.*, No. 1:07-CV-258, 2009 WL 2168717, at *4 (E.D. Tenn. Jul. 16, 2009) (reimaging of employee's

[21]The court ordered the production of back-up tapes to remedy the failure to preserve, but it was not clear whether this was considered a "sanction" under Rule 37 or a determination that inaccessible data should be produced based on a finding of good cause under Rule 26(b)(2)(B).

hard drive after employee's retirement did not fall within Rule 37(e) because the defendant had been on notice that information on the hard drive could be at issue and the reimaging took place immediately after the employee's retirement); *Phillip M. Adams & Assocs., L.L.C. v. Dell, Inc.*, 621 F. Supp. 2d 1173, 1191–92 (D. Utah 2009) (Rule 37(e) did not apply to destruction of evidence when the defendant had no document destruction/retention policy and left it to employees to save documents they thought important); *Tech. Sales Assocs.*, 2009 WL 728520, at *8 (one relevant computer had approximately 70,000 files deleted with a tool known as "Eraser" in just one month during the discovery period; another computer had email files moved into the "recycle bin" the day before a scheduled forensic examination; the court held Rule 37(e) "is intended to protect a party from sanctions where the routine operation of a computer system inadvertently overwrites potentially relevant evidence, not when the party intentionally deletes electronic evidence"); *Pandora Jewelry, LLC v. Chamilia, LLC*, No. CCB-06-3041, 2008 WL 4533902, at *8 n.7 (D. Md. Sept. 30, 2008) ("To the extent the lack of production results from deletion of emails, Chamilia's failure to prevent the loss does not fall within the routine, good faith exception of Rule 37(e), which protects parties 'for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.'");[22] *Meccatech, Inc. v. Kiser*, No. 8:05CV570, 2008 WL 6010937, at *9 (D. Neb. Apr. 2, 2008) (imposing severe sanctions for intentional and bad faith discovery conduct and noting that intentional destruction is "not 'lost as a result of the routine, good-faith operation of an electronic information system'" (citing FED. R. CIV. P. 37(e))); *Doe v. Norwalk*

[22]The court also implied that Rule 37(e) could not apply once the duty to preserve had arisen. *See Pandora Jewelry*, 2008 WL 4533902, at *8 n.7 ("[B]ecause Chamilia had a duty to preserve documents when it sent the January 8 and 15, 2007 communications and the October 2, 2007 communication, Chamilia's failure to preserve documents does not fall within the protective scope of Rule 37(e).").

Cmty. Coll., 248 F.R.D. 372, 378 (2007) ("[I]n order to take advantage of the good faith exception, a party needs to act affirmatively to prevent the system from destroying or altering information, even if such destruction would occur in the regular course of business. Because the defendants failed to suspend it at any time, . . . the court finds that the defendants cannot take advantage of Rule 37(f)'s good faith exception. . . . This Rule therefore appears to require a routine *system* in order to take advantage of the good faith exception, and the court cannot find that the defendants had such a system in place.");[23] *Peskoff v. Faber*, 244 F.R.D. 54, 60–61 (D.D.C. 2007) (sanctions were permitted for failure to turn off auto-delete features after the preservation duty arose and Rule 37(f) did not provide protection because that rule requires a litigation hold and turning off auto-delete features; sanctions were precluded for the period before notice of litigation because Rule 37(f) does not require auto-delete features to be disabled in that period and no exceptional circumstances were present);[24] *United States v. Krause* (*In re Krause*), 367 B.R. 740, 767–68 (Bankr. D. Kan. 2007) (Rule 37(f) did not apply because the installation of the GhostSurf program, a program designed to wipe or eradicate data or files, on one computer after the court ordered turning over electronic

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[23]The court explained that at one point emails were backed up for one year, and at an earlier point were only backed up for six months or less. The defendants did not have "one consistent, 'routine' system in place," and did not follow a State Librarian's policy of retaining electronic documents for two years. Further, the defendants did nothing to stop the destruction of backup tapes after the duty to preserve arose. *Doe*, 248 F.R.D. at 378. Because the Rule 37(e) advisory committee notes indicate that "the Rule only applies to information lost 'due to the 'routine operation of an electronic information system'—the ways in which such systems are generally designed, programmed, and implemented to meet the party's technical and business needs,'" it could not apply in this case, where there was no routine system in place. *Id.*

[24]Although the court found that sanctions were precluded for continuing the auto-delete feature before notice of litigation was received, the court stated that "[n]onetheless, Rule 37(f) must be read in conjunction with the discovery guidelines of Rule 26(b)." *Peskoff*, 244 F.R.D. at 61. The court concluded that the balancing factors in Rule 26(b)(2)(C) authorized requiring the defendant to participate in a process to ascertain whether a forensic examination was justified. *Id.*

evidence and on another the day before turning it over, was not routine, good-faith operation of an electronic information system; there was an obligation to disable the wiping feature once the preservation duty arose and certainly to not reinstall and run the program, as the debtor did here);[25] *cf. Disability Rights Council of Greater Wash. v. Wash. Metro. Transit Auth.*, 242 F.R.D. 139, 145–46 (D.D.C. 2007) (defendant failed to stop its email system from automatically deleting all emails after 60 days until at least more than two years after suit was filed; court held that "it is clear that [Rule 37(e)] does not exempt a party who fails to stop the operation of a system that is obliterating information that may be discoverable in litigation"; court also found Rule 37(e) inapplicable because the plaintiffs did not seek sanctions but rather that the defendant be required to search backup tapes for discoverable information previously deleted).[26]

And other courts have found that sanctions were not appropriate without the need to specifically apply Rule 37(e). *See, e.g.*, *Denim N. Am. Holdings, LLC v. Swift Textiles, LLC*, 816 F. Supp. 2d 1308, 1311–12, 1328–30 (M.D. Ga. 2011) (refusing sanction of dismissal or adverse inference based on individual employees' practice of manually deleting emails because circuit law

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[25]The court noted that "[j]ust as a litigant may have an obligation to suspend certain features of a 'routine operation,' the Court concludes that a litigant has an obligation to suspend features of a computer's operation that are not routine if those features will result in destroying evidence." *In re Krause*, 367 B.R. at 768. The court held that in this case "that obligation required Krause to disable the running of the wiping feature of GhostSurf as soon as the preservation duty attached. And it certainly obligated Krause to refrain from reinstalling GhostSurf when his computers crashed and he restored them." *Id.*

[26]The court noted: "I am anything but certain that I should permit a party who has failed to preserve accessible information without cause to then complain about the inaccessibility of the only electronically stored information that remains. It reminds me too much of Leo Kosten's definition of chutzpah: 'that quality enshrined in a man who, having killed his mother and his father, throws himself on the mercy of the court because he is an orphan.'" *Disability Rights Council of Greater Wash.*, 242 F.R.D. at 147.

required bad faith, and citing Rule 37(e), but not seeming to rely on it in denying sanctions (and not mentioning Rule 37(e) in denying reconsideration)); *Bryden v. Boys and Girls Club of Rockford*, No. 09 C 50290, 2011 WL 843907, at *5 (N.D. Ill. Mar. 8, 2011) (the court denied a motion for sanctions without prejudice when the defendant's third-party contractor that hosted the defendant's domain and email accounts upgraded their server without the defendant's knowledge and deleted all prior emails, a year after the preservation duty began, but did so because it did not yet have enough information on prejudice to the plaintiff or on the defendant's efforts to preserve; the court cited Rule 37(e) in its description of the legal standard, but did not say whether it applied); *Viramontes v. U.S. Bancorp*, No. 10 C 761, 2011 WL 291077, at *3–5 (N.D. Ill. Jan. 27, 2011) (denying request for adverse inference as a sanction for the defendant's destruction of emails pursuant to its routine document retention policy because the emails were destroyed before the duty to preserve arose and there was no bad faith given the routine operation of the document destruction policy; mentioned Rule 37(e) in the statement of legal standards, but did not seem to directly apply it); *Sue v. Milyard*, No. 07-cv-01711-REB-MJW, 2009 WL 2424435, at *2 (D. Colo. Aug. 6, 2009) (after video footage of a strip search at issue was recorded over within five to seven days due to the normal operating process of the camera's computer system, and the request to retain it was not received until after the normal process deleted it, the court denied sanctions, but although Rule 37(e) was cited in the legal standards section of the opinion, there was no indication that it was actually applied and the court seemed to rely on lack of intentional destruction, as required for use of inherent authority); *cf. Northington v. H & M Int'l*, No. 08-CV-6297, 2011 WL 663055, *8–9, *14, *16, *21 (N.D. Ill. Jan. 12, 2011) (the defendant was grossly negligent and reckless in preserving ESI related to the discrimination claim, which eventually led to email accounts and other ESI being destroyed as part

of routine business operations; the court imposed some, but not all, requested sanctions and noted Rule 37(e) in the legal standards but did not seem to apply it); *Keithley v. Home Store.com, Inc.*, No. C-03-04447 SI (EDL), 2008 WL 383384, at *1, *4–5, *16 (N.D. Cal. Aug. 12, 2008) (discussing Rule 37(e) but not whether it applied; discovery misconduct included failure to properly administer a litigation hold on electronic documents; court imposed monetary sanctions and an adverse inference for what it described as reckless and egregious discovery misconduct, seemingly under both inherent authority and Rule 37); *Okla. ex rel. Edmondson v. Tyson Foods, Inc.*, No. 05-CV-329-GKF-SAJ, 2007 WL 1498973, at *6 (N.D. Okla. May 17, 2007) (advising the parties, without explanation, that "they should be very cautious in relying upon any 'safe harbor' doctrine as described in new Rule 37(f)").

II. Meaning of "routine, good-faith operation of an electronic storage system"

"Routine" has been described as "actions taken 'according to a standard procedure' or those which are 'ordinary.'" Allman, *Impact of Rule 37(e)*, *supra*, at 28. "The Committee Note to Rule 37(e) speaks of 'the ways in which such [electronic storage] systems are generally designed, programmed, and implemented' . . . ." *Id.* at 28–29; *see also* Davidovitch, *supra*, at 1136 (noting that the Rules Committees defined "routine" as "the 'ways in which such systems are generally designed, programmed, and implemented to meet the party's technical and business needs'" and that "'[s]uch features are essential to the operation of electronic information systems.'" (alteration in original)). Davidovitch argues that the Committee's "choice of language indicates that the Judicial [Conference] Committee believes that a system's 'routine' operation is more than just an operation which is periodic or habitual, but rather one that has a purpose linked to the party's particular 'technical and business needs.'" Davidovitch, *supra*, at 1136. "In essence, a determination of

whether a system is 'routine' should focus on how the system was operated generally, without regard to the particular facts surrounding the lost information in question." *Id.* Relatedly, some have pointed out that a document retention policy is critical to being able to take advantage of the rule. *See* Jacquelyn A. Caridad & Stephanie A. Blair, *Electronic Discovery Decisions Relating to the Amended Federal Rules*, 80 PA. B. ASS'N Q. 158, 171 (2009) (describing a case that "elevates the importance of establishing a thorough retention program with sufficient oversight," and that "indicates that organically derived retention and storage practices that almost solely rely on employees for retention of important company documents and data are no longer acceptable"); Rachel Hytken, Comment, *Electronic Discovery: To What Extent Do the 2006 Amendments Satisfy Their Purposes?*, 12 LEWIS & CLARK L. REV. 875, 893 (2008) ("In other words, to receive the benefits of a safe harbor, a party must have a functioning and enforced records management system.").

Another commentator has explained "routine operation" as used in Rule 37 as follows:

> Turning first to the Rule's requirement that the party lose the information during the "routine operation" of its electronic information systems, little debate exists regarding whether an individual's actions may fall within this provision. The routine operation of a computer system includes more than simply a "periodic or habitual" operation of an electronic system. In particular, the Judicial Conference suggests that to be routine, the operation must be "designed, programmed, and implemented to meet the party's technical and business needs." To this end, the court must examine the electronic system as a whole and determine whether the system operated to generally serve the technical and business needs of the party. As such, the court will evaluate the computer system as a whole and not consider how the system operated in the specific instance that resulted in the loss of responsive information.

Alexander B. Hastings, Note, *A Solution to the Spoliation Chaos: Rule 37(e)'s Unfulfilled Potential to Bring Uniformity to Electronic Spoliation Doctrine*, 79 GEO. WASH. L. REV. 860, 874–75 (2011)

(footnotes omitted).

There is some evidence that manual deletion of ESI would not qualify as routine operation under the rule. *See* John M. Barkett, *Help Has Arrived . . . Sort Of: The E-Discovery Rules*, SN082 ALI-ABA 201 (2008) ("Rule 37(e) does not seem to provide a safe harbor for the electronic storage habit of individuals . . . ."); Emily Burns, Michelle Greer Galloway & Jeffrey Gross, *E-Discovery: One Year of the Amended Federal Rules of Civil Procedure*, 64 N.Y.U. ANN. SURV. AM. L. 201, 220 (2008) (noting that in *Doe*, the court stated that Rule 37(e) requires a "routine system," which is "a system which is 'generally designed, programmed, and implemented to meet the party's technical and business needs,'" and that the court "suggested that the deletion of the defendant's emails was not the result of an established system, but rather of ad hoc deletions by individual custodians"); Favro, *supra*, at 326–27 ("The Safe Harbor only applied to data that was destroyed due to the ordinary functions of a computer system. It did not prevent sanctions when data was manually deleted. For example, the Safe Harbor afforded no protection to a company that relied on its individual employees to manually archive and delete electronic data." (footnotes omitted)); *see also* Favro, *supra*, at 333 (describing a case that held that programming server to automatically delete all mail not manually archived by employees was unreasonable because "'[w]hile a party may design its information management practices to suit its business purposes, one of those business purposes must be accountability to third parties'" (quoting *Philip M. Adams*, 621 F. Supp. 2d at 1191, 1195)) *cf. Coburn*, 2010 WL 3895764, at *3 ("The destruction of emails as part of a regular good-faith *function of a software application* may not be sanctioned absent exceptional circumstances." (emphasis added)).[27] The cases focus heavily on electronic systems and auto-delete functions, not

[27] *Coburn* also indicated that Rule 37(e) can apply to electronic information systems of any

on the involvement of individual decisions to delete, even if the individuals have a regular practice of deleting or preserving material. And the Advisory Committee seemed to contemplate automated functions that had little, if any manual involvement. *See* Civil Rules 2005 Report, *supra*, at 73 (explaining that the rule responds to "a distinctive feature of electronic information systems, the routine modification, overwriting, and deletion of information that attends normal use," and that "[e]xamples of this feature in present systems include programs that recycle storage media kept for brief periods against the possibility of a disaster that broadly affects computer operations; automatic overwriting of information that has been 'deleted'; programs that change metadata (automatically created identifying information about the history or management of an electronic file) to reflect the latest access to particular electronically stored information; and programs that automatically discard information that has not been accessed within a defined period or that exists beyond a defined period without an affirmative effort to store it for a longer period. . . . [T]he proposed rule recognizes that such automatic features are essential to the operation of electronic information systems.").

Nonetheless, there is some evidence that minimal individual intervention in an electronic system may not take a protected activity out of Rule 37(e)'s protections. *See Miller*, 2011 WL 1458491, at *3 (rejecting argument that denial of sanctions was erroneous because the recording device did not automatically overwrite previous videos but instead required a decision by the user to reformat the hard drive). As the *Miller* court pointed out, the committee notes state that routine operation "includes the alteration and overwriting of information, *often* without the operator's specific direction or awareness," FED. R. CIV. P. 37(e), Advisory Comm. Note (2006 Amendments)

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size. *Id.* at *3 n.3 ("While Rule 37(e) is more readily applicable to larger scale 'electronic information systems,' Coburn asserts, and Pulte does not dispute, that the Rule is also applicable to her home use of an electronic information system.").

(emphasis added), and this suggests that while the Advisory Committee contemplated that the routine operations covered by the rule would usually occur without the operator's direction, it was not limited to such situations and might also include instances of deletion at the operator's direction. *See Miller*, 2011 WL 1458491, at *3 n.1 ("Here, it was essential to the operation of Defendants' cameras that the user either save the recordings on the DVD or rewrite the information on it. Critically, by noting that routine operations 'often' occur without the operator's specific direction, the drafters acknowledge that 'routine operations' can still occur despite the direct involvement of a system user. Accordingly, Plaintiffs' contention that the activity of the camera user—which was extremely minimal in this case—takes the electronic information outside of Rule 37(e)'s safe harbor construes Rule 37(e) too narrowly."). Thus, a party has some basis for arguing that some manual intervention in an electronic system does not necessarily mean that the system is not operating "routinely," but given that Rule 37(e) has really only been applied in a handful of cases not involving the additional complication of manual intervention, it is safe to assume that the more manual intervention or individual decisionmaking involved, the less likely it is that the rule will be applied.

With respect to defining "good faith," Allman explains that "[t]he absence of 'bad faith' plays a decisive role in defining the presence of 'good faith.' The cases typically hold that 'bad faith' is 'when a thing is done dishonestly and not merely negligently.'" Allman, *Impact of Rule 37(e)*, *supra*, at 29 (footnotes omitted); *see also* Wright, *supra*, at 819 ("[A]s a general principle, ['good faith'] is commonly understood to be the absence of bad faith."). Clearly, "[a] party which utilizes a system involving routine destruction for the purpose of eliminating information believed to be disadvantageous is not operating in 'good faith.'" Allman, *supra*, at 31.

Another commentator has suggested that "the good faith standard limits the imposition of

spoliation sanctions for failure to provide electronically stored information to a showing of reckless or intentional conduct." Hebl, *supra*, at 83. Hebl suggests that "[g]ood faith is generally understood to be the absence of bad faith, so if a spoliating party can show that its actions were not in bad faith, it will have met the state of mind standard required by Rule 37(e)."[28] *Id.* at 96. According to Hebl, "it is well settled that 'bad faith' does in fact mean intentional or reckless conduct," and therefore the 'good faith' standard in Rule 37(e) requires acting without intentional or reckless conduct, despite the Advisory Committee's assertions that it was stopping short of an reckless standard by adopting an "intermediate standard." *Id.* at 97. Hebl concludes: "[A]lthough the Advisory Committee suggested that it was adopting an 'intermediate standard,' the adoption of language which already had a well-settled meaning in the spoliation context, in combination with the Advisory Committee's own statements, leads to the inevitable conclusion that Rule 37(e)'s good faith standard requires a showing of intent or recklessness." *Id.* at 98–99. He suggests several types of conduct that would constitute bad faith and take the party's conduct outside the scope of Rule 37(e):

> To summarize, if a party consciously and purposefully downloads software that targets and deletes relevant information from its storage system, bad faith is present and Rule 37(e)'s protection will be unavailable. Second, if a party is subjectively aware that its document deletion policy will result in the destruction of relevant

[28]The good-faith standard in Rule 37(e) may be more nuanced and flexible than just the absence of bad faith. Clearly a party cannot act in bad faith and take advantage of the safe harbor, but the rule seems to go further than that, requiring affirmative good-faith operation of an electronic information system. The *Cache La Poudre* case may illustrate this. In that case, the party did take some actions to ensure that ESI was not destroyed. But because the party relied on employees to implement most of its preservation obligations, the court imposed sanctions. The party most likely was not acting in bad faith, with the intent to hide information from the other side. But if the party clearly did not take sufficient actions to preserve, even if they were not intentionally hiding information, it seems there is a good argument that the party did not act in good faith. Perhaps the "good faith" standard was meant to provide courts with flexibility for dealing with situations somewhere between negligent and intentional or reckless conduct.

> evidence, and that party does not intervene to stop this policy, its conduct is willfully blind, the party is acting in bad faith, and Rule 37(e)'s protection will be unavailable. Finally, the intentional destruction of evidence in direct response to pending litigation does not, under any circumstances, receive Rule 37(e)'s protection.

Id. at 103.

Another commentator has noted that "by itself, . . . the good-faith clause does not reveal the level of mens rea at which a party may still claim protection under the safe harbor provision. . . . [T]he Judicial Conference intended the good-faith standard to serve as a middle ground between the alternative of a strict intentional or narrow reasonableness standard." Hastings, *supra*, at 875. He suggests that the good-faith standard represented a compromise between the "reasonableness" standard proposed in the proposal published for public comment and the intentional standards in the footnoted version of the published proposal. *Id.* at 876. As a result, he concludes that "[t]he hesitancy of the Judicial Conference to fully adopt an intentional or reasonableness standard demonstrates that the good-faith standard should not be read as a firm standard, but rather should be interpreted as a malleable approach to mens rea." *Id.* He also suggests that courts have "erred on the side of caution and have narrowly interpreted the protections of Rule 37(e)," but that "the varying interpretations of the Rule prevent parties from developing 'routine' computer systems that appropriately maintain and delete electronic information." *Id.*

The case law has also provided examples of certain actions that do not qualify as routine, good-faith operation of an electronic storage system. *See, e.g.*, *Bootheel*, 2011 WL 4549626, at *4 (throwing away computer that had crashed after Office Depot confirmed it would not reboot was not routine, good-faith operation of an electronic storage system); *Wilson*, 2010 WL 1712236 ("routine, good-faith operation" does not encompass failure to make a copy of relevant ESI, but rather is

directed to overwriting as part of standard protocol); *Rimkus*, 688 F. Supp. 2d at 642 (concluding that "a policy put into place after a duty to preserve had arisen, that applies almost exclusively to emails subject to that duty to preserve, is not a routine, good-faith operation of a computer system," and that the selective and manual deletion of emails was not covered by Rule 37(e)).[29]

III. Use of the "absent exceptional circumstances" clause

The courts have not defined this term and I did not find any cases in which the court utilized this exception to avoid application of Rule 37(e). As noted in the section above on the history of Rule 37(e), there is some evidence that the Advisory Committee intended this provision to apply to instances of severe prejudice, but it ended up leaving flexibility for courts to interpret the exception. The courts have not done so. *See* Hytken, *supra*, at 895 ("Neither the Committee nor the courts have attempted to define ['exceptional circumstances']; there is no sense of when, if, or how this term will take on meaning.").

According to one commentator, the exceptional circumstances exception "allows a party seeking sanctions to override the safe harbor if it can establish that the circumstances under which the information was lost necessitate sanctions, even though the party responsible for the loss has satisfied the three elements of Rule 37(e)." Davidovitch, *supra*, at 1140. Davidovitch indicates that although the Rules Committees did not specify what constitutes an exceptional circumstance, they did indicate that "it is one in which 'a court should provide remedies to protect an entirely innocent party requesting discovery against serious prejudice arising from the loss of potentially important

[29]For more examples, see the section above on cases declining to apply Rule 37(e) due to the lack of "routine, good-faith operation."

information.'"[30] *Id.*; *see also* Hardaway et al., *supra*, at 586 (concluding that the exception for "exceptional circumstances" "suggests that a showing of extreme prejudice to the requesting party's case might overcome the safe harbor"). Davidovitch predicted that "if courts choose to apply the 'exceptional circumstances' provision in the same way that the courts [have interpreted that language in other contexts], then they withhold the benefit of the rule from parties which are found to repeatedly lose information, without the appearance of bad faith, or from parties that have a history of dishonesty." Davidovitch, *supra*, at 1141.

IV. Litigation Holds

Many courts have held that a party must have implemented an adequate litigation hold in order to take advantage of the protection of Rule 37(e). *See, e.g.*, *Webb v. Jessamine Cty. Fiscal Court*, No. 5:09-CV-314-JMH, 2011 WL 3652751, at *6 (E.D. Ky. Aug. 19, 2011) ("Good-faith operation requires a party intervene to prevent the elimination of information on the system 'because of pending or reasonably anticipated litigation.'" (citing FED. R. CIV. P. 37 (2006 Advisory Committee's Note))); *Cannata v. Wyndham Worldwide Corp.*, No. 2:10-cv-00068-PMP-LRL, 2011 WL 3495987, at *3 (D. Nev. Aug. 10, 2011) ("The Advisory Committee's comments to Rule 37(e) provide that any automatic deletion feature should be turned off once a litigation hold is imposed."); *Point Blank Solutions, Inc. v. Toyobo Am., Inc.*, No. 09-61166-CIV, 2011 WL 1456029, at *11 (S.D. Fla. Apr. 5, 2011) (citing Rule 37(e) advisory committee note for proposition that "[a] party has an obligation to retain relevant documents, including emails, once litigation is reasonably anticipated");

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[30]Davidovitch cites the GAP report included in the Civil Rules Committee's report, which was eventually attached to the Standing Committee's report to the Judicial Conference. However, as noted earlier in the section on the history of Rule 37(e), it appears that there was some concern at the Standing Committee level about the language relating to prejudice and it was removed from the committee note.

Coburn, 2010 WL 3895764, at *3 ("If the routine operation of the computer system is likely to destroy electronically stored information that is relevant and not otherwise available on another source, a party must place a litigation hold suspending the destruction."); *S.E. Mech. Servs.*, 2009 WL 2242395, at *2 (noting that Rule 37(e) contains a limited safe harbor, but that "[o]nce a party files suit or reasonably anticipates doing so, however, it has an obligation to make a conscientious effort to preserve electronically stored information that would be relevant to the dispute." (citing *Peskoff v. Faber*, 251 F.R.D. 59, 62 (D.D.C. 2008); FED. R. CIV. P. 37, advisory committee notes (2006 amendments))); *Kessler*, 2009 WL 2603104, at *18 ("The Advisory Committee notes [to Rule 37(e)] make clear, however, that '[w]hen a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system' is *required*." (emphasis added) (second alteration in original) (quoting Advisory Committee Note to the 2006 Amendment to Federal Rule of Civil Procedure 37(e))); *Major Tours, Inc. v. Colorel*, No. 05-3091, 2009 WL 2413631, at *4 (D.N.J. Aug. 4, 2009) ("The Advisory Committee comments to FED. R. CIV. P. 37(e) further prescribe that any automatic deletion feature should be turned off and a litigation hold imposed once litigation can be reasonably anticipated."); *KCH Servs.*, 2009 WL 2216601, at *1 (failure to implement litigation hold after notice fell "beyond the scope of 'routine, good faith operation of an electronic information system'"); *Arista Records*, 608 F. Supp. 2d at 431 n.31 ("The Advisory Committee notes make clear, however, that '[w]hen a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system' is required.");[31] *Peskoff*, 244 F.R.D. at 60 ("The

[31]The court did not apply Rule 37(e) because sanctions were requested pursuant to its inherent authority, but found Rule 37(e) instructive on the parties' duty to preserve ESI.

Advisory Committee comments to amended Rule 37(f) make it clear that any automatic deletion feature should be turned off and a litigation hold imposed once litigation can be reasonably anticipated."); *Disability Rights Council of Greater Wash.*, 242 F.R.D. at 146 ("[I]t is clear that this Rule does not exempt a party who fails to stop the operation of a system that is obliterating information that may be discoverable in litigation."); *see also* Burns et al., *supra*, at 220 ("Other courts have taken the producing party's 'shield' embodied in Rule 37(e) and turned it into a 'sword' to be used by the requesting party to prove spoliation of evidence. At least one well-respected e-discovery jurist has interpreted the advisory committee's notes to Rule 37(e) as actually imposing a separate affirmative obligation on parties to disable any routine systems that would eliminate discoverable information after the duty to preserve had attached."); Favro, *supra*, at 327 ("Most courts applying Rule 37(e) have issued sanctions for spoliation when a party has failed to suspend particular aspects of its computer systems after a preservation duty attached. Thus, the Advisory Committee did impose a duty to stop the routine destruction of electronic data in certain circumstances despite its earlier misgivings about doing so."); Hardaway et al., *supra*, at 585–86 ("Courts have generally concluded that, when the duty to preserve attaches to evidence, the safe harbor of Rule 37(e) does not apply because a party cannot, in good faith, delete this relevant evidence, even as part of a records management program. Indeed, once a party is aware of or should reasonably anticipate litigation, the party has a duty to implement a litigation hold. A party who fails to implement the litigation hold cannot take advantage of the safe haven." (footnotes omitted)); Joanna K. Slusarz, *No Fishing Poles in the Office*, 78 DEF. COUNS. J. 450, 461 (Oct. 2011) ("A party must show that it has modified or suspended the routine operation of computer systems to prevent loss of data that is subject to a preservation requirement" in order to take advantage of Rule 37(e).);

Wright, *supra*, at 814–15 ("Under Rule 37(e), good faith requires that a party adhere to its preservation obligation, whereby it *must* intervene with any document destruction policy and 'modify or suspend certain features of that routine operation to prevent the loss' of potentially relevant documentation when litigation is reasonably foreseeable." (emphasis added)); *cf.* Hytken, *supra*, at 892 ("The safe harbor discourages a judge from levying sanctions against a party who disposes of E.S.I. as part of their regular information management system in good faith and *before their litigation hold responsibilities arise*. A producing party benefits from Rule 37 when 1) acting in 'good faith', 2) *it implements a litigation hold*, and 3) the loss of E.S.I. resulted from 'the routine operation of . . . an electronic information system.'" (emphases added)).[32]

The courts that have indicated that Rule 37(e) requires a litigation hold often focus on the following language in the committee note:

> Good faith in the routine operation of an information system may involve a party's intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation. . . . The good faith requirement of Rule 37(f) means that a party is not permitted to exploit the routine operation of any information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve. When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a "litigation hold."

FED. R. CIV. P. 37 Advisory Committee Note (2006 Amendment). The Advisory Committee's report submitting the final proposed rule to the Judicial Conference indicated that implementation of a

[32]Hytken argues that "[t]he second requirement of the safe harbor, implementing a proper litigation hold, has great importance because a court may presume when a party has taken proper steps to put a litigation hold in place that it has acted in good faith." Hytken, *supra*, at 893.

litigation hold would often bear on the court's determination of a party's good faith, but would not be dispositive: "As the Note explains, good faith *may require* that a party intervene to suspend certain features of the routine operation of an information system to prevent loss of information subject to preservation obligations. Such intervention is often called a 'litigation hold.'. . . The steps taken to implement an effective litigation hold *bear on good faith*, as does compliance with any agreements the parties have reached regarding preservation and with any court orders directing preservation." Civil Rules 2005 Report, *supra*, at 75 (emphases added). The Advisory Committee did not seem to put the same emphasis on a litigation hold as the courts subsequently interpreting the rule.

Although numerous cases have read the advisory committee notes to Rule 37(e) to require a litigation hold in order to take advantage of the rule's protections, at least some commentators have recognized that this is an inaccurate reading of the note. *See* Hebl, *supra*, at 105 (noting that the court's holding in *Peskoff* that the committee note requires a litigation hold "is not what the note says . . . . Rather the note merely provides that failure to turn off an automatic deletion feature may be one factor to consider in determining whether good faith is present and . . . , if the failure to turn this feature off is not the result of reckless or intentional conduct, a sanction cannot be imposed"); Douglas L. Rogers, *A Search for Balance in the Discovery of ESI since December 1, 2006*, 14 RICH. J. L. & TECH. 8, 22 (2008) (disagreeing with the conclusion reached by some courts that the advisory committee notes require the implementation of a litigation hold in all circumstances in order to take advantage of the rule).

V. What is a "sanction"?

Courts and commentators have not directly addressed what constitutes a "sanction" that

cannot be entered if a party's actions fall under the protections of Rule 37(e). The rule text limits its application to only sanctions provided for under the rules. The advisory committee notes reflects the same: "The protection provided by Rule 37(f) applies only to sanctions 'under these rules.' It does not affect other sources of authority to impose sanctions or rules of professional responsibility." FED. R. CIV. P. 37 Advisory Committee Note (2006 Amendment). Thus, a party who meets the requirements for applying Rule 37(e) would clearly be exempt from the specific sanctions under Rule 37(b), for example. Courts that have applied Rule 37(e) have precluded requested sanctions including dismissal or default, an adverse inference instruction, and monetary expenses. *See, e.g.*, *Kermode*, 2011 WL 2619096, at *2 (denying default judgment and an evidentiary hearing for an adverse inference); *Olson*, 2010 WL 2639853, at *3 (denying request for an order barring production of any evidence of an alleged theft and an award of expenses incurred in bringing the motion for sanctions).

The case law does not clearly indicate whether Rule 37(e) would preclude a separate category of curative measures, remedies, or discovery management tools, as opposed to punitive sanctions, but a couple of cases may be instructive. In *Disability Rights Council of Greater Wash.*, 242 F.R.D. at 146, the court found Rule 37(e) inapplicable in part because the plaintiffs did not seek sanctions, but instead requested that the defendant be ordered to search backup tapes for information that was deleted pursuant to the defendant's automatic email deletion policy, which had not been suspended during litigation. This seems to imply that requiring searching backup tapes for inaccessible information that might have been reasonably accessible had an appropriate litigation hold been put in place is not a "sanction" barred by Rule 37(e).[33] Relatedly, in *Peskoff*, 244 F.R.D. at 60–61, the

[33]However, the court found Rule 37(e) inapplicable anyway because of the party's failure to

court found that Rule 37(e) did not require disabling automatic deletion features before litigation is anticipated, but still utilized Rule 26(b)(2)(C) to require the defendant to participate in a process to ascertain whether a forensic examination was justified. The court explained that "Rule 37(f) must be read in conjunction with the discovery guidelines of Rule 26(b). . . . I find that balancing the factors in Rule 26(b)(2)(C) authorizes me to require Faber to participate in a process designed to ascertain whether a forensic examination is justified because the emails are relevant, the results of the search that was conducted are incomprehensible, and there is no other way to try to find the emails." *Id.* at 61. It was not clear that the court was directly considering sanctions, but instead, in the context of discovery deficiencies, the questions of "whether it is time to appoint a forensic analyst who can search the network server and the individual hard drives of [relevant people] to see if any additional information can be retrieved . . ." and "who shall pay for such a forensic examination." *Id.* at 59. But the court's discussion of Rule 37(e) and its potential interaction with Rule 26(b)(2)(C) may imply that Rule 37(e) may not preclude curative measures even if other "sanctions" are precluded.

In sum, there is not enough case law applying Rule 37(e) to determine whether application of the rule would preclude curative measures.

VI. Conclusion

Rule 37(e) was intended to provide a narrow protection for loss of ESI subject to a preservation duty. The history of the rule provision indicates that the Advisory Committee was

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stop its automatic email deletion feature during litigation. *See Disability Rights Council of Greater Wash.*, 242 F.R.D. at 146. If Rule 37(e) had come into play because of the routine, good-faith operation of an electronic storage system, perhaps ordering searching of backup tapes might have been precluded.

primarily concerned with ensuring that courts distinguish between the loss of information in the world of paper discovery and the loss of information in the electronic world. The Advisory Committee wanted to ensure that courts and parties understood that because of both the volume of ESI and the potential for inadvertent loss of ESI, both of which were exponentially greater than in the world of paper discovery, the loss of ESI could not be treated in the same manner as the loss of information kept in static form. The application of the rule has been extremely narrow. It has only been applied in a handful of cases, and even in those cases it is not clear that the court would have reached a different result without the rule. I did not find any cases where it was clear that Rule 37(e) precluded sanctions and that a different result would have been reached without the rule.

In addition, while the rule was intended to address a narrow set of circumstances, many courts may have interpreted the rule even more narrowly than intended, by, for example, finding it inapplicable once a duty to preserve arises, finding a strict requirement of a litigation hold in the advisory committee notes, or relying on inherent authority for sanctions analysis. Nonetheless, the rule's principles may have influenced even those courts analyzing sanctions under inherent authority. The rule seems to have been a first step in the direction of providing comfort to parties in their efforts to adequately preserve ESI, but it appears to only apply in a narrow set of circumstances.

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Phoenix, Arizona 85003

The Honorable Paul Grimm
Chair, Discovery Subcommittee
of the Advisory Committee on Civil Rules
United States Courthouse
101 W. Lombard Street
Baltimore, Maryland 21201

Dear Judges Campbell and Grimm:

Pursuant to Judge Campbell's request and my offer at the November Rules Committee meeting, the Department of Justice respectfully submits its further thoughts regarding potential changes to the Federal Rules of Civil Procedure concerning preservation sanctions. As discussed at the meeting, while the Department continues to question how widespread preservation sanctions issues may be, the proposed revision to Federal Rule of Civil Procedure 37(e) makes substantial progress in addressing some of our concerns. We have now had time to consult further within the Department and with other agencies and we conclude that proposed FRCP 37(e) is more consistent with language the Department may be inclined to support with a few proposed changes.

We offer these comments to assist the Committee in finalizing the proposed revision to FRCP 37(e). We respectfully request that the Committee make the changes we suggest below before forwarding the language to the Standing Committee for its January meeting, and request that our comments be forwarded to the Standing Committee as well. We also urge the Committee to submit the proposed FRCP 37(e) to the Standing Committee for purposes of discussion – rather than a final vote – at the January meeting. The Duke Subcommittee

proposals may affect the final sanctions rule language. We believe it would be advisable and more efficient to have thorough discussion of proposed 37(e) in January, and then a final vote on all of the proposed amendments once the Standing Committee has considered the Duke Subcommittee proposals at the June Standing Committee meeting. This sequencing will permit the Committee to determine whether there is further information that should be taken into account before reaching a final decision on the proposed 37(e).

The federal government has many interests to weigh in considering this potential amendment, since we are a party in one-third of all civil litigation in the federal courts. At various times, we are plaintiffs, defendants, litigants in complex cases, and parties in small matters. We are thus uniquely affected by any change. We offer the Committee the following general and specific observations regarding proposed FRCP 37(e).

General Observations

We provide four general observations regarding proposed FRCP 37(e). First, the Department agrees that, if a rule is going to be promulgated, it should apply equally to electronic documents, paper, and tangible things. The notes to proposed FRCP 37(e) should make this scope and application clear. Second, we strongly support including the concept of proportionality, as phrased in proposed FRCP 37(e)(3)(E). Third, we continue to support the Committee's removal of FRCP 37(e)(3)(D), as decided at the November 2012 meeting.

Finally, the proposed removal of current FRCP 37(e) is a key change and warrants additional consideration. The proposed revision to FRCP 37(e) does not expressly provide a safe harbor or address the routine operation of a computer system. In the Department's experience, while the case law is sparse in the use of this subsection, current FRCP 37(e) is valuable because it is used and relied upon when creating document retention policies and proactive preservation plans. Current FRCP 37(e) has the desired effect, and was a "carrot" for organizations to move toward better electronic document and information management systems. If current FRCP 37(e) is removed, this incentive will no longer exist. Many of the executive branch agencies we have consulted do not support the removal of current 37(e). We strongly suggest that current FRCP 37(e) and its accompanying note be preserved. At the very least, current FRCP 37(e) and its accompanying note text should be expressly included in the notes to the revised rule.

Specific Concerns with Proposed FRCP 37(e) Language

In addition to our general observations, we have specific concerns and suggestions regarding portions of the language of the proposed rule, specifically: (1) the scope of discovery in proposed FRCP 37(e); (2) the undefined use of "willful" and "bad faith" in proposed FRCP 37(e)(2)(a); and (3) several of the factors listed in proposed FRCP 37(e)(3) (specifically FRCP 37 (3)(A), and (3)(F)). We also have several suggestions for additional language to address concerns raised by proposed FRCP 37(e)(2)(a).

1. Scope of "Discoverable Information" in Proposed FRCP 37(e) is Ambiguous

Proposed FRCP 37(e) is limited to addressing the preservation of "discoverable information." It is unclear from the text and the accompanying note what "discoverable information" entails. Is it broader, narrower, or different from the scope outlined in FRCP 26? Does "discoverable information" include privileged information? Does "discoverable information," for example, include data a party would consider inaccessible, such as information on disaster recovery tapes? This broad language may be interpreted to include any failure to preserve any information, no matter how trivial, redundant, or marginally relevant the information may be. We recommend that the note clarify that the scope of discovery a party anticipates should be consistent with the scope of FRCP 26(b)(1). We are concerned that, absent clarification, the rule revision will trigger ancillary litigation regarding the scope of "discoverable information."

2. The Terms "Willful" and "In Bad Faith" are Undefined in the Proposed Rule and Have Been Inconsistently Interpreted by Courts.

The Department is concerned by the undefined use of "willful or in bad faith" in proposed FRCP 37(e)(2)(a). While the Committee notes that courts have experience with these concepts, there is no consistency within or across circuits. The desire for predictability and a uniform national standard that in part motivated the Committee to consider amending the rule will not be achieved because key terms are not defined. As reflected in Judge Grimm's decision in *Victor Stanley II*, courts have adopted a wide variety of interpretations for "willful" and "bad faith." We understand the rule lists the factors to be considered, but we are concerned that this is not the same as setting a national standard that would define these terms.

For example, in some tax litigation, "willfulness" includes reckless disregard and in other cases, "willfulness" may include "willful blindness." *See e.g. Jefferson v. United States*, 546 F.3d 477, 481-482 (7th Cir. 2008); *Phillips v. United States*, 73 F.3d 939, 942-943 (9th Cir. 1996)(finding no error in trial court's use of a jury instruction on "willfulness" that quoted a "gross negligence" standard); *United States v. Vespe*, 868 F.2d 1328, 1335 (3d Cir. 1989); *United States v. Williams*, 2012 WL 2948569, at *3 (4th Cir. July 20, 2012); *United States v. McBride*, 2012 WL 5464955, at *18 (D. Utah Nov. 8, 2012).

We are concerned that there may be unintended confusion for litigants and the courts if the rule lacks clarity on these important terms. For example, will certain technology or process failures – such as not turning off email auto-deletion or failing to preserve inaccessible data or destroying disaster recovery tapes—be universally interpreted by the courts under the proposed rule? We question whether courts will consistently evaluate how the actions of, for example, a third party contractor or social media provider in control of the relevant data, might be imputed to a litigant when the "willful" or "bad faith" standard is undefined.

We suggest that "willful" and/or "bad faith" be defined or clarified, at least in the note, to provide uniform guidance to the courts and litigants. The Department does not propose a definition at this time but we welcome the opportunity to work with the Committee to define this crucial term.

3. *Comments and Concerns with Three of the Factors Listed in proposed 37(e)(3)*

a. Suggestions for Proposed FRCP 37(e)(3)(A)

The current draft of proposed FRCP 37(e)(3)(A) does not account for a situation where a party repeatedly "loses" data while claiming ignorance of its preservation obligations. The Department has confronted this defense in past cases. We believe changing "was on notice" to "reasonably should have known" or similar language in proposed FRCP 37(e)(3)(A) would allow a court to take into account prior instances of the same or similar conduct by the party that would put the party on notice that it had a duty to preserve. We propose the following revision in advance of the Committee forwarding the language to the Standing Committee:

> "(A) the extent to which the party ~~was on notice that~~ reasonably should have known that litigation was likely and that the information would be discoverable;"

b. Suggestions for Proposed FRCP 37(e)(3)(F)

We question whether the language of proposed FRCP 37(e)(3)(F) and the corresponding note create an expectation that parties would seek court guidance before dispositive motions are filed. We are concerned that, as currently phrased, (F) would be an invitation to parties to burden the courts with trivial disputes that the parties should work out on their own. If a party can only avoid sanctions by showing that it made timely and sufficient efforts to bring all discovery disputes to the attention of the court, then the rule may create incentives for parties to bring every disagreement to courts for resolution or fear being sanctioned under proposed FRCP 37(e)(3)(F). The results of this interpretation would obviously overtax the judiciary's already strained dockets and would create collateral litigation for the parties. We would ask the Committee to consider clarification of this language in advance of the Standing Committee's January meeting.

c. Suggestions for Proposed New Language

Finally, we recommend additional language to help clarify the use of "substantial prejudice" in proposed FRCP 37(e)(2)(a). The rule should provide guidance and consistency in how courts should interpret "substantial prejudice." In particular, we think that the court should consider the availability of reliable alternative sources of the lost or destroyed information and the materiality of the lost information to the claims and defenses in the case. Our proposed FRCP 37(e)(4) text is as follows:

Proposed FRCP 37(e)(4):

"(4) In determining whether a party has been substantially prejudiced by another party's failure to preserve relevant information, the court should consider all relevant factors, including:

(A) the availability of reliable alternative sources of the lost or destroyed information;

(B) the materiality of the lost information to the claims or defenses in the case."

We believe that the rule should elaborate on the factors the court should consider in evaluating "substantial prejudice," so that this key term is given context like other important aspects of the proposed rule.

Conclusion

We commend the Committee for its work and look forward to continuing the dialogue on these important issues, which will have significant effects on the federal government as the largest litigant in the civil justice system. We believe real progress has been made, but further modifications are needed. The pending and interrelated work of the Duke Subcommittee counsels in favor of waiting to move the proposed FRCP 37(e) for a final vote at the Standing Committee until it is clear how all of the potential rules changes interrelate.

We respectfully request that, in advance of the January Standing Committee meeting, the Committee revise proposed FRCP 37(e) as we suggest and forward our comments to the Standing Committee. We remain committed to assisting this process and thank the Committee for its consideration.

Sincerely,

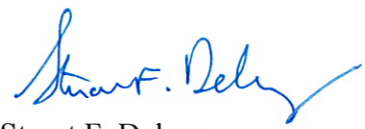

Stuart F. Delery
Principal Deputy Assistant Attorney General

I.B. ACTION TO RECOMMEND PUBLICATION OF REVISED RULE 6(d)

ACTION ITEM: RULE 6(d)

The Committee recommends this revision of Rule 6(d) for publication at an appropriate time:

> (d) ADDITIONAL TIME AFTER CERTAIN KINDS OF SERVICE. When a party may or must act within a specified time after ~~service~~ being served and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a).

The purpose of the revision is to defeat the argument that a party who must act within a specified time after making service can extend the time to act by choosing a method of service that provides added time.

Before Rule 6(d) was amended in 2005 it provided the extra time to act when a party had a right or was required to act within a prescribed period after service "upon the party" if the paper or notice "is served upon the party" by the designated means. Only the party served, not the party making service, could claim the extra three days.

When Rule 6(d) was revised in 2005 for other purposes, it was restyled according to the conventions adopted for the Style Project. "[A]fter service" seemed a useful economy of words. The problem is that at least three rules allow a party to act within a specified time after making service.

Rule 14(a)(1) requires permission to serve a third-party complaint only if the third-party plaintiff files the complaint "more than 14 days after serving its original answer." Rule 15(a)(1)(A) allows a party to amend a pleading once as a matter of course "within * * * 21 days after serving it" if the pleading is not one to which a responsive pleading is required. Rule 38(b)(1) allows a party to demand a jury trial by "serving the other parties with a written demand * * * no later than 14 days after the last pleading directed to the issue is served."

A literal reading of present Rule 6(d) would, for example, allow a defendant to extend the Rule 15(a)(1)(A) period to amend once as a matter of course to 24 days by choosing to serve the answer by any of the means specified in Rule 6(d).

It seems worthwhile to correct this unintended artifact of drafting, although the reason may be no more than to undo an unintended change. Allowing the 3 extra days does not seem a matter of great moment. There is no sign that the present rule has caused any problems in practice; it was pointed out in a law

review article,[1] not by anguished courts or litigants. It is possible to read the present rule to allow 3 added days only after being served, looking back to the pre-2005 language. That possibility, however, may be the best reason to amend to make "being served" explicit. A defendant, for example, might read the present rule literally, and deliberately take 24 days to amend an answer. Reading "being served" into the rule might prove a trap for the wary. Even then, it seems unlikely that a court would deny leave to amend — or to implead, or demand jury trial — over a 3-day delay in presenting a plausible position.

I.C. ACTION TO RECOMMEND PUBLICATION: "FINAL" JUDGMENT

ACTION ITEM: RULE 55(c)

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

Close reading of the three rules together establishes that relief from a default judgment is limited by the demanding standards of Rule 60(b) only if the default judgment is made final under Rule 54(b) or when there is a final judgment adjudicating all claims among all parties. Several cases described in a memorandum by Judge Harris, however, show that several courts have recognized the risk that unreflected reading of Rule 55(c) may lead a court astray. Judge Harris's memorandum is attached.

Rule 55(c) is easily clarified by adding a single word. If the question had been recognized at the time, the change would have been suitable for the Style Project. The change can be recommended now, although it may be better to schedule publication for comment with a suitable package of proposals. Remembering the distinction between a default and a default judgment, Rule 55(c) would be revised:

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[1] James J. Duane, *The Federal Rule of Civil Procedure That Was Changed by Accident: A lesson in the Perils of Stylistic Revision*, 62 S.C.L. Rev. 41 (2010).

12b-006703

(c) SETTING ASIDE A DEFAULT OR A DEFAULT JUDGMENT. The court may set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(b).

Committee Note

Rule 55(c) is amended to make plain the interplay between Rules 54(b), 55(c), and 60(b). A default judgment that does not dispose of all of the claims among all parties is not a final judgment unless the court directs entry of final judgment under Rule 54(b). Until final judgment is entered, Rule 54(b) allows revision of the default judgment at any time. The demanding standards set by Rule 60(b) apply only in seeking relief from a final judgment.

Early drafts of the Committee Note offered a bit of further advice: "In many circumstances it is inappropriate to enter final judgment because proceedings that remain among other parties may show that there is no claim against the party subjected to the default judgment. See *Frow v. De La Vega*, 15 Wall. (82 U.S.) 552 (1872)." The Committee decided that this sort of advice is generally inappropriate for a Committee Note, and is particularly inappropriate when a modest amendment is made for a modest purpose.

12b-006704

MEMORANDUM

To: Professor Edward H. Cooper, Reporter
Advisory Committee on Civil Rules

cc: Honorable David G. Campbell, Chair
Advisory Committee on Civil Rules

Professor Richard Marcus, Reporter
Advisory Committee on Civil Rules

From: Arthur I. Harris, U.S. Bankruptcy Judge and Liaison from Bankruptcy Rules Advisory Committee to Civil Rules Advisory Committee

Date: December 14, 2011

Re: Motions to set aside nonfinal default judgments under Fed. R. Civ. P. 55(c), 54(b), and 60(b)

This memorandum follows up on an issue I raised during the "mailbox" portion of the meeting of the Advisory Committee on Civil Rules on Nov. 8, 2011. At the meeting, I flagged a potential conflict in the way the Federal Rules of Civil Procedure address motions to set aside nonfinal default judgments. Under Rule 55(c) a court "may set aside a default judgment under Rule 60(b)," however, a nonfinal default judgment (where claims remain pending against one or more parties) is an interlocutory order that is arguably governed by Rule 54(b), which does not carry the same restrictions as Rule 60(b).

As I explain in more detail below, Sixth Circuit precedent permits me to use the more lenient standard in Rule 54(b) for setting aside nonfinal default judgments. On the other hand, it may be worth considering an amendment to Rule 55(c) to clarify to judges and attorneys that motions to set aside nonfinal default judgments, like all other interlocutory judgments, are not governed by Rule 60(b). In any event, the exercise of writing this memo has helped me better understand these issues and, I hope, is worthy of sharing with my former teacher and longtime rules committee reporter.

12b-006705

In re Brown

Confusion as to whether Rule 60(b) governs relief from nonfinal default judgments is illustrated in an adversary proceeding and two appeals that arose from a bankruptcy case called *In re Brown*. In this case, everyone involved – including the party seeking Rule 60(b) relief, the bankruptcy court, the Bankruptcy Appellate Panel (BAP), and the Sixth Circuit – apparently assumed that the motion to set aside the nonfinal default judgment was governed by Rule 60(b).[1] Had the courts applied the more lenient standard for reconsidering interlocutory orders under the last sentence of Rule 54(b), the outcome in all likelihood would have been different.

In *Brown*, the bankruptcy trustee filed an adversary complaint seeking to avoid a mortgage and obtain other relief under the Bankruptcy Code because of an alleged defect in the acknowledgement of the debtor's mortgage. The alleged defect was that the notary who notarized the mortgage was not authorized to be a notary because the notary's application was incomplete, even though the State of Kentucky had approved the notary's application. The trustee obtained a default judgment against defendant Countrywide, but claims remained pending in the same adversary proceeding against another defendant, First Liberty.

Ten weeks after entry of a default judgment against Countrywide, Countrywide moved to set aside the default judgment under Rule 60(b)(1), (b)(4), and (b)(6). At the time, cross motions for summary judgment remained pending as to the trustee's claims against defendant First Liberty. Countrywide argued that

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[1] Although this matter arose in the context of an adversary proceeding – essentially a civil action within a bankruptcy case – the situation is essentially the same as one arising in a civil case in district court. Rule 7055 of the Federal Rules of Bankruptcy Procedure incorporates Fed. R. Civ. P. 55; Rule 7054 of the Federal Rules of Bankruptcy Procedure incorporates Fed. R. Civ. P. 54(a)-(c); and Rule 9024 of the Federal Rules of Bankruptcy Procedure generally incorporates Fed. R. Civ. P. 60. In addition, the more pragmatic concept of finality in bankruptcy cases generally does not apply to appeals from adversary proceedings. *See, e.g.*, *Millers Cove Energy Co. v. Moore* (*In re Millers Cove Energy Co.*), 128 F.3d 449, 451-52 (6th Cir. 1997) (noting that adversary proceedings can be viewed as "stand-alone lawsuits").

under a Kentucky statute, a trustee cannot collaterally attack a notarized document simply because the notary's application to be a notary should not have been approved.

The bankruptcy court held a hearing on Countrywide's Rule 60(b) motion. At the hearing, Countrywide abandoned its Rule 60(b)(1) argument and specifically stated that it was focusing its request for relief under Rule 60(b)(4) and (b)(6). At the hearing, the bankruptcy court stated:

> The Court will grant the motion to vacate the order under Rule 60(b)(6). I don't think 60(b)(4) applies. . . . Countrywide has not offered any particular reason why they can't seem to get their act together, didn't get their act together in this case. But, it does appear that there is a meritorious defense and maybe a winning defense. And there will not be prejudice to the plaintiff in this case because the case is ongoing. And with respect to culpable conduct and whether or not that's applicable here, we just don't know. The switch of service of process agents may have, in fact, contributed to the problem that's before the Court today. But, I think it's a matter of, in this case, because the really driving concern is the question of the likelihood of a meritorious defense in this case.

Bankr. Ct. Tr. at 14-15. The bankruptcy court later entered summary judgment in Countrywide's favor, upholding the validity and enforceability of the mortgage, and dismissed the Trustee's claims against all remaining defendants. The Trustee appealed the order granting summary judgment and the order vacating the default judgment to the BAP.

The BAP reversed the decision of the bankruptcy court after concluding that the bankruptcy court abused its discretion in setting aside the default judgment. *See Rogan v. Countrywide Home Loans, Inc.* (*In re Brown*), 413 B.R. 700 (B.A.P. 6th Cir. 2009). The BAP noted that Countrywide had abandoned its arguments under Rule 60(b)(1) and (b)(4) and held that Countrywide had not met its burden of showing "extraordinary circumstances" for relief under Rule 60(b)(6). 413 B.R. at 705 (citing *Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. P'ship.*, 507 U.S. 380, 393 (1993)). Countrywide appealed the decision to the Sixth Circuit.

In an unpublished decision, the Sixth Circuit affirmed the decision of the BAP. *Countrywide Home Loan, Inc. v. Rogan (In re Brown),* No. 09-6198, Document: 006110766206 (6th Cir. Oct. 21, 2010)(unpublished Order). The Sixth Circuit held:

> In the absence of evidence demonstrating "exceptional and extraordinary circumstances," the bankruptcy court abused its discretion in vacating the default judgment. Contrary to Countrywide's argument on appeal, the existence of a meritorious defense and the avoidance of its mortgage does not satisfy the "exceptional and extraordinary circumstances" requirement of Rule 60(b)(6).

Id. at 4 (citation omitted).[2]

In none of these decisions, did any of the courts consider the possibility that a standard other than Rule 60(b) should apply to a motion to set aside a nonfinal default judgment.[3]

Discussion

The decisions by the bankruptcy court, the BAP, and the Sixth Circuit in the *Brown* case illustrate the possible confusion created by the language in Rule 55(c) that a court "may set aside a default judgment under Rule 60(b)." It is true that Rule 60(b) indicates in several places that it addresses *final* judgments:

- the adding of the word "final" to the heading of Rule 60(b) in the 2007 restyling;
- the adding of the word "final" before "judgment" in the 1948 amendment;
- the language in the 1946 committee note explaining that Rule 60(b) affords relief from *final* judgments; "and hence interlocutory judgments are not brought within the restrictions of the rule, but rather they are left subject to

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[2] A copy of the Sixth Circuit's unpublished Order in *Brown* is attached.

[3] Although I was initially assigned to the panel hearing the appeal to the BAP, that appeal was later reassigned to a randomly drawn reconstituted panel that did not include me.

the complete power of the court rendering them to afford such relief from them as justice requires."

And it is true that the last sentence of Rule 54(b) provides that nonfinal orders may be revised at any time before entry of final judgment. Nevertheless, there appear to be many judges and attorneys who read the literal language of Rule 55(c) as directing them to consider or draft motions to set aside all default judgments, even nonfinal ones, within the restrictions of Rule 60(b).

Proposed Amendment to Fed. R. Civ. P. 55(c)

I have included a proposed amendment to Rule 55(c) to clarify that Rule 60(b) affords relief from *final* judgments. The added word is *italicized*.

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Rule 55

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1. (c) **Setting Aside a Default or a Default Judgment**.
2. The court may set aside an entry of default for good cause, and it
3. may set aside a *final* default judgment under Rule 60(b).

Possible Committee Note

The qualifying word "final" is added to clarify that Rule 60(b) affords relief from *final* judgments. Consistent with the last sentence of Rule 54(b) and the 1946 Advisory Committee Note to Rule 60(b), interlocutory judgments, including nonfinal default judgments, are not subject to the restrictions of Rule 60(b), "but rather they are left subject to the complete power of the court rendering them to afford such relief from them as justice requires."

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Other Case Law

Serendipitously, on December 13, 2011, the Sixth Circuit issued a new opinion that addressed almost exactly the same issue. *See Dassault Systemes, SA v. Childress*, 663 F.3d 832 (6th Cir. 2011).[4] The only difference was that in the *Dassault* case the default judgment was not final because the amount of damages had yet to be determined when the motion to set aside the default judgment was filed. Judge Karen Nelson Moore, writing for the Sixth Circuit, explained:

> Because of the initial grant of default judgment and the timing of Childress's motion to set aside entry of default judgment, it is not immediately clear which rule should have been applied. At first blush, the district court's grant of Dassault's motion for default judgment suggests that Rule 60(b) should apply. But, because final judgment was not entered until after Childress filed his motion to set aside entry of default judgment, applying the Rule 60(b) standard to a motion challenging a not-yet-final default judgment seems premature.
>
> . . . .
>
> An order granting default judgment without any judgment entry on the issue of damages is no more than an interlocutory order to which Rule 60(b) does not yet apply. . . . Thus, absent entry of a final default judgment, the more lenient Rule 55(c) standard governs a motion to set aside a default or default judgment.

Id. at *6-8 (citations omitted).

My nonexhaustive review of relevant case law indicates several other circuit courts hold, or at least suggest, that Rule 60(b) does not apply to motions to set aside nonfinal default judgments. *See Swarna v. Al Awadi*, 622 F.3d 123, 140 (2d Cir. 2010) (default judgment that left open the issue of damages was a nonfinal order for purposes of appeal); *FDIC v. Francisco Inv. Corp.*, 873 F.2d 474, 478 (1st Cir. 1989); *Jackson v. Beech*, 636 F.2d 831, 835-36 & n.7

[4] A copy of the Sixth Circuit's slip opinion in *Dassault* is attached.

(D.C. Cir. 1980); *see also*; *O'Brien v. R.J. O'Brien & Assoc., Inc.*, 998 F.2d 1394, 1401 (7th Cir. 1993) (declining to state whether Rule 60(b) standard or less restrictive standard applied to motion to set aside a default judgment that had not become final and appealable).

Among these additional cases, the First Circuit's *FDIC v. Francisco* decision provides perhaps the most definitive analysis:

> A cursory reading of [Rule 55(c)] seems to mandate the application of the stricter standards of Rule 60(b) to all requests to set aside default judgments. However, the Rule 60(b) standards were tailored for setting aside *final* judgments. In the case at bar, when the court denied defendants' motion to set aside default judgment, it had not become final. Fed.R.Civ.P. 54(b).
>
> Thus, the more liberal "good cause" standard should be applied. . . . Generally, non-final judgments can be set aside or otherwise changed by the district court at any time before they become final. Fed.R.Civ.P. 54(b). If we were to apply the 60(b) standard to non-final default judgments we would have the anomaly of using the strict standard envisioned for final judgments to non-final default judgments and the more liberal standard of Rule 54(b) to other non-final judgments. This result would be inconsistent with the purposes underlying the Federal Rules of Civil Procedure, especially considering that when deciding whether to set aside entries of default and default judgments courts favor allowing trial on the merits.

873 F.2d at 478 (citations omitted) (emphasis in original).

Whether this is a problem that warrants discussion as a possible amendment to the Civil Rules is for you and the civil rules committee to decide. Certainly there is case law to support the proposition that Rule 60(b) does not apply to motions to set aside nonfinal default judgments, even absent any amendment to the Civil Rules. On the other hand, the fact that attorneys and lower courts continue to apply the more restrictive Rule 60(b) standard to nonfinal default judgments suggests that an amendment to clarify Rule 55(c) may be in order.

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

ACTION ITEM: RULE 77(c)(1)

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

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

* * *

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

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

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

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

PART II: DISCUSSION ITEMS

II.A. DUKE CONFERENCE RULES DRAFTS

The rules sketches shown here are presented for discussion to guide further development looking toward a package that may be ready to advance at the June meeting with a recommendation for

publication. The sketches have been developed through countless conference calls, a miniconference held in Dallas on October 8, 2012, and discussions in the Advisory Committee. The goal is to find ways to reduce cost and delay, increasing realistic access to the courts and furthering the goals of Rule 1.

The current sketches grow out of the conference held at the Duke University School of Law in May, 2010. The most prominent themes developed at the Conference are frequently summarized in two words and a phrase: cooperation, proportionality, and "early, hands-on case management." Most participants felt that these goals can be pursued effectively within the basic framework of the Civil Rules as they stand. There was little call for drastic revision, and it was recognized that the rules can be made to work better by renewing efforts to educate lawyers and judges in the opportunities already available. It also was recognized that many possible rules reforms should be guided by empirical work, both in the form done by the Federal Judicial Center and other investigators and also in the form of pilot projects. Many initiatives have been launched in those directions. Rules amendments remain for consideration. Some of them are being developed independently. The Discovery Subcommittee has come a long way in considering preservation of information for discovery and possible sanctions. Pleading standards remain on the Committee’s agenda. Other rules, however, can profitably be considered for revision. Early stages of the Subcommittee’s work generated a large number of possible changes, both from direct suggestions at the Conference and from further consideration of the broad themes. More recently the Subcommittee has started to narrow the list, discarding possible changes that, for one reason or another, do not seem ripe for present consideration.

The proposals presently being considered are grouped in three roughly defined sets. They involve several rules and different parts of some of those rules. The proposals have been developed as part of an integrated package, with the thought that in combination they may encourage significant reductions in cost and delay. The package can survive without all of the parts, although greater effects can be expected if most parts remain.

The first topics look directly to the early stages of establishing case management. These changes would shorten the time for making service after filing an action; reduce the time for issuing a scheduling order; and emphasize the value of holding an actual conference of court and parties before issuing a scheduling order. They also would look toward encouraging an informal conference with the court before making a discovery motion. The last item in this set would modify the Rule 26(d) discovery moratorium by allowing Rule 34 requests to be served at some interval after the action is begun, but setting the time to respond to start at the Rule 26(f) conference.

The next set of changes look more directly to the reach of

discovery. They begin with shifting the Rule 26(b)(2)(C)(iii) proportionality factors into Rule 26(b)(1). Rule 26(b)(1) is further changed by limiting the scope of discovery to matter relevant to any party's claim or defense and by modifying the provision for discovery of information not admissible in evidence. More specific means of encouraging proportionality are illustrated by models that reduce the presumptive number of depositions and interrogatories, and for the first time incorporate presumptive limitations on the number of requests to produce and requests for admissions. Another approach is a set of provisions to improve the quality of discovery objections and the clarity of responses. Finally, modest changes would serve as reminders of the need to consider preservation of electronically stored information and the value of considering agreements under Evidence Rule 502 by adding these topics to Rules 16(b)(3)(B)(iii) and (iv) as well as 26(f)(3)(C) and (D).

The last proposal would revise Rule 1 to direct that the rules be employed by the court and parties to secure the canonical goals of Rule 1.

A few variations on the sketches are presented in footnotes, at times to note ideas that have been considered and put aside.

Other topics considered by the Subcommittee have been deferred for possible future work. The value of Rule 26(a)(1) initial disclosures is regularly debated by various groups. The Subcommittee decided that any consideration of this subject should await developing experience with various state-court models that provide expanded initial disclosures. The timing of contention discovery under Rules 33 and 36 was considered by drafts that would encourage postponement to the conclusion of other discovery, but some observers urged that early contention discovery can be useful. This subject has been deferred indefinitely, in part because adoption of presumptive numerical limits on Rule 36 requests to admit and reducing the presumptive limit on the number of Rule 33 interrogatories would likely reduce the occasional over-uses of contention discovery. And a major topic, cost sharing in discovery, is addressed only by a sketch that revises Rule 26(c) to make explicit the authority to provide for cost sharing by a protective order. Broader cost-sharing issues have been referred to the Discovery Subcommittee. Cost sharing is so important as to require in-depth study that would unduly delay the other proposals in the package.

These sketches have advanced a long way from their beginnings. But work remains, both in expression and in resolving some details. More importantly, the list of topics is not closed. Time remains to permit development of new proposals. Suggestions for new topics will be welcomed.

If possible, it will be desirable to publish these proposals together with the proposed revision of Rule 37(e) on preservation and spoliation. There is always a hope that the frequency of

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publication for comment can be reduced. And a substantial package of proposals may well provoke greater interest and more thorough comments on all parts than would happen with separate publication.

1. Scheduling Orders and Managing Discovery

a. Rules 16(b) and 4(m): Scheduling Order Timing & Conference

These proposals attack delay directly by shortening the time for service allowed by Rule 4(m) and by advancing the time to issue a scheduling order. In addition, Rule 16(b)(1)(B) is revised to encourage an actual scheduling conference.

Rule 4(m)

(m) ***Time Limit for Service.*** If a defendant is not served within ~~120~~ 60 days after the complaint is filed, the court * * * must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause * * *.

The proposal to shorten the time for service set by Rule 4(m) has been approved by consensus.

Shortening the time to issue the scheduling order provoked conflicting reactions. The special concerns expressed by the Department of Justice are noted below. More generally, some participants worried that setting the time too early could mean that under-prepared lawyers are unable to support an effective conference. At the same time, many thought the present 120- and 90-day periods are too long. This draft reflects a modest reduction, to 90 and 60 days, and adds permission to delay the order for good cause.

Rule 16(b)

(b) SCHEDULING.

(1) Scheduling Order. Except in categories of actions exempted by local rule,[2] the district judge — or a

[2] Earlier sketches sought to integrate the exemptions from Rule 16(b)(1) with the exemptions from initial disclosure requirements listed in Rule 26(a)(1)(B). The disclosure exemptions apply to the parties' conference under Rule 26(f) and to the discovery moratorium under Rule 26(d)(1). It would be attractive to have a single set of exemptions for all of these related rules. This possibility remains under consideration. The next step will be to survey local rules to determine what categories of actions are frequently made exempt from Rule 16(b)(1). The survey may suggest additional categories that might be added to 26(a)(1)(B). It also might support a determination whether to continue to recognize exemptions

magistrate judge when authorized by local rule — must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference ~~by telephone, mail, or other means~~.

(2) Time to Issue. The judge must issue the scheduling order as soon as practicable, but ~~in any event~~ unless good cause is found for delay must issue the order within the earlier of ~~120~~ 90 days after any defendant has been served with the complaint or ~~90~~ 60 days after any defendant has appeared.[3]

The revision of Rule 16(b)(1)(B) emphasizes the value of holding an actual conference, at least by telephone, before issuing a scheduling order. This change has not proved controversial in itself. But there have been conflicting suggestions that Rule 16(b)(1)(A) should be eliminated so that there always must be a conference apart from the exempted categories of cases, or that the court should have authority to dispense with any conference.

Eliminating Rule 16(b)(1)(A) would foreclose entry of a scheduling order based on the parties' Rule 26(f) report without a scheduling conference. Subcommittee members believe a conference should be held in every case. "Effective management requires a conference." Even if the parties agree on a scheduling order, the court may wish to change some provisions, and it may be important to address issues not included in the report. But there are counter-arguments that the court should be free, if it finds it appropriate, to dispense with the conference. The thought is that although in most cases there are important advantages to having a conference even after the parties have presented an apparently sound discovery plan, there may be cases in which the court is satisfied that an effective management

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by local rule from scheduling order requirements.

[3] The 90 and 60 day periods have been adopted only for illustration. Each period has an impact on timing the Rule 26(f) conference. Rule 26(f)(1) sets the conference "as soon as practicable — and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b)." If reducing the time to enter the scheduling order seems to deprive the parties of sufficient time to prepare for the 26(f) conference, Rule 26(f) could be amended to set the time for the conference, and for the 26(f) report, closer to the time for the scheduling order.

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order can be crafted without a conference.[4]

Some participants have suggested the court also should have authority to dispense with any scheduling conference. On this view, many cases on the federal docket are not particularly complicated, and a conference may impose significant burdens without any corresponding benefit. This concern would be addressed in part if the rule carries forward authority to exempt categories of actions by local rule. And the sketch continues to authorize issuance of a scheduling order without a conference after receiving the parties' report under Rule 26(f).

The Department of Justice is concerned with the proposals to accelerate the time for issuing a scheduling order. It advances the reasons for allowing it 60 days to answer under Rule 12(a)(2) and (3). After a complaint is served "it takes time to find the right lawyer, and for the right lawyer to identify the right people in the right agency" to figure out what an action really involves. The Subcommittee, however, believes that the alternative 90- and 60-day periods suggested in the sketch should suffice for the Department's needs in most cases.

Resetting the time to issue the scheduling order invites trouble when the time comes before all defendants are served. Later service on additional defendants may lead to another conference and order. Revising Rule 4(m) to shorten the presumptive time for making service reduces this risk. Shortening the Rule 4(m) time may also be desirable for independent reasons, encouraging plaintiffs to be diligent in attempting service and getting the case under way. There may be some collateral consequences — Rule 15(c)(1)(C) invokes the time provided by Rule 4(m) for determining relation back of pleading amendments that change the party against whom a claim is asserted. But that may not deter the change.

b. Uniform Exemptions: Rules 16(b), 26(a)(1)(B), 26(d), 26(f)

There has been considerable support for adopting a single set of exemptions that would remove cases from the requirements for a scheduling order, initial disclosures, the parties' conference, and the discovery moratorium. See footnote 2 above. The topic will be deferred, however, unless relatively easy research into the local rule exemptions authorized by Rule 16(b)(1) shows either that there is no reason to expand the

[4] The judge may not see any need for a conference, particularly if the Rule 26(f) report is prepared by attorneys known to be reliable and seems sound. The judge might ignore a requirement that a conference be held in all cases, or might hold a pro forma conference. The dockets in some courts may not permit scheduling conferences in all cases.

categories of actions exempted from initial disclosure or that a sensible number of categories can be added without risking serious loss.

c. Informal Conference With Court Before Discovery Motion

Participants at the Duke Conference repeated the running lament that some judges — too many from their perspective — fail to take an active interest in managing discovery disputes. They repeated the common observation that judges who do become involved can make the process work well. Many judges tell the parties to bring discovery disputes to the judge by telephone, without formal motions. This prompt availability to resolve disputes produces good results. There are not many calls; the parties work out most potential disputes knowing that pointless squabbles should not be taken to the judge. Legitimate disputes are taken to the judge, and ordinarily can be resolved expeditiously. Simply making the judge available to manage discovery disputes accomplishes effective management. A survey of local rules showed that at least a third of all districts have local rules that implement this experience by requiring that the parties hold an informal conference with the court before filing a discovery motion.

It will be useful to promote the informal pre-motion conference for discovery motions. The central question is whether to encourage it or to make it mandatory. Encouragement is not likely to encounter significant resistance. Making it mandatory, even with an escape clause, is likely to encounter substantial resistance from some judges. In the end, the Subcommittee has concluded that there is likely to be too much resistance to justify a mandatory provision. The proposal adds the conference to the Rule 16(b)(3) list of subjects that may be included in a scheduling order. This reminder could serve as a gentle but potentially effective encouragement, particularly when supplemented by coverage in judicial education programs.

Rule 16(b)(3)(B)(v)

(3) * * *

(B) *Permitted Contents.* The scheduling order may: * * *

(v) direct that before filing a motion for an order relating to discovery the movant must request an informal conference with the court.

[present (v) and (vi) would be renumbered]

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d. Discovery Before Parties' Conference

The parties' Rule 26(f) conference may work better if the parties have actual discovery requests to consider. But Rule 26(d)(1) imposes a moratorium on discovery "before the parties have conferred as required by Rule 26(f)." Early sketches considered by the Subcommittee would have allowed all forms of discovery to be pursued before the Rule 26(f) conference. One approach imposed an initial waiting period, while another would have allowed requests to be made at any time after the action is commenced. The time to respond would run from the Rule 26(f) conference. These sketches have been narrowed to a draft that applies only to requests under Rule 34(a), and that imposes a 21-day waiting period.

Rule 26(d)(1)

(1) **Timing**. A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except:

(A) in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B)~~,~~;

(B) that more than 21 days after service of the summons and complaint on any defendant a party may deliver to [any party][that defendant] requests under Rule 34(a), to be considered as served at the [first] Rule 26(f) conference; or

(C) when authorized by these rules, by stipulation, or by court order.

The proposal has been limited to Rule 34 requests for several reasons. Rule 34 is a major source of discovery difficulties. Depositions may also be a source of problems, but there is little reason to believe that much will be gained by advance lists of people who may be deposed, nor even by designating the matters for examination by deposing an entity under Rule 30(b)(6). Any need for early depositions is protected by Rule 30(a)(2)(A)(iii). Advance models of interrogatories and requests to admit also seem less important, and relief from the moratorium is already available under Rule 26(d)(1). Rule 35 examinations require a court order or agreement.

The waiting period has been retained. To be sure, there is little reason to fear a return to the problems encountered in prior practice that allowed a plaintiff to launch discovery before a defendant could get started, and then accorded a presumptive priority that allowed the plaintiff to complete discovery before the defendant could begin. But at least two practical concerns have emerged. One is that early requests may

be drawn in broad terms that, given need to reflect, may be narrowed. Another is that even though the time to respond is set from the Rule 26(f) conference, legitimate requests for additional time will encounter inappropriate skepticism based on the opportunity to begin to prepare before the time formally began to run.

This proposal is not without complications. Several miniconference participants said that they would serve early discovery requests if the Rule 26(d) discovery moratorium were relaxed. Most of them regularly represent plaintiffs, but at least one corporate counsel said he would welcome the opportunity to receive early requests. In addition, there are signs that at least some lawyers simply ignore the Rule 26(d) moratorium, perhaps because of ignorance or possibly because of tacit agreement that it is unnecessary. But doubts also were expressed about the probability that many parties will take advantage of an opportunity for early discovery. Most lawyers seem to delay discovery as long as possible, and are unlikely to serve requests before the Rule 26(f) conference. The discovery rules are complicated now. Further complications should be introduced only for reasons better than providing the possibility of early discovery requests. There also is a possible ambiguity in calculating time from the Rule 26(f) conference because conferences often are informal, providing occasions for disputes about the time of the conference.

It may be desirable to amend the time-to-respond provisions of Rule 34 by adding a cross-reference to the provision that considers an early Rule 34 request to be served at the time of the Rule 26(f) conference. Experience shows that lawyers do not always keep in mind the often intricate interactions among the rules, and indeed sometimes fail to follow through express cross-references. It may prove difficult to draft an elegant cross-reference. This draft is a tentative illustration:

Rule 34(b)(2)(A)

(2) ***Responses and Objections.***

(A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served <u>or — if the request was delivered under Rule 26(d)(1)(B) — within 30 days after the parties' [first] Rule 26(f) conference.</u> A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

Rule 45

The Subcommittee has not thought it worthwhile to provide an exemption from the Rule 26(d)(1) moratorium for nonparty subpoenas to produce under Rule 45. Rule 45 subpoenas addressed to nonparties seem to be more clearly focused than the broad or overbroad requests that sometimes characterize Rule 34 practice.

And Rule 45 specifically protects a nonparty who objects against significant expense resulting from compliance. It is better to avoid complications that promise little real advantage.

2. Other Discovery Issues

a. Proportionality: Rule 26(b)(1)

Both at the Duke Conference and otherwise, laments are often heard that although discovery in most cases is conducted in reasonable proportion to the nature of the case, discovery runs out of control in an important fraction of all cases. It is difficult to resist the proposition that discovery should be confined to limits reasonably proportional to the needs of the case. The rules provide for this in many ways. Rule 26(c), for example, provides for an order that protects against "undue burden or expense." In 1983 the underlying concept of proportionality was adopted in Rule 26(b)(2) and also Rule 26(g), with the expectation that the new cost-benefit calculus would solve most problems of excessive discovery. That expectation has not been realized. More recently still, Rule 26(b)(1) was amended in 2000 to distinguish between lawyer-managed discovery of material relevant to the parties' "claims or defenses" and court-managed discovery of material relevant only to a more broadly conceived "subject matter involved in the action." In part the hope was to provide a stimulus to more active involvement in discovery by judges who had been holding aloof. The optimistic assessment is that the 2000 amendment had some slight effect. However that may be, and however well discovery works in a high percentage of all cases as measured by total docket numbers, serious, even grave problems persist in enough cases to generate compelling calls for further attempts to control excessive discovery. The geometric growth in potentially discoverable information generated by electronic storage adds still more imperative concerns. And these concerns are exacerbated by the problem of preserving information in anticipation of litigation, a problem addressed by the proposed revisions of Rule 37(e) that are presented separately.

Early Subcommittee sketches sought to bolster these earlier attempts by expressly limiting the scope of discovery under Rule 26(b)(1) to what is "proportional to the reasonable needs of the case." But substantial concern was expressed that even a shared pragmatic understanding of proportionality does not provide sufficiently definite meaning to enshrine "proportionality" in rule text. The initial sketches and post-Dallas attempts to sketch alternative ways to incorporate "proportional" into Rule 26(b)(1) failed to allay these concerns.

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Those who expressed concern with adding "proportional" to Rule 26(b)(1) without further refinement also commonly expressed support for the cost-benefit limits on discovery mandated by Rule 26(b)(2)(C)(iii). These provisions were seen to provide suitably nuanced guidance to avoid interminable wrangling in contentious discovery cases.

The inability to control excessive discovery by revising the scope of discovery in 2000, and the substantial support for Rule 26(b)(2)(C)(iii), have combined to suggest that it would be desirable to transfer the calculus of (iii) to become part of the Rule 26(b)(1) definition of the scope of discovery. This transfer is illustrated by the sketch set out below.

The sketch makes further changes as well. Discovery is confined to matter relevant to any party's claim or defense, eliminating the present provision that, on finding good cause, allows a court to expand discovery to the subject matter involved in the action. It is difficult to see why discovery that is not relevant to any party's claim or defense should be allowed. Substantial limits are placed on the present third sentence: "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." The concern is that the "reasonably calculated" concept has failed in practice. Too many lawyers, and perhaps judges, understand the rule to mean that there are no limits on discovery, because it is always possible that somehow, somewhere, a bit of relevant information may be uncovered.

In all, this sketch reflects a determination that it is important to attempt once more to adopt effective controls on discovery while preserving the core values that have been enshrined in the Civil Rules from the beginning in 1938. Reducing the burdens of discovery also enhances access to the courts by reducing what can be a daunting obstacle. There are increasing demands to make far more dramatic changes.

The current sketches of Rule 26(b)(1) and 26(b)(2)(C)(iii) look like this:

(1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense <u>and proportional to the needs of the case considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information [within this scope of discovery]{sought} need not be admissible in evidence to be discoverable.</u> — ~~including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of~~

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~~any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~

Other revisions would be made in Rule 26(b)(2). Subparagraph (A) would incorporate references to proposed limits on the numbers of discovery requests and to the length of depositions, as illustrated below. Subparagraph (B) would be amended to refer to the scope of discovery under (b)(1) rather than to subparagraph (C). And subparagraph (C) would be revised to reflect the transfer of (iii) to (b)(1):

(C) When required. On motion or on its own, the court must limit the frequency or extent of discovery ~~otherwise allowed by these rules or by local rule~~ if it determines that: * * *

(iii) the ~~burden or expense of the~~ proposed discovery is outside the scope permitted by Rule 26(b)(1) ~~outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.~~

This approach would require revising many of the cross-references to Rule 26(b)(2) in other rules, substituting Rule 26(b)(1). For example, Rule 30(a)(2) would begin: "A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1)~~(2)~~: * * *."

b. Limiting the Number of Discovery Requests

The Duke Conference included observations about approaching proportionality indirectly by tightening present presumptive numerical limits on the number of discovery requests and adding new limits. These sketches illustrate lower limits for Rule 33 interrogatories and new limits for Rule 36 requests to admit that have stirred little controversy. Lower limits on the numbers and length of depositions have been studied and are carried forward to test further the doubts that have been expressed with some force. Similarly, possible limits on the number of Rule 34 requests are sketched to prompt further discussion.

An important common feature of all of these sketches is that the limits are merely presumptive. They can be set aside by agreement of the parties or by court order.

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Many studies over the years, several of them by the FJC, show that most actions in the federal courts are conducted with a modest level of discovery. Only a relatively small fraction of cases involve extensive discovery, and in some of those cases extensive discovery may be reasonably proportional to the needs of the case. But the absolute number of cases with extensive discovery is high, and there are strong reasons to fear that many of them involve unreasonable discovery requests. Many reasons may account for unreasonable discovery behavior — ineptitude, fear of claims of professional incompetence, strategic imposition, profit from hourly billing, and other inglorious motives. It even is possible that the presumptive limits now built into Rules 30, 31, and 33 operate for some lawyers as a target, not a ceiling.

Various proposals have been made to tighten the presumptive limits presently established in Rules 30, 31, and 33, and to add new presumptive limits to Rule 34 document requests and Rule 36 requests to admit. The actual numbers chosen for any rule will be in part arbitrary, but they can reflect actual experience with the needs of most cases. Setting limits at a margin above the discovery actually conducted in most cases may function well, reducing unwarranted discovery but leaving appropriate discovery available by agreement of the parties or court order.

Beginning with a proposal that has generated little controversy, Rule 33(a)(1) could be revised:

> **(1)** *Number.* Unless otherwise stipulated or ordered by the court, a party may serve on another party no more than ~~25~~ 15 interrogatories, including all discrete subparts.

(This could be made more complicated by adding a limit for multiparty cases — for example, no more than 15 addressed to any single party, and no more than 30 in all. No one seems to have suggested that. The complication is not likely to be worth the effort.)

Adding similar limits to Rule 36 for the first time also has generated little controversy. A clear version would add a new 36(a)(2), building on present (a)(1):

> **(1)** *Scope.* A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to:
>
> (A) facts, the application of law to fact, or opinions about either; and
>
> (B) the genuineness of any described document.
>
> **(2)** *Number.* Unless otherwise stipulated or ordered by the court, a party may serve no more than 25 requests to admit under Rule 36(a)(1)(A) on any other party,

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including all discrete subparts.

Things are not so simple for Rule 34. Many participants at the Dallas miniconference questioned the wisdom of adopting limits, even if limits could be enforced with little difficulty. They believe that Rule 34 burdens are reduced if the requesting party frames a larger number of narrowly and sharply focused requests than if forced to frame a smaller number of broadly diffuse requests. And one participant suggested that the problem is not the number of requests but the number of sources that must be searched. Questions of implementation supplement these reservations. It may not be easy to apply a numerical limit on the number of requests; "including all discrete subparts," as in Rule 33, may not work. This question ties to the Rule 34(b)(1)(A) requirement that the request "must describe with reasonable particularity each item or category of items to be inspected." Counting the number of requests could easily degenerate into a parallel fight over the reasonable particularity of a category of items. But concern may be overdrawn. Actual experience with scheduling orders that impose numerical limits on the number of Rule 34 requests suggests that parties can adjust to counting without any special difficulty. If this approach is followed, the limit might be located in the first lines of Rule 34(a):

(a) In General. A party may serve on any other party ~~a~~ no more than [25] requests within the scope of Rule 26(b): * * *

(3) Leave to serve additional requests may be granted to the extent consistent with Rule 26(b)(1).

This form applies to all the various items that can be requested — documents, electronically stored information, tangible things, premises. It would be possible to draft a limit that applies only to documents and electronically stored information, the apparent subject of concern. But either way, there is a manifest problem in setting numerical limits. If a car is dismembered in an accident, is it only one request to ask to inspect all remaining parts? More importantly, what effect would numerical limits have on the ways in which requests are framed? "All documents, electronically stored information, and tangible things relevant to the claims or defenses of any party?" Or, with court permission, "relevant to the subject matter involved in this action"? Or at least "all documents and electronically stored information relating to the design of the 2008 model Huppmobile"? For that matter, suppose a party has a single integrated electronic storage system, while another has ten separate systems: does that affect the count? Still, the experience of judges who adopt such limits in scheduling orders suggests that disputes about counting seldom present real problems.

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(The Subcommittee has concluded there is no apparent need to attempt to revise Rule 45 to mirror the limits proposed for Rule 34.)

For depositions, the sketches discussed at the Dallas miniconference reduced the presumptive limits from 10 depositions per side to 5, and reduced the presumptive duration of a deposition to 4 hours. The sketch encountered mixed reactions. The main argument against the proposal was that the present limits — 10 depositions per side, lasting up to 7 hours — work well. Some cases legitimately need more than 5 depositions per side, and there is no point in requiring the parties to seek the court's permission. So for the length of a deposition, although a reduction to 6 hours might be appropriate. On the other hand, FJC data show that most cases involve fewer than 5 depositions. A limit that reflects common practice should work well. In Professor Gensler's memorable phrase, "it is easier to manage up from a lower limit than to manage down from a higher limit." The sketches are carried forward for continuing discussion:

Rules 30(a)(2)(A)(i) and 30(d)(1):

(a) When a Deposition May Be Taken. * * *

(2) *With Leave.* A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2[1]):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than ~~10~~ 5 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants; * * *

(d) Duration; Sanction; Motion to Terminate or Limit

(1) *Duration.* Unless otherwise stipulated or ordered by the court, a deposition is limited to [~~one day of 7~~ 4 hours in a single day][one day of ~~7~~ 4 hours].

A parallel change would be made in Rule 31(a)(2)(A)(i) as to the number of depositions. Rule 31 does not have a provision parallel to the "one day of 7 hours" provision in Rule 30(d).

The authority to change any of these limitations would be repeated in revised Rule 26(b)(2)(A):

(2) *Limitations on Frequency and Extent.*

(A) *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions, ~~and~~ interrogatories, requests [to produce][under Rule 34], and requests for

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admissions, or on the length of depositions under Rule 30. ~~By order or local rule, the court may also limit the number of requests under Rule 36.~~

c. Discovery Objections and Responses

The common laments about excessive discovery requests are occasionally met by protests that discovery responses often are incomplete, evasive, dilatory, and otherwise out of keeping with the purposes of the rules. Several proposals have been made to address these problems. One, which would add "not evasive" to the certifications attributed by Rule 26(g)(1) to a discovery request, response, or objection met vigorous opposition at the miniconference. Many participants felt this addition is unnecessary and might promote additional litigation. The Subcommittee has decided to withdraw this sketch, in part because the certifications already stated in Rule 26(g)(1)(B) can be used to reach evasive responses.

RULE 34: SPECIFIC OBJECTIONS

Two proposals have been advanced to improve the quality of discovery objections. The first would incorporate in Rule 34 the Rule 33 requirement that objections be stated with specificity. The second would require a statement whether information has been withheld on the basis of the objection. These proposals have won general support.

Rule 33(b)(4) begins: "The grounds for objecting to an interrogatory must be stated with specificity." Two counterparts appear in Rule 34(b)(2). (B) says that the response to a request to produce must state that inspection will be permitted "or state an objection to the request, including the reasons." (C) says: "An objection to part of a request must specify the part and permit inspection of the rest." "[I]ncluding the reasons" in Rule 34(b)(2)(B) may not convey as clearly as should be a requirement that the reasons "be stated with specificity." If the objection rests on privilege, Rule 26(b)(5)(A) should control. But for other objections, it is difficult to understand why specificity is not as important for documents, tangible things, and entry on premises as it is for answering an interrogatory. Even if the objection is a lack of "possession, custody, or control," the range of possible grounds is wide.

This sketch revises Rule 34(b)(2)(B) to parallel Rule 33(b)(4):

(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state [the grounds for

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objecting {to the request} with specificity] [an objection to the request, including the specific reasons.]

RULE 34: STATE WHAT IS WITHHELD

Many Conference participants, both at the time of the Conference and since, have observed that responding parties often begin a response with a boilerplate list of general objections, and often repeat the same objections in responding to each individual request. At the same time, they produce documents in a way that leaves the requesting party guessing whether responsive documents have been withheld under cover of the general objections. (The model Rule 16(b) scheduling order in the materials provided by the panel on Eastern District of Virginia practices reflects a similar concern: " * * * general objections may not be asserted to discovery demands. Where specific objections are asserted to a demand, the answer or response must not be ambiguous as to what if anything is being withheld in reliance on the objection.)

Broad support has been expressed for addressing this problem by adding a new sentence to Rule 34(b)(2)(C):

(C) *Objections*. An objection to part of a request must specify the part and permit inspection of the rest. An objection [to a request or part of a request] must state whether any responsive [materials]{documents, electronically stored information, or tangible things <or premises?>} are being withheld [under]{on the basis of} the objection.[5]

RULES 34 AND 37: FAILURE TO PRODUCE

Rule 34 is somewhat eccentric in referring at times to stating that inspection will be permitted, and at other times to "producing" requested information. Common practice is to produce documents and electronically stored information, rather than make them available for inspection. Two amendments have been proposed to clarify the role of actual production, one in Rule 34, the other in Rule 37.

Earlier sketches revising Rule 34(b)(2)(B) have been improved in response to observations offered at the Dallas miniconference. The changes address the time for producing, recognizing that frequently production cannot be made all at once at the time for the response, but also recognizing that the time for production should not be open-ended. "Rolling production" is a common and necessary mode of compliance:

(B) Responding to Each Item. For each item or category, the

[5] Could this be simplified: "An objection must state whether anything is being withheld on the basis of the objection"?

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response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons. If the responding party elects to produce copies of documents or electronically stored information instead of permitting inspection, the response must state that copies will be produced, and the production must be completed no later than the time for inspection stated in the request or a later reasonable time stated in the response.

Rule 37(a)(3)(B)(iv) would be amended to provide that a party seeking discovery may move for an order compelling an answer if:

(iv) a party fails to produce documents or fails to respond that inspection will be permitted — or fails to permit inspection — as requested under Rule 34.

d. Preservation and Evidence Rule 502 in Rules 16(b), 26(f)

Quite modest suggestions have been made to expand Rules 16(b) and 26(f) to add reminders of subjects already covered in the rules. Many observers continue to lament that preservation obligations are too often overlooked in Rule 26(f) conferences and in scheduling orders. And the Evidence Rules Committee is concerned that the advantages of Evidence Rule 502(e) agreements on the effect of disclosure are still not widely known. There has been little discussion of these sketches, but some good might come of adding these topics to Rules 16(b) and 26(f):

Rule 16(b)(3)(B)(iii), (iv)

(B) *Permitted Contents.* The scheduling order may:

(iii) provide for disclosure, ~~or~~ discovery, or preservation of electronically stored information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Rule 502(e) of the Federal Rules of Evidence;

Rule 26(f)(3)(C), (D)

(3) *Discovery Plan.* A discovery plan must state the parties' views and proposals on: * * *

(C) any issues about disclosure, ~~or~~ discovery, or

preservation of electronically stored information, including the form or forms in which it should be produced;[6]

(D) any issues about claims of privilege or of protection as trial-preparation materials, including — if the parties agree on a procedure to assert these claims after production — whether to ask the court to include their agreement in an order under Rule 502(d) and (e) of the Federal Rules of Evidence;[7]

e. Initial Disclosures

Questions about the value of initial disclosures under Rule 26(a)(1)(A) have persisted for many years. Divergent views were expressed at the Duke Conference. The Subcommittee has concluded that this topic is not yet ripe for consideration. Practices in some states require more expansive disclosures than Rule 26 requires. Empirical studies are being made of some of these practices. It is better to wait to see what they reveal.

f. Cost Shifting (Discovery only)

Both at the Duke Conference and otherwise, suggestions continue to be made that the discovery rules should be amended to include explicit provisions requiring the requesting party to bear the costs of responding. Cost-bearing could indeed reduce the burdens imposed by discovery, in part by compensating the responding party and in part by reducing the total level of requests. But any expansion of this practice runs counter to deeply entrenched views that every party should bear the costs of sorting through and producing the discoverable information in its possession. These proposals deserve serious development. But they require careful work that cannot be rushed. And they can readily be severed from the other proposals that make up the present package. They will remain on the Committee agenda, but are no

[6] Note that Rule 26(f)(2) deliberately requires discussion of issues about preserving "discoverable information"; it is not limited to electronically stored information. The (f)(3) discovery plan provisions are more detailed than the (f)(2) subjects for discussion, so the discontinuity may not be a problem.

[7] This drafting assumes that any request to adopt the agreement in a court order should mean that it is a Rule 502(e) agreement, and that the order should be governed by Rule 502(d).

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longer part of the "Duke Rules" package. What remains is a more modest approach through Rule 26(c).

Rule 26(c) authorizes "an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: * * *." The list of examples does not explicitly include cost shifting. Paragraph (B) covers an order "specifying terms, including time and place, for the disclosure or discovery." "Terms" could easily include cost shifting, but may be restrained by its association with the narrow examples of time and place. More importantly, "including" does not exclude — the style convention treats examples as only illustrations of a broader power. Rule 26(b)(2)(B), indeed, covers the idea of cost shifting when the court orders discovery of electronically stored information that is not reasonably accessible by saying simply that "[t]he court may specify conditions for the discovery." The authority to protect against undue expense includes authority to deny discovery unless the requesting party pays part or all of the costs of responding. Courts in fact exercise this authority now, particularly in addressing electronic discovery issues.

Notwithstanding the conclusion that Rule 26(c) now authorizes cost shifting in discovery, this authority is not prominent on the face of the rules. Nor does it yet figure prominently in reported cases. If it is desirable to encourage greater use of cost shifting, a more explicit provision could be useful. Rule 26(b)(2)(B) recognizes cost shifting for discovery of electronically stored information that is not reasonably accessible from concern that Rule 26(c) might not be equal to the task. So it may also be desirable to supplement Rule 26(c) with a more express provision.

The more conservative approach does no more than add an express reference to cost shifting in present Rule 26(c)(1)(B):

> **(1)** *In General.* * * * The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: * * *
>
> > **(B)** specifying terms, including time and place <u>or the allocation of expenses</u>, for the disclosure or discovery; * * *

3. Cooperation: Rule 1

The wish for reasonable proportionality in discovery overlapped with a broader theme explored at the Duke Conference. Cooperation among the parties can go a long way toward achieving proportional discovery efforts and reducing the need for judicial

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management. But cooperation is important for many other purposes. Discovery is not the only arena for tactics that some litigants lament as tactics in a war of attrition. Ill-founded motions to dismiss — whether for failure to state a claim or any other Rule 12(b) ground, motions for summary judgment, or other delaying tactics are examples.

It is easy enough to draft a rule that mandates reasonable cooperation within a framework that remains appropriately adversarial. It is difficult to know whether any such rule can be more than aspirational. Rule 11 already governs unreasonable motion practice, and there is little outcry for changing the standards defined by Rule 11.[8] And there is always the risk that the ploy of adding an open-ended duty to cooperate will invite its own defeat by encouraging tactical motions, repeating the sorry history of the 1983 Rule 11 amendments.

The sketch considered at the Dallas miniconference revised Rule 1 to impose duties on the parties in two ways. The first, which survives on the agenda, provided that the rules should be "employed by the court and parties" to achieve the iconic Rule 1 aspirations. The second would have added "and the parties should cooperate to achieve these ends." This second provision encountered substantial opposition. The opposition extended to a suggested softening that would say only that the parties "are expected to cooperate to achieve these ends." Much of the opposition rested on concern that cooperation is an open-ended concept that, if embraced in rule text, could easily lead to less cooperation and an increase in disputes in which every party accuses every other party of failing to cooperate. Additional concerns have been expressed that anything imposing new duties on lawyers will become entangled with rules of professional responsibility. This provision has been abandoned. The concept of cooperation could be spelled out in the Committee Note once it is clear that Rule 1 applies to lawyers and not simply the court.

The surviving Rule 1 sketch is:

> * * * [These rules] should be construed, ~~and~~ administered, and employed by the court and parties to secure the just, speedy, and inexpensive[9] determination

[8] Nor is there any sense that the 1993 amendments softening the role of sanctions should be revisited, despite the continuing concern reflected in proposed legislation currently captioned as the Lawsuit Abuse Reduction Act.

[9] Here the ACTL/IAALS proposal would ratchet down the expectations of Rule 1: "~~speedy, and inexpensive~~ timely, efficient, and cost-effective determination * * *."

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of every action and proceeding.[10]

If this proposal moves forward, it will be important to frame the Committee Note with care. Descriptions of cooperation as a duty or obligation will encounter the same reactions as explicit rule text.

Appendix

Various parts of the same rules are affected by proposals made for different purposes. This appendix lays out the full set of changes rule by rule.

Rule 1

> * * * [These rules] should be construed, ~~and~~ administered, and employed by the court and parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

Rule 4

(m) TIME LIMIT FOR SERVICE. If a defendant is not served within ~~120~~ 60 days after the complaint is filed, the court * * * must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause * * *

Rule 16(b)

(b) SCHEDULING.

(1) Scheduling Order. Except in categories of actions exempted by local rule, the district judge — or a magistrate judge when authorized by local rule — must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference ~~by telephone, mail, or other means~~.

(2) Time to Issue. The judge must issue the scheduling order as soon as practicable, but ~~in any event~~ unless good cause is found for delay must issue the order: within the earlier of ~~120~~ 90 days after any defendant

[10] The ACTL/IAALS version is much longer. The court and parties are directed to "assure that the process and costs are proportionate to the amount in controversy and the complexity and importance of the issues. The factors to be considered by the court * * * include, without limitation: needs of the case, amount in controversy, parties' resources, and complexity and importance of the issues at stake in the litigation."

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has been served with the complaint or ~~90~~ 60 days after any defendant has appeared.

(3) * * *

(B) *Permitted Contents.* The scheduling order may:

(iii) provide for disclosure, ~~or~~ discovery, or preservation of electronically stored information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Rule 502(e) of the Federal Rules of Evidence;

(v) direct that before filing a motion for an order relating to discovery the movant must request an informal conference with the court;

[present (v) and (vi) would be renumbered] * * *

Rule 26

(b) Discovery Scope and Limits.

(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information [within this scope of discovery]{sought} need not be admissible in evidence to be discoverable. ~~— including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~ * * *

(2) *Limitations on Frequency and Extent.*

(A) *When Permitted.* By order, the court may alter the limits in these rules on the number of

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depositions, ~~and~~ interrogatories, requests [to produce][under Rule 34], and requests for admissions, or on the length of depositions under Rule 30. ~~By order or local rule, the court may also limit the number of requests under Rule 36.~~

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery ~~otherwise allowed by these rules or by local rule~~ if it determines that: * * *

(iii) the ~~burden or expense of the~~ proposed discovery is outside the scope permitted by Rule 26(b)(1) ~~outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.~~

* * *

(c) Protective Orders

(1) *In General.* * * * The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: * * *

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery; * * *

(d) Timing and Sequence of Discovery.

(1) Timing. A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except:

(A) in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B)~~,~~;

(B) that more than 21 days after service of the summons and complaint on any defendant a party may deliver to [any party][that defendant] requests under Rule 34(a), to be considered as served at the [first] Rule 26(f) conference; or

(C) when authorized by these rules, by stipulation, or by court order.

(2) Sequence. Unless the parties stipulate, or~~, on motion,~~ the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence;

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and

(B) discovery by one party does not require any other party to delay its discovery.

* * *

(f)(1) *Conference Timing.* Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or * * *"

(3) *Discovery Plan.* A discovery plan must state the parties' views and proposals on: * * *

(C) any issues about disclosure, ~~or~~ discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including — if the parties agree on a procedure to assert these claims after production — whether to ask the court to include their agreement in an order under Rule 502(d) and (e) of the Federal Rules of Evidence;

Rule 30

(a)(2) ***With Leave.*** A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1~~2~~)[11]:

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than ~~10~~ 5 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants; * * *

(d) Duration; Sanction; Motion to Terminate or Limit

(1) *Duration.* Unless otherwise stipulated or ordered by the court, a deposition is limited to [~~one day of 7~~ 4 hours in a single day][one day of ~~7~~ 4 hours].

Rule 31

(a)(2) *With Leave.* A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule

[11] This change from (b)(2) to (b)(1) illustrates a number of cross-references to present (b)(2) that would have to be changed to conform to the proposed transposition of (b)(2) to become part of (b)(1)'s definition of the scope of discovery.

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26(b)(2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than ~~10~~ 5 depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by the third-party defendants; * * *

Rule 33

(a)(1) *Number.* Unless otherwise stipulated or ordered by the court, a party may serve on another party no more than ~~25~~ 15 interrogatories, including all discrete subparts.

Rule 34

(a) In General. A party may serve on any other party ~~a~~ no more than [25] requests within the scope of Rule 26(b): * * *

(3) Leave to serve additional requests may be granted to the extent consistent with Rule 26(b)(1).

(b)(2) *Responses and Objections.* * * *

(A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served or — if the request was delivered under Rule 26(d)(1)(B) — within 30 days after the parties' [first] Rule 26(f) conference. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state [the grounds for objecting {to the request} with specificity] [an objection to the request, including the specific reasons.] If the responding party elects to produce copies of documents or electronically stored information instead of permitting inspection, the response must state that copies will be produced, and the production must be completed no later than the time for inspection stated in the request or a later reasonable time stated in the response.

(C) *Objections*. An objection to part of a request must specify the part and permit inspection of the rest. An objection [to a request or part of a request] must state whether any responsive [materials]{documents, electronically stored information, or tangible things <or premises?>} are being withheld [under]{on the basis

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of} the objection.

Rule 36

(a) SCOPE AND PROCEDURE.

(1) *Scope.* A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to:

(A) facts, the application of law to fact, or opinions about either; and

(B) the genuineness of any described document.

(2) *Number.* Unless otherwise stipulated or ordered by the court, a party may serve no more than 25 requests to admit under Rule 36(a)(1)(A) on any other party, including all discrete subparts. * * *

Rule 37

(a)(3)(B)(iv) [A party seeking discovery may move for an order compelling an answer if:] a party fails to produce documents or fails to respond that inspection will be permitted — or fails to permit inspection — as requested under Rule 34.

II.B. RULE 84 FORMS

Uncertainties about the impact of the Supreme Court's still recent decisions on pleading standards on the Rule 84 official pleading forms led the Committee to broader questions about Rule 84 and the Rule 84 Forms. These questions led to comparisons with the other bodies of rules. Official forms are attached to the Appellate, Bankruptcy, and Civil Rules. The Appellate and Civil Forms have been generated through the full Enabling Act Process. The Bankruptcy Forms are developed through the Enabling Act committees, but the final step is approval by the Judicial Conference without going on to the Supreme Court or Congress. The Administrative Office produces forms for use in criminal prosecutions, but these forms are not "official." A subcommittee formed of representatives of the advisory committees examined these differences. It reported that forms play different roles in the different types of litigation, and that there is no apparent reason to adopt a uniform approach across the different sets of rules and advisory committees.

With this reassurance of independence, the Rule 84 Subcommittee was formed to study Rule 84 and the Rule 84 forms. It gathered information about the general use of the forms by informal inquiries that confirmed the initial impressions of Subcommittee members. Lawyers do not much use these forms, and

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there is little indication that they often provide meaningful help to pro se litigants. And as discussed further below, the pleading forms live in tension with recently developing approaches to general pleading standards.

From this beginning, the Subcommittee considered several alternative approaches. The simplest would be to leave Rule 84 and the Rule 84 forms where they lie. The most burdensome would be to take on full responsibility for maintaining the forms in a way that ensures a good fit with contemporary practice and needs, and perhaps developing additional forms to address many of the subjects that are not now illustrated by the forms. The work required to maintain the forms through the full Enabling Act process would divert the energies of all actors in the process from other work that, over the years, has seemed more important. Other approaches also were considered.

After some initial hesitation, the Subcommittee has come to believe that the best approach is to abrogate Rule 84 and the Rule 84 forms. Several considerations support this conclusion. One important consideration is the amount of work that would be required to assume full responsibility for maintaining the forms. Another consideration is that many alternative sources provide excellent forms. One source is the Administrative Office.

A further reason to abrogate Rule 84 is the tension between the pleading forms and emerging pleading standards. The pleading forms were adopted in 1938 as an important means of educating bench and bar on the dramatic change in pleading standards effected by Rule 8(a)(2). They — and all the other forms — were elevated in 1946 from illustrations to official status by adding to Rule 84 the present provision that the forms "suffice under these rules." Whatever else may be said, the ranges of topics covered by the pleading forms omit many of the categories of actions that comprise the bulk of the federal docket. And some of the forms have come to seem inadequate, particularly the Form 18 complaint for patent infringement. Attempting to modernize the existing forms, and perhaps to create new forms to address such claims as those arising under the antitrust laws (*Twombly*) or implicating official immunity (*Iqbal*), would be very difficult considering the case-specific pleading required by *Twombly* and *Iqbal*.

Abrogation need not remove the Enabling Act committees entirely from forms work. The Administrative Office has a working group on forms that includes six judges and six court clerks. They have produced a number of civil forms that are quite good. The forms are available on the Administrative Office web site, some of them in a format that can be filled in, and others in a format that can be downloaded for completion by standard word-processing programs. The working group is willing to work in conjunction with the Advisory Committee. If Rule 84 is abrogated, a conservative initial approach would be to appoint a liaison

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from the Advisory Committee to work with the working group. New and revised forms could be reviewed, perhaps by a Forms Subcommittee. Experience with this process would shape the longer-term relationships. The forms for criminal prosecutions have been developed successfully with only occasional review by the Criminal Rules Committee. Similar success may be hoped for with the Civil Rules. The Administrative Office forms, moreover, would have to win their way by intrinsic merit, unaided by official status. A court dissatisfied with a particular form would not be obliged to accept it.

One and perhaps two particular forms require special consideration. Rule 4(d)(1)(D) requires that a request to waive service of process be made by Form 5. The Form 6 waiver is not required, but is closely tied to Form 5. It would be possible simply to remove this requirement, perhaps substituting a recital in the rule of the elements that must be included in the request and in the waiver. The corresponding Administrative Office forms are identical to Form 5 and virtually identical to Form 6. But without something in Rule 4(d) to mandate their use, the Administrative Office forms might not be uniformly employed. An alternative would be to adopt a request form, and perhaps a waiver form, as part of Rule 4. These forms were carefully developed as part of creating Rule 4(d), and might be carried forward into Rule 4 without change. It also would be possible to consider some revisions, even to Rule 4(d) itself, but it is not clear whether there is a need for change that justifies further delay in the Rule 84 project.

The Committee and Subcommittee ask this question: Does the Standing Committee have concerns about the possible abrogation of Rule 84 and its official forms?

II.C. CLASS ACTIONS: RULE 23

The Rule 23 Subcommittee Report to the Committee in November said that "[t]houghtful observation and fact-gathering, rather than immediate action, seem the order of the day." It will be some time before proposals to revise Rule 23 are made, if any are to be made by this Subcommittee.

At least three concerns account for the Subcommittee’s approach of "watchful waiting." The work of the Discovery and Duke Conference Subcommittees continues to command much of the Committee’s resources, and the work of at least the Discovery Subcommittee seems never to be done. In addition to the remaining uncertainties about the ways in which recent Supreme Court class-action decisions will play out in practice, the Court has granted certiorari in at least three class-action cases; one of them raises questions that bear directly on one of the central issues the Subcommittee thinks deserves attention. And it will be

important to gain broader input to identify which issues should be considered — and perhaps addressed — without attempting a complete review of all possible Rule 23 issues.

The tentative lists of potential issues reported in November are copied here in the hope of eliciting reactions and guidance as to the importance of these issues and, perhaps more important, as to other issues that also deserve attention. The lists are tentative not only in identifying issues but also in allocating them between "front burner" and "back burner" status. All observations are welcome.

"Front burner" issues

(1) Settlement class certification

(2) Class certification and merits scrutiny

(3) Issues classes under Rule 23(c)(4)

(4) Refining or improving criteria for settlement review under Rule 23(e)

(5) Rule 23(b)(2) and monetary relief

"Back burner" issues

(1) Fundamental revision of Rule 23(b)

(2) Revisiting Rule 23(a)(2)

(3) Requiring court approval for "individual" settlement of cases filed as putative class actions

(4) Revisiting the "predominance" or "superiority" language in Rule 23(b)(3)

(5) Revising the notice requirements of Rule 23(c), and considering notice by means other than U.S. mail

(6) Responding to the Supreme Court's *Shady Grove* decision by confirming district court discretion in deciding whether to certify a class

(7) Addressing choice of law in Rule 23

(8) Revisiting Rule 23(h) and standards for attorney-fee awards in class actions

(9) Addressing the binding effect of a federal court's denial of certification or refusal to approve a proposed class-action settlement

(10) Addressing the propriety of aggregation by consent.

(Another issue may be added in conjunction with the Appellate Rules Committee, which has begun consideration of a proposal to require court approval when an objector seeks to dismiss an appeal from a class-action judgment. Both Committees

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recognize that these questions implicate both the Appellate and Civil Rules.)

II.D. PLEADING STANDARDS

Pleading standards were included in the agenda materials for the Committee's meetings in March and November, as they have been included in the materials for every meeting since the 2007 decision in the *Twombly* case. Discussion at the March meeting was brief. There was no discussion at the shortened November meeting.

The Committee has been provided many alternative approaches to revising pleading standards. Some focus directly on pleading standards. Others look to integrating discovery with practice on motions to dismiss, spurred in part by concerns about the difficulty plaintiffs face in pleading cases with "asymmetrical information." Expansion of the motion for a more definite statement also has been sketched.

The Committee feels that it should await further development of the case law and the results of a pending FJC study before considering whether amendments to the pleading rules are warranted. The lower courts continue to engage in an essentially common-law process of refining pleading practices, and new lessons remain to be learned from this process. The Federal Judicial Center is launching a project to study all Rule 12 motions, not only 12(b)(6) motions to dismiss for failure to state a claim, and will include motions for summary judgment as well.

The time to take up these topics may come when the FJC study is complete. Or it may come when there is a sense that lower courts have come about as far as can be, if the outcomes seem to be substantial disuniformity among courts or general pleading standards that seem too relaxed or too demanding. It might even be that the cases show a need to develop specific pleading standards for particular categories of cases, generalizing on the models provided by Rule 9. The Committee will continue to monitor developments and will keep the Standing Committee apprised of its thinking.

II.E. DELAYED RULINGS ON MOTIONS TO REMAND REMOVED ACTIONS

Jim Hood, Attorney General of the State of Mississippi, wrote to this Committee to propose two amendments to the Federal Rules of Civil Procedure. The proposals are prompted by frustration with delays in ruling on motions to remand actions brought "to protect citizens from corporate wrongdoing," often

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presenting a need for immediate protection. In one case the court of appeals issued mandamus to direct a prompt ruling on a motion to remand that had been pending for three years. In another case it took 15 months to get a ruling on the motion to remand.

General Hood proposed two new rules provisions. One would require "automatic remand of cases in which the district court takes no action on a motion to remand within 30 days." The second would require the removing party to pay all actual expenses, including attorney fees, incurred as a result of removal when remand is ordered.

It is easy to understand a litigant's sense of frustration with what seem undue delays in ruling on remand. Without knowing the detailed circumstances of these two cases — apart from the fact that relief was granted by extraordinary writ in one of them — it may be assumed that the district court should have managed its docket and the complexities of the motions in a way that provided prompter rulings.

Interesting questions could be identified in fleshing out the details of these proposals. The Committee concluded, however, that each is a matter calling for action by Congress, not by Rules Enabling Act committees. The automatic remand rule would at times result in surrendering federal subject-matter and removal jurisdiction over an action properly brought to the federal court. Congress controls subject-matter jurisdiction. The Civil Rules do not. Rule 82, indeed, expressly provides that the rules "do not extend or limit the jurisdiction of the district courts." The award of expenses and attorney fees on remand is addressed by 28 U.S.C. § 1447(c), which makes the award discretionary. The Supreme Court has confirmed that there are circumstances in which there are good reasons to deny an award of expenses and fees. Whatever else might be thought of Enabling Act authority to address this question, it is more fitting to submit this question to Congress.

Judge Sutton has conveyed to Attorney General Hood the Committee's response.

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DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

NOVEMBER 2, 2012

The Civil Rules Advisory Committee meeting scheduled for November 1 and 2, 2012, was held on November 2 at the Administrative Office of the United States Courts. The meeting was shortened in order to adjust to the transportation difficulties caused by Storm Sandy. Many participants and observers gathered at the Administrative Office. Others participated by video- or audio-conference systems. Participants included Judge David G. Campbell, Committee Chair, and Committee members John Barkett, Esq.; Elizabeth Cabraser, Esq.; Hon. Stuart F. Delery; Judge Paul S. Diamond; Judge Paul W. Grimm; Peter D. Keisler, Esq.; Dean Robert H. Klonoff; Judge John G. Koeltl; Judge Michael W. Mosman; Judge Solomon Oliver, Jr.; and Judge Gene E.K. Pratter. Justice Randall T. Shepard and Anton R. Valukas, Esq., whose second terms as Committee members concluded on October 1, also participated. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Judge Jeffrey S.Sutton, Chair, Judge Diane P. Wood, and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge Arthur I. Harris participated as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., the court-clerk representative, also participated. The Department of Justice was further represented by Theodore Hirt, Jonathan F. Olin, and Allison Stanton. Joe Cecil and Emery Lee participated for the Federal Judicial Center. Peter G. McCabe, Jonathan C. Rose, Benjamin J. Robinson, and Julie Wilson represented the Administrative Office. Observers included Henry D. Fellows, Jr., Esq. (American College of Trial Lawyers); Joseph D. Garrison, Esq. (National Employment Lawyers Association); Rachel Hines, Esq. (Department of Justice); Brittany K.T. Kauffman, Esq. (Institute for the Advancement of the American Legal System); John K. Rabiej (Duke Center for Judicial Studies); Jerome Scanlan (EEOC);Alfred W. Cortese, Jr., Esq., and Alex Dahl (Lawyers for Civil Justice); John Vail, Esq. (American Association for Justice); Thomas Y. Allman, Esq.; William P. Butterfield, Esq., Richard Braman, Esq., Conor R. Crowley, Esq., John J. Rosenthal, and Kenneth J. Withers, Esq. (Sedona Conference); Zviad V. Guruli, Esq.; and Jonathan M. Redgrave, Esq.

All participants' statements were recorded by audio means.

Judge Campbell opened the meeting by thanking all participants for joining the meeting in this unusual format. The meeting is just that, the meeting that was formally noticed for this day and place. Business will be conducted as usual, just as if all participants were physically present at the Administrative Office. Observers will be afforded opportunities to speak in the usual routine.

Judge Campbell also noted the death of Mark R. Kravitz, former chair of this Committee, who died on the last day of his first year

as chair of the Standing Committee. He was a beloved friend and leader. The Committee's thoughts and prayers are with his family. A memorial service will be held on November 17 in New Haven. Memorial funds have been established in Mark's name.

Judge Campbell introduced Judge Sutton as the new chair of the Standing Committee. He will make as formidable a team with Reporter Coquillette as former chairs have made.

This is the last meeting for outgoing members Shepard and Valukas, who have completed their terms. Judge Colloton has moved over to chair the Appellate Rules Committee, taking the position vacated by Judge Sutton. All three have made substantial contributions to the Committee. Lawyer Valukas brought rich experience, great expertise, and solid common sense to bear, particularly in his unstinting contributions to the work of the Discovery Subcommittee. Chief Justice Shepard has been a pillar of the judiciary for many years before serving on this Committee, serving prominently in the Conference of Chief Justices among many other positions, and regularly contributed the broad perspectives of state courts. Judge Colloton will fare well in the Appellate Rules Committee; if past experience is a guide, there is a strong prospect that joint projects will bring the Appellate and Civil Rules Committees together during his term.

The Judicial Conference approved the proposed amendments to Rule 45 at its September meeting. Rule 45 was on the consent calendar, suggesting that the Conference believes that the proposals are good. Rule 45 is headed next to the Supreme Court.

March 2012 Minutes

The draft minutes of the March 2012 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

Meeting Format

Judge Campbell described the format for the meeting. The meeting is scheduled for four hours. The Discovery Subcommittee proposal for a revised Rule 37(e) on preservation and sanctions will be discussed first. If full discussion can be had in the time available, the goal will be to take a vote on the Subcommittee proposal to present the revised rule to the Standing Committee at its January meeting with a recommendation to approve publication in the summer of 2013. The sketches prepared by the Duke Subcommittee will come next. The proposal of the Rule 84 Subcommittee will follow, with the expectation that it will not require lengthy discussion. If time remains, two other matters will be presented

for a vote. First are the proposals advanced by Attorney General Hood, of Mississippi, to adopt a rule requiring speedy disposition of motions to remand removed actions to state court and a rule requiring that the removing party pay all costs, including attorney fees, incurred by removal of an action that is remanded. The second is a proposal to correct a potential style misadventure in Rule 6(d).

The procedure for the proposals of the Discovery Subcommittee, Duke Conference Subcommittee, and Rule 84 Subcommittee will begin with presentations by the Subcommittee chairs and the Reporter with first-line responsibility for each. Then each Committee member and liaison will be called on in turn for comments and advice. If time allows, observers will be invited to participate. Voting, when a matter requires a vote, will be by polling each member unless discussion shows apparent agreement that can be confirmed by asking whether there is any disagreement with the seeming consensus.

Comments on other matters reflected in the agenda materials, and also on matters that are discussed at the meeting, can be sent to Judge Campbell as committee chair and to the chairs of the Subcommittees.

New Rule 37(e)

Judge Grimm introduced the Rule 37(e) proposal. The materials begin at page 121 of the agenda materials; the draft rule begins at page 127, followed by the draft Committee Note.

The proposal reflects nearly two and a half years of Subcommittee work, beginning soon after the Duke Conference and building on the unanimous recommendation of the panel that a preservation rule be adopted. A miniconference on advanced drafts was held in Dallas in November, 2011. Further work developed drafts that were presented to the Committee for discussion in March, 2012. The Subcommittee work continued through a series of seven conference calls held from July 5 through the end of September, each lasting for at least an hour. Subcommittee members accomplished an extraordinary amount of work. Submissions were received from the Sedona Conference in the form of a not-yet-final draft that included model rule language; from John Vail, who raised questions about the relationship between federal rules and state spoliation law as mediated through the Erie doctrine, issues that are being considered; Lawyers for Civil Justice has from the beginning provided helpful guidance and suggestions; Tom Allman has offered observations about local rules that might affect preservation of electronically stored information.

The recommendation is to adopt the new provisions as a

131 replacement for present Rule 37(e). Earlier drafts had been framed
132 as a new Rule 37(g), but they have evolved to a point that protects
133 everything that has been protected by present Rule 37(e) and
134 protects much else as well.

135 The draft lists factors to aid in determining what is
136 reasonable preservation, and what curative measures or sanctions to
137 employ. The Subcommittee did not reach consensus on the factors
138 listed in draft 37(e)(3)(C)(requests to preserve) and (D)(a party's
139 resources and sophistication in litigation). Some feared that
140 listing these factors might unintentionally increase burdens in
141 litigation. Guidance will be asked on that.

142 Guidance also will be sought on Note language set out in
143 brackets at lines 123-128 on page 131 of the agenda materials. This
144 paragraph says that even an intentional attempt to destroy
145 information does not support sanctions under the rule if the
146 attempt fails. It does no more than state one of the things that is
147 clear from the rule text — the rule applies only when a party fails
148 to preserve information.

149 Several key features of proposed Rule 37(e) deserve note.

150 Unlike present Rule 37(e), the proposed rule applies to all
151 forms of information, not only electronically stored information.

152 As compared to some threads in present case law, the rule
153 provides more comprehensive protection for those who inadvertently
154 and in good faith lose information.

155 The limitations of consequences for losing information are
156 reflected in the distinction between proposed paragraphs (1) and
157 (2). A distinction is drawn between remedies — curative measures —
158 and sanctions. Remedies include such tools as additional discovery,
159 restoring lost information or developing substitute information,
160 and paying expenses (including attorney fees) caused by the failure
161 to preserve. Sanctions are available under paragraph (2) only if
162 the failure to preserve caused substantial prejudice in the
163 litigation and was willful or in bad faith.

164 Rule 37(e) is intended to create a uniform national standard.
165 Both at the Duke conference and the miniconference many
166 participants complained that disuniformity among federal courts
167 leads to vast over-preservation as they feel a need to comply with
168 the most onerous standard identified by any one court.

169 Proposed 37(e)(2) authorizes use of any of the sanctions
170 listed in Rule 37(b)(2) even though there is no order to preserve.
171 But substantial prejudice plus willfulness or bad faith must be

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172 shown, except for the very limited circumstances described in
173 (c)(2)(B) where the failure irreparably deprives a party of any
174 meaningful opportunity to present a claim or defense. The working
175 example of this category is destructive testing of a product that
176 makes it impossible for other parties to perform their own tests.

177 Present Rule 37(e) is limited to regulating sanctions "under
178 these rules." That limit is discarded in the proposal. The purpose
179 is to make it unnecessary to resort to inherent authority. There is
180 a lot of loose language in the cases about inherent authority.
181 (e)(2)(A), requiring substantial prejudice and bad faith or
182 willfulness, encompasses all the circumstances in which it would be
183 appropriate to rely on inherent authority.

184 The several factors listed in proposed Rule 37(e)(3) stress
185 reasonableness and proportionality. They apply only when there is
186 a failure to preserve.

187 Professor Marcus added that the Subcommittee went through many
188 issues at length. Andrea Kuperman provided an excellent memorandum
189 on reported uses of current Rule 37(e), supporting the conclusion
190 that the proposal does not take away any protection that has been
191 important. He further noted that Judge Harris has suggested some
192 possible wording changes in proposed (e)(3) that will be considered
193 by the Subcommittee. And there was a high level of consensus in the
194 Subcommittee on the proposal. Even as to the items that failed to
195 achieve consensus there was not much dissent.

196 Judge Grimm reiterated that the Subcommittee is proposing that
197 Rule 37(e) be recommended to the Standing Committee for
198 publication. It seeks a Committee vote, subject to the
199 Subcommittee's further consideration of the argument that there may
200 be Erie problems in relating to state spoliation law, and to
201 reviewing the wording suggested by Judge Harris. If the
202 Subcommittee concludes that any significant change should be made
203 in the proposal, it will seek a Committee vote by e-mail.

204 Judge Campbell summarized the most prominent issues for
205 discussion: Should subparagraphs (e)(3)(C) and (D) go forward?
206 Should the Note language about unsuccessful attempts to destroy
207 information be omitted? If a draft proposal is approved by
208 Committee vote, it will go to the Standing Committee at the January
209 meeting with a recommendation to publish next summer. This schedule
210 will be particularly helpful if a package of Duke Subcommittee
211 proposals can be approved at the April meeting, so that both sets
212 of recommendations can be published at the same time.

213 Committee members and liaisons spoke in order.

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The first member expressed concern that (e)(3)(C) and (D) "are not necessary." They are simply elaborations of factor (B), looking to the reasonableness of the party's efforts to preserve information. And for that matter, (B) should be cut short: "the reasonableness of the party's efforts to preserve the information;~~, including the use of a litigation hold and the scope of the preservation effort;~~ There is no need to elaborate the reasonableness requirement in (C) and (D), and there is a potential for mischief. Apart from these matters, the proposal "is fine."

The next Committee member offered "only a brief editorial. We will continue to face problems, but the rule will advance the courts' ability to solve the problems." It will not constrain desirable solutions. Sanctions will be focused.

Support was then offered for factor (C), dealing with requests to preserve. Participants in the miniconference focused on over-preservation resulting from a lack of guidance. It is wrong to assume that lawyers cannot talk to each other. We should encourage them to talk about preservation, to substitute dialogue for "gotcha" tactics. Factor (D), on the other hand, is a "rabbit hole." How should a court determine whether a lawyer or a party is "sophisticat[ed] in litigation"? This serves no purpose.

A judge tended to agree that (C) and (D) are not necessary, but thought that the package could be supported even if they are included.

Another member thought this is a "nicely constructed rule," that offers good answers to difficult questions. An initial reaction that factor (C) on requests to preserve should be dropped has been discarded in favor of the arguments that lawyer dialogue should be encouraged. Factor (D) is an additional concern. As (e)(3) is framed, a party's resources and sophistication are considered both in determining what is reasonable preservation and in determining whether there is bad faith or willfulness. But resources and sophistication are relevant to bad faith or willfulness only in rare circumstances. If (D) is retained, courts may be misled to think it is relevant to bad faith or willfulness. The Note language on unsuccessful efforts to lose information is unnecessary; it should be dropped. Finally, the introductory language of (e) begins: "If a party fails to preserve discoverable information that reasonably should be preserved * * *." The problem is that no one is a party until an action is filed. It would be better to say information "that reasonably <u>should have been</u> preserved."

The next member thought it difficult to determine which of factors (A) through (F) in (e)(3) bear on reasonableness, which on

258 bad faith or willfulness. The Sedona Conference draft teases out
259 factors that relate to good faith. Should we attempt to
260 disaggregate the factors in (e)(3)? (It was noted that the
261 Subcommittee had considered this problem and had been afraid that
262 "more precision would generate unhelpful arguments." A further
263 response was a reminder that these factors "are illustrative, not
264 exhaustive." A court can find that some of them are irrelevant in
265 a particular case, and can consider factors not listed. It is
266 desirable to avoid complexity.)

267 A further note on drafting history observed that the
268 Subcommittee began with the thought of attempting to define precise
269 triggers for the duty to preserve. Draft (e)(3) is designed to
270 suggest the things that bear both on the criteria for litigants
271 and potential litigants to consider in undertaking preservation and
272 on thinking when the duty to preserve arises.

273 The next member in the rotation supported both factors (C) and
274 (D). (C) concerns, and will encourage, discussion among the
275 lawyers. (D) reflects concern individual parties lack
276 sophistication on questions of preservation, frequently have little
277 concept of what electronically stored information they have, and
278 are particularly vulnerable to losing data from social media. But
279 the note language on unsuccessful efforts to lose information
280 should be deleted.

281 Continuing along the Committee roster, another member
282 supported factor (C) in order to encourage discussions among the
283 lawyers. Factor (D) is important not only for individuals, but also
284 in dealing with the increasing frequency of litigation that
285 involves municipalities and counties that are financially strapped.
286 And it is good that the rule has been drafted in technologically
287 neutral terms that are likely to survive the advances of technology
288 over time.

289 A judge member reported that his initial view was that factors
290 (C) and (D) should be deleted, but that the discussion had
291 persuaded him otherwise. He had been worried about which of the
292 factors address which issues, but (D) — sophistication and
293 resources — goes to bad faith as well as reasonableness, and should
294 be retained. The rule "seems slanted toward big litigation," as
295 illustrated by the reference to "holds," but it will apply to all
296 litigation. It is the normal-scale litigation that (D) will serve.
297 The Note language on failed attempts to destroy information should
298 be deleted.

299 The next judge member commended the draft as ready to take the
300 next step to the Standing Committee. Shorter rules are better than
301 longer rules. Factors (C) and (D) should be dropped for this

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302 reason, and (B) should be shortened by deleting the references to
303 litigation holds and the scope of preservation. The value of
304 encouraging professional cooperation can be served by putting
305 factor (C) into the Committee Note. There is a drafting change that
306 would improve (2)(a). A recent long argument about the possible
307 ambiguity of antecedents in dealing with "and" "or" sequences
308 points to the need to at least insert a comma, or better to
309 rearrange it to read: "that the failure caused substantial
310 prejudice in the litigation and was willful or in bad faith." This
311 will make it clear that both willful or bad faith failures warrant
312 sanctions only if there was substantial prejudice. The Note
313 language on unsuccessful attempts to delete information should be
314 omitted.

315 The Department of Justice recognized that much hard work has
316 gone into developing proposed Rule 37(e), vigorously grappling with
317 the issues. The draft make progress. The Department has doubts
318 about how widespread the sanctions problems are. And there are
319 several reasons to conclude that it would be premature to vote on
320 the proposal today. The Department has not had time to do a full
321 review, nor have the agencies the Department represents. It must be
322 remembered that the Department appears on all sides of all the
323 varieties of litigation that come to federal courts — it is
324 involved in about one-third of the civil actions. It has not yet
325 come to a position on the proposal. Despite the real progress that
326 has been made in the proposed draft, the Department is not in a
327 position to vote for taking it forward with a recommendation for
328 publication.

329 At the same time, The Department can make some observations.
330 (1) It is right to address loss of all forms of information, not
331 just electronically stored information. (2)Invoking proportionality
332 as one of the factors to measure reasonable preservation is
333 strongly supported. (3) Present Rule 37(e) should be preserved. It
334 provides a safe harbor that has guided information technology
335 professionals in addressing some of these issues. Still, the same
336 considerations could be taken into account under the proposed rule.
337 (4) The proposed rule refers to failure to preserve "discoverable
338 information"; the Note should say expressly that Rule 26(b) defines
339 the scope of what is discoverable. (5) Willfulness and bad faith
340 can make sense as a concept for a standard, but achieving
341 uniformity may be advanced by providing a better developed
342 explanation in the Note. Without guidance, different courts will
343 interpret these words in different ways. (6) Proposed (e)(3)(A)
344 looks to "the extent to which the party was on notice that
345 litigation was likely," etc. This should include "should have
346 known"; a prospective party may "lose" information and claim lack
347 of actual knowledge. (7) Both factors (C) and (D) should be
348 omitted. (C), looking to requests to preserve, may encourage

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349 premature or very broad preservation demands early in the process.
350 Government agencies already are receiving such demands, often early
351 in the administrative process. "Dialogue is good, but this gets in
352 the way." So factor (D),looking to a party's resources and
353 sophistication in litigation, could be used against the government
354 because it has what seem to be vast resources and has a high level
355 of sophistication in litigation. (8) Factor (F), asking whether the
356 party sought timely guidance from the court, raises a question of
357 the relationship to dispositive motions. Is it expected that a
358 party will ask the court for guidance on preservation obligations
359 before rulings on dispositive motions, at a time when the scope of
360 discovery may seem broader than it will be after the motions are
361 resolved? (9) The Rule does not include a list of factors bearing
362 on the determination of "substantial prejudice" in (e)(2)(A). It
363 would help to describe such elements as materiality, the
364 availability of information from alternative sources, and so on.
365 (10) The note language on a failed attempt to destroy information
366 should be deleted — it is not necessary, even while it is not
367 objectionable.

368 Another Committee member expressed admiration for the work.
369 Factors (e)(3)(C) and (D) seem useful. And it is wise to include
370 factor (E), proportionality. Courts too often overlook the need for
371 proportionality, both in preservation and in discovery.

372 A liaison expressed ambivalence about retaining factors (C)
373 and (D), but suggested that "generally, shorter is better." The
374 note language on failed attempts to destroy information should be
375 removed. It is not clear which of the (e)(3) factors bear on
376 determining reasonable preservation, which on determining
377 willfulness or bad faith. Nor is it clear how they relate to the
378 choice of remedies under (e)(1) or sanctions under (e)(2). The rule
379 text might be studied further to see whether clarification is
380 feasible.

381 Another liaison said that the note language on unsuccessful
382 attempts to destroy information should be dropped.

383 A third liaison applauded the distinction between remedies,
384 (e)(1), and sanctions, (e)(2). The questions raised by factor (C),
385 requests for preservation, and (D), resources and sophistication,
386 stem from the fact that many problems can be resolved without
387 considering all of the suggested factors, and may require
388 consideration of others. The text should be clear that the court is
389 not required to consider all factors in every dispute. Perhaps
390 "the court should consider all relevant factors <u>where appropriate</u>
391 * * *." Public comments may help in considering these questions.
392 And the Note language on thwarted spoliation attempts should be
393 deleted.

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394 Judge Sutton lauded the draft rule as a terrific product. He
395 remained agnostic on factors (C) and (D) — they could be moved to
396 the Note as illustrations of what is reasonable preservation. The
397 Note language on extreme bad faith efforts that fail to lose
398 information should be expunged. And as a matter of caution, one
399 word might be added to (e)(2)(B): the failure to preserve, although
400 not willful or in bad faith, "irreparably deprived a party of any
401 meaningful opportunity to present a cognizable claim or defense *
402 * *."

403 Reporter Coquillette observed that "This is a long Note.
404 Delete anything you're not sure is necessary."

405 An observer agreed with the suggestion that (e)(3)(B) should
406 be shortened by deleting "~~including the use of a litigation hold~~
407 ~~and the scope of the preservation efforts~~." A hold is a technical
408 means of implementing preservation; probably it is not needed in
409 less complex litigations. (C) and (D) could be relegated to the
410 Note.

411 Another observer thought the draft "almost right." The
412 distinction between remedies and sanctions "is key." This
413 distinction is not well reflected in the case law, which generally
414 is under-reasoned. But (e)(2) raises a serious concern. It
415 precludes use of an adverse-inference instruction as a curative
416 measure by treating it as a sanction. This conflicts with the law
417 in many states. Under these state laws, preservation is a duty owed
418 not only to the court but to other parties. In some of them an
419 adverse inference instruction is available for a negligent failure
420 to preserve. This is a substantive state duty, and a substantive
421 state remedy. Erie doctrine and the limits of § 2072 forbid
422 invoking the proposed rule to limit the remedy provided by state
423 law when the federal court is resolving a state-law claim.

424 Yet another observer approved the drafting as "technology
425 agnostic," so it can survive through the continual changes of
426 technology. And it is good to cover all forms of information, not
427 only electronically stored information. But explicit reference to
428 a litigation hold as a factor in measuring reasonable preservation
429 "is too detailed." There is a risk that some parties or courts may
430 read this factor to require a written notice, when oral notice
431 might suffice. This can be relegated to the Note. Factor (C),
432 looking to requests to preserve, will generate overbroad — even
433 form — demands to preserve. We do need to encourage dialogue
434 between the parties, but this should be put in the Note on factor
435 (A), looking to the extent to which the party was on notice that
436 information would be discoverable in likely litigation. It also
437 could bear on factor (F), whether the party sought guidance from
438 the court. Factor (D), looking to a party's sophistication, may be

439 misapplied as courts mistakenly attribute sophistication in
440 litigation to small and medium-size companies that in fact are not
441 sophisticated. Again, this can be explored in the Note, but does
442 not belong in the rule. Still, there is room to be concerned that
443 individual litigants will be "hammered" for ignorantly doing things
444 that a business would not do. It is right to replace present 37(e)
445 with the new provisions, but the Note should carry forward the
446 protection for automatic processes that routinely destroy
447 information. And the Note language on unsuccessful bad-faith
448 attempts to destroy information is unnecessary.

449 Observers from the Sedona conference noted that the working
450 group had submitted a draft proposal in response to the Advisory
451 Committee's interest in receiving comments. A committee was formed.
452 It has considered not only Rule 37 but other topics addressed by
453 the Duke Subcommittee. The Rule 37 committee was formed as a
454 balance of those who primarily represent plaintiffs, or primarily
455 represent defendants, and corporate counsel. It did not achieve
456 complete consensus. The draft is a compromise. It has four main
457 characteristics: it provides a uniform sanctions standard; it is
458 not a tort-based duty; it requires heightened culpability for more
459 serious sanctions; and it avoids a false distinction between
460 sanctions and remedies.

461 The Sedona views were amplified. The distinction drawn between
462 remedies, proposed (e)(1), and sanctions, proposed (e)(2), is
463 false. Most courts view as sanctions the measures that (e)(1) would
464 characterize as remedies. Tying remedies to loss of evidence limits
465 courts in the future. Remedies can be appropriate even when there
466 is no loss of evidence. The focus in (e)(2)(A) on bad faith and
467 willfulness "will perpetuate confusions the courts exhibit now."
468 Bad faith is not the same as willfulness. The Sedona proposals take
469 a better approach in providing a list of factors that bear on "good
470 faith," moving away from a tort standard. Is the information
471 available from other sources? Is there material prejudice? Is the
472 motion for court action timely? The aim is to incentivize good
473 behavior, to consider "intent" as bearing on the weight of the
474 sanctions. For the "Silvestri" problem addressed by (e)(2)(B),
475 Sedona relies on "absent exceptional circumstances." That is better
476 than looking for irreparably depriving a party of any meaningful
477 opportunity to present a claim or defense, a concept that will
478 generate huge litigation. How does this differ from the
479 "substantial prejudice" invoked in (e)(2)(A)?

480 The Sedona group also moved away from rule text addressing
481 requests to preserve, the (e)(3)(C) factor, for reasons expressed
482 by other participants. So too it rejected (D), looking to a party's
483 sophistication and resources, because that will be unfair to
484 corporations: consider the preservation burdens that might be

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485 imposed on a corporation with such far-flung activities as to be
486 involved in 15,000 litigations, generating great sophistication.
487 Factor (F), seeking guidance from the court, raises problems with
488 information claimed to be privileged: how does the party seek, and
489 the court give, meaningful guidance?

490 Finally, the Sedona draft approaches sanctions differently.
491 Rather than incorporate Rule 37(b)(2), they specifically enumerate
492 sanctions. Spoliation sanctions are available only on showing
493 intent. And the rule text should incorporate a "least severe
494 sanction" provision. Proportionality does not bear on choosing the
495 "weight" of the sanction. It does bear on determining the degree of
496 prejudice.

497 One of the Sedona observers added that speaking for himself,
498 it would be useful to step back from the present Rule 37(e) draft.
499 It will generate "a lot of litigation."

500 Judge Campbell suggested that the Committee needs to move
501 toward a conclusion. The discussion has provided many helpful
502 comments. There would be still more helpful comments if the
503 discussion were continued for another three or four years. The
504 Subcommittee has worked hard for two and a half years, including a
505 miniconference. It would be useful to take this to the Standing
506 Committee in January with a recommendation to approve publication.
507 The Subcommittee will continue to polish the proposal for
508 submission to the Standing Committee. Presenting a proposal for
509 publication will support a thorough discussion in the Standing
510 Committee. The Standing Committee can judge whether it is ready for
511 publication. Of course the proposal could be deferred for further
512 work at the April Advisory Committee meeting, to present it to the
513 Standing Committee for the first time at its spring meeting.
514 Perhaps the better course is to aim for the January meeting.

515 Judge Sutton noted that the Rule 37(e) proposal interacts with
516 the Duke Conference Subcommittee drafts. The Standing Committee can
517 devote more time to thorough discussion of the 37(e) proposal in
518 January than can be found in the more crowded spring agenda. The
519 Subcommittee can continue to work on the draft that will go to the
520 January agenda. It makes sense to vote now.

521 Four Committee votes were taken. By vote of 7 to 4, the
522 Committee voted to retain Rule 37(e)(3)(C), listing requests for
523 preservation among the factors to be considered in determining what
524 is reasonable preservation and whether there is bad faith or
525 willfulness. By vote of 6 to 5, the Committee voted to delete the
526 next factor, (D), looking to a party's resources and sophistication
527 in litigation. The Committee voted unanimously to delete the draft
528 Note language discussing a deliberate but unsuccessful effort to

529 spoil discoverable information. The Department of Justice voted
530 against sending the proposal to the Standing Committee in January;
531 all other members voted in favor.

532 *Duke Conference Subcommittee*

533 Judge Koeltl introduced the report of the Duke Conference
534 Subcommittee. The report to be considered is not the version that
535 appears in the original agenda materials but a revised version
536 circulated a week before this meeting. The revised version includes
537 new sketches that reflect a Subcommittee conference call held after
538 the October 8 miniconference in Dallas. The rules amendments
539 sketched in the report constitute a package. Some are more
540 important than others. Some still will be discarded, and perhaps
541 others will be added. As a whole, the package is aimed to reduce
542 expense and delay, to promote access to the courts, to serve the
543 goals of Rule 1. "We have come far."

544 The sketches will be described in three groups, but there is
545 no priority among the groups. And they will be discussed together.

546 The first group begins with a set of changes that would
547 accelerate the first stages of an action. The time to serve process
548 set out in Rule 4(m) would be reduced from 120 days to 60 days. The
549 alternative times for issuing the scheduling order would be
550 reduced. Rule 16(b) now sets the time as the earlier of 120 days
551 after any defendant has been served or 90 days after any defendant
552 has appeared. The proposals would reduce the 120-day period to 60
553 days, or possibly 90; the 90-day period would be reduced to 45, or
554 possibly 60. The extent of the reduction will be determined after
555 hearing more advice. Discussion at the miniconference suggested
556 that two further proposals be considered — carrying forward the
557 authority for local rules that exempt categories of cases from the
558 scheduling-order requirement, and allowing exceptions to the timing
559 requirement for good cause.

560 The next change in the first group would change the scope of
561 discovery defined by Rule 26(b)(1). Discovery would be limited to
562 what is proportional to the needs of the case as measured by the
563 cost-benefit calculus now required by Rule 26(b)(2)(C)(iii).
564 Participants in the miniconference expressed ready acceptance of
565 these factors. Further changes would delete the present authority
566 to order discovery extending to the subject matter of the action,
567 confining all discovery to what is relevant to the claims or
568 defenses of the parties. In addition, the sentence allowing
569 discovery of information that appears reasonably calculated to lead
570 to the discovery of admissible evidence is shortened, so as to
571 provide only that information need not be admissible in evidence to
572 be discoverable. This change reflects experience, shared by the

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573 miniconference participants, that in operation many lawyers and
574 judges read the "reasonably calculated" phrase to obliterate all
575 limits on the scope of discovery; any information may lead to other
576 evidence that is relevant and admissible. These changes result in
577 a shorter, clearer rule that incorporates a concept of
578 proportionality made workable by adopting the (b)(2)(C)(iii)
579 factors.

580 The third set of changes in the first group look to limits on
581 the numbers of discovery requests that are allowed. The presumptive
582 number of Rule 33 interrogatories would be reduced from 25 to 15.
583 A new limit of 25 Rule 36 requests for admissions would be added,
584 with an exception for requests to admit the genuineness of
585 documents. Another new limit would set 25 as the number of Rule 34
586 requests; this limit has encountered objections that it would lead
587 to a smaller number of broader requests, while other participants
588 in the miniconference thought that real experience shows this is
589 not a problem. The number of depositions allowed per side would be
590 reduced from 10 to 5, and the time limit for each would be reduced
591 from 7 hours to 4 hours. There was support for the deposition
592 limits, but also some resistance from those who think the reduction
593 is both unnecessary and unrealistic. But there seemed to be general
594 agreement that a reduction of the presumptive time from 7 hours to
595 6 hours per deposition would work.

596 The second group starts with a sketch that would allow
597 discovery requests to be served before the parties' Rule 26(f)
598 conference; the time to respond would run from the close of the
599 conference. This sketch in part responds to a perception that the
600 Rule 26(d) moratorium barring service of discovery requests before
601 the parties have conferred is often ignored or not even known. Pre-
602 conference requests would enhance both the parties' conference and
603 the scheduling conference with the court by providing a specific
604 focus on actual discovery requests. It may be wise to impose some
605 hiatus after filing before the requests can be served.

606 The next set of proposals in the second group focuses on
607 objections to Rule 34 requests to produce. Objections would become
608 subject to the same specificity requirement as Rule 33 imposes on
609 objections to interrogatories. An objecting party would be required
610 to state whether any documents are being withheld under the
611 objections. If a party elects to produce documents rather than
612 permit inspection, the response must state a reasonable time when
613 production will be made; this sketch recognizes the value of
614 "rolling" production.

615 The third proposal in the second group focuses on encouraging
616 cooperation among the parties. The Subcommittee favors a more
617 modest sketch that would amend Rule 1 to make clear that the rules

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618 should be employed by the parties to achieve the Rule 1 goals of
619 just, speedy, and inexpensive determination of the action. The
620 Subcommittee feared the collateral consequences of a more
621 aggressive sketch that would add to Rule 1 a new final sentence
622 stating that the parties should cooperate to achieve these ends.

623 The third group of proposals includes some that have proved
624 uncontroversial. One would add to the list of subjects suitable for
625 a scheduling order a direction to seek a conference with the court
626 before filing a discovery motion. Related sketches would expand the
627 topics for the scheduling order, and for the parties' Rule 26(f)
628 conference, to include preservation of electronically stored
629 information and entry of court orders under Evidence Rule 502(e).
630 Other sketches in the third group are likely to be deferred. One
631 would adopt a uniform set of exemptions from Rule 26(a)(1) initial
632 disclosures and from mandatory scheduling conferences. This topic
633 will benefit from further research. Another set would defer the
634 time to respond to contention discovery under Rules 33 and 36. The
635 questions posed by initial disclosures under Rule 26(a)(1) reflect
636 a significant difference of views about the practice that may be
637 illuminated by developing practice in some states. Some sketches
638 deal with cost-shifting in discovery; more work is required, but
639 there is a consensus that the allocation of costs should be added
640 as a possible provision of a protective order.

641 Professor Cooper added two points. A sketch that would amend
642 Rule 26(g) to state specifically that a discovery objection or
643 response is not evasive has been put aside in deference to the
644 fears of many miniconference participants who thought this
645 provision would generate much litigation as a "sanctions tort." The
646 general certifications imposed by Rule 26(g) should embrace evasive
647 responses and objections in any event. And it may be worthwhile to
648 consider further a sketch that, omitting depositions, would allow
649 discovery requests under Rules 33, 34, 35, and 36 to be served (or
650 a Rule 35 motion to be made) at any time after the action is filed.
651 The old practice that enabled a plaintiff to get a head start and
652 claim priority in all discovery has been abandoned and, in light of
653 Rule 26(d)(2), should not be a problem. This approach would avoid
654 the awkward choices that must be made in drafting an initial no-
655 discovery hiatus, to be followed by requests served before the Rule
656 26(f) conference. Time to respond still would be measured from the
657 Rule 26(f) conference. Some concerns would remain — it may not
658 always be clear when the first 26(f) conference has been held, and
659 the advance notice might make it more difficult for a responding
660 party to persuade the court that it needs still more time to
661 respond.

662 These multiple questions were again submitted to the Committee
663 for a sequential "roll call" of the members.

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664 The first member thought that shortening the time for service
665 and accelerating the timing of the scheduling conference makes
666 sense. This will get the litigation going. Far more important, the
667 proposal to make proportionality an express limit on the scope of
668 discovery under Rule 26(b)(1) is right on target. More and more
669 judges rely on proportionality in applying the cost-benefit
670 analysis of Rule 26(b)(2)(C)(iii). The other changes in (b)(1) also
671 are OK. There is no apparent problem with the present Rule 33
672 presumptive limit to 25 interrogatories, but there also is likely
673 to be no problem if the limit is reduced to 15. Adding numerical
674 limits to Rule 36, with an exception for requests to admit the
675 genuineness of documents, also is appropriate. Imposing a
676 presumptive limit of 25 requests to produce under Rule 34 is not
677 obviously right; it will be difficult, however, to define the right
678 number. But it is clear from practice, and experience in mediating
679 and arbitrating, that "Rule 34 can be handled in a smart way." As
680 for the number of depositions, most cases now involve 5 or fewer
681 per side; a reduction from 7 hours to 6 hours would be fine.
682 Allowing discovery requests before the Rule 26(f) conference is
683 good, but setting the time to respond from the conference may be
684 difficult because it may not be clear when the conference has
685 ended. It is good to require that Rule 34 objections be specific
686 and that the responding party state whether anything is being
687 withheld under the objections. Requiring the responding party to
688 state a reasonable time when production will be made is good.
689 Bringing the parties into Rule 1 is a good idea. But it may be
690 better to refer to "collaboration" rather than "cooperation.

691 The next member said that it can work to reduce the
692 presumptive limits on the number of discovery requests so long as
693 it is clear that they are only presumptive, that the parties and
694 court should be alert to the need for flexibility in making
695 exceptions. Allowing discovery requests before the Rule 26(f)
696 conference will be good — it will eliminate confusion about the
697 Rule 26(d) discovery moratorium. Adding the concept of party
698 cooperation to Rule 1 is good, but "collaboration" may be a better
699 concept to use. "Anything that promotes Evidence Rule 502 is good."

700 Applauding the package, the next member said that it is
701 important to keep within the § 2072 limit that bars abridging,
702 enlarging, or modifying any substantive right. Many outside
703 observers want changes that would violate that limit. These
704 proposals do not. Litigation will, gas-like, expand to fill the
705 available volume; the proposed acceleration of the first steps in
706 an action reflect the reality of the smaller cases that are the
707 staple of federal litigation and that do not need so much time.
708 "The attempt to eliminate boilerplate objections is worthy." The
709 Evidence Rules Committee believes that Evidence Rule 502 is
710 underused by the bar; amending the Civil Rules to draw attention to

711 it is good.

712 Another member expressed support for the package.

713 Two more members noted support for the package in the terms
714 used by the earlier speakers. One suggested support for the "Utah"
715 model that would set limits on depositions by allocating a finite
716 number of hours per party or side, leaving it to the parties to
717 divide the total time budget among depositions — one might be held
718 to a single hour, while another might run far longer.

719 The next member offered comments in supporting the general
720 package. The "not controversial" proposals are good. Requiring that
721 Rule 34 objections be specific is good. Asserting that lawyers are
722 responsible for achieving the goals of Rule 1 is good. As for
723 allowing discovery requests to be served before the Rule 26(f)
724 conference, "I haven't seen any problems, but if the Subcommittee
725 sees them," the proposal is OK. Moving up the time for the 16(b)
726 scheduling conference is attractive, but perhaps it should be 90
727 days after any defendant is served or 60 days after any defendant
728 appears. Limiting the presumptive number of discovery requests is
729 appropriate if it is made clear that there is room for flexibility
730 through judicial discretion. Incorporating proportionality into the
731 Rule 26(b)(1) scope of discovery is good.

732 A Subcommittee member noted the need to focus on the
733 "philosophical" question posed by the risk of making rules so
734 specific as to interfere with the judge's case-management
735 discretion. Should some of these issues be dealt with by educating
736 the bench and bar, one of the initial efforts launched by the
737 Subcommittee after the Duke Conference? That could reduce the need
738 to incorporate numerical and time limits in the rules. But
739 shortening the time periods for serving process and holding the
740 first scheduling conference is obviously right.

741 The Department of Justice thinks the package is impressive,
742 but is still thinking about some of the components. The Department
743 wholeheartedly endorses incorporating the concept of
744 proportionality in Rule 26(b)(1). There are practical problems for
745 the Department in accelerating events at the beginning of an
746 action. Federal government defendants are given more time to answer
747 for reasons that also apply here. It takes time to get the case to
748 the right lawyers, and then for the lawyers to get to the right
749 people with the right information. Early discovery requests cut
750 against the value of an initial conference with the court on what
751 the scope of the case actually will be, and seem inconsistent with
752 the values of initial disclosures. Accelerating the time when
753 requests are actually reduced to writing "may make things worse."
754 The question is how best to focus discovery on what the actual

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755 issues in the case will be. (In response to a question about the
756 importance of initial disclosures in this process, it was repeated
757 that they are helpful in the early discussions about what discovery
758 is needed. Writing detailed requests before the initial discussion
759 will lead to broader requests, or requests based on misinformation
760 or misperception.) As to the presumptive numerical limits on
761 discovery, "there is a bit of a division within the Department." It
762 will be essential to ensure that courts understand their flexible
763 authority to set appropriate parameters.

764 Another member thought it very attractive to permit discovery
765 requests to be served before the initial conference, running the
766 time to respond from the conference.

767 The last Committee member to speak said that the broad slate
768 of proposals promises a good cumulative effect on the way discovery
769 is conducted. "There is a possibility of significant improvement."

770 A liaison reminded the Committee that adoption of these
771 proposals would create a need to make conforming amendments to the
772 Bankruptcy Rules that incorporate the Civil Rules. Bankruptcy Rule
773 1001, for example, incorporates Civil Rule 1.

774 The clerks-of-court liaison stated that shortening the Rule
775 4(m) time for service to 60 days makes sense from the clerks'
776 perspective. It is not clear whether it is feasible to shorten the
777 time for the initial scheduling conference and order.

778 Another liaison thought the package "an amazing distillation
779 of the Duke Conference." A cap on the total number of hours for all
780 depositions seems attractive. As Professor Gensler observed, it is
781 easier to manage up from a floor than to manage down. It is
782 important that case-management discretion remain, and be well
783 recognized.

784 Reporter Coquillette observed that any addition to Rule 1 that
785 affects attorney conduct must confront the consequent impact on the
786 rules of professional responsibility. These are matters of state
787 law that present big issues.

788 Judge Campbell observed that the package of proposals remains
789 a work in progress. The Subcommittee and Committee remain open to
790 further suggestions.

791 An observer underlined the concern that applying Rule 1 to
792 the parties "raises a vast array of questions that may be
793 inconsistent with the adversary system of justice." Even speaking
794 of "cooperation" among the parties in a Committee Note "is only
795 slightly less objectionable" than putting it in a rule text. He

796 further suggested that discovery requests before the Rule 26(f)
797 conference are premature. The conference should be mostly about
798 defining the issues in the action.

799 Another observer suggested that cooperation among the parties
800 should be addressed in the Committee Note, not in rule text. The
801 Sedona committee proposal is to amend Rule 1 to provide that the
802 rules "should be construed, complied with, and administered" to
803 achieve the Rule 1 goals.

804 Judge Koeltl expressed appreciation for all of these
805 contributions. The Subcommittee will continue to work on the
806 drafts. Further comments will be welcomed. "We have had a lot of
807 supporters as we have gone forward." Detailed models will be
808 helpful in addressing such matters as the number of depositions,
809 the length of depositions, allowing discovery requests before the
810 Rule 26(f) conference (including whether there should be a hiatus
811 between initial filing and serving the requests), and other topics.
812 The Subcommittee expects to have a package of proposals ready for
813 consideration at the April Advisory Committee meeting. All
814 proposals and comments will advance the work. The Subcommittee
815 believes the package will have a significant beneficial effect on
816 the conduct of litigation. But it is expected, and desirable, that
817 there will be still more comments and suggestions as the package is
818 scrutinized during the period for public comment. Earlier versions
819 of the package put aside many initial drafts, and the package has
820 been still further pruned. Detailed rule text and Committee Notes
821 will be prepared. The Subcommittee hopes they will win as much
822 enthusiastic response as the current drafts.

823 *Rule 84*

824 Judge Pratter introduced the report of the Rule 84
825 Subcommittee by stating that the Subcommittee hopes to ask approval
826 in April of a recommendation to the Standing Committee to publish
827 a specific proposal on what, if anything, to do with Rule 84. The
828 purpose today is to revisit the discussion at the March Advisory
829 Committee meeting. The discussion then seemed to show interest in
830 abrogating Rule 84. But later exchanges suggest some concern that
831 all competing considerations should be carefully weighed once more,
832 to ensure that we not move too fast.

833 Responding to this concern, the Subcommittee reached out to
834 find out who uses the Forms, and for what purposes. This effort
835 confirmed what had been suspected. Very few professionals or
836 practitioners use the Rule 84 Forms. Some think the forms cause
837 problems — the patent bar is agitated about the serious problems
838 they find in the Form 18 complaint for patent infringement. Many of
839 the lawyers who were contacted responded: "I don’t use the Forms;

840 perhaps someone else does." Lawyers instead use their own forms,
841 their firms' forms, Administrative Office forms, local forms, forms
842 provided by treatises, and forms from like sources.

843 The Forms have not received frequent attention from the
844 Advisory Committee. There is little enthusiasm for taking on the
845 task that would follow from assuming active responsibility for the
846 Forms. Meanwhile, the Administrative Office working group on forms,
847 composed of six judges and six court clerks, is doing a great deal
848 of attentive and conscientious work on AO forms. They deal with a
849 host of forms, including forms for civil actions. "They are really
850 good."

851 Judge Colloton has expressed concern that abrogation of the
852 pleading forms would bedevil the bench and bar in working out the
853 impact on pleading practice. He is concerned that the forms will
854 live on through the influence of decisions rendered while they
855 stood as official guides to pleading practice.

856 Many options are open. The Committee could do nothing, leaving
857 Rule 84 and the Forms to carry on as they are. Or it could
858 undertake a complete overhaul of the Forms. Or it could retain Rule
859 84 but shed all responsibility for ongoing maintenance and revision
860 — but it is questionable whether it would be either legal or wise
861 to delegate this Enabling Act responsibility. Or we could "defang"
862 Rule 84 by deleting the provision that the Forms suffice under the
863 rules, leaving them as mere illustrations. Or, as the Subcommittee
864 currently prefers, Rule 84 can be abrogated. The Subcommittee asks
865 advice on which direction it should pursue.

866 Judge Campbell elaborated Judge Colloton's concern that
867 decisions that have relied on the Forms in developing pleading
868 standards will live on, giving the Forms renewed life in the common
869 law. Or courts might view the Forms, no longer official, as still
870 a form of legislative history that illuminates the continuing
871 meaning of Rule 8 pleading standards. But Judge Colloton also
872 believes that the draft Committee Note does a good job of
873 addressing these questions; his concern is to make sure that the
874 Committee considers these things.

875 Reporter Cooper offered a few additional remarks. First, some
876 of the lawyers surveyed by the Subcommittee reported that they do
877 not use the Rule 84 Forms, but speculated that the Forms might be
878 helpful to pro se parties. But there seems to be little indication
879 that pro se parties often find the forms, much less use them. Some
880 courts are making attempts to aid pro se litigants by developing
881 local forms for common types of litigation, a process that may work
882 better than attempting to fill the need through the Enabling Act.
883 Second, abrogating the pleading Forms does not mean that none of

884 them should remain adequate under developing pleading standards.
885 Form 11, for example, may well suffice as a complaint for an
886 automobile accident case even though it would not do as a complaint
887 for negligence in more complicated settings. Finally, if Rule 84
888 is abrogated, the Committee will need to establish a system for
889 coordinating with the Administrative Office working group. It may
890 be wise to begin with a relatively conservative approach that
891 establishes a close connection, so that the Committee monitors the
892 process and is enabled to participate when that seems desirable.
893 This is one of the subjects that should be addressed when a
894 proposal for publication is advanced next spring.

895 Discussion began with support for abrogating Rule 84. The goal
896 should be to remove the Forms from the Enabling Act process. The
897 process takes too long. "We're not nimble."

898 The next member noted the concern about carrying forward the
899 validity of the common law that depended on the pleading forms, but
900 agreed that there is no profit in attempting to revamp the process
901 to force greater Advisory Committee involvement.

902 Another member asked how far back the forms go. It was noted
903 that the original pleading forms were developed in 1938; Judge
904 Clark explained that it is difficult to capture the intended new
905 pleading practice in rule text, "but at least you can paint
906 pictures." The forms were illustrative in the beginning, but in
907 1946 Rule 84 was amended to state that they suffice under the
908 rules. All of the forms were restyled as part of the Style Project
909 that culminated in 2007, but much less attention was lavished on
910 them than on the rules themselves. A few forms have been carefully
911 developed by the Committee. Forms 5 and 6 were developed to
912 implement the Rule 4(d) waiver-of-service provisions when the
913 waiver procedure was created. Form 52, the Report of the Parties'
914 Planning Meeting, was carefully revised in conjunction with Rule
915 26(f) amendments. But for the most part the Forms have languished
916 in benign neglect. With this background, the member observed that
917 "too many subjects of federal litigation are missing" from the
918 pleading forms. Either there should be wholesale revisions to make
919 them reflect the forms of litigation that dominate the docket or
920 they should be abrogated. "They will live on, but the half-life
921 will be short." And the courts have had sufficient time to adjust
922 to the pleading decisions in *Twombly* and *Iqbal*; abrogation of the
923 pleading forms will not be seen as taking sides on pleading
924 standards.

925 Several more members expressed support for abrogation. One
926 summarized that the alternatives are clearly set out, and "the
927 trail leads back to abrogation." A liaison supported abrogation,
928 noting that the next-best alternative would be to divorce the

929 Advisory Committee from the process of maintaining and revising the
930 forms. The Administrative Office working group provides strong
931 support and produces very good forms.

932 It was noted that further thought should be given to
933 preserving the Form 5 request to waive service — Rule 4(d)(1)(D)
934 specifically requires that it be used. Form 6, the waiver itself,
935 is not required by Rule 4, but it too might be preserved, perhaps
936 by incorporating it into Rule 4 as Form 5 is now incorporated. Some
937 members urged that Form 6 be carried forward. The Subcommittee will
938 consider the manner of preserving and perhaps revising Form 5, and
939 also will consider possibly preserving Form 6.

940 And it was suggested that the Committee should not worry about
941 the effect of abrogation on pleading precedents. The precedents may
942 carry forward, but they will be treated in the same way as other
943 precedents developed under the aegis of subsequently repealed
944 statutes. These issues should not be addressed directly in the
945 Committee Note since any comments might be read as comments on what
946 the Committee thinks pleading standards should be. Another member
947 agreed with this view.

948 Another member supporting abrogation noted that there is no
949 sense that pro se plaintiffs are using the pleading forms. The
950 courts that are working to help pro se plaintiffs are not using
951 Rule 84 Forms for the purpose.

952 Turning to the Committee Note, it was suggested that it is too
953 narrow to refer only to Administrative Office forms. It should be
954 recognized that there are other excellent sources of forms as well.
955 Another suggestion was that the draft Note is, as the agenda
956 materials suggest, too long. It should be shortened.

957 Judge Campbell concluded the discussion by reminding observers
958 that comments on Rule 84 can be sent to him and to Judge Pratter.

959 *Speedy Remand of Removed Actions*

960 Jim Hood, the Attorney General of Mississippi, has proposed
961 that rules be adopted to deal with "the use of removal to federal
962 court as a dilatory defense tactic" to interfere with the need for
963 immediate protection of citizens "from corporate wrongdoing." The
964 problem is aggravated by delays in ruling on motions to remand. In
965 one recent case in his office the Fifth Circuit granted mandamus to
966 compel prompt disposition of a remand motion that had languished
967 for three years on the district court docket. In another case it
968 took fifteen months to get a final ruling from the district court.

969 Two remedies are proposed. The first rule would require

970 automatic remand if the district court fails to act on a motion to
971 remand within 30 days. The second rule would provide that whenever
972 a case is remanded the removing party must pay just costs and
973 actual expenses, incurring attorney fees.

974 The long delays described by Attorney General Hood are cause
975 for genuine sympathy and concern. But there are countervailing
976 considerations that make each proposal ill-suited for cure by rules
977 adopted under the Rules Enabling Act. Although the agenda materials
978 do not make specific recommendations, the Reporter offered a
979 summary of the reasons why each proposal is more properly
980 considered in the legislative process than in the rulemaking
981 process.

982 The automatic remand proposal encounters at least three
983 obstacles. The first and most profound is that it would require
984 remand for want of timely decision even though the action was
985 properly removed and lies in the subject-matter jurisdiction of the
986 federal court. The Rules Enabling Act should not be used to expand
987 or to limit subject-matter jurisdiction. This point is emphasized
988 by Rule 82: "These rules do not extend or limit the jurisdiction of
989 the district courts." It is for Congress, not the courts — not even
990 with the participation of Congress at the culmination of the
991 Enabling Act process — to define subject-matter jurisdiction.

992 Another difficulty with the automatic remand period is that 30
993 days often will not be enough to act responsibly on a motion to
994 remand. Complicated questions of law or fact may arise. The court
995 may be hard-pressed by many conflicting obligations. These
996 difficulties would be reduced if the period were made longer,
997 although even 90 or 120 days — still within the 6-month reporting
998 period — may not be long enough, particularly in courts with
999 especially crowded dockets. These concerns reflect a third
1000 obstacle. The Judicial Conference has long opposed statutory or
1001 rules requirements that give some disputes priority over others on
1002 the court's docket. This policy is reflected in 28 U.S.C. § 1657,
1003 which directs that "each court of the United States shall determine
1004 the order in which civil actions are heard and determined," with
1005 exceptions that are not relevant to the present question.

1006 The mandatory imposition of expenses, including attorney fees,
1007 encounters at least two obstacles. The more fundamental is that it
1008 would amend 28 U.S.C. § 1447(c), which makes the award of expenses
1009 and fees a matter for district court discretion. Congress
1010 considered these questions not so long ago, and opted for
1011 discretion. Supersession by an Enabling Act rule should be
1012 attempted only for compelling reasons, and even then might better
1013 be left to a request by the Judicial Conference that Congress take
1014 up the matter. A similar issue is presented by § 1446(a), which

1015 requires that a notice of removal be signed pursuant to Civil Rule
1016 11. The long-drawn battle over the choice between discretionary and
1017 mandatory sanctions under Rule 11 is familiar; the choice for
1018 discretion is relatively recent and firm.

1019 The second obstacle to making an award of expenses and fees
1020 mandatory is that it is bad policy. Some removals may indeed be
1021 dilatory. Others present legitimate arguments for federal
1022 jurisdiction, even if in the end the arguments fail. It is not only
1023 that the rules committees should defer to Congress. It is that
1024 Congress got it right.

1025 A third but less important obstacle also was noted. Although
1026 § 1447(d) bars review of most remand orders by appeal or otherwise,
1027 the award of fees and expenses incident to remand is an appealable
1028 final judgment. Review of the award commonly entails review of the
1029 remand. The result may be reversal of the award because the remand
1030 was wrong — nothing can be done about the remand, but the court of
1031 appeals has been put the work of deciding the issue.

1032 Judge Campbell summarized these concerns from additional
1033 perspectives. It is easy to understand Attorney General Hood's
1034 frustration. But we should be reluctant to base rules amendments on
1035 extreme cases. The 30-day automatic remand would in effect amend
1036 the federal subject-matter jurisdiction statutes and the removal
1037 statutes. That does not seem a sensible subject for the rulemaking
1038 process. His own experience is that expenses and attorney fees are
1039 often awarded on remanding an action; some removal attempts present
1040 no colorable basis for removal or are dilatory. But other cases
1041 present valid arguments; that the argument fails at the last point
1042 of fine analysis does not mean that the removing party should have
1043 to pay.

1044 Committee discussion reflected unanimous agreement that these
1045 proposals are not proper subjects for consideration in the Rules
1046 Enabling Act process. It was noted that extreme events should not
1047 be brushed off. Sometimes the system fails, and the system should
1048 attempt to do something to correct the failures. Whatever the
1049 circumstances of the cases that Attorney General Hood has
1050 encountered, however, resolution should be found in other sources.
1051 Mandamus from the Fifth Circuit finally provided relief in one of
1052 these cases. At least extraordinary cases may be subject to
1053 correction by that process. It was agreed that Judge Sutton would
1054 respond to Attorney General Hood.

1055 *Rule 6(d): "After Service"*

1056 Rule 6(d) was rewritten two years before the Style Project,
1057 but in keeping with Style Project precepts. Before the revision, it

1058 provided an additional 3 days to respond when service is made by
1059 various described means. It provided the three extra days following
1060 service "upon the party." The spirit of economy in style led to a
1061 subtle change, allowing 3 extra days when a party must act within
1062 a specified time "after service." The problem is that no one
1063 thought of the rules that allow a party to act within a specified
1064 time after making service, Rules 14(a)(1)(service of a third-party
1065 complaint more than 14 days after serving the original answer);
1066 15(a)(1)(A)(leave to amend a complaint once as a matter of course
1067 "within * * * 21 days after serving it); and 38(b)(1)(jury demand
1068 no more than 14 days after the last pleading is served). Time to
1069 act "after service" could easily be read to include time to act
1070 after making service. Thus a party who serves an answer could
1071 extend the time to amend once as a matter of course from 21 days to
1072 24 days by electing to make service by any of the means eligible
1073 for the 3 added days.

1074 For reasons described in the agenda materials, this
1075 misadventure does not seem grave. But it can be fixed easily:

1076 When a party may or must act within a specified time
1077 after ~~service~~ being served and service is made under Rule
1078 5(b)(2)(C), (D), (E), or (F), 3 days are added * * *.

1079 The only reason for going slow is that Rule 6(d) may soon
1080 require attention for other reasons. The question whether it is
1081 appropriate to add 3 days after each of the various means of
1082 service described in Rule 5(b)(2)(C), (D), (E), and (F) has
1083 lingered for some time. The most pointed question may be whether
1084 service by electronic means has matured to a point that warrants
1085 treating it in the same way as direct personal service. This
1086 question, however, is related to more general questions about
1087 electronic filing and service that involve the other advisory
1088 committees and that will take some time for further work.

1089 A recommendation to approve the "being served" amendment to
1090 Rule 6(d) for publication as part of the next package of Civil
1091 Rules published for comment was approved unanimously. It can be
1092 paired with an earlier-approved amendment of Rule 55 and presented
1093 to the Standing Committee for approval, with publication to await
1094 a package of more important amendments. That can be next summer if
1095 the Rule 37(e) proposal and perhaps the Duke Conference
1096 Subcommittee proposals are approved for publication then.

1097 *Technical Cross-Reference Fix*

1098 The Administrative Office has just received a suggestion that
1099 the cross-reference to Rule 6(a)(4)(A) in Rule 77(c)(1) is an
1100 apparent oversight, probably made in the Time Computation Project.

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1101 The holidays defined in former 6(a)(4)(A) are now defined in Rule
1102 6(a)(6)(A). It was agreed that if study of the suggestion proves it
1103 to be as simple an oversight as it seems, the technical correction
1104 can be made without publication for comment.

1105 *Closing*

1106 The meeting closed with a reminder that the next meeting will
1107 be on April 11 and 12, 2013, in Norman, Oklahoma, hosted by the
1108 University of Oklahoma Law School. Judge Koeltl thanked the
1109 Administrative Office for making such successful arrangements to
1110 carry on the meeting by electronic means. Judge Campbell thanked
all participants.

Respectfully submitted

Edward H. Cooper
Reporter

November 4 version

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TAB 3

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TAB 3A

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

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

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

FROM: **Honorable Sidney A. Fitzwater, Chair**
Advisory Committee on Evidence Rules

DATE: **November 26, 2012**

RE: **Report of the Advisory Committee on Evidence Rules**

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on October 5, 2012 in Charleston, South Carolina at the Charleston School of Law. The meeting was preceded by a Symposium on Federal Rule of Evidence 502 that the Charleston School of Law hosted at the Committee's request. The Committee is not proposing any action items for the Standing Committee at its January 2013 meeting. It continues to monitor the need for rule changes necessitated by the Supreme Court's decision in *Crawford v. Washington* and its progeny. The Committee's work also includes four proposed amendments that have been published for comment—Rules 801(d)(1)(B) and 803(6)-(8)—and a continuous study of the Evidence Rules.

II. Action Items

No action items.

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III. Information Items

A. Symposium on Rule of Evidence 502

Prior to commencement of the fall meeting, at the request of the Committee, the Charleston School of Law hosted a Symposium on Rule of Evidence 502. The purpose of the Symposium was to review the current use (or lack of use) of Rule 502 by courts and litigants, and to discuss ways in which the Rule can be better known and understood so that it can fulfill its original purposes. According to the Committee note, Rule 502 has two major purposes. The first is to "resolve[] some longstanding disputes in the courts about the effect of certain disclosures of communications or information protected by the attorney-client privilege or as work product—specifically those disputes involving inadvertent disclosure and subject matter waiver." The second purpose of Rule 502 is to "respond[] to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information." The Committee note points out that "[t]his concern is especially troubling in cases involving electronic discovery." Accordingly, "[t]he rule seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of a communication or information covered by the attorney-client privilege or work-product protection." Despite these salutary purposes, Rule 502 has not been used as anticipated.

The Symposium consisted of an in-depth panel discussion moderated by Committee Reporter Professor Daniel J. Capra. Panelists included judges, lawyers, and academics with pertinent expertise and experience in the subject matter of the Rule, many of whom are veterans of the rulemaking process. The judge participants were Lee H. Rosenthal, Paul Grimm, Paul S. Diamond, John Facciola, and Geraldine Soat Brown. The lawyer participants were John Barkett, Chilton Varner, Ariana Tadler, Maura R. Grossman, Steven Morrison, Daniel Smith, and Edwin Buffmire. The academic participants were Kenneth S. Broun, Allyson Haynes Stuart, Rick Marcus, Ann Murphy, and Liesa Richter. After the Symposium concluded, the participants collaborated in drafting a model Rule 502(d) order. The Symposium proceedings and the model Rule 502(d) order will be published in the March 2013 issue of the *Fordham Law Review*. A copy of the model order is attached to this report.

Although the model order has been approved by the Symposium participants, neither the Committee nor the Standing Committee will be asked to approve the model order. The Committee did conclude, however, that, with Standing Committee approval, it would be helpful to draw attention to the benefits of Rule 502 by sending a letter from the Committee to each chief judge highlighting Rule 502, the Symposium, and the model order. The Committee also concluded that the Federal Judicial Center should be strongly encouraged to develop judicial education and training materials addressing Rule 502.

B. Proposed Amendment to Rule 803(10)

The amendment to Rule 803(10) that the Standing Committee approved at its June 2012 meeting for transmittal to the Judicial Conference of the United States was approved by the Judicial Conference on the consent calendar at its September 2012 meeting. If approved by the Supreme Court and not abrogated by the Congress, it will take effect on December 1, 2013.

C. Proposed Amendments to Rules 801(d)(1)(B) and 803(6)-(8)

The Standing Committee approved for publication at its June 2012 meeting proposed amendments to Rules 801(d)(1)(B) and 803(6)-(8). The Committee has scheduled two public hearings on these proposals. The first is scheduled in conjunction with the Standing Committee's January 4, 2013, meeting in Boston, Massachusetts. The second is scheduled for January 22, 2013, in Washington, D.C. As of the date of this report, no public comments have been received concerning any of the proposed amendments. It is therefore uncertain whether either or both hearings will be necessary.

D. *Crawford v. Washington* and the Hearsay Exceptions in the Evidence Rules

As previous reports have noted, the Committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*, in which the Court held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to confront and cross-examine the declarant.

The Reporter regularly provides the Committee a case digest of all federal circuit cases discussing *Crawford* and its progeny. The goal of the digest is to enable the Committee to keep current on developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions.

The Supreme Court's most recent *Crawford* decision came last Term in *Williams v. Illinois*, a plurality decision. At the fall meeting, the Committee heard a roundtable discussion involving Committee Reporter Professor Daniel J. Capra, Committee consultant Professor Kenneth S. Broun, and Committee member Paul Shechtman, a practicing attorney who also teaches evidence. The panelists concluded—as did the Committee—that the result of *Williams* is so murky that it will take the courts some time to determine its impact on the relationship between the Confrontation Clause and the Federal Rules of Evidence. Accordingly, the Committee determined that it would be inappropriate at this time to propose any amendments designed to prevent one or more of the Federal Rules from being applied in violation of the Confrontation Clause.

E. "Continuous Study" of the Evidence Rules

The Committee is responsible for engaging in a "continuous study" of the need for any amendments to the Federal Rules of Evidence. The grounds for possible amendments include (1) a split in authority about the meaning of a rule; (2) a disparity between the text of a rule and the way that the Rule is actually being applied in courts; and (3) difficulties in applying a rule, as experienced by courts, practitioners, and academic commentators.

Under this standard, the Reporter has raised the following possible amendments for the Committee's consideration: (1) amending Rule 106 to provide that statements may be used for completion even if they are hearsay; (2) clarifying that Rule 607 does not permit a party to impeach its own witness if the only reason for calling the witness is to present otherwise inadmissible evidence to the jury; (3) clarifying that Rule 803(5) can be used to admit statements made by one person and recorded by another; (4) clarifying the business duty requirement in Rule 803(6); and (5) resolving a dispute in the courts over whether prior testimony in a civil case may be admitted against one who was not a party at the time the testimony was given. The Committee has previously

resolved to continue its continuous study of the Evidence Rules without recommending action on any particular possible amendment.

F. Symposium on Technology and the Federal Rules of Evidence

As noted in a prior report, the Committee plans to convene a symposium in conjunction with its fall 2013 meeting to consider the intersection of the Evidence Rules and emerging technologies. The Committee will examine whether the Evidence Rules should be amended to accommodate technological advances in the presentation of evidence. This Symposium will follow the same process as the previous symposia on the Restyled Rules of Evidence and Rule 502. The Committee intends to invite outstanding members of the bench, bar, and legal academy to make presentations, and the proceedings will be published in a law review.

G. Privileges Report

At the fall 2012 meeting, Professor Kenneth S. Broun, the Committee's consultant on privileges, presented his analysis of the journalist's privilege. His work for the Committee on privileges is informational. It neither represents the work of the Committee itself nor suggests explicit or implicit approval by the Standing Committee or the Committee.

IV. Minutes of the Fall 2012 Meeting

The draft of the minutes of the Committee's fall 2012 meeting is attached to this report. These minutes have not yet been approved by the Committee.

APPENDIX A.1

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Model Draft of a Rule 502(d) Order

Symposium on Rule 502

[To be attached to the Symposium Transcript to be published in the Fordham Law Review, and to be sent to District Chief Judges for purposes of local rulemaking.]

Form of Order Implementing Rule 502(d) of the Federal Rules of Evidence When Information Protected by the Attorney-Client Privilege or as Attorney Work-Product is Produced by a Party.

(a) No Waiver by Disclosure. This order is entered pursuant to Rule 502(d) of the Federal Rules of Evidence. Subject to the provisions of this Order, if a party (the "Disclosing Party") discloses information in connection with the pending litigation that the Disclosing Party thereafter claims to be privileged or protected by the attorney-client privilege or attorney work product protection ("Protected Information"), the disclosure of that Protected Information will not constitute or be deemed a waiver or forfeiture — in this or any other action — of any claim of privilege or work product protection that the Disclosing Party would otherwise be entitled to assert with respect to the Protected Information and its subject matter.

(b) Notification Requirements; Best Efforts of Receiving Party. A Disclosing Party must promptly notify the party receiving the Protected Information ("the Receiving Party"), in writing, that it has disclosed that Protected Information without intending a waiver by the disclosure. Upon such notification, the Receiving Party must —unless it contests the claim of attorney-client privilege or work product protection in accordance with paragraph (c) — promptly (i) notify the Disclosing Party that it will make best efforts to identify and return, sequester or destroy (or in the case of electronically stored information,

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delete) the Protected Information and any reasonably accessible copies it has, and (ii) provide a certification that it will cease further review, dissemination, and use of the Protected Information. Within five business days of receipt of the notification from the Receiving Party, the Disclosing Party must explain as specifically as possible why the Protected Information is privileged. [For purposes of this Order, Protected Information that has been stored on a source of electronically stored information that is not reasonably accessible, such as backup storage media, is sequestered. If such data is restored, the Receiving Party must promptly take steps to delete or sequester the restored privileged information.]

(c) Contesting Claim of Privilege or Work Product Protection. If the Receiving Party contests the claim of attorney-client privilege or work product protection, the Receiving Party must — within five business days of receipt of the claim of disclosure— move the Court for an Order compelling disclosure of the information claimed as unprotected (a "Disclosure Motion"). The Disclosure Motion must be filed under seal and must not assert as a ground for compelling disclosure the fact or circumstances of the disclosure. Pending resolution of the Disclosure Motion, the Receiving Party must not use the challenged information in any way or disclose it to any person other than those required by law to be served with a copy of the sealed Disclosure Motion.

(d) Stipulated Time Periods. The parties may stipulate to extend the time periods set forth in paragraphs (b) and (c).

(e) Attorney's Ethical Responsibilities. Nothing in this order overrides any attorney's ethical responsibilities to refrain from examining or disclosing materials that the attorney knows or reasonably should know to be privileged and to inform the Disclosing Party that such materials have been produced.

(f) Burden of Proving Privilege or Work-Product Protection. The Disclosing Party retains the burden — upon challenge pursuant to paragraph (c) — of establishing the privileged or protected nature of the Protected Information.

(g) In camera Review. Nothing in this Order limits the right of any party to petition the Court for an *in camera* review of the Protected Information.

(h) Voluntary and Subject Matter Waiver. This Order does not preclude a party from voluntarily waiving the attorney-client privilege or work product protection. The provisions of Federal Rule 502(a) apply when the Disclosing Party uses or indicates that it may use information produced under this Order to support a claim or defense.

(i) Rule 502(b)(2). The provisions of Federal Rule of Evidence 502(b)(2) are inapplicable to the production of Protected Information under this Order.

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Advisory Committee on Evidence Rules

Minutes of the Meeting of October 5, 2012

Charleston, South Carolina

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on October 5, 2012, at the Charleston School of Law, in Charleston, South Carolina.

The following members of the Committee were present:

Hon. Sidney A. Fitzwater, Chair
Hon. Brent R. Appel
Hon. Anita B. Brody
Hon. William Sessions
Hon. John A. Woodcock, Jr.
Paul Shechtman, Esq.
Elizabeth J. Shapiro, Esq., Department of Justice

Also present were:

William T. Hangley, Esq., departing member of the Committee
Marjorie A. Meyers, Esq., departing member of the Committee
Hon. Richard Wesley, Liaison from the Standing Committee
Hon. Paul Diamond, Liaison from the Civil Rules Committee
Hon. John F. Keenan, Liaison from the Criminal Rules Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Kenneth S. Broun, Consultant to the Committee
Timothy Reagan, Esq., Federal Judicial Center
Peter McCabe, Esq., Secretary to the Standing Committee
Jonathan Rose, Chief, Rules Committee Support Office
Benjamin Robinson, Esq., Rules Committee Support Office

Julie Albert, Fordham Law School
Alfred W. Cortese, Jr., Esq., Lawyers for Civil Justice
Alexander R. Dahl, Esq. Lawyers for Civil Justice
Professor Ann Murphy, Gonzaga University School of Law
Professor Liesa Richter, University of Oklahoma College of Law
Hon. Lee H. Rosenthal, Former Chair of the Standing Committee
Dan Smith, Esq., Department of Justice
John Vail, Esq., Center for Constitutional Litigation, P.C.

I. Opening Business

Welcoming Remarks and Departing Members

Judge Fitzwater, the Chair of the Committee, greeted the members and thanked Dean Andrew Abrams and the Charleston School of Law for hosting the Committee. Dean Abrams welcomed the members and observers, and expressed his thanks for holding the committee meeting at the law school. He highlighted the school's commitment to developing practical lawyering skills and the significant pro bono contributions of his students.

Judge Fitzwater recognized several current and departing members of the Committee. He congratulated Paul Schectman on his recent election to the American Law Institute. He welcomed former Committee member Judge Joseph F. Anderson, Jr., who traveled from Columbia, South Carolina to observe the meeting. Judge Fitzwater thanked Judge Anderson for his many contributions to the restyling effort, and Judge Anderson in turn thanked the Committee members for their service and applauded the success of the restyled rules.

Judge Fitzwater recognized the distinguished service of two departing members, William T. Hangley and Marjorie Myers. He highlighted their significant contributions to the Committee stretching back before his tenure as Chair. Mr. Hangley brought the perspective of an experienced trial attorney to the complex process of evidence rulemaking, which proved especially critical during the restyling process. He also solicited helpful input from the American Bar Association's Section of Litigation and the American College of Trial Lawyers. Ms. Myers proved to be a superb advocate for the federal defenders, but she always sought the best result, not simply what would be most advantageous to her clients. Judge Fitzwater noted that Ms. Myers worked especially well with her counterpart from the Department of Justice. Members added their sincere thanks for the hard work performed by and friendships forged with Mr. Hangley and Ms. Myers. Their service to the committee and practical insights will be sorely missed.

Mr. Rose reported on the status of the Committee's vacancies and pending appointments. He noted that the Chief Justice is expected to select replacements for Mr. Hangley and Ms. Myers imminently.

Public Hearings

Judge Fitzwater noted that the Committee has scheduled two public hearings for members of the public who wish to present testimony on the proposed amendments to Rules 801 and 803. The first is scheduled in conjunction with the Standing Committee's semi-annual meeting, on January 4, 2013, in Boston, Massachusetts. A second public hearing is scheduled for January 22, 2013, in Washington D.C. Judge Fitzwater stated that there was strong support for publication at the Standing Committee. Mr. Robinson reported that no comments had yet been received by the Administrative Office.

Approval of Minutes

The minutes of the Spring 2012 Committee meeting were approved.

Rule 502 Symposium

Judge Fitzwater commented on the Rule 502 Symposium that took place on the morning before the meeting. He remarked that the symposium far exceeded his expectations and raised a number of important suggestions for promoting the use of Rule 502 to reduce discovery costs. He noted that a transcript of the proceedings — as well as a number of articles from Symposium participants — will be published in the Fordham Law Review.

Judge Fitzwater invited those present to share their observations about the symposium. The members all agreed that the presentation was excellent. A judge member strongly suggested that Rule 502 be referenced in the Federal Rules of Civil Procedure so that parties at the outset of the proceedings are aware of its importance in reducing the costs of preproduction privilege review. Another member added that the work ahead is largely in the hands of the Advisory Committee on Civil Rules, and that the Committee should monitor the progress of that committee. A third member expressed concerns about the perceived approach of a "tipping point" if the costs of reviewing and producing electronically stored information continue to eclipse the amounts in controversy.

The members discussed whether to undertake work to develop a model Rule 502 order. A judge member recommended pursuing a model order that could be broadly publicized, prior to the proliferation of local rules or standing orders that may fail to incorporate important concepts examined during the symposium. The reporter stated that several symposium participants had agreed to work together further to develop a model order, which will be published in the symposium edition of the Fordham Law Review. The reporter noted several potential obstacles the Committee could encounter if it sought to take the lead in drafting and "issuing" a model order. The Reporter suggested, and the members generally agreed, that the better way for the Committee to draw attention to the benefits of Rule 502 may be to send a letter from the Committee to each chief judge highlighting the rule, the symposium, and the model order. Judge Fitzwater recommended that such a letter be discussed at the Standing Committee meeting.

A judge member suggested, and the full committee agreed, that in addition to any letter writing initiative, the Federal Judicial Center should be strongly encouraged to develop judicial education and training materials addressing Rule 502. One member observed that newly-appointed judges with primarily criminal practice backgrounds might have little or no knowledge of Rule 502, and all members agreed that it would be worthwhile to develop specific materials for the orientation seminar for newly-appointed federal judges. Another member remarked that a program of orientation on Rule 502 will be just as useful to sitting judges.

The Committee briefly discussed the application of Rule 502 in the criminal law setting. A member noted that there are important Sixth Amendment issues yet to be resolved before the courts

of appeals. Another member stated that subdivision (d) of Rule 502 will have limited use in criminal proceedings, but the Committee should be aware of the possibility of "intentional inadvertent disclosures" by defense counsel in criminal cases, notwithstanding the obvious ethical implications. The member noted that if unscrupulous defense counsel believed the fruits of her intentional inadvertent disclosure could be placed out of reach of prosecutors, there may be a strong temptation to intentionally produce privileged material and then demand use fruits protection from the court (through a *Kastigar* hearing or otherwise). The members agreed that little if anything could be done in the text of the rule to eliminate the possibility of such strategic behavior.

Mr. Rose observed that the reporter handled with ease the difficult task of moderating a panel of such high-caliber judges, practitioners, and academics, and suggested that the continued use of such symposia as introductory events to committee meetings would continue to enhance the public perception of the rulemaking process and increase participation from the bench, bar, and public. The members joined Judge Fitzwater's sincere thanks to the Reporter and the symposium participants for a well-executed program.

June Meeting of the Standing Committee

Judge Fitzwater reported on the June meeting of the Standing Committee. He summarized the Committee's report and his presentation to the Standing Committee including the Committee's proposals: 1) to refer an amendment to Rule 803(10) to the Judicial Conference; and 2) to release proposed amendments to Rules 801(d)(1)(B) and Rules 803(6)-(8) for public comment. The Standing Committee unanimously approved all of the Committee's proposals.

II. Proposed Amendment to Rule 803(10)

The Committee briefly discussed the proposed amendment to Rule 803(10). That amendment adds a notice-and-demand procedure to the Rule in cases where the government is offering a certificate against a defendant in a criminal case. Such certificates are in almost all cases "testimonial" and so introducing them against an accused will violate the Confrontation Clause under the Supreme Court's opinion in *Melendez-Diaz v. Massachusetts*. Under the notice-and-demand procedure, the person who prepared the certificate need not be produced to testify if the government provides timely notice of intent to proffer the certificate and the defendant fails to timely demand production of the witness. In *Melendez-Diaz*, the Court declared that the use of a notice-and-demand procedure (and the defendant's failure to demand production under that procedure) would cure an otherwise unconstitutional use of testimonial certificates.

The Advisory Committee's proposed amendment was approved by the Judicial Conference on the consent calendar at its September 2012 session. The Supreme Court will have until May 1, 2013, to review the proposed amendment. Unless Congress takes action to modify, defer, or reject the proposed amendment, it would become effective on December 1, 2013.

III. Proposed Amendment to Rule 801(d)(1)(B)

At the Spring 2012 meeting the Committee voted to recommend that a proposed amendment to Evidence Rule 801(d)(1)(B) — the hearsay exemption for certain prior consistent statements — be released for public comment. Under the proposal, Rule 801(d)(1)(B) would be amended to provide that prior consistent statements are admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility. The justification for the amendment is that there is no meaningful distinction between substantive and rehabilitative use of prior consistent statements.

Under the current rule, some prior consistent statements offered to rehabilitate a witness's credibility — specifically those that rebut a charge of recent fabrication or improper influence or motive — are also admissible substantively. In contrast, other rehabilitative statements — such as those that explain a prior inconsistency or rebut a charge of faulty recollection — are not admissible under the hearsay exemption but only for rehabilitation. There are two basic practical problems in the distinction between substantive and credibility use as applied to prior consistent statements. First, the necessary jury instruction is almost impossible for jurors to follow. The prior consistent statement is of little or no use for credibility unless the jury believes it to be true. Second, and for similar reasons, the distinction between substantive and impeachment use of prior consistent statements has little, if any, practical effect. The proponent has already presented the witness's trial testimony, so the prior consistent statement ordinarily adds no real substantive effect to the proponent's case.

As of the date of the fall meeting, no formal public comment had been received on the proposed amendment. But the Reporter noted that a professor had raised a concern that the proposed amendment might "overrule" the Supreme Court's decision in *Tome v. United States*, because it might be read to allow the admission of prior consistent statements for substantive effect even though those statements were made *after* a witness's motive to falsify arose. The Reporter reiterated that the point of the amendment was *not* to admit more prior consistent statements. The only point was to provide the same (substantive effect) treatment for all the statements currently admitted as prior consistent statements. The Reporter recognized that *if* a court found that a prior consistent statement made after the motive to falsify arose would actually be properly admitted to rehabilitate the witness's credibility, then under the amendment that statement would also be admitted as substantive evidence. But the Reporter noted that 1) such an event was extremely unlikely; and 2) in the narrow band of cases in which it could even possibly occur, it would in any case, under the logic of the amendment, be appropriate to treat such a statement as substantively admissible. That is because under the proposed amendment, all prior consistent statements that are admissible for rehabilitation are also admissible substantively.

The Committee concluded that prior consistent statements made after a motive to falsify might be admitted as substantive evidence, but that such an admission would not reflect any alteration to the present scope of admissibility (instead clarifying how admissible evidence may be used). The Committee's consultant on privileges noted that *Tome v. United States* was not a

constitutional case, and that any variance between the proposed amendment to Rule 801(d)(1)(b) and the Court's holding would not run afoul of transubstantive rulemaking concerns.

The Reporter suggested that the draft committee note accompanying the proposed rule be revised to eliminate the citation to a relevant law review article. He noted the Standing Committee's preference to avoid legal citations in committee notes. The members acknowledged the helpful input of Frank W. Bullock, Jr., the author of the article and former member of the Standing Committee, who first suggested that the Committee pursue the amendment. The members agreed to discuss further refinements to the proposed amendment at the Committee's Spring 2013 meeting, after the close of the public comment period.

IV. Possible Amendment to Rules 803(6)-(8)

The Committee briefly discussed the proposed amendments to Rules 803(6)-(8), the hearsay exceptions for business records, absence of business records, and public records. Those exceptions in original form set forth admissibility requirements and then provided that a record meeting those requirements was admissible despite the fact it is hearsay "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." The rules do not specifically state which party has the burden of showing trustworthiness or untrustworthiness. The amendments clarify that the opponent has the burden of showing that the proffered record is untrustworthy. The reasons for the amendment are: 1) to resolve a conflict in the case law by providing a uniform rule; 2) to clarify a possible ambiguity in the rule as it was originally adopted and as restyled; and 3) to provide a result that makes the most sense, as imposing a burden of proving trustworthiness on the proponent is unjustified given that the proponent must establish that all the other admissibility requirements of these rules are met — requirements that tend to guarantee trustworthiness in the first place.

The Committee discussed the slight differences among the committee notes for Rules 803(6)-(8). A member suggested that the Committee consider deleting the second paragraph (i.e. "The opponent, in meeting its burden . . .") of the note accompanying Rule 803(8) as redundant of the note set out for Rule 803(6). The Reporter opposed deleting the second paragraph from the note for Rule 803(8). He described the practical differences between the three rules and detailed why a tailored note for each was preferable. He noted that when enacted, the Rules and Committee notes will be read and applied separately, not together, and so there was no risk of redundancy. He also noted that it was important to state that an opponent, in meeting its burden of showing untrustworthiness, need not produce evidence — that sometimes argument is sufficient. And deleting such an important provision from the note to Rule 803(8) but retaining it in Rule 803(6) could mislead lawyers and courts to think that the opponent *does* have to provide evidence to show that a record offered under Rule 803(8) is untrustworthy. The Committee's consultant on privileges echoed the need for a more thorough note for each rule. Judge Fitzwater asked the Committee to revisit the issue, if necessary, at its Spring 2013 meeting, following the close of the public comment period.

V. *Crawford* Developments — Presentation on *Williams v. Illinois*

The Reporter provided the Committee with a case digest of all federal circuit cases discussing *Crawford v. Washington* and its progeny. The digest was grouped by subject matter. The goal of the digest is to allow the Committee to keep apprised of developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions.

The *Crawford* digest this time around provided a special focus on the Supreme Court's Confrontation Clause case from last term — *Williams v. Illinois* — and its impact on the Federal Rules of Evidence. Paul Shechtman, Ken Broun and the Reporter engaged in a roundtable discussion on the meaning of *Williams* — a case that was decided 4-1-4 with the deciding vote by Justice Thomas based on an analysis with which all other members of the Court disagreed. The speakers all concluded — as did the Committee — that the result of *Williams* is so murky that it will take the courts some time to figure out its impact on the relationship between the Confrontation Clause and the Federal Rules of Evidence. Accordingly, the Committee determined that it would be inappropriate at this time to propose any amendments designed to prevent one or more of the Federal Rules from being applied in violation of the Confrontation Clause.

The Committee resolved to continue monitoring developments on the relationship between the Federal Rules of Evidence and the accused's right to confrontation.

VII. Symposium on Technology and the Federal Rules of Evidence

The Evidence Rules Committee is sponsoring a symposium on whether the Evidence Rules should be amended to accommodate technological advances in the presentation of evidence. This Symposium is intended to follow the same process as the previous symposia on the Restyling and Rule 502. The Committee will invite outstanding members of the bench, bar and legal academia to make presentations, and the proceedings will be published in a law review. This symposium will take place on the morning before the Fall 2013 meeting of the Committee.

The Reporter invited suggestions from the members for symposium panelists. Members identified a handful of judges and law professors, but resolved to continue the search for potential panelists leading up to the symposium.

VIII. Privileges Report

Professor Broun, the Committee's consultant on privileges, presented his analysis of the journalist's privilege. This presentation is part of Professor Broun's continuing work to develop an article on the federal common law of privileges. Professor Broun's work, when it is published, will

neither represent the work of the Committee nor suggest explicit nor implicit approval by the Standing Committee or the Advisory Committee.

Professor Broun asked for Committee input on whether attempting to write the text of a journalist privilege under federal law was a worthwhile effort, in light of the conflict in the cases and lack of consensus as to whether such a privilege even exists. The DOJ representative expressed a preference not to develop a survey rule because the Justice Department does not believe there is a journalist's privilege rooted in the First Amendment. A member observed that defining who is a journalist will prove to be a significant drafting obstacle given the use of blogs, just as attempts to define who is a media defendant for purposes of libel law has created a morass of conflicting case law.

Committee members expressed gratitude to Professor Broun for keeping the Committee apprised of developments in the area of privileges, but did not request that he perform further research or drafting regarding the journalist's privilege.

IX. Next Meeting

The Spring 2013 meeting of the Committee is scheduled for Friday, May 3, in Miami, Florida.

Respectfully submitted,

Benjamin Robinson
Daniel J. Capra

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TAB 4A

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

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

DATE: December 5, 2012

TO: Judge Jeffrey S. Sutton, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Steven M. Colloton, Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on September 27, 2012, in Philadelphia, Pennsylvania. The Committee saluted your work as chair, and wished you well in your new role as chair of the Standing Committee. You kindly invited me to attend the meeting, and I assumed the chair of the advisory committee on October 1, 2012.

At the September meeting, the Committee removed from its agenda three items (concerning sealed appellate filings, criminal appeal deadlines, and pinpoint citations in briefs), and discussed various other items. The Advisory Committee is not presenting any action items for the Standing Committee's January 2013 meeting.

The Committee has scheduled its next meeting for April 22 and 23, 2013, in Washington, DC. Detailed information about the Committee's activities can be found in the Reporter's draft of the minutes of the September meeting and in the Committee's study agenda, both of which are attached to this report.

II. Information Items

The Committee decided not to proceed with a proposed rule amendment concerning the sealing or redaction of appellate briefs. The circuits take varying approaches to sealing and redaction on appeal. In the D.C. and Federal Circuits, litigants are directed to review the record and determine whether any sealed portions should be unsealed at the time of the appeal. In some other circuits, matters sealed below are presumptively maintained under seal in the record on appeal. In the Seventh Circuit, by contrast, the opposite presumption applies: Unless sealing is directed by statute or rule, sealed items in the record on appeal are unsealed after a brief grace period unless a party seeks the excision of those items from the record or unless a party moves to seal those items on appeal.

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

The Committee removed from its agenda a proposal that Appellate Rule 4(b) be amended to lengthen from 14 days to 30 days the time for a criminal defendant to file an appeal. The Rule allows 30 days for the government to file an appeal. The Committee considered a similar proposal in 2002-04 and decided that no change was warranted. Participants in the September 2012 discussion observed that there are institutional reasons why the government requires more time, and noted that the period between conviction and sentencing provides time for defense counsel to assess possible grounds for appealing the conviction. They also noted that the district court has discretion under Appellate Rule 4(b)(4) to extend the appeal time for good cause – a standard that could be met, for example, if defense counsel needs additional time to assess possible grounds for appealing the sentence. In light of these considerations, members did not perceive a need to amend the Rule.

The Committee also removed from its agenda a proposal that Appellate Rule 28(e) be amended "to require a pinpoint citation to the appendix or record to support each statement of fact and procedural history anywhere in every brief," rather than "only in the statement of facts." Members noted that Rule 28 already does require specific citations in the argument section of a brief: Rule 28(a)(9)(A) requires that the argument contain "citations to the . . . parts of the record on which the appellant relies." After discussion, the Committee decided not to proceed with a proposed rule amendment on this topic.

Three existing items were retained on the agenda to await future developments. First, the Committee briefly considered whether the Appellate Rules should be amended in light of the shift to electronic filing and service. In particular, some participants viewed as anachronistic Appellate Rule 26(c)'s "three-day rule," which adds three days to a given period if that period is measured after service and service is accomplished electronically or by a non-electronic means that does not result in delivery on the date of service. But the discussion did not disclose any aspects of the Appellate Rules that urgently require revision. Committee members noted that it may make sense to wait until the Advisory Committees feel the time is ripe to address these questions jointly.

Second, the Committee revisited the topic of "manufactured finality," which concerns attempts to "manufacture" a final judgment – in order to appeal the disposition of one or more claims – by dismissing the remaining claims in a case without prejudice or conditionally. The Committee noted that the Supreme Court recently granted certiorari in *SEC v. Gabelli*, 653 F.3d 49 (2d Cir. 2011). In *Gabelli*, the Second Circuit's jurisdiction rested on that circuit's precedent holding that an appealable judgment results if a litigant who wishes to appeal the dismissal of its primary claim dismisses all remaining claims and commits not to reassert those claims if the judgment is affirmed, but reserves the right to reinstate the dismissed claims if the court of appeals reverses. The Committee decided to await the Court's decision in *Gabelli* before deciding what, if anything, to do with respect to the topic of manufactured finality.

Third, the Committee retained on its agenda a proposal to further amend the language of Form 4 (concerning applications to proceed *in forma pauperis*). Proposed amendments to Form 4 are currently before the Supreme Court; if the Court approves them and Congress takes no contrary action, those amendments will take effect December 1, 2013. There was no consensus that another amendment to Form 4 is warranted, but the Committee decided for now to retain the item on the agenda.

The Committee discussed two topics that call for consultation with the Civil Rules Committee. One concerns the treatment of appeal bonds in Civil Rule 62. A Committee member has suggested that it would be useful to clarify a number of aspects of practice under Civil Rule 62. In particular, he notes that Civil Rule 62(b) and Civil Rule 62(d) treat separately the period of time during which postjudgment motions are pending and the period of the appeal itself, and he suggests that it would be preferable to treat both those time periods under one unified framework. As any action on this topic probably would involve an amendment to Civil Rule 62, rather than to an Appellate Rule, it seems unlikely that the matter will proceed unless the Civil Rules Committee deems it worthy of attention.

The other topic concerns appeals by class action objectors. The Committee has received a proposal that Appellate Rule 42 be amended to add a provision that would bar the dismissal of an appeal from a judgment approving a class action settlement or fee award if there is any payment in exchange for the dismissal of the appeal. This proposal implicates themes that previously arose in the Civil Rules Committee's discussions leading up to the 2003 amendments to Civil Rule 23. The proposal to amend Appellate Rule 42, however, would go beyond the provisions of Civil Rule 23(e)(5). Here, too, close consultation with the Civil Rules Committee

will be necessary.

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

TAB 4B

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Advisory Committee on Appellate Rules
Table of Agenda Items — December 2012

FRAP Item	Proposal	Source	Current Status
05-01	Amend FRAP 21 & 27(c) to conform to Justice for All Act of 2004.	Advisory Committee	Discussed and retained on agenda 04/05; awaiting proposal from Department of Justice Discussed and retained on agenda 04/06; Department of Justice will monitor practice under the Act
07-AP-E	Consider possible FRAP amendments in response to Bowles v. Russell (2007).	Mark Levy, Esq.	Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 04/11
07-AP-H	Consider issues raised by Warren v. American Bankers Insurance of Florida, 2007 WL 3151884 (10th Cir. 2007), concerning the operation of the separate document rule.	Appellate Rules Committee	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08
07-AP-I	Consider amending FRAP 4(c)(1) to clarify the effect of failure to prepay first-class postage.	Hon. Diane Wood	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08
08-AP-C	Abolish FRAP 26(c)'s three-day rule.	Hon. Frank H. Easterbrook	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09
08-AP-G	Consider substantive and style changes to FRAP Form 4	Appellate Rules Committee	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 10/10 Draft approved 04/11 for submission to Standing Committee Approved for publication by Standing Committee 06/11 Published for comment 08/11 Draft approved 04/12 for submission to Standing Committee Approved by Standing Committee 06/12 Approved by Judicial Conference 09/12

12b-006806

FRAP Item	Proposal	Source	Current Status
08-AP-H	Consider issues of "manufactured finality" and appealability	Mark Levy, Esq.	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 10/10 Discussed and retained on agenda 04/11 Discussed and retained on agenda 09/12
08-AP-J	Consider FRAP implications of conflict screening	Committee on Codes of Conduct	Discussed and retained on agenda 11/08
08-AP-L	Amend FRAP 6(b)(2)(A)(ii) to remove ambiguity	Reporter	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09 Discussed and retained on agenda 10/10 Discussed jointly with Bankruptcy Rules Committee and retained on agenda 04/11 Discussed and retained on agenda 10/11 Draft approved 04/12 for submission to Standing Committee Approved for publication by Standing Committee 06/12 Published for comment 08/12
08-AP-M	Consider FRAP implications of interlocutory appeals in tax cases	Reporter	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Draft approved 10/10 for submission to Standing Committee Approved for publication by Standing Committee 01/11 Published for comment 08/11 Draft approved 04/12 for submission to Standing Committee Approved by Standing Committee 06/12 Approved by Judicial Conference 09/12
08-AP-N	Amend FRAP 5 to allow parties to submit an appendix of key documents from the record along with petitions and answers	Peder K. Batalden, Esq.	Discussed and retained on agenda 04/09
08-AP-P	Amend FRAP 32 to change from double line-spacing to 1.5 line-spacing for briefs	Peder K. Batalden, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09
08-AP-Q	Consider amending FRAP 10(b) to permit the use of digital audio recordings in place of written transcripts	Hon. Michael M. Baylson	Discussed and retained on agenda 04/09 Discussed and retained on agenda 10/10

FRAP Item	Proposal	Source	Current Status
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09
09-AP-A	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	ABA Council of Appellate Lawyers	Discussed and retained on agenda 04/09
09-AP-B	Amend FRAP 1(b) to include federally recognized Indian tribes within the definition of "state"	Daniel I.S.J. Rey-Bear, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed and retained on agenda 10/11 Discussed and retained on agenda 04/12
09-AP-C	Consider possible FRAP amendments in the light of project to revise Part VIII of the Bankruptcy Rules	Bankruptcy Rules Committee	Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed jointly with Bankruptcy Rules Committee and retained on agenda 04/11 Discussed and retained on agenda 10/11 Draft approved 04/12 for submission to Standing Committee Approved for publication by Standing Committee 06/12 Published for comment 08/12
09-AP-D	Consider implications of Mohawk Industries, Inc. v. Carpenter	John Kester, Esq.	Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10
10-AP-B	Consider FRAP 28's treatment of statements of the case and of the facts	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Draft approved 04/11 for submission to Standing Committee Approved for publication by Standing Committee 06/11 Published for comment 08/11 Draft approved 04/12 for submission to Standing Committee Approved by Standing Committee 06/12 Approved by Judicial Conference 09/12
10-AP-D	Consider factors to be taken into account when taxing costs under FRAP 39	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/10 Discussed and retained on agenda 04/11 Discussed and retained on agenda 10/11

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FRAP Item	Proposal	Source	Current Status
10-AP-H	Consider issues relating to appellate review of remand orders	Committee on Federal-State Jurisdiction	Discussed and retained on agenda 10/10
11-AP-C	Amend FRAP 3(d)(1) to take account of electronic filing	Harvey D. Ellis, Jr., Esq.	Awaiting initial discussion
11-AP-D	Consider changes to FRAP in light of CM/ECF	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/11 Discussed and retained on agenda 09/12
11-AP-F	Consider amendment authorizing discretionary interlocutory appeals from attorney-client privilege rulings	Amy M. Smith, Esq.	Awaiting initial discussion
12-AP-B	Consider amending FRAP Form 4's directive concerning institutional-account statements for IFP applicants	Peter Goldberger, Esq., on behalf of the National Association of Criminal Defense Lawyers (NACDL)	Discussed and retained on agenda 09/12
12-AP-D	Consider the treatment of appeal bonds under Civil Rule 62 and Appellate Rule 8	Kevin C. Newsom, Esq.	Discussed and retained on agenda 09/12
12-AP-E	Consider treatment of length limits for petitions for rehearing en banc under Rule 35	Professor Neal K. Katyal	Discussed and retained on agenda 09/12
12-AP-F	Consider amending FRAP 42 to address class action appeals	Professors Brian T. Fitzpatrick and Brian Wolfman and Dean Alan B. Morrison	Discussed and retained on agenda 09/12

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Minutes of Fall 2012 Meeting of
Advisory Committee on Appellate Rules
September 27, 2012
Philadelphia, Pennsylvania

I. Introductions

Judge Jeffrey S. Sutton called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, September 27, 2012, at 10:10 a.m. at the University of Pennsylvania Law School in Philadelphia, Pennsylvania. The following Advisory Committee members were present: Judge Michael A. Chagares, Judge Robert Michael Dow, Jr., Justice Allison H. Eid, Judge Peter T. Fay, Professor Amy Coney Barrett, Professor Neal K. Katyal, Mr. Kevin C. Newsom, and Mr. Richard G. Taranto. Mr. H. Thomas Byron III, Civil Division, U.S. Department of Justice ("DOJ"), was present representing the Solicitor General. Also present were Judge Steven M. Colloton, the incoming Chair of the Committee; Judge Adalberto Jordan, liaison from the Bankruptcy Rules Committee; Professor Daniel R. Coquillette, Reporter for the Standing Committee; Mr. Jonathan C. Rose, Rules Committee Officer in the Administrative Office ("AO"); Mr. Benjamin Robinson, Deputy Rules Committee Officer and Counsel to the Rules Committees; Mr. Leonard Green, liaison from the appellate clerks; Ms. Marie Leary from the Federal Judicial Center ("FJC"). Dean Michael A. Fitts attended briefly to welcome the committee; Professor Stephen B. Burbank and Professor Tobias Barrington Wolff attended the first portion of the meeting to give a presentation. A number of students from the Law School attended portions of the meeting. Professor Catherine T. Struve, the Reporter, took the minutes.

Dean Fitts welcomed the Committee and noted that how pleased and honored the Law School was to have the Committee meet at the Law School. He observed that Penn Law School is very proud of its civil procedure faculty, including Professors Burbank and Wolff (who would be addressing the Committee). And he thanked the Committee members for their important work in improving the Rules. Judge Sutton thanked Dean Fitts for hosting the Committee's meeting. Judge Sutton noted that Judge Jordan is joining the Committee as a liaison member from the Bankruptcy Rules Committee in order to facilitate communications between the two Committees on matters that pertain to both the Appellate Rules and the Bankruptcy Rules. Judge Jordan served as an Assistant United States Attorney and then as a federal district judge in Miami, and in early 2012 he was confirmed to a seat on the U.S. Court of Appeals for the Eleventh Circuit. Judge Sutton also welcomed Judge Colloton, whose term as the Chair of the Appellate Rules Committee would commence on October 1, 2012.

Professor Coquillette brought greetings from Judge Mark R. Kravitz, the Chair of the Standing Committee. Professor Coquillette also reported that Judge Kravitz had just received a major honor: The Connecticut Bar Foundation has instituted a symposium in Judge Kravitz's name.

During the meeting, Judge Sutton thanked Mr. Rose, Mr. Robinson, and the AO staff for their preparations for and participation in the meeting. Judge Sutton also thanked Mr. Green for his excellent and important contributions during his service on the Committee. He congratulated Mr. Green on his retirement, and observed that Mr. Green was the longest-serving Clerk of the Sixth Circuit.

II. Presentations by Professor Burbank and Professor Wolff

The Reporter introduced Professors Burbank and Wolff. She noted how fortunate she is to serve on a faculty with colleagues who are stronger scholars of procedure than she is. Professor Burbank, she noted, is the nation's leading authority on the history of the Rules Enabling Act and has long been a close observer of the rulemaking process. The Reporter noted her personal debt of gratitude to Professor Burbank for his generous and thoughtful guidance during the twelve years that they had been colleagues. More recently, Penn was fortunate to induce Professor Wolff to join the faculty. Even before getting to know Professor Wolff, the Reporter recalled, she had already realized that he is the most creative, thoughtful, innovative scholar of her generation on topics such as such as the preclusive effect of judgments in class actions. At Judge Sutton's invitation, Professor Burbank had agreed to address the Committee on the topic of the rulemaking process, and Professor Wolff had agreed to comment on this presentation.

Professor Burbank observed that the Federal Rules of Civil Procedure are nearing their seventy-fifth anniversary, and thus he took as his topic "Rulemaking at 75" (with a focus on the Civil Rules). He noted that Professor Barrett is an expert on the topic of courts' inherent rulemaking power. Congress, he observed, has almost plenary power with respect to federal court procedure – limited only in those areas where true inherent court power operates. The U.S. Supreme Court has been very modest in its claims of inherent power that can trump a contrary directive from Congress.

Nonetheless, Congress has given the federal courts rulemaking power, both local and supervisory, since almost the beginning. In the eighteenth and nineteenth century, the Supreme Court refrained from exercising its supervisory rulemaking power for actions at law. By means of the 1872 Conformity Act, Congress effectively withdrew that power. Meanwhile, experience in states such as New York – which went from the relative simplicity of the Field Code to complexity of the Throop Code – and the concerns of lawyers with multistate practices contributed to a movement supporting adoption of a uniform system of federal procedure. The American Bar Association took up that idea and advocated in favor of it for two decades. The concept was opposed by Senator Thomas Walsh, but after Walsh's death the concept of uniform federal procedure came to fruition in the 1934 passage of the Rules Enabling Act.

When the first Advisory Committee began meeting in the 1930s, questions arose with respect to the scope and limits of the rulemaking power. The major question at the time concerned the meaning of "general rules." Ultimately, the Advisory Committee almost backed into the idea that their task was to create trans-substantive rules.

As for the scope limitation set by the Enabling Act – that the Rules "shall neither abridge, enlarge, nor modify the substantive rights of any litigant" – the original Advisory Committee had no coherent and consistent understanding of that limitation. In a 1937 letter, William D. Mitchell (the Chair of the original Advisory Committee) stated that "the twilight zone around the dividing line between substance and procedure is a very broad one. If it were not for the fact that the court which makes these rules will decide whether they were within the authority, we would have very serious difficulties in dealing with this problem. The general policy I have acted on is that where a difficult question arose as to whether a matter was substance or procedure and I thought the proposed provision was a good one, I have voted to put it in, on the theory that if the Court adopted it, the Court would be likely to hold, if the question ever arises in litigation, that the matter is a procedural one." And Mitchell's prediction proved accurate; the Supreme Court has never invalidated a Civil Rule.

Sibbach v. Wilson & Co., 312 U.S. 1 (1941), cast the Enabling Act's scope limitation in terms of federalism concerns, but the notion that the Enabling Act's scope limitation arose from federalism concerns is a myth; the real motivation for that limit was a concern over separation of powers. *Hanna v. Plumer*, 380 U.S. 460 (1965), clarified that it makes a difference, for purposes of the *Erie* analysis, what *type* of federal law is operating, but *Hanna* did not improve the law respecting the nature of the Enabling Act's scope limitation. The concerns expressed by Justice Harlan in his separate opinion in *Hanna* have been vindicated; it seems almost impossible to invalidate a duly adopted Rule. Citing as examples *Semtek International, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001), and *Burlington Northern Railroad Co. v. Woods*, 480 U.S. 1 (1987), Professor Burbank stated that the Supreme Court's jurisprudence on the Enabling Act's scope limitation is incoherent.

During the early 1980s, Professor Burbank recalled, the Civil Rules Committee took a broad view of its powers, as evidenced by the 1983 amendments to Civil Rule 11. As a contrast, Professor Burbank cited the conference that the Civil Rules Committee convened in 2001 to discuss the topic of federal courts' power to enjoin overlapping class actions. Academics who participated in that conference expressed the view that the rulemakers would exceed their powers under the Enabling Act if they were to propose the adoption of a rule empowering federal courts to enjoin the certification of a state-court class action where certification of a substantially similar class had been denied in federal court; and the Committee decided not to proceed with such a proposal. Similar concerns about the scope of rulemaking authority led some to support the enactment by Congress of the Class Action Fairness Act.

Professor Burbank next highlighted the politics of rulemaking during different time periods. Initially, there was a long honeymoon (punctuated occasionally by dissents – by Justices Black and Douglas – from the Court's orders promulgating a proposed rule). In the 1980s, Representative

Kastenmeier began engaging in oversight of issues relating to the Civil Rules – such as offers of judgment under Civil Rule 68. Congress itself has acknowledged the power of procedure; for instance, in the Private Securities Litigation Reform Act it ratcheted up the pleading standard. As the power of procedure to affect the operation of the substantive law became more widely recognized, the topic attracted interest, and also interest groups. Meanwhile, during the 1980s the rulemaking process became more transparent. Chief Justice Burger oversaw the creation of a legislative affairs office within the AO.

The composition of the Advisory Committee changed over time. The original Advisory Committee was made up of lawyers and academics; it included no sitting judges. That changed during the 1970s, perhaps because people no longer perceived (as they formerly had) a unity of interests between the bench and bar. Calls arose for judicial management of litigation. Now, Professor Burbank observed, judges have come to dominate the rulemaking process. This raises the question, he suggested, how judges should function as part of a political process – for that, he stated, is what the rulemaking process is.

The rulemaking process has made progress with respect to the use of empirical data. Charles Clark and Edson Sunderland were legal realists who valued empirical research. One barrier to such research on matters touching the rulemaking process, Professor Burbank argued, has been the appeal of the image of trans-substantive rules. But when one compares the rulemakers' attitude toward empirical research in the 1980s and today, the change is admirable. Professor Burbank adduced, as an example of this shift, the Civil Rules Committee's decision not to incorporate into the recent Civil Rule 56 amendments the point-counterpoint mechanism that some districts mandate by local rule. But, Professor Burbank suggested, it would be even better if the AO would systematically collect, and make available to researchers outside the FJC, data concerning the litigation system.

Professor Wolff opened his remarks by noting that much of his scholarship focuses on the relationship between procedural rules and the underlying substantive law. He suggested that the rulemakers should take a modest view of the role that rules should play in relation to the substantive law. Judges and lawyers have become accustomed, Professor Wolff observed, to thinking about procedure trans-substantively. Similarly, he noted, in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, 130 S. Ct. 1431 (2010), the plurality asserted that Civil Rule 23 is merely another joinder rule. That assertion, Professor Wolff suggested, avoids the tough question that would otherwise arise: If you acknowledge the transformative nature of Rule 23, how could Rule 23 be a valid exercise of rulemaking power? Professor Wolff posited that one can answer that question by viewing the permissibility of class certification as tied to, and dependent on, the policies that underlie the relevant substantive law. In this view, the rules provide courts with an *occasion* for asking difficult liability questions. But, he suggested, it is not for the rulemakers to decide how liability policy will respond to the Rules; that task lies with legislators or with common-law courts. The Court recognized this principle, Professor Wolff commented, in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). In *Wal-Mart*, one of the Court's holdings was that the proposed employment discrimination class could not be certified under Civil Rule 23(b)(2) because that would conflict with certain requirements that the Court viewed as non-defeasible features of Title VII's statutory scheme.

Judge Sutton thanked Professor Burbank and Professor Wolff for their remarks. It is very helpful, he noted, for the Committee to obtain big-picture perspectives on the rulemaking process. He recalled that, in fall 2011, the Committee had heard from Professor Richard D. Freer on the issue of the frequency of rule amendments. (Later in the meeting, Judge Sutton noted that Professor Freer had recently drafted an article setting out his critiques of the rulemaking process.) Judge Sutton asked Professors Burbank and Wolff if they had advice to share with the Committee about the rulemaking process.

Professor Wolff noted that rule changes impose costs on the legal profession. Bold changes in the Rules, he suggested, should be undertaken only when supported by empirical data. Professor Burbank mentioned his 1993 article, "Ignorance and Procedural Law Reform: Time for a Moratorium," in which he criticized the 1993 amendments to Civil Rule 26 concerning initial disclosures. Professor Burbank agreed about the importance of empirical data. He also noted that trans-substantive procedure has costs. When rules are made with complex cases in mind, the rules become more elaborate and this raises the expense of litigation. As an example, Professor Burbank cited the point-counterpoint procedure for summary judgment, which, he observed, allows a litigant to impose huge costs on an opponent. Professor Wolff questioned whether the recent amendments to Civil Rule 56 were helpful to litigants in low-stakes cases. It is important, he suggested, to think about the broad array of litigants who may use the federal courts, and to ensure access to justice.

Professor Coquillette recalled that, in the 1990s, the Standing Committee considered the possibility of drafting a set of uniform Federal Rules of Attorney Conduct. In the end, the Standing Committee decided not to proceed with that project, which some regarded as being at or outside the limits of the rulemaking power. Senator Leahy, however, regarded the project as a good one and drafted a bill that would have empowered the rulemakers to undertake it. Professor Coquillette asked whether it is valuable when Congress looks to the Rules Committees for ideas on law reform. Professor Burbank responded that good law reform can require thinking beyond the boundaries of the Rules Enabling Act. (He pointed out that when sending forward the 1993 amendments to Civil Rule 4, the rulemakers included a special note flagging the question whether new Rule 4(k)(2) complied with the Rules Enabling Act's limits.) Professor Burbank suggested that multi-tiered lawmaking – in which the rulemakers provide input to Congress – can be useful.

Professor Wolff suggested that it can also be useful for the rulemakers to flag for the judicial branch issues that may arise from a change in the Rules. As an example, he cited the 1966 Committee Note to Civil Rule 23, which directed judges' attention to the connection between the procedures articulated in amended Rule 23 and the binding effect of a resulting judgment.

Mr. Rose stated that a classmate of his who is a district judge has commented on the difference between managerial judges who seek to avert trial through case management and summary judgment, and others who are more traditionalist about the idea that scheduling trials itself constitutes effective case management. He asked the presenters if they had suggestions for changing the way that the AO collects statistics. Professor Burbank noted that he had been involved in the ABA's project on the "vanishing trial" and, in connection with that, he wrote two articles about summary judgment. He found that the AO's data did not distinguish summary judgment motions

from other pretrial motions. The AO, Professor Burbank said, keeps statistics for the judiciary's purposes, and not for researchers' purposes. The Rules Committees have turned to the FJC for targeted research, but the FJC's resources are limited. He noted that he and Professor Judith Resnik participate in the activities of the American Bar Association's Standing Committee on Federal Judicial Improvements, and they have proposed a project on the collection of court data. Mr. Rose asked whether Professor Burbank has a view on the question of managerial judging. Professor Burbank responded that it is sad that people have come to regard trial as a failure. Modern procedure, he said, has made trial impossible, even for those who want it and deserve it. Summary judgments now account for from four to six times as many terminations as trials do. It would be better, he suggested, if federal judges spent more time in court trying cases and less time in their chambers managing cases.

Returning to the topic of the amendments to Civil Rule 56, an appellate judge recalled that the proposal to include a point-counterpoint mechanism in Rule 56 first arose because many federal districts have instituted such a mechanism in their local rules. Those districts felt that the mechanism worked very well. There was a concern that the rules for summary judgment procedure should be uniform nationwide. Opposition to the point-counterpoint proposal did come from judges in some districts who had employed the point-counterpoint mechanism and found that it did not work well. But there were also those who did not want a new mechanism imposed on their districts. So the failure of the point-counterpoint proposal was not solely due to conclusions drawn from empirical data. There were concerns about whether the proposal could ultimately receive approval. And there was a balancing of the value of uniformity against the value of local control. Professor Burbank responded that if the Committee had reached a contrary conclusion, that would have been surprising in light of the FJC study's findings concerning the length of time to motion disposition: When the point-counterpoint procedure was used, summary judgment motions took longer to decide. Also, the FJC study found a statistically significant difference in dismissal rates in employment discrimination cases: When the point-counterpoint mechanism was used, those cases were dismissed at a higher rate. The appellate judge participant responded that in evaluating the higher dismissal rate, one must consider why cases are being dismissed at a higher rate. The purpose of the point-counterpoint rule, he noted, is to clarify the issues.

Professor Wolff recalled that, at the 2010 Duke Civil Litigation Conference, he had argued during one of the sessions that *Twombly* and *Iqbal* confer a type of discretion on district judges – to employ their "judicial experience and common sense" – that the judges themselves should not wish to have. In a one-on-one conversation after that discussion, a judge had said to him that the *Twombly* / *Iqbal* pleading standard is a useful tool for disposing of *pro se* prisoner complaints. Professor Wolff suggested that good empirical data can help make visible to judges aspects of the practice in their own courthouses that the judges, acting in all good faith, may not otherwise perceive.

Judge Sutton asked Professors Burbank and Wolff for their views on whether it is better for procedural reforms to come about through judicial decisions or by means of a Rule amendment. Professor Burbank noted that the idea of "uniform rules" is appealing, but that a facially uniform rule can be interpreted differently in different places around the country. Many Rules, he observed,

confer discretion; such discretion-conferring Rules should not be viewed the same way as Rules that explicitly make policy choices. Professor Wolff suggested that so long as judges think carefully about the interplay between procedural rules and the substantive law, open-textured Rules can be a virtue. As an example, he cited litigation in which many "Doe" defendants are joined in a single copyright-infringement suit concerning file-sharing; in such suits, Civil Rules 20 and 26 give the district judge considerable discretion whether to allow early discovery prior to resolving the propriety of joinder.

Judge Sutton thanked Professors Burbank and Wolff for their presentations.

III. Approval of Minutes of April 2012 Meeting

During the meeting, a motion was made and seconded to approve the minutes of the Committee's April 2012 meeting. The motion passed by voice vote without dissent.

IV. Report on June 2012 Meeting of Standing Committee and Other Information Items

Judge Sutton described relevant aspects of the Standing Committee's June 2012 meeting. He noted that the Standing Committee gave final approval to proposed amendments to Appellate Rules 13, 14, 24, 28, and 28.1 and to Form 4, and that those amendments were recently approved by the Judicial Conference for submission to the Supreme Court. The Standing Committee approved for publication proposed amendments to Appellate Rule 6, concerning appeals in bankruptcy cases; so far, he reported, no comments had been submitted.

Judge Sutton noted that, after the Appellate Rules Committee's spring 2012 meeting, he had written to the Chief Judge of each circuit to thank them for their input on the question of amicus filings by Indian tribes and to let them know that the Committee plans to revisit the question in five years. At the Judicial Conference, Judge Sutton reported, he spoke with Chief Judge Kozinski, who stated that the Ninth Circuit will consider the possibility of adopting a local rule concerning such filings. He encouraged those present to suggest to the Chief Judge of their home circuit that the circuit consider adopting a local rule on that issue.

Judge Sutton noted that, at the Standing Committee's January 2012 meeting, Judge Kravitz had appointed Judge Gorsuch as the chair of a subcommittee to discuss terms, in the sets of national Rules, that may be affected by the shift from paper to electronic filing, storage, and transmission. Research performed for the subcommittee by Andrea Kuperman disclosed that the Rules currently use many different terms that could be affected by the shift to electronic filing. The subcommittee held discussions during spring 2012 and determined that, going forward, each Advisory Committee should attend carefully to the choice of words, in proposed Rule amendments, to denote the filing, storage, and transmission of documents.

V. Discussion Items

A. Item No. 10-AP-I (redactions in briefs)

Judge Sutton invited Judge Dow to introduce this item, concerning sealing and redaction of appellate briefs. Judge Dow noted that the item arose from an observation by Paul Alan Levy of Public Citizen Litigation Group, who stated that redactions in appellate briefs make it difficult for a potential amicus to gain the information necessary for effective amicus participation. That observation led the Committee to a more general discussion of sealing on appeal.

The Committee's inquiries identified three primary approaches to sealing and redaction on appeal. The D.C. Circuit and Federal Circuit require the litigants to review the record and to try to determine jointly whether any sealed portions can be unsealed; the litigants are to present that agreement to the court below. Some other circuits apply a presumption that materials sealed below should remain sealed on appeal. By contrast, the Seventh Circuit applies a contrary presumption; after a brief grace period, any sealed portions of the record on appeal are unsealed unless a motion is made to maintain the seal or unless the parties ask the court to excise the materials in question from the record on appeal.

Judge Dow reported that he, Mr. Letter, and Mr. Green had spoken informally with people in selected Circuit Clerks' offices to gain a better understanding of local circuit practices. In Mr. Letter's absence, the Reporter summarized the results of his research; she reported that the officials with whom Mr. Letter had conferred did not identify any practical problems with their circuits' approaches to sealing. The clerks' responses did provide some reason to think, the Reporter suggested, that a shift to an approach like the Seventh Circuit's approach might raise concerns in some circuits about possible resource constraints and delays. Mr. Green noted that, in the Sixth Circuit, items in the record that were sealed below remain sealed on appeal. The Sixth Circuit's approach, he said, seems to work well; motions seeking either to seal or to unseal matters in the record are rare, and counsel tend to have no complaints.

Judge Dow explained that the premise underlying the Seventh Circuit's approach is that the judiciary's activities are open to the public. There is a concern that district courts may seal items in the record without adequate justification if both parties agree to sealing. Judge Dow noted that the Seventh Circuit's approach requires more work both from the district court and from the parties. On appeal in the Seventh Circuit, the following procedure applies: If the record on appeal includes sealed items and the sealing is not required by statute or rule, the Clerk's Office notifies the parties that after two weeks the sealed documents will be unsealed unless a party moves to maintain the documents under seal or unless a party asks the Court to return the sealed documents to the district court (on the ground that those documents were not germane to the lower court's decision). Participants in this process characterize it as a well-oiled machine.

In sum, Judge Dow concluded, each circuit that was canvassed seems happy with its own procedures for dealing with sealed appellate filings. To achieve nationwide adoption of an approach similar to the Seventh Circuit's might take a Supreme Court decision or legislation. Failing that, the best course may be to try to generate dialogue among the circuits concerning best practices. The CM/ECF system, Judge Dow noted, has the capacity to handle sealed filings.

An appellate judge agreed that it may be difficult to induce other circuits to change their approaches, and that this fact makes him somewhat skeptical about the prospects for a national rule on the subject. On the other hand, he suggested, the Seventh Circuit's approach makes sense. He agreed that it could be productive to circulate to each circuit information concerning the other circuits' practices.

An attorney member asked how sealed filings affect the resulting court opinions. The Reporter responded that her research had not focused on the treatment, in judicial opinions, of information from sealed filings. Participants in the discussion noted the importance of explaining the reasons for a judicial decision and also the possibility of asking the parties to address in letter briefs whether previously sealed information should be disclosed in the opinion. An appellate judge asked how sealed materials in criminal cases are handled on appeal in the Seventh Circuit. The Reporter mentioned that the Seventh Circuit's procedures take into account statutory sealing requirements; if materials are sealed pursuant to statute or rule, then the Seventh Circuit's presumption in favor of unsealing on appeal does not apply. Judge Dow reported that there sometimes are motions by third parties to unseal materials that the court has placed under seal; such motions might be made, for example, by a media entity. An appellate judge noted that judicial opinions might disclose some information from a sealed document; for example, an opinion addressing a sentencing issue might discuss information from a pre-sentence investigation report.

An appellate judge member suggested that, if each circuit is satisfied with its own approach, there is no need for rulemaking on this topic. Judge Dow, noting the earlier proposal to circulate information to each circuit's Chief Judge, asked what sort of information might be included. Judge Sutton responded that the letter could describe the genesis of this item and also describe the varied approaches that the circuits take to sealed materials. The Committee has found that information useful, he noted, so it could be helpful to share it with each circuit.

A member expressed support for the idea but asked whether it is likely that the circuits would give attention to this question. The Reporter observed that after the Committee had circulated to the Chief Judges of each circuit Ms. Leary's 2011 report on the taxation of appellate costs under Rule 39, at least one circuit had changed its practices concerning costs. A participant suggested that any letter on sealing practices should be sent to the Circuit Clerks as well as the Chief Judges. A member asked how frequently the Committee decides to send letters to the Chief Judges. The Reporter noted that in fall 2006 Judge Stewart, as the Chair of the Committee, had written to the Chief Judge of each circuit to urge the circuits to consider whether their local briefing requirements were truly necessary and to stress the need to make those requirements accessible to lawyers.

Professor Coquillette observed that it is important not to encourage the proliferation of local circuit rules. In some instances, though, committees have identified specific areas where local variation may be justified, and have merely circulated information about such local variations.

An appellate judge member asked whether the letter should take a policy position on which approach is best. Another participant asked whether such a letter might cause readers to wonder why the Committee is not moving forward with a rulemaking proposal. An appellate judge observed

that, even if a provision were to be adopted that imposed a nationally uniform presumption in favor of unsealing on appeal (i.e., an approach similar to the Seventh Circuit's), this would not ensure that the resulting *decisions* on motions to seal achieved uniform results. The Reporter observed that if the Committee were to decide to take a strong policy position, consultation with other interested Judicial Conference committees (such as the Judicial Conference Committee on Court Administration and Case Management ("CACM")) might be advisable. Mr. Rose said that advance coordination would not be necessary if the Committee's letter were informational.

An appellate judge member expressed support for the idea of a letter. Judge Sutton asked whether the Committee preferred that the letter take an agnostic position on the relative merits of the circuits' approaches. Professor Coquillette stated that it would be necessary to consult CACM before taking the step of endorsing the Seventh Circuit's approach. An appellate judge member suggested that the letter could usefully identify the concerns that arise from sealed and redacted appellate filings. A district judge member added that the letter could also note the Seventh Circuit's rationale for its approach.

A motion was made that the Committee not proceed with a proposed rule amendment on the subject of sealed or redacted appellate filings. The motion was seconded and passed by voice vote without dissent.

Judge Sutton undertook to write to the Chief Judge of each circuit to advise them of Mr. Levy's suggestion, the reasons for it, the Committee's findings concerning the circuits' approaches, and the rationale for the Seventh Circuit's approach. Copies of the letter would be sent to the Circuit Clerks. A motion was made to approve this approach. The motion was seconded and passed by voice vote without dissent.

B. Item No. 11-AP-E (FRAP 4(b) / criminal appeal deadlines)

Judge Sutton invited Judge Fay to present this item, which arises from a suggestion by Dr. Roger Roots that Appellate Rule 4(b) be amended to lengthen the deadline for a criminal defendant to take an appeal. Judge Fay reviewed the suggestion and observed that the Committee had discussed a similar proposal roughly a decade earlier. At that time, after a very broad discussion, the Committee had voted to remove the proposal from its agenda. More recently, the Committee at its Spring 2012 meeting discussed Dr. Roots' proposal. Much of the discussion focused on whether the current 14-day deadline poses a hardship for defendants. Participants in that discussion observed that it is typically easier for a criminal defendant to decide whether to appeal than it is for the government to decide whether to appeal. And there is ordinarily a time lapse between conviction and sentencing, so that (except as to sentencing issues) defendants tend to have more than 14 days within which to consider possible bases for appeal.

Judge Fay noted that the agenda materials for the current meeting included some figures concerning the rate at which federal criminal defendants appeal; he stated that he was surprised by the low proportion of such defendants who appeal. The agenda materials also indicated that the choice of deadlines for criminal defendants' appeals is not likely to have major implications for

speedy trial requirements. It appears, Judge Fay noted, that relatively few appeals are dismissed on untimeliness grounds. District courts are likely to grant extensions where warranted. After *Bowles v. Russell*, 551 U.S. 205 (2007), courts are unlikely to regard a criminal defendant's appeal deadline as jurisdictional. The DOJ has opposed altering criminal defendants' appeal time limit, and has pointed out that there are big differences between the government and criminal defendants in terms of the time needed to decide whether to appeal. In sum, Judge Fay suggested, the current Rule works well and there is no reason to change it.

The Reporter thanked Ms. Leary for her very helpful research on criminal defendants' appeals. Ms. Leary noted that she had done a preliminary search, looking only at criminal appeals terminated in the Third Circuit since January 1, 2011. Among those appeals, nine were dismissed because the pro se defendant failed to meet Appellate Rule 4(b)'s 14-day deadline. But, she noted, in all but one of those cases, the defendant's delay was lengthy and would have rendered the appeal untimely even if the relevant deadline had been 30 days rather than 14 days. A member asked whether Ms. Leary had looked at all relevant appeals in the Third Circuit during the stated time period; she responded that the search was comprehensive.

A district judge member observed that very few cases go to trial. There is typically a long delay between conviction and sentencing. And where a criminal defendant needs more time to file a notice of appeal, caselaw in the Seventh Circuit supports the view that the district court should grant an extension under Rule 4(b)(4). Mr. Byron reiterated the DOJ's view that no amendment is needed.

A motion was made and seconded to remove this item from the Committee's agenda. The motion passed by voice vote without dissent.

C. Item Nos. 08-AP-A, 11-AP-C, and 11-AP-D (possible changes in light of electronic filing and service)

Judge Sutton invited the Reporter to introduce these items, which concern the possibility of amending the Appellate Rules to account for the shift to electronic filing, service, and transmission. The Committee last discussed this set of issues at its fall 2011 meeting. At this point, the Advisory Committees may not be ready to take joint action to further adjust the Rules in light of electronic filing. Given that fact, the Committee may wish to consider whether it wishes to proceed with such updates to the Appellate Rules outside the context of a joint project. There have been some relevant developments since the fall 2011 meeting. In the interim, the Eleventh and Federal Circuits have instituted electronic filing. The Bankruptcy Rules Committee has published for comment proposed amendments to Part VIII of the Bankruptcy Rules, which deal with appellate practice and which reflect the early adoption, in bankruptcy practice, of electronic filing and service. There are a variety of adjustments that might eventually be made to the Appellate Rules in light of the shift to electronic filing; one of the questions before the Committee is how to time those adjustments. One approach would be to propose such revisions only when the Committee is proposing to amend a particular Rule for other reasons. But, the Reporter suggested, it makes sense for the Committee to

consider whether there are any such revisions that are worth proposing earlier than that, as stand-alone amendments.

Mr. Green reported that the Circuit Clerks do not see an urgent need for revisions to the Appellate Rules at this time. Admittedly, he noted, Rule 26(c)'s "three-day rule" is odd and anachronistic. It would be difficult to achieve nationally uniform procedures for the treatment of the record and appendix; practices currently vary widely among the circuits. Judge Sutton asked whether the "three-day rule" is causing problems. Mr. Green responded that he did not think it causes logistical problems; rather, it is an oddity and it is hard to explain why it exists.

Mr. Byron asked about the effects, if any, of the adoption of the next generation of software for the CM/ECF system. The Reporter noted that the new software is slated to be rolled out gradually over a period of years. Mr. Green stated that the next generation software will make refinements, rather than big changes, in the electronic filing system.

Judge Sutton suggested that it might make sense for the Advisory Committees to address jointly the question of whether to revise the Rules to account for changes related to electronic filing. By consensus, the Committee retained Items 08-AP-A, 11-AP-C, and 11-AP-D on its study agenda.

D. Item No. 08-AP-H (manufactured finality)

Judge Sutton invited the Reporter to introduce this item, which concerns the possibility of amending the Rules to address situations in which parties attempt to "manufacture" a final appealable judgment (so as to obtain review of a ruling on one claim in a suit (the "central claim")) by dismissing all other pending claims (the "peripheral claims"). The Reporter noted that the Civil / Appellate Subcommittee, chaired by Judge Colloton, had considered this item in depth but had not reached consensus on it.

The Reporter noted that there are a variety of ways in which one might try to secure review of the central claim. First, a straightforward way is to dismiss the peripheral claims with prejudice; there is consensus that such action produces a final, appealable judgment. Second, at the other end of the spectrum, if the peripheral claims are dismissed without prejudice, roughly half the circuits have made clear that this does not produce an appealable judgment; but there are some decisions in a few circuits taking a different view. The Ninth Circuit has a test that examines whether the would-be appellant tried to manipulate appellate jurisdiction. Third, when the dismissal of the peripheral claims was nominally without prejudice but those claims can no longer be asserted due to some practical impediment, there is a growing consensus that such a dismissal does create an appealable judgment. Fourth, in the Eighth and Ninth Circuits an appealable judgment results when the dismissal of the peripheral claims without prejudice completely removes a defendant from the suit. Fifth, the Second Circuit takes the view that an appealable judgment results if the appellant conditionally dismisses the peripheral claims with prejudice – i.e., commits not to re-assert the peripheral claims unless the appeal results in the reinstatement of the central claim. However, some four circuits disagree with this view. Most recently, in *SEC v. Gabelli*, 653 F.3d 49 (2d Cir. 2011),

the Second Circuit applied the conditional-prejudice doctrine to permit an appeal, but refused to extend the doctrine to the attempted cross-appeal in the same case.

An attorney member noted that, two days earlier, the Supreme Court had granted certiorari in *Gabelli*.

Judge Colloton summarized the Civil Rules Committee's discussions of the topic of manufactured finality; some members of that Committee had reacted negatively to the idea of the conditional-prejudice doctrine. The Civil / Appellate Subcommittee considered the idea of proposing a rule that would eliminate avenues for manufacturing jurisdiction (such as dismissal without prejudice or with conditional prejudice), and alternatively considered the idea of not proposing a rule amendment. Ultimately, through lack of strong support for the first option, the Subcommittee defaulted to the second option. Some participants in the discussion were of the opinion that any problems that arise can be handled under Civil Rule 54(b).

A member asked whether the topic of appellate jurisdiction is appropriate for rulemaking. Judge Colloton responded that Congress has authorized rulemaking to define when a district-court ruling is final for purposes of appeal. An attorney member stated that this area of law meets his criterion for rulemaking action: It is an area in which litigants ought to be able to find a clear answer.

A participant asked for examples of scenarios that could not be adequately dealt with under Civil Rule 54(b). It was noted that the use of Civil Rule 54(b) is within the district court's discretion, and that Civil Rule 54(b) certification can apply only when there is a particular claim that is ripe for the certification. Judge Colloton noted that Professor Cooper had pointed out that Civil Rule 54(b) does not address instances where a ruling severely affects a claim but does not completely dispose of it – as when a court has excluded a party's most persuasive evidence in support of its claim, but has ruled admissible just enough evidence "to survive summary judgment and limp through trial."

It was suggested that it would be wise to await the Supreme Court's decision in *Gabelli*. By consensus, the Committee retained this item on its study agenda.

VI. Additional Old Business and New Business

A. Item No. 12-AP-B (Form 4's directive regarding institutional-account statements)

Judge Sutton invited the Reporter to introduce this item, which arises from a comment that the National Association of Criminal Defense Lawyers ("NACDL") submitted on the pending amendment to Form 4 (concerning applications to proceed *in forma pauperis* ("IFP")). The pending amendments – which are on track to take effect on December 1, 2013 if the Supreme Court approves them and Congress takes no contrary action – make certain technical changes to the Form and revise

the current Form's detailed questions about the applicant's payments for legal and other services.

The pending technical changes include a revision to the Form's directive that prisoners must attach an institutional account statement. The pending revision would limit that directive to prisoners "seeking to appeal a judgment in a civil action or proceeding." That revised language more closely tracks the language in 28 U.S.C. § 1915(a)(2) (a statutory provision added by the Prison Litigation Reform Act ("PLRA")). Commenting on this proposed change, NACDL suggested that this provision be further revised by adding the following parenthetical: "(not including a decision in a habeas corpus proceeding or a proceeding under 28 U.S.C. § 2255)."

The Reporter stated that NACDL's legal analysis accords with the overall state of the law. All circuits have cases stating that the PLRA's IFP provisions do not apply to habeas petitions under Section 2254. A majority of circuits have cases stating the same view with respect to Section 2255 motions. However, the Reporter noted that courts might well apply the PLRA's IFP requirements if a prisoner (erroneously or not) styled a challenge to prison conditions as a habeas petition, or if a prisoner included a prison-conditions challenge in a habeas petition.

The Reporter suggested that, in evaluating NACDL's proposal, it may be useful to consider the effect of Form 4's wording on the risk of error by an IFP applicant. Form 4, as revised by the pending amendment, might risk inconveniencing some IFP applicants in habeas cases who erroneously think that they must include an institutional-account statement with their IFP application. This risk may be relatively widespread, but would likely pose no more than an inconvenience in any given case. If NACDL's proposed change is made, there would be a risk that some (relatively small) number of IFP applicants would erroneously believe they need not include an institutional-account statement. That risk would not likely be widespread, but it might have more significant implications for the appeal. Those implications would depend on how courts would treat the absence of an institutional-account statement when one is required. The caselaw gives reason to hope that such an error would not render the filing untimely, and that the appeal would be permitted to proceed so long as the applicant supplied the required statement promptly once alerted to the error. That would be the likely outcome, but there remains the possibility that a court might disagree.

An appellate judge member suggested that the worst-case scenario under the Form (as revised by the pending amendment) does not seem a matter for grave concern: The prison will simply supply an institutional-account statement unnecessarily. An attorney member asked what would happen if an inmate is moved from one institution to another – would he or she need to supply more than one institutional-account statement? Mr. Green stated that if a litigant omitted an institutional-account statement when one was required, his office would simply direct the litigant to remedy the omission. A district judge member reported that this requirement does not cause problems at the district court level; within his district, each prison has a designated person whose job it is to process the institutional-account statements.

Judge Colloton noted the broader issue of the role of rulemaking concerning forms; the Civil Rules Committee, he observed, is considering whether to cease promulgating forms. Professor Coquillette noted that the Advisory Committees vary in their approaches to forms.

An attorney member suggested that any change in response to NACDL's comment should be held for disposition along with other small changes that might be addressed once every five years or so. Judge Sutton agreed that it is worth thinking about the frequency of rule amendments. More generally, though, bundling amendments might not always work for all of the Advisory Committees. Mr. Byron recalled that in the late 1990s and early 2000s the Appellate Rules Committee did follow the practice of bundling rule amendments.

Concerning the present proposal about Form 4, Mr. Byron stated that the DOJ defers to the views of the judges and clerks. An appellate judge member suggested that it would make sense to wait and see how the pending amendments to Form 4 function in practice before considering further changes.

By consensus, the Committee retained this item on its agenda.

B. Item No. 12-AP-C (FRAP 28 – pinpoint citations)

Judge Sutton invited Judge Chagares to present this item, which arises from a suggestion submitted by the Council of Appellate Lawyers of the Appellate Judges Conference of the American Bar Association's Judicial Division (the "Council") as part of that group's comments on the pending amendments to Rules 28 and 28.1 (concerning the statement of the case). The Council proposes "amending Rule 28(e) to require a pinpoint citation to the appendix or record to support each statement of fact and procedural history anywhere in every brief," rather than "only in the statement of facts."

Judge Chagares noted that it is very frustrating to read briefs that lack citations to the record. The amendment proposed by the Council, he suggested, might raise awareness (among less experienced lawyers) about the requirement of citations to the record. However, an attorney member asked what the Council's proposed amendment would change. Another attorney member observed that Appellate Rule 28(a)(9)(A) already requires "citations to the authorities and parts of the record on which the appellant relies." Professor Coquillette argued that one should not propose a rule amendment for the purpose of educating lawyers. A member suggested that lawyers should not need further instruction concerning the requirement of citations to the record. Judge Jordan observed that the Bankruptcy Rules Committee has had a similar discussion about whether to amend the Rules in order to address lawyers' failure to comply with existing requirements; some rules, he noted, are disobeyed frequently. Good lawyers will comply with the rules and bad lawyers will not.

A motion was made and seconded to remove this item from the Committee's study agenda. The motion passed by voice vote without dissent.

C. Item No. 12-AP-D (Civil Rule 62 and FRAP 8 – appeal bonds)

Judge Sutton invited Mr. Newsom to introduce this item, which arises from Mr. Newsom's suggestion that the Committee consider the topic of appeal bonds. Mr. Newsom explained that he finds the bonding process mystifying every time that it arises in a complex civil case. Though he does not advocate amending the Rules to educate lawyers about the bonding process, he suggested that amendments might usefully address gaps in the Rules' treatment of the topic. This topic centrally concerns Civil Rule 62, but most lawyers who deal with these issues are appellate lawyers.

Mr. Newsom pointed out that Civil Rule 62 currently addresses separately two time periods for which a bond will typically be needed: Civil Rule 62(b) addresses stays of a judgment pending disposition of a postjudgment motion, while Civil Rule 62(d) addresses stays of the judgment pending appeal. Issues that might be addressed by a Rule amendment include the timing, form, and amount of a bond. Current Rule 62 may produce something of a gap, because under Rule 62(d) the stay takes effect only when the court approves the bond, and the bond can be given "upon or after filing the notice of appeal." So technically the Rule 62(b) stay would have expired upon the disposition of the postjudgment motion, and the Rule 62(d) stay would not take effect until the appellant has filed the notice of appeal and the bond, and the court has approved the bond.

The question of procedure, Mr. Newsom suggested, is more interesting than the question of the amount of the bond. Questions include the following: (1) Should Civil Rule 62(b) be amended to *require* the issuance of a stay upon the posting of sufficient security? (2) Should the Rule be amended to reflect the reality that most complex cases involve both postjudgment motions and an appeal, and to treat those two periods under the same framework? (3) Should the Rule be amended to address the timing gap between disposition of the postjudgment motion and the approval of the supersedeas bond? In practice, Mr. Newsom said, lawyers take a "belt and suspenders" approach by obtaining – for purposes of the postjudgment motion period – a bond that will also meet the requirements for a supersedeas bond under Civil Rule 62(d); one pays a single annual premium and can get a refund for the unused period.

An attorney member observed that this topic seems to fall largely within the jurisdiction of the Civil Rules Committee. Judge Sutton asked for Judge Dow's views. Judge Dow responded that the appeal-bond requirement can be a big problem when things go wrong. He suggested that the Reporter discuss the matter with Professor Cooper.

By consensus, the Committee retained this item on its study agenda.

D. Item No. 12-AP-E (FRAP 35 – length limits for petitions for rehearing en banc)

Judge Sutton invited Professor Katyal to introduce this item, which arises from Professor Katyal's observation that Appellate Rule 35(b)(2) sets a 15-page limit for rehearing petitions.

Professor Katyal observed that he has seen a lot of manipulation of length limits that are set in pages. People waste time altering fonts and line spacing. The 1998 amendments to the Appellate Rules set type-volume length limits for merits briefs, but limits denoted in pages remain in Rules

5, 21, 27, and 35. The time may have come to reconsider that choice. Technological developments have made it much easier to count words. The type-volume limit is harder to manipulate. On the other hand, the type-volume limit does entail an added item – a certificate of compliance. And some pro se litigants continue to file handwritten briefs. But on balance, Professor Katyal suggested, it would be worthwhile to denote length limits in a consistent fashion. An attorney member agreed with this view.

A district judge member pointed out that Rule 28(j) sets a 350-word limit for letters concerning supplemental authorities, and he expressed support for that approach. Mr. Byron noted that one might view the type-volume approach as the exception and the page-limit approach as the general rule. He asked whether the page limits create problems for judges and clerks. Mr. Green said that they do not. Professor Katyal observed that when one's opponent manipulates a page limit, it can be awkward to call the opponent on it. The district judge member observed that when length limits are set in pages, the resulting briefs can be harder to read.

The Reporter noted that the type-volume limits include a safe harbor denoted in pages, and she asked how those safe-harbor page limits compare to the type-volume limits. Mr. Byron responded that the safe-harbor page limits are significantly shorter than the type-volume limits. An attorney member observed that the Supreme Court switched from page limits to word limits in 2007. A participant asked how length limits are applied to pro se briefs. An appellate judge participant responded that the court would likely just deal with the pro se brief on its merits rather than worrying about its compliance with length limits.

An attorney member expressed support for pursuing this topic further. By consensus, the Committee retained this item on its study agenda.

E. Item No. 12-AP-F (FRAP 42 and class action appeals)

Judge Sutton invited the Reporter to introduce this item, which arises from a suggestion by Professors Brian T. Fitzpatrick, Brian Wolfman, and Alan B. Morrison that Appellate Rule 42 be amended to require approval from the court of appeals for any dismissal of an appeal from a judgment approving a class action settlement or fee award, and to bar such dismissals absent a certification that no person will give or receive anything of value in exchange for dismissing the appeal.

The Reporter observed that the backdrop for this proposal is the debate over the role of objectors in class actions. That debate played a part in the Civil Rules Committee's discussions, during the early 2000s, of the proposals that ultimately gave rise to the 2003 amendments to Civil Rule 23. The 2003 amendments, among other things, revised Rule 23(e) in order to intensify judicial scrutiny of proposed class settlements. In considering ways to better inform the district judge about the merits of such a proposed settlement, the Civil Rules Committee had discussed possible ways to facilitate a role for objectors in generating information about a proposed settlement. Participants discussed – but the Committee ultimately rejected – the possibility of amending Rule 23 to, for example, provide for discovery conducted by objectors, or provide ways to remunerate

objectors and their counsel. Participants noted that objectors may have varying motives and that it could be problematic to give all such objectors undue sway. Ultimately the Committee moved in a different direction; the 2003 amendments to Rule 23 use other means to try to improve the settlement approval process – such as providing the possibility of a second round of opting out.

The question, in dealing with objectors, has always been how best to promote useful objections while minimizing the problems caused by objectors (and their counsel) whose objections do not improve the result for the class and who are motivated by the prospect of personal gain. When determining how to treat the withdrawal of an objection, one might also seek to distinguish between objections with grounds that apply to the class as a whole and objections founded upon circumstances unique to the objector in question.

Civil Rule 23(e)(5) addresses the question of dropping an objection. It provides that "[a]ny class member may object" to a proposed class settlement, and that "the objection may be withdrawn only with the court's approval." To that extent, Civil Rule 23(e)'s treatment of objectors departs from the usual principle that the court will not force a litigant to keep litigating when the litigant no longer wishes to do so. (Of course, the requirement of court approval for class settlements is itself a departure from that principle.)

The proponents of the current proposal point out that Civil Rule 23(e)(5) will not prevent objectors from making objections in order to extract monetary compensation. Those objectors might simply wait until they have a pending appeal and then offer to drop the appeal if they are paid off at that point. Currently there is no provision in the Rules that explicitly addresses that possibility. Professor Cooper has pointed out that during the discussions that led to the 2003 amendments, there was a proposal to draft the provision in Civil Rule 23(e) broadly enough to encompass the withdrawal of objector appeals. That proposal did not make it into the 2003 amendments to Civil Rule 23. Some participants had questioned whether a district court would have authority to address the propriety of an objector's dismissal of a pending appeal.

Compared with current Civil Rule 23(e)(5), the proposed amendment to Appellate Rule 42 is broader in scope and more stringent in its criteria. Unlike Civil Rule 23(e)(5), the proposed amendment would encompass objections to fee awards. Civil Rule 23(h)(2) does contemplate objections to fee awards, but does not constrain the dropping of such objections in the way that the proposed Appellate Rule 42 amendment would. In addition, Civil Rule 23(e)(5) gives the district court discretion whether to approve the withdrawal of an objection, whereas the proposed amendment to Appellate Rule 42 would remove the court of appeals' discretion to approve the withdrawal of the appeal if there is a payment in exchange for that withdrawal.

The Reporter suggested that the proposal is an elegant one in the sense that its goal is to craft a Rule that would cause undesirable objectors to self-select out of the appellate process. If they anticipate that they can get no personal benefit from the appeal, then they will not appeal. But the Reporter noted a few questions about the proposal. One concerns the possibility that the Rule's existence might not deter all such objectors from appealing. If an objector did in fact take an appeal, and then receive something of value in exchange for dropping the appeal, the court would be in the

unusual position of forcing a now-unwilling appellant to maintain an appeal. There are not very many cases that interpret and apply Appellate Rule 42, but among those scattered cases are at least some that remark upon the awkwardness of denying an appellant permission to drop an appeal. Perhaps it would be less awkward in the case of a class action objector's appeal, to the extent that one could view the objector as having a duty to act in the interests of the class when objecting. One question is whether the proposal could be modified to provide the court of appeals with discretion whether to permit the dropping of an appeal – along the lines of the discretion that Civil Rule 23(e)(5) accords to the district court. The decision whether to permit the withdrawal of the appeal would fall to the court of appeals, unless that court decided to remand to the district court for a resolution of that question. Court of appeals judges may not be as well situated as the district court to assess the validity of the objector's reasons for seeking to withdraw the appeal.

Judge Sutton suggested that this proposal might best be considered within the larger context of the Civil Rules Committee's consideration of possible changes to Civil Rule 23. If so, perhaps it would be useful for a member of the Appellate Rules Committee to participate in the discussions of the relevant subcommittee of the Civil Rules Committee. Professor Coquillette agreed that it will be important to work closely with the Civil Rules Committee.

An attorney member stated that the current proposal concerning Appellate Rule 42 would go beyond the provisions of Civil Rule 23(e)(5). It is not intuitively obvious, this member suggested, that all payments to class action objectors are nefarious. District judges are in a better position than court of appeals judges to assess an objector's reasons for withdrawing an objection. If the Committee moves forward with a proposal on this topic, the proposal should assign the decision to the district court rather than the court of appeals.

An appellate judge member described her experience with parties' motions seeking permission to withdraw from an appeal. Resolving such motions, she reported, can be very time-intensive for the appellate court.

By consensus, the Committee retained this item on its study agenda.

VII. Adjournment

The Committee adjourned at 3:45 p.m. on September 27, 2012.

Respectfully submitted,

_____

Catherine T. Struve
Reporter

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TAB 5

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TAB 5A

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

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CHAIR

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CRIMINAL RULES

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EVIDENCE RULES

MEMORANDUM

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

FROM: **Honorable Eugene R. Wedoff, Chair**
Advisory Committee on Bankruptcy Rules

DATE: **December 5, 2012**

RE: **Report of the Advisory Committee on Bankruptcy Rules**

I. Introduction

The Advisory Committee on Bankruptcy Rules met on September 20 and 21, 2012, in Portland, Oregon. The draft minutes of that meeting accompany this report.

At this meeting the Advisory Committee discussed a number of suggestions for rule amendments and new forms that had been submitted by bankruptcy judges, members of the bar, and court personnel. It also continued its discussion of several ongoing projects.

The Advisory Committee has no action items to report at this time. Rather, this report is intended to provide the Standing Committee with information about four matters that may result in rule or form amendments that the Advisory Committee will bring to the June meeting for approval for publication.

Part II of the report presents for the Standing Committee's preliminary consideration revised bankruptcy forms for individual debtor cases. These proposed forms are the products of the Forms Modernization Project. The first group of modernized individual forms was published in August, and the Committee will be reviewing any comments addressing them. The forms included in this report are the remaining revised individual forms. They have not yet been

approved by the Advisory Committee because it wants to take into account any comments received on the published individual forms before acting on the remaining ones. The Advisory Committee anticipates, however, that it will bring these forms to the Standing Committee at the June meeting with a recommendation that they be published for comment in August 2013.

Part III discusses a mini-conference that the Advisory Committee held in Portland on September 19, the day before its regular meeting. The focus of the mini-conference was on the home mortgage forms and related rules that went into effect on December 1, 2011. The invited participants provided feedback to the Committee about how the new reporting requirements are being implemented and whether there is a need for any revision of the forms or rules.

Part IV reports on the progress of the Committee's development of an official form for chapter 13 plans and its consideration of related rule amendments. The Committee hopes to be in a position to seek the Standing Committee's approval in June of the publication of the proposed form and rule amendments.

Finally, Part V of this report discusses the Committee's consideration of whether to propose a bankruptcy rule that would allow bankruptcy filings with the electronic signature of an individual who is not a registered user of the CM/ECF system without requiring the individual's attorney or the court to retain an original document bearing the individual's handwritten signature.

II. Restyled Forms

The Bankruptcy Forms Modernization Project ("FMP") began its work in 2008. The project is being carried out by an ad hoc group composed of members of the Advisory Committee's Subcommittee on Forms, working with representatives of other relevant Judicial Conference committees, the Federal Judicial Center, and the Administrative Office of the U.S. Courts.

The dual goals of the FMP are to improve the official bankruptcy forms and to improve the interface between the forms and available technology. The judiciary is in the process of developing "the next generation" of CM/ECF ("Next Gen"), and the modernized forms are being designed to use the enhanced technology that will become available through Next Gen. From a forms perspective, a major change in Next Gen will be the ability to store as data all information reported on forms so that authorized users can produce customized reports from the forms containing the information they want, displayed in whatever format they choose.

The Advisory Committee approved the FMP's decision to create a separate set of forms for use in cases involving individual debtors. Separating those forms from the forms used by non-individual debtors, such as corporations and partnerships, allows for the elimination of irrelevant questions on both sets of forms and for the incorporation of a more user-friendly style in the individual forms.

In August 2012 the Standing Committee published for public comment the first group of restyled individual forms:

- application forms for the payment of fees in installments and for fee waivers (currently Official Forms 3A and 3B);
- income and expenses forms (currently Official Forms 6I and 6J); and
- means test forms (currently Official Forms 22A, 22B, and 22C).

To date, only one comment has been received on the published forms. It was submitted by a consumer bankruptcy attorney in Pennsylvania and was supportive of the proposed forms. The Advisory Committee, however, expects to receive more comments before the February deadline, and it will review those comments before deciding whether to seek approval for publication of the remaining individual forms. Because of the likelihood, however, that the Committee will bring the balance of the individual forms to the Standing Committee in June with a request that they be approved for publication, the Advisory Committee will present them for preliminary review at this meeting.

Drafts of the eighteen revised individual forms currently under consideration are attached to this report. The accompanying Committee Note for each form discusses the most significant differences between the proposed form and the one it would replace. In order to generate more complete and accurate responses, all of the proposed forms adopt a style and format that is easier to read and understand than the existing forms. This restyling is based on the recognition that there is a need for the forms submitted by individuals to be less technical, both because individuals are generally less sophisticated than other entities and because individuals may not have the assistance of counsel. Accordingly, the proposed forms for individual debtors use language more common in ordinary conversation, employ more intuitive layouts, and include clearer instructions and examples within the forms. Many open-ended and multiple-part questions have been replaced with specific questions.

The forms presented with this report are the following:

- Official Form 101—Voluntary Petition for Individuals Filing for Bankruptcy
- Official Form 101AB—Your Statement About an Eviction Judgment Against You – Parts A and B
- Official Form 104—List in Individual Chapter 11 Cases of Creditors Who Have the 20 Largest Unsecured Claims Against You Who are not Insiders
- Official Form 106 – Summary—A Summary of Your Assets and Liabilities and Certain Statistical Information
- Official Form 106A—Schedule A: Property
- Official Form 106B—Schedule B: Creditors Who Hold Claims Secured by Property
- Official Form 106C—Schedule C: Creditors Who Have Unsecured Claims
- Official Form 106D—Schedule D: The Property You Claim as Exempt

- Official Form 106E—Schedule E: Executory Contracts and Unexpired Leases
- Official Form 106F—Schedule F: Your Codebtors
- Official Form 106 – Declaration—Declaration About an Individual Debtor's Schedules
- Official Form 107—Your Statement of Financial Affairs for Individuals Filing for Bankruptcy
- Official Form 112—Statement of Intention for Individuals Filing Under Chapter 7
- Official Form 119—Bankruptcy Petition Preparer's Notice, Declaration and Signature
- Official Form 121—Your Statement About Your Social Security Numbers
- Official Form 318—Discharge of Debtor in a Chapter 7 Case
- Official Form 423—Certification About a Financial Management Course
- Official Form 427—Cover Sheet for Reaffirmation Agreement

As the above list of forms reflects, the FMP has developed a new numbering system that organizes the bankruptcy forms in a logical way and retains a relationship to current form numbering. The basic protocol of the new numbering system is as follows:

1xx – Forms for Individuals Filing for Bankruptcy (used early in the case)
2xx – Forms for Non-individual Filing for Bankruptcy (used early in the case)
3xx – Orders and Court Notices
4xx – Additional Official Forms (used later in the case)
xxxx – Director's Forms

To the extent possible, forms incorporate their current numbers. The following is an example of how the new numbering system relates to the current numbering:

Current Voluntary Petition	Official Form 1
Modernized Individual Voluntary Petition	Official Form 101
Modernized Non-individual Voluntary Petition	Official Form 201

The logic of this numbering system, which is intuitive and easy to explain, is intended to ease the transition to the modernized forms for those who are accustomed to the numbering and organization of the current Official Bankruptcy Forms. A working draft of the conversion table is included in the attachment to this report.

An instruction booklet that would accompany the revised individual forms is also included in the attachment. It contains information about the process of filing for bankruptcy, checklists of forms that must be filed with the petition or within fourteen days thereafter, and the pre-filing notice that § 342(b) of the Bankruptcy Code requires the bankruptcy clerk to give to individuals with primarily consumer debts. The booklet then provides detailed instructions for completing selected forms and a glossary of terms used in the forms.

Setting out detailed instructions in a separate document reduces the need for lengthy instructions in the forms themselves. The Advisory Committee does not anticipate requesting

that the instruction booklet be approved as an Official Form, but the instruction booklet is included with the proposed forms now to illustrate the manner in which the new forms will be presented to debtors.

III. Home Mortgage Forms and Rules

On December 1, 2011, amendments to Rule 3001(c), new Rule 3002.1, and new Official Forms 10A, 10S1, and 10S2 went into effect. These rules and forms were promulgated to ensure that debtors and trustees are fully informed of the basis for home mortgage claims and of the amounts that must be paid to cure any arrearages and to make payments in the proper amount on home mortgages during chapter 13 cases. They require a home mortgage creditor to provide more detailed information in support of its proof of claim and, during the course of a chapter 13 case, to give notice of any changes in the ongoing payment amount and of the assessment of any fees, expenses, and charges. Rule 3002.1 also provides a procedure for obtaining information about the status of a home mortgage at the conclusion of a chapter 13 case.

The Advisory Committee held a mini-conference on September 19, 2012, to explore the effectiveness of the new rules and forms and to consider whether any adjustments to the requirements might be advisable. The Committee invited fifteen participants, consisting of attorneys for consumer debtors and for mortgage servicers, chapter 13 trustees, bankruptcy judges, and a bankruptcy clerk. The participants were asked to discuss a set of issues that the Committee identified in advance of the conference, including the following:

- *Balancing amount and cost of disclosure.* Do the rules and forms strike the optimal balance between disclosure of useful information and the cost of producing the information?

- *Best procedures.* Can there be improvements in the procedures for disclosing the required information and for resolving any disputes about amounts claimed by creditors, arising both before and after the bankruptcy filing?

- *Technical and administrative issues.* Have any administrative or technical problems been encountered in completing or filing the forms?

- *Possible ambiguities.* Are there ambiguous provisions of the rules or forms that need to be amended by the Rules Committee rather than left to judicial interpretation?

The mini-conference revealed general acceptance of the disclosure requirements. Participants expressed a desire, however, to eliminate ambiguities in the rules and forms and to make some adjustments to facilitate compliance and to require the provision of additional information. Some participants agreed to continue discussions with each other after the mini-conference in order to arrive at consensus recommendations for the Committee. They were

invited to submit supplemental information, and the Committee has received several such submissions.

The Committee's Consumer Issues and Forms Subcommittees are considering the feedback that was provided at the mini-conference and are evaluating whether any amendments to the home mortgage rules or forms need to be pursued now. A number of the issues discussed at the conference are likely to be resolved over time as courts and affected parties become more familiar with the new requirements. Others, however, may merit the Committee's consideration. The subcommittees are actively considering the suggestion that a detailed loan payment history be attached to a home mortgage proof of claim in a format that can be automated. They are also considering whether there is a need to amend Rule 9009 (Forms) in response to the desire expressed at the mini-conference to eliminate local variations in the disclosure requirements. The Advisory Committee will take up at its spring meeting any recommendations from the subcommittees.

IV. Chapter 13 Form Plan and Related Rule Amendments

As previously reported, an ad hoc group of the Advisory Committee has been working on drafting an official form for chapter 13 plans. The creation of such a form was the subject of suggestions that a bankruptcy judge and an association of state attorneys general submitted to the Committee. A survey of chief bankruptcy judges revealed strong support for a national form plan.

One benefit of an official form plan would be to make more uniform the procedures for plan confirmation in chapter 13 cases, which now vary substantially among the districts. Many districts require the use of local model plans containing distinctive features. These differences impose substantial costs on creditors with regional or national businesses and on software vendors, whose products must accommodate all of the local variations. Also, a national form could require that any variances from its standard provisions be located in a specific, highlighted section of the plan, allowing for easier review by the court, trustees, and creditors. This would assist courts' compliance with the Supreme Court's direction in *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010), that bankruptcy judges independently review chapter 13 plans for conformity with applicable law.

The working group presented a draft of the form plan for preliminary review at the Committee's fall meeting. The group also proposed amendments to Rules 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, designed to require use of the national form and provide authority needed to implement some of the plan's provisions. The Committee discussed the proposed form and rule amendments in Portland and accepted the working group's suggestion that the drafts be shared with a cross-section of interested parties to obtain their feedback on the proposals.

In order to obtain this feedback, the Committee will hold a mini-conference on the draft plan and proposed rule amendments on January 18 in Chicago. Invited participants include chapter 13 trustees, consumer debtors' attorneys, attorneys for a variety of creditor interests, a representative of the Executive Office for U.S. Trustees, bankruptcy judges, and a bankruptcy clerk. They have been divided into panels and asked to address specific topics relating to the plan or rule amendments.

Assuming that there is a generally favorable response to the proposals at the mini-conference, the working group will make revisions to the plan and rule amendments based on the feedback received and then present the model plan package to the Consumer Issues and Forms Subcommittees for their consideration. The subcommittees will report their recommendation to the Advisory Committee at its spring meeting. If the Committee approves a form chapter 13 plan and rule amendments at that meeting, it will seek the Standing Committee's approval for publication of the package in August 2013.

V. Consideration of Electronic Signature Issues

As the Committee reported at the June 2012 meeting, it has been considering the development of a rule that would allow courts to accept for filing in a bankruptcy case a document that bears the electronic signature of a person who is not registered with the CM/ECF system—without requiring the retention of the original document with the handwritten signature of the non-registrant. Currently, under Rule 5005(b)[1] these issues in bankruptcy courts are governed by local rules that vary significantly from one district to another. The Committee on Court Administration and Case Management ("CACM") was the originator of model rules regarding electronic case filing, and the Commentary to those rules asserted the need to retain the original hand-signed document.[2] As a result, many, but not all, bankruptcy courts require the

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[1] Bankruptcy Rule 5005(b)(2) provides in part that a "court may by local rule permit or require documents to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes." This provision was added in 1996 to authorize courts to permit electronic filing, signing, and verification, and later amended in 2006 to allow courts to require those activities to be done electronically, so long as reasonable exceptions are allowed.

[2] Model Rule 7 (Retention Requirements) imposed a duty on a Filing User (i.e. the filing attorney) to maintain in paper form any electronically filed document that required the original signature of someone other than the Filing User. The Commentary to the rule stated without further elaboration that, "because electronically filed documents do not include original, handwritten signatures, it is necessary to provide for retention of certain signed documents in paper form in case they are needed as evidence in the future." The rule did not specify a retention period, but instead left that decision up to each district. The Commentary noted that the then-existing local rules "varied considerably on the required retention period." It advised that, "[a]ssuming that the purpose of document retention is to preserve relevant evidence for a subsequent proceeding, the appropriate retention period might relate to relevant statutes of limitations."

attorney for the non-registrant (usually a debtor) to retain the original document with a handwritten signature for a specified period of time.

The Advisory Committee began considering this issue at the request of the Forms Modernization Project. A number of debtors' attorneys who provided feedback on the restyled individual forms expressed concern about the increased length of the proposed forms. The FMP suggested that this concern would be lessened if attorneys were not required to retain paper copies of all of the documents requiring the debtor's signature. That change would also respond to two concerns expressed by representatives of the Department of Justice about the current practice: (1) The debtor's attorney is usually the custodian of documents that might be used to prosecute the debtor, and (2) the required retention periods vary among districts and are not necessarily related to any relevant statutes of limitations.

The Committee, through its Subcommittee on Technology and Cross Border Insolvency, has begun to investigate two approaches to the use of electronic signatures that would not require the retention of documents with handwritten signatures. The first approach, used in at least one bankruptcy court, requires that, for any electronically filed document signed by someone other than the filing attorney, the document be accompanied by a declaration of authenticity that is hand-signed by the non-attorney. That declaration is scanned and maintained in electronic form by the clerk's office. The second approach is used by the Internal Revenue Service pursuant to 26 U.S.C. § 6061(b)(2), which validates electronic signatures on tax returns. The IRS uses personal identification numbers as electronic signatures, with no requirement for any original hand-signed document.

At its June 2012 meeting, the Standing Committee authorized the Committee to continue to pursue this issue as it relates to the Bankruptcy Rules. The Committee thereafter requested the assistance of the Federal Judicial Center to examine existing practices regarding the use of electronic signatures by non-registrants and requirements for the retention of documents with handwritten signatures. Dr. Molly Johnson of the FJC has been gathering information on relevant local bankruptcy and district court rules. She has also surveyed Assistant U.S. Attorneys, U.S. Trustees, and chapter 7 trustees regarding several alternative approaches to the use of electronic signatures by bankruptcy debtors and the retention of documents with handwritten signatures.[3] She will report her findings to the Committee by the end of the year. That information will be conveyed to the Standing Committee by oral report at the January meeting.

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[3] After its fall meeting, the Advisory Committee received a copy of a memorandum from Judge Julie Robinson, CACM chair, to Judge Mark Kravitz that requested the Standing Committee to "explore creating a federal rule regarding electronic signatures and the retention of paper documents containing original signatures." CACM suggested three possible approaches to the issue, and Dr. Johnson included those approaches in her survey, along with the declaration procedure that the Committee has been considering.

APPENDIX A.1

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Fill in this information to identify your case:

United States Bankruptcy Court for the:

_____ District of _____
(State)

Case number (*If known*): _____

Chapter you are filing under:
- ❑ Chapter 7
- ❑ Chapter 11
- ❑ Chapter 12
- ❑ Chapter 13

❑ Check if this is an amended filing

Official Form 101

Voluntary Petition for Individuals Filing for Bankruptcy

12/14

The bankruptcy forms use *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, these forms use *you* to ask for information from both debtors. For example, if a form asks, "Do you own a car?" the answer would be *yes* if either debtor owns a car. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Identify Yourself

	About Debtor 1:	About Debtor 2 (Spouse Only in a Joint Case):
1. Your full name Write the name that is on your government-issued picture identification (for example, your driver's license or passport). Bring your picture identification to your meeting with the trustee.	_____ First name _____ Middle name _____ Last name _____ Suffix (Sr., Jr., II, III)	_____ First name _____ Middle name _____ Last name _____ Suffix (Sr., Jr., II, III)
2. All other names you have used in the last 8 years Include your married or maiden names.	_____ First name _____ Middle name _____ Last name _____ First name _____ Middle name _____ Last name	_____ First name _____ Middle name _____ Last name _____ First name _____ Middle name _____ Last name
3. Only the last 4 digits of your Social Security number or federal Individual Taxpayer Identification number (ITIN)	xxx – xx – ____ ____ ____ ____ OR **9** xx – xx – ____ ____ ____ ____	xxx – xx – ____ ____ ____ ____ OR **9** xx – xx – ____ ____ ____ ____

	About Debtor 1:	About Debtor 2 (Spouse Only in a Joint Case):
4. Any business names and Employer Identification Numbers (EIN) you have used in the last 8 years Include trade names and *doing business as* names	❑ I have not used any business names or EINs. Business name Business name __ __ – __ __ __ __ __ __ __ EIN __ __ – __ __ __ __ __ __ __ EIN	❑ I have not used any business names or EINs. Business name Business name __ __ – __ __ __ __ __ __ __ EIN __ __ – __ __ __ __ __ __ __ EIN
5. Where you live	Number Street City State ZIP Code County **If your mailing address is different from the one above, fill it in here.** Note that the court will send any notices to you at this mailing address. Number Street P.O. Box City State ZIP Code	**If Debtor 2 lives at a different address:** Number Street City State ZIP Code County **If Debtor 2's mailing address is different from yours, fill it in here.** Note that the court will send any notices to this mailing address. Number Street P.O. Box City State ZIP Code
6. Why you are choosing *this district* to file for bankruptcy	*Check one:* ❑ Over the last 180 days before filing this bankruptcy filing package, I have lived in this district longer than in any other district. ❑ I have another reason. Explain. (See 28 U.S.C. § 1408.)	*Check one:* ❑ Over the last 180 days before filing this bankruptcy filing package, I have lived in this district longer than in any other district. ❑ I have another reason. Explain. (See 28 U.S.C. § 1408.)

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Part 2: Tell the Court About Your Bankruptcy Case

7. The Chapter of the Bankruptcy Code you are choosing to file under

Check one. (For a brief description of each, see *Notice Required by 11 U.S.C. § 342(b) for Individuals Filing for Bankruptcy* (Form B2010)). Also, go to the top of page 1 and check the appropriate box.

❑ Chapter 7

❑ Chapter 11

❑ Chapter 12

❑ Chapter 13

8. How you will pay the fee

If you file under Chapter …	Your total fee is…
7	$306
11	$1,213
12	$246
13	$281

❑ **I will pay the entire fee when I file my petition**. Please check with the clerk's office in your local court for more details about how you may pay. Typically, if you are paying the fee yourself, you may pay with cash, cashier's check, or money order. If your attorney is submitting your payment on your behalf, your attorney may pay with a credit card or check with a pre-printed address.

❑ **I need to pay the fee in installments**. If you choose this option, sign and attach the *Application for Individuals to Pay Your Filing Fee in Installments* (Official Form 103A).

❑ **I request that my fee be waived** (You may request this option only if you are filing for Chapter 7. By law, a judge may waive your fee only if your income is less than 150% of the official poverty line that applies to your family size and you are unable to pay the fee in installments). If you choose this option, you must fill out the *Application to Have the Chapter 7 Filing Fee Waived* (Official Form 103B) and file it with your bankruptcy filing package.

9. Have you filed for bankruptcy within the last 8 years?

❑ No

❑ Yes. District _____ When _____ Case number _____
MM / DD / YYYY

District _____ When _____ Case number _____
MM / DD / YYYY

District _____ When _____ Case number _____
MM / DD / YYYY

10. Are any bankruptcy cases pending or being filed by a spouse who is not filing this case with you, a business partner, or an affiliate?

❑ No

❑ Yes. Debtor _____ Relationship to you _____

District _____ When _____ Case number, if known_____
MM / DD / YYYY

Debtor _____ Relationship to you _____

District _____ When _____ Case number, if known_____
MM / DD / YYYY

11. Do you rent your residence?

❑ No. Go to Part 3.

❑ Yes. Has your landlord obtained an eviction judgment against you?

❑ No. Go to Part 3.

❑ Yes. Fill out *Part A - Your Statement About an Eviction Judgment Against You* (Official Form 101A) and file it with this bankruptcy petition.

Part 3: Report About Any Businesses You Own as a Sole Proprietor

12. Are you a sole proprietor of any full- or part-time business?

A sole proprietorship is a business you own as an individual, rather than a separate legal entity such as a corporation, partnership, or LLC.

If you have more than one sole proprietorship, use a separate sheet and attach it to this package.

❑ No. Go to Part 4.

❑ Yes. Name and location of business

_____
Name of business, if any

_____
Number Street

_____

_____ _____ _____
City State ZIP Code

Check the appropriate box to describe your business:

❑ Health Care Business (as defined in 11 U.S.C. § 101(27A))

❑ Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))

❑ Stockbroker (as defined in 11 U.S.C. § 101(53A))

❑ Commodity Broker (as defined in 11 U.S.C. § 101(6))

❑ None of the above

13. Are you filing under Chapter 11 of the Bankruptcy Code and are you a *small business debtor*?

For a definition of *small business debtor*, see 11 U.S.C. § 101(51D).

If you are filing under Chapter 11, the court must know whether you are a small business debtor so that it can set appropriate deadlines.

❑ No. I am not filing under Chapter 11.

❑ No. I am filing under Chapter 11, but I am NOT a small business debtor according to the definition in the Bankruptcy Code.

❑ Yes. I am filing under Chapter 11 and I am a small business debtor according to the definition in the Bankruptcy Code.

Part 4: Report if You Own or Have Any Hazardous Property or Any Property That Needs Immediate Attention

14. Do you own or have any property that poses or is alleged to pose a threat of imminent and identifiable hazard to public health or safety? Or do you own any property that needs immediate attention?

For example, do you own perishable goods or livestock that must be fed?

❑ No

❑ Yes. What is the hazard? _____

_____

If immediate attention is needed, why is it needed? _____

_____

Where is the property? _____
Number Street

_____

_____ _____ _____
City State ZIP Code

12b-006849

Part 5: Explain Your Efforts to Receive Credit Counseling

15. Tell the court whether you have received credit counseling.

The law requires that you receive credit counseling before you file for bankruptcy. You must truthfully check one of the following choices. If you cannot do so, you are not eligible to file.

If you file anyway, the court can dismiss your case, you will lose whatever filing fee you paid, and your creditors can begin collection activities again.

About Debtor 1:

You must check one:

❑ **I received counseling from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.**

Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.

❑ **I received counseling from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.**

Within 14 days after you file this bankruptcy petition, you MUST file a copy of the certificate and payment plan, if any.

❑ **I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and the following circumstances merit a 30-day temporary waiver of the requirement.**

To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the credit counseling and why you were unable to obtain it before filed for bankruptcy.

Your case may be dismissed if the court is dissatisfied with your reasons for not receiving credit counseling before you file this bankruptcy filing package.

If the court is satisfied with your reasons, you must still receive credit counseling within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed.

Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.

❑ **I am not required to receive credit counseling because of:**

❑ **Incapacity.** I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.

❑ **Disability.** My physical disability causes me to be unable to participate in credit counseling in person, by phone, or through the internet, even after I reasonably tried to do so.

❑ **Active duty.** I am currently on active military duty in a military combat zone.

If you believe you are not required to receive credit counseling, you must file a motion for waiver of credit counseling with the court.

About Debtor 2 (Spouse Only in a Joint Case):

You must check one:

❑ **I received counseling from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.**

Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.

❑ **I received counseling from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.**

Within 14 days after you file this bankruptcy petition, you MUST file a copy of the certificate and payment plan, if any.

❑ **I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and the following circumstances merit a 30-day temporary waiver of the requirement.**

To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the credit counseling and why you were unable to obtain it before filed for bankruptcy.

Your case may be dismissed if the court is dissatisfied with your reasons for not receiving credit counseling before you file this bankruptcy filing package.

If the court is satisfied with your reasons, you must still receive credit counseling within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed.

Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.

❑ **I am not required to receive credit counseling because of:**

❑ **Incapacity.** I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.

❑ **Disability.** My physical disability causes me to be unable to participate in credit counseling in person, by phone, or through the internet, even after I reasonably tried to do so.

❑ **Active duty.** I am currently on active military duty in a military combat zone.

If you believe you are not required to receive credit counseling, you must file a motion for waiver of credit counseling with the court.

Part 6: Answer These Questions for Reporting Purposes

16. What kind of debt do you have?

16a. **Are your debts primarily consumer debts?** *Consumer debts* are defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose."

- ❑ No. Go to line 16b.
- ❑ Yes. Go to line 17.

16b. **Are your debts primarily business debts?** *Business debts* are debts that you incurred to obtain money for a business or investment or through the operation of the business or investment.

- ❑ No. Go to line 16c.
- ❑ Yes. Go to line 17.

16c. State what debts you owe that are not consumer debts or business debts. _____

17. Are you filing under Chapter 7?

Do you estimate that after any exempt property is excluded and administrative expenses are paid that funds will be available for distribution to unsecured creditors?

- ❑ No. I am not filing under Chapter 7. Go to line 18.
- ❑ Yes. I am filing under Chapter 7. Do you estimate that after any exempt property is excluded and administrative expenses are paid that funds will be available to distribute to unsecured creditors?
  - ❑ No
  - ❑ Yes

18. How many creditors do you estimate that you owe?

❑ 1-49	❑ 1,000-5,000	❑ 25,001-50,000
❑ 50-99	❑ 5,001-10,000	❑ 50,001-100,000
❑ 100-199	❑ 10,001-25,000	❑ More than 100,000
❑ 200-999		

19. How much do you estimate your assets to be worth?

❑ $0-$50,000	❑ $1,000,001-$10 million	❑ $500,000,001-$1 billion
❑ $50,001-$100,000	❑ $10,000,001-$50 million	❑ $1,000,000,001-$10 billion
❑ $100,001-$500,000	❑ $50,000,001-$100 million	❑ $10,000,000,001-$50 billion
❑ $500,001-$1 million	❑ $100,000,001-$500 million	❑ More than $50 billion

20. How much do you estimate your liabilities to be?

❑ $0-$50,000	❑ $1,000,001-$10 million	❑ $500,000,001-$1 billion
❑ $50,001-$100,000	❑ $10,000,001-$50 million	❑ $1,000,000,001-$10 billion
❑ $100,001-$500,000	❑ $50,000,001-$100 million	❑ $10,000,000,001-$50 billion
❑ $500,001-$1 million	❑ $100,000,001-$500 million	❑ More than $50 billion

Part 7: Sign Here

I declare under penalty of perjury that the information provided in this petition is true and correct to the best of my knowledge, information, and belief. I understand that if I make a false statement, I could be fined up to $250,000 or imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

If I have chosen to file under Chapter 7, I am aware that I may proceed under Chapter 7, 11, 12, or 13 of title 11, United States Code, understand the relief available under each such chapter, and choose to proceed under Chapter 7.

If no attorney represents me and I did not pay or agree to pay someone who is not an attorney to help me fill out this document, I have obtained and read the notice required by 11 U.S.C. § 342(b).

I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

For your attorney, if you are represented by one

If you are not represented by an attorney, you do not need to file this page.

I, the attorney for the debtor(s) named in this petition, declare that I have informed the debtor(s) about eligibility to proceed under Chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each chapter for which the person is eligible. I also certify that I have delivered to the debtor(s) the notice required by 11 U.S.C. § 342(b) and, in a case in which § 707(b)(4)(D) applies, certify that I have no knowledge after an inquiry that the information in the schedules filed with the petition is incorrect.

✘ _____ Date _____

Signature of Attorney for Debtor MM / DD / YYYY

_____

Printed name

_____

Firm name

_____

Number Street

_____

_____ _____ _____

City State ZIP Code

Contact phone _____ Email address _____

_____ _____

Bar number State

12b-006852

For you if you are filing this bankruptcy filing package without an attorney

If you are represented by an attorney, you do not need to file this page.

As an individual, the law allows you to represent yourself in bankruptcy court, but **you should understand that many people find it extremely difficult to represent themselves successfully. Because bankruptcy has long-term financial and legal consequences, you are strongly urged to hire a qualified attorney.**

To be successful, you must correctly file and handle your bankruptcy case. The rules are very technical, and a misstep or inaction may affect your rights. For example, your case may be dismissed because you did not file a required document, pay a fee on time, attend a meeting or hearing, or cooperate with the court, case trustee, U.S. trustee, bankruptcy administrator, or audit firm if your case is selected for audit. If that happens, you could lose your right to file another case, or you may lose protections, including the benefit of the automatic stay.

You must list all your property and debts in the schedules that you are required to file with the court. Even if you plan to pay a particular debt outside of your bankruptcy, you must list that debt in your schedules. If you do not list a debt, the debt may not be discharged. If you do not list property or properly claim it as exempt, you may not be able to keep the property. The judge can also deny you a discharge of all your debts if you do something dishonest in your bankruptcy case, such as destroying or hiding property, falsifying records, or lying. Individual bankruptcy cases are randomly audited to determine if debtors have been accurate, truthful, and complete. **Bankruptcy fraud is a serious crime; you could be fined and imprisoned.**

If you decide to file without an attorney, the court expects you to follow the rules as if you had hired an attorney. The court will not treat you differently because you are filing for yourself. To be successful, you must be familiar with the United States Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and the local rules of the court in which your case is filed. You must also be familiar with any state exemption laws that apply.

Are you aware that filing for bankruptcy is a serious action with long-term financial and legal consequences?

❑ No
❑ Yes

Are you aware that bankruptcy fraud is a serious crime and that if your bankruptcy filing package is inaccurate or incomplete, you could be fined or imprisoned?

❑ No
❑ Yes

Did you pay or agree to pay someone who is not an attorney to help you fill out this bankruptcy filing package?

❑ No
❑ Yes. Name of Person_____.
Attach *Bankruptcy Petition Preparer's Notice, Declaration, and Signature* (Official Form 119).

By signing here, I acknowledge that I understand the risks involved in filing without an attorney. I have read and understood this notice, and I am aware that filing a bankruptcy case without an attorney may cause me to lose my rights or property if I do not properly handle the case.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

Contact phone _____

Cell phone _____

Email address _____

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

Contact phone _____

Cell phone _____

Email address _____

COMMITTEE NOTE

Official Form 101, *Voluntary Petition for Individuals Filing for Bankruptcy*, applies only in cases of individual debtors. Form 101 replaces Official Form 1, Voluntary Petition. It is renumbered to distinguish it from the forms used by non-individual debtors such as corporations, and includes stylistic changes throughout the form. It is revised as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. Because the goals of the Forms Modernization Project include improving the interface between technology and the forms so as to increase efficiency and reduce the need to produce the same information in multiple formats, many of the open-ended questions and multiple-part instructions have been replaced with more specific questions.

Official Form 101 has been substantially reorganized. References to Exhibits A, B, C, and D, and the exhibits themselves, have been eliminated because the requested information is now asked in the form or is not applicable to individual debtors.

Part 1, *Identify Yourself,* line 6, replaces the venue box from page 2 of Official Form 1 and deletes venue questions that pertain only to non-individuals.

Part 2, *Tell the Court About Your Bankruptcy Case,* line 7, removes choices for chapters 9 and 15 filings because they do not pertain to individuals. Additionally, Part 2 adds a table at line 8 which lists the applicable filing fees for chapters 7, 11, 12, and 13. The status of "being filed" is added to the question regarding bankruptcy cases pending or filed by a spouse, business partner, or affiliate (line 10). Lastly, the question "Do you rent your residence?" (line 11) and Official Form B101AB, *Your Statement About an Eviction Judgment Against You – Part A & B*, replaces "certification by a debtor who resides as a tenant of residential property," on page 2 of Official Form 1.

Part 3, *Report About Any Businesses You Own as a Sole Proprietor,* line 12, incorporates options from the "nature of business" box from page 1 of Official Form 1 that would apply to individual debtors, thus eliminating checkboxes for railroads and clearing banks. Part 3, line 13, also eliminates a checkbox to report whether a plan was filed with the petition, or if plan acceptances were solicited prepetition. Additionally, line 13 rephrases the question relating to whether a debtor filing under Chapter 11 is a small business debtor.

Part 4, *Report if You Own or Have Any Hazardous Property or Any Property That Needs Immediate Attention,* line 14, replaces Exhibit C from Official Form 1 and adds the category of "property that needs immediate attention."

Part 5, *Explain Your Efforts to Receive Credit Counseling* (line 15), replaces Exhibit D from Official Form 1. Additionally, this part describes incapacity and disability using a simplified definition, tells the debtor of the ability to file a motion for a waiver, and eliminates statutory reference about districts where credit counseling does not apply because such districts are rare.

Part 6, *Answer These Questions for Reporting Purposes* (line 16c), provides a text field for the debtor to describe the type of debt, if the debtor believes it is neither primarily consumer nor business debt.

Part 7, *Sign Here*, combines the two attorney signature blocks into one certification and eliminates signature lines for corporations/partnerships and chapter 15 Foreign Representative. The declaration and signature section for a non-attorney bankruptcy petition preparer (BPP) has also been removed as unnecessary. The same declaration, required under 11 U.S.C. § 110, is contained in Official Form 119. That form must be completed and signed by the BPP, and filed with each document prepared by a BPP.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Draft August 23, 2012

Official Form 101A

Part A: Your Statement About an Eviction Judgment Against You

12/14

Fill out this form only if:

- **you rent your residence; and**
- **your landlord has obtained a judgment for possession in an eviction, unlawful detainer action, or similar proceeding (called an *eviction judgment*) against you to possess your residence; and**
- **you want to stay in your rented residence after you file your case for bankruptcy.**

***Your Statement About an Eviction Judgment Against You* has two parts that you must file at different times:**

- **File Part A with the court when you first file your bankruptcy filing package. Serve a copy on your landlord.**
- **File Part B within 30 days after you file your *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101). Also, serve a copy on your landlord.**

You must serve your landlord with a copy of this form. Check the Bankruptcy Rules (www.uscourts.gov/rules) and the court's local website (go to www.uscourts/gov.courtlinks to find your court's website) for any specific requirements that you might have to meet to serve this statement.

File this part when you file your bankruptcy filing package

Fill this out if your landlord has an eviction judgment against you AND you wish to stay in your residence for 30 days after you file your *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101) with the court.

11 U.S.C. §§ 362(b)(22) and 362(l)

If your landlord DOES NOT have an eviction judgment, you do not need to fill out this form.

Has your landlord obtained an eviction judgment against you to possess your residence?

No. You do not need to fill out this form.

Yes. Landlord's name _____

Landlord's address _____
Number Street

_____ _____ _____
City State ZIP Code

If you answered *Yes*, check all that apply:

I certify under penalty of perjury that:

Under the state or other nonbankruptcy law that applies to the judgment for possession (*eviction judgment*), I have the right to stay in my residence by paying my landlord the entire amount I owe.

I have given the bankruptcy court clerk a deposit for the rent that would be due during the 30 days after I file the *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101).

_____ _____
Signature of Debtor 1 Signature of Debtor 2

Date _____ Date _____
MM / DD / YYYY MM / DD / YYYY

If you checked both boxes above, signed the form to certify that both apply, and served your landlord a copy of this statement, the automatic stay under 11 U.S.C. § 362(a)(3) will apply to the continuation of the eviction against you for 30 days after you file your *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101).

If you wish to stay in your residence after that 30-day period and continue to receive the protection of the automatic stay under 11 U.S.C. § 362(a)(3), you must pay the entire amount you owe to your landlord as stated in the eviction judgment before the 30-day period ends. You must also fill out Part B of this form, file it with the bankruptcy court, and serve your landlord a copy of it before the 30-day period ends.

12b-006856

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Draft August 16, 2012

Official Form 101B

Part B: Your Statement About an Eviction Judgment Against You

12/14

Fill out Part B of this form only if:

- **you filed Part A of this form; and**
- **you served a copy of Part A on your landlord; and**
- **you want to stay in your rented residence for more than 30 days after you file your *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101).**

File Part B within 30 days after you file your *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101). Also, serve a copy on your landlord.

File Part B within 30 days after you file your bankruptcy filing package

If your landlord has an eviction judgment against you, do you wish to stay in your residence for MORE than 30 days after you file your *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101) with the court?

11 U.S.C. §§ 362(b)(22) and 362(l).

If your landlord DOES NOT have an eviction judgment, you do not need to fill out this form.

No. You do not need to fill out this form.

Yes. **I certify under penalty of perjury that** (*Check all that apply*):

❑ Under the state or other nonbankruptcy law that applies to the judgment for possession (*eviction judgment*), I have the right to stay in my residence by paying my landlord the entire amount I owe.

❑ Within 30 days after I filed my *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101), I have paid my landlord the entire amount I owe as stated in the judgment for possession (*eviction judgment*).

_____
Signature of Debtor 1

Date _____
MM / DD / YYYY

_____
Signature of Debtor 2

Date _____
MM / DD / YYYY

You must serve your landlord with a copy of this form.

Check the Bankruptcy Rules (www.uscourts.gov/rules) and the court's local website (go to www.uscourts/gov.courtlinks to find your court's website) for any specific requirements that you might have to meet to serve this statement.

12b-006857

COMMITTEE NOTE

Official Form 101AB, *Your Statement About an Eviction Judgment Against You*, is substantially revised as part of the Forms Modernization Project. It replaces the "*Certification by a Debtor Who Resides as a Tenant of Residential Property*" section on Official Form 1, *Voluntary Petition*. The form applies only in cases of individual debtors.

The form is divided into Parts A and B.

Part A explains that debtors need to complete and file the form only if their landlord has a judgment for possession or an eviction judgment against them and they wish to stay in their residence for 30 days after filing their bankruptcy petition. The form adds references to the provisions in the Bankruptcy Code that specify when debtor-tenants subject to eviction may remain in their residence after filing for bankruptcy.

The form eliminates the checkboxes that the debtor has served the landlord with the certification and paid the court the rent that would be due during the 30 days after the filing of the bankruptcy petition. Instead, debtors are required to certify under penalty of perjury that the rent has been paid to the court and the instructions direct debtors to serve a copy of the statement on the landlord.

The form eliminates the checkbox that the debtor claims there are circumstances under applicable nonbankruptcy law under which the debtor would be permitted to cure the monetary default that gave rise to the judgment for possession (or eviction judgment) and remain in residence. Instead, debtors are required to certify under penalty of perjury that they have the right to stay in their residence under state law or other nonbankruptcy law by paying their landlord the entire amount they owe.

Part B is new. If debtors wish to stay in their residence for more than 30 days after filing the petition, they must complete and file Part B of Form 101AB within the 30 days. Under Part B, debtors certify under penalty of perjury that they have paid their landlord the entire amount owed as stated in the judgment for possession or in the eviction judgment.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 104

For Individual Chapter 11 Cases: The List of Creditors Who Have the 20 Largest Unsecured Claims Against You Who Are Not Insiders

12/14

If you are an individual filing for bankruptcy under Chapter 11, you must fill out this form. If you are filing under Chapter 7, Chapter 12, or Chapter 13, do not fill out this form. Do not include claims by anyone who is an *insider*. Insiders include relatives; general partners of you or your relatives; corporations of which you are an officer, director, or person in control; and any managing agent. 11 U.S.C. § 101. Also, do not include claims by secured creditors, unless the unsecured claim resulting from inadequate collateral value places the creditor among the holders of the 20 largest unsecured claims.

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information.

List the 20 Unsecured Claims in Order from Largest to Smallest. Do not include claims by insiders.

			Unsecured claim
1	_____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code _____ Contact _____ Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a security interest in your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: - $_____ Unsecured claim $_____	$_____
2	_____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code _____ Contact _____ Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a security interest in your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: - $_____ Unsecured claim $_____	$_____

12b-006859

			Unsecured claim
3	Creditor's Name Number Street City State ZIP Code Contact Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a security interest in your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: - $_____ Unsecured claim $_____	$_____
4	Creditor's Name Number Street City State ZIP Code Contact Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a security interest in your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: - $_____ Unsecured claim $_____	$_____
5	Creditor's Name Number Street City State ZIP Code Contact Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a security interest in your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: - $_____ Unsecured claim $_____	$_____
6	Creditor's Name Number Street City State ZIP Code Contact Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a security interest in your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: - $_____ Unsecured claim $_____	$_____
7	Creditor's Name Number Street City State ZIP Code Contact Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a security interest in your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: - $_____ Unsecured claim $_____	$_____

			Unsecured claim
8	Creditor's Name Number Street City State ZIP Code Contact Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a security interest in your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: - $_____ Unsecured claim $_____	$_____
9	Creditor's Name Number Street City State ZIP Code Contact Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a security interest in your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: - $_____ Unsecured claim $_____	$_____
10	Creditor's Name Number Street City State ZIP Code Contact Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a security interest in your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: - $_____ Unsecured claim $_____	$_____
11	Creditor's Name Number Street City State ZIP Code Contact Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a security interest in your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: - $_____ Unsecured claim $_____	$_____
12	Creditor's Name Number Street City State ZIP Code Contact Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a security interest in your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: - $_____ Unsecured claim $_____	$_____

			Unsecured claim
13	Creditor's Name Number Street City State ZIP Code Contact Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a security interest in your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: - $_____ Unsecured claim $_____	$_____
14	Creditor's Name Number Street City State ZIP Code Contact Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a security interest in your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: - $_____ Unsecured claim $_____	$_____
15	Creditor's Name Number Street City State ZIP Code Contact Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a security interest in your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: - $_____ Unsecured claim $_____	$_____
16	Creditor's Name Number Street City State ZIP Code Contact Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a security interest in your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: - $_____ Unsecured claim $_____	$_____
17	Creditor's Name Number Street City State ZIP Code Contact Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a security interest in your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: - $_____ Unsecured claim $_____	$_____

			Unsecured claim
18	Creditor's Name Number Street City State ZIP Code Contact Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a security interest in your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: - $_____ Unsecured claim $_____	$_____
19	Creditor's Name Number Street City State ZIP Code Contact Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a security interest in your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: - $_____ Unsecured claim $_____	$_____
20	Creditor's Name Number Street City State ZIP Code Contact Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a security interest in your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: - $_____ Unsecured claim $_____	$_____

COMMITTEE NOTE

Official Form 104, *For Individual Chapter 11 Cases: The List of Creditors Who Have the 20 Largest Unsecured Claims Against You Who Are Not Insiders*, is revised as part of the Forms Modernization Project. It replaces Official Form 4, *List of Creditors Holding 20 Largest Unsecured Claims* in chapter 11 cases filed by individuals or joint debtors and is renumbered to distinguish it from the version to be used in chapter 11 cases filed by non-individuals, such as corporations and partnerships, and in chapter 9 cases.

Form 104 is reformatted to make it easier to complete and understand and to be more visually appealing. Blanks and checkboxes are provided for specific information about each claim rather than columns for types of information. A separate, numbered section is provided for each of the 20 claims, rather than providing a single section that is to be copied and completed for additional claims.

The instruction not to include fully secured claims is restated in less technical terms. Debtors are instructed to include a secured creditor only if the creditor has an unsecured claim resulting from inadequate collateral value. Blanks are provided to calculate the value of the unsecured portion of a partially secured claim.

Examples of "insiders" are provided in addition to the statutory reference. The form adds an explicit instruction not to file the form in a chapter 7, chapter 12, or chapter 13 case. An instruction to be as complete and accurate as possible is added, along with a warning that, if two married people are filing jointly, both are equally responsible for supplying correct information.

The form eliminates the declaration under penalty of perjury. Also, with respect to children who may be creditors, the direction to state only the initials of a minor child and the name and address of the child's parent or guardian, rather than the child's full name, is moved to the general instruction booklet for the forms, because it applies to all of the forms.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 106-Summary

A Summary of Your Assets and Liabilities and Certain Statistical Information 12/14

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. Fill out all of your schedules first; then complete the information on this form. If you are filing amended schedules after you file your original forms, you must fill out a new *Summary* and check the box at the top of this page.

Part 1: Summarize Your Assets

	Your assets Value of what you own
1. ***Schedule A: Property*** (Official Form 106A).	
1a. Copy line 55, Total real estate, from *Schedule A*	$ _____
1b. Copy line 62, Total personal property, from *Schedule A*	$ _____
1c. Copy line 63, Total of all property on *Schedule A*	$ _____

Part 2: Summarize Your Liabilities

	Your liabilities Amount you owe
2. *Schedule B: Creditors Who Have Claims Secured by Your Property* (Official Form 106B)	
2a. Copy the total you listed in the *Amount of claim* column at the bottom of the last page of Part 1 of *Schedule B*	$ _____
3. *Schedule C: Creditors Who Have Unsecured Claims* (Official Form 106C)	
3a. Copy the total claims from Part 2 (priority unsecured claims) from line 6e of *Schedule C*	$ _____
3b. Copy the total claims from Part 3 (nonpriority unsecured claims) from line 6j of *Schedule C*	+ $ _____
Your total liabilities	$ _____

Part 3: Summarize Your Income and Expenses

4. *Schedule G: Your Income* (Official Form 106G) Copy your combined monthly income from line 12 of *Schedule G*	$ _____
5. *Schedule H: Your Expenses* (Official Form 106H) Copy your monthly expenses from line 22, Column A, of *Schedule H*	$ _____

Part 4: Answer These Questions for Administrative and Statistical Records

6. **Are you filing for bankruptcy under Chapters 7, 11, or 13?**

- ☐ No. You have nothing to report on this part of the form. Check this box and submit this form to the court with your other schedules.
- ☐ Yes

7. **What kind of debt do you have?**

- ☐ **Your debts are primarily consumer debts.** *Consumer debts* are those "incurred by an individual primarily for a personal, family, or household purpose." 11 U.S.C. § 101(8). Fill out lines 8-10 for statistical purposes. 28 U.S.C. § 159.
- ☐ **Your debts are not primarily consumer debts**. You have nothing to report on this part of the form. Check this box and submit this form to the court with your other schedules.

8. **From the *Statement of Your Current Monthly Income*** (Official Forms 108-1, 109, or 110-1):
Copy your total current monthly income from line 14 of 108-1, line 11 of 109, or line 11 of 110-1.

$ _____

9. **Copy the following special categories of claims from Part 4, line 6 of *Schedule C: Creditors Who Have Unsecured Claims*** (Official Form 106C):

	Total claim
From Part 4 on *Schedule C*, copy the following:	
9a. Domestic support obligations (Copy line 6a.)	$_____
9b. Taxes and certain other debts you owe the government. (Copy line 6b.)	$_____
9c. Claims for death or personal injury while you were intoxicated. (Copy line 6c.)	$_____
From Part 4 on *Schedule C*, copy the following:	
9d. Student loans. (Copy line 6f.)	$_____
9e. Obligations arising out of a separation agreement or divorce that you did not report as priority claims. (Copy line 6g.)	$_____
9f. Debts to pension or profit-sharing plans, and other similar debts. (Copy line 6h.)	+ $_____
9g. **Total.** Add lines 9a through 9f.	$_____

Fill in this information to identify your case and this filing:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____

❑ Check if this is an amended filing

Official Form 106A

Schedule A: Property

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In each category, separately list and describe items worth more than $500. Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Describe Each Residence, Building, Land, or Other Real Estate You Own or Have an Interest in

1. **Do you own or have any legal or equitable interest in any residence, building, land, or similar property?**

❑ No
❑ Yes. Where is the property?

1a.

_____
Street address, if available, or other description

_____

_____
City State ZIP Code

_____
County

What is the property? Check all that apply.

Single-family home
Duplex or multi-unit building
Condominium or cooperative
Manufactured or mobile home
Land
Investment property
Time share
Other _____

Who is an owner of the property? Check one.

❑ Debtor 1 only
❑ Debtor 2 only
❑ Debtor 1 and Debtor 2 only
❑ At least one of the debtors and another

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule B: Creditors Who Hold Claims Secured by Property.*

Current value of the entire property $_____

Current value of the portion you own $_____

❑ **Check if this is community property** (see instructions)

Other information you wish to add about this item, such as local property identification number:

If you own or have more than one, list here:

1b.

_____
Street address, if available, or other description

_____

_____
City State ZIP Code

_____
County

What is the property? Check all that apply.

❑ Single-family home
❑ Duplex or multi-unit building
❑ Condominium or cooperative
❑ Manufactured or mobile home
❑ Land
❑ Investment property
❑ Time share
❑ Other _____

Who is an owner of the property? Check one.

❑ Debtor 1 only
❑ Debtor 2 only
❑ Debtor 1 and Debtor 2 only
❑ At least one of the debtors and another

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule B: Creditors Who Hold Claims Secured by Property.*

Current value of the entire property $_____

Current value of the portion you own $_____

❑ **Check if this is community property** (see instructions)

Other information you wish to add about this item, such as local property identification number:

1c.

Street address, if available, or other description

City State ZIP Code

County

What is the property? Check all that apply.

- ❑ Single-family home
- ❑ Duplex or multi-unit building
- ❑ Condominium or cooperative
- ❑ Manufactured or mobile home
- ❑ Land
- ❑ Investment property
- ❑ Time share
- ❑ Other _____

Who is an owner of the property? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule B: Creditors Who Hold Claims Secured by Property.*

Current value of the entire property	**Current value of the portion you own**
$_____	$_____

❑ **Check if this is community property** (see instructions)

Other information you wish to add about this item, such as local property identification number:

2. **Add the dollar value of all of your entries from Part 1, including any entries for pages you have attached for Part 1. Write that number here.** ..... ➔ $_____

Part 2: Describe Your Vehicles

Do you own or have legal or equitable interest in any vehicles, whether they are registered or not? Include any vehicles you own that someone else drives. Do not report leased vehicles here. If you lease a vehicle, fill out *Schedule E: Executory Contracts and Unexpired Leases.*

3. **Cars, vans, trucks, tractors, sport utility vehicles, motorcycles**

- ❑ No
- ❑ Yes

3a.

Make: _____

Model: _____

Year: _____

Mileage:
- ❑ 0-24,999
- ❑ 25,000-49,999
- ❑ 50,000-74,999
- ❑ 75,000 or more

Other information:

Who is an owner of the property? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is community property** (see instructions)

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule B: Creditors Who Hold Claims Secured by Property.*

Current value of the entire property	**Current value of the portion you own**
$_____	$_____

If you own or have more than one, describe here:

3b.

Make: _____

Model: _____

Year: _____

Mileage:
- ❑ 0-24,999
- ❑ 25,000-49,999
- ❑ 50,000-74,999
- ❑ 75,000 or more

Other information:

Who is an owner of the property? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is community property** (see instructions)

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule B: Creditors Who Hold Claims Secured by Property.*

Current value of the entire property	**Current value of the portion you own**
$_____	$_____

3c. Make: _____

Model: _____

Year: _____

Mileage: ❑ 0-24,999
❑ 25,000-49,999
❑ 50,000-74,999
❑ 75,000 or more

Other information:

Who is an owner of the property? Check one.

❑ Debtor 1 only
❑ Debtor 2 only
❑ Debtor 1 and Debtor 2 only
❑ At least one of the debtors and another

❑ **Check if this is community property** (see instructions)

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule B: Creditors Who Hold Claims Secured by Property.*

Current value of the entire property	**Current value of the portion you own**
$_____	$_____

3d. Make: _____

Model: _____

Year: _____

Mileage: ❑ 0-24,999
❑ 25,000-49,999
❑ 50,000-74,999
❑ 75,000 or more

Other information:

Who is an owner of the property? Check one.

❑ Debtor 1 only
❑ Debtor 2 only
❑ Debtor 1 and Debtor 2 only
❑ At least one of the debtors and another

❑ **Check if this is community property** (see instructions)

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule B: Creditors Who Hold Claims Secured by Property.*

Current value of the entire property	**Current value of the portion you own**
$_____	$_____

4. **Watercraft, aircraft, motor homes, ATVs and other recreational vehicles, other vehicles, and accessories**

Examples: Boats, trailers, motors, personal watercraft, fishing vessels, snow mobiles, accessories

❑ No
❑ Yes

4a. Make: _____

Model: _____

Year: _____

Other information:

Who is an owner of the property? Check one.

❑ Debtor 1 only
❑ Debtor 2 only
❑ Debtor 1 and Debtor 2 only
❑ At least one of the debtors and another

❑ **Check if this is community property** (see instructions)

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule B: Creditors Who Hold Claims Secured by Property.*

Current value of the entire property	**Current value of the portion you own**
$_____	$_____

If you own or have more than one, list here:

4b. Make: _____

Model: _____

Year: _____

Other information:

Who is an owner of the property? Check one.

❑ Debtor 1 only
❑ Debtor 2 only
❑ Debtor 1 and Debtor 2 only
❑ At least one of the debtors and another

❑ **Check if this is community property** (see instructions)

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule B: Creditors Who Hold Claims Secured by Property.*

Current value of the entire property	**Current value of the portion you own**
$_____	$_____

5. **Add the dollar value of all of your entries from Part 2, including any entries for pages you have attached for Part 2. Write that number here** ..... ➔ $_____

Part 3: Describe Your Personal and Household Items

Do you own or have any legal or equitable interest in any of the following items?	Current value of the portion you own Do not deduct secured claims or exemptions.
6. **Household goods and furnishings** *Examples*: Major appliances, furniture, linens, china, kitchenware ❑ No ❑ Yes. Describe.....	$_____
7. **Electronics** *Examples:* Televisions and radios; audio, video, stereo, and digital equipment; computers, printers, scanners; music collections; electronic devices including cell phones, cameras, media players, games ❑ No ❑ Yes. Describe.....	$_____
8. **Collectibles of value** *Examples:* Antiques and figurines; paintings, prints, or other artwork; books, pictures, or other art objects; stamp, coin, or baseball card collections; china and crystal; other collections, memorabilia, collectibles ❑ No ❑ Yes. Describe.....	$_____
9. **Equipment for sports and hobbies** *Examples:* Sports, photographic, exercise, and other hobby equipment; bicycles, pool tables, golf clubs, skis; canoes and kayaks; carpentry tools; musical instruments ❑ No ❑ Yes. Describe.....	$_____
10. **Firearms** *Examples:* Pistols, rifles, shot guns, ammunition, and related equipment ❑ No ❑ Yes. Describe.....	$_____
11. **Clothes** *Examples:* Everyday clothes, furs, leather coats, designer wear, shoes, accessories ❑ No ❑ Yes. Describe.....	$_____
12. **Jewelry** Examples: Everyday jewelry, costume jewelry, engagement rings, wedding rings, heirloom jewelry, watches, gems, gold, silver ❑ No ❑ Yes. Describe.....	$_____
13. **Non-farm animals** *Examples:* Dogs, cats, birds, horses ❑ No ❑ Yes. Describe.....	$_____
14. **Any other personal and household items you did not already list, including any health aids you did not list** ❑ No ❑ Yes. Give specific information.	$_____
15. **Add the dollar value of all of your entries from Part 3, including any entries for pages you have attached for Part 3. Write that number here** ..... ➔	$_____

Part 4: Describe Your Financial Assets

Do you own or have any legal or equitable interest in any of the following?

Current value of the portion you own
Do not deduct secured claims or exemptions.

16. **Cash**
Examples: Money you have in your wallet, in your home, in a safe deposit box, and on hand when you file your petition

- ❑ No
- ❑ Yes .....

Cash: $_____

17. **Deposits of money**
Examples: Checking, savings, money market, or other financial accounts; certificates of deposit; shares in credit unions, brokerage houses, and other similar institutions. If you have multiple accounts with the same institution, list each.

- ❑ No
- ❑ Yes .....

	Institution name:	
17a. Checking account:	_____	$_____
17b. Checking account:	_____	$_____
17c. Savings account:	_____	$_____
17d. Savings account:	_____	$_____
17e. Certificates of deposit:	_____	$_____
17f. Other financial account:	_____	$_____
17g. Other financial account:	_____	$_____
17h. Other financial account:	_____	$_____
17i. Other financial account:	_____	$_____

18. **Bonds, mutual funds, or publicly traded stocks**
Examples: Bond funds, investment accounts with brokerage firms, money market accounts

- ❑ No
- ❑ Yes .....

Institution name:	
_____	$_____
_____	$_____
_____	$_____

19. **Non-publicly traded stock and interests in incorporated and unincorporated businesses, including an interest in an LLC, partnership, and joint venture**

- ❑ No
- ❑ Yes. Give specific information about them. .....

Name of entity:	% of ownership:	
_____	_____%	$_____
_____	_____%	$_____
_____	_____%	$_____

20. **Government and corporate bonds and other negotiable and non-negotiable instruments**

Negotiable instruments include personal checks, cashiers' checks, promissory notes, and money orders. *Non-negotiable instruments* are those you cannot transfer to someone by signing or delivering them.

- ❑ No
- ❑ Yes. Give specific information about them. .....

Issuer name:

_____ $_____

_____ $_____

_____ $_____

21. **Retirement or pension accounts**

Examples: Interests in IRA, ERISA, Keogh, 401(k), 403(b), thrift savings accounts, or other pension or profit-sharing plans

- ❑ No
- ❑ Yes. List each account separately. .

Type of account:	Institution name:	
401(k) or similar plan:	_____	$_____
Pension plan:	_____	$_____
IRA:	_____	$_____
Retirement account:	_____	$_____
Keogh:	_____	$_____
Additional account:	_____	$_____
Additional account:	_____	$_____

22. **Security deposits and pre-payments**

Your share of all unused deposits you have made so that you may continue service or use from a company

Examples: Agreements with landlords, prepaid rent, public utilities (electric, gas, water), telecommunications companies, or others

- ❑ No
- ❑ Yes.....

	Institution name or individual:	
Electric:	_____	$_____
Gas:	_____	$_____
Heating oil:	_____	$_____
Security deposit on rental unit:	_____	$_____
Prepaid rent:	_____	$_____
Telephone:	_____	$_____
Water:	_____	$_____
Rented furniture:	_____	$_____
Other:	_____	$_____

23. **Annuities** (A contract for a periodic payment of money to you, either for life or for a number of years)

- ❑ No
- ❑ Yes.....

Issuer name and description:

_____ $_____

_____ $_____

_____ $_____

24. **Interests in an education IRA** as defined in 26 U.S.C. § 530(b)(1) or under a qualified state tuition plan as defined in 26 U.S.C. § 529(b)(1).

❑ No

❑ Yes .....

Institution name and description. Separately file the records of any interests.11 U.S.C. § 521(c):

_____ $_____

_____ $_____

_____ $_____

25. **Trusts, equitable or future interests in property (other than anything listed in Part 1), and rights or powers exercisable for your benefit**

❑ No

❑ Yes. Give specific information about them.... $_____

26. **Patents, copyrights, trademarks, trade secrets, and other intellectual property**

Examples: Internet domain names, websites, proceeds from royalties and licensing agreements

❑ No

❑ Yes. Give specific information about them.... $_____

27. **Licenses, franchises, and other general intangibles**

Examples: Building permits, exclusive licenses, cooperative association holdings, liquor licenses, professional licenses

❑ No

❑ Yes. Give specific information about them.... $_____

Money or property owed to you	**Current value of the portion you own** Do not deduct secured claims or exemptions.

28. **Tax refunds owed to you**

❑ No

❑ Yes. Give specific information about them, including whether you already filed the returns and the tax years. .....

Federal: $_____

State: $_____

Local: $_____

29. **Family support**

Examples: Past due or lump sum alimony, spousal support, child support, maintenance, divorce settlement, property settlement

❑ No

❑ Yes. Give specific information.....

Alimony: $_____

Maintenance: $_____

Support: $_____

Divorce settlement: $_____

Property settlement: $_____

30. **Other amounts someone owes you**

Examples: Amounts earned and unpaid from wages, disability insurance payments, disability benefits, sick pay, vacation pay, workers' compensation, Social Security benefits

❑ No

❑ Yes. Give specific information..... $_____

31. **Interests in insurance policies**

Examples: Health, disability, or life insurance; health savings account (HSA); credit, homeowner's, or renter's insurance

- ❑ No
- ❑ Yes. Name the insurance company of each policy and list its value.....

Company name:	Beneficiary:	Surrender or refund value:
_____	_____	$_____
_____	_____	$_____
_____	_____	$_____

32. **Any interest in property that is due you from someone who has died**

If you are the beneficiary of a living trust, expect proceeds from a life insurance policy, have inherited something from an existing estate

- ❑ No
- ❑ Yes. Give specific information..... $_____

33. **Claims against third parties, whether or not you have filed a lawsuit or made a demand for payment**

Examples: Accidents, employment disputes, insurance claims, or rights to sue

- ❑ No
- ❑ Yes. Describe each claim. ..... $_____

34. **Other contingent and unliquidated claims of every nature, including counterclaims of the debtor and rights to set off claims**

- ❑ No
- ❑ Yes. Describe each claim. ..... $_____

35. **Any financial assets you did not already list**

- ❑ No
- ❑ Yes. Give specific information. ..... $_____

36. **Add the dollar value of all of your entries from Part 4, including any entries for pages you have attached for Part 4. Write that number here** ..... ➔ $_____

Part 5: Describe Any Business-Related Property You Own or Have an Interest in. List any real estate in Part 1.

37. **Do you own or have any legal or equitable interest in any business-related property?**

- ❑ No. Go to Part 6.
- ❑ Yes. Go to line 38.

Current value of the portion you own

Do not deduct secured claims or exemptions.

38. **Accounts receivable or commissions you already earned**

- ❑ No
- ❑ Yes. Describe ..... $_____

39. **Office equipment, furnishings, and supplies**

Examples: Business-related computers, software, modems, printers, copiers, fax machines, rugs, telephones, desks, chairs, electronic devices

- ❑ No
- ❑ Yes. Describe ..... $_____

40. **Machinery, fixtures, equipment, supplies you use in business, and tools of your trade**

- ❑ No
- ❑ Yes. Describe ..... $_____

41. **Inventory**

- ❑ No
- ❑ Yes. Describe ..... $_____

42. **Interests in partnerships or joint ventures**

- ❑ No
- ❑ Yes. Describe .....

Name of entity:	% of ownership:	
_____	_____%	$_____
_____	_____%	$_____
_____	_____%	$_____

43. **Customer lists, mailing lists, or other compilations**

- ❑ No
- ❑ Yes. **Do your lists include personally identifiable information** (as defined in 11 U.S.C. § 101(41A))**?**
  - ❑ No
  - ❑ Yes. Describe..... $_____

44. **Any business-related property you did not already list**

- ❑ No
- ❑ Yes. Give specific information .....

$_____
$_____
$_____
$_____
$_____
$_____

45. **Add the dollar value of all of your entries from Part 5, including any entries for pages you have attached for Part 5. Write that number here** ..... ➔ $_____

Part 6: Describe Any Farm- and Commercial Fishing-Related Property You Own or Have an Interest in

If you own or have an interest in farmland, fill out Part 1.

46. **Do you own or have any legal or equitable interest in any farm- or commercial fishing-related property?**

- ❑ No. Go to Part 7.
- ❑ Yes. Go to line 47.

Current value of the portion you own
Do not deduct secured claims or exemptions.

47. **Farm animals**

Examples: Livestock, poultry, farm-raised fish

- ❑ No
- ❑ Yes..... $_____

48. **Crops—either growing or harvested**

- ❑ No
- ❑ Yes. Give specific information. ..... $_____

49. **Farm and fishing equipment and implements**

- ❑ No
- ❑ Yes ..... $_____

50. **Farm and fishing supplies, chemicals, and feed**

- ❑ No
- ❑ Yes ..... $_____

51. **Any farm- and commercial fishing-related property you did not already list**

- ❑ No
- ❑ Yes. Give specific information. ..... $_____

52. **Add the dollar value of all of your entries from Part 6, including any entries for pages you have attached for Part 6. Write that number here** ..... ➔ $_____

Part 7: Describe All Property You Own or Have an Interest in That You Did Not List Above

53. **Do you have other property of any kind you did not already list?**
Examples: Season tickets, country club membership

- ❑ No
- ❑ Yes. Give specific information. .....

$_____
$_____
$_____

54. **Add the dollar value of all of your entries from Part 7. Write that number here** ..... ➔ $_____

Part 8: List the Totals of Each Part of this Form

55. **Part 1: Total real estate, line 2** ..... ➔ **$**_____

56. **Part 2: Total vehicles, line 5** $_____

57. **Part 3: Total personal and household items, line 15** $_____

58. **Part 4: Total financial assets, line 36** $_____

59. **Part 5: Total business-related property, line 45** $_____

60. **Part 6: Total farm- and fishing-related property, line 52** $_____

61. **Part 7: Total other property not listed, line 54** + $_____

62. **Total personal property.** Add lines 56 through 61..... $_____ Copy personal property total ➔ + $_____

63. **Total of all property on Schedule A.** Add line 55 + line 62..... $_____

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 106B

Schedule B: Creditors Who Hold Claims Secured by Property

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Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, copy the Additional Page, fill it out, number the entries, and attach it to this form. On the top of any additional pages, write your name and case number (if known).

1. **Do any creditors hold claims secured by your property?**
   - ❑ No. Check this box and submit this form to the court with your other schedules. You have nothing else to report on this form.
   - ❑ Yes. Fill in all of the information below.

Part 1: List Your Creditors Who Hold Secured Claims

2. **List all of your creditors who hold secured claims in alphabetical order.** If a creditor has more than one secured claim, list the creditor separately for each claim.

		Amount of claim Do not deduct the value of collateral.	Value of collateral that supports this claim	Unsecured portion If any
1 _____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code	**Describe the property that is collateral:**	$_____	$_____	$_____
	As of the date you file, the claim is: Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply			
Who owes the debt? Check one. ❑ Debtor 1 only ❑ Debtor 2 only ❑ Debtor 1 and Debtor 2 only ❑ At least one of the debtors and another ❑ **Check if this is a community claim**	**Nature of lien**. Check all that apply. ❑ An agreement you made (such as mortgage or secured car loan) ❑ Statutory lien (such as tax lien, mechanic's lien) ❑ Judgment lien from a lawsuit ❑ Other _____			
Date debt was incurred _____	**Last 4 digits of account number** ___ ___ ___ ___			
2 _____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code	**Describe the property that is collateral:**	$_____	$_____	$_____
	As of the date you file, the claim is: Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply			
Who owes the debt? Check one. ❑ Debtor 1 only ❑ Debtor 2 only ❑ Debtor 1 and Debtor 2 only ❑ At least one of the debtors and another ❑ **Check if this is a community claim**	**Nature of lien**. Check all that apply. ❑ An agreement you made (such as mortgage or secured car loan) ❑ Statutory lien (such as tax lien, mechanic's lien) ❑ Judgment lien from a lawsuit ❑ Other _____			
Date debt was incurred _____	**Last 4 digits of account number** ___ ___ ___ ___			
	Add the dollar value of your entries on this page. Write that number here:	$_____		$_____

Part 1: Additional Page

		Amount of claim Do not deduct the value of collateral.	Value of collateral that supports this claim	Unsecured portion If any
☐ _____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code **Who owes the debt?** Check one. ☐ Debtor 1 only ☐ Debtor 2 only ☐ Debtor 1 and Debtor 2 only ☐ At least one of the debtors and another ☐ **Check if this is a community claim** **Date debt was incurred** _____	**Describe the property that is collateral:** **As of the date you file, the claim is:** Check all that apply. ☐ Contingent ☐ Unliquidated ☐ Disputed ☐ None of the above apply **Nature of lien**. Check all that apply. ☐ An agreement you made (such as mortgage or secured car loan) ☐ Statutory lien (such as tax lien, mechanic's lien) ☐ Judgment lien from a lawsuit ☐ Other _____ **Last 4 digits of account number** ___ ___ ___ ___	$_____	$_____	$_____
☐ _____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code **Who owes the debt?** Check one. ☐ Debtor 1 only ☐ Debtor 2 only ☐ Debtor 1 and Debtor 2 only ☐ At least one of the debtors and another ☐ **Check if this is a community claim** **Date debt was incurred** _____	**Describe the property that is collateral:** **As of the date you file, the claim is:** Check all that apply. ☐ Contingent ☐ Unliquidated ☐ Disputed ☐ None of the above apply **Nature of lien**. Check all that apply. ☐ An agreement you made (such as mortgage or secured car loan) ☐ Statutory lien (such as tax lien, mechanic's lien) ☐ Judgment lien from a lawsuit ☐ Other _____ **Last 4 digits of account number** ___ ___ ___ ___	$_____	$_____	$_____
☐ _____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code **Who owes the debt?** Check one. ☐ Debtor 1 only ☐ Debtor 2 only ☐ Debtor 1 and Debtor 2 only ☐ At least one of the debtors and another ☐ **Check if this is a community claim** **Date debt was incurred** _____	**Describe the property that is collateral:** **As of the date you file, the claim is:** Check all that apply. ☐ Contingent ☐ Unliquidated ☐ Disputed ☐ None of the above apply **Nature of lien**. Check all that apply. ☐ An agreement you made (such as mortgage or secured car loan) ☐ Statutory lien (such as tax lien, mechanic's lien) ☐ Judgment lien from a lawsuit ☐ Other _____ **Last 4 digits of account number** ___ ___ ___ ___	$_____	$_____	$_____
Add the dollar value of your entries on this page. Write that number here:		$_____		$_____
If this is the last page of your form, add the dollar value from all pages. Write that number here:		$_____		$_____

12b-006878

Part 2: List Others to Be Notified for a Debt That You Already Listed

Use this page only if you have others to be notified for a debt that you already listed in Part 1. For example, if a collection agency is trying to collect from you for a debt you owe to someone else, list the creditor in Part 1, then list the collection agency here.

If you do not have more than one creditor for the same debt, do not fill out or submit this page.

Name

Number Street

City State ZIP Code

On which line in Part 1 did you enter the creditor? _____

Last 4 digits of account number ___ ___ ___ ___

Name

Number Street

City State ZIP Code

On which line in Part 1 did you enter the creditor? _____

Last 4 digits of account number ___ ___ ___ ___

Name

Number Street

City State ZIP Code

On which line in Part 1 did you enter the creditor? _____

Last 4 digits of account number ___ ___ ___ ___

Name

Number Street

City State ZIP Code

On which line in Part 1 did you enter the creditor? _____

Last 4 digits of account number ___ ___ ___ ___

Name

Number Street

City State ZIP Code

On which line in Part 1 did you enter the creditor? _____

Last 4 digits of account number ___ ___ ___ ___

Name

Number Street

City State ZIP Code

On which line in Part 1 did you enter the creditor? _____

Last 4 digits of account number ___ ___ ___ ___

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Draft August 20, 2012

❑ Check if this is an amended filing

Official Form 106C

Schedule C: Creditors Who Have Unsecured Claims

12/14

Be as complete and accurate as possible. Use Part 1 for creditors with PRIORITY claims and Part 2 for creditors with NONPRIORITY claims. If you need more space, copy the Part you need, fill it out, and number the entries in the boxes on the left. Attach the Continuation Page to this page. If you have no information to report in a Part, do not file that Part. On the top of any additional pages, write your name and case number (if known).

Part 1: List All of Your Creditors with PRIORITY Unsecured Claims

1. **Do any creditors have priority unsecured claims against you?**

❑ No. Go to Part 2.
❑ Yes.

2. **List in alphabetical order all of your creditors with priority unsecured claims and identify what kind of priority claim it is.** If you have more than two creditors with priority unsecured claims, fill out the Continuation Page of Part 2. (For an explanation of each type of claim, see *How to Fill Out Schedule C* in the instructions for this form.)

	Total claim	Priority amount	Nonpriority amount
2a	$_____	$_____	$_____
2b	$_____	$_____	$_____

2a

_____
Priority Creditor's Name

_____
Number Street

_____

_____
City State ZIP Code

Who incurred the debt? Check one.

❑ Debtor 1 only
❑ Debtor 2 only
❑ Debtor 1 and Debtor 2 only
❑ At least one of the debtors and another

❑ **Check if this is a community debt**

Last 4 digits of account number ___ ___ ___ ___

When was the debt incurred? _____

As of the date you file, the claim is: Check all that apply.

❑ Contingent
❑ Unliquidated
❑ Disputed
❑ None of the above apply

Type of PRIORITY unsecured claim:

❑ Domestic support obligations
❑ Taxes and certain other debts you owe the government
❑ Claims for death or personal injury while you were intoxicated
❑ Other. Specify _____

2b

_____
Priority Creditor's Name

_____
Number Street

_____

_____
City State ZIP Code

Who incurred the debt? Check one.

❑ Debtor 1 only
❑ Debtor 2 only
❑ Debtor 1 and Debtor 2 only
❑ At least one of the debtors and another

❑ **Check if this is a community debt**

Last 4 digits of account number ___ ___ ___ ___

When was the debt incurred? _____

As of the date you file, the claim is: Check all that apply.

❑ Contingent
❑ Unliquidated
❑ Disputed
❑ None of the above apply

Type of PRIORITY unsecured claim:

❑ Domestic support obligations
❑ Taxes and certain other debts you owe the government
❑ Claims for death or personal injury while you were intoxicated
❑ Other. Specify _____

Part 1: Your Creditors with PRIORITY Unsecured Claims — Continuation Page

After listing any entries on this page, number them beginning with 2c, followed by 2d, and so forth.

	Total claim	Priority amount	Nonpriority amount
	$_____	$_____	$_____
	$_____	$_____	$_____
	$_____	$_____	$_____
	$_____	$_____	$_____

_____
Priority Creditor's Name

_____
Number Street

_____

_____
City State ZIP Code

Who incurred the debt? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is a community debt**

Last 4 digits of account number ___ ___ ___ ___

When was the debt incurred? _____

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Type of PRIORITY unsecured claim:

- ❑ Domestic support obligations
- ❑ Taxes and certain other debts you owe the government
- ❑ Claims for death or personal injury while you were intoxicated
- ❑ Other. Specify _____

_____
Priority Creditor's Name

_____
Number Street

_____

_____
City State ZIP Code

Who incurred the debt? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is a community debt**

Last 4 digits of account number ___ ___ ___ ___

When was the debt incurred? _____

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Type of PRIORITY unsecured claim:

- ❑ Domestic support obligations
- ❑ Taxes and certain other debts you owe the government
- ❑ Claims for death or personal injury while you were intoxicated
- ❑ Other. Specify _____

_____
Priority Creditor's Name

_____
Number Street

_____

_____
City State ZIP Code

Who incurred the debt? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is a community debt**

Last 4 digits of account number ___ ___ ___ ___

When was the debt incurred? _____

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Type of PRIORITY unsecured claim:

- ❑ Domestic support obligations
- ❑ Taxes and certain other debts you owe the government
- ❑ Claims for death or personal injury while you were intoxicated
- ❑ Other. Specify _____

_____
Priority Creditor's Name

_____
Number Street

_____

_____
City State ZIP Code

Who incurred the debt? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is a community debt**

Last 4 digits of account number ___ ___ ___ ___

When was the debt incurred? _____

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Type of PRIORITY unsecured claim:

- ❑ Domestic support obligations
- ❑ Taxes and certain other debts you owe the government
- ❑ Claims for death or personal injury while you were intoxicated
- ❑ Other. Specify _____

Part 2: List All of Your Creditors with NONPRIORITY Unsecured Claims

3. Do any creditors have nonpriority unsecured claims against you?

- ❑ No. Go to Part 3.
- ❑ Yes

4. List in alphabetical order all of your creditors with nonpriority unsecured claims and identify what kind of nonpriority claim it is. After you list your creditors, number the boxes on the left for the creditors you entered in Part 2. Begin numbering with 4a, followed by 4b. If you have more than 4 creditors with nonpriority unsecured claims, attach additional copies of Part 2.

Total claim

Nonpriority Creditor's Name

Number Street

City State ZIP Code

Who incurred the debt? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another
- ❑ **Check if this is a community debt**

Last 4 digits of account number ___ ___ ___ ___

$_____

When was the debt incurred? _____

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Type of NONPRIORITY unsecured claim:

- ❑ Student loans
- ❑ Obligations arising out of a separation agreement or divorce that you did not report as priority claims
- ❑ Debts to pension or profit-sharing plans, and other similar debts
- ❑ Other. Specify _____

Nonpriority Creditor's Name

Number Street

City State ZIP Code

Who incurred the debt? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another
- ❑ **Check if this is a community debt**

Last 4 digits of account number ___ ___ ___ ___

$_____

When was the debt incurred? _____

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Type of NONPRIORITY unsecured claim:

- ❑ Student loans
- ❑ Obligations arising out of a separation agreement or divorce that you did not report as priority claims
- ❑ Debts to pension or profit-sharing plans, and other similar debts
- ❑ Other. Specify _____

Nonpriority Creditor's Name

Number Street

City State ZIP Code

Who incurred the debt? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another
- ❑ **Check if this is a community debt**

Last 4 digits of account number ___ ___ ___ ___

$_____

When was the debt incurred? _____

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Type of NONPRIORITY unsecured claim:

- ❑ Student loans
- ❑ Obligations arising out of a separation agreement or divorce that you did not report as priority claims
- ❑ Debts to pension or profit-sharing plans, and other similar debts
- ❑ Other. Specify _____

Nonpriority Creditor's Name

Number Street

City State ZIP Code

Who incurred the debt? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another
- ❑ **Check if this is a community debt**

Last 4 digits of account number ___ ___ ___ ___

$_____

When was the debt incurred? _____

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Type of NONPRIORITY unsecured claim:

- ❑ Student loans
- ❑ Obligations arising out of a separation agreement or divorce that you did not report as priority claims
- ❑ Debts to pension or profit-sharing plans, and other similar debts
- ❑ Other. Specify _____

Part 3: List Others to Be Notified for a Debt That You Already Listed

5. Use this page only if you have other creditors for a debt that you already listed in Parts 1 or 2. For example, if a collection agency is trying to collect from you for a debt you owe to someone else, list the original creditor in Part 2, then list the collection agency here. If you do not have more than one creditor for the same debt, do not fill out or submit this page.

Name

Number Street

City State ZIP Code

On which entry in Part 1 or Part 2 did you list the original creditor?

Line _____ of (*Check one*): ❑ Part 1: Creditors with Priority Unsecured Claims
❑ Part 2: Creditors with Nonpriority Unsecured Claims

Last 4 digits of account number ___ ___ ___ ___

Name

Number Street

City State ZIP Code

On which entry in Part 1 or Part 2 did you list the original creditor?

Line _____ of (*Check one*): ❑ Part 1: Creditors with Priority Unsecured Claims
❑ Part 2: Creditors with Nonpriority Unsecured Claims

Last 4 digits of account number ___ ___ ___ ___

Name

Number Street

City State ZIP Code

On which entry in Part 1 or Part 2 did you list the original creditor?

Line _____ of (*Check one*): ❑ Part 1: Creditors with Priority Unsecured Claims
❑ Part 2: Creditors with Nonpriority Unsecured Claims

Last 4 digits of account number ___ ___ ___ ___

Name

Number Street

City State ZIP Code

On which entry in Part 1 or Part 2 did you list the original creditor?

Line _____ of (*Check one*): ❑ Part 1: Creditors with Priority Unsecured Claims
❑ Part 2: Creditors with Nonpriority Unsecured Claims

Last 4 digits of account number ___ ___ ___ ___

Name

Number Street

City State ZIP Code

On which entry in Part 1 or Part 2 did you list the original creditor?

Line _____ of (*Check one*): ❑ Part 1: Creditors with Priority Unsecured Claims
❑ Part 2: Creditors with Nonpriority Unsecured Claims

Last 4 digits of account number ___ ___ ___ ___

Name

Number Street

City State ZIP Code

On which entry in Part 1 or Part 2 did you list the original creditor?

Line _____ of (*Check one*): ❑ Part 1: Creditors with Priority Unsecured Claims
❑ Part 2: Creditors with Nonpriority Unsecured Claims

Last 4 digits of account number ___ ___ ___ ___

Name

Number Street

City State ZIP Code

On which entry in Part 1 or Part 2 did you list the original creditor?

Line _____ of (*Check one*): ❑ Part 1: Creditors with Priority Unsecured Claims
❑ Part 2: Creditors with Nonpriority Unsecured Claims

Last 4 digits of account number ___ ___ ___ ___

Part 4: Add the Amounts for Each Type of Unsecured Claim

6. Total the amounts of certain types of unsecured claims for statistical reporting purposes. For reporting purposes, add the amounts for each type of unsecured claim.

			Total claim
Total claims from Part 2	6a. **Domestic support obligations**	6a.	$_____
	6b. **Taxes and certain other debts you owe the government**	6b.	$_____
	6c. **Claims for death or personal injury while you were intoxicated**	6c.	$_____
	6d. **Other.** Add all other priority unsecured claims. Write that amount here.	6d.	+ $_____
	6e. **Total.** Add lines 6a through 6d.	6e.	$_____

			Total claim
Total claims from Part 3	6f. **Student loans**	6f.	$_____
	6g. **Obligations arising out of a separation agreement or divorce that you did not report as priority claims**	6g.	$_____
	6h. **Debts to pension or profit-sharing plans, and other similar debts**	6h.	$_____
	6i. **Other.** Add all other nonpriority unsecured claims. Write that amount here.	6i.	+ $_____
	6j. **Total.** Add lines 6f through 6i.	6j.	$_____

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 106D

Schedule D: The Property You Claim as Exempt

1/14

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. Using the property you listed on *Schedule A: Property* (Official Form 106A) as your source, list the property that you claim as exempt. If more space is needed, fill out and attach to this page as many copies of *Part 2: Additional Page* as necessary. On the top of any additional pages, write your name and case number (if known). For each item of property you claim as exempt, you must specify the amount of the exemption you claim. Usually, a specific dollar amount is claimed as exempt, but in some circumstances the amount of the exemption claimed might be indicated as 100% of fair market value. For example, a debtor might claim 100% of fair market value for an exemption that is unlimited in dollar amount, such as some exemptions for health aids.

Part 1: Identify the Property You Claim as Exempt

1. **Which set of exemptions are you claiming?** *Check one only, even if your spouse is filing with you.*
   - ❑ You are claiming state and federal non-bankruptcy exemptions. 11 U.S.C. § 522(b)(3)
   - ❑ You are claiming federal exemptions. 11 U.S.C. § 522(b)(2)

2. **For any property you list on *Schedule A* that you claim as exempt, fill in the information below.**

Brief description of the property and line on *Schedule A* that lists this property	Current value of the portion you own Copy the value from *Schedule A*	Amount of the exemption you claim	Specific laws that allow exemption
Brief description: Line from *Schedule A:* _____	$_____	_____	_____
Brief description: Line from *Schedule A:* _____	$_____	_____	_____
Brief description: Line from *Schedule A:* _____	$_____	_____	_____
Brief description: Line from *Schedule A:* _____	$_____	_____	_____

3. **Are you claiming a homestead exemption of more than $146,450?** (Subject to adjustment on 4/01/13 and every 3 years after that for cases filed on or after the date of adjustment.)
   - ❑ No
   - ❑ Yes. Did you acquire the property covered by the exemption within 1,215 days before you filed this case?
     - ❑ No
     - ❑ Yes

Part 2: Additional Page

Brief description of the property and line on *Schedule A* that lists this property	Current value of the portion you own Copy the value from *Schedule A*	Amount of the exemption you claim	Specific laws that allow exemption
Brief description: Line from *Schedule A:* _____	$_____	_____	_____
Brief description: Line from *Schedule A:* _____	$_____	_____	_____
Brief description: Line from *Schedule A:* _____	$_____	_____	_____
Brief description: Line from *Schedule A:* _____	$_____	_____	_____
Brief description: Line from *Schedule A:* _____	$_____	_____	_____
Brief description: Line from *Schedule A:* _____	$_____	_____	_____
Brief description: Line from *Schedule A:* _____	$_____	_____	_____
Brief description: Line from *Schedule A:* _____	$_____	_____	_____
Brief description: Line from *Schedule A:* _____	$_____	_____	_____
Brief description: Line from *Schedule A:* _____	$_____	_____	_____
Brief description: Line from *Schedule A:* _____	$_____	_____	_____

Fill in this information to identify your case:

Debtor _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse If filing) First Name Middle Name Last Name

United States Bankruptcy Court for the:_____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 106E

Schedule E: Executory Contracts and Unexpired Leases

12/14

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, copy the additional page, fill it out, number the entries, and attach it to this page. On the top of any additional pages, write your name and case number (if known).

1. **Do you have any executory contracts or unexpired leases?**
   ❑ No. Check this box and file this form with the court with your other schedules. You have nothing else to report on this form.
   ❑ Yes. Fill in all of the information below.

2. **List separately each person or company with whom you have the contract or lease. Then state what each contract or lease is for (for example, rent, vehicle lease, cell phone).** See the instructions for more examples of executory contracts and unexpired leases.

	Person or company with whom you have the contract or lease	State what the contract or lease is for
1	Name Number Street City State ZIP Code	
2	Name Number Street City State ZIP Code	
3	Name Number Street City State ZIP Code	
4	Name Number Street City State ZIP Code	
5	Name Number Street City State ZIP Code	

Additional Page if You Have More Contracts or Leases

Person or company with whom you have the contract or lease	What the contract or lease is for
Name Number Street City State ZIP Code	
Name Number Street City State ZIP Code	
Name Number Street City State ZIP Code	
Name Number Street City State ZIP Code	
Name Number Street City State ZIP Code	
Name Number Street City State ZIP Code	
Name Number Street City State ZIP Code	
Name Number Street City State ZIP Code	

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the:_____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 106F

Schedule F: Your Codebtors

12/14

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, copy the Additional Page, fill it out, and number the entries in the boxes on the left. Attach the Additional Page to this page. On the top of any Additional Pages, write your name and case number (if known). Answer every question.

1. **Do you have any codebtors?** (If you are filing a joint case, do not list either spouse as a codebtor.)
   - ❑ No
   - ❑ Yes

2. **Within the last 8 years, have you lived in a community property state or territory?** (*Community property states and territories* include Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington, and Wisconsin.)
   - ❑ No. Go to line 3.
   - ❑ Yes. Did your spouse, former spouse, or legal equivalent live with you at the time?
     - ❑ No
     - ❑ Yes. In which community state or territory did you live? _____

       Fill in the name and current address of that person.

       _____
       Name of your spouse

       _____
       Number Street

       _____
       City State ZIP Code

3. **In Column 1, list as codebtors all of the people or entities who are also liable for any debts you may have. Include all guarantors and co-signers; do not include your spouse as a codebtor if your spouse is filing with you. List the person shown in line 2 above as a codebtor only if that person is a guarantor or co-signer. Make sure you have listed the creditor on Schedule B or Schedule C. Use Schedule B or Schedule C to fill out Column 2.**

	Column 1: **Your codebtor**	*Column 2:* **The creditor to whom you owe the debt**
1	_____ Name _____ Number Street _____ City State ZIP Code	Line from *Schedule B:* _____ OR Line from *Schedule C:* _____
2	_____ Name _____ Number Street _____ City State ZIP Code	Line from *Schedule B:* _____ OR Line from *Schedule C:* _____
3	_____ Name _____ Number Street _____ City State ZIP Code	Line from *Schedule B:* _____ OR Line from *Schedule C:* _____

12b-006889

Additional Page to List More Codebtors

Column 1: **Your codebtor**	*Column 2:* **The creditor to whom you owe the debt**
Name Number Street City State ZIP Code	Line from *Schedule B:* _____ OR Line from *Schedule C:* _____
Name Number Street City State ZIP Code	Line from *Schedule B:* _____ OR Line from *Schedule C:* _____
Name Number Street City State ZIP Code	Line from *Schedule B:* _____ OR Line from *Schedule C:* _____
Name Number Street City State ZIP Code	Line from *Schedule B:* _____ OR Line from *Schedule C:* _____
Name Number Street City State ZIP Code	Line from *Schedule B:* _____ OR Line from *Schedule C:* _____
Name Number Street City State ZIP Code	Line from *Schedule B:* _____ OR Line from *Schedule C:* _____
Name Number Street City State ZIP Code	Line from *Schedule B:* _____ OR Line from *Schedule C:* _____
Name Number Street City State ZIP Code	Line from *Schedule B:* _____ OR Line from *Schedule C:* _____

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 106-Declaration

Declaration About an Individual Debtor's Schedules

12/14

If two married people are filing together, both are equally responsible for supplying correct information.

You must file this form whenever you file bankruptcy schedules or amended schedules. If you make a false statement, you could be fined up to $500,000 or imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

Sign Here

Did you pay or agree to pay someone who is NOT an attorney to help you fill out this bankruptcy filing package?

❑ No

❑ Yes. Name of person_____.
Attach *Bankruptcy Petition Preparer's Notice, Declaration, and Signature* (Official Form 119).

Under penalty of perjury, I declare that I have read the forms filed with this declaration, and that they are true and correct.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

COMMITTEE NOTE

The schedules to be used in cases of individual debtors are revised as part of the Forms Modernization Project, making them easier to read and, as a result, likely to generate more complete and accurate responses. The goals of the Forms Modernization Project include improving the interface between technology and the forms so as to increase efficiency and reduce the need to produce the same information in multiple formats. Therefore, many of the open-ended questions and multiple-part instructions have been replaced with more specific questions. The individual debtor schedules are also renumbered starting with the number 106 and followed by the letter or name of the schedule to distinguish them from the versions to be used in non-individual cases.

Official Form 106A, *Schedule A: Your Property*, consolidates information about an individual debtor's real and personal property into a single form. It replaces Official Form 6A, *Real Property Schedule* and Official Form 6B, *Personal Property,* in cases of individual debtors. In addition to specific questions about the assets the form also includes open text fields to allow debtors who want to provide additional information regarding particular assets to do so.

The layout and categories of property on Official Form 106A have changed. Instead of dividing property interests into two categories (real or personal property), the new form uses seven categories likely to be more familiar to non-lawyers: real estate, vehicles, personal household items, financial assets, business-related property, farm- and commercial fishing-related property, and a catch-all category for property that was not listed elsewhere in the form. Although the new form categories and the examples provided in many of the categories are designed to prompt debtors to be thorough and list all of their interests in property, the prompts are not intended to require a detailed description of items of little value that are unlikely to be administered by the case trustee. For example, the debtor is directed to separately describe and list individual items of property only if they are worth more than $500, and is allowed to describe generally items of minimal value (such

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as children's clothes) by adding the value of the items and reporting the total.

Because a particular item of property may fit into more than category, the instructions for the form explain that it should be listed only once.

In addition, because property may fit within a particular category, but not be elicited by the particular line items within the category, the debtor is asked in Parts 3 – 6 (lines 14, 35, 44, and 51) to specifically identify and value any other property in the specific category.

Part 1, *Describe Each Residence, Building, Land, or Other Real Estate You Own or Have an Interest in*, avoids legal terms such as "life estate" or "joint tenancy," because many individual debtors do not fully understand the nature of their ownership interest in real property. Instead, the debtor is asked to state the "current value of the portion you own," and to also state whether ownership is shared with someone else. Furthermore, instead of asking an open-ended description of the property, the form guides the debtor in answering the description question by providing eight options from which to choose: single-family home, duplex or multi-unit building, condominium or cooperative, manufactured or mobile home, land, investment property, time share, and other.

Part 2, *Describe Your Vehicles*, also guides the debtor in answering the question, asking for the make, model, year, and mileage of the car or other vehicle. Because mileage is just a general indication of vehicle value, the debtor is not required to list the exact mileage, but instead is prompted to provide the approximate mileage by selecting from four checkboxes.

Part 3, *Describe Your Personal and Household Items*, simplifies wording, updates categories, and uses more common terms. For example, "Wearing apparel" is changed to "clothes" and examples include furs, which were previously grouped with jewelry. Firearms, on the other hand, which were previously grouped with sports and other hobbies, are now set out as a separate category. Additionally, because a new Part 6 has been

added to separately describe-farm related property, Part 3 includes a category for "non-farm animals."

Part 4, *Describe Your Financial Assets*, prompts a listing of the debtor's financial assets though several questions providing separate space for the institution name after the type of applicable account, and for the value of the debtor's interest in the asset. Two new categories are added: "bonds, mutual funds, or publicly traded stocks" and "claims against third parties, whether or not you have filed a lawsuit or made a demand for payment."

Part 5, *Describe Any Business-Related Property You Own or Have an Interest in,* provides prompts for listing business-related property such as accounts receivable, inventory, and machinery, and includes a direction to list business-related real estate in Part 1, to avoid listing real estate twice.

Part 6, *Describe Any Farm- and Commercial Fishing-Related Property You Own or Have an Interest in*, provides prompts for listing farm- or commercial fishing-related property such as farm animals, crops, and feed. It also includes a direction to list any farm- or commercial fishing-related real estate in Part 1.

Part 7, *Describe All Property You Own or Have an Interest In That You Did Not List Above* is a catch-all provision that allows the debtor to report property that is difficult to categorize.

Part 8, *List the Totals of Each Part of This Form*¸ tabulates the total value of the debtor's interest in the listed property. The tabulation includes two subtotals, one for real estate, which corresponds to the real property total that is reported on previous Official Form 6A. The second subtotal is of Parts 2-7, which corresponds to the personal property total that is reported on previous Official Form 6B.

Official Form 106B, *Schedule B: Creditors Who Hold Claims Secured by Property*, replaces Official Form 6D, *Creditors Holding Secured Claims,* in cases of individual debtors.

Part 1, *List Your Creditors Who Hold Secured Claims*, now directs the debtor to list only the last four digits of the account

number. Part 1 also adds four checkboxes with which to describe the nature of the lien: an agreement the debtor made (such as mortgage or secured car loan); statutory lien (such as tax lien, mechanic's lien); judgment lien from a lawsuit; and other.

The form adds Part 2, *List Others to Be Notified for a Debt That You Already Listed*. The debtor is instructed to use Part 2 if there is a need to notify someone other than the creditor for a debt listed in Part 1. For example, if a collection agency is trying to collect for a creditor listed in Part 1, the collection agency would be listed in Part 2.

Official Form 106C, *Schedule C: Creditors Who Have Unsecured Claims*, consolidates information about priority and nonpriority unsecured claims into a single form. It replaces Official Form 6E – *Creditors Holding Unsecured Priority Claims*, and Official Form 6F – *Creditors Holding Unsecured Nonpriority Claims*, in cases of individual debtors.

Although both priority and non-priority unsecured claims are reported in Official Form 106C, the two types of claims are separately grouped so that the total for each type can be reported for case administration and statistical purposes. The form eliminates the question "consideration for claim" and instructs debtors to list creditors in alphabetical order.

Part 1, *List All of Your Creditors with PRIORITY Unsecured Claims*, includes four checkboxes identifying the type of priority that applies to the claim: domestic support obligations; taxes and certain other debts owed to the government; claims for death or personal injury while intoxicated; and "other." The first three categories are required to be separately reported for statistical purposes. If the debtor selects "other," the debtor must specify the basis of the priority, *e.g.* wages, or employee benefit plan contribution.

Part 2, *List All of Your Creditors with NONPRIORITY Unsecured Claims*, no longer asks whether the claim is subject to setoff. The form creates four checkboxes for types of claims that must be separately reported for statistical purposes: student loans; obligations arising out of a separation agreement or divorce not

listed as priority claims; debts to pension or profit-sharing plans and other similar debts; and "other." If the debtor selects "other," the debtor must specify the basis of the claim.

Part 3, *List Others to Be Notified for a Debt That You Already Listed*, is a new addition to the form. The debtor is instructed to use Part 3 only if there is a need to notify someone other than the creditor for a debt listed in Parts 1 and 2. For example, if a collection agency is trying to collect for a creditor listed in Part 1, the collection agency would be listed in Part 3.

Finally, Part 4, *Add the Amounts for Each Type of Unsecured Claim*, subtotals particular types of unsecured claims for statistical reporting purposes.

Official Form 106D, *Schedule D: The Property You Claim as Exempt*, replaces Official Form 6C – *Property Claimed as Exempt*, in cases of individual debtors.

Part 1, *Identify the Property You Claim as Exempt*, includes a table to list the property the debtor seeks to exempt, the value of the property owned by the debtor, the amount of the claimed exemption, and the law that allows the exemption. The first column asks for a brief description of the exempt property, and also asks for the line number where the property is listed on Schedule A. The second column asks for the value of the portion if the asset owned by the debtor, rather than the entire asset. The third column asks for the amount, rather than the value, of the exemption claim. The change in the wording of the third column is stylistic.

The form has also been changed in light of the Supreme Court's ruling in *Schwab v. Reilly,* 130 S.Ct. 2652 (2010). The dollar sign is removed from the entries in the "amount of the exemption you claim" column, and an instruction is added to the form explaining that for each item of property the debtor claims as exempt, the debtor must specify the amount of the exemption claimed. Usually, a specific dollar amount is claimed as exempt because that is what the applicable law allows, but in some circumstances the law may permit the entire item to be claimed as exempt. In such a circumstance, an exemption claim might be

indicated as 100% of fair market value. For example, a debtor might claim 100% of fair market value for an exemption that is unlimited in dollar amount, such as some exemptions for health aids.

Official Form 106E, *Schedule E: Executory Contracts and Unexpired Leases*, replaces Official Form 6G, *Executory Contracts and Unexpired Leases*, in cases of individual debtors.

The form is simplified. Instead of requiring the debtor to make multiple assertions about each potential executory contract or unexpired lease, the form simply requires the debtor to identify the name and address of the entity that the contract or lease is with, and to state what the contract or lease is for. Definitions and examples of executory contracts and unexpired leases are included in the separate instructions for the form.

An additional page is provided in case the debtor has so many executory contracts and unexpired leases that the available page is not adequate. If the debtor needs to use the additional page, the debtor is required to fill-in the entry number.

Official Form 106F, *Schedule F: Your Codebtors*, replaces Official Form 6H, *Codebtors*, in cases of individual debtors.

The form breaks out the questions about whether there are any codebters, and whether the debtor has lived with a spouse or legal equivalent in a community property state in the prior eight years. It also removes Alaska from the listed community property states. Finally, it asks the debtor to indicate where the debt is listed on Schedule B or Schedule C, thereby eliminating the need to list the name and address of the creditor.

Official Form 106G, *Schedule G: Your Income,* replaces Official Form 6I, *Your Income*, in cases of individual debtors.

The form is one of an initial set of forms that were published as part of the Forms Modernization Project in 2012. It is renumbered and internal cross references are updated to conform to the new numbering system now being introduced by the Forms Modernization Project.

Official Form 106H, *Schedule H: Your Expenses,* replaces Official Form 6J, *Your Expenses*, in cases of individual debtors.

The form is one of an initial set of forms that were published as part of the Forms Modernization Project in 2012. It is renumbered and internal cross references are updated to conform to the new numbering system now being introduced by the Forms Modernization Project.

Official Form 106 – Summary, *A Summary of Your Assets and Liabilities and Certain Statistical Information*, replaces, Official Form 6, *Summary of Schedules and Statistical Summary of Certain Liability and Related Data (28 U.S.C. § 159)*, in cases of individual debtors.

The form is reformatted and updated with cross references indicating from which forms and line numbers the summary information is gathered. In addition, because most filings are now done electronically, the form no longer requires the debtor to list the other schedules being filed with the Summary or to tabulate the total number of sheets used to compile the Schedules.

Official Form 106 – Declaration, *Declaration About an Individual Debtor's Schedules*, replaces Official Form 6, *Declaration Concerning Debtor's* Schedules, in cases of individual debtors.

The form, which is to be signed by the debtor and filed with the debtor's schedules, deletes the Declaration and Signature of Bankruptcy Petition Preparer (BBP). Instead, the debtor is directed to complete and file Official Form 119, *Bankruptcy Petition Preparer's Notice, Declaration, and Signature*, if a BBP helped fill out the bankruptcy forms. The form also deletes the Declaration Under Penalty of Perjury on Behalf of a Corporation or Partnership as unnecessary in a bankruptcy case filed by an individual debtor.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 107

Your Statement of Financial Affairs for Individuals Filing for Bankruptcy 12/14

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Give Details About Where You Lived Before

1. **During the last 3 years, have you lived anywhere other than where you live now?**

❑ No
❑ Yes. List all of the places you lived in the last 3 years. Do not include where you live now.

Debtor 1:	Dates Debtor 1 lived there	Debtor 2:	Dates Debtor 2 lived there
_____ Number Street _____ _____ City State ZIP Code	From _____ To _____	Same as Debtor 1 _____ Number Street _____ _____ City State ZIP Code	Same as Debtor 1 From _____ To _____
_____ Number Street _____ _____ City State ZIP Code	From _____ To _____	Same as Debtor 1 _____ Number Street _____ _____ City State ZIP Code	Same as Debtor 1 From _____ To _____

2. **Within the last 8 years, did you ever live with a spouse or legal equivalent in a community property state or territory?** (*Community property states and territories* include Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington, and Wisconsin.)

❑ No
❑ Yes. Make sure you fill out Schedule F: *Your Codebtors* (Official Form 106F).

Part 2: Explain the Sources of Your Income

3. **Did you have any income from being employed or operating a business during this year or the two previous calendar years?**
Fill in a total amount for the income you receive from all jobs and all businesses, including part-time activities. If you are filing a joint case and you have income that you receive together, list it only once under Debtor 1.

❑ No
❑ Yes. Fill in the details.

	Debtor 1		Debtor 2	
	Sources of income Check all that apply.	**Gross income** (before deductions and exclusions)	**Sources of income** Check all that apply.	**Gross income** (before deductions and exclusions)
From January 1 of current year until the date you filed for bankruptcy:	Wages, commissions, bonuses, tips Operating a business	$_____	Wages, commissions, bonuses, tips Operating a business	$_____
For last calendar year: (January 1 to December 31, _____) YYYY	Wages, commissions, bonuses, tips Operating a business	$_____	Wages, commissions, bonuses, tips Operating a business	$_____
For the calendar year before that: (January 1 to December 31, _____) YYYY	Wages, commissions, bonuses, tips Operating a business	$_____	Wages, commissions, bonuses, tips Operating a business	$_____

4. **Did you receive any other income during this year or the two previous calendar years?**
Include income regardless of whether that income is taxable. Examples of *other income* are alimony, child support, Social Security, unemployment, and other public benefit payments, pensions, rental income, interest, dividends, money collected from lawsuits, royalties, and gambling and lottery winnings. If you are filing a joint case and you have income that you receive together, list it only once under Debtor 1.

List each source and the gross income for each separately. Do not include income that you listed in line 3.

❑ No
❑ Yes. Fill in the details.

	Debtor 1		Debtor 2	
	Sources of income Describe below.	**Gross income from each source** (before deductions and exclusions)	**Sources of income** Describe below.	**Gross income from each source** (before deductions and exclusions)
From January 1 of current year until the date you filed for bankruptcy:	_____	$_____	_____	$_____
	_____	$_____	_____	$_____
	_____	$_____	_____	$_____
For last calendar year: (January 1 to December 31, _____) YYYY	_____	$_____	_____	$_____
	_____	$_____	_____	$_____
	_____	$_____	_____	$_____
For the calendar year before that: (January 1 to December 31, _____) YYYY	_____	$_____	_____	$_____
	_____	$_____	_____	$_____
	_____	$_____	_____	$_____

Part 3: List Certain Payments You Made Before You Filed for Bankruptcy

5. Are either Debtor 1's or Debtor 2's debts primarily consumer debts?

❑ No. **My debts are not primarily consumer debts.** *Consumer debts* are defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose."

During the 90 days before you filed for bankruptcy, did you pay any creditor a total of $5,850 or more?

❑ No. Go to line 6.

❑ Yes. List below each creditor to whom you paid a total of $5,850 or more in one or more payments and the total amount you paid that creditor. Do not include payments for domestic support obligations, such as child support and alimony. Also, do not include payments to an attorney for this bankruptcy case.

❑ Yes. **My debts are primarily consumer debts.**

During the 90 days before you filed for bankruptcy, did you pay any creditor a total of $600 or more?

❑ No. Go to line 6.

❑ Yes. List below each creditor to whom you paid a total of $600 or more and the total amount you paid that creditor. Do not include payments for domestic support obligations, such as child support and alimony. Also, do not include payments to an attorney for this bankruptcy case.

	Dates of payment	Total amount paid	Amount you still owe	Was this payment for…
_____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code	_____ _____ _____	$_____	$_____	Mortgage Car Credit card Loan repayment Suppliers or vendors Other _____
_____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code	_____ _____ _____	$_____	$_____	Mortgage Car Credit card Loan repayment Suppliers or vendors Other _____
_____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code	_____ _____ _____	$_____	$_____	Mortgage Car Credit card Loan repayment Suppliers or vendors Other _____

6. **Within 1 year before you filed for bankruptcy, did you make a payment on a debt you owed anyone who was an insider?**
Insiders include relatives; general partners of you or your relatives; corporations of which you are an officer, director, or person in control; and any managing agent. 11 U.S.C. § 101. Include payments for domestic support obligations, such as child support and alimony.

- ❑ No
- ❑ Yes. List all payments to an insider.

	Dates of payment	Total amount paid	Amount you still owe	Reason for this payment
_____ Insider's Name _____ Number Street _____ _____ City State ZIP Code	_____ _____ _____	$_____	$_____	
_____ Insider's Name _____ Number Street _____ _____ City State ZIP Code	_____ _____ _____	$_____	$_____	

7. **Within 1 year before you filed for bankruptcy, did you make any payments or transfer any property on account of a debt that benefitted an insider?**
Include payments on debts guaranteed or co-signed by an insider.

- ❑ No
- ❑ Yes. List all payments that benefit an insider.

	Dates of payment	Total amount paid	Amount you still owe	Reason for this payment Include creditor's name
_____ Insider's Name _____ Number Street _____ _____ City State ZIP Code	_____ _____ _____	$_____	$_____	
_____ Insider's Name _____ Number Street _____ _____ City State ZIP Code	_____ _____ _____	$_____	$_____	

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Part 4: Identify Legal Actions, Repossessions, Foreclosures, and Returns

8. **Within 1 year before you filed for bankruptcy, were you a party in any lawsuit, court action, or administrative proceeding?**
List all such matters, including personal injury cases, small claims actions, divorces, collection suits, paternity actions, support or custody modifications, and contract disputes.

❑ No
❑ Yes. Fill in the details.

	Nature of the case	Court or agency	Status of the case
Case title_____ _____ Case number _____		_____ Court Name _____ Number Street _____ City State ZIP Code	Pending On appeal Concluded
Case title_____ _____ Case number _____		_____ Court Name _____ Number Street _____ City State ZIP Code	Pending On appeal Concluded

9. **Within 1 year before you filed for bankruptcy, was any of your property repossessed, foreclosed, garnished, attached, seized, or levied?**
Check all that apply and fill in the details below.

❑ No. Go to line 10.
❑ Yes. Fill in the information below.

	Describe the property	Date	Value of the property
_____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code	**Explain what happened** ❑ Property was repossessed. ❑ Property was foreclosed. ❑ Property was garnished. ❑ Property was attached. ❑ Property was seized or levied.	_____	$_____
_____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code	**Explain what happened** ❑ Property was repossessed. ❑ Property was foreclosed. ❑ Property was garnished. ❑ Property was attached. ❑ Property was seized or levied.	_____	$_____

10. Within 90 days before you filed for bankruptcy, did any creditor, including a bank or financial institution, set off or otherwise take anything from your accounts without your permission or refuse to make a payment because you owed a debt?

- ❑ No
- ❑ Yes. Fill in the details.

	Describe the action the creditor took	Date action was taken	Amount
_____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code	Last 4 digits of account number: XXXX–___ ___ ___ ___	_____	$_____

11. **Within 1 year before you filed for bankruptcy, was any of your property in the possession of an assignee for the benefit of creditors, a court-appointed receiver, custodian, or other official?**

- ❑ No
- ❑ Yes. Fill in the details.

	Describe the property	Value
_____ Custodian's Name _____ Number Street _____ _____ City State ZIP Code	Case title _____ Case number _____ Date of order or assignment _____ MM / DD / YYYY	$_____ _____ Court Name _____ Number Street _____ City State ZIP Code

Part 5: List Certain Gifts and Contributions

12. **Within 2 years before you filed for bankruptcy, did you give any gifts with a total value of more than $600 per person?**

- ❑ No
- ❑ Yes. Fill in the details for each gift.

Gifts with a total value of more than $600 per person	Describe the gifts	Dates you gave the gifts	Value
_____ Person to Whom You Gave the Gift _____ Number Street _____ City State ZIP Code Person's relationship to you _____		_____	$_____
		_____	$_____

Gifts with a total value of more than $600 per person	Describe the gifts	Dates you gave the gifts	Value
_____ Person to Whom You Gave the Gift _____ _____ Number Street _____ City State ZIP Code Person's relationship to you _____		_____	$_____
		_____	$_____

13. Within 2 years before you filed for bankruptcy, did you give any gifts or contributions with a total value of more than $600 to any charity?

- ❑ No
- ❑ Yes. Fill in the details for each gift or contribution.

Gifts or contributions to charities that total more than $600	Describe what you contributed	Date you contributed	Value
_____ Charity's Name _____ _____ Number Street _____ City State ZIP Code		_____	$_____
		_____	$_____

Part 6: List Certain Losses

14. **Within 1 year before you filed for bankruptcy or since you filed for bankruptcy, did you lose anything because of theft, fire, other disaster, or gambling?**

- ❑ No
- ❑ Yes. Fill in the details.

Describe the property you lost and how the loss occurred	Describe any insurance coverage for the loss Include the amount that insurance has paid. List pending insurance claims on line 33 of *Schedule A: Property.*	Date of your loss	Value of property lost
		_____	$_____

Part 7: List Certain Payments or Transfers

15. **Within 1 year before you filed for bankruptcy, did you or anyone else acting on your behalf pay or transfer any property to anyone you consulted about seeking bankruptcy or preparing a bankruptcy petition?**
Include any attorneys, bankruptcy petition preparers, or credit counseling agencies for services required in your bankruptcy.

- ❑ No
- ❑ Yes. Fill in the details.

	Description and value of any property transferred	Date payment or transfer was made	Amount of payment
_____ Person Who Was Paid _____ Number Street _____ _____ City State ZIP Code _____ Email or website address _____ Person Who Made the Payment, if Not You		_____ _____	$_____ $_____

	Description and value of any property transferred	Date payment or transfer was made	Amount of payment
_____ Person Who Was Paid _____ Number Street _____ _____ City State ZIP Code _____ Email or website address _____ Person Who Made the Payment, if Not You		_____ _____	$_____ $_____

16. **Within 1 year before you filed for bankruptcy, did you or anyone else acting on your behalf pay anything to anyone who promised to help you deal with your creditors or to make payments to your creditors?**
Do not include any payment or transfer that you listed on line 15.

- ❑ No
- ❑ Yes. Fill in the details.

	Description and value of any property transferred	Date payment or transfer was made	Amount of payment
_____ Person Who Was Paid _____ Number Street _____ _____ City State ZIP Code		_____ _____	$_____ $_____

17. **Within 2 years before you filed for bankruptcy, did you sell, trade, or otherwise transfer any property to anyone, other than property transferred in the ordinary course of your business or financial affairs?**
Include both outright transfers and transfers made as security. Do not include gifts and transfers that you have already listed on this statement.

- ❑ No
- ❑ Yes. Fill in the details.

	Description and value of property transferred	Describe any property or payments received or debts paid in exchange	Date transfer was made
_____ Person Who Received Transfer _____ Number Street _____ _____ City State ZIP Code Person's relationship to you _____			_____
_____ Person Who Received Transfer _____ Number Street _____ _____ City State ZIP Code Person's relationship to you _____			_____

18. **Within 10 years before you filed for bankruptcy, did you transfer any property to a self-settled trust or similar device of which you are a beneficiary?** (These are often called *asset-protection devices*.)

- ❑ No
- ❑ Yes. Fill in the details.

	Description and value of the property transferred	Date transfer was made
Name of trust _____ _____		_____

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Part 8: List Certain Financial Accounts, Safety Deposit Boxes, and Storage Units

19. **Within 1 year before you filed for bankruptcy, were any financial accounts or instruments held in your name, or for your benefit, closed, sold, moved, or transferred?**
Include checking, savings, money market, or other financial accounts; certificates of deposit; shares in banks, credit unions, brokerage houses, pension funds, cooperatives, associations, and other financial institutions.

❑ No
❑ Yes. Fill in the details.

	Last 4 digits of account number	Type of account	Date account was closed , sold, moved, or transferred	Last balance before closing or transfer
Name of Financial Institution Number Street City State ZIP Code	XXXX–___ ___ ___ ___	Checking Savings Money market Brokerage Other_____	_____	$_____
Name of Financial Institution Number Street City State ZIP Code	XXXX–___ ___ ___ ___	Checking Savings Money market Brokerage Other_____	_____	$_____

20. **Do you now have, or did you have within 1 year before you filed for bankruptcy, any safe deposit box or other depository for securities, cash, or other valuables?**

❑ No
❑ Yes. Fill in the details.

	Who else had access to it?	Describe the contents	Do you still have it?
Name of Financial Institution Number Street City State ZIP Code	Name Number Street City State ZIP Code		No Yes

21. **Do you store property in a storage unit, or have you stored property in a storage unit within 1 year before you filed for bankruptcy?** Do not include storage units that are part of the building in which you live.

❑ No
❑ Yes. Fill in the details.

	Who else has or had access to it?	Describe the contents	Do you still have it?
Name of Storage Facility Number Street City State ZIP Code	Name Number Street City State ZIP Code		No Yes

Part 9: Identify Property You Hold or Control for Someone Else

22. **Do you hold or control any property that someone else owns?** Include any property you borrowed from, are storing for, or hold in trust for someone.

- ❑ No
- ❑ Yes. Fill in the details.

	Where is the property?	Describe the property	Value
Owner's Name Number Street City State ZIP Code	Number Street City State ZIP Code		$_____

Part 10: Give Details About Environmental Information

For the purpose of Part 10, the following definitions apply:

- *Environmental law* means any federal, state, or local statute or regulation concerning pollution, contamination, releases of hazardous or toxic substances, wastes, or material into the air, land, soil, surface water, groundwater, or other medium, including statutes or regulations controlling the cleanup of these substances, wastes, or material.
- *Site* means any location, facility, or property that any environmental law defines, whether you now own, operate, or utilize it or used to own, operate, or utilize it, including disposal sites.
- *Hazardous material* means anything an environmental law defines as a hazardous waste, hazardous substance, toxic substance, hazardous material, pollutant, contaminant, or similar term.

Report all notices, releases, and proceedings that you know about, regardless of when they occurred.

23. **Has any governmental unit notified you that you may be liable or potentially liable under or in violation of an environmental law?**

- ❑ No
- ❑ Yes. Fill in the details.

	Governmental unit	Environmental law, if you know it	Date of notice
Name of site Number Street City State ZIP Code	Governmental unit Number Street City State ZIP Code		_____

24. **Have you notified any governmental unit of any release of hazardous material?**

- ❑ No
- ❑ Yes. Fill in the details.

	Governmental unit	Environmental law, if you know it	Date of notice
Name of site Number Street City State ZIP Code	Governmental unit Number Street City State ZIP Code		_____

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25. **Have you been a party in any judicial or administrative proceeding under any environmental law?** Include settlements and orders.

- ❑ No
- ❑ Yes. Fill in the details.

	Court or agency	Nature of the case	Status of the case
Case title_____ _____ _____ Case number	_____ Court Name _____ Number Street _____ City State ZIP Code		Pending On appeal Concluded

Part 11: Give Details About Your Business or Connections to Any Business

26. **Within 4 years before you filed for bankruptcy, did you own a business or have any of the following connections to any business?**

- ❑ A sole proprietor or self-employed in a trade, profession, or other activity, either full-time or part-time
- ❑ Member of a limited liability company (LLC) or limited liability partnership (LLP)
- ❑ A partner in a partnership
- ❑ An officer, director, or managing executive of a corporation
- ❑ Owner of at least 5% of the voting or equity securities of a corporation

- ❑ No. None of the above applies. Go to Part 12.
- ❑ Yes. Check all that apply above and fill in the details below for each business.

	Describe the nature of the business	Employer Identification number Do not include Social Security number or ITIN.
_____ Business Name _____ Number Street _____ _____ City State ZIP Code		EIN: ___ ___ – ___ ___ ___ ___ ___ ___ ___
	Name of accountant or bookkeeper	**Dates business existed**
		From _____ To _____
	Describe the nature of the business	**Employer Identification number** Do not include Social Security number or ITIN.
_____ Business Name _____ Number Street _____ _____ City State ZIP Code		EIN: ___ ___ – ___ ___ ___ ___ ___ ___ ___
	Name of accountant or bookkeeper	**Dates business existed**
		From _____ To _____
	Describe the nature of the business	**Employer Identification number** Do not include Social Security number or ITIN.
_____ Business Name _____ Number Street _____ _____ City State ZIP Code		EIN: ___ ___ – ___ ___ ___ ___ ___ ___ ___
	Name of accountant or bookkeeper	**Dates business existed**
		From _____ To _____

12b-006910

27. **Within 2 years before you filed for bankruptcy, did you give a financial statement to anyone about your business?** Include all financial institutions, creditors, or other parties.

- ❑ No
- ❑ Yes. Fill in the details below.

	Date issued
Name	MM / DD / YYYY
Number Street	
City State ZIP Code	

Part 12: Sign Here

I declare under penalty of perjury that I have read the answers on this Statement of Financial Affairs and any attachments and that the answers are true and correct.

✘ _____
Signature of Debtor 1

Date _____

✘ _____
Signature of Debtor 2

Date _____

Did you attach additional pages to *Your Statement of Financial Affairs for Individuals Filing for Bankruptcy* (Official Form 107)?

- ❑ No
- ❑ Yes

12b-006911

COMMITTEE NOTE

Official Form 107*, Your Statement of Financial Affairs for Individuals Filing for Bankruptcy*, which applies only in cases of individual debtors, is revised in its entirety as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. The goals of the Forms Modernization Project include improving the interface between technology and the forms so as to increase efficiency and reduce the need to produce the same information in multiple formats. Therefore, many of the open-ended questions and multiple-part instructions have been replaced with more specific questions. In addition, the form is renumbered to distinguish it from the version to be used in non-individual cases, and stylistic changes were made throughout the form.

The form is derived from Official Form 7*, Statement of Financial Affairs*. The new form uses eleven sections likely to be more understandable to non-lawyers, groups questions of a similar nature together, and eliminates questions unrelated to individual debtors. The new form deletes the instruction, currently found in many questions, that married debtors filing under chapter 12 or chapter 13 must include information applicable to their spouse, even if their spouse is not filing with them, unless the spouses are separated.

Part 1, *Give Details About Where You Lived Before*, moves the questions regarding the debtor's prior addresses and residences in a community property state to the beginning of the form. The form eliminates the "name used" question in reference to prior addresses. Also, the debtor is no longer required to list the name of a spouse or former spouse who lived with the debtor in a community property state.

Part 2, *Explain the Sources of Your Income*, consolidates the questions regarding income, adding "wages, commissions, bonuses, tips" as a category for sources of income, and eliminates the option to report income on a fiscal year basis. In addition, the form provides examples of types of "other income." The time

period is changed from the prior two years to two calendar years plus the portion of the year in which the bankruptcy is filed.

Part 3, *List Certain Payments You Made Before You Filed for Bankruptcy*, includes questions related to payments made in the 90 days prior to bankruptcy, with a separate question for payments made to insiders within one year before filing for bankruptcy. The statutory definition of consumer debt is provided. The question regarding payments for consumer and non-consumer debts requires the debtor to use checkboxes to specifically indicate the purpose of the payment. The form instructs debtors to include payments for domestic support obligations in the section regarding insider payments. The form provides a separate question regarding payments or transfers on account of a debt that benefited an insider. For both questions regarding payments to insiders, the debtor is required to provide a reason for the payment.

Part 4, *Identify Legal Actions, Repossessions, Foreclosures, and Returns*, consolidates questions regarding actions against the debtor's property. The form provides examples of types of legal actions, and requires the debtor to indicate the status of any action. The form adds the requirement that a debtor include any property levied within a year of filing for bankruptcy, and that the debtor provide the last four digits of any account number for any setoffs. Also, a debtor must list any assignment for the benefit of creditors made within one year of filing for bankruptcy.

Part 5, *List Certain Gifts and Contributions*, changes the reporting threshold to $600 per person or charity, and increases the look-back period from one to two years.

Part 6, *List Certain Losses*, clarifies how to report insurance coverage for losses, providing that the debtor must include amounts of insurance that have been paid on this form, but must list pending insurance claims on Official Form 106A.

Part 7, *List Certain Payments or Transfers*, includes questions regarding payments or transfers of property by the debtor. The question regarding payments or transfers to anyone who was consulted about seeking bankruptcy or preparing a bankruptcy petition requires the person's email or website address,

as well as the name of the person who made the payment, if it was not the debtor. There is a separate question asked about payments or transfers to anyone who promised to help with creditors or make payments to creditors, reminding the debtors not to include any payments or transfers already listed. Also, the debtor must list any transfers of property, outright or for security purposes, within two years of filing for bankruptcy, unless the transfer is in the ordinary course of the debtor's business. There is a reminder not to list gifts or other transfers already included elsewhere on the form. The question regarding self-settled trusts includes a notation that such trusts are often referred to as asset-protection devices.

Part 8, *List Certain Financial Accounts, Safety Deposit Boxes, and Storage Units*, adds money market accounts to the examples provided for the question regarding financial accounts or instruments, and removes "other instruments" from the examples. Also, the form adds a question about whether the debtor has or had property stored in a storage unit within one year of filing for bankruptcy. The debtor must provide the name and address of the storage facility and anyone who has or had access to the unit, as well as a description of the contents and whether the debtor still has access to the storage unit. Storage units that are part of the building in which the debtor resides are excluded.

Part 9, *Identify Property You Hold or Control for Someone Else*, instructs that the debtor should include any property that the debtor borrowed from, is storing for, or is holding in trust for someone.

Part 10, *Give Details About Environmental Information*, adds any location, facility, or property that a debtor uses or used in the definition of "site." Also, the debtor must list the case title and nature of the case for any judicial or administrative proceedings under any environmental law, and must choose a checkbox option to indicate the status of the case.

Part 11, *Give Details About Your Business or Connections to Any Business*, eliminates any instructions that apply to corporations and partnerships. The debtor must indicate if, within four years (previously six years) before filing for bankruptcy, the debtor owned a business or had certain connections to a business,

with five categories of businesses provided as checkboxes. If the debtor has a connection to a business, the debtor must list the name, address, nature, and Employer Identification Number of the business, the dates of the business' existence, and the name of an accountant or bookkeeper for the business. Accounting information requested is truncated; the debtor is simply required to provide the name of the business bookkeeper or accountant.

Part 12, *Sign Here*, eliminates the signature boxes for a partnership or corporation and a non-attorney bankruptcy petition preparer. Also, the debtor is asked to indicate through checkboxes whether additional pages are attached to the form.

12b-006915

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 112

Statement of Intention for Individuals Filing Under Chapter 7

12/14

If you are an individual filing under Chapter 7 and creditors have claims secured by your property or you have leased personal property and the lease has not expired, you must fill out this form. You must file this form with the court within 30 days after you file your bankruptcy petition or by the date set for the meeting of creditors, whichever is earlier, unless the court extends the time for cause. You must also have delivered copies to the creditors and lessors you listed on the form.

If two married people are filing together in a joint case, both are equally responsible for supplying correct information. Both debtors must sign and date the form.

Be as complete and accurate as possible. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known).

Part 1: List Your Creditors Who Hold Secured Claims

1. **For any creditors that you listed in Part 1 of *Schedule B*, fill in the information below.**

Identify the creditor and the property that is collateral		What do you intend to do with the property that is subject to a secured debt?	Did you claim the property as exempt on Schedule D?
Creditor's name:		Give the property to the creditor. Keep the property. *Check one*: I will redeem the property. I will sign a *Reaffirmation Agreement*. Other. Explain: _____	❑ No ❑ Yes
Description of property securing debt:			
Creditor's name:		Give the property to the creditor. Keep the property. *Check one*: I will redeem the property. I will sign a *Reaffirmation Agreement*. Other. Explain: _____	❑ No ❑ Yes
Description of property securing debt:			
Creditor's name:		Give the property to the creditor. Keep the property. *Check one*: I will redeem the property. I will sign a *Reaffirmation Agreement*. Other. Explain: _____	❑ No ❑ Yes
Description of property securing debt:			
Creditor's name:		Give the property to the creditor. Keep the property. *Check one*: I will redeem the property. I will sign a *Reaffirmation Agreement*. Other. Explain: _____	❑ No ❑ Yes
Description of property securing debt:			

Part 2: List Your Unexpired Personal Property Leases

For any unexpired personal property leases that you listed in *Schedule E*, fill in the information below. *Unexpired leases* are leases that are still in effect; the lease period has not yet ended. You may assume an unexpired personal property lease if the trustee does not assume it. 11 U.S.C. § 365(p)(2).

Describe your unexpired personal property leases		Will the lease be assumed?
Lessor's name:		❑ No ❑ Yes
Description of leased property:		
Lessor's name:		❑ No ❑ Yes
Description of leased property:		
Lessor's name:		❑ No ❑ Yes
Description of leased property:		
Lessor's name:		❑ No ❑ Yes
Description of leased property:		
Lessor's name:		❑ No ❑ Yes
Description of leased property:		
Lessor's name:		❑ No ❑ Yes
Description of leased property:		

Part 3: Sign Here

Under penalty of perjury, I declare that I have indicated my intention about any property of my estate that secures a debt and any personal property that is subject to an unexpired lease.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

COMMITTEE NOTE

Official Form 112*, Statement of Intention for Individuals Filing Under Chapter 7* is revised in its entirety as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. In addition, the form is renumbered, and stylistic changes were made throughout the form.

The form is derived from Official Form 8*, Chapter 7 Individual Debtor's Statement of Intention*. The new form has three parts which use language likely to be understandable to non-lawyers. In addition, the instructions are more extensive, advising an individual Chapter 7 debtor that the form must be completed and filed within 30 days, and that the debtor must deliver copies of the form to creditors and lessors listed on the form.

Part 1, *Your Creditors Who Hold Secured Claims*, refers to signing a "Reaffirmation Agreement" rather than asking whether the debtor intends to "reaffirm the debt." In addition, the debtor is asked if the property is claimed as exempt on Schedule C (Official Form 106C).

Part 2, *List Your Unexpired Personal Property Leases*, defines unexpired leases and explains that a debtor may assume an unexpired personal property lease if the trustee does not assume it.

12b-006918

Fill in this information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____ Chapter _____
(If known)

Official Form 119

Bankruptcy Petition Preparer's Notice, Declaration, and Signature

12/14

Bankruptcy petition preparers as defined in 11 U.S.C. § 110 must fill out this form. Only bankruptcy petition preparers should fill out this form. Bankruptcy petition preparers must fill out this form anytime they help prepare documents to be filed in the case. If more than one bankruptcy petition preparer helped with the documents, each must sign in Part 3. A bankruptcy petition preparer who does not comply with the provisions of title 11 of the United States Code and the Federal Rules of Bankruptcy Procedure may be fined and imprisoned.
11 U.S.C. § 110; 18 U.S.C. § 156.

Part 1: Notice to Debtor

Bankruptcy petition preparers must give the debtor a copy of this form and have the debtor sign it before they prepare any documents for filing or accept any compensation. A signed copy of this form must be filed with any document prepared.

Bankruptcy petition preparers are not attorneys and may not practice law or give you legal advice, including the following:

- Whether to file a petition under the Bankruptcy Code (11 U.S.C. § 101 et seq.);
- Whether filing a case under Chapter 7, 11, 12, or 13 is appropriate;
- Whether your debts will be eliminated or discharged in a case under the Bankruptcy Code;
- Whether you will be able to keep your home, car, or other property after filing a case under the Bankruptcy Code;
- The tax consequences that may arise because a case is filed under the Bankruptcy Code;
- Whether any tax claims may be discharged;
- Whether you may or should promise to repay debts to a creditor or enter into a reaffirmation agreement;
- How to characterize the nature of your interests in property or your debts; or
- Bankruptcy procedures and rights.

The bankruptcy petition preparer _____ **has notified me of**
Name
any maximum allowable fee before preparing any document for filing or accepting any fee.

_____ Date _____
Signature of Debtor 1, acknowledging receipt of this notice MM / DD / YYYY

_____ Date _____
Signature of Debtor 2, acknowledging receipt of this notice MM / DD / YYYY

Part 2: Declaration of the Bankruptcy Petition Preparer

Under penalty of perjury, I declare that:

- I am a bankruptcy petition preparer or the officer, principal, responsible person, or partner of a bankruptcy petition preparer;
- I or my firm prepared the documents listed below and gave the debtor a copy of them and the *Notice to Debtor by Bankruptcy Petition Preparer* as required by 11 U.S.C. §§ 110(b), 110(h), and 342(b); and
- if rules or guidelines are established according to 11 U.S.C. § 110(h) setting a maximum fee for services that bankruptcy petition preparers may charge, I or my firm have notified the debtor of the maximum amount before preparing any document for filing or before accepting any fee from the debtor.

_____ _____ _____
Printed name Title, if any Firm name, if it applies

_____
Number Street

_____ _____ _____ _____
City State ZIP Code Contact phone

I or my firm prepared the documents listed below:

- ❑ Voluntary Petition (Form 101)
- ❑ Your Statement About Social Security Numbers (Form 102)
- ❑ A Summary of Schedules (Form 106-Summary)
- ❑ Schedule A (Form106A)
- ❑ Schedule B (Form 106B)
- ❑ Schedule C (Form106C)
- ❑ Schedule D (Form 106D)
- ❑ Schedule E (Form 106E)
- ❑ Schedule F (Form 106F)
- ❑ Schedule G (Form 106G)
- ❑ Schedule H (Form 106H)
- ❑ Statement of Financial Affairs (Form 107)
- ❑ Declaration About an Individual Debtor's Schedules (Form 106 Declaration)
- ❑ Debtor's Statement of Intention (Form 112)
- ❑ Statement of Current Monthly Income (Forms 108-1, 108-2,109, 110-1, 110-2)
- ❑ Application to Pay Filing Fee in Installments (Form 103A)
- ❑ Application to Have Chapter 7 Filing Fee Waived (Form 103B)
- ❑ A list of names and addresses of all creditors (*creditor or mailing matrix*)
- ❑ Other _____

Part 3: Sign Here

Bankruptcy petition preparers must sign and give their Social Security Numbers. If more than one bankruptcy petition preparer prepared the documents to which this declaration applies, the signature and Social Security Number of each preparer must be provided. 11 U.S.C. § 110.

_____ ___ ___ ___ -- ___ ___ -- ___ ___ ___ ___ Date _____
Signature of bankruptcy petition preparer or officer, principal, responsible person, or partner Social Security Number of person who signed MM / DD / YYYY

_____
Printed name

_____ ___ ___ ___ -- ___ ___ -- ___ ___ ___ ___ Date _____
Signature of bankruptcy petition preparer or officer, principal, responsible person, or partner Social Security Number of person who signed MM / DD / YYYY

_____
Printed name

COMMITTEE NOTE

Official Form 119*, Bankruptcy Petition Preparer's Notice, Declaration, and Signature*, applies only in cases of individual debtors. It is revised as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. In addition, the form is renumbered, and stylistic changes were made throughout the form.

The form is derived from Official Form 19*, Declaration and Signature of Non-Attorney Bankruptcy Petition Preparer*. An instruction is added to the form that provides statutory citations. Filers are advised that only bankruptcy petition preparers should use the form, and that if more than one bankruptcy petition preparer helped with the documents, each must sign the form.

Part 1, *Notice to Debtor*, is moved to the beginning of the form and revised. An instruction is added that bankruptcy petition preparers must give the debtor a copy of the form and have the debtor sign it before they prepare any documents for filing or accept compensation, and that the form must be filed with any document prepared. It warns the debtor that bankruptcy petition preparers are not attorneys and may not practice law or give legal advice, with a list of examples of advice that may not be provided by a bankruptcy petition preparer. The signature line includes a note that the debtor acknowledges receipt of the notice.

Part 2, *Declaration of Bankruptcy Petition Preparer*, revises the declaration by the bankruptcy petition preparer to include an officer, principal, responsible person, or partner of a bankruptcy petition preparer. The bankruptcy petition preparer must provide a firm name, if applicable, as well as a contact phone, and must indicate which documents the bankruptcy petition preparer prepared from a list of documents. An "other" option is provided if additional documents were prepared.

Part 3, *Sign Here*, provides spaces for the bankruptcy petition preparer to enter a social security number, and adds the

12b-006921

language regarding an officer, principal, responsible person or partner of the bankruptcy petition preparer on the signature line.

12b-006922

Fill in this information to identify your case:

United States Bankruptcy Court for the:

_____ District of _____
State

Case number (*If known*): _____

Draft October 3, 2012

Official Form 121

Your Statement About Your Social Security Numbers

12/14

Use this form to tell the court about any Social Security or federal Individual Taxpayer Identification Numbers you have used. Do not file this form as part of the public case file. This form must be submitted separately and must not be included in the court's public electronic records.

To protect your privacy, the court will not make this form available to the public. You should not include a full Social Security Number or Individual Taxpayer Number on any other document filed with the court. The court will make only the last four digits of your numbers known to the public. However, the full numbers will be available to your creditors, the U.S. trustee or bankruptcy administrator, and the trustee assigned to your case and to help creditors correctly identify a case, full Social Security Numbers may appear on an electronic version of some notices. Please consult local court procedures for submission requirements.

If you do not tell the truth on this form, you may be fined up to $250,000, you may be imprisoned for up to 5 years, or both.

Part 1: Tell the court about yourself and your spouse if your spouse is filing with you

	For Debtor 1:	For Debtor 2 (Only If Spouse Is Filing):
1. Your name	First name Middle name Last name	First name Middle name Last name

Part 2: Tell the court about all of your Social Security or federal Individual Taxpayer Identification Numbers

2. All Social Security Numbers you have used	___ ___ ___ – ___ ___ – ___ ___ ___ ___ ___ ___ ___ – ___ ___ – ___ ___ ___ ___ You do not have a Social Security Number.	___ ___ ___ – ___ ___ – ___ ___ ___ ___ ___ ___ ___ – ___ ___ – ___ ___ ___ ___ You do not have a Social Security Number.
3. All federal Individual Taxpayer Identification Numbers (ITIN) you have used	9 ___ ___ – ___ ___ – ___ ___ ___ ___ 9 ___ ___ – ___ ___ – ___ ___ ___ ___ You do not have an ITIN.	9 ___ ___ – ___ ___ – ___ ___ ___ ___ 9 ___ ___ – ___ ___ – ___ ___ ___ ___ You do not have an ITIN.

Part 3: Sign here

	Under penalty of perjury, I declare that the information I have provided in this form is true and correct. _____ Signature of Debtor 1 Date _____ MM / DD / YYYY	Under penalty of perjury, I declare that the information I have provided in this form is true and correct. _____ Signature of Debtor 2 Date _____ MM / DD / YYYY

COMMITTEE NOTE

Official Form 121, *Your Statement About Your Social Security Numbers*, is revised as part of the Forms Modernization Project. The form, which applies only in cases of individual debtors, replaces Official Form 21, *Statement of Social Security Number(s)*. It is renumbered to distinguish it from the forms used by non-individual debtors such as corporations and partnerships.

To make Form 121 easier to understand and complete, the form is divided into three sections and directions on the form are simplified. The debtors' address is eliminated from the form and the Employer Tax-Identification number (EIN) is moved from the caption to the body of the form.

12b-006924

Information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Last 4 digits of Social Security Number or ITIN ___ ___ ___ ___

EIN __ __ - __ __ __ __ __ __ __

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

Last 4 digits of Social Security Number or ITIN ___ ___ ___ ___

EIN __ __ - __ __ __ __ __ __ __

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number: _____

Order of Discharge

IT IS ORDERED: A discharge under 11 U.S.C. § 727 is granted to:

_____ [_____]

_____
MM / DD / YYYY

By the court: _____
United States Bankruptcy Judge

Notice to the creditors:

This order means that no one may make any attempt to collect a discharged debt from the debtors personally. For example, creditors with discharged debts cannot sue, garnish wages, assert a deficiency, or otherwise try to collect from the debtors personally. Creditors cannot contact the debtors by mail, phone, or otherwise in any attempt to collect the debt personally. Creditors who violate this order can be required to pay debtors damages and attorney's fees.

However, a creditor with a lien may enforce a claim against the debtors' property subject to that lien.

This order does not prevent debtors from paying any debt voluntarily or from paying reaffirmed debts according to the reaffirmation agreement. 11 U.S.C. § 524(c), (f).

This order does not close or dismiss the case, and it does not determine how much money, if any, the trustee will pay creditors.

Notice to the debtor:

This court order grants you (the debtor) a discharge. Most debts are covered by the discharge, but not all. Generally a discharge removes your personal liability for debts that you owed before you filed your bankruptcy case.

Also, if this case began under a different chapter of the Bankruptcy Code and was later converted to chapter 7, debts that existed before the conversion are discharged.

This order does not close or dismiss the case, and it does not determine how much money, if any, the trustee will pay creditors.

In a case involving community property: Special rules protect certain community property owned by the debtor's spouse, even if that spouse did not file a bankruptcy case.

For more information, see page 2 ►

Creditors cannot collect discharged debts from you

This order means that no one can make any attempt to collect from you personally a debt that has been discharged. For example, creditors with discharged debts cannot sue you, garnish your wages, assert a deficiency claim against you, or otherwise try to collect from you personally. They cannot contact you by mail, phone, or otherwise in any attempt to collect the debt as your personal liability.

A creditor who violates this order can be required to pay you damages and attorney's fees.

However, you may voluntarily pay any debt that has been discharged.

But creditors might collect for some debts

This discharge does not stop creditors from collecting debts that you reaffirmed or from any property in which they have a valid security interest.

Debts covered by a valid reaffirmation agreement are not discharged. When you signed a reaffirmation agreement, you chose to give up your discharge for that particular debt.

In addition, the creditor may have a right to enforce a lien against your property unless the lien was avoided or eliminated. For example, the creditor may have the right to foreclose a home mortgage or repossess an auto.

Also, this discharge does not stop creditors from collecting from anyone else who is also liable on the debt, such as your insurance company or a relative who cosigned or guaranteed a loan.

Some debts are not discharged

Examples of some debts that are not discharged are:

Debts that are domestic support obligations;

Debts for most student loans;

Debts for most taxes;

Debts that the bankruptcy court has decided or will decide are not discharged in this bankruptcy case;

Debts for most fines, penalties, forfeitures, or criminal restitution obligations;

Some debts which you did not properly list;

Debts for certain types of loans owed to pension, profit sharing, stock bonus, or retirement plans; and

Debts for death or personal injury caused by your operating a vehicle while intoxicated.

This information is only a general summary of the bankruptcy discharge; some exceptions exist. Because the law is complicated, you should consult an attorney to determine the exact effect of this discharge.

COMMITTEE NOTE

Official Form 318, *Order of Discharge*, is revised and renumbered as part of the Forms Modernization Project. The form is used to issue a discharge in chapter 7 cases filed by individuals or joint debtors. It replaces Official Form 18, *Discharge of Debtor*, Director's Procedural Form 18J, *Discharge of Joint Debtors*, and Director's Procedural Form 18JO, *Discharge of One Joint Debtor*.

To make the discharge order and the explanation of it easier to read and understand, legal terms are explained more fully or replaced with commonly understood terms and the form is reformatted.

Reaffirmed debts are explained more fully and debtors are informed that a discharge will not stop creditors from collecting debts from any property in which they have a valid security interest. In addition, debtors are advised that the discharge does not stop creditors from collecting from anyone else who is liable on the debt, such as cosigner on the loan or an insurance company.

Director's Procedural Forms 18J and 18JO are no longer needed because Form 318 specifies the names of the debtors, or debtor, to whom the discharge is issued.

12b-006927

Fill in this information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Draft August 20, 2012

Official Form B423

Certification About a Financial Management Course

12/14

If you are an individual and you filed for bankruptcy under chapter 7 or 13, or under chapter 11 if § 1141(d)(3)(C) applies, you must take an approved course about personal financial management. In a joint case, each debtor must take the course. 11 U.S.C. 727(a)(11).

After you finish the course, the provider will give you a certificate. The provider may notify the court that you have completed the course. If the provider does not do so, then Debtor 1 and Debtor 2 must each file this form with the certificate number before your debts will be discharged.

If you filed under chapter 7 and you need to file this form, file it within 60 days after the first date set for the meeting of creditors under § 341 of the Bankruptcy Code.

If you filed under chapter 11 or 13 and you need to file this form, file it before you make the last payment that your plan requires or before you file a motion for a discharge under § 1141(d)(5)(B) or § 1328(b) of the Bankruptcy Code. Fed. R. Bankr. P. 1007(c).

In some cases, the court can waive the requirement to take the financial management course. To have the requirement waived, you must file a motion with the court and obtain a court order.

Part 1: Tell the Court About the Required Course

You must check one:

I completed an approved course in personal financial management:

Date I took the course _____
MM / DD / YYYY

Name of approved provider _____

Certificate number _____

I am not required to complete a course in personal financial management because the court has granted my motion for a waiver of the requirement based on *(check one)***:**

- ❑ **Incapacity.** I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.
- ❑ **Disability.** My physical disability causes me to be unable to complete a course in personal financial management in person, by phone, or through the internet, even after I reasonably tried to do so.
- ❑ **Active duty.** I am currently on active military duty in a military combat zone.
- ❑ **Residence.** I live in a district in which the United States trustee (or bankruptcy administrator) has determined that the approved instructional courses cannot adequately meet my needs.

Part 2: Sign Here

I certify that the information I have provided is true and correct.

_____ _____ Date _____
Signature of debtor named on certificate Printed name of debtor MM / DD / YYYY

COMMITTEE NOTE

Official Form 423, *Certification About a Financial Management Course*, is revised as part of the Forms Modernization Project. The form replaces Official Form 23, *Debtor's Certification of Completion of Postpetition Instructional Course Concerning Personal Financial Management*. Form 423 is renumbered to distinguish it from the forms used by non-individual debtors such as corporations and partnerships.

To make Form 423 easier to understand, legal terms are explained more fully or replaced with commonly understood terms and the form is reformatted. Part 1, *Tell the Court About the Required Course*, provides definitions for "incapacity" and "disability," rather than providing statutory citations.

A statement is added that, in some cases, the court can waive the requirement to complete the financial management course. To have the requirement waived, the debtor must file a motion with the court and obtain a court order.

12b-006929

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Draft
August 23, 2012

Official Form 427

Cover Sheet for Reaffirmation Agreement

12/14

Anyone who is a party to a reaffirmation agreement may fill out and file this form. Fill it out completely, attach it to the reaffirmation agreement, and file the documents within the time set under Bankruptcy Rule 4008.

Part 1: Explain the Repayment Terms of the Reaffirmation Agreement

1. **Who is the creditor?**	_____ Name of the creditor
2. **How much is the debt?**	On the date that the bankruptcy case is filed $_____ To be paid under the reaffirmation agreement $_____ $_____ per month for _____ months (if fixed interest rate)
3. **What is the annual percentage rate (APR) of interest?**	Before the bankruptcy case was filed _____% Under the reaffirmation agreement _____% ❑ Fixed rate ❑ Adjustable rate
4. **Does collateral secure the debt?**	No Yes. Describe the collateral. _____ Current market value $_____
5. **Does the creditor assert that the debt is nondischargeable?**	No Yes. Attach an explanation of the nature of the debt and the basis for contending that the debt is nondischargeable.

6. **Using information from *Schedule G: Your Income*** (Official Form 106G) **and *Schedule H: Your Expenses*** (Official Form 106H)**, fill in the amounts.**

Income and expenses reported on Schedules G and H		Income and expenses stated on the reaffirmation agreement	
6a. Combined monthly income from line 12 of Schedule G	$ _____	6e. Monthly income from all sources after payroll deductions	$ _____
6b. Monthly expenses from Column A, line 22 of Schedule H	– $ _____	6f. Monthly expenses	– $ _____
6c. Monthly payments on all reaffirmed debts not listed on Schedule H	– $ _____	6g. Monthly payments on all reaffirmed debts not included in monthly expenses	– $ _____
6d. **Scheduled net monthly income** Subtract lines 6b and 6c from 6a. If the total is less than 0, put the number in brackets.	$ _____	6h. **Present net monthly income** Subtract lines 6f and 6g from 6e. If the total is less than 0, put the number in brackets.	$ _____

7. **Are the income amounts on lines 6a and 6e different?**	No Yes. Explain why they are different and complete line 10._____ _____
8. **Are the expense amounts on lines 6b and 6f different?**	No Yes. Explain why they are different and complete line 10._____ _____
9. **Is the net monthly income in line 6h less than 0?**	No Yes. A presumption of hardship arises (unless the creditor is a credit union). Explain how the debtor will make monthly payments on the reaffirmed debt and pay other living expenses. Complete line 10. _____ _____
10. **Debtor's certification about lines 7-9** If any answer on lines 7-9 is *Yes*, the debtor must sign here. If all the answers on lines 7-9 are *No*, go to line 11.	I certify that each explanation on lines 7-9 is true and correct. ✘ _____ Signature of Debtor 1 ✘ _____ Signature of Debtor 2 (Spouse Only in a Joint Case)
11. **Did counsel represent the debtor in negotiating the reaffirmation agreement?**	No Yes. Has counsel executed a declaration or an affidavit to support the reaffirmation agreement? No Yes

Part 2: Sign Here

Whoever fills out this form must sign here.	**I certify that the attached agreement is a true and correct copy of the reaffirmation agreement between the parties identified on this *Cover Sheet for Reaffirmation Agreement*.** _____ Signature Date _____ MM / DD / YYYY _____ Printed Name Check one: Debtor or Debtor's Attorney Creditor or Creditor's Attorney

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COMMITTEE NOTE

Official Form 427, *Cover Sheet for Reaffirmation Agreement,* is revised and renumbered as part of the Forms Modernization Project. The form replaces Official Form 27, *Reaffirmation Agreement Cover Sheet*. To make it easier to understand, the form is reformatted and legal terms are explained more fully or replaced with commonly understood terms.

The calculation of the debtor's net monthly income is expanded to include the debtor's net monthly income at the time the bankruptcy petition is filed as well as debtor's net monthly income at the time of the reaffirmation agreement. Rather than requiring filers to state their relationship to the case, checkboxes are provided for the debtor or the debtor's attorney and for the creditor or the creditor's attorney.

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APPENDIX A.2

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OFFICIAL FORMS Chart Draft -- 9.27.2012					
B 1	Voluntary Petition	B101	Voluntary Petition for Individuals Filing for Bankruptcy *(incorporates exhibits – carves out eviction judgment statement as new form B101AB)*	Fall 2012	August 2013
		B101A B101B	Your Statement About an Eviction Judgment Against You – Parts A and B *(was in Form B1)*	Fall 2012	August 2013
		B201	Voluntary Petition for Non-Individuals Filing for Bankruptcy		
	Exhibit A	B201A	Attachment to Voluntary Petition for Non-Individuals Filing for Bankruptcy Under Chapter 11		
	Exhibit C	B101 B201	*Hazardous Property or Property That Needs Immediate Attention -- incorporated in Forms B101 and B201*		
	Exhibit D	B101	*Individual Debtor's Statement of Compliance with Credit Counseling Requirement – Incorporated in Form B101*		
B 2	Declaration under Penalty of Perjury on Behalf of a Corporation or Partnership	B202	Declaration Under Penalty of Perjury On Behalf of a Corporation or Partnership *(For petition, schedules, SOFA, etc)*		
B 3A	Application and Order to Pay Filing Fee in Installments	B103A	Application for Individuals to Pay the Filing Fee in Installments	Spring 2011	August 2012
B 3B	Application for Waiver of Chapter 7 Filing Fee	B103B	Application to Have the Chapter 7 Filing Fee Waived	Spring 2011	August 2012

B 4	List of Creditors Holding 20 Largest Unsecured Claims	B104	For Individual Chapter 11 Cases: The List of Creditors Who Have the 20 Largest Unsecured Claims Against You Who Are Not Insiders *(individuals)*	Fall 2012	August 2013
		B204	For Chapter 11 Cases: The List of Creditors Who Have the 20 Largest Unsecured Claims Against You Who Are Not Insiders *(non-individuals)*		
B 5	Involuntary Petition	B105	Involuntary Petition Against an Individual	Spring 2013	August 2013
		B205	Involuntary Petition Against a Non-Individual		
B6	Cover Sheet for Schedules	**No coversheet created**			
B6	Summary of Schedules (Includes Statistical Summary of Certain Liabilities)	B106 -- Summary	A Summary of Your Assets and Liabilities and Certain Statistical Information (*individuals)*	Fall 2012	August 2013
		B206 -- Summary	A Summary of Your Assets and Liabilities (*non-individuals)*		
B 6A	Schedule A - Real Property	B106-A	Schedule A: Property (Official Form 106A) (*combines real and personal property, individuals)*	Fall 2012	August 2013
B 6B	Schedule B - Personal Property	B206-A	Schedule A: Property (*combines real and personal property, non-individuals)*		
B 6C	Schedule C - Property Claimed as Exempt	B106-D	Schedule D: The Property You Claim as Exempt (*individuals)*	Fall 2012	August 2013
B 6D	Schedule D - Creditors Holding Secured Claims	B106-B	Schedule B: Creditors Who Hold Claims Secured By Property (*against individuals*)	Fall 2012	August 2013

		B206-B	Schedule B: Creditors Who Hold Claims Secured By Property *(against non-individuals)*		
B 6E	Schedule E - Creditors Holding Unsecured Priority Claims	B106C	Schedule C: Creditors Who Have Unsecured Claims *(against individuals, combines priority and non-priority)*	Fall 2012	August 2013
B 6F	Schedule F - Creditors Holding Unsecured Nonpriority Claims	B206C	Schedule C: Creditors Who Have Unsecured Claims (*against non-individuals, combines priority and non-priority)*		
B 6G	Schedule G - Executory Contracts and Unexpired Leases	B106E	Schedule E: Executory Contracts and Unexpired Leases (*individuals)*	Fall 2012	August 2013
		B206E	Schedule E: Executory Contracts and Unexpired Leases (*non-individuals)*		
B 6H	Schedule H - Codebtors	B106F	Schedule F: Your Codebtors (*individuals)*	Fall 2012	August 2013
		B206F	Schedule F: Your Codebtors (*non-individuals)*		
B 6I	Schedule I - Current Income of Individual Debtor(s)	B106G	Schedule G: Your Income (*individuals – published as B6I)*	Fall 2011	August 2012
			no non-individual version		
B 6J	Schedule J- Current Expenditures of Individual Debtor(s)	B106H	Schedule H: Your Expenses (*individuals-published as 6J)*	Fall 2011	August 2012
			no non-individual version		
B 6	Declaration Concerning Debtor's Schedules	B106 -- Declaration	Declaration About an Individual Debtor's Schedules	Fall 2012	August 2013
		B202	Declaration Under Penalty of Perjury On Behalf of a Corporation or Partnership *(For petition, schedules, SOFA, etc)*		

B 7	Statement of Financial Affairs	B107	Your Statement of Financial Affairs for Individuals Filing for Bankruptcy	Fall 2012	August 2013
		B207	Statement of Your Financial Affairs *(non-Individuals)*		
B 8	Chapter 7 Individual Debtor's Statement of Intention	B112	Statement of Intention for Individuals Filing Under Chapter 7	Fall 2012	August 2013
B 9	Notice of Commencement of Case under the Bankruptcy Code, Meeting of Creditors, and Deadlines	**No coversheet created.**			
B 9A	Chapter 7 Individual or Joint Debtor No Asset Case	B 309A	(For Individuals or Joint Debtors) Notice of Chapter 7 Bankruptcy Case – No Proof of Claim Deadline	Spring 2013	August 2013
B 9B	Chapter 7 Corporation/Partnership No Asset Case	B 309C	(For Corporations or Partnerships) Notice of Chapter 7 Bankruptcy Case – No Proof of Claim Deadline Set	Spring 2013	August 2013
B 9C	Chapter 7 Individual or Joint Debtor Asset Case	B 309B	(For Individuals or Joint Debtors) Notice of Chapter 7 Bankruptcy Case – Proof of Claim Deadline Set	Spring 2013	August 2013
B 9D	Chapter 7 Corporation/Partnership Asset Case (12/11)	B 309D	(For Corporations or Partnerships) Notice of Chapter 7 Bankruptcy Case – Proof of Claim Deadline Set	Spring 2013	August 2013
B 9E	Chapter 11 Individual or Joint Debtor Case	B 309E	(For Individuals or Joint Debtors) Notice of Chapter 11 Bankruptcy Case *(former Alt version combined with Form B309-E)*	Spring 2013	August 2013
B 9E(Alt.)	Chapter 11 Individual or Joint Debtor Case				
B 9F	Chapter 11 Corporation/Partnership Case	B 309F	(For Corporations or Partnerships) Notice of Chapter 11 Bankruptcy Case *(former Alt version combined with Form B309-F)*	Spring 2013	August 2013
B 9F(Alt.)	Chapter 11 Corporation/Partnership Case				
B 9G	Chapter 12 Individual or Joint Debtor Family Farmer	B 309G	(For Individuals or Joint Debtors) Notice of Chapter 12 Bankruptcy Case	Spring 2013	August 2013

B 9H	Chapter 12 Corporation/Partnership Family Farmer	B 309H	(For Corporations or Partnerships) Notice of Chapter 12 Bankruptcy Case	Spring 2013	August 2013
B 9I	Chapter 13 Case	B 309I	Notice of Chapter 13 Bankruptcy Case	Spring 2013	August 2013
B 10	Proof Of Claim	B 410	Proof Of Claim		
B 10A	Proof Of Claim, Attachment A	B 410A	Proof Of Claim, Attachment A		
B 10S1	Proof Of Claim, Supplement 1	B 410S1	Proof Of Claim, Supplement 1		
B 10S2	Proof Of Claim, Supplement 2	B 410S2	Proof Of Claim, Supplement 2		
B 11A	General Power of Attorney	B 411-A			
B 11B	Special Power of Attorney	B 411-B			
B 12	Order and Notice for Hearing on Disclosure Statement	B 312			
B 13	Order Approving Disclosure Statement and Fixing Time for Filing Acceptances or Rejections of Plan, Combined with Notice Thereof	B 313			
B 14	Ballot for Accepting or Rejecting Plan	B 414			
B 15	Order Confirming Plan	B 315			
B 16A	Caption	B 416A			
B 16B	Caption (Short Title)	B 416B			
B 16C	[Abrogated]	N/A			
B 16D	Caption for Use in Adversary Proceeding other than for a Complaint Filed by a Debtor	B 416D			
B 17	Notice of Appeal under 28 U.S.C. §158(a) or (b) from a Judgment, Order or Decree of a Bankruptcy Court	B 417			
B 18	Discharge of Debtor	B 318	Discharge of Debtor in a Chapter 7 Case	Fall 2012	August 2013
B 19	Declaration and Signature of Non-Attorney Bankruptcy Petition Preparer	B119	Bankruptcy Petition Preparer's Notice, Declaration and Signature *(was B 113)*	Fall 2012	August 2013

B 20A	Notice of Motion or Objection	B 420-A	Notice of Motion or Objection	Spring 2013	August 2013
B 20B	Notice of Objection to Claim	B 420-B	Notice of Objection to Claim	Spring 2013	August 2013
B 21	Statement of Social Security Number	B 121 *updated from B102*	Your Statement About Your Social Security Numbers	Fall 2012	August 2013
B 22A	Statement of Current Monthly Income and Means Test Calculation (Chapter 7)	B 108-1	Chapter 7 Statement of Your Current Monthly Income and Means-Test Calculation	Spring 2011	August 2012
		B 108-2	Chapter 7 Means Test Calculation	Spring 2011	August 2012
B 22B	Statement of Current Monthly Income (Chapter 11)	B 109	Chapter 11 Statement of Your Current Monthly Income	Spring 2011	August 2012
B 22C	Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income (Chapter 13)	B 110-1	Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period	Spring 2011	August 2012
		B 110-2	Chapter 13 Calculation of Your Disposable Income	Spring 2011	August 2012
B 23	Debtor's Certification of Completion of Instructional Course Concerning Financial Management	B 423	Certification About a Financial Management Course *(was B 113)*	Fall 2012	August 2013
B 24	Certification to Court of Appeals	B 424			
B 25A	Plan of Reorganization in Small Business Case under Chapter 11	B 425-A			
B 25B	Disclosure Statement in Small Business Case under Chapter 11	B 425-B			
B 25C	Small Business Monthly Operating Report	B 425-C			
B 26	Periodic Report Regarding Value, Operations and Profitability of Entities in Which the Debtor's Estate Holds a Substantial or Controlling Interest	B 426			

B 27	Reaffirmation Agreement Cover Sheet	B427	Cover Sheet for Reaffirmation Agreement	Fall 2012	August 2013
DIRECTOR FORMS					
B 13S	Order Conditionally Approving Disclosure Statement, Fixing Time for Filing Acceptances or Rejections of Plan, and Fixing the Time for Filing Objections to the Disclosure Statement and to the Confirmation of the Plan, Combined with Notice Thereof and of the Hearing on Final Approval of the Disclosure Statement and the Hearing on Confirmation of the Plan	B 1300-S			
B 15S	Order Finally Approving Disclosure Statement and Confirming Plan	B 1500-S			
B 18F	Discharge of Debtor After Completion of Chapter 12 Plan	B 1800-F			
B 18FH	Discharge of Debtor Before Completion of Chapter 12 Plan	B 1800-FH			
B 18J	Discharge of Joint Debtors (Chapter 7)	B 318	Order of Discharge *(combined with Forms 18 and 18JO)*		
B 18JO	Discharge of One Joint Debtor (Chapter 7)	B 318	Order of Discharge *(combined with Forms 18 and 18J)*		
B 18RI	Discharge of Individual Debtor in a Chapter 11 Case	B 1800-RI			
B 18W	Discharge of Debtor After Completion of Chapter 13 Plan	B 1800-W			
B 18WH	Order Discharging Debtor Before Completion of Chapter 13 Plan	B 1800-WH			
B 104	Adversary Proceeding Cover Sheet	B 1040			
B 131	Exemplification Certificate	B 1310			

B 132	Application for Search of Bankruptcy Records	B 1320			
B 133	Claims Register	B 1330			
B 200	Required Lists, Schedules, Statements and Fees	B 2000			
B 201A	Notice to Individual Consumer Debtor	B 2010			
B 201B	Certification of Notice to Individual Consumer Debtor(s)	B 101	Not needed because certification is in petition		
B 202	Statement of Military Service	B 2020			
B 203	Disclosure of Compensation of Attorney for Debtor	B 2030	Attorney's Disclosure of Compensation		
B 204	Notice of Need to File Proof of Claim Due to Recovery of Assets	B 2040			
B 205	Notice to Creditors and Other Parties in Interest	B 2050			
B 206	Certificate of Commencement of Case	B 2060			
B 207	Certificate of Retention of Debtor In Possession	B 2070			
B 210A	Transfer of Claim Other Than for Security	B 2100-A			
B 210B	Notice of Transfer of Claim Other Than for Security	B 2100-B			
B 230A	Order Confirming Chapter 12 Plan	B 2300-A			
B 230B	Order Confirming Chapter 13 Plan	B 2300-B			
B 231A	Order Fixing Time to Object to Proposed Modification of Confirmed Chapter 12 Plan	B 2310-A			
B 231B	Order Fixing Time to Object to Proposed Modification of Confirmed Chapter 13 Plan	B 2310-B			
B 240A	Reaffirmation Documents	B 2400-A			
B 240B	Motion for Approval of Reaffirmation Agreement	B 2400-B			
B 240C	Order on Reaffirmation Agreement	B 2400-C			
B 240A/B ALT	Reaffirmation Agreement	B 2400-A/B ALT			

B 240C ALT	Order on Reaffirmation Agreement	B 2400-C ALT			
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B 250B	Summons and Notice of Pretrial Conference in an Adversary Proceeding	B 2500-B			
B 250C	Summons and Notice of Trial in an Adversary Proceeding	B 2500-C			
B 250D	Third-Party Summons	B 2500-D			
B 250E	Summons to Debtor in Involuntary Case	B 2500-E			
B 250F	Summons in a Chapter 15 Case Seeking Recognition of a Foreign Nonmain Proceeding	B 2500-F			
B 253	Order for Relief in an Involuntary Case	B 2530			
B 254	Subpoena for Rule 2004 Examination	B 2540			
B 255	Subpoena in an Adversary Proceeding	B 2550			
B 256	Subpoena in a Case Under the Bankruptcy Code	B 2560			
B 260	Entry of Default	B 2600			
B 261A	Judgment by Default	B 2610-A			
B 261B	Judgment by Default	B 2610-B			
B 261C	Judgment in an Adversary Proceeding	B 2610-C			
B 262	Notice of Entry of Judgment	B 2620			
B 263	Bill of Costs	B 2630			
B 264	Writ of Execution to the United States Marshal	B 2640			
B 265	Certification of Judgment for Registration in Another District	B 2650			
B 270	Notice of Filing of Final Report of Trustee, of Hearing on Applications for Compensation [and of Hearing on Abandonment of Property by the Trustee]	B 2700			
B 271	Final Decree	B 2710			

B 280	Disclosure of Compensation of Bankruptcy Petition Preparer	B 2800	Disclosure of Compensation of Bankruptcy Petition Preparer		
B 281	Appearance of Child Support Creditor or Representative	B 2810			
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APPENDIX A.3

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Instructions

Bankruptcy Forms for Individuals

U.S. Bankruptcy Court | September 2012

12b-006948

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About this Booklet of Instructions

This booklet provides instructions for completing selected forms that individuals filing for bankruptcy must submit to the U.S. Bankruptcy Court. You can download all of the required forms without charge from:

http://www.uscourts.gov/FormsAndFees/Forms/BankruptcyForms.aspx.

The instructions are designed to accompany the forms and are intended to help you understand what information is required to properly file.

Completing the forms is only a part of the bankruptcy process. You are strongly encouraged to hire a qualified attorney not only to help you complete the forms but also to give you general advice about bankruptcy and to represent you in your bankruptcy case. If you cannot afford to pay an attorney, you might qualify for free legal services if they are provided in your area. Contact your state or local bar association for help in obtaining free legal services or in hiring an attorney. **Note: It is particularly difficult to succeed in a chapter 11, 12, or 13 case without an attorney.**

If an attorney represents you, you must provide information so the attorney can prepare your forms. Once the attorney prepares the forms, you must make sure that the forms are accurate and complete. These instructions may help you perform those tasks. If you are filing for bankruptcy without the help of an attorney, this booklet tells you which forms must be filed and provides information about them.

You should carefully read this booklet and keep it with your records. Review the individual forms as you read the instructions for each.

Although bankruptcy petition preparers can help you type the bankruptcy forms, they cannot file the documents for you and cannot give you legal advice. Court employees cannot give you legal advice either.

Read This Important Warning

Because bankruptcy can have serious long-term financial and legal consequences, including loss of your property, you should hire an attorney and carefully consider all of your options before you file. Only an attorney can give you legal advice about what can happen as a result of filing for bankruptcy and what your options are. If you do file for bankruptcy, an attorney can help you fill out the forms properly and protect you, your family, your home, and your possessions.

Although the law allows you to represent yourself in bankruptcy court, you should understand that many people find it difficult to represent themselves successfully. The rules are technical, and a misstep or inaction may harm you. If you file without an attorney, you are still responsible for knowing and following all of the legal requirements.

You may not file bankruptcy if you are not eligible to file or if you do not intend to file the documents necessary to complete the bankruptcy.

Bankruptcy fraud is a serious crime; you could be fined and imprisoned if you commit fraud in your bankruptcy case. If you deliberately make a false statement, you could be fined up to $250,000 or imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

About the bankruptcy forms and filing bankruptcy

Use the forms that are numbered in the 100 series to file bankruptcy for an individual or a married couple. Use the forms that are numbered in the 200 series if you are preparing a bankruptcy on behalf of a non-individual, such as a corporation, partnership, or limited liability company (LLC).

When a bankruptcy is filed, the U.S. Bankruptcy Court opens a case and reviews information. It is important that the answers to the questions on the forms be complete and accurate so that the case proceeds smoothly. A person filing bankruptcy who gives false information could be charged with a federal crime or could lose all the benefits of filing for bankruptcy.

You should understand that filing a bankruptcy case is not private. Anyone has a right to see your bankruptcy forms after you file them. However, in some circumstances, if a court issues a protective order to keep your address, telephone number, or other information from being disclosed to the public, it may be possible to protect your information under 11 U.S.C. § 107 and Bankruptcy Rule 9037.

Understand the terms used in the forms

The forms for individuals use *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, these forms use *you* to ask for information from both debtors. For example, if a form asks, "Do you own a car?" the answer would be *yes* if either debtor owns a car. When information is needed about the spouses separately, the forms use *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

To understand other terms used in the forms and the instructions, see the *Glossary* at the end of this booklet.

Things to remember when filling out these forms

- Be as complete and accurate as possible.
- If more space is needed, attach a separate sheet to the form. On the top of any additional pages, write your name and case number (if known).
- If two married people are filing together, both are equally responsible for supplying correct information.
- For your records, be sure to keep a copy of your bankruptcy documents and all attachments that you file.
- Do not file these instructions with the bankruptcy forms that you file with the court.
- Do not list a minor child's full name. Instead, fill in only the child's initials and the full name and address of the child's parent or guardian. For example, write A.B., a minor child (*John Doe, parent, 123 Main St., City, State*). 11 U.S.C. § 112; Bankruptcy Rule 1007(m) and 9037.

About the Process for Filing a Bankruptcy Case for Individuals

Before you file your bankruptcy case

Before you file for bankruptcy, you must do several things:

- **Receive a briefing about credit counseling from an approved agency** within 180 days before you file. (If you and your spouse are filing together, each of you must receive a briefing before you file. Failure to do so will almost certainly result in the dismissal of your case.) You may have a briefing about credit counseling one-on-one or in a group, by telephone, or by internet.

  For a list of approved providers, go to: http://www.justice.gov/ust/eo/bapcpa/ccde/cc_approved.htm

  In Alabama and North Carolina, go to: http://www.uscourts.gov.

  After you finish the briefing, you will receive a certificate that you will need to file in your bankruptcy case.

- **Find out in which bankruptcy court you must file your bankruptcy case**. It is important that you file in the correct district within your state. To find out which district you are in, go to: http://www.uscourts.gov/courtlinks

- **Check the court's local website** for any specific local requirements that you might have to meet. Go to: http://www.uscourts.gov/courtlinks

- **Find out which chapters of the Bankruptcy Code you are eligible for**. For descriptions of each chapter, review the information contained in the notice, *Notice Required by 11 U.S.C. § 342(b) for Individuals Filing for Bankruptcy* (Form B2010), which is included in this booklet.

Note: **It is particularly difficult to succeed in a chapter 11, 12, or 13 case without an attorney.**

To file for bankruptcy, you must give the court several forms and documents. Some must be filed at the time you file the case. Others may be filed up to 14 days later.

When you file your bankruptcy case

You must file the forms listed below on the date you open your bankruptcy case. For copies of the forms listed here, go to http://www.uscourts.gov. (The list continues on the next page.):

- *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101). This form opens the case. Directions for filling it out are included in the form itself.

- *Your Statement About Your Social Security Numbers* (Official Form 102). This form gives the court your full Social Security number or federal Individual Taxpayer Identification number. To protect your privacy, the court will make only the last four digits of your number known to the general public. However, the court will make your full number available to your creditors, the U.S. trustee or bankruptcy administrator, and the trustee assigned to your case. This form has no separate instructions.

- Your filing fee. If you cannot pay the entire filing fee, you must also include:
  - *Application for Individuals to Pay the Filing Fee in Installments* (Official Form B103A), or
  - *Application to Have the Chapter 7 Filing Fee Waived* (Official Form B103B). Use this form only if you are filing under chapter 7 and you meet the criteria to have the chapter 7 filing fee waived.

- A list of names and addresses of all of your creditors, formatted as a mailing list according to instructions from the bankruptcy court in which you file. (Your court may call this a *creditor matrix* or *mailing matrix*.)

- Your credit counseling certificate from an approved credit counseling agency. (See *Before you file your bankruptcy case*, above). If you have received the briefing about credit counseling but have not yet received the certificate, file it when you receive it. If you have not already received the briefing and believe you are entitled to a temporary waiver from receiving it or that you are not required to receive the briefing, see line 15 of the *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101). Waivers are rare and if you do not qualify for a waiver, your case will be dismissed.

- *For Individual Chapter 11 Cases: The List of Creditors Who Have the 20 Largest Unsecured Claims Against You Who Are Not Insiders* (Official Form 104). Fill out this form only if you file under chapter 11.

- *Your Statement About an Eviction Judgment Against You–Parts A and B* (Official Form 101A and B). Use this form if your landlord has an eviction judgment against you and you want to stay in your residence after you file your forms to open your bankruptcy case.

- *Bankruptcy Petition Preparer's Notice, Declaration, and Signature* (Official Form 119) and *Disclosure of Compensation of Bankruptcy Petition Preparer* (Form 2800). Use these forms if a bankruptcy petition preparer helped you fill out your forms.

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When you file your bankruptcy case or within 14 days after you file

You must file the forms listed below either when you file your bankruptcy case or within 14 days after you file your *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101). If you do not do so, your case may be dismissed. Although it is possible to open your case by submitting only the documents that are listed under *When you file your bankruptcy case*, you should file the entire set of forms at one time to help your case proceed smoothly.

Although some forms may ask you similar questions, you must fill out all of the forms completely to protect your legal rights.

The list below shows the forms that all individuals must file as well as the forms that are specific to each chapter. For copies of the official forms listed here, go to http://www.uscourts.gov.

All individuals who file for bankruptcy must file these forms and the forms for the specific chapter:

- ❑ *Schedules of Assets and Liabilities* (Official Form 106) which includes these forms:
  - ❑ *Schedule A: Property* (Official Form 106A)
  - ❑ *Schedule B: Creditors Who Hold Claims Secured by Your Property* (Official Form 106B)
  - ❑ *Schedule C: Creditors Who Have Unsecured Claims* (Official Form 106C)
  - ❑ *Schedule D: The Property You Claim as Exempt* (Official Form 106D)
  - ❑ *Schedule E: Executory Contracts and Unexpired Leases* (Official Form 106E)
  - ❑ *Schedule F: Your Codebtors* (Official Form 106F)
  - ❑ *Schedule G: Your Income* (Official Form 106G)
  - ❑ *Schedule H: Your Expenses* (Official Form 106H)
  - ❑ *A Summary of Your Schedules for Individuals Filing for Bankruptcy* (Official Form 106 Summary). This form gives an overview of the totals on the schedules
  - ❑ *Declaration About an Individual Debtor's Schedules* (Official Form 106 Declaration)
- ❑ *Your Statement of Financial Affairs for Individuals Filing for Bankruptcy* (Official Form 107)
- ❑ *Disclosure of Compensation to Debtor's Attorney* (Form 2030)
- ❑ Credit counseling certificate that you received from an approved credit counseling agency
- ❑ Copies of all payment advices (*pay stubs*) or other evidence of payment that you received within 60 days before you filed your bankruptcy case. Some local courts may require that you submit these documents to the trustee assigned to your case rather than filing them with the court. Check the court's local website to find out if local requirements apply. Go to http://www.uscourts.gov/courtlinks.

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If you file under chapter 7, you must also file:

- ❑ *Statement of Intention for Individuals Filing Under Chapter 7* (Official Form 112)
- ❑ *Chapter 7 Statement of Your Current Monthly Income* (Official Form 108-1)
- ❑ If necessary, *Chapter 7 Means Test Calculation* (Official Form 108-2).

If you file under chapter 11, you must also file:

- ❑ *Chapter 11 Statement of Your Current Monthly Income* (Official Form 109)

If you file under chapter 11 and are a small business debtor (that is, if you are self-employed and your debts are less than $2,343,300), within 7 days after you file your bankruptcy forms to open your case, you must also file your most recent:

- ❑ Balance sheet
- ❑ Statement of operations
- ❑ Cash-flow statement
- ❑ Federal income tax return

If you do not have these documents, you must file a statement made under penalty of perjury that you have not prepared either a balance sheet, statement of operations, or cash-flow statement or you have not filed a federal tax return.

If you file under chapter 11, you must also file additional documents.

If you file under chapter 12, you must also file:

- ❑ Chapter 12 Plan (within 90 days after you file your bankruptcy forms to open your case)

If you file under chapter 13, you must also file:

- ❑ *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period* (Official Form 110-1)
- ❑ If necessary, *Chapter 13 Calculation of Your Disposable Income* (Official Form 110-2)
- ❑ Chapter 13 Plan (Many bankruptcy courts require you to use a local form plan. Check the court's local website for any specific form that you might have to use. Go to http://www.uscourts.gov/courtlinks.)

12b-006955

Notice Required by 11 U.S.C. § 342(b) for Individuals Filing for Bankruptcy (Form 2010)

This notice is for you if:

You are an individual filing for bankruptcy, and

Your debts are primarily consumer debts. *Consumer debts* are defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose."

The types of bankruptcy that are available to individuals

Individuals who meet the qualifications may file under one of four different chapters of the Bankruptcy Code:

- Chapter 7 — Liquidation
- Chapter 11— Reorganization
- Chapter 12— Voluntary repayment plan for family farmers or fishermen
- Chapter 13— Voluntary repayment plan for individuals with regular income

You should have an attorney review your decision to file for bankruptcy and the choice of chapter.

Chapter 7: Liquidation

	$245	filing fee
	$46	administrative fee
+	$15	trustee surcharge
	$306	total fee

Chapter 7 is for individuals who have financial difficulty and cannot pay their debts. The primary purpose for a debtor to file under chapter 7 is to have your debts discharged. The bankruptcy discharge relieves you from having to pay any of your pre-bankruptcy debts unless an exception to discharge applies to particular debts.

However, if the court finds that you have committed certain kinds of improper conduct described in the Bankruptcy Code, the court may deny your discharge.

You should know that even if you receive a discharge, some debts are not discharged under the law. Therefore, you may still be responsible to pay:

- most taxes;
- most student loans;
- domestic support and property settlement obligations;
- most fines, penalties, forfeitures, and criminal restitution obligations; and
- certain debts that are not properly listed in your bankruptcy papers.

12b-006956

You may also be required to pay debts arising from:

- fraud or theft;
- breach of fiduciary duty;
- intentional injuries that you inflicted; and
- death or personal injury caused by operating a motor vehicle, vessel, or aircraft while intoxicated from alcohol or drugs.

If your debts are primarily consumer debts, the court can dismiss your chapter 7 case if it finds that you have income to repay creditors a certain amount. You must file *Chapter 7 Statement of Your Current Monthly Income* (Official Form 108–1) if you are an individual filing for bankruptcy under Chapter 7. This form will determine your current monthly income and compare whether your income is more than the median income that applies in your state.

If your income is not above the median for your state, you will not have to fill out the second form *Chapter 7 Means Test Calculation* (Official Form 108–2).

If your income is above the median for your state, you must file that form. The calculations on the form—sometimes called the *Means Test*—deduct from your income living expenses and payments on certain debts to determine any amount available to pay unsecured creditors. If your income is more than the median income for your state of residence and family size, depending on the results of the *Means Test*, the U.S. trustee, bankruptcy administrator, or creditors can file a motion to dismiss your case under § 707(b) of the Bankruptcy Code. If a motion is filed, the court will decide if your case should be dismissed. To avoid dismissal, you may choose to proceed under another chapter of the Bankruptcy Code.

If you are an individual filing for bankruptcy, the law may allow you to keep some property, or it may entitle you to part of the proceeds if the property is sold after your case is filed. Property that the law permits you to keep is called *exempt property*. For example, exemptions may enable you to keep your home, a car, clothing, and household items.

Exemptions are not automatic. To be considered exempt, you must list the property on *Schedule D: The Property You Claim as Exempt* (Official Form 106D). If you do not list the property, the trustee may sell it and pay all of the proceeds to your creditors.

Chapter 11: Reorganization

	$1,167	filing fee
+	$46	administrative fee
	$1,213	total fee

Chapter 11 is for reorganizing a business but is also available to individuals. The provisions of chapter 11 are too complicated to summarize briefly.

Chapter 12: Repayment plan for family farmers or fishermen

	$200	filing fee
+	$46	administrative fee
	$246	total fee

Similar to Chapter 13, Chapter 12 permits family farmers and fishermen to repay their debts over a period of time using future earnings.

12b-006957

Chapter 13: Repayment plan for individuals with regular income

	$235	filing fee
+	$46	administrative fee
	$281	total fee

Chapter 13 is for individuals who have regular income and would like to pay all or part of their debts in installments over a period of time. You are only eligible for chapter 13 if your debts are not more than certain dollar amounts set in 11 U.S.C. § 109.

Under chapter 13, you must file with the court a plan to repay your creditors all or part of the money that you owe them, using your future earnings. The court must approve your plan and may allow you to repay your debts within 3 years or 5 years, depending on your income and other factors.

After you make the payments under your plan, your debts are generally discharged. However, you may still be responsible to pay:

- domestic support obligations,
- most student loans,
- certain taxes,
- most criminal fines and restitution obligations,
- certain debts that are not properly listed in your bankruptcy papers,
- certain debts for acts that caused death or personal injury, and
- certain long-term secured obligations.

Bankruptcy crimes have serious consequences

- If you knowingly and fraudulently conceal assets or make a false oath or statement under penalty of perjury—either orally or in writing—in connection with a bankruptcy case, you may be fined, imprisoned, or both.
- All information you supply in connection with a bankruptcy case is subject to examination by the Attorney General acting through the Office of the U.S. Trustee, the Office of the U.S. Attorney, and other offices and employees of the U.S. Department of Justice.

Warning: File Your Forms on Time

Section 521(a)(1) of the Bankruptcy Code requires that you promptly file detailed information about your creditors, assets, liabilities, income, expenses and general financial condition. The court may dismiss your bankruptcy case if you do not file this information within the deadlines set by the Bankruptcy Code, the Bankruptcy Rules, and the local rules of the court.

For more information about the documents and their deadlines, go to: http://www.uscourts.gov/bkforms/bankruptcy_forms.html#procedure.

12b-006958

Make sure the court has your mailing address

The bankruptcy court sends notices to the mailing address you list on *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101). To ensure that you receive information about your case, Bankruptcy Rule 4002 requires that you notify the court of any changes in your address.

A married couple may file a bankruptcy case together—called a *joint case*. If you file a joint case and each spouse lists the same mailing address on the bankruptcy petition, the bankruptcy court generally will mail you and your spouse one copy of each notice, unless you file a statement with the court asking that each spouse receive separate copies.

Understand which services you could receive from credit counseling agencies

The law generally requires that you receive a credit counseling briefing from an approved credit counseling agency. 11 U.S.C. § 109(h). With limited exceptions, you must receive it within the 180 days ***before*** you file your bankruptcy petition. This briefing is usually conducted by telephone or on the Internet.

The clerk of the bankruptcy court has a list of approved agencies. If you are filing a joint case, both spouses must receive the briefing.

In addition, after filing a bankruptcy case, you generally must complete a financial management instructional course before you can receive a discharge. The clerk also has a list of approved financial management instructional courses. If you are filing a joint case, both spouses must complete the course.

Read This Warning

Because bankruptcy can have serious long-term financial and legal consequences, including loss of your property, you should hire an attorney and carefully consider all of your options before you file. An attorney can explain to you what can happen as a result of filing for bankruptcy and what your options are. If you do file for bankruptcy, an attorney can help you fill out the forms properly and protect you, your family, your home, and your possessions. Bankruptcy petition preparers can only help you type the forms required; they cannot give you legal advice of any kind.

Although the law allows you to represent yourself in bankruptcy court, you should understand that many people find it extremely difficult to represent themselves successfully. The rules are very technical, and a misstep or inaction may affect your rights. If you file without an attorney, you are still responsible for knowing and following all of the legal requirements.

You may not file bankruptcy if you are not eligible to file or if you do not intend to file the documents necessary to complete the bankruptcy.

Bankruptcy fraud is a serious crime; you could be fined and imprisoned if you commit fraud in your bankruptcy case. If you make a false statement, you could be fined up to $250,000 or imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

12b-006959

Instructions for Selected Forms

Schedule A: Property (Official Form 106A)

Schedule A: Property (Official Form 106A) lists property interests that are involved in a bankruptcy case. All individuals filing for bankruptcy must honestly list everything they own or have a legal or equitable interest in. *Legal or equitable interest* is a broad term and includes all kinds of property interests in both tangible and intangible property, whether or not anyone else has an interest in that property.

The information in this form is grouped by category and includes several examples for many items. Note that those examples are meant to give you an idea of what to include in the categories. They are not intended to be complete lists of everything within that category. Make sure you list everything you own or have an interest in.

You must verify under penalty of perjury that the information you provide is complete and accurate. If you fail to list any property, you may lose the property, lose your bankruptcy discharge, be fined up to $250,000, and be imprisoned for up to 5 years. 11 U.S.C. §§ 554, 727; 18 U.S.C. §§ 152, 157, 3559, 3571, and 3581.

Understand the terms used in this form

Community property — Type of property ownership available in certain states for property owned by spouses and, in some instances, legal equivalents of spouses. Community property states and territories include Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington, and Wisconsin.

Current value — In this form, report the *current value* of the property that you own in each category. *Current value* is sometimes called *fair market value* and, for this form, is the fair market value as of the date of the filing of the petition. *Current value* is how much the property is worth, which may be more or less than when you purchased the property. *Property you own* includes property you have purchased, even if you owe money on it, such as a home with a mortgage or an automobile with a lien.

Report the current value of the portion you own

For each question, report the current value of the portion of the property that you own. To do this, you would usually determine the current value of the entire property and the percentage of the property that you own. Multiply the current value of the property by the percentage that you own. Report the result where the form asks for *Current value of the portion you own*. For example:

- If you own a house by yourself, you own 100% of that house. Report the entire current value of the house.
- If you and a sister own the house equally, report 50% of the value of the house (or half of the value of the house).

In certain categories, current value may be difficult to figure out. When you cannot find the value from a reputable source (such as a pricing guide for your car), estimate the value and be prepared to explain how you determined it.

12b-006961

List items once on this form

List items only once on this form; do not list them in more than one category. List all real estate in Part 1 and other property in the other parts of the form.

Where you list similar items of minimal value (such as clothing), add the value of the items and report a total.

Be specific when you describe each item. If you have an item that you think could fit into more than one category, select the most suitable category and list the item there.

Separately describe and list individual items worth more than $500.

Match the values to the other schedules

Make sure that the values you report on this form match the values you report on *Schedule B: Creditors Who Hold Claims Secured by Your Property* (Official Form 106B) and *Schedule D: The Property You Claim as Exempt* (Official Form 106D).

On this form, do not list any interests you may have in executory contracts (for example, an unexpired lease for your apartment, a contract for improvements or repairs for your home, a real estate listing agreement, or a lease for your car). List those contracts or leases on *Schedule E: Executory Contracts and Unexpired Leases* (Official Form 106E).

12b-006962

Schedule B: Creditors Who Hold Claims Secured by Property (Official Form 106B)

The people or organizations to whom you owe money are called your *creditors*. A *claim* is a creditor's right to payment. When you file for bankruptcy, the court needs to know who all your creditors are and what types of claims they have against you.

Typically in bankruptcy cases, there are more debts than assets to pay those debts. The court must know as much as possible about your creditors to make sure that their claims are properly treated according to the rules.

Creditors may have different types of claims:

- **Secured claims**. Report these on *Schedule B: Creditors Who Hold Claims Secured by Property* (Official Form 106B).
- **Unsecured claims**. Report these on *Schedule C: Creditors Who Have Unsecured Claims* (Official Form 106C).

If your debts are not paid, creditors with secured claims may be able to get paid from specific property in which that creditor has an interest, such as a mortgage or a lien. That property is sometimes called *collateral* for your debt and could include items such as your house, your car, or your furniture. Creditors with unsecured claims do not have rights against specific property.

Many claims have a specific amount, and you clearly owe them. However, some claims are uncertain when you file for bankruptcy, or they become due only after you file. You must list all claims in your schedules, even if the claims are contingent, unliquidated, or disputed.

Claims may be contingent, unliquidated, or disputed

Claims may be:

- Contingent claims,
- Unliquidated claims, or
- Disputed claims.

A claim is *contingent* if you are not obligated to pay it unless a particular event occurs after you file for bankruptcy. You owe a contingent claim, for example, if you cosigned someone else's loan. You may not have to pay unless that person later fails to repay the loan.

A claim is *unliquidated* if the amount of the debt cannot be readily determined, such as by referring to an agreement or by a simple computation. An unliquidated claim is one for which there may be a definite liability but where the value has not been set. For instance, if you were involved in a car accident, the victim may have an unliquidated claim against you because the amount of damages has not been set.

A claim is *disputed* if you disagree about whether you owe the debt. For instance, your claim is disputed if a bill collector demands payment for a bill you believe you already fully paid.

A single claim can have one, more than one, or none of these characteristics.

On *Schedule B: Creditors Who Hold Claims Secured by Property* (Official Form 106B), list all creditors who have a claim that is secured by your property.

Do not leave out any secured creditors

In alphabetical order, list anyone who has judgment liens, garnishments, statutory liens, mortgages, deeds of trust, and other security interests against your property. When listing creditors who hold secured claims, be sure to include all of them. For example, include the following:

- Your relatives or friends who hold a lien or security interest in your property;
- Car or truck lenders, stores, banks, credit unions, and others who made loans to enable you to finance the purchase of property and who have a lien against that property;
- Anyone who holds a mortgage or deed of trust on real estate that you own;
- Contractors or mechanics who have liens on property you own because they did work on the property and were not paid;
- Someone who won a lawsuit against you and has a judgment lien;
- Another parent or a government agency that has a lien for unpaid child support;
- Doctors or attorneys who have liens on the outcome of a lawsuit;
- Federal, state, or local government agencies such as the IRS that have tax liens against property for unpaid taxes; and
- Anyone who is trying to collect a secured debt from you, such as collection agencies and attorneys.

List the debt in Part 1 only once and list any others that should be notified about that debt in Part 2. For example, if a collection agency is trying to collect from you for a debt you owe to someone else, list the person to whom you owe the debt in Part 1, and list the collection agency in Part 2. If you are not sure who the creditor is, list the person you are paying in Part 1 and list anyone else who has contacted you about this debt in Part 2.

If a creditor's full claim is more than the value of your property securing that claim—for instance, a car loan in an amount greater than the value of the car—the creditor's claim may be partly secured and partly unsecured. In that situation, list the claim only once on *Schedule B: Creditors Who Hold Claims Secured by Property* (Official Form 106B). Do not repeat it on *Schedule C: Creditors Who Hold Unsecured Claims* (Official Form 106C). List a creditor in *Schedule B* even if it appears that there is no value to support that creditor's secured claim.

Determine the unsecured portion of secured claims

To determine the amount of a secured claim, compare the amount of the claim to the value of the property that supports the claim. If the value of the property is greater than the amount of the claim, then the entire amount of the claim is secured. But if the value of the property is less than the amount of the claim, the difference is an *unsecured portion*. For example, if the outstanding balance of a car loan is $10,000 and the car is worth $8,000, the car loan has a $2,000 unsecured portion.

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If there is more than one secured claim against the same property, the claim that is entitled to be paid first must be subtracted from the property value to determine how much value remains for the next claim. For example, if a home worth $300,000 has a first mortgage of $200,000 and a second mortgage of $150,000, the first mortgage would be fully secured, and there would be $100,000 of property value for the second mortgage, which would have an unsecured portion of $50,000.

	$300,000	value of a home
-	$200,000	first mortgage
	$100,000	remaining property value
	$150,000	second mortgage
-	$100,000	remaining property value
	$ 50,000	unsecured portion of second mortgage

Schedule C: Creditors Who Have Unsecured Claims (Official Form 106C)

The people or organizations to whom you owe money are called your *creditors*. A *claim* is a creditor's right to payment. When you file for bankruptcy, the court needs to know who all your creditors are and what types of claims they have against you.

Typically in bankruptcy cases, there are more debts than assets to pay those debts. The court must know as much as possible about your creditors to make sure that their claims are properly treated according to the rules.

Use *Schedule C: Creditors Who Have Unsecured Claims* (Official Form 106C) to identify everyone who holds an unsecured claim against you when you file your bankruptcy petition, unless you have already listed them on *Schedule B: Creditors Who Hold Claims Secured by Your Property* (Official Form 106B).

Creditors may have different types of claims:

- **Secured claims**. Report these on *Schedule B: Creditors Who Hold Claims Secured by Property* (Official Form 106B).
- **Unsecured claims**. Report these on *Schedule C: Creditors Who Have Unsecured Claims* (Official Form 106C).

If your debts are not paid, creditors with secured claims may be able to get paid from specific property in which that creditor has an interest, such as a mortgage or a lien. That property is sometimes called *collateral* for your debt and could include items such as your house, your car, or your furniture. Creditors with unsecured claims do not have rights against specific property.

Many claims have a specific amount, and you clearly owe them. However, some claims are uncertain when you file for bankruptcy, or they become due only after you file. You must list all claims in your schedules, even if the claims are contingent, unliquidated, or disputed.

Claims may be contingent, unliquidated, or disputed

Claims may be:

- Contingent claims,
- Unliquidated claims, or
- Disputed claims.

A claim is *contingent* if you are not obligated to pay it unless a particular event occurs after you file for bankruptcy. You owe a contingent claim, for example, if you cosigned someone else's loan. You may not have to pay unless that person later fails to repay the loan.

A claim is *unliquidated* if the amount of the debt cannot be readily determined, such as by referring to an agreement or by a simple computation. An unliquidated claim is one for which there may be a definite liability but where the value has not been set. For instance, if you were involved in a car accident, the victim may have an unliquidated claim against you because the amount of damages has not been set.

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A claim is *disputed* if you disagree about whether you owe the debt. For instance, your claim is disputed if a bill collector demands payment for a bill you believe you already fully paid.

A single claim can have one, more than one, or none of these characteristics.

Creditors with unsecured claims do not have liens on or other security interests in your property. Secured creditors have a right to take property if you do not pay them. Common examples are lenders for your car, your home, or your furniture.

Do not leave out any unsecured creditors

List all unsecured creditors in each part of the form in alphabetical order. Even if you plan to pay a creditor, you must list that creditor. When listing creditors who hold unsecured claims, be sure to include all of them. For instance, include the following:

- Your relatives or friends to whom you owe money;
- Your ex-spouse, if you are still obligated under a divorce decree or settlement agreement to pay joint debts;
- A credit card company, even if you intend to fully pay your credit card bill;
- A lender, even if the loan is cosigned;
- Anyone who holds a loan or promissory note that you cosigned for someone else;
- Anyone who has sued or may sue you because of an accident, dispute, or similar event that has occurred; or
- Anyone who is trying to collect a debt from you such as a bill collector or attorney.

Unsecured claims could be priority or nonpriority claims

What are priority unsecured claims?

In bankruptcy cases, *priority unsecured claims* are those debts that the Bankruptcy Code requires to be paid before most other unsecured claims are paid. The most common priority unsecured claims are certain income tax debts and past due alimony or child support. Priority unsecured claims include those you owe for:

- **Domestic support obligations**—If you owe domestic support to a spouse or former spouse; a child or the parent, legal guardian, or responsible relative of a child; or a governmental unit to whom such a domestic support claim has been assigned.
  11 U.S.C. § 507(a)(1).

- **Taxes and certain other debts you owe the government**—If you owe certain federal, state, or local government taxes, customs duties, or penalties.
  11 U.S.C. § 507(a)(8).

- **Claims for death or personal injury that you caused while you were intoxicated—**If you have a claim against you for death or personal injury that resulted from your unlawfully operating a motor vehicle or vessel while you were unlawfully intoxicated from alcohol, drugs, or another substance. This priority does not apply to claims for property damage.
  11 U.S.C. § 507(a)(10).

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- **Other:**

  - **Deposits by individuals**—If you took money from someone who planned to purchase, lease, or rent your property or use your services but you never delivered or performed. For the debt to have priority, the property or services must have been intended for personal, family, or household use (only the first $2,600 per person is a priority debt). 11 U.S.C. § 507(a)(7).

  - **Wages, salaries, and commissions**—If you owe wages, salaries, and commissions, including vacation, severance, and sick leave pay and those amounts were earned within 180 days before you open your bankruptcy case or ceased business. In either instance, only the first $11,775 per claim is a priority debt. 11 U.S.C. § 507(a)(4).

  - **Contributions to employee benefit plans**—If you owe contributions to an employee benefit plan for services an employee rendered within 180 days before you file your bankruptcy petition, or within 180 days before your business ends. Count only the first $11,775 per employee, less any amounts owed for wages, salaries, and commissions. 11 U.S.C. § 507(a)(5).

  - **Certain claims of farmers and fishermen—**Only the first $5,775 per farmer or fisherman is a priority debt. 11 U.S.C. § 507(a)(6).

What are nonpriority unsecured claims?

Nonpriority unsecured claims are those debts that generally will be paid after priority unsecured claims are paid. The most common examples of nonpriority unsecured claims are credit card bills, medical bills, and educational loans.

What if a claim has both priority and nonpriority amounts?

If a claim has both priority and nonpriority amounts, list that claim in Part 2 and show both priority and nonpriority amounts. Do not list it again in Part 3.

In Part 3, list all of the creditors you have not listed before. You must list every creditor that you owe, regardless of the amount you owe and even if you plan to pay a particular debt. If you do not list a debt, it may not be discharged.

What is needed for statistical purposes?

For statistical reasons, the court must collect information about some specific categories of unsecured claims.

The categories for priority unsecured claims are:

- **Domestic support obligations**
- **Taxes and certain other debts you owe the government**
- **Claims for death or personal injury that you caused while you were intoxicated**

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The categories for nonpriority unsecured claims are:

- **Student loans—**If you owe money for any loans that you used to pay for your education;
- **Obligations arising out of a separation agreement or divorce that you did not report as priority claims—**If you owe debts for separation or divorce agreements or for domestic support and you did not report those debts in Part 2; and
- **Debts to pension or profit-sharing plans and other similar debts**—If you owe money to a pension or profit-sharing plan.

12b-006969

Schedule D: The Property You Claim as Exempt
(Official Form 106D)

How exemptions work

If you are an individual filing for bankruptcy, the law may allow you to keep some property, or it may entitle you to part of the proceeds if the property is sold after your case is filed. Property that the law permits you to keep is called *exempt* property. For example, exemptions may enable you to keep your home, a car, clothing, and household items.

Exemptions are not automatic. To be considered exempt, you must list the property on *Schedule D: The Property You Claim as Exempt* (Official Form 106D). If you do not list the property, the trustee may sell it and pay all of the proceeds to your creditors.

You may unnecessarily lose property if you do not claim exemptions to which you are entitled. You are strongly encouraged to hire a qualified attorney to advise you.

Determine which set of exemptions you will use

Before you fill out this form, you must learn which set of exemptions you can use. In general, exemptions are determined on a state-by-state basis. Some states permit you to use the exemptions provided by the Bankruptcy Code. 11 U.S.C. § 522.

The Bankruptcy Code provides that you use the exemptions in the law of the state where you had your legal home for 730 days before you file for bankruptcy. Special rules may apply if you did not have the same home state for 730 days before you file.

You may lose property if you do not use the best set of exemptions for your situation.

If your spouse is filing with you and you are filing in a state in which you may choose between state and federal sets of bankruptcy exemptions, you both must use the same set of exemptions.

Claiming exemptions

Using the property and values that you listed on *Schedule A: Property* (Official Form 106A) as your source, list on this form the property that you claim as exempt.

Listing the amount of each exemption

For each item of property you claim as exempt, you must specify the amount of the exemption you claim. Usually, a specific dollar amount is claimed as exempt, but in some circumstances, the amount of the exemption claimed might be indicated as 100% of fair market value. For example, a debtor might claim 100% of fair market value for an exemption that is unlimited in dollar amount, such as some exemptions for health aids.

Listing which laws apply

In the last column of the form, you must identify the laws that allow you to claim the property as exempt. If you have questions about exemptions, consult a qualified attorney.

12b-006970

Schedule E: Executory Contracts and Unexpired Leases (Official Form 106E)

Use *Schedule E: Executory Contracts and Unexpired Leases* (Official Form 106E) to identify your ongoing leases and certain contracts. List all of your executory contracts and unexpired leases.

Executory contracts are contracts between you and someone else in which neither you nor the other party has performed all of the requirements by the time you file for bankruptcy. *Unexpired leases* are leases that are still in effect; the lease period has not yet ended.

You must list all agreements that may be executory contracts or unexpired leases, including the following:

- Residential leases (for example, a rental agreement for a place where you live or vacation, even if it is only a verbal or month-to-month arrangement);
- Service provider agreements (for example, contracts for cell phones and personal electronic devices);
- Internet and cable contracts;
- Vehicle leases;
- Supplier or service contracts (for example, contracts for lawn care or home alarm or security systems);
- Timeshare contracts or leases that you did not list on *Schedule A: Property* (Official Form 106A);
- Rent-to-own contracts;
- Employment contracts;
- Realtor listing agreements;
- Contracts to sell a residence, building, land, or other real property;
- Equipment leases;
- Leases for business or investment property;
- Supplier and service contracts for your business;
- Copyright and patent license agreements; and
- Development contracts.

12b-006971

Schedule F: Your Codebtors (Official Form 106F)

If you have any debts that someone else may also be responsible for paying, these people or entities are called *codebtors*. Use *Schedule F: Your Codebtors* (Official Form 106F) to list any codebtors who are responsible for any debts you have listed on the other schedules.

To help fill out this form, use both *Schedule B: Creditors Who Hold Claims Secured by Property* (Official Form 106B) and *Schedule C: Creditors Who Have Unsecured Claims* (Official Form 106C).

List all of your codebtors and the creditors to whom you owe the debt. For example, if someone cosigned for the car loan that you owe, you must list that person on this form.

If you are filing a joint case, do not list either spouse as a codebtor.

Other codebtors could include the following:

- Cosigner;
- Guarantor;
- Former spouse;
- Unmarried partner;
- Joint contractor; or
- Nonfiling spouse—even if not the spouse a cosigner—where the debt is for necessities (such as food or medical care) if state law makes the nonfiling spouse legally responsible for debts for necessities.

12b-006972

Schedule G: Your Income (Official Form 106G)

In *Schedule G: Your Income* (Official Form 106G), you will give the details about your employment and monthly income as of the date you file this form. If you are married and your spouse is living with you, include information about your spouse even if your spouse is not filing with you. If you are separated and your spouse is not filing with you, do not include information about your spouse.

How to report employment and income

If you have nothing to report for a line, write $0.

In Part 1, line 1, fill in employment information for you and, if appropriate, for a nonfiling spouse. If either person has more than one employer, attach a separate page with information about the additional employment.

In Part 2, give details about the monthly income you currently expect to receive. Show all totals as monthly payments, even if income is not received in monthly payments.

If your income is received in another time period, such as daily, weekly, quarterly, annually, or irregularly, calculate how much income would be by month, as described below.

If either you or a nonfiling spouse has more than one employer, calculate the monthly amount for each employer separately, and then combine the income information for all employers for that person on lines 2-7.

If all or part of your income is sporadic, such as overtime or commissions, include your best estimate of the monthly amount you expect to receive.

One easy way to calculate how much income you receive per month is to total the payments earned in a year, then divide by 12 to get a monthly figure. For example, if you are paid annually, you would simply divide your annual salary by 12 to get the monthly amount.

Below are other examples of how to calculate monthly amount.

Example for weekly payments:

If you are paid $1,000 every week, figure your monthly income in this way:

	$1,000	income every week
X	52	number of pay periods in the year
	$52,000	total income for the year

$52,000 (*income for year*) / 12 (number of months in year) = $4,333 monthly income

Example for bi-weekly payments:

If you are paid $2,500 every other week, figure your monthly income in this way:

	$2,500	income every other week
X	26	number of pay periods in the year
	$65,000	total income for the year

$65,000 (income for year) / 12 (number of months in year) = $5,417 monthly income

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Example for daily payments:

If you are paid $75 a day and you work about 8 days a month, figure your monthly income in this way:

	$75	income a day
X	96	days a year
	$7,200	total income for the year

$7,200 (income for year) / 12 (number of months in year) = $600 monthly income

or this way:

	$75	income a day
X	8	payments a month
	$600	income for the month

Example for quarterly payments:

If you are paid $15,000 every quarter, figure your monthly income in this way:

	$15,000	income every quarter
X	4	pay periods in the year
	$60,000	total income for the year

$60,000 (income for year) / 12 = $5,000 (number of months in year) monthly income

Example for irregular payments:

If you are paid $4,000 8 times a year, figure your monthly income in this way:

	$4,000	income a payment
X	8	payments a year
	$32,000	income for the year

$32,000 (income for year) / 12 (number of months in year) = $2,667 monthly income

In Part 2, line 11, fill in amounts that other people provide to pay the expenses you list on *Schedule H: Your Expenses*. For example, if you and a person to whom you are not married deposit the income from both of your jobs into a single bank account and pay all household expenses and you list all your joint household expenses on *Schedule H*, you must list the amounts that person contributes monthly to pay the household expenses on line 11. If you have a roommate and you divide the rent and utilities, do not list the amounts your roommate pays on line 11 if you have listed only your share of those expenses on *Schedule H*. However, if you have listed the cost of the rent and utilities for your entire house or apartment on *Schedule H*, you must list your roommate's contribution to those expenses on *Schedule G*, line 14. Do not list line 11 contributions that you already disclosed on line 5.

Note that the income you report on *Schedule G* may be different from the income you report on other bankruptcy forms. For example, the *Chapter 7 Statement of Your Current Monthly Income* (Official Form 108-1), *Chapter 11 Statement of Your Current Monthly Income* (Official Form 109), and the *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period* (Official Form 110-1) all use a different definition of income and apply that definition to a different period of time. *Schedule G* asks about the income that you are now receiving and expect to receive, while the other forms ask about income you received in the applicable time period before filing. So the amount of income reported in any of those forms may be different from the amount reported here.

Schedule H: Your Expenses (Official Form 106H)

Use Column A of *Schedule H: Your Expenses* (Official Form 106H) to estimate the monthly expenses, as of the date you file for bankruptcy, for you, your dependents, and the other people in your household whose income is included on *Schedule G: Your Income* (Official Form 106G).

If you are filing under chapter 13, you must also complete Column B. In Column B, itemize what your monthly expenses would be under the plan that you are submitting with this schedule or, if no plan is being submitted now, under the most recent plan you previously submitted.

Include your nonfiling spouse's expenses unless you are separated. If both spouses are filing but one of you keeps a separate household, fill out separate *Schedule H* for Debtor 1 and Debtor 2 and write *Debtor 1* or *Debtor 2* at the top of page 1 of the form.

Do not include expenses that other members of your household pay directly from their income if you did not include that income on *Schedule G*. For example, if you have a roommate and you divide the rent and utilities and you have not listed your roommate's contribution to household expenses in line 11 of *Schedule G*, you would list only your share of these expenses on *Schedule H*.

Show all totals as monthly payments. If you have weekly, quarterly, or annual payments, calculate how much you would spend on those items every month.

Do not list as expenses any payments on credit card debts incurred before filing bankruptcy.

Do not include business expenses on this form. You have already accounted for those expenses as part of determining net business income on *Schedule G*.

On line 20, do not include expenses for your residence or for any rental or business property. You have already listed expenses for your residence on lines 4 and 5 of this form. You listed the expenses for your rental and business property as part of the process of determining your net income from that property on *Schedule G* (line 8a).

If you have nothing to report for a line, write $0.

12b-006975

A Summary of Your Assets and Liabilities and Certain Statistical Information (Official Form 106-Summary)

When you file for bankruptcy, you must summarize certain information from the following forms:

- *Schedule A: Property* (Official Form 106A)
- *Schedule B: Creditors Who Have Claims Secured by Property* (Official Form 106B)
- *Schedule C: Creditors Who Have Unsecured Claims* (Official Form 106C)
- *Schedule G: Your Income* (Official Form 106G)
- *Schedule H: Your Expenses* (Official Form 106H)
- *Chapter 7 Statement of Your Current Monthly Income* (Official Form 108-1), *Chapter 11 Statement of Your Current Monthly Income* (Official Form 109), or *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period* (Official Form 110-1)

After you fill out all of the forms, complete *A Summary of Your Assets and Liabilities and Certain Statistical Information* (Official Form 106-Summary) to report the totals of certain information that you listed in the forms.

If you are filing an amended version of any of these forms at some time after you file your original forms, you must fill out a new *Summary* to ensure that your information is up to date and you must check the box at the top.

12b-006976

Your Statement of Financial Affairs if You Are an Individual Filing for Bankruptcy (Official Form 107)

Your Statement of Financial Affairs provides a summary of your financial history over certain periods of time before you file for bankruptcy. If you are an individual in a bankruptcy case, you must fill out this statement.
11 U.S.C. § 521(a) and Bankruptcy Rule 1007(b)(1).

If you are married and your spouse is not filing this case with you, you need only provide information on this form about your spouse if you are filing under chapter 12 or chapter 13 and are not separated from your spouse.

If you are in business as a sole proprietor, partner, family farmer, or self-employed professional, you must provide the information about all of your business and personal financial activities.

Although this statement may ask you questions that are similar to some questions on the schedules, you must fill out all of the forms completely to protect your legal rights.

Understand the terms used in this form

Legal equivalent of a spouse — A person whom applicable nonfederal law recognizes as having a relationship with the debtor that grants legal rights and responsibilities equivalent, in whole or in part, to those granted to a spouse.

12b-006977

Chapter 7 Statement of Your Current Monthly Income and Means Test Calculation (Official Forms 108–1 and 108–2)

If you are filing under chapter 11, 12, or 13, do not fill out this form.

Official Forms 108–1 and 108–2 determine whether your income and expenses create a presumption of abuse that may prevent you from obtaining relief from your debts under chapter 7 of the Bankruptcy Code. Chapter 7 relief can be denied to a person who has primarily consumer debts if the court finds that the person has enough income to repay creditors a portion of their claims according to a formula set out in the Bankruptcy Code.

You must file Official Form 108–1, the *Chapter 7 Statement of Your Current Monthly Income* if you are an individual filing for bankruptcy under chapter 7. This form will determine your current monthly income and compare whether your income is more than the median income for households of the same size in your state. If your income is not above the median, there is no presumption of abuse and you will not have to fill out the second form.

If your income is above the median, you must file the second form, Official Form 108 –2, *Chapter 7 Means Test Calculation*. The calculations on this form—sometimes called the *Means Test*—reduce your income by living expenses and payment of certain debts, resulting in an amount available to pay other debts. If this amount is high enough, it will give rise to a *presumption of abuse*. A presumption of abuse does not mean you are actually trying to abuse the bankruptcy system. Rather, the presumption simply means that you are presumed to have enough income that you should not be granted relief under chapter 7. You may overcome the presumption by showing special circumstances that reduce your income or increase your expenses.

If you cannot obtain relief under chapter 7, you may be eligible to continue under another chapter of the Bankruptcy Code and pay creditors over a period of time.

Read each question carefully. You may not be required to answer every question on this form. For example, your military status may determine whether you must fill out the entire form. The instructions will alert you if you may skip questions.

If you have nothing to report for a line, write $0.

Some of the questions require you to go to other sources for information. In those cases, the form has instructions for where to find the information you need.

If you and your spouse are filing together, you and your spouse may file a single statement. However, if an exclusion in Parts 1 or 2 applies to either of you, separate statements may be required. 11 U.S.C. § 707(b)(2)(C).

12b-006978

Chapter 11 Statement of Your Current Monthly Income (Official Form 109)

If you are filing under chapter 7, 12, or 13, do not fill out this form.

You must file the *Chapter 11 Statement of Your Current Monthly Income* (Official Form 109) if you are an individual filing for bankruptcy under chapter 11.

If you have nothing to report for a line, write $0.

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Chapter 13 Statement of Your Current Monthly Income, Calculation of Commitment Period and Chapter 13 Calculation of Your Disposable Income

(Official Forms 110–1 and 110–2)

If you are filing under chapter 7, 11, or 12, do not fill out this form.

Official Forms 110─1 and 110─2 determine the commitment period for your payments to creditors, how the amount you may be required to pay to creditors is established, and, in some situations, how much you must pay.

You must file 110─1, the *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period* (Official Form 110─1) if you are an individual and you are filing under chapter 13. This form will report your current monthly income and determine whether your income is at or below the median income for households of the same size in your state. If your income is equal to or less than the median, you will not have to fill out the second form. Form 110-1 also will determine your applicable commitment period─the time period for making payments to your creditors.

If your income is above the median, you must file the second form, 110─2, *Chapter13 Calculation of Your Disposable Income*. The calculations on this form—sometimes called the *Means Test*—reduce your income by living expenses and payment of certain debts, resulting in an amount available to pay unsecured debts. Your chapter 13 plan may be required to provide for payment of this amount toward unsecured debts.

Read each question carefully. You may not be required to answer every question on this form. The instructions will alert you if you may skip questions.

Some of the questions require you to go to other sources for information. In those cases, the form has instructions for where to find the information you need.

Generally, if you and your spouse are filing together, you should file one statement together.

Statement of Intention for Individuals Filing Under Chapter 7 (Official Form 112)

If you are filing under chapter 11, 12, or 13, do not fill out this form.

You must fill out the *Statement of Intention for Individuals Filing Under Chapter 7* (Official Form 112) if you are an individual filing under chapter 7 or if your case has been converted to chapter 7 and creditors have claims secured by your property or you have any unexpired leases of personal property. The Bankruptcy Code requires you to state your intentions about such claims and provides for early termination of the automatic stay as to personal property if the statement is not timely filed. The same early termination of the automatic stay applies to any unexpired lease of personal property unless you state that you intend to assume the unexpired lease if the trustee does not do so.

To help fill out this form, use the information you have already provided on the following forms:

- *Schedule B: Creditors Who Hold Claims Secured by Property* (Official Form 106B),
- *Schedule D: The Property You Claim as Exempt* (Official Form 106D), and
- *Schedule E: Executory Contracts and Unexpired Leases* (Official Form 106E).

Explain what you intend to do with your property that is collateral for a claim

If you have property that is collateral (or security) for a claim, you must state what you intend to do with that property.

You may choose to either give the property to the creditor, or keep the property. Below is more information about each of these options.

You may give the property to the creditor. If you give the property to the creditor (*you surrender the property*), your bankruptcy discharge will protect you from any claim for a deficiency if the property is worth less than what you owe the creditor, unless the court determines that the debt is non-dischargeable.

You may want to keep the property. If you want to keep your secured personal property, you may be able to reaffirm the debt, redeem the property, or take other action (for example, avoid a lien using 11 U.S.C. 522(f)).

- **You may be able to reaffirm the debt.** You may decide to remain legally obligated to pay a debt so that you can keep the property securing the debt. This is called *reaffirming a debt*. You may reaffirm the debt in full on its original terms or you and the creditor may agree to change the terms. For example, if you want to keep your car, you may reaffirm a car loan, stating that you will continue to make monthly payments for it. **Only reaffirm those debts that you are confident you can repay.** You may seek to reaffirm the debt if you sign a *Reaffirmation Agreement*, which is a contract between you and a creditor and you follow the proper

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procedure for the *Reaffirmation Agreement.* 11 U.S.C. § 524. The procedure is explained in greater detail in the Disclosures that are part of the reaffirmation documents.

- **You may be able to redeem your property.** 11 U.S.C. § 722. You can redeem property only if all of the following apply:
  - The property secures a debt that is a *consumer debt* ─ you incurred the debt primarily for personal, family, or household use.
  - The property is *tangible personal property* ─ the property is physical, such as furniture, appliances, and cars.
  - You are either claiming the property as exempt or the trustee has abandoned it.

  To obtain court authorization to redeem your property, you must file a motion to redeem. If the court grants your motion, you pay the creditor the value of the property or the amount of the claim, whichever is less. The payment will be a single lump-sum payment.

Explain what you intend to do with your leased personal property

If you lease personal property such as your car, you may be able to continue your lease if the trustee does not assume the lease. To continue your lease, you can write to the lessor that you want to assume your lease. The creditor may respond by telling you whether it agrees that you may assume the lease and may require you to pay any past-due amounts before you can do so. If the lessor agrees to your request to assume the lease, you must write to the lessor within 30 days stating that you assume the lease.
11 U.S.C. § 365(p)(2).

File the *Statement of Intention* before the deadline

You must file this form either within 30 days after you file your bankruptcy petition or by the date set for the meeting of creditors, whichever is earlier. You must also deliver copies of this statement to the creditors and lessors you listed on the form. Bankruptcy Rule 1007(b)(2).

If two married people are filing together in a joint case, both are equally responsible for supplying correct information. Both debtors must sign and date the form.

12b-006982

Application for Individuals to Pay the Filing Fee in Installments (Official Form 103A)

If you cannot afford to pay the full filing fee when you first file for bankruptcy, you may pay the fee in installments. However, in most cases, you must pay the entire fee within 120 days after you file, and the court must approve your payment timetable. Your debts will not be discharged until you pay your entire fee.

Do not file this form if you can afford to pay your full fee when you file.

If you are filing under chapter 7 and cannot afford to pay the full filing fee at all, you may be qualified to ask the court to waive your filing fee.

See *Application to Have Your Chapter 7 Filing Fee Waived* (Official Form 103B).

If a bankruptcy petition preparer helped you complete this form, make sure that person fills out the *Bankruptcy Petition Preparer's Notice, Declaration, and Signature* (Official Form 113); include a copy of it when you file this application.

12b-006983

Application to Have the Chapter 7 Filing Fee Waived (Official Form 103B)

The fee for filing a bankruptcy case under chapter 7 is $306. If you cannot afford to pay the entire fee now in full or in installments within 120 days, use this form. If you can afford to pay your filing fee in installments, see *Application for Individuals to Pay the Filing Fee in Installments* (Official Form 103A).

If you file this form, you are asking the court to waive your fee. After reviewing your application, the court may waive your fee, set a hearing for further investigation, or require you to pay the fee in installments or in full.

For your fee to be waived, all of these statements must be true:

- You are filing for bankruptcy under chapter 7.
- You are an individual.
- The total combined monthly income for your family is less than 150% of the official poverty guideline last published by the U.S. Department of Health and Human Services (DHHS). (For more information about the guidelines, go to http://www.uscourts.gov.)
- You cannot afford to pay the fee in installments.

Your family includes you, your spouse, and any dependents listed on *Schedule H.* Your family may be different from your *household*, referenced on *Schedules G* and *H*. Your household may include your unmarried partner and others who live with you and with whom you share income and expenses.

If a bankruptcy petition preparer helped you complete this form, make sure that person fills out *Bankruptcy Petition Preparer's Notice, Declaration, and Signature* (Official Form 113); include a copy of it when you file this application.

If you have already completed the following forms, the information on them may help you when you fill out this application:

- *Schedule A: Property* (Official Form 106A)
- *Schedule G: Your Income* (Official Form 106G)
- *Schedule H: Your Expenses* (Official Form 106H)

12b-006984

For Individual Chapter 11 Cases: The List of Creditors Who Have the 20 Largest Unsecured Claims Against You Who Are Not Insiders (Official Form 104)

If you are filing under chapter 7, 12, or 13, do not fill out this form.

The people or organizations to whom you owe money are called your *creditors*. A *claim* is a creditor's right to payment. If you are an individual filing for bankruptcy under chapter 11, you must fill out the *For Individual Chapter 11 Cases: The List of Creditors Who Have the 20 Largest Unsecured Claims Against You Who Are Not Insiders* (Official Form 104).

Creditors may have different types of claims:

- Secured claims, or
- Unsecured claims.

If your debts are not paid, creditors with secured claims may be able to get paid from specific property in which that creditor has an interest, such as a mortgage or a lien. If a creditor has security in your property, but the value of the security available to pay the creditor is less than the amount you owe the creditor, the creditor has both a secured and unsecured claim against you. The amount of the unsecured claim is the total claim minus the value of the security that is available to pay the creditor.

Generally, creditors with unsecured claims do not have rights against specific property, or the specific property in which the creditor has rights is not worth enough to pay the creditor in full. For example, if you owe a creditor $30,000 for your car and the creditor has a security interest in your car but the car is worth only $20,000, the creditor has a $20,000 secured claim and a $10,000 unsecured claim.

	$30,000	Total amount you owe creditor
–	$20,000	Amount your car is worth (amount of secured claim)
	$10,000	Amount of unsecured claim

Many claims have a specific amount, and you clearly owe them. However, some claims are uncertain when you file for bankruptcy, or they become due only after you file. You must include such claims when listing your 20 largest unsecured claims on this list.

Claims may be contingent, unliquidated, or disputed.

The form asks you to identify claims that are:

- Contingent claims,
- Unliquidated claims, or
- Disputed claims.

A claim is *contingent* if you are not obligated to pay it unless a particular event occurs after you file for bankruptcy. You owe a contingent claim, for example, if you cosigned someone else's loan. You may not have to pay unless that person later fails to repay the loan.

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A claim is *unliquidated* if the amount of the debt cannot be readily determined, such as by referring to an agreement or by a simple computation. An unliquidated claim is one for which there may be a definite liability but where the amount has not been set. For instance, if you were involved in a car accident, the victim may have an unliquidated claim against you because the amount of damages has not been set.

A claim is *disputed* if you do not agree that you owe the debt. For instance, your claim is disputed if a bill collector demands payment for a bill you believe you already fully paid.

A single claim can have one, more than one, or none of these characteristics.

On this form, list the creditors with the 20 largest unsecured claims who are not insiders

You must file this form when you file your chapter 11 bankruptcy case with the court.

When you list the 20 largest unsecured creditors, include all unsecured creditors, except for the following two types of creditors, even if you plan to pay them. Do not include:

- Anyone who is an *insider*. *Insiders* include relatives; general partners of you or your relatives; corporations of which you are an officer, director, or person in control; and any managing agent. 11 U.S.C. § 101(31).
- Secured creditors, unless the unsecured claim resulting from inadequate collateral value places the creditor among the holders of the 20 largest unsecured claims.

Make sure that all of the creditors listed on this form are also listed on either *Schedule B: Creditors Who Hold Claims Secured by Property* (Official Form 106B) or *Schedule C: Creditors Who Have Unsecured Claims* (Official Form 106C).

On the form, you will fill in what the claim is for. Examples include trade debts, bank loans, professional services, and government contracts.

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Glossary

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Definitions Used in the Forms for Individuals Filing for Bankruptcy

Here are definitions for some of the important terms used in the forms for individuals who are filing for bankruptcy. See *Bankruptcy Basics* (http://www.uscourts.gov/FederalCourts) for more information about filing for bankruptcy and other important terms you should know.

Annuity — A contract for the periodic payment of money to you, either for life or for a number of years.

Bankruptcy petition preparer — Any person or business, other than a lawyer or someone who works for a lawyer, that charges a fee to prepare bankruptcy documents. Under your direction and control, the bankruptcy petition preparer generates bankruptcy forms for you to file by typing them. Because they are not attorneys, they cannot give legal advice or represent you in bankruptcy court. Also called *typing services*.

Business debt — Debt that you incurred to obtain money for a business or investment or through the operation of the business or investment.

Claim — A creditor's right to payment.

Codebtor — If you have any debts that someone else may also be responsible for paying, this person or entity is called a *codebtor*.

Collateral for your debt — If your debts are not paid, creditors with secured claims such as a mortgage or a lien may be able to get paid from specific property in which that creditor has an interest.

Community property — Type of property ownership available in certain states for property owned by spouses and, in some instances, legal equivalents of spouses. Community property states and territories include Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington, and Wisconsin.

Consumer debt — Debt incurred by an individual primarily for a personal, family, or household purpose.

Contingent claim — Debt you are not obligated to pay unless a particular event occurs after you file for bankruptcy. You owe a contingent claim, for example, if you cosigned someone else's loan. You may not have to pay unless that person later fails to repay the loan.

Creditor matrix or mailing matrix — A list of names and addresses of all of your creditors, formatted as a mailing list according to instructions from the bankruptcy court in which you file.

Creditor — The person or organization to whom you owe money.

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Creditor with secured claims — Creditors who have a right to take property if you do not pay them. Common examples are lenders for your car, your home, or your furniture.

Creditor with unsecured claims — Creditor who does not have lien on or other security interest in your property.

Current value, fair market value, or value — Generally, the fair market value as of the date of the filing of the petition. It is how much the property is worth, which may be more or less than when you purchased the property. See the instructions for specific forms regarding whether the value requested is as of the date of the filing of the petition, the date you complete the form, or some other date.

Debtor 1 — A debtor filing alone or one person in married couple who is filing a bankruptcy case with a spouse.

Debtor 2 — The second person in a married couple who is filing a bankruptcy case with a spouse.

Dependent — The term *dependent* generally means people who are economically dependent on the debtor regardless of whether they can be claimed as a dependent on the debtor's federal tax return. However, *Chapter 7 Means Test Calculation*, (Official Form 108-2) and *Chapter 13 Calculation of Your Disposable Income*, (Official Form 110-2) use the term in a more limited way. See the instructions on those forms.

Discharge — A discharge in bankruptcy relieves you from having to pay debts that you owed before you filed your bankruptcy case. Most debts are covered by the discharge, but not all. (The instruction booklet explains more about common debts that are excepted from discharge.)

Only your personal liability is removed by the discharge; creditors with discharged debts cannot sue you, garnish your wages, assert a deficiency against you, or otherwise try to collect from you personally.

But a discharge does not stop creditors from collecting debts from any property in which they have a security interest—such as foreclosing a home mortgage or repossessing an auto. Similarly, a discharge does not stop creditors from collecting from anyone else who is also liable on the debt, such as a relative who cosigned or guaranteed a loan.

Even if a debt has been discharged, you can choose to repay it by either *reaffirming the debt* (see the definition below) or by voluntarily paying the debt. The creditor may negotiate a reaffirmation agreement with you, but may not suggest that you make voluntary payment.

Disputed claim — If you disagree about whether you owe a debt. For instance, your claim is disputed if a bill collector demands payment for a bill you believe you already fully paid.

Eviction judgment — Your landlord has obtained a judgment for possession in an eviction, unlawful detainer action, or similar proceeding.

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Executory contract — Contract between you and someone else in which neither you nor the other party has performed all of the requirements by the time you file for bankruptcy.

Exempt property — Property that the law permits you to keep.

Individual debtor — You are a person who is filing for bankruptcy by yourself or with your spouse.

Joint case — A single case filed by a married couple.

Legal equivalent of a spouse — A person whom applicable nonfederal law recognizes as having a relationship with the debtor that grants legal rights and responsibilities equivalent, in whole or in part, to those granted to a spouse.

Legal or equitable interest — A broad term that includes all kinds of property interests in both tangible and intangible property, whether or not anyone else has an interest in that property.

Negotiable instrument — Include personal checks, cashiers' checks, promissory notes, and money orders.

Non-individual debtor — You are filing for bankruptcy on behalf of a non-individual, such as a corporation, partnership, or limited liability company (LLC).

Non-negotiable instrument — Financial instrument that you cannot transfer to someone by signing or delivering it.

Nonpriority unsecured claim — Debt that generally will be paid after priority unsecured claims are paid. The most common examples are credit card bills, medical bills, and educational loans.

Payment advice — A statement such as a pay stub or earnings statement from your employer that shows all earnings and deductions from your pay.

Presumption of abuse — A legal determination meaning you may have too much income to be granted relief under chapter 7. You may overcome the presumption by showing special circumstances that reduce your income or increase your expenses.

Priority unsecured claim — Debt that the Bankruptcy Code requires to be paid before most other unsecured claims are paid. The most common examples are certain income tax debts and past due alimony or child support.

Property you own — Includes property you have purchased, even if you owe money on it, such as a home with a mortgage or an automobile with a lien.

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Reaffirming a debt — You may agree to repay a debt that would otherwise be discharged by entering into a reaffirmation agreement with the creditor. A reaffirmation agreement may allow you to keep property that a creditor has the right to take from you because it secures the debt being reaffirmed. For a reaffirmation agreement to be effective, you must enter into it before discharge. You may ask the court to delay your discharge if you need more time to complete your reaffirmation agreement. The court may have to find that the agreement is not an undue burden on you before it can become effective.

Sole proprietorship — A business you own as an individual, rather than a separate legal entity such as a corporation, partnership, or LLC.

Unexpired lease — Lease that is still in effect; the lease period has not yet ended.

Unliquidated claim — If the amount of a debt cannot be readily determined, such as by referring to an agreement or by a simple computation. An unliquidated claim is one for which there may be a definite liability but where the value has not been set. For instance, if you were involved in a car accident, the victim may have an unliquidated claim against you because the amount of damages has not been set.

You — A debtor filing alone or one person in married couple who is filing a bankruptcy case with a spouse.

TAB 5B

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ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of September 20 - 21, 2012
Portland, Oregon

(DRAFT MINUTES)

The following members attended the meeting:

Bankruptcy Judge Eugene R. Wedoff, Chair
Circuit Judge Sandra Segal Ikuta
Circuit Judge Adalberto Jordan (by telephone)
District Judge Karen Caldwell
District Judge Jean Hamilton
District Judge Robert James Jonker
Bankruptcy Judge Arthur I. Harris
Bankruptcy Judge Elizabeth L. Perris
Bankruptcy Judge Judith H. Wizmur
Professor Edward R. Morrison (by telephone)
Michael St. Patrick Baxter, Esquire
Richardo I. Kilpatrick, Esquire
J. Christopher Kohn, Esquire
David A. Lander, Esquire
John Rao, Esquire

The following persons also attended the meeting:

Professor S. Elizabeth Gibson, reporter
Professor Troy A. McKenzie, assistant reporter
Circuit Judge Edward Levi, former chair
District Judge James A. Teilborg, liaison from the Committee on Rules of Practice and Procedure (Standing Committee)
Chief Bankruptcy Judge Pamela Pepper, Eastern District of Wisconsin
Peter G. McCabe, secretary of the Standing Committee
Patricia S. Ketchum, advisor to the Committee
Ramona D. Elliott, Deputy Director /General Counsel, Executive Office for U.S. Trustees (EOUST)
Lisa Tracy, Associate General Counsel, EOUST
James J. Waldron, Clerk, U.S. Bankruptcy Court for the District of New Jersey
Jonathan Rose, Rules Committee Support Officer, Administrative Office of the U.S. Courts (Administrative Office)
Benjamin Robinson, Administrative Office
James H. Wannamaker, Administrative Office
Scott Myers, Administrative Office
Molly Johnson, Federal Judicial Center
Debra L. Miller, Chapter 13 Trustee, South Bend, IN

Raymond J. Obuchowski, Esquire, on behalf of the National Association of Bankruptcy Trustees

Habbo G. Fokkens, Senior Counsel, Law Division, Wells Fargo

Introductory Items

The Chair asked participants to introduce themselves, and then he announced that this would be Mr. Rao's last meeting. He thanked Mr. Rao for his six years of service to the Committee and in particular for his stewardship of the model chapter 13 plan that was being presented to the Committee at this meeting.

2. Approval of minutes of Phoenix meeting of March 29 - 30, 2012.

The Committee approved the Phoenix minutes with several minor changes.

3. Oral reports on meetings of other committees.

(A) June 2012 meeting of the Committee on Rules of Practice and Procedure, including approval of the amendments to Civil Rules 37 and 45, which are scheduled to take effect on December 1, 2013.

The Chair said the Standing Committee adopted all the proposals put forth by the Advisory Committee. With respect to the pending amendments to Civil Rules 37 and 45, the Reporter said that no changes in the bankruptcy versions would be necessary. In response to a question about e-filing, the Reporter added that the Advisory Committee had been encouraged to move forward in its consideration of rules governing the use of electronic signatures for bankruptcy filings.

(B) June 2012 meeting of the Committee on the Administration of the Bankruptcy System.

The Chair said that the primary focus of the June meeting of the Bankruptcy Administration Committee was cost containment and the reduction of funding for bankruptcy courts. He said bankruptcy courts were being encouraged to pursue shared services with district courts in order to deal with reduced funding.

(C) Upcoming November 2012 meeting of the Advisory Committee on Civil Rules.

Judge Harris said that he would report on the November 2012 Civil Rules meeting when the Advisory Committee meets in the spring.

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(D) April 2012 meeting and upcoming October 2012 meeting of the Advisory Committee on Evidence Rules.

Judge Wizmur said that at its spring 2012 meeting the Evidence Advisory Committee approved for public comment several rules dealing with the hearsay exception. She added that the Standing Committee has adopted the recommendation and that the rules have been published for comment. She said that electronic discovery rules will be discussed at a symposium in conjunction with the fall 2012 Evidence Committee meeting.

(E) April 2012 meeting and upcoming September 2012 meeting of the Advisory Committee on Appellate Rules.

The Reporter said that Appellate Rule 6 was currently published for public comment with changes designed to coordinate with the bankruptcy appellate rules that are also published for comment.

(F) Bankruptcy CM/ECF Working Group and the CM/ECF NextGen Project.

Judge Perris said the last big release for CM/ECF will be delivered to the courts in the next few weeks, and that the first release of NextGen is scheduled for early 2014.

Subcommittee Reports and Other Action Items

4. Report by the Subcommittee on Consumer Issues.

(A) Recommendation concerning Suggestion 12-BK-I by Judge John E. Waites (on behalf of the Bankruptcy Judges Advisory Group) to amend Rule 1006(b) to provide that courts may require a minimum initial payment with requests to pay filing fees in installments.

Judge Harris said the Subcommittee considered a suggestion by the Bankruptcy Judges Advisory Group (BJAG) to amend Rule 1006(b) to make clear that a court may require a minimum initial payment when approving requests to pay filing fees in installments. Some courts require an initial payment when a filing is made, Judge Harris said, because of concerns about collecting the filing fee if the case is dismissed before the full fee is paid. Courts do not construe Rule 1006(b) uniformly, however. The BJAG suggestion pointed out that some courts read the rule to prohibit requiring payment of a first installment at filing, and courts that require payment of a first installment at filing vary as to its amount.

BJAG suggested that uncertainty about the practice could be eliminated by amending Rule 1006(b) to clearly state that courts may require a minimum payment to accompany an application to pay in installments. BJAG also recommended that the rule set a maximum amount

for the first installment of 25% of the filing fee as a fair balance between maintaining debtor access to bankruptcy relief and reducing the court burden of collecting unpaid fees.

The Subcommittee concluded that the current language of Rule 1006(b)(1) is inconsistent with a local rule that requires an initial payment with an application to pay in installments. The Subcommittee considered whether to recommend that efforts be made to bring courts requiring an initial installment into conformity with Rule 1006(b), but ultimately concluded that that the national rule should be changed to permit a local practice of requiring an upfront payment of a reasonable amount with an application to pay in installments. Subcommittee members favored a flexible approach so long as the initial payment would not be so great as to discourage applications to pay in installments or to prompt more requests for fee waivers. Accordingly, the Subcommittee accepted BJAG's recommendation of 25% of the total filing fee as the maximum amount that could be required by local rule.

The Subcommittee also discussed but could not come to a consensus on whether the clerk's office should be affirmatively authorized to reject a filing if an initial installment payment required by local rule is not tendered at the time of filing.

Judge Harris said that he had reconsidered his own position since the Subcommittee discussed the BJAG's suggestion, and he thought it would be more equitable to debtors to set a national initial installment amount. Other members also supported a national minimum first installment. Mr. Rao, however, pointed out that an initial installment requirement might actually drive up requests for fee waivers in chapter 7. He said that approximately 30% of chapter 7 filers are eligible to request a fee waiver, but only 2-3% actually request a waiver. After additional discussion, most members favored revising Rule 1006 either to allow or to require a minimum first installment of some amount, but several members thought that additional research should be done to determine the scope of the problem and the likelihood that requiring an initial installment will drive up chapter 7 fee waiver requests. **The Subcommittee agreed to investigate and to report back in the spring.** The Subcommittee was also asked to consider procedures for dealing with any failure to pay an installment when due. No member supported a procedure that allowed the clerk to reject a filing for failure to provide a required initial payment, but there was support for immediately setting a hearing on dismissal.

(B) Recommendation concerning Suggestion 11-BK-N by for a rule and form for applications to waive fees other than filing fees, under 28 U.S.C. § 1930(f)(2) and (f)(3).

David Yen, an attorney at the Legal Assistance Foundation of Chicago, submitted a suggestion (11-BK-N) regarding the waiver of bankruptcy fees other than the ones that Rule 1006(c) and Official Form 3B currently address. That rule and form govern the waiver of filing fees by individual chapter 7 debtors, as authorized by 28 U.S.C. § 1930(f)(1). Subsection (f)(2) of that statute authorizes waiver of other bankruptcy fees for debtors who qualify for a filing-fee

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waiver under (f)(1). And subsection (f)(3) provides that subsection (f) "does not restrict the district court or the bankruptcy court from waiving . . . fees prescribed under this section for other debtors and creditors."

Mr. Yen proposes that procedures and Official Forms be adopted for (1) debtors who have qualified for a filing-fee waiver and who seek the waiver of additional fees, and (2) debtors as well as creditors who seek fee waivers but who are not entitled to a filing-fee waiver under section 1930(f)(1). Mr. Yen gives some suggestions for the content of these forms.

The Subcommittee concluded that there was no need for a national form to process "other fee" waiver requests from debtors who had already been granted a filing fee waiver under subsection (f)(1) because the information reported in Official Form 3B would either be sufficient for the court to process the request or could be easily updated at the time the new request was made. The Subcommittee also did not think that an official form for waivers under 28 U.S.C. § 1930(f)(3) was necessary, but recommended that the Forms Subcommittee consider the creation of a director's form for such waivers that could be used by courts if they thought it would be useful to parties seeking fee waivers. **After discussing the Subcommittee's analysis, the Advisory Committee referred to the Forms Subcommittee the issue of creating a director's form for fee waivers other than for the chapter 7 filing fee.**

(C) Recommendation concerning Suggestion 12-BK-B Matthew T. Loughney (on behalf of the Bankruptcy Noticing Working Group) to amend Rule 2002(f)(7) to require notice of the confirmation of the debtor's chapter 13 plan.

Judge Harris gave the report. He said it is not clear why chapter 13 was omitted from the requirement in Rule 2002(f)(7) to notice confirmation orders, and that members of the Subcommittee saw potential benefits in providing notice of confirmation orders in chapter 13 cases. The Subcommittee also identified two concerns with the suggestion. First, the omission of chapter 13 cases from Rule 2002(f)(7) has not created any confusion in the case law, and nothing prevents courts from invoking their authority in appropriate cases to order service of notice of confirmation on creditors. Second, there is a concern that the costs of requiring notice will outweigh the benefits, particularly if the burden of noticing the confirmation order is placed on the debtor. **After a short discussion, the Advisory Committee deferred consideration and asked the Subcommittee to contact clerks' offices about whether notice is already being made already under local practice and, if so, whether the court, the trustee, or the debtor bears the cost of the noticing.**

(D) Oral report concerning Suggestion 12-BK-D Judge S. Martin Teel, Jr., to amend Rule 7001(1) as it concerns compelling the debtor to deliver the value of property to the trustee.

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The Reporter said that the Judge Teel's suggestion would allow a trustee to seek turnover of the value of property, in addition to property itself, by a turnover motion against a debtor. Judge Teel's concern arose because sometimes the property subject to a turnover motion has already been disposed of by the time the trustee learns about it, and adding the recovery of the value of property to this procedure would eliminate the requirement for the trustee to file a separate adversary proceeding against the debtor. **The Reporter said that there were concerns about whether this was a sufficiently significant problem to require rule changes and that the Subcommittee would consider the issue further and report back at the spring meeting.**

5. Joint Report by the Subcommittees on Consumer Issues and Forms.

> Oral report on the mini-conference to gather input on new Rules 3001(c) and 3002.1 and the new mortgage forms –Form 10 (Attachment A), Form 10 (Supplement 1), and Form 10 (Supplement 2).

The Reporter explained that the day before the meeting the Advisory Committee's Consumer and Forms Subcommittees held a mini-conference on users' experiences with the new mortgage rules (Bankruptcy Rules 3001(c) and 3002.1) and forms (B10 Attachment, B10 Supplement 1, and B10 Supplement 2). Attorneys for consumer debtors and mortgage servicers, chapter 13 trustees, bankruptcy judges, and a bankruptcy clerk participated in the mini-conference and provided constructive feedback about their experiences with the rules and forms.

The participants were divided into panels, and each panel met by phone before the mini-conference to discuss pre-assigned topics. The panels then presented their topics to the rest of the participants at the meeting. The presentations revealed general acceptance of the disclosure requirements in the rules and forms, but also a desire to eliminate ambiguities and to make adjustments to facilitate compliance and provide additional information.

There was general agreement among the participants on the following topics:

- A detailed payment history should be attached to the proof of claim. The payment history should be in a form that can be automated.
- Disclosure requirements should be uniform nationwide with no local variations permitted.
- The proof of claim attachment should include the amount of the mortgage payment as of the petition date.
- Home equity lines of credit (HELOCs) should be treated differently from other types of claims secured by the debtor's principal residence.
- There should be a procedure for objecting to payment changes.
- An official form should be adopted for the Trustee's Notice of Final Cure Payment.

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- Rule 3002.1 should specify when the creditor's notice obligation terminates if the residence is surrendered or the stay is lifted.
- Rule 3002.1 should state clearly that it applies whenever a plan provides for maintenance of current mortgage payments, even if there is no arrearage to be cured.
- The attachment to the proof of claim should be revised so that it calculates the claim amount.

Some of the participants agreed to gather additional information for the Advisory Committee's benefit, and others indicated that they would continue to engage in discussions in an effort to arrive at agreement on additional suggestions.

The Consumer and Forms Subcommittees will carefully consider the feedback received at the mini-conference and report at the spring 2013 meeting of the Advisory Committee on any proposals they recommend for amending the mortgage rules or forms.

6. Report by the Chapter 13 Form Plan Working Group.

Recommendation concerning adopting an official form for chapter 13 plans; amending Rules 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009 in connection with adopting an official form; and contacting interest groups to obtain reactions to the proposed official form and rules amendments.

Mr. Rao said that a working group has been working on a proposal for an official form for chapter 13 plans. He said the working group started by surveying the many form plans used in districts across the country. It has attempted to incorporate common provisions from those plans into an official form and to provide a structure that allows for easy discovery of uncommon provisions.

In its deliberations, the working group also concluded that amendments to the bankruptcy rules would be helpful – if not essential – to an effective national form. Mr. Rao said that the working group has now created an initial draft of a proposed official form as well as proposed amendments to eight rules (Rules 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009), all of which were included in the agenda materials.

Mr. Rao said that the working group is now seeking feedback from the Advisory Committee on the draft proposals. He said he anticipated that the working group and the Consumer and Forms Subcommittees would use the feedback in revising the proposed plan and rules and would present a recommendation to the Advisory Committee at its spring meeting about publication for public comment. Mr. Rao said the working group members also recommend seeking feedback over the winter from outside groups, such as the National

Association of Chapter 13 Trustees and consumer and creditor attorney groups that practice in chapter 13.

Mr. Rao reviewed the draft plan and rules in the agenda materials and received a number of comments from members identifying issues with the proposals or suggesting improvements to the drafts. One proposal that generated significant discussion among members was the treatment of secured claims under the proposed rules and official form. Mr. Rao explained that a proposed change to the rules that would require secured creditors to file a proof of claim before the plan confirmation hearing date was designed to facilitate resolution of any differences between the plan and the proof of claim and thereby enhance the plan confirmation process.

Mr. Rao said that the Advisory Committee previously agreed in concept to a proposed rule amendment that would require secured creditors to file proofs of claim by a specified deadline. Some Advisory Committee members questioned whether the requirement should apply across all chapters, however, or only in chapter 13, and the question of whether it should apply in chapter 11 cases was referred to the Business Subcommittee. Mr. Rao said the Working Group favored applying the requirement to all chapters, and that the proposed amendment to Rule 3002(a) in the agenda materials would do that. The working group also proposed that the deadline for filing proofs of claim under Rule 3002(c) – which deals with claims in chapters 7, 12, and 13 – be reduced from 90 days after the first date set for the § 341 meeting of creditors to 60 days after the filing of the petition to ensure that claims are filed before the confirmation hearing in chapter 12 or chapter 13. He noted that a different time period is set out for involuntary chapter 7 cases, and that, consistent with the limitation in section 502(b)(9) of the Code, the proposed deadline would not apply to governmental creditors.

Judge Wizmur reviewed concerns considered by the Business Subcommittee about requiring secured creditors to file claims in chapter 11 cases. She said a memo discussing the issues was in the agenda materials at Tab 8A. The main concern, she said, is that there is nothing in chapter 11 practice that would be "fixed" by requiring secured creditors to file a proof of claim and that such a requirement might have unintended consequences. Under 11 U.S.C. § 1111(a), she said, all claims are "deemed filed" if scheduled by the debtor in a chapter 11 case unless they are scheduled as "disputed, contingent or unliquidated." Accordingly, if the creditor is satisfied with how its claim is scheduled, it does not need to file a proof of claim.

Judge Wizmur said that one perceived advantage of not filing a claim is that the creditor can avoid subjecting itself to the jurisdiction of the bankruptcy court. But, she pointed out, that strategy only works if the creditor is willing to accept how the debtor scheduled the claim. If the creditor wishes to dispute how the claim is scheduled, it must file a proof of claim in order to get the bankruptcy court to resolve the dispute, and, in so doing, will subject itself to bankruptcy court jurisdiction. Judge Wedoff added that changing Rule 3002(a) to require a deadline for filing such a claim just establishes a timeframe for bringing the dispute to the attention of the court. Section 1111(a) along with Rule 3003(c) would still allow the creditor to take advantage

of the "deemed filing" status, and thereby avoid the jurisdiction of the bankruptcy court, if there is no dispute. After further discussion, members who had initially expressed concern about applying a requirement for secured proofs of claim in chapter 11 said their concerns had been addressed.

Members also discussed proposed changes to Rule 9009. Judge Perris explained that the need for the proposed changes stemmed from past experience with the current language which says that, except as provided in Rule 3016(d), the Official Forms "shall be observed and used with alterations as may be appropriate." She said that some courts have interpreted "with alternations as may be appropriate" as allowing them to require a local variation of a form instead of the official version, and that filers sometimes modified Official Forms without clearly showing the modification. As an example, she said that some creditors simply refused to incorporate the new signature block that was added to the proof of claim form in 2011, and instead used an older version of the signature block. Judge Perris said that the version of Rule 9009 in the agenda materials was amended with the following principles in mind: (1) require courts to accept the official forms, (2) allow users to alter some forms to eliminate questions that are not relevant, (3) prohibit alteration of some forms, such as the proposed official form chapter 13 plan and the proposed detailed loan payment history being considered as a replacement for the official form attachment to the proof of claim form, and (4) allow a court to create local versions of official forms, as long as the court does not require use of a local version instead of the national version.

Members generally agreed with the objectives of the proposed changes to Rule 9009. There was concern, however, about whether the draft in the agenda materials clearly met the objectives. One member said that the phrase "shall be observed and used" seemed imprecise and suggested instead stating simply "shall be used." Some members pointed out that it may be necessary to go through the forms one by one to decide which should be alterable and which should not. Then Rule 9009 could state a general principle that the Official Forms should (or should not) be alterable, with a carve-out listing the forms to which the general principle does not apply. Another member suggested stating in the rule a general principle of non-alterability that would apply unless the Official Form itself allows for different treatment.

The Reporter pointed out that in deciding whether some official forms should be alterable, and others not alterable, the Subcommittee should be mindful that several rules have different phrasing regarding the use of official forms, such as "prepared as prescribed by the appropriate Official Form," or "shall conform to the appropriate Official Form" or "conform substantially to the appropriate Official Form." Finally, Ms. Ketchum pointed out that many of the forms that are designed to be altered, such as the forms used in chapter 11 cases, might be reclassified as director's forms so it is clear that alterations are not restricted by Rule 9009.

Members also discussed several options for obtaining feedback from outside groups about the proposed rules and form chapter 13 plan. **The Advisory Committee decided that the**

best approach to develop dialog among different chapter 13 constituencies would be to hold a one day mini-conference in Chicago on January 17, 2013, the day before the planned public hearing in Chicago on the bankruptcy rules currently published for comment. [After the meeting concluded, the proposed date was changed to **January 18, 2013,** the same date as the scheduled public hearing in Chicago].

7. Report by the Subcommittee on Forms and the Forms Modernization Project.

(A) Report on the status of the Forms Modernization Project.

Judge Perris gave an overview of the progress of the Forms Modernization Project (FMP) since its inception in 2008. She noted that the fee forms, income and expense forms, and means test forms were all approved for publication by the Standing Committee at its June meeting and were out for public comment now. She said that there was one comment so far (positive) but that she expected more feedback by the end of the comment period, February 15, 2013.

Judge Perris said the FMP was largely done with the individual filing package, and the agenda materials included the most recent versions of the following forms: proposed new Official Forms B101, B101AB, B102, B104, B106-Summary, B106A, B106B, B106C, B106D, B106E, B106F, B106-Declaration, B107, B112, B119, B318, B423, and B427 and the committee notes and instructions. She said the new numbering system was a result of creating different forms for filing individual and non-individual bankruptcy cases. She said that the 1XX series was used for forms filed early in individual bankruptcy cases, the 2XX series was for forms filed early in non-individual cases, the 3XX series was for orders and court notices, and the 4XX series was for forms filed later in the case. She added that because all the new official forms would be three digits, the director's forms (which currently use three digits) would use four digits, generally by adding a zero to the end of the current three-digit number.

Judge Perris explained that general instructions were now in the form of a booklet, rather than associated with each particular form, to avoid repetition of common instructions and to more clearly separate the instructions from the forms that would be filed. She said her purpose in bringing the forms to the Advisory Committee for this meeting was to solicit feedback to consider along with any comments received on the FMP forms that are currently out for public comment. She added that she anticipated resubmission of revised versions at the spring meeting with a request for publication.

Judge Perris explained the development of the non-individual forms is well underway, and those forms would likely look much different than the individual forms. The non-individual forms are being designed with the following guiding principles:

- Eliminate requests for information that pertains only to individuals.

- To the extent possible, parallel how businesses commonly keep their financial records.
- Include information identifying where and how the requested information departs from information maintained according to standard accounting practices.
- Provide better instructions about how to value assets on the schedules, and provide a valuation methodology that will allow people who commonly sign schedules to respond without needing expert valuations of assets.
- Revise the secured debt schedule to clarify the status of debts that are cross-collateralized and the relative priority of secured creditors.
- Require responsive information to be set out in the forms themselves and not simply included as attachments.
- Use a more open-ended response format, as compared to the draft individual debtor forms.
- Keep inter-district variations to a minimum, particularly with respect to the mailing matrix.

Judge Perris said that it was not yet clear when the non-individual forms would be ready to publish for comment, and that further consideration would be appropriate at the spring meeting. A likely possibility is that the individual and non-individual forms will have to be published in successive years. That means, Judge Perris said, that the Advisory Committee will have to decide whether to recommend that each group of forms go into effect in the normal course (i.e., in successive years), or if instead it would be less disruptive to the bankruptcy community to hold the effective date for the individual forms for a year to allow both individual and non-individual forms to go into effect at the same time.

The Advisory Committee reviewed the individual forms in the agenda materials and had the following comments:

B102: A member noted that there are missing checkboxes on questions 2 and 3. Another member asked whether including the leading "9" in the space for the debtor's Individual Taxpayer Identification Number (to be filled out if the debtor has an ITIN instead of a social security number) might be confusing to some debtors because there were only eight digits left to fill out. Another member suggested that it might be clearer if the "9" were underlined, and members agreed to defer to the judgment of the FMP's forms consultant.

B104 CN: A member suggested adding an "s" to "eliminate" in first line of last paragraph of the Committee Note for the list of 20 Largest Unsecured Creditors.

B106-Summary: The Advisory Committee discussed replacing "married people" with "spouses" because "married" is not in the Bankruptcy Code, but most members favored using "married people."

B106A: A member pointed out that there are missing checkboxes on question 1a. Another member suggested that the form ask for the purchase price of listed vehicles as a check on the accuracy of the figure reported for current value, but most members thought auto valuation books already provided a sufficient check on reported current value.

B106C: Judge Perris explained that the form combines both priority and non-priority unsecured claims, which are currently on separate forms, into a single form. One member suggested that, although it is clear from the layout and instructions on B106B that the unsecured portion of a secured claim should be reported on that form, a cross reference in the instructions for this form might also be helpful.

B106D: Judge Perris said that form incorporates a proposed change addressing *Schwab v. Reilly*, 130 S. Ct. 2652 (2010), that is further discussed at Tab 7B of the Agenda Book.

After the Advisory Committee reviewed all of the individual schedules, one member asked for reconsideration of the proposed numbering scheme as it pertains to the schedules. The suggestion would change Schedule B106A to B106AB, to signal that it is derived from current schedules A and B, and change B106C to B106EF to signal that it is derived from current schedules E and F. The proposed changes would allow the remaining schedules to retain the same letter designation as current versions which could be less disruptive. No other member seconded the proposal for reconsideration of the new numbering scheme.

B112: A member noted that checkboxes are missing from the first column in the middle of the first page of the form.

Instruction Book: A member said the table of contents should be updated, and noted that page numbers in the table of contents for the glossary seem to show only the leading digit (i.e., "4" instead of "40").

After further discussion, the Advisory Committee decided to include the individual forms, related committee notes, and instruction book in its report to the Standing Committee with a request for preliminary comments.

(B) Recommendation concerning revision of the exemption schedule as a result of the Supreme Court's holding in *Schwab v. Reilly*, 130 S. Ct. 2652 (2010).

The Reporter explained that last spring, based on concerns raised during the public comment period, the Committee withdrew a proposed amendment to the exemption schedule that was designed to implement the holding in *Schwab*. The proposal would have added a checkbox to the form to allow debtors to state the value of a claimed exemption as the "full fair market value of the exempted property"—as an alternative to stating "Exemption limited to $_____."

The Reporter said that the FMP, and the Consumer and Forms Subcommittees, subsequently developed an alternative approach that was incorporated into the version of the exemption schedule included with the new FMP form at Tab 7A. **Because the Advisory Committee is not being asked to take action on any of the FMP forms at this meeting, however, the Chair tabled the recommendation regarding the *Schwab* holding until the spring meeting.**

8. Report by the Subcommittee on Business Issues.

(A) Report concerning amending the Bankruptcy Rules to require the filing of proofs of secured claims in chapter 11 cases.

See discussion at Tab 6.

(B) Recommendation concerning Suggestion 11-BK-M by attorney Jim F. Spencer, Jr., on behalf of the Advisory Committee to the Uniform Local Rules for the Northern and Southern Districts of Mississippi, to amend Rule 9027 to require that a notice of removal be filed with the bankruptcy clerk for the district and division where the civil action to be removed is pending.

Judge Wizmur said that the Subcommittee recommends no action on this item because the majority of the case law now holds that a notice of removal should be filed with the bankruptcy court, and because Bankruptcy Rule 9013 defines "clerk" as the bankruptcy clerk. **The Committee declined to take any action.**

9. Report by the Subcommittee on Privacy, Public Access, and Appeals.

Recommendation concerning Suggestion 12-BK-H by Professor Alan N. Resnick to amend the Bankruptcy Rules in response to *Stern v. Marshall*, 131 S. Ct. 2594 (2011).

Judge Jordon said that the Subcommittee recommends reconsidering the suggestion at a future meeting because the Advisory Committee's *Stern*-related rules amendments are still out for public comment, because case law is still developing on *Stern,* and because a number of courts have created local rules that address the suggestion. **The Advisory Committee agreed to reconsider suggestion 12-BK-H at a future meeting**.

10. Report by the Subcommittee on Technology and Cross Border Insolvency.

Report concerning adopting a bankruptcy rule establishing standards for electronic signatures by parties other than attorneys.

Mr. Baxter said that, as described in the agenda materials, the Subcommittee has considered two options for the use of electronic signatures by debtors or others who are not part of the CM/ECF system: a declaration procedure similar to the one used in the Northern District of Illinois, or an amendment to Bankruptcy Rule 5005(b) that would allow electronic filing for documents filed and signed in accordance with Judicial Conference procedures. He said that, since there are not currently any Judicial Conference filing procedures for electronic signatures, the Subcommittee favored the declaration procedure as being easier to implement. The Subcommittee would like to do further research to determine how many other bankruptcy courts are already using declaration procedures like the one in Illinois, and to evaluate the experiences the three courts that are testing the pro se electronic filing pilot in NextGen. Dr. Johnson has agreed to undertake this research and will report her findings to the Subcommittee. **The Subcommittee will report back at the spring 2013 meeting.**

11. Oral report by the Subcommittee on Attorney Conduct and Health Care.

Mr. Rao said that the Subcommittee had no assignments.

Discussion Items

12. Oral report on the revision of Interim Rule 1007-I to conform the Interim Rule to the proposed amendment to Rule 1007, which is scheduled to take effect on December 1, 2012.

The Committee agreed that the Director should advise the courts to amend their local rule version of Interim Rule 1007-I so that it conforms to the pending Rule 1007 changes that are scheduled to go into effect on December 1, 2012.

13. Oral report on Suggestion 12-BK-E by Judge Richard Schmidt to amend Rules 7008, 7012, 9014, 9027, and 9033 in response to the Supreme Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011).

The Chair said that part of the suggestion has already been incorporated into the *Stern*-amendments that are currently out for public comment, and that the Advisory Committee previously considered and rejected the possibility of requiring a litigant to affirmatively demand an Article III judge or face waiver of that right. **No further action required by the Committee.**

14. Oral report on Suggestion 12-BK-L by Judge Neil P. Olack to amend Rule 7008(b) to clarify the pleading requirements to recover statutory attorney's fees.

12b-007007

The Chair said this matter has already been considered and the current amendments published for public comment would eliminate 7008(b) in its entirety and replace it with 7054. **No further action required.**

Information Items

15. Oral report on the status of bankruptcy-related legislation, including the revision of Forms B200 and B201 as a result of the enactment of the Temporary Bankruptcy Judgeships Extension Act of 2012 (Pub. L. No. 112-121).

Mr. Wannamaker reviewed pending legislation. He explained that in light of the upcoming election it was unlikely that anything would pass this year, but that much of the legislation would probably be reintroduced in the next legislative session. He said that the Temporary Bankruptcy Judgeships Extension Act of 2012 did pass and has been enacted as Pub. L. No. 112-121. He said the new law would have a minor impact on two Director's Forms, B200 and B201, both of which would need to be updated to reflect an increase in the Chapter 11 filing fee that occurred to pay for the extended judgeships.

16. Oral update on opinions interpreting section 109(h) of the Bankruptcy Code.

The Reporter said that 11 U.S.C. § 109(h) requires individual debtors to complete an approved course on credit counseling in order to be a debtor under title 11. She said that courts were split on the meaning of the original language of that subsection and whether it allowed the debtor to file a petition on the same day as taking the course (so long as the course was completed prior to filing) or if it instead required the debtor to wait a calendar day before filing. The Reporter said that a technical amendment made to section 109(h) in 2011 was apparently designed to settle the court split by making clear that the debtor may file a case the same day as completing the required course. Unfortunately, however, the technical amendment introduced a new ambiguity, and might now be read to allow the debtor to file the petition and then complete the counseling course later in the day.

The Reporter said that if courts interpreting section 109(h) allow completion of the credit counseling course on the same day but after the petition is filed, the Advisory Committee may need to consider amendments to Rule 1007 and Official Form 23. She said no changes were needed yet, however, because the two bankruptcy courts that have reviewed the new language so far have both concluded that the credit counseling course must be completed before the bankruptcy petition is filed. She said she would report on further case law developments at the spring 2013 meeting.

17. *Bull Pen.*

Amendment to Official Form 23 to implement the proposed amendment to Rule 1007(b)(7) which would authorize providers of financial management course providers to file notification of the debtor's completion of the course, approved at September 2010 meeting.

The proposed amendment is scheduled to go forward at the spring 2013 meeting.

18. Rules Docket.

Mr. Wannamaker asked members to review the Rules Docket and to let him know if any changes are needed.

19. Future meetings: Spring 2013 meeting, April 2 – 3, in New York City. Possible locations for the fall 2013 meeting.

The Chair suggested Minneapolis for the fall 2013 meeting.

20. New business.

The Chair expressed his profound thanks to District Judge James A. Teilborg, who was attending his last meeting as liaison from the Standing Committee.

21. Adjourn.

Respectfully submitted,

Scott Myers

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12b-007013

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

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

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

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

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

Date: **November 26, 2012**

I. Introduction

Because of Hurricane Sandy, the Advisory Committee on the Federal Rules of Criminal Procedure ("the Committee") was unable to meet as scheduled on October 29-30 in Washington, D.C. The fall meeting was not rescheduled because of the difficulty of securing overlapping hotel accommodations and conference space at the Administrative Office for early to mid-November on such short notice, as well as the busy schedule of members.

This report discusses briefly two information items: (1) the proposed amendments to Rules 12 and 34 regarding pretrial motions, which were published for public comment and are being studied further by the Committee, and (2) a new proposal by the Department of Justice to amend Rule 4 to permit effective service of a summons on a foreign organization that has no agent or principal place of business within the United States.

II. Information Items

A. Rules 12 and 34

Proposed amendments to Rule 12 (which governs pretrial motions) and conforming changes to Rule 34 were published for public comment in August 2011, and numerous submissions were received, including detailed objections and suggestions from defense bar organizations.

Since the close of the comment period in February 2012, the Rule 12 Subcommittee (chaired by Judge Morrison England) and the Reporters have been studying the comments and discussing possible changes. The Reporters prepared an extensive memorandum, totaling more than 80 pages, analyzing the comments and discussing possible changes in the amendments as published. The Rule 12 Subcommittee discussed this memorandum and the concerns raised by the public comments at a half-day meeting held in conjunction with the full Committee's April meeting in San Francisco. The Reporters were asked to prepare additional materials, and following receipt of the additional materials the Rule 12 Subcommittee met again by teleconference in preparation for the Committee's October meeting. The Subcommittee reaffirmed the need for the amendment, but it concluded that several changes were warranted based on the public comments. With those changes, the Subcommittee has recommended to the Advisory Committee that the amended proposal be approved and transmitted to the Standing Committee.

As noted, Hurricane Sandy made it impossible to hold the Committee's fall meeting, and consideration of the Rule 12 Subcommittee's report has been deferred until the Committee's April meeting.

B. Rule 4

The Department of Justice has submitted a proposal to amend Rule 4 to permit effective service of a summons on a foreign organization that has no agent or principal place of business within the United States. The Department recommends that Rule 4 be amended in two key respects:

(1) to remove the requirement that a copy of the summons be sent to the organization's last known mailing address within the district or principal place of business within the United States, and

(2) to provide the means to serve a summons upon an organization located outside the United States.

The Department argues the proposed amendments are necessary to ensure that organizations committing domestic offenses are not able to avoid liability through the simple expedient of declining to maintain an agent, place of business and mailing address within the United States.

Because of the cancellation of the October meeting, the Committee has not yet discussed the Department's proposal. It will be on the agenda for the April meeting.

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168 F.R.D. 679

Federal Rules Decisions
December, 1995

A SELF-STUDY OF FEDERAL JUDICIAL RULEMAKING
A REPORT FROM THE SUBCOMMITTEE ON LONG RANGE PLANNING TO THE COMMITTEE ON RULES OF PRACTICE, PROCEDURE AND EVIDENCE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

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***680 COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES**

WASHINGTON, D.C. 20544

TO: The Committee on Rules of Practice and Procedure

FROM: Daniel R. Coquillette, Reporter

RE: Self-Study (Report of the Subcommittee on Long Range Planning.)

DATE: May 10, 1996

At the Committee's meeting on January 12-13, 1996, the Hon. Frank H. Easterbrook presented the Final Report of the Subcommittee on Long Range Planning, including the Subcommittee's *A Self-Study of Federal Judicial Rulemaking* prepared by himself and Professor Thomas E. Baker (the "Self-Study"). After discussion, a motion was made and passed as amended that: 1) the Subcommittee report be "received" by the Committee, 2) that the report be published as "received" and 3) that the Subcommittee be discharged. There was an expression of thanks to Judge Easterbrook and Professor Baker for their hard work.

On request of the Hon. Thomas S. Ellis, III, The Hon. Alicemarie H. Stotler, Chair, stated that the Committee would examine the document again at the June, 1996 meeting. Members should read the last draft carefully, and submit to the Reporter any last comments before final action at the June, 1996 meeting. See the Memorandum of February 20, 1996 from the Chair to the Committee soliciting comments. Helpful comments were received from the Chair and from Professor Edward Cooper, Reporter, Civil Rules Advisory Committee. These have been circulated. No further comments were received from members of the Committee.

RECOMMENDATION

On close examination, eight of the sixteen recommendations of the Self-Study have already been implemented, or are no longer necessary due to other changes, including the outcome of a meeting with the Chief Justice on December 13, 1995. (See "*Discussion,*" below.) Five more are within the special authority of the Chair of the Committee, who has taken careful note of the recommendations made. (See *Recommendations 4, 5, 6,* and *11*). This leaves just three recommendations. *Recommendations 8* and *10* express a concern about "the effects of creating local options in the national rules." *Recommendation 16* suggests a change in the rule making process to a biennial cycle "as the norm." These three recommendations can be acted upon at any time by motion of a member of the Committee, and will certainly be reexamined in the context of the pending 1996 Rand Study and the termination of the Civil Justice Reform Act at the end of this year.

The Self-Study has already proved most useful as a source of insight to both the Chair and Committee in making decisions. Like any good planning document, it is already being passed by events. Under these circumstances, ***681** there is no point in formally debating the document or adopting any specific recommendation. The Self-Study should be "received" as voted on January 13, 1996, with special gratitude expressed to Judge Easterbrook and Professor Baker.

DISCUSSION

Recommendations 1, 3, 7, 9, 12, 13, 14, and *15* all concern matters on which action has already been taken, or are currently unnecessary due to other changes. *Recommendation 1* and *9* suggests recommendations to the Chief Justice as to the "personal and professional diversity" of appointments to the Advisory and Standing Committees. These concerns have been brought to the Chief Justice's attention. *Recommendation 3* concerns the need for longer terms for Chairs. This was discussed with the Chief Justice on December 13, 1995.

Recommendation 7 concerns the effective use of data gathered by the Civil Justice Reform Act of 1990. This is already a matter of high urgency to the Chair and Reporter, and will be discussed at length when the Rand Report is in hand later this year. *Recommendations 12* and *13* suggest monitoring the growing demands on the Reporter and continuing the practice of appointing liaison members from the Standing Committee to the Advisory Committees. Both are being done.

Recommendation 14 suggests that the Committee "should continue to improve the style of new and amended rules, and should use its experience to decide whether to revise each set of federal rules fully." All new rules are being amended pursuant to the new style guidelines and under the oversight of the style Subcommittee. The issue of full restyling of complete sets of federal rules was discussed at length with the Chief Justice on December 13, 1995. He agreed that the Federal Rules of Appellate Procedure should be released for public comment in a completely restyled format, and suggested that restylization of other complete sets of federal rules should be held pending experience with the Appellate Rules. This is being done.

Recommendation 15 was to "abolish the Subcommittee on Long Range Planning" and to reassign "issues regarding long range planning" to the Reporter. This was done on January 13, 1996.

Recommendations 2, 4, 5, 6 and *11* are within the power of the Chair of the Committee to implement at anytime, and she has taken careful note of them. *Recommendation 2* suggests orientation meetings with new members. This has already been implemented by the Standing Committee, and has been recommended to the Advisory Committees: *Recommendation 4* suggests using Advisory Committee Reporters to circulate pertinent articles and organizing in-house seminars. This is also being encouraged. *Recommendations 5* and *6* suggest the use of electronic technology to improve the work of the Committees and the better use and development of available data. This is under continuous study, in consultation with the Administrative Office. *Recommendation 11* suggests that "the Standing Committee ..., must be mindful that the primary responsibility for drafting rules changes is assigned to the Advisory Committee" and that "substantial ***682** changes" by the Standing Committee be returned to the Advisory Committee for "further consideration." This is the present policy of the Chair.

All that remains are *Recommendations 8* and *10,* concerning the "effect of creating local options in the national rules" and *Recommendation 16,* suggesting a change in the rulemaking cycle to a "biennial cycle" as "the norm." As indicated above under "*Recommendation,*" these suggestions can be brought forward by motion of any member of the Committee in the context of specific rule changes. A more general discussion is also certain to result this year on the release of the 1996 Rand Study and the termination of the Civil Justice Reform Act of 1990.

In short, the Self-Study has been a most useful project. It is best "received" as an on-going resource for the Committee, rather than "accepted" as a fixed, rigidly applied policy. Special gratitude should be extended to Judge Easterbrook and to Professor Baker for their hard work and wisdom.

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*683 Introduction

At the June 1993 meeting, the Standing Committee directed the Subcommittee on Long Range Planning to undertake a thorough study of the federal judicial rulemaking procedures, including: (1) a description of existing procedures; (2) a summary of criticisms and concerns; (3) an assessment of how existing procedures might be improved; and (4) appropriate proposed recommendations.

The self-study was deferred in anticipation of the January 1994 executive session and related discussion. At that meeting, the Standing Committee decided to solicit public comments. Appendix A to this Report contains a summary of the comments received. In addition, the Subcommittee canvassed the secondary literature. Appendix B to this Report is an annotated bibliography. An interim report was circulated in anticipation of the June 1994 meeting of the Standing Committee. The interim report raised several issues for preliminary discussion at that meeting and solicited further written comments from those in attendance. Drafts were circulated to the Standing Committee in January and July of 1995. After receiving comments from the Advisory Committees, the Subcommittee lays before the Standing Committee this final report, for consideration at the January 1996 meeting.

The following sections organize this Self-Study Report on the federal judicial rulemaking procedures: a History of the origins of modern rulemaking; a description of Current Procedures; a discussion of Evaluative Norms; the Issues and Recommendations for reforms; and a brief Conclusion.

History [1]

Modern federal judicial rulemaking dates from 1958. A few paragraphs of history inform our understanding of current practice.

The Judiciary Act of 1789 first authorized federal courts to fashion necessary rules of practice. [2] A lesser known statute enacted a few days later provided that in actions at law the federal procedure should be the same as in the state courts. [3] This created a system that seems odd to us today: a distinctly national procedure for equity and admiralty, coupled with a static procedure, conforming to the procedure in each state as of September 1789, for actions at law. Procedure for actions at law in federal ***684** courts was frozen, while state courts altered their procedures. The system became more odd, or at least more uneven, in 1828, when a statute required federal courts in subsequently admitted states to conform to 1828 state procedures. The same statute provided that all federal courts were to follow 1828 state procedures, with some discretion, in proceedings for writs of execution and other enforcement procedures. [4] This unsatisfactory system prevented the federal courts from following state procedural reform such as the New York Code of 1848, which merged law and equity and simplified pleading. [5]

The next legislative change came in 1872 when Congress required all actions at law to follow the corresponding state forum's rules and procedures. [6] Under the Conformity Act there were as many different sets of federal rules and procedures as there were states. [7]

This Report is not the place to retell the history of the Federal Rules of Civil Procedure, a story "told in large part in terms of dedicated individuals who worked and campaigned to bring them into existence." [8] What bears emphasis is that until 1938, that is, for the Nation's first 150 years, things were very different from what they are today.

Before 1938, the federal courts followed state procedural law, state substantive statutes, and federal substantive common law, even in diversity cases. Of course, the substantive common law of the forum state was recognized to be controlling in the famous 1938 Supreme Court diversity decision of *Erie Railroad Co. v. Tompkins,* [9] overruling *Swift v. Tyson,* which had stood since 1842. [10] And in the same year, after more than two decades of effort, national rules of procedure were adopted by the

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Supreme Court, which embraced the work of an ad hoc Advisory Committee it had appointed under the Rules Enabling Act of 1934.[11] Thus 1938 marked an inversion in diversity cases: henceforth there would be federal procedural law and state substantive law. Those 1938 rules—recognizable today despite numerous amendments—established a nationally-uniform set of federal procedures, abolished the distinction between law and equity, created ***685** one form of action, provided for liberal joinder of claims and parties, and authorized extensive discovery.

The Supreme Court's ad hoc Advisory Committee comprised distinguished lawyers and law professors. While the ad hoc Committee members have been lionized for their accomplishment of drafting the rules, their more subtle but equally lasting achievement was to establish the basic traditions of federal procedural reform.[12] Two features of that experience have characterized federal judicial rulemaking ever since. First, the ad hoc Committee took care to elicit the thinking and the experience of the bench and bar by widely distributing drafts and soliciting comments, evincing willingness to reconsider and redraft its recommendations. Second, "the work of the Committee was viewed as intellectual, rather than a mere exercise in counting noses."[13] The ad hoc Committee recommended to the Supreme Court what it considered the best rules rather than rules that might be supported most widely or might appease special interests. Although the rulemaking process has been revised over the years since, these traditions have endured.

This positive experience located rulemaking responsibility inside the judicial branch, but the modern rulemaking process continues to evolve. A year after the new rules went into effect, the Supreme Court called on the ad hoc Advisory Committee to submit amendments, which the Court accepted and sent to Congress, and which became effective in 1941.[14] The next year, the Supreme Court designated the ad hoc Committee as a continuing Advisory Committee, which thereafter periodically submitted rules amendments through the 1940s and early 1950s.[15] But rumblings of dissatisfaction were heard, attributable in part to a perception that the Supreme Court merely rubber-stamped the recommendations from the Advisory Committee. Several of the Justices agreed with that criticism, dissenting from orders to complain that the proposals were not actually the work of the Court.[16] Other observers had misgivings about the tenure and influence of the members of the Advisory Committee, who served until resignation or death. In 1955 the Advisory Committee submitted an extensive report to the Supreme Court with numerous proposed amendments. The Court neither acted on the Report nor explained its inaction. Instead, the Justices ordered the Committee "discharged with thanks" and revoked its authority as a continuing body.[17]

The resulting void in rulemaking led the American Bar Association, the ***686** Judicial Conference, and other groups to express concern.[18] At the time, there was no small controversy over whether the Court should designate a new committee and how the members might be selected. A consensus emerged that some ongoing rulemaking process was desirable, but that the process had to be reformed. The replacement rulemaking procedures were designed by Chief Justice Earl Warren, Justice Tom C. Clark, and Chief Judge John J. Parker of the Fourth Circuit, during their cruise to attend the 1957 American Bar Association Convention. Justice Clark recalled: "On our daily walks around the deck of the Queen Mary, we thrashed out the problem thoroughly, finally agreeing that the Chief Justice, as the Chair of the Judicial Conference, should appoint the committees which would give them the tag of 'Chief Justice Committees.' "[19] This "Queen Mary Compromise" led to a statutory amendment by which Congress assigned responsibility to the Judicial Conference for advising the Supreme Court regarding changes in the various sets of federal rules—admiralty, appellate, bankruptcy, civil and criminal—which only the Court had formal statutory authority to amend.[20] The rulemaking process today follows the basic 1958 design.[21] Only two developments in rulemaking since then are sufficiently noteworthy to deserve brief mention in this history.

First, there was a showdown over the Federal Rules of Evidence. An Advisory Committee on Rules of Evidence was created in 1965. Following standard rulemaking procedures, after extensive study, the Advisory Committee promulgated a set of proposed rules in 1972. Those proposed rules were highly controversial, especially the rules dealing with evidentiary privileges. Congress postponed the rules of evidence pending further legislation. Then Congress made substantial revisions before enacting rules of evidence into law, effective in 1975.[22] The legislative veto provision attached to all rules of evidence has since been discarded, but the applicable statute still provides that any revision of the rules governing evidentiary privileges shall have no force unless

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approved by Congress.[23] The Chief Justice reestablished an Advisory Committee on the Rules of Evidence in 1993, after a 20-year hiatus. This committee has embarked on a comprehensive review of the subject, but has decided not to reopen the privileges question.

***687** Second, Congress amended the Rules Enabling Act in 1988 to require the rules committees to hold open meetings, maintain public minutes, and afford wider notice of proposals and longer periods for public commentary on proposed rules.[24] Rulemaking today is more accessible to interested parties than ever before. It is also slower, and the exchange is not an unmixed blessing. In the wake of the 1988 changes, only Congress can change rules with dispatch. This means that any group with a perceived pressing need seeks its forum in the legislature rather than the judiciary, and today Congress regularly demonstrates its interest in federal rules matters by holding committee hearings and amending the rules themselves.

Current Procedures[25]

Congress has authorized the federal judiciary to prescribe the rules of practice, procedure, and evidence, subject to an expressly reserved legislative power to reject, modify, or defer any judicially-made rules. This statutory authorization is found in the Rules Enabling Act.[26] Pursuant to this statutory authorization and responsibility, the judicial branch has developed an elaborate committee structure with attendant rulemaking procedures. The *Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure* describe the current procedures for judicial rulemaking.[27] These rulemaking procedures were adopted by the Judicial Conference of the United States. They govern the operations of the Standing Committee and the various Advisory Committees in drafting and recommending new rules or amendments to the present sets of federal rules of practice and procedure.

The Judicial Conference of the United States consists of the Chief Justice of the United States, the chief judges of the 13 United States courts of appeals, the Chief Judge of the Court of International Trade, and 12 district judges chosen for a term of 3 years by the judges of each circuit. The Judicial Conference meets twice every year to consider administrative problems and policy issues affecting the federal judiciary and to make recommendations to Congress concerning legislation affecting the federal judicial system.[28] It also acts through an Executive Committee on some matters.

By statute, the Judicial Conference is charged with carrying on a "continuous study of the operation and effect of the general rules of practice and procedure."[29] The Conference is empowered to recommend changes and ***688** additions in the federal rules "from time to time" to the Supreme Court, in order to "promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay."[30]

To perform these responsibilities of study and drafting, the Judicial Conference has created the Committee on Rules of Practice, Procedure, and Evidence (Standing Committee)[31] and various Advisory Committees (currently one each on Appellate Rules, Bankruptcy Rules, Civil Rules, Criminal Rules and Evidence Rules). All appointments are made by the Chief Justice of the United States, for a three-year, once-renewable term. Members are federal and state judges, practicing attorneys, and scholars. On recommendation of the Advisory Committee's chair, the Chief Justice appoints a reporter, usually from the academy, to serve the committee as an expert advisor. The reporter coordinates the committee's agenda and drafts the rules amendments and the explanatory committee notes.

The Standing Committee coordinates the rulemaking responsibilities of the Judicial Conference. The Standing Committee reviews the recommendations of the various Advisory Committees and makes recommendations to the Judicial Conference for proposed rules changes "as may be necessary to maintain consistency and otherwise promote the interest of justice."[32] The Secretary to the Standing Committee, currently the Assistant Director for Judges Programs of the Administrative Office of the U.S. Courts, coordinates the operational aspects of the entire rulemaking process and maintains the official records of the rules

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committees. The Rules Committee Support Office of the Administrative Office provides day-to-day administrative and legal support for the Secretary and the various committees. [33] The Federal Judicial Center provides staff assistance, particularly with respect to research. [34]

Rulemaking procedures are elaborate:

> The pervasive and substantial impact of the rules on the practice of law in the federal courts demands exacting and meticulous care in drafting rule changes. The rulemaking process is time-consuming and involves a minimum of seven stages of formal comment and review. From beginning to end, it usually takes two to three years for a suggestion to be enacted. [35]

***689** By delegation from the Judicial Conference, each Advisory Committee is charged to carry out a "continuous study of the operation and effect of the general rules of practice and procedure" in its particular field. [36] An Advisory Committee considers suggestions and recommendations received from any source, new statutes and judicial decisions affecting the rules, and other relevant legal commentary. "Proposed changes in the rules are suggested by judges, clerks of court, lawyers, professors, government agencies, or other individuals and organizations." [37] Copies or summations of all written recommendations and suggestions that are received are first acknowledged in writing and then forwarded to each member. The Advisory Committees meet at the call of the chair. Each meeting is preceded by notice of the time and place, including publication in the *Federal Register*, and meetings are open to the public. [38] Upon considering a suggestion for a rules change, the Advisory Committee has several options, including: (1) accepting the suggestion, either completely or with modifications or limitations; (2) deferring action on the suggestion or seeking additional information regarding its operation and impact; (3) rejecting the suggestion because it does not have merit or would be inconsistent with other rules or a statute; or (4) rejecting the suggestion because, while it may have some merit, it is not really necessary or sufficiently important to warrant a formal amendment. [39]

The Reporter to the Advisory Committee, under the direction of the Advisory Committee or its Chair, prepares the initial drafts of rules changes and "Committee Notes" explaining their purpose or intent. The Advisory Committee then meets to consider and revise these drafts and submits them, along with an Advisory Committee Report which includes any minority or separate views, to the Standing Committee. The reporters of all the Advisory Committees are encouraged to work together, with the reporter to the Standing Committee, to promote clarity and consistency among the various sets of federal rules; the Standing Committee has created a Style Subcommittee, with its own Consultant, that works with the Advisory Committees to help achieve clear and consistent drafts of proposed amendments.

Once the Standing Committee approves the drafts for publication, the proposed rules changes are printed and circulated to the bench and bar, and to the public generally. Every effort is made to publish the proposed rules widely. More than 10,000 persons and organizations are on the mailing list, including: federal judges and other federal court officials; United States Attorneys; other federal government agencies and officials; state chief justices; state attorneys general; law schools; bar associations; and interested lawyers, individuals and organizations who request to be included on the distribution list. [40] A notice is published in the *Federal Register* and the proposed rules changes also are reproduced with explanatory committee ***690** notes and supporting documents in the West Publishing Company's advance sheets of *Supreme Court Reporter*, *Federal Reporter*, and *Federal Supplement.* [41] As a matter of routine, copies are provided to other legal publishing firms. Anyone who requests a copy of any particular set of proposed changes may obtain one.

The comment period runs six months from the *Federal Register* notice date. The Advisory Committee usually conducts public hearings on proposed rule changes, again preceded by widely-published notice. The hearings typically are held in several geographically diverse cities to allow for regional comment. Transcripts of the hearings are generally available. The six-month time period may be abbreviated, and the public hearing cut out, only if the Standing Committee or its Chair determines that the administration of justice requires that the process be expedited.

At the conclusion of the comment period, the reporter prepares a summary of the written comments received and the testimony presented at public hearing for the Advisory Committee, which may make additional changes in the proposed rules. If there are substantial new changes, there may be an additional period for public notice and comment. The Advisory Committee then submits the proposed rule changes and Committee Notes to the Standing Committee. Each submission is accompanied by a separate report of the comments received which explains any changes made subsequent to the original publication. The report also includes the minority views of Advisory Committee members who chose to have their separate views recorded.

The Standing Committee coordinates the work of the several Advisory Committees, individually and jointly. Although on occasion the Standing Committee suggests actual proposals to be studied, its chief function is to review the proposed rules changes recommended by the Advisory Committees. Meetings of the Standing Committee are open to the public and are preceded by public notice in the *Federal Register.* [42] Minutes of all meetings are maintained as public records and made available to interested parties.

The Chair and Reporter of each Advisory Committee attend the meetings of the Standing Committee to present the proposed rules changes and Committee Notes. The Standing Committee may accept, reject, or modify a proposal. If a Standing Committee modification effects a substantial change, the proposal may be returned to the Advisory Committee with appropriate instructions, including the possibility of a second publication for another period of public comment and public hearings. The Standing Committee transmits the proposed rule changes and Committee Notes approved by it, together with the Advisory Committee report, to the Judicial Conference. The Standing Committee's report to the Judicial Conference includes its recommendations and explanations of any changes it has made, along with the minority views of any members who wish to record separate statements.

The Judicial Conference, in turn, transmits those recommendations it approves to the Supreme Court of the United States. Formally, the ***691** Supreme Court retains the ultimate responsibility for the adoption of changes in the rules, accomplished by an Order of the Court. [43] The Supreme Court has at times played an active part, refusing to adopt rules proposed to it and making changes in the text of rules. [44] In practice, however, the Advisory Committees and the Standing Committee are the main engines for procedural reform in the federal courts. Under the enabling statutes, [45] amendments to the rules may be reported by the Chief Justice to the Congress at or after the beginning of a regular session of Congress but not later than May 1st. The amendments become effective no earlier than December 1 of the year of transmittal, if Congress takes no action. [46]

Since 1958 this rulemaking procedure has been followed regularly. [47] Spirited debates have been generated, from time to time, over particular proposals and sets of amendments. Some of these controversies have been resolved within the Third Branch. In recent years, these rulemaking procedures have been followed with the result that particular proposals have been rejected at each level of consideration—at the Advisory Committees, at the Standing Committee, at the Judicial Conference, and at the Supreme Court—often with attendant public debate and occasionally with high controversy. Debate likewise has attended proposals that have been approved. For example, the thorough changes to the civil discovery provisions in 1993 drew a separate statement from one member of the Supreme Court and a dissenting statement from three others.

Other controversies have played out in the Congress. For example, the 1993 amendments were the subject of hearings in both the Senate and the House of Representatives. A bill to rescind some of the discovery rules changes in that package passed the House but did not reach the floor of the Senate. Most recently, Congress included three new rules of evidence in the Violent Crime Control and Law Enforcement Act of 1994. [48] But over the years judges and the judiciary regularly have been heard to urge that ***692** Congress should feel obliged to exercise greater self-restraint in this regard and defer to the Rules Enabling Act process.

Evaluative Norms [49]

It is worth a few pages to consider rulemaking procedures from a normative vantage, to ask what are the explicit and implicit norms that overlay the entire enterprise of federal judicial rulemaking, beyond the more familiar first level of abstraction that would consider the policy underlying some specific rule change. This vantage includes rulemaking norms as they are currently understood as well as how they might be "reimagined." If rulemaking procedures are a meta-procedure, in the sense they are the procedures followed to promulgate new court procedures, then this segment of this Report, for what it is worth, might be described as a meta-meta-procedure. To describe it this way is to admit that this part has the smell of the lamp about it.

Inadequacies. Some argue that the existing norms to be found in the federal rules are not adequate and do not contemplate all that must be taken into account in a meaningful assessment of rulemaking as a process. Rule 1's goal for the federal civil rules is the "just, speedy, and inexpensive determination of every action." Although the three specified norms of justice, speed, and economy in civil litigation are rooted in common sense, they beg some of the most important questions that face rulemakers.

In a world in which time is money, speed and economy are two sides of the same figurative coin—and the sides are indistinguishable. Standing alone, they would argue for deciding every case by the quickest (and therefore cheapest) means possible—such as the flip of a more conventional coin on which the head does not mirror the tail. Of course a "heads or tails" system of resolving civil disputes would be intolerable, because it would be unjust. But the norm of justice lends itself more easily to condemnation of offered measures, rather than to a constructive way to sort proffered reforms, because it conceals at least two competing conceptions of what justice requires.

On the one hand, justice has something to do with fairness to individuals. Civil cases ought to reach the "right" result—the outcome that would follow if every relevant fact were known with absolute accuracy, if all uncertainty in meaning or application were wrung out of every relevant proposition of law, and if society itself could by some extraordinary plebiscite resolve whether the application of the general law to the unique circumstances of a particular case should be tempered by overriding concerns of the situational equity.

On the other hand, justice also has something to do with concerns of equality and aggregate social efficiency. If we were to allocate all of our resources to attaining the Nth degree of accuracy and absolute equity in our determinations of legal liability in a particular case, there would be far less, if any, resources left to adjudicate other deserving cases, let alone to ***693** accomplish all of the other functions government performs besides deciding civil disputes. Moreover, if equity were given a standing veto over pre-existing legal rules as applied to the actual facts of any given case, we would subvert the system of reliance on protected expectations that permits a society to function amid a welter of conflicting interests without every such conflict becoming a contested dispute brought into court.

The fact that Rule 1 speaks of a just determination in *every* case, not only the one before a judge at any given moment, is more a reminder of the inevitable tension between concerns of fairness and efficiency than a criterion for resolving that tension. It should therefore be no surprise that the history of federal civil procedure under the Federal Rules has featured a continuous but seldom explicitly elaborated struggle between what might be labeled the "primacy of fairness" versus the "primacy of efficiency." The "primacy of fairness" argues for subordination of procedural rules in favor of reaching the merits of the parties' dispute under the substantive law, and conditioning the finality of determination on liberal opportunities for amendment of pleadings, reconsideration by the trial court, and appellate review. The "primacy of efficiency" argues for rigorous enforcement of procedural rules to narrow the range of the parties' dispute and to expedite decision, and limiting the opportunity for, and scope of, appellate review.

Alternatives. What alternative or additional norms might be imagined for federal judicial rulemaking, beyond the norms that might be considered for the particular rules and procedures themselves? Federal rules of procedure should be adopted, construed, and administered to promote five related norms: efficiency, fairness, simplicity, consensus, and uniformity.

The application of the norm of efficiency to the rulemaking process requires an assessment of how costly it is to initiate consideration of a rule change and for that proposal to proceed to implementation by the federal courts. That assessment is

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itself rather complicated, requiring, for instance, consideration of the social cost of the rulemaking process in terms of how much more time the rulemakers would have spent adjudicating cases, representing clients, or teaching students and conducting research, had they not been involved in the rulemaking process.

The assessment of the efficiency of the rulemaking process is further complicated by being interactive with assessment of the efficiency of the actual rules the rulemaking process produces. A conservative and time-consuming process of rulemaking may be less costly than fast-track rulemaking that taxes the litigation system with a constant need for retraining and a high rate of error attributable to unfamiliarity with as-yet unconstrued new rules, unless it can be shown that the long-run efficiency gains of new rules are consistently high. The inefficiency of frequently changing the rules might argue either for keeping the rulemaking process inefficient and thus resistant to proposals for change, or for adopting some form of staging process by which rule changes are limited, absent exceptional circumstances, to a prescribed schedule of once every so many years. Moreover, since the Judicial Conference does not have monopoly power in rulemaking, the relative efficiency of either an inert or a volatile judicial rulemaking process will be determined, in part, by the efficiency or inefficiency of the rules likely to be produced by direct Congressional action, or by ***694** Congressional delegation of local rulemaking power to individual district courts, should centralized rulemaking by the Judicial Conference committee structure be deemed unduly torpid.

As applied to the rulemaking process, the norm of fairness calls not only for receptivity to proposals for change by those not directly vested with rulemaking power, but also for access to the process of implementing a proposed rule change by those whose interests are most likely to be affected by any proposed change. How seriously is public comment encouraged and facilitated, and is this a pro forma gesture or is there evidence that adverse public comment makes a difference in the progression of a proposal into a rule change? As applied to the rules that the process produces, the norm of fairness requires evaluation of whether changes in the rules promote or retard the likelihood that individual cases will come to the right result, whether by adjudication or pro tanto by settlement, in relation to the efficiency gains or losses that result from such changes. Is the rulemaking system biased in favor of ratcheting up efficiency at the expense of fairness, or vice versa?

The norm of simplicity, specified in 28 U.S.C. § 331, serves the related interests of both efficiency and fairness. Unduly complex rules of procedure not only increase the cost of training, compliance, and enforcement, but also increase the likelihood of mistaken and hence unfair application. Any rulemaking process that regularly produces unduly complex rules of procedure or unduly complicates existing simple rules threatens the systemic goals of efficiency and fairness.

As applied to the rulemaking process, the norm of consensus overlaps, but does not duplicate, the norm of fairness. The norm of consensus demands, first, that the rulemaking process be sufficiently open to public input to be fairly representative of, or at least sensitive to, the interests of those who will be most affected by the rules it produces. But this norm demands more than mere notice and the opportunity to be heard. There must be some sharing of, or at least constraint upon, the power to make new rules, so that a lack of consensus about the wisdom of problematic proposed rules will normally suffice to block the adoption of such rules. Consensus should not be too strong a norm, however, because it favors the status quo. At the same time, the expectation for consensus should render the rulemaking process sufficiently inert to resist utopian reform by policymakers who are so detached from the arena of litigation to which the rules are directed that they are indifferent to the practical impact of rule changes upon those most affected by them.

The norm of uniformity is fundamental to the rulemaking process first set in place by the 1934 Rules Enabling Act. The Act was intended to promote a system of federal procedure that was not only trans-substantive but, with minor local variations, uniform in application in all federal district courts. Geographical uniformity is more important than trans-substantive application of the federal rules. Deviations from trans-substantive uniformity can, where necessary and appropriate, be expressly specified within the rules. Current examples are the special rules for class actions brought derivatively by shareholders, and the entire set of discrete rules of procedure for bankruptcy cases. But geographical disuniformity, even when expressly ***695** permitted by local opt-out provisions inserted into the national rules, operates insidiously and often covertly to impair the norms of both efficiency and fairness.

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The norm of uniformity demands that the procedure for litigating actions in federal courts remain essentially similar nationwide. If each district court's rules of civil procedure are allowed to become sufficiently distinct that venue may affect outcome and that a special aptitude in local procedure becomes essential to competent representation in that court, forum-shopping would be encouraged. Moreover, litigants must either risk the unfairness of inadvertent mistake in conforming to localized rules of procedure or incur inefficient costs of insuring against the idiosyncrasies of local practice by ad hoc procedural research or the prophylactic retention of local counsel.

Issues and Recommendations

In this section of this Report, we turn to issues, analyses, and recommendations. [50] We take up issues related to the five entities in rulemaking: Advisory Committees; Standing Committee; Judicial Conference; Supreme Court; and Congress. The report concludes with a discussion of the time line of rulemaking.

A. Advisory Committees

Memberships: Criticisms have been leveled at the composition of the various rules committees. First, there have been allegations of an under-representation of the bar, particularly active practitioners, and of other identifiable interest groups within the bar, such as public interest lawyers. The often implied but sometimes explicit objection is that the Advisory Committees are dominated by federal judges. Second, there have been allegations of a lack of diversity of members. The argument is that the Advisory Committees ought to mirror the diversity of the federal bar, which includes more women and minorities than are currently found on the federal bench.

These are considerations for the attention of the appointing authority, the Chief Justice. In recent years, the Advisory Committees have been enlarged to include more non-judges. Whether they (and the Standing Committee) have already become too large for sustained exchanges and careful discussion is an interesting question; drafting by large committees is rarely successful. We doubt that they should be larger; perhaps they should be smaller. At all events, the rules committees are committees of the Judicial Conference of the United States, the policy-making entity of the Third Branch. They are not “bar” committees. “Representativeness”—seats on the Advisory Committee for major identifiable factions of the bar—is incompatible with the tradition of federal rulemaking based on a disinterested expertise, as opposed to interest-group politics. Rulemaking ought not follow public opinion or the ratio of specialties at the bar.

***696** Federal judges ought to remain a majority of the members of the Advisory Committees. They have the knowledge and time to act in the best interest of the public those courts serve. They are of course lawyers too, with experience on both sides of the bench. The ability to compare these two experiences makes judges especially appropriate rulemakers. This is not to say that the appointing power ought to be exercised without regard to the concerns we have mentioned. It is enough to suggest that these considerations be given appropriate attention and that efforts be made to identify well-qualified candidates with diverse personal and professional experiences. Some recognition may appropriately be given to enduring divisions in the practice of law. For example, the Advisory Committee on the Criminal Rules includes a representative of the Department of Justice and a Federal Public Defender. Analogously, the Civil Justice Reform Act of 1990 required that advisory groups be “balanced and include attorneys and other persons who are representative of major categories of litigants” in each district. [51]

To help achieve these goals, the Chief Justice now solicits advice widely from within the federal judiciary and the Administrative Office of the U.S. Courts. The Chief Justice could consider seeking suggestions from the American Bar Association and similar other organizations as well. [52]

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[1] Recommendation to the Chief Justice: Appointments to the Advisory Committees should reflect the personal and professional diversity in the federal bench and bar.

Length of terms: Members' terms on the Advisory Committee should be long enough to maintain continuity and to allow a member to see a proposal through to adoption, but not so long as to create inflexibility and to render rulemaking an "insider's game." The current practice is to appoint members for an initial three-year term followed by a second three-year term. On balance, this seems a reasonable normal term of years for members, but the Chief Justice should retain his existing discretion to make exceptions when appropriate to help committees follow through with extended rulemaking projects.

Members must master a potentially bewildering number of proposals within a complex process. The Chair, Reporter, and veteran members of the Advisory Committee can be of great assistance. The rotation on and off of the Advisory Committee affords new members a break-in period. This by-product is reason to maintain the staggered terms. Still, more formal assistance might be appropriate. This might take the form of an orientation meeting scheduled the day before the regular meeting of the Advisory Committee, attended by the new members, the Chair, and the Reporter, and perhaps others. Additionally, the Standing Committee and the Advisory Committees should continue to invite members whose terms have expired to attend the meeting after their term ends, in order to promote continuity.

***697 [2] Recommendation to the Advisory Committees: Chairs and Reporters of the Advisory Committees should schedule orientation meetings with new members.**

Somewhat different considerations obtain for Chairs. Rulemaking projects take three years from beginning to end. A Chair with a three-year term therefore can see a project through only if it commences at the outset of his or her tenure. A leader ought to be granted some time to think through proposals, to make them, and still have time to see them through. Reporters now serve indefinitely. Making a non-member of the committee the only enduring voice is questionable. A Chair, too, ought to provide continuity within the Advisory Committee and the Standing Committee. It is not uncommon for the Chairs to represent the judicial branch before the Congress. The practice of elevating an experienced member to the Chair is appropriate. If a Chair is designated at the end of one three-year term, a term of five years as Chair would be appropriate, increasing total service to eight years. This duration is not out of line in a life time-tenured institution. The shorter terms of members preserve sufficient opportunity for widespread involvement in rulemaking.

[3] Recommendation to the Chief Justice: The term for Chairs of the Advisory Committees should be five years.

Resources and support: Members of the Advisory Committees need sufficient resources and support for their part-time but nonetheless important duties. The permanent staff from the Administrative Office provides necessary logistical support for attending meetings and related duties. The Reporters provide important expertise and drafting assistance. Members exchange information about new developments as a matter of routine. Liaison members of the Standing Committee also contribute to the smooth operation of the committee system. The paper-flow through the Advisory Committees is substantial. The relevant literature in each of these areas of the law is growing rapidly.

Because committee members are part-time rulemakers it might be useful to provide them with some regular entrée to the secondary literature, including law journals and social-science publications that have some bearing on their responsibilities. The Reporters are the most logical bibliographers.

Various Advisory Committees have planned in-house seminars, presentations by panels of experts in their field, to bring members up-to-date on recent developments. These "continuing education" events should be continued.

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[4] Recommendation to the Advisory Committees: Each Advisory Committee ought to consider adding to the Reporter's duties two tasks: first, regularly circulating law journal articles, social-science publications, and other pertinent articles; second, arranging and organizing in-house seminars.

Outreach and intake: One frequently heard criticism of federal rulemaking is that it is a closed process dominated by insiders and elites. The twin complaints are that some worthy proposals go begging for lack of a sponsor and some equally unworthy proposals are pushed through the process by ***698** members with an agenda. In fact, anyone can suggest a rules amendment; the Committees' meetings are open to the public, periods for public comment and public hearings are routine steps; proposed rules changes are widely published and distributed; [53] and the official records of the various rulemaking entities are public documents. Unless a flood of comments prevents it, the Advisory Committee (through its Secretary) acknowledges correspondence and later advises every correspondent of the action taken on his or her proposal. But even inaccurate perceptions have a way of overtaking reality, and they cannot go unchallenged. The Administrative Office's brochure entitled *The Federal Rules of Practice and Procedure—A Summary for Bench and Bar* is a good example of the ongoing effort to correct misconceptions about federal rulemaking. In August 1994 the Chair of the Standing Committee wrote the presidents of all state bar associations, requesting them to designate persons to receive drafts and make comments; so far 42 of the state bars have done this. Advisory Committees have established some independent points of contact.

To promote both the appearance and reality of openness, greater uses of technology should be explored. The extensive mailing list for requests for comments on proposed rules changes usually generates only a few dozen responses. Not infrequently, public hearings scheduled for proposals are canceled for lack of interest.

There are alternate ways to reach interested persons. For example, the public hearing before the April 1994 meeting of the Advisory Committee on the Criminal Rules was broadcast on C-SPAN. Other things might be tried. Public hearings might be conducted relying on closed-circuit television. Proposed rules changes, traditionally distributed in print media, can be made available on the Internet at low cost. Most universities and agencies of the federal government already have access to the Internet —although most federal judges do not. Law firms are increasingly likely to be connected to the Internet. The most recent set of proposed amendments published for comment has been made available via the Administrative Office's home page. [54] Persons should be permitted to lodge their comments online for collection and transmittal to the Advisory Committee. The Advisory Committees and the Standing Committee could communicate by e-mail and other electronic means. Distribution of documents by fax can be discontinued and replaced by distribution of attachments to e-mail messages.

[5] Recommendation to the Administrative Office: Electronic technologies should be used to promote rapid dissemination of proposals, receipt of comments, and the work of the rules committees.

***699 The need for research:** It is frequently asserted, most often by academic critics, [55] that federal rulemaking today is too dependent on anecdotal information rather than empirical research. Rules changes more often than not depend on the legal research of the Reporters combined with the informed judgment of the members of the rules committees. To make this argument is not necessarily to find fault with the model of disinterested experts as rulemakers. Nor does the argument deny the not-infrequent, well-documented instances when rulemakers have relied on empirical research. [56] Yet not enough has been done to incorporate empirical research into rulemaking on a regular basis. The major difficulties: research is expensive, it takes a long time, and the results are of doubtful utility when they come from survey research or from demonstration projects. Controlled experiments are rare indeed, and sophisticated econometric analysis of variation (the subject of the next section) is difficult to conduct.

We cannot expect members of the rules committees to be experts in empirical research techniques, although a few have been. We can expect the Reporters to be well-versed in the literature related to their expertise, including interdisciplinary writings and studies in other disciplines that have some bearing. Indeed, this ought to be a criterion for appointment of Reporters. It might

also be prudent for the Reporters to recruit colleagues in other disciplines whose expertise complements their own, as a kind of informal group of advisors. Additionally, the Administrative Office and the Federal Judicial Center may be called on to gather, digest, and synthesize empirical work of other institutions. The Advisory Committees should notify these institutions about what data ought to be collected. The Federal Judicial Center, in particular, should engage in original rules-related empirical research to determine how procedures are working. Likewise, the Center is adept at field studies and pilot programs—although, as we have observed, data from such projects is problematic, if only because of selection effects in litigation. (Litigants settle when they agree on a probable outcome; samples of litigated cases then may reflect the degree of uncertainty rather than the anticipated operation of the system. Moreover, the amounts paid in settlement, which may be the best indicators of anticipated performance, are rarely available to researchers.) Advisory Committees must take advantage of available data. Finally, a program might be developed for commissioning independent studies to be performed by outside experts under contract with the Advisory Committee.

In sum: the Standing Committee ought to be able to expect that the Advisory Committees will rely to the maximum possible extent on empirical data as a basis for proposing rules changes.

[6] Recommendation to all the Advisory Committees: Each Advisory Committee should ground its proposals on available data and develop mechanisms for gathering and evaluating data that are not otherwise available, and should use these data to decide whether changes in existing rules should be proposed.]

***700** An empirical research project of national scope is taking place under the auspices of the Civil Justice Reform Act of 1990. [57] Indeed, some have suggested that the program of district-by-district plans for case management has effectively created a second track of federal rulemaking that threatens the policy goals of national uniformity and political neutrality behind the Rules Enabling Act process. The pilot programs and district plans present an unparalleled opportunity for empirical research into the effectiveness of reforms, within districts and comparing districts with other districts. The Judicial Conference delegated primary responsibility for oversight and evaluation under the Act to the Committee on Court Administration and Case Management. But, as members of the Standing Committee will recall, the Standing Committee has established a liaison with that Committee. Congress has extended the deadline for reporting to December 31, 1996. [58]

The Advisory Committee on the Civil Rules has the most direct interest in the evaluation of the delay and cost reduction plans. That Advisory Committee will be obliged to conduct its own assessment of the final report to Congress with the expectation that some local innovations in practice and procedure will deserve to be incorporated into the Federal Rules of Civil Procedure—and that less successful innovations will be abandoned, if necessary by being forbidden in the national rules. (We return below to the subject of uniformity.) The final report of the RAND study will provide the Advisory Committee with data for assessing future proposals for rules changes. In the long run, the Advisory Committees and the Standing Committee ought to be expected to learn to better utilize empirical research during the evaluation and reporting cycle. To this end, the Standing Committee should request that the Advisory Committee on Civil Rules provide a written report generalizing from the experience with the 1990 Act.

[7] Recommendation to the Advisory Committee on the Civil Rules: The Advisory Committee should report on and make suggestions about how data gathered from the experience under the Civil Justice Reform Act of 1990 might effectively be used in rulemaking.

Finally, the Standing Committee ought to go about gathering information about the experiences with the phenomenon of local options in the national rules. As part of the 1993 amendments to the Federal Rules of Civil Procedure, districts were afforded the discretion to opt-in or opt-out of various discovery rules changes. The resulting patchwork provides the equivalent of field experiments in the effectiveness of the optioned rules changes. The Federal Judicial Center has begun to collect data on the experience with opting in and out. The Standing Committee should recommend that the Advisory Committee on Civil Rules, in conjunction with the Federal Judicial Center and scholars, seek to evaluate and compare the experiences between districts that opted-in and those that opted-out. This study ought to assess the particular measures involved and offer guidance to the

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Standing Committee on the future appropriateness of writing local options into the national rules. There should be no bias in this inquiry: ***701** although it has long been a belief of the Standing Committee that uniform rules would facilitate a national practice, this belief should be investigated rather than treated as a shibboleth.

[8] Recommendation to the Advisory Committee on the Civil Rules: The Advisory Committee should assess the effects of creating local options in the national rules.

B. Standing Committee

Membership: The discussion about the composition of membership on the Advisory Committees will not be rehearsed here. Much of it applies to the Standing Committee.

It has been suggested that the Standing Committee should be reconstituted to consist only of an independent chair plus the chairs of the various Advisory Committees—or perhaps to have overlapping membership with the Advisory Committees, comprising the Chair plus one or two members of each Advisory Committee. Such a change would reduce the effectiveness of the Standing Committee as an independent voice (and a check), but it would increase continuity and ensure that each member is more thoroughly versed in the subject. The Chief Justice should consider each side of this balance in selecting the composition of the Standing Committee. One middle position between constituting the Standing Committee wholly from members of the Advisory Committees would be to make the Chairs full members of the Standing Committee, giving them *de jure* the roles that many have assumed *de facto* in recent years. We make no concrete suggestion here but again commend this possibility to the consideration of the Chief Justice.

The criticism that the committees do not "represent" the bar resonates more for the Advisory Committees, which have principal drafting responsibility, than for the Standing Committee. Therefore, we do not suggest enlarging the membership of the Standing Committee to include more attorneys. Nevertheless, it is proper to take into account goals of diversity in membership.

[9] Recommendation to the Chief Justice: Appointments to the Standing Committees should reflect the personal and professional diversity in the federal bench and bar.

Assuring uniformity. The Rules Enabling Act process is supposed to achieve and maintain a uniform national system of federal practice and procedure. National uniformity has been undermined by three factors. First, the ADR movement has created a menu of "nouveaux procedures"[59] that present choices of different resolution procedures for different kinds of disputes. Second, the Civil Justice Reform Act of 1990 balkanized rulemaking authority. Third, the Standing Committee has followed something of a reverse King James Version of rulemaking that "taketh away" and then "giveth": the Standing Committee's Local Rules Project has harmonized local rules with the national rules, but in recent rules amendments, e.g., Fed.R.Civ.P. 26(a), the Standing Committee has authorized district courts to strike off on their own paths, even to reject the national rule. But the new Fed.R.Civ.P. 83, effective on December 1, 1995, insists that local rules be ***702** consistent with, and not duplicate, national rules. To promote uniformity in other areas, the Standing Committee has circulated to all district courts a report of the Local Rules Project on criminal rules, and the Reporter has prepared a careful study that will serve as the basis of initiatives looking toward more uniform rules of ethics.

To identify these three developments is not to pass judgment on them, although the worry often heard is that the federal courts are reverting to the pre-1938 era of local procedure. It would not be appropriate for our Subcommittee to recommend a once-and-for-all solution—though we have already suggested taking a good hard look at the consequences. The Judicial Conference's own Long Range Planning Committee was unable to suggest a concrete solution.[60] Our exercise in taking the long-range view would not be complete if we did not at least draw attention to a worry expressed by many on the bench and in the bar. The worry is that the national rules and rulemaking are well on their way to becoming merely the lounge act and not the main room attraction in federal practice and procedure.

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[10] Recommendation to the Standing Committee: The Standing Committee ought to keep the goal of national uniformity prominent in its expectations and decisionmaking. The Local Rules Project initiatives should be understood as a part of the continuing duty of the Standing Committee. There ought to be a strong but rebuttable presumption against local options in the national rules.% B

Redrafting proposals. The main task of drafting proposed rules belongs to the Advisory Committees. The Advisory Committees possess the requisite expertise and serve as the focal point for suggestions and public commentary on the present and proposed rules. Rulemaking procedures and tradition, however, recognize that the Standing Committee may revise drafts of proposed rules submitted by the Advisory Committees, before or after the public comment period. Those procedures and traditions likewise anticipate that the Standing Committee will exercise self-restraint. Members of the Standing Committee should communicate concerns about style and grammar to the Chairs and Reporters of the Advisory Committees before the meeting of the Standing Committee begins, to permit these matters to be rectified off the floor (it is easier to draft in small, peaceful groups) and presented to the Standing Committee in writing to facilitate careful reflection. Meetings of the Standing Committee then can focus on substance. We recognize, of course, that style and substance may be inseparable. If in the judgment of the Standing Committee a proposal requires substantial changes for either style or substance, the draft ought to be returned to the Advisory Committee. This division of the rulemaking labor obliges the Standing Committee to be aware of its function and respectful of the role of the Advisory Committees.

[11] Recommendation to the Standing Committee: The Standing Committee and its members must be mindful that the primary *703 responsibility for drafting rules changes is assigned to the Advisory Committees. Members of the Standing Committee should facilitate careful changes in language. If in the judgment of the Standing Committee a proposal requires substantial changes, the Standing Committee should return the measure to the Advisory Committee for further consideration.

Reporter. The Reporter to the Standing Committee has duties different from the those of the Reporters to the Advisory Committees. The former serves as a drafter, but the limited drafting function of the Standing Committee likewise limits this responsibility of its Reporter. The Reporter facilitates communication between the Advisory Committees and the Standing Committee, especially between regular meetings of the Standing Committee, by attending the meetings of the Advisory Committees and by communicating with their Reporters. The Reporter advises the Chair, assists the Administrative Office rules committee staff, and cooperates with the Federal Judicial Center. The Reporter monitors Congressional activities that are related to rulemaking and rules proposals. The Reporter keeps the Standing Committee abreast of commentary and literature related to the rules and rulemaking. The Reporter performs out-reach efforts such as appearing before bar groups to familiarize the profession and the public with the rulemaking process and particular proposals. The Reporter serves as a director for special projects, such as the Local Rules Project. The Reporter serves as an advisor to the Standing Committee, as for example with the pending challenge to the Ninth Circuit Rules jointly filed by several states' attorneys general. The Reporter, as the “scholar-in-residence” of the Standing Committee, pursues long range proposals for rulemaking.

If these duties continue to increase and become more time-consuming, the Standing Committee may eventually decide to appoint an Associate Reporter to assist the Reporter. The sense of the Subcommittee is that things have not yet reached that point. If the Standing Committee accepts the recommendation below to allow the Subcommittee on Long Range Planning to lapse as well as other recommendations made here that would add to the duties of the Reporter, then an Associate Reporter might be needed sooner rather than later. Therefore, our recommendation is open-ended.

[12] Recommendation to the Standing Committee: The Standing Committee should take cognizance of the growing demands being placed on its Reporter and eventually should consider whether to appoint an Associate Reporter.

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Liaison members. Liaison members from the Standing Committee attend and have the privilege of the floor at meetings of the Advisory Committees. This innovation ought to be continued with some attention to developing a more definite role for the liaison members.

[13] Recommendation to the Chair: The practice of appointing liaison members from the Standing Committee to the various Advisory Committees should be continued.]

Subcommittee on Style. Judge Robert E. Keeton, the immediate past Chair of the Standing Committee, established a Subcommittee on Style and charged it with undertaking a restyling of the various sets of federal rules. ***704** That Subcommittee appointed a Consultant who has written a manual on rules drafting. The Subcommittee regularly has contributed to the efforts of the Advisory Committees and the Standing Committee to achieve greater consistency and clarity in the language of the federal rules.

The objective of this effort—uniform, readable, rules consistent with modern legal usage—is important not only to users of the rules but also to drafters, for clarity promotes understanding. The work of the Subcommittee, and particularly the Consultant's drafting manual, will be advantageous to the Standing Committee (and other legal drafters) in the years to come. But it remains an open question whether the plan to rewrite the body of existing rules will succeed. The principal question is whether it is possible to revise the rules without too many accidental change in meaning. A stated goal of preserving meaning invites readers to use the old rules to interpret the new ones, which may complicate interpretation for some time. (This has occurred with the 1948 amendments to Title 28 of the United States Code.) Discovery of ambiguities also leads to discovery of unwelcome substance; yet definitions of “unwelcome” differ, and the ensuing debate about substance may frustrate agreement on style changes.

The Supreme Court also has shown some unease with this process, which until the completion of the project produces differences in style across rules; the “restyled” rules use terminology in a different way from the older rules. When sending a package to Congress on April 27, 1995, the Supreme Court changed “must” to “shall” to preserve consistent usage. The Court may prefer an all-at-once project, of the kind now under way, but thoroughgoing restyling will be a long time coming for several sets of rules. The Advisory Committee on Appellate Rules has completed its initial review of a complete rewrite; the other advisory committees are mid-way in the process or have not yet begun it.

The Long Range Planning Subcommittee believes that the objects of the project are desirable, and that it should be continued. Better drafting for rules newly proposed, or revised for other reasons, should be pursued assiduously. Costs and benefits of revising whole sets of rules at once are more closely balanced: the gains are greater, but so too the costs. Experience with the Appellate Rules will permit the Standing Committee to decide how to proceed with the other sets of rules.

[14] Recommendation to the Standing Committee: The Standing Committee should continue to improve the style of new and amended rules, and should use its experience to decide whether to revise each set of federal rules fully.

Subcommittee on Long Range Planning. The immediate past Chair of the Standing Committee established a Subcommittee for Long Range Planning. Since then, the Subcommittee has planned to find a role, without substantial long range success. The rulemaking process *is* a form of long-range planning, which suggests that there is no need for a separate long-range planning organ. The Subcommittee has filed reports with the Standing Committee about long range proposals already in the rulemaking pipeline and recommended the introduction of other such proposals. It has recommended that Advisory Committees study comprehensive packages of procedural reforms proposed by scholars, committees, and bar groups. (In ***705** the three years since the Standing Committee adopted this recommendation, no Advisory Committee has reported back to the Standing Committee on any of these proposals.) The Subcommittee has attempted to monitor the work of the Judicial Conference's Committee on Long Range Planning. It performed this self-study of rulemaking procedures.

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The term of one member of the Subcommittee as a member of the Standing Committee expired before the preparation of this Report; his vacancy on the Subcommittee has not been filled. The term of Professor Baker, the original chair of the Subcommittee, expired at the end of September 1995. He too has not been replaced, but he has continued to participate in the preparation of this final version of the Report. The Subcommittee enthusiastically recommends that with the completion of this Report the Standing Committee disband the Subcommittee on Long Range Planning. (Similarly, in June 1995 the Chief Justice discharged the Judicial Conference's own Committee on Long Range Planning.) Another option is to assign long range planning in rulemaking to the reportorial function, perhaps on the occasion of creating the position of Associate Reporter, as is anticipated in a previous recommendation.

[15] Recommendation to the Chair of the Standing Committee: The Subcommittee on Long Range Planning should be abolished. Issues regarding long range planning in the rules process should be reassigned to the Reporter.

C. Judicial Conference

The Judicial Conference performs a function somewhere between the Standing Committee's and the Supreme Court's. For the most part, the Judicial Conference evaluates proposals on the basis of the paper record compiled by the Advisory Committees and the Standing Committee, and it gives thumbs up or thumbs down (the latter rarely) without making changes. We do not make any recommendations concerning the way the Judicial Conference deals with proposals from the Standing Committee —except for the obvious implication that a change in the role of the Supreme Court (discussed below) would alter the role of the Judicial Conference, and vice versa. The Judicial Conference is the largest body that participates in the process and hence is the least suited to technical drafting. It also has the least time for rulemaking; its agendas are crowded with other subjects, and rules are discussed briefly when they are discussed at all. This increases the chance of misunderstanding, which leads to error. As we mention below, therefore, if the Supreme Court retains its current role, it may be appropriate to remove the Judicial Conference as a separate step in the process.

D. Supreme Court

The main issue regarding the Supreme Court's participation in judicial rulemaking is whether the High Court should continue its role in the statutory scheme. Congress has designated the Supreme Court as the entity with power to promulgate rules for the federal courts, subject to the possibility of legislation during the seven months between proposal and effective date.

***706** Historically, the Court's role has been justified on two levels. First, the Supreme Court, as the highest federal court, exercises supervisory powers over the lower federal courts. Second, the prestige of the Court lends authority to the rules.

Commentators and individual Justices have questioned these justifications and argued that the Court's role is, in the pejorative, to serve as a “rubber stamp.” Others on and off the Court have answered that the historic rationales still apply. They draw attention to the occasions when the Supreme Court has disapproved or altered draft rules and to the dissenting statements from some of the Justices regarding particular rules. There is the further, but inevitable, complication that the Supreme Court frequently is called on to interpret the rules and to decide whether they are valid under the Rules Enabling Act and the Constitution.

Justice White's statement regarding the 1993 package of amendments summed up his 31 years of experience in judicial rulemaking.[61] He concluded that the Supreme Court's “promulgation” of rules functionally amounts to a certification to the Congress that the Rules Enabling Act procedures are operating properly and that the particular proposals before the Court are the products of a careful rulemaking process. The transmittal letters from the Chief Justice since then have made the same point.

Given the considerations on both sides, we leave to the Justices themselves the question whether there should be any change in their role—and, correspondingly, whether, if it is best to maintain the Court's current role, it would be appropriate to reduce

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the role of the Judicial Conference. Having *both* of these bodies pass on rules that have already been fully ventilated consumes much time for little purpose.

There is one other possible change worth mentioning. A few years ago, the British Embassy sent a diplomatic note to the Court concerning the implications of a proposal for service in foreign countries. The measure was returned to the Judicial Conference for further consideration. After the concerns of the foreign governments were addressed, the proposal went forward. In the aftermath of that round of rulemaking, the Justices informed the Standing Committee that they wanted to be alerted to any controversy or objections to particular proposals, as part of the written record forwarded with the rules packages. The Supreme Court may appropriately conclude that return of rules packages—rather than the revision of the proposals and promulgation of rules that the Advisory Committees and Standing Committee have not reviewed—is the best approach when the proposals it receives seem problematic to the Justices.

E. Congress

The separation of powers that is part of the structure of the Constitution is not designed for efficiency. By creating federal courts and defining their jurisdiction, Congress keeps the promise of the Preamble to "establish justice." Rulemaking is a power that is legislative in nature to the extent that rules affect the interests of litigants and regulate the conduct of officers of the Third Branch (including attorneys), but is nevertheless ***707** delegated partly to the Third Branch. The line drawn in the statutory authorization allows rules dealing with "practice and procedure" but prohibits rules that "abridge, enlarge or modify any substantive rights." [62] On the judicial side, this distinction requires careful discernment.

Congress has the power to adopt rules and procedures for the federal courts. [63] "May" does not imply "should." The wisdom behind the Rules Enabling Act procedures is deep. The Third Branch has the expertise to write rules of practice and procedure. Respect for the independence of the coordinate judicial branch, and the overarching values that independence protects, also counsels moderation in legislative promulgation or amendment of rules. Similarly with respect to legislation regulating the rulemaking process. In his year-end report for 1994, the Chief Justice wrote: "I believe that this [Rules Enabling Act] system has worked well, and that Congress should not seek to regulate the composition of the Rules Committees any more than it already has." The Judicial Conference has reached the same conclusion. See also Recommendation 1 above. And the Judicial Conference's Committee on Long Range Planning shares this understanding. See *Proposed Long Range Plan for the Federal Courts* (Mar.1995) Recommendation 30, Implementation Strategy 30a ("Rules should be developed exclusively in accordance with the time-tested and orderly process established by the Rules Enabling Act.").

The Judicial Conference has the responsibility to represent before Congress the interests of the federal courts and the citizens they serve. The Standing Committee has the responsibility to aid the Judicial Conference in performing this role. The Standing Committee should continue to monitor legislative activity and serve as a resource to the Judicial Conference to remind Congress of the values behind the Rules Enabling Act. Existing links between the Advisory Committees (and the AO) and Members of Congress and committee staffs should be maintained and, if possible, reinforced. It may be necessary to remind Congress, too, that the 1988 legislation increasing the time needed to amend a rule affects the relation between legislative and judicial branches in the way we discussed above.

F. The Rulemaking Calendar

The rulemaking cycle: Three changes in the rulemaking environment have occurred at roughly the same time. (1) The period between initial proposal and ultimate rule was extended in 1988 by increased opportunities for comment and an increased length of report-and-wait periods, so that it is now difficult to see a proposal through in fewer than three years. (2) The national rulemaking process had become more frenetic, with multiple packages pending simultaneously. Instead of five or more years between amendment cycles (the old norm), it is now common to see multiple amendments to the same rule in different phases: one pending before Congress, another pending before the Judicial Conference, a third out for public comment, and a fourth

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under consideration by an Advisory Committee. ***708** (3) Meanwhile local rulemaking has burgeoned, in part, but only in part, at the instance of Congress (the Civil Justice Reform Act of 1990).

On one thing most people agree: *all* of these developments are unfortunate. It takes too long to amend a rule or create a new one, and delay not only perpetuates whatever problem occasioned the call for amendment but also invites Congress and local courts to step in. The former undermines the Rules Enabling Act process (and discards the benefits of expertise); the latter undermines national uniformity. If the Supreme Court cannot respond quickly to a problem, legislation or local rules must be the answer. That amendments to the Rules Enabling Act are themselves responsible for the extended rulemaking cycle—so that Congress is the source of the delay it bemoans—offers no succor to those who seek swift changes. At the same time, few people can be found to support the existence of multiple changes to the same rule. Professor Wright, an observer and long-time participant in the rulemaking process, has condemned the process of overlapping amendments in no uncertain terms. [64] His *cri de coeur* is one among many strong and fundamentally correct indictments. It also illustrates the intractable nature of the problem—for it is precisely the change in the length of the cycle that has made overlaps inevitable!

When rules could be amended after a year or so of effort, and when the Chairs of the Advisory Committees and Standing Committee had indefinite terms, it was easy to have discrete and well-separated packages of rules. The heads of the committees could plan a coherent program, confident that they could see it through, and that if new information called for prompt change, they could accomplish it by adding it to an existing package. No more. The increased length and formality of the rulemaking process makes it difficult for a bright idea or alteration required by legislation to "catch up" with an existing package. Meanwhile the members of the committees serve shorter terms, so that fresh blood brings fresh suggestions every year and the Chairs, to have any effect before their three-year terms expire, must act with dispatch. No wonder we see a drawn-out process in which amending cycles overlap while local rules sprout like weeds. And it is almost impossible to imagine a cure while the duration from proposal to effectiveness is longer than the terms of Chairs.

What is worse, a cure that entailed enforced separation of rules packages—say, a maximum of one package per three-year term of a Chair—would have large costs of its own. Would the package have to start life at the outset of the Chair's time? Too soon; the Chair needs time to settle in, do some deep thinking, review the data, collect the thoughts of the committee, and so on. Then would the package start late in the Chair's term? Too late; its architect would leave before shepherding the package through and accommodating the many demands for amendments that occur in the process. Meanwhile new things come up—new statutes, decisions that interpret a rule to create a trap for the unwary (the source of the overlapping proposals concerning Fed.R.App.P. 3 and 4 that Professor Wright bemoaned)—and the cost of tidiness may be that litigants forfeit their rights. Put to a choice between simplifying the life of judges and authors, and preserving the rights of litigants, the rules committees sensibly ***709** choose the latter. That seals the fate of proposals to simplify and separate amendment packages without any escape hatch. Once we allow the escape hatch, however, messiness is inevitable.

Several recommendations above aim at relieving the stresses that have led to the current problems. We have suggested longer terms for Chairs and slower turnover of committees. We have ruminated about the possibility of abbreviating the rulemaking process by skipping one or another of the participants (either the Judicial Conference or the Supreme Court). What we now take up is the possibility of setting norms for our own work—norms rather than rules, for the reasons we have explained, but norms that if implemented will relieve some points of stress.

Let us establish biennial cycles as the norm. Rules would be issued for comment every other year—not every year, or every six months, as is possible now. Advisory Committees could be encouraged to make recommendations to the Standing Committee every year (to ease the problem of congestion for both the Advisory Committees and the Standing Committee), but proposals would be consolidated for biennial publication. All Advisory Committees could be on the same schedule, so unless some emergency intervened the bar could anticipate that, say, proposals would be sent out for public comment only in even-numbered years. Chairs with longer tenure could plan for these cycles, and it would be easier for late-occurring ideas to "catch up" without the need for separate publication.

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A change in the publication cycle could be accompanied, to advantage, by a change in the Standing Committee's schedule. The summer meeting of the Standing Committee has been set by working backward from the May 1 deadline for promulgating rules and transmitting them to Congress (with a December 1 effective date). The Supreme Court can promulgate the rules by May 1 only if it receives a recommendation of the Judicial Conference the preceding fall (a recommendation at the Conference's spring meeting would leave the Court too little time). The Conference can make the necessary recommendation only if the Standing Committee acts by July, which leaves time to write and circulate the final recommendations. The summer meeting is therefore an enduring feature of the rulemaking landscape, so long as the Judicial Conference and the Court play their current roles and the statutory schedule is unchanged.

Not so the winter meeting—and not so the content of meetings. If all recommendations to the Judicial Conference are consolidated for action at the summer meeting, the second meeting of the year can be reserved for the discussion of drafts the Advisory Committees want to publish for comment. A meeting of the Standing Committee in the fall, rather than the winter, would create sufficient time to have a full comment period, a meeting of the Advisory Committee the next spring, and consideration of the final proposals at the ensuing summer meeting of the Standing Committee. This change could shave six months to a year off the rulemaking schedule, making a biennial cycle more attractive. [65]

***710** As we have stressed, it will be essential to allow exceptions for true exigencies, as well as for off-year republication of proposals that deserve further comment. These should be few, however, as a longer cycle will permit more concentrated thought.

[16] Recommendation to the Standing Committee: The Standing Committee should establish a biennial cycle as the norm in rulemaking, should limit its summer meeting to the consideration of proposals to the Judicial Conference, and should hold a fall meeting for the consideration of recommendations that drafts by sent out for public comment.

Conclusion

The Subcommittee believes that the current rulemaking process is fundamentally sound, but improvement is both possible and desirable. Practices and procedures of the federal courts are admired and emulated by the state court systems and by the court systems of other countries. The procedure that has evolved for maintaining that system of rules deserves substantial credit for this. Nevertheless, we offer these constructive criticisms and recommendations.

Our hope for this Self-Study Report is that it will assist the Standing Committee to consider and then recommend adjustments in the federal judicial rulemaking mechanism.

Respectfully submitted,

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***711 APPENDIX A**

Summary of Comments Received for the Self-Study of Judicial Rulemaking by Thomas E. Baker Chair, Subcommittee on Long Range Planning May 2, 1994

Notice: The following notice of the self-study was mailed to several thousand individuals and organizations on the mailing list the Administrative Office uses to announce proposed rules amendments. It also appeared in several legal newspapers and in some of the advance sheets of the West Publishing Company's federal courts reporters. It was signed by the Chairs of the

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Standing Committee and the Subcommittee. Interested persons were asked to send in comments and suggestions to the Chair of the Subcommittee. Also enclosed was a copy of the Administrative Office's brochure entitled, “The Federal Rules of Practice and Procedure—A Summary for Bench and Bar.”

SELF-STUDY

The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, through its Subcommittee on Long Range Planning, is conducting a self-study of judicial rulemaking procedures.

The self-study will consider:
What are the appropriate goals of federal judicial rulemaking?

How well do the existing rulemaking procedures accomplish those goals?

What are the criticisms of the way rules are made?

How might rulemaking procedures be improved?

What follows are summaries of the comments and suggestions received. The complete responses have been distributed to members of the Subcommittee and the Chair, Reporter, and Secretary of the Standing Committee. These summaries are in rough chronological order.

(1) Laurens Walker, Boyd Professor of Law, University of Virginia, Feb. 17, 1994: sends two articles, *A Comprehensive Reform of Federal Civil Rulemaking,* 61 Geo. L.J. 455 (1993) and *Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments,* 51 Law & Contemp.Prob. 67 (1988); proposes a synopic model from administrative law known as “comprehensive rationality”; advocates an empirical approach to rulemaking; suggests that the Supreme Court require that the Advisory Committees engage in social scientific cost/benefit analysis preliminary to any rules changes; as the title indicates, the earlier article advocates thinking of the present rules as a baseline for conducting restricted field experiments in order to gather empirical information on the likely impact of changes before implementing them in the national rules.

***712** (2) Jonathan F. Lewis, Editor-in-Chief, George Washington Law Review, undated: forwards a copy of the 1993 article by Professor Walker, described in (1).

(3) Stephen B. Burbank, Robert G. Fuller, Jr., Professor of Law, University of Pennsylvania, Feb. 17, 1994: sends a forthcoming article from the Brooklyn Law Review; concludes there is a compelling need for a clearer, shared conception of the proper spheres respectively for judicial rulemaking and legislative initiatives; urges that more time and energy be devoted to collecting and analyzing empirical data before changes are made in the national rules; recommends a moratorium on further civil rules changes until such a study has been undertaken, with the cooperation of the bench and bar and Congress.

(4) Frank J. Remington, Professor of Law, University of Wisconsin-Madison Law School, Feb. 17, 1994: suggests that the reporters to the Advisory Committees ought to respond on the merits to public comments and suggestions, beyond a form acknowledgment, to achieve more substantive give-and-take that might benefit and inform rulemaking and would encourage more public participation; was sent a form letter of acknowledgement(!).

(5) John P. Frank, Esq., Lewis & Roca, Phoenix, AZ, Feb. 25, 1994: endorses the goals in FRCP 1; criticizes the civil rules for what they have become, unduly long and unnecessarily complex, compounded by turgid committee notes, chaotic when contemplated against the Civil Justice Reform Act, disuniform for all the local options; advocates the restoration of the balance of lawyer-members on the Advisory Committees; urges that reconstituted committees, each with a majority of lawyer-members,

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should reconsider the rules from beginning to end with the fundamental goal in mind to restore simplicity and to end the present insiders' game that federal procedure has become.

(6) Susan P. Graber, Associate Justice, Supreme Court of Oregon, Feb. 28, 1994: suggests a topic for possible rules changes in both the Civil and the Appellate Rules; recommends consideration of rules establishing standards and procedures for certifying questions of state law to state courts.

(7) Jeffrey A. Parness, Professor, Northern Illinois University College of Law, Mar. 1, 1994: recommends better record keeping and indexing of the public comments received by the Advisory Committees for researchers and scholars; the Rules Committees should hire outside consultants to conduct literature surveys and specified research to supplement the research support from the Administrative Office and the Federal Judicial Center; suggests that formal relations be established with relevant state governmental entities that may be impacted by rules changes, *e.g.*, the 1993 amendments to Civil Rule 11 likely will increase the number of state bar disciplinary referrals made by federal judges.

(8) Alan B. Morrison, Public Citizen Litigation Group, Washington, DC, Mar. 11, 1994: complains that the memberships of the various Advisory Committees include too many (appellate) judges and too few practitioners; practitioner-members too often are prominent lawyers or high level government officials who do not work day-in and day-out with the rules; there are too many law professors without real-world, in-court experience; while ***713** geographic diversity is useful, more important representativeness is lacking for the variety of firms and lawyers that appear in federal court, such as civil rights attorneys or plaintiffs' attorneys; Advisory Committees almost never offer explanations for rejecting individual suggestions and comments on proposed changes; the current format for public hearings is unsatisfactory and ineffective, because so many persons want to be heard time is limited, thus it is hardly worth it for many groups to send representatives (closed circuit television might be an improvement); access to the public records of the committees should be improved, perhaps through more readily accessible print and electronic sources like *Law Week* or the Internet; recently, there has been a significant increase in the number and the complexity of rules changes, exacerbated by locally-optional provisions that greatly reduce uniformity; recommends more frequent meetings by reconstituted Advisory Committees, with larger, professional, full-time staff.

(9) Thomas Earl Patton, Schnader, Harrison, Segal & Lewis, Washington, DC, Mar. 11, 1994: suggests that the system is reverting to the pre-1938 stage of local procedures, with the loss of the two basic principles of uniformity and simplicity; criticizes the latest rules changes for including opt-out provisions; draws attention to the wide opposition from all portions of the bar to the 1993 discovery reforms; argues that the “case-management” philosophy of judging has taken over rulemaking and is being taken to the extreme; the views of the experienced trial bar are not being given adequate weight in rulemaking; urges that the Advisory Committees be more representative of the practicing bar and be protected from reformers on a mission; urges that Congress somehow be taken out of rulemaking.

(10) Marc Galanter, Institute for Legal Studies, University of Wisconsin-Madison Law School, Mar. 13, 1994: urges greater use and reliance on systematic, empirical research for rulemaking; identifies a system need for better data collection and the development of “civil justice indicators” to aid in the assessment of current and proposed rules; recommends that procedures be adopted to draw upon social science expertise, such as adding a social scientist to the membership or commissioning experts to conduct reviews of the relevant social science literature.

(11) A. Leo Levin, Professor, University of Pennsylvania Law School, Mar. 14, 1994: the rulemaking process is too long; the rules have become too long and too complex; the trend is away from national uniformity in procedures; differentiated procedures, common in case processing, should be developed for rulemaking, so that less controversial amendments might proceed more expeditiously; endorses a rules amendments moratorium and the creation of a commission to study rulemaking procedures and make legislative recommendations to Congress.

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(12) James F. Roman, Duxbury, MA, Mar. 15, 1994: an ex-convict and former pro se litigant accuses the federal court system of wrongdoing and fraud; argues that present rulemaking procedures are unduly cumbersome and duplicitous; at all levels, federal courts are not performing adequately; maintains that the Administrative Office and the courts are self-aggrandizing institutions.

(13) Ed Hendricks, Chairman, American Judicature Society Justice System Reform Committee, Mar. 15, 1994: concludes that judicial rulemaking ***714** has improved over the years through greater representativeness in the memberships of the committees and broader access and participation; advocates more systematic, affirmative efforts to gather information as a basis for rules changes; recommends expansion of list of organizations and individuals from whom comments are solicited; prior to consideration of rules changes, there should be a careful canvassing of the available literature, including relevant empirical data each time a proposal is considered; the committees should communicate with the research community and fund particular studies for possible rules changes; there is a need for systematically and longitudinally gathering and recording civil justice indicators (akin to criminal justice indicators) and data about caseloads and existing court procedures; the memberships of the committees should be more representative of the bar and other groups; questions whether the Supreme Court should continue to play a role in rulemaking.

(14) James A. Parker, U.S. District Judge, Dist. NM, member of the Standing Committee, Mar. 15, 1994: consider reducing the number of members of the Standing Committee to improve efficiency; the criminal defense bar may not be adequately represented on the Standing Committee; the self-study should evaluate the 6-month publication period, whether it is too long or too short, how often the Standing Committee has adjusted the period for particular rules changes, and whether the "substantial change" standard for republication needs better definition; the experience under the procedures for closed committee meetings and redacted public minutes should be examined.

(15) John C. Smith, Publisher, West Publishing Company, Mar. 16, 1994: publishes several "products" with multiple sets of federal rules and statutes; suggests that better coordination of publications could be achieved by making the amendments to the Bankruptcy Rules effective on the same date as the other federal rules; suggests that annual supplements and pocket parts could be published more timely if Congress were to approve or disapprove amendments by December 1 of the session to which the proposals are made, but the amendments would become effective on March 1 of the following calendar year.

(16) Robert D. Evans, Director, Governmental Affairs Office, American Bar Association, Mar. 23, 1994: statement from the ABA; urges that appointments to the rules committees reflect the demographic diversity of the legal community and that membership also more substantially represent the practicing bar, especially trial lawyers and criminal defense lawyers, and the academy; the membership of the Evidence Rules Advisory Committee needs this sort of attention; records should be kept and made public giving some accounting of the diversity of memberships and appointments; if the Supreme Court does not and cannot participate actively in rulemaking, the rules enabling legislation should be amended to eliminate the Court's formal role that adds approximately six months to the already lengthy process; deadlines for public comments—illustrated by the deadline for responses in the present self-study—do not afford ample time for meaningful participation by institutions like the ABA; calendaring meetings twice a year results in a two or three year cycle for rules changes; a priority should be given to providing interested individuals and organizations timely notification of public meetings and hearings; publishing an agenda in advance of ***715** meetings, including proposals being considered for publication and approval, would encourage greater outside participation; any publication for comment of a rule that would delegate to the Judicial Conference the authority to issue guidelines or standards should include a draft of the actual guideline or standard for comment; the current provisions for republication of "substantial changes" in proposals after public comment are not adequate, as the recent changes in Civil Rule 26 illustrate; the Criminal Rules Advisory Committee is criticized for being unwilling to overturn case law and statutes and for not following the ABA standards in areas like defense discovery; the Civil Rules Advisory Committee is criticized for being too willing to take the initiative for reform and for not deferring to the Civil Justice Reform Act of 1990; provisions in the national rules that allow for local opting out compromise the goal of uniformity; there is a need for greater reliance on empirical data in rule making, including controlled experiments; coordination is needed among the various rules committees, especially among the committees dealing with the rules of evidence and the civil and criminal rules; the national rules ought to better address the development and implementation of ADR procedures; some thought ought to be given to making future rules

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changes substance-specific, so that different types of lawsuits would proceed on different procedural tracks; the rulemaking process needs to determine appropriate responses to the CJRA; overall, the self-study should attend to ways to improve and maintain the fairness and openness of the rulemaking process.

(17) Judith Resnik, Orrin B. Evans Professor, University of Southern California Law Center, Mar. 19 & 24, 1994: concludes that rulemaking goals vary over time; endorses the Rule 26 model of a national rule with local options, to accommodate the CJRA; the rulemaking committees should seek to structure and lead the conversation among local rulemakers; the CJRA is an opportunity for gathering empirical information; suggests specific ways the rules committees might develop background information for evaluating proposals; notes the untapped resource of procedure professors at the law schools; raises practical problems with the archives materials on rulemaking, how they are accessed and how they are maintained; *From "Cases" to "Litigation"*, 54 Law & Contemp.Prob. 5 (1991); sent her Letter to Judge Becker of the Long Range Planning Committee of the Judicial Conference; advocates structural mechanisms to increase and improve understanding of federal courts; adequate and useful data still is lacking on such commonplace federal court practices as complex litigation, class actions, the pretrial process, and settlement practices; little is known about the demographics of litigants and their perceptions; decisionmaking personnel, such as magistrate judges and bankruptcy judges, have not been studied; the appellate process likewise is relatively unstudied; recommends a national meeting of researchers, academics, lawyers, and judges to consider the kind of information that is available and to contemplate what other information might be gathered; concludes some permanent structure, perhaps similar to the lawyers advisory committees under the CJRA, is needed to provide systemic information from those "outside" the judiciary.

(18) Larry A. Hammond, Chair, Criminal Justice Reform Committee of the American Judicature Society, Phoenix, AZ, Mar. 25, 1994: urges that rulemakers evaluating civil rule changes take into account the impact of ***716** those changes on the criminal justice system; so long as there are more cases than there are enough judges to handle them, any change on the civil side will affect the criminal docket; the system is a whole.

(19) Myrna Raeder, Professor of Law, Southwestern University, Mar. 28, 1994: serves as Vice Chairperson of the A.B.A. Criminal Justice Section's Committee on Rules of Criminal Procedure and Evidence; urges that the Judicial Conference attempt to achieve committee memberships that reflect the diversity of the federal bar, rather than the current level of diversity of the federal bench; greater diversity can be fostered by better record keeping and by obtaining wider input, from relevant groups, to identify potential members; expresses concern for the recent trend of proliferating rules changes effected outside the Rules Enabling Act process; suggests that short of a formal amendment to the authorizing legislation, there ought to be some informal understanding that Congressional initiatives will be referred to the appropriate Advisory Committee; comments on the uncertainty surrounding the Civil Justice Reform Act of 1990 and its implications for judicial rulemaking; recommends that the rules committees gather and evaluate data from the CJRA plans to seek to harmonize local experiments and to identify proposals worthy of national implementation; requests advanced notification and publication of proposed rules changes, agendas, and minutes of committee meetings.

(20) Alfred W. Cortese, Jr., Kirkland & Ellis, Washington, DC, Apr. 4, 1994: goals of rulemaking ought to include external neutrality from external politics, internal neutrality so far as litigants are concerned, responsiveness to those who use the federal courts, maintenance of the distinction between procedure and substantive or jurisdictional changes, efficiency measured against fairness; preserving the integrity of judicial rulemaking obliges both the Congress and rulemakers to be sensitive to the tensions in the Rules Enabling Act procedures and recent incidents suggest both sides have not always succeeded; the rules presently favor the initiation and maintenance of a lawsuit; responsiveness would be enhanced by greater public participation in rulemaking and by more bar participation as committee members; rulemaking procedures are working reasonably well and no significant changes are indicated; how to balance independence and responsiveness, insularity and participation, is rightly left to the professionalism of the members and staffs of the rules committees.

(21) William R. Slomanson, Professor, Western State University College of Law, San Diego, CA, Apr. 4, 1994: supports the self-study; proposes the appointment of one local subcommittee member in each district to be responsible for communication

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between the bar in that district and the Standing Committee; such a decentralized system would take more time, but would provide far greater participation than the present comment period and public hearings.

(22) Daniel R. Coquillette, Reporter, Committee on Rules of Practice and Procedure, Boston, MA, Apr. 5, 1994: describes the current duties of the Reporter to the Standing Committee, which have been greatly expanded over the years; concludes that the Rules Enabling Act process is the only mechanism capable of restoring and maintaining procedural uniformity to the federal courts.

***717** (23) Joseph F. Weis, Jr., U.S. Circuit Judge, Third Circuit, Pittsburgh, PA, Apr. 14, 1994: former Chair, Standing Committee; expresses twin concerns over delay in rulemaking and insufficient uniformity among the different sets of rules; suggests that two members from each Advisory Committee be selected to reconstitute the Standing Committee and the Chair of the Standing Committee be an ex officio member of each Advisory Committee; further efficiency would be obtained by scheduling all the meetings of all the advisory committees at the same time and place, to be followed immediately by a meeting of the Standing Committee; continued emphasis must be placed on the partnership between the judiciary and the Congress under the Rules Enabling Act process; renewed efforts should be made to keep Congressional staff informed about rulemaking initiatives.

*718 APPENDIX B

FEDERAL JUDICIAL RULEMAKING: AN ANNOTATED BIBLIOGRAPHY

Prepared under the supervision of Thomas E. Baker by Gregory A. Cardenas, Gregory J. Fouratt and Eric Gifford Candidates for J.D., Texas Tech University School of Law

September 1995

James E. Bailey III, *Legislating Procedure in the Bankruptcy System: A Level Playing Field or a Slippery Slope?,* 24 Mem.St.U.L.Rev. (1994): questions whether responsibility for amending and promulgating general rules of practice and procedure in federal bankruptcy courts should rest with Congress or with some other independent body; stresses the importance of a neutral and detached rulemaking process and expresses concern about legislation introduced by the 103d Congress proposing bankruptcy rules amendments.

Newton D. Baker, *Policies Involved in Federal Rule-Making,* 18 Judicature 134 (1935): suggests that the predominant policy interests in rulemaking reform are uniformity of practice in all federal trial courts and conformity of state to federal practice.

Thomas E. Baker, *An Introduction to Federal Court Rulemaking Procedure,* 22 Tex.Tech.L.Rev. 323 (1991): provides a brief history of rulemaking; summarizes present procedures.

Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts,* 84 Colum.L.Rev. 1433 (1984): details the history of Congress' active role in procedural rulemaking; emphasizes the supervisory power doctrine.

Margaret A. Berger, Discussion Leader, *Civil Litigation in the Twenty-First Century: A Panel Discussion,* 59 Brook.L.Rev. 1199 (1993): participants discuss the future of procedure by tracing its history and attempting to predict its development in light of current trends; members include Judith Resnik, Kenneth R. Feinberg, Ralph K. Winter, Deborah R. Hensler, Stephen N. Subrin, Elizabeth M. Schneider and Jeffrey W. Stempel.

Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules,* 89 Colum.L.Rev. 1 (1989): explores the normative framework underlying the rhetoric of procedural reform from the Field Code to the Federal Rules of Civil Procedure; concludes with some thoughts on current procedure "crisis."

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Winifred R. Brown, Federal Rulemaking: Problems and Possibilities (Fed.Jud.Ctr.1981): a comprehensive account of rulemaking procedures; evaluates criticisms and proposed reforms.

***719** Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington's "Substance" and "Procedure" in the Rules Enabling Act*, 1989 Duke L.J. 1012: criticizes Professor Carrington for misreading federal rules and misinterpreting their purpose(s).

Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 Brook.L.Rev. 841 (1994): argues for the need for a clearer conception of the proper spheres of rulemaking responsibility; urges greater reliance on empirical data; recommends a moratorium on civil rules changes; advocates greater cooperation among bench and bar and Congress.

Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 Notre Dame L.Rev. 693, (1988): describes the trend in modern procedural law away from rules that determine policy decisions and toward rules that confer a substantial amount of normative discretion on trial courts.

Stephen B. Burbank, *Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 131 U.Pa.L.Rev. 283 (1982): uses the Act to explore the tensions between Congress and the judiciary regarding the source of the authority to promulgate court rules.

Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U.Pa.L.Rev. 1015 (1982): provides extensive legislative history of Rules Enabling Act.

Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U.Pa.L.Rev. 1925 (1989): asserts that Rule 11 is part of a transformation away from rules which determine policy choices and toward more discretionary rules.

Warren E. Burger, *The State of the Federal Judiciary—1979*, 65 A.B.A.J. 358 (1979): calls for fresh look at entire federal rulemaking process; questions whether the Supreme Court should continue to be involved.

Paul D. Carrington, *Continuing Work on the Civil Rules: The Summons*, 63 Notre Dame L.Rev. 733 (1988): uses Rule 4 proposals to shed light on the contemporary process of federal rule revision.

Paul D. Carrington, *Learning From the Rule 26 Brouhaha: Our Courts Need Real Friends*, 156 F.R.D. 295 (1994): discusses the history of rulemaking; notes flaws remaining in the reformed rulemaking process; speculates about the future of the rulemaking politics in light of the 1993 amendment to Fed.R.Civ.P. 26(a)(1).

Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U.Pa.L.Rev. 2067 (1989): rejects the argument that judicially-made rules should direct courts to proceed differently according to the substantive nature of the rights sought to be enforced; provides a critical analysis of the rulemaking process.

Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 Duke L.J. 1012 (1989): examines the meanings of "substance" and "procedure" in evaluating the power of the supersession clause of the Rules Enabling Act; argues against the politicization of the rulemaking process.

***720** Paul D. Carrington, *The New Order in Judicial Rulemaking*, 75 Judicature 161 (1991): opines that fractional politics is jeopardizing the federal rulemaking process; proposes the creation of an independent group to organize efforts to protect the

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rules in Congress and to provide a base constituency for the Supreme Court in the exercise of its authority under the Rules Enabling Act.

Henry P. Chandler, *Some Major Advances in the Federal Judicial System,* 1922-1947, 31 F.R.D. 307 (1963): an exhaustive 210-page look at four major advances during this time frame; includes 1938 adoption of Federal Rules of Civil Procedure.

Charles E. Clark, *"Clarifying" Amendments to the Federal Rules?,* 14 Ohio St. L.J. 241 (1953): applauds the then-existing rulemaking process and emphasizes its importance in preventing procedures from becoming sterile; identifies amendments to overcome arbitrary interpretations as the major benefit of the on-going process.

Charles E. Clark, *The Influence of Federal Procedural Reform,* 13 Law & Contemp.Probs. 144 (1948): summarizes the history of the civil procedure reform movement against the background which made it inevitable and the obstacles that had to be overcome; describes the experience of drafting and promulgating the rules and some of their more important characteristics; suggests lessons to be learned for future reformers.

Charles E. Clark, *Power of the Supreme Court to Make Rules of Appellate Procedure,* 49 Harv.L.Rev. 1303 (1936): discusses the sources of the High Court's appellate rulemaking power; attempts to define its scope.

Charles E. Clark, *The Role of the Supreme Court in Federal Rule-Making,* 46 Judicature 250 (1963): Recalls the role the Supreme Court played in the original reform movement; focuses on the institutional leadership of the Court, as well as on the influence of individual justices.

Charles E. Clark, *Two Decades of the Federal Civil Rules,* 58 Colum.L.Rev. 435 (1958): examines the impact of the Fed.R.Civ.P. during the 20 years following their adoption; analyzes the role of the Supreme Court; foresees a continuing role for an advisory committee, a permanent committee system as opposed to an ad hoc approach.

Comment, *Rules of Evidence and the Federal Practice: Limits on the Supreme Court's Rulemaking Power,* 1974 Ariz.St.L.J. 77 (1974): explores the validity of "substantiveness" as a curb on the Court's rulemaking power; concludes that Congressional involvement can be avoided by the realization that this power is administrative in character and exercisable pursuant to a delegation of legislative power; advocates the prescription of safeguards to ensure the consideration of all competing interests.

Comment, *Separation of Powers and the Federal Rules of Evidence,* 26 Hastings L.J. 1059 (1975): proposes an arrangement permitting the judiciary to promulgate procedural and evidentiary rules and the legislature to enact privilege rules, to avoid the substantive limitation on the judicial rulemaking power.

Cary H. Copeland, *Who's Making the Rules Around Here Anyway?,* 62 A.B.A.J. 663 (1976): criticizes the extent of Congressional review of the federal rules.

***721** Robert N. Clinton, *Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts,* 63 Iowa L.Rev. 15 (1977): reviews the exercise of Supreme Court rulemaking authority in the context of Rule 9; raises serious constitutional, statutory, and policy questions regarding the appropriate exercise of the rulemaking authority by the Supreme Court.

Steven Flanders, *In Praise of Local Rules,* 62 Judicature 28, 33 (1978): argues that local rules do not significantly undermine uniformity of national procedure; maintains that local rules are necessary and important.

John P. Frank, *The Rules of Civil Procedure—Agency for Reform,* 137 U.Pa.L.Rev. 1883 (1989): lauds the drafters of the original rules for their efforts in merging law and equity; bemoans the present state of the rules, decrying their nitpickiness and wordiness; articulates an agenda for reform; most of the recommendations involve individual rules.

Jack H. Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure,* 69 Calif.L.Rev. 806 (1981): urges the Supreme Court to devote more diligence to its review of proposed rules; insists that it is better to leave procedural reforms in the hands of Supreme Court and advisory committees than to elected politicians.

Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis,* 27 Stan.L.Rev. 673 (1975): Discusses the unfettered role of judges in the rulemaking process and congressional response; bemoans the perils of Congress' reentering the judicial rulemaking realm.

Arthur J. Goldberg, *The Supreme Court, Congress, and Rules of Evidence,* 5 Seton Hall L.Rev. 667 (1974): demarcates the authority of both Congress and the Judiciary to promulgate court rules as a function of both separation of powers and as an aspect of the substance/procedure dichotomy.

Jay S. Goodman, *On the Fiftieth Anniversary of the Federal Rules of Civil Procedure: What Did the Drafters Intend?,* 21 Suffolk L.Rev. 351 (1987): discussion of genesis of rules, the affect of the 1983 amendments, and the intent of the original authors; emphasis is on impact of the rules themselves, not the process of rule-making.

Charles W. Grau, Judicial Rulemaking: Administration, Access and Accountability (American Judicature Society 1978): analyzes critical issues in judicial rulemaking; suggests ways to increase accountability and access to the rulemaking process.

Charles W. Grau, *Who Rules the Courts? The Issue of Access to the Rulemaking Process,* 62 Judicature 428 (1979): notes the increasing public access to the rulemaking process; weighs the pros and cons of these developments.

Geoffrey C. Hazard, Jr., Reporter, *Report of the Conference on the Federal Rules of Civil Procedure,* Sponsored by the Southwestern Legal Foundation and the Southern Methodist University School of Law, Mar. 30-31, 1995: summarizes the proceedings of this invitational conference attended by lawyers, judges and academics; focusses on areas of jury trial, discovery, and aggregation; discussion ranged from the particular to the general, from possible procedural reforms to how to think about rulemaking as a process.

***722** Geoffrey C. Hazard, Jr., *Undemocratic Legislation (Book Review),*87 Yale L.J. 1284 (1978): reviews Judge Weinstein's 1977 book on court rulemaking; critiques participatory civil rulemaking.

Peter C. Hoffer, *Text, Translation, Context, Conversation, Preliminary Notes for Decoding the Deliberations of the Advisory Committee that Wrote the Federal Rules of Civil Procedure,* 37 Am.J.Legal Hist. 409 (1993): provides a historical account of the deliberation involved in the drafting and amendment of the Federal Rules of Civil Procedure; focuses on the individual personal interplay involved in these deliberations.

Kenneth M. Holland, *The Federal Rules of Civil Procedure: A Policy Evaluation,* 3 Law & Policy Q. 209 (1981): evaluates the success of the FRCP; explores why they have only been partially successful.

Alexander Holtzoff, *Origin and Sources of the Federal Rules of Civil Procedure,* 30 N.Y.U.L.Rev. 1057 (1955): examines the sources of the federal rules of procedure; describes the philosophy of the rules and their salient features.

Jeffrey Jackson, *Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers,* 52 Md.L.Rev. 217 (1993): asserts that judicial independence from legislative rulemaking is essential to preserving separation of powers; argues that additional court funding is necessary.

Vicki C. Jackson, *Empiricism, Gender, and Legal Pedagogy: An Experiment in a Federal Courts Seminar at Georgetown University Law Center,* 83 Geo.L.J. 461 (1994): discusses the effect of feminist legal theory and empiricism upon the court

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system, emphasizing the experiences of the various Task Forces on gender discrimination; other symposium articles focus on various other gender issues.

Charles W. Joiner & Oscar J. Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making,* 55 Mich.L.Rev. 623 (1957): surveys and discusses the sources and scope of the rulemaking power and the extent to which it can and should be exercised.

Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I),* 81 Harv.L.Rev. 356 (1976): summarizes and comments on 1966 amendments to the Fed.R.Civ.P.; includes a section describing how amendments take shape.

Benjamin Kaplan, *The Federal Rulemaking Process—The Reporters Speak,* 137 U.Pa.L.Rev. 2125 (1989): critiques the address by then Reporter Professor Carrington at University of Pennsylvania's 50th Anniversary Symposium.

Laura A. Kaster & Kenneth A. Wittenberg, *Rulemakers Should Be Litigators,* Nat'l L.J., Aug. 17, 1992, at 15: complains about the lack of litigators on the Advisory Committees; asserts that the current rulemakers—judges, academicians, procedural "wonks"—cannot appreciate how the changes in the Federal Rules will fundamentally change the attorney-client relationship.

Robert E. Keeton, *The Changing Nature of Legal Issues in State and Federal Courts,* 37 Ariz.L.Rev. 425 (1995): discusses author's personal perceptions of the rulemaking process gained from his service as chair of ***723** the Standing Committee; argues in favor of the Rules Enabling Act process as the optimum method to improve upon the federal rules of practice and procedure; imagines what the future will bring by way of workload and legal challenges for federal district courts.

Robert E. Keeton, *The Function of Local Rules and the Tension with Uniformity,* 50 U.Pitt L.Rev. 853 (1989): comments on the function of local rules and the tension between the policy of national uniformity and local flexibility.

Howard Lesnick, *The Federal Rule-Making Process, A Time for Re-examination,* 61 A.B.A.J. 579 (1975): based on the experience with the Fed.R.Evid., calls for a re-examination of the rulemaking process.

A. Leo Levin and Anthony G. Amsterdam, *Legislative Control Over Judicial Rulemaking: A Program in Constitutional Revision,* 107 U.Pa.L.Rev. 1 (1958): advocates legislative review over rulemaking when "important decisions of public policy are necessarily involved."

Harold Lewis, *The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rule Revision,* 85 Mich.L.Rev. 1507 (1987): using Fed.R.Civ.P. 15(c) as a case study, decries the rules amendment process; focuses on the process' caseload implications; describes how rulemaking has failed to stay abreast of litigation developments, etc.; suggests alternative procedures.

Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress,* 59 Brook.L.Rev. 761 (1993): discusses the current state of civil litigation reform and the difficulties inherent to a neutralist reform position; evaluates current controversies and presents observations about potential areas for future progress towards improved court procedures.

Long Range Plan for the Federal Courts, Submitted to the Judicial Conference of the U.S. (March 1995): endorses Rules Enabling Act process; encourages uniformity and flexibility; advocates wide participation in rulemaking.

Albert B. Maris, *Federal Procedural Rule-Making: The Program of the Judicial Conference,* 47 A.B.A.J. 772 (1961): discusses the history of judicial rulemaking and the roles of the Judicial Conference and its advisory committees.

Thomas W. Merrill, *The Common Law Powers of Federal Courts,* 52 U.Chi.L.Rev. 1 (1985): argues there is no separation of powers objection to federal courts adopting rules for internal operation or for control of litigation.

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Arthur Miller, The August 1983 Amendments to the Federal Rules of Civil Procedure: Promoting Effective Case Management and Lawyer Responsibility (Fed.Jud. Ctr 1984): notes the explosion of federal court litigation and describes attempts by the Advisory Committee on Civil Rules to address the problem through federal rulemaking.

James W. Moore & Helen I. Bendix, *Congress, Evidence and Rulemaking,* 84 Yale L.J. 9 (1974): discourages Congress from intervening in rulemaking process for Fed.R.Evid.

Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking,* 69 N.C.L.Rev. 795 (1991): uses the ***724** proposed informal discovery rule to examine the increasing politicization of civil rulemaking process; forecasts the decline of Advisory Committees and the rise of more political power brokers.

Linda S. Mullenix, *Judicial Power and the Rules Enabling Act,* 46 Mercer L.Rev. 733 (1995): contributes to a symposium on the general topic of federal judicial independence; expressed concern for the erosion of Third Branch power and independence from Congressional intrusions into federal procedural rulemaking; takes issue with Professor Redish's more traditional starting point of analysis that procedural rulemaking authority is a delegation from the legislative branch to the courts.

Note, *The Proposed Federal Rules of Evidence: Of Privileges and the Division of Rule-Making Powers,* 76 Mich.L.Rev. (1978): examines constitutional division of rulemaking power; emphasizes the development of federal evidence law.

Note, *Separation of Powers and the Federal Rules of Evidence,* 26 Hastings L.J. 1059 (1975): analyzes the Supreme Court's historical rulemaking power to determine whether privilege rules are within that power.

James L. Oakes, *Book Review,* 78 Colum.L.Rev. 205 (1978): critiques Judge Weinstein's 1977 book on rulemaking.

John B. Oakley, *An Open Letter on Reforming the Process of Revising the Federal Rules,* 55 Mont.L.Rev. 434 (1994): a letter to Professor Baker offering general advice on how the Long Range Planning Subcommittee should evaluate the federal court rulemaking procedures; notes many of the common criticisms of the process and outlines some possible reforms.

John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure,* 61 Wash.L.Rev. 1367 (1986): presents a new survey of the civil procedures of the 50 states and D.C.; identifies those jurisdictions that have systematically replicated the federal rules.

Gustavus Ohlinger, *Questions Raised by the 1937 Report of the Advisory Committee on Rules of Civil Procedure for the District Courts of the United States,* 11 U.Cin.L.Rev. 445 (1957): answers two rhetorical questions, are the judicial systems which the Advisory Committee examined, and our federal system of constitutional courts, in all respects analogous? and what is the scope of rulemaking power delegated to the Supreme Court?

Jeffrey A. Parness, *Book Review,* 35 Vand.L.Rev. 1453 (1982) (reviewing Winifred R. Brown, Federal Rulemaking: Problems and Possibilities (1981)): outlines some of the perceived deficiencies in the report; suggests that state rulemaking processes can provide guidance for federal rulemaking; raises some possible constitutional problems with the current process.

Jeffrey A. Parness and Curtis B. Copeland, *Access to Judicial Rulemaking Procedures,* 1982 Ariz.St.L.J. 641: reviews the contemporary judicial rulemakers, judicial rules and rulemaking procedures, as well as recent criticisms; articulates the minimum requisites for an accessible rulemaking process.

***725** Roscoe Pound, *A Practical Program of Procedural Reform,* 22 Green Bag 438 (1910): provides a summary of Deab Pound's ideas for procedural reform.

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Roscoe Pound, *Principles of Practice Reform,* 71 Cent.L.J. 221 (1910): articulates a series of specific suggestions for procedural reform, some of which deal with the rulemaking process. Proceedings, The Pound Conference: Perspectives on Justice in the Future (West 1979): includes addresses and commentary from several notable authorities on issues pertaining to rulemaking.

Donna J. Pugh et al., Judicial Rulemaking, A Compendium (American Judicature Society 1984): provides an update of material in the Korbaker, Alfini, Grau book, Judicial Rulemaking in the State Courts: A Compendium.

Judith Resnik, *The Domain of Courts,* 137 U.Pa.L.Rev. 2219 (1989): objects to relying too much on trying to determine the drafters' intent of the Fed.R.Civ.P.; cautions against ignoring the political content and consequences of procedural rules; expresses concern that 50 years from now the rules will preclude resolution of small cases.

Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline,* 53 U.Chi.L.Rev. 494 (1986): traces the world view of the drafters of the federal rules in an effort to discover the influences that animated rules reform.

Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990,* 46 Stan.L.Rev. 1447 (1994): discusses the Civil Justice Reform Act and how it attempted to change and improve the rulemaking process; recognizes Congress' constitutional power over judicial rulemaking, but argues for caution and restraint; emphasizes the value of transubstantive and nationally-uniform rules of civil procedure; expresses some concern for the effects of local rulemaking.

David M. Roberts, *The Myth of Uniformity in Federal Civil Procedure: Federal Civil Rule 83 and District Court Local Rulemaking Powers,* 8 U.Puget Sound L.Rev. 537 (1985): demonstrates how the proliferation of local rules threatens the integrity and uniformity of federal procedure.

Maurice Rosenberg, *The Federal Civil Rules After Half a Century,* 36 Me.L.Rev. 243 (1984): asserts that the stated goal of speedy and inexpensive achievement of justice is being impeded by the rules themselves; argues for diversified rules of procedure tailored to the varied needs of individual cases.

Panel, *The Rule-Making Function and the Judicial Conference of the United States,* 21 F.R.D. 117 (1957): distinguished panel discussion conducted about the then-proposed amendment to 28 U.S.C. § 331 to authorize the Judicial Conference to carry on continuous study of federal procedure.

Linda J. Rusch, *Separation of Powers Analysis as a Method for Determining the Validity of Federal District Court's Exercise of Local Rulemaking Power: Application to Local Rules Mandating Alternative Dispute Resolution,* 23 Conn.L.Rev. 483 (1991): suggests a separation of powers test based on functionalism to determine the proper scope of judicial rulemaking authority.

***726** Lawrence G. Sager, *Foreward: Constitutional Limitations on Congress Authority to Regulate the Jurisdiction of the Federal Courts,* 95 Harv.L.Rev. 17 (1981): asserts that the Constitution confers this rule-making authority not on Congress, but on the courts themselves, in the context of jurisdiction-stripping proposals.

David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking,* 137 U.Pa.L.Rev. 1969 (1989): focusing on one particular federal rule, the article analyzes the federal rulemaking process from drafting through promulgation and amendment; analyzes whether the current status of the Rule comports with the drafters' intent and whether the rule-making process skews the drafters' intent.

Jeffrey W. Stempel, *Halting Devolution or Bleak to the Future: Subrin's New-Old Procedure as a Possible Antidote to Dreyfuss's "Tolstoy Problem",* 46 Fla.L.Rev. 57 (1994): considers ideas of Professors Dreyfuss and Subrin on 1993 Amendments to the Fed.R.Civ.P. and their general misgivings about the rulemaking process; argues that for effective reform the system needs a "renewed institutional focus" on the part of the litigation community of lawyers, judges and academics.

Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform,* 59 Brook.L.Rev. 659 (1993): assesses litigation reform initiatives by evaluating recent activities and debates over direction of reform; proposes a more integrated and deliberate reform methodology; approves generally of the Rules Enabling Act process, but suggests refinements borrowing from legislative and administrative paradigms.

Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns,* 137 U.Pa.L.Rev. 1999 (1989): examines the goal of uniformity and the proliferation of local rules.

Stephen N. Subrin, *Fireworks on the 50th Anniversary of the Federal Rules of Civil Procedure,* 73 Judicature 1 (1989): Discusses the six symposia held to commemorate 50th anniversary of Fed.R.Civ.P.; highlights their often controversial nature and the opposing viewpoints on their effectiveness.

Edson R. Sunderland, *The Grant of Rulemaking Power to the Supreme Court of the United States,* 32 Mich.L.Rev. 1116 (1934): discusses the history of the procedural reform movement which culminated with passage of the Rules Enabling Act.

Edson R. Sunderland, *Implementing the Rule-Making Power,* 25 N.Y.U.L.Rev. 27 (1950): weighs the pros and cons of legislative promulgation of federal court rules as opposed to the courts promulgating these rules.

Edson R. Sunderland, *The Regulation of Procedure by Rules Originating in the Judicial Council,* 10 Ind.L.J. 202 (1935): concludes that an independent body like the judicial council would be an appropriate body for development of rules of procedure.

Griffen Terry, Comment, *A Critical Analysis of the Formulation and Content of the 1993 Amendments to the Federal Rules of Civil Procedure,* 63 U.Cin.L.Rev. 869: discusses the 1993 amendments to the Fed.R.Civ.P. ***727** and provides a general description of the federal rulemaking process commenting on its changing dynamics; argues generally that involvement by Congress adversely impacts the rulemaking process.

Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure,* 24 Ariz.St.L.J. 1393 (1992): details recent developments which threaten the continued viability of a uniform, simple system of federal civil procedure.

Carl Tobias, *Civil Justice Reform Roadmap,* 142 F.R.D. 507 (1992): charts recent developments in civil justice reform efforts among legislative, judicial and executive branches of the federal government.

Carl Tobias, *The Clinton Administration and Civil Justice Reform,* 144 F.R.D. 437 (1993): presents a general overview of substance and procedure of civil justice reform as of January 1994.

Carl Tobias, *Common Sense and Other Legal Reforms,* 48 Vand.L.Rev. 699 (1995): analyzes the proposed Common Sense Legal Reform Act and its potential impact upon other reform initiatives and the civil justice system; argues that Congress should reject or delay the act's passage as a means of preventing interference with ongoing reform initiatives.

Carl Tobias, *Improving the 1988 and 1990 Judicial Improvement Acts,* 46 Stan.L.Rev. 1589 (1994): analyzes the differing approaches to procedural reform embodied in the Civil Justice Reform Act of 1990 and the Judicial Improvements and Access to Justice Act of 1988; argues that more procedural revisions through notice and comment rulemaking at the national level may be achieved by combining the best elements of each act.

Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure,* 74 Cornell L.Rev. 270 (1989): criticizes the traditional rulemaking process and its underlying trans-substantive philosophy of the Fed.R.Civ.P.

Carl Tobias, *Reconsidering Rule 11,* 46 U.Miami L.Rev. 855 (1992): examines the new federal rule-making procedure, which allows for more public comment, and its effect on the re-examination of Rule 11.

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Carl Tobias, *Silver Linings in Federal Civil Justice Reform,* 59 Brook.L.Rev. 857 (1993): analyzes the impact of the Civil Justice Reform Act of 1990 and identifies some benefits it has conferred upon the court system.

Carl Tobias, *The Transmittal Letter Translated,* 46 Fla.L.Rev. 127 (1994): examines the first test by the United States Supreme Court of the revised procedures instituted by Congress in 1988; analyzes changes to Rule 11 and Rule 26 and notes continued passivity in the judicial rulemaking process; urges a general Congressional self-restraint in rulemaking.

Janice Toran, *Tis A Gift to be Simple: Aesthetics and Procedural Reform,* 89 Mich.L.Rev. 352 (1990): hypothesizes that aesthetic considerations, simplicity, elegance, coherence, and the like, should and do play a role in the formulation of legal procedures and the procedural reform process.

George G. Tyler, *The Origin of the Rule-Making Power and its Exercise by Legislatures,* 22 A.B.A.J. 772 (1936): chronicles the history of the migrating locus of rulemaking power, from the legislature to the courts.

Laurens Walker, *Avoiding Surprise from Federal Civil Rule Making: The Role of Economic Analysis,* 23 J.Legal Studies 569 (1994): considers the ***728** feasibility of applying economic analysis to the civil rules as a basis for policy making; proposes new criteria designed to make empirical predictions about rule changes.

Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking,* 60 Geo.Wash.L.Rev. 455 (1993): focusing on the changes to Rules 11 and 26, criticizes the whole rulemaking process; suggests that the controversy over recent amendments threatens judicial control of rulemaking and worries that the expertise of federal judges may be lost or unduly discounted.

Laurens Walker, *Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments,* 51 Law & Contemp.Probs. 67 (1988): theorizes that the process that guided the development of the Fed.R.Civ.P. through the first 50 years is not appropriate for the work that lies ahead; identifies as the chief deficiency the lack of a systematic official plan to collect valid information about the likely impact of changes to the rules before they are amended; proposes a series of field experiments as a solution.

Sam B. Warner, *The Role of Courts and Judicial Councils in Procedural Reform,* 85 U.Pa.L.Rev. 441 (1937): explores the extent of courts' rulemaking powers and who should exercise those powers.

Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?,* 137 U.Pa.L.Rev. 1901 (1989): discusses the first 50 years of the Fed.R.Civ.P. and poses and answers a series of rhetorical questions about the possibility that the rules in effect deny justice to certain classes of litigants.

Jack B. Weinstein, Reform of Court Rulemaking Procedures 90 (1977): condensed version of book published as: Weinstein, Reform of Federal Court Rulemaking Procedures, 76 Colum.L.Rev. 905 (1976); recommends changes; also published as: Jack B. Weinstein, Reform of the Federal Rule-Making Process, 63 A.B.A.J. 47 (1977).

Jack B. Weinstein, *Routine Bifurcation of Jury Negligence Trials: An Example of the Questionable Use of Rule Making Power,* 14 Vand.L.Rev. 831 (1961): uses the bifurcation rule to demonstrate some problems that can arise when rules with substantive weight are appraised merely on their procedural characteristics.

Jack B. Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and Erie,* 54 Brook.L.Rev. 1 (1988): describes the adoption of Fed.R.Civ.P. and the Erie decision; focuses on the relative indifference that surrounded these two events when they occurred in 1938 and the huge impact they have had in the 50 years since.

Russell R. Wheeler, *Broadening Participation in the Courts Through Rule-Making and Administration,* 62 Judicature 281, 282-83 (1979): describes the federal rulemaking process; characterizes it as “relatively simple”; examines the tension between

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the judiciary working to govern itself by making its own rules and the "democratic" method of allowing substantial public involvement in the rulemaking process.

Ralph U. Whitten, *Separation of Powers Restrictions on Judicial Rulemaking: A Case Study of Federal Rule 4*, 40 Me.L.Rev. 41 (1988): examines the permissible scope of supervisory rulemaking by the Supreme Court under the separation of powers doctrine.

***729** Joseph A. Wickes, *The New Rulemaking Power of the United States Supreme Court*, 13 Tex.L.Rev. 1 (1934): examines the historical background of the Rules Enabling Act.

John H. Wigmore, *All Legislative Rules for Judiciary Procedure are Void Constitutionally*, 23 Ill.L.Rev. 276 (1928): editorial asserts that any time a legislature attempts to impose upon the judiciary any rules for the discharge of the judiciary's duties, the rules are constitutionally invalid.

Charles A. Wright, *Amendments to the Federal Rules: The Functioning of a Continuing Rules Committee*, 7 Vand.L.Rev. 521 (1954): describes 1954 set of amendments to the Fed.R.Civ.P. and the rulemaking process used to make them.

Charles Alan Wright, *Foreword: The Malaise of Federal Rulemaking*, 14 Rev.Litig. 1 (1994): characterizes the rulemaking process as being in great disorder and in need of revision; notes the tradition and prestige of the rulemaking process, but criticizes the senseless complexity that has developed due to the proliferation of local rulemaking; suggests that Congressional interference in the process merely adds to the existing disorder; other contributions to the Symposium deal with particular amendments in the 1993 package and larger issues of procedural reform.

Charles A. Wright, *Book Review*, 9 St. Mary's L.J. 652, 653-58 (1978): endorses many of Judge Weinstein's suggested improvements of the rulemaking process.

Charles A. Wright, *Procedural Reform: Its Limitations and Its Future*, 1 Ga.L.Rev. 563 (1967): describes the apparently smooth operation of "procedural reform" within the federal system.

21 Charles A. Wright and K. Graham, Federal Practice and Procedure § 5006 (1977): chronicles the history of the drafting process for the Fed.R.Evid.

4 Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure §§ 1001-1008 (1969 and Supp.1993): chronicles the history of procedure in federal courts; discusses the drive for procedural reform which culminated in the Rules Enabling Act; examines the formation of the federal rules and the contributions of the advisory committees.

12 Charles A. Wright & Arthur Miller, Federal Practice and Procedure § 3152 (1973): discusses the abuses of local rulemaking power.

Footnotes

1 This portion of this Report is adapted from Thomas E. Baker, An Introduction to Federal Court Rulemaking Procedure, 22 Tex.Tech L.Rev. 323, 324-28 (1991). For a more detailed history, see Stephen B. Burbank, The Rules Enabling Act of 1934, 130 U.Pa.L.Rev. 1015, 1035-95 (1982). See also Peter G. McCabe, Renewal of the Federal Rulemaking Process, 44 Am.U.L.Rev. 1655 (1995), which provides a comprehensive statement of current practices and a summary of their history.

2 Act of Sept. 24, 1789, ch. 20, § 17, 1 Stat. 73, 83.

3 Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93.

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4 Act of May 19, 1828, ch. 68, 4 Stat. 278.

5 Charles E. Clark, The Challenge of a New Federal Judicial Procedure, 20 Cornell L.Q. 443, 499-50 (1935).

6 Act of June 1, 1872, ch. 255, 17 Stat. 197.

7 "[T]he procedural law continued to operate in an atmosphere of uncertainty and confusion, aggravated by the growing tendency of federal courts to develop their own rules of procedure under the licensing words of the 1872 Act that conformity was to be 'as near as may be.' " Charles Alan Wright & Arthur R. Miller, 4 Federal Practice and Procedure § 1002 at 14 (2d ed. 1987).

8 Id. § 1004 at 21.

9 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

10 41 U.S. (16 Pet.) 1, 10 L.Ed. 865 (1842).

11 Act of June 19, 1934, ch. 651, §§ 1-2, 48 Stat. 1064; Appointment of Committee to Draft Unified System of Equity and Law Rules, 295 U.S. 774 (1935).

12 Wright & Miller, supra note 7, § 1005.

13 Ibid.

14 Order Requesting Amendments from the Advisory Committee, 308 U.S. 642 (1939).

15 Continuance of Advisory Committee, 314 U.S. 720 (1941); Charles E. Clark, "Clarifying" Amendments to the Federal Rules?, 14 Ohio St.L.J. 241 (1953).

16 E.g., Order Amending the Rules of Civil Procedure, 329 U.S. 843 (1946) (noting Justice Frankfurter's reliance on the judgment of the Advisory Committee); Order Amending the Rules of Civil Procedure, 308 U.S. 643 (1939) (noting Justice Black's disapproval); Order Adopting the Rules of Procedure for the District Courts of the United States, 302 U.S. 783 (1937) (noting Justice Brandeis' disapproval).

17 Order Discharging the Advisory Committee, 352 U.S. 803 (1956).

18 The Rule-Making Function and the Judicial Conference of the United States, 44 A.B.A.J. 42 (1958) (panel discussion).

19 Tom C. Clark, Foreword to Wright & Miller, supra note 7, at ix.

20 Act of July 11, 1958, Pub.L. No. 93-12, 72 Stat. 356; Panel Discussion, The Rule-Making Function of the Judicial Conference of the United States, 44 A.B.A.J. 42 (1958).

21 The Justices continue to express their individual concerns about the Supreme Court's appropriate role in judicial rulemaking. Statement of Justice White, 113 S.Ct. 575 [preliminary pages] (Apr. 22, 1993); Dissenting Statement of Justice Scalia, joined by Justices Thomas and Souter, 113 S.Ct. 581 [preliminary pages] (Apr. 22, 1993); Order Amending the Rules of Civil Procedure, 374 U.S. 861 (1963) (opposing statements of Justices Black and Douglas).

22 Act of January 2, 1975, Pub.L. No. 93-595, 88 Stat.1926; Edward W. Cleary, Preliminary Notes on Reading the Rules of Evidence, 57 Neb.L.Rev. 908 (1978).

23 28 U.S.C. § 2074(b).

24 Judicial Improvements and Access to Justice Act, Pub.L. No. 100-702, 102 Stat. 4642 (codified at 28 U.S.C. § 2073(c)).

25 This portion of this Report is adapted from Baker, supra note 1, at 328-31, and Administrative Office of the U.S. Courts, The Federal Rules of Practice and Procedure—A Summary for Bench and Bar (Oct. 1993) (hereinafter A Summary for Bench and Bar).

26 28 U.S.C. §§ 2071-2077.

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27 Announcement, 54 Fed.Reg. 13,752 (Apr. 5, 1989) (publishing Procedures adopted by the Judicial Conference of the United States on Mar. 14, 1989).

28 28 U.S.C. § 331.

29 Ibid.

30 Ibid.

31 28 U.S.C. § 2073(b). The convention has been to refer to this Committee as the "Standing Committee on Rules of Practice and Procedure" or simply the "Standing Committee."

32 8 U.S.C. § 2073(b).

33 "Meetings of the rules committees are open to the public and are widely announced. All records of the committees, including minutes of committee meetings, suggestions and comments submitted by the public, statements of witnesses, transcripts of public hearings, and memoranda prepared by the reporters, are public and are maintained by the secretary. Copies of the rules and proposed amendments are available from the Rules Committee Support Office." A Summary for Bench and Bar, supra note 25.

34 See 28 U.S.C. § 620(b)(1), (4). See also Experimentation in the Law: Report of the Federal Judicial Center Advisory Committee on Experimentation in the Law (1981).

35 A Summary for Bench and Bar, supra note 25.

36 See 28 U.S.C. § 2073(b).

37 A Summary for Bench and Bar, supra note 25.

38 Notice of Public Meeting, 59 Fed.Reg. 59,793 (Nov. 18, 1994).

39 A Summary for Bench and Bar, supra note 25.

40 A Summary for Bench and Bar, supra note 25.

41 E.g., 115 S.Ct. No. 1, at cxvi (Nov. 1, 1994).

42 Notice of Meeting, 55 Fed.Reg. 25,384 (1990).

43 Order Amending the Federal Rules of Civil Procedure (Apr. 22, 1993), H.R.Doc. 103-74, 103d Cong., 1st Sess., reprinted at 113 S.Ct. 478 [preliminary pages] (1993).

44 The Supreme Court actually made changes in the original adoption of the civil and criminal rules. Wright & Miller, supra note 7, §§ 2 n. 8 & 1004 n. 18. Charles E. Clark, The Role of the Supreme Court in Federal Rulemaking, 46 J.Am.Jud.Soc. 250 (1963). And the Court continues to do so. Order, 129 F.R.D. 559 (May 1, 1990); Order of April 27, 1995 (not yet reported).

45 28 U.S.C. §§ 2071-77.

46 But see Act of March 30, 1973, Pub.L. 93-12, 87 Stat. 9 (providing that the proposed Rules of Evidence should have no effect until expressly approved by Act of Congress).

47 Order Amending the Rules of Civil Procedure, 480 U.S. 955 (1987); Order Amending the Rules of Civil Procedure, 471 U.S. 1155 (1985); Order Amending the Rules of Civil Procedure, 461 U.S. 1097 (1983).

48 Pub.L. No. 103-322, 108 Stat. 1796; H.R.Rep. No. 103-711, 103d Cong., 2nd Sess. (1994). On unanimous recommendation of the Advisory Committee on Evidence and of the Standing Committee, the Judicial Conference informed Congress that in its view this exercise was imprudent and had produced seriously flawed language. The Judicial Conference proposed an alternative text more in accord with the norms and drafting style of the other rules. See *Report of the Judicial Conference on the Admission of Character Evidence in Certain Sexual Misconduct Cases* (Feb. 1995). Congress took no action, and the new rules went into force on July 9, 1995, as originally enacted.

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49 This part of this Report is adapted, with permission, from a letter from Professor Oakley to the Chair of the Subcommittee. John B. Oakley, An Open Letter on Reforming the Process of Revising the Federal Rules, 55 Mont.L.Rev. 435 (1994).

50 Professor Carl Tobias assisted in the compilation of issues for consideration in this part of this Report.

51 28 U.S.C. § 478(b).

52 See also Long Range Plan for the Federal Courts (May 1995) Recommendation 30, Implementation Strategy 30c: "In developing rules, the Judicial Conference and the individual courts should seek significant participation by the interested public and representatives of the bar, including members of the federal and state benches."

53 The full mailing list contains more than 10,000 names. Most addressees receive them ex officio, but there is also a revolving list that eventually will number 2,500 scholars and members of the bar. Any recipient on the revolving list who does not respond over the course of three years will be replaced with a new name.

54 At http://www.uscourts.gov. The Federal Judicial Center also has a home page, at http://www.fjc.gov, with its own publications and links to other legal sites on the Internet. The Cornell Legal Information Institute has made the rules themselves, and many other legal texts, available at http:// www.law.cornell.edu. Other sites are blooming. For example, Villanova maintains what it calls "The Home Page for the Federal Courts on the Internet" at http:// www.law.vill.edu/Fed-Ct/fedcourt.html.

55 Baker, supra note 1, at 334-35. See particularly Stephen B. Burbank, Ignorance and Procedural Law Reform: A Call for a Moratorium, 59 Brooklyn L.Rev. 841 (1993).

56 Baker, supra note 1, at 335.

57 Pub.L. No. 101-650, 104 Stat. 5089 (1990).

58 Pub.L. No. 103-420, 103rd Cong., 2nd Sess. (Oct. 25, 1994).

59 Baker, supra note 1, at 334.

60 Proposed Long Range Plan for the Federal Courts (Mar. 1995) Recommendation 30, Implementation Strategy 30b: "The national rules should strive for greater uniformity of practice and procedure, but individual courts should be permitted limited flexibility to account for differing local circumstances and to experiment with innovative procedures."

61 Statement of Justice White, 113 S.Ct. at 575 [preliminary pages] (Apr. 22, 1993).

62 28 U.S.C. § 2072(a) & (b).

63 U.S. Const. art. III, § 1.

64 Charles Alan Wright, Foreword: The Malaise of Federal Rulemaking, 14 Rev.Litigation 1 (1994).

65 The following schedule would work. In spring or summer of Year One, the Advisory Committee makes a recommendation for publication. The Standing Committee would consider the recommendation at a meeting between September 15 and 30. Publication at the beginning of November (giving the AO a month for preparation) would produce a comment period closing at the end of April in Year Two. Advisory Committees would meet toward the end of April, in conjunction with any oral hearings, to consider comments and make recommendations for a meeting of the Standing Committee to be held at the end of June of beginning of July. The Standing Committee would transmit any approved drafts to the Judicial Conference for consideration in the fall of Year Two. If the Conference and Supreme Court approved, the rule would take effect on December 1 of Year Three, a total time of approximately 2 1/2 years from initial proposal to effectiveness.

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 3-4, 2013
Cambridge, Massachusetts

Minutes

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ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Cambridge, Massachusetts, on Thursday and Friday, January 3 and 4, 2013. The following members were present:

Judge Jeffrey S. Sutton, Chair
Dean C. Colson, Esq.
Roy T. Englert, Jr., Esq.
Gregory G. Garre, Esq.
Judge Marilyn L. Huff
Chief Justice Wallace B. Jefferson
Dean David F. Levi
Judge Patrick J. Schiltz
Larry D. Thompson, Esq.
Judge Richard C. Wesley
Judge Diane P. Wood

The Department of Justice was represented at various points at the meeting by Acting Assistant Attorney General Stuart F. Delery, Elizabeth J. Shapiro, Esq., and Allison Stanton, Esq.

Deputy Attorney General James M. Cole, Judge Neil M. Gorsuch, and Judge Jack Zouhary were unable to attend.

Also participating were former member Judge James A. Teilborg; Professor Geoffrey C. Hazard, Jr., consultant to the committee; and Peter G. McCabe, Administrative Office Assistant Director for Judges Programs. The committee's style consultant, Professor R. Joseph Kimble, participated by telephone.

On Thursday afternoon, January 3, Judge Sutton moderated a panel discussion on civil litigation reform initiatives with the following panelists: Judge John G. Koeltl, a member of the Advisory Committee on Civil Rules and Chair of its Duke Conference subcommittee; Rebecca Love Kourlis, Executive Director of the Institute for the Advancement of the American Legal System at the University of Denver and a former justice of the Colorado Supreme Court; Dr. Emery G. Lee, III, Senior Research Associate in the Research Division of the Federal Judicial Center; and Judge Barbara B. Crabb, U.S. District Court for the Western District of Wisconsin.

Providing support to the Standing Committee were:

Professor Daniel R. Coquillette	The Committee's Reporter
Jonathan C. Rose	The Committee's Secretary and Chief, Rules Committee Support Office
Benjamin J. Robinson	Deputy Rules Officer
Julie Wilson	Rules Office Attorney
Andrea L. Kuperman (by telephone)	Chief Counsel to the Rules Committees
Joe Cecil	Research Division, Federal Judicial Center

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
- Judge Steven M. Colloton, Chair
- Professor Catherine T. Struve, Reporter (by telephone)

Advisory Committee on Bankruptcy Rules —
- Judge Eugene R. Wedoff, Chair
- Professor S. Elizabeth Gibson, Reporter
- Professor Troy A. McKenzie, Associate Reporter

Advisory Committee on Civil Rules —
- Judge David G. Campbell, Chair
- Professor Edward H. Cooper, Reporter
- Professor Richard L. Marcus, Associate Reporter

Advisory Committee on Criminal Rules —
- Judge Reena Raggi, Chair

Professor Sara Sun Beale, Reporter
Advisory Committee on Evidence Rules —
Chief Judge Sidney A. Fitzwater, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Sutton opened the meeting by noting the extraordinary service to the rules committees by his predecessor Judge Mark Kravitz, which would be further commemorated at the committee's dinner in the evening. He praised Judge Kravitz's extraordinary ten years of service on both the Civil Rules Advisory Committee and the Standing Committee. Judge Kravitz served as chair of both committees.

Judge Sutton specifically called attention to the commendation of Judge Kravitz in Chief Justice Roberts's year-end report and asked that the following paragraph from that report be included in the minutes:

> On September 30, 2012, Mark R. Kravitz, United States District Judge for the District of Connecticut, passed away at the age of 62 from amyotrophic lateral sclerosis—Lou Gehrig's Disease. We in the Judiciary remember Mark not only as a superlative trial judge, but as an extraordinary teacher, scholar, husband, father, and friend. He possessed the temperament, insight, and wisdom that all judges aspire to bring to the bench. He tirelessly volunteered those same talents to the work of the Judicial Conference, as chair of the Committee on Rules of Practice and Procedure, which oversees the revision of all federal rules of judicial procedure. Mark battled a tragic illness with quiet courage and unrelenting good cheer, carrying a full caseload and continuing his committee work up until the final days of his life. We shall miss Mark, but his inspiring example remains with us as a model of patriotism and public service.

Chief Justice John G. Roberts, Jr., 2012 Year-End Report on the Federal Judiciary 11 (2012).

Judge Sutton reported that at its September 2012 meeting, the Judicial Conference approved without debate all fifteen proposed rules changes forwarded to it by the committee for transmittal to the Supreme Court. Assuming approval by the Court and no action by Congress to modify, defer, or delay the proposals, the amendments will become effective on December 1, 2013.

APPROVAL OF MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of its last meeting, held on June 11 and 12, 2012, in Washington, D.C.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell and Professors Cooper and Marcus presented the report of the advisory committee, as set forth in Judge Campbell's memorandum of December 5, 2012 (Agenda Item 3). Judge Campbell presented several action items, including the recommendation to publish for comment amendments to Rules 37(e), 6(d), and 55(c). Judge Campbell also presented the advisory committee's recommendation to adopt without publication an amendment to Rule 77(c)(1).

Amendment for Final Approval

FED. R. CIV. P. 77(c)(1) – CROSS REFERENCE CORRECTION

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

As a result of the 2009 Time Computation amendment, the Rule's list of legal holidays remained unchanged, but became Rule 6(a)(6)(A). However, through inadvertence, the cross-reference in Rule 77(c) was not addressed at that time. The proposed amendment corrects the cross-reference.

The committee unanimously by voice vote approved the proposed amendment for final approval by the Judicial Conference without publication.

Amendments for Publication

FED. R. CIV. P. 37(e)

Judge Campbell first gave a short history behind the drafting of the proposed new Rule 37(e). He stated that the subject of the rule had been extensively considered at a mini-conference, as well as in numerous meetings of the advisory committee and conference calls of the advisory committee's discovery subcommittee. There was wide agreement that the time had come for developing a rules-based approach to preservation

and sanctions.

The Civil Rules Committee hosted a mini-conference in Dallas in September 2011. Participants in that mini-conference provided examples of extraordinary costs assumed by litigants, and those not yet involved in litigation, to preserve massive amounts of information, as a result of the present uncertain state of preservation obligations under federal law. In December 2011, a subcommittee of the House Judiciary Committee held a hearing on the costs of American discovery that focused largely on the costs of preservation for litigation.

The discovery subcommittee of the advisory committee had agreed for some time that some form of uniform federal rule regarding preservation obligations and sanctions should be established. The subcommittee initially considered three different approaches: (1) implementing a specific set of preservation obligations; (2) employing a more general statement of preservation obligations, using reasonableness and proportionality as the touchstones; and (3) addressing the issue through sanctions. The subcommittee rejected the first two approaches. The approach that would set out specific guidance was rejected because it would be difficult to set out specific guidelines that would apply in all civil cases, and changing technology might quickly render such a rule obsolete. The more general approach was rejected because it might be too general to provide real guidance. The subcommittee therefore opted for a third approach that focuses on possible remedies and sanctions for failure to preserve. This approach attempts to specify the circumstances in which remedial actions, including discovery sanctions, will be permitted in cases where evidence has been lost or destroyed. It should provide a measure of protection to those litigants who have acted reasonably in the circumstances.

After an extensive and wide ranging discussion of the proposed new Rule 37(e), the committee approved it for publication in August 2013, conditioned on the advisory committee reviewing at its Spring 2013 meeting the major points raised at this meeting. Judge Campbell agreed that the advisory committee would address concerns raised by Standing Committee members and make appropriate revisions in the draft rule and note for the committee's consideration at its June 2013 meeting.

During the course of the committee's discussion, the following concerns were expressed with respect to the current draft of proposed new Rule 37(e) and its note:

Displacement of Other Laws

One committee member expressed concern about the statement in the note that the amended rule "*displaces* any other law that would authorize imposing litigation sanctions in the absence of a finding of wilfulness or bad faith, including state law in diversity cases." (emphasis added).

The member pointed out that use of the term "displace" could be read as a possible effort to preempt on a broad basis state or federal laws or regulations requiring the preservation of records in different contexts and for different purposes, such as tax, banking, professional, or antitrust regulation. Judge Campbell stated that there had been no such intent on the part of the advisory committee. The advisory committee had been focused on establishing a uniform federal standard solely for the preservation of records for litigation in federal court (including cases based on diversity jurisdiction). The advisory committee intended to preserve any separate state-law torts of spoliation.

Judge Campbell believed the draft committee note could be appropriately clarified to make clear that the proposed rule on preservation sanctions had no application beyond the trial of cases. A committee member noted that a statutory requirement of records preservation for non-trial purposes should not require a litigant to make greater preservation efforts for trial discovery purposes than would otherwise be required by the amended rule.

Use of the Term "Sanction"

Another participant noted that the word "sanction" has particularly adverse significance in most contexts when applied to the conduct of a lawyer. In some jurisdictions, this might require reporting an attorney to the board of bar overseers. Thus, in using the term "sanction," he urged that the advisory committee differentiate between its use when referring to the actions permitted under the rule in response to failures to preserve and its broader application to the general area of professional responsibility.

"Irreparable Deprivation"

Several committee members raised concerns about proposed language that would allow for sanctions if the failure to preserve "irreparably deprived a party of any meaningful opportunity to present a claim or defense." These members stated that this language could potentially eliminate most of the rule's intended protection for the innocent and routine disposition of records. Also, as a matter of style and precise expression, one committee member preferred substitution of the word "adequate"for the word "meaningful."

Acts of God

Another concern was whether the proposed draft of Rule 37(e) would permit the imposition of sanctions against an innocent litigant whose records were destroyed by an "act of God." The accidental destruction of records because of flooding during the recent Hurricane Sandy was offered as a hypothetical example. Judge Campbell agreed that a literal reading of the current draft might lead to imposition of sanctions as the result of a blameless destruction of records resulting from such an event. Both he and Professor

Cooper agreed that the question of who should bear the loss in an "act of God" circumstance was an important policy issue for the advisory committee to revisit at its spring meeting.

Preservation of Current Rule 37(e) Language

The Department of Justice and several committee members also recommended retention of the language of the current Rule 37(e), which protects the routine, good-faith operation of an electronic information system. Andrea Kuperman's research showed that the current rule is rarely invoked. But the Department of Justice argued that in its experience, the presence of the Rule 37(e) has served as a useful incentive for government departments to modernize their record-keeping practices.

Expanded Definition of "Substantial Prejudice"

The Department also urged that the term "substantial prejudice in the litigation"—a finding required under the draft proposal in order to impose sanctions for failure to preserve—be given further definition. It suggested that "substantial prejudice" should be assessed both in the context of reliable alternative sources of the missing evidence or information as well as in the context of the materiality of the missing evidence to the claims and defenses involved in the case. The Department and several committee members suggested that publication for public comment might be helpful to the committee in developing its final proposed rule.

By voice vote, the committee preliminarily approved for publication in August 2013 draft proposed Rule 37(e) on the condition that the advisory committee would review the foregoing comments and make appropriate revisions in the proposed draft rule and note for approval by the Standing Committee at its June 2013 meeting.

FED. R. CIV. P. 6(d) – CLARIFICATION OF "3 DAYS AFTER SERVICE"

Professor Cooper reviewed the advisory committee's proposed amendment to Rule 6(d), which provides an additional 3 days to act after certain methods of service. The purpose of the amendment is to foreclose the possibility that a party who must act within a specified time after making service could extend the time to act by choosing a method of service that provides the added time.

Before Rule 6(d) was amended in 2005, the rule provided an additional 3 days to respond when service was made by various described means. Only the party being served, not the party making the service, had the option of claiming the extra 3 days. When Rule 6(d) was revised in 2005 for other purposes, it was restyled according to the conventions adopted for the Style Project, allowing 3 additional days when a party must

act within a specified time "after service." This could be interpreted to cover rules allowing a party to act within a specified time after making (as opposed to receiving) service, which is not what the advisory committee intended. For example, a literal reading of present Rule 6(d) would allow a defendant to extend from 21 to 24 days the Rule 15(a)(1)(A) period to amend once as a matter of course by choosing to serve the answer by any of the means specified in Rule 6(d). Although it had not received reports of problems in practice, the advisory committee determined that this unintended effect should be eliminated by clarifying that the extra 3 days are available only to the party receiving, as opposed to making, service.

The committee without objection by voice vote approved the proposed amendment for publication.

FED. R. CIV. P. 55(c) – APPLICATION TO "FINAL" DEFAULT JUDGMENT

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

A close reading of the three rules together establishes that relief from a default judgment is limited by the demanding standards of Rule 60(b) only if the default judgment is made final under Rule 54(b) or when there is a final judgment adjudicating all claims among all parties.

Several cases, however, have struggled to reach the correct meaning of Rule 55(c), and at times a court may fail to recognize the meaning. The proposed amendment clarifies Rule 55(c) by adding the word "final" before "default judgment."

The committee without objection by voice vote approved the proposed amendment for publication.

Information Items

Judge Campbell reported on several information items that did not require committee action at this time.

DUKE CONFERENCE SUBCOMMITTEE WORK

A subcommittee of the advisory committee formed after the advisory committee's May 2010 Conference on Civil Litigation held at Duke University School of Law ("Duke Conference subcommittee") is continuing to implement and oversee further work on ideas resulting from that conference. Judge Campbell and Judge Koeltl (the Chair of the Duke Conference subcommittee) presented to the committee a package of various potential rule amendments developed by the subcommittee that are aimed at reducing the costs and delays in civil litigation, increasing realistic access to the courts, and furthering the goals of Rule 1 "to secure the just, speedy, and inexpensive determination of every action and proceeding." This package of amendments has been developed though countless subcommittee conference calls, a mini-conference held in Dallas in October 2012, and discussions during advisory committee meetings. The discussions that have occurred will guide further development of the rules package, with a goal of recommending publication of this package for public comment at the committee's June 2013 meeting.

An important issue at the Duke Conference and in the work undertaken since by the Duke Conference subcommittee has been the principle that discovery should be conducted in reasonable proportion to the needs of the case. In an important fraction of the cases, discovery still seems to run out of control. Thus, the search for ways to embed the concept of proportionality successfully in the rules continues.

Current sketches of possible amendments to parts of Rule 26 exemplify this effort and include the following proposals:

Rule 26

* * * * *

(b) Discovery Scope and Limits.

(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense <u>and proportional to the needs of the case considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information [within this scope of discovery]{sought} need not be admissible in evidence to be discoverable.</u> ~~— including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons~~

~~who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~ * * *

(2) *Limitations on Frequency and Extent.*

(A) *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions, ~~and~~ interrogatories, requests [to produce][under Rule 34], and requests for admissions, or on the length of depositions under Rule 30. ~~By order or local rule, the court may also limit the number of requests under Rule 36.~~

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery ~~otherwise allowed by these rules or by local rule~~ if it determines that: * * *

(iii) the ~~burden or expense of the~~ proposed discovery is outside the scope permitted by Rule 26(b)(1) ~~outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.~~

* * * * *

(c) Protective Orders

(1) *In General.* * * * The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: * * *

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery; * * *

The drafts are works in progress and will be revisited by the advisory committee at its spring meeting.

FED. R. CIV. P. 84 AND FORMS

Judge Campbell further reported that the subcommittee of the advisory committee

formed to study Rule 84 and associated forms is inclined to recommend abrogating Rule 84. This inclination follows months of gathering information about the general use of the forms and whether they provide meaningful help to attorneys and pro se litigants. The advisory committee is evaluating the subcommittee's inclination and intends to make a recommendation to the committee concerning the future of Rule 84 at the June 2013 meeting. If Rule 84 is abrogated, forms will still remain available through other sources, including the Administrative Office. Although forms developed by the Administrative Office do not go through the full Enabling Act process, the subcommittee would likely recommend that the advisory committee plan to work with the Administrative Office in drafting and revising forms for use in civil actions.

The committee briefly discussed the feasibility of appointing a liaison member of the civil rules advisory committee to the Administrative Office forms committee. Several members of the committee praised the prior work of the Administrative Office forms committee, particularly its ready responsiveness to current judicial and litigant needs. Its flexibility and responsiveness to rapidly changing requirements were favorably compared to the more cumbersome process imposed by the Rules Enabling Act. Peter McCabe, who chairs the Administrative Office forms committee, expressed the willingness of that committee to respond to the needs of the civil rules advisory committee.

No significant concern was raised by the committee about the potential abrogation of Rule 84.

MOTIONS TO REMAND

Judge Campbell reported on a proposal from Jim Hood, Attorney General of Mississippi, to require automatic remand in cases in which a district court takes no action on a motion to remand within thirty days. Attorney General Hood also proposed that the removing party be required to pay expenses, including attorney fees, incurred as a result of removal when remand is ordered. While the advisory committee was sympathetic to the problems created by federal courts failing to act timely on removal motions, it did not believe the subject fell within the jurisdiction of the rules committees. Both subject matter jurisdiction and the shifting of costs from one party to another on removal and remand are governed by federal statutes enacted by Congress and not by rules promulgated under the Rules Enabling Act. Judge Sutton has conveyed the advisory committee's response to Attorney General Hood.

PANEL ON CIVIL LITIGATION REFORM PILOT PROJECTS

Four panelists covered the topics outlined below.

Selected Federal Court Reform Projects

Judge Koeltl outlined five litigation reform projects that the Duke Conference subcommittee is following. These include:

a. A set of mandatory initial discovery protocols for employment discrimination cases was developed as part of the work resulting from the Duke Conference. These protocols were developed by experienced employment litigation lawyers and have so far been adopted by the Districts of Connecticut and Oregon.

b. A set of proposals embodied in a pilot project in the Southern District of New York to simplify the management of complex cases.

c. A Southern District of New York project to manage section 1983 prisoner abuse cases with increased automatic discovery and less judicial involvement. The project's goal is to resolve these types of cases within 5.5 months using judges as sparingly as possible through the use of such devices as specific mandatory reciprocal discovery, mandatory settlement demands, and mediation.

d. A project in the Seventh Circuit inspired by Chief Judge James F. Holderman that seeks to expedite and limit electronic discovery. The project emphasizes concepts of proportionality and cooperation among attorneys. One specific innovation, Judge Koeltl noted, was the mandatory appointment of a discovery liaison by each litigant.

e. The expedited trial project being implemented in the Northern District of California. This project provides for shortened periods for discovery and depositions and severely limits the duration of a trial. The goal is for the trial to occur within six months after discovery limits have been agreed upon. Judge Koeltl noted, however, that this entire procedure is an "opt in" one, and so far no litigant has "opted" to use it. As a result, the entire project is now under review to determine what changes will make it more appealing to litigants.

State Court Pilot Projects

Justice Kourlis presented a summary of information compiled by the Institute for the Advancement of the American Legal System on state court pilot projects. She said these projects fell into three basic categories, all with the common purpose of increasing access to the courts for all types of litigants. The three basic categories were:

a. Different rules for different types of cases

One category of pilot projects attempts to resolve issues of cost and delay by establishing different sets of rules for different types of cases, such as for complex (e.g., business) cases and simple cases amenable to short, expedited, and summary ("SES")

procedures. Complex case programs are currently underway in California and Ohio. In those projects, the emphasis appears to be on close judicial case management, frequent conferences, and cooperation by counsel. Substantial prior experience in complex business cases by participating judges appears to have contributed to the success of the projects.

SES programs for simple cases are currently underway in California, Nevada, New York, Oregon, and Texas. These programs emphasize streamlined discovery, strict adherence to tight trial deadlines, and, in at least one state, mandatory participation by litigants whose cases fall under a $100,000 damages limit.

b. Proportionality in Discovery

A number of states have launched projects to achieve this objective. These projects have involved local rule changes to expedite and limit the scope of discovery, more frequent and earlier conferences with judges, and more active judicial case management to achieve proportionate discovery and encourage attorney cooperation.

c. Active Judicial Case Management

This third category of state projects overlaps with the first two categories. Some examples of the techniques employed include: (i) the assignment of a case to a single judicial officer from start to finish; (ii) early and comprehensive pretrial conferences; and (iii) enhanced judicial involvement in pretrial discovery disputes before the filing of any written motions.

A "Rocket Docket" Court

Judge Crabb gave a succinct presentation on the benefits of her "rocket docket" court (the Western District of Wisconsin) and how such a court can effectively manage its docket. She explained that litigants value certainty and predictability, and that the best way to achieve these goals is to set a firm trial date. Given her court's current case volume, the goal is to complete a case within twelve to fifteen months after it is filed. Judge Crabb explained that this management style achieves transparency, simplicity, and service to the public.

Once a case is filed in the Western District of Wisconsin, a magistrate judge promptly holds a comprehensive scheduling conference. At this conference, a case plan is developed and discovery dates are fixed. Although this court usually will not change pre-trial discovery deadlines, it will do so on application of both parties if the ultimate trial date is not jeopardized.

In Judge Crabb's district, the magistrate judges are always available for telephone

conferences on motions or other pretrial disputes, but they do not seek to actively manage cases. The litigants know that they have a firm trial date and can be relied upon to seek judicial intervention whenever it is necessary. In Judge Crabb's view, this "rocket docket" approach permits both the rapid disposition of a high volume of cases and maintenance of high morale of the court staff.

Federal Judicial Center Statistical Observations on Discovery

Dr. Lee of the Federal Judicial Center then gave a short presentation on statistical observations about discovery. He noted that the Center's research shows that the cost of discovery is a problem only in a minority of cases. Indeed, various statistical analyses lead him to conclude that the problem cases are a small subset of the total number of cases filed and involve a rather small subset of difficult lawyers.

Dr. Lee cited a multi-variate analysis done in 2009 and 2010 for the Duke Conference. In that study, the Federal Judicial Center found that the costly discovery cases have several common factors:

1. High stakes for the litigants (either economic or non-economic);
2. Factual complexity;
3. Disputes over electronic discovery; and
4. Rulings on motions for summary judgment.

Other interesting statistical observations of the study included the fact that on average a 1% increase in the economic value of the case leads to a .25% increase in its total discovery cost. Other discovery surveys indicate that almost 75% of lawyers on average believe that discovery in their cases is proportionate and that the other side is sufficiently cooperative. Only in a small minority of the cases—approximately 6%—are lawyers convinced that discovery demands by the opposing side are highly unreasonable.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Colloton and Professor Struve presented the report of the advisory committee, as set forth in Judge Colloton's memorandum of December 5, 2012 (Agenda Item 6). There were no action items for the committee.

Information Items

SEALING AND REDACTION OF APPELLATE BRIEFS

Judge Colloton reported that the advisory committee had decided not to proceed with a proposal to implement a national uniform standard for sealing or redaction of appellate briefs. He explained that the circuits take varying approaches to sealing and redaction on appeal. During the advisory committee's discussions, several members had expressed support for the approach of the Seventh Circuit, where sealed items in the record on appeal are unsealed after a brief grace period unless a party seeks the excision of those items from the record or moves to seal them on appeal. This approach is based on the belief that judicial proceedings should be open and transparent. However, members also noted that each circuit currently seems satisfied with its own approach to sealed filings.

Given the division of opinion among the circuits, the advisory committee ultimately decided there was no compelling reason to propose a rule amendment on the topic of sealing on appeal. However, its members believed that each circuit might find it helpful to know how other circuits handle such questions; therefore, shortly after its meeting, Judge Sutton, in one of his last acts as the chair of the advisory committee, wrote to the chief judge and clerk of each circuit to summarize the concerns that have been raised about sealed filings, the various approaches to those filings in different circuits, and the rationale behind the approach of the Seventh Circuit.

MANUFACTURED FINALITY

The advisory committee also revisited the topic of "manufactured finality," which occurs when parties attempt to create an appealable final judgment by dismissing peripheral claims in order to secure appellate review of the central claim. A review of circuit practice found that virtually all circuits agree that an appealable final judgment is created when all peripheral claims are dismissed with prejudice. Many circuits also agree that an appealable final judgment is not created when a litigant dismisses peripheral claims without prejudice, although some circuits take a different view. But less uniformity exists for handling middle ground attempts to "manufacture" finality. For example, there is disagreement in the circuits as to whether an appealable judgment results if the appellant conditionally dismisses the peripheral claims with prejudice by agreeing not to reassert the peripheral claims unless the appeal results in reinstatement of the central claim. A joint civil-appellate rules subcommittee was appointed to review whether "manufactured finality" might be addressed in the federal rules. On initial examination, members had divergent views.

Before last fall's advisory committee meeting, the Supreme Court accepted for review *SEC v. Gabelli*, 653 F.3d 49 (2nd Cir. 2011), *cert. granted*, 133 S.Ct. 97 (2012). The Second Circuit's jurisdiction in that case rested on "conditional finality." Since the Court might clarify this issue in that case, the advisory committee decided to await the Court's decision before deciding how to proceed.

LENGTH LIMITS FOR BRIEFS

The advisory committee is considering whether to overhaul the treatment of filing-length limits in the Appellate Rules. The 1998 amendments to the Appellate Rules set the length limits for merits briefs by means of a type-volume limitation, but Rules 5, 21, 27, 35, and 40 still set length limits in terms of pages for other types of appellate filings. Members have reported that the page limits invite manipulation of fonts and margins, and that such manipulation wastes time, disadvantages opponents, and makes filings harder to read. The advisory committee intends to consider whether the type-volume approach should be extended to these other types of appellate filings.

CLASS ACTION OBJECTORS

Finally, the advisory committee has received correspondence about so-called "professional" class action objectors who allegedly file specious objections to a settlement and then appeal the approval of the settlement with the goal of extracting a payment from class action attorneys in exchange for withdrawing their appeals. One proposed solution would amend Rule 42 to require court approval of voluntary dismissal motions by class action objectors, together with a certification by an objector that nothing of value had been received in exchange for withdrawing the appeal. Another proposed solution would require an appeal bond from class action objectors sufficient to cover the costs of delay caused by appeals from denials of non-meritorious objections. Judge Colloton suggested that collaboration with the Civil Rules Advisory Committee would likely be required to determine both the scope of and possible remedies for this problem.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raggi and Professor Beale presented the report of the advisory committee, as set forth in Judge Raggi's memorandum of November 26, 2012 (Agenda Item 8). As the committee's fall meeting in Washington was canceled as a result of Hurricane Sandy, there were no action items for the committee.

Information Items

Judge Raggi reported that on the agenda for the advisory committee's Fall 2012 meeting and now high on the agenda for its Spring 2013 meeting is a Department of Justice proposal to amend Rule 4 to permit effective service of summons on a foreign organization that has no agent or principal place of business within the United States. The Department argues that its proposed change is necessary in order to prevent evasion of service by organizations committing offenses within the United States.

Judge Raggi also reported on the status of the proposed amendments to Rule 12,

the rule addressing pleadings and pretrial motions. The proposed amendments were published for public comment in August 2011. The amendments clarify which motions must be raised before trial and the consequences if the motions are not timely filed. Numerous comments were received, including detailed objections and suggestions from various bar organizations. The committee's reporters prepared an 80-page analysis of these comments. In its consideration of the comments, the Rule 12 subcommittee reaffirmed the need for the amendment, but concluded that the public comments warranted several changes in its proposal. With those changes, the subcommittee has recommended to the advisory committee that an amended proposal be approved and transmitted to the Standing Committee for its approval. The advisory committee's consideration of the Rule 12 subcommittee's report will take place at its Spring 2013 meeting. Judge Raggi expressed her appreciation for the extended attention already devoted by Judge Sutton to the committee's work on Rule 12.

REPORT OF THE ADVISORY COMMITTEE ON RULES OF EVIDENCE

Judge Fitzwater and Professor Capra delivered the report of the advisory committee, as set forth in Judge Fitzwater's memorandum of November 26, 2012 (Agenda Item 4). There were no action items for the committee.

Information Items

SYMPOSIUM ON FED. R. EVID. 502

Professor Capra reported on a symposium the advisory committee hosted in conjunction with its Fall 2012 meeting. The purpose of the symposium was to review the current use (or lack of use) of Rule 502 (on attorney-client privilege and work product and waiver of those protections) and to discuss ways in which the rule can be better known and understood so that it can fulfill its original purposes of clarifying and limiting waiver of privilege and work product protection, thereby reducing delays and costs in litigation. Panelists included judges, lawyers, and academics with expertise and experience in the subject matter of the rule, some of whom are also veterans of the rulemaking process. The symposium proceedings and a model Rule 502(d) order will be published in the March 2013 issue of the *Fordham Law Review*.

The panel attributed much of the lack of use of Rule 502 as a device to aid in pre-production review to a simple lack of knowledge of the rule by practitioners and judges. Part of this absence of knowledge was attributed to the rule's location in the rules of evidence as opposed to the rules of civil procedure. Various suggestions on promotion of the rule's visibility, including a model Rule 502 order, education through Federal Judicial Center classes and a possible informational letter to chief district judges, are in the process of being implemented or developed.

PROPOSED AMENDMENTS TO FED. R. EVID. 801(d)(1) AND 803(6)-(8)

A published proposed amendment to Rule 801(d)(1), the hearsay exemption for certain prior consistent statements, provides that prior consistent statements are admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility. This proposal has been the subject of only one public comment so far. Proposed amendments to Rule 803(6)-(8)—the hearsay exemptions for business records, absence of business records, and public records—would clarify that the opponent has the burden of showing that the proffered record is untrustworthy. No comments have been received yet on this proposal.

SYMPOSIUM ON TECHNOLOGY AND THE FEDERAL RULES OF EVIDENCE

Judge Fitzwater reported that the advisory committee is planning to convene a symposium to highlight the intersection of the evidence rules and emerging technologies and to consider whether the evidence rules need to be amended in light of technological advances. The symposium will be held in conjunction with the advisory committee's Fall 2013 meeting at the University of Maine School of Law in Portland.

These presentations concluded the first day of the meeting of the Standing Committee.

FRIDAY, JANUARY 4, 2013

REPORT ON PACE OF RULEMAKING

Benjamin Robinson gave a brief presentation on the timing and pace of federal rulemaking over the past thirty years. Judge Sutton had requested the report, noting that at various times in the past both the Federal Judicial Center and the committee have tackled this subject. He specifically pointed to the Easterbrook-Baker "self-study" report by the Standing Committee, 169 F.R.D. 679 (1995), contained in the agenda book.

Mr. Robinson presented a series of charts that demonstrated that over the past thirty years there have been several peaks and valleys in the pace of federal rulemaking. The charts demonstrated that the peaks were caused by legislative activity and to a lesser extent by several rules restyling projects.

For example, bankruptcy legislation in the mid-1980s created the occasion in 1987 for 117 bankruptcy rule changes. Similarly, bankruptcy legislation created the occasion for 95 bankruptcy rule changes in 1991. Additional bankruptcy legislation in 2005 produced a total of 43 bankruptcy rules amendments in 2008. The civil and evidence rules restyling projects also have required a considerable number of rule changes.

Mr. Robinson's presentation initiated a broader discussion of the timing and pace of rulemaking by committee members.

Judge Sutton stated that he had placed this matter on the agenda in part to sensitize the Standing Committee to the work required by the Supreme Court on rule amendments.

At one point during the discussion, Judge Sutton advanced a theoretical proposal that perhaps rule changes could be made every two years instead of every year. For example, the civil and appellate rules committees could group their proposed changes in the even years, while the criminal, evidence, and bankruptcy rules committees could group their proposed changes in the odd years. Judge Sutton noted that such a scheme would have the advantage of predictability both for the Supreme Court and for the bar as to what types of rule changes could be expected in a particular year.

Judge Sutton asked for comments from several of those present, in particular, participants who have had extensive experience over the years in the rulemaking process. Several points emerged during the discussion. First, there is no question that the Supreme Court is very aware of the burden that the rulemaking process places upon it. Chief Justices Burger and Rehnquist were particularly conscious of it. Also, the current rules calendar places a heavy burden on the Court in that the rule proposals arrive in the

spring when the Court is busiest. However, no one argued that seeking a legislative change in the calendar made any sense. Instead, the idea was advanced that the Rules Committees could target the March meeting of the Judicial Conference for its major proposals, rather than the September meeting. This would mean that the rule changes could go to the Court at a more convenient time, such as late summer before its annual session begins on October 1. However, a correlative disadvantage would be the overall extension in the length of time required for a proposed amendment to the rules to be adopted.

Experienced observers pointed out that much of the timing of rulemaking is dictated by external factors such as legislation or decided cases. While the timing of such projects as the restyling of the evidence and civil rules might be discretionary, the need for new rules created by legislation or other external events often is not. All participants appeared to agree that keeping the Supreme Court involved in the rulemaking process is most important to its integrity and standing. Thus, all agreed at a minimum that greater sensitivity to the needs and desires of the Court as to the timing of proposed rules changes is highly advisable.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Wedoff, Professor Gibson, and Professor McKenzie presented the report of the advisory committee, as set forth in Judge Wedoff's memorandum of December 5, 2012 (Agenda Item 7). The report covered four major subjects: (1) revisions to the official forms for individual debtors; (2) a mini-conference on home mortgage forms and rules; (3) the development of a Chapter 13 form plan and related rule amendments; and (4) electronic signature issues.

DRAFTS OF REVISED OFFICIAL FORMS FOR INDIVIDUAL DEBTORS

Judge Wedoff first reported on the restyled Official Bankruptcy Forms for individual debtors. These forms are the initial product of the forms modernization project, a multi-year endeavor of the advisory committee, working in conjunction with the Federal Judicial Center and the Administrative Office. The dual goals of the forms modernization project are to improve the official bankruptcy forms and to improve the interface between the forms and available technology.

In August 2012, the first nine forms were published for public comment. To date, few comments have been received; however, the advisory committee expects to receive more comments before the February 15, 2013, deadline, and it will review those comments before seeking approval at the June meeting to publish the following eighteen remaining forms for individual debtor cases that have not yet been published:

Forms To Be Considered in June

- Official Form 101—Voluntary Petition for Individuals Filing for Bankruptcy
- Official Form 101AB—Your Statement About an Eviction Judgment Against You – Parts A and B
- Official Form 104—List in Individual Chapter 11 Cases of Creditors Who Have the 20 Largest Unsecured Claims Against You Who are not Insiders
- Official Form 106 – Summary—A Summary of Your Assets and Liabilities and Certain Statistical Information
- Official Form 106A—Schedule A: Property
- Official Form 106B—Schedule B: Creditors Who Hold Claims Secured by Property
- Official Form 106C—Schedule C: Creditors Who Have Unsecured Claims
- Official Form 106D—Schedule D: The Property You Claim as Exempt
- Official Form 106E—Schedule E: Executory Contracts and Unexpired Leases
- Official Form 106F—Schedule F: Your Codebtors
- Official Form 106 – Declaration—Declaration About an Individual Debtor's Schedules
- Official Form 107—Your Statement of Financial Affairs for Individuals Filing for Bankruptcy
- Official Form 112—Statement of Intention for Individuals Filing Under Chapter 7
- Official Form 119—Bankruptcy Petition Preparer's Notice, Declaration and Signature
- Official Form 121—Your Statement About Your Social Security Numbers
- Official Form 318—Discharge of Debtor in a Chapter 7 Case
- Official Form 423—Certification About a Financial Management Course
- Official Form 427—Cover Sheet for Reaffirmation Agreement

In anticipation of seeking publication in June, Judge Wedoff gave the committee an extensive preview of each of the above forms and took under advisement specific committee member comments on each of them with a plan to incorporate these comments in the preparation of the advisory committee's ultimate proposals.

MINI-CONFERENCE ON HOME MORTGAGE FORMS AND RULES

Judge Wedoff reported on a successful mini-conference held by the advisory committee on September 19, 2012, to explore the effectiveness of the new rules and forms concerning the impact of home mortgage rules and reporting requirements for chapter 13 cases, which went into effect on December 1, 2011. The mini-conference reflected a general acceptance of the disclosure requirements of the new rules, but pointed out various specific difficulties that will likely require some subsequent fine-tuning either by the advisory committee or through case-law development.

CHAPTER 13 FORM PLAN AND RELATED RULE AMENDMENTS

Professor McKenzie reported on the advisory committee's development of a national form plan for chapter 13 cases. The working group presented a draft of the form plan for preliminary review at the advisory committee's Fall 2012 meeting. The group also proposed amendments to Bankruptcy Rules 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, specifically to require use of the national form plan and to establish the authority needed to implement some of the plan's provisions.

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

CONSIDERATION OF ELECTRONIC SIGNATURE ISSUES

The last item of Judge Wedoff's report was an update on the advisory committee's consideration (at the request of the forms modernization project) of a rule establishing a uniform procedure for the treatment and preservation of electronic signatures. The advisory committee has requested Dr. Molly Johnson of the Federal Judicial Center to gather information on existing practices regarding the use of electronic signatures by nonregistered individuals and requirements for retention of documents with handwritten signatures. Her findings will be available by the end of this year and will be reported to the advisory committee at its Spring 2014 meeting.

NEXT MEETING

The Standing Committee will hold its next meeting in Washington, D.C., on June 3 and 4, 2013.

Agenda E-19 (Summary)
Rules
March 2013

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

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

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

- Federal Rules of Appellate Procedure. . . . . pp. 2-5
- Federal Rules of Bankruptcy Procedure.. . . . . pp. 5-7
- Federal Rules of Civil Procedure.. . . . . pp. 7-11
- Federal Rules of Criminal Procedure.. . . . . pp. 11-12
- Federal Rules of Evidence. . . . . pp. 12-13

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

Agenda E-19
Rules
March 2013

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

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

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

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

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

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

FEDERAL RULES OF APPELLATE PROCEDURE

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

Informational Items

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

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

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

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

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

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

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

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

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

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

FEDERAL RULES OF BANKRUPTCY PROCEDURE

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

Informational Items

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

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

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

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

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

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

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

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

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

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

The Committee concurred with the advisory committee's recommendations.

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

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

Rules Approved for Publication and Comment

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

Rule 6(d)

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

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

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

Rule 55(c)

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

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

Informational Items

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

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

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

FEDERAL RULES OF CRIMINAL PROCEDURE

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

Informational Items

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

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

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

FEDERAL RULES OF EVIDENCE

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

Informational Items

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

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

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

Respectfully submitted,

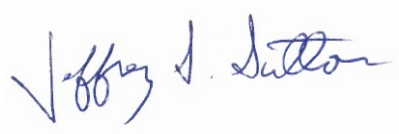

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Roy T. Englert, Jr.	Patrick J. Schiltz
Gregory G. Garre	Larry A. Thompson
Neil M. Gorsuch	Richard C. Wesley
Marilyn L. Huff	Diane P. Wood

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

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WASHINGTON, D.C. 20544

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JONATHAN C. ROSE
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EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

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

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

Date: December 5, 2012

Re: Report of the Civil Rules Advisory Committee

Introduction

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

* * * * *

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

* * * * *

PART I: ACTION ITEMS

* * * * *

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

ACTION ITEM: RULE 77(c)(1)

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

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

* * * * *

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

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

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

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

* * * * *

PROPOSED AMENDMENT TO THE FEDERAL RULES OF CIVIL PROCEDURE*

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

* * * * *

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

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

Committee Note

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

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

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Washington, DC
June 3-4, 2013

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15. Official Forms 17A, 17B, and 17C

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To carry on a continuous study of the operation and effect of the general rules of practice and procedure.

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Dean C. Colson	ESQ	Florida	2009	2015
Roy T. Englert, Jr.	ESQ	Washington, DC	2010	2013
Gregory G. Garre	ESQ	Washington, DC	2011	2014
Neil M. Gorsuch	C	Tenth Circuit	2010	2013
Marilyn L. Huff	D	California (Southern)	2007	2013
Wallace B. Jefferson	CJUST	Texas	2010	2013
David F. Levi	ACAD	North Carolina	2009	2015
Patrick J. Schiltz	D	Minnesota	2010	2013
Larry A. Thompson	ESQ	Georgia	2011	2014
Richard C. Wesley	C	Second Circuit	2011	2014
Diane P. Wood	C	Seventh Circuit	2007	2013
Jack Zouhary	D	Ohio (Northern)	2012	2015
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AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
June 3-4, 2013

1. Welcome and Opening Remarks

A. Welcome and opening remarks by Chair

B. Report on March 2013 Judicial Conference session

C. Transmission of Supreme Court-approved proposed rules amendments to Congress

D. **ACTION –** Approving Minutes of January 2013 Committee Meeting

2. Report of the Advisory Committee on Civil Rules – Judge David G. Campbell

A. Duke Civil Litigation Conference Rules Package

ACTION – Approving publishing for public comment proposed amendments to Rules 1, 4, 16, 26, 30, 31, 33, 34, 36, and 37

B. Rule 37(e)

ACTION – Approving a modification to the proposed amendment to Rule 37(e) previously approved for publication for public comment

C. Rule 84 and Official Forms

ACTION – Approving publishing for public comment proposed abrogation of Rule 84 and the Appendix of Forms, and proposed amendments to Rule 4 and Forms 5 and 6

D. Minutes and other informational items

3. Report of the Advisory Committee on Criminal Rules – Judge Reena Raggi

A. Rule 12 – Pleadings and Pretrial Motions

ACTION – Approving and transmitting to the Judicial Conference proposed amendments to Rules 12 and 34

B. Rules 5 and 58 – Consular Notification

ACTION – Approving and transmitting to the Judicial Conference proposed amendments to Rules 5 and 58

C. Minutes and other informational items

4. Report of the Advisory Committee on Bankruptcy Rules – Judge Eugene R. Wedoff

A. **ACTION –** Approving and transmitting to the Judicial Conference proposed amendments to:

1. Rules 7008, 7012, 7016, 9027, and 9033
2. Rules 8001-8028 (Part VIII of the Bankruptcy Rules)
3. Rule 1014(b)
4. Rule 7004(e)
5. Rules 7008(b) and 7054
6. Rules 9023 and 9024
7. Official Forms 3A, 3B, 6I, and 6J
8. Official Form 23

B. **ACTION –** Approving publishing for public comment proposed amendments to:

9. Official Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2
10. Rules to implement the chapter 13 plan form
11. Rule 5005
12. Rule 9006(f)
13. Official Form 113 (chapter 13 plan form)
14. Remaining revised forms for individual debtors
15. Official Forms 17A, 17B, and 17C

C. Minutes and other informational items

5. Report of the Advisory Committee on Evidence Rules – Chief Judge Sidney A. Fitzwater

A. **ACTION –** Approving and transmitting to the Judicial Conference a proposed amendment to Rule 801(d)(1)(B)

B. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Rules 803(6), 803(7), and 803(8)

C. Minutes and other informational items

6. Report of the Advisory Committee on Appellate Rules – Judge Steven M. Colloton

A. **ACTION** – Approving and transmitting to the Judicial Conference a proposed amendment to Rule 6

B. Minutes and other informational items

7. Report of the Inter-Committee CM/ECF Subcommittee – Judge Michael A. Chagares

8. Report of the Administrative Office

9. Next meeting in Phoenix, Arizona on January 9-10, 2014

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 3-4, 2013
Cambridge, Massachusetts

Draft Minutes

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ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Cambridge, Massachusetts, on Thursday and Friday, January 3 and 4, 2013. The following members were present:

Judge Jeffrey S. Sutton, Chair
Dean C. Colson, Esq.
Roy T. Englert, Jr., Esq.
Gregory G. Garre, Esq.
Judge Marilyn L. Huff
Chief Justice Wallace B. Jefferson
Dean David F. Levi
Judge Patrick J. Schiltz
Larry D. Thompson, Esq.
Judge Richard C. Wesley
Judge Diane P. Wood

The Department of Justice was represented at various points at the meeting by Acting Assistant Attorney General Stuart F. Delery, Elizabeth J. Shapiro, Esq., and Allison Stanton, Esq.

Deputy Attorney General James M. Cole, Judge Neil M. Gorsuch, and Judge Jack Zouhary were unable to attend.

Also participating were former member Judge James A. Teilborg; Professor Geoffrey C. Hazard, Jr., consultant to the committee; and Peter G. McCabe, Administrative Office Assistant Director for Judges Programs. The committee's style consultant, Professor R. Joseph Kimble, participated by telephone.

On Thursday afternoon, January 3, Judge Sutton moderated a panel discussion on civil litigation reform initiatives with the following panelists: Judge John G. Koeltl, a member of the Advisory Committee on Civil Rules and Chair of its Duke Conference subcommittee; Rebecca Love Kourlis, Executive Director of the Institute for the Advancement of the American Legal System at the University of Denver and a former justice of the Colorado Supreme Court; Dr. Emery G. Lee, III, Senior Research Associate in the Research Division of the Federal Judicial Center; and Judge Barbara B. Crabb, U.S. District Court for the Western District of Wisconsin.

Providing support to the Standing Committee were:

Professor Daniel R. Coquillette	The Committee's Reporter
Jonathan C. Rose	The Committee's Secretary and Chief, Rules Committee Support Office
Benjamin J. Robinson	Deputy Rules Officer
Julie Wilson	Rules Office Attorney
Andrea L. Kuperman (by telephone)	Chief Counsel to the Rules Committees
Joe Cecil	Research Division, Federal Judicial Center

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
- Judge Steven M. Colloton, Chair
- Professor Catherine T. Struve, Reporter (by telephone)

Advisory Committee on Bankruptcy Rules —
- Judge Eugene R. Wedoff, Chair
- Professor S. Elizabeth Gibson, Reporter
- Professor Troy A. McKenzie, Associate Reporter

Advisory Committee on Civil Rules —
- Judge David G. Campbell, Chair
- Professor Edward H. Cooper, Reporter
- Professor Richard L. Marcus, Associate Reporter

Advisory Committee on Criminal Rules —

Judge Reena Raggi, Chair
Professor Sara Sun Beale, Reporter
Advisory Committee on Evidence Rules —
Chief Judge Sidney A. Fitzwater, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Sutton opened the meeting by noting the extraordinary service to the rules committees by his predecessor Judge Mark Kravitz, which would be further commemorated at the committee's dinner in the evening. He praised Judge Kravitz's extraordinary ten years of service on both the Civil Rules Advisory Committee and the Standing Committee. Judge Kravitz served as chair of both committees.

Judge Sutton specifically called attention to the commendation of Judge Kravitz in Chief Justice Roberts's year-end report and asked that the following paragraph from that report be included in the minutes:

> On September 30, 2012, Mark R. Kravitz, United States District Judge for the District of Connecticut, passed away at the age of 62 from amyotrophic lateral sclerosis—Lou Gehrig's Disease. We in the Judiciary remember Mark not only as a superlative trial judge, but as an extraordinary teacher, scholar, husband, father, and friend. He possessed the temperament, insight, and wisdom that all judges aspire to bring to the bench. He tirelessly volunteered those same talents to the work of the Judicial Conference, as chair of the Committee on Rules of Practice and Procedure, which oversees the revision of all federal rules of judicial procedure. Mark battled a tragic illness with quiet courage and unrelenting good cheer, carrying a full caseload and continuing his committee work up until the final days of his life. We shall miss Mark, but his inspiring example remains with us as a model of patriotism and public service.

Chief Justice John G. Roberts, Jr., 2012 Year-End Report on the Federal Judiciary 11 (2012).

Judge Sutton reported that at its September 2012 meeting, the Judicial Conference approved without debate all fifteen proposed rules changes forwarded to it by the committee for transmittal to the Supreme Court. Assuming approval by the Court and no action by Congress to modify, defer, or delay the proposals, the amendments will become effective on December 1, 2013.

APPROVAL OF MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of its last meeting, held on June 11 and 12, 2012, in Washington, D.C.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell and Professors Cooper and Marcus presented the report of the advisory committee, as set forth in Judge Campbell's memorandum of December 5, 2012 (Agenda Item 3). Judge Campbell presented several action items, including the recommendation to publish for comment amendments to Rules 37(e), 6(d), and 55(c). Judge Campbell also presented the advisory committee's recommendation to adopt without publication an amendment to Rule 77(c)(1).

Amendment for Final Approval

FED. R. CIV. P. 77(c)(1) – CROSS REFERENCE CORRECTION

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

As a result of the 2009 Time Computation amendment, the Rule's list of legal holidays remained unchanged, but became Rule 6(a)(6)(A). However, through inadvertence, the cross-reference in Rule 77(c) was not addressed at that time. The proposed amendment corrects the cross-reference.

The committee unanimously by voice vote approved the proposed amendment for final approval by the Judicial Conference without publication.

Amendments for Publication

FED. R. CIV. P. 37(e)

Judge Campbell first gave a short history behind the drafting of the proposed new Rule 37(e). He stated that the subject of the rule had been extensively considered at a mini-conference, as well as in numerous meetings of the advisory committee and conference calls of the advisory committee's discovery subcommittee. There was wide

agreement that the time had come for developing a rules-based approach to preservation and sanctions.

The Civil Rules Committee hosted a mini-conference in Dallas in September 2011. Participants in that mini-conference provided examples of extraordinary costs assumed by litigants, and those not yet involved in litigation, to preserve massive amounts of information, as a result of the present uncertain state of preservation obligations under federal law. In December 2011, a subcommittee of the House Judiciary Committee held a hearing on the costs of American discovery that focused largely on the costs of preservation for litigation.

The discovery subcommittee of the advisory committee had agreed for some time that some form of uniform federal rule regarding preservation obligations and sanctions should be established. The subcommittee initially considered three different approaches: (1) implementing a specific set of preservation obligations; (2) employing a more general statement of preservation obligations, using reasonableness and proportionality as the touchstones; and (3) addressing the issue through sanctions. The subcommittee rejected the first two approaches. The approach that would set out specific guidance was rejected because it would be difficult to set out specific guidelines that would apply in all civil cases, and changing technology might quickly render such a rule obsolete. The more general approach was rejected because it might be too general to provide real guidance. The subcommittee therefore opted for a third approach that focuses on possible remedies and sanctions for failure to preserve. This approach attempts to specify the circumstances in which remedial actions, including discovery sanctions, will be permitted in cases where evidence has been lost or destroyed. It should provide a measure of protection to those litigants who have acted reasonably in the circumstances.

After an extensive and wide ranging discussion of the proposed new Rule 37(e), the committee approved it for publication in August 2013, conditioned on the advisory committee reviewing at its Spring 2013 meeting the major points raised at this meeting. Judge Campbell agreed that the advisory committee would address concerns raised by Standing Committee members and make appropriate revisions in the draft rule and note for the committee's consideration at its June 2013 meeting.

During the course of the committee's discussion, the following concerns were expressed with respect to the current draft of proposed new Rule 37(e) and its note:

Displacement of Other Laws

One committee member expressed concern about the statement in the note that the amended rule "*displaces* any other law that would authorize imposing litigation sanctions in the absence of a finding of wilfulness or bad faith, including state law in diversity

cases." (emphasis added).

The member pointed out that use of the term "displace" could be read as a possible effort to preempt on a broad basis state or federal laws or regulations requiring the preservation of records in different contexts and for different purposes, such as tax, banking, professional, or antitrust regulation. Judge Campbell stated that there had been no such intent on the part of the advisory committee. The advisory committee had been focused on establishing a uniform federal standard solely for the preservation of records for litigation in federal court (including cases based on diversity jurisdiction). The advisory committee intended to preserve any separate state-law torts of spoliation.

Judge Campbell believed the draft committee note could be appropriately clarified to make clear that the proposed rule on preservation sanctions had no application beyond the trial of cases. A committee member noted that a statutory requirement of records preservation for non-trial purposes should not require a litigant to make greater preservation efforts for trial discovery purposes than would otherwise be required by the amended rule.

Use of the Term "Sanction"

Another participant noted that the word "sanction" has particularly adverse significance in most contexts when applied to the conduct of a lawyer. In some jurisdictions, this might require reporting an attorney to the board of bar overseers. Thus, in using the term "sanction," he urged that the advisory committee differentiate between its use when referring to the actions permitted under the rule in response to failures to preserve and its broader application to the general area of professional responsibility.

"Irreparable Deprivation"

Several committee members raised concerns about proposed language that would allow for sanctions if the failure to preserve "irreparably deprived a party of any meaningful opportunity to present a claim or defense." These members stated that this language could potentially eliminate most of the rule's intended protection for the innocent and routine disposition of records. Also, as a matter of style and precise expression, one committee member preferred substitution of the word "adequate"for the word "meaningful."

Acts of God

Another concern was whether the proposed draft of Rule 37(e) would permit the imposition of sanctions against an innocent litigant whose records were destroyed by an "act of God." The accidental destruction of records because of flooding during the recent

Hurricane Sandy was offered as a hypothetical example. Judge Campbell agreed that a literal reading of the current draft might lead to imposition of sanctions as the result of a blameless destruction of records resulting from such an event. Both he and Professor Cooper agreed that the question of who should bear the loss in an "act of God" circumstance was an important policy issue for the advisory committee to revisit at its spring meeting.

Preservation of Current Rule 37(e) Language

The Department of Justice and several committee members also recommended retention of the language of the current Rule 37(e), which protects the routine, good-faith operation of an electronic information system. Andrea Kuperman's research showed that the current rule is rarely invoked. But the Department of Justice argued that in its experience, the presence of the Rule 37(e) has served as a useful incentive for government departments to modernize their record-keeping practices.

Expanded Definition of "Substantial Prejudice"

The Department also urged that the term "substantial prejudice in the litigation"—a finding required under the draft proposal in order to impose sanctions for failure to preserve—be given further definition. It suggested that "substantial prejudice" should be assessed both in the context of reliable alternative sources of the missing evidence or information as well as in the context of the materiality of the missing evidence to the claims and defenses involved in the case. The Department and several committee members suggested that publication for public comment might be helpful to the committee in developing its final proposed rule.

By voice vote, the committee preliminarily approved for publication in August 2013 draft proposed Rule 37(e) on the condition that the advisory committee would review the foregoing comments and make appropriate revisions in the proposed draft rule and note for approval by the Standing Committee at its June 2013 meeting.

FED. R. CIV. P. 6(d) – CLARIFICATION OF "3 DAYS AFTER SERVICE"

Professor Cooper reviewed the advisory committee's proposed amendment to Rule 6(d), which provides an additional 3 days to act after certain methods of service. The purpose of the amendment is to foreclose the possibility that a party who must act within a specified time after making service could extend the time to act by choosing a method of service that provides the added time.

Before Rule 6(d) was amended in 2005, the rule provided an additional 3 days to

respond when service was made by various described means. Only the party being served, not the party making the service, had the option of claiming the extra 3 days. When Rule 6(d) was revised in 2005 for other purposes, it was restyled according to the conventions adopted for the Style Project, allowing 3 additional days when a party must act within a specified time "after service." This could be interpreted to cover rules allowing a party to act within a specified time after making (as opposed to receiving) service, which is not what the advisory committee intended. For example, a literal reading of present Rule 6(d) would allow a defendant to extend from 21 to 24 days the Rule 15(a)(1)(A) period to amend once as a matter of course by choosing to serve the answer by any of the means specified in Rule 6(d). Although it had not received reports of problems in practice, the advisory committee determined that this unintended effect should be eliminated by clarifying that the extra 3 days are available only to the party receiving, as opposed to making, service.

The committee without objection by voice vote approved the proposed amendment for publication.

FED. R. CIV. P. 55(c) – APPLICATION TO "FINAL" DEFAULT JUDGMENT

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

A close reading of the three rules together establishes that relief from a default judgment is limited by the demanding standards of Rule 60(b) only if the default judgment is made final under Rule 54(b) or when there is a final judgment adjudicating all claims among all parties.

Several cases, however, have struggled to reach the correct meaning of Rule 55(c), and at times a court may fail to recognize the meaning. The proposed amendment clarifies Rule 55(c) by adding the word "final" before "default judgment."

The committee without objection by voice vote approved the proposed amendment for publication.

Information Items

Judge Campbell reported on several information items that did not require committee action at this time.

DUKE CONFERENCE SUBCOMMITTEE WORK

A subcommittee of the advisory committee formed after the advisory committee's May 2010 Conference on Civil Litigation held at Duke University School of Law ("Duke Conference subcommittee") is continuing to implement and oversee further work on ideas resulting from that conference. Judge Campbell and Judge Koeltl (the Chair of the Duke Conference subcommittee) presented to the committee a package of various potential rule amendments developed by the subcommittee that are aimed at reducing the costs and delays in civil litigation, increasing realistic access to the courts, and furthering the goals of Rule 1 "to secure the just, speedy, and inexpensive determination of every action and proceeding." This package of amendments has been developed though countless subcommittee conference calls, a mini-conference held in Dallas in October 2012, and discussions during advisory committee meetings. The discussions that have occurred will guide further development of the rules package, with a goal of recommending publication of this package for public comment at the committee's June 2013 meeting.

An important issue at the Duke Conference and in the work undertaken since by the Duke Conference subcommittee has been the principle that discovery should be conducted in reasonable proportion to the needs of the case. In an important fraction of the cases, discovery still seems to run out of control. Thus, the search for ways to embed the concept of proportionality successfully in the rules continues.

Current sketches of possible amendments to parts of Rule 26 exemplify this effort and include the following proposals:

Rule 26

* * * * *

(b) Discovery Scope and Limits.

(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense <u>and proportional to the needs of the case considering the amount in controversy, the importance of the issues at stake in the action, the parties'</u>

resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information [within this scope of discovery]{sought} need not be admissible in evidence to be discoverable. ~~— including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~ * * *

(2) *Limitations on Frequency and Extent.*

(A) *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions, ~~and~~ interrogatories, requests [to produce][under Rule 34], and requests for admissions, or on the length of depositions under Rule 30. ~~By order or local rule, the court may also limit the number of requests under Rule 36.~~

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery ~~otherwise allowed by these rules or by local rule~~ if it determines that: * * *

(iii) the ~~burden or expense of the~~ proposed discovery is outside the scope permitted by Rule 26(b)(1) ~~outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.~~

* * * * *

(c) Protective Orders

(1) *In General.* * * * The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: * * *

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery; * * *

The drafts are works in progress and will be revisited by the advisory committee at its spring meeting.

FED. R. CIV. P. 84 AND FORMS

Judge Campbell further reported that the subcommittee of the advisory committee formed to study Rule 84 and associated forms is inclined to recommend abrogating Rule 84. This inclination follows months of gathering information about the general use of the forms and whether they provide meaningful help to attorneys and pro se litigants. The advisory committee is evaluating the subcommittee's inclination and intends to make a recommendation to the committee concerning the future of Rule 84 at the June 2013 meeting. If Rule 84 is abrogated, forms will still remain available through other sources, including the Administrative Office. Although forms developed by the Administrative Office do not go through the full Enabling Act process, the subcommittee would likely recommend that the advisory committee plan to work with the Administrative Office in drafting and revising forms for use in civil actions.

The committee briefly discussed the feasibility of appointing a liaison member of the civil rules advisory committee to the Administrative Office forms committee. Several members of the committee praised the prior work of the Administrative Office forms committee, particularly its ready responsiveness to current judicial and litigant needs. Its flexibility and responsiveness to rapidly changing requirements were favorably compared to the more cumbersome process imposed by the Rules Enabling Act. Peter McCabe, who chairs the Administrative Office forms committee, expressed the willingness of that committee to respond to the needs of the civil rules advisory committee.

No significant concern was raised by the committee about the potential abrogation of Rule 84.

MOTIONS TO REMAND

Judge Campbell reported on a proposal from Jim Hood, Attorney General of Mississippi, to require automatic remand in cases in which a district court takes no action on a motion to remand within thirty days. Attorney General Hood also proposed that the removing party be required to pay expenses, including attorney fees, incurred as a result of removal when remand is ordered. While the advisory committee was sympathetic to the problems created by federal courts failing to act timely on removal motions, it did not believe the subject fell within the jurisdiction of the rules committees. Both subject matter jurisdiction and the shifting of costs from one party to another on removal and remand are governed by federal statutes enacted by Congress and not by rules promulgated under the Rules Enabling Act. Judge Sutton has conveyed the advisory committee's response to Attorney General Hood.

PANEL ON CIVIL LITIGATION REFORM PILOT PROJECTS

Four panelists covered the topics outlined below.

Selected Federal Court Reform Projects

Judge Koeltl outlined five litigation reform projects that the Duke Conference subcommittee is following. These include:

a. A set of mandatory initial discovery protocols for employment discrimination cases was developed as part of the work resulting from the Duke Conference. These protocols were developed by experienced employment litigation lawyers and have so far been adopted by the Districts of Connecticut and Oregon.

b. A set of proposals embodied in a pilot project in the Southern District of New York to simplify the management of complex cases.

c. A Southern District of New York project to manage section 1983 prisoner abuse cases with increased automatic discovery and less judicial involvement. The project's goal is to resolve these types of cases within 5.5 months using judges as sparingly as possible through the use of such devices as specific mandatory reciprocal discovery, mandatory settlement demands, and mediation.

d. A project in the Seventh Circuit inspired by Chief Judge James F. Holderman that seeks to expedite and limit electronic discovery. The project emphasizes concepts of proportionality and cooperation among attorneys. One specific innovation, Judge Koeltl noted, was the mandatory appointment of a discovery liaison by each litigant.

e. The expedited trial project being implemented in the Northern District of California. This project provides for shortened periods for discovery and depositions and severely limits the duration of a trial. The goal is for the trial to occur within six months after discovery limits have been agreed upon. Judge Koeltl acknowledged, however, that this entire procedure is an "opt in" one, and so far no litigant has "opted" to use it. As a result, the entire project is now under review to determine what changes will make it more appealing to litigants.

State Court Pilot Projects

Justice Kourlis presented a summary of information compiled by the Institute for the Advancement of the American Legal System on state court pilot projects. She said

these projects fell into three basic categories, all with the common purpose of increasing access to the courts for all types of litigants. The three basic categories were:

a. Different rules for different types of cases

One category of pilot projects attempts to resolve issues of costs and delay by establishing different sets of rules for different types of cases, such as for complex (e.g., business) cases and simple cases amenable to short, summary, and expedited ("SES") procedures. Complex case programs are currently underway in California and Ohio. In those projects, the emphasis appears to be on close judicial case management, frequent conferences, and cooperation by counsel. Substantial prior experience in complex business cases by participating judges appears to have contributed to the success of the projects.

SES programs for simple cases are currently underway in California, Nevada, New York, Oregon, and Texas. These programs emphasize streamlined discovery, strict adherence to tight trial deadlines, and, in at least one state, mandatory participation by litigants whose cases fall under a $100,000 damages limit.

b. Proportionality in Discovery

A number of states have launched projects to achieve this objective. These projects have involved local rule changes to expedite and limit the scope of discovery, more frequent and earlier conferences with judges, and more active judicial case management to achieve proportionate discovery and encourage attorney cooperation.

c. Active Judicial Case Management

This third category of state projects overlaps with the first two categories. Some examples of the techniques employed include: (i) the assignment of a case to a single judicial officer from start to finish; (ii) early and comprehensive pretrial conferences; and (iii) enhanced judicial involvement in pretrial discovery disputes before the filing of any written motions.

A "Rocket Docket" Court

Judge Crabb gave a succinct presentation on the benefits of her "rocket docket" court (the Western District of Wisconsin) and how such a court can effectively manage its docket. She explained that litigants value certainty and predictability, and that the best way to achieve these goals is to set a firm trial date. Given her court's current case volume, the goal is to complete a case within twelve to fifteen months after it is filed. Judge Crabb explained that this management style achieves transparency, simplicity, and

service to the public.

Once a case is filed in the Western District of Wisconsin, a magistrate judge promptly holds a comprehensive scheduling conference. At this conference, a case plan is developed and discovery dates are fixed. Although this court usually will not change pre-trial discovery deadlines, it will do so on application of both parties if the ultimate trial date is not jeopardized.

In Judge Crabb's district, the magistrate judges are always available for telephone conferences on motions or other pretrial disputes, but they do not seek to actively manage cases. The litigants know that they have a firm trial date and can be relied upon to seek judicial intervention whenever it is necessary. In Judge Crabb's view, this "rocket docket" approach permits both the rapid disposition of a high volume of cases and maintenance of high morale of the court staff.

Federal Judicial Center Statistical Observations on Discovery

Dr. Lee of the Federal Judicial Center then gave a short presentation on statistical observations about discovery. He noted that the Center's research shows that the cost of discovery is a problem only in a minority of cases. Indeed, various statistical analyses lead him to conclude that the problem cases are a small subset of the total number of cases filed and involve a rather small subset of difficult lawyers.

Dr. Lee cited a multi-variant analysis done in 2009 and 2010 for the Duke Conference. In that study, the Federal Judicial Center found that the costly discovery cases have several common factors:

1. High stakes for the litigants (either economic or non-economic);
2. Factual complexity;
3. Disputes over electronic discovery; and
4. Rulings on motions for summary judgment.

Other interesting statistical observations of the study included the fact that on average a 1% increase in the economic value of the case leads to a .25% increase in its total discovery cost. Other discovery surveys indicate that almost 75% of lawyers on average believe that discovery in their cases is proportionate and that the other side is sufficiently cooperative. Only in a small minority of the cases—approximately 6%—are lawyers convinced that discovery demands by the opposing side are highly unreasonable.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Colloton and Professor Struve presented the report of the advisory committee, as set forth in Judge Colloton's memorandum of December 5, 2012 (Agenda Item 6). There were no action items for the committee.

Information Items

SEALING AND REDACTION OF APPELLATE BRIEFS

Judge Colloton reported that the advisory committee had decided not to proceed with a proposal to implement a national uniform standard for sealing or redaction of appellate briefs. He explained that the circuits take varying approaches to sealing and redaction on appeal. During the advisory committee's discussions, several members had expressed support for the approach of the Seventh Circuit, where sealed items in the record on appeal are unsealed after a brief grace period unless a party seeks the excision of those items from the record or moves to seal them on appeal. This approach is based on the belief that judicial proceedings should be open and transparent. However, members also noted that each circuit currently seems satisfied with its own approach to sealed filings.

Given the division of opinion among the circuits, the advisory committee ultimately decided there was no compelling reason to propose a rule amendment on the topic of sealing on appeal. However, its members believed that each circuit might find it helpful to know how other circuits handle such questions; therefore, shortly after its meeting, Judge Sutton, in one of his last acts as the chair of the advisory committee, wrote to the chief judge and clerk of each circuit to summarize the concerns that have been raised about sealed filings, the various approaches to those filings in different circuits, and the rationale behind the approach of the Seventh Circuit.

MANUFACTURED FINALITY

The advisory committee also revisited the topic of "manufactured finality," which occurs when parties attempt to create an appealable final judgment by dismissing peripheral claims in order to secure appellate review of the central claim. A review of circuit practice found that virtually all circuits agree that an appealable final judgment is created when all peripheral claims are dismissed with prejudice. Many circuits also agree that an appealable final judgment is not created when a litigant dismisses peripheral claims without prejudice, although some circuits take a different view. But less uniformity exists for handling middle ground attempts to "manufacture" finality. For example, there is disagreement in the circuits as to whether an appealable judgment results if the appellant conditionally dismisses the peripheral claims with prejudice by

agreeing not to reassert the peripheral claims unless the appeal results in reinstatement of the central claim. A joint civil-appellate rules subcommittee was appointed to review whether "manufactured finality" might be addressed in the federal rules. On initial examination, members had divergent views.

Before last fall's advisory committee meeting, the Supreme Court accepted for review *SEC v. Gabelli*, 653 F.3d 49 (2nd Cir. 2011), *cert. granted*, 133 S.Ct. 97 (2012). The Second Circuit's jurisdiction in that case rested on "conditional finality." Since the Court might clarify this issue in that case, the advisory committee decided to await the Court's decision before deciding how to proceed.

LENGTH LIMITS FOR BRIEFS

The advisory committee is considering whether to overhaul the treatment of filing-length limits in the Appellate Rules. The 1998 amendments to the Appellate Rules set the length limits for merits briefs by means of a type-volume limitation, but Rules 5, 21, 27, 35, and 40 still set length limits in terms of pages for other types of appellate filings. Members have reported that the page limits invite manipulation of fonts and margins, and that such manipulation wastes time, disadvantages opponents, and makes filings harder to read. The advisory committee intends to consider whether the type-volume approach should be extended to these other types of appellate filings.

CLASS ACTION OBJECTORS

Finally, the advisory committee has received correspondence about so-called "professional" class action objectors who allegedly file specious objections to a settlement and then appeal the approval of the settlement with the goal of extracting a payment from class action attorneys in exchange for withdrawing their appeals. One proposed solution would amend Rule 42 to require court approval of voluntary dismissal motions by class action objectors, together with a certification by an objector that nothing of value had been received in exchange for withdrawing the appeal. Another proposed solution would require an appeal bond from class action objectors sufficient to cover the costs of delay caused by appeals from denials of non-meritorious objections. Judge Colloton suggested that collaboration with the Civil Rules Advisory Committee would likely be required to determine both the scope of and possible remedies for this problem.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raggi and Professor Beale presented the report of the advisory committee, as set forth in Judge Raggi's memorandum of November 26, 2012 (Agenda Item 8). As the committee's fall meeting in Washington was canceled as a result of Hurricane Sandy,

there were no action items for the committee.

Information Items

Judge Raggi reported that on the agenda for the advisory committee's Fall 2012 meeting and now high on the agenda for its Spring 2013 meeting is a Department of Justice proposal to amend Rule 4 to permit effective service of summons on a foreign organization that has no agent or principal place of business within the United States. The Department argues that its proposed change is necessary in order to prevent evasion of service by organizations committing offenses within the United States.

Judge Raggi also reported on the status of the proposed amendments to Rule 12, the rule addressing pleadings and pretrial motions. The proposed amendments were published for public comment in August 2011. The amendments clarify which motions must be raised before trial and the consequences if the motions are not timely filed. Numerous comments were received, including detailed objections and suggestions from various bar organizations. The committee's reporters prepared an 80-page analysis of these comments. In its consideration of the comments, the Rule 12 subcommittee reaffirmed the need for the amendment, but concluded that the public comments warranted several changes in its proposal. With those changes, the subcommittee has recommended to the advisory committee that an amended proposal be approved and transmitted to the Standing Committee for its approval. The advisory committee's consideration of the Rule 12 subcommittee's report will take place at its Spring 2013 meeting. Judge Raggi expressed her appreciation for the extended attention already devoted by Judge Sutton to the committee's work on Rule 12.

REPORT OF THE ADVISORY COMMITTEE ON RULES OF EVIDENCE

Judge Fitzwater and Professor Capra delivered the report of the advisory committee, as set forth in Judge Fitzwater's memorandum of November 26, 2012 (Agenda Item 4). There were no action items for the committee.

Information Items

SYMPOSIUM ON FED. R. EVID. 502

Professor Capra reported on a symposium the advisory committee hosted in conjunction with its Fall 2012 meeting. The purpose of the symposium was to review the current use (or lack of use) of Rule 502 (on attorney-client privilege and work product and waiver of those protections) and to discuss ways in which the rule can be better known and understood so that it can fulfill its original purposes of clarifying and limiting

waiver of privilege and work product protection, thereby reducing delays and costs in litigation. Panelists included judges, lawyers, and academics with expertise and experience in the subject matter of the rule, some of whom are also veterans of the rulemaking process. The symposium proceedings and a model Rule 502(d) order will be published in the March 2013 issue of the *Fordham Law Review*.

The panel attributed much of the lack of use of Rule 502 as a device to aid in pre-production review to a simple lack of knowledge of the rule by practitioners and judges. Part of this absence of knowledge was attributed to the rule's location in the rules of evidence as opposed to the rules of civil procedure. Various suggestions on promotion of the rule's visibility, including a model Rule 502 order, education through Federal Judicial Center classes and a possible informational letter to chief district judges, are in the process of being implemented or developed.

PROPOSED AMENDMENTS TO FED. R. EVID. 801(d)(1) AND 803(6)-(8)

A published proposed amendment to Rule 801(d)(1), the hearsay exemption for certain prior consistent statements, provides that prior consistent statements are admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility. This proposal has been the subject of only one public comment so far. Proposed amendments to Rule 803(6)-(8)—the hearsay exemptions for business records, absence of business records, and public records—would clarify that the opponent has the burden of showing that the proffered record is untrustworthy. No comments have been received yet on this proposal.

SYMPOSIUM ON TECHNOLOGY AND THE FEDERAL RULES OF EVIDENCE

Judge Fitzwater reported that the advisory committee is planning to convene a symposium to highlight the intersection of the evidence rules and emerging technologies and to consider whether the evidence rules need to be amended in light of technological advances. The symposium will be held in conjunction with the advisory committee's Fall 2013 meeting at the University of Maine School of Law in Portland.

These presentations concluded the first day of the meeting of the Standing Committee.

FRIDAY, JANUARY 4, 2013

REPORT ON PACE OF RULEMAKING

Benjamin Robinson gave a brief presentation on the timing and pace of federal rulemaking over the past thirty years. Judge Sutton had requested the report, noting that at various times in the past both the Federal Judicial Center and the committee have tackled this subject. He specifically pointed to the Easterbrook-Baker "self-study" report by the Standing Committee, 169 F.R.D. 679 (1995), contained in the agenda book.

Mr. Robinson presented a series of charts that demonstrated that over the past thirty years there have been several peaks and valleys in the pace of federal rulemaking. The charts demonstrated that the peaks were caused by legislative activity and to a lesser extent by several rules restyling projects.

For example, bankruptcy legislation in the mid-1980s created the occasion in 1987 for 117 bankruptcy rule changes. Similarly, bankruptcy legislation created the occasion for 95 bankruptcy rule changes in 1991. Additional bankruptcy legislation in 2005 produced a total of 43 bankruptcy rules amendments in 2008. The civil and evidence rules restyling projects also have required a considerable number of rule changes.

Mr. Robinson's presentation initiated a broader discussion of the timing and pace of rulemaking by committee members.

Judge Sutton stated that he had placed this matter on the agenda in part to sensitize the Standing Committee to the work required by the Supreme Court on rule amendments.

At one point during the discussion, Judge Sutton advanced a theoretical proposal that perhaps rule changes could be made every two years instead of every year. For example, the civil and appellate rules committees could group their proposed changes in the even years, while the criminal, evidence, and bankruptcy rules committees could group their proposed changes in the odd years. Judge Sutton noted that such a scheme would have the advantage of predictability both for the Supreme Court and for the bar as to what types of rule changes could be expected in a particular year.

Judge Sutton asked for comments from several of those present, in particular, participants who have had extensive experience over the years in the rulemaking process. Several points emerged during the discussion. First, there is no question that the Supreme Court is very aware of the burden that the rulemaking process places upon it. Chief Justices Burger and Rehnquist were particularly conscious of it. Also, the current rules

calendar places a heavy burden on the Court in that the rule proposals arrive in the spring when the Court is busiest. However, no one argued that seeking a legislative change in the calendar made any sense. Instead, the idea was advanced that the Rules Committees could target the March meeting of the Judicial Conference for its major proposals, rather than the September meeting. This would mean that the rule changes could go to the Court at a more convenient time, such as late summer before its annual session begins on October 1. However, a correlative disadvantage would be the overall extension in the length of time required for a proposed amendment to the rules to be adopted.

Experienced observers pointed out that much of the timing of rulemaking is dictated by external factors such as legislation or decided cases. While the timing of such projects as the restyling of the evidence and civil rules might be discretionary, the need for new rules created by legislation or other external events often is not. All participants appeared to agree that keeping the Supreme Court involved in the rulemaking process is most important to its integrity and standing. Thus, all agreed at a minimum that greater sensitivity to the needs and desires of the Court as to the timing of proposed rules changes is highly advisable.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Wedoff, Professor Gibson, and Professor McKenzie presented the report of the advisory committee, as set forth in Judge Wedoff's memorandum of December 5, 2012 (Agenda Item 7). The report covered four major subjects: (1) revisions to the official forms for individual debtors; (2) a mini-conference on home mortgage forms and rules; (3) the development of a Chapter 13 form plan and related rule amendments; and (4) electronic signature issues.

DRAFTS OF REVISED OFFICIAL FORMS FOR INDIVIDUAL DEBTORS

Judge Wedoff first reported on the restyled Official Bankruptcy Forms for individual debtors. These forms are the initial product of the forms modernization project, a multi-year endeavor of the advisory committee, working in conjunction with the Federal Judicial Center and the Administrative Office. The dual goals of the forms modernization project are to improve the official bankruptcy forms and to improve the interface between the forms and available technology.

In August 2012, the first nine forms were published for public comment. To date, few comments have been received; however, the advisory committee expects to receive more comments before the February 15, 2013, deadline, and it will review those comments before seeking approval at the June meeting to publish the following eighteen remaining forms for individual debtor cases that have not yet been published:

Forms To Be Considered in June

- Official Form 101—Voluntary Petition for Individuals Filing for Bankruptcy
- Official Form 101AB—Your Statement About an Eviction Judgment Against You – Parts A and B
- Official Form 104—List in Individual Chapter 11 Cases of Creditors Who Have the 20 Largest Unsecured Claims Against You Who are not Insiders
- Official Form 106 – Summary—A Summary of Your Assets and Liabilities and Certain Statistical Information
- Official Form 106A—Schedule A: Property
- Official Form 106B—Schedule B: Creditors Who Hold Claims Secured by Property
- Official Form 106C—Schedule C: Creditors Who Have Unsecured Claims
- Official Form 106D—Schedule D: The Property You Claim as Exempt
- Official Form 106E—Schedule E: Executory Contracts and Unexpired Leases
- Official Form 106F—Schedule F: Your Codebtors
- Official Form 106 – Declaration—Declaration About an Individual Debtor's Schedules
- Official Form 107—Your Statement of Financial Affairs for Individuals Filing for Bankruptcy
- Official Form 112—Statement of Intention for Individuals Filing Under Chapter 7
- Official Form 119—Bankruptcy Petition Preparer's Notice, Declaration and Signature
- Official Form 121—Your Statement About Your Social Security Numbers
- Official Form 318—Discharge of Debtor in a Chapter 7 Case
- Official Form 423—Certification About a Financial Management Course
- Official Form 427—Cover Sheet for Reaffirmation Agreement

In anticipation of seeking publication in June, Judge Wedoff gave the committee an extensive preview of each of the above forms and took under advisement specific committee member comments on each of them with a plan to incorporate these comments in the preparation of the advisory committee's ultimate proposals.

MINI-CONFERENCE ON HOME MORTGAGE FORMS AND RULES

Judge Wedoff reported on a successful mini-conference held by the advisory committee on September 19, 2012, to explore the effectiveness of the new rules and forms concerning the impact of home mortgage rules and reporting requirements for chapter 13 cases, which went into effect on December 1, 2011. The mini-conference reflected a general acceptance of the disclosure requirements of the new rules, but pointed out various specific difficulties that will likely require some subsequent fine-tuning either

by the advisory committee or through case-law development.

CHAPTER 13 FORM PLAN AND RELATED RULE AMENDMENTS

Professor McKenzie reported on the advisory committee's development of a national form plan for chapter 13 cases. The working group presented a draft of the form plan for preliminary review at the advisory committee's Fall 2012 meeting. The group also proposed amendments to Bankruptcy Rules 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, specifically to require use of the national form plan and to establish the authority needed to implement some of the plan's provisions.

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

CONSIDERATION OF ELECTRONIC SIGNATURE ISSUES

The last item of Judge Wedoff's report was an update on the advisory committee's consideration (at the request of the forms modernization project) of a rule establishing a uniform procedure for the treatment and preservation of electronic signatures. The advisory committee has requested Dr. Molly Johnson of the Federal Judicial Center to gather information on existing practices regarding the use of electronic signatures by nonregistered individuals and requirements for retention of documents with handwritten signatures. Her findings will be available by the end of this year and will be reported to the advisory committee at its Spring 2014 meeting.

NEXT MEETING

The Standing Committee will hold its next meeting in Washington, D.C., on June 3 and 4, 2013.

TAB 2

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TAB 2A

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

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

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

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

Date: May 8, 2013

Re: Report of the Advisory Committee on Civil Rules

I. Introduction

The Civil Rules Advisory Committee met at the University of Oklahoma College of Law on April 11-12, 2013. Draft Minutes of this meeting are attached. This report has been prepared by Professor Cooper, Committee Reporter, with Professor Marcus, Associate Reporter, and various subcommittee chairs.

Part IA of this Report presents for action a proposal recommending publication for comment of revisions to Rules 1, 4, 16, 26, 30, 31, 33, 34, 36, and 37. These recommendations are little changed from the proposals that were presented for discussion, but not for action, at the January meeting of the Standing Committee. They form a package developed in response to the central themes that emerged from the conference held at the Duke Law School in May, 2010. Participants urged the need for increased cooperation; proportionality in using procedural tools, most particularly discovery; and early, active judicial case management.

Part IB presents for action a proposal recommending publication for comment of a revised Rule 37(e). Publication was

approved at the January 2013 meeting of the Standing Committee, recognizing that the Advisory Committee would consider several matters discussed at the January meeting and report back to this June meeting. The revisions provide both remedies and sanctions for failure to preserve discoverable information that should have been preserved. In addition, they describe factors to be considered both in determining whether information should have been preserved and also in determining whether a failure was willful or in bad faith. This report describes the outcome of deliberations by the Discovery Subcommittee and Advisory Committee in addressing the matters raised at the January meeting, and also lists the questions that will be specifically flagged in the request for public comment.

Part IC presents for action a recommendation to approve for publication a proposal that would abrogate Rule 84 and the Rule 84 official forms. This proposal includes amendments of Rule 4(d)(1)(C) and (D) that direct use of official Rule 4 Forms that adopt what now are the Form 5 request to waive service and the Form 6 waiver.

Part II presents information on several matters that were discussed at the April meeting. Several of these matters remain on the Committee agenda. Others have been put aside. The Committee is not now seeking guidance on these matters, but will welcome discussion on any of them.

The matters that remain on the agenda include some specific new questions: Should Rule 17(c)(2) be amended to address the circumstances that may require a court to inquire whether it need appoint a guardian for an unrepresented party who may be incompetent? Is it time to reexamine the procedures for stays pending appeal under Rule 62 in conjunction with possible consideration of the same questions by the Appellate Rules Committee?

Several new matters have been referred to the Committee by the Committee on Court Administration and Case Management, mostly in conjunction with development of the next generation CM/ECF program. These questions involve such issues as use of the Notice of Electronic Filing as a certificate of service and the acceptance of electronic signatures. The Committee anticipates that these and a number of other issues involving electronic filing and service will be addressed in a joint committee constituted by representatives from all of the advisory committees. Other of the CACM issues await further development in CACM’s work.

Other matters have been on the agenda for some time but do not yet seem ripe for present development. These include the development of pleading standards in response to the Supreme Court's *Twombly* and *Iqbal* decisions, and emerging issues in class-action practice.

Two items have been removed from the agenda. The Committee concluded there is no need to reconsider the provision in Rule 41 that allows dismissal of an action without prejudice on stipulation by all parties. It also concluded that there is no need to adopt a rule recommending speedy trial and appellate action on a petition to return a child to its home country under the Hague Convention on the Civil Aspects of International Child Abduction.

Finally, the Committee benefited from a panel discussion of the use of Technology Assisted Review in discovery of electronically stored information.

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TAB 2B

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PART I: ACTION ITEMS

A. Rules 1, 4, 16, 26, 30, 31, 33, 34, 36, 37: Action to Recommend Publication of Revised Rules ("Duke Rules" Package)

The 2010 Duke Conference bristled with ideas for reducing cost and delay in civil litigation, including many that seem suitable subjects for incorporation in the rules. Advanced drafts were discussed at the January meeting of the Standing Committee. Suggestions made during the meeting and other refinements were explored in two conference calls of the Duke Conference Subcommittee. The Advisory Committee recommends publication for comment of the package presented to it by the Subcommittee.

Judge Koeltl, chair of the Duke Conference Subcommittee, recalled that three main themes were repeatedly stressed at the Duke Conference. Proportionality in discovery, cooperation among lawyers, and early and active judicial case management are highly valued and, at times, missing in action. The Subcommittee worked on various means of advancing these goals. The package of rules changes has evolved over a period of nearly three years through many drafts and meetings and discussions in Advisory Committee meetings. The Committee is unanimous in proposing that each part of the amendments be recommended for publication.

The rules proposals are grouped in three sets. One set looks to improve early and effective judicial case management. The second seeks to enhance the means of keeping discovery proportional to the action. The third hopes to advance cooperation. The rules involved in these three sets overlap. The changes are described first, set-by-set. The rules texts showing the changes follow, along with Committee Notes. The final step is a clean set of the rules texts as they would appear after amending.

Case-Management Proposals

The case-management proposals reflect a perception that the early stages of litigation often take far too long. "Time is money." The longer it takes to litigate an action, the more it costs. And delay is itself undesirable. The most direct aim at early case management is reflected in Rules 4(m) and 16(b). Another important proposal relaxes the Rule 26(d)(1) discovery moratorium to permit early delivery of Rule 34 requests to produce, setting the time to respond to begin at the first Rule 26(f) conference.

<u>Rule 4(m)</u>: Rule 4(m) would be revised to shorten the time to serve the summons and complaint from 120 days to 60 days. The effect will

40 be to get the action moving in half the time. The amendment
41 responds to the commonly expressed view that four months to serve
42 the summons and complaint is too long. Concerns that circumstances
43 occasionally justify a longer time to effect service are met by the
44 court's duty, already in Rule 4(m), to extend the time if the
45 plaintiff shows good cause for the failure to serve within the
46 specified time.

47 The Department of Justice has reacted to this proposal by
48 suggesting that shortening the time to serve will exacerbate a
49 problem it now encounters in condemnation actions. Rule
50 71.1(d)(3)(A) directs that service of notice of the proceeding be
51 made on defendant-owners "in accordance with Rule 4." This
52 wholesale incorporation of Rule 4 may seem to include Rule 4(m).
53 Invoking Rule 4(m) to dismiss a condemnation proceeding for failure
54 to effect service within the required time, however, is
55 inconsistent with Rule 71.1(i)(C), which directs that if the
56 plaintiff "has already taken title, a lesser interest, or
57 possession of" the property, the court must award compensation.
58 This provision protects the interests of owners, who would be
59 disserved if the proceeding is dismissed without awarding
60 compensation but leaving title in the plaintiff. The Department
61 regularly finds it necessary to explain to courts that dismissal
62 under Rule 4(m) is inappropriate in these circumstances, and fears
63 that this problem will arise more frequently because it is
64 frequently difficult to identify and serve all owners even within
65 120 days.

66 The need to better integrate Rule 4(m) with Rule 71.1 is met
67 by amending Rule 4(m)'s last sentence: "This subdivision (m) does
68 not apply to service in a foreign country under Rule 4(f) or
69 4(j)(1) <u>or to service of a notice under Rule 71.1(d)(3)(A)</u>." The
70 Department of Justice believes that this amendment will resolve the
71 problem. The Department does not believe that there is any further
72 need to consider the integration of Rule 4 with Rule 71.1(d)(3)(A).

73 <u>Rule 16(b)(2): Time for Scheduling Order</u>: Rule 16(b)(2) now
74 provides that the judge must issue the scheduling order within the
75 earlier of 120 days after any defendant has been served or 90 days
76 after any defendant has appeared. Several Subcommittee drafts cut
77 these times in half, to 60 days and 45 days. The recommended
78 revision, however, cuts the times to 90 days after any defendant is
79 served or 60 days after any defendant appears. The reduced
80 reductions reflect concerns that in many cases it may not be
81 possible to be prepared adequately for a productive scheduling
82 conference in a shorter period. These concerns are further
83 reflected in the addition of a new provision that allows the judge

84 to extend the time on finding good cause for delay. The Committee
85 believes that even this modest reduction in the presumed time will
86 do some good, while affording adequate time for most cases.

87 The Department of Justice, however, expressed some concerns
88 about accelerating time lines at the onset of litigation. Many of
89 the reasons are much the same as those that underlie the Rule 12
90 provisions allowing it 60 days to answer. It is not just that the
91 Department is a vast and intricate organization. Its clients often
92 are other vast and intricate government agencies. The time required
93 to designate the right attorneys in the Department is followed by
94 the time required to identify the right people in the client agency
95 to work with the attorneys and to begin gathering the information
96 necessary to litigate. More generally, there is room to be
97 skeptical that shortening the time to serve and the time to enter
98 a scheduling order will do much to advance things. It is important
99 that lawyers have time at the beginning of an action to think about
100 the case, and to discuss it with each other. More time to prepare
101 will make for a better scheduling conference, and for more
102 effective discovery in the end. The Note should reflect that
103 extensions should be liberally granted for the sake of better
104 overall efficiency.

105 Other attorneys have expressed similar concerns that there are
106 cases in which it is not feasible to prepare for a meaningful
107 scheduling conference on an accelerated schedule. A defendant may
108 take time to select its attorneys, compressing the apparent
109 schedule. And some cases are inherently too complex to allow even
110 a preliminary working grasp of likely litigation needs in the
111 presumptive times allowed.

112 These concerns persuaded the Subcommittee to relax its initial
113 proposal, which would have cut the present times in half, to 60
114 days after service or 45 days after an appearance. They also were
115 responsible for adding the new provision that authorizes the court
116 to delay the scheduling order beyond the specified times. This
117 provision would provide more time than the current rule, but only
118 in appropriate cases, and seems protection enough, both for complex
119 cases in general and for the special needs of the Department of
120 Justice.

121 <u>Rule 16(b): Actual Conference</u>: Present Rule 16(b)(1)(B) authorizes
122 issuance of a scheduling order after receiving the parties' Rule
123 26(f) report or after consulting "at a scheduling conference by
124 telephone, mail, or other means."

125 The Committee believes that an actual conference by direct

126 communication among the parties and court is very valuable. It
127 considered a proposal that would require an actual conference in
128 all actions, except those in exempted categories. This proposal was
129 rejected in the end after hearing from several judges and lawyers
130 at the miniconference hosted by the Subcommittee in Dallas that
131 there are cases in which the judge is confident that a Rule 26(f)
132 report prepared by able lawyers provides a sound basis for a
133 scheduling order without further ado. But if there is to be a
134 scheduling conference, the Committee believes it should be by
135 direct communication; "mail, or other means" are not effective.
136 This change is effected by requiring consultation "at a scheduling
137 conference," striking "by telephone, mail, or other means." The
138 Committee Note makes it clear that a conference can be held face-
139 to-face, by telephone, or by other means of simultaneous
140 communication.

141 A separate issue has been held in abeyance. Rule 16(b)(1)
142 exempts "categories of actions exempted by local rule" from the
143 scheduling order requirement. It may be attractive to substitute a
144 uniform national set of exemptions, uniform not only for Rule 16(b)
145 but integrated with the exemptions from initial disclosure. Actions
146 exempt from initial disclosure also are exempt from the discovery
147 moratorium in Rule 26(d) and the parties' conference required by
148 Rule 26(f). Exempting the same categories of actions from the
149 scheduling order requirement would simplify the rules and should
150 respond to similar concerns. But it has seemed better to await
151 further inquiry into the categories now exempted by local rules,
152 and to explore the reasons for exemptions not now made in Rule
153 26(a)(1)(B). This topic is being developed for possible future
154 action.

155 Rules 16(b)(3), 26(f): Additional Subjects: Three subjects are
156 proposed for addition to the Rule 16(b)(3) list of permitted
157 contents of a scheduling order. Two of them are also proposed for
158 the list of subjects in a Rule 26(f) discovery plan. Those two are
159 described here; the third is noted separately below.

160 The proposals would permit a scheduling order and discovery
161 plan to provide for the preservation of electronically stored
162 information and to include agreements reached under Rule 502 of the
163 Federal Rules of Evidence. Each is an attempt to remind litigants
164 that these are useful subjects for discussion and agreement. The
165 Evidence Rules Committee is concerned that Rule 502 remains
166 underused; an express reference in Rule 16 may promote its more
167 effective use.

168 Rule 16(b)(3): Conference Before Discovery Motion: This proposal

169 would add a new Rule 16(b)(3)(v), permitting a scheduling order to
170 "direct that before moving for an order relating to discovery the
171 movant must request a conference with the court."

172 Many courts, but less than a majority, now have local rules
173 similar to this proposal. Experience with these rules shows that an
174 informal pre-motion conference with the court often resolves a
175 discovery dispute without the need for a motion, briefing, and
176 order. The practice has proved highly effective in reducing cost
177 and delay.

178 The Subcommittee considered an alternative that would have
179 required a conference with the court before any discovery motion.
180 In the end, it concluded that at present it is better simply to
181 encourage this practice. Many judges do not require a pre-motion
182 conference now. It is possible that local conditions and practices
183 in some courts establish effective substitutes. Absent a stronger
184 showing of need, it seems premature to adopt a mandate, but the
185 consideration of this practice should encourage its use.

186 Rule 26(d)(1): Early Rule 34 Requests: The Subcommittee considered
187 at length a variety of proposals that would allow discovery
188 requests to be made before the parties' Rule 26(f) conference. The
189 purpose of the early requests would not be to start the time to
190 respond. Instead, the purpose is to facilitate the conference by
191 allowing consideration of actual requests, providing a focus for
192 specific discussion. In the end, the proposal has been limited to
193 Rule 34 requests to produce.

194 The proposal adds a new Rule 26(d)(2), better set out in full
195 than summarized:

196 (2) *Early Rule 34 Requests.*

197 (A) *Time to Deliver.* More than 21 days after the summons and
198 complaint are served on any party, a request under Rule
199 34 may be delivered:

200 (i) to that party by any other party, and

201 (ii) by that party to any plaintiff or to any other
202 party that has been served.

203 (B) *When Considered Served.* The request is considered as
204 served at the first Rule 26(f) conference.

205 A corresponding change would be made in Rule 34(b)(2)(A),

206 setting the time to respond to a request delivered under Rule
207 26(d)(2) within 30 days after the parties' first Rule 26(f)
208 conference.

209 Some participants in the miniconference — particularly those
210 who typically represent plaintiffs — said they would take advantage
211 of this procedure to advance the Rule 26(f) conference and early
212 discovery planning. Concrete disputes as to the scope of discovery
213 could then be brought to the attention of the court at a Rule 16
214 conference. Others expressed skepticism, wondering why anyone would
215 want to expose discovery strategy earlier than required and fearing
216 that initial requests made before the conference are likely to be
217 unreasonably broad and to generate an inertia that will resist
218 change at the conference.

219 After considering these concerns, the Subcommittee concluded
220 that the opportunity should be made available to advance the Rule
221 26(f) conference by providing a specific focus for discussion of
222 Rule 34 requests, which often involve heavy discovery burdens.
223 Little harm will be done if parties fail to take advantage of the
224 opportunity, and real benefit may be gained if they do.

225 Proportionality: Discovery Proposals

226 Several proposals seek to promote responsible use of discovery
227 proportional to the needs of the case. The most important address
228 the scope of discovery directly by amending Rule 26(b)(1), and by
229 promoting clearer responses to Rule 34 requests to produce. Others
230 tighten the presumptive limits on the number and duration of
231 depositions and the number of interrogatories, and for the first
232 time add a presumptive limit of 25 to the number of requests for
233 admission other than those that relate to the genuineness of
234 documents. Yet another explicitly recognizes the present authority
235 to issue a protective order specifying an allocation of expenses
236 incurred by discovery.

237 Rule 26(b)(1): Proportionality By Adopting Rule 26(b)(2)(C)(iii)
238 Cost-Benefit Analysis: In 1983 the Committee thought to have solved
239 the problems of disproportionate discovery by adding the provision
240 that has come to be lodged in present Rule 26(b)(2)(C)(iii). This
241 rule directs that "on motion or on its own, the court must limit
242 the frequency or extent of discovery otherwise allowed by these
243 rules if it determines that * * * (iii) the burden or expense of
244 the proposed discovery outweighs its likely benefit, considering
245 the needs of the case, the amount in controversy, the parties'
246 resources, the importance of the issues at stake in the action, and
247 the importance of the discovery in resolving the issues."

248 Although the rule now directs that the court "must" limit
249 discovery, on its own and without motion, it cannot be said to have
250 realized the hopes of its authors. In most cases discovery now, as
251 it was then, is accomplished in reasonable proportion to the
252 realistic needs of the case. This conclusion has been established
253 by repeated empirical studies, including the large-scale closed-
254 case study done by the Federal Judicial Center for the Duke
255 Conference. But at the same time discovery runs out of proportion
256 in a worrisome number of cases, particularly those that are
257 complex, involve high stakes, and generate particularly contentious
258 adversary behavior. The number of cases and the burdens imposed
259 present serious problems. These problems have not yet been solved.

260 Several proposals were considered to limit the general scope
261 of discovery provided by Rule 26(b)(1) by adding a requirement of
262 "proportionality." Addition of this term without definition,
263 however, generated concerns that it would be too open-ended to
264 support uniform or even meaningful implementation. Limiting it to
265 "reasonably proportional" did not allay those concerns. At the same
266 time, many participants in the miniconference expressed respect for
267 the principles embodied in Rule 26(b)(2)(C)(iii), finding it
268 suitably nuanced and balanced. The problem is not with the rule
269 text but with its implementation — it is not invoked often enough
270 to dampen excessive discovery demands.

271 These considerations frame the proposal to revise the scope of
272 discovery defined in Rule 26(b)(1) by transferring the analysis
273 required by present Rule 26(b)(2)(C)(iii) to become a limit on the
274 scope of discovery, so that discovery must be

275 > proportional to the needs of the case considering the
276 > amount in controversy, the importance of the issues at
277 > stake in the action, the parties's resources, the
278 > importance of the discovery in resolving the issues, and
279 > whether the burden or expense of the proposed discovery
280 > outweighs its likely benefit.

281 A corresponding change is made by amending Rule 26(b)(2)(C)(iii) to
282 cross-refer to (b)(1): the court remains under a duty to limit the
283 frequency or extent of discovery that exceeds these limits, on
284 motion or on its own.

285 Other changes as well are made in Rule 26(b)(1). The rule was
286 amended in 2000 to introduce a distinction between party-controlled
287 discovery and court-controlled discovery. Party-controlled
288 discovery is now limited to "matter that is relevant to any party's
289 claim or defense." That provision is carried forward in proposed

290 Rule 26(b)(1). Court-controlled discovery is now authorized to
291 extend, on court order for good cause, to "any matter relevant to
292 the subject matter involved in the action." The Committee Note made
293 it clear that the parties' claims or defenses are those identified
294 in the pleadings. The proposed amendment deletes the "subject
295 matter involved in the action" from the scope of discovery.
296 Discovery should be limited to the parties' claims or defenses. If
297 discovery of information relevant to the claims or defenses
298 identified in the pleadings shows support for new claims or
299 defenses, amendment of the pleadings may be allowed when
300 appropriate.

301 Rule 26(b)(1) also would be amended by revising the
302 penultimate sentence: "Relevant information need not be admissible
303 at the trial if the discovery appears reasonably calculated to lead
304 to the discovery of admissible evidence." This provision traces
305 back to 1946, when it was added to overcome decisions that denied
306 discovery solely on the ground that the requested information would
307 not be admissible in evidence. A common example was hearsay.
308 Although a witness often could not testify that someone told him
309 the defendant ran through a red light, knowing who it was that told
310 that to the witness could readily lead to admissible testimony.
311 This sentence was amended in 2000 to add "Relevant" as the first
312 word. The 2000 Committee Note reflects concern that the "reasonably
313 calculated" standard "might swallow any other limitation on the
314 scope of discovery." "Relevant" was added "to clarify that
315 information must be relevant to be discoverable * * *." Despite the
316 2000 amendment, many cases continue to cite the "reasonably
317 calculated" language as though it defines the scope of discovery,
318 and judges often hear lawyers argue that this sentence sets a broad
319 standard for appropriate discovery.

320 To offset the risk that the provision addressing admissibility
321 may defeat the limits otherwise defining the scope of discovery,
322 the proposal is to revise this sentence to read: "Information
323 within this scope of discovery need not be admissible in evidence
324 to be discoverable." The limits defining the scope of discovery are
325 thus preserved. The purpose of the amendment is to carry through
326 the purpose underlying the 2000 amendment, with the hope that this
327 further change will at last overcome the inertia that has thwarted
328 this purpose.

329 A portion of present Rule 26(b)(1) is omitted from the
330 proposed revision. After allowing discovery of any matter relevant
331 to any party's claim or defense, the present rule adds: "including
332 the existence, description, nature, custody, condition, and
333 location of any documents or other tangible things and the identity

334 and location of persons who know of any discoverable matter."
335 Discovery of such matters is so deeply entrenched in practice that
336 it is no longer necessary to clutter the rule text with these
337 examples.

338 Several discovery rules cross-refer to Rule 26(b)(2) as a
339 reminder that it applies to all methods of discovery. Transferring
340 the restrictions of (b)(2)(C)(iii) to become part of (b)(1) makes
341 it appropriate to revise the cross-references to include both
342 (b)(1) and (b)(2). The revisions are shown throughout the proposed
343 rules.

344 Proportionality: Rule 26(c): Allocation of Expenses: Another
345 proposal adds to Rule 26(c)(1)(B) an explicit recognition of the
346 authority to enter a protective order that allocates the expenses
347 of discovery. This power is implicit in present Rule 26(c), and is
348 being exercised with increasing frequency. The amendment will make
349 the power explicit, avoiding arguments that it is not conferred by
350 the present rule text. The Committee soon will begin to focus on
351 proposals advanced by some groups that greater changes should be
352 made in the general presumption that the responding party should
353 bear the costs imposed by discovery requests. It will be some time,
354 however, before the Committee determines whether any broader
355 recommendations might be made.

356 Proportionality: Rules 30, 31, 33, and 36: Presumptive Numerical
357 Limits: Rules 30 and 31 establish a presumptive limit of 10
358 depositions by the plaintiffs, or by the defendants, or by third-
359 party defendants. Rule 30(d)(1) establishes a presumptive time
360 limit of 1 day of 7 hours for a deposition by oral examination.
361 Rule 33(a)(1) sets a presumptive limit of "no more than 25 written
362 interrogatories, including all discrete subparts." There are no
363 presumptive numerical limits for Rule 34 requests to produce or for
364 Rule 36 requests to admit. The proposals reduce the limits in
365 Rules 30, 31, and 33. They add to Rule 36, for the first time,
366 presumptive numerical limits. A presumptive limit of 25 Rule 34
367 requests to produce was studied at length but ultimately abandoned.

368 The proposals would reduce the presumptive limit on the number
369 of depositions from 10 to 5, and would reduce the presumptive
370 duration to 1 day of 6 hours. Rules 30 and 31 continue to provide
371 that the court must grant leave to take more depositions "to the
372 extent consistent with Rule 26(b)(1) and (2)."

373 Reducing the presumptive limit on the number of depositions
374 was considered at length. Some judges at the Duke Conference
375 expressed the view that civil litigators over-use depositions,

376 apparently holding the view that every witness who testifies at
377 trial must be deposed beforehand. These judges noted that they
378 regularly see lawyers effectively cross-examine witnesses in
379 criminal trials without the benefit of depositions, a practice
380 widely viewed as sufficient to satisfy the demands of due process.
381 The judges also observed that they rarely, if ever, see witnesses
382 effectively impeached with deposition transcripts. At the same
383 time, many parties are opting to resolve their disputes through
384 private arbitration or mediation services that are less expensive
385 than civil litigation because they do not involve depositions, and
386 yet these alternatives are thought sufficient to reach resolution
387 of important disagreements.

388 Research by the FJC further supports these concerns, and also
389 suggests that a presumptive limit of 5 depositions will have no
390 effect in most cases. Emery Lee returned to the data base compiled
391 for the 2010 FJC study to measure the frequency of cases with more
392 than 5 depositions by plaintiffs or by defendants. The data base
393 itself was built by excluding several categories of actions that
394 are not likely to have discovery. The data for numbers of
395 depositions were further limited by counting only cases in which
396 there was at least one deposition. Drawing from reports by
397 plaintiffs of how many depositions the plaintiffs took and how many
398 depositions the defendants took, and parallel reports by
399 defendants, the numbers ranged from 14% to 23% of cases with more
400 than 5 depositions by the plaintiff or by the defendant. With one
401 exception, the estimates were that 78% or 79% of these cases had 10
402 or fewer depositions. Other findings are that each additional
403 deposition increases the cost of an action by about 5%, and that
404 estimates that discovery costs were "too high" increase with the
405 number of depositions.

406 On the other hand, many comments say that the present limit of
407 10 depositions works well — that leave is readily granted when
408 there is good reason to take more than 10, and that parties do not
409 wantonly take more than 5 depositions simply because the
410 presumptive limit is 10. More pointedly, some lawyers who represent
411 individual plaintiffs in employment discrimination cases have urged
412 that they commonly need more than 5 depositions to establish their
413 claims.

414 In short, it appears that less than one-quarter of federal
415 court civil cases result in more than five depositions, and even
416 fewer in more than ten. The question is whether it will be useful
417 to revise Rules 30 and 31 to establish a lower presumptive
418 threshold for potential judicial management. Setting the limit at
419 5 does not mean that motions and orders must be made in every case

420 that deserves more than 5 — the parties can be expected to agree,
421 and should manage to agree, in most of these cases. But the lower
422 limit can be useful in inducing reflection on the need for
423 depositions, in prompting discussions among the parties, and — when
424 those avenues fail — in securing court supervision. The Committee
425 Note addresses the concerns expressed by those who oppose the new
426 limit by stressing that leave to take more than 5 depositions must
427 be granted when appropriate. The fear that lowering the threshold
428 will raise judicial resistance seems ill-founded. Courts are
429 willing now to grant leave to take more than 10 depositions per
430 side in actions that warrant a greater number. The argument that
431 they will become reluctant to grant leave to take more than 5, or
432 more than 10, is not persuasive.

433 Considering judicial experience and the FJC findings, and
434 aiming to decrease the cost of civil litigation, making it more
435 accessible for average citizens, the Committee is persuaded that
436 the presumptive number of depositions should be reduced. Hopefully,
437 the change will result in an adjustment of expectations concerning
438 the appropriate amount of civil discovery.

439 Shortening the presumptive length of a deposition from 7 hours
440 to 6 hours reflects revision of earlier drafts that would have
441 reduced the time to 4 hours. The 4-hour limit was prompted by
442 experience in some state courts. Arizona, for example, adopted a 4-
443 hour limit several years ago. Judges in Arizona federal courts
444 often find that parties stipulate to 4-hour limits based on their
445 favorable experience with the state rule. But several comments have
446 suggested that for many depositions, 4 hours do not suffice. At the
447 same time, several others have observed that squeezing 7 hours of
448 deposition time into one day, after accounting for lunch time and
449 other breaks, often means that the deposition extends well into the
450 evening. Judges also have noted that 6 hours of trial time makes
451 for a very full day when lunch and breaks are considered. The
452 reduction to 6 hours is intended to reduce the burden of deposing
453 a witness for 7 hours in one day, but without sacrificing the
454 opportunity to conduct a complete examination.

455 The proposal to reduce the presumptive number of Rule 33
456 interrogatories to 15 has not attracted much concern. There has
457 been some concern that 15 interrogatories are not enough even for
458 some relatively small-stakes cases. As with Rules 30 and 31, the
459 Subcommittee has concluded that 15 will meet the needs of most
460 cases, and that it is advantageous to provide for court supervision
461 when the parties cannot reach agreement in the cases that may
462 justify a greater number.

463 Rule 36 requests to admit are an established part of the
464 rules, whether they be regarded as true "discovery" devices or as
465 a device for framing the issues more directly than is accomplished
466 even by contention interrogatories. The proposal to add a
467 presumptive limit of 25 expressly exempts requests to admit the
468 genuineness of documents, avoiding any risk that the limit might
469 cause problems in document-heavy litigation. This proposal did not
470 draw much criticism from those who commented on Subcommittee
471 deliberations. (The Subcommittee also considered provisions that
472 would generally defer the time for admissions to the completion of
473 other discovery, but in the end decided that early requests can be
474 useful.)

475 Proportionality: Rule 34 Objections and Responses: Discovery
476 burdens can be pushed out of proportion to the reasonable needs of
477 a case by those asked to respond, not only those who make requests.
478 The Subcommittee considered adding to Rule 26(g) a provision that
479 signing a discovery request, response, or objection certifies that
480 it is "not evasive." That proposal was put aside in the face of
481 concerns that "evasive" is a malleable concept, and that
482 malleability will invite satellite litigation.

483 More specific concerns underlie Rule 34 proposals addressing
484 objections and actual production. Objections are addressed in two
485 ways. First, Rule 34(b)(2)(B) would require that the grounds for
486 objecting to a request be stated with specificity. This language is
487 borrowed from Rule 33(b)(4), where it has served well. Second, Rule
488 34(b)(2)(C) would require that an objection "state whether any
489 responsive materials are being withheld on the basis of that
490 objection." This provision responds to the common lament that Rule
491 34 responses often begin with a "laundry list" of objections, then
492 produce volumes of materials, and finally conclude that the
493 production is made subject to the objections. The requesting party
494 is left uncertain whether anything actually has been withheld.
495 Providing that information can aid the decision whether to contest
496 the objections. The Committee Note also explains that it is proper
497 to state limits on the extent of the search without further
498 elaboration — for example, that the search was limited to documents
499 created on or after a specified date, or maintained by identified
500 sources.

501 Actual production is addressed by new language in Rule
502 34(b)(2)(B) and a corresponding addition to Rule 37(a)(3)(B)(iv).
503 Present Rule 34 recognizes a distinction between permitting
504 inspection of documents, electronically stored information, or
505 tangible things, and actually producing copies. The distinction,
506 however, is not clearly developed in the rule. If a party elects to

507 produce materials rather than permit inspection, the current rule
508 does not indicate when such production is required to be made. The
509 new provision directs that a party electing to produce must state
510 that copies will be produced, and directs that production be
511 completed no later than the time for inspection stated in the
512 request or a later reasonable time stated in the response. The
513 Committee Note recognizes the value of "rolling production" that
514 makes production in discrete batches. Rule 37 is amended by adding
515 authority to move for an order to compel production if "a party
516 fails to produce documents."

517 Cooperation

518 Reasonable cooperation among adversaries is vitally important
519 to successful use of the resources provided by the Civil Rules.
520 Participants at the Duke Conference regularly pointed to the costs
521 imposed by hyperadversary behavior and wished for some rule that
522 would enhance cooperation.

523 It would be possible to impose a duty of cooperation by direct
524 rule provisions. The provisions might be limited to the discovery
525 rules alone, because discovery behavior gives rise to many of the
526 laments, or could apply generally to all litigation behavior.
527 Consideration of drafts that would impose a direct and general duty
528 of cooperation faced several concerns. Cooperation is an open-ended
529 concept. It is difficult to identify a proper balance of
530 cooperation with legitimate, even essential, adversary behavior. A
531 general duty might easily generate excessive collateral litigation,
532 similar to the experience with an abandoned and unlamented version
533 of Rule 11. And there may be some risk that a general duty of
534 cooperation could conflict with professional responsibilities of
535 effective representation. These drafts were abandoned.

536 What is proposed is a modest addition to Rule 1. The parties
537 are made to share responsibility for achieving the high aspirations
538 expressed in Rule 1: "[T]hese rules should be construed,
539 administered, and employed by the court and the parties to secure
540 the just, speedy, and inexpensive determination of every action and
541 proceeding." The Note observes that most lawyers and parties
542 conform to this expectation, and notes that "[e]ffective advocacy
543 is consistent with — and indeed depends upon — cooperative and
544 proportional use of procedure."

545 As amended, Rule 1 will encourage cooperation by lawyers and
546 parties directly, and will provide useful support for judicial
547 efforts to elicit better cooperation when the lawyers and parties
548 fall short. It cannot be expected to cure all adversary excesses,

549 but it will do some good.

550 Package

551 These proposals constitute a whole that is greater than the
552 sum of its parts. Together, these proposals can do much to reduce
553 cost and delay. Still, each part must be scrutinized and stand, be
554 modified, or fall on its own. The proposals are not interdependent
555 in the sense that all, or even most, must be adopted to achieve
556 meaningful gains.

557 **Duke Rules Package**

558 **Rule 1 Scope and Purpose**

559 * * * [These rules] should be construed, ~~and~~
560 administered, and employed by the court and the parties
561 to secure the just, speedy, and inexpensive determination
562 of every action and proceeding.

563 Committee Note

564 Rule 1 is amended to emphasize that just as the court should
565 construe and administer these rules to secure the just, speedy, and
566 inexpensive determination of every action, so the parties share the
567 responsibility to employ the rules in the same way. Most lawyers
568 and parties cooperate to achieve these ends. But discussions of
569 ways to improve the administration of civil justice regularly
570 include pleas to discourage over-use, misuse, and abuse of
571 procedural tools that increase cost and result in delay. Effective
572 advocacy is consistent with — and indeed depends upon — cooperative
573 and proportional use of procedure.

574 **Rule 4 Summons**

575 *** * ***

576 (m) TIME LIMIT FOR SERVICE. If a defendant is not served within ~~120~~ 60
577 days after the complaint is filed, the court * * * must
578 dismiss the action without prejudice against that defendant or
579 order that service be made within a specified time. But if
580 the plaintiff shows good cause for the failure, the court must
581 extend the time for service for an appropriate period. This
582 subdivision does not apply to service in a foreign country
583 under Rule 4(f) or 4(j)(1) or to service of a notice under
584 Rule 71.1(d)(3)(A).

585 Committee Note

586 The presumptive time for serving a defendant is reduced from
587 120 days to 60 days. This change, together with the shortened times
588 for issuing a scheduling order set by amended Rule 16(b)(2), will
589 reduce delay at the beginning of litigation.

590 The final sentence is amended to make it clear that the
591 reference to Rule 4 in Rule 71.1(d)(3)(A) does not include Rule
592 4(m). Dismissal under Rule 4(m) for failure to make timely service
593 would be inconsistent with the limits on dismissal established by
594 Rule 71.1(i)(C) when "the plaintiff has already taken title, a
595 lesser interest, or possession as to any part of" the property.

596 **Rule 16 Pretrial Conferences; Scheduling; Management**

597 (b) SCHEDULING.

598 (1) *Scheduling Order.* Except in categories of actions
599 exempted by local rule, the district judge — or a
600 magistrate judge when authorized by local rule — must
601 issue a scheduling order:

602 (A) after receiving the parties' report under Rule
603 26(f); or

604 (B) after consulting with the parties' attorneys and
605 any unrepresented parties at a scheduling
606 conference ~~by telephone, mail, or other means~~.

607 (2) *Time to Issue.* The judge must issue the scheduling order
608 as soon as practicable, but ~~in any event~~ unless the judge
609 finds good cause for delay the judge must issue it within
610 the earlier of ~~120~~ 90 days after any defendant has been
611 served with the complaint or ~~90~~ 60 days after any
612 defendant has appeared.

613 (3) *Contents of the Order.* * * *

614 (B) *Permitted Contents.* The scheduling order may: * * *

615 (iii) provide for disclosure, ~~or~~ discovery, or
616 preservation of electronically stored
617 information;

618 (iv) include any agreements the parties reach for
619 asserting claims of privilege or of protection
620 as trial-preparation material after
621 information is produced, including agreements
622 reached under Federal Rule of Evidence 502;

623 (v) direct that before moving for an order relating
624 to discovery the movant must request a
625 conference with the court;

626 [present (v) and (vi) would be renumbered] * * *

627 Committee Note

628 The provision for consulting at a scheduling conference by

629 "telephone, mail, or other means" is deleted. A scheduling
630 conference is more effective if the court and parties engage in
631 direct simultaneous communication. The conference may be held in
632 person, by telephone, or by more sophisticated electronic means.

633 The time to issue the scheduling order is reduced to the
634 earlier of 90 days (not 120 days) after any defendant has been
635 served, or 60 days (not 90 days) after any defendant has appeared.
636 This change, together with the shortened time for making service
637 under Rule 4(m), will reduce delay at the beginning of litigation.
638 At the same time, a new provision recognizes that the court may
639 find good cause to extend the time to issue the scheduling order.
640 In some cases it may be that the parties cannot prepare adequately
641 for a meaningful Rule 26(f) conference and then a scheduling
642 conference in the time allowed. Because the time for the Rule 26(f)
643 conference is geared to the time for the scheduling conference or
644 order, an order extending the time for the scheduling conference
645 will also extend the time for the Rule 26(f) conference. But in
646 most cases it will be desirable to hold at least a first scheduling
647 conference in the time set by the rule.

648 Three items are added to the list of permitted contents in
649 Rule 16(b)(3)(B).

650 The order may provide for preservation of electronically
651 stored information, a topic also added to the provisions of a
652 discovery plan under Rule 26(f)(3)(C). Parallel amendments of Rule
653 37(e) recognize that a duty to preserve discoverable information
654 may arise before an action is filed, and may be shaped by prefiling
655 requests to preserve and responses to them.

656 The order also may include agreements incorporated in a court
657 order under Evidence Rule 502 controlling the effects of disclosure
658 of information covered by attorney-client privilege or work-product
659 protection, a topic also added to the provisions of a discovery
660 plan under Rule 26(f)(3)(D).

661 Finally, the order may direct that before filing a motion for
662 an order relating to discovery the movant must request a conference
663 with the court. Many judges who hold such conferences find them an
664 efficient way to resolve most discovery disputes without the delay
665 and burdens attending a formal motion, but the decision whether to
666 require such conferences is left to the discretion of the judge in
667 each case.

668 **Rule 26. Duty to Disclose; General Provisions; Governing**
669 **Discovery**

670 (b) DISCOVERY SCOPE AND LIMITS.

671 (1) *Scope in General.* Unless otherwise limited by court order,

672 the scope of discovery is as follows: Parties may obtain
673 discovery regarding any nonprivileged matter that is
674 relevant to any party's claim or defense and proportional
675 to the needs of the case considering the amount in
676 controversy, the importance of the issues at stake in the
677 action, the parties' resources, the importance of the
678 discovery in resolving the issues, and whether the burden
679 or expense of the proposed discovery outweighs its likely
680 benefit. Information within this scope of discovery need
681 not be admissible in evidence to be discoverable. ~~=~~
682 ~~including the existence, description, nature, custody,~~
683 ~~condition, and location of any documents or other~~
684 ~~tangible things and the identity and location of persons~~
685 ~~who know of any discoverable matter. For good cause, the~~
686 ~~court may order discovery of any matter relevant to the~~
687 ~~subject matter involved in the action. Relevant~~
688 ~~information need not be admissible at the trial if the~~
689 ~~discovery appears reasonably calculated to lead to the~~
690 ~~discovery of admissible evidence. All discovery is~~
691 ~~subject to the limitations imposed by Rule 26(b)(2)(C).~~

692 (2) *Limitations on Frequency and Extent.*

693 (A) *When Permitted.* By order, the court may alter the
694 limits in these rules on the number of depositions,
695 ~~and~~ interrogatories, and requests for admissions,
696 or on the length of depositions under Rule 30. ~~By~~
697 ~~order or local rule, the court may also limit the~~
698 ~~number of requests under Rule 36.~~

699 * * *

700 (C) *When Required.* On motion or on its own, the court
701 must limit the frequency or extent of discovery
702 ~~otherwise allowed by these rules or by local rule~~
703 if it determines that: * * *

704 (iii) the ~~burden or expense of the~~ proposed
705 discovery is outside the scope permitted by
706 Rule 26(b)(1) ~~outweighs its likely benefit,~~
707 ~~considering the needs of the case, the amount~~
708 ~~in controversy, the parties' resources, the~~
709 ~~importance of the issues at stake in the~~
710 ~~action, and the importance of the discovery in~~
711 ~~resolving the issues.~~

712 * * *

713 (c) PROTECTIVE ORDERS.

714 (1) *In General.* * * * The court may, for good cause, issue an

715 order to protect a party or person from annoyance,
716 embarrassment, oppression, or undue burden or expense,
717 including one or more of the following: * * *

718 (B) specifying terms, including time and place or the
719 allocation of expenses, for the disclosure or
720 discovery; * * *

721 (d) TIMING AND SEQUENCE OF DISCOVERY.

722 (1) *Timing*. A party may not seek discovery from any source
723 before the parties have conferred as required by Rule
724 26(f), except:

725 (A) in a proceeding exempted from initial disclosure
726 under Rule 26(a)(1)(B)~~,~~; or

727 (B) when authorized by these rules, including Rule
728 26(d)(2), by stipulation, or by court order.

729 (2) *Early Rule 34 Requests.*

730 (A) *Time to Deliver.* More than 21 days after the summons
731 and complaint are served on a party, a request
732 under Rule 34 may be delivered:

733 (i) to that party by any other party, and

734 (ii) by that party to any plaintiff or to any other
735 party that has been served.

736 (B) When Considered Served. The request is considered as
737 served at the first Rule 26(f) conference.

738 (~~2~~3) *Sequence*. Unless~~, on motion,~~ the parties stipulate or
739 the court orders otherwise for the parties' and
740 witnesses' convenience and in the interests of justice:

741 (A) methods of discovery may be used in any sequence;
742 and

743 (B) discovery by one party does not require any other
744 party to delay its discovery.

745 * * *

746 (f) CONFERENCE OF THE PARTIES; PLANNING FOR DISCOVERY.

747 (1) *Conference Timing*. Except in a proceeding exempted from
748 initial disclosure under Rule 26(a)(1)(B) or * * *

749 (3) *Discovery Plan*. A discovery plan must state the parties'
750 views and proposals on: * * *

751 (C) any issues about disclosure, ~~or~~ discovery, or

752 preservation of electronically stored information,
753 including the form or forms in which it should be
754 produced;

755 (D) any issues about claims of privilege or of
756 protection as trial-preparation materials,
757 including — if the parties agree on a procedure to
758 assert these claims after production — whether to
759 ask the court to include their agreement in an
760 order under Federal Rule of Evidence 502;

761 Committee Note

762 The scope of discovery is changed in several ways. Rule
763 26(b)(1) is revised to limit the scope of discovery to what is
764 proportional to the needs of the case. The considerations that bear
765 on proportionality are moved from present Rule 26(b)(2)(C)(iii).
766 Although the considerations are familiar, and have measured the
767 court's duty to limit the frequency or extent of discovery, the
768 change incorporates them into the scope of discovery that must be
769 observed by the parties without court order.

770 The amendment deletes the former provision authorizing the
771 court, for good cause, to order discovery of any matter relevant to
772 the subject matter involved in the action. Proportional discovery
773 relevant to any party's claim or defense suffices. Such discovery
774 may support amendment of the pleadings to add a new claim or
775 defense that affects the scope of discovery.

776 The former provision for discovery of relevant but
777 inadmissible information that appears reasonably calculated to lead
778 to the discovery of admissible evidence is also amended. Discovery
779 of nonprivileged information not admissible in evidence remains
780 available so long as it is otherwise within the scope of discovery.
781 Hearsay is a common illustration. The qualifying phrase — "if the
782 discovery appears reasonably calculated to lead to the discovery of
783 admissible evidence" — is omitted. Discovery of inadmissible
784 information is limited to matter that is otherwise within the scope
785 of discovery, namely that which is relevant to a party's claim or
786 defense and proportional to the needs of the case. The discovery of
787 inadmissible evidence should not extend beyond the permissible
788 scope of discovery simply because it is "reasonably calculated" to
789 lead to the discovery of admissible evidence. Deleting the
790 "reasonably calculated" phrase will further the purpose of the 2000
791 amendment that revised this sentence out of concern that, as
792 expressed in the 2000 Committee Note, it "might swallow any other
793 limitation on the scope of discovery."

794 Rule 26(b)(2)(A) is revised to reflect the addition of
795 presumptive limits on the number of requests for admission under

796 Rule 36. The court may alter these limits just as it may alter the
797 presumptive limits set by Rules 30, 31, and 33.

798 Rule 26(b)(2)(C)(iii) is amended to reflect the transfer of
799 the considerations that bear on proportionality to Rule 26(b)(1).
800 The court still must limit the frequency or extent of proposed
801 discovery, on motion or on its own, if it is outside the scope
802 permitted by Rule 26(b)(1). Rule 26(b)(2)(C) is further amended by
803 deleting the reference to discovery "otherwise allowed by these
804 rules or local rule." Neither these rules nor local rules can
805 "otherwise allow" discovery that exceeds the scope defined by Rule
806 26(b)(1) or that must be limited under Rule 26(b)(2)(C).

807 Rule 26(c)(1)(B) is amended to include an express recognition
808 of protective orders that specify terms allocating expenses for
809 disclosure or discovery. Authority to enter such orders is included
810 in the present rule, and courts are coming to exercise this
811 authority. Explicit recognition will forestall the temptation some
812 parties may feel to contest this authority.

813 Rule 26(d)(1)(B) is amended to allow a party to deliver Rule
814 34 requests to another party more than 21 days after that party has
815 been served even though the parties have not yet had a required
816 Rule 26(f) conference. Delivery may be made by any party to the
817 party that has been served, and by that party to any plaintiff and
818 any other party that has been served. Delivery does not count as
819 service; the requests are considered to be served at the first Rule
820 26(f) conference. Under Rule 34(b)(2)(A) the time to respond runs
821 from service. This relaxation of the discovery moratorium is
822 designed to facilitate focused discussion during the Rule 26(f)
823 conference. Discussion at the conference may produce changes in the
824 requests. The opportunity for advance scrutiny of requests
825 delivered before the Rule 26(f) conference should not affect a
826 decision whether to allow additional time to respond.

827 Former Rule 26(d)(2) is renumbered as (d)(3) and amended to
828 recognize that the parties may stipulate to case-specific sequences
829 of discovery.

830 Rule 26(f)(3) is amended in parallel with Rule 16(b)(3) to add
831 two items to the discovery plan — issues about preserving
832 electronically stored information and court orders on agreements to
833 protect against waiver of privilege or work-product protection
834 under Evidence Rule 502. Parallel amendments of Rule 37(e)
835 recognize that a duty to preserve discoverable information may
836 arise before an action is filed, and may be shaped by prefiling
837 requests to preserve and responses to them.

838 **Rule 30 Depositions by Oral Examination**

839 (a) WHEN A DEPOSITION MAY BE TAKEN. * * *

840 (2) *With Leave.* A party must obtain leave of court, and the
841 court must grant leave to the extent consistent with Rule
842 26(b)(1) and (2):

843 (A) if the parties have not stipulated to the deposition
844 and:

845 (i) the deposition would result in more than ~~10~~ 5
846 depositions being taken under this rule or
847 Rule 31 by the plaintiffs, or by the
848 defendants, or by the third-party defendants;
849 * * *

850 (d) DURATION; SANCTION; MOTION TO TERMINATE OR LIMIT.

851 (1) *Duration.* Unless otherwise stipulated or ordered by the
852 court, a deposition is limited to one day of ~~7~~ 6 hours.
853 The court must allow additional time consistent with Rule
854 26(b)(1) and (2) if needed to fairly examine the deponent
855 or if the deponent, another person, or any other
856 circumstance impedes or delays the examination.

857 Committee Note

858 Rule 30 is amended to reduce the presumptive number of
859 depositions to 5 by the plaintiffs, or by the defendants, or by the
860 third-party defendants. Rule 30(a)(2), however, continues to direct
861 that the court must grant leave to take more depositions to the
862 extent consistent with Rule 26(b)(1) and (2). And Rule 30(a)(2)(A)
863 continues to recognize that the parties may stipulate to a greater
864 number. Just as cases frequently arise in which one or all sides
865 reasonably need more than 10 depositions, so there will be still
866 more cases that reasonably justify more than 5. First-line reliance
867 continues to rest on the parties to recognize the cases in which
868 more depositions are required, acting in accord with Rule 1. But if
869 the parties fail to agree, the court is responsible for identifying
870 the cases that need more, recognizing that the context of
871 particular cases often will justify more. The court's determination
872 is guided by the scope of discovery defined in Rule 26(b)(1) and
873 the limiting principles stated in Rule 26(b)(2).

874 Rule 30(d) is amended to reduce the presumptive limit of a
875 deposition to one day of 6 hours. Experience with the present 7-
876 hour presumptive limit suggests that a deposition begun in the
877 morning often runs into evening hours after accounting for breaks.
878 Six hours should suffice for most depositions, and encourage
879 efficient use of the time while providing a less arduous experience

880 for the deponent.

881 **Rule 31 Depositions by Written Questions**

882 (a) WHEN A DEPOSITION MAY BE TAKEN. * * *

883 (2) *With Leave.* A party must obtain leave of court, and the
884 court must grant leave to the extent consistent with Rule
885 26(b)(1) and (2):

886 (A) if the parties have not stipulated to the deposition
887 and:

888 (i) the deposition would result in more than ~~10~~ 5
889 depositions being taken under this rule or
890 Rule 30 by the plaintiffs, or by the
891 defendants, or by the third-party defendants;
892 * * *

893 Committee Note

894 Rule 31 is amended to adopt for depositions by written
895 questions the same presumptive limit of 5 depositions by the
896 plaintiffs, or by the defendants, or by the third-party defendants
897 as is adopted for Rule 30 depositions by oral examination.

898 **Rule 33 Interrogatories to Parties**

899 (a) IN GENERAL.

900 (1) *Number.* Unless otherwise stipulated or ordered by the court, a
901 party may serve on another party no more than ~~25~~ 15
902 interrogatories, including all discrete subparts. Leave to
903 serve additional interrogatories may be granted to the extent
904 consistent with Rule 26(b)(1) and (2).

905 Committee Note

906 Rule 33 is amended to reduce from 25 to 15 the presumptive
907 limit on the number of interrogatories to parties. As with the
908 reduction in the presumptive number of depositions under Rules 30
909 and 31, the purpose is to encourage the parties to think carefully
910 about the most efficient and least burdensome use of discovery
911 devices. There is no change in the authority to increase the number
912 by stipulation or by court order. As with other numerical limits on
913 discovery, the court should recognize that some cases will require
914 a greater number of interrogatories, and set a limit consistent
915 with Rule 26(b)(1) and (2).

916 **Rule 34 Producing Documents, Electronically Stored Information,**
917 **and Tangible Things, or Entering onto Land, for Inspection and**
918 **Other Purposes** * * *

919 (b) PROCEDURE. * * *

920 (2) *Responses and Objections.* * * *

921 (A) *Time to Respond.* The party to whom the request is
922 directed must respond in writing within 30 days
923 after being served or — if the request was
924 delivered under Rule 26(d)(1)(B) — within 30 days
925 after the parties' first Rule 26(f) conference. A
926 shorter or longer time may be stipulated to under
927 Rule 29 or be ordered by the court.

928 (B) *Responding to Each Item.* For each item or
929 category, the response must either state that
930 inspection and related activities will be
931 permitted as requested or state the grounds
932 for objecting to the request with specificity,
933 including the reasons. If the responding party
934 states that it will produce copies of
935 documents or of electronically stored
936 information instead of permitting inspection,
937 the production must be completed no later than
938 the time for inspection stated in the request
939 or a later reasonable time stated in the
940 response.

941 (C) *Objections*. An objection must state whether any
942 responsive materials are being withheld on the
943 basis of that objection. An objection to part of a
944 request must specify the part and permit inspection
945 of the rest. . * * *

946 Committee Note

947 Several amendments are made in Rule 34, aimed at reducing the
948 potential to impose unreasonable burdens by objections to requests
949 to produce.

950 Rule 34(b)(2)(A) is amended to fit with new Rule 26(d)(1)(B).
951 The time to respond to a Rule 34 request delivered before the
952 parties' Rule 26(f) conference is 30 days after the first Rule
953 26(f) conference.

954 Rule 34(b)(2)(B) is amended to make it clear that objections
955 to Rule 34 requests must be stated with specificity. This provision
956 adopts the language of Rule 33(b)(4), eliminating any doubt that
957 less specific objections might be suitable under Rule 34.

958 Rule 34(b)(2)(B) is further amended to reflect the common
959 practice of producing copies of documents or electronically stored
960 information rather than simply permitting inspection. The response
961 to the request must state that copies will be produced. The
962 production must be completed either by the time for inspection
963 stated in the request or by a later reasonable time specifically
964 identified in the response. When it is necessary to make the
965 production in stages the response should specify the beginning and
966 end dates of the production.

967 Rule 34(b)(2)(C) is amended to provide that an objection to a
968 Rule 34 request must state whether anything is being withheld on
969 the basis of the objection. This amendment should end the confusion
970 that frequently arises when a producing party states several
971 objections and still produces information, leaving the requesting
972 party uncertain whether any relevant and responsive information has
973 been withheld on the basis of the objections. An objection that
974 states the limits that have controlled the search for responsive
975 and relevant materials qualifies as a statement that the materials
976 have been "withheld." Examples would be a statement that the search
977 was limited to materials created during a defined period, or
978 maintained by identified sources.

979 **Rule 36 Requests for Admission**

980 (a) SCOPE AND PROCEDURE.

981 (1) *Scope.* A party may serve on any other party a written
982 request to admit, for purposes of the pending action
983 only, the truth of any matters within the scope of Rule
984 26(b)(1) relating to:

985 (A) facts, the application of law to fact, or opinions
986 about either; and

987 (B) the genuineness of any described document.

988 <u>(2) *Number.* Unless otherwise stipulated or ordered by the</u>
989 <u>court, a party may serve no more than 25 requests to</u>
990 <u>admit under Rule 36(a)(1)(A) on any other party,</u>
991 <u>including all discrete subparts. The court may grant</u>
992 <u>leave to serve additional requests to the extent</u>
993 <u>consistent with Rule 26(b)(1) and (2)</u>. * * *

994 [Present (2), (3), (4), (5), and(6) would be renumbered]

995 Committee Note

996 For the first time, a presumptive limit of 25 is introduced
997 for the number of Rule 36(a)(1)(A) requests to admit the truth of
998 facts, the application of law to fact, or opinions about either.
999 "[A]ll discrete subparts" are included in the count, to be

1000 determined in the same way as under Rule 33(a)(1). The limit does
1001 not apply to requests to admit the genuineness of any described
1002 document under Rule 36(a)(1)(B). As with other numerical limits on
1003 discovery, the court should recognize that some cases will require
1004 a greater number of requests, and set a limit consistent with the
1005 limits of Rule 26(b)(1) and (2).

1006 **Rule 37 Failure to Make Disclosures or to Cooperate in Discovery;**
1007 **Sanctions**

1008 (a) MOTION FOR AN ORDER COMPELLING DISCLOSURE OR DISCOVERY. * * *

1009 (3) *Specific Motions.* * * *

1010 (B) *To Compel a Discovery Response.* A party seeking
1011 discovery may move for an order compelling an
1012 answer, designation, production, or inspection.
1013 This motion may be made if: * * *

1014 (iv) a party <u>fails to produce documents or</u> fails
1015 to respond that inspection will be permitted —
1016 or fails to permit inspection — as requested
1017 under Rule 34.

1018 Committee Note

1019 Rule 37(a)(3)(B)(iv) is amended to reflect the common practice
1020 of producing copies of documents or electronically stored
1021 information rather than simply permitting inspection. This change
1022 brings item (iv) into line with paragraph (B), which provides a
1023 motion for an order compelling "production, or inspection."

1024 Rules Text

1025 **Rule 1 Scope and Purpose**

1026 * * * [These rules] should be construed, administered,
1027 and employed by the court and the parties to secure the
1028 just, speedy, and inexpensive determination of every
1029 action and proceeding.

1030 **Rule 4 Summons**

1031 *** * ***

1032 (m) TIME LIMIT FOR SERVICE. If a defendant is not served within 60 days
1033 after the complaint is filed, the court * * * must dismiss the
1034 action without prejudice against that defendant or order that
1035 service be made within a specified time. But if the plaintiff
1036 shows good cause for the failure, the court must extend the
1037 time for service for an appropriate period. This subdivision
1038 (m) does not apply to service in a foreign country under Rule
1039 4(f) or 4(j)(1) or to service of a notice under Rule
1040 71.1(d)(3)(A).

1041 **Rule 16 Pretrial Conferences; Scheduling; Management**

1042 (b) SCHEDULING.

1043 (1) *Scheduling Order.* Except in categories of actions
1044 exempted by local rule, the district judge — or a
1045 magistrate judge when authorized by local rule — must
1046 issue a scheduling order:

1047 (A) after receiving the parties' report under Rule
1048 26(f); or

1049 (B) after consulting with the parties' attorneys and
1050 any unrepresented parties at a scheduling
1051 conference.

1052 (2) *Time to Issue.* The judge must issue the scheduling order
1053 as soon as practicable, but unless the judge finds good
1054 cause for delay the judge must issue it within the
1055 earlier of 90 days after any defendant has been served
1056 with the complaint or 60 days after any defendant has
1057 appeared.

1058 (3) *Contents of the Order.* * * *

1059 (B) *Permitted Contents.* The scheduling order may: * * *

1060 (iii) provide for disclosure, discovery, or
1061 preservation of electronically stored
1062 information;

1063 (iv) include any agreements the parties reach for
1064 asserting claims of privilege or of protection
1065 as trial-preparation material after
1066 information is produced, including agreements
1067 reached under Federal Rule 502 of Evidence
1068 502;

1069 (v) direct that before moving for an order relating
1070 to discovery the movant must request a
1071 conference with the court;

1072 [present (v) and (vi) would be renumbered] * * *

1073 **Rule 26. Duty to Disclose; General Provisions; Governing**
1074 **Discovery**

1075 (b) DISCOVERY SCOPE AND LIMITS.

1076 (1) *Scope in General.* Unless otherwise limited by court order,
1077 the scope of discovery is as follows: Parties may obtain
1078 discovery regarding any nonprivileged matter that is
1079 relevant to any party's claim or defense and proportional
1080 to the needs of the case considering the amount in
1081 controversy, the importance of the issues at stake in the
1082 action, the parties' resources, the importance of the
1083 discovery in resolving the issues, and whether the burden
1084 or expense of the proposed discovery outweighs its likely
1085 benefit. Information within this scope of discovery need
1086 not be admissible in evidence to be discoverable.

1087 (2) *Limitations on Frequency and Extent.*

1088 (A) *When Permitted.* By order, the court may alter the
1089 limits in these rules on the number of depositions,
1090 interrogatories, and requests for admissions, or on
1091 the length of depositions under Rule 30.

1092 * * *

1093 (C) *When Required.* On motion or on its own, the court
1094 must limit the frequency or extent of discovery if
1095 it determines that: * * *

1096 (iii) the proposed discovery is outside the scope
1097 permitted by Rule 26(b)(1).

1098 * * *

1099 (c) PROTECTIVE ORDERS.

1100 (1) *In General.* * * * The court may, for good cause, issue an
1101 order to protect a party or person from annoyance,
1102 embarrassment, oppression, or undue burden or expense,

1103 including one or more of the following: * * *

1104 (B) specifying terms, including time and place or the
1105 allocation of expenses, for the disclosure or
1106 discovery; * * *

1107 (d) TIMING AND SEQUENCE OF DISCOVERY.

1108 (1) *Timing*. A party may not seek discovery from any source
1109 before the parties have conferred as required by Rule
1110 26(f), except:

1111 (A) in a proceeding exempted from initial disclosure
1112 under Rule 26(a)(1)(B); or

1113 (B) when authorized by these rules, including Rule
1114 26(d)(2), by stipulation, or by court order.

1115 (2) *Early Rule 34 Requests.*

1116 (A) *Time to Deliver.* More than 21 days after the summons
1117 and complaint are served on a party, a request
1118 under Rule 34 may be delivered:

1119 (i) to that party by any other party, and

1120 (ii) by that party to any plaintiff or to any other
1121 party that has been served.

1122 (B) *When Considered Served.* The request is considered as
1123 served at the first Rule 26(f) conference.

1124 (3) *Sequence.* Unless the parties stipulate or the court
1125 orders otherwise for the parties' and witnesses'
1126 convenience and in the interests of justice:

1127 (A) methods of discovery may be used in any sequence;
1128 and

1129 (B) discovery by one party does not require any other
1130 party to delay its discovery.

1131 * * *

1132 (f) CONFERENCE OF THE PARTIES; PLANNING FOR DISCOVERY.

1133 (1) *Conference Timing.* Except in a proceeding exempted from
1134 initial disclosure under Rule 26(a)(1)(B) or * * *

1135 (3) *Discovery Plan.* A discovery plan must state the parties'
1136 views and proposals on: * * *

1137 (C) any issues about disclosure, discovery, or
1138 preservation of electronically stored information,
1139 including the form or forms in which it should be

1140 produced;

1141 (D) any issues about claims of privilege or of
1142 protection as trial-preparation materials,
1143 including — if the parties agree on a procedure to
1144 assert these claims after production — whether to
1145 ask the court to include their agreement in an
1146 order under Federal Rule of Evidence 502;

1147 **Rule 30 Depositions by Oral Examination**

1148 (a) WHEN A DEPOSITION MAY BE TAKEN. * * *

1149 (2) *With Leave.* A party must obtain leave of court, and the
1150 court must grant leave to the extent consistent with Rule
1151 26(b)(1) and (2):

1152 (A) if the parties have not stipulated to the deposition
1153 and:

1154 (i) the deposition would result in more than 5
1155 depositions being taken under this rule or
1156 Rule 31 by the plaintiffs, or by the
1157 defendants, or by the third-party defendants;
1158 * * *

1159 (d) DURATION; SANCTION; MOTION TO TERMINATE OR LIMIT.

1160 (1) *Duration.* Unless otherwise stipulated or ordered by the
1161 court, a deposition is limited to one day of 6 hours. The
1162 court must allow additional time consistent with Rule
1163 26(b)(1) and (2) if needed to fairly examine the deponent
1164 or if the deponent, another person, or any other
1165 circumstance impedes or delays the examination.

1166 **Rule 31 Depositions by Written Questions**

1167 (a) WHEN A DEPOSITION MAY BE TAKEN. * * *

1168 (2) *With Leave.* A party must obtain leave of court, and the
1169 court must grant leave to the extent consistent with Rule
1170 26(b)(1) and (2):

1171 (A) if the parties have not stipulated to the deposition
1172 and:

1173 (i) the deposition would result in more than 5
1174 depositions being taken under this rule or
1175 Rule 30 by the plaintiffs, or by the
1176 defendants, or by the third-party defendants;
1177 * * *

1178 **Rule 33 Interrogatories to Parties**

1179 (a) IN GENERAL.

1180 (1) *Number.* Unless otherwise stipulated or ordered by the court, a
1181 party may serve on another party no more than 15
1182 interrogatories, including all discrete subparts. Leave to
1183 serve additional interrogatories may be granted to the extent
1184 consistent with Rule 26(b)(1) and (2).

1185 **Rule 34 Producing Documents, Electronically Stored Information,**
1186 **and Tangible Things, or Entering onto Land, for Inspection and**
1187 **Other Purposes** * * *

1188 (b) PROCEDURE. * * *

1189 (2) *Responses and Objections.* * * *

1190 (A) *Time to Respond.* The party to whom the request is
1191 directed must respond in writing within 30 days
1192 after being served or — if the request was
1193 delivered under Rule 26(d)(1)(B) — within 30 days
1194 after the parties' first Rule 26(f) conference. A
1195 shorter or longer time may be stipulated to under
1196 Rule 29 or be ordered by the court.

1197 (B) *Responding to Each Item.* For each item or
1198 category, the response must either state that
1199 inspection and related activities will be
1200 permitted as requested or state the grounds
1201 for objecting to the request with specificity,
1202 including the reasons. If the responding party
1203 states that it will produce copies of
1204 documents or of electronically stored
1205 information instead of permitting inspection,
1206 the production must be completed no later than
1207 the time for inspection stated in the request
1208 or a later reasonable time stated in the
1209 response.

1210 (C) *Objections*. An objection must state whether any
1211 responsive materials are being withheld on the
1212 basis of that objection. An objection to part of a
1213 request must specify the part and permit inspection
1214 of the rest. . * * *

1215 **Rule 36 Requests for Admission**

1216 (a) SCOPE AND PROCEDURE.

1217 (1) *Scope.* A party may serve on any other party a written
1218 request to admit, for purposes of the pending action

1219 only, the truth of any matters within the scope of Rule
1220 26(b)(1) relating to:

1221 (A) facts, the application of law to fact, or opinions
1222 about either; and

1223 (B) the genuineness of any described document.

1224 (2) *Number.* Unless otherwise stipulated or ordered by the
1225 court, a party may serve no more than 25 requests to
1226 admit under Rule 36(a)(1)(A) on any other party,
1227 including all discrete subparts. The court may grant
1228 leave to serve additional requests to the extent
1229 consistent with Rule 26(b)(1) and (2). * * *

1230 [Present (2), (3), (4), (5), and(6) would be renumbered]

1231 **Rule 37 Failure to Make Disclosures or to Cooperate in Discovery;**
1232 **Sanctions**

1233 (a) MOTION FOR AN ORDER COMPELLING DISCLOSURE OR DISCOVERY. * * *

1234 (3) *Specific Motions.* * * *

1235 (B) *To Compel a Discovery Response.* A party seeking
1236 discovery may move for an order compelling an
1237 answer, designation, production, or inspection.
1238 This motion may be made if: * * *

1239 (iv) a party fails to produce documents or fails
1240 to respond that inspection will be permitted —
1241 or fails to permit inspection — as requested
1242 under Rule 34.

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1243 **B. Rule 37(e): Action to Recommend Publication of Revised**
1244 **Rule 37(e)**

1245 In January, the Standing Committee preliminarily approved
1246 proposed amendments to Rule 37(e) for publication in August, 2013,
1247 on condition that the Advisory Committee consider the issues raised
1248 during the January meeting and make appropriate revisions in the
1249 draft rule and Note, returning for approval by the Standing
1250 Committee during the June meeting. The Advisory Committee's
1251 Discovery Subcommittee has carefully considered possible revisions
1252 responsive to the concerns raised by the Standing Committee. The
1253 Subcommittee's revisions were submitted to the Advisory Committee
1254 during its Spring meeting and -- with further revisions --
1255 unanimously approved by the Advisory Committee.

1256 The fundamental thrust of the proposal is as presented during
1257 the Standing Committee's January meeting -- to amend the rule to
1258 address the overbroad preservation many litigants and potential
1259 litigants felt they had to undertake to ensure they would not later
1260 face sanctions. Rule amendments for this purpose were unanimously
1261 proposed by the E-Discovery Panel at the May, 2010, Duke
1262 Conference, and the Discovery Subcommittee set to work on
1263 developing amendments soon thereafter. A mini-conference was
1264 convened in September, 2011, to evaluate the various proposed
1265 approaches the Subcommittee had identified. From that point, the
1266 Subcommittee refined the approach that was presented in January.

1267 The proposed amendment focuses on sanctions rather than
1268 attempting directly to regulate the details of preservation. But
1269 it provides guidance for a court by recognizing that a party that
1270 adopts reasonable and proportionate preservation measures should
1271 not be subject to sanctions. In addition, the amendment provides
1272 a uniform national standard for culpability findings to support
1273 imposition of sanctions. Except in exceptional cases in which a
1274 party's actions irreparably deprive another party of any meaningful
1275 opportunity to present or defend against the claims in the
1276 litigation, sanctions may be imposed only on a finding that the
1277 party acted willfully or in bad faith. So the amendment rejects
1278 the view adopted in some cases, such as Residential Funding Corp.
1279 v. DeGeorge Finan. Corp., 306 F.3d 99 (2d Cir. 2002), that would
1280 permit sanctions for negligence.

1281 Below is the revised rule and Note, along with a list of
1282 questions that the Advisory Committee feels should be published
1283 with the draft of the rule amendment, in order to focus public
1284 comment on issues that have been raised, including those raised by
1285 members of the Standing Committee. There follows an

1286 overstrike/double underline version of the rule (and similar
1287 version of the Note) showing changes to the restyled rule since the
1288 Standing Committee's January meeting.

1289 It seems simplest to address separately the various issues
1290 raised during the January meeting.

1291 Displacement of Other Laws

1292 Concern was expressed in January about draft Note language
1293 saying that amended Rule 37(e) "displaces any other law that would
1294 authorize imposing litigation sanctions in the absence of a finding
1295 of willfulness or bad faith, including state law in diversity
1296 cases."

1297 The Note language concerning the origin of the obligation to
1298 preserve has been revised as follows:

1299 This preservation obligation was not created by Rule 37(e),
1300 but has been recognized by many court decisions. ~~arises from~~
1301 ~~the common law, and~~ It may in some instances be triggered or
1302 clarified by a court order in the case.

1303 In addition, further revisions removed "displacement" from the
1304 Note:
1305 The amended rule therefore forecloses reliance on
1306 inherent authority or state law to impose litigation sanctions
1307 in the absence of the findings required under Rule
1308 37(e)(1)(B). ~~displaces any other law that would authorize~~
1309 ~~imposing litigation sanctions in the absence of a finding of~~
1310 ~~wilfulness or bad faith, including state law in diversity~~
1311 ~~cases.~~

1312 Use of the Term "Sanction"

1313 Concern was expressed about use of the word "sanction," which
1314 might have adverse significance when applied to the conduct of a
1315 lawyer, such as requiring that the attorney report the imposition
1316 of this "sanction" to the state bar.

1317 The following additional sentence was added to the Note:

1318 It [the new rule] borrows the term "sanctions" from Rule
1319 37(b)(2), and does not attempt to prescribe whether such
1320 measures would be so regarded for other purposes, such as an
1321 attorney's professional responsibility.

1322 "Irreparable Prejudice" provision

1323 Standing Committee members expressed concern that the proposed
1324 rule language would permit imposition of litigation sanctions
1325 whenever the loss of information prevented a party from presenting
1326 "a claim or defense" even when the claim or defense is of minor
1327 significance in the litigation. In addition, as a matter of style
1328 some members urged that the Advisory Committee reconsider using the
1329 word "meaningful" in the rule.

1330 Rule 37(e)(1)(B)(ii) has been revised to authorize imposition
1331 of sanctions in the absence of a finding of willfulness or bad
1332 faith only when the court finds that the party's actions:

1333 irreparably deprived a party of any meaningful opportunity to
1334 present or defend against the ~~a~~ claims ~~or defense~~ in the
1335 litigation.

1336 A party seeking sanctions under this revised provision must show
1337 that it was disabled from presenting its side in the litigation.
1338 The word "meaningful" has been retained because the committee
1339 concluded that it most accurately reflects the narrow nature of
1340 this exception.

1341 In order to make clearer the narrowness of this authorization
1342 for sanctions, the Note has been substantially revised as follows:

1343 This subdivision ~~Rule 37(e)(2)(B)~~ permits the court to
1344 impose sanctions in narrowly limited circumstances without
1345 making a finding of either bad faith or willfulness. The need
1346 to show bad faith or willfulness is excused only by finding an
1347 impact more severe than the substantial prejudice required to
1348 support sanctions under Rule 37(e)(1)(B)(i). It still must be
1349 shown that a party failed to preserve discoverable information
1350 that should have been preserved. In addition, it must be
1351 shown that the failure irreparably deprived a party of any
1352 meaningful opportunity to present or defend against the claims
1353 in the litigation. ~~As under Rule 37(e)(2)(A), the threshold~~
1354 ~~for sanctions is that the court find that lost information~~
1355 ~~reasonably should have been preserved by the party to be~~
1356 ~~sanctioned.~~

1357 The first step in determining whether a party's failure
1358 to preserve discoverable information that should have been
1359 preserved has irreparably deprived another party of any
1360 meaningful opportunity to present or defend against the claims
1361 in the litigation is to examine carefully the apparent

1362 importance of the lost information. Particularly with
1363 electronically stored information, alternative sources may
1364 often exist. The next step is to explore the possibility that
1365 curative measures under subdivision (e)(1)(A) can reduce the
1366 adverse impact. If a party loses readily accessible
1367 electronically stored information, for example, the court may
1368 direct the party to attempt to retrieve the information by
1369 alternative means. If such measures are not possible or fail
1370 to restore important information, the court must determine
1371 whether the loss has irreparably deprived a party of any
1372 meaningful opportunity to present or defend against the claims
1373 in the litigation.

1374 The "irreparably deprived" test is more demanding than
1375 the "substantial prejudice" that permits sanctions under Rule
1376 37(e)(1)(B)(i) on a showing of bad faith or willfulness.
1377 Examples might include cases in which the alleged injury-
1378 causing instrumentality has been lost. A plaintiff's failure
1379 to preserve an automobile claimed to have defects that caused
1380 injury without affording the defendant manufacturer an
1381 opportunity to inspect the damaged vehicle may be an example.
1382 Such a situation led to affirmance of dismissal, as not an
1383 abuse of discretion, in Silvestri v. General Motors Corp., 271
1384 F.3d 583 (4th Cir. 2001). Or a party may lose the only
1385 evidence of a critically important event. But even such losses
1386 may not irreparably deprive another party of any meaningful
1387 opportunity to litigate. Remaining sources of evidence and
1388 the opportunity to challenge the evidence presented by the
1389 party who lost discoverable information that should have been
1390 preserved, along with possible presentation of evidence and
1391 argument about the significance of the lost information,
1392 should often afford a meaningful opportunity to litigate.

1393 The requirement that a party be irreparably deprived of
1394 any meaningful opportunity to present or defend against the
1395 claims in the litigation is further narrowed by looking to all
1396 the claims in the action. Lost information may appear critical
1397 to litigating a particular claim or defense, but sanctions
1398 should not be imposed — or should be limited to the affected
1399 claims or defenses — if those claims or defenses are not
1400 central to the litigation.

1401 It should also be noted that the first two questions in the
1402 list of questions for public comment invite input on issues related
1403 to those raised by the Standing Committee discussion:

1404 1. Should the rule be limited to sanctions for loss of

1405 electronically stored information? Current Rule 37(e) is so
1406 limited, and much commentary focuses on the preservation
1407 problems resulting from the proliferation of such information.
1408 But the dividing line between "electronically stored
1409 information" and other discoverable matter may be uncertain,
1410 and may become more uncertain in the future, and loss of
1411 tangible things or documents important in litigation is a
1412 recurrent concern in litigation today.

1413 2. Should Rule 37(b)(1)(B)(ii) be retained in the rule?
1414 This provision is focused on the possibility that one side's
1415 failure to preserve evidence may catastrophically deprive the
1416 other side of any meaningful opportunity to litigate, and
1417 permits imposition of sanctions even absent a finding of
1418 willfulness or bad faith. It has been suggested that limiting
1419 the rule to loss of electronically stored information would
1420 make (B)(ii) unnecessary. Does this provision add important
1421 flexibility to the rule?

1422 Acts of God

1423 Standing Committee members raised concerns about whether
1424 proposed (B)(ii) was meant to authorize imposition of sanctions
1425 when information was lost without any fault by the party that lost
1426 it.

1427 The Discovery Subcommittee spent considerable time evaluating
1428 this issue. It even considered proposing that an alternative
1429 amendment be published as an appendix to the main proposal,
1430 eliminating (B)(ii) and limiting the rule to loss of electronically
1431 stored information, on the theory that loss of that sort of
1432 evidence would rarely, if ever, have the cataclysmic consequences
1433 that (B)(ii) addresses.

1434 Eventually, the Advisory Committee decided that changing
1435 proposed Rule 37(e)(1)(B) to focus on "the party's actions" rather
1436 than "the party's failure" afforded a solution to this problem.
1437 The proposed version of the rule therefore will permit sanctions in
1438 the absence of willfulness or bad faith only if "the party's
1439 actions" irreparably deprive the opponent of any meaningful
1440 opportunity to litigate the case. This will preclude sanctions
1441 when information is lost through causes other than the party's
1442 actions, such as a natural disaster. This point is made by the
1443 following new Note language:

1444 <u>A special situation arises when discoverable information</u>
1445 <u>is lost because of events outside a party's control. A party</u>

1446 may take the steps that should have been taken to preserve the
1447 information, but lose it to such unforeseeable circumstances
1448 as flood, earthquake, fire, or malicious computer attacks.
1449 Curative measures may be appropriate in such circumstances —
1450 this is information that should have been preserved — but
1451 sanctions are not. The loss is not caused by "the party's
1452 actions" as required by (e)(1)(B).

1453 Preservation of current Rule 37(e) Language

1454 During the January meeting, concern was expressed about the
1455 absence of any explanation in the Note for the abrogation of Rule
1456 37(e). The Discovery Subcommittee had obtained a thorough research
1457 memo from Andrea Kuperman showing that current Rule 37(e) has been
1458 used only very rarely. It concluded that there was no circumstance
1459 that would be covered by current Rule 37(e) but would not be
1460 protected under the proposed revision.

1461 The Note has been amended to provide this explanation:

1462 Amended Rule 37(e) supersedes the current rule because it
1463 provides protection for any conduct that would be protected
1464 under the current rule. The current rule provides: "Absent
1465 exceptional circumstances, a court may not impose sanctions
1466 under these rules on a party for failing to provide
1467 electronically stored information lost as a result of the
1468 routine, good-faith operation of an electronic information
1469 system." The routine good faith operation of an electronic
1470 information system should be respected under the amended rule.
1471 As under the current rule, the prospect of litigation may call
1472 for altering that routine operation. And the prohibition of
1473 sanctions in the amended rule means that any loss of data that
1474 would be insulated against sanctions under the current rule
1475 would also be protected under the amended rule.

1476 In addition, the Advisory Committee proposes that the
1477 invitation for public comment highlight this issue:

1478 3. Should the provisions of current Rule 37(e) be
1479 retained in the rule? As stated in the Committee Note, the
1480 amended rule appears to provide protection in any situation in
1481 which current Rule 37(e) would apply.

1482 This treatment is intended both to make a suitable record
1483 showing that abrogation of current Rule 37(e) is not intended in
1484 any way to remove protection it provided, and to permit the public
1485 comment period to illuminate whether there is reason for worry

1486 about abrogating the current rule.

1487 Expanded definition of "Substantial Prejudice"

1488 In January, it was suggested that the term "substantial
1489 prejudice in the litigation" in Rule 37(e)(1)(B)(i) might
1490 profitably be given further definition, and the Advisory Committee
1491 was urged to invite public comment on this topic. The Note to Rule
1492 37(e)(1)(B)(i) already provides:

1493 [T]he court must find that the loss of information caused
1494 substantial prejudice in the litigation. Because digital data
1495 often duplicate other data, substitute evidence is often
1496 available. Although it is impossible to demonstrate with
1497 certainty what lost information would prove, the party seeking
1498 sanctions must show that it has been substantially prejudiced
1499 by the loss. Among other things, the court may consider the
1500 measures identified in Rule 37(e)(1)(A) in making this
1501 determination; if these measures can sufficiently reduce the
1502 prejudice, sanctions would be inappropriate even when the
1503 court finds willfulness or bad faith. Rule 37(e)(1)(B)(i)
1504 authorizes imposition of Rule 37(b)(2) sanctions in the
1505 expectation that the court will employ the least severe
1506 sanction needed to repair the prejudice resulting from loss of
1507 the information.

1508 In addition, the Advisory Committee proposes to raise this
1509 issue during the public comment period with the following
1510 invitation to comment:

1511 4. Should there be an additional definition of
1512 "substantial prejudice" under Rule 37(e)(1)(B)(i)? One
1513 possibility is that the rule could be augmented by directing
1514 that the court should consider all factors, including the
1515 availability of reliable alternative sources of the lost or
1516 destroyed information, and the importance of the lost
1517 information to the claims or defenses in the case.

1518 Added flexibility on Curative Measures

1519 Another topic raised by some members of the Standing Committee
1520 in January was that the rule might unduly limit curative measures
1521 the court might deem desirable. Reflecting on this concern, the
1522 Discovery Subcommittee concluded that the rule could be improved by
1523 removing the phrase "the party to undertake" from Rule 37(e)(1)(A):

1524 permit additional discovery, order ~~the party to undertake~~
1525 curative measures, or order the party to pay the reasonable
1526 expenses, including attorney's fees, caused by the failure;
1527 and

1528 The removal of this phrase means that curative measures are not
1529 limited to orders directed to the party that failed to preserve
1530 information. Additional Note material addresses this possibility:

1531 Additional curative measures might include permitting
1532 introduction at trial of evidence about the loss of
1533 information or allowing argument to the jury about the
1534 possible significance of lost information.

1535 Role of Other Preservation Duties

1536 Another concern raised during the January meeting was the role
1537 of preservation duties imposed by other bodies of law, such as
1538 statutes or regulations. Note language has been added addressing
1539 this issue:

1540 Although the rule focuses on the common law obligation to
1541 preserve in the anticipation or conduct of litigation, courts
1542 may sometimes consider whether there was an independent
1543 requirement that the lost information be preserved. The court
1544 should be sensitive, however, to the fact that such
1545 independent preservation requirements may be addressed to a
1546 wide variety of concerns unrelated to the current litigation.

1547 Removal of "reasonably" from Rule 37(e)(1)

1548 Rule 37(e)(2) focuses on the reasonableness and
1549 proportionality of parties' conduct in preserving information in
1550 the anticipation or conduct of litigation. A redundant invocation
1551 of "reasonably" also appeared in Rule 37(e)(1) and has been
1552 removed.

1553 "Clean" version of Rule 37(e) amendment

1554 **Rule 37. Failure to Make Disclosures or to Cooperate in**
1555 **Discovery; Sanctions**

1556 * * * * *

1557 ~~**(e) FAILURE TO PROVIDE ELECTRONICALLY STORED INFORMATION.** Absent~~
1558 ~~exceptional circumstances, a court may not impose sanctions~~
1559 ~~under these rules on a party for failing to provide~~
1560 ~~electronically stored information lost as a result of the~~
1561 ~~routine, good-faith operation of an electronic information~~
1562 ~~system.~~
1563
1564 **(e) FAILURE TO PRESERVE DISCOVERABLE INFORMATION.**

1565 **(1)** *Curative measures; sanctions.* If a party failed to
1566 preserve discoverable information that should have been
1567 preserved in the anticipation or conduct of litigation,
1568 the court may

1569 **(A)** permit additional discovery, order curative
1570 measures, or order the party to pay the reasonable
1571 expenses, including attorney's fees, caused by the
1572 failure; and

1573 **(B)** impose any sanction listed in Rule 37(b)(2)(A) or
1574 give an adverse-inference jury instruction, but
1575 only if the court finds that the party's actions:

1576 **(i)** caused substantial prejudice in the litigation
1577 and were willful or in bad faith; or

1578 **(ii)** irreparably deprived a party of any meaningful
1579 opportunity to present or defend against the
1580 claims in the litigation.

1581 **(2)** *Factors to be considered in assessing a party's conduct.*
1582 The court should consider all relevant factors in
1583 determining whether a party failed to preserve
1584 discoverable information that should have been preserved
1585 in the anticipation or conduct of litigation, and whether
1586 the failure was willful or in bad faith. The factors
1587 include:

1588 **(A)** the extent to which the party was on notice that
1589 litigation was likely and that the information
1590 would be discoverable;

1591 **(B)** the reasonableness of the party's efforts to
1592 preserve the information;

1593 **(C)** whether the party received a request to preserve
1594 information, whether the request was clear and
1595 reasonable, and whether the person who made it and
1596 the party consulted in good faith about the scope
1597 of preservation;

1598 **(D)** the proportionality of the preservation efforts to
1599 any anticipated or ongoing litigation; and

1600 **(E)** whether the party timely sought the court's
1601 guidance on any unresolved disputes about
1602 preserving discoverable information.

1603 COMMITTEE NOTE

1604 In 2006, Rule 37(e) was added to provide protection against
1605 sanctions for loss of electronically stored information under
1606 certain limited circumstances, but preservation problems have
1607 nonetheless increased. The Committee has been repeatedly informed
1608 of growing concern about the increasing burden of preserving
1609 information for litigation, particularly with regard to
1610 electronically stored information. Many litigants and prospective
1611 litigants have emphasized their uncertainty about the obligation to
1612 preserve information, particularly before litigation has actually
1613 begun. The remarkable growth in the amount of information that
1614 might be preserved has heightened these concerns. Significant
1615 divergences among federal courts across the country have meant that
1616 potential parties cannot determine what preservation standards they
1617 will have to satisfy to avoid sanctions. Extremely expensive
1618 overpreservation may seem necessary due to the risk that very
1619 serious sanctions could be imposed even for merely negligent,
1620 inadvertent failure to preserve some information later sought in
1621 discovery.

1622 This amendment to Rule 37(e) addresses these concerns by
1623 adopting a uniform set of guidelines for federal courts, and
1624 applying them to all discoverable information, not just
1625 electronically stored information. The amended rule is not
1626 limited, as is the current rule, to information lost due to "the
1627 routine, good-faith operation of an electronic information system."
1628 The amended rule is designed to ensure that potential litigants who
1629 make reasonable efforts to satisfy their preservation
1630 responsibilities may do so with confidence that they will not be
1631 subjected to serious sanctions should information be lost despite
1632 those efforts. It does not provide "bright line" preservation
1633 directives because bright lines seem unsuited to a set of problems
1634 that is intensely context-specific. Instead, the rule focuses on

1635 a variety of considerations that the court should weigh in
1636 calibrating its response to the loss of information.

1637 Amended Rule 37(e) supersedes the current rule because it
1638 provides protection for any conduct that would be protected under
1639 the current rule. The current rule provides: "Absent exceptional
1640 circumstances, a court may not impose sanctions under these rules
1641 on a party for failing to provide electronically stored information
1642 lost as a result of the routine, good-faith operation of an
1643 electronic information system." The routine good faith operation
1644 of an electronic information system should be respected under the
1645 amended rule. As under the current rule, the prospect of
1646 litigation may call for altering that routine operation. And the
1647 prohibition of sanctions in the amended rule means that any loss of
1648 data that would be insulated against sanctions under the current
1649 rule would also be protected under the amended rule.

1650 Amended Rule 37(e) applies to loss of discoverable information
1651 "that should have been preserved in the anticipation or conduct of
1652 litigation." This preservation obligation was not created by Rule
1653 37(e), but has been recognized by many court decisions. It may in
1654 some instances be triggered or clarified by a court order in the
1655 case. Rule 37(e)(2) identifies many of the factors that should be
1656 considered in determining, in the circumstances of a particular
1657 case, when a duty to preserve arose and what information should
1658 have been preserved.

1659 Except in very rare cases in which a party's actions cause the
1660 loss of information that irreparably deprives another party of any
1661 meaningful opportunity to present or defend against the claims in
1662 the litigation, sanctions for loss of discoverable information may
1663 only be imposed on a finding of willfulness or bad faith, combined
1664 with substantial prejudice.

1665 The amended rule therefore forecloses reliance on inherent
1666 authority or state law to impose litigation sanctions in the
1667 absence of the findings required under Rule 37(e)(1)(B). But the
1668 rule does not affect the validity of an independent tort claim for
1669 relief for spoliation if created by the applicable law. The law of
1670 some states authorizes a tort claim for spoliation. The
1671 cognizability of such a claim in federal court is governed by the
1672 applicable substantive law, not Rule 37(e).

1673 An amendment to Rule 26(f)(3) directs the parties to address
1674 preservation issues in their discovery plan, and an amendment to
1675 Rule 16(b)(3) recognizes that the court's scheduling order may
1676 address preservation. These amendments may prompt early attention
1677 to matters also addressed by Rule 37(e).

1678 **Subdivision (e)(1)(A).** When the court concludes that a party
1679 failed to preserve information that should have been preserved in
1680 the anticipation or conduct of litigation, it may adopt a variety
1681 of measures that are not sanctions. One is to permit additional
1682 discovery that would not have been allowed had the party preserved
1683 information as it should have. For example, discovery might be
1684 ordered under Rule 26(b)(2)(B) from sources of electronically
1685 stored information that are not reasonably accessible. More
1686 generally, the fact that a party has failed to preserve information
1687 may justify discovery that otherwise would be precluded under the
1688 proportionality analysis of Rule 26(b)(1) and (2)(C).

1689 In addition to, or instead of, ordering further discovery, the
1690 court may order curative measures, such as requiring the party that
1691 failed to preserve information to restore or obtain the lost
1692 information, or to develop substitute information that the court
1693 would not have ordered the party to create but for the failure to
1694 preserve. The court may also require the party that failed to
1695 preserve information to pay another party's reasonable expenses,
1696 including attorney fees, caused by the failure to preserve. Such
1697 expenses might include, for example, discovery efforts caused by
1698 the failure to preserve information. Additional curative measures
1699 might include permitting introduction at trial of evidence about
1700 the loss of information or allowing argument to the jury about the
1701 possible significance of lost information.

1702 **Subdivision (e)(1)(B)(i).** This subdivision authorizes
1703 imposition of the sanctions listed in Rule 37(b)(2)(A) for willful
1704 or bad-faith failure to preserve information, whether or not there
1705 was a court order requiring such preservation. Rule 37(e)(1)(B)(i)
1706 is designed to provide a uniform standard in federal court for
1707 sanctions for failure to preserve. It rejects decisions that have
1708 authorized the imposition of sanctions -- as opposed to measures
1709 authorized by Rule 37(e)(1)(A) -- for negligence or gross
1710 negligence. It borrows the term "sanctions" from Rule 37(b)(2),
1711 and does not attempt to prescribe whether such measures would be so
1712 regarded for other purposes, such as an attorney's professional
1713 responsibility.

1714 This subdivision protects a party that has made reasonable
1715 preservation decisions in light of the factors identified in Rule
1716 37(e)(2), which emphasize both reasonableness and proportionality.
1717 Despite reasonable efforts to preserve, some discoverable
1718 information may be lost. Although loss of information may affect
1719 other decisions about discovery, such as those under Rule 26(b)(1),
1720 (b)(2)(B) and (b)(2)(C), sanctions may be imposed only for willful
1721 or bad faith actions, unless the exceptional circumstances
1722 described in Rule 37(e)(2)(B) are shown.

1723 The threshold under Rule 37(e)(1)(B)(i) is that the court find
1724 that lost information should have been preserved; if so, the court
1725 may impose sanctions only if it can make two further findings.
1726 First, the court must find that the loss of information caused
1727 substantial prejudice in the litigation. Because digital data
1728 often duplicate other data, substitute evidence is often available.
1729 Although it is impossible to demonstrate with certainty what lost
1730 information would prove, the party seeking sanctions must show that
1731 it has been substantially prejudiced by the loss. Among other
1732 things, the court may consider the measures identified in Rule
1733 37(e)(1)(A) in making this determination; if these measures can
1734 sufficiently reduce the prejudice, sanctions would be inappropriate
1735 even when the court finds willfulness or bad faith. Rule
1736 37(e)(1)(B)(i) authorizes imposition of Rule 37(b)(2) sanctions in
1737 the expectation that the court will employ the least severe
1738 sanction needed to repair the prejudice resulting from loss of the
1739 information.

1740 Second, it must be established that the party that failed to
1741 preserve did so willfully or in bad faith. This determination
1742 should be made with reference to the factors identified in Rule
1743 37(e)(2).

1744 **Subdivision (e)(1)(B)(ii).** This subdivision permits the court
1745 to impose sanctions in narrowly limited circumstances without
1746 making a finding of either bad faith or willfulness. The need to
1747 show bad faith or willfulness is excused only by finding an impact
1748 more severe than the substantial prejudice required to support
1749 sanctions under Rule 37(e)(1)(B)(i). It still must be shown that
1750 a party failed to preserve discoverable information that should
1751 have been preserved. In addition, it must be shown that the
1752 failure irreparably deprived a party of any meaningful opportunity
1753 to present or defend against the claims in the litigation.

1754 The first step in determining whether a party's failure to
1755 preserve discoverable information that should have been preserved
1756 has irreparably deprived another party of any meaningful
1757 opportunity to present or defend against the claims in the
1758 litigation is to examine carefully the apparent importance of the
1759 lost information. Particularly with electronically stored
1760 information, alternative sources may often exist. The next step is
1761 to explore the possibility that curative measures under subdivision
1762 (e)(1)(A) can reduce the adverse impact. If a party loses readily
1763 accessible electronically stored information, for example, the
1764 court may direct the party to attempt to retrieve the information
1765 by alternative means. If such measures are not possible or fail to
1766 restore important information, the court must determine whether the
1767 loss has irreparably deprived a party of any meaningful opportunity
1768 to present or defend against the claims in the litigation.

1769 The "irreparably deprived" test is more demanding than the
1770 "substantial prejudice" that permits sanctions under Rule
1771 37(e)(1)(B)(i) on a showing of bad faith or willfulness. Examples
1772 might include cases in which the alleged injury-causing
1773 instrumentality has been lost. A plaintiff's failure to preserve
1774 an automobile claimed to have defects that caused injury without
1775 affording the defendant manufacturer an opportunity to inspect the
1776 damaged vehicle may be an example. Such a situation led to
1777 affirmance of dismissal, as not an abuse of discretion, in
1778 Silvestri v. General Motors Corp., 271 F.3d 583 (4th Cir. 2001).
1779 Or a party may lose the only evidence of a critically important
1780 event. But even such losses may not irreparably deprive another
1781 party of any meaningful opportunity to litigate. Remaining sources
1782 of evidence and the opportunity to challenge the evidence presented
1783 by the party who lost discoverable information that should have
1784 been preserved, along with possible presentation of evidence and
1785 argument about the significance of the lost information, should
1786 often afford a meaningful opportunity to litigate.

1787 The requirement that a party be irreparably deprived of any
1788 meaningful opportunity to present or defend against the claims in
1789 the litigation is further narrowed by looking to all the claims in
1790 the action. Lost information may appear critical to litigating a
1791 particular claim or defense, but sanctions should not be imposed —
1792 or should be limited to the affected claims or defenses — if those
1793 claims or defenses are not central to the litigation.

1794 A special situation arises when discoverable information is
1795 lost because of events outside a party’s control. A party may take
1796 the steps that should have been taken to preserve the information,
1797 but lose it to such unforeseeable circumstances as flood,
1798 earthquake, fire, or malicious computer attacks. Curative measures
1799 may be appropriate in such circumstances — this is information that
1800 should have been preserved — but sanctions are not. The loss is not
1801 caused by "the party’s actions" as required by (e)(1)(B).

1802 **Subdivision (e)(2).** These factors guide the court when asked
1803 to adopt measures under Rule 37(e)(1)(A) due to loss of information
1804 or to impose sanctions under Rule 37(e)(1)(B). The listing of
1805 factors is not exclusive; other considerations may bear on these
1806 decisions, such as whether the information not retained reasonably
1807 appeared to be cumulative with materials that were retained. With
1808 regard to all these matters, the court's focus should be on the
1809 reasonableness of the parties' conduct.

1810 The first factor is the extent to which the party was on
1811 notice that litigation was likely and that the information lost
1812 would be discoverable in that litigation. A variety of events may
1813 alert a party to the prospect of litigation. But often these

1814 events provide only limited information about that prospective
1815 litigation, so that the scope of discoverable information may
1816 remain uncertain.

1817 The second factor focuses on what the party did to preserve
1818 information after the prospect of litigation arose. The party's
1819 issuance of a litigation hold is often important on this point.
1820 But it is only one consideration, and no specific feature of the
1821 litigation hold -- for example, a written rather than an oral hold
1822 notice -- is dispositive. Instead, the scope and content of the
1823 party's overall preservation efforts should be scrutinized. One
1824 focus would be on the extent to which a party should appreciate
1825 that certain types of information might be discoverable in the
1826 litigation, and also what it knew, or should have known, about the
1827 likelihood of losing information if it did not take steps to
1828 preserve. The court should be sensitive to the party's
1829 sophistication with regard to litigation in evaluating preservation
1830 efforts; some litigants, particularly individual litigants, may be
1831 less familiar with preservation obligations than other litigants
1832 who have considerable experience in litigation. Although the rule
1833 focuses on the common law obligation to preserve in the
1834 anticipation or conduct of litigation, courts may sometimes
1835 consider whether there was an independent requirement that the lost
1836 information be preserved. The court should be sensitive, however,
1837 to the fact that such independent preservation requirements may be
1838 addressed to a wide variety of concerns unrelated to the current
1839 litigation. The fact that some information was lost does not
1840 itself prove that the efforts to preserve were not reasonable.

1841 The third factor looks to whether the party received a request
1842 to preserve information. Although such a request may bring home
1843 the need to preserve information, this factor is not meant to
1844 compel compliance with all such demands. To the contrary,
1845 reasonableness and good faith may not require any special
1846 preservation efforts despite the request. In addition, the
1847 proportionality concern means that a party need not honor an
1848 unreasonably broad preservation demand, but instead should make its
1849 own determination about what is appropriate preservation in light
1850 of what it knows about the litigation. The request itself, or
1851 communication with the person who made the request, may provide
1852 insights about what information should be preserved. One important
1853 matter may be whether the person making the preservation request is
1854 willing to engage in good faith consultation about the scope of the
1855 desired preservation.

1856 The fourth factor emphasizes a central concern --
1857 proportionality. The focus should be on the information needs of
1858 the litigation at hand. That may be only a single case, or
1859 multiple cases. Rule 26(b)(1) is amended to make proportionality

1860 a central factor in determining the scope of discovery. Rule
1861 37(e)(2)(D) explains that this calculation should be made with
1862 regard to "any anticipated or ongoing litigation." Prospective
1863 litigants who call for preservation efforts by others (the third
1864 factor) should keep those proportionality principles in mind.

1865 Making a proportionality determination often depends in part
1866 on specifics about various types of information involved, and the
1867 costs of various forms of preservation. The court should be
1868 sensitive to party resources; aggressive preservation efforts can
1869 be extremely costly, and parties (including governmental parties)
1870 may have limited resources to devote to those efforts. A party may
1871 act reasonably by choosing the least costly form of information
1872 preservation, if it is substantially as effective as more costly
1873 forms. It is important that counsel become familiar with their
1874 clients' information systems and digital data -- including social
1875 media -- to address these issues. A party urging that preservation
1876 requests are disproportionate may need to provide specifics about
1877 these matters in order to enable meaningful discussion of the
1878 appropriate preservation regime.

1879 Finally, the fifth factor looks to whether the party alleged
1880 to have failed to preserve as required sought guidance from the
1881 court if agreement could not be reached with the other parties.
1882 Until litigation commences, reference to the court may not be
1883 possible. In any event, this is not meant to encourage premature
1884 resort to the court; amendments to Rule 26(f)(3) direct the parties
1885 to address preservation in their discovery plan, and amendments to
1886 Rule 16(c)(3) invite provisions on this subject in the scheduling
1887 order. Ordinarily the parties' arrangements are to be preferred to
1888 those imposed by the court. But if the parties cannot reach
1889 agreement, they should not forgo available opportunities to obtain
1890 prompt resolution of the differences from the court.

1891 Questions for invitation to comment

1892 1. Should the rule be limited to sanctions for loss of
1893 electronically stored information? Current Rule 37(e) is so
1894 limited, and much commentary focuses on the preservation problems
1895 resulting from the proliferation of such information. But the
1896 dividing line between "electronically stored information" and other
1897 discoverable matter may be uncertain, and may become more uncertain
1898 in the future, and loss of tangible things or documents important
1899 in litigation is a recurrent concern in litigation today.

1900 2. Should Rule 37(b)(1)(B)(ii) be retained in the rule? This
1901 provision is focused on the possibility that one side's failure to
1902 preserve evidence may catastrophically deprive the other side of
1903 any meaningful opportunity to litigate, and permits imposition of
1904 sanctions even absent a finding of willfulness or bad faith. It

1905 has been suggested that limiting the rule to loss of electronically
1906 stored information would make (B)(ii) unnecessary. Does this
1907 provision add important flexibility to the rule?

1908 3. Should the provisions of current Rule 37(e) be retained in
1909 the rule? As stated in the Committee Note, the amended rule
1910 appears to provide protection in any situation in which current
1911 Rule 37(e) would apply.

1912 4. Should there be an additional definition of "substantial
1913 prejudice" under Rule 37(e)(1)(B)(i)? One possibility is that the
1914 rule could be augmented by directing that the court should consider
1915 all factors, including the availability of reliable alternative
1916 sources of the lost or destroyed information, and the importance of
1917 the lost information to the claims or defenses in the case.

1918 5. Should there be an additional definition of willfulness or
1919 bad faith under Rule 37(e)(1)(B)(i)? If so, what should be
1920 included in that definition?

1921 "Dirty" version of 37(e) amendment

1922 (Showing changes since January Standing Committee meeting)

1923

1924 **Rule 37. Failure to Make Disclosures or to Cooperate in**
1925 **Discovery; Sanctions**

1926 * * * * *

1927 ~~**(e) FAILURE TO PROVIDE ELECTRONICALLY STORED INFORMATION.** Absent~~
1928 ~~exceptional circumstances, a court may not impose sanctions~~
1929 ~~under these rules on a party for failing to provide~~
1930 ~~electronically stored information lost as a result of the~~
1931 ~~routine, good-faith operation of an electronic information~~
1932 ~~system.~~

1933 **(e) FAILURE TO PRESERVE DISCOVERABLE INFORMATION.**

1934 **(1)** *Curative measures; sanctions.* If a party failed to
1935 preserve discoverable information that ~~reasonably~~ should
1936 have been preserved in the anticipation or conduct of
1937 litigation, the court may

1938 **(A)** permit additional discovery, order ~~the party to~~
1939 ~~undertake~~ curative measures, or order the party to
1940 pay the reasonable expenses, including attorney's
1941 fees, caused by the failure; and

1942 **(B)** impose any sanction listed in Rule 37(b)(2)(A) or
1943 give an adverse-inference jury instruction, but
1944 only if the court finds that the party's actions

1945 ~~failure~~:

1946 **(i)** caused substantial prejudice in the litigation
1947 and were ~~was~~ willful or in bad faith; or

1948 **(ii)** irreparably deprived a party of any meaningful
1949 opportunity to present or defend against the ~~a~~
1950 claims in the litigation ~~or defense~~.

1951 **(2)** *Factors to be considered in assessing a party's conduct*
1952 ~~*Determining reasonableness and willfulness or bad faith*~~.
1953 The court should consider all relevant factors i~~I~~n
1954 determining whether a party failed to preserve
1955 discoverable information that ~~reasonably~~ should have been
1956 preserved in the anticipation or conduct of litigation,
1957 and whether the failure was willful or in bad faith. The
1958 ~~, the court should consider all relevant~~ factors~~,~~
1959 includ~~ing~~e:

1960 **(A)** the extent to which the party was on notice that
1961 litigation was likely and that the information
1962 would be discoverable;

1963 **(B)** the reasonableness of the party's efforts to
1964 preserve the information;

1965 **(C)** whether the party received a request to preserve
1966 information, whether the request was clear and
1967 reasonable, and whether the person who made it and
1968 the party consulted in good faith ~~engaged in good-~~
1969 ~~faith consultation~~ about the scope of preservation;

1970 **(D)** the proportionality of the preservation efforts to
1971 any anticipated or ongoing litigation; and

1972 **(E)** whether the party timely sought the court's
1973 guidance on any unresolved disputes about
1974 preserving discoverable information.

1975 DRAFT COMMITTEE NOTE

1976 In 2006, Rule 37(e) was added to provide protection against
1977 sanctions for loss of electronically stored information under
1978 certain limited circumstances, but preservation problems have
1979 nonetheless increased. The Committee has been repeatedly informed
1980 of growing concern about the increasing burden of preserving
1981 information for litigation, particularly with regard to
1982 electronically stored information. Many litigants and prospective
1983 litigants have emphasized their uncertainty about the obligation to
1984 preserve information, particularly before litigation has actually
1985 begun. The remarkable growth in the amount of information that

1986 might be preserved has heightened these concerns. Significant
1987 divergences among federal courts across the country have meant that
1988 potential parties cannot determine what preservation standards they
1989 will have to satisfy to avoid sanctions. Extremely expensive
1990 overpreservation may seem necessary due to the risk that very
1991 serious sanctions could be imposed even for merely negligent,
1992 inadvertent failure to preserve some information later sought in
1993 discovery.

1994 This amendment to Rule 37(e) addresses these concerns by
1995 adopting a uniform set of guidelines for federal courts, and
1996 applying them to all discoverable information, not just
1997 electronically stored information. The amended rule ~~It~~ is not
1998 limited, as is the current rule, to information lost due to "the
1999 routine, good-faith operation of an electronic information system."
2000 The amended rule is designed to ensure that potential litigants who
2001 make reasonable efforts to satisfy their preservation
2002 responsibilities may do so with confidence that they will not be
2003 subjected to serious sanctions should information be lost despite
2004 those efforts. It does not provide "bright line" preservation
2005 directives because bright lines seem unsuited to a set of problems
2006 that is intensely context-specific. Instead, the rule focuses on
2007 a variety of considerations that the court should weigh in
2008 calibrating its response to the loss of information.

2009 Amended Rule 37(e) supersedes the current rule because it
2010 provides protection for any conduct that would be protected under
2011 the current rule. The current rule provides: "Absent exceptional
2012 circumstances, a court may not impose sanctions under these rules
2013 on a party for failing to provide electronically stored information
2014 lost as a result of the routine, good-faith operation of an
2015 electronic information system." The routine good faith operation
2016 of an electronic information system should be respected under the
2017 amended rule. As under the current rule, the prospect of
2018 litigation may call for altering that routine operation. And the
2019 prohibition of sanctions in the amended rule means that any loss of
2020 data that would be insulated against sanctions under the current
2021 rule would also be protected under the amended rule.

2022 Amended Rule 37(e) applies to loss of discoverable information
2023 "that ~~reasonably~~ should have been preserved in the anticipation or
2024 conduct of litigation." This preservation obligation was not
2025 created by Rule 37(e), but has been recognized by many court
2026 decisions. ~~arises from the common law, and~~ It may in some
2027 instances be triggered or clarified by a court order in the case.
2028 Rule 37(e)(2) identifies many of the factors that should be
2029 considered in determining, in the circumstances of a particular
2030 case, when a duty to preserve arose and what information should
2031 have been ~~be~~ preserved.

2032 Except in very rare cases in which a party's actions cause the
2033 loss of information that irreparably deprives~~d~~ another party of any
2034 meaningful opportunity to present or defend against the ~~a~~ claims in
2035 the litigation, ~~or defense,~~ sanctions for loss of discoverable
2036 information may only be imposed on a finding of willfulness or bad
2037 faith, combined with substantial prejudice.

2038 The amended rule therefore forecloses reliance on inherent
2039 authority or state law to impose litigation sanctions in the
2040 absence of the findings required under Rule 37(e)(1)(B). ~~displaces~~
2041 ~~any other law that would authorize imposing litigation sanctions in~~
2042 ~~the absence of a finding of wilfulness or bad faith, including~~
2043 ~~state law in diversity cases.~~ But the rule does not affect the
2044 validity of an independent tort claim for relief for spoliation if
2045 created by the applicable law. The law of some states authorizes
2046 a tort claim for spoliation. The cognizability of such a claim in
2047 federal court is governed by the applicable substantive law, not
2048 Rule 37(e).

2049 An amendment to Rule 26(f)(3) directs the parties to address
2050 preservation issues in their discovery plan, and an amendment to
2051 Rule 16(b)(3) recognizes that the court's scheduling order may
2052 address preservation. These amendments may prompt early attention
2053 to matters also addressed by Rule 37(e).

2054 ~~Unlike the 2006 version of the rule, amended Rule 37(e) is not~~
2055 ~~limited to "sanctions under these rules." It provides rule-based~~
2056 ~~authority for sanctions for loss of all kinds of discoverable~~
2057 ~~information, and therefore makes unnecessary resort to inherent~~
2058 ~~authority.~~

2059 **Subdivision (e)(1)(A).** When the court concludes that a party
2060 failed to preserve information that should have been preserved in
2061 the anticipation or conduct of litigation, ~~it reasonably should~~
2062 ~~have preserved,~~ it may adopt a variety of measures that are not
2063 sanctions. One is to permit additional discovery that would not
2064 have been allowed had the party preserved information as it should
2065 have. For example, discovery might be ordered under Rule
2066 26(b)(2)(B) from sources of electronically stored information that
2067 are not reasonably accessible. More generally, the fact that a
2068 party has failed to preserve information may justify discovery that
2069 otherwise would be precluded under the proportionality analysis of
2070 Rule 26(b)(1) and (2)(C).

2071 In addition to, or instead of, ordering further discovery, the
2072 court may order ~~the party that failed to preserve information to~~
2073 ~~take~~ curative measures, such as requiring the party that failed to
2074 preserve information to restore or obtain the lost information, or
2075 to develop substitute information that the court would not have

2076 ordered the party to create but for the failure to preserve. The
2077 court may also require the party that failed to preserve
2078 information to pay another party's reasonable expenses, including
2079 attorney fees, caused by the failure to preserve. Such expenses
2080 might include, for example, discovery efforts caused by the failure
2081 to preserve information. Additional curative measures might
2082 include permitting introduction at trial of evidence about the loss
2083 of information or allowing argument to the jury about the possible
2084 significance of lost information.

2085 **Subdivision (e)(1)(B)(i).** This subdivision authorizes
2086 imposition of the sanctions listed in Rule 37(b)(2)(A) for willful
2087 or bad-faith failure to preserve information, whether or not there
2088 was a court order requiring such preservation. Rule 37(e)(1)(B)(i)
2089 is designed to provide a uniform standard in federal court for
2090 sanctions for failure to preserve. It rejects decisions that have
2091 authorized the imposition of sanctions -- as opposed to measures
2092 authorized by Rule 37(e)(1)(A) -- for negligence or gross
2093 negligence. It borrows the term "sanctions" from Rule 37(b)(2),
2094 and does not attempt to prescribe whether such measures would be so
2095 regarded for other purposes, such as an attorney's professional
2096 responsibility.

2097 This subdivision protects a party that has made reasonable
2098 preservation decisions in light of the factors identified in Rule
2099 37(e)(2), which emphasize both reasonableness and proportionality.
2100 Despite reasonable efforts to preserve, some discoverable
2101 information may be lost. Although loss of information may affect
2102 other decisions about discovery, such as those under Rule 26(b)(1),
2103 (b)(2)(B) and ~~26~~(b)(2)(C), sanctions may be imposed only for
2104 willful or bad faith actions, unless the exceptional circumstances
2105 described in Rule 37(e)(2)(B) are shown.

2106 The threshold under Rule 37(e)(1)(B)(i) is that the court find
2107 that lost information ~~reasonably~~ should have been preserved; if so,
2108 the court may impose sanctions only if it can make two further
2109 findings. First, ~~it must be established that the party that failed~~
2110 ~~to preserve did so willfully or in bad faith. This determination~~
2111 ~~should be made with reference to the factors identified in Rule~~
2112 ~~37(e)(3).~~

2113 ~~Second,~~ the court must ~~also~~ find that the loss of information
2114 caused substantial prejudice in the litigation. Because digital
2115 data often duplicate other data, substitute evidence is often
2116 available. Although it is impossible to demonstrate with certainty
2117 what lost information would prove, the party seeking sanctions must
2118 show that it has been substantially prejudiced by the loss. Among
2119 other things, the court may consider the measures identified in
2120 Rule 37(e)(1)(A) in making this determination; if these measures

2121 can sufficiently reduce the prejudice, sanctions would be
2122 inappropriate even when the court finds willfulness or bad faith.
2123 Rule 37(e)(1)(B)(i) authorizes imposition of Rule 37(b)(2)
2124 sanctions in the expectation that the court will employ the least
2125 severe sanction needed to repair the prejudice resulting from loss
2126 of the information.

2127 Second, it must be established that the party that failed to
2128 preserve did so willfully or in bad faith. This determination
2129 should be made with reference to the factors identified in Rule
2130 37(e)(2).

2131 **Subdivision (e)(1)(B)(ii).** This subdivision ~~Rule~~
2132 ~~37(e)(1)(B)(ii)~~ permits the court to impose sanctions in narrowly
2133 limited circumstances without making a finding of either bad faith
2134 or willfulness. The need to show bad faith or willfulness is
2135 excused only by finding an impact more severe than the substantial
2136 prejudice required to support sanctions under Rule 37(e)(1)(B)(i).
2137 It still must be shown that a party failed to preserve discoverable
2138 information that should have been preserved. In addition, it must
2139 be shown that the failure irreparably deprived a party of any
2140 meaningful opportunity to present or defend against the claims in
2141 the litigation. ~~As under Rule 37(e)(2)(A), the threshold for~~
2142 ~~sanctions is that the court find that lost information reasonably~~
2143 ~~should have been preserved by the party to be sanctioned.~~

2144 The first step in determining whether a party's failure to
2145 preserve discoverable information that should have been preserved
2146 has irreparably deprived another party of any meaningful
2147 opportunity to present or defend against the claims in the
2148 litigation is to examine carefully the apparent importance of the
2149 lost information. Particularly with electronically stored
2150 information, alternative sources may often exist. The next step is
2151 to explore the possibility that curative measures under subdivision
2152 (e)(1)(A) can reduce the adverse impact. If a party loses readily
2153 accessible electronically stored information, for example, the
2154 court may direct the party to attempt to retrieve the information
2155 by alternative means. If such measures are not possible or fail to
2156 restore important information, the court must determine whether the
2157 loss has irreparably deprived a party of any meaningful opportunity
2158 to present or defend against the claims in the litigation.

2159 The "irreparably deprived" test is more demanding than the
2160 "substantial prejudice" that permits sanctions under Rule
2161 37(e)(1)(B)(i) on a showing of bad faith or willfulness. Examples
2162 might include cases in which the alleged injury-causing
2163 instrumentality has been lost. A plaintiff's failure to preserve
2164 an automobile claimed to have defects that caused injury without
2165 affording the defendant manufacturer an opportunity to inspect the

2166 damaged vehicle may be an example. Such a situation led to
2167 affirmance of dismissal, as not an abuse of discretion, in
2168 Silvestri v. General Motors Corp., 271 F.3d 583 (4th Cir. 2001).
2169 Or a party may lose the only evidence of a critically important
2170 event. But even such losses may not irreparably deprive another
2171 party of any meaningful opportunity to litigate. Remaining sources
2172 of evidence and the opportunity to challenge the evidence presented
2173 by the party who lost discoverable information that should have
2174 been preserved, along with possible presentation of evidence and
2175 argument about the significance of the lost information, should
2176 often afford a meaningful opportunity to litigate.

2177 The requirement that a party be irreparably deprived of any
2178 meaningful opportunity to present or defend against the claims in
2179 the litigation is further narrowed by looking to all the claims in
2180 the action. Lost information may appear critical to litigating a
2181 particular claim or defense, but sanctions should not be imposed —
2182 or should be limited to the affected claims or defenses — if those
2183 claims or defenses are not central to the litigation.

2184 A special situation arises when discoverable information is
2185 lost because of events outside a party's control. A party may take
2186 the steps that should have been taken to preserve the information,
2187 but lose it to such unforeseeable circumstances as flood,
2188 earthquake, fire, or malicious computer attacks. Curative measures
2189 may be appropriate in such circumstances — this is information that
2190 should have been preserved — but sanctions are not. The loss is not
2191 caused by "the party's actions" as required by (e)(1)(B).

2192 ~~Even if bad faith or willfulness is shown, sanctions may only~~
2193 ~~be imposed under Rule 37(e)(2)(A) when the loss of information~~
2194 ~~caused substantial prejudice in the litigation. Rule 37(e)(2)(B)~~
2195 ~~permits sanctions in the absence of a showing of bad faith or~~
2196 ~~willfulness only if that loss of information deprived a party of~~
2197 ~~any meaningful opportunity to present a claim or defense. Examples~~
2198 ~~might include cases in which the alleged injury-causing~~
2199 ~~instrumentality has been lost before the parties may inspect it, or~~
2200 ~~cases in which the only evidence of a critically important event~~
2201 ~~has been lost. Such situations are extremely rare.~~

2202 ~~Before resorting to sanctions, a court would ordinarily~~
2203 ~~consider lesser measures, including those listed in Rule 37(e)(1),~~
2204 ~~to avoid or minimize the prejudice. If such measures substantially~~
2205 ~~cure the prejudice, Rule 37(e)(2)(B) does not apply. Even if such~~
2206 ~~prejudice persists, the court should employ the least severe~~
2207 ~~sanction.~~

2208 **Subdivision (e)(2).** These factors guide the court when asked
2209 to adopt measures under Rule 37(e)(1)(A) due to loss of information

2210 or to impose sanctions under Rule 37(e)(1)(B). The listing of
2211 factors is not exclusive; other considerations may bear on these
2212 decisions, such as whether the information not retained reasonably
2213 appeared to be cumulative with materials that were retained. With
2214 regard to all these matters, the court's focus should be on the
2215 reasonableness of the parties' conduct.

2216 The first factor is the extent to which the party was on
2217 notice that litigation was likely and that the information lost
2218 would be discoverable in that litigation. A variety of events may
2219 alert a party to the prospect of litigation. But often these
2220 events provide only limited information about that prospective
2221 litigation, so that the scope of discoverable information may
2222 remain uncertain.

2223 The second factor focuses on what the party did to preserve
2224 information after the prospect of litigation arose. The party's
2225 issuance of a litigation hold is often important on this point.
2226 But it is only one consideration, and no specific feature of the
2227 litigation hold -- for example, a written rather than an oral hold
2228 notice -- is dispositive. Instead, the scope and content of the
2229 party's overall preservation efforts should be scrutinized. One
2230 focus would be on the extent to which a party should appreciate
2231 that certain types of information might be discoverable in the
2232 litigation, and also what it knew, or should have known, about the
2233 likelihood of losing information if it did not take steps to
2234 preserve. The court should be sensitive to the party's
2235 sophistication with regard to litigation in evaluating preservation
2236 efforts; some litigants, particularly individual litigants, may be
2237 less familiar with preservation obligations than other litigants
2238 who have considerable experience in litigation. Although the rule
2239 focuses on the common law obligation to preserve in the
2240 anticipation or conduct of litigation, courts may sometimes
2241 consider whether there was an independent requirement that the lost
2242 information be preserved. The court should be sensitive, however,
2243 to the fact that such independent preservation requirements may be
2244 addressed to a wide variety of concerns unrelated to the current
2245 litigation. The fact that some information was lost does not
2246 itself prove that the efforts to preserve were not reasonable.

2247 The third factor looks to whether the party received a request
2248 to preserve information. Although such a request may bring home
2249 the need to preserve information, this factor is not meant to
2250 compel compliance with all such demands. To the contrary,
2251 reasonableness and good faith may not require any special
2252 preservation efforts despite the request. In addition, the
2253 proportionality concern means that a party need not honor an
2254 unreasonably broad preservation demand, but instead should make its
2255 own determination about what is appropriate preservation in light

2256 of what it knows about the litigation. The request itself, or
2257 communication with the person who made the request, may provide
2258 insights about what information should be preserved. One important
2259 matter may be whether the person making the preservation request is
2260 willing to engage in good faith consultation about the scope of the
2261 desired preservation.

2262 The fourth factor emphasizes a central concern --
2263 proportionality. The focus should be on the information needs of
2264 the litigation at hand. That may be only a single case, or
2265 multiple cases. Rule 26(b)(1) is amended to make proportionality
2266 a central factor in determining the scope of discovery. ~~Rule~~
2267 ~~26(b)(2)(C) provides guidance particularly applicable to~~
2268 ~~calibrating a reasonable preservation regime.~~ Rule 37(e)(2)(D)
2269 explains that this calculation should be made with regard to "any
2270 anticipated or ongoing litigation." Prospective litigants who call
2271 for preservation efforts by others (the third factor) should keep
2272 those proportionality principles in mind.

2273 Making a proportionality determination often depends in part
2274 on specifics about various types of information involved, and the
2275 costs of various forms of preservation. The court should be
2276 sensitive to party resources; aggressive preservation efforts can
2277 be extremely costly, and parties (including governmental parties)
2278 may have limited resources to devote to those efforts. A party may
2279 act reasonably by choosing the least costly form of information
2280 preservation, if it is substantially as effective as more costly
2281 forms. It is important that counsel become familiar with their
2282 clients' information systems and digital data -- including social
2283 media -- to address these issues. A party urging that preservation
2284 requests are disproportionate may need to provide specifics about
2285 these matters in order to enable meaningful discussion of the
2286 appropriate preservation regime.

2287 Finally, the fifth factor looks to whether the party alleged
2288 to have failed to preserve as required sought guidance from the
2289 court if agreement could not be reached with the other parties.
2290 Until litigation commences, reference to the court may not be
2291 possible. In any event, this is not meant to encourage premature
2292 resort to the court; amendments to Rule 26(f)(3) direct~~s~~ the
2293 parties to address preservation in their discovery plan, and
2294 amendments to Rule 16(c)(3) invite provisions on this subject in
2295 the scheduling order. ~~discuss and to attempt to resolve issues~~
2296 ~~concerning preservation before presenting them to the court.~~
2297 Ordinarily the parties' arrangements are to be preferred to those
2298 imposed by the court. But if the parties cannot reach agreement,
2299 they should not forgo available opportunities to obtain prompt
2300 resolution of the differences from the court.

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2301 **C. Rule 84: Action to Recommend Abrogation, Amending Rule**
2302 **4(d)(1)(D)**

2303 The Committee recommends approval to publish for comment
2304 proposals that would abrogate Rule 84 and the Official Forms,
2305 amending Rule 4(d)(1)(D) to incorporate present Forms 5 and 6 as
2306 official Rule 4 Forms.

2307 Uncertainties about the impact of the Supreme Court's still
2308 recent decisions on pleading standards on the Rule 84 official
2309 pleading forms led the Committee to broader questions about Rule 84
2310 and the Rule 84 Forms. These questions led to comparisons with the
2311 other bodies of rules. Official forms are attached to the
2312 Appellate, Bankruptcy, and Civil Rules. The Appellate and Civil
2313 Forms have been generated through the full Enabling Act Process.
2314 Bankruptcy Rule 9009 distinguishes two types of forms. "Official
2315 Forms prescribed by the Judicial Conference of the United States
2316 shall be observed and used with alterations as may be appropriate."
2317 These Forms are developed through the Enabling Act committees, but
2318 the final step is approval by the Judicial Conference without going
2319 on to the Supreme Court or Congress. Rule 9009 further recognizes
2320 that the Director of the Administrative Office "may issue
2321 additional forms for use under the Code. The forms shall be
2322 construed to be consistent with these rules and the Code." The
2323 Administrative Office produces forms for use in criminal
2324 prosecutions, but these forms are not "official." (Former Criminal
2325 Rule 58 and the official forms were abrogated in 1983; the
2326 Committee Note explained that they were unnecessary.) A
2327 subcommittee formed of representatives of the advisory committees
2328 examined these differences. It reported that forms play different
2329 roles in the different forms of litigation, and that there is no
2330 apparent reason to adopt a uniform approach across the different
2331 sets of rules and advisory committees.

2332 With this reassurance of independence, the Rule 84
2333 Subcommittee was formed to study Rule 84 and Rule 84 forms. It
2334 gathered information about the general use of the forms by informal
2335 inquiries that confirmed the initial impressions of Subcommittee
2336 members. Lawyers do not much use these forms, and there is little
2337 indication that they often provide meaningful help to pro se
2338 litigants. And as discussed further below, the pleading forms live
2339 in tension with recently developing approaches to general pleading
2340 standards.

2341 From this beginning, the Subcommittee considered several
2342 alternative approaches. The simplest would be to leave Rule 84 and
2343 the Rule 84 forms where they lie. The most burdensome would be to
2344 take on full responsibility for maintaining the forms in a way that
2345 ensures a good fit with contemporary practice and needs, and

2346 perhaps developing additional forms to address many of the subjects
2347 that are not now illustrated by the forms. The work required to
2348 maintain the forms through the full Enabling Act process would
2349 divert the energies of all actors in the process from other work
2350 that, over the years, has seemed more important. Other approaches
2351 also were considered.

2352 The Subcommittee came to believe that the best approach is to
2353 abrogate Rule 84 and the Rule 84 forms. Several considerations
2354 support this conclusion. One important consideration is the amount
2355 of work that would be required to assume full responsibility for
2356 maintaining the forms. Another consideration is that many
2357 alternative sources provide excellent forms. One source is the
2358 Administrative Office.

2359 A further reason to abrogate Rule 84 is the tension between
2360 the pleading forms and emerging pleading standards. The pleading
2361 forms were adopted in 1938 as an important means of educating bench
2362 and bar on the dramatic change in pleading standards effected by
2363 Rule 8(a)(2). They — and all the other forms — were elevated in
2364 1948 from illustrations to a status that "suffice[s] under these
2365 rules." Whatever else may be said, the ranges of topics covered by
2366 the pleading forms omit many of the categories of actions that
2367 comprise the bulk of today's federal docket. And some of the forms
2368 have come to seem inadequate, particularly the Form 18 complaint
2369 for patent infringement. Attempting to modernize the existing
2370 forms, and perhaps to create new forms to address such claims as
2371 those arising under the antitrust laws (*Twombly*) or implicating
2372 official immunity (*Iqbal*), would be an imposing and precarious
2373 undertaking. Such an undertaking might be worthwhile if in recent
2374 years the pleading reforms had provided meaningful guidance to the
2375 bar in formulating complaints, but they have not. The Committee's
2376 work has suggested that few if any lawyers consult the forms when
2377 drafting complaints.

2378 Abrogation need not remove the Enabling Act committees
2379 entirely from forms work. The Administrative Office has a working
2380 group on forms that includes six judges and six court clerks. They
2381 have produced a number of civil forms that are quite good. The
2382 forms are available on the Administrative Office web site, some of
2383 them in a format that can be filled in, and others in a format that
2384 can be downloaded for completion by standard word-processing
2385 programs. The working group is willing to work in conjunction with
2386 the Advisory Committee. If Rule 84 is abrogated, a conservative
2387 initial approach would be to appoint a liaison from the Advisory
2388 Committee to work with the working group. New and revised forms
2389 could be reviewed, perhaps by a Forms Subcommittee. Experience with
2390 this process would shape the longer-term relationships. The forms
2391 for criminal prosecutions have been developed successfully with

2392 only occasional review by the Criminal Rules Committee. Similar
2393 success may be hoped for with the Civil Rules. The Administrative
2394 Office forms, moreover, would have to win their way by intrinsic
2395 merit, unaided by official status. A court dissatisfied with a
2396 particular form would not be obliged to accept it.

2397 Two forms require special consideration. Rule 4(d)(1)(D)
2398 requires that a request to waive service of process be made by Form
2399 5. The Form 6 waiver is not required, but is closely tied to Form
2400 5. It would be possible simply to remove this requirement, perhaps
2401 substituting a recital in the rule of the elements that must be
2402 included in the request and in the waiver. The corresponding
2403 Administrative Office forms are identical to Form 5 and virtually
2404 identical to Form 6. But without something in Rule 4(d) to mandate
2405 their use, the Administrative Office forms might not be uniformly
2406 employed. An alternative would be to adopt a request form and a
2407 waiver form, as part of Rule 4. These forms were carefully
2408 developed as part of creating Rule 4(d), and might be carried
2409 forward into Rule 4 without change.

2410 These questions were discussed with the Standing Committee
2411 last January. With the support provided by that discussion, the
2412 Advisory Committee has concluded that the best course is to
2413 abrogate Rule 84. Forms 5 and 6 should be preserved by amending
2414 Rule 4(d)(1)(D) to incorporate them, recast as Rule 4 Forms and
2415 attached directly to Rule 4. These changes are accomplished by the
2416 rule texts, Committee Notes, and Forms set out below. The Committee
2417 recommends that they be approved for publication this summer.

2418 **Rule 84. Forms**

2419 **Rule 84. [Abrogated (Apr. __, 2015, eff. Dec. 1, 2015).]** ~~The forms~~
2420 ~~in the Appendix suffice under these rules and illustrate the~~
2421 ~~simplicity and brevity that these rules contemplate.~~

2422 Committee Note

2423 Rule 84 was adopted when the Civil Rules were established in
2424 1938 "to indicate, subject to the provisions of these rules, the
2425 simplicity and brevity of statement which the rules contemplate."
2426 The purpose of providing illustrations for the rules, although
2427 useful when the rules were adopted, has been fulfilled.
2428 Accordingly, recognizing that there are many excellent alternative
2429 sources for forms, including the Administrative Office of the
2430 United States Courts, Rule 84 and the Appendix of Forms are no
2431 longer necessary and have been abrogated.

2432

2433 **APPENDIX OF FORMS**

2434 **Abrogated [(Apr. __, 2015, eff. Dec. 1, 2015).]**

2435 **Rule 4. Summons**

2436 * * *

2437 (d) WAIVING SERVICE.

2438 (1) *Requesting a Waiver.* * * * The plaintiff may notify such
2439 a defendant that an action has been commenced and request
2440 that the defendant waive service of a summons. The notice
2441 and request must: * * *

2442 (C) be accompanied by a copy of the complaint, 2
2443 copies of ~~a~~ the waiver form appended to this
2444 Rule 4, and a prepaid means for returning the
2445 form;

2446 (D) inform the defendant, using ~~text prescribed in~~
2447 ~~Form 5~~ the form appended to this Rule 4, of
2448 the consequences of waiving and not waiving
2449 service; * * *

2450 Committee Note

2451 Abrogation of Rule 84 and the other official forms requires
2452 that former Forms 5 and 6 be directly incorporated into Rule 4.

2453 ~~Form 5.~~ Rule 4 Notice of a Lawsuit and Request to Waive Service of
2454 Summons.

2455 (Caption ~~— See Form 1~~.)

2456 To (name the defendant or – if the defendant is a corporation,
2457 partnership, or association – name an officer or agent authorized
2458 to receive service):

2459 **Why are you getting this?**

2460 A lawsuit has been filed against you, or the entity you
2461 represent, in this court under the number shown above. A copy of
2462 the complaint is attached.

2463 This is not a summons, or an official notice from the court.
2464 It is a request that, to avoid expenses, you waive formal service
2465 of a summons by signing and returning the enclosed waiver. To
2466 avoid these expenses, you must return the signed waiver within
2467 (give at least 30 days or at least 60 days if the defendant is
2468 outside any judicial district of the United States) from the date
2469 shown below, which is the date this notice was sent. Two copies of
2470 the waiver form are enclosed, along with a stamped, self-addressed
2471 envelope or other prepaid means for returning one copy. You may

2472 keep the other copy.

2473 **What happens next?**

2474 If you return the signed waiver, I will file it with the
2475 court. The action will then proceed as if you had been served on
2476 the date the waiver is filed, but no summons will be served on you
2477 and you will have 60 days from the date this notice is sent (see
2478 the date below) to answer the complaint (or 90 days if this notice
2479 is sent to you outside any judicial district of the United States).

2480 If you do not return the signed waiver within the time
2481 indicated, I will arrange to have the summons and complaint served
2482 on you. And I will ask the court to require you, or the entity you
2483 represent, to pay the expenses of making service.

2484 Please read the enclosed statement about the duty to avoid
2485 unnecessary expenses.

2486 I certify that this request is being sent to you on the date
2487 below.

2488

2489 Date: (Date)(Signature of the attorney or unrepresented party)

2490

2491 _____

2492 (Printed name)

2493 (Address)

2494 (E-mail address)

2495 (Telephone number)

2496

2497

2498 ~~Form 6.~~ Rule 4 Waiver of the Service of Summons.

2499

2500 To (name the plaintiff's attorney or the unrepresented plaintiff):

2501 I have received your request to waive service of a summons in
2502 this action along with a copy of the complaint, two copies of this
2503 waiver form, and a prepaid means of returning one signed copy of
2504 the form to you.

2505 I, or the entity I represent, agree to save the expense of
2506 serving a summons and complaint in this case.

2507

2508 I understand that I, or the entity I represent, will keep all
2509 defenses or objections to the lawsuit, the court's jurisdiction,
2510 and the venue of the action, but that I waive any objections to the
2511 absence of a summons or of service.

2512 I also understand that I, or the entity I represent, must file
2513 and serve an answer or a motion under Rule 12 within 60 days from
2514 _____, the date when this request was sent (or 90
2515 days if it was sent outside the United States). If I fail to do
2516 so, a default judgment will be entered against me or the entity I
2517 represent.

2518

2519 Date: (Date)

2520

2521 (Signature of the attorney or unrepresented party)

2522

2523 _____

2524 (Printed name)

2525 (Address)

2526 (E-mail address)(Telephone number)

2527

2528 **Duty to Avoid Unnecessary Expenses of Serving a Summons**

2529 Rule 4 of the Federal Rules of Civil Procedure requires
2530 certain defendants to cooperate in saving unnecessary expenses of
2531 serving a summons and complaint. A defendant who is located in the
2532 United States and who fails to return a signed waiver of service
2533 requested by a plaintiff located in the United States will be
2534 required to pay the expenses of service, unless the defendant shows
2535 good cause for the failure.

2536 "Good cause" does *not* include a belief that the lawsuit is

2537 groundless, or that it has been brought in an improper venue, or
2538 that the court has no jurisdiction over this matter or over the
2539 defendant or the defendant's property.

2540 If the waiver is signed and returned, you can still make these
2541 and all other defenses and objections, but you cannot object to the
2542 absence of a summons or of service.

2543 If you waive service, then you must, within the time specified
2544 on the waiver form, serve an answer or a motion under Rule 12 on
2545 the plaintiff and file a copy with the court. By signing and

2546 returning the waiver form, you are allowed more time to respond
2547 than if a summons had been served.

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TAB 2E

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2548 **PART II: INFORMATION ITEMS**

2549 **A. Rule 17(c)(2): Information — Duty of Inquiry**

2550 Rule 17(c)(2) directs that "The court must appoint a guardian
2551 ad litem — or issue another appropriate order — to protect a minor
2552 or incompetent person who is unrepresented in an action."

2553 In *Powell v. Symons*, 680 F.3d 301 (3d Cir.2012), the court
2554 struggled to identify the circumstances that might oblige a judge
2555 to initiate an inquiry into the competence of an unrepresented
2556 litigant. It concluded that the duty of inquiry arises only if
2557 there is "verifiable evidence of incompetence," and that the duty
2558 is not triggered simply by bizarre behavior. At the same time, it
2559 lamented "the paucity of comments on Rule 17" and observed that "We
2560 will respectfully send a copy of this opinion to the chairperson of
2561 the Advisory Committee to call its attention to" the question.

2562 Preliminary discussion emphasized the difficulty of this
2563 question. Rule 17(c)(2) could be read to direct that a court must
2564 inquire into the competence of an unrepresented party whenever
2565 there is any sign that competence may be in doubt. It could be read
2566 to say that a court need act only when informed of an existing
2567 adjudication of incompetence. It can be read to create a duty of
2568 inquiry at some indeterminate point in between these alternatives.
2569 An expansive duty of inquiry could impose onerous burdens, not only
2570 in making the inquiry but also in finding representatives.

2571 A set of empirical questions underlies these abstract
2572 questions. The most fundamental is also the most obvious: how often
2573 do pro se litigants who are "incompetent" within the meaning of
2574 Rule 17(c)(2) go through litigation without appointment of a
2575 guardian or entry of another "appropriate order"? How many of them
2576 are competent to function as clients if an attorney is appointed as
2577 representative? How many need a guardian who can function as the
2578 client — with or without appointment of counsel? What resources are
2579 available to support the inquiry into competence, and to support
2580 appointment of a guardian or other protective action? It seems
2581 likely that it will be difficult to obtain reliable answers to
2582 these questions.

2583 The Committee has concluded that the next step should be a
2584 careful survey of current decisions that address whatever duty of
2585 inquiry into competence is recognized. A Committee member
2586 volunteered to supervise the research over the course of the
2587 summer.

2588 **B. Rule 62: Information**

2589 The Appellate Rules Committee may undertake a study of the
2590 Appellate and Civil Rules provisions governing stays pending
2591 appeal, including the provisions for security. The Civil Rules
2592 Committee stands ready to work with the Appellate Rules Committee
2593 on such projects as the Appellate Rules Committee decides to take
2594 up.

2595 **C. Court Administration and Case Management Projects:**
2596 **Information**

2597 The Court Administration and Case Management Committee has
2598 raised a number of topics that may lead to Civil Rules amendments.
2599 Action on all of these topics has been deferred pending further
2600 development by CACM.

2601 Judge Sentelle, Chair of the Judicial Conference Executive
2602 Committee, referred one of these questions to the Civil Rules
2603 Committee and to CACM simultaneously. The question comes from a
2604 district judge who volunteers to manage cases in other districts by
2605 videoconference from his own district. There is substantial
2606 experience with pretrial management in this mode; there may not be
2607 any need for rules amendments to guide or direct what is already
2608 going on. But there may be more difficult questions if a judge in
2609 one district undertakes to use videoconferencing to conduct a trial
2610 physically held in a courthouse in another district. The question
2611 put to the committees assumes that only a bench trial would be
2612 conducted in this manner. Even then, Rule 43(a) illustrates the
2613 questions that must be addressed. Rule 43(a) now allows testimony
2614 in open court by "contemporaneous transmission from a different
2615 location" only "for good cause in compelling circumstances and with
2616 appropriate safeguards." It is a fair question whether Rule 43(a)
2617 is automatically satisfied by the advantages of allowing
2618 interdistrict assignments without travelling to the actual trial.
2619 It also is a fair question whether Rule 43(a) should be amended to
2620 ensure that videoconferencing across district lines is a generally
2621 proper means of conducting even a bench trial.

2622 Two issues relating to e-filing have been raised in the
2623 process of developing the next generation CM/ECF system. One is
2624 whether the Notice of Electronic Filing can automatically be
2625 treated as a certificate of service. The other is whether an
2626 electronic signature in the CM/ECF system can be prima facie
2627 evidence of a valid signature. The Committee recommends appointment
2628 of a joint committee of all the advisory committees to study these
2629 issues and a number of other issues relating to electronic filing
2630 and service.

2631

2632 Another issue also grows out of the next generation CM/ECF
2633 system. The system will include a national database, available only
2634 to "designated court users," that identifies "restricted filers."
2635 Two examples of restricted filers are prisoners subject to
2636 restrictions under the Prisoner Litigation Reform Act and disbarred
2637 attorneys. The concern is that restricted filers are identified by
2638 name and address, thwarting identification when — as often happens
2639 with pro se litigants — a litigant changes addresses. CACM
2640 recommends that this problem be addressed by amending Rule
2641 4(a)(1)(C) to require that a summons "state the name and address of
2642 the plaintiff's attorney or — if unrepresented — the plaintiff's
2643 name, address, and last four digits of the social-security number
2644 of the plaintiff." In this day of rampant identity theft,
2645 discussion in the Committee raised substantial doubts about
2646 requiring pro se plaintiffs to provide even the last four digits of
2647 their social security numbers. This topic will be pursued further
2648 with CACM.

2649 **D. Pleading; Class Actions: Information**

2650 The Rule 23 Subcommittee deferred further work pending
2651 decisions in a substantial number of class-action cases on the
2652 Supreme Court docket this Term. It plans to resume work when they
2653 have been decided, aiming first to sort through an intimidating
2654 list of possible questions to produce an agenda identifying the
2655 most important. It seems likely that it will be important to hold
2656 a miniconference with experienced lawyers, judges, and academics to
2657 inform this process. There is no firm sense yet whether the result
2658 will be an agenda of issues that seem ripe for proposing Rule 23
2659 amendments.

2660 Pleading standards have held a constant place on the agenda
2661 for the last twenty years without yet generating any closely
2662 focused proposals for reform. The Committee does not sense any
2663 circumstances that point toward immediate consideration of the
2664 practices that continue to evolve in the aftermath of the *Twombly*
2665 and *Iqbal* decisions. The Federal Judicial Center is conducting a
2666 study of dispositions by all forms of dispositive motions. The
2667 completion of that study will prompt a renewed inquiry whether
2668 rules proposals should be developed.

2669 **E. Dismissal by Parties' Stipulation: Information**

2670 Rule 41(a)(1)(A)(ii) allows a plaintiff to "dismiss an action
2671 without a court order by filing * * * a stipulation of dismissal
2672 signed by all parties who have appeared." Rule 41(a)(1)(B) provides
2673 that unless the stipulation states otherwise, the dismissal is
2674 without prejudice.

2675

2676 A question about this provision was raised by a judge who,
2677 after twice refusing a request by all parties to defer a firm trial
2678 date so that the parties might seek to settle some 500 related
2679 cases, most of them pending before other judges, was confronted by
2680 a joint stipulation dismissing the action without prejudice. The
2681 concern is that allowing the parties to do this will frustrate
2682 effective case management and dissipate the value of the investment
2683 in managing the case up to the dismissal.

2684 The Committee concluded that there is no need to amend Rule 41
2685 on this account. There can be compelling circumstances that prevent
2686 parties bent on settlement from settling within a tight time frame,
2687 yet hold real promise of eventual settlement. That is what happened
2688 with these cases — the parties were in fact able to reach a
2689 comprehensive settlement.

2690 Beyond the specifics of this particular case, the Committee
2691 believes that private litigation does not generate such strong
2692 public interests as to require the parties to continue to litigate
2693 after an action is once filed. Settlement moots an action,
2694 depriving the court of jurisdiction to proceed further. The wish of
2695 all parties to conclude an action without yet being able to settle
2696 deserves equal respect.

2697 Concerns about frustrating effective case management and
2698 squandering the investment of scarce judicial resources up to the
2699 point of dismissal also seem overstated. Committee members do not
2700 believe that there is any general problem of joint dismissals
2701 followed by revival in a new action.

2702 **F. Hague Convention: Prompt Return of Children: Information**

2703 *Chafin v. Chafin*, 133 S.Ct. 1017 (2013), ruled that return of
2704 mother and child to the habitual residence determined by the
2705 district court under the Hague Convention on the Civil Aspects of
2706 International Child Abduction did not moot the father's appeal. The
2707 Court emphasized the need for prompt decision in the trial court
2708 and on appeal, pointing to the express terms of the Convention,
2709 common judicial practice, and a Federal Judicial Center guide for
2710 handling Convention cases. Justice Ginsburg repeated these themes
2711 in a concurring opinion, including a footnote suggesting that the
2712 Appellate and Civil Rules Advisory Committees might consider
2713 "whether uniform rules for expediting [Convention] proceedings are
2714 in order." 133 S.Ct. at 1029 n. 3.

2715 The Committee has concluded that there is no real need to
2716 adopt a civil rule specific to Hague Convention cases. Courts
2717 already recognize the need for resolving matters affecting child
2718 custody as promptly as possible. The Court's opinions in the *Chafin*
2719 case will reinforce this understanding.

2720 Not only is there no need for a rule. The Judicial Conference
2721 has an entrenched policy opposing statutes or court rules that give
2722 docket priority to specific categories of litigation. One priority
2723 can interfere with wise management of a particular docket. A small
2724 number of competing priorities can cause serious interference. And
2725 a welter of conflicting priorities can lead to chaos.

2726 In a real sense, the very importance of achieving expeditious
2727 disposition of international child abduction disputes undermines
2728 the need for a specific court rule. The importance is manifest.
2729 Courts recognize the need and rise to meet it.

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DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

APRIL 11-12, 2013

The Civil Rules Advisory Committee met at the University of Oklahoma College of Law on April 11 and 12, 2013. Participants included Judge David G. Campbell, Committee Chair, and Committee members John M. Barkett, Esq.; Elizabeth Cabraser, Esq.; Hon. Stuart F. Delery; Judge Paul S. Diamond (by telephone); Parker C. Folse, Esq. (by telephone); Judge Paul W. Grimm; Peter D. Keisler, Esq.; Dean Robert H. Klonoff; Judge John G. Koeltl; Judge Scott M. Matheson, Jr.; Chief Justice David E. Nahmias (by telephone); Judge Solomon Oliver, Jr.; and Judge Gene E.K. Pratter. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Judge Jeffrey S.Sutton, Chair, Judge Diane P. Wood, and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge Arthur I. Harris participated as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., the court-clerk representative, also participated by telephone. The Department of Justice was further represented by Theodore Hirt. Emery Lee participated for the Federal Judicial Center. Jonathan C. Rose, Andrea Kuperman, Benjamin J. Robinson, and (by telephone) Julie Wilson represented the Administrative Office. Emery Lee represented the Federal Judicial Center. Steven S. Gensler, a former committee member, managed the meeting. Professor Thomas D. Rowe, Jr., another former committee member, also attended. Observers included Joseph D. Garrison, Esq. (National Employment Lawyers Association); John K. Rabiej (Duke Center for Judicial Studies); Jerome Scanlan (EEOC); Alex Dahl, Esq. and Robert Levy, Esq. (Lawyers for Civil Justice); John Vail, Esq. (American Association for Justice); Thomas Y. Allman, Esq. (by telephone); Kenneth Lazarus, Esq. (American Medical Association); Ariana Tadler, Esq., Henry Kelston, Esq., William P. Butterfield, Esq., Maura Grossman, Esq., and John J. Rosenthal (Sedona Conference); Professor Gordon V. Cormack; and Ian J. Wilson.

Judge Campbell opened the meeting by welcoming the Committee and observers to the beautiful Oklahoma campus and the impressive Law School building. Dean Joseph Harroz, Jr., in turned welcomed the Committee to the Law School, noting the School's delight that Jonathan Rose and Professor Gensler had suggested that the Committee meet in Norman.

Judge Campbell noted that three new members have been appointed to replace Chief Justice Shepard, Judge Colloton, and Anton Valukas, who have rotated off the Committee — Judge Colloton is chairing the Appellate Rules Committee, however, making it likely that he will be involved in projects that join the two committees. Chief Justice Nahmias of the Georgia Supreme Court is a graduate of Duke and of the Harvard Law School. He clerked for Judge Silberman on the D.C. Circuit and then for Justice Scalia. He

46 practiced with Hogan & Hartson, in the U.S. Attorney's office in
47 Atlanta, as Deputy Assistant Attorney General in the Criminal
48 Division, and as United States Attorney for the Northern District
49 of Georgia. He was appointed to the Georgia Supreme Court in 2009.
50 Judge Matheson is a graduate of Stanford, Oxford as a Rhodes
51 Scholar, and Yale Law School. He practiced with Williams &
52 Connally, and as district attorney. He was Dean of the University
53 of Utah Law School for eight years, and held a chair at the Law
54 School when he was appointed to the Tenth Circuit. Parker Folse is
55 a graduate of Harvard and the University of Texas Law School. He
56 clerked for Judge Sneed in the Ninth Circuit and for Chief Justice
57 Rehnquist. He founded the Seattle office of Susman Godfrey in 1995.
58 He has been active in the ABA Antitrust Section. He represents both
59 plaintiffs and defendants in complex litigation, often involving
60 antitrust and patents. He has been named lawyer of the year for
61 "bet-the-company" litigation. A personal commitment prevented his
62 attendance at this meeting.

63 Judge Campbell also noted that this will be the last meeting
64 for Judge Wood as liaison from the Standing Committee. Her term on
65 the Standing Committee concludes this fall, and she will promptly
66 become Chief Judge of the Seventh Circuit. She has been more a
67 member of the Civil Rules Committee than a liaison. She has always
68 been fully prepared on all agenda items, and participates as an
69 active member.

70 Judge Campbell also noted that "we still miss Mark Kravitz."
71 Professor-Reporter Coquillette reported that rules committee
72 members had given generously to establish funds in Judge Kravitz's
73 memory at the Connecticut Bar Foundation and the Friends School for
74 Disadvantaged Children in New Haven.

75 Judge Campbell reported on the Standing Committee's January
76 meeting. The Committee approved Rule 37(e) for publication,
77 understanding that some revisions would be made and presented for
78 review at their June meeting. They like the rule. They also
79 responded favorably to a presentation of the Duke Rules package.
80 They approved for publication minor revisions of Rules 6(d) and
81 55(c), and a technical correction of Rule 77. The Judicial
82 Conference approved the Rule 77 correction as a consent calendar
83 item.

84 The Supreme Court has approved the proposed amendments of Rule
85 45. There is no reason to expect that Congress will be moved to
86 make revisions.

87 *November 2012 Minutes*

88 The draft minutes of the November 2012 Committee meeting were
89 approved without dissent, subject to correction of typographical

90 and similar errors.

91 *Legislative Activity*

92 There is little legislative activity to report in these early
93 days of the new Congress. The House Subcommittee will continue to
94 look at the work of this Committee.

95 *"Duke Rules" Package*

96 Judge Koeltl, chair of the Duke Conference Subcommittee,
97 recalled that three main themes were repeatedly stressed at the
98 Duke Conference. Proportionality in discovery, cooperation among
99 lawyers, and early and active judicial case management are highly
100 valued and, at times, missing in action. The Subcommittee has
101 worked on various means of advancing these goals. The package of
102 rules changes has evolved through many drafts and meetings. The
103 Subcommittee is unanimous in proposing that each part of the rules
104 be recommended for publication.

105 The rules proposals are grouped in three sets. One set looks
106 to improve early and effective case management. The second seeks to
107 enhance the means of keeping discovery proportional to the action.
108 The third hopes to advance cooperation.

109 **CASE-MANAGEMENT PROPOSALS**

110 The case-management proposals reflect a perception that the
111 early stages of litigation often take far too long. "Time is
112 money." The longer it takes to litigate an action, the more it
113 costs. And delay is itself undesirable.

114 Rule 4(m): Rule 4(m) would be revised to shorten the time to serve
115 the summons and complaint from 120 days to 60 days. The Department
116 of Justice has reacted to this proposal by suggesting that, by
117 shortening the time to serve, it will exacerbate a problem it now
118 encounters in condemnation actions. Rule 71.1(d)(3)(A) directs that
119 service of notice of the proceeding be made on defendant-owners "in
120 accordance with Rule 4." This wholesale incorporation of Rule 4 may
121 seem to include Rule 4(m). Invoking Rule 4(m) to dismiss a
122 condemnation proceeding for failure to effect service within the
123 required time, however, is inconsistent with Rule 71.1(i)(C), which
124 directs that if the plaintiff "has already taken title, a lesser
125 interest, or possession of" the property, the court must award
126 compensation. This provision protects the interests of owners, who
127 would be disserved if the proceeding is dismissed without awarding
128 compensation but leaving title in the plaintiff. The Department
129 regularly finds it necessary to explain to courts that dismissal
130 under Rule 4(m) is inappropriate in these circumstances, and fears
131 that this problem will arise more frequently because it is

132 frequently difficult to identify and serve all owners even within
133 120 days.

134 The need to better integrate Rule 4(m) with Rule 71.1 can be
135 met by amending Rule 4(m)'s last sentence: "This subdivision (m)
136 does not apply to service in a foreign country under Rule 4(f) or
137 4(j)(1) or to service of a notice under Rule 71.1(d)(3)(A)." The
138 Department of Justice believes that this amendment will resolve the
139 problem. The Department does not believe that there is any further
140 need to consider the integration of Rule 4 with Rule 71.1(d)(3)(A).

141 Rule 16(b)(2): Time for Scheduling Order: Rule 16(b)(2) currently
142 directs that a scheduling order must issue within the earlier of
143 120 days after any defendant has been served or 90 days after any
144 defendant has appeared. Several Subcommittee drafts cut these times
145 in half, to 60 days and 45 days. The recommended revision, however,
146 cuts the times to 90 days after any defendant is served or 60 days
147 after any defendant appears. The reduced reductions reflect
148 concerns that in many cases it may not be possible to be prepared
149 adequately for a productive scheduling conference in a shorter
150 period. These concerns are further reflected in the addition of a
151 new provision that allows the judge to extend the time on finding
152 good cause for delay. The Subcommittee believes that even this
153 modest reduction in the presumed time will do some good, while
154 affording adequate time for most cases.

155 But the Department of Justice expressed some concerns about
156 accelerating time lines at the onset of litigation. There is room
157 to be skeptical that shortening the time to serve and the time to
158 enter a scheduling order will do much to advance things. It is
159 important that lawyers have time at the beginning of an action to
160 think about the case, and to discuss it with each other. More time
161 to prepare will make for a better scheduling conference, and for
162 more effective discovery in the end. The Note should reflect that
163 extensions should be liberally granted for the sake of better
164 overall efficiency.

165 A judge responded to the Department's concern by offering
166 enthusiastic support for the proposed limits. "Lawyers will do
167 things only when they have to; government lawyers may be the worst,
168 perhaps because they are overworked." It is proving necessary to
169 micromanage the case-management rules "because judges don't
170 manage." Reducing the up-front times is a good idea.

171 In response to a question, the Department of Justice said that
172 its experience with the "rocket docket" in the Eastern District of
173 Virginia is that at times it gets relief from the stringent time
174 limits, and at other times it does not get relief. Agencies that
175 get sued there allocate their resources to give priority to Eastern
176 District cases; this is known to be a special situation. The result

177 is to do these cases instead of some others. A judge observed that
178 "the Eastern District is free riding on the lack of comparable time
179 constraints elsewhere."
180
181 Rule 16(b)(1)(B): Contemporaneous Conference: Rule 16(b)(1)(B) now
182 provides for a scheduling conference "by telephone, mail, or other
183 means." The reference to mail is clear, but loses the advantages of
184 direct contemporaneous communication. The reference to other means
185 is unclear — resort to a ouija board is not contemplated, but other
186 possibilities are vague. The proposal strikes these words, but the
187 Committee Note makes it clear that "conference" includes any mode
188 of direct simultaneous exchange. A conference telephone call
189 suffices. Skype or other technologies also suffice. The
190 Subcommittee considered the possibility of requiring an actual
191 conference by these means in all cases subject to the scheduling
192 order requirement, but in the end accepted the views of several
193 participants in the Dallas miniconference that there are cases in
194 which the parties' Rule 26(f) report provides a suitable foundation
195 for an order without needing a conference with the court.

196 Rule 16(b)(3) [26(f)]: Preserving ESI, Evidence Rule 502: The
197 proposals add two subjects to the "permitted contents" of a
198 scheduling order and to the Rule 26(f) discovery plan. One is the
199 preservation of electronically stored information. The other is
200 agreements under Evidence Rule 502 on [non]waiver of privilege or
201 work-product protection. Emphasizing the importance of discussing
202 preservation of electronically stored information addresses a
203 problem that touches on the broader issues addressed by the
204 proposal to amend Rule 37(e) that has been approved for publication
205 and will be discussed later in this meeting. Adding Evidence Rule
206 502 responds to the concern of the Evidence Rules Committee that
207 lawyers simply have not come to realize the value — or perhaps even
208 the existence — of Rule 502.

209 An observer said that it is good to add these references to
210 Rule 502. "We need more acknowledgment of how it works."

211 Another observer said that the Rule 16 and 26(f) dialogue
212 about preserving ESI "should not become a case-by-case discussion
213 of a party's preservation methods, procedures, systems." Different
214 companies have general systems they should be allowed to use in all
215 their cases.

216 Rule 16(b)(3): Conference Before Discovery Motion: The third
217 subject proposed to be added to the list of permitted topics is a
218 direction "that before moving for an order relating to discovery
219 the movant must request a conference with the court." About one-
220 third of federal judges now require a pre-motion conference before
221 a discovery motion. Their experience is that most discovery
222 disputes can be effectively resolved at an informal conference,

223 often by telephone, saving much time and expense. The Subcommittee
224 considered making the pre-motion conference mandatory, but put the
225 idea aside for fear that there may be some courts that are not in
226 a position to implement a mandatory rule.

227 A judge member of the committee observed that the premotion
228 conference is widely used and "is inspiring in practice. A
229 telephone call can clear the disputatious sky."

230 Rule 26(d), 34(b)(2)(A): Early Requests to Produce: This proposal
231 would revise the discovery moratorium imposed by Rule 26(d) to
232 allow delivery of a Rule 34 request before the parties' Rule 26(f)
233 conference. Delivery does not have the effect of service. The
234 request would be considered served at the first Rule 26(f)
235 conference. A parallel amendment to Rule 34 starts the time to
236 respond at the first Rule 26(f) conference, not the time of
237 delivery. The goal is to provide a more specific focus for
238 discussion at the conference. In part the change would reflect a
239 puzzling experience with present practice — many lawyers seem
240 unaware of the moratorium, either serving discovery requests before
241 the 26(f) conference or asking for a stay of discovery during a
242 time when a stay is not needed because the moratorium remains in
243 effect. The proposal does not authorize delivery of Rule 34
244 requests with the complaint. A request may be delivered by the
245 plaintiff to a party more than 21 days after serving the summons
246 and complaint on that party. The party to whom delivery is made may
247 deliver requests to the plaintiff or any other party that has been
248 served. Some lawyers who generally represent plaintiffs are
249 enthusiastic about this proposal. And at the Dallas miniconference,
250 some lawyers who generally represent defendants thought this
251 practice would be useful "so we can begin talking."

252 The Department of Justice noted concerns about allowing early
253 Rule 34 requests. Early discussion of discovery plans is useful,
254 but early delivery of formally developed requests may have the
255 effect of backing parties into positions before they have a chance
256 to talk. This concern is felt in different parts of the Department.
257 "This could be a step backward." The purpose of generating focused
258 discussion might be better served by adding to the subjects for
259 discussion at a Rule 26(f) conference the categories of documents
260 that will be requested.

261 In responding to a question, the Subcommittee and Reporter
262 recognized that no thought had been given to the role of Rule 6(d)
263 in measuring the time to respond to an early discovery request
264 considered to have been served at the first Rule 26(f) conference.
265 If, for example, the request was delivered by mail, would it also
266 be considered to have been served by mail, allowing 3 extra days to
267 respond? This question could be addressed in the Committee Note,
268 but it may be as well to leave it to the parties and courts to

269 figure out that the mode of delivery should carry through. One
270 reason for letting the issue lie may be that Rule 6(d) is due for
271 reconsideration in the rather near future.

272 Expediting the Early Stages: General Observations: Discussion of
273 the case-management proposals began with the observation that it is
274 disappointing that there is a continuing need to micro-manage the
275 rules that address case management. It would be better to promote
276 effective case management by better educating judges in the
277 opportunities created by simpler rules. But that does not seem to
278 work. The package achieves a good balance. "Lawyers may not like
279 it, but their clients will." It is important that the FJC continue
280 its education efforts.

281 An observer said that it is a great thing to work toward
282 earlier district-court involvement in litigation.

283 **PROPORTIONALITY**

284 Three major changes are proposed for Rule 26(b)(1).

285 "Subject matter" Discovery: Rule 26(b)(1) was amended in 2000 to
286 distinguish between discovery of matter "relevant to any party's
287 claim or defense" and discovery of matter "relevant to the subject
288 matter involved in the action." Subject-matter discovery can be had
289 only by order issued for good cause. This distinction between
290 lawyer-managed and court-managed discovery will be ended by
291 eliminating the provision for subject-matter discovery. Discovery
292 will be limited to the parties' claims and defenses. This will
293 further the longstanding belief that discovery should be limited to
294 the parties' claims and defenses, a position that can readily be
295 found even in the pre-2000 rule language. Of course it remains open
296 to ask whether that is too narrow.

297 A former Committee member observed that in the late 1990s he
298 had argued against the separation of "subject matter" discovery
299 from the scope of lawyer-controlled discovery. "Now I think it's
300 the right thing." The present provision for court-controlled
301 subject-matter discovery does not seem to make a difference. It was
302 adopted in part in the hope that it would get judges more involved
303 in managing discovery through motions for subject-matter discovery.
304 That has not much happened. There were, and remain, many cases in
305 which judges are actively involved. The attempt to expand these
306 numbers did not matter much.

307 Proportionality Factors: The proposals limit the scope of discovery
308 to matter "proportional to the reasonable needs of the case,"
309 considering the factors described in present Rule 26(b)(2)(C)(iii).
310 "People never get to Rule 26(b)(2)(C)(iii)." Experience shows that
311 it is left to the judge to invoke these limits. Rule 26(b)(2)

312 imposes a duty on the judge to raise these issues without motion,
313 but it is important that they be directly incorporated in the scope
314 of discovery to reinforce the parties' obligations to conduct
315 proportional discovery. Rule 26(g)(1)(B)(iii) will continue to
316 reinforce the parties' obligations in these directions. Some early
317 comments have addressed this proposal. One question, reflecting
318 comments on earlier drafts that simply referred to proportionality,
319 is how to define proportionality. Related questions seem to ask for
320 reconsideration of the factors now included in (b)(2)(C)(iii) —
321 should account be taken of the parties' resources? Of the balance
322 between burden or expense and likely benefit? Judges have been
323 required to consider these elements since 1983. They are better
324 brought directly into the scope of discovery defined by (b)(1).

325 Early comments by a number of plaintiffs' lawyers protest the
326 plan to relocate the (b)(2)(C)(iii) factors to become part of
327 (b)(1). They believe it should be the court's duty, not the
328 parties' duty, to consider these proportionality factors. Imposing
329 this duty on the lawyers will, they argue, lead to increased fights
330 about discovery.

331 The Department of Justice expressed support for this part of
332 the Rule 26(b)(1) proposal.

333 An observer suggested that while proportionality is a worthy
334 concept, it must be refined so that it is not used to limit access
335 to justice.

336 A Subcommittee member reported feeling pleased by the FJC
337 closed-case survey finding that about two-thirds of the lawyers who
338 responded thought that discovery was reasonably proportioned to
339 their case. But then a friend observed that if one-third of lawyers
340 think discovery has been disproportional to the needs of the case,
341 something should be done. "The challenge is not to overhaul the
342 entire system, but to keep what is good and deal with cases where
343 cost is disproportionate." The Subcommittee understands that access
344 to the courts is important. But one part of access is cost. It is
345 hard to cope with that. Lawyers may react with equanimity to the
346 FJC finding that median costs per case are $15,000 or $20,000. But
347 in a prior case the figure was $5,000 less. "How many middle-class
348 Americans can afford to spend that to go to court? They cannot."
349 More than 20% of the cases filed in the Southern District of New
350 York are pro se cases. In some courts the figure is higher. Cost is
351 an important deterrent that needs to be addressed. An observer
352 added a comment that the FJC cost figures look to lawyer costs.
353 They do not include the internal costs borne by the parties, an
354 often important cost.

355 An observer who worked with the Sedona Working Group # 1
356 recalled that the Group spent two years in discussing these issues.

357 They submitted a proposal to the Committee last October. For now,
358 comments seem most important on proportionality and preservation.
359 Rule 26(b)(1) should refer to proportionality in preservation. Rule
360 26(b)(2)(C) also should address proportional preservation. These
361 rules should be embellished by detailed Committee Notes. The Rule
362 26(f) proposal should be expanded to address not only preservation
363 of ESI but to suggest the details of preservation that should be
364 discussed, and also to include plans to terminate preservation. And
365 the parties should be required to report any remaining disputes
366 after the Rule 26(f) conference. So too, the Rule 16 proposals
367 should be expanded to include a purpose to resolve disputes about
368 preservation.

369 The proportionality proposal was questioned. The rules have
370 had a proportionality requirement in Rule 26(b)(2)(C)(iii) for
371 nearly 30 years. It has become routine to protest that requested
372 discovery is "too much." Proportionality is a rough measure. The
373 proposed rule changes the burden — under it, the proponent of
374 discovery must prove the requests are proportionate in order to be
375 entitled to discovery. "That's a wrong step. 'Proportionality' will
376 become the new 'burdensomeness.'" It will be the requester's duty
377 to establish proportionality. There are many problems with that.
378 Consider an action with one or two natural persons as plaintiffs
379 suing a large entity. One deposition is enough to glean all the
380 discoverable information a natural person has. Many depositions may
381 be needed to retrieve the information held by an entity.

382 A direct response was offered to the observation about the
383 burden to show proportionality. Rule 26(g)(1)(B)(iii) provides that
384 the person who propounds a discovery request automatically
385 certifies that it is proportional.

386 <u>"Reasonably calculated to lead to the discovery of admissible</u>
387 <u>evidence"</u>: Rule 26(b)(1) was amended more than 60 years ago by
388 adding the sentence that now reads: "Relevant information need not
389 be admissible at the trial if the discovery appears reasonably
390 calculated to lead to the discovery of admissible evidence." This
391 provision was meant only to respond to admissibility problems; a
392 common illustration is discovery of hearsay that may pave the way
393 to admissible forms of the same information. But "reasonably
394 calculated" has taken on a life of its own. Many lawyers seek to
395 use it to expand the scope of discovery, arguing that virtually
396 everything is discoverable because it might lead to admissible
397 evidence. Preliminary research by Andrea Kuperman has uncovered
398 hundreds if not thousands of cases that explore this phrase; many
399 of them seem to show that courts also think it defines the scope of
400 discovery. "Relevant" was added as the first word in 2000. The
401 Committee Note reflects concern that this sentence "might swallow
402 any other limitation on the scope of discovery." The same concern
403 continues today. Current cases seem to ignore the 2000 amendment

404 and its purpose. The Subcommittee proposal amends Rule 26(b)(1) to
405 make it clear that this sentence properly addresses only the
406 discoverability of information in forms that may not be admissible
407 in evidence, and does not expand the scope of discovery defined by
408 the first sentence: "Information within this scope of discovery
409 need not be admissible in evidence to be discoverable."

410 Early comments by a number of plaintiffs' lawyers protest this
411 proposal, arguing that the "reasonably calculated" concept is the
412 cornerstone of discovery. A Committee member, on the other hand,
413 commented that it is stunning how many courts overlook the 2000
414 amendment. The purpose of this amendment is to achieve what the
415 Committee thought it had accomplished with the 2000 amendment.

416 The Department of Justice believes that the "reasonably
417 calculated" formula should be retained as it is in the present
418 rule. This is a familiar phrase. Even though some courts may
419 misread this sentence now, amending it will be seen by many as
420 narrowing the scope of discovery. That perception should be
421 addressed in the Committee Note if the proposal carries through,
422 but there still may be unintended limiting effects.

423 Another Committee member expressed concern that "we should
424 think hard" about deleting the "reasonably calculated" sentence.

425 Rule 26(c): Allocation of Expenses: Another proposal adds to Rule
426 26(c)(1)(B) an explicit recognition of the authority to enter a
427 protective order that allocates the expenses of discovery. This
428 power is implicit in Rule 26(c), and is being exercised with
429 increasing frequency. The amendment will make the power explicit,
430 avoiding arguments that it is not conferred by the present rule
431 text.

432 An observer said that shifting costs "will continue to limit
433 discovery."

434 Presumptive Limits: Rules 30 and 31: Rules 30 and 31 now set a
435 presumptive limit of 10 depositions by the plaintiffs, by the
436 defendants, or by third-party defendants. Rule 30(d)(1) sets a
437 presumptive time limit of one day of 7 hours for a deposition. The
438 proposal reduces the presumptive number to 5 depositions, and the
439 presumptive time limit to one day of 6 hours. Criticisms have been
440 made, especially by plaintiffs' lawyers, of the reduction to 5
441 depositions. The Subcommittee considered the criticisms, but
442 decided that the 5-deposition figure is reasonable. The FJC study
443 shows a reasonable number of cases with more than 5 depositions per
444 side. When this happens, a good share of lawyers think the
445 discovery is too costly; it may be that discovery costs in those
446 cases went up for other reasons as well, but increasing the number
447 of depositions feeds the sense of disproportionality. The number,

448 moreover, is only presumptive. The parties can stipulate to more.
449 If the parties fail to agree, the court must grant leave for more
450 depositions to the extent consistent with Rules 26(b)(1) and (2).
451 Reducing the presumptive number provides another tool for judicial
452 case management, and promotes dialogue among the lawyers.

453 Emery Lee described his research on the numbers of depositions
454 in practice. He used the data base for the 2009 Civil Rules Survey.
455 The survey drew from all cases closed in the final quarter of 2008.
456 the sample excluded cases that concluded in less than 60 days, and
457 categories of cases that typically have no discovery. He looked for
458 counts of depositions in cases that had any discovery, in cases
459 that had at least one deposition (fact depositions were more common
460 than expert-witness depositions), and in cases that actually went
461 to trial (trial cases were over-sampled in the whole set, so as to
462 have a meaningful number for evaluation). The report is set out at
463 pages 125 to 133 of the agenda materials. Table 1 reflects the
464 number of cases with more than 5 depositions from the group of
465 cases that had any discovery. The estimates by plaintiffs and
466 defendants are close enough to conclude with some confidence that
467 more than 5 depositions were taken in about 10% of these cases. The
468 numbers increase dramatically for cases with depositions of expert
469 trial witnesses. Table 2 shows that among the cases with any
470 depositions, fewer than 5 depositions were the most common count,
471 with 6 to 10 not far behind. More than 10 depositions were taken in
472 no more than 5% of this group of cases. Table 3 shows that still
473 higher numbers of depositions were taken in cases that went to
474 trial — the range from 6 to 10 was around 25% for depositions taken
475 by plaintiffs, and close to 15% for depositions taken by
476 defendants. The ranges were around 10% for more than 10 depositions
477 by plaintiffs, and somewhat less for 10 depositions taken by
478 defendants. Tables 4 and 5 show that as the number of depositions
479 increased, attorneys were more likely to think that discovery costs
480 were disproportionate to the stakes. But it is fair to suspect that
481 as compared to lawyers' estimates, clients are rather more likely
482 to think the costs of discovery are disproportionate to the stakes.

483 The value of these data in projecting the costs of discovery
484 in the future was questioned on the ground that they come from a
485 time when, as the FJC studies showed, discovery of electronically
486 stored information was avoided in many cases. The FJC study may
487 understate the actual costs of discovery today. Often there was no
488 discussion of electronically stored information in the Rule 16
489 conference; a significant number of cases had no litigation hold on
490 ESI; indeed many cases did not involve any discovery of ESI. As
491 practice as evolved since then, discovery of electronically stored
492 information is common, and commonly expensive. Another comment was
493 that it is particularly striking that in cases with more than 5
494 depositions on both sides about 45% of the lawyers thought that
495 discovery costs were too high in relation to the stakes.

496 The Department of Justice expressed concerns about reducing
497 presumptive limits on discovery. Department lawyers who litigate on
498 the "affirmative side" are particularly concerned. Five depositions
499 may not be enough, and they fear it will be difficult to get leave
500 to take more. Several branches, including those that litigate
501 antitrust, environment, civil rights, multiple violations of
502 workplace safety requirements at multiple facilities of a single
503 employer, and others report real difficulty in getting leave to
504 take more than 10 depositions. At the least, the Committee Note
505 should say more about the importance of sympathetic consideration
506 of the need to take more than 5 depositions in many types of cases.
507 Responding to a question, the Department recognized that it does
508 not yet have the kind of empirical data that would document the
509 extensive anecdotal reports. The reports, however, are based on
510 real experience with many judges who seem to view 10 depositions as
511 a fixed limit, not a point that suggests the need for involved case
512 management.

513 A Committee member enthusiastically supported the 5-deposition
514 presumptive limit. His experience as a judge is that when one side
515 wants to take more than 10 depositions, the other side usually also
516 wants to take more than 10. Usually the need is obvious. A 5-
517 deposition limit will work as well as the 10-deposition works.

518 Another Committee member expressed reservations about
519 tightening presumptive numerical limits. It may be that managing up
520 from lower numbers will prove more expensive than managing down
521 from higher numbers. It may be worth asking whether it would work
522 better to adopt a concept of reasonable numbers, to be measured by
523 proportionality. And there can be problems with Rule 30(b)(6)
524 depositions.

525 An observer said that limiting discovery limits the ability to
526 prove the case. As pleading standards become more demanding,
527 limiting discovery risks premature decisions on the merits.
528 Tightening numerical limits may be unnecessary — the statistics
529 seem to show that generally people are behaving reasonably. "I am
530 concerned there are many judges who are literalists, who will not
531 let us negotiate upward." Six-hour depositions may lead to requests
532 for an extra day; my own practice is to start early and finish on
533 time. If tighter limits are adopted, depositions of expert trial
534 witnesses and Rule 30(b)(6) depositions of an entity should be
535 exempted from the limits. She was asked whether her experience with
536 the present rules is that leave is readily given to take more than
537 10 depositions. She replied that in most large cases leave is
538 given. "But most of my cases are with forward-looking judges. I did
539 not like the 10-deposition limit, but learned to live with it. But
540 the lower the number, the more difficult it will be to negotiate
541 upward."

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542 Another observer suggested that presumptive limits provide a
543 framework for discussion. The parties can work it out without
544 involving the court.

545 Presumptive Limits: Rule 33: The proposals reduce the presumptive
546 number of Rule 33 interrogatories from 25 to 15. There have been
547 some comments that interrogatories are critical to discovery, and
548 that the reduction will gut the rule. The Southern District of New
549 York, however, has for years set a general limit at 5 categories of
550 information at the outset of the litigation. The limit in part
551 results from the collective wisdom of experienced judges that
552 lawyers write questions seeking vast amounts of information and
553 other lawyers respond by writing answers designed to disguise, not
554 reveal, information.

555 Presumptive Limits: Rule 36: The proposals establish for the first
556 time a presumptive numerical limit of 25 on Rule 36 requests to
557 admit. Requests to admit the genuineness of documents are excluded
558 from the limit. The proposal responds to a concern that Rule 36 has
559 been abused in some cases. Early comments support the proposal,
560 although a few express doubts.

561 Responding to a question about the basis for settling on 25 as
562 the presumptive number of requests to admit, Judge Koeltl said that
563 25 was chosen by analogy to present Rule 33, drawing from the
564 thoughts of the Subcommittee and the experience of the Committee.
565 The comments received so far support the number — indeed the letter
566 from the leadership of the ABA Litigation Section suggests that
567 requests to admit the genuineness of documents might be included in
568 the limit. The employment lawyers have focused more on Rule 33, but
569 some of them have supported the limit proposed for Rule 36. Emery
570 Lee added that the FJC report for the Duke Conference found that
571 plaintiffs and defendants both reported that plaintiffs requested
572 22 admissions per case; defendants reported that defendants
573 averaged 13.2 per case, while plaintiffs reported that defendants
574 averaged 21 per case. The proposed presumptive limit of 25 is
575 higher than average case experience.

576 An observer said it is helpful to carve requests to admit the
577 genuineness of documents out from the presumptive limit.

578 Rule 34 Responses: The Rule 34 proposals address widespread
579 perceptions of abuses in responding. The Standing Committee
580 reviewed these proposals with enthusiasm. A common response to a
581 Rule 34 request is a boilerplate litany of objections, concluding:
582 "to the extent not objected to, any relevant documents will be
583 produced." The requesting party has no sense whether anything has
584 been withheld. The proposals require that a response state the
585 grounds for objecting to a request "with specificity." These words
586 are borrowed from Rule 33(b)(4). If an objection is made, it must

587 state whether any responsive materials are being withheld on the
588 basis of the objection. The Committee Note observes that this
589 obligation can be met, when relevant, by stating the scope of the
590 search — for example, that the search has been limited to documents
591 created after a specified date, or to identified sources.

592 The Department of Justice "completely endorses" the need to
593 get beyond boilerplate objections to find whether anything has been
594 withheld.

595 An observer noted that "a party cannot tell you what they do
596 not know about documents they are not looking for." It might be
597 better to move into rule text the Committee Note statement that it
598 suffices to state the limits of the responding party's search.

599 Rule 34 Production: Rule 34 speaks, almost at random, of permitting
600 inspection and of producing. The proposals provide that a party who
601 responds that it will produce copies of documents or electronically
602 stored information must complete production no later than the time
603 for inspection stated in the request or a later reasonable time
604 stated in the response. The Committee Note, drawing from discussion
605 at the Dallas miniconference, recognizes that "rolling" production
606 may be made in stages, within a time frame specified in the
607 response.

608 The Department of Justice expressed concerns that it can be a
609 challenge to do a production and to figure out the appropriate time
610 frame for rolling production. It must be made clear that responders
611 often need time to get on top of production obligations. An
612 observer offered a similar comment that the end-date for production
613 should be kept flexible.

614 Multitrack System: An observer asked whether the Committee had
615 considered recommending a multitrack system, working toward
616 proportionality by steering simpler cases toward reduced discovery.
617 The Committee has considered simplified procedure proposals in the
618 past. The Subcommittee considered it briefly in developing the new
619 rules proposals, but concluded that it is not yet time to move in
620 this direction. Still, the time may come. Utah, for example, has
621 adopted a tiered discovery approach, and allocates a total number
622 of hours for depositions rather than a limit on the number of
623 depositions. Texas has adopted a mandatory program. Further
624 discussion noted that differentiated case tracks have not proved
625 successful in federal courts. "Parties do not want to say that
626 their cases are simple." The Northern District of California speedy
627 trial project has had no takers.

628 **COOPERATION**

629 Rule 1: The Subcommittee considered drafts that would amend Rule 1

630 to add an explicit duty of cooperation by the parties. Participants
631 at the Dallas miniconference and others expressed concerns about
632 this direct approach. One concern was that Rule 1 would become a
633 source of frequent collateral litigation, in the way of Rule 11 in
634 the form it took from 1983 to 1993. Another was that this new duty
635 might become entangled with obligations of professional
636 responsibility, and might trench too far on providing vigorous
637 advocacy. Responding to these concerns, the proposal would amend
638 Rule 1 to provide that these rules "should be construed, ~~and~~
639 administered, and employed by the court and the parties to secure
640 the just, speedy, and inexpensive determination of every action."
641 The Committee Note observes that "[e]ffective advocacy is
642 consistent with — and indeed depends upon — cooperative and
643 proportional use of procedure."

644 An observer said it is good to encourage cooperation. A
645 similar observation said that the proposed rule and Note "are
646 terrific."

647 Another observer noted that the Sedona Conference working
648 group had recommended that Rule 1 be amended to provide that the
649 rules should be "complied with" to achieve their goals. Their
650 suggested Note stated that cooperation does not conflict with the
651 duty of vigorous representation.

652 **PACKAGE**

653 These proposals form a package greater than the sum of the
654 parts. Some parts appeal more to plaintiffs than to defendants,
655 while others appeal more to defendants than to plaintiffs. Some
656 sense of balance may be lost if changes appear to go in one
657 direction only. Still, each part must be scrutinized and stand, be
658 modified, or fall on its own. The proposals are not interdependent
659 in the sense that all, or even most, must be adopted to achieve
660 meaningful gains.

661 And, inevitably, some style issues remain. And, as always,
662 vigilance is required to search out absent-minded errors. As one
663 example, the draft fails to renumber present Rule 26(d)(2) as (3)
664 to reflect the insertion of a new paragraph (2).

665 It was noted that this package has stimulated an unusual
666 number of pre-publication comments by some groups that have been
667 closely following the Committee's work. The most recent tally
668 counts 249 comments. Most of them come from plaintiffs' employment
669 lawyers, with some reflecting concerns for civil-rights litigation
670 more generally. They have not yet been distributed to the
671 Committee. It seems unwise to start revising a carefully developed
672 package in response to comments from one segment of the bar that
673 has been more diligent than others. These comments of course will

674 be considered. Many of them focus on the presumptive limitations on
675 depositions and other discovery. A frequent theme is that "the
676 system is not broken, and does not need to be fixed." Plaintiffs
677 say that employers have most of the information needed to litigate
678 discrimination claims. They fear that judges will see presumptive
679 limits as firm limits. They note that when providing representation
680 on a contingent-fee basis they have built-in incentives to limit
681 the costs of discovery. And they fear that stricter limits on
682 discovery will leave them unable to survive summary judgment. And
683 they respond to the suggestion that it is easier to manage up than
684 to manage down by arguing that the limits will generate more
685 disputes and increase the need for judicial management in place of
686 responsible self-regulation by the parties. All of these concerns
687 will be taken into account, but after publication provides a spur
688 to other segments of the bench and bar that may provide offsetting
689 views.

690 An observer repeated the prediction that the package will
691 stimulate a large number of comments. It will be important to
692 remember that many people think the system is not broken, and to
693 articulate the problems the proposals address.

694 A letter signed by many in the leadership of the ABA
695 Litigation Section largely supports the package of proposals.

696 A judge member of the Committee observed that the package is
697 good. "A lot of this is common sense." Many of the proposals
698 reflect practices that have been adopted by local rules or in
699 standing orders. The Committee will continue to balance all
700 comments that come in, as it has balanced everything it has heard
701 so far. Some of the early letters seem to reflect a fear that there
702 would be no public hearings; these concerns will be assuaged as the
703 public comment period plays out in its usual full course.

704 Another judge commented that this is an important package. "We
705 will hear a great deal about it, more even than we heard about the
706 Rule 56 proposals." The Rule 56 experience shows that the Committee
707 is eager to learn from public comments. One of the important
708 changes made in response to testimony and written comments was to
709 abandon the "point-counterpoint" procedure. The Committee will be
710 equally eager to learn from comments about this package. It is
711 difficult to foresee what changes may be made, but cogent arguments
712 will be evaluated with great respect.

713 The next comment was that the Subcommittee took its work very
714 seriously. "Bring the comments on." This is a good-faith package of
715 proposals to reduce cost and delay.

716 Yet another committee member observed that "If we don’t figure
717 out ways to address cooperation, proportionality, and increased

718 management, we're in trouble." The package seems to make real
719 strides. It is exciting to have proposals to recommend for
720 publication just three years after the Duke Conference, even if it
721 is only in the context of careful rulemaking that three years seems
722 like speed.

723 The Department of Justice comments noted that the Subcommittee
724 and Committee have taken account of the Department comments made as
725 the package has been developed. It makes sense to publish the
726 package for comment. "There is much that is excellent. We are
727 bedeviled by the cost of discovery, and often by the difficulty of
728 getting it." The Department is sympathetic to the pursuit of
729 proportionality, to the Rule 34 proposals on objections and
730 response time, and to early case management. It continues, however,
731 to have the concerns addressed to several of the proposals as noted
732 above.

733 A Committee member observed that this is "an impressive
734 package. The whole is greater than the sum of the parts." It will
735 generate a great debate. A similar view was expressed by another
736 member. This is great work. It makes sense to publish the package
737 as a whole.

738 Another Committee member suggested that the proposals are
739 affected by a relatively uniform conclusion that initial
740 disclosures under Rule 26(a)(1)(A) are not particularly useful. A
741 recent conversation with lawyers in Florida showed that average
742 cases take a year and a quarter in the Northern and Southern
743 Districts, but only 4 months in the Middle District. Lawyers at the
744 conference said that the difference is the judge. Extensive public
745 comments can be expected on the package — "Everyone will have a dog
746 in this race." Initial reactions may be overblown. It will be
747 important to allow the dust to settle to provide a better picture.

748 This prediction of extensive public comment provoked mixed
749 reactions. One suggestion was that it is easy to assume that a
750 package as important as this one will get the attention of the bar
751 and draw extensive comments. But sometimes experience belies
752 expectations, perhaps because not all parts of the bar become aware
753 of published proposals. "We should be sure to get word out to all
754 parts of the bar." But a contrary suggestion was that the
755 outpouring of comments from a relatively narrow segment of the bar
756 may presage thousands of comments after publication. "We may be
757 entering a brave new public-comment world." It will be desirable to
758 consider the possibility of establishing a site for public comments
759 that allows participants to channel their comments by subject-
760 matter, easing the task of compiling, comparing, and learning from
761 them. Some such approach could facilitate the important task of
762 making sure that the Committee takes maximum advantage of comments
763 from all parts of the profession, and that no group feel left out

764 of the process.

765 An observer said that "we all could do better" in working to
766 reduce the cost of litigation and to promote resolutions on the
767 merits.

768 An observer said that this is a good overall package. "The
769 system *is* broke in terms of cost." The scope-of-discovery proposals
770 are especially good. Presumptive limits are positive, whether the
771 limit is 10, 5, or 7 depositions. Depositions usually end late, so
772 the reduction from 7 to 6 hours is good. "Proportionality is
773 great." But it would be good to add a presumptive numerical limit
774 on the number of custodians whose records must be searched in
775 discovering electronically stored information.

776 An observer suggested reservations about characterizing these
777 proposals as a "package." Earlier sets of proposals have been
778 whittled down. For example, a proposal to adopt a presumptive limit
779 of 25 Rule 34 requests to produce carried a long way through the
780 process, only to be stripped out. The Committee should not be
781 reluctant to abandon further particular parts that the public
782 comment process shows to be unwise.

783 Another observer said that there is a crisis in discovery
784 today, caused by an exponential growth in the volume of data. In a
785 significant number of cases the system is driven by the cost of
786 discovery, not the merits. The best answer is to be found in clear,
787 self-executing rules.

788 A Committee member recalled that when Chief Justice Roberts
789 approved the idea of holding the Duke Conference he urged that it
790 not be just another academic exercise. This package of rules
791 proposals provides a real, practical outcome, admirably advancing
792 the pragmatic hopes for the conference.

793 Another Committee member suggested that these are
794 transsubstantive rules. Committee members tend to speak from "a
795 privileged experience, where we negotiate and work it out." Limits
796 on the number of depositions, for example, are readily worked
797 around. But we will be hearing from people experienced with very
798 different kinds of cases, where there is no MDL judge on the scene,
799 where discovery is uniquely addressed to a single case. It is an
800 open question whether the system is broke for some types of cases.

801 A motion to recommend approval of the Duke Rules package for
802 publication passed by unanimous vote.

803 Judge Campbell noted that the Committee should promote a
804 wealth of comments from all segments of the bar. This is a package,
805 but it is not an unseverable package. Each of the individual

806 proposals must be able to stand independently of any proposals that
807 are found to be unwise by the testimony-and-comment process.

808 *Rule 37(e): Preservation and Sanctions*

809 Judge Grimm noted the long progress of Rule 37(e), beginning
810 immediately after the Duke Conference panel suggested that a
811 detailed rule should be adopted to set standards for preserving
812 electronically stored information for discovery. The Committee
813 approved a proposed rule in November. The Subcommittee resolved
814 questions that were left open by the Committee. It considered
815 suggestions by the Style Consultant, adopting many of them. In
816 January the Standing Committee approved the rule for publication,
817 recognizing that it had left some questions for further work with
818 a report back to the June meeting. It also suggested some questions
819 that should be specifically flagged in the request for comment.

820 The Subcommittee has considered the questions left open after
821 the Standing Committee meeting, finding ready answers to most. One,
822 dealing with the loss of information that irreparably deprives a
823 party of a meaningful opportunity to litigate, has presented
824 drafting challenges that need careful attention today.

825 Four principles shape the proposal. Curative measures are
826 available to address the loss of information even if no fault was
827 involved in the loss. Sanctions are not appropriate if the party
828 acted reasonably and proportionally. Sanctions are appropriate if
829 the party acted willfully or in bad faith and the loss causes
830 substantial prejudice. And sanctions also are proper if the loss
831 irreparably deprives another party of a meaningful opportunity to
832 present or defend against the claims in the action, meaning the
833 core of the action rather than incidental claims or defenses, and
834 if the loss resulted from some measure of fault, described in the
835 proposal as negligence or gross negligence. It is this final
836 provision that has caused continuing debate, in large part because
837 it stirs fears that some judges will find a party has been
838 irreparably deprived of a meaningful opportunity to claim or defend
839 in circumstances that would not even support a finding of
840 substantial prejudice, all for the purpose of imposing sanctions
841 for negligence or gross negligence. What is intended to require
842 super-prejudice as a condition for sanctions absent willfulness bad
843 faith might come to restore the negligence standard the Committees
844 intend to reject. At the least, uncertainty in predicting
845 implementation of this exception could defeat the purpose to
846 provide reassurance against the uncertainties of present practice
847 that cause many large enterprises to overpreserve vast amounts of
848 information for fear of sanctions rested on hindsight evaluations
849 of what was reasonable.

850 Five sets of issues raised in the November Advisory Committee

851 meeting were considered by the Subcommittee after the meeting.

852 (1) The argument that Erie doctrine requires that federal
853 courts defer to state law on spoliation is not persuasive. The
854 questions involve discovery procedure in federal courts. Some
855 states recognize an independent tort remedy for spoliation. The
856 Committee Note recognizes that Rule 37(e) does not affect those
857 rights.

858 (2) One observer suggested expansion of the role played by the
859 list of factors in Rule 37(e)(2). They might be brought to bear in
860 determining what curative measures or what sanctions to employ, and
861 to measure the prejudice or irreparable deprivation element. The
862 Subcommittee concluded that these factors should be confined, as
863 they have been, to measuring whether discoverable information
864 should have been preserved and whether the failure was willful or
865 in bad faith. They were not developed to measure other things, and
866 do not seem well adapted to serve other purposes.

867 (3) The punctuation of(e)(1)(B)(i) created a possible
868 ambiguity. It has been reorganized to eliminate any ambiguity.

869 (4) It was suggested that the list of factors in (e)(2) should
870 be prefaced with two additional words: "should consider all
871 relevant factors, including <u>when appropriate</u> * * *." These words
872 seem unnecessary. The list is suggestive, not exclusive, and it is
873 apparent on casual inspection that some items in the list need not
874 be considered in a particular case. For example, if there was no
875 request to preserve information, that factor disappears from the
876 underlying calculations.

877 (5) Many drafts of the list of factors included litigation
878 holds. This factor was deleted from concern that it might prove
879 misleading in practice. Holds are nuanced. They come in many
880 shapes, and what is appropriate in particular circumstances may be
881 inapposite in other circumstances. Including holds as a factor
882 might cause a court to give too much weight to some particular
883 method.

884 The Standing Committee discussion raised seven questions that
885 were considered by the Subcommittee.

886 (1) The Note to the January draft referred to "displacing"
887 state law requiring preservation. One thought was that this might
888 seem to displace statutory preservation obligations. "We displaced
889 displaced." The Committee Note now says that Rule 37(e) rests on
890 the duty to preserve that has been recognized by the common law of
891 court decisions. Rule 37(e) itself does not create an obligation to
892 preserve.

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893 (2) It was suggested that the very word "sanctions" is risky
894 because it overlaps the duty of professional responsibility to
895 self-report "sanctions." The Note was revised to address this
896 concern, stating that Rule 37(e) does not address professional
897 responsibility duties. The "sanctions" term is adopted from Rule
898 37(b)(2), the rule incorporated here.

899 (3) The provision for sanctions when a loss of information
900 irreparably deprives a party of a meaningful opportunity to present
901 a claim or defense stirred concern arising from the experience that
902 many actions combine central claims or defenses with incidental or
903 peripheral claims or defenses that lack any real importance.
904 Depriving a party of an opportunity to litigate the lesser issues
905 should not warrant sanctions. This concern led to redrafting that
906 refers to deprivation of any meaningful opportunity to present or
907 defend against the claims in the action. The Committee Note
908 underscores the point: "Lost information may appear critical to a
909 given claim or defense, but that claim or defense may not be
910 central to the overall action."

911 (4) It was possible to read the January draft to mean that
912 sanctions could be imposed absent any fault for loss of information
913 that should have been preserved if the loss irreparably deprived a
914 party of a meaningful opportunity to present or defend against a
915 claim. Among the examples was a hospital that lost records stored
916 in a basement that was flooded by Superstorm Sandy, an
917 unforeseeable event. This came to be referred to as the "Act of
918 God" problem. The January draft was not intended to support
919 sanctions in such circumstances. The revised draft requires
920 negligence or gross negligence to support sanctions. The idea is
921 that the "irreparably deprived" standard requires super-prejudice,
922 something more than the "substantial prejudice" that supports
923 sanctions for willful or bad-faith loss of information. Greater
924 prejudice would justify sanctions on a lesser showing of fault,
925 described as negligence or gross negligence. Although the reference
926 to "gross negligence" seems redundant, it was included to fill in
927 the gap and, by implication, to demonstrate that greater fault is
928 required to show willfulness or bad faith. The Subcommittee has
929 remained divided on this question, however, for the reason noted
930 above. Some courts might seize on this provision as an excuse to
931 impose sanctions for merely negligent behavior in circumstances
932 that at worst involve only substantial prejudice, and that might
933 come to involve still lower levels of harm.

934 (5) The concept of a "meaningful" opportunity to present or
935 defend against a claim was thought to lack precision. But none of
936 the words considered as a substitute seemed satisfactory.
937 "Meaningful" was retained.

938 (6) The Department of Justice expressed concern that present

939 Rule 37(e) should be retained, either independently or within the
940 body of what is proposed as an amended Rule 37(e). But the present
941 rule provides only a limited safe harbor; the Committee Note
942 suggests that a party may have to intervene to halt the routine
943 operation of an electronic information system because of present or
944 reasonably anticipated litigation. The Subcommittee concluded that
945 the proposed Rule 37(e) confers all the protection conferred by the
946 present rule, and more. It should suffice to inform people that the
947 new rule provides greater protection. The new Committee Note
948 addresses this question in a full paragraph that, among other
949 things, states that the routine, good-faith operation of an
950 electronic information system should be respected under the rule.
951 And one of the ways in which the new rule confers greater
952 protection is that it is not limited to ousting sanctions "under
953 these rules." Present case law, in a loose and imprecise way,
954 frequently relies on inherent authority to justify sanctions. The
955 Committee Note expressly forecloses reliance on inherent authority.

956 The Department renewed this suggestion during later
957 discussion. It has proved helpful in dealing with information
958 technology systems specialists during the design of new information
959 systems.

960 (7) The Department of Justice has expressed concern that
961 "substantial prejudice" should be defined more expansively. But
962 the Subcommittee concluded that it is not helpful to attempt
963 greater precision outside the context of a particular case. Courts
964 are good, with the help of the parties, in measuring the impact a
965 loss of information has on a particular case.

966 The Department renewed this suggestion during later
967 discussion. It would be useful to ask for comments during the
968 publication process. Various elements that bear on prejudice could
969 be offered as examples — the availability of other sources of
970 information, the materiality of the lost information, and the like.
971 It was pointed out that Question 4, at p. 163 of the agenda
972 materials, is sketched in terms that anticipate possible expansion
973 along these lines.

974 The Subcommittee worked out the present proposal through a
975 great number of conference calls. The level of participation by
976 Subcommittee members was extraordinary. The Subcommittee believes
977 that it has effectively addressed all of the potential problems
978 just described, apart from finding suitable language to protect
979 against sanctions when discoverable information is lost without a
980 party's fault but the result is great prejudice. Any reference to
981 negligence or gross negligence in rule text causes real anxiety to
982 many participants and observers.

983 In addition to the questions posed by the Advisory Committee

984 and Standing Committee, the Subcommittee made three changes on its
985 own.

986 (1) "reasonably" was deleted in describing the duty to
987 preserve: "If a party failed to preserve discoverable information
988 that ~~reasonably~~ should have been preserved * * *." The factors in
989 (e)(2) provide better direction in this dimension, most obviously
990 in (e)(2)(B) — "the reasonableness of the party's efforts to
991 preserve the information."

992 (2) The provision for curative measures was expanded by
993 deleting these words: "order ~~the party to undertake~~ curative
994 measures * * *." The change was made to support curative actions
995 taken without court order. A party, for example, could be permitted
996 to introduce evidence of another party's failure to preserve, and
997 to argue that adverse inferences should be drawn from the failure.
998 The party's argument would not be an adverse-inference instruction
999 subject to the limits imposed by (1)(B). Such measures can help to
1000 level the playing field.

1001 Later discussion asked why an adverse-inference instruction is
1002 treated as a sanction — why is it not also a curative measure? The
1003 response was that there is a continuum of available tools along
1004 this dimension. The most powerful is an instruction by the judge
1005 that the jury must find the lost information was harmful to the
1006 case of the party who lost it. A less powerful version instructs
1007 the jury that it may infer the information was harmful. Still
1008 another version may leave it to the jury to determine whether any
1009 information was lost, and then to determine what inferences might
1010 be drawn from the loss. These inferences logically flow only from
1011 knowing that the information was harmful. They do not flow from
1012 being sloppy or disorganized. Willfulness or bad faith is the key.
1013 Another Committee member observed that Wigmore referred to "a
1014 consciousness of a weak case." Another participant noted that an
1015 adverse-inference instruction was given in the Zubulake case. The
1016 fear of these instructions is one of the fears that drives
1017 prospective parties to over-preserve. "We need to limit this
1018 nuclear weapon."

1019 Another Committee member continued the discussion. There are
1020 many possible versions of adverse-inference instructions or
1021 arguments. It is difficult to define a precise line. It is
1022 desirable to preserve flexibility that enables a court to avoid too
1023 much direction. Although it has not proved possible to draft a
1024 clear distinction between an instruction that amounts to a sanction
1025 and lesser measures that qualify as curative measures, the
1026 distinction remains important. "There should be no dispositive
1027 inferences without fault."

1028 An observer suggested that asking the jury to decide what

1029 inferences to draw "asks the jury to decide a side issue, not the
1030 merits of the case."

1031 (3) "in the anticipation or conduct of litigation," an
1032 important element of (e)(1), was added to the (e)(2) reference to
1033 failure to preserve information that "should have been preserved in
1034 the anticipation or conduct of litigation." The Subcommittee was
1035 worried about failures to preserve information as required by
1036 independent duties imposed by statute or regulation; such failures
1037 might not reasonably bear on the duty to preserve for litigation.
1038 The change helps to focus the (e)(2) factors on preservation for
1039 litigation.

1040 "Act of God": Successive drafts have provided for sanctions when
1041 discoverable information is lost without willfulness or bad faith,
1042 but the effect is to irreparably deprive a party of any meaningful
1043 opportunity to present or defend against the claims in the action.
1044 This provision reflects situations that came, in Subcommittee
1045 discussions, to be identified with the Silvestri case in the Fourth
1046 Circuit. The owner of the automobile in which the plaintiff was
1047 injured allowed it to be destroyed before the defendant
1048 manufacturer had any opportunity to inspect it. The court of
1049 appeals affirmed a dispositive sanction imposed by the district
1050 court, finding there was no abuse of discretion. This decision, and
1051 others like it, are part of the common law. The purpose of Rule
1052 37(e) is to recognize the common-law duty to preserve. The
1053 Subcommittee has believed that the rule text should reflect these
1054 decisions. The Standing Committee, however, feared that as drafted
1055 the rule would authorize sanctions when discoverable information
1056 was destroyed without any fault, as by an "Act of God." The
1057 Subcommittee agreed that while sanctions should not be imposed,
1058 curative measures should be available. That created a drafting
1059 problem. It would not do to suggest in the Committee Note that loss
1060 by an Act of God does not amount to a party's failure to preserve,
1061 since that interpretation of the rule text would bar not only
1062 sanctions but also curative measures. The same difficulty arises
1063 with any attempt to limit the meaning of "should have been
1064 preserved. The solution was to add a limiting element: sanctions
1065 could be imposed only if the failure to preserve "was negligent or
1066 grossly negligent." The Subcommittee recognized that "grossly
1067 negligent" was redundant — any grossly negligent failure also would
1068 be negligent. But it thought that including these words in
1069 (e)(1)(B)(ii) would help to prevent concepts of gross negligence
1070 from bleeding into the "willfulness" that suffices to support
1071 sanctions when loss of discoverable information causes substantial
1072 prejudice.

1073 Discussion within the Subcommittee repeatedly reflected a
1074 concern that any reference to negligence or gross negligence in the
1075 rule text would suggest a sliding scale that balances degrees of

1076 culpability against degrees of prejudice. A judge reluctant to
1077 brand a lawyer with bad faith might "skitter off" into finding
1078 negligence that irreparably deprived another party of any
1079 meaningful opportunity to litigate.

1080 The cases that present the "no-fault" failure seem to involve
1081 tangible evidence. The Subcommittee could not find a case where a
1082 loss of electronically stored information effectively put another
1083 party out of court unless there was willfulness or bad faith. "ESI,
1084 like cockroaches and styrofoam, is something you cannot get rid
1085 of." This thought suggested that it might be better to avoid the
1086 question by addressing Rule 37(e) only to the loss of
1087 electronically stored information and requiring willfulness or bad
1088 faith, as well as substantial prejudice, and omitting any provision
1089 addressing extreme prejudice but no willfulness or bad faith. Given
1090 the speed of change in electronic information systems, however, the
1091 Subcommittee was uncertain whether that is prudent. Accordingly it
1092 chose to maintain the draft that allows sanctions for irreparable
1093 deprivation if there is only negligence or gross negligence, but
1094 also to prepare for publication of an alternative draft that
1095 focuses only on electronically stored information and omits the
1096 irreparable deprivation provision.

1097 The alternative draft is set out in an appendix to the draft
1098 rule and Committee Note. It may be an advantage that it does not
1099 attempt to regulate the loss of tangible evidence, or traditional
1100 documents. Common-law sanctions would remain available for loss of
1101 discoverable information that is not electronically stored. This
1102 approach is less complete, less elegant. But this project was
1103 launched in response to complaints that parties and prospective
1104 parties feel forced to over-preserve electronically stored
1105 information, in part for want of any common nationwide standards.
1106 Public comments can test the hypothesis that ESI is so often
1107 recoverable by curative measures that irreparable deprivation is
1108 unlikely, apart from cases of willfulness or bad faith. This
1109 alternative approach avoids any concern that no-fault losses of
1110 information will be sanctioned. It avoids the risk that parallel
1111 rule provisions would encourage a creeping tendency to import
1112 negligence concepts into willfulness.

1113 The Committee was reminded that the Standing Committee has
1114 approved publication of Rule 37(e) this summer. The questions open
1115 for discussion are those that have not yet been explored in this
1116 Committee, including the question whether the rule should be
1117 limited to loss of electronically stored information.

1118 The Committee also was pointed to the list of questions that
1119 will be flagged in transmitting the rule for public comment. Are
1120 these the right questions? Are they properly framed?

1121 Discussion of the ESI-only alternative began with the
1122 observation that usually the Committee publishes a preferred
1123 version, raising questions about potential changes without
1124 publishing a full alternative draft. The question whether Rule
1125 37(e) should be limited to loss of electronically stored
1126 information was discussed repeatedly in the Subcommittee and with
1127 the Committee, and the choice always has been to stick with a
1128 comprehensive rule that applies to all forms of discoverable
1129 information. One consideration is that the line between
1130 electronically stored information and other information is
1131 uncertain, and may become more uncertain with further advances in
1132 technology. And it is better to adhere to general principles absent
1133 some convincing reason to believe that different standards may
1134 properly apply. Still, the most recent rounds of discussion may
1135 shake faith in that conclusion. The problems encountered in
1136 attempting to recognize problems of irreparable loss that do not
1137 seem to be encountered with electronically stored information may
1138 be so great as to narrow the focus to loss of electronically stored
1139 information. The original concern was over-preservation of
1140 electronically stored information. Publishing the alternative might
1141 provoke comments showing instances in which loss of electronically
1142 stored information has irreparably deprived a party of a meaningful
1143 opportunity to litigate, contrary to the tentative belief that this
1144 event is unlikely.

1145 Support for publishing the alternative was expressed in more
1146 positive terms. "Residential Funding" is a problem with respect to
1147 the pre-litigation duty to preserve. There is a serious risk that
1148 concepts of negligence and gross negligence will prove expansive.
1149 Adding them to proposed (e)(1)(B)(ii) threatens to expand the risk.

1150 A similar observation suggested the ESI-only version in the
1151 appendix may be desirable. The reliance on negligence or gross
1152 negligence is troubling. This project began to give clear guidance
1153 in the use of curative measures and sanctions, and in the process
1154 to overrule cases that employ sanctions for negligence or gross
1155 negligence. The ESI-only version avoids the "Act of God" problem by
1156 requiring willfulness or bad faith for any sanctions. Resort to the
1157 negligence or gross negligence standard from concern that loss of
1158 other forms of discoverable information may have more severe
1159 consequences may cause problems.

1160 A more general observation was that it is important to seek
1161 comment during the publication period on every alternative the
1162 Committee sees as possible. Whether by publishing an appendix or
1163 posing questions, the issues should be clearly identified so as to
1164 reduce the risk that the comments will suggest changes so profound
1165 as to require republication to ensure full opportunity to comment.

1166 Another observation expressed concern that the amendments give

1167 judges tools to use if information is lost without fault. As
1168 information storage moves into the cloud, there will be increasing
1169 risks that information will be lost without fault. The main draft
1170 gives clear guidance, both as to curative measures and as to
1171 sanctions.

1172 The Department of Justice understands the impetus to get away
1173 from sanctions for negligence or gross negligence, but has thought
1174 that a rule covering all types of evidence is preferable. It may be
1175 best to publish the alternative rule addressing only ESI. Comments
1176 may show a way to reconcile these concerns.

1177 Another comment suggested that another approach would be to
1178 retain a rule that applies to all forms of information, not
1179 electronically stored information alone, but to require willfulness
1180 or bad faith for sanctions. That would overrule the negligence or
1181 gross negligence cases even when the negligent behavior irreparably
1182 deprived another party of any meaningful opportunity to litigate.
1183 No one has wanted to do that. Adopting an ESI-only rule that
1184 requires willfulness or bad faith would be defended on the ground
1185 that loss of ESI will not have such irreparable consequences.

1186 An observer noted that after struggling with this problem, the
1187 Sedona working group chose to rely on an "absent exceptional
1188 circumstances" limit on sanctions. It would be a mistake to adopt
1189 a negligence or gross negligence standard. Multiple standards will
1190 generate incredible problems. No one thinks negligence or gross
1191 negligence should be the standard.

1192 Another observer said that adopting a negligence or gross
1193 negligence test would inject a tort standard into a rule of
1194 procedure. The true issue is whether the rule should apply to ESI
1195 only. Publishing an all-information rule that includes negligence
1196 or gross negligence will focus comments on that problem, reducing
1197 the level of comments on the question whether the rule should be
1198 limited to loss of ESI alone.

1199 An interim summary was attempted. These are tough questions.
1200 The "Act of God" concern led to incorporating a negligence or gross
1201 negligence standard to ensure that sanctions are not available for
1202 a no-fault loss of discoverable information, while sanctions remain
1203 available if the loss irreparably deprived a party of a meaningful
1204 opportunity to litigate. The hospital servers in a basement
1205 inundated by Superstorm Sandy became a running example: should
1206 sanctions be imposed when records are unavailable in the next
1207 malpractice action? The January draft could be read to authorize
1208 sanctions even absent negligence or gross negligence, imposing
1209 liability because the information was lost and it was information
1210 that "should" have been preserved. Subsequent discussions focused
1211 mostly on loss of ESI, but it is difficult today to distinguish

1212 between ESI and other forms of information, and the difficulty may
1213 well increase as technology evolves. Is a print-out of information
1214 lost from an electronic storage system ESI? What about the
1215 information recorder in an automobile damaged in a collision and
1216 then scrapped?

1217 Would it do to omit any reference to negligence or gross
1218 negligence, falling back to the January draft, and rely on a
1219 statement in the Committee Note that loss to an Act of God is not
1220 a party's failure to preserve? But how would that square with the
1221 desire to allow curative measures in such circumstances?

1222 A Committee member agreed that it is artificial to distinguish
1223 between ESI and other forms of information-evidence. The
1224 distinction is difficult to explain in theory, and it may become
1225 increasingly difficult to apply in practice. Another member was
1226 enthusiastic about deleting any reference to negligence or gross
1227 negligence, but retaining a rule that applies to all forms of
1228 information. The Committee Note could provide assurance enough for
1229 the Act of God situation.

1230 Discussion returned to the possibility that (e)(1)(B)(ii)
1231 could be dropped entirely, even from a rule that applies to loss of
1232 any form of discoverable information. That would mean that no
1233 sanctions are available absent willfulness or bad faith, no matter
1234 how severe the prejudice to the party who never had the information
1235 and never had any opportunity to preserve it, and no matter now
1236 negligent the party who had the information was. But it may be
1237 better to publish (B)(ii); it will be easier to delete it in the
1238 face of adverse comments than to add it back. The alternative of
1239 adopting a rule limited to loss of ESI, requiring willfulness or
1240 bad faith for any sanctions, can still be flagged in requesting
1241 comments.

1242 An alternative to "negligent or grossly negligent" was
1243 suggested as a way out of distaste for the tort-like aura of these
1244 words. The failure to preserve irreparably depriving another party
1245 of any meaningful opportunity to litigate might be described as
1246 "culpable." The Committee Note could explain that culpability is
1247 intended to distinguish the "Act of God" loss.

1248 These suggestions foundered on the reminder that curative
1249 measures, unlike sanctions, should be available even when no fault
1250 at all was involved in the loss of information that should have
1251 been preserved. A Committee Note cannot give different meanings to
1252 "failure to preserve" for curative measures than for sanctions. As
1253 an example, loss of the servers flooded in the basement might be
1254 cured by spending $50,000 to retrieve the same information from a
1255 backup system. Ordering restoration is an appropriate response.

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1256 The concern persists: which party should bear the consequences
1257 of an irreparable loss of information?

1258 Seeking ways to protect the party who had no opportunity to
1259 preserve the information led to other suggestions. Would it be
1260 possible to define loss by an "act" of a party, and distinguish an
1261 Act of God? This could be done by revising (e)(1)(B): "impose any
1262 sanction * * * but only if the court finds that the ~~failure~~ actions
1263 of the party * * *." This rule text would provide a functional
1264 foundation for Committee Note discussion of the no-fault loss of
1265 information.

1266 Further discussion emphasized the importance of coming to rest
1267 on the version that seems best to the Committee. That version can
1268 be published for comment. All of the issues can be raised as
1269 questions addressed to the rule text that is preferred for now.
1270 There is no need to publish an alternative version that is limited
1271 to electronically stored information — the rule text changes are
1272 minimal, and the question can be clearly focused without cluttering
1273 the proposal for comment. What is important is to raise all
1274 foreseeable issues clearly, so that all participants have an
1275 opportunity to comment. That will reduce the risk that dramatic
1276 changes in response to public comments will require republication
1277 for a second round of comments. There is continuing interest in
1278 allowing sanctions, not mere curative measures, when loss of
1279 information as a result of a party's negligence irreparably limits
1280 another party's opportunity to litigate. This threshold of injury
1281 is higher than the substantial prejudice that justifies sanctions
1282 when information is lost because of willfulness or bad faith.
1283 Despite some continuing support for dropping the irreparably
1284 deprived provision entirely, it is better to publish it.

1285 Discussion of Rule 37(e) resumed on the second day of the
1286 meeting. The Subcommittee convened early and explored several
1287 alternatives. In the end, it agreed unanimously to abandon
1288 publication of an ESI-only alternative as an appendix, and to
1289 revise proposed (e)(1)(B) as follows:

1290 (B) impose any sanction listed in Rule 37(b)(2)(A) or give an
1291 adverse-inference jury instruction, but only if the court
1292 finds that the party's actions ~~failure~~:
1293 (i) caused substantial prejudice in the litigation and
1294 was willful or in bad faith; or
1295 (ii) irreparably deprived a party of any meaningful
1296 opportunity to present or defend against the claims
1297 in the litigation ~~action and was negligent or~~
1298 ~~grossly negligent~~.

1299 The Subcommittee agreed that "actions" include inaction, a
1300 failure to act. The focus is on what a party did or did not do, and

1301 on "irreparably deprived." The Note will focus the "Act of God"
1302 concern by discussing events beyond a party's control. Such events
1303 as a fire, earthquake, or severe storm are not a party's act.
1304 Sanctions will not be available. But curative measures will remain
1305 available.

1306 A motion to recommend that the Standing Committee approve
1307 publication of proposed Rule 37(e) as thus revised was unanimously
1308 approved.

1309 *Rule 84*

1310 The tentative conclusion that Rule 84 should be abrogated was
1311 not listed as an action item on the agenda for this meeting in
1312 deference to the other matters calling for prompt action. But it
1313 would be useful to reconfirm the conclusion to prepare the way for
1314 publication as part of a single package with the other proposals
1315 that have been approved for publication this summer or will be
1316 recommended for approval. The Standing Committee is increasingly
1317 interested in assembling packages of proposals for periodic
1318 publication, rather than confront the bench and bar with smaller
1319 sets of amendments every year.

1320 Judge Pratter noted that the Rule 84 Subcommittee initially
1321 thought that abrogation is the obvious right answer. But rather
1322 than act quickly, it took a step back to make sure abrogation is
1323 the right answer. One important consideration, as discussed in
1324 earlier Committee meetings, is that the Rules Enabling Act process
1325 is not well adapted to generating, maintaining, and revising a good
1326 and useful set of forms. The Working Group on Forms working with
1327 the Administrative Office does good work, with a more flexible
1328 process. The Committee can support their work, perhaps with a
1329 liaison to ensure a reliable means of communication.

1330 Andrea Kuperman has provided a careful analysis of the
1331 question whether the Forms would continue to influence practice
1332 after formal abrogation. She found that courts readily respond by
1333 recognizing that abrogated rules no longer control. Habits of
1334 thought formed under the Forms' influence may carry forward, but
1335 there is nothing wrong with that. The most sensitive questions are
1336 likely to involve pleading. The process of weaving together the
1337 notice pleading traditions embodied in the pleading Forms and more
1338 recent Supreme Court decisions will continue either way.

1339 Forms 5 and 6 present a unique question. Rule 4(d)(1)(D)
1340 directs that a request to waive service must "inform the defendant,
1341 using text prescribed in Form 5, of the consequences of waiving and
1342 not waiving service." Although this text does not refer to Form 6,
1343 Form 6 is embedded in Form 5. It likely will prove desirable to
1344 maintain waiver forms that are, in some way, "official." The

1345 Subcommittee will consider this question further and circulate a
1346 proposed solution to the Committee in time for action to be
1347 submitted to the Standing Committee in June.

1348 The Committee unanimously approved abrogation of Rule 84,
1349 subject to adopting an appropriate resolution of the questions
1350 posed by Forms 5 and 6.

1351 *Rule 17(c)(2)*

1352 Rule 17(c)(2) provides: "The court must appoint a guardian ad
1353 litem — or issue another appropriate order — to protect a minor or
1354 incompetent person who is unrepresented in an action."

1355 This seemingly innocent provision presents a difficult
1356 question. When is a court obliged to inquire into the competence of
1357 an unrepresented party? It would be possible to read the rule to
1358 require an inquiry in every case, to ensure that its purpose is
1359 fulfilled. It also is possible to read the rule in a quite
1360 different way, requiring appointment of a guardian only if an
1361 unrepresented party has been adjudicated incompetent in a separate
1362 proceeding and the adjudication is in fact brought to the court's
1363 attention. A wide range of alternatives lie between these readings.
1364 The court wrestled with this mid-range of alternatives in *Powell v.*
1365 *Symons*, 680 F.3d 301 (3d Cir.2012). It lamented "the paucity of
1366 comments on Rule 17," and adopted an approach that raises a duty of
1367 inquiry only when there is "verifiable evidence of incompetence."
1368 "[B]izarre behavior alone is insufficient to trigger a mandatory
1369 inquiry * * *." Judge Sloviter, a former member of the Standing
1370 Committee, concluded by noting that "We will respectfully send a
1371 copy of this opinion to the chairperson of the Advisory Committee
1372 to call to its attention the paucity of comments on Rule 17." 680
1373 F.3d at 311 n. 10.

1374 Discussion began with the observation that the cost of
1375 appointing a guardian or other representative is a problem. Who
1376 will pay? This is not merely an academic concern. It is a serious
1377 problem.

1378 Another judge thought it likely that many judges have not
1379 thought of this. "We get a lot of pro se cases." Many are
1380 frivolous; "we evaluate the case, not the litigant." If a case
1381 seems to have potential merit, his court has funds that can be used
1382 to pay court costs and makes an effort to find representation. But
1383 the possible need to inquire into the party's competence is not
1384 considered.

1385 Another judge echoed the concern that this is a difficult
1386 question. The rate of pro se filings continues to grow. It has
1387 reached 40% in the District of Arizona, including many actions by

1388 prisoners. The rate approaches 50% in the Eastern District of
1389 California. Inquiring into competence is a difficult undertaking.
1390 The Third Circuit recognizes that "once the duty of inquiry is
1391 satisfied, a court may not weigh the merits of claims beyond the §
1392 1915A or § 1915(e)(2) screening if applicable." It is uncertain
1393 what amounts to "verifiable evidence of incompetence." The Ninth
1394 Circuit appears to find a duty of inquiry when there is a
1395 "substantial question." That may impose a greater obligation on the
1396 district court. This question may arise with some frequency — the
1397 Third Circuit opinion has already been cited by at least six
1398 district courts. The question is whether it is better to leave this
1399 question for further development in the genius of the common-law
1400 process, or to take it into the Enabling Act process now?

1401 A Committee member suggested that as a practical matter, the
1402 immediate reaction is to appoint counsel. That makes the issue go
1403 away. Then counsel has to wrestle with the question whether the
1404 party is competent to function as a client — there still may be a
1405 need for an actual representative. It might help to survey lawyers
1406 who represent pro se litigants to see whether a rule change is
1407 needed.

1408 Another judge asked how the Committee could go about gathering
1409 useful information. One example appears in the statutory command to
1410 appoint a guardian for a child involved in a child pornography
1411 case. The statute commands, but there is no money to pay for it.
1412 "Learning more may suggest a rule."

1413 Yet another judge offered an analogy to the "fairly high
1414 standard" for referring a criminal defendant for a determination of
1415 competency. There will be a mine-field of problems if some
1416 analogous practice is adopted for pro se civil litigants.

1417 A Committee member suggested that the case law seems to
1418 address the problem when a person who appears without a guardian
1419 later appears to be not competent. Perhaps the common law should be
1420 allowed to develop. At the same time, it might be useful to reach
1421 out to groups who work with people who might become enmeshed in
1422 this problem.

1423 A judge suggested that "there is a huge set of people out
1424 there who are not known to be incompetent." The rulemaking problems
1425 overlap with state law. Perhaps it is better to put these problems
1426 aside for now?

1427 A different judge observed that the rule appears to be written
1428 to say this is the court’s responsibility. That can be onerous.

1429 Another analogy was offered. These problems arise in
1430 proceedings to remove aliens to other countries. Screening for

1431 incompetence is a real problem.

1432 The question was put by framing three alternatives: (1) These
1433 issues could be left to continued development in the courts, a
1434 "common-law" solution. (2) We could undertake a thorough survey of
1435 the cases to form a comprehensive understanding of the approaches
1436 taken to define a standard for a duty of inquiry. Or (3) We could
1437 undertake a broader inquiry by reaching out to others to attempt to
1438 reach some understanding of the extent and frequency of litigation
1439 by unrepresented incompetents.

1440 These alternatives were supplemented by a fourth: the question
1441 could be kept on the long-term agenda for future consideration.

1442 A motion was made to take the topic up again in a year, after
1443 doing a survey of the case law. One question to put to the cases is
1444 how often the issue of competence is addressed "up front," compared
1445 to how often it is raised only later in the proceedings.

1446 An earlier theme returned. "This is a world of limited
1447 resources." There is no present proposal to change the rule. "We're
1448 not likely to be able to do anything about it." It is best to
1449 attempt nothing now, but to keep the question on the agenda.

1450 A similar view was expressed. The question should be kept on
1451 the agenda, within a broader system that attempts to keep track of
1452 everything on the agenda that affects pro se litigation.

1453 Another suggestion was that the Committee could ask for advice
1454 from the Committee on Court Administration and Case Management.

1455 These questions returned on the second day of the meeting.
1456 Three approaches were again suggested: (1) Take it off the table.
1457 (2) Keep it in the cupboard, to be revisited next year. (3) Keep it
1458 on a more active list, looking into the case law and perhaps asking
1459 whether the Committee on Court Administration and Case Management
1460 is interested.

1461 A Committee member confessed to reading 20 Rule 17(c)(2) cases
1462 overnight. "The fact patterns are quite varied." And there are many
1463 more cases. Courts recognize that there must be some basis to make
1464 a decision, not just a party's assertion. Perhaps we should wait a
1465 year.

1466 The Committee was reminded that the question is not the
1467 standard for appointing a representative once the issue is raised.
1468 The question is to identify the circumstances that oblige the court
1469 to raise the issue of competence without a motion. Is there a duty
1470 to inquire simply because a party is behaving in a way that
1471 suggests issues about competence? How high should the threshold be?

1472 Remember that at least as articulated, the Ninth Circuit threshold
1473 may be lower, imposing the duty of inquiry more frequently, than in
1474 at least some other circuits.

1475 Another member suggested that it would be helpful to have some
1476 research to support further consideration of a problem that likely
1477 goes by without being considered in many cases.

1478 The relation between screening and Rule 17(c)(2) was brought
1479 back into the discussion. "There are cases that are delusional."
1480 But "no one expects an amendment to be enacted in the near term. We
1481 have many other things to do." There likely will be a tide of
1482 comments on the proposals the Committee is recommending for
1483 publication this summer. Why undertake further research now?

1484 A judge volunteered to commission research by a summer intern.
1485 The research could help decide whether to move these questions up
1486 for further attention in the near future. This offer was accepted.
1487 The target will be to get a memorandum out to the Committee by late
1488 summer.

1489 *Rule 41(a): Dismissal by All Parties*

1490 Judge Martone, District of Arizona, brought to the Committee's
1491 attention a possible source of dissatisfaction with the provisions
1492 of Rule 41(a)(1)(A)(ii) and (a)(1)(B) that combine to enable all
1493 parties to a litigation to stipulate to dismissal without
1494 prejudice. The parties in a case before him asked to vacate a firm
1495 trial date so they could complete the details of anticipated
1496 settlements. He refused. The parties then sought to reopen the
1497 question and he again refused. Three days later the parties filed
1498 a stipulation dismissing the action without prejudice.

1499 Judge Martone's order in that case directed the parties to
1500 address two questions. First, is the district plan for setting firm
1501 trial dates, adopted under the Civil Justice Reform Act, an
1502 "applicable federal statute" that, under the express terms of Rule
1503 41(a)(1)(A), limits the right to dismiss without prejudice by
1504 stipulation of all the parties? And second, was the stipulation in
1505 this case such improper conduct or collusion as to authorize an
1506 exercise of inherent power to reject it?

1507 The express language of Rule 41 provides that the stipulation
1508 is effective "without a court order." It responds to a long and
1509 deep tradition of party control. Just as the parties can moot an
1510 action by settlement, so they can agree to dismiss on terms that do
1511 not bar a second action on the same claim. The simple acts of
1512 filing an action and litigating it even deep into the pretrial
1513 process do not create such court interests as to warrant denial of
1514 the right to dismiss without prejudice.

1515 This traditional understanding may be subject to challenge in
1516 an era of increasing judicial responsibility for case management.
1517 Setting a firm trial date has proved a valuable and effective
1518 management tool. Increasing management responsibilities, moreover,
1519 increase the court's investment in the action. Allowing the parties
1520 to thwart the control exercised in setting a firm trial date, and
1521 to waste the court's investment, might seem too high a price to pay
1522 to preserve the traditional freedom to dismiss without prejudice
1523 when all parties agree to do so.

1524 This introduction was elaborated by a description of the
1525 litigation that confronted Judge Martone. Many parallel cases were
1526 pending before other judges in the same court. The parties were
1527 undertaking to settle some 500 cases. The circumstances made it
1528 imperative to get all of the cases virtually settled before they
1529 could reach final settlements in any. Other judges, confronted with
1530 this problem, agreed to continue the cases, requiring periodic
1531 progress reports every 60 days. Settlements actually were
1532 accomplished. That approach worked.

1533 A broader question was asked: Is there a general problem
1534 around the country with parties who stipulate to dismiss without
1535 prejudice in order to escape a particular case-management program?
1536 How frequently does this happen? And how often is the dismissal in
1537 fact followed by a new action? If there is a new action, how often
1538 is it possible to salvage much, or most, of the management invested
1539 in the first action?

1540 A Committee member replied that he had never heard of a
1541 stipulated dismissal followed by reinstatement. This is not like
1542 the old practice of settling a case pending appeal and asking that
1543 the district-court judgment be vacated. The judgment is a public
1544 act that should not be subject to undoing by the parties. But
1545 before judgment the case is the parties' property. "We can rely on
1546 the defendant to protect the public interest. The defendant does
1547 not want to be hit with another action."

1548 Another member agreed. It will be a rare event to find that
1549 the parties "are in the same place" in a complex case. Stipulated
1550 dismissals without prejudice do not happen often.

1551 A third member observed that statutes of limitations provide
1552 a disincentive. The risk of losing the claim to a limitations bar
1553 falls entirely on the plaintiff. "There is not a vast reservoir of
1554 actions that will spring" back to life after a stipulated
1555 dismissal.

1556 A fourth member said that the defendant's agreement to the
1557 dismissal "should do it."

1558 A judge noted that the risk of judge shopping is reduced by
1559 the rules in many courts that would reassign a refiled case to the
1560 judge who was assigned to the original case.

1561 Another judge said that in nine years on the bench he had
1562 never had a case where he thought the parties were colluding to
1563 achieve an improper result through dismissal. There have been cases
1564 where the parties need time to settle. They can be resolved by
1565 placing the case in suspense and denying all pending motions
1566 without prejudice.

1567 A third judge said he had never seen a problem. The right to
1568 a stipulated dismissal is not abused. And it is important to
1569 remember that courts are established to serve the public.

1570 And a fourth judge reported that sixteen years of experience
1571 with settlement conferences shows many reasons why parties need to
1572 suspend proceedings while working out a settlement. It works to
1573 suspend the case while requiring regular progress reports. And it
1574 may help to reflect that fewer than 2% of civil actions go to
1575 trial. There will not be many cases in which a stipulated dismissal
1576 is followed by revival in a new action that actually goes to trial.

1577 The Committee agreed that there is no need to explore this
1578 question further. It will be removed from the agenda.

1579 *Questions Referred from CACM*

1580 The Committee on Court Administration and Case Management has
1581 referred a number of questions about possible changes in the Civil
1582 Rules.

1583 Videoconferencing for Civil Trials. Judge Sentelle, Chair of the
1584 Judicial Conference Executive Committee, referred this question to
1585 both the Committee on Court Administration and Case Management and
1586 the Committee on Rules of Practice and Procedure. The question was
1587 asked by a judge who helps out courts in other districts "by
1588 handling civil cases remotely through our videoconferencing
1589 facilities." He observes that videoconferencing can work to
1590 "remotely handle the pre-trial aspects of a variety of civil cases
1591 and even try jury waived cases * * *." Any limits that may be
1592 imposed by the statutes that define the places where a district
1593 judge can exercise judicial functions are outside the Enabling Act
1594 process. But it is a fair question whether the Civil Rules might be
1595 amended to support this kind of cooperation.

1596 The most immediately relevant rule appears to be Rule 43(a).
1597 Rule 43(a) directs that testimony be taken in open court, but
1598 concludes: "For good cause in compelling circumstances and with
1599 appropriate safeguards, the court may permit testimony in open

1600 court by contemporaneous transmission from a different location."
1601 This standard was deliberately set very high. Should it be relaxed
1602 in some way to enable a judge in one district to better participate
1603 in proceedings in another district without leaving the home
1604 district?

1605 The first observation was that the pending amendments of Rule
1606 45 raised questions about the distance witnesses should be
1607 compelled to travel to attend a hearing or trial. The Committee
1608 concluded that the current limits should remain undisturbed, even
1609 though the 100-mile rule goes back to the Eighteenth Century. Rule
1610 43 is extremely cautious about the circumstances that justify live
1611 testimony without travelling to the hearing or trial. Starting down
1612 the road to greater use of remote transmission "is a big deal." We
1613 should be careful.

1614 The next observation was that nothing in the rules inhibits
1615 conferences with attorneys by telephone or video. That practice is
1616 routine. District judges in Alaska and Hawaii regularly participate
1617 in actions pending in Arizona by these means. Even in criminal
1618 cases, where confrontation is an important consideration, video
1619 hearings can be used in determining competence. It is a fair
1620 question whether judges should be permitted to do anything that
1621 rules now prevent.

1622 Another judge focused on the suggestion that a bench trial
1623 might be held in one courtroom while the judge is in another
1624 courtroom. That is quite different from using video or like means
1625 when communicating directly with one person or with a few more in
1626 a conference, not a contested proceeding.

1627 A similar observation was that remote witnesses are heard
1628 regularly in criminal competency hearings.

1629 A Committee member with extensive arbitration experience said
1630 that international arbitrations often involve participation by
1631 people in all corners of the earth, and in circumstances that make
1632 it prohibitively expensive to bring them all to one place. Remote
1633 transmission has proved workable in such circumstances, and is
1634 often useful in less complex situations.

1635 It was suggested that one useful step would be to foster an
1636 exchange of techniques that courts are using now. The FJC could
1637 gather the information and put it in a bench book or in educational
1638 programs.

1639 The early stages of these topics means that CACM has not yet
1640 determined whether there are things courts should be allowed to do
1641 but that are prevented by current rules, or that could be guided
1642 and encouraged by well-thought rules amendments. The Committee

1643 concluded that a report should be made to CACM that current rules
1644 seem sufficiently flexible to support many useful practices, but
1645 that the Committee will be pleased to consider any recommendations
1646 that CACM may advance.

1647 E-Filing Issues: CACM has urged consideration of two issues that
1648 arise in conjunction with development of the next generation of the
1649 CM/ECF system for case management and electronic case filing.

1650 The first issue is whether the Notice of Electronic Filing
1651 that court systems automatically generate should be recognized as
1652 a certificate of service. CACM endorses the concept and asks
1653 consideration "whether the federal rules of procedure should be
1654 amended to allow an NEF to constitute a certificate of service when
1655 the recipient is registered for electronic filing and has consented
1656 to receive notice electronically." This approach would not apply to
1657 litigants that have not registered for electronic filing or have
1658 not consented to electronic service.

1659 The second issue goes to retention of records requiring a
1660 third party's "wet signature." A number of alternatives are
1661 possible. CACM prefers "a national rule specifying that an
1662 electronic signature in the CM/ECF system is *prima facie* evidence
1663 of a valid signature." A person challenging the validity of the
1664 signature would have the burden of proving invalidity.

1665 The introduction of these questions concluded by asking
1666 whether the time has come to establish, under auspices of the
1667 Standing Committee, an all-committees group to work on a variety of
1668 issues that may arise with respect to e-filing. Rule 5(d)(3), for
1669 example, provides for e-filing only according to a local court
1670 rule, and further provides that a local rule may require e-filing
1671 only if reasonable exceptions are allowed. Should this be
1672 reexamined in conjunction with the new CM/ECF system and the
1673 continuing development of electronic communication? Another example
1674 that has been noted repeatedly is Rule 6(d), which allows an
1675 additional 3 days to act after being served by electronic means.
1676 Whatever the situation when this provision was added, is it still
1677 sensible to add the 3 days? No doubt other issues will be
1678 identified. Many of them will be common to several different sets
1679 of rules. When the time comes to address them, a joint enterprise
1680 seems valuable. And the time may be now, or soon.

1681 Discussion began with a report that the Bankruptcy Rules
1682 Committee has proposed a rule on e-signatures that treats e-filings
1683 as if signed in ink. A scanned copy of a paper document signed
1684 under penalty of perjury has the same effect as a wet signature.
1685 The filer does not have to retain the originals. "These are
1686 sensitive issues." The Bankruptcy Rules Committee hopes for
1687 guidance on a trans-committee level. There is a great value in

1688 uniformity across the different sets of rules.

1689 It was further noted that there is a federal e-signing
1690 statute, and a Uniform Act that has been adopted in 46 states. Many
1691 federal agencies have e-signature rules. There is a statute for the
1692 IRS. One possibility may be that study by the rules committees will
1693 show problems so general as to warrant a recommendation for
1694 additional legislation. But that possibility lies in the future, as
1695 something the joint enterprise may conclude is useful more than as
1696 something to be pursued at the outset.

1697 The discussion of e-signing provoked a reminder that there are
1698 many issues in addition to e-signatures. Changes in e-filing rules
1699 may well prove desirable. Much will depend on the final shape of
1700 the next-generation CM/ECF system.

1701 Discussion concluded by endorsing the value of launching a
1702 project that brings all the advisory committees together under the
1703 guidance of the Standing Committee.

1704 Restricted Filers: The next generation of the CM/ECF system will
1705 include a national database, available only to "designated court
1706 users," that identifies "restricted filers." Examples of restricted
1707 filers are prisoners subject to restrictions under the Prisoner
1708 Litigation Reform Act and attorneys who have been subject to
1709 disciplinary action. The question arises from the requirement in
1710 Rule 4(a)(1)(C) that a summons must "state the name and address of
1711 the plaintiff's attorney or — if unrepresented — of the plaintiff."
1712 Many restricted filers appear pro se. And many pro se plaintiffs
1713 change addresses frequently. Changed addresses will frustrate
1714 identification. A new address will mark the filer as "new" in the
1715 system. CACM suggests that Rule 4(a)(1)(C) be amended to read: "(C)
1716 state the name and address of the plaintiff's attorney or — if
1717 unrepresented — the plaintiff's name, address, and last four digits
1718 of the social-security number of the plaintiff."

1719 Discussion began with an expression of real concern about
1720 requiring the plaintiff to disclose part of the social security
1721 number. "We need to reflect on the mental makeup of pro se
1722 plaintiffs." Many of them will resist this requirement. There also
1723 is a risk with public availability: it is often easy to get the
1724 first five digits of the number from public data. "We should
1725 require redacting — it will be a real burden."

1726 Safer alternatives might be considered, such as part of a
1727 passport number, or a driver's license number, or the number in a
1728 state-issued identification card. This might be added to the face
1729 of the complaint form. It might be feasible to ask the clerk to
1730 inspect the document. And it may be feasible to find a work-around
1731 for plaintiffs who lack any of these documents.

1732 The discomfort with using social-security numbers was
1733 expressed by another participant, who suggested that it might help
1734 to require a plaintiff to disclose all names the plaintiff has ever
1735 been known by. And better use of "match technology" might be part
1736 of the solution.
1737
1738 It was asked how often these problems arise: how many
1739 disbarred attorneys attempt to file, how many prisoners who have
1740 maxed-out?

1741 The clerk answered that her office always checks attorneys;
1742 about once a year they catch one who has been disbarred. Her court
1743 has not had much of a problem with maxed-out prisoners. A judge
1744 agreed that his court has a much greater problem with disbarred
1745 attorneys than with other restricted filers.

1746 It was pointed out that the Seventh Circuit's private site can
1747 identify restricted filers with "the press of a button." This
1748 feature could be nationalized. Or party identification can be
1749 sought through PACER.

1750 Bankruptcy courts have similar problems, but they are dealt
1751 with through such means as withdrawing e-filing privileges. It is
1752 not apparent that there is a need for added protections.

1753 These questions seem best addressed initially to those who are
1754 working directly with the next generation CM/ECF system. The
1755 concerns about requiring disclosure of even part of a social-
1756 security number can be conveyed to them. It seems premature to
1757 attempt judgments about Civil Rules amendments before there is a
1758 better sense of how the new CM/ECF system will work, what burdens
1759 may be placed on clerks' offices, and what burdens may be placed on
1760 plaintiffs. These reactions will be communicated to the Committee
1761 on Court Administration and Case Management.

1762 *Rule 62*

1763 The Appellate Rules Committee is carrying forward work on
1764 stays pending appeal and appeal bonds. It is recognized that the
1765 work is likely to involve Rule 62. The questions involve such
1766 matters as the fit between the 14-day automatic stay, the 28-day
1767 period after judgment to move for relief under Rules 50, 52, and
1768 59, and the 30-day period to file a notice of appeal. Other
1769 questions also are being studied. There are not yet any specific
1770 proposals to amend the Civil Rules.

1771 It was agreed that the Civil Rules Committee should designate
1772 someone to work with the Appellate Rules Committee. Depending on
1773 the choices of the Appellate Rules Committee, it may prove
1774 desirable to appoint a joint subcommittee in the form that has

1775 proved useful in past projects that require the integration of
1776 Civil Rules with Appellate Rules.

1777 *International Child Abduction: Prompt Return*

1778 *Chafin v. Chafin*, 133 S.Ct. 1017 (2013), ruled that return of
1779 a mother and child to the habitual residence determined by the
1780 district court under the Hague Convention on the Civil Aspects of
1781 International Child Abduction did not moot the father's appeal. The
1782 Court's opinion emphasized that courts nonetheless "should take
1783 steps to decide these cases as expeditiously as possible * * *.
1784 Many courts already do so." Justice Ginsburg also emphasized the
1785 need for speedy decision, and in footnote suggested that "the
1786 Advisory Committees on Federal Rules of Civil and Appellate
1787 Procedure might consider whether uniform rules for expediting
1788 [Convention] proceedings are in order." 133 S.Ct. at 1029 n. 3.

1789 Justice Ginsburg's suggestion was introduced with full
1790 agreement that these cases should be treated with all possible
1791 dispatch. The question is whether that goal is better furthered by
1792 adopting encouraging provisions in court rules or by other means.

1793 The need for court rules may be examined in light of the
1794 Court's recognition that most courts understand the need for prompt
1795 decision and do their best to move these cases as quickly as
1796 possible. The Court's encouragement will add force to this common
1797 approach. Judicial education efforts can supplement the Court's
1798 urging. The Federal Judicial Center International Litigation Guide,
1799 for example, includes a 2012 volume on the Hague Convention; the
1800 chapter on procedural issues begins with four pages stressing that
1801 expeditious handling is required by Article 11 of the Convention
1802 and provided by the courts.

1803 Given these alternative resources, there is added reason to
1804 consider the reasons that may weigh against adopting a Convention-
1805 specific court rule. State courts have concurrent jurisdiction of
1806 these proceedings, so a federal court rule would not cover all
1807 cases. More importantly, the Judicial Conference has a longstanding
1808 and regularly renewed policy opposing statutes or rules that give
1809 docket priority to specific types of litigation. One priority, or
1810 a few priorities, could easily interfere with management of
1811 conflicting needs for immediate attention by a court burdened by
1812 many cases of many different types. The road from one priority to
1813 many priorities, moreover, is all too easy to follow. Conflicting
1814 priority commands would inevitably emerge, confusing and impeding
1815 wise allocation of scarce judicial resources.

1816 Discussion began with a judge's suggestion that FJC education
1817 of judges will work better than a court rule.

1818 Another judge recalled spending a year with a Hague Convention
1819 case, involving two parents "who hate each other." The need for
1820 prompt disposition is well understood. The problems with
1821 implementing it are not susceptible to resolution by court rule.
1822 But at least one parent will provide constant reminders of the need
1823 for speed. And a court of appeals can expedite matters by deciding,
1824 "opinion to follow."

1825 Still another judge observed that "ten minutes of reading will
1826 instruct any judge on the need for expedition. I cannot imagine a
1827 judge who will not understand the need." His court gets these cases
1828 constantly, and although it is one of the busiest courts in the
1829 country the judges manage to resolve these cases promptly.

1830 Still another judge reported that discussion with the Mass
1831 Torts group at the Judicial Conference meeting in March found
1832 agreement that a rule will not help. The Supreme Court has resolved
1833 the mootness problem. Any court of appeals will expedite the
1834 appeals now that they are not open to dismissal for mootness if
1835 return to the home country has been accomplished.

1836 The Committee decided that no action should be taken on this
1837 matter.

1838 *Rule 23*

1839 Dean Klonoff reported for the Rule 23 Subcommittee. Last
1840 November,the Subcommittee identified a list of issues that may
1841 deserve study. The issues were divided between "front burner" and
1842 "back burner" categories. The lists are tentative, both in
1843 determining what issues deserve study and in assigning priorities
1844 among whatever issues come to be studied. Further work has been
1845 stayed pending disposition of the several class-action cases
1846 pending in the Supreme Court.

1847 The 5:4 decision in the *Comcast* case rewrote the question
1848 presented and went off on narrow grounds. It is a technical
1849 decision, followed by a grant-vacate-remand disposition of a couple
1850 of similar cases. It does not provide the guidance that some had
1851 hoped to come from the Court. The Subcommittee will need to study
1852 the impact of this decision. The *Amgen* decision is largely limited
1853 to securities class actions. The Subcommittee will resume
1854 deliberations, and at some point will want to consult with the
1855 bench and bar on what issues should be studied in depth. A
1856 miniconference is a likely means of gathering views. But a
1857 miniconference or similar venture is not likely in the near future.

1858 A Subcommittee member pointed out that the Appellate Rules
1859 Committee is considering whether rules should be adopted to govern
1860 settlement by an objector pending appeal from a class-action

1861 judgment. "This is a problem. There has been a lot of discussion.
1862 The Subcommittee will want to work on this." And it will be
1863 important to see what impact *Comcast* has, "if any."

1864 *Pleading*

1865 It was noted that the agenda continues to hold a place for
1866 consideration of pleading standards as they evolve in reaction to
1867 the *Twombly* and *Iqbal* decisions. The Federal Judicial Center is
1868 working on a study of all dispositive motions, advancing — among
1869 other things — its initial study of the impact of these decisions.
1870 No decision has been made as to the appropriate time to return to
1871 these questions.

1872 *Publicizing Rules Amendments*

1873 It has been suggested that the Committee should consider
1874 whether more should be done to publicize rules amendments as they
1875 happen. The seeming widespread disregard of Evidence Rule 502 in
1876 its early years provides an object lesson on the occasional — or
1877 perhaps more frequent — failure of rules amendments to be
1878 recognized and implemented by the bar.

1879 A first effort might be made to draw attention to the pending
1880 revisions of Rule 45. It will be important to help the bench and
1881 bar understand how they will work. Technically, a lawyer who on
1882 December 2 issues a subpoena from a district court in California
1883 for discovery in an action pending in the district court in Arizona
1884 will issue a nonbinding instrument. Under revised Rule 45 the
1885 subpoena must issue from the Arizona court where the action is
1886 pending.

1887 Another example of a rule change that will affect many lawyers
1888 is the impending change of the Appellate Rules to collapse separate
1889 statements of the case and of the facts into a single statement. It
1890 will be important to educate lawyers in this change.

1891 Initial suggestions were that the Federal Judicial Center
1892 might be helpful in communicating rules changes to the federal
1893 courts. There might be some way for the Committee to draw attention
1894 to new rules by an open letter, or by an article prepared by some
1895 appropriate person or entity. The Evidence Rules Committee, for
1896 example, became concerned that Evidence Rule 502 is underutilized.
1897 It held a conference and the Reporter, Professor Capra, wrote it up
1898 as a law review article. But any such efforts must be tempered by
1899 concern about the Committee's proper role. There is a real risk
1900 that works that seem to be sponsored by the Committee may generate
1901 post hoc and spurious "legislative history," giving unintended
1902 meaning to the new rules.

1903 A Committee member said that "web site practitioners"
1904 regularly visit the sites of the FJC and the Judicial Panel on
1905 Multidistrict Litigation. These lawyers would read new rules,
1906 whether the full text is posted on the site or whether instead
1907 there is a simple "alert" that new rules have been adopted.

1908 Another member noted that the Civil Procedure ListServ can be
1909 used to draw the attention of law professors.

1910 The ABA Litigation Section was suggested as another source to
1911 reach many lawyers. The Litigation Section is the largest ABA
1912 section, and regularly holds CLE programs. A Committee member said
1913 that Rule 45 would be included in upcoming programs — that it is
1914 easy to accomplish this form of education.

1915 Beyond the ABA, the Federal Bar Association could be notified
1916 of rules changes, expecting that the chapters in large cities will
1917 be an effective means of communication.

1918 The courts of appeals have regular conferences. It should be
1919 possible to include a ten-minute identification of new rules on
1920 their programs.

1921 A more adventuresome suggestion from an observer was that
1922 perhaps CM/ECF systems could be programmed to provide an automatic
1923 notice of rules changes to lawyers the first time each lawyer signs
1924 into the system.

1925 A practical note was sounded by the observation that new rules
1926 generally apply to pending cases. The Administrative Office Forms
1927 Group has begun work on a new subpoena form for bankruptcy cases.
1928 These forms have been sent to the Civil Rules Committee, and are
1929 being considered here as well. And the bankruptcy courts have a
1930 "blast e-mail" system that is sent to all e-filers whenever a rule
1931 or form is changed, with links to the new version. All federal
1932 courts could be urged to do this.

1933 The Administrative Office staff noted that the package of
1934 rules amendments the Supreme Court sends to Congress is sent to all
1935 federal judges. The Administrative Office can ask court clerks and
1936 executives to send notice to all e-filers. The notice could simply
1937 advise consulting the e-file versions of new rules on the AO web
1938 site. And proposed amendments are sent to legal publishers.

1939 A still more intriguing observation was that the Advisory
1940 Committee may have submitted an amicus brief to the Supreme Court
1941 in the case considering the validity of Rule 35, *Sibbach v. Wilson*.

1942 Cautions were sounded about the extent to which the FJC might
1943 be involved. The FJC regularly engages in many efforts to keep

1944 federal judges current on new developments, including rules
1945 amendments. Court attorneys are included in these efforts. But it
1946 has not taken on the role of continuing education for the bar in
1947 general.

1948 *Impending Publication*

1949 Educating bench and bar on newly adopted rules is important.
1950 It also is important to the process to encourage widespread
1951 participation in the public comment process when proposed rules are
1952 published for comment. Notices are sent to all state bars, and to
1953 a goodly number of other groups and individuals that have indicated
1954 interest in the process. Committee members were encouraged to think
1955 of ways to stimulate interest that might be adopted if, as
1956 recommended, extensive sets of amendments are approved for
1957 publication this summer.

1958 *Technology Assisted Review*

1959 Computers are being put to the task of sorting through vast
1960 amounts of computer-based information to reduce the burdens of
1961 discovery. Much attention focuses on retrieving information to
1962 respond to discovery requests, but computers can be used for other
1963 discovery-related purposes as well. A party receiving responses to
1964 discovery requests, for example, may use computer searches to
1965 extract the useful information from the produced documents and also
1966 to search for leads to other responsive and relevant materials that
1967 were not included in the responses. The most sophisticated of these
1968 computer-assisted methods have come to be referred to as
1969 "technology assisted review." One of these methods, called
1970 "predictive coding," relies on humans familiar with the litigation
1971 to "teach" a computer how to identify relevant and responsive
1972 documents.

1973 To assist the Committee in becoming familiar with the
1974 opportunities to advance the cause of proportional discovery
1975 through advanced computer search techniques, The Duke Law School
1976 Center for Judicial Studies presented a panel on predictive coding.
1977 The panel presentation was an introduction to a day-long program to
1978 be presented by the Center on April 19. The panel was moderated by
1979 John K. Rabiej, Director of the Center, and included Gordon V.
1980 Cormack, Maura R. Grossman, John J. Rosenthal, and Ian J. Wilson.

1981 The panel presentation was followed by questions. The
1982 questions and answers reflected several points. Many lawyers,
1983 litigants, and courts are unfamiliar with TAR or uneasy about it.
1984 At its best, it can recall a higher fraction of relevant documents
1985 than human reviewers find, and at lower cost. One source of cost
1986 saving can be greater precision in selecting only relevant
1987 documents; fewer documents to review for privilege,

1988 confidentiality, or other protections means lower cost for a
1989 process that most litigants prefer to conduct by human review. It
1990 is important to recognize that properly implemented search methods
1991 are at least as good as human review, but to accept that neither
1992 approach achieves perfection. "It is not easy to defend a discovery
1993 response process that yields 80% recall." And it must be recognized
1994 that not every process that may be labeled as technology assisted
1995 review is equal to every other process. The market of providers is
1996 likely to sort itself out in the coming years.

1997 *Next Meeting*

1998 The next meeting is set for November 7 and 8 in Washington,
1999 D.C. If the recommendations to publish rules proposals are approved
2000 — Rule 37(e) changes and some less important proposals have already
2001 been approved — that will be a good time to schedule the first
2002 public hearing on the proposals. Given the history of past November
2003 hearings, and the likelihood that the November agenda will be
2004 relatively light in order to conserve energy for the work that will
2005 remain in digesting comments and testimony on the published
2006 proposals, it seems safe to set aside the first day, November 7,
2007 for the hearing. If the hearing occupies the first full day, it may
2008 be necessary to anticipate a full day for the meeting on November
2009 8.

2010 *A Thank You*

2011 Judge Campbell concluded the meeting by expressing warm thanks
2012 to the University of Oklahoma and the Law School for being
wonderful hosts.

Respectfully submitted

Edward H. Cooper
Reporter

April 23, 2013 version

TAB 3

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TAB 3A

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

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

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

From: Honorable Reena Raggi, Chair
Advisory Committee on Federal Rules of Criminal Procedure

Date: May 8, 2013

Re: Report of the Advisory Committee on Criminal Rules

I. Introduction

The Advisory Committee on the Federal Rules of Criminal Procedure ("the Advisory Committee") met on April 25, 2013, in Durham, North Carolina, and took action on a number of proposals. The Draft Minutes are attached. (Tab D).

This report presents two action item for Standing Committee consideration:

(1) approval to transmit to the Judicial Conference a proposed amendment to Rule 12 (pretrial motions), and a conforming amendment to Rule 34; and

(2) approval to transmit to the Judicial Conference proposed amendments to Rules 5 and 58 (adding consular notification).

II. Action Items – Recommendations to Transmit Amendments to the Judicial Conference

1. ACTION ITEM – Rules 12 and 34

The Advisory Committee recommends approval of amendments to Rules 12 and 34. To facilitate consideration of this proposal, the following materials are attached:

Tab B.1 - 2013 Submitted Rule 12 Amendment – "clean" version (shows how Rule 12 would look if the Standing Committee approves of the Advisory Committee's proposed changes)
Tab B.2 - Blackline comparison of Current and Submitted Rule 12, showing proposed amendments
Tab B.3 - Blackline comparison of Current and Submitted Rule 34, showing proposed amendments
Tab B.4 - Reporters' 2013 Memorandum to Advisory Committee on Development of Rule 12 Amendment
Tab B.5 - 2011 Published Amendments to Rules 12 and 34

The proposed amendments originate in a 2006 request from the Department of Justice that "failure to state an offense" be deleted from current Rule 12(b)(3) as a defect that can be raised "at any time," in light of the Supreme Court's decision in *United States v. Cotton,* 535 U.S. 625, 629-31 (2002), holding that "failure to state an offense" is not a jurisdictional defect.

The Advisory Committee's efforts to effect such an amendment sparked extensive discussion within the Advisory Committee and between the Advisory and Standing Committees regarding various aspects of Rule 12. This resulted in three separate amendment proposals being presented to the Standing Committee, the third of which was approved for publication in August 2011. See Tab B.5. In response to the thoughtful public comments received and upon its own further review, the Advisory Committee has revised its third proposal for amendment further. These revisions will not require republication. A detailed chronology of the amendment's evolution, including the public comments received and changes made following publication, is contained in the Reporters' 2013 Memorandum to the Advisory Committee, a copy of which is attached. See Tab B.4.[1]

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[1]After publication, the Committee made the following six changes to the published amendment of Rule 12:

(1) restored language that had been removed from 12(b)(2) as to purpose of rule, and relocated it to (b)(1);
(2) deleted double jeopardy claims from the proposed list of 12(b)(3) claims that must be raised before trial;
(3) deleted statute of limitations from the proposed list of 12(b)(3) claims that must be raised before trial;
(4) added 12(c)(2) making explicit district courts' authority to extend or reset deadline for

The Advisory Committee now presents to the Standing Committee proposed amendments to Rules 12 and 34 that effect the original deletion requested by the Justice Department, clarify other aspects of the rules, and take into account public comments. See Tab B.1, B.2. The submitted proposals have the unanimous approval of the Advisory Committee.

The substantive features of the submitted amendment to Rule 12 (which also restyle these rules) can be summarized as follows:

(1) By contrast to current Rule 12(b)(1), which starts with an unexplained cross-reference to Rule 47 (discussing form, content, and timing of motions), submitted Rule 12(b)(1) achieves greater clarity by stating the rule's general purpose—the filing of pretrial motions (relocated from current rule 12(b))—before cross-referencing Rule 47.

(2) Submitted Rule 12(b)(2) identifies motions that may be made at any time separately from Rule 12(b)(3), which identifies motions that must be made before trial. This provides greater clarity—visually as well as textually—than current Rule 12(b)(3), which identifies motions that may be made at any time only in an ellipsis exception to otherwise mandatory motions alleging defects in the indictment or information.

(3) Submitted Rule 12(b)(2) recognizes lack of jurisdiction as the only motion that may be made "at any time while the case is pending," thus effecting the Justice Department's request not to accord that status to failure to state an offense.

(4) Submitted Rule 12(b)(3) provides clearer notice with respect to motions that must be made before trial.

(a) At the start, it clarifies that its motion mandate is dependent on two conditions:

i. the basis for the motion must be reasonably available before

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pretrial motions;

(5) deleted language referencing Rule 52;

(6) deleted proposed new language requiring showing of "cause and prejudice" and restored current "good cause" as standard for hearing late filed motions.

The third and sixth changes, made by the Advisory Committee at its April meeting, are not covered in the Reporter's March 2013 memo, but are explained in the draft minutes of the April meeting.

The Advisory Committee has amended the published Committee Note to reflect these changes to the rule's text and to state explicitly that the rule does not change statutory deadlines under provisions such as the Jury Selection and Service Act. See Tab B.1, B.2.

trial, and

ii. the motion must be capable of resolution before trial.

This ensures that motions are raised pretrial when warranted while safeguarding against a rigid filing requirement that could be unfair to defendants.

(b) Submitted Rule 12(b)(3)(A)-(B) provide more specific notice of the motions that must be filed pretrial if the just referenced twin conditions are satisfied. While the general categories of "defect[s] in instituting the prosecution" (current Rule 12(b)(3)(A)) and "defect[s] in the indictment or information (current Rule 12(b)(3)(B)) are retained, they are now clarified with illustrative non-exhaustive lists.

Submitted Rule 12(b)(3)(A) thus lists as defects in instituting the prosecution that must be raised before trial:

i. improper venue,
ii. preindictment delay,
iii. violation of the constitutional right to a speedy trial,
iv. selective or vindictive prosecution, and
v. error in grand jury or preliminary hearing proceedings.

Submitted Rule 12(b)(3)(B) lists as defects in the indictment or information that must be raised before trial the following:

i. duplicity,
ii. multiplicity,
iii. lack of specificity,
iv. improper joinder, and
v. failure to state an offense.

The noted inclusion of failure to state an offense in Rule 12(b)(3)(B) completes the amendment originally sought by the Department of Justice.

The submitted rule does not include double jeopardy or statute of limitations challenges among required pre-trial motions in light of concerns raised in public comments. The Advisory Committee is of the view that subjecting such motions to a rule mandate is premature, requiring further consideration as to the appropriate standards for review for untimely filings.

(c) Submitted Rule 12(b)(3)(C)-(E) duplicate the current rule in continuing to

require that motions to suppress evidence, to sever charges or defendants, and to seek Rule 16 discovery must be made before trial.

(5) Submitted Rule 12(c) identifies both the deadlines for filing motions and the consequences of missing those deadlines. Grouping these two subjects together in one section is a visual improvement over the current rule, which discusses deadlines in (c) and consequences in later provision (e). More specifically,

(a) Submitted Rule 12(c)(1) tracks the current rule's language in recognizing the discretion afforded district courts to set motion deadlines. Nevertheless, it now adds a default deadline—the start of trial—if the district court fails to set a motion deadline. This affords defendants the maximum time to make mandatory pretrial motions, but it forecloses an argument that, because the district court did not set a motion deadline, a defendant need not comply with the rule's mandate to file certain motions before trial.

(b) Submitted Rule 12(c)(2) explicitly acknowledges district court discretion to extend or reset motion deadlines at any time before trial. This discretion, which is implicit in the current rule, permits district courts to entertain late-filed motions at any time before jeopardy attaches as warranted. It also allows district courts to avoide subsequent claims that defense counsel was constitutionally ineffective for failing to meet a filing deadline.

(c) Submitted Rule 12(c)(3)(A) retains current Rule 12(e)'s standard of "good cause" for review of untimely motions (with the exception of failure to state an offense discussed separately in submitted Rule 12(c)(3)(B)). At the same time, the submitted rule does not employ the word "waiver" as in the current rule because that term, in other contexts, is understood to mean a knowing and affirmative surrender of rights.

With respect to "good cause," the proposed Advisory Committee Note indicates that courts have generally construed those words, as used in current Rule 12(e), to require a showing of both cause and prejudice before an untimely claim may be considered. The published proposed amendment substituted cause and prejudice for good cause, thinking to achieve greater clarity, but after reviewing public comments and its own further consideration of the issue, the Advisory Committee decided to retain the term "good cause," to avoid both any suggestion of a change from the current standard and arguments based on some constructions of "cause and prejudice" in other contexts, notably, the miscarriage of justice exception to this standard in habeas corpus jurisprudence, not apt to Rule 12.

The amended rule, like the current one, continues to make no reference to

Rule 52 (providing for plain error review of defaulted claims), thereby permitting the Courts of Appeals to decide if and how to apply Rules 12 and 52 when arguments that should have been the subject of required Rule 12(b)(3) motions are raised for the first time on appeal.

(d) Insofar as the submitted amendment, at Rule 12(b)(3)(B), would now require a defendant to raise a claim of failure to state an offense before trial, submitted Rule 12(c)(3)(B) provides that the standard of review when such a claim is untimely is not "good cause" (i.e., cause and prejudice) but simply "prejudice." The Advisory Committee thinks this standard provides a sufficient incentive for a defendant to raise such a claim before trial, while also recognizing the fundamental nature of this particular claim and closely approximating current law, which permits review without a showing of "cause."

A conforming amendment to Rule 34 that omits language requiring a court to arrest judgment if "the indictment or information does not charge an offense," is also presented for approval.

Recommendation: The Advisory Committee recommends that amendments to Rule 12 and 34 be transmitted to the Judicial Conference as amended following publication.

2. ACTION ITEM – Rules 5 and 58

The Advisory Committee recommends approval of its second proposal to amend Rules 5 and 58 to provide for advice concerning consular notification, as amended following publication. To facilitate review of this proposal, the following materials are attached:

Tab C.1 - 2013 Submitted Rules 5 and 58 Amendments – "clean" version (shows how Rules 5 and 58 would look if the Standing Committee approves of the Advisory Committee's proposed changes)
Tab C.2 - Blackline comparison of Current and Submitted Rules 5 and 58, showing proposed amendments
Tab C.3 - 2012 Published Amendments to Rules 5 and 58
Tab C.4 - Amendment Proposal Returned from the Supreme Court

In 2010, the Justice Department, at the urging of the State Department, proposed amendments to Rules 5 and 58, the rules specifying procedures for initial proceedings in felony and misdemeanor cases respectively, to provide notice to defendants of consular notification obligations arising under Article 36 of the multilateral Vienna Convention on Consular Relations ("Vienna Convention"), as well as various bilateral treaties.

The first proposed amendments responding to this request were published for public comment and subsequently approved by the Advisory Committee, the Standing Committee, and the

Judicial Conference. In April 2012, however, the Supreme Court returned the amendments to the Advisory Committee for further consideration. See Tab C.4.

At its April 2012 meeting, the Advisory Committee identified two possible concerns with the returned proposal: (1) perceived intrusion on executive discretion in conducting foreign affairs, both generally and specifically as it pertains to deciding how, or even if, to carry out treaty obligations; and (2) perceived conferral on persons other than the sovereign signatories to treaties—specifically, criminal defendants—of rights to demand compliance with treaty provisions.[2]

The amendments were redrafted to respond to these concerns. The redrafted amendments were carefully worded to provide notice without any attending suggestion of individual rights or remedies. Indeed, the Committee Note emphasizes that the proposed rules do not themselves create any such rights or remedies. The Standing Committee approved publication of the redrafted amendments in June 2012. See Tab C.3.

Upon review of received public comments, as well as its own further consideration, the Advisory Committee has made the following changes to the proposed amendments, none of which requires further publication. See Tab C.1-C.2.

(1) The introductory phrase of Submitted Rule 5(d)(1) and 58(b)(2), now provides for the specified advice to be given to all defendants, by contrast to the published rule, which had provided for consular notification to be given "if the defendant is held in custody and is not a United States citizen." See Tab C.3.

The change was made at the suggestion of the Federal Magistrate Judges Association ("FMJA") and the National Association of Criminal Defense Attorneys. The FMJA, in particular, observed that the quoted language could be construed to require the arraigning judicial officer to ascertain a defendant's citizenship, an inquiry that could involve self-incrimination. Providing consular notice to all defendants without such an inquiry parallels Rule 11(b)(1)(O) (which the Supreme Court has now transmitted to Congress), which provides for all defendants to be given notice at sentencing of possible immigration consequences without specific inquiry into their nationality or status in the United States.

As for the "in custody" requirement, interested parties disagreed as to when a defendant was

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[2]Insofar as Article 36 of the Vienna Convention provides for signatory nations to advise detained foreign nationals of other signatory nations of an opportunity to contact their home country's consulate, litigation has not yet resolved whether such a provision gives rise to any individual rights or remedies. *See Sanchez-Llamas v. Oregon,* 548 U.S. 331 (2006) (holding that suppression of evidence was not appropriate remedy for failure to advise foreign national of ability to have consulate notified of arrest and detention regardless of whether Vienna Convention conferred any individual rights). Thus, the Advisory Committee concluded that the remand of the amendment proposal from the Supreme Court could be understood to suggest that the rule may have gotten ahead of settled law on this matter.

"in custody" or "detained." Providing notice to all defendants at their initial appearance not only avoids the need to resolve this question, it avoids the need to consider a further notice requirement when defendants initially admitted to bail are subsequently remanded. Thus, while the Advisory Committee is mindful of the need to avoid adding unnecessary notice requirements to rules governing initial appearances, sentences, etc., it concludes, as now stated in the proposed Committee Note, that "the most effective and efficient method of conveying this [consular notification] information is to provide it to every defendant, without attempting to determine the defendant's citizenship."

(2) At Professor Coquillette's recommendation, the published Committee Note deletes a reference to the Code of Federal Regulations, which might become outdated if the regulation were revised.

Recommendation: The Advisory Committee recommends that the amendments to Rules 5 and 58 be transmitted to the Judicial Conference as amended following publication.

III. Information Item

The Department of Justice has urged amendment of Rule 4 to facilitate service of process on foreign corporations. It submits that the current rule impedes prosecution of foreign corporations that have committed offenses punishable in United States, but that cannot be served for lack of a last known address or principal place of business in the United States. It argues that this has created a "growing class of organizations, particularly foreign corporations" that have gained "'an undue advantage' over the government relating to the initiation of criminal proceedings." The Advisory Committee has referred the matter to a subcommittee for further study and report.

TAB 3B

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TAB 3B.1

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Rule 12. Pleadings and Pretrial Motions

* * * * *

(b) Pretrial Motions.

(1) ***In General.*** A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits. Rule 47 applies to a pretrial motion.

(2) ***Motions That May Be Made at Any Time.*** A motion that the court lacks jurisdiction may be made at any time while the case is pending.

(3) ***Motions That Must Be Made Before Trial.*** The following defenses, objections, and requests must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits:

(A) a defect in instituting the prosecution, including:

(i) improper venue;

(ii) preindictment delay;

(iii) a violation of the constitutional right to a speedy trial;

(iv) selective or vindictive prosecution; and

(v) an error in the grand-jury proceeding or preliminary hearing;

(B) a defect in the indictment or information, including:

(i) joining two or more offenses in the same count (duplicity);

(ii) charging the same offense in more than one count (multiplicity);

(iii) lack of specificity;

(iv) improper joinder; and

(v) failure to state an offense;

(C) suppression of evidence;

(D) severance of charges or defendants under Rule 14; and

(E) discovery under Rule 16.

(4) ***Notice of the Government's Intent to Use Evidence.***

(A) *At the Government's Discretion*. At the arraignment or as soon afterward as practicable, the government may notify the defendant of its intent to use

specified evidence at trial in order to afford the defendant an opportunity to object before trial under Rule 12(b)(3)(C).

(B) *At the Defendant's Request*. At the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)(C), request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.

(c) Deadline for a Pretrial Motion; Consequences of Not Making a Timely Motion.

(1) *Setting the Deadline.* The court may, at the arraignment or as soon afterward as practicable, set the deadline for the parties to make pretrial motions and may also schedule a motion hearing. If the court does not set one, the deadline is the start of trial.

(2) *Extending or Resetting the Deadline.* At any time before trial, the court may extend or reset the deadline for pretrial motions.

(3) *Consequences of Not Making a Timely Motion Under Rule 12(b)(3).* If a party does not meet the deadline for making a Rule 12(b)(3) motion, the motion is untimely. But a court may consider the defense, objection, or request if:

(A) the party shows good cause; or

(B) for a claim of failure to state an offense, the defendant shows prejudice.

(d) Ruling on a Motion. The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding a motion, the court must state its essential findings on the record.

(e) [Reserved]

Committee Note

Rule 12(b)(1). The language formerly in (b)(2), which provided that "any defense**,** objection, or request that the court can determine without trial of the general issue" may be raised by motion before trial, has been relocated here. The more modern phrase "trial on the

merits" is substituted for the more archaic phrase "trial of the general issue." No change in meaning is intended.

Rule 12(b)(2). As revised, subdivision (b)(2) states that lack of jurisdiction may be raised at any time the case is pending. This provision was relocated from its previous placement at the end of subsection (b)(3)(B) and restyled. No change in meaning is intended.

Rule 12(b)(3). The amendment clarifies which motions must be raised before trial.

The introductory language includes two important limitations. The basis for the motion must be one that is "reasonably available" and the motion must be one that the court can determine "without trial on the merits." The types of claims subject to Rule 12(b)(3) generally will be available before trial and they can – and should – be resolved then. The Committee recognized, however, that in some cases, a party may not have access to the information needed to raise particular claims that fall within the general categories subject to Rule 12(b)(3) prior to trial. The "then reasonably available" language is intended to ensure that a claim a party could not have raised on time is not subject to the limitation on review imposed by Rule 12(c)(3). Additionally, only those issues that can be determined "without a trial on the merits" need be raised by motion before trial. Just as in (b)(1), the more modern phrase "trial on the merits" is substituted for the more archaic phrase "trial of the general issue." No change in meaning is intended.

The rule's command that motions alleging "a defect in instituting the prosecution" and "errors in the indictment or information" must be made before trial is unchanged. The amendment adds a nonexclusive list of commonly raised claims under each category to help ensure that such claims are not overlooked. The Rule is not intended to and does not affect or supersede statutory provisions that establish the time to make specific motions, such as motions under the Jury Selection and Service Act, 18 U.S.C. § 1867(a).

Rule 12(b)(3)(B) has also been amended to remove language that allowed the court at any time while the case is pending to hear a claim that the "indictment or information fails . . . to state an offense." This specific charging error was previously considered fatal whenever raised and was excluded from the general requirement that charging deficiencies be raised prior to trial. The Supreme Court abandoned any jurisdictional justification for the exception in *United States v. Cotton*, 535 U.S. 625, 629-31 (2002) (overruling *Ex parte Bain*, 121 U.S. 1 (1887), "[i]nsofar as it held that a defective indictment deprives a court of jurisdiction").

Rule 12(c). As revised, subdivision (c) governs both the deadline for making pretrial motions and the consequences of failing to meet the deadline for motions that must be made before trial under Rule 12(b)(3).

As amended, subdivision (c) contains three paragraphs. Paragraph (c)(1) retains the existing provisions for establishing the time when pretrial motions must be made, and adds a sentence stating that unless the court sets a deadline, the deadline for pretrial motions is the start of trial, so that motions may be ruled upon before jeopardy attaches. Subdivision (e) of the present rule contains the language "or by any extension the court provides," which anticipates that a district court has the discretion to extend the deadline for pretrial motions. New paragraph (c)(2) recognizes this discretion explicitly and relocates the Rule's mention of it to a more logical place - after the provision concerning setting the deadline and before the provision concerning the consequences of not meeting the deadline.

New paragraph (c)(3) governs the review of untimely claims, previously addressed in Rule 12(e). Rule 12(e) provided that a party "waives" a defense not raised within the time set under Rule 12(c). Although the term waiver in the context of a criminal case ordinarily refers to the intentional relinquishment of a known right, Rule 12(e) has never required any determination that a party who failed to make a timely motion intended to relinquish a defense, objection, or request that was not raised in a timely fashion. Accordingly, to avoid possible confusion the Committee decided not to employ the term "waiver" in new paragraph (c)(3).

The standard for review of untimely claims under new paragraph 12(c)(3) depends on the nature of the defense, objection, or request. The general standard for claims that must be raised before trial under Rule 12(b)(3) is stated in (c)(3)(A), which – like the present rule -- requires that the party seeking relief show "good cause" for failure to raise a claim by the deadline. The Supreme Court and lower federal courts have interpreted the "good cause" standard under Rule 12(e) to require both (1) "cause" for the failure to raise the claim on time, and (2) "prejudice" resulting from the error. *Davis v. United States,* 411 U.S. 233, 242 (1973); *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 363 (1963).

New subparagraph (c)(3)(B) provides a different standard for one specific claim: the failure of the charging document to state an offense. The Committee concluded that judicial review of these claims, which go to adequacy of the notice afforded to the defendant, and the power to bring a defendant to trial or to impose punishment, should be available without a showing of "good cause." Rather, review should be available whenever a defendant shows prejudice from the failure to state a claim. Accordingly, subparagraph (c)(3)(B) provides that the court can consider these claims if the party "shows prejudice." Unlike plain error review under Rule 52(b), the standard under Rule (12)(c)(3)(B) does not require a showing that the error was "plain" or that the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." Nevertheless, it will not always be possible for a defendant to make the required showing of prejudice. For example, in some cases in which the charging document omitted an element of the offense, the defendant may have admitted the element as part of a guilty plea after having been afforded timely notice by other means.

Rule 12(e). The effect of failure to raise issues by a pretrial motion have been relocated from (e) to (c)(3).

DRAFT: SUBJECT TO COMMITTEE APPROVAL OF CHANGES

CHANGES MADE AFTER PUBLICATION

Language that had been deleted from Rule 12(b)(2) as unnecessary was restored and relocated in (b)(1). The change begins the Rule's treatment of pretrial motions with an appropriate general statement and responds to concerns that the deletion might have been perceived as unintentionally restricting the district courts' authority to rule on pretrial motions. The references to "double jeopardy" and "statute of limitations" were dropped from the nonexclusive list in (b)(3)(A) to permit further debate over the treatment of such claims. New paragraph (c)(2) was added to state explicitly the district court's authority to extend or reset the deadline for pretrial motions; this authority had been recognized implicitly in language being deleted from Rule 12(e). In subdivision (c), the cross reference to Rule 52 was omitted as unnecessarily controversial. In subparagraph (c)(3)(A), the current language "good cause" was retained. In subparagraph (c)(3)(B), the reference to "double jeopardy" was omitted to mirror the omission from (b)(3)(A), and the word "only" was deleted from the phrase "prejudice only" because it was superfluous. Finally, the Committee Note was amended to reflect these post-publication changes and to state explicitly that the rule is not intended to change or supersede statutory deadlines under provisions such as the Jury Selection and Service Act.

PUBLIC COMMENTS

Assistant Attorney General Lanny Breuer (11-CR-003) supported the amendment because it requires claims of failure to state an offense to be raised before trial; provides clarity by listing specific claims and defenses that must be raised before trial; includes language stating that a motion must be made before trial only when the basis for the motion is "reasonably available"; eliminates the confusing term "waiver" and clarifies the good cause standard, specifying that "cause and prejudice" must generally be shown; and provides a more lenient standard for the review of objections based upon double jeopardy and failure to state a claim.

The Federal Magistrate Judges Association (FMJA) (11-CR-004) endorsed the amendment to clarify when certain motions must be made and the consequences of failure to raise the issues in a timely manner.

The New York Council of Defense Lawyers (NYCDL) (11-CR-007) noted that the amendment would bring "valuable clarity to many facets of Rule 12," but urged significant changes before adoption. NYCDL (1) objected to requiring that defendants raise before trial claims alleging double jeopardy, statute of limitations, multiplicity, duplicity, and other constitutional claims; and (2) argued that the "cause and prejudice" standard for claims presented for the first time in the district court and on appeal "is unduly harsh and prejudicial to defendants."

The Federal Public Defenders (FPD) (11-CR-008) opposed the amendment on the ground that it would create uncertainty regarding what motions can be decided before trial and "potentially alter existing settled law" in this regard; increase litigation; "[c]reate an impossibly high and confusing standard for defendants"; "[u]nduly circumscribe traditional and necessary judicial discretion in the handling of courtroom proceedings"; and "[p]otentially" violate their clients' Fifth and Sixth Amendment rights "by allowing grand jury indictments to be broadened through the use of jury instructions."

The National Association of Criminal Defense Lawyers (NACDL) (11-CR-010) praised certain aspects of the amendment, but urged that it should not be adopted without multiple significant changes: deleting the list of claims and defenses that must be raised before trial; clarifying that the rule does not affect statutory time limits for filing certain motions; retaining failure to state an offense as an claim that can be raised at any time; and altering the showing required for untimely motions, which should vary depending on the procedural stage at which the motion is first made.

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TAB 3B.2

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Rule 12. Pleadings and Pretrial Motions

* * * * *

(b) Pretrial Motions.

(1) ***In General.*** A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits. Rule 47 applies to a pretrial motion.

(2) ~~***Motions That May Be Made Before Trial.*** A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue.~~***Motions That May Be Made at Any Time.*** A motion that the court lacks jurisdiction may be made at any time while the case is pending.

(3) ***Motions That Must Be Made Before Trial.*** The following defenses, objections, and requests must be raised by pretrial motion ~~before trial~~ if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits:

(A) ~~a motion alleging~~ a defect in instituting the prosecution, including:

(i) improper venue;

(ii) preindictment delay;

(iii) a violation of the constitutional right to a speedy trial;

(iv) selective or vindictive prosecution; and

(v) an error in the grand-jury proceeding or preliminary hearing;

(B) ~~a motion alleging~~ a defect in the indictment or information, including:

(i) joining two or more offenses in the same count (duplicity);

(ii) charging the same offense in more than one count (multiplicity);

(iii) lack of specificity;

(iv) improper joinder; and

(v) failure to state an offense;

~~but at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense~~;

(C) ~~a motion to~~ suppression of evidence;

(D) ~~a Rule 14 motion to~~ severance of charges or defendants under Rule 14;

and

(E) ~~a Rule 16 motion for~~ discovery under Rule 16.

(4) ***Notice of the Government's Intent to Use Evidence.***

(A) *At the Government's Discretion*. At the arraignment or as soon afterward as practicable, the government may notify the defendant of its intent to use specified evidence at trial in order to afford the defendant an opportunity to object before trial under Rule 12(b)(3)(C).

(B) *At the Defendant's Request*. At the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)(C), request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.

(c) ~~Motion Deadline.~~ Deadline for a Pretrial Motion; Consequences of Not Making a Timely Motion.

(1) *Setting the Deadline.* The court may, at the arraignment or as soon afterward as practicable, set the deadline for the parties to make pretrial motions and may also schedule a motion hearing. If the court does not set one, the deadline is the start of trial.

(2) *Extending or Resetting the Deadline.* At any time before trial, the court may extend or reset the deadline for pretrial motions.

(3) *Consequences of Not Making a Timely Motion Under Rule 12(b)(3).* If a party does not meet the deadline for making a Rule 12(b)(3) motion, the motion is untimely. But a court may consider the defense, objection, or request if:

(A) the party shows good cause; or

(B) for a claim of failure to state an offense, the defendant shows prejudice.

(d) Ruling on a Motion. The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding a motion, the court must state its essential findings on the record.

(e) [Reserved] ~~**Waiver of a Defense, Objection, or Request.** A party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c)~~

~~or by any extension the court provides. For good cause, the court may grant relief from the waiver~~

Committee Note

Rule 12(b)(1). The language formerly in (b)(2), which provided that "any defense**,** objection, or request that the court can determine without trial of the general issue" may be raised by motion before trial, has been relocated here. The more modern phrase "trial on the merits" is substituted for the more archaic phrase "trial of the general issue." No change in meaning is intended.

Rule 12(b)(2). As revised, subdivision (b)(2) states that lack of jurisdiction may be raised at any time the case is pending. This provision was relocated from its previous placement at the end of subsection (b)(3)(B) and restyled. No change in meaning is intended.

Rule 12(b)(3). The amendment clarifies which motions must be raised before trial.

The introductory language includes two important limitations. The basis for the motion must be one that is "reasonably available" and the motion must be one that the court can determine "without trial on the merits." The types of claims subject to Rule 12(b)(3) generally will be available before trial and they can – and should – be resolved then. The Committee recognized, however, that in some cases, a party may not have access to the information needed to raise particular claims that fall within the general categories subject to Rule 12(b)(3) prior to trial. The "then reasonably available" language is intended to ensure that a claim a party could not have raised on time is not subject to the limitation on review imposed by Rule 12(c)(3). Additionally, only those issues that can be determined "without a trial on the merits" need be raised by motion before trial. Just as in (b)(1), the more modern phrase "trial on the merits" is substituted for the more archaic phrase "trial of the general issue." No change in meaning is intended.

The rule's command that motions alleging "a defect in instituting the prosecution" and "errors in the indictment or information" must be made before trial is unchanged. The amendment adds a nonexclusive list of commonly raised claims under each category to help ensure that such claims are not overlooked. The Rule is not intended to and does not affect or supersede statutory provisions that establish the time to make specific motions, such as motions under the Jury Selection and Service Act, 18 U.S.C. § 1867(a).

Rule 12(b)(3)(B) has also been amended to remove language that allowed the court at any time while the case is pending to hear a claim that the "indictment or information fails . . . to state an offense." This specific charging error was previously considered fatal whenever raised and was excluded from the general requirement that charging deficiencies be raised prior to trial. The Supreme Court abandoned any jurisdictional justification for the exception in *United States v. Cotton,* 535 U.S. 625, 629-31 (2002) (overruling *Ex parte Bain*, 121 U.S. 1 (1887), "[i]nsofar as it held that a defective indictment deprives a court of jurisdiction").

Rule 12(c). As revised, subdivision (c) governs both the deadline for making pretrial motions and the consequences of failing to meet the deadline for motions that must be made before trial under Rule 12(b)(3).

As amended, subdivision (c) contains three paragraphs. Paragraph (c)(1) retains the existing provisions for establishing the time when pretrial motions must be made, and adds a sentence stating that unless the court sets a deadline, the deadline for pretrial motions is the start of trial, so that motions may be ruled upon before jeopardy attaches. Subdivision (e) of the present rule contains the language "or by any extension the court provides," which anticipates that a district court has the discretion to extend the deadline for pretrial motions. New paragraph (c)(2) recognizes this discretion explicitly and relocates the Rule's mention of it to a more logical place - after the provision concerning setting the deadline and before the provision concerning the consequences of not meeting the deadline.

120 New paragraph (c)(3) governs the review of untimely claims, previously addressed in
121 Rule 12(e). Rule 12(e) provided that a party "waives" a defense not raised within the time set
122 under Rule 12(c). Although the term waiver in the context of a criminal case ordinarily refers to
123 the intentional relinquishment of a known right, Rule 12(e) has never required any determination
124 that a party who failed to make a timely motion intended to relinquish a defense, objection, or
125 request that was not raised in a timely fashion. Accordingly, to avoid possible confusion the
126 Committee decided not to employ the term "waiver" in new paragraph (c)(3).
127
128 The standard for review of untimely claims under new paragraph 12(c)(3) depends on the
129 nature of the defense, objection, or request. The general standard for claims that must be raised
130 before trial under Rule 12(b)(3) is stated in (c)(3)(A), which – like the present rule -- requires
131 that the party seeking relief show "good cause" for failure to raise a claim by the deadline. The
132 Supreme Court and lower federal courts have interpreted the "good cause" standard under Rule
133 12(e) to require both (1) "cause" for the failure to raise the claim on time, and (2) "prejudice"
134 resulting from the error. *Davis v. United States,* 411 U.S. 233, 242 (1973); *Shotwell Mfg. Co. v.*
135 *United States*, 371 U.S. 341, 363 (1963).
136
137 New subparagraph (c)(3)(B) provides a different standard for one specific claim: the
138 failure of the charging document to state an offense. The Committee concluded that judicial
139 review of these claims, which go to adequacy of the notice afforded to the defendant, and the
140 power to bring a defendant to trial or to impose punishment, should be available without a
141 showing of "good cause." Rather, review should be available whenever a defendant shows
142 prejudice from the failure to state a claim. Accordingly, subparagraph (c)(3)(B) provides that the
143 court can consider these claims if the party "shows prejudice." Unlike plain error review under
144 Rule 52(b), the standard under Rule (12)(c)(3)(B) does not require a showing that the error was
145 "plain" or that the error "seriously affects the fairness, integrity, or public reputation of judicial
146 proceedings." Nevertheless, it will not always be possible for a defendant to make the required
147 showing of prejudice. For example, in some cases in which the charging document omitted an
148 element of the offense, the defendant may have admitted the element as part of a guilty plea after
149 having been afforded timely notice by other means.

Rule 12(e). The effect of failure to raise issues by a pretrial motion have been relocated from (e) to (c)(3).

DRAFT: SUBJECT TO COMMITTEE APPROVAL OF CHANGES

CHANGES MADE AFTER PUBLICATION

Language that had been deleted from Rule 12(b)(2) as unnecessary was restored and relocated in (b)(1). The change begins the Rule's treatment of pretrial motions with an appropriate general statement and responds to concerns that the deletion might have been perceived as unintentionally restricting the district courts' authority to rule on pretrial motions. The references to "double jeopardy" and "statute of limitations" were dropped from the nonexclusive list in (b)(3)(A) to permit further debate over the treatment of such claims. New paragraph (c)(2) was added to state explicitly the district court's authority to extend or reset the deadline for pretrial motions; this authority had been recognized implicitly in language being deleted from Rule 12(e). In subdivision (c), the cross reference to Rule 52 was omitted as unnecessarily controversial. In subparagraph (c)(3)(A), the current language "good cause" was retained. In subparagraph (c)(3)(B), the reference to "double jeopardy" was omitted to mirror the omission from (b)(3)(A), and the word "only" was deleted from the phrase "prejudice only" because it was superfluous. Finally, the Committee Note was amended to reflect these post-publication changes and to state explicitly that the rule is not intended to change or supersede statutory deadlines under provisions such as the Jury Selection and Service Act.

PUBLIC COMMENTS

Assistant Attorney General Lanny Breuer (11-CR-003) supported the amendment because it requires claims of failure to state an offense to be raised before trial; provides clarity by listing specific claims and defenses that must be raised before trial; includes language stating that a motion must be made before trial only when the basis for the motion is "reasonably available"; eliminates the confusing term "waiver" and clarifies the good cause standard,

specifying that "cause and prejudice" must generally be shown; and provides a more lenient standard for the review of objections based upon double jeopardy and failure to state a claim.

The Federal Magistrate Judges Association (FMJA) (11-CR-004) endorsed the amendment to clarify when certain motions must be made and the consequences of failure to raise the issues in a timely manner.

The New York Council of Defense Lawyers (NYCDL) (11-CR-007) noted that the amendment would bring "valuable clarity to many facets of Rule 12," but urged significant changes before adoption. NYCDL (1) objected to requiring that defendants raise before trial claims alleging double jeopardy, statute of limitations, multiplicity, duplicity, and other constitutional claims; and (2) argued that the "cause and prejudice" standard for claims presented for the first time in the district court and on appeal "is unduly harsh and prejudicial to defendants."

The Federal Public Defenders (FPD) (11-CR-008) opposed the amendment on the ground that it would create uncertainty regarding what motions can be decided before trial and "potentially alter existing settled law" in this regard; increase litigation; "[c]reate an impossibly high and confusing standard for defendants"; "[u]nduly circumscribe traditional and necessary judicial discretion in the handling of courtroom proceedings"; and "[p]otentially" violate their clients' Fifth and Sixth Amendment rights "by allowing grand jury indictments to be broadened through the use of jury instructions."

The National Association of Criminal Defense Lawyers (NACDL) (11-CR-010) praised certain aspects of the amendment, but urged that it should not be adopted without multiple significant changes: deleting the list of claims and defenses that must be raised before trial; clarifying that the rule does not affect statutory time limits for filing certain motions; retaining failure to state an offense as an claim that can be raised at any time; and altering the showing required for untimely motions, which should vary depending on the procedural stage at which the motion is first made.

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Rule 34. Arresting Judgment

(a) In General. Upon the defendant's motion or on its own, the court must arrest judgment if the court does not have jurisdiction of the charged offense. ~~if:~~

~~(1) the indictment or information does not charge an offense; or~~

~~(2) the court does not have jurisdiction of the charged offense.~~

* * * * *

Committee Note

This amendment conforms Rule 34 to Rule 12(b) which has been amended to remove language that the court at any time while the case is pending may hear a claim that the "indictment or information fails . . . to state an offense." The amended Rule 12 instead requires that such a defect be raised before trial.

NO COMMENTS OR CHANGES AFTER PUBLICATION

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TAB 3B.4

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MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professors Sara Sun Beale and Nancy King, Reporters**

RE: **Rule 12**

DATE: **March 24, 2013**

The Criminal Rules Committee has been studying a proposal to amend Fed. R. Crim. P. 12 since 2006. The Committee's proposed amendment to Rule 12 and a conforming change to Rule 34 were published in August 2011, and public comments totaling 47 pages were received from five groups. The reporters prepared a 60 page memorandum analyzing each of the issues raised in the comments. The comments and the reporters' memorandum were considered at length by the Rule 12 Subcommittee, which held a half-day, face-to-face meeting in conjunction with the Advisory Committee's April meeting in San Francisco and a follow-up teleconference. After the Advisory Committee's October meeting was cancelled due to Hurricane Sandy, the Subcommittee met by teleconference in February 2013 to consider whether to recommend additional changes.

This memorandum begins with a brief history of the proposed amendment, and then presents (1) the Subcommittee's response to the public comments, (2) the Subcommittee's recommendations for changes in the published amendment, and (3) the text of the proposed amendment with the changes proposed by the Subcommittee.

This meeting will, we hope, bring to a successful conclusion eight years of work. We do not attempt to restate in this memorandum all of the analysis on each issue we discuss. Rather, this memorandum provides an overview of the issues and the Subcommittee's conclusions. For more in-depth analysis, we also provide the reporters' March 31, 2012 memorandum to the Subcommittee (updated with additional case citations), a memorandum analyzing double jeopardy claims on a circuit-by-circuit basis (accompanied by a table of cases), and the full text of the public comments. We request that members of the Advisory Committee review the supporting materials in preparation for a full discussion of the issues at the April meeting.

I. THE HISTORY OF THE PROPOSED AMENDMENT

In 2006, in the wake of the Supreme Court's decision in *United States v. Cotton*, 535 U.S. 625 (2002), the Department of Justice asked the Criminal Rules Committee to consider amending Rule 12(b)(3)(B) to require defendants to raise *before trial* any objection that the indictment failed to state an offense by eliminating the provision that required review of such a claim even when raised for the first time after conviction.

The proposal evolved substantially between 2006 and publication in 2011. Two aspects of the development warrant special mention. First, the proposal expanded to address other features of Rule 12's treatment of pretrial motions in general. The proposed amendment, as published:

- states that the requirement that certain claims and defenses be raised before trial applies only if the basis for the motion is "reasonably available" before trial;

- enumerates the common types of motions that courts have found to constitute defects "in instituting the prosecution" and "in the indictment or information" that must be raised before trial; and

- clarifies the general standard for relief from the rule that late-filed claims may not be considered, resolving confusion created by the non-standard use of the term "waiver" to reach situations in which there was no intentional relinquishment of a known right.

Second, one of the most difficult issues has been what standard the courts should apply when a defendant does not raise the failure-to-state-an-offense (FTSO) claim before trial. As described below, the Committee considered a number of different standards for relief from the rule barring consideration of late-filed claims. The proposed rule adopts a two-tier standard: it requires a showing of "cause and prejudice" to consider all untimely claims except for double jeopardy and failure to state an offense, which may be reviewed upon a showing of "prejudice."

2008 – "good cause" – rejected by the Criminal Rules Committee:

In 2008 the Rule 12 Subcommittee proposed an amendment that would have subjected untimely FTSO claims to the standard already applied to all other untimely claims under Rule 12(e). The Committee rejected that draft and asked the Subcommittee to prepare an amendment that would not require a defendant to show "cause" in order to receive relief when the failure to state an offense prejudiced him.

2009 – "prejudice to the substantial rights of the defendant" – approved by the Rules Committee but remanded by the Standing Committee:

Responding to the Committee's concern, in 2009 the Subcommittee tried a different tack, bifurcating the standard for untimely claims and providing a more generous standard for FTSO claims. The proposed amendment revised 12(e) to provide relief from the waiver "when a failure

to state an offense in the indictment or information *has prejudiced a substantial right of the defendant*." The existing "good cause" standard, applied to all other untimely claims, remained unchanged. The amendment was approved by the Committee and sent on to the Standing Committee. The Standing Committee, however, remanded the proposal to the Committee in June 2009, indicating that additional consideration should be given to the concepts of "waiver" and "forfeiture" and how Rule 12 interacted with Rule 52.

2010 – January 2011 – "good cause" for claims that are "waived" and "plain error" for claims that have been "forfeited" – approved by the Rules Committee but remanded by the Standing Committee:

Responding to the Standing Committee's 2009 concerns, the Subcommittee redrafted the proposed amendment to Rule 12, this time attempting to clarify exactly which sorts of claims must be raised, and when a claim was considered "waived" under the rule. To address the confusion in the courts over whether Rule 52(b) plain error review applied and when, the proposed amendment (1) expressly designated plain error review under Rule 52(b) as the standard for obtaining relief for three specific claims (FTSO, double jeopardy, and statute of limitations) under a new subsection entitled "forfeiture," and (2) left in place the "good cause" standard already applied to all other untimely claims, changing the language to "cause and prejudice" to reflect the Supreme Court's interpretation of the "good cause" standard, and moving this into a separate subsection entitled "waiver."

At its January 2011 meeting, the Standing Committee remanded the proposal once again to allow the Advisory Committee to consider several concerns. First, some members expressed concern that the Rule continued to employ the term "waiver" to mean something other than deliberate and knowing relinquishment. Second, some members were concerned that requiring a defendant to show plain error under Rule 52 could be even more difficult than showing "cause and prejudice." If so, the proposed amendment would not create a more generous review standard for the three favored claims. Finally, the reporters were also urged to consider some reorganization.

June 2011 – eliminating terms "waiver" and "forfeiture" – specifying "cause and prejudice" for untimely claims, but "prejudice only" for failure-to-state-an-offense and double jeopardy – Rule 12 governs and Rule 52 does not apply – approved for public comment:

In response to the Standing Committee's additional suggestions and concerns, the Advisory Committee undertook a final and more fundamental revision of Rule 12. It was this proposal that was approved by the Standing Committee in June 2011 and published in August 2011. The key elements of the proposal are noted below.

<u>As published the proposed rule no longer employs the terms "waiver" or "forfeiture."</u> Because the ordinary meaning of waiver is a knowing and intentional relinquishment of a right, the non-standard use of that term in Rule 12 creates unnecessary confusion and difficulties. The Advisory Committee was urged to consider revising the rule to avoid using these terms. Although the elimination of these terms was not part of the purpose of the amendment as originally envisioned,

there was agreement that the use of the term "waiver" has been a source of considerable confusion. Rule 12's initial use of the term waiver predated the Supreme Court's clarification of the difference between waiver and forfeiture and the meaning of plain error in *United States v. Olano*, 507 U.S. 725, 731-32 (1993). Redrafting to avoid the terms "waiver" and "forfeiture" achieves clarity and avoid traps for the unwary.

As published the proposed rule (like earlier proposals in June 2009 and January 2011) bifurcates the standard applicable when a defense, claim, or objection subject to Rule 12(b)(3) is raised in an untimely fashion, depending upon the type of claim at issue.

- Omitting any reference to the term waiver, the amendment as published specifies that for all but two specific types of claims, an untimely claim may be considered only if the party who seeks to raise it shows "cause and prejudice." As explained in greater detail in the reporters' updated March 2012 memorandum to the Rule 12 Subcommittee (included infra), the Committee replaced the phrase "good cause" with "cause and prejudice" to reflect the Supreme Court's interpretation of the current rule.

- For claims of FTSO or double jeopardy, the amendment as published provided that the court may consider the claim if the party shows "prejudice only." This is a more generous test than that applicable to other claims raised late under Rule 12, because it does not require the objecting party to demonstrate "cause," i.e. the reason for failing to raise the claim earlier. It may also be a more generous test than plain error under Rule 52(b) – the standard included in the January 2011 proposal – because it does not require the objecting party to show, in addition to prejudice, that the error was "plain" or that "the error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.' " *United States v. Olano*, 507 U.S. 725, 731-32 (1993) (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)).

- Because of the continuing controversy in the appellate courts on the question whether review of untimely claims is governed by Rule 12(e) or Rule 52(b), the Advisory Committee added and the Standing Committee approved for publication an express statement that if a party files an untimely motion "Rule 52 does not apply," and set forth the criteria of "cause and prejudice" and "prejudice only" for FTSO and double jeopardy claims.

Additionally, the Committee made other changes in language and organization to improve clarity.

II. THE PUBLIC COMMENTS AND THE SUBCOMMITTEE'S RECOMMENDATIONS

Following publication, comments in support of the proposed amendment were received from the Department of Justice and the Federal Magistrate Judges Association, and letters that oppose various aspects of the proposed amendment were received from the New York Council of Defense Lawyers (NYCDL), the Federal Defenders, and National Association of Criminal Defense Lawyers (NACDL). The proposal generated neither requests to testify nor comments from the bench other than the letter in support from FMJA. The full text of the public comments appears infra.

Because Hurricane Sandy caused the cancellation of the Advisory Committee's October meeting, Judge Raggi asked Judge Jeffrey Sutton, the chair of the Standing Committee, to provide comments for consideration by the Subcommittee in preparation for the April Advisory Committee meeting. Without taking a position on the question whether the published rule should be further amended, Judge Sutton noted the complexity of the proposal and the large number of difficult (and in some cases controversial) issues that it sought to resolve. Although it is appropriate to use the amendment process to resolve conflicts over the interpretation or application of the rules, Judge Sutton noted that the published rule is unusual in seeking to resolve so many conflicts and policy issues. The inclusion of so many difficult and/or controversial issues may have an effect at the later stages of the process, at the Standing Committee, the Judicial Conference, the Supreme Court, and Congress. After discussion of Judge Sutton's comments, the Subcommittee concluded that it would be desirable to consider whether the proposed amendment could and should be simplified in order to facilitate final approval of its core elements.

As described more fully in the reporters' updated March 31, 2012 memorandum (included infra), the critical letters from the defense groups raised a variety of arguments and concerns discussed below. After considering these issues and arguments (as well as more general arguments in favor of simplification and streamlining), the Subcommittee recommends that the Advisory Committee approve and transmit the proposed amendment to the Standing Committee after making the following post-publication changes (including changes in the Committee Note accompanying changes in the text):

- restoring language that had been deleted from (b)(2) and relocating it to (b)(1);
- deleting double jeopardy from the proposed list of claims that must be raised before trial;
- amending the Committee Note to state explicitly that the rule does not change statutory deadlines under provisions such as the Jury Selection and Service Act;
- making explicit in new (c)(2) the district court's authority to extend or reset the deadline for pretrial motions (which is recognized implicitly now in Rule 12(e));
- deleting the statement that "Rule 52(b) does not apply" to late-raised claims; and
- separating the standard for consideration of late-raised claims into separate paragraphs.

In addition, the Subcommittee considered, and requests discussion by the Advisory Committee, of one of the Style Consultant's recommendations regarding the language of 12(c) (concerning the phrase "prejudice only").

This section of the memorandum sets forth the Subcommittee's conclusions and recommendations concerning each of the issues raised during the public comment period, and its proposed responses to Judge Sutton's suggestion that the published rule might be streamlined or simplified.

A. Objections to adding FTSO claims of failure to the list that must be raised before trial.

As expected, defense commentators opposed requiring FTSO claims to be raised before trial. They argued that this aspect of the proposed amendment is neither supported by the Supreme Court's decision in *United States v. Cotton*, 535 U.S. 625 (2002), nor justified by the risk of sandbagging. They also expressed concern that the proposed amendment would violate the Rules Enabling Act, lead to violations of the Fifth and Sixth Amendment rights, and prejudge Supreme Court resolution of open questions.

The Rule 12 Subcommittee considered and reaffirmed the decision that FTSO claims should be subject to Rule 12's requirement that they be raised before trial. The Subcommittee agreed that *Cotton* – which did not mention or address Rule 12 – does not require the amendment. But in holding that the failure to state an offense is not a jurisdictional error, the Supreme Court opened the door to permit such an amendment. Members concluded that there is significant value to requiring that FTSO claims be raised before trial. Despite the argument that the defense has no incentive to delay raising FTSO claims, cases have arisen in which courts felt sandbagging had occurred leading to a waste of judicial resources. Indeed, one court decried such sandbagging and urged that the Rules be amended to address the problem. *See United States v. Panarella*, 277 F.3d 678, 686 (3d Cir. 2002) ("Requiring a defendant to raise this defense before pleading guilty respects the proper relationship between trial and appellate courts and prevents the waste of judicial resources caused when a defendant deliberately delays raising a defense that, if successful, requires reversal of the defendant's conviction and possibly reindictment."). Moreover, the Subcommittee perceived no Rules Enabling Act barrier to adding an additional claim to the other constitutional issues that Rule 12 now requires to be raised before trial.

The Subcommittee also concluded that the Fifth and Sixth Amendment issues raised by the Federal Defenders are separate from those addressed by Rule 12 and the proposed amendment. The Federal Defenders expressed concern that the amended rule might prohibit a defendant from raising constitutional challenges to jury instructions at trial, e.g., claims that an instruction including an element omitted from the indictment would constructively amend the indictment or deprive the defendant of notice. The Federal Defenders note that the government has at times argued that by failing to raise a Fifth Amendment problem before trial (when it could be easily addressed by a superseding indictment) a defendant waives his chance to complain later about what is essentially the same problem: lack of grand jury review of one or more essential elements. The Federal Defenders maintain that regardless of the failure of a defendant to raise an indictment's defect, an objection to the instructions alleging constructive amendment or lack of notice should remain available.

The proposed amendment, however, speaks only to the consideration of objections to the indictment or information. Neither the proposed amendment nor the Committee Note addresses a defendant's ability to object to jury instructions on the ground that those instructions constructively

amend the indictment in violation of the Fifth Amendment, or change the theory of prosecution or otherwise surprise the defense, depriving the defendant of the notice guaranteed by the Sixth Amendment. The Subcommittee concluded that whether a judge should grant a constitutional challenge to jury instructions in a case in which a defendant failed to object to a defective indictment is a matter to be resolved by the courts if and when such cases arise. The amendment does not purport to preclude such challenges, nor is it intended to limit in any way the appropriate resolution of these separate questions.

THE SUBCOMMITTEE'S RECOMMENDATION: the Advisory Committee should retain FTSO claims on the list of claims and defenses that must be raised before trial.

B. Objections to the specification of other claims that must be raised before trial.

Defense commentators also focused on several other kinds of claims that the proposed amendment lists among those that must be raised before trial. They argued that double jeopardy, statute of limitations, multiplicity, and duplicity claims should not be required before trial. One comment also opposed listing specific kinds of claims in 12(b)(3)(A) and (B) and retaining the distinction between (A) and (B).

The list of claims and defenses in the published amendment was drawn from the cases interpreting two general categories in the present rule: defects "in instituting the prosecution" and "in the indictment or information." As discussed below, the Subcommittee recommends that the Advisory Committee retain the structure of the published amendment and the list of specific claims in (b)(3)(A) and (B), but make one change: deleting double jeopardy from the list of claims that must be raised before trial. The Subcommittee also recommends that language be added to the Committee Note to guard against any suggestion that the rule was intended to displace any statutory deadlines for pretrial motions.

1. Listing specific claims and keeping (3)(A) and (B) separate

The Subcommittee strongly endorses the conclusion that the listing of specific claims that must be raised before trial will assist courts and advocates. This is a central feature of the proposal, and it should be retained.

If it were writing on a clean slate, the Subcommittee agrees that there would be some merit in the suggestion that it should merge the list of claims in (3)(A) and (B) (defects in "instituting the prosecution" and in "the indictment or information"). But we are not writing on clean slate, and the Subcommittee recommends retaining the current structure. Throughout the consideration of the amendment, the Advisory Committee has tried to avoid renumbering to the extent possible to assist

future researchers. Merging these two categories would make future research on some of the most heavily litigated issues under Rule 12 more difficult. Retaining the current structure avoids those problems.

THE SUBCOMMITTEE'S RECOMMENDATION: the Advisory Committee should retain the list of claims that must be raised before trial in (3)(A) and (B) (defects in "instituting the prosecution" and in "the indictment or information") and not merge (A) and (B).

2. Double jeopardy

The New York Council of Defense Lawyers correctly recognized requiring double jeopardy claims to be raised before trial would be a change in some courts. Although many courts have required double jeopardy and statute of limitation claims to be presented before trial when clear from the face of the indictment, not all courts do so.[1] The courts that require these particular motions be filed before trial generally reason that they are "defects in the indictment." But some other courts rely on the 1944 Committee Note as support for distinguishing double jeopardy and statute of limitations from the claims that must be raised before trial.[2]

Although there are strong arguments in favor of using this amendment to resolve the disagreement and provide a basis for uniform national treatment of double jeopardy claims, the Subcommittee was concerned that questions about – and objections to – the treatment of double jeopardy might be sufficient to derail the proposal as a whole. Accordingly, after reviewing the options the Subcommittee concluded that it would be prudent to delete double jeopardy from the enumerated list of claims that must be raised before trial. Because the list of claims that must be raised is not exhaustive, most circuits courts will continue to require double jeopardy claims to be raised before trial whether or not such claims are listed in Rule 12(b)(3)(B). But deleting double jeopardy from this list does not foreclose arguments that the original design of Rule 12 distinguished double jeopardy from the claims that must be raised before trial. Deleting double jeopardy from the list of claims thus avoids taking a position on this issue and alienating supporters of the minority view.

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[1]We provide extensive citations for these points in footnotes 15-22 of our March 31, 2012 memorandum to the Rule 12 Subcommittee (updated with new cases August 16, 2012), which is included infra. Also included infra is a memorandum providing a circuit-by-circuit analysis of the double jeopardy cases.

[2]The courts that have allowed these claims to be raised during trial often point to the Advisory Committee Note from 1944, which states that motions that "may" but need not be brought before trial include "such matters as former jeopardy, former conviction, former acquittal, statute of limitations . . . ."

Omitting double jeopardy from the list of claims that must be raised before trial also removes another possible obstacle to final approval of the rule: debates about the proper standard of review if double jeopardy claims are subject to the timing requirements of Rule 12(b)(3). As noted in the reporters' supplemental memorandum on double jeopardy (included infra), the standard for review of late-raised double jeopardy claims in most courts is plain error. However, there is considerable variation in the appellate cases. Many circuits have at least a few decisions that also refer to "waiver" in this context. The published rule, however, applied the "prejudice" standard to double jeopardy (as well as failure to state a claim). Although the Committee has taken the view that there would be no difference in the effect of the "prejudice" and plain error standards in double jeopardy cases, this point was not obvious and it required extended explanation and defense. Moreover, authorizing relief upon a showing of prejudice would be a change from the various panel opinions that used waiver or waiver as well as plain error. Removing double jeopardy from the list of enumerated claims obviates the need to address this issue in the proposal.

The Subcommittee concluded that simplifying the proposed rule by omitting the references to double jeopardy would remove what might have been a significant obstacle to adoption of the proposal. The double jeopardy case law has varied considerably from circuit to circuit, perhaps because double jeopardy issues can arise in so many different contexts. Although there would be real advantages to a rule change that would settle all of these disputes about double jeopardy, the Subcommittee concluded, with some reluctance, that retaining the double jeopardy provisions might simply be taking on too much for a single proposal.

THE SUBCOMMITTEE'S RECOMMENDATION: the Advisory Committee should delete double jeopardy from the list of claims that must be raised before trial. If this recommendation is accepted, the Advisory Committee should also delete the standard for review of late-raised double jeopardy claims.

3. Multiplicity, duplicity, and statutes of limitations

The Subcommittee agreed with the commentators that under some circumstances it is not possible to raise multiplicity and duplicity claims before trial. However, the proposed amendment applies only when the basis of a claim is "reasonably available" before trial. That limitation should take care of the concerns in the public comments about claims that become apparent only after trial begins.

Similarly, the Subcommittee concluded that it should generally be possible to raise statute of limitations before trial, subject to the limitation that such claims are "reasonably available" at that time. As a matter of policy, the Subcommittee reaffirmed the judgment that statute of limitation claims should be raised before trial when reasonably available.

THE SUBCOMMITTEE'S RECOMMENDATION: the Advisory Committee should retain multiplicity, duplicity, and statute of limitations in the list of claims that must be raised before trial.

4. Distinguishing statutory deadlines from claims that must be raised before trial

The National Association of Criminal Defense Lawyers raised a concern that one or more of the claims that must be raised before trial under the proposed rule might be interpreted to supersede statutory deadlines. It explained:

> Listing only the constitutional right to a speedy trial might be interpreted to suggest that statutory motions need not be filed prior to trial. The Rule, or at least Note, should make clear that the amended Rule "will supersede that statute [the Speedy Trial Act] or any other that purports to set a specific pretrial motion deadline, such as 18 U.S.C. § 3237(b) (certain venue motions) or 28 U.S.C. § 1867(b) (jury selection challenges), by virtue of the Rules Enabling Act . . . ." (NACDL Public Comment at 6).

The amendment was not intended to have any effect on statutorily prescribed deadlines for pretrial motions. To make that point crystal clear, the Subcommittee proposes an addition to the Committee Note.

THE SUBCOMMITTEE'S RECOMMENDATION: the Advisory Committee should add the following language to the Committee Note:

> ***The Rule is not intended to and does not affect or supersede statutory provisions that establish the time to make specific motions, such as motions under the Jury Selection and Service Act, 18 U.S.C. § 1867(a).***

C. Objection to deleting language in (b)(2).

The Federal Defenders expressed concern that the deletion of certain language in (b)(2) could be interpreted as removing the authority of courts to consider particular motions before trial that do not require a trial on the merits. The Subcommittee proposes that the language in question be restored and relocated in (b)(1) with slight stylistic revisions.

As published, the amendment deleted the following language now found in Rule 12(b)(2): "A party *may* raise by pretrial motion any defense, objection, or request that the court can determine without trial of the general issue." (Emphasis added). This language was deleted because of a concern that the permissive word "may" could be misleading. It implies that a party may *or may not*

raise such a motion. But Rule 12 does not permit the parties to wait to raise certain motions that can be resolved without a trial on the merits. Indeed, it requires many motions to be made before trial. The Committee concluded that this potentially confusing language could be deleted because it was no longer necessary. When Rule 12 was adopted in 1944, it abolished pleas in abatement, demurrers, and other forms of pleading. The language in question stated that motions to dismiss were the new vehicle for raising these claims and defenses. Nearly 60 year later, motions to dismiss are well established, and thus the language was no longer considered necessary.

In their public comment and during the Subcommittee deliberations, the Federal Defenders expressed concern that courts might interpret the change as stripping the courts of authority to consider certain motions before trial, especially in the case of pretrial motions to dismiss for insufficient evidence on stipulated facts when the government did not object.

Although Rule 12 does not contain any analogue to the Civil Rule's motion for summary judgment and at least one circuit has categorically prohibited summary judgment dismissals,[3] several appellate courts have recognized that in narrow circumstances the court can rule on the legal sufficiency of the government's case before trial. A recent Fourth Circuit decision summarized the cases:

> Although there is no provision for summary judgment in the Federal Rules of Criminal Procedure, the district court's pretrial dismissal of the § 922(h) charges was procedurally appropriate under Rule 12(b)(2). That rule provides that "[a] party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue." Fed.R.Crim.P. 12(b)(2). *As circuit courts have almost uniformly concluded, a district court may consider a pretrial motion to dismiss an indictment where the government does not dispute the ability of the court to reach the motion and proffers, stipulates, or otherwise does not dispute the pertinent facts*. See United States v. Flores, 404 F.3d 320, 325 (5th Cir.2005); United States v. Yakou, 428 F.3d 241, 247 (D.C.Cir.2005) (citing United States v. Phillips, 367 F.3d 846, 855 & n. 25 (9th Cir.2004); United States v. DeLaurentis, 230 F.3d 659, 660–61 (3d Cir.2000); United States v. Alfonso, 143 F.3d 772, 776–77 (2d Cir.1998); United States v. Nabors, 45 F.3d 238, 240 (8th Cir.1995); United States v. Hall, 20 F.3d 1084, 1087–88 (10th Cir.1994); United States v. Levin, 973 F.2d 463, 470 (6th Cir.1992); United States v. Risk, 843 F.2d 1059, 1061 (7th Cir.1988)).

United States v. Weaver, 659 F.3d 353, 355 n.* (4th Cir. 2011) (emphasis added).

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[3] *United States v. Critzer*, 951 F.2d 306, 307 (11th Cir. 1992). See also *United States v. Nabors*, 45 F.3d 238 (8th Cir. 1995) (reversing dismissal of indictment for failure of proof, noting, "[t]here being no equivalent in criminal procedure to the motion for summary judgment that may be made in a civil case, see Fed.R.Civ.P. 56(c), the government has no duty to reveal all of its proof before trial.").

After discussion, the Subcommittee concluded that it would be desirable to restore the language in question to the text of the rule and to relocate it in (b)(1). This improves the rule by placing a general statement about the availability of pretrial motions in its proper place, and it addresses the Federal Defender's concern that deletion of this language might have unintended effects. This language has also been cited as authority for pretrial rulings on motions in limine, which make the trial process more efficient by narrowing the evidentiary issues and avoiding trial interruptions. *See, e.g.*, *United States v. Bulger*, 2013 WL 781925, at * 4 & n. 6 (D. Mass. Mar. 4, 2013) (noting conflicting authority on whether Rule 12 "expressly authorizes" motions in limine).

Subsection (b)(1) (captioned "*In general*") was unchanged in the published rule and now begins abruptly with the statement "Rule 47 applies to a pretrial motion." In the Subcommittee's view, it would be an improvement to begin the Rule's treatment of pretrial motions with the more general statement "A party may by pretrial motion raise any defense, objection, or request that the court can determine without a trial on the merits." Although the language would still be permissive, it would be followed by subsections (b)(2) and (3), which clearly indicate that some motions may be made at any time and others must be raised before trial. The more modern phrase "trial on the merits," used later in the rule, is substituted for "trial of the general issue." No change in meaning is intended.

As revised, Rule 12(b)(1) would provide:

1 **(1) In General.** A party may, by pretrial motion, raise any defense, objection, or request that
2 the court can determine without a trial on the merits. Rule 47 applies to all pretrial motions.
3

The Subcommittee's proposal does involve relocating the provision in question from (b)(2) to (b)(1). In general, the Committee has attempted, when possible, to avoid renumbering in order to facilitate research, especially when the provision in question has been the subject of extensive litigation. In this case, however, the change in placement seems warranted, particularly in comparison to the alternatives (deletion of the language, or merely a reference in the Committee Note).

The Subcommittee also proposes the following addition to the Committee Note:

1 **Subdivision (b)(1).** The language formerly in (b)(2), which provided that "any
2 defense, objection, or request that the court can determine without trial of the general issue"
3 may be raised by motion before trial, has been relocated here. The more modern phrase "trial
4 on the merits" is substituted for the more archaic phrase "trial of the general issue." No
5 change in meaning is intended.

THE SUBCOMMITTEE'S RECOMMENDATION: the Advisory Committee should add the following language to the proposed amendment to Rule 12(b)(1):

> ***A party may, by pretrial motion, raise any defense, objection, or request that the court can determine without a trial on the merits.***

If the proposed language is added to the rule, the Committee Note should be amended as well.

D. Objection to language defining issues that can be determined without "trial on the merits."

NACDL expressed concern that the amended rule would be interpreted so broadly that counsel would file unnecessary motions before trial and courts would later hold that other motions were untimely. ("[I]t is likely if not inevitable that litigations and courts will understand references to motions that 'can be determined without a trial on the merits' to mean motions that *might* be able to be determined without a trial . . . .") The language to which this comment refers, however, is little changed by the proposed amendment. The current rule refers to motions "that *the court can determine without trial* of the general issue," and the proposed amendment refers to motions that "*can be determined without*" a trial on the merits. There is no reason to think that this change would lead to a different interpretation.

THE SUBCOMMITTEE'S RECOMMENDATION: The Advisory Committee should make no change in the phrase "can be determined without a trial."

E. Concerns about the Court's authority to extend or reset the deadline for pretrial motions.

The Subcommittee also recommends new language that would explicitly state the district court's authority to extend or reset the deadline for pretrial motions at any time before trial. In the Subcommittee's view, it is critical that the changes in Rule 12 not have the unintended effect of restricting the ability of district courts to deal efficiently with claims and defenses before trial. The present rule implicitly recognizes that the district court may extend the time to consider claims not raised by the deadline for pretrial motions. Rule 12(e) now states that "[a] party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) *or by any extension the court provides*." (Emphasis added.) The Subcommittee concluded that it would be beneficial to explicitly state the court's authority to extend or reset the deadline, and to make it clear that a motion made before the new deadline would be timely.

The Subcommittee proposes that a new subparagraph (c)(2) be added:

(c) ~~Motion Deadline.~~ **Deadline for a Pretrial Motion; Consequences of Not Making a Timely Motion.**

(1) ***Setting the Deadline.*** The court may, at the arraignment or as soon afterward as practicable, set the deadline for the parties to make pretrial motions and may also schedule a motion hearing. If the court does not set a deadline, the deadline is the start of trial.

(2) ***Extending or Resetting the Deadline.*** At any time before trial, the court may extend or reset the deadline for pretrial motions.

(3) ***Consequences of an Untimely Motion Under Rule 12(b)(3).***[4] If a party does not meet the deadline [set under (c)(1) or (2)] ~~– or any extension the court provides –~~ for making a Rule 12(b)(3) motion, the motion is untimely. In such a case, Rule 52[(b)] does not apply, but a court may consider the defense, objection, or request if:

(A) the party shows cause and prejudice; or

(B) the defense or objection is failure to state an offense or double jeopardy, and the party shows prejudice [only].

As published, (c)(2) – which the Subcommittee proposes to renumber (c)(3) – drew from present Rule 12(e) and referred in the phrase set off by dashes only to a date that had been extended, but not one that the court had reset. The Subcommittee's current proposal recognizes that the district court may extend or reset the deadline (which might, for example, shorten the deadline). Courts and litigants might be confused if the dashed phrase in (c)(3) referred only to deadlines that had been extended, and not those that had been reset. Accordingly, the Subcommittee proposes striking the phrase currently set off by dashes.

To make it completely clear that all references in (b)(1), (2), and (3) refer to the same deadline, the references to "a" deadline were changed to "the" deadline. Thus in (1) the court sets "the deadline," in (2) the court may extend or reset "the deadline," and (3) states that a motion is untimely if not made before "the deadline [set under (c)(1) or (2)]." The Subcommittee bracketed "set under (c)(1) or (2)" to highlight the question whether the language is sufficiently clear without the cross reference. Professor Kimble thinks the cross reference is unnecessary, and recommends its deletion.

The Subcommittee also proposes that the Committee Note be revised to reflect the addition of the new paragraph in the text:

As amended, subdivision (c) contains ~~two~~ three paragraphs. Paragraph (c)(1) retains the existing provisions for establishing the time when pretrial motions must be made, and adds a sentence stating that unless the court sets a deadline, the deadline for pretrial motions is the start of trial, so that motions may be ruled upon before jeopardy attaches. Subsection (e) of the present rule contains the language "or by any extension the court provides," which

[4] As noted below, the Subcommittee also recommends additional changes to (c)(3).

anticipates that a district court has the discretion to extend the deadline for pretrial motions. The new paragraph (c)(2) recognizes this discretion explicitly and relocates the Rule's statement of it to a more logical place: after the provision concerning setting the deadline and before the provision concerning the consequences of not meeting the deadline. New paragraph (c)~~(2)~~(3) governs review of untimely claims, which were previously addressed in Rule 12(e).

THE SUBCOMMITTEE'S RECOMMENDATION: The Advisory Committee should add new subparagraph (c)(2) expressly stating the court's authority to extend or reset the deadline for pretrial motions, and make the conforming changes in the text of the rule and the Committee Note.

G. Objections to the standards for relief.

Defense commentators also raised a host of arguments concerning the standards for relief from the consequences of failing to raise an issue before trial. Most fundamentally, they challenged the requirement of "cause and prejudice" on several grounds. Some of the comments focused on the application of cause and prejudice in the trial court before conviction. They argued this standard is not supported by precedent and is unworkable and inappropriate for challenges prior to conviction. Two comments argued in favor of different standards when a claim is first raised at different procedural stages (in the district court, on appeal, and on collateral attack). Another comment argued that the meaning of "prejudice" was not clear, and using the term in Rule 12 would lead to substantial uncertainty and litigation. This comment also argued that requiring a showing of prejudice would lead to wasteful substitution of defense counsel. Finally, at various stages concern has been expressed with the phrase "Rule 52 does not apply."

1. Cause and prejudice

The Subcommittee recommends that no change be made in the standard of "cause and prejudice." As described more fully on pages 42-48 of the reporters' updated March 3, 2012 memorandum (infra), the Supreme Court's opinions stating that the standard under Rule 12 is cause and prejudice give no indication that this requirement is applicable only to claims raised for the first time after conviction. Moreover, we identified cases from six circuits supporting an assessment of prejudice as well as cause in considering relief for untimely claims raised before conviction. After reconsidering this question, the Subcommittee concluded that discarding the good cause review standard as it has been defined by the Supreme Court – as cause and prejudice – would be a dramatic break from precedent. The standard has been applied for decades to untimely claims under Rule 12, and courts assessing cause and prejudice under Rule 12 have encountered no difficulty doing so. Before publication, the Subcommittee, the Committee, and the Standing Committee had all recognized that not all courts interpreted good cause to require both cause and prejudice, but were persuaded that an amendment was the appropriate way to resolve the inconsistency, and did not choose to propose a dramatic break with current practice. Given the long history of applying the Rule 12 standards, the Subcommittee was unpersuaded that it would generate uncertainty and

litigation to make explicit the requirement that "prejudice" must be shown by a party who failed to raise a claim or defense before trial as required by Rule 12(b)(3). For the same reason, there is no reason to believe that the proposal will lead to new and wasteful substitution of counsel.

The Subcommittee also discussed the concern that district court discretion would be unduly limited if trial judges were required to find prejudice as well as cause before a late claim could be considered. The Subcommittee recognized that district judges should have substantial leeway in determining how best to manage claims raised before trial. It concluded that the "cause and prejudice" standard was consistent with that principle, particularly in light of the two new provisions in the rule: the proposed new (c)(2) spelling out the discretion of a judge to respond to a late claim filed any time before trial by simply extending the filing deadline, discussed above, and the proposed new language, to which there has been no objection, providing that the Rule does not bar consideration of any claim filed after the deadline, if the basis for the claim was not reasonably available before the deadline.

Finally, the Subcommittee was not persuaded by the suggestion in one comment that all late-raised constitutional claims should be subject to review upon a showing of "prejudice only." This, again, would be a dramatic break with present practice.

THE SUBCOMMITTEE'S RECOMMENDATION: The Advisory Committee should retain "cause and prejudice" as the standard for review of late-raised claims other than failure to state an offense.

The Subcommittee found other concerns relating to the standards for relief more persuasive. It recommends that the provision stating the consequences for untimely motions be amended to delete the statement that "Rule 52 does not apply" and that the standards for relief be separated and restated as described below. These recommendations, like the deletion of double jeopardy, are intended to eliminate controversial aspects of the proposal in order to pave the way for approval of the core elements. Additionally, as noted below, the Subcommittee considered and requests discussion of a stylistic change recommended by Professor Joe Kimble.

2. Deletion of "Rule 52 does not apply"

As modified, the proposal still sets forth the "consequences of an untimely motion" and states the standard for when "a court may consider the [untimely] defense, motion, or request." Because some appellate courts have applied "plain error" to late-raised claims, the statement that "Rule 52(b) does not apply," though not strictly necessary, was included to guard against the possibility that some courts might continue to require a showing of plain error as well as (or instead of) "cause and prejudice" for all late claims other than failure to state an offense (for which only a showing of "prejudice" is required). The reference to Rule 52, however, has proven to be a lightening rod at various stages. The Subcommittee weighed the benefits of including this language, and explicitly

mandating a uniform approach in the appellate courts, against the possibility that objections to this one aspect of the rule might be sufficient to prevent adoption of the proposal. The Subcommittee concluded that it would be prudent to delete this language, though members expressed the view that this was an important issue that should be considered and discussed by the Advisory Committee at the April meeting.

THE SUBCOMMITTEE'S RECOMMENDATION: The Advisory Committee should delete "Rule 52 does not apply" from proposed Rule 12(c)(3).

3. Separation of standards of review

The Subcommittee also concluded that it would also be beneficial to revise the provision governing late raised claims to make it clearer that there is one general rule for considering untimely motions, and that general rule has just one exception for motions for failure to state an offense. As published, the proposal provided:

1 **(2)** ***Consequences of an Untimely Motion Under Rule 12(b)(3).*** If a party does not meet
2 the deadline – or any extension the court provides – for making a Rule 12(b)(3) motion, the
3 motion is untimely. In such a case, Rule 52[5] does not apply, but a court may consider the
4 defense, objection, or request if:
5 (A) the party shows cause and prejudice; or
6 (B) the defense or objection is failure to state an offense or double jeopardy, and the
7 party shows prejudice [only].

As noted above, the Subcommittee has proposed relocating the reference to the court's authority to extend the time for making a motion into a new paragraph (c)(2), which requires renumbering the remaining portion of subsection (c). The Subcommittee proposes revising what would become paragraph (c)(3) and adding a new paragraph (c)(4):

[5]Professor Kimble noted that as published the amendment referred to Rule 52 as a whole; he asked whether the Committee intended to make all of the Rule 52 in applicable, or only Rule 52(b) (which provides that a "plain error" must be shown if an error was not brought to the district court's attention). In general, the cases addressing the question whether Rule 12 or Rule 52 govern when claims are raised belatedly have focused on Rule 52(b), and Subcommittee members did not identify any problems that would be posed by restricting the reference to Rule 52(b). Accordingly, the Subcommittee and the reporters provisionally agreed that the reference should be limited to Rule 52(b) if the provision is retained. If the provision is retained, however, Subcommittee members and reporters would appreciate hearing the full Committee's views on this issue.

1 **(3)** ***Consequences of an Untimely Motion Under Rule 12(b)(3).*** Except as provided in
2 paragraph (c)(4), if a party does not meet the deadline [set under (c)(1) or (2)] for making a
3 Rule 12(b)(3) motion, the motion is untimely. In such a case, a court may consider the
4 defense, objection, or request if the party shows cause and prejudice.
5 **(4)** ***Consequences of an Untimely Motion for Failure to State an Offense.***
6 Notwithstanding paragraph (c)(3), a court may consider an untimely motion for failure to
7 state an offense if the defendant shows prejudice [only].

In the Subcommittee's view, this separation and restatement of the standards makes it clearer that the general standard for untimely motions is cause and prejudice, and draws attention to the one exception: "prejudice only" for late raised claims that the charging document failed to state an offense.

THE SUBCOMMITTEE'S RECOMMENDATION: The Advisory Committee should revise proposed paragraph (b)(3) and add new paragraph (c)(4) for clarity.

4. Reference to "prejudice only"

Professor Kimble has objected to the world "only" in proposed subparagraph (c)(3)(B) of the proposal as published (shown in brackets on line 7 in the first version quoted above). The Subcommittee's revision places the same phrase in (c)(4) (shown on line 7 of the Subcommittee's proposed revision quoted above).

The Advisory Commission added "only" to counter the likelihood that courts might add requirements other than prejudice to the showing required for untimely double jeopardy and failure-to-state-an-offense claims. There has been some confusion and disagreement among the appellate courts on the question what showing is required. For example, some decisions have required a showing of both good cause and plain error for late-raised double jeopardy claims. The Advisory Committee felt that there was a danger that if the amendment were adopted, some courts would continue such practices absent the clearest possible signal in the text: "prejudice only."

However, the Subcommittee acknowledges Professor Kimble's point that as a literal matter the standards under (A) and (B) ("cause and prejudice" versus "prejudice") are clear: in contrast to (A), (B) requires only prejudice even without the word "only." Moreover, Professor Kimble argued that adding "only" here sets a dangerous precedent: it might suggest that if other provisions in the rules setting standards or requirements do not add "only," the courts may add additional requirements. Professor Kimble suggested that this would be such a serious problem he would likely seek the views of the Style Subcommittee of the Standing Committee if the Advisory Committee does not agree to delete "only."

THE SUBCOMMITTEE'S RECOMMENDATION: The Subcommittee requests discussion on the question whether to delete the word "only."

III. THE NEED FOR REPUBLICATION

Although the determination whether republication is necessary will be made by the Standing Committee, it will wish to know the Advisory Committee's views. Accordingly, it would be useful for the Advisory Committee to turn to this issue once it has determined what changes (if any) it approves in the text and Committee Note as published.

Subcommittee members doubted that republication would be necessary or beneficial if the Advisory Committee approves the post-publication changes described above. Although the published rule certainly generated controversy and critical commentary from several defense groups, each of the changes after publication would seek to clarify the proposal without changing it in any significant way, or to delete provisions that had generated controversy and opposition.

Restoring the omitted language from (b)(2) would simply make clear that the amendment worked no unintended change. This is consistent with the intention stated in the published Committee Note describing the deletion of the language. Moreover, the change responds to a concern raised during the public comment period.

Subcommittee members view the addition of new (c)(2) as a significant improvement, but nonetheless doubt that it warrants republication. Subcommittee members expressed the view that it was extremely important for district judges to have sufficient flexibility to deal with untimely pretrial motion before trial. Given the importance of the subject, republication would be advisable if the addition to the text of new (c)(2) were deemed to constitute a major change in the proposed amendment. However, subdivision (e) of the present rule contains the language "or by any extension the court provides," and it thus anticipates that a district court has the discretion to extend the deadline for pretrial motions. Accordingly, in the Subcommittee's view the proposed amendment merely makes explicit the authority that the district courts now possess, and integrates this authority with the overall revision of Rule 12.

Similarly, the Subcommittee's proposed addition to the Committee note and the changes recommended by the Style Consultant respond to concerns about perceived ambiguities in the rule as published. In the Subcommittee's view, they are all intended to state more clearly the intent of the original proposal, and they are responsive to concerns raised in the public comment period.

Two changes – the deletion of double jeopardy from the list of claims that must be raised before trial, and the deletion of the statement that Rule 52(b) does not apply – remove provisions that generated controversy and opposition. The Advisory Committee's goal in requiring double jeopardy to be raised before trial and stating that Rule 52(b) does not apply to late-raised claims governed by Rule 12 was to settle circuit conflicts and avoid future litigation about the standard of review for late-raised claims. Although eliminating those provisions reduces in some respects the

benefits of the proposed amendment, leaving the law on these points unchanged should help defuse opposition to the amendment. In the Subcommittee's view, it is doubtful that such a scaling back of the proposal would warrant republication.

TAB 3B.5

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE***

Rule 12. Pleadings and Pretrial Motions

1 * * * * *

2 **(b) Pretrial Motions.**

3 **(1)** ***In General.*** Rule 47 applies to a pretrial motion.

4 **(2)** ~~***Motions That May Be Made Before Trial.*** A party~~

5 ~~may raise by pretrial motion any defense,~~

6 ~~objection, or request that the court can determine~~

7 ~~without a trial of the general issue.~~ ***Motions That***

8 ***May Be Made at Any Time.*** A motion that the

9 court lacks jurisdiction may be made at any time

10 while the case is pending.

11 **(3)** ***Motions That Must Be Made Before Trial.*** The

12 following defenses, objections, and requests must

13 be raised by motion before trial if the basis for the

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

14 motion is then reasonably available and the motion
15 can be determined without a trial on the merits:
16 (A) a motion alleging a defect in instituting the
17 prosecution, including:
18 (i) improper venue;
19 (ii) preindictment delay;
20 (iii) a violation of the constitutional right to
21 a speedy trial;
22 (iv) double jeopardy;
23 (v) the statute of limitations;
24 (vi) selective or vindictive prosecution;
25 and
26 (vii) an error in the grand-jury proceeding or
27 preliminary hearing;
28 (B) ~~a motion alleging~~ a defect in the indictment
29 or information, including:
30 (i) joining two or more offenses in the
31 same count (duplicity);

32 (ii) charging the same offense in more than
33 one count (multiplicity);
34 (iii) lack of specificity;
35 (iv) improper joinder; and
36 (v) failure to state an offense.
37 ~~— but at any time while the case is pending, the~~
38 ~~court may hear a claim that the indictment or~~
39 ~~information fails to invoke the court's jurisdiction~~
40 ~~or to state an offense~~;
41 (C) ~~a motion to~~ suppression of evidence;
42 (D) ~~a Rule 14 motion to sever~~severance of
43 charges or defendants under Rule 14; and
44 (E) ~~a Rule 16 motion for~~ discovery under Rule
45 16.
46 **(4)** ***Notice of the Government's Intent to Use***
47 ***Evidence.***
48 (A) *At the Government's Discretion*. At the
49 arraignment or as soon afterward as

50 practicable, the government may notify the
51 defendant of its intent to use specified
52 evidence at trial in order to afford the
53 defendant an opportunity to object before
54 trial under Rule 12(b)(3)(C).

55 (B) *At the Defendant's Request*. At the
56 arraignment or as soon afterward as
57 practicable, the defendant may, in order to
58 have an opportunity to move to suppress
59 evidence under Rule 12(b)(3)(C), request
60 notice of the government's intent to use (in
61 its evidence-in-chief at trial) any evidence
62 that the defendant may be entitled to discover
63 under Rule 16.

64 **(c) ~~Motion Deadline.~~ Deadline for a Pretrial Motion;**
65 **Consequences of Not Making a Timely Motion.**

66 **(1)** ***Setting a Deadline.*** The court may, at the
67 arraignment or as soon afterward as practicable,

68 set a deadline for the parties to make pretrial
69 motions and may also schedule a motion hearing.
70 If the court does not set a deadline, the deadline is
71 the start of trial.
72 **(2)** ***Consequences of an Untimely Motion under Rule***
73 ***12(b)(3).*** If a party does not meet the deadline —
74 or any extension the court provides — for making
75 a Rule 12(b)(3) motion, the motion is untimely. In
76 such a case, Rule 52 does not apply, but a court
77 may consider the defense, objection, or request if:
78 (A) the party shows cause and prejudice; or
79 (B) the defense or objection is failure to state an
80 offense or double jeopardy, and the party
81 shows prejudice only.
82 **(d) Ruling on a Motion.** The court must decide every
83 pretrial motion before trial unless it finds good cause to
84 defer a ruling. The court must not defer ruling on a
85 pretrial motion if the deferral will adversely affect a

86 party's right to appeal. When factual issues are involved
87 in deciding a motion, the court must state its essential
88 findings on the record.

89 **(e)** **[Reserved]** ~~**Waiver of a Defense, Objection, or**~~
90 ~~**Request.** A party waives any Rule 12(b)(3) defense,~~
91 ~~objection, or request not raised by the deadline the court~~
92 ~~sets under Rule 12(c) or by any extension the court~~
93 ~~provides. For good cause, the court may grant relief~~
94 ~~from the waiver.~~

95 * * * * *

Committee Note

Subdivision (b)(2). The amendment deletes the provision providing that "any defense, objection, or request that the court can determine without trial of the general issue" may be raised by motion before trial. This language was added in 1944 to make sure that matters previously raised by demurrers, special pleas, and motions to quash could be raised by pretrial motion. The Committee concluded that the use of pretrial motions is so well established that it no longer requires explicit authorization. Moreover, the Committee was concerned that the permissive language might be misleading, since Rule 12(b)(3) does not permit the parties to wait until after the trial begins to make certain motions that can be determined without a trial on the merits.

As revised, subdivision (b)(2) states that lack of jurisdiction may be raised at any time the case is pending. This provision was relocated from its previous placement at the end of subsection (b)(3)(B) and restyled. No change in meaning is intended.

Subdivision (b)(3). The amendment clarifies which motions must be raised before trial.

The introductory language includes two important limitations. The basis for the motion must be one that is "available" and the motion must be one that the court can determine "without trial on the merits." The types of claims subject to Rule 12(b)(3) generally will be available before trial and they can — and should — be resolved then. The Committee recognized, however, that in some cases, a party may not have access to the information needed to raise particular claims that fall within the general categories subject to Rule 12(b)(3) prior to trial. The "then reasonably available" language is intended to ensure that a claim a party could not have raised on time is not subject to the limitation on review imposed by Rule 12(c)(2). *Cf.* 28 U.S.C. § 1867(a) & (b) (requiring claims to be raised promptly after they were "discovered or could have been discovered by the exercise of due diligence"). Additionally, only those issues that can be determined "without a trial on the merits" need be raised by motion before trial. The more modern phrase "trial on the merits" is substituted for the more archaic phrase "trial of the general issue" that appeared in existing (now deleted) (b)(2). No change in meaning is intended.

The rule's command that motions alleging "a defect in instituting the prosecution" and "errors in the indictment or information" must be made before trial is unchanged. The amendment adds a nonexclusive list of commonly raised claims under each category to help ensure that such claims are not overlooked.

Rule 12(b)(3)(B) has also been amended to remove language that allowed the court at any time while the case is pending to hear a claim that the "indictment or information fails . . . to state an offense." This specific charging error was previously considered fatal whenever raised and was excluded from the general requirement that charging deficiencies be raised prior to trial. The Supreme Court abandoned any jurisdictional justification for the exception in *United States v. Cotton*, 535 U.S. 625, 629-31 (2002) (overruling *Ex parte Bain*, 121 U.S. 1 (1887), "[i]nsofar as it held that a defective indictment deprives a court of jurisdiction").

Subdivision (c). As revised, subdivision (c) governs both the deadline for making pretrial motions and the consequences of failing to meet the deadline for motions that must be made before trial under Rule 12(b)(3).

As amended, subdivision (c) contains two paragraphs. Paragraph (c)(1) retains the existing provisions for establishing the time when pretrial motions must be made, and adds a sentence stating that unless the court sets a deadline, the deadline for pretrial motions is the start of trial, so that motions may be ruled upon before jeopardy attaches. New paragraph (c)(2) governs review of untimely claims, which were previously addressed in Rule 12(e).

Rule 12(e) provided that a party "waives" a defense not raised within the time set under Rule 12(c). Although the term waiver in the context of a criminal case ordinarily refers to the intentional relinquishment of a known right, Rule 12(e) has never required any determination that a party who failed to make a timely motion intended to relinquish a defense, objection, or request that was not raised in a timely fashion. Accordingly, to avoid possible confusion the Committee decided not to employ the term "waiver" in new paragraph (c)(2).

The standard for review of untimely claims under new subdivision 12(c)(2) depends on the nature of the defense, objection, or request. The general standard for claims that must be raised before trial under Rule 12(b)(3) is stated in (c)(2)(A), which requires that the party seeking relief show "cause and prejudice" for failure to raise a claim by the deadline. Although former Rule 12(e) referred to "good cause," no change in meaning is intended. The Supreme Court and lower federal courts interpreted the "good cause" standard under Rule 12(e) to require both (1) "cause" for the failure to raise the claim on time, and (2) "prejudice" resulting from the error. *Davis v. United States*, 411 U.S. 233, 242 (1973); *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 363 (1963). Each concept — "cause" and "prejudice" — is well-developed in case law applying Rule 12. The amended rule reflects the judicial construction of Rule 12(e).

Subdivision (c)(2)(B) provides a different standard for two specific claims: failure of the charging document to state an offense and violations of double jeopardy. The Committee concluded that judicial review of these claims, which go to adequacy of the notice afforded to the defendant, and the power of the state to bring a defendant to trial or to impose punishment, should be available without a showing of "cause." Accordingly, paragraph (c)(2)(B) provides that the court can consider these claims if the party "shows prejudice only." Unlike plain error review under Rule 52(b), the new standard under Rule 12(c)(2)(B) does not require a showing that the error was "plain" or that the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." Nevertheless, it will not always be possible for a defendant to make the required showing. For example, in some cases in which the charging document omitted an element of the offense the defendant may have admitted the element as part of a guilty plea after having been afforded timely notice by other means.

Subdivision (e). The effect of failure to raise issues by a pretrial motion have been relocated from (e) to (c)(2).

Rule 34. Arresting Judgment

1 **(a) In General.** Upon the defendant's motion or on its
2 own, the court must arrest judgment if the court does not
3 have jurisdiction of the charged offense.~~if:~~
4 ~~(1) the indictment or information does not charge an~~
5 ~~offense; or~~
7 ~~(2) the court does not have jurisdiction of the charged~~
8 ~~offense.~~
9 * * * * *

Committee Note

This amendment conforms Rule 34 to Rule 12(b) which has been amended to remove language that the court at any time while the case is pending may hear a claim that the "indictment or information fails . . . to state an offense." The amended Rule 12 instead requires that such a defect be raised before trial.

TAB 3C

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TAB 3C.1

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RULES 5 WITH PROPOSED MODIFICATIONS
WITH PROPOSED NOTES

Rule 5. Initial Appearance

* * * * *

(d) Procedure in a Felony Case.

(1) ***Advice*.** If the defendant is charged with a felony, the judge must inform the defendant of the following:

* * * *

(D) any right to a preliminary hearing; and

(E) the defendant's right not to make a statement, and that any statement made may be used against the defendant; and

(F) that a defendant who is not a United States citizen may request that an attorney for the government or a federal law enforcement official notify a consular officer from the defendant's country of nationality that the defendant has been arrested — but that

17 even without the defendant's request, a

18 treaty or other international agreement may

19 require consular notification.

20

* * * * *

Committee Note

Subdivision (d)(1)(F). Article 36 of the Vienna Convention on Consular Relations provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention, and bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 requires consular notification advice to be given "without delay," and arresting officers are primarily responsible for providing this advice.

Providing this advice at the initial appearance is designed, not to relieve law enforcement officers of that responsibility, but to provide additional assurance that U.S. treaty obligations are fulfilled, and to create a judicial record of that action. The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without attempting to determine the defendant's citizenship.

At the time of this amendment, many questions remain unresolved by the courts concerning Article 36, including whether it creates individual rights that may be invoked in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). This amendment does not address those questions. More particularly, it does not create any such rights or remedies.

DRAFT: SUBJECT TO COMMITTEE APPROVAL OF CHANGES MADE AFTER PUBLICATION

In response to public comments the amendment was rephrased to state that the information regarding consular notification should be provided to all defendants who are arraigned. Although it is anticipated that ordinarily only defendants who are held in custody will ask the government to notify a consular official of their arrest, it is appropriate to provide this information to all defendants at their initial appearance. The new phrasing also makes it clear that the advice should be provided to every defendant, without any attempt to determine the defendant's citizenship. A conforming change was made to the Committee Note.

PUBLIC COMMENTS CONCERNING RULE 5 AS PUBLISHED IN 2012

12-CR-001. George C. Lobb. Mr. Loeb criticizes the proposed amendment because it does not provide for the enforcement of individual rights in judicial proceedings and does not set a precise time at which law enforcement must give advice concerning consular notification.

12-CR-002. Federal Magistrate Judges Association. FMJA "endorses the purpose behind the proposed amendments but suggests rewording" to (1) require that the advice be given to all defendants, not just those "in custody," and (2) make it clear that judges should give warnings to all defendants, not seek to determine whether individual defendants are citizens. It also "remains concerned that incorporating any statement into the Rules regarding consular notification carries some risk that it will be interpreted as a substantive right."

12-CR-003. Peter Goldberger on behalf of the National

Association of Criminal Defense Lawyers. NACDL generally supports the proposed amendment, but reiterates its 2010 concerns, noting particularly that it is unclear "whether the phrase 'is held' refers to the defendant's status at the commencement of, or at the conclusion of, the hearing."

PUBLIC COMMENTS CONCERNING RULE 5 AS PUBLISHED IN 2010

10-CR-001. Peter Goldberger on behalf of the National Association of Criminal Defense Lawyers. NACDL agrees with the amendment in principle, but suggests amendments to (1) clarify the meaning of "held in custody," (2) make clear that consular warnings may not be delayed until the initial hearing, and (3) make clear that the initial hearing in extradition cases must be held "without unnecessary delay."

10-CR-002. Federal Magistrate Judges Association. FMJA (1) recommends that proposed Rule 5(c)(4) be revised to require that the initial hearing for extradited defendants must be held "without unnecessary delay," (2) expresses some reservations about imposing upon courts the executive function of giving consular notification, and (3) notes that great care would have to be taken to ensure that defendants who are given this notice do not incriminate themselves.

Rule 58. Petty Offenses and Other Misdemeanors

* * * * *

"(b) Pretrial Procedure.

* * * * *

(2) Initial Appearance. At the defendant's initial appearance on a petty offense or other misdemeanor charge, the magistrate judge must inform the defendant of the following:

* * * * *

(F) the right to a jury trial before either a magistrate judge or a district judge – unless the charge is a petty offense; ~~and~~

(G) any right to a preliminary hearing under Rule 5.1, and the general circumstances, if any, under which the defendant may secure pretrial release; and

(H) that a defendant who is not a United States citizen may request that an attorney for the government or a federal law enforcement official notify a consular officer from the defendant's country of nationality that the defendant has been arrested — but that even without the defendant's request, a treaty or other international agreement may require consular notification.

COMMITTEE NOTE

Section (b)(2)(H) Article 36 of the Vienna Convention on Consular Relations provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention, and bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 requires consular notification advice to be given "without delay," and arresting officers are primarily responsible for providing this advice.

Providing this advice at the initial appearance is designed, not to relieve law enforcement officers of that responsibility, but to provide additional assurance that U.S. treaty obligations are fulfilled, and to create a judicial record of that action. The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without attempting to determine the defendant's citizenship.

At the time of this amendment, many questions remain unresolved by the courts concerning Article 36, including whether it creates individual rights that may be invoked in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). This amendment does not address those questions. More particularly, it does not create any such rights or remedies.

DRAFT: SUBJECT TO COMMITTEE APPROVAL OF CHANGES MADE AFTER PUBLICATION

In response to public comments the amendment was rephrased to state that the information regarding consular notification should be provided to all defendants who are arraigned. Although it is anticipated that ordinarily only defendants who are held in custody will ask the government to notify a consular official of their arrest, it is appropriate to provide this information to all defendants at the initial appearance. The new phrasing also makes it clear that the advice should be provided to every defendant, without any attempt to determine the defendant's citizenship. A conforming change was made to the Committee Note.

PUBLIC COMMENTS CONCERNING RULE 58 AS PUBLISHED IN 2012

12-CR-001. George C. Lobb. Mr. Loeb criticizes the proposed amendment because it does not provide for the enforcement of individual rights that may be invoked in a judicial proceeding and does not define a precise time at which law enforcement must give advice concerning consular notification.

12-CR-002. Federal Magistrate Judges Association. FMJA "endorses the purpose behind the proposed amendments but suggests rewording" to (1) require that the advice be given to all defendants, not just those "in custody," and (2) make it clear that judges should give warnings to all defendants, not seek to determine whether individual defendants are citizens. It also "remains concerned that incorporating any statement into the Rules regarding consular notification carries some risk that it will be interpreted as a substantive right."

12-CR-003. Peter Goldberger on behalf of the National Association of Criminal Defense Lawyers. NACDL generally supports the proposed amendments, but reiterates its 2010 concerns, noting particularly that it is unclear "whether the phrase 'is held' refers to the defendant's status at the commencement of, or at the conclusion of, the hearing."

PUBLIC COMMENTS CONCERNING RULE 58 AS PUBLISHED IN 2010

10-CR-001. Peter Goldberger on behalf of the National Association of Criminal Defense Lawyers. NACDL agrees with the amendment in principle, but suggests amendments to (1) clarify the meaning of "held in custody," (2) make clear that consular warnings may not be delayed until the initial hearing, and (3) make clear that the initial hearing in extradition cases must be held "without unnecessary delay."

10-CR-002. Federal Magistrate Judges Association. FMJA (1) recommends that proposed rule be revised to require that the initial hearing for extradited defendants must be held "without unnecessary delay," (2) expresses some reservations about imposing upon courts the executive function of giving consular notification, and (3) notes that great care would have to be taken to ensure that defendants who are given this notice do not incriminate themselves.

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RULES 5 WITH PROPOSED MODIFICATIONS
WITH PROPOSED NOTES*

Rule 5. Initial Appearance

*** * * * ***

1

2 **(d) Procedure in a Felony Case.**

3 **(1)** ***Advice*.** If the defendant is charged with a

4 felony, the judge must inform the defendant of

5 the following:

6 * * * *

7 (D) any right to a preliminary hearing; ~~and~~

8 (E) the defendant's right not to make a

9 statement, and that any statement made

10 may be used against the defendant; and

11 (F) that a defendant who is not a United States

12 citizen may request that an attorney for the

13 government or a federal law enforcement

14 official notify a consular officer from the

15 defendant's country of nationality that the

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16 defendant has been arrested — but that

17 even without the defendant's request, a

18 treaty or other international agreement may

19 require consular notification.

20

* * * * *

Committee Note

Subdivision (d)(1)(F). Article 36 of the Vienna Convention on Consular Relations provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention, and bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 requires consular notification advice to be given "without delay," and arresting officers are primarily responsible for providing this advice.

Providing this advice at the initial appearance is designed, not to relieve law enforcement officers of that responsibility, but to provide additional assurance that U.S. treaty obligations are fulfilled, and to create a judicial record of that action. The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without attempting to determine the defendant's citizenship.

At the time of this amendment, many questions remain unresolved by the courts concerning Article 36, including whether it creates individual rights that may be invoked in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). This amendment does not address those questions. More particularly, it does not

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create any such rights or remedies.

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PUBLIC COMMENTS CONCERNING RULE 5 AS PUBLISHED IN 2012

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incorporating any statement into the Rules regarding consular notification carries some risk that it will be interpreted as a substantive right."

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PUBLIC COMMENTS CONCERNING RULE 5 AS PUBLISHED IN 2010

10-CR-001. Peter Goldberger on behalf of the National Association of Criminal Defense Lawyers. NACDL agrees with the amendment in principle, but suggests amendments to (1) clarify the meaning of "held in custody," (2) make clear that consular warnings may not be delayed until the initial hearing, and (3) make clear that the initial hearing in extradition cases must be held "without unnecessary delay."

10-CR-002. Federal Magistrate Judges Association. FMJA (1) recommends that proposed Rule 5(c)(4) be revised to require that the initial hearing for extradited defendants must be held "without unnecessary delay," (2) expresses some reservations about imposing upon courts the executive function of giving consular notification, and (3) notes that great care would have to be taken to ensure that defendants who are given this notice do not incriminate themselves.

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Rule 58. Petty Offenses and Other Misdemeanors

* * * * *

"(b) Pretrial Procedure.

* * * * *

(2) Initial Appearance. At the defendant's initial appearance on a petty offense or other misdemeanor charge, the magistrate judge must inform the defendant of the following:

* * * * *

(F) the right to a jury trial before either a magistrate judge or a district judge – unless the charge is a petty offense; ~~and~~

(G) any right to a preliminary hearing under Rule 5.1, and the general circumstances, if any, under which the defendant may secure pretrial release~~.~~ ; and

(H) that a defendant who is not a United States citizen may request that an attorney for the government or a federal law enforcement official notify a consular officer from the defendant's country of nationality that the defendant has been arrested — but that even without the defendant's request, a treaty or other international agreement may require consular notification.

COMMITTEE NOTE

Section (b)(2)(H) Article 36 of the Vienna Convention on Consular Relations provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention, and bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 requires consular notification advice to be given "without delay," and arresting officers are primarily responsible for providing this advice.

Providing this advice at the initial appearance is designed, not to relieve law enforcement officers of that responsibility, but to provide additional assurance that U.S. treaty obligations are fulfilled, and to create a judicial record of that action. The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without attempting to determine the defendant's citizenship.

At the time of this amendment, many questions remain unresolved by the courts concerning Article 36, including whether it creates individual rights that may be invoked in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). This amendment does not address those questions. More particularly, it does not create any such rights or remedies.

DRAFT: SUBJECT TO COMMITTEE APPROVAL OF CHANGES MADE AFTER PUBLICATION

In response to public comments the amendment was rephrased to state that the information regarding consular notification should be provided to all defendants who are arraigned. Although it is anticipated that ordinarily only defendants who are held in custody will ask the government to notify a consular official of their arrest, it is appropriate to provide this information to all defendants at the initial appearance. The new phrasing also makes it clear that the advice should be provided to every defendant, without any attempt to determine the defendant's citizenship. A conforming change was made to the Committee Note.

PUBLIC COMMENTS CONCERNING RULE 58 AS PUBLISHED IN 2012

12-CR-001. George C. Lobb. Mr. Loeb criticizes the proposed amendment because it does not provide for the enforcement of individual rights that may be invoked in a judicial proceeding and does not define a precise time at which law enforcement must give advice concerning consular notification.

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12-CR-003. Peter Goldberger on behalf of the National Association of Criminal Defense Lawyers. NACDL generally supports the proposed amendments, but reiterates its 2010 concerns, noting particularly that it is unclear "whether the phrase 'is held' refers to the defendant's status at the commencement of, or at the conclusion of, the hearing."

PUBLIC COMMENTS CONCERNING RULE 58 AS PUBLISHED IN 2010

10-CR-001. Peter Goldberger on behalf of the National Association of Criminal Defense Lawyers. NACDL agrees with the amendment in principle, but suggests amendments to (1) clarify the meaning of "held in custody," (2) make clear that consular warnings may not be delayed until the initial hearing, and (3) make clear that the initial hearing in extradition cases must be held "without unnecessary delay."

10-CR-002. Federal Magistrate Judges Association. FMJA (1) recommends that proposed rule be revised to require that the initial hearing for extradited defendants must be held "without unnecessary delay," (2) expresses some reservations about imposing upon courts the executive function of giving consular notification, and (3) notes that great care would have to be taken to ensure that defendants who are given this notice do not incriminate themselves.

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RULES 5 AND 58 – AS PUBLISHED 2012*

Rule 5. Initial Appearance

* * * * *

(d) Procedure in a Felony Case.

(1) ***Advice*.** If the defendant is charged with a felony, the judge must inform the defendant of the following:

* * * *

(D) any right to a preliminary hearing; ~~and~~

(E) the defendant's right not to make a statement, and that any statement made may be used against the defendant; and

(F) if the defendant is held in custody and is not a United States citizen:

(i) that the defendant may request that an attorney for the government or a federal law enforcement official notify a consular officer from the defendant's

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

16 country of nationality that the

17 defendant has been arrested; and

18 (ii) that even without the defendant's

19 request, consular notification may be

20 required by a treaty or other

21 international agreement.

22

* * * * *

Committee Note

Subdivision (d)(1)(F). Article 36 of the Vienna Convention on Consular Relations provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention, and bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 requires consular notification advice to be given "without delay," and arresting officers are primarily responsible for providing this advice. See 28 C.F.R. § 50.5 (requiring consular notification advice to arrested foreign nationals by Department of Justice arresting officers).

Providing this advice at the initial appearance is designed, not to relieve law enforcement officers of that responsibility, but to provide additional assurance that U.S. treaty obligations are fulfilled, and to create a judicial record of that action.

At the time of this amendment, many questions remain unresolved by the courts concerning Article 36, including whether it creates individual rights that may be invoked in a judicial proceeding

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

and what, if any, remedy may exist for a violation of Article 36. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). This amendment does not address those questions. More particularly, it does not create any such rights or remedies.

1 **Rule 58. Petty Offenses and Other Misdemeanors**

2 * * * * *

3 **"(b) Pretrial Procedure.**

4 * * * * *

5 **(2) Initial Appearance.** At the defendant's initial
6 appearance on a petty offense or other misdemeanor
7 charge, the magistrate judge must inform the defendant
8 of the following:

9 * * * * *

10 (F) the right to a jury trial before either
11 a magistrate judge or a district judge –
12 unless the charge is a petty offense; ~~and~~

13 (G) any right to a preliminary hearing
14 under Rule 5.1, and the general
15 circumstances, if any, under which the
16 defendant may secure pretrial release~~.~~; and

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

17 (H) if the defendant is held in custody

18 and is not a United States citizen:

19 (i) that the defendant may request that an

20 attorney for the government or a federal law

21 enforcement officer notify a consular officer

22 from the defendant's country of nationality that

23 the defendant has been arrested; and

24 (ii) that even without the defendant's request,

25 consular notification may be required by a

26 treaty or other international agreement.

COMMITTEE NOTE

Section (b)(2)(H) Article 36 of the Vienna Convention on Consular Relations provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention, and bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 requires consular notification advice to be given "without delay," and arresting officers are primarily responsible for providing this advice. See 28 C.F.R. § 50.5 (requiring consular notification advice to arrested foreign nationals by Department of Justice arresting officers).

Providing this advice at the initial appearance is designed, not to relieve law enforcement officers of that responsibility, but to provide additional assurance that our treaty obligations are fulfilled, and to

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

create a judicial record of that action.

At the time of this amendment, many questions remain unresolved by the courts concerning Article 36, including whether it creates individual rights that may be invoked in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). This amendment does not address those questions. More particularly, it does not create any such rights or remedies.

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

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TAB 3C.4

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RULES 5 AND 58 AS SUBMITTED TO SUPREME COURT – INCLUDING PORTIONS RETURNED FOR RECONSIDERATION*

Rule 5. Initial Appearance

*** * * * ***

(d) Procedure in a Felony Case.

(1) ***Advice*.** If the defendant is charged with a felony, the judge must inform the defendant of the following:

* * * * *

(D) any right to a preliminary hearing; ~~and~~

(E) the defendant's right not to make a statement, and that any statement made may be used against the defendant; and

(F) if the defendant is held in custody and is not a United States citizen, that an attorney for the government or a federal law enforcement officer will:

(i) notify a consular officer from the

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

15 defendant's country of nationality that

16 the defendant has been arrested if the

17 defendant so requests; or

18 (ii) make any other consular notification

19 required by treaty or other

20 international agreement.

* * * * *

Committee Note

Subdivision (d)(1)(F). This amendment is designed to ensure that the United States fulfills its international obligations under Article 36 of the Vienna Convention on Consular Relations, and other bilateral treaties. Bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 of the Vienna Convention provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention. At the time of this amendment, many questions remain unresolved concerning Article 36, including whether it creates individual rights that may be invoked in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). This amendment does not address those questions.

Rule 58. Petty Offenses and Other Misdemeanors

* * * * *

(b) Pretrial Procedure.

* * * * *

(2) Initial Appearance. At the defendant's initial appearance on a petty offense or other misdemeanor charge, the magistrate judge must inform the defendant of the following:

* * * * *

(F) the right to a jury trial before either a magistrate judge or a district judge – unless the charge is a petty offense; ~~and~~

(G) any right to a preliminary hearing under Rule 5.1, and the general circumstances, if any, under which the defendant may secure pretrial release~~.~~ ; and

(H) if the defendant is held in custody and is not a United States citizen, that an attorney for the government or a federal law enforcement officer will:

(i) notify a consular officer from the

22 defendant's country of nationality that

23 the defendant has been arrested if the

24 defendant so requests; or

25 (ii) make any other consular notification

26 required by treaty or other

27 international agreement.

COMMITTEE NOTE

Section (b)(2)(H). This amendment is part of the government's effort to ensure that the United States fulfills its international obligations under Article 36 of The Vienna Convention on Consular Relations, and other bilateral treaties. Bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 of the Convention provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention. At the time of these amendments, many questions remain unresolved concerning Article 36, including whether it creates individual rights that may be invoked in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). These amendments do not address those questions.

TAB 3D

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ADVISORY COMMITTEE ON CRIMINAL RULES
DRAFT MINUTES
April 25, 2013, Durham, North Carolina

I. Attendance and Preliminary Matters

The Criminal Rules Advisory Committee ("Committee") met in at Duke Law School in Durham, North Carolina on April 25, 2013. The following persons were in attendance:

Judge Reena Raggi, Chair
Carol A. Brook, Esq.
Judge Morrison C. England, Jr.
Kathleen Felton, Esq.
Mark Filip, Esq. (by telephone)
Chief Justice David E. Gilbertson
James N. Hatten, Esq.
Judge John F. Keenan
Judge David M. Lawson
Professor Andrew D. Leipold
Judge Donald W. Molloy
Judge Timothy R. Rice
John S. Siffert, Esq.
Jonathan Wroblewski, Esq.
Judge James B. Zagel
Professor Sara Sun Beale, Reporter
Professor Nancy King, Reporter

Judge Jeffrey Sutton, Standing Committee Chair
Professor Daniel Coquillette, Standing Committee Reporter
Judge Marilyn L. Huff, Standing Committee Liaison
Judge Richard C. Tallman, Former Advisory Committee Chair

The following persons were present to support the Committee:

Laural L. Hooper, Esq.
Jonathan C. Rose, Esq.
Benjamin J. Robinson, Esq.

II. CHAIR'S REMARKS AND OPENING BUSINESS

A. Chair's Remarks

Judge Raggi introduced new members Mark Filip (who participated by telephone) and John S. Siffert. She also thanked Judge Richard Tallman, the former chair of the Committee, for attending. Judge Tallman played a critical role in the development of the proposed amendment

to Rule 12.

Judge Raggi noted that the Department of Justice recently conferred significant honors on Jonathan Wroblewski and Kathleen Felton. Mr. Wroblewski received the John C. Keeney award for Exceptional Integrity and Professionalism. Ms. Felton received the most prestigious award given by the Criminal Division, the Henry E. Peterson Memorial Award, in recognition of her "lasting contribution to the Division." Judge Raggi congratulated Mr. Wroblewski and Ms. Felton, and thanked them for their exceptional contributions to the Committee's work. Judge Raggi also noted with regret Ms. Felton's plan to retire before the next meeting of the Committee.

B. Review and Approval of Minutes of April 2012 Meeting

A motion to approve the minutes of the April 2012 Committee meeting in San Francisco, California, having been moved and seconded:

The Committee unanimously approved the April 2012 meeting minutes by voice vote.

C. Proposed Amendments Approved by the Supreme Court for Transmittal to Congress

Judge Raggi reported that the following proposed amendments, approved by the Supreme Court and transmitted to Congress, will take effect on December 1, 2013, unless Congress acts to the contrary:

Rule 11. Advice re Immigration Consequences of Guilty Plea.

Rule 16. Government Disclosure: Proposed technical and conforming amendment.

III. CRIMINAL RULES ACTIONS

A. Proposed Amendments to Rules 12 and 34

Judge Raggi noted that the main work before the Committee was consideration of Rules 12 and 34. Because the proposed amendments have such a lengthy history and the materials in the agenda book were voluminous, Judge Raggi asked the Reporters to begin with a summary of the history of the proposal.

Professors Beale and King stated that following the Supreme Court's decision in *United States v. Cotton*, 535 U.S. 625 (2002), in 2006 the Department of Justice asked the Criminal

Rules Committee to consider amending Rule 12(b)(3)(B) to require defendants to raise *before trial* any objection that the indictment failed to state an offense by eliminating the provision that required review of such a claim even when raised for the first time after conviction. (In the remainder of these minutes, failure to state an offense will be referred to as FTSO.) At the urging of members of the Advisory Committee and at the Standing Committee, the proposal evolved and expanded over the course of eight years to address other features of Rule 12's treatment of pretrial motions in general.

As published, the proposed amendment:

- stated that the requirement that certain claims and defenses be raised before trial applies only if the basis for the motion is "reasonably available" before trial;

- enumerated the common types of motions that courts have found to constitute defects "in instituting the prosecution" and "in the indictment or information" that must be raised before trial;

- included FTSO among the defects "in the indictment or information" that must be raised before trial; and

- clarified the general standard for relief from the rule that late-filed claims may not be considered, resolving confusion created by the non-standard use of the term "waiver" to reach situations in which there was no intentional relinquishment of a known right.

Judge Raggi noted that she had encouraged the defense bar to review the published amendment, and that the Committee had received thoughtful extended comments that were extremely helpful. The Reporters then drew the Committee's attention to the various issues raised in the public comments, particularly the concerns raised by the defense bar.

To consider the issues raised in the public comments the Rule 12 Subcommittee met in person in San Francisco and held numerous additional meetings by telephone. Judge Raggi thanked the Subcommittee for its extraordinary efforts, and asked Judge England, the Subcommittee chair, to give an overview of the Subcommittee's proposal for amendment as revised following publication.

Judge England prefaced his presentation by noting that, in contrast to earlier proposals for amendment of Rule 12, which had passed the Subcommittee by divided votes, the proposal he would now present had been approved by the Subcommittee unanimously. The proposed amendment would increase the clarity of guidance provided by Rule 12 to both courts and practitioners by listing the common motions that must be raised before trial and delineating the standard of review for late-raised claims. For claims other than FTSO, the proposed standard

was cause and prejudice. For FTSO, the recommended standard was prejudice alone. The Subcommittee also concluded that the district courts needed to have significant discretion to handle claims in the period before trial, and it added language to make that clearer. Finally, at the urging of Judge Raggi, the Subcommittee reconsidered features of the proposed rule that applied the standards for late-raised claims to appellate courts. The Subcommittee ultimately agreed it was best not to try to tie the hands of the appellate courts. Accordingly, it agreed to delete from the proposed rule the statement that Rule 52 does not apply. This would allow the appellate courts to determine whether to apply the standards specified in Rule 12(c) or the plain error standard specified in Rule 52 when untimely claims are raised for the first time on appeal.

When Judge England completed his presentation of the Subcommittee proposal, Judge Raggi agreed that the proposed rule provides greater clarity in identifying motions that must be filed before trial. She also noted that proposed 12(c)(2) gives district judges the needed flexibility to consider untimely motions and claims raised before jeopardy attaches, which could have the practical advantage of minimizing later claims of ineffective assistance of counsel. The proposed amendments also clarify that if the circumstances giving rise to a claim or defense identified in Rule 12(b)(3) are not known before trial, no pretrial motion is required. At that point, Judge Raggi invited Subcommittee members to add their views.

Speaking individually, Subcommittee members agreed that the proposed amendment reflected compromise. Nevertheless, the proposed rule was a considerable improvement over the current one. A defense representative noted that some features of the proposed rule might not benefit defendants in particular cases, but she voiced strong support for retaining the prejudice-only standard for late-raised FTSO claims and the abundant discretion afforded to trial judges. A judge characterized the Subcommittee proposal as a "delicate but exquisite compromise," and he noted that like Civil Rule 12 it "clears the decks before trial" and affords the trial judge abundant discretion to do substantial justice. Representatives of the Department of Justice noted that they began with a narrow policy-based proposal to require FTSO claims to be raised before trial, so that errors would be raised promptly and rectified. However, if the charging document did not give the defendant notice, and he could show prejudice, the Department has always agreed that relief should be afforded. The current proposal also clarifies what claims must be raised before trial, provides substantial discretion to the district judge before the jury is sworn, eliminates the term "waiver," and bifurcates the standard for late-raised claims, providing for cause and prejudice (a clarification of what the law currently is) for all claims except FTSO, for which prejudice alone is sufficient. In resolving conflicts that had developed in the lower courts, the proposal used terms that had been litigated and defined in the case law.

Judge Raggi noted that the proposal raises two different standard of review questions, because it:

(1) changes "good cause" to "cause and prejudice" in order to reflect the interpretation given by most courts, and

(2) provides a different standard, "prejudice," for late raised FTSO claims.

Following *Cotton*, many appellate courts are now applying plain error to FTSO claims raised for the first time on appeal, and Judge Raggi said she had urged the Subcommittee to consider whether it was desirable to mandate the prejudice standard for late-raised FTSO claims on appeal.

Judge Raggi then opened the floor for general discussion by all committee members. A member asked the purpose of limiting the motions that must be raised before trial to those where the basis is "*reasonably* available." The Reporters and Subcommittee members explained that "available" appears to be a binary factual concept: information was or was not available. In contrast, "reasonably available" includes both this factual component and a qualitative judgment. For example, if the information necessary to raise the motion was included on one page of a massive data dump only one day before the date for filing pretrial motions, it might be deemed available in a factual sense, but not reasonably available. The requirement that a motion "must" be raised before trial applies only if the basis for the motion was "then reasonably available." This allows the defense to argue that, given the circumstances, it was not reasonable to expect a claim or defense to be raised. If the court determines that the basis for the motion was not reasonably available, then proposed Rule 12(b)(3) does not require the motion to be raised before trial. Therefore a later motion would <u>not</u> be untimely under Rule 12(c), and there would be no need to show good cause.

A defense member expressed a variety of concerns with the proposed amendment. First, he argued, the proposal shifts the burden of proof/burden of production by requiring the defense to raise certain "defenses" before trial. But the law generally permits the defense to remain silent and not to assert defenses before trial. For example, in the Third Circuit a statute of limitations defense is timely whether raised before trial, during trial, or at the time of jury instructions. The defendant can wait until the government rests, and then raise its claim that the government has not proven conduct that occurred within the limitations period. In the member's view, requiring this issue to be raised before trial would be a radical change. It would alert the prosecution to the problem. The proposal may also work a change for other claims or defenses. For example, even if some circuits require venue to be raised before trial, the matter may be open in other circuits. In some cases, it may also be to the advantage of the defense not to raise selective or vindictive prosecution before trial, because the government might change its presentation of the case. The member noted that requiring such defenses to be raised before trial may be efficient, but efficiency is not the concern of the defense. In some cases it might also be problematic for the defense to raise multiplicity before trial. These are not merely procedural issues. They are defenses. A defendant has a constitutional right to remain silent, and the government has the

burden of proof. Finally, he expressed concern about the uncertainty created by the new standard "reasonably available." There will be substantial litigation about what the defendant should have known. What if the defendant gets a gigabyte of data one year before trial? The member proposed as an alternative that claims must be raised before trial only when the defense has "actual knowledge." And even that would not solve the problem with shifting the burden of proof, especially for venue and statute of limitations.

Judge Raggi asked the member who first raised the issue of "reasonably available" if he was satisfied with the explanations. He responded that he now understood the rationale for including the word and the issues it would generate.

Judge Raggi then asked for any other concerns about the rule, so that the Subcommittee could respond to all of the issues. One member asked what kind of error could occur in a preliminary hearing, and given grand jury secrecy, how would a defendant know before trial that an error had occurred. Another participant asked why the Subcommittee proposed to substitute "cause and prejudice" for the traditional "good cause." Judge Raggi noted that Judge Sutton had also raised that issue, and asked him for his comments on the proposed amendment.

Judge Sutton noted that he was relatively new to Rule 12. He thanked the Committee for its extensive work on the proposal and expressed his sense that after eight years it was very important to complete the project. He identified a number of strengths of the proposal. First, it is valuable to clarify what issues must be raised before trial. Second, it is imperative to get rid of the term "waiver" in Rule 12(e). The current language was drafted before the Supreme Court clarified the distinction between waiver and forfeiture, and it makes no sense now. Giving district judges more flexibility before trial is very important. It's becoming clearer that this is a rule addressed to the district courts, which he characterized as positive.

Judge Sutton also provided perspective on the Supreme Court's role in the rulemaking process. Although the Court has the authority to approve rules over the dissent of a justice, under Chief Justice Roberts unanimity has been required. So rules must, in effect, be approved by all nine justices. With that in mind, Judge Sutton agreed that it was appropriate to omit double jeopardy from the non-exhaustive list of claims that must be raised before trial. But given the agreement that the word "waiver" should be eliminated, why not substitute "forfeiture"? Finally, he predicted that there would be a lot of push back on the proposed change from "good cause" to "cause and prejudice." "Good cause" is a well established concept, and it gives the court wide discretion. Prejudice is part of that traditional enquiry. But when you codify a standard, it ordinarily carries with it the meaning it has developed. Because "cause and prejudice" is now the standard in habeas litigation, its meaning in that context (including the exception for actual innocence) could carry over to Rule 12.

Judge Tallman explained that you could say the original rule was drafted, at least in part,

on the erroneous assumption that failure to state an offense was a jurisdictional error. *Cotton* then made it clear that failure to state an offense is not jurisdictional. In response to the concerns raised by the defense member, Judge Tallman noted that the proposal does reflect a policy judgment that the rules should discourage sandbagging. It does attempt to flush out issues that could be dispositive, which from the court's perspective should be raised early for effective case management. It may require the defense to play a card earlier than it wishes, but it does not require the defense to come forward with evidence. As an appellate judge, he shared some of the concerns that using "cause and prejudice" in Rule 12 could import some of the habeas case law. But trial judges understand "good cause." Finally, he noted that all of the issues raised at the meeting had been thoroughly vetted on multiple occasions. He commended the latest proposal as a very good rule and one that was a significant improvement over current Rule 12. The Supreme Court has now clarified the distinction between jurisdictional issues and merits claims, and there's no reason to allow sandbagging on non-jurisdictional issues.

Judge Raggi noted that the speakers had raised concerns about four main aspects of the Subcommittee's proposed rule:

(1) "then reasonably available";
(2) items on the enumerated list of claims (particularly statute of limitations);
(3) substituting "forfeiture" for "waiver"; and
(4) substituting "cause and prejudice" for "good cause."

She declared a break in the meeting and asked the Subcommittee to use the time to consider its response to these concerns and report back to the full Committee.

Following the break, Judge England announced the Subcommittee's views on the issues identified by Judge Raggi. In all cases, the Subcommittee was unanimous.

(1) The Subcommittee reaffirmed its strong support for "then reasonably available."
(2) The Subcommittee agreed that it would be acceptable to remove statute of limitations from the list of claims that must be raised before trial.
(3) The Subcommittee rejected the proposal to substitute "forfeiture" for "waiver" in subdivision (e).
(4) The Subcommittee agreed to retain "good cause" rather than "cause and prejudice."

He noted if the Committee as a whole endorsed this approach, it would be necessary to rework the language to incorporate "good cause." Members then explained the Subcommittee's views.

(1) <u>"then reasonably available"</u>

The Subcommittee was unanimous in the view that the qualifier "then *reasonably*

available" should be retained. The mandate of the rule (and the potential sanction) should be restricted to cases in which the court finds the basis of the defense was "reasonably" available. This is very important from the defense perspective, and it gives appropriate flexibility to the court.

A question arose as to whether the Committee Note could be used to clarify the meaning of "reasonably" in this context. Professor Coquillette reminded everyone that Committee Notes cannot be used to change the meaning of the rule. Professor Beale noted that as published the proposed Committee Note included the following:

> The "then reasonably available" language is intended to ensure that a claim a party could not have raised on time is not subject to the limitation on review imposed by Rule 12(c)(3) and (4). Cf. 28 U.S.C. § 1867(a) & (b) (requiring claims to be raised promptly after they were "discovered or could have been discovered by the exercise of due diligence").

She stated that the Cf. citation had been added only to provide an illustration of the kind of analysis that courts might undertake. Although the note could not properly be used to narrow or restrict the rule itself, there was general agreement that it would be beneficial to delete the Cf. citation.

Discussion focused on the effect of including the word "reasonably." A member stated that even if the word reasonably were omitted courts might nonetheless read in the same concept. Another member responded that it was nonetheless desirable to include the word in the text. Judge England observed that on the facts of any given case courts might disagree about what is reasonable, but that's inevitable. A member commented that judges already disagree about when a witness is "available." On his court, for example, the judges disagree about whether soldiers serving in Afghanistan are "available," depending on their view of the efficacy of video technology. The Reporters noted that inclusion of the "reasonably available" criteria is important because it short circuits the analysis: unless the basis for a late-filed motion was reasonably available, there is no need to show either cause or prejudice. Professor King also pointed out that inclusion of the word "reasonably" had been praised by defense commentators, and its deletion might be understood to make the rule significantly harsher. On this view, deletion might require republication.

A member sought clarification of who bore the burden of establishing that the basis for a motion was reasonably available. Several members expressed the view that the government would have this burden because it would be seeking to bar the claim or defense as untimely. In contrast, if the basis for the motion was reasonably available and the motion was thus untimely, the defense would have the burden of showing good cause. The chair and members discussed the possibility of adding a discussion of this issue to the Committee Note, but no action was taken

on this point.

(2) changes to the list of enumerated claims

Professor King explained the Subcommittee's willingness to delete statute of limitations from the list of claims which must be raised before trial. The Subcommittee had previously agreed to remove double jeopardy from the list, and it agreed to treat statute of limitations in the same way. Professor King noted that the 1944 Committee Note had described both double jeopardy and statute of limitations as defenses that need not be raised before trial. The Subcommittee's preference was to add both to the list of defenses that must be raised before trial with the understanding that other aspects of the rule – the limitation to motions for which the basis was "then reasonably available" which "can be determined without a trial on the merits" – would respond to the relevant concerns. However, the Subcommittee was amenable to deleting statute of limitations from the list of claims. The list is illustrative, not exhaustive. Many but not all courts now treat both double jeopardy and statute of limitations as defects in the indictment or institution of the prosecution that must be raised before trial, and deleting these claims from the rule simply allows the case law to continue to develop. Although the Subcommittee would prefer to clarify the law and bring about uniformity, the members agreed to delete both double jeopardy and statute of limitations in the interest of achieving the broadest support for the proposed amendment.

The member who had previously enquired about the inclusion of errors in the grand jury and preliminary hearing indicated that he was satisfied that there were rare instances in which such claims could be raised and determined before trial.

(3) substitution of "forfeiture" for "waiver"

The Subcommittee unanimously rejected the suggestion to substitute "forfeiture" for "waiver" in subdivision (e). Judge Raggi noted that she had discouraged the use of the term "forfeiture" because it was the language of appellate courts, and the rule was principally directed at the district courts. Looking ahead to the question how this might be viewed by the Supreme Court, she observed that the portion of the rule that included the "waiver" language when the Court decided *Cotton* was being eliminated. The new provisions on relief were part of a comprehensive revision of Rule 12. Judge Sutton stated he was satisfied with the explanation that "forfeiture" was principally an appellate standard, and it was not desirable to import that into the rule. Judge Tallman indicated that the disagreement in the application of forfeiture in the appellate cases was another reason not to import that phrase into the rule. Finally, Judge Raggi noted that forfeiture is generally associated with the plain error standard, not the good cause/cause and prejudice standards.

(4) retention of "good cause"

The Subcommittee also agreed to retain "good cause" (the term in the present rule) rather than "cause and prejudice" (the phrase substituted in the amendment published for public comment). The Subcommittee concluded that retaining the familiar "good cause" standard would assuage concerns that habeas case law would be imported into Rule 12, garner support in the Standing Committee, and avoid problems when the proposal is transmitted to the Supreme Court. Again, in a cost benefit calculus, the benefit of clarification was outweighed by the problems that might be caused. The Subcommittee noted, however, this change would require some additional revisions to the text. Judge Raggi deferred discussion of any changes in the language to accommodate "good cause." If the Committee approved the proposed rule in concept, she suggested, then the Subcommittee could use the lunch hour to draft the necessary language.

In light of the Subcommittee's resolution of the issues that had been raised for discussion, and with no member seeking further discussion, Judge Raggi then called for a vote on the proposed amendment to Rule 12 as modified in the following respects:

(1) eliminating statute of limitations defenses from (b)(3)(A),
(2) specifying that a court may consider an untimely claim if the party shows "good cause," and
(3) deleting the Cf. reference in the Committee Note accompanying (b)(3).

With the understanding that specific language to incorporate "good cause" into (c)(3) would be submitted for review, the Committee voted unanimously to transmit Rule 12, as amended following publication, to the Standing Committee.

By voice vote, the Committee also unanimously approved transmitting the conforming amendment to Rule 34.

Following the lunch break, the Subcommittee presented the following revised language for proposed Rule 12(c)(3):

(3) ***Consequences of Not Making a Timely Motion Under Rule 12(b).*** If a party does not meet the deadline for making a Rule 12(b)(3) motion, the motion is untimely. In such a case, a court may consider the defense, objection, or request if:
(A) the party shows good cause; or
(B) for a claim of failure to state an offense, the defendant shows prejudice.

Judge Raggi called for discussion. A member asked why (A) referred to the "party" and (B) to the "defendant." Professor Beale explained that only a defendant can raise a claim of failure to state an offense, but the prosecution as well as the defense may raise other pretrial motions governed by Rule 12.

After time for review of the proposed language, Judge Raggi asked whether there were any further concerns. Hearing none, she declared that the morning vote approving Rule 12 for transmission to the Standing Committee would stand with the inclusion of the new language for Rule 12(c)(3). The Reporters would make the necessary changes to the Committee Note to incorporate the other changes made by the Committee. The revised rule would also be subject to restyling. Judge Raggi assured members that any restyling changes that might be significant would be referred to the Rule 12 Subcommittee and, if necessary, to the Committee.

Judge Sutton asked for the Committee's view on the need for republication. Judge Raggi stated that in her view none of the post-publication changes warranted republication, as they did not change the balance among the parties. Professor Beale observed that certain controversial features supported by the Department of Justice had been deleted, but the Department had agreed to those changes as part of an overall agreement to move the rule forward. No member of the Committee supported republication.

B. Proposed Amendments to Rules 5 and 58

This is the Committee's second effort to amend Rules 5 and 58 to provide for advice concerning consular notification. The first proposed amendments were published for public comment and subsequently approved by the Advisory Committee, the Standing Committee, and the Judicial Conference. However, in April 2012 the Supreme Court returned the Rule 5(d) and Rule 58 amendments to the Advisory Committee for further consideration. In response, the Committee revised the language of the proposed amendments, which were approved for publication by the Standing Committee in August 2012.

Rules 5 and 58 govern the procedure for initial appearances in felony and misdemeanor cases. Both provide, inter alia, that the judge must inform the defendant of various procedural rights (including the right to retain counsel or request that counsel be appointed for him, any right to a preliminary hearing, and the right not to make incriminating statements). Parallel amendments to Rules 5 and 58 were proposed by the Department of Justice to facilitate the United States' compliance with Article 36 of the Vienna Convention on Consular Relations ("the Vienna Convention"), which provides for detained foreign nationals to be advised of the opportunity to contact the consulates of their home country. Various bilateral agreements also contain consular notification provisions.

As published in 2012, the proposed rules require the court to inform non-citizen defendants at their initial appearance that (1) they may request that a consular officer from their country of nationality be notified of their arrest, and (2) in some cases international treaties and agreements require consular notification without a defendant's request. The proposed rules do not, however, address the question whether treaty provisions requiring consular notification may

be invoked by individual defendants in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36 of the Vienna Convention. More particularly, as the Committee note emphasizes, the proposed rules do not themselves create any such rights or remedies.

Opening the discussion, Judge Raggi noted that, in twice proposing amendments to Rules 5 and 58, the Committee had carefully considered the policy question of whether the judiciary should be involved in the executive's efforts to satisfy its consular notification requirements under various treaties. The Committee had answered that question in the affirmative, albeit not unanimously. Further, the Committee's 2012 redrafting of the amendment in response to the Supreme Court's remand had been approved for publication by the Standing Committee. Thus, the immediate issue before the Committee was the comments received in response to publication.

Professor Beale described the public comments, which urged changes in the introductory clause of the proposed rules providing that the advice must be given "if the defendant is held in custody and is not a United States citizen." The Federal Magistrate Judges Association (FMJA) recommended that the quoted language be deleted and that the advice requirement apply to all defendants. Two reasons informed the recommendation. First, the FMJA expressed concern that the amendment could be interpreted to require that the arraigning judge determine whether a defendant is a U.S. citizen before providing the advice regarding consular notification. An inquiry of this nature would be undesirable, because defendants might make incriminating statements. Professor Beale endorsed the FMJA's suggestion that it would be better to rephrase the new provisions to parallel proposed Rule 11(b)(1)(O), which is being transmitted from the Supreme Court to Congress. Proposed Rule 11(b)(1)(O) requires the court to give warnings to all defendants about the possible collateral immigration consequences of a guilty plea. The Committee Note explains:

> The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without attempting to determine the defendant's citizenship.

Second, the FMJA submitted that the proposed advice requirement should not be limited to defendants "in custody" at the time of their initial appearance.[1] After consultation with the

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[1] There was some disagreement between the Department of State and the FMJA concerning the scope of the obligation under Article 36, but it was not necessary for the Committee to resolve this disagreement. The FMJA noted that Article 36 of the Vienna Convention covers any national who is "arrested or committed to prison or to custody pending trial or is detained in any other manner." Because all defendants who are brought to the court for an initial appearance are arrestees, the FMJA concludes that the proposed amendment should provide for all

Department of State, the Department of Justice had no objection to removing the "in custody" language in the proposed rule if the Committee considers that appropriate. The National Association of Criminal Defense Attorneys also expressed concern with the "in custody" language, though for other reasons.

Professor Beale noted that the revised language now proposed had been agreed to by the Department of Justice after consultation with the Department of State, and vetted by the Style Consultant.

Judge Raggi stated that the key post-publication change was expanding the notification to all defendants, not only those in custody. Although there is always a concern about adding to the long list of information judges are already required to provide, she explained that in this instance there was a practical reason to provide the required advice to all defendants at their initial appearance. Specifically, a defendant who was not in custody at the time of his first appearance might later be remanded for various reasons, such as violation of the conditions of bail. It would be more efficient to provide the warning to all defendants at the first appearance, rather than try to ensure that advice is given later under the varying circumstances that might occur in individual cases.

Professor Coquillette questioned the inclusion in the Committee Note of a reference to the Code of Federal Regulations governing consular advice by arresting officers. He noted that if the regulations were altered it would not be possible to change the Note to update the citation. The Committee agreed to delete the citation and explanatory parenthetical.

A member asked what the consequence would be if a judge does not provide the advice. The proposed rule does not provide for a right or a remedy. Judge Raggi noted that the

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defendants to receive advice concerning consular notification irrespective of their custodial status at arraignment.

Although the Department of Justice had no objection to removing the "in custody" language in the proposed rule if the Committee considers that appropriate, as noted in the March 25, 2013 letter from Ms. Felton and Mr. Wroblewski, the Department of State does not agree with the FMJA's reading of the Vienna Convention. As reflected in U.S. DEPARTMENT OF STATE, CONSULAR NOTIFICATION AND ACCESS at 17 (3rd ed. 2010) http://travel.state.gov/pdf/cna/CNA_Manual_3d_Edition.pdf , the Department construes the Vienna Convention to cover only situations in which a foreign national's ability to communicate with or visit consular officers is impeded as a result of actions by government officials limiting the foreign national's freedom. (For example, the Department of State would not consider a "detention" to include a brief traffic stop or similar event in which a foreign national is questioned and then allowed to resume his or her activities.) In light of the magistrates' concern, however, the Department saw no harm in offering this advice to every arrestee at the first appearance if the Committee considers that appropriate.

Departments of State and Justice see value in incorporating this advice into the rules as part of the effort to satisfy our treaty obligations, even absent a remedial provision. Speaking on behalf of the Justice Department, Ms. Felton noted that there is often no record of advice given by arresting officers; providing the warning at the initial appearance would create a record of compliance with treaty obligations. Additionally, the federal rule may provide a model for similar state rules and thus indirectly bring about more widespread compliance with Article 36.

By voice vote, the Committee unanimously agreed that Rule 5, as modified after publication, be transmitted to the Standing Committee.

By voice vote, the Committee unanimously agreed that Rule 58, as modified after publication, be transmitted to the Standing Committee.

IV. NEW PROPOSAL FOR DISCUSSION

Judge Raggi asked Mr. Wroblewski to provide an introduction to the Department of Justice proposal to amend Rule 4.

Mr. Wroblewski explained that Rule 4 has become an obstacle to the prosecution of foreign corporations that commit offenses in the United States but cannot be served because they have no known last address or principal place of business in the U.S. Some courts have held that efforts to serve by other means were insufficient even if they would provide notice. He stated that this issue is now coming up with some frequency.

Judge Raggi noted that the next step would be the appointment of a subcommittee, but that some initial discussion might be helpful. She asked how the provision sought by the Department would work in practice. What if the foreign corporation were served, but it entered no appearance. Did the Department contemplate that it would be able to prosecute without an appearance, and, if not, what would be the benefit of the change?

Mr. Wroblewski said he was not prepared to answer all facets of the question, but he drew attention to several points. First, to date foreign corporations have not generally ignored service. They have appeared but contested the adequacy of service. Additionally, even if a corporation has not entered an appearance, effective service would have other beneficial consequences, such as asset forfeiture, regardless of whether the government could proceed with the prosecution.

Judge Raggi noted that these were among the issues to be considered by a Subcommittee. She announced that Judge David Lawson had agreed to chair the Rule 4 Subcommittee, and that Judge Rice, Mr. Siffert, and representatives of the Department of Justice would serve as

members. She asked the Subcommittee to report at the October meeting.

V. STATUS REPORT ON CRIMINAL RULES

Mr. Robinson stated that in response to the trial of Senator Ted Stevens, hearings were held in Congress to consider disclosure obligations of Federal Prosecutors. The Administrative Office worked with Judge Raggi to prepare a voluminous submission that contained all of the Committee's work on Rule 16. Informally we heard that staff found our materials very helpful.

Ms. Brook stated that she had testified at the hearing as a Federal Defender, not as a member of the Committee. She provided written testimony, was questioned extensively, and then provided written comments.

VI. INFORMATION ITEMS

Judge Raggi reported to the Committee that the FJC's Benchbook Committee had acted on the Criminal Rules Committee's suggestion that a discussion of Brady/Giglio obligations be included in the next edition of the Benchbook. A copy of the new Benchbook's detailed and comprehensive section on Brady/Giglio was included in the Committee's agenda book. Judge Raggi expressed her gratitude to the Benchbook Committee for allowing her to participate in its discussions leading to the preparation of this new section.

Judge Lawson, who served as a liaison to the Synonym Subcommittee, was asked to comment on the Subcommittee, whose report was included in the Agenda Book. He noted that the Subcommittee report includes a chart detailing a very large number of words and phrases that appear in more than one set of rules. At this point, no action to standardize these many terms is contemplated.

Judge Raggi announced that the Committee's next meeting would be held October 17-18, 2013, in Salt Lake City, where the Committee will be hosted by the University of Utah School of Law.

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TAB 4

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TAB 4A

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

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

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

From: Honorable Eugene R. Wedoff, Chair
Advisory Committee on Federal Rules of Bankruptcy Procedure

Date: May 8, 2013

Re: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on April 2 and 3, 2013, in New York, New York, at the United States Bankruptcy Court. The draft minutes of that meeting accompany this report as Appendix C. The Committee's actions fall into three categories.

First, the Advisory Committee took action on the proposed rule and form amendments that were published for comment in August 2012. Forty-six comments were submitted in response to the publication, some of which addressed multiple rules and forms. The comments were considered in a series of subcommittee conference calls, at a meeting of the Forms Modernization Project, and in Committee discussions at the New York meeting. (The comments are summarized below, along with a discussion of the changes that the Committee made in response.) The Advisory Committee now seeks the Standing Committee's final approval and transmission to the Judicial Conference of most of the published items: the revision of the Part VIII rules and amendments to ten other rules and five official forms. Because the Committee made significant changes after publication to one set of published forms—the means test forms—it requests that those forms be republished.

Second, the Advisory Committee took action on new proposed rule and form amendments that are the result of two major projects: the continuing work of the Forms Modernization Project and the development of a chapter 13 plan form. The Committee requests publication for public comment of (1) the remaining group of modernized forms for use in individual-debtor bankruptcy cases and (2) a chapter 13 plan form and implementing rule amendments.

Finally, as discussed below, the Committee also approved and seeks publication for comment of proposed amendments to two other rules and three forms.

Part II of this report discusses the action items, grouped as follows:

(A1) matters published in August 2012 for which the Advisory Committee seeks approval for transmission to the Judicial Conference—amendments to Rules 1014, 7004, 7008, 7012, 7016, 7054, 8001-8028, 9023, 9024, 9027, and 9033, and Official Forms 3A, 3B, 6I, and 6J;

(A2) a conforming amendment to Official Form 23, for which the Committee requests transmission to the Judicial Conference without publication;

(B1) amendments to Official Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2, for which the Committee seeks approval for republication in August 2013, along with the initial publication of Official Form 22A-1Supp; and

(B2) matters for which the Advisory Committee seeks approval for publication in August 2013—amendments to Rules 2002, 3002, 3007, 3012, 3015, 4003, 5005, 5009, 7001, 9006, and 9009, and Official Forms 101, 101A, 101B, 104, 106Sum, 106A/B, 106C, 106D, 106E/F, 106G, 106H, 106Dec, 107, 112, 113, 119, 121, 318, 423, 427, 17A, 17B, and 17C.

II. Action Items

A. Items for Final Approval

A1. Amendments Published for Comment in August 2012. **The Advisory Committee recommends that the proposed rule and form amendments that are discussed below be approved and forwarded to the Judicial Conference. It recommends that the amended forms take effect on December 1, 2013.** The text of the amended rules and forms is set out in Appendix A.

Action Item 1. Rules 7008, 7012, 7016, 9027, and 9033 would be amended in response to *Stern v. Marshall*, 131 S. Ct. 2594 (2011). The Bankruptcy Rules follow the Judicial Code's division between core and non-core proceedings. The current rules contemplate that a

bankruptcy judge's adjudicatory authority is more limited in non-core proceedings than in core proceedings. For example, parties are required to state whether they do or do not consent to final adjudication by the bankruptcy judge in non-core proceedings. There is no comparable requirement for core proceedings. *Stern*, which held that a bankruptcy judge did not have authority under Article III of the Constitution to enter final judgment in a proceeding deemed core under the Judicial Code, has introduced the possibility that such a proceeding may nevertheless lie beyond the power of a bankruptcy judge to adjudicate finally. In other words, a proceeding could be "core" as a statutory matter but "non-core" as a constitutional matter.

The Advisory Committee proposed to amend the Bankruptcy Rules in three respects. First, the terms core and non-core would be removed from Rules 7008, 7012, 9027, and 9033 to avoid possible confusion in light of *Stern*. Second, parties in all bankruptcy proceedings (including removed actions) would need to state whether they do or do not consent to entry of final orders or judgment by the bankruptcy judge. Third, Rule 7016, which governs pretrial procedures, would be amended to direct bankruptcy courts to decide the proper treatment of proceedings.

The Advisory Committee received eight comments on all or part of these proposed amendments. In the main, the comments expressed support for the amendments but raised five issues:

(1) whether to retain the terms "core" and "non-core";

(2) whether references to the "bankruptcy court" in the published amendments should revert to the "bankruptcy judge," the term that is currently used;

(3) whether to provide procedures for treating as proposed findings and conclusions a bankruptcy judge's decision entered as a final order or judgment when that decision is later determined to be beyond the bankruptcy judge's final adjudicatory power;

(4) whether to require a statement as to consent when a litigant proceeds by motion before filing a formal pleading; and

(5) whether to provide that a litigant may consent to final adjudication by a bankruptcy judge with respect to part, but not the whole, of a proceeding.

After reviewing the comments, the Advisory Committee voted unanimously to recommend final approval of the published amendments. With respect to the first three issues raised by the comments, these points were thoroughly considered before publication of the amendments. The Advisory Committee did not find the comments to raise new concerns that would justify revisiting those issues. Issues (4) and (5), on the other hand, had not been considered previously. The Advisory Committee nevertheless concluded that the comments raising those issues, although presenting possible suggestions for future rulemaking, did not

require alteration of the published amendments. Similarly, the Advisory Committee concluded that a comment by the Bankruptcy Clerks Advisory Group regarding the requirement of service of notice by mail under current Rules 9027 and 9033 might be considered for future rulemaking but was beyond the scope of the *Stern*-related amendments. The comments are set out in more detail in Appendix A.

Action Item 2. Rules 8001-8028 (Part VIII of the Bankruptcy Rules) are the products of a comprehensive revision of the rules governing bankruptcy appeals to district courts, bankruptcy appellate panels, and, with respect to some procedures, courts of appeals. They result from a multi-year project to bring the bankruptcy appellate rules into closer alignment with the Federal Rules of Appellate Procedure; to incorporate a presumption favoring the electronic transmission, filing, and service of court documents; and to adopt a clearer style. Existing rules were reorganized and renumbered, some rules were combined, and provisions of other rules were moved to new locations. Much of the language of the existing rules was restyled.

Fourteen sets of comments were submitted in response to the publication of these rules. Many of the comments were lengthy and detailed. They demonstrated the commenters' careful review of the published rules and provided suggestions on issues of style, organization, and substance. In considering the comments, the Advisory Committee was guided by the goal of maintaining close adherence to the Federal Rules of Appellate Procedure ("FRAP"), except where those rules are incompatible with bankruptcy appeals. It also recommended postponing for future consideration a number of suggestions that would change existing practice or raise policy issues requiring careful consideration. In general, the comments displayed a positive response to the proposed revision of the Part VIII rules, and the Advisory Committee unanimously voted to recommend them for final approval with the post-publication changes that are indicated.

Not all of the proposed rules were commented upon. The following discussion describes the most significant comments that were submitted and the Advisory Committee's responses. Appendix A sets out after each rule a more complete listing of both the comments—including some on rules not discussed below—and the changes made after publication.

General Comments. Two bankruptcy judges and the National Conference of Bankruptcy Judges praised the revision of the Part VIII rules, stating that it would lead to improved quality of bankruptcy appellate practice, reduce confusion, and yield a more efficient and effective bankruptcy appellate practice.

Rule 8002. Two comments expressed concern about the inclusion of an inmate mailbox rule, which deems a notice of appeal by an inmate timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. The commenters stated that this rule could delay for several days the determination that a bankruptcy court order or judgment has become final. The Committee continued to support the inclusion of this provision

in order to mirror FRAP 4(c). It believed that, given the rarity of inmate appeals in bankruptcy cases, the impact of the provision on finality will be limited.

Rule 8003. Several comments pointed out that the provision in subdivision (d) directing the clerk of the appellate court to docket an appeal "under the title of the bankruptcy court action" is unclear since "action" might refer to the overall bankruptcy case or to an adversary proceeding within the case. The Committee agreed that this was an instance in which the FRAP language needs to be modified for the bankruptcy context. It voted to change the wording in Rule 8003(d)(2) and the parallel provision in Rule 8004(c)(2) to "under the title of the bankruptcy case and the title of any adversary proceeding."

Rule 8004. The clerk of a bankruptcy appellate panel ("BAP") commented on the provision of subdivision (c)(3) that directed the dismissal of an appeal if leave to appeal is denied. She stated that appellants sometimes file a motion for leave to appeal when leave is not required and in that situation, although the motion is denied, dismissal is not appropriate. The Committee voted to delete the sentence in question, which is not contained in either the current bankruptcy rule or FRAP rule from which the proposed rule is derived.

One comment pointed out an inconsistency between proposed Rule 8003 and Rule 8004. Rule 8003(c) requires the bankruptcy clerk to serve the notice of appeal, whereas Rule 8004(a) places that duty on the appellant (along with the motion for leave to appeal). This difference is a carryover from existing practice. The Committee decided to consider in the future whether the service requirement should be the same in both rules.

Rule 8005. Several comments questioned whether an election to have an appeal heard by the district court, rather than the BAP, must still be made by a statement in a separate document. Subdivision (a) of the proposed rule refers to an official form that did not exist at the time the rule was published, and some comments also expressed confusion about that reference. At the spring meeting, the Committee approved for publication an amendment to the notice of appeal form, Official Form 17A, that will include a section for making an election under this rule. That form, which if approved will take effect on the same date as the rule, will clarify that the separate-document rule no longer applies.

Two comments addressed the procedure that should apply when an appellee elects to have the district court hear an appeal that was initially sent to the BAP. The Committee agreed with one of the comments that the BAP clerk should notify the bankruptcy clerk if an appeal is transferred to the district court, and it voted to add a sentence to that effect in subdivision (b).

Rule 8006. Two comments stated that the proposed rule does not give the bankruptcy court sufficient time to certify a direct appeal to the court of appeals. Under subdivision (b), a matter is deemed to remain pending in the bankruptcy court for purposes of this rule for 30 days after the effective date of the first notice of appeal. The Advisory Committee decided that this time limit strikes an appropriate balance between giving the bankruptcy court time to decide

whether to certify a direct appeal and letting the district court or BAP know at a reasonably early time that a certification for direct appeal will not be coming from the bankruptcy court. Under 28 U.S.C. § 158(d)(2), district courts and BAPs also have certification authority.

Rule 8007. Two comments questioned the provision of the published rule that appeared to permit a party to seek a stay pending appeal in an appellate court before a notice of appeal has been filed. The comments took the position that, until a notice of appeal is filed, the appellate court lacks jurisdiction to rule on a stay motion. The Committee agreed that the rule should be clarified to eliminate the possibility of filing a motion for a stay in the appellate court prior to the filing of a notice of appeal.

Rule 8009. Two bankruptcy judges and the Bankruptcy Clerks Advisory Group submitted comments stating that the practice of having the parties designate the record on appeal is now outdated and that the 8th Circuit BAP's rule regarding the record should be adopted. Under that rule the record before the bankruptcy court is the record on appeal, and parties refer by number to the appropriate bankruptcy court docket entries in their appellate briefs. BAP judges are able to review the entire bankruptcy court record electronically. The Advisory Committee decided that the rule should remain as published but that this issue should be taken up for consideration in the future.

Several comments objected to two FRAP provisions that were included in this rule: subdivision (c) that permits a statement of the evidence when a transcript is unavailable, and subdivision (d) that permits an agreed statement as the record on appeal. As to both, the Committee favored remaining consistent with the parallel FRAP provisions.

Rule 8010. Three comments noted that, while subdivision (b)(1) directs the bankruptcy clerk to transmit the record to the appellate clerk when it is complete, it does not specify what the clerk should do if the record is never completed. The Advisory Committee voted to add this issue to the list of matters for future consideration.

Rule 8013. One comment suggested that district courts be allowed to require a notice of motion in bankruptcy appeals if they otherwise follow that practice in their court. Another comment made a similar suggestion concerning proposed orders. The Advisory Committee agreed with these comments and added "Unless the court orders otherwise" to subdivision (a)(2)(D)(ii).

Another comment questioned why a rule allowing intervention on appeal is necessary and whether a party moving to intervene would have standing. The Advisory Committee noted that it is not always clear who is a party to a contested matter, so someone affected by an order being appealed may want to intervene to participate in the appeal. A United States trustee is also sometimes in the position of needing to intervene on appeal.

Rule 8016. Two comments raised questions about subdivision (f), which addressed the consequences of failing to file a brief on time. It was unclear why the provision was located in the rule governing cross-appeals, and it seemed to be inconsistent with a provision in Rule 8018. The Advisory Committee thought that the comments were well taken, and it voted to delete the subdivision.

Rule 8017. The States' Association of Bankruptcy Attorneys commented that all governmental units, not just the United States and states, should be permitted to file an amicus brief without consent or leave of court. The Advisory Committee adhered to the decision to make the bankruptcy rule consistent with FRAP 29.

Rule 8018. A bankruptcy judge commented that the authorization in subdivision (f) for dismissal of an appeal or cross-appeal should require notice and an opportunity to show cause why the appeal should not be dismissed. The Advisory Committee voted to reword the provision to clarify that dismissal can occur only upon motion of a party or on the court's own motion, after which the appellant would have an opportunity to respond.

Rule 8019. One comment stated that there should not be a presumption in favor of oral argument and that the grounds for not allowing it should not be limited. The Advisory Committee made no change to the proposed rule, which is consistent with current Rule 8012 and FRAP 34(a)(2).

Another comment asserted that there is an inconsistency between subdivision (b), which requires a unanimous vote of a BAP panel to dispense with oral argument, and subdivision (g), which allows a BAP panel by majority vote to require oral argument when the parties agree to submit the case on the briefs. The Advisory Committee concluded that these provisions are consistent with FRAP 34(a)(2) and (f) and with the presumption in favor of oral argument.

Rule 8021. The States' Association of Bankruptcy Attorneys commented that subdivision (b), which permits the assessment of costs for or against the United States, its agencies, and officers only if authorized by law, should apply to all governmental units. The Advisory Committee made no change to this provision, which is consistent with FRAP 39(b).

Rule 8023. In its comments, the National Conference of Bankruptcy Judges suggested two issues for future consideration by the Advisory Committee relating to this rule, which governs voluntary dismissals of appeals. (1) In the bankruptcy court Rule 7041 requires a plaintiff seeking to dismiss an adversary proceeding objecting to the debtor's discharge to provide notice to certain parties and obtain a court order containing appropriate terms and conditions. The NCBJ suggests the need for similar safeguards when that type of proceeding is voluntarily dismissed on appeal. (2) Under Rule 9019 a trustee is required to obtain court approval of any compromise or settlement. The NCBJ stated that it is not clear how Rule 9019 relates to this rule. The Advisory Committee added these issues to its list of matters for future consideration.

Rule 8024. The National Conference of Bankruptcy Judges commented that the rule carries forward a problem in current Rule 8016: It does not provide for the issuance of a mandate by the appellate court and thus does not make clear when jurisdiction revests in the bankruptcy court after the conclusion of an appeal. While the existing rule does not appear to be disrupting bankruptcy administration unduly, the comment suggested that the Advisory Committee consider this issue in the future. The Advisory Committee agreed to do so.

Action Item 3. Rule 1014(b) governs the procedure for determining where cases will proceed if petitions are filed in different districts by, against, or regarding the same debtor or related debtors. The rule currently provides that, upon motion, the court in which the first-filed petition is pending may determine—in the interest of justice or for the convenience of the parties—the district or districts in which the cases will proceed. Except as otherwise ordered by that court, proceedings in the cases in the other districts "shall be stayed by the courts in which they have been filed" until the first court makes its determination.

The Advisory Committee proposed amending Rule 1014(b) to provide that proceedings in subsequently filed cases are stayed only upon order of the court in which the first-filed petition is pending and to expand the list of persons entitled to receive notice of a motion in the first court for a determination of where the related cases should proceed. The amendment would state more clearly what event triggers the stay of proceedings in the court in which a subsequent petition is filed. The current rule has led to uncertainty about whether the stay goes into effect immediately upon the filing of the second petition or only upon the filing of a motion to determine where the cases should proceed. Rather than selecting either of these options, the Committee decided that an order by the first court should be required. That requirement would eliminate any uncertainty about whether a stay was in effect. It would also permit a judicial determination—not just a party's assertion—that the rule applies and that a stay of other proceedings is needed.

Four sets of comments were submitted in response to the publication of the proposed amendments. Two of the commenters—Bankruptcy Judge Robert J. Kressel and the National Conference of Bankruptcy Judges—questioned the jurisdiction of the first court to enjoin parties to other cases. The States' Association of Bankruptcy Attorneys raised four issues. Its comment stated that (1) the rule does not clearly state that the first court has exclusive authority to determine the venue of the related cases; (2) it is not clear who can seek a determination of where the cases can proceed; (3) the Committee Note says that the clerk can order the moving party to provide notice, but that party will not always have the information needed to provide notice to parties in other cases; and (4) a time limit should be imposed for seeking a determination in the first court. Finally, Bankruptcy Judge Christopher Klein commented that the current rule generally works well and engenders cooperation among the affected courts, something he fears will not happen under the amended rule.

Regarding the jurisdictional issue that was raised, the Advisory Committee noted that the rule—in its current form as well as in the proposed amended version—allows a court to order a change of venue of cases pending in other courts. The accompanying stay provision is intended to prevent the entry of inconsistent orders while the venue situation is resolved by the first court.

The proposed amendment both clarifies and narrows the scope of the stay provision. The current rule applies a blanket rule that all the later-filed cases are stayed while the first court makes the venue determination. The amended rule would limit the stay to situations in which the first court finds that the rule in fact applies and that a stay is needed. Bankruptcy courts have long been held to have jurisdiction to issue stays to protect the estate being administered, including stays to protect the individuals managing the estate. *Ex parte Christy*, 44 U.S. 292, 318 (1845) (recognizing the power of a court presiding over a bankruptcy case to issue stays of other proceedings); *Celotex Corp. v. Edwards*, 514 U.S. 300, 313 (1995) (enforcing a bankruptcy court's injunction preventing judgment creditors from proceeding against sureties). Consistent with this authority, the legitimacy of the existing rule's stay authority has not been questioned. The Committee concluded that an amendment that reduces the scope of that authority would be equally valid.

In considering the comments of the States' Association of Bankruptcy Attorneys, the Committee concluded that the amended rule would give the first court exclusive authority to determine where the related cases will proceed if a motion for that purpose is filed in that court. The Committee did not support imposing a time limit for filing the motion because of the varying circumstances in which this rule might be invoked. The Committee also concluded that the rule did not need to be more specific about the provision of notice. It did, however, vote to make a wording change regarding notice that was suggested by the National Conference of Bankruptcy Judges.

Despite Judge Klein's positive experience with current Rule 1014(b), the Committee remained concerned that it imposes a stay of other cases at a time that is uncertain and under circumstances of which affected courts and parties may be unaware.

The Committee therefore unanimously voted to approve the amendments to Rule 1014(b) with one wording change.

Action Item 4. Rule 7004(e) governs the time during which a summons is valid after its issuance in an adversary proceeding. The current rule provides that a summons is valid so long as it is served within 14 days of its issuance. The Advisory Committee sought publication of an amendment to reduce that period from 14 days to 7 days. The concern prompting the amendment is that a 14-day delay before service of a summons may unduly limit the defendant's time to answer, which is calculated under Rule 7012 of the Bankruptcy Rules from the date the summons is issued and not (as is the case under the Civil Rules) the date it is served. Because summonses are routinely issued electronically and served by mail (as permitted under Rule

7004(b)), the Advisory Committee believed that a seven-day service window would be sufficient.

Upon publication of the amendment, the Advisory Committee received four comments. Each of the comments raised essentially the same issue—that a seven-day window to serve a summons may be too short in some circumstances. Two comments noted that service by mail is not permitted under Rule 7004(b) when the recipient's postal address is not a "dwelling house or usual place of abode or . . . the place where the individual regularly conducts a business or profession." If, for example, the recipient has only a post office box, the Bankruptcy Rules do not provide for service by mail. Effecting service within seven days may be impracticable under those circumstances. One comment observed that with an unrepresented plaintiff or one whose lawyer is not a registered electronic filer, the summons will not be issued electronically. If the party receives the summons by mail from the clerk, some or all of the seven-day period will expire, making timely service unlikely. A similar concern was raised with respect to judges who require the inclusion of a scheduling order with the summons. The scheduling order might not be prepared for several days, which could impede the ability to make timely service.

For three reasons, the Advisory Committee concluded that the concerns raised by the comments did not justify altering or abandoning the amendment to Rule 7004(e). First, the principal concern expressed by the comments—that a seven-day service window might be insufficient in particular circumstances—had been contemplated by the Advisory Committee. Those circumstances were considered to be infrequent and, if they did arise, were thought to be best handled through a request for an enlargement of the time to serve the summons under Rule 9006(b). The comments do not suggest that the Advisory Committee was mistaken in its consideration of the issue. In response to the comments, the Advisory Committee has added language to the Committee Note accompanying the amendment in order to highlight the availability of an enlargement of time under Rule 9006(b).

Second, the alternative approaches to service of summonses offered by the comments would require significant changes to the Bankruptcy Rules. The Advisory Committee, however, sought to make the least disruptive change that would ensure sufficient time to serve, and respond to, a summons. The Advisory Committee rejected an alternative amendment to Rule 7012 that would lengthen the defendant's time to answer, because that approach would not serve the need to expedite proceedings in bankruptcy. The Advisory Committee also declined to make more extensive changes to Rule 7004, such as adopting the Civil Rules' method of calculating the defendant's time to respond.

Third, the published amendment's 7-day time to serve a summons, although less than the 14-day period under the current rule, is close to the ten-day period that prevailed before it was lengthened by the Time-Computation Project. The comments suggest that further study may be warranted with respect to harmonizing the Bankruptcy and Civil Rules on issuance and service of a summons and complaint. But that project is well beyond the scope of the published amendment.

Accordingly, the Advisory Committee voted unanimously to recommend final approval of the text of the amended rule as published, together with a revised Committee Note.

Action Item 5. Rules 7008(b) and 7054 would be amended to change the procedure for seeking attorney's fees in bankruptcy proceedings. The Advisory Committee proposed the amendments in order to clarify and to promote uniformity in the procedures for seeking an award of attorney's fees. Rule 7054 would be amended to include much of the substance of Civil Rule 54(d)(2). Rule 7008(b), which currently addresses attorney's fees, would be deleted. By bringing the Bankruptcy Rules into closer alignment with the Civil Rules, the amendments would eliminate a potential trap for an attorney, particularly one familiar with the Civil Rules, who might overlook the requirement in Rule 7008(b) to plead a request for attorney's fees as a claim in the complaint, answer, or other pleading. As under the Civil Rules, the procedure for seeking an award of attorney's fees would be governed exclusively by Rule 7054, unless the governing substantive law requires the fees to be proved at trial as an element of damages.

Two comments were submitted on these amendments. The States' Association of Bankruptcy Attorneys addressed the sentence in Rule 7054(b)(1), which is not proposed for amendment, that permits the award of costs against the United States, its officers, and agencies only to the extent permitted by law. The Association suggested that the provision be broadened to apply to all governmental units. The other comment was submitted by attorney Louis M. Bubala III. Mr. Bubala stated that he was "pleased especially with the proposed elimination of Rule 7008(b) and addition of Rule 7054(b)(2) regarding claims for attorney's fees. The current rules have caused problems over the years, and the adoption of the procedure from the civil rules is a good one."

The Advisory Committee voted unanimously to approve the amendments as published.

Action Item 6. Rule 9023, which governs New Trials; Amendment of Judgments, and **Rule 9024**, which governs Relief from Judgment or Order, would be amended to include a cross-reference to proposed Rule 8008, which governs Indicative Rulings. The Advisory Committee proposed these amendments in order to call attention at an appropriate place in the rules to that new bankruptcy appellate rule. Rule 8008 prescribes procedures for both the bankruptcy court and the appellate court when an indicative ruling is sought. It therefore incorporates provisions of both Civil Rule 62.1 and FRAP 12.1. Because a litigant filing a post-judgment motion that implicates the indicative-ruling procedure will not encounter a rule similar to Civil Rule 62.1 in either the Part VII or Part IX rules, the Committee decided that it would be useful to include a cross-reference to Rule 8008 in the rules governing post-judgment motions.

The only comment submitted in response to the publication of these amendments was from the National Conference of Bankruptcy Judges. It commented that a cross-reference to another rule is more appropriately placed in a Committee Note than in the rule itself.

The Advisory Committee voted unanimously to approve the amendments to these rules as published because a Committee Note may not be amended without an amendment of the rule. Furthermore, several comments on the Part VIII rules suggested that it is helpful to have a cross-reference to another rule included in the rule, rather than in the Committee Note, because Committee Notes are not always published in rule compilations and are often overlooked.

Action Item 7. Official Forms 3A, 3B, 6I, and 6J are restyled forms for use in individual-debtor cases that were published for comment last August. The Advisory Committee unanimously voted to recommend them for final approval with the post-publication changes that are indicated.

The forms were developed as part of the Advisory Committee's ongoing Forms Modernization Project ("FMP"), which is a multi-year endeavor of the Advisory Committee, working in conjunction with the Federal Judicial Center and the Administrative Office of the U.S. Courts. The dual goals of the FMP are to improve the official bankruptcy forms and to improve the interface between the forms and available technology. The judiciary is in the process of developing "the next generation" of CM/ECF ("Next Gen"), and the modernized forms are being designed to use enhanced technology that will become available through Next Gen. From a forms perspective, the major change in Next Gen will be the ability to store all information on forms as data so that authorized users can produce customized reports containing the information they want from the forms, displayed in whatever format they choose.

The FMP group made a preliminary decision, endorsed by the Advisory Committee, that the forms for individual debtors should be separated from those for entities other than individuals. There is a greater need for the forms submitted by individuals to be less technical, because individuals are generally less sophisticated than other entities and because individuals may not have the assistance of counsel. Accordingly, the forms for individual debtors are designed to use language more common in ordinary conversation, to employ more intuitive layouts, and to include clearer instructions and examples within the forms and more extensive separate instruction sheets.

Official Forms 3A (Application for Individuals to Pay the Filing Fee in Installments), 3B (Application to Have the Chapter 7 Filing Fee Waived), 6I (Schedule I: Your Income), and 6J (Schedule J: Your Expenses) were selected for the initial-implementation stage of the FMP because they make no significant change in substantive content and simply replace existing forms that apply only in individual-debtor cases. The restyled forms all involve the debtors' income and expenses, and they are employed by a range of users: the courts, U.S. trustees, and case trustees, for varied purposes. The publication of these forms has already provided valuable feedback on the FMP approach to form design, and, if adopted, their use will provide a helpful gauge of the effectiveness of the FMP approach.

In response to the publication of these forms, 29 sets of comments were submitted, and one letter was informally submitted to the working group. Set out below is a discussion of the most significant comments and the changes made by the Advisory Committee in response.

General Comments. Comments on the overall project and the published forms in general fell primarily into the following categories:

- support for the new forms;
- dislike of the new forms and a preference for maintaining the current forms;
- concern that the forms contain too much shading, too much white space, and too many pages, all of which will increase printing, mailing, and electronic transmission costs;
- concern that the forms will encourage pro se filings, to the detriment of the debtors and the courts; and
- expressions of a need for a clear statement about the extent to which software-generated forms can deviate from the graphic and formatting styles of the proposed forms, such as by omitting instructions and omitting or collapsing inapplicable sections.

The Advisory Committee discussed these comments during its spring meeting. Members first discussed the most fundamental question—whether the project should proceed notwithstanding the negative commentary. After reviewing the reasons for the project and the guiding principles behind the redesign, the Committee unanimously concluded that the project should proceed.

In response to the numerous comments about shading, the Committee accepted the FMP's recommendation that shading should largely be eliminated. The Committee agreed with the FMP's redesign of the forms, which retains the black banner for the "part" designation but uses a different format for the title of each part. Shading was largely eliminated from the balance of each of the forms. The Committee believes that these changes will reduce toner usage and increase the ease with which forms are printed and reproduced.

The Advisory Committee also agreed with the FMP's assessment regarding page length. The increase in the page length is a function of several factors. First, in an effort to increase accuracy and ease of use, and to create a form whose answers can populate a usable database of answers, more specific questions are posed, and the debtor is often prompted to provide an answer. Second, rather than providing a dense set of instructions at the beginning of a form and then blank spaces for the answers, these forms provide instructions where the debtor is likely to need them. Third, more space is provided to answer some of the questions. Finally, examples are often included to help the debtor understand what information is being requested. The Committee agreed with the FMP that this approach is likely to provide more accurate, usable information.

The extent to which software-generated forms may deviate from the official forms is an issue that is relevant to other forms, not just to the modernized forms. Proposed revised Rule 9009, which is part of the chapter 13 plan form and rules package presented at this meeting for publication, provides additional guidance regarding the extent to which software-generated forms may deviate from the official forms.

Whether the use of plain English and a more user-friendly design will encourage more filings without the assistance of counsel has been the subject of discussion since the beginning of this project. The preparation of comprehensive instructions that explain the impact and complexity of a bankruptcy case and provide ample warnings about the significance of the forms should discourage, not encourage, pro se filings. In addition, the Committee believes that it is important that forms be understandable by all debtors, including those who are represented, because debtors are required to sign the forms under penalty of perjury. The comments did not cause the Committee to change its views.

Comments on Official Form 3A (installment payment of filing fees). Two sets of comments addressed this form specifically. Both suggested the need to add to the form the option of paying a chapter 13 filing fee through the debtor's plan. Districts differ on whether to permit this practice, and the current form does not expressly provide this option. In view of the fact that the practice is far from universal and the bankruptcy system has been able to accommodate the practice when it is allowed, the Advisory Committee decided that the form should remain silent regarding that option.

Line 2 of the published form stated that a debtor may ask the court to extend the deadline for payment of the final fee installment and that the debtor must explain why an extension is needed. One comment noted that no space was provided on the form for the explanation. Because the FMP group contemplated that such an extension would require a separate application at a later time, and in order to avoid any confusion, reference to the possibility of an extension was moved from the form to the instructions. This change is consistent with the form currently in effect, which merely informs the debtor of the possibility of obtaining an extension "for cause shown" and does not ask the debtor to provide reasons for the extension as part of the application.

A comment proposed deletion of the instruction in the signature box not to pay "anyone else in connection with your bankruptcy case" until the entire filing fee is paid. The comment noted that this statement would prohibit a debtor from making payments to a chapter 13 trustee before all of the installment payments are made. The published form changed the wording of the current form slightly, but in a way that gave rise to this comment. Current Form 3A includes the statement, "Until the filing fee is paid in full, I will not make any additional payment or transfer any additional property to an attorney or any other person *for services* in connection with this case" (emphasis added). The Committee agreed with the FMP that the comment should be addressed by reinserting "for services" in the statement.

Comments on Official Form 3B (waiver of filing fees). Five comments were submitted regarding this form. Several of them stated that certain information asked for on the proposed form should be omitted because of its irrelevance to the waiver decision. The following information was suggested for deletion:

- line 3, non-cash government assistance;
- lines 12-16, various assets that the debtor owns;
- line 19, payment for bankruptcy services by someone else; and
- line 20, prior bankruptcy filings by the debtor or the debtor's spouse.

The current form asks for the second and third items of information listed above, and the Advisory Committee decided to continue requesting that information. The current form also asks for prior bankruptcy filings by the debtor, but not by the debtor's spouse unless the spouse is also filing. On recommendation of the FMP, the Committee decided that the request for information about prior filings should be limited to filings by the debtor(s), and not by a non-filing spouse.

The decision about how to respond to the first item, non-cash government assistance, was more complicated. The amount of non-cash government assistance may be relevant to determining whether a debtor is able to make payments of the filing fee, since it may reduce the debtor's other expenses, but it is not specifically asked for on current Form 3B. The current form asks for the total combined monthly income as computed on Schedule I. Restyled Schedule I as published asked debtors to include the value of "[o]ther government assistance." Immediately preceding that question, it asked for "unemployment compensation" and "Social Security," which might have suggested to some debtors that "other government assistance" referred only to other forms of cash assistance. At the same time, non-cash governmental assistance should not be counted in determining whether the debtor meets an income threshold for waiver eligibility. The interim procedures of the Judicial Conference regarding chapter 7 fee waivers direct that "Non-cash governmental assistance (such as food stamps or housing subsidies) is not included [in income]."

The comments caused the FMP group to rephrase the request for information about governmental assistance on both Form 3B and Schedule I and to harmonize the two forms. In completing Form 3B, the debtor is permitted to use the income calculated on Schedule I. Because Schedule I has been revised to direct the debtor to include non-cash governmental assistance in income to the extent that the debtor knows the value of such assistance, on Form 3B it is necessary to have the debtor first report the amount of income including the value of non-cash assistance and then deduct the value of such assistance to determine the amount of income for purposes of the fee waiver application. In response to comments that the debtor does not always know the value of non-cash governmental assistance, both Form 3B and Schedule I have been revised to clarify that the debtor only needs to include the value of such assistance to the extent known. The Advisory Committee approved these changes recommended by the FMP.

Comments on Official Form 6I (income). Fourteen comments specifically addressed this form. Several of them raised questions about when income information must be provided about non-filing spouses. In order to clarify the requirement, the following instruction was added at the beginning of the form: "If you are married and not filing jointly, and your spouse is living with you, include information about your spouse. If you are separated and your spouse is not filing with you, do not include information about your spouse." The form specifically asks for information about both spouses when they file jointly.

As discussed above, in response to comments about non-cash governmental assistance, the Advisory Committee approved changes to Schedule I. As revised, the form asks the debtor to report income from unemployment compensation, Social Security, and "Other governmental assistance that you regularly receive." For the last category, the form directs the debtor to include the value of cash assistance and "the value (if known) of any non-cash assistance."

The FMP group recommended and the Advisory Committee approved two changes to the form's list of payroll deductions. The proposed form now asks separately about mandatory and voluntary contributions to retirement plans. And a new specific payroll deduction for "domestic support obligations" was added in response to a comment that these deductions are sufficiently common to justify a specific listing.

Comments on Official Form 6J (expenses). Fifteen comments specifically addressed Schedule J. The part of the proposed form drawing the most comment was the inclusion in part 2 of column B ("For Chapter 13 Only – What your expenses will be if your current plan is confirmed"). The comments displayed uncertainty about the purpose served by that column and doubt about the accuracy of the responses that it would elicit. The FMP group recommended two changes, which the Advisory Committee approved, in response to those comments. First, column B in was eliminated. Second, in order to permit districts that currently allow debtors to use Schedules I and J to update their income and expense information, a new checkbox was added to both forms in which a debtor can indicate that the information on the form is a "supplement . . . as of the following date:_____."

One commenter questioned the reason for the question, "Does anyone else live in your household?" Agreeing with the FMP that the question was too broad, the Advisory Committee approved the following changes to Part 1 of Schedule J. First, questions 1 and 2 on the published form were combined into a single question asking about all of the debtor(s)'s dependents, regardless of whether the dependents live with the debtor. Second, question 3 was revised to make its financial purpose clear. In the published version of the form, question 3 asked, "Does anyone else live in your household?" Now question 3 asks, "Do your expenses include expenses of people other than yourself and your dependents?" The question has been converted to a simple "yes/no" format. If the debtor's Schedule J reveals that it includes expenses for people other than the debtor and the debtor's dependents, interested parties may investigate further if warranted.

Several comments questioned the inclusion of student loan payments as an expense deduction in Schedule J. They argued that allowing this deduction represented a policy decision that student loans can continue to be paid during a chapter 13 case without constituting unfair discrimination against other unsecured claims that are not being paid in full. Another comment contrasted the treatment of student loans with other nondischargeable debts that are not treated as deductions. In response, the category of student loans as a distinct line item was eliminated. Now debtors who are paying student loans as an expense may list those payments as an "other" installment payment on line 21 of the form.

Just as with Schedule I, some comments questioned the treatment of non-filing spouses on this form. To eliminate the confusion, the following wording was added to the instructions for the form: "If you are married and are filing individually, include your non-filing spouse's expenses unless you are separated. If you are filing jointly and Debtor 1 and Debtor 2 keep separate households, fill out a separate *Schedule J* for each debtor. Check the box at the top of page 1 of the form for Debtor 2 to show that a separate form is being filed." New question 1 affirmatively asks if debtor 2 lives in a separate household. If so, that debtor is directed to file a separate Schedule J.

A2. Amendment for Which Final Approval Is Sought Without Publication. **The Advisory Committee recommends that an amendment to Official Form 23 be approved and forwarded to the Judicial Conference. It recommends that the amended form become effective on December 1, 2013.** Because the proposed amendment is conforming in nature, the Committee concluded that publication for comment is not required. The text of the amended form is set out in Appendix A.

Action Item 8. Official Form 23 is the form an individual debtor files in a chapter 7 or chapter 13 case to certify that he or she has completed a postpetition instructional course concerning personal financial management—a requirement for receiving a discharge. The Supreme Court has approved an amendment to Rule 1007(b)(7), due to go into effect on December 1, 2013, that will relieve individual debtors of the obligation to file Official Form 23 if the provider of an instructional course concerning personal financial management directly notifies the court that the debtor has completed the course. The preface and instructions to Form 23 would be amended to reflect that change by stating that a debtor should file the form only if the course provider has not already notified the court of the debtor's completion of the course.

B. Items for Publication in August 2013

The Advisory Committee recommends that the proposed rule and form amendments and new proposed forms that are discussed below be published for public comment. The texts of the amended rules and official forms are set out in Appendix B.

B1. Form Amendments for Which Republication Is Sought.

Action Item 9. Official Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2, the restyled means-test forms for individual debtors under chapter 7, 11, and 13, were published for comment in August 2012. Eighteen sets of comments on these forms were officially submitted, and one person informally provided the Advisory Committee with a detailed review of the forms. The comments ranged from suggestions and critiques regarding wording, style, and formatting of the forms to ones raising questions about interpretations of the Bankruptcy Code and case law. The FMP, the Subcommittee on Forms, and the Advisory Committee carefully considered all of the comments. The Committee determined that several of the comments were well taken, and it approved changes to the forms in response. Because it determined that the changes made were of sufficient significance to require republication, it requests that the newly revised means-test forms be published for public comment in August. Along with the republication of Official Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2, the Committee requests publication of **Official Form 22A-1Supp**, which was created in response to the comments.

The following discussion describes the most significant changes that the Committee made to the means-test forms at the spring meeting. In addition to the changes that are discussed, a number of stylistic changes were made.

(1) Creation of a separate form for chapter 7 means-test exemption. Section 707(b)(2)(D) exempts—either permanently or for a specified period—a limited number of chapter 7 debtors from being subject to the means test. In the current chapter 7 means-test form (Official Form 22A) and the revised form that was published last summer (proposed Official Form 22A-1), information about eligibility for an exemption is asked for at the beginning of the form. Because of the complexity of the qualifying requirements, this portion of the form occupies the entire first page.

Several comments were submitted regarding this part of the published form. One comment suggested moving to a separate form the questions that pertain to exemptions based on certain types of military service. The Advisory Committee agreed and decided that all of the exemption questions should be removed from Form 22A-1 and placed in a new supplement to that form, Official Form 22A-1Supp. That change serves two purposes. It unclutters Form 22A-1 by removing questions that are only occasionally applicable. It also results in uniform line numbering in the three means-test forms about income (22A-1, 22B, and 22C-1). Previously, the initial questions that were only in the chapter 7 form caused a misalignment with the parallel forms.

(2) New instruction about a domestic support obligation paid by one joint debtor or non-filing spouse to the other debtor. A comment suggested and the Advisory Committee agreed that the question in line 3 of Forms 22A-1, 22B, and 22C-1 about income from alimony and maintenance payments should be accompanied by an instruction not to include such payments from a spouse if column B (for reporting the income of a joint debtor or non-filing spouse) is filled in. The instruction is intended to prevent double reporting of the same income.

(3) Changes to implement the *Hamilton v. Lanning* decision. In *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010), the Supreme Court held that the calculation of a chapter 13 debtor's projected disposable income under § 1325(b) requires consideration of changes to income or expenses reported elsewhere on Official Form 22C that, at the time of plan confirmation, had occurred or were virtually certain to occur. Proposed Form 22C-2, as published last summer, included a section in which a debtor was asked to report any income or expense reported on the form that "has changed or is virtually certain to change during the 12 months after the date you filed your bankruptcy petition." Two comments stated that the 12-month limitation should be deleted. The Advisory Committee voted to accept this suggestion as better reflecting the *Lanning* decision. As revised, line 46 of Form 22C-2 directs a debtor to indicate if reported income or expenses "have changed or are virtually certain to change after the date that you filed your bankruptcy petition and during the time your case will be open."

The Advisory Committee also approved a change at the spring meeting to Official Form 22C-1 to reflect the possibility that a bankruptcy judge might calculate current monthly income under § 101(10A)(A)(ii), rather than the ordinary method required by § 101(10A)(A)(I). The Advisory Committee agreed to provide for this possibility by adding the language "Unless otherwise ordered by the court," to the options in line 21 of proposed Form 22C-1 for stating the applicable commitment period.

B2. Rules and Forms for Which Publication Is Sought.

Action Item 10. Rules to implement the chapter 13 plan form. For the past two years, the Advisory Committee has studied the creation of a national plan form for chapter 13 cases. The twin goals of the project have been to bring more uniformity to chapter 13 practice and to simplify the review of chapter 13 plans by debtors, courts, trustees, and creditors. These goals are consistent with the Supreme Court's decision in *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010), which held that an order confirming a procedurally improper chapter 13 plan was nevertheless entitled to preclusive effect and that bankruptcy judges must independently review chapter 13 plans for conformity with applicable law.

The Advisory Committee formed a Chapter 13 Plan Form Working Group to steer the project. The Working Group produced a draft plan form, together with a number of draft amendments to the Bankruptcy Rules that would be necessary to give effect to the plan and would clarify and increase the efficiency of chapter 13 practice. At its September 2012 meeting in Portland, Oregon, the Advisory Committee discussed drafts of the plan form and rule amendments prepared by the Working Group. The Advisory Committee also approved the Working Group's recommendation to hold a mini-conference on the draft plan and rules. That mini-conference, held in Chicago in January 2013, brought together participants from a broad cross-section of groups interested in the chapter 13 process. The participants included chapter 13 trustees, bankruptcy judges, a court clerk, consumer debtor attorneys, and representatives of secured and unsecured creditors. Based on the input received during the mini-conference, the Working Group prepared a revised draft plan and accompanying rule amendments for

consideration by the Advisory Committee at its April 2013 meeting in New York. The Advisory Committee voted unanimously to seek publication of the form and rule amendments.

The following discussion summarizes the amendments to the Bankruptcy Rules that the Advisory Committee seeks permission to publish with the chapter 13 plan form.

Rule 2002. The Bankruptcy Rules describe categories of events that trigger the obligation to provide notice. Rule 2002 currently requires 28 days' notice of the time to file objections to confirmation of a chapter 13 plan as well as of the confirmation hearing itself. Because the Bankruptcy Rules do not currently require that an objection to confirmation be filed in advance of the confirmation hearing, notice of the confirmation hearing and notice of the time to file an objection to confirmation can be made at the same time. An amendment to Rule 3015(f), however, would require that objections to confirmation of a chapter 13 plan be filed at least seven days before the confirmation hearing.

The Advisory Committee had two concerns about the interplay between current Rule 2002 and amended Rule 3015(f). First, parties would need to cross-reference the two rules in order to calculate the proper time for serving notice of the deadline to file an objection to confirmation in a chapter 13 case, and this might pose a trap for the unwary. Second, the combination of the 7-day pre-hearing deadline for objections to confirmation under Rule 3015(f) and the 28-day notice period for the time to file objections to confirmation under Rule 2002 would effectively create a 35-day notice period for a confirmation hearing, which is unnecessarily long. In particular, when a pre-confirmation modification of a plan is required, a 35-day period would be excessive.

The Advisory Committee proposes to retain the 28-day period for notice of a chapter 13 confirmation hearing, but to amend Rule 2002 in light of the new time period for objections to confirmation in Rule 3015(f). Thus, Rule 2002 would require 21 days' notice of the time to file objections to confirmation.

Rule 3002. When the Advisory Committee surveyed bankruptcy judges and trustees regarding chapter 13 practice, they frequently expressed dissatisfaction with the requirements for filing a proof of claim. The current rule requires only unsecured creditors to file proofs of claim, which has caused confusion about whether and when secured creditors must file proofs of claim in chapter 13 cases. Adding to that confusion, the lengthy deadline for filing a proof of claim under the current rule means that a timely claim could be filed even after the Bankruptcy Code requires a court to hold a confirmation hearing in a chapter 13 case.

Amended Rule 3002 responds to both of these concerns. First, Rule 3002(a) would be amended to require a secured creditor, as well as an unsecured creditor, to file a proof of claim in order to have an allowed claim. In keeping with Code § 506(d), however, the amendment also makes clear that the failure of a secured creditor to file a proof of claim does not render the creditor's lien void. Second, Rule 3002(c) would be amended to change the calculation of the

claims bar date. Rather than 90 days from the meeting of creditors under Code § 341, the bar date would be 60 days after the petition is filed in a chapter 13 case. The amended rule includes a provision for an extension of the bar date when the debtor has failed to provide in a timely manner a list of creditors' names and addresses for notice purposes. In response to concerns raised during the Chicago mini-conference, the amended rule would also include a longer bar date for certain supporting documents required for mortgage claims on a debtor's principal residence. With those claims, the mortgagee would be required to file a proof of claim within the 60-day period but would have an additional 60 days to file a supplement with the supporting documents.

Rule 3007. Objections to claims are governed by Rule 3007. Because the plan form permits some determinations regarding claims to be made through the plan, the Advisory Committee proposes an amendment to Rule 3007. The amended rule would provide an exception to the need to file a claim objection if a determination with respect to that claim is made in connection with plan confirmation under proposed Rule 3012.

Rule 3012. In order to implement the provisions of the plan form that would allow determinations of the amount of a claim in certain circumstances, the Advisory Committee proposes to amend and reorganize Rule 3012. The amendment would provide that the amount of a secured claim under Code § 506(a) may be determined in a proposed plan, subject to objection and resolution at the confirmation hearing. Current Rule 3012 provides for the valuation of a secured claim by motion only. The amended rule would also make clear that a chapter 13 plan would not control the amount of a claim entitled to priority treatment or the amount of a secured claim of a governmental unit.

Rule 3015. Rule 3015 governs the filing of a chapter 13 plan as well as plan modifications and objections to confirmation. The Advisory Committee proposes extensive amendments to the rule. They include an amended subdivision (c) requiring use of the official form for chapter 13 plans, a new seven-day deadline in Rule 3015(f) for filing objections to confirmation, and an amended subdivision (g) providing when the plan terms control over contrary proofs of claim. These amendments dovetail with amendments to Rules 2002, 3007, and 3012.

Rule 4003. Code § 522(f) permits a debtor to avoid certain liens encumbering property that is exempt from the debtor's estate. Current Rule 4003(d) provides that lien avoidance under this section of the Code requires a motion. The plan form, however, would include a provision for a debtor to request lien avoidance as permitted by § 522(f). The Advisory Committee proposes an amendment to Rule 4003(d) to give effect to that part of the plan form.

Rule 5009. The Advisory Committee has included a procedure in amended Rule 5009(d) for the debtor to obtain an order confirming that a secured claim has been satisfied. This is particularly important to debtors who need, for title purposes, documentation showing that an unsecured second mortgage or other lien has been satisfied in a chapter 12 or chapter 13 case.

Because the Advisory Committee does not wish to take a position on the requirements for lien satisfaction, the language of the amended rule permits the debtor to request entry of the order but does not specify those requirements.

Rule 7001. Rule 7001 lists disputes that are required to be conducted by adversary proceeding. Current Rule 7001(2) includes among the list of adversary proceedings a proceeding "to determine the validity, priority, or extent of a lien or other interest in property." The Advisory Committee proposes to amend Rule 7001(2) so that determinations of the amount of a secured claim (under amended Rule 3012) and lien avoidance (under amended Rule 4003(d)) through a chapter 12 or chapter 13 plan would not require an adversary proceeding.

Rule 9009. In order to ensure use of the chapter 13 plan form without significant alterations, the Advisory Committee has proposed an amendment to Rule 9009. That rule currently provides that official forms may be "used with alterations as may be appropriate" and with "their contents rearranged." The language of the current rule raised the concern that debtors (or courts) might rearrange the chapter 13 plan form or include terms that deviate from it without properly identifying those terms. Because greater uniformity is a principal goal of the plan form, amended Rule 9009 would limit the range of permissible changes to forms. The amended rule—which would be reorganized with separate subdivisions for official forms, director's forms, and a rule of construction for forms—prohibits alterations to official forms, unless alterations are permitted by the Bankruptcy Rules or by an official form itself. The amended rule would also permit modification of forms in limited circumstances to take account of the use of similar typefaces and the need to expand or delete space for responses on a form. These provisions would permit a filer to expand or delete space, as appropriate, when responding to an item on a form or to skip a category of information by indicating that no response is reported for that category. The amended rule also includes a provision for the alteration of form court orders in a particular case.

Action Item 11. Rule 5005 governs the Filing and Transmittal of Papers. As reported at last two meetings, the Advisory Committee has been considering the advisability of proposing a national bankruptcy rule that would permit the use of electronic signatures of debtors and other individuals who are not registered users of CM/ECF, without requiring the retention of the original document bearing a handwritten signature. The Committee now seeks publication for public comment of a proposed amendment of Rule 5005 that would create such a rule.

Currently the use of electronic signatures in bankruptcy courts is governed by local rules. Bankruptcy Rule 5005(b)(2) provides in part that a "court may by local rule permit or require documents to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes."

Many of the local rules that deal with electronic signatures are based on Model Rules for Electronic Case Filing that were approved by the Judicial Conference of the United States ("JCUS") in 2001 and modified in 2003. The model rules were recommended by the Committee

on Court Administration and Case Management ("CACM"), which developed them with participation by the Committee on Information Technology and the Standing Committee. The introduction to the model rules explains that courts are "free to adapt the provisions of these model rules as they choose."

Two of the model rules relate to signatures on electronically filed documents. Model Rule 8 (Signatures) provides that the "user log-in and password required to submit documents to the Electronic Filing System serve as the Filing User's signature on all electronic documents filed with the court. . . . for any . . . purpose for which a signature is required in connection with proceedings before the court." Regarding the signature of an individual without a CM/ECF user log-in and password (a "non-Filing User"), Model Rule 8 states that an electronically filed document should represent the signature by "a 's/' and the name typed in the space where a signature would otherwise appear, or as a scanned image."

Model Rule 7 (Retention Requirements) imposes a duty on a Filing User to maintain in paper form any electronically filed document that required the original signature of someone other than the Filing User. The Commentary to the rule states without further elaboration that, "because electronically filed documents do not include original, handwritten signatures, it is necessary to provide for retention of certain signed documents in paper form in case they are needed as evidence in the future." The rule does not specify the retention period, but instead leaves that decision up to each district.

Many bankruptcy courts today have local rules that require the attorney (Filing User) to preserve original documents bearing the debtor's (non-Filing User's) signature for a specified period of time. The retention periods vary. A few bankruptcy courts do not require retention of the original document so long as the attorney submits a declaration manually signed by the debtor attesting to the truth of the information electronically filed or, in other courts, files a scanned image of the signature page with the debtor's original signature.

The issue of the retention of documents that are filed electronically with the debtor's signature was initially brought to the Advisory Committee by the Forms Modernization Project. It raised the issue in response to concerns expressed by debtors' attorneys about their need to retain petitions, schedules, and other individual-debtor filing documents that will be lengthier in the proposed restyled format. Representatives of the Department of Justice also expressed concerns about the retention of original documents by debtors' attorneys and the lack of uniformity regarding the retention period. The Department made a recommendation to the Next Gen's Additional Stakeholders Functional Requirements Group that documents bearing handwritten signatures, signed under penalty of perjury, be retained by the clerk of court for five years—the statute of limitations for fraud and perjury proceedings—unless a national rule were adopted declaring that electronic copies of such documents in the court's CM/ECF system constitute legally sufficient best evidence in the absence of an original signed document.

After its fall 2012 meeting, the Advisory Committee received a copy of a memorandum from the chair of CACM to the chair of the Standing Committee that requested the Standing Committee to "explore creating a federal rule regarding electronic signatures and the retention of paper documents containing original signatures." CACM suggested three possible approaches to the issue:

- Its preference is the promulgation of a national rule specifying that an electronic signature in the CM/ECF system is *prima facie* evidence of a valid signature. Under this proposal, the burden would be placed on persons opposing the validity of the signature to prove with appropriate evidence that an electronic signature was not valid.

- The second approach would be to require courts to retain copies of all originally-signed, paper documents that are electronically filed. According to CACM, this method would address problems with law firms retaining such records, but would impose a substantial cost on the courts.

- According to CACM, a third alternative would be a policy option. CACM could ask JCUS to specify the retention period for original documents containing the signature of a non-Filing User. CACM noted, however, that such a policy would not address the problems for external users because of lack of uniformity in local rules, and it would not encourage the reliance on electronic signatures.

At the request of the Advisory Committee, Dr. Molly Johnson of the Federal Judicial Center collected and reviewed local bankruptcy rules regarding signatures of debtors on documents that are filed electronically and requirements for the retention of original documents bearing a non-Filing User's signature. For a point of comparison, she also reviewed local district court rules regarding signatures by non-Filing Users and related retention requirements. In connection with her report, Dr. Johnson reviewed a recent Office of Management and Budget document on the use of electronic signatures in federal transactions and solicited the views of interested parties about possible rule changes that would eliminate retention requirements.

Informal feedback from U.S. trustees, chapter 7 case trustees, and the Executive Office of U.S. Attorneys indicated a preference for handwritten signatures affixed to original documents, rather than purely electronic signatures and an accompanying declaration, but recognized that scanned images of signatures may also be workable. They expressed concern about whether a debtor's declaration would be persuasive evidence that the debtor saw all of the relevant documents or knew which documents were covered by the declaration.

The Advisory Committee's Subcommittee on Technology and Cross Border Insolvency considered several options for a rule that would allow the use of electronic signatures of non-Filing Users without requiring either an attorney or the court to retain the original document. At the spring meeting, it recommended to the Committee a proposed amendment of Rule 5005 that

would allow scanned signatures of debtors and other non-Filing Users to be treated the same as handwritten signatures without requiring the retention of hard copies of documents. The Subcommittee stressed the importance of requiring the scanned signature page and the related document to be filed as a single docket entry in order provide clarity about the document that was being attested to by the non-Filing User. The amended rule would also provide that the user name and password of a registered user of the CM/ECF system would be treated as that individual's signature on electronically filed documents. The Subcommittee noted that the validity of a signature submitted under the amended rule would still be subject to challenge, just as is true for a handwritten signature.

After full discussion, the Advisory Committee unanimously approved the Subcommittee's recommendation, and it requests that the proposed revision of Rule 5005(a) be published for comment.

Action Item 12. Rule 9006(f), which is modeled on Civil Rule 6(d), provides three additional days for a party to act "after service" if service is made by mail or under Civil Rule 5(b)(2)(D), (E), or (F). At the January 2013 meeting, the Standing Committee approved for publication a proposed amendment of Civil Rule 6(d) that would clarify that only the party that is served by mail or under the specified provisions of Civil Rule 5—and not the party making service—is permitted to add three days to any prescribed period for taking action after service is made. Because Rule 9006(f) contains the same potential ambiguity as current Rule 6(d), the Advisory Committee voted to propose a parallel amendment of the bankruptcy rule. The Committee requests that the proposed amendment of Rule 9006(f) be published for public comment at the same time as the amendment of Civil Rule 6(d).

Action Item 13. Official Form 113 (chapter 13 plan form). The Advisory Committee seeks permission to publish for public comment a national plan form for chapter 13 cases. As described in Action Item 10, the plan form is the product of more than two years of study and consultation by a Working Group of the Advisory Committee.

The plan form includes ten parts. Beginning with a notice to interested parties (Part 1), the plan form covers: the amount, source, and length of the debtor's plan payments (Part 2); the treatment of secured claims (Part 3); the treatment of the trustee's fees, administrative claims, and other priority claims (Part 4); the treatment of unsecured claims not entitled to priority (Part 5); the treatment of executory contracts and unexpired leases (Part 6); the order of distribution of payments by the trustee (Part 7); the revesting of property of the estate with the debtor (Part 8); and nonstandard plan terms (Part 9). Part 10 is the signature box.

The plan form contains a number of significant features. First, it permits a debtor to propose to limit the amount of a secured claim (Part 3, § 3.2), to avoid certain liens as provided by the Bankruptcy Code (Part 3, § 3.4), and to include nonstandard terms that are not part of—or that deviate from—the official form (Part 9). In order to make any of these particular terms effective, however, the debtor must clearly indicate in Part 1 that the plan includes one or more

of them by marking the appropriate checkbox. Thus, the face of the document will put the court, the trustee, and creditors on notice that the plan contains terms that may require additional scrutiny. Second, the plan form makes clear when it will control over a creditor's contrary proof of claim. For example, a debtor may propose to limit the amount of a nongovernmental secured claim under Code § 506(a) because the collateral securing it is worth less than the claim. The proposed amount of the secured claim would be binding, subject to a creditor's objection to the plan and a final determination of the issue in connection with plan confirmation. Otherwise, a creditor's proof of claim will control the amount and treatment of the claim, subject to a claim objection.

The treatment of nonstandard plan provisions has been a concern during the process of drafting the plan. As described earlier, Part 1 requires the debtor to indicate whether the plan form includes nonstandard terms. In order to give further assurance that the debtor has filed a plan form that otherwise adheres to the official form, the Working Group proposed that the plan's signature box include a certification to that effect. Thus, the plan form requires that the debtor's attorney (or the debtor, if pro se) must certify by signing the plan that all of its provisions are identical to the official form, except for nonstandard provisions located in Part 9.

The Advisory Committee anticipates that the plan form would go into effect at the same time as the amendments to the Bankruptcy Rules intended to implement it. Accordingly, a request for final approval of the plan form after publication for public comment would be timed to match the progress of those rule amendments.

Action Item 14. Remaining revised forms for individual debtors. As discussed above under Action Item 7, the Advisory Committee has been engaged in a multi-year undertaking—through its FMP—to restyle the official bankruptcy forms and to improve the interface between the forms and available technology. The Advisory Committee approved the FMP's decision to create a separate set of forms for use in cases involving individual debtors. The first group of the individual-debtor forms was published for comment last August, and, as set out in Action Items 7 and 8, the Committee is seeking either final approval or republication of those forms at this meeting. The Committee also requests publication of the remaining restyled individual-debtor forms in August of this year. These forms are included in Appendix B. Although the normal effective date for official bankruptcy forms published this summer would be December 1, 2014, the Advisory Committee recommends that the effective date be delayed until at least December 1, 2015, for reasons that are discussed below.

Drafts of the proposed Official Forms for which publication is sought were presented to the Standing Committee for its preliminary review at the January 2013 meeting. Members of the Standing Committee offered comments, both of a stylistic and substantive nature, and the Advisory Committee subsequently approved some changes to the proposed forms in response to that feedback. The Advisory Committee approved other changes to the forms at its spring meeting in response to comments that were submitted on the forms published in 2012 and suggestions by Committee members.

As explained at the January 2013 Standing Committee meeting, the need for different versions of case opening forms for individuals and non-individuals required the FMP to develop a new numbering scheme for all the bankruptcy forms that both organizes the bankruptcy forms in a logical way and has some relationship to current form numbers. The basic numbering protocol for the new forms is:

1XX – Forms for Individuals Filing for Bankruptcy

2XX – Forms for Non-individual Filing for Bankruptcy

3XX – Orders and Court Notices

4XX – Additional Official Forms

XXXX - Director's Forms

A forms number conversion chart to accompany the forms for publication is included in Appendix B.

The proposed Official Forms for which the Advisory Committee requests publication are the following:

101	**Voluntary Petition for Individuals Filing for Bankruptcy**
101A	**Initial Statement About an Eviction Judgment Against You**
101B	**Statement About Payment of an Eviction Judgment Against You**
104	**List in Individual Chapter 11 Cases of Creditors Who Have the 20 Largest Unsecured Claims Against You and Are Not Insiders**
105	**Involuntary Petition Against an Individual**
106Sum	**Summary of Your Assets and Liabilities and Certain Statistical Information**
106A/B	**Schedule A/B: Property**
106C	**Schedule C: The Property You Claim as Exempt**
106D	**Schedule D: Creditors Who Hold Claims Secured by Property**
106E/F	**Schedule E/F: Creditors Who Have Unsecured Claims**
106G	**Schedule G: Executory Contracts and Unexpired Leases**

106H **Schedule H: Your Codebtors**

106Dec **Declaration About an Individual Debtor's Schedules**

107 **Statement of Financial Affairs for Individuals Filing for Bankruptcy**

112 **Statement of Intention for Individuals Filing Under Chapter 7**

119 **Bankruptcy Petition Preparer's Notice, Declaration, and Signature**

121 **Statement About Your Social Security Numbers**

318 **Order of Discharge**

423 **Certification About a Financial Management Course**

427 **Cover Sheet for Reaffirmation Agreement**

An instruction booklet for individuals is also included for comment.

Changes Made after the January Meeting. (1) The exemption schedule's *Schwab v. Reilly* option. As presented at the January meeting of the Standing Committee, the draft of the schedule that a debtor uses for claiming property as exempt (at that time designated as Schedule D and now as Schedule C) included four columns for providing information. They were labeled: **I.** Brief description of the property and line on *Schedule A* that lists this property; **ii.** Current value of the portion you own; **iii.** Amount of the exemption you claim; and **iv.** Specific laws that allow exemption. The third column—Amount of the exemption you claim—included only a blank line on which a debtor could insert either a specific dollar amount or use the option offered by *Schwab v. Reilly*, 130 S. Ct. 2652 (2010), of claiming as exempt "100% of fair market value."[1]

The instructions at the beginning of the form explained, "For each item of property you claim as exempt, you must specify the amount of the exemption you claim. Usually, a specific dollar amount is claimed as exempt, but in some circumstances the amount of the exemption claimed might be indicated as 100% of fair market value. For example, a debtor might claim 100% of fair market value for an exemption that is unlimited in amount, such as some exemptions for health aids."

This design of the form represented a compromise between the existing exemption schedule and an earlier published amendment to the schedule, which was eventually withdrawn

[1] The *Schwab* Court stated, "Where, as here, it is important to the debtor to exempt the full market value of the asset or the asset itself, our decision will encourage the debtor to declare the value of her claimed exemption in a manner that makes the scope of the exemption clear, for example, by listing the exempt value as "full fair market value (FMV)" or "100% of FMV." 130 S. Ct. at 2668.

by the Advisory Committee. The existing exemption schedule requires a debtor to specify "the value of the claimed exemption." The proposed amendment that was published in August 2011 added two checkboxes to the form to allow debtors to state the value of a claimed exemption as either (1) the "Full fair market value of the exempted property" or (2) "Exemption limited to $_____."

The Advisory Committee decided not to pursue the August 2011 proposal after reviewing comments submitted in response to publication. A number of them, mostly by bankruptcy trustees, stated that because the new option could be easily invoked by checking a box, it would encourage debtors to claim the full fair market value of an asset as exempt, even when using an exemption capped at an amount less than the asset's value. They argued that the increase in such exemption claims would then lead to a "plethora of objections."

In January when the draft exemption form was discussed by the Standing Committee, several concerns were raised about the form's proposed wording and format. One concern was that the option of claiming 100% of fair market value was presented too subtly for pro se debtors to understand it. One member suggested that additional examples be provided of when that option could properly be invoked, and another suggested highlighting the relevant instructions. It was also suggested that perhaps the Advisory Committee had given too much deference to the views of trustees and that the Committee should consider revising the form to present the "100% FMV" option more clearly. At the conclusion of the meeting, one member of the Standing Committee suggested that the column for "Amount of the exemption you claim" provide two options: (1) a checkbox followed by a line with a dollar sign, and (2) a checkbox followed by "100% of fair market value, not greater than any applicable statutory limit."

A revised draft of the proposed exemption form was prepared to incorporate the suggestions offered by the Standing Committee. As approved by the Advisory Committee, the form now provides two options under "Amount of the exemption you claim": (1) a checkbox followed by a line with a dollar sign, and (2) a checkbox followed by "100% of fair market value, up to any applicable statutory limit." The instruction at the top of the form relating to the exemption amount appears in a separate paragraph, written in bold. It reads as follows:

> For each item of property you claim as exempt, you must specify the amount of the exemption you claim. One way of doing so is to state a specific dollar amount as exempt. Alternatively, you may claim the full fair market value of the property being exempted up to the amount of any applicable statutory limit. Some exemptions—such as those for health aids, rights to receive certain benefits, and tax-exempt retirement funds—may be unlimited in dollar amount. However, if you claim an exemption of 100% of fair market value under a law that limits the exemption to a particular dollar amount and the value of the property is determined to exceed that amount, your exemption would be limited to the applicable statutory amount.

The Advisory Committee concluded that this version of the form provides the debtor a means of claiming an exemption of 100% of fair market value when doing so is permissible under applicable law.

(2) Changed designations of the debtor's schedules. Official Form 6 (to be redesignated as Official Form 106) consists of a series of schedules that a debtor must file at the outset of a bankruptcy case. The schedules are referred to by letter—currently A–J. As proposed by the FMP group, some schedules would be combined (current A and B, and E and F), and the order of some schedules would be changed. As a result, the existing letter designations of all of the schedules would be altered.

At the spring meeting, two members of the Advisory Committee suggested an alternative designation scheme for the schedules that would result in only a minimal change from the existing designations. Under their proposal, the two combined forms would be designated by two letters—A/B and E/F—and the schedules would remain in the same order as they currently appear. As a result, all but the combined forms would retain their current letter designations. The proponents of this alternative argued that publishing new schedules with a lettering scheme that more closely aligns with the status quo would minimize confusion during the period of implementation and transition to the new forms and would likely make it easier to build support for the new forms among the constituencies that use them on a daily basis.

After discussion, the Committee adopted the alternative designation proposal by a vote of 7 to 5.

(3) Other changes after the January meeting. In response to comments made about the restyled individual-debtor forms that were published in August 2012, the Advisory Committee approved formatting and appearance changes to those forms, and it made the same changes to the forms that are now proposed for publication. Most shading was removed from the forms, and the black banners separating the parts of the forms were reduced. The Committee's review and editing of the proposed forms also resulted in some stylistic changes and, in a few forms, substantive changes to ensure conformity with the Bankruptcy Code and rules.

Proposed Effective Date. Although the normal effective date for official bankruptcy forms published in 2013 would be December 1, 2014, the Advisory Committee recommends that the effective date for the restyled individual-debtor forms that will be initially published this summer be delayed at least until December 1, 2015, in order to permit them to go into effect at the same time as the restyled forms for non-individual cases. The non-individual forms are about a year behind the individual forms in development. There are two reasons for the need for synchronization. First, many of the individual-debtor forms being published this summer are revisions of forms that currently apply in all bankruptcy cases, individual and non-individual. To avoid overlap and confusion, the non-individual forms should not go into effect until the current forms have been replaced for all cases. Second, the forms that will be published this summer implement the new forms-numbering scheme. Waiting for the effective date of the non-

individual forms will allow there to be a uniform numbering scheme for all of the bankruptcy forms. A year or more delay in the effective date will also have the benefit of allowing the next generation of CM/ECF to first become operational. Next Gen will provide the ability to store information on the forms as data so that authorized users can produce customized reports suitable for their needs. One of the goals of the FMP has been to take advantage of these new technological developments.

Action Item 15. Official Forms 17A, 17B, and 17C are proposed for publication in connection with the revision of the bankruptcy appellate rules. Form 17A would be an amended and renumbered notice-of-appeal form, and Forms 17B and 17C would be new.

Proposed Form 17A would include in the Notice of Appeal a section for the appellant's optional statement of election to have the appeal heard by the district court rather than by the bankruptcy appellate panel. It would only be applicable in districts for which appeals to a bankruptcy appellate panel have been authorized. Inclusion of the statement in the notice of appeal would ensure compliance with the statutory requirement that an appellant make its election to have the district court hear its appeal "at the time of filing the appeal." 28 U.S.C. § 158(c)(1)(A).

New Form 17B—the Optional Appellee Statement of Election to Proceed in the District Court—would be the form that an appellee would file if it wanted the appeal to be heard by the district court and the appellant or another appellee did not make that election. To comply with § 158(c)(1)(B), the appellee would have to file the form within 30 days after service of the notice of appeal.

New Form 17C—Certificate of Compliance with Rule 8015(a)(7)(B) or 8016(d)(2)—would provide a means for a party to certify compliance with the provisions of the bankruptcy appellate rules that prescribe limitations on brief length based on number of words or lines of text (the "type-volume limitation"). It is based on Appellate Form 6, which implements the parallel provisions of FRAP 32(a)(7)(B).

The Advisory Committee requests that the proposed forms be published this August so that they would be on schedule to take effect on December 1, 2014, the same effective date as is anticipated for the revised Part VIII rules.

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APPENDIX A

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Appendix A.1

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

For Final Approval and Transmittal to the Judicial Conference

Rule 1014. Dismissal and Change of Venue

1 * * * * *

2 (b) PROCEDURE WHEN PETITIONS INVOLVING
3 THE SAME OR RELATED DEBTORS ARE FILED IN
4 DIFFERENT COURTS. If petitions commencing cases under the
5 Code or seeking recognition under chapter 15 are filed in different
6 districts by, regarding, or against (1) the same debtor, (2) a
7 partnership and one or more of its general partners, (3) two or
8 more general partners, or (4) a debtor and an affiliate, ~~on motion~~
9 ~~filed~~ the court in the district in which the first-filed petition ~~filed~~
10 ~~first~~ is pending ~~and after hearing on notice to the petitioners, the~~
11 ~~United States trustee, and other entities as directed by the court,~~
12 ~~the court~~ may determine, in the interest of justice or for the
13 convenience of the parties, the district or districts in which ~~the case~~
14 ~~or~~ any of the cases should proceed. The court may so determine
15 on motion and after a hearing, with notice to the following entities
16 in the affected cases: the United States trustee, entities entitled to

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

17 notice under Rule 2002(a), and other entities as the court directs.

18 ~~Except as otherwise ordered by~~ ~~t~~ The court ~~in the district in which~~

19 ~~the petition filed first is pending,~~ may order the parties to the later-

20 filed cases not to proceed further ~~the proceedings on the other~~

21 ~~petitions shall be stayed by the courts in which they have been~~

22 ~~filed~~ until it makes the determination ~~is made~~.

COMMITTEE NOTE

Subdivision (b) provides a practical solution for resolving venue issues when related cases are filed in different districts. It designates the court in which the first-filed petition is pending as the decision maker if a party seeks a determination of where the related cases should proceed. Subdivision (b) is amended to clarify when proceedings in the subsequently filed cases are stayed. It requires an order of the court in which the first-filed petition is pending to stay proceedings in the related cases. Requiring a court order to trigger the stay will prevent the disruption of other cases unless there is a judicial determination that this subdivision of the rule applies and that a stay of related cases is needed while the court makes its venue determination.

Notice of the hearing must be given to all debtors, trustees, creditors, indenture trustees, and United States trustees in the affected cases, as well as any other entity that the court directs. Because the clerk of the court that makes the determination often may lack access to the names and addresses of entities in other cases, a court may order the moving party to provide notice.

The other changes to subdivision (b) are stylistic.

Changes Made After Publication

The only change made after publication was stylistic.

Summary of Public Comment

12-BK-005. Judge Robert J. Kressel (Bankr. D. Minn.). I do not understand how a judge has jurisdiction to enter orders affecting parties in a case pending in another district in front of a different judge.

12-BK-008. National Conference of Bankruptcy Judges (NCBJ). The NCBJ is concerned that the court hearing the first-filed case would lack jurisdiction to order parties in the other cases, some of whom may not be parties to the first-filed case, not to proceed further. In addition, a wording suggestion is offered to make clearer who is to receive notice of the motion in the first-filed case.

12-BK-010. States' Association of Bankruptcy Attorneys. The rule does not expressly state that the court where the first petition is filed shall be the only one to determine the issue of where the cases should proceed. It is also not clear who can initiate such a determination or whether the court may or should do so sua sponte. While the Committee Note says that the court can order the moving party to provide notice to parties in the other cases, the rule does not say so. Finally, a time limit should be set for filing a motion for a determination in the first court since the stay is no longer automatic.

12-BK-033. Chief Judge Christopher M. Klein (Bankr. E.D. Cal.). The current rule-mandated stay has generally worked well. Under the proposed amendment, the later-filed cases can proceed unabated until the first court orders the later-filed cases to stop. Stays are less likely to occur (judges do not like telling other judges what to do), resulting in a greater chance of multiple, inconsistent orders being issued in the respective cases involving the same or related debtors.

Rule 7004. Process; Service of Summons, Complaint

1 * * * * *

2 (e) SUMMONS: TIME LIMIT FOR SERVICE WITHIN

3 THE UNITED STATES. Service made under Rule 4(e), (g),

4 (h)(1), (I), or (j)(2) F.R. Civ. P. shall be by delivery of the

5 summons and complaint within ~~14~~ 7 days after the summons is

6 issued. If service is by any authorized form of mail, the summons

7 and complaint shall be deposited in the mail within ~~14~~ 7 days after

8 the summons is issued. If a summons is not timely delivered or

9 mailed, another summons shall be issued and served. This

10 subdivision does not apply to service in a foreign country.

COMMITTEE NOTE

Subdivision (e) is amended to alter the period of time during which service of the summons and complaint must be made. The amendment reduces that period from fourteen days to seven days after issuance of the summons. Because Rule 7012 provides that the defendant's time to answer the complaint is calculated from the date the summons is issued, a lengthy delay between issuance and service of the summons may unduly shorten the defendant's time to respond. The amendment is therefore intended to encourage prompt service after issuance of a summons. If service of the summons within any seven-day period is impracticable, a court retains the discretion to enlarge that period of time under Rule 9006(b).

Changes Made After Publication

A new sentence referring to the availability of an enlargement of time under Rule 9006(b) was added to the Committee Note.

Summary of Public Comment

12-BK-001. Bradley R. Tamm (Attorney, Honolulu, Hawaii). The shortened time is sufficient in circumstances when service can be effected by mail. Sometimes, however, service cannot be effected by mail under Rule 7004(b), such as when an individual's only address is a post office box. Seven days will often be insufficient and will lead to situations where the summons must be reissued multiple times. Instead of shortening the summons service window in Rule 7004(e), the defendant's time to respond in Rule 7012(a) should be lengthened. That period could be increased from 30 days to 45 days, or the government's 35-day period to answer could be applied to all parties.

12-BK-031. Insolvency Law Committee of the Business Law Section of the State Bar of California. Service within 7 days may be onerous under certain circumstances. Some judges require service of a scheduling order, which may not issue until days after the case is filed and the summons is issued. We recommend keeping the 14-day window and revising Rule 7012(a) to provide the defendant with 28 days to respond after service of the summons and complaint.

12-BK-033. Chief Judge Christopher M. Klein (Bankr. E.D. Cal.). Rule 7004(e) is dysfunctional, and reducing the service window from 14 to 7 days will only make the existing problems worse. The published amendment will increase the likelihood of stale summonses, which will increase delay. Because the "limited life" summons under the Bankruptcy Rules is out of step with practice in federal district court and state court, where a summons typically does not expire, general practice lawyers and pro se parties fall into a trap for the unwary.

These bankruptcy-specific service provisions date back to the era of the Bankruptcy Act, when the Civil Rules lacked a time limit for service. The Civil Rules now contain a time limit for service under Rule 4(m), and the Bankruptcy Rules should reflect that change. The Rules Committee should (1) delete the time limit on the validity of the summons under Rule 7004(e); (2) amend Rule 7012(a) to mirror the times in Civil Rule 12(a); and (3) alter the Civil Rule 4(m) time limit (incorporated by Bankruptcy Rule 7004(a)) to less than the 120 days in the Civil Rule.

12-BK-041. Daniel Press (Attorney, McLean, Virginia). In most cases, counsel should be able to serve the summons and complaint by mail within 7 days. If, however, an unrepresented plaintiff, or one whose lawyer is not a registered electronic filer, receives the summons by mail from the clerk, some or all of the 7-day window will expire, making it impossible to make timely service on the defendant. In addition, not all domestic summonses can be served by mail. Service within 7 days may be impossible in such situations.

The rule should be amended to allow service by mail to post office boxes, or there should be a different time period specified for service that is not made by mail. Also, although Rule 7004(e) does not include service under Civil Rule 4(j)(1) (service on foreign governments or agencies), an express exception should be included.

Rule 7008. General Rules of Pleading

1 ~~(a) APPLICABILITY OF RULE 8 F.R.CIV.P.~~ Rule 8
2 F.R.Civ.P. applies in adversary proceedings. The allegation of
3 jurisdiction required by Rule 8(a) shall also contain a reference to
4 the name, number, and chapter of the case under the Code to which
5 the adversary proceeding relates and to the district and division
6 where the case under the Code is pending. In an adversary
7 proceeding before a bankruptcy ~~judge~~ court, the complaint,
8 counterclaim, cross-claim, or third-party complaint shall contain a
9 statement ~~that the proceeding is core or noncore and, if non-core~~
10 that the pleader does or does not consent to entry of final orders or
11 judgment by the bankruptcy ~~judge~~ court.

12 ~~(b) ATTORNEY'S FEES. A request for an award of~~
13 ~~attorney's fees shall be pleaded as a claim in a complaint, cross-~~
14 ~~claim, third-party complaint, answer, or reply as may be~~
~~appropriate.~~

COMMITTEE NOTE

Former subdivision (a) is amended to remove the requirement that the pleader state whether the proceeding is core or non-core and to require in all proceedings that the pleader state whether the party does or does not

consent to the entry of final orders or judgment by the bankruptcy court. Some proceedings that satisfy the statutory definition of core proceedings, 28 U.S.C. § 157(b)(2), may remain beyond the constitutional power of a bankruptcy judge to adjudicate finally. The amended rule calls for the pleader to make a statement regarding consent, whether or not a proceeding is termed non-core. Rule 7012(b) has been amended to require a similar statement in a responsive pleading. The bankruptcy judge will then determine the appropriate course of proceedings under Rule 7016.

The rule is also amended to delete subdivision (b), which required a request for attorney's fees always to be pleaded as a claim in an allowed pleading. That requirement, which differed from the practice under the Federal Rules of Civil Procedure, had the potential to serve as a trap for the unwary.

The procedures for seeking an award of attorney's fees are now set out in Rule 7054(b)(2), which makes applicable most of the provisions of Rule 54(d)(2) F.R. Civ. P. As specified by Rule 54(d)(2)(A) and (B) F.R. Civ. P., a claim for attorney's fees must be made by a motion filed no later than 14 days after entry of the judgment unless the governing substantive law requires those fees to be proved at trial as an element of damages. When fees are an element of damages, such as when the terms of a contract provide for the recovery of fees incurred prior to the instant adversary proceeding, the general pleading requirements of this rule still apply.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

12-BK-003. Douglas N. Candeub (Attorney, Wilmington, Delaware). The Advisory Committee should not abandon references to "core" and "non-core" proceedings in the rules. Those terms could be retained while adding a statement regarding consent in all proceedings.

12-BK-008. National Conference of Bankruptcy Judges (NCBJ). The NCBJ approves of the published rule amendments to the extent that they require a statement regarding consent in all adversary proceedings. But the terms "core" and "non-core" should not be deleted from the rule. In the NCBJ's view, the court and parties benefit from knowing early in the proceeding whether the parties view the proceeding as core or non-core.

12-BK-010. States'Association of Bankruptcy Attorneys (SABA). We approve of the basic approach of the amendments. The amended rules should make clear that a party may consent to some aspects of a bankruptcy court's determination and not others. For example, a state may consent to final adjudication by a bankruptcy court on the question whether the automatic stay applies to a police or regulatory action but not consent to a final adjudication by the bankruptcy court of the underlying substantive claim.

12-BK-033. Chief Judge Christopher M. Klein (Bankr. E.D. Cal.). The term "bankruptcy court," which was substituted in place of "bankruptcy judge," should be defined. The Bankruptcy Rules apply in cases and proceedings under title 11, whether before district judges or bankruptcy judges. Accordingly, reference to the "bankruptcy court" could be read to include a district judge that is sitting in bankruptcy (such as upon withdrawal of the reference). In those circumstances, there is no need for a statement regarding consent, because an Article III judge is presiding.

12-BK-037. National Bankruptcy Conference (NBC). Rule 7008 should be revised to permit a party to consent to the bankruptcy court's final adjudication of specific issues or claims in the proceeding.

12-BK-044. Louis M. Bubala (Attorney, Reno, Nevada). I am pleased with the proposed elimination of Rule 7008(b) and addition of Rule 7054(b)(2) regarding claims for attorney's fees. The current rules have caused problems over the years, and the adoption of the procedure from the civil rules is a good one.

Rule 7012. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on the Pleadings

1 * * * * *

2 (b) APPLICABILITY OF RULE 12(b)-(I) F.R. CIV. P.

3 Rule 12(b)-(I) F.R. Civ. P. applies in adversary proceedings. A

4 responsive pleading ~~shall admit or deny an allegation that the~~

5 ~~proceeding is core or non-core. If the~~ ~~response is that the~~

6 ~~proceeding is non-core it~~ shall include a statement that the party

7 does or does not consent to entry of final orders or judgment by the

8 bankruptcy ~~judge~~ court. ~~In non-core proceedings, final orders and~~

9 ~~judgments shall not be entered on the bankruptcy judge's order~~

10 ~~except with the express consent of the parties~~.

COMMITTEE NOTE

Subdivision (b) is amended to remove the requirement that the pleader state whether the proceeding is core or non-core and to require in all proceedings that the pleader state whether the party does or does not consent to the entry of final orders or judgment by the bankruptcy court. The amended rule also removes the provision requiring express consent before the entry of final orders and judgments in non-core proceedings. Some proceedings that satisfy the statutory definition of core proceedings, 28 U.S.C. § 157(b)(2), may remain beyond the constitutional power of a bankruptcy judge to adjudicate finally. The amended rule calls for the pleader to make a statement regarding consent, whether or not a proceeding is termed non-core. This amendment complements the requirements of amended Rule 7008(a). The bankruptcy judge's subsequent determination of the appropriate course of proceedings, including whether to enter final orders and judgments or to issue proposed findings of fact and conclusions of law, is a pretrial matter now provided for in amended Rule 7016.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

12-BK-003. Douglas N. Candeub (Attorney, Wilmington, Delaware). The Advisory Committee should not abandon references to "core" and "non-core" proceedings in the rules. Those terms could be retained while adding a statement regarding consent in all proceedings.

12-BK-008. National Conference of Bankruptcy Judges (NCBJ). The NCBJ approves of the published rule amendments to the extent that they require a statement regarding consent in all adversary proceedings. But the

terms "core" and "non-core" should not be deleted from the rule. In the NCBJ's view, the court and parties benefit from knowing early in the proceeding whether the parties view the proceeding as core or non-core.

12-BK-033. Chief Judge Christopher M. Klein (Bankr. E.D. Cal.). The term "bankruptcy court," which was substituted in place of "bankruptcy judge," should be defined. The Bankruptcy Rules apply in cases and proceedings under title 11, whether before district judges or bankruptcy judges. Accordingly, reference to the "bankruptcy court" could be read to include a district judge that is sitting in bankruptcy (such as upon withdrawal of the reference). In those circumstances, there is no need for a statement regarding consent, because an Article III judge is presiding.

12-BK-037. National Bankruptcy Conference (NBC). Rule 7012(b) should be revised to permit a party to consent to the bankruptcy court's final adjudication of specific issues or claims in the proceeding.

Rule 7016. Pre~~-T~~trial Procedures~~; Formulating Issues~~

1 (a) PRETRIAL CONFERENCES; SCHEDULING;
2 MANAGEMENT. Rule 16 F.R.Civ.P. applies in adversary
3 proceedings.

4 (b) DETERMINING PROCEDURE. The bankruptcy
5 court shall decide, on its own motion or a party's timely motion,
6 whether:

7 (1) to hear and determine the proceeding;

8 (2) to hear the proceeding and issue proposed
9 findings of fact and conclusions of law; or

10 (3) to take some other action.

COMMITTEE NOTE

This rule is amended to create a new subdivision (b) that provides for the bankruptcy court to enter final orders and judgment, issue proposed findings and conclusions, or take some other action in a proceeding. The rule leaves the decision as to the appropriate course of proceedings to the bankruptcy court. The court's decision will be informed by the parties' statements, required under Rules 7008(a), 7012(b), and 9027(a) and (e), regarding consent to the entry of final orders and judgment. If the bankruptcy court chooses to issue proposed findings of fact and conclusions of law, Rule 9033 applies.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

12-BK-001. National Conference of Bankruptcy Judges (NCBJ). The addition of subpart (b) to Rule 7016 is unnecessary and confusing. It suggests that the bankruptcy court must choose one of three possible dispositions at an early stage of an adversary proceeding. This is an intrusion on the court's inherent case management authority. The proposed amendment does not fill the gap created by removing the required allegation as to whether a proceeding is core or non-core. Even if the Advisory Committee does not retain the requirement that parties declare whether a proceeding is core or non-core, Rule 7016 should be kept in its current form.

12-BK-009. Judge S. Martin Teel, Jr. (Bankr. D.D.C.). The proposed changes to the rules do not address the treatment of a bankruptcy judge's decision, entered as a final order or judgment, if it is later determined that the bankruptcy judge lacked constitutional authority to enter a final order or judgment. If Rule 9033 is not amended to address this issue, then the Committee Note in Rule 7016 should be changed to add language expressly providing for the treatment of the bankruptcy court's decision as proposed findings of fact and conclusions of law.

12-BK-037. National Bankruptcy Conference (NBC). Rather than permit the bankruptcy court to decide *Stern* issues on its own motion, proposed Rule 7016 should require notice and a hearing. In the alternative,

the Court should make a formal decision not to hold a hearing rather than simply deciding *Stern* issues on its own.

The proposed rule, which deals with pre-trial procedures, does not address the treatment of *Stern* issues that arise in the resolution of motions to dismiss or other preliminary rulings. The proposed rules should provide a mechanism for a party to raise *Stern* issues if the party has not yet filed an answer or other pleading.

Rule 7054. Judgments; Costs

1 (a) JUDGMENTS. Rule 54(a)-(c) F.R. Civ. P. applies in
2 adversary proceedings.

3 (b) COSTS; ATTORNEY'S FEES

4 (1) *Costs Other Than Attorney's Fees*. The court
5 may allow costs to the prevailing party except when a statute of the
6 United States or these rules otherwise provides. Costs against the
7 United States, its officers and agencies shall be imposed only to
8 the extent permitted by law. Costs may be taxed by the clerk on 14
9 days' notice; on motion served within seven days thereafter, the
10 action of the clerk may be reviewed by the court.

11 (2) *Attorney's Fees.*

12 (A) Rule 54(d)(2)(A)-(C) and (E) F.R. Civ.
13 P. applies in adversary proceedings except for the reference in
14 Rule 54(d)(2)(C) to Rule 78.

15 (B) By local rule, the court may establish

16 special procedures to resolve fee-related issues without extensive

17 evidentiary hearings.

COMMITTEE NOTE

Subdivision (b) is amended to prescribe the procedure for seeking an award of attorney's fees and related nontaxable expenses in adversary proceedings. It does so by adding new paragraph (2) that incorporates most of the provisions of Rule 54(d)(2) F.R. Civ. P. The title of subdivision (b) is amended to reflect the new content, and the previously existing provision governing costs is renumbered as paragraph (1) and re-titled.

As provided in Rule 54(d)(2)(A), new subsection (b)(2) does not apply to fees recoverable as an element of damages, as when sought under the terms of a contract providing for the recovery of fees incurred prior to the instant adversary proceeding. Such fees typically are required to be claimed in a pleading.

Rule 54(d)(2)(D) F.R. Civ. P. does not apply in adversary proceedings insofar as it authorizes the referral of fee matters to a master or a magistrate judge. The use of masters is not authorized in bankruptcy cases, *see* Rule 9031, and 28 U.S.C. § 636 does not authorize a magistrate judge to exercise jurisdiction upon referral by a bankruptcy judge. The remaining provision of Rule 54(d)(2)(D) is expressed in subdivision (b)(2)(B) of this rule.

Rule 54(d)(2)(C) refers to Rule 78 F.R. Civ. P., which is not applicable in adversary proceedings. Accordingly, that reference is not incorporated by this rule.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

12-BK-010. States' Association of Bankruptcy Attorneys. The provision in Rule 7054(b)(1) that permits the award of costs against the United States, its officers, and agencies only to the extent permitted by law should be broadened to apply to all governmental units.

12-BK-044. Louis M. Bubala (Attorney, Reno, Nevada). I am pleased with the proposed elimination of Rule 7008(b) and addition of Rule 7054(b)(2) regarding claims for attorney's fees. The current rules have caused problems over the years, and the adoption of the procedure from the civil rules is a good one.

Rule 9023. New Trials; Amendment of Judgments

1 Rule 59 F.R.Civ.P. applies in cases under the Code, except
2 as provided in Rule 3008. <u>In some circumstances, Rule 8008</u>
3 <u>governs post-judgment motion practice after an appeal has been</u>
4 <u>docketed and is pending.</u>

COMMITTEE NOTE

This rule is amended to include a cross-reference to Rule 8008. That rule governs the issuance of an indicative ruling when relief is sought that the court lacks authority to grant because of an appeal that has been docketed and is pending.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

12-BK-008. National Conference of Bankruptcy Judges (NCBJ). The cross-reference to Rule 8008 is more appropriately placed in a Committee Note than in the amended rule itself.

Rule 9024. Relief from Judgment or Order

1 Rule 60 F.R.Civ.P. applies in cases under the Code except
2 that (1) a motion to reopen a case under the Code or for the
3 reconsideration of an order allowing or disallowing a claim against
4 the estate entered without a contest is not subject to the one-year
5 limitation prescribed in Rule 60(c), (2) a complaint to revoke a
6 discharge in a chapter 7 liquidation case may be filed only within
7 the time allowed by § 727(e) of the Code, and (3) a complaint to
8 revoke an order confirming a plan may be filed only within the
9 time allowed by § 1144, § 1230, or § 1330. <u>In some</u>
10 <u>circumstances, Rule 8008 governs post-judgment motion practice</u>
11 <u>after an appeal has been docketed and is pending.</u>

COMMITTEE NOTE

This rule is amended to include a cross-reference to Rule 8008. That rule governs the issuance of an indicative ruling when relief is sought that the court lacks authority to grant because of an appeal that has been docketed and is pending.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

12-BK-008. National Conference of Bankruptcy Judges (NCBJ). The cross-reference to Rule 8008 is more appropriately placed in a Committee Note than in the amended rule itself.

Rule 9027. Removal

(a) NOTICE OF REMOVAL.

(1) *Where filed; form and content*. A notice of removal shall be filed with the clerk for the district and division within which is located the state or federal court where the civil action is pending. The notice shall be signed pursuant to Rule 9011 and contain a short and plain statement of the facts which entitle the party filing the notice to remove, contain a statement that upon removal of the claim or cause of action ~~the proceeding is core or non-core and, if non-core~~, ~~that~~ the party filing the notice does or does not consent to entry of final orders or judgment by the bankruptcy ~~judge~~ court, and be accompanied by a copy of all process and pleadings.

* * * * *

(e) PROCEDURE AFTER REMOVAL.

* * * * *

(3) Any party who has filed a pleading in connection with the removed claim or cause of action,

19 other than the party filing the notice of removal, shall file a

20 statement ~~admitting or denying any allegation in the notice~~

21 ~~of removal that upon removal of the claim or cause of~~

22 ~~action the proceeding is core or non-core. If the statement~~

23 ~~alleges that the proceeding is non-core, it shall state~~ that the

24 party does or does not consent to entry of final orders or

25 judgment by the bankruptcy ~~judge~~ court. A statement

26 required by this paragraph shall be signed pursuant to Rule

27 9011 and shall be filed not later than 14 days after the filing

28 of the notice of removal. Any party who files a statement

29 pursuant to this paragraph shall mail a copy to every other

30 party to the removed claim or cause of action.

31 * * * * *

COMMITTEE NOTE

Subdivisions (a)(1) and (e)(3) are amended to delete the requirement for a statement that the proceeding is core or non-core and to require in all removed actions a statement that the party does or does not consent to the entry of final orders or judgment by the bankruptcy court. Some proceedings that satisfy the statutory definition of core proceedings, 28 U.S.C. § 157(b)(2), may remain beyond the constitutional power of a bankruptcy judge to adjudicate finally. The amended rule calls for a statement regarding consent at the time of removal, whether or not a proceeding is termed non-core.

The party filing the notice of removal must include a statement regarding consent in the notice, and the other parties who have filed pleadings must respond in a separate statement filed within 14 days after removal. If a party to the removed claim or cause of action has not filed a pleading prior to removal, however, there is no need to file a separate statement under subdivision (e)(3), because a statement regarding consent

must be included in a responsive pleading filed pursuant to Rule 7012(b). Rule 7016 governs the bankruptcy court's decision whether to hear and determine the proceeding, issue proposed findings of fact and conclusions of law, or take some other action in the proceeding.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

12-BK-031. Insolvency Law Committee of the Business Law Section of the State Bar of California. The rule should clarify whether, in a removed action, a statement regarding consent included in a party's first pleading or motion satisfies the requirement of the rule, or whether a separate statement is required. The Committee Note states that no statement is required if a party to a removed action has not yet filed a pleading prior to removal, because the statement will be filed in a responsive pleading in accordance with Rule 7012. But that party may choose to file a pre-answer motion instead. The rule could also be read to require a separate statement even if the party files a pleading.

12-BK-040. Bankruptcy Clerks Advisory Group (BCAG). Proposed Rule 9027(e)(3) requires the party filing a statement regarding consent upon removal to "mail a copy to every other party to the removed cause of action." "Mail" should be changed to "transmit" because service can be accomplished electronically. Furthermore, the copy of the statement is unnecessary when a notice would be sufficient.

Rule 9033. ~~Review of~~ Proposed Findings of Fact and Conclusions of Law ~~in Non-Core Proceedings~~

1 (a) SERVICE. ~~In non-core proceedings heard pursuant to~~

2 ~~28 U.S.C. § 157(c)(1)~~In a proceeding in which the bankruptcy

3 court has issued ~~the bankruptcy judge shall file~~ proposed findings

4 of fact and conclusions of law.~~.~~ ~~T~~the clerk shall serve forthwith

5 copies on all parties by mail and note the date of mailing on the

6 docket.

7 * * * * *

COMMITTEE NOTE

Subdivision (a) is amended to delete language limiting this provision to non-core proceedings. Some proceedings that satisfy the statutory definition of core proceedings, 28 U.S.C. § 157(b)(2), may remain beyond the constitutional power of a bankruptcy judge to adjudicate finally. If the bankruptcy court decides, pursuant to Rule 7016, that it is appropriate to issue proposed findings of fact and conclusions of law in a proceeding, this rule governs the subsequent procedures.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

12-BK-008. National Conference of Bankruptcy Judges (NCBJ). The requirement that the clerk serve proposed findings of fact and conclusions of law "by mail and note the date of mailing on the docket" should be altered to reflect electronic service. A mailing requirement is anachronistic and unnecessary. That portion of the rule should be eliminated, so that the rule would simply read "the clerk shall serve forthwith copies on all parties."

12-BK-040. Bankruptcy Clerks Advisory Group (BCAG). Rule 9033(a) should not require the clerk to serve copies of the proposed findings

and conclusions "by mail." BCAG endorses the NCBJ's comment that this language be revised to state: "The clerk shall serve forthwith copies on all parties."

12-BK-009. Judge S. Martin Teel, Jr. (Bankr. D.D.C.). Rule 9033 should address the treatment of a bankruptcy judge's decision that is entered as a final order but later determined to be beyond the bankruptcy judge's constitutional authority to adjudicate finally. A new subpart of the rule should provide that the decision in those circumstances should be treated as proposed findings and conclusions. The subpart could provide that the bankruptcy court may indicate whether its decision should be so treated if it is determined that the judge lacked the authority to enter a final order or judgment.

The approach taken by some courts, such as the Southern District of New York, that have adopted an amended standing order of reference is insufficient. The S.D.N.Y. order does not include a deadline for the parties to file objections to the decision now deemed proposed findings and conclusions, and the briefs filed on appeal would not necessarily contain all objections to those findings and conclusions.

12-BK-033. Chief Judge Christopher M. Klein (Bankr. E.D. Cal.). Rule 9033 should designate a process for transmitting the report and recommendation to the district court, perhaps as in proposed Rule 8003(d). The rule should provide for the bankruptcy clerk to certify to the district court that objections to the proposed findings and conclusions were, or were not, filed.

A uniform national rule should be in place to determine the procedures for deeming a bankruptcy judge's decision to be proposed findings and conclusions on appeal if the district court determines that the entry of a final judgment exceeded the authority of the bankruptcy judge. The rule should also authorize a bankruptcy appellate panel (BAP) to transfer an appeal to a district court if the BAP determines that the decision below was beyond the constitutional authority of the bankruptcy judge to enter final judgment.

12-BK-037. National Bankruptcy Conference (NBC). Because a bankruptcy court may not know whether its decision will later be determined to be beyond its constitutional authority to enter final judgment, the difference in procedures between proposed findings and conclusions

under Rule 9033 and judgments entered under Rule 7054 and Civil Rule 54(a) should be narrowed. If a district court concludes that a decision entered as a final judgment should be treated as proposed findings and conclusions, the losing party may be deprived of procedural rights under Rule 9033 to object to those proposed findings and conclusions.

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Appendix A.2

FEDERAL RULES OF BANKRUPTCY PROCEDURE

PART VIII. BANKRUPTCY APPEALS

Rule

8001. Scope of Part VIII Rules; Definition of "BAP"; Method of Transmission

8002. Time for Filing Notice of Appeal

8003. Appeal as of Right—How Taken; Docketing the Appeal

8004. Appeal by Leave—How Taken; Docketing the Appeal

8005. Election to Have an Appeal Heard by the District Court Instead of the BAP

8006. Certifying a Direct Appeal to the Court of Appeals

8007. Stay Pending Appeal; Bonds; Suspension of Proceedings

8008. Indicative Rulings

8009. Record on Appeal; Sealed Documents

8010. Completing and Transmitting the Record

8011. Filing and Service; Signature

8012. Corporate Disclosure Statement

8013. Motions; Intervention

8014. Briefs

8015. Form and Length of Briefs; Form of Appendices and Other Papers

8016. Cross-Appeals

8017. Brief of an Amicus Curiae

8018. Serving and Filing Briefs; Appendices

8019. Oral Argument

8020. Frivolous Appeal and Other Misconduct

8021. Costs

8022. Motion for Rehearing

8023. Voluntary Dismissal

8024. Clerk's Duties on Disposition of the Appeal

8025. Stay of a District Court or BAP Judgment

8026. Rules by Circuit Councils and District Courts; Procedure When There is No Controlling Law

8027. Notice of a Mediation Procedure

8028. Suspension of Rules in Part VIII

Summary of Public Comment

General Comments on the Revision of Part VIII

12-BK-008. National Conference of Bankruptcy Judges. The NCBJ applauds and endorses the revisions to Part VIII. Bringing the Part VIII rules more into line with the structure and organization of the Federal Rules of Appellate Procedure will reduce confusion and improve the quality of bankruptcy appellate practice.

12-BK-014. Judge Dennis Montali (Bankr. N.D. Cal.)**.** The proposed changes are welcome and reflect the fact that we are in the twenty-first century and electronic filing is here to stay. They will make the entire bankruptcy appellate process run more efficiently and effectively.

12-BK-033. Judge Christopher M. Klein (Bankr. E.D. Cal.)**.** The product is impressive and a great leap forward for bankruptcy appellate procedure.

One stylistic comment was submitted.

Rule 8001. Scope of Part VIII Rules; Definition of "BAP"; Method of Transmission

1 (a) GENERAL SCOPE. These Part VIII rules govern the
2 procedure in a United States district court and a bankruptcy
3 appellate panel on appeal from a judgment, order, or decree of a
4 bankruptcy court. They also govern certain procedures on appeal
5 to a United States court of appeals under 28 U.S.C. § 158(d).
6 (b) DEFINITION OF "BAP." "BAP" means a bankruptcy
7 appellate panel established by a circuit's judicial council and
8 authorized to hear appeals from a bankruptcy court under 28
9 U.S.C. § 158.
10 (c) METHOD OF TRANSMITTING DOCUMENTS. A
11 document must be sent electronically under these Part VIII rules,
12 unless it is being sent by or to an individual who is not represented
13 by counsel or the court's governing rules permit or require mailing
14 or other means of delivery.

COMMITTEE NOTE

These Part VIII rules apply to appeals under 28 U.S.C. § 158(a) from bankruptcy courts to district courts and BAPs. The Federal Rules of Appellate Procedure generally govern bankruptcy appeals to courts of appeals.

Eight of the Part VIII rules do, however, relate to appeals to courts of appeals. Rule 8004(e) provides that the authorization by a court of appeals of a direct appeal of a bankruptcy court's interlocutory order or decree constitutes a grant of leave to appeal. Rule 8006 governs the procedure for certification under 28 U.S.C. § 158(d)(2) of a direct appeal

from a judgment, order, or decree of a bankruptcy court to a court of appeals. Rule 8007 addresses stays pending a direct appeal to a court of appeals. Rule 8008 authorizes a bankruptcy court to issue an indicative ruling while an appeal is pending in a court of appeals. Rules 8009 and 8010 govern the record on appeal in a direct appeal to a court of appeals. Rule 8025 governs the granting of a stay of a district court or BAP judgment pending an appeal to the court of appeals. And Rule 8028 authorizes the court of appeals to suspend applicable Part VIII rules in a particular case, subject to certain enumerated exceptions.

These rules take account of the evolving technology in the federal courts for the electronic filing, storage, and transmission of documents. Except as applied to pro se parties, the Part VIII rules require documents to be sent electronically, unless applicable court rules or orders expressly require or permit another means of sending a particular document.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

Several stylistic comments were submitted.

Rule 8002. Time for Filing Notice of Appeal

1 (a) IN GENERAL.

2 (1) *Fourteen-Day Period*. Except as provided in
3 subdivisions (b) and (c), a notice of appeal must be filed with the
4 bankruptcy clerk within 14 days after entry of the judgment, order,
5 or decree being appealed.

6 (2) *Filing Before the Entry of Judgment*. A notice of appeal
7 filed after the bankruptcy court announces a decision or order—but
8 before entry of the judgment, order, or decree—is treated as filed on
9 the date of and after the entry.

10 (3) *Multiple Appeals*. If one party files a timely notice of
11 appeal, any other party may file a notice of appeal within 14 days
12 after the date when the first notice was filed, or within the time
13 otherwise allowed by this rule, whichever period ends later.

14 (4) *Mistaken Filing in Another Court*. If a notice of appeal
15 is mistakenly filed in a district court, BAP, or court of appeals, the
16 clerk of that court must state on the notice the date on which it was
17 received and transmit it to the bankruptcy clerk. The notice of
18 appeal is then

19 considered filed in the bankruptcy court on the date so stated.

20 (b) EFFECT OF A MOTION ON THE TIME TO APPEAL.

21 (1) *In General*. If a party timely files in the bankruptcy

22 court any of the following motions, the time to file an appeal runs for

23 all parties from the entry of the order disposing of the last such

24 remaining motion:

25 (A) to amend or make additional findings under Rule

26 7052, whether or not granting the motion would alter the

27 judgment;

28 (B) to alter or amend the judgment under Rule 9023;

29 (C) for a new trial under Rule 9023; or

30 (D) for relief under Rule 9024 if the motion is filed

31 within 14 days after the judgment is entered.

32 (2) *Filing an Appeal Before the Motion is Decided*. If a

33 party files a notice of appeal after the court announces or enters a

34 judgment, order, or decree—but before it disposes of any motion

35 listed in subdivision (b)(1)—the notice becomes effective when the

36 order disposing of the last such remaining motion is entered.

37 (3) *Appealing the Ruling on the Motion*. If a party intends to

38 challenge an order disposing of any motion listed in subdivision

39 (b)(1)—or the alteration or amendment of a judgment, order, or

40 decree upon the motion—the party must file a notice of appeal or an

41 amended notice of appeal. The notice or amended notice must
42 comply with Rule 8003 or 8004 and be filed within the time
43 prescribed by this rule, measured from the entry of the order
44 disposing of the last such remaining motion.
45 (4) *No Additional Fee*. No additional fee is required to file
46 an amended notice of appeal.
47 (c) APPEAL BY AN INMATE CONFINED IN AN
48 INSTITUTION.
49 (1) *In General*. If an inmate confined in an institution files a
50 notice of appeal from a judgment, order, or decree of a bankruptcy
51 court, the notice is timely if it is deposited in the institution's
52 internal mail system on or before the last day for filing. If the
53 institution has a system designed for legal mail, the inmate must use
54 that system to receive the benefit of this rule. Timely filing may be
55 shown by a declaration in compliance with 28 U.S.C. § 1746 or by a
56 notarized statement, either of which must set forth the date of deposit
57 and state that first-class postage has been prepaid.
58 (2) *Multiple Appeals*. If an inmate files under this
59 subdivision the first notice of appeal, the 14-day period provided in
60 subdivision (a)(3) for another party to file a notice of appeal runs
61 from the date when the bankruptcy clerk dockets the first notice.
62 (d) EXTENDING THE TIME TO APPEAL.

63 (1) *When the Time May be Extended*. Except as provided in
64 subdivision (d)(2), the bankruptcy court may extend the time to file a
65 notice of appeal upon a party's motion that is filed:
66 (A) within the time prescribed by this rule; or
67 (B) within 21 days after that time, if the party shows
68 excusable neglect.
69 (2) *When the Time May Not be Extended*. The bankruptcy
70 court may not extend the time to file a notice of appeal if the
71 judgment, order, or decree appealed from:
72 (A) grants relief from an automatic stay under § 362,
73 922, 1201, or 1301 of the Code;
74 (B) authorizes the sale or lease of property or the use
75 of cash collateral under § 363 of the Code;
76 (C) authorizes the obtaining of credit under § 364 of
77 the Code;
78 (D) authorizes the assumption or assignment of an
79 executory contract or unexpired lease under § 365 of the
80 Code;
81 (E) approves a disclosure statement under § 1125 of
82 the Code; or
83 (F) confirms a plan under § 943, 1129, 1225, or 1325
84 of the Code.

85 (3) *Time Limits on an Extension*. No extension of time may

86 exceed 21 days after the time prescribed by this rule, or 14 days after

87 the order granting the motion to extend time is entered, whichever is

88 later.

COMMITTEE NOTE

This rule is derived from former Rule 8002 and F.R.App.P. 4(a) and (c). With the exception of subdivision (c), the changes to the former rule are stylistic. The rule retains the former rule's 14-day time period for filing a notice of appeal, as opposed to the longer periods permitted for appeals in civil cases under F.R.App.P. 4(a).

Subdivision (a) continues to allow any other party to file a notice of appeal within 14 days after the first notice of appeal is filed, or thereafter to the extent otherwise authorized by this rule. Subdivision (a) also retains provisions of the former rule that prescribe the date the notice of appeal is deemed filed if the appellant files it prematurely or in the wrong court.

Subdivision (b), like former Rule 8002(b) and F.R.App.P. 4(a), tolls the time for filing a notice of appeal when certain postjudgment motions are filed, and it prescribes the effective date of a notice of appeal that is filed before the court disposes of all of the specified motions. As under the former rule, a party that wants to appeal the court's disposition of the motion or the alteration or amendment of a judgment, order, or decree in response to such a motion must file a notice of appeal or, if it has already filed one, an amended notice of appeal.

Although Rule 8003(a)(3)(C) requires a notice of appeal to be accompanied by the required fee, no additional fee is required for the filing of an amended notice of appeal.

Subdivision (c) mirrors the provisions of F.R.App.P. 4(c)(1) and (2), which specify timing rules for a notice of appeal filed by an inmate confined in an institution.

Subdivision (d) continues to allow the court to grant an extension of time to file a notice of appeal, except with respect to certain specified judgments, orders, and decrees.

Changes Made After Publication

Stylistic changes were made to the title of subdivision (b)(3) and to subdivision (c)(1).

Summary of Public Comment

12-BK-004. Thomas R. Morris (Attorney, Farmington Hills, Mich.)**.** The inmate mailbox rule prescribed by subdivision (c) should be made subject to the exceptions provided for in proposed Rule 8002(d)(2). These exceptions help to ensure the finality of certain types of bankruptcy court orders upon which transactions often rely. If the inmate mailbox rule is not made subject to the same exceptions, a transaction that depends on the finality of an order could be held hostage to the possibility of an inmate appeal or at least thrown into uncertainty if an inmate appeal becomes known after the expiration of the regular appeal period.

12-BK-011. Debtor/Creditor Rights Comm. of the Business Law Section of the State Bar of Michigan. The Committee agrees with the comment of Mr. Morris. The inmate appeal rule should not be added to Rule 8002, but, if it is, it should be limited to inmates who had previously opposed entry of the order from which an appeal is taken and disclosed their status as an inmate.

12-BK-014. Judge Dennis Montali (Bankr. N.D. Cal.)**.** Subdivision (b)(1) should recognize that parties frequently make motions for reconsideration and bankruptcy courts act on them, even though the rules do not specifically authorize this motion. A motion to reconsider should be added to the list of motions that toll the time for filing a notice of appeal.

12-BK-033. Judge Christopher M. Klein (Bankr. E.D. Cal.)**.** Rule 8002 should include a provision like FRAP 4(a)(6), which permits the district court to reopen the time to file an appeal for someone who did not receive notice of entry of the judgment within 21 days after its entry. This rule applies to bankruptcy cases appealed from the district court to the court of appeals, and there is no reason that it should not also be available for the first level of appeal. It would also be useful for Rule 8002 to have a provision similar to FRAP 4(a)(7), which addresses when a judgment or order is entered for purposes of Rule 4(a). The provision helps clarify timing issues presented by the separate-document requirement.

Several stylistic comments were submitted.

Rule 8003. Appeal as of Right—How Taken; Docketing the Appeal

1 (a) FILING THE NOTICE OF APPEAL.

2 (1) *In General*. An appeal from a judgment, order,
3 or decree of a bankruptcy court to a district court or BAP
4 under 28 U.S.C. § 158(a)(1) or (a)(2) may be taken only by
5 filing a notice of appeal with the bankruptcy clerk within
6 the time allowed by Rule 8002.

7 (2) *Effect of Not Taking Other Steps*. An
8 appellant's failure to take any step other than the timely
9 filing of a notice of appeal does not affect the validity of
10 the appeal, but is ground only for the district court or BAP
11 to act as it considers appropriate, including dismissing the
12 appeal.

13 (3) *Contents*. The notice of appeal must:

14 (A) conform substantially to the appropriate
15 Official Form;

16 (B) be accompanied by the judgment, order,
17 or decree, or the part of it, being appealed; and

18 (C) be accompanied by the prescribed fee.

19 (4) *Additional Copies*. If requested to do so, the
20 appellant must furnish the bankruptcy clerk with enough

21 copies of the notice to enable the clerk to comply with
22 subdivision (c).
23 (b) JOINT OR CONSOLIDATED APPEALS.
24 (1) *Joint Notice of Appeal*. When two or more
25 parties are entitled to appeal from a judgment, order, or
26 decree of a bankruptcy court and their interests make
27 joinder practicable, they may file a joint notice of appeal.
28 They may then proceed on appeal as a single appellant.
29 (2) *Consolidating Appeals*. When parties have
30 separately filed timely notices of appeal, the district court
31 or BAP may join or consolidate the appeals.
32 (c) SERVING THE NOTICE OF APPEAL.
33 (1) *Serving Parties and Transmitting to the United*
34 *States Trustee*. The bankruptcy clerk must serve the notice
35 of appeal on counsel of record for each party to the appeal,
36 excluding the appellant, and transmit it to the United States
37 trustee. If a party is proceeding pro se, the clerk must send
38 the notice of appeal to the party's last known address. The
39 clerk must note, on each copy, the date when the notice of
40 appeal was filed.
41 (2) *Effect of Failing to Serve or Transmit Notice*.
42 The bankruptcy clerk's failure to serve notice on a party or

43 transmit notice to the United States trustee does not affect
44 the validity of the appeal.
45 (3) *Noting Service on the Docket*. The clerk must
46 note on the docket the names of the parties served and the
47 date and method of the service.
48 (d) TRANSMITTING THE NOTICE OF APPEAL TO
49 THE DISTRICT COURT OR BAP; DOCKETING THE APPEAL.
50 (1) *Transmitting the Notice*. The bankruptcy clerk
51 must promptly transmit the notice of appeal to the BAP
52 clerk if a BAP has been established for appeals from that
53 district and the appellant has not elected to have the district
54 court hear the appeal. Otherwise, the bankruptcy clerk
55 must promptly transmit the notice to the district clerk.
56 (2) *Docketing in the District Court or BAP*. Upon
57 receiving the notice of appeal, the district or BAP clerk
58 must docket the appeal under the title of the bankruptcy
59 case and the title of any adversary proceeding, and must
60 identify the appellant, adding the appellant's name if
61 necessary.

COMMITTEE NOTE

This rule is derived from several former Bankruptcy Rule and Appellate Rule provisions. It addresses appeals as of right, joint and consolidated appeals, service of the notice of appeal, and the timing of the

docketing of an appeal in the district court or BAP.

Subdivision (a) incorporates, with stylistic changes, much of the content of former Rule 8001(a) regarding the taking of an appeal as of right under 28 U.S.C. § 158(a)(1) or (2). The rule now requires that the judgment, order, or decree being appealed be attached to the notice of appeal.

Subdivision (b), which is an adaptation of F.R.App.P. 3(b), permits the filing of a joint notice of appeal by multiple appellants that have sufficiently similar interests that their joinder is practicable. It also allows the district court or BAP to consolidate appeals taken separately by two or more parties.

Subdivision (c) is derived from former Rule 8004 and F.R.App.P. 3(d). Under Rule 8001(c), the former rule's requirement that service of the notice of appeal be accomplished by mailing is generally modified to require that the bankruptcy clerk serve counsel by electronic means. Service on pro se parties must be made by sending the notice to the address most recently provided to the court.

Subdivision (d) modifies the provision of former Rule 8007(b), which delayed the docketing of an appeal by the district court or BAP until the record was complete and the bankruptcy clerk transmitted it. The new provision, adapted from F.R.App.P. 3(d) and 12(a), requires the bankruptcy clerk to promptly transmit the notice of appeal to the clerk of the district court or BAP. Upon receipt of the notice of appeal, the district or BAP clerk must docket the appeal. Under this procedure, motions filed in the district court or BAP prior to completion and transmission of the record can generally be placed on the docket of an already pending appeal.

Changes Made After Publication

In subdivision (d)(2), the direction for docketing a bankruptcy appeal was changed to reflect the fact that many bankruptcy appeals have dual titles—the bankruptcy case itself and the adversary proceeding that is the subject of the appeal. Stylistic changes were made to subdivision (c)(1). Conforming changes were made to the Committee Note.

Summary of Public Comment

12-BK-005. Judge Robert J. Kressel (Bankr. D. Minn.)**.** The title of subdivision (c) refers to "serving" the notice of appeal, and subdivision (c)(3) refers to noting service on the docket. Subdivision (c)(1), however, requires the clerk to "transmit" the notice of appeal. "Transmit" should be substituted for "serve."

12-BK-036. Mary P. Sharon, Clerk (1st Cir. BAP). Same.

12-BK-040. Bankruptcy Clerks Advisory Group. Same.

12-BK-005. Judge Robert J. Kressel (Bankr. D. Minn.). The meaning of the concluding sentence of subdivision (b)(1)—"They may then proceed on appeal as a single appellant"—is unclear.

12-BK-040. Bankruptcy Clerks Advisory Group. Agrees with Judge Kressel's comment.

12-BK-005. Judge Robert J. Kressel (Bankr. D. Minn.). Subdivision (c)(1) should require the appellant rather than the bankruptcy clerk to serve the notice of appeal on the parties.

12-BK-008. National Conference of Bankruptcy Judges. Same. If the service duty remains on the bankruptcy clerk, Rule 8004(c)(1) concerning interlocutory appeals should be made consistent with Rule 8003(c)(1).

12-BK-026. Judge S. Martin Teel, Jr. (Bankr. D.D.C.). Same. If the service duty remains on the bankruptcy clerk, service should not be required on entities that received electronic notice of the docketing of the notice of appeal in the bankruptcy court.

12-BK-040. Bankruptcy Clerks Advisory Group. Agrees with Judge Kressel's and the NCBJ comments.

12-BK-010. The States' Association of Bankruptcy Attorneys. Subdivision (d)(1) should be revised to delay the transmission of the notice of appeal until the time has expired for all parties to the appeal to make an election to have the district court, rather than the BAP, hear the appeal. This change would avoid requiring the BAP to transfer an appeal to the district court if the appellee elects to have the district court hear it.

12-BK-026. Judge S. Martin Teel, Jr. (Bankr. D.D.C.). Sometimes the bankruptcy clerk will not have transmitted the notice of appeal to the BAP when an appellee files an election to have the district court hear the appeal. The rule should reflect that possibility.

12-BK-040. Bankruptcy Clerks Advisory Group. Subdivision (c)(1) requires the clerk to note on each copy of the notice of appeal the date when it was filed. This requirement is unnecessary because the electronic docket within CM/ECF will state the filing date.

12-BK-034. Oregon State Bar Debtor-Creditor Section Local Rules and Forms Committee. The change to Rule 8003 removing the delay of docketing an appeal provides greater clarity regarding the timing of the docketing of the appeal and will save bankruptcy clerks time and resources.

Several stylistic comments were submitted.

Rule 8004. Appeal by Leave—How Taken; Docketing the Appeal

1 (a) NOTICE OF APPEAL AND MOTION FOR LEAVE
2 TO APPEAL. To appeal from an interlocutory order or decree of a
3 bankruptcy court under 28 U.S.C. § 158(a)(3), a party must file
4 with the bankruptcy clerk a notice of appeal as prescribed by Rule
5 8003(a). The notice must:
6 (1) be filed within the time allowed by Rule 8002;
7 (2) be accompanied by a motion for leave to appeal
8 prepared in accordance with subdivision (b); and
9 (3) unless served electronically using the court's
10 transmission equipment, include proof of service in
11 accordance with Rule 8011(d).
12 (b) CONTENTS OF THE MOTION; RESPONSE.
13 (1) *Contents*. A motion for leave to appeal under
14 28 U.S.C. § 158(a)(3) must include the following:
15 (A) the facts necessary to understand the
16 question presented;
17 (B) the question itself;
18 (C) the relief sought;
19 (D) the reasons why leave to appeal should
20 be granted; and
21 (E) a copy of the interlocutory order or

22 decree and any related opinion or memorandum.

23 (2) *Response*. A party may file with the district or
24 BAP clerk a response in opposition or a cross-motion
25 within 14 days after the motion is served.

26 (c) TRANSMITTING THE NOTICE OF APPEAL AND
27 THE MOTION; DOCKETING THE APPEAL; DETERMINING
28 THE MOTION.

29 (1) *Transmitting to the District Court or BAP*. The
30 bankruptcy clerk must promptly transmit the notice of
31 appeal and the motion for leave to the BAP clerk if a BAP
32 has been established for appeals from that district and the
33 appellant has not elected to have the district court hear the
34 appeal. Otherwise, the bankruptcy clerk must promptly
35 transmit the notice and motion to the district clerk.

36 (2) *Docketing in the District Court or BAP*. Upon
37 receiving the notice and motion, the district or BAP clerk
38 must docket the appeal under the title of the bankruptcy
39 case and the title of any adversary proceeding, and must
40 identify the appellant, adding the appellant's name if
41 necessary.

42 (3) *Oral Argument Not Required*. The motion and
43 any response or cross-motion are submitted without oral

44 argument unless the district court or BAP orders otherwise.

45 (d) FAILURE TO FILE A MOTION WITH A

46 NOTICE OF APPEAL. If an appellant timely files a notice

47 of appeal under this rule but does not include a motion for

48 leave, the district court or BAP may order the appellant to

49 file a motion for leave, or treat the notice of appeal as a

50 motion for leave and either grant or deny it. If the court

51 orders that a motion for leave be filed, the appellant must

52 do so within 14 days after the order is entered, unless the

53 order provides otherwise.

54 (e) DIRECT APPEAL TO A COURT OF APPEALS. If

55 leave to appeal an interlocutory order or decree is required under

56 28 U.S.C. § 158(a)(3), an authorization of a direct appeal by the

57 court of appeals under 28 U.S.C. § 158(d)(2) satisfies the

58 requirement.

COMMITTEE NOTE

This rule is derived from former Rules 8001(b) and 8003 and F.R.App.P. 5. It retains the practice for interlocutory bankruptcy appeals of requiring a notice of appeal to be filed along with a motion for leave to appeal. Like current Rule 8003, it alters the timing of the docketing of the appeal in the district court or BAP.

Subdivision (a) requires a party seeking leave to appeal under 28 U.S.C. § 158(a)(3) to file with the bankruptcy clerk both a notice of appeal and a motion for leave to appeal.

Subdivision (b) prescribes the contents of the motion, retaining the

requirements of former Rule 8003(a). It also continues to allow another party to file a cross-motion or response to the appellant's motion. Because of the prompt docketing of the appeal under the current rule, the cross-motion or response must be filed in the district court or BAP, rather than in the bankruptcy court as the former rule required.

Subdivision (c) requires the bankruptcy clerk to transmit promptly to the district court or BAP the notice of appeal and the motion for leave to appeal. Upon receipt of the notice and the motion, the district or BAP clerk must docket the appeal. Unless the district court or BAP orders otherwise, no oral argument will be held on the motion.

Subdivision (d) retains the provisions of former Rule 8003(c). It provides that if the appellant timely files a notice of appeal, but fails to file a motion for leave to appeal, the court can either direct that a motion be filed or treat the notice of appeal as the motion and either grant or deny leave.

Subdivision (e), like former Rule 8003(d), treats the authorization of a direct appeal by the court of appeals as a grant of leave to appeal under 28 U.S.C. § 158(a)(3) if the district court or BAP has not already granted leave. Thus, a separate order granting leave to appeal is not required. If the court of appeals grants permission to appeal, the record must be assembled and transmitted in accordance with Rules 8009 and 8010.

Changes Made After Publication

In subdivision (c)(2), the direction for docketing a bankruptcy appeal was changed to reflect the fact that many bankruptcy appeals have dual titles—the bankruptcy case itself and the adversary proceeding that is the subject of the appeal. As published, subdivision (c)(3) stated that the court must dismiss the appeal if the motion for leave to appeal is denied. That sentence was deleted.

Summary of Public Comment

12-BK-036. Mary P. Sharon, Clerk (1st Cir. BAP). Subdivision (c)(3) should provide that the appellate court "may" (not "must") dismiss the appeal if leave to appeal is denied. We sometimes deny such motions as moot because the order appealed from was final, not interlocutory.

Subdivision (a) should refer to "an appeal from an interlocutory order,

decree, or judgment," not just "order or decree." We frequently see attempts to appeal a partial judgment, which can be interlocutory.

Subdivision (a)(3) requires the notice of appeal to be accompanied by proof of service unless it is served electronically. There is not a similar provision under Rule 8003. Moreover, the proof of service only applies to the notice of appeal and not to the motion for leave to appeal. It would be better to include in this rule the language of Rule 8003(c).

12-BK-010. The States' Association of Bankruptcy Attorneys. Subdivision (c)(1) presents the same issue as Rule 8003(d)(1) concerning the time for the bankruptcy clerk to transmit the notice of appeal to the BAP for docketing the appeal.

12-BK-014. Judge Dennis Montali (Bankr. N.D. Cal.). It is not clear whether the harmless error provisions of proposed Rule 8003(a)(2) apply to this rule. Perhaps the Committee Note should indicate that they do apply.

Rule 8005(d) requires a motion for leave to appeal that is not accompanied by a notice of appeal to be treated as a notice of appeal for purposes of determining the timeliness of a statement of election to have a district court hear an appeal. Rule 8004(d), however, is silent about whether a motion for leave to appeal may be treated as a notice of appeal. The provision should expressly state that such a motion may be treated as a notice of appeal. The result should not differ based on whether or not a BAP has been authorized.

12-BK-031. Insolvency Law Comm. of the Business Law Section of the State Bar of California. Subdivision (b)(2) provides that a response in opposition or a cross-motion to a motion for leave to appeal is to be filed in the district court or BAP even though the original motion is filed in the bankruptcy court. This may cause confusion. The rule should be modified to provide that a response or cross-motion must be filed within 14 days after the bankruptcy clerk transmits the notice of appeal, rather than after the motion is served.

12-BK-033. Judge Christopher M. Klein (Bankr. E.D. Cal.). Rule 8004 should specify that motions for leave to appeal are not governed by Rule 9014. This addition would parallel proposed Rule 8006(f)(4) (a request for certification of a direct appeal is not governed by Rule 9014).

The rule should clarify the power of the bankruptcy court during an interlocutory appeal. This issue causes considerable confusion among courts.

12-BK-034. Oregon State Bar Debtor-Creditor Section Local Rules and Forms Committee. The change to Rule 8004 removing the delay of docketing an appeal provides greater clarity regarding the timing of the docketing of the appeal and will save bankruptcy clerks time and resources.

Several stylistic comments were submitted.

Rule 8005. Election to Have an Appeal Heard by the District Court Instead of the BAP

1 (a) FILING OF A STATEMENT OF ELECTION. To
2 elect to have an appeal heard by the district court, a party must:
3 (1) file a statement of election that conforms
4 substantially to the appropriate Official Form; and
5 (2) do so within the time prescribed by 28 U.S.C.
6 § 158(c)(1).
7 (b) TRANSMITTING THE DOCUMENTS RELATED
8 TO THE APPEAL. Upon receiving an appellant's timely
9 statement of election, the bankruptcy clerk must transmit to the
10 district clerk all documents related to the appeal. Upon receiving a
11 timely statement of election by a party other than the appellant, the
12 BAP clerk must transmit to the district clerk all documents related
13 to the appeal and notify the bankruptcy clerk of the transmission.
14 (c) DETERMINING THE VALIDITY OF AN
15 ELECTION. A party seeking a determination of the validity of an
16 election must file a motion in the court where the appeal is then
17 pending. The motion must be filed within 14 days after the
18 statement of election is filed.
19 (d) MOTION FOR LEAVE WITHOUT A NOTICE OF
20 APPEAL—EFFECT ON THE TIMING OF AN ELECTION. If
21 an appellant moves for leave to appeal under Rule 8004 but fails to

22 file a separate notice of appeal with the motion, the motion must be

23 treated as a notice of appeal for purposes of determining the

24 timeliness of a statement of election.

COMMITTEE NOTE

This rule, which implements 28 U.S.C. § 158(c)(1), is derived from former Rule 8001(e). It applies only in districts in which an appeal to a BAP is authorized.

As the former rule required, subdivision (a) provides that an appellant that elects to have a district court, rather than a BAP, hear its appeal must file with the bankruptcy clerk a statement of election when it files its notice of appeal. The statement must conform substantially to the appropriate Official Form. For appellants, that statement is included in the Notice of Appeal Official Form. If a BAP has been established for appeals from the bankruptcy court and the appellant does not file a timely statement of election, any other party that elects to have the district court hear the appeal must file a statement of election with the BAP clerk no later than 30 days after service of the notice of appeal.

Subdivision (b) requires the bankruptcy clerk to transmit all appeal documents to the district clerk if the appellant files a timely statement of election. If the appellant does not make that election, the bankruptcy clerk must transmit those documents to the BAP clerk. Upon a timely election by any other party, the BAP clerk must promptly transmit the appeal documents to the district clerk and notify the bankruptcy clerk that the appeal has been transferred.

Subdivision (c) provides a new procedure for the resolution of disputes regarding the validity of an election. A motion seeking the determination of the validity of an election must be filed no later than 14 days after the statement of election is filed. Nothing in this rule prevents a court from determining the validity of an election on its own motion.

Subdivision (d) provides that, in the case of an appeal by leave, if the appellant files a motion for leave to appeal but fails to file a notice of appeal, the filing and service of the motion will be treated for timing purposes under this rule as the filing and service of the notice of appeal.

Changes Made After Publication

In subdivision (b), a requirement was added that the BAP clerk notify the bankruptcy clerk if an appeal is transferred from the BAP to the district court upon the election of an appellee. Conforming and clarifying changes were made to the Committee Note.

Summary of Public Comment

12-BK-005. Judge Robert J. Kressel (Bankr. D. Minn.). Subdivision (a) should emphasize that the official election form needs to be a separate document from the notice of appeal. The separate document requirement should be retained.

12-BK-010. The States' Association of Bankruptcy Attorneys. Is there an official form, or is it still being drafted? The election form should be combined with the notice of appeal. The current separate statement requirement causes confusion and, when not followed, leads to the voiding of an election to have the appeal heard in the district court. Putting the two forms together will ensure that they are filed at the same time.

12-BK-014. Judge Dennis Montali (Bankr. N.D. Cal.). Subdivision (a) should make clear whether the statement of election must be set forth in a separate document. The current separate document requirement should be retained.

12-BK-036. Mary P. Sharon, Clerk (1st Cir. BAP). Subdivision (a) does not specify whether the election must be made by a separate document. Requiring a separate document makes things much clearer for the courts and parties.

12-BK-040. Bankruptcy Clerks Advisory Group. Subdivision (a) refers to an Official Form, but there is no such form.

12-BK-005. Judge Robert J. Kressel (Bankr. D. Minn.). The provision in subdivision (b) for the BAP clerk to transmit documents to the district clerk may not be well received by district clerks. They are accustomed to receiving documents from bankruptcy clerks. The current practice (at least in the 8th Cir. BAP) of having the BAP clerk return the appeal to the bankruptcy clerk, who then transmits it to the district clerk, should be retained or allowed as an acceptable alternative.

12-BK-040. Bankruptcy Clerks Advisory Group. Subdivision (b) should be revised to require notification of the bankruptcy clerk if the BAP

clerk transmits the record to the district clerk.

12-BK-010. The States' Association of Bankruptcy Attorneys. Given the suggestion for revising proposed Rule 8003 to delay transmittal of the appeal until all parties' time to elect a district court has expired, subdivision (b)(1) should be revised to eliminate the possibility of a BAP clerk transmitting an appeal to the district clerk. If no parties file a statement of election, the bankruptcy clerk will transmit the appeal to the BAP clerk. If any party does elect a district court, the bankruptcy clerk will send the appeal to the district clerk.

12-BK-014. Judge Dennis Montali (Bankr. N.D. Cal.). There are two problems with subdivision (c). First, it does not deal with the situation in which the bankruptcy court erroneously transmits a notice of appeal to the district court even though no election was made. In that case there should be a longer period of time to contest the transmittal to the district court. Second, even when a statement of election is filed, 14 days to contest the election is not long enough. The time should be the same as the appellee's time to file an election.

12-BK-033. Judge Christopher M. Klein (Bankr. E.D. Cal.). The rule does not retain the provision of current Rule 8001(e)(2), which provides for the withdrawal of an election with the district court's acquiescence.

Several stylistic comments were submitted.

Rule 8006. Certifying a Direct Appeal to the Court of Appeals

1 (a) EFFECTIVE DATE OF A CERTIFICATION. A
2 certification of a judgment, order, or decree of a bankruptcy court
3 for direct review in a court of appeals under 28 U.S.C. § 158(d)(2)
4 is effective when:
5 (1) the certification has been filed;
6 (2) a timely appeal has been taken under Rule 8003
7 or 8004; and
8 (3) the notice of appeal has become effective under
9 Rule 8002.
10 (b) FILING THE CERTIFICATION. The certification
11 must be filed with the clerk of the court where the matter is
12 pending. For purposes of this rule, a matter remains pending in the
13 bankruptcy court for 30 days after the effective date under Rule
14 8002 of the first notice of appeal from the judgment, order, or
15 decree for which direct review is sought. A matter is pending in
16 the district court or BAP thereafter.
17 (c) JOINT CERTIFICATION BY ALL APPELLANTS
18 AND APPELLEES. A joint certification by all the appellants and
19 appellees under 28 U.S.C. § 158(d)(2)(A) must be made by using
20 the appropriate Official Form. The parties may supplement the
21 certification with a short statement of the basis for the certification,

22 which may include the information listed in subdivision (f)(2).

23 (d) THE COURT THAT MAY MAKE THE

24 CERTIFICATION. Only the court where the matter is pending, as

25 provided in subdivision (b), may certify a direct review on request

26 of parties or on its own motion.

27 (e) CERTIFICATION ON THE COURT'S OWN

28 MOTION.

29 (1) *How Accomplished*. A certification on the

30 court's own motion must be set forth in a separate

31 document. The clerk of the certifying court must serve it

32 on the parties to the appeal in the manner required for

33 service of a notice of appeal under Rule 8003(c)(1). The

34 certification must be accompanied by an opinion or

35 memorandum that contains the information required by

36 subdivision (f)(2)(A)-(D).

37 (2) *Supplemental Statement by a Party*. Within 14

38 days after the court's certification, a party may file with the

39 clerk of the certifying court a short supplemental statement

40 regarding the merits of certification.

41 (f) CERTIFICATION BY THE COURT ON REQUEST.

42 (1) *How Requested*. A request by a party for

43 certification that a circumstance specified in 28 U.S.C.

44 §158(d)(2)(A)(i)-(iii) applies—or a request by a majority of
45 the appellants and a majority of the appellees—must be
46 filed with the clerk of the court where the matter is pending
47 within 60 days after the entry of the judgment, order, or
48 decree.

49 (2) *Service and Contents*. The request must be
50 served on all parties to the appeal in the manner required
51 for service of a notice of appeal under Rule 8003(c)(1), and
52 it must include the following:

53 (A) the facts necessary to understand the
54 question presented;

55 (B) the question itself;

56 (C) the relief sought;

57 (D) the reasons why the direct appeal
58 should be allowed, including which circumstance
59 specified in 28 U.S.C. § 158(d)(2)(A)(i)-(iii)
60 applies; and

61 (E) a copy of the judgment, order, or decree
62 and any related opinion or memorandum.

63 (3) *Time to File a Response or a Cross-Request*. A
64 party may file a response to the request within 14 days after
65 the request is served, or such other time as the court where

66 the matter is pending allows. A party may file a cross-
67 request for certification within 14 days after the request is
68 served, or within 60 days after the entry of the judgment,
69 order, or decree, whichever occurs first.
70 (4) *Oral Argument Not Required*. The request,
71 cross-request, and any response are submitted without oral
72 argument unless the court where the matter is pending
73 orders otherwise.
74 (5) *Form and Service of the Certification*. If the
75 court certifies a direct appeal in response to the request, it
76 must do so in a separate document. The certification must
77 be served on the parties to the appeal in the manner
78 required for service of a notice of appeal under Rule
79 8003(c)(1).
80 (g) PROCEEDING IN THE COURT OF APPEALS
81 FOLLOWING A CERTIFICATION. Within 30 days after the
82 date the certification becomes effective under subdivision (a), a
83 request for permission to take a direct appeal to the court of
84 appeals must be filed with the circuit clerk in accordance with F.
R. App. P. 6(c).

COMMITTEE NOTE

This rule is derived from former Rule 8001(f), and it provides the

procedures for the certification of a direct appeal of a judgment, order, or decree of a bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2). Once a case has been certified in the bankruptcy court, the district court, or the BAP for direct appeal and a request for permission to appeal has been timely filed with the circuit clerk, the Federal Rules of Appellate Procedure govern further proceedings in the court of appeals.

Subdivision (a), like the former rule, requires that an appeal be properly taken—now under Rule 8003 or 8004—before a certification for direct review in the court of appeals takes effect. This rule requires the timely filing of a notice of appeal under Rule 8002 and accounts for the delayed effectiveness of a notice of appeal under the circumstances specified in that rule. Ordinarily, a notice of appeal is effective when it is filed in the bankruptcy court. Rule 8002, however, delays the effectiveness of a notice of appeal when (1) it is filed after the announcement of a decision or order but prior to the entry of the judgment, order, or decree; or (2) it is filed after the announcement or entry of a judgment, order, or decree but before the bankruptcy court disposes of certain postjudgment motions.

When the bankruptcy court enters an interlocutory order or decree that is appealable under 28 U.S.C. § 158(a)(3), certification for direct review in the court of appeals may take effect before the district court or BAP grants leave to appeal. The certification is effective when the actions specified in subdivision (a) have occurred. Rule 8004(e) provides that if the court of appeals grants permission to take a direct appeal before leave to appeal an interlocutory ruling has been granted, the authorization by the court of appeals is treated as the granting of leave to appeal.

Subdivision (b) provides that a certification must be filed in the court where the matter is pending, as determined by this subdivision. This provision modifies the former rule. Because of the prompt docketing of appeals in the district court or BAP under Rules 8003 and 8004, a matter is deemed—for purposes of this rule only—to remain pending in the bankruptcy court for 30 days after the effective date of the notice of appeal. This provision will in appropriate cases give the bankruptcy judge, who will be familiar with the matter being appealed, an opportunity to decide whether certification for direct review is appropriate. Similarly, subdivision (d) provides that only the court where the matter is then pending according to subdivision (b) may make a certification on its own motion or on the request of one or more parties.

Section 158(d)(2) provides three different ways in which an appeal may be certified for direct review. Implementing these options, the rule

provides in subdivision (c) for the joint certification by all appellants and appellees; in subdivision (e) for the bankruptcy court's, district court's, or BAP's certification on its own motion; and in subdivision (f) for the bankruptcy court's, district court's, or BAP's certification on request of a party or a majority of appellants and a majority of appellees.

Subdivision (g) requires that, once a certification for direct review is made, a request to the court of appeals for permission to take a direct appeal to that court must be filed with the clerk of the court of appeals no later than 30 days after the effective date of the certification. Federal Rule of Appellate Procedure 6(c), which incorporates all of F.R.App.P. 5 except subdivision (a)(3), prescribes the procedure for requesting the permission of the court of appeals and governs proceedings that take place thereafter in that court.

Changes Made After Publication

In subdivisions (b) and (g), cross-references were added. In subdivision (f)(4), the statement regarding the inapplicability of Rule 9014 was deleted as unnecessary. A clarifying change was made to the first paragraph of the Committee Note.

Summary of Public Comment

12-BK-033. Judge Christopher M. Klein (Bankr. E.D. Cal.). Subdivision (c) should provide an opportunity for the bankruptcy court to comment on the proceeding's suitability for direct appeal when a certification is jointly made by all appellants and appellees.

12-BK-014. Judge Dennis Montali (Bankr. N.D. Cal.**)**. Subdivision (d), in combination with subdivision (b), gives a bankruptcy court only 30 days after the effective date of the first notice of appeal, to certify a direct appeal. That is not enough time for the court that will be most knowledgeable about the case to make a decision. Either Rule 9006 should be amended to allow the bankruptcy court to extend this time period, or the period in which the case is deemed to remain pending in the bankruptcy court for purposes of this rule should be extended to at least 60 days. When a majority of appellants and appellees request a certification, they have 60 days after the entry of judgment to do so. Midway through this time period, the court that can make the certification will change, causing confusion.

12-BK-036. Mary P. Sharon, Clerk (1st Cir. BAP). If a request for

certification is made within 30 days after the notice of appeal, but the bankruptcy court does not rule on it within that time period, the bankruptcy court loses jurisdiction to certify the appeal. The rule does not make clear how the bankruptcy court would transmit the motion to the appropriate appellate court.

Several stylistic comments were submitted.

Rule 8007. Stay Pending Appeal; Bonds; Suspension of Proceedings

1 (a) INITIAL MOTION IN THE BANKRUPTCY COURT.

2 (1) *In General*. Ordinarily, a party must move first

3 in the bankruptcy court for the following relief:

4 (A) a stay of a judgment, order, or decree of

5 the bankruptcy court pending appeal;

6 (B) the approval of a supersedeas bond;

7 (C) an order suspending, modifying,

8 restoring, or granting an injunction while an appeal

9 is pending; or

10 (D) the suspension or continuation of

11 proceedings in a case or other relief permitted by

12 subdivision (e).

13 (2) *Time to File*. The motion may be made either

14 before or after the notice of appeal is filed.

15 (b) MOTION IN THE DISTRICT COURT, THE BAP,

16 OR THE COURT OF APPEALS ON DIRECT APPEAL.

17 (1) *Request for Relief*. A motion for the relief

18 specified in subdivision (a)(1)—or to vacate or modify a

19 bankruptcy court's order granting such relief—may be

20 made in the court where the appeal is pending.

21 (2) *Showing or Statement Required*. The motion

must:

(A) show that moving first in the bankruptcy court would be impracticable; or

(B) if a motion was made in the bankruptcy court, either state that the court has not yet ruled on the motion, or state that the court has ruled and set out any reasons given for the ruling.

(3) *Additional Content*. The motion must also include:

(A) the reasons for granting the relief requested and the facts relied upon;

(B) affidavits or other sworn statements supporting facts subject to dispute; and

(C) relevant parts of the record.

(4) *Serving Notice*. The movant must give reasonable notice of the motion to all parties.

(c) FILING A BOND OR OTHER SECURITY. The district court, BAP, or court of appeals may condition relief on filing a bond or other appropriate security with the bankruptcy court.

(d) BOND FOR A TRUSTEE OR THE UNITED STATES. The court may require a trustee to file a bond or other

44 appropriate security when the trustee appeals. A bond or other
45 security is not required when an appeal is taken by the United
46 States, its officer, or its agency or by direction of any department
47 of the federal government.
48 (e) CONTINUATION OF PROCEEDINGS IN THE
49 BANKRUPTCY COURT. Despite Rule 7062 and subject to the
50 authority of the district court, BAP, or court of appeals, the
51 bankruptcy court may:
52 (1) suspend or order the continuation of other
53 proceedings in the case; or
54 (2) issue any other appropriate orders during the
55 pendency of an appeal to protect the rights of all parties in
56 interest.

COMMITTEE NOTE

This rule is derived from former Rule 8005 and F.R.App.P. 8. It now applies to direct appeals in courts of appeals.

Subdivision (a), like the former rule, requires a party ordinarily to seek relief pending an appeal in the bankruptcy court. Subdivision (a)(1) expands the list of relief enumerated in F.R.App.P. 8(a)(1) to reflect bankruptcy practice. It includes the suspension or continuation of other proceedings in the bankruptcy case, as authorized by subdivision (e). Subdivision (a)(2) clarifies that a motion for a stay pending appeal, approval of a supersedeas bond, or any other relief specified in paragraph (1) may be made in the bankruptcy court before or after the filing of a notice of appeal.

Subdivision (b) authorizes a party to seek the relief specified in (a)(1), or the vacation or modification of the granting of such relief, by

means of a motion filed in the court where the appeal is pending—district court, BAP, or the court of appeals on direct appeal. Accordingly, a notice of appeal need not be filed with respect to a bankruptcy court's order granting or denying such a motion. The motion for relief in the district court, BAP, or court of appeals must state why it was impracticable to seek relief initially in the bankruptcy court, if a motion was not filed there, or why the bankruptcy court denied the relief sought.

Subdivisions (c) and (d) retain the provisions of the former rule that permit the district court or BAP—and now the court of appeals—to condition the granting of relief on the posting of a bond by the appellant, except when that party is a federal government entity. Rule 9025 governs proceedings against sureties.

Subdivision (e) retains the provision of the former rule that authorizes the bankruptcy court to decide whether to suspend or allow the continuation of other proceedings in the bankruptcy case while the matter for which a stay has been sought is pending on appeal.

Changes Made After Publication

The clause "or where it will be taken" was deleted in subdivision (b)(1). Stylistic changes were made to the titles of subdivisions (b) and (e) and in subdivision (e)(1). A discussion of subdivision (e) was added to the Committee Note.

Summary of Public Comment

12-BK-005. Judge Robert J. Kressel (Bankr. D. Minn.). Although it is appropriate to allow a motion for stay or other relief to be made in the bankruptcy court before a notice of appeal is filed, as subdivision (a)(2) provides, a notice of appeal should be required before an appellate court can hear such a motion. That is how the appellate court obtains jurisdiction. The rule does not explain how the motion gets before the appellate court if no notice of appeal has been filed.

12-BK-040. Bankruptcy Clerks Advisory Group. Agrees with Judge Kressel's comment.

12-BK-033. Judge Christopher M. Klein (Bankr. E.D. Cal.)**.** If the intent of subdivision (e) is to override the doctrine of exclusive appellate jurisdiction, the rule or Committee Note should be more explicit. Also

subdivision (b)(2)(B) should require a copy of any written ruling or order in the bankruptcy court to be included with the motion.

12-BK-010. The States' Association of Bankruptcy Attorneys. Subdivision (d) should except all governmental units, not just the United States, from the bond requirement.

12-BK-014. Judge Dennis Montali (Bankr. N.D. Cal.). Asking the bankruptcy court to grant a stay pending appeal is almost always a waste of time—even though that is the long-standing practice. This step in the process should be permissive rather than mandatory. In addition, the rule should state that the appellate court's consideration of the stay motion should be *de novo* rather than a review of whether the bankruptcy court abused its discretion in denying the stay.

Several stylistic changes were submitted.

Rule 8008. Indicative Rulings

1 (a) RELIEF PENDING APPEAL. If a party files a timely
2 motion in the bankruptcy court for relief that the court lacks
3 authority to grant because of an appeal that has been docketed and
4 is pending, the bankruptcy court may:
5 (1) defer considering the motion;
6 (2) deny the motion; or
7 (3) state that the court would grant the motion if the
8 court where the appeal is pending remands for that purpose,
9 or state that the motion raises a substantial issue.
10 (b) NOTICE TO THE COURT WHERE THE APPEAL IS
11 PENDING. The movant must promptly notify the clerk of the
12 court where the appeal is pending if the bankruptcy court states
13 that it would grant the motion or that the motion raises a
14 substantial issue.
15 (c) REMAND AFTER AN INDICATIVE RULING. If the
16 bankruptcy court states that it would grant the motion or that the
17 motion raises a substantial issue, the district court or BAP may
18 remand for further proceedings, but it retains jurisdiction unless it
19 expressly dismisses the appeal. If the district court or BAP
20 remands but retains jurisdiction, the parties must promptly notify

21 the clerk of that court when the bankruptcy court has decided the

22 motion on remand.

COMMITTEE NOTE

This rule is an adaptation of F.R.Civ.P. 62.1 and F.R.App.P. 12.1. It provides a procedure for the issuance of an indicative ruling when a bankruptcy court determines that, because of a pending appeal, the court lacks jurisdiction to grant a request for relief that the court concludes is meritorious or raises a substantial issue. The rule does not attempt to define the circumstances in which an appeal limits or defeats the bankruptcy court's authority to act in the face of a pending appeal. In contrast, Rule 8002(b) identifies motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before the last such motion is resolved. In those circumstances, the bankruptcy court has authority to resolve the motion without resorting to the indicative ruling procedure.

Subdivision (b) requires the movant to notify the court where an appeal is pending if the bankruptcy court states that it would grant the motion or that it raises a substantial issue. This provision applies to appeals pending in the district court, the BAP, or the court of appeals.

Federal Rules of Appellate Procedure 6 and 12.1 govern the procedure in the court of appeals following notification of the bankruptcy court's indicative ruling.

Subdivision (c) of this rule governs the procedure in the district court or BAP upon notification that the bankruptcy court has issued an indicative ruling. The district court or BAP may remand to the bankruptcy court for a ruling on the motion for relief. The district court or BAP may also remand all proceedings, thereby terminating the initial appeal, if it expressly states that it is dismissing the appeal. It should do so, however, only when the appellant has stated clearly its intention to abandon the appeal. Otherwise, the district court or BAP may remand for the purpose of ruling on the motion, while retaining jurisdiction to proceed with the appeal after the bankruptcy court rules, provided that the appeal is not then moot and a party wishes to proceed.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

12-BK-014. Judge Dennis Montali (Bankr. N.D. Cal.). Subdivision (c) should be made applicable to courts of appeals on direct appeal. While FRAP 12.1 deals with remands by the courts of appeals after notification of indicative rulings, it does not authorize remand to bankruptcy courts.

12-BK-033. Judge Christopher M. Klein (Bankr. E.D. Cal.). Rather than completely ducking the question when an appeal limits or defeats the bankruptcy court's authority to act while the appeal is pending, the Committee Note should at least note the point on which there seems to be a consensus—that a trial court retains plenary authority when an interlocutory order is appealed, at least until the appellate court grants leave to appeal.

One stylistic comment was submitted.

Rule 8009. Record on Appeal; Sealed Documents

1 (a) DESIGNATING THE RECORD ON APPEAL;
2 STATEMENT OF THE ISSUES.
3 (1) *Appellant*.
4 (A) The appellant must file with the
5 bankruptcy clerk and serve on the appellee a
6 designation of the items to be included in the record
7 on appeal and a statement of the issues to be
8 presented.
9 (B) The appellant must file and serve the
10 designation and statement within 14 days after:
11 (i) the appellant's notice of appeal as
12 of right becomes effective under Rule 8002;
13 or
14 (ii) an order granting leave to appeal
15 is entered.
16 A designation and statement served prematurely
17 must be treated as served on the first day on which
18 filing is timely.
19 (2) *Appellee and Cross-Appellant.* Within 14 days
20 after being served, the appellee may file with the
21 bankruptcy clerk and serve on the appellant a designation

22 of additional items to be included in the record. An
23 appellee who files a cross-appeal must file and serve a
24 designation of additional items to be included in the record
25 and a statement of the issues to be presented on the cross-
26 appeal.
27 (3) *Cross-Appellee*. Within 14 days after service of
28 the cross-appellant's designation and statement, a cross-
29 appellee may file with the bankruptcy clerk and serve on
30 the cross-appellant a designation of additional items to be
31 included in the record.
32 (4) *Record on Appeal*. The record on appeal must
33 include the following:
34 • the docket entries kept by the
35 bankruptcy clerk;
36 • items designated by the parties;
37 • the notice of appeal;
38 • the judgment, order, or decree being
39 appealed;
40 • any order granting leave to appeal;
41 • any certification required for a direct appeal
42 to the court of appeals;
43 • any opinion, findings of fact, and

44 conclusions of law relating to the issues on appeal,
45 including transcripts of all oral rulings;
46 • any transcript ordered under subdivision (b);
47 any statement required by subdivision (c);
48 and
49 • any additional items from the record that the
50 court where the appeal is pending orders.
51 (5) *Copies for the Bankruptcy Clerk*. If paper
52 copies are needed, a party filing a designation of items
53 must provide a copy of any of those items that the
54 bankruptcy clerk requests. If the party fails to do so, the
55 bankruptcy clerk must prepare the copy at the party's
56 expense.
57 (b) TRANSCRIPT OF PROCEEDINGS.
58 (1) *Appellant's Duty to Order*. Within the time
59 period prescribed by subdivision (a)(1), the appellant must:
60 (A) order in writing from the reporter, as
61 defined in Rule 8010(a)(1), a transcript of such
62 parts of the proceedings not already on file as the
63 appellant considers necessary for the appeal, and
64 file a copy of the order with the bankruptcy clerk;
65 or

66 (B) file with the bankruptcy clerk a
67 certificate stating that the appellant is not ordering a
68 transcript.
69 (2) *Cross-Appellant's Duty to Order*. Within 14
70 days after the appellant files a copy of the transcript order
71 or a certificate of not ordering a transcript, the appellee as
72 cross-appellant must:
73 (A) order in writing from the reporter, as
74 defined in Rule 8010(a)(1), a transcript of such
75 additional parts of the proceedings as the cross-
76 appellant considers necessary for the appeal, and
77 file a copy of the order with the bankruptcy clerk;
78 or
79 (B) file with the bankruptcy clerk a
80 certificate stating that the cross-appellant is not
81 ordering a transcript.
82 (3) *Appellee's or Cross-Appellee's Right to Order*.
83 Within 14 days after the appellant or cross-appellant files a
84 copy of a transcript order or certificate of not ordering a
85 transcript, the appellee or cross-appellee may order in
86 writing from the reporter a transcript of such additional
87 parts of the proceedings as the appellee or cross-appellee

88 considers necessary for the appeal. A copy of the order
89 must be filed with the bankruptcy clerk.
90 (4) *Payment*. At the time of ordering, a party must
91 make satisfactory arrangements with the reporter for paying
92 the cost of the transcript.
93 (5) *Unsupported Finding or Conclusion.* If the
94 appellant intends to argue on appeal that a finding or
95 conclusion is unsupported by the evidence or is contrary to
96 the evidence, the appellant must include in the record a
97 transcript of all relevant testimony and copies of all
98 relevant exhibits.
99 (c) STATEMENT OF THE EVIDENCE WHEN A
100 TRANSCRIPT IS UNAVAILABLE. If a transcript of a hearing or
101 trial is unavailable, the appellant may prepare a statement of the
102 evidence or proceedings from the best available means, including
103 the appellant's recollection. The statement must be filed within
104 the time prescribed by subdivision (a)(1) and served on the
105 appellee, who may serve objections or proposed amendments
106 within 14 days after being served. The statement and any
107 objections or proposed amendments must then be submitted to the
108 bankruptcy court for settlement and approval. As settled and
109 approved, the statement must be included by the bankruptcy clerk

110 in the record on appeal.

111 (d) AGREED STATEMENT AS THE RECORD ON

112 APPEAL. Instead of the record on appeal as defined in

113 subdivision (a), the parties may prepare, sign, and submit to the

114 bankruptcy court a statement of the case showing how the issues

115 presented by the appeal arose and were decided in the bankruptcy

116 court. The statement must set forth only those facts alleged and

117 proved or sought to be proved that are essential to the court's

118 resolution of the issues. If the statement is accurate, it—together

119 with any additions that the bankruptcy court may consider

120 necessary to a full presentation of the issues on appeal—must be

121 approved by the bankruptcy court and must then be certified to the

122 court where the appeal is pending as the record on appeal. The

123 bankruptcy clerk must then transmit it to the clerk of that court

124 within the time provided by Rule 8010. A copy of the agreed

125 statement may be filed in place of the appendix required by Rule

126 8018(b) or, in the case of a direct appeal to the court of appeals, by

127 F.R.App.P. 30.

128 (e) CORRECTING OR MODIFYING THE RECORD.

129 (1) *Submitting to the Bankruptcy Court*. If any

130 difference arises about whether the record accurately

131 discloses what occurred in the bankruptcy court, the

difference must be submitted to and settled by the bankruptcy court and the record conformed accordingly. If an item has been improperly designated as part of the record on appeal, a party may move to strike that item.

(2) *Correcting in Other Ways*. If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected, and a supplemental record may be certified and transmitted:

(A) on stipulation of the parties;

(B) by the bankruptcy court before or after the record has been forwarded; or

(C) by the court where the appeal is pending.

(3) *Remaining Questions*. All other questions as to the form and content of the record must be presented to the court where the appeal is pending.

(f) SEALED DOCUMENTS. A document placed under seal by the bankruptcy court may be designated as part of the record on appeal. In doing so, a party must identify it without revealing confidential or secret information, but the bankruptcy clerk must not transmit it to the clerk of the court where the appeal

154 is pending as part of the record. Instead, a party must file a motion
155 with the court where the appeal is pending to accept the document
156 under seal. If the motion is granted, the movant must notify the
157 bankruptcy court of the ruling, and the bankruptcy clerk must
158 promptly transmit the sealed document to the clerk of the court
159 where the appeal is pending.
160 (g) OTHER NECESSARY ACTIONS. All parties to an
161 appeal must take any other action necessary to enable the
162 bankruptcy clerk to assemble and transmit the record.

COMMITTEE NOTE

This rule is derived from former Rule 8006 and F.R.App.P. 10 and 11(a). The provisions of this rule and Rule 8010 are applicable to appeals taken directly to a court of appeals under 28 U.S.C. § 158(d)(2), as well as to appeals to a district court or BAP. See F.R.App.P. 6(c)(2)(A) and (B).

The rule retains the practice of former Rule 8006 of requiring the parties to designate items to be included in the record on appeal. In this respect, the bankruptcy rule differs from the appellate rule. Among other things, F.R.App.P. 10(a) provides that the record on appeal consists of all the documents and exhibits filed in the case. This requirement would often be unworkable in a bankruptcy context because thousands of items might have been filed in the overall bankruptcy case.

Subdivision (a) provides the time period for an appellant to file a designation of items to be included in the record on appeal and a statement of the issues to be presented. It then provides for the designation of additional items by the appellee, cross-appellant, and cross-appellee, as well as for the cross-appellant's statement of the issues to be presented in its appeal. Subdivision (a)(4) prescribes the content of the record on appeal. Ordinarily, the bankruptcy clerk will not need to have paper copies of the designated items because the clerk will either transmit them to the appellate court electronically or otherwise make them available electronically. If the bankruptcy clerk requires a paper copy of some or all of the items

designated as part of the record, the clerk may request the party that designated the item to provide the necessary copies, and the party must comply with the request or bear the cost of the clerk's copying.

Subdivision (b) governs the process for ordering a complete or partial transcript of the bankruptcy court proceedings. In situations in which a transcript is unavailable, subdivision (c) allows for the parties' preparation of a statement of the evidence or proceedings, which must be approved by the bankruptcy court.

Subdivision (d) adopts the practice of F.R.App.P. 10(d) of permitting the parties to agree on a statement of the case in place of the record on appeal. The statement must show how the issues on appeal arose and were decided in the bankruptcy court. It must be approved by the bankruptcy court in order to be certified as the record on appeal.

Subdivision (e), modeled on F.R.App.P. 10(e), provides a procedure for correcting the record on appeal if an item is improperly designated, omitted, or misstated.

Subdivision (f) is a new provision that governs the handling of any document that remains sealed by the bankruptcy court and that a party wants to include in the record on appeal. The party must request the court where the appeal is pending to accept the document under seal, and that motion must be granted before the bankruptcy clerk may transmit the sealed document to the district, BAP, or circuit clerk.

Subdivision (g) requires the parties' cooperation with the bankruptcy clerk in assembling and transmitting the record. It retains the requirement of former Rule 8006, which was adapted from F.R.App.P. 11(a).

Changes Made After Publication

In subdivision (a)(2) and (3), the place of filing was clarified. "Docket entries kept by the bankruptcy clerk" was added to the list in subdivision (a)(4).

Summary of Public Comment

12-BK-005. Judge Robert J. Kressel (Bankr. D. Minn.). The practice of designating the record is fairly archaic. The 8th Cir. BAP has a rule that the

record before the bankruptcy court is the record on appeal. The record does not have to be designated or copied. Instead the parties refer to the appropriate bankruptcy court docket numbers in their briefs, and BAP judges can review the entire bankruptcy court record. This rule should at the least accommodate that practice.

12-BK-015. Judge Barry S. Schermer (Bankr. E.D. Mo.). The bankruptcy judges of the E.D. Mo. agree with Judge Kressel's comment about designation of the record.

12-BK-040. Bankruptcy Clerks Advisory Group. Agrees with Judge Kressel's and Judge Schermer's comments.

12-BK-036. Mary P. Sharon, Clerk (1st Cir. BAP). Subdivision (a)(1)(A) provides that the appellant files its designation in the bankruptcy court, but subdivisions (a)(2) and (a)(3) do not specify the court where the appellee, cross-appellant, and cross-appellee file their designations.

12-BK-026. Judge S. Martin Teel, Jr. (Bankr. D.D.C.). "The docket entries maintained by the bankruptcy clerk" should be added as the first entry in the list of items to be included in the record on appeal. This is derived from FRAP 10(a)(3), although the certification requirement is deleted. In subdivision (a)(4), delete "from the record" from the last item, and authorize the bankruptcy court to order additional items added.

12-BK-008. National Conference of Bankruptcy Judges. Subdivision (a)(5) includes the possibility of the bankruptcy clerk having to prepare paper copies of items for the record on appeal at a party's expense if the clerk requests them and the party does not comply. Although this provision is part of existing Rule 8006, it should be eliminated. The parties should bear the burden of producing them, not the clerk.

12-BK-040. Bankruptcy Clerks Advisory Group. Agrees with the NCBJ comment.

12-BK-034. Oregon State Bar Debtor-Creditor Section Local Rules and Forms Committee. Proposed subdivision (a) provides stylistic changes that will assist practitioners in completing the record on appeal with greater ease.

12-BK-040. Bankruptcy Clerks Advisory Group. In subdivisions (b)(1), (b)(2), and (b)(3), if an appellant is not ordering a transcript, it must file with the bankruptcy clerk a certificate stating that fact. Since orders for transcripts must be filed with the clerk, as well as the reporter's receipt of a

transcript order, the filing of a certificate of no transcript seems unnecessary. The certificate requirement also suggests the need for a special form.

12-BK-005. Judge Robert J. Kressel (Bankr. D. Minn.). Subdivision (b)(5) should make clear that the transcript referred to is the one described in (b)(1) and not a transcript that a party has created on its own and included in a brief or submitted as a separate document.

Subdivision (c) is troubling, at least without a definition of "unavailable." Many appellants will argue that a transcript is unavailable because they cannot afford to pay for it.

12-BK-036. Mary P. Sharon, Clerk (1st Cir. BAP). Same (as comment about subdivision (c)).

12-BK-040. Bankruptcy Clerks Advisory Group. The group agrees with Judge Kressel's comment. This rule will require the bankruptcy clerk to check for service, track the time for filing objections, as well as the settlement and approval of the statement. It also appears that the clerk will have to verify that the transcript is unavailable. If the provision is retained, it needs to be revised.

12-BK-005. Judge Robert J. Kressel (Bankr. D. Minn.). Subdivision (d)—Agreed Statement as the Record on Appeal—will cause havoc and irritate bankruptcy judges.

12-BK-015. Judge Barry S. Schermer (Bankr. E.D. Mo.). The bankruptcy judges of the E.D. Mo. strongly oppose the addition of subdivision (d). It would cause much additional work for bankruptcy judges and their staff. The benefits to the parties and the appellate court are questionable.

12-BK-040. Bankruptcy Clerks Advisory Group. Agrees with Judge Schermer's comment.

12-BK-033. Judge Christopher M. Klein (Bankr. E.D. Cal.). Subdivision (e)(1) authorizes a party to move to strike an item that has been improperly designated as part of the record on appeal. The FRAP provision on which this rule is modeled, FRAP 10(e), does not contain a similar sentence. Improper designation goes beyond whether the record accurately reflects what occurred in the bankruptcy court. It goes to the form and content of the record, which are governed by (e)(3) and are resolved by the appellate court. The sentence about moving to strike should therefore be moved from

subdivision (e)(1) to (e)(3).

12-BK-040. Bankruptcy Clerks Advisory Group. Subdivision (f) addresses sealed documents. Currently sealed documents remain under seal during the appeal. The rule suggests that, if a party does not file a motion with the appellate court to accept the document under seal, the document may be unsealed. The more protective approach would be to keep the document sealed unless requested otherwise.

Rule 8010. Completing and Transmitting the Record

1 (a) REPORTER'S DUTIES.

2 (1) *Proceedings Recorded Without a Reporter*

3 *Present.* If proceedings were recorded without a reporter

4 being present, the person or service selected under

5 bankruptcy court procedures to transcribe the recording is

6 the reporter for purposes of this rule.

7 (2) *Preparing and Filing the Transcript*. The

8 reporter must prepare and file a transcript as follows:

9 (A) Upon receiving an order for a transcript

10 in accordance with Rule 8009(b), the reporter must

11 file in the bankruptcy court an acknowledgment of

12 the request that shows when it was received, and

13 when the reporter expects to have the transcript

14 completed.

15 (B) After completing the transcript, the

16 reporter must file it with the bankruptcy clerk, who

17 will notify the district, BAP, or circuit clerk of its

18 filing.

19 (C) If the transcript cannot be completed

20 within 30 days after receiving the order, the reporter

21 must request an extension of time from the

22 bankruptcy clerk. The clerk must enter on the

23 docket and notify the parties whether the extension

24 is granted.

25 (D) If the reporter does not file the

26 transcript on time, the bankruptcy clerk must notify

27 the bankruptcy judge.

28 (b) CLERK'S DUTIES.

29 (1) *Transmitting the Record—In General*. Subject

30 to Rule 8009(f) and subdivision (b)(5) of this rule, when

31 the record is complete, the bankruptcy clerk must transmit

32 to the clerk of the court where the appeal is pending either

33 the record or a notice that the record is available

34 electronically.

35 (2) *Multiple Appeals*. If there are multiple appeals

36 from a judgment, order, or decree, the bankruptcy clerk

37 must transmit a single record.

38 (3) *Receiving the Record*. Upon receiving the

39 record or notice that it is available electronically, the

40 district, BAP, or circuit clerk must enter that information
41 on the docket and promptly notify all parties to the appeal.
42 (4) *If Paper Copies Are Ordered*. If the court
43 where the appeal is pending directs that paper copies of the
44 record be provided, the clerk of that court must so notify
45 the appellant. If the appellant fails to provide them, the
46 bankruptcy clerk must prepare them at the appellant's
47 expense.
48 (5) *When Leave to Appeal is Requested*. Subject to
49 subdivision (c), if a motion for leave to appeal has been
50 filed under Rule 8004, the bankruptcy clerk must prepare
51 and transmit the record only after the district court, BAP, or
52 court of appeals grants leave.
53 (c) RECORD FOR A PRELIMINARY MOTION IN THE
54 DISTRICT COURT, BAP, OR COURT OF APPEALS. This
55 subdivision (c) applies if, before the record is transmitted, a party
56 moves in the district court, BAP, or court of appeals for any of the
57 following relief:
58 • leave to appeal;
59 • dismissal;
60 • a stay pending appeal;
61 • approval of a supersedeas bond, or additional

62 security on a bond or undertaking on appeal; or

63 • any other intermediate order.

64 The bankruptcy clerk must then transmit to the clerk of the court

65 where the relief is sought any parts of the record designated by a

66 party to the appeal or a notice that those parts are available

67 electronically.

COMMITTEE NOTE

This rule is derived from former Rule 8007 and F.R.App. P 11. It applies to an appeal taken directly to a court of appeals under 28 U.S.C. § 158(d)(2), as well as to an appeal to a district court or BAP.

Subdivision (a) generally retains the procedure of former Rule 8007(a) regarding the reporter's duty to prepare and file a transcript if a party requests one. It clarifies that the person or service that transcribes the recording of a proceeding is considered the reporter under this rule if the proceeding is recorded without a reporter being present in the courtroom. It also makes clear that the reporter must file with the bankruptcy court the acknowledgment of the request for a transcript and statement of the expected completion date, the completed transcript, and any request for an extension of time beyond 30 days for completion of the transcript.

Subdivision (b) requires the bankruptcy clerk to transmit the record to the district, BAP or circuit clerk when the record is complete and, in the case of appeals under 28 U.S.C. §158(a)(3), leave to appeal has been granted. This transmission will be made electronically, either by sending the record itself or sending notice that the record can be accessed electronically. The court where the appeal is pending may, however, require that a paper copy of some or all of the record be furnished, in which case the clerk of that court will direct the appellant to provide the copies. If the appellant does not do so, the bankruptcy clerk must prepare the copies at the appellant's expense.

In a change from former Rule 8007(b), subdivision (b) of this rule no longer directs the clerk of the appellate court to docket the appeal upon receipt of the record from the bankruptcy clerk. Instead, under Rules

8003(d) and 8004(c) and F.R.App.P. 12(a), the district, BAP, or circuit clerk dockets the appeal upon receipt of the notice of appeal or, in the case of appeals under 28 U.S.C. § 158(a)(3), the notice of appeal and the motion for leave to appeal. Accordingly, by the time the district, BAP, or circuit clerk receives the record, the appeal will already be docketed in that court. The clerk of the appellate court must indicate on the docket and give notice to the parties to the appeal when the transmission of the record is received. Under Rule 8018(a) and F.R.App.P. 31, the briefing schedule is generally based on that date.

Subdivision (c) is derived from former Rule 8007(c) and F.R.App.P. 11(g) . It provides for the transmission of parts of the record that the parties designate for consideration by the district court, BAP, or court of appeals in ruling on specified preliminary motions filed prior to the preparation and transmission of the record on appeal.

Changes Made After Publication

Subdivision (a)(1) was revised to more accurately reflect the way in which transcription services are selected. A cross-reference to Rule 8009(b) was added to subdivision (a)(2)(A).

Summary of Public Comment

12-BK-026. Judge S. Martin Teel, Jr. (Bankr. D.D.C.). In subdivision (a)(1), "bankruptcy court" should be changed to "bankruptcy clerk" because the clerk is the person who designates the person or service that transcribes the recording of a court proceeding. Worded as it is, the provision might lead to appellants bothering the court with motions to designate a court reporter or transcription service.

12-BK-040. Bankruptcy Clerks Advisory Group. Regarding subdivision (a)(1), bankruptcy clerks do not designate a single transcription service. Instead, in order to avoid favoritism, they provide a list of transcription services.

12-BK-033. Judge Christopher M. Klein (Bankr. E.D. Cal.). Regarding subdivision (a)(2)(A): Add a cross-reference to Rule 8009(b) to emphasize the need for making satisfactory arrangements for paying the court reporter. Nonpayment is a common cause of delays of bankruptcy appeals.

12-BK-008. National Conference of Bankruptcy Judges. Subdivision (b)(1) directs the bankruptcy clerk to transmit the record when it is complete. In some cases the record is never complete because the parties fail to designate what the record should contain. The provision should be revised to fix an outside deadline for the clerk's transmission of the record. Once the deadline passes, the clerk would transmit whatever items in the list in proposed Rule 8009(a)(4) the clerk has.

12-BK-034. Oregon State Bar Debtor-Creditor Section Local Rules and Forms Committee. Subdivision (b) does not specify the clerk's duties if the record is never completed.

12-BK-040. Bankruptcy Clerks Advisory Group. Endorses the NCBJ comment on this issue.

12-BK-014. Judge Dennis Montali (Bankr. N.D. Cal.). In some cases when the appellate court orders paper copies of the record to be delivered, it may be appropriate for the appellee to provide them. Add to the end of the first sentence of subdivision (b)(4), "or the appellee where appropriate."

12-BK-008. National Conference of Bankruptcy Judges. Subdivision (b)(4) should be eliminated for the reasons stated regarding Rule 8009(a)(5).

12-BK-040. Bankruptcy Clerks Advisory Group. The group endorses the NCBJ comment on this issue.

12-BK-033. Judge Christopher M. Klein (Bankr. E.D. Cal.). The requirement that a reporter file an acknowledgment of the order for a transcript may be more difficult for a reporter in the bankruptcy court than in the district court. In the bankruptcy court the reporter is unlikely to have a close relationship and familiarity with the court, and the duty imposed under this provision is more onerous than the requirement of FRAP 11(b)(1)(A). Also limit the reporter's duty under subdivision (a)(2)(A) to requests for transcripts that are designated for purposes of an appeal.

The requirements of subdivision (a)(2)(C)–(D) (reporter must seek extension of time, clerk must report tardiness) will be ineffectual. The bankruptcy judge has no tools and few incentives to do anything but shrug.

Consider authorizing a sanction of dismissal of an appeal if the appellant is delinquent in performing any of its duties regarding completion of the record.

12-BK-040. Bankruptcy Clerks Advisory Group. Subdivision (a)(2) does not make clear how a reporter will be able to estimate when the transcript will be completed or how the reporter requests an extension of time from the bankruptcy clerk.

Rule 8011. Filing and Service; Signature

1 (a) FILING.

2 (1*) With the Clerk.* A document required or permitted to be

3 filed in a district court or BAP must be filed with the clerk of that

4 court.

5 (2) *Method and Timeliness*.

6 (A) *In general*. Filing may be accomplished by

7 transmission to the clerk of the district court or BAP. Except

8 as provided in subdivision (a)(2)(B) and (C), filing is timely

9 only if the clerk receives the document within the time fixed

10 for filing.

11 (B) *Brief or Appendix*. A brief or appendix is also

12 timely filed if, on or before the last day for filing, it is:

13 (i) mailed to the clerk by first-class mail—or

14 other class of mail that is at least as

15 expeditious—postage prepaid, if the district court's

16 or BAP's procedures permit or require a brief or

17 appendix to be filed by mailing; or

18 (ii) dispatched to a third-party commercial
19 carrier for delivery within 3 days to the clerk, if the
20 court's procedures so permit or require.
21 (C) *Inmate Filing*. A document filed by an inmate
22 confined in an institution is timely if deposited in the
23 institution's internal mailing system on or before the last day
24 for filing. If the institution has a system designed for legal
25 mail, the inmate must use that system to receive the benefit
26 of this rule. Timely filing may be shown by a declaration in
27 compliance with 28 U.S.C. § 1746 or by a notarized
28 statement, either of which must set forth the date of deposit
29 and state that first-class postage has been prepaid.
30 (D) *Copies*. If a document is filed electronically, no
31 paper copy is required. If a document is filed by mail or
32 delivery to the district court or BAP, no additional copies are
33 required. But the district court or BAP may require by local
34 rule or by order in a particular case the filing or furnishing of
35 a specified number of paper copies.
36 (3) *Clerk's Refusal of Documents*. The court's clerk must
37 not refuse to accept for filing any document transmitted for that
38 purpose solely because it is not presented in proper form as required
39 by these rules or by any local rule or practice.

40 (b) SERVICE OF ALL DOCUMENTS REQUIRED. Unless a rule
41 requires service by the clerk, a party must, at or before the time of the filing
42 of a document, serve it on the other parties to the appeal. Service on a party
43 represented by counsel must be made on the party's counsel.
44 (c) MANNER OF SERVICE.
45 (1) *Methods*. Service must be made electronically, unless it
46 is being made by or on an individual who is not represented by
47 counsel or the court's governing rules permit or require service by
48 mail or other means of delivery. Service may be made by or on an
49 unrepresented party by any of the following methods:
50 (A) personal delivery;
51 (B) mail; or
52 (C) third-party commercial carrier for delivery
53 within 3 days.
54 (2) *When Service Is Complete*. Service by electronic means
55 is complete on transmission, unless the party making service
56 receives notice that the document was not transmitted successfully.
57 Service by mail or by commercial carrier is complete on mailing or
58 delivery to the carrier.
59 (d) PROOF OF SERVICE.
60 (1) *What Is Required*. A document presented for filing must
61 contain either:

62 (A) an acknowledgment of service by the person
63 served; or
64 (B) proof of service consisting of a statement by the
65 person who made service certifying:
66 (i) the date and manner of service;
67 (ii) the names of the persons served; and
68 (iii) the mail or electronic address, the fax
69 number, or the address of the place of delivery, as
70 appropriate for the manner of service, for each person
71 served.
72 (2) *Delayed Proof*. The district or BAP clerk may permit
73 documents to be filed without acknowledgment or proof of service,
74 but must require the acknowledgment or proof to be filed promptly
75 thereafter.
76 (3) *Brief or Appendix*. When a brief or appendix is filed, the
77 proof of service must also state the date and manner by which it was
78 filed.
79 (e) SIGNATURE. Every document filed electronically must
80 include the electronic signature of the person filing it or, if the person is
81 represented, the electronic signature of counsel. The electronic signature
82 must be provided by electronic means that are consistent with any technical
83 standards that the Judicial Conference of the United States establishes.

84 Every document filed in paper form must be signed by the person filing the

85 document or, if the person is represented, by counsel.

COMMITTEE NOTE

This rule is derived from former Rule 8008 and F.R.App.P. 25. It adopts some of the additional details of the appellate rule, and it provides greater recognition of the possibility of electronic filing and service.

Subdivision (a) governs the filing of documents in the district court or BAP. Consistent with other provisions of these Part VIII rules, subdivision (a)(2) requires electronic filing of documents, including briefs and appendices, unless the district court's or BAP's procedures permit or require other methods of delivery to the court. An electronic filing is timely if it is received by the district or BAP clerk within the time fixed for filing. No additional copies need to be submitted when documents are filed electronically, by mail, or by delivery unless the district court or BAP requires them.

Subdivision (a)(3) provides that the district or BAP clerk may not refuse to accept a document for filing solely because its form does not comply with these rules or any local rule or practice. The district court or BAP may, however, direct the correction of any deficiency in any document that does not conform to the requirements of these rules or applicable local rules, and may prescribe such other relief as the court deems appropriate.

Subdivisions (b) and (c) address the service of documents in the district court or BAP. Except for documents that the district or BAP clerk must serve, a party that makes a filing must serve copies of the document on the other parties to the appeal. Service on represented parties must be made on counsel. Subdivision (c) expresses the general requirement under these Part VIII rules that documents be sent electronically. *See* Rule 8001(c). Local court rules, however, may provide for other means of service, and subdivision (c) specifies non-electronic methods of service by or on an unrepresented party. Electronic service is complete upon transmission, unless the party making service receives notice that the transmission did not reach the person intended to be served in a readable form.

Subdivision (d) retains the former rule's provisions regarding proof of service of a document filed in the district court or BAP. In addition, it

provides that a certificate of service must state the mail or electronic address or fax number to which service was made.

Subdivision (e) is a new provision that requires an electronic signature of counsel or an unrepresented filer for documents that are filed electronically in the district court or BAP. A local rule may specify a method of providing an electronic signature that is consistent with any standards established by the Judicial Conference of the United States. Paper copies of documents filed in the district court or BAP must bear an actual signature of counsel or the filer. By requiring a signature, subdivision (e) ensures that a readily identifiable attorney or party takes responsibility for every document that is filed.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

12-BK-005. Judge Robert J. Kressel (Bankr. D. Minn.). The rule allowing briefs and appendices to be timely filed if mailed by the deadline has always been a bad rule. Why shouldn't the filing rules be the same for these documents as for all others?

12-BK-026. Judge S. Martin Teel, Jr. (Bankr. D.D.C.). Subdivision (a)(2) should not follow the ill-advised rule of FRAP 25(a)(2)(B) of having different filing rules for briefs and appendices.

12-BK-005. Judge Robert J. Kressel (Bankr. D. Minn.). Subdivision (a)(2)(C) requires that a notarized statement state that first-class postage has been prepaid, but the rule does not require that the postage be paid. And subdivision (b) refers to service by the clerk. The rules should not require service by the clerk.

12-BK-033. Judge Christopher M. Klein (Bankr. E.D. Cal.). Subdivision (a)(3), which is similar to Rule 5005(a)(1), should incorporate a provision similar to Rule 5005(c). Also the Committee Note's discussion of the signature requirement of subdivision (e) should refer to Rule 9011, unless Rule 9011 is to be qualified. In that case, there is a need for clarification.

One stylistic comment was submitted.

Rule 8012. Corporate Disclosure Statement

1 (a) WHO MUST FILE. Any nongovernmental corporate
2 party appearing in the district court or BAP must file a statement
3 that identifies any parent corporation and any publicly held
4 corporation that owns 10% or more of its stock or states that there
5 is no such corporation.
6 (b) TIME TO FILE; SUPPLEMENTAL FILING. A party
7 must file the statement with its principal brief or upon filing a
8 motion, response, petition, or answer in the district court or BAP,
9 whichever occurs first, unless a local rule requires earlier filing.
10 Even if the statement has already been filed, the party's principal
11 brief must include a statement before the table of contents. A party
12 must supplement its statement whenever the required information
13 changes.

COMMITTEE NOTE

This rule is derived from F.R.App.P. 26.1. It requires the filing of corporate disclosure statements and supplemental statements in order to assist district court and BAP judges in determining whether they should recuse themselves. Rule 9001 makes the definitions in § 101 of the Code applicable to these rules. Under § 101(9) the word "corporation" includes a limited liability company, limited liability partnership, business trust, and certain other entities that are not designated under applicable law as corporations.

If filed separately from a brief, motion, response, petition, or answer, the statement must be filed and served in accordance with Rule 8011. Under Rule 8015(a)(7)(B)(iii), the corporate disclosure statement is not included in calculating applicable word-count limitations.

Changes Made After Publication

A sentence was added to the Committee Note to draw attention to the broad definition of "corporation" under § 101(9) of the Bankruptcy Code.

Summary of Public Comment

12-BK-014. Judge Dennis Montali (Bankr. N.D. Cal.). It may be worth explaining in the Committee Note that a "corporate party" includes limited liability partnerships, limited liability companies, and other entities that are included within the definition of "corporation" in § 101(9) of the Bankruptcy Code.

Rule 8013. Motions; Intervention

1 (a) CONTENTS OF A MOTION; RESPONSE; REPLY.

2 (1) *Request for Relief.* A request for an order or
3 other relief is made by filing a motion with the district or
4 BAP clerk, with proof of service on the other parties to the
5 appeal.

6 (2) *Contents of a Motion*.

7 (A) *Grounds and the Relief Sought.* A
8 motion must state with particularity the grounds for
9 the motion, the relief sought, and the legal argument
10 necessary to support it.

11 (B) *Motion to Expedite an Appeal*. A
12 motion to expedite an appeal must explain what
13 justifies considering the appeal ahead of other
14 matters. If the district court or BAP grants the
15 motion, it may accelerate the time to transmit the
16 record, the deadline for filing briefs and other
17 documents, oral argument, and the resolution of the
18 appeal. A motion to expedite an appeal may be
19 filed as an emergency motion under subdivision (d).

20 (C) *Accompanying Documents.*

21 (i) Any affidavit or other document

22 necessary to support a motion must be
23 served and filed with the motion.
24 (ii) An affidavit must contain only
25 factual information, not legal argument.
26 (iii) A motion seeking substantive
27 relief must include a copy of the bankruptcy
28 court's judgment, order, or decree, and any
29 accompanying opinion as a separate exhibit.
30 (D) *Documents Barred or Not Required.*
31 (i) A separate brief supporting or
32 responding to a motion must not be filed.
33 (ii) Unless the court orders
34 otherwise, a notice of motion or a proposed
35 order is not required.
36 (3) *Response and Reply; Time to File*. Unless the
37 district court or BAP orders otherwise,
38 (A) any party to the appeal may file a
39 response to the motion within 7 days after service of
40 the motion; and
41 (B) the movant may file a reply to a
42 response within 7 days after service of the response,
43 but may only address matters raised in the response.

44 (b) DISPOSITION OF A MOTION FOR A
45 PROCEDURAL ORDER. The district court or BAP may rule on a
46 motion for a procedural order—including a motion under Rule
47 9006(b) or (c)—at any time without awaiting a response. A party
48 adversely affected by the ruling may move to reconsider, vacate, or
49 modify it within 7 days after the procedural order is served.
50 (c) ORAL ARGUMENT. A motion will be decided
51 without oral argument unless the district court or BAP orders
52 otherwise.
53 (d) EMERGENCY MOTION.
54 (1) *Noting the Emergency*. When a movant
55 requests expedited action on a motion because irreparable
56 harm would occur during the time needed to consider a
57 response, the movant must insert the word "Emergency"
58 before the title of the motion.
59 (2) *Contents of the Motion*. The emergency motion
60 must
61 (A) be accompanied by an affidavit setting
62 out the nature of the emergency;
63 (B) state whether all grounds for it were
64 submitted to the bankruptcy court and, if not, why
65 the motion should not be remanded for the

66 bankruptcy court to consider;

67 (C) include the e-mail addresses, office

68 addresses, and telephone numbers of moving

69 counsel and, when known, of opposing counsel and

70 any unrepresented parties to the appeal; and

71 (D) be served as prescribed by Rule 8011.

72 (3) *Notifying Opposing Parties*. Before filing an

73 emergency motion, the movant must make every

74 practicable effort to notify opposing counsel and any

75 unrepresented parties in time for them to respond. The

76 affidavit accompanying the emergency motion must state

77 when and how notice was given or state why giving it was

78 impracticable.

79 (e) POWER OF A SINGLE BAP JUDGE TO

80 ENTERTAIN A MOTION.

81 (1) *Single Judge's Authority*. A BAP judge may

82 act alone on any motion, but may not dismiss or otherwise

83 determine an appeal, deny a motion for leave to appeal, or

84 deny a motion for a stay pending appeal if denial would

85 make the appeal moot.

86 (2) *Reviewing a Single Judge's Action*. The BAP

87 may review a single judge's action, either on its own

88 motion or on a party's motion.

89 (f) FORM OF DOCUMENTS; PAGE LIMITS; NUMBER

90 OF COPIES.

91 (1) *Format of a Paper Document*. Rule 27(d)(1)

92 F.R.App.P. applies in the district court or BAP to a paper

93 version of a motion, response, or reply.

94 (2) *Format of an Electronically Filed Document*.

95 A motion, response, or reply filed electronically must

96 comply with the requirements for a paper version regarding

97 covers, line spacing, margins, typeface, and type style. It

98 must also comply with the page limits under paragraph (3).

99 (3) *Page Limits*. Unless the district court or BAP

100 orders otherwise:

101 (A) a motion or a response to a motion must

102 not exceed 20 pages, exclusive of the corporate

103 disclosure statement and accompanying documents

104 authorized by subdivision (a)(2)(C); and

105 (B) a reply to a response must not exceed

106 10 pages.

107 (4) *Paper Copies*. Paper copies must be provided

108 only if required by local rule or by an order in a particular

109 case.

110 (g) INTERVENING IN AN APPEAL. Unless a statute

111 provides otherwise, an entity that seeks to intervene in an appeal

112 pending in the district court or BAP must move for leave to

113 intervene and serve a copy of the motion on the parties to the

114 appeal. The motion or other notice of intervention authorized by

115 statute must be filed within 30 days after the appeal is docketed. It

116 must concisely state the movant's interest, the grounds for

117 intervention, whether intervention was sought in the bankruptcy

118 court, why intervention is being sought at this stage of the

119 proceeding, and why participating as an amicus curiae would not

120 be adequate.

COMMITTEE NOTE

This rule is derived from former Rule 8011 and F.R.App.P. 15(d) and 27. It adopts many of the provisions of the appellate rules that specify the form and page limits of motions and accompanying documents, while also adjusting those requirements for electronic filing. In addition, it prescribes the procedure for seeking to intervene in the district court or BAP.

Subdivision (a) retains much of the content of former Rule 8011(a) regarding the contents of a motion, response, and reply. It also specifies the documents that may accompany a motion. Unlike the former rule, which allowed the filing of separate briefs supporting a motion, subdivision (a) now adopts the practice of F.R.App.P. 27(a) of prohibiting the filing of briefs supporting or responding to a motion. The motion or response itself must include the party's legal arguments.

Subdivision (a)(2)(B) clarifies the procedure for seeking to expedite an appeal. A motion under this provision seeks to expedite the time for the disposition of the appeal as a whole, whereas an emergency motion—which is addressed by subdivision (d)—typically involves an urgent request for relief short of disposing of the entire appeal (for example, an emergency request for a stay pending appeal to prevent imminent mootness). In appropriate cases—such as when there is an urgent need to resolve the appeal quickly to prevent harm—a party may file a motion to expedite the appeal as an emergency motion.

Subdivision (b) retains the substance of former Rule 8011(b). It authorizes the district court or BAP to act on a motion for a procedural order without awaiting a response to the motion. It specifies that a party seeking reconsideration, vacation, or modification of the order must file a motion within 7 days after service of the order.

Subdivision (c) continues the practice of former Rule 8011(c) and F.R.App.P. 27(e) of dispensing with oral argument of motions in the district court or BAP unless the court orders otherwise.

Subdivision (d), which carries forward the content of former Rule 8011(d), governs emergency motions that the district court or BAP may rule on without awaiting a response when necessary to prevent irreparable harm. A party seeking expedited action on a motion in the district court or BAP must explain the nature of the emergency, whether all grounds in support of the motion were first presented to the bankruptcy court, and, if not, why the district court or BAP should not remand for reconsideration. The moving party must also explain the steps taken to notify opposing counsel and any unrepresented parties in advance of filing the emergency motion and, if they were not notified, why it was impracticable to do so.

Subdivision (e), like former Rule 8011(e) and similar to F.R.App.P. 27(c), authorizes a single BAP judge to rule on certain motions. This authority, however, does not extend to issuing rulings that would dispose of the appeal. For that reason, the rule now prohibits a single BAP judge from denying a motion for a stay pending appeal when the effect of that ruling would be to require dismissal of the appeal as moot. A ruling by a single judge is subject to review by the BAP.

Subdivision (f) incorporates by reference the formatting and appearance requirements of F.R.App.P. 27(d)(1). When paper versions of the listed documents are filed, they must comply with the requirements of the specified rules regarding reproduction, covers, binding, appearance, and format. When these documents are filed electronically, they must comply

with the relevant requirements of the specified rules regarding covers and format. Subdivision (f) also specifies page limits for motions, responses, and replies, which is a matter that former Rule 8011 did not address.

Subdivision (g) clarifies the procedure for seeking to intervene in a proceeding that has been appealed. It is based on F.R.App.P. 15(d), but it also requires the moving party to explain why intervention is being sought at the appellate stage. The former Part VIII rules did not address intervention.

Changes After Publication

Subdivision (a)(2)(D) was changed to allow the court to require a notice of motion or proposed order. A stylistic change was made to subdivision (d)(2)(B).

Summary of Public Comment

12-BK-008. National Conference of Bankruptcy Judges. Subdivision (a)(2)(D)(ii) provides that a notice of motion is not required. This provision is contrary to the motion practice in some district courts, such as the Northern District of Illinois, which require a notice of motion for all motions. The provision should either be deleted or modified to add "unless required by local rule."

12-BK-026. Judge S. Martin Teel, Jr. (Bankr. D.D.C.). Modify subdivision (a)(2)(D)(iii) by adding at the end of the provision, "unless required by local rule or order of the court in which the appeal is pending." A district court or BAP should have discretion to require a proposed order.

Modify subdivision (d)(2)(B). Sometimes it would not be appropriate to file a motion relating to an appeal in the bankruptcy court.

12-BK-008. National Conference of Bankruptcy Judges. Subdivision (f)(3)(A) provides that a motion may not exceed 20 pages. Some districts have local rules with more restrictive requirements. The provision should therefore be prefaced with "Unless otherwise provided by local rule."

Subdivision (g), which allows intervention in an appeal, should be deleted. It does not have a counterpart in the general appellate rules, although some circuits have recognized an inherent power to permit intervention. It is not clear why a special bankruptcy appellate intervention rule is needed or who

would have standing to participate on appeal if they had not participated in proceedings in the bankruptcy court.

12-BK-036. Mary P. Sharon, Clerk (1st Cir. BAP). It is unclear why subdivision (g) is necessary or whether a party moving to intervene would have standing

12-BK-033. Judge Christopher M. Klein (Bankr. E.D. Cal.). Subdivision (d) appears to require irreparable harm to support an emergency motion. There could be situations, however, such as expediting an appeal, that may warrant emergency consideration even though irreparable harm will not ensue.

Several stylistic comments were submitted.

Rule 8014. Briefs

1 (a) APPELLANT'S BRIEF. The appellant's brief must
2 contain the following under appropriate headings and in the order
3 indicated:
4 (1) a corporate disclosure statement, if required by
5 Rule 8012;
6 (2) a table of contents, with page references;
7 (3) a table of authorities—cases (alphabetically
8 arranged), statutes, and other authorities—with references
9 to the pages of the brief where they are cited;
10 (4) a jurisdictional statement, including:
11 (A) the basis for the bankruptcy court's
12 subject-matter jurisdiction, with citations to
13 applicable statutory provisions and stating relevant
14 facts establishing jurisdiction;
15 (B) the basis for the district court's or
16 BAP's jurisdiction, with citations to applicable
17 statutory provisions and stating relevant facts
18 establishing jurisdiction;
19 (C) the filing dates establishing the
20 timeliness of the appeal; and
21 (D) an assertion that the appeal is from a

22 final judgment, order, or decree, or information
23 establishing the district court's or BAP's
24 jurisdiction on another basis;
25 (5) a statement of the issues presented and, for each
26 one, a concise statement of the applicable standard of
27 appellate review;
28 (6) a concise statement of the case setting out the
29 facts relevant to the issues submitted for review, describing
30 the relevant procedural history, and identifying the rulings
31 presented for review, with appropriate references to the
32 record;
33 (7) a summary of the argument, which must contain
34 a succinct, clear, and accurate statement of the arguments
35 made in the body of the brief, and which must not merely
36 repeat the argument headings;
37 (8) the argument, which must contain the
38 appellant's contentions and the reasons for them, with
39 citations to the authorities and parts of the record on which
40 the appellant relies;
41 (9) a short conclusion stating the precise relief
42 sought; and
43 (10) the certificate of compliance, if required by

44 Rule 8015(a)(7) or (b).

45 (b) APPELLEE'S BRIEF. The appellee's brief must
46 conform to the requirements of subdivision (a)(1)-(8) and (10),
47 except that none of the following need appear unless the appellee
48 is dissatisfied with the appellant's statement:

49 (1) the jurisdictional statement;

50 (2) the statement of the issues and the applicable
51 standard of appellate review; and

52 (3) the statement of the case.

53 (c) REPLY BRIEF. The appellant may file a brief in reply
54 to the appellee's brief. A reply brief must comply with the
55 requirements of subdivision (a)(2)-(3).

56 (d) STATUTES, RULES, REGULATIONS, OR
57 SIMILAR AUTHORITY. If the court's determination of the
58 issues presented requires the study of the Code or other statutes,
59 rules, regulations, or similar authority, the relevant parts must be
60 set out in the brief or in an addendum.

61 (e) BRIEFS IN A CASE INVOLVING MULTIPLE
62 APPELLANTS OR APPELLEES. In a case involving more than
63 one appellant or appellee, including consolidated cases, any
64 number of appellants or appellees may join in a brief, and any
65 party may adopt by reference a part of another's brief. Parties may

66 also join in reply briefs.

77 (f) CITATION OF SUPPLEMENTAL AUTHORITIES.

78 If pertinent and significant authorities come to a party's attention

79 after the party's brief has been filed—or after oral argument but

80 before a decision—a party may promptly advise the district or

81 BAP clerk by a signed submission setting forth the citations. The

82 submission, which must be served on the other parties to the

83 appeal, must state the reasons for the supplemental citations,

84 referring either to the pertinent page of a brief or to a point argued

85 orally. The body of the submission must not exceed 350 words.

86 Any response must be made within 7 days after the party is served,

87 unless the court orders otherwise, and must be similarly limited.

COMMITTEE NOTE

This rule is derived from former Rule 8010(a) and (b) and F.R.App.P. 28. Adopting much of the content of Rule 28, it provides greater detail than former Rule 8010 contained regarding appellate briefs.

Subdivision (a) prescribes the content and structure of the appellant's brief. It largely follows former Rule 8010(a)(1), but, to ensure national uniformity, it eliminates the provision authorizing a district court or BAP to alter these requirements. Subdivision (a)(1) provides that when Rule 8012 requires an appellant to file a corporate disclosure statement, it must be placed at the beginning of the appellant's brief. Subdivision (a)(10) is new. It implements the requirement under Rule 8015(a)(7)(C) and (b) for the filing of a certificate of compliance with the limit on the number of words or lines allowed to be in a brief.

Subdivision (b) carries forward the provisions of former Rule 8010(a)(2).

Subdivision (c) is derived from F.R.App.P. 28(c). It authorizes an appellant to file a reply brief, which will generally complete the briefing process.

Subdivision (d) is similar to former Rule 8010(b), but it is reworded to reflect the likelihood that briefs will generally be filed electronically rather than in paper form.

Subdivision (e) mirrors F.R.App.P. 28(i). It authorizes multiple appellants or appellees to join in a single brief. It also allows a party to incorporate by reference portions of another party's brief.

Subdivision (f) adopts the procedures of F.R.App.P. 28(j) with respect to the filing of supplemental authorities with the district court or BAP after a brief has been filed or after oral argument. Unlike the appellate rule, it specifies a period of 7 days for filing a response to a submission of supplemental authorities. The supplemental submission and response must comply with the signature requirements of Rule 8011(e).

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

12-BK-033. Judge Christopher M. Klein (Bankr. E.D. Cal.). In subdivision (a)(4)(D), consider requiring an assertion that leave to appeal has been granted in the case of an interlocutory appeal under § 158(a)(3).

12-BK-036. Mary P. Sharon, Clerk (1st Cir. BAP). Subdivision (f), which governs supplemental authorities, requires a party to inform the court by way of a "signed submission." Proceeding by a motion would be preferable.

One stylistic comment was submitted.

Rule 8015. Form and Length of Briefs; Form of Appendices and Other Papers.

1 (a) PAPER COPIES OF A BRIEF. If a paper copy of a
2 brief may or must be filed, the following provisions apply:
3 (1) *Reproduction*.
4 (A) A brief may be reproduced by any
5 process that yields a clear black image on light
6 paper. The paper must be opaque and unglazed.
7 Only one side of the paper may be used.
8 (B) Text must be reproduced with a clarity
9 that equals or exceeds the output of a laser printer.
10 (C) Photographs, illustrations, and tables
11 may be reproduced by any method that results in a
12 good copy of the original. A glossy finish is
13 acceptable if the original is glossy.
14 (2) *Cover*. The front cover of a brief must contain:
15 (A) the number of the case centered at the
16 top;
17 (B) the name of the court;
18 (C) the title of the case as prescribed by
19 Rule 8003(d)(2) or 8004(c)(2);
20 (D) the nature of the proceeding and the
21 name of the court below;

(E) the title of the brief, identifying the party or parties for whom the brief is filed; and

(F) the name, office address, telephone number, and e-mail address of counsel representing the party for whom the brief is filed.

(3) *Binding*. The brief must be bound in any manner that is secure, does not obscure the text, and permits the brief to lie reasonably flat when open.

(4) *Paper Size, Line Spacing, and Margins*. The brief must be on 8½-by-11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there.

(5) *Typeface*. Either a proportionally spaced or monospaced face may be used.

(A) A proportionally spaced face must include serifs, but sans-serif type may be used in headings and captions. A proportionally spaced face must be 14-point or larger.

(B) A monospaced face may not contain

more than 10½ characters per inch.

(6) *Type Styles*. A brief must be set in plain, roman style, although italics or boldface may be used for emphasis. Case names must be italicized or underlined.

(7) *Length*.

(A) *Page limitation*. A principal brief must not exceed 30 pages, or a reply brief 15 pages, unless it complies with (B) and (C).

(B) *Type-volume limitation*.

(i) A principal brief is acceptable if:

- it contains no more than 14,000 words; or
- it uses a monospaced face and contains no more than 1,300 lines of text.

(ii) A reply brief is acceptable if it contains no more than half of the type volume specified in item (i).

(iii) Headings, footnotes, and quotations count toward the word and line limitations. The corporate disclosure statement, table of contents, table of

citations, statement with respect to oral argument, any addendum containing statutes, rules, or regulations, and any certificates of counsel do not count toward the limitation.

(C) *Certificate of Compliance*.

(i) A brief submitted under subdivision (a)(7)(B) must include a certificate signed by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either:

- the number of words in the brief; or
- the number of lines of monospaced type in the brief.

(ii) The certification requirement is satisfied by a certificate of compliance that conforms substantially to the appropriate

88 Official Form.

89 (b) ELECTRONICALLY FILED BRIEFS. A brief filed
90 electronically must comply with subdivision (a), except for (a)(1),
91 (a)(3), and the paper requirement of (a)(4).

92 (c) PAPER COPIES OF APPENDICES. A paper copy of
93 an appendix must comply with subdivision (a)(1), (2), (3), and (4),
94 with the following exceptions:

95 (1) An appendix may include a legible photocopy
96 of any document found in the record or of a printed
97 decision.

98 (2) When necessary to facilitate inclusion of odd-
99 sized documents such as technical drawings, an appendix
100 may be a size other than 8½-by-11 inches, and need not lie
101 reasonably flat when opened.

102 (d) ELECTRONICALLY FILED APPENDICES. An
103 appendix filed electronically must comply with subdivision (a)(2)
104 and (4), except for the paper requirement of (a)(4).

105 (e) OTHER DOCUMENTS.

106 (1) *Motion*. Rule 8013(f) governs the form of a
107 motion, response, or reply.

108 (2) *Paper Copies of Other Documents*. A paper
109 copy of any other document, other than a submission under

110 Rule 8014(f), must comply with subdivision (a), with the

111 following exceptions:

112 (A) A cover is not necessary if the caption

113 and signature page together contain the information

114 required by subdivision (a)(2).

115 (B) Subdivision (a)(7) does not apply.

116 (3) *Other Documents Filed Electronically*. Any

117 other document filed electronically, other than a

118 submission under Rule 8014(f), must comply with the

119 appearance requirements of paragraph (2).

120 (f) LOCAL VARIATION. A district court or BAP must

121 accept documents that comply with the applicable requirements of

122 this rule. By local rule, a district court or BAP may accept

123 documents that do not meet all of the requirements of this rule.

COMMITTEE NOTE

This rule is derived primarily from F.R.App.P. 32. Former Rule 8010(c) prescribed page limits for principal briefs and reply briefs. Those limits are now addressed by subdivision (a)(7) of this rule. In addition, the rule incorporates most of the detail of F.R.App.P. 32 regarding the appearance and format of briefs, appendices, and other documents, along with new provisions that apply when those documents are filed electronically.

Subdivision (a) prescribes the form requirements for briefs that are filed in paper form. It incorporates F.R.App.P. 32(a), except it does not include color requirements for brief covers, it requires the cover of a brief to include counsel's e-mail address, and cross-references to the appropriate bankruptcy rules are substituted for references to the Federal Rules of

Appellate Procedure.

Subdivision (a)(7) decreases the length of briefs, as measured by the number of pages, that was permitted by former Rule 8010(c). Page limits are reduced from 50 to 30 pages for a principal brief and from 25 to 15 for a reply brief in order to achieve consistency with F.R.App.P. 32(a)(7). But as permitted by the appellate rule, subdivision (a)(7) also permits the limits on the length of a brief to be measured by a word or line count, as an alternative to a page limit. Basing the calculation of brief length on either of the type-volume methods specified in subdivision (a)(7)(B) will result in briefs that may exceed the designated page limits in (a)(7)(A) and that may be approximately as long as allowed by the prior page limits.

Subdivision (b) adapts for briefs that are electronically filed subdivision (a)'s form requirements. With the use of electronic filing, the method of reproduction, method of binding, and use of paper become irrelevant. But information required on the cover, formatting requirements, and limits on brief length remain the same.

Subdivisions (c) and (d) prescribe the form requirements for appendices. Subdivision (c), applicable to paper appendices, is derived from F.R.App.P. 32(b), and subdivision (d) adapts those requirements for electronically filed appendices.

Subdivision (e), which is based on F.R.App.P. 32(c), addresses the form required for documents—in paper form or electronically filed—that these rules do not otherwise cover.

Subdivision (f), like F.R.App.P. 32(e), provides assurance to lawyers and parties that compliance with this rule's form requirements will allow a brief or other document to be accepted by any district court or BAP. A court may, however, by local rule or, under Rule 8028 by order in a particular case, choose to accept briefs and documents that do not comply with all of this rule's requirements. The decision whether to accept a brief that appears not to be in compliance with the rules must be made by the court. Under Rule 8011(a)(3), the clerk may not refuse to accept a document for filing solely because it is not presented in proper form as required by these rules or any local rule or practice.

Under Rule 8011(e), the party filing the document or, if represented, its counsel must sign all briefs and other submissions. If the document is filed electronically, an electronic signature must be provided in accordance with Rule 8011(e).

Changes Made After Publication

In subdivision (f), "or order in a particular case" was deleted as unnecessary. The discussion in the Committee Note about brief lengths was revised, and the discussion of subdivision (f) was expanded.

Summary of Public Comment

12-BK-033. Judge Christopher M. Klein (Bankr. E.D. Cal.). Subdivision (f) seems inconsistent with Rule 8011(a)(3). Perhaps it would be more accurate to provide that nonconforming documents must be accepted for filing (Rule 8011(a)(3)), but that a court may order a document not conforming to the requirements of Rule 8015 to be stricken if prompt corrective action is not taken.

12-BK-010. The States' Association of Bankruptcy Attorneys. The Committee Note incorrectly suggests that the page limits of proposed subdivision (a)(7) will be shorter than the existing page limits provided by current Rule 8010(c). Although the page limitation of proposed subdivision (a)(7)(A) reduces the number of pages from 50 to 30, the Committee Note to FRAP 32 indicates that the type-volume limitation that is adopted by subdivision (a)(7)(B) is expected to approximate 50 pages. The 30-page limit is merely a safe harbor. The Committee Note to Rule 8015 should make clear that no significant reduction in brief length is being imposed.

12-BK-034. Oregon State Bar Debtor-Creditor Section Local Rules and Forms Committee. We support the proposed reduction of brief page length, as this will bring greater consistency with the FRAP and Oregon Local Bankruptcy Rules.

Several stylistics comments were submitted.

Rule 8016. Cross-Appeals

1 (a) APPLICABILITY. This rule applies to a case in which
2 a cross-appeal is filed. Rules 8014(a)-(c), 8015(a)(7)(A)-(B), and
3 8018(a)(1)-(3) do not apply to such a case, except as otherwise
4 provided in this rule.
5 (b) DESIGNATION OF APPELLANT. The party who
6 files a notice of appeal first is the appellant for purposes of this
7 rule and Rule 8018(a)(4) and (b) and Rule 8019. If notices are
8 filed on the same day, the plaintiff, petitioner, applicant, or movant
9 in the proceeding below is the appellant. These designations may
10 be modified by the parties' agreement or by court order.
11 (c) BRIEFS. In a case involving a cross-appeal:
12 (1) *Appellant's Principal Brief*. The appellant must
13 file a principal brief in the appeal. That brief must comply
14 with Rule 8014(a).
15 (2) *Appellee's Principal and Response Brief*. The
16 appellee must file a principal brief in the cross-appeal and
17 must, in the same brief, respond to the principal brief in the
18 appeal. That brief must comply with Rule 8014(a), except
19 that the brief need not include a statement of the case
20 unless the appellee is dissatisfied with the appellant's
21 statement.

22 (3) *Appellant's Response and Reply Brief*. The
23 appellant must file a brief that responds to the principal
24 brief in the cross-appeal and may, in the same brief, reply
25 to the response in the appeal. That brief must comply with
26 Rule 8014(a)(2)-(8) and (10), except that none of the
27 following need appear unless the appellant is dissatisfied
28 with the appellee's statement in the cross-appeal:
29 (A) the jurisdictional statement;
30 (B) the statement of the issues and the
31 applicable standard of appellate review; and
32 (C) the statement of the case.
33 (4) *Appellee's Reply Brief*. The appellee may file a
34 brief in reply to the response in the cross-appeal. That brief
35 must comply with Rule 8014(a)(2)-(3) and (10) and must
36 be limited to the issues presented by the cross-appeal.
37 (d) LENGTH.
38 (1) *Page Limitation*. Unless it complies with
39 paragraphs (2) and (3), the appellant's principal brief must
40 not exceed 30 pages; the appellee's principal and response
41 brief, 35 pages; the appellant's response and reply brief, 30
42 pages; and the appellee's reply brief, 15 pages.
43 (2) *Type-Volume Limitation*.

(A) The appellant's principal brief or the appellant's response and reply brief is acceptable if:

(i) it contains no more than 14,000 words; or

(ii) it uses a monospaced face and contains no more than 1,300 lines of text.

(B) The appellee's principal and response brief is acceptable if:

(i) it contains no more than 16,500 words; or

(ii) it uses a monospaced face and contains no more than 1,500 lines of text.

(C) The appellee's reply brief is acceptable if it contains no more than half of the type volume specified in subparagraph (A).

(D) Headings, footnotes, and quotations count toward the word and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules, or regulations, and any certificates of counsel do not count toward the limitation.

66 (3) *Certificate of Compliance*. A brief submitted
67 either electronically or in paper form under paragraph (2)
68 must comply with Rule 8015(a)(7)(C).
69 (e) TIME TO SERVE AND FILE A BRIEF. Briefs must
70 be served and filed as follows, unless the district court or BAP by
71 order in a particular case excuses the filing of briefs or specifies
72 different time limits:
73 (1) the appellant's principal brief, within 30 days
74 after the docketing of notice that the record has been
75 transmitted or is available electronically;
76 (2) the appellee's principal and response brief,
77 within 30 days after the appellant's principal brief is
78 served;
79 (3) the appellant's response and reply brief, within
80 30 days after the appellee's principal and response brief is
81 served; and
82 (4) the appellee's reply brief, within 14 days after
83 the appellant's response and reply brief is served, but at
84 least 7 days before scheduled argument unless the district
85 court or BAP, for good cause, allows a later filing.

COMMITTEE NOTE

This rule is derived from F.R.App.P. 28.1. It governs the timing, content, length, filing, and service of briefs in bankruptcy appeals in which there is a cross-appeal. The former Part VIII rules did not separately address the topic of cross-appeals.

Subdivision (b) prescribes which party is designated the appellant when there is a cross-appeal. Generally, the first to file a notice of appeal will be the appellant.

Subdivision (c) specifies the briefs that the appellant and the appellee may file. Because of the dual role of the parties to the appeal and cross-appeal, each party is permitted to file a principal brief and a response to the opposing party's brief, as well as a reply brief. For the appellee, the principal brief in the cross-appeal and the response in the appeal are combined into a single brief. The appellant, on the other hand, initially files a principal brief in the appeal and later files a response to the appellee's principal brief in the cross-appeal, along with a reply brief in the appeal. The final brief that may be filed is the appellee's reply brief in the cross-appeal.

Subdivision (d), which prescribes page limits for briefs, is adopted from F.R.App.P. 28.1(e). It applies to briefs that are filed electronically, as well as to those filed in paper form. Like Rule 8015(a)(7), it imposes limits measured by either the number of pages or the number of words or lines of text.

Subdivision (e) governs the time for filing briefs in cases in which there is a cross-appeal. It adapts the provisions of F.R.App.P. 28.1(f).

Changes Made After Publication

Subdivision (d)(2)(D) was added, and subdivision (f) was deleted. In subdivision (a), the statement that Rule 8018(a) does not apply was changed to refer to Rule 8018(a)(1)-(3). In subdivision (b), Rule 8018(a)(4) was added to the list of rules. Conforming changes were made to the Committee Note.

Summary of Public Comment

12-BK-008. National Conference of Bankruptcy Judges. Subdivision (f) addresses the consequences of an appellant's or an appellee's failure to file a brief on time. This provision is misplaced because it applies to all

appeals, not just to cross-appeals. Moreover, another provision —Rule 8018(a)(4)—addresses the same subject, but differs in scope. A single rule addressing the issue would be better.

12-BK-036. Mary P. Sharon, Clerk (1st Cir. BAP). It is unclear why subdivision (f) is tucked in here. It also appears to duplicate Rule 8018(a)(4).

12-BK-026. Judge S. Martin Teel, Jr. (Bankr. D.D.C.). In subdivision (f) the authorization for dismissal of an appeal or cross-appeal should require notice and an opportunity to show cause why dismissal ought not be ordered. This issue is more logically addressed in Rule 8018.

12-BK-033. Judge Christopher M. Klein (Bankr. E.D. Cal.). Subdivision (d) addresses length and type-volume limitations similar to those in Rule 8015. A counterpart to Rule 8015(f) should be incorporated.

Rule 8017. Brief of an Amicus Curiae

1 (a) WHEN PERMITTED. The United States or its officer
2 or agency or a state may file an amicus-curiae brief without the
3 consent of the parties or leave of court. Any other amicus curiae
4 may file a brief only by leave of court or if the brief states that all
5 parties have consented to its filing. On its own motion, and with
6 notice to all parties to an appeal, the district court or BAP may
7 request a brief by an amicus curiae.
8 (b) MOTION FOR LEAVE TO FILE. The motion must
9 be accompanied by the proposed brief and state:
10 (1) the movant's interest; and
11 (2) the reason why an amicus brief is desirable and
12 why the matters asserted are relevant to the disposition of
13 the appeal.
14 (c) CONTENTS AND FORM. An amicus brief must
15 comply with Rule 8015. In addition to the requirements of Rule
16 8015, the cover must identify the party or parties supported and
17 indicate whether the brief supports affirmance or reversal. If an
18 amicus curiae is a corporation, the brief must include a disclosure
19 statement like that required of parties by Rule 8012. An amicus
20 brief need not comply with Rule 8014, but must include the
21 following:

22 (1) a table of contents, with page references;

23 (2) a table of authorities—cases (alphabetically
24 arranged), statutes, and other authorities—with references
25 to the pages of the brief where they are cited;

26 (3) a concise statement of the identity of the amicus
27 curiae, its interest in the case, and the source of its
28 authority to file;

29 (4) unless the amicus curiae is one listed in the first
30 sentence of subdivision (a), a statement that indicates
31 whether:

32 (A) a party's counsel authored the brief in
33 whole or in part;

34 (B) a party or a party's counsel contributed
35 money that was intended to fund preparing or
36 submitting the brief; and

37 (C) a person—other than the amicus curiae,
38 its members, or its counsel—contributed money that
39 was intended to fund preparing or submitting the
40 brief and, if so, identifies each such person;

41 (5) an argument, which may be preceded by a
42 summary and need not include a statement of the applicable
43 standard of review; and

44 (6) a certificate of compliance, if required by Rule
45 8015(a)(7)(C) or 8015(b).
46 (d) LENGTH. Except by the district court's or BAP's
47 permission, an amicus brief must be no more than one-half the
48 maximum length authorized by these rules for a party's principal
49 brief. If the court grants a party permission to file a longer brief,
50 that extension does not affect the length of an amicus brief.
51 (e) TIME FOR FILING. An amicus curiae must file its
52 brief, accompanied by a motion for filing when necessary, no later
53 than 7 days after the principal brief of the party being supported is
54 filed. An amicus curiae that does not support either party must file
55 its brief no later than 7 days after the appellant's principal brief is
56 filed. The district court or BAP may grant leave for later filing,
57 specifying the time within which an opposing party may answer.
58 (f) REPLY BRIEF. Except by the district court's or
59 BAP's permission, an amicus curiae may not file a reply brief.
60 (g) ORAL ARGUMENT. An amicus curiae may
61 participate in oral argument only with the district court's or BAP's
62 permission.

COMMITTEE NOTE

This rule is derived from F.R.App.P. 29. The former Part VIII rules did not address the participation by an amicus curiae in a bankruptcy appeal.

Subdivision (a) adopts the provisions of F.R.App.P. 29(a). In addition, it authorizes the district court or BAP on its own motion— with notice to the parties—to request the filing of a brief by an amicus curiae.

Subdivisions (b)-(g) adopt F.R.App.P. 29(b)-(g).

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

12-BK-010. The States' Association of Bankruptcy Attorneys. All governmental units should be permitted to file an amicus brief without consent or leave of court.

One stylistic comment was submitted.

Rule 8018. Serving and Filing Briefs; Appendices

1 (a) TIME TO SERVE AND FILE A BRIEF. The
2 following rules apply unless the district court or BAP by order in a
3 particular case excuses the filing of briefs or specifies different
4 time limits:
5 (1) The appellant must serve and file a brief within
6 30 days after the docketing of notice that the record has
7 been transmitted or is available electronically.
8 (2) The appellee must serve and file a brief within
9 30 days after service of the appellant's brief.
10 (3) The appellant may serve and file a reply brief
11 within 14 days after service of the appellee's brief, but a
12 reply brief must be filed at least 7 days before scheduled
13 argument unless the district court or BAP, for good cause,
14 allows a later filing.
15 (4) If an appellant fails to file a brief on time or
16 within an extended time authorized by the district court or
17 BAP, an appellee may move to dismiss the appeal—or the
18 district court or BAP, after notice, may dismiss the appeal
19 on its own motion. An appellee who fails to file a brief
20 will not be heard at oral argument unless the district court
21 or BAP grants permission.

22 (b) DUTY TO SERVE AND FILE AN APPENDIX TO
23 THE BRIEF.
24 (1) *Appellant*. Subject to subdivision (e) and Rule
25 8009(d), the appellant must serve and file with its principal
26 brief excerpts of the record as an appendix. It must contain
27 the following:
28 (A) the relevant entries in the bankruptcy
29 docket;
30 (B) the complaint and answer, or other
31 equivalent filings;
32 (C) the judgment, order, or decree from
33 which the appeal is taken;
34 (D) any other orders, pleadings, jury
35 instructions, findings, conclusions, or opinions
36 relevant to the appeal;
37 (E) the notice of appeal; and
38 (F) any relevant transcript or portion of it.
39 (2) *Appellee*. The appellee may also serve and file
40 with its brief an appendix that contains material required to
41 be included by the appellant or relevant to the appeal or
42 cross-appeal, but omitted by the appellant.
43 (3) *Cross-Appellee*. The appellant as cross-

44 appellee may also serve and file with its response an
45 appendix that contains material relevant to matters raised
46 initially by the principal brief in the cross-appeal, but
47 omitted by the cross-appellant.
48 (c) FORMAT OF THE APPENDIX. The appendix must
49 begin with a table of contents identifying the page at which each
50 part begins. The relevant docket entries must follow the table of
51 contents. Other parts of the record must follow chronologically.
52 When pages from the transcript of proceedings are placed in the
53 appendix, the transcript page numbers must be shown in brackets
54 immediately before the included pages. Omissions in the text of
55 documents or of the transcript must be indicated by asterisks.
56 Immaterial formal matters (captions, subscriptions,
57 acknowledgments, and the like) should be omitted.
58 (d) EXHIBITS. Exhibits designated for inclusion in the
59 appendix may be reproduced in a separate volume or volumes,
60 suitably indexed.
61 (e) APPEAL ON THE ORIGINAL RECORD WITHOUT
62 AN APPENDIX. The district court or BAP may, either by rule for
63 all cases or classes of cases or by order in a particular case,
64 dispense with the appendix and permit an appeal to proceed on the
65 original record, with the submission of any relevant parts of the

66 record that the district court or BAP orders the parties to file.

COMMITTEE NOTE

This rule is derived from former Rule 8009 and F.R.App.P. 30 and 31. Like former Rule 8009, it addresses the timing of serving and filing briefs and appendices, as well as the content and format of appendices. Rule 8011 governs the methods of filing and serving briefs and appendices.

The rule retains the bankruptcy practice of permitting the appellee to file its own appendix, rather than requiring the appellant to include in its appendix matters designated by the appellee. Rule 8016 governs the timing of serving and filing briefs when a cross-appeal is taken. This rule's provisions about appendices apply to all appeals, including cross-appeals.

Subdivision (a) retains former Rule 8009's provision that allows the district court or BAP to dispense with briefing or to provide different time periods than this rule specifies. It increases some of the time periods for filing briefs from the periods prescribed by the former rule, while still retaining shorter time periods than some provided by F.R.App.P. 31(a). The time for filing the appellant's brief is increased from 14 to 30 days after the docketing of the notice of the transmission of the record or notice of the availability of the record. That triggering event is equivalent to docketing the appeal under former Rule 8007. Appellate Rule 31(a)(1), by contrast, provides the appellant 40 days after the record is filed to file its brief. The shorter time period for bankruptcy appeals reflects the frequent need for greater expedition in the resolution of bankruptcy appeals, while still providing the appellant more time to prepare its brief than the former rule provided.

Subdivision (a)(2) similarly expands the time period for filing the appellee's brief from 14 to 30 days after the service of the appellant's brief. This period is the same as F.R. App. 31(a)(1) provides.

Subdivision (a)(3) retains the 14-day time period for filing a reply brief that the former rule prescribed, but it qualifies that period to ensure that the final brief is filed at least 7 days before oral argument.

If a district court or BAP has a mediation procedure for bankruptcy appeals, that procedure could affect when briefs must be filed. *See* Rule 8027.

Subdivision (a)(4) is new. Based on F.R.App.P. 31(c), it provides

for actions that may be taken—dismissal of the appeal or denial of participation in oral argument—if the appellant or appellee fails to file its brief.

Subdivisions (b) and (c) govern the content and format of the appendix to a brief. Subdivision (b) is similar to former Rule 8009(b), and subdivision (c) is derived from F.R.App.P. 30(d).

Subdivision (d), which addresses the inclusion of exhibits in the appendix, is derived from F.R.App.P. 30(e).

Changes Made After Publication

Subdivision (a)(4) was revised to provide more detail about the procedure for dismissing an appeal due to appellant's failure to timely file a brief.

Summary of Public Comment

12-BK-026. Judge S. Martin Teel, Jr. (Bankr. D.D.C.). In Rule 8016(f), the authorization for dismissal of an appeal or cross-appeal should require notice and an opportunity to show cause why dismissal ought not be ordered. This issue is more logically addressed in Rule 8018.

12-BK-005. Judge Robert J. Kressel (Bankr. D. Minn.). Subdivision (e) allows the appellate court to dispense with the appendix and permit an appeal to proceed on the original record. Similar language should be included in Rule 8009.

One stylistic comment was submitted.

Rule 8019. Oral Argument

1 (a) PARTY'S STATEMENT. Any party may file, or a
2 district court or BAP may require, a statement explaining why oral
3 argument should, or need not, be permitted.
4 (b) PRESUMPTION OF ORAL ARGUMENT AND
5 EXCEPTIONS. Oral argument must be allowed in every case
6 unless the district judge—or all the BAP judges assigned to hear
7 the appeal—examine the briefs and record and determine that oral
8 argument is unnecessary because
9 (1) the appeal is frivolous;
10 (2) the dispositive issue or issues have been
11 authoritatively decided; or
12 (3) the facts and legal arguments are adequately
13 presented in the briefs and record, and the decisional
14 process would not be significantly aided by oral argument.
15 (c) NOTICE OF ARGUMENT; POSTPONEMENT. The
16 district court or BAP must advise all parties of the date, time, and
17 place for oral argument, and the time allowed for each side. A
18 motion to postpone the argument or to allow longer argument must
19 be filed reasonably in advance of the hearing date.
20 (d) ORDER AND CONTENTS OF ARGUMENT. The
21 appellant opens and concludes the argument. Counsel must not

22 read at length from briefs, the record, or authorities.

23 (e) CROSS-APPEALS AND SEPARATE APPEALS. If
24 there is a cross-appeal, Rule 8016(b) determines which party is the
25 appellant and which is the appellee for the purposes of oral
26 argument. Unless the district court or BAP directs otherwise, a
27 cross-appeal or separate appeal must be argued when the initial
28 appeal is argued. Separate parties should avoid duplicative
29 argument.

30 (f) NONAPPEARANCE OF A PARTY. If the appellee
31 fails to appear for argument, the district court or BAP may hear the
32 appellant's argument. If the appellant fails to appear for argument,
33 the district court or BAP may hear the appellee's argument. If
34 neither party appears, the case will be decided on the briefs unless
35 the district court or BAP orders otherwise.

36 (g) SUBMISSION ON BRIEFS. The parties may agree to
37 submit a case for decision on the briefs, but the district court or
38 BAP may direct that the case be argued.

39 (h) USE OF PHYSICAL EXHIBITS AT ARGUMENT;
40 REMOVAL. Counsel intending to use physical exhibits other than
41 documents at the argument must arrange to place them in the
42 courtroom on the day of the argument before the court convenes.
43 After the argument, counsel must remove the exhibits from the

44 courtroom unless the district court or BAP directs otherwise. The
45 clerk may destroy or dispose of the exhibits if counsel does not
46 reclaim them within a reasonable time after the clerk gives notice
47 to remove them.

COMMITTEE NOTE

This rule generally retains the provisions of former Rule 8012 and adds much of the additional detail of F.R.App.P. 34. By incorporating the more detailed provisions of the appellate rule, Rule 8019 promotes national uniformity regarding oral argument in bankruptcy appeals.

Subdivision (a), like F.R.App.P. 34(a)(1), now allows a party to submit a statement explaining why oral argument is or is not needed. It also authorizes a court to require this statement. Former Rule 8012 only authorized statements explaining why oral argument should be allowed.

Subdivision (b) retains the reasons set forth in former Rule 8012 for the district court or BAP to conclude that oral argument is not needed.

The remainder of this rule adopts the provisions of F.R.App.P. 34(b)-(g), with one exception. Rather than requiring the district court or BAP to hear appellant's argument if the appellee does not appear, subdivision (f) authorizes the district court or BAP to go forward with the argument in the appellee's absence. Should the court decide, however, to postpone the oral argument in that situation, it would be authorized to do so.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

12-BK-005. Judge Robert J. Kressel (Bankr. D. Minn.). There should not be a presumption in favor of oral argument. Furthermore, the grounds for not allowing it should not be limited. It is sometimes not granted for other reasons, such as the need for an expedited decision or issues of cost.
12-BK-014. Judge Dennis Montali (Bankr. N.D. Cal.). There is an

inconsistency between subdivisions (b) and (g). Subdivision (b) requires unanimity among the panel of BAP judges to dispense with oral argument, yet subdivision (g) says that the BAP may direct a case to be argued even though the parties agreed to submit it on the briefs. A simple majority of the judges should be sufficient in either situation.

12-BK-027. William McNeil (Attorney, Malvern, Pennsylvania). The Committee Note regarding subdivision (f) is inconsistent with the rule. The note states that if the appellee does not appear, the court is authorized to postpone oral argument. Subdivision (f), however, authorizes postponement only if both parties fail to appear. An appellant who appears for oral argument should not be forced to reappear at a postponed argument just because the other party failed to appear.

12-BK-036. Mary P. Sharon, Clerk (1st Cir. BAP). Subdivision (d) regarding order and contents of argument is unnecessary. Subdivision (g) does not provide the means by which the parties inform the court of their agreement to submit the case for decision on the briefs.

One stylistic comment was submitted.

Rule 8020. Frivolous Appeal and Other Misconduct

1 (a) FRIVOLOUS APPEAL—DAMAGES AND COSTS.
2 If the district court or BAP determines that an appeal is frivolous,
3 it may, after a separately filed motion or notice from the court and
4 reasonable opportunity to respond, award just damages and single
5 or double costs to the appellee.
6 (b) OTHER MISCONDUCT. The district court or BAP
7 may discipline or sanction an attorney or party appearing before it
8 for other misconduct, including failure to comply with any court
9 order. First, however, the court must afford the attorney or party
10 reasonable notice, an opportunity to show cause to the contrary,
11 and, if requested, a hearing.

COMMITTEE NOTE

This rule is derived from former Rule 8020 and F.R.App.P. 38 and 46(c). Subdivision (a) permits an award of damages and costs to an appellee for a frivolous appeal. Subdivision (b) permits the district court or BAP to impose on parties as well as their counsel sanctions for misconduct other than taking a frivolous appeal. Failure to comply with a court order, for which sanctions may be imposed, may include a failure to comply with a local court rule.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

12-BK-033. Judge Christopher M. Klein (Bankr. E.D. Cal.). Subdivision (b) provides sanctioning authority for the "failure to comply with any court order." It would be better to add "or local rule" after "order." The Committee Note states that failure to comply with a court order may include a failure to comply with a local court rule, but people do not always read Committee Notes, and some courts do not consider them authoritative.

Rule 8021. Costs

1 (a) AGAINST WHOM ASSESSED. The following rules
2 apply unless the law provides or the district court or BAP orders
3 otherwise:
4 (1) if an appeal is dismissed, costs are taxed against
5 the appellant, unless the parties agree otherwise;
6 (2) if a judgment, order, or decree is affirmed, costs
7 are taxed against the appellant;
8 (3) if a judgment, order, or decree is reversed, costs
9 are taxed against the appellee;
10 (4) if a judgment, order, or decree is affirmed or
11 reversed in part, modified, or vacated, costs are taxed only
12 as the district court or BAP orders.
13 (b) COSTS FOR AND AGAINST THE UNITED
14 STATES. Costs for or against the United States, its agency, or its
15 officer may be assessed under subdivision (a) only if authorized
16 by law.
17 (c) COSTS ON APPEAL TAXABLE IN THE
18 BANKRUPTCY COURT. The following costs on appeal are
19 taxable in the bankruptcy court for the benefit of the party entitled
20 to costs under this rule:
21 (1) the production of any required copies of a brief,

22 appendix, exhibit, or the record;

23 (2) the preparation and transmission of the record;

24 (3) the reporter's transcript, if needed to determine

25 the appeal;

26 (4) premiums paid for a supersedeas bond or other

27 bonds to preserve rights pending appeal; and

28 (5) the fee for filing the notice of appeal.

29 (d) BILL OF COSTS; OBJECTIONS. A party who wants

30 costs taxed must, within 14 days after entry of judgment on appeal,

31 file with the bankruptcy clerk, with proof of service, an itemized

32 and verified bill of costs. Objections must be filed within 14 days

33 after service of the bill of costs, unless the bankruptcy court

34 extends the time.

COMMITTEE NOTE

This rule is derived from former Rule 8014 and F.R.App.P. 39. It retains the former rule's authorization for taxing appellate costs against the losing party and its specification of the costs that may be taxed. The rule also incorporates some of the additional details regarding the taxing of costs contained in F.R.App.P. 39. Consistent with former Rule 8014, the bankruptcy clerk has the responsibility for taxing all costs. Subdivision (b), derived from F.R.App.P. 39(b), clarifies that additional authority is required for the taxation of costs by or against federal governmental parties.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

12-BK-010. The States' Association of Bankruptcy Attorneys.
Subdivision (b) should be expanded to apply to all governmental units, not just to the United States and its agencies and officers.

Rule 8022. Motion for Rehearing.

1 (a) TIME TO FILE; CONTENTS; RESPONSE; ACTION
2 BY THE DISTRICT COURT OR BAP IF GRANTED.
3 (1) *Time.* Unless the time is shortened or extended
4 by order or local rule, any motion for rehearing by the
5 district court or BAP must be filed within 14 days after
6 entry of judgment on appeal.
7 (2) *Contents*. The motion must state with
8 particularity each point of law or fact that the movant
9 believes the district court or BAP has overlooked or
10 misapprehended and must argue in support of the motion.
11 Oral argument is not permitted.
12 (3) *Response*. Unless the district court or BAP
13 requests, no response to a motion for rehearing is
14 permitted. But ordinarily, rehearing will not be granted in
15 the absence of such a request.
16 (4) *Action by the District Court or BAP*. If a
17 motion for rehearing is granted, the district court or BAP
18 may do any of the following:
19 (A) make a final disposition of the appeal
20 without reargument;
21 (B) restore the case to the calendar for

22 reargument or resubmission; or

23 (C) issue any other appropriate order.

24 (b) FORM OF THE MOTION; LENGTH. The motion

25 must comply in form with Rule 8013(f)(1) and (2). Copies must

26 be served and filed as provided by Rule 8011. Unless the district

27 court or BAP orders otherwise, a motion for rehearing must not

28 exceed 15 pages.

COMMITTEE NOTE

This rule is derived from former Rule 8015 and F.R.App.P. 40. It deletes the provision of former Rule 8015 regarding the time for appeal to the court of appeals because the matter is addressed by F.R.App.P. 6(b)(2)(A).

Changes Made After Publication

In subdivision (b), the reference to local rule was deleted as unnecessary.

Summary of Public Comment

12-BK-036. Mary P. Sharon, Clerk (1st Cir. BAP). It would give the courts more flexibility to state in subdivision (a)(2) that there is no oral argument on a motion for rehearing unless the court orders otherwise. An absolute prohibition seems unnecessary.

One stylistic comment was submitted.

Rule 8023. Voluntary Dismissal

1 The clerk of the district court or BAP must dismiss an
2 appeal if the parties file a signed dismissal agreement specifying
3 how costs are to be paid and pay any fees that are due. An appeal
4 may be dismissed on the appellant's motion on terms agreed to by
5 the parties or fixed by the district court or BAP.

COMMITTEE NOTE

This rule is derived from former Rule 8001(c) and F.R.App.P. 42. The provision of the former rule regarding dismissal of appeals in the bankruptcy court prior to docketing of the appeal has been deleted. Now that docketing occurs promptly after a notice of appeal is filed, *see* Rules 8003(d) and 8004(c), an appeal likely will not be voluntarily dismissed before docketing.

The rule retains the provision of the former rule that the district or BAP clerk must dismiss an appeal upon the parties' agreement. District courts and BAPs continue to have discretion to dismiss an appeal on an appellant's motion. Nothing in the rule prohibits a district court or BAP from dismissing an appeal for other reasons authorized by law, such as the failure to prosecute an appeal.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

12-BK-008. National Conference of Bankruptcy Judges. The proposed rule is consistent with current practice under Rule 8001(c), and the NCBJ supports its adoption. The rule, however, presents two issues that the Committee should consider in the near future. (1) It does not account for the possibility that an appeal may concern an objection to discharge under § 727(a). In the bankruptcy court, Rule 7041 provides that a plaintiff may not dismiss this type of action without giving notice and obtaining a court order

containing appropriate terms and conditions. Consideration should be given to including similar safeguards in this rule. (2) The rule also does not take into account that a bankruptcy trustee may be a party to an appeal that is voluntarily dismissed. Under Rule 9019 the trustee is required to obtain court approval of any compromise. The rule does not make clear how it relates to Rule 9019.

12-BK-036. Mary P. Sharon, Clerk (1st Cir. BAP). The rule provides that the appellate court must dismiss if the parties file an agreement. Since they are requesting relief, according to Rule 8013(a) they should have to file a motion.

Rule 8024. Clerk's Duties on Disposition of the Appeal

1 (a) JUDGMENT ON APPEAL. The district or BAP clerk
2 must prepare, sign, and enter the judgment after receiving the
3 court's opinion or, if there is no opinion, as the court instructs.
4 Noting the judgment on the docket constitutes entry of judgment.
5 (b) NOTICE OF A JUDGMENT. Immediately upon the
6 entry of a judgment, the district or BAP clerk must:
7 (1) transmit a notice of the entry to each party to
8 the appeal, to the United States trustee, and to the
9 bankruptcy clerk, together with a copy of any opinion; and
10 (2) note the date of the transmission on the docket.
11 (c) RETURNING PHYSICAL ITEMS. If any physical
12 items were transmitted as the record on appeal, they must be
13 returned to the bankruptcy clerk on disposition of the appeal.

COMMITTEE NOTE

This rule is derived from former Rule 8016, which was adapted from F.R.App.P. 36 and 45(c) and (d). The rule is reworded to reflect that only items in the record that are physically, as opposed to electronically, transmitted to the district court or BAP need to be returned to the bankruptcy clerk. Other changes to the former rule are stylistic.

Changes Made After Publication

Stylistic changes were made to subdivision (c) and the Committee Note.

Summary of Public Comment

12-BK-040. Bankruptcy Clerks Advisory Group. Subdivision (c) refers to returning "original" documents. The bankruptcy clerk would not be transmitting original documents as the record on appeal. It therefore would be better to refer to "any paper documents."

12-BK-008. National Conference of Bankruptcy Judges. The proposed rule carries forward a problem in current rule 8016. It fails to address when jurisdiction revests in the bankruptcy court after an appeal. The Federal Rules of Appellate Procedure resolve this problem for appeals from the district court to the court of appeals by providing for the issuance of a mandate by the appellate court. Until the mandate is issued, the district court generally lacks authority to take any action with respect to the matters involved in the appeal. Proposed Rule 8024 lacks any comparable provision, even though it provides for the appellate clerk's transmission of notice of entry of judgment, with a copy of any opinion, to the parties, the U.S. trustee, and the bankruptcy clerk. The rule should adopt a mandate requirement with time limits for the issuance of the mandate and a provision for when it becomes effective. Because the problem exists with the current rule and does not seem to be disrupting bankruptcy administration unduly, promulgation of this rule should not be delayed. But the Committee should consider the issue in the near future.

Rule 8025. Stay of a District Court or BAP Judgment

(a) AUTOMATIC STAY OF JUDGMENT ON APPEAL. Unless the district court or BAP orders otherwise, its judgment is stayed for 14 days after entry.

(b) STAY PENDING APPEAL TO THE COURT OF APPEALS.

(1) *In General*. On a party's motion and notice to all other parties to the appeal, the district court or BAP may stay its judgment pending an appeal to the court of appeals.

(2) *Time Limit*. The stay must not exceed 30 days after the judgment is entered, except for cause shown.

(3) *Stay Continued*. If, before a stay expires, the party who obtained the stay appeals to the court of appeals, the stay continues until final disposition by the court of appeals.

(4) *Bond or Other Security*. A bond or other security may be required as a condition for granting or continuing a stay of the judgment. A bond or other security may be required if a trustee obtains a stay, but not if a stay is obtained by the United States or its officer or agency or at the direction of any department of the United States government.

22 (c) AUTOMATIC STAY OF AN ORDER, JUDGMENT,
23 OR DECREE OF A BANKRUPTCY COURT. If the district court
24 or BAP enters a judgment affirming an order, judgment, or decree
25 of the bankruptcy court, a stay of the district court's or BAP's
26 judgment automatically stays the bankruptcy court's order,
27 judgment, or decree for the duration of the appellate stay.
28 (d) POWER OF A COURT OF APPEALS NOT
29 LIMITED. This rule does not limit the power of a court of appeals
30 or any of its judges to do the following:
31 (1) stay a judgment pending appeal;
32 (2) stay proceedings while an appeal is pending;
33 (3) suspend, modify, restore, vacate, or grant a stay
34 or an injunction while an appeal is pending; or
35 (4) issue any order appropriate to preserve the
36 status quo or the effectiveness of any judgment to be
37 entered.

COMMITTEE NOTE

This rule is derived from former Rule 8017. Most of the changes to the former rule are stylistic. Subdivision (c) is new. It provides that if a district court or BAP affirms the bankruptcy court ruling and the appellate judgment is stayed, the bankruptcy court's order, judgment, or decree that is affirmed on appeal is automatically stayed to the same extent as the stay of the appellate judgment.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

No comments were submitted.

Rule 8026. Rules by Circuit Councils and District Courts; Procedure When There is No Controlling Law

1 (a) LOCAL RULES BY CIRCUIT COUNCILS AND
2 DISTRICT COURTS.
3 (1) *Adopting Local Rules*. A circuit council that
4 has authorized a BAP under 28 U.S.C. § 158(b) may make
5 and amend rules governing the practice and procedure on
6 appeal from a judgment, order, or decree of a bankruptcy
7 court to the BAP. A district court may make and amend
8 rules governing the practice and procedure on appeal from
9 a judgment, order, or decree of a bankruptcy court to the
10 district court. Local rules must be consistent with, but not
11 duplicative of, Acts of Congress and these Part VIII rules.
12 Rule 83 F.R.Civ.P. governs the procedure for making and
13 amending rules to govern appeals.
14 (2) *Numbering*. Local rules must conform to any
15 uniform numbering system prescribed by the Judicial
16 Conference of the United States.
17 (3) *Limitation on Imposing Requirements of Form*.
18 A local rule imposing a requirement of form must not be
19 enforced in a way that causes a party to lose any right
20 because of a nonwillful failure to comply.
21 (b) PROCEDURE WHEN THERE IS NO

22 CONTROLLING LAW.

23 (1) *In General*. A district court or BAP may

24 regulate practice in any manner consistent with federal law,

25 applicable federal rules, the Official Forms, and local rules.

26 (2) *Limitation on Sanctions*. No sanction or other

27 disadvantage may be imposed for noncompliance with any

28 requirement not in federal law, applicable federal rules, the

29 Official Forms, or local rules unless the alleged violator has

30 been furnished in the particular case with actual notice of

31 the requirement.

COMMITTEE NOTE

This rule is derived from former Rule 8018. The changes to the former rule are stylistic.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

No comments were submitted.

Rule 8027. Notice of a Mediation Procedure

1 If the district court or BAP has a mediation procedure
2 applicable to bankruptcy appeals, the clerk must notify the parties
3 promptly after docketing the appeal of:
4 (a) the requirements of the mediation procedure; and
5 (b) any effect the mediation procedure has on the time to
6 file briefs.

COMMITTEE NOTE

This rule is new. It requires the district or BAP clerk to advise the parties promptly after an appeal is docketed of any court mediation procedure that is applicable to bankruptcy appeals. The notice must state what the mediation requirements are and how the procedure affects the time for filing briefs.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

No comments were submitted.

Rule 8028. Suspension of Rules in Part VIII

1 In the interest of expediting decision or for other cause in a
2 particular case, the district court or BAP, or where appropriate the
3 court of appeals, may suspend the requirements or provisions of
4 the rules in Part VIII, except Rules 8001, 8002, 8003, 8004, 8005,
5 8006, 8007, 8012, 8020, 8024, 8025, 8026, and 8028.

COMMITTEE NOTE

This rule is derived from former Rule 8019 and F.R.App.P. 2. To promote uniformity of practice and compliance with statutory authority, the rule includes a more extensive list of requirements that may not be suspended than either the former rule or the Federal Rules of Appellate Procedure provide. Rules governing the following matters may not be suspended:

- scope of the rules; definition of "BAP"; method of transmission;
- time for filing a notice of appeal;
- taking an appeal as of right;
- taking an appeal by leave;
- election to have an appeal heard by a district court instead of a BAP;
- certification of direct appeal to a court of appeals;
- stay pending appeal;
- corporate disclosure statement;
- sanctions for frivolous appeals and other misconduct;
- clerk's duties on disposition of an appeal;
- stay of a district court's or BAP's judgment;
- local rules; and
- suspension of the Part VIII rules.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

No comments were submitted.

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APPENDIX A.3

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Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 3A

Application for Individuals to Pay the Filing Fee in Installments

12/13

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information.

Part 1: Specify Your Proposed Payment Timetable

1. Which chapter of the Bankruptcy Code are you choosing to file under?

❑ Chapter 7..... *Fee*: **$306**
❑ Chapter 11..... *Fee*: **$1,213**
❑ Chapter 12..... *Fee*: **$246**
❑ Chapter 13..... *Fee*: **$281**

2. You may apply to pay the filing fee in up to four installments. Fill in the amounts you propose to pay and the dates you plan to pay them. Be sure all dates are business days. Then add the payments you propose to pay.

You must propose to pay the entire fee no later than 120 days after you file this bankruptcy case. If the court approves your application, the court will set your final payment timetable.

You propose to pay…

$_____ ❑ With the filing of the petition
❑ On or before this date..... _____ MM / DD / YYYY

$_____ On or before this date ..... _____ MM / DD / YYYY

$_____ On or before this date ..... _____ MM / DD / YYYY

+ $_____ On or before this date ..... _____ MM / DD / YYYY

Total $_____ ◀ Your total must equal the entire fee for the chapter you checked in line 1.

Part 2: Sign Below

By signing here, you state that you are unable to pay the full filing fee at once, that you want to pay the fee in installments, and that you understand that:

- You must pay your entire filing fee before you make any more payments or transfer any more property to an attorney, bankruptcy petition preparer, or anyone else for services in connection with your bankruptcy case.
- You must pay the entire fee no later than 120 days after you first file for bankruptcy, unless the court later extends your deadline. Your debts will not be discharged until your entire fee is paid.
- If you do not make any payment when it is due, your bankruptcy case may be dismissed, and your rights in other bankruptcy proceedings may be affected.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

✘ _____
Your attorney's name and signature, if you used one

Date _____
MM / DD / YYYY

12b-007602

Fill in this information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number (*If known*): _____ Chapter filing under:

- ❑ Chapter 7
- ❑ Chapter 11
- ❑ Chapter 12
- ❑ Chapter 13

Order Approving Payment of Filing Fee in Installments

After considering the *Application for Individuals to Pay the Filing Fee in Installments* (Official Form 3A), the court orders that:

[ ] The debtor(s) may pay the filing fee in installments on the terms proposed in the application.

[ ] The debtor(s) must pay the filing fee according to the following terms:

	You must pay…	**On or before this date…**
	$_____	_____ Month / day / year
	$_____	_____ Month / day / year
	$_____	_____ Month / day / year
+	$_____	_____ Month / day / year
Total	$_____	

Until the filing fee is paid in full, the debtor(s) must not make any additional payment or transfer any additional property to an attorney or to anyone else for services in connection with this case.

_____ **By the court:** _____
Month / day / year United States Bankruptcy Judge

12b-007603

Official Form 3A

Instructions for the Application for Individuals to Pay the Filing Fee in Installments

United States Bankruptcy Court 12/01/13

How to Fill Out the Application

If you cannot afford to pay the full filing fee when you first file for bankruptcy, you may pay the fee in installments. However, in most cases, you must pay the entire fee within 120 days of when you file, and the court must approve your payment timetable. If necessary after the court establishes the initial schedule, you may ask the court to extend the deadline to 180 days after you file. In that case, you must explain why you need the extension. Your debts will not be discharged until you pay your entire fee.

Do not file this form if you can afford to pay your full fee when you file.

If you are filing under chapter 7 and cannot afford to pay the full filing fee at all, you may be qualified to ask the court to waive your filing fee. See *Application to Have Your Chapter 7 Filing Fee Waived* (Official Form 3B).

If a bankruptcy petition preparer helped you complete this form, make sure that person fills out the *Declaration and Signature of Non-Attorney Bankruptcy Petition Preparer* (Official Form 19); include a copy of it in this package.

Things to remember when filling out this form

- Be as complete and accurate as possible.
- If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known).
- If two married people are filing together, both are equally responsible for supplying correct information.

Do not file these instructions with your bankruptcy filing package. Keep them for your records.

12b-007604

COMMITTEE NOTE

This form, which applies only in cases of individual debtors, has been revised as part of the Forms Modernization Project, making the form easier to read and, as a result, likely to generate more complete and accurate responses. Also, the declaration and signature section for a non-attorney bankruptcy petition preparer (BPP) has been removed as unnecessary. The same declaration, required under 11 U.S.C. § 110, is contained in Official Form 19. That form must be completed and signed by the BPP, and filed with each document for filing prepared by a BPP.

Changes Made After Publication

The instruction that the debtor must propose to pay the entire fee no later than 120 days after "you first file for bankruptcy" was changed to "after you file this bankruptcy case."

Reference to the possibility of an extension to pay the fee beyond 120 days after filing was moved from the form to the instructions.

The instruction in the signature box regarding payments to others before the filing fee is paid was revised by adding the words "for services" as follows: "You must pay your entire filing fee before you make any more payments or transfer any more property to an attorney, bankruptcy petition preparer, or anyone else for services in connection with your bankruptcy case."

Summary of Public Comment

12-BK-012. Walter Oney[1] (Attorney, Fitchburg, Massachusetts). The form should take a position on whether the debtor may pay part of the filing fee through the chapter 13 plan. The form should include space for a debtor to explain why an extension of the final date for payment is needed. The instruction that the debtor must propose to pay the entire fee no later than 120 days after "you first file for bankruptcy" should be changed to "after you file this bankruptcy case." It is not clear why the debtor's attorney is asked to sign the form.

12-BK-046. National Association of Consumer Bankruptcy Attorneys. The instruction in the signature box not to pay

[1] Comments 12-BK-007, -019, -021, -023, -030, -039, -041 expressed agreement with Mr. Oney.

“anyone else in connection with your bankruptcy case” until the entire filing fee is paid should be removed because chapter 13 debtors often make payments to the trustee while their filing fee installments are still being paid. The order should include an option for paying the filing fee installments through a chapter 13 plan.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 3B

Application to Have the Chapter 7 Filing Fee Waived

12/13

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known).

Part 1: Tell the Court About Your Family and Your Family's Income

1. What is the size of your family?

Your family includes you, your spouse, and any dependents listed on *Schedule J: Current Expenditures of Individual Debtor(s)* (Official Form 6J).

Check all that apply:

❑ You
❑ Your spouse
❑ Your dependents _____ How many dependents?

_____ Total number of people

2. Fill in your family's average monthly income.

Include your spouse's income if your spouse is living with you, even if your spouse is not filing.

Do not include your spouse's income if you are separated and your spouse is not filing with you.

Add your income and your spouse's income. Include the value (if known) of any non-cash governmental assistance that you receive, such as food stamps (benefits under the Supplemental Nutrition Assistance Program) or housing subsidies.

If you have already filled out *Schedule I: Your Income,* see line 10 of that schedule.

		That person's average monthly net income (take-home pay)
You		$_____
Your spouse ...	+	$_____
Subtotal.....		$_____
Subtract any non-cash governmental assistance that you included above.	−	$_____
Your family's average monthly net income Total.....		$_____

3. Do you receive non-cash governmental assistance?

❑ No
❑ Yes. Describe.....

Type of assistance

4. Do you expect your family's average monthly net income to increase or decrease by more than 10% during the next 6 months?

❑ No
❑ Yes. Explain. .....

5. Tell the court why you are unable to pay the filing fee in installments within 120 days. If you have some additional circumstances that cause you to not be able to pay your filing fee in installments, explain them.

12b-007607

Part 2: Tell the Court About Your Monthly Expenses

6. Estimate your average monthly expenses.

Include amounts paid by any government assistance that you reported on line 2.

If you have already filled out *Schedule J, Your Expenses,* copy line 22 from that form.

$_____

7. Do these expenses cover anyone who is not included in your family as reported in line 1?

- ❑ No
- ❑ Yes. Identify who .....

8. Does anyone other than you regularly pay any of these expenses?

If you have already filled out *Schedule I: Your Income*, copy the total from line 11.

- ❑ No
- ❑ Yes. How much do you regularly receive as contributions? $_____ monthly

9. Do you expect your average monthly expenses to increase or decrease by more than 10% during the next 6 months?

- ❑ No
- ❑ Yes. Explain .....

Part 3: Tell the Court About Your Property

If you have already filled out *Schedule A: Real Property (Official Form 6A)* and *Schedule B: Personal Property (Official Form 6B)*, attach copies to this application and go to Part 4.

10. How much cash do you have?

Examples: Money you have in your wallet, in your home, and on hand when you file this application

Cash: $_____

11. Bank accounts and other deposits of money?

Examples: Checking, savings, money market, or other financial accounts; certificates of deposit; shares in banks, credit unions, brokerage houses, and other similar institutions. If you have more than one account with the same institution, list each. Do not include 401(k) and IRA accounts.

	Institution name:	Amount:
Checking account:	_____	$_____
Savings account:	_____	$_____
Other financial accounts:	_____	$_____
Other financial accounts:	_____	$_____

12. Your home? (if you own it outright or are purchasing it)

Examples: House, condominium, manufactured home, or mobile home

_____
Number Street

_____
City State ZIP Code

Current value: $_____

Amount you owe on mortgage and liens: $_____

13. Other real estate?

_____
Number Street

_____
City State ZIP Code

Current value: $_____

Amount you owe on mortgage and liens: $_____

14. The vehicles you own?

Examples: Cars, vans, trucks, sports utility vehicles, motorcycles, tractors, boats

Make: _____
Model: _____
Year: _____
Mileage _____

Current value: $_____

Amount you owe on liens: $_____

Make: _____
Model: _____
Year: _____
Mileage _____

Current value: $_____

Amount you owe on liens: $_____

12b-007608

15. Other assets?

Do not include household items and clothing.

Describe the other assets:

Current value: $_____

Amount you owe on liens: $_____

16. Money or property due you?

Examples: Tax refunds, past due or lump sum alimony, spousal support, child support, maintenance, divorce or property settlements, Social Security benefits, Workers' compensation, personal injury recovery

Who owes you the money or property?

_____

_____

How much is owed?

$_____

$_____

Do you believe you will likely receive payment in the next 180 days?

❑ No

❑ Yes. Explain:

Part 4: Answer These Additional Questions

17. Have you paid anyone for services for this case, including filling out this application, the bankruptcy filing package, or the schedules?

❑ No

❑ Yes. **Whom did you pay?** *Check all that apply:*

- ❑ An attorney
- ❑ A bankruptcy petition preparer, paralegal, or typing service
- ❑ Someone else _____

How much did you pay?

$_____

18. Have you promised to pay or do you expect to pay someone for services for your bankruptcy case?

❑ No

❑ Yes. **Whom do you expect to pay?** *Check all that apply:*

- ❑ An attorney
- ❑ A bankruptcy petition preparer, paralegal, or typing service
- ❑ Someone else _____

How much do you expect to pay?

$_____

19. Has anyone paid someone on your behalf for services for this case?

❑ No

❑ Yes. **Who was paid on your behalf?** *Check all that apply:*

- ❑ An attorney
- ❑ A bankruptcy petition preparer, paralegal, or typing service
- ❑ Someone else _____

Who paid? *Check all that apply:*

- ❑ Parent
- ❑ Brother or sister
- ❑ Friend
- ❑ Pastor or clergy
- ❑ Someone else _____

How much did someone else pay?

$_____

20. Have you filed for bankruptcy within the last 8 years?

❑ No

❑ Yes. District _____ When _____ (MM/ DD/ YYYY) Case number _____

District _____ When _____ (MM/ DD/ YYYY) Case number _____

District _____ When _____ (MM/ DD/ YYYY) Case number _____

Part 5: Sign Below

By signing here under penalty of perjury, I declare that I cannot afford to pay the filing fee either in full or in installments. I also declare that the information I provided in this application is true and correct.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

12b-007609

Fill in this information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Order on the Application to Have the Chapter 7 Filing Fee Waived

After considering the debtor's *Application to Have the Chapter 7 Filing Fee Waived* (Official Form 3B), the court orders that the application is:

[ ] Granted. However, the court may order the debtor to pay the fee in the future if developments in administering the bankruptcy case show that the waiver was unwarranted.

[ ] Denied. The debtor must pay the $306 filing fee according to the following terms:

	You must pay…	**On or before this date…**
	$_____.____	_____ Month / day / year
	$_____.____	_____ Month / day / year
	$_____.____	_____ Month / day / year
+	$_____.____	_____ Month / day / year
Total	$ 306.00	

If the debtor would like to propose a different payment timetable, the debtor must file a motion promptly with a payment proposal. The debtor may use *Application for Individuals to Pay the Filing Fee in Installments* (Official Form 3A) for this purpose. The court will consider it.

The debtor must pay the entire filing fee before making any more payments or transferring any more property to an attorney, bankruptcy petition preparer, or anyone else in connection with the bankruptcy case. The debtor must also pay the entire filing fee to receive a discharge. If the debtor does not make any payment when it is due, the bankruptcy case may be dismissed and the debtor's rights in future bankruptcy cases may be affected.

[ ] Scheduled for hearing.

A hearing to consider the debtor's application will be held

on _____ at _____:_____ AM / PM at _____.
Month / day / year Address of courthouse

If the debtor does not appear at this hearing, the court may deny the application.

_____ **By the court:** _____
Month / day / year United States Bankruptcy Judge

12b-007610

Official Form 3B

Instructions for the Application to Have the Chapter 7 Filing Fee Waived

United States Bankruptcy Court 12/01/2013

How to Fill Out the Application

The fee for filing a bankruptcy case under Chapter 7 is $306. If you cannot afford to pay the entire fee now in full or in installments within 120 days, use this form. If you can afford to pay your filing fee in installments, see *Application for Individuals to Pay the Filing Fee in Installments* (Official Form 3A).

If you file this form, you are asking the court to waive your fee. After reviewing your application, the court may waive your fee, set a hearing for further investigation, or require you to pay the fee in installments or in full.

For your fee to be waived, all of these statements must be true:

- You are filing for bankruptcy under Chapter 7.
- You are an individual.
- The total combined monthly income for your family is less than 150% of the official poverty guideline last published by the U.S. Department of Health and Human Services (DHHS). (For more information about the guidelines, go to http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyResources/PovertyGuidelines.aspx.)
- You cannot afford to pay the fee in installments.

  Your family includes you, your spouse, and any dependents listed on *Schedule J*. Your family may be different from your *household*, referenced on *Schedules I* and *J*. Your household may include your unmarried partner and others who live with you and with whom you share income and expenses.

If a bankruptcy petition preparer helped you complete this form, make sure that person fills out *Declaration and Signature of Non-Attorney Bankruptcy Petition Preparer* (Official Form 19); include a copy of it in this package.

If you have already completed the following forms, the information on them may help you when you fill out this application:

- *Schedule A: Real Property* (Official Form 6A)
- *Schedule I: Your Income* (Official Form 6I)
- *Schedule J: Your Expenses* (Official Form J)

Understand the terms used in this form

The *Application to Have the Chapter 7 Filing Fee Waived* (Official Form 3B) uses *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, this form uses *you* to ask for information from both debtors. For example, if the form asks, "Do you own a car?" the answer would be *yes* if either debtor owns a car. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Things to remember when filling out this form

- Be as complete and accurate as possible.
- If you have some additional circumstances that cause you to not be able to pay your filing fee in installments, explain them on line 5 of the form.
- If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known).
- If two married people are filing together, both are equally responsible for supplying correct information.

Do not file these instructions with your bankruptcy filing package. Keep them for your records.

COMMITTEE NOTE

This form, which applies only in cases of individual debtors, has been revised as part of the Forms Modernization Project, making the form easier to read and, as a result, likely to generate more complete and accurate responses. Additionally, in calculating the income that determines the debtor's initial eligibility for a fee waiver, line 2 of the form now directs the debtor to exclude non-cash governmental assistance, such as food stamps and housing subsidies. However, because non-cash governmental assistance may be relevant in evaluating the additional requirement that the debtor be unable to pay the filing fee, the nature of any such assistance is to be reported separately on line 3. Also, the declaration and signature section for a non-attorney bankruptcy petition preparer (BPP) has been removed as unnecessary. The same declaration, required under 11 U.S.C. § 110, is contained in Official Form 19. That form must be completed and signed by the BPP, and filed with each document for filing prepared by a BPP.

Changes Made After Publication

At line 2 of the form the calculation of the debtor's average monthly income was changed. The debtor is first instructed to report income including non-cash governmental assistance, if known, and then is instructed to subtract non-cash governmental assistance from that figure to calculate average monthly net income.

The following sentence was added at line 5 of the form: "If you have some additional circumstances that cause you to not be able to pay your filing fee in installments, explain them."

At line 6, the debtor is directed to include in the estimate of average monthly expenses any governmental assistance that was reported on line 2 of the form.

At line 20, the instruction to report any bankruptcy filing by the debtor's non-filing spouse was removed.

Summary of Public Comment

12-BK-012. Walter Oney[1] (Attorney, Fitchburg, Massachusetts). Mr. Oney submitted a 58-page comment that reviewed and critiqued the published forms on a line-by-line basis. His comments were detailed and addressed both stylistic and substantive matters. With regard to Official Form 3B, his most significant substantive comments were the following:

- The instructions in part 1 about non-cash governmental assistance are confusing. The debtor should be instructed to subtract the value of non-cash assistance included on Schedule I before filling out Line 2. The order of Lines 2 and 3 should be reversed.

- Schedule I does not capture all of the family income that 28 U.S.C. § 1930(f)(1) contemplates, and a pro se debtor is unlikely to know what to include on Form 3B.

- It is not clear why six months is a relevant time period for possible changes in income and expenses on Lines 4 and 9. Most chapter 7 cases are over in three months, and installment payments generally have to be completed in 120 days.

- Consider omitting Lines 12-16. If the reason for asking about these assets is to determine if the debtor could liquidate them in order to pay the filing fee, liens that might be avoided under § 522(f) should not be subtracted from the values. Because these assets are property of the estate, the debtor won't be able to liquidate them until the trustee abandons them, and that won't happen until after the fee is paid.

- Omit Line 20. The statute does not condition a fee waiver on the debtor not being a serial filer. It is not relevant to a fee waiver application whether a non-filing spouse has filed for bankruptcy. Consider adding a line for calculating 150% of the applicable poverty guidelines, which might be helpful to the court. Pro se debtors should be instructed not to complete this line.

12-BK-013. Judge James D. Walker, Jr. (Bankr. M.D. Ga.). Two questions should be added: (1) "Is your current financial situation the result of unusual circumstances? If yes, explain." (2) "Has anyone assisted you in the preparation of this form? If yes, what is your relationship to that person?" The first question would

[1] Comments 12-BK-007, -019, -021, -023, -030, -039, and -041 expressed agreement with Mr. Oney.

provide information necessary for deciding whether to grant a waiver – i.e., the circumstances that led to the bankruptcy filing and whether those circumstances are likely to be temporary or permanent. The answer to the second question could help the judge gauge the reliability of the information reported. For example, it may reveal that the debtor was assisted by an attorney acting pro bono.

12-BK-019. Penny Souhrada (Attorney, Davenport, Iowa). I do not believe that the Code requires revealing information about whether someone else paid for the services of an attorney or petition preparer. Will the court follow up by reviewing the listed person's finances and asking that person to help pay the debtor's debts?

12-BK-045. David S. Yen (Attorney, Legal Assistance Foundation of Metropolitan Chicago). The first question in Part 1 should be revised to instruct, like the current form, not to include a spouse if the debtor is separated and not filing jointly. The question about family members should be revised to capture information about an adult living with the debtor who is neither a spouse nor a dependent. Question 3 in Part 1 should be deleted because it is difficult to put a dollar value on non-cash government benefits, such as Medicaid, free or reduced price lunches, and public housing benefits. Instead, Question 6 should be revised to instruct: "If some of your expenses are paid for by non-cash government assistance such as food stamps or housing subsidies, list only the cash that your household spends on the subsidized items." The revised question addresses the relevant issue—the ability of the debtor to come up with cash. Question 20 should be revised to ask about previous bankruptcy cases of debtor 1 and debtor 2, not about a "spouse," who may not be filing with the debtor.

The order should include space for stating the reasons for denial without a hearing. It should also indicate that, if the waiver is denied and circumstances change or the reasons for the denial no longer apply, the debtor can ask the court to reconsider the denial.

12-BK-046. National Association of Consumer Bankruptcy Attorneys. There is no need to ask about non-cash government housing assistance. The debtor is unlikely to know that value and the difference between the market rent and the subsidized amount the debtor pays does not indicate anything about the debtor's ability to pay the filing fee. The current form seems cleaner and easier to read and fill out.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Check if this is:

- ❑ An amended filing
- ❑ A supplement showing post-petition chapter 13 income as of the following date:

_____
MM / DD / YYYY

Official Form 6I

Schedule I: Your Income

12/13

Be as complete and accurate as possible. If two married people are filing together (Debtor 1 and Debtor 2), both are equally responsible for supplying correct information. If you are married and not filing jointly, and your spouse is living with you, include information about your spouse. If you are separated and your spouse is not filing with you, do not include information about your spouse. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Describe Employment

1. **Fill in your employment information.**

If you have more than one job, attach a separate page with information about additional employers.

Include part-time, seasonal, or self-employed work.

Occupation may Include student or homemaker, if it applies.

	Debtor 1	Debtor 2 or non-filing spouse
Employment status	❑ Employed ❑ Not employed	❑ Employed ❑ Not employed
Occupation	_____	_____
Employer's name	_____	_____
Employer's address	_____ Number Street _____ _____ _____ City State ZIP Code	_____ Number Street _____ _____ _____ City State ZIP Code
How long employed there?	_____	_____

Part 2: Give Details About Monthly Income

Estimate monthly income as of the date you file this form. If you have nothing to report for any line, write $0 in the space. Include your non-filing spouse unless you are separated.

If you or your non-filing spouse have more than one employer, combine the information for all employers for that person on the lines below. If you need more space, attach a separate sheet to this form.

		For Debtor 1	For Debtor 2 or non-filing spouse
2. **List monthly gross wages, salary, and commissions** (before all payroll deductions). If not paid monthly, calculate what the monthly wage would be.	2.	$_____	$_____
3. **Estimate and list monthly overtime pay.**	3.	+ $_____	+ $_____
4. **Calculate gross income.** Add line 2 + line 3.	4.	$_____	$_____

12b-007615

		For Debtor 1	For Debtor 2 or non-filing spouse
Copy line 4 here ➔	4.	$_____	$_____
5. **List all payroll deductions:**			
5a. **Tax, Medicare, and Social Security deductions**	5a.	$_____	$_____
5b. **Mandatory contributions for retirement plans**	5b.	$_____	$_____
5c. **Voluntary contributions for retirement plans**	5c.	$_____	$_____
5d. **Required repayments of retirement fund loans**	5d.	$_____	$_____
5e. **Insurance**	5e.	$_____	$_____
5f. **Domestic support obligations**	5f.	$_____	$_____
5g. **Union dues**	5g.	$_____	$_____
5h. **Other deductions.** Specify: _____	5h.	+ $_____	+ $_____
6. **Add the payroll deductions**. Add lines 5a + 5b + 5c + 5d + 5e +5f + 5g +5h.	6.	$_____	$_____
7. **Calculate total monthly take-home pay.** Subtract line 6 from line 4.	7.	$_____	$_____
8. **List all other income regularly received:**			
8a. **Net income from rental property and from operating a business, profession, or farm** Attach a statement for each property and business showing gross receipts, ordinary and necessary business expenses, and the total monthly net income.	8a.	$_____	$_____
8b. **Interest and dividends**	8b.	$_____	$_____
8c. **Family support payments that you, a non-filing spouse, or a dependent regularly receive** Include alimony, spousal support, child support, maintenance, divorce settlement, and property settlement.	8c.	$_____	$_____
8d. **Unemployment compensation**	8d.	$_____	$_____
8e. **Social Security**	8e.	$_____	$_____
8f. **Other government assistance that you regularly receive** Include cash assistance and the value (if known) of any non-cash assistance that you receive, such as food stamps (benefits under the Supplemental Nutrition Assistance Program) or housing subsidies. Specify: _____	8f.	$_____	$_____
8g. **Pension or retirement income**	8g.	$_____	$_____
8h. **Other monthly income.** Specify: _____	8h.	+ $_____	+ $_____
9. **Add all other income**. Add lines 8a + 8b + 8c + 8d + 8e + 8f +8g + 8h.	9.	$_____	$_____
10. **Calculate monthly income.** Add line 7 + line 9. Add the entries in line 10 for Debtor 1 and Debtor 2 or non-filing spouse.	10.	$_____ +	$_____ = $_____

11. **State all other regular contributions to the expenses that you list in *Schedule J*.**
Include contributions from an unmarried partner, members of your household, your dependents, your roommates, and other friends or relatives**.**
Do not include any amounts already included in lines 2-10 or amounts that are not available to pay expenses listed in *Schedule J*.
Specify: _____ 11. + $_____

12. **Add the amount in the last column of line 10 to the amount in line 11.** The result is the combined monthly income.
Write that amount on the *Summary of Schedules* and *Statistical Summary of Certain Liabilities and Related Data,* if it applies 12. $_____
Combined monthly income

13. **Do you expect an increase or decrease within the year after you file this form?**
- ❑ No.
- ❑ Yes. Explain:

12b-007616

Official Form 6I

Instructions for Schedule I: Your Income

United States Bankruptcy Court 12/01/13

How to fill out Schedule I

In *Schedule I: Your Income* (Official Form 6I), you will give the details about your employment and monthly income as of the date you file this form. If you are married and your spouse is living with you, include information about your spouse even if your spouse is not filing with you. If you are separated and your spouse is not filing with you, do not include information about your spouse.

How to report employment and income

If you have nothing to report for a line, write $0.

In Part 1, line 1, fill in employment information for you and, if appropriate, for a non-filing spouse. If either person has more than one employer, attach a separate page with information about the additional employment.

In Part 2, give details about the monthly income you currently expect to receive. Show all totals as monthly payments, even if income is not received in monthly payments.

If your income is received in another time period, such as daily, weekly, quarterly, annually, or irregularly, calculate how much income would be by month, as described below.

If either you or a non-filing spouse has more than one employer, calculate the monthly amount for each employer separately, and then combine the income information for all employers for that person on lines 2-7.

One easy way to calculate how much income per month is to total the payments earned in a year, then divide by 12 to get a monthly figure. For example, if you are paid seasonally, you would simply divide the amount you expect to earn in a year by 12 to get the monthly amount.

Below are other examples of how to calculate monthly amount.

Example for quarterly payments:

If you are paid $15,000 every quarter, figure your monthly income in this way:

	$15,000	*income every quarter*
X	4	*pay periods in the year*
	$60,000	*total income for the year*

$60,000 (*income for year*) = $5,000 *monthly income*
12 (*number of months in year*)

Example for bi-weekly payments:

If you are paid $2,500 every other week, figure your monthly income in this way:

	$2,500	*income every other week*
X	26	*number of pay periods in the year*
	$65,000	*total income for the year*

$65,000 (*income for year*) = $5,417 *monthly income*
12 (*number of months in year*)

Example for weekly payment:

If you are paid $1,000 every week, figure your monthly income in this way:

	$1,000	*income every week*
X	52	*number of pay periods in the year*
	$52,000	*total income for the year*

$52,000 (*income for year*) = $4,333 *monthly income*
12 (*number of months in year*)

Example for irregular payments:

If you are paid $4,000 8 times a year, figure your monthly income in this way:

$4,000 *income a payment*
X 8 *payments a year*
$32,000 *income for the* year

$32,000 (*income for year*) = $2,667 *monthly income*
12 (*number of months in year*)

Example for daily payments:

If you are paid $75 a day and you work about 8 days a month, figure your monthly income in this way:

$75 *income a day*
X 96 *days a year*
$7,200 *total income for the year*

$7,200 (*income for year*) = $600 *monthly income*
12 (*number of months in year*)

or this way:

$75 *income a day*
X 8 *payments a month*
$600 *income for the* month

In Part 2, line 11, fill in amounts that other people provide to pay the expenses you list on *Schedule J: Your Expenses*. For example, if you and a person to whom you are not married pay all household expenses together and you list all your joint household expenses on *Schedule J*, you must list the amounts that person contributes monthly to pay the household expenses on line 11. If you have a roommate and you divide the rent and utilities, do not list the amounts your roommate pays on line 11 if you have listed only your share of those expenses on *Schedule J*. Do not list on line 11 contributions that you already disclosed elsewhere on the form.

Note that the income you report on *Schedule I* may be different from the income you report on other bankruptcy forms. For example, the *Statement of Current Monthly Income and Means Test Calculation (Chapter 7)* (Official Form 22A), *Statement of Current Monthly Income (Chapter 11)* (Official Form 22B), and the *Statement of Current Monthly Income and Calculation of Commitment Period (Chapter 13)* (Official Form 22C) all use a different definition of income and apply that definition to a different period of time. *Schedule I* asks about the income that you are now receiving, while the other forms ask about income you received in the applicable time period before filing. So the amount of income reported in any of those forms may be different from the amount reported here.

If, after filing *Schedule I*, you need to file an estimate of income in a chapter 13 case for a date after your bankruptcy, you may complete a supplemental *Schedule I*. To do so you must check the "supplement" box at the top of the form and fill in the date.

Understand the terms used in this form

This form uses *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, this form uses *you* to ask for information from both debtors. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Things to remember when filling out this form

- Be as complete and accurate as possible.
- If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known).
- If two married people are filing together, both are equally responsible for supplying correct information.

Do not file these instructions with your bankruptcy filing package. Keep them for your records.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Check if this is:

- ❑ An amended filing
- ❑ A supplement showing post-petition chapter 13 expenses as of the following date: _____
  MM / DD / YYYY
- ❑ A separate filing for Debtor 2 because Debtor 2 maintains a separate household

Official Form 6J

Schedule J: Your Expenses

12/13

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach another sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Describe Your Household

1. **Is this a joint case?**
   - ❑ No. Go to line 2.
   - ❑ Yes. **Does Debtor 2 live in a separate household?**
     - ❑ No
     - ❑ Yes. Debtor 2 must file a separate Schedule J.

2. **Do you have dependents?**
   - ❑ No
   - ❑ Yes. Fill out this information for each dependent.....

   Do not list Debtor 1 and Debtor 2.

   Do not state the dependents' names.

Dependent's relationship to Debtor 1 or Debtor 2	Dependent's age	Does dependent live with you?
_____	_____	❑ No ❑ Yes
_____	_____	❑ No ❑ Yes
_____	_____	❑ No ❑ Yes
_____	_____	❑ No ❑ Yes
_____	_____	❑ No ❑ Yes

3. **Do your expenses include expenses of people other than yourself and your dependents?**
   - ❑ No
   - ❑ Yes

Part 2: Estimate Your Ongoing Monthly Expenses

Estimate your expenses as your bankruptcy filing date unless you are using this form as supplement in a Chapter 13 case to report expenses as of a date after the bankruptcy is filed. If this is a supplemental *Schedule J*, check the box at the top of the form and fill in the applicable date.

Include expenses paid for with non-cash government assistance if you know the value of such assistance and have included it on *Schedule I: Your Income* (Official Form 6I.)

		Your expenses
4. **The rental or home ownership expenses for your residence.** Include first mortgage payments and any rent for the ground or lot.	4.	$_____
If not included in line 4:		
4a. Real estate taxes	4a.	$_____
4b. Property, homeowner's, or renter's insurance	4b.	$_____
4c. Home maintenance, repair, and upkeep expenses	4c.	$_____
4d. Homeowner's association or condominium dues	4d.	$_____

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		Your expenses
5. **Additional mortgage payments for your residence**, such as home equity loans	5.	$_____
6. **Utilities:**		
6a. Electricity, heat, natural gas	6a.	$_____
6b. Water, sewer, garbage collection	6b.	$_____
6c. Telephone, cell phone, Internet, satellite, and cable services	6c.	$_____
6d. Other. Specify: _____	6d.	$_____
7. **Food and housekeeping supplies**	7.	$_____
8. **Childcare and children's education costs**	8.	$_____
9. **Clothing, laundry, and dry cleaning**	9.	$_____
10. **Personal care products and services**	10.	$_____
11. **Medical and dental expenses**	11.	$_____
12. **Transportation.** Include gas, maintenance, bus or train fare. Do not include car payments.	12.	$_____
13. **Entertainment, clubs, recreation, newspapers, magazine, and books**	13.	$_____
14. **Charitable contributions and religious donations**	14.	$_____
15. **Insurance.** Do not include insurance deducted from your pay or included in lines 4 or 20.		
15a. Life insurance	15a.	$_____
15b. Health insurance	15b.	$_____
15c. Vehicle insurance	15c.	$_____
15d. Other insurance. Specify:_____	15d.	$_____
16. **Taxes.** Do not include taxes deducted from your pay or included in lines 4 or 20. Specify: _____	16.	$_____
17. **Installment or lease payments:**		
17a. Car payments for Vehicle 1	17a.	$_____
17b. Car payments for Vehicle 2	17b.	$_____
17c. Other. Specify:_____	17c.	$_____
17d. Other. Specify:_____	17d.	$_____
18. **Your payments of alimony, maintenance, and support that you did not report as deducted from your pay on line 5, *Schedule I, Your Income* (Official Form 6I).**	18.	$_____
19. **Other payments you make to support others who do not live with you.** Specify:_____	19.	$_____
20. **Other real property expenses not included in lines 4 or 5 of this form or on *Schedule I*: *Your Income.***		
20a. Mortgages on other property	20a.	$_____
20b. Real estate taxes	20b.	$_____
20c. Property, homeowner's, or renter's insurance	20c.	$_____
20d. Maintenance, repair, and upkeep expenses	20d.	$_____
20e. Homeowner's association or condominium dues	20e.	$_____

12b-007620

21. **Other**. Specify: _____ 21. +$_____

22. **Your monthly expenses.** Add lines 4 through 21.
The result is your monthly expenses. 22. $_____

23. **Calculate your monthly net income.**

23a. Copy line 12 (*your combined monthly income*) from *Schedule I.* 23a. $_____

23b. Copy your monthly expenses from line 22 above. 23b. – $_____

23c. Subtract your monthly expenses from your monthly income.
The result is your *monthly net income*. 23c. $_____

24. **Do you expect an increase or decrease in your expenses within the year after you file this form?**

For example, do you expect to finish paying for your car loan within the year or do you expect your mortgage payment to increase or decrease because of a modification to the terms of your mortgage?

❑ No.
❑ Yes.

Explain here:

12b-007621

Official Form 6J

Instructions for Schedule J: Your Expenses

United States Bankruptcy Court 12/01/13

How to Fill Out Schedule J

Schedule J: Your Expenses (Official Form 6J) provides an estimate the monthly expenses, as of the date you file for bankruptcy, for you, your dependents, and the other people in your household whose income is included on *Schedule I: Your Income* (Official Form 6I). On your initial filing in Part 2 select "Initial estimate at the beginning of the case".

If you are married and are filing individually, include your non-filing spouse's expenses unless you are separated.

If you are filing jointly and Debtor 1 and Debtor 2 keep separate households, fill out a separate *Schedule J* for each debtor. Check the box at the top of page 1 of the form for Debtor 2 to show that a separate form is being filed.

Do not include expenses that other members of your household pay directly from their income if you did not include that income on *Schedule I*. For example, if you have a roommate and you divide the rent and utilities and you have not listed your roommate's contribution to household expenses in line 11 of *Schedule I*, you would list only your share of these expenses on *Schedule J*.

Show all totals as monthly payments. If you have weekly, quarterly, or annual payments, calculate how much you would spend on those items every month.

Do not list as expenses any payments on credit card debts incurred before filing bankruptcy.

Do not include business expenses on this form. You have already accounted for those expenses as part of determining net business income on *Schedule I*.

On line 20, do not include expenses for your residence or for any rental or business property. You have already listed expenses for your residence on lines 4 and 5 of this form. You listed the expenses for your rental and business property as part of the process of determining your net income from that property on *Schedule I* (line 8a).

If you have nothing to report for a line, write $0.

If, after filing *Schedule J*, you need to file an estimate of expenses in a chapter 13 case for a date after your bankruptcy, you may complete a supplemental *Schedule J*. To do so you must check the "supplement" box at the top of the form and fill in the date.

Understand the terms used in this form

This form uses *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, this form uses *you* to ask for information from both debtors. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Things to remember when filling out this form

- Be as complete and accurate as possible.
- If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known).
- If two married people are filing together, both are equally responsible for supplying correct information.
- Do not list a minor child's full name. Instead, fill in only the child's initials and the full name and address of the child's parent or guardian. For example, write A.B., a minor child (*John Doe, parent, 123 Main St., City, State*). 11 U.S.C. § 112; Fed. R. Bankr. P. 1007(m) and 9037.

Do not file these instructions with your bankruptcy filing package. Keep them for your records.

COMMITTEE NOTE

Schedule I: Your Income (Official Form 6I) and *Schedule J: Your Expenses* (Official Form 6J), which apply only in cases of individual debtors, have been revised as part of the Forms Modernization Project, making the forms easier to read and, as a result, likely to generate more complete and accurate responses.

Revised Schedules I and J seek to obtain a full picture of the debtor's economic situation—to the extent that debtor receives income or has expenses. The revised forms are intended to avoid the situation that frequently happens with the current forms where debtor lives with and pools assets with other people and the household provides support to dependents who may not be related by blood or marriage to the debtor.

The amendments seek to avoid the situation where the expenses listed on Schedule J are for the entire household, but the income listed on Schedule I is only for the debtor. Line 11 on revised Schedule I now includes contributions made by someone else to the expenses on Schedule J, and the debtor is instructed to include contributions from an unmarried partner, members of the debtor’s household, dependents, roommates, and other friends or relatives.

As revised, the initial Schedule J will provide estimated expenses at the beginning of the case and the debtor will so indicate in Part 2 of the form.

In drafting the form it became apparent that at least some courts are using Schedules I and J in analyzing proposed chapter 13 plans and potential modification of those plans or when a debtor’s financial circumstances change. To avoid a lack of clarity on the form regarding the date to be used in computing expenses, and in order to allow Schedule J to continue to serve the plan feasibility function, the revised form may also be used as a supplement to the initial filing if the debtor checks the appropriate box in the caption and indicates the pertinent post-filing date of the estimate.

New lines 1, 2, and 3 on revised Schedule J request information about the debtor’s household. Line 1 requires joint debtors who maintain separate households to file separate Schedule J forms. A check box has been added to the caption to identify such filings. Line 2 requires information about each dependent

who lives with the debtor and each dependent who lives separately. In order to allow a full understanding of the debtor's expenses, Line 3 requires debtors to state whether their expenses include the expenses of persons other than themselves and their dependents. In addition, new line 23 on the form includes a calculation of the debtor's monthly net income.

Changes Made After Publication

Official Form 6I

A checkbox was added to the top of the form for the following statement: "A supplement showing post-petition chapter 13 income as of the following date _____."

The following two sentences were added to the directions at the top of the form: "If you are married and not filing jointly, and your spouse is living with you, include information about your spouse. If you are separated and your spouse is not filing with you, do not include information about your spouse."

At line 1 of the form, the direction to include employment information about a non-filing spouse was removed.

At line 5, the entry for listing contributions to retirement plans was divided into separate entries for mandatory and voluntary contributions, and an entry was added for union dues.

Line 8f, regarding government assistance, was revised with a direction to include the value of any non-cash assistance such as food stamps or housing subsidies, if known.

Official Form 6J

A checkbox was added to the top of the form for the following statement: "A supplement showing post-petition chapter 13 income as of the following date _____."

A checkbox was added to the top of the form for the following statement, identifying the form as "A separate filing for Debtor 2 because Debtor 2 maintains a separate household".

A new line 1 was added to Part 1, directing Debtor 2 to fill out a separate Schedule J if the case is a joint case and Debtor 2 lives in a separate household. The remaining questions in Part 1 were reorganized, and an instruction to not list dependent names was added.

In Part 2, Column A was relabeled "Your expenses," and Column B was eliminated.

At line 17, Installment or lease payments, the separate entry for student loan payments was removed.

At line 18, an instruction was added to clarify that alimony, maintenance, and support should be listed as an expense only to the extent that it has not already been accounted for as a payroll deduction on line 5 of Schedule I.

Summary of Public Comment on Schedule I

12-BK-007. Brian Flick (Attorney, Cincinnati, Ohio). Schedule I is too long and the information requested is redundant. Use the existing Schedule I, and change only the payroll expense itemization to include liens for retirement loans and retirement deductions.

12-BK-008. National Conference of Bankruptcy Judges. The deleted language contained in current Schedule I that refers to the "Spouse" column should be restored so that the "Spouse" column is completed in every case filed by joint debtors and by every married debtor, unless the spouses are separated and a joint petition is not filed. This would provide more complete disclosure, continue existing practice, and conform the revised form to the instructions for filling it out.

12-BK-012. Walter Oney[1] (Attorney, Fitchburg, Massachusetts). Mr. Oney submitted a 58-page comment that reviewed and critiqued the published forms on a line-by-line basis. His comments were detailed and addressed both stylistic and substantive matters. With regard to Schedule I, among his most significant substantive comments were the following:

- Married debtors will not easily understand when they should report their spouse's income.

[1] Comments 12-BK-007, -017, -019, -021, -023, -030, -039, and -041 concurred with Mr. Oney's comments.

- It is unlikely that pro se filers will be able to reliably combine their income from multiple jobs with different pay periods, as the revised form directs. The instructions about how to determine a monthly income are overwhelmingly confusing, even for a filer who has only one job.

- Debtors often lack even rudimentary bookkeeping skills, so asking them to attach a statement concerning real estate and business income is problematic. There should be a form for reporting business and real estate income expenses. Alternatively, debtors could be directed to use their bookkeeping software to generate a profit and loss statement covering a specific time period.

- All non-cash government benefits should be shown in Schedule I, which will make it easier for pro se debtors to complete the fee waiver form. Debtors may not realize that they are supposed to report as income items such as food stamps, housing subsidies, WIC vouchers, and fuel assistance that they receive in kind or directly.

- Joint filers who live in separate households may each be receiving contributions to their separate household expenses from other people. This schedule lumps these separate contributions together.

- Line 5b combines voluntary and involuntary retirement contributions. If this embodies a policy decision that both kinds of deductions are reasonable expenses in every chapter, it is likely that some chapter 13 trustees and most chapter 7 trustees would strongly disagree.

12-BK-025. Stuart Gold (Attorney, Southfield, Michigan). Schedule I should include a line to reflect if the debtor is using savings (retirement or otherwise) to balance his or her budget. This issue comes up from time to time in overcoming hardship concerns for a reaffirmation.

12-BK-030. Jeanne Hovenden (Attorney, Chesterfield, Virginia). The instructions for Schedule I need to include—above the "Part 1" line, rather than on the side—the statement about not including a non-filing spouse if the debtor is separated from that spouse.

12-BK-038. John Gustafson (Chapter 13 Standing Trustee, Toledo, Ohio). Changes on Schedules I and J do not reflect the costs and benefits of changing the line number or letter designations. The cost is the loss of the ability to search Lexis and Westlaw for cases discussing various items that have been listed for years using the same numbering system by using line numbers. The form could easily preserve the old numbering system.

Part 2 of Schedule I should say to include the non-filing spouse "unless you are legally separated, or maintain separate households." The instruction should be at the top of the form.

12-BK-039. Caralyce M. Lassner (Attorney, Utica, Michigan). Rather than revising Schedule I to make it easier for pro se debtors to use, the instructions could be revised. The revised form is unnecessarily longer without adding substantive information that would justify additional length. The lengthening appears to be directly due to partial incorporation of the instructions into the face of the form.

Child support, spousal support, or other domestic support obligations should be listed as specific payroll deductions. To maximize accurate and full disclosure, the Instructions for Schedule I should provide additional instruction about what "income" is. To simplify the form, change the column heading to "Debtor 2/Spouse," because "non-filing spouse" may be confusing to a pro se debtor.

12-BK-040. Bankruptcy Clerks Advisory Group. The instructions are difficult to understand and likely will create confusion for debtors, especially pro se debtors, which could result in clerk's office staff spending more time responding to questions, reviewing forms, issuing deficiencies, and possibly scheduling hearings to address form completion problems. The examples given for the treatment of a roommate's contribution to household expenses are inconsistent in the instructions for Schedule I and for Schedule J. The Committee Note provides a much clearer description.

12-BK-041. Daniel Press (Attorney, McLean, Virginia). Although Schedules I and J should be updated to reflect some expenses that debtors incur now that did not exist when the original schedules were adopted, such as telecommunications, there is no need for a wholesale overhaul.

12-BK-042. Joe Wittman (Attorney, Topeka, Kansas). The additional length of Schedules I and J—double that of the current forms—is unnecessary. The current form or some version of it is adequate. There are too many variations of what "income" and "expenses" are and whether they are "routine" or intermittent, which will confuse pro se debtors. People who are trained in the law can easily put the information on the forms and deal with the unusual case.

12-BK-043. American Legal and Financial Network Executive Bankruptcy Sub-Committee on Local Rules and Rules Changes. Comments are all positive with respect to the new Schedules I and J. The forms are a vast improvement over the current forms. They provide significantly more transparency, are more intuitive, and provide greater disclosures for creditors and the court to consider in analyzing the debtor's current financial situation as it relates to a reorganization or liquidation process.

The inclusion of court and district information at the top of Schedule I is extremely helpful to creditors who typically manage a nationwide portfolio. The more user-friendly format and instructions should help in many cases, especially with pro se debtors. Line 11 in Part 2 is a welcome addition in this age of merged and non-traditional households. It will help debtors and creditors in ascertaining the true contributions to the overall household income.

12-BK-044. Louis M. Bubala (Attorney, Reno, Nevada). Strongly supports the revisions to forms for individual debtors, which add clarity to the financial disclosures. The broad exclusion for employment of and income of the debtor's non-filing, separated spouse should be removed. The exclusion is inconsistent with Nevada's community property law. The use of the word "separated" on Schedule I may have unintended consequences in Nevada and possibly other community property states in avoiding disclosure of post-petition income. Given the state law nature of marriage and property, you should reconsider removing this reporting exception.

Applauds the directive in Part 1 of Schedule I that the debtor attach a separate page with information about additional employers. This additional reporting could be added to Part 2 about monthly income. The committee should require not only the combined amounts, but also separate reporting of income for each employer.

12-BK-045. David S. Yen (Attorney, Legal Assistance Foundation of Metropolitan Chicago). The reference in column 2 throughout Schedule I to "Debtor 2 or non-filing spouse" is a change from the current form, which does not require the income of a non-filing spouse if the couple is separated. The new form should instruct the filer not to include income of a spouse if the couple is separated and not filing jointly.

Income from primary employers of Debtor 1 and Debtor 2 or a non-filing spouse living with Debtor 1 should be listed in detail on Schedule I in order to provide information on how the debtor arrived at the numbers. The form should ask only for net income from other employers. This strikes a balance between the benefit of having complete itemization and the cost of having to file longer forms.

The word "cash" should be inserted in the heading and first sentence of Part 2 of Schedule I between "Monthly" and "Income," and in line 8f, after "Other" and before "government."

The current 10% threshold should be retained for expected changes in income and expenses. Income and many expenses change either seasonably or for some other reason, but most pro se debtors will mark the box saying that there are no expected changes. In our free market economy, every debtor should say that he or she expects an increase or decrease.

12-BK-046. National Association of Consumer Bankruptcy Attorneys (NACBA). NACBA questions the relocation of the list of dependents from Schedule I to Schedule J. The proposed forms do not fix the problem that the current forms have no place to include second job information.

Carl Barnes. (Software Developer, Best Case Bankruptcy, not officially submitted). Part 1: Describe Employment. Tighten up to fit dependents information on the page.

Line 5a. Payroll taxes and social security payments. Use of "payments" is confusing. The correct term is "contributions" (FICA is the Federal Insurance Contributions Act).

Lines 5f through 5h should be changed back to a single line, as it is in the current form, to make the Schedule I data fit on one page. Additional detail could be provided in an attachment if necessary.

Line 10. Calculate monthly income. Move the total joint income to a separate line. This will make more room in the lines above by not having space reserved for a third column. It also avoids confusing references in the instructions to "last column of line 10." All of the income data could be on a single page, making it easier to read.

Summary of Public Comment on Schedule J

12-BK-006. Raymond P. Bell, Jr. (Vice President of Bankruptcy Management Services, Mercantile Adjustment Bureau, LLC, Willow Grove, Pennsylvania). Column B starting on page 2 asks "[w]hat your expenses will be if your current plan is confirmed." This could be confusing, and could just replicate what is in Column A if the debtor wants to be safe. There is a long period of time between filing and the confirmation hearing, and things could change. Given that the dismissal rate for chapter 13s is high, it is not clear why this column is needed or what useful information it will provide. The second paragraph of the Instructions for Schedule J relating to Column B is also confusing.

12-BK-007. Brian Flick (Attorney, Cincinnati, Ohio). The forms are too long and the information requested is redundant. For example, "Dependents in Home you are supporting, Dependents not supporting, other non-dependents."

12-BK-012. Walter Oney[2] (Attorney, Fitchburg, Massachusetts). Mr. Oney submitted a 58-page comment that reviewed and critiqued the published forms on a line-by-line basis. His comments were detailed and addressed both stylistic and substantive matters. With regard to Schedule J, among his most significant substantive comments were the following:

- Pro se filers will not understand the instructions for filing separate copies of the form when they are married but separated versus filing jointly. The second column will confuse pro se filers. There should be two versions of Schedule J based on whether there is one household or two.

- Eliminate the chapter 13 column.

[2] Comments 12-BK-007, -017, -019, -021, -023, -030, -039, and -041 concurred with Mr. Oney's comments.

- Neither the form nor the instructions say how to treat expenses that will be paid through a chapter 12 or 13 plan. Schedule J should capture contractually required payments, even if the plan provides for surrender of the collateral, cram down, or conduit payments. But plan feasibility requires consideration of debtor's expected cash flow, so Schedule J should not show expenses that will be paid by the trustee. The form instructions should be changed to ask for all expenses as of the filing date in the first column, and projected out-of-pocket expenses in the second column.

- The line items for food & housekeeping supplies and personal care services should be replaced with a single item labeled "Food and other household expenses."

- Explanatory comments that give examples inhibit responses, because people interpret them to mean that only the type of expense listed in the example should be included.

- Including student loan payments in line 17c appears to embody a policy decision that the payments are proper deductions in all chapters. This view is not universally accepted, and the form or instructions need to be explicit about the underlying policy of allowing debtors to be able to continue making contractually required student loan payments without being accused of unfair discrimination.

12-BK-020. Susan Silveira (Attorney, San Jose, California). The request that debtors list their "future" expenses on Schedule J should be omitted. It would be speculative and does not seem necessary to comply with the Bankruptcy Code. It could produce difficulties for trustees, debtors, creditors, and judges.

12-BK-028. Nathan Horowitz (Attorney, White Plains, New York). I do not see the usefulness of the two columns for expenses. A vast majority of debtors expect their expenses to be the same at filing as they will at confirmation in 6 months. There can be changes in financial circumstances, but those are often unexpected. Expected changes (avoiding a second lien, paying off a car loan within the year) can be included in the footnote provided on the current form. The two columns will in most cases simply be duplicated.

"Clothing" and "laundry and dry cleaning" are distinct expenses that should not be lumped together, as this makes it more difficult

for a trustee to focus on a particular expense. The trustee will simply ask for a breakdown of the expenses, which will cause additional work. The same is true for lumping together child care and education. Keeping separate expenses separate allows a complete look at a debtor's financial obligations and reduces potential inquiries.

12-BK-030. Jeanne Hovenden (Attorney, Chesterfield, Virginia). The portion of Schedule J dealing with dependents is confusing. Asking multiple questions about dependents will lead to less clarity, not more, from debtors who are already confused by the current forms. Column B is confusing and unnecessary. The description in line 5 needs to include the words "second mortgage" and "HELOC" in addition to "home equity loans." Many debtors are fixated on these terms and will not include them unless specifically prompted.

12-BK-038. John Gustafson (Chapter 13 Standing Trustee, Toledo, Ohio). Line 17c lists student loan payments as a deduction. This should be deleted. There is no line item for restitution payments, payments on nondischargeable debts, co-signed loans, or payments on credit cards the debtor wants to keep using. Including a line item for student loan payments makes it look like the Official Forms endorse deducting student loan payments, because after deducting all of the line items, line 22 says "The result is your monthly expenses." That is not correct if student loans are being paid through a plan.

12-BK-039. Caralyce M. Lassner (Attorney, Utica, Michigan). The form is expanded from one page to three with little additional information being solicited.

Part 1. Moving dependent information from Schedule I to Schedule J is logical. But asking about other household residents is misplaced if the goal is to create a more pro se debtor friendly form to assist in getting more accurate and complete disclosures. Line 8 of Schedule I, which asks for "all other income regularly received," does not ask for disclosure of income or contributions from individuals listed in Schedule J, line 3. There should be an additional column of check boxes, potentially applicable to all individuals identified in Part 1, asking "Does this individual contribute to your household expenses?" There should be additional instructions to Schedule J explaining that for each individual identified on Schedule J as contributing, their contribution must be included on Schedule I.

Part 2. The use of two columns, and specifically the limitation of Column B to chapter 13 cases, is cumbersome and unnecessary. If the purpose is to show the debtor's pre- and postpetition expenses, Column B should not be limited to chapter 13. All debtors will experience changes in their budget upon filing their petitions.

Line 20. Not many debtors will have second properties, so there is no reason to include this line item in all cases, thereby lengthening the form.

12-BK-040. Bankruptcy Clerks Advisory Group. There may be credit reporting issues if a non-filing spouse is identified as Debtor 2. The form requires a non-filing spouse to be identified as "Debtor 2." If a non-filing spouse is identified as a debtor in the schedules, credit reporting agencies might use the bankruptcy of the non-filing spouse in a credit report. Calling the non-filing spouse "Debtor 2" could lead to an assumption that the non-filing spouse is filing bankruptcy.

The instructions to Schedule J require a non-filing spouse to be identified as "Debtor 2," but the box at the top of page 1 identifies "Debtor 2" as "Spouse, if filing." There is no place on the form to clearly delineate the non-filing spouse. Remaining pages list only "Debtor 1" at the top. If the non-filing spouse must fill out this form, there is no way to identify him or her. Schedule I and Form 22 provide a Column B identified as "Debtor 2 or non-filing spouse," which suggests that Debtor 2 is not the same as a non-filing spouse.

Column B could be difficult to complete, because it might be hard for debtors to estimate what expenses will change if the current plan is confirmed. It is likely that only line 21 would change. The plan can address changes, so this column is duplicitous.

Questions 1 through 3 are repetitive. They should be condensed into a single question that clearly addresses which dependents are living in each household.

12-BK-045. David S. Yen (Attorney, Legal Assistance Foundation of Metropolitan Chicago). For chapter 13 cases, any benefit of having two columns is outweighed by the extra work and confusion that would result from including two columns. It appears that the intent of Column B is that an expense for a secured debt where the trustee is paying the secured creditor should be listed as zero. Thus, if the plan provides that the trustee will make the car payment, the entry in line 17a, Column B would

be zero. But this may not be clear to a pro se debtor, who may enter the car payment in Column B, even though the plan provides that the trustee will be making the payment. The instructions should clarify that if an expense will be paid by the chapter 13 trustee, the amount in Column B should be zero.

The instructions should include this statement: "If some of your expenses are paid for by non-cash government assistance such as food stamps or housing subsidies, list only the cash that your household spends on the subsidized items."

The current 10% threshold for expected changes in expenses should be retained. Many expenses change either seasonably or for some other reason, but most pro se debtors will mark the box saying that there are no expected changes.

12-BK-046. National Association of Consumer Bankruptcy Attorneys. The two columns in Part 2 for chapter 13 debtors are unnecessary. They would require chapter 13 debtors to complete three separate budgets. There is no Code requirement for this, and it is very burdensome on the debtors. There is no reason for the pre-bankruptcy budget. The form should include a second check box for amendments, to indicate that budget amounts are based on circumstances as of the date of any amendment to Schedule J.

Student loan payments are an appropriate expense in chapter 7 cases, as in most cases they will be nondischargeable and need to be paid. In appropriate circumstances, chapter 13 debtors should be allowed to separately classify student loan claims and continue to pay them. But because many courts and trustees object to including these payments in chapter 7 and 13 budgets, including the payments in Schedule J is a trap for the unwary. The instructions should indicate that debtors can include student loan payments under the "Other" category if appropriate.

Line 18 should note that a debtor should not duplicate amounts paid through payroll deduction that are reported on Schedule I. Schedule J should specifically include a line or lines for emergencies and miscellaneous, as is provided in the National Standards under food and clothing on the B22 forms. The types of educational expenses should mirror the B22 line items more closely.

Carl Barnes. (Software Developer, Best Case Bankruptcy, not officially submitted). The information about dependents should be put back on Schedule I. Putting the information in Schedule I fits

the income/expense data better across the two forms, uses less space, and splits the data across pages for better reading.

APPENDIX A.4

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UNITED STATES BANKRUPTCY COURT

_____ District Of _____

In re _____, Case No. _____
Debtor

Chapter _____

DEBTOR'S CERTIFICATION OF COMPLETION OF POSTPETITION INSTRUCTIONAL COURSE CONCERNING PERSONAL FINANCIAL MANAGEMENT

This from should not be filed if an approved provider of a postpetition instructional course concerning personal financial management has already notified the court of the debtor's completion of the course. Otherwise, every individual debtor in a chapter 7 or a chapter 13 case or in a chapter 11 case in which § 1141(d)(3) applies must file this certification. If a joint petition is filed and this certification is required, each spouse must complete and file a separate certification. Complete one of the following statements and file by the deadline stated below:

☐ I, _____, the debtor in the above-styled case, hereby
(Printed Name of Debtor)
certify that on _____ (Date), I completed an instructional course in personal financial management provided by _____, an approved personal financial
(Name of Provider)
management provider.

Certificate No. (if any):_____.

☐ I, _____, the debtor in the above-styled case, hereby
(Printed Name of Debtor)
certify that no personal financial management course is required because of *[Check the appropriate box.]*:

☐ Incapacity or disability, as defined in 11 U.S.C. § 109(h);
☐ Active military duty in a military combat zone; or
☐ Residence in a district in which the United States trustee (or bankruptcy administrator) has determined that the approved instructional courses are not adequate at this time to serve the additional individuals who would otherwise be required to complete such courses.

Signature of Debtor: _____

Date: _____

Instructions: Use this form only to certify whether you completed a course in personal financial management and only if your course provider has not already notified the court of your completion of the course. (Fed. R. Bankr. P. 1007(b)(7).) Do NOT use this form to file the certificate given to you by your prepetition credit counseling provider and do NOT include with the petition when filing your case.

Filing Deadlines: In a chapter 7 case, file within 60 days of the first date set for the meeting of creditors under § 341 of the Bankruptcy Code. In a chapter 11 or 13 case, file no later than the last payment made by the debtor as required by the plan or the filing of a motion for a discharge under § 1141(d)(5)(B) or § 1328(b) of the Code. (See Fed. R. Bankr. P. 1007(c).)

COMMITTEE NOTE

The form is amended to reflect the amendment of Rule 1007(b)(7). As amended, that rule allows an approved provider of a personal financial management course to notify the court directly of the debtor's completion of the course. That notification relieves the debtor of the obligation to file this form.

Because this amendment is being made to conform to an amendment to Rule 1007(b)(7) that will take effect on December 1, 2013, final approval is sought without publication.

APPENDIX B

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APPENDIX B.1

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Appendix B

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

For Publication for Public Comment

Rule 2002. Notices to Creditors, Equity Security Holders, Administrators in Foreign Proceedings, Persons Against Whom Provisional Relief is Sought in Ancillary and Other Cross-Border Cases, United States, and United States Trustee

(a) TWENTY-ONE-DAY NOTICES TO PARTIES IN INTEREST. Except as provided in subdivisions (h), (i), (*l*), (p), and (q) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees at least 21 days' notice by mail of:

* * * * *

(7) the time fixed for filing proofs of claims pursuant to Rule 3003(c); ~~and~~

(8) the time fixed for filing objections and the hearing to consider confirmation of a chapter 12 plan; and

(9) the time fixed for filing objections to confirmation of a chapter 13 plan.

(b) TWENTY-EIGHT-DAY NOTICES TO PARTIES IN INTEREST. Except as provided in subdivision (*l*) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees not less than

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

16 (1) 28 days' notice by mail of the time fixed ~~(1)~~ for filing
17 objections and the hearing to consider approval of a disclosure statement or, under
18 §1125(f), to make a final determination whether the plan provides adequate
19 information so that a separate disclosure statement is not necessary; ~~and~~
20 (2) 28 days' notice by mail of the time fixed for filing objections
21 and the hearing to consider confirmation of a chapter 9~~,~~ or chapter 11~~, or chapter~~
22 ~~13~~ plan; and
23 (3) 28 days' notice by mail of the time fixed for the hearing to
24 consider confirmation of a chapter 13 plan.
25 * * * * *

COMMITTEE NOTE

Subdivisions (a) and (b) are amended and reorganized to alter the provisions governing notice under this rule in chapter 13 cases. Subdivision (a)(9) is added to require at least 21 days' notice of the time for filing objections to confirmation of a chapter 13 plan. Subdivision (b)(3) is added to provide separately for 28 days' notice of the date of the confirmation hearing in a chapter 13 case. These amendments conform to amended Rule 3015, which governs the time for presenting objections to confirmation of a chapter 13 plan. Other changes are stylistic.

Rule 3002. Filing Proof of Claim or Interest

(a) NECESSITY FOR FILING. ~~An~~ A secured creditor, unsecured creditor, or an equity security holder must file a proof of claim or interest for the claim or interest to be allowed, except as provided in Rules 1019(3), 3003, 3004, and 3005. A lien that secures a claim against the debtor is not void due only to the failure of any entity to file a proof of claim.

(b) PLACE OF FILING. A proof of claim or interest shall be filed in accordance with Rule 5005.

(c) TIME FOR FILING. In a voluntary chapter 7 ~~liquidation~~ case, chapter 12 ~~family farmer's debt adjustment~~ case, or chapter 13 ~~individual's debt adjustment~~ case, a proof of claim is timely filed if it is filed not later than ~~90~~ 60 days after the date the petition is filed or the date of the order of conversion to a chapter 12 or 13 case. In an involuntary chapter 7 case, a proof of claim is timely filed if it is filed not later than 90 days after the order for relief is entered, ~~the first date set for the meeting of creditors called under § 341(a) of the Code,~~ except as follows:

* * * * *

(6) ~~If notice of the time to file a proof of claim has been mailed to a creditor at a foreign address, o~~On motion filed by ~~the~~ a creditor before or after the expiration of the time to file a proof of claim, the court may extend the time to file a proof of claim by not more than 60 days from the date of the order granting the motion. The motion may be granted if the court finds that ~~the notice was~~

22 ~~insufficient under the circumstances to give the creditor a reasonable time to file a~~

23 ~~proof of claim~~

24 (A) the notice was insufficient under the circumstances to

25 give the creditor a reasonable time to file a proof of claim because the debtor

26 failed to timely file the list of creditors' names and addresses required by Rule

27 1007(a), or

28 (B) the notice was insufficient under the circumstances to

29 give the creditor a reasonable time to file a proof of claim, and notice of the time

30 to file a proof of claim was mailed to the creditor at a foreign address.

31 (7) A proof of claim filed by the holder of a claim that is secured

32 by a security interest in the debtor's principal residence is timely filed if

33 (A) the proof of claim, together with the attachments

34 required by Rule 3001(c)(2)(C), is filed not later than 60 days after the order for

35 relief is entered, and

36 (B) any attachments required by Rule 3001(c)(1) and (d)

37 are filed as a supplement to the holder's claim not later than 120 days after the

38 order for relief is entered.

COMMITTEE NOTE

Subdivision (a) is amended to clarify that a creditor, including a secured creditor, must file a proof of claim in order to have an allowed claim. The amendment also clarifies, in accordance with § 506(d), that the failure of a secured creditor to file a proof of claim does not render the creditor's lien void. The amendment preserves the existing exceptions to this rule under Rules 1019(3), 3003, 3004, and 3005. Under Rule 1019(3), a creditor does not need to file another proof of claim after conversion of a case to chapter 7. Rule 3003 governs the filing of a proof of claim in chapter 9 and chapter 11 cases. Rules

3004 and 3005 govern the filing of a proof of claim by the debtor, trustee, or another entity if a creditor does not do so in a timely manner.

Subdivision (c) is amended to alter the calculation of the bar date for proofs of claim in chapter 7, chapter 12, and chapter 13 cases. The amendment changes the time for filing a proof of claim in a voluntary chapter 7 case, a chapter 12 case, or a chapter 13 case from 90 days after the § 341 meeting of creditors to 60 days after the petition date. If a case is converted to chapter 12 or chapter 13, the 60-day time for filing runs from the order of conversion. In an involuntary chapter 7 case, a 90-day time for filing applies and runs from the entry of the order for relief.

Subdivision (c)(6) is amended to expand the exception to the bar date for cases in which a creditor received insufficient notice of the time to file a proof of claim. The amendment provides that the court may extend the time to file a proof of claim if the debtor fails to file a timely list of names and addresses of creditors as required by Rule 1007(a). The amendment also clarifies that if a court grants a creditor's motion under this rule to extend the time to file a proof of claim, the extension runs from the date of the court's decision on the motion.

Subdivision (c)(7) is added to provide a two-stage deadline for filing mortgage proofs of claim secured by an interest in the debtor's principal residence. Those proofs of claim must be filed with the appropriate Official Form mortgage attachment within 60 days of the order for relief. The claim will be timely if any additional documents evidencing the claim, as required by Rule 3001(c)(1) and (d), are filed within 120 days of the order for relief. The order for relief is the commencement of the case upon filing a petition, except in an involuntary case. See § 301 and § 303(h). The confirmation of a plan within the 120-day period set forth in subdivision (c)(7)(B) does not prohibit an objection to the proof of claim.

Rule 3007. Objections to Claims

(a) OBJECTIONS TO CLAIMS. An objection to the allowance of a claim shall be in writing and filed. ~~A~~ Except to the extent that the amount of a claim is determined under Rule 3012 in connection with plan confirmation in a chapter 12 or 13 case, a copy of the objection with notice of the hearing thereon shall be mailed or otherwise delivered to the claimant, the debtor or debtor in possession and the trustee at least 30 days prior to the hearing.

* * * * *

COMMITTEE NOTE

Subdivision (a) is amended to provide that an objection to a claim is unnecessary if the determination of the amount of the claim is made through a chapter 12 or chapter 13 plan in accordance with Rule 3012.

Rule 3012. ~~Valuation of Security~~ Determination of the Amount of Secured and Priority Claims

~~The court may determine the value of a claim secured by a lien on property in which the estate has an interest on motion of any party in interest and after a hearing on notice to the holder of the secured claim and any other entity as the court may direct.~~

(a) DETERMINATION OF AMOUNT OF CLAIM. On request by a party in interest and after notice—to the holder of the claim and any other entity the court designates—and a hearing, the court may determine

(1) the amount of a secured claim under § 506(a) of the Code, or

(2) the amount of a claim entitled to priority under § 507 of the Code.

(b) REQUEST FOR DETERMINATION; HOW MADE. Except as provided in subdivision (c), a request to determine the amount of a secured claim may be made by motion, in a claim objection, or in a plan filed in a chapter 12 or 13 case. A request to determine the amount of a claim entitled to priority may be made by motion or in a claim objection. The request shall be served on the holder of the claim and any other entity the court designates in the manner provided for service of a summons and complaint by Rule 7004.

(c) CLAIMS OF GOVERNMENTAL UNITS. A request to determine the amount of a secured claim of a governmental unit may be made by motion or in a

20 claim objection after the governmental unit files a proof of claim or after the time

21 for filing one under Rule 3002(c)(1) has expired.

COMMITTEE NOTE

This rule is amended and reorganized.

Subdivision (a) provides, in keeping with the former version of this rule, that a party in interest may seek a determination of the amount of a secured claim. The amended rule provides that the amount of a claim entitled to priority may also be determined by the court.

Subdivision (b) is added to provide that a request to determine the amount of a secured claim may be made in a chapter 12 or chapter 13 plan, as well as by a motion or a claim objection. Secured claims of governmental units are not included in this subdivision and are governed by subdivision (c). The amount of a claim entitled to priority may be determined through a motion or a claim objection.

Subdivision (c) clarifies that a determination under this rule with respect to a secured claim of a governmental unit may be made by motion or in a claim objection, but not until the governmental unit has filed a proof of claim or its time for filing a proof of claim has expired.

Rule 3015. Filing, Objection to Confirmation, Effect of Confirmation, and Modification of a Plan in a Chapter 12 ~~Family Farmer Debt Adjustment~~ or a Chapter 13 ~~Individual's Debt Adjustment~~ Case

(a) FILING OF CHAPTER 12 PLAN. The debtor may file a chapter 12 plan with the petition. If a plan is not filed with the petition, it shall be filed within the time prescribed by § 1221 of the Code.

(b) FILING OF CHAPTER 13 PLAN. The debtor may file a chapter 13 plan with the petition. If a plan is not filed with the petition, it shall be filed within 14 days thereafter, and such time may not be further extended except for cause shown and on notice as the court may direct. If a case is converted to chapter 13, a plan shall be filed within 14 days thereafter, and such time may not be further extended except for cause shown and on notice as the court may direct.

(c) ~~DATING. Every proposed plan and any modification thereof shall be dated.~~FORM OF CHAPTER 13 PLAN. The plan filed in a chapter 13 case shall be prepared as prescribed by the appropriate Official Form. Provisions not otherwise included in the Official Form or deviating from the Official Form are effective only if they are included in a section of the Official Form designated for nonstandard provisions and are also identified in accordance with any other requirements of the Official Form.

(d) NOTICE ~~AND COPIES~~. If the plan ~~The plan or a summary of the plan shall be~~ is not included with the ~~each~~ notice of the hearing on confirmation mailed pursuant to Rule 2002, the debtor shall serve the plan on the trustee and all creditors when it is filed with the court. ~~If required by the court, the debtor shall~~

~~furnish a sufficient number of copies to enable the clerk to include a copy of the plan with the notice of the hearing.~~

(e) TRANSMISSION TO UNITED STATES TRUSTEE. The clerk shall forthwith transmit to the United States trustee a copy of the plan and any modification thereof filed pursuant to subdivision (a) or (b) of this rule.

(f) OBJECTION TO CONFIRMATION; DETERMINATION OF GOOD FAITH IN THE ABSENCE OF AN OBJECTION. An objection to confirmation of a plan shall be filed and served on the debtor, the trustee, and any other entity designated by the court, and shall be transmitted to the United States trustee, ~~before confirmation of the plan~~ at least seven days before the hearing on confirmation. An objection to confirmation is governed by Rule 9014. If no objection is timely filed, the court may determine that the plan has been proposed in good faith and not by any means forbidden by law without receiving evidence on such issues.

(g) EFFECT OF CONFIRMATION. Any determination made under Rule 3012 of the amount of a secured claim under § 506(a) of the Code in a chapter 12 or 13 case is binding on the holder of the claim, even if the holder files a contrary proof of claim under Rule 3002 or the debtor schedules that claim under § 521(a) of the Code, and regardless of whether any objection to the claim has been filed under Rule 3007.

~~(g)~~ (h) MODIFICATION OF PLAN AFTER CONFIRMATION. A request to modify a plan pursuant to § 1229 or § 1329 of the Code shall identify the proponent and shall be filed together with the proposed modification. The

clerk, or some other person as the court may direct, shall give the debtor, the trustee, and all creditors not less than 21 days notice by mail of the time fixed for filing objections and, if an objection is filed, the hearing to consider the proposed modification, unless the court orders otherwise with respect to creditors who are not affected by the proposed modification. A copy of the notice shall be transmitted to the United States trustee. A copy of the proposed modification, or a summary thereof, shall be included with the notice. ~~If required by the court, the proponent shall furnish a sufficient number of copies of the proposed modification, or a summary thereof, to enable the clerk to include a copy with each notice.~~ If a copy is not included with the notice and the proposed modification is sought by the debtor, a copy shall be served on the trustee and all creditors in the manner provided for service of the plan by subdivision (d) of this rule. Any objection to the proposed modification shall be filed and served on the debtor, the trustee, and any other entity designated by the court, and shall be transmitted to the United States trustee. An objection to a proposed modification is governed by Rule 9014.

COMMITTEE NOTE

This rule is amended and reorganized.

Subdivision (c) is amended to require use of the Official Form for chapter 13 plans. The amended rule also provides that nonstandard provisions in a chapter 13 plan must be set out in the section of the Official Form specifically designated for such provisions and identified in the manner required by the Official Form.

Subdivision (d) is amended to ensure that the trustee and creditors are served with the plan in advance of confirmation. Service may be made either at the time the plan is filed or with the notice under Rule 2002 of the hearing to consider confirmation of the plan.

Subdivision (f) is amended to require service of an objection to confirmation at least seven days before the hearing to consider confirmation of a plan. The seven-day notice period may be altered in a particular case by the court under Rule 9006.

Subdivision (g) is amended to provide that the amount of a secured claim under § 506(a) may be determined through a chapter 12 or chapter 13 plan in accordance with Rule 3012. That determination controls over a contrary proof of claim, without the need for a claim objection under Rule 3007, and over the schedule submitted by the debtor under § 521(a). The amount of a secured claim of a governmental unit, however, may not be determined through a chapter 12 or chapter 13 plan under Rule 3012.

Subdivision (h) was formerly subdivision (g). It is redesignated and amended to clarify that service of a proposed plan modification must be made in accordance with subdivision (d) of this rule.

Rule 4003. Exemptions

1 * * * * *

2 (d) AVOIDANCE BY DEBTOR OF TRANSFERS OF EXEMPT

3 PROPERTY. A proceeding by the debtor to avoid a lien or other transfer of

4 property exempt under § 522(f) of the Code shall be commenced by motion in the

5 manner provided for by ~~in accordance with~~ Rule 9014, or by a chapter 12 or 13

6 plan served in the manner provided by Rule 7004 for service of a summons and

7 complaint. Notwithstanding the provisions of subdivision (b), a creditor may

8 object to a motion or chapter 12 or 13 plan provision filed under § 522(f) by

9 challenging the validity of the exemption asserted to be impaired by the lien.

COMMITTEE NOTE

Subdivision (d) is amended to provide that a request under § 522(f) to avoid a lien or other transfer of exempt property may be made by motion or by a chapter 12 or chapter 13 plan. A plan that proposes lien avoidance in accordance with this rule must be served as provided under Rule 7004 for service of a summons and complaint. Lien avoidance not governed by this rule requires an adversary proceeding.

Rule 5005. Filing, Electronic Signatures, and Transmittal of Papers

(a) FILING and SIGNATURES.

(1) *Place of Filing*.

* * * * *

(2) *Filing by Electronic Means.* A court may by local rule permit or require documents to be filed~~, signed, or verified~~ by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A local rule may require filing by electronic means only if reasonable exceptions are allowed. A document filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules~~, the Federal Rules of Civil Procedure made applicable by these rules,~~ and § 107 of the Code.

(3) *Signatures on Documents Filed by Electronic Means*.

(A) *The Signature of a Registered User*. The user name and password of an individual who is registered to use the court's electronic filing system serves as that individual's signature on any electronically filed document. The signature may be used with the same force and effect as a written signature under these rules and for any other purpose for which a signature is required in proceedings before the court.

(B) *Signature of Other Individuals*. When an individual other than a registered user of the court's electronic filing system is required to sign a document that is filed electronically, the individual shall include in a single filing with the document a scanned or otherwise electronically replicated copy of

23 the document's signature page bearing the individual's original signature. Once a
24 document has been properly filed under this rule, the original document bearing
25 the individual's original signature need not be retained. The electronic signature
26 may then be used with the same force and effect as a written signature under these
27 rules and for any other purpose for which a signature is required in proceedings
28 before the court.
29 * * * * *

COMMITTEE NOTE

The rule is amended to address the treatment of electronic signatures in documents filed in connection with bankruptcy cases, a matter previously addressed only in local bankruptcy rules. New provisions are added that prescribe the circumstances under which electronic signatures may be treated in the same manner as handwritten signatures without the need for anyone to retain paper documents with original signatures. The amended rule supersedes any conflicting local rules.

The title of the rule and subdivision (a) are amended to reflect the rule's expanded scope. The reference to "the Federal Rules of Civil Procedure made applicable by these rules" in subdivision (a)(2) is stricken as unnecessary.

Subdivision (a)(3) is added to address the effect of signatures in documents that are electronically filed. Subparagraph (A) applies to persons who are registered users of a court's electronic filing system. It adopts as the national rule the practice that previously existed in virtually all districts. The user name and password of an individual who is registered to use the CM/ECF system are treated as that person's signature for all documents that are electronically filed. That signature may then be treated the same as a written signature for purposes of the Bankruptcy Rules and for any other purpose for which a signature is required in court proceedings.

Subparagraph (B) applies to the signatures of persons who are not registered users of the court's electronic filing system. When documents require the signature of a debtor or other individual who is not a registered user of CM/ECF—such as petitions, schedules, and declarations—they may be filed electronically along with a scanned or otherwise electronically replicated image of the signature page bearing the individual's actual signature. Those documents will then be stored electronically by the court, and neither the court nor the filing attorney is required to retain paper copies of the filed documents. This

amendment, which changes the practice that previously existed in many districts, was prompted by several concerns: the lack of uniformity of retention periods required by local rules, the burden placed on lawyers and courts to retain a large volume of paper, and potential conflicts of interest imposed on lawyers who were required to retain documents that could be used as evidence against their clients. When scanned signature pages are filed in accordance with this rule, the electronically filed signature may be treated the same as a written signature for purposes of the Bankruptcy Rules and for any other purpose for which a signature is required in court proceedings.

Just as someone may challenge in court proceedings the validity of a handwritten signature, nothing in this rule prevents a challenge to the validity of an electronic signature that is filed in compliance the rule's provisions.

Rule 5009. Closing Chapter 7 ~~Liquidation~~, Chapter 12 ~~Family Farmer's Debt Adjustment~~, Chapter 13 ~~Individual's Debt Adjustment~~, and Chapter 15 ~~Ancillary and Cross-Border~~ Cases; Order Declaring Lien Satisfied

(a) CLOSING OF CASES UNDER CHAPTERS 7, 12, AND 13. If in a chapter 7, chapter 12, or chapter 13 case the trustee has filed a final report and final account and has certified that the estate has been fully administered, and if within 30 days no objection has been filed by the United States trustee or a party in interest, there shall be a presumption that the estate has been fully administered.

* * * * *

(d) ORDER DECLARING LIEN SATISFIED. In a chapter 12 or chapter 13 case, if a claim that was secured by property of the estate is subject to a lien under applicable nonbankruptcy law, the debtor may request entry of an order determining that the lien on that property has been satisfied. The request shall be made by motion and shall be served on the holder of the claim and any other entity the court designates in the manner provided by Rule 7004 for service of a summons and complaint. An order entered under this subdivision is effective as a release of the lien.

COMMITTEE NOTE

Subdivision (d) is added to provide a procedure by which a debtor in a chapter 12 or chapter 13 case may request an order declaring a lien satisfied. A debtor may need documentation for title purposes of the elimination of a second mortgage or other lien that was secured by property of the estate. Although requests for such orders are likely to be made at the time the case is being closed, the rule does not prohibit a request at another time if the lien has been satisfied and any other requirements for entry of the order have been met.

Other changes to this rule are stylistic.

Rule 7001. Scope of Rules of Part VII

1 An adversary proceeding is governed by the rules of this Part VII. The
2 following are adversary proceedings:
3 * * * * *
4 (2) a proceeding to determine the validity, priority, or extent of a lien or
5 other interest in property, ~~other than~~ not including a proceeding under Rule 3012
6 or Rule 4003(d);
7 * * * * *

COMMITTEE NOTE

Subdivision (2) is amended to provide that the determination of the validity, priority, or extent of a lien under Rule 3012 or Rule 4003(d) does not require an adversary proceeding. The determination of the amount of a secured claim may be sought through a chapter 12 or chapter 13 plan in accordance with Rule 3012. Thus, a debtor may propose to eliminate a wholly unsecured junior lien in a chapter 12 or chapter 13 plan without a separate adversary proceeding. Similarly, the avoidance of a lien on exempt property may be sought through a chapter 12 or chapter 13 plan in accordance with Rule 4003(d). An adversary proceeding continues to be required for lien avoidance not governed by Rule 4003(d).

Rule 9006. Computing and Extending Time

1 * * * * *

2 (f) ADDITIONAL TIME AFTER SERVICE BY MAIL OR UNDER

3 RULE 5(b)(2)(D), (E), OR (F) F.R. CIV. P. When there is a right or requirement

4 to act or undertake some proceedings within a prescribed period after ~~service~~

5 being served and that service is by mail or under Rule 5(b)(2)(D), (E), or (F) F.R.

6 Civ. P., three days are added after the prescribed period would otherwise expire

7 under Rule 9006(a).

8 * * * * *

COMMITTEE NOTE

Subdivision (f) is amended to conform to a corresponding amendment of Civil Rule 6(d). The amendment clarifies that only the party that is served by mail or under the specified provisions of Civil Rule 5—and not the party making service—is permitted to add three days to any prescribed period for taking action after service is made.

Rule 9009. Forms

(a) OFFICIAL FORMS. ~~Except as otherwise provided in Rule 3016(d), the~~ The Official Forms prescribed by the Judicial Conference of the United States shall be ~~observed and~~ used ~~with alterations as may be appropriate~~ without alteration, except as otherwise provided in these rules or in a particular Official Form. Official Forms may be modified

(1) to use font faces substantially similar to those prescribed, maintaining the prescribed size and style;

(2) to expand the prescribed areas for responses in order to permit complete responses;

(3) to delete space not needed for responses;

(4) to delete items requiring detail in a question or category if the filer indicates—either by checking "no" or "none" or by stating in words—that there is nothing to report on that question or category; and

(5) for court orders in a particular case only, to make any change that does not conflict with an applicable rule or with an Official Form that the order addresses or implements. ~~Forms may be combined and their contents rearranged to permit economies in their use.~~

(b) DIRECTOR'S FORMS. The Director of the Administrative Office of the United States Courts may issue additional forms for use under the Code.

20 (c) CONSTRUCTION. The forms shall be construed to be consistent with

21 these rules and the Code.

COMMITTEE NOTE

This rule is amended and reorganized into separate subdivisions.

Subdivision (a) addresses permissible modifications to Official Forms. It requires that an Official Form be used without alteration, except when another rule or the Official Form itself permits alteration. The former language generally permitting alterations has been deleted, but the rule preserves the ability of a filer to modify an Official Form to use a typeface substantially similar to the prescribed size and style, to expand or delete the space for responses as appropriate, and to delete inapplicable items so long as the filer indicates that no response is intended. For example, when more space will be necessary to completely answer a question on an Official Form without an attachment, the answer space may be expanded. On the other hand, many Official Forms indicate on their face that certain changes are not appropriate. The Official Form chapter 13 plan, for example, requires that topics be addressed in a particular order, and that nonstandard provisions be addressed in a specified section of the plan. Any changes that contravene the instructions on the Official Form chapter 13 plan would be prohibited by this rule.

The rule permits modification of court orders included in the Official Forms, provided that the modification does not conflict with any applicable rule or Official Form. For example, the court may add an additional provision to the Order Approving Payment of Filing Fee in Installments, which is part of Official Form 3A.

The creation of subdivision (b) and subdivision (c) is stylistic.

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APPENDIX B.2

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Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number _____
(If known)

Check one box only as directed in this form and in Form 22A-1Supp:

❑ 1. There is no presumption of abuse.

❑ 2. The presumption of abuse is determined by Form 22A–2.

❑ 3. The Means Test does not apply now because of qualified military service but it could apply later.

❑ Check if this is an amended filing

Official Form 22A–1

Chapter 7 Statement of Your Current Monthly Income

12/14

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for being accurate. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known). If you believe that you are exempted from a presumption of abuse because you do not have primarily consumer debts or because of qualifying military service, complete and file Official Form 22A-1Supp with this form.

Part 1: Calculate Your Current Monthly Income

1. **What is your marital and filing status?** Check one only.
   - ❑ **Not married.** Fill out Column A, lines 2-11.
   - ❑ **Married and your spouse is filing with you.** Fill out both Columns A and B, lines 2-11.
   - ❑ **Married and your spouse is NOT filing with you. You and your spouse are:**
     - ❑ **Living in the same household and are not legally separated.** Fill out both Columns A and B, lines 2-11.
     - ❑ **Living separately or are legally separated**. Fill out Column A, lines 2-11; do not fill out Column B. By checking this box, you declare under penalty of perjury that you and your spouse are legally separated under nonbankruptcy law that applies or that you and your spouse are living apart for reasons that do not include evading the Means Test requirements. 11 U.S.C. § 707(b)(7)(B).

Fill in the average monthly income that you received from all sources, derived during the 6 full months before you file this bankruptcy case. 11 U.S.C. § 101(10A). For example, if you are filing on September 15, the 6-month period would be March 1 through August 31. If the amount of your monthly income varied during the 6 months, add the income for all 6 months and divide the total by 6. Fill in the result. Do not include any income amount more than once. For example, if both spouses own the same rental property, put the income from that property in one column only. If you have nothing to report for any line, write $0 in the space.

			Column A **For you**	*Column B* **Debtor 2 or non-filing spouse**
2. **Your gross wages, salary, tips, bonuses, overtime, and commissions** (before all payroll deductions).			$_____	$_____
3. **Alimony and maintenance payments.** Do not include payments from a spouse if Column B is filled in.			$_____	$_____
4. **All amounts from any source which are regularly paid for household expenses of you or your dependents, including child support.** Include regular contributions from an unmarried partner, members of your household, your dependents, parents, and roommates. Include regular contributions from a spouse only if Column B is not filled in. Do not include payments you listed on line 3.			$_____	$_____
5. **Net income from operating a business, profession, or farm**				
Gross receipts (before all deductions)	$_____			
Ordinary and necessary operating expenses	– $_____			
Net monthly income from a business, profession, or farm	$_____	**Copy here➔**	$_____	$_____
6. **Net income from rental and other real property**				
Gross receipts (before all deductions)	$_____			
Ordinary and necessary operating expenses	– $_____			
Net monthly income from rental or other real property	$_____	**Copy here➔**	$_____	$_____
7. **Interest, dividends, and royalties**			$_____	$_____

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

	Column A **For you**	Column B **Debtor 2 or non-filing spouse**
8. **Unemployment compensation**	$_____	$_____
Do not enter the amount if you contend that the amount received was a benefit under the Social Security Act. Instead, list it here:..... ➔		
For you ..... $_____		
For your spouse ..... $_____		
9. **Pension or retirement income.** Do not include any amount received that was a benefit under the Social Security Act.	$_____	$_____
10. **Income from all other sources not listed above.** Specify the source and amount. Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, a crime against humanity, or international or domestic terrorism. If necessary, list other sources on a separate page and put the total on line 10c.		
10a. _____	$_____	$_____
10b. _____	$_____	$_____
10c. Total amounts from separate pages, if any.	+$_____	+ $_____
11. **Calculate your total current monthly income.** Add lines 2 through 10 for each column. Then add the total for Column A to the total for Column B.	$_____ +	$_____ = $_____ **Total current monthly income**

Part 2: Determine Whether the Means Test Applies to You

12. **Calculate your current monthly income for the year.** Follow these steps:

12a. Copy your total current monthly income from line 11..... **Copy line 11 here**➔ 12a. $_____

Multiply by 12 (the number of months in a year). x 12

12b. The result is your annual income for this part of the form. 12b. $_____

13. **Calculate the median family income that applies to you.** Follow these steps:

Fill in the state in which you live. _____

Fill in the number of people in your household. _____

Fill in the median family income for your state and size of household. ..... 13. $_____

To find that information, either go to the Means Test information at http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm or ask for help at the clerk's office of the bankruptcy court.

14. **How do the lines compare?**

14a. ❑ Line 12b is less than or equal to line 13. On the top of page 1, check box 1, *There is no presumption of abuse.* Go to Part 3.

14b. ❑ Line 12b is more than line 13. On the top of page 1, check box 2, *The presumption of abuse is determined by Form 22A-2*. Go to Part 3 and fill out Form 22A–*2.*

Part 3: Sign Below

By signing here, I declare under penalty of perjury that the information on this statement and in any attachments is true and correct.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

If you checked line 14a, do NOT fill out or file Official Form 22A–2, *Chapter 7 Means Test Calculation*.

If you checked line 14b, fill out Official Form 22A–2, *Chapter 7 Means Test Calculation* and file it with this form.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number (If known) _____

❑ Check if this is an amended filing

Official Form 22A–1Supp

Statement of Exemption from Presumption of Abuse Under § 707(b)(2) 12/14

File this supplement together with *Chapter 7 Statement of Your Current Monthly Income* (Official Form 22A-1) if you believe that you are exempted from a presumption of abuse. Be as complete and accurate as possible. If two married people are filing together, and any of the exclusions in this statement applies to only one of you, the other person should complete a separate Official Form 22A-1 if you believe that this is required by 11 U.S.C. § 707(b)(2)(C).

Part 1: Identify the Kind of Debts You Have

1. **Are your debts primarily consumer debts?** *Consumer debts* are defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose." Make sure that your answer is consistent with the "Nature of Debts" box on page 1 of the *Voluntary Petition* (Official Form 1).

   ❑ No. Go to the top of page 1 of Official Form 22A-1, and check box 1, *There is no presumption of abuse.* Then sign Part 3 of that form, and submit this supplement with that form.

   ❑ Yes. Go to Part 2.

Part 2: Determine Whether Military Service Provisions Apply to You

2. **Are you a disabled veteran** (as defined in 38 U.S.C. § 3741(1))**?**

   ❑ No. Go to line 3.

   ❑ Yes. Did you incur debts mostly while you were on active duty or while you were performing a homeland defense activity? 10 U.S.C. § 101(d)(1)); 32 U.S.C. § 901(1).

   ❑ No. Go to line 3.

   ❑ Yes. Go to the top of page 1 of Official Form 22A-1, and check box 1, *There is no presumption of abuse.* Then sign Part 3 of that form, and submit this supplement with that form.

3. **Are you or have you been a Reservist or member of the National Guard?**

   ❑ No. Complete Official Form 22A-1. Do not submit this supplement.

   ❑ Yes. Were you called to active duty or did you perform a homeland defense activity? 10 U.S.C. § 101(d)(1); 32 U.S.C. § 901(1).

   ❑ No. Complete Official Form 22A-1. Do not submit this supplement.

   ❑ Yes. Check any one of the following categories that applies:

   ❑ **I was called to active duty after September 11, 2001**, for at least 90 days and remain on active duty**.**

   ❑ **I was called to active duty after September 11, 2001,** for at least 90 days and was released from active duty on _____, which is fewer than 540 days before I file this bankruptcy case.

   ❑ **I am performing a homeland defense activity for at least 90 days.**

   ❑ **I performed a homeland defense activity for at least 90 days**, ending on _____, which is fewer than 540 days before I file this bankruptcy case.

If you checked one of the categories to the left, go to the top of page 1 of Official Form 22A-1, and check box 3, *The Means Test does not apply now because of qualified military service but it could apply later.* Then sign Part 3 of that form, and submit this supplement with that form.

You are not required to fill out the rest of Official Form 22A-1 during the exclusion period. The *exclusion period* means the time you are on active duty or are performing a homeland defense activity, and for 540 days afterward. 11 U.S.C. § 707(b)(2)(D)(ii).

If your exclusion period ends before your case is closed, you may have to file an amended Official Form 22A-1.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number _____
(If known)

Check the appropriate box as directed in lines 40 or 42:

According to the calculations required by this Statement:

❑ 1. There is no presumption of abuse.

❑ 2. There is a presumption of abuse.

❑ Check if this is an amended filing

Official Form 22A–2

Chapter 7 Means Test Calculation

12/14

To fill out this form, you will need your completed copy of Form 22A–1:*Chapter 7 Statement of Your Current Monthly Income* (Official Form 22A-1).

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for being accurate. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).

Part 1: Determine Your Adjusted Income

1. **Copy your total current monthly income.** ..... **Copy line 11 from Official Form 22A-1 here➔** .....1. $_____

2. **Did you fill out Column B in Part 1 of Official Form 22A–1?**

❑ No. Fill in $0 on line 3d.

❑ Yes. Is your spouse filing with you?

❑ No. Go to line 3.

❑ Yes. Fill in $0 on line 3d.

3. **Adjust your current monthly income by subtracting any part of your spouse's income not used to pay for the household expenses of you or your dependents.** Follow these steps:

On line 11, Column B of Form 22A–1, was any amount of the income you reported for your spouse NOT regularly used for the household expenses of you or your dependents?

❑ No. Fill in 0 on line 3d.

❑ Yes. Fill in the information below:

State each purpose for which the income was used For example, the income is used to pay your spouse's tax debt or to support people other than you or your dependents	**Fill in the amount you are subtracting from your spouse's income**
3a. _____	$_____
3b. _____	$_____
3c. _____	+ $_____
3d. **Total.** Add lines 3a, 3b, and 3c.	$_____

Copy total here ➔ .....3d. − $_____

4. **Adjust your current monthly income.** Subtract line 3d from line 1. $_____

Part 2: Calculate Your Deductions from Your Income

The Internal Revenue Service (IRS) issues National and Local Standards for certain expense amounts. Use these amounts to answer the questions in lines 6-15. To find the IRS standards, either go to http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm or ask for help at the clerk's office of the bankruptcy court.

Deduct the expense amounts set out in lines 6-15 regardless of your actual expense. In later parts of the form, you will use some of your actual expenses if they are higher than the standards. Do not deduct any amounts that you subtracted from your spouse's income in line 3 and do not deduct any operating expenses that you subtracted from income in lines 5 and 6 of Form 22A–1.

If your expenses differ from month to month, enter the average expense.

Whenever this part of the form refers to *you*, it means both you and your spouse if Column B of Form 22A–1 is filled in.

5. **The number of people used in determining your deductions from income**

   Fill in the number of people who could be claimed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support. This number may be different from the number of people in your household. [ ]

National Standards You must use the IRS National Standards to answer the questions in lines 6-7.

6. **Food, clothing, and other items:** Using the number of people you entered in line 5 and the IRS National Standards, fill in the dollar amount for food, clothing, and other items. $_____

7. **Out-of-pocket health care allowance:** Using the number of people you entered in line 5 and the IRS National Standards, fill in the dollar amount for out-of-pocket health care. The number of people is split into two categories—people who are under 65 and people who are 65 or older—because older people have a higher IRS allowance for health care costs. If your actual expenses are higher than this IRS amount, you may deduct the additional amount on line 22.

People who are under 65 years of age

7a. Out-of-pocket health care allowance per person $_____

7b. Number of people who are under 65 X _____

7c. **Subtotal.** Multiply line 7a by line 7b. $_____ **Copy line 7c here➔** ..... $_____

People who are 65 years of age or older

7d. Out-of-pocket health care allowance per person $_____

7e. Number of people who are 65 or older X _____

7f. **Subtotal.** Multiply line 7d by line 7e. $_____ **Copy line 7f here➔** ..... + $_____

7g. **Total**. Add lines 7c and 7f..... $_____ **Copy total here➔** ..... 7g. $_____

Local Standards You must use the IRS Local Standards to answer the questions in lines 8-15.

Based on information from the IRS, the U.S. Trustee Program has divided the IRS Local Standard for housing for bankruptcy purposes into two parts:

- **Housing and utilities – Insurance and operating expenses**
- **Housing and utilities – Mortgage or rent expenses**

Use the U.S. Trustee Program chart to answer the questions in lines 8-9. Go to http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm or ask for help at the clerk's office of the bankruptcy court.

8. **Housing and utilities – Insurance and operating expenses:** Using the number of people you entered in line 5, fill in the dollar amount listed for your county for insurance and operating expenses. $_____

9. **Housing and utilities – Mortgage or rent expenses:**

9a. Using the number of people you entered in line 5, fill in the dollar amount listed for your county for mortgage or rent expenses. 9a. $_____

9b. Total average monthly payment for all mortgages and other debts secured by your home.

To calculate the total average monthly payment, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Then divide by 60.

Name of the creditor	Does payment include taxes or insurance?	Average monthly payment
_____	❑ No ❑ Yes	$_____
_____	❑ No ❑ Yes	$_____
_____	❑ No ❑ Yes	+ $_____

9b. Total average monthly payment $_____ **Copy line 9b here➔** — $_____ Repeat this amount on line 33a.

9c. Net mortgage or rent expense.
Subtract line 9b (*total average monthly payment*) from line 9a (*mortgage or rent expense*). If this amount is less than $0, enter $0. 9c. $_____ **Copy line 9c here➔** $_____

10. **If you claim that the U.S. Trustee Program's division of the IRS Local Standard for housing does not accurately compute the amount that applies to you, fill in any additional amount you claim.** $_____

Explain why: _____
_____

11. **Local transportation expenses:** Check the number of vehicles for which you claim an ownership or operating expense.

❑ 0. Go to line 14.
❑ 1. Go to line 12.
❑ 2 or more. Go to line 12.

12. **Vehicle operation expense:** Using the IRS Local Standards and the number of vehicles for which you claim the operating expenses, fill in the *Operating Costs* that apply for your Census region or metropolitan statistical area. $_____

13. **Vehicle ownership or lease expense:** Using the IRS Local Standards, calculate the net ownership or lease expense for each vehicle below. You may not claim the expense if you do not make any loan or lease payments on the vehicle. In addition, you may not claim the expense for more than two vehicles.

Vehicle 1 **Describe Vehicle 1:** _____

_____

13a. Ownership or leasing costs using IRS Local Standard 13a. $_____

13b. Average monthly payment for all debts secured by Vehicle 1.
Do not include costs for leased vehicles.

To calculate the average monthly payment here and on line 13e, add all amounts that are contractually due to each secured creditor in the 60 months after you filed for bankruptcy. Then divide by 60.

Name of each creditor for Vehicle 1	Average monthly payment
_____	$_____

Copy 13b here ➔ — $_____ Repeat this amount on line 33b.

13c. Net Vehicle 1 ownership or lease expense
Subtract line 13b from line 13a. If this amount is less than $0, enter $0. 13c. $_____ **Copy net Vehicle 1 expense here**..... ➔ $_____

Vehicle 2 **Describe Vehicle 2:** _____

_____

13d. Ownership or leasing costs using IRS Local Standard 13d. $_____

13e. Average monthly payment for all debts secured by Vehicle 2. Do not include costs for leased vehicles.

Name of each creditor for Vehicle 2	Average monthly payment
_____	$_____

Copy 13e here ➔ — $_____ Repeat this amount on line 33c.

13f. Net Vehicle 2 ownership or lease expense
Subtract line 13e from 13d. If this amount is less than $0, enter $0. 13f. $_____ **Copy net Vehicle 2 expense here**..... ➔ $_____

14. **Public transportation expense**: If you claimed 0 vehicles in line 11, using the IRS Local Standards, fill in the *Public Transportation* expense allowance regardless of whether you use public transportation. $_____

15. **Additional public transportation expense:** If you claimed 1 or more vehicles in line 11 and if you claim that you may also deduct a public transportation expense, you may fill in what you believe is the appropriate expense, but you may not claim more than the IRS Local Standard for *Public Transportation*.

$_____

Other Necessary Expenses In addition to the expense deductions listed above, you are allowed your monthly expenses for the following IRS categories.

16. **Taxes:** The total monthly amount that you will actually owe for federal, state and local taxes, such as income taxes, self-employment taxes, social security taxes, and Medicare taxes. You may include the monthly amount withheld from your pay for these taxes. However, if you expect to receive a tax refund, you must divide the expected refund by 12 and subtract that number from the total monthly amount that is withheld to pay for taxes.

    Do not include real estate, sales, or use taxes. $_____

17. **Involuntary deductions:** The total monthly payroll deductions that your job requires, such as retirement contributions, union dues, and uniform costs.

    Do not include amounts that are not required by your job, such as voluntary 401(k) contributions or payroll savings. $_____

18. **Life insurance:** The total monthly premiums that you pay for your own term life insurance. If two married people are filing together, include payments that you make for your spouse's term life insurance. Do not include premiums for life insurance on your dependents, for a non-filing spouse's life insurance, or for any form of life insurance other than term. $_____

19. **Court-ordered payments:** The total monthly amount that you pay as required by the order of a court or administrative agency, such as spousal or child support payments.

    Do not include payments on past due obligations for spousal or child support. You will list these obligations in line 35. $_____

20. **Education:** The total monthly amount that you pay for education that is either required:
    - as a condition for your job, or
    - for your physically or mentally challenged dependent child if no public education is available for similar services.

    $_____

21. **Childcare:** The total monthly amount that you pay for childcare, such as babysitting, daycare, nursery, and preschool.

    Do not include payments for any elementary or secondary school education. $_____

22. **Additional health care expenses, excluding insurance costs:** The monthly amount that you pay for health care that is required for the health and welfare of you or your dependents and that is not reimbursed by insurance or paid by a health savings account. Include only the amount that is more than the total entered in line 7.
    Payments for health insurance or health savings accounts should be listed only in line 25. $_____

23. **Telecommunication services:** The total monthly amount that you pay for telecommunication services such as pagers, call waiting, caller identification, special long distance, business internet service, and business cell phone service, to the extent necessary for your health and welfare or that of your dependents or for the production of income, if it is not reimbursed by your employer. + $_____

    Do not include payments for basic home telephone, internet and cell phone service. Do not include self-employment expenses, such as those reported on line 8 of Official Form 22A-1, or any amount you previously deducted.

24. **Add all of the expenses allowed under the IRS expense allowances.**

    Add lines 6 through 23. $_____

Additional Expense Deductions These are additional deductions allowed by the Means Test.
Note: Do not include any expense allowances listed in lines 6-24.

25. **Health insurance, disability insurance, and health savings account expenses.** The monthly expenses for health insurance, disability insurance, and health savings accounts that are reasonably necessary for yourself, your spouse, or your dependents.

Health insurance	$_____		
Disability insurance	$_____		
Health savings account	+ $_____		
Total	$_____	**Copy total here➔**	$_____

Do you actually spend this total amount?

❑ No. How much do you actually spend? $_____
❑ Yes

26. **Continued contributions to the care of household or family members.** The actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses. $_____

27. **Protection against family violence.** The reasonably necessary monthly expenses that you incur to maintain the safety of you and your family under the Family Violence Prevention and Services Act or other federal laws that apply. $_____

By law, the court must keep the nature of these expenses confidential.

28. **Additional home energy costs.** Your home energy costs are included in your non-mortgage housing and utilities allowance on line 8.

If you believe that you have home energy costs that are more than the home energy costs included in the non-mortgage housing and utilities allowance, then fill in the excess amount of home energy costs. $_____

You must give your case trustee documentation of your actual expenses, and you must show that the additional amount claimed is reasonable and necessary.

29. **Education expenses for dependent children who are younger than 18.** The monthly expenses (not more than $156.25* per child) that you pay for your dependent children who are younger than 18 years old to attend a private or public elementary or secondary school. $_____

You must give your case trustee documentation of your actual expenses, and you must explain why the amount claimed is reasonable and necessary and not already accounted for in lines 6-23.

* Subject to adjustment on 4/01/16, and every 3 years after that for cases begun on or after the date of adjustment.

30. **Additional food and clothing expense.** The monthly amount by which your actual food and clothing expenses are higher than the combined food and clothing allowances in the IRS National Standards. That amount cannot be more than 5% of the food and clothing allowances in the IRS National Standards. $_____

To find the maximum additional allowance, either go to http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm or ask for help at the clerk's office of the bankruptcy court.

You must show that the additional amount claimed is reasonable and necessary.

31. **Continuing charitable contributions.** The amount that you will continue to contribute in the form of cash or financial instruments to a religious or charitable organization. 26 U.S.C. § 170(c)(1)-(2). $_____

32. **Add all of the additional expense deductions.** $_____

Add lines 25 through 31.

Deductions for Debt Payment

33. **For debts that are secured by an interest in property that you own, including home mortgages, vehicle loans, and other secured debt, fill in lines 33a through 33g.**

Do not deduct mortgage payments previously deducted as an operating expense in Line 9. To calculate the total average monthly payment, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Then divide by 60.

		Average monthly payment
Mortgages on your home:		
33a. Copy line 9b here	➔	$_____
Loans on your first two vehicles:		
33b. Copy line 13b here.	➔	$_____
33c. Copy line 13e here.	➔	$_____

	Name of each creditor for other secured debt	Identify property that secures the debt	Does payment include taxes or insurance?	
33d.	_____	_____	❑ No ❑ Yes	$_____
33e.	_____	_____	❑ No ❑ Yes	$_____
33f.	_____	_____	❑ No ❑ Yes	+ $_____

33g. Total average monthly payment. Add lines 33a through 33f. ..... $_____ **Copy total here➔** $_____

34. **Are any debts that you listed in line 33 secured by your primary residence, a vehicle, or other property necessary for your support or the support of your dependents?**

❑ No. Go to line 35.

❑ Yes. State any amount that you must pay to a creditor, in addition to the payments listed in line 34, to keep possession of your property (called the *cure amount*). Next, divide by 60 and fill in the information below.

Name of the creditor	Identify property that secures the debt	Total cure amount		Monthly cure amount
_____	_____	$_____	÷ 60 =	$_____
_____	_____	$_____	÷ 60 =	$_____
_____	_____	$_____	÷ 60 =	+ $_____
			Total	$_____

Copy total here➔ $_____

35. **Do you owe any priority claims such as a priority tax, child support, or alimony — that are past due as of the filing date of your bankruptcy case?** 11 U.S.C. § 507.

❑ No. Go to line 36.

❑ Yes. Fill in the total amount of all of these priority claims. Do not include current or ongoing priority claims, such as those you listed in line 19.

Total amount of all past-due priority claims ..... $_____ ÷ 60 = $_____

36. **Are you eligible to file a case under Chapter 13?** 11 U.S.C. § 109(e). For more information, go to www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter13.aspx

❑ No. Go to line 37.

❑ Yes. Fill in the following information.

Projected monthly plan payment if you were filing under Chapter 13 $_____

Current multiplier for your district as determined under schedules issued by the Executive Office for United States Trustees. To find this information, go to www.justice.gov/ust/eo/bapcpa/meanstesting.htm or ask for help at the clerk's office of the bankruptcy court. x _____

Average monthly administrative expense if you were filing under Chapter 13 $_____ **Copy total here➔** $_____

37. **Add all of the deductions for debt payment.**
Add lines 33g through 36. $_____

Total Deductions from Income

38. **Add all of the allowed deductions.**

Copy line 24, *All of the expenses allowed under IRS expense allowances* ..... $_____

Copy line 32, *All of the additional expense deductions* ..... $_____

Copy line 37, *All of the deductions for debt payment* ..... + $_____

Total deductions $_____ **Copy total here ➔** $_____

Determine Whether There Is a Presumption of Abuse

39. **Calculate monthly disposable income for 60 months**

39a. Copy line 4, *adjusted current monthly income* ..... $_____

39b. Copy line 38, *Total deductions*..... − $_____

39c. Monthly disposable income. 11 U.S.C. § 707(b)(2). Subtract line 39b from line 39a. $_____ **Copy line 39c here➔** $_____

For the next 60 months (5 years)..... x 60

39d. **Total**. Multiply line 39c by 60. ..... 39d. $_____ **Copy line 39d here➔** $_____

40. **Find out whether there is a presumption of abuse.** Check the box that applies:

❑ **The line 39d is less than $7,475*.** On the top of page 1 of this form, check box 1, *There is no presumption of abuse.* Go to Part 5.

❑ **The line 39d is more than $12,475*.** On the top of page 1 of this form, check box 2, *There is a presumption of abuse.* You may fill out Part 4 if you claim special circumstances. Then go to Part 5.

❑ **The line 39d is at least $7,475*, but not more than $12,475*.** Go to line 41.

* Subject to adjustment on 4/01/16, and every 3 years after that for cases filed on or after the date of adjustment.

41. 41a. **Fill in the amount of your total nonpriority unsecured debt.** If you filled out *A Summary of Your Assets and Liabilities and Certain Statistical Information Schedules* (Official Form 6), you may refer to line 3b on that form.

38a. $_____

x .25

41b. **25% of your total nonpriority unsecured debt.** 11 U.S.C. § 707(b)(2)(A)(i)(I)
Multiply line 41a by 0.25.

$_____ **Copy here➔** $_____

42. **Determine whether the income you have left over after subtracting all allowed deductions is enough to pay 25% of your unsecured, nonpriority debt.**
Check the box that applies:

❑ **Line 39d is less than line 41b.** On the top of page 1 of this form, check box 1, *There is no presumption of abuse.* Go to Part 5.

❑ **Line 39d is equal to or more than line 41b.** On the top of page 1 of this form, check box 2, *There is a presumption of abuse.* You may fill out Part 4 if you claim special circumstances. Then go to Part 5.

Give Details About Special Circumstances

43. **Do you have any special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative?** 11 U.S.C. § 707(b)(2)(B).

❑ No. Go to Part 5.

❑ Yes. Fill in the following information. All figures should reflect your average monthly expense or income adjustment for each item. You may include expenses you listed in line 25.

You must give a detailed explanation of the special circumstances that make the expenses or income adjustments necessary and reasonable. You must also give your case trustee documentation of your actual expenses or income adjustments.

Give a detailed explanation of the special circumstances	**Average monthly expense or income adjustment**
_____	$_____
_____	$_____
_____	$_____
_____	$_____

Sign Below

By signing here, I declare under penalty of perjury that the information on this statement and in any attachments is true and correct.

✘ _____
Signature of Debtor 1

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

Date _____
MM / DD / YYYY

Instructions for the Chapter 7 Statement of Your Current Monthly Income and Means Test Calculation

United States Bankruptcy Court 12/01/14

How to fill out these forms

Official Forms 22A–1 and 22A –2 determine whether your income and expenses create a presumption of abuse that may prevent you from obtaining relief from your debts under chapter 7 of the Bankruptcy Code. Chapter 7 relief can be denied to a person who has primarily consumer debts if the court finds that the person has enough income to repay creditors a portion of their claims set out in the Bankruptcy Code.

You must file 22A –1, the *Chapter 7 Statement of Your Current Monthly Income* (Official Form 22A –1) if you are an individual filing for bankruptcy under chapter 7. This form will determine your current monthly income and compare whether your income is more than the median income for households of the same size in your state. If your income is not above the median, there is no presumption of abuse and you will not have to fill out the second form.

Similarly, Official Form 22A-1Supp determines whether you may be exempted from the presumption of abuse because you do not have primarily consumer debts or because you have provided certain military or homeland defense services. If one of these exemptions applies, you should file a supplement, Official Form 22A-1Supp, and verify the supplement by completing Part 3 of Official Form 22A-1. If you qualify for an exemption, you are not required to fill out any part of Form 22A-1 other than the verification. If the exemptions do not apply, you should complete all of the parts of Official Form 22A-1 and file it without the supplemental form.

If you and your spouse are filing together, you and your spouse may file a single Official Form 22A-1. However, if an exemption on Official Form 22A-1Supp applies to only one of you, separate forms may be required. 11 U.S.C. § 707(b)(2)(C).

If your completed Official Form 22A-1 shows income above the median, you must file the second form, 22A –2, *Chapter 7 Means Test Calculation* (Official Form 22A –2). The calculations on this form—sometimes called the *Means Test*—reduce your income by living expenses and payment of certain debts, resulting in an amount available to pay other debts. If this amount is high enough, it will give rise to a *presumption of abuse*. A presumption of abuse does not mean you are actually trying to abuse the bankruptcy system. Rather, the presumption simply means that you may have enough income that you should not be granted relief under chapter 7. You may overcome the presumption by showing special circumstances that reduce your income or increase your expenses.

If you cannot obtain relief under chapter 7, you may be eligible to continue under another chapter of the Bankruptcy Code and pay creditors over a period of time.

Read each question carefully. You may not be required to answer every question on this form. For example, your military status may determine whether you must fill out the entire form. The instructions will alert you if you may skip questions.

If you have nothing to report for a line, write $0.

Some of the questions require you to go to other sources for information. In those cases, the form has instructions for where to find the information you need.

Understand the terms used in the form

This form uses *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, this form uses *you* to ask for information from both debtors. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Things to remember when filling out these forms

- Be as complete and accurate as possible.
- If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known).
- If two married people are filing together, both are equally responsible for supplying correct information.

Do not file these instructions with your bankruptcy filing package. Keep them for your records.

12b-007680

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Draft May 7, 2013

❒ Check if this is an amended filing

Official Form 22B

Chapter 11 Statement of Your Current Monthly Income

12/14

You must file this form if you are an individual and are filing for bankruptcy under Chapter 11. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).

Part 1: Calculate Your Current Monthly Income

1. **What is your marital and filing status?** Check one only.

❑ **Not married.** Fill out Column A, lines 2-11.

❑ **Married and your spouse is filing with you.** Fill out both Columns A and B, lines 2-11.

❑ **Married and your spouse is NOT filing with you.** Fill out Column A, lines 2-11.

Fill in the average monthly income that you received from all sources during the 6 full months before you filed for bankruptcy. 11 U.S.C. § 101(10A). For example, if you are filing on September 15, the 6-month period would be March 1 through August 31. If the amount of your monthly income varied during the 6 months, add the income for all 6 months and divide the total by 6. Fill in the result.
Do not include any income amount more than once. For example, if both spouses own the same rental property, put the income from that property in one column only. If you have nothing to report for any line, write $0 in the space.

			Column A **For Debtor 1**	*Column B* **Debtor 2 or non-filing spouse**
2. **Your gross wages, salary, tips, bonuses, overtime, and commissions** (before all payroll deductions).			$_____	$_____
3. **Alimony and maintenance payments.** Do not include payments from a spouse if Column B is filled in.			$_____	$_____
4. **All amounts from any source which are regularly paid for household expenses of you or your dependents, including child support.** Include regular contributions from an unmarried partner, members of your household, your dependents, parents, and roommates. Include regular contributions from a spouse only if Column B is not filled in. Do not include payments you listed on line 3.			$_____	$_____
5. **Net income from operating a business, profession, or farm**				
Gross receipts (before all deductions)	$_____			
Ordinary and necessary operating expenses	– $_____			
Net monthly income from a business, profession, or farm	$_____	**Copy here➔**	$_____	$_____
6. **Net income from rental and other real property**				
Gross receipts (before all deductions)	$_____			
Ordinary and necessary operating expenses	– $_____			
Net monthly income from rental or other real property	$_____	**Copy here➔**	$_____	$_____

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

	Column A **For Debtor 1**	Column B **Debtor 2 or non-filing spouse**
7. **Interest, dividends, and royalties**	$_____	$_____
8. **Unemployment compensation**	$_____	$_____
Do not enter the amount if you contend that the amount received was a benefit under the Social Security Act. Instead, list it here:..... ↓		
For you ..... $_____		
For your spouse ..... $_____		
9. **Pension or retirement income.** Do not include any amount received that was a benefit under the Social Security Act.	$_____	$_____
10. **Income from all other sources not listed above.** Specify the source and amount. Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, a crime against humanity, or international or domestic terrorism. If necessary, list other sources on a separate page and put the total on line 10c.		
10a. _____	$_____	$_____
10b. _____	$_____	$_____
10c. Total amounts from separate pages, if any.	+ $_____	+ $_____
11. **Calculate your total current monthly income.** Add lines 2 through 10 for each column. Then add the total for Column A to the total for Column B.	$_____ +	$_____ = $_____
		Total current monthly income

Part 2: Sign Below

By signing here, under penalty of perjury I declare that the information on this statement and in any attachments is true and correct.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date_____
MM / DD / YYYY

Official Form 22B

Instructions for the Chapter 11 Statement of Your Current Monthly Income

United States Bankruptcy Court 12/01/14

How to Fill Out this Form

You must file the *Chapter 11 Statement of Your Current Monthly Income* (Official Form 22B) if you are an individual filing for bankruptcy under Chapter 11.

If you have nothing to report for a line, write $0.

Understand the terms used in the form

This form uses *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, this form uses *you* to ask for information from both debtors. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Things to remember when filling out this form

- Be as complete and accurate as possible.
- If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies On the top of any additional pages, write your name and case number (if known).
- If two married people are filing together, both are equally responsible for supplying correct information.

Do not file these instructions with your bankruptcy filing package. Keep them for your records.

12b-007683

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Check as directed in lines 17 and 21:

According to the calculations required by this Statement:

- ❑ 1. Disposable income is not determined under 11 U.S.C. § 1325(b)(3).
- ❑ 2. Disposable income is determined under 11 U.S.C. § 1325(b)(3).
- ❑ 3. The commitment period is 3 years.
- ❑ 4. The commitment period is 5 years.

❑ Check if this is an amended filing

Official Form 22C–1

Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period

12/14

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for being accurate. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).

Part 1: Calculate Your Average Monthly Income

1. **What is your marital and filing status?** Check one only.
   - ❑ **Not married.** Fill out Column A, lines 2-11.
   - ❑ **Married.** Fill out both Columns A and B, lines 2-11.

Fill in the average monthly income that you received from all sources, derived during the 6 full months before you file this bankruptcy case. 11 U.S.C. § 101(10A). For example, if you are filing on September 15, the 6-month period would be March 1 through August 31. If the amount of your monthly income varied during the 6 months, add the income for all 6 months and divide the total by 6. Fill in the result. Do not include any income amount more than once. For example, if both spouses own the same rental property, put the income from that property in one column only. If you have nothing to report for any line, write $0 in the space.

			Column A **For Debtor 1**	*Column B* **Debtor 2 or non-filing spouse**
2. **Your gross wages, salary, tips, bonuses, overtime, and commissions** (before all payroll deductions).			$_____	$_____
3. **Alimony and maintenance payments.** Do not include payments from a spouse if Column B is filled in.			$_____	$_____
4. **All amounts from any source which are regularly paid for household expenses of you or your dependents, including child support.** Include regular contributions from an unmarried partner, members of your household, your dependents, parents, and roommates. Include regular contributions from a spouse only if Column B is not filled in. Do not include payments you listed on line 3.			$_____	$_____
5. **Net income from operating a business, profession, or farm**				
Gross receipts (before all deductions)	$_____			
Ordinary and necessary operating expenses	– $_____			
Net monthly income from a business, profession, or farm	$_____	**Copy here➔**	$_____	$_____
6. **Net income from rental and other real property**				
Gross receipts (before all deductions)	$_____			
Ordinary and necessary operating expenses	– $_____			
Net monthly income from rental or other real property	$_____	**Copy here➔**	$_____	$_____

	Column A **For Debtor 1**	Column B **Debtor 2 or non-filing spouse**
7. **Interest, dividends, and royalties**	$_____	$_____
8. **Unemployment compensation**	$_____	$_____
Do not enter the amount if you contend that the amount received was a benefit under the Social Security Act. Instead, list it here: ..... ➔		
For you ..... $_____		
For your spouse ..... $_____		
9. **Pension or retirement income.** Do not include any amount received that was a benefit under the Social Security Act.	$_____	$_____
10. **Income from all other sources not listed above.** Specify the source and amount. Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, a crime against humanity, or international or domestic terrorism. If necessary, list other sources on a separate page and put the total on line 10c.		
10a. _____	$_____	$_____
10b. _____	$_____	$_____
10c. Total amounts from separate pages, if any.	+ $_____	+ $_____
11. **Calculate your total average monthly income.** Add lines 2 through 10 for each column. Then add the total for Column A to the total for Column B.	$_____ +	$_____ = $_____ **Total average monthly income**

Part 2: Determine How to Measure Your Deductions from Income

12. **Copy your total average monthly income from line 11.** ..... $_____

13. **Calculate the marital adjustment.** Check one:

- ❑ You are not married. Fill in 0 in line 13d.
- ❑ You are married and your spouse is filing with you. Fill in 0 in line 13d.
- ❑ You are married and your spouse is not filing with you.
  Fill in the amount of the income listed in line 11, Column B, that was NOT regularly paid for the household expenses of you or your dependents, such as payment of the spouse's tax liability or the spouse's support of someone other than you or your dependents.

  In lines 13a-c, specify the basis for excluding this income and the amount of income devoted to each purpose. If necessary, list additional adjustments on a separate page.

  If this adjustment does not apply, enter 0 on line 13d.

13a. _____ $_____

13b. _____ $_____

13c. _____ + $_____

13d. Total ..... $_____ **Copy here.** ➔ 13d. — _____

14. **Your current monthly income.** Subtract line 13d from line 12. 14. $ _____

15. **Calculate your current monthly income for the year.** Follow these steps:

15a. Copy line 14 here ➔ ..... 15a. $ _____

Multiply line 15a by 12 (the number of months in a year). **x** 12

15b. The result is your current monthly income for the year for this part of the form. 15b. $_____

16. **Calculate the median family income that applies to you.** Follow these steps:

16a. Fill in the state in which you live. _____

16b. Fill in the number of people in your household. _____

16c. Fill in the median family income for your state and size of household. ..... 16c. $_____

To find that information, either go to the Means Test information at http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm or ask for help at the clerk's office of the bankruptcy court .

17. **How do the lines compare?**

17a. ❑ Line 15b is less than or equal to line 16c. On the top of page 1 of this form, check box 1, *Disposable income is not determined under 11 U.S.C. § 1325(b)(3)*. **Go to Part 3.** Do NOT fill out Official Form 22C–2: *Calculation of Disposable Income.*

17b. ❑ Line 15b is more than line 16c. On the top of page 1 of this form, check box 2, *Disposable income is determined under 11 U.S.C. § 1325(b)(3).* **Go to Part 3 and fill out Official Form 22C–2: Calculation of Disposable Income.** On line 35 of that form, copy your current monthly income from line 14 above.

Part 3: Calculate Your Commitment Period Under 11 U.S.C. §1325(b)(4)

18. **Copy your total average monthly income from line 11.** ..... 18. $_____

19. **Deduct the marital adjustment if it applies.** If you are married, your spouse is not filing with you, and you contend that calculating the commitment period under 11 U.S.C. § 1325(b)(4) allows you to deduct part of your spouse's income, copy the amount from line 13d.

If the marital adjustment does not apply, fill in 0 on line 19a. 19a. – $_____

Subtract line 19a from line 18. 19b. $_____

20. **Calculate your current monthly income for the year.** Follow these steps:

20a. Copy line 19b.. ..... 20a. $_____

Multiply by 12 (the number of months in a year). x 12

20b. The result is your current monthly income for the year for this part of the form. 20b. $_____

20c. Copy the median family income for your state and size of household from line 16c. ..... $_____

21. **How do the lines compare?**

❑ Line 20b is less than line 20c. Unless otherwise ordered by the court, on the top of page 1 of this form, check box 3, *The commitment period is 3 years*. Go to Part 4.

❑ Line 20b is more than or equal to line 20c. Unless otherwise ordered by the court, on the top of page 1 of this form, check box 4, *The commitment period is 5 years*. Go to Part 4.

Part 4: Sign Below

By signing here, under penalty of perjury I declare that the information on this statement and in any attachments is true and correct.

✘ _____ ✘ _____
Signature of Debtor 1 Signature of Debtor 2

Date _____ Date _____
MM / DD / YYYY MM / DD / YYYY

If you checked 17a, do NOT fill out or file Official Form 22C–2: *Calculation of Disposable Income*.

If you checked 17b, fill out Official Form 22C–2: *Calculation of Disposable Income* and file it with this form. On line 35 of that form, copy your current monthly income from line 14 above.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Draft May 7, 2013

❑ Check if this is an amended filing

Official Form 22C–2

Chapter 13 Calculation of Your Disposable Income

12/14

To fill out this form, you will need your completed copy of Form 22C–1*: Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period*.

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for being accurate. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).

Part 1: Calculate Your Deductions from Your Income

The Internal Revenue Service (IRS) issues National and Local Standards for certain expense amounts. Use these amounts to answer the questions in lines 6-15. To find the IRS standards, either go to http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm **or ask for help at the clerk's office of the bankruptcy court.**

Deduct the expense amounts set out in lines 6-15 regardless of your actual expense. In later parts of the form, you will use some of your actual expenses if they are higher than the standards. Do not include any operating expenses that you subtracted from income in lines 5 and 6 of Official Form 22C–1, and do not deduct any amounts that you subtracted from your spouse's income in line 13 of Form 22C–1.

If your expenses differ from month to month, enter the average expense.

Note: Line numbers 1-4 are not used in this form. These numbers apply to information required by a similar form used in chapter 7 cases.

5. **The number of people used in determining your deductions from income**
Fill in the number of people who could be claimed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support. This number may be different from the number of people in your household. ☐

National Standards You must use the IRS National Standards to answer the questions in lines 6-7.

6. **Food, clothing, and other items:** Using the number of people you entered in line 5 and the IRS National Standards, fill in the dollar amount for food, clothing, and other items. $_____

7. **Out-of-pocket health care allowance:** Using the number of people you entered in line 5 and the IRS National Standards, fill in the dollar amount for out-of-pocket health care. The number of people is split into two categories—people who are under 65 and people who are 65 or older—because older people have a higher IRS allowance for health care costs. If your actual expenses are higher than this IRS amount, you may deduct the additional amount on line 22.

People who are under 65 years of age

7a. Out-of-pocket health care allowance per person $_____

7b. Number of people who are under 65 X _____

7c. Subtotal. Multiply line 7a by line 7b. $_____ **Copy line 7c here➔** $_____

People who are 65 years of age or older

7d. Out-of-pocket health care allowance per person $_____

7e. Number of people who are 65 or older X _____

7f. Subtotal. Multiply line 7d by line 7e. $_____ **Copy line 7f here➔** + $_____

7g. **Total**. Add lines 7c and 7f. ..... $_____ **Copy total here➔**..... 7g. $_____

Local Standards You must use the IRS Local Standards to answer the questions in lines 8-15.

Based on information from the IRS, the U.S. Trustee Program has divided the IRS Local Standard for housing for bankruptcy purposes into two parts:

- **Housing and utilities – Insurance and operating expenses**
- **Housing and utilities – Mortgage or rent expenses**

Refer to the U.S. Trustee website to answer the questions in lines 8-9. Go to http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm or ask for help at the clerk's office of the bankruptcy court.

8. **Housing and utilities – Insurance and operating expenses:** Using the number of people you entered in line 5, fill in the dollar amount listed for your county for insurance and operating expenses. $_____

9. **Housing and utilities – Mortgage or rent expenses:**

9a. Using the number of people you entered in line 5, fill in the dollar amount listed for your county for mortgage or rent expenses. $_____

9b. Total average monthly payment for all mortgages and other debts secured by your home.

To calculate the total average monthly payment, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Next divide by 60.

Name of the creditor	Average monthly payment
_____	$_____
_____	$_____
_____	+ $_____

9b. Total average monthly payment ..... $_____ **Copy line 9b here➔** – $_____ Repeat this amount on line 33a.

9c. Net mortgage or rent expense.

Subtract line 9b (*total average monthly payment*) from line 9a (*mortgage or rent expense*). If this number is less than $0, enter $0. $_____ **Copy 9c here➔** $_____

10. **If you claim that the U.S. Trustee Program's division of the IRS Local Standard for housing does not accurately compute the amount that applies to you, fill in any additional amount you claim.** $_____

Explain why: _____

_____

11. **Local transportation expenses:** Check the number of vehicles for which you claim an ownership or operating expense.

- ❑ 0. Go to line 14.
- ❑ 1. Go to line 12.
- ❑ 2 or more. Go to line 12.

12. **Vehicle operation expense:** Using the IRS Local Standards and the number of vehicles for which you claim the operating expenses, fill in the *Operating Costs* that apply for your Census region or metropolitan statistical area. $_____

13. **Vehicle ownership or lease expense:** Using the IRS Local Standards, calculate the net ownership or lease expense for each vehicle below. You may not claim the expense if you do not make any loan or lease payments on the vehicle. In addition, you may not claim the expense for more than two vehicles.

Vehicle 1 **Describe Vehicle 1:** _____
_____

13a. Ownership or leasing costs using IRS Local Standard 13a. $_____

13b. Average monthly payment for all debts secured by Vehicle 1.
Do not include costs for leased vehicles.

To calculate the average monthly payment here and on line 13e, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Then divide by 60.

Name of each creditor for Vehicle 1	Average monthly payment
_____	$_____

Copy13b here➔ — $_____ Repeat this amount on line 33b.

13c. Net Vehicle 1 ownership or lease expense
Subtract line 13b from line 13a. If this number is less than $0, enter $0. $_____ **Copy net Vehicle 1 expense here➔** $_____

Vehicle 2 **Describe Vehicle 2:** _____
_____

13d. Ownership or leasing costs using IRS Local Standard 13d. $_____

13e. Average monthly payment for all debts secured by Vehicle 2.
Do not include costs for leased vehicles.

Name of each creditor for Vehicle 2	Average monthly payment
_____	$_____

Copy here➔ — $_____ Repeat this amount on line 33c.

13f. Net Vehicle 2 ownership or lease expense
Subtract line 13e from 13d. If this number is less than $0, enter $0. 13f. $_____ **Copy net Vehicle 2 expense here ➔** $_____

14. **Public transportation expense**: If you claimed 0 vehicles in line 11, using the IRS Local Standards, fill in the *Public Transportation* expense allowance regardless of whether you use public transportation. $_____

15. **Additional public transportation expense:** If you claimed 1 or more vehicles in line 11 and if you claim that you may also deduct a public transportation expense, you may fill in what you believe is the appropriate expense, but you may not claim more than the IRS Local Standard for *Public Transportation*. $_____

Other Necessary Expenses	In addition to the expense deductions listed above, you are allowed your monthly expenses for the following IRS categories.

16. **Taxes:** The total monthly amount that you actually pay for federal, state and local taxes, such as income taxes, self-employment taxes, social security taxes, and Medicare taxes. You may include the monthly amount withheld from your pay for these taxes. However, if you expect to receive a tax refund, you must divide the expected refund by 12 and subtract that number from the total monthly amount that is withheld to pay for taxes. $_____

    Do not include real estate, sales, or use taxes.

17. **Involuntary deductions:** The total monthly payroll deductions that your job requires, such as retirement contributions, union dues, and uniform costs.

    Do not include amounts that are not required by your job, such as voluntary 401(k) contributions or payroll savings. $_____

18. **Life insurance:** The total monthly premiums that you pay for your own term life insurance. If two married people are filing together, include payments that you make for your spouse's term life insurance.

    Do not include premiums for life insurance on your dependents, for a non-filing spouse's life insurance, or for any form of life $_____

19. **Court-ordered payments:** The total monthly amount that you pay as required by the order of a court or administrative agency, such as spousal or child support payments. $_____

    Do not include payments on past due obligations for spousal or child support. You will list these obligations in line 35.

20. **Education:** The total monthly amount that you pay for education that is either required:
    - as a condition for your job, or
    - for your physically or mentally challenged dependent child if no public education is available for similar services.

    $_____

21. **Childcare:** The total monthly amount that you pay for childcare, such as babysitting, daycare, nursery, and preschool. Do not include payments for any elementary or secondary school education. $_____

22. **Additional health care expenses, excluding insurance costs:** The monthly amount that you pay for health care that is required for the health and welfare of you or your dependents and that is not reimbursed by insurance or paid by a health savings account. Include only the amount that is more than the total entered in line 7. $_____

    Payments for health insurance or health savings accounts should be listed only in line 25.

23. **Telecommunication services:** The total monthly amount that you pay for telecommunication services for you and your dependents, such as pagers, call waiting, caller identification, special long distance, and business cell phone service, to the extent necessary for your health and welfare or that of your dependents or for the production of income, if it is not reimbursed by your employer. + $_____

    Do not include payments for basic home telephone, internet and cell phone service. Do not include self-employment expenses, such as those reported on line 5 of Official Form 22C-1, or any amount you previously deducted.

24. **Add all of the expenses allowed under the IRS expense allowances.**
    Add lines 6 through 23. $_____

Additional Expense Deductions	These are additional deductions allowed by the Means Test. *Note*: Do not include any expense allowances listed in lines 6-24.

25. **Health insurance, disability insurance, and health savings account expenses.** The monthly expenses for health insurance, disability insurance, and health savings accounts that are reasonably necessary for yourself, your spouse, or your dependents.

Health insurance	$_____	
Disability insurance	$_____	
Health savings account	+ $_____	
Total	$_____	**Copy total here➔** ..... $_____

    Do you actually spend this total amount?

    ❑ No. How much do you actually spend? $_____
    ❑ Yes

26. **Continuing contributions to the care of household or family members.** The actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses. $_____

27. **Protection against family violence.** The reasonably necessary monthly expenses that you incur to maintain the safety of you and your family under the Family Violence Prevention and Services Act or other federal laws that apply. $_____

    By law, the court must keep the nature of these expenses confidential.

28. **Additional home energy costs.** Your home energy costs are included in your non-mortgage housing and utilities allowance on line 4.

If you believe that you have home energy costs that are more than the home energy costs included in the non-mortgage housing and utilities allowance, then fill in the excess amount of home energy costs. $_____

You must give your case trustee documentation of your actual expenses, and you must show that the additional amount claimed is reasonable and necessary.

29. **Education expenses for dependent children who are younger than 18.** The monthly expenses (not more than $156.25* per child) that you pay for your dependent children who are younger than 18 years old to attend a private or public elementary or secondary school. $_____

You must give your case trustee documentation of your actual expenses, and you must explain why the amount claimed is reasonable and necessary and not already accounted for in lines 6-23.

* Subject to adjustment on 4/01/16, and every 3 years after that for cases begun on or after the date of adjustment.

30. **Additional food and clothing expense.** The monthly amount by which your actual food and clothing expenses are higher than the combined food and clothing allowances in the IRS National Standards. That amount cannot be more than 5% of the food and clothing allowances in the IRS National Standards. $_____

To find the maximum additional allowance, either go to http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm or ask for help at the clerk's office of the bankruptcy court.

You must show that the additional amount claimed is reasonable and necessary.

31. **Continuing charitable contributions.** The amount that you will continue to contribute in the form of cash or financial instruments to a religious or charitable organization. 11 U.S.C. § 548(d)3 and (4). + _____

Do not include any amount more than 15% of your gross monthly income.

32. **Add all of the additional expense deductions.** $_____

Add lines 25 through 31.

Deductions for Debt Payment

33. **For debts that are secured by an interest in property that you own, including home mortgages, vehicle loans, and other secured debt, fill in lines 33a through 33g.**

Do not deduct mortgage payments previously deducted as an operating expense in line 9.

To calculate the total average monthly payment, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Then divide by 60.

			Average monthly payment
Mortgages on your home			
33a. Copy line 9b here ..... ➔			$_____
Loans on your first two vehicles			
33b. Copy line 13b here. ..... ➔			$_____
33c. Copy line 13e here. ..... ➔			$_____
Name of each creditor for other secured debt	**Identify property that secures the debt**	**Does payment include taxes or insurance?**	
33d. _____	_____	No Yes	$_____
33e. _____	_____	No Yes	$_____
33f. _____	_____	No Yes	+ $_____
33g. Total average monthly payment. Add lines 33a through 33f.			$_____

Copy total here➔ $_____

34. **Are any debts that you listed in line 33 secured by your primary residence, a vehicle, or other property necessary for your support or the support of your dependents?**

❑ No. Go to line 35.
❑ Yes. State any amount that you must pay to a creditor, in addition to the payments listed in line 34, to keep possession of your property (called the *cure amount*). Next, divide by 60 and fill in the information below.

Name of the creditor	Identify property that secures the debt	Total cure amount		Monthly cure amount
_____	_____	$_____	÷ 60 =	$_____
_____	_____	$_____	÷ 60 =	$_____
_____	_____	$_____	÷ 60 = +	$_____
			Total	$_____

Copy total here ➔ $_____

35. **Do you owe any priority claims—such as a priority tax, child support, or alimony— that are past due as of the filing date of your bankruptcy case?** 11 U.S.C. § 507.

❑ No. Go to line 36.
❑ Yes. Fill in the total amount of all of these priority claims. Do not include current or ongoing priority claims, such as those you listed in line 19.

Total amount of all past-due priority claims. ..... $_____ ÷ 60 $_____

36. **Projected monthly Chapter 13 plan payment** $_____

Current multiplier for your district as determined under schedules issued by the Executive Office for United States Trustees. To find this information, go to www.justice.gov/ust/eo/bapcpa/meanstesting.htm or ask for help at the clerk's office of the bankruptcy court . x _____

Average monthly administrative expense $_____ **Copy total here** ➔ $_____

37. **Add all of the deductions for debt payment.** Add lines 33g through 36. $_____

Total Deductions from Income

38. **Add all of the allowed deductions.**

Copy line 24, *All of the expenses allowed under IRS expense allowances* ..... $_____

Copy line 32, *All of the additional expense deductions* ..... $_____

Copy line 37, *All of the deductions for debt payment* ..... + $_____

Total deductions $_____ **Copy total here** ➔ $_____

Part 2: Determine Your Disposable Income Under 11 U.S.C. § 1325(b)(2)

39. **Copy your total current monthly income from line 14 of Form 22C-1, *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period.*** ..... $_____

40. **Fill in any reasonably necessary income you receive for support for dependent children.** The monthly average of any child support payments, foster care payments, or disability payments for a dependent child, reported in Part I of Form 22C-1, that you received in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child. $_____

41. **Fill in all qualified retirement deductions.** The monthly total of all amounts that your employer withheld from wages as contributions for qualified retirement plans, as specified in 11 U.S.C. § 541(b)(7) plus all required repayments of loans from retirement plans, as specified in 11 U.S.C. § 362(b)(19). $_____

42. **Total of all deductions allowed under 11 U.S.C. § 707(b)(2)(A)**. Copy line 38 here ..... ➔ $_____

43. **Deduction for special circumstances.** If special circumstances justify additional expenses and you have no reasonable alternative, describe the special circumstances and their expenses. You must give your case trustee a detailed explanation of the special circumstances and documentation for the expenses.

Describe the special circumstances	Amount of expense
43a. _____	$_____
43b. _____	$_____
43c. _____	+ $_____
43d. **Total**. Add lines 43a through 43c	$_____ Copy 43d here ➔ + $_____

44. **Total adjustments.** Add lines 40, 41, 42, and 43d. ..... ➔ $_____ Copy total here ➔ − $_____

45. **Calculate your monthly disposable income under § 1325(b)(2).** Subtract line 44 from line 39. $_____

Part 3: Change in Income or Expenses

46. **Change in income or expenses.** If the income in Form 22C-1 or the expenses you reported in this form have changed or are virtually certain to change after the date you filed your bankruptcy petition and during the time your case will be open, fill in the information below. For example, if the wages reported increased after you filed your petition, check 22C-1 in the first column, enter line 2 in the second column, explain why the wages increased, fill in when the increase occurred, and fill in the amount of the increase.

Form	Line	Reason for change	Date of change	Increase or decrease?	Amount of change
❑ 22C–1 ❑ 22C–2	____	_____	_____	❑ Increase ❑ Decrease	$_____
❑ 22C–1 ❑ 22C–2	____	_____	_____	❑ Increase ❑ Decrease	$_____
❑ 22C–1 ❑ 22C–2	____	_____	_____	❑ Increase ❑ Decrease	$_____
❑ 22C–1 ❑ 22C–2	____	_____	_____	❑ Increase ❑ Decrease	$_____

Part 4: Sign Below

By signing here, under penalty of perjury you declare that the information on this statement and in any attachments is true and correct.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

Official Forms 22C–1 and 22C–2

Instructions for the Chapter 13 Statement of Your Current Monthly Income, Calculation of Commitment Period and Chapter 13 Calculation of Your Disposable Income

United States Bankruptcy Court 12/01/14

How to Fill Out these Forms

Official Forms 22C─1 and 22C─2 determine the period for your payments to creditors, how the amount you may be required to pay to creditors is established, and, in some situations, how much you must pay.

You must file 22C ─1, the *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period* (Official Form 22C ─1) if you are an individual and you are filing under chapter 13. This form will determine your current monthly income and determine whether your income is at or below the median income for households of the same size in your state. If your income is not above the median, you will not have to fill out the second form. Form 22C -1 also will determine your applicable commitment period─the time period for making payments to your creditors, unless the court orders otherwise.

If your income is above the median, you must file the second form, 22C─2, *Chapter13 Calculation of Your Disposable Income*. The calculations on this form—sometimes called the *Means Test*—reduce your income by living expenses and payment of certain debts, resulting in an amount available to pay unsecured debts. Your chapter 13 plan may be required to provide for payment of this amount toward unsecured debts.

Read each question carefully. You may not be required to answer every question on this form. The instructions will alert you if you may skip questions.

Some of the questions require you to go to other sources for information. In those cases, the form has instructions for where to find the information you need.

If you and your spouse are filing together, you and your spouse must file a single statement.

Understand the terms used in these form

These forms use *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, these forms use *you* to ask for information from both debtors. When information is needed about the spouses separately, the forms use *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Things to remember when filling out this form

- Be as complete and accurate as possible.
- If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).
- If two married people are filing together, both are equally responsible for supplying correct information.

Do not file these instructions with your bankruptcy filing package. Keep them for your records.

12b-007695

COMMITTEE NOTE

Official Forms 22A-1, 22A-1Supp, 22A-2, 22C-1, and 22C-2 are new versions of the "means test" forms used by individuals in chapter 7 and 13, formerly Official Forms 22A and 22C. The original forms were substantially revised as part of the Forms Modernization Project. Official Form 22B, used by individuals in chapter 11, has also been revised as part of the project, which was designed so that the individuals completing the forms would do so more accurately and completely.

The revised versions of the means test forms present the relevant information in a format different from the original forms. For chapter 7, former Official Form 22A has been split into two forms: 22A-1 and 22A-2. The first form, Official Form 22A-1, *Chapter 7 Statement of Your Current Monthly Income*, is to be completed by all chapter 7 debtors. It calculates a debtor's current monthly income and compares that calculation to the median income for households of the same size in the debtor's state. The second form, Official Form 22A-2, *Chapter 7 Means Test Calculation*, is to be completed only by those chapter 7 debtors whose income is above the applicable state median. The prior version of Official Form 22A was introduced by several questions bearing on the applicability of the means test. Debtors who do not have primarily consumer debts, as well as certain members of the armed forces, are exempt from a presumption of abuse under the means test, and so are excused from completing the form. However, the great majority of individual debtors in chapter 7 do not fall within the exemptions. Accordingly, the exemptions from means testing have been placed in a separate supplement, Official Form 22A-1Supp, that will be filed only where applicable, making Form 22A present the relevant information more directly and in a manner consistent with the parallel chapter 13 form.

For chapter 13, there is a similar split of income and expense calculations. All chapter 13 debtors must complete Official Form 22C-1, *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period*, which calculates current monthly income and the plan commitment period. Debtors only need to complete the second form, Official Form 22C-2, *Chapter13 Calculation of Your Disposable Income*, if their current monthly income exceeds the applicable median. Form 22C-2 calculates disposable income under 11 U.S.C. § 1325(b)(3), through a report of allowed expense deductions.

Line 60 of former Official Form 22C has not been repeated in Official Form 22C-2. This line allowed debtors to list, but not deduct from income, "Other Necessary Expense" items that are not included within the categories specified by the Internal Revenue Service. Because debtors are separately allowed to list—and deduct—any expenses arising from special circumstances, former Line 60 was rarely used.

Form 22C-2 also reflects the Supreme Court's decision in *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010). Adopting a forward-looking approach, the Court held in *Lanning* that the calculation of a chapter 13 debtor's projected disposable income under § 1325(b) required consideration of changes to income or expenses reported elsewhere on former Official Form 22C that, at the time of plan confirmation, had occurred or were virtually certain to occur. Those changes could result in either an increased or decreased projected disposable income. Because only debtors whose annualized current monthly income exceeds the applicable median family income have their projected disposable income determined by the information provided on Official Form 22C-2, only these debtors are required to provide the information about changes to income and expenses on Official Form 22C-2. Part 3 of Official Form 22C-2 provides for the reporting of those changes.

In reporting changes to income a debtor must indicate whether the amounts reported in Official Form 22C-1—which are monthly averages of various types of income received during the six months prior to the filing of the bankruptcy case—have already changed or are virtually certain to change during the pendency of the case. For each change, the debtor must indicate the line of Official Form 22C-1 on which the amount to be changed was reported, the reason for the change, the date of its occurrence, whether the change is an increase or decrease of income, and the amount of the change. Similarly, in reporting changes to expenses, a debtor must list changes to the debtor's actual expenditures reported in Part 1 of Official Form 22C-2 that are virtually certain to occur while the case is pending. With respect to the deductible amounts reported in Part 1 that are determined by the IRS national and local standards, only changed amounts that result from changed circumstances in the debtor's life—such as the addition of a family member or the surrender of a vehicle—should be reported. For each change in expenses, the same information required to be provided for income changes must be reported.

Unlike former Official Forms 22A and 22C, Official Forms 22A-2 and 22C-2 permit, at line 23, the deduction of cell phone

expenses necessary for the production of income if those expenses have not been reimbursed by the debtor's employer or deducted by the debtor in calculating net self-employment income. The same line also states that expenses for internet service may be deducted as a telecommunication services expense only if necessary for the production of income. Under IRS guidelines adopted in 2011, expenses for home internet service used for other purposes are included in the Local Standards for Housing and utilities—Insurance and operating expenses. Also, Official Forms 22A-2 and 22C-2 now provide, at line 18, for deductions of the premiums paid by one jointly filing debtor on term life insurance policies of the other joint debtor as well for premium payments on the debtor's own policies.

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APPENDIX B.3

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No.	Current title	New No.*	New title	Drafted?	Date to BK Comm.	Publication Date
			OFFICIAL FORMS			
					Chart Draft -- 05022013	
B 1	Voluntary Petition	B101	Voluntary Petition for Individuals Filing for Bankruptcy *(incorporates exhibits – carves out eviction judgment statement as new form B101AB)*	Yes	Fall 2012	August 2013
		B101A B101B	Your Statement About an Eviction Judgment Against You – Parts A and B *(was in Form B1)*	Yes	Fall 2012	August 2013
		B201	Voluntary Petition for Non-Individuals Filing for Bankruptcy	Yes	Fall 2013	August 2014
	Exhibit A	B201A	Attachment to Voluntary Petition for Non-Individuals Filing for Bankruptcy Under Chapter 11	Yes	Fall 2013	August 2014
	Exhibit C	B101 B201	*Hazardous Property or Property That Needs Immediate Attention -- incorporated in Forms B101 and B201*	Yes		
	Exhibit D	B101	*Individual Debtor's Statement of Compliance with Credit Counseling Requirement – Incorporated in Form B101*	Yes		
B 2	Declaration under Penalty of Perjury on Behalf of a Corporation or Partnership	B202	Declaration Under Penalty of Perjury On Behalf of a Corporation or Partnership *(For petition, schedules, SOFA, etc)*	Yes	Fall 2013	August 2014
B 3A	Application and Order to Pay Filing Fee in Installments	B103A	Application for Individuals to Pay the Filing Fee in Installments	Yes	Spring 2011	August 2012
B 3B	Application for Waiver of Chapter 7 Filing Fee	B103B	Application to Have the Chapter 7 Filing Fee Waived	Yes	Spring 2011	August 2012

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4XX = Add. Official Forms XXXX = director's forms

No.	Current title	New No.*	New title	Drafted?	Date to BK Comm.	Publication Date
B 4	List of Creditors Holding 20 Largest Unsecured Claims	B104	For Individual Chapter 11 Cases: The List of Creditors Who Have the 20 Largest Unsecured Claims Against You Who Are Not Insiders *(individuals)*	Yes	Fall 2012	August 2013
		B204? B404?	For Chapter 11 Cases: The List of Creditors Who Have the 20 Largest Unsecured Claims Against You Who Are Not Insiders *(non-individuals)*	Yes	Fall 2013	August 2014
B 5	Involuntary Petition	B105	Involuntary Petition Against an Individual	Yes	Fall 2012	August 2013
		B205	Involuntary Petition Against a Non-Individual	Yes	Fall 2013	August 2014
B6	Cover Sheet for Schedules	**No coversheet created**				
B6	Summary of Schedules (Includes Statistical Summary of Certain Liabilities)	B106 -- Summary	A Summary of Your Assets and Liabilities and Certain Statistical Information (*individuals)*	Yes	Fall 2012	August 2013
		B206 -- Summary	A Summary of Your Assets and Liabilities (*non-individuals)*	Yes	Fall 2013	August 2014
B 6A	Schedule A - Real Property	B106A/B	Schedule A/B: Property (*combines real and personal property, individuals)*	Yes	Fall 2012	August 2013
B 6B	Schedule B - Personal Property	B206A/B	Schedule A/B: Property (*combines real and personal property, non-individuals)*	Yes	Fall 2013	August 2014
B 6C	Schedule C - Property Claimed as Exempt	B106C	Schedule C: The Property You Claim as Exempt (*individuals)*	Yes	Fall 2012	August 2013
B 6D	Schedule D - Creditors Holding Secured Claims	B106D	Schedule D: Creditors Who Hold Claims Secured By Property (*against individuals*)	Yes	Fall 2012	August 2013
		B206D	Schedule D: Creditors Who Hold Claims Secured By	Yes	Fall 2013	August

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No.	Current title	New No.*	New title	Drafted?	Date to BK Comm.	Publication Date
			Property *(against non-individuals)*			2014
B 6E	Schedule E - Creditors Holding Unsecured Priority Claims	B106E/F	Schedule E/F: Creditors Who Have Unsecured Claims *(against individuals, combines priority and non-priority)*	Yes	Fall 2012	August 2013
B 6F	Schedule F - Creditors Holding Unsecured Nonpriority Claims	B206E/F	Schedule E/F: Creditors Who Have Unsecured Claims (*against non-individuals, combines priority and non-priority)*	Yes	Fall 2013	August 2014
B 6G	Schedule G - Executory Contracts and Unexpired Leases	B106G	Schedule G: Executory Contracts and Unexpired Leases (*individuals)*	Yes	Fall 2012	August 2013
		B206G	Schedule G: Executory Contracts and Unexpired Leases (*non-individuals)*	Yes	Fall 2013	August 2014
B 6H	Schedule H - Codebtors	B106H	Schedule H: Your Codebtors (*individuals)*	Yes	Fall 2012	August 2013
		B206H	Schedule H: Your Codebtors (*non-individuals)*	Yes	Fall 2013	August 2014
B 6I	Schedule I - Current Income of Individual Debtor(s)	B106I	Schedule I: Your Income (*individuals – published as 6I)*	Yes	Fall 2011	August 2012
		B206I	Schedule I: Your Income (*non-individuals)*	Yes		
B 6J	Schedule J- Current Expenditures of Individual Debtor(s)	B106J	Schedule J: Your Expenses (*individuals- published as 6J)*	Yes	Fall 2011	August 2012
		B206J	Schedule J: Your Expenses (*non-individuals)*	Yes		
B 6	Declaration Concerning Debtor's Schedules	B106 -- Declaration	Declaration About an Individual Debtor's Schedules	Yes	Fall 2012	August 2013
		B202	Declaration Under Penalty of Perjury On Behalf of a Corporation or Partnership *(For petition, schedules,*	Yes	Fall 2013	August

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No.	Current title	New No.*	New title	Drafted?	Date to BK Comm.	Publication Date
			SOFA, etc)			2014
B 7	Statement of Financial Affairs	B107	Your Statement of Financial Affairs for Individuals Filing for Bankruptcy	Yes	Fall 2012	August 2013
		B207	Statement of Your Financial Affairs *(non-Individuals)*	Yes	Fall 2013	August 2014
B 8	Chapter 7 Individual Debtor's Statement of Intention	B112	Statement of Intention for Individuals Filing Under Chapter 7	Yes	Fall 2012	August 2013
B 9	Notice of Commencement of Case under the Bankruptcy Code, Meeting of Creditors, and Deadlines	**No coversheet created.**				
B 9A	Chapter 7 Individual or Joint Debtor No Asset Case	B 309A	(For Individuals or Joint Debtors) Notice of Chapter 7 Bankruptcy Case – No Proof of Claim Deadline	Yes	Spring 2013	August 2014
B 9B	Chapter 7 Corporation/Partnership No Asset Case	B 309C	(For Corporations or Partnerships) Notice of Chapter 7 Bankruptcy Case – No Proof of Claim Deadline Set	Yes	Spring 2013	August 2014
B 9C	Chapter 7 Individual or Joint Debtor Asset Case	B 309B	(For Individuals or Joint Debtors) Notice of Chapter 7 Bankruptcy Case – Proof of Claim Deadline Set	Yes	Spring 2013	August 2014
B 9D	Chapter 7 Corporation/Partnership Asset Case (12/11)	B 309D	(For Corporations or Partnerships) Notice of Chapter 7 Bankruptcy Case – Proof of Claim Deadline Set	Yes	Spring 2013	August 2014
B 9E	Chapter 11 Individual or Joint Debtor Case	B 309E	(For Individuals or Joint Debtors) Notice of Chapter 11 Bankruptcy Case *(former Alt version combined with Form B309-E)*	Yes	Spring 2013	August 2014
B 9E(Alt.)	Chapter 11 Individual or Joint Debtor Case					
B 9F	Chapter 11 Corporation/Partnership Case	B 309F	(For Corporations or Partnerships) Notice of Chapter 11 Bankruptcy Case *(former Alt version combined with Form B309-F)*	Yes	Spring 2013	August 2014
B 9F(Alt.)	Chapter 11 Corporation/Partnership Case					
B 9G	Chapter 12 Individual or Joint	B 309G	(For Individuals or Joint Debtors) Notice of Chapter	Yes	Spring 2013	August

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No.	Current title	New No.*	New title	Drafted?	Date to BK Comm.	Publication Date
	Debtor Family Farmer		12 Bankruptcy Case			2014
B 9H	Chapter 12 Corporation/Partnership Family Farmer	B 309H	(For Corporations or Partnerships) Notice of Chapter 12 Bankruptcy Case	Yes	Spring 2013	August 2014
B 9I	Chapter 13 Case	B 309I	Notice of Chapter 13 Bankruptcy Case	Yes	Spring 2013	August 2014
B 10	Proof Of Claim	B 410	Proof Of Claim		Fall 2013	August 2014
B 10A	Proof Of Claim, Attachment A	B 410A	Proof Of Claim, Attachment A		Fall 2013	August 2014
B 10S1	Proof Of Claim, Supplement 1	B 410S1	Proof Of Claim, Supplement 1		Fall 2013	August 2014
B 10S2	Proof Of Claim, Supplement 2	B 410S2	Proof Of Claim, Supplement 2		Fall 2013	August 2014
B 11A	General Power of Attorney	B 411A				August 2014
B 11B	Special Power of Attorney	B 411B				August 2014
B 12	Order and Notice for Hearing on Disclosure Statement	B 312				August 2014
B 13	Order Approving Disclosure Statement and Fixing Time for Filing Acceptances or Rejections of Plan, Combined with Notice Thereof	B 313				August 2014
B 14	Ballot for Accepting or Rejecting Plan	B 414				August 2014
B 15	Order Confirming Plan	B 315				August 2014
B 16A	Caption	B 416A				August

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No.	Current title	New No.*	New title	Drafted?	Date to BK Comm.	Publication Date
						2014
B 16B	Caption (Short Title)	B 416B				August 2014
B 16C	[Abrogated]	N/A				August 2014
B 16D	Caption for Use in Adversary Proceeding other than for a Complaint Filed by a Debtor	B 416D				August 2014
B 17	Notice of Appeal under 28 U.S.C. §158(a) or (b) from a Judgment, Order or Decree of a Bankruptcy Court	B 417				August 2014
B 18	Discharge of Debtor	B 318	Discharge of Debtor in a Chapter 7 Case	Yes	Fall 2012	August 2013
B 19	Declaration and Signature of Non-Attorney Bankruptcy Petition Preparer	B119	Bankruptcy Petition Preparer's Notice, Declaration and Signature *(was B 113)*	Yes	Fall 2012	August 2013
B 20A	Notice of Motion or Objection	B 420A	Notice of Motion or Objection	Yes	Spring 2013	August 2014
B 20B	Notice of Objection to Claim	B 420B	Notice of Objection to Claim	Yes	Spring 2013	August 2014
B 21	Statement of Social Security Number	B 121 *updated from B102*	Your Statement About Your Social Security Numbers	Yes	Fall 2012	August 2013
B 22A	Statement of Current Monthly Income and Means Test Calculation (Chapter 7)	B 108-1	Chapter 7 Statement of Your Current Monthly Income and Means-Test Calculation *(published as 22A-1)*	Yes	Spring 2011 Spring 2012	August 2012, 13
		B 108-1Supp	Chapter 7 means test exemption attachment (*published as 22A-1Supp*)	Yes	Spring 2013	August 2013
		B 108-2	Chapter 7 Means Test Calculation *(published as 22A-2)*	Yes	Spring 2011 Spring 2012	August 2012, 13
B 22B	Statement of Current Monthly Income (Chapter 11)	B 109	Chapter 11 Statement of Your Current Monthly Income *(published as 22B)*	Yes	Spring 2011	August

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No.	Current title	New No.*	New title	Drafted?	Date to BK Comm.	Publication Date
					Spring 2012	2012, 13
B 22C	Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income (Chapter 13)	B 110-1	Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period *(published as 22C-1)*	Yes	Spring 2011 Spring 2012	August 2012, 13
		B 110-2	Chapter 13 Calculation of Your Disposable Income *(published as 22C-2)*	Yes	Spring 2011 Spring 2012	August 2012, 13
B 23	Debtor's Certification of Completion of Instructional Course Concerning Financial Management	B 423	Certification About a Financial Management Course *(was B 113)*	Yes	Fall 2012	August 2013
B 24	Certification to Court of Appeals	B 424				August 2014
B 25A	Plan of Reorganization in Small Business Case under Chapter 11	B 425A				
B 25B	Disclosure Statement in Small Business Case under Chapter 11	B 425B				
B 25C	Small Business Monthly Operating Report	B 425C				
B 26	Periodic Report Regarding Value, Operations and Profitability of Entities in Which the Debtor's Estate Holds a Substantial or Controlling Interest	B 426				
B 27	Reaffirmation Agreement Cover Sheet	B427	Cover Sheet for Reaffirmation Agreement	Yes	Fall 2012	August 2013
DIRECTOR FORMS						
B 13S	Order Conditionally Approving	B 1300S				

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No.	Current title	New No.*	New title	Drafted?	Date to BK Comm.	Publication Date
	Disclosure Statement, Fixing Time for Filing Acceptances or Rejections of Plan, and Fixing the Time for Filing Objections to the Disclosure Statement and to the Confirmation of the Plan, Combined with Notice Thereof and of the Hearing on Final Approval of the Disclosure Statement and the Hearing on Confirmation of the Plan					
B 15S	Order Finally Approving Disclosure Statement and Confirming Plan	B 1500S				
B 18F	Discharge of Debtor After Completion of Chapter 12 Plan	B 1800F				
B 18FH	Discharge of Debtor Before Completion of Chapter 12 Plan	B 1800FH				
B 18J	Discharge of Joint Debtors (Chapter 7)	B 318	Order of Discharge *(combined with Forms 18 and 18JO)*			
B 18JO	Discharge of One Joint Debtor (Chapter 7)	B 318	Order of Discharge *(combined with Forms 18 and 18J)*			
B 18RI	Discharge of Individual Debtor in a Chapter 11 Case	B 1800RI				
B 18W	Discharge of Debtor After Completion of Chapter 13 Plan	B 1800W				
B 18WH	Order Discharging Debtor Before Completion of Chapter 13 Plan	B 1800WH				
B 104	Adversary Proceeding Cover Sheet	B 1040				
B 131	Exemplification Certificate	B 1310				
B 132	Application for Search of Bankruptcy Records	B 1320				

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No.	Current title	New No.*	New title	Drafted?	Date to BK Comm.	Publication Date
B 133	Claims Register	B 1330				
B 200	Required Lists, Schedules, Statements and Fees	B 2000				
B 201A	Notice to Individual Consumer Debtor	B 2010				
B 201B	Certification of Notice to Individual Consumer Debtor(s)	B 101	Not needed because certification is in petition			
B 202	Statement of Military Service	B 2020				
B 203	Disclosure of Compensation of Attorney for Debtor	B 2030	Attorney's Disclosure of Compensation			
B 204	Notice of Need to File Proof of Claim Due to Recovery of Assets	B 2040				
B 205	Notice to Creditors and Other Parties in Interest	B 2050				
B 206	Certificate of Commencement of Case	B 2060				
B 207	Certificate of Retention of Debtor In Possession	B 2070				
B 210A	Transfer of Claim Other Than for Security	B 2100A				
B 210B	Notice of Transfer of Claim Other Than for Security	B 2100B				
B 230A	Order Confirming Chapter 12 Plan	B 2300A				
B 230B	Order Confirming Chapter 13 Plan	B 2300B				
B 231A	Order Fixing Time to Object to Proposed Modification of Confirmed Chapter 12 Plan	B 2310A				
B 231B	Order Fixing Time to Object to Proposed Modification of Confirmed Chapter 13 Plan	B 2310B				

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No.	Current title	New No.*	New title	Drafted?	Date to BK Comm.	Publication Date
B 240A	Reaffirmation Documents	B 2400A				
B 240B	Motion for Approval of Reaffirmation Agreement	B 2400B				
B 240C	Order on Reaffirmation Agreement	B 2400C				
B 240A/B ALT	Reaffirmation Agreement	B 2400A/B ALT				
B 240C ALT	Order on Reaffirmation Agreement	B 2400C ALT				
B 250A	Summons in an Adversary Proceeding	B 2500A				
B 250B	Summons and Notice of Pretrial Conference in an Adversary Proceeding	B 2500B				
B 250C	Summons and Notice of Trial in an Adversary Proceeding	B 2500C				
B 250D	Third-Party Summons	B 2500D				
B 250E	Summons to Debtor in Involuntary Case	B 2500E				
B 250F	Summons in a Chapter 15 Case Seeking Recognition of a Foreign Nonmain Proceeding	B 2500F				
B 253	Order for Relief in an Involuntary Case	B 2530				
B 254	Subpoena for Rule 2004 Examination	B 2540				
B 255	Subpoena in an Adversary Proceeding	B 2550				
B 256	Subpoena in a Case Under the Bankruptcy Code	B 2560				
B 260	Entry of Default	B 2600				

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No.	Current title	New No.*	New title	Drafted?	Date to BK Comm.	Publication Date
B 261A	Judgment by Default	B 2610A				
B 261B	Judgment by Default	B 2610B				
B 261C	Judgment in an Adversary Proceeding	B 2610C				
B 262	Notice of Entry of Judgment	B 2620				
B 263	Bill of Costs	B 2630				
B 264	Writ of Execution to the United States Marshal	B 2640				
B 265	Certification of Judgment for Registration in Another District	B 2650				
B 270	Notice of Filing of Final Report of Trustee, of Hearing on Applications for Compensation [and of Hearing on Abandonment of Property by the Trustee]	B 2700				
B 271	Final Decree	B 2710				
B 280	Disclosure of Compensation of Bankruptcy Petition Preparer	B 2800	Disclosure of Compensation of Bankruptcy Petition Preparer			
B 281	Appearance of Child Support Creditor or Representative	B 2810				
B 283	Chapter 13 Debtor's Certifications Regarding Domestic Support Obligations and Section 522(q)	B 283				

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Fill in this information to identify your case:

United States Bankruptcy Court for the:

_____ District of _____
(State)

Case number (*If known*): _____

Chapter you are filing under:
- ❑ Chapter 7
- ❑ Chapter 11
- ❑ Chapter 12
- ❑ Chapter 13

❑ Check if this is an amended filing

Official Form 101

Voluntary Petition for Individuals Filing for Bankruptcy

12/15

The bankruptcy forms use *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, these forms use *you* to ask for information from both debtors. For example, if a form asks, "Do you own a car," the answer would be *yes* if either debtor owns a car. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Identify Yourself

	About Debtor 1:	About Debtor 2 (Spouse Only in a Joint Case):
1. Your full name Write the name that is on your government-issued picture identification (for example, your driver's license or passport). Bring your picture identification to your meeting with the trustee.	First name Middle name Last name Suffix (Sr., Jr., II, III)	First name Middle name Last name Suffix (Sr., Jr., II, III)
2. All other names you have used in the last 8 years Include your married or maiden names.	First name Middle name Last name First name Middle name Last name	First name Middle name Last name First name Middle name Last name
3. Only the last 4 digits of your Social Security number or federal Individual Taxpayer Identification number (ITIN)	xxx – xx – ____ ____ ____ ____ OR 9xx – xx – ____ ____ ____ ____	xxx – xx – ____ ____ ____ ____ OR 9xx – xx – ____ ____ ____ ____

	About Debtor 1:	About Debtor 2 (Spouse Only in a Joint Case):
4. Any business names and Employer Identification Numbers (EIN) you have used in the last 8 years Include trade names and *doing business as* names	❑ I have not used any business names or EINs. _____ Business name _____ Business name ___ ___ – ___ ___ ___ ___ ___ ___ ___ EIN ___ ___ – ___ ___ ___ ___ ___ ___ ___ EIN	❑ I have not used any business names or EINs. _____ Business name _____ Business name ___ ___ – ___ ___ ___ ___ ___ ___ ___ EIN ___ ___ – ___ ___ ___ ___ ___ ___ ___ EIN
5. Where you live	_____ Number Street _____ _____ City State ZIP Code _____ County **If your mailing address is different from the one above, fill it in here.** Note that the court will send any notices to you at this mailing address. _____ Number Street _____ P.O. Box _____ City State ZIP Code	**If Debtor 2 lives at a different address:** _____ Number Street _____ _____ City State ZIP Code _____ County **If Debtor 2's mailing address is different from yours, fill it in here.** Note that the court will send any notices to this mailing address. _____ Number Street _____ P.O. Box _____ City State ZIP Code
6. Why you are choosing *this district* to file for bankruptcy	*Check one:* ❑ Over the last 180 days before filing this bankruptcy filing package, I have lived in this district longer than in any other district. ❑ I have another reason. Explain. (See 28 U.S.C. § 1408.) _____ _____ _____ _____	*Check one:* ❑ Over the last 180 days before filing this bankruptcy filing package, I have lived in this district longer than in any other district. ❑ I have another reason. Explain. (See 28 U.S.C. § 1408.) _____ _____ _____ _____

Part 2: Tell the Court About Your Bankruptcy Case

7. The chapter of the Bankruptcy Code you are choosing to file under

Check one. (For a brief description of each, see *Notice Required by 11 U.S.C. § 342(b) for Individuals Filing for Bankruptcy* (Form B2010)). Also, go to the top of page 1 and check the appropriate box.

- ❑ Chapter 7
- ❑ Chapter 11
- ❑ Chapter 12
- ❑ Chapter 13

8. How you will pay the fee

If you file under Chapter …	Your total fee is…
7	$306
11	$1,213
12	$246
13	$281

❑ **I will pay the entire fee when I file my petition**. Please check with the clerk's office in your local court for more details about how you may pay. Typically, if you are paying the fee yourself, you may pay with cash, cashier's check, or money order. If your attorney is submitting your payment on your behalf, your attorney may pay with a credit card or check with a pre-printed address.

❑ **I need to pay the fee in installments**. If you choose this option, sign and attach the *Application for Individuals to Pay Your Filing Fee in Installments* (Official Form 103A).

❑ **I request that my fee be waived** (You may request this option only if you are filing for Chapter 7. By law, a judge may waive your fee only if your income is less than 150% of the official poverty line that applies to your family size and you are unable to pay the fee in installments). If you choose this option, you must fill out the *Application to Have the Chapter 7 Filing Fee Waived* (Official Form 103B) and file it with your bankruptcy filing package.

9. Have you filed for bankruptcy within the last 8 years?

❑ No

❑ Yes. District _____ When _____ Case number _____
MM / DD / YYYY

District _____ When _____ Case number _____
MM / DD / YYYY

District _____ When _____ Case number _____
MM / DD / YYYY

10. Are any bankruptcy cases pending or being filed by a spouse who is not filing this case with you, or by a business partner, or by an affiliate?

❑ No

❑ Yes. Debtor _____ Relationship to you _____

District _____ When _____ Case number, if known_____
MM / DD / YYYY

Debtor _____ Relationship to you _____

District _____ When _____ Case number, if known_____
MM / DD / YYYY

11. Do you rent your residence?

❑ No. Go to line 12.

❑ Yes. Has your landlord obtained an eviction judgment against you and do you want to stay in your residence?

- ❑ No. Go to line 12.
- ❑ Yes. Fill out *Initial Statement About an Eviction Judgment Against You* (Form 101A) and file it with this bankruptcy petition.

Part 3: Report About Any Businesses You Own as a Sole Proprietor

12. Are you a sole proprietor of any full- or part-time business?

A sole proprietorship is a business you own as an individual, rather than a separate legal entity such as a corporation, partnership, or LLC.

If you have more than one sole proprietorship, use a separate sheet and attach it to this package.

- ❑ No. Go to Part 4.
- ❑ Yes. Name and location of business

_____
Name of business, if any

_____
Number Street

_____

_____ _____ _____
City State ZIP Code

Check the appropriate box to describe your business:

- ❑ Health Care Business (as defined in 11 U.S.C. § 101(27A))
- ❑ Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))
- ❑ Stockbroker (as defined in 11 U.S.C. § 101(53A))
- ❑ Commodity Broker (as defined in 11 U.S.C. § 101(6))
- ❑ None of the above

13. Are you filing under Chapter 11 of the Bankruptcy Code and are you a *small business debtor*?

For a definition of *small business debtor*, see 11 U.S.C. § 101(51D).

If you are filing under Chapter 11, the court must know whether you are a small business debtor so that it can set appropriate deadlines.

- ❑ No. I am not filing under Chapter 11.
- ❑ No. I am filing under Chapter 11, but I am NOT a small business debtor according to the definition in the Bankruptcy Code.
- ❑ Yes. I am filing under Chapter 11 and I am a small business debtor according to the definition in the Bankruptcy Code.

Part 4: Report if You Own or Have Any Hazardous Property or Any Property That Needs Immediate Attention

14. Do you own or have any property that poses or is alleged to pose a threat of imminent and identifiable hazard to public health or safety? Or do you own any property that needs immediate attention?

For example, do you own perishable goods or livestock that must be fed?

- ❑ No
- ❑ Yes. What is the hazard? _____

_____

If immediate attention is needed, why is it needed? _____

_____

Where is the property? _____
Number Street

_____

_____ _____ _____
City State ZIP Code

Part 5: Explain Your Efforts to Receive a Briefing About Credit Counseling

15. Tell the court whether you have received briefing about credit counseling.

The law requires that you receive a briefing about credit counseling before you file for bankruptcy. You must truthfully check one of the following choices. If you cannot do so, you are not eligible to file.

If you file anyway, the court can dismiss your case, you will lose whatever filing fee you paid, and your creditors can begin collection activities again.

About Debtor 1:

You must check one:

❑ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.**

Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.

❑ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.**

Within 14 days after you file this bankruptcy petition, you MUST file a copy of the certificate and payment plan, if any.

❑ **I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and exigent circumstances merit a 30-day temporary waiver of the requirement.**

To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the briefing, why you were unable to obtain it before you filed for bankruptcy, and what exigent circumstances required you to file this case.

Your case may be dismissed if the court is dissatisfied with your reasons for not receiving a briefing before you file this bankruptcy filing package.

If the court is satisfied with your reasons, you must still receive a briefing within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed.

Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.

❑ **I am not required to receive a briefing about credit counseling because of:**

❑ **Incapacity.** I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.

❑ **Disability.** My physical disability causes me to be unable to participate in a briefing in person, by phone, or through the internet, even after I reasonably tried to do so.

❑ **Active duty.** I am currently on active military duty in a military combat zone.

If you believe you are not required to receive a briefing about credit counseling, you must file a motion for waiver of credit counseling with the court.

About Debtor 2 (Spouse Only in a Joint Case):

You must check one:

❑ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.**

Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.

❑ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.**

Within 14 days after you file this bankruptcy petition, you MUST file a copy of the certificate and payment plan, if any.

❑ **I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and exigent circumstances merit a 30-day temporary waiver of the requirement.**

To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the briefing, why you were unable to obtain it before you filed for bankruptcy, and what exigent circumstances required you to file this case.

Your case may be dismissed if the court is dissatisfied with your reasons for not receiving a briefing before you file this bankruptcy filing package.

If the court is satisfied with your reasons, you must still receive a briefing within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed.

Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.

❑ **I am not required to receive a briefing about credit counseling because of:**

❑ **Incapacity.** I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.

❑ **Disability.** My physical disability causes me to be unable to participate in a briefing in person, by phone, or through the internet, even after I reasonably tried to do so.

❑ **Active duty.** I am currently on active military duty in a military combat zone.

If you believe you are not required to receive a briefing about credit counseling, you must file a motion for waiver of credit counseling with the court.

Part 6: Answer These Questions for Reporting Purposes

16. What kind of debts do you have?

16a. **Are your debts primarily consumer debts?** *Consumer debts* are defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose."

- ❑ No. Go to line 16b.
- ❑ Yes. Go to line 17.

16b. **Are your debts primarily business debts?** *Business debts* are debts that you incurred to obtain money for a business or investment or through the operation of the business or investment.

- ❑ No. Go to line 16c.
- ❑ Yes. Go to line 17.

16c. State the type of debts you owe that are not consumer debts or business debts.

_____

17. Are you filing under Chapter 7?

Do you estimate that after any exempt property is excluded and administrative expenses are paid that funds will be available for distribution to unsecured creditors?

- ❑ No. I am not filing under Chapter 7. Go to line 18.
- ❑ Yes. I am filing under Chapter 7. Do you estimate that after any exempt property is excluded and administrative expenses are paid that funds will be available to distribute to unsecured creditors?
  - ❑ No
  - ❑ Yes

18. How many creditors do you estimate that you owe?

❑ 1-49	❑ 1,000-5,000	❑ 25,001-50,000
❑ 50-99	❑ 5,001-10,000	❑ 50,001-100,000
❑ 100-199	❑ 10,001-25,000	❑ More than 100,000
❑ 200-999		

19. How much do you estimate your assets to be worth?

❑ $0-$50,000	❑ $1,000,001-$10 million	❑ $500,000,001-$1 billion
❑ $50,001-$100,000	❑ $10,000,001-$50 million	❑ $1,000,000,001-$10 billion
❑ $100,001-$500,000	❑ $50,000,001-$100 million	❑ $10,000,000,001-$50 billion
❑ $500,001-$1 million	❑ $100,000,001-$500 million	❑ More than $50 billion

20. How much do you estimate your liabilities to be?

❑ $0-$50,000	❑ $1,000,001-$10 million	❑ $500,000,001-$1 billion
❑ $50,001-$100,000	❑ $10,000,001-$50 million	❑ $1,000,000,001-$10 billion
❑ $100,001-$500,000	❑ $50,000,001-$100 million	❑ $10,000,000,001-$50 billion
❑ $500,001-$1 million	❑ $100,000,001-$500 million	❑ More than $50 billion

Part 7: Sign Below

For you

I declare under penalty of perjury that the information provided in this petition is true and correct. I understand that if I make a false statement, I could be fined up to $250,000 or imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

If I have chosen to file under Chapter 7, I am aware that I may proceed under Chapter 7, 11, 12, or 13 of title 11, United States Code, understand the relief available under each such chapter, and choose to proceed under Chapter 7.

If no attorney represents me and I did not pay or agree to pay someone who is not an attorney to help me fill out this document, I have obtained and read the notice required by 11 U.S.C. § 342(b).

I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

✘ _____ ✘ _____

Signature of Debtor 1 Signature of Debtor 2

Date _____ Date _____
MM / DD / YYYY MM / DD / YYYY

For your attorney, if you are represented by one

If you are not represented by an attorney, you do not need to file this page.

I, the attorney for the debtor(s) named in this petition, declare that I have informed the debtor(s) about eligibility to proceed under Chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each chapter for which the person is eligible. I also certify that I have delivered to the debtor(s) the notice required by 11 U.S.C. § 342(b) and, in a case in which § 707(b)(4)(D) applies, certify that I have no knowledge after an inquiry that the information in the schedules filed with the petition is incorrect.

✘ _____ Date _____
Signature of Attorney for Debtor MM / DD / YYYY

_____
Printed name

_____
Firm name

_____
Number Street

_____

_____ _____ _____
City State ZIP Code

Contact phone _____ Email address _____

_____ _____
Bar number State

For you if you are filing this bankruptcy filing package without an attorney

If you are represented by an attorney, you do not need to file this page.

The law allows you, as an individual, to represent yourself in bankruptcy court, but **you should understand that many people find it extremely difficult to represent themselves successfully. Because bankruptcy has long-term financial and legal consequences, you are strongly urged to hire a qualified attorney.**

To be successful, you must correctly file and handle your bankruptcy case. The rules are very technical, and a misstep or inaction may affect your rights. For example, your case may be dismissed because you did not file a required document, pay a fee on time, attend a meeting or hearing, or cooperate with the court, case trustee, U.S. trustee, bankruptcy administrator, or audit firm if your case is selected for audit. If that happens, you could lose your right to file another case, or you may lose protections, including the benefit of the automatic stay.

You must list all your property and debts in the schedules that you are required to file with the court. Even if you plan to pay a particular debt outside of your bankruptcy, you must list that debt in your schedules. If you do not list a debt, the debt may not be discharged. If you do not list property or properly claim it as exempt, you may not be able to keep the property. The judge can also deny you a discharge of all your debts if you do something dishonest in your bankruptcy case, such as destroying or hiding property, falsifying records, or lying. Individual bankruptcy cases are randomly audited to determine if debtors have been accurate, truthful, and complete. **Bankruptcy fraud is a serious crime; you could be fined and imprisoned.**

If you decide to file without an attorney, the court expects you to follow the rules as if you had hired an attorney. The court will not treat you differently because you are filing for yourself. To be successful, you must be familiar with the United States Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and the local rules of the court in which your case is filed. You must also be familiar with any state exemption laws that apply.

Are you aware that filing for bankruptcy is a serious action with long-term financial and legal consequences?

❑ No
❑ Yes

Are you aware that bankruptcy fraud is a serious crime and that if your bankruptcy filing package is inaccurate or incomplete, you could be fined or imprisoned?

❑ No
❑ Yes

Did you pay or agree to pay someone who is not an attorney to help you fill out this bankruptcy filing package?

❑ No
❑ Yes. Name of Person_____.
Attach *Bankruptcy Petition Preparer's Notice, Declaration, and Signature* (Official Form 119).

By signing here, I acknowledge that I understand the risks involved in filing without an attorney. I have read and understood this notice, and I am aware that filing a bankruptcy case without an attorney may cause me to lose my rights or property if I do not properly handle the case.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

Contact phone _____

Cell phone _____

Email address _____

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

Contact phone _____

Cell phone _____

Email address _____

COMMITTEE NOTE

Official Form 101, *Voluntary Petition for Individuals Filing for Bankruptcy*, applies only in cases of individual debtors. Form 101 replaces Official Form 1, Voluntary Petition. It is renumbered to distinguish it from the forms used by non-individual debtors, such as corporations, and includes stylistic changes throughout the form. It is revised as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. Because the goals of the Forms Modernization Project include improving the interface between technology and the forms so as to increase efficiency and reduce the need to produce the same information in multiple formats, many of the open-ended questions and multiple-part instructions have been replaced with more specific questions.

Official Form 101 has been substantially reorganized. References to Exhibits A, B, C, and D, and the exhibits themselves, have been eliminated because the requested information is now asked in the form or is not applicable to individual debtors.

Part 1, *Identify Yourself*, line 6, replaces the venue box from page 2 of Official Form 1 and deletes venue questions that pertain only to non-individuals.

Part 2, *Tell the Court About Your Bankruptcy Case*, line 7, removes choices for chapters 9 and 15 filings because they do not pertain to individuals. Additionally, Part 2 adds at line 8 a table that lists the applicable filing fees for chapters 7, 11, 12, and 13. The status of "being filed" is added to the question regarding bankruptcy cases pending or filed by a spouse, business partner, or affiliate (line 10). Lastly, the question "Do you rent your residence?" (line 11) and Official Forms 101A, *Initial Statement About an Eviction Judgment Against You*, and 101B, *Statement About Payment of an Eviction Judgment Against You*, replace "Certification By a Debtor Who Resides as a Tenant of Residential Property," on page 2 of Official Form 1.

Part 3, *Report About Any Businesses You Own as a Sole Proprietor*, line 12, incorporates options from the "nature of business" box from page 1 of Official Form 1 that would apply to individual debtors, thus eliminating checkboxes for railroads and clearing banks. Part 3, line 13, also eliminates a checkbox to report whether a plan was filed with the petition, or if plan acceptances were solicited prepetition. Additionally, line 13 rephrases the question relating to whether a debtor filing under Chapter 11 is a small business debtor.

Part 4, *Report if You Own or Have Any Hazardous Property or Any Property That Needs Immediate Attention*, line 14, replaces Exhibit C from Official Form 1 and adds the category of "property that needs immediate attention."

Part 5, *Explain Your Efforts to Receive a Briefing About Credit Counseling* (line 15), replaces Exhibit D from Official Form 1. Additionally, this part describes incapacity and disability using a simplified definition, tells the debtor of the ability to file a motion for a waiver, and eliminates statutory reference about districts where credit counseling does not apply because such districts are rare.

Part 6, *Answer These Questions for Reporting Purposes* (line 16c), provides a text field for the debtor to describe the type of debts owed if the debtor believes they are neither primarily consumer nor business debts.

Part 7, *Sign Below*, deletes from the debtor's declaration the phrase "to the best of my knowledge, information, and belief" in order to conform to the language of 28 U.S.C. § 1746. *See* Rule 1008. This part combines the two attorney signature blocks into one certification and eliminates signature lines for corporations/partnerships and chapter 15 Foreign Representatives. The declaration and signature section for a non-attorney bankruptcy petition preparer (BPP) has also been removed as unnecessary. The same declaration, required under 11 U.S.C. § 110, is contained in Official Form 119. That form must be completed and signed by the BPP and filed with each document prepared by a BPP.

A warning is added about the difficulties of filing bankruptcy without an attorney and the possibility of losing property or rights if the debtor does not properly handle the case. Pro se debtors are required to acknowledge reading and understanding the warning and to disclose whether they have paid or agreed to pay someone who is not an attorney to help complete the bankruptcy filing. Debtors who are represented by an attorney do not need to file the page that sets out the warning and acknowledgement.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Draft May 3, 2013

Official Form 101A

Initial Statement About an Eviction Judgment Against You

12/15

Fill out this form only if:

- **you rent your residence; and**
- **your landlord has obtained a judgment for possession in an eviction, unlawful detainer action, or similar proceeding (called *eviction judgment*) against you to possess your residence; and**
- **you want to stay in your rented residence after you file your case for bankruptcy.**

See 11 U.S.C. §§ 362(b)(22) and 362(l)

File this form with the court when you first file your bankruptcy filing package.

You must serve your landlord with a copy of this form. Check the Bankruptcy Rules (www.uscourts.gov/rulesandpolicies/rules.aspx) and the court's local website (go to www.uscourts.gov/Court_Locator.aspx to find your court's website) for any specific requirements that you might have to meet to serve this statement.

Certification About Applicable Law and Deposit of Rent

Landlord's name _____

Landlord's address _____
Number Street

_____ _____ _____
City State ZIP Code

I certify under penalty of perjury that:

❑ Under the state or other nonbankruptcy law that applies to the judgment for possession (*eviction judgment*), I have the right to stay in my residence by paying my landlord the entire amount I owe.

❑ I have given the bankruptcy court clerk a deposit for the rent that would be due during the 30 days after I file the *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101).

✘ _____
Signature of Debtor 1

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

Date _____
MM / DD / YYYY

If you checked both boxes above, signed the form to certify that both apply, and served your landlord a copy of this statement, the automatic stay under 11 U.S.C. § 362(a)(3) will apply to the continuation of the eviction against you for 30 days after you file your *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101).

You must serve your landlord with a copy of this form.

If you wish to stay in your residence after that 30-day period and continue to receive the protection of the automatic stay under 11 U.S.C. § 362(a)(3), you must pay the entire amount you owe to your landlord as stated in the eviction judgment before the 30-day period ends. You must also fill out Official Form 101B, file it with the bankruptcy court, and serve your landlord a copy of it before the 30-day period ends.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Draft May 3, 2013

Official Form 101B

Statement About Payment of an Eviction Judgment Against You

12/15

Fill out this form only if:

- **you filed Official Form 101A; and**
- **you served a copy of Official Form 101A on your landlord; and**
- **you want to stay in your rented residence for more than 30 days after you file your *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101).**

File this form within 30 days after you file your *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101). Also serve a copy on your landlord within that same time period.

Certification About Applicable Law and Payment of Eviction Judgment

I certify under penalty of perjury that (*Check all that apply*):

❑ Under the state or other nonbankruptcy law that applies to the judgment for possession (*eviction judgment*), I have the right to stay in my residence by paying my landlord the entire amount I owe.

❑ Within 30 days after I filed my *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101), I have paid my landlord the entire amount I owe as stated in the judgment for possession (*eviction judgment*).

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

You must serve your landlord with a copy of this form.

Check the Bankruptcy Rules (www.uscourts.gov/rulesandpolicies/rules.aspx) and the court's local website (go to http://www.uscourts.gov/Court_Locator.aspx to find your court's website) for any specific requirements that you might have to meet to serve this statement.

"Missing" Forms Modernization Project (FMP) Forms for Individuals

Nine FMP Official Bankruptcy Forms are not included in this publication package because they have already been published for public comment under the current two-digit forms numbering scheme. The forms will be updated with their projected three-digit number designations listed below when this publication package is approved for implementation.

Projected three digit form number	Form Title	Two digit form number and publication year(s)
103A	Application for Individuals to Pay the Filing Fee in Installments	3A (2012)
103B	Application to Have the Chapter 7 Filing Fee Waived	3B (2012)
106I	Schedule I: Your Income	6I (2012)
106J	Schedule J: Your Expenses	6J (2012)
108-1	Chapter 7 Statement of Your Current Monthly Income and Means-Test Calculation	22A-1 (2012 and 2013)
108-1Supp	Statement of Exemption from Presumption of Abuse Under § 707(b)(2)	22A-1Supp (2013)
108-2	Chapter 7 Means Test Calculation	22A-2 (2012 and 2013)
109	Chapter 11 Statement of Your Current Monthly Income	22B (2012 and 2013)
110-2	Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period	22C-1 (2012 and 2013)
110-2	Chapter 13 Calculation of Your Disposable Income	22C-2 (2012 and 2013)

COMMITTEE NOTE

Official Form 101A, *Initial Statement About an Eviction Judgment Against You*, and Official Form 101B, *Statement About Payment of an Eviction Judgment Against You*, are new forms promulgated as part of the Forms Modernization Project. They replace the "*Certification by a Debtor Who Resides as a Tenant of Residential Property*" section on Official Form 1, *Voluntary Petition*. The forms apply only in cases of individual debtors.

Official Form 101A explains that debtors need to complete and file the form only if their landlord has a judgment for possession or an eviction judgment against them and they wish to stay in their residence for 30 days after filing their bankruptcy petition. The form adds references to the provisions in the Bankruptcy Code that specify when debtor-tenants subject to eviction may remain in their residence after filing for bankruptcy.

The form eliminates the checkboxes that the debtor has served the landlord with the certification and paid the court the rent that would be due during the 30 days after the filing of the bankruptcy petition. Instead, debtors are required to certify under penalty of perjury that the rent has been paid to the court, and the instructions direct debtors to serve a copy of the statement on the landlord.

The form eliminates the checkbox that the debtor claims there are circumstances under applicable nonbankruptcy law under which the debtor would be permitted to cure the monetary default that gave rise to the judgment for possession (or eviction judgment) and remain in residence. Instead, debtors are required to certify under penalty of perjury that they have the right to stay in their residence under state law or other nonbankruptcy law by paying their landlord the entire amount they owe.

Official Form 101B is new. If debtors wish to stay in their residence for more than 30 days after filing the petition, they must complete, file, and serve the form within 30 days after the petition is filed. Under Official Form 101B, debtors certify under penalty of perjury that they have the right to stay in their residence under state law or other

nonbankruptcy law by paying their landlord the entire amount they owe and that they have paid their landlord the entire amount owed as stated in the judgment for possession or in the eviction judgment.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 104

For Individual Chapter 11 Cases: List of Creditors Who Have the 20 Largest Unsecured Claims Against You and Are Not Insiders

12/15

If you are an individual filing for bankruptcy under Chapter 11, you must fill out this form. If you are filing under Chapter 7, Chapter 12, or Chapter 13, do not fill out this form. Do not include claims by anyone who is an *insider*. Insiders include your relatives; any general partners; relatives of any general partners; partnerships of which you are a general partner; corporations of which you are an officer, director, person in control, or owner of 20 percent or more of their voting securities; and any managing agent, including one for a business you operate as a sole proprietor. 11 U.S.C. § 101. Also, do not include claims by secured creditors unless the unsecured claim resulting from inadequate collateral value places the creditor among the holders of the 20 largest unsecured claims.

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information.

Part 1: List the 20 Unsecured Claims in Order from Largest to Smallest. Do Not Include Claims by Insiders.

		Unsecured claim
1	**What is the nature of the claim?** _____	$_____
Creditor's Name _____	**As of the date you file, the claim is:** Check all that apply.	
Number Street _____	❑ Contingent	
_____	❑ Unliquidated	
City State ZIP Code _____	❑ Disputed	
Contact _____	❑ None of the above apply	
Contact phone _____	**Does the creditor have a lien on your property?**	
	❑ No	
	❑ Yes. Total claim (secured and unsecured): $_____	
	Value of security: - $_____	
	Unsecured claim $_____	
2	**What is the nature of the claim?** _____	$_____
Creditor's Name _____	**As of the date you file, the claim is:** Check all that apply.	
Number Street _____	❑ Contingent	
_____	❑ Unliquidated	
City State ZIP Code _____	❑ Disputed	
Contact _____	❑ None of the above apply	
Contact phone _____	**Does the creditor have a lien on your property?**	
	❑ No	
	❑ Yes. Total claim (secured and unsecured): $_____	
	Value of security: - $_____	
	Unsecured claim $_____	

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

Unsecured claim

3

Creditor's Name _____
Number Street _____
City State ZIP Code _____
Contact _____
Contact phone _____

What is the nature of the claim? _____ $_____

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $_____
  - Value of security: - $_____
  - Unsecured claim $_____

4

Creditor's Name _____
Number Street _____
City State ZIP Code _____
Contact _____
Contact phone _____

What is the nature of the claim? _____ $_____

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $_____
  - Value of security: - $_____
  - Unsecured claim $_____

5

Creditor's Name _____
Number Street _____
City State ZIP Code _____
Contact _____
Contact phone _____

What is the nature of the claim? _____ $_____

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $_____
  - Value of security: - $_____
  - Unsecured claim $_____

6

Creditor's Name _____
Number Street _____
City State ZIP Code _____
Contact _____
Contact phone _____

What is the nature of the claim? _____ $_____

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $_____
  - Value of security: - $_____
  - Unsecured claim $_____

7

Creditor's Name _____
Number Street _____
City State ZIP Code _____
Contact _____
Contact phone _____

What is the nature of the claim? _____ $_____

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $_____
  - Value of security: - $_____
  - Unsecured claim $_____

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

Unsecured claim

8

Creditor's Name _____
Number Street _____
City State ZIP Code _____
Contact _____
Contact phone _____

What is the nature of the claim? _____ $_____

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $_____
  - Value of security: - $_____
  - Unsecured claim $_____

9

Creditor's Name _____
Number Street _____
City State ZIP Code _____
Contact _____
Contact phone _____

What is the nature of the claim? _____ $_____

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $_____
  - Value of security: - $_____
  - Unsecured claim $_____

10

Creditor's Name _____
Number Street _____
City State ZIP Code _____
Contact _____
Contact phone _____

What is the nature of the claim? _____ $_____

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $_____
  - Value of security: - $_____
  - Unsecured claim $_____

11

Creditor's Name _____
Number Street _____
City State ZIP Code _____
Contact _____
Contact phone _____

What is the nature of the claim? _____ $_____

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $_____
  - Value of security: - $_____
  - Unsecured claim $_____

12

Creditor's Name _____
Number Street _____
City State ZIP Code _____
Contact _____
Contact phone _____

What is the nature of the claim? _____ $_____

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $_____
  - Value of security: - $_____
  - Unsecured claim $_____

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

Unsecured claim

13

Creditor's Name _____
Number Street _____
City State ZIP Code _____
Contact _____
Contact phone _____

What is the nature of the claim? _____ $_____

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $_____
  - Value of security: - $_____
  - Unsecured claim $_____

14

Creditor's Name _____
Number Street _____
City State ZIP Code _____
Contact _____
Contact phone _____

What is the nature of the claim? _____ $_____

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $_____
  - Value of security: - $_____
  - Unsecured claim $_____

15

Creditor's Name _____
Number Street _____
City State ZIP Code _____
Contact _____
Contact phone _____

What is the nature of the claim? _____ $_____

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $_____
  - Value of security: - $_____
  - Unsecured claim $_____

16

Creditor's Name _____
Number Street _____
City State ZIP Code _____
Contact _____
Contact phone _____

What is the nature of the claim? _____ $_____

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $_____
  - Value of security: - $_____
  - Unsecured claim $_____

17

Creditor's Name _____
Number Street _____
City State ZIP Code _____
Contact _____
Contact phone _____

What is the nature of the claim? _____ $_____

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $_____
  - Value of security: - $_____
  - Unsecured claim $_____

Unsecured claim

18

Creditor's Name

Number Street

City State ZIP Code

Contact

Contact phone

What is the nature of the claim? _____ $_____

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?

- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $_____
  - Value of security: - $_____
  - Unsecured claim $_____

19

Creditor's Name

Number Street

City State ZIP Code

Contact

Contact phone

What is the nature of the claim? _____ $_____

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?

- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $_____
  - Value of security: - $_____
  - Unsecured claim $_____

20

Creditor's Name

Number Street

City State ZIP Code

Contact

Contact phone

What is the nature of the claim? _____ $_____

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?

- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $_____
  - Value of security: - $_____
  - Unsecured claim $_____

Part 2: Sign Below

Under penalty of perjury, I declare that the information provided in this form is true and correct.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

COMMITTEE NOTE

Official Form 104, *For Individual Chapter 11 Cases: List of Creditors Who Have the 20 Largest Unsecured Claims Against You and Are Not Insiders*, is revised as part of the Forms Modernization Project. It replaces Official Form 4, *List of Creditors Holding 20 Largest Unsecured Claims*, in chapter 11 cases filed by individuals or joint debtors. The form is renumbered to distinguish it from the version to be used in chapter 11 cases filed by non-individuals, such as corporations and partnerships, and in chapter 9 cases.

Form 104 is reformatted to make it easier to complete and understand. Blanks and checkboxes are provided for specific information about each claim, replacing columns for listing information. A separate, numbered section is provided for each of the 20 claims.

The instruction not to include fully secured claims is restated in less technical terms. Debtors are instructed to include a secured creditor only if the creditor has an unsecured claim resulting from inadequate collateral value that is among the 20 largest unsecured claims. Blanks are provided to calculate the value of the unsecured portion of a partially secured claim.

Examples of “insiders” are provided in addition to the statutory reference. The form adds an explicit instruction not to file the form in a chapter 7, chapter 12, or chapter 13 case. An instruction to be as complete and accurate as possible is added, along with a warning that, if two married people are filing jointly, both are equally responsible for supplying correct information.

With respect to children who may be creditors, the direction to state only the initials of a minor child and the name and address of the child's parent or guardian, rather than the child’s full name, is moved to the general instruction booklet for the forms because it applies to all of the forms.

Fill in this information to identify the case:

United States Bankruptcy Court for the:

_____ District of _____
(State)

Case number (*If known*): _____ Chapter _____

❑ Check if this is an amended filing

Official Form 105

Involuntary Petition Against an Individual

12/15

Use this form to begin a bankruptcy case against an individual you allege to be a debtor subject to an involuntary case. If you want to begin a case against a non-individual, use the *Involuntary Petition Against a Non-individual* (Official Form 205). Be as complete and accurate as possible. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write name and case number (if known).

Part 1: Identify the Chapter of the Bankruptcy Code Under Which Petition Is Filed

1. Chapter of the Bankruptcy Code

Check one:

❑ Chapter 7
❑ Chapter 11

Part 2: Identify the Debtor

2. Debtor's full name

_____
First name

_____
Middle name

_____
Last name

_____
Suffix (Sr., Jr., II, III)

3. Other names you know the debtor has used in the last 8 years

Include any assumed, married, maiden, or trade names, or *doing business as* names.

_____
_____
_____

4. Only the last 4 digits of debtor's Social Security Number or federal Individual Taxpayer Identification Number (ITIN)

❑ Unknown

xxx – xx – ____ ____ ____ ____ OR 9xx – xx – ____ ____ ____ ____

5. Any Employer Identification Numbers (EINs) used in the last 8 years

❑ Unknown

__ __ – __ __ __ __ __ __ __
EIN

__ __ – __ __ __ __ __ __ __
EIN

6. Debtor's address

Principal residence

_____
Number Street

_____

_____
City State ZIP Code

_____
County

Mailing address, if different from residence

_____
Number Street

_____

_____
City State ZIP Code

Principal place of business

_____
Number Street

_____

_____
City State ZIP Code

_____
County

7. Type of business

❑ Debtor does not operate a business

Check one if the debtor operates a business:

❑ Health Care Business (as defined in 11 U.S.C. § 101(27A))
❑ Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))
❑ Stockbroker (as defined in 11 U.S.C. § 101(53A))
❑ Commodity Broker (as defined in 11 U.S.C. § 101(6))
❑ None of the above

8. Type of debt

Each petitioner believes:

❑ **Debts are primarily consumer debts.** *Consumer debts* are defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose."

❑ **Debts are primarily business debts.** *Business debts* are debts that were incurred to obtain money for a business or investment or through the operation of the business or investment.

9. Do you know of any bankruptcy cases pending by or against any partner, spouse, or affiliate of this debtor?

❑ No

❑ Yes. Debtor _____ Relationship _____

District _____ Date filed _____ Case number, if known_____
MM / DD / YYYY

Debtor _____ Relationship _____

District _____ Date filed _____ Case number, if known_____
MM / DD / YYYY

Part 3: Report About the Case

10. Venue

Reason for filing in this court.

Check one:

- ❑ Over the last 180 days before the filing of this bankruptcy, the debtor has resided, had the principal place of business, or had principal assets in this district longer than in any other district.
- ❑ A bankruptcy case concerning debtor's affiliates, general partner, or partnership is pending in this district.
- ❑ Other reason. Explain. (See 28 U.S.C. § 1408.) _____

11. Allegations

Each petitioner is eligible to file this petition under 11 U.S.C. § 303(b).

The debtor may be the subject of an involuntary case under 11 U.S.C. § 303(a).

At least one box must be checked:

- ❑ The debtor is generally not paying such debts as they become due, unless they are the subject of a bona fide dispute as to liability or amount.
- ❑ Within 120 days before the filing of this petition, a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.

12. Has there been a transfer of any claim against the debtor by or to any petitioner?

- ❑ No
- ❑ Yes. Attach all documents that evidence the transfer and any statements required under Bankruptcy Rule 1003(a).

13. Each petitioner's claim

Name of petitioner	Nature of petitioner's claim	Amount of the claim above the value of any lien
		$ _____
		$ _____
		$ _____
	Total	$ _____

If more than 3 petitioners, attach additional sheets with the statement under penalty of perjury, each petitioner's (or representative's) signature under the statement, along with the signature of the petitioner's attorney, and the information on the petitioning creditor, the petitioner's claim, the petitioner's representative, and the attorney following the format on this form.

Part 4: Request for Relief

Petitioners request that an order for relief be entered against the debtor under the chapter specified in Part 1 of this petition. If a petitioning creditor is a corporation, attach the corporate ownership statement required by Bankruptcy Rule 1010(b). If any petitioner is a foreign representative appointed in a foreign proceeding, a certified copy of the order of the court granting recognition is attached.

Petitioners declare under penalty of perjury that the information provided in this petition is true and correct to the best of their knowledge, information, and belief. Petitioners understand that if they make a false statement, they could be fined up to $250,000 or imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571. If relief is not ordered, the court may award attorneys' fees, costs, damages, and punitive damages. 11 U.S.C. § 303(i).

Petitioners or Petitioners' Representative

✘ _____

Signature of petitioner or representative, including representative's title

_____

Printed name of petitioner

Date signed _____
MM / DD / YYYY

Mailing address of petitioner

_____

Number Street

_____

City State ZIP Code

If petitioner is an individual and is not represented by an attorney:

Contact phone _____

Email _____

Name and mailing address of petitioner's representative, if any

_____

Name

_____

Number Street

_____

City State ZIP Code

Attorneys

✘ _____

Signature of attorney

_____

Printed name

_____

Firm name, if any

_____

Number Street

_____

City State ZIP Code

Date signed _____
MM / DD / YYYY

Contact phone _____ Email _____

✘ _____

Signature of petitioner or representative, including representative's title

_____

Printed name of petitioner

Date signed _____
MM / DD / YYYY

Mailing address of petitioner

_____

Number Street

_____

City State ZIP Code

Name and mailing address of petitioner's representative, if any

_____

Name

_____

Number Street

_____

City State ZIP Code

✘ _____

Signature of Attorney

_____

Printed name

_____

Firm name, if any

_____

Number Street

_____

City State ZIP Code

Date signed _____
MM / DD / YYYY

Contact phone _____ Email _____

✘ _____

Signature of petitioner or representative, including representative's title

_____

Printed name of petitioner

Date signed _____
MM / DD / YYYY

Mailing address of petitioner

_____

Number Street

_____

City State ZIP Code

Name and mailing address of petitioner's representative, if any

_____

Name

_____

Number Street

_____

City State ZIP Code

✘ _____

Signature of Attorney

_____

Printed name

_____

Firm name, if any

_____

Number Street

_____

City State ZIP Code

Date signed _____
MM / DD / YYYY

Contact phone _____ Email _____

COMMITTEE NOTE

Official Form 105, *Involuntary Petition Against an Individual*, which is used only in cases of individual debtors, is revised in its entirety as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. In addition, the form is renumbered to distinguish it from the version to be used in non-individual cases, and stylistic changes were made throughout the form.

The form is derived from Official Form 5, *Involuntary Petition*. The new form separates questions into four parts likely to be more familiar to non-lawyers, groups questions of a similar nature together, and eliminates questions unrelated to individual debtors.

Part 1, *Identify the Chapter of the Bankruptcy Code Under Which Petition is Filed*, moves to the beginning of the form the question regarding the chapter of the Bankruptcy Code under which the petition is filed.

Part 2, *Identify the Debtor*, includes the questions regarding the debtor's name, prior names, Social Security Number, Individual Taxpayer Identification Number and Employer Identification Number. Petitioners must list the address for the debtor's principal residence, mailing address (if different), and principal place of business. Petitioners must indicate whether the debtor operates a business, and, if so, use checkboxes to indicate whether the business falls into certain categories. The statutory definition of "consumer debts" is provided, as well as a definition of "business debts."

Part 3, *Report About the Case*, amends the question regarding venue to advise that venue is the "Reason to file in this court" and amends the choices for venue. The first option is revised to read: "Over the last 180 days before the filing of this bankruptcy, the debtor has resided, had the principal place of business, or had principal assets in this district longer than any other district." Also, the form adds an option for "Other reason.

Explain," with a statutory reference. In the question for Allegations, the exact citation to the Bankruptcy Code is provided for the second allegation, and checkboxes are provided for the last allegation. Petitioners must check "yes" or "no" to answer whether there has been any transfer of any claim against the debtor by or to a petitioner. The information regarding the petitioner's claims is moved to this part of the form, and the portion listing the amount of the claim is amended to ask about the amount of the claim that exceeds the value of the lien, if any.

Part 4, *Request for Relief*, amends the instructions to include a warning about making a false statement, and adds a separate requirement for each petitioner's mailing address. Also, petitioners' attorneys must provide their email addresses, or if a petitioner is an individual and not represented by an attorney, the contact phone and email address of that petitioner must be provided.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 106Sum

Summary of Your Assets and Liabilities and Certain Statistical Information 12/15

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. Fill out all of your schedules first; then complete the information on this form. If you are filing amended schedules after you file your original forms, you must fill out a new *Summary* and check the box at the top of this page.

Part 1: Summarize Your Assets

	Your assets Value of what you own
1. ***Schedule A/B: Property*** (Official Form 106A/B).	
1a. Copy line 55, Total real estate, from *Schedule A/B*	$ _____
1b. Copy line 62, Total personal property, from *Schedule A/B*	$ _____
1c. Copy line 63, Total of all property on *Schedule A/B*	$ _____

Part 2: Summarize Your Liabilities

	Your liabilities Amount you owe
2. *Schedule D: Creditors Who Hold Claims Secured by Property* (Official Form 106D)	
2a. Copy the total you listed in Column A, *Amount of claim,* at the bottom of the last page of Part 1 of *Schedule D*	$ _____
3. *Schedule E/F: Creditors Who Have Unsecured Claims* (Official Form 106E/F)	
3a. Copy the total claims from Part 1 (priority unsecured claims) from line 6e of *Schedule E/F*	$ _____
3b. Copy the total claims from Part 2 (nonpriority unsecured claims) from line 6j of *Schedule E/F*	+ $ _____
Your total liabilities	$ _____

Part 3: Summarize Your Income and Expenses

4. *Schedule I: Your Income* (Official Form 106I) Copy your combined monthly income from line 12 of *Schedule I*	$ _____
5. *Schedule J: Your Expenses* (Official Form 106J) Copy your monthly expenses from line 22, Column A, of *Schedule J*	$ _____

12b-007742

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

Part 4: Answer These Questions for Administrative and Statistical Records

6. **Are you filing for bankruptcy under Chapters 7, 11, or 13?**

❑ No. You have nothing to report on this part of the form. Check this box and submit this form to the court with your other schedules.
❑ Yes

7. **What kind of debt do you have?**

❑ **Your debts are primarily consumer debts.** *Consumer debts* are those "incurred by an individual primarily for a personal, family, or household purpose." 11 U.S.C. § 101(8). Fill out lines 8-10 for statistical purposes. 28 U.S.C. § 159.

❑ **Your debts are not primarily consumer debts**. You have nothing to report on this part of the form. Check this box and submit this form to the court with your other schedules.

8. **From the *Statement of Your Current Monthly Income*** (Official Form 108-1, 109, or 110-1):
Copy your total current monthly income from line 11. $ _____

9. **Copy the following special categories of claims from Part 4, line 6 of *Schedule E/F: Creditors Who Have Unsecured Claims*** (Official Form 106E/F):

	Total claim
From Part 4 on *Schedule E/F*, copy the following:	
9a. Domestic support obligations (Copy line 6a.)	$_____
9b. Taxes and certain other debts you owe the government. (Copy line 6b.)	$_____
9c. Claims for death or personal injury while you were intoxicated. (Copy line 6c.)	$_____
9d. Student loans. (Copy line 6f.)	$_____
9e. Obligations arising out of a separation agreement or divorce that you did not report as priority claims. (Copy line 6g.)	$_____
9f. Debts to pension or profit-sharing plans, and other similar debts. (Copy line 6h.)	+ $_____
9g. **Total.** Add lines 9a through 9f.	$_____

Fill in this information to identify your case and this filing:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____

❑ Check if this is an amended filing

Official Form 106A/B

Schedule A/B: Property

12/15

In each category, separately list and describe items worth more than $500. List an asset only once. If an asset fits in more than one category, list the asset in the category where you think it fits best. Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Describe Each Residence, Building, Land, or Other Real Estate You Own or Have an Interest In

1. **Do you own or have any legal or equitable interest in any residence, building, land, or similar property?**

❑ No
❑ Yes. Where is the property?

1.1. _____
Street address, if available, or other description

_____

_____
City State ZIP Code

_____
County

What is the property? Check all that apply.
❑ Single-family home
❑ Duplex or multi-unit building
❑ Condominium or cooperative
❑ Manufactured or mobile home
❑ Land
❑ Investment property
❑ Timeshare
❑ Other _____

Who is an owner of the property? Check one.
❑ Debtor 1 only
❑ Debtor 2 only
❑ Debtor 1 and Debtor 2 only
❑ At least one of the debtors and another

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule D: Creditors Who Hold Claims Secured by Property.*

Current value of the entire property? $_____

Current value of the portion you own? $_____

❑ **Check if this is community property** (see instructions)

Other information you wish to add about this item, such as local property identification number: _____

If you own or have more than one, list here:

1.2. _____
Street address, if available, or other description

_____

_____
City State ZIP Code

_____
County

What is the property? Check all that apply.
❑ Single-family home
❑ Duplex or multi-unit building
❑ Condominium or cooperative
❑ Manufactured or mobile home
❑ Land
❑ Investment property
❑ Timeshare
❑ Other _____

Who is an owner of the property? Check one.
❑ Debtor 1 only
❑ Debtor 2 only
❑ Debtor 1 and Debtor 2 only
❑ At least one of the debtors and another

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule D: Creditors Who Hold Claims Secured by Property.*

Current value of the entire property? $_____

Current value of the portion you own? $_____

❑ **Check if this is community property** (see instructions)

Other information you wish to add about this item, such as local property identification number: _____

1.3. _____
Street address, if available, or other description

_____

_____
City State ZIP Code

_____
County

What is the property? Check all that apply.
- ❑ Single-family home
- ❑ Duplex or multi-unit building
- ❑ Condominium or cooperative
- ❑ Manufactured or mobile home
- ❑ Land
- ❑ Investment property
- ❑ Timeshare
- ❑ Other _____

Who is an owner of the property? Check one.
- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule D: Creditors Who Hold Claims Secured by Property.*

Current value of the entire property?	**Current value of the portion you own?**
$_____	$_____

❑ **Check if this is community property** (see instructions)

Other information you wish to add about this item, such as local property identification number: _____

2. **Add the dollar value of the portion you own for all of your entries from Part 1, including any entries for pages you have attached for Part 1. Write that number here.** ……➔ $_____

Part 2: Describe Your Vehicles

Do you own or have legal or equitable interest in any vehicles, whether they are registered or not? Include any vehicles you own that someone else drives. Do not report leased vehicles here. If you lease a vehicle, fill out *Schedule G: Executory Contracts and Unexpired Leases.*

3. **Cars, vans, trucks, tractors, sport utility vehicles, motorcycles**
- ❑ No
- ❑ Yes

3.1. Make: _____
Model: _____
Year: _____
Mileage:
- ❑ 0-24,999
- ❑ 25,000-49,999
- ❑ 50,000-74,999
- ❑ 75,000 or more

Other information:

Who is an owner of the property? Check one.
- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is community property** (see instructions)

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule D: Creditors Who Hold Claims Secured by Property.*

Current value of the entire property?	**Current value of the portion you own?**
$_____	$_____

If you own or have more than one, describe here:

3.2. Make: _____
Model: _____
Year: _____
Mileage:
- ❑ 0-24,999
- ❑ 25,000-49,999
- ❑ 50,000-74,999
- ❑ 75,000 or more

Other information:

Who is an owner of the property? Check one.
- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is community property** (see instructions)

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule D: Creditors Who Hold Claims Secured by Property.*

Current value of the entire property?	**Current value of the portion you own?**
$_____	$_____

3.3. Make: _____
Model: _____
Year: _____
Mileage: ❑ 0-24,999
❑ 25,000-49,999
❑ 50,000-74,999
❑ 75,000 or more
Other information:

Who is an owner of the property? Check one.
❑ Debtor 1 only
❑ Debtor 2 only
❑ Debtor 1 and Debtor 2 only
❑ At least one of the debtors and another

❑ **Check if this is community property** (see instructions)

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule D: Creditors Who Hold Claims Secured by Property.*

Current value of the entire property? $_____
Current value of the portion you own? $_____

3.4. Make: _____
Model: _____
Year: _____
Mileage: ❑ 0-24,999
❑ 25,000-49,999
❑ 50,000-74,999
❑ 75,000 or more
Other information:

Who is an owner of the property? Check one.
❑ Debtor 1 only
❑ Debtor 2 only
❑ Debtor 1 and Debtor 2 only
❑ At least one of the debtors and another

❑ **Check if this is community property** (see instructions)

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule D: Creditors Who Hold Claims Secured by Property.*

Current value of the entire property? $_____
Current value of the portion you own? $_____

4. **Watercraft, aircraft, motor homes, ATVs and other recreational vehicles, other vehicles, and accessories**
Examples: Boats, trailers, motors, personal watercraft, fishing vessels, snowmobiles, motorcycle accessories
❑ No
❑ Yes

4.1. Make: _____
Model: _____
Year: _____
Other information:

Who is an owner of the property? Check one.
❑ Debtor 1 only
❑ Debtor 2 only
❑ Debtor 1 and Debtor 2 only
❑ At least one of the debtors and another

❑ **Check if this is community property** (see instructions)

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule D: Creditors Who Hold Claims Secured by Property.*

Current value of the entire property? $_____
Current value of the portion you own? $_____

If you own or have more than one, list here:

4.2. Make: _____
Model: _____
Year: _____
Other information:

Who is an owner of the property? Check one.
❑ Debtor 1 only
❑ Debtor 2 only
❑ Debtor 1 and Debtor 2 only
❑ At least one of the debtors and another

❑ **Check if this is community property** (see instructions)

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule D: Creditors Who Hold Claims Secured by Property.*

Current value of the entire property? $_____
Current value of the portion you own? $_____

5. **Add the dollar value of the portion you own for all of your entries from Part 2, including any entries for pages you have attached for Part 2. Write that number here** ..... ➔ $_____

Part 3: Describe Your Personal and Household Items

Do you own or have any legal or equitable interest in any of the following items?	Current value of the portion you own? Do not deduct secured claims or exemptions.

6. **Household goods and furnishings**
   Examples: Major appliances, furniture, linens, china, kitchenware
   ❑ No
   ❑ Yes. Describe..... $_____

7. **Electronics**
   Examples: Televisions and radios; audio, video, stereo, and digital equipment; computers, printers, scanners; music collections; electronic devices including cell phones, cameras, media players, games
   ❑ No
   ❑ Yes. Describe..... $_____

8. **Collectibles of value**
   Examples: Antiques and figurines; paintings, prints, or other artwork; books, pictures, or other art objects; stamp, coin, or baseball card collections; other collections, memorabilia, collectibles
   ❑ No
   ❑ Yes. Describe..... $_____

9. **Equipment for sports and hobbies**
   Examples: Sports, photographic, exercise, and other hobby equipment; bicycles, pool tables, golf clubs, skis; canoes and kayaks; carpentry tools; musical instruments
   ❑ No
   ❑ Yes. Describe..... $_____

10. **Firearms**
   Examples: Pistols, rifles, shotguns, ammunition, and related equipment
   ❑ No
   ❑ Yes. Describe..... $_____

11. **Clothes**
   Examples: Everyday clothes, furs, leather coats, designer wear, shoes, accessories
   ❑ No
   ❑ Yes. Describe..... $_____

12. **Jewelry**
   Examples: Everyday jewelry, costume jewelry, engagement rings, wedding rings, heirloom jewelry, watches, gems, gold, silver
   ❑ No
   ❑ Yes. Describe..... $_____

13. **Non-farm animals**
   Examples: Dogs, cats, birds, horses
   ❑ No
   ❑ Yes. Describe..... $_____

14. **Any other personal and household items you did not already list, including any health aids you did not list**
   ❑ No
   ❑ Yes. Give specific information. ..... $_____

15. **Add the dollar value of all of your entries from Part 3, including any entries for pages you have attached for Part 3. Write that number here** ..... ➔ $_____

Part 4: Describe Your Financial Assets

Do you own or have any legal or equitable interest in any of the following?

Current value of the portion you own?
Do not deduct secured claims or exemptions.

16. **Cash**
Examples: Money you have in your wallet, in your home, in a safe deposit box, and on hand when you file your petition

❑ No
❑ Yes ..... Cash: ..... $_____

17. **Deposits of money**
Examples: Checking, savings, or other financial accounts; certificates of deposit; shares in credit unions, brokerage houses, and other similar institutions. If you have multiple accounts with the same institution, list each.

❑ No
❑ Yes ..... Institution name:

17.1. Checking account: _____ $_____
17.2. Checking account: _____ $_____
17.3. Savings account: _____ $_____
17.4. Savings account: _____ $_____
17.5. Certificates of deposit: _____ $_____
17.6. Other financial account: _____ $_____
17.7. Other financial account: _____ $_____
17.8. Other financial account: _____ $_____
17.9. Other financial account: _____ $_____

18. **Bonds, mutual funds, or publicly traded stocks**
Examples: Bond funds, investment accounts with brokerage firms, money market accounts

❑ No
❑ Yes ..... Institution name:

_____ $_____
_____ $_____
_____ $_____

19. **Non-publicly traded stock and interests in incorporated and unincorporated businesses, including an interest in an LLC, partnership, and joint venture**

❑ No
❑ Yes. Give specific information about them.....

Name of entity:	% of ownership:	
_____	_____%	$_____
_____	_____%	$_____
_____	_____%	$_____

20. **Government and corporate bonds and other negotiable and non-negotiable instruments**

Negotiable instruments include personal checks, cashiers' checks, promissory notes, and money orders.
Non-negotiable instruments are those you cannot transfer to someone by signing or delivering them.

- ❑ No
- ❑ Yes. Give specific information about them..... Issuer name:

_____ $_____
_____ $_____
_____ $_____

21. **Retirement or pension accounts**

Examples: Interests in IRA, ERISA, Keogh, 401(k), 403(b), thrift savings accounts, or other pension or profit-sharing plans

- ❑ No
- ❑ Yes. List each account separately.

Type of account:	Institution name:	
401(k) or similar plan:	_____	$_____
Pension plan:	_____	$_____
IRA:	_____	$_____
Retirement account:	_____	$_____
Keogh:	_____	$_____
Additional account:	_____	$_____
Additional account:	_____	$_____

22. **Security deposits and prepayments**

Your share of all unused deposits you have made so that you may continue service or use from a company
Examples: Agreements with landlords, prepaid rent, public utilities (electric, gas, water), telecommunications companies, or others

- ❑ No
- ❑ Yes.....

	Institution name or individual:	
Electric:	_____	$_____
Gas:	_____	$_____
Heating oil:	_____	$_____
Security deposit on rental unit:	_____	$_____
Prepaid rent:	_____	$_____
Telephone:	_____	$_____
Water:	_____	$_____
Rented furniture:	_____	$_____
Other:	_____	$_____

23. **Annuities** (A contract for a periodic payment of money to you, either for life or for a number of years)

- ❑ No
- ❑ Yes..... Issuer name and description:

_____ $_____
_____ $_____
_____ $_____

24. **Interests in an education IRA** as defined in 26 U.S.C. § 530(b)(1) or under a qualified state tuition plan as defined in 26 U.S.C. § 529(b)(1).

- ❑ No
- ❑ Yes ..... Institution name and description. Separately file the records of any interests.11 U.S.C. § 521(c):

_____ $_____
_____ $_____
_____ $_____

25. **Trusts, equitable or future interests in property (other than anything listed in line 1), and rights or powers exercisable for your benefit**

- ❑ No
- ❑ Yes. Give specific information about them.... $_____

26. **Patents, copyrights, trademarks, trade secrets, and other intellectual property**
Examples: Internet domain names, websites, proceeds from royalties and licensing agreements

- ❑ No
- ❑ Yes. Give specific information about them.... $_____

27. **Licenses, franchises, and other general intangibles**
Examples: Building permits, exclusive licenses, cooperative association holdings, liquor licenses, professional licenses

- ❑ No
- ❑ Yes. Give specific information about them.... $_____

Money or property owed to you? **Current value of the portion you own?** Do not deduct secured claims or exemptions.

28. **Tax refunds owed to you**

- ❑ No
- ❑ Yes. Give specific information about them, including whether you already filed the returns and the tax years. .....

Federal: $_____
State: $_____
Local: $_____

29. **Family support**
Examples: Past due or lump sum alimony, spousal support, child support, maintenance, divorce settlement, property settlement

- ❑ No
- ❑ Yes. Give specific information.....

Alimony: $_____
Maintenance: $_____
Support: $_____
Divorce settlement: $_____
Property settlement: $_____

30. **Other amounts someone owes you**
Examples: Unpaid wages, disability insurance payments, disability benefits, sick pay, vacation pay, workers' compensation, Social Security benefits; unpaid loans you made to someone else

- ❑ No
- ❑ Yes. Give specific information..... $_____

31. **Interests in insurance policies**
Examples: Health, disability, or life insurance; health savings account (HSA); credit, homeowner's, or renter's insurance

❑ No
❑ Yes. Name the insurance company of each policy and list its value. ...

Company name:	Beneficiary:	Surrender or refund value:
_____	_____	$_____
_____	_____	$_____
_____	_____	$_____

32. **Any interest in property that is due you from someone who has died**
If you are the beneficiary of a living trust, expect proceeds from a life insurance policy, have inherited something from an existing estate

❑ No
❑ Yes. Give specific information..... $_____

33. **Claims against third parties, whether or not you have filed a lawsuit or made a demand for payment**
Examples: Accidents, employment disputes, insurance claims, or rights to sue

❑ No
❑ Yes. Describe each claim. ..... $_____

34. **Other contingent and unliquidated claims of every nature, including counterclaims of the debtor and rights to set off claims**

❑ No
❑ Yes. Describe each claim. ..... $_____

35. **Any financial assets you did not already list**

❑ No
❑ Yes. Give specific information..... $_____

36. **Add the dollar value of all of your entries from Part 4, including any entries for pages you have attached for Part 4. Write that number here** ..... ➔ $_____

Part 5: Describe Any Business-Related Property You Own or Have an Interest In. List any real estate in Part 1.

37. **Do you own or have any legal or equitable interest in any business-related property?**

❑ No. Go to Part 6.
❑ Yes. Go to line 38.

Current value of the portion you own?
Do not deduct secured claims or exemptions.

38. **Accounts receivable or commissions you already earned**

❑ No
❑ Yes. Describe..... $_____

39. **Office equipment, furnishings, and supplies**
Examples: Business-related computers, software, modems, printers, copiers, fax machines, rugs, telephones, desks, chairs, electronic devices

❑ No
❑ Yes. Describe..... $_____

40. **Machinery, fixtures, equipment, supplies you use in business, and tools of your trade**

- ❑ No
- ❑ Yes. Describe..... $_____

41. **Inventory**

- ❑ No
- ❑ Yes. Describe..... $_____

42. **Interests in partnerships or joint ventures**

- ❑ No
- ❑ Yes. Describe.....

Name of entity:	% of ownership:	
_____	_____%	$_____
_____	_____%	$_____
_____	_____%	$_____

43. **Customer lists, mailing lists, or other compilations**

- ❑ No
- ❑ Yes. **Do your lists include personally identifiable information** (as defined in 11 U.S.C. § 101(41A))**?**
  - ❑ No
  - ❑ Yes. Describe..... $_____

44. **Any business-related property you did not already list**

- ❑ No
- ❑ Yes. Give specific information .....

_____	$_____
_____	$_____
_____	$_____
_____	$_____
_____	$_____
_____	$_____

45. **Add the dollar value of all of your entries from Part 5, including any entries for pages you have attached for Part 5. Write that number here** ..... ➔ $_____

Part 6: Describe Any Farm- and Commercial Fishing-Related Property You Own or Have an Interest In.

If you own or have an interest in farmland, list it in Part 1.

46. **Do you own or have any legal or equitable interest in any farm- or commercial fishing-related property?**

- ❑ No. Go to Part 7.
- ❑ Yes. Go to line 47.

Current value of the portion you own?
Do not deduct secured claims or exemptions.

47. **Farm animals**

Examples: Livestock, poultry, farm-raised fish

- ❑ No
- ❑ Yes..... $_____

48. **Crops—either growing or harvested**

❑ No
❑ Yes. Give specific information. ..... $_____

49. **Farm and fishing equipment and implements**

❑ No
❑ Yes ..... $_____

50. **Farm and fishing supplies, chemicals, and feed**

❑ No
❑ Yes ..... $_____

51. **Any farm- and commercial fishing-related property you did not already list**

❑ No
❑ Yes. Give specific information. ..... $_____

52. **Add the dollar value of all of your entries from Part 6, including any entries for pages you have attached for Part 6. Write that number here** ..... ➔ $_____

Part 7: Describe All Property You Own or Have an Interest in That You Did Not List Above

53. **Do you have other property of any kind you did not already list?**
Examples: Season tickets, country club membership

❑ No
❑ Yes. Give specific information. ..... $_____ $_____ $_____

54. **Add the dollar value of all of your entries from Part 7. Write that number here** ..... ➔ $_____

Part 8: List the Totals of Each Part of this Form

55. **Part 1: Total real estate, line 2** ..... ➔ $_____

56. **Part 2: Total vehicles, line 5** $_____

57. **Part 3: Total personal and household items, line 15** $_____

58. **Part 4: Total financial assets, line 36** $_____

59. **Part 5: Total business-related property, line 45** $_____

60. **Part 6: Total farm- and fishing-related property, line 52** $_____

61. **Part 7: Total other property not listed, line 54** + $_____

62. **Total personal property.** Add lines 56 through 61. ..... $_____ Copy personal property total ➔ + $_____

63. **Total of all property on Schedule A/B.** Add line 55 + line 62. ..... $_____

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 106C

Schedule C: The Property You Claim as Exempt

12/15

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. Using the property you listed on *Schedule A/B: Property* (Official Form 106A/B) as your source, list the property that you claim as exempt. If more space is needed, fill out and attach to this page as many copies of *Part 2: Additional Page* as necessary. On the top of any additional pages, write your name and case number (if known).

For each item of property you claim as exempt, you must specify the amount of the exemption you claim. One way of doing so is to state a specific dollar amount as exempt. Alternatively, you may claim the full fair market value of the property being exempted up to the amount of any applicable statutory limit. Some exemptions—such as those for health aids, rights to receive certain benefits, and tax-exempt retirement funds—may be unlimited in dollar amount. However, if you claim an exemption of 100% of fair market value under a law that limits the exemption to a particular dollar amount and the value of the property is determined to exceed that amount, your exemption would be limited to the applicable statutory amount.

Part 1: Identify the Property You Claim as Exempt

1. **Which set of exemptions are you claiming?** *Check one only, even if your spouse is filing with you.*
   - ❑ You are claiming state and federal nonbankruptcy exemptions. 11 U.S.C. § 522(b)(3)
   - ❑ You are claiming federal exemptions. 11 U.S.C. § 522(b)(2)

2. **For any property you list on *Schedule A/B* that you claim as exempt, fill in the information below.**

Brief description of the property and line on *Schedule A/B* that lists this property	**Current value of the portion you own** Copy the value from *Schedule A/B*	**Amount of the exemption you claim** *Check only one box for each exemption.*	**Specific laws that allow exemption**
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____

3. **Are you claiming a homestead exemption of more than $155,675?**
   (Subject to adjustment on 4/01/16 and every 3 years after that for cases filed on or after the date of adjustment.)
   - ❑ No
   - ❑ Yes. Did you acquire the property covered by the exemption within 1,215 days before you filed this case?
     - ❑ No
     - ❑ Yes

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

Part 2: Additional Page

Brief description of the property and line on *Schedule A/B* that lists this property	Current value of the portion you own Copy the value from *Schedule A/B*	Amount of the exemption you claim *Check only one box for each exemption*	Specific laws that allow exemption
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 106D

Schedule D: Creditors Who Hold Claims Secured by Property

12/15

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, copy the Additional Page, fill it out, number the entries, and attach it to this form. On the top of any additional pages, write your name and case number (if known).

1. **Do any creditors hold claims secured by your property?**
   - ❑ No. Check this box and submit this form to the court with your other schedules. You have nothing else to report on this form.
   - ❑ Yes. Fill in all of the information below.

Part 1: List Your Secured Claims

2. **List all of your secured claims in the alphabetical order of the major creditor who holds each claim.** If a creditor has more than one secured claim, list the creditor separately for each claim. If more than one creditor holds a particular claim, list the other creditors in Part 2.

		Column A **Amount of claim** Do not deduct the value of collateral.	*Column B* **Value of collateral that supports this claim**	*Column C* **Unsecured portion** If any
2.1 _____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code **Who owes the debt?** Check one. ❑ Debtor 1 only ❑ Debtor 2 only ❑ Debtor 1 and Debtor 2 only ❑ At least one of the debtors and another ❑ **Check if this is a community claim** **Date debt was incurred** _____	**Describe the property that is collateral:** **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Nature of lien**. Check all that apply. ❑ An agreement you made (such as mortgage or secured car loan) ❑ Statutory lien (such as tax lien, mechanic's lien) ❑ Judgment lien from a lawsuit ❑ Other _____ **Last 4 digits of account number** ___ ___ ___ ___	$_____	$_____	$_____
2.2 _____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code **Who owes the debt?** Check one. ❑ Debtor 1 only ❑ Debtor 2 only ❑ Debtor 1 and Debtor 2 only ❑ At least one of the debtors and another ❑ **Check if this is a community claim** **Date debt was incurred** _____	**Describe the property that is collateral:** **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Nature of lien**. Check all that apply. ❑ An agreement you made (such as mortgage or secured car loan) ❑ Statutory lien (such as tax lien, mechanic's lien) ❑ Judgment lien from a lawsuit ❑ Other _____ **Last 4 digits of account number** ___ ___ ___ ___	$_____	$_____	$_____
Add the dollar value of your entries in Column A on this page. Write that number here:		$_____		

12b-007756

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

Part 1: Additional Page

After listing any entries on this page, number them beginning with 2.3, followed by 2.4, and so forth.

		Column A **Amount of claim** Do not deduct the value of collateral.	*Column B* **Value of collateral that supports this claim**	*Column C* **Unsecured portion** If any
☐ _____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code **Who owes the debt?** Check one. ☐ Debtor 1 only ☐ Debtor 2 only ☐ Debtor 1 and Debtor 2 only ☐ At least one of the debtors and another ☐ **Check if this is a community claim** **Date debt was incurred** _____	**Describe the property that is collateral:** **As of the date you file, the claim is:** Check all that apply. ☐ Contingent ☐ Unliquidated ☐ Disputed ☐ None of the above apply **Nature of lien**. Check all that apply. ☐ An agreement you made (such as mortgage or secured car loan) ☐ Statutory lien (such as tax lien, mechanic's lien) ☐ Judgment lien from a lawsuit ☐ Other _____ **Last 4 digits of account number** ___ ___ ___ ___	$_____	$_____	$_____
☐ _____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code **Who owes the debt?** Check one. ☐ Debtor 1 only ☐ Debtor 2 only ☐ Debtor 1 and Debtor 2 only ☐ At least one of the debtors and another ☐ **Check if this is a community claim** **Date debt was incurred** _____	**Describe the property that is collateral:** **As of the date you file, the claim is:** Check all that apply. ☐ Contingent ☐ Unliquidated ☐ Disputed ☐ None of the above apply **Nature of lien**. Check all that apply. ☐ An agreement you made (such as mortgage or secured car loan) ☐ Statutory lien (such as tax lien, mechanic's lien) ☐ Judgment lien from a lawsuit ☐ Other _____ **Last 4 digits of account number** ___ ___ ___ ___	$_____	$_____	$_____
☐ _____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code **Who owes the debt?** Check one. ☐ Debtor 1 only ☐ Debtor 2 only ☐ Debtor 1 and Debtor 2 only ☐ At least one of the debtors and another ☐ **Check if this is a community claim** **Date debt was incurred** _____	**Describe the property that is collateral:** **As of the date you file, the claim is:** Check all that apply. ☐ Contingent ☐ Unliquidated ☐ Disputed ☐ None of the above apply **Nature of lien**. Check all that apply. ☐ An agreement you made (such as mortgage or secured car loan) ☐ Statutory lien (such as tax lien, mechanic's lien) ☐ Judgment lien from a lawsuit ☐ Other _____ **Last 4 digits of account number** ___ ___ ___ ___	$_____	$_____	$_____

Add the dollar value of your entries in Column A on this page. Write that number here: $_____

If this is the last page of your form, add the dollar value totals from all pages. Write that number here: $_____

12b-007757

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

Part 2: List Others to Be Notified for a Debt That You Already Listed

Use this page only if you have others to be notified about your bankruptcy for a debt that you already listed in Part 1. For example, if a collection agency is trying to collect from you for a debt you owe to someone else, list the creditor in Part 1, and then list the collection agency here. Similarly, if you have more than one creditor for any of the debts that you listed in Part 1, list the additional creditors here. If you do not have additional persons to be notified for any debts in Part 1, do not fill out or submit this page.

☐ _____
Name
_____
Number Street
_____
_____
City State ZIP Code

On which line in Part 1 did you enter the creditor? _____
Last 4 digits of account number ___ ___ ___ ___

☐ _____
Name
_____
Number Street
_____
_____
City State ZIP Code

On which line in Part 1 did you enter the creditor? _____
Last 4 digits of account number ___ ___ ___ ___

☐ _____
Name
_____
Number Street
_____
_____
City State ZIP Code

On which line in Part 1 did you enter the creditor? _____
Last 4 digits of account number ___ ___ ___ ___

☐ _____
Name
_____
Number Street
_____
_____
City State ZIP Code

On which line in Part 1 did you enter the creditor? _____
Last 4 digits of account number ___ ___ ___ ___

☐ _____
Name
_____
Number Street
_____
_____
City State ZIP Code

On which line in Part 1 did you enter the creditor? _____
Last 4 digits of account number ___ ___ ___ ___

☐ _____
Name
_____
Number Street
_____
_____
City State ZIP Code

On which line in Part 1 did you enter the creditor? _____
Last 4 digits of account number ___ ___ ___ ___

12b-007758

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Draft April 19, 2013

❑ Check if this is an amended filing

Official Form 106E/F

Schedule E/F: Creditors Who Have Unsecured Claims

12/15

Be as complete and accurate as possible. Use Part 1 for creditors with PRIORITY claims and Part 2 for creditors with NONPRIORITY claims. Do not include any creditors with partially secured claims that are listed in *Schedule D: Creditors Who Hold Claims Secured by Property*. If more space is needed, copy the Part you need, fill it out, number the entries in the boxes on the left. Attach the Continuation Page to this page. If you have no information to report in a Part, do not file that Part. On the top of any additional pages, write your name and case number (if known).

Part 1: List All of Your PRIORITY Unsecured Claims

1. **Do any creditors have priority unsecured claims against you?**
   - ❑ No. Go to Part 2.
   - ❑ Yes.

2. **List all of your priority unsecured claims in the alphabetical order of the creditor who holds each claim.** If a creditor has more than one priority unsecured claim, list the creditor separately for each claim. For each claim listed, identify what type of claim it is. If you have more than two priority unsecured claims, fill out the Continuation Page of Part 1. If more than one creditor holds a particular claim, list the other creditors in Part 3. (For an explanation of each type of claim, see the instructions for this form in the instruction booklet.)

		Total claim	Priority amount	Nonpriority amount
2.1	_____ Priority Creditor's Name _____ Number Street _____ _____ City State ZIP Code **Who incurred the debt?** Check one. ❑ Debtor 1 only ❑ Debtor 2 only ❑ Debtor 1 and Debtor 2 only ❑ At least one of the debtors and another ❑ **Check if this is a community debt** **Last 4 digits of account number** ___ ___ ___ ___ **When was the debt incurred?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Type of PRIORITY unsecured claim:** ❑ Domestic support obligations ❑ Taxes and certain other debts you owe the government ❑ Claims for death or personal injury while you were intoxicated ❑ Other. Specify _____	$_____	$_____	$_____
2.2	_____ **Last 4 digits of account number** ___ ___ ___ ___	$_____	$_____	$_____

12b-007759

Priority Creditor's Name

_____
Number Street

_____

_____
City State ZIP Code

Who incurred the debt? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is a community debt**

When was the debt incurred? _____

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Type of PRIORITY unsecured claim:

- ❑ Domestic support obligations
- ❑ Taxes and certain other debts you owe the government
- ❑ Claims for death or personal injury while you were intoxicated
- ❑ Other. Specify _____

Part 1: Your PRIORITY Unsecured Claims — Continuation Page

After listing any entries on this page, number them beginning with 2.3, followed by 2.4, and so forth.

	Total claim	Priority amount	Nonpriority amount
	$_____	$_____	$_____
	$_____	$_____	$_____
	$_____	$_____	$_____

Priority Creditor's Name

_____
Number Street

_____

_____
City State ZIP Code

Who incurred the debt? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is a community debt**

Last 4 digits of account number ___ ___ ___ ___

When was the debt incurred? _____

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Type of PRIORITY unsecured claim:

- ❑ Domestic support obligations
- ❑ Taxes and certain other debts you owe the government
- ❑ Claims for death or personal injury while you were intoxicated
- ❑ Other. Specify _____

Priority Creditor's Name

_____
Number Street

_____

_____
City State ZIP Code

Who incurred the debt? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is a community debt**

Last 4 digits of account number ___ ___ ___ ___

When was the debt incurred? _____

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Type of PRIORITY unsecured claim:

- ❑ Domestic support obligations
- ❑ Taxes and certain other debts you owe the government
- ❑ Claims for death or personal injury while you were intoxicated
- ❑ Other. Specify _____

Priority Creditor's Name

_____
Number Street

_____

_____
City State ZIP Code

Who incurred the debt? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is a community debt**

Last 4 digits of account number ___ ___ ___ ___

When was the debt incurred? _____

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Type of PRIORITY unsecured claim:

- ❑ Domestic support obligations
- ❑ Taxes and certain other debts you owe the government
- ❑ Claims for death or personal injury while you were intoxicated
- ❑ Other. Specify _____

Priority Creditor's Name _____

Number Street _____

City State ZIP Code _____

Who incurred the debt? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is a community debt**

Last 4 digits of account number ___ ___ ___ ___ $_____ $_____ $_____

When was the debt incurred? _____

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Type of PRIORITY unsecured claim:

- ❑ Domestic support obligations
- ❑ Taxes and certain other debts you owe the government
- ❑ Claims for death or personal injury while you were intoxicated
- ❑ Other. Specify _____

Part 2: List All of Your NONPRIORITY Unsecured Claims

3. Do any creditors have nonpriority unsecured claims against you?

- ❑ No. You have nothing to report in this part. Submit this form to the court with your other schedules.
- ❑ Yes

4. List all of your nonpriority unsecured claims in the alphabetical order of the creditor who holds each claim. If a creditor has more than one priority unsecured claim, list the creditor separately for each claim. For each claim listed, identify what type of claim it is. If you have more than four priority unsecured claims fill out the Continuation Page of Part 2. If more than one creditor holds a particular claim, list the other creditors in Part 3.

Total claim

4.1

Nonpriority Creditor's Name _____

Number Street _____

City State ZIP Code _____

Who incurred the debt? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is a community debt**

Last 4 digits of account number ___ ___ ___ ___ $_____

When was the debt incurred? _____

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Type of NONPRIORITY unsecured claim:

- ❑ Student loans
- ❑ Obligations arising out of a separation agreement or divorce that you did not report as priority claims
- ❑ Debts to pension or profit-sharing plans, and other similar debts
- ❑ Other. Specify _____

4.2

Nonpriority Creditor's Name _____

Number Street _____

City State ZIP Code _____

Who incurred the debt? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is a community debt**

Last 4 digits of account number ___ ___ ___ ___ $_____

When was the debt incurred? _____

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Type of NONPRIORITY unsecured claim:

- ❑ Student loans
- ❑ Obligations arising out of a separation agreement or divorce that you did not report as priority claims
- ❑ Debts to pension or profit-sharing plans, and other similar debts
- ❑ Other. Specify _____

4.3

Nonpriority Creditor's Name _____

Number Street _____

City State ZIP Code _____

Last 4 digits of account number ___ ___ ___ ___ $_____

When was the debt incurred? _____

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated

Who incurred the debt? Check one.
- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another
- ❑ **Check if this is a community debt**

- ❑ Disputed
- ❑ None of the above apply

Type of NONPRIORITY unsecured claim:
- ❑ Student loans
- ❑ Obligations arising out of a separation agreement or divorce that you did not report as priority claims
- ❑ Debts to pension or profit-sharing plans, and other similar debts
- ❑ Other. Specify _____

4.4

_____
Nonpriority Creditor's Name

_____
Number Street

_____
City **State** **ZIP Code**

Last 4 digits of account number ___ ___ ___ ___ $_____

When was the debt incurred? _____

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Who incurred the debt? Check one.
- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another
- ❑ **Check if this is a community debt**

Type of NONPRIORITY unsecured claim:
- ❑ Student loans
- ❑ Obligations arising out of a separation agreement or divorce that you did not report as priority claims
- ❑ Debts to pension or profit-sharing plans, and other similar debts
- ❑ Other. Specify _____

Part 2: Your NONPRIORITY Unsecured Claims — Continuation Page

After listing any entries on this page, number them beginning with 4.5, followed by 4.6, and so forth. **Total claim**

_____
Nonpriority Creditor's Name

_____
Number Street

_____
City State ZIP Code

Last 4 digits of account number ___ ___ ___ ___

When was the debt incurred? _____ $_____

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Who incurred the debt? Check one.
- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another
- ❑ **Check if this is a community debt**

Type of NONPRIORITY unsecured claim:
- ❑ Student loans
- ❑ Obligations arising out of a separation agreement or divorce that you did not report as priority claims
- ❑ Debts to pension or profit-sharing plans, and other similar debts
- ❑ Other. Specify_____

_____
Nonpriority Creditor's Name

_____
Number Street

_____
City State ZIP Code

Last 4 digits of account number ___ ___ ___ ___

When was the debt incurred? _____ $_____

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Who incurred the debt? Check one.
- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another
- ❑ **Check if this is a community debt**

Type of NONPRIORITY unsecured claim:
- ❑ Student loans
- ❑ Obligations arising out of a separation agreement or divorce that you did not report as priority claims
- ❑ Debts to pension or profit-sharing plans, and other similar debts
- ❑ Other. Specify_____

Last 4 digits of account number _____ $

Nonpriority Creditor's Name

Number Street

City State ZIP Code

Who incurred the debt? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is a community debt**

When was the debt incurred? _____

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Type of NONPRIORITY unsecured claim:

- ❑ Student loans
- ❑ Obligations arising out of a separation agreement or divorce that you did not report as priority claims
- ❑ Debts to pension or profit-sharing plans, and other similar debts
- ❑ Other. Specify_____

Last 4 digits of account number ___ ___ ___ ___ $_____

Nonpriority Creditor's Name

Number Street

City State ZIP Code

Who incurred the debt? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is a community debt**

When was the debt incurred? _____

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Type of NONPRIORITY unsecured claim:

- ❑ Student loans
- ❑ Obligations arising out of a separation agreement or divorce that you did not report as priority claims
- ❑ Debts to pension or profit-sharing plans, and other similar debts
- ❑ Other. Specify_____

Part 3: List Others to Be Notified for a Debt That You Already Listed

5. Use this page only if you have others to be notified about your bankruptcy, for a debt that you already listed in Parts 1 or 2. For example, if a collection agency is trying to collect from you for a debt you owe to someone else, list the original creditor in Parts 1 or 2, then list the collection agency here. Similarly, if you have more than one creditor for any of the debts that you listed in Parts 1 or 2, list the additional creditors here. If you do not have additional persons to be notified for any debts in Parts 1 or 2, do not fill out or submit this page.

Name

Number Street

City State ZIP Code

On which entry in Part 1 or Part 2 did you list the original creditor?

Line _____ of (*Check one*): ❑ Part 1: Creditors with Priority Unsecured Claims
❑ Part 2: Creditors with Nonpriority Unsecured Claims

Last 4 digits of account number ___ ___ ___ ___

Name

Number Street

City State ZIP Code

On which entry in Part 1 or Part 2 did you list the original creditor?

Line _____ of (*Check one*): ❑ Part 1: Creditors with Priority Unsecured Claims
❑ Part 2: Creditors with Nonpriority Unsecured Claims

Last 4 digits of account number ___ ___ ___ ___

Name

Number Street

City State ZIP Code

On which entry in Part 1 or Part 2 did you list the original creditor?

Line _____ of (*Check one*): ❑ Part 1: Creditors with Priority Unsecured Claims
❑ Part 2: Creditors with Nonpriority Unsecured Claims

Last 4 digits of account number ___ ___ ___ ___

Name

On which entry in Part 1 or Part 2 did you list the original creditor?

Line _____ of (*Check one*): ❑ Part 1: Creditors with Priority Unsecured Claims
❑ Part 2: Creditors with Nonpriority Unsecured Claims

Number Street

_____

_____
City State ZIP Code

Last 4 digits of account number ___ ___ ___ ___

_____
Name

_____
Number Street

_____

_____
City State ZIP Code

On which entry in Part 1 or Part 2 did you list the original creditor?

Line _____ of (*Check one*): ❑ Part 1: Creditors with Priority Unsecured Claims
❑ Part 2: Creditors with Nonpriority Unsecured Claims

Last 4 digits of account number ___ ___ ___ ___

_____
Name

_____
Number Street

_____

_____
City State ZIP Code

On which entry in Part 1 or Part 2 did you list the original creditor?

Line _____ of (*Check one*): ❑ Part 1: Creditors with Priority Unsecured Claims
❑ Part 2: Creditors with Nonpriority Unsecured Claims

Last 4 digits of account number ___ ___ ___ ___

_____
Name

_____
Number Street

_____

_____
City State ZIP Code

On which entry in Part 1 or Part 2 did you list the original creditor?

Line _____ of (*Check one*): ❑ Part 1: Creditors with Priority Unsecured Claims
❑ Part 2: Creditors with Nonpriority Unsecured Claims

Last 4 digits of account number ___ ___ ___ ___

Part 4: Add the Amounts for Each Type of Unsecured Claim

6. Total the amounts of certain types of unsecured claims for statistical reporting purposes. For reporting purposes, add the amounts for each type of unsecured claim.

			Total claim
Total claims from Part 1	6a. **Domestic support obligations**	6a.	$_____
	6b. **Taxes and certain other debts you owe the government**	6b.	$_____
	6c. **Claims for death or personal injury while you were intoxicated**	6c.	$_____
	6d. **Other.** Add all other priority unsecured claims. Write that amount here.	6d.	+ $_____
	6e. **Total.** Add lines 6a through 6d.	6e.	$_____

			Total claim
Total claims from Part 2	6f. **Student loans**	6f.	$_____
	6g. **Obligations arising out of a separation agreement or divorce that you did not report as priority claims**	6g.	$_____
	6h. **Debts to pension or profit-sharing plans, and other similar debts**	6h.	$_____

12b-007764

6i. **Other.** Add all other nonpriority unsecured claims. Write that amount here.	6i.	+ $_____
6j. **Total.** Add lines 6f through 6i.	6j.	$_____

Fill in this information to identify your case:

Debtor _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse If filing) First Name Middle Name Last Name

United States Bankruptcy Court for the:_____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 106G

Schedule G: Executory Contracts and Unexpired Leases

12/15

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, copy the additional page, fill it out, number the entries, and attach it to this page. On the top of any additional pages, write your name and case number (if known).

1. **Do you have any executory contracts or unexpired leases?**
   - ❑ No. Check this box and file this form with the court with your other schedules. You have nothing else to report on this form.
   - ❑ Yes. Fill in all of the information below even if the contracts or leases are listed on *Schedule A/B: Property* (Official Form 106A/B).

2. **List separately each person or company with whom you have the contract or lease. Then state what each contract or lease is for (for example, rent, vehicle lease, cell phone).** See the instructions for this form in the instruction booklet for more examples of executory contracts and unexpired leases.

Person or company with whom you have the contract or lease	State what the contract or lease is for
1 Name Number Street City State ZIP Code	
2 Name Number Street City State ZIP Code	
3 Name Number Street City State ZIP Code	
4 Name Number Street City State ZIP Code	
5 Name Number Street City State ZIP Code	

12b-007766

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

Additional Page if You Have More Contracts or Leases

Person or company with whom you have the contract or lease	What the contract or lease is for
☐ Name Number Street City State ZIP Code	
☐ Name Number Street City State ZIP Code	
☐ Name Number Street City State ZIP Code	
☐ Name Number Street City State ZIP Code	
☐ Name Number Street City State ZIP Code	
☐ Name Number Street City State ZIP Code	
☐ Name Number Street City State ZIP Code	
☐ Name Number Street City State ZIP Code	

12b-007767

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the:_____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 106H

Schedule H: Your Codebtors

12/15

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, copy the Additional Page, fill it out, and number the entries in the boxes on the left. Attach the Additional Page to this page. On the top of any Additional Pages, write your name and case number (if known). Answer every question.

1. **Do you have any codebtors?** (If you are filing a joint case, do not list either spouse as a codebtor.)
   - ❑ No
   - ❑ Yes
2. **Within the last 8 years, have you lived in a community property state or territory?** (*Community property states and territories* include Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington, and Wisconsin.)
   - ❑ No. Go to line 3.
   - ❑ Yes. Did your spouse, former spouse, or legal equivalent live with you at the time?
     - ❑ No
     - ❑ Yes. In which community state or territory did you live? _____. Fill in the name and current address of that person.

       _____
       Name of your spouse

       _____
       Number Street

       _____
       City State ZIP Code

3. **In Column 1, list as codebtors all of the people or entities who are also liable for any debts you may have. Include all guarantors and cosigners; do not include your spouse as a codebtor if your spouse is filing with you. List the person shown in line 2 again as a codebtor only if that person is a guarantor or cosigner. Make sure you have listed the creditor on *Schedule D* (Official Form 106D) or *Schedule E/F* (Official Form 106E/F). Use *Schedule D* or *Schedule E/F* to fill out Column 2.**

	Column 1: **Your codebtor**	*Column 2:* **The creditor to whom you owe the debt**
1	Name Number Street City State ZIP Code	Line from *Schedule D:* _____ OR Line from *Schedule E/F:* _____
2	Name Number Street City State ZIP Code	Line from *Schedule D:* _____ OR Line from *Schedule E/F:* _____
3	Name Number Street City State ZIP Code	Line from *Schedule D:* _____ OR Line from *Schedule E/F:* _____

12b-007768

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

Additional Page to List More Codebtors

Column 1: **Your codebtor**	*Column 2:* **The creditor to whom you owe the debt**
Name Number Street City State ZIP Code	Line from *Schedule D:* _____ OR Line from *Schedule E/F:* _____
Name Number Street City State ZIP Code	Line from *Schedule D:* _____ OR Line from *Schedule E/F:* _____
Name Number Street City State ZIP Code	Line from *Schedule D:* _____ OR `Line from *Schedule E/F:* _____
Name Number Street City State ZIP Code	Line from *Schedule D:* _____ OR Line from *Schedule E/F:* _____
Name Number Street City State ZIP Code	Line from *Schedule D:* _____ OR Line from *Schedule E/F:* _____
Name Number Street City State ZIP Code	Line from *Schedule D:* _____ OR Line from *Schedule E/F:* _____
Name Number Street City State ZIP Code	Line from *Schedule D:* _____ OR Line from *Schedule E/F:* _____
Name Number Street City State ZIP Code	Line from *Schedule D:* _____ OR Line from *Schedule E/F:* _____

12b-007769

"Missing" Forms Modernization Project (FMP) Forms for Individuals

Nine FMP Official Bankruptcy Forms are not included in this publication package because they have already been published for public comment under the current two-digit forms numbering scheme. The forms will be updated with their projected three-digit number designations listed below when this publication package is approved for implementation.

Projected three digit form number	Form Title	Two digit form number and publication year(s)
103A	Application for Individuals to Pay the Filing Fee in Installments	3A (2012)
103B	Application to Have the Chapter 7 Filing Fee Waived	3B (2012)
106I	Schedule I: Your Income	6I (2012)
106J	Schedule J: Your Expenses	6J (2012)
108-1	Chapter 7 Statement of Your Current Monthly Income and Means-Test Calculation	22A-1 (2012 and 2013)
108-1Supp	Statement of Exemption from Presumption of Abuse Under § 707(b)(2)	22A-1Supp (2013)
108-2	Chapter 7 Means Test Calculation	22A-2 (2012 and 2013)
109	Chapter 11 Statement of Your Current Monthly Income	22B (2012 and 2013)
110-2	Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period	22C-1 (2012 and 2013)
110-2	Chapter 13 Calculation of Your Disposable Income	22C-2 (2012 and 2013)

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 106Dec

Declaration About an Individual Debtor's Schedules

12/15

If two married people are filing together, both are equally responsible for supplying correct information.

You must file this form whenever you file bankruptcy schedules or amended schedules. If you make a false statement, you could be fined up to $500,000 or imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

Sign Below

Did you pay or agree to pay someone who is NOT an attorney to help you fill out this bankruptcy filing package?

❑ No

❑ Yes. Name of person_____.
Attach *Bankruptcy Petition Preparer's Notice, Declaration, and Signature* (Official Form 119).

Under penalty of perjury, I declare that I have read the forms filed with this declaration and that they are true and correct.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

COMMITTEE NOTE

The schedules to be used in cases of individual debtors are revised as part of the Forms Modernization Project, making them easier to read and, as a result, likely to generate more complete and accurate responses. The goals of the Forms Modernization Project include improving the interface between technology and the forms so as to increase efficiency and reduce the need to produce the same information in multiple formats. Therefore, many of the open-ended questions and multiple-part instructions have been replaced with more specific questions. The individual debtor schedules are also renumbered, starting with the number 106 and followed by the letter or name of the schedule to distinguish them from the versions to be used in non-individual cases.

Official Form 106Sum, *Summary of Your Assets and Liabilities and Certain Statistical Information*, replaces Official Form 6, *Summary of Schedules and Statistical Summary of Certain Liability and Related Data (28 U.S.C. § 159)*, in cases of individual debtors.

The form is reformatted and updated with cross-references indicating the line numbers of specific schedules from which the summary information is to be gathered. In addition, because most filings are now done electronically, the form no longer requires the debtor to indicate which schedules are attached or to state the number of sheets of paper used for the schedules.

Official Form 106A/B, *Schedule A/B: Property*, consolidates information about an individual debtor's real and personal property into a single form. It replaces Official Form 6A, *Real Property*, and Official Form 6B, *Personal Property*, in cases of individual debtors. In addition to specific questions about the assets, the form also includes open text fields for providing additional information regarding particular assets when appropriate.

The layout and categories of property on Official Form 106A/B have changed. Instead of dividing property interests into two categories (real or personal property), the new form uses seven categories likely to be more familiar to non-lawyers: real estate, vehicles, personal household items, financial assets, business-related property, farm- and commercial fishing-related property, and a catch-all category for property that was not listed elsewhere in the form. Although the new form categories and the examples provided in many of the categories are designed to prompt debtors to be thorough and list all of their interests in property, the prompts are not intended to require a detailed description of items of little value that are unlikely to be administered by the case trustee. For example, the debtor is directed to separately describe and list individual items of property only if they are worth more than $500. The debtor may describe generally items of minimal value (such as children's clothes) by adding the value of the items and reporting the total.

Although a particular item of property may fit into more than one category, the instructions for the form explain that it should be listed only once.

In addition, because property that falls within a particular category may not be specifically elicited by the particular line items on the form, the debtor is asked in Parts 3–6 (lines 14, 35, 44, and 51) to specifically identify and value any other property in the category.

Part 1, *Describe Each Residence, Building, Land, or Other Real Estate You Own or Have an Interest In*, avoids legal terms such as "life estate" or "joint tenancy," because many individual debtors do not fully understand the nature of their ownership interest in real property. Instead, the debtor is asked to state the "current value of the portion you own," and to also state whether ownership is shared with someone else. Furthermore, instead of asking an open-ended description of the property, the form guides the debtor in answering the description question by providing eight options from which to choose: single-family home, duplex or multi-unit building, condominium or cooperative, manufactured or mobile home, land, investment property, timeshare, and other.

Part 2, *Describe Your Vehicles*, also guides the debtor in answering the question, asking for the make, model, year, and mileage of the car or other vehicle. Because mileage is just a general indication of vehicle value, the debtor is not required to list the exact mileage, but instead is prompted to provide the approximate mileage by selecting from four checkboxes.

Part 3, *Describe Your Personal and Household Items*, simplifies wording, updates categories, and uses more common terms. For example, "Wearing apparel" is changed to "Clothes" and examples include furs, which were previously grouped with jewelry. Firearms, on the other hand, which were previously grouped with sports and other hobbies, are now set out as a separate category. Additionally, because a new Part 6 has been added to separately describe-farm related property, Part 3 includes a category for "Non-farm animals."

Part 4, *Describe Your Financial Assets*, prompts a listing of the debtor's financial assets through several questions providing separate space, after each listed type of account or deposit, for the institution name and the value of the debtor's interest in the asset. Two new categories of financial assets are added: "Bonds, mutual funds, or publicly traded stocks" and "Claims against third parties, whether or not you have filed a lawsuit or made a demand for payment."

Part 5, *Describe Any Business-Related Property You Own or Have an Interest In*, provides prompts for listing business-related property such as accounts receivable, inventory, and machinery, and includes a direction to list business-related real estate in Part 1, to avoid listing real estate twice.

Part 6, *Describe Any Farm- and Commercial Fishing-Related Property You Own or Have an Interest In*, provides prompts for listing farm- or commercial fishing-related property, such as farm animals, crops, and feed. It also includes a direction to list any farm- or commercial fishing-related real estate in Part 1.

Part 7, *Describe All Property You Own or Have an Interest in That You Did Not List Above*, is a catch-all provision that allows the debtor to report property that is difficult to categorize.

Part 8, *List the Totals of Each Part of this Form*¸ tabulates the total value of the debtor's interest in the listed property. The tabulation includes two subtotals, one for real estate, which corresponds to the real property total that was reported on former Official Form 6A. The second subtotal is of Parts 2-7, which corresponds to the personal property total that was reported on former Official Form 6B.

Official Form 106C, *Schedule C: The Property You Claim as Exempt*, replaces Official Form 6C, *Property Claimed as Exempt*, in cases of individual debtors.

Part 1, *Identify the Property You Claim as Exempt*, includes a table to list the property the debtor seeks to exempt, the value of the property owned by the debtor, the amount of the claimed exemption, and the law that allows the exemption. The first column asks for a brief description of the exempt property, and it also asks for the line number where the property is listed on Schedule A/B. The second column asks for the value of the portion of the asset owned by the debtor, rather than the entire asset. The third column asks for the amount, rather than the value, of the exemption claim.

The form has also been changed in light of the Supreme Court's ruling in *Schwab v. Reilly*, 130 S. Ct. 2652 (2010). Entries in the "amount of the exemption you claim" column may now be listed as either a dollar limited amount or as 100% of fair market value, up to any applicable statutory limit. For example, a debtor might claim 100% of fair market value for a home covered by an exemption capped at $15,000, and that limit would be applicable. This choice would impose no dollar limit where the exemption is unlimited in dollar amount, such as some exemptions for health aids, certain governmental benefits, and tax-exempt retirement funds.

Official Form 106D, *Schedule D: Creditors Who Hold Claims Secured by Property*, replaces Official Form 6D, *Creditors Holding Secured Claims*, in cases of individual debtors.

Part 1, *List Your Secured Claims*, now directs the debtor to

list only the last four digits of the account number. Part 1 also adds four checkboxes with which to describe the nature of the lien: an agreement the debtor made (such as mortgage or secured car loan); statutory lien (such as tax lien, mechanic's lien); judgment lien from a lawsuit; and other.

The form adds Part 2, *List Others to Be Notified for a Debt That You Already Listed*. The debtor is instructed to use Part 2 if there is a need to notify someone about the bankruptcy filing other than the creditor for a debt listed in Part 1. For example, if a collection agency is trying to collect for a creditor listed in Part 1, the collection agency would be listed in Part 2.

Official Form 106E/F, *Schedule E/F: Creditors Who Have Unsecured Claims*, consolidates information about priority and nonpriority unsecured claims into a single form. It replaces Official Form 6E, *Creditors Holding Unsecured Priority Claims*, and Official Form 6F, *Creditors Holding Unsecured Nonpriority Claims*, in cases of individual debtors.

Although both priority and nonpriority unsecured claims are reported in Official Form 106E/F, the two types of claims are separately grouped so that the total for each type can be reported for case administration and statistical purposes. The form eliminates the question "consideration for claim" and instructs debtors to list claims in the alphabetical order of creditors.

Part 1, *List All of Your PRIORITY Unsecured Claims*, includes four checkboxes for identifying the type of priority that applies to the claim: domestic support obligations; taxes and certain other debts owed to the government; claims for death or personal injury while intoxicated; and "other." The first three categories are required to be separately reported for statistical purposes. If the debtor selects "other," the debtor must specify the basis of the priority, *e.g.*, wages or employee benefit plan contribution.

Part 2, *List All of Your NONPRIORITY Unsecured Claims*, no longer asks whether the claim is subject to setoff. The form creates four checkboxes, including three for types of claims that must be separately reported for statistical purposes: student loans;

obligations arising out of a separation agreement or divorce not listed as priority claims; and debts to pension or profit-sharing plans and other similar debts. The remaining "other" checkbox treats claims not subject to separate reporting. If the debtor selects "other," the debtor must specify the basis of the claim.

Part 3, *List Others to Be Notified for a Debt That You Already Listed*, is new. The debtor is instructed to use Part 3 only if there is a need to give notice of the bankruptcy to someone other than a creditor listed in Parts 1 and 2. For example, if a collection agency is trying to collect for a creditor listed in Part 1, the collection agency would be listed in Part 3.

Finally, Part 4, *Add the Amounts for Each Type of Unsecured Claim*, requires the debtor to provide the total amounts of particular types of unsecured claims for statistical reporting purposes and the overall totals of the priority and nonpriority unsecured claims reported in this form.

Official Form 106G, *Schedule G: Executory Contracts and Unexpired Leases*, replaces Official Form 6G, *Executory Contracts and Unexpired Leases*, in cases of individual debtors.

The form is simplified. Instead of requiring the debtor to make multiple assertions about each potential executory contract or unexpired lease, the form simply requires the debtor to identify the name and address of the other party to the contract or lease, and to state what the contract or lease deals with. Definitions and examples of executory contracts and unexpired leases are included in the separate instructions for the form.

An additional page is provided in case the debtor has so many executory contracts and unexpired leases that the available page is not adequate. If the debtor needs to use the additional page, the debtor is required to fill in the entry number.

Official Form 106H, *Schedule H: Your Codebtors*, replaces Official Form 6H, *Codebtors*, in cases of individual debtors.

The form breaks out the questions about whether there are any codebters, and whether the debtor has lived with a spouse or legal equivalent in a community property state in the prior eight years. It also removes Alaska from the listed community property states. Finally, it asks the debtor to indicate where the debt is listed on Schedule D or Schedule E/F, thereby eliminating the need to list the name and address of the creditor.

Official Form 106I, *Schedule I: Your Income*, replaces Official Form 6I, *Your Income*, in cases of individual debtors.

The form is one of an initial set of forms that were published as part of the Forms Modernization Project in 2012. It is renumbered and internal cross references are updated to conform to the new numbering system now being introduced by the Forms Modernization Project.

Official Form 106J, *Schedule J: Your Expenses*, replaces Official Form 6J, *Your Expenses*, in cases of individual debtors.

The form is one of an initial set of forms that were published as part of the Forms Modernization Project in 2012. It is renumbered and internal cross references are updated to conform to the new numbering system now being introduced by the Forms Modernization Project.

Official Form 106Dec, *Declaration About an Individual Debtor's Schedules*, replaces Official Form 6, *Declaration Concerning Debtor's Schedules*, in cases of individual debtors.

The form, which is to be signed by the debtor and filed with the debtor's schedules, deletes the Declaration and Signature of Bankruptcy Petition Preparer (BPP). Instead, the debtor is directed to complete and file Official Form 119, *Bankruptcy Petition Preparer's Notice, Declaration, and Signature*, if a BPP helped fill out the bankruptcy forms.

Because the form applies only to individual debtors, it no longer contains the Declaration Under Penalty of Perjury on Behalf of a Corporation or Partnership. It also deletes from the

declaration the phrase “to the best of my knowledge, information, and belief” in order to conform to the language of 28 U.S.C. § 1746. *See* Rule 1008.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 107

Statement of Financial Affairs for Individuals Filing for Bankruptcy

12/15

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Give Details About Where You Lived Before

1. **During the last 3 years, have you lived anywhere other than where you live now?**

❑ No
❑ Yes. List all of the places you lived in the last 3 years. Do not include where you live now.

Debtor 1:	Dates Debtor 1 lived there	Debtor 2:	Dates Debtor 2 lived there
		❑ Same as Debtor 1	❑ Same as Debtor 1
_____ Number Street _____ _____ City State ZIP Code	From _____ To _____	_____ Number Street _____ _____ City State ZIP Code	From _____ To _____
		❑ Same as Debtor 1	❑ Same as Debtor 1
_____ Number Street _____ _____ City State ZIP Code	From _____ To _____	_____ Number Street _____ _____ City State ZIP Code	From _____ To _____

2. **Within the last 8 years, did you ever live with a spouse or legal equivalent in a community property state or territory?** (*Community property states and territories* include Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington, and Wisconsin.)

❑ No
❑ Yes. Make sure you fill out Schedule H: *Your Codebtors* (Official Form 106H).

Part 2: Explain the Sources of Your Income

3. **Did you have any income from being employed or operating a business during this year or the two previous calendar years?**
Fill in a total amount for the income you received from all jobs and all businesses, including part-time activities. If you are filing a joint case and you have income that you receive together, list it only once under Debtor 1.

❑ No
❑ Yes. Fill in the details.

	Debtor 1		Debtor 2	
	Sources of income Check all that apply.	**Gross income** (before deductions and exclusions)	**Sources of income** Check all that apply.	**Gross income** (before deductions and exclusions)
From January 1 of current year until the date you filed for bankruptcy:	❑ Wages, commissions, bonuses, tips ❑ Operating a business	$_____	❑ Wages, commissions, bonuses, tips ❑ Operating a business	$_____
For last calendar year: (January 1 to December 31, _____) YYYY	❑ Wages, commissions, bonuses, tips ❑ Operating a business	$_____	❑ Wages, commissions, bonuses, tips ❑ Operating a business	$_____
For the calendar year before that: (January 1 to December 31, _____) YYYY	❑ Wages, commissions, bonuses, tips ❑ Operating a business	$_____	❑ Wages, commissions, bonuses, tips ❑ Operating a business	$_____

4. **Did you receive any other income during this year or the two previous calendar years?**
Include income regardless of whether that income is taxable. Examples of *other income* are alimony; child support; Social Security, unemployment, and other public benefit payments; pensions; rental income; interest; dividends; money collected from lawsuits; royalties; and gambling and lottery winnings. If you are filing a joint case and you have income that you received together, list it only once under Debtor 1.

List each source and the gross income from each source separately. Do not include income that you listed in line 3.

❑ No
❑ Yes. Fill in the details.

	Debtor 1		Debtor 2	
	Sources of income Describe below.	**Gross income from each source** (before deductions and exclusions)	**Sources of income** Describe below.	**Gross income from each source** (before deductions and exclusions)
From January 1 of current year until the date you filed for bankruptcy:	_____	$_____	_____	$_____
	_____	$_____	_____	$_____
	_____	$_____	_____	$_____
For last calendar year: (January 1 to December 31, _____) YYYY	_____	$_____	_____	$_____
	_____	$_____	_____	$_____
	_____	$_____	_____	$_____
For the calendar year before that: (January 1 to December 31, _____) YYYY	_____	$_____	_____	$_____
	_____	$_____	_____	$_____
	_____	$_____	_____	$_____

Part 3: List Certain Payments You Made Before You Filed for Bankruptcy

5. Are either Debtor 1's or Debtor 2's debts primarily consumer debts?

❑ No. **My debts are not primarily consumer debts.** *Consumer debts* are defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose."

During the 90 days before you filed for bankruptcy, did you pay any creditor a total of $6,225* or more?

❑ No. Go to line 6.

❑ Yes. List below each creditor to whom you paid a total of $6,225* or more in one or more payments and the total amount you paid that creditor. Do not include payments for domestic support obligations, such as child support and alimony. Also, do not include payments to an attorney for this bankruptcy case.

* Subject to adjustment on 4/01/16 and every 3 years after that for cases filed on or after the date of adjustment.

❑ Yes. **My debts are primarily consumer debts.**

During the 90 days before you filed for bankruptcy, did you pay any creditor a total of $600 or more?

❑ No. Go to line 6.

❑ Yes. List below each creditor to whom you paid a total of $600 or more and the total amount you paid that creditor. Do not include payments for domestic support obligations, such as child support and alimony. Also, do not include payments to an attorney for this bankruptcy case.

	Dates of payment	Total amount paid	Amount you still owe	Was this payment for…
_____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code	_____ _____ _____	$_____	$_____	❑ Mortgage ❑ Car ❑ Credit card ❑ Loan repayment ❑ Suppliers or vendors ❑ Other _____
_____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code	_____ _____ _____	$_____	$_____	❑ Mortgage ❑ Car ❑ Credit card ❑ Loan repayment ❑ Suppliers or vendors ❑ Other _____
_____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code	_____ _____ _____	$_____	$_____	❑ Mortgage ❑ Car ❑ Credit card ❑ Loan repayment ❑ Suppliers or vendors ❑ Other _____

6. **Within 1 year before you filed for bankruptcy, did you make a payment on a debt you owed anyone who was an insider?**
Insiders include your relatives; any general partners; relatives of any general partners; partnerships of which you are a general partner; corporations of which you are an officer, director, person in control, or owner of 20 percent or more of their voting securities; and any managing agent, including one for a business you operate as a sole proprietor. 11 U.S.C. § 101. Include payments for domestic support obligations, such as child support and alimony.

❑ No
❑ Yes. List all payments to an insider.

	Dates of payment	Total amount paid	Amount you still owe	Reason for this payment
Insider's Name Number Street City State ZIP Code		$	$	
Insider's Name Number Street City State ZIP Code		$	$	

7. **Within 1 year before you filed for bankruptcy, did you make any payments or transfer any property on account of a debt that benefited an insider?**
Include payments on debts guaranteed or cosigned by an insider.

❑ No
❑ Yes. List all payments that benefited an insider.

	Dates of payment	Total amount paid	Amount you still owe	Reason for this payment Include creditor's name
Insider's Name Number Street City State ZIP Code		$	$	
Insider's Name Number Street City State ZIP Code		$	$	

Part 4: Identify Legal Actions, Repossessions, and Foreclosures

8. **Within 1 year before you filed for bankruptcy, were you a party in any lawsuit, court action, or administrative proceeding?**
List all such matters, including personal injury cases, small claims actions, divorces, collection suits, paternity actions, support or custody modifications, and contract disputes.

❑ No
❑ Yes. Fill in the details.

	Nature of the case	Court or agency	Status of the case
Case title_____ _____ Case number _____		_____ Court Name _____ Number Street _____ City State ZIP Code	❑ Pending ❑ On appeal ❑ Concluded
Case title_____ _____ Case number _____		_____ Court Name _____ Number Street _____ City State ZIP Code	❑ Pending ❑ On appeal ❑ Concluded

9. **Within 1 year before you filed for bankruptcy, was any of your property repossessed, foreclosed, garnished, attached, seized, or levied?**
Check all that apply and fill in the details below.

❑ No. Go to line 10.
❑ Yes. Fill in the information below.

	Describe the property	Date	Value of the property
_____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code	**Explain what happened** ❑ Property was repossessed. ❑ Property was foreclosed. ❑ Property was garnished. ❑ Property was attached, seized, or levied.	_____	$_____
	Describe the property	**Date**	**Value of the property**
_____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code	**Explain what happened** ❑ Property was repossessed. ❑ Property was foreclosed. ❑ Property was garnished. ❑ Property was attached, seized, or levied.	_____	$_____

10. Within 90 days before you filed for bankruptcy, did any creditor, including a bank or financial institution, set off or otherwise take anything from your accounts without your permission or refuse to make a payment because you owed a debt?

- ❑ No
- ❑ Yes. Fill in the details.

	Describe the action the creditor took	Date action was taken	Amount
_____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code	Last 4 digits of account number: XXXX–___ ___ ___ ___	_____	$_____

11. **Within 1 year before you filed for bankruptcy, was any of your property in the possession of an assignee for the benefit of creditors, a court-appointed receiver, custodian, or other official?**

- ❑ No
- ❑ Yes. Fill in the details.

	Describe the property	Value
_____ Custodian's Name _____ Number Street _____ _____ City State ZIP Code	Case title _____ Case number _____ Date of order or assignment _____ MM / DD / YYYY	$_____ _____ Court Name _____ Number Street _____ City State ZIP Code

Part 5: List Certain Gifts and Contributions

12. **Within 2 years before you filed for bankruptcy, did you give any gifts with a total value of more than $600 per person?**

- ❑ No
- ❑ Yes. Fill in the details for each gift.

Gifts with a total value of more than $600 per person	Describe the gifts	Dates you gave the gifts	Value
_____ Person to Whom You Gave the Gift _____ Number Street _____ City State ZIP Code Person's relationship to you _____		_____ _____	$_____ $_____

Gifts with a total value of more than $600 per person	Describe the gifts	Dates you gave the gifts	Value
_____ Person to Whom You Gave the Gift _____ _____ Number Street _____ City State ZIP Code Person's relationship to you _____		_____	$_____
		_____	$_____

13. Within 2 years before you filed for bankruptcy, did you give any gifts or contributions with a total value of more than $600 to any charity?

- ❑ No
- ❑ Yes. Fill in the details for each gift or contribution.

Gifts or contributions to charities that total more than $600	Describe what you contributed	Date you contributed	Value
_____ Charity's Name _____ _____ Number Street _____ City State ZIP Code		_____	$_____
		_____	$_____

Part 6: List Certain Losses

14. **Within 1 year before you filed for bankruptcy or since you filed for bankruptcy, did you lose anything because of theft, fire, other disaster, or gambling?**

- ❑ No
- ❑ Yes. Fill in the details.

Describe the property you lost and how the loss occurred	Describe any insurance coverage for the loss Include the amount that insurance has paid. List pending insurance claims on line 33 of *Schedule A/B: Property.*	Date of your loss	Value of property lost
		_____	$_____

Part 7: List Certain Payments or Transfers

15. **Within 1 year before you filed for bankruptcy, did you or anyone else acting on your behalf pay or transfer any property to anyone you consulted about seeking bankruptcy or preparing a bankruptcy petition?**
Include any attorneys, bankruptcy petition preparers, or credit counseling agencies for services required in your bankruptcy.

❑ No
❑ Yes. Fill in the details.

	Description and value of any property transferred	Date payment or transfer was made	Amount of payment
_____ Person Who Was Paid _____ Number Street _____ _____ City State ZIP Code _____ Email or website address _____ Person Who Made the Payment, if Not You		_____ _____	$_____ $_____

	Description and value of any property transferred	Date payment or transfer was made	Amount of payment
_____ Person Who Was Paid _____ Number Street _____ _____ City State ZIP Code _____ Email or website address _____ Person Who Made the Payment, if Not You		_____ _____	$_____ $_____

16. **Within 1 year before you filed for bankruptcy, did you or anyone else acting on your behalf pay or transfer any property to anyone who promised to help you deal with your creditors or to make payments to your creditors?**
Do not include any payment or transfer that you listed on line 15.

❑ No
❑ Yes. Fill in the details.

	Description and value of any property transferred	Date payment or transfer was made	Amount of payment
_____ Person Who Was Paid _____ Number Street _____ _____ City State ZIP Code		_____ _____	$_____ $_____

17. **Within 2 years before you filed for bankruptcy, did you sell, trade, or otherwise transfer any property to anyone, other than property transferred in the ordinary course of your business or financial affairs?**
Include both outright transfers and transfers made as security. Do not include gifts and transfers that you have already listed on this statement.

❑ No
❑ Yes. Fill in the details.

	Description and value of property transferred	Describe any property or payments received or debts paid in exchange	Date transfer was made
_____ Person Who Received Transfer _____ Number Street _____ _____ City State ZIP Code Person's relationship to you _____			_____
_____ Person Who Received Transfer _____ Number Street _____ _____ City State ZIP Code Person's relationship to you _____			_____

18. **Within 10 years before you filed for bankruptcy, did you transfer any property to a self-settled trust or similar device of which you are a beneficiary?** (These are often called *asset-protection devices*.)

❑ No
❑ Yes. Fill in the details.

	Description and value of the property transferred	Date transfer was made
Name of trust _____ _____		_____

Part 8: List Certain Financial Accounts, Safety Deposit Boxes, and Storage Units

19. **Within 1 year before you filed for bankruptcy, were any financial accounts or instruments held in your name, or for your benefit, closed, sold, moved, or transferred?**
Include checking, savings, money market, or other financial accounts; certificates of deposit; shares in banks, credit unions, brokerage houses, pension funds, cooperatives, associations, and other financial institutions.

❑ No
❑ Yes. Fill in the details.

	Last 4 digits of account number	Type of account	Date account was closed, sold, moved, or transferred	Last balance before closing or transfer
Name of Financial Institution Number Street City State ZIP Code	XXXX–___ ___ ___ ___	❑ Checking ❑ Savings ❑ Money market ❑ Brokerage ❑ Other_____	_____	$_____
Name of Financial Institution Number Street City State ZIP Code	XXXX–___ ___ ___ ___	❑ Checking ❑ Savings ❑ Money market ❑ Brokerage ❑ Other_____	_____	$_____

20. **Do you now have, or did you have within 1 year before you filed for bankruptcy, any safe deposit box or other depository for securities, cash, or other valuables?**

❑ No
❑ Yes. Fill in the details.

	Who else had access to it?	Describe the contents	Do you still have it?
Name of Financial Institution Number Street City State ZIP Code	Name Number Street City State ZIP Code		❑ No ❑ Yes

21. **Do you store property in a storage unit, or have you stored property in a storage unit within 1 year before you filed for bankruptcy?**
Do not include storage units that are part of the building in which you live.

❑ No
❑ Yes. Fill in the details.

	Who else has or had access to it?	Describe the contents	Do you still have it?
Name of Storage Facility Number Street City State ZIP Code	Name Number Street City State ZIP Code		❑ No ❑ Yes

Part 9: Identify Property You Hold or Control for Someone Else

22. **Do you hold or control any property that someone else owns?** Include any property you borrowed from, are storing for, or hold in trust for someone.

- ❑ No
- ❑ Yes. Fill in the details.

	Where is the property?	Describe the property	Value
Owner's Name Number Street City State ZIP Code	Number Street City State ZIP Code		$_____

Part 10: Give Details About Environmental Information

For the purpose of Part 10, the following definitions apply:

- *Environmental law* means any federal, state, or local statute or regulation concerning pollution, contamination, releases of hazardous or toxic substances, wastes, or material into the air, land, soil, surface water, groundwater, or other medium, including statutes or regulations controlling the cleanup of these substances, wastes, or material.
- *Site* means any location, facility, or property as defined under any environmental law, whether you now own, operate, or utilize it or used to own, operate, or utilize it, including disposal sites.
- *Hazardous material* means anything an environmental law defines as a hazardous waste, hazardous substance, toxic substance, hazardous material, pollutant, contaminant, or similar term.

Report all notices, releases, and proceedings that you know about, regardless of when they occurred.

23. **Has any governmental unit notified you that you may be liable or potentially liable under or in violation of an environmental law?**

- ❑ No
- ❑ Yes. Fill in the details.

	Governmental unit	Environmental law, if you know it	Date of notice
Name of site Number Street City State ZIP Code	Governmental unit Number Street City State ZIP Code		_____

24. **Have you notified any governmental unit of any release of hazardous material?**

- ❑ No
- ❑ Yes. Fill in the details.

	Governmental unit	Environmental law, if you know it	Date of notice
Name of site Number Street City State ZIP Code	Governmental unit Number Street City State ZIP Code		_____

25. **Have you been a party in any judicial or administrative proceeding under any environmental law?** Include settlements and orders.

- ❑ No
- ❑ Yes. Fill in the details.

	Court or agency	Nature of the case	Status of the case
Case title_____ _____ _____ Case number	_____ Court Name _____ Number Street _____ City State ZIP Code		❑ Pending ❑ On appeal ❑ Concluded

Part 11: Give Details About Your Business or Connections to Any Business

26. **Within 4 years before you filed for bankruptcy, did you own a business or have any of the following connections to any business?**

- ❑ A sole proprietor or self-employed in a trade, profession, or other activity, either full-time or part-time
- ❑ Member of a limited liability company (LLC) or limited liability partnership (LLP)
- ❑ A partner in a partnership
- ❑ An officer, director, or managing executive of a corporation
- ❑ Owner of at least 5% of the voting or equity securities of a corporation

- ❑ No. None of the above applies. Go to Part 12.
- ❑ Yes. Check all that apply above and fill in the details below for each business.

	Describe the nature of the business	Employer Identification number Do not include Social Security number or ITIN.
_____ Business Name _____ Number Street		EIN: ___ ___ – ___ ___ ___ ___ ___ ___ ___
_____ _____ City State ZIP Code	**Name of accountant or bookkeeper**	**Dates business existed** From _____ To _____
	Describe the nature of the business	**Employer Identification number** Do not include Social Security number or ITIN.
_____ Business Name _____ Number Street		EIN: ___ ___ – ___ ___ ___ ___ ___ ___ ___
_____ _____ City State ZIP Code	**Name of accountant or bookkeeper**	**Dates business existed** From _____ To _____
	Describe the nature of the business	**Employer Identification number** Do not include Social Security number or ITIN.
_____ Business Name _____ Number Street		EIN: ___ ___ – ___ ___ ___ ___ ___ ___ ___
_____ _____ City State ZIP Code	**Name of accountant or bookkeeper**	**Dates business existed** From _____ To _____

27. **Within 2 years before you filed for bankruptcy, did you give a financial statement to anyone about your business?** Include all financial institutions, creditors, or other parties.

- ❑ No
- ❑ Yes. Fill in the details below.

	Date issued
Name	MM / DD / YYYY
Number Street	
City State ZIP Code	

Part 12: Sign Below

I declare under penalty of perjury that I have read the answers on this *Statement of Financial Affairs* and any attachments and that the answers are true and correct.

✘ _____
Signature of Debtor 1

Date _____

✘ _____
Signature of Debtor 2

Date _____

Did you attach additional pages to *Your Statement of Financial Affairs for Individuals Filing for Bankruptcy* (Official Form 107)?

- ❑ No
- ❑ Yes

COMMITTEE NOTE

Official Form 107, *Statement of Financial Affairs for Individuals Filing for Bankruptcy*, which applies only in cases of individual debtors, is revised in its entirety as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. The goals of the Forms Modernization Project include improving the interface between technology and the forms so as to increase efficiency and reduce the need to produce the same information in multiple formats. Therefore, many of the open-ended questions and multiple-part instructions have been replaced with more specific questions. In addition, the form is renumbered to distinguish it from the version to be used in non-individual cases, and stylistic changes were made throughout the form.

The form is derived from former Official Form 7, *Statement of Financial Affairs*. The new form uses eleven sections likely to be more understandable to non-lawyers, groups questions of a similar nature together, and eliminates questions unrelated to individual debtors. The new form deletes the instruction, previously found in many questions, that married debtors filing under chapter 12 or chapter 13 must include information applicable to their spouse, even if their spouse is not filing with them, unless the spouses are separated. This change was made because a non-filing spouse's general financial affairs are not relevant to the debtor's bankruptcy case.

Part 1, *Give Details About Where You Lived Before*, moves the questions regarding the debtor's prior addresses, as well as residences in a community property state, to the beginning of the form. The form eliminates the "name used" question in reference to prior addresses. Also, the debtor is no longer required to list the name of a spouse or former spouse who lived with the debtor in a community property state since that information will be provided in Official Form 106F.

Part 2, *Explain the Sources of Your Income*, consolidates the questions regarding income, adding "wages, commissions, bonuses, tips" as a category for sources of income, and it

eliminates the option to report income on a fiscal year basis. In addition, the form provides examples of types of "other income." The time period is clarified to indicate that the prior two years means two calendar years, plus the portion of the calendar year in which the bankruptcy is filed.

Part 3, *List Certain Payments You Made Before You Filed for Bankruptcy*, includes questions related to payments made in the 90 days prior to bankruptcy, with a separate question for payments made to insiders within one year before filing for bankruptcy. The statutory definition of consumer debt is provided. The question regarding the nature of the debtor's debts requires the debtor to use checkboxes to indicate whether or not they are primarily consumer debts. The form instructs debtors not to include payments for domestic support obligations in the section regarding insider payments. The form provides a separate question regarding payments or transfers on account of a debt that benefited an insider. For both questions regarding payments to insiders, the debtor is required to provide a reason for the payment. Partnerships of which the debtor is a general partner have been added to the examples of "insiders."

Part 4, *Identify Legal Actions, Repossessions, and Foreclosures*, consolidates questions regarding actions against the debtor's property. The form provides examples of types of legal actions, and requires the debtor to indicate the status of any action. The form adds the requirements that a debtor include any property levied on within a year of filing for bankruptcy and that the debtor provide the last four digits of any account number for any setoffs. Also, a debtor must list any assignment for the benefit of creditors made within one year of filing for bankruptcy.

Part 5, *List Certain Gifts and Contributions*, changes the reporting threshold to $600 per person or charity and increases the look-back period from one to two years.

Part 6, *List Certain Losses*, clarifies how to report insurance coverage for losses. It provides that the debtor must include on this form amounts of insurance that have been paid, but must list pending insurance claims on Official Form 106A/B.

Part 7, *List Certain Payments or Transfers*, includes questions regarding payments or transfers of property by the debtor. The question regarding payments or transfers to anyone who was consulted about seeking bankruptcy or preparing a bankruptcy petition requires the email or website address of the person who was paid, as well as the name of the person who made the payment if it was not the debtor. There is a separate question asked about payments or transfers to anyone who promised to help the debtor deal with creditors or make payments to creditors, reminding the debtor not to include any payments or transfers already listed. Also, the debtor must list any transfers of property, outright or for security purposes, made within two years of filing for bankruptcy, unless the transfer was made in the ordinary course of the debtor's business. There is a reminder not to list gifts or other transfers already included elsewhere on the form. The question regarding self-settled trusts adds an explanation that such trusts are often referred to as asset-protection devices.

Part 8, *List Certain Financial Accounts, Safety Deposit Boxes, and Storage Units*, adds money market accounts to the examples provided for the question regarding financial accounts or instruments and removes "other instruments" from the examples. Also, the form adds a question about whether the debtor has or had property stored in a storage unit within one year of filing for bankruptcy. The debtor must provide the name and address of the storage facility and anyone who has or had access to the unit, as well as a description of the contents and whether the debtor still has access to the storage unit. Storage units that are part of the building in which the debtor resides are excluded.

Part 9, *Identify Property You Hold or Control for Someone Else*, instructs that the debtor should include any property that the debtor borrowed from, is storing for, or is holding in trust for someone.

Part 10, *Give Details About Environmental Information*, requires the debtor to list the case title and nature of the case for any judicial or administrative proceeding under any environmental law and to indicate the status of the case.

Part 11, *Give Details About Your Business or Connections to Any Business*, eliminates instructions that apply only to corporations and partnerships. The debtor must indicate if, within four years (previously six years) before filing for bankruptcy, the debtor owned a business or had certain connections to a business, with five categories of businesses provided as checkboxes. If the debtor has a connection to a business, the debtor must list the name, address, nature, and Employer Identification number of the business, the dates the business existed, and the name of an accountant or bookkeeper for the business. Accounting information requested is truncated; the debtor is simply required to provide the name of the business bookkeeper or accountant.

Part 12, *Sign Below*, eliminates the signature boxes for a partnership or corporation and a non-attorney bankruptcy petition preparer. Also, the debtor is asked to indicate through checkboxes whether additional pages are attached to the form.

"Missing" Forms Modernization Project (FMP) Forms for Individuals

Nine FMP Official Bankruptcy Forms are not included in this publication package because they have already been published for public comment under the current two-digit forms numbering scheme. The forms will be updated with their projected three-digit number designations listed below when this publication package is approved for implementation.

Projected three digit form number	Form Title	Two digit form number and publication year(s)
103A	Application for Individuals to Pay the Filing Fee in Installments	3A (2012)
103B	Application to Have the Chapter 7 Filing Fee Waived	3B (2012)
106I	Schedule I: Your Income	6I (2012)
106J	Schedule J: Your Expenses	6J (2012)
108-1	Chapter 7 Statement of Your Current Monthly Income and Means-Test Calculation	22A-1 (2012 and 2013)
108-1Supp	Statement of Exemption from Presumption of Abuse Under § 707(b)(2)	22A-1Supp (2013)
108-2	Chapter 7 Means Test Calculation	22A-2 (2012 and 2013)
109	Chapter 11 Statement of Your Current Monthly Income	22B (2012 and 2013)
110-2	Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period	22C-1 (2012 and 2013)
110-2	Chapter 13 Calculation of Your Disposable Income	22C-2 (2012 and 2013)

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 112

Statement of Intention for Individuals Filing Under Chapter 7

12/15

If you are an individual filing under Chapter 7 and creditors have claims secured by your property or you have leased personal property and the lease has not expired, you must fill out this form. You must file this form with the court within 30 days after you file your bankruptcy petition or by the date set for the meeting of creditors, whichever is earlier, unless the court extends the time for cause. You must also deliver copies to the creditors and lessors you list on the form.

If two married people are filing together in a joint case, both are equally responsible for supplying correct information. Both debtors must sign and date the form.

Be as complete and accurate as possible. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known).

Part 1: List Your Creditors Who Hold Secured Claims

1. **For any creditors that you listed in Part 1 of *Schedule D*, fill in the information below.**

Identify the creditor and the property that is collateral	What do you intend to do with the property that secures a debt?	Did you claim the property as exempt on Schedule C?
Creditor's name: Description of property securing debt:	❑ Give the property to the creditor. ❑ Keep the property. *Check one*: ❑ I will redeem the property. ❑ I will sign a *Reaffirmation Agreement*. ❑ Other. Explain: _____	❑ No ❑ Yes
Creditor's name: Description of property securing debt:	❑ Give the property to the creditor. ❑ Keep the property. *Check one*: ❑ I will redeem the property. ❑ I will sign a *Reaffirmation Agreement*. ❑ Other. Explain: _____	❑ No ❑ Yes
Creditor's name: Description of property securing debt:	❑ Give the property to the creditor. ❑ Keep the property. *Check one*: ❑ I will redeem the property. ❑ I will sign a *Reaffirmation Agreement*. ❑ Other. Explain: _____	❑ No ❑ Yes
Creditor's name: Description of property securing debt:	❑ Give the property to the creditor. ❑ Keep the property. *Check one*: ❑ I will redeem the property. ❑ I will sign a *Reaffirmation Agreement*. ❑ Other. Explain: _____	❑ No ❑ Yes

Your name _____
First Name Middle Name Last Name

Case number (*If known*)_____

Part 2: List Your Unexpired Personal Property Leases

For any unexpired personal property lease that you listed in *Schedule G*, fill in the information below. *Unexpired leases* are leases that are still in effect; the lease period has not yet ended. You may assume an unexpired personal property lease if the trustee does not assume it. 11 U.S.C. § 365(p)(2).

Describe your unexpired personal property leases	Will the lease be assumed?
Lessor's name: Description of leased property:	❑ No ❑ Yes
Lessor's name: Description of leased property:	❑ No ❑ Yes
Lessor's name: Description of leased property:	❑ No ❑ Yes
Lessor's name: Description of leased property:	❑ No ❑ Yes
Lessor's name: Description of leased property:	❑ No ❑ Yes
Lessor's name: Description of leased property:	❑ No ❑ Yes
Lessor's name: Description of leased property:	❑ No ❑ Yes

Part 3: Sign Below

Under penalty of perjury, I declare that I have indicated my intention about any property of my estate that secures a debt and any personal property that is subject to an unexpired lease.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

COMMITTEE NOTE

Official Form 112, *Statement of Intention for Individuals Filing Under Chapter* 7, is revised in its entirety as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. In addition, the form is renumbered, and stylistic changes are made throughout the form.

The form is derived from former Official Form 8, *Chapter 7 Individual Debtor's Statement of Intention*. The new form uses language likely to be understandable to non-lawyers. In addition, the instructions are more extensive, advising an individual Chapter 7 debtor that the form must be completed and filed within 30 days and that the debtor must deliver copies of the form to creditors and lessors listed on the form.

Part 1, *Your Creditors Who Hold Secured Claims*, refers to signing a "Reaffirmation Agreement" rather than asking whether the debtor intends to "reaffirm the debt." In addition, the debtor is asked if the property is claimed as exempt on Schedule C (Official Form 106C).

Part 2, *List Your Unexpired Personal Property Leases*, defines unexpired leases and explains that a debtor may assume an unexpired personal property lease if the trustee does not assume it.

Fill in this information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____ Chapter _____
(If known)

Draft May 3, 2013

Official Form 119

Bankruptcy Petition Preparer's Notice, Declaration, and Signature

12/15

Bankruptcy petition preparers as defined in 11 U.S.C. § 110 must fill out this form every time they help prepare documents that are filed in the case. If more than one bankruptcy petition preparer helps with the documents, each must sign in Part 3. A bankruptcy petition preparer who does not comply with the provisions of title 11 of the United States Code and the Federal Rules of Bankruptcy Procedure may be fined and imprisoned. 11 U.S.C. § 110; 18 U.S.C. § 156.

Part 1: Notice to Debtor

Bankruptcy petition preparers must give the debtor a copy of this form and have the debtor sign it before they prepare any documents for filing or accept any compensation. A signed copy of this form must be filed with any document prepared.

Bankruptcy petition preparers are not attorneys and may not practice law or give you legal advice, including the following:

whether to file a petition under the Bankruptcy Code (11 U.S.C. § 101 et seq.);

whether filing a case under Chapter 7, 11, 12, or 13 is appropriate;

whether your debts will be eliminated or discharged in a case under the Bankruptcy Code;

whether you will be able to keep your home, car, or other property after filing a case under the Bankruptcy Code;

what tax consequences may arise because a case is filed under the Bankruptcy Code;

whether any tax claims may be discharged;

whether you may or should promise to repay debts to a creditor or enter into a reaffirmation agreement;

how to characterize the nature of your interests in property or your debts; or

what procedures and rights apply in a bankruptcy case.

The bankruptcy petition preparer _____ **has notified me of**
Name

any maximum allowable fee before preparing any document for filing or accepting any fee.

_____ Date _____
Signature of Debtor 1 acknowledging receipt of this notice MM / DD / YYYY

_____ Date _____
Signature of Debtor 2, acknowledging receipt of this notice MM / DD / YYYY

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

Part 2: Declaration of the Bankruptcy Petition Preparer

Under penalty of perjury, I declare that:

I am a bankruptcy petition preparer or the officer, principal, responsible person, or partner of a bankruptcy petition preparer;

I or my firm prepared the documents listed below and gave the debtor a copy of them and the *Notice to Debtor by Bankruptcy Petition Preparer* as required by 11 U.S.C. §§ 110(b), 110(h), and 342(b); and

if rules or guidelines are established according to 11 U.S.C. § 110(h) setting a maximum fee for services that bankruptcy petition preparers may charge, I or my firm notified the debtor of the maximum amount before preparing any document for filing or before accepting any fee from the debtor.

_____ _____ _____
Printed name Title, if any Firm name, if it applies

_____
Number Street

_____ _____ _____ _____
City State ZIP Code Contact phone

I or my firm prepared the documents listed below:

- ❑ Voluntary Petition (Form 101)
- ❑ Statement About Your Social Security Numbers (Form 121)
- ❑ Your Assets and Liabilities and Certain Statistical Information (Form 106Sum)
- ❑ Schedule A/B (Form 106A/B)
- ❑ Schedule C (Form 106C)
- ❑ Schedule D (Form 106D)
- ❑ Schedule E/F (Form 106E/F)
- ❑ Schedule G (Form 106G)
- ❑ Schedule H (Form 106H)
- ❑ Schedule I (Form 106I)
- ❑ Schedule J (Form 106J)
- ❑ Declaration About an Individual Debtor's Schedules (Form 106Dec)
- ❑ Statement of Financial Affairs (Form 107)
- ❑ Statement of Intention for Individuals Filing Under Chapter 7 (Form 112)
- ❑ Chapter 7 Statement of Your Current Monthly Income (Form 108-1)
- ❑ Statement of Exemption from Presumption of Abuse Under § 707(b)(2) (Form 108-1Supp)
- ❑ Chapter 7 Means Test Calculation (Form 108-2)
- ❑ Chapter 11 Statement of Your Current Monthly Income (Form 109)
- ❑ Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period (Form 110-1)
- ❑ Chapter 13 Calculation of Your Disposable Income (Form 110-2)
- ❑ Application to Pay Filing Fee in Installments (Form 103A)
- ❑ Application to Have Chapter 7 Filing Fee Waived (Form 103B)
- ❑ A list of names and addresses of all creditors (*creditor or mailing matrix*)
- ❑ Other _____

Part 3: Sign Below

Bankruptcy petition preparers must sign and give their Social Security numbers. If more than one bankruptcy petition preparer prepared the documents to which this declaration applies, the signature and Social Security number of each preparer must be provided. 11 U.S.C. § 110.

_____ ___ ___ ___ -- ___ ___ -- ___ ___ ___ ___ Date _____
Signature of bankruptcy petition preparer or officer, principal, responsible person, or partner Social Security number of person who signed MM / DD / YYYY

_____
Printed name

_____ ___ ___ ___ -- ___ ___ -- ___ ___ ___ ___ Date _____
Signature of bankruptcy petition preparer or officer, principal, responsible person, or partner Social Security number of person who signed MM / DD / YYYY

_____
Printed name

COMMITTEE NOTE

Official Form 119, *Bankruptcy Petition Preparer's Notice, Declaration, and Signature*, applies only in cases of individual debtors. It is revised as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. In addition, the form is renumbered, and stylistic changes are made throughout the form.

The form is derived from former Official Form 19, *Declaration and Signature of Non-Attorney Bankruptcy Petition Preparer*. An instruction is added to the form that provides statutory citations. Filers are advised that if more than one bankruptcy petition preparer helped with the documents, each must sign the form.

Part 1, *Notice to Debtor*, is moved to the beginning of the form and revised. An instruction is added that bankruptcy petition preparers must give the debtor a copy of the form and have the debtor sign it before they prepare any documents for filing or accept compensation, and that the form must be filed with any document prepared. It warns the debtor that bankruptcy petition preparers are not attorneys and may not practice law or give legal advice, with a list of examples of advice that may not be provided by a bankruptcy petition preparer. The signature line of this part includes a statement that the debtor acknowledges receipt of the notice.

Part 2, *Declaration of the Bankruptcy Petition Preparer*, revises the declaration by the bankruptcy petition preparer to include an officer, principal, responsible person, or partner of a bankruptcy petition preparer. The bankruptcy petition preparer must provide a firm name, if applicable, as well as a contact phone, and must indicate which documents the bankruptcy petition preparer prepared from a list of documents. An "other" option is provided for any additional documents.

Part 3, *Sign Below*, provides spaces for the bankruptcy petition preparer to enter a social security number, and it adds language regarding an officer, principal, responsible person, or partner of the bankruptcy petition preparer on the signature line.

Fill in this information to identify your case:

United States Bankruptcy Court for the:

_____ District of _____
State

Case number (*If known*): _____

Draft May 3, 2013

Official Form 121

Statement About Your Social Security Numbers

12/15

Use this form to tell the court about any Social Security or federal Individual Taxpayer Identification numbers you have used. Do not file this form as part of the public case file. This form must be submitted separately and must not be included in the court's public electronic records.

To protect your privacy, the court will not make this form available to the public. You should not include a full Social Security Number or Individual Taxpayer Number on any other document filed with the court. The court will make only the last four digits of your numbers known to the public. However, the full numbers will be available to your creditors, the U.S. Trustee or bankruptcy administrator, and the trustee assigned to your case. To help creditors correctly identify a case, full Social Security Numbers may appear on an electronic version of some notices. Please consult local court procedures for submission requirements.

If you do not tell the truth on this form, you may be fined up to $250,000, you may be imprisoned for up to 5 years, or both.

Part 1: Tell the Court About Yourself and Your spouse if Your Spouse is Filing With You

	For Debtor 1:	For Debtor 2 (Only If Spouse Is Filing):
1. Your name	First name	First name
	Middle name	Middle name
	Last name	Last name

Part 2: Tell the Court About all of Your Social Security or Federal Individual Taxpayer Identification Numbers

2. All Social Security Numbers you have used	___ ___ ___ – ___ ___ – ___ ___ ___ ___	___ ___ ___ – ___ ___ – ___ ___ ___ ___
	___ ___ ___ – ___ ___ – ___ ___ ___ ___	___ ___ ___ – ___ ___ – ___ ___ ___ ___
	❑ You do not have a Social Security number.	❑ You do not have a Social Security number.
3. All federal Individual Taxpayer Identification Numbers (ITIN) you have used	9 ___ ___ – ___ ___ – ___ ___ ___ ___	9 ___ ___ – ___ ___ – ___ ___ ___ ___
	9 ___ ___ – ___ ___ – ___ ___ ___ ___	9 ___ ___ – ___ ___ – ___ ___ ___ ___
	❑ You do not have an ITIN.	❑ You do not have an ITIN.

Part 3: Sign Below

Under penalty of perjury, I declare that the information I have provided in this form is true and correct.	Under penalty of perjury, I declare that the information I have provided in this form is true and correct.
✘ _____ Signature of Debtor 1	✘ _____ Signature of Debtor 2
Date _____ MM / DD / YYYY	Date _____ MM / DD / YYYY

12b-007805

COMMITTEE NOTE

Official Form 121, *Statement About Your Social Security Numbers*, is revised as part of the Forms Modernization Project. The form, which applies only in cases of individual debtors, replaces former Official Form 21, *Statement of Social Security Number(s)*. It is renumbered to distinguish it from the forms used by non-individual debtors, such as corporations and partnerships.

To make Form 121 easier to understand and complete, the form is divided into three sections, and directions on the form are simplified. The debtors' Employer Tax-Identification number (EIN) is eliminated from the form, and the debtor's name is moved from the caption to the body of the form.

Information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Last 4 digits of Social Security number or ITIN ___ ___ ___ ___

EIN __ __ - __ __ __ __ __ __ __

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

Last 4 digits of Social Security number or ITIN ___ ___ ___ ___

EIN __ __ - __ __ __ __ __ __ __

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number: _____

Order of Discharge

IT IS ORDERED: A discharge under 11 U.S.C. § 727 is granted to:

_____ [_____]

_____
MM / DD / YYYY

By the court: _____
United States Bankruptcy Judge

Notice to the creditors:

This order means that no one may make any attempt to collect a discharged debt from the debtors personally. For example, creditors cannot sue, garnish wages, assert a deficiency, or otherwise try to collect from the debtors personally on discharged debts. Creditors cannot contact the debtors by mail, phone, or otherwise in any attempt to collect the debt personally. Creditors who violate this order can be required to pay debtors damages and attorney's fees.

However, a creditor with a lien may enforce a claim against the debtors' property subject to that lien.

This order does not prevent debtors from paying any debt voluntarily or from paying reaffirmed debts according to the reaffirmation agreement. 11 U.S.C. § 524(c), (f).

This order does not close or dismiss the case, and it does not determine how much money, if any, the trustee will pay creditors.

Notice to the debtor:

This court order grants you (the debtor) a discharge. Most debts are covered by the discharge, but not all. Generally a discharge removes your personal liability for debts that you owed before you filed your bankruptcy case.

Also, if this case began under a different chapter of the Bankruptcy Code and was later converted to chapter 7, debts that existed before the conversion are discharged.

This order does not close or dismiss the case, and it does not determine how much money, if any, the trustee will pay creditors.

In a case involving community property: Special rules protect certain community property owned by the debtor's spouse, even if that spouse did not file a bankruptcy case.

For more information, see page 2 ►

Creditors cannot collect discharged debts from you

This order means that no one can make any attempt to collect from you personally a debt that has been discharged. For example, creditors cannot sue you, garnish your wages, assert a deficiency claim against you, or otherwise try to collect from you personally on discharged debts. They cannot contact you by mail, phone, or otherwise in any attempt to collect the debt as your personal liability.

A creditor who violates this order can be required to pay you damages and attorney's fees.

However, you may voluntarily pay any debt that has been discharged.

But creditors might collect for some debts

This discharge does not stop creditors from collecting debts that you reaffirmed or from any property in which they have a valid lien.

Debts covered by a valid reaffirmation agreement are not discharged. When you signed a reaffirmation agreement, you chose to give up your discharge for that particular debt.

In addition, the creditor may have a right to enforce a lien against your property unless the lien was avoided or eliminated. For example, the creditor may have the right to foreclose a home mortgage or repossess an automobile.

Also, this discharge does not stop creditors from collecting from anyone else who is also liable on the debt, such as your insurance company or a relative who cosigned or guaranteed a loan.

Some debts are not discharged

Examples of some debts that are not discharged are:

- debts that are domestic support obligations;
- debts for most student loans;
- debts for most taxes;
- debts that the bankruptcy court has decided or will decide are not discharged in this bankruptcy case;
- debts for most fines, penalties, forfeitures, or criminal restitution obligations;
- some debts which you did not properly list;
- debts for certain types of loans owed to pension, profit sharing, stock bonus, or retirement plans; and
- debts for death or personal injury caused by your operating a vehicle while intoxicated.

This information is only a general summary of the bankruptcy discharge; some exceptions exist. Because the law is complicated, you should consult an attorney to determine the exact effect of this discharge.

COMMITTEE NOTE

Official Form 318, *Order of Discharge*, is revised and renumbered as part of the Forms Modernization Project. The form is used to issue a discharge in chapter 7 cases filed by individuals or joint debtors. It replaces former Official Form 18, *Discharge of Debtor*, Director's Procedural Form 18J, *Discharge of Joint Debtors*, and Director's Procedural Form 18JO, *Discharge of One Joint Debtor*.

To make the discharge order and the explanation of it easier to read and understand, legal terms are explained more fully or replaced with commonly understood terms, and the form is reformatted.

Reaffirmed debts are explained more fully, and debtors are informed that a discharge will not stop creditors from collecting debts from any property in which they have a valid lien. In addition, debtors are advised that the discharge does not stop creditors from collecting from anyone else who is liable on the debt, such as a cosigner on the loan or an insurance company.

Director's Procedural Forms 18J and 18JO are no longer needed because Form 318 specifies the names of the debtors, or debtor, to whom the discharge is issued.

Fill in this information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Draft April 19, 2013

Official Form 423

Certification About a Financial Management Course

12/15

If you are an individual and you filed for bankruptcy under chapter 7 or 13, or under chapter 11 and § 1141 (d)(3) applies, you must take an approved course about personal financial management. In a joint case, each debtor must take the course. 11 U.S.C. §§ 727(a)(11) and 1328(g).

After you finish the course, the provider will give you a certificate. The provider may notify the court that you have completed the course. If the provider does not do so, then Debtor 1 and Debtor 2 must each file this form with the certificate number before your debts will be discharged.

If you filed under chapter 7 and you need to file this form, file it within 60 days after the first date set for the meeting of creditors under § 341 of the Bankruptcy Code.

If you filed under chapter 11 or 13 and you need to file this form, file it before you make the last payment that your plan requires or before you file a motion for a discharge under § 1141(d)(5)(B) or § 1328(b) of the Bankruptcy Code. Fed. R. Bankr. P. 1007(c).

In some cases, the court can waive the requirement to take the financial management course. To have the requirement waived, you must file a motion with the court and obtain a court order.

Part 1: Tell the Court About the Required Course

You must check one:

❑ **I completed an approved course in personal financial management:**

Date I took the course _____
MM / DD / YYYY

Name of approved provider _____

Certificate number _____

❑ **I am not required to complete a course in personal financial management because the court has granted my motion for a waiver of the requirement based on** *(check one)***:**

❑ **Incapacity.** I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.

❑ **Disability.** My physical disability causes me to be unable to complete a course in personal financial management in person, by phone, or through the internet, even after I reasonably tried to do so.

❑ **Active duty.** I am currently on active military duty in a military combat zone.

❑ **Residence.** I live in a district in which the United States trustee (or bankruptcy administrator) has determined that the approved instructional courses cannot adequately meet my needs.

Part 2: Sign Here

I certify that the information I have provided is true and correct.

_____ _____ Date _____
Signature of debtor named on certificate Printed name of debtor MM / DD / YYYY

COMMITTEE NOTE

Official Form 423, *Certification About a Financial Management Course*, is revised as part of the Forms Modernization Project. The form replaces former Official Form 23, *Debtor's Certification of Completion of Postpetition Instructional Course Concerning Personal Financial Management*. Form 423 is renumbered to distinguish it from the forms used by non-individual debtors, such as corporations and partnerships.

To make Form 423 easier to understand, legal terms are explained more fully or replaced with commonly understood terms, and the form is reformatted. Part 1, *Tell the Court About the Required Course*, provides definitions for "incapacity" and "disability," rather than providing statutory citations.

A statement is added that, in some cases, the court can waive the requirement to complete the financial management course. To have the requirement waived, the debtor must file a motion with the court and obtain a court order.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Draft May 3, 2013

Official Form 427

Cover Sheet for Reaffirmation Agreement

12/15

Anyone who is a party to a reaffirmation agreement may fill out and file this form. Fill it out completely, attach it to the reaffirmation agreement, and file the documents within the time set under Bankruptcy Rule 4008.

Part 1: Explain the Repayment Terms of the Reaffirmation Agreement

1. **Who is the creditor?**

_____
Name of the creditor

2. **How much is the debt?**

On the date that the bankruptcy case was filed $_____

To be paid under the reaffirmation agreement $_____

$_____ per month for ____ months (if fixed interest rate)

3. **What is the annual percentage rate (APR) of interest?**

Before the bankruptcy case was filed _____%

Under the reaffirmation agreement _____% ❑ Fixed rate
❑ Adjustable rate

4. **Does collateral secure the debt?**

❑ No
❑ Yes. Describe the collateral. _____

Current market value $_____

5. **Does the creditor assert that the debt is nondischargeable?**

❑ No
❑ Yes. Attach an explanation of the nature of the debt and the basis for contending that the debt is nondischargeable.

6. **Using information from *Schedule I: Your Income*** (Official Form 106I) **and *Schedule J: Your Expenses*** (Official Form 106J)**, fill in the amounts.**

Income and expenses reported on Schedules I and J		Income and expenses stated on the reaffirmation agreement	
6a. Combined monthly income from line 12 of Schedule I	$ _____	6e. Monthly income from all sources after payroll deductions	$ _____
6b. Monthly expenses from line 22 of Schedule J	– $ _____	6f. Monthly expenses	– $ _____
6c. Monthly payments on all reaffirmed debts not listed on Schedule J	– $ _____	6g. Monthly payments on all reaffirmed debts not included in monthly expenses	– $ _____
6d. **Scheduled net monthly income** Subtract lines 6b and 6c from 6a. If the total is less than 0, put the number in brackets.	$ _____	6h. **Present net monthly income** Subtract lines 6f and 6g from 6e. If the total is less than 0, put the number in brackets.	$ _____

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

7. **Are the income amounts on lines 6a and 6e different?**
   - ❑ No
   - ❑ Yes. Explain why they are different, and complete line 10._____

8. **Are the expense amounts on lines 6b and 6f different?**
   - ❑ No
   - ❑ Yes. Explain why they are different, and complete line 10._____

9. **Is the net monthly income on line 6h less than 0?**
   - ❑ No
   - ❑ Yes. A presumption of hardship arises (unless the creditor is a credit union).
     Explain how the debtor will make monthly payments on the reaffirmed debt and pay other living expenses.
     Complete line 10.

10. **Debtor's certification about lines 7-9**

    If any answer on lines 7-9 is *Yes*, the debtor must sign here.

    If all the answers on lines 7-9 are *No*, go to line 11.

    I certify that each explanation on lines 7-9 is true and correct.

    ✘ _____ ✘ _____
    Signature of Debtor 1 Signature of Debtor 2 (Spouse Only in a Joint Case)

11. **Did counsel represent the debtor in negotiating the reaffirmation agreement?**
    - ❑ No
    - ❑ Yes. Has counsel executed a declaration or an affidavit to support the reaffirmation agreement?
      - ❑ No
      - ❑ Yes

Part 2: Sign Below

Whoever fills out this form must sign here.

I certify that the attached agreement is a true and correct copy of the reaffirmation agreement between the parties identified on this *Cover Sheet for Reaffirmation Agreement*.

✘ _____ Date _____
Signature MM / DD / YYYY

_____
Printed Name

Check one:

- ❑ Debtor or Debtor's Attorney
- ❑ Creditor or Creditor's Attorney

COMMITTEE NOTE

Official Form 427, *Cover Sheet for Reaffirmation Agreement*, is revised and renumbered as part of the Forms Modernization Project. The form replaces former Official Form 27, *Reaffirmation Agreement Cover Sheet*. To make it easier to understand, the form is reformatted, and legal terms are explained more fully or replaced with commonly understood terms.

The calculation of the debtor's net monthly income is expanded to include the debtor's net monthly income at the time the bankruptcy petition is filed, as well as the debtor's net monthly income at the time of the reaffirmation agreement. Rather than requiring filers to state their relationship to the case, checkboxes are provided for the debtor or the debtor's attorney and for the creditor or the creditor's attorney.

Instructions

Bankruptcy Forms for Individuals

U.S. Bankruptcy Court | December 2015

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About this Booklet of Instructions

This booklet provides instructions for completing selected forms that individuals filing for bankruptcy must submit to the U.S. Bankruptcy Court. You can download all of the required forms without charge from:

http://www.uscourts.gov/FormsAndFees/Forms/BankruptcyForms.aspx.

The instructions are designed to accompany the forms and are intended to help you understand what information is required to properly file.

Completing the forms is only a part of the bankruptcy process. You are strongly encouraged to hire a qualified attorney not only to help you complete the forms but also to give you general advice about bankruptcy and to represent you in your bankruptcy case. If you cannot afford to pay an attorney, you might qualify for free legal services if they are provided in your area. Contact your state or local bar association for help in obtaining free legal services or in hiring an attorney. **Note: It is particularly difficult to succeed in a chapter 11, 12, or 13 case without an attorney.**

If an attorney represents you, you must provide information so the attorney can prepare your forms. Once the attorney prepares the forms, you must make sure that the forms are accurate and complete. These instructions may help you perform those tasks. If you are filing for bankruptcy without the help of an attorney, this booklet tells you which forms must be filed and provides information about them.

You should carefully read this booklet and keep it with your records. Review the individual forms as you read the instructions for each.

Although bankruptcy petition preparers can help you type the bankruptcy forms, they cannot file the documents for you and cannot give you legal advice. Court employees cannot give you legal advice either.

Read This Important Warning

Because bankruptcy can have serious long-term financial and legal consequences, including loss of your property, you should hire an attorney and carefully consider all of your options before you file. Only an attorney can give you legal advice about what can happen as a result of filing for bankruptcy and what your options are. If you do file for bankruptcy, an attorney can help you fill out the forms properly and protect you, your family, your home, and your possessions.

Although the law allows you to represent yourself in bankruptcy court, you should understand that many people find it difficult to represent themselves successfully. The rules are technical, and a misstep or inaction may harm you. If you file without an attorney, you are still responsible for knowing and following all of the legal requirements.

You may not file bankruptcy if you are not eligible to file or if you do not intend to file the documents necessary to complete the bankruptcy.

Bankruptcy fraud is a serious crime; you could be fined and imprisoned if you commit fraud in your bankruptcy case. If you deliberately make a false statement, you could be fined up to $250,000 or imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

About the bankruptcy forms and filing bankruptcy

Use the forms that are numbered in the 100 series to file bankruptcy for individuals or married couples. Use the forms that are numbered in the 200 series if you are preparing a bankruptcy on behalf of a non-individual, such as a corporation, partnership, or limited liability company (LLC). Sole proprietors must use the forms that are numbered in the 100 series.

When a bankruptcy is filed, the U.S. Bankruptcy Court opens a case. It is important that the answers to the questions on the forms be complete and accurate so that the case proceeds smoothly. A person filing bankruptcy who gives false information could be charged with a federal crime or could lose all the benefits of filing for bankruptcy.

You should understand that filing a bankruptcy case is not private. Anyone has a right to see your bankruptcy forms after you file them. However, in some circumstances, if a court issues a protective order to keep your address, telephone number, or other information from being disclosed to the public, it may be possible to protect your information under 11 U.S.C. § 107 and Bankruptcy Rule 9037.

Understand the terms used in the forms

The forms for individuals use *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, these forms use *you* to ask for information from both debtors. For example, if a form asks, "Do you own a car?" the answer would be *yes* if either debtor owns a car. When information is needed about the spouses separately, the forms use *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

To understand other terms used in the forms and the instructions, see the *Glossary* at the end of this booklet.

Things to remember when filling out these forms

- Do not file these instructions with the bankruptcy forms that you file with the court.
- Be as complete and accurate as possible.
- If more space is needed, attach a separate sheet to the form. On the top of any additional pages, write your name and case number (if known). Also identify the form and line number to which the additional information applies.
- If two married people are filing together, both are equally responsible for supplying correct information.
- Do not list a minor child's full name. Instead, fill in only the child's initials and the full name and address of the child's parent or guardian. For example, write A.B., a minor child (*John Doe, parent, 123 Main St., City, State*). 11 U.S.C. § 112; Bankruptcy Rule 1007(m) and 9037.
- For your records, be sure to keep a copy of your bankruptcy documents and all attachments that you file.

On what date was a debt incurred?

When a debt was incurred on a single date, fill in the actual date that the debt was incurred.

When a debt was incurred on multiple dates, fill in the range of dates. For example, if the debt is from a credit card, fill in the month and year of the first and last transaction, if known.

About the Process for Filing a Bankruptcy Case for Individuals

Before you file your bankruptcy case

Before you file for bankruptcy, you must do several things:

- **Receive a briefing about credit counseling from an approved agency** within 180 days before you file. (If you and your spouse are filing together, each of you must receive a briefing before you file. Failure to do so will almost certainly result in the dismissal of your case.) You may have a briefing about credit counseling one-on-one or in a group, by telephone, or by internet.

  For a list of approved providers, go to: http://www.justice.gov/ust/eo/bapcpa/ccde/cc_approved.htm

  In Alabama and North Carolina, go to: http://www.uscourts.gov.

  After you finish the briefing, you will receive a certificate that you will need to file in your bankruptcy case.

- **Find out in which bankruptcy court you must file your bankruptcy case**. It is important that you file in the correct district within your state. To find out which district you are in, go to: http://www.uscourts.gov/courtlinks

- **Check the court's local website** for any specific local requirements that you might have to meet. Go to: http://www.uscourts.gov/courtlinks

- **Find out which chapters of the Bankruptcy Code you are eligible for**. For descriptions of each chapter, review the information contained in the notice, *Notice Required by 11 U.S.C. § 342(b) for Individuals Filing for Bankruptcy* (Form B2010), which is included in this booklet.

Note: **It is particularly difficult to succeed in a chapter 11, 12, or 13 case without an attorney.**

To file for bankruptcy, you must give the court several forms and documents. Some must be filed at the time you file the case. Others may be filed up to 14 days later.

When you file your bankruptcy case

You must file the forms listed below on the date you open your bankruptcy case. For copies of the forms listed here, go to http://www.uscourts.gov. (The list continues on the next page.):

- *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101). This form opens the case. Directions for filling it out are included in the form itself.

- *Statement About Your Social Security Numbers* (Official Form 121). This form gives the court your full Social Security number or federal Individual Taxpayer Identification number. To protect your privacy, the court will make only the last four digits of your number known to the general public. However, the court will make your full number available to your creditors, the U.S. trustee or bankruptcy administrator, and the trustee assigned to your case. This form has no separate instructions.

- Your filing fee. If you cannot pay the entire filing fee, you must also include:
  - *Application for Individuals to Pay the Filing Fee in Installments* (Official Form 103A), or
  - *Application to Have the Chapter 7 Filing Fee Waived* (Official Form 103B). Use this form only if you are filing under chapter 7 and you meet the criteria to have the chapter 7 filing fee waived.

- A list of names and addresses of all of your creditors, formatted as a mailing list according to instructions from the bankruptcy court in which you file. (Your court may call this a *creditor matrix* or *mailing matrix*.)

- Your credit counseling certificate from an approved credit counseling agency. (See *Before you file your bankruptcy case*, above). If you have received the briefing about credit counseling but have not yet received the certificate, file it when you receive it. If you have not already received the briefing and believe you are entitled to a temporary waiver from receiving it or that you are not required to receive the briefing, see line 15 of the *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101). Waivers are rare and if you do not qualify for a waiver, your case will be dismissed.

- *For Individual Chapter 11 Cases: List of Creditors Who Have the 20 Largest Unsecured Claims Against You and Are Not Insiders* (Official Form 104). Fill out this form only if you file under chapter 11.

- *Initial Statement About an Eviction Judgment Against You* (Official Form 101A) and *Statement About Payment of an Eviction Judgment Against You* (Official Form 101B). Use these forms if your landlord has an eviction judgment against you and you want to stay in your residence after you file your forms to open your bankruptcy case.

- *Bankruptcy Petition Preparer's Notice, Declaration, and Signature* (Official Form 119) and *Disclosure of Compensation of Bankruptcy Petition Preparer* (Form 2800). Use these forms if a bankruptcy petition preparer helped you fill out your forms.

When you file your bankruptcy case or within 14 days after you file

You must file the forms listed below either when you file your bankruptcy case or within 14 days after you file your *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101). If you do not do so, your case may be dismissed. Although it is possible to open your case by submitting only the documents that are listed under *When you file your bankruptcy case*, you should file the entire set of forms at one time to help your case proceed smoothly.

Although some forms may ask you similar questions, you must fill out all of the forms completely to protect your legal rights.

The list below shows the forms that all individuals must file as well as the forms that are specific to each chapter. For copies of the official forms listed here, go to http://www.uscourts.gov.

All individuals who file for bankruptcy must file these forms and the forms for the specific chapter:

- ❑ *Schedules of Assets and Liabilities* (Official Form 106) which includes these forms:
  - ❑ *Schedule A/B: Property* (Official Form 106A/B)
  - ❑ *Schedule C: The Property You Claim as Exempt* (Official Form 106C)
  - ❑ *Schedule D: Creditors Who Hold Claims Secured by Your Property* (Official Form 106D)
  - ❑ *Schedule E/F: Creditors Who Have Unsecured Claims* (Official Form 106E/F)
  - ❑ *Schedule G: Executory Contracts and Unexpired Leases* (Official Form 106G)
  - ❑ *Schedule H: Your Codebtors* (Official Form 106H)
  - ❑ *Schedule I: Your Income* (Official Form 106I)
  - ❑ *Schedule J: Your Expenses* (Official Form 106J)
  - ❑ *Summary of Your Assets and Liabilities and Certain Statistical Information* (Official Form 106Sum). This form gives an overview of the totals on the schedules
  - ❑ *Declaration About an Individual Debtor's Schedules* (Official Form 106Dec)
- ❑ *Statement of Financial Affairs for Individuals Filing for Bankruptcy* (Official Form 107)
- ❑ *Disclosure of Compensation to Debtor's Attorney* — Unless local rules provide otherwise, Director's Form 2030 may be used.
- ❑ Credit counseling certificate that you received from an approved credit counseling agency
- ❑ Copies of all payment advices (*pay stubs*) or other evidence of payment that you received within 60 days before you filed your bankruptcy case. Some local courts may require that you submit these documents to the trustee assigned to your case rather than filing them with the court. Check the court's local website to find out if local requirements apply. Go to http://www.uscourts.gov/courtlinks.

If you file under chapter 7, you must also file:

- ❑ *Statement of Intention for Individuals Filing Under Chapter 7* (Official Form 112)
- ❑ *Chapter 7 Statement of Your Current Monthly Income* (Official Form 108-1)
- ❑ If necessary, *Chapter 7 Means Test Calculation* (Official Form 108-2).

If you file under chapter 11, you must also file:

- ❑ *Chapter 11 Statement of Your Current Monthly Income* (Official Form 109)

If you file under chapter 11 and are a small business debtor (that is, if you are self-employed and your debts are less than $2,490,925*), within 7 days after you file your bankruptcy forms to open your case, you must also file your most recent:

- ❑ Balance sheet
- ❑ Statement of operations
- ❑ Cash-flow statement
- ❑ Federal income tax return

If you do not have these documents, you must file a statement made under penalty of perjury that you have not prepared either a balance sheet, statement of operations, or cash-flow statement or you have not filed a federal tax return.

If you file under chapter 11, you must also file additional documents.

* Subject to adjustment on 4/01/16, and every 3 years after that for cases begun on or after the date of adjustment.

If you file under chapter 12, you must also file:

- ❑ Chapter 12 Plan (within 90 days after you file your bankruptcy forms to open your case)

If you file under chapter 13, you must also file:

- ❑ *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period* (Official Form 110-1)
- ❑ If necessary, *Chapter 13 Calculation of Your Disposable Income* (Official Form 110-2)
- ❑ Chapter 13 Plan (Many bankruptcy courts require you to use a local form plan. Check the court's local website for any specific form that you might have to use. Go to http://www.uscourts.gov/courtlinks.)

Notice Required by 11 U.S.C. § 342(b) for Individuals Filing for Bankruptcy (Form 2010)

This notice is for you if:

You are an individual filing for bankruptcy, and

Your debts are primarily consumer debts. *Consumer debts* are defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose."

The types of bankruptcy that are available to individuals

Individuals who meet the qualifications may file under one of four different chapters of the Bankruptcy Code:

- Chapter 7 — Liquidation
- Chapter 11— Reorganization
- Chapter 12— Voluntary repayment plan for family farmers or fishermen
- Chapter 13— Voluntary repayment plan for individuals with regular income

You should have an attorney review your decision to file for bankruptcy and the choice of chapter.

Chapter 7: Liquidation

	$245	filing fee
	$46	administrative fee
+	$15	trustee surcharge
	$306	total fee

Chapter 7 is for individuals who have financial difficulty and cannot pay their debts. The primary purpose for a debtor to file under chapter 7 is to have your debts discharged. The bankruptcy discharge relieves you from having to pay any of your pre-bankruptcy debts unless an exception to discharge applies to particular debts.

However, if the court finds that you have committed certain kinds of improper conduct described in the Bankruptcy Code, the court may deny your discharge.

You should know that even if you receive a discharge, some debts are not discharged under the law. Therefore, you may still be responsible to pay:

- most taxes;
- most student loans;
- domestic support and property settlement obligations;
- most fines, penalties, forfeitures, and criminal restitution obligations; and
- certain debts that are not properly listed in your bankruptcy papers.

You may also be required to pay debts arising from:

- fraud or theft;
- breach of fiduciary duty;
- intentional injuries that you inflicted; and
- death or personal injury caused by operating a motor vehicle, vessel, or aircraft while intoxicated from alcohol or drugs.

If your debts are primarily consumer debts, the court can dismiss your chapter 7 case if it finds that you have income to repay creditors a certain amount. You must file *Chapter 7 Statement of Your Current Monthly Income* (Official Form 108–1) if you are an individual filing for bankruptcy under chapter 7. This form will determine your current monthly income and compare whether your income is more than the median income that applies in your state.

If your income is not above the median for your state, you will not have to fill out the second form *Chapter 7 Means Test Calculation* (Official Form 108–2).

If your income is above the median for your state, you must file that form. The calculations on the form—sometimes called the *Means Test*—deduct from your income living expenses and payments on certain debts to determine any amount available to pay unsecured creditors. If your income is more than the median income for your state of residence and family size, depending on the results of the *Means Test*, the U.S. trustee, bankruptcy administrator, or creditors can file a motion to dismiss your case under § 707(b) of the Bankruptcy Code. If a motion is filed, the court will decide if your case should be dismissed. To avoid dismissal, you may choose to proceed under another chapter of the Bankruptcy Code.

If you are an individual filing for bankruptcy, the law may allow you to keep some property, or it may entitle you to part of the proceeds if the property is sold after your case is filed. Property that the law permits you to keep is called *exempt property*. For example, exemptions may enable you to keep your home, a car, clothing, and household items.

Exemptions are not automatic. To be considered exempt, you must list the property on *Schedule C: The Property You Claim as Exempt* (Official Form 106C). If you do not list the property, the trustee may sell it and pay all of the proceeds to your creditors.

Chapter 11: Reorganization

	$1,167	filing fee
+	$46	administrative fee
	$1,213	total fee

Chapter 11 is for reorganizing a business but is also available to individuals. The provisions of chapter 11 are too complicated to summarize briefly.

Chapter 12: Repayment plan for family farmers or fishermen

	$200	filing fee
+	$46	administrative fee
	$246	total fee

Similar to chapter 13, chapter 12 permits family farmers and fishermen to repay their debts over a period of time using future earnings.

Chapter 13: Repayment plan for individuals with regular income

	$235	filing fee
+	$46	administrative fee
	$281	total fee

Chapter 13 is for individuals who have regular income and would like to pay all or part of their debts in installments over a period of time. You are only eligible for chapter 13 if your debts are not more than certain dollar amounts set in 11 U.S.C. § 109.

Under chapter 13, you must file with the court a plan to repay your creditors all or part of the money that you owe them, using your future earnings. The court must approve your plan and may allow you to repay your debts within 3 years or 5 years, depending on your income and other factors.

After you make the payments under your plan, your debts are generally discharged. However, you may still be responsible to pay:

- domestic support obligations,
- most student loans,
- certain taxes,
- most criminal fines and restitution obligations,
- certain debts that are not properly listed in your bankruptcy papers,
- certain debts for acts that caused death or personal injury, and
- certain long-term secured obligations.

Bankruptcy crimes have serious consequences

- If you knowingly and fraudulently conceal assets or make a false oath or statement under penalty of perjury—either orally or in writing—in connection with a bankruptcy case, you may be fined, imprisoned, or both.
- All information you supply in connection with a bankruptcy case is subject to examination by the Attorney General acting through the Office of the U.S. Trustee, the Office of the U.S. Attorney, and other offices and employees of the U.S. Department of Justice.

Warning: File Your Forms on Time

Section 521(a)(1) of the Bankruptcy Code requires that you promptly file detailed information about your creditors, assets, liabilities, income, expenses and general financial condition. The court may dismiss your bankruptcy case if you do not file this information within the deadlines set by the Bankruptcy Code, the Bankruptcy Rules, and the local rules of the court.

For more information about the documents and their deadlines, go to: http://www.uscourts.gov/bkforms/bankruptcy_forms.html#procedure.

Make sure the court has your mailing address

The bankruptcy court sends notices to the mailing address you list on *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101). To ensure that you receive information about your case, Bankruptcy Rule 4002 requires that you notify the court of any changes in your address.

A married couple may file a bankruptcy case together—called a *joint case*. If you file a joint case and each spouse lists the same mailing address on the bankruptcy petition, the bankruptcy court generally will mail you and your spouse one copy of each notice, unless you file a statement with the court asking that each spouse receive separate copies.

Understand which services you could receive from credit counseling agencies

The law generally requires that you receive a credit counseling briefing from an approved credit counseling agency. 11 U.S.C. § 109(h). With limited exceptions, you must receive it within the 180 days ***before*** you file your bankruptcy petition. This briefing is usually conducted by telephone or on the Internet.

The clerk of the bankruptcy court has a list of approved agencies. If you are filing a joint case, both spouses must receive the briefing.

In addition, after filing a bankruptcy case, you generally must complete a financial management instructional course before you can receive a discharge. The clerk also has a list of approved financial management instructional courses. If you are filing a joint case, both spouses must complete the course.

Read This Warning

Because bankruptcy can have serious long-term financial and legal consequences, including loss of your property, you should hire an attorney and carefully consider all of your options before you file. An attorney can explain to you what can happen as a result of filing for bankruptcy and what your options are. If you do file for bankruptcy, an attorney can help you fill out the forms properly and protect you, your family, your home, and your possessions. Bankruptcy petition preparers can only help you type the forms required; they cannot give you legal advice of any kind.

Although the law allows you to represent yourself in bankruptcy court, you should understand that many people find it extremely difficult to represent themselves successfully. The rules are very technical, and a misstep or inaction may affect your rights. If you file without an attorney, you are still responsible for knowing and following all of the legal requirements.

You may not file bankruptcy if you are not eligible to file or if you do not intend to file the documents necessary to complete the bankruptcy.

Bankruptcy fraud is a serious crime; you could be fined and imprisoned if you commit fraud in your bankruptcy case. If you make a false statement, you could be fined up to $250,000 or imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

Instructions for Selected Forms

Schedule A/B: Property (Official Form 106A/B)

Schedule A/B: Property (Official Form 106A/B) lists property interests that are involved in a bankruptcy case. All individuals filing for bankruptcy must honestly list everything they own or have a legal or equitable interest in. *Legal or equitable interest* is a broad term and includes all kinds of property interests in both tangible and intangible property, whether or not anyone else has an interest in that property.

The information in this form is grouped by category and includes several examples for many items. Note that those examples are meant to give you an idea of what to include in the categories. They are not intended to be complete lists of everything within that category. Make sure you list everything you own or have an interest in.

You must verify under penalty of perjury that the information you provide is complete and accurate. If you fail to list any property, you may lose the property, lose your bankruptcy discharge, be fined up to $250,000, and be imprisoned for up to 5 years. 11 U.S.C. §§ 554, 727; 18 U.S.C. §§ 152, 157, 3559, 3571, and 3581.

Understand the terms used in this form

Community property — Type of property ownership available in certain states for property owned by spouses and, in some instances, legal equivalents of spouses. Community property states and territories include Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington, and Wisconsin.

Current value — In this form, report the *current value* of the property that you own in each category. *Current value* is sometimes called *fair market value* and, for this form, is the fair market value as of the date of the filing of the petition. *Current value* is how much the property is worth, which may be more or less than when you purchased the property. *Property you own* includes property you have purchased, even if you owe money on it, such as a home with a mortgage or an automobile with a lien.

Report the current value of the portion you own

For each question, report the current value of the portion of the property that you own. To do this, you would usually determine the current value of the entire property and the percentage of the property that you own. Multiply the current value of the property by the percentage that you own. Report the result where the form asks for *Current value of the portion you own*. For example:

- If you own a house by yourself, you own 100% of that house. Report the entire current value of the house.
- If you and a sister own the house equally, report 50% of the value of the house (or half of the value of the house).

In certain categories, current value may be difficult to figure out. When you cannot find the value from a reputable source (such as a pricing guide for your car), estimate the value and be prepared to explain how you determined it.

List items once on this form

List items only once on this form; do not list them in more than one category. List all real estate in Part 1 and other property in the other parts of the form.

Where you list similar items of minimal value (such as clothing), add the value of the items and report a total.

Be specific when you describe each item. If you have an item that you think could fit into more than one category, select the most suitable category and list the item there.

Separately describe and list individual items worth more than $500.

Match the values to the other schedules

Make sure that the values you report on this form match the values you report on *Schedule D: Creditors Who Hold Claims Secured by Your Property* (Official Form 106D) and *Schedule C: The Property You Claim as Exempt* (Official Form 106C).

On this form, do not list any interests you may have in executory contracts (for example, an unexpired lease for your apartment, a contract for improvements or repairs for your home, a real estate listing agreement, or a lease for your car). List those contracts or leases on *Schedule G: Executory Contracts and Unexpired Leases* (Official Form 106G).

Schedule C: The Property You Claim as Exempt
(Official Form 106C)

How exemptions work

If you are an individual filing for bankruptcy, the law may allow you to keep some property, or it may entitle you to part of the proceeds if the property is sold after your case is filed. Property that the law permits you to keep is called *exempt* property. For example, exemptions may enable you to keep your home, a car, clothing, and household items.

Exemptions are not automatic. To be considered exempt, you must list the property on *Schedule C: The Property You Claim as Exempt* (Official Form 106C). If you do not list the property, the trustee may sell it and pay all of the proceeds to your creditors.

You may unnecessarily lose property if you do not claim exemptions to which you are entitled. You are strongly encouraged to hire a qualified attorney to advise you.

Determine which set of exemptions you will use

Before you fill out this form, you must learn which set of exemptions you can use. In general, exemptions are determined on a state-by-state basis. Some states permit you to use the exemptions provided by the Bankruptcy Code. 11 U.S.C. § 522.

The Bankruptcy Code provides that you use the exemptions in the law of the state where you had your legal home for 730 days before you file for bankruptcy. Special rules may apply if you did not have the same home state for 730 days before you file.

You may lose property if you do not use the best set of exemptions for your situation.

If your spouse is filing with you and you are filing in a state in which you may choose between state and federal sets of bankruptcy exemptions, you both must use the same set of exemptions.

Claiming exemptions

Using the property and values that you listed on *Schedule A/B: Property* (Official Form 106A/B) as your source, list on this form the property that you claim as exempt.

Listing the amount of each exemption

For each item of property you claim as exempt, you must specify the amount of the exemption you claim. Usually, a specific dollar amount is claimed as exempt, but in some circumstances, the amount of the exemption claimed might be indicated as 100% of fair market value. For example, a debtor might claim 100% of fair market value for an exemption that is unlimited in dollar amount, such as some exemptions for health aids.

Listing which laws apply

In the last column of the form, you must identify the laws that allow you to claim the property as exempt. If you have questions about exemptions, consult a qualified attorney.

Schedule D: Creditors Who Hold Claims Secured by Property (Official Form 106D)

The people or organizations to whom you owe money are called your *creditors*. A *claim* is a creditor's right to payment. When you file for bankruptcy, the court needs to know who all your creditors are and what types of claims they have against you.

Typically in bankruptcy cases, there are more debts than assets to pay those debts. The court must know as much as possible about your creditors to make sure that their claims are properly treated according to the rules.

Creditors may have different types of claims:

- **Secured claims**. Report these on *Schedule D: Creditors Who Hold Claims Secured by Property* (Official Form 106D).
- **Unsecured claims**. Report these on *Schedule E/F: Creditors Who Have Unsecured Claims* (Official Form 106E/F).

If your debts are not paid, creditors with secured claims may be able to get paid from specific property in which that creditor has an interest, such as a mortgage or a lien. That property is sometimes called *collateral* for your debt and could include items such as your house, your car, or your furniture. Creditors with unsecured claims do not have rights against specific property.

Many claims have a specific amount, and you clearly owe them. However, some claims are uncertain when you file for bankruptcy, or they become due only after you file. You must list all claims in your schedules, even if the claims are contingent, unliquidated, or disputed.

Claims may be contingent, unliquidated, or disputed

Claims may be:

- Contingent claims,
- Unliquidated claims, or
- Disputed claims.

A claim is *contingent* if you are not obligated to pay it unless a particular event occurs after you file for bankruptcy. You owe a contingent claim, for example, if you cosigned someone else's loan. You may not have to pay unless that person later fails to repay the loan.

A claim is *unliquidated* if the amount of the debt cannot be readily determined, such as by referring to an agreement or by a simple computation. An unliquidated claim is one for which there may be a definite liability but where the value has not been set. For instance, if you were involved in a car accident, the victim may have an unliquidated claim against you because the amount of damages has not been set.

A claim is *disputed* if you disagree about whether you owe the debt. For instance, your claim is disputed if a bill collector demands payment for a bill you believe you already fully paid.

A single claim can have one, more than one, or none of these characteristics.

On *Schedule D: Creditors Who Hold Claims Secured by Property* (Official Form 106D), list all creditors who have a claim that is secured by your property.

Do not leave out any secured creditors

In alphabetical order, list anyone who has judgment liens, garnishments, statutory liens, mortgages, deeds of trust, and other security interests against your property. When listing creditors who hold secured claims, be sure to include all of them. For example, include the following:

- Your relatives or friends who hold a lien or security interest in your property;
- Car or truck lenders, stores, banks, credit unions, and others who made loans to enable you to finance the purchase of property and who have a lien against that property;
- Anyone who holds a mortgage or deed of trust on real estate that you own;
- Contractors or mechanics who have liens on property you own because they did work on the property and were not paid;
- Someone who won a lawsuit against you and has a judgment lien;
- Another parent or a government agency that has a lien for unpaid child support;
- Doctors or attorneys who have liens on the outcome of a lawsuit;
- Federal, state, or local government agencies such as the IRS that have tax liens against property for unpaid taxes; and
- Anyone who is trying to collect a secured debt from you, such as collection agencies and attorneys.

List the debt in Part 1 only once and list any others that should be notified about that debt in Part 2. For example, if a collection agency is trying to collect from you for a debt you owe to someone else, list the person to whom you owe the debt in Part 1, and list the collection agency in Part 2. If you are not sure who the creditor is, list the person you are paying in Part 1 and list anyone else who has contacted you about this debt in Part 2.

If a creditor's full claim is more than the value of your property securing that claim—for instance, a car loan in an amount greater than the value of the car—the creditor's claim may be partly secured and partly unsecured. In that situation, list the claim only once on *Schedule D: Creditors Who Have Claims Secured by Property* (Official Form 106D). Do not repeat it on *Schedule E/F: Creditors Who Hold Unsecured Claims* (Official Form 106E/F). List a creditor in *Schedule D* even if it appears that there is no value to support that creditor's secured claim.

Determine the unsecured portion of secured claims

To determine the amount of a secured claim, compare the amount of the claim to the value of your portion of the property that supports the claim. If that value is greater than the amount of the claim, then the entire amount of the claim is secured. But if that value is less than the amount of the claim, the difference is an *unsecured portion*. For example, if the outstanding balance of a car loan is $10,000 and the car is worth $8,000, the car loan has a $2,000 unsecured portion.

If there is more than one secured claim against the same property, the claim that is entitled to be paid first must be subtracted from the property value to determine how much value remains for the next claim. For example, if a home worth $300,000 has a first mortgage of $200,000 and a second mortgage of $150,000, the first mortgage would be fully secured, and there would be $100,000 of property value for the second mortgage, which would have an unsecured portion of $50,000.

	$300,000	value of a home
-	$200,000	first mortgage
	$100,000	remaining property value
	$150,000	second mortgage
-	$100,000	remaining property value
	$ 50,000	unsecured portion of second mortgage

Schedule E/F: Creditors Who Have Unsecured Claims (Official Form 106E/F)

The people or organizations to whom you owe money are called your *creditors*. A *claim* is a creditor's right to payment. When you file for bankruptcy, the court needs to know who all your creditors are and what types of claims they have against you.

Typically in bankruptcy cases, there are more debts than assets to pay those debts. The court must know as much as possible about your creditors to make sure that their claims are properly treated according to the rules.

Use *Schedule E/F: Creditors Who Have Unsecured Claims* (Official Form 106E/F) to identify everyone who holds an unsecured claim against you when you file your bankruptcy petition, unless you have already listed them on *Schedule D: Creditors Who Hold Claims Secured by Your Property* (Official Form 106D).

Creditors may have different types of claims:

- **Secured claims**. Report these on *Schedule D: Creditors Who Hold Claims Secured by Property* (Official Form 106D).
- **Unsecured claims**. Report these on *Schedule E/F: Creditors Who Have Unsecured Claims* (Official Form 106E/F).

If your debts are not paid, creditors with secured claims may be able to get paid from specific property in which that creditor has an interest, such as a mortgage or a lien. That property is sometimes called *collateral* for your debt and could include items such as your house, your car, or your furniture. Creditors with unsecured claims do not have rights against specific property.

Many claims have a specific amount, and you clearly owe them. However, some claims are uncertain when you file for bankruptcy, or they become due only after you file. You must list all claims in your schedules, even if the claims are contingent, unliquidated, or disputed.

Claims may be contingent, unliquidated, or disputed

Claims may be:

- Contingent claims,
- Unliquidated claims, or
- Disputed claims.

A claim is *contingent* if you are not obligated to pay it unless a particular event occurs after you file for bankruptcy. You owe a contingent claim, for example, if you cosigned someone else's loan. You may not have to pay unless that person later fails to repay the loan.

A claim is *unliquidated* if the amount of the debt cannot be readily determined, such as by referring to an agreement or by a simple computation. An unliquidated claim is one for which there may be a definite liability but where the value has not been set. For instance, if you were involved in a car accident, the victim may have an unliquidated claim against you because the amount of damages has not been set.

A claim is *disputed* if you disagree about whether you owe the debt. For instance, your claim is disputed if a bill collector demands payment for a bill you believe you already fully paid.

A single claim can have one, more than one, or none of these characteristics.

Creditors with unsecured claims do not have liens on or other security interests in your property. Secured creditors have a right to take property if you do not pay them. Common examples are lenders for your car, your home, or your furniture.

Do not leave out any unsecured creditors

List all unsecured creditors in each part of the form in alphabetical order. Even if you plan to pay a creditor, you must list that creditor. When listing creditors who hold unsecured claims, be sure to include all of them. For instance, include the following:

- Your relatives or friends to whom you owe money;
- Your ex-spouse, if you are still obligated under a divorce decree or settlement agreement to pay joint debts;
- A credit card company, even if you intend to fully pay your credit card bill;
- A lender, even if the loan is cosigned;
- Anyone who holds a loan or promissory note that you cosigned for someone else;
- Anyone who has sued or may sue you because of an accident, dispute, or similar event that has occurred; or
- Anyone who is trying to collect a debt from you such as a bill collector or attorney.

Unsecured claims could be priority or nonpriority claims

What are priority unsecured claims?

In bankruptcy cases, *priority unsecured claims* are those debts that the Bankruptcy Code requires to be paid before most other unsecured claims are paid. The most common priority unsecured claims are certain income tax debts and past due alimony or child support. Priority unsecured claims include those you owe for:

- **Domestic support obligations**—If you owe domestic support to a spouse or former spouse; a child or the parent, legal guardian, or responsible relative of a child; or a governmental unit to whom such a domestic support claim has been assigned.
  11 U.S.C. § 507(a)(1).

- **Taxes and certain other debts you owe the government**—If you owe certain federal, state, or local government taxes, customs duties, or penalties.
  11 U.S.C. § 507(a)(8).

- **Claims for death or personal injury that you caused while you were intoxicated—**If you have a claim against you for death or personal injury that resulted from your unlawfully operating a motor vehicle or vessel while you were unlawfully intoxicated from alcohol, drugs, or another substance. This priority does not apply to claims for property damage.
  11 U.S.C. § 507(a)(10).

- **Other:**

  - **Deposits by individuals**—If you took money from someone who planned to purchase, lease, or rent your property or use your services but you never delivered or performed. For the debt to have priority, the property or services must have been intended for personal, family, or household use (only the first $2,775* per person is a priority debt). 11 U.S.C. § 507(a)(7).

  - **Wages, salaries, and commissions**—If you owe wages, salaries, and commissions, including vacation, severance, and sick leave pay and those amounts were earned within 180 days before you open your bankruptcy case or ceased business. In either instance, only the first $12,475* per claim is a priority debt. 11 U.S.C. § 507(a)(4).

  - **Contributions to employee benefit plans**—If you owe contributions to an employee benefit plan for services an employee rendered within 180 days before you file your bankruptcy petition, or within 180 days before your business ends. Count only the first $12,475* per employee, less any amounts owed for wages, salaries, and commissions. 11 U.S.C. § 507(a)(5).

  - **Certain claims of farmers and fishermen—**Only the first $6,150* per farmer or fisherman is a priority debt. 11 U.S.C. § 507(a)(6).

  * Subject to adjustment on 4/01/16, and every 3 years after that for cases begun on or after the date of adjustment.

What are nonpriority unsecured claims?

Nonpriority unsecured claims are those debts that generally will be paid after priority unsecured claims are paid. The most common examples of nonpriority unsecured claims are credit card bills, medical bills, and educational loans.

What if a claim has both priority and nonpriority amounts?

If a claim has both priority and nonpriority amounts, list that claim in Part 2 and show both priority and nonpriority amounts. Do not list it again in Part 3.

In Part 3, list all of the creditors you have not listed before. You must list every creditor that you owe, regardless of the amount you owe and even if you plan to pay a particular debt. If you do not list a debt, it may not be discharged.

What is needed for statistical purposes?

For statistical reasons, the court must collect information about some specific categories of unsecured claims.

The categories for priority unsecured claims are:

- **Domestic support obligations**
- **Taxes and certain other debts you owe the government**
- **Claims for death or personal injury that you caused while you were intoxicated**

The categories for nonpriority unsecured claims are:

- **Student loans—**If you owe money for any loans that you used to pay for your education;
- **Obligations arising out of a separation agreement or divorce that you did not report as priority claims—**If you owe debts for separation or divorce agreements or for domestic support and you did not report those debts in Part 2; and
- **Debts to pension or profit-sharing plans and other similar debts**—If you owe money to a pension or profit-sharing plan.

Schedule G: Executory Contracts and Unexpired Leases (Official Form 106G)

Use *Schedule G: Executory Contracts and Unexpired Leases* (Official Form 106G) to identify your ongoing leases and certain contracts. List all of your executory contracts and unexpired leases.

Executory contracts are contracts between you and someone else in which neither you nor the other party has performed all of the requirements by the time you file for bankruptcy. *Unexpired leases* are leases that are still in effect; the lease period has not yet ended.

You must list all agreements that may be executory contracts or unexpired leases, even if they are listed on *Schedule A/B: Property* (Official Form 106A/B), including the following:

- Residential leases (for example, a rental agreement for a place where you live or vacation, even if it is only a verbal or month-to-month arrangement);
- Service provider agreements (for example, contracts for cell phones and personal electronic devices);
- Internet and cable contracts;
- Vehicle leases;
- Supplier or service contracts (for example, contracts for lawn care or home alarm or security systems);
- Timeshare contracts or leases;
- Rent-to-own contracts;
- Employment contracts;
- Real estate listing agreements;
- Contracts to sell a residence, building, land, or other real property;
- Equipment leases;
- Leases for business or investment property;
- Supplier and service contracts for your business;
- Copyright and patent license agreements; and
- Development contracts.

Schedule H: Your Codebtors (Official Form 106H)

If you have any debts that someone else may also be responsible for paying, these people or entities are called *codebtors*. Use *Schedule H: Your Codebtors* (Official Form 106H) to list any codebtors who are responsible for any debts you have listed on the other schedules.

To help fill out this form, use both *Schedule D: Creditors Who Hold Claims Secured by Property* (Official Form 106D) and *Schedule E/F: Creditors Who Have Unsecured Claims* (Official Form 106E/F).

List all of your codebtors and the creditors to whom you owe the debt. For example, if someone cosigned for the car loan that you owe, you must list that person on this form.

If you are filing a joint case, do not list either spouse as a codebtor.

Other codebtors could include the following:

- Cosigner;
- Guarantor;
- Former spouse;
- Unmarried partner;
- Joint contractor; or
- Nonfiling spouse—even if not the spouse a cosigner—where the debt is for necessities (such as food or medical care) if state law makes the nonfiling spouse legally responsible for debts for necessities.

Schedule I: Your Income (Official Form 106I)

In *Schedule I: Your Income* (Official Form 106I), you will give the details about your employment and monthly income as of the date you file this form. If you are married and your spouse is living with you, include information about your spouse even if your spouse is not filing with you. If you are separated and your spouse is not filing with you, do not include information about your spouse.

How to report employment and income

If you have nothing to report for a line, write $0.

In Part 1, line 1, fill in employment information for you and, if appropriate, for a non-filing spouse. If either person has more than one employer, attach a separate page with information about the additional employment.

In Part 2, give details about the monthly income you currently expect to receive. Show all totals as monthly payments, even if income is not received in monthly payments.

If your income is received in another time period, such as daily, weekly, quarterly, annually, or irregularly, calculate how much income would be by month, as described below.

If either you or a non-filing spouse has more than one employer, calculate the monthly amount for each employer separately, and then combine the income information for all employers for that person on lines 2-7.

One easy way to calculate how much income per month is to total the payments earned in a year, then divide by 12 to get a monthly figure. For example, if you are paid seasonally, you would simply divide the amount you expect to earn in a year by 12 to get the monthly amount

Below are other examples of how to calculate monthly amount.

Example for weekly payments:

If you are paid $1,000 every week, figure your monthly income in this way:

	$1,000	income every week
X	52	number of pay periods in the year
	$52,000	total income for the year

$52,000 (*income for year*) / 12 (number of months in year) = $4,333 monthly income

Example for bi-weekly payments:

If you are paid $2,500 every other week, figure your monthly income in this way:

	$2,500	income every other week
X	26	number of pay periods in the year
	$65,000	total income for the year

$65,000 (income for year) / 12 (number of months in year) = $5,417 monthly income

Example for daily payments:

If you are paid $75 a day and you work about 8 days a month, figure your monthly income in this way:

	$75	income a day
X	96	days a year
	$7,200	total income for the year

$7,200 (income for year) / 12 (number of months in year) = $600 monthly income

or this way:

	$75	income a day
X	8	payments a month
	$600	income for the month

Example for quarterly payments:

If you are paid $15,000 every quarter, figure your monthly income in this way:

	$15,000	income every quarter
X	4	pay periods in the year
	$60,000	total income for the year

$60,000 (income for year) / 12 = $5,000 (number of months in year) monthly income

Example for irregular payments:

If you are paid $4,000 8 times a year, figure your monthly income in this way:

	$4,000	income a payment
X	8	payments a year
	$32,000	income for the year

$32,000 (income for year) / 12 (number of months in year) = $2,667 monthly income

In Part 2, line 11, fill in amounts that other people provide to pay the expenses you list on Schedule J: Your Expenses. For example, if you and a person to whom you are not married pay all household expenses together and you list all your joint household expenses on Schedule J, you must list the amounts that person contributes monthly to pay the household expenses on line 11. If you have a roommate and you divide the rent and utilities, do not list the amounts your roommate pays on line 11 if you have listed only your share of those expenses on Schedule J. Do not list on line 11 contributions that you already disclosed elsewhere on the form.

Note that the income you report on *Schedule I* may be different from the income you report on other bankruptcy forms. For example, the *Chapter 7 Statement of Your Current Monthly Income* (Official Form 108-1), *Chapter 11 Statement of Your Current Monthly Income* (Official Form 109), and the *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period* (Official Form 110-1) all use a different definition of income and apply that definition to a different period of time. *Schedule I* asks about the income that you are now receiving, while the other forms ask about income you received in the applicable time period before filing. So the amount of income reported in any of those forms may be different from the amount reported here.

If, after filing Schedule I, you need to file an estimate of income in a chapter 13 case for a date after your bankruptcy, you may complete a supplemental Schedule I. To do so you must check the “supplement” box at the top of the form and fill in the date.

Schedule J: Your Expenses (Official Form 106J)

Schedule J: Your Expenses (Official Form 106J) provides an estimate the monthly expenses, as of the date you file for bankruptcy, for you, your dependents, and the other people in your household whose income is included on *Schedule I: Your Income* (Official Form 106I). On your initial filing in Part 2 select "Initial estimate at the beginning of the case".

If you are married and are filing individually, include your non-filing spouse's expenses unless you are separated.

If you are filing jointly and Debtor 1 and Debtor 2 keep separate households, fill out a separate *Schedule J* for each debtor. Check the box at the top of page 1 of the form for Debtor 2 to show that a separate form is being filed.

Do not include expenses that other members of your household pay directly from their income if you did not include that income on *Schedule I*. For example, if you have a roommate and you divide the rent and utilities and you have not listed your roommate's contribution to household expenses in line 11 of *Schedule I*, you would list only your share of these expenses on *Schedule J*.

Show all totals as monthly payments. If you have weekly, quarterly, or annual payments, calculate how much you would spend on those items every month.

Do not list as expenses any payments on credit card debts incurred before filing bankruptcy.

Do not include business expenses on this form. You have already accounted for those expenses as part of determining net business income on *Schedule I*.

On line 20, do not include expenses for your residence or for any rental or business property. You have already listed expenses for your residence on lines 4 and 5 of this form. You listed the expenses for your rental and business property as part of the process of determining your net income from that property on *Schedule I* (line 8a).

If you have nothing to report for a line, write $0.

If, after filing *Schedule J*, you need to file an estimate of expenses in a chapter 13 case for a date after your bankruptcy, you may complete a supplemental *Schedule J*. To do so you must check the "supplement" box at the top of the form and fill in the date.

Summary of Your Assets and Liabilities and Certain Statistical Information (Official Form 106Sum)

When you file for bankruptcy, you must summarize certain information from the following forms:

- *Schedule A/B: Property* (Official Form 106A/B)
- *Schedule D: Creditors Who Have Claims Secured by Property* (Official Form 106D)
- *Schedule E/F: Creditors Who Hold Unsecured Claims* (Official Form 106E/F)
- *Schedule I: Your Income* (Official Form 106I)
- *Schedule J: Your Expenses* (Official Form 106J)
- *Chapter 7 Statement of Your Current Monthly Income* (Official Form 108-1), *Chapter 11 Statement of Your Current Monthly Income* (Official Form 109), or *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period* (Official Form 110-1)

After you fill out all of the forms, complete *Summary of Your Assets and Liabilities and Certain Statistical Information* (Official Form 106Sum) to report the totals of certain information that you listed in the forms.

If you are filing an amended version of any of these forms at some time after you file your original forms, you must fill out a new *Summary* to ensure that your information is up to date and you must check the box at the top.

Statement of Financial Affairs for Individuals Filing for Bankruptcy (Official Form 107)

Your Statement of Financial Affairs for Individuals Filing for Bankruptcy, provides a summary of your financial history over certain periods of time before you file for bankruptcy. If you are an individual in a bankruptcy case, you must fill out this statement.
11 U.S.C. § 521(a) and Bankruptcy Rule 1007(b)(1).

If you are married and your spouse is not filing this case with you, you need only provide information on this form about your spouse if you are filing under chapter 12 or chapter 13 and are not separated from your spouse.

If you are in business as a sole proprietor, partner, family farmer, or self-employed professional, you must provide the information about all of your business and personal financial activities.

Although this statement may ask you questions that are similar to some questions on the schedules, you must fill out all of the forms completely to protect your legal rights.

Understand the terms used in this form

Legal equivalent of a spouse — A person whom applicable nonfederal law recognizes as having a relationship with the debtor that grants legal rights and responsibilities equivalent, in whole or in part, to those granted to a spouse.

Chapter 7 Statement of Your Current Monthly Income and Means Test Calculation (Official Forms 108–1 and 108–2)

If you are filing under chapter 11, 12, or 13, do not fill out this form.

Official Forms 108–1 and 108–2 determine whether your income and expenses create a presumption of abuse that may prevent you from obtaining relief from your debts under chapter 7 of the Bankruptcy Code. Chapter 7 relief can be denied to a person who has primarily consumer debts if the court finds that the person has enough income to repay creditors a portion of their claims according to a formula set out in the Bankruptcy Code.

You must file Official Form 108–1, the *Chapter 7 Statement of Your Current Monthly Income* if you are an individual filing for bankruptcy under chapter 7. This form will determine your current monthly income and compare whether your income is more than the median income for households of the same size in your state. If your income is not above the median, there is no presumption of abuse and you will not have to fill out the second form.

If your income is above the median, you must file the second form, Official Form 108 –2, *Chapter 7 Means Test Calculation*. The calculations on this form—sometimes called the *Means Test*—reduce your income by living expenses and payment of certain debts, resulting in an amount available to pay other debts. If this amount is high enough, it will give rise to a *presumption of abuse*. A presumption of abuse does not mean you are actually trying to abuse the bankruptcy system. Rather, the presumption simply means that you are presumed to have enough income that you should not be granted relief under chapter 7. You may overcome the presumption by showing special circumstances that reduce your income or increase your expenses.

If you cannot obtain relief under chapter 7, you may be eligible to continue under another chapter of the Bankruptcy Code and pay creditors over a period of time.

Read each question carefully. You may not be required to answer every question on this form. For example, your military status may determine whether you must fill out the entire form. The instructions will alert you if you may skip questions.

If you have nothing to report for a line, write $0.

Some of the questions require you to go to other sources for information. In those cases, the form has instructions for where to find the information you need.

If you and your spouse are filing together, you and your spouse may file a single statement. However, if an exclusion in Parts 1 or 2 applies to either of you, separate statements may be required. 11 U.S.C. § 707(b)(2)(C).

Chapter 11 Statement of Your Current Monthly Income (Official Form 109)

If you are filing under chapter 7, 12, or 13, do not fill out this form.

You must file the *Chapter 11 Statement of Your Current Monthly Income* (Official Form 109) if you are an individual filing for bankruptcy under chapter 11.

If you have nothing to report for a line, write $0.

Chapter 13 Statement of Your Current Monthly Income, Calculation of Commitment Period and Chapter 13 Calculation of Your Disposable Income
(Official Forms 110–1 and 110–2)

If you are filing under chapter 7, 11, or 12, do not fill out this form.

Official Forms 110─1 and 110─2 determine the commitment period for your payments to creditors, how the amount you may be required to pay to creditors is established, and, in some situations, how much you must pay.

You must file 110─1, the *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period* (Official Form 110─1) if you are an individual and you are filing under chapter 13. This form will report your current monthly income and determine whether your income is at or below the median income for households of the same size in your state. If your income is equal to or less than the median, you will not have to fill out the second form. Form 110-1 also will determine your applicable commitment period─the time period for making payments to your creditors.

If your income is above the median, you must file the second form, 110─2, *Chapter13 Calculation of Your Disposable Income*. The calculations on this form—sometimes called the *Means Test*—reduce your income by living expenses and payment of certain debts, resulting in an amount available to pay unsecured debts. Your chapter 13 plan may be required to provide for payment of this amount toward unsecured debts.

Read each question carefully. You may not be required to answer every question on this form. The instructions will alert you if you may skip questions.

Some of the questions require you to go to other sources for information. In those cases, the form has instructions for where to find the information you need.

Generally, if you and your spouse are filing together, you should file one statement together.

Statement of Intention for Individuals Filing Under Chapter 7 (Official Form 112)

If you are filing under chapter 11, 12, or 13, do not fill out this form.

You must fill out the *Statement of Intention for Individuals Filing Under Chapter 7* (Official Form 112) if you are an individual filing under chapter 7 or if your case has been converted to chapter 7 and creditors have claims secured by your property or you have any unexpired leases of personal property. The Bankruptcy Code requires you to state your intentions about such claims and provides for early termination of the automatic stay as to personal property if the statement is not timely filed. The same early termination of the automatic stay applies to any unexpired lease of personal property unless you state that you intend to assume the unexpired lease if the trustee does not do so.

To help fill out this form, use the information you have already provided on the following forms:

- *Schedule D: Creditors Who Hold Claims Secured by Property* (Official Form 106D),
- *Schedule C: The Property You Claim as Exempt* (Official Form 106C), and
- *Schedule G: Executory Contracts and Unexpired Leases* (Official Form 106G).

Explain what you intend to do with your property that is collateral for a claim

If you have property that is collateral (or security) for a claim, you must state what you intend to do with that property.

You may choose to either give the property to the creditor, or keep the property. Below is more information about each of these options.

You may give the property to the creditor. If you give the property to the creditor (*you surrender the property*), your bankruptcy discharge will protect you from any claim for a deficiency if the property is worth less than what you owe the creditor, unless the court determines that the debt is non-dischargeable.

You may want to keep the property. If you want to keep your secured personal property, you may be able to reaffirm the debt, redeem the property, or take other action (for example, avoid a lien using 11 U.S.C. 522(f)).

- **You may be able to reaffirm the debt.** You may decide to remain legally obligated to pay a debt so that you can keep the property securing the debt. This is called *reaffirming a debt*. You may reaffirm the debt in full on its original terms or you and the creditor may agree to change the terms. For example, if you want to keep your car, you may reaffirm a car loan, stating that you will continue to make monthly payments for it. **Only reaffirm those debts that you are confident you can repay.** You may seek to reaffirm the debt if you sign a *Reaffirmation Agreement*, which is a contract between you and a creditor and you follow the proper

procedure for the *Reaffirmation Agreement.* 11 U.S.C. § 524. The procedure is explained in greater detail in the Disclosures that are part of the reaffirmation documents.

- **You may be able to redeem your property.** 11 U.S.C. § 722. You can redeem property only if all of the following apply:
  - The property secures a debt that is a *consumer debt* ─ you incurred the debt primarily for personal, family, or household use.
  - The property is *tangible personal property* ─ the property is physical, such as furniture, appliances, and cars.
  - You are either claiming the property as exempt or the trustee has abandoned it.

  To obtain court authorization to redeem your property, you must file a motion to redeem. If the court grants your motion, you pay the creditor the value of the property or the amount of the claim, whichever is less. The payment will be a single lump-sum payment.

Explain what you intend to do with your leased personal property

If you lease personal property such as your car, you may be able to continue your lease if the trustee does not assume the lease. To continue your lease, you can write to the lessor that you want to assume your lease. The creditor may respond by telling you whether it agrees that you may assume the lease and may require you to pay any past-due amounts before you can do so. If the lessor agrees to your request to assume the lease, you must write to the lessor within 30 days stating that you assume the lease.
11 U.S.C. § 365(p)(2).

File the *Statement of Intention* before the deadline

You must file this form either within 30 days after you file your bankruptcy petition or by the date set for the meeting of creditors, whichever is earlier. You must also deliver copies of this statement to the creditors and lessors you listed on the form. Bankruptcy Rule 1007(b)(2).

If two married people are filing together in a joint case, both are equally responsible for supplying correct information. Both debtors must sign and date the form.

Application for Individuals to Pay the Filing Fee in Installments (Official Form 103A)

If you cannot afford to pay the full filing fee when you first file for bankruptcy, you may pay the fee in installments. However, in most cases, you must pay the entire fee within 120 days after you file, and the court must approve your payment timetable. Your debts will not be discharged until you pay your entire fee.

Do not file this form if you can afford to pay your full fee when you file.

If you are filing under chapter 7 and cannot afford to pay the full filing fee at all, you may be qualified to ask the court to waive your filing fee.

See *Application to Have Your Chapter 7 Filing Fee Waived* (Official Form 103B).

If a bankruptcy petition preparer helped you complete this form, make sure that person fills out the *Bankruptcy Petition Preparer's Notice, Declaration, and Signature* (Official Form 119); include a copy of it when you file this application.

Application to Have the Chapter 7 Filing Fee Waived (Official Form 103B)

The fee for filing a bankruptcy case under chapter 7 is $306. If you cannot afford to pay the entire fee now in full or in installments within 120 days, use this form. If you can afford to pay your filing fee in installments, see *Application for Individuals to Pay the Filing Fee in Installments* (Official Form 103A).

If you file this form, you are asking the court to waive your fee. After reviewing your application, the court may waive your fee, set a hearing for further investigation, or require you to pay the fee in installments or in full.

For your fee to be waived, all of these statements must be true:

- You are filing for bankruptcy under chapter 7.
- You are an individual.
- The total combined monthly income for your family is less than 150% of the official poverty guideline last published by the U.S. Department of Health and Human Services (DHHS). (For more information about the guidelines, go to http://www.uscourts.gov.)
- You cannot afford to pay the fee in installments.

Your family includes you, your spouse, and any dependents listed on *Schedule I.* Your family may be different from your *household*, referenced on *Schedules I* and *J*. Your household may include your unmarried partner and others who live with you and with whom you share income and expenses.

If a bankruptcy petition preparer helped you complete this form, make sure that person fills out *Bankruptcy Petition Preparer's Notice, Declaration, and Signature* (Official Form 119); include a copy of it when you file this application.

If you have already completed the following forms, the information on them may help you when you fill out this application:

- *Schedule A/B: Property* (Official Form 106A/B)
- *Schedule I: Your Income* (Official Form 106I)
- *Schedule J: Your Expenses* (Official Form 106J)

For Individual Chapter 11 Cases: List of Creditors Who Have the 20 Largest Unsecured Claims Against You and Are Not Insiders (Official Form 104)

If you are filing under chapter 7, 12, or 13, do not fill out this form.

The people or organizations to whom you owe money are called your *creditors*. A *claim* is a creditor's right to payment. If you are an individual filing for bankruptcy under chapter 11, you must fill out *For Individual Chapter 11 Cases: List of Creditors Who Have the 20 Largest Unsecured Claims Against You and Are Not Insiders* (Official Form 104).

Creditors may have different types of claims:

- Secured claims, or
- Unsecured claims.

If your debts are not paid, creditors with secured claims may be able to get paid from specific property in which that creditor has an interest, such as a mortgage or a lien. If a creditor has security in your property, but the value of the security available to pay the creditor is less than the amount you owe the creditor, the creditor has both a secured and unsecured claim against you. The amount of the unsecured claim is the total claim minus the value of the security that is available to pay the creditor.

Generally, creditors with unsecured claims do not have rights against specific property, or the specific property in which the creditor has rights is not worth enough to pay the creditor in full. For example, if you owe a creditor $30,000 for your car and the creditor has a security interest in your car but the car is worth only $20,000, the creditor has a $20,000 secured claim and a $10,000 unsecured claim.

	$30,000	Total amount you owe creditor
–	$20,000	Amount your car is worth (amount of secured claim)
	$10,000	Amount of unsecured claim

Many claims have a specific amount, and you clearly owe them. However, some claims are uncertain when you file for bankruptcy, or they become due only after you file. You must include such claims when listing your 20 largest unsecured claims on this list.

Claims may be contingent, unliquidated, or disputed.

The form asks you to identify claims that are:

- Contingent claims,
- Unliquidated claims, or
- Disputed claims.

A claim is *contingent* if you are not obligated to pay it unless a particular event occurs after you file for bankruptcy. You owe a contingent claim, for example, if you cosigned someone else's loan. You may not have to pay unless that person later fails to repay the loan.

A claim is *unliquidated* if the amount of the debt cannot be readily determined, such as by referring to an agreement or by a simple computation. An unliquidated claim is one for which there may be a definite liability but where the amount has not been set. For instance, if you were involved in a car accident, the victim may have an unliquidated claim against you because the amount of damages has not been set.

A claim is *disputed* if you do not agree that you owe the debt. For instance, your claim is disputed if a bill collector demands payment for a bill you believe you already fully paid.

A single claim can have one, more than one, or none of these characteristics.

On this form, list the creditors with the 20 largest unsecured claims who are not insiders

You must file this form when you file your chapter 11 bankruptcy case with the court.

When you list the 20 largest unsecured creditors, include all unsecured creditors, except for the following two types of creditors, even if you plan to pay them. Do not include:

- Anyone who is an *insider*. *Insiders* include relatives; general partners of you or your relatives; corporations of which you are an officer, director, or person in control; and any managing agent. 11 U.S.C. § 101(31).
- Secured creditors, unless the unsecured claim resulting from inadequate collateral value places the creditor among the holders of the 20 largest unsecured claims.

Make sure that all of the creditors listed on this form are also listed on either *Schedule D: Creditors Who Hold Claims Secured by Property* (Official Form 106D) or *Schedule E/F: Creditors Who Have Unsecured Claims* (Official Form 106E/F).

On the form, you will fill in what the claim is for. Examples include trade debts, bank loans, professional services, and government contracts.

Glossary

Definitions Used in the Forms for Individuals Filing for Bankruptcy

Here are definitions for some of the important terms used in the forms for individuals who are filing for bankruptcy. See *Bankruptcy Basics* (http://www.uscourts.gov/FederalCourts) for more information about filing for bankruptcy and other important terms you should know.

Annuity — A contract for the periodic payment of money to you, either for life or for a number of years.

Bankruptcy petition preparer — Any person or business, other than a lawyer or someone who works for a lawyer, that charges a fee to prepare bankruptcy documents. Under your direction and control, the bankruptcy petition preparer generates bankruptcy forms for you to file by typing them. Because they are not attorneys, they cannot give legal advice or represent you in bankruptcy court. Also called *typing services*.

Business debt — Debt that you incurred to obtain money for a business or investment or through the operation of the business or investment.

Claim — A creditor's right to payment, even if contingent, disputed, unliquidated, or unmatured.

Codebtor — A person or entity that may also be responsible for paying a claim against the debtor.

Collateral for your debt — If your debts are not paid, creditors with secured claims such as a mortgage or a lien may be able to get paid from specific property in which that creditor has an interest.

Community property — Type of property ownership available in certain states for property owned by spouses and, in some instances, legal equivalents of spouses. Community property states and territories include Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington, and Wisconsin.

Consumer debt — Debt incurred by an individual primarily for a personal, family, or household purpose.

Contingent claim — Debt you are not obligated to pay unless a particular event occurs after you file for bankruptcy. You owe a contingent claim, for example, if you cosigned someone else's loan. You may not have to pay unless that person later fails to repay the loan.

Creditor matrix or mailing matrix — A list of names and addresses of all of your creditors, formatted as a mailing list according to instructions from the bankruptcy court in which you file.

Creditor — The person or organization to whom you owe money.

Creditor with secured claims — Creditors who have a right to take property if you do not pay them. Common examples are lenders for your car, your home, or your furniture.

Creditor with unsecured claims — Creditor who does not have lien on or other security interest in your property.

Current value, fair market value, or value — Generally, the fair market value as of the date of the filing of the petition. It is how much the property is worth, which may be more or less than when you purchased the property. See the instructions for specific forms regarding whether the value requested is as of the date of the filing of the petition, the date you complete the form, or some other date.

Debtor 1 — A debtor filing alone or one person in married couple who is filing a bankruptcy case with a spouse.

Debtor 2 — The second person in a married couple who is filing a bankruptcy case with a spouse.

Dependent — The term *dependent* generally means people who are economically dependent on the debtor regardless of whether they can be claimed as a dependent on the debtor's federal tax return. However, *Chapter 7 Means Test Calculation*, (Official Form 108-2) and *Chapter 13 Calculation of Your Disposable Income*, (Official Form 110-2) use the term in a more limited way. See the instructions on those forms.

Discharge — A discharge in bankruptcy relieves you from having to pay debts that you owed before you filed your bankruptcy case. Most debts are covered by the discharge, but not all. (The instruction booklet explains more about common debts that are excepted from discharge.)

Only your personal liability is removed by the discharge; creditors with discharged debts cannot sue you, garnish your wages, assert a deficiency against you, or otherwise try to collect from you personally.

But a discharge does not stop creditors from collecting debts from any property in which they have a security interest—such as foreclosing a home mortgage or repossessing an automobile. Similarly, a discharge does not stop creditors from collecting from anyone else who is also liable on the debt, such as a relative who cosigned or guaranteed a loan.

Even if a debt has been discharged, you can choose to repay it by either *reaffirming the debt* (see the definition below) or by voluntarily paying the debt. The creditor may negotiate a reaffirmation agreement with you, but may not suggest that you make voluntary payments.

Disputed claim — If you disagree about whether you owe a debt. For instance, your claim is disputed if a bill collector demands payment for a bill you believe you already fully paid.

Eviction judgment — Your landlord has obtained a judgment for possession in an eviction, unlawful detainer action, or similar proceeding.

Executory contract — Contract between you and someone else in which neither you nor the other party has performed all of the requirements by the time you file for bankruptcy.

Exempt property — Property that the law permits you to keep.

Individual debtor — You are a person who is filing for bankruptcy by yourself or with your spouse.

Joint case — A single case filed by a married couple.

Legal equivalent of a spouse — A person whom applicable nonfederal law recognizes as having a relationship with the debtor that grants legal rights and responsibilities equivalent, in whole or in part, to those granted to a spouse.

Legal or equitable interest — A broad term that includes all kinds of property interests in both tangible and intangible property, whether or not anyone else has an interest in that property.

Negotiable instrument — Include personal checks, cashiers' checks, promissory notes, and money orders.

Non-individual debtor — You are filing for bankruptcy on behalf of a non-individual, such as a corporation, partnership, or limited liability company (LLC).

Non-negotiable instrument — Financial instrument that you cannot transfer to someone by signing or delivering it.

Nonpriority unsecured claim — Debt that generally will be paid after priority unsecured claims are paid. The most common examples are credit card bills, medical bills, and educational loans.

Payment advice — A statement such as a pay stub or earnings statement from your employer that shows all earnings and deductions from your pay.

Presumption of abuse — A legal determination meaning you may have too much income to be granted relief under chapter 7. You may overcome the presumption by showing special circumstances that reduce your income or increase your expenses.

Priority unsecured claim — Debt that the Bankruptcy Code requires to be paid before most other unsecured claims are paid. The most common examples are certain income tax debts and past due alimony or child support.

Property you own — Includes property you have purchased, even if you owe money on it, such as a home with a mortgage or an automobile with a lien.

Reaffirming a debt — You may agree to repay a debt that would otherwise be discharged by entering into a reaffirmation agreement with the creditor. A reaffirmation agreement may allow you to keep property that a creditor has the right to take from you because it secures the debt being reaffirmed. For a reaffirmation agreement to be effective, you must enter into it before discharge. You may ask the court to delay your discharge if you need more time to complete your reaffirmation agreement. The court may have to find that the agreement is not an undue burden on you before it can become effective.

Secured claim — A claim that may be satisfied in whole or in part either

- through a charge against or an interest in the debtor's property, or
- through a right of setoff.

Sole proprietorship — A business you own as an individual, rather than a separate legal entity such as a corporation, partnership, or LLC. Sole proprietors must use the bankruptcy forms that are numbered in the 100 series.

Unexpired lease —Unexpired leases are leases that are in effect at the time of the bankruptcy filing.

Unliquidated claim — If the amount of a debt cannot be readily determined, such as by referring to an agreement or by a simple computation. An unliquidated claim is one for which there may be a definite liability but where the value has not been set. For instance, if you were involved in a car accident, the victim may have an unliquidated claim against you because the amount of damages has not been set.

You — A debtor filing alone or one person in married couple who is filing a bankruptcy case with a spouse.

APPENDIX B.4

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United States Bankruptcy Court for the _____ District of _____

Debtor(s): _____

Case No.: _____

Date: _____

❑ Check if this is an amended plan

Official Form 113
Chapter 13 Plan

12/15

Part 1: Notice to Interested Parties

Check all that apply:

❑ **The plan seeks to limit the amount of a secured claim, as set out in Part 3, Section 3.2, which may result in a partial payment or no payment at all to the secured creditor.**

❑ **The plan requests the avoidance of a judicial lien or nonpossessory, nonpurchase-money security interest as set out in Part 3, Section 3.4.**

❑ **The plan sets out nonstandard provisions in Part 9.**

Important Notice: Your rights may be affected. Your claim may be reduced, modified, or eliminated.

You should read these papers carefully and discuss them with your attorney, if you have one in this bankruptcy case. If you do not have an attorney, you may wish to consult one.

If you oppose the plan's treatment of your claim or any provision of this plan, you or your attorney must file an objection to confirmation at least 7 days before the hearing on confirmation, unless otherwise ordered by the Bankruptcy Court. The Bankruptcy Court may confirm this plan without further notice if no objection to confirmation is filed. See Bankruptcy Rule 3015. In addition, you must file a proof of claim—or one must be filed on your behalf—in order for you to be paid under any plan that may be confirmed.

Part 2: Plan Payments and Length of Plan

2.1 Debtor(s) will pay to the trustee $ _____ per_____ for _____ months, and

$ _____ per _____ for _____ months.

2.2 Payments to the trustee will be made from future earnings in the following manner:

Check all that apply:

❑ Debtor(s) will make payments pursuant to a payroll deduction order.

❑ Debtor(s) will make payments directly to the trustee.

2.3 Additional payments to the trustee will be made as follows:

Check all that apply:

❑ Debtor(s) will turn over to the trustee:

❑ any tax refunds received during the plan term.

❑ any tax refunds in excess of $ _____ received during the plan term.

On or before April 20 of the year following the filing of this case and each year thereafter, Debtor(s) will submit to the trustee a copy of the federal tax return filed for the prior year.

❑ Other sources of funding, including the sale of property. Describe the source, amount, and date when available:

_____

_____

2.4 The estimated total amount of plan payments is $ _____.

2.5 The applicable commitment period is: ❑ 36 months ❑ 60 months

Part 3: Treatment of Secured Claims

3.1 Maintenance of payments and cure of any default

❑ **None** [If "none" is checked, the rest of § 3.1 need not be completed or reproduced]

The debtor(s) will maintain the contractual installment payments and cure any default in payments on the secured claims listed below. The allowed claim for any arrearage amount will be paid under the plan, with interest, if any, at the rate stated. Unless otherwise ordered by the court, (1) the amounts listed on the proof of claim control over any contrary amounts listed below as to the current installment payment and arrearage, and (2) if relief from the automatic stay is ordered as to any item of collateral listed in this paragraph, all payments under this plan as to that collateral will cease and all claims as to that collateral will no longer be treated by the plan. The final column includes only payments disbursed by the trustee rather than by the debtor.

Name of creditor	Collateral	Current installment payment (including escrow payment)	Estimated amount of arrearage	Interest rate on arrearage (if applicable)	Monthly plan payment on arrearage or other payment arrangement	Estimated total payments by trustee
_____	_____	$_____	$_____	_____	$_____	$_____
_____	_____	Disbursed by:				
_____	_____	❑ Trustee				
_____	_____	❑ Debtor(s)				
_____	_____	$_____	$_____	_____	$_____	$_____
_____	_____	Disbursed by:				
_____	_____	❑ Trustee				
_____	_____	❑ Debtor(s)				

3.2 Request for valuation of security and claim modification

❑ **None** [If checked, the rest of § 3.2 need not be completed or reproduced]

This paragraph will be effective only if the applicable box in Part 1 of this plan is checked.

The debtor(s) request that the court determine the value of the secured claims listed below, except for the claims of governmental units. For each non-governmental secured claim as to which a proof of claim has been filed in accordance with Bankruptcy Rule 3002, the debtors state that the value of the secured claim should be as stated below in the column headed "Amount of secured claim." For secured claims of governmental units, unless otherwise ordered by the court, the amounts listed in proofs of claim filed in accordance with Bankruptcy Rule 3002 control over any contrary amounts listed below. For each listed secured claim, the controlling amount of the claim will be paid in full under the plan with interest at the rate stated below.

The portion of any allowed claim that exceeds the amount of the secured claim will be treated as an unsecured claim under Part 5 of this plan. If the amount of a creditor's secured claim is listed below as having no value, the creditor's allowed claim will be treated in its entirety as an unsecured claim under Part 5 of this plan. Unless otherwise ordered by the court, the amount of the creditor's claim listed on the proof of claim controls over any contrary amounts listed under Part 5 as to the unsecured portion, if any, of the claim.

The holder of any claim listed below as having value in the column headed "Amount of secured claim" will retain the lien until the earlier of:

(a) payment of the underlying debt determined under nonbankruptcy law, or

(b) discharge under 11 U.S.C. § 1328, at which time the lien will terminate and be released by the creditor. See Bankruptcy Rule 3015.

❑ Debtor(s) will be eligible to receive a discharge in this case.

❑ Debtor(s) will not be eligible to receive a discharge in this case.

Name of creditor	Estimated amount of creditor's claim	Collateral	Value of collateral	Amount of claims senior to creditor's claim	Amount of secured claim	Interest rate	Monthly payment to creditor	Estimated total of monthly payments
_____	$_____	_____	$_____	$_____	$_____	_____	$_____	$_____
_____		_____						
_____	$_____	_____	$_____	$_____	$_____	_____	$_____	$_____
_____		_____						
_____	$_____	_____	$_____	$_____	$_____	_____	$_____	$_____
_____		_____						

3.3 Secured claims excluded from 11 U.S.C. § 506

❑ **None** [If checked, the rest of § 3.3 need not be completed or reproduced]

The claims listed below were either:

(1) incurred within 910 days before the petition date and secured by a purchase money security interest in a motor vehicle acquired for the personal use of the debtor(s), or

(2) incurred within 1 year of the petition date and secured by a purchase money security interest in any other thing of value.

These claims will be paid in full under the plan with interest at the rate stated below. Unless otherwise ordered by the court, the claim amount listed on the proof of claim controls over any contrary amounts listed below. The final column includes only payments disbursed by trustee rather than by the debtor.

Name of creditor	Collateral	Amount of claim	Interest rate	Monthly plan payment	Estimated total payments by trustee
_____ _____ _____	_____ _____ _____	$_____	_____	$_____ Disbursed by: ❑ Trustee ❑ Debtor(s)	$_____
_____ _____ _____	_____ _____ _____	$_____	_____	$_____ Disbursed by: ❑ Trustee ❑ Debtor(s)	$_____

3.4 Lien avoidance

❑ **None** [If "None" is checked, the rest of Section § 3.4 need not be completed or reproduced]

This paragraph will be effective only if the applicable box on Part 1 of this plan is checked.

The judicial liens or nonpossessory, nonpurchase-money security interests securing the claims listed below impair exemptions to which the debtor(s) would have been entitled under 11 U.S.C. § 522(b). A judicial lien or security interest securing a claim listed below will be avoided to the extent that it impairs such exemptions upon entry of the order confirming the plan. The amount of the judicial lien or security interest that is avoided will be treated as an unsecured claim in Part 5. The calculation of the amount of the judicial lien or security interest that is avoided is shown on Exhibit A, which is attached to this plan and incorporated herein by reference. The amount, if any, of the judicial lien or security interest that is not avoided will be paid in full as a secured claim under the plan. See 11 U.S.C. § 522(f) and Bankruptcy Rule 4003(d).

Name of creditor	Collateral	Amount of secured claim after avoidance	Interest rate (if applicable)	Monthly plan payment (if applicable)	Estimated total amount of secured claim
_____ _____	_____ _____	$_____	_____	$_____	$_____
_____ _____	_____ _____	$_____	_____	$_____	$_____

3.5 Surrender of collateral

❑ **None** [if "None" is checked, the rest of § 3.5 need not be completed or reproduced]

The debtor(s) elect to surrender to the creditors listed below the personal or real property that is collateral for the claim. The debtor(s) consent to termination of the stay under 11 U.S.C. § 362(a) and § 1301 with respect to the collateral upon confirmation of the plan. Any allowed unsecured claim resulting from the disposition of the collateral will be treated in Part 5 below.

Name of creditor	Collateral
_____	_____
_____	_____

Part 4: Treatment of Trustee's Fees and Administrative and Other Priority Claims

4.1 General

All allowed priority claims other than those treated in § 4.5 will be paid in full without interest, unless otherwise stated.

4.2 Trustee's fees

These fees are estimated to be _____% of plan payments; and during the plan term, they are estimated to total $_____.

4.3 Attorney's fees

The balance of the fees owed to the attorney of the debtor(s) is estimated to be $_____.

4.4 Other priority claims

❑ **None** [If "None" is checked, the rest of § 4.4 need not be completed or reproduced]

The following are the debtor's estimates of the amount of such claims.

Name of creditor	Basis for priority treatment	Estimated amount of claim to be paid	Interest rate (if applicable)	Estimated total amount of payments
_____	_____	$_____	_____	$_____
_____	_____			
_____	_____	$_____	_____	$_____
_____	_____			

4.5 Domestic support obligations assigned to a governmental unit and paid less than full amount

❑ **None** [If "None" is checked, the rest of § 4.5 need not be completed or reproduced]

The allowed priority claims listed below are based on a domestic support obligation that has been assigned to a governmental unit and will be paid less than the full amount of the claim under 11 U.S.C. § 1322(a)(4).

Name of creditor	Amount of claim to be paid	Interest rate (if applicable)	Estimated total amount of payments
_____	$_____	_____	$_____
_____	$_____	_____	$_____

Part 5: Treatment of Nonpriority Unsecured Claims

5.1 Maintenance of payments and cure of any default

❑ **None** [If "None" is checked, the rest of § 5.1 need not be completed or reproduced]

The debtor(s) will maintain the contractual installment payments and cure any default in payments on the unsecured claims listed below on which the last payment is due after the final plan payment. The allowed claim for the arrearage amount will be paid under the plan.

Name of creditor	Current installment payment	Amount of arrearage to be paid	Estimated total payments by trustee
_____	$_____	$_____	$_____
_____	Disbursed by:		
_____	❑ Trustee		
	❑ Debtor(s)		
_____	$_____	$_____	$_____
_____	Disbursed by:		
_____	❑ Trustee		
	❑ Debtor(s)		

5.2 Separately classified nonpriority unsecured claims

❑ **None** [If "None" is checked, the rest of § 5.2 need not be completed or reproduced]

The nonpriority unsecured allowed claims listed below are separately classified and will be treated as follows:

Name of creditor	Basis for separate classification and treatment	Amount of claim to be paid	Interest rate (if applicable)	Estimated total amount of payments
_____ _____	_____ _____	$_____	_____	$_____
_____ _____	_____ _____	$_____	_____	$_____

5.3 Nonpriority unsecured claims

Allowed nonpriority unsecured claims that are not separately classified will be paid, pro rata, up to the full amount of the claims, as follows:

Check all that apply:

❑ the sum of $_____, unless a greater amount is required under another checked option;

❑ _____% of the total amount of these claims;

❑ the funds remaining after disbursements have been made to all other creditors provided for in this plan.

If the estate of the debtor(s) were liquidated under chapter 7 nonpriority unsecured claims would be paid approximately $_____. Payments on allowed nonpriority unsecured claims will not be less than this amount.

5.4 Interest

Interest on allowed unsecured claims, other than separately classified nonpriority unsecured claims, will (*Check the applicable box*):

❑ not be paid.

❑ be paid at an annual percentage rate of _____ % under 11 U.S.C. § 1325(a)(4), and is estimated to total $ _____.

Part 6: Executory Contracts and Unexpired Leases

6.1 All executory contracts and unexpired leases are rejected, except those listed below, which are assumed and will be treated as provided for below or under another specified provision of the plan.

❑ **None to be assumed** [If checked, the rest of § 6.1 need not be completed or reproduced]

The final column includes only payments disbursed by the trustee rather than by the debtor.

Name of creditor	Property description	Treatment (Refer to other plan section if applicable)	Current installment payment	Amount of arrearage to be paid	Estimated total payments by trustee
_____ _____	_____ _____	_____ _____	$_____ Disbursed by: ❑ Trustee ❑ Debtor(s)	$_____	$_____
_____ _____	_____ _____	_____ _____	$_____ Disbursed by: ❑ Trustee ❑ Debtor(s)	$_____	$_____

Part 7: Order of Distribution of Trustee Payments

7.1 The trustee will make payments in the estimated amounts shown on Exhibit B, in the following order:

a. Trustee's fees

b. Monthly payments on secured claims

c. _____

d. _____

e. _____

f. _____

g. _____

h. _____

Part 8: Vesting of Property of the Estate

8.1 Property of the estate shall revest in the debtor(s) upon

Check the applicable box:

❑ Plan confirmation

❑ Closing of case

❑ Other: _____

Part 9: Nonstandard Plan Provisions

Under Bankruptcy Rule 3015(c), nonstandard provisions are required to be set forth below. ***These plan provisions will be effective only if the applicable box in Part 1 of this plan is checked.***

_____

_____

_____

_____

_____

Part 10: Signatures

The debtor's attorney (or debtor, if not represented by an attorney) certifies that all provisions of this plan are identical to the Official Form 113, except for language contained in Part 9: Nonstandard Plan Provisions.

Debtors
(Sign if not represented by an attorney)

✘ _____ Date _____
Signature of debtor MM / DD / YYYY

✘ _____ Date _____
Signature of debtor MM / DD / YYYY

Debtors' Attorney

✘ _____ Date_____
Signature of debtor's attorney MM / DD / YYYY

Exhibit A Calculation of lien avoidance

A.1 The judicial lien or nonpossessory, nonpurchase-money security interest provided for in Section 3.4 is avoided to the extent listed below:
Do not complete if the plan involves no lien avoidance; if more than one lien is to be avoided, provide the information for each lien.

Name of creditor	Collateral	Judgment lien information (such as judgment date, date of lien recording, book and page number)	Calculation of lien avoidance	
			a. Amount of lien	$_____
			b. Amount of all other liens	$_____
			c. Value of claimed exemptions	$_____
			d. Total: Lines a + b + c = line d	$_____
			e. Value of debtor's interest in property	$_____
			f. Subtract line e from line d	$_____
			Extent of exemption impairment (*Check applicable box*):	
			❑ **Line f is equal to or greater than line a**. The entire lien is avoided.	
			❑ **Line f is less than line a.** A portion of the lien is avoided.	
			Amount of lien not avoided Subtract line f from line a	$_____

Exhibit B Estimated amounts of trustee payments

B.1 The trustee will make the following estimated payments on allowed claims in the order set forth in Section 7.1:

a. **Current installment and arrearage payments on secured claims** (*Part 3, Section 3.1 total*): $_____

b. **Allowed secured claims** (*Part 3, Section 3.2 total*): $_____

c. **Secured claims not subject to 11 U.S.C. § 506** (*Part 3, Section 3.3 total*): $_____

d. **Judicial liens or security interests not avoided** (*Part 3, Section 3.4 total*): $_____

e. **Administrative and other priority claims** (*Part 4 total*): $_____

f. **Current installment payments and arrearage payments on unsecured debts** (*Part 5, Section 5.1 total*): $_____

g. **Separately classified unsecured claims** (*Part 5, Section 5.2 total*): $_____

h. **Nonpriority unsecured claims** (*Part 5, Section 5.3 total*): $_____

i. **Interest on allowed unsecured claims** (*Part 5, Section 5.4 total*): $_____

j. **Arrearage payments on executory contracts and unexpired leases** (*Part 6, Section 6.1 total*): $_____

Total of lines a through j ..... $_____

COMMITTEE NOTE

Official Form 113 is new and is the required plan form in all chapter 13 cases. See Bankruptcy Rule 3015. Alterations to the text of the form or the order of its provisions, except as indicated on the form itself, are prohibited. See Bankruptcy Rule 9009. As the form explains, spaces for responses may be expanded or collapsed as appropriate, and sections that are inapplicable do not need to be reproduced.

Part 1. This part is intended to highlight some provisions of the plan for the benefit of interested parties and the court. For that reason, if the plan includes one or more of the provisions listed in this part, the appropriate boxes must be checked. For example, if Part 9 of the plan proposes a provision not included in, or contrary to, the Official Form, then that nonstandard provision will be ineffective if the appropriate check box is not selected.

Part 2. This part states the proposed periodic plan payments, plan length, the estimated total plan payments, and sources of funding for the plan. Section 2.1 allows the debtor or debtors to propose periodic payments in other than monthly intervals. For example, if the debtor receives a paycheck every week and wishes to make plan payments accordingly, that should be indicated in § 2.1. Section 2.2 provides for the manner in which the debtor will make payments. The debtor may also make payments through a designated third party, such as an electronic funds transfer program.

Part 3. This part provides for the treatment of secured claims.

Section 3.1 provides for the treatment of claims under Code §1322(b)(5) (maintaining current payments and curing any arrearage). For the claim of a secured creditor listed in § 3.1, an estimated arrearage amount should be given. A contrary arrearage amount listed on the creditor's proof of claim, unless contested by objection or motion, will control over the amount given in the plan.

In § 3.2, the plan may propose to determine under Code § 506(a) the value of a secured claim for which a proof of claim has been filed. For example, the plan could seek to reduce the secured portion of a creditor's claim to the value of the collateral securing it. For the secured claim of a nongovernmental creditor, that determination would be binding upon confirmation of the plan. For the secured claim of a governmental unit, however, a contrary valuation listed on the creditor's proof of claim, unless contested by objection or motion, would control over the valuation given in the plan. See Bankruptcy Rule 3012. Although § 3.2 applies to secured claims for which a proof of claim has been filed in accordance with Bankruptcy Rule 3002, that rule contemplates that a debtor, the trustee, or another entity may file a proof of claim if the creditor does not do so in a timely manner. See Bankruptcy Rules 3004 and 3005. Section 3.2 will not be effective unless the appropriate check box in Part 1 is selected.

Section 3.3 deals with secured claims that may not be bifurcated into secured and unsecured portions under Code § 506(a), but it allows for an interest rate other than the contract rate to be applied to payments on such a claim.

In § 3.4, the plan may propose to avoid certain judicial liens or security interests encumbering exempt property in accordance with Code § 522(f). A separate exhibit shows the calculation of the amount of the judicial lien or

security interest that is avoided. A plan proposing avoidance in § 3.4 must be served in the manner provided by Bankruptcy Rule 7004 for service of a summons and complaint. See Bankruptcy Rule 4003. Section 3.4 will not be effective unless the appropriate check box in Part 1 is selected.

Section 3.5 provides for elections to surrender collateral and consent to termination of the stay under § 362(a) and § 1301 with respect to the collateral surrendered. Termination will be effective upon confirmation of the plan.

Part 4. This part provides for the treatment of claims entitled to priority status. In § 4.4, the plan calls for an estimated amount of each such claim. A contrary amount listed on the creditor's proof of claim, unless changed by court order in response to an objection or motion, will control over the amount given in the plan.

Part 5. This part provides for the treatment of unsecured claims that are not entitled to priority status. In § 5.3, the plan may propose to pay nonpriority unsecured claims in accordance with several options. One or more options may be selected. For example, the plan could propose simply to pay unsecured creditors any funds remaining after disbursements to other creditors, or also provide that a defined percentage of the total amount of unsecured claims will be paid.

Part 6. This part provides for executory contracts and unexpired leases. An executory contract or unexpired lease is rejected unless it is listed in this part.

Part 7. This part provides an order of distribution of payments under the plan. Other than the trustee's fees and monthly payments to secured creditors, the order of distribution is left to be completed by the debtor in keeping with the requirements of the Code. A separate exhibit lists the estimated amounts of these distributions.

Part 8. This part defines when property of the estate will revest in the debtor or debtors. One choice must be selected—upon plan confirmation, upon closing the case, or upon some other specified event. This plan provision is subject to a contrary court order under Code § 1327(b).

Part 9. This part gives the debtor or debtors the opportunity to propose provisions that are not otherwise in, or are contrary to, the Official Form. All such nonstandard provisions must be set forth in this part and nowhere else in the plan. This part will not be effective unless the appropriate check box in Part 1 is selected. See Bankruptcy Rule 3015.

Part 10. The plan must be signed by the attorney for the debtor or debtors, unless the debtor or debtors are not represented by an attorney, in which case the plan must be signed by the debtor or debtors. The signature in this part is a certification to the court that the plan's provisions are identical to the Official Form, except for any nonstandard provisions contained in Part 9.

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APPENDIX B.5

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Draft: May 10, 2013

[Caption as in Form 16A, 16B, or 16D, as appropriate]

NOTICE OF APPEAL AND STATEMENT OF ELECTION

Part 1: Identify the appellant(s)

1. Name(s) of appellant(s):
   _____

2. Position of appellant(s) in the adversary proceeding or bankruptcy case that is the subject of this appeal:

For appeals in an adversary proceeding.

- ❑ Plaintiff
- ❑ Defendant
- ❑ Other (describe) _____

For appeals in a bankruptcy case and not in an adversary proceeding.

- ❑ Debtor
- ❑ Creditor
- ❑ Trustee
- ❑ Other (describe) _____

Part 2: Identify the subject of this appeal

1. Describe the judgment, order, or decree appealed from: _____

2. State the date on which the judgment, order, or decree was entered: _____

Part 3: Identify the other parties to the appeal

List the names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their attorneys (attach additional pages if necessary):

1. Party: _____ Attorney: _____
   _____
   _____
   _____

2. Party: _____ Attorney: _____
   _____
   _____
   _____

Part 4: Optional election to have appeal heard by District Court (applicable only in certain districts)

If a Bankruptcy Appellate Panel is available in this judicial district, the Bankruptcy Appellate Panel will hear this appeal unless, pursuant to U.S.C. § 158(c)(1), a party elects to have the appeal heard by the United States District Court. If an appellant filing this notice wishes to have the appeal heard by the United States District Court, check below. Do not check the box if the appellant wishes the Bankruptcy Appellate Panel to hear the appeal.

- ❑ Appellant(s) elect to have the appeal heard by the United States District Court rather than by the Bankruptcy Appellate Panel.

Part 5: Sign below

_____ Date: _____

Signature of attorney for appellant(s) (or appellant(s) if not represented by an attorney)

Name, address, and telephone number of attorney (or appellant(s) if not represented by an attorney):

_____
_____
_____
_____

Fee waiver notice: If appellant is a child support creditor or its representative and appellant has filed the form specified in § 304(g) of the Bankruptcy Reform Act of 1994, no fee is required.

COMMITTEE NOTE

The form is amended and renumbered. It is amended to add to the Notice of Appeal an optional Statement of Election to have the appeal heard by the district court rather than by the bankruptcy appellate panel. Current Rule 8005(a) eliminates the requirement, imposed by former Rule 8001(e), that a separate document be used in making an election to have an appeal heard by the district court rather than the bankruptcy appellate panel. It instead requires a statement that conforms substantially to the Official Form for such an election. Form 17A effectuates Rule 8005(a)'s requirement for election by an appellant by combining the notice of appeal and statement of election. It thereby facilitates compliance with the statutory requirement that an appellant wishing to make an election do so at the time of filing the appeal. 28 U.S.C. § 158(c)(1)(A).

The statement of election in Part 4 is applicable only in districts for which appeals to a bankruptcy appellate panel have been authorized. If an appeal is being taken from a bankruptcy court located in a circuit that does not have a bankruptcy appellate panel or in a district that has not authorized appeals to be heard by the circuit's bankruptcy appellate panel, the appellant should not complete Part 4.

When a bankruptcy appellate panel is available to hear an appeal, completion of Part 4 is optional. An appellant that wants its appeal heard by the bankruptcy appellate panel should not complete this part.

The form is renumbered as Official Form 17A because a new companion form—Optional Appellee Statement of Election to Proceed in the District Court—is designated as Official Form 17B, and another bankruptcy appellate form—Certificate of Compliance with Rule 8015(a)(7)(B) or 8016(d)(2)—is designated as Official Form 17C.

The fixed caption has been deleted because the short title caption on the current form is not appropriate if the debtor is the appellant or if the appeal is in an adversary proceeding. *See* 11 U.S.C. § 342(c); Rule 7008; Rule 9004(b). The form should be captioned as in Official Form 16A, Caption (Full); Official Form 16B, Caption (Short Title); or Official Form 16D, Caption for Use in Adversary proceeding, as appropriate.

Draft: May 10, 2013

[Caption as in Form 16A, 16B, or 16D, as appropriate]

OPTIONAL APPELLEE STATEMENT OF ELECTION TO PROCEED IN DISTRICT COURT

This form should be filed only if all of the following are true:

- this appeal is pending in a district served by a Bankruptcy Appellate Panel,
- the appellant(s) did not elect in the Notice of Appeal to proceed in the District Court rather than in the Bankruptcy Appellate Panel,
- no other appellee has filed a statement of election to proceed in the district court, and
- you elect to proceed in the District Court.

Part 1: Identify the appellee(s) electing to proceed in the District Court

1. Name(s) of appellee(s):
   _____

2. Position of appellee(s) in the adversary proceeding or bankruptcy case that is the subject of this appeal:

For appeals in an adversary proceeding.

- ❑ Plaintiff
- ❑ Defendant
- ❑ Other (describe) _____

For appeals in a bankruptcy case and not in an adversary proceeding.

- ❑ Debtor
- ❑ Creditor
- ❑ Trustee
- ❑ Other (describe) _____

Part 2: Election to have this appeal heard by the District Court (applicable only in certain districts)

I (we) elect to have the appeal heard by the United States District Court rather than by the Bankruptcy Appellate Panel.

Part 3: Sign below

_____
Signature of attorney for appellee(s) (or appellee(s) if not represented by an attorney)

Date: _____

Name, address, and telephone number of attorney (or appellee(s) if not represented by an attorney):
_____
_____
_____

12b-007877

COMMITTEE NOTE

This form is new. It is the Official Form for an appellee to state its election to have an appeal heard by the district court rather than by the bankruptcy appellate panel. If an appellee desires to make that election and the appellant or another appellee has not already done so, the appellee must file a statement that conforms substantially to this form within 30 days of service of the Notice of Appeal. 28 U.S.C. § 158(c)(1)(B).

The form is applicable only in districts for which appeals to a bankruptcy appellate panel have been authorized. If an appeal is being taken from a bankruptcy court located in a circuit that does not have a bankruptcy appellate panel or in a district that has not authorized appeals to be heard by the circuit's bankruptcy appellate panel, the appellee should not complete this form.

When a bankruptcy appellate panel is available to hear an appeal, completion of the form is optional. An appellee that wants its appeal heard by the bankruptcy appellate panel should not complete this form.

The form should be captioned as in Official Form 16A, Caption (Full); Official Form 16B, Caption (Short Title); or Official Form 16D, Caption for Use in Adversary proceeding, as appropriate. *See* 11 U.S.C. § 342(c); Rule 7008; Rule 9004(b).

Draft: May 10, 2013

[This certification must be appended to your brief if the length of your brief is calculated by maximum number of words or lines of text rather than number of pages.]

Certificate of Compliance With Rule 8015(a)(7)(B) or 8016(d)(2)

This brief complies with the type-volume limitation of Rule 8015(a)(7)(B) or 8016(d)(2) because:

- ❑ this brief contains [*state the number of*] words, excluding the parts of the brief exempted by Rule 8015(a)(7)(B)(iii) or 8016(d)(2)(D), or
- ❑ this brief uses a monospaced typeface having no more than 10½ characters per inch and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Rule 8015(a)(7)(B)(iii) or 8016(d)(2)(D).

_____ Date: _____
Signature

Print name of person signing certificate of compliance:
_____

COMMITTEE NOTE

This form is new. When the length of a brief is calculated by the maximum number of words or lines of text rather than by number of pages, Rules 8015(a)(7)(C) and 8016(d)(3) require an attorney or unrepresented party to certify that the brief complies with the applicable type-volume limitation. Completion of this form satisfies that certification requirement. This form is not needed if the brief meets the applicable page limitation under Rule 8015(a)(7)(A) or 8016(d)(1).

The form does not include a caption because it is included in the brief.

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APPENDIX C

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ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of April 2–3, 2013
New York, New York

Draft Minutes

The following members attended the meeting:

Bankruptcy Judge Eugene R. Wedoff, Chair
Circuit Judge Sandra Segal Ikuta
Circuit Judge Adalberto Jordan (by telephone)
District Judge Karen Caldwell
District Judge Jean Hamilton
District Judge Robert James Jonker
Bankruptcy Judge Arthur I. Harris
Bankruptcy Judge Elizabeth L. Perris
Bankruptcy Judge Judith H. Wizmur
Professor Edward R. Morrison
Michael St. Patrick Baxter, Esquire
Richardo I. Kilpatrick, Esquire
J. Christopher Kohn, Esquire
David A. Lander, Esquire
Jill Michaux, Esquire

The following persons also attended the meeting:

Professor S. Elizabeth Gibson, reporter
Professor Troy A. McKenzie, assistant reporter
Roy T. Englert, Jr., Esq., liaison from the Committee on Rules of Practice and Procedure (Standing Committee)
Bankruptcy Judge Erithe A. Smith, liaison from the Committee on Bankruptcy Administration
Jonathan Rose, secretary of the Standing Committee and Chief, Rules Committee Support Office
Patricia S. Ketchum, advisor to the Advisory Committee
Ramona D. Elliott, Deputy Director /General Counsel, Executive Office for U.S. Trustees (EOUST) (by telephone)
Lisa Tracy, Associate General Counsel, EOUST (by telephone)
James J. Waldron, Clerk, U.S. Bankruptcy Court for the District of New Jersey
Peter G. McCabe, Assistant Director, Office of Judges Programs, Administrative Office of the U.S. Courts (Administrative Office)
Benjamin Robinson, Deputy Rules Officer
James H. Wannamaker, Administrative Office
Scott Myers, Administrative Office
Bridget Healy, Administrative Office
Molly Johnson, Federal Judicial Center
Michael T. Bates, Senior Company Counsel, Wells Fargo
Eric Donowho, Chief Administrative Officer, Barrett, Daffin, Frappier, Turner & Engel, LLP

Marcy J. Ford, Executive Vice President and Managing Partner Bankruptcy Department, Trott & Trott, PC
Craig Goldblatt, WilmerHale LLP
Raymond J. Obuchowski, on behalf of the National Association of Bankruptcy Trustees
Anita M. Warner, Vice President, Assistant General Counsel, Chase
Daniel A. West, Shareholder/Managing Attorney, South & Associates

The following summary of matters discussed at the meeting is written in the order of the meeting agenda unless otherwise specified, not necessarily in the order actually discussed. It should be read in conjunction with the agenda materials and other written materials referred to, all of which are on file in the office of the Secretary of the Standing Committee.

An electronic copy of the agenda materials, other than materials distributed at the meeting after the agenda materials were published, is available at http://www.uscourts.gov/RulesAndPolicies/rules/archives/agenda-books/committee-rules-bankruptcy-procedure.aspx. Votes and other action taken by the Advisory Committee and assignments by the Chair appear in **bold**.

Introductory Items

1. Greetings; welcome to new member Jill Michaux, Esq., and new liaison representatives Roy T. Englert, Jr., Esq., and Judge Erithe A. Smith; and recognition of the service of former committee member Jerry Patchan.

The Chair welcomed the Advisory Committee's newest member, Jill Michaux, Esq., and its new liaisons from the Standing Rules Committee, Roy Englert, and from the Committee on Bankruptcy Administration, Judge Erithe Smith.

At the Chair's request, Ms. Ketchum and Mr. McCabe recognized the service of former member Jerry Patchan, who recently passed away. Ms. Ketchum noted that it was ironic to honor Mr. Patchan at this time in light of the many comments the Advisory Committee received in response to publication of the first set forms produced as part of the Forms Modernization Project. Mr. Patchan, she said, was the first chair of the Advisory Committee's Forms Subcommittee and he presided over the last major overhaul of bankruptcy forms in the late 1980s. Mr. Patchan was a former bankruptcy judge, became a private attorney and joined the Advisory Committee, and later was director of the Executive Office for United States trustees.

2. Approval of minutes of Portland meeting of September 20–21, 2012.

The draft minutes were approved with minor edits.

3. Oral reports on meetings of other committees:

(A) January 2013 meeting of the Advisory Committee on Rules of Practice and Procedure.

The Chair said that the Standing Committee was asked to comment on the modernized bankruptcy forms for individuals at its January meeting, and that there was general approval of the new forms. There were some concerns, however, about the Advisory Committee's attempt to

incorporate the Supreme Court's holding in *Schwab v. Reilly*, 130 S. Ct. 2652 (2010) into the exemption schedule. The Chair said that the Joint Consumer Forms Subcommittee has amended the exemption schedule to address the Standing Committee's concerns, and that the revised form would be considered at Agenda Item 7(A).

The Chair said the Standing Committee asked the Advisory Committee to move forward in its consideration of a rule for electronic signatures and that the proposal of the Subcommittee on Technology and Cross Border Insolvency on that issue would be considered at Agenda Item 10.

(B) January 2013 meeting of the Advisory Committee on the Administration of the Bankruptcy System.

Judge Smith reported on the most recent meeting of the Advisory Committee on the Administration of the Bankruptcy System, which she said focused largely on budget matters.

(C) November 2012 meeting of the Advisory Committee on Civil Rules, including the Civil Rules Committee's approval of an amendment of Civil Rule 6(d) for future publication.

Judge Harris said there was one matter before the Committee on Civil Rules that has near term bankruptcy rules implications. The Civil Rules Committee voted to approve a proposed amendment to Rule 6(d), he said, that would clarify that only the party being served (not the party serving) by certain means described in the rule could add 3 days to a time period. Judge Harris moved for the Advisory Committee to recommend publication of the same change to Bankruptcy Rule 9006(f), which incorporates the language from Rule 6(d), so that counting under the two rules remains the same. **The Advisory Committee recommended the following amendment Rule 9006(f) for publication**: Replace the word "service" with "being served."

Mr. McCabe added that a pending change to the Rule 45 on track to take effect December 1, 2013, which is incorporated into Bankruptcy Rule 9016, would require changes to the bankruptcy subpoena forms. **The Chair asked the Forms Subcommittee to consider needed changes this summer, and to report back at the fall meeting**.

(D) October 2012 meeting of the Advisory Committee on Evidence.

Judge Wizmur reported on the work of the Advisory Committee on Evidence.

(E) September 2012 meeting of the Advisory Committee on Appellate Rules.

Judge Jordon reported on the work of the Advisory Committee on Appellate Rules.

(F) Bankruptcy Next Generation of CM/ECF Working Group.

Judge Perris reported on the progress of Next Generation of CM/ECF at Agenda item 7.

Subcommittee Reports and Other Action Items

4. Report by the Subcommittee on Consumer Issues.

(A) Oral report concerning Suggestion 12-BK-I by Judge John E. Waites (on behalf of the Bankruptcy Judges Advisory Group) to amend Rule 1006(b) to provide that courts may require a minimum initial payment with requests to pay filing fees in installments.

Judge Harris said that in light of the amount of material currently being considered by the Advisory Committee, the Subcommittee decided to table this issue for now. He added that, although the Subcommittee did not fully discuss the suggestion, there was concern expressed by some members that requiring an initial installment payment at the time of filing might encourage eligible debtors in chapter 7 to file an application to waive the filing fee instead an application to pay in installments.

(B) Oral report concerning Suggestion 12-BK-B by Matthew T. Loughney (on behalf of the Bankruptcy Noticing Working Group) to amend Rule 2002(f)(7) to require notice of the confirmation of the debtor's chapter 13 plan.

Judge Harris said that in light of the amount of material currently being considered by the Advisory Committee, the Subcommittee decided to table this issue for now. He added that the Subcommittee will attempt to ascertain and review current practice to determine how many courts already require notice of confirmation of the debtor's chapter 13 plan and who does the notice (i.e., court, debtor or trustee).

(C) Recommendation concerning Suggestion 12-BK-D by Judge S. Martin Teel, Jr., to amend Rule 7001(1) as it concerns compelling the debtor to deliver the value of property to the trustee.

Professor Gibson gave the report. She said that the Subcommittee had concluded that the proposed amendment should not be pursued for two reasons. First, the issue that provoked Judge Teel's suggestion does not appear to have caused much confusion in the courts. There is agreement that a trustee may proceed by motion to seek a turnover from the debtor of property of the estate or proceeds of the property and, when that property is money that the debtor no longer possesses, the turnover of an equivalent amount of money. The only disagreement concerns whether the trustee must proceed by way of an adversary proceeding to recover a money judgment for the value of non-cash property of the estate when neither the property nor its proceeds remain in the debtor's possession at the time of the turnover action. There is little case law on the question. The one decision that created the issue, *Price*, was an unpublished decision in 2006 that has not been cited for its procedural ruling in any other opinions.

Second, the Subcommittee concluded that a basis exists for limiting the Rule 7001(1) exception to "a proceeding to compel the debtor to deliver property to the trustee." A proceeding to recover a judgment against the debtor for the *value* of property that the debtor no longer possesses results in a money judgment that is enforceable by execution and levy on any of the debtor's non-exempt property. The Subcommittee concluded that there is a reasonable basis for treating such an action like most other proceedings to recover money or property—with the greater formalities required for an adversary proceeding. No member objected to the Subcommittee's recommendation. No further action will be taken.

(D) Oral report concerning Comment 11-BK-12 by Judge Frank regarding the negative notice procedure for objections to claims in the proposed amendment to Rule 3007 that was published (and withdrawn).

Judge Harris said that in light of the amount of material currently being considered by the Advisory Committee, the Subcommittee decided to table this issue for now. He added that in preliminary discussions, members on the Subcommittee were concerned about changing the burden of proof in a negative notice process, and whether negative notice would be sufficient if service was made only on the name and address on the filed proof of claim.

5. Report by the Chapter 13 Plan Form Working Group.

Recommendation by the Subcommittees on Consumer Issues and Forms concerning adopting a national chapter 13 plan form and amending Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009 in connection with adopting a plan form.

The Chair, Judge Perris and Professor McKenzie presented the recommendation of the Joint Subcommittee on Consumer Issues and Forms for publication of a national chapter 13 plan form and related rule amendments. Judge Perris said that the original suggestions for a national form for chapter 13 plans came from a bankruptcy judge and a group of state attorneys general. Bankruptcy judges were polled and most responded that a national form would be a good idea, and many recommended that the national form be based upon the local version currently in effect in their districts.

A central goal of the plan form is to improve procedures in chapter 13 practice. That goal has taken on heightened importance with the Supreme Court's decision in *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010), which held that an order confirming a procedurally improper chapter 13 plan is nevertheless *res judicata*, and which emphasized the duty of bankruptcy judges to review chapter 13 plans for compliance with the law.

At its September 2012 meeting in Portland, Oregon, the Advisory Committee discussed drafts of the plan form and rule amendments prepared by the Advisory Committee's Chapter 13 Plan Form Working Group (Working Group). The Advisory Committee also approved a recommendation to hold a mini-conference on the draft plan and rules. That mini-conference, held in January 2013, brought together participants from a broad cross-section of groups interested in the chapter 13 process. The participants included chapter 13 trustees, bankruptcy judges, a court clerk, and representatives of creditors and consumer debtors. The Working Group incorporated the input received during the mini-conference, and the joint Subcommittees on Consumer Issues and Forms (Joint Subcommittee) provided additional input on the draft plan and rules.

Professor McKenzie said that the plan form contains three features that will be highlighted at the beginning of the document. First, it permits the debtor to limit the amount of a secured claim under § 506(a) of the Code, subject to a creditor's objection to confirmation. Second, the plan also permits the debtor to request the avoidance of certain liens impairing exemptions under Code § 522(f). Third, the plan includes a space in which the debtor may propose nonstandard provisions—that is, provisions not included in, or contrary to, the plan form. None of these features will be effective unless the debtor indicates, in the first part of the

document, that the plan contains that feature. One member suggested that a requirement to both complete the relevant section and then indicate that section had been completed at the beginning of the plan creates the possibility of inconsistencies, but other members pointed out that highlighting these three issues at the beginning of the plan provides heightened notice to the affected party, and that the plan is clear about what needs to be completed to make a provision effective.

The Joint Subcommittee concluded that effective implementation of the plan form will require conforming amendments to Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009. The amendments fall into three categories.

First, there are amendments that would affect the filing, processing, and treatment of claims. Rule 3002(a) would be amended to require a secured creditor to file a proof of claim in order to have an allowed claim. Rule 3002(c) changes the deadline for filing proofs of claim in chapter 13 cases to 60 days after the petition date so that the confirmation hearing date established by § 1324(b) of the Code could be set after all non-governmental proofs of claim are filed. The sixty-day period is extended to allow the filing of documentation required under Rule 3001(c)(1) and (d) for certain mortgage claims.

Several interrelated rule amendments would provide for circumstances when the plan will control over a contrary proof of claim. Amendments to Rules 3012 and 3015 provide that the plan may make a binding determination of the amount of a secured claim subject to ultimate resolution at the confirmation hearing. Amended Rule 3007, in turn, provides an exception to the need to file a claim objection if claim allowance is resolved under Rule 3012. Similarly, amended Rule 4003(d) makes clear that a plan may provide for avoidance of liens under 11 U.S.C. § 522(f). And amended Rule 7001 makes clear that an adversary proceeding is not necessary to determine the validity, priority, or extent of a lien resolved through a plan. Relatedly, if a lien encumbering property of the estate has been satisfied, amended Rule 5009(d) provides that the debtor may request an order documenting that the lien has been satisfied.

Second, several proposed rule amendments concern service and notice in chapter 13 cases. Amendments to Rule 3015 are intended to ensure that creditors receive a copy of the plan before confirmation and that any objections to confirmation are filed and served seven days before the confirmation hearing. Similarly, Rule 2002 would be amended to clarify the notice period before a confirmation hearing (28 days) and the deadline for filing objections to confirmation (21 days).

Some of the amendments require enhanced service. Rule 3012 would be amended to provide that a request to determine the amount of a secured claim under a plan must be served in accordance with Rule 7004's requirements for adversary proceedings. Similar service requirements are included in amended Rule 4003(d), which concerns a plan proposing lien avoidance under Code § 522(f). If a debtor requests an order declaring a lien satisfied under amended Rule 5009(d), service in accordance with Rule 7004 is also required.

Third, the Advisory Committee is proposing amendments to the Bankruptcy Rules that would limit deviations from the Official Form chapter 13 plan.

Rule 3015(c) would be amended to require the use of the Official Form plan and to make clear that provisions deviating from the Official Form are not effective unless they are placed in the part of the Official Form for nonstandard provisions (and identified accordingly).

The Advisory Committee considered alternative proposed revisions to Rule 9009, which were set out beginning at page 147 of the Agenda Book. Both versions would prohibit alterations of an Official Form, except when the Bankruptcy Rules or an Official Form itself would permit modification, and except for Official Form orders, which could be modified by a court in individual cases unless a Bankruptcy Rule or the Official Form itself provided otherwise. Both versions of proposed Rule 9009 also provide for alterations to forms with respect to fonts, and for the addition or deletion of spaces, as the case may be, when responding to an item.

The two versions of the proposed Rule 9009 differed, however, on whether a court could permissively adopt a localized version of a national form—to, for example, add a certificate of service to a form that must be served. The first version of the rule, on page 147 of the Agenda Book, would not allow such localization. Instead, the local court could adopt a supplemental form to handle the local requirement. The alternate variation, on page 149 of the Agenda Book, would permit but not allow a court to require that filers to use a localized version of an Official Form. **The Advisory Committee voted 7–5 to recommend publishing the first version of Rule 9009, as set out at page 147 of the Agenda Book, subject to review by the Style Subcommittee. The Advisory Committee voted unanimously to recommend publication of the proposed plan form and accompanying rule amendments.**

6. Joint Report by the Subcommittees on Consumer Issues and Forms.

(A) Status report on mortgage rules and forms amendments discussed at the mini-conference in Portland, including requiring a detailed loan history and amending Rule 9009 to specify the extent to which Official Forms may be modified.

The Reporter gave a status report on the mortgage forms mini-conference. She said that several issues were raised at the meeting, including the possible need to adopt a national form detailing the loan payment history. There are still questions, she said, about the time frame any loan history should start, and servicers were concerned about local courts modifying any a national loan history form if one is adopted. Proposed revisions to Rule 9009, however, which are to be published this fall in connection with the nation chapter 13 plan discussed at Agenda Item 5 above, would limit the types of modifications that can be made to official bankruptcy forms. Accordingly, the Joint Subcommittee decided to wait until after the Rule 9009 comment period ends before considering further changes to the mortgage rules and forms. No recommendation is being made at this time.

(B) Recommendation concerning Suggestion 11-BK-N by David S. Yen for a rule and form for applications to waive fees other than filing fees, under 28 U.S.C. § 1930(f)(2) and (f)(3).

Judge Harris gave the report. He said that the Joint Subcommittee had been asked at the September 2012 meeting to consider a Director's Form for fee waivers under 28 U.S.C. § 1930(f)(2) and (f)(3). He said the Joint Subcommittee concluded that there is not a pressing need for a special form to request fee waivers under 28 U.S.C. § 1930(f)(2). There is already an official form that a chapter 7 debtor may use to request a waiver of the filing fee under 28 U.S.C. § 1930(f)(1). The information on that form would generally be relevant, or could be updated, if the chapter 7 debtor seeks a waiver of other fees under Section 1930(f)(2) later in the case.

Judge Harris said that 28 U.S.C. § 1930(f)(3) refers to fee waivers "in accordance with Judicial Conference policy." The current Judicial Conference policy on fee waivers is limited to chapter 7 debtors. In 2005 the Judicial Conference adopted Interim Procedures Regarding Chapter 7 Fee Waiver Provisions. The procedures primarily address fee waivers under § 1930(f)(1), but they also state that "[o]ther fees scheduled by the Judicial Conference under 28 U.S.C. §§ 1930(b) and (c) may be waived in the discretion of the bankruptcy court or district court for individual debtors whose filing fee has been waived." The interim procedures do not contain any reference to waiver of fees for creditors or for debtors who are not entitled to a fee waiver under § 1930(f)(1).

Judge Harris said that the Judicial Conference's Committee on the Administration of the Bankruptcy System is currently considering a revision of the interim fee waiver procedures. The most recent draft of the revision does not address fee waivers under § 1930(f)(3). In light of the ongoing revisions of the fee waiver guidelines and the current absence of any Judicial Conference policy for waivers under § 1930(f)(3), the Joint Subcommittee recommends that the Advisory Committee refrain from acting further on a Director's Form for fee waivers under § 1930(f)(3) until a Judicial Conference policy on this type of waiver is issued.

7. Report by the Subcommittee on Forms and the Forms Modernization Project.

(A) Report on the status of the Forms Modernization Project and recommendation concerning publication of the remaining new individual forms developed by the project, including revision of the exemption schedule as a result of the Supreme Court's holding in *Schwab v. Reilly*, 130 S. Ct. 2652 (2010).

Forms Modernization Project and the Next Generation of CM/ECF

Judge Perris gave an overview of the Forms Modernization Project (FMP) and how the FMP's work has been coordinated with development of the next generation of case management and electronic case filing software (Next Gen).

The FMP is a working group of the Advisory Committee and consists of current and former members of the Forms Subcommittee, advisors from other Judicial Conference groups such as the Bankruptcy Judges Advisory Group and the Bankruptcy Clerks Advisory Group, advisors from the Federal Judicial Center, the Executive Office for United States Trustees, and a Bankruptcy Administrator. The FMP began its work modernizing the official bankruptcy forms in 2008. The dual goals of the FMP are to improve the language and format of official bankruptcy forms and to improve the interface between the forms and available technology, including the enhanced technology that will become available through the judiciary's Next Gen program.

From a forms perspective, the major change in Next Gen will be the ability to store all information on forms as data so that authorized users can produce customized reports containing the information they want from the forms, displayed in whatever format they choose. Judge Perris said that the initial release of Next Gen, which would include report generating tools for internal court users, is planned for 2014.

As an initial matter, the FMP separated case opening forms for individual and non-individual debtors. Drafting of the individual forms is complete, and a subset of those forms (3A, 3B, 6I, 6J, 22A-1, 22A-2, 22B, 22C-1 and 22C-2), were published for public comment in August

2012. The comments and recommendations for those nine forms are discussed at Agenda Items 7(B) and 7(C) below.

Judge Perris said there were several reasons the Advisory Committee published only a subset of individual forms in 2012, including the need for further refinements on some forms. A more important concern, however, was that it was unclear in 2012 whether Next Gen would be in place when the new forms were projected to go into effect on December 1, 2013. Putting all of the new forms into effect before the Next Gen report writing functions are available to the courts would likely increase the difficulty of transitioning to the new forms. On the other hand, having a small subset in place when Next Gen goes into effect will allow for fuller testing of the new forms before other modernized forms are approved.

Judge Perris said that the remaining individual debtor forms were presented to the Advisory Committee at its fall 2012 meeting and to the Standing Rules Committee at its winter 2012 meeting with a request for preliminary comments prior to publication. She said that those forms, set out in the Supplement to the Agenda Book beginning at page 91, have been revised to reflect the preliminary comments from the Advisory Committee and Standing Committee and also reflect formatting changes that were made as a result of general comments about the nine FMP forms that were published last August. The most significant formatting change since the Advisory Committee and Standing Committee last saw the forms that will be recommended for publication this year, she said, was a reduction in the use of shading and long black bars to separate the parts and sections on the new forms.

Judge Perris said that the non-individual forms are on track to be published for comment in August 2014. The FMP has completed initial drafts of most of the non-individual forms, she said, and has begun prepublication testing with groups of law clerks, law students, lawyers and judges.

Judge Perris said three issues needed to be resolved prior to a motion for publication of the remaining individual FMP forms in August 2013: (1) a revision of the proposal to modify the exemption schedule to account for the Supreme Court's decision in *Schwab v. Reilly*, 130 S. Ct. 2652 (2010); (2) a request to change the lettering of the new schedules (discussed at Agenda Item 7(D) below); and (3) a recommendation for a delayed effective date of the renumbered individual forms.

Schwab v. Reilly and the Individual Debtor's Exemption Schedule

The Chair spoke about the proposed *Schwab* changes to the exemption schedule. He said that some members of the Standing Committee had been concerned that the proposal recommended by the Advisory Committee was unclear. As submitted to the Standing Committee, the exemption schedule had a blank line in the value column and an instruction at the top of the form that an exemption amount could be put in on the line, or the debtor could write on the line "full fair market value." The Chair said that as a result of the Standing Committee's concerns, the Joint Subcommittee recommended revising the exemption schedule to include two checkboxes: one checkbox that would allow the debtor to specify a dollar amount for the exemption, and a second checkbox that would allow the debtor to exempt "100% fair market value *up to the applicable statutory limit.*" The italicized language, he said, addressed a concern previously raised by case trustees that if a checkbox simply allowed the debtor to exempt "100% of full market value," debtors would routinely check the box without considering whether the exemption had a dollar limit specified by statute. By limiting the checkbox

exemption to 100% of full market value up to any applicable statutory limit, the Chair said, a debtor would be easily able to follow *Schwalb* without prompting unnecessary objections from case trustees. **After a short discussion, the Advisory Committee recommended the revised exemption schedule for publication.**

Motion for delayed effective date of the remaining individual forms

Judge Perris explained that, depending on the Advisory Committee's decisions at Agenda Items 7(B) and 7(C), the forms published last fall (3A, 3B, 6I, 6J, 22A-1, 22A-2, 22B, 22C-1 and 22C-2) are on track to go into effect December 1, 2013, and December 1, 2014. She said that there is no problem with the proposed effective dates for those forms because they are projected to replace existing versions that are used exclusively by individuals. Most of the forms to be published this August, however, are individual debtor versions of forms that are currently used by all debtors. Official Form 1, the current voluntary petition, for example, will be replaced by two FMP versions: one version for individual-debtors, Official Form 101, and another version for non-individual debtors, Official Form 201. Only the individual debtor version of the voluntary petition is complete and ready to be published this year, however.

Like the petition, there will be different versions of the schedules and the statement of financial affairs for individuals and non-individuals. The need for different versions of case opening forms for individuals and non-individuals required the FMP to develop a new numbering system for all the bankruptcy forms that both organizes the bankruptcy forms in a logical way and has some relationship to current form numbers. The basic numbering protocol for the new forms is:

1XX – Forms for Individuals Filing for Bankruptcy

2XX – Forms for Non-individual Filing for Bankruptcy

3XX – Orders and Court Notices

4XX – Additional Official Forms

XXXX - Director's Forms

The new numbering system will make it difficult, Judge Perris said, to introduce renumbered forms piecemeal. She explained that the normal effective date for the renumbered individual-debtor forms to be published this August would be December 1, 2014. The Subcommittee recommended delaying the effective date until at least December 1, 2015, so that they can go into effect at the same time as the non-individual versions of the forms—which are about a year behind in development.

Judge Perris said that there are two reasons to synchronize the effective date of the individual and non-individual forms. First, as explained above, many of the individual-debtor forms being published this August are revisions of forms that currently apply in all bankruptcy cases, individual and non-individual. To avoid overlap and confusion, the non-individual forms should not go into effect until the current forms have been replaced for all cases. Second, the forms that will be published this August implement the new forms-numbering scheme described above. Delaying the effective date of the non-individual forms will allow there to be a uniform numbering scheme for all of the bankruptcy forms. The delay will also permit the bulk of the

modernized forms to go into effect after the first release of the Next Gen is fully operational, thus making it easier for court personnel to take advantage of the improved technology and interface.

In the meantime, courts will be able to work with a smaller subset of the new forms (3A, 3B, 6I and 6J scheduled to take effect December 1, 2013, and the means-test forms scheduled to take effect December 1, 2014), allowing time to adjust to the new format and technology features.

A motion to publish the remaining individual forms, with a proposed effective date no earlier than December 1, 2015, passed without opposition.

NOTE: The remaining individual-debtor forms to be published are set out beginning at page 91 of the Supplement to the Agenda Book. As set out in the Supplement, they are Official Forms 101, 101A, 101B, 104, 105, 107, 112, 119, 121, 318, 423, 427, and the debtor's schedules – 106A, 106B, 106, C, 106D, 106E, 106F, 106Dec, and 106Sum. As revised at Agenda Item 7(D), however, the schedules to be published will be labeled 106A/B, 106C, 106D, 106E/F, 106G, 106Dec, and 106Sum. A form number conversion chart for the individual-debtor forms is attached to these minutes.

(B) Recommendation concerning comments received on the published amendments to Official Forms 3A, 3B, 6I, and 6J.

Judge Perris highlighted the more significant comments for proposed Official Forms 3A, 3B, 6I, and 6J. She added that the comments were more fully discussed in the agenda materials.

Judge Perris said that Official Forms 3A (Application for Individuals to Pay the Filing Fee in Installments), 3B (Application to Have the Chapter 7 Filing Fee Waived), 6I (Schedule I: Your Income), and 6J (Schedule J: Your Expenses) were selected for the initial implementation stage of the FMP because they make no significant change in substantive content and simply replace existing forms, which already apply only in individual-debtor cases. The restyled forms all involve the debtors' income and expenses, and they are employed by a range of users: the courts, U.S. trustees, and case trustees, for varied purposes.

In response to the publication of these forms—and of Official Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2, discussed at Agenda Item 7(C) below—29 sets of comments were submitted, and one letter was informally submitted. Judge Perris said that the comments on the overall project and the published forms in general fell primarily into the following categories:

- support for the new forms;
- dislike of the new forms and a preference for maintaining the current forms;
- concern that the forms contain too much shading, too much white space, and too many pages, all of which will increase printing, mailing, and electronic transmission costs;
- concern that the forms will encourage *pro se* filings, to the detriment of the debtors and the courts; and
- the need for a clear statement about the extent to which software-generated forms can deviate from the graphic and formatting styles of the proposed forms, including the omission of instructions that are provided in the format of checkboxes and the omission or collapsing of inapplicable sections.

Judge Perris first discussed the most fundamental question—whether the project should proceed notwithstanding the preference of some commenters for the current forms. **After reviewing the reasons for the project and the guiding principles behind the redesign, the Advisory Committee unanimously concluded that the project should proceed.**

In response to the numerous comments about shading, **the Advisory Committee voted to accept the FMP's recommendation that shading should largely be eliminated**. The Advisory Committee also agreed with the FMP's proposed redesign of the forms, which retains the black banner for the "part" designation but uses a different format for the title of each part. Shading was largely eliminated from the balance of each of the forms. Members commented that these changes will reduce toner usage and increase the ease with which forms are printed and reproduced.

Judge Perris said that the increase in the length of the forms is a function of several factors. First, in an effort to increase accuracy and ease of use, and to create a form whose answers can populate a usable database of answers, more specific questions are asked, and the debtor is often prompted to provide an answer by selecting from a list of choices. Second, rather than providing a dense set of instructions at the beginning of a form and then blank spaces for the answers, many instructions are integrated throughout the form where the debtor is likely to need them. Third, more space is provided to answer some of the questions. Finally, examples are often included to help the debtor understand what information is being requested.

Judge Perris added that evaluating the length of the new forms before they are completed with debtor information is misleading because proposed revisions to Rule 9009, which is part of the chapter 13 plan form and rules package presented at this meeting for publication, will allow the filer to "collapse" question answers that do not require all the white space provided on the forms. In discussing this issue, members agreed that new design is likely to provide more accurate, usable information.

Judge Perris said that proposed Rule 9009 also provides guidance regarding the extent to which software-generated forms may deviate from the official forms.

Judge Perris said that whether the use of plain English and a more user-friendly design will encourage more *pro se* filings has been the subject of discussion since the beginning of the project. She said that FMP believes that the preparation of comprehensive instructions that explain the impact and complexity of a bankruptcy case and provide extensive warnings about the significance of filing for bankruptcy will discourage, not encourage, *pro se* filings. In addition, the FMP believes that it is important that forms be understandable by all debtors, including those who are represented, because debtors are required to sign the forms under penalty of perjury. The comments did not change those views.

Comments on Official Form 3A. Two sets of comments addressed this form specifically. Both suggested adding an option to the form allowing for payment a chapter 13 filing fee through the debtor's plan. Districts differ on whether they permit this practice, and the current form does not expressly provide this option. Because the practice is not universal and the bankruptcy system has historically been able to accommodate the practice where it is allowed, the Subcommittee recommends that the form should remain silent regarding that option. The Advisory Committee agreed with the Subcommittee.

Line 2 of the published form stated that a debtor may ask the court to extend the deadline for payment of the final fee installment and that the debtor must explain why an extension is needed. One comment noted that no space was provided on the form for the explanation. Judge Perris said that the FMP contemplated that such an extension would require a separate application at a later time, and in order to avoid any confusion, recommended moving the statement about the possibility of an extension from the form to the separate form instructions. Judge Perris said that the change is consistent with the form currently in effect, which merely informs the debtor of the possibility of obtaining an extension "for cause shown" and does not ask the debtor to provide reasons for the extension as part of the application. **The Advisory Committee agreed with the proposed change.**

One comment suggested deleting the instruction in the signature box not to pay "anyone else in connection with your bankruptcy case" until the entire filing fee is paid because it would prohibit a debtor from making payments to a chapter 13 trustee before all of the installment payments are made. A member noted that current Official Form 3A includes the statement, "Until the filing fee is paid in full, I will not make any additional payment or transfer any additional property to an attorney or any other person *for services* in connection with this case" (emphasis added). **The Advisory Committee agreed with the FMP that the comment should be addressed by reinserting "for services" in the statement.**

Comments on Official Form 3B. Five comments were submitted regarding this form. Several of them stated that certain information asked for on the proposed form should be omitted because of its irrelevance to the waiver decision. The following information was suggested for deletion:

- line 3, non-cash government assistance;
- lines 12–16, various assets that the debtor owns;
- line 19, payment for bankruptcy services by someone else; and
- line 20, prior bankruptcy filings by the debtor or the debtor's spouse.

The current version of the form asks for the second and third items of information listed above, and the Advisory Committee decided to continue requesting that information. The current form also asks for prior bankruptcy filings by the debtor, but not by the debtor's spouse unless the spouse is also filing. Upon consideration of the comments, the FMP recommended deleting the request for information about prior filings of a non-filing spouse. **The Advisory Committee agreed with the FMP.**

Judge Perris said that the decision about how to respond to the first item, non-cash government assistance, was more complicated. The amount of non-cash government assistance may be relevant to determining whether a debtor is able to pay the filing fee in installments, since it may reduce the debtor's other expenses, but it is not specifically asked for on current Official Form 3B. Instead, the current form simply asks for the total combined monthly income as computed on Schedule I. Restyled Schedule I as published asked debtors to include the value of "[o]ther government assistance." Immediately preceding that question, it asked for "unemployment compensation" and "Social Security," which might have suggested to some debtors that "other government assistance" referred only to other forms of cash assistance. At the same time, non-cash governmental assistance should not be counted in determining whether the debtor meets an income threshold for waiver eligibility. The interim procedures of the Judicial

Conference regarding chapter 7 fee waivers direct that "Non-cash governmental assistance (such as food stamps or housing subsidies) is not included [in income]."

Judge Perris said that, as a result of the comments, the FMP recommends rephrasing the requests for information about governmental assistance on both Official Form 3B and Schedule I to harmonize the two forms. In completing Official Form 3B, the debtor is permitted to use the income calculated on Schedule I. As revised, however, the income on Schedule I includes non-cash governmental assistance in income to the extent that the debtor knows the value of such assistance. Accordingly, on Official Form 3B it was necessary to have the debtor first report the amount of income including the value of non-cash assistance, and then deduct the value of such assistance to determine the amount of income for purposes of the fee waiver application. In addition, the FMP recommended revising both forms to clarify that the debtor only needs to include the value of non-cash governmental assistance to the extent known. **The Advisory Committee approved the changes recommended by the FMP.**

Comments on Official Form 6I. Judge Perris said that 14 comments specifically addressed this form. Several of them raised questions about when income information must be provided about non-filing spouses. In order to clarify the requirement, the FMP added the following instruction at the beginning of the form: "If you are married, not filing jointly, and your spouse is living with you, include information about your spouse. If you are separated and your spouse is not filing with you, do not include information about your spouse." The form specifically asks for information about both spouses when they file jointly. **The Advisory Committee agreed with the FMP.**

In addition to the changes needed to coordinate Schedule I with Official Form 3A (discussed above) the FMP recommended two changes to the form's list of payroll deductions. As revised in the agenda materials, Schedule I was amended to ask separately about mandatory and voluntary contributions to retirement plans. And a new specific payroll deduction for "domestic support obligations" was added in response to a comment that these deductions are sufficiently common to justify a specific listing. **The Advisory Committee approved the changes.**

Comments on Official Form 6J. Fifteen comments specifically addressed Schedule J. Judge Perris said that the part of the proposed form drawing the most comment was the inclusion in part 2 of column B ("For Chapter 13 Only – What your expenses will be if your current plan is confirmed"). Many commenters were uncertain about the purpose of that column and doubted whether debtors would provide useful information. The FMP recommended two changes in response to those comments. First, column B was eliminated. Second, in order to permit districts that currently allow debtors to use Schedules I and J to update their income and expense information, a new checkbox was added to both forms where a debtor can indicate that the information on the form is a "supplement as of the following post-petition date:_____." **The Advisory Committee approved the changes recommended by the FMP.**

One commenter questioned the reason for the question, "Does anyone else live in your household?" Judge Perris said that the FMP concluded that the question was too broad, and recommended the following changes to Part 1 of Schedule J. First, questions 1 and 2 on the published form were combined into a single question asking about all of the debtor's dependents, regardless of whether the dependents live with the debtor. Second, question 3 was revised to make its financial purpose clear. In the published version of the form, question 3 asked, "Does anyone else live in your household?" This was amended to read "Do your expenses include

expenses of people other than yourself and your dependents?" The question has been converted to a simple "yes/no" format. If the debtor's Schedule J reveals that it includes expenses for people other than the debtor and the debtor's dependents, interested parties may investigate further if warranted. **The Advisory Committee approved the changes.**

Several comments questioned the inclusion of student loan payments as an expense deduction in Schedule J. They argued that explicitly listing this deduction represented a policy decision that student loans can continue to be paid during a chapter 13 case without constituting unfair discrimination against other unsecured claims that are not being paid in full. Another comment contrasted the treatment of student loans with other nondischargeable debts that are not treated as deductions. In response, the category of student loans as a distinct line item was eliminated. Now debtors who are paying student loans as an expense may list those payments as an "other" installment payment on line 17 of the form. **The Advisory Committee approved the changes.**

Just as with Schedule I, some comments questioned the treatment of non-filing spouses on Schedule J. To eliminate the confusion, the FMP added the following instructions: "If you are married and are filing individually, include your non-filing spouse's expenses unless you are separated. If you are filing jointly and Debtor 1 and Debtor 2 keep separate households, fill out a separate *Schedule J* for each debtor. Check the box at the top of page 1 of the form for Debtor 2 to show that a separate form is being filed." New question 1 affirmatively asks if debtor 2 lives in a separate household. If so, that debtor is directed to file a separate Schedule J. **The Advisory Committee approved the changes.**

After approving the changes listed above, the Advisory Committee recommended that Official Forms 3A, 3B, 6I and 6J become effective on December 1, 2013.

(C) Recommendation concerning comments received on the published amendments to Official Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2.

The Chair discussed Official Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2, the restyled means-test forms for individual debtors under chapter 7, 11, and 13, that were published for comment in August 2012. Eighteen sets of comments on the means-test forms were officially submitted, and one person informally provided the Advisory Committee with a detailed review of the forms. The Chair said that the comments ranged from suggestions and critiques regarding wording, style, and formatting of the forms to ones raising questions about interpretations of the Bankruptcy Code and case law. The FMP and the Forms Subcommittee carefully considered all of the comments. The Subcommittee determined that several of the comments were well taken, and recommended the following changes to the forms in response.

<u>Creation of a separate form for chapter 7 means-test exemption and harmonizing the line numbers across the means-test forms</u>.

The Chair explained that 11 U.S.C. § 707(b)(2)(D) exempts—either permanently or for a specified period—a small percentage of chapter 7 debtors from being subject to the means test. In the current chapter 7 means-test form (Official Form 22A) and the revised form that was published last summer (proposed Official Form 22A-1), information about eligibility for an exemption is asked for at the beginning of the form. Because of the complexity of the qualifying

requirements, this portion of the form occupies multiple line numbers and the entire first page of the form.

The Chair said that several comments were submitted regarding this part of the published form, and one comment suggested that because of its limited applicability, the questions that pertain to exemptions based on certain types of military service should be moved to the separate form. The Subcommittee agreed with the proposal and recommends that a separate supplement to Official Form 22A-1 be created, listing all exemption questions, to be used only when applicable. The Chair explained that the proposal would serve two purposes: It would unclutter Official Form 22A-1 by removing questions that are only occasionally applicable, and it would allow the Advisory Committee to address another criticism by adopting uniform line numbering in the three means-test forms dealing with income (22A-1, 22B, and 22C-1). Currently, the initial questions that were only in the chapter 7 form caused a misalignment of line numbers covering similar topics across the forms. **The Advisory Committee agreed with the Subcommittee's recommendation.**

New instruction about a domestic support obligation paid by one joint debtor or non-filing spouse to the other debtor.

The Chair said that a comment suggested that in any case where the income of both spouses is set out, there should not be a separate income item for the payment of a domestic support obligation from one spouse to the other. He said that the Subcommittee recommends adding an instruction to the relevant questions in order to prevent double reporting of the same income. **The Advisory Committee agreed.**

Changes to implement the *Hamilton v. Lanning* decision.

In *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010), the Supreme Court held that the calculation of a chapter 13 debtor's projected disposable income under § 1325(b) requires consideration of changes to income or expenses reported elsewhere on Official Form 22C that, at the time of plan confirmation, had occurred or were virtually certain to occur. As published last summer, the Chair explained, proposed Official Form 22C-2 included a section that asked the debtor to report any income or expense listed on the form that "has changed or is virtually certain to change during the 12 months after the date you filed your bankruptcy petition."

The Chair said that two comments stated that the 12-month limitation should be eliminated because the *Lanning* decision does not support such a limitation. **The Advisory Committee agreed that the 12-month limitation should be eliminated from Official Form 22C-2. After the meeting, the *Lanning* instruction was revised to direct the debtor to indicate if reported income or expenses "have changed or are virtually certain to change after the date that you filed your bankruptcy petition and during the time your case will be open."**

The Chair said that another issue raised by the comments was whether Official Forms 22C-1 and 22C-2 should introduce an adjustment for changes in income, under the *Lanning* decision, for determining the applicable commitment period under 11 U.S.C. § 1325(b)(4). He said that at least one decision has accepted the argument that a change in the debtor's income from the calculation of current monthly income should similarly allow a change in the applicable commitment period. *In re Ducret*, 2011 WL 2621329 (Bankr. S.D. Fla. 2011). However, this decision was reversed on appeal, in a decision finding that the definition of § 101(10A) is

controlling, and that the *Lanning* decision is inapposite. *In re Ducret*, 2012 WL 4468376 at *4 (S.D. Fla. 2012).

One member was in favor of an explicit adjustment. Another member said that the applicable commitment period could vary from the result stated in the form if the debtor's "current monthly income were calculated under § 101(10A)(A)(ii) of the Code rather than under § 101(10A)(A)(i), the method applicable where the debtor has timely filed the required income statement. **After a discussion, the Advisory Committee voted to add to the direction on the form for specifying the three-year commitment, "Unless otherwise ordered by the court . . .".**

The Chair said that another issue presented by the comments was whether the means test forms should continue to reject the holding in *Drummand v. Wiegand (In re Wiegand)*, 386 B.R. 238 (9th Cir. BAP 2008), that gross business and rental receipts are to be counted as "current monthly income" under § 101(10A).

The Chair said that the Advisory Committee rejected the logic of *Wiegand* when the means test forms were developed and had revisited the issue several times since then without changing the forms. *Wiegand*, he pointed out, is limited to chapter 13 cases, and is based on language in § 1325(b) that, before the means test was introduced in the 2005 Code amendments, allowed the deduction of business expenses from the income that a debtor could be required to pay into a chapter 13 plan. However, there is no indication that Congress considered this provision when it included the definition of current monthly income as part of the means test, which it made applicable to both chapter 7 and chapter 13 cases. Among other things, the Chair said, counting gross business receipts as "current monthly income" creates unreasonable distinctions between similarly situated debtors, giving a sole proprietor current monthly income based on the business's gross receipts, while giving the sole owner of an LLC or Chapter S corporation only the net profits of the business. Moreover, the Census Bureau's median state income, to which the debtor's current monthly income is compared, itself includes only net business income. And finally, the chapter 7 means test includes no deduction for business expenses, which would result in nearly all chapter 7 debtors operating a business having a presumption of abuse.

Since *Wiegand* was decided, the Chair said, three courts other than those in the Ninth Circuit have adopted the Ninth Circuit BAP's decision, and two courts have rejected it. One member suggested creating a supplement to deal with *Wiegand* but another member pointed out the case has been in effect in the Ninth Circuit for five years now, and bankruptcy practice appears to have adapted in that circuit without a change to the forms. After further discussion, only one member was in favor of adding a line to Official Form 22C-1 to report gross income for a debtor that operates a business.

The Chair said that another legal issue raised by the comments was whether Official Forms 22A-2, and 22C-2 should allow the use the *Johnson v. Zimmer* formula for determining the number of persons used in calculating National and Local IRS expense allowances. The current forms, the Chair said, incorporate the rule from the IRS Collection Financial Standards providing that the number of persons used to calculate IRS expense allowances should be the number that would be allowed as exemptions on the debtor's federal income tax return, plus the number of any additional dependents that the debtor supports. *Johnson v. Zimmer*, 686 F.3d 224 (4th Cir. 2012), the Chair said, uses a different, fractional economic unit approach. The Chair noted that there have been no reported decisions to date that follow the *Johnson v.*

Zimmer approach. After a discussion, no member favored changes to the forms to account for *Johnson v. Zimmer*.

After the meeting, by email vote, the Advisory Committee approved for republication revised versions of Official Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2, and new Official Form 22A-1Supp with the changes recommended in bold above.

(D) Alternative proposal by Judge Harris and Ms. Michaux to reletter proposed new Forms 106A, 106B, 106C, 106D, 106E, 106F, 106G, and 106H.

Committee members Judge Harris and Ms. Michaux presented an alternative to the relettering scheme proposed by the Advisory Committee for the new FMP schedules. Mr. Myers explained that early in its revision process, the FMP concluded that the existing order of schedules—listing property, then exemptions, and then debts was illogical, because a debtor first needs to know whether there is equity available in an asset before applying an exemption to that asset. The more logical approach, the FMP concluded, would be to list property, then claims—which allows the debtor to calculate equity, and then list exemptions. This reordering, however, plus the FMP's decision to combine related schedules (personal and secured property schedules are combined into a single two-part property, and priority and non-priority claims are combined into a single two-part claims schedule), meant that the proposed new lettering scheme would not track the existing lettering scheme.

Judge Harris and Ms. Michaux suggested an alternative: representing the newly combined schedules by both letters of the schedules they were derived from (i.e., the FMP property schedule for individuals would be lettered 106A/B to show to it is derived from exiting Schedules 6A and 6B, and the claims schedule for individuals would be lettered 106E/F to show it was derived from existing schedules 6E and 6F). Under this proposal, the remaining schedules would retain their existing letter designations. Judge Harris and Ms. Michaux argued that their proposal would make the transition to the new forms much less disruptive since existing letter designations have become highly ingrained over the past 30 years.

After discussing the alternatives, the Advisory Committee voted 7 to 5 in favor of the alternative proposal for renumbering.

(E) Report on automatic dollar adjustments to Official Forms 1, 6C, 6E, 7, 10, 22A, and 22C and Director's Procedural Forms 200 and 283 on April 1, 2013, to conform to the dollar adjustments in the Bankruptcy Code, as provided in Section 104(a) of the Code.

Mr. Myers explained that under Section 104(a) of the Bankruptcy Code, certain dollar amounts stated in Bankruptcy Code sections are automatically updated to reflect changes in the consumer price index over the prior three years. The most recent adjustment, he said, which occurred on April 1, 2013, required adjustments to dollar amounts listed in the seven official bankruptcy forms and two director's forms listed above. None of the changes require action by the Advisory Committee, Mr. Myers said, and the revised forms have already been posted on the court's public website.

8. Report by the Subcommittee on Business Issues.

Recommendation concerning comments received on published amendments to Rules 7008, 7012, 7016, 9027, and 9033 which were proposed in response to the Supreme Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011).

Judge Wizmur gave the report. She explained that currently the Bankruptcy Rules follow the division between core and non-core proceedings set forth in 28 U.S.C. § 157. With respect to proceedings that are core under the statute, she said, the rules contemplate that the bankruptcy judge may enter a final judgment. If a proceeding is non-core, on the other hand, the rules and statute contemplate that the bankruptcy judge will issue a report and recommendation to the district court, unless all parties consent to entry of a final judgment by the bankruptcy judge.

Stern held that a bankruptcy judge did not have authority under Article III of the Constitution to enter final judgment in a proceeding that was listed as core under 28 U.S.C. § 157(b)(2). Accordingly, reference in the rules to core and non-core no longer clarify whether the bankruptcy court has authority to enter a final judgment. As a result of *Stern*, the Advisory Committee proposed to amend the Bankruptcy Rules in three respects. First, the terms core and non-core would be removed from Rules 7008, 7012, 9027, and 9033 to avoid possible confusion in light of *Stern*. Second, in all bankruptcy proceedings (including removed actions), the parties would need to state whether they do or do not consent to entry of final orders or judgment by the bankruptcy judge. Third, Rule 7016, which governs pretrial procedures, would be amended to direct bankruptcy courts to decide the proper treatment of proceedings.

The Advisory Committee received eight comments on all or part of these proposed amendments. In the main, the comments expressed support for the amendments but raised five issues:

(1) whether to retain the terms "core" and "non-core";

(2) whether references to the "bankruptcy court" in the published amendments should revert to the "bankruptcy judge," the term that is currently used;

(3) whether to provide procedures for treating as proposed findings and conclusions a bankruptcy judge's decision entered as a final order or judgment when that decision is later determined to be beyond the bankruptcy judge's final adjudicatory power;

(4) whether to require a statement as to consent when a litigant proceeds by motion before filing a formal pleading; and

(5) whether to provide that a litigant may consent to final adjudication by a bankruptcy judge with respect to part, but not the whole, of a proceeding.

After reviewing the comments, the Advisory Committee voted unanimously to recommend final approval of the published amendments. With respect to the first three issues raised by the comments, these points were thoroughly considered before publication of the amendments. The Advisory Committee did not find that the comments raised new concerns that would justify revisiting those issues. Issues (4) and (5), on the other hand, were not considered previously. The Advisory Committee nevertheless concluded that the comments raising those issues, although presenting possible suggestions for future rulemaking, did not require alteration of the published amendments. Similarly, the Advisory Committee concluded that a comment by the Bankruptcy Clerks Advisory Group regarding the requirement of service of notice by mail

under current Rules 9027 and 9033 might be considered for future rulemaking but was beyond the scope of the *Stern*-related amendments.

9. Report by the Subcommittee on Privacy, Public Access, and Appeals.

(A) Recommendation concerning comments received on published amendments to Rules 8001–8028, the proposed revision of the bankruptcy appellate rules, and to Rules 9023 and 9024, amended to refer to the procedure in proposed new Rule 8008 governing indicative rulings.

The Reporter first addressed the proposed revisions to Rules 9023 and 9024 to incorporate a cross-reference to Rule 8008 regarding indicative rulings. The National Bankruptcy Conference suggested adding the cross reference to committee notes for Rules 9023 and 9024, instead of in the rules themselves, but committee notes are historical and can only be added when rules are updated, **so the Advisory Committee recommended Rules 9023 and 9024 for final approval as published.**

The Reporter explained that published revisions to Rules 8001–8028 (Part VIII of the Bankruptcy Rules) are the products of a comprehensive revision of the rules governing bankruptcy appeals to district courts, bankruptcy appellate panels, and, with respect to some procedures, courts of appeals. They result from a multi-year project to bring the bankruptcy appellate rules into closer alignment with the Federal Rules of Appellate Procedure (FRAP); to incorporate a presumption favoring the electronic transmission, filing, and service of court documents; and to adopt a clearer style. Existing rules were reorganized and renumbered, some rules were combined, and provisions of other rules were moved to new locations. Much of the language of the existing rules was restyled.

She said that 14 sets of comments were submitted in response to the publication of these rules. Many of the comments were lengthy and detailed and demonstrated the commenters' careful review of the published rules and provided suggestions on issues of style, organization, and substance. The Reporter said that in considering the comments, the Subcommittee was guided by the goal of maintaining close adherence to the FRAP, except where those rules are incompatible with bankruptcy appeals. It also recommended postponing for future consideration a number of suggestions that would change existing practice or raise policy issues requiring careful consideration.

In general, the Reporter said, the comments displayed a positive response to the proposed revision of the Part VIII rules. She discussed the more significant comments, as set forth below, and noted that a more complete listing of comments and changes recommended by the Subcommittee was included in the agenda materials.

General Comments. Two bankruptcy judges and the National Conference of Bankruptcy Judges praised the revision of the Part VIII rules, stating that it would lead to improved quality of bankruptcy appellate practice, reduce confusion, and yield a more efficient and effective bankruptcy appellate practice.

Rule 8002. Two comments expressed concern about the inclusion of an inmate mailbox rule, which deems a notice of appeal by an inmate timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. The commenters stated that this rule could delay for several days the determination that a bankruptcy court order or judgment

has become final. The Subcommittee continued to support the inclusion of this provision in order to mirror FRAP 4(c). It believed that, given the rarity of inmate appeals in bankruptcy cases, the impact of the provision on finality will be limited. **A motion to change the title of 8002(b)(3) to "Appealing the Ruling on the Motion" was approved.**

Rule 8003. Several comments pointed out that the provision in subdivision (d) directing the clerk of the appellate court to docket an appeal "under the title of the bankruptcy court action" was unclear since "action" might refer to the overall bankruptcy case or to an adversary proceeding within the case. The Subcommittee agreed that this was an instance in which the FRAP language needs to be modified for the bankruptcy context. **The Advisory Committee voted to change the wording in Rule 8003(d)(2) and the parallel provision in Rule 8004(c)(2) to "under the title of the bankruptcy case and the title of any adversary proceeding."**

Rule 8004. The clerk of a bankruptcy appellate panel ("BAP") commented on the provision of subdivision (c)(3) that directed the dismissal of an appeal if leave to appeal is denied. She stated that appellants sometimes file a motion for leave to appeal when leave is not required and in that situation, although the motion is denied, dismissal is not appropriate. **The Advisory Committee voted to delete the sentence in question, which is not contained in either the current bankruptcy rule or the FRAP rule from which the proposed rule is derived.**

One comment pointed out an inconsistency between proposed Rule 8003 and Rule 8004. Rule 8003(c) requires the bankruptcy clerk to serve the notice of appeal, whereas Rule 8004(a) places that duty on the appellant (along with the motion for leave to appeal). This difference is a carryover from existing practice. **The Advisory Committee decided to consider in the future whether the service requirement should be the same in both rules.**

Rule 8005. Several comments questioned whether an election to have an appeal heard by the district court, rather than the BAP, must still be made by a statement in a separate document. Subdivision (a) of the proposed rule refers to an official form that did not exist at the time the rule was published, and some comments also expressed confusion about that reference. At Agenda Item 9(B) below, the Advisory Committee recommended publication an amendment to the notice of appeal form, Official Form 17A, that will include a section for making an election under this rule. That form, which if approved will take effect on the same date as the rule, will clarify that the separate-document rule no longer applies. The Subcommittee also recommended updating the committee note to indicate that a statement electing to have the appeal heard by the district court "must be made using the appropriate Official Form." One member noted, however, that the Official Form would be created by attorneys using word processors, not simply downloaded of the public website and filled out, and suggested retaining the committee note as published on this point to say "the statement must *conform substantially* to the appropriate Official Form." **The motion to retain "conform substantially" was approved.**

Two comments addressed the procedure that should apply when an appellee elects to have the district court hear an appeal that was initially sent to the BAP. The Subcommittee agreed with one of the comments that the BAP clerk should notify the bankruptcy clerk if an appeal is transferred to the district court, and it voted to add a sentence to that effect in subdivision (b) as set forth in the agenda materials. **The Advisory Committee approved the addition.**

Rule 8006. Two comments stated that the proposed rule does not give the bankruptcy court sufficient time to certify a direct appeal to the court of appeals. Under subdivision (b), a matter is deemed to remain pending in the bankruptcy court for purposes of this rule for 30 days after the effective date of the first notice of appeal. The Subcommittee decided that this time limit strikes an appropriate balance between giving the bankruptcy court time to decide whether to certify a direct appeal and letting the district court or BAP know at a reasonably early time that a certification for direct appeal will not be coming from the bankruptcy court. However, the Subcommittee did add cross-references to Rule 8002 and FRAP 6(c), and deleted a cross-reference to 9014. **The Advisory Committee approved the changes.**

Rule 8007. Two comments questioned the provision of the published rule that appeared to permit a party to seek a stay pending appeal in an appellate court before a notice of appeal has been filed. The comments took the position that, until a notice of appeal is filed, the appellate court lacks jurisdiction to rule on a stay motion. The Subcommittee agreed and recommended deleting "or where it will be taken" from 8007(b)(2) to eliminate a possible reading of the rule that would permit the filing a motion for a stay in the appellate court prior to the filing of a notice of appeal. **The Advisory Committee approved the change.**

Rule 8009. Two bankruptcy judges and the Bankruptcy Clerks Advisory Group submitted comments stating that the practice of having the parties designate the record on appeal is now outdated and that the 8th Circuit BAP's rule regarding the record should be adopted. Under that rule the record before the bankruptcy court is the record on appeal, and parties refer by number to the appropriate bankruptcy court docket entries in their appellate briefs. BAP judges are able to review the entire bankruptcy court record electronically. The Subcommittee recommended that the rule should remain as published but that this issue should be taken up for consideration in the future. **The Advisory Committee agreed to consider the issue in the future.**

Several comments objected to two FRAP provisions that were included in this rule: subdivision (c) that permits a statement of the evidence when a transcript is unavailable, and subdivision (d) that permits an agreed statement as the record on appeal. As to both, the Subcommittee and the Advisory Committee favored remaining consistent with the parallel FRAP provisions.

The Advisory Committee approved the addition of language clarifying the designation of the bankruptcy record should be filed with the bankruptcy clerk.

Rule 8010. Three comments noted that, while subdivision (b)(1) directs the bankruptcy clerk to transmit the record to the appellate clerk when it is complete, it does not specify what the clerk should do if the record is never completed. **The Advisory Committee voted to add this issue to the list of matters for future consideration.**

Rule 8013. One comment suggested that district courts be allowed to require a notice of motion in bankruptcy appeals if they otherwise follow that practice in their court. Another comment made a similar suggestion concerning proposed orders. **The Advisory Committee agreed with these comments and added "Unless the court orders otherwise" to subdivision (a)(2)(D)(ii).**

Another comment questioned why a rule allowing intervention on appeal is necessary and whether a party moving to intervene would have standing. The Subcommittee concluded that it is not always clear who is a party to a contested matter, so someone affected by an order being

appealed may want to intervene to participate in the appeal. Likewise, a United States trustee may need this authority to participate in some appeals.

Rule 8016. Two comments raised questions about subdivision (f), which addressed the consequences of failing to file a brief on time. It was unclear why the provision was located in the rule governing cross-appeals, and it seemed to be inconsistent with a provision in Rule 8018. **The Advisory Committee thought that the comments were well taken, and it voted to delete the subdivision.**

Rule 8017. The States' Association of Bankruptcy Attorneys commented that all governmental units, not just the United States and states, should be permitted to file an amicus brief without consent or leave of court. The Advisory Committee made no change, adhering to the decision to make the bankruptcy rule consistent with FRAP 29.

Rule 8018. A bankruptcy judge commented that the authorization in subdivision (f) for dismissal of an appeal or cross-appeal should require notice and an opportunity to show cause why the appeal should not be dismissed. **The Advisory Committee voted to reword the provision to clarify that dismissal can occur only upon motion of a party or on the court's own motion, after which the appellant would have an opportunity to respond.**

Rule 8019. One comment stated that there should not be a presumption in favor of oral argument and that the grounds for not allowing it should not be limited. The Advisory Committee made no change to the proposed rule, which is consistent with current Rule 8012 and FRAP 34(a)(2).

Another comment asserted that there is an inconsistency between subdivision (b), which requires a unanimous vote of a BAP panel to dispense with oral argument, and subdivision (g), which allows a BAP panel by majority vote to require oral argument when the parties agree to submit the case on the briefs. The Advisory Committee concluded that these provisions are consistent with FRAP 34(a)(2) and (f) and with the presumption in favor of oral argument.

Rule 8021. The States' Association of Bankruptcy Attorneys commented that subdivision (b), which permits the assessment of costs for or against the United States, its agencies, and officers only if authorized by law, should apply to all governmental units. The Advisory Committee made no change to this provision, which is consistent with FRAP 39(b).

Rule 8023. The National Conference of Bankruptcy Judges (NCBJ) suggested two issues for future consideration by the Advisory Committee relating to this rule, which governs voluntary dismissals of appeals. (1) In the bankruptcy court, Rule 7041 requires a plaintiff seeking to dismiss an adversary proceeding objecting to the debtor's discharge to provide notice to certain parties and obtain a court order containing appropriate terms and conditions. The NCBJ suggests the need for similar safeguards when that type of proceeding is voluntarily dismissed on appeal. (2) Under Rule 9019 a trustee is required to obtain court approval of any compromise or settlement. The NCBJ stated that it is not clear how Rule 9019 relates to this rule. **The Advisory Committee added these issues to its list of matters for future consideration.**

Rule 8024. The NCBJ commented that the rule carries forward a problem in current Rule 8016: It does not provide for the issuance of a mandate by the appellate court and thus does not make clear when jurisdiction revests in the bankruptcy court after the conclusion of an appeal. While the existing rule does not appear to be disrupting bankruptcy administration unduly, the

comment suggested that the Advisory Committee consider this issue in the future. **The Advisory Committee agreed to do so.**

The Advisory Committee unanimously recommended the revised Part VIII Rules for final approval with the post-publication changes set forth in the agenda materials and as further revised at the meeting.

(B) Recommendation by Judge Perris and Professor Gibson concerning revising and renumbering Official Form 17A, Notice of Appeal, to include an election by the appellant to have an appeal heard by the district court; adopting new Official Form 17B, Statement of Election by Appellee(s); and adopting new Official Form 17C, Certificate of Compliance with Rule 8015(a)(7)(B) or 8016(d)(2).

Judge Perris discussed the proposed forms.

Proposed Official Form 17A would include in the Notice of Appeal a section for the appellant's optional statement of election to have the appeal heard by the district court rather than by the bankruptcy appellate panel. It would only be applicable in districts for which appeals to a bankruptcy appellate panel have been authorized. Inclusion of the statement in the notice of appeal would ensure compliance with the statutory requirement that an appellant make its election to have the district court hear its appeal "at the time of filing the appeal." 28 U.S.C. § 158(c)(1)(A).

New Official Form 17B—the Optional Appellee Statement of Election to Proceed in the District Court—would be the form that an appellee would file if it wanted the appeal to be heard by the district court and the appellant or another appellee had not made that election. To comply with § 158(c)(1)(B), the appellee would have to file the form within 30 days after service of the notice of appeal.

New Official Form 17C—Certificate of Compliance with Rule 8015(a)(7)(B) or 8016(d)(2)—would provide a means for a party to certify compliance with the provisions of the bankruptcy appellate rules that prescribe limitations on brief length based on number of words or lines of text (the "type-volume limitation"). It is based on Appellate Form 6, which implements the parallel provisions of FRAP 32(a)(7)(B).

The Advisory Committee voted to recommend that the appellate forms be published this August so that they will be on track to go into effect on December 1, 2014, the same anticipated effective date for the revised Part VIII rules.

10. Report by the Subcommittee on Technology and Cross Border Insolvency.

Recommendation concerning adopting a bankruptcy rule establishing standards for electronic signatures.

Mr. Baxter gave the report. A request for a national rule governing electronic signature came to the Advisory Committee from the Forms Modernization Project and from the Court Administration and Case Management Committee (CACM). He referred members to the Reporter's memo of March 13, 2013, at page 321 of the Agenda Book for further background.

The need for a national rule governing electronic signatures, which would change the practice currently existing in many districts, was prompted by several concerns: the lack of uniformity of retention periods required by local rules, the burden placed on lawyers and courts to retain a large volume of paper, and potential conflicts of interest imposed on lawyers who are required to retain documents that could be used as evidence against their clients. At its fall 2012 meeting, the Advisory Committee referred the matter to the Subcommittee.

The Subcommittee, Mr. Baxter said, considered various options and ultimately recommended for publication an amendment to Rule 5005 that would prescribe the circumstances under which electronic signatures may be treated in the same manner as handwritten signatures without the need for anyone to retain paper documents with original signatures. The amended rule would supersede any conflicting local rules.

A new subdivision (a)(3) would be added to Rule 5005 to address the effect of signatures in documents that are electronically filed. One provision would apply to persons who are registered users of a court's electronic filing system and would adopt as the national rule the practice that currently exists in virtually all districts: the user name and password of an individual who is registered to use the CM/ECF system would be treated as that person's signature for all documents that are electronically filed. That signature could then be treated the same as a handwritten signature for purposes of the Bankruptcy Rules and for any other purpose for which a signature is required in court proceedings.

The other proposed provision would apply to the signatures of debtors or other persons who are not registered to file electronically. When a document (such as petitions, schedules, and declarations) is signed by someone who is not a registered user of CM/ECF, it could be filed electronically along with a scanned image of the signature page bearing the individual's actual signature. The document would then be stored electronically by the court, and neither the court nor the filing attorney would be required to retain a paper copy. Moreover, scanned signature pages, filed electronically in accordance with the proposed new rule, could be treated the same as a handwritten signature for purposes of the Bankruptcy Rules and for any other purpose for which a signature is required in court proceedings.

The Advisory Committee discussed the Subcommittee's recommendation, and reviewed the proposed new language to Rule 5005. Mr. Kohn said that he spoke with several lawyers from the Department of Justice and that there was concern about verification of the scanned signature. Some prosecutors, he said, would prefer that the actual signature be maintained by someone, or that some other authentication system be built in—for example notarization, or authentication by the case trustee at the 341 meeting of creditors. He suggested that the Advisory Committee defer for now, and perhaps work on the rule with the Advisory Committee on Evidence.

Judge Wedoff said that at the Standing Committee's January 2013 meeting, he explained that the Subcommittee was considering a rule change that would allow the scanned image of the signature of a debtor to be treated as a valid signature without the need for retention of the original hand-signed document by the court or the attorney. He said that there were no objections to continued consideration of a bankruptcy rule along these lines. He said he thought publication would be an opportunity for comments from those concerned about not retaining hand-signed documents.

Dr. Molly Johnson said that in conducting research on the current use of scanned signature, she received feedback from U.S. trustees, chapter 7 case trustees, and the Executive

Office for United States Attorneys (EOUSA). She said that feedback was consistent with Mr. Kohn's comments and that there was a preference for handwritten signatures affixed to original documents, but that there was also a recognition that scanned images of signature might work. The EOUSA was unwilling to provide written feedback considering possible alternatives being considered, preferring instead to withhold comments until a proposed rule is published.

After additional discussion, the Advisory Committee voted unanimously to recommend publication of the proposed amendments to Rule 5005 in August 2013.

11. Recommendations concerning comments received on published amendments to Rules 1014(b), 7004(e), 7008(b), and 7054. [

Bankruptcy Rule 1014(b).

Professor Gibson reviewed the comments on the proposed amendment to Rule 1014(b). That rule, she explained, governs the procedure for determining where cases will proceed if petitions are filed in different districts by, against, or regarding the same debtor or related debtors. As revised, the rule would address uncertainty about what events trigger the stay in a subsequently filed petition by requiring an order from the first court. It would also permit a judicial determination—not just a party's assertion—that the rule applied and that a stay of other proceedings was needed.

Professor Gibson said four sets of comments were submitted. The comments raised issues about (1) whether the first court has authority to enjoin parties to cases in other courts; (2) whether the first court has the exclusive authority to determine the venue of the related cases; (3) who may seek a venue determination in the first court; and (4) whether the proposed rule would reduce inter-court cooperation. Some of the comments also suggested wording changes. For reasons discussed in Professor Gibson's March 22, 2013 memo at page 471 of the Supplemental Materials, she recommended that the amendment go into effect as published, with the following exception: at line 16 of the proposed rule (on page 477 of the Supplemental materials) replace the word "these" with "the effected cases." **The proposed revision was approved, and a recommendation for final approval passed without objection.**

Bankruptcy Rule 7004(e).

Professor McKenzie said that the Advisory Committee there were four comments on the amendment to Rule 7004(e). The proposed amendment would shorten the time during which a summons is valid from 14 days to 7 days after it is issued. The change is intended to ensure that the defendant has sufficient time to respond to a complaint in bankruptcy litigation. Although Rule 7012(a) gives a defendant (other than a United States officer or agency) 30 days to answer a complaint, the time period is measured from the date the summons is issued, not when it is served. Accordingly, a lengthy delay between issuance and service of the summons may unduly shorten the defendant's time to respond in a bankruptcy proceeding.

Professor McKenzie said that each of the four comments raise the same issue—that a 7-day window to serve a summons may be too short in some circumstances. The Business Subcommittee considered this possibility when it suggested the amendment. At that time, it concluded that a 7-day window would be sufficient in the vast majority of cases, and that the infrequent situations where a longer period is needed could be best handled through a request for

an enlargement of time under Rule 9006. Professor McKenzie said that the comments did not change that view.

After discussing the comments, the Advisory Committee recommended final approval of Rule 7004(e) as published. It also approved the concept of adding a sentence to the committee note that highlights the opportunity to seek an extension of time under Rule 9006 in appropriate circumstances.

Bankruptcy Rules 7008(b) and 7054.

The Reporter reviewed the comments on Bankruptcy Rules 7054 and 7008. She said that the proposed amendments to those rules would change the procedure for seeking attorney's fees in bankruptcy proceedings. Rule 7054 would be amended to include much of the substance of Civil Rule 54(d)(2). Rule 7008(b), which currently addresses attorney's fees, would be deleted. By bringing the bankruptcy rules into closer alignment with the civil rules, the amendments would eliminate a potential trap for an attorney, particularly one familiar with the civil rules, who might overlook the Rule 7008(b) requirement to plead a request for attorney's fees as a claim in the complaint, answer, or other pleading. As under the civil rules, the procedure for seeking an award of attorney's fees would be governed exclusively by Rule 7054, unless the governing substantive law requires the fees to be proved at trial as an element of damages.

Professor Gibson said that there were two comments on the proposal. Comment 12-BK-044 supported the changes. Comment 12-BK-010, submitted by the State's Association of Bankruptcy Attorneys ("SABA"), did not address the proposed changes. Instead, the SABA comment addressed the sentence in Rule 7054(b)(1) that permits the award of costs against the United States, its officers and agencies only to the extent permitted by law. SABA suggested that the provision be broadened to apply to all governmental units.

After a short discussion, the Advisory Committee decided not to take up the SABA suggestion, and **voted to recommend final approval of the proposed attorney fee changes to Rules 7008 and 7054 as published.**

12. Oral report by the Subcommittee on Attorney Conduct and Health Care.

Judge Jonker said that there was no business before the Subcommittee since the last Advisory Committee meeting.

Discussion Items

13. Oral report on Suggestion 13-BK-A by David W. Ostrander to include the debtor's age on the Statement of Financial Affairs or the Schedules of Assets and Liabilities.

    Assigned to the Forms Subcommittee.

14. Oral report on Suggestion 13-BK-B by Judges Eric L. Frank and Bruce I. Fox to amend Official Form 1, the Voluntary Petition, to include checkboxes for the documents Section 1116(1) of the Bankruptcy Code requires small business debtors to file.

    Assigned to the Forms Subcommittee.

15. Oral report on Suggestion 12-BK-M by Judge Scott W. Dales to amend Rule 2002(h) to mitigate the cost of giving notice to creditors who have not filed proofs of claim.

Assigned to the Consumer Subcommittee.

16. Oral report on Suggestion 13-BK-C by the American Bankruptcy Institute's Task Force on National Ethics Standards to amend Rule 2014 to specify the relevant connections that must be described in the verified statement accompanying an application to employ professionals.

Assigned to the Subcommittee on Attorney Conduct and Health Care.

17. Oral report on Judge William G. Young's suggestion to abolish Bankruptcy Appellate Panels (BAPs) and to assign bankruptcy appeals from courts with high caseloads to courts with low caseloads.

The Chair explained that this issue, which would likely require changes to the Bankruptcy Code and Rules if implemented, is being considered by the Advisory Committee on the Administration of the Bankruptcy System.

Information Items

18. Oral report on the status of bankruptcy-related legislation.

Mr. Wannamaker reviewed bankruptcy-related legislation currently pending in Congress.

19. Oral update on opinions interpreting Section 109(h) of the Bankruptcy Code.

The Reporter said that there are now three cases that have addressed the 2010 technical update to 11 U.S.C. § 109(h) that appear to allow an individual to take the required credit counseling course *after* the petition is filed, so long as the course is taken on the same day. She said each of three courts reviewing the new language, however, have concluded that the course must be taken *before* the case if filed. **The Advisory Committee agreed that further reports would be unnecessary unless a split of authority among courts develops.**

20. *Bull Pen.*

Amendment to Official Form 23 to implement the proposed amendment to Rule 1007(b)(7) which would authorize providers of financial management course providers to file notification of the debtor's completion of the course, approved at September 2010 meeting.

The Advisory Committee recommended that Official Form 23 be removed from the bull pen and go into effect December 1, 2013, along with the related amendment to Rule 1007(b)(7) that is scheduled to take effect December 1, 2013.

21. Rules Docket.

Mr. Wannamaker asked members to review the Rules Tracking Docket and to email him with any needed changes.

22. Future meetings: Fall 2013 meeting, September 24–25, in Minneapolis. Possible locations for the spring 2014 meeting.

    The Chair suggested Austin, Texas, for the spring 2014 meeting.

23. New business.

No new business.

24. Adjourn.

Respectfully submitted,

Scott Myers

Conversion Chart for Modernized Bankruptcy Forms for Individual Debtors

Current Schedule Number	Current schedule name	FMP schedule name	FMP label (agenda book)	FMP label (revised)	Proposed effective date
		Voluntary Petition for Individuals Filing for Bankruptcy *(incorporates former exhibits)*	**101**	same	12/15
1	Voluntary Petition – including Exhibits A, C and D	Initial Statement About an Eviction Judgment Against You *(formally part of petition).*	**101A**	same	12/15
		Statement About Payment of an Eviction Judgment Against You *(formally part of petition).*	**101B**	same	12/15
3A	Application and Order to Pay Filing Fee in Installments	Application for Individuals to Pay the Filing Fee in Installments	**103A (pub as 3A in 2012)**	same	**12/13 as 3A**; 12/15 as 103A
3B	Application for Waiver of Chapter 7 Filing Fee	Application to Have the Chapter 7 Filing Fee Waived	**103B (pub as 3B in 2012)**	same	**12//13 as 3B**; 12/15 as 103B
4	List of Creditors Holding 20 Largest Unsecured Claims	For Individual Chapter 11 Cases: The List of Creditors Who Have the 20 Largest Unsecured Claims Against You Who Are Not Insiders *(individuals)*	**104**	same	12/15
5	Involuntary Petition	Involuntary Petition Against an Individual	**105**	same	12/15
6A 6B	Real Property Personal Property	Property (*combines real and personal property, individuals)*	106A	**106A/B**	12/15
6C	Property Claimed as Exempt	The Property You Claim as Exempt (*individuals)*	106D	**106C**	12/15
6D	Creditors Holding Secured Claims	Creditors Who Hold Claims Secured By Property (*against individuals*)	106B	**106D**	12/15
6E 6F	Creditors Holding Unsecured Priority Claims Creditors Holding Unsecured Nonpriority Claims	Creditors Who Have Unsecured Claims *(against individuals, combines priority and non-priority)*	106C	**106E/F**	12/15
6G	Executory Contracts and Unexpired Leases	Executory Contracts and Unexpired Leases (*individuals)*	106E	**106G**	12/15
6H	Codebtors	Your Codebtors (*individuals)*	106F	**106H**	12/15
6I	Executory Contracts and Unexpired Leases	Your Income (*individuals)*	106G (pub as 6I in 2012)	**106I**	**12/13 as 6I**; 12/1/15 as 106I
6J	Current Income of Individual Debtor(s)	Your Expenses (*individuals)*	106H (pub as 6J in 2012)	**106J**	**12/13 as 6J**; 12/1/15 as 106J
7	Statement of Financial Affairs	Statement of Financial Affairs for Individuals Filing for Bankruptcy	**107**	same	12/1/15
22A	Statement of Current Monthly Income and Means Test Calculation (Chapter 7)	Chapter 7 Statement of Your Current Monthly Income and Means-Test Calculation *(published as 22A-1)*	**108-1**	same	**12/14 as 22A-1**; 12/15 as 108-1
		Chapter 7 means test exclusion attachment (*published as 22A-1Supp*)	**108-1Supp**	same	**12/14 as 22A-1Supp**; 12/15 as 108-1Supp
		Chapter 7 Means Test Calculation *(published as 22A-2)*	**108-2**	same	**12/14 as 22A-2**; 12/15 as 108-2

12b-007913

Current Schedule Number	Current schedule name	FMP schedule name	FMP label (agenda book)	FMP label (revised)	Proposed effective date
22B	Statement of Current Monthly Income (Chapter 11)	Chapter 11 Statement of Your Current Monthly Income *(published as 22B)*	**109**	same	**12/14 as 22B**; 12/15 as 109
22C	Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income (Chapter 13)	Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period *(published as 22C-1)*	**110-1**	same	**12/14 as 22C-1**; 12/15 as 110-1
		Chapter 13 Calculation of Your Disposable Income *(published as 22C-2)*	**110-2**	same	**12/14 as 22C-2**; 12/15 as 110-2
8	Chapter 7 Individual Debtor's Statement of Intention	Statement of Intention for Individuals Filing Under Chapter 7	**112**	same	12/1/15
19	Declaration and Signature of Non-Attorney Bankruptcy Petition Preparer	Bankruptcy Petition Preparer's Notice, Declaration and Signature	**119**	same	12/1/15
21	Statement of Social Security Number	Your Statement About Your Social Security Numbers	**121**	same	12/1/15
18	Discharge of Debtor	Order of Discharge	**318**	same	12/1/15
23	Debtor's Certification of Completion of Instructional Course Concerning Financial Management	Certification About a Financial Management Course	**423**	same	12/1/15
27	Reaffirmation Agreement Cover Sheet	Cover Sheet for Reaffirmation Agreement	**427**	same	12/1/15

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TAB 5

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TAB 5A

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

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

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

FROM: **Honorable Sidney A. Fitzwater, Chair**
Advisory Committee on Evidence Rules

DATE: **May 7, 2013**

RE: **Report of the Advisory Committee on Evidence Rules**

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on May 3, 2013 at the University of Miami School of Law, Coral Gables, Florida.

The Committee seeks final Standing Committee approval and transmittal to the Judicial Conference of the United States of four proposals: an amendment to Rule 801(d)(1)(B)—the hearsay exemption for certain prior consistent statements—to provide that prior consistent statements are admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility, and amendments to Rules 803(6)-(8)—the hearsay exceptions for business records, absence of business records, and public records—to eliminate an ambiguity uncovered during the restyling project and clarify that the opponent has the burden of showing that the proffered record is untrustworthy.

II. Action Items

A. Proposed Amendment to Evidence Rule 801(d)(1)(B)

The Committee proposes that Rule 801(d)(1)(B) be amended to provide that prior consistent statements are admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility. The Standing Committee approved proposed amended Rule 801(d)(1)(B) for publication at its June 2012 meeting. The proposed rule and committee note now presented for final Standing Committee approval are attached as an appendix to this report. They have been modified slightly from the versions issued for publication to address certain concerns raised by public comment.

The proposal to amend Rule 801(d)(1)(B) originated with Judge Frank W. Bullock, Jr., when he was a member of the Standing Committee. Judge Bullock proposed that Rule 801(d)(1)(B) be amended to provide that prior consistent statements are admissible under the hearsay exemption whenever they would be admissible to rehabilitate the witness's credibility. Under the current Rule, some prior consistent statements offered to rehabilitate a witness's credibility—specifically, those that rebut a charge of recent fabrication or improper influence or motive—are also admissible substantively. But other rehabilitative statements—such as those that explain a prior inconsistency or rebut a charge of faulty recollection—are not admissible under the hearsay exemption, but only for rehabilitation. There are two basic practical problems in distinguishing between substantive and credibility use as applied to prior consistent statements. First, the necessary jury instruction is almost impossible for jurors to follow. The prior consistent statement is of little or no use for credibility unless the jury believes it to be true. Second, and for similar reasons, the distinction between substantive and impeachment use of prior consistent statements has little, if any, practical effect. The proponent has already presented the witness's trial testimony, so the prior consistent statement ordinarily adds no real substantive effect to the proponent's case.

The public comment on the proposed amendment is summarized in the appendix to this report. Although largely negative, it is sparse. The Committee found two concerns expressed in the public comment to merit revisions to the proposed rule and committee note. First, there was a concern that the phrase "otherwise rehabilitates the declarant's credibility as a witness" is vague and could lead courts to admit prior consistent statements that heretofore have been excluded for any purpose. Second, there was a more specific concern that the language could lead courts to admit prior consistent statements to rebut a charge that the witness had a motive to falsify, even though the statement was made *after* the motive to falsify arose, thereby undermining the Supreme Court's ruling in *Tome v. United States*, 513 U.S. 150 (1995).

In response to these concerns, the Committee voted, with one member dissenting, to approve proposed Rule 801(d)(1)(B) with the slight modification to (ii) shown on the following blacklined version. The Committee concluded that the proposal preserves the *Tome* pre-motive rule as to consistent statements offered to rebut a charge of bad motive, while properly expanding substantive admissibility to statements offered to rehabilitate on other grounds—such as to explain an inconsistency or to rebut a charge of bad memory. And the proposal does so without resorting to the potentially vague "otherwise rehabilitates" language.

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

* * *

(B) is consistent with the declarant's testimony and is offered:
(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; * * *

The committee note has also been slightly modified to account for the proposed changes to the Rule.

At the suggestion of the Chair of the Standing Committee, this report includes Judge Friendly's observation that Rule 801(d)(1)(B) was problematic when enacted because it relied on an insubstantial distinction between substantive and rehabilitative use. *See United States v. Quinto*, 609 F.2d 66-67 (2d Cir. 1979) (Friendly, J., concurring) ("Before adoption of the Federal Rules of Evidence, there had been . . . little need to consider the use of prior consistent statements as affirmative evidence, since they were no more probative for that purpose than what the witness had said or could say on the stand.").

Recommendation: The Committee recommends that the proposed amendment to Evidence Rule 801(d)(1)(B) be approved and transmitted to the Judicial Conference of the United States.

B. Proposed Amendments to Evidence Rules 803(6)-(8)

The Committee proposes that Evidence Rules 803(6)-(8) be amended to address an ambiguity uncovered during restyling, but left unaddressed at that time because the changes required to clarify the ambiguity were viewed as substantive. The Standing Committee approved proposed amended Rules 803(6)-(8) for publication at its June 2012 meeting. The proposed rules and committee notes now presented for final Standing Committee approval are attached as appendixes to this report. The committee notes have been modified slightly from the versions issued for publication to address the concern, raised by public comment, that the notes use language that fails to track the text of the Rules. No changes have been made to the proposed rules as published.

The restyling project uncovered an ambiguity in Rules 803(6)-(8)—the hearsay exceptions for business records, absence of business records, and public records. These exceptions originally set out admissibility requirements and then provided that a record that met these requirements, although hearsay, was admissible "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." The Rules did not specifically state which party had the burden of showing trustworthiness or untrustworthiness.

The restyling project initially sought to clarify this ambiguity by providing that a record that fit the other admissibility requirements would satisfy the exception if "the opponent does not show that" the source of information or the method or circumstances of preparation indicate lack of trustworthiness. But this proposal did not go forward as part of restyling because research into the

case law indicated that the change would be substantive. While most courts impose the burden of proving untrustworthiness on the opponent, a few courts require the proponent to prove that the record is trustworthy. Because the proposal would have changed the law in at least one court, it was deemed substantive and therefore outside the scope of the restyling project. When the Standing Committee approved the Restyled Rules, several members suggested that this Committee consider making the minor substantive change to clarify that the opponent has the burden of showing untrustworthiness.

Initially, the Committee did not think it necessary to propose clarifying amendments to these Rules. At its spring 2012 meeting, however, the Reporter noted that the Texas restyling committee had unanimously concluded that restyled Rules 803(6) and (8) could be interpreted as making substantive changes by placing the burden on the *proponent* of the evidence to show trustworthiness. The Committee then revisited the matter. The proposed amendments clarify that the *opponent* has the burden of showing that the proffered record is untrustworthy. The reasons espoused by the Committee for the amendments are: first, to resolve a conflict in the case law by providing uniform rules; second, to clarify a possible ambiguity in the Rules as originally adopted and as restyled; and third, to provide a result that makes the most sense, as imposing a burden of proving trustworthiness on the proponent is unjustified given that the proponent must establish that all the other admissibility requirements of these Rules are met—requirements that tend to guarantee trustworthiness in the first place.

There were only two public comments on the proposed amendments. Both approved of the text, but one comment suggested that the committee notes use language that fails to track the text of the Rules. Slight changes have been made to each of the three committee notes to address this concern.

Recommendation: The Committee recommends that the proposed amendment to Evidence Rules 803(6)-(8) be approved and transmitted to the Judicial Conference of the United States.

III. Information Items

A. Symposium on Technology and the Federal Rules of Evidence

As noted in a prior report, the Committee plans to convene a symposium in conjunction with its fall 2013 meeting at the University of Maine School of Law to consider the intersection of the Evidence Rules and emerging technologies. The Committee will examine whether the Evidence Rules should be amended to accommodate technological advances in the presentation and preservation of evidence. This symposium will follow the same process as the previous symposia on the Restyled Rules of Evidence and Rule 502. The Committee intends to invite outstanding members of the bench, bar, and legal academy, as well as leaders in the area of electronic information management, to make presentations. The proceedings will be published in the *Fordham Law Review*.

B. Possible Amendment of Rule 902(1)

The Committee considered whether the Reporter should prepare materials for discussion at a future meeting on a proposed amendment to Evidence Rule 902. Judge Andrew D. Hurwitz, a judge of the Ninth Circuit and a former Committee member, suggested that the Committee consider whether federally-regulated Indian tribes should be included in the list of public entities that issue self-authenticating documents under Evidence Rule 902. In *United States v. Alvirez*, No. 11-10244 (9th Cir. Mar. 14, 2013), the Ninth Circuit held that documents bearing the seal of a federally-recognized Indian tribe were not self-authenticating under Rule 902(1). Judge Hurwitz suggested that it is anomalous that self-authentication is granted to cities and, for example, the Trust Territory of the Pacific Islands, but not to Indian tribes.

The Chair of the Standing Committee informed the Committee of the experience of the Appellate Rules Committee in reviewing whether Indian tribes should have the right to file *amicus* briefs in the circuit courts.

Following a wide-ranging discussion, the Committee concluded that it should not proceed at this time to consider an amendment to Rule 902. Instead, because the treatment of Indian tribal documents raises questions that potentially impact rules other than the Evidence Rules, the Committee should await the direction of the Standing Committee concerning whether this is an issue for the Committee or for more than one advisory committee to consider.

C. *Crawford v. Washington* and the Hearsay Exceptions in the Evidence Rules

As previous reports have noted, the Committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*, in which the Court held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to confront and cross-examine the declarant.

The Reporter regularly provides the Committee a case digest of all federal circuit cases discussing *Crawford* and its progeny. The goal of the digest is to enable the Committee to keep current on developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions. If the Committee determines that it is appropriate to propose amendments to prevent one or more of the Evidence Rules from being applied in violation of the Confrontation Clause, it will propose them for the Standing Committee's consideration.

D. Electronic Signatures and Bankruptcy Rule 5005(a)

The Bankruptcy Rules Committee asked the Committee to review a proposed amendment to Bankruptcy Rule 5005—the rule on filing and signature—for its potential impact on the Evidence Rules.

The proposal would add a new subdivision (3) to govern signatures on documents filed by electronic means. Proposed subdivision (3)(A) provides that if a filer is registered with ECF, the filer's username and password will serve as the filer's signature on any electronic document. Subdivision (3)(B) provides that, if a document is signed by a person who is not registered with ECF, a scanned signature page can be filed with the document as a single filing, without any need for the filing user to retain the original document. Both subdivisions provide that a signature in accord with the Rule "may be used with the same force and effect as a written signature for the

purpose of applying these rules and for any other purpose for which a signature is required in proceedings before the court."

The Committee provided preliminary feedback on the proposed amendment to Bankruptcy Rule 5005, including the view that the amendment would not require a corresponding amendment to the Evidence Rules.

E. Privileges Report

At the spring 2013 meeting, Professor Kenneth S. Broun, the Committee's consultant on privileges, presented his analysis of the clergy-penitent privilege and the trade secret privileges. He noted that he would add to his analysis of the clergy-penitent privilege by discussing a possible crime-fraud exception.

Professor Broun's work on privileges is informational and is part of his continuing work to develop an article that he will publish on the federal common law of privileges. It neither represents the work of the Committee itself nor suggests explicit or implicit approval by the Standing Committee or the Committee.

IV. Minutes of the Spring 2013 Meeting

The draft of the minutes of the Committee's spring 2013 meeting is attached to this report. These minutes have not yet been approved by the Committee.

TAB 5B

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Appendix to Report to the Standing Committee
from the Advisory Committee on Evidence Rules

June 2013

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 801(d)(1)(B)

1 **Rule 801. Definitions That Apply to This Article; Exclusions from**
2 **Hearsay**

3 * * *

4 **(d) Statements That Are Not Hearsay.** A statement that
5 meets the following conditions is not hearsay:

6 **(1)** ***A Declarant-Witness's Prior Statement.*** The
7 declarant testifies and is subject to cross-examination
8 about a prior statement, and the statement:

9 * * *

10 **(B)** is consistent with the declarant's
11 testimony and is offered:
12 (i) to rebut an express or implied
13 charge that the declarant recently
14 fabricated it or acted from a recent
15 improper influence or motive in so
16 testifying; or
17 (ii) to rehabilitate the declarant's
18 credibility as a witness when attacked

19 on another ground; * * *

20

21 * * *

22 **Committee Note**

23

24 Rule 801(d)(1)(B), as originally adopted, provided for
25 substantive use of certain prior consistent statements of a witness
26 subject to cross-examination. As the Advisory Committee noted,
27 "[t]he prior statement is consistent with the testimony given on the
28 stand, and, if the opposite party wishes to open the door for its
29 admission in evidence, no sound reason is apparent why it should not
30 be received generally."

31

32 Though the original Rule 801(d)(1)(B) provided for
33 substantive use of certain prior consistent statements, the scope of
34 that Rule was limited. The Rule covered only those consistent
35 statements that were offered to rebut charges of recent fabrication or
36 improper motive or influence. The Rule did not, for example,
37 provide for substantive admissibility of consistent statements that are
38 probative to explain what otherwise appears to be an inconsistency in
39 the witness's testimony. Nor did it cover consistent statements that
40 would be probative to rebut a charge of faulty memory. Thus, the
41 Rule left many prior consistent statements potentially admissible only
42 for the limited purpose of rehabilitating a witness's credibility. The
43 original Rule also led to some conflict in the cases; some courts
44 distinguished between substantive and rehabilitative use for prior
45 consistent statements, while others appeared to hold that prior
46 consistent statements must be admissible under Rule 801(d)(1)(B) or
47 not at all.

48

49 The amendment retains the requirement set forth in *Tome v.*
50 *United States,* 513 U.S. 150 (1995): that under Rule 801(d)(1)(B), a
51 consistent statement offered to rebut a charge of recent fabrication of
52 improper influence or motive must have been made before the alleged
53 fabrication or improper inference or motive arose. The intent of the
54 amendment is to extend substantive effect to consistent statements
55 that rebut other attacks on a witness — such as the charges of
56 inconsistency or faulty memory.

57

58 The amendment does not change the traditional and well-
59 accepted limits on bringing prior consistent statements before the
60 factfinder for credibility purposes. It does not allow impermissible

bolstering of a witness. As before, prior consistent statements under the amendment may be brought before the factfinder only if they properly rehabilitate a witness whose credibility has been attacked. As before, to be admissible for rehabilitation, a prior consistent statement must satisfy the strictures of Rule 403. As before, the trial court has ample discretion to exclude prior consistent statements that are cumulative accounts of an event. The amendment does not make any consistent statement admissible that was not admissible previously — the only difference is that prior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well.

CHANGES MADE AFTER PUBLICATION AND COMMENTS

The text of the proposed amendment was changed to clarify that the traditional limits on using prior consistent statements to rebut a charge of recent fabrication or improper influence or motive are retained. The Committee Note was modified to accord with the change in text.

SUMMARY OF PUBLIC COMMENTS

Hon. Joan Ericksen, (12-EV-001) opposes the proposed amendment as released for public comment on the ground that it is not needed and may lead to unintended consequences.

The Federal Public Defender (12-EV-002) opposes the proposed amendment as released for public comment on the ground that it is "unnecessary and would actually be counterproductive" because it would allow for admission of more prior consistent statements and would "change the dynamics at the trial."

The Federal Magistrate Judges Association (12-EV-003) "is concerned that, despite the Advisory Committee's stated purpose, the proposed revision significantly undermines the rule against bolstering a witness and opens the door to the admission of self-serving consistent statements as substantive evidence." The FMJA suggests that "the revision specifically state limits to the expansion of what types of rehabilitation evidence are admissible — for example, to rebut a charge of faulty recollection — or that the Rule not be changed at all."

Professor Liesa Richter (12-EV-004) states that "[a]mending

106 Rule 801(d)(1)(B) to include prior consistent statements used to
107 rehabilitate impeaching attacks other than attacks on motivation is
108 completely consistent with the stated reason for the original hearsay
109 exemption" and "advances the development of clear and rational
110 evidentiary policies that can be administered efficiently and
111 uniformly." Professor Richter argues, however, that the proposal as
112 issued for public comment could be read to undermine the limitation
113 on admitting prior consistent statements established in *Tome v.*
114 *United States*, 513 U.S. 150 (1995): that under Rule 801(d)(1)(B), a
115 consistent statement offered to rebut a charge of recent fabrication or
116 improper influence or motive must have been made before the alleged
117 fabrication or alleged improper influence or motive arose. The
118 proposed amendment as issued for public comment was revised with
119 the intent to address that concern.
120
121 **The National Association of Criminal Defense Lawyers**
122 **(12-EV-005)** contends that prior consistent statements should be
123 subject to the same admissibility requirements as those applicable to
124 prior inconsistent statements under Rule 801(d)(1)(A), i.e., they
125 should be admissible as substantive evidence only when made under
126 oath and subject to cross-examination. The NACDL also contends
127 that the words "otherwise rehabilitates" — as used in the proposed
128 amendment as released for public comment — are "fatally
129 ambiguous."
130
131 **William T. Hangley, Esq. (12-EV-006)** objects to the
132 proposed amendment because it would lead to greater admissibility
133 of prior consistent statements, and suggests that more study is
134 required before that result is mandated. He also argues that treating
135 prior consistent statements as substantive is unnecessary because the
136 statement simply replicates testimony that the witness has already
137 given.

TAB 5C

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Appendix to Report to the Standing Committee
from the Advisory Committee on Evidence Rules

June 2013

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 803(6)

1 **Rule 803. Exceptions to the Rule Against Hearsay— Regardless**
2 **of Whether the Declarant is Available as a Witness**
3 The following are not excluded by the rule against hearsay,
4 regardless of whether the declarant is available as a witness.
5 * * *
6 **(6)** ***Records of a Regularly Conducted Activity.*** A record
7 of an act, event, condition, opinion, or diagnosis if:
8 **(A)** the record was made at or near the time by -
9 or from information transmitted by - someone
10 with knowledge;
11 **(B)** the record was kept in the course of a
12 regularly conducted activity of a business,
13 organization, occupation, or calling, whether
14 or not for profit;
15 **(C)** making the record was a regular practice of
16 that activity;
17 **(D)** all these conditions are shown by the
18 testimony of the custodian or another
19 qualified witness, or by a certification that

complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) ~~neither~~ the opponent does not show that the source of information ~~nor~~ or the method or circumstances of preparation indicate a lack of trustworthiness.

* * *

Committee Note

The Rule has been amended to clarify that if the proponent has established the stated requirements of the exception — regular business with regularly kept record, source with personal knowledge, record made timely, and foundation testimony or certification — then the burden is on the opponent to show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. It is appropriate to impose this burden on opponent, as the basic admissibility requirements are sufficient to establish a presumption that the record is reliable.

The opponent, in meeting its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. For example, the opponent might argue that a record was prepared in anticipation of litigation and is favorable to the preparing party without needing to introduce evidence on the point. A determination of untrustworthiness necessarily depends on the circumstances.

CHANGES MADE AFTER PUBLICATION AND COMMENTS

In accordance with a public comment, a slight change was made to the Committee Note to better track the language of the rule.

SUMMARY OF PUBLIC COMMENTS

The Federal Magistrate Judges Association (12-EV-003)

endorses the proposed amendment.

The National Association of Criminal Defense Lawyers (12-EV-005) states that the text of the amendment is "well-constructed" but suggests that the Committee Note strays from the language of the text and suggests that the Committee Note be revised to refer to the opponent's burden to prove that the circumstances of preparation "indicate" a lack of trustworthiness.

Appendix to Report to the Standing Committee
from the Advisory Committee on Evidence Rules

June 2013

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 803(7)

Rule 803. Exceptions to the Rule Against Hearsay— Regardless of Whether the Declarant is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness.

* * *

(7) ***Absence of a Record of a Regularly Conducted Activity.*** Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) ~~neither~~ the opponent does not show that the possible source of the information ~~nor~~ or other circumstances indicate a lack of trustworthiness.

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20 * * *

21 **Committee Note**
22
23 The Rule has been amended to clarify that if the proponent
24 has established the stated requirements of the exception — set forth
25 in Rule 803(6) — then the burden is on the opponent to show that the
26 possible source of the information or other circumstances indicate a
27 lack of trustworthiness. The amendment maintains consistency with
28 the proposed amendment to the trustworthiness clause of Rule
29 803(6).
30
31
32 **CHANGES MADE AFTER PUBLICATION AND COMMENTS**
33
34 In accordance with a public comment, a slight change was
35 made to the Committee Note to better track the language of the rule.
36
37 **SUMMARY OF PUBLIC COMMENTS**
38
39 **The Federal Magistrate Judges Association (12-EV-003)**
40 endorses the proposed amendment.
41
42 **The National Association of Criminal Defense Lawyers**
43 **(12-EV-005)** states that the text of the amendment is "well-
44 constructed" but suggests that the Committee Note strays from the
45 language of the text and that the Committee Note be revised to refer
46 to the opponent's burden to prove that the circumstances of
47 preparation "indicate" a lack of trustworthiness.

Appendix to Report to the Standing Committee
from the Advisory Committee on Evidence Rules

June 2013

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 803(8)

1 **Rule 803. Exceptions to the Rule Against Hearsay— Regardless**
2 **of Whether the Declarant is Available as a Witness**
3 The following are not excluded by the rule against hearsay,
4 regardless of whether the declarant is available as a witness.
5 * * *
6 **(8)** ***Public Records.*** A record or statement of a public
7 office if:
8 **(A)** it sets out:
9 **(i)** the office's activities;
10 **(ii)** a matter observed while under a legal
11 duty to report, but not including, in a
12 criminal case, a matter observed by
13 law-enforcement personnel; or
14 **(iii)** in a civil case or against the
15 government in a criminal case, factual
16 findings from a legally authorized
17 investigation; and
18
19 **(B)** ~~neither~~ the opponent does not show that the

source of information ~~nor~~ or other circumstances indicate a lack of trustworthiness.

* * *

Committee Note

The Rule has been amended to clarify that if the proponent has established that the record meets the stated requirements of the exception — prepared by a public office and setting out information as specified in the Rule — then the burden is on the opponent to show that the source of information or other circumstances indicate a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. Public records have justifiably carried a presumption of reliability, and it should be up to the opponent to "demonstrate why a time-tested and carefully considered presumption is not appropriate." *Ellis v. International Playtex, Inc.*, 745 F.2d 292, 301 (4th Cir. 1984). The amendment maintains consistency with the proposed amendment to the trustworthiness clause of Rule 803(6).

The opponent, in meeting its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. For example, the opponent might argue that a record was prepared in anticipation of litigation and is favorable to the preparing party without needing to introduce evidence on the point. A determination of untrustworthiness necessarily depends on the circumstances.

CHANGES MADE AFTER PUBLICATION AND COMMENTS

In accordance with a public comment, a slight change was made to the Committee Note to better track the language of the rule.

SUMMARY OF PUBLIC COMMENTS

The Federal Magistrate Judges Association (12-EV-003) endorses the proposed amendment.

The National Association of Criminal Defense Lawyers (12-EV-005) states that the text of the amendment is "well-

61 constructed" but suggests that the Committee Note strays from the
62 language of the text and that the Committee Note be revised to refer
63 to the opponent's burden to prove that the circumstances of
64 preparation "indicate" a lack of trustworthiness.

TAB 5D

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Advisory Committee on Evidence Rules

Minutes of the Meeting of May 3, 2013

Miami, Florida

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on May 3, 2013, at the University of Miami School of Law, Coral Gables, Florida.

The following members of the Committee were present:

Hon. Sidney A. Fitzwater, Chair
Hon. Brent R. Appel
Hon. Anita B. Brody
Hon. William K, Sessions, III
Hon. John A. Woodcock, Jr.
Edward C. DuMont, Esq.
Paul Shechtman, Esq.
Elizabeth J. Shapiro, Esq., Department of Justice
A.J. Kramer, Public Defender, by phone

Also present were:

Hon. Jeffrey S. Sutton, Chair of the Committee on Rules of Practice and Procedure
Hon. Judith Wizmur, Liaison from the Bankruptcy Committee, by phone
Hon. Paul Diamond, Liaison from the Civil Rules Committee
Hon. John F. Keenan, Liaison from the Criminal Rules Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Kenneth S. Broun, Consultant to the Committee
Professor Daniel Coquillette, Reporter to the Standing Committee
Timothy Reagan, Esq., Federal Judicial Center
Jonathan Rose, Chief, Rules Committee Support Office
Benjamin Robinson, Esq., Rules Committee Support Office
Andrea Kuperman, Rules Clerk for Judge Sutton, by phone.

I. Opening Business

Welcoming Remarks

Judge Fitzwater, the Chair of the Committee, greeted the members and thanked Dean Patricia White and Professor Michael Graham of the University of Miami School of Law for hosting the

Committee.

The Chair welcomed Judge Sutton, the Chair of the Standing Committee. Judge Sutton spoke briefly about the pace of rulemaking, a concern that has been addressed by the Standing Committee. He noted that ideally it would be best to correlate the efforts of the Rules Committees in promulgating amendments, so that the Supreme Court is not inundated at any particular time. The Standing Committee has found, however, that the pace of rulemaking is highly affected by outside forces, most prominently from Congressional and Supreme Court activity. Thus, coordination among the Committees in promulgating rule amendments is difficult if not impossible. That said, Judge Sutton stressed the need of the Committees to be sensitive to rule fatigue, i.e., to the notion that the rules are in a constant state of flux. One way to address rule fatigue is for an Advisory Committee to package a set of amendments rather than stagger them — thus some amendments might be held back or accelerated to be put on the same timetable as others. In fact the Evidence Rules Committee does group amendments whenever possible, as the package of amendments from 2006 indicates.

Judge Sutton noted that the Evidence Rules Committee proposed the least number of amendments of all the Rules Committees over the last 15 years. The Chair noted that the attitude of the Committee has always been that Evidence Rules are not to be amended unless there is a compelling reason, and the Committee continues its review of the rules on that principle.

Approval of Minutes

The minutes of the Fall 2012 Committee meeting were approved.

Changes to the Committee

The Chair noted with sadness that it was the last meeting for Judge Brody, a valued member of the Committee and the last remaining Committee member involved with the Restyling Project. He noted that Judge Brody was invited to the next meeting and would be getting a tribute at that time.

The Chair also noted that Dr. Tim Reagan was moving to the Standing Committee as the FJC representative. He thanked Dr. Reagan for all his fine service to the Evidence Rules Committee.

New Members

Judge Fitzwater introduced and welcomed two new Committee members: 1) Edward DuMont, Partner at Wilmer Hale, vice chair of the firm's appellate and Supreme Court practice; and 2) A.J. Kramer, Public Defender for the District of Columbia. He thanked the Chief Justice for appointing members with such outstanding credentials.

June Meeting of the Standing Committee

The Chair reported on the January meeting of the Standing Committee. The Evidence Rules Committee presented no action items at the meeting. The Chair reported to the Standing Committee on the successful Rule 502 symposium that was recently published in the *Fordham Law Review*. He also reported on the Committee's plan for a symposium on technology and the rules of evidence, which is scheduled for October 11, 2013 at the University of Maine School of Law.

II. Proposed Amendment to Rule 801(d)(1)(B)

At the Spring 2012 meeting the Committee voted to recommend that a proposed amendment to Evidence Rule 801(d)(1)(B) — the hearsay exemption for certain prior consistent statements — be released for public comment. Under the proposal, Rule 801(d)(1)(B) would be amended to provide that prior consistent statements are admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility.

Under the current rule, some prior consistent statements offered to rehabilitate a witness's credibility — specifically those that rebut a charge of recent fabrication or improper influence or motive — are also admissible substantively. In contrast, other rehabilitative statements — such as those that explain a prior inconsistency or rebut a charge of faulty recollection — are not admissible under the hearsay exemption but only for rehabilitation. There are two basic practical problems in the distinction between substantive and credibility use as applied to prior consistent statements. First, the necessary jury instruction is almost impossible for jurors to follow. The prior consistent statement is of little or no use for credibility unless the jury believes it to be true. Second, and for similar reasons, the distinction between substantive and impeachment use of prior consistent statements has little, if any, practical effect. The proponent has already presented the witness's trial testimony, so the prior consistent statement ordinarily adds no real substantive effect to the proponent's case. The proposed amendment sought to prevent unnecessary confusion by providing for identical treatment of all prior consistent statements that are found by the court to be admissible to rehabilitate a witness.

The public comment on the proposed amendment was sparse, but largely negative. The Committee found two concerns expressed in the public comment to be meritorious and to require some kind of adjustment to the rule as issued for public comment. First, there was a concern that the phrase "otherwise rehabilitates the declarant's credibility as a witness" was vague and could lead to courts admitting prior consistent statements that have heretofore been excluded for any purpose — while that technically would not be possible because the proposal requires that a prior consistent statement must be admissible for rehabilitation under existing law in order to be admissible substantively, the expressed concern was that courts might somehow use the amendment as an excuse to admit more prior consistent statements. Second, there was a more specific concern that the language could lead courts to admit prior consistent statements to rebut a charge that the witness

had a motive to falsify, even though the statement was made *after* the motive to falsify arose. If that were so, it would mean that the Supreme Court's ruling in *Tome v. United States*, 513 U.S. 150 (1995), would be undermined, as the Court in that case held that admissibility of prior consistent statements under Rule 801(d)(1)(B) was limited to those consistent statements that were made *before* a motive to falsify arose.

In response to these concerns, the Chair proposed a change to the amendment as proposed for public comment. That change was as follows (blacklined from the existing rule):

> **(d) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:
>
> **(1)** ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
>
> * * *
>
> **(B)** is consistent with the declarant's testimony and is offered:
>
> (i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
>
> (ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; * * *

Committee members praised the Chair's proposal as a solution to the concerns addressed in the public comment. They concluded that the proposal preserves the *Tome* pre-motive rule as to consistent statements offered to rebut a charge of bad motive, while properly expanding substantive admissibility to statements offered to rehabilitate on other grounds — such as to explain an inconsistency or to rebut a charge of bad memory. And the proposal does so without resorting to the potentially vague "otherwise rehabilitates" language. Committee members also generally agreed that the Committee's initial reason for proposing a change to Rule 801(d)(1)(B) was a sound one — it makes no sense to provide that some prior consistent statements are admissible substantively and some only for rehabilitation, thus the current rule invites confusion for no good reason.

The Public Defender objected to the proposal on the ground that it provided an open door for admitting prior consistent statements that are made after a motive to falsify. The DOJ representative spoke in favor of the amendment, noting specifically that it preserved the *Tome* pre-motive requirement for statements offered to rebut a charge of bad motive, and that preservation evidenced the limited nature of the amendment.

Discussion then shifted to the Committee Note. The Reporter had suggested changes to the Note that was submitted for public comment, in order to accommodate the changes to the text that were proposed. Committee members suggested minor changes that were added to the working draft. Professor Coquillette mentioned that the Committee Note contained a citation to *Tome* and that some past members of the Standing Committee have looked askance at citing case law in Committee

Notes, on the ground that case law could be overruled and that subsequent overruling might diminish the Note. But members noted that the citation to *Tome* was not for the purpose of establishing the validity of the rule, but rather was to emphasize that the rule was not meant to change the existing limitation on admitting prior consistent statements to rehabilitate witnesses attacked for having a bad motive. Even if *Tome* were overruled, the validity of the amendment would be unimpaired. Moreover, it was noted that the citation to *Tome* was important because it would signal to the Supreme Court that the proposed amendment was *not* intended to overturn the Court's case law on the subject.

After discussion concluded, the Committee Note as proposed for approval read as follows:

Committee Note

Rule 801(d)(1)(B), as originally adopted, provided for substantive use of certain prior consistent statements of a witness subject to cross-examination. As the Advisory Committee noted, "[t]he prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally."

Though the original Rule 801(d)(1)(B) provided for substantive use of certain prior consistent statements, the scope of that Rule was limited. The Rule covered only those consistent statements that were offered to rebut charges of recent fabrication or improper motive or influence. The Rule did not, for example, provide for substantive admissibility of consistent statements that are probative to explain what otherwise appears to be an inconsistency in the witness's testimony. Nor did it cover consistent statements that would be probative to rebut a charge of faulty memory. Thus, the Rule left many prior consistent statements potentially admissible only for the limited purpose of rehabilitating a witness's credibility. The original Rule also led to some conflict in the cases; some courts distinguished between substantive and rehabilitative use for prior consistent statements, while others appeared to hold that prior consistent statements must be admissible under Rule 801(d)(1)(B) or not at all.

The amendment retains the requirement set forth in *Tome v. United States*, 513 U.S. 150 (1995): that under Rule 801(d)(1)(B), a consistent statement offered to rebut a charge of recent fabrication of improper influence or motive must have been made before the alleged fabrication or improper inference or motive arose. The intent of the amendment is to extend substantive effect to consistent statements that rebut other attacks on a witness — such as the charges of inconsistency or faulty memory.

The amendment does not change the traditional and well-accepted limits on bringing prior consistent statements before the factfinder for credibility purposes. It does not allow impermissible bolstering of a witness. As before, prior consistent statements under the amendment may be brought before the factfinder only if they properly rehabilitate a witness whose credibility has been attacked. As before, to be admissible for rehabilitation, a prior

consistent statement must satisfy the strictures of Rule 403. As before, the trial court has ample discretion to exclude prior consistent statements that are cumulative accounts of an event. The amendment does not make any consistent statement admissible that was not admissible previously — the only difference is that prior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well.

A motion was made and seconded to approve the proposed amendment to Rule 801(d)(1)(B) and the accompanying Committee Note — both as set forth above. The Committee approved the motion with one dissent.

The Chair raised the question whether, given the changes to the proposal as issued for public comment, it would be necessary to submit the proposal for a new round of comment. Committee members concluded that a new round of public comment was not necessary, because the changes simply sharpened the proposal and did no more than effectuate the intent that the Committee had from the beginning: to retain the *Tome* pre-motive requirement for consistent statements offered to rebut a charge of bad motive, while expanding substantive admissibility to prior consistent statements that rehabilitated on other grounds. Accordingly, the Committee (with one dissent) voted to recommend the proposed amendment to Rule 801(d)(1)(B) and the accompanying Committee Note to the Standing Committee with the recommendation that it refer the proposal to the Judicial Conference.

In conclusion, Judge Sutton suggested that the supporting materials for the proposed amendment should include the famous statement by Judge Friendly that Rule 801(d)(1)(B) was problematic when enacted because it relied on an insubstantial distinction between substantive and rehabilitative use. *See United States v. Quinto*, 609 F.2d 66-67 (2d Cir. 1979) (Friendly, J., concurring) ("Before adoption of the Federal Rules of Evidence, there had been . . . little need to consider the use of prior consistent statements as affirmative evidence, since they were no more probative for that purpose than what the witness had said or could say on the stand.").

III. Proposed Amendment to Rules 803(6)-(8)

The Committee considered the proposed amendments to the trustworthiness clauses of Rules Rules 803(6)-(8) — the hearsay exceptions for business records, absence of business records, and public records — that had been issued for public comment. Those exceptions in original form set forth admissibility requirements and then provided that a record meeting those requirements was admissible despite the fact it is hearsay "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." The restyling changed that language to "the opponent does not show" untrustworthiness. The rules do not specifically state which party

has the burden of showing trustworthiness or untrustworthiness, and there is some conflict in the case law on which party has that burden.

The proposed amendments clarify that the *opponent* has the burden of showing that the proffered record is untrustworthy. The reasons espoused by the Committee for the amendment are: 1) to resolve a conflict in the case law by providing a uniform rule; 2) to clarify a possible ambiguity in the rule as it was originally adopted and as restyled; and 3) to provide a result that makes the most sense, as imposing a burden of proving trustworthiness on the proponent is unjustified given that the proponent must establish that all the other admissibility requirements of these rules are met — requirements that tend to guarantee trustworthiness in the first place.

There were only two public comments on the proposed amendments. Both approved of the text, but one comment suggested that the Committee Note used language that failed to track the text of the rule. The Reporter, while noting that the language of the proposed Committee Note was completely in accord with the case law, agreed with the public comment that it is always better to track the text where possible. The Reporter proposed a slight change to each of the three Committee Notes.

Committee members commented that the amendment would promote uniformity and that imposing an untrustworthiness burden on the opponent is appropriate — as requiring the proponent to prove trustworthiness along with all the other admissibility requirements would be inconsistent with the thrust of each of the rules and would improperly narrow their scope.

As to the Note, Committee members suggested minor changes that were implemented by the Reporter into the working draft.

A motion was made to approve the proposed amendments as issued for public comment, and also the accompanying Committee Notes as adjusted to respond to the public comment and with minor suggestions from Committee members. That motion was unanimously approved by the Committee. What follows are the rules and respective Committee Notes as approved by the Committee:

Rule 803. Exceptions to the Rule Against Hearsay— Regardless of Whether the Declarant is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness.

* * *

(6) ***Records of a Regularly Conducted Activity.*** A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by — or from information transmitted by — someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) ~~neither~~ the <u>opponent does not show that the</u> source of information ~~nor~~ <u>or</u> the method or circumstances of preparation indicate a lack of trustworthiness.

* * *

Committee Note

The Rule has been amended to clarify that if the proponent has established the stated requirements of the exception — regular business with regularly kept record, source with personal knowledge, record made timely, and foundation testimony or certification — then the burden is on the opponent to show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. It is appropriate to impose this burden on opponent, as the basic admissibility requirements are sufficient to establish a presumption that the record is reliable.

The opponent, in meeting its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. For example, the opponent might argue that a record was prepared in anticipation of litigation and is favorable to the preparing party without needing to introduce evidence on the point. A determination of untrustworthiness necessarily depends on the circumstances.

(7) ***Absence of a Record of a Regularly Conducted Activity.*** Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) ~~neither~~ the opponent does not show that the possible source of the information ~~nor~~ or other circumstances indicate a lack of trustworthiness.

* * *

Committee Note

The Rule has been amended to clarify that if the proponent has established the stated requirements of the exception — set forth in Rule 803(6) — then the burden is on the opponent to show that the possible source of the information or other circumstances indicate a lack of trustworthiness. The amendment maintains consistency with the proposed amendment to the trustworthiness clause of Rule 803(6).

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(8) ***Public Records.*** A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) ~~neither~~ the opponent does not show that the source of information ~~nor~~ or other circumstances indicate a lack of trustworthiness.

* * *

Committee Note

The Rule has been amended to clarify that if the proponent has established that the record meets the stated requirements of the exception — prepared by a public office and setting out information as specified in the Rule — then the burden is on the opponent to show that the source of information or other circumstances indicate a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. Public records have justifiably carried a presumption of reliability, and it should be up to the opponent to "demonstrate why a time-tested and carefully considered presumption is not appropriate."

Ellis v. International Playtex, Inc., 745 F.2d 292, 301 (4th Cir. 1984). The amendment maintains consistency with the proposed amendment to the trustworthiness clause of Rule 803(6).

The opponent, in meeting its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. For example, the opponent might argue that a record was prepared in anticipation of litigation and is favorable to the preparing party without needing to introduce evidence on the point. A determination of untrustworthiness necessarily depends on the circumstances.

IV. Self-Authentication of Documents Bearing the Seal of an Indian Tribe

In *United States v. Alvirez*, #11-10244 (March 14, 2013), the Ninth Circuit held that documents bearing the seal of a federally-recognized Indian tribe were not self-authenticating under Rule 902(1) of the Federal Rules of Evidence. That Rule provides as follows:

Rule 902. Evidence That Is Self-Authenticating
The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

(1) Domestic Public Documents That Are Sealed and Signed. A document that bears:

(A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and

(B) a signature purporting to be an execution or attestation.

The Ninth Circuit used a plain meaning approach and found that because Indian tribes were not mentioned, the sealed documents of Indian tribes could not be self-authenticating under the rule.

Judge Hurwitz, a judge of the Ninth Circuit and a former member of the Committee, suggested that the Committee might consider whether federally-regulated Indian tribes should be included in the list of public entities that issue self-authenticating documents under Rule 902. He suggested that it is anomalous that self-authentication is granted to cities and, for example, the Trust Territory of the Pacific Islands, but not to Indian tribes.

The question for the Committee at the meeting was whether the Reporter should prepare materials on a proposed amendment to 902 for some future meeting. The Committee engaged in a wide-ranging discussion about the possible merits of an amendment and more broadly about whether treatment of Indian tribes warranted a systematic, trans-substantive inquiry over all of the Rules.

Judge Sutton informed the Committee of the experience of the Appellate Rules Committee in reviewing whether Indian tribes should have the right to file amicus briefs in the circuit courts. After much discussion over many meetings the Committee put the proposal in abeyance, in order to monitor the Ninth Circuit's work on a local rule. Members of the Evidence Rules Committee recognized, however, that there could not be a local rule solution to a rule on the authenticity of evidence.

Committee members exchanged a number of ideas in the course of the discussion, among them:

- It was possible that any attempt to amend the rule to affect Indian tribes could not proceed before a process of consultation.

- Indian tribes might vary in their degree of rigor in maintaining public documents, but no rule of evidence should attempt to distinguish among Indian tribes.[1]

- The absence of Indian tribes from the list in Rule 902(1) does not raise a significant problem in practice. All it means is that the proponent would have to: 1) provide an accompanying certificate by a custodian under Rule 902(4); 2) call a witness to authenticate; or 3) provide circumstantial evidence or other indication of authenticity under Rule 901.

- Because the problem for trial practice is not significant, the real issue is one of dignity — as was the case with the right to file amicus briefs. Though the contrary argument was also made that what was presented was a gap in the Rules and the Committee should consider whether to fill that gap as it would any other.

---

[1] If the courts are considered departments or agencies of the United States, it would be illegal to promulgate a rule that would provide a different evidentiary result for records of some tribes and not others. *See* 25 USC 476 (f) ("Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination . . . with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.").

- If Indian tribes are added to the list in Rule 902(1), the Committee would also have to consider whether other public entities should be added to the list. That is, there should be a systematic inquiry.

- Any amendment would have to be limited to federally-recognized Indian tribes and the Committee would have to make sure that it crafted the right language to cover that classification.

- If there are issues of authenticity regarding tribal documents, a rule rendering all such documents self-authenticating might raise confrontation issues in criminal cases because the defendant may have difficulty in challenging such documents.

- There may well be many places in the national rules in which Indian tribes might be included, and it would be important to have uniform treatment across the rules. For example, Civil Rule 44, which parallels Rule 902 in many ways, makes no mention of Indian tribes.

- There may be other Evidence Rules that might warrant consideration of whether Indian tribal documents should be covered. One example is Rule 609, governing impeachment by prior convictions.

- The Committee might consider asking the FJC to do some research on the use of Indian tribal documents in federal litigation.

In the end, the Committee resolved unanimously that it would be unwise to proceed at this time with an amendment to Rule 902 that would cover tribal documents. The Committee unanimously determined that treatment of Indian tribal documents raised a question that spanned all the national rules, and therefore it would await the direction of the Standing Committee.

V. Proposed Amendment to the Bankruptcy Rules on Electronic Signatures.

The Bankruptcy Rules Committee asked the Evidence Rules Committee to review a proposed amendment to Bankruptcy Rule 5005, the rule on filing and signature. The proposal would add a new subdivision (3) to govern signatures on documents filed by electronic means. Proposed Subdivision (3)(A) provides that if a filer is registered with ECF, their username and password will serve as that filer's signature on any electronic document. Subdivision (3)(B) provides that if a document is signed by a person who is not registered on ECF, a scanned signature page can be filed with the document as a single filing, without any need for the filing user to retain the original document. Both subdivisions provide that a signature in accord with the rule "may be used with the same force and effect as a written signature for the purpose of applying these rules and for any other purpose for which a signature is required in proceedings before the court."

Judge Wizmur, the liaison from the Bankruptcy Committee, made the presentation on the proposal. She noted that the use of electronic signatures has been a matter for local rulemaking. It is basically standard practice that the username and password of a filing user constitutes a valid electronic signature. Thus proposed (3)(A) thus does not appear to be controversial. With respect to non-filing users, however, the local rules diverge, most importantly with respect to retention requirements. While most courts require the filing attorney to retain the original, retention periods vary widely. Moreover, many local rules require the signer to execute a declaration that is filed separately, and the filing and retaining requirements for that declaration vary widely. Concerns have also been expressed that requiring the filing attorney to retain the original is burdensome and could lead to ethical issues when, for example, the government requires the attorney to turn over the original as part of a fraud investigation. Yet it would also be burdensome to shift the retention requirements to the courts — when a model local rule on the subject was first being drafted, court clerks from across the country objected to a proposal that would require the courts to retain the originals of documents signed by non-filing users. Thus, proposed (3)(B) is intended to provide needed uniformity and also to remediate the burdens and other problems that come with retaining the originals.

In a wide-ranging discussion, members of the Committee provided preliminary feedback on the proposed amendment to Bankruptcy Rule 5005. Comments included the following:

- There was consensus that the amendment would not require any kind of corresponding amendment to the Evidence Rules. Questions of authenticity will arise but they can be handled by existing Rule 901. The Bankruptcy amendment does have an effect on the best evidence rule (Rule 1002) because it treats the scanned signatures as originals rather than duplicates. But no amendment to the Evidence Rules is required for that to happen, and it would not appear that treatment of scanned signatures as originals rather than duplicates would have any effect on the operation of Rule 1002 in practice.

- Because the document is separate from the signature, the signer may not have read the document but simply signed a signature page. Thus there is room for abuse because the filing party may act without proper authorization.

- The DOJ representative noted concerns about the effect of the proposal on criminal fraud prosecutions when the original document is not retained. There are indications that it is more difficult for experts to examine and compare electronic signatures. It also may be difficult to prove that the signer actually saw the documents or knew which ones were covered by the declaration.

- The question of electronic signatures is one that goes beyond Bankruptcy, and probably affects all the Rules. In that regard, Judge Sutton noted that the Standing Committee has just established a subcommittee on the effect of CM/ECF on the rules of practice and procedure — a subcommittee including members from each of the Advisory Committees, all the reporters, and a member of CACM. The Executive Office of the U.S. Attorney is also conducting a review of the impact of electronic signatures beyond bankruptcy cases.

In the end, Committee members agreed that any rule on electronic signatures by non-filing users should require some form of verification by the filing user that the scanned signature was part of the original document. That would not be a certification as to the truth of the contents of the original document, as such a certification would not necessarily be within the personal knowledge of the filing user. Rather it would be a certification only that the signature was a signature to the actual document that is filed. This could be done by a rule requiring either an actual certification, or verification by a notary public, to be filed with the document. Or the rule could state that the filing user's username and password is deemed to be a certification. Committee members thought that some kind of verification requirement was necessary to remediate the possibility of mischief inherent in filing a separate signature page.

Committee members expressed thanks to Judge Wizmur and to the Bankruptcy Rules Committee for the opportunity to comment on the proposal.

VI. *Crawford* Developments — Presentation on *Williams v. Illinois*

The Reporter provided the Committee with a case digest of all federal circuit cases discussing *Crawford v. Washington* and its progeny. The digest was grouped by subject matter. The goal of the digest is to allow the Committee to keep apprised of developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions.

The Reporter noted that one of the most important areas of dispute among the courts is whether autopsy reports are testimonial. The courts have split about equally on the subject after the Supreme Court's fractious set of opinions in *Williams v. Illinois.*

Committee members noted that the law of Confrontation was in flux, especially after *Williams*, and it was not appropriate at this point to consider any amendment to the Evidence Rules to deal with Confrontation issues. The Committee resolved to continue monitoring developments on the relationship between the Federal Rules of Evidence and the accused's right to confrontation.

VII. Symposium on Technology and the Federal Rules of Evidence

The Evidence Rules Committee is sponsoring a symposium on whether the Evidence Rules should be amended to accommodate technological advances in the presentation of evidence. This Symposium is intended to follow the same process as the previous symposia on the Restyling and

Rule 502. The Committee has already invited a number of outstanding members of the bench, bar and legal academia to make presentations. The Committee also plans to invite some of the leading people in the area of electronic information management. This symposium will take place on the morning before the Fall 2013 meeting of the Committee, and the proceedings will be published in the Fordham Law Review. The Reporter and the Chair invited suggestions from the members for additional symposium panelists.

VIII. Privileges Report

Professor Broun, the Committee's consultant on privileges, presented his analysis of the clergy-penitent privilege and the trade secret privilege. This presentation was part of Professor Broun's continuing work to develop an article that he will publish on the federal common law of privileges. Professor Broun's work, when it is published, will neither represent the work of the Committee nor suggest explicit or implicit approval by the Standing Committee or the Advisory Committee.

Professor Broun noted that he would add to his analysis of the clergy-penitent privilege by discussing a possible crime-fraud exception. Committee members expressed gratitude to Professor Broun for keeping the Committee apprised of developments in the area of privileges.

IX. Next Meeting

The Fall 2013 meeting of the Committee is scheduled for Friday, October 11, in Portland, Maine.

Respectfully submitted,

Daniel J. Capra

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TAB 6

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TAB 6A

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

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

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

From: Honorable Steven M. Colloton, Chair
Advisory Committee on Federal Rules of Appellate Procedure

Date: May 8, 2013

Re: Report of the Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on April 22 and 23, 2013, in Washington, DC. The Committee gave final approval to proposed amendments to Appellate Rule 6. The Committee removed nine items from its study agenda and discussed various other agenda items.

Part II of this Report discusses the proposed amendments to Rule 6, for which the Committee seeks final approval. Part III discusses other matters.

The Committee has scheduled its next meeting for October 3-4, 2013, at the Seton Hall Law School in Newark, NJ.

Detailed information about the Committee's activities can be found in the Reporter's draft of the minutes of the April meeting[1] and in the Committee's study agenda, both of which are attached to this report.

[1] The minutes have not yet been approved by the Committee.

II. Action Item for Final Approval: Proposed Amendments to Appellate Rule 6

As discussed in the report of the Bankruptcy Rules Committee, that Committee seeks final approval of proposed amendments to Part VIII of the Bankruptcy Rules – the rules that govern appeals from bankruptcy court to a district court or bankruptcy appellate panel ("BAP"). In tandem with that project, the Appellate Rules Committee seeks final approval of proposed amendments to Appellate Rule 6 (concerning appeals to the court of appeals in a bankruptcy case).

The proposed amendments to Appellate Rule 6 (which are set out in the enclosure to this report) would (1) update that Rule's cross-references to the Bankruptcy Part VIII Rules, (2) amend Rule 6(b)(2)(A)(ii) to remove an ambiguity dating from the 1998 restyling, (3) add a new Rule 6(c) to address permissive direct appeals from the bankruptcy court under 28 U.S.C. § 158(d)(2), and (4) revise Rule 6 to take account of the range of methods available now or in the future for dealing with the record on appeal.

The Appellate Rules do not expressly address permissive direct appeals from a bankruptcy court to a court of appeals under 28 U.S.C. § 158(d)(2). When Section 158(d)(2) was enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), the Appellate Rules Committee decided that no immediate action was necessary, because BAPCPA established interim procedures for administering the new direct appeals mechanism. Some of those interim procedures were displaced by the 2008 addition of subdivision (f) in Bankruptcy Rule 8001. The Committee now considers it appropriate to specify how the Appellate Rules apply to direct appeals under Section 158(d)(2).

Proposed Appellate Rule 6(c) would treat the record on direct appeals differently than existing Rule 6(b) treats the record on bankruptcy appeals from a district court or BAP. Rule 6(b) contains a streamlined procedure for redesignating and forwarding the record on appeal, because in the appeals covered by Rule 6(b), the appellate record already will have been compiled for purposes of the appeal to the district court or the BAP. In a direct appeal, the record generally will be compiled from scratch. The closest model for the compilation and transmission of the bankruptcy court record is the set of rules chosen by the Bankruptcy Rules Part VIII project for appeals from the bankruptcy court to the district court or the BAP. Thus, proposed Rule 6(c) incorporates the relevant Part VIII rules by reference while making some adjustments to account for the particularities of direct appeals to the court of appeals.

Both the Bankruptcy Rules Part VIII project and the project to revise Appellate Rule 6 have highlighted changes in the treatment of the record. The Appellate Rules were drafted on the assumption that the record on appeal would be available only in paper form. The proposed Part VIII Rules are drafted with a contrary presumption in mind: The default principle under those Rules is that the record will be made available in electronic form. In revising Rule 6(b) and in drafting new Rule 6(c), the Appellate Rules Committee adopted language that can accommodate the various ways in which the lower-court record could be made available to the

court of appeals – e.g., in paper form, in electronic files that can be sent to the court of appeals, or by means of electronic links. Such language seems advisable in the light of the shift to electronic filing; and such language seems particularly salient in the case of proposed Rule 6(c) because that Rule will incorporate by reference the Part VIII Rules that deal with the record on appeal.

A. Text of proposed amendments and Committee Note

The Committee recommends final approval of the proposed amendments to Rule 6 as set out in the enclosure to this report.

B. Changes made after publication and comment

The Committee received one comment on the proposed amendments to Rule 6, from Judge S. Martin Teel, Jr., a United States Bankruptcy Judge in the District of Columbia. Judge Teel's suggestions are described in the enclosure to this report. The Committee decided that the suggestions warrant further study, but that it was not advisable to implement them in the context of the current proposal. Instead, the Committee added Judge Teel's suggestions to its agenda for future consideration. The Committee made no change in the proposal as published.

III. Information Items

At its April 2013 meeting, the Committee reviewed, and removed from its agenda, a number of items that had lingered on the docket for some years. These items concerned the operation of Civil Rule 58(a)'s separate document requirement; the possibility of permitting 1.5-spaced or double-sided briefs; the use of audiorecordings in lieu of transcripts; appendices to petitions for permission to appeal; appellate costs; mandamus practice under the Crime Victims' Rights Act; and an inquiry from the Committee on Federal-State Jurisdiction concerning appellate review of remand orders. Each of these items is discussed in more detail in the minutes of the April meeting.

The Committee also discussed, and decided to remove from its agenda, an item that arose from *Chafin v. Chafin*, 133 S. Ct. 1017 (2013). The opinions in *Chafin* underscore the need for prompt disposition of proceedings under the International Child Abduction Remedies Act. The Committee felt, however, that this issue is best addressed by judicial education rather than by an attempt to establish docket priorities by court rule.

The Committee is considering two possible amendments to Rule 4's treatment of the deadlines for filing notices of appeal. One project arises from the circuits' differing interpretations of the term "timely" in Rule 4(a)(4) (which tolls the time to take a civil appeal "[i]f a party timely files" certain motions). A lopsided circuit split has developed concerning whether a motion filed within a purported extension of a non-extendable deadline under Civil Rules 50, 52, or 59 counts as "timely" under Rule 4(a)(4), and the Committee is considering

whether and how to amend the Rule to answer this question.

A second project concerns Rule 4(c)(1)'s inmate-filing provision for notices of appeal. The Committee is considering amendments to the Rule that might address, *inter alia*, whether an inmate must prepay postage in order to benefit from the inmate-filing rule; whether and when an inmate must provide a declaration attesting to the circumstances of the filing; whether the inmate must use a legal mail system when one exists in the relevant institution; and whether a represented inmate can benefit from the inmate-filing rule.

The Committee is considering two projects that would address requirements for filings in the courts of appeals. The first concerns length limits. The Rules set length limits for briefs using a type/volume formula plus a safe harbor in the form of a (shorter) page limit. But the length limits for rehearing petitions and some other papers are set in pages. The Committee is considering two possible options. One option would replace the page limits with a type/volume-plus-safe-harbor provision modeled on the Rules' length limits for briefs. The other option would set type/volume limits for briefs prepared on computers and would set an equivalent limit, denoted in pages, for briefs prepared without the aid of a computer. The Committee's deliberation also brought to light the potential that the 1998 amendments to Rule 32(a)(7), adopting a type/volume limitation of no more than 14,000 words for a principal brief, may have caused an increase in the length of the average appellate brief. The Committee may consider whether that word count should be adjusted as part of the length-limit project.

The second brief-related project concerns the possibility of addressing amicus filings in connection with petitions for panel rehearing and/or rehearing en banc. The proposal that is under consideration would not require a court of appeals to accept such filings, but would specify length and timing rules for those filings when a court chooses to permit them.

The Committee has on its docket two items concerning appellate jurisdiction that require coordination with other Advisory Committees. One item concerns the possibility of adopting a rule amendment to address the practice of "manufactured finality" – roughly speaking, the practice whereby an appellant seeks to render the ruling on its primary claim final and appealable by dismissing all other remaining claims. There is a conflict in authority about what procedure is sufficient to achieve finality, and this item was the subject of prior discussions in the Civil / Appellate Subcommittee. The Appellate Rules Committee reviewed the topic at its April meeting in an effort to reach a decision on how to proceed. A substantial majority of the committee favored an approach that would amend the Rules to make clear that a party can establish a final judgment only through Federal Rule of Civil Procedure 54(b) or by dismissing with prejudice all remaining claims and parties. This approach appears to be in accord with the majority of the circuits that have addressed dismissals without prejudice and dismissals with "conditional prejudice." The Committee resolved to ask the Civil Rules Committee to consider such a possible amendment.

The second appellate-jurisdiction item arises from the Court's observation in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), and *Swint v. Chambers County Commission*, 514 U.S. 35 (1995), that the rulemaking process is the preferred means for determining whether and when prejudgment orders should be immediately appealable. The committee will perform initial research aimed at determining whether it would be useful and practical to undertake a larger project that might specify by rule the universe of interlocutory orders that should be appealable. Alternatively, the committee may deem it appropriate to consider only the appealability of particular categories of orders that are brought to the committee's attention, such as the attorney-client privilege ruling at issue in *Mohawk Industries*.

Another project that will entail close coordination with the Civil Rules Committee concerns a proposal to amend the Rules to address appeals by class-action objectors. At the April meeting, the Committee heard from proponents of two different approaches. The first proposal would amend Appellate Rule 42 to bar the dismissal of an objector appeal if the objector received anything of value in exchange for dismissing the appeal. The second proposal would authorize the requirement of a cost bond (and the later imposition of costs) reflecting the full costs of delay in implementation of the class settlement as a result of the appeal. Members of the Civil Rules Committee's Rule 23 Subcommittee have agreed that the topic deserves consideration, although they initially expressed reservations about both of these approaches. The Committee intends to study the matter further over the summer and to consult again with the Rule 23 Subcommittee.

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TAB 6B

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE[1]

Rule 6. Appeal in a Bankruptcy Case ~~From a Final Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel~~

(a) Appeal From a Judgment, Order, or Decree of a District Court Exercising Original Jurisdiction in a Bankruptcy Case. An appeal to a court of appeals from a final judgment, order, or decree of a district court exercising jurisdiction under 28 U.S.C. § 1334 is taken as any other civil appeal under these rules.

(b) Appeal From a Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel Exercising Appellate Jurisdiction in a Bankruptcy Case.

(1) Applicability of Other Rules. These rules apply to an appeal to a court of appeals under 28 U.S.C. § 158(d)(1) from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction under 28 U.S.C. § 158(a) or (b)~~. But there are 3 exceptions~~, but with these qualifications:

(A) Rules 4(a)(4), 4(b), 9, 10, 11, ~~12(b)~~ 12(c), 13-20, 22-23, and 24(b) do not apply;

[1] New material is underlined; matter to be omitted is lined through.

(B) the reference in Rule 3(c) to "Form 1 in the Appendix of Forms" must be read as a reference to Form 5; ~~and~~

(C) when the appeal is from a bankruptcy appellate panel, ~~the term~~ "district court," as used in any applicable rule, means "appellate panel~~.~~"; and

(D) in Rule 12.1, "district court" includes a bankruptcy court or bankruptcy appellate panel.

(2) Additional Rules. In addition to the rules made applicable by Rule 6(b)(1), the following rules apply:

(A) Motion for ~~r~~Rehearing.

(i) If a timely motion for rehearing under Bankruptcy Rule ~~8015~~ 8022 is filed, the time to appeal for all parties runs from the entry of the order disposing of the motion. A notice of appeal filed after the district court or bankruptcy appellate panel announces or enters a judgment, order, or decree – but before disposition of the motion for rehearing – becomes effective when the order disposing of the motion for rehearing is entered.

(ii) ~~Appellate review of~~ If a party intends to challenge the order disposing of the motion – or the alteration or amendment of a judgment, order, or decree upon the motion – then ~~requires~~ the party, in compliance with Rules 3(c) and 6(b)(1)(B), ~~to amend a previously filed notice of appeal. A party intending to challenge an altered or amended judgment, order, or decree~~ must file a notice of appeal or amended notice of appeal. The notice or amended notice must be filed within the time prescribed by Rule 4 – excluding Rules 4(a)(4) and 4(b) – measured from the entry of the order disposing of the motion.

(iii) No additional fee is required to file an amended notice.

(B) The ~~r~~Record on ~~a~~Appeal.

(i) Within 14 days after filing the notice of appeal, the appellant must file with the clerk possessing the record assembled in accordance with Bankruptcy Rule ~~8006~~ 8009 – and serve on the appellee – a

statement of the issues to be presented on appeal and a designation of the record to be certified and ~~sent~~ made available to the circuit clerk.

(ii) An appellee who believes that other parts of the record are necessary must, within 14 days after being served with the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included.

(iii) The record on appeal consists of:

- the redesignated record as provided above;
- the proceedings in the district court or bankruptcy appellate panel; and
- a certified copy of the docket entries prepared by the clerk under Rule 3(d).

(C) ~~Forwarding~~ Making the ~~r~~Record Available.

(i) When the record is complete, the district clerk or bankruptcy-appellate-panel clerk must number the documents

constituting the record and ~~send~~ promptly make it available ~~them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified~~ to the circuit clerk. ~~Unless directed to do so by a party or the circuit clerk~~ If the clerk makes the record available in paper form, the clerk will not send ~~to the court of appeals~~ documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals, unless directed to do so by a party or the circuit clerk. If ~~the exhibits are~~ unusually bulky or heavy exhibits are to be made available in paper form, a party must arrange with the clerks in advance for their transportation and receipt.

(ii) All parties must do whatever else is necessary to enable the clerk to assemble the record and ~~forward the record~~ make it available. When the record is made available in paper form, t~~T~~he court of

appeals may provide by rule or order that a certified copy of the docket entries be ~~sent~~ made available in place of the redesignated record~~, b~~. But any party may request at any time during the pendency of the appeal that the redesignated record be ~~sent~~ made available.

(D) Filing the ~~r~~Record. ~~Upon receiving the record — or a certified copy of the docket entries sent in place of the redesignated record — the circuit clerk must file it and immediately notify all parties of the filing date~~ When the district clerk or bankruptcy-appellate-panel clerk has made the record available, the circuit clerk must note that fact on the docket. The date noted on the docket serves as the filing date of the record. The circuit clerk must immediately notify all parties of the filing date.

(c) Direct Review by Permission Under 28 U.S.C. § 158(d)(2).

(1) Applicability of Other Rules. These rules apply to a direct appeal by permission under 28 U.S.C. § 158(d)(2), but with these qualifications:

132 (A) Rules 3-4, 5(a)(3), 6(a), 6(b), 8(a), 8(c),
133 9-12, 13-20, 22-23, and 24(b) do not apply;
134 (B) as used in any applicable rule, "district
135 court" or "district clerk" includes – to the extent
136 appropriate – a bankruptcy court or bankruptcy
137 appellate panel or its clerk; and
138 (C) the reference to "Rules 11 and 12(c)" in
139 Rule 5(d)(3) must be read as a reference to Rules
140 6(c)(2)(B) and (C).
141 **(2) Additional Rules.** In addition, the following
142 rules apply:
143 **(A) The Record on Appeal.** Bankruptcy
144 Rule 8009 governs the record on appeal.
145 **(B) Making the Record Available.**
146 Bankruptcy Rule 8010 governs completing the
147 record and making it available.
148 **(C) Stays Pending Appeal.** Bankruptcy
149 Rule 8007 applies to stays pending appeal.
150 **(D) Duties of the Circuit Clerk.** When the
151 bankruptcy clerk has made the record available, the
152 circuit clerk must note that fact on the docket. The
153 date noted on the docket serves as the filing date of

154 the record. The circuit clerk must immediately

155 notify all parties of the filing date.

156 **(E) Filing a Representation Statement.**

157 Unless the court of appeals designates another time,

158 within 14 days after entry of the order granting

159 permission to appeal, the attorney who sought

160 permission must file a statement with the circuit

161 clerk naming the parties that the attorney represents

162 on appeal.

Committee Note

Subdivision (b)(1). Subdivision (b)(1) is updated to reflect the renumbering of 28 U.S.C. § 158(d) as 28 U.S.C. § 158(d)(1). Subdivision (b)(1)(A) is updated to reflect the renumbering of Rule 12(b) as Rule 12(c). New subdivision (b)(1)(D) provides that references in Rule 12.1 to the "district court" include – as appropriate – a bankruptcy court or bankruptcy appellate panel.

Subdivision (b)(2). Subdivision (b)(2)(A)(i) is amended to refer to Bankruptcy Rule 8022 (in accordance with the renumbering of Part VIII of the Bankruptcy Rules).

Subdivision (b)(2)(A)(ii) is amended to address problems that stemmed from the adoption — during the 1998 restyling project — of language referring to challenges to "an altered or amended judgment, order, or decree." Current Rule 6(b)(2)(A)(ii) states that "[a] party intending to challenge an altered or amended judgment, order, or decree must file a notice of appeal or amended notice of appeal …." Before the 1998 restyling, the comparable subdivision of Rule 6 instead read "[a] party intending to challenge an alteration or amendment of the judgment, order, or decree shall file an amended notice of appeal …." The 1998 restyling made a similar change in Rule 4(a)(4). One court has explained that the 1998 amendment introduced ambiguity into that Rule: "The new formulation could be read to expand the obligation to file an amended notice to circumstances where the ruling on the post-trial motion alters the prior judgment in an insignificant manner or in a

manner favorable to the appellant, even though the appeal is not directed against the alteration of the judgment." *Sorensen v. City of New York*, 413 F.3d 292, 296 n.2 (2d Cir. 2005). Though the *Sorensen* court was writing of Rule 4(a)(4), a similar concern arises with respect to Rule 6(b)(2)(A)(ii). Rule 4(a)(4) was amended in 2009 to remove the ambiguity identified by the *Sorensen* court. The current amendment follows suit by removing Rule 6(b)(2)(A)(ii)'s reference to challenging "an altered or amended judgment, order, or decree," and referring instead to challenging "the alteration or amendment of a judgment, order, or decree."

Subdivision (b)(2)(B)(i) is amended to refer to Rule 8009 (in accordance with the renumbering of Part VIII of the Bankruptcy Rules).

Due to the shift to electronic filing, in some appeals the record will no longer be transmitted in paper form. Subdivisions (b)(2)(B)(i), (b)(2)(C), and (b)(2)(D) are amended to reflect the fact that the record sometimes will be made available electronically.

Subdivision (b)(2)(D) sets the duties of the circuit clerk when the record has been made available. Because the record may be made available in electronic form, subdivision (b)(2)(D) does not direct the clerk to "file" the record. Rather, it directs the clerk to note on the docket the date when the record was made available and to notify the parties of that date, which shall serve as the date of filing the record for purposes of provisions in these Rules that calculate time from that filing date.

Subdivision (c). New subdivision (c) is added to govern permissive direct appeals from the bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2). For further provisions governing such direct appeals, see Bankruptcy Rule 8006.

Subdivision (c)(1). Subdivision (c)(1) provides for the general applicability of the Federal Rules of Appellate Procedure, with specified exceptions, to appeals covered by subdivision (c) and makes necessary word adjustments.

Subdivision (c)(2). Subdivision (c)(2)(A) provides that the record on appeal is governed by Bankruptcy Rule 8009. Subdivision (c)(2)(B) provides that the record shall be made available as stated in Bankruptcy Rule 8010. Subdivision (c)(2)(C) provides that Bankruptcy Rule 8007 applies to stays pending

appeal; in addition, Appellate Rule 8(b) applies to sureties on bonds provided in connection with stays pending appeal.

Subdivision (c)(2)(D), like subdivision (b)(2)(D), directs the clerk to note on the docket the date when the record was made available and to notify the parties of that date, which shall serve as the date of filing the record for purposes of provisions in these Rules that calculate time from that filing date.

Subdivision (c)(2)(E) is modeled on Rule 12(b), with appropriate adjustments.

CHANGES MADE AFTER PUBLICATION AND COMMENT

No changes were made after publication and comment.

SUMMARY OF PUBLIC COMMENTS

12-AP-001: Judge S. Martin Teel, Jr. Judge Teel, a United States Bankruptcy Judge in the District of Columbia, suggested that Appellate Rule 6(b)(2)(B)(iii)'s list of the contents of the record on appeal be revised by deleting the Rule's current reference to "a certified copy of the docket entries prepared by the clerk under Rule 3(d)" and inserting "the docket entries maintained by the clerk of the district court or bankruptcy appellate panel." Judge Teel stated that the reference to certification is unnecessary, that the lower-court clerk maintains rather than prepares the docket entries, and that the cross-reference to Appellate Rule 3(d) is superfluous. Turning to Appellate Rule 3(d) itself, Judge Teel also questioned why the lower-court clerk should be required to transmit a copy of the docket entries to the court of appeals now that docket entries are available electronically.

TAB 6C

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Advisory Committee on Appellate Rules
Table of Agenda Items — May 2013

FRAP Item	Proposal	Source	Current Status
07-AP-E	Consider possible FRAP amendments in response to Bowles v. Russell (2007).	Mark Levy, Esq.	Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 04/11 Discussed and retained on agenda 04/13
07-AP-I	Consider amending FRAP 4(c)(1) to clarify the effect of failure to prepay first-class postage.	Hon. Diane Wood	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/13
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08
08-AP-C	Abolish FRAP 26(c)'s three-day rule.	Hon. Frank H. Easterbrook	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/13
08-AP-G	Consider substantive and style changes to FRAP Form 4	Appellate Rules Committee	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 10/10 Draft approved 04/11 for submission to Standing Committee Approved for publication by Standing Committee 06/11 Published for comment 08/11 Draft approved 04/12 for submission to Standing Committee Approved by Standing Committee 06/12 Approved by Judicial Conference 09/12 Approved by Supreme Court 04/13

FRAP Item	Proposal	Source	Current Status
08-AP-H	Consider issues of "manufactured finality" and appealability	Mark Levy, Esq.	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 10/10 Discussed and retained on agenda 04/11 Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13
08-AP-J	Consider FRAP implications of conflict screening	Committee on Codes of Conduct	Discussed and retained on agenda 11/08
08-AP-L	Amend FRAP 6(b)(2)(A)(ii) to remove ambiguity	Reporter	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09 Discussed and retained on agenda 10/10 Discussed jointly with Bankruptcy Rules Committee and retained on agenda 04/11 Discussed and retained on agenda 10/11 Draft approved 04/12 for submission to Standing Committee Approved for publication by Standing Committee 06/12 Published for comment 08/12 Draft approved 04/13 for submission to Standing Committee
08-AP-M	Consider FRAP implications of interlocutory appeals in tax cases	Reporter	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Draft approved 10/10 for submission to Standing Committee Approved for publication by Standing Committee 01/11 Published for comment 08/11 Draft approved 04/12 for submission to Standing Committee Approved by Standing Committee 06/12 Approved by Judicial Conference 09/12 Approved by Supreme Court 04/13
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09
09-AP-A	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	ABA Council of Appellate Lawyers	Discussed and retained on agenda 04/09

FRAP Item	Proposal	Source	Current Status
09-AP-B	Amend FRAP 1(b) to include federally recognized Indian tribes within the definition of "state"	Daniel I.S.J. Rey-Bear, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed and retained on agenda 10/11 Discussed and retained on agenda 04/12
09-AP-C	Consider possible FRAP amendments in the light of project to revise Part VIII of the Bankruptcy Rules	Bankruptcy Rules Committee	Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed jointly with Bankruptcy Rules Committee and retained on agenda 04/11 Discussed and retained on agenda 10/11 Draft approved 04/12 for submission to Standing Committee Approved for publication by Standing Committee 06/12 Published for comment 08/12 Draft approved 04/13 for submission to Standing Committee
09-AP-D	Consider implications of Mohawk Industries, Inc. v. Carpenter	John Kester, Esq.	Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed and retained on agenda 04/13
10-AP-B	Consider FRAP 28's treatment of statements of the case and of the facts	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Draft approved 04/11 for submission to Standing Committee Approved for publication by Standing Committee 06/11 Published for comment 08/11 Draft approved 04/12 for submission to Standing Committee Approved by Standing Committee 06/12 Approved by Judicial Conference 09/12 Approved by Supreme Court 04/13
11-AP-C	Amend FRAP 3(d)(1) to take account of electronic filing	Harvey D. Ellis, Jr., Esq.	Discussed and retained on agenda 04/13
11-AP-D	Consider changes to FRAP in light of CM/ECF	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/11 Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13

FRAP Item	Proposal	Source	Current Status
11-AP-F	Consider amendment authorizing discretionary interlocutory appeals from attorney-client privilege rulings	Amy M. Smith, Esq.	Discussed and retained on agenda 04/13
12-AP-B	Consider amending FRAP Form 4's directive concerning institutional-account statements for IFP applicants	Peter Goldberger, Esq., on behalf of the National Association of Criminal Defense Lawyers (NACDL)	Discussed and retained on agenda 09/12
12-AP-D	Consider the treatment of appeal bonds under Civil Rule 62 and Appellate Rule 8	Kevin C. Newsom, Esq.	Discussed and retained on agenda 09/12
12-AP-E	Consider treatment of length limits for petitions for rehearing en banc under Rule 35	Professor Neal K. Katyal	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13
12-AP-F	Consider amending FRAP 42 to address class action appeals	Professors Brian T. Fitzpatrick and Brian Wolfman and Dean Alan B. Morrison	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13
13-AP-B	Amend FRAP to address permissible length and timing of an amicus brief in support of a petition for rehearing and/or rehearing en banc	Roy T. Englert, Jr., Esq.	Discussed and retained on agenda 04/13
13-AP-D	Revise Rule 6(b)(2)(B)(iii)'s list of contents of record on appeal, and revise Rule 3(d)(1) in light of electronic filing	Hon. S. Martin Teel, Jr.	Awaiting initial discussion
13-AP-E	Consider treatment of audiorecordings of appellate arguments	Appellate Rules Committee	Awaiting initial discussion
13-AP-F	Consider items included for purposes of length limit in Rule 35(b)(2)	Gregory G. Garre, Esq.	Awaiting initial discussion
13-AP-G	Consider clarifying which items can be excluded when calculating length under Rule 28.1(e)	Appellate Rules Committee	Awaiting initial discussion

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Minutes of Spring 2013 Meeting of Advisory Committee on Appellate Rules April 22 and 23, 2013 Washington, D.C.

I. Introductions

Judge Steven M. Colloton called the meeting of the Advisory Committee on Appellate Rules to order on Monday, April 22, 2013, at 9:00 a.m. at the Mecham Conference Center in the Thurgood Marshall Federal Judiciary Building in Washington, D.C. The following Advisory Committee members were present: Judge Michael A. Chagares, Judge Robert Michael Dow, Jr., Justice Allison H. Eid, Judge Peter T. Fay, Judge Richard G. Taranto, Professor Amy Coney Barrett, Professor Neal K. Katyal, and Mr. Kevin C. Newsom. Mr. Douglas Letter, Director of the Appellate Staff of the Civil Division, U.S. Department of Justice ("DOJ"), and Mr. H. Thomas Byron III, also of the Civil Division, were present representing the Solicitor General. Mr. Gregory G. Garre, liaison from the Standing Committee; Mr. Peter G. McCabe, Secretary to the Standing Committee; Mr. Benjamin Robinson, Deputy Rules Committee Officer and Counsel to the Rules Committees; Ms. Julie Wilson, Attorney Advisor in the Administrative Office ("AO"); Mr. Michael Ellis Gans, liaison from the appellate clerks; and Ms. Marie Leary from the Federal Judicial Center ("FJC") were also present. Professor Daniel R. Coquillette, Reporter for the Standing Committee, participated by telephone. On the second day of the meeting, Professor John E. Lopatka and Professor Brian T. Fitzpatrick participated in the discussion of one agenda item, and Ms. Holly Sellers, Staff Attorney with the Judicial Conference Committee on Federal-State Jurisdiction, was present for the discussion of another item.

Judge Colloton opened the meeting – his first as the Committee's Chair – by noting that he looked forward to working with the Committee. He congratulated Judge Taranto on his recent confirmation as a Judge of the U.S. Court of Appeals for the Federal Circuit. He welcomed Mr. Garre, who was replacing Mr. Colson as the liaison from the Standing Committee. Mr. Garre, Judge Colloton noted, served as the forty-fourth Solicitor General of the United States and now is a partner at Latham & Watkins. Judge Colloton also welcomed Mr. Gans, who first joined the Eighth Circuit Clerk's Office in 1983 and who now replaces Mr. Green as the liaison from the appellate clerks.

At 2:50 p.m. on the first day of the meeting, the Committee joined Professor Coquillette in Boston in observing a moment of silence in honor of the victims of the Boston Marathon bombing.

II. Approval of Minutes of September 2012 Meeting

A motion was made and seconded to approve the minutes of the September 2012 meeting. The motion passed by voice vote without dissent.

III. Report on January 2013 Meeting of Standing Committee

Judge Colloton reported that the Standing Committee, at its January meeting, had paid tribute to the memory of Judge Mark R. Kravitz, who died on September 30, 2012. Judge Kravitz is deeply missed.

IV. Other Information Items

Judge Colloton noted that the Supreme Court has approved the proposed amendments to Appellate Rules 28 and 28.1 (concerning the statement of the case), Appellate Rules 13, 14, and 24 (concerning appeals from the United States Tax Court), and Appellate Form 4 (concerning applications to proceed in forma pauperis). Absent contrary action by Congress, those amendments are on track to take effect on December 1, 2013.

V. For Final Approval: Item Nos. 08-AP-L and 09-AP-C

Judge Colloton invited the Reporter to introduce these items, which concern proposed amendments to Appellate Rule 6. The Reporter reminded the Committee that these amendments were designed to dovetail with the Bankruptcy Rules Committee's package of amendments to Part VIII of the Bankruptcy Rules (concerning bankruptcy appellate practice). The amendments would update Rule 6's cross-references to certain Part VIII Rules; amend Rule 6(b)(2)(A)(ii) to remove an ambiguity that resulted from the restyling of the Appellate Rules; and add a new Rule 6(c) to address permissive direct appeals from the bankruptcy court under 28 U.S.C. § 158(d)(2). The amendments also revise Rule 6 to account for the range of possible methods for handling the record on appeal.

A great many comments were submitted on the proposed amendments to the Part VIII Rules; by contrast, only one comment was submitted on the proposal to amend Rule 6. The Reporter noted that the Appellate Rules Committee's agenda materials included a redline showing possible changes that were proposed to the Bankruptcy Rules Committee in light of the public comments. At its spring 2013 meeting, the Bankruptcy Rules Committee had approved many of those changes, had rejected others, and had made a few additional changes. Thus, the proposed Part VIII package, as finally approved by the Bankruptcy Rules Committee, differed in some respects from the version reproduced in Volume II of the Appellate Rules Committee's agenda materials; the Reporter assured the Committee that none of those differences would affect the operation of Rule 6, and she offered to share the as-approved version with any Committee members who wished to review it.

Among the post-publication changes to the Part VIII package, the most interesting change, from the perspective of practice in the courts of appeals, concerns proposed Bankruptcy Rule 8007 (which addresses stays pending appeal). Under proposed Appellate Rule 6(c)(2)(C), Rule 8007 will apply to direct appeals to the courts of appeals

under Section 158(d)(2). Proposed Rule 8007(a), like Appellate Rule 8(a)(1), requires that a litigant seeking a stay must ordinarily move first in the lower court; Rule 8007(a)(2) states that this "motion may be made either before or after the notice of appeal is filed." As published, Rule 8007(b)(1) provided that "[a] motion for the relief specified in subdivision (a)(1) – or to vacate or modify a bankruptcy court's order granting such relief – may be made in the court where the appeal is pending or where it will be taken." However, a commentator questioned the authority of the appellate court to entertain such a motion prior to the filing of a notice of appeal. In response to this comment, the Bankruptcy Rules Committee decided to delete "or where it will be taken" from Rule 8007(b)(1). The Reporter stated that this change seems to bring the proposed Rule into conformity with Section 158(d)(2)(D), which provides: "An appeal under this paragraph does not stay any proceeding of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the appeal is taken, unless the respective bankruptcy court, district court, or bankruptcy appellate panel, or the court of appeals in which the appeal is pending, issues a stay of such proceeding pending the appeal." In sum, the Reporter suggested, this change seems like an improvement, as do the other post-publication changes that the Bankruptcy Rules Committee made to the proposed Part VIII Rules.

The sole comment on the proposed amendments to Appellate Rule 6 was submitted by Judge S. Martin Teel, Jr., a United States Bankruptcy Judge in the District of Columbia. Judge Teel suggested deleting from Rule 6(b)(2)(B)(iii)'s list of the contents of the record on appeal the phrase "a certified copy of the docket entries prepared by the clerk under Rule 3(d)" and substituting "the docket entries maintained by the clerk of the district court or bankruptcy appellate panel." Judge Teel stated that the reference to certification is unnecessary, that the lower-court clerk maintains rather than prepares the docket entries, and that the cross-reference to Appellate Rule 3(d) is superfluous. Judge Teel also questioned why Appellate Rule 3(d) requires the lower-court clerk to transmit a copy of the docket entries to the court of appeals now that docket entries are available electronically. The Reporter suggested that Judge Teel's comments warrant consideration, but that it would be preferable to add them to the Committee's agenda as a separate item rather than trying to take account of them in the currently-proposed amendments to Rule 6.

A member moved to approve the Rule 6 proposal as published. The motion was seconded, and it passed by voice vote without dissent.

VI. Discussion Items

A. Items Proposed for Removal from Agenda

Judge Colloton explained that, upon becoming Chair of the Committee, he had decided to take a fresh look at long-pending items on the Committee's docket. He invited the Reporter to present to the Committee six items that appeared to be ripe for removal from the docket.

1. Item No. 07-AP-H (separate document requirement)

The Reporter reminded the Committee that this item arose from the observation that, where Civil Rule 58(a) requires a judgment to be set out in a separate document, and the district court fails to comply with this requirement, under Civil Rule 58(c)(2) the time limit for making postjudgment motions does not start to run until 150 days after entry of the judgment on the docket. This creates the possibility that a litigant might make a very belated postjudgment motion that – because it was still technically timely – would suspend the effectiveness of any previously-filed notice of appeal pending disposition of the motion.

In 2008, the Committee considered possible ways to address this scenario. Initially, it discussed whether to adopt a time limit within which tolling motions must be filed when a separate document was required but not provided. After consulting with the Civil Rules Committee, however, the Committee decided that it was preferable to raise awareness of Rule 58's requirements in the hopes of improving district court compliance. Since 2008, this item has lain dormant.

By consensus, the Committee decided to remove this item from the docket.

2. Item No. 08-AP-N (FRAP 5 / appendix)

The Reporter noted that this item arose from Peder Batalden's suggestion that the Committee amend Rule 5 to permit litigants to submit an appendix of key record documents along with a petition for permission to appeal (or along with an answer to such a petition). The concern is that courts might count the appendix toward the length limit set by Rule 5(c). (Rule 5(c) excludes the items required by Rule 5(b)(1)(E), but that list of items does not include an appendix.)

When the Committee discussed this proposal in 2009, members observed that when the filings in the district court are electronic, the court of appeals can usually access those documents via the CM/ECF system. Admittedly, as the Committee noted, pro se litigants continue to make paper filings, and some sealed filings are not available in CM/ECF. But, the Reporter suggested, now that all of the courts of appeals have completed the shift to electronic filing, the rationale for this proposal seems weaker than it was in 2009.

Mr. Gans reported that each district court sets its own parameters concerning the access of court of appeals personnel to filings in the district court; some districts, for example, do not permit electronic access to sealed documents.

An appellate judge member asked whether anyone had reported instances in which a court of appeals forbade the filing of an appendix to a petition or an answer. If not, he suggested, it would be a good idea to remove this item from the agenda.

By consensus, the Committee removed this item from the agenda.

3. Item No. 08-AP-P (FRAP 32 / line spacing)

The Reporter stated that this item arose from Mr. Batalden's proposal that the Committee amend the Rules to permit the use of 1.5-spaced, rather than double-spaced, briefs. When the Committee discussed this proposal, members also considered the possibility of amending the Rules to permit double-sided briefs. There was some support for each of these proposals during the Committee's discussion. However, other participants had predicted that judges would oppose such changes. Moreover, it was suggested that the shift to electronic filing would eventually render the question of double-sided printing moot.

An appellate judge member stated that the judges of the Eleventh Circuit prefer double-spaced, single-sided briefs. Another appellate judge member asked whether some units within the DOJ had, in the past, filed double-sided briefs. Mr. Letter responded that the DOJ had periodically raised the possibility of submitting double-sided briefs but that the courts had never acceded to that suggestion. Another appellate judge recalled that Iowa lawyers were known in the Eighth Circuit for attempting to file double-sided briefs – and the explanation was that the Iowa Supreme Court required double-sided briefs.

Mr. Letter said that, in his view, the key question is what judges prefer. However, he also noted that moving to double-sided printing would save a lot of paper and a lot of storage space. Commercially printed briefs, he observed, are printed double-sided, as are books and newspapers. He urged the Committee to consider permitting double-sided printing.

Another appellate judge stated that he preferred the Rules' current approach; he reported that he writes on the blank side of the pages. An attorney participant stated that he had become accustomed to printing documents double-sided for his own use, and that this practice does consume a lot less paper. Mr. Letter added that double-sided briefs are lighter.

An appellate judge asked Mr. Gans whether his office stores appellate briefs. Mr. Gans responded that his office keeps the briefs for a period of time and then recycles them. He observed that sometimes there are copies of briefs that were never used; on the other hand, in other instances his office runs out of copies and has to print more. A member asked whether the Committee could encourage circuits to lower the number of required copies of briefs.

An appellate judge predicted that judges would resist the adoption of double-sided printing. A motion was made to remove this item from the agenda. The motion was seconded and passed by voice vote without dissent.

4. Item No. 08-AP-Q (use of audiorecordings in lieu of transcript)

Judge Colloton introduced this item, which arose from a suggestion by Judge Michael M. Baylson that the Committee consider amending the Appellate Rules to permit the use of audiorecordings in lieu of a transcript for purposes of the record on appeal.

Professor Coquillette observed that any proposal that would affect court reporters would become highly political. An appellate judge member suggested that searching an audio file would be more difficult and time consuming than looking through a written transcript. A motion was made and seconded to remove this item from the agenda. The motion passed by voice vote without dissent.

An attorney participant asked whether the Committee had ever considered drafting a rule concerning the release of audiorecordings of appellate arguments. Some courts, he reported, are very slow to release them – in contrast with recent Supreme Court practice. Mr. Letter stated that he did not recall such a proposal. Professor Coquillette stressed that it would be important for the Committee to confer with the Judicial Conference Committee on Court Administration and Case Management ("CACM") before commencing such a project. Mr. McCabe noted that CACM is in charge of pilot programs concerning audiorecordings and videorecordings of trial-court proceedings. A member stated that he favored approaching CACM to discuss practices concerning the release of appellate argument audiorecordings. He noted that there is a strong public interest in open access, and also that the recordings are very useful to advocates who are preparing for their own arguments. Mr. Gans asked whether the FJC has studied this issue. By consensus, the Committee resolved to investigate this matter further.

5. Item No. 10-AP-D (FRAP 39 / *Snyder v. Phelps*)

Judge Colloton introduced this item, which related to a bill – the "Fair Payment of Court Fees Act of 2010" – which would have amended Civil Rule 68 and Appellate Rule 39 in response to concerns raised about the taxation of costs in *Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009), *aff'd*, 131 S. Ct. 1207 (2011). At the Committee's request, Ms. Leary prepared a study concerning the circuits' practices with respect to appellate costs. Judge Sutton, as chair of this committee, sent Ms. Leary's report to the Chief Judges of each circuit, and the Fourth Circuit subsequently reduced the ceiling on the permissible reimbursement per page of copies. The bill has not been reintroduced since then.

A motion was made to remove this item from the Committee's agenda. The motion was seconded, and passed by voice vote without dissent.

6. Item No. 10-AP-H (appellate review of remand orders)

The Reporter reminded the Committee that this item relates to an inquiry the Committee received in 2010 from Karen Kremer, an attorney at the AO who works with the Judicial Conference's Committee on Federal-State Jurisdiction. Ms. Kremer had asked whether the Appellate Rules Committee was considering questions relating to appellate review of remand orders. The Committee discussed this inquiry at its fall 2010 meeting and noted that this topic falls within the primary jurisdiction of the Federal-State

Jurisdiction Committee. Committee members expressed willingness to assist with a project in this area if the Federal-State Jurisdiction Committee decided to undertake one. The Committee did not hear anything further on the matter from the Federal-State Jurisdiction Committee.

A motion was made, and seconded, to remove this item from the Committee's agenda. The motion passed by voice vote without dissent.

B. Items for Further Discussion

1. Item No. 05-01 (FRAP 21 & 27(c) / Justice for All Act of 2004)

Judge Colloton and the Reporter introduced this item, which concerned the possibility of amending the Appellate Rules to account for the mandamus procedures set by the Crime Victims' Rights Act ("CVRA") (which was part of the Justice for All Act of 2004). If a district court denies relief sought by a crime victim under the CVRA, the CVRA authorizes the victim to seek a writ of mandamus from the court of appeals. The statute authorizes the issuance of the mandamus writ "on the order of a single judge" and sets a 72-hour deadline for the court of appeals to reach a decision on the application. Then-Professor Schiltz, the Committee's Reporter at the time, identified three problems arising from the CVRA. One is that Rule 27(c) (which provides that a circuit judge acting alone "may not dismiss or otherwise determine an appeal or other proceeding") prevents individual judges from issuing mandamus writs and Rule 47(a)(1) forecloses local rules that are inconsistent with the Appellate Rules. A second is that the 72-hour deadline would be extremely hard to meet. A third was that, as of 2005, the Rules provided no method for computing time periods set in hours. The third of these problems was removed by the adoption, in 2009, of Rule 26(a)(2)'s provision for counting time periods stated in hours. When the committee last considered this matter, it was left that the Department of Justice would monitor practice under the Act and notify the committee of any difficulties. Judge Colloton asked Mr. Letter whether he could report on how the first and second problems identified by Professor Schiltz have played out in practice.

Mr. Letter reported that he had consulted the Solicitor General, the Criminal Appellate Office at DOJ, and various United States Attorney's Offices. Those consultations produced no sense that a rule change is warranted. Mr. Letter surveyed judicial opinions that deal with the CVRA. There are, he reported, some procedural issues that are being litigated in the circuits, but those issues are likely to be resolved through judicial decisionmaking more quickly than they could be resolved by means of a rule change. There has been litigation over whether review of a district court ruling is available via an appeal, or whether mandamus is the only avenue; most courts say the latter. Mr. Letter suggested that this question is probably not appropriate for treatment through rulemaking.

Mr. Letter noted that the 72-hour deadline is not typically observed by courts. Some courts view the issue in terms of waiver; there is some question whether the deadline is waivable by the litigants. In any event, no court has ruled that a failure to

meet this deadline deprives the court of the power to act. Mr. Letter also observed that courts do not all apply the same standard of review when deciding CVRA petitions. However, Mr. Letter's office was unable to identify a case in which the choice (among the different standards of review that are in use in different courts) would have produced a difference in outcome. An appellate judge stated his impression that none of the courts of appeals directs CVRA petitions to a single judge for resolution; rather, all of the circuits use three-judge panels. Mr. Letter agreed.

Judge Colloton asked whether there is any sense that delays in resolving CVRA appeals are causing harm to victims. Mr. Letter responded that he is not aware of any such instances. Mr. Letter noted that although a rule adopted under the Rules Enabling Act will supersede any existing statutory provisions that conflict with it, it would be odd to try to supersede the CVRA's 72-hour deadline through rulemaking. Judge Colloton noted that, during the Committee's prior discussions of this topic, then-Professor Schiltz had raised the possibility of amending the Appellate Rules to permit a single judge to act on CVRA petitions (as a way of expediting them and to conform to the statute's contemplated procedure).

Mr. McCabe pointed out that the statute requires the AO to report to Congress every year on any instances in which a court denied a victim's request for relief under the CVRA. There are, he said, very few such instances per year. Mr. Letter noted that there is a developing circuit split concerning restitution awards against downloaders of child pornography, but that is unrelated to the issues raised by this docket item.

By consensus, the Committee decided to remove this item from its agenda.

2. Item No. 07-AP-E (*Bowles v. Russell*)

Judge Colloton invited the Reporter to introduce this item, which arose from a suggestion that the Committee consider possible responses to the Supreme Court's holding, in *Bowles v. Russell*, 551 U.S. 205 (2007), that Rule 4(a)(6)'s 14-day time limit on reopening the time to take a civil appeal is mandatory and jurisdictional.

Starting in 2007, the Committee discussed a number of possible approaches. It considered the idea of altering the law to specify which appeal-related deadlines were or were not jurisdictional, and the idea of reinstating the "unique circumstances" doctrine (which had provided an avenue for excusing noncompliance with a deadline). After discussing questions of the scope of rulemaking authority, the Committee turned to the possibility of developing proposed legislation that would set a method for determining whether statutory deadlines were jurisdictional. However, after considering the potential scope of that project, the Committee decided to reassess how big a problem *Bowles*-related issues really were in practice. This question proved difficult to assess; the caselaw showed that some litigants were losing the opportunity for appellate review because an appeal deadline was deemed jurisdictional under *Bowles*, but it was hard to tell how frequently this was happening. In addition, some doctrines were available to

mitigate the effect of *Bowles* – for example, the possibility of treating, as the notice of appeal, another document that was the substantial equivalent of such a notice.

After years of comprehensive consideration, it seemed that this item might be ripe for removal from the Committee's agenda. However, there were a couple of loose ends that merited the Committee's attention. Since *Bowles*, the lower courts are treating statutory deadlines for taking an appeal from the district court to the court of appeals as jurisdictional, but they are treating non-statutory appeal deadlines as non-jurisdictional claim-processing rules. This dichotomy gives rise to a difficulty in instances where a basic appeal deadline is set by statute but the Rules fill in statutory gaps; should such a gap-filling rule be viewed as jurisdictional?

In particular, two questions have arisen concerning the treatment under Rule 4(a)(4) of motions that toll the time to take a civil appeal. 28 U.S.C. § 2107 does not mention such motions, but the tolling effect of certain postjudgment motions was recognized even prior to that statute's enactment. Rule 4(a)(4) refers to the tolling effect of specified "timely" motions. A number of circuits have concluded that the Civil Rules' non-extendable deadlines for post-judgment motions are claim-processing rather than jurisdictional rules. In this view, if the district court purports to extend such a deadline, and no party objects, the district court has authority to decide the late-filed motion on its merits. But is such a motion "timely" under Rule 4(a)(4), such that it tolls the time to take an appeal? The majority view in the circuits is that such a motion does not qualify for tolling effect – but the Sixth Circuit has taken the opposite view.

Another question concerns the nature of Rule 4(a)(4)'s requirements themselves: is Rule 4(a)(4)'s requirement of a "timely" motion itself a jurisdictional requirement, or merely a claim-processing rule? Drafting a rule change to address this second question, the Reporter suggested, could be more challenging. An appellate judge member suggested looking at other Rules, if any, that refer to the waivability of a requirement set by Rule. This member wondered whether addressing the waivability of one requirement would give rise to any negative implications for the treatment of other such requirements. The Reporter made a note to look at other rules that refer to timeliness, and also to consider the possible implications (of any proposed change concerning Rule 4(a)(4)) for Rule 4(b)(3)'s tolling provision. The appellate judge member also noted the possible relevance of Rule 4(a)(7)(B) (which states that failure to comply with Civil Rule 58(a)'s separate document requirement "does not affect the validity of an appeal").

Judge Colloton asked Committee members for their views on whether the Committee should propose an amendment to clarify the meaning of "timely" in Rule 4(a)(4). An appellate judge member said that it would be worthwhile to clarify the Rule. Another appellate judge member agreed.

A district judge member noted that it might be useful to gather data on how frequently district courts mistakenly grant a litigant's request to extend one of the non-extendable deadlines for post-judgment motions. He observed that, in criminal cases, the

deadlines for some postjudgment motions *are* extendable and requests for extensions are routinely granted.

By consensus, the Committee decided to keep this item on its agenda. The Reporter undertook to work with Judge Dow, Mr. Letter, and Mr. Byron to draft illustrative alternatives for an amendment to Rule 4(a)(4) – one draft that would implement the majority view concerning the meaning of "timely," and another that would implement the Sixth Circuit's view.

3. Item No. 07-AP-I (FRAP 4(c) / inmate filing)

Judge Colloton invited the Reporter to introduce this item, which concerns the operation of Rule 4(c)(1)'s inmate-filing provision. The first sentence of Rule 4(c)(1) applies the prison-mailbox rule to notices of appeal. The second sentence states that the inmate, to receive the benefit of this rule, must use the "system designed for legal mail" if the institution has one. The third sentence states that timeliness "may be shown" by a declaration or notarized statement setting out the date of deposit and attesting that first-class postage was prepaid. Judge Diane Wood asked the Committee to consider clarifying whether this Rule requires prepayment of postage as a condition of timeliness. Research revealed that there also may be confusion in the law about whether the declaration discussed in the third sentence is required in all instances and, if so, when it must be furnished.

The doctrinal backdrop for this inquiry includes prisoners' constitutional right of access to court under *Bounds v. Smith*, 430 U.S. 817 (1977). The Court has ruled that *Bounds* requires that inmates be provided with the "tools … to attack their sentences, directly or collaterally, and … to challenge the conditions of their confinement." *Lewis v. Casey*, 518 U.S. 343, 355 (1996). Although courts have recognized (or assumed) that there is a federal constitutional right to some amount of free postage for an indigent inmate's legal mail, the constitutionally required amount may be relatively small. The Reporter noted that the Sixth Circuit, in a 2010 decision, found a *Bounds* violation where a defendant's attempt to file a direct appeal of his state-court judgment of conviction was thwarted by prison officials' delay in mailing his appeal papers and by the absence of a prison-mailbox rule under state law.

The Committee's agenda materials set forth some possible drafting alternatives for amendments to Rule 4(c)(1). The Rule could be amended to extend clearly the postage-prepayment requirement to all prison-mailbox filings. An argument in favor of such a change is that it could speed the processing of appeals by preventing delays in the transit of the notice of appeal; counter-arguments would stem from the facts that inmates have fewer opportunities to earn money than non-inmates and that inmates lack the alternative of delivering the notice of appeal to the court by hand. The latter concerns would suggest that if the Committee were to propose an amendment cementing a postage-prepayment requirement, it should also consider including a provision for excusing compliance in appropriate circumstances. The materials also sketched a possible amendment that would restrict the postage-prepayment requirement to instances

when the inmate does not use a legal mail system, but it is unclear why such a choice would be desirable. Another possible type of amendment would make clear whether the declaration or notarized statement is always required, and, if so, whether it must be included with the notice of appeal or whether it can be provided later. Another question is whether it would be possible to clarify what is meant by a "system designed for legal mail"; but a clearer alternative seems difficult to formulate. Finally, another possible type of amendment would clarify whether Rule 4(c)(1) applies to filings by an inmate who has a lawyer.

Judge Colloton observed that the 1993 Committee Note to Rule 4(c) stated that this inmate-filing provision was "similar to that in Supreme Court Rule 29.2." There may have been some ambiguity in the original Rule, he suggested, with respect to the requirement of a declaration. In 1998 the second sentence of Rule 4(c)(1) – referring a "system designed for legal mail" – was added. The 1998 Committee Note to Rule 4(c) explained: "Some institutions have special internal mail systems for handling legal mail; such systems often record the date of deposit of mail by an inmate, the date of delivery of mail to an inmate, etc." Judge Colloton pointed out that "often" is different from "always." He asked whether it is always the case that a piece of mail processed through an institution's legal mail system will have a date stamp, such that it would be unnecessary to have a declaration by the inmate concerning the date of deposit.

Mr. Gans stated that simplicity is key for rules concerning inmate filings. He reported that inmates tend to assume that all of their filings are governed by *Houston v. Lack*, 487 U.S. 266 (1988). Judge Colloton asked whether the Clerk's Office checks inmate mailings for a date stamp. Mr. Gans responded that his office does typically look at the envelope, which is usually scanned in as a PDF file by the District Clerk's Office. The Federal Bureau of Prisons, he noted, does mark the envelopes containing inmate mailings. He reported that his office typically does not see a declaration by the inmate concerning the date of deposit of the mailing; usually the issue does not arise unless the appellee moves to dismiss the appeal. Sometimes the court of appeals remands the case to the district court for the district court to make a finding concerning when the notice of appeal was filed.

An appellate judge member suggested that the provision concerning legal mail systems adds complexity. Another member questioned why the Rule should require payment of postage, and why the institution should not be required to cover the cost of postage for a notice of appeal. Covering the cost of postage, this member suggested, would be cheaper than litigating the question of whether there was good cause to excuse the inmate from paying the postage. Mr. Letter summarized the Federal Bureau of Prisons policy. Under this policy, inmates are generally responsible for paying their own postage costs, but the institution will provide stamps for legal mail (subject to possible limitation by the warden). Mr. Gans noted that, before inmates arrive in a Federal Bureau of Prisons facility, they may be held temporarily in a facility (such as a county jail) where different mail practices apply. An appellate judge agreed that it would be very rare for an inmate to arrive in an institution run by the Federal Bureau of Prisons within the 14-day period for filing a notice of appeal. Mr. Letter observed that federal public defenders file

notices of appeal on behalf of their clients as a matter of course. Mr. Gans responded, though, that retained or appointed counsel might not follow this practice.

An appellate judge member observed that the Committee is not in a position to require an institution to pay the cost of postage for inmates filing a notice of appeal. Another member responded that the Rule could be amended to address the question that does fall within the Committee's purview – namely, whether a notice of appeal that was timely deposited in the institution's mail system is considered timely filed despite subsequent delays caused by nonpayment of postage. If the Rule were amended to provide that such a notice is timely, this member conceded, the effect would likely be that the institution would decide to pay the postage costs itself. This member expressed concern at the possibility that a defendant's appeal might fall through the cracks, and he questioned why the system requires criminal defendants to file a notice of appeal rather than assuming that they will wish to take an appeal. Another participant noted that Rule 4(c)(1) applies to both civil and criminal cases.

An attorney participant stated that he favored making the rules clearer and easier to apply. However, he asked whether the Supreme Court has encountered difficulties in applying its Rule 29.2. A member responded that the filing of certiorari petitions presents different issues because a certiorari petition (unlike a notice of appeal) is not a one-page document.

Mr. Letter questioned whether a Rule could require the government to pay inmates' postage costs; such a requirement, he suggested, could raise questions of sovereign immunity. An appellate judge member responded that a Rule could address the issue by stating that a notice of appeal could be timely even if the lack of postage delayed its arrival at the courthouse. Another appellate judge asked why such a filing should be timely if the inmate had the money to pay for postage and failed to do so. The other appellate judge responded that a bright-line rule providing for timeliness would allow courts to avoid expending judicial efforts on the question of whether the inmate had the resources to pay for postage. Another member added that, under such an approach, the inmate would still need to deposit the notice of appeal in the institution's mail system within the filing deadline.

A district judge member observed that, in civil cases, inmates who lose in the district court are typically litigating pro se. Another member suggested holding this item on the Committee's agenda and conducting research on the origins of the postage-prepayment requirement. An appellate judge suggested that it would also be useful to research whether any similar issues have arisen under the Supreme Court's Rule 29.2. Another appellate judge noted that while the second sentence in Supreme Court Rule 29.2 refers to the statement or declaration noting the date the document was deposited in the mail system and stating that postage has been prepaid, the third sentence provides further steps for the Clerk to take if "[i]f the postmark is missing or not legible." An attorney participant stated that inmates do not have a constitutional right to require the government to pay for postage; he suggested that it would be useful to see whether other Rules discuss prepayment of postage. An appellate judge asked whether there is

information on the frequency with which inmates lose their appeal rights because of the wording of the current Rule 4(c)(1). The Reporter responded that the caselaw provides some examples; for instance, in *United States v. Ceballos-Martinez*, 371 F.3d 713 (10th Cir. 2004), the defendant's notice of appeal was postmarked with a date prior to the deadline for filing the notice of appeal, but the court held his appeal untimely because he had failed to provide a declaration or notarized statement setting forth the notice's date of deposit with prison officials and attesting that first-class postage was pre-paid.

An appellate judge member suggested that it would be useful to revise the Rule to clarify the idea that the declaration *suffices*, but is not required, to show compliance with the Rule. The Reporter suggested that Rule 32(a)(7)(C)(ii) might provide a useful model.

An appellate judge member asked whether amending the Rule to make clear that there is no postage-prepayment requirement would touch off conflicts between inmates and prison authorities. An attorney participant suggested that it would be odd to eliminate the postage-prepayment requirement for notices of appeal but not for briefs. The Reporter noted that the deadline for filing a notice of appeal is jurisdictional in civil cases. Mr. Gans observed, however, that if a litigant fails to meet an appellate briefing deadline, the litigant only receives one opportunity to show cause why the appeal should not be dismissed.

With respect to the effects of amending the Rule to clarify that there is no postage-prepayment requirement, the Reporter suggested that it might be useful to study how practice has developed in the Seventh and Tenth Circuits, where the caselaw provides that prepayment of postage is not required if the inmate uses the legal mail system. An appellate judge member asked why the Rule should *require* an inmate to use an institution's legal mail system in order to get the benefit of the inmate-filing rule. Another appellate judge agreed that this is a good question.

Judge Colloton observed that several possibilities may be on the table. First, the discussion touched upon the possibility of amending Rule 4(c)(1) to eliminate any requirement that postage be prepaid. Second, the discussion raised the question whether the second sentence of Rule 4(c)(1) (requiring use of an institution's legal mail system) makes sense. There was also the question of the declaration referred to in the third sentence of Rule 4(c)(1); participants in the discussion did not seem to think that the declaration should be required if there was another way to tell that the notice was timely deposited in the mail system. Another approach might focus on bringing Rule 4(c)(1) into closer parallel with Supreme Court Rule 29.2.

A district judge member suggested that one approach could be to provide that the notice of appeal is timely whether or not postage is paid by the inmate, and that if institution pays the postage on the inmate's behalf, the institution can debit the postage cost from the inmate's institutional account. To get the benefit of such a provision, this member suggested, the inmate could be required to certify that he or she is indigent. Almost all such litigants, the member stated, are proceeding *in forma pauperis*.

Judge Colloton asked whether any Committee members would be willing to work with the Reporter to draft alternatives in advance of the next meeting. Justice Eid, Professor Barrett, and Mr. Letter volunteered to assist with this task.

4. Item Nos. 08-AP-A, 08-AP-C, 11-AP-C, 11-AP-D (possible amendments relating to electronic filing)

Judge Colloton reported that the Standing Committee was in the process of convening a subcommittee to consider possible amendments to each set of national Rules to take further account of electronic filing issues. Professor Coquillette stated that he would be coordinating the subcommittee's efforts, and that Professor Capra would serve as the subcommittee's reporter. Most of the other Advisory Committees, he noted, were appointing a representative to serve on the subcommittee.

Judge Colloton invited the Reporter to introduce the collection of existing agenda items that relate to electronic filing. The Reporter reminded the Committee that all of the circuits had completed their transition to the CM/ECF system. She observed that the project to revise Part VIII of the Bankruptcy Rules (which the Committee had discussed earlier in the day) provided a model for ways in which the Rules could be amended to take account of electronic filing. With input from the other Circuit Clerks, Mr. Green (who was Mr. Gans's predecessor as the Circuit Clerks' representative on the Committee) had prepared a list of Appellate Rules that could be considered in this connection. Relevant topics included requirements for service by the clerk; filing or service by parties; the treatment of the record; the treatment of the appendix; the format of briefs and other papers; and the number of required copies. One issue that had been raised by a number of commentators concerned the "three-day rule" in Appellate Rule 26(c), which adds three days to a given period if that period is measured after service and service is accomplished electronically or by a non-electronic means that does not result in delivery on the date of service.

Judge Colloton invited the Committee members to suggest topics that might be ripe for study. The three-day rule might be one such topic. With respect to the appendix, there may be varying views; some judges may prefer an electronic appendix while others will continue to prefer paper.

As to the three-day rule, Mr. Letter pointed out that eliminating this provision in instances where the paper is served electronically could cause problems for lawyers whose opponents electronically serve them at 11:59 p.m. Perhaps, he suggested, the rule could be amended to eliminate the three-day rule for electronically served papers but to provide one extra day for responding to a paper that is electronically served after noon. Mr. Gans responded that such a rule would be difficult for clerks to enforce; moreover, if late-night electronic service causes a problem in a given case the court could grant a one-day extension. In the Eighth Circuit, he noted, the Clerk's Office serves some documents electronically on behalf of inmate litigants; but this practice is not universal among other circuits. Pro se prisoner litigation, Mr. Gans reported, constitutes roughly a third of the Eighth Circuit's docket. Mr. Gans suggested that the three-day rule is no longer

necessary but that if the Rule were amended the change would result in some transition costs.

A member stated that, although lawyers have an ingrained habit of relying on the three-day rule, it does not make sense in the case of electronically served papers. An appellate judge asked how often service is accomplished by U.S. Mail. Mr. Gans reported that, in the Eighth Circuit, over a period of years, only a handful of lawyers had been exempted from using the CM/ECF system. Mr. Letter pointed out that in a number of circuits there will continue to be papers served in paper form by pro se litigants. Those papers are typically delayed in reaching federal-government lawyers because all mail that comes to the DOJ is screened on its way in for security reasons.

An appellate judge member noted two possible ways of amending Rule 26(c) to address the question of electronic service. One option would be to delete the last sentence of the Rule, which currently states that "[f]or purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service." An alternative would be to revise that sentence by deleting the "not." Mr. Gans stated that he preferred the latter approach.

The Reporter observed that, although the application of the three-day rule to electronically-served papers has garnered the most criticism, Chief Judge Easterbrook also has voiced a more general objection to the three-day rule – namely, that it interferes with the Rules' general preference for setting time periods in multiples of seven days. Mr. Gans stated that the continuing prevalence of paper filings by pro se litigants provides a valid argument in favor of maintaining the three-day rule for documents served by mail. An appellate judge asked whether such pro se papers typically require an extensive response by opposing counsel. Mr. Letter predicted that if the three-day rule is eliminated altogether, the change will require the government to file more motions for extension of time.

Mr. Byron pointed out that the Standing Committee's electronic-filing subcommittee would no doubt consider the question of what to do about the three-day rules in the Appellate, Bankruptcy, Civil, and Criminal Rules. Mr. Gans noted that it is important for the three-day rule to function the same way in all of these sets of Rules.

Judge Colloton asked Committee members for their views concerning the treatment of the appendix. The Reporter observed that circuits vary widely in their practices, with some requiring appendices and some requiring "record excerpts" instead. There is a question whether it is possible for the Rules to nudge circuits toward the use of electronic appendices. Mr. Gans observed that court employees do not want to be the ones to print the appendix.

Judge Colloton encouraged Committee members to share any additional thoughts on this topic, and to let him know if they were interested in serving on the newly-formed subcommittee.

5. Item No. 08-AP-H (manufactured finality)

Judge Colloton introduced this topic, which concerns the efforts of a would-be appellant to "manufacture" appellate jurisdiction over an appeal from the disposition of fewer than all the claims in an action by dismissing the remaining claims. Judge Colloton reminded the Committee that, as of fall 2012, it had appeared possible that the Court would shed light on this topic when deciding *Gabelli v. SEC*, 133 S. Ct. 1216 (2013). As it turned out, however, the Court's decision in *Gabelli* did not speak to the manufactured-finality issue.

Judge Colloton had chaired the Civil / Appellate Subcommittee, which previously considered this topic. He noted that a majority of the Subcommittee members had agreed that it would be desirable to bring clarity to this question of appellate jurisdiction, and had felt that this was an appropriate topic for rulemaking. However, the Subcommittee had failed to reach consensus on how to clarify the law in this area. A majority of the circuits have ruled that a dismissal of the remaining claims without prejudice does not suffice to render the judgment final. And a majority of circuits to consider the question have ruled that a dismissal of the remaining claims with conditional prejudice (i.e., a dismissal that is final as to the remaining claims unless the appellant wins on appeal as to the central claim) does not suffice to render the judgment final. Some circuits look at whether the appellant dismissed the remaining claims with the intent to manipulate appellate jurisdiction – a standard that presents problems of administrability.

Judge Colloton pointed out that the agenda materials included some sketches that Professor Cooper had prepared for the Civil / Appellate Subcommittee's consideration. As a basis for discussion, Judge Colloton suggested considering the possibility of an amendment that would adopt the strict view that a dismissal without prejudice does not achieve finality. Such an approach would help to avoid piecemeal litigation; and avenues for taking an immediate appeal are already provided by Civil Rule 54(b) and by 28 U.S.C. § 1292(b). Judge Colloton drew the Committee's attention to one of Professor Cooper's sketches: "A party asserting a claim for relief can establish a final judgment by voluntary dismissal only by dismissing with prejudice all claims and parties remaining in the action." He asked the Committee members to comment on this possibility.

An appellate judge member stated that he liked the idea of having a clear rule. An attorney member expressed agreement, and stated that some of the existing approaches to manufactured finality felt like methods for gaming the system; an attorney participant concurred in this view. Another member, however, questioned how big a problem the current caselaw is posing in practice; are there many abuses, or are lawyers using existing caselaw to serve the legitimate needs of their clients? Mr. Letter noted that the issue comes up frequently and has generated plenty of caselaw. An appellate judge stated that he did not know how often appellants use the vehicle of manufactured finality in order to take an appeal; he observed that the Second Circuit first recognized conditional prejudice as an avenue for creating finality a decade ago, in *Purdy v. Zeldes*, 337 F.3d 253 (2d Cir. 2003).

Mr. Letter pointed out that some district judges may be unwilling to direct entry of judgment as to fewer than all claims or parties under Civil Rule 54(b). An appellate judge member suggested that it would be worthwhile to understand the reasons why circuits that take a relatively permissive approach to manufactured finality have decided to do so. In complex patent cases, this member noted, there may be an interest in clearing the way for appellate review on the main issue in the case. A district judge member noted that he has directed entry of judgment under Civil Rule 54(b) in cases where the appeal would be taken to the Federal Circuit.

An appellate judge member stated that he favored the sketch pointed out by Judge Colloton. The district judge member agreed.

It was determined that the Chair and the Reporter would contact Judge Campbell and Professor Cooper and ask if the Civil Rules Committee would give consideration to the possibility of adopting a rule amendment along the lines of the sketch.

Later in the meeting, the discussion returned to the topic of manufactured finality. Mr. Letter pointed out that in False Claims Act cases, the government frequently files both a False Claims Act claim (which carries treble damages) and a common-law claim (which does not). If the False Claims Act claim is dismissed, the case may or may not be worth trying on the common-law claim by itself. If an appeal is taken and the court of appeals upholds the dismissal of the False Claims Act claim, sometimes the government might wish to pursue the common-law claim (though in many cases it would instead simply dismiss that claim). Mr. Letter reported that some district judges may be unwilling to direct entry of final judgment as to the False Claims Act claim under Civil Rule 54(b), because they do not wish to try the common-law claim. Mr. Letter stated that he would need to verify the DOJ's position concerning the manufactured-finality issue, but that he suspected that the DOJ would not support a rule change modeled on the sketch.

An appellate judge member expressed skepticism about the value of permitting appeals in the type of scenario described by Mr. Letter. Another appellate judge member asked whether any court has explored an approach that would permit a dismissal without prejudice to result in finality so long as it is clear that the statute of limitations continues to run while the appeal is litigated. The statute of limitations on the voluntarily-dismissed claims, he suggested, could provide some discipline for parties who seek to use manufactured finality to take an appeal.

6. Item No. 12-AP-E (length limits)

Judge Colloton turned the Committee's attention to this item, which concerns the question of how to formulate length limits in the Appellate Rules. Most of the Appellate Rules that set length limits, Judge Colloton observed, set those limits in terms of pages rather than type/volume limits. The Reporter pointed out that the Committee's agenda materials included a chart showing possible ways to reformulate the length limits that are currently set in pages. One column showed a type/volume limit designed to roughly

approximate the current page limit, coupled with the alternative of a shorter page limit. The next column showed a type/volume limit that would provide greater length than the current page limit, coupled with the alternative of the current page limit. And the final column showed a type/volume limit – for papers produced using a computer – that was designed to approximate the current page limit; for papers produced without the aid of a computer, the final column showed the current page limit.

Judge Colloton expressed doubt about the viability of the approaches sketched in the first two columns. Professor Katyal stated that the Supreme Court's switch (in 2007) to using word counts was a great move. Setting length limits in pages invites litigants to game the system and also wastes lawyers' time. Professor Katyal suggested that the approach illustrated in the third column – setting length limits in pages only for typewritten briefs – was an elegant solution. An attorney participant stated a preference for page limits and expressed nostalgia for the prior version of the Supreme Court Rules. Judge Colloton noted that Professor Katyal, in raising this issue, had focused on rehearing petitions; he asked Professor Katyal whether he felt that other page limits, such as those for motion papers, were also problematic. Professor Katyal responded that in his experience it is the rehearing petition page limits that have posed problems, but that it would be best to express all the Rules' length limits in the same units.

Mr. Byron noted that although it is impracticable for a litigant to count the words in a typewritten paper, it is possible to use the alternative type/volume method by counting the number of lines of text in the paper. Mr. Byron queried whether courts would want to treat motions the same way as rehearing petitions for purposes of the length limits. The Supreme Court's rules, he suggested, treat motions differently from rehearing petitions. Professor Katyal responded that the Supreme Court's Rules do not set page limits for motions or applications. There are page limits, he reported, for certiorari-stage pleadings that are prepared on letter-size paper pursuant to Supreme Court Rule 33.2(b); that is because most of those documents are in *in forma pauperis* cases and many are prepared by prisoners who may hand-write their petitions.

The discussion turned to the basis for developing the numbers shown in the columns in the chart. The Reporter explained that, for illustrative purposes, she had assumed the correctness of the statement in the 1998 Committee Note to Rule 32(a)(7) that the type/volume limits in Rule 32(a)(7)(B) "approximate the current 50-page limit," and had divided those limits by 50 to obtain the word and line equivalents of a single page. Mr. Letter stated, however, that the Committee Note was incorrect in suggesting that a length of 14,000 words was equivalent to a length of 50 pages. As he recalled, 50 pages was the equivalent of some 12,500 words. An appellate judge member suggested that perhaps the difference reflected the fact that additional lines might be included (when length limits are set in pages) by placing material in a footnote instead of in the text.

Mr. Letter suggested that, while litigants are tempted to manipulate the length of briefs, the temptation is less with respect to rehearing petitions and motions because those documents are shorter. He also suggested that clerks may prefer page limits because they are easier to administer. He reported that he had seen lawyers manipulate the length

limits for rehearing petitions, but that this occurred less frequently with such petitions than it had with briefs. Professor Katyal responded that, especially when a litigant is seeking rehearing en banc, the brevity of the page limit generates an incentive to manipulate the limit. Mr. Letter asked Professor Katyal whether he advocated a word limit, for rehearing petitions, that would yield petitions longer than the current 15 pages. Professor Katyal responded that the limit should be equivalent to 15 pages.

A member asked Mr. Gans whether the burden – for the Clerk's Office – of verifying compliance with type/volume limits would be less for papers filed electronically. Mr. Gans responded that electronic word counts work differently for PDF documents than for Word or WordPerfect documents. To count the words in a PDF, it becomes necessary to convert the file to another format; rather than do so, the Clerk's Office asks the attorney to submit a version in either Word or WordPerfect. Participants discussed the possibility that a filer could manipulate the performance of the word-counting software. Mr. Letter suggested that word limits, too, could lead lawyers to waste time cutting words in order to fit within a given limit. Professor Katyal responded, however, that at least the activity of cutting words to comply with a word limit affects the substance of the filing, whereas the activity of fitting more words on a page to comply with a page limit bears no relation to the substance of the filing.

Mr. Garre noted a question that has arisen concerning the operation of the length limit for petitions for rehearing en banc: Does the statement required by Rule 35(b)(1) count for purposes of the 15-page limit set by Rule 35(b)(2)? He reported that the circuits take varying approaches to this question; the Federal Circuit requires the statement to count. Mr. Garre agreed to survey circuit practices on this issue in preparation for the Committee's next meeting. The Chair wondered what is the basis for excluding the statement from the length limit, since the "petition" must not exceed fifteen pages and the "petition must *begin with*" the statement.

Mr. Letter suggested that frequent Rule amendments are undesirable, and he noted that Rule 32(a)(7)'s provisions are still relatively new. An appellate judge member expressed agreement with this view. Justice Eid noted that the Colorado Supreme Court uses word limits and periodically checks briefs for compliance with those limits. She undertook to provide a comparison with the Colorado Supreme Court's rules for the next meeting.

An appellate judge asked whether setting length limits in words creates more work for the Clerk's Office. Mr. Gans predicted that attorneys would in some instances fail to file the required certification. He asked whether the proposal on the table related only to petitions for rehearing or to all of the documents for which length limits are currently set in pages. Professor Katyal responded that it would make sense for all the length limits to take a consistent approach. Although the rule change would give rise to some transition problems, he suggested, the switch to type/volume limits is inevitable. An attorney member agreed that consistency is desirable.

Judge Colloton noted that, if the frequency of rule changes is a concern, proposed amendments can be held for bundling with other proposals. Turning to the option of switching to a type/volume limit, he asked Committee members whether they favored the model used in Rule 32(a)(7), where in effect the length limits for handwritten briefs were shortened, or whether they instead favored the approach shown in the rightmost column of the chart, that is, a model that seeks equivalence between documents prepared on computers and documents prepared on typewriters or by hand. One participant expressed support for the approach shown in the final column of the chart, which would set limits using different methods for typewritten papers than for papers prepared on a computer. An attorney participant asked how one would operationalize that approach; would the litigant have to certify that a computer had not been used in preparing the paper? He suggested that one could avoid making a distinction between papers that were or were not prepared on a computer by instead requiring those submitting typewritten papers to comply with the line-counting option in a type/volume limit. An appellate judge noted, however, that the latter expedient would not address the issue of handwritten briefs; he asked whether concerns over handwritten briefs had been discussed during the development of the 1998 amendments. Mr. Byron stated that rules concerning CM/ECF typically require litigants to obtain a waiver in order to avoid using the CM/ECF system, and he asked whether the Rules concerning length limits could distinguish among filers based on whether they were CM/ECF users or not.

Judge Colloton suggested that it would be useful to prepare alternative drafts of amendments – one set that would impose length limits modeled on Rule 32(a)(7)'s approach (as shown in the leftmost of the three columns) and another set that would track the approach illustrated in the rightmost column. He also asked whether, if the approach in the rightmost column were adopted for the provisions that currently employ page limits, that approach should be considered for Rule 32(a)(7) as well. An appellate judge member responded that it is important to avoid undue length in briefs, and that it would not bother him if the length limits for briefs were set using a different method than the length limits for other papers.

A district judge member observed that the approach shown in the rightmost column would treat pro se filings more similarly to filings by counsel in terms of length; under Rule 32(a)(7)'s approach, by contrast, a pro se filer who uses the page limits option gets less space. On the other hand, this member said, many pro se filers may not need the extra length. An appellate judge member noted that attorneys tend to use the entire permitted length even when a shorter paper would suffice. An attorney participant questioned why short length limits would unduly burden pro se litigants. Mr. Letter observed that pro se briefs tend to be less complicated than briefs prepared by counsel, and suggested that this might render Rule 32(a)(7)'s 30-page limit less of a hardship than it might otherwise appear.

The attorney participant suggested that it might be useful to research whether briefs filed under Rule 32(a)(7)'s 14,000-word length limit are longer than than they were before. An appellate judge member recalled that the way that lawyers fit additional words into the old page limits was by moving portions of the brief from the text into the

footnotes. Mr. Gans stated that the CM/ECF system includes a field for word counts, which he could search in order to produce figures from which to derive an average length. An appellate judge member suggested that the attorney members might be able to survey documents in their firms' archives. Another appellate judge member suggested looking on Westlaw at petitions for rehearing. Judge Colloton asked Mr. Letter whether he recalled this question being studied during the late 1990s by any local rules committees. Mr. Letter responded that word-counting software was at a relatively early stage then.

The Reporter raised one additional issue concerning length limits. Unlike Rule 32(a)(7)(B), Rule 28.1(e) – which sets length limits for briefs in connection with cross-appeals – does not include a list of items that can be excluded for purposes of calculating length. Rule 28.1(a) excludes Rule 32(a)(7)(B) from applying to cross-appeals. Judge Colloton asked the Committee members whether it would be useful to clarify the Rule. Two attorney members stated that they have assumed the same exclusions apply to briefs on cross-appeals. Judge Colloton suggested that the question concerning Rule 28.1(e) be kept on the Committee's docket for future consideration as a housekeeping amendment.

7. Item No. 12-AP-F (class action objector appeals)

Judge Colloton reminded the Committee that he had invited Professor John E. Lopatka, who is the A. Robert Noll Distinguished Professor of Law at Pennsylvania State University Law School, and Professor Brian T. Fitzpatrick, who is a Professor of Law at Vanderbilt Law School, to speak with the Committee about the topic of appeals by class action objectors. Judge Colloton invited the Reporter to briefly introduce this topic.

The Reporter observed that the basics of the problem are well known. In reviewing class action settlements, judges need good information concerning the quality of the settlement. Discussions over the last decade or so have focused on various ways of producing that information, whether through the opt-out mechanism or through encouraging objectors. During the discussions that led to the 2003 amendments to Civil Rule 23, participants noted the difficulty of crafting rules that distinguish between good objectors – who improve the quality of the settlement – and undesirable objectors – who seek merely to extract payments for themselves. There are reports that objectors routinely take appeals from orders approving class settlements. The Court's decision in *Devlin v. Scardelletti*, 536 U.S. 1 (2002) – which allowed a class member to take an appeal even if the member had not intervened below – has facilitated the practice of objector appeals. As a practical matter, such an appeal has the effect of staying the implementation of the settlement. Class counsel may end up offering the objector a payment in order to drop the appeal – a practice that some class action lawyers characterize as a tax on their activities.

The 2003 amendments to Civil Rule 23 included some measures designed to address the behavior of objectors in the district court. Civil Rule 23(e)(5) permits a class member to object to a proposed settlement, and provides that the objection may be withdrawn only with the court's approval. (Interestingly, Civil Rule 23(h)(2), which

permits a class member to object to a request for attorney fees, does not include a requirement of court approval for the withdrawal of such an objection.) The 2003 Committee Note to Civil Rule 23(e) included a passage that seemed apposite to the Committee's current inquiry:

> Subdivision (e)(4)(B) requires court approval for withdrawal of objections made under subdivision (e)(4)(A). Review follows automatically if the objections are withdrawn on terms that lead to modification of the settlement with the class. Review also is required if the objector formally withdraws the objections. If the objector simply abandons pursuit of the objection, the court may inquire into the circumstances.
>
> Approval … may be given or denied with little need for further inquiry if the objection and the disposition go only to a protest that the individual treatment afforded the objector under the proposed settlement is unfair because of factors that distinguish the objector from other class members. Different considerations may apply if the objector has protested that the proposed settlement is not fair, reasonable, or adequate on grounds that apply generally to a class or subclass. Such objections, which purport to represent class-wide interests, may augment the opportunity for obstruction or delay. If such objections are surrendered on terms that do not affect the class settlement or the objector's participation in the class settlement, the court often can approve withdrawal of the objections without elaborate inquiry.
>
> Once an objector appeals, control of the proceeding lies in the court of appeals. The court of appeals may undertake review and approval of a settlement with the objector, perhaps as part of appeal settlement procedures, or may remand to the district court to take advantage of the district court's familiarity with the action and settlement.

This Committee Note, thus, discussed in general terms the topic of objector appeals. The Reporter noted that the Civil Rules Committee – during the discussions that led up to the 2003 amendments – had considered the possibility of addressing the question of objector appeals in the rule text, but had decided not to do so. The Reporter suggested that the dynamics that had been present at the district court level, and which may now be held in check by Rule 23(e)(5)'s requirement of court review for the withdrawal of objections, may be replicating themselves during the appeal.

Judge Colloton noted that he had asked Ms. Leary to conduct some research on the frequency of objector appeals and their disposition, and he invited Ms. Leary to summarize her preliminary findings. Ms. Leary explained that she had decided to focus on appeals from class settlements in districts within the Seventh Circuit because the district courts in that circuit have an average representative level of class action filings. Ms. Leary used an electronic search of the CM/ECF system in the relevant districts in

order to identify all class action cases in which final approval of a Rule 23-certified class action settlement was granted between January 1, 2008, and March 19, 2013, and after which one or more appeals were taken. Through further analysis, Ms. Leary identified those settled class actions from which an appeal was taken by one or more class members who had objected to the settlement in the district court prior to final approval. Ms. Leary identified 27 appeals by objectors in eight class actions. The appeals were concentrated in a few districts. All 27 of the appeals were voluntarily dismissed on motion under Rule 42(b). Among 21 of those appeals, the average time from inception to dismissal was less than three months. In many of those appeals, the appeals were dismissed before the appellant filed a brief. In many of the appeals, the class representatives asked the district court to require the objector to post a cost bond. In one case, the court ordered the objectors to post cost bonds of $4,500 each; in another case, the court refused to require a bond; and in other cases, the objectors dismissed their appeals before a ruling was made on the bond request.

Judge Colloton expressed the Committee's appreciation for Ms. Leary's research. An appellate judge asked if the data reflected the number of class settlements that were approved in the district court and from which no appeal was taken. Ms. Leary stated that she had not gathered those data, but stated her impression that objections to settlements are relatively rare, and appeals from settlements are likewise relatively rare.

Judge Colloton reminded the Committee that Professor Fitzpatrick, along with Professor Brian Wolfman and Dean Alan Morrison, had submitted a proposal concerning Rule 42 to the Committee in 2012. Professor Lopatka and Judge Brooks Smith, he noted, had coauthored an article in the Florida State University Law Review that proposed amendments to the Rules concerning costs and cost bonds. Judge Colloton had invited Professor Fitzpatrick and Professor Lopatka to present their ideas to the Committee. He turned first to Professor Fitzpatrick, as the proponent of the proposal that was formally pending before the Committee.

Professor Fitzpatrick began by commenting on the empirical data concerning class action objector appeals. Professor Fitzpatrick, in researching his article, *The End of Objector Blackmail?*, 62 Vanderbilt Law Review 1623 (2009), reviewed every class settlement that was approved by a federal district court in 2006. Roughly 10 percent of those settlements were appealed. He suggested that the reason why the other settlements are not appealed is that it is not worthwhile for an objector to seek to hold up a settlement unless the settlement carries the prospect of substantial attorney fees. It is the class counsel, he noted, who would pay the objector to abandon the objection. Accordingly, objections are typically made to the big settlements, where the attorney fees will be large.

Professor Fitzpatrick advocated the adoption of a rule that would entirely bar an objector from dropping an appeal in exchange for anything of value. He argued that Rule 23(e)(5) – which does not bar the dropping of objections but does require court approval for their withdrawal – does not go far enough. Responding to the argument that sometimes objectors might raise an objection that is specific to them rather than generally applicable to the members of the class, Professor Fitzpatrick stated that he has never seen

such an objection. If an objector has an objection that is unique to him, then why is he legitimately a member of the class? Dropping an objector appeal, he asserted, affects all of the class members, by depriving them of positive changes that might have been made to the settlement in response to the objection. In addition, he noted, requiring court approval for dropping an appeal would create a lot of work for the court. Professor Fitzpatrick noted that when class counsel pay objectors to drop their appeals, the effect is equivalent to a tax on class action plaintiffs' lawyers. There are no good data on how big that tax is. But he has heard informal reports from class action lawyers of numbers that range from $ 50,000 to $ 1 million per objector. Addressing possible concerns about his proposal, Professor Fitzpatrick stated that the biggest concern is what would happen if an objector filed an appeal but then reached an agreement with class counsel and simply failed to prosecute the appeal.

Professor Fitzpatrick observed that Professor Lopatka and Judge Smith criticize the idea of banning the dismissal of objectors' appeals on the ground that such a ban would merely alter the timing of objectors' demands, by leading them to bargain with class counsel during the 30-day window between the entry of judgment and the deadline for the notice of appeal. But, Professor Fitzpatrick argued, a ban on the withdrawal of appeals would remove the objector's leverage because the threat to file the appeal would no longer be credible.

Responding to the appeal-bond proposal by Professor Lopatka and Judge Smith, Professor Fitzpatrick asserted that requiring an appeal bond would not prevent meritorious objector appeals from being settled in exchange for a payoff to the objector. He stated that appeal bonds are currently an available tool under Rule 7 and yet they have not curtailed objector blackmail. Moreover, he said, even if the district court imposes an appeal bond, it is possible to appeal the imposition of the bond. An approach that would bar the objector from appealing the bond without first posting the bond would, Professor Fitzpatrick argued, likely violate Due Process. In addition, if would-be appellants lack an effective avenue for securing review of the imposition of a bond requirement, then district judges may become too ready to require such bonds. A bond requirement could prevent a good objector, such as Public Citizen Litigation Group, from taking a meritorious appeal.

Judge Colloton thanked Professor Fitzpatrick, and turned next to Professor Lopatka. Professor Lopatka observed that everyone is in agreement about the nature of the problem concerning objector appeals. As to the scope of the problem, he agreed with Professor Fitzpatrick that data are hard to obtain. Looking only at the number of appeals taken may undercount the problem, because such a count would omit appeals that are threatened but then foregone. In addition, while it would be helpful to know more about the scope of the problem, the fact that such extortionate behavior occurs at all offends the purposes of the justice system.

The interaction between objector and class counsel, he stated, is a bargaining game. Taking an appeal is not costly because the appellate briefs typically do not require

much work. There is a need to change the framework so that objectors' threats to take an appeal become less credible.

Professor Lopatka stated that the cost and appeal bond measures that he and Judge Smith advocated would not eliminate the possibility of extortionate behavior by objectors, but that those measures would change the terms of the bargaining. Responding to Professor Fitzpatrick's point that the current appeal bond requirement has not stemmed objector appeals, Professor Lopatka observed that the circuits currently disagree about the items that can be taken into account when a court sets the amount of a Rule 7 bond. Professor Lopatka and Judge Smith propose amending the Rules to make clear the district court's authority to require a bond in the full amount of all projected costs of delay attributable to the appeal, and to bar the objector from appealing the bond order without first posting the bond. Otherwise, Professor Lopatka argued, an appeal from the bond order would give the objector the same bargaining advantage as an appeal from the underlying settlement approval. But the district court would have discretion, under the proposal, to reduce the amount of the bond if the grounds for appeal seemed legitimate and if a bond in the full amount would effectively bar the appeal.

Professor Lopatka argued that Professor Fitzpatrick's proposal, though ingenious, would likely fail to deprive objectors of their leverage. Professor Lopatka offered a hypothetical: Suppose that an objector files an objection in the district court. The district court rejects the objection. The objector uses the thirty days after entry of judgment to put class counsel to a choice: Either the class counsel can pay the objector, in which event the objector will forgo filing a notice of appeal, or class counsel can refuse, in which event the objector will file the notice of appeal. True, once the objector files the notice of appeal, Professor Fitzpatrick's proposal would prevent the objector from dismissing it in exchange for money. But the appeal would not be very costly for the objector to litigate, and it would impose substantial delay costs on class counsel.

Judge Colloton thanked Professor Lopatka for his comments, and invited the Reporter to summarize some feedback that she had informally obtained from members of the Civil Rules Committee's Rule 23 Subcommittee. The Reporter stated that the Subcommittee took the view that this is a serious issue that is worth attention, and one on which it is important for the two Committees to coordinate their efforts. Subcommittee members believed that the bond mechanism proposed by Professor Lopatka and Judge Smith was too blunt a tool. The Subcommittee also expressed a preference for court review of the withdrawal of an objector appeal, rather than an outright ban on dismissals; but the Subcommittee noted that court review carried the possibility of delay. Individual subcommittee members had provided further feedback, some of which the Reporter highlighted without attempting to provide attribution. One question, she noted, concerned instances in which an objector's appeal is dismissed in return for *both* a payment to the individual objector *and* modification of the settlement that results in better terms for the class. Another question concerned the possibility that banning the withdrawal of an appeal in exchange for payment might shift the time for such withdrawals to the certiorari-petition stage. At least one participant did, though, suggest that Professor Fitzpatrick's proposal was appealing because it took a structural,

incentives-based approach rather than relying on ad hoc decisionmaking by a district judge.

Professor Fitzpatrick responded that, if class counsel and the defendant believe that there are grounds for improving the settlement, they can ask the court of appeals to remand the case so that the district court can review and approve the settlement modification. In such an event, the district court could, if appropriate, award fees to the objector for having produced the improvement in the settlement. Turning to the specter of "zombie appeals" (i.e., appeals that the appellant refuses to pursue but that the court is barred from dismissing), Professor Fitzpatrick stated that the problem would only arise if someone actually accedes to an objector's demands. So long as class counsel has refused to pay anything to the objector, then if the objector fails to prosecute the appeal, the appellees can move for dismissal of the appeal and can provide the required certification that they have paid nothing of value to the objector. As for the possibility that a ban on dismissal of appeals to the court of appeals would simply move the bargaining process to the certiorari-petition stage, Professor Fitzpatrick stated that his impression was that the Supreme Court acts fairly quickly on petitions for certiorari.

Professor Lopatka conceded that raising the cap on the permissible size of appeal bonds might create an obstacle to some legitimate appeals. However, he expressed optimism that district judges would not overuse a more robust appeal-bond tool. As evidence that judges do not seek to insulate their rulings from review, Professor Lopatka noted that district judges sometimes certify interlocutory rulings for immediate appellate review under 28 U.S.C. § 1292(b).

An appellate judge asked Professor Lopatka how he would suggest handling appeals from an order imposing a cost bond. Professor Lopatka suggested that allowing the objector to appeal the cost bond order would be tantamount to allowing the objector to appeal the settlement itself, in the sense that it would permit the objector to hold the settlement hostage. On the other hand, he conceded, perhaps the appeal from the cost bond order could be disposed of more quickly.

An appellate judge member asked whether there are other means to control the conduct of objectors, such as suspending membership in the court's bar for an objector's attorney who behaves unethically. Professor Lopatka responded that district judges have sometimes employed such measures, but that they tend not to want to spend judicial time on it. In addition, he stated, class counsel have sometimes sought sanctions against objectors' attorneys; but that, too, has failed to solve the problem. Professor Coquillette observed that disciplinary proceedings are a blunt instrument for addressing a problem of this nature. ABA Model Rules 3.4 and 8.4 provide a basis for discipline, but people are reluctant to pursue it.

A member stated that he agreed that objector conduct can become salient by affecting the big class action settlements, even if those settlements are a small percentage of the total number of class settlements. But he suggested that, even though the amounts mentioned by Professor Fitzpatrick were large numbers, they were very small in

comparison to the typical amount of attorney fees received by class counsel in connection with a large class action settlement. Professor Fitzpatrick noted that the figures he had cited ($ 50,000 to $ 1 million) were settlements with *single objectors*; in connection with any large class action settlement, there are typically multiple objectors.

A member asked whether an objector might find a way around the proposed ban on appeal dismissals by arguing that, when and if class counsel pay the objector a satisfactory settlement, the objector's appeal becomes moot. Professor Fitzpatrick noted Supreme Court precedents holding that when a district court certifies a class action (or erroneously denies such certification), the class gains its own legal status such that subsequent events mooting the individual plaintiff's claim do not thereby moot the class action.[1] The member observed, however, that the Court had recently refused to apply those precedents in the context of a collective action brought by an employee under the Fair Labor Standards Act on behalf of similarly situated employees.[2]

A district judge member observed that by the time a class settlement is on appeal, the district judge has reviewed and addressed the objections in detail. In the habeas context, this member pointed out, the district judge must grant or deny a certificate of appealability ("COA") at the time that he or she enters a final judgment denying the habeas petition. The member stated that he is forthright in giving an accurate view of the merits of the petitioner's claims when he drafts the ruling on the COA. Perhaps, he suggested, it would be useful to require class action objectors to obtain a COA in order to appeal a class settlement. Such a requirement would leverage the district judge's expertise. Professor Lopatka responded that, when he and Judge Smith first started work on their proposal, they considered advocating a COA requirement. However, they turned to a bond requirement instead because a COA is binary (it does or does not issue) while a bond is more nuanced (because the amount can be adjusted). Also, he suggested, if the district court's denial of the COA is reviewable in the court of appeals, then that too could provide an objector with an opportunity to hold up the settlement. An appellate judge asked why appealing the denial of a COA would differ from appealing the imposition of an appeal bond requirement. Professor Lopatka responded that, in either of those instances, it would make a difference whether the appeal of the preliminary matter could be quickly disposed of. Professor Fitzpatrick suggested that the rule could impose a time limit for the disposition of such appeals; but participants noted the Judicial Conference policy against imposing such time limits by rule.

Mr. Letter stated that the discussion thus far suggested to him that the reason objector appeals can cause problems is that the appeal stays the implementation of the settlement. He asked whether one could address this problem by providing that the implementation will proceed, despite the pending appeal, unless the would-be appellant posts a bond. Professor Fitzpatrick responded that if the order approving the settlement is reversed on appeal, it will be hard to unwind an already-implemented settlement if the payments have already gone to the class members. One measure that partly fills this

[1] *See* Sosna v. Iowa, 419 U.S. 393 (1975), and United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980).
[2] *See* Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523 (2013).

function, Professor Fitzpatrick noted, is the use of "quick-pay provisions" – i.e., a provision in the settlement that entitles class counsel to receive their fees upon settlement approval despite the pendency of an appeal (but subject to the return of the fees if the order is reversed on appeal). Quick-pay provisions can provide a fairly good solution, he reported, but defendants are reluctant to agree to such provisions unless they receive security that assures the repayment of the fees if the judgment is reversed on appeal. Mr. Letter observed that the difficulty of recouping amounts paid pursuant to a judgment that is ultimately reversed on appeal is not unique to class suits. Professor Fitzpatrick responded that in a large class suit, the costs of administering the settlement can themselves run into the millions of dollars.

Mr. Letter also suggested that this topic seems to present questions of policy that seem more suitable for treatment by Congress than by the rulemaking process. Congress, he observed, would have the power to subpoena repeat objectors and to question them about their practices. Mr. Letter also noted that one could view this topic as a subset of the broader category of instances in which litigants settle nuisance suits because it makes more sense to settle them than to litigate them. Professor Lopatka responded that, even if addressing objector appeals would leave other nuisance litigation unaddressed, that should not be a reason to reject measures that could address objector appeals. As to quick pay provisions, Professor Lopatka stated that it is not yet clear whether they will catch on; some defendants are unwilling to front money to the class counsel before it is clear whether the settlement will be upheld in the event of an appeal. Mr. Letter asked whether a "partial quick pay" mechanism would provide a useful compromise – i.e., whether objectors would lose their leverage if the defendant paid class counsel a portion of their fee pending disposition of the appeal. Professor Lopatka responded that such a measure would reduce the size of the "tax" objectors can impose on class counsel, but would not eliminate it.

An attorney participant asked whether there exist any other rules that prohibit a party from settling a claim in exchange for money. Professor Fitzpatrick stated that he did not know of any. The attorney participant asked Professor Fitzpatrick to clarify whether the court of appeals would have to approve the settlement as well as the dismissal. If the parties can settle something without needing the court to review the settlement, the settlement could then have possible mootness consequences that would affect the question of dismissal.

Professor Fitzpatrick argued that the proposed Rule 42 amendment would yield a framework that the Clerk's Office could readily administer: If the movant filed the required certification, the appeal would be dismissed, and if the certification were not provided, the appeal would not be dismissed. An attorney participant suggested that an alternative approach could require court approval for the dismissal of an appeal and could direct the court, in reviewing a request for approval, to consider whether the appellant received anything of value in exchange for seeking to dismiss the appeal. Professor Fitzpatrick responded that the courts of appeals would likely be unwilling to scrutinize the arrangements that lead an objector to seek dismissal of an appeal. An appellate judge asked whether the task of reviewing the request to dismiss an appeal could be assigned to

the district judge. An attorney participant asked whether it would be useful to require an objector to certify that the appeal was taken in good faith. Professor Fitzpatrick expressed doubt that such a requirement would be effective in addressing abuses.

The Reporter noted that while Rule 23(e)(5) requires court approval for the withdrawal of an objection to a class action settlement, Rule 23(h)(2) does not include a similar provision requiring court approval for the withdrawal of an objection to an award of attorney fees. She asked whether any difference had arisen in practice between objections focused on settlements and objections focused on attorney fees. Professor Fitzpatrick responded that he had not perceived a difference. Ms. Leary pointed out that objectors typically object to both the settlement and the fee award.

An appellate judge member stated that he was concerned by the potential sweep of proposed solutions that had been discussed. He stated that it was important to avoid chilling appeals by good objectors. Professor Lopatka agreed that this is a key concern. The question, he suggested, is whether the district court can distinguish appeals that have merit from those that do not. He reported that district judges tend to think that they can spot professional objectors.

Judge Colloton thanked Professor Fitzpatrick and Professor Lopatka for their contributions to a very helpful discussion. He invited them to share any suggestions for the direction of future empirical research. Professor Fitzpatrick suggested that it could be useful to perform a confidential survey of class action lawyers and ask them about the size of any side payments they have made to objectors; one could perform a similar survey of the objectors' attorneys as well. The Reporter noted the Committee's debt to Ms. Leary for her research, which had been very labor-intensive due to the lack of ready methods for locating the relevant appeals.

8. Item Nos. 09-AP-D & 11-AP-F (response to Mohawk Industries)

Judge Colloton introduced these items, which arise from proposals concerning the possibility of amending the Rules – in the wake of *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009) – to provide for appellate review of attorney-client privilege rulings.

Judge Colloton observed that the Supreme Court had indicated, both in *Mohawk Industries* and in *Swint v. Chambers County Commission*, 514 U.S. 35 (1995), that the preferred method for determining whether interlocutory orders should be immediately appealable is the Rules Committee process, not further caselaw expansion of the collateral order doctrine. In 1990, Congress amended the Rules Enabling Act to add 28 U.S.C. § 2072(c), which authorizes the rulemakers to "define when a ruling of a district court is final for the purposes of appeal under section 1291." In 1992, Congress amended 28 U.S.C. § 1292 by adding Section 1292(e), which authorizes the rulemakers "to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d)."

Judge Colloton asked the Committee members for their views on whether it would make sense to tackle this general area. Should a project focus on appeals from attorney-client privilege rulings? On other areas where there are conflicts in the caselaw? Judge Colloton suggested that it would be useful to perform research concerning the status of the caselaw; a member agreed with this view. An appellate judge member asked about the Committee's prior discussions of this topic. The Reporter stated that the Committee had considered whether there were areas in addition to attorney-client privilege – for example, qualified immunity – where the law concerning interlocutory review might warrant clarification. But the Committee had decided to start by focusing on attorney-client privilege appeals and to consult the other Advisory Committees for their views. The project had not developed momentum in the other Advisory Committees, but the Evidence Rules Committee had stressed the need for consultation if the Appellate Rules Committee were to proceed in this area.

Professor Coquillette expressed concern about the possible scope of a research project on the law of interlocutory appeals, and suggested the importance of prioritizing the Reporter's tasks. An appellate judge member noted that changes in this area could alter the landscape of appeals. Another appellate judge member suggested consulting academics who have already been writing on this topic.

By consensus, the Committee retained this item on its agenda.

VII. New Business

A. Item No. 13-AP-A (FRAP 29(a) / government amici)

Judge Colloton invited the Reporter to introduce this item, which arises from a suggestion by Dr. Roger I. Roots that Rule 29(a) be amended "to require that *any* party seeking to file an *amicus curiae* brief must obtain leave of court or state that all parties have consented to the filing." Dr. Roots asserts that Rule 29(a)'s current exemptions for certain government amici improperly favor those government entities.

The Reporter noted that governmental amici have always been treated specially under Rule 29. The only change in Rule 29's list of exempt governmental filers came in 1998, with the addition of the District of Columbia. The 1968 Committee Note to Rule 29 does not explain why the Rule exempted governmental filers from the requirement of party consent or court leave. The Committee Note cited five local circuit rules and then stated that Rule 29 "follows the practice of a majority of circuits in requiring leave of court to file an amicus brief except under the circumstances stated therein. Compare Supreme Court Rule 42." Perhaps, the Reporter suggested, the exemption for governmental amici can be explained by considerations of separation of powers and federalism.

Mr. Letter observed that the federal Rules treat the government specially in a number of ways. The federal government makes more filings in federal court than any other litigant. It would be undesirable, he suggested, for the Rules to require the

government to move for leave to file. Not only do comity considerations apply, but also the quality of the government's briefing is high. In fact, the courts of appeals often request briefing from the United States. The DOJ, he noted, litigates on behalf of the people of the United States, and its filings in the courts of appeals require authorization from the Solicitor General.

A member moved to remove this item from the Committee's agenda. The United States, this member agreed, is different from non-governmental litigants both substantively and procedurally. It represents the people, and comity considerations support the exemption. An attorney participant agreed, stating that courts have good reasons to wish to hear from sovereigns as amici and that those sovereigns are not abusing the privilege afforded them by Rule 29(a). The motion was seconded and passed by voice vote without dissent.

B. Item No. 13-AP-B (amicus briefs on rehearing)

Judge Colloton invited Judge Chagares to introduce this item, which arises from a proposal by Roy T. Englert, Jr., that the Committee consider amending the Appellate Rules to address amicus filings with respect to petitions for rehearing and/or rehearing en banc. Judge Chagares stressed that the proposal would not require a court of appeals to permit such amicus filings, but rather it would govern procedural questions (such as length and deadlines) in a circuit chooses to permit them. The circuits, he noted, vary in their treatment of such questions. Adopting a rule that addresses the timing and length of amicus filings with respect to rehearing would foster predictability and uniformity. The courts of appeals review rehearing petitions relatively quickly; thus, Judge Chagares suggested, it is important that amicus filings not lengthen the schedule for filing papers. The amicus should coordinate with the petitioner. If a rule concerning these amicus filings were to follow the model set by Rule 29(d), then one would give the amicus half as much length as the petitioner – which would yield a length of seven and a half pages for the amicus filing.

An appellate judge member stated that it would be useful to provide clear rules on length and timing. Another appellate judge noted that, during past discussions, some had suggested that adopting rules on these topics (even rules that merely addressed timing and length) would encourage amicus filings at the rehearing stage. Another appellate judge member reported that, in the Federal Circuit, there is a slightly greater expectation that a rehearing petition might be granted, given the Federal Circuit's unique role in shaping patent law. The judges are interested, he said, in knowing whether the questions at issue in the appeal have broad importance. Amicus filings can be informative on this point, both because the identity of the amicus can shed light on the perceived importance of the issue and because amici can make points that the petitioner may be unable to include in the petition (due to space constraints and the need to cover technical points). A seven-and-a-half page limit for amicus filings, this member suggested, would often be too short. But, he noted, that does not necessarily mean that the issue must be addressed in the Appellate Rules.

Judge Chagares asked Mr. Gans what the Eighth Circuit's practice is. Mr. Gans responded that his office frequently receives questions on these issues and is unable to provide clear guidance. He observed that if a rule allowed a time lag between the petition and the amicus filing, this might be inefficient from the judges' perspective because it might require them to take two looks at the briefing. An appellate judge noted that such a time lag could also interfere with the timing of a response to the petition (if the court orders a response). An attorney member reported that the Fifth Circuit lacks a local rule on point; this produces uncertainty on the lawyers' part and leads them to take the most conservative approach with respect to length and timing. An appellate judge asked whether members would favor requiring the amicus to file at the same time as the party whose position the amicus supports. The attorney member responded that such an approach would not be ideal from the amicus's perspective but that he would not oppose it. Mr. Gans observed that the court can extend the time to file a petition for rehearing or rehearing en banc. Another member stated that amicus filings with respect to rehearing can add value; thus, he suggested, it would be beneficial to adopt rules on this topic, and such rules would be unlikely to cause a flood of amicus filings. This member agreed that seven and a half pages would be too short a limit; 15 pages would be preferable.

Mr. Letter agreed that certainty on these questions would be valuable. But, he suggested, circuit practices may vary widely, such that local rules would make more sense than a national rule. Some circuits, he noted, grant rehearing en banc much more frequently than others. The United States sometimes files amicus briefs with respect to rehearing. To avoid redundancy between the party's filing and the amicus filing, he suggested, it would be better to have a time lag of two to three days rather than requiring the amicus to file on the same day as the party it supports. Amici, he observed, do not always coordinate their filings with the party whose position they support. Mr. Letter suggested a length limit of eight or ten pages rather than fifteen, on the ground that judges might find longer filings burdensome.

An attorney participant stated that, in recent years, amici have become more likely to coordinate their efforts with those of the party whom they support – especially in briefing before the Supreme Court. Thus, he suggested, it should not be problematic to require amici to meet the same deadline as the party whom they support. He stated that seven pages seemed like an adequate length for amicus filings.

An appellate judge noted that the Ninth Circuit has a local rule providing that the amicus must file its brief no later than ten days after the petition. There are at least a couple of circuits, he suggested, that would not like such a rule. The Reporter recalled that – during the Committee's prior discussions of this general topic – Judge Sutton had informally consulted with judges in several circuits, focusing on circuits that did not have local rules on point. Customarily, Judge Colloton observed, the Rules Committees are wary of encouraging the adoption of local rules. Professor Coquillette agreed that the rulemakers have a policy against doing so. A member pointed out that amicus filings with respect to rehearing may be particularly key where no one anticipated the panel's ruling.

Mr. Gans noted that the Eleventh Circuit has a local rule that sets a length limit of fifteen pages and a time limit of ten days after the filing of the petition. An appellate judge member observed that when amici are briefing issues in the Supreme Court, it is already evident what the questions presented are; by contrast, at the stage of rehearing in the court of appeals, amici may be unsure of the precise nature of the questions and it may not be easy for them to coordinate with the party whose position they are supporting. Mr. Letter noted that, in criminal appeals, Rule 40 sets a presumptive 14-day deadline for rehearing petitions. It may be difficult, he suggested, for amici to prepare their filings within that short time period.

Professor Coquillette reminded the Committee that an Appellate Rule will abrogate inconsistent local rules. The Judicial Conference has delegated to the Standing Committee the task of reviewing local rules for consistency with the national Rules. On the occasions when the Standing Committee points out local rules that are inconsistent with a national Rule, controversy results. Mr. Letter asked whether it would be useful for Judge Colloton to poll the Chief Judges of each Circuit to ask whether they favor adoption of a national Rule. Judge Chagares added that it might be useful to poll the Circuit Clerks concerning their local practices.

Judge Colloton proposed that further information be gathered in advance of the Committee's next meeting.

C. Item No. 13-AP-C (*Chafin v. Chafin* / ICARA appeals)

Judge Colloton invited the Reporter to introduce this item, which arises from the suggestion by Justice Ginsburg (joined by Justices Scalia and Breyer), in *Chafin v. Chafin*, 133 S. Ct. 1017 (2013), that the Civil and Appellate Rules Committees consider adopting uniform rules to expedite proceedings under the Hague Convention on the Civil Aspects of International Child Abduction ("Convention").[3] Congress has implemented the Convention by enacting the International Child Abduction Remedies Act ("ICARA"). The Convention requires U.S. courts to order the return of children to their country of habitual residence under specified circumstances. In *Chafin*, the Court held that a child's return to her country of habitual residence did not render moot an appeal from the order directing that return. The Court in *Chafin* stressed the need for speedy disposition of ICARA proceedings, and cited an FJC study which noted that courts have already followed a practice of expediting such proceedings. The cases highlighted in the FJC study were cases in which the court expedited the disposition of a particular appeal; none of those opinions cited a local circuit rule requiring speedy processing of this particular category of appeal, and a quick search by the Reporter did not disclose any such provisions. Rule 2 authorizes a court of appeals to "suspend any provision of [the Appellate Rules] in a particular case and order proceedings as it directs," in order, inter alia, "to expedite its decision." Thus, the courts of appeals currently possess authority to expedite ICARA appeals. The question, the Reporter suggested, is whether to mandate deadlines for such appeals or to leave the matter to the courts' discretion.

[3] *See* Chafin v. Chafin, 133 S. Ct. 1017, 1029 n.3 (2013) (Ginsburg, J., joined by Scalia & Breyer, JJ., concurring).

Professor Coquillette expressed appreciation for the Justices' willingness to refer matters to the Rules Committees. However, he suggested that there are reasons for the Rules Committees to hesitate before attempting to implement specific pieces of legislation. Judge Sutton had discussed this matter with the Civil Rules Advisory Committee, which had decided to take no action. Judge Sutton was contemplating an informal communication with members of the Supreme Court about the matter, but would welcome the Appellate Rules Committee's views on it.

Mr. Letter reported that the United States has filed amicus briefs in a fair number of ICARA cases. To his surprise, the parties in those cases often failed to move to expedite the proceedings. Perhaps, he suggested, the decision in *Chafin* will produce an improvement in the processing of such cases by encouraging the parties to make more motions to expedite. Article 11 of the Convention, he noted, sets a goal of six weeks for the court to reach a decision. Mr. Letter also stated that it is important to make a distinction between the need to expedite the proceedings and the standards for obtaining a stay; the usual standards should govern the question of the stay. A district judge member reported that, in his experience, the parties usually move quickly to commence the proceeding, but that once the proceeding has commenced, there is often an informal stay in order to give the judge time to rule. Mr. Letter noted that Article 12 of the Convention directs the relevant authority, under specified circumstances, to "order the return of the child forthwith."

A member asked whether there are any Rules that set time limits for judicial action. Mr. Robinson said that he was not aware of any; Professor Coquillette agreed. Judge Colloton asked whether there are any data on how long ICARA appeals take. Mr. Letter stated that his impression is that sometimes they can take a surprisingly long time. Ms. Leary observed that it was unlikely that there would be any code that would enable researchers to readily identify ICARA appeals.

An appellate judge reported that, in his circuit, the clerk alerts the judges if an ICARA appeal is filed, and the court then hears that appeal at the next argument panel. Mr. Gans reported that ICARA cases tend to move very quickly in the district court. Ms. Sellers stated that the Judicial Conference Committee on Federal-State Jurisdiction was monitoring the Rules Committees' discussions of ICARA matters so as to be able to update the Committee's state-court representatives concerning the federal courts' approach. Mr. Robinson reported that Judge Fogel (the Director of the FJC) is aware of the issue raised by the *Chafin* Court. Mr. Robinson suggested the possibility of asking the FJC to raise judicial awareness of the need to expedite ICARA proceedings. Judge Colloton suggested that this was an issue on which judicial education would be useful.

An attorney participant asked whether the Committees ever produce commentary without amending a Rule. The closest example that the Reporter could think of was a 2000 pamphlet by Professor Capra, the Reporter for the Evidence Rules Committee, concerning caselaw that had diverged from the text of the Evidence Rules. Professor

Coquillette noted that in that instance, Professor Capra authored the pamphlet and the FJC published it.

A motion was made to remove this item from the Committee's agenda and to notify the Chair of the Standing Committee that the advisory committee concurs in the idea of coordinating through the Standing Committee a response to Members of the Court. The motion was seconded and passed by voice vote without dissent.

VIII. Adjournment

The Appellate Rules Committee adjourned at noon on April 23, 2013.

Respectfully submitted,

_____

Catherine T. Struve
Reporter

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 3-4, 2013
Washington, D.C.

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ATTENDANCE

The spring meeting of the Judicial Conference Committee on Rules of Practice and Procedure ("Standing Committee") was held in Washington, D.C., on Monday and Tuesday, June 3 and 4, 2013. The following members were present:

Judge Jeffrey S. Sutton, Chair
Deputy Attorney General James M. Cole
Dean C. Colson, Esq.
Roy T. Englert, Jr., Esq.
Gregory G. Garre, Esq.
Judge Neil Gorsuch
Judge Marilyn L. Huff
Chief Justice Wallace B. Jefferson
Dean David F. Levi
Judge Patrick J. Schiltz
Larry D. Thompson, Esq.
Judge Richard C. Wesley
Judge Diane P. Wood
Judge Jack Zouhary

Also participating were Professor Geoffrey C. Hazard, Jr., and Professor R. Joseph Kimble, consultants to the Standing Committee; and Peter G. McCabe, Administrative Office Assistant Director for Judges Programs. In addition to the Deputy Attorney General, the Department of Justice was represented at various points by Stuart F. Delery, Esquire, Theodore J. Hirt, Esquire, Christopher Kohn, Esquire, Elizabeth J. Shapiro, Esquire, and Allison Stanton, Esquire. Judge Michael A. Chagares, Chair of the Inter-Committee CM/ECF Subcommittee, also participated.

Providing support to the Standing Committee were:

Professor Daniel R. Coquillette	The Standing Committee's Reporter
Jonathan C. Rose	The Standing Committee's Secretary and Chief, Rules Committee Support Office
Benjamin J. Robinson	Deputy Rules Officer and Counsel to the Rules Committees
Julie Wilson	Rules Office Attorney
Andrea L. Kuperman	Chief Counsel to the Rules Committees
Joe Cecil	Senior Research Associate, Research Division, Federal Judicial Center
Scott Myers	Attorney, Bankruptcy Division, AO
James Wannamaker	Attorney, Bankruptcy Division, AO
Bridget M. Healy	Attorney, Bankruptcy Division, AO

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
- Judge Steven M. Colloton, Chair
- Professor Catherine T. Struve, Reporter (by telephone)

Advisory Committee on Bankruptcy Rules —
- Judge Eugene R. Wedoff, Chair
- Professor S. Elizabeth Gibson, Reporter
- Professor Troy A. McKenzie, Associate Reporter

Advisory Committee on Civil Rules —
- Judge David G. Campbell, Chair
- Judge Paul W. Grimm, Chair of Discovery Subcommittee (by telephone)
- Judge John G. Koeltl, Chair of Duke Subcommittee (by telephone)
- Professor Edward H. Cooper, Reporter
- Professor Richard L. Marcus, Associate Reporter

Advisory Committee on Criminal Rules —
- Judge Reena Raggi, Chair
- Professor Sara Sun Beale, Reporter
- Professor Nancy King, Associate Reporter

Advisory Committee on Evidence Rules —
Chief Judge Sidney A. Fitzwater, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Sutton opened the meeting by thanking the chairs, reporters, committee members and staff for their extraordinary work in preparation for this meeting with its heavy agenda.

He reported that in April 2013, the Supreme Court adopted without change and sent to Congress the package of fifteen proposed rule changes previously approved by the Judicial Conference at its September meeting. Rules and forms to be amended are listed below.

- Appellate Rules 13, 14, 24, 28, and 28.1, and Form 4
- Bankruptcy Rules 1007(b)(7), 4004(c)(1), 5009(b), 9006(d), 9013, and 9014
- Civil Rules 37 and 45
- Criminal Rule 11
- Evidence Rule 803(10)

In accordance with the provisions of Sections 2072 and 2075 of Title 28, United States Code, these amendments will take effect on December 1, 2013, if Congress does not enact legislation to reject, modify, or defer them. They will govern in proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

Judge Sutton also stated that the Standing Committee would try this year to advance the timing of its report to the Judicial Conference to have it available by the first week in July. After the Judicial Conference meeting in September, an equivalent effort will be made to have the package of amendments approved by the Conference available to the Supreme Court no later than early October. Under the old schedule, proposed rule changes typically did not arrive at the Court until mid- to late-December after approval by the Judicial Conference at its meeting in September.

This new process will enlarge the time available and increase scheduling flexibility for the Court to address the proposed rule changes while still adhering to the timelines mandated by the Rules Enabling Act.

Judge Sutton also reported that the Chief Justice had made appointments for all Rules Committee vacancies in May 2013 so that the new committee members could be notified in time to attend their respective committee meetings this fall. This represented a tremendous effort on the part of all responsible to expedite the appointment process. Judge Sutton expressed his thanks on behalf of all the Rules Committee chairs to Laura Minor, Judge Hogan, and the Chief Justice.

He further expressed his intention to invite retiring Standing Committee members Judges Huff and Wood to participate as panelists at the January meeting, when their exceptional contributions would be formally recognized.

APPROVAL OF MINUTES OF THE LAST MEETING

Action: The Standing Committee, by voice vote without objection, approved the minutes of its last meeting, held on January 3–4, 2013, in Cambridge, Massachusetts.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge David G. Campbell, assisted by the advisory committee's two reporters, Professor Edward H. Cooper and Professor Richard L. Marcus, presented the report of the Civil Rules Advisory Committee. The advisory committee sought approval to publish for public comment a number of proposed amendments.

ACTION ITEMS

A. Proposed Action: Publication of Revised Rules 1, 4, 16, 26, 30, 31, 33, 34, 36, and 37 (the Duke Conference rules package)

Judge Campbell first presented the advisory committee's recommendation for publication of a series of amendments aimed at improving the pretrial process of civil litigation, which are the product of a conference on civil litigation that the Civil Rules Committee hosted at Duke University School of Law in 2010. The proposed revisions recommended for publication include changes to Rules 1, 4, 16, 26, 30, 31, 33, 34, 36, and 37. These recommendations were little changed in their basic thrust from the proposals that were presented for discussion at the January 2013 meeting of the Standing Committee. However, a number of revisions were made both to the amendments and to the committee notes to address the concerns expressed at the January meeting.

Judge Campbell first explained how the proposed revised rules relate to the three major themes of the Duke Conference. He stressed the primary role of Judge Koeltl and his Duke Conference Subcommittee as well as the advisory committee's two reporters in the development of the package of proposed amendments. These amendments are designed to reduce the costs and delays of civil litigation and to promote the aim of the rules "to assure the just, speedy and inexpensive determination of every action and proceeding."

The three main themes repeatedly stressed at the Duke Conference were: (1) early and active judicial case management, (2) the necessity for proportionality in discovery, and (3) a duty of cooperation in the discovery process by counsel. The conclusion of the Duke Conference was that at present some or all of these elements are too often missing in civil litigation. The proposed rule changes address these three areas.

Case Management Proposals

The case management proposals reflect a perception that the early stages of litigation often take far too long. The most direct aim at early case management is reflected in proposed amendments to Rules 4(m) and 16(b). Another important proposal relaxes the Rule 26(d)(1) discovery moratorium to permit early delivery of Rule 34 requests to produce, but sets the time to respond after the first Rule 26(f) conference.

Rule 4(m): Time to Serve the Summons and Complaint: Rule 4(m) would be revised to shorten the time to serve the summons and complaint from 120 days to 60 days. As under the current rule, a judge would retain the ability to extend the time for service for good cause. The amendment responds to the commonly expressed view that four months to serve the summons and complaint is too long.

A concern raised by the Department of Justice about confusion over the applicability of Rule 4(m) to condemnation actions is addressed by amending the last sentence: "This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1) or to service of a notice under Rule 71.1(d)(3)(A)."

Rule 16(b)(2): Time for Scheduling Order: The proposed amendment to Rule 16(b)(2) would reduce the present requirements for issuing a scheduling order by 30 days to 90 days after any defendant is served or 60 days after any defendant appears. The addition of a new provision allows the judge to extend the time for a scheduling order on finding good cause for delay.

Rule 16(b): Actual Conference: Present Rule 16(b)(1)(B) authorizes issuance of a scheduling order after receiving the parties' Rule 26(f) report or after consulting "at a scheduling conference **by telephone, mail, or other means**." The proposed amendment would eliminate the bolded language. Judge Campbell explained that the advisory committee believes that in the absence of a Rule 26(f) report, an actual conference by simultaneous communication among the parties and court is a very valuable case management tool. A judge would retain the ability to issue a scheduling order based only on the Rule 26(f) report.

Rules 16(b)(3), 26(f): Additional Subjects: The proposals add preservation of electronically stored information (ESI) and agreements under Evidence Rule 502 on waiver of privilege or work product protection to the "permitted contents" of a scheduling order and to the Rule 26(f) discovery plan. A third proposal would add a new Rule 16(b)(3)(B)(v), permitting a scheduling order to "direct that before moving for an order relating to discovery the movant must request a conference with the court." A number of courts now have local rules similar to this proposal. Experience has shown that an informal pre-motion conference with the court often resolves a discovery dispute.

Rule 26(d)(1): Early Rule 34 Requests: After considering a variety of proposals that would allow discovery requests to be made before the parties' Rule 26(f) conference in order to enhance its focus and specificity, the advisory committee limited the proposed change to Rule 34 requests to produce by adding a new Rule 26(d)(2) that would permit the delivery of such requests before the scheduling conference.

A corresponding change would be made to Rule 34(b)(2)(A), setting the time to respond to a request delivered under Rule 26(d)(2) within 30 days after the parties' first Rule 26(f) conference. As Rule 34 requests frequently involve heavy discovery burdens, the advisory committee thought that early court consideration of such requests might be useful.

Proposals to Incorporate Proportionality

Several proposals seek to promote responsible use of discovery proportional to the needs of the case. Some important changes address the scope of discovery directly by amending Rule 26(b)(1) and by requiring clearer responses to Rule 34 requests to produce. Others tighten the presumptive limits on the number and duration of depositions and the number of interrogatories, and for the first time add a presumptive limit of 25 to the number of requests for admission other than those that relate to the genuineness of documents. Yet another proposed change explicitly recognizes the district court's existing authority to issue a protective order specifying an allocation of expenses incurred by discovery.

Rule 26(b)(1): Adopting Rule 26(b)(2)(C)(iii) Cost-Benefit Analysis: Given the widespread respect for balanced discovery principles embodied in Rule 26(b)(2)(C)(iii), the advisory committee proposed to transfer the analysis required by that rule to become a limit on the scope of discovery permitted by Rule 26(b)(1). Under the new proposed Rule 26(b)(1), "discovery must be proportional to the needs of the case, considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."

A corresponding change is made by amending Rule 26(b)(2)(C)(iii) to cross-refer to (b)(1); thus, the court remains under a duty to limit the frequency or extent of discovery that exceeds these limits, on motion or on its own.

Other changes are also made in Rule 26(b)(1). Under the amended rule, all discovery is limited to "matter that is relevant to any party's claim or defense." The ability to extend discovery to "any matter relevant to the subject matter involved in the action" is eliminated. The parties' claims or defenses are those identified in the pleadings.

Rule 26(b)(1) also would be amended by revising the penultimate sentence: "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Many cases continue to cite the

"reasonably calculated" language as though it defines the scope of discovery, and judges often hear lawyers argue that this sentence sets a broad standard for appropriate discovery. To eliminate this potential for improper expansion of the scope of discovery, this sentence would be revised to read: "Information within this scope of discovery need not be admissible in evidence to be discoverable."

The proposed revision of Rule 26(b)(1) also omits its current specific reference to "the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter." Discovery of such matters is so deeply entrenched in practice that the current reference is superfluous.

Several discovery rules cross-refer to Rule 26(b)(2) as a reminder that it applies to all methods of discovery. Transferring the restrictions of Rule 26(b)(2)(C)(iii) to become part of subdivision (b)(1) makes it appropriate to revise the cross-references to include both (b)(1) and (b)(2).

Rule 26(c): Allocation of Expenses: Another proposal adds to Rule 26(c)(1)(B) an explicit recognition of the court's authority to enter a protective order that allocates the expenses of discovery.

Rules 30, 31, 33, and 36: Presumptive Numerical Limits: Rules 30 and 31 establish a presumptive limit of 10 depositions by the plaintiffs, or by the defendants, or by third-party defendants. Rule 30(d)(1) establishes a presumptive time limit of one 7-hour day for a deposition by oral examination. Rule 33(a)(1) sets a presumptive limit of "no more than 25 written interrogatories, including all discrete subparts." There are no presumptive numerical limits for Rule 34 requests to produce or for Rule 36 requests to admit. The proposals reduce the limits in Rules 30, 31, and 33. They add to Rule 36, for the first time, presumptive numerical limits.

The proposals would reduce the presumptive limit on the number of depositions from 10 to 5, and would reduce the presumptive duration to 1 day of 6 hours. Rules 30 and 31 continue to provide that the court must grant leave to take more depositions "to the extent consistent with Rule 26(b)(1) and (2)."

The presumptive number of Rule 33 interrogatories under the proposed amendment is reduced to 15. Rule 36 requests to admit under the proposed rule would have a presumptive limit of 25, but the rule would expressly exempt requests to admit the genuineness of documents. After due consideration, a proposal to limit Rule 34 requests to produce was rejected because of a concern that a limit might simply prompt blunderbuss requests.

Rule 34: Objections and Responses: Discovery burdens can be pushed out of proportion to the reasonable needs of a case by those asked to respond, not only those who make requests. The proposed amendments to Rule 34 address objections and actual production by adding several specific requirements.

Objections are addressed in two ways. First, Rule 34(b)(2)(B) would require that the grounds for objecting to a request be stated with specificity. Second, Rule 34(b)(2)(C) would require that an objection "state whether any responsive materials are being withheld on the basis of that objection." This provision responds to the common complaint that Rule 34 responses often begin with a "laundry list" of objections, then produce volumes of materials, and finally conclude that the production is made subject to the objections. The requesting party is left uncertain whether anything actually has been withheld.

Actual production is addressed by new language in Rule 34(b)(2)(B) and a corresponding addition to Rule 37(a)(3)(B)(iv). Present Rule 34 recognizes a distinction between permitting inspection of documents, ESI, or tangible things, and actually producing copies. However, if a party elects to produce materials rather than permit inspection, the current rule does not indicate when such production is required to be made. The new provision would direct that a party electing to produce state that copies will be produced, and directs that production be completed no later than the time for inspection stated in the request or a later reasonable time stated in the response. Rule 37 is further amended by adding authority to move for an order to compel production if "a party fails to produce documents."

Enhancing Cooperation

Reasonable cooperation among adversaries is vitally important to successful use of the resources provided by the Civil Rules. Participants at the Duke Conference regularly pointed to the costs imposed by excessive adversarial behavior and wished for some rule that would enhance cooperation.

Proposed Addition to Rule 1: The advisory committee determined that proposals to mandate cooperation would be problematic. Instead, it settled on a more modest proposal – an addition to Rule 1. The parties are made to share responsibility along with the court for achieving the high aspirations expressed in Rule 1: "[T]hese rules should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."

Standing Committee Discussion of Proposed Duke Conference Amendments

Following the presentation of Judge Campbell and the advisory committee reporters, Judge Sutton, echoed by every other Standing Committee member who spoke, thanked them, Judge Koeltl, the members of the Duke Conference subcommittee and the full Civil Rules Advisory Committee for the countless hours of painstaking deliberation and work reflected in the careful crafting of these proposals. Professor Cooper then offered to entertain any

questions from the Standing Committee concerning all elements of the Duke Conference amendments package.

One member expressed curiosity about the reasons for a small list of what he suspected were "unnecessary tweaks" in the current rules, which could distract those submitting comments and others from the truly significant and major positive changes to the civil litigation process made by other parts of the Duke Conference amendments package. He commented on his list of tweaks as follows.

He first expressed substantial skepticism as to the wisdom of changing the current text of Rule 1 to emphasize the duty of parties to cooperate. He thought little practical impact would be achieved. Rule 1 as written, he believed, has achieved a certain talismanic quality with the passage of time. Tinkering with its aspirational language seemed to him perilously close to the committee simply talking to itself.

As to the proposals' attempt to limit discovery by refining the definition of its permissible scope, he found that unlikely to succeed. He recalled the various efforts to redefine the scope of discovery over the years first to broaden it, and then later to narrow it. The sequence reminded him of Karl Marx's observations about history repeating itself first as tragedy and then as farce. He thought that the current proposal effectively brought us back to the most constricted definition of the permissible scope of discovery. In his view, all the various changes over time resulted in less practical impact on cases than any of their authors had expected. For the same reasons, he did not think this tweak of accepted discovery scripture would achieve very much, but did not oppose its publication.

Pursuing his list, he agreed with the change of the length of a deposition day from 7 hours to 6 if that had proven to be a more reasonable definition of a deposition day.

Concerning the proposed changes to Rule 16, he found the emphasis on face-to-face or simultaneous communication in a Rule 16 conference to be a distracting and almost counterproductive change. His practical experience as a judge in a far flung, heavy caseload district was that the achievement of simultaneous communication by a judge and opposing counsel was a "big deal, highly time-consuming, and unnecessary in very many cases." He acknowledged that counsel for most parties would love to "shmooze" with the judge, but have no real need to do so. He predicted that the change would just lead to the widespread delegation of discovery issues to magistrate judges.

Judge Campbell responded to several of the foregoing points. First, he observed that there was broad consensus of his committee that increased cooperation by counsel on discovery matters would in fact be helpful. However, any attempt to make it mandatory in the rules would likely just enhance satellite ligation on the issue. The purpose of the Rule 1 change was to emphasize that the duty of cooperation applied to the parties and not solely to the judge. It would also give the Federal Judicial Center ("FJC") a hook on which to hang their instruction to judges about cooperation as an element of best practices in case

management.

There was an even broader consensus on the efficacy of simultaneous communication in Rule 16(f) conferences as a case management tool. A spur to early case involvement by judges was widely thought to be central to speeding things up. Early exposure by the parties to the judge tends to eliminate a lot of collateral motion practice and frivolous delay. Once counsel get a sense of how a judge is likely to rule on a given topic, a lot of delay-causing tactics are simply never tried.

Judge Campbell said he has a 15- or 20-minute Rule 16 scheduling conference in every civil case. He also requires a joint telephone call before the filing of any written discovery motion. Professor Cooper added that there was initial committee sentiment to make a Rule 16 conference mandatory. However, after further examination and the expression of opinion by other judges, the advisory committee realized that in some cases the Rule 26(f) report shows that a Rule 16 conference really is not necessary.

Judge Sutton observed that all of these points were likely to provoke many comments upon publication. The initially skeptical member of the Standing Committee also conceded that he had misunderstood that a Rule 16 conference would simply be encouraged, but not mandatory under the proposed amendment. However, he stressed his thought that the advisory committee was doing a lot. For that very reason, it should want public comments only on the consequential and important changes. The proposed changes to Rule 1 and to the definition of the permissible scope of discovery did not, he thought, come close to the hurdle or threshold of importance for a rule change and thus presented a significant risk of merely distracting people from a focus on the important changes.

Another member praised the package, found no harm in publication of the proposed change to Rule 1, and found the text of the proposed Rule 16 clear enough that a Rule 16 conference was discretionary as opposed to mandatory. Judge Campbell stressed again that proposed Rule 16(b) makes clear that a Rule 26(f) report OR a Rule 16 conference meets the requirements of the proposed rules.

Another participant observed that the package added up to enshrining in the rules a series of practices that a judge may adopt, but doesn't have to. He thought a better approach to these discovery issues might well be an educational strategy implemented by the FJC as opposed to a strategy that relied on these permissive but not mandatory proposed changes in discovery rules.

The Department of Justice representative said that the Department shared virtually all of the concerns raised by the skeptics, but was doing its best to arrive at a timely position on the merits of the proposed changes. In the meantime, it supported publication of the proposed changes and thought the public comments would likely be illuminating and helpful. The representative observed that certain types of litigation by the Department, such as those relating to "pattern and practice," require full discovery, as well as initial time limits both

long enough and sufficiently flexible for the government to get adequate discovery in some of its cases.

A final comment was that the package overall was an "amazing job." This member observed that the committee note should include the rationale for cutting the number of depositions from 10 to 5 and questioned why the proposal contained no limit on requests for production. On the latter point, Judge Campbell responded that the advisory committee's sentiment was that the most useful discovery tool in many cases was a set of targeted production requests under Rule 34. The advisory committee thought that a limit on them might simply provoke blunderbuss production requests. When pressed whether some limit on Rule 34 requests would not help, Judge Campbell replied that in his court he did set a presumptive limit of 25.

Judge Sutton expressed his own concerns about the proposed change to Rule 1. However, he thought it would be anomalous to subtract from publication the only proposed remedial change that addressed one of the three major prongs of concerns expressed at the Duke Conference – cooperation by counsel.

After Judge Campbell expressed agreement with those who thought that an FJC education effort was also important, Judge Sutton called for a vote on publication of the proposed amendments to the rules relating to discovery. Publication of the package of Duke Conference amendments received unanimous support from the Standing Committee with the exception of three members who dissented from the decision to publish the proposed change to Rule 1.

Action: The Standing Committee, by voice vote, approved publication of the proposed amendments to Rules 1, 4, 16, 26, 30, 31, 33, 34, 36, and 37, with three members objecting to the proposed amendment to Rule 1.

B. Proposed Action: Publication of Revised Rule 37(e)

The Duke Conference also addressed the need to focus on the issues of preservation requirements and sanctions with a particular emphasis on electronic discovery.

In January 2013, the Standing Committee preliminarily approved proposed amendments to Rule 37(e) for publication in August 2013, with the understanding that the advisory committee would present at the June 2013 meeting a revised proposal for publication that addressed concerns expressed in January.

The fundamental thrust of the proposal presented for publication remains as presented during the Standing Committee's January 2103 meeting – to amend the rule to address the overly broad preservation many litigants and potential litigants believe they have to undertake to ensure they will not later face sanctions. The proposal grew out of the suggestion made by a panel at the 2010 Duke Conference that the advisory committee

attempt to adopt rule amendments to address preservation and sanctions. The Discovery Subcommittee set to work on developing amendments soon thereafter. The advisory committee hosted a mini-conference in September 2011 to evaluate the various proposed approaches the subcommittee had identified. From that point, the subcommittee refined the approach that was first presented to the Standing Committee in January 2013.

The proposed amendment focuses on sanctions rather than attempting directly to regulate the details of preservation. But it provides guidance for a court by recognizing that a party that adopts reasonable and proportionate preservation measures in anticipation of litigation should not be subject to sanctions. In addition, the amendment provides a uniform national standard for culpability findings to support the imposition of sanctions. Except in exceptional cases in which a party's actions irreparably deprive another party of any meaningful opportunity to present or defend against the claims in the litigation, sanctions may be imposed only on a finding that the party acted willfully or in bad faith and that the conduct caused substantial prejudice. The amendment rejects the view adopted in some cases, such as *Residential Funding Corp. v. DeGeorge Finan. Corp*., 306 F.3d 99 (2d Cir. 2002), that permits sanctions for negligence in failing to meet preservation obligations.

Judge Campbell gave a short explanation of how the concerns expressed at the January 2013 meeting had been addressed by tweaks in the rule or note language, and also reviewed the five questions specifically posed in the request for public comment. Slight changes in the rule and note text were thought necessary to make clear that a court could order curative measures beyond merely orders to a party to remedy the failure to preserve discoverable information. Similarly, changing the rule text to focus on "the party's actions" rather than simply "the party's failure" would operate to prevent the imposition of sanctions in the absence of willfulness or bad faith only if "the party's actions" as opposed to an "act of God" deprived the opponent of a meaningful opportunity to litigate the case.

Significant efforts were made to refine the rule's attempt to preserve a line of cases that allow the imposition of sanctions in cases of failure to preserve, not involving bad faith or willfulness, where a party's actions "irreparably deprive a party of any meaningful opportunity to present or defend against claims in the litigation." To address a concern that this provision should not apply to the deprivation of opportunity to litigate a minor claim in the case, the advisory committee had tweaked the text and added language to the note that explains that the provision requires an impact on the overall case. The advisory committee also recognized the concern that this provision could swallow the rule's limits on sanctions, but continued to think it necessary to avoid overruling a substantial body of case law. It was thought that public comment would assist in pointing out the need for any additional revisions. Other concerns expressed in January about whether the proposed rule could be construed as relating to sanctions for attorney conduct or as displacing other laws relating to preservation requirements outside the discovery context were eliminated by appropriate revisions in the committee note.

Members of the advisory committee believed that the coverage of the proposed new

Rule 37(e) was coextensive with that provided under the prior version and therefore elimination of the prior version was warranted.

The questions for public comment are:

1. Should the rule be limited to sanctions for electronically stored information?
2. Should Rule 37(e)(1)(B)(ii) be retained in the rule?
3. Should the provisions of the current Rule 37(e) be retained in the rule?
4. Should there be an additional definition of "substantial prejudice" under Rules 37(e)(1)(B)(i)? If so, what should be included in that definition?
5. Should there be an additional definition of willfulness or bad faith under Rule 37(e)(1)(B)(i)?

Standing Committee Discussion of Proposed Amendments to Rule 37(e)

There was a short committee discussion concerning Rule 37(e). It was observed that electronic discovery is rapidly becoming the most burdensome aspect of discovery and therefore may provoke the most comment.

Judge Campbell answered questions and elaborated on the proposal. He stressed that one major goal of the amendments to Rule 37(e) was to distinguish between the negligent and intentional loss of evidence. He also explained that an example of a critical evidentiary loss is the loss of the instrumentality causing injury before the defendant can examine it, and an example of a curative measure would be requiring the restoration of back-up tapes in the case of a loss of evidence.

A Standing Committee member expressed his disappointment that specific safe harbors were not a part of the amendments package. He said that the ability to preserve something that should have been discoverable in the context of a lawsuit was virtually impossible in a large organization. He thought that was particularly true with respect to the ever expanding social media. He asked if drafting some specific safe harbors, particularly for large organizations, should be attempted.

Judge Campbell replied that his committee has tried to address some of these concerns by strengthening the emphasis on the relevance requirements and by adding substantial prejudice as prerequisite to triggering sanctions for the loss or absence of evidence. The attempts at a "safe harbor" provision ran into a roadblock of serious dimensions. No one has any idea what ESI will look like 5-10 years from now.

Action: The Standing Committee, by voice vote without objection, approved publication of the proposed amendments to Rule 37(e), as revised after the January 2013 meeting.

C. Proposed Action: Publication of Proposals to Abrogate Rule 84, Amend Rule 4(d)(1)(D), and Retain Current Forms 4 and 5 as a Part of Rule 4

Judge Campbell presented the recommendation that the Standing Committee approve the publication for comment of proposals that would abrogate Rule 84 and the Official Forms, and amend Rule 4(d)(1)(D) to incorporate present Forms 5 and 6 as official Rule 4 Forms.

A Rule 84 Subcommittee was formed to study Rule 84 and Rule 84 forms. The subcommittee found that these forms are used very infrequently and there is little indication that they often provide meaningful help to pro se litigants.

In addition, there is an increasing tension between the pleading forms in Rule 84 and emerging pleading standards. The pleading forms were adopted in 1938 as an important means of educating the bench and bar on the dramatic change in pleading standards effected by Rule 8(a)(2). They – and all the other forms – were elevated in 1948 from illustrations to a status that "suffice[s] under these rules." The range of topics covered by the pleading forms omits many of the categories of actions that comprise the bulk of today's federal docket. Indeed some of the forms are now inadequate, particularly the Form 18 complaint for patent infringement. Attempting to modernize the existing forms, and perhaps to create new forms to address such claims as those arising under the antitrust laws (*Twombly*) or implicating official immunity (*Iqbal*), would be a time-consuming undertaking. Such an undertaking might be warranted if in recent years the pleading forms had provided meaningful guidance to the bar in formulating complaints. However, the subcommittee's work has suggested that few, if any, lawyers consult the forms when drafting complaints. They either use their own forms, or refer to other sources, such as forms drafted by the Administrative Office's working group on forms.

Two forms require special consideration. Rule 4(d)(1)(D) requires that a request to waive service of process be made by Form 5. The Form 6 waiver of service of summons is not required, but is closely tied to Form 5. The advisory committee has concluded that the best course is to abrogate Rule 84, but preserve Forms 5 and 6 by amending Rule 4(d)(1)(D) to incorporate them recast as Rule 4 Forms attached directly to Rule 4.

Standing Committee Discussion of Proposed Abrogation of Rule 84 and Amendment to Rule 4

The Standing Committee's discussion was short. The current Rule 84 forms have become an obsolete appendage. The discussion of pleading standards in *Twombly* and *Iqbal* cases is simply illustrative of the many potential difficulties generated by the presence of obsolete forms in the Civil Rules. One member thought those cases should be specifically mentioned in any advisory committee note discussing the abrogation of Rule 84 and its forms. However, the prevailing view of other members and the reporters was that the Standing Committee should adhere to its practice of not taking a position on particular cases.

A final observation was that unless the Civil Rules Advisory Committee was prepared to undertake a thorough review of all of the civil forms, they should be abolished. It was further observed that the AO forms committee was a more than satisfactory substitute.

Action: The Standing Committee, by voice vote without objection, approved publication of the proposed amendments to Rules 84 and 4.

INFORMATION ITEMS

Judge Campbell agreed with Judge Sutton that the items contained in the information section of the Civil Rules Advisory Committee's report could be read rather than reviewed at this meeting.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Chief Judge Sidney A. Fitzwater, assisted by the advisory committee's reporter, Professor Daniel J. Capra, presented the report of the Evidence Rules Committee. The advisory committee sought final Standing Committee approval and transmittal to the Judicial Conference of the United States of four proposals: (1) an amendment to Rule 801(d)(1)(B) – the hearsay exemption for certain prior consistent statements – to provide that prior consistent statements are admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility; and (2) amendments to Rules 803(6)-(8) – the hearsay exceptions for business records, absence of business records, and public records – to eliminate an ambiguity uncovered during the restyling project and to clarify that the opponent has the burden of showing that the proffered record is untrustworthy.

ACTION ITEMS

A. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Rule 801(d)(1)(B)

The advisory committee proposed that Rule 801(d)(1)(B) be amended to provide that prior consistent statements are admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility. The amendment is intended to eliminate confusing jury instructions on the permissible use of prior consistent statements. Judge Fitzwater emphasized that this amendment would preserve the rule of *Tome v. United States*, 513 U.S. 150 (1995). Under that case, a prior consistent statement is not hearsay only if it was made prior to the time when the motive to fabricate arose.

A member of the Standing Committee observed that if a witness was in court and available to be cross-examined, there seemed little reason to exclude prior consistent statements on any basis. The advisory committee's reporter observed that this current

amendment represented a small step in that direction.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendments to Rule 801(d)(1)(B) for transmission to the Judicial Conference for its approval.

B. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Rules 803(6)-(8) (Hearsay Exceptions for Business Records, Absence of Business Records, and Public Records) – Burden of Proof As To Trustworthiness

The advisory committee proposed that Rules 803(6)-(8) be amended to address an ambiguity uncovered during restyling, but left unaddressed. Subsequent restyling efforts in Texas revealed the ambiguity could be misinterpreted as placing the burden of proof on a proponent of a proffered record to show that it was trustworthy.

The proposed amendments clarify that the *opponent* has the burden of showing that the proffered record is untrustworthy. The reasons espoused by the advisory committee for the amendments are: first, to resolve a conflict in the case law by providing uniform rules; second, to clarify a possible ambiguity in the rules as originally adopted and as restyled; and third, to provide a result that makes the most sense, as imposing a burden of proving trustworthiness on the proponent is unjustified given that the proponent must establish that all the other admissibility requirements of these rules are met – requirements that tend to guarantee trustworthiness in the first place.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendments to Rules 803(6)-(8) for transmission to the Judicial Conference for its approval.

INFORMATION ITEMS

Judge Fitzwater noted as an informational matter that the Evidence Rules Advisory Committee had received a suggestion from a judge in the 9th Circuit to consider an amendment to Rule 902 to include federally recognized Indian tribes on the list of public entities that issue self-authenticating documents. The advisory committee decided not to pursue consideration of such a rule without further guidance from the Standing Committee. It believed that other rules might well impact Indian tribes. Judge Campbell noted that this spring the 9th Circuit had reversed a case of his involving the admission of a tribal document verifying membership in a tribe on the very ground that federally recognized tribes were not included in the Rule 902 list of public entities that can issue self-authenticating documents. Judge Sutton noted that the Appellate Rules Advisory Committee had previously dealt with the ability of Indian tribes to file amicus briefs by deciding to wait for a reasonable period to see if the 9th Circuit adopted a local rule allowing the filing of such briefs. He noted that this particular issue appeared to be one involving considerations of tribal "dignity" – perhaps

an inherently more political area where the Rules Committees should move with caution. However, he placed the practical concerns raised in a case like Judge Campbell's involving self-authentication of tribal documents in a different category. There he believed that some action by the Evidence Rules Advisory Committee might be warranted.

Finally, Judge Fitzwater reminded the Standing Committee of the symposium scheduled at the University of Maine School of Law in Portland this October, which will address the intersection of the Rules of Evidence and emerging technologies. This symposium will present an opportunity to discuss the alternatives to validate electronic signatures currently presented in the proposed amendments to the Bankruptcy Rules.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Reena Raggi, assisted by the advisory committee's two reporters, Professor Sara Sun Beale and Professor Nancy King, presented the report of the Criminal Rules Advisory Committee. In summary, this report presented three items for action by the Standing Committee:

1. Approval to transmit to the Judicial Conference a proposed amendment to Rule 12 (pretrial motions), and a conforming amendment to Rule 34;

2. Approval to transmit to the Judicial Conference proposed amendments to Rules 5 and 58 (adding consular notification); and

3. Approval to transmit to the Judicial Conference a technical and conforming amendment to Rule 6 (the Grand Jury).

These recommendations were reviewed at the Standing Committee meeting as follows.

ACTION ITEMS

A. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Rules 12 (Pretrial Motions) and 34

These proposed amendments have their origin in a 2006 request from the Department of Justice that "failure to state an offense" be deleted from current Rule 12(b)(3) as a defect that can be raised "at any time," in light of the Supreme Court's decision in *United States v. Cotton*, 535 U.S. 625, 629-31 (2002) (holding that "failure to state an offense" is not a jurisdictional defect).

The advisory committee's efforts to craft such an amendment have sparked extensive and protracted discussions over time within the advisory committee and between the advisory

committee and the Standing Committee regarding various aspects of Rule 12. This interplay has resulted in three separate amendment proposals being presented to the Standing Committee, the third of which was approved for publication in August 2011. In response to the thoughtful public comments received and on its own further review, the advisory committee further revised its third proposal for amendment to Rule 12, but did not believe the revisions require republication. The submitted proposals had the unanimous approval of the advisory committee.

The substantive features of the proposed amendment to Rule 12 (which also restyles this rule) can be summarized as follows:

(1) By contrast to current Rule 12(b)(1), which now starts with an unexplained cross-reference to Rule 47 (discussing the form, content, and timing of motions), the proposed revised Rule 12(b)(1) would achieve greater clarity by stating the rule's general purpose – to address the filing of pretrial motions (relocated from current Rule 12(b)) – before cross-referencing Rule 47.

(2) Proposed Rule 12(b)(2) identifies motions that <u>may</u> be made at any time separately from Rule 12(b)(3), which identifies motions that <u>must</u> be made before trial. This provides greater clarity – visually as well as textually. The current Rule 12(b)(3) identifies motions that may be made at any time only in an exception to otherwise mandatory motions alleging defects in the indictment or information.

(3) Proposed Rule 12(b)(2) recognizes lack of jurisdiction as the only motion that may be made "at any time while the case is pending," thus implementing the Justice Department's request not to accord that status to a motion raising the failure to state an offense.

(4) Proposed Rule 12(b)(3) provides clearer notice with respect to motions that must be made before trial.

(a) At the start, it clarifies that its motion mandate is dependent on two conditions:

i. the basis for the motion must be reasonably available before trial, and
ii. the motion must be capable of resolution before trial.

This ensures that motions are raised pretrial when warranted while safeguarding against a rigid filing requirement that could be unfair to defendants.

(b) Proposed Rule 12(b)(3)(A)-(B) provides more specific notice of the motions that must be filed pretrial if the just-referenced twin conditions are satisfied. While the general categories of "defect[s] in instituting the prosecution" (current Rule 12(b)(3)(A))

and "defect[s] in the indictment or information (current Rule 12(b)(3)(B)) are retained, they are now clarified with illustrative non-exhaustive lists.

Proposed Rule 12(b)(3)(A) thus lists as defects in instituting the prosecution that must be raised before trial:

i. improper venue,
ii. preindictment delay,
iii. violation of the constitutional right to a speedy trial,
iv. selective or vindictive prosecution, and
v. error in grand jury or preliminary hearing proceedings.

Proposed Rule 12(b)(3)(B) lists as defects in the indictment or information that must be raised before trial:

i. duplicity,
ii. multiplicity,
iii. lack of specificity,
iv. improper joinder, and
v. failure to state an offense.

The inclusion of failure to state an offense in Rule 12(b)(3)(B) accomplishes the amendment originally sought by the Department of Justice.

The proposed rule does not include double jeopardy or statute of limitations challenges among required pretrial motions in light of concerns raised in public comments. The advisory committee believes that subjecting such motions to a rule mandate is premature, requiring further consideration as to the appropriate treatment of untimely filings.

(5) Proposed Rule 12(b)(3)(C)-(E) duplicates the current rule in continuing to require that motions to suppress evidence, to sever charges or defendants, and to seek Rule 16 discovery must be made before trial.

(6) Proposed Rule 12(c) identifies both the deadlines for filing motions and the consequences of missing those deadlines. Grouping these two subjects together in one section is a visual improvement over the current rule, which discusses deadlines in (c) and consequences in later provision (e). More specifically,

(a) Proposed Rule 12(c)(1) tracks the current rule's language in recognizing the discretion afforded district courts to set motion deadlines. Nevertheless, it now adds a default deadline – the start of trial – if the district court fails to set a motion deadline. This affords defendants the maximum time to make mandatory pretrial motions, but it forecloses an argument that, because the district court did not

set a motion deadline, a defendant need not comply with the rule's mandate to file certain motions before trial.

(b) Proposed Rule 12(c)(2) explicitly acknowledges district court discretion to extend or reset motion deadlines at any time before trial. This discretion, which is implicit in the current rule, permits district courts to entertain late-filed motions at any time before jeopardy attaches as warranted. It also allows district courts to avoid subsequent claims that defense counsel was constitutionally ineffective for failing to meet a filing deadline.

(c) Proposed Rule 12(c)(3)(A) retains current Rule 12(e)'s standard of "good cause" for review of untimely motions (with the exception of failure to state an offense discussed separately in submitted Rule 12(c)(3)(B)). At the same time, the submitted rule does not employ the word "waiver" as in the current rule because that term, in other contexts, is understood to mean a knowing and affirmative surrender of rights.

With respect to "good cause," the proposed committee note indicates that courts have generally construed those words, as used in current Rule 12(e), to require a showing of both cause and prejudice before an untimely claim may be considered. The published proposed amendment substituted cause and prejudice for good cause, hoping to achieve greater clarity, but after reviewing public comments and further considering the issue, the advisory committee decided to retain the term "good cause," to avoid both any suggestion of a change from the current standard and arguments based on some constructions of "cause and prejudice" in other contexts, notably, the miscarriage of justice exception to this standard in habeas corpus jurisprudence.

The amended rule, like the current one, continues to make no reference to Rule 52 (providing for plain error review of defaulted claims), thereby permitting the courts of appeals to decide if and how to apply Rules 12 and 52 when arguments that should have been the subject of required Rule 12(b)(3) motions are raised for the first time on appeal.

(d) Insofar as the submitted amendment, at Rule 12(b)(3)(B), would now require a defendant to raise a claim of failure to state an offense before trial, the proposed Rule 12(c)(3)(B) provides that the standard of review when such a claim is untimely is not "good cause" (*i.e.*, cause and prejudice) but simply "prejudice." The advisory committee

> thought that this standard provides a sufficient incentive for a defendant to raise such a claim before trial, while also recognizing the fundamental nature of this particular claim and closely approximating current law, which permits review without a showing of "cause."

The committee note to accompany the proposed amendment to Rule 12 has been revised to make clear that the amendment is not intended to disturb the existing broad discretion of the trial judge to set, reset, or decline to reset deadlines for pretrial motions.

A conforming amendment to Rule 34 that omits language requiring a court to arrest judgment if "the indictment or information does not charge an offense" is also presented for publication.

Standing Committee Discussion of Proposed Amendments to Rule 12

Judge Raggi noted that the default deadline for filing the mandatory pretrial motions specified by Rule 12 would be at the start of trial when the jury is empaneled and jeopardy attaches when the jury is sworn.

Deputy Attorney General James Cole acknowledged that the Department of Justice originally prompted a review of this rule. He expressed the Department's gratitude to the Criminal Rules Advisory Committee and the Standing Committee for their years of hard work. He thought this proposed amendment would provide greater clarity regarding mandatory pretrial motions and therefore strongly supported it.

Another member wondered whether any defendant realistically would ever have "prejudice" resulting in the grant of relief after failing to file a mandatory pretrial motion. He discounted speculation that defense attorneys might try to "game" the system by failing to raise a defective indictment (*e.g.*, missing an element of the crime) until after jeopardy had attached. He pointed out that the attorney would risk the defect being noticed by the judge, and it could be cured by a proper instruction to the jury. Another member responded that a "prejudice" issue would likely arise on a post-trial motion only after jeopardy had attached and a defendant had been convicted. He predicted that district and appellate courts might arrive as to differing conclusions on what amounted to "prejudice" in the context of a new Rule 12.

A final concern was raised about how information protected by grand jury secrecy under Rule 6(e) might be raised in the context of a Rule 12 motion and how such information would relate to the mandatory filing and prejudice issues. The response of the reporters was that such information would be governed by the "reasonably available" standard of the rule. If such information was not "reasonably available" pretrial and was sufficiently important to the motion, a court would have discretion to hear the motion at issue at a later time.

Judge Raggi asked that former advisory committee chair Judge Richard Tallman and

current subcommittee chair Judge Morrison England be commended for their enormously important contributions to producing this final version of a proposed comprehensive amendment to Rule 12. Judge Sutton added his personal inclusion of Judge Raggi and Professors Sara Sun Beale and Nancy King to the list of those whom the Standing Committee should commend for their outstanding efforts. The members of the Standing Committee unanimously agreed.

Finally, Judge Sutton expressed his personal thanks to the chairs and members of the Criminal Rules Advisory Committee, whose efforts over the years had culminated in such a worthwhile compromise resolving the major prior difficulties and stumbling blocks to amending the rule.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendments to Rules 12 and 34 for transmission to the Judicial Conference for its approval.

B. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Rules 5 and 58 (Consular Notification)

The advisory committee also recommended approval of its second proposal to amend Rules 5 and 58 to provide for advice concerning consular notification, as amended following publication.

In 2010, the Justice Department, at the urging of the State Department, proposed amendments to Rules 5 and 58, the rules specifying procedures for initial proceedings in felony and misdemeanor cases respectively, to provide notice to defendants of consular notification obligations arising under Article 36 of the multilateral Vienna Convention on Consular Relations ("Vienna Convention"), as well as various bilateral treaties.

The first proposed amendments responding to this request were published for public comment and subsequently approved by the advisory committee, the Standing Committee, and the Judicial Conference. In April 2012, however, the Supreme Court returned the amendments to the advisory committee for further consideration.

At its April 2012 meeting, the advisory committee identified two possible concerns with the returned proposal: (1) perceived intrusion on executive discretion in conducting foreign affairs, both generally and specifically as it pertains to deciding how, or even if, to carry out treaty obligations; and (2) perceived conferral on persons other than the sovereign signatories to treaties – specifically, criminal defendants – of rights to demand compliance

with treaty provisions.[1]

The amendments were redrafted to respond to these concerns. The redrafted amendments were carefully worded to provide notice without any attending suggestion of individual rights or remedies. Indeed, the committee note emphasizes that the proposed rules do not themselves create any such rights or remedies. The Standing Committee approved publication of the redrafted amendments in June 2012.

Upon review of received public comments, as well as its own further consideration, the advisory committee made the following changes to the proposed amendments, none of which requires further publication.

The introductory phrase of submitted Rules 5(d)(1) and 58(b)(2) now provides for the specified advice to be given to all defendants, in contrast to the published rule, which had provided for consular notification to be given "if the defendant is held in custody and is not a United States citizen."

The change was made to avoid any implication that the arraigning judicial officer was required to ascertain a defendant's citizenship, an inquiry that could involve self-incrimination. Providing consular notice to all defendants without such an inquiry parallels Rule 11(b)(1)(O) (which the Supreme Court has now transmitted to Congress), which provides for all defendants to be given notice at the plea proceeding of possible immigration consequences without specific inquiry into their nationality or status in the United States.

As for the "in custody" requirement, interested parties disagreed as to when a defendant was "in custody" or "detained." Providing notice to all defendants at their initial appearance not only avoids the need to resolve this question, it avoids the need to consider a further notice requirement when defendants initially admitted to bail are subsequently remanded. Thus, while the advisory committee is mindful of the need to avoid adding unnecessary notice requirements to rules governing initial appearances, sentences, etc., it concluded, as now stated in the proposed committee note, that "the most effective and efficient method of conveying this [consular notification] information is to provide it to every defendant, without attempting to determine the defendant's citizenship."

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[1] Insofar as Article 36 of the Vienna Convention provides for signatory nations to advise detained foreign nationals of other signatory nations of an opportunity to contact their home country's consulate, litigation has not yet resolved whether such a provision gives rise to any individual rights or remedies. *See Sanchez-Llamas v. Oregon,* 548 U.S. 331 (2006) (holding that suppression of evidence was not appropriate remedy for failure to advise foreign national of ability to have consulate notified of arrest and detention regardless of whether Vienna Convention conferred any individual rights). Thus, the advisory committee concluded that the remand of the amendment proposal from the Supreme Court could be understood to suggest that the rule may have gotten ahead of settled law on this matter.

Standing Committee Discussion of the Proposed Amendments to Rules 5 and 58

Deputy Attorney General Cole again commended Judge Raggi and her committee for its excellent work in assisting to conform the Criminal Rules with the treaty obligations of the United States.

Another member inquired whether judges would simply read the materials specified in the rule as an advisory notice to the defendant or whether the judge's reading of the notice was intended to provoke a response from the defendant. There was unanimous agreement with the position of the advisory committee that all the amended rule proposals sought to accomplish was simply to give the notification required by the treaty to the defendant of a foreign nation.

Deputy Attorney General Cole observed that treaty violations occur mostly in state court. The amended Rules 5 and 58 thus provide a good model for the states. Professor Beale observed that 47 percent of defendants in the federal courts are not U.S. citizens. This rule provides the basis for the court to make a good record of the notification it has provided.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendments to Rules 5 and 58, as amended following publication, for transmission to the Judicial Conference for its approval.

C. Proposed Action: Transmission to the Judicial Conference of Proposed Technical and Conforming Amendment to Rule 6 (The Grand Jury)

The Office of the Law Revision Counsel informed the Administrative Office of a reorganization of chapter 15 of Title 50 of the United States Code. This revision has made incorrect a current statutory reference in Rule 6(e)(3)(D) to the code section defining counter-intelligence. The proposed amendment would simply substitute a reference to the correct section of Title 50 for the current one that is now obsolete.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendment to Rule 6 for transmission to the Judicial Conference for its approval.

INFORMATION ITEM

The Department of Justice has urged amendment of Criminal Rule 4 to facilitate service of process on foreign corporations. It submits that the current rule impedes prosecution of foreign corporations that have committed offenses punishable in the United States, but that cannot be served for lack of a last known address or principal place of business in the United States. It argues that this has created a "growing class of organizations, particularly foreign corporations" that have gained "an undue advantage" over the government relating to the initiation of criminal proceedings. The advisory committee

has referred the matter to a subcommittee for further study and report.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Steven M. Colloton, assisted by the advisory committee's reporter, Professor Catherine T. Struve (by telephone), presented the report of the Appellate Rules Advisory Committee. In conjunction with the Bankruptcy Rules Advisory Committee's proposal to amend Part VIII of the Bankruptcy Rules – the rules that govern appeals from bankruptcy court to a district court or bankruptcy appellate panel ("BAP") – the Appellate Rules Advisory Committee sought final approval of a proposed amendment to Appellate Rule 6 (concerning appeals to the court of appeals in a bankruptcy case).

ACTION ITEM

A. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Appellate Rule 6

The proposed amendment to Appellate Rule 6 would: (1) update that rule's cross-references to the Bankruptcy Part VIII Rules, (2) amend Rule 6(b)(2)(A)(ii) to remove an ambiguity dating from the 1998 restyling, (3) add a new Rule 6(c) to address permissive direct appeals from the bankruptcy court under 28 U.S.C. § 158(d)(2), and (4) revise Rule 6 to take account of the range of methods available now or in the future for dealing with the record on appeal.

Proposed Appellate Rule 6(c) would treat the record on direct appeals differently than existing Rule 6(b) treats the record on bankruptcy appeals from a district court or BAP. Rule 6(b) contains a streamlined procedure for redesignating and forwarding the record on appeal, because in the appeals covered by Rule 6(b), the appellate record already will have been compiled for purposes of the appeal to the district court or the BAP. In a direct appeal, the record generally will be compiled from scratch. The closest model for the compilation and transmission of the bankruptcy court record is the set of rules chosen by the Bankruptcy Rules Part VIII project for appeals from the bankruptcy court to the district court or the BAP. Thus, proposed Rule 6(c) incorporates the relevant Part VIII rules by reference while making some adjustments to account for the particularities of direct appeals to the court of appeals.

Both the Bankruptcy Rules Part VIII project and the project to revise Appellate Rule 6 have highlighted changes in the treatment of the record. The Appellate Rules were drafted on the assumption that the record on appeal would be available only in paper form. The proposed Part VIII Rules are drafted with a contrary presumption in mind: the default principle under those rules is that the record will be made available in electronic form. In revising Rule 6(b) and in drafting new Rule 6(c), the Appellate Rules Committee adopted language that can accommodate the various ways in which the lower-court record could be made available to the court of appeals – *e.g.*, in paper form, in electronic files that can be sent to the court of appeals, or by means of electronic links.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendments to Appellate Rule 6 for transmission to the Judicial Conference for its approval.

INFORMATION ITEMS

Two other matters were briefly discussed during Judge Colloton's presentation. First, a Standing Committee member inquired whether the conversion of page limits to word limits in appellate briefs may not have resulted in the filing of longer appellate briefs. Judge Colloton said a review of the matter would be part of the advisory committee's broader review of other page limits for appellate filings.

Another Standing Committee member prompted a general discussion of whether appellate courts are sufficiently responsive to the need for swift adjudication of proceedings under the Hague Convention on the Civil Aspects of International Child Abduction. While appellate consideration of stay applications is usually prompt, decisions on the merits can sometimes be delayed. The discussion resulted in a preliminary suggestion that a letter from the advisory committee chair to chief judges of the circuits might be appropriate to remind them of the Supreme Court's concern about expediting these cases as expressed in the opinions in *Chafin v. Chafin*, 133 S. Ct. 1017 (2013). Judge Colloton agreed to discuss the matter with Judge Sutton, bearing in mind that letters to chief judges from the committees should be employed sparingly if they are to have the desired effect.

Other members of the Standing Committee were of the view that despite the traditional reluctance of the rules committees to endorse provisions that require the expediting of specific classes of cases, stronger measures than mere exhortation may be required.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Eugene Wedoff, assisted by the advisory committee's two reporters, Professor Elizabeth Gibson and Professor Troy McKenzie, presented the report of the Bankruptcy Rules Advisory Committee. The advisory committee sought the Standing Committee's final approval and transmission to the Judicial Conference of most of the previously published items: the revision of the Part VIII Rules and amendments to 10 other rules and 5 official forms. Because the advisory committee made significant changes after publication to one set of published forms – the means test forms – it requested that those forms be republished.

The advisory committee also requested publication for public comment of (1) the remaining group of modernized forms for use in individual-debtor bankruptcy cases, and (2) a chapter 13 plan form and implementing rule amendments.

ACTION ITEMS

In brief, the actions sought from the Standing Committee by Judge Wedoff and his committee were as follows.

1. Approval for transmission to the Judicial Conference of amendments to Rules 1014, 7004, 7008, 7012, 7016, 7054, 8001-8028, 9023, 9024, 9027, and 9033, and Official Forms 3A, 3B, 6I, and 6J;

2. Approval for transmission to the Judicial Conference without publication of a conforming amendment to Official Form 23;

3. Approval for republication in August 2013 of amendments to the means test forms – Official Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2 – along with the initial publication of Official Form 22A-1Supp; and

4. Approval for publication in August 2013 of amendments to Rules 2002, 3002, 3007, 3012, 3015, 4003, 5005, 5009, 7001, 9006, and 9009, and Official Forms 101, 101A, 101B, 104, 105, 106Sum, 106A/B, 106C, 106D, 106E/F, 106G, 106H, 106Dec, 107, 112, 113, 119, 121, 318, 423, 427, 17A, 17B, and 17C.

Judge Wedoff first discussed the rules recommended for transmission to the Judicial Conference and the forms sought to be approved by the Judicial Conference with an effective date of December 1, 2013.

A. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Rules 7008, 7012, 7016, 9027, and 9033

Amendments to Rules 7008, 7012, 7016, 9027, and 9033 are proposed in response to *Stern v. Marshall*, 131 S. Ct. 2594 (2011). The Bankruptcy Rules follow the Judicial Code's division between core and non-core proceedings. The current rules contemplate that a bankruptcy judge's adjudicatory authority is more limited in non-core proceedings than in core proceedings. For example, parties are required to state whether they do or do not consent to final adjudication by the bankruptcy judge in non-core proceedings. There is no comparable requirement for core proceedings. *Stern*, which held that a bankruptcy judge did not have authority under Article III of the Constitution to enter final judgment in a proceeding deemed core under the Judicial Code, has introduced the possibility that such a proceeding may nevertheless lie beyond the power of a bankruptcy judge to adjudicate finally. In other words, a proceeding could be "core" as a statutory matter but "non-core" as a constitutional matter.

The proposals would amend the Bankruptcy Rules in three respects. First, the terms "core" and "non-core" would be removed from Rules 7008, 7012, 9027, and 9033 to avoid possible confusion in light of *Stern*. Second, parties in all bankruptcy proceedings (including removed actions) would be required to state whether they do or do not consent to entry of final orders or judgment by the bankruptcy judge. Third, Rule 7016, which governs pretrial

procedures, would be amended to direct bankruptcy courts to decide the proper treatment of proceedings.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendments to Rules 7008, 7012, 7016, 9027, and 9033 for transmission to the Judicial Conference for its approval.

B. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Rules 8001-8028 (Part VIII of the Bankruptcy Rules)

On Tuesday morning, June 4, 2013, the Standing Committee meeting opened with a presentation by Professor Elizabeth Gibson of the comprehensive set of amendments to Part VIII of the bankruptcy appellate rules. These amendments are designed with the goal of making the bankruptcy appellate rules consistent with the Federal Rules of Appellate Procedure. Professor Gibson observed that this project of conforming and restyling the bankruptcy appellate rules, which is now finally approaching conclusion, has been a lengthy one – ongoing since she first became a reporter to the Bankruptcy Rules Advisory Committee.

In summary, she noted that the proposed amendments to Rules 8001-8028 (Part VIII of the Bankruptcy Rules) constitute a comprehensive revision of the rules governing bankruptcy appeals to district courts, bankruptcy appellate panels, and with respect to some procedures, courts of appeals. This multi-year project attempted to bring the bankruptcy appellate rules into closer alignment with the Federal Rules of Appellate Procedure; to incorporate a presumption favoring the electronic transmission, filing, and service of court documents; and to adopt a clearer style. Existing rules have been reorganized and renumbered, some rules have been combined, and provisions of other rules have been moved to new locations. Much of the language of the existing rules has been restyled.

In general, the public comments reflected a positive response to the proposed revision of the Part VIII rules. Thus, the advisory committee unanimously voted to recommend them for final approval to the Standing Committee with the post-publication changes listed by Professor Gibson as follows:

Rule 8003. Several comments pointed out that the provision in subdivision (d) directing the clerk of the appellate court to docket an appeal "under the title of the bankruptcy court action" is unclear since "action" might refer to the overall bankruptcy case or to an adversary proceeding within the case. The advisory committee agreed that this was an instance in which the Appellate Rules' language needs to be modified for the bankruptcy context. It voted to change the wording in Rule 8003(d)(2) and the parallel provision in Rule 8004(c)(2) to "under the title of the bankruptcy case and the title of any adversary proceeding."

Rule 8004. The clerk of a BAP commented on Rule 8004(c)(3), which directed the dismissal of an appeal if leave to appeal is denied. She stated that appellants sometimes file a motion for leave to appeal when leave is not required and in that situation, although the

motion is denied, dismissal is not appropriate. The advisory committee voted to delete the sentence in question, which is not contained in either the current bankruptcy rule or the appellate rule from which the proposed rule is derived.

Rule 8005. Several comments questioned whether an election to have an appeal heard by the district court, rather than the BAP, must still be made by a statement in a separate document. At the spring meeting, the advisory committee approved for publication an amendment to the notice of appeal form, Official Form 17A, that will include a section for making an election under this rule. That form, which if approved will take effect on the same date as the rule, will clarify that the separate-document rule no longer applies.

The advisory committee agreed with one of the comments it received, which recommended that the BAP clerk notify the bankruptcy clerk if an appeal is transferred to the district court, and it voted to add a sentence to that effect in subdivision (b).

Rule 8007. The advisory committee agreed that the rule should be clarified to eliminate the possibility of filing a motion for a stay in the appellate court prior to the filing of a notice of appeal.

Rule 8013. One comment suggested that district courts be allowed to require a notice of motion in bankruptcy appeals if they otherwise follow that practice in their court. Another comment made a similar suggestion concerning proposed orders. The advisory committee agreed with these comments and added "Unless the court orders otherwise" to subdivision (a)(2)(D)(ii).

Rule 8016. Two comments raised questions about subdivision (f), which addressed the consequences of failing to file a brief on time. It was unclear why the provision was located in the rule governing cross-appeals, and it seemed to be inconsistent with a provision in Rule 8018. The advisory committee thought that the comments were well taken, and it voted to delete the subdivision.

Rule 8018. The advisory committee voted to reword the provision to clarify that dismissal of an appeal or cross-appeal can occur only upon motion of a party or on the court's own motion, after which the appellant would have an opportunity to respond.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendments to Rules 8001-8028 (Part VIII of the Bankruptcy Rules) for transmission to the Judicial Conference for its approval.

C. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Rule 1014(b)

Rule 1014(b) governs the procedure for determining where cases will proceed if petitions are filed in different districts by, against, or regarding the same debtor or related debtors. The rule currently provides that, upon motion, the court in which the first-filed petition is pending may determine – in the interest of justice or for the convenience of the parties – the district or districts in which the cases will proceed. Except as otherwise ordered

by that court, proceedings in the cases in the other districts "shall be stayed by the courts in which they have been filed" until the first court makes its determination.

The proposed amendment both clarifies and narrows the scope of the stay provision. The current rule applies a blanket rule that all the later-filed cases are stayed while the first court makes the venue determination. The amended rule would limit the stay to situations in which the first court finds that the rule in fact applies and that a stay is needed.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendment to Rule 1014(b) for transmission to the Judicial Conference for its approval.

D. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Rules 7004(e)

Rule 7004(e) governs the time during which a summons is valid after its issuance in an adversary proceeding. The current rule provides that a summons is valid so long as it is served within 14 days of its issuance. The advisory committee sought final approval of an amendment to reduce that period from 14 days to 7 days.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendment to Rules 7004(e), with a minor technical revision, for transmission to the Judicial Conference for its approval.

E. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Rules 7008 and 7054

Rules 7008(b) and 7054 would be amended to change the procedure for seeking attorney's fees in bankruptcy proceedings. The advisory committee proposed the amendments in order to clarify and to promote uniformity in the procedures for seeking an award of attorney's fees. Rule 7054 would be amended to include much of the substance of Civil Rule 54(d)(2). Rule 7008(b), which currently addresses attorney's fees, would be deleted. Just as the procedure for seeking attorney's fees in civil actions is governed exclusively by Civil Rule 54(d), Bankruptcy Rule 7054 would provide the exclusive procedure for seeking an award of attorney's fees in bankruptcy cases, unless the governing substantive law requires the fees to be proved at trial as an element of damages.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendments to Rules 7008 and 7054 for transmission to the Judicial Conference for its approval.

F. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Rules 9023 and 9024

Rule 9023, which governs new trials and amendment of judgments, and Rule 9024, which governs relief from judgments or orders, would be amended to include a cross-reference to proposed Rule 8008, which governs indicative rulings. The advisory committee

proposed these amendments in order to call attention at an appropriate place in the rules to that new bankruptcy appellate rule. Rule 8008 prescribes procedures for both the bankruptcy court and the appellate court when an indicative ruling is sought. It therefore incorporates provisions of both Civil Rule 62.1 and Appellate Rule 12.1. Because a litigant filing a post-judgment motion that implicates the indicative-ruling procedure will not encounter a rule similar to Civil Rule 62.1 in either the Part VII or Part IX rules, the advisory committee decided that it would be useful to include a cross-reference to Rule 8008 in the rules governing post-judgment motions.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendments to Rules 9023 and 9024 for transmission to the Judicial Conference for its approval.

G. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Official Forms 3A, 3B, 6I, and 6J

Official Forms 3A (Application for Individuals to Pay the Filing Fee in Installments), 3B (Application to Have the Chapter 7 Filing Fee Waived), 6I (Schedule I: Your Income), and 6J (Schedule J: Your Expenses) were selected for the initial-implementation stage of the Forms Modernization Project ("FMP") because they make no significant change in substantive content and simply replace existing forms that apply only in individual-debtor cases. The restyled forms all involve the debtors' income and expenses, and they are employed by a range of users: the courts, U.S. trustees, and case trustees, for varied purposes. The publication of these forms has already provided valuable feedback on the FMP approach to form design, and, if adopted, their use will provide a helpful gauge of the effectiveness of the FMP approach. Published last August, these forms were recommended by the advisory committee, unanimously, for final approval with some post-publication changes.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendments to Official Forms 3A, 3B, 6I, and 6J, with the post-publication changes, for transmission to the Judicial Conference for its approval.

H. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Official Form 23

The Supreme Court has approved an amendment to Rule 1007(b)(7), due to go into effect on December 1, 2013, that will relieve individual debtors of the obligation to file Official Form 23 if the provider of an instructional course concerning personal financial management directly notifies the court that the debtor has completed the course. The preface and instructions to Official Form 23 would be amended to reflect that change by stating that a debtor should file the form only if the course provider has not already notified the court of the debtor's completion of the course.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendments to Official Form 23 for transmission to the Judicial Conference for its approval without publication.

I. Proposed Action: Republication of Proposed Amendments to Official Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2, and Publication of Proposed New Official Form 22A-1Supp

Official Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2, the restyled means-test forms for individual debtors under chapters 7, 11, and 13, were published for comment in August 2012. Because it determined that the changes made in response to comments were of sufficient significance to require republication, the advisory committee requested that the newly revised means-test forms be published for public comment in August. Along with the republication of Official Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2, the advisory committee requested publication of new Official Form 22A-1Supp, which was created in response to the comments.

Action: The Standing Committee, by voice vote without objection, approved for publication the proposed amendments to Official Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2 as revised and Form 22A-1Supp.

J. Proposed Action: Publication of Rules Related to New Chapter 13 Plan Form

For the past two years, the advisory committee has studied the creation of a national plan form for chapter 13 cases. The twin goals of the project have been to bring more uniformity to chapter 13 practice and to simplify the review of chapter 13 plans by debtors, courts, trustees, and creditors. These goals are consistent with the Supreme Court's decision in *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010), which held that an order confirming a procedurally improper chapter 13 plan was nevertheless entitled to preclusive effect and that bankruptcy judges must independently review chapter 13 plans for conformity with applicable law.

The advisory committee approved a draft plan and accompanying rule amendments at its April 2013 meeting in New York. The advisory committee voted unanimously to seek publication of the form and rule amendments related to the new chapter 13 plan.

Professor Troy McKenzie led the following discussion, which summarizes the amendments to the Bankruptcy Rules that the Standing Committee voted to publish with the chapter 13 plan form.

Rule 2002. The Bankruptcy Rules describe categories of events that trigger the obligation to provide notice. Rule 2002 currently requires 28 days' notice of the time to file objections to confirmation of a chapter 13 plan as well as of the confirmation hearing itself. An amendment to Rule 3015(f), however, would require that objections to confirmation of a chapter 13 plan be filed at least seven days before the confirmation hearing.

The advisory committee proposed to retain the 28-day period for notice of a chapter 13 confirmation hearing, but to amend Rule 2002 in light of the new time period for

objections to confirmation in Rule 3015(f). Thus, Rule 2002 would require 21 days' notice of the time to file objections to confirmation.

Rule 3002. Rule 3002(a) would be amended to require a secured creditor, as well as an unsecured creditor, to file a proof of claim in order to have an allowed claim. In keeping with Code § 506(d), however, the amendment also makes clear that the failure of a secured creditor to file a proof of claim does not render the creditor's lien void. Second, Rule 3002(c) would be amended to change the calculation of the claims bar date. Rather than 90 days from the meeting of creditors under Code § 341, the bar date would be 60 days after the petition is filed in a chapter 13 case. The amended rule includes a provision for an extension of the bar date when the debtor has failed to provide in a timely manner a list of creditors' names and addresses for notice purposes. In response to concerns raised during a mini-conference held in Chicago, the amended rule would also include a longer bar date for certain supporting documents required for mortgage claims on a debtor's principal residence. With those claims, the mortgagee would be required to file a proof of claim within the 60-day period but would have an additional 60 days to file a supplement with the supporting documents.

Rule 3007. Objections to claims are governed by Rule 3007. Because the plan form permits some determinations regarding claims to be made through the plan, the advisory committee proposed an amendment to Rule 3007. The amended rule would provide an exception to the need to file a claim objection if a determination with respect to that claim is made in connection with plan confirmation under proposed Rule 3012.

Rule 3012. The proposed amendment would provide that the amount of a secured claim under Code § 506(a) may be determined in a proposed plan, subject to objection and resolution at the confirmation hearing. Current Rule 3012 provides for the valuation of a secured claim by motion only. The amended rule would also make clear that a chapter 13 plan would not control the amount of a claim entitled to priority treatment or the amount of a secured claim of a governmental unit.

Rule 3015. Rule 3015 governs the filing of a chapter 13 plan as well as plan modifications and objections to confirmation. The advisory committee proposed extensive amendments to the rule. They include an amended subdivision (c) requiring use of the official form for chapter 13 plans, a new 7-day deadline in Rule 3015(f) for filing objections to confirmation, and an amended subdivision (g) providing when the plan terms control over contrary proofs of claim. These amendments dovetail with proposed amendments to Rules 2002, 3007, and 3012.

Rule 4003. Code § 522(f) permits a debtor to avoid certain liens encumbering property that is exempt from the debtor's estate. Current Rule 4003(d) provides that lien avoidance under this section of the Code requires a motion. The plan form, however, would include a provision for a debtor to request lien avoidance as permitted by § 522(f). The advisory committee proposed an amendment to Rule 4003(d) to give effect to that part of the plan form.

Rule 5009. The advisory committee has included a procedure in proposed amended Rule 5009(d) for the debtor to obtain an order confirming that a secured claim has been satisfied. The language of the proposed amended rule permits the debtor to request entry of the order but does not specify the requirements for lien satisfaction.

Rule 7001. The advisory committee proposed to amend Rule 7001(2) so that determinations of the amount of a secured claim (under amended Rule 3012) and lien avoidance (under amended Rule 4003(d)) through a chapter 12 or chapter 13 plan would not require an adversary proceeding.

Rule 9009. In order to ensure use of the chapter 13 plan form without significant alterations, the advisory committee proposed an amendment to Rule 9009. Because greater uniformity is a principal goal of the plan form, proposed amended Rule 9009 would limit the range of permissible changes to forms.

Action: The Standing Committee, by voice vote without objection, approved for publication the proposed rule amendments related to the proposed new chapter 13 plan.

K. Proposed Action: Publication of Proposed Amendments to Rule 5005 (electronic signatures)

Rule 5005 governs the filing and transmittal of papers. The advisory committee sought approval to publish for public comment a proposed amendment to Rule 5005 that would create a national bankruptcy rule permitting the use of electronic signatures of debtors and other individuals who are not registered users of CM/ECF, without requiring the retention of the original document bearing a handwritten signature.

The proposed amendment to Rule 5005 would allow the electronic filing of a scanned signature page bearing the original signature of a debtor or other non-filing user to be treated the same as a handwritten signature without requiring the retention of hard copies of documents. The scanned signature page and the related document would have to be filed as a single docket entry to provide clarity about the document that was being attested to by the non-filing user. The amended rule would also provide that the user name and password of a registered user of the CM/ECF system would be treated as that individual's signature on electronically filed documents. The validity of a signature submitted under the amended rule would still be subject to challenge, just as is true for a handwritten signature.

The proposal incorporates recommendations from the Inter-Committee CM/ECF Subcommittee, which is chaired by Judge Michael A. Chagares and which includes members of the Standing Committee, each of the advisory committees, and the Committee on Court Administration and Case Management. As noted, the amended rule would provide that the scanned signature of a non-filing user, when filed as part of a single filing with an electronic document, serves as a signature to that document – without any requirement that the original be retained. The subcommittee noted that once a non-filing user has a signature scanned, there is no assurance that the signature was to the original document – and that concern is

greater than with a hard copy, as it is less likely that a hard copy signature page would be attached to a number of documents. The subcommittee suggested publishing two alternative solutions to this issue. The advisory committee agreed with that suggestion and presented its proposed amendment to the Standing Committee with the suggested alternatives incorporated.

One alternative would be for the rule to state that the filing by the registered user is deemed a certification that the scanned signature was part of the original document. The second alternative would keep the filing lawyer out of the matter of any attestation about authenticity by using notaries public for that purpose. The Standing Committee accepted the recommendation of the CM/ECF Subcommittee and the Bankruptcy Rules Advisory Committee that Rule 5005(a)(3)(B) be published with both alternatives. It was agreed that publication of proposed Rule 5005(a)(3)(B) with both alternatives would allow careful public consideration of the problem of assuring that scanned signatures are a part of the original document. It would assure input from interested and knowledgeable members of the public on how best to protect against the possible misuse of electronic signatures.

Judges Fitzwater and Sutton again reminded the Standing Committee that the Evidence Rules Advisory Committee is hosting a technology symposium in Portland, Maine in October 2013, which would provide another forum to solicit public comment on alternative methods to verify electronic signatures.

Judge Chagares noted that the CM/ECF Subcommittee will examine whether there are other technology issues related to the Next Generation of CM/ECF that should be addressed across all the sets of rules. Professor Capra, the reporter to the subcommittee, will work with the advisory committee reporters to identify rules affected by electronic filing and CM/ECF. If common issues arise across the different sets of rules, a model might be developed for the sake of uniformity.

Action: The Standing Committee, by voice vote without objection, approved publication of the proposed amendment to Rule 5005, including an invitation for comment on the proposed alternative methods for assuring that a signature is part of the original document.

L. Proposed Action: Publication of Proposed Amendments to Rule 9006(f)

Rule 9006(f), which is modeled on Civil Rule 6(d), provides three additional days for a party to act "after service" if service is made by mail or under Civil Rule 5(b)(2)(D), (E), or (F). At the January 2013 meeting, the Standing Committee approved for publication a proposed amendment to Civil Rule 6(d) that would clarify that only the party that is served by mail or under the specified provisions of Civil Rule 5 – and not the party making service – is permitted to add three days to any prescribed period for taking action after service is made. Because Rule 9006(f) contains the same potential ambiguity as current Civil Rule 6(d), the advisory committee requested approval to publish a parallel amendment of the bankruptcy rule.

Action: The Standing Committee, by voice vote without objection, approved publication of the proposed amendments to Rule 9006(f).

M. Proposed Action: Publication of Official Form 113 (new national Chapter 13 form)

The advisory committee recommended publication for public comment of a national plan form for chapter 13 cases. As described above in Item J, the plan form is the product of more than two years of study and consultation by the advisory committee.

The plan form includes ten parts. Beginning with a notice to interested parties (Part 1), the plan form covers: the amount, source, and length of the debtor's plan payments (Part 2); the treatment of secured claims (Part 3); the treatment of the trustee's fees, administrative claims, and other priority claims (Part 4); the treatment of unsecured claims not entitled to priority (Part 5); the treatment of executory contracts and unexpired leases (Part 6); the order of distribution of payments by the trustee (Part 7); the revesting of property of the estate with the debtor (Part 8); and nonstandard plan terms (Part 9). Part 10 is the signature box.

The plan form contains a number of significant features. First, it permits a debtor to propose to limit the amount of a secured claim (Part 3, § 3.2), to avoid certain liens as provided by the Bankruptcy Code (Part 3, § 3.4), and to include nonstandard terms that are not part of – or that deviate from – the official form (Part 9). In order to make any of these particular terms effective, however, the debtor must clearly indicate in Part 1 that the plan includes one or more of them by marking the appropriate checkbox. Thus, the face of the document will put the court, the trustee, and creditors on notice that the plan contains terms that may require additional scrutiny. Second, the plan form makes clear when it will control over a creditor's contrary proof of claim. For example, a debtor may propose to limit the amount of a nongovernmental secured claim under Code § 506(a) because the collateral securing it is worth less than the claim. The proposed amount of the secured claim would be binding, subject to a creditor's objection to the plan and a final determination of the issue in connection with plan confirmation. Otherwise, a creditor's proof of claim will control the amount and treatment of the claim, subject to a claim objection.

The treatment of nonstandard plan provisions has been a concern during the process of drafting the plan. As described earlier, Part 1 requires the debtor to indicate whether the plan form includes nonstandard terms. In order to give further assurance that the debtor has filed a plan form that otherwise adheres to the official form, the plan's signature box includes a certification to that effect. Thus, the plan form requires that the debtor's attorney (or the debtor, if pro se) must certify by signing the plan that all of its provisions are identical to the official form, except for nonstandard provisions located in Part 9.

Action: The Standing Committee, by voice vote without objection, approved publication of Official Form 113 (new national chapter 13 plan form).

N. Proposed Action: Publication of Individual Debtor Forms

The advisory committee requested publication of the following individual debtor forms to be effective December 2015:

101	Voluntary Petition for Individuals Filing for Bankruptcy
101A	Initial Statement About an Eviction Judgment Against You
101B	Statement About Payment of an Eviction Judgment Against You
104	List in Individual Chapter 11 Cases of Creditors Who Have the 20 Largest Unsecured Claims Against You and Are Not Insiders
105	Involuntary Petition Against an Individual
106Sum	Summary of Your Assets and Liabilities and Certain Statistical Information
106A/B	Schedule A/B: Property
106C	Schedule C: The Property You Claim as Exempt
106D	Schedule D: Creditors Who Hold Claims Secured by Property
106E/F	Schedule E/F: Creditors Who Have Unsecured Claims
106G	Schedule G: Executory Contracts and Unexpired Leases
106H	Schedule H: Your Codebtors
106Dec	Declaration About an Individual Debtor's Schedules
107	Statement of Financial Affairs for Individuals Filing for Bankruptcy
112	Statement of Intention for Individuals Filing Under Chapter 7
119	Bankruptcy Petition Preparer's Notice, Declaration, and Signature
121	Statement About Your Social Security Numbers
318	Order of Discharge
423	Certification About a Financial Management Course
427	Cover Sheet for Reaffirmation Agreement

The advisory committee also requested approval to publish for comment an instruction booklet for individuals.

Although the normal effective date for official bankruptcy forms published in 2013 would be December 1, 2014, Judge Wedoff noted that the effective date for the restyled individual-debtor forms that will be initially published this summer will be delayed at least until December 1, 2015, in order to permit them to go into effect at the same time as the restyled forms for non-individual cases.

Action: The Standing Committee, by voice vote without objection, approved publication of the Individual Debtor Forms, along with an instruction booklet for individuals.

O. Proposed Action: Publication of Official Forms 17A, 17B, and 17C

The advisory committee proposed publishing Official Forms 17A, 17B, and 17C, in connection with the revision of Part VIII of the Bankruptcy Rules, which govern bankruptcy appeals. Form 17A would be an amended and renumbered notice-of-appeal form, and Forms 17B and 17C would be new.

Proposed Form 17A would include in the Notice of Appeal a section for the appellant's optional statement of election to have the appeal heard by the district court rather than by the bankruptcy appellate panel. It would only be applicable in districts for which appeals to a bankruptcy appellate panel have been authorized.

New Form 17B – the Optional Appellee Statement of Election to Proceed in the District Court – would be the form that an appellee would file if it wanted the appeal to be heard by the district court and the appellant or another appellee did not make that election.

New Form 17C – Certificate of Compliance with Rule 8015(a)(7)(B) or 8016(d)(2) – would provide a means for a party to certify compliance with the provisions of the bankruptcy appellate rules that prescribe limitations on brief length based on number of words or lines of text (the "type-volume limitation"). It is based on Appellate Form 6, which implements the parallel provisions of Appellate Rule 32(a)(7)(B).

The advisory committee sought approval for publication this summer so that the proposed amendments would be scheduled to take effect December 1, 2014, the same effective date as is anticipated for the revised Part VIII rules.

<u>Action</u>: The Standing Committee, by voice vote without objection, approved publication of Official Forms 17A, 17B, and 17C.

REPORT OF THE ADMINISTRATIVE OFFICE

Benjamin Robinson gave a short report on recent activity by the Rules Committee Support Office (RCSO) to deal with the expected flood of public comments arising from the publication of the proposed amendments to the Civil Rules and Bankruptcy Rules in August 2013. He stated that 250 public comments had been received after the January 2013 meeting of the Standing Committee and were being held for filing during the comment period. These showed some earmarks of an organized letter writing campaign and more were expected.

After consulting with the Administrative Conference of the United States and others heavily involved in rule-making activities, Mr. Robinson worked with the webmasters and designers of regulations.gov – a website currently used by more than 30 departments and 150 agencies for their rulemaking activities. As a result of these efforts, on August 15, 2013, the RCSO will activate a website on regulations.gov that will allow the electronic filing and docketing of comments on proposed rules. This new system should add to the transparency and realtime accessibility of public comments to the committees, their reporters, and the general public.

CONCLUDING REMARKS

Judge Sutton confirmed with Judge Campbell that one of the public hearings on the proposed Civil Rules would take place on Thursday, January 9, 2014. Attendance by members of the Standing Committee is encouraged but not required. Mr. Robinson noted that the RCSO would attempt to make the hearing available in courthouses through video conference and otherwise by teleconference. Judge Sutton confirmed that the Standing Committee will meet on Friday, January 10. The Standing Committee dinner will be Thursday evening, January 9. Judge Sutton then thanked everyone for the productive meeting and declared it adjourned.

NEXT MEETING

The Standing Committee will hold its next meeting in Phoenix, Arizona on January 9 and 10, 2014.

Agenda E-19 (Summary)
Rules
September 2013

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

1. Approve the proposed amendment to Appellate Rule 6, and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law. . . . . pp. 2-4

2. a. Approve the proposed amendments to Bankruptcy Rules 1014, 7004, 7008, 7012, 7016, 7054, 8001–8028, 9023, 9024, 9027, and 9033, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and

   b. Approve the proposed revisions of Official Bankruptcy Forms 3A, 3B, 6I, 6J, 6 Summary, 23, and 27, to take effect on December 1, 2013. . . . . pp. 4-12

3. Approve the proposed amendments to Criminal Rules 5, 6, 12, 34, and 58, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law. . . . . pp. 25-29

4. Approve the proposed amendments to Evidence Rules 801(d)(1)(B) and 803(6)–(8), and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law. . . . . pp. 29-32

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

- Federal Rules of Bankruptcy Procedure.. . . . . pp. 12-17
- Federal Rules of Civil Procedure.. . . . . pp. 18-25

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

Agenda E-19
Rules
September 2013

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure (the "Committee") met on June 3-4, 2013. All members attended.

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

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

NOTICE
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Office; Peter G. McCabe, the Administrative Office's Assistant Director for Judges Programs; Andrea L. Kuperman, Chief Counsel to the Rules Committees; Bridget M. Healy, Scott Myers, and James H. Wannamaker III, Attorneys in the Administrative Office's Bankruptcy Judges Division; and Dr. Joe Cecil, Senior Research Associate, Federal Judicial Center. Stuart F. Delery, Principal Deputy Assistant Attorney General for the Civil Division, and Theodore Hirt, J. Christopher Kohn, Elizabeth J. Shapiro, and Allison Stanton attended on behalf of the Department of Justice. Also in attendance were Judge Michael A. Chagares, member of the Advisory Committee on Appellate Rules and chair of the inter-committee CM/ECF subcommittee; Judge Paul W. Grimm (by telephone), member of the Advisory Committee on Civil Rules; and Judge John G. Koeltl (by telephone), member of the Advisory Committee on Civil Rules.

FEDERAL RULES OF APPELLATE PROCEDURE

Rule Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules submitted a proposed amendment to Rule 6, with a recommendation that it be approved and transmitted to the Judicial Conference. The proposed amendment was circulated to the bench, bar, and public for comment in August 2012.

Rule 6 concerns appeals to the courts of appeals in bankruptcy cases. The proposed amendment would (1) update cross-references to Part VIII of the Bankruptcy Rules; (2) amend Rule 6(b)(2)(A)(ii) to remove an ambiguity dating from the 1998 restyling; (3) add a new Rule 6(c) to address permissive direct appeals from the bankruptcy court under 28 U.S.C. § 158(d)(2); and (4) revise Rule 6 to take account of the range of methods available now or in the future for dealing with the record on appeal.

The current Appellate Rules do not expressly address permissive direct appeals from a bankruptcy court to a court of appeals under 28 U.S.C. § 158(d)(2). When section 158(d)(2) was enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), the advisory committee decided that no immediate action was warranted because BAPCPA established interim procedures for administering the new direct appeals mechanism. Some of those interim procedures were displaced by the 2008 addition of subdivision (f) in Bankruptcy Rule 8001, making desirable an amendment specifying how the Appellate Rules apply to direct appeals under § 158(d)(2).

Proposed Rule 6(c) would treat the record on direct appeals from a bankruptcy court differently than existing Rule 6(b) treats the record on bankruptcy appeals from a district court or bankruptcy appellate panel. Rule 6(b) contains a streamlined procedure for redesignating and forwarding the record on appeal because in appeals covered by Rule 6(b), the appellate record already will have been compiled for purposes of the appeal to the district court or the bankruptcy appellate panel. In a direct appeal, however, the record is generally compiled from scratch. The closest model for the compilation and transmission of the bankruptcy court record appears in Part VIII of the Bankruptcy Rules, which addresses appeals from the bankruptcy court to the district court or the bankruptcy appellate panel. Proposed Rule 6(c) would therefore incorporate the relevant Part VIII rules by reference, while making some adjustments to account for the particularities of direct appeals to the court of appeals.

The effort to revise Appellate Rule 6 and an effort to revise Part VIII of the Bankruptcy Rules with respect to appeals, discussed *infra*, highlight changes in the treatment of the record. The Appellate Rules were drafted on the assumption that the record on appeal would be available only in paper form. In contrast, Part VIII of the Bankruptcy Rules has been drafted with the

default principle that the record will be made available in electronic form. In revising Rule 6(b) and in drafting new Rule 6(c), the advisory committee was mindful of the shift to electronic filing and adopted language that accommodates the various ways in which the lower court record could be made available to the court of appeals. Such language is particularly salient in the case of proposed Rule 6(c) because it would incorporate by reference the Bankruptcy Rules that deal with the record on appeal.

Following publication of the proposed changes to Rule 6, the advisory committee received one comment, submitted by a bankruptcy judge, which the advisory committee added to its agenda for future consideration. The advisory committee, however, decided to make no change to the proposal as published.

The Committee concurred with the advisory committee's recommendation.

> **Recommendation:** That the Judicial Conference approve the proposed amendment to Appellate Rule 6, and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

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

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 1014, 7004, 7008, 7012, 7016, 7054, 8001–8028, 9023, 9024, 9027, and 9033, and Official Forms 3A, 3B, 6I, 6J, 6 Summary, 23, and 27, with a recommendation that they be approved and transmitted to the Judicial Conference. Except as noted below, the proposed amendments were circulated to the bench, bar, and public for comment in August 2012.

Rule 1014

Rule 1014(b) governs the procedure for determining where cases will proceed if petitions are filed in different districts by, against, or regarding the same debtor or related debtors. The current rule provides that, upon motion, the court in which the first-filed petition is pending may determine–in the interest of justice or for the convenience of the parties–the district or districts in which the cases will proceed. Other courts must stay proceedings in later-filed cases until the first court makes its determination, unless that court orders otherwise.

The proposed amendment would provide that proceedings in subsequently filed cases are stayed only upon order of the court in which the first-filed petition is pending and expands the list of persons entitled to receive notice of a motion in the first court for a determination of where the related cases should proceed. The amendment states more clearly what event triggers the stay of proceedings in the court in which a subsequent petition is filed. The current rule has led to uncertainty about whether the stay goes into effect immediately upon the filing of the second petition or only upon the filing of a motion to determine where the cases should proceed. Rather than selecting either of these options, the advisory committee decided that an order by the first court should be required. That requirement would eliminate any uncertainty about whether a stay was in effect. It would also permit a judicial determination–not just a party's assertion–that the rule applies and that a stay of other proceedings is needed.

Four sets of comments were submitted. After considering all of the comments, the advisory committee unanimously voted to approve the amendments to Rule 1014(b) with one wording change.

Rule 7004(e)

Rule 7004(e) governs the time during which a summons is valid after its issuance in an adversary proceeding. The proposed amendment would shorten that period from 14 days to 7. The concern prompting the amendment is that a 14-day delay before service of a summons may unduly limit the defendant's time to answer, which is calculated under Rule 7012 from the date the summons is issued and not–as is the case under the Civil Rules–the date it is served. Because summonses are routinely issued electronically and served by mail (as permitted under Rule 7004(b)), a 7-day service window is sufficient.

The advisory committee received four comments, each of which raised essentially the same issue: that a 7-day window to serve a summons may be too short in some circumstances. For three reasons, the advisory committee concluded that the concerns raised by the comments did not justify altering or abandoning the amendment to Rule 7004(e). First, the principal concern expressed by the comments–that a 7-day service window might be insufficient in particular circumstances–had been contemplated by the advisory committee. Those circumstances were considered to be infrequent and, if they did arise, were thought to be best handled through a request under Rule 9006(b) for an enlargement of the time to serve the summons. In response to the comments, language was added to the Committee Note highlighting the availability of an enlargement of time under Rule 9006(b).

Second, the alternative approaches to service of summonses offered by the commenters would require significant changes to the Bankruptcy Rules. The advisory committee sought to make the least disruptive change that would ensure sufficient time to serve and respond to a summons.

Third, the published amendment's 7-day time to serve a summons, although less than the 14-day period under the current rule, is close to the 10-day period that prevailed before it was lengthened by the Time Computation Project. The comments suggest that further study may be warranted with respect to harmonizing the Bankruptcy and Civil Rules on issuance and service of a summons and complaint. But that project is beyond the scope of the published amendment. The Committee approved the amendment to Rule 7004(e) with a minor stylistic change to the text.

Rules 7008, 7012, 7016, 9027, and 9033

The proposed amendments to Rules 7008, 7012, 7016, 9027, and 9033 respond to the Supreme Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011). The Bankruptcy Rules follow the Judicial Code's division between core and non-core proceedings. The current rules contemplate that a bankruptcy judge's adjudicatory authority is more limited in non-core proceedings than in core proceedings. For example, parties are required to state whether they consent to final adjudication by the bankruptcy judge in non-core proceedings. There is no comparable requirement for core proceedings. *Stern* held that a bankruptcy judge did not have authority under Article III of the Constitution to enter final judgment in a proceeding deemed core under the Judicial Code. In other words, a proceeding could be "core" as a statutory matter but "non-core" as a constitutional matter.

The proposed amendments would alter the Bankruptcy Rules in three respects. First, the terms core and non-core would be removed from Rules 7008, 7012, 9027, and 9033, to avoid possible confusion in light of *Stern*. Second, parties in all bankruptcy proceedings (including removed actions) would be required to state whether they consent to entry of a final order or judgment by the bankruptcy judge. Third, Rule 7016, which governs pretrial procedures, would

be amended to direct bankruptcy courts to decide the proper treatment of proceedings. The advisory committee received eight comments that were largely supportive of the proposals. After reviewing the comments, the advisory committee decided unanimously to recommend approval of the proposals as published.

Rules 7008(b) and 7054

The proposed amendments to these rules would change the procedure for seeking attorney's fees in bankruptcy proceedings, bringing the Bankruptcy Rules into closer alignment with the Civil Rules. Rule 7054 would be amended to include much of the substance of Civil Rule 54(d)(2). Rule 7008(b), which currently addresses attorney's fees, would be deleted. The amendments are intended to eliminate a potential trap for an attorney, particularly one familiar with the Civil Rules, who might overlook the requirement in Rule 7008(b) to plead a request for attorney's fees as a claim in the complaint, answer, or other pleading. As under the Civil Rules, the procedure for seeking an award of attorney's fees would be governed exclusively by Rule 7054, unless the governing substantive law requires the fees to be proved at trial as an element of damages. The advisory committee received two comments, one of which addressed a sentence in Rule 7054(b)(1) that was not proposed for amendment and the other of which expressed support for the amendments. The advisory committee unanimously approved the amendments as published.

Rules 8001–8028 (Part VIII of the Bankruptcy Rules)

The proposed amendments to Part VIII of the Bankruptcy Rules–the rules governing appeals to district courts and bankruptcy appellate panels–are the product of a multi-year project to (1) bring the bankruptcy appellate rules into closer alignment with the Federal Rules of

Appellate Procedure; (2) incorporate a presumption favoring the electronic transmission, filing, and service of court documents; and (3) adopt a clearer and simpler style.

Fourteen sets of comments were submitted in response to the publication of these rules. Many of the comments were lengthy and detailed, and provided suggestions on issues of style, organization, and substance. In considering the comments, the advisory committee was guided by the goal of maintaining close adherence to the Federal Rules of Appellate Procedure, except where those rules are incompatible with bankruptcy appeals. It recommended postponing for future consideration a number of suggestions that would change existing practice or raise policy issues requiring careful consideration. In general, the comments displayed a positive response to the proposed revision of the Part VIII rules, and the advisory committee voted to recommend them for final approval with some post-publication changes to address issues raised by the comments.

Rules 9023 and 9024

The proposed amendments to Rule 9023, which governs new trials and amendment of judgments, and Rule 9024, which governs relief from a judgment or order, would add references to the procedure in proposed new Rule 8008 governing indicative rulings. Rule 8008 prescribes procedures for both the bankruptcy court and the appellate court when an indicative ruling is sought. It therefore incorporates provisions of both Civil Rule 62.1 and Appellate Rule 12.1. Because a litigant filing a post-judgment motion that implicates the indicative ruling procedure will not encounter a rule similar to Civil Rule 62.1 in either the Part VII or Part IX rules, the advisory committee decided that it would be useful to include a cross-reference to Rule 8008 in the rules governing post-judgment motions.

The advisory committee received one comment suggesting that a cross-reference to another rule is more appropriately placed in a Committee Note than in the rule itself. The advisory committee did not think it appropriate to amend a Committee Note without an amendment to the rule. Furthermore, several comments on the Part VIII Rules suggested that it is helpful to have a cross-reference to another rule included in the rule text, rather than in the Committee Note, because Committee Notes are not always published in rule compilations and are often overlooked. The advisory committee unanimously approved the amendments as published.

Official Forms

Official Forms 3A, 3B, 6I, and 6J are four of the nine restyled forms that were published in August 2012 for use in individual-debtor cases. The forms are the initial product of the forms modernization project, a multi-year endeavor of the advisory committee, working in conjunction with the Federal Judicial Center and the Administrative Office. The dual goals of the project are to improve the official bankruptcy forms and to improve the interface between the forms and the latest technology. Working incrementally, the project participants made a preliminary decision that the debtor forms for individuals and entities other than individuals should be separated, recognizing that individuals are generally less sophisticated than other entities and may not have the assistance of counsel. Accordingly, the forms for individual debtors are designed to use language more common in ordinary conversation, to employ more intuitive layouts, and to include clearer instructions and examples within the forms and more extensive separate instruction sheets.

Official Forms 3A (Application for Individuals to Pay the Filing Fee in Installments), 3B (Application to Have the Chapter 7 Filing Fee Waived), 6I (Schedule I: Your Income), and 6J

(Schedule J: Your Expenses) were selected for the initial implementation stage of the project because the proposed revisions to those forms include no significant change in substantive content and would simply replace existing forms that apply only in individual debtor cases. The advisory committee felt that publication of these forms and their use after adoption would be useful in gauging the effectiveness of the forms modernization project.

The advisory committee received comments on the forms modernization project in general, as well as comments on specific forms. Several post-publication changes are discussed in the advisory committee's report to the Committee. Despite receiving some negative commentary about the project as a whole, the advisory committee determined–after revisiting the purpose and principles underlying the project–that the guiding principles behind the project outweighed the negative commentary. The advisory committee unanimously decided that the project should proceed, but made some changes to address specific issues raised by the comments. Following its approval of Official Forms 3A, 3B, 6I, and 6J, the Committee approved technical and conforming amendments to Official Forms 6 Summary and 27 to update cross-references to line numbers on Official Forms 6I and 6J that will be changed if the proposed amendments to those forms are adopted.

Official Form 23 is the form an individual debtor files in a chapter 7 or chapter 13 case to certify that he or she has completed a post-petition instructional course concerning personal financial management–a requirement for receiving a discharge. The Supreme Court has approved an amendment to Rule 1007(b)(7), due to go into effect on December 1, 2013, that will relieve individual debtors of the obligation to file Official Form 23 if the provider of an instructional course concerning personal financial management directly notifies the court that the debtor has completed the course. The preface and instructions to Official Form 23 are amended

to reflect that change by stating that a debtor should file the form only if the course provider has not already notified the court of the debtor's completion of the course. Because the amendment is conforming in nature, publication for public comment was unnecessary.

The advisory committee recommended that all proposed amendments to the Official Forms go into effect on December 1, 2013.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference:

a. Approve the proposed amendments to Bankruptcy Rules 1014, 7004, 7008, 7012, 7016, 7054, 8001-8028, 9023, 9024, 9027, and 9033, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and

b. Approve the proposed revisions of Official Bankruptcy Forms 3A, 3B, 6I, 6J, 6 Summary, 23, and 27, to take effect on December 1, 2013.

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

Rules Approved for Publication and Comment

The advisory committee submitted proposed amendments to Rules 2002, 3002, 3007, 3012, 3015, 4003, 5005, 5009, 7001, 9006, 9009, and Official Forms 17A, 17B, 17C, 22A-1, 22A-1Supp, 22A-2, 22B, 22C-1, 22C-2, 101, 101A, 101B, 104, 105, 106 Summary, 106A/B, 106C, 106D, 106E/F, 106G, 106H, 106Dec, 107, 112, 113, 119, 121, 318, 423, and 427, with a request that they be published for comment. The Committee approved the advisory committee's recommendation.

<u>Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009</u>

For the past two years, a working group created by the advisory committee has been working on drafting a national chapter 13 plan form. The twin goals of the project have been to

bring more uniformity to chapter 13 practice and to simplify the review of chapter 13 plans by debtors, courts, trustees, and creditors.

A draft of the plan form, together with proposed amendments to Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, were presented for preliminary review at the advisory committee's Fall 2012 meeting. Further feedback was obtained at a mini-conference held in January 2013 that was attended by a broad cross-section of groups interested in the chapter 13 process. Based on the input received during the mini-conference, the working group prepared a revised plan form and accompanying rules amendments, which were approved by the advisory committee. The proposed rules amendments are necessary to implement the national plan form– they require use of the plan form and establish the authority needed to implement some of the form's provisions.

Rule 5005

Rule 5005 governs the filing and transmittal of papers. For some time, the advisory committee has been considering the advisability of proposing a national bankruptcy rule that would permit the use of electronic signatures of debtors and other individuals who are not registered users of CM/ECF ("non-filing users"), without requiring the retention of the original document bearing a handwritten signature.

Currently, under Rule 5005(b)(2), the use of electronic signatures in bankruptcy courts is governed by local rules. Many of the local rules are based on Model Rules on Electronic Case Filing that were approved by the Judicial Conference in 2001 and modified in 2003. JCUS-SEP/OCT 01, p. 50; JCUS-SEP 03, p. 15. The Model Rules impose a duty on the filing user (i.e., the attorney) to maintain in paper form any electronically filed document that requires the original signature of someone other than the filing user, but the Model Rules do not specify a

retention period, leaving that decision up to each district. Many bankruptcy courts require the attorney to preserve original documents bearing the debtor's signature for a specified period of time, but the retention periods vary. Some bankruptcy courts do not require retention of the original document at all so long as the attorney submits a declaration manually signed by the debtor attesting to the truth of the information electronically filed. In other courts, retention is not required if the attorney files a scanned image of the signature page with the debtor's original signature.

The issue of the retention of documents that are filed electronically with a non-filing user's signature was brought to the advisory committee's attention by several interested parties, namely, the forms modernization project, the Department of Justice, and the Judicial Conference Committee on Court Administration and Case Management ("CACM"). CACM requested that the Rules Committees consider developing a national rule on electronic signatures and retention of paper documents containing original signatures.

After much study and consideration of several options allowing for the use of electronic signatures without a retention requirement, the advisory committee's subcommittee on technology and cross border insolvency developed the proposed amendment to Rule 5005(a) that would allow scanned signatures of debtors and other non-filing users to be treated the same as handwritten signatures without retention of hard copies of documents. The Committee approved publication of the proposed amendment to Rule 5005(a) along with alternative language suggested by the inter-committee CM/ECF subcommittee, which is comprised of representatives from each advisory committee as well as a member from CACM.

Rule 9006

Rule 9006(f)–modeled on Civil Rule 6(d)–provides 3 additional days for a party to act "after service" if service is made by mail or under Civil Rule 5(b)(2)(D), (E), or (F). The Committee has approved for publication a proposed amendment of Civil Rule 6(d) that would clarify that only the party that is served by mail or under the specified provisions of Civil Rule 5–and not the party making service–is permitted to add 3 days to any prescribed period for acting after service is made. Because Rule 9006(f) contains the same potential ambiguity as current Civil Rule 6(d), the advisory committee proposed a parallel amendment to Rule 9006(f).

Official Forms

Official Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2–the proposed restyled means-test forms for individual debtors under chapters 7, 11, and 13–were published for comment in August 2012. The advisory committee received 18 comments, as well as a single informal but detailed review of the forms. The comments ranged from suggestions and critiques regarding wording, style, and formatting of the forms to questions about interpretations of the Bankruptcy Code and case law. After careful consideration, the advisory committee determined that several of the comments were well taken and made changes to the proposed forms. Because it determined that the changes made were of sufficient significance to require republication, the advisory committee sought republication of Official Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2, and publication of Official Form 22A-1Supp, which was created in response to the comments.

Official Form 113 is the national chapter 13 plan form. As discussed above, it is the product of more than two years of study and consultation by a working group of the advisory committee. The 10-part plan form includes a number of significant features. First, it permits a debtor to propose to limit the amount of a secured claim, to avoid certain liens as provided by the

Bankruptcy Code, and to include nonstandard terms that are not part of–or that deviate from–the official form. In order to make any of these particular terms effective, however, the debtor must clearly indicate in Part 1 that the plan includes one or more of them by marking the appropriate checkbox. Thus, the face of the document will put the court, the trustee, and creditors on notice that the plan contains terms that may require additional scrutiny. Second, the plan form makes clear when it will control over a creditor's contrary proof of claim. For example, a debtor may propose to limit the amount of a non-governmental secured claim under § 506(a) because the collateral securing it is worth less than the claim. The proposed amount of the secured claim would be binding, subject to a creditor's objection to the plan and a final determination of the issue in connection with plan confirmation. Otherwise, a creditor's proof of claim will control the amount and treatment of the claim, subject to a claim objection. The plan form requires that the debtor's attorney (or the debtor, if pro se) certify by signing the plan that all of its provisions are identical to the official form, except for the nonstandard provisions located in Part 9 of the plan.

The advisory committee anticipates that the plan form would go into effect at the same time as the implementing rules amendments. Accordingly, a request for final approval of the plan form following publication would be timed to match the progress of the proposed amendments to Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009.

As discussed above, the advisory committee–through the forms modernization project–is engaged in a multi-year undertaking to restyle the Official Forms and to improve the interface between the forms and available technology. The project includes the creation of a separate set of forms for use in cases involving individual debtors; the first group of those forms was published for comment in August 2012. Proposed Official Forms 101, 101A, 101B, 104, 105,

106 Summary, 106A/B, 106C, 106D, 106E/F, 106G, 106H, 106Dec, 107, 112, 119, 121, 318, 423, and 427 are the remaining 20 restyled individual-debtor forms. An instruction booklet for individuals is also included for comment. These forms would become effective on December 1, 2015–the same effective date that is anticipated for the restyled forms for non-individual cases.

Official Forms 17A, 17B, and 17C are part of the comprehensive revision of the bankruptcy appellate rules and would become effective on the same date proposed for the Part VIII Rules–December 1, 2014. Proposed Official Form 17A is an amended and renumbered notice of appeal form, and includes a section for the appellant's optional statement of election to have the appeal heard by the district court rather than by the bankruptcy appellate panel. It would only be applicable in districts that have authorized appeals to a bankruptcy appellate panel. Inclusion of the statement in the notice of appeal will ensure compliance with the statutory requirement that an appellant make its election to have the district court hear its appeal "at the time of filing the appeal." 28 U.S.C. § 158(c)(1)(A). Proposed Official Form 17B is a new form that an appellee would file if it wanted the appeal to be heard by the district court and the appellant or another appellee did not make that election. To comply with section 158(c)(1)(B), the appellee would have to file the form within 30 days after service of the notice of appeal. Proposed Official Form 17C provides a means for a party to certify compliance with the provisions of the bankruptcy appellate rules that prescribe limitations on brief length based on number of words or lines of text (the "type-volume limitation"). It is based on Appellate Form 6, which implements the parallel provisions of Appellate Rule 32(a)(7)(B).

FEDERAL RULES OF CIVIL PROCEDURE

Rules Approved for Publication and Comment

The advisory committee submitted proposed amendments to Rules 1, 4, 16, 26, 30, 31, 33, 34, 36, 37, and 84, with a request that they be published for comment. The Committee approved the advisory committee's recommendation.

Rules 1, 4, 16, 26, 30, 31, 33, 34, 36, and 37

Following the advisory committee's May 2010 Conference on Civil Litigation held at Duke University School of Law, a subcommittee was formed to implement and oversee work on ideas resulting from that conference. A package of rules amendments was developed through numerous subcommittee conference calls, a mini-conference held in October 2012, and discussions during advisory committee and Committee meetings. The proposed rules amendments are aimed at reducing the costs and delays in civil litigation, increasing realistic access to the courts, and furthering the goals of Rule 1 "to secure the just, speedy, and inexpensive determination of every action and proceeding."

The rules proposals are grouped into three sets. The first set seeks to improve early and effective judicial case management. The second seeks to enhance the means of keeping discovery proportional to the action. The third set encourages cooperation.

The case management proposals reflect a perception that the early stages of litigation often take far too long. Rule 4(m) would be revised to shorten the time to serve the summons and complaint from 120 days to 60 days. The amendment responds to the commonly expressed view that four months to serve the summons and complaint is too long. Concerns that circumstances occasionally justify a longer time to effect service are met by the court's duty,

already established in Rule 4(m), to extend the time if the plaintiff shows good cause for the failure to serve within the specified time.

Rule 16(b)(2) would be amended to provide that the judge must issue the scheduling order within the earlier of 90 days after any defendant has been served or 60 days after any defendant has appeared, which is 30 days shorter than the current rule. A provision would be added that allows the judge to extend the time on finding good cause for delay.

Present Rule 16(b)(1)(B) authorizes issuance of a scheduling order after receiving the parties' Rule 26(f) report or after consulting "at a scheduling conference by telephone, mail, or other means." An actual conference by direct communication among the parties and court is very valuable; "mail, or other means" are not effective. The proposed amendment would therefore strike the rule language indicating that a scheduling conference may be by "telephone, mail, or other means." The Committee Note would make it clear instead that a conference can be held face-to-face, by telephone, or by other means of simultaneous communication. Judges would still have authority to issue a scheduling order without a conference where a conference is unnecessary.

Three subjects are proposed for addition to the Rule 16(b)(3) list of permitted contents of a scheduling order. Two of them are also proposed for the list of subjects in a Rule 26(f) discovery plan. The proposals would permit a scheduling order and discovery plan to provide for the preservation of electronically stored information and to include agreements reached under Rule 502 of the Federal Rules of Evidence. Each is an attempt to remind litigants that these are useful subjects for discussion and agreement.

A new Rule 16(b)(3)(v) would be added that permits a scheduling order to "direct that before moving for an order relating to discovery the movant must request a conference with the

court." Many courts already have local rules or practices similar to this proposal. Experience with these rules shows that an informal pre-motion conference with the court often resolves a discovery dispute without the need for a motion, briefing, and order. The practice has proved highly effective in reducing cost and delay.

A variety of proposals were considered that would allow discovery requests to be made before the parties' Rule 26(f) conference. The purpose of the early requests would not be to start the time to respond, but to facilitate the conference by allowing consideration of actual requests, providing a focus for specific discussion. In the end, the proposal has been limited to Rule 34 requests to produce. A corresponding change would be made in Rule 34(b)(2)(A), setting the time to respond to a request delivered under Rule 26(d)(2) within 30 days after the parties' first Rule 26(f) conference.

As mentioned above, the proposed rules amendments also seek to promote responsible use of discovery proportional to the needs of the case. Some changes would address the scope of discovery directly by amending Rule 26(b)(1), and by promoting clearer responses to Rule 34 requests to produce. Others would reduce the presumptive limits on the number and duration of depositions and the number of interrogatories, and for the first time add a presumptive limit of 25 to the number of requests for admission other than those that relate to the genuineness of documents. Another would explicitly recognize the present authority to issue a protective order specifying an allocation of expenses incurred by discovery.

There are several proposed amendments to Rule 26(b)(1). In particular, the scope of discovery defined in Rule 26(b)(1) would be revised by transferring the proportionality analysis required by present Rule 26(b)(2)(C)(iii) to become a direct component of the scope of discovery, requiring that discovery be –

> proportional to the needs of the case considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

A corresponding change would be made to Rule 26(b)(2)(C)(iii) by amending it to cross-refer to Rule 26(b)(1): the court would remain under a duty to limit the frequency or extent of discovery that exceeds these limits, on motion or on its own. As amended, Rule 26(b)(1) would no longer permit a court to order discovery of "any matter relevant to the subject matter involved in the action"; the advisory committee determined that discovery should be limited to the parties' claims or defenses. Finally, the last sentence of Rule 26(b)(1), which currently provides that "[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence," would be revised. That provision was added in 1946 to overcome decisions that denied discovery on the ground that it would not be admissible in evidence, and it was revised in 2000 to emphasize that information must be relevant to be discoverable. Despite the 2000 amendment, many cases continue to cite the "reasonably calculated" language as though it defines the scope of discovery. The proposed amendment would offset the risk that the provision addressing admissibility might defeat the limits otherwise defining the scope of discovery by revising the sentence to read: "Information within this scope of discovery need not be admissible in evidence to be discoverable."

Another proposal would add to Rule 26(c)(1)(B) an explicit recognition of the authority to enter a protective order that allocates the expenses of discovery. This power is implicit in present Rule 26(c), and is being exercised with increasing frequency. The amendment would make the power explicit, preempting arguments that it is not conferred by the present rule text.

The proposals would reduce the presumptive limits on discovery in Rules 30, 31, and 33, and for the first time add presumptive numerical limits to Rule 36 requests to admit. The

proposals would reduce the presumptive limit on the number of depositions from 10 to 5, and reduce the presumptive duration from 1 day of 7 hours to 1 day of 6 hours. Rules 30 and 31 would continue to provide that the court must grant leave to take more or longer depositions "to the extent consistent with Rule 26(b)(1) and (2)." The proposals would reduce the presumptive number of Rule 33 interrogatories from 25 to 15, and add a presumptive limit of 25 to Rule 36 requests to admit.

In developing the package of rules amendments, the advisory committee was mindful that discovery costs can be imposed by those asked to respond, not only by those who make requests. These concerns underlie Rule 34 proposals addressing objections and actual production. Objections would be addressed in two ways. First, Rule 34(b)(2)(B) would require that the grounds for objecting to a request be stated with specificity. Second, Rule 34(b)(2)(C) would require that an objection "state whether any responsive materials are being withheld on the basis of that objection." This provision responds to the common lament that Rule 34 responses often begin with a laundry list of objections, then produce volumes of materials, and finally conclude that the production is made subject to the objections. The requesting party is left uncertain whether anything actually has been withheld. Providing that information could aid the decision whether to contest the objections.

Actual production would be addressed by new language in Rule 34(b)(2)(B) and a corresponding addition to Rule 37(a)(3)(B)(iv). The new provision would direct that a party electing to produce must state that copies will be produced, and it would direct that production be completed no later than the time for inspection stated in the request or a later reasonable time stated in the response. The Committee Note would recognize the value of "rolling production"

that makes production in discrete batches. Rule 37 would be amended by adding authority to move for an order to compel production if a party fails to produce documents.

Finally, cooperation among litigants is vitally important. The proposed amendment to Rule 1 would recognize that the parties share responsibility for achieving the high aspirations expressed in that rule. As amended, Rule 1 would encourage cooperation by lawyers and parties directly, and would provide useful support for judicial efforts to elicit better cooperation when the lawyers and parties fall short.

Rule 37(e)

Also at the Duke Conference, many expressed concerns regarding preservation and sanctions, and it was suggested that the advisory committee develop a rule to address these concerns. The advisory committee's discovery subcommittee quickly began work on these issues. At its Fall 2012 meeting, the advisory committee voted to recommend that proposed revisions to Rule 37(e), regarding failure to preserve discoverable information, be published for public comment. With the understanding that actual publication would not occur until August 2013, the advisory committee submitted a preliminary draft to the Committee at its January 2013 meeting. The resulting discussion was useful and provided the advisory committee with valuable feedback. The discovery subcommittee and the advisory committee made further revisions based on that discussion and presented a revised proposal at the Committee's June 2013 meeting.

The fundamental thrust of the proposal is to amend the rule to address the overbroad preservation many litigants and potential litigants feel they have to undertake to ensure they would not later face sanctions. The proposed amendment would focus on sanctions rather than attempting directly to regulate the details of preservation. It would provide guidance for a court by recognizing that a party that adopts reasonable and proportionate preservation measures

should not be subject to sanctions. In addition, the amendment would provide a uniform national standard for the level of culpability needed to impose sanctions. Ordinarily, sanctions could be imposed only on finding that the party acted willfully or in bad faith and caused substantial prejudice. The proposed amendment therefore rejects the view adopted in some cases that sanctions should be permitted for negligence. *See, e.g.*, *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99 (2d Cir. 2002). But sanctions also would be available in exceptional cases in which a party's actions irreparably deprive another party of any meaningful opportunity to present or defend against the claims in the litigation.

Rules 4 and 84

The advisory committee has determined that abrogation of Rule 84 and all the Civil Rules Official Forms is advisable. This recommendation follows months of gathering information about how forms are generally used and whether they provide meaningful help to attorneys and pro se litigants. The proposed amendments would abrogate Rule 84 and the Official Forms, and amend Rule 4(d)(1)(D) to append present Forms 5 and 6 to Rule 4.

A subcommittee made up of representatives from the advisory committees determined that, for various reasons, there is no need to establish uniform approaches to illustrative forms across the different advisory committees. The Advisory Committee on Civil Rules then created a Rule 84 subcommittee to carry forward consideration of the illustrative civil forms.

After carefully studying the issue and considering several alternatives, the subcommittee came to believe that the best approach is to abrogate Rule 84 and the Official Forms. Several considerations support this conclusion. One is the amount of work that would be required to assume full responsibility for maintaining the forms. Another is that many alternative sources provide excellent forms, including the Administrative Office. Attempting to modernize the

existing forms would be an imposing and precarious undertaking, which does not seem worthwhile at this time and would divert the advisory committee's attention from other worthy projects. The advisory committee's work has suggested that few if any lawyers consult the forms when drafting complaints.

Two forms required special consideration. Rule 4(d)(1)(D) requires that a request to waive service of process be made by Form 5. The Form 6 waiver of service of summons is not required, but is closely tied to Form 5. Accordingly, the advisory committee determined that Forms 5 and 6 should be preserved by amending Rule 4(d)(1)(D) to attach them to Rule 4.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted proposed amendments to Rules 5, 6, 12, 34, and 58, with a recommendation that they be approved and transmitted to the Judicial Conference.

Rules 12 and 34

Rule 12(b)(3) lists motions that must be made before trial. In 2006, the Department of Justice asked the advisory committee to consider amending Rule 12(b)(3)(B) to require defendants to raise before trial any objection that the indictment failed to state an offense. The current rule allows a motion raising failure to state an offense at any time, in part because such a failure was thought to be jurisdictional. The Supreme Court's decision in *United States v. Cotton,* 535 U.S. 625, 629-31 (2002), which held that "failure to state an offense" is not a jurisdictional defect, undercuts this rationale.

The proposal evolved substantially between 2006 and publication in 2011. In particular, the advisory committee decided to address other features of Rule 12's treatment of pretrial

motions in general, as well as what standard courts should apply when a defendant fails to raise a "failure to state an offense" claim before trial. The advisory committee's undertaking to amend Rule 12 sparked extensive discussion, within both the advisory committee and the Committee. The advisory committee submitted three separate amendment proposals to the Committee, and the last proposal was published in 2011.

The advisory committee received 47 pages of public comments. As a result of those comments, as well as its own further review, the advisory committee made revisions, none of which requires republication. The revised proposed amendments to Rule 12 would effect the original request by the Justice Department, clarify other aspects of the rule, and take into account public comments. A conforming amendment to Rule 34 would omit language requiring a court to arrest judgment if "the indictment or information does not charge an offense."

Rules 5 and 58

In 2010, the Department of Justice, at the urging of the State Department, proposed amendments to Rules 5 and 58, the rules specifying procedures for initial proceedings in felony and misdemeanor cases respectively, to provide for notice to defendants of consular notification obligations arising under Article 36 of the multilateral Vienna Convention on Consular Relations as well as various bilateral treaties.

The proposed amendments were circulated to the bench, bar, and public for comment in August 2010. Following publication, the proposed amendments were approved by the Committee and the Judicial Conference in 2011, and subsequently transmitted to the Supreme Court.

The amendments submitted to the Court in 2011 included not only a change to Rule 5(d) and Rule 58 providing for consular notice, but also a change to Rule 5(c) to clarify where an

initial appearance should take place for persons who have been surrendered to the United States pursuant to an extradition treaty. In April 2012, the Court approved and transmitted to Congress only the proposed amendment to Rule 5(c). It then recommitted the remainder of the proposed amendments to the advisory committee for further consideration.

The advisory committee subsequently identified two possible concerns with the returned proposal: (1) perceived intrusion on executive discretion in conducting foreign affairs, both generally and specifically, as it pertains to deciding how, or even if, to carry out treaty obligations; and (2) perceived conferral on persons other than the sovereign signatories to treaties–specifically, criminal defendants–of the right to demand compliance with treaty provisions.

The amendments were redrafted to respond to these concerns. The redrafted amendments were carefully worded to provide notice without any suggestion of individual rights or remedies. The revised Committee Note emphasizes that the proposed rules do not themselves create any such rights or remedies. The revised proposals were published in August 2012.

Upon review of the comments it received as well as its own further consideration, the advisory committee made slight changes to the proposed amendments, none of which requires further publication. First, the introductory phrase of Rules 5(d)(1) and 58(b)(2) would provide for the specified advice to be given to *all* defendants. As published, the rule provided for consular notification to be given "if the defendant is held in custody and is not a United States citizen." The change was made in response to comments that suggested that the language as published could be construed to require the arraigning judicial officer to ascertain a defendant's citizenship, an inquiry that could involve self-incrimination. Providing consular notice to all defendants without such an inquiry would parallel an amendment to Rule 11(b)(1)(O) currently

pending before Congress, which provides for all defendants to be given notice at sentencing of possible immigration consequences without specific inquiry into their nationality or status in the United States.

In addition, those who provided comments disagreed as to when a defendant was "in custody" or "detained." Providing notice to all defendants at their initial appearance would not only avoid the need to resolve this question, but also avoid the need to consider a further notice requirement when defendants initially admitted to bail are subsequently remanded. While the advisory committee is mindful of the need to avoid adding unnecessary notice requirements, it concluded, as now stated in the proposed Committee Note, that "the most effective and efficient method of conveying this [consular notification] information is to provide it to every defendant, without attempting to determine the defendant's citizenship."

Second, at the suggestion of the Committee's reporter, the advisory committee removed from the published Committee Note a reference to the Code of Federal Regulations, which might become outdated if the regulation were revised.

Rule 6

As of May 20, 2013, chapter 15 of title 50, United States Code, was reorganized into four new chapters. As a result, the statutory reference in Criminal Rule 6(e)(3)(D) to the section of the Code defining counterintelligence–50 U.S.C. § 401a–is no longer correct because section 401a is recodified as 50 U.S.C. § 3003. The proposed amendment to Rule 6 would correct the citation. Because the amendment is technical, publication for public comment is unnecessary.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed amendments to Criminal Rules 5, 6, 12, 34, and 58, and transmit them to the

Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

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

FEDERAL RULES OF EVIDENCE

Rules Recommended for Approval and Transmission

The Advisory Committee on Evidence Rules submitted proposed amendments to Rules 801(d)(1)(B) and 803(6)–(8), with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments were circulated to the bench, bar, and public for comment in August 2012.

Rule 801(d)(1)(B)

Rule 801(d)(1)(B) is the hearsay exemption for certain prior consistent statements. It would be amended to provide that prior consistent statements are admissible under the hearsay exemption whenever they are admissible to 1) rebut an express or implied charge that the witness recently fabricated testimony or acted from a recent improper influence or motive in so testifying; and 2) rehabilitate the declarant's credibility when attacked on another ground. Under the current rule, some prior consistent statements offered to rehabilitate a witness's credibility–specifically, those that rebut a charge of recent fabrication or improper influence or motive–are also admissible substantively under the hearsay exemption. In contrast, other rehabilitative statements–such as those that explain a prior inconsistency or rebut a charge of faulty recollection–are admissible only for rehabilitation but not substantively. There are two basic practical problems in distinguishing between substantive and credibility use as applied to prior consistent statements. First, the necessary jury instruction is almost impossible for jurors to follow. The prior consistent statement is of little or no use for credibility unless the jury believes

it to be true. Second, and for similar reasons, the distinction between substantive and impeachment use of prior consistent statements has little, if any, practical effect. The proponent has already presented the witness's trial testimony, so the prior consistent statement ordinarily adds no real substantive effect to the proponent's case.

In reviewing the comments received after publication, the advisory committee found two concerns that merited revisions. First, there was a concern that the phrase "otherwise rehabilitates the declarant's credibility as a witness" is vague and could lead courts to admit prior consistent statements that heretofore have been excluded for any purpose. Second, there was a more specific concern that the language could lead courts to admit prior consistent statements to rebut a charge that the witness had a motive to falsify, even though the statement was made *after* the motive to falsify arose, thereby undermining the Supreme Court's ruling in *Tome v. United States,* 513 U.S. 150 (1995).

In response to these concerns, the advisory committee voted, with one member dissenting, to approve proposed Rule 801(d)(1)(B) with a slight modification that the advisory committee believes would preserve the *Tome* pre-motive rule as to consistent statements offered to rebut a charge of bad motive, while properly expanding substantive admissibility to statements offered to rehabilitate on other grounds (such as to explain an inconsistency or to rebut a charge of bad memory). The proposed Committee Note has also been slightly modified to account for the modification to the proposed amendment to the rule.

Rules 803(6)–(8)

The recent restyling project uncovered an ambiguity in Rules 803(6)–(8)–the hearsay exceptions for business records, absence of business records, and public records. The exceptions originally set out admissibility requirements and then provided that a record that met these

requirements, although hearsay, was admissible "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." The rules did not specifically state which party had the burden of showing trustworthiness or untrustworthiness.

The restyling project initially sought to clarify this ambiguity by providing that a record that fit the other admissibility requirements would satisfy the exception if "the opponent does not show that" the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. But the proposal did not go forward as part of restyling because research into the case law indicated that the change would be substantive. Most courts impose the burden of proving untrustworthiness on the opponent, but a few require the proponent to prove that a record is trustworthy. Because the proposal would have changed the law in at least one court, it was deemed substantive and therefore outside the scope of the restyling project.

When the Committee approved the restyled Evidence Rules, several members suggested that the advisory committee consider making a minor substantive change to clarify that the opponent has the burden of showing untrustworthiness. The proposed amendments do just that. They would clarify that the *opponent* has the burden of showing that the proffered record is untrustworthy.

The advisory committee received two comments on the published proposals. Both approved of the text, but one comment argued that the proposed Committee Notes use language that fails to track the text of the rules. Slight changes have been made to each of the three Committee Notes to address this concern.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed amendments to Evidence Rules 801(d)(1)(B) and 803(6)–(8), and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

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

Respectfully submitted,

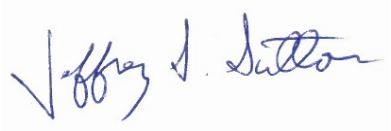

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Appendix A – Proposed Amendment to the Federal Rules of Appellate Procedure
Appendix B – Proposed Amendments to the Federal Rules of Bankruptcy Procedure
Appendix C – Proposed Amendments to the Federal Rules of Criminal Procedure
Appendix D – Proposed Amendments to the Federal Rules of Evidence

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

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EVIDENCE RULES

MEMORANDUM

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

From: Honorable Steven M. Colloton, Chair
Advisory Committee on Federal Rules of Appellate Procedure

Date: May 8, 2013

Re: Report of the Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on April 22 and 23, 2013, in Washington, DC. The Committee gave final approval to proposed amendments to Appellate Rule 6.

* * * * *

II. Action Item for Final Approval: Proposed Amendments to Appellate Rule 6

As discussed in the report of the Bankruptcy Rules Committee, that Committee seeks final approval of proposed amendments to Part VIII of the Bankruptcy Rules – the rules that govern appeals from bankruptcy court to a district court or bankruptcy appellate panel ("BAP"). In tandem with that project, the Appellate Rules Committee seeks final approval of proposed amendments to Appellate Rule 6 (concerning appeals to the court of appeals in a bankruptcy case).

The proposed amendments to Appellate Rule 6 (which are set out in the enclosure to this report) would (1) update that Rule's cross-references to the Bankruptcy Part VIII Rules, (2) amend Rule 6(b)(2)(A)(ii) to remove an ambiguity dating from the 1998 restyling, (3) add a new Rule 6(c) to address permissive direct appeals from the bankruptcy court under 28 U.S.C. § 158(d)(2), and (4) revise Rule 6 to take account of the range of methods available now or in the future for dealing with the record on appeal.

The Appellate Rules do not expressly address permissive direct appeals from a bankruptcy court to a court of appeals under 28 U.S.C. § 158(d)(2). When Section 158(d)(2) was enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), the Appellate Rules Committee decided that no immediate action was necessary, because BAPCPA established interim procedures for administering the new direct appeals mechanism. Some of those interim procedures were displaced by the 2008 addition of subdivision (f) in Bankruptcy Rule 8001. The Committee now considers it appropriate to specify how the Appellate Rules apply to direct appeals under Section 158(d)(2).

Proposed Appellate Rule 6(c) would treat the record on direct appeals differently than existing Rule 6(b) treats the record on bankruptcy appeals from a district court or BAP. Rule 6(b) contains a streamlined procedure for redesignating and forwarding the record on appeal, because in the appeals covered by Rule 6(b), the appellate record already will have been compiled for purposes of the appeal to the district court or the BAP. In a direct appeal, the record generally will be compiled from scratch. The closest model for the compilation and transmission of the bankruptcy court record is the set of rules chosen by the Bankruptcy Rules Part VIII project for appeals from the bankruptcy court to the district court or the BAP. Thus, proposed Rule 6(c) incorporates the relevant Part VIII rules by reference while making some adjustments to account for the particularities of direct appeals to the court of appeals.

Both the Bankruptcy Rules Part VIII project and the project to revise Appellate Rule 6 have highlighted changes in the treatment of the record. The Appellate Rules were drafted on the assumption that the record on appeal would be available only in paper form. The proposed Part VIII Rules are drafted with a contrary presumption in mind: The default principle under those Rules is that the record will be made available in electronic form. In revising Rule 6(b) and in drafting new Rule 6(c), the Appellate Rules Committee adopted language that can accommodate the various ways in which the lower-court record could be made available to the court of appeals – e.g., in paper form, in electronic files that can be sent to the court of appeals, or by means of electronic links. Such language seems advisable in the light of the shift to

electronic filing; and such language seems particularly salient in the case of proposed Rule 6(c) because that Rule will incorporate by reference the Part VIII Rules that deal with the record on appeal.

A. Text of proposed amendments and Committee Note

The Committee recommends final approval of the proposed amendments to Rule 6 as set out in the enclosure to this report.

B. Changes made after publication and comment

The Committee received one comment on the proposed amendments to Rule 6, from Judge S. Martin Teel, Jr., a United States Bankruptcy Judge in the District of Columbia. Judge Teel's suggestions are described in the enclosure to this report. The Committee decided that the suggestions warrant further study, but that it was not advisable to implement them in the context of the current proposal. Instead, the Committee added Judge Teel's suggestions to its agenda for future consideration. The Committee made no change in the proposal as published.

* * * * *

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

1 **Rule 6. Appeal in a Bankruptcy Case ~~From a Final~~**
2 **~~Judgment, Order, or Decree of a District~~**
3 **~~Court or Bankruptcy Appellate Panel~~**

4 **(a) Appeal From a Judgment, Order, or Decree of a**
5 **District Court Exercising Original Jurisdiction in a**
6 **Bankruptcy Case.** An appeal to a court of appeals
7 from a final judgment, order, or decree of a district
8 court exercising jurisdiction under 28 U.S.C. § 1334 is
9 taken as any other civil appeal under these rules.

10 **(b) Appeal From a Judgment, Order, or Decree of a**
11 **District Court or Bankruptcy Appellate Panel**
12 **Exercising Appellate Jurisdiction in a Bankruptcy**
13 **Case.**

14 (1) **Applicability of Other Rules.** These rules
15 apply to an appeal to a court of appeals under

---

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

16 28 U.S.C. § 158(d)(1) from a final judgment,
17 order, or decree of a district court or bankruptcy
18 appellate panel exercising appellate jurisdiction
19 under 28 U.S.C. § 158(a) or (b)~~. But there are 3~~
20 ~~exceptions~~, but with these qualifications:
21 (A) Rules 4(a)(4), 4(b), 9, 10, 11, ~~12(b)~~12(c),
22 13-20, 22-23, and 24(b) do not apply;
23 (B) the reference in Rule 3(c) to "Form 1 in the
24 Appendix of Forms" must be read as a
25 reference to Form 5; ~~and~~
26 (C) when the appeal is from a bankruptcy
27 appellate panel, ~~the term~~ "district court," as
28 used in any applicable rule, means
29 "appellate panel~~.~~"; and

30 (D) in Rule 12.1, "district court" includes a
31 bankruptcy court or bankruptcy appellate
32 panel.
33 (2) **Additional Rules.** In addition to the rules made
34 applicable by Rule 6(b)(1), the following rules
35 apply:
36 (A) **Motion for ~~r~~Rehearing.**
37 (i) If a timely motion for rehearing under
38 Bankruptcy Rule ~~8015~~ 8022 is filed,
39 the time to appeal for all parties runs
40 from the entry of the order disposing
41 of the motion. A notice of appeal filed
42 after the district court or bankruptcy
43 appellate panel announces or enters a
44 judgment, order, or decree – but
45 before disposition of the motion for

46 rehearing – becomes effective when
47 the order disposing of the motion for
48 rehearing is entered.
49 (ii) ~~Appellate review of~~ If a party intends
50 to challenge the order disposing of the
51 motion – or the alteration or
52 amendment of a judgment, order, or
53 decree upon the motion – then
54 ~~requires~~ the party, in compliance with
55 Rules 3(c) and 6(b)(1)(B), ~~to amend a~~
56 ~~previously filed notice of appeal. A~~
57 ~~party intending to challenge an altered~~
58 ~~or amended judgment, order, or decree~~
59 must file a notice of appeal or
60 amended notice of appeal. The notice
61 or amended notice must be filed

62 within the time prescribed by Rule 4 –
63 excluding Rules 4(a)(4) and 4(b) –
64 measured from the entry of the order
65 disposing of the motion.
66 (iii) No additional fee is required to file an
67 amended notice.
68 (B) **The ~~r~~Record on ~~a~~Appeal.**
69 (i) Within 14 days after filing the notice
70 of appeal, the appellant must file with
71 the clerk possessing the record
72 assembled in accordance with
73 Bankruptcy Rule ~~8006~~ 8009 – and
74 serve on the appellee – a statement of
75 the issues to be presented on appeal
76 and a designation of the record to be

77 certified and ~~sent~~ made available to
78 the circuit clerk.
79 (ii) An appellee who believes that other
80 parts of the record are necessary must,
81 within 14 days after being served with
82 the appellant's designation, file with
83 the clerk and serve on the appellant a
84 designation of additional parts to be
85 included.
86 (iii) The record on appeal consists of:
87 • the redesignated record as
88 provided above;
89 • the proceedings in the district
90 court or bankruptcy appellate
91 panel; and

92 • a certified copy of the docket
93 entries prepared by the clerk
94 under Rule 3(d).
95 (C) **~~Forwarding~~ Making the ~~r~~Record**
96 **Available.**
97 (i) When the record is complete, the
98 district clerk or bankruptcy-appellate-
99 panel clerk must number the
100 documents constituting the record and
101 ~~send~~ promptly make it available ~~them~~
102 ~~promptly to the circuit clerk together~~
103 ~~with a list of the documents~~
104 ~~correspondingly numbered and~~
105 ~~reasonably identified~~ to the circuit
106 clerk. ~~Unless directed to do so by a~~
107 ~~party or the circuit clerk~~ If the clerk

108 makes the record available in paper
109 form, the clerk will not send ~~to the~~
110 ~~court of appeals~~ documents of unusual
111 bulk or weight, physical exhibits other
112 than documents, or other parts of the
113 record designated for omission by
114 local rule of the court of appeals,
115 unless directed to do so by a party or
116 the circuit clerk. If ~~the exhibits are~~
117 unusually bulky or heavy exhibits are
118 to be made available in paper form, a
119 party must arrange with the clerks in
120 advance for their transportation and
121 receipt.
122 (ii) All parties must do whatever else is
123 necessary to enable the clerk to

124 assemble the record and ~~forward the~~
125 ~~record~~ make it available. When the
126 record is made available in paper
127 form, t~~T~~he court of appeals may
128 provide by rule or order that a certified
129 copy of the docket entries be ~~sent~~
130 made available in place of the
131 redesignated record~~, b~~. But any party
132 may request at any time during the
133 pendency of the appeal that the
134 redesignated record be ~~sent~~ made
135 available.

136 (D) **Filing the ~~r~~Record.** ~~Upon receiving the~~
137 ~~record — or a certified copy of the docket~~
138 ~~entries sent in place of the redesignated~~
139 ~~record — the circuit clerk must file it and~~

140 ~~immediately notify all parties of the filing~~
141 ~~date~~ When the district clerk or bankruptcy-
142 appellate-panel clerk has made the record
143 available, the circuit clerk must note that
144 fact on the docket. The date noted on the
145 docket serves as the filing date of the
146 record. The circuit clerk must immediately
147 notify all parties of the filing date.
148 **(c) Direct Review by Permission Under 28 U.S.C.**
149 **§ 158(d)(2).**
150 (1) **Applicability of Other Rules.** These rules
151 apply to a direct appeal by permission under 28
152 U.S.C. § 158(d)(2), but with these qualifications:
153 (A) Rules 3-4, 5(a)(3), 6(a), 6(b), 8(a), 8(c), 9-
154 12, 13-20, 22-23, and 24(b) do not apply;

155 (B) as used in any applicable rule, "district
156 court" or "district clerk" includes – to the
157 extent appropriate – a bankruptcy court or
158 bankruptcy appellate panel or its clerk; and
159 (C) the reference to "Rules 11 and 12(c)" in
160 Rule 5(d)(3) must be read as a reference to
161 Rules 6(c)(2)(B) and (C).
162 (2) **Additional Rules.** In addition, the following
163 rules apply:
164 (A) **The Record on Appeal.** Bankruptcy
165 Rule 8009 governs the record on appeal.
166 (B) **Making the Record Available.**
167 Bankruptcy Rule 8010 governs completing
168 the record and making it available.
169 (C) **Stays Pending Appeal.** Bankruptcy
170 Rule 8007 applies to stays pending appeal.

171 (D) **Duties of the Circuit Clerk.** When the
172 bankruptcy clerk has made the record
173 available, the circuit clerk must note that
174 fact on the docket. The date noted on the
175 docket serves as the filing date of the
176 record. The circuit clerk must immediately
177 notify all parties of the filing date.
178 (E) **Filing a Representation Statement.**
179 Unless the court of appeals designates
180 another time, within 14 days after entry of
181 the order granting permission to appeal, the
182 attorney who sought permission must file a
183 statement with the circuit clerk naming the
184 parties that the attorney represents on
185 appeal.

Committee Note

Subdivision (b)(1). Subdivision (b)(1) is updated to reflect the renumbering of 28 U.S.C. § 158(d) as 28 U.S.C. § 158(d)(1). Subdivision (b)(1)(A) is updated to reflect the renumbering of Rule 12(b) as Rule 12(c). New subdivision (b)(1)(D) provides that references in Rule 12.1 to the "district court" include – as appropriate – a bankruptcy court or bankruptcy appellate panel.

Subdivision (b)(2). Subdivision (b)(2)(A)(i) is amended to refer to Bankruptcy Rule 8022 (in accordance with the renumbering of Part VIII of the Bankruptcy Rules).

Subdivision (b)(2)(A)(ii) is amended to address problems that stemmed from the adoption — during the 1998 restyling project — of language referring to challenges to "an altered or amended judgment, order, or decree." Current Rule 6(b)(2)(A)(ii) states that "[a] party intending to challenge an altered or amended judgment, order, or decree must file a notice of appeal or amended notice of appeal ...." Before the 1998 restyling, the comparable subdivision of Rule 6 instead read "[a] party intending to challenge an alteration or amendment of the judgment, order, or decree shall file an amended notice of appeal ...." The 1998 restyling made a similar change in Rule 4(a)(4). One court has explained that the 1998 amendment introduced ambiguity into that Rule: "The new formulation could be read to expand the obligation to file an amended notice to circumstances where the ruling on the post-trial motion alters the prior judgment in an

insignificant manner or in a manner favorable to the appellant, even though the appeal is not directed against the alteration of the judgment." *Sorensen v. City of New York*, 413 F.3d 292, 296 n.2 (2d Cir. 2005). Though the *Sorensen* court was writing of Rule 4(a)(4), a similar concern arises with respect to Rule 6(b)(2)(A)(ii). Rule 4(a)(4) was amended in 2009 to remove the ambiguity identified by the *Sorensen* court. The current amendment follows suit by removing Rule 6(b)(2)(A)(ii)'s reference to challenging "an altered or amended judgment, order, or decree," and referring instead to challenging "the alteration or amendment of a judgment, order, or decree."

Subdivision (b)(2)(B)(i) is amended to refer to Rule 8009 (in accordance with the renumbering of Part VIII of the Bankruptcy Rules).

Due to the shift to electronic filing, in some appeals the record will no longer be transmitted in paper form. Subdivisions (b)(2)(B)(i), (b)(2)(C), and (b)(2)(D) are amended to reflect the fact that the record sometimes will be made available electronically.

Subdivision (b)(2)(D) sets the duties of the circuit clerk when the record has been made available. Because the record may be made available in electronic form, subdivision (b)(2)(D) does not direct the clerk to "file" the record. Rather, it directs the clerk to note on the docket the date when the record was made available and to notify the parties of that date, which shall serve as the date of filing the record for purposes of provisions in these Rules that calculate time from that filing date.

Subdivision (c). New subdivision (c) is added to govern permissive direct appeals from the bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2). For further provisions governing such direct appeals, see Bankruptcy Rule 8006.

Subdivision (c)(1). Subdivision (c)(1) provides for the general applicability of the Federal Rules of Appellate Procedure, with specified exceptions, to appeals covered by subdivision (c) and makes necessary word adjustments.

Subdivision (c)(2). Subdivision (c)(2)(A) provides that the record on appeal is governed by Bankruptcy Rule 8009. Subdivision (c)(2)(B) provides that the record shall be made available as stated in Bankruptcy Rule 8010. Subdivision (c)(2)(C) provides that Bankruptcy Rule 8007 applies to stays pending appeal; in addition, Appellate Rule 8(b) applies to sureties on bonds provided in connection with stays pending appeal.

Subdivision (c)(2)(D), like subdivision (b)(2)(D), directs the clerk to note on the docket the date when the record was made available and to notify the parties of that date, which shall serve as the date of filing the record for purposes of provisions in these Rules that calculate time from that filing date.

Subdivision (c)(2)(E) is modeled on Rule 12(b), with appropriate adjustments.

Changes Made After Publication and Comment

No changes were made after publication and comment.

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

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EVIDENCE RULES

MEMORANDUM

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

From: Honorable Eugene R. Wedoff, Chair
Advisory Committee on Federal Rules of Bankruptcy Procedure

Date: May 8, 2013

Re: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on April 2 and 3, 2013, in New York, New York, at the United States Bankruptcy Court. The draft minutes of that meeting accompany this report as Appendix C. The Committee's actions fall into three categories.

First, the Advisory Committee took action on the proposed rule and form amendments that were published for comment in August 2012. Forty-six comments were submitted in response to the publication, some of which addressed multiple rules and forms. The comments were considered in a series of subcommittee conference calls, at a meeting of the Forms Modernization Project, and in Committee discussions at the New York meeting. (The comments are summarized below, along with a discussion of the changes that the Committee made in response.) The Advisory Committee now seeks the Standing Committee's final approval and transmission to the Judicial Conference of most of the published items: the revision of the Part VIII rules and amendments to ten other rules and five official forms. Because the Committee made significant changes after publication to one set of published forms—the means test forms—it requests that those forms be republished.

* * * * *

Part II of this report discusses the action items, grouped as follows:

(A1) matters published in August 2012 for which the Advisory Committee seeks approval for transmission to the Judicial Conference—amendments to Rules 1014, 7004, 7008, 7012, 7016, 7054, 8001-8028, 9023, 9024, 9027, and 9033, and Official Forms 3A, 3B, 6I, and 6J;

(A2) a conforming amendment to Official Form 23, for which the Committee requests transmission to the Judicial Conference without publication;

(B1) amendments to Official Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2, for which the Committee seeks approval for republication in August 2013, along with the initial publication of Official Form 22A-1Supp; and

(B2) matters for which the Advisory Committee seeks approval for publication in August 2013—amendments to Rules 2002, 3002, 3007, 3012, 3015, 4003, 5005, 5009, 7001, 9006, and 9009, and Official Forms 101, 101A, 101B, 104, 106Sum, 106A/B, 106C, 106D, 106E/F, 106G, 106H, 106Dec, 107, 112, 113, 119, 121, 318, 423, 427, 17A, 17B, and 17C.

II. Action Items

A. Items for Final Approval

A1. Amendments Published for Comment in August 2012. **The Advisory Committee recommends that the proposed rule and form amendments that are discussed below be approved and forwarded to the Judicial Conference. It recommends that the amended forms take effect on December 1, 2013.** The text of the amended rules and forms is set out in Appendix A.

Action Item 1. Rules 7008, 7012, 7016, 9027, and 9033 would be amended in response to *Stern v. Marshall*, 131 S. Ct. 2594 (2011). The Bankruptcy Rules follow the Judicial Code's division between core and non-core proceedings. The current rules contemplate that a bankruptcy judge's adjudicatory authority is more limited in non-core proceedings than in core proceedings. For example, parties are required to state whether they do or do not consent to final adjudication by the bankruptcy judge in non-core proceedings. There is no comparable requirement for core proceedings. *Stern*, which held that a bankruptcy judge did not have authority under Article III of the Constitution to enter final judgment in a proceeding deemed core under the Judicial Code, has introduced the possibility that such a proceeding may nevertheless lie beyond the power of a bankruptcy judge to adjudicate finally. In other words, a proceeding could be "core" as a statutory matter but "non-core" as a constitutional matter.

The Advisory Committee proposed to amend the Bankruptcy Rules in three respects. First, the terms core and non-core would be removed from Rules 7008, 7012, 9027, and 9033 to avoid possible confusion in light of *Stern*. Second, parties in all bankruptcy proceedings (including removed actions) would need to state whether they do or do not consent to entry of final orders or judgment by the bankruptcy judge. Third, Rule 7016, which governs pretrial procedures, would be amended to direct bankruptcy courts to decide the proper treatment of proceedings.

The Advisory Committee received eight comments on all or part of these proposed amendments. In the main, the comments expressed support for the amendments but raised five issues:

(1) whether to retain the terms "core" and "non-core";

(2) whether references to the "bankruptcy court" in the published amendments should revert to the "bankruptcy judge," the term that is currently used;

(3) whether to provide procedures for treating as proposed findings and conclusions a bankruptcy judge's decision entered as a final order or judgment when that decision is later determined to be beyond the bankruptcy judge's final adjudicatory power;

(4) whether to require a statement as to consent when a litigant proceeds by motion before filing a formal pleading; and

(5) whether to provide that a litigant may consent to final adjudication by a bankruptcy judge with respect to part, but not the whole, of a proceeding.

After reviewing the comments, the Advisory Committee voted unanimously to recommend final approval of the published amendments. With respect to the first three issues raised by the comments, these points were thoroughly considered before publication of the amendments. The Advisory Committee did not find the comments to raise new concerns that would justify revisiting those issues. Issues (4) and (5), on the other hand, had not been considered previously. The Advisory Committee nevertheless concluded that the comments

raising those issues, although presenting possible suggestions for future rulemaking, did not require alteration of the published amendments. Similarly, the Advisory Committee concluded that a comment by the Bankruptcy Clerks Advisory Group regarding the requirement of service of notice by mail under current Rules 9027 and 9033 might be considered for future rulemaking but was beyond the scope of the *Stern*-related amendments. The comments are set out in more detail in Appendix A.

Action Item 2. Rules 8001-8028 (Part VIII of the Bankruptcy Rules) are the products of a comprehensive revision of the rules governing bankruptcy appeals to district courts, bankruptcy appellate panels, and, with respect to some procedures, courts of appeals. They result from a multi-year project to bring the bankruptcy appellate rules into closer alignment with the Federal Rules of Appellate Procedure; to incorporate a presumption favoring the electronic transmission, filing, and service of court documents; and to adopt a clearer style. Existing rules were reorganized and renumbered, some rules were combined, and provisions of other rules were moved to new locations. Much of the language of the existing rules was restyled.

Fourteen sets of comments were submitted in response to the publication of these rules. Many of the comments were lengthy and detailed. They demonstrated the commenters' careful review of the published rules and provided suggestions on issues of style, organization, and substance. In considering the comments, the Advisory Committee was guided by the goal of maintaining close adherence to the Federal Rules of Appellate Procedure ("FRAP"), except where those rules are incompatible with bankruptcy appeals. It also recommended postponing for future consideration a number of suggestions that would change existing practice or raise policy issues requiring careful consideration. In general, the comments displayed a positive response to the proposed revision of the Part VIII rules, and the Advisory Committee unanimously voted to recommend them for final approval with the post-publication changes that are indicated.

Not all of the proposed rules were commented upon. The following discussion describes the most significant comments that were submitted and the Advisory Committee's responses. Appendix A sets out after each rule a more complete listing of both the comments—including some on rules not discussed below—and the changes made after publication.

General Comments. Two bankruptcy judges and the National Conference of Bankruptcy Judges praised the revision of the Part VIII rules, stating that it would lead to improved quality of bankruptcy appellate practice, reduce confusion, and yield a more efficient and effective bankruptcy appellate practice.

Rule 8002. Two comments expressed concern about the inclusion of an inmate mailbox rule, which deems a notice of appeal by an inmate timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. The commenters stated that this rule could delay for several days the determination that a bankruptcy court order or judgment has become final. The Committee continued to support the inclusion of this provision in order to mirror FRAP 4(c). It believed that, given the rarity of inmate appeals in bankruptcy cases, the impact of the provision on finality will be limited.

Rule 8003. Several comments pointed out that the provision in subdivision (d) directing the clerk of the appellate court to docket an appeal "under the title of the bankruptcy court action" is unclear since "action" might refer to the overall bankruptcy case or to an adversary proceeding within the case. The Committee agreed that this was an instance in which the FRAP language needs to be modified for the bankruptcy context. It voted to change the wording in Rule 8003(d)(2) and the parallel provision in Rule 8004(c)(2) to "under the title of the bankruptcy case and the title of any adversary proceeding."

Rule 8004. The clerk of a bankruptcy appellate panel ("BAP") commented on the provision of subdivision (c)(3) that directed the dismissal of an appeal if leave to appeal is denied. She stated that appellants sometimes file a motion for leave to appeal when leave is not required and in that situation, although the motion is denied, dismissal is not appropriate. The Committee voted to delete the sentence in question, which is not contained in either the current bankruptcy rule or FRAP rule from which the proposed rule is derived.

One comment pointed out an inconsistency between proposed Rule 8003 and Rule 8004. Rule 8003(c) requires the bankruptcy clerk to serve the notice of appeal, whereas Rule 8004(a) places that duty on the appellant (along with the motion for leave to appeal). This difference is a carryover from existing practice. The Committee decided to consider in the future whether the service requirement should be the same in both rules.

Rule 8005. Several comments questioned whether an election to have an appeal heard by the district court, rather than the BAP, must still be made by a statement in a separate document. Subdivision (a) of the proposed rule refers to an official form that did not exist at the time the rule was published, and some comments also expressed confusion about that reference. At the spring meeting, the Committee approved for publication an amendment to the notice of appeal form, Official Form 17A, that will include a section for making an election under this rule. That form, which if approved will take effect on the same date as the rule, will clarify that the separate-document rule no longer applies.

Two comments addressed the procedure that should apply when an appellee elects to have the district court hear an appeal that was initially sent to the BAP. The Committee agreed with one of the comments that the BAP clerk should notify the bankruptcy clerk if an appeal is transferred to the district court, and it voted to add a sentence to that effect in subdivision (b).

Rule 8006. Two comments stated that the proposed rule does not give the bankruptcy court sufficient time to certify a direct appeal to the court of appeals. Under subdivision (b), a matter is deemed to remain pending in the bankruptcy court for purposes of this rule for 30 days after the effective date of the first notice of appeal. The Advisory Committee decided that this time limit strikes an appropriate balance between giving the bankruptcy court time to decide whether to certify a direct appeal and letting the district court or BAP know at a reasonably early time that a certification for direct appeal will not be coming from the bankruptcy court. Under 28 U.S.C. § 158(d)(2), district courts and BAPs also have certification authority.

Rule 8007. Two comments questioned the provision of the published rule that appeared to permit a party to seek a stay pending appeal in an appellate court before a notice of appeal has been filed. The comments took the position that, until a notice of appeal is filed, the appellate court lacks jurisdiction to rule on a stay motion. The Committee agreed that the rule should be clarified to eliminate the possibility of filing a motion for a stay in the appellate court prior to the filing of a notice of appeal.

Rule 8009. Two bankruptcy judges and the Bankruptcy Clerks Advisory Group submitted comments stating that the practice of having the parties designate the record on appeal is now outdated and that the 8th Circuit BAP's rule regarding the record should be adopted. Under that rule the record before the bankruptcy court is the record on appeal, and parties refer by number to the appropriate bankruptcy court docket entries in their appellate briefs. BAP judges are able to review the entire bankruptcy court record electronically. The Advisory Committee decided that the rule should remain as published but that this issue should be taken up for consideration in the future.

Several comments objected to two FRAP provisions that were included in this rule: subdivision (c) that permits a statement of the evidence when a transcript is unavailable, and subdivision (d) that permits an agreed statement as the record on appeal. As to both, the Committee favored remaining consistent with the parallel FRAP provisions.

Rule 8010. Three comments noted that, while subdivision (b)(1) directs the bankruptcy clerk to transmit the record to the appellate clerk when it is complete, it does not specify what the clerk should do if the record is never completed. The Advisory Committee voted to add this issue to the list of matters for future consideration.

Rule 8013. One comment suggested that district courts be allowed to require a notice of motion in bankruptcy appeals if they otherwise follow that practice in their court. Another comment made a similar suggestion concerning proposed orders. The Advisory Committee agreed with these comments and added "Unless the court orders otherwise" to subdivision (a)(2)(D)(ii).

Another comment questioned why a rule allowing intervention on appeal is necessary and whether a party moving to intervene would have standing. The Advisory Committee noted that it is not always clear who is a party to a contested matter, so someone affected by an order being appealed may want to intervene to participate in the appeal. A United States trustee is also sometimes in the position of needing to intervene on appeal.

Rule 8016. Two comments raised questions about subdivision (f), which addressed the consequences of failing to file a brief on time. It was unclear why the provision was located in the rule governing cross-appeals, and it seemed to be inconsistent with a provision in Rule 8018. The Advisory Committee thought that the comments were well taken, and it voted to delete the subdivision.

Rule 8017. The States' Association of Bankruptcy Attorneys commented that all governmental units, not just the United States and states, should be permitted to file an amicus brief without consent or leave of court. The Advisory Committee adhered to the decision to make the bankruptcy rule consistent with FRAP 29.

Rule 8018. A bankruptcy judge commented that the authorization in subdivision (f) for dismissal of an appeal or cross-appeal should require notice and an opportunity to show cause why the appeal should not be dismissed. The Advisory Committee voted to reword the provision to clarify that dismissal can occur only upon motion of a party or on the court's own motion, after which the appellant would have an opportunity to respond.

Rule 8019. One comment stated that there should not be a presumption in favor of oral argument and that the grounds for not allowing it should not be limited. The Advisory Committee made no change to the proposed rule, which is consistent with current Rule 8012 and FRAP 34(a)(2).

Another comment asserted that there is an inconsistency between subdivision (b), which requires a unanimous vote of a BAP panel to dispense with oral argument, and subdivision (g), which allows a BAP panel by majority vote to require oral argument when the parties agree to submit the case on the briefs. The Advisory Committee concluded that these provisions are consistent with FRAP 34(a)(2) and (f) and with the presumption in favor of oral argument.

Rule 8021. The States' Association of Bankruptcy Attorneys commented that subdivision (b), which permits the assessment of costs for or against the United States, its agencies, and officers only if authorized by law, should apply to all governmental units. The Advisory Committee made no change to this provision, which is consistent with FRAP 39(b).

Rule 8023. In its comments, the National Conference of Bankruptcy Judges suggested two issues for future consideration by the Advisory Committee relating to this rule, which governs voluntary dismissals of appeals. (1) In the bankruptcy court Rule 7041 requires a plaintiff seeking to dismiss an adversary proceeding objecting to the debtor's discharge to provide notice to certain parties and obtain a court order containing appropriate terms and conditions. The NCBJ suggests the need for similar safeguards when that type of proceeding is voluntarily dismissed on appeal. (2) Under Rule 9019 a trustee is required to obtain court approval of any compromise or settlement. The NCBJ stated that it is not clear how Rule 9019 relates to this rule. The Advisory Committee added these issues to its list of matters for future consideration.

Rule 8024. The National Conference of Bankruptcy Judges commented that the rule carries forward a problem in current Rule 8016: It does not provide for the issuance of a mandate by the appellate court and thus does not make clear when jurisdiction revests in the bankruptcy court after the conclusion of an appeal. While the existing rule does not appear to be disrupting bankruptcy administration unduly, the comment suggested that the Advisory Committee consider this issue in the future. The Advisory Committee agreed to do so.

Action Item 3. Rule 1014(b) governs the procedure for determining where cases will proceed if petitions are filed in different districts by, against, or regarding the same debtor or related debtors. The rule currently provides that, upon motion, the court in which the first-filed petition is pending may determine—in the interest of justice or for the convenience of the parties—the district or districts in which the cases will proceed. Except as otherwise ordered by that court, proceedings in the cases in the other districts "shall be stayed by the courts in which they have been filed" until the first court makes its determination.

The Advisory Committee proposed amending Rule 1014(b) to provide that proceedings in subsequently filed cases are stayed only upon order of the court in which the first-filed petition is pending and to expand the list of persons entitled to receive notice of a motion in the first court for a determination of where the related cases should proceed. The amendment would state more clearly what event triggers the stay of proceedings in the court in which a subsequent petition is filed. The current rule has led to uncertainty about whether the stay goes into effect immediately upon the filing of the second petition or only upon the filing of a motion to determine where the cases should proceed. Rather than selecting either of these options, the Committee decided that an order by the first court should be required. That requirement would eliminate any uncertainty about whether a stay was in effect. It would also permit a judicial determination—not just a party's assertion—that the rule applies and that a stay of other proceedings is needed.

Four sets of comments were submitted in response to the publication of the proposed amendments. Two of the commenters—Bankruptcy Judge Robert J. Kressel and the National Conference of Bankruptcy Judges—questioned the jurisdiction of the first court to enjoin parties to other cases. The States' Association of Bankruptcy Attorneys raised four issues. Its comment stated that (1) the rule does not clearly state that the first court has exclusive authority to determine the venue of the related cases; (2) it is not clear who can seek a determination of where the cases can proceed; (3) the Committee Note says that the clerk can order the moving party to provide notice, but that party will not always have the information needed to provide notice to parties in other cases; and (4) a time limit should be imposed for seeking a determination in the first court. Finally, Bankruptcy Judge Christopher Klein commented that the current rule generally works well and engenders cooperation among the affected courts, something he fears will not happen under the amended rule.

Regarding the jurisdictional issue that was raised, the Advisory Committee noted that the rule—in its current form as well as in the proposed amended version—allows a court to order a change of venue of cases pending in other courts. The accompanying stay provision is intended to prevent the entry of inconsistent orders while the venue situation is resolved by the first court.

The proposed amendment both clarifies and narrows the scope of the stay provision. The current rule applies a blanket rule that all the later-filed cases are stayed while the first court makes the venue determination. The amended rule would limit the stay to situations in which the first court finds that the rule in fact applies and that a stay is needed. Bankruptcy courts have long been held to have jurisdiction to issue stays to protect the estate being administered, including stays to protect the individuals managing the estate. *Ex parte Christy*, 44 U.S. 292,

318 (1845) (recognizing the power of a court presiding over a bankruptcy case to issue stays of other proceedings); *Celotex Corp. v. Edwards*, 514 U.S. 300, 313 (1995) (enforcing a bankruptcy court's injunction preventing judgment creditors from proceeding against sureties). Consistent with this authority, the legitimacy of the existing rule's stay authority has not been questioned. The Committee concluded that an amendment that reduces the scope of that authority would be equally valid.

In considering the comments of the States' Association of Bankruptcy Attorneys, the Committee concluded that the amended rule would give the first court exclusive authority to determine where the related cases will proceed if a motion for that purpose is filed in that court. The Committee did not support imposing a time limit for filing the motion because of the varying circumstances in which this rule might be invoked. The Committee also concluded that the rule did not need to be more specific about the provision of notice. It did, however, vote to make a wording change regarding notice that was suggested by the National Conference of Bankruptcy Judges.

Despite Judge Klein's positive experience with current Rule 1014(b), the Committee remained concerned that it imposes a stay of other cases at a time that is uncertain and under circumstances of which affected courts and parties may be unaware.

The Committee therefore unanimously voted to approve the amendments to Rule 1014(b) with one wording change.

Action Item 4. Rule 7004(e) governs the time during which a summons is valid after its issuance in an adversary proceeding. The current rule provides that a summons is valid so long as it is served within 14 days of its issuance. The Advisory Committee sought publication of an amendment to reduce that period from 14 days to 7 days. The concern prompting the amendment is that a 14-day delay before service of a summons may unduly limit the defendant's time to answer, which is calculated under Rule 7012 of the Bankruptcy Rules from the date the summons is issued and not (as is the case under the Civil Rules) the date it is served. Because summonses are routinely issued electronically and served by mail (as permitted under Rule 7004(b)), the Advisory Committee believed that a seven-day service window would be sufficient.

Upon publication of the amendment, the Advisory Committee received four comments. Each of the comments raised essentially the same issue—that a seven-day window to serve a summons may be too short in some circumstances. Two comments noted that service by mail is not permitted under Rule 7004(b) when the recipient's postal address is not a "dwelling house or usual place of abode or . . . the place where the individual regularly conducts a business or profession." If, for example, the recipient has only a post office box, the Bankruptcy Rules do not provide for service by mail. Effecting service within seven days may be impracticable under those circumstances. One comment observed that with an unrepresented plaintiff or one whose lawyer is not a registered electronic filer, the summons will not be issued electronically. If the party receives the summons by mail from the clerk, some or all of the seven-day period will expire, making timely service unlikely. A similar concern was raised with respect to judges who

require the inclusion of a scheduling order with the summons. The scheduling order might not be prepared for several days, which could impede the ability to make timely service.

For three reasons, the Advisory Committee concluded that the concerns raised by the comments did not justify altering or abandoning the amendment to Rule 7004(e). First, the principal concern expressed by the comments—that a seven-day service window might be insufficient in particular circumstances—had been contemplated by the Advisory Committee. Those circumstances were considered to be infrequent and, if they did arise, were thought to be best handled through a request for an enlargement of the time to serve the summons under Rule 9006(b). The comments do not suggest that the Advisory Committee was mistaken in its consideration of the issue. In response to the comments, the Advisory Committee has added language to the Committee Note accompanying the amendment in order to highlight the availability of an enlargement of time under Rule 9006(b).

Second, the alternative approaches to service of summonses offered by the comments would require significant changes to the Bankruptcy Rules. The Advisory Committee, however, sought to make the least disruptive change that would ensure sufficient time to serve, and respond to, a summons. The Advisory Committee rejected an alternative amendment to Rule 7012 that would lengthen the defendant's time to answer, because that approach would not serve the need to expedite proceedings in bankruptcy. The Advisory Committee also declined to make more extensive changes to Rule 7004, such as adopting the Civil Rules' method of calculating the defendant's time to respond.

Third, the published amendment's 7-day time to serve a summons, although less than the 14-day period under the current rule, is close to the ten-day period that prevailed before it was lengthened by the Time-Computation Project. The comments suggest that further study may be warranted with respect to harmonizing the Bankruptcy and Civil Rules on issuance and service of a summons and complaint. But that project is well beyond the scope of the published amendment.

Accordingly, the Advisory Committee voted unanimously to recommend final approval of the text of the amended rule as published, together with a revised Committee Note.

Action Item 5. Rules 7008(b) and 7054 would be amended to change the procedure for seeking attorney's fees in bankruptcy proceedings. The Advisory Committee proposed the amendments in order to clarify and to promote uniformity in the procedures for seeking an award of attorney's fees. Rule 7054 would be amended to include much of the substance of Civil Rule 54(d)(2). Rule 7008(b), which currently addresses attorney's fees, would be deleted. By bringing the Bankruptcy Rules into closer alignment with the Civil Rules, the amendments would eliminate a potential trap for an attorney, particularly one familiar with the Civil Rules, who might overlook the requirement in Rule 7008(b) to plead a request for attorney's fees as a claim in the complaint, answer, or other pleading. As under the Civil Rules, the procedure for seeking an award of attorney's fees would be governed exclusively by Rule 7054, unless the governing substantive law requires the fees to be proved at trial as an element of damages.

Two comments were submitted on these amendments. The States' Association of Bankruptcy Attorneys addressed the sentence in Rule 7054(b)(1), which is not proposed for amendment, that permits the award of costs against the United States, its officers, and agencies only to the extent permitted by law. The Association suggested that the provision be broadened to apply to all governmental units. The other comment was submitted by attorney Louis M. Bubala III. Mr. Bubala stated that he was "pleased especially with the proposed elimination of Rule 7008(b) and addition of Rule 7054(b)(2) regarding claims for attorney's fees. The current rules have caused problems over the years, and the adoption of the procedure from the civil rules is a good one."

The Advisory Committee voted unanimously to approve the amendments as published.

Action Item 6. Rule 9023, which governs New Trials; Amendment of Judgments, and **Rule 9024**, which governs Relief from Judgment or Order, would be amended to include a cross-reference to proposed Rule 8008, which governs Indicative Rulings. The Advisory Committee proposed these amendments in order to call attention at an appropriate place in the rules to that new bankruptcy appellate rule. Rule 8008 prescribes procedures for both the bankruptcy court and the appellate court when an indicative ruling is sought. It therefore incorporates provisions of both Civil Rule 62.1 and FRAP 12.1. Because a litigant filing a post-judgment motion that implicates the indicative-ruling procedure will not encounter a rule similar to Civil Rule 62.1 in either the Part VII or Part IX rules, the Committee decided that it would be useful to include a cross-reference to Rule 8008 in the rules governing post-judgment motions.

The only comment submitted in response to the publication of these amendments was from the National Conference of Bankruptcy Judges. It commented that a cross-reference to another rule is more appropriately placed in a Committee Note than in the rule itself.

The Advisory Committee voted unanimously to approve the amendments to these rules as published because a Committee Note may not be amended without an amendment of the rule. Furthermore, several comments on the Part VIII rules suggested that it is helpful to have a cross-reference to another rule included in the rule, rather than in the Committee Note, because Committee Notes are not always published in rule compilations and are often overlooked.

Action Item 7. Official Forms 3A, 3B, 6I, and 6J are restyled forms for use in individual-debtor cases that were published for comment last August. The Advisory Committee unanimously voted to recommend them for final approval with the post-publication changes that are indicated.

The forms were developed as part of the Advisory Committee's ongoing Forms Modernization Project ("FMP"), which is a multi-year endeavor of the Advisory Committee, working in conjunction with the Federal Judicial Center and the Administrative Office of the U.S. Courts. The dual goals of the FMP are to improve the official bankruptcy forms and to improve the interface between the forms and available technology. The judiciary is in the process of developing "the next generation" of CM/ECF ("Next Gen"), and the modernized forms are being designed to use enhanced technology that will become available through Next

Gen. From a forms perspective, the major change in Next Gen will be the ability to store all information on forms as data so that authorized users can produce customized reports containing the information they want from the forms, displayed in whatever format they choose.

The FMP group made a preliminary decision, endorsed by the Advisory Committee, that the forms for individual debtors should be separated from those for entities other than individuals. There is a greater need for the forms submitted by individuals to be less technical, because individuals are generally less sophisticated than other entities and because individuals may not have the assistance of counsel. Accordingly, the forms for individual debtors are designed to use language more common in ordinary conversation, to employ more intuitive layouts, and to include clearer instructions and examples within the forms and more extensive separate instruction sheets.

Official Forms 3A (Application for Individuals to Pay the Filing Fee in Installments), 3B (Application to Have the Chapter 7 Filing Fee Waived), 6I (Schedule I: Your Income), and 6J (Schedule J: Your Expenses) were selected for the initial-implementation stage of the FMP because they make no significant change in substantive content and simply replace existing forms that apply only in individual-debtor cases. The restyled forms all involve the debtors' income and expenses, and they are employed by a range of users: the courts, U.S. trustees, and case trustees, for varied purposes. The publication of these forms has already provided valuable feedback on the FMP approach to form design, and, if adopted, their use will provide a helpful gauge of the effectiveness of the FMP approach.

In response to the publication of these forms, 29 sets of comments were submitted, and one letter was informally submitted to the working group. Set out below is a discussion of the most significant comments and the changes made by the Advisory Committee in response.

General Comments. Comments on the overall project and the published forms in general fell primarily into the following categories:

- support for the new forms;
- dislike of the new forms and a preference for maintaining the current forms;
- concern that the forms contain too much shading, too much white space, and too many pages, all of which will increase printing, mailing, and electronic transmission costs;
- concern that the forms will encourage pro se filings, to the detriment of the debtors and the courts; and
- expressions of a need for a clear statement about the extent to which software-generated forms can deviate from the graphic and formatting styles of the proposed forms, such as by omitting instructions and omitting or collapsing inapplicable sections.

The Advisory Committee discussed these comments during its spring meeting. Members first discussed the most fundamental question—whether the project should proceed notwithstanding the negative commentary. After reviewing the reasons for the project and the guiding principles behind the redesign, the Committee unanimously concluded that the project should proceed.

In response to the numerous comments about shading, the Committee accepted the FMP's recommendation that shading should largely be eliminated. The Committee agreed with the FMP's redesign of the forms, which retains the black banner for the "part" designation but uses a different format for the title of each part. Shading was largely eliminated from the balance of each of the forms. The Committee believes that these changes will reduce toner usage and increase the ease with which forms are printed and reproduced.

The Advisory Committee also agreed with the FMP's assessment regarding page length. The increase in the page length is a function of several factors. First, in an effort to increase accuracy and ease of use, and to create a form whose answers can populate a usable database of answers, more specific questions are posed, and the debtor is often prompted to provide an answer. Second, rather than providing a dense set of instructions at the beginning of a form and then blank spaces for the answers, these forms provide instructions where the debtor is likely to need them. Third, more space is provided to answer some of the questions. Finally, examples are often included to help the debtor understand what information is being requested. The Committee agreed with the FMP that this approach is likely to provide more accurate, usable information.

The extent to which software-generated forms may deviate from the official forms is an issue that is relevant to other forms, not just to the modernized forms. Proposed revised Rule 9009, which is part of the chapter 13 plan form and rules package presented at this meeting for publication, provides additional guidance regarding the extent to which software-generated forms may deviate from the official forms.

Whether the use of plain English and a more user-friendly design will encourage more filings without the assistance of counsel has been the subject of discussion since the beginning of this project. The preparation of comprehensive instructions that explain the impact and complexity of a bankruptcy case and provide ample warnings about the significance of the forms should discourage, not encourage, pro se filings. In addition, the Committee believes that it is important that forms be understandable by all debtors, including those who are represented, because debtors are required to sign the forms under penalty of perjury. The comments did not cause the Committee to change its views.

Comments on Official Form 3A (installment payment of filing fees). Two sets of comments addressed this form specifically. Both suggested the need to add to the form the option of paying a chapter 13 filing fee through the debtor's plan. Districts differ on whether to permit this practice, and the current form does not expressly provide this option. In view of the fact that the practice is far from universal and the bankruptcy system has been able to

accommodate the practice when it is allowed, the Advisory Committee decided that the form should remain silent regarding that option.

Line 2 of the published form stated that a debtor may ask the court to extend the deadline for payment of the final fee installment and that the debtor must explain why an extension is needed. One comment noted that no space was provided on the form for the explanation. Because the FMP group contemplated that such an extension would require a separate application at a later time, and in order to avoid any confusion, reference to the possibility of an extension was moved from the form to the instructions. This change is consistent with the form currently in effect, which merely informs the debtor of the possibility of obtaining an extension "for cause shown" and does not ask the debtor to provide reasons for the extension as part of the application.

A comment proposed deletion of the instruction in the signature box not to pay "anyone else in connection with your bankruptcy case" until the entire filing fee is paid. The comment noted that this statement would prohibit a debtor from making payments to a chapter 13 trustee before all of the installment payments are made. The published form changed the wording of the current form slightly, but in a way that gave rise to this comment. Current Form 3A includes the statement, "Until the filing fee is paid in full, I will not make any additional payment or transfer any additional property to an attorney or any other person *for services* in connection with this case" (emphasis added). The Committee agreed with the FMP that the comment should be addressed by reinserting "for services" in the statement.

Comments on Official Form 3B (waiver of filing fees). Five comments were submitted regarding this form. Several of them stated that certain information asked for on the proposed form should be omitted because of its irrelevance to the waiver decision. The following information was suggested for deletion:

- line 3, non-cash government assistance;
- lines 12-16, various assets that the debtor owns;
- line 19, payment for bankruptcy services by someone else; and
- line 20, prior bankruptcy filings by the debtor or the debtor's spouse.

The current form asks for the second and third items of information listed above, and the Advisory Committee decided to continue requesting that information. The current form also asks for prior bankruptcy filings by the debtor, but not by the debtor's spouse unless the spouse is also filing. On recommendation of the FMP, the Committee decided that the request for information about prior filings should be limited to filings by the debtor(s), and not by a non-filing spouse.

The decision about how to respond to the first item, non-cash government assistance, was more complicated. The amount of non-cash government assistance may be relevant to determining whether a debtor is able to make payments of the filing fee, since it may reduce the debtor's other expenses, but it is not specifically asked for on current Form 3B. The current form asks for the total combined monthly income as computed on Schedule I. Restyled Schedule I as published asked debtors to include the value of "[o]ther government assistance."

Immediately preceding that question, it asked for "unemployment compensation" and "Social Security," which might have suggested to some debtors that "other government assistance" referred only to other forms of cash assistance. At the same time, non-cash governmental assistance should not be counted in determining whether the debtor meets an income threshold for waiver eligibility. The interim procedures of the Judicial Conference regarding chapter 7 fee waivers direct that "Non-cash governmental assistance (such as food stamps or housing subsidies) is not included [in income]."

The comments caused the FMP group to rephrase the request for information about governmental assistance on both Form 3B and Schedule I and to harmonize the two forms. In completing Form 3B, the debtor is permitted to use the income calculated on Schedule I. Because Schedule I has been revised to direct the debtor to include non-cash governmental assistance in income to the extent that the debtor knows the value of such assistance, on Form 3B it is necessary to have the debtor first report the amount of income including the value of non-cash assistance and then deduct the value of such assistance to determine the amount of income for purposes of the fee waiver application. In response to comments that the debtor does not always know the value of non-cash governmental assistance, both Form 3B and Schedule I have been revised to clarify that the debtor only needs to include the value of such assistance to the extent known. The Advisory Committee approved these changes recommended by the FMP.

Comments on Official Form 6I (income). Fourteen comments specifically addressed this form. Several of them raised questions about when income information must be provided about non-filing spouses. In order to clarify the requirement, the following instruction was added at the beginning of the form: "If you are married and not filing jointly, and your spouse is living with you, include information about your spouse. If you are separated and your spouse is not filing with you, do not include information about your spouse." The form specifically asks for information about both spouses when they file jointly.

As discussed above, in response to comments about non-cash governmental assistance, the Advisory Committee approved changes to Schedule I. As revised, the form asks the debtor to report income from unemployment compensation, Social Security, and "Other governmental assistance that you regularly receive." For the last category, the form directs the debtor to include the value of cash assistance and "the value (if known) of any non-cash assistance."

The FMP group recommended and the Advisory Committee approved two changes to the form's list of payroll deductions. The proposed form now asks separately about mandatory and voluntary contributions to retirement plans. And a new specific payroll deduction for "domestic support obligations" was added in response to a comment that these deductions are sufficiently common to justify a specific listing.

Comments on Official Form 6J (expenses). Fifteen comments specifically addressed Schedule J. The part of the proposed form drawing the most comment was the inclusion in part 2 of column B ("For Chapter 13 Only – What your expenses will be if your current plan is confirmed"). The comments displayed uncertainty about the purpose served by that column and doubt about the accuracy of the responses that it would elicit. The FMP group recommended

two changes, which the Advisory Committee approved, in response to those comments. First, column B in was eliminated. Second, in order to permit districts that currently allow debtors to use Schedules I and J to update their income and expense information, a new checkbox was added to both forms in which a debtor can indicate that the information on the form is a "supplement . . . as of the following date:_____."

One commenter questioned the reason for the question, "Does anyone else live in your household?" Agreeing with the FMP that the question was too broad, the Advisory Committee approved the following changes to Part 1 of Schedule J. First, questions 1 and 2 on the published form were combined into a single question asking about all of the debtor(s)'s dependents, regardless of whether the dependents live with the debtor. Second, question 3 was revised to make its financial purpose clear. In the published version of the form, question 3 asked, "Does anyone else live in your household?" Now question 3 asks, "Do your expenses include expenses of people other than yourself and your dependents?" The question has been converted to a simple "yes/no" format. If the debtor's Schedule J reveals that it includes expenses for people other than the debtor and the debtor's dependents, interested parties may investigate further if warranted.

Several comments questioned the inclusion of student loan payments as an expense deduction in Schedule J. They argued that allowing this deduction represented a policy decision that student loans can continue to be paid during a chapter 13 case without constituting unfair discrimination against other unsecured claims that are not being paid in full. Another comment contrasted the treatment of student loans with other nondischargeable debts that are not treated as deductions. In response, the category of student loans as a distinct line item was eliminated. Now debtors who are paying student loans as an expense may list those payments as an "other" installment payment on line 21 of the form.

Just as with Schedule I, some comments questioned the treatment of non-filing spouses on this form. To eliminate the confusion, the following wording was added to the instructions for the form: "If you are married and are filing individually, include your non-filing spouse's expenses unless you are separated. If you are filing jointly and Debtor 1 and Debtor 2 keep separate households, fill out a separate *Schedule J* for each debtor. Check the box at the top of page 1 of the form for Debtor 2 to show that a separate form is being filed." New question 1 affirmatively asks if debtor 2 lives in a separate household. If so, that debtor is directed to file a separate Schedule J.

A2. Amendment for Which Final Approval Is Sought Without Publication. **The Advisory Committee recommends that an amendment to Official Form 23 be approved and forwarded to the Judicial Conference. It recommends that the amended form become effective on December 1, 2013.** Because the proposed amendment is conforming in nature, the Committee concluded that publication for comment is not required. The text of the amended form is set out in Appendix A.

Action Item 8. Official Form 23 is the form an individual debtor files in a chapter 7 or chapter 13 case to certify that he or she has completed a postpetition instructional course

concerning personal financial management—a requirement for receiving a discharge. The Supreme Court has approved an amendment to Rule 1007(b)(7), due to go into effect on December 1, 2013, that will relieve individual debtors of the obligation to file Official Form 23 if the provider of an instructional course concerning personal financial management directly notifies the court that the debtor has completed the course. The preface and instructions to Form 23 would be amended to reflect that change by stating that a debtor should file the form only if the course provider has not already notified the court of the debtor's completion of the course.

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

For Final Approval and Transmittal to the Judicial Conference

Rule 1014. Dismissal and Change of Venue

1 * * * * *

2 (b) PROCEDURE WHEN PETITIONS
3 INVOLVING THE SAME OR RELATED DEBTORS
4 ARE FILED IN DIFFERENT COURTS. If petitions
5 commencing cases under the Code or seeking recognition
6 under chapter 15 are filed in different districts by,
7 regarding, or against (1) the same debtor, (2) a partnership
8 and one or more of its general partners, (3) two or more
9 general partners, or (4) a debtor and an affiliate, ~~on motion~~
10 ~~filed~~ the court in the district in which the first-filed petition
11 ~~filed first~~ is pending ~~and after hearing on notice to the~~
12 ~~petitioners, the United States trustee, and other entities as~~

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

13 ~~directed by the court, the court~~ may determine, in the
14 interest of justice or for the convenience of the parties, the
15 district or districts in which ~~the case or~~ any of the cases
16 should proceed. The court may so determine on motion
17 and after a hearing, with notice to the following entities in
18 the affected cases: the United States trustee, entities
19 entitled to notice under Rule 2002(a), and other entities as
20 the court directs. ~~Except as otherwise ordered by the~~The
21 court ~~in the district in which the petition filed first is~~
22 ~~pending,~~ may order the parties to the later-filed cases not to
23 proceed further ~~the proceedings on the other petitions shall~~
24 ~~be stayed by the courts in which they have been filed~~ until
25 it makes the determination ~~is made~~.

Committee Note

Subdivision (b) provides a practical solution for resolving venue issues when related cases are filed in different districts. It designates the court in which the first-

filed petition is pending as the decision maker if a party seeks a determination of where the related cases should proceed. Subdivision (b) is amended to clarify when proceedings in the subsequently filed cases are stayed. It requires an order of the court in which the first-filed petition is pending to stay proceedings in the related cases. Requiring a court order to trigger the stay will prevent the disruption of other cases unless there is a judicial determination that this subdivision of the rule applies and that a stay of related cases is needed while the court makes its venue determination.

Notice of the hearing must be given to all debtors, trustees, creditors, indenture trustees, and United States trustees in the affected cases, as well as any other entity that the court directs. Because the clerk of the court that makes the determination often may lack access to the names and addresses of entities in other cases, a court may order the moving party to provide notice.

The other changes to subdivision (b) are stylistic.

Changes Made After Publication

The only change made after publication was stylistic.

Rule 7004. Process; Service of Summons, Complaint

1 * * * * *

2 (e) SUMMONS: TIME LIMIT FOR SERVICE
3 WITHIN THE UNITED STATES. Service made under
4 Rule 4(e), (g), (h)(1), (I), or (j)(2) F.R.Civ.P. shall be by
5 delivery of the summons and complaint within ~~14~~ 7 days
6 after the summons is issued. If service is by any authorized
7 form of mail, the summons and complaint shall be
8 deposited in the mail within ~~14~~ 7 days after the summons is
9 issued. If a summons is not timely delivered or mailed,
10 another summons ~~shall~~ will be issued ~~and served~~ for
11 service. This subdivision does not apply to service in a
12 foreign country.

* * * * *

Committee Note

Subdivision (e) is amended to alter the period of time during which service of the summons and complaint must be made. The amendment reduces that period from fourteen days to seven days after issuance of the summons. Because Rule 7012 provides that the defendant's time to answer the complaint is calculated from the date the

summons is issued, a lengthy delay between issuance and service of the summons may unduly shorten the defendant's time to respond. The amendment is therefore intended to encourage prompt service after issuance of a summons. If service of the summons within any seven-day period is impracticable, a court retains the discretion to enlarge that period of time under Rule 9006(b).

Changes Made After Publication

A new sentence referring to the availability of an enlargement of time under Rule 9006(b) was added to the Committee Note. The only other change made after publication was stylistic.

Rule 7008. General Rules of Pleading

1 ~~(a) APPLICABILITY OF RULE 8 F.R.CIV.P.~~
2 Rule 8 F.R.Civ.P. applies in adversary proceedings. The
3 allegation of jurisdiction required by Rule 8(a) shall also
4 contain a reference to the name, number, and chapter of the
5 case under the Code to which the adversary proceeding
6 relates and to the district and division where the case under
7 the Code is pending. In an adversary proceeding before a
8 bankruptcy ~~judge~~court, the complaint, counterclaim, cross-
9 claim, or third-party complaint shall contain a statement
10 ~~that the proceeding is core or noncore and, if non-core~~ that
11 the pleader does or does not consent to entry of final orders
12 or judgment by the bankruptcy ~~judge~~court.
13 ~~(b) ATTORNEY'S FEES. A request for an award of~~
14 ~~attorney's fees shall be pleaded as a claim in a complaint,~~
15 ~~cross-claim, third party complaint, answer, or~~
16 ~~reply as may be appropriate.~~

Committee Note

Former subdivision (a) is amended to remove the requirement that the pleader state whether the proceeding is core or non-core and to require in all proceedings that the pleader state whether the party does or does not consent to the entry of final orders or judgment by the bankruptcy court. Some proceedings that satisfy the statutory definition of core proceedings, 28 U.S.C. § 157(b)(2), may remain beyond the constitutional power of a bankruptcy judge to adjudicate finally. The amended rule calls for the pleader to make a statement regarding consent, whether or not a proceeding is termed non-core. Rule 7012(b) has been amended to require a similar statement in a responsive pleading. The bankruptcy judge will then determine the appropriate course of proceedings under Rule 7016.

The rule is also amended to delete subdivision (b), which required a request for attorney's fees always to be pleaded as a claim in an allowed pleading. That requirement, which differed from the practice under the Federal Rules of Civil Procedure, had the potential to serve as a trap for the unwary.

The procedures for seeking an award of attorney's fees are now set out in Rule 7054(b)(2), which makes applicable most of the provisions of Rule 54(d)(2) F.R.Civ.P. As specified by Rule 54(d)(2)(A) and (B) F.R.Civ.P., a claim for attorney's fees must be made by a motion filed no later than 14 days after entry of the judgment unless the governing substantive law requires those fees to be proved at trial as an element of damages. When fees are an element of damages, such as when the

terms of a contract provide for the recovery of fees incurred prior to the instant adversary proceeding, the general pleading requirements of this rule still apply.

Changes Made After Publication

No changes were made after publication.

Rule 7012. Defenses and Objections — When and How Presented — By Pleading or Motion — Motion for Judgment on the Pleadings

1 * * * * *

2 (b) APPLICABILITY OF RULE 12(b)-(I)
3 F.R.CIV.P. Rule 12(b)-(I) F.R.Civ.P. applies in adversary
4 proceedings. A responsive pleading ~~shall admit or deny an~~
5 ~~allegation that the proceeding is core or non-core. If the~~
6 ~~response is that the proceeding is non-core it~~ shall include a
7 statement that the party does or does not consent to entry of
8 final orders or judgment by the bankruptcy ~~judge~~court. ~~In~~
9 ~~non-core proceedings, final orders and judgments shall not~~
10 ~~be entered on the bankruptcy judge's order except with the~~
11 ~~express consent of the parties~~.

Committee Note

Subdivision (b) is amended to remove the requirement that the pleader state whether the proceeding is core or non-core and to require in all proceedings that the pleader state whether the party does or does not consent to the entry of final orders or judgment by the bankruptcy court. The amended rule also removes the provision requiring express consent before the entry of final orders and judgments in non-core proceedings. Some proceedings that satisfy the statutory definition of core proceedings, 28 U.S.C.

§ 157(b)(2), may remain beyond the constitutional power of a bankruptcy judge to adjudicate finally. The amended rule calls for the pleader to make a statement regarding consent, whether or not a proceeding is termed non-core. This amendment complements the requirements of amended Rule 7008(a). The bankruptcy judge's subsequent determination of the appropriate course of proceedings, including whether to enter final orders and judgments or to issue proposed findings of fact and conclusions of law, is a pretrial matter now provided for in amended Rule 7016.

Changes Made After Publication

No changes were made after publication.

Rule 7016. Pre-~~T~~trial Procedures~~; Formulating Issues~~

1 (a) PRETRIAL CONFERENCES; SCHEDULING;
2 MANAGEMENT. Rule 16 F.R.Civ.P. applies in adversary
3 proceedings.
4 (b) DETERMINING PROCEDURE. The
5 bankruptcy court shall decide, on its own motion or a
6 party's timely motion, whether:
7 (1) to hear and determine the proceeding;
8 (2) to hear the proceeding and issue proposed
9 findings of fact and conclusions of law; or
10 (3) to take some other action.

Committee Note

This rule is amended to create a new subdivision (b) that provides for the bankruptcy court to enter final orders and judgment, issue proposed findings and conclusions, or take some other action in a proceeding. The rule leaves the decision as to the appropriate course of proceedings to the bankruptcy court. The court's decision will be informed by the parties' statements, required under Rules 7008(a), 7012(b), and 9027(a) and (e), regarding consent to the entry of final orders and judgment. If the bankruptcy court chooses to issue proposed findings of fact and conclusions of law, Rule 9033 applies.

Changes Made After Publication

No changes were made after publication.

Rule 7054. Judgments; Costs

1 (a) JUDGMENTS. Rule 54(a)-(c) F.R.Civ.P.
2 applies in adversary proceedings.
3 (b) COSTS; ATTORNEY'S FEES.
4 (1) *Costs Other Than Attorney's Fees.* The
5 court may allow costs to the prevailing party except
6 when a statute of the United States or these rules
7 otherwise provides. Costs against the United States,
8 its officers and agencies shall be imposed only to the
9 extent permitted by law. Costs may be taxed by the
10 clerk on 14 days' notice; on motion served within
11 seven days thereafter, the action of the clerk may be
12 reviewed by the court.
13 (2) *Attorney's Fees.*
14 (A) Rule 54(d)(2)(A)-(C) and (E)
15 F.R.Civ.P. applies in adversary proceedings
16 except for the reference in Rule 54(d)(2)(C) to
17 Rule 78.

18 (B) By local rule, the court may establish

19 special procedures to resolve fee-related issues

20 without extensive evidentiary hearings.

Committee Note

Subdivision (b) is amended to prescribe the procedure for seeking an award of attorney's fees and related nontaxable expenses in adversary proceedings. It does so by adding new paragraph (2) that incorporates most of the provisions of Rule 54(d)(2) F.R.Civ.P. The title of subdivision (b) is amended to reflect the new content, and the previously existing provision governing costs is renumbered as paragraph (1) and re-titled.

As provided in Rule 54(d)(2)(A), new subsection (b)(2) does not apply to fees recoverable as an element of damages, as when sought under the terms of a contract providing for the recovery of fees incurred prior to the instant adversary proceeding. Such fees typically are required to be claimed in a pleading.

Rule 54(d)(2)(D) F.R.Civ.P. does not apply in adversary proceedings insofar as it authorizes the referral of fee matters to a master or a magistrate judge. The use of masters is not authorized in bankruptcy cases, *see* Rule 9031, and 28 U.S.C. § 636 does not authorize a magistrate judge to exercise jurisdiction upon referral by a bankruptcy judge. The remaining provision of Rule 54(d)(2)(D) is expressed in subdivision (b)(2)(B) of this rule.

Rule 54(d)(2)(C) refers to Rule 78 F.R.Civ.P., which is not applicable in adversary proceedings. Accordingly, that reference is not incorporated by this rule.

Changes Made After Publication

No changes were made after publication.

1 **Rule 9023. New Trials; Amendment of Judgments**

2 Except as provided in this rule and Rule 3008,
3 Rule 59 F.R.Civ.P. applies in cases under the Code. A
4 motion for a new trial or to alter or amend a judgment shall
5 be filed, and a court may on its own order a new trial, no
6 later than 14 days after entry of judgment. In some
7 circumstances, Rule 8008 governs post-judgment motion
8 practice after an appeal has been docketed and is pending.

Committee Note

This rule is amended to include a cross-reference to Rule 8008. That rule governs the issuance of an indicative ruling when relief is sought that the court lacks authority to grant because of an appeal that has been docketed and is pending.

Changes Made After Publication and Comment

No changes were made after publication and comment.

1 **Rule 9024. Relief from Judgment or Order**

2 Rule 60 F.R.Civ.P. applies in cases under the Code
3 except that (1) a motion to reopen a case under the Code or
4 for the reconsideration of an order allowing or disallowing
5 a claim against the estate entered without a contest is not
6 subject to the one-year limitation prescribed in Rule 60(c),
7 (2) a complaint to revoke a discharge in a chapter 7
8 liquidation case may be filed only within the time allowed
9 by § 727(e) of the Code, and (3) a complaint to revoke an
10 order confirming a plan may be filed only within the time
11 allowed by § 1144, § 1230, or § 1330. In some
12 circumstances, Rule 8008 governs post-judgment motion
13 practice after an appeal has been docketed and is pending.

Committee Note

This rule is amended to include a cross-reference to Rule 8008. That rule governs the issuance of an indicative ruling when relief is sought that the court lacks authority to

grant because of an appeal that has been docketed and is pending.

Changes Made After Publication

No changes were made after publication.

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Rule 9027. Removal

1 (a) NOTICE OF REMOVAL.

2 (1) *Where filed; form and content.* A notice of
3 removal shall be filed with the clerk for the district
4 and division within which is located the state or
5 federal court where the civil action is pending. The
6 notice shall be signed pursuant to Rule 9011 and
7 contain a short and plain statement of the facts which
8 entitle the party filing the notice to remove, contain a
9 statement that upon removal of the claim or cause of
10 action ~~the proceeding is core or non-core and, if non-~~
11 ~~core~~, ~~that~~ the party filing the notice does or does not
12 consent to entry of final orders or judgment by the
13 bankruptcy ~~judge~~court, and be accompanied by a copy
14 of all process and pleadings.

15 * * * * *

16 (e) PROCEDURE AFTER REMOVAL.

17 * * * * *

18 (3) Any party who has filed a pleading in
19 connection with the removed claim or cause of action,
20 other than the party filing the notice of removal, shall
21 file a statement ~~admitting or denying any allegation in~~
22 ~~the notice of removal that upon removal of the claim~~
23 ~~or cause of action the proceeding is core or non core.~~
24 ~~If the statement alleges that the proceeding is non-~~
25 ~~core, it shall state~~ that the party does or does not
26 consent to entry of final orders or judgment by the
27 bankruptcy ~~judge~~court. A statement required by this
28 paragraph shall be signed pursuant to Rule 9011 and
29 shall be filed not later than 14 days after the filing of
30 the notice of removal. Any party who files a
31 statement pursuant to this paragraph shall mail a copy
32 to every other party to the removed claim or cause of
33 action.

34 * * * * *

Committee Note

Subdivisions (a)(1) and (e)(3) are amended to delete the requirement for a statement that the proceeding is core or non-core and to require in all removed actions a statement that the party does or does not consent to the entry of final orders or judgment by the bankruptcy court. Some proceedings that satisfy the statutory definition of core proceedings, 28 U.S.C. § 157(b)(2), may remain beyond the constitutional power of a bankruptcy judge to adjudicate finally. The amended rule calls for a statement regarding consent at the time of removal, whether or not a proceeding is termed non-core.

The party filing the notice of removal must include a statement regarding consent in the notice, and the other parties who have filed pleadings must respond in a separate statement filed within 14 days after removal. If a party to the removed claim or cause of action has not filed a pleading prior to removal, however, there is no need to file a separate statement under subdivision (e)(3), because a statement regarding consent must be included in a responsive pleading filed pursuant to Rule 7012(b). Rule 7016 governs the bankruptcy court's decision whether to hear and determine the proceeding, issue proposed findings of fact and conclusions of law, or take some other action in the proceeding.

Changes Made After Publication

No changes were made after publication.

Rule 9033. ~~Review of~~ Proposed Findings of Fact and Conclusions of Law ~~in Non-Core Proceedings~~

(a) SERVICE. ~~In non-core proceedings heard pursuant to 28 U.S.C. § 157(c)(1)~~ In a proceeding in which the bankruptcy court has issued ~~the bankruptcy judge shall file~~ proposed findings of fact and conclusions of law. ~~.~~ ~~T~~the clerk shall serve forthwith copies on all parties by mail and note the date of mailing on the docket.

* * * * *

Committee Note

Subdivision (a) is amended to delete language limiting this provision to non-core proceedings. Some proceedings that satisfy the statutory definition of core proceedings, 28 U.S.C. § 157(b)(2), may remain beyond the constitutional power of a bankruptcy judge to adjudicate finally. If the bankruptcy court decides, pursuant to Rule 7016, that it is appropriate to issue proposed findings of fact and conclusions of law in a proceeding, this rule governs the subsequent procedures.

Changes Made After Publication

No changes were made after publication.

PART VIII. BANKRUPTCY APPEALS*

For Final Approval and Transmittal to the Judicial Conference

Rule	
8001.	Scope of Part VIII Rules; Definition of "BAP"; Method of Transmission
8002.	Time for Filing Notice of Appeal
8003.	Appeal as of Right—How Taken; Docketing the Appeal
8004.	Appeal by Leave—How Taken; Docketing the Appeal
8005.	Election to Have an Appeal Heard by the District Court Instead of the BAP
8006.	Certifying a Direct Appeal to the Court of

* The proposed amendments to Part VIII of the Bankruptcy Rules are comprehensive. Existing rules have been reorganized and renumbered, some rules have been combined, and provisions of other rules have been moved to new locations. Much of the language of the existing rules has been restyled. Because of the comprehensive nature of the proposed revision, it is not possible to present the amendments in a redlined version that points out changes to the existing rules. Nor can the proposed revision be presented in a comparative format as was previously used for the restyled Evidence Rules.

Appeals

8007. Stay Pending Appeal; Bonds; Suspension of Proceedings

8008. Indicative Rulings

8009. Record on Appeal; Sealed Documents

8010. Completing and Transmitting the Record

8011. Filing and Service; Signature

8012. Corporate Disclosure Statement

8013. Motions; Intervention

8014. Briefs

8015. Form and Length of Briefs; Form of Appendices and Other Papers

8016. Cross-Appeals

8017. Brief of an Amicus Curiae

8018. Serving and Filing Briefs; Appendices

8019. Oral Argument

8020. Frivolous Appeal and Other Misconduct

8021. Costs

8022. Motion for Rehearing

8023. Voluntary Dismissal

8024. Clerk's Duties on Disposition of the Appeal

8025. Stay of a District Court or BAP Judgment

8026. Rules by Circuit Councils and District Courts; Procedure When There is No Controlling Law

8027. Notice of a Mediation Procedure

8028. Suspension of Rules in Part VIII

Rule 8001. Scope of Part VIII Rules; Definition of "BAP"; Method of Transmission

1 (a) GENERAL SCOPE. These Part VIII rules
2 govern the procedure in a United States district court and a
3 bankruptcy appellate panel on appeal from a judgment, order,
4 or decree of a bankruptcy court. They also govern certain
5 procedures on appeal to a United States court of appeals
6 under 28 U.S.C. § 158(d).
7 (b) DEFINITION OF "BAP." "BAP" means a
8 bankruptcy appellate panel established by a circuit's judicial
9 council and authorized to hear appeals from a bankruptcy
10 court under 28 U.S.C. § 158.
11 (c) METHOD OF TRANSMITTING
12 DOCUMENTS. A document must be sent electronically
13 under these Part VIII rules, unless it is being sent by or to an
14 individual who is not represented by counsel or the court's

15 governing rules permit or require mailing or other means of

16 delivery.

COMMITTEE NOTE

These Part VIII rules apply to appeals under 28 U.S.C. § 158(a) from bankruptcy courts to district courts and BAPs. The Federal Rules of Appellate Procedure generally govern bankruptcy appeals to courts of appeals.

Eight of the Part VIII rules do, however, relate to appeals to courts of appeals. Rule 8004(e) provides that the authorization by a court of appeals of a direct appeal of a bankruptcy court's interlocutory order or decree constitutes a grant of leave to appeal. Rule 8006 governs the procedure for certification under 28 U.S.C. § 158(d)(2) of a direct appeal from a judgment, order, or decree of a bankruptcy court to a court of appeals. Rule 8007 addresses stays pending a direct appeal to a court of appeals. Rule 8008 authorizes a bankruptcy court to issue an indicative ruling while an appeal is pending in a court of appeals. Rules 8009 and 8010 govern the record on appeal in a direct appeal to a court of appeals. Rule 8025 governs the granting of a stay of a district court or BAP judgment pending an appeal to the court of appeals. And Rule 8028 authorizes the court of appeals to suspend applicable Part VIII rules in a particular case, subject to certain enumerated exceptions.

These rules take account of the evolving technology in the federal courts for the electronic filing, storage, and

transmission of documents. Except as applied to pro se parties, the Part VIII rules require documents to be sent electronically, unless applicable court rules or orders expressly require or permit another means of sending a particular document.

Changes Made After Publication

No changes were made after publication.

Rule 8002. Time for Filing Notice of Appeal

1 (a) IN GENERAL.

2 (1) *Fourteen-Day Period.* Except as provided
3 in subdivisions (b) and (c), a notice of appeal must be
4 filed with the bankruptcy clerk within 14 days after
5 entry of the judgment, order, or decree being
6 appealed.

7 (2) *Filing Before the Entry of Judgment.* A
8 notice of appeal filed after the bankruptcy court
9 announces a decision or order—but before entry of the
10 judgment, order, or decree—is treated as filed on the
11 date of and after the entry.

12 (3) *Multiple Appeals.* If one party files a
13 timely notice of appeal, any other party may file a
14 notice of appeal within 14 days after the date when the
15 first notice was filed, or within the time otherwise

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16 allowed by this rule, whichever period ends later.

17 (4) *Mistaken Filing in Another Court.* If a
18 notice of appeal is mistakenly filed in a district court,
19 BAP, or court of appeals, the clerk of that court must
20 state on the notice the date on which it was received
21 and transmit it to the bankruptcy clerk. The notice of
22 appeal is then considered filed in the bankruptcy court
23 on the date so stated.

24 (b) EFFECT OF A MOTION ON THE TIME TO
25 APPEAL.

26 (1) *In General.* If a party timely files in the
27 bankruptcy court any of the following motions, the
28 time to file an appeal runs for all parties from the
29 entry of the order disposing of the last such remaining
30 motion:

31 (A) to amend or make additional

32 findings under Rule 7052, whether or not
33 granting the motion would alter the judgment;
34 (B) to alter or amend the judgment
35 under Rule 9023;
36 (C) for a new trial under Rule 9023;
37 or
38 (D) for relief under Rule 9024 if the
39 motion is filed within 14 days after the
40 judgment is entered.
41 (2) *Filing an Appeal Before the Motion is*
42 *Decided.* If a party files a notice of appeal after the
43 court announces or enters a judgment, order, or
44 decree—but before it disposes of any motion listed in
45 subdivision (b)(1)—the notice becomes effective
46 when the order disposing of the last such remaining
47 motion is entered.

48 (3) *Appealing the Ruling on the Motion.* If a
49 party intends to challenge an order disposing of any
50 motion listed in subdivision (b)(1)—or the alteration
51 or amendment of a judgment, order, or decree upon
52 the motion—the party must file a notice of appeal or
53 an amended notice of appeal. The notice or amended
54 notice must comply with Rule 8003 or 8004 and be
55 filed within the time prescribed by this rule, measured
56 from the entry of the order disposing of the last such
57 remaining motion.
58 (4) *No Additional Fee.* No additional fee is
59 required to file an amended notice of appeal.
60 (c) APPEAL BY AN INMATE CONFINED IN AN
61 INSTITUTION.
62 (1) *In General.* If an inmate confined in an
63 institution files a notice of appeal from a judgment,

64 order, or decree of a bankruptcy court, the notice is
65 timely if it is deposited in the institution's internal
66 mail system on or before the last day for filing. If the
67 institution has a system designed for legal mail, the
68 inmate must use that system to receive the benefit of
69 this rule. Timely filing may be shown by a
70 declaration in compliance with 28 U.S.C. § 1746 or
71 by a notarized statement, either of which must set
72 forth the date of deposit and state that first-class
73 postage has been prepaid.
74 (2) *Multiple Appeals*. If an inmate files under
75 this subdivision the first notice of appeal, the 14-day
76 period provided in subdivision (a)(3) for another party
77 to file a notice of appeal runs from the date when the
78 bankruptcy clerk dockets the first notice.
79 (d) EXTENDING THE TIME TO APPEAL.

80 (1) *When the Time May be Extended.* Except
81 as provided in subdivision (d)(2), the bankruptcy
82 court may extend the time to file a notice of appeal
83 upon a party's motion that is filed:
84 (A) within the time prescribed by this
85 rule; or
86 (B) within 21 days after that time, if
87 the party shows excusable neglect.
88 (2) *When the Time May Not be Extended.* The
89 bankruptcy court may not extend the time to file a
90 notice of appeal if the judgment, order, or decree
91 appealed from:
92 (A) grants relief from an automatic
93 stay under § 362, 922, 1201, or 1301 of the
94 Code;
95 (B) authorizes the sale or lease of

96 property or the use of cash collateral under §
97 363 of the Code;
98 (C) authorizes the obtaining of credit
99 under § 364 of the Code;
100 (D) authorizes the assumption or
101 assignment of an executory contract or
102 unexpired lease under § 365 of the Code;
103 (E) approves a disclosure statement
104 under § 1125 of the Code; or
105 (F) confirms a plan under § 943, 1129,
106 1225, or 1325 of the Code.
107 (3) *Time Limits on an Extension.* No
108 extension of time may exceed 21 days after the time
109 prescribed by this rule, or 14 days after the order
110 granting the motion to extend time is entered,
whichever is later.

COMMITTEE NOTE

This rule is derived from former Rule 8002 and F.R.App.P. 4(a) and (c). With the exception of subdivision (c), the changes to the former rule are stylistic. The rule retains the former rule's 14-day time period for filing a notice of appeal, as opposed to the longer periods permitted for appeals in civil cases under F.R.App.P. 4(a).

Subdivision (a) continues to allow any other party to file a notice of appeal within 14 days after the first notice of appeal is filed, or thereafter to the extent otherwise authorized by this rule. Subdivision (a) also retains provisions of the former rule that prescribe the date the notice of appeal is deemed filed if the appellant files it prematurely or in the wrong court.

Subdivision (b), like former Rule 8002(b) and F.R.App.P. 4(a), tolls the time for filing a notice of appeal when certain postjudgment motions are filed, and it prescribes the effective date of a notice of appeal that is filed before the court disposes of all of the specified motions. As under the former rule, a party that wants to appeal the court's disposition of the motion or the alteration or amendment of a judgment, order, or decree in response to such a motion must file a notice of appeal or, if it has already filed one, an amended notice of appeal.

Although Rule 8003(a)(3)(C) requires a notice of appeal to be accompanied by the required fee, no additional fee is required for the filing of an amended notice of appeal.

Subdivision (c) mirrors the provisions of F.R.App.P. 4(c)(1) and (2), which specify timing rules for a notice of appeal filed by an inmate confined in an institution.

Subdivision (d) continues to allow the court to grant an extension of time to file a notice of appeal, except with respect to certain specified judgments, orders, and decrees.

Changes Made After Publication

Stylistic changes were made to the title of subdivision (b)(3) and to subdivision (c)(1).

Rule 8003. Appeal as of Right—How Taken; Docketing the Appeal

1 (a) FILING THE NOTICE OF APPEAL.

2 (1) *In General.* An appeal from a judgment,
3 order, or decree of a bankruptcy court to a district
4 court or BAP under 28 U.S.C. § 158(a)(1) or (a)(2)
5 may be taken only by filing a notice of appeal with the
6 bankruptcy clerk within the time allowed by Rule
7 8002.

8 (2) *Effect of Not Taking Other Steps.* An
9 appellant's failure to take any step other than the
10 timely filing of a notice of appeal does not affect the
11 validity of the appeal, but is ground only for the
12 district court or BAP to act as it considers appropriate,
13 including dismissing the appeal.

14 (3) *Contents.* The notice of appeal must:

15 (A) conform substantially to the
16 appropriate Official Form;
17 (B) be accompanied by the
18 judgment, order, or decree, or the part of it,
19 being appealed; and
20 (C) be accompanied by the
21 prescribed fee.
22 (4) *Additional Copies*. If requested to do so,
23 the appellant must furnish the bankruptcy clerk with
24 enough copies of the notice to enable the clerk to
25 comply with subdivision (c).
26 (b) JOINT OR CONSOLIDATED APPEALS.
27 (1) *Joint Notice of Appeal*. When two or
28 more parties are entitled to appeal from a judgment,
29 order, or decree of a bankruptcy court and their
30 interests make joinder practicable, they may file a

31 joint notice of appeal. They may then proceed on
32 appeal as a single appellant.
33 (2) *Consolidating Appeals*. When parties
34 have separately filed timely notices of appeal, the
35 district court or BAP may join or consolidate the
36 appeals.
37 (c) SERVING THE NOTICE OF APPEAL.
38 (1) *Serving Parties and Transmitting to the*
39 *United States Trustee*. The bankruptcy clerk must
40 serve the notice of appeal on counsel of record for
41 each party to the appeal, excluding the appellant, and
42 transmit it to the United States trustee. If a party is
43 proceeding pro se, the clerk must send the notice of
44 appeal to the party's last known address. The clerk
45 must note, on each copy, the date when the notice of
46 appeal was filed.

47 (2) *Effect of Failing to Serve or Transmit*
48 *Notice*. The bankruptcy clerk's failure to serve notice
49 on a party or transmit notice to the United States
50 trustee does not affect the validity of the appeal.
51 (3) *Noting Service on the Docket*. The clerk
52 must note on the docket the names of the parties
53 served and the date and method of the service.
54 (d) TRANSMITTING THE NOTICE OF APPEAL
55 TO THE DISTRICT COURT OR BAP; DOCKETING THE
56 APPEAL.
57 (1) *Transmitting the Notice*. The bankruptcy
58 clerk must promptly transmit the notice of appeal to
59 the BAP clerk if a BAP has been established for
60 appeals from that district and the appellant has not
61 elected to have the district court hear the appeal.
62 Otherwise, the bankruptcy clerk must promptly

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63 transmit the notice to the district clerk.

64 (2) *Docketing in the District Court or BAP.*

65 Upon receiving the notice of appeal, the district or

66 BAP clerk must docket the appeal under the title of

67 the bankruptcy case and the title of any adversary

68 proceeding, and must identify the appellant, adding

69 the appellant's name if necessary.

COMMITTEE NOTE

This rule is derived from several former Bankruptcy Rule and Appellate Rule provisions. It addresses appeals as of right, joint and consolidated appeals, service of the notice of appeal, and the timing of the docketing of an appeal in the district court or BAP.

Subdivision (a) incorporates, with stylistic changes, much of the content of former Rule 8001(a) regarding the taking of an appeal as of right under 28 U.S.C. § 158(a)(1) or (2). The rule now requires that the judgment, order, or decree being appealed be attached to the notice of appeal.

Subdivision (b), which is an adaptation of F.R.App.P. 3(b), permits the filing of a joint notice of appeal by multiple

appellants that have sufficiently similar interests that their joinder is practicable. It also allows the district court or BAP to consolidate appeals taken separately by two or more parties.

Subdivision (c) is derived from former Rule 8004 and F.R.App.P. 3(d). Under Rule 8001(c), the former rule's requirement that service of the notice of appeal be accomplished by mailing is generally modified to require that the bankruptcy clerk serve counsel by electronic means. Service on pro se parties must be made by sending the notice to the address most recently provided to the court.

Subdivision (d) modifies the provision of former Rule 8007(b), which delayed the docketing of an appeal by the district court or BAP until the record was complete and the bankruptcy clerk transmitted it. The new provision, adapted from F.R.App.P. 3(d) and 12(a), requires the bankruptcy clerk to promptly transmit the notice of appeal to the clerk of the district court or BAP. Upon receipt of the notice of appeal, the district or BAP clerk must docket the appeal. Under this procedure, motions filed in the district court or BAP prior to completion and transmission of the record can generally be placed on the docket of an already pending appeal.

Changes Made After Publication

In subdivision (d)(2), the direction for docketing a bankruptcy appeal was changed to reflect the fact that many

bankruptcy appeals have dual titles—the bankruptcy case itself and the adversary proceeding that is the subject of the appeal. Stylistic changes were made to subdivision (c)(1). Conforming changes were made to the Committee Note.

Rule 8004. Appeal by Leave—How Taken; Docketing the Appeal

1 (a) NOTICE OF APPEAL AND MOTION FOR
2 LEAVE TO APPEAL. To appeal from an interlocutory order
3 or decree of a bankruptcy court under 28 U.S.C. § 158(a)(3),
4 a party must file with the bankruptcy clerk a notice of appeal
5 as prescribed by Rule 8003(a). The notice must:
6 (1) be filed within the time allowed by
7 Rule 8002;
8 (2) be accompanied by a motion for leave to
9 appeal prepared in accordance with subdivision (b);
10 and
11 (3) unless served electronically using the
12 court's transmission equipment, include proof of
13 service in accordance with Rule 8011(d).
14 (b) CONTENTS OF THE MOTION; RESPONSE.

15 (1) *Contents*. A motion for leave to appeal
16 under 28 U.S.C. § 158(a)(3) must include the
17 following:
18 (A) the facts necessary to understand
19 the question presented;
20 (B) the question itself;
21 (C) the relief sought;
22 (D) the reasons why leave to appeal
23 should be granted; and
24 (E) a copy of the interlocutory order
25 or decree and any related opinion or
26 memorandum.
27 (2) *Response*. A party may file with the
28 district or BAP clerk a response in opposition or a
29 cross-motion within 14 days after the motion is
30 served.

31 (c) TRANSMITTING THE NOTICE OF APPEAL
32 AND THE MOTION; DOCKETING THE APPEAL;
33 DETERMINING THE MOTION.
34 (1) *Transmitting to the District Court or BAP.*
35 The bankruptcy clerk must promptly transmit the
36 notice of appeal and the motion for leave to the BAP
37 clerk if a BAP has been established for appeals from
38 that district and the appellant has not elected to have
39 the district court hear the appeal. Otherwise, the
40 bankruptcy clerk must promptly transmit the notice
41 and motion to the district clerk.
42 (2) *Docketing in the District Court or BAP.*
43 Upon receiving the notice and motion, the district or
44 BAP clerk must docket the appeal under the title of
45 the bankruptcy case and the title of any adversary
46 proceeding, and must identify the appellant, adding

47 the appellant's name if necessary.

48 (3) *Oral Argument Not Required.* The motion
49 and any response or cross-motion are submitted
50 without oral argument unless the district court or BAP
51 orders otherwise.

52 (d) FAILURE TO FILE A MOTION WITH A
53 NOTICE OF APPEAL. If an appellant timely files a notice
54 of appeal under this rule but does not include a motion for
55 leave, the district court or BAP may order the appellant to file
56 a motion for leave, or treat the notice of appeal as a motion
57 for leave and either grant or deny it. If the court orders that a
58 motion for leave be filed, the appellant must do so within 14
59 days after the order is entered, unless the order provides
60 otherwise.

61 (e) DIRECT APPEAL TO A COURT OF APPEALS.
62 If leave to appeal an interlocutory order or decree is required

63 under 28 U.S.C. § 158(a)(3), an authorization of a direct
64 appeal by the court of appeals under 28 U.S.C. § 158(d)(2)
65 satisfies the requirement.

COMMITTEE NOTE

This rule is derived from former Rules 8001(b) and 8003 and F.R.App.P. 5. It retains the practice for interlocutory bankruptcy appeals of requiring a notice of appeal to be filed along with a motion for leave to appeal. Like current Rule 8003, it alters the timing of the docketing of the appeal in the district court or BAP.

Subdivision (a) requires a party seeking leave to appeal under 28 U.S.C. § 158(a)(3) to file with the bankruptcy clerk both a notice of appeal and a motion for leave to appeal.

Subdivision (b) prescribes the contents of the motion, retaining the requirements of former Rule 8003(a). It also continues to allow another party to file a cross-motion or response to the appellant's motion. Because of the prompt docketing of the appeal under the current rule, the cross-motion or response must be filed in the district court or BAP, rather than in the bankruptcy court as the former rule required.

Subdivision (c) requires the bankruptcy clerk to transmit promptly to the district court or BAP the notice of appeal and the motion for leave to appeal. Upon receipt of the notice and the motion, the district or BAP clerk must

docket the appeal. Unless the district court or BAP orders otherwise, no oral argument will be held on the motion.

Subdivision (d) retains the provisions of former Rule 8003(c). It provides that if the appellant timely files a notice of appeal, but fails to file a motion for leave to appeal, the court can either direct that a motion be filed or treat the notice of appeal as the motion and either grant or deny leave.

Subdivision (e), like former Rule 8003(d), treats the authorization of a direct appeal by the court of appeals as a grant of leave to appeal under 28 U.S.C. § 158(a)(3) if the district court or BAP has not already granted leave. Thus, a separate order granting leave to appeal is not required. If the court of appeals grants permission to appeal, the record must be assembled and transmitted in accordance with Rules 8009 and 8010.

Changes Made After Publication

In subdivision (c)(2), the direction for docketing a bankruptcy appeal was changed to reflect the fact that many bankruptcy appeals have dual titles—the bankruptcy case itself and the adversary proceeding that is the subject of the appeal. As published, subdivision (c)(3) stated that the court must dismiss the appeal if the motion for leave to appeal is denied. That sentence was deleted.

Rule 8005. Election to Have an Appeal Heard by the District Court Instead of the BAP

1 (a) FILING OF A STATEMENT OF ELECTION.
2 To elect to have an appeal heard by the district court, a party
3 must:
4 (1) file a statement of election that conforms
5 substantially to the appropriate Official Form; and
6 (2) do so within the time prescribed by 28
7 U.S.C. § 158(c)(1).
8 (b) TRANSMITTING THE DOCUMENTS
9 RELATED TO THE APPEAL. Upon receiving an
10 appellant's timely statement of election, the bankruptcy clerk
11 must transmit to the district clerk all documents related to the
12 appeal. Upon receiving a timely statement of election by a
13 party other than the appellant, the BAP clerk must transmit
14 to the district clerk all documents related to the appeal and

15 notify the bankruptcy clerk of the transmission.

16 (c) DETERMINING THE VALIDITY OF AN
17 ELECTION. A party seeking a determination of the validity
18 of an election must file a motion in the court where the appeal
19 is then pending. The motion must be filed within 14 days
20 after the statement of election is filed.

21 (d) MOTION FOR LEAVE WITHOUT A NOTICE
22 OF APPEAL—EFFECT ON THE TIMING OF AN
23 ELECTION. If an appellant moves for leave to appeal under
24 Rule 8004 but fails to file a separate notice of appeal with the
25 motion, the motion must be treated as a notice of appeal for
26 purposes of determining the timeliness of a statement of
27 election.

COMMITTEE NOTE

This rule, which implements 28 U.S.C. § 158(c)(1), is derived from former Rule 8001(e). It applies only in districts in which an appeal to a BAP is authorized.

As the former rule required, subdivision (a) provides that an appellant that elects to have a district court, rather than a BAP, hear its appeal must file with the bankruptcy clerk a statement of election when it files its notice of appeal. The statement must conform substantially to the appropriate Official Form. For appellants, that statement is included in the Notice of Appeal Official Form. If a BAP has been established for appeals from the bankruptcy court and the appellant does not file a timely statement of election, any other party that elects to have the district court hear the appeal must file a statement of election with the BAP clerk no later than 30 days after service of the notice of appeal.

Subdivision (b) requires the bankruptcy clerk to transmit all appeal documents to the district clerk if the appellant files a timely statement of election. If the appellant does not make that election, the bankruptcy clerk must transmit those documents to the BAP clerk. Upon a timely election by any other party, the BAP clerk must promptly transmit the appeal documents to the district clerk and notify the bankruptcy clerk that the appeal has been transferred.

Subdivision (c) provides a new procedure for the resolution of disputes regarding the validity of an election. A motion seeking the determination of the validity of an election must be filed no later than 14 days after the statement of election is filed. Nothing in this rule prevents a court from determining the validity of an election on its own motion.

Subdivision (d) provides that, in the case of an appeal by leave, if the appellant files a motion for leave to appeal but

fails to file a notice of appeal, the filing and service of the motion will be treated for timing purposes under this rule as the filing and service of the notice of appeal.

Changes Made After Publication

In subdivision (b), a requirement was added that the BAP clerk notify the bankruptcy clerk if an appeal is transferred from the BAP to the district court upon the election of an appellee. Conforming and clarifying changes were made to the Committee Note.

Rule 8006. Certifying a Direct Appeal to the Court of Appeals

1 (a) EFFECTIVE DATE OF A CERTIFICATION. A
2 certification of a judgment, order, or decree of a bankruptcy
3 court for direct review in a court of appeals under 28 U.S.C.
4 § 158(d)(2) is effective when:
5 (1) the certification has been filed;
6 (2) a timely appeal has been taken under Rule
7 8003 or 8004; and
8 (3) the notice of appeal has become effective
9 under Rule 8002.
10 (b) FILING THE CERTIFICATION. The
11 certification must be filed with the clerk of the court where
12 the matter is pending. For purposes of this rule, a matter
13 remains pending in the bankruptcy court for 30 days after the
14 effective date under Rule 8002 of the first notice of appeal

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15 from the judgment, order, or decree for which direct review
16 is sought. A matter is pending in the district court or BAP
17 thereafter.
18 (c) JOINT CERTIFICATION BY ALL
19 APPELLANTS AND APPELLEES. A joint certification by
20 all the appellants and appellees under 28 U.S.C.
21 § 158(d)(2)(A) must be made by using the appropriate
22 Official Form. The parties may supplement the certification
23 with a short statement of the basis for the certification, which
24 may include the information listed in subdivision (f)(2).
25 (d) THE COURT THAT MAY MAKE THE
26 CERTIFICATION. Only the court where the matter is
27 pending, as provided in subdivision (b), may certify a direct
28 review on request of parties or on its own motion.
29 (e) CERTIFICATION ON THE COURT'S OWN
30 MOTION.

31 (1) *How Accomplished.* A certification on the
32 court's own motion must be set forth in a separate
33 document. The clerk of the certifying court must
34 serve it on the parties to the appeal in the manner
35 required for service of a notice of appeal under Rule
36 8003(c)(1). The certification must be accompanied by
37 an opinion or memorandum that contains the
38 information required by subdivision (f)(2)(A)-(D).
39 (2) *Supplemental Statement by a Party.*
40 Within 14 days after the court's certification, a party
41 may file with the clerk of the certifying court a short
42 supplemental statement regarding the merits of
43 certification.
44 (f) CERTIFICATION BY THE COURT ON
45 REQUEST.
46 (1) *How Requested.* A request by a party for

47 certification that a circumstance specified in 28
48 U.S.C. §158(d)(2)(A)(i)-(iii) applies—or a request by
49 a majority of the appellants and a majority of the
50 appellees—must be filed with the clerk of the court
51 where the matter is pending within 60 days after the
52 entry of the judgment, order, or decree.

53 (2) *Service and Contents*. The request must
54 be served on all parties to the appeal in the manner
55 required for service of a notice of appeal under Rule
56 8003(c)(1), and it must include the following:

57 (A) the facts necessary to understand
58 the question presented;

59 (B) the question itself;

60 (C) the relief sought;

61 (D) the reasons why the direct appeal
62 should be allowed, including which

63 circumstance specified in 28 U.S.C. §
64 158(d)(2)(A)(i)-(iii) applies; and
65 (E) a copy of the judgment, order, or
66 decree and any related opinion or
67 memorandum.
68 (3) *Time to File a Response or a Cross-*
69 *Request*. A party may file a response to the request
70 within 14 days after the request is served, or such
71 other time as the court where the matter is pending
72 allows. A party may file a cross-request for
73 certification within 14 days after the request is served,
74 or within 60 days after the entry of the judgment,
75 order, or decree, whichever occurs first.
76 (4) *Oral Argument Not Required*. The
77 request, cross-request, and any response are submitted
78 without oral argument unless the court where the

79 matter is pending orders otherwise.

80 (5) *Form and Service of the Certification.* If
81 the court certifies a direct appeal in response to the
82 request, it must do so in a separate document. The
83 certification must be served on the parties to the
84 appeal in the manner required for service of a notice
85 of appeal under Rule 8003(c)(1).

86 (g) PROCEEDING IN THE COURT OF APPEALS
87 FOLLOWING A CERTIFICATION. Within 30 days after
88 the date the certification becomes effective under subdivision
89 (a), a request for permission to take a direct appeal to the
90 court of appeals must be filed with the circuit clerk in
91 accordance with F. R. App. P. 6(c).

COMMITTEE NOTE

This rule is derived from former Rule 8001(f), and it provides the procedures for the certification of a direct appeal of a judgment, order, or decree of a bankruptcy court to the

court of appeals under 28 U.S.C. § 158(d)(2). Once a case has been certified in the bankruptcy court, the district court, or the BAP for direct appeal and a request for permission to appeal has been timely filed with the circuit clerk, the Federal Rules of Appellate Procedure govern further proceedings in the court of appeals.

Subdivision (a), like the former rule, requires that an appeal be properly taken—now under Rule 8003 or 8004—before a certification for direct review in the court of appeals takes effect. This rule requires the timely filing of a notice of appeal under Rule 8002 and accounts for the delayed effectiveness of a notice of appeal under the circumstances specified in that rule. Ordinarily, a notice of appeal is effective when it is filed in the bankruptcy court. Rule 8002, however, delays the effectiveness of a notice of appeal when (1) it is filed after the announcement of a decision or order but prior to the entry of the judgment, order, or decree; or (2) it is filed after the announcement or entry of a judgment, order, or decree but before the bankruptcy court disposes of certain postjudgment motions.

When the bankruptcy court enters an interlocutory order or decree that is appealable under 28 U.S.C. § 158(a)(3), certification for direct review in the court of appeals may take effect before the district court or BAP grants leave to appeal. The certification is effective when the actions specified in subdivision (a) have occurred. Rule 8004(e) provides that if the court of appeals grants permission to take a direct appeal before leave to appeal an interlocutory ruling has been granted, the authorization by the court of appeals is treated as

the granting of leave to appeal.

Subdivision (b) provides that a certification must be filed in the court where the matter is pending, as determined by this subdivision. This provision modifies the former rule. Because of the prompt docketing of appeals in the district court or BAP under Rules 8003 and 8004, a matter is deemed—for purposes of this rule only—to remain pending in the bankruptcy court for 30 days after the effective date of the notice of appeal. This provision will in appropriate cases give the bankruptcy judge, who will be familiar with the matter being appealed, an opportunity to decide whether certification for direct review is appropriate. Similarly, subdivision (d) provides that only the court where the matter is then pending according to subdivision (b) may make a certification on its own motion or on the request of one or more parties.

Section 158(d)(2) provides three different ways in which an appeal may be certified for direct review. Implementing these options, the rule provides in subdivision (c) for the joint certification by all appellants and appellees; in subdivision (e) for the bankruptcy court's, district court's, or BAP's certification on its own motion; and in subdivision (f) for the bankruptcy court's, district court's, or BAP's certification on request of a party or a majority of appellants and a majority of appellees.

Subdivision (g) requires that, once a certification for direct review is made, a request to the court of appeals for permission to take a direct appeal to that court must be filed

with the clerk of the court of appeals no later than 30 days after the effective date of the certification. Federal Rule of Appellate Procedure 6(c), which incorporates all of F.R.App.P. 5 except subdivision (a)(3), prescribes the procedure for requesting the permission of the court of appeals and governs proceedings that take place thereafter in that court.

Changes Made After Publication

In subdivisions (b) and (g), cross-references were added. In subdivision (f)(4), the statement regarding the inapplicability of Rule 9014 was deleted as unnecessary. A clarifying change was made to the first paragraph of the Committee Note.

Rule 8007. Stay Pending Appeal; Bonds; Suspension of Proceedings

1 (a) INITIAL MOTION IN THE BANKRUPTCY
2 COURT.
3 (1) *In General.* Ordinarily, a party must move
4 first in the bankruptcy court for the following relief:
5 (A) a stay of a judgment, order, or
6 decree of the bankruptcy court pending
7 appeal;
8 (B) the approval of a supersedeas
9 bond;
10 (C) an order suspending, modifying,
11 restoring, or granting an injunction while an
12 appeal is pending; or
13 (D) the suspension or continuation of
14 proceedings in a case or other relief permitted

15 by subdivision (e).

16 (2) *Time to File.* The motion may be made
17 either before or after the notice of appeal is filed.

18 (b) MOTION IN THE DISTRICT COURT, THE
19 BAP, OR THE COURT OF APPEALS ON DIRECT
20 APPEAL.

21 (1) *Request for Relief.* A motion for the relief
22 specified in subdivision (a)(1)—or to vacate or
23 modify a bankruptcy court's order granting such
24 relief—may be made in the court where the appeal is
25 pending.

26 (2) *Showing or Statement Required.* The
27 motion must:

28 (A) show that moving first in the
29 bankruptcy court would be impracticable; or

30 (B) if a motion was made in the

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31 bankruptcy court, either state that the court
32 has not yet ruled on the motion, or state that
33 the court has ruled and set out any reasons
34 given for the ruling.
35 (3) *Additional Content.* The motion must also
36 include:
37 (A) the reasons for granting the relief
38 requested and the facts relied upon;
39 (B) affidavits or other sworn
40 statements supporting facts subject to dispute;
41 and
42 (C) relevant parts of the record.
43 (4) *Serving Notice.* The movant must give
44 reasonable notice of the motion to all parties.
45 (c) FILING A BOND OR OTHER SECURITY. The
46 district court, BAP, or court of appeals may condition relief

47 on filing a bond or other appropriate security with the
48 bankruptcy court.
49 (d) BOND FOR A TRUSTEE OR THE UNITED
50 STATES. The court may require a trustee to file a bond or
51 other appropriate security when the trustee appeals. A bond
52 or other security is not required when an appeal is taken by
53 the United States, its officer, or its agency or by direction of
54 any department of the federal government.
55 (e) CONTINUATION OF PROCEEDINGS IN THE
56 BANKRUPTCY COURT. Despite Rule 7062 and subject to
57 the authority of the district court, BAP, or court of appeals,
58 the bankruptcy court may:
59 (1) suspend or order the continuation of other
60 proceedings in the case; or
61 (2) issue any other appropriate orders during
62 the pendency of an appeal to protect the rights of all

63 parties in interest.

COMMITTEE NOTE

This rule is derived from former Rule 8005 and F.R.App.P. 8. It now applies to direct appeals in courts of appeals.

Subdivision (a), like the former rule, requires a party ordinarily to seek relief pending an appeal in the bankruptcy court. Subdivision (a)(1) expands the list of relief enumerated in F.R.App.P. 8(a)(1) to reflect bankruptcy practice. It includes the suspension or continuation of other proceedings in the bankruptcy case, as authorized by subdivision (e). Subdivision (a)(2) clarifies that a motion for a stay pending appeal, approval of a supersedeas bond, or any other relief specified in paragraph (1) may be made in the bankruptcy court before or after the filing of a notice of appeal.

Subdivision (b) authorizes a party to seek the relief specified in (a)(1), or the vacation or modification of the granting of such relief, by means of a motion filed in the court where the appeal is pending—district court, BAP, or the court of appeals on direct appeal. Accordingly, a notice of appeal need not be filed with respect to a bankruptcy court's order granting or denying such a motion. The motion for relief in the district court, BAP, or court of appeals must state why it was impracticable to seek relief initially in the bankruptcy court, if a motion was not filed there, or why the bankruptcy court denied the relief sought.

Subdivisions (c) and (d) retain the provisions of the former rule that permit the district court or BAP—and now the court of appeals—to condition the granting of relief on the posting of a bond by the appellant, except when that party is a federal government entity. Rule 9025 governs proceedings against sureties.

Subdivision (e) retains the provision of the former rule that authorizes the bankruptcy court to decide whether to suspend or allow the continuation of other proceedings in the bankruptcy case while the matter for which a stay has been sought is pending on appeal.

Changes Made After Publication

The clause "or where it will be taken" was deleted in subdivision (b)(1). Stylistic changes were made to the titles of subdivisions (b) and (e) and in subdivision (e)(1). A discussion of subdivision (e) was added to the Committee Note.

Rule 8008. Indicative Rulings

1 (a) RELIEF PENDING APPEAL. If a party files a
2 timely motion in the bankruptcy court for relief that the court
3 lacks authority to grant because of an appeal that has been
4 docketed and is pending, the bankruptcy court may:
5 (1) defer considering the motion;
6 (2) deny the motion; or
7 (3) state that the court would grant the motion
8 if the court where the appeal is pending remands for
9 that purpose, or state that the motion raises a
10 substantial issue.
11 (b) NOTICE TO THE COURT WHERE THE
12 APPEAL IS PENDING. The movant must promptly notify
13 the clerk of the court where the appeal is pending if the
14 bankruptcy court states that it would grant the motion or that
15 the motion raises a substantial issue.

16 (c) REMAND AFTER AN INDICATIVE RULING.
17 If the bankruptcy court states that it would grant the motion or
18 that the motion raises a substantial issue, the district court or
19 BAP may remand for further proceedings, but it retains
20 jurisdiction unless it expressly dismisses the appeal. If the
21 district court or BAP remands but retains jurisdiction, the
22 parties must promptly notify the clerk of that court when the
23 bankruptcy court has decided the motion on remand.

COMMITTEE NOTE

This rule is an adaptation of F.R.Civ.P. 62.1 and F.R.App.P. 12.1. It provides a procedure for the issuance of an indicative ruling when a bankruptcy court determines that, because of a pending appeal, the court lacks jurisdiction to grant a request for relief that the court concludes is meritorious or raises a substantial issue. The rule does not attempt to define the circumstances in which an appeal limits or defeats the bankruptcy court's authority to act in the face of a pending appeal. In contrast, Rule 8002(b) identifies motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before the last such motion is resolved. In those circumstances, the bankruptcy court has authority to resolve the motion without resorting to

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the indicative ruling procedure.

Subdivision (b) requires the movant to notify the court where an appeal is pending if the bankruptcy court states that it would grant the motion or that it raises a substantial issue. This provision applies to appeals pending in the district court, the BAP, or the court of appeals.

Federal Rules of Appellate Procedure 6 and 12.1 govern the procedure in the court of appeals following notification of the bankruptcy court's indicative ruling.

Subdivision (c) of this rule governs the procedure in the district court or BAP upon notification that the bankruptcy court has issued an indicative ruling. The district court or BAP may remand to the bankruptcy court for a ruling on the motion for relief. The district court or BAP may also remand all proceedings, thereby terminating the initial appeal, if it expressly states that it is dismissing the appeal. It should do so, however, only when the appellant has stated clearly its intention to abandon the appeal. Otherwise, the district court or BAP may remand for the purpose of ruling on the motion, while retaining jurisdiction to proceed with the appeal after the bankruptcy court rules, provided that the appeal is not then moot and a party wishes to proceed.

Changes Made After Publication

No changes were made after publication.

Rule 8009. Record on Appeal; Sealed Documents

1 (a) DESIGNATING THE RECORD ON APPEAL;
2 STATEMENT OF THE ISSUES.
3 (1) *Appellant.*
4 (A) The appellant must file with the
5 bankruptcy clerk and serve on the appellee a
6 designation of the items to be included in the
7 record on appeal and a statement of the issues
8 to be presented.
9 (B) The appellant must file and serve
10 the designation and statement within 14 days
11 after:
12 (i) the appellant's notice of
13 appeal as of right becomes effective
14 under Rule 8002; or
15 (ii) an order granting leave to

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16 appeal is entered.

17 A designation and statement served
18 prematurely must be treated as served on the
19 first day on which filing is timely.

20 (2) *Appellee and Cross-Appellant.* Within 14
21 days after being served, the appellee may file with the
22 bankruptcy clerk and serve on the appellant a
23 designation of additional items to be included in the
24 record. An appellee who files a cross-appeal must file
25 and serve a designation of additional items to be
26 included in the record and a statement of the issues to
27 be presented on the cross-appeal.

28 (3) *Cross-Appellee.* Within 14 days after
29 service of the cross-appellant's designation and
30 statement, a cross-appellee may file with the
31 bankruptcy clerk and serve on the cross-appellant a

32 designation of additional items to be included in the
33 record.
34 (4) *Record on Appeal.* The record on appeal
35 must include the following:
36 • the docket entries kept by the
37 bankruptcy clerk;
38 • items designated by the parties;
39 • the notice of appeal;
40 • the judgment, order, or decree being
41 appealed;
42 • any order granting leave to appeal;
43 any certification required for a direct appeal to
44 the court of appeals;
45 • any opinion, findings of fact, and
46 conclusions of law relating to the issues on
47 appeal, including transcripts of all oral

48 rulings;

49 • any transcript ordered under
50 subdivision (b);

51 • any statement required by subdivision
52 (c);

53 and

54 • any additional items from the record
55 that the court where the appeal is
56 pending orders.

57 (5) *Copies for the Bankruptcy Clerk.* If paper
58 copies are needed, a party filing a designation of items
59 must provide a copy of any of those items that the
60 bankruptcy clerk requests. If the party fails to do so,
61 the bankruptcy clerk must prepare the copy at the
62 party's expense.

63 (b) TRANSCRIPT OF PROCEEDINGS.

64 (1) *Appellant's Duty to Order.* Within the
65 time period prescribed by subdivision (a)(1), the
66 appellant must:
67 (A) order in writing from the reporter,
68 as defined in Rule 8010(a)(1), a transcript of
69 such parts of the proceedings not already on
70 file as the appellant considers necessary for
71 the appeal, and file a copy of the order with
72 the bankruptcy clerk; or
73 (B) file with the bankruptcy clerk a
74 certificate stating that the appellant is not
75 ordering a transcript.
76 (2) *Cross-Appellant's Duty to Order.* Within
77 14 days after the appellant files a copy of the
78 transcript order or a certificate of not ordering a
79 transcript, the appellee as cross-appellant must:

80 (A) order in writing from the reporter,
81 as defined in Rule 8010(a)(1), a transcript of
82 such additional parts of the proceedings as the
83 cross-appellant considers necessary for the
84 appeal, and file a copy of the order with the
85 bankruptcy clerk; or
86 (B) file with the bankruptcy clerk a
87 certificate stating that the cross-appellant is
88 not ordering a transcript.
89 (3) *Appellee's or Cross-Appellee's Right to*
90 *Order*. Within 14 days after the appellant or cross-
91 appellant files a copy of a transcript order or
92 certificate of not ordering a transcript, the appellee or
93 cross-appellee may order in writing from the reporter
94 a transcript of such additional parts of the proceedings
95 as the appellee or cross-appellee considers necessary

96 for the appeal. A copy of the order must be filed with
97 the bankruptcy clerk.
98 (4) *Payment*. At the time of ordering, a party
99 must make satisfactory arrangements with the reporter
100 for paying the cost of the transcript.
101 (5) *Unsupported Finding or Conclusion.* If
102 the appellant intends to argue on appeal that a finding
103 or conclusion is unsupported by the evidence or is
104 contrary to the evidence, the appellant must include in
105 the record a transcript of all relevant testimony and
106 copies of all relevant exhibits.
107 (c) STATEMENT OF THE EVIDENCE WHEN A
108 TRANSCRIPT IS UNAVAILABLE. If a transcript of a
109 hearing or trial is unavailable, the appellant may prepare a
110 statement of the evidence or proceedings from the best
111 available means, including the appellant's recollection. The

112 statement must be filed within the time prescribed by
113 subdivision (a)(1) and served on the appellee, who may serve
114 objections or proposed amendments within 14 days after
115 being served. The statement and any objections or proposed
116 amendments must then be submitted to the bankruptcy court
117 for settlement and approval. As settled and approved, the
118 statement must be included by the bankruptcy clerk in the
119 record on appeal.

120 (d) AGREED STATEMENT AS THE RECORD ON
121 APPEAL. Instead of the record on appeal as defined in
122 subdivision (a), the parties may prepare, sign, and submit to
123 the bankruptcy court a statement of the case showing how the
124 issues presented by the appeal arose and were decided in the
125 bankruptcy court. The statement must set forth only those
126 facts alleged and proved or sought to be proved that are
127 essential to the court's resolution of the issues. If the

128 statement is accurate, it—together with any additions that the
129 bankruptcy court may consider necessary to a full presentation
130 of the issues on appeal—must be approved by the bankruptcy
131 court and must then be certified to the court where the appeal
132 is pending as the record on appeal. The bankruptcy clerk
133 must then transmit it to the clerk of that court within the time
134 provided by Rule 8010. A copy of the agreed statement may
135 be filed in place of the appendix required by Rule 8018(b) or,
136 in the case of a direct appeal to the court of appeals, by
137 F.R.App.P. 30.

138 (e) CORRECTING OR MODIFYING THE
139 RECORD.

140 (1) *Submitting to the Bankruptcy Court.* If
141 any difference arises about whether the record
142 accurately discloses what occurred in the bankruptcy
143 court, the difference must be submitted to and settled

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144 by the bankruptcy court and the record conformed
145 accordingly. If an item has been improperly
146 designated as part of the record on appeal, a party may
147 move to strike that item.
148 (2) *Correcting in Other Ways*. If anything
149 material to either party is omitted from or misstated in
150 the record by error or accident, the omission or
151 misstatement may be corrected, and a supplemental
152 record may be certified and transmitted:
153 (A) on stipulation of the parties;
154 (B) by the bankruptcy court before or
155 after the record has been forwarded; or
156 (C) by the court where the appeal is
157 pending.
158 (3) *Remaining Questions*. All other questions
159 as to the form and content of the record must be

160 presented to the court where the appeal is pending.

161 (f) SEALED DOCUMENTS. A document placed
162 under seal by the bankruptcy court may be designated as part
163 of the record on appeal. In doing so, a party must identify it
164 without revealing confidential or secret information, but the
165 bankruptcy clerk must not transmit it to the clerk of the court
166 where the appeal is pending as part of the record. Instead, a
167 party must file a motion with the court where the appeal is
168 pending to accept the document under seal. If the motion is
169 granted, the movant must notify the bankruptcy court of the
170 ruling, and the bankruptcy clerk must promptly transmit the
171 sealed document to the clerk of the court where the appeal is
172 pending.

173 (g) OTHER NECESSARY ACTIONS. All parties to
174 an appeal must take any other action necessary to enable the
175 bankruptcy clerk to assemble and transmit the record.

COMMITTEE NOTE

This rule is derived from former Rule 8006 and F.R.App.P. 10 and 11(a). The provisions of this rule and Rule 8010 are applicable to appeals taken directly to a court of appeals under 28 U.S.C. § 158(d)(2), as well as to appeals to a district court or BAP. *See* F.R.App.P. 6(c)(2)(A) and (B).

The rule retains the practice of former Rule 8006 of requiring the parties to designate items to be included in the record on appeal. In this respect, the bankruptcy rule differs from the appellate rule. Among other things, F.R.App.P. 10(a) provides that the record on appeal consists of all the documents and exhibits filed in the case. This requirement would often be unworkable in a bankruptcy context because thousands of items might have been filed in the overall bankruptcy case.

Subdivision (a) provides the time period for an appellant to file a designation of items to be included in the record on appeal and a statement of the issues to be presented. It then provides for the designation of additional items by the appellee, cross-appellant, and cross-appellee, as well as for the cross-appellant's statement of the issues to be presented in its appeal. Subdivision (a)(4) prescribes the content of the record on appeal. Ordinarily, the bankruptcy clerk will not need to have paper copies of the designated items because the clerk will either transmit them to the appellate court electronically or otherwise make them available electronically. If the bankruptcy clerk requires a paper copy

of some or all of the items designated as part of the record, the clerk may request the party that designated the item to provide the necessary copies, and the party must comply with the request or bear the cost of the clerk's copying.

Subdivision (b) governs the process for ordering a complete or partial transcript of the bankruptcy court proceedings. In situations in which a transcript is unavailable, subdivision (c) allows for the parties' preparation of a statement of the evidence or proceedings, which must be approved by the bankruptcy court.

Subdivision (d) adopts the practice of F.R.App.P. 10(d) of permitting the parties to agree on a statement of the case in place of the record on appeal. The statement must show how the issues on appeal arose and were decided in the bankruptcy court. It must be approved by the bankruptcy court in order to be certified as the record on appeal.

Subdivision (e), modeled on F.R.App.P. 10(e), provides a procedure for correcting the record on appeal if an item is improperly designated, omitted, or misstated.

Subdivision (f) is a new provision that governs the handling of any document that remains sealed by the bankruptcy court and that a party wants to include in the record on appeal. The party must request the court where the appeal is pending to accept the document under seal, and that motion must be granted before the bankruptcy clerk may transmit the sealed document to the district, BAP, or circuit clerk.

Subdivision (g) requires the parties' cooperation with the bankruptcy clerk in assembling and transmitting the record. It retains the requirement of former Rule 8006, which was adapted from F.R.App.P. 11(a).

Changes Made After Publication

In subdivision (a)(2) and (3), the place of filing was clarified. "Docket entries kept by the bankruptcy clerk" was added to the list in subdivision (a)(4).

Rule 8010. Completing and Transmitting the Record

1 (a) REPORTER'S DUTIES.

2 (1) *Proceedings Recorded Without a Reporter*
3 *Present.* If proceedings were recorded without a
4 reporter being present, the person or service selected
5 under bankruptcy court procedures to transcribe the
6 recording is the reporter for purposes of this rule.

7 (2) *Preparing and Filing the Transcript.* The
8 reporter must prepare and file a transcript as follows:

9 (A) Upon receiving an order for a
10 transcript in accordance with Rule 8009(b),
11 the reporter must file in the bankruptcy court
12 an acknowledgment of the request that shows
13 when it was received, and when the reporter
14 expects to have the transcript completed.

15 (B) After completing the transcript, the

16 reporter must file it with the bankruptcy clerk,
17 who will notify the district, BAP, or circuit
18 clerk of its filing.
19 (C) If the transcript cannot be
20 completed within 30 days after receiving the
21 order, the reporter must request an extension
22 of time from the bankruptcy clerk. The clerk
23 must enter on the docket and notify the parties
24 whether the extension is granted.
25 (D) If the reporter does not file the
26 transcript on time, the bankruptcy clerk must
27 notify the bankruptcy judge.
28 (b) CLERK'S DUTIES.
29 (1) *Transmitting the Record—In General.*
30 Subject to Rule 8009(f) and subdivision (b)(5) of this
31 rule, when the record is complete, the bankruptcy

32 clerk must transmit to the clerk of the court where the
33 appeal is pending either the record or a notice that the
34 record is available electronically.

35 (2) *Multiple Appeals*. If there are multiple
36 appeals from a judgment, order, or decree, the
37 bankruptcy clerk must transmit a single record.

38 (3) *Receiving the Record*. Upon receiving the
39 record or notice that it is available electronically, the
40 district, BAP, or circuit clerk must enter that
41 information on the docket and promptly notify all
42 parties to the appeal.

43 (4) *If Paper Copies Are Ordered*. If the court
44 where the appeal is pending directs that paper copies
45 of the record be provided, the clerk of that court must
46 so notify the appellant. If the appellant fails to

47 provide them, the bankruptcy clerk must prepare them
48 at the appellant's expense.
49 (5) *When Leave to Appeal is Requested.*
50 Subject to subdivision (c), if a motion for leave to
51 appeal has been filed under Rule 8004, the bankruptcy
52 clerk must prepare and transmit the record only after
53 the district court, BAP, or court of appeals grants
54 leave.
55 (c) RECORD FOR A PRELIMINARY MOTION IN
56 THE DISTRICT COURT, BAP, OR COURT OF APPEALS.
57 This subdivision (c) applies if, before the record is
58 transmitted, a party moves in the district court, BAP, or court
59 of appeals for any of the following relief:
60 • leave to appeal;
61 • dismissal;
62 • a stay pending appeal;

63 • approval of a supersedeas bond, or additional
64 security on a bond or undertaking on appeal; or
65 • any other intermediate order.
66 The bankruptcy clerk must then transmit to the clerk of the
67 court where the relief is sought any parts of the record
68 designated by a party to the appeal or a notice that those parts
69 are available electronically.

COMMITTEE NOTE

This rule is derived from former Rule 8007 and F.R.App. P 11. It applies to an appeal taken directly to a court of appeals under 28 U.S.C. § 158(d)(2), as well as to an appeal to a district court or BAP.

Subdivision (a) generally retains the procedure of former Rule 8007(a) regarding the reporter's duty to prepare and file a transcript if a party requests one. It clarifies that the person or service that transcribes the recording of a proceeding is considered the reporter under this rule if the proceeding is recorded without a reporter being present in the courtroom. It also makes clear that the reporter must file with the bankruptcy court the acknowledgment of the request for a transcript and statement of the expected completion date,

the completed transcript, and any request for an extension of time beyond 30 days for completion of the transcript.

Subdivision (b) requires the bankruptcy clerk to transmit the record to the district, BAP or circuit clerk when the record is complete and, in the case of appeals under 28 U.S.C. §158(a)(3), leave to appeal has been granted. This transmission will be made electronically, either by sending the record itself or sending notice that the record can be accessed electronically. The court where the appeal is pending may, however, require that a paper copy of some or all of the record be furnished, in which case the clerk of that court will direct the appellant to provide the copies. If the appellant does not do so, the bankruptcy clerk must prepare the copies at the appellant's expense.

In a change from former Rule 8007(b), subdivision (b) of this rule no longer directs the clerk of the appellate court to docket the appeal upon receipt of the record from the bankruptcy clerk. Instead, under Rules 8003(d) and 8004(c) and F.R.App.P. 12(a), the district, BAP, or circuit clerk dockets the appeal upon receipt of the notice of appeal or, in the case of appeals under 28 U.S.C. § 158(a)(3), the notice of appeal and the motion for leave to appeal. Accordingly, by the time the district, BAP, or circuit clerk receives the record, the appeal will already be docketed in that court. The clerk of the appellate court must indicate on the docket and give notice to the parties to the appeal when the transmission of the record is received. Under Rule 8018(a) and F.R.App.P. 31, the briefing schedule is generally based on that date.

Subdivision (c) is derived from former Rule 8007(c) and F.R.App.P. 11(g) . It provides for the transmission of parts of the record that the parties designate for consideration by the district court, BAP, or court of appeals in ruling on specified preliminary motions filed prior to the preparation and transmission of the record on appeal.

Changes Made After Publication

Subdivision (a)(1) was revised to more accurately reflect the way in which transcription services are selected. A cross-reference to Rule 8009(b) was added to subdivision (a)(2)(A).

Rule 8011. Filing and Service; Signature

1 (a) FILING.

2 (1) *With the Clerk.* A document required or
3 permitted to be filed in a district court or BAP must
4 be filed with the clerk of that court.

5 (2) *Method and Timeliness.*

6 (A) *In General.* Filing may be
7 accomplished by transmission to the clerk of
8 the district court or BAP. Except as provided
9 in subdivision (a)(2)(B) and (C), filing is
10 timely only if the clerk receives the document
11 within the time fixed for filing.

12 (B) *Brief or Appendix.* A brief or
13 appendix is also timely filed if, on or before
14 the last day for filing, it is:

15 (i) mailed to the clerk by first-
16 class mail—or other class of mail that
17 is at least as expeditious—postage
18 prepaid, if the district court's or
19 BAP's procedures permit or require a
20 brief or appendix to be filed by
21 mailing; or
22 (ii) dispatched to a third-party
23 commercial carrier for delivery within
24 3 days to the clerk, if the court's
25 procedures so permit or require.
26 (C) *Inmate Filing*. A document filed
27 by an inmate confined in an institution is
28 timely if deposited in the institution's internal
29 mailing system on or before the last day for
30 filing. If the institution has a system designed

31 for legal mail, the inmate must use that system
32 to receive the benefit of this rule. Timely
33 filing may be shown by a declaration in
34 compliance with 28 U.S.C. § 1746 or by a
35 notarized statement, either of which must set
36 forth the date of deposit and state that first-
37 class postage has been prepaid.
38 (D) *Copies*. If a document is filed
39 electronically, no paper copy is required. If a
40 document is filed by mail or delivery to the
41 district court or BAP, no additional copies are
42 required. But the district court or BAP may
43 require by local rule or by order in a particular
44 case the filing or furnishing of a specified
45 number of paper copies.

46 (3) *Clerk's Refusal of Documents.* The
47 court's clerk must not refuse to accept for filing any
48 document transmitted for that purpose solely because
49 it is not presented in proper form as required by these
50 rules or by any local rule or practice.
51 (b) SERVICE OF ALL DOCUMENTS REQUIRED.
52 Unless a rule requires service by the clerk, a party must, at or
53 before the time of the filing of a document, serve it on the
54 other parties to the appeal. Service on a party represented by
55 counsel must be made on the party's counsel.
56 (c) MANNER OF SERVICE.
57 (1) *Methods.* Service must be made
58 electronically, unless it is being made by or on an
59 individual who is not represented by counsel or the
60 court's governing rules permit or require service by
61 mail or other means of delivery. Service may be made

62 by or on an unrepresented party by any of the
63 following methods:
64 (A) personal delivery;
65 (B) mail; or
66 (C) third-party commercial carrier for
67 delivery within 3 days.
68 (2) *When Service Is Complete.* Service by
69 electronic means is complete on transmission, unless
70 the party making service receives notice that the
71 document was not transmitted successfully. Service
72 by mail or by commercial carrier is complete on
73 mailing or delivery to the carrier.
74 (d) PROOF OF SERVICE.
75 (1) *What Is Required.* A document presented
76 for filing must contain either:

77 (A) an acknowledgment of service by
78 the person served; or
79 (B) proof of service consisting of a
80 statement by the person who made service
81 certifying:
82 (i) the date and manner of
83 service;
84 (ii) the names of the persons
85 served; and
86 (iii) the mail or electronic
87 address, the fax number, or the address
88 of the place of delivery, as appropriate
89 for the manner of service, for each
90 person served.
91 (2) *Delayed Proof.* The district or BAP clerk
92 may permit documents to be filed without

93 acknowledgment or proof of service, but must require
94 the acknowledgment or proof to be filed promptly
95 thereafter.
96 (3) *Brief or Appendix.* When a brief or
97 appendix is filed, the proof of service must also state
98 the date and manner by which it was filed.
99 (e) SIGNATURE. Every document filed
100 electronically must include the electronic signature of the
101 person filing it or, if the person is represented, the electronic
102 signature of counsel. The electronic signature must be
103 provided by electronic means that are consistent with any
104 technical standards that the Judicial Conference of the United
105 States establishes. Every document filed in paper form must
106 be signed by the person filing the document or, if the person
107 is represented, by counsel.

COMMITTEE NOTE

This rule is derived from former Rule 8008 and F.R.App.P. 25. It adopts some of the additional details of the appellate rule, and it provides greater recognition of the possibility of electronic filing and service.

Subdivision (a) governs the filing of documents in the district court or BAP. Consistent with other provisions of these Part VIII rules, subdivision (a)(2) requires electronic filing of documents, including briefs and appendices, unless the district court's or BAP's procedures permit or require other methods of delivery to the court. An electronic filing is timely if it is received by the district or BAP clerk within the time fixed for filing. No additional copies need to be submitted when documents are filed electronically, by mail, or by delivery unless the district court or BAP requires them.

Subdivision (a)(3) provides that the district or BAP clerk may not refuse to accept a document for filing solely because its form does not comply with these rules or any local rule or practice. The district court or BAP may, however, direct the correction of any deficiency in any document that does not conform to the requirements of these rules or applicable local rules, and may prescribe such other relief as the court deems appropriate.

Subdivisions (b) and (c) address the service of documents in the district court or BAP. Except for documents that the district or BAP clerk must serve, a party that makes a filing must serve copies of the document on the

other parties to the appeal. Service on represented parties must be made on counsel. Subdivision (c) expresses the general requirement under these Part VIII rules that documents be sent electronically. *See* Rule 8001(c). Local court rules, however, may provide for other means of service, and subdivision (c) specifies non-electronic methods of service by or on an unrepresented party. Electronic service is complete upon transmission, unless the party making service receives notice that the transmission did not reach the person intended to be served in a readable form.

Subdivision (d) retains the former rule's provisions regarding proof of service of a document filed in the district court or BAP. In addition, it provides that a certificate of service must state the mail or electronic address or fax number to which service was made.

Subdivision (e) is a new provision that requires an electronic signature of counsel or an unrepresented filer for documents that are filed electronically in the district court or BAP. A local rule may specify a method of providing an electronic signature that is consistent with any standards established by the Judicial Conference of the United States. Paper copies of documents filed in the district court or BAP must bear an actual signature of counsel or the filer. By requiring a signature, subdivision (e) ensures that a readily identifiable attorney or party takes responsibility for every document that is filed.

Changes Made After Publication

No changes were made after publication.

Rule 8012. Corporate Disclosure Statement

1 (a) WHO MUST FILE. Any nongovernmental
2 corporate party appearing in the district court or BAP must
3 file a statement that identifies any parent corporation and any
4 publicly held corporation that owns 10% or more of its stock
5 or states that there is no such corporation.
6 (b) TIME TO FILE; SUPPLEMENTAL FILING. A
7 party must file the statement with its principal brief or upon
8 filing a motion, response, petition, or answer in the district
9 court or BAP, whichever occurs first, unless a local rule
10 requires earlier filing. Even if the statement has already been
11 filed, the party's principal brief must include a statement
12 before the table of contents. A party must supplement its
13 statement whenever the required information changes.

COMMITTEE NOTE

This rule is derived from F.R.App.P. 26.1. It requires the filing of corporate disclosure statements and supplemental statements in order to assist district court and BAP judges in determining whether they should recuse themselves. Rule 9001 makes the definitions in § 101 of the Code applicable to these rules. Under § 101(9) the word "corporation" includes a limited liability company, limited liability partnership, business trust, and certain other entities that are not designated under applicable law as corporations.

If filed separately from a brief, motion, response, petition, or answer, the statement must be filed and served in accordance with Rule 8011. Under Rule 8015(a)(7)(B)(iii), the corporate disclosure statement is not included in calculating applicable word-count limitations.

Changes Made After Publication

A sentence was added to the Committee Note to draw attention to the broad definition of "corporation" under § 101(9) of the Bankruptcy Code.

Rule 8013. Motions; Intervention

1 (a) CONTENTS OF A MOTION; RESPONSE;
2 REPLY.
3 (1) *Request for Relief.* A request for an order
4 or other relief is made by filing a motion with the
5 district or BAP clerk, with proof of service on the
6 other parties to the appeal.
7 (2) *Contents of a Motion.*
8 (A) *Grounds and the Relief Sought.* A
9 motion must state with particularity the
10 grounds for the motion, the relief sought, and
11 the legal argument necessary to support it.
12 (B) *Motion to Expedite an Appeal.* A
13 motion to expedite an appeal must explain
14 what justifies considering the appeal ahead of
15 other matters. If the district court or BAP

16 grants the motion, it may accelerate the time
17 to transmit the record, the deadline for filing
18 briefs and other documents, oral argument,
19 and the resolution of the appeal. A motion to
20 expedite an appeal may be filed as an
21 emergency motion under subdivision (d).
22 (C) *Accompanying Documents.*
23 (i) Any affidavit or other
24 document necessary to support a
25 motion must be served and filed with
26 the motion.
27 (ii) An affidavit must contain
28 only factual information, not legal
29 argument.
30 (iii) A motion seeking
31 substantive relief must include a copy

32 of the bankruptcy court's judgment,
33 order, or decree, and any
34 accompanying opinion as a separate
35 exhibit.
36 (D) *Documents Barred or Not*
37 *Required.*
38 (i) A separate brief supporting
39 or responding to a motion must not be
40 filed.
41 (ii) Unless the court orders
42 otherwise, a notice of motion or a
43 proposed order is not required.
44 (3) *Response and Reply; Time to File.* Unless
45 the district court or BAP orders otherwise,

46 (A) any party to the appeal may file a
47 response to the motion within 7 days after
48 service of the motion; and
49 (B) the movant may file a reply to a
50 response within 7 days after service of the
51 response, but may only address matters raised
52 in the response.
53 (b) DISPOSITION OF A MOTION FOR A
54 PROCEDURAL ORDER. The district court or BAP may rule
55 on a motion for a procedural order—including a motion under
56 Rule 9006(b) or (c)—at any time without awaiting a response.
57 A party adversely affected by the ruling may move to
58 reconsider, vacate, or modify it within 7 days after the
59 procedural order is served.

60 (c) ORAL ARGUMENT. A motion will be decided
61 without oral argument unless the district court or BAP orders
62 otherwise.
63 (d) EMERGENCY MOTION.
64 (1) *Noting the Emergency*. When a movant
65 requests expedited action on a motion because
66 irreparable harm would occur during the time needed
67 to consider a response, the movant must insert the
68 word "Emergency" before the title of the motion.
69 (2) *Contents of the Motion*. The emergency
70 motion must
71 (A) be accompanied by an affidavit
72 setting out the nature of the emergency;
73 (B) state whether all grounds for it
74 were submitted to the bankruptcy court and, if

75 not, why the motion should not be remanded
76 for the bankruptcy court to consider;
77 (C) include the e-mail addresses,
78 office addresses, and telephone numbers of
79 moving counsel and, when known, of
80 opposing counsel and any unrepresented
81 parties to the appeal; and
82 (D) be served as prescribed by
83 Rule 8011.
84 (3) *Notifying Opposing Parties*. Before filing
85 an emergency motion, the movant must make every
86 practicable effort to notify opposing counsel and any
87 unrepresented parties in time for them to respond.
88 The affidavit accompanying the emergency motion
89 must state when and how notice was given or state
90 why giving it was impracticable.

91 (e) POWER OF A SINGLE BAP JUDGE TO
92 ENTERTAIN A MOTION.
93 (1) *Single Judge's Authority.* A BAP judge
94 may act alone on any motion, but may not dismiss or
95 otherwise determine an appeal, deny a motion for
96 leave to appeal, or deny a motion for a stay pending
97 appeal if denial would make the appeal moot.
98 (2) *Reviewing a Single Judge's Action.* The
99 BAP may review a single judge's action, either on its
100 own motion or on a party's motion.
101 (f) FORM OF DOCUMENTS; PAGE LIMITS;
102 NUMBER OF COPIES.
103 (1) *Format of a Paper Document.*
104 Rule 27(d)(1) F.R.App.P. applies in the district court
105 or BAP to a paper version of a motion, response, or
106 reply.

107 (2) *Format of an Electronically Filed*
108 *Document*. A motion, response, or reply filed
109 electronically must comply with the requirements for
110 a paper version regarding covers, line spacing,
111 margins, typeface, and type style. It must also comply
112 with the page limits under paragraph (3).
113 (3) *Page Limits*. Unless the district court or
114 BAP orders otherwise:
115 (A) a motion or a response to a
116 motion must not exceed 20 pages, exclusive
117 of the corporate disclosure statement and
118 accompanying documents authorized by
119 subdivision (a)(2)(C); and
120 (B) a reply to a response must not
121 exceed 10 pages.

122 (4) *Paper Copies*. Paper copies must be
123 provided only if required by local rule or by an order
124 in a particular case.
125 (g) INTERVENING IN AN APPEAL. Unless a
126 statute provides otherwise, an entity that seeks to intervene in
127 an appeal pending in the district court or BAP must move for
128 leave to intervene and serve a copy of the motion on the
129 parties to the appeal. The motion or other notice of
130 intervention authorized by statute must be filed within 30
131 days after the appeal is docketed. It must concisely state the
132 movant's interest, the grounds for intervention, whether
133 intervention was sought in the bankruptcy court, why
134 intervention is being sought at this stage of the proceeding,
135 and why participating as an amicus curiae would not be
136 adequate.

COMMITTEE NOTE

This rule is derived from former Rule 8011 and F.R.App.P. 15(d) and 27. It adopts many of the provisions of the appellate rules that specify the form and page limits of motions and accompanying documents, while also adjusting those requirements for electronic filing. In addition, it prescribes the procedure for seeking to intervene in the district court or BAP.

Subdivision (a) retains much of the content of former Rule 8011(a) regarding the contents of a motion, response, and reply. It also specifies the documents that may accompany a motion. Unlike the former rule, which allowed the filing of separate briefs supporting a motion, subdivision (a) now adopts the practice of F.R.App.P. 27(a) of prohibiting the filing of briefs supporting or responding to a motion. The motion or response itself must include the party's legal arguments.

Subdivision (a)(2)(B) clarifies the procedure for seeking to expedite an appeal. A motion under this provision seeks to expedite the time for the disposition of the appeal as a whole, whereas an emergency motion—which is addressed by subdivision (d)—typically involves an urgent request for relief short of disposing of the entire appeal (for example, an emergency request for a stay pending appeal to prevent imminent mootness). In appropriate cases—such as when there is an urgent need to resolve the appeal quickly to prevent harm—a party may file a motion to expedite the appeal as an emergency motion.

Subdivision (b) retains the substance of former Rule 8011(b). It authorizes the district court or BAP to act on a motion for a procedural order without awaiting a response to the motion. It specifies that a party seeking reconsideration, vacation, or modification of the order must file a motion within 7 days after service of the order.

Subdivision (c) continues the practice of former Rule 8011(c) and F.R.App.P. 27(e) of dispensing with oral argument of motions in the district court or BAP unless the court orders otherwise.

Subdivision (d), which carries forward the content of former Rule 8011(d), governs emergency motions that the district court or BAP may rule on without awaiting a response when necessary to prevent irreparable harm. A party seeking expedited action on a motion in the district court or BAP must explain the nature of the emergency, whether all grounds in support of the motion were first presented to the bankruptcy court, and, if not, why the district court or BAP should not remand for reconsideration. The moving party must also explain the steps taken to notify opposing counsel and any unrepresented parties in advance of filing the emergency motion and, if they were not notified, why it was impracticable to do so.

Subdivision (e), like former Rule 8011(e) and similar to F.R.App.P. 27(c), authorizes a single BAP judge to rule on certain motions. This authority, however, does not extend to issuing rulings that would dispose of the appeal. For that reason, the rule now prohibits a single BAP judge from

denying a motion for a stay pending appeal when the effect of that ruling would be to require dismissal of the appeal as moot. A ruling by a single judge is subject to review by the BAP.

Subdivision (f) incorporates by reference the formatting and appearance requirements of F.R.App.P. 27(d)(1). When paper versions of the listed documents are filed, they must comply with the requirements of the specified rules regarding reproduction, covers, binding, appearance, and format. When these documents are filed electronically, they must comply with the relevant requirements of the specified rules regarding covers and format. Subdivision (f) also specifies page limits for motions, responses, and replies, which is a matter that former Rule 8011 did not address.

Subdivision (g) clarifies the procedure for seeking to intervene in a proceeding that has been appealed. It is based on F.R.App.P. 15(d), but it also requires the moving party to explain why intervention is being sought at the appellate stage. The former Part VIII rules did not address intervention.

Changes After Publication

Subdivision (a)(2)(D) was changed to allow the court to require a notice of motion or proposed order. A stylistic change was made to subdivision (d)(2)(B).

Rule 8014. Briefs

1 (a) APPELLANT'S BRIEF. The appellant's brief
2 must contain the following under appropriate headings and in
3 the order indicated:
4 (1) a corporate disclosure statement, if
5 required by Rule 8012;
6 (2) a table of contents, with page references;
7 (3) a table of authorities — cases
8 (alphabetically arranged), statutes, and other
9 authorities — with references to the pages of the brief
10 where they are cited;
11 (4) a jurisdictional statement, including:
12 (A) the basis for the bankruptcy
13 court's subject-matter jurisdiction, with
14 citations to applicable statutory provisions and
15 stating relevant facts establishing jurisdiction;

16 (B) the basis for the district court's or
17 BAP's jurisdiction, with citations to
18 applicable statutory provisions and stating
19 relevant facts establishing jurisdiction;
20 (C) the filing dates establishing the
21 timeliness of the appeal; and
22 (D) an assertion that the appeal is
23 from a final judgment, order, or decree, or
24 information establishing the district court's or
25 BAP's jurisdiction on another basis;
26 (5) a statement of the issues presented and, for
27 each one, a concise statement of the applicable
28 standard of appellate review;
29 (6) a concise statement of the case setting out
30 the facts relevant to the issues submitted for review,
31 describing the relevant procedural history, and

32 identifying the rulings presented for review, with
33 appropriate references to the record;
34 (7) a summary of the argument, which must
35 contain a succinct, clear, and accurate statement of the
36 arguments made in the body of the brief, and which
37 must not merely repeat the argument headings;
38 (8) the argument, which must contain the
39 appellant's contentions and the reasons for them, with
40 citations to the authorities and parts of the record on
41 which the appellant relies;
42 (9) a short conclusion stating the precise relief
43 sought; and
44 (10) the certificate of compliance, if required
45 by Rule 8015(a)(7) or (b).
46 (b) APPELLEE'S BRIEF. The appellee's brief must
47 conform to the requirements of subdivision (a)(1)-(8) and

48 (10), except that none of the following need appear unless the
49 appellee is dissatisfied with the appellant's statement:
50 (1) the jurisdictional statement;
51 (2) the statement of the issues and the
52 applicable standard of appellate review; and
53 (3) the statement of the case.
54 (c) REPLY BRIEF. The appellant may file a brief in
55 reply to the appellee's brief. A reply brief must comply with
56 the requirements of subdivision (a)(2)-(3).
57 (d) STATUTES, RULES, REGULATIONS, OR
58 SIMILAR AUTHORITY. If the court's determination of the
59 issues presented requires the study of the Code or other
60 statutes, rules, regulations, or similar authority, the relevant
61 parts must be set out in the brief or in an addendum.
62 (e) BRIEFS IN A CASE INVOLVING MULTIPLE
63 APPELLANTS OR APPELLEES. In a case involving more

64 than one appellant or appellee, including consolidated cases,
65 any number of appellants or appellees may join in a brief, and
66 any party may adopt by reference a part of another's brief.
67 Parties may also join in reply briefs.

77 (f) CITATION OF SUPPLEMENTAL
78 AUTHORITIES. If pertinent and significant authorities come
79 to a party's attention after the party's brief has been filed—or
80 after oral argument but before a decision—a party may
81 promptly advise the district or BAP clerk by a signed
82 submission setting forth the citations. The submission, which
83 must be served on the other parties to the appeal, must state
84 the reasons for the supplemental citations, referring either to
85 the pertinent page of a brief or to a point argued orally. The
86 body of the submission must not exceed 350 words. Any
87 response must be made within 7 days after the party is served,

88 unless the court orders otherwise, and must be similarly
89 limited.

COMMITTEE NOTE

This rule is derived from former Rule 8010(a) and (b) and F.R.App.P. 28. Adopting much of the content of Rule 28, it provides greater detail than former Rule 8010 contained regarding appellate briefs.

Subdivision (a) prescribes the content and structure of the appellant's brief. It largely follows former Rule 8010(a)(1), but, to ensure national uniformity, it eliminates the provision authorizing a district court or BAP to alter these requirements. Subdivision (a)(1) provides that when Rule 8012 requires an appellant to file a corporate disclosure statement, it must be placed at the beginning of the appellant's brief. Subdivision (a)(10) is new. It implements the requirement under Rule 8015(a)(7)(C) and (b) for the filing of a certificate of compliance with the limit on the number of words or lines allowed to be in a brief.

Subdivision (b) carries forward the provisions of former Rule 8010(a)(2).

Subdivision (c) is derived from F.R.App.P. 28(c). It authorizes an appellant to file a reply brief, which will generally complete the briefing process.

Subdivision (d) is similar to former Rule 8010(b), but it is reworded to reflect the likelihood that briefs will generally be filed electronically rather than in paper form.

Subdivision (e) mirrors F.R.App.P. 28(i). It authorizes multiple appellants or appellees to join in a single brief. It also allows a party to incorporate by reference portions of another party's brief.

Subdivision (f) adopts the procedures of F.R.App.P. 28(j) with respect to the filing of supplemental authorities with the district court or BAP after a brief has been filed or after oral argument. Unlike the appellate rule, it specifies a period of 7 days for filing a response to a submission of supplemental authorities. The supplemental submission and response must comply with the signature requirements of Rule 8011(e).

Changes Made After Publication

No changes were made after publication.

Rule 8015. Form and Length of Briefs; Form of Appendices and Other Papers.

1 (a) PAPER COPIES OF A BRIEF. If a paper copy
2 of a brief may or must be filed, the following provisions
3 apply:
4 (1) *Reproduction.*
5 (A) A brief may be reproduced by any
6 process that yields a clear black image on light
7 paper. The paper must be opaque and
8 unglazed. Only one side of the paper may be
9 used.
10 (B) Text must be reproduced with a
11 clarity that equals or exceeds the output of a
12 laser printer.
13 (C) Photographs, illustrations, and
14 tables may be reproduced by any method that

15 results in a good copy of the original. A
16 glossy finish is acceptable if the original is
17 glossy.
18 (2) *Cover*. The front cover of a brief must
19 contain:
20 (A) the number of the case centered at
21 the top;
22 (B) the name of the court;
23 (C) the title of the case as prescribed
24 by Rule 8003(d)(2) or 8004(c)(2);
25 (D) the nature of the proceeding and
26 the name of the court below;
27 (E) the title of the brief, identifying
28 the party or parties for whom the brief is filed;
29 and

30 (F) the name, office address,
31 telephone number, and e-mail address of
32 counsel representing the party for whom the
33 brief is filed.
34 (3) *Binding*. The brief must be bound in any
35 manner that is secure, does not obscure the text, and
36 permits the brief to lie reasonably flat when open.
37 (4) *Paper Size, Line Spacing, and Margins*.
38 The brief must be on 8½-by-11 inch paper. The text
39 must be double-spaced, but quotations more than two
40 lines long may be indented and single-spaced.
41 Headings and footnotes may be single-spaced.
42 Margins must be at least one inch on all four sides.
43 Page numbers may be placed in the margins, but no
44 text may appear there.

45 (5) *Typeface.* Either a proportionally spaced
46 or monospaced face may be used.
47 (A) A proportionally spaced face must
48 include serifs, but sans-serif type may be used
49 in headings and captions. A proportionally
50 spaced face must be 14-point or larger.
51 (B) A monospaced face may not
52 contain more than 10½ characters per inch.
53 (6) *Type Styles.* A brief must be set in plain,
54 roman style, although italics or boldface may be used
55 for emphasis. Case names must be italicized or
56 underlined.
57 (7) *Length.*
58 (A) *Page limitation.* A principal brief
59 must not exceed 30 pages, or a reply brief 15
60 pages, unless it complies with (B) and (C).

61 (B) *Type-volume limitation.*

62 (i) A principal brief is
63 acceptable if:

64 • it contains no
65 more than 14,000
66 words; or

67 • it uses a
68 monospaced face and
69 contains no more than
70 1,300 lines of text.

71 (ii) A reply brief is acceptable
72 if it contains no more than half of the
73 type volume specified in item (i).

74 (iii) Headings, footnotes, and
75 quotations count toward the word and
76 line limitations. The corporate

77 disclosure statement, table of contents,
78 table of citations, statement with
79 respect to oral argument, any
80 addendum containing statutes, rules,
81 or regulations, and any certificates of
82 counsel do not count toward the
83 limitation.
84 (C) *Certificate of Compliance.*
85 (i) A brief submitted under
86 subdivision (a)(7)(B) must include a
87 certificate signed by the attorney, or an
88 unrepresented party, that the brief
89 complies with the type-volume
90 limitation. The person preparing the
91 certificate may rely on the word or line
92 count of the word-processing system

93 used to prepare the brief. The
94 certificate must state either:
95 • the number of words in
96 the brief; or
97 • the number of lines of
98 monospaced type in the brief.
99 (ii) The certification
100 requirement is satisfied by a certificate
101 of compliance that conforms
102 substantially to the appropriate
103 Official Form.
104 (b) ELECTRONICALLY FILED BRIEFS. A brief
105 filed electronically must comply with subdivision (a), except
106 for (a)(1), (a)(3), and the paper requirement of (a)(4).

107 (c) PAPER COPIES OF APPENDICES. A paper
108 copy of an appendix must comply with subdivision (a)(1), (2),
109 (3), and (4), with the following exceptions:
110 (1) An appendix may include a legible
111 photocopy of any document found in the record or of
112 a printed decision.
113 (2) When necessary to facilitate inclusion of
114 odd-sized documents such as technical drawings, an
115 appendix may be a size other than 8½-by-11 inches,
116 and need not lie reasonably flat when opened.
117 (d) ELECTRONICALLY FILED APPENDICES.
118 An appendix filed electronically must comply with
119 subdivision (a)(2) and (4), except for the paper requirement of
120 (a)(4).
121 (e) OTHER DOCUMENTS.

122 (1) *Motion.* Rule 8013(f) governs the form of
123 a motion, response, or reply.
124 (2) *Paper Copies of Other Documents.* A
125 paper copy of any other document, other than a
126 submission under Rule 8014(f), must comply with
127 subdivision (a), with the following exceptions:
128 (A) A cover is not necessary if the
129 caption and signature page together contain
130 the information required by subdivision (a)(2).
131 (B) Subdivision (a)(7) does not apply.
132 (3) *Other Documents Filed Electronically.*
133 Any other document filed electronically, other than a
134 submission under Rule 8014(f), must comply with the
135 appearance requirements of paragraph (2).
136 (f) LOCAL VARIATION. A district court or BAP
137 must accept documents that comply with the applicable

138 requirements of this rule. By local rule, a district court or
139 BAP may accept documents that do not meet all of the
140 requirements of this rule.

COMMITTEE NOTE

This rule is derived primarily from F.R.App.P. 32. Former Rule 8010(c) prescribed page limits for principal briefs and reply briefs. Those limits are now addressed by subdivision (a)(7) of this rule. In addition, the rule incorporates most of the detail of F.R.App.P. 32 regarding the appearance and format of briefs, appendices, and other documents, along with new provisions that apply when those documents are filed electronically.

Subdivision (a) prescribes the form requirements for briefs that are filed in paper form. It incorporates F.R.App.P. 32(a), except it does not include color requirements for brief covers, it requires the cover of a brief to include counsel's e-mail address, and cross-references to the appropriate bankruptcy rules are substituted for references to the Federal Rules of Appellate Procedure.

Subdivision (a)(7) decreases the length of briefs, as measured by the number of pages, that was permitted by former Rule 8010(c). Page limits are reduced from 50 to 30 pages for a principal brief and from 25 to 15 for a reply brief in order to achieve consistency with F.R.App.P. 32(a)(7). But as permitted by the appellate rule, subdivision (a)(7) also

permits the limits on the length of a brief to be measured by a word or line count, as an alternative to a page limit. Basing the calculation of brief length on either of the type-volume methods specified in subdivision (a)(7)(B) will result in briefs that may exceed the designated page limits in (a)(7)(A) and that may be approximately as long as allowed by the prior page limits.

Subdivision (b) adapts for briefs that are electronically filed subdivision (a)'s form requirements. With the use of electronic filing, the method of reproduction, method of binding, and use of paper become irrelevant. But information required on the cover, formatting requirements, and limits on brief length remain the same.

Subdivisions (c) and (d) prescribe the form requirements for appendices. Subdivision (c), applicable to paper appendices, is derived from F.R.App.P. 32(b), and subdivision (d) adapts those requirements for electronically filed appendices.

Subdivision (e), which is based on F.R.App.P. 32(c), addresses the form required for documents—in paper form or electronically filed—that these rules do not otherwise cover.

Subdivision (f), like F.R.App.P. 32(e), provides assurance to lawyers and parties that compliance with this rule's form requirements will allow a brief or other document to be accepted by any district court or BAP. A court may, however, by local rule or, under Rule 8028 by order in a particular case, choose to accept briefs and documents that do

not comply with all of this rule's requirements. The decision whether to accept a brief that appears not to be in compliance with the rules must be made by the court. Under Rule 8011(a)(3), the clerk may not refuse to accept a document for filing solely because it is not presented in proper form as required by these rules or any local rule or practice.

Under Rule 8011(e), the party filing the document or, if represented, its counsel must sign all briefs and other submissions. If the document is filed electronically, an electronic signature must be provided in accordance with Rule 8011(e).

Changes Made After Publication

In subdivision (f), "or order in a particular case" was deleted as unnecessary. The discussion in the Committee Note about brief lengths was revised, and the discussion of subdivision (f) was expanded.

Rule 8016. Cross-Appeals

1 (a) APPLICABILITY. This rule applies to a case in
2 which a cross-appeal is filed. Rules 8014(a)-(c),
3 8015(a)(7)(A)-(B), and 8018(a)(1)-(3) do not apply to such a
4 case, except as otherwise provided in this rule.
5 (b) DESIGNATION OF APPELLANT. The party
6 who files a notice of appeal first is the appellant for purposes
7 of this rule and Rule 8018(a)(4) and (b) and Rule 8019. If
8 notices are filed on the same day, the plaintiff, petitioner,
9 applicant, or movant in the proceeding below is the appellant.
10 These designations may be modified by the parties' agreement
11 or by court order.
12 (c) BRIEFS. In a case involving a cross-appeal:
13 (1) *Appellant's Principal Brief.* The appellant
14 must file a principal brief in the appeal. That brief
15 must comply with Rule 8014(a).

16 (2) *Appellee's Principal and Response Brief.*
17 The appellee must file a principal brief in the cross-
18 appeal and must, in the same brief, respond to the
19 principal brief in the appeal. That brief must comply
20 with Rule 8014(a), except that the brief need not
21 include a statement of the case unless the appellee is
22 dissatisfied with the appellant's statement.
23 (3) *Appellant's Response and Reply Brief.*
24 The appellant must file a brief that responds to the
25 principal brief in the cross-appeal and may, in the
26 same brief, reply to the response in the appeal. That
27 brief must comply with Rule 8014(a)(2)-(8) and (10),
28 except that none of the following need appear unless
29 the appellant is dissatisfied with the appellee's
30 statement in the cross-appeal:
31 (A) the jurisdictional statement;

32 (B) the statement of the issues and the
33 applicable standard of appellate review; and
34 (C) the statement of the case.
35 (4) *Appellee's Reply Brief.* The appellee may
36 file a brief in reply to the response in the cross-appeal.
37 That brief must comply with Rule 8014(a)(2)-(3) and
38 (10) and must be limited to the issues presented by the
39 cross-appeal.
40 (d) LENGTH.
41 (1) *Page Limitation.* Unless it complies with
42 paragraphs (2) and (3), the appellant's principal brief
43 must not exceed 30 pages; the appellee's principal and
44 response brief, 35 pages; the appellant's response and
45 reply brief, 30 pages; and the appellee's reply brief, 15
46 pages.
47 (2) *Type-Volume Limitation.*

48 (A) The appellant's principal brief or
49 the appellant's response and reply brief is
50 acceptable if:
51 (i) it contains no more than
52 14,000 words; or
53 (ii) it uses a monospaced face
54 and contains no more than 1,300 lines
55 of text.
56 (B) The appellee's principal and
57 response brief is acceptable if:
58 (i) it contains no more than
59 16,500 words; or
60 (ii) it uses a monospaced face
61 and contains no more than 1,500 lines
62 of text.

63 (C) The appellee's reply brief is
64 acceptable if it contains no more than half of
65 the type volume specified in subparagraph
66 (A).
67 (D) Headings, footnotes, and
68 quotations count toward the word and line
69 limitations. The corporate disclosure
70 statement, table of contents, table of citations,
71 statement with respect to oral argument, any
72 addendum containing statutes, rules, or
73 regulations, and any certificates of counsel do
74 not count toward the limitation.
75 (3) *Certificate of Compliance.* A brief
76 submitted either electronically or in paper form under
77 paragraph (2) must comply with Rule 8015(a)(7)(C).

78 (e) TIME TO SERVE AND FILE A BRIEF. Briefs
79 must be served and filed as follows, unless the district court
80 or BAP by order in a particular case excuses the filing of
81 briefs or specifies different time limits:
82 (1) the appellant's principal brief, within 30
83 days after the docketing of notice that the record has
84 been transmitted or is available electronically;
85 (2) the appellee's principal and response brief,
86 within 30 days after the appellant's principal brief is
87 served;
88 (3) the appellant's response and reply brief,
89 within 30 days after the appellee's principal and
90 response brief is served; and
91 (4) the appellee's reply brief, within 14 days
92 after the appellant's response and reply brief is served,
93 but at least 7 days before scheduled argument unless

94 the district court or BAP, for good cause, allows a

95 later filing.

COMMITTEE NOTE

This rule is derived from F.R.App.P. 28.1. It governs the timing, content, length, filing, and service of briefs in bankruptcy appeals in which there is a cross-appeal. The former Part VIII rules did not separately address the topic of cross-appeals.

Subdivision (b) prescribes which party is designated the appellant when there is a cross-appeal. Generally, the first to file a notice of appeal will be the appellant.

Subdivision (c) specifies the briefs that the appellant and the appellee may file. Because of the dual role of the parties to the appeal and cross-appeal, each party is permitted to file a principal brief and a response to the opposing party's brief, as well as a reply brief. For the appellee, the principal brief in the cross-appeal and the response in the appeal are combined into a single brief. The appellant, on the other hand, initially files a principal brief in the appeal and later files a response to the appellee's principal brief in the cross-appeal, along with a reply brief in the appeal. The final brief that may be filed is the appellee's reply brief in the cross-appeal.

Subdivision (d), which prescribes page limits for briefs, is adopted from F.R.App.P. 28.1(e). It applies to briefs that are filed electronically, as well as to those filed in paper form. Like Rule 8015(a)(7), it imposes limits measured by either the number of pages or the number of words or lines of text.

Subdivision (e) governs the time for filing briefs in cases in which there is a cross-appeal. It adapts the provisions of F.R.App.P. 28.1(f).

Changes Made After Publication

Subdivision (d)(2)(D) was added, and subdivision (f) was deleted. In subdivision (a), the statement that Rule 8018(a) does not apply was changed to refer to Rule 8018(a)(1)-(3). In subdivision (b), Rule 8018(a)(4) was added to the list of rules. Conforming changes were made to the Committee Note.

Rule 8017. Brief of an Amicus Curiae

1 (a) WHEN PERMITTED. The United States or its
2 officer or agency or a state may file an amicus-curiae brief
3 without the consent of the parties or leave of court. Any other
4 amicus curiae may file a brief only by leave of court or if the
5 brief states that all parties have consented to its filing. On its
6 own motion, and with notice to all parties to an appeal, the
7 district court or BAP may request a brief by an amicus curiae.
8 (b) MOTION FOR LEAVE TO FILE. The motion
9 must be accompanied by the proposed brief and state:
10 (1) the movant's interest; and
11 (2) the reason why an amicus brief is
12 desirable and why the matters asserted are relevant to
13 the disposition of the appeal.
14 (c) CONTENTS AND FORM. An amicus brief must
15 comply with Rule 8015. In addition to the requirements of

16 Rule 8015, the cover must identify the party or parties
17 supported and indicate whether the brief supports affirmance
18 or reversal. If an amicus curiae is a corporation, the brief
19 must include a disclosure statement like that required of
20 parties by Rule 8012. An amicus brief need not comply with
21 Rule 8014, but must include the following:
22 (1) a table of contents, with page
23 references;
24 (2) a table of authorities—cases
25 (alphabetically arranged), statutes, and other
26 authorities—with references to the pages of the brief
27 where they are cited;
28 (3) a concise statement of the identity of the
29 amicus curiae, its interest in the case, and the source
30 of its authority to file;

31 (4) unless the amicus curiae is one listed in
32 the first sentence of subdivision (a), a statement that
33 indicates whether:
34 (A) a party's counsel authored the
35 brief in whole or in part;
36 (B) a party or a party's counsel
37 contributed money that was intended to fund
38 preparing or submitting the brief; and
39 (C) a person—other than the amicus
40 curiae, its members, or its
41 counsel—contributed money that was
42 intended to fund preparing or submitting the
43 brief and, if so, identifies each such person;
44 (5) an argument, which may be preceded by a
45 summary and need not include a statement of the
46 applicable standard of review; and

47 (6) a certificate of compliance, if required by
48 Rule 8015(a)(7)(C) or 8015(b).
49 (d) LENGTH. Except by the district court's or BAP's
50 permission, an amicus brief must be no more than one-half
51 the maximum length authorized by these rules for a party's
52 principal brief. If the court grants a party permission to file a
53 longer brief, that extension does not affect the length of an
54 amicus brief.
55 (e) TIME FOR FILING. An amicus curiae must file
56 its brief, accompanied by a motion for filing when necessary,
57 no later than 7 days after the principal brief of the party being
58 supported is filed. An amicus curiae that does not support
59 either party must file its brief no later than 7 days after the
60 appellant's principal brief is filed. The district court or BAP
61 may grant leave for later filing, specifying the time within
62 which an opposing party may answer.

63 (f) REPLY BRIEF. Except by the district court's or
64 BAP's permission, an amicus curiae may not file a reply brief.
65 (g) ORAL ARGUMENT. An amicus curiae may
66 participate in oral argument only with the district court's or
67 BAP's permission.

COMMITTEE NOTE

This rule is derived from F.R.App.P. 29. The former Part VIII rules did not address the participation by an amicus curiae in a bankruptcy appeal.

Subdivision (a) adopts the provisions of F.R.App.P. 29(a). In addition, it authorizes the district court or BAP on its own motion— with notice to the parties—to request the filing of a brief by an amicus curiae.

Subdivisions (b)-(g) adopt F.R.App.P. 29(b)-(g).

Changes Made After Publication

No changes were made after publication.

Rule 8018. Serving and Filing Briefs; Appendices

1 (a) TIME TO SERVE AND FILE A BRIEF. The
2 following rules apply unless the district court or BAP by order
3 in a particular case excuses the filing of briefs or specifies
4 different time limits:
5 (1) The appellant must serve and file a brief
6 within 30 days after the docketing of notice that the
7 record has been transmitted or is available
8 electronically.
9 (2) The appellee must serve and file a brief
10 within 30 days after service of the appellant's brief.
11 (3) The appellant may serve and file a reply
12 brief within 14 days after service of the appellee's
13 brief, but a reply brief must be filed at least 7 days
14 before scheduled argument unless the district court or
15 BAP, for good cause, allows a later filing.

16 (4) If an appellant fails to file a brief on time
17 or within an extended time authorized by the district
18 court or BAP, an appellee may move to dismiss the
19 appeal—or the district court or BAP, after notice, may
20 dismiss the appeal on its own motion. An appellee
21 who fails to file a brief will not be heard at oral
22 argument unless the district court or BAP grants
23 permission.
24 (b) DUTY TO SERVE AND FILE AN APPENDIX
25 TO THE BRIEF.
26 (1) *Appellant*. Subject to subdivision (e) and
27 Rule 8009(d), the appellant must serve and file with
28 its principal brief excerpts of the record as an
29 appendix. It must contain the following:
30 (A) the relevant entries in the
31 bankruptcy docket;

32 (B) the complaint and answer, or other
33 equivalent filings;
34 (C) the judgment, order, or decree
35 from which the appeal is taken;
36 (D) any other orders, pleadings, jury
37 instructions, findings, conclusions, or opinions
38 relevant to the appeal;
39 (E) the notice of appeal; and
40 (F) any relevant transcript or portion
41 of it.
42 (2) *Appellee*. The appellee may also serve
43 and file with its brief an appendix that contains
44 material required to be included by the appellant or
45 relevant to the appeal or cross-appeal, but omitted by
46 the appellant.

47 (3) *Cross-Appellee*. The appellant as cross-
48 appellee may also serve and file with its response an
49 appendix that contains material relevant to matters
50 raised initially by the principal brief in the cross-
51 appeal, but omitted by the cross-appellant.
52 (c) FORMAT OF THE APPENDIX. The appendix
53 must begin with a table of contents identifying the page at
54 which each part begins. The relevant docket entries must
55 follow the table of contents. Other parts of the record must
56 follow chronologically. When pages from the transcript of
57 proceedings are placed in the appendix, the transcript page
58 numbers must be shown in brackets immediately before the
59 included pages. Omissions in the text of documents or of the
60 transcript must be indicated by asterisks. Immaterial formal
61 matters (captions, subscriptions, acknowledgments, and the
62 like) should be omitted.

63 (d) EXHIBITS. Exhibits designated for inclusion in
64 the appendix may be reproduced in a separate volume or
65 volumes, suitably indexed.
66 (e) APPEAL ON THE ORIGINAL RECORD
67 WITHOUT AN APPENDIX. The district court or BAP may,
68 either by rule for all cases or classes of cases or by order in a
69 particular case, dispense with the appendix and permit an
70 appeal to proceed on the original record, with the submission
71 of any relevant parts of the record that the district court or
72 BAP orders the parties to file.

COMMITTEE NOTE

This rule is derived from former Rule 8009 and F.R.App.P. 30 and 31. Like former Rule 8009, it addresses the timing of serving and filing briefs and appendices, as well as the content and format of appendices. Rule 8011 governs the methods of filing and serving briefs and appendices.

The rule retains the bankruptcy practice of permitting the appellee to file its own appendix, rather than requiring the appellant to include in its appendix matters designated by the

appellee. Rule 8016 governs the timing of serving and filing briefs when a cross-appeal is taken. This rule's provisions about appendices apply to all appeals, including cross-appeals.

Subdivision (a) retains former Rule 8009's provision that allows the district court or BAP to dispense with briefing or to provide different time periods than this rule specifies. It increases some of the time periods for filing briefs from the periods prescribed by the former rule, while still retaining shorter time periods than some provided by F.R.App.P. 31(a). The time for filing the appellant's brief is increased from 14 to 30 days after the docketing of the notice of the transmission of the record or notice of the availability of the record. That triggering event is equivalent to docketing the appeal under former Rule 8007. Appellate Rule 31(a)(1), by contrast, provides the appellant 40 days after the record is filed to file its brief. The shorter time period for bankruptcy appeals reflects the frequent need for greater expedition in the resolution of bankruptcy appeals, while still providing the appellant more time to prepare its brief than the former rule provided.

Subdivision (a)(2) similarly expands the time period for filing the appellee's brief from 14 to 30 days after the service of the appellant's brief. This period is the same as F.R. App. 31(a)(1) provides.

Subdivision (a)(3) retains the 14-day time period for filing a reply brief that the former rule prescribed, but it

qualifies that period to ensure that the final brief is filed at least 7 days before oral argument.

If a district court or BAP has a mediation procedure for bankruptcy appeals, that procedure could affect when briefs must be filed. *See* Rule 8027.

Subdivision (a)(4) is new. Based on F.R.App.P. 31(c), it provides for actions that may be taken—dismissal of the appeal or denial of participation in oral argument—if the appellant or appellee fails to file its brief.

Subdivisions (b) and (c) govern the content and format of the appendix to a brief. Subdivision (b) is similar to former Rule 8009(b), and subdivision (c) is derived from F.R.App.P. 30(d).

Subdivision (d), which addresses the inclusion of exhibits in the appendix, is derived from F.R.App.P. 30(e).

Changes Made After Publication

Subdivision (a)(4) was revised to provide more detail about the procedure for dismissing an appeal due to appellant's failure to timely file a brief.

Rule 8019. Oral Argument

1 (a) PARTY'S STATEMENT. Any party may file, or
2 a district court or BAP may require, a statement explaining
3 why oral argument should, or need not, be permitted.
4 (b) PRESUMPTION OF ORAL ARGUMENT AND
5 EXCEPTIONS. Oral argument must be allowed in every case
6 unless the district judge—or all the BAP judges assigned to
7 hear the appeal—examine the briefs and record and determine
8 that oral argument is unnecessary because
9 (1) the appeal is frivolous;
10 (2) the dispositive issue or issues have been
11 authoritatively decided; or
12 (3) the facts and legal arguments are
13 adequately presented in the briefs and record, and the
14 decisional process would not be significantly aided by
15 oral argument.

16 (c) NOTICE OF ARGUMENT; POSTPONEMENT.
17 The district court or BAP must advise all parties of the date,
18 time, and place for oral argument, and the time allowed for
19 each side. A motion to postpone the argument or to allow
20 longer argument must be filed reasonably in advance of the
21 hearing date.
22 (d) ORDER AND CONTENTS OF ARGUMENT.
23 The appellant opens and concludes the argument. Counsel
24 must not read at length from briefs, the record, or authorities.
25 (e) CROSS-APPEALS AND SEPARATE
26 APPEALS. If there is a cross-appeal, Rule 8016(b)
27 determines which party is the appellant and which is the
28 appellee for the purposes of oral argument. Unless the district
29 court or BAP directs otherwise, a cross-appeal or separate
30 appeal must be argued when the initial appeal is argued.
31 Separate parties should avoid duplicative argument.

32 (f) NONAPPEARANCE OF A PARTY. If the
33 appellee fails to appear for argument, the district court or
34 BAP may hear the appellant's argument. If the appellant fails
35 to appear for argument, the district court or BAP may hear the
36 appellee's argument. If neither party appears, the case will be
37 decided on the briefs unless the district court or BAP orders
38 otherwise.

39 (g) SUBMISSION ON BRIEFS. The parties may
40 agree to submit a case for decision on the briefs, but the
41 district court or BAP may direct that the case be argued.

42 (h) USE OF PHYSICAL EXHIBITS AT
43 ARGUMENT; REMOVAL. Counsel intending to use
44 physical exhibits other than documents at the argument must
45 arrange to place them in the courtroom on the day of the
46 argument before the court convenes. After the argument,
47 counsel must remove the exhibits from the courtroom unless

48 the district court or BAP directs otherwise. The clerk may
49 destroy or dispose of the exhibits if counsel does not reclaim
50 them within a reasonable time after the clerk gives notice to
remove them.

COMMITTEE NOTE

This rule generally retains the provisions of former Rule 8012 and adds much of the additional detail of F.R.App.P. 34. By incorporating the more detailed provisions of the appellate rule, Rule 8019 promotes national uniformity regarding oral argument in bankruptcy appeals.

Subdivision (a), like F.R.App.P. 34(a)(1), now allows a party to submit a statement explaining why oral argument is or is not needed. It also authorizes a court to require this statement. Former Rule 8012 only authorized statements explaining why oral argument should be allowed.

Subdivision (b) retains the reasons set forth in former Rule 8012 for the district court or BAP to conclude that oral argument is not needed.

The remainder of this rule adopts the provisions of F.R.App.P. 34(b)-(g), with one exception. Rather than requiring the district court or BAP to hear appellant's argument if the appellee does not appear, subdivision (f) authorizes the district court or BAP to go forward with the

argument in the appellee's absence. Should the court decide, however, to postpone the oral argument in that situation, it would be authorized to do so.

Changes Made After Publication

No changes were made after publication.

Rule 8020. Frivolous Appeal and Other Misconduct

1 (a) FRIVOLOUS APPEAL—DAMAGES AND
2 COSTS. If the district court or BAP determines that an
3 appeal is frivolous, it may, after a separately filed motion or
4 notice from the court and reasonable opportunity to respond,
5 award just damages and single or double costs to the appellee.
6 (b) OTHER MISCONDUCT. The district court or
7 BAP may discipline or sanction an attorney or party appearing
8 before it for other misconduct, including failure to comply
9 with any court order. First, however, the court must afford
10 the attorney or party reasonable notice, an opportunity to
11 show cause to the contrary, and, if requested, a hearing.

COMMITTEE NOTE

This rule is derived from former Rule 8020 and F.R.App.P. 38 and 46(c). Subdivision (a) permits an award of damages and costs to an appellee for a frivolous appeal. Subdivision (b) permits the district court or BAP to impose on parties as well as their counsel sanctions for misconduct

other than taking a frivolous appeal. Failure to comply with a court order, for which sanctions may be imposed, may include a failure to comply with a local court rule.

Changes Made After Publication

No changes were made after publication.

Rule 8021. Costs

1 (a) AGAINST WHOM ASSESSED. The following
2 rules apply unless the law provides or the district court or
3 BAP orders otherwise:
4 (1) if an appeal is dismissed, costs are taxed
5 against the appellant, unless the parties agree
6 otherwise;
7 (2) if a judgment, order, or decree is affirmed,
8 costs are taxed against the appellant;
9 (3) if a judgment, order, or decree is reversed,
10 costs are taxed against the appellee;
11 (4) if a judgment, order, or decree is affirmed
12 or reversed in part, modified, or vacated, costs are
13 taxed only as the district court or BAP orders.
14 (b) COSTS FOR AND AGAINST THE UNITED
15 STATES. Costs for or against the United States, its agency,

16 or its officer may be assessed under subdivision (a) only if
17 authorized by law.
18 (c) COSTS ON APPEAL TAXABLE IN THE
19 BANKRUPTCY COURT. The following costs on appeal are
20 taxable in the bankruptcy court for the benefit of the party
21 entitled to costs under this rule:
22 (1) the production of any required copies of a
23 brief, appendix, exhibit, or the record;
24 (2) the preparation and transmission of the
25 record;
26 (3) the reporter's transcript, if needed to
27 determine the appeal;
28 (4) premiums paid for a supersedeas bond or
29 other bonds to preserve rights pending appeal; and
30 (5) the fee for filing the notice of appeal.

31 (d) BILL OF COSTS; OBJECTIONS. A party who
32 wants costs taxed must, within 14 days after entry of
33 judgment on appeal, file with the bankruptcy clerk, with proof
34 of service, an itemized and verified bill of costs. Objections
35 must be filed within 14 days after service of the bill of costs,
36 unless the bankruptcy court extends the time.

COMMITTEE NOTE

This rule is derived from former Rule 8014 and F.R.App.P. 39. It retains the former rule's authorization for taxing appellate costs against the losing party and its specification of the costs that may be taxed. The rule also incorporates some of the additional details regarding the taxing of costs contained in F.R.App.P. 39. Consistent with former Rule 8014, the bankruptcy clerk has the responsibility for taxing all costs. Subdivision (b), derived from F.R.App.P. 39(b), clarifies that additional authority is required for the taxation of costs by or against federal governmental parties.

Changes Made After Publication

No changes were made after publication.

Rule 8022. Motion for Rehearing.

1 (a) TIME TO FILE; CONTENTS; RESPONSE;
2 ACTION BY THE DISTRICT COURT OR BAP IF
3 GRANTED.
4 (1) *Time.* Unless the time is shortened or
5 extended by order or local rule, any motion for
6 rehearing by the district court or BAP must be filed
7 within 14 days after entry of judgment on appeal.
8 (2) *Contents.* The motion must state with
9 particularity each point of law or fact that the movant
10 believes the district court or BAP has overlooked or
11 misapprehended and must argue in support of the
12 motion. Oral argument is not permitted.
13 (3) *Response.* Unless the district court or BAP
14 requests, no response to a motion for rehearing is

15 permitted. But ordinarily, rehearing will not be
16 granted in the absence of such a request.
17 (4) *Action by the District Court or BAP*. If a
18 motion for rehearing is granted, the district court or
19 BAP may do any of the following:
20 (A) make a final disposition of the
21 appeal without reargument;
22 (B) restore the case to the calendar for
23 reargument or resubmission; or
24 (C) issue any other appropriate order.
25 (b) FORM OF THE MOTION; LENGTH. The
26 motion must comply in form with Rule 8013(f)(1) and (2).
27 Copies must be served and filed as provided by Rule 8011.
28 Unless the district court or BAP orders otherwise, a motion
29 for rehearing must not exceed 15 pages.

COMMITTEE NOTE

This rule is derived from former Rule 8015 and F.R.App.P. 40. It deletes the provision of former Rule 8015 regarding the time for appeal to the court of appeals because the matter is addressed by F.R.App.P. 6(b)(2)(A).

Changes Made After Publication

In subdivision (b), the reference to local rule was deleted as unnecessary.

Rule 8023. Voluntary Dismissal

1 The clerk of the district court or BAP must dismiss an
2 appeal if the parties file a signed dismissal agreement
3 specifying how costs are to be paid and pay any fees that are
4 due. An appeal may be dismissed on the appellant's motion
5 on terms agreed to by the parties or fixed by the district court
6 or BAP.

COMMITTEE NOTE

This rule is derived from former Rule 8001(c) and F.R.App.P. 42. The provision of the former rule regarding dismissal of appeals in the bankruptcy court prior to docketing of the appeal has been deleted. Now that docketing occurs promptly after a notice of appeal is filed, *see* Rules 8003(d) and 8004(c), an appeal likely will not be voluntarily dismissed before docketing.

The rule retains the provision of the former rule that the district or BAP clerk must dismiss an appeal upon the parties' agreement. District courts and BAPs continue to have discretion to dismiss an appeal on an appellant's motion. Nothing in the rule prohibits a district court or BAP from dismissing an appeal for other reasons authorized by law, such as the failure to prosecute an appeal.

Changes Made After Publication

No changes were made after publication.

12b-008305

Rule 8024. Clerk's Duties on Disposition of the Appeal

1 (a) JUDGMENT ON APPEAL. The district or BAP
2 clerk must prepare, sign, and enter the judgment after
3 receiving the court's opinion or, if there is no opinion, as the
4 court instructs. Noting the judgment on the docket constitutes
5 entry of judgment.
6 (b) NOTICE OF A JUDGMENT. Immediately upon
7 the entry of a judgment, the district or BAP clerk must:
8 (1) transmit a notice of the entry to each party
9 to the appeal, to the United States trustee, and to the
10 bankruptcy clerk, together with a copy of any opinion;
11 and
12 (2) note the date of the transmission on the
13 docket.
14 (c) RETURNING PHYSICAL ITEMS. If any
15 physical items were transmitted as the record on appeal, they

16 must be returned to the bankruptcy clerk on disposition of the

17 appeal.

COMMITTEE NOTE

This rule is derived from former Rule 8016, which was adapted from F.R.App.P. 36 and 45(c) and (d). The rule is reworded to reflect that only items in the record that are physically, as opposed to electronically, transmitted to the district court or BAP need to be returned to the bankruptcy clerk. Other changes to the former rule are stylistic.

Changes Made After Publication

Stylistic changes were made to subdivision (c) and the Committee Note.

Rule 8025. Stay of a District Court or BAP Judgment

1 (a) AUTOMATIC STAY OF JUDGMENT ON
2 APPEAL. Unless the district court or BAP orders otherwise,
3 its judgment is stayed for 14 days after entry.
4 (b) STAY PENDING APPEAL TO THE COURT OF
5 APPEALS.
6 (1) *In General.* On a party's motion and
7 notice to all other parties to the appeal, the district
8 court or BAP may stay its judgment pending an appeal
9 to the court of appeals.
10 (2) *Time Limit.* The stay must not exceed 30
11 days after the judgment is entered, except for cause
12 shown.
13 (3) *Stay Continued.* If, before a stay expires,
14 the party who obtained the stay appeals to the court of

15 appeals, the stay continues until final disposition by
16 the court of appeals.
17 (4) *Bond or Other Security.* A bond or other
18 security may be required as a condition for granting or
19 continuing a stay of the judgment. A bond or other
20 security may be required if a trustee obtains a stay, but
21 not if a stay is obtained by the United States or its
22 officer or agency or at the direction of any department
23 of the United States government.
24 (c) AUTOMATIC STAY OF AN ORDER,
25 JUDGMENT, OR DECREE OF A BANKRUPTCY COURT.
26 If the district court or BAP enters a judgment affirming an
27 order, judgment, or decree of the bankruptcy court, a stay of
28 the district court's or BAP's judgment automatically stays the
29 bankruptcy court's order, judgment, or decree for the duration
30 of the appellate stay.

31 (d) POWER OF A COURT OF APPEALS NOT
32 LIMITED. This rule does not limit the power of a court of
33 appeals or any of its judges to do the following:
34 (1) stay a judgment pending appeal;
35 (2) stay proceedings while an appeal is
36 pending;
37 (3) suspend, modify, restore, vacate, or grant
38 a stay or an injunction while an appeal is pending; or
39 (4) issue any order appropriate to preserve the
40 status quo or the effectiveness of any judgment to be
41 entered.

COMMITTEE NOTE

This rule is derived from former Rule 8017. Most of the changes to the former rule are stylistic. Subdivision (c) is new. It provides that if a district court or BAP affirms the bankruptcy court ruling and the appellate judgment is stayed, the bankruptcy court's order, judgment, or decree that is affirmed on appeal is automatically stayed to the same extent as the stay of the appellate judgment.

Changes Made After Publication

No changes were made after publication.

Rule 8026. Rules by Circuit Councils and District Courts; Procedure When There is No Controlling Law

1 (a) LOCAL RULES BY CIRCUIT COUNCILS AND
2 DISTRICT COURTS.
3 (1) *Adopting Local Rules*. A circuit council
4 that has authorized a BAP under 28 U.S.C. § 158(b)
5 may make and amend rules governing the practice and
6 procedure on appeal from a judgment, order, or decree
7 of a bankruptcy court to the BAP. A district court
8 may make and amend rules governing the practice and
9 procedure on appeal from a judgment, order, or decree
10 of a bankruptcy court to the district court. Local rules
11 must be consistent with, but not duplicative of, Acts
12 of Congress and these Part VIII rules. Rule 83
13 F.R.Civ.P. governs the procedure for making and
14 amending rules to govern appeals.

15 (2) *Numbering*. Local rules must conform to
16 any uniform numbering system prescribed by the
17 Judicial Conference of the United States.
18 (3) *Limitation on Imposing Requirements of*
19 *Form*. A local rule imposing a requirement of form
20 must not be enforced in a way that causes a party to
21 lose any right because of a nonwillful failure to
22 comply.
23 (b) PROCEDURE WHEN THERE IS NO
24 CONTROLLING LAW.
25 (1) *In General*. A district court or BAP may
26 regulate practice in any manner consistent with federal
27 law, applicable federal rules, the Official Forms, and
28 local rules.
29 (2) *Limitation on Sanctions*. No sanction or
30 other disadvantage may be imposed for

31 noncompliance with any requirement not in federal
32 law, applicable federal rules, the Official Forms, or
33 local rules unless the alleged violator has been
34 furnished in the particular case with actual notice of
35 the requirement.

COMMITTEE NOTE

This rule is derived from former Rule 8018. The changes to the former rule are stylistic.

Changes Made After Publication

No changes were made after publication.

Rule 8027. Notice of a Mediation Procedure

1 If the district court or BAP has a mediation procedure
2 applicable to bankruptcy appeals, the clerk must notify the
3 parties promptly after docketing the appeal of:
4 (a) the requirements of the mediation procedure; and
5 (b) any effect the mediation procedure has on the time
6 to file briefs.

COMMITTEE NOTE

This rule is new. It requires the district or BAP clerk to advise the parties promptly after an appeal is docketed of any court mediation procedure that is applicable to bankruptcy appeals. The notice must state what the mediation requirements are and how the procedure affects the time for filing briefs.

Changes Made After Publication

No changes were made after publication.

Rule 8028. Suspension of Rules in Part VIII

1 In the interest of expediting decision or for other cause
2 in a particular case, the district court or BAP, or where
3 appropriate the court of appeals, may suspend the
4 requirements or provisions of the rules in Part VIII, except
5 Rules 8001, 8002, 8003, 8004, 8005, 8006, 8007, 8012, 8020,
6 8024, 8025, 8026, and 8028.

COMMITTEE NOTE

This rule is derived from former Rule 8019 and F.R.App.P. 2. To promote uniformity of practice and compliance with statutory authority, the rule includes a more extensive list of requirements that may not be suspended than either the former rule or the Federal Rules of Appellate Procedure provide. Rules governing the following matters may not be suspended:

- scope of the rules; definition of "BAP"; method of transmission;
- time for filing a notice of appeal;
- taking an appeal as of right;
- taking an appeal by leave;
- election to have an appeal heard by a district court instead of a BAP;

- certification of direct appeal to a court of appeals;
- stay pending appeal;
- corporate disclosure statement;
- sanctions for frivolous appeals and other misconduct;
- clerk's duties on disposition of an appeal;
- stay of a district court's or BAP's judgment;
- local rules; and
- suspension of the Part VIII rules.

Changes Made After Publication

No changes were made after publication.

Draft May 3, 2013

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

☐ Check if this is an amended filing

Official Form 3A

Application for Individuals to Pay the Filing Fee in Installments

12/13

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information.

Part 1: Specify Your Proposed Payment Timetable

1. **Which chapter of the Bankruptcy Code are you choosing to file under?**

☐ Chapter 7..... *Fee*: **$306**
☐ Chapter 11..... *Fee*: **$1,213**
☐ Chapter 12..... *Fee*: **$246**
☐ Chapter 13..... *Fee*: **$281**

2. **You may apply to pay the filing fee in up to four installments. Fill in the amounts you propose to pay and the dates you plan to pay them. Be sure all dates are business days. Then add the payments you propose to pay.**

You must propose to pay the entire fee no later than 120 days after you file this bankruptcy case. If the court approves your application, the court will set your final payment timetable.

You propose to pay...		
$_____	☐ With the filing of the petition ☐ On or before this date.....	_____ MM / DD / YYYY
$_____	On or before this date	_____ MM / DD / YYYY
$_____	On or before this date	_____ MM / DD / YYYY
+ $_____	On or before this date	_____ MM / DD / YYYY
Total $_____	◀ Your total must equal the entire fee for the chapter you checked in line 1.	

Part 2: Sign Below

By signing here, you state that you are unable to pay the full filing fee at once, that you want to pay the fee in installments, and that you understand that:

- You must pay your entire filing fee before you make any more payments or transfer any more property to an attorney, bankruptcy petition preparer, or anyone else for services in connection with your bankruptcy case.
- You must pay the entire fee no later than 120 days after you first file for bankruptcy, unless the court later extends your deadline. Your debts will not be discharged until your entire fee is paid.
- If you do not make any payment when it is due, your bankruptcy case may be dismissed, and your rights in other bankruptcy proceedings may be affected.

✕ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✕ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

✕ _____
Your attorney's name and signature, if you used one

Date _____
MM / DD / YYYY

Fill in this information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number (*If known*): _____ Chapter filing under:

- ❑ Chapter 7
- ❑ Chapter 11
- ❑ Chapter 12
- ❑ Chapter 13

Order Approving Payment of Filing Fee in Installments

After considering the *Application for Individuals to Pay the Filing Fee in Installments* (Official Form 3A), the court orders that:

[ ] The debtor(s) may pay the filing fee in installments on the terms proposed in the application.

[ ] The debtor(s) must pay the filing fee according to the following terms:

	You must pay...	On or before this date...
	$_____	_____ Month / day / year
	$_____	_____ Month / day / year
	$_____	_____ Month / day / year
+	$_____	_____ Month / day / year
Total	$_____	

Until the filing fee is paid in full, the debtor(s) must not make any additional payment or transfer any additional property to an attorney or to anyone else for services in connection with this case.

_____
Month / day / year

By the court: _____
United States Bankruptcy Judge

COMMITTEE NOTE

This form, which applies only in cases of individual debtors, has been revised as part of the Forms Modernization Project, making the form easier to read and, as a result, likely to generate more complete and accurate responses. Also, the declaration and signature section for a non-attorney bankruptcy petition preparer (BPP) has been removed as unnecessary. The same declaration, required under 11 U.S.C. § 110, is contained in Official Form 19. That form must be completed and signed by the BPP, and filed with each document for filing prepared by a BPP.

Changes Made After Publication

The instruction that the debtor must propose to pay the entire fee no later than 120 days after "you first file for bankruptcy" was changed to "after you file this bankruptcy case."

Reference to the possibility of an extension to pay the fee beyond 120 days after filing was moved from the form to the instructions.

The instruction in the signature box regarding payments to others before the filing fee is paid was revised by adding the words "for services" as follows: "You must pay your entire filing fee before you make any more payments or transfer any more property to an attorney, bankruptcy petition preparer, or anyone else for services in connection with your bankruptcy case."

Draft April 9, 2013

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

☐ Check if this is an amended filing

Official Form 3B

Application to Have the Chapter 7 Filing Fee Waived

12/13

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known).

Part 1: Tell the Court About Your Family and Your Family's Income

1. What is the size of your family?

Your family includes you, your spouse, and any dependents listed on *Schedule J: Current Expenditures of Individual Debtor(s)* (Official Form 6J).

Check all that apply:

☐ You
☐ Your spouse
☐ Your dependents _____ How many dependents? _____ Total number of people

2. Fill in your family's average monthly income.

Include your spouse's income if your spouse is living with you, even if your spouse is not filing.

Do not include your spouse's income if you are separated and your spouse is not filing with you.

Add your income and your spouse's income. Include the value (if known) of any non-cash governmental assistance that you receive, such as food stamps (benefits under the Supplemental Nutrition Assistance Program) or housing subsidies.

If you have already filled out *Schedule I: Your Income,* see line 10 of that schedule.

	That person's average monthly net income (take-home pay)
You	$_____
Your spouse ... +	$_____
Subtotal.....	$_____
Subtract any non-cash governmental assistance that you included above.	− $_____
Your family's average monthly net income Total.....	$_____

3. Do you receive non-cash governmental assistance?

☐ No
☐ Yes. Describe.....

Type of assistance

4. Do you expect your family's average monthly net income to increase or decrease by more than 10% during the next 6 months?

☐ No
☐ Yes. Explain. .....

5. Tell the court why you are unable to pay the filing fee in installments within 120 days. If you have some additional circumstances that cause you to not be able to pay your filing fee in installments, explain them.

Debtor 1 _____ Case number (*if known*) _____
First Name Middle Name Last Name

Part 2: Tell the Court About Your Monthly Expenses

6. Estimate your average monthly expenses.
Include amounts paid by any government assistance that you reported on line 2. $_____

If you have already filled out *Schedule J, Your Expenses,* copy line 22 from that form.

7. Do these expenses cover anyone who is not included in your family as reported in line 1?
- ❑ No
- ❑ Yes. Identify who .....

8. Does anyone other than you regularly pay any of these expenses?
If you have already filled out *Schedule I: Your Income*, copy the total from line 11.
- ❑ No
- ❑ Yes. How much do you regularly receive as contributions? $_____ monthly

9. Do you expect your average monthly expenses to increase or decrease by more than 10% during the next 6 months?
- ❑ No
- ❑ Yes. Explain .....

Part 3: Tell the Court About Your Property

If you have already filled out *Schedule A: Real Property (Official Form 6A)* and *Schedule B: Personal Property (Official Form 6B)*, attach copies to this application and go to Part 4.

10. How much cash do you have?
Examples: Money you have in your wallet, in your home, and on hand when you file this application

Cash: $_____

11. Bank accounts and other deposits of money?
Examples: Checking, savings, money market, or other financial accounts; certificates of deposit; shares in banks, credit unions, brokerage houses, and other similar institutions. If you have more than one account with the same institution, list each. Do not include 401(k) and IRA accounts.

	Institution name:	Amount:
Checking account:	_____	$_____
Savings account:	_____	$_____
Other financial accounts:	_____	$_____
Other financial accounts:	_____	$_____

12. Your home? (if you own it outright or are purchasing it)
Examples: House, condominium, manufactured home, or mobile home

_____
Number Street
_____
City State ZIP Code

Current value: $_____
Amount you owe on mortgage and liens: $_____

13. Other real estate?

_____
Number Street
_____
City State ZIP Code

Current value: $_____
Amount you owe on mortgage and liens: $_____

14. The vehicles you own?
Examples: Cars, vans, trucks, sports utility vehicles, motorcycles, tractors, boats

Make: _____
Model: _____
Year: _____
Mileage _____
Current value: $_____
Amount you owe on liens: $_____

Make: _____
Model: _____
Year: _____
Mileage _____
Current value: $_____
Amount you owe on liens: $_____

Rules Appendix B-206

12b-008322

Debtor 1 _____ Case number (*if known*) _____
First Name Middle Name Last Name

15. Other assets?

Do not include household items and clothing.

Describe the other assets:

Current value: $_____

Amount you owe on liens: $_____

16. Money or property due you?

Examples: Tax refunds, past due or lump sum alimony, spousal support, child support, maintenance, divorce or property settlements, Social Security benefits, Workers' compensation, personal injury recovery

Who owes you the money or property?	How much is owed?	Do you believe you will likely receive payment in the next 180 days?
_____	$_____	❑ No
_____	$_____	❑ Yes. Explain:

Part 4: Answer These Additional Questions

17. Have you paid anyone for services for this case, including filling out this application, the bankruptcy filing package, or the schedules?

❑ No
❑ Yes. **Whom did you pay?** *Check all that apply:*
- ❑ An attorney
- ❑ A bankruptcy petition preparer, paralegal, or typing service
- ❑ Someone else _____

How much did you pay? $_____

18. Have you promised to pay or do you expect to pay someone for services for your bankruptcy case?

❑ No
❑ Yes. **Whom do you expect to pay?** *Check all that apply:*
- ❑ An attorney
- ❑ A bankruptcy petition preparer, paralegal, or typing service
- ❑ Someone else _____

How much do you expect to pay? $_____

19. Has anyone paid someone on your behalf for services for this case?

❑ No
❑ Yes. **Who was paid on your behalf?** *Check all that apply:*
- ❑ An attorney
- ❑ A bankruptcy petition preparer, paralegal, or typing service
- ❑ Someone else _____

Who paid? *Check all that apply:*
- ❑ Parent
- ❑ Brother or sister
- ❑ Friend
- ❑ Pastor or clergy
- ❑ Someone else _____

How much did someone else pay? $_____

20. Have you filed for bankruptcy within the last 8 years?

❑ No
❑ Yes. District _____ When _____ (MM/ DD/ YYYY) Case number _____
District _____ When _____ (MM/ DD/ YYYY) Case number _____
District _____ When _____ (MM/ DD/ YYYY) Case number _____

Part 5: Sign Below

By signing here under penalty of perjury, I declare that I cannot afford to pay the filing fee either in full or in installments. I also declare that the information I provided in this application is true and correct.

✗ _____ ✗ _____
Signature of Debtor 1 Signature of Debtor 2

Date _____ Date _____
MM / DD / YYYY MM / DD / YYYY

Fill in this information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Order on the Application to Have the Chapter 7 Filing Fee Waived

After considering the debtor's *Application to Have the Chapter 7 Filing Fee Waived* (Official Form 3B), the court orders that the application is:

[ ] **Granted.** However, the court may order the debtor to pay the fee in the future if developments in administering the bankruptcy case show that the waiver was unwarranted.

[ ] **Denied.** The debtor must pay the $306 filing fee according to the following terms:

	You must pay...	On or before this date...
	$_____._____	_____ Month / day / year
	$_____._____	_____ Month / day / year
	$_____._____	_____ Month / day / year
+	$_____._____	_____ Month / day / year
Total	$ 306.00	

If the debtor would like to propose a different payment timetable, the debtor must file a motion promptly with a payment proposal. The debtor may use *Application for Individuals to Pay the Filing Fee in Installments* (Official Form 3A) for this purpose. The court will consider it.

The debtor must pay the entire filing fee before making any more payments or transferring any more property to an attorney, bankruptcy petition preparer, or anyone else in connection with the bankruptcy case. The debtor must also pay the entire filing fee to receive a discharge. If the debtor does not make any payment when it is due, the bankruptcy case may be dismissed and the debtor's rights in future bankruptcy cases may be affected.

[ ] **Scheduled for hearing.**

A hearing to consider the debtor's application will be held

on _____ at _____:_____ AM / PM at _____.
Month / day / year Address of courthouse

If the debtor does not appear at this hearing, the court may deny the application.

Rules Appendix B-208
Month / day / year

By the court: _____
United States Bankruptcy Judge

COMMITTEE NOTE

This form, which applies only in cases of individual debtors, has been revised as part of the Forms Modernization Project, making the form easier to read and, as a result, likely to generate more complete and accurate responses. Additionally, in calculating the income that determines the debtor's initial eligibility for a fee waiver, line 2 of the form now directs the debtor to exclude non-cash governmental assistance, such as food stamps and housing subsidies. However, because non-cash governmental assistance may be relevant in evaluating the additional requirement that the debtor be unable to pay the filing fee, the nature of any such assistance is to be reported separately on line 3. Also, the declaration and signature section for a non-attorney bankruptcy petition preparer (BPP) has been removed as unnecessary. The same declaration, required under 11 U.S.C. § 110, is contained in Official Form 19. That form must be completed and signed by the BPP, and filed with each document for filing prepared by a BPP.

Changes Made After Publication

At line 2 of the form the calculation of the debtor's average monthly income was changed. The debtor is first instructed to report income including non-cash governmental assistance, if known, and then is instructed to subtract non-cash governmental assistance from that figure to calculate average monthly net income.

The following sentence was added at line 5 of the form: "If you have some additional circumstances that cause you to not be able to pay your filing fee in installments, explain them."

At line 6, the debtor is directed to include in the estimate of average monthly expenses any governmental assistance that was reported on line 2 of the form.

At line 20, the instruction to report any bankruptcy filing by the debtor's non-filing spouse was removed.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Check if this is:

- ❑ An amended filing
- ❑ A supplement showing post-petition chapter 13 income as of the following date:

_____
MM / DD / YYYY

Official Form 6I

Schedule I: Your Income

12/13

Be as complete and accurate as possible. If two married people are filing together (Debtor 1 and Debtor 2), both are equally responsible for supplying correct information. If you are married and not filing jointly, and your spouse is living with you, include information about your spouse. If you are separated and your spouse is not filing with you, do not include information about your spouse. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Describe Employment

1. **Fill in your employment information.**

   If you have more than one job, attach a separate page with information about additional employers.

   Include part-time, seasonal, or self-employed work.

   Occupation may Include student or homemaker, if it applies.

	Debtor 1	Debtor 2 or non-filing spouse
Employment status	❑ Employed ❑ Not employed	❑ Employed ❑ Not employed
Occupation	_____	_____
Employer's name	_____	_____
Employer's address	_____ Number Street _____ _____ City State ZIP Code	_____ Number Street _____ _____ City State ZIP Code
How long employed there?	_____	_____

Part 2: Give Details About Monthly Income

Estimate monthly income as of the date you file this form. If you have nothing to report for any line, write $0 in the space. Include your non-filing spouse unless you are separated.

If you or your non-filing spouse have more than one employer, combine the information for all employers for that person on the lines below. If you need more space, attach a separate sheet to this form.

		For Debtor 1	For Debtor 2 or non-filing spouse
2. **List monthly gross wages, salary, and commissions** (before all payroll deductions). If not paid monthly, calculate what the monthly wage would be.	2.	$_____	$_____
3. **Estimate and list monthly overtime pay.**	3.	+ $_____	+ $_____
4. **Calculate gross income.** Add line 2 + line 3.	4.	$_____	$_____

Rules Appendix B-210

Debtor 1 _____ Case number (if known) _____
First Name Middle Name Last Name

		For Debtor 1	For Debtor 2 or non-filing spouse
Copy line 4 here →	4.	$_____	$_____
5. **List all payroll deductions:**			
5a. **Tax, Medicare, and Social Security deductions**	5a.	$_____	$_____
5b. **Mandatory contributions for retirement plans**	5b.	$_____	$_____
5c. **Voluntary contributions for retirement plans**	5c.	$_____	$_____
5d. **Required repayments of retirement fund loans**	5d.	$_____	$_____
5e. **Insurance**	5e.	$_____	$_____
5f. **Domestic support obligations**	5f.	$_____	$_____
5g. **Union dues**	5g.	$_____	$_____
5h. **Other deductions.** Specify: _____	5h.	+ $_____	+ $_____
6. **Add the payroll deductions.** Add lines 5a + 5b + 5c + 5d + 5e +5f + 5g +5h.	6.	$_____	$_____
7. **Calculate total monthly take-home pay.** Subtract line 6 from line 4.	7.	$_____	$_____
8. **List all other income regularly received:**			
8a. **Net income from rental property and from operating a business, profession, or farm** Attach a statement for each property and business showing gross receipts, ordinary and necessary business expenses, and the total monthly net income.	8a.	$_____	$_____
8b. **Interest and dividends**	8b.	$_____	$_____
8c. **Family support payments that you, a non-filing spouse, or a dependent regularly receive** Include alimony, spousal support, child support, maintenance, divorce settlement, and property settlement.	8c.	$_____	$_____
8d. **Unemployment compensation**	8d.	$_____	$_____
8e. **Social Security**	8e.	$_____	$_____
8f. **Other government assistance that you regularly receive** Include cash assistance and the value (if known) of any non-cash assistance that you receive, such as food stamps (benefits under the Supplemental Nutrition Assistance Program) or housing subsidies. Specify: _____	8f.	$_____	$_____
8g. **Pension or retirement income**	8g.	$_____	$_____
8h. **Other monthly income.** Specify: _____	8h.	+ $_____	+ $_____
9. **Add all other income.** Add lines 8a + 8b + 8c + 8d + 8e + 8f +8g + 8h.	9.	$_____	$_____
10. **Calculate monthly income.** Add line 7 + line 9. Add the entries in line 10 for Debtor 1 and Debtor 2 or non-filing spouse.	10.	$_____ +	$_____ = $_____

11. **State all other regular contributions to the expenses that you list in *Schedule J*.**
Include contributions from an unmarried partner, members of your household, your dependents, your roommates, and other friends or relatives.
Do not include any amounts already included in lines 2-10 or amounts that are not available to pay expenses listed in *Schedule J*.
Specify: _____ 11. + $_____

12. **Add the amount in the last column of line 10 to the amount in line 11.** The result is the combined monthly income.
Write that amount on the *Summary of Schedules* and *Statistical Summary of Certain Liabilities and Related Data,* if it applies 12. $_____
Combined monthly income

13. **Do you expect an increase or decrease within the year after you file this form?**
❑ No.
❑ Yes. Explain: _____

Rules Appendix B-211

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number _____
(If known)

Check if this is:

- ❑ An amended filing
- ❑ A supplement showing post-petition chapter 13 expenses as of the following date: _____ MM / DD / YYYY
- ❑ A separate filing for Debtor 2 because Debtor 2 maintains a separate household

Official Form 6J

Schedule J: Your Expenses

12/13

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach another sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Describe Your Household

1. **Is this a joint case?**

   ❑ No. Go to line 2.
   ❑ Yes. **Does Debtor 2 live in a separate household?**

   ❑ No
   ❑ Yes. Debtor 2 must file a separate Schedule J.

2. **Do you have dependents?**

   Do not list Debtor 1 and Debtor 2.

   Do not state the dependents' names.

   ❑ No
   ❑ Yes. Fill out this information for each dependent.....

Dependent's relationship to Debtor 1 or Debtor 2	Dependent's age	Does dependent live with you?
		❑ No ❑ Yes
		❑ No ❑ Yes
		❑ No ❑ Yes
		❑ No ❑ Yes
		❑ No ❑ Yes

3. **Do your expenses include expenses of people other than yourself and your dependents?**

   ❑ No
   ❑ Yes

Part 2: Estimate Your Ongoing Monthly Expenses

Estimate your expenses as of your bankruptcy filing date unless you are using this form as a supplement in a Chapter 13 case to report expenses as of a date after the bankruptcy is filed. If this is a supplemental *Schedule J*, check the box at the top of the form and fill in the applicable date.

Include expenses paid for with non-cash government assistance if you know the value of such assistance and have included it on *Schedule I: Your Income* (Official Form 6I.)

		Your expenses
4. **The rental or home ownership expenses for your residence.** Include first mortgage payments and any rent for the ground or lot.	4.	$_____
If not included in line 4:		
4a. Real estate taxes	4a.	$_____
4b. Property, homeowner's, or renter's insurance	4b.	$_____
4c. Home maintenance, repair, and upkeep expenses	4c.	$_____
4d. Homeowner's association or condominium dues	4d.	$_____

Debtor 1 _____ Case number (*if known*) _____
First Name Middle Name Last Name

		Your expenses
5. **Additional mortgage payments for your residence**, such as home equity loans	5.	$
6. **Utilities:**		
6a. Electricity, heat, natural gas	6a.	$
6b. Water, sewer, garbage collection	6b.	$
6c. Telephone, cell phone, Internet, satellite, and cable services	6c.	$
6d. Other. Specify: _____	6d.	$
7. **Food and housekeeping supplies**	7.	$
8. **Childcare and children's education costs**	8.	$
9. **Clothing, laundry, and dry cleaning**	9.	$
10. **Personal care products and services**	10.	$
11. **Medical and dental expenses**	11.	$
12. **Transportation.** Include gas, maintenance, bus or train fare. Do not include car payments.	12.	$
13. **Entertainment, clubs, recreation, newspapers, magazines, and books**	13.	$
14. **Charitable contributions and religious donations**	14.	$
15. **Insurance.** Do not include insurance deducted from your pay or included in lines 4 or 20.		
15a. Life insurance	15a.	$
15b. Health insurance	15b.	$
15c. Vehicle insurance	15c.	$
15d. Other insurance. Specify: _____	15d.	$
16. **Taxes.** Do not include taxes deducted from your pay or included in lines 4 or 20. Specify: _____	16.	$
17. **Installment or lease payments:**		
17a. Car payments for Vehicle 1	17a.	$
17b. Car payments for Vehicle 2	17b.	$
17c. Other. Specify: _____	17c.	$
17d. Other. Specify: _____	17d.	$
18. **Your payments of alimony, maintenance, and support that you did not report as deducted from your pay on line 5, *Schedule I, Your Income* (Official Form 6I).**	18.	$
19. **Other payments you make to support others who do not live with you.** Specify: _____	19.	$
20. **Other real property expenses not included in lines 4 or 5 of this form or on *Schedule I: Your Income*.**		
20a. Mortgages on other property	20a.	$
20b. Real estate taxes	20b.	$
20c. Property, homeowner's, or renter's insurance	20c.	$
20d. Maintenance, repair, and upkeep expenses	20d.	$
20e. Homeowner's association or condominium dues	20e.	$

21. **Other**. Specify: _____ 21. +$_____

22. **Your monthly expenses.** Add lines 4 through 21.
The result is your monthly expenses. 22. $_____

23. **Calculate your monthly net income.**

23a. Copy line 12 (*your combined monthly income*) from *Schedule I*. 23a. $_____

23b. Copy your monthly expenses from line 22 above. 23b. – $_____

23c. Subtract your monthly expenses from your monthly income.
The result is your *monthly net income*. 23c. $_____

24. **Do you expect an increase or decrease in your expenses within the year after you file this form?**

For example, do you expect to finish paying for your car loan within the year or do you expect your mortgage payment to increase or decrease because of a modification to the terms of your mortgage?

☐ No.
☐ Yes. Explain here:

UNITED STATES BANKRUPTCY COURT

_____ District of _____

In re _____,
Debtor

Case No. _____

Chapter _____

SUMMARY OF SCHEDULES

Indicate as to each schedule whether that schedule is attached and state the number of pages in each. Report the totals from Schedules A, B, D, E, F, I, and J in the boxes provided. Add the amounts from Schedules A and B to determine the total amount of the debtor's assets. Add the amounts of all claims from Schedules D, E, and F to determine the total amount of the debtor's liabilities. Individual debtors also must complete the "Statistical Summary of Certain Liabilities and Related Data" if they file a case under chapter 7, 11, or 13.

NAME OF SCHEDULE	ATTACHED (YES/NO)	NO. OF SHEETS	ASSETS	LIABILITIES	OTHER
A - Real Property			$		
B - Personal Property			$		
C - Property Claimed as Exempt					
D - Creditors Holding Secured Claims				$	
E - Creditors Holding Unsecured Priority Claims (Total of Claims on Schedule E)				$	
F - Creditors Holding Unsecured Nonpriority Claims				$	
G - Executory Contracts and Unexpired Leases					
H - Codebtors					
I - Current Income of Individual Debtor(s)					$
J - Current Expenditures of Individual Debtors(s)					$
TOTAL			$	$	

UNITED STATES BANKRUPTCY COURT

_____ District of _____

In re _____, Case No. _____
Debtor

Chapter _____

STATISTICAL SUMMARY OF CERTAIN LIABILITIES AND RELATED DATA (28 U.S.C. § 159)

If you are an individual debtor whose debts are primarily consumer debts, as defined in § 101(8) of the Bankruptcy Code (11 U.S.C. § 101(8)), filing a case under chapter 7, 11 or 13, you must report all information requested below.

☐ Check this box if you are an individual debtor whose debts are NOT primarily consumer debts. You are not required to report any information here.

This information is for statistical purposes only under 28 U.S.C. § 159.

Summarize the following types of liabilities, as reported in the Schedules, and total them.

Type of Liability	Amount
Domestic Support Obligations (from Schedule E)	$
Taxes and Certain Other Debts Owed to Governmental Units (from Schedule E)	$
Claims for Death or Personal Injury While Debtor Was Intoxicated (from Schedule E) (whether disputed or undisputed)	$
Student Loan Obligations (from Schedule F)	$
Domestic Support, Separation Agreement, and Divorce Decree Obligations Not Reported on Schedule E	$
Obligations to Pension or Profit-Sharing, and Other Similar Obligations (from Schedule F)	$
TOTAL	$

State the following:

Average Income (from Schedule I, Line 12)	$
Average Expenses (from Schedule J, Line 22)	$
Current Monthly Income (from Form 22A Line 12; **OR**, Form 22B Line 11; **OR**, Form 22C Line 20)	$

State the following:

1. Total from Schedule D, "UNSECURED PORTION, IF ANY" column		$
2. Total from Schedule E, "AMOUNT ENTITLED TO PRIORITY" column.	$	
3. Total from Schedule E, "AMOUNT NOT ENTITLED TO PRIORITY, IF ANY" column		$
4. Total from Schedule F		$
5. Total of non-priority unsecured debt (sum of 1, 3, and 4)		$

COMMITTEE NOTE

Schedule I: Your Income (Official Form 6I) and *Schedule J: Your Expenses* (Official Form 6J), which apply only in cases of individual debtors, have been revised as part of the Forms Modernization Project, making the forms easier to read and, as a result, likely to generate more complete and accurate responses.

Revised Schedules I and J seek to obtain a full picture of the debtor's economic situation—to the extent that debtor receives income or has expenses. The revised forms are intended to avoid the situation that frequently happens with the current forms where debtor lives with and pools assets with other people and the household provides support to dependents who may not be related by blood or marriage to the debtor.

The amendments seek to avoid the situation where the expenses listed on Schedule J are for the entire household, but the income listed on Schedule I is only for the debtor. Line 11 on revised Schedule I now includes contributions made by someone else to the expenses on Schedule J, and the debtor is instructed to include contributions from an unmarried partner, members of the debtor's household, dependents, roommates, and other friends or relatives.

As revised, the initial Schedule J will provide estimated expenses at the beginning of the case and the debtor will so indicate in Part 2 of the form.

In drafting the form it became apparent that at least some courts are using Schedules I and J in analyzing proposed chapter 13 plans and potential modification of those plans or when a debtor's financial circumstances change. To avoid a lack of clarity on the form regarding the date to be used in computing expenses, and in order to allow Schedule J to continue to serve the plan feasibility function, the revised form may also be used as a supplement to the initial filing if the debtor checks the appropriate box in the caption and indicates the pertinent post-filing date of the estimate.

New lines 1, 2, and 3 on revised Schedule J request information about the debtor's household. Line 1 requires joint debtors who maintain separate households to file separate Schedule J forms. A check box has been added to the caption to identify such filings. Line 2 requires information about each dependent

who lives with the debtor and each dependent who lives separately. In order to allow a full understanding of the debtor's expenses, Line 3 requires debtors to state whether their expenses include the expenses of persons other than themselves and their dependents. In addition, new line 23 on the form includes a calculation of the debtor's monthly net income.

Summary of Schedules (Official Form 6 Summary), is updated on page 2 to reflect new line number references to Schedules I and J for Average Income and Average Expenses.

Changes Made After Publication

Official Form 6I

A checkbox was added to the top of the form for the following statement: "A supplement showing post-petition chapter 13 income as of the following date _____."

The following two sentences were added to the directions at the top of the form: "If you are married and not filing jointly, and your spouse is living with you, include information about your spouse. If you are separated and your spouse is not filing with you, do not include information about your spouse."

At line 1 of the form, the direction to include employment information about a non-filing spouse was removed.

At line 5, the entry for listing contributions to retirement plans was divided into separate entries for mandatory and voluntary contributions, and an entry was added for union dues.

Line 8f, regarding government assistance, was revised with a direction to include the value of any non-cash assistance such as food stamps or housing subsidies, if known.

Official Form 6J

A checkbox was added to the top of the form for the following statement: "A supplement showing post-petition chapter 13 income as of the following date _____."

A checkbox was added to the top of the form for the following statement, identifying the form as "A separate filing for Debtor 2 because Debtor 2 maintains a separate household".

A new line 1 was added to Part 1, directing Debtor 2 to fill out a separate Schedule J if the case is a joint case and Debtor 2 lives in a separate household. The remaining questions in Part 1 were reorganized, and an instruction to not list dependent names was added.

In Part 2, Column A was relabeled "Your expenses," and Column B was eliminated.

At line 17, Installment or lease payments, the separate entry for student loan payments was removed.

At line 18, an instruction was added to clarify that alimony, maintenance, and support should be listed as an expense only to the extent that it has not already been accounted for as a payroll deduction on line 5 of Schedule I.

UNITED STATES BANKRUPTCY COURT

_____ District Of _____

In re _____, Case No. _____
Debtor

Chapter _____

DEBTOR'S CERTIFICATION OF COMPLETION OF POSTPETITION INSTRUCTIONAL COURSE CONCERNING PERSONAL FINANCIAL MANAGEMENT

This form should not be filed if an approved provider of a postpetition instructional course concerning personal financial management has already notified the court of the debtor's completion of the course. Otherwise, every individual debtor in a chapter 7 or a chapter 13 case or in a chapter 11 case in which § 1141(d)(3) applies must file this certification. If a joint petition is filed and this certification is required, each spouse must complete and file a separate certification. Complete one of the following statements and file by the deadline stated below:

☐ I, _____, the debtor in the above-styled case, hereby
(Printed Name of Debtor)
certify that on _____ (Date), I completed an instructional course in personal financial management provided by _____, an approved personal financial
(Name of Provider)
management provider.

Certificate No. (if any):_____.

☐ I, _____, the debtor in the above-styled case, hereby
(Printed Name of Debtor)
certify that no personal financial management course is required because of *[Check the appropriate box.]*:

☐ Incapacity or disability, as defined in 11 U.S.C. § 109(h);
☐ Active military duty in a military combat zone; or
☐ Residence in a district in which the United States trustee (or bankruptcy administrator) has determined that the approved instructional courses are not adequate at this time to serve the additional individuals who would otherwise be required to complete such courses.

Signature of Debtor: _____

Date: _____

Instructions: Use this form only to certify whether you completed a course in personal financial management and only if your course provider has not already notified the court of your completion of the course. (Fed. R. Bankr. P. 1007(b)(7).) Do NOT use this form to file the certificate given to you by your prepetition credit counseling provider and do NOT include with the petition when filing your case.

Filing Deadlines: In a chapter 7 case, file within 60 days of the first date set for the meeting of creditors under § 341 of the Bankruptcy Code. In a chapter 11 or 13 case, file no later than the last payment made by the debtor as required by the plan or the filing of a motion for a discharge under § 1141(d)(5)(B) or § 1328(b) of the Code. (See Fed. R. Bankr. P. 1007(c).)

COMMITTEE NOTE

The form is amended to reflect the amendment of Rule 1007(b)(7). As amended, that rule allows an approved provider of a personal financial management course to notify the court directly of the debtor's completion of the course. That notification relieves the debtor of the obligation to file this form.

Because this amendment is being made to conform to an amendment to Rule 1007(b)(7) that will take effect on December 1, 2013, final approval is sought without publication.

UNITED STATES BANKRUPTCY COURT

_____ District of _____

In re _____,
Debtor

Case No. _____
Chapter ____

REAFFIRMATION AGREEMENT COVER SHEET

This form must be completed in its entirety and filed, with the reaffirmation agreement attached, within the time set under Rule 4008. It may be filed by any party to the reaffirmation agreement.

1. Creditor's Name:_____

2. Amount of the debt subject to this reaffirmation agreement:
$_____ on the date of bankruptcy $_____ to be paid under reaffirmation agreement

3. Annual percentage rate of interest: _____% prior to bankruptcy
_____% under reaffirmation agreement (___ Fixed Rate ___ Adjustable Rate)

4. Repayment terms (if fixed rate): $_____ per month for _____ months

5. Collateral, if any, securing the debt: Current market value: $_____
Description: _____

6. Does the creditor assert that the debt is nondischargeable? ___Yes ___ No
(If yes, attach a declaration setting forth the nature of the debt and basis for the contention that the debt is nondischargeable.)

Debtor's Schedule I and J Entries

7A. Total monthly income from Schedule I, line 12 $_____

8A. Total monthly expenses from Schedule J, line 22 $_____

9A. Total monthly payments on reaffirmed debts not listed on Schedule J $_____

Debtor's Income and Expenses as Stated on Reaffirmation Agreement

7B. Monthly income from all sources after payroll deductions $_____

8B. Monthly expenses $_____

9B. Total monthly payments on reaffirmed debts not included in monthly expenses $_____

10B. Net monthly income $_____
(Subtract sum of lines 8B and 9B from line 7B. If total is less than zero, put the number in brackets.)

11. Explain with specificity any difference between the income amounts (7A and 7B):

_____

_____

12. Explain with specificity any difference between the expense amounts (8A and 8B):

_____

_____

If line 11 or12 is completed, the undersigned debtor, and joint debtor if applicable, certifies that any explanation contained on those lines is true and correct.

_____	_____
Signature of Debtor (only required if line 11 or 12 is completed)	Signature of Joint Debtor (if applicable, and only required if line 11 or 12 is completed)

Other Information

☐ Check this box if the total on line 10B is less than zero. If that number is less than zero, a presumption of undue hardship arises (unless the creditor is a credit union) and you must explain with specificity the sources of funds available to the Debtor to make the monthly payments on the reaffirmed debt:

_____

_____

Was debtor represented by counsel during the course of negotiating this reaffirmation agreement?

_____Yes _____No

If debtor was represented by counsel during the course of negotiating this reaffirmation agreement, has counsel executed a certification (affidavit or declaration) in support of the reaffirmation agreement?

_____Yes _____No

FILER'S CERTIFICATION

I hereby certify that the attached agreement is a true and correct copy of the reaffirmation agreement between the parties identified on this Reaffirmation Agreement Cover Sheet.

_____

Signature

_____

Print/Type Name & Signer's Relation to Case

COMMITTEE NOTE

Lines 7A and 8A of the form are updated to revise references to new line numbers on Schedules I and J for Total Monthly Income and Total Monthly Expenses.

Because this amendment is being made to conform to the amendments to Schedules I and J that will take effect on December 1, 2013, final approval is sought without publication.

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

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CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

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

From: Honorable Reena Raggi, Chair
Advisory Committee on Federal Rules of Criminal Procedure

Date: May 8, 2013 (revised June 2013)

Re: Report of the Advisory Committee on Criminal Rules

I. Introduction

The Advisory Committee on the Federal Rules of Criminal Procedure ("the Advisory Committee") met on April 25, 2013, in Durham, North Carolina, and took action on a number of proposals. The Draft Minutes are attached. (Tab D).

This report presents three action items for Standing Committee consideration:

(1) approval to transmit to the Judicial Conference a proposed amendment to Rule 12 (pretrial motions), and a conforming amendment to Rule 34;
(2) approval to transmit to the Judicial Conference proposed amendments to Rules 5 and 58 (adding consular notification); and

(3) approval to transmit to the Judicial Conference a technical and conforming amendment to Rule 6.[1]

II. Action Items — Recommendations to Transmit Amendments to the Judicial Conference

1. ACTION ITEM — Rules 12 and 34

The Advisory Committee recommends approval of amendments to Rules 12 and 34. To facilitate consideration of this proposal, the following materials are attached:

Tab B.1 – 2013 Submitted Rule 12 Amendment
Tab B.2 – Blackline comparison of Current and Submitted Rule 12
Tab B.3 – Blackline comparison of Current and Submitted Rule 34
Tab B.4 – Reporters' 2013 Memorandum to Advisory Committee on Development of Rule 12 Amendment
Tab B.5 – 2011 Published Amendment Proposal

The proposed amendments originate in a 2006 request from the Department of Justice that "failure to state an offense" be deleted from current Rule 12(b)(3) as a defect that can be raised "at any time," in light of the Supreme Court's decision in *United States v. Cotton,* 535 U.S. 625, 629-31 (2002), holding that "failure to state an offense" is not a jurisdictional defect.

The Advisory Committee's efforts to effect such an amendment sparked extensive discussion within the Advisory Committee and between the Advisory and Standing Committees regarding various aspects of Rule 12. This resulted in three separate amendment proposals being presented to the Standing Committee, the third of which was approved for publication in August 2011. See Tab B.5. In response to the thoughtful public comments received and upon its own further review, the Advisory Committee has revised its third proposal for amendment further. These revisions will not require republication. A detailed chronology of the amendment's evolution, including the public comments received and changes made following publication, is contained in the Reporters' 2013

[1]In response to legislative action that occurred after its April meeting, the Advisory Committee approved this amendment by email vote.

Memorandum to the Advisory Committee, a copy of which is attached. See Tab B.4 [2]

The Advisory Committee now presents to the Standing Committee proposed amendments to Rules 12 and 34 that effect the original deletion requested by the Justice Department, clarify other aspects of the rules, and take into account public comments. See Tab B.1, B.2. The submitted proposals have the unanimous approval of the Advisory Committee.

The substantive features of the submitted amendment to Rule 12 (which also restyle these rules) can be summarized as follows:

(1) By contrast to current Rule 12(b)(1), which starts with an unexplained cross-reference to Rule 47 (discussing form, content, and timing of motions), submitted Rule 12(b)(1) achieves greater clarity by stating the rule's general purpose—the filing of pretrial motions (relocated from current rule 12(b))—before cross-referencing Rule 47.

(2) Submitted Rule 12(b)(2) identifies motions that may be made at any time separately from Rule 12(b)(3), which identifies motions that must be made before trial. This provides greater clarity—visually as well as textually—than current Rule 12(b)(3), which identifies motions that may be made at any time only in an ellipsis exception to otherwise mandatory motions alleging defects in the indictment or information.

---

[2]After publication, the Advisory Committee made the following six changes to the published amendment of Rule 12:

(1) restored language that had been removed from 12(b)(2) as to purpose of rule, and relocated it to (b)(1);
(2) deleted double jeopardy claims from the proposed list of 12(b)(3) claims that must be raised before trial;
(3) deleted statute of limitations from the proposed list of 12(b)(3) claims that must be raised before trial;
(4) added 12(c)(2) making explicit district courts' authority to extend or reset deadline for pretrial motions;
(5) deleted language referencing Rule 52; and
(6) deleted proposed new language requiring showing of "cause and prejudice" and restored current "good cause" as standard for hearing late filed motions.

The third and sixth changes, made by the Advisory Committee at its April meeting, are not covered in the Reporter's March 2013 memo, but are explained in the draft minutes of the April meeting.

The Advisory Committee also made several changes to the published Committee Note. The revised Note reflects the changes to the rule's text and states explicitly that the rule does not change statutory deadlines under provisions such as the Jury Selection and Service Act. See Tab B.1, B.2. Finally, in response to the suggestion of a member of the Standing Committee made after the April meeting, the Advisory Committee approved by email vote an addition to the Committee Note stating expressly that the district court has broad discretion not only to extend and reset, but also to decline to extend or reset the deadline in 12(c)(2).

(3) Submitted Rule 12(b)(2) recognizes lack of jurisdiction as the only motion that may be made "at any time while the case is pending," thus effecting the Justice Department's request not to accord that status to failure to state an offense.

(4) Submitted Rule 12(b)(3) provides clearer notice with respect to motions that must be made before trial.

(a) At the start, it clarifies that its motion mandate is dependent on two conditions:

i. the basis for the motion must be reasonably available before trial, and
ii. the motion must be capable of resolution before trial.

This ensures that motions are raised pretrial when warranted while safeguarding against a rigid filing requirement that could be unfair to defendants.

(b) Submitted Rule 12(b)(3)(A)-(B) provides more specific notice of the motions that must be filed pretrial if the just referenced twin conditions are satisfied. While the general categories of "defect[s] in instituting the prosecution" (current Rule 12(b)(3)(A)) and "defect[s] in the indictment or information (current Rule 12(b)(3)(B)) are retained, they are now clarified with illustrative non-exhaustive lists.

Submitted Rule 12(b)(3)(A) thus lists as defects in instituting the prosecution that must be raised before trial:

i. improper venue,
ii. preindictment delay,
iii. violation of the constitutional right to a speedy trial,
iv. selective or vindictive prosecution, and
v. error in grand jury or preliminary hearing proceedings.

Submitted Rule 12(b)(3)(B) lists as defects in the indictment or information that must be raised before trial the following:

i. duplicity,
ii. multiplicity,
iii. lack of specificity,
iv. improper joinder, and
v. failure to state an offense.

The noted inclusion of failure to state an offense in Rule 12(b)(3)(B) completes the amendment originally sought by the Department of Justice.

The submitted rule does not include double jeopardy or statute of limitations challenges among required pretrial motions in light of concerns raised in public comments. The Advisory Committee is of the view that subjecting such motions to a rule mandate is premature, requiring further consideration as to the appropriate standards for review for untimely filings.

(c) Submitted Rule 12(b)(3)(C)-(E) duplicates the current rule in continuing to require that motions to suppress evidence, to sever charges or defendants, and to seek Rule 16 discovery must be made before trial.

(5) Submitted Rule 12(c) identifies both the deadlines for filing motions and the consequences of missing those deadlines. Grouping these two subjects together in one section is a visual improvement over the current rule, which discusses deadlines in (c) and consequences in later provision (e). More specifically,

(a) Submitted Rule 12(c)(1) tracks the current rule's language in recognizing the discretion afforded district courts to set motion deadlines. Nevertheless, it now adds a default deadline—the start of trial—if the district court fails to set a motion deadline. This affords defendants the maximum time to make mandatory pretrial motions, but it forecloses an argument that, because the district court did not set a motion deadline, a defendant need not comply with the rule's mandate to file certain motions before trial.

(b) Submitted Rule 12(c)(2) explicitly acknowledges district court discretion to extend or reset motion deadlines at any time before trial. This discretion, which is implicit in the current rule, permits district courts to entertain late-filed motions at any time before jeopardy attaches as warranted. It also allows district courts to avoid subsequent claims that defense counsel was constitutionally ineffective for failing to meet a filing deadline.

(c) Submitted Rule 12(c)(3)(A) retains current Rule 12(e)'s standard of "good cause" for review of untimely motions (with the exception of failure to state an offense discussed separately in submitted Rule 12(c)(3)(B)). At the same time, the submitted rule does not employ the word "waiver" as in the current rule because that term, in other contexts, is understood to mean a knowing and affirmative surrender of rights.

With respect to "good cause," the proposed Advisory Committee Note indicates that courts have generally construed those words, as used in current Rule 12(e), to require a showing of both cause and prejudice before an untimely claim may be considered. The published proposed amendment substituted cause and prejudice for good cause, thinking to achieve greater clarity, but after reviewing public comments and its own further

consideration of the issue, the Advisory Committee decided to retain the term "good cause," to avoid both any suggestion of a change from the current standard and arguments based on some constructions of "cause and prejudice" in other contexts, notably, the miscarriage of justice exception to this standard in habeas corpus jurisprudence, not apt to Rule 12.

The amended rule, like the current one, continues to make no reference to Rule 52 (providing for plain error review of defaulted claims), thereby permitting the Courts of Appeals to decide if and how to apply Rules 12 and 52 when arguments that should have been the subject of required Rule 12(b)(3) motions are raised for the first time on appeal.

(d) Insofar as the submitted amendment, at Rule 12(b)(3)(B), would now require a defendant to raise a claim of failure to state an offense before trial, submitted Rule 12(c)(3)(B) provides that the standard of review when such a claim is untimely is not "good cause" (i.e., cause and prejudice) but simply "prejudice." The Advisory Committee thinks this standard provides a sufficient incentive for a defendant to raise such a claim before trial, while also recognizing the fundamental nature of this particular claim and closely approximating current law, which permits review without a showing of "cause."

A conforming amendment to Rule 34 that omits language requiring a court to arrest judgment if "the indictment or information does not charge an offense," is also presented for approval.

Recommendation: The Advisory Committee recommends that amendments to Rules 12 and 34 be transmitted to the Judicial Conference as amended following publication.

2. ACTION ITEM — Rules 5 and 58

The Advisory Committee recommends approval of its second proposal to amend Rules 5 and 58 to provide for advice concerning consular notification, as amended following publication. To facilitate review of this proposal, the following materials are attached:

Tab C.1 – 2013 Submitted Rules 5 and 58
Tab C.2 – Blackline comparison of Current and Submitted Rules 5 and 58
Tab C.3 – 2012 Published Rules 5 and 58
Tab C.4 – Amendment Proposal Returned from Supreme Court

In 2010, the Justice Department, at the urging of the State Department, proposed amendments to Rules 5 and 58 (the rules specifying procedures for initial proceedings in felony and misdemeanor cases respectively) to provide notice to defendants of consular notification obligations arising under Article 36 of the multilateral Vienna Convention on Consular Relations ("Vienna Convention"), as well as various bilateral treaties.

The first proposed amendments responding to this request were published for public comment and subsequently approved by the Advisory Committee, the Standing Committee, and the Judicial Conference. In April 2012, however, the Supreme Court returned the amendments to the Advisory Committee for further consideration. See Tab C.4.

At its April 2012 meeting, the Advisory Committee identified two possible concerns with the returned proposal: (1) perceived intrusion on executive discretion in conducting foreign affairs, both generally and specifically as it pertains to deciding how, or even if, to carry out treaty obligations; and (2) perceived conferral on persons other than the sovereign signatories to treaties—specifically, criminal defendants—of rights to demand compliance with treaty provisions.[3]

The amendments were redrafted to respond to these concerns. The redrafted amendments were carefully worded to provide notice without any attending suggestion of individual rights or remedies. Indeed, the Committee Note emphasizes that the proposed rules do not themselves create any such rights or remedies. The Standing Committee approved publication of the redrafted amendments in June 2012. See Tab C.3.

Upon review of received public comments, as well as its own further consideration, the Advisory Committee has made the following changes to the proposed amendments, none of which requires further publication. See Tab C.1-C.2.

(1) The introductory phrase of Submitted Rules 5(d)(1) and 58(b)(2), now provides for the specified advice to be given to all defendants, by contrast to the published rule, which had provided for consular notification to be given "if the defendant is held in custody and is not a United States citizen." See Tab C.3.

The change was made at the suggestion of the Federal Magistrate Judges Association ("FMJA") and the National Association of Criminal Defense Attorneys. The FMJA, in particular, observed that the quoted language could be construed to require the arraigning judicial officer to ascertain a defendant's citizenship, an inquiry that could involve self-incrimination. Providing consular notice to all defendants without such an inquiry parallels Rule 11(b)(1)(O) (which the Supreme Court has now transmitted to Congress), which provides for all defendants to be given notice at sentencing of possible immigration consequences without specific inquiry into their nationality or status in the United States.

As for the "in custody" requirement, interested parties disagreed as to when a defendant was

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[3]Insofar as Article 36 of the Vienna Convention provides for signatory nations to advise detained foreign nationals of other signatory nations of an opportunity to contact their home country's consulate, litigation has not yet resolved whether such a provision gives rise to any individual rights or remedies. *See Sanchez-Llamas v. Oregon,* 548 U.S. 331 (2006) (holding that suppression of evidence was not appropriate remedy for failure to advise foreign national of ability to have consulate notified of arrest and detention regardless of whether Vienna Convention conferred any individual rights). Thus, the Advisory Committee concluded that the remand of the amendment proposal from the Supreme Court could be understood to suggest that the rule may have gotten ahead of settled law on this matter.

"in custody" or "detained." Providing notice to all defendants at their initial appearance not only avoids the need to resolve this question, it avoids the need to consider a further notice requirement when defendants initially admitted to bail are subsequently remanded. Thus, while the Advisory Committee is mindful of the need to avoid adding unnecessary notice requirements to rules governing initial appearances, sentences, etc., it concludes, as now stated in the proposed Committee Note, that "the most effective and efficient method of conveying this [consular notification] information is to provide it to every defendant, without attempting to determine the defendant's citizenship."

(2) At Professor Coquillette's recommendation, the published Committee Note deletes a reference to the Code of Federal Regulations, which might become outdated if the regulation were revised.

Recommendation: The Advisory Committee recommends that the amendments to Rules 5 and 58 be transmitted to the Judicial Conference as amended following publication.

3. ACTION ITEM — Rule 6

The recent reorganization of Chapter 15 of title 50 of the United States Code (effective May 20, 2013) requires a conforming change in Rule 6. The statutory reference in Rule 6(e)(3)(D) to "50 U.S.C. § 401a" as the Code section defining counterintelliegence is no longer correct. Section 401a has been reclassified as 50 U.S.C. § 3003. The Advisory Committee recommends that Rule 6 be amended to reflect the correct citation. This technical and conforming amendment does not require publication.

Recommendation: The Advisory Committee recommends that the technical and conforming amendment to Rule 6 be transmitted to the Judicial Conference.

* * * * *

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

1 **Rule 5. Initial Appearance**

2 * * * * *

3 **(d) Procedure in a Felony Case.**

4 **(1)** ***Advice.*** If the defendant is charged with a felony,
5 the judge must inform the defendant of the
6 following:

7 * * * * *

8 (D) any right to a preliminary hearing; ~~and~~

9 (E) the defendant's right not to make a statement,
10 and that any statement made may be used
11 against the defendant~~.~~; and

12 (F) that a defendant who is not a United States
13 citizen may request that an attorney for the
14 government or a federal law enforcement

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

15 official notify a consular officer from the
16 defendant's country of nationality that the
17 defendant has been arrested — but that even
18 without the defendant's request, a treaty or
19 other international agreement may require
20 consular notification.
21 * * * * *

Committee Note

Rule 5(d)(1)(F). Article 36 of the Vienna Convention on Consular Relations provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention, and bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 requires consular notification advice to be given "without delay," and arresting officers are primarily responsible for providing this advice.

Providing this advice at the initial appearance is designed, not to relieve law enforcement officers of that responsibility, but to provide additional assurance that U.S. treaty obligations are fulfilled, and to create a judicial record of that action. The Committee concluded that the

most effective and efficient method of conveying this information is to provide it to every defendant, without attempting to determine the defendant's citizenship.

At the time of this amendment, many questions remain unresolved by the courts concerning Article 36, including whether it creates individual rights that may be invoked in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). This amendment does not address those questions. More particularly, it does not create any such rights or remedies.

Changes Made After Publication and Comment

In response to public comments the amendment was rephrased to state that the information regarding consular notification should be provided to all defendants who are arraigned. Although it is anticipated that ordinarily only defendants who are held in custody will ask the government to notify a consular official of their arrest, it is appropriate to provide this information to all defendants at their initial appearance. The new phrasing also makes it clear that the advice should be provided to every defendant, without any attempt to determine the defendant's citizenship. A conforming change was made to the Committee Note.

1 **Rule 6. The Grand Jury**

2 * * * * *

3 **(e) Recording and Disclosing the Proceedings.**

4 * * * * *

5 **(3)** ***Exceptions.***

6 * * * * *

7 (D) An attorney for the government may
8 disclose any grand-jury matter involving
9 foreign intelligence, counterintelligence (as
10 defined in 50 U.S.C. § ~~401a~~3003), or
11 foreign intelligence information (as defined
12 in Rule 6(e)(3)(D)(iii)) to any federal law
13 enforcement, intelligence, protective,
14 immigration, national defense, or national
15 security official to assist the official
16 receiving the information in the

17 performance of that official's duties. An
18 attorney for the government may also
19 disclose any grand-jury matter involving,
20 within the United States or elsewhere, a
21 threat of attack or other grave hostile acts of
22 a foreign power or its agent, a threat of
23 domestic or international sabotage or
24 terrorism, or clandestine intelligence
25 gathering activities by an intelligence
26 service or network of a foreign power or by
27 its agent, to any appropriate federal, state,
28 state subdivision, Indian tribal, or foreign
29 government official, for the purpose of
30 preventing or responding to such threat or
31 activities.
32 * * * * *

Committee Note

Rule 6(e)(3)(D). This technical and conforming amendment updates a citation affected by the editorial reclassification of chapter 15 of title 50, United States Code. The amendment replaces the citation to 50 U.S.C. § 401a with a citation to 50 U.S.C. § 3003. No substantive change is intended.

1 **Rule 12. Pleadings and Pretrial Motions**

2 * * * * *

3 **(b) Pretrial Motions.**

4 **(1)** ***In General.*** A party may raise by pretrial motion

5 any defense, objection, or request that the court

6 can determine without a trial on the merits.

7 Rule 47 applies to a pretrial motion.

8 **(2)** ~~***Motions That May Be Made Before Trial.*** A~~

9 ~~party may raise by pretrial motion any defense,~~

10 ~~objection, or request that the court can determine~~

11 ~~without a trial of the general issue.~~***Motions That***

12 ***May Be Made at Any Time***. A motion that the

13 court lacks jurisdiction may be made at any time

14 while the case is pending.

15 **(3)** ***Motions That Must Be Made Before Trial***. The

16 following defenses, objections, and requests must

17 be raised by pretrial motion ~~before trial~~if the
18 basis for the motion is then reasonably available
19 and the motion can be determined without a trial
20 on the merits:
21 (A) ~~a motion alleging~~ a defect in instituting the
22 prosecution~~;~~, including:
23 (i) improper venue;
24 (ii) preindictment delay;
25 (iii) a violation of the constitutional right to
26 a speedy trial;
27 (iv) selective or vindictive prosecution; and
28 (v) an error in the grand-jury proceeding
29 or preliminary hearing;
30 (B) ~~a motion alleging~~ a defect in the indictment
31 or information, including:

32 (i) joining two or more offenses in the
33 same count (duplicity);
34 (ii) charging the same offense in more than
35 one count (multiplicity);
36 (iii) lack of specificity;
37 (iv) improper joinder; and
38 (v) failure to state an offense;
39 ~~— but at any time while the case is pending,~~
40 ~~the court may hear a claim that the~~
41 ~~indictment or information fails to invoke the~~
42 ~~court's jurisdiction or to state an offense;~~
43 (C) ~~a motion to~~ suppression of evidence;
44 (D) ~~a Rule 14 motion to sever~~severance of
45 charges or defendants under Rule 14; and
46 (E) ~~a Rule 16 motion for~~discovery under
47 Rule 16.

48 **(4)** ***Notice of the Government's Intent to Use***
49 ***Evidence.***
50 (A) *At the Government's Discretion.* At the
51 arraignment or as soon afterward as
52 practicable, the government may notify the
53 defendant of its intent to use specified
54 evidence at trial in order to afford the
55 defendant an opportunity to object before
56 trial under Rule 12(b)(3)(C).
57 (B) *At the Defendant's Request.* At the
58 arraignment or as soon afterward as
59 practicable, the defendant may, in order to
60 have an opportunity to move to suppress
61 evidence under Rule 12(b)(3)(C), request
62 notice of the government's intent to use (in
63 its evidence-in-chief at trial) any evidence

64 that the defendant may be entitled to
65 discover under Rule 16.
66 **(c)** ~~**Motion Deadline.**~~ **Deadline for a Pretrial Motion;**
67 **Consequences of Not Making a Timely Motion.**
68 (1) ***Setting the Deadline.*** The court may, at the
69 arraignment or as soon afterward as practicable,
70 set a deadline for the parties to make pretrial
71 motions and may also schedule a motion hearing.
72 If the court does not set one, the deadline is the
73 start of trial.
74 (2) ***Extending or Resetting the Deadline.*** At any
75 time before trial, the court may extend or reset
76 the deadline for pretrial motions.
77 (3) ***Consequences of Not Making a Timely Motion***
78 ***Under Rule 12(b)(3).*** If a party does not meet
79 the deadline for making a Rule 12(b)(3) motion,

80 the motion is untimely. But a court may consider
81 the defense, objection, or request if:
82 (A) the party shows good cause; or
83 (B) for a claim of failure to state an offense, the
84 defendant shows prejudice.
85 **(d) Ruling on a Motion.** The court must decide every
86 pretrial motion before trial unless it finds good cause
87 to defer a ruling. The court must not defer ruling on a
88 pretrial motion if the deferral will adversely affect a
89 party's right to appeal. When factual issues are
90 involved in deciding a motion, the court must state its
91 essential findings on the record.
92 **(e)** [Reserved]~~**Waiver of a Defense, Objection, or**~~
93 ~~**Request.** A party waives any Rule 12(b)(3) defense,~~
94 ~~objection, or request not raised by the deadline the~~
95 ~~court sets under Rule 12(c) or by any extension the~~

96 ~~court provides. For good cause, the court may grant~~

97 ~~relief from the waiver.~~

98 * * * * *

Committee Note

Rule 12(b)(1). The language formerly in (b)(2), which provided that "any defense, objection, or request that the court can determine without trial of the general issue" may be raised by motion before trial, has been relocated here. The more modern phrase "trial on the merits" is substituted for the more archaic phrase "trial of the general issue." No change in meaning is intended.

Rule 12(b)(2). As revised, subdivision (b)(2) states that lack of jurisdiction may be raised at any time the case is pending. This provision was relocated from its previous placement at the end of subsection (b)(3)(B) and restyled. No change in meaning is intended.

Rule 12(b)(3). The amendment clarifies which motions must be raised before trial.

The introductory language includes two important limitations. The basis for the motion must be one that is "reasonably available" and the motion must be one that the court can determine "without trial on the merits." The types of claims subject to Rule 12(b)(3) generally will be available before trial and they can – and should – be resolved then. The Committee recognized, however, that

in some cases, a party may not have access to the information needed to raise particular claims that fall within the general categories subject to Rule 12(b)(3) prior to trial. The "then reasonably available" language is intended to ensure that a claim a party could not have raised on time is not subject to the limitation on review imposed by Rule 12(c)(3). Additionally, only those issues that can be determined "without a trial on the merits" need be raised by motion before trial. Just as in (b)(1), the more modern phrase "trial on the merits" is substituted for the more archaic phrase "trial of the general issue." No change in meaning is intended.

The rule's command that motions alleging "a defect in instituting the prosecution" and "errors in the indictment or information" must be made before trial is unchanged. The amendment adds a nonexclusive list of commonly raised claims under each category to help ensure that such claims are not overlooked. The Rule is not intended to and does not affect or supersede statutory provisions that establish the time to make specific motions, such as motions under the Jury Selection and Service Act, 18 U.S.C. § 1867(a).

Rule 12(b)(3)(B) has also been amended to remove language that allowed the court at any time while the case is pending to hear a claim that the "indictment or information fails . . . to state an offense." This specific charging error was previously considered fatal whenever raised and was excluded from the general requirement that charging deficiencies be raised prior to trial. The Supreme Court abandoned any jurisdictional justification for the

exception in *United States v. Cotton,* 535 U.S. 625, 629-31 (2002) (overruling *Ex parte Bain*, 121 U.S. 1 (1887), "[i]nsofar as it held that a defective indictment deprives a court of jurisdiction").

Rule 12(c). As revised, subdivision (c) governs both the deadline for making pretrial motions and the consequences of failing to meet the deadline for motions that must be made before trial under Rule 12(b)(3).

As amended, subdivision (c) contains three paragraphs. Paragraph (c)(1) retains the existing provisions for establishing the time when pretrial motions must be made, and adds a sentence stating that unless the court sets a deadline, the deadline for pretrial motions is the start of trial, so that motions may be ruled upon before jeopardy attaches. Subdivision (e) of the present rule contains the language "or by any extension the court provides," which anticipates that a district court has broad discretion to extend, reset, or decline to extend or reset, the deadline for pretrial motions. New paragraph (c)(2) recognizes this discretion explicitly and relocates the Rule's mention of it to a more logical place – after the provision concerning setting the deadline and before the provision concerning the consequences of not meeting the deadline. No change in meaning is intended.

New paragraph (c)(3) governs the review of untimely claims, previously addressed in Rule 12(e). Rule 12(e) provided that a party "waives" a defense not raised within the time set under Rule 12(c). Although the term waiver in the context of a criminal case ordinarily

refers to the intentional relinquishment of a known right, Rule 12(e) has never required any determination that a party who failed to make a timely motion intended to relinquish a defense, objection, or request that was not raised in a timely fashion. Accordingly, to avoid possible confusion the Committee decided not to employ the term "waiver" in new paragraph (c)(3).

The standard for review of untimely claims under new paragraph 12(c)(3) depends on the nature of the defense, objection, or request. The general standard for claims that must be raised before trial under Rule 12(b)(3) is stated in (c)(3)(A), which – like the present rule – requires that the party seeking relief show "good cause" for failure to raise a claim by the deadline. The Supreme Court and lower federal courts have interpreted the "good cause" standard under Rule 12(e) to require both (1) "cause" for the failure to raise the claim on time, and (2) "prejudice" resulting from the error. *Davis v. United States,* 411 U.S. 233, 242 (1973); *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 363 (1963).

New subparagraph (c)(3)(B) provides a different standard for one specific claim: the failure of the charging document to state an offense. The Committee concluded that judicial review of these claims, which go to adequacy of the notice afforded to the defendant, and the power to bring a defendant to trial or to impose punishment, should be available without a showing of "good cause." Rather, review should be available whenever a defendant shows prejudice from the failure to state a claim. Accordingly, subparagraph (c)(3)(B) provides that the court can

consider these claims if the party "shows prejudice." Unlike plain error review under Rule 52(b), the standard under Rule (12)(c)(3)(B) does not require a showing that the error was "plain" or that the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." Nevertheless, it will not always be possible for a defendant to make the required showing of prejudice. For example, in some cases in which the charging document omitted an element of the offense, the defendant may have admitted the element as part of a guilty plea after having been afforded timely notice by other means.

Rule 12(e). The effect of failure to raise issues by a pretrial motion has been relocated from (e) to (c)(3).

Changes Made After Publication and Comment

Language that had been deleted from Rule 12(b)(2) as unnecessary was restored and relocated in (b)(1). The change begins the Rule's treatment of pretrial motions with an appropriate general statement and responds to concerns that the deletion might have been perceived as unintentionally restricting the district courts' authority to rule on pretrial motions. The references to "double jeopardy" and "statute of limitations" were dropped from the nonexclusive list in (b)(3)(A) to permit further debate over the treatment of such claims. New paragraph (c)(2) was added to state explicitly the district court's authority to extend or reset the deadline for pretrial motions; this authority had been

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recognized implicitly in language being deleted from Rule 12(e). In subdivision (c), the cross reference to Rule 52 was omitted as unnecessarily controversial. In subparagraph (c)(3)(A), the current language "good cause" was retained. In subparagraph (c)(3)(B), the reference to "double jeopardy" was omitted to mirror the omission from (b)(3)(A), and the word "only" was deleted from the phrase "prejudice only" because it was superfluous. Finally, the Committee Note was amended to reflect these post-publication changes and to state explicitly that the rule is not intended to change or supersede statutory deadlines under provisions such as the Jury Selection and Service Act.

1 **Rule 34. Arresting Judgment**

2 **(a) In General.** Upon the defendant's motion or on its

3 own, the court must arrest judgment if the court does

4 not have jurisdiction of the charged offense.~~if:~~

5 ~~(1) the indictment or information does not charge an~~

6 ~~offense; or~~

7 ~~(2) the court does not have jurisdiction of the~~

8 ~~charged offense.~~

* * * * *

Committee Note

Rule 34(a). This amendment conforms Rule 34 to Rule 12(b) which has been amended to remove language that the court at any time while the case is pending may hear a claim that the "indictment or information fails . . . to state an offense." The amended Rule 12 instead requires that such a defect be raised before trial.

No Comments or Changes after Publication

12b-008367

1 **Rule 58. Petty Offenses and Other Misdemeanors**

2 * * * * *

3 **(b) Pretrial Procedure.**

4 * * * * *

5 **(2)** ***Initial Appearance.*** At the defendant's initial
6 appearance on a petty offense or other
7 misdemeanor charge, the magistrate judge must
8 inform the defendant of the following:

9 * * * * *

10 (F) the right to a jury trial before either a
11 magistrate judge or a district judge – unless
12 the charge is a petty offense;~~ and~~

13 (G) any right to a preliminary hearing under
14 Rule 5.1, and the general circumstances, if
15 any, under which the defendant may secure
16 pretrial release~~.~~; and

17 (H) that a defendant who is not a United States
18 citizen may request that an attorney for the
19 government or a federal law enforcement
20 official notify a consular officer from the
21 defendant's country of nationality that the
22 defendant has been arrested — but that even
23 without the defendant's request, a treaty or
24 other international agreement may require
25 consular notification.

* * * * *

Committee Note

Rule 58(b)(2)(H). Article 36 of the Vienna Convention on Consular Relations provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention, and bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 requires consular notification advice to be given "without delay," and arresting officers are primarily responsible for providing this advice.

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Providing this advice at the initial appearance is designed, not to relieve law enforcement officers of that responsibility, but to provide additional assurance that U.S. treaty obligations are fulfilled, and to create a judicial record of that action. The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without attempting to determine the defendant's citizenship.

At the time of this amendment, many questions remain unresolved by the courts concerning Article 36, including whether it creates individual rights that may be invoked in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). This amendment does not address those questions. More particularly, it does not create any such rights or remedies.

Changes Made After Publication and Comment

In response to public comments the amendment was rephrased to state that the information regarding consular notification should be provided to all defendants who are arraigned. Although it is anticipated that ordinarily only defendants who are held in custody will ask the government to notify a consular official of their arrest, it is appropriate to provide this information to all defendants at the initial appearance. The new phrasing also makes it clear that the advice should be provided to

every defendant, without any attempt to determine the defendant's citizenship. A conforming change was made to the Committee Note.

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

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SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

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

FROM: **Honorable Sidney A. Fitzwater, Chair**
Advisory Committee on Evidence Rules

DATE: **May 7, 2013**

RE: **Report of the Advisory Committee on Evidence Rules**

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on May 3, 2013 at the University of Miami School of Law, Coral Gables, Florida.

The Committee seeks final Standing Committee approval and transmittal to the Judicial

Conference of the United States four proposals: an amendment to Rule 801(d)(1)(B)—the hearsay exemption for certain prior consistent statements—to provide that prior consistent statements are admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility, and amendments to Rules 803(6)-(8)—the hearsay exceptions for business records, absence of business records, and public records—to eliminate an ambiguity uncovered during the restyling project and clarify that the opponent has the burden of showing that the proffered record is untrustworthy.

II. Action Items

A. Proposed Amendment to Evidence Rule 801(d)(1)(B)

The Committee proposes that Rule 801(d)(1)(B) be amended to provide that prior consistent statements are admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility. The Standing Committee approved proposed amended Rule 801(d)(1)(B) for publication at its June 2012 meeting. The proposed rule and committee note now presented for final Standing Committee approval are attached as an appendix to this report. They have been modified slightly from the versions issued for publication to address certain concerns raised by public comment.

The proposal to amend Rule 801(d)(1)(B) originated with Judge Frank W. Bullock, Jr., when he was a member of the Standing Committee. Judge Bullock proposed that Rule 801(d)(1)(B) be amended to provide that prior consistent statements are admissible under the hearsay exemption whenever they would be admissible to rehabilitate the witness's credibility. Under the current Rule, some prior consistent statements offered to rehabilitate a witness's credibility—specifically, those that rebut a charge of recent fabrication or improper influence or motive—are also admissible substantively. But other rehabilitative statements—such as those that explain a prior inconsistency or rebut a charge of faulty recollection—are not admissible under the hearsay exemption, but only for rehabilitation. There are two basic practical problems in distinguishing between substantive and credibility use as applied to prior consistent statements. First, the necessary jury instruction is almost impossible for jurors to follow. The prior consistent statement is of little or no use for credibility unless the jury believes it to be true. Second, and for similar reasons, the distinction between substantive and impeachment use of prior consistent statements has little, if any, practical effect. The proponent has already presented the witness's trial testimony, so the prior consistent statement ordinarily adds no real substantive effect to the proponent's case.

The public comment on the proposed amendment is summarized in the appendix to this report. Although largely negative, it is sparse. The Committee found two concerns expressed in the public comment to merit revisions to the proposed rule and committee note. First, there was a concern that the phrase "otherwise rehabilitates the declarant's credibility as a witness" is vague and could lead courts to admit prior consistent statements that heretofore have been excluded for any purpose. Second, there was a more specific concern that the language could lead courts to admit prior consistent statements to rebut a charge that the witness had a motive to falsify, even though the statement was made *after* the motive to falsify arose, thereby undermining the Supreme Court's ruling in *Tome v. United States,* 513 U.S. 150 (1995).

In response to these concerns, the Committee voted, with one member dissenting, to approve proposed Rule 801(d)(1)(B) with the slight modification to (ii) shown on the following blacklined version. The Committee concluded that the proposal preserves the *Tome* pre-motive rule as to consistent statements offered to rebut a charge of bad motive, while properly expanding substantive admissibility to statements offered to rehabilitate on other grounds—such as to explain an inconsistency or to rebut a charge of bad memory. And the proposal does so without resorting to the potentially vague "otherwise rehabilitates" language.

> **(d) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:
>
> **(1)** ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
>
> * * *
>
> **(B)** is consistent with the declarant's testimony and is offered:
> (i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
> (ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; * * *

The committee note has also been slightly modified to account for the proposed changes to the Rule.

Recommendation: The Committee recommends that the proposed amendment to Evidence Rule 801(d)(1)(B) be approved and transmitted to the Judicial Conference of the United States.

B. Proposed Amendments to Evidence Rules 803(6)-(8)

The Committee proposes that Evidence Rules 803(6)-(8) be amended to address an ambiguity uncovered during restyling, but left unaddressed at that time because the changes required to clarify the ambiguity were viewed as substantive. The Standing Committee approved proposed amended Rules 803(6)-(8) for publication at its June 2012 meeting. The proposed rules and committee notes now presented for final Standing Committee approval are attached as appendixes to this report. The committee notes have been modified slightly from the versions issued for publication to address the concern, raised by public comment, that the notes use language that fails to track the text of the Rules. No changes have been made to the proposed rules as published.

The restyling project uncovered an ambiguity in Rules 803(6)-(8)—the hearsay exceptions for business records, absence of business records, and public records. These exceptions originally set out admissibility requirements and then provided that a record that met these requirements, although hearsay, was admissible "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." The Rules did not specifically state which party had the burden of showing trustworthiness or untrustworthiness.

The restyling project initially sought to clarify this ambiguity by providing that a record that fit the other admissibility requirements would satisfy the exception if "the opponent does not show that" the source of information or the method or circumstances of preparation indicate lack of trustworthiness. But this proposal did not go forward as part of restyling because research into the case law indicated that the change would be substantive. While most courts impose the burden of proving untrustworthiness on the opponent, a few courts require the proponent to prove that the record is trustworthy. Because the proposal would have changed the law in at least one court, it was deemed substantive and therefore outside the scope of the restyling project. When the Standing Committee approved the Restyled Rules, several members suggested that this Committee consider making the minor substantive change to clarify that the opponent has the burden of showing untrustworthiness.

Initially, the Committee did not think it necessary to propose clarifying amendments to these Rules. At its spring 2012 meeting, however, the Reporter noted that the Texas restyling committee had unanimously concluded that restyled Rules 803(6) and (8) could be interpreted as making substantive changes by placing the burden on the *proponent* of the evidence to show trustworthiness. The Committee then revisited the matter. The proposed amendments clarify that the *opponent* has the burden of showing that the proffered record is untrustworthy. The reasons espoused by the Committee for the amendments are: first, to resolve a conflict in the case law by providing uniform rules; second, to clarify a possible ambiguity in the Rules as originally adopted and as restyled; and third, to provide a result that makes the most sense, as imposing a burden of proving trustworthiness on the proponent is unjustified given that the proponent must establish that all the other admissibility requirements of these Rules are met—requirements that tend to guarantee trustworthiness in the first place.

There were only two public comments on the proposed amendments. Both approved of the text, but one comment suggested that the committee notes use language that fails to track the text of the Rules. Slight changes have been made to each of the three committee notes to address this concern.

Recommendation: The Committee recommends that the proposed amendment to Evidence Rules 803(6)-(8) be approved and transmitted to the Judicial Conference of the United States.

* * * * *

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE*

1 **Rule 801. Definitions That Apply to This Article;**
2 **Exclusions from Hearsay**

3 * * * * *

4 **(d) Statements That Are Not Hearsay.** A statement that
5 meets the following conditions is not hearsay:

6 **(1)** ***A Declarant-Witness's Prior Statement.*** The
7 declarant testifies and is subject to cross-
8 examination about a prior statement, and the
9 statement:

10 * * * * *

11 **(B)** is consistent with the declarant's testimony
12 and is offered:

13 (i) to rebut an express or implied charge
14 that the declarant recently fabricated it

---

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

15 or acted from a recent improper
16 influence or motive in so testifying; or
17 (ii) to rehabilitate the declarant's
18 credibility as a witness when attacked
19 on another ground; or
20 * * * * *

Committee Note

Rule 801(d)(1)(B), as originally adopted, provided for substantive use of certain prior consistent statements of a witness subject to cross-examination. As the Advisory Committee noted, "[t]he prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally."

Though the original Rule 801(d)(1)(B) provided for substantive use of certain prior consistent statements, the scope of that Rule was limited. The Rule covered only those consistent statements that were offered to rebut charges of recent fabrication or improper motive or influence. The Rule did not, for example, provide for substantive admissibility of consistent statements that are probative to explain what otherwise appears to be an inconsistency in the witness's testimony. Nor did it cover

consistent statements that would be probative to rebut a charge of faulty memory. Thus, the Rule left many prior consistent statements potentially admissible only for the limited purpose of rehabilitating a witness's credibility. The original Rule also led to some conflict in the cases; some courts distinguished between substantive and rehabilitative use for prior consistent statements, while others appeared to hold that prior consistent statements must be admissible under Rule 801(d)(1)(B) or not at all.

The amendment retains the requirement set forth in *Tome v. United States,* 513 U.S. 150 (1995): that under Rule 801(d)(1)(B), a consistent statement offered to rebut a charge of recent fabrication of improper influence or motive must have been made before the alleged fabrication or improper inference or motive arose. The intent of the amendment is to extend substantive effect to consistent statements that rebut other attacks on a witness — such as the charges of inconsistency or faulty memory.

The amendment does not change the traditional and well-accepted limits on bringing prior consistent statements before the factfinder for credibility purposes. It does not allow impermissible bolstering of a witness. As before, prior consistent statements under the amendment may be brought before the factfinder only if they properly rehabilitate a witness whose credibility has been attacked. As before, to be admissible for rehabilitation, a prior consistent statement must satisfy the strictures of Rule 403. As before, the trial court has ample discretion to exclude prior consistent statements that are cumulative accounts of an event. The amendment does not make any consistent

statement admissible that was not admissible previously — the only difference is that prior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well.

Changes Made After Publication and Comment

The text of the proposed amendment was changed to clarify that the traditional limits on using prior consistent statements to rebut a charge of recent fabrication or improper influence or motive are retained. The Committee Note was modified to accord with the change in text.

1 **Rule 803. Exceptions to the Rule Against Hearsay —**
2 **Regardless of Whether the Declarant is**
3 **Available as a Witness**

4 The following are not excluded by the rule against hearsay,
5 regardless of whether the declarant is available as a
6 witness:

7 * * * * *

8 **(6)** ***Records of a Regularly Conducted Activity.*** A
9 record of an act, event, condition, opinion, or
10 diagnosis if:

11 **(A)** the record was made at or near the time by
12 — or from information transmitted by —
13 someone with knowledge;

14 **(B)** the record was kept in the course of a
15 regularly conducted activity of a business,
16 organization, occupation, or calling,
17 whether or not for profit;

18 **(C)** making the record was a regular practice of
19 that activity;
20 **(D)** all these conditions are shown by the
21 testimony of the custodian or another
22 qualified witness, or by a certification that
23 complies with Rule 902(11) or (12) or with
24 a statute permitting certification; and
25 **(E)** ~~neither~~ the opponent does not show that the
26 source of information ~~nor~~ or the method or
27 circumstances of preparation indicate a lack
28 of trustworthiness.
29 * * * * *

Committee Note

The Rule has been amended to clarify that if the proponent has established the stated requirements of the exception — regular business with regularly kept record, source with personal knowledge, record made timely, and foundation testimony or certification — then the burden is on the opponent to show that the source of information or

the method or circumstances of preparation indicate a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. It is appropriate to impose this burden on opponent, as the basic admissibility requirements are sufficient to establish a presumption that the record is reliable.

The opponent, in meeting its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. For example, the opponent might argue that a record was prepared in anticipation of litigation and is favorable to the preparing party without needing to introduce evidence on the point. A determination of untrustworthiness necessarily depends on the circumstances.

Changes Made After Publication and Comment

In accordance with a public comment, a slight change was made to the Committee Note to better track the language of the rule.

1 **Rule 803. Exceptions to the Rule Against Hearsay —**
2 **Regardless of Whether the Declarant is**
3 **Available as a Witness**

4 The following are not excluded by the rule against hearsay,
5 regardless of whether the declarant is available as a
6 witness:

7 * * * * *

8 **(7)** ***Absence of a Record of a Regularly Conducted***
9 ***Activity.*** Evidence that a matter is not included
10 in a record described in paragraph (6) if:
11 **(A)** the evidence is admitted to prove that the
12 matter did not occur or exist;
13 **(B)** a record was regularly kept for a matter of
14 that kind; and
15 **(C)** ~~neither~~ the opponent does not show that the
16 possible source of the information ~~nor~~ or

17 other circumstances indicate a lack of

18 trustworthiness.

19 * * * * *

Committee Note

The Rule has been amended to clarify that if the proponent has established the stated requirements of the exception — set forth in Rule 803(6) — then the burden is on the opponent to show that the possible source of the information or other circumstances indicate a lack of trustworthiness. The amendment maintains consistency with the proposed amendment to the trustworthiness clause of Rule 803(6).

Changes Made After Publication and Comment

In accordance with a public comment, a slight change was made to the Committee Note to better track the language of the rule.

1 **Rule 803. Exceptions to the Rule Against Hearsay —**
2 **Regardless of Whether the Declarant is**
3 **Available as a Witness**

4 The following are not excluded by the rule against hearsay,
5 regardless of whether the declarant is available as a
6 witness:

7 * * * * *

8 **(8)** ***Public Records.*** A record or statement of a
9 public office if:

10 **(A)** it sets out:

11 **(i)** the office's activities;

12 **(ii)** a matter observed while under a legal
13 duty to report, but not including, in a
14 criminal case, a matter observed by
15 law-enforcement personnel; or

16 **(iii)** in a civil case or against the
17 government in a criminal case, factual

18 findings from a legally authorized
19 investigation; and
20 **(B)** ~~neither~~ the opponent does not show that the
21 source of information ~~nor~~ or other
22 circumstances indicate a lack of
23 trustworthiness.
24 * * * * *

Committee Note

The Rule has been amended to clarify that if the proponent has established that the record meets the stated requirements of the exception — prepared by a public office and setting out information as specified in the Rule — then the burden is on the opponent to show that the source of information or other circumstances indicate a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. Public records have justifiably carried a presumption of reliability, and it should be up to the opponent to "demonstrate why a time-tested and carefully considered presumption is not appropriate." *Ellis v. International Playtex, Inc.*, 745 F.2d 292, 301 (4th Cir. 1984). The amendment maintains consistency with the proposed amendment to the trustworthiness clause of Rule 803(6).

The opponent, in meeting its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. For example, the opponent might argue that a record was prepared in anticipation of litigation and is favorable to the preparing party without needing to introduce evidence on the point. A determination of untrustworthiness necessarily depends on the circumstances.

Changes Made After Publication and Comment

In accordance with a public comment, a slight change was made to the Committee Note to better track the language of the rule.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Phoenix, AZ
January 9-10, 2014

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AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Phoenix, Arizona
January 9-10, 2014

1. Welcome and Opening Remarks

A. Welcome and opening remarks by Judge Jeffrey S. Sutton

B. Report on September 2013 Judicial Conference session

C. Transmission of Judicial Conference-approved proposed rules amendments to Supreme Court

2. ACTION: Approving Minutes of June 2013 Committee Meeting

3. Report of the Advisory Committee on Appellate Rules – Judge Steven M. Colloton

4. Report of the Advisory Committee on Bankruptcy Rules – Judge Eugene R. Wedoff

A. **ACTION:** Approving and transmitting to the Judicial Conference proposed conforming amendments to Rule 1007

B. Rules published for public comment

5. Report of the Advisory Committee on Criminal Rules – Judge Reena Raggi

6. Report of the Advisory Committee on Evidence Rules – Chief Judge Sidney A. Fitzwater

7. Report of the Inter-Committee CM/ECF Subcommittee – Judge Michael A. Chagares

8. Panel Discussion: *Political and Professional Context of Rulemaking*

Professor Daniel R. Coquillette, Judge Marilyn L. Huff (S.D. Cal.),
Peter G. McCabe, Esq., Judge Lee H. Rosenthal (S.D. Tex.),
Judge Anthony J. Scirica (3d Cir.), and Chief Judge Diane P. Wood (7th Cir.)

9. Report of the Advisory Committee on Civil Rules – Judge David G. Campbell

A. **ACTION:** Approving publishing for public comment proposed amendments to Rules 82 and 6(d)

12b-008392

B. Rules published for public comment and public hearings

10. Report of the Administrative Office

A. Legislative Report

B. March 2014 Long-Range Planning Meeting of Judicial Conference Committee Chairs

11. Next meeting in Washington, D.C. on May 29-30, 2014

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 3-4, 2013
Washington, D.C.

Draft Minutes as of September 12, 2013

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ATTENDANCE

The spring meeting of the Judicial Conference Committee on Rules of Practice and Procedure ("Standing Committee") was held in Washington, D.C., on Monday and Tuesday, June 3 and 4, 2013. The following members were present:

Judge Jeffrey S. Sutton, Chair
Deputy Attorney General James M. Cole
Dean C. Colson, Esq.
Roy T. Englert, Jr., Esq.
Gregory G. Garre, Esq.
Judge Neil Gorsuch
Judge Marilyn L. Huff
Chief Justice Wallace B. Jefferson
Dean David F. Levi
Judge Patrick J. Schiltz
Larry D. Thompson, Esq.
Judge Richard C. Wesley
Judge Diane P. Wood
Judge Jack Zouhary

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Also participating were Professor Geoffrey C. Hazard, Jr., and Professor R. Joseph Kimble, consultants to the Standing Committee; and Peter G. McCabe, Administrative Office Assistant Director for Judges Programs. In addition to the Deputy Attorney General, the Department of Justice was represented at various points by Stuart F. Delery, Esquire, Theodore J. Hirt, Esquire, Christopher Kohn, Esquire, Elizabeth J. Shapiro, Esquire, and Allison Stanton, Esquire. Judge Michael A. Chagares, Chair of the Inter-Committee CM/ECF Subcommittee, also participated.

Providing support to the Standing Committee were:

Professor Daniel R. Coquillette	The Standing Committee's Reporter
Jonathan C. Rose	The Standing Committee's Secretary and Chief, Rules Committee Support Office
Benjamin J. Robinson	Deputy Rules Officer and Counsel to the Rules Committees
Julie Wilson	Rules Office Attorney
Andrea L. Kuperman	Chief Counsel to the Rules Committees
Joe Cecil	Senior Research Associate, Research Division, Federal Judicial Center
Scott Myers	Attorney, Bankruptcy Division, AO
James Wannamaker	Attorney, Bankruptcy Division, AO
Bridget M. Healy	Attorney, Bankruptcy Division, AO

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
- Judge Steven M. Colloton, Chair
- Professor Catherine T. Struve, Reporter (by telephone)

Advisory Committee on Bankruptcy Rules —
- Judge Eugene R. Wedoff, Chair
- Professor S. Elizabeth Gibson, Reporter
- Professor Troy A. McKenzie, Associate Reporter

Advisory Committee on Civil Rules —
- Judge David G. Campbell, Chair
- Judge Paul W. Grimm, Chair of Discovery Subcommittee (by telephone)
- Judge John G. Koeltl, Chair of Duke Subcommittee (by telephone)
- Professor Edward H. Cooper, Reporter
- Professor Richard L. Marcus, Associate Reporter

Advisory Committee on Criminal Rules —
- Judge Reena Raggi, Chair
- Professor Sara Sun Beale, Reporter
- Professor Nancy King, Associate Reporter

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Advisory Committee on Evidence Rules —
Chief Judge Sidney A. Fitzwater, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Sutton opened the meeting by thanking the chairs, reporters, committee members and staff for their extraordinary work in preparation for this meeting with its heavy agenda.

He reported that in April 2013, the Supreme Court adopted without change and sent to Congress the package of fifteen proposed rule changes previously approved by the Judicial Conference at its September meeting. Rules and forms to be amended are listed below.

- Appellate Rules 13, 14, 24, 28, and 28.1, and Form 4
- Bankruptcy Rules 1007(b)(7), 4004(c)(1), 5009(b), 9006(d), 9013, and 9014
- Civil Rules 37 and 45
- Criminal Rule 11
- Evidence Rule 803(10)

In accordance with the provisions of Sections 2072 and 2075 of Title 28, United States Code, these amendments will take effect on December 1, 2013, if Congress does not enact legislation to reject, modify, or defer them. They will govern in proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

Judge Sutton also stated that the Standing Committee would try this year to advance the timing of its report to the Judicial Conference to have it available by the first week in July. After the Judicial Conference meeting in September, an equivalent effort will be made to have the package of amendments approved by the Conference available to the Supreme Court no later than early October. Under the old schedule, proposed rule changes typically did not arrive at the Court until mid- to late-December after approval by the Judicial Conference at its meeting in September.

This new process will enlarge the time available and increase scheduling flexibility for the Court to address the proposed rule changes while still adhering to the timelines mandated by the Rules Enabling Act.

Judge Sutton also reported that the Chief Justice had made appointments for all Rules Committee vacancies in May 2013 so that the new committee members could be notified in time to attend their respective committee meetings this fall. This represented a tremendous effort on the part of all responsible to expedite the appointment process. Judge Sutton expressed his thanks on behalf of all the Rules Committee chairs to Laura Minor, Judge Hogan, and the Chief Justice.

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He further expressed his intention to invite retiring Standing Committee members Judges Huff and Wood to participate as panelists at the January meeting, when their exceptional contributions would be formally recognized.

APPROVAL OF MINUTES OF THE LAST MEETING

Action: The Standing Committee, by voice vote without objection, approved the minutes of its last meeting, held on January 3–4, 2013, in Cambridge, Massachusetts.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge David G. Campbell, assisted by the advisory committee's two reporters, Professor Edward H. Cooper and Professor Richard L. Marcus, presented the report of the Civil Rules Advisory Committee. The advisory committee sought approval to publish for public comment a number of proposed amendments.

ACTION ITEMS

A. Proposed Action: Publication of Revised Rules 1, 4, 16, 26, 30, 31, 33, 34, 36, and 37 (the Duke Conference rules package)

Judge Campbell first presented the advisory committee's recommendation for publication of a series of amendments aimed at improving the pretrial process of civil litigation, which are the product of a conference on civil litigation that the Civil Rules Committee hosted at Duke University School of Law in 2010. The proposed revisions recommended for publication include changes to Rules 1, 4, 16, 26, 30, 31, 33, 34, 36, and 37. These recommendations were little changed in their basic thrust from the proposals that were presented for discussion at the January 2013 meeting of the Standing Committee. However, a number of revisions were made both to the amendments and to the committee notes to address the concerns expressed at the January meeting.

Judge Campbell first explained how the proposed revised rules relate to the three major themes of the Duke Conference. He stressed the primary role of Judge Koeltl and his Duke Conference Subcommittee as well as the advisory committee's two reporters in the development of the package of proposed amendments. These amendments are designed to reduce the costs and delays of civil litigation and to promote the aim of the rules "to assure the just, speedy and inexpensive determination of every action and proceeding."

The three main themes repeatedly stressed at the Duke Conference were: (1) early and active judicial case management, (2) the necessity for proportionality in discovery, and (3) a duty of cooperation in the discovery process by counsel. The conclusion of the Duke Conference was that at present some or all of these elements are too often missing in civil litigation. The proposed rule changes address these three areas.

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Case Management Proposals

The case management proposals reflect a perception that the early stages of litigation often take far too long. The most direct aim at early case management is reflected in proposed amendments to Rules 4(m) and 16(b). Another important proposal relaxes the Rule 26(d)(1) discovery moratorium to permit early delivery of Rule 34 requests to produce, but sets the time to respond after the first Rule 26(f) conference.

Rule 4(m): Time to Serve the Summons and Complaint: Rule 4(m) would be revised to shorten the time to serve the summons and complaint from 120 days to 60 days. As under the current rule, a judge would retain the ability to extend the time for service for good cause. The amendment responds to the commonly expressed view that four months to serve the summons and complaint is too long.

A concern raised by the Department of Justice about confusion over the applicability of Rule 4(m) to condemnation actions is addressed by amending the last sentence: "This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1) or to service of a notice under Rule 71.1(d)(3)(A)."

Rule 16(b)(2): Time for Scheduling Order: The proposed amendment to Rule 16(b)(2) would reduce the present requirements for issuing a scheduling order by 30 days to 90 days after any defendant is served or 60 days after any defendant appears. The addition of a new provision allows the judge to extend the time for a scheduling order on finding good cause for delay.

Rule 16(b): Actual Conference: Present Rule 16(b)(1)(B) authorizes issuance of a scheduling order after receiving the parties' Rule 26(f) report or after consulting "at a scheduling conference **by telephone, mail, or other means**." The proposed amendment would eliminate the bolded language. Judge Campbell explained that the advisory committee believes that in the absence of a Rule 26(f) report, an actual conference by simultaneous communication among the parties and court is a very valuable case management tool. A judge would retain the ability to issue a scheduling order based only on the Rule 26(f) report.

Rules 16(b)(3), 26(f): Additional Subjects: The proposals add preservation of electronically stored information (ESI) and agreements under Evidence Rule 502 on waiver of privilege or work product protection to the "permitted contents" of a scheduling order and to the Rule 26(f) discovery plan. A third proposal would add a new Rule 16(b)(3)(B)(v), permitting a scheduling order to "direct that before moving for an order relating to discovery the movant must request a conference with the court." A number of courts now have local rules similar to this proposal. Experience has shown that an informal pre-motion conference with the court often resolves a discovery dispute.

Rule 26(d)(1): Early Rule 34 Requests: After considering a variety of proposals that

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would allow discovery requests to be made before the parties' Rule 26(f) conference in order to enhance its focus and specificity, the advisory committee limited the proposed change to Rule 34 requests to produce by adding a new Rule 26(d)(2) that would permit the delivery of such requests before the scheduling conference.

A corresponding change would be made to Rule 34(b)(2)(A), setting the time to respond to a request delivered under Rule 26(d)(2) within 30 days after the parties' first Rule 26(f) conference. As Rule 34 requests frequently involve heavy discovery burdens, the advisory committee thought that early court consideration of such requests might be useful.

Proposals to Incorporate Proportionality

Several proposals seek to promote responsible use of discovery proportional to the needs of the case. Some important changes address the scope of discovery directly by amending Rule 26(b)(1) and by requiring clearer responses to Rule 34 requests to produce. Others tighten the presumptive limits on the number and duration of depositions and the number of interrogatories, and for the first time add a presumptive limit of 25 to the number of requests for admission other than those that relate to the genuineness of documents. Yet another proposed change explicitly recognizes the district court's existing authority to issue a protective order specifying an allocation of expenses incurred by discovery.

Rule 26(b)(1): Adopting Rule 26(b)(2)(C)(iii) Cost-Benefit Analysis: Given the widespread respect for balanced discovery principles embodied in Rule 26(b)(2)(C)(iii), the advisory committee proposed to transfer the analysis required by that rule to become a limit on the scope of discovery permitted by Rule 26(b)(1). Under the new proposed Rule 26(b)(1), "discovery must be proportional to the needs of the case, considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."

A corresponding change is made by amending Rule 26(b)(2)(C)(iii) to cross-refer to (b)(1); thus, the court remains under a duty to limit the frequency or extent of discovery that exceeds these limits, on motion or on its own.

Other changes are also made in Rule 26(b)(1). Under the amended rule, all discovery is limited to "matter that is relevant to any party's claim or defense." The ability to extend discovery to "any matter relevant to the subject matter involved in the action" is eliminated. The parties' claims or defenses are those identified in the pleadings.

Rule 26(b)(1) also would be amended by revising the penultimate sentence: "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Many cases continue to cite the "reasonably calculated" language as though it defines the scope of discovery, and judges often hear lawyers argue that this sentence sets a broad standard for appropriate discovery.

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To eliminate this potential for improper expansion of the scope of discovery, this sentence would be revised to read: "Information within this scope of discovery need not be admissible in evidence to be discoverable."

The proposed revision of Rule 26(b)(1) also omits its current specific reference to "the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter." Discovery of such matters is so deeply entrenched in practice that the current reference is superfluous.

Several discovery rules cross-refer to Rule 26(b)(2) as a reminder that it applies to all methods of discovery. Transferring the restrictions of Rule 26(b)(2)(C)(iii) to become part of subdivision (b)(1) makes it appropriate to revise the cross-references to include both (b)(1) and (b)(2).

Rule 26(c): Allocation of Expenses: Another proposal adds to Rule 26(c)(1)(B) an explicit recognition of the court's authority to enter a protective order that allocates the expenses of discovery.

Rules 30, 31, 33, and 36: Presumptive Numerical Limits: Rules 30 and 31 establish a presumptive limit of 10 depositions by the plaintiffs, or by the defendants, or by third-party defendants. Rule 30(d)(1) establishes a presumptive time limit of one 7-hour day for a deposition by oral examination. Rule 33(a)(1) sets a presumptive limit of "no more than 25 written interrogatories, including all discrete subparts." There are no presumptive numerical limits for Rule 34 requests to produce or for Rule 36 requests to admit. The proposals reduce the limits in Rules 30, 31, and 33. They add to Rule 36, for the first time, presumptive numerical limits.

The proposals would reduce the presumptive limit on the number of depositions from 10 to 5, and would reduce the presumptive duration to 1 day of 6 hours. Rules 30 and 31 continue to provide that the court must grant leave to take more depositions "to the extent consistent with Rule 26(b)(1) and (2)."

The presumptive number of Rule 33 interrogatories under the proposed amendment is reduced to 15. Rule 36 requests to admit under the proposed rule would have a presumptive limit of 25, but the rule would expressly exempt requests to admit the genuineness of documents. After due consideration, a proposal to limit Rule 34 requests to produce was rejected because of a concern that a limit might simply prompt blunderbuss requests.

Rule 34: Objections and Responses: Discovery burdens can be pushed out of proportion to the reasonable needs of a case by those asked to respond, not only those who make requests. The proposed amendments to Rule 34 address objections and actual production by adding several specific requirements.

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Objections are addressed in two ways. First, Rule 34(b)(2)(B) would require that the grounds for objecting to a request be stated with specificity. Second, Rule 34(b)(2)(C) would require that an objection "state whether any responsive materials are being withheld on the basis of that objection." This provision responds to the common complaint that Rule 34 responses often begin with a "laundry list" of objections, then produce volumes of materials, and finally conclude that the production is made subject to the objections. The requesting party is left uncertain whether anything actually has been withheld.

Actual production is addressed by new language in Rule 34(b)(2)(B) and a corresponding addition to Rule 37(a)(3)(B)(iv). Present Rule 34 recognizes a distinction between permitting inspection of documents, ESI, or tangible things, and actually producing copies. However, if a party elects to produce materials rather than permit inspection, the current rule does not indicate when such production is required to be made. The new provision would direct that a party electing to produce state that copies will be produced, and directs that production be completed no later than the time for inspection stated in the request or a later reasonable time stated in the response. Rule 37 is further amended by adding authority to move for an order to compel production if "a party fails to produce documents."

Enhancing Cooperation

Reasonable cooperation among adversaries is vitally important to successful use of the resources provided by the Civil Rules. Participants at the Duke Conference regularly pointed to the costs imposed by excessive adversarial behavior and wished for some rule that would enhance cooperation.

Proposed Addition to Rule 1: The advisory committee determined that proposals to mandate cooperation would be problematic. Instead, it settled on a more modest proposal – an addition to Rule 1. The parties are made to share responsibility along with the court for achieving the high aspirations expressed in Rule 1: "[T]hese rules should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."

Standing Committee Discussion of Proposed Duke Conference Amendments

Following the presentation of Judge Campbell and the advisory committee reporters, Judge Sutton, echoed by every other Standing Committee member who spoke, thanked them, Judge Koeltl, the members of the Duke Conference subcommittee and the full Civil Rules Advisory Committee for the countless hours of painstaking deliberation and work reflected in the careful crafting of these proposals. Professor Cooper then offered to entertain any questions from the Standing Committee concerning all elements of the Duke Conference amendments package.

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One member expressed curiosity about the reasons for a small list of what he suspected were "unnecessary tweaks" in the current rules, which could distract those submitting comments and others from the truly significant and major positive changes to the civil litigation process made by other parts of the Duke Conference amendments package. He commented on his list of tweaks as follows.

He first expressed substantial skepticism as to the wisdom of changing the current text of Rule 1 to emphasize the duty of parties to cooperate. He thought little practical impact would be achieved. Rule 1 as written, he believed, has achieved a certain talismanic quality with the passage of time. Tinkering with its aspirational language seemed to him perilously close to the committee simply talking to itself.

As to the proposals' attempt to limit discovery by refining the definition of its permissible scope, he found that unlikely to succeed. He recalled the various efforts to redefine the scope of discovery over the years first to broaden it, and then later to narrow it. The sequence reminded him of Karl Marx's observations about history repeating itself first as tragedy and then as farce. He thought that the current proposal effectively brought us back to the most constricted definition of the permissible scope of discovery. In his view, all the various changes over time resulted in less practical impact on cases than any of their authors had expected. For the same reasons, he did not think this tweak of accepted discovery scripture would achieve very much, but did not oppose its publication.

Pursuing his list, he agreed with the change of the length of a deposition day from 7 hours to 6 if that had proven to be a more reasonable definition of a deposition day.

Concerning the proposed changes to Rule 16, he found the emphasis on face-to-face or simultaneous communication in a Rule 16 conference to be a distracting and almost counterproductive change. His practical experience as a judge in a far flung, heavy caseload district was that the achievement of simultaneous communication by a judge and opposing counsel was a "big deal, highly time-consuming, and unnecessary in very many cases." He acknowledged that counsel for most parties would love to "shmooze" with the judge, but have no real need to do so. He predicted that the change would just lead to the widespread delegation of discovery issues to magistrate judges.

Judge Campbell responded to several of the foregoing points. First, he observed that there was broad consensus of his committee that increased cooperation by counsel on discovery matters would in fact be helpful. However, any attempt to make it mandatory in the rules would likely just enhance satellite ligation on the issue. The purpose of the Rule 1 change was to emphasize that the duty of cooperation applied to the parties and not solely to the judge. It would also give the Federal Judicial Center ("FJC") a hook on which to hang their instruction to judges about cooperation as an element of best practices in case management.

There was an even broader consensus on the efficacy of simultaneous communication

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in Rule 16(f) conferences as a case management tool. A spur to early case involvement by judges was widely thought to be central to speeding things up. Early exposure by the parties to the judge tends to eliminate a lot of collateral motion practice and frivolous delay. Once counsel get a sense of how a judge is likely to rule on a given topic, a lot of delay-causing tactics are simply never tried.

Judge Campbell said he has a 15- or 20-minute Rule 16 scheduling conference in every civil case. He also requires a joint telephone call before the filing of any written discovery motion. Professor Cooper added that there was initial committee sentiment to make a Rule 16 conference mandatory. However, after further examination and the expression of opinion by other judges, the advisory committee realized that in some cases the Rule 26(f) report shows that a Rule 16 conference really is not necessary.

Judge Sutton observed that all of these points were likely to provoke many comments upon publication. The initially skeptical member of the Standing Committee also conceded that he had misunderstood that a Rule 16 conference would simply be encouraged, but not mandatory under the proposed amendment. However, he stressed his thought that the advisory committee was doing a lot. For that very reason, it should want public comments only on the consequential and important changes. The proposed changes to Rule 1 and to the definition of the permissible scope of discovery did not, he thought, come close to the hurdle or threshold of importance for a rule change and thus presented a significant risk of merely distracting people from a focus on the important changes.

Another member praised the package, found no harm in publication of the proposed change to Rule 1, and found the text of the proposed Rule 16 clear enough that a Rule 16 conference was discretionary as opposed to mandatory. Judge Campbell stressed again that proposed Rule 16(b) makes clear that a Rule 26(f) report OR a Rule 16 conference meets the requirements of the proposed rules.

Another participant observed that the package added up to enshrining in the rules a series of practices that a judge may adopt, but doesn't have to. He thought a better approach to these discovery issues might well be an educational strategy implemented by the FJC as opposed to a strategy that relied on these permissive but not mandatory proposed changes in discovery rules.

The Department of Justice representative said that the Department shared virtually all of the concerns raised by the skeptics, but was doing its best to arrive at a timely position on the merits of the proposed changes. In the meantime, it supported publication of the proposed changes and thought the public comments would likely be illuminating and helpful. The representative observed that certain types of litigation by the Department, such as those relating to "pattern and practice," require full discovery, as well as initial time limits both long enough and sufficiently flexible for the government to get adequate discovery in some of its cases.

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A final comment was that the package overall was an "amazing job." This member observed that the committee note should include the rationale for cutting the number of depositions from 10 to 5 and questioned why the proposal contained no limit on requests for production. On the latter point, Judge Campbell responded that the advisory committee's sentiment was that the most useful discovery tool in many cases was a set of targeted production requests under Rule 34. The advisory committee thought that a limit on them might simply provoke blunderbuss production requests. When pressed whether some limit on Rule 34 requests would not help, Judge Campbell replied that in his court he did set a presumptive limit of 25.

Judge Sutton expressed his own concerns about the proposed change to Rule 1. However, he thought it would be anomalous to subtract from publication the only proposed remedial change that addressed one of the three major prongs of concerns expressed at the Duke Conference – cooperation by counsel.

After Judge Campbell expressed agreement with those who thought that an FJC education effort was also important, Judge Sutton called for a vote on publication of the proposed amendments to the rules relating to discovery. Publication of the package of Duke Conference amendments received unanimous support from the Standing Committee with the exception of three members who dissented from the decision to publish the proposed change to Rule 1.

<u>Action</u>: The Standing Committee, by voice vote, approved publication of the proposed amendments to Rules 1, 4, 16, 26, 30, 31, 33, 34, 36, and 37, with three members objecting to the proposed amendment to Rule 1.

B. Proposed Action: Publication of Revised Rule 37(e)

The Duke Conference also addressed the need to focus on the issues of preservation requirements and sanctions with a particular emphasis on electronic discovery.

In January 2013, the Standing Committee preliminarily approved proposed amendments to Rule 37(e) for publication in August 2013, with the understanding that the advisory committee would present at the June 2013 meeting a revised proposal for publication that addressed concerns expressed in January.

The fundamental thrust of the proposal presented for publication remains as presented during the Standing Committee's January 2103 meeting – to amend the rule to address the overly broad preservation many litigants and potential litigants believe they have to undertake to ensure they will not later face sanctions. The proposal grew out of the suggestion made by a panel at the 2010 Duke Conference that the advisory committee attempt to adopt rule amendments to address preservation and sanctions. The Discovery Subcommittee set to work on developing amendments soon thereafter. The advisory committee hosted a mini-conference in September 2011 to evaluate the various proposed

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approaches the subcommittee had identified. From that point, the subcommittee refined the approach that was first presented to the Standing Committee in January 2013.

The proposed amendment focuses on sanctions rather than attempting directly to regulate the details of preservation. But it provides guidance for a court by recognizing that a party that adopts reasonable and proportionate preservation measures in anticipation of litigation should not be subject to sanctions. In addition, the amendment provides a uniform national standard for culpability findings to support the imposition of sanctions. Except in exceptional cases in which a party's actions irreparably deprive another party of any meaningful opportunity to present or defend against the claims in the litigation, sanctions may be imposed only on a finding that the party acted willfully or in bad faith and that the conduct caused substantial prejudice. The amendment rejects the view adopted in some cases, such as *Residential Funding Corp. v. DeGeorge Finan. Corp.*, 306 F.3d 99 (2d Cir. 2002), that permits sanctions for negligence in failing to meet preservation obligations.

Judge Campbell gave a short explanation of how the concerns expressed at the January 2013 meeting had been addressed by tweaks in the rule or note language, and also reviewed the five questions specifically posed in the request for public comment. Slight changes in the rule and note text were thought necessary to make clear that a court could order curative measures beyond merely orders to a party to remedy the failure to preserve discoverable information. Similarly, changing the rule text to focus on "the party's actions" rather than simply "the party's failure" would operate to prevent the imposition of sanctions in the absence of willfulness or bad faith only if "the party's actions" as opposed to an "act of God" deprived the opponent of a meaningful opportunity to litigate the case.

Significant efforts were made to refine the rule's attempt to preserve a line of cases that allow the imposition of sanctions in cases of failure to preserve, not involving bad faith or willfulness, where a party's actions "irreparably deprive a party of any meaningful opportunity to present or defend against claims in the litigation." To address a concern that this provision should not apply to the deprivation of opportunity to litigate a minor claim in the case, the advisory committee had tweaked the text and added language to the note that explains that the provision requires an impact on the overall case. The advisory committee also recognized the concern that this provision could swallow the rule's limits on sanctions, but continued to think it necessary to avoid overruling a substantial body of case law. It was thought that public comment would assist in pointing out the need for any additional revisions. Other concerns expressed in January about whether the proposed rule could be construed as relating to sanctions for attorney conduct or as displacing other laws relating to preservation requirements outside the discovery context were eliminated by appropriate revisions in the committee note.

Members of the advisory committee believed that the coverage of the proposed new Rule 37(e) was coextensive with that provided under the prior version and therefore elimination of the prior version was warranted.

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The questions for public comment are:

1. Should the rule be limited to sanctions for electronically stored information?
2. Should Rule 37(e)(1)(B)(ii) be retained in the rule?
3. Should the provisions of the current Rule 37(e) be retained in the rule?
4. Should there be an additional definition of "substantial prejudice" under Rules 37(e)(1)(B)(i)? If so, what should be included in that definition?
5. Should there be an additional definition of willfulness or bad faith under Rule 37(e)(1)(B)(i)?

Standing Committee Discussion of Proposed Amendments to Rule 37(e)

There was a short committee discussion concerning Rule 37(e). It was observed that electronic discovery is rapidly becoming the most burdensome aspect of discovery and therefore may provoke the most comment.

Judge Campbell answered questions and elaborated on the proposal. He stressed that one major goal of the amendments to Rule 37(e) was to distinguish between the negligent and intentional loss of evidence. He also explained that an example of a critical evidentiary loss is the loss of the instrumentality causing injury before the defendant can examine it, and an example of a curative measure would be requiring the restoration of back-up tapes in the case of a loss of evidence.

A Standing Committee member expressed his disappointment that specific safe harbors were not a part of the amendments package. He said that the ability to preserve something that should have been discoverable in the context of a lawsuit was virtually impossible in a large organization. He thought that was particularly true with respect to the ever expanding social media. He asked if drafting some specific safe harbors, particularly for large organizations, should be attempted.

Judge Campbell replied that his committee has tried to address some of these concerns by strengthening the emphasis on the relevance requirements and by adding substantial prejudice as prerequisite to triggering sanctions for the loss or absence of evidence. The attempts at a "safe harbor" provision ran into a roadblock of serious dimensions. No one has any idea what ESI will look like 5-10 years from now.

Action: The Standing Committee, by voice vote without objection, approved publication of the proposed amendments to Rule 37(e), as revised after the January 2013 meeting.

C. Proposed Action: Publication of Proposals to Abrogate Rule 84, Amend Rule 4(d)(1)(D), and Retain Current Forms 4 and 5 as a Part of Rule 4

Judge Campbell presented the recommendation that the Standing Committee approve

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the publication for comment of proposals that would abrogate Rule 84 and the Official Forms, and amend Rule 4(d)(1)(D) to incorporate present Forms 5 and 6 as official Rule 4 Forms.

A Rule 84 Subcommittee was formed to study Rule 84 and Rule 84 forms. The subcommittee found that these forms are used very infrequently and there is little indication that they often provide meaningful help to pro se litigants.

In addition, there is an increasing tension between the pleading forms in Rule 84 and emerging pleading standards. The pleading forms were adopted in 1938 as an important means of educating the bench and bar on the dramatic change in pleading standards effected by Rule 8(a)(2). They – and all the other forms – were elevated in 1948 from illustrations to a status that "suffice[s] under these rules." The range of topics covered by the pleading forms omits many of the categories of actions that comprise the bulk of today's federal docket. Indeed some of the forms are now inadequate, particularly the Form 18 complaint for patent infringement. Attempting to modernize the existing forms, and perhaps to create new forms to address such claims as those arising under the antitrust laws (*Twombly*) or implicating official immunity (*Iqbal*), would be a time-consuming undertaking. Such an undertaking might be warranted if in recent years the pleading forms had provided meaningful guidance to the bar in formulating complaints. However, the subcommittee's work has suggested that few, if any, lawyers consult the forms when drafting complaints. They either use their own forms, or refer to other sources, such as forms drafted by the Administrative Office's working group on forms.

Two forms require special consideration. Rule 4(d)(1)(D) requires that a request to waive service of process be made by Form 5. The Form 6 waiver of service of summons is not required, but is closely tied to Form 5. The advisory committee has concluded that the best course is to abrogate Rule 84, but preserve Forms 5 and 6 by amending Rule 4(d)(1)(D) to incorporate them recast as Rule 4 Forms attached directly to Rule 4.

Standing Committee Discussion of Proposed Abrogation of Rule 84 and Amendment to Rule 4

The Standing Committee's discussion was short. The current Rule 84 forms have become an obsolete appendage. The discussion of pleading standards in *Twombly* and *Iqbal* cases is simply illustrative of the many potential difficulties generated by the presence of obsolete forms in the Civil Rules. One member thought those cases should be specifically mentioned in any advisory committee note discussing the abrogation of Rule 84 and its forms. However, the prevailing view of other members and the reporters was that the Standing Committee should adhere to its practice of not taking a position on particular cases.

A final observation was that unless the Civil Rules Advisory Committee was prepared to undertake a thorough review of all of the civil forms, they should be abolished. It was further observed that the AO forms committee was a more than satisfactory substitute.

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<u>Action</u>: The Standing Committee, by voice vote without objection, approved publication of the proposed amendments to Rules 84 and 4.

INFORMATION ITEMS

Judge Campbell agreed with Judge Sutton that the items contained in the information section of the Civil Rules Advisory Committee's report could be read rather than reviewed at this meeting.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Chief Judge Sidney A. Fitzwater, assisted by the advisory committee's reporter, Professor Daniel J. Capra, presented the report of the Evidence Rules Committee. The advisory committee sought final Standing Committee approval and transmittal to the Judicial Conference of the United States of four proposals: (1) an amendment to Rule 801(d)(1)(B) – the hearsay exemption for certain prior consistent statements – to provide that prior consistent statements are admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility; and (2) amendments to Rules 803(6)-(8) – the hearsay exceptions for business records, absence of business records, and public records – to eliminate an ambiguity uncovered during the restyling project and to clarify that the opponent has the burden of showing that the proffered record is untrustworthy.

ACTION ITEMS

A. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Rule 801(d)(1)(B)

The advisory committee proposed that Rule 801(d)(1)(B) be amended to provide that prior consistent statements are admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility. The amendment is intended to eliminate confusing jury instructions on the permissible use of prior consistent statements. Judge Fitzwater emphasized that this amendment would preserve the rule of *Tome v. United States*, 513 U.S. 150 (1995). Under that case, a prior consistent statement is not hearsay only if it was made prior to the time when the motive to fabricate arose.

A member of the Standing Committee observed that if a witness was in court and available to be cross-examined, there seemed little reason to exclude prior consistent statements on any basis. The advisory committee's reporter observed that this current amendment represented a small step in that direction.

<u>Action</u>: The Standing Committee, by voice vote without objection, approved the proposed amendments to Rule 801(d)(1)(B) for transmission to the Judicial Conference for its approval.

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B. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Rules 803(6)-(8) (Hearsay Exceptions for Business Records, Absence of Business Records, and Public Records) – Burden of Proof As To Trustworthiness

The advisory committee proposed that Rules 803(6)-(8) be amended to address an ambiguity uncovered during restyling, but left unaddressed. Subsequent restyling efforts in Texas revealed the ambiguity could be misinterpreted as placing the burden of proof on a proponent of a proffered record to show that it was trustworthy.

The proposed amendments clarify that the *opponent* has the burden of showing that the proffered record is untrustworthy. The reasons espoused by the advisory committee for the amendments are: first, to resolve a conflict in the case law by providing uniform rules; second, to clarify a possible ambiguity in the rules as originally adopted and as restyled; and third, to provide a result that makes the most sense, as imposing a burden of proving trustworthiness on the proponent is unjustified given that the proponent must establish that all the other admissibility requirements of these rules are met – requirements that tend to guarantee trustworthiness in the first place.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendments to Rules 803(6)-(8) for transmission to the Judicial Conference for its approval.

INFORMATION ITEMS

Judge Fitzwater noted as an informational matter that the Evidence Rules Advisory Committee had received a suggestion from a judge in the 9th Circuit to consider an amendment to Rule 902 to include federally recognized Indian tribes on the list of public entities that issue self-authenticating documents. The advisory committee decided not to pursue consideration of such a rule without further guidance from the Standing Committee. It believed that other rules might well impact Indian tribes. Judge Campbell noted that this spring the 9th Circuit had reversed a case of his involving the admission of a tribal document verifying membership in a tribe on the very ground that federally recognized tribes were not included in the Rule 902 list of public entities that can issue self-authenticating documents. Judge Sutton noted that the Appellate Rules Advisory Committee had previously dealt with the ability of Indian tribes to file amicus briefs by deciding to wait for a reasonable period to see if the 9th Circuit adopted a local rule allowing the filing of such briefs. He noted that this particular issue appeared to be one involving considerations of tribal "dignity" – perhaps an inherently more political area where the Rules Committees should move with caution. However, he placed the practical concerns raised in a case like Judge Campbell's involving self-authentication of tribal documents in a different category. There he believed that some action by the Evidence Rules Advisory Committee might be warranted.

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Finally, Judge Fitzwater reminded the Standing Committee of the symposium scheduled at the University of Maine School of Law in Portland this October, which will address the intersection of the Rules of Evidence and emerging technologies. This symposium will present an opportunity to discuss the alternatives to validate electronic signatures currently presented in the proposed amendments to the Bankruptcy Rules.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Reena Raggi, assisted by the advisory committee's two reporters, Professor Sara Sun Beale and Professor Nancy King, presented the report of the Criminal Rules Advisory Committee. In summary, this report presented three items for action by the Standing Committee:

1. Approval to transmit to the Judicial Conference a proposed amendment to Rule 12 (pretrial motions), and a conforming amendment to Rule 34;

2. Approval to transmit to the Judicial Conference proposed amendments to Rules 5 and 58 (adding consular notification); and

3. Approval to transmit to the Judicial Conference a technical and conforming amendment to Rule 6 (the Grand Jury).

These recommendations were reviewed at the Standing Committee meeting as follows.

ACTION ITEMS

A. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Rules 12 (Pretrial Motions) and 34

These proposed amendments have their origin in a 2006 request from the Department of Justice that "failure to state an offense" be deleted from current Rule 12(b)(3) as a defect that can be raised "at any time," in light of the Supreme Court's decision in *United States v. Cotton*, 535 U.S. 625, 629-31 (2002) (holding that "failure to state an offense" is not a jurisdictional defect).

The advisory committee's efforts to craft such an amendment have sparked extensive and protracted discussions over time within the advisory committee and between the advisory committee and the Standing Committee regarding various aspects of Rule 12. This interplay has resulted in three separate amendment proposals being presented to the Standing Committee, the third of which was approved for publication in August 2011. In response to the thoughtful public comments received and on its own further review, the advisory committee further revised its third proposal for amendment to Rule 12, but did not believe the revisions require republication. The submitted proposals had the unanimous approval

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of the advisory committee.

The substantive features of the proposed amendment to Rule 12 (which also restyles this rule) can be summarized as follows:

(1) By contrast to current Rule 12(b)(1), which now starts with an unexplained cross-reference to Rule 47 (discussing the form, content, and timing of motions), the proposed revised Rule 12(b)(1) would achieve greater clarity by stating the rule's general purpose – to address the filing of pretrial motions (relocated from current Rule 12(b)) – before cross-referencing Rule 47.

(2) Proposed Rule 12(b)(2) identifies motions that may be made at any time separately from Rule 12(b)(3), which identifies motions that must be made before trial. This provides greater clarity – visually as well as textually. The current Rule 12(b)(3) identifies motions that may be made at any time only in an ellipsis exception to otherwise mandatory motions alleging defects in the indictment or information.

(3) Proposed Rule 12(b)(2) recognizes lack of jurisdiction as the only motion that may be made "at any time while the case is pending," thus implementing the Justice Department's request not to accord that status to a motion raising the failure to state an offense.

(4) Proposed Rule 12(b)(3) provides clearer notice with respect to motions that must be made before trial.

(a) At the start, it clarifies that its motion mandate is dependent on two conditions:

i. the basis for the motion must be reasonably available before trial, and
ii. the motion must be capable of resolution before trial.

This ensures that motions are raised pretrial when warranted while safeguarding against a rigid filing requirement that could be unfair to defendants.

(b) Proposed Rule 12(b)(3)(A)-(B) provides more specific notice of the motions that must be filed pretrial if the just-referenced twin conditions are satisfied. While the general categories of "defect[s] in instituting the prosecution" (current Rule 12(b)(3)(A)) and "defect[s] in the indictment or information (current Rule 12(b)(3)(B)) are retained, they are now clarified with illustrative non-exhaustive lists.

Proposed Rule 12(b)(3)(A) thus lists as defects in instituting the prosecution that must be raised before trial:

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i. improper venue,
ii. preindictment delay,
iii. violation of the constitutional right to a speedy trial,
iv. selective or vindictive prosecution, and
v. error in grand jury or preliminary hearing proceedings.

Proposed Rule 12(b)(3)(B) lists as defects in the indictment or information that must be raised before trial:

i. duplicity,
ii. multiplicity,
iii. lack of specificity,
iv. improper joinder, and
v. failure to state an offense.

The inclusion of failure to state an offense in Rule 12(b)(3)(B) accomplishes the amendment originally sought by the Department of Justice.

The proposed rule does not include double jeopardy or statute of limitations challenges among required pretrial motions in light of concerns raised in public comments. The advisory committee believes that subjecting such motions to a rule mandate is premature, requiring further consideration as to the appropriate treatment of untimely filings.

(5) Proposed Rule 12(b)(3)(C)-(E) duplicates the current rule in continuing to require that motions to suppress evidence, to sever charges or defendants, and to seek Rule 16 discovery must be made before trial.

(6) Proposed Rule 12(c) identifies both the deadlines for filing motions and the consequences of missing those deadlines. Grouping these two subjects together in one section is a visual improvement over the current rule, which discusses deadlines in (c) and consequences in later provision (e). More specifically,

(a) Proposed Rule 12(c)(1) tracks the current rule's language in recognizing the discretion afforded district courts to set motion deadlines. Nevertheless, it now adds a default deadline – the start of trial – if the district court fails to set a motion deadline. This affords defendants the maximum time to make mandatory pretrial motions, but it forecloses an argument that, because the district court did not set a motion deadline, a defendant need not comply with the rule's mandate to file certain motions before trial.

(b) Proposed Rule 12(c)(2) explicitly acknowledges district court discretion to extend or reset motion deadlines at any time before trial. This discretion, which is implicit in the current rule, permits district

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courts to entertain late-filed motions at any time before jeopardy attaches as warranted. It also allows district courts to avoid subsequent claims that defense counsel was constitutionally ineffective for failing to meet a filing deadline.

(c) Proposed Rule 12(c)(3)(A) retains current Rule 12(e)'s standard of "good cause" for review of untimely motions (with the exception of failure to state an offense discussed separately in submitted Rule 12(c)(3)(B)). At the same time, the submitted rule does not employ the word "waiver" as in the current rule because that term, in other contexts, is understood to mean a knowing and affirmative surrender of rights.

With respect to "good cause," the proposed committee note indicates that courts have generally construed those words, as used in current Rule 12(e), to require a showing of both cause and prejudice before an untimely claim may be considered. The published proposed amendment substituted cause and prejudice for good cause, hoping to achieve greater clarity, but after reviewing public comments and further considering the issue, the advisory committee decided to retain the term "good cause," to avoid both any suggestion of a change from the current standard and arguments based on some constructions of "cause and prejudice" in other contexts, notably, the miscarriage of justice exception to this standard in habeas corpus jurisprudence.

The amended rule, like the current one, continues to make no reference to Rule 52 (providing for plain error review of defaulted claims), thereby permitting the courts of appeals to decide if and how to apply Rules 12 and 52 when arguments that should have been the subject of required Rule 12(b)(3) motions are raised for the first time on appeal.

(d) Insofar as the submitted amendment, at Rule 12(b)(3)(B), would now require a defendant to raise a claim of failure to state an offense before trial, the proposed Rule 12(c)(3)(B) provides that the standard of review when such a claim is untimely is not "good cause" (*i.e.*, cause and prejudice) but simply "prejudice." The advisory committee thought that this standard provides a sufficient incentive for a defendant to raise such a claim before trial, while also recognizing the fundamental nature of this particular claim and closely approximating current law, which permits review without a showing of "cause."

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The committee note to accompany the proposed amendment to Rule 12 has been revised to make clear that the amendment is not intended to disturb the existing broad discretion of the trial judge to set, reset, or decline to reset deadlines for pretrial motions.

A conforming amendment to Rule 34 that omits language requiring a court to arrest judgment if "the indictment or information does not charge an offense" is also presented for publication.

Standing Committee Discussion of Proposed Amendments to Rule 12

Judge Raggi noted that the default deadline for filing the mandatory pretrial motions specified by Rule 12 would be at the start of trial when the jury is empaneled and jeopardy attaches when the jury is sworn.

Deputy Attorney General James Cole acknowledged that the Department of Justice originally prompted a review of this rule. He expressed the Department's gratitude to the Criminal Rules Advisory Committee and the Standing Committee for their years of hard work. He thought this proposed amendment would provide greater clarity regarding mandatory pretrial motions and therefore strongly supported it.

Another member wondered whether any defendant realistically would ever have "prejudice" resulting in the grant of relief after failing to file a mandatory pretrial motion. He discounted speculation that defense attorneys might try to "game" the system by failing to raise a defective indictment (*e.g.*, missing an element of the crime) until after jeopardy had attached. He pointed out that the attorney would risk the defect being noticed by the judge, and it could be cured by a proper instruction to the jury. Another member responded that a "prejudice" issue would likely arise on a post-trial motion only after jeopardy had attached and a defendant had been convicted. He predicted that district and appellate courts might arrive as to differing conclusions on what amounted to "prejudice" in the context of a new Rule 12.

A final concern was raised about how information protected by grand jury secrecy under Rule 6(e) might be raised in the context of a Rule 12 motion and how such information would relate to the mandatory filing and prejudice issues. The response of the reporters was that such information would be governed by the "reasonably available" standard of the rule. If such information was not "reasonably available" pretrial and was sufficiently important to the motion, a court would have discretion to hear the motion at issue at a later time.

Judge Raggi asked that former advisory committee chair Judge Richard Tallman and current subcommittee chair Judge Morrison England be commended for their enormously important contributions to producing this final version of a proposed comprehensive amendment to Rule 12. Judge Sutton added his personal inclusion of Judge Raggi and Professors Sara Sun Beale and Nancy King to the list of those whom the Standing Committee should commend for their outstanding efforts. The members of the Standing

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Committee unanimously agreed.

Finally, Judge Sutton expressed his personal thanks to the chairs and members of the Criminal Rules Advisory Committee, whose efforts over the years had culminated in such a worthwhile compromise resolving the major prior difficulties and stumbling blocks to amending the rule.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendments to Rules 12 and 34 for transmission to the Judicial Conference for its approval.

B. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Rules 5 and 58 (Consular Notification)

The advisory committee also recommended approval of its second proposal to amend Rules 5 and 58 to provide for advice concerning consular notification, as amended following publication.

In 2010, the Justice Department, at the urging of the State Department, proposed amendments to Rules 5 and 58, the rules specifying procedures for initial proceedings in felony and misdemeanor cases respectively, to provide notice to defendants of consular notification obligations arising under Article 36 of the multilateral Vienna Convention on Consular Relations ("Vienna Convention"), as well as various bilateral treaties.

The first proposed amendments responding to this request were published for public comment and subsequently approved by the advisory committee, the Standing Committee, and the Judicial Conference. In April 2012, however, the Supreme Court returned the amendments to the advisory committee for further consideration.

At its April 2012 meeting, the advisory committee identified two possible concerns with the returned proposal: (1) perceived intrusion on executive discretion in conducting foreign affairs, both generally and specifically as it pertains to deciding how, or even if, to carry out treaty obligations; and (2) perceived conferral on persons other than the sovereign signatories to treaties – specifically, criminal defendants – of rights to demand compliance with treaty provisions.[1]

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[1] Insofar as Article 36 of the Vienna Convention provides for signatory nations to advise detained foreign nationals of other signatory nations of an opportunity to contact their home country's consulate, litigation has not yet resolved whether such a provision gives rise to any individual rights or remedies. *See Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006) (holding that suppression of evidence was not appropriate remedy for failure to advise foreign national of ability to have consulate notified of arrest and detention regardless of whether Vienna Convention conferred any individual rights). Thus, the advisory committee concluded that the remand of the amendment proposal from the Supreme Court could be understood to suggest that the rule may have gotten ahead of settled law on this matter.

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The amendments were redrafted to respond to these concerns. The redrafted amendments were carefully worded to provide notice without any attending suggestion of individual rights or remedies. Indeed, the committee note emphasizes that the proposed rules do not themselves create any such rights or remedies. The Standing Committee approved publication of the redrafted amendments in June 2012.

Upon review of received public comments, as well as its own further consideration, the advisory committee made the following changes to the proposed amendments, none of which requires further publication.

The introductory phrase of submitted Rules 5(d)(1) and 58(b)(2) now provides for the specified advice to be given to all defendants, in contrast to the published rule, which had provided for consular notification to be given "if the defendant is held in custody and is not a United States citizen."

The change was made to avoid any implication that the arraigning judicial officer was required to ascertain a defendant's citizenship, an inquiry that could involve self-incrimination. Providing consular notice to all defendants without such an inquiry parallels Rule 11(b)(1)(O) (which the Supreme Court has now transmitted to Congress), which provides for all defendants to be given notice at the plea proceeding of possible immigration consequences without specific inquiry into their nationality or status in the United States.

As for the "in custody" requirement, interested parties disagreed as to when a defendant was "in custody" or "detained." Providing notice to all defendants at their initial appearance not only avoids the need to resolve this question, it avoids the need to consider a further notice requirement when defendants initially admitted to bail are subsequently remanded. Thus, while the advisory committee is mindful of the need to avoid adding unnecessary notice requirements to rules governing initial appearances, sentences, etc., it concluded, as now stated in the proposed committee note, that "the most effective and efficient method of conveying this [consular notification] information is to provide it to every defendant, without attempting to determine the defendant's citizenship."

Standing Committee Discussion of the Proposed Amendments to Rules 5 and 58

Deputy Attorney General Cole again commended Judge Raggi and her committee for its excellent work in assisting to conform the Criminal Rules with the treaty obligations of the United States.

Another member inquired whether judges would simply read the materials specified in the rule as an advisory notice to the defendant or whether the judge's reading of the notice was intended to provoke a response from the defendant. There was unanimous agreement with the position of the advisory committee that all the amended rule proposals sought to accomplish was simply to give the notification required by the treaty to the defendant of a foreign nation.

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Deputy Attorney General Cole observed that treaty violations occur mostly in state court. The amended Rules 5 and 58 thus provide a good model for the states. Professor Beale observed that 47 percent of defendants in the federal courts are not U.S. citizens. This rule provides the basis for the court to make a good record of the notification it has provided.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendments to Rules 5 and 58, as amended following publication, for transmission to the Judicial Conference for its approval.

C. Proposed Action: Transmission to the Judicial Conference of Proposed Technical and Conforming Amendment to Rule 6 (The Grand Jury)

The Office of the Law Revision Counsel informed the Administrative Office of a reorganization of chapter 15 of Title 50 of the United States Code. This revision has made incorrect a current statutory reference in Rule 6(e)(3)(D) to the code section defining counter-intelligence. The proposed amendment would simply substitute a reference to the correct section of Title 50 for the current one that is now obsolete.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendment to Rule 6 for transmission to the Judicial Conference for its approval.

INFORMATION ITEM

The Department of Justice has urged amendment of Criminal Rule 4 to facilitate service of process on foreign corporations. It submits that the current rule impedes prosecution of foreign corporations that have committed offenses punishable in the United States, but that cannot be served for lack of a last known address or principal place of business in the United States. It argues that this has created a "growing class of organizations, particularly foreign corporations" that have gained "an undue advantage" over the government relating to the initiation of criminal proceedings. The advisory committee has referred the matter to a subcommittee for further study and report.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Steven M. Colloton, assisted by the advisory committee's reporter, Professor Catherine T. Struve (by telephone), presented the report of the Appellate Rules Advisory Committee. In conjunction with the Bankruptcy Rules Advisory Committee's proposal to amend Part VIII of the Bankruptcy Rules – the rules that govern appeals from bankruptcy court to a district court or bankruptcy appellate panel ("BAP") – the Appellate Rules Advisory Committee sought final approval of a proposed amendment to Appellate Rule 6 (concerning appeals to the court of appeals in a bankruptcy case).

ACTION ITEM

12b-008429

A. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Appellate Rule 6

The proposed amendment to Appellate Rule 6 would: (1) update that rule's cross-references to the Bankruptcy Part VIII Rules, (2) amend Rule 6(b)(2)(A)(ii) to remove an ambiguity dating from the 1998 restyling, (3) add a new Rule 6(c) to address permissive direct appeals from the bankruptcy court under 28 U.S.C. § 158(d)(2), and (4) revise Rule 6 to take account of the range of methods available now or in the future for dealing with the record on appeal.

Proposed Appellate Rule 6(c) would treat the record on direct appeals differently than existing Rule 6(b) treats the record on bankruptcy appeals from a district court or BAP. Rule 6(b) contains a streamlined procedure for redesignating and forwarding the record on appeal, because in the appeals covered by Rule 6(b), the appellate record already will have been compiled for purposes of the appeal to the district court or the BAP. In a direct appeal, the record generally will be compiled from scratch. The closest model for the compilation and transmission of the bankruptcy court record is the set of rules chosen by the Bankruptcy Rules Part VIII project for appeals from the bankruptcy court to the district court or the BAP. Thus, proposed Rule 6(c) incorporates the relevant Part VIII rules by reference while making some adjustments to account for the particularities of direct appeals to the court of appeals.

Both the Bankruptcy Rules Part VIII project and the project to revise Appellate Rule 6 have highlighted changes in the treatment of the record. The Appellate Rules were drafted on the assumption that the record on appeal would be available only in paper form. The proposed Part VIII Rules are drafted with a contrary presumption in mind: the default principle under those rules is that the record will be made available in electronic form. In revising Rule 6(b) and in drafting new Rule 6(c), the Appellate Rules Committee adopted language that can accommodate the various ways in which the lower-court record could be made available to the court of appeals – *e.g.*, in paper form, in electronic files that can be sent to the court of appeals, or by means of electronic links.

<u>Action</u>: The Standing Committee, by voice vote without objection, approved the proposed amendments to Appellate Rule 6 for transmission to the Judicial Conference for its approval.

INFORMATION ITEMS

Two other matters were briefly discussed during Judge Colloton's presentation. First, a Standing Committee member inquired whether the conversion of page limits to word limits in appellate briefs may not have resulted in the filing of longer appellate briefs. Judge Colloton said a review of the matter would be part of the advisory committee's broader review of other page limits for appellate filings.

Another Standing Committee member prompted a general discussion of whether

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appellate courts are sufficiently responsive to the need for swift adjudication of proceedings under the Hague Convention on the Civil Aspects of International Child Abduction. While appellate consideration of stay applications is usually prompt, decisions on the merits can sometimes be delayed. The discussion resulted in a preliminary suggestion that a letter from the advisory committee chair to chief judges of the circuits might be appropriate to remind them of the Supreme Court's concern about expediting these cases as expressed in the opinions in *Chafin v. Chafin*, 133 S. Ct. 1017 (2013). Judge Colloton agreed to discuss the matter with Judge Sutton, bearing in mind that letters to chief judges from the committees should be employed sparingly if they are to have the desired effect.

Other members of the Standing Committee were of the view that despite the traditional reluctance of the rules committees to endorse provisions that require the expediting of specific classes of cases, stronger measures than mere exhortation may be required.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Eugene Wedoff, assisted by the advisory committee's two reporters, Professor Elizabeth Gibson and Professor Troy McKenzie, presented the report of the Bankruptcy Rules Advisory Committee. The advisory committee sought the Standing Committee's final approval and transmission to the Judicial Conference of most of the previously published items: the revision of the Part VIII Rules and amendments to 10 other rules and 5 official forms. Because the advisory committee made significant changes after publication to one set of published forms – the means test forms – it requested that those forms be republished.

The advisory committee also requested publication for public comment of (1) the remaining group of modernized forms for use in individual-debtor bankruptcy cases, and (2) a chapter 13 plan form and implementing rule amendments.

ACTION ITEMS

In brief, the actions sought from the Standing Committee by Judge Wedoff and his committee were as follows.

1. Approval for transmission to the Judicial Conference of amendments to Rules 1014, 7004, 7008, 7012, 7016, 7054, 8001-8028, 9023, 9024, 9027, and 9033, and Official Forms 3A, 3B, 6I, and 6J;

2. Approval for transmission to the Judicial Conference without publication of a conforming amendment to Official Form 23;

3. Approval for republication in August 2013 of amendments to the means test forms – Official Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2 – along with the initial publication of Official Form 22A-1Supp; and

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4. Approval for publication in August 2013 of amendments to Rules 2002, 3002, 3007, 3012, 3015, 4003, 5005, 5009, 7001, 9006, and 9009, and Official Forms 101, 101A, 101B, 104, 105, 106Sum, 106A/B, 106C, 106D, 106E/F, 106G, 106H, 106Dec, 107, 112, 113, 119, 121, 318, 423, 427, 17A, 17B, and 17C.

Judge Wedoff first discussed the rules recommended for transmission to the Judicial Conference and the forms sought to be approved by the Judicial Conference with an effective date of December 1, 2013.

A. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Rules 7008, 7012, 7016, 9027, and 9033

Amendments to Rules 7008, 7012, 7016, 9027, and 9033 are proposed in response to *Stern v. Marshall*, 131 S. Ct. 2594 (2011). The Bankruptcy Rules follow the Judicial Code's division between core and non-core proceedings. The current rules contemplate that a bankruptcy judge's adjudicatory authority is more limited in non-core proceedings than in core proceedings. For example, parties are required to state whether they do or do not consent to final adjudication by the bankruptcy judge in non-core proceedings. There is no comparable requirement for core proceedings. *Stern*, which held that a bankruptcy judge did not have authority under Article III of the Constitution to enter final judgment in a proceeding deemed core under the Judicial Code, has introduced the possibility that such a proceeding may nevertheless lie beyond the power of a bankruptcy judge to adjudicate finally. In other words, a proceeding could be "core" as a statutory matter but "non-core" as a constitutional matter.

The proposals would amend the Bankruptcy Rules in three respects. First, the terms "core" and "non-core" would be removed from Rules 7008, 7012, 9027, and 9033 to avoid possible confusion in light of *Stern*. Second, parties in all bankruptcy proceedings (including removed actions) would be required to state whether they do or do not consent to entry of final orders or judgment by the bankruptcy judge. Third, Rule 7016, which governs pretrial procedures, would be amended to direct bankruptcy courts to decide the proper treatment of proceedings.

<u>Action</u>: The Standing Committee, by voice vote without objection, approved the proposed amendments to Rules 7008, 7012, 7016, 9027, and 9033 for transmission to the Judicial Conference for its approval.

B. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Rules 8001-8028 (Part VIII of the Bankruptcy Rules)

On Tuesday morning, June 4, 2013, the Standing Committee meeting opened with a presentation by Professor Elizabeth Gibson of the comprehensive set of amendments to Part VIII of the bankruptcy appellate rules. These amendments are designed with the goal of making the bankruptcy appellate rules consistent with the Federal Rules of Appellate Procedure. Professor Gibson observed that this project of conforming and restyling the bankruptcy appellate rules, which is now finally approaching conclusion, has been a lengthy

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one – ongoing since she first became a reporter to the Bankruptcy Rules Advisory Committee.

In summary, she noted that the proposed amendments to Rules 8001-8028 (Part VIII of the Bankruptcy Rules) constitute a comprehensive revision of the rules governing bankruptcy appeals to district courts, bankruptcy appellate panels, and with respect to some procedures, courts of appeals. This multi-year project attempted to bring the bankruptcy appellate rules into closer alignment with the Federal Rules of Appellate Procedure; to incorporate a presumption favoring the electronic transmission, filing, and service of court documents; and to adopt a clearer style. Existing rules have been reorganized and renumbered, some rules have been combined, and provisions of other rules have been moved to new locations. Much of the language of the existing rules has been restyled.

In general, the public comments reflected a positive response to the proposed revision of the Part VIII rules. Thus, the advisory committee unanimously voted to recommend them for final approval to the Standing Committee with the post-publication changes listed by Professor Gibson as follows:

Rule 8003. Several comments pointed out that the provision in subdivision (d) directing the clerk of the appellate court to docket an appeal "under the title of the bankruptcy court action" is unclear since "action" might refer to the overall bankruptcy case or to an adversary proceeding within the case. The advisory committee agreed that this was an instance in which the Appellate Rules' language needs to be modified for the bankruptcy context. It voted to change the wording in Rule 8003(d)(2) and the parallel provision in Rule 8004(c)(2) to "under the title of the bankruptcy case and the title of any adversary proceeding."

Rule 8004. The clerk of a BAP commented on Rule 8004(c)(3), which directed the dismissal of an appeal if leave to appeal is denied. She stated that appellants sometimes file a motion for leave to appeal when leave is not required and in that situation, although the motion is denied, dismissal is not appropriate. The advisory committee voted to delete the sentence in question, which is not contained in either the current bankruptcy rule or the appellate rule from which the proposed rule is derived.

Rule 8005. Several comments questioned whether an election to have an appeal heard by the district court, rather than the BAP, must still be made by a statement in a separate document. At the spring meeting, the advisory committee approved for publication an amendment to the notice of appeal form, Official Form 17A, that will include a section for making an election under this rule. That form, which if approved will take effect on the same date as the rule, will clarify that the separate-document rule no longer applies.

The advisory committee agreed with one of the comments it received, which recommended that the BAP clerk notify the bankruptcy clerk if an appeal is transferred to the district court, and it voted to add a sentence to that effect in subdivision (b).

Rule 8007. The advisory committee agreed that the rule should be clarified to

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eliminate the possibility of filing a motion for a stay in the appellate court prior to the filing of a notice of appeal.

Rule 8013. One comment suggested that district courts be allowed to require a notice of motion in bankruptcy appeals if they otherwise follow that practice in their court. Another comment made a similar suggestion concerning proposed orders. The advisory committee agreed with these comments and added "Unless the court orders otherwise" to subdivision (a)(2)(D)(ii).

Rule 8016. Two comments raised questions about subdivision (f), which addressed the consequences of failing to file a brief on time. It was unclear why the provision was located in the rule governing cross-appeals, and it seemed to be inconsistent with a provision in Rule 8018. The advisory committee thought that the comments were well taken, and it voted to delete the subdivision.

Rule 8018. The advisory committee voted to reword the provision to clarify that dismissal of an appeal or cross-appeal can occur only upon motion of a party or on the court's own motion, after which the appellant would have an opportunity to respond.

<u>Action</u>: The Standing Committee, by voice vote without objection, approved the proposed amendments to Rules 8001-8028 (Part VIII of the Bankruptcy Rules) for transmission to the Judicial Conference for its approval.

C. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Rule 1014(b)

Rule 1014(b) governs the procedure for determining where cases will proceed if petitions are filed in different districts by, against, or regarding the same debtor or related debtors. The rule currently provides that, upon motion, the court in which the first-filed petition is pending may determine – in the interest of justice or for the convenience of the parties – the district or districts in which the cases will proceed. Except as otherwise ordered by that court, proceedings in the cases in the other districts "shall be stayed by the courts in which they have been filed" until the first court makes its determination.

The proposed amendment both clarifies and narrows the scope of the stay provision. The current rule applies a blanket rule that all the later-filed cases are stayed while the first court makes the venue determination. The amended rule would limit the stay to situations in which the first court finds that the rule in fact applies and that a stay is needed.

<u>Action</u>: The Standing Committee, by voice vote without objection, approved the proposed amendment to Rule 1014(b) for transmission to the Judicial Conference for its approval.

D. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Rules 7004(e)

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Rule 7004(e) governs the time during which a summons is valid after its issuance in an adversary proceeding. The current rule provides that a summons is valid so long as it is served within 14 days of its issuance. The advisory committee sought final approval of an amendment to reduce that period from 14 days to 7 days.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendment to Rules 7004(e), with a minor technical revision, for transmission to the Judicial Conference for its approval.

E. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Rules 7008 and 7054

Rules 7008(b) and 7054 would be amended to change the procedure for seeking attorney's fees in bankruptcy proceedings. The advisory committee proposed the amendments in order to clarify and to promote uniformity in the procedures for seeking an award of attorney's fees. Rule 7054 would be amended to include much of the substance of Civil Rule 54(d)(2). Rule 7008(b), which currently addresses attorney's fees, would be deleted. Just as the procedure for seeking attorney's fees in civil actions is governed exclusively by Civil Rule 54(d), Bankruptcy Rule 7054 would provide the exclusive procedure for seeking an award of attorney's fees in bankruptcy cases, unless the governing substantive law requires the fees to be proved at trial as an element of damages.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendments to Rules 7008 and 7054 for transmission to the Judicial Conference for its approval.

F. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Rules 9023 and 9024

Rule 9023, which governs new trials and amendment of judgments, and Rule 9024, which governs relief from judgments or orders, would be amended to include a cross-reference to proposed Rule 8008, which governs indicative rulings. The advisory committee proposed these amendments in order to call attention at an appropriate place in the rules to that new bankruptcy appellate rule. Rule 8008 prescribes procedures for both the bankruptcy court and the appellate court when an indicative ruling is sought. It therefore incorporates provisions of both Civil Rule 62.1 and Appellate Rule 12.1. Because a litigant filing a post-judgment motion that implicates the indicative-ruling procedure will not encounter a rule similar to Civil Rule 62.1 in either the Part VII or Part IX rules, the advisory committee decided that it would be useful to include a cross-reference to Rule 8008 in the rules governing post-judgment motions.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendments to Rules 9023 and 9024 for transmission to the Judicial Conference for its approval.

G. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Official Forms 3A, 3B, 6I, and 6J

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Official Forms 3A (Application for Individuals to Pay the Filing Fee in Installments), 3B (Application to Have the Chapter 7 Filing Fee Waived), 6I (Schedule I: Your Income), and 6J (Schedule J: Your Expenses) were selected for the initial-implementation stage of the Forms Modernization Project ("FMP") because they make no significant change in substantive content and simply replace existing forms that apply only in individual-debtor cases. The restyled forms all involve the debtors' income and expenses, and they are employed by a range of users: the courts, U.S. trustees, and case trustees, for varied purposes. The publication of these forms has already provided valuable feedback on the FMP approach to form design, and, if adopted, their use will provide a helpful gauge of the effectiveness of the FMP approach. Published last August, these forms were recommended by the advisory committee, unanimously, for final approval with some post-publication changes.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendments to Official Forms 3A, 3B, 6I, and 6J, with the post-publication changes, for transmission to the Judicial Conference for its approval.

H. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Official Form 23

The Supreme Court has approved an amendment to Rule 1007(b)(7), due to go into effect on December 1, 2013, that will relieve individual debtors of the obligation to file Official Form 23 if the provider of an instructional course concerning personal financial management directly notifies the court that the debtor has completed the course. The preface and instructions to Official Form 23 would be amended to reflect that change by stating that a debtor should file the form only if the course provider has not already notified the court of the debtor's completion of the course.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendments to Official Form 23 for transmission to the Judicial Conference for its approval without publication.

I. Proposed Action: Republication of Proposed Amendments to Official Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2, and Publication of Proposed New Official Form 22A-1Supp

Official Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2, the restyled means-test forms for individual debtors under chapters 7, 11, and 13, were published for comment in August 2012. Because it determined that the changes made in response to comments were of sufficient significance to require republication, the advisory committee requested that the newly revised means-test forms be published for public comment in August. Along with the republication of Official Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2, the advisory committee requested publication of new Official Form 22A-1Supp, which was created in response to the comments.

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<u>Action</u>: The Standing Committee, by voice vote without objection, approved for publication the proposed amendments to Official Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2 as revised and Form 22A-1Supp.

J. Proposed Action: Publication of Rules Related to New Chapter 13 Plan Form

For the past two years, the advisory committee has studied the creation of a national plan form for chapter 13 cases. The twin goals of the project have been to bring more uniformity to chapter 13 practice and to simplify the review of chapter 13 plans by debtors, courts, trustees, and creditors. These goals are consistent with the Supreme Court's decision in *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010), which held that an order confirming a procedurally improper chapter 13 plan was nevertheless entitled to preclusive effect and that bankruptcy judges must independently review chapter 13 plans for conformity with applicable law.

The advisory committee approved a draft plan and accompanying rule amendments at its April 2013 meeting in New York. The advisory committee voted unanimously to seek publication of the form and rule amendments related to the new chapter 13 plan.

Professor Troy McKenzie led the following discussion, which summarizes the amendments to the Bankruptcy Rules that the Standing Committee voted to publish with the chapter 13 plan form.

Rule 2002. The Bankruptcy Rules describe categories of events that trigger the obligation to provide notice. Rule 2002 currently requires 28 days' notice of the time to file objections to confirmation of a chapter 13 plan as well as of the confirmation hearing itself. An amendment to Rule 3015(f), however, would require that objections to confirmation of a chapter 13 plan be filed at least seven days before the confirmation hearing.

The advisory committee proposed to retain the 28-day period for notice of a chapter 13 confirmation hearing, but to amend Rule 2002 in light of the new time period for objections to confirmation in Rule 3015(f). Thus, Rule 2002 would require 21 days' notice of the time to file objections to confirmation.

Rule 3002. Rule 3002(a) would be amended to require a secured creditor, as well as an unsecured creditor, to file a proof of claim in order to have an allowed claim. In keeping with Code § 506(d), however, the amendment also makes clear that the failure of a secured creditor to file a proof of claim does not render the creditor's lien void. Second, Rule 3002(c) would be amended to change the calculation of the claims bar date. Rather than 90 days from the meeting of creditors under Code § 341, the bar date would be 60 days after the petition is filed in a chapter 13 case. The amended rule includes a provision for an extension of the bar date when the debtor has failed to provide in a timely manner a list of creditors' names and addresses for notice purposes. In response to concerns raised during a mini-conference held in Chicago, the amended rule would also include a longer bar date for certain supporting documents required for mortgage claims on a debtor's principal residence. With those claims, the mortgagee would be required to file a proof of claim within the 60-

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day period but would have an additional 60 days to file a supplement with the supporting documents.

Rule 3007. Objections to claims are governed by Rule 3007. Because the plan form permits some determinations regarding claims to be made through the plan, the advisory committee proposed an amendment to Rule 3007. The amended rule would provide an exception to the need to file a claim objection if a determination with respect to that claim is made in connection with plan confirmation under proposed Rule 3012.

Rule 3012. The proposed amendment would provide that the amount of a secured claim under Code § 506(a) may be determined in a proposed plan, subject to objection and resolution at the confirmation hearing. Current Rule 3012 provides for the valuation of a secured claim by motion only. The amended rule would also make clear that a chapter 13 plan would not control the amount of a claim entitled to priority treatment or the amount of a secured claim of a governmental unit.

Rule 3015. Rule 3015 governs the filing of a chapter 13 plan as well as plan modifications and objections to confirmation. The advisory committee proposed extensive amendments to the rule. They include an amended subdivision (c) requiring use of the official form for chapter 13 plans, a new 7-day deadline in Rule 3015(f) for filing objections to confirmation, and an amended subdivision (g) providing when the plan terms control over contrary proofs of claim. These amendments dovetail with proposed amendments to Rules 2002, 3007, and 3012.

Rule 4003. Code § 522(f) permits a debtor to avoid certain liens encumbering property that is exempt from the debtor's estate. Current Rule 4003(d) provides that lien avoidance under this section of the Code requires a motion. The plan form, however, would include a provision for a debtor to request lien avoidance as permitted by § 522(f). The advisory committee proposed an amendment to Rule 4003(d) to give effect to that part of the plan form.

Rule 5009. The advisory committee has included a procedure in proposed amended Rule 5009(d) for the debtor to obtain an order confirming that a secured claim has been satisfied. The language of the proposed amended rule permits the debtor to request entry of the order but does not specify the requirements for lien satisfaction.

Rule 7001. The advisory committee proposed to amend Rule 7001(2) so that determinations of the amount of a secured claim (under amended Rule 3012) and lien avoidance (under amended Rule 4003(d)) through a chapter 12 or chapter 13 plan would not require an adversary proceeding.

Rule 9009. In order to ensure use of the chapter 13 plan form without significant alterations, the advisory committee proposed an amendment to Rule 9009. Because greater uniformity is a principal goal of the plan form, proposed amended Rule 9009 would limit the range of permissible changes to forms.

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Action: The Standing Committee, by voice vote without objection, approved for publication the proposed rule amendments related to the proposed new chapter 13 plan.

K. Proposed Action: Publication of Proposed Amendments to Rule 5005 (electronic signatures)

Rule 5005 governs the filing and transmittal of papers. The advisory committee sought approval to publish for public comment a proposed amendment to Rule 5005 that would create a national bankruptcy rule permitting the use of electronic signatures of debtors and other individuals who are not registered users of CM/ECF, without requiring the retention of the original document bearing a handwritten signature.

The proposed amendment to Rule 5005 would allow the electronic filing of a scanned signature page bearing the original signature of a debtor or other non-filing user to be treated the same as a handwritten signature without requiring the retention of hard copies of documents. The scanned signature page and the related document would have to be filed as a single docket entry to provide clarity about the document that was being attested to by the non-filing user. The amended rule would also provide that the user name and password of a registered user of the CM/ECF system would be treated as that individual's signature on electronically filed documents. The validity of a signature submitted under the amended rule would still be subject to challenge, just as is true for a handwritten signature.

The proposal incorporates recommendations from the Inter-Committee CM/ECF Subcommittee, which is chaired by Judge Michael A. Chagares and which includes members of the Standing Committee, each of the advisory committees, and the Committee on Court Administration and Case Management. As noted, the amended rule would provide that the scanned signature of a non-filing user, when filed as part of a single filing with an electronic document, serves as a signature to that document – without any requirement that the original be retained. The subcommittee noted that once a non-filing user has a signature scanned, there is no assurance that the signature was to the original document – and that concern is greater than with a hard copy, as it is less likely that a hard copy signature page would be attached to a number of documents. The subcommittee suggested publishing two alternative solutions to this issue. The advisory committee agreed with that suggestion and presented its proposed amendment to the Standing Committee with the suggested alternatives incorporated.

One alternative would be for the rule to state that the filing by the registered user is deemed a certification that the scanned signature was part of the original document. The second alternative would keep the filing lawyer out of the matter of any attestation about authenticity by using notaries public for that purpose. The Standing Committee accepted the recommendation of the CM/ECF Subcommittee and the Bankruptcy Rules Advisory Committee that Rule 5005(a)(3)(B) be published with both alternatives. It was agreed that publication of proposed Rule 5005(a)(3)(B) with both alternatives would allow careful public consideration of the problem of assuring that scanned signatures are a part of the

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original document. It would assure input from interested and knowledgeable members of the public on how best to protect against the possible misuse of electronic signatures.

Judges Fitzwater and Sutton again reminded the Standing Committee that the Evidence Rules Advisory Committee is hosting a technology symposium in Portland, Maine in October 2013, which would provide another forum to solicit public comment on alternative methods to verify electronic signatures.

Judge Chagares noted that the CM/ECF Subcommittee will examine whether there are other technology issues related to the Next Generation of CM/ECF that should be addressed across all the sets of rules. Professor Capra, the reporter to the subcommittee, will work with the advisory committee reporters to identify rules affected by electronic filing and CM/ECF. If common issues arise across the different sets of rules, a model might be developed for the sake of uniformity.

Action: The Standing Committee, by voice vote without objection, approved publication of the proposed amendment to Rule 5005, including an invitation for comment on the proposed alternative methods for assuring that a signature is part of the original document.

L. Proposed Action: Publication of Proposed Amendments to Rule 9006(f)

Rule 9006(f), which is modeled on Civil Rule 6(d), provides three additional days for a party to act "after service" if service is made by mail or under Civil Rule 5(b)(2)(D), (E), or (F). At the January 2013 meeting, the Standing Committee approved for publication a proposed amendment to Civil Rule 6(d) that would clarify that only the party that is served by mail or under the specified provisions of Civil Rule 5 – and not the party making service – is permitted to add three days to any prescribed period for taking action after service is made. Because Rule 9006(f) contains the same potential ambiguity as current Civil Rule 6(d), the advisory committee requested approval to publish a parallel amendment of the bankruptcy rule.

Action: The Standing Committee, by voice vote without objection, approved publication of the proposed amendments to Rule 9006(f).

M. Proposed Action: Publication of Official Form 113 (new national Chapter 13 form)

The advisory committee recommended publication for public comment of a national plan form for chapter 13 cases. As described above in Item J, the plan form is the product of more than two years of study and consultation by the advisory committee.

The plan form includes ten parts. Beginning with a notice to interested parties (Part 1), the plan form covers: the amount, source, and length of the debtor's plan payments (Part 2); the treatment of secured claims (Part 3); the treatment of the trustee's fees, administrative claims, and other priority claims (Part 4); the treatment of unsecured claims not entitled to priority (Part 5); the treatment of executory contracts and unexpired leases (Part 6); the order

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of distribution of payments by the trustee (Part 7); the revesting of property of the estate with the debtor (Part 8); and nonstandard plan terms (Part 9). Part 10 is the signature box.

The plan form contains a number of significant features. First, it permits a debtor to propose to limit the amount of a secured claim (Part 3, § 3.2), to avoid certain liens as provided by the Bankruptcy Code (Part 3, § 3.4), and to include nonstandard terms that are not part of – or that deviate from – the official form (Part 9). In order to make any of these particular terms effective, however, the debtor must clearly indicate in Part 1 that the plan includes one or more of them by marking the appropriate checkbox. Thus, the face of the document will put the court, the trustee, and creditors on notice that the plan contains terms that may require additional scrutiny. Second, the plan form makes clear when it will control over a creditor's contrary proof of claim. For example, a debtor may propose to limit the amount of a nongovernmental secured claim under Code § 506(a) because the collateral securing it is worth less than the claim. The proposed amount of the secured claim would be binding, subject to a creditor's objection to the plan and a final determination of the issue in connection with plan confirmation. Otherwise, a creditor's proof of claim will control the amount and treatment of the claim, subject to a claim objection.

The treatment of nonstandard plan provisions has been a concern during the process of drafting the plan. As described earlier, Part 1 requires the debtor to indicate whether the plan form includes nonstandard terms. In order to give further assurance that the debtor has filed a plan form that otherwise adheres to the official form, the plan's signature box includes a certification to that effect. Thus, the plan form requires that the debtor's attorney (or the debtor, if pro se) must certify by signing the plan that all of its provisions are identical to the official form, except for nonstandard provisions located in Part 9.

<u>Action</u>: The Standing Committee, by voice vote without objection, approved publication of Official Form 113 (new national chapter 13 plan form).

N. Proposed Action: Publication of Individual Debtor Forms

The advisory committee requested publication of the following individual debtor forms to be effective December 2015:

101	Voluntary Petition for Individuals Filing for Bankruptcy
101A	Initial Statement About an Eviction Judgment Against You
101B	Statement About Payment of an Eviction Judgment Against You
104	List in Individual Chapter 11 Cases of Creditors Who Have the 20 Largest Unsecured Claims Against You and Are Not Insiders
105	Involuntary Petition Against an Individual
106Sum	Summary of Your Assets and Liabilities and Certain Statistical Information

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106A/B	Schedule A/B: Property
106C	Schedule C: The Property You Claim as Exempt
106D	Schedule D: Creditors Who Hold Claims Secured by Property
106E/F	Schedule E/F: Creditors Who Have Unsecured Claims
106G	Schedule G: Executory Contracts and Unexpired Leases
106H	Schedule H: Your Codebtors
106Dec	Declaration About an Individual Debtor's Schedules
107	Statement of Financial Affairs for Individuals Filing for Bankruptcy
112	Statement of Intention for Individuals Filing Under Chapter 7
119	Bankruptcy Petition Preparer's Notice, Declaration, and Signature
121	Statement About Your Social Security Numbers
318	Order of Discharge
423	Certification About a Financial Management Course
427	Cover Sheet for Reaffirmation Agreement

The advisory committee also requested approval to publish for comment an instruction booklet for individuals.

Although the normal effective date for official bankruptcy forms published in 2013 would be December 1, 2014, Judge Wedoff noted that the effective date for the restyled individual-debtor forms that will be initially published this summer will be delayed at least until December 1, 2015, in order to permit them to go into effect at the same time as the restyled forms for non-individual cases.

Action: The Standing Committee, by voice vote without objection, approved publication of the Individual Debtor Forms, along with an instruction booklet for individuals.

O. Proposed Action: Publication of Official Forms 17A, 17B, and 17C

The advisory committee proposed publishing Official Forms 17A, 17B, and 17C, in connection with the revision of Part VIII of the Bankruptcy Rules, which govern bankruptcy appeals. Form 17A would be an amended and renumbered notice-of-appeal form, and Forms 17B and 17C would be new.

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Proposed Form 17A would include in the Notice of Appeal a section for the appellant's optional statement of election to have the appeal heard by the district court rather than by the bankruptcy appellate panel. It would only be applicable in districts for which appeals to a bankruptcy appellate panel have been authorized.

New Form 17B – the Optional Appellee Statement of Election to Proceed in the District Court – would be the form that an appellee would file if it wanted the appeal to be heard by the district court and the appellant or another appellee did not make that election.

New Form 17C – Certificate of Compliance with Rule 8015(a)(7)(B) or 8016(d)(2) – would provide a means for a party to certify compliance with the provisions of the bankruptcy appellate rules that prescribe limitations on brief length based on number of words or lines of text (the "type-volume limitation"). It is based on Appellate Form 6, which implements the parallel provisions of Appellate Rule 32(a)(7)(B).

The advisory committee sought approval for publication this summer so that the proposed amendments would be scheduled to take effect December 1, 2014, the same effective date as is anticipated for the revised Part VIII rules.

Action: The Standing Committee, by voice vote without objection, approved publication of Official Forms 17A, 17B, and 17C.

REPORT OF THE ADMINISTRATIVE OFFICE

Benjamin Robinson gave a short report on recent activity by the Rules Committee Support Office (RCSO) to deal with the expected flood of public comments arising from the publication of the proposed amendments to the Civil Rules and Bankruptcy Rules in August 2013. He stated that 250 public comments had been received after the January 2013 meeting of the Standing Committee and were being held for filing during the comment period. These showed some earmarks of an organized letter writing campaign and more were expected.

After consulting with the Administrative Conference of the United States and others heavily involved in rule-making activities, Mr. Robinson worked with the webmasters and designers of regulations.gov – a website currently used by more than 30 departments and 150 agencies for their rulemaking activities. As a result of these efforts, on August 15, 2013, the RCSO will activate a website on regulations.gov that will allow the electronic filing and docketing of comments on proposed rules. This new system should add to the transparency and realtime accessibility of public comments to the committees, their reporters, and the general public.

CONCLUDING REMARKS

Judge Sutton confirmed with Judge Campbell that one of the public hearings on the proposed Civil Rules would take place on Thursday, January 9, 2014. Attendance by

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members of the Standing Committee is encouraged but not required. Mr. Robinson noted that the RCSO would attempt to make the hearing available in courthouses through video conference and otherwise by teleconference. Judge Sutton confirmed that the Standing Committee will meet on Friday, January 10. The Standing Committee dinner will be Thursday evening, January 9. Judge Sutton then thanked everyone for the productive meeting and declared it adjourned.

NEXT MEETING

The Standing Committee will hold its next meeting in Phoenix, Arizona on January 9 and 10, 2014.

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TAB 2A

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

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

DATE: December 16, 2013

TO: Judge Jeffrey S. Sutton, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Steven M. Colloton, Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules canceled its meeting scheduled for October 3-4, 2013, due to the lapse in appropriations. Thus, rather than report on actions taken by the Committee, I highlight in Part II of this Report some of the Committee's current projects on which it would welcome input from the Standing Committee.

The Committee's full study agenda is attached. The Committee's next meeting is scheduled for April 28-29, 2013.

II. Highlights of the Committee's current work

Parts II.A and II.B discuss two projects that address possible amendments to Rule 4's treatment of the deadlines for filing notices of appeal. Parts II.C and II.D discuss two projects concerning requirements for filings in the courts of appeals – one concerning length limits, and one concerning amicus filings in connection with petitions for panel rehearing and/or rehearing en banc.

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A. Rule 4(a)(4)

A lopsided circuit split has developed concerning whether a motion filed within a purported extension of a non-extendable deadline under Civil Rules 50, 52, or 59 counts as "timely" under Appellate Rule 4(a)(4), and the Committee is considering whether and how to amend the Rule to answer this question.

Caselaw in the wake of *Bowles v. Russell*, 551 U.S. 205 (2007), holds that statutory appeal deadlines are jurisdictional but that nonstatutory appeal deadlines are nonjurisdictional claim-processing rules. Rule 4(a)(4) provides that "[i]f a party timely files in the district court" certain post-judgment motions, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." The statutory provision setting the deadlines for civil appeals – 28 U.S.C. § 2107 – does not mention such tolling motions.

A number of circuits have ruled that the Civil Rules' deadlines for post-judgment motions are nonjurisdictional claim-processing rules. In this view, where a district court purports to extend the time for making such a motion, and no party objects to that extension, the district court has authority to decide the motion on its merits. But does the motion count as a "timely" one that, under Appellate Rule 4(a)(4), tolls the time to appeal? The Third, Seventh, Ninth, and Eleventh Circuits have issued post-*Bowles* rulings stating that such a motion does not toll the appeal time, and pre-*Bowles* caselaw from the Second Circuit accords with this position. However, the Sixth Circuit has held to the contrary.

There is substantial support among Committee members for clarifying the meaning of "timely" in Rule 4(a)(4). This provision tolls a jurisdictional appeal period, and its meaning should be clear and uniform across the circuits. The first and most basic question in considering such an amendment is whether to implement the majority approach (i.e., that postjudgment motions made outside the deadlines set by the Civil Rules are never "timely" under Rule 4(a)(4)) or the minority approach (i.e., that a motion made – without a timeliness objection – within a purported extension of the relevant deadline can qualify as "timely" under Rule 4(a)(4)).

An amendment adopting the majority approach would work the least change in current law. It would also make the answer explicit in the Rule's text, and thus more accessible to pro se litigants and less-experienced lawyers. Such an amendment arguably tracks the spirit of the Court's decision in *Bowles*, which overruled the Court's prior decisions concerning the "unique circumstances" doctrine "to the extent they purport to authorize an exception to a jurisdictional rule." Of the initial trio of Supreme Court cases establishing the unique circumstances doctrine, two involved erroneous district court assurances concerning the timeliness of postjudgment motions that were in fact untimely; thus, interpreting "timely" in Rule 4(a)(4) to require compliance with the relevant Civil Rules deadline seems to accord with the *Bowles* Court's overruling of the unique circumstances doctrine with respect to jurisdictional appeal deadlines. Drafting such an amendment would be

relatively straightforward, and some Committee members have noted that such an amendment would help to clarify and simplify the computation of appeal deadlines. Here is a sketch of a possible new Rule 4(a)(4)(C) that would implement the majority view:

> (C) **Timely Defined.** For purposes of Rule 4(a)(4)(A), a motion is timely if it is made within the time allowed by the Federal Rules of Civil Procedure. A motion made after that time is not rendered timely for purposes of Rule 4(a)(4)(A) by:
>
> > (i) a court order that exceeds the court's authority (if any) to extend the deadline for the motion under the Federal Rules of Civil Procedure, or
> >
> > (ii) another party's consent or failure to object.

A cross-reference to this new provision could be added in Rule 4(a)(4)(A) itself:

> (A) If a party ~~timely~~ files in the district court any of the following motions under the Federal Rules of Civil Procedure <u>and the motion is timely as defined in Rule 4(a)(4)(C)</u>, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

As noted above, an amendment adopting the minority approach could be seen as an effort to change one effect of the *Bowles* decision. Some Committee members have expressed hesitancy to attempt to countermand via a rule amendment a result that the Supreme Court adopted via decisional law. On the other hand, there have been past instances where a rule amendment was designed to change the result of a Supreme Court decision; one example is the 1993 amendment to Appellate Rule 3(c), which responded to *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988). And some Committee members have expressed support for an approach that would preserve appeal rights for litigants who delay filing a notice of appeal in reliance upon a court order purporting to extend a deadline for a postjudgment motion. Drafting such an amendment seems more challenging than drafting an amendment to implement the majority approach, in part because the amendment would need to make clear what sort of errors can be forgiven and what sort cannot. Here is a sketch of one possible alternative:

> **(C) Timely Defined.** For purposes of Rule 4(a)(4)(A), a motion is timely if it is:
>
> > (i) made within the time allowed by the relevant Federal Rule of Civil Procedure; or
> >
> > (ii) made within the time designated for making the motion by a court order, if the court order is entered within the time limit prescribed by this

Rule 4(a) for filing a notice of appeal.

B. Rule 4(c)'s inmate-filing provision

This project concerns Rule 4(c)(1)'s inmate-filing provision for notices of appeal. The Committee is considering amendments to the Rule that might address, *inter alia*, whether an inmate must prepay postage in order to benefit from the inmate-filing rule; whether and when an inmate must provide a declaration attesting to the circumstances of the filing; whether the inmate must use a legal mail system when one exists in the relevant institution; and whether a represented inmate can benefit from the inmate-filing rule.

Appellate Rule 4(c)(1) provides:

> If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

The original impetus for the Committee's study of this rule was Judge Diane Wood's suggestion that the Committee consider clarifying whether Rule 4(c)(1)'s inmate-filing rule requires prepayment of postage. The Seventh Circuit has held that when the institution has no legal mail system, the third sentence of Rule 4(c)(1) requires that postage be prepaid. *See United States v. Craig*, 368 F.3d 738, 740 (7th Cir. 2004). By contrast, the Seventh and Tenth Circuits have indicated that, if the institution has a legal mail system and the inmate uses that system, prepayment of postage is not required for timeliness. *See Ingram v. Jones*, 507 F.3d 640, 644 (7th Cir. 2007), and *United States v. Ceballos-Martinez*, 387 F.3d 1140, 1144 (10th Cir. 2004). The Committee has discussed the possibility of eliminating the postage-prepayment requirement, either for all inmates, or for inmate filers who certify that they are indigent, but has not reached a consensus in support of either of those approaches. Both Supreme Court Rule 29.2 and Rule 4(c) always have required inmates to prepay postage, and some Committee members are reluctant to eliminate that requirement. The Constitution requires the state or federal government to provide indigent inmates with stamps to mail certain legal documents to court, *Bounds v. Smith*, 430 U.S. 817, 824-25 (1977), so an inmate presumably would have a remedy if enforcement of the prepayment requirement interfered with the inmate's constitutional right of access to the courts.

The Committee also has discussed whether to amend the Rule to make clear that the declaration mentioned in the Rule suffices to show timely filing but is not required if timeliness can be shown by other evidence. Participants in the Committee's discussions have observed that it is

useful for the Rule to include a directive to the inmate to submit the declaration, because the declaration provides helpful information and preserves that information while recollections are fresh. But participants noted it may be better policy to allow an inmate to provide proof of timely deposit even if the inmate initially did not provide a declaration. One possible approach might be to permit the inmate to show good cause why the absence of the declaration should be excused. A "good cause" standard, however, could give rise to satellite litigation. Instead, one might add language that explicitly contemplates alternative means of showing timeliness: "Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746, or by a notarized statement, ~~either of which must~~ that sets forth the date of deposit and states that first-class postage has been prepaid. Timely filing also may be shown by other [proof] [evidence] that the notice was timely deposited with first-class postage prepaid."

Committee members also have discussed the possibility of promulgating an official form that would walk an inmate through statements that would suffice to establish eligibility for the inmate-filing rule. These Committee members recognize that there is a trend away from reliance on official forms, as evidenced by the published proposals to abrogate Civil Rule 84 and almost all of the Official Forms that accompany the Civil Rules. But the Civil Rules proposal seems consistent with an approach that retains a few select forms as an official part of the Rules, and that selects those forms for retention on the basis of their salience to and entwinement with a particular mechanism set by a Rule. Forms may be especially useful to pro se litigants. And assisting pro se litigants in turn assists the Clerk's Office that must process their filings. Use of an official form could reduce the time needed for a clerk or a judge to review the filing.

Participants in the Committee's discussions have questioned the usefulness of the current Rule's requirement that "[i]f an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule." The 1998 Committee Note provided this rationale for the requirement: "Some institutions have special internal mail systems for handling legal mail; such systems often record the date of deposit of mail by an inmate, the date of delivery of mail to an inmate, etc. The Advisory Committee amends the rule to require an inmate to use the system designed for legal mail, if there is one, in order to receive the benefit of this subdivision."

Use of a mail system that logs the date of the inmate's deposit is desirable. But the Rule itself does not actually refer to a mail system that logs the date; it instead refers to "a system designed for legal mail." Given that inmates are unlikely to consult the 1998 Committee Note when applying Rule 4(c)(1), it might be desirable to revise the Rule to provide a functional definition. For example, the Rule could state: "If the institution has a mail system that will log the date when an inmate deposits a piece of mail with the institution for mailing, the inmate must use that system to receive the benefit of this rule." Another alternative is to delete this sentence altogether – a change that would bring Rule 4(c)(1) into closer parallel with Supreme Court Rule 29.2.

C. Length limits

The Appellate Rules set length limits for briefs using a type-volume formula plus a safe harbor in the form of a (shorter) page limit. But the length limits for rehearing petitions and some other papers are set in pages, and the Committee is considering whether to propose changes in the Rules that set those length limits.

The Committee is focusing on two possible options. One would replace the page limits with a type-volume-plus-safe-harbor provision modeled on the Rules' length limits for briefs. Under that approach, the existing page limits in Rules 5, 21, 27, 35, and 40 would be shortened, and an alternative would be added in each rule that would approximate the existing page limits through the use of type-volume limits. The Committee would need to determine how much to shorten the page limits; the goal would be to provide a workable page limit for those who would find it difficult to compute a type-volume limit, without introducing an incentive for lawyers to circumvent the type-volume limits by using the page limits. One principal concern with this approach is that pro se filers and others who must file typewritten or handwritten pleadings would be allowed fewer pages than under the current rules.

The other option would retain the current page limits for papers prepared without the aid of a computer, but would set roughly equivalent type-volume limits for papers prepared on computers. The idea here is that attorneys who typically prepare pleadings by computer would have little incentive to shift to typewritten or handwritten pleadings in order to circumvent the type-volume limitation by using page limits. But an amendment that applies type-volume limitations to computer-aided papers would not disadvantage pro se filers. Research discovered at least one set of state rules that distinguishes between papers prepared by computer and papers prepared by other means. *See* Cal. Rules of Court Rule 8.204(c) ("(1) A brief produced on a computer must not exceed 14,000 words, including footnotes.… (2) A brief produced on a typewriter must not exceed 50 pages.").

The Committee's inquiries have also disclosed evidence suggesting that the 1998 amendments to Rule 32(a)(7), adopting a type-volume limitation of 14,000 words for a principal brief to replace the former 50-page limit, caused an increase in the permitted length of a brief. One participant observed that, prior to 1998, the D.C. Circuit had adopted a word limit and had chosen 12,500 words as the appropriate limit. The Committee's liaison to the Circuit Clerks researched this question further. Based on the average word count per page in 210 briefs filed by attorneys during the last four years in which old Rule 28(g) was in effect, the equivalent of 50 pages would have been 13,000 words. The clerk also used CM/ECF to research the word length of principal briefs filed in 2008 under the current type-volume limits. In a set of more than 1,000 briefs, only some 15 percent were more than 12,500 words. The Committee may consider whether the word count should be adjusted as part of the length-limit project.

D. Amicus briefs on rehearing

The second brief-related project concerns the possibility of addressing amicus filings in connection with petitions for panel rehearing and/or rehearing en banc. Matters that could be addressed by a proposed rule include length, timing, and other topics that Rule 29 addresses with respect to amicus filings at the merits-briefing stage.

A principal policy question is whether the federal rules should address this matter at all. Attorneys who file briefs in support of petitions for rehearing understandably seek clear guidance about the filing deadlines for, and permitted length of, such briefs. Most circuits have no local rule on the topic, and attorneys have reported frustration with their inability to obtain accurate guidance. From the perspective of the courts, however, the Committee has heard expressions of concern that a new appellate rule concerning amicus briefs at the rehearing stage may encourage a proliferation of filings at that stage. The Committee will consider these competing views in its evaluation.

A related question is whether any new rule on this subject should permit a circuit to opt out of any its provisions by local rule or by order in a case. The Committee is aware of the Rules Committees' general reluctance to encourage local rulemaking. But in this instance, there may well be reasons for local variation, given that rules concerning amicus filings need to mesh with the rules and practices concerning the parties' filings and with the court's internal practices in connection with rehearing petitions.

As to the particulars of a possible new rule, one issue is length. Appellate Rule 29(d) provides that amicus filings in connection with the merits briefing of an appeal are presumptively limited to half the permissible length of "a party's principal brief." Appellate Rules 35(b) and 40(b) presumptively limit a party's rehearing petition to 15 pages; thus, if one were to apply the same half-length approach to amicus filings in support of a rehearing petition, such filings would be limited to 7 ½ pages. The few existing local circuit provisions allow greater lengths, ranging roughly from 10 to 15 pages. The Committee's discussions may focus on whether to follow the half-length approach (which, rounding up, would produce a limit of 8 pages), or whether to choose a length limit within the 10- to 15-page range. The Committee may also discuss whether to specify length limits for amicus filings in opposition to a rehearing petition.

Another question is timing. Appellate Rule 29(e) provides that an amicus must file its brief and motion "no later than 7 days after the principal brief of the party being supported is filed." The Appellate Rules set a presumptive deadline (in most cases) of 14 days (after entry of judgment) for a party to file a petition for hearing and/or rehearing en banc. For amicus filings at the rehearing stage, questions arise whether the deadline should be the same as the party's deadline or a certain number of days later than the party's deadline. Using the later deadline would track Rule 29's approach and also would accord with three of the four local circuit rules on point. Some participants have suggested that amicus briefs will be more useful and less redundant if the amici have an

opportunity to review the party's brief before filing a brief in support. On the other hand, courts of appeals may dislike any rule that extends the time for resolving rehearing petitions, and a later deadline for amicus briefs could do so. *Cf. Fry v. Exelon Corp. Cash Balance Pension Plan*, 576 F.3d 723, 725 (7th Cir. 2009) (Easterbrook, Chief Judge, in chambers). If the Committee proceeds in this area, then it also would have to consider whether to address amicus filings in support of the party opposing rehearing and amicus filings that support neither party.

The Committee may also consider whether a proposed rule should address other questions concerning amicus filings in connection with rehearing. See for example the following provisions concerning merits briefs: Rules 29(a) (requirement of court leave or party consent, plus exceptions); 29(b) (content of motion for leave to file); 29(c) (requirements of disclosure and form); 29(g) (oral argument). Should a new rule on amicus filings incorporate, as default provisions, some or all of Rules 29(a) – (c)? The Committee might, for example, consider subjecting later amicus filings to the disclosure requirements set by Rule 29(c). It may be less urgent to address matters of form than matters of disclosure; on the other hand, the application of Rule 32's form requirements to amicus filings in connection with rehearing could be relatively uncontroversial. A national rule could also set default rules addressing whether an amicus must obtain court permission in order to file a brief. One option would be to apply current Rule 29(a), thus allowing certain governmental amici to file without party consent or court leave and allowing any amicus to file without court leave if the parties consent. Another option would be to require all amici to obtain court leave in order to file a brief in connection with a rehearing petition.

The Committee would also need to consider where to place any such provisions. Placing the new provisions in Rule 29 would allow would-be amici to find all of the amicus-specific provisions in one rule, although some renumbering would be required. An alternative would be to add the new provisions to Rules 35 and 40, though that could cause some redundancy.

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Advisory Committee on Appellate Rules
Table of Agenda Items — December 2013

FRAP Item	Proposal	Source	Current Status
07-AP-E	Consider possible FRAP amendments in response to Bowles v. Russell (2007).	Mark Levy, Esq.	Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 04/11 Discussed and retained on agenda 04/13
07-AP-I	Consider amending FRAP 4(c)(1) to clarify the effect of failure to prepay first-class postage.	Hon. Diane Wood	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/13
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08
08-AP-C	Abolish FRAP 26(c)'s three-day rule.	Hon. Frank H. Easterbrook	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/13
08-AP-H	Consider issues of "manufactured finality" and appealability	Mark Levy, Esq.	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 10/10 Discussed and retained on agenda 04/11 Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13
08-AP-J	Consider FRAP implications of conflict screening	Committee on Codes of Conduct	Discussed and retained on agenda 11/08

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FRAP Item	Proposal	Source	Current Status
08-AP-L	Amend FRAP 6(b)(2)(A)(ii) to remove ambiguity	Reporter	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09 Discussed and retained on agenda 10/10 Discussed jointly with Bankruptcy Rules Committee and retained on agenda 04/11 Discussed and retained on agenda 10/11 Draft approved 04/12 for submission to Standing Committee Approved for publication by Standing Committee 06/12 Published for comment 08/12 Draft approved 04/13 for submission to Standing Committee Approved by Standing Committee 06/13 Approved by Judicial Conference 09/13
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09
09-AP-A	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	ABA Council of Appellate Lawyers	Discussed and retained on agenda 04/09
09-AP-B	Amend FRAP 1(b) to include federally recognized Indian tribes within the definition of "state"	Daniel I.S.J. Rey-Bear, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed and retained on agenda 10/11 Discussed and retained on agenda 04/12; Committee will revisit in 2017

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FRAP Item	Proposal	Source	Current Status
09-AP-C	Consider possible FRAP amendments in the light of project to revise Part VIII of the Bankruptcy Rules	Bankruptcy Rules Committee	Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed jointly with Bankruptcy Rules Committee and retained on agenda 04/11 Discussed and retained on agenda 10/11 Draft approved 04/12 for submission to Standing Committee Approved for publication by Standing Committee 06/12 Published for comment 08/12 Draft approved 04/13 for submission to Standing Committee Approved by Standing Committee 06/13 Approved by Judicial Conference 09/13
09-AP-D	Consider implications of Mohawk Industries, Inc. v. Carpenter	John Kester, Esq.	Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed and retained on agenda 04/13
11-AP-C	Amend FRAP 3(d)(1) to take account of electronic filing	Harvey D. Ellis, Jr., Esq.	Discussed and retained on agenda 04/13
11-AP-D	Consider changes to FRAP in light of CM/ECF	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/11 Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13
11-AP-F	Consider amendment authorizing discretionary interlocutory appeals from attorney-client privilege rulings	Amy M. Smith, Esq.	Discussed and retained on agenda 04/13
12-AP-B	Consider amending FRAP Form 4's directive concerning institutional-account statements for IFP applicants	Peter Goldberger, Esq., on behalf of the National Association of Criminal Defense Lawyers (NACDL)	Discussed and retained on agenda 09/12
12-AP-D	Consider the treatment of appeal bonds under Civil Rule 62 and Appellate Rule 8	Kevin C. Newsom, Esq.	Discussed and retained on agenda 09/12
12-AP-E	Consider treatment of length limits for petitions for rehearing en banc under Rule 35	Professor Neal K. Katyal	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13

FRAP Item	Proposal	Source	Current Status
12-AP-F	Consider amending FRAP 42 to address class action appeals	Professors Brian T. Fitzpatrick and Brian Wolfman and Dean Alan B. Morrison	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13
13-AP-B	Amend FRAP to address permissible length and timing of an amicus brief in support of a petition for rehearing and/or rehearing en banc	Roy T. Englert, Jr., Esq.	Discussed and retained on agenda 04/13
13-AP-C	Consider possible rules for expediting proceedings under Hague Convention on the Civil Aspects of International Child Abduction	Hon. Steven M. Colloton	Discussed by Appellate Rules Committee 04/13 Discussed by Standing Committee 06/13
13-AP-D	Revise Rule 6(b)(2)(B)(iii)'s list of contents of record on appeal, and revise Rule 3(d)(1) in light of electronic filing	Hon. S. Martin Teel, Jr.	Awaiting initial discussion
13-AP-E	Consider treatment of audiorecordings of appellate arguments	Appellate Rules Committee	Awaiting initial discussion
13-AP-F	Consider items included for purposes of length limit in Rule 35(b)(2)	Gregory G. Garre, Esq.	Awaiting initial discussion
13-AP-G	Consider clarifying which items can be excluded when calculating length under Rule 28.1(e)	Appellate Rules Committee	Awaiting initial discussion
13-AP-H	Consider possible amendments to FRAP 41 in light of Bell v. Thompson, 545 U.S. 794 (2005), and Ryan v. Schad, 133 S. Ct. 2548 (2013)	Hon. Steven M. Colloton	Awaiting initial discussion

TAB 3

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TAB 3A

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

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

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

FROM: Honorable Eugene R. Wedoff, Chair
Advisory Committee on Bankruptcy Rules

DATE: December 12, 2013

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on September 24 and 25, 2013, at the University of St. Thomas School of Law in Minneapolis, Minnesota. The draft minutes of that meeting are set out in Appendix C to this report.

At the meeting the Advisory Committee discussed a number of suggestions for rule and form amendments that were submitted by bankruptcy judges, members of the bar, and court personnel. It also discussed several ongoing projects.

The Committee is presenting one action item at this time—a technical, conforming amendment to Rule 1007(a). Part II of this report discusses that amendment. In addition, the report discusses some rule and form amendments for which final approval or publication will be sought at the June 2014 Standing Committee meeting. Part III provides the Standing Committee

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with an overview of the comments that have been received to date on the proposed official form for chapter 13 plans and implementing rule amendments, which were published in August. Part IV reports on the limited reaction so far to the published amendment to Rule 5005 regarding electronic signatures. Finally, Part V provides a preview of the restyled bankruptcy forms for non-individual debtors—the final installment of the Forms Modernization Project.

II. Action Item—Rule 1007(a)(1) and (2) for Final Approval Without Publication

Subdivisions (a)(1) and (a)(2) of Rule 1007 require the filing at the outset of a case of the names and addresses of all entities included on "Schedules D, E, F, G, and H." The restyled schedules for individual cases that were published for comment in August 2013 use slightly different designations. Under the new numbering and lettering protocol of the proposed forms, the schedules referred to in Rule 1007(a)(1) and (a)(2) will become Official Forms 106 D, E/F, G, and H—reflecting a combination of what had been separate Schedules E and F into a single Schedule E/F. In order to make Rule 1007(a) consistent with the new form designations, the Advisory Committee voted unanimously at the fall meeting to propose a conforming amendment to subdivision (a)(1) and (a)(2) of that rule. The text of the proposed amendment is included in Appendix A.

The schedules and other individual forms published in 2013 (other than the means test forms) are proposed to take effect on December 1, 2015—a year later than normal—in order to coincide with the effective date of the restyled non-individual forms. That timeline means that if the Standing Committee approves without publication the conforming amendments to Rule 1007(a)(1) and (a)(2) at this or the June 2014 meeting, the rule amendments will be able to go into effect at the same time as the forms.

The Advisory Committee recommends that conforming amendments to Rule 1007(a)(1) and (a)(2), which change references to Schedules E and F to Schedule E/F, be approved and forwarded to the Judicial Conference.

III. Comments on the Proposed Chapter 13 Plan Form and Related Rule Amendments

Over the past two years, the Advisory Committee undertook to create an official form for plans in chapter 13 cases. Acting on the advice of the Working Group tasked with leading the project, the Advisory Committee has proposed a draft form together with related amendments to nine of the Bankruptcy Rules (Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009). If adopted, the official form would supplant a patchwork of local forms in chapter 13 cases. The Standing Committee approved publication of the form and accompanying rule amendments at its June 2013 meeting.

As anticipated, the proposed form and rule amendments have drawn a significant number of comments. Approximately two dozen public comments have been submitted, including an omnibus submission from the National Association of Chapter Thirteen Trustees that combines

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comments from individual chapter 13 trustees around the country. The great majority of comments relate to the proposed official form rather than the rule amendments. In the main, the comments submitted thus far are detailed and constructive. Only a small number oppose adoption of the form or amended rules.

One issue raised in the comments concerns the provision of multiple options in the plan form when one or more of those options may conflict with the prevailing law in a particular judicial district. This feature of the form reflects the divergence of interpretations about aspects of chapter 13 upon which the Advisory Committee does not take a position. Several comments have suggested that the Advisory Committee should add language clarifying that the provision of an option on the form does not necessarily mean the option is available under the law of the debtor's district. The Working Group will consider all of the suggestions set out in the comments and will make recommendations for any changes in the form and rules at the Advisory Committee's spring 2014 meeting. At that meeting, the Advisory Committee will determine the extent to which it will recommend final approval of the form and rules or propose changes that would require republication.

IV. Comments on the Proposed Amendments to Rule 5005(a)

At its June 2013 meeting, the Standing Committee approved for publication amendments to Rule 5005 (Filing and Transmittal of Papers). The amendments would permit the use of electronic signatures of debtors and other individuals who are not registered users of CM/ECF without requiring the retention of the original document bearing a handwritten signature. This national rule would supersede the current array of local rules, many of which require the registered user (usually an attorney) who is filing documents electronically to preserve the originals of all filed documents bearing the signature of a debtor or other non-registered user for a specified period of time. Under the proposed amendments to Rule 5005, new subdivision (a)(3) would allow scanned signatures of non-registered users to be treated the same as handwritten signatures—without requiring the retention of the hand-signed documents—if the scanned signature page bearing the individual's original signature is part of a single filing.

On the recommendation of the Standing Committee's Subcommittee on CM/ECF, the Standing Committee voted to include in the published amendments alternative means of providing assurance that a scanned signature was actually part of the original document filed electronically. Under one option, the act of filing by a registered person would be deemed the person's certification that the scanned signature was part of the original document. The other option would require a certification by a notary public. The August publication materials called attention to these options and specifically invited comment on them.

So far the publication of the Rule 5005 amendment has produced little response. Only two comments have been submitted on it to date. Both were submitted by bankruptcy attorneys. One expressed confusion about when original documents must be retained under the proposed rule, and the other erroneously read the proposed rule as requiring the entire document, not just

the signature page, to be scanned—a requirement that would require much more storage space on the court's computer system.

Because the fall meeting of the Advisory Committee on Evidence Rules was canceled due to the government shutdown, the planned symposium on electronic evidence, which would have included a panel on electronic signatures, did not take place.

V. Preview of the Revised Official Forms for Non-Individual Debtors

As the Advisory Committee has previously reported, it is engaged in a multi-year project to revise many of the official bankruptcy forms. The Bankruptcy Official Forms Modernization Project ("FMP") began its work in 2008. The project is being carried out by an ad hoc group composed of members of the Advisory Committee's Subcommittee on Forms, working in liaison with representatives of other relevant Judicial Conference committees. The dual goals of the FMP are to improve the official bankruptcy forms and to improve the interface between the forms and available technology.

The Advisory Committee decided to implement the modernized forms in stages in order to allow for fuller testing of the technological features and to facilitate a smoother transition. A small number of the modernized forms became effective on December 1, 2013; others will become effective December 1, 2014; and the majority of the forms are expected to become effective on December 1, 2015. At its fall 2013 meeting, the Advisory Committee reviewed drafts of the revised forms for non-individual debtors. The FMP is continuing to revise them in response to comments provided by members of the Advisory Committee and others whose input was sought. The FMP anticipates that the Advisory Committee will vote to recommend the non-individual forms for publication at its spring meeting and will bring them to the Standing Committee in June.

The FMP's decision to create separate forms for individual and non-individual debtors rested on two considerations. First, the information that needs to be provided by the two groups of debtors differs somewhat. Using separate forms allows the elimination of unnecessary requests for information. Second, the level of sophistication of the persons completing the forms also differs between the two groups. Individual forms are often completed by pro se debtors with no legal training, and in all individual cases the forms need to be understood by the debtor, who is unlikely to be trained in either law or accounting, but who is required to declare that the information provided is true and correct. Non-individual debtors, on the other hand, must always be represented by counsel, and the person responsible for signing the petition on behalf of the debtor typically is knowledgeable about business and perhaps also legal matters.

These differences are reflected in the design of the two proposed petition forms, which are included in Appendix B to this report. Official Form 201, the petition for non-individual debtors, contains more open-ended questions than does Form 101, the petition for individuals, which contains lists of potential answers for the debtor to check. The non-individual petition

also includes fewer instructions, definitions, and illustrations than the individual petition. While the individual petition addresses the debtor as "you" and includes an extra column for information to be provided about a spouse when a joint petition is filed, the non-individual petition is addressed to a single debtor, which the form refers to in the third person. The non-individual petition is the shorter of the two because it does not need to include requests for information about fee waivers or payment in installments or about spouses, evictions, or credit counseling. Similar differences are reflected throughout the two sets of forms. In addition, non-individual forms that seek financial information are organized to parallel the manner in which businesses commonly keep their financial records.

Despite these differences, the individual and non-individual debtor forms have a similar look and format. They are also both designed to take advantage of the enhanced technology that will become available in the next generation of CM/ECF. The major change in Next Gen affecting bankruptcy forms will be the ability to store all forms information as data so that authorized users can produce customized reports containing the information they want from the forms, displayed in whatever format they choose. Once the judiciary implements Next Gen, the initial authorized users— judges and clerks' staff—will be able to use forms data to generate customized reports. The provision of similar access to non-judiciary users, however, will depend on the future development of pertinent policies of the Judicial Conference.

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APPENDIX A

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Appendix A

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

For Final Approval and Transmittal to the Judicial Conference

Rule 1007. Lists, Schedules, Statements, and Other Documents; Time Limits

(a) CORPORATE OWNERSHIP STATEMENT, LIST OF CREDITORS AND EQUITY SECURITY HOLDERS, AND OTHER LISTS.

(1) *Voluntary Case*. In a voluntary case, the debtor shall file with the petition a list containing the name and address of each entity included or to be included on Schedules D, ~~E, F~~ E/F, G, and H as prescribed by the Official Forms. If the debtor is a corporation, other than a governmental unit, the debtor shall file with the petition a corporate ownership statement containing the information described in Rule 7007.1. The debtor shall file a supplemental statement promptly upon any change in circumstances that renders the corporate ownership statement inaccurate.

(2) *Involuntary Case*. In an involuntary case, the debtor shall file, within seven days after entry of the order for relief, a list containing the name and address of each entity included or to be included on Schedules D, ~~E, F~~ E/F, G, and H as prescribed by the Official Forms.

* * * * *

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

12b-008476

COMMITTEE NOTE

In subdivisions (a)(1) and (a)(2), the references to Schedules are amended to reflect the new designations adopted as part of the Forms Modernization Project.

Because this amendment is made to conform to a change in the designation of the Official Forms that the rule refers to and is technical in nature, final approval is sought without publication.

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APPENDIX B

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APPENDIX B.1

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Fill in this information to identify your case:

United States Bankruptcy Court for the:

_____ District of _____
(State)

Case number (*If known*): _____ Chapter you are filing under:

q Chapter 7
q Chapter 11
q Chapter 12
q Chapter 13

q Check if this is an amended filing

Official Form 101

Voluntary Petition for Individuals Filing for Bankruptcy

12/15

The bankruptcy forms use *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, these forms use *you* to ask for information from both debtors. For example, if a form asks, "Do you own a car," the answer would be *yes* if either debtor owns a car. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Identify Yourself

	About Debtor 1:	About Debtor 2 (Spouse Only in a Joint Case):
1. Your full name Write the name that is on your government-issued picture identification (for example, your driver's license or passport). Bring your picture identification to your meeting with the trustee.	_____ First name _____ Middle name _____ Last name _____ Suffix (Sr., Jr., II, III)	_____ First name _____ Middle name _____ Last name _____ Suffix (Sr., Jr., II, III)
2. All other names you have used in the last 8 years Include your married or maiden names.	_____ First name _____ Middle name _____ Last name _____ First name _____ Middle name _____ Last name	_____ First name _____ Middle name _____ Last name _____ First name _____ Middle name _____ Last name
3. Only the last 4 digits of your Social Security number or federal Individual Taxpayer Identification number (ITIN)	xxx – xx – ____ ____ ____ ____ OR **9**xx – xx – ____ ____ ____ ____	xxx – xx – ____ ____ ____ ____ OR **9**xx – xx – ____ ____ ____ ____

	About Debtor 1:	About Debtor 2 (Spouse Only in a Joint Case):
4. Any business names and Employer Identification Numbers (EIN) you have used in the last 8 years Include trade names and *doing business as* names	q I have not used any business names or EINs. _____ Business name _____ Business name ___ ___ – ___ ___ ___ ___ ___ ___ ___ EIN ___ ___ – ___ ___ ___ ___ ___ ___ ___ EIN	q I have not used any business names or EINs. _____ Business name _____ Business name ___ ___ – ___ ___ ___ ___ ___ ___ ___ EIN ___ ___ – ___ ___ ___ ___ ___ ___ ___ EIN
5. Where you live	_____ Number Street _____ _____ City State ZIP Code _____ County **If your mailing address is different from the one above, fill it in here.** Note that the court will send any notices to you at this mailing address. _____ Number Street _____ P.O. Box _____ City State ZIP Code	**If Debtor 2 lives at a different address:** _____ Number Street _____ _____ City State ZIP Code _____ County **If Debtor 2's mailing address is different from yours, fill it in here.** Note that the court will send any notices to this mailing address. _____ Number Street _____ P.O. Box _____ City State ZIP Code
6. Why you are choosing *this district* to file for bankruptcy	*Check one:* q Over the last 180 days before filing this bankruptcy filing package, I have lived in this district longer than in any other district. q I have another reason. Explain. (See 28 U.S.C. § 1408.) _____ _____ _____ _____	*Check one:* q Over the last 180 days before filing this bankruptcy filing package, I have lived in this district longer than in any other district. q I have another reason. Explain. (See 28 U.S.C. § 1408.) _____ _____ _____ _____

Part 2: Tell the Court About Your Bankruptcy Case

7. The chapter of the Bankruptcy Code you are choosing to file under

Check one. (For a brief description of each, see *Notice Required by 11 U.S.C. § 342(b) for Individuals Filing for Bankruptcy* (Form B2010)). Also, go to the top of page 1 and check the appropriate box.

q Chapter 7

q Chapter 11

q Chapter 12

q Chapter 13

8. How you will pay the fee

If you file under Chapter …	Your total fee is…
7	$306
11	$1,213
12	$246
13	$281

q **I will pay the entire fee when I file my petition**. Please check with the clerk's office in your local court for more details about how you may pay. Typically, if you are paying the fee yourself, you may pay with cash, cashier's check, or money order. If your attorney is submitting your payment on your behalf, your attorney may pay with a credit card or check with a pre-printed address.

q **I need to pay the fee in installments**. If you choose this option, sign and attach the *Application for Individuals to Pay Your Filing Fee in Installments* (Official Form 103A).

q **I request that my fee be waived** (You may request this option only if you are filing for Chapter 7. By law, a judge may waive your fee only if your income is less than 150% of the official poverty line that applies to your family size and you are unable to pay the fee in installments). If you choose this option, you must fill out the *Application to Have the Chapter 7 Filing Fee Waived* (Official Form 103B) and file it with your bankruptcy filing package.

9. Have you filed for bankruptcy within the last 8 years?

q No

q Yes. District _____ When _____ Case number _____
MM / DD / YYYY

District _____ When _____ Case number _____
MM / DD / YYYY

District _____ When _____ Case number _____
MM / DD / YYYY

10. Are any bankruptcy cases pending or being filed by a spouse who is not filing this case with you, or by a business partner, or by an affiliate?

q No

q Yes. Debtor _____ Relationship to you _____

District _____ When _____ Case number, if known_____
MM / DD / YYYY

Debtor _____ Relationship to you _____

District _____ When _____ Case number, if known_____
MM / DD / YYYY

11. Do you rent your residence?

q No. Go to line 12.

q Yes. Has your landlord obtained an eviction judgment against you and do you want to stay in your residence?

q No. Go to line 12.

q Yes. Fill out *Initial Statement About an Eviction Judgment Against You* (Form 101A) and file it with this bankruptcy petition.

Part 3: Report About Any Businesses You Own as a Sole Proprietor

12. Are you a sole proprietor of any full- or part-time business?

A sole proprietorship is a business you own as an individual, rather than a separate legal entity such as a corporation, partnership, or LLC.

If you have more than one sole proprietorship, use a separate sheet and attach it to this package.

q No. Go to Part 4.

q Yes. Name and location of business

_____
Name of business, if any

_____
Number Street

_____

_____ _____ _____
City State ZIP Code

Check the appropriate box to describe your business:

q Health Care Business (as defined in 11 U.S.C. § 101(27A))

q Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))

q Stockbroker (as defined in 11 U.S.C. § 101(53A))

q Commodity Broker (as defined in 11 U.S.C. § 101(6))

q None of the above

13. Are you filing under Chapter 11 of the Bankruptcy Code and are you a *small business debtor*?

For a definition of *small business debtor*, see 11 U.S.C. § 101(51D).

If you are filing under Chapter 11, the court must know whether you are a small business debtor so that it can set appropriate deadlines.

q No. I am not filing under Chapter 11.

q No. I am filing under Chapter 11, but I am NOT a small business debtor according to the definition in the Bankruptcy Code.

q Yes. I am filing under Chapter 11 and I am a small business debtor according to the definition in the Bankruptcy Code.

Part 4: Report if You Own or Have Any Hazardous Property or Any Property That Needs Immediate Attention

14. Do you own or have any property that poses or is alleged to pose a threat of imminent and identifiable hazard to public health or safety? Or do you own any property that needs immediate attention?

For example, do you own perishable goods or livestock that must be fed?

q No

q Yes. What is the hazard? _____

_____

If immediate attention is needed, why is it needed? _____

_____

Where is the property? _____
Number Street

_____

_____ _____ _____
City State ZIP Code

Part 5: Explain Your Efforts to Receive a Briefing About Credit Counseling

15. Tell the court whether you have received briefing about credit counseling.

The law requires that you receive a briefing about credit counseling before you file for bankruptcy. You must truthfully check one of the following choices. If you cannot do so, you are not eligible to file.

If you file anyway, the court can dismiss your case, you will lose whatever filing fee you paid, and your creditors can begin collection activities again.

About Debtor 1:

You must check one:

q **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.**

Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.

q **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.**

Within 14 days after you file this bankruptcy petition, you MUST file a copy of the certificate and payment plan, if any.

q **I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and exigent circumstances merit a 30-day temporary waiver of the requirement.**

To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the briefing, why you were unable to obtain it before you filed for bankruptcy, and what exigent circumstances required you to file this case.

Your case may be dismissed if the court is dissatisfied with your reasons for not receiving a briefing before you file this bankruptcy filing package.

If the court is satisfied with your reasons, you must still receive a briefing within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed.

Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.

q **I am not required to receive a briefing about credit counseling because of:**

- q **Incapacity.** I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.
- q **Disability.** My physical disability causes me to be unable to participate in a briefing in person, by phone, or through the internet, even after I reasonably tried to do so.
- q **Active duty.** I am currently on active military duty in a military combat zone.

If you believe you are not required to receive a briefing about credit counseling, you must file a motion for waiver of credit counseling with the court.

About Debtor 2 (Spouse Only in a Joint Case):

You must check one:

q **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.**

Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.

q **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.**

Within 14 days after you file this bankruptcy petition, you MUST file a copy of the certificate and payment plan, if any.

q **I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and exigent circumstances merit a 30-day temporary waiver of the requirement.**

To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the briefing, why you were unable to obtain it before you filed for bankruptcy, and what exigent circumstances required you to file this case.

Your case may be dismissed if the court is dissatisfied with your reasons for not receiving a briefing before you file this bankruptcy filing package.

If the court is satisfied with your reasons, you must still receive a briefing within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed.

Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.

q **I am not required to receive a briefing about credit counseling because of:**

- q **Incapacity.** I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.
- q **Disability.** My physical disability causes me to be unable to participate in a briefing in person, by phone, or through the internet, even after I reasonably tried to do so.
- q **Active duty.** I am currently on active military duty in a military combat zone.

If you believe you are not required to receive a briefing about credit counseling, you must file a motion for waiver of credit counseling with the court.

Part 6: Answer These Questions for Reporting Purposes

16. What kind of debts do you have?

16a. **Are your debts primarily consumer debts?** *Consumer debts* are defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose."

q No. Go to line 16b.
q Yes. Go to line 17.

16b. **Are your debts primarily business debts?** *Business debts* are debts that you incurred to obtain money for a business or investment or through the operation of the business or investment.

q No. Go to line 16c.
q Yes. Go to line 17.

16c. State the type of debts you owe that are not consumer debts or business debts.

_____

17. Are you filing under Chapter 7?

Do you estimate that after any exempt property is excluded and administrative expenses are paid that funds will be available for distribution to unsecured creditors?

q No. I am not filing under Chapter 7. Go to line 18.

q Yes. I am filing under Chapter 7. Do you estimate that after any exempt property is excluded and administrative expenses are paid that funds will be available to distribute to unsecured creditors?

q No
q Yes

18. How many creditors do you estimate that you owe?

q 1-49
q 50-99
q 100-199
q 200-999
q 1,000-5,000
q 5,001-10,000
q 10,001-25,000
q 25,001-50,000
q 50,001-100,000
q More than 100,000

19. How much do you estimate your assets to be worth?

q $0-$50,000
q $50,001-$100,000
q $100,001-$500,000
q $500,001-$1 million
q $1,000,001-$10 million
q $10,000,001-$50 million
q $50,000,001-$100 million
q $100,000,001-$500 million
q $500,000,001-$1 billion
q $1,000,000,001-$10 billion
q $10,000,000,001-$50 billion
q More than $50 billion

20. How much do you estimate your liabilities to be?

q $0-$50,000
q $50,001-$100,000
q $100,001-$500,000
q $500,001-$1 million
q $1,000,001-$10 million
q $10,000,001-$50 million
q $50,000,001-$100 million
q $100,000,001-$500 million
q $500,000,001-$1 billion
q $1,000,000,001-$10 billion
q $10,000,000,001-$50 billion
q More than $50 billion

Part 7: Sign Below

For you

I declare under penalty of perjury that the information provided in this petition is true and correct. I understand that if I make a false statement, I could be fined up to $250,000 or imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

If I have chosen to file under Chapter 7, I am aware that I may proceed under Chapter 7, 11, 12, or 13 of title 11, United States Code, understand the relief available under each such chapter, and choose to proceed under Chapter 7.

If no attorney represents me and I did not pay or agree to pay someone who is not an attorney to help me fill out this document, I have obtained and read the notice required by 11 U.S.C. § 342(b).

I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

û_____ û_____
Signature of Debtor 1 Signature of Debtor 2

Date _____ Date _____
MM / DD / YYYY MM / DD / YYYY

For your attorney, if you are represented by one

If you are not represented by an attorney, you do not need to file this page.

I, the attorney for the debtor(s) named in this petition, declare that I have informed the debtor(s) about eligibility to proceed under Chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each chapter for which the person is eligible. I also certify that I have delivered to the debtor(s) the notice required by 11 U.S.C. § 342(b) and, in a case in which § 707(b)(4)(D) applies, certify that I have no knowledge after an inquiry that the information in the schedules filed with the petition is incorrect.

û_____ Date _____
Signature of Attorney for Debtor MM / DD / YYYY

_____
Printed name

_____
Firm name

_____
Number Street

_____

_____ _____ _____
City State ZIP Code

Contact phone _____ Email address _____

_____ _____
Bar number State

For you if you are filing this bankruptcy filing package without an attorney

If you are represented by an attorney, you do not need to file this page.

The law allows you, as an individual, to represent yourself in bankruptcy court, but **you should understand that many people find it extremely difficult to represent themselves successfully. Because bankruptcy has long-term financial and legal consequences, you are strongly urged to hire a qualified attorney.**

To be successful, you must correctly file and handle your bankruptcy case. The rules are very technical, and a misstep or inaction may affect your rights. For example, your case may be dismissed because you did not file a required document, pay a fee on time, attend a meeting or hearing, or cooperate with the court, case trustee, U.S. trustee, bankruptcy administrator, or audit firm if your case is selected for audit. If that happens, you could lose your right to file another case, or you may lose protections, including the benefit of the automatic stay.

You must list all your property and debts in the schedules that you are required to file with the court. Even if you plan to pay a particular debt outside of your bankruptcy, you must list that debt in your schedules. If you do not list a debt, the debt may not be discharged. If you do not list property or properly claim it as exempt, you may not be able to keep the property. The judge can also deny you a discharge of all your debts if you do something dishonest in your bankruptcy case, such as destroying or hiding property, falsifying records, or lying. Individual bankruptcy cases are randomly audited to determine if debtors have been accurate, truthful, and complete. **Bankruptcy fraud is a serious crime; you could be fined and imprisoned.**

If you decide to file without an attorney, the court expects you to follow the rules as if you had hired an attorney. The court will not treat you differently because you are filing for yourself. To be successful, you must be familiar with the United States Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and the local rules of the court in which your case is filed. You must also be familiar with any state exemption laws that apply.

Are you aware that filing for bankruptcy is a serious action with long-term financial and legal consequences?

q No
q Yes

Are you aware that bankruptcy fraud is a serious crime and that if your bankruptcy filing package is inaccurate or incomplete, you could be fined or imprisoned?

q No
q Yes

Did you pay or agree to pay someone who is not an attorney to help you fill out this bankruptcy filing package?

q No
q Yes. Name of Person_____.
Attach *Bankruptcy Petition Preparer's Notice, Declaration, and Signature* (Official Form 119).

By signing here, I acknowledge that I understand the risks involved in filing without an attorney. I have read and understood this notice, and I am aware that filing a bankruptcy case without an attorney may cause me to lose my rights or property if I do not properly handle the case.

û _____	û _____
Signature of Debtor 1	Signature of Debtor 2
Date _____ MM / DD / YYYY	Date _____ MM / DD / YYYY
Contact phone _____	Contact phone _____
Cell phone _____	Cell phone _____
Email address _____	Email address _____

APPENDIX B.2

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125-008491

Fill in this information to identify the case:

United States Bankruptcy Court for the:

_____ District of _____
(State)

Case number (*If known*): _____ Chapter _____

q Check if this is an amended filing

Official Form 201

Voluntary Petition for Non-Individuals Filing for Bankruptcy

12/15

If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write the debtor's name and the case number (if known). For more information, a separate document, *Instructions for Bankruptcy Forms for Non-Individuals,* is available.

1. Debtor's name _____

2. All other names debtor used in the last 8 years

Include any assumed names, trade names and *doing business as* names

_____
_____
_____
_____
_____

3. Debtor's federal Employer Identification Number (EIN)

__ __ – __ __ __ __ __ __ __

4. Debtor's address

Principal place of business

_____
Number Street

_____

_____
City State ZIP Code

_____
County

Mailing address, if different from principal place of business

_____
Number Street

_____
P.O. Box

_____
City State ZIP Code

Location of principal assets, if different from principal place of business

_____
Number Street

_____

_____
City State ZIP Code

5. Debtor's website (URL) _____

6. Type of debtor

q Corporation (including Limited Liability Company (LLC) and Limited Liability Partnership (LLP))
q Partnership (excluding LLP)
q Other. Specify: _____

7. Describe debtor's business

A. *Check one:*

- q Health Care Business (as defined in 11 U.S.C. § 101(27A))
- q Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))
- q Railroad (as defined in 11 U.S.C. §101(44))
- q Stockbroker (as defined in 11 U.S.C. § 101(53A))
- q Commodity Broker (as defined in 11 U.S.C. § 101(6))
- q Clearing Bank (as defined in 11 U.S.C. §781(3))
- q None of the above

B. *Check all that apply:*

- q Tax-exempt entity (as described in 26 U.S.C. §501)
- q Investment company, including hedge fund or pooled investment vehicle (as defined in 15 U.S.C. § 80a-3)
- q Investment advisor (as defined in 15 U.S.C. § 80b-2(a)(11))

C. NAICS (North American Industry Classification System) 6-digit code that best describes debtor. See www.naics.com/search.htm.

___ ___ ___ ___ ___ ___

8. Under which chapter of the Bankruptcy Code is the debtor filing?

Check one:

- q Chapter 7
- q Chapter 9
- q Chapter 11. *Check all that apply*:
  - q Debtor's aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than $2,490,925 (amount subject to adjustment on 4/01/16 and every 3 years after that).
  - q The debtor is a small business debtor as defined in 11 U.S.C. § 101(51D).
  - q A plan is being filed with this petition.
  - q Acceptances of the plan were solicited prepetition from one or more classes of creditors, in accordance with 11 U.S.C. § 1126(b).
  - q The debtor is required to file periodic reports (for example, 10K and 10Q) with the Securities and Exchange Commission according to § 13 or 15(d) of the Securities Exchange Act of 1934. File the *Attachment to Voluntary Petition for Non-Individuals Filing for Bankruptcy Under Chapter 11* (Official Form 201A) with this form.
  - q The debtor is a shell company as defined in the Securities Exchange Act of 1934 Rule 12b-2.
- q Chapter 12

9. Were prior bankruptcy cases filed by or against the debtor within the last 8 years?

If more than 2 cases, attach a separate list.

q No

q Yes. District _____ When _____ Case number _____
MM / DD / YYYY

District _____ When _____ Case number _____
MM / DD / YYYY

10. Are any bankruptcy cases pending or being filed by a business partner or an affiliate of the debtor?

List all cases. If more than 1, attach a separate list.

q No

q Yes. Debtor _____ Relationship _____

District _____ When _____
MM / DD / YYYY

Case number, if known _____

11. Why is venue proper in *this district*?

Check all that apply:

q Debtor has had its domicile, principal place of business, or principal assets in this district for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other district.

q A bankruptcy case concerning debtor's affiliate, general partner, or partnership is pending in this district.

12. Does the debtor own or have possession of any real property or personal property that needs immediate attention?

q No

q Yes. Answer below for each property that needs immediate attention. Attach additional sheets if needed.

Why does the property need immediate attention? (*Check all that apply.*)

q It poses or is alleged to pose a threat of imminent and identifiable hazard to public health or safety.

What is the hazard? _____

q It needs to be physically secured or protected from the weather.

q It includes perishable goods or assets that could quickly deteriorate or lose value without attention (for example, livestock, seasonal goods, meat, dairy, produce, or securities-related assets or other options).

q Other _____

Where is the property?_____
Number Street

_____

_____ _____ _____
City State ZIP Code

Is the property insured?

q No

q Yes. Insurance agency _____

Contact name _____

Phone _____

Statistical and administrative information

13. Debtor's estimation of available funds

Check one:

q Funds will be available for distribution to unsecured creditors.

q After any administrative expenses are paid, no funds will be available for distribution to unsecured creditors.

14. Estimated number of creditors

q 1-49	q 1,000-5,000	q 25,001-50,000
q 50-99	q 5,001-10,000	q 50,001-100,000
q 100-199	q 10,001-25,000	q More than 100,000
q 200-999		

15. Estimated assets

q $0-$50,000	q $1,000,001-$10 million	q $500,000,001-$1 billion
q $50,001-$100,000	q $10,000,001-$50 million	q $1,000,000,001-$10 billion
q $100,001-$500,000	q $50,000,001-$100 million	q $10,000,000,001-$50 billion
q $500,001-$1 million	q $100,000,001-$500 million	q More than $50 billion

16. Estimated liabilities

q $0-$50,000	q $1,000,001-$10 million	q $500,000,001-$1 billion
q $50,001-$100,000	q $10,000,001-$50 million	q $1,000,000,001-$10 billion
q $100,001-$500,000	q $50,000,001-$100 million	q $10,000,000,001-$50 billion
q $500,001-$1 million	q $100,000,001-$500 million	q More than $50 billion

Request for Relief, Declaration, and Signatures

WARNING -- Bankruptcy fraud is a serious crime. Making a false statement in connection with a bankruptcy case can result in fines up to $500,000 or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

17. Signature of debtor

The debtor requests relief in accordance with the chapter of title 11, United States Code, specified in this petition.

I have been authorized to file this petition on behalf of the debtor.

I have examined the information in this petition and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____
MM / DD / YYYY

û _____ _____
Signature of authorized individual Printed name

Title _____

18. Signature of attorney

û _____ Date _____
Signature of attorney for debtor MM / DD / YYYY

_____
Printed name

_____
Firm name

_____
Number Street

_____ _____ _____
City State ZIP Code

_____ _____
Contact phone Email address

_____ _____
Bar number State

TAB 3B

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125-008497

ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of September 24 - 25, 2013
At the University of St. Thomas, School of Law
Minneapolis, Minnesota

Draft Minutes

The following members attended the meeting:

Bankruptcy Judge Eugene R. Wedoff, Chair
Circuit Judge Sandra Segal Ikuta
Circuit Judge Adalberto Jordan
District Judge Jean Hamilton
District Judge Robert James Jonker
District Judge Amul R. Thapar
Bankruptcy Judge Arthur I. Harris
Bankruptcy Judge Elizabeth L. Perris
Bankruptcy Judge Judith H. Wizmur
Professor Edward R. Morrison
Michael St. Patrick Baxter, Esquire
Richardo I. Kilpatrick, Esquire
J. Christopher Kohn, Esquire
David A. Lander, Esquire (by telephone)
Jill Michaux, Esquire

The following persons also attended the meeting:

Professor S. Elizabeth Gibson, reporter
Professor Troy A. McKenzie, assistant reporter
Roy T. Englert, Jr., Esq., liaison from the Committee on Rules of Practice and Procedure (Standing Committee)
Bankruptcy Judge Erithe A. Smith, liaison from the Committee on Bankruptcy Administration
Jonathan Rose, Secretary, Standing Committee, and Rules Committee Officer
Ramona D. Elliott, Deputy Director /General Counsel, Executive Office for U.S. Trustees (EOUST)
James J. Waldron, Clerk, U.S. Bankruptcy Court for the District of New Jersey
Peter G. McCabe, Assistant Director, Office of Judges Programs, Administrative Office of the U.S. Courts (Administrative Office)
Benjamin Robinson, Deputy Rules Committee Officer and Counsel to the Rules Committees (by telephone)
Andrea L. Kuperman, Chief Counsel to the Rules Committees (by telephone)
James H. Wannamaker, Administrative Office
Scott Myers, Administrative Office
Bridget Healy, Administrative Office
Molly Johnson, Federal Judicial Center

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District Judge Patrick J. Schiltz, District of Minnesota
Associate Dean Joel Nichols, St. Thomas School of Law
Professor Nancy B. Rappaport, William S. Boyd School of Law, UNLV
Michael T. Bates, Senior Company Counsel, Wells Fargo
Margaret Burks, President, National Association of Chapter 13 Trustees
Jon M. Waage, Chapter 13 Trustee, Middle District of Florida
Raymond J. Obuchowski, on behalf of the National Association of Bankruptcy Trustees
Debra L. Miller, Chapter 13 Trustee, Northern District of Indiana

The following summary of matters discussed at the meeting is written in the order of the meeting agenda unless otherwise specified, not necessarily in the order actually discussed. It should be read in conjunction with the agenda materials. An electronic copy of the agenda materials is available at http://www.uscourts.gov/RulesAndPolicies/rules/archives/agenda-books/committee-rules-bankruptcy-procedure.aspx. Votes and other action taken by the Advisory Committee and assignments by the Chair appear in **bold**.

Introductory Items

1. Greetings and welcome to new member Judge Amul R. Thapar.

The Chair welcomed the Advisory Committee's newest member, Judge Thapar, and thanked Judge Schiltz and Associate Dean Joel Nichols for hosting the Advisory Committee's meeting at the Saint Thomas School of Law. The participants introduced themselves and the Chair recognized Mr. McCabe for his service to all the rules committees and Mr. Wannamaker for his many years of service as primary staff support for the Advisory Committee. The Chair noted that both men would be retiring in the next few months and the Advisory Committee would deeply miss their institutional knowledge and camaraderie.

2. Approval of minutes of New York meeting of April 2 - 3, 2013.

The draft minutes were approved.

3. Oral reports on meetings of other committees:

(A) June 2013 meeting of the Committee on Rules of Practice and Procedure, including the request for comments on the alternatives included in the proposed amendment of Rule 5005(a)

The Reporter, Chair, and Judge Wizmur gave the report. All of the Advisory Committee's recommendations were approved. The form of the proposed amendment to Rule 5005(a) was modified to provide alternative proposals with respect to electronic signatures of individuals who are not registered users of the judiciary's case management and electronic case filing system (CM/ECF).

Judge Wizmur explained that the Advisory Committee on Evidence did not think there was a need to change the evidence rules in order for electronic signatures to be admissible as evidence. There was, however, concern about how scanned signatures would be validated.

The Reporter and the Chair explained that a cross-committee "CM/ECF Subcommittee" has been created to consider the impact of electronic filing on the existing federal rules. As part of that subcommittee's initial recommendations, alternative versions of the proposed amendments to Rule 5005(a) have been published for public comment. With respect to individuals who are not registered users of CM/ECF, one proposed version of the rule would deem the registered user's electronic submission of the signature to validate it. In bankruptcy cases that would mean the debtor's attorney would validate the debtor's signature by submitting it as part of a CM/ECF filing. The alternative proposal would require that a notary public validate the signature of the non-registered user.

(B) Cross-committee CM/ECF Subcommittee

The Reporter explained that in addition to weighing in on the proposed amendments to Rule 5005, the CM/ECF Subcommittee has also proposed eliminating the 3-day extension in Rule 9006(f) and Civil Rule 6(d) in cases of electronic service. She said that the proposal would be taken to the Standing Committee in January. Several members supported the idea, and one member suggested that the 3-day extension should be removed for all modes of service. But other members noted occasional problems with electronic service including spam filters, security settings, and the failure of electronic mail servers. The Chair said that he would relate concerns about ineffective electronic service to the Standing Committee.

(C) June 2013 meeting of the Committee on the Administration of the Bankruptcy System.

Judge Smith said that the term of the Bankruptcy Administration Committee's Chair, Judge Joy Conti, ends this month, and that the new chair, Judge Danny Reeves, begins his term on October 1, 2013.

Judge Smith said that the General Accounting Office has issued its report "Efforts to Consolidate and Share Services between District and Bankruptcy Clerks' Offices" and that it did not find any evidence that consolidation would save money. She said that the AO has gathered data on shared services and it hopes to have a report at the Committee's December meeting. She said there appear to be savings in shared services, but that the savings are difficult to quantify.

Judge Smith said that the Committee approved funding for recalled bankruptcy judges and temporary law clerks. The Committee has endorsed the use of video conferencing to save costs where possible, and has again been asked to look at eliminating the Bankruptcy Appellate Panels (BAPs) as a cost savings measure. As it has in the past, the Committee determined eliminating the BAPs would be cost-shifting rather than cost-saving.

With respect to judgeship requests, Judge Smith explained that the Committee has been asked to prioritize judgeship needs. Judge Smith also sent members a copy of the revised *In Forma Pauperis* guidelines that were recently approved by the Judicial Conference.

(D) April 2013 meeting of the Advisory Committee on Civil Rules.

Judge Harris said that the amendments on civil discovery that emerged out of the Duke conference have been approved for publication. Most proposed amendments, if adopted, will automatically apply in bankruptcy proceedings because most of the bankruptcy discovery rules incorporate civil discovery rules. The "Scope and Purpose" rule for bankruptcy (Rule 1001) does not, however, incorporate the civil rule version (Rule 1). Accordingly, if the Advisory Committee decides to track the proposed amendment to Rule 1, a conforming change to Rule 1001 will have to be recommended and approved. In this respect, the Chair approved Judge Harris' request to put in the dugout consideration of an amendment to Rule 1001 to track proposed changes to Fed. R. Civ. Pro 1.

(E) May 2013 meeting of the Advisory Committee on Evidence.

Judge Wizmur said that in addition to the electronic signature issue with respect to Rule 5005, the Evidence Rules Advisory Committee will hold a mini-conference in Portland, Maine next month (October 2013) to discuss the impact of technology on the rules of evidence.

(F) April 2013 meeting of the Advisory Committee on Appellate Rules.

Judge Jordon said that the Appellate Rules Committee has approved published revisions to Appellate Rule 6 that would (1) update that Rule's cross-references to the Bankruptcy Part VIII Rules, (2) amend Rule 6(b)(2)(A)(ii) to remove an ambiguity dating from the 1998 restyling, (3) add a new Rule 6(c) to address permissive direct appeals from the bankruptcy court under 28 U.S.C. §158(d)(2), and (4) take account of the range of methods available now or in the future for dealing with the record on appeal.

(G) Bankruptcy Next Generation of CM/ECF Working Group.

Judge Perris and Mr. Waldron said that the development of CM/ECF NextGen continues and that test courts should begin seeing the first release early next year and that full implementation by all bankruptcy courts is targeted for early 2015. Mr. Myers added that the Administrative Office has had a number of conference calls with private forms vendors in connection with the development of NextGen. Some vendors have expressed concern that not all of their competitors will invest the resources to comply with the new requirements and may thereby obtain a competitive pricing advantage for their software. Mr. Myers said the vendors have been told, however, that courts will likely issue deficiency notices to bankruptcy attorneys who submit forms without all the data required by NextGen and that as a result attorneys will seek out vendors that do comply with the new requirements.

Subcommittee Reports and Other Action Items

4. Report by the Subcommittee on Consumer Issues.

(A) Recommendation concerning Suggestion 12-BK-B by Matthew T. Loughney (on behalf of the Bankruptcy Noticing Working Group) to amend Rule 2002(f)(7) to require notice of the confirmation of the debtor's chapter 13 plan.

Rule 2002(f)(7) currently requires notice to creditors of the entry of confirmation orders in cases under chapters 9, 11, and 12—but not chapter 13. The Assistant Reporter said that the Administrative Office's Bankruptcy Noticing Working Group has suggested that the rule be expanded to require notice when a chapter 13 confirmation order is entered. The Working Group explained that although courts can order notice of entry of a chapter 13 confirmation order under Rule 9022, adding the notice requirement to Rule 2007(f)(7) would provide clarity about who should receive the notice.

The Assistant Reporter said that the Subcommittee carefully considered the suggestion but concluded that a rule amendment was unnecessary. The Subcommittee first concluded that notice of the chapter 13 plan confirmation hearing, already required by the bankruptcy rules, was sufficient notice of the pending entry of a confirmation order, and that creditors represented by counsel who have entered an appearance in the case will receive electronic notice when the chapter 13 confirmation order is entered on the docket.

The Subcommittee also conducted an informal survey of 77 court clerks and found that approximately 80% reported that the judges in their courts already routinely require some type of notice under Rule 9022. Given that current noticing practices appear to be sufficient, and that the Subcommittee is already considering a separate suggestion to limit certain notice requirements in chapter 13 cases that may be costly and provide little benefit, the Subcommittee recommends that no further action be taken on the suggestion. **The Advisory Committee agreed with the Subcommittee and no further action will be taken on the suggestion.**

Professor Morrison said that, like chapter 13 cases, there seemed to be little benefit to providing notice of entry of the confirmation order in small business chapter 11 cases. At Professor Morrison's request, **the Chair asked the Business Subcommittee to consider removing small business chapter 11 cases from the list in Rule 2002(f)(7).**

(B) Recommendation concerning Comment 11-BK-12 by Judge Eric L. Frank regarding the negative notice procedure for objections to claims in the proposed amendment to Rule 3007 that was published in 2011.

Judge Harris and the Reporter reminded members that the Advisory Committee previously proposed an amendment to Rule 3007(a) in response to two suggestions submitted on behalf of the Bankruptcy Judges Advisory Group ("BJAG"). The first suggestion (09-BK-H),

from Judge Margaret D. McGarity, proposed an amendment to permit the use of a negative notice procedure for objections to claims. The second suggestion (09-BK-N), from Judge Michael E. Romero, sought clarification of the proper method of serving objections to claims. Judge Romero noted that some courts require service under Rule 7004 because an objection to a claim creates a contested matter and Rule 9014(b) provides that the "motion [initiating a contested matter] shall be served in the manner provided for service of a summons and complaint by Rule 7004." Other courts have concluded that Rule 3007(a) governs claims objections by specifying the notice recipient of a claims objection.

2011 Proposed Amendments to Rule 3007(a)

The Reporter said that Advisory Committee addressed the suggestions through proposed amendments to Rule 3007(a) published for comment in 2011-12. The amendments adopted an objection procedure to make clear that Rule 7004 applies to claims objections only if the recipient is the United States, an officer or agency of the United States, or an insured depository institution. Otherwise, the claimant must be served by first class mail at the address and name set out on the proof of claim. The proposed amendments also permitted a negative noticing procedure.

The Reporter said that there were two comments in response to the published amendments. Judge Eric Frank questioned whether a negative notice procedure is generally appropriate for an objection to a claim since, under Rule 3001(f), a properly executed and filed proof of claim is entitled to be treated as prima facie evidence of the validity and amount of the claim. Given this evidentiary effect of a proof of claim, Judge Frank suggested that in many situations a claim should not be disallowed by default and without a hearing. The other comment was submitted by Mr. Raymond P. Bell, Jr. (11-BK-015), who agreed with Judge Frank.

In his comment, Judge Frank contended that the problem with the proposed amendment arose more from the Committee Note than from the text of the rule itself. While the rule's reference to "any deadline to request a hearing" might suggest that a claim can be disallowed just because of the failure to make such a request, it did not expressly say so. The Committee Note, however, stated that the amendment authorized local rules to *require* a claimant to request a hearing or file a response. He therefore suggested that, "at a minimum," the Committee Note be revised to "state unequivocally that although local rules may impose the obligation on a claimant to respond to a proof of claim, there may [be] matters in which a proof of claim is valid and allowable notwithstanding the failure to file a response to claims objection or request a hearing …." In his view, the Committee Note should indicate that, with regard to those matters, the court has a duty to determine whether Rule 3001(f) requires allowance of the claim, even if the claimant does not respond or request a hearing.

At the spring 2012 meeting, the Subcommittee recommended that the proposed amendments to Rule 3007(a) be withdrawn so that they could be considered along with the package of rule amendments accompanying the development of a national chapter 13 plan form. The proposed plan form would allow certain claims to be determined through the plan and the

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Subcommittee concluded that the method of service on the claimant should be the same regardless of whether the claim amount was determined through the plan or through a claims objection.

The Proposed 2013 Amendments to Rules 3007 and 3012

In connection with the chapter 13 plan form published for comment in August 2013, the Standing Committee published amendments to Rules 3007 and 3012 that would require enhanced Rule 7004 service for requests to determine the amount of secured and priority claims in chapter 12 and 13 cases. The proposed amendments to Rule 3012 make clear that secured claims can be modified through the plan as well as by claim objection or motion, and that priority claim amounts can be challenged though a claim objection or motion. Regardless of the form of objection, however, the proposed amendment to Rule 3012 appears to require service under Rule 7004. Outside the chapter 12 and chapter 13 context, however, the proposed 2013 amendment to Rule 3007 leaves the current method of objecting to claims unchanged – arguably requiring only that the objection and hearing be mailed or otherwise delivered to the claimant.

The Reporter said that the Subcommittee was asked to try to create a unified approach to the service of claim objections as well as claim modifications accomplished through plans. She said that the Advisory Committee's 2011 proposed amendment to Rule 3007(a) was based on the belief that claim objections should generally be served on the person that the claimant designated on the proof of claim for receipt of notices, rather than according to Rule 7004. She said that the Subcommittee continues to recommend this method of service for claim objections, and that it therefore recommends final approval of Rule 3007(a) as published in 2011 and as shown in the agenda materials beginning at page 98. She added that the Subcommittee also acknowledged Judge Frank's concerns and that it therefore recommends adding language to the Committee Note (as shown at page 99 of the agenda materials) to make clear that an objection to a claim does not automatically overcome the prima facie validity of a proof of claim that is afforded by Rule 3001(f).

The Reporter said that the Subcommittee also continued to recommend the portion of the proposed 2013 amendment to Rule 3012 that would allow a secured claim to be modified through a chapter 12 or 13 plan, along with the more formal Rule 7004 service in that context to increase the likelihood that affected claimants are made aware that the plan proposes to modify their claim. The Reporter said that the Subcommittee now recommends revising published Rule 3012 to clarify that all claims objections, including objections to secured and priority claims, be served on the person designated on the proof of claim in accordance with proposed Rule 3007(a); that secured claims being modified through a plan be governed by the service provision in Rule 3012; and that motions to modify a claim be governed as they currently are, by Rule 9014.

A motion to approve the Subcommittee's recommendations, subject to further amendments after considering comments on the published versions of Rule 3007 and 3012, passed without objection.

(C) Recommendation concerning conforming amendments of Rule 1007(a)(1) and (a)(2) to reflect the changed designations of the schedules proposed by the Forms Modernization Project.

Judge Harris explained that because schedules E and F are being combined for the Forms Modernization Project, the Subcommittee recommended a technical conforming amendments to Rule 1007(a)(1) and (a)(2) replacing references to schedules E and F with E/F. **A motion to conform the rule to the new form designations, effective when the new forms go into effect, passed without opposition.** The Chair explained that because the proposed amendment was conforming, publication would not be necessary.

(D) Oral report concerning Suggestion 12-BK-I by Judge John E. Waites (on behalf of the Bankruptcy Judges Advisory Group) to amend Rule 1006(b) to provide that courts may require a minimum initial payment with requests to pay filing fees in installments.

Judge Harris said that the Subcommittee was aware that some courts already require an initial payment with a fee installment application, and that it has asked the FJC to research the prevalence of the practice and the amount of required initial installments. On behalf of the FJC, Ms. Johnson said that she hopes to have research done in time for a Subcommittee call before the spring meeting.

(E) Oral report concerning Suggestion 12-BK-M by Judge Scott W. Dales to amend Rule 2002(h) to mitigate the cost of giving notice to creditors who have not filed proofs of claim in a chapter 13 case.

Judge Harris reviewed the suggestion. Bankruptcy Rule 2002(a) requires that certain notices go to all creditors. After the claims bar date in a chapter 7 case, however, Rule 2002(h) allows the court to enter an order limiting future notices to creditors who have either filed a claim or who have been given an extension to file a claim at a later date. Judge Dales suggests that Rule 2002(h) be revised and made applicable to chapter 13, or even to all chapters.

Judge Harris said that the Subcommittee recommends putting Judge Dale's suggestion in the dugout until after the published chapter 13 amendments have been considered. There were no objections to the Subcommittee's recommendation, and the suggestion was placed in the dugout.

5. Report by the Chapter 13 Plan Form Working Group.

Oral report concerning (1) responses to the publication of the chapter 13 plan form and the implementing rules amendments and (2) outreach to the chapter 13 community concerning the plan form and rules.

The Chair recognized the various people attending the meeting who commented on and/or attended meetings regarding the plan form. The Assistant Reporter discussed the plan

form process, and Mr. Kilpatrick explained the developments of an adequate protection order. Mr. Kilpatrick also noted that most of the comments received so far have been positive and many have included constructive suggestions for improvements. The Chair added that he anticipates many comments which should generate a full discussion of the plan form and the chapter 13 process at the spring 2014 meeting.

6. Report by the Mortgage Claim Form Working Group.

Oral report concerning amending Official Form 10A (Mortgage Proof of Claim Attachment) to require inclusion of a loan history.

Ms. Michaux explained that the working group was formed at the spring 2013 meeting. It has already had several conference calls, and the members hope to have a proposal for a detailed loan history to replace Official Form 10A ready to be considered at the spring 2014 meeting. The purpose of a detailed loan history, in contrast to the summary that is now Official Form 10A, Ms. Michaux said, is to provide as a default a clear accounting of how payments have been applied to the loan so that debtors can object to the claim calculation when appropriate.

7. Joint Report by the Subcommittees on Consumer Issues and Forms

(A) Recommendations concerning (1) Suggestion 13-BK-E by Judge Carol Doyle to amend Rule 3002.1 to clarify that the rule applies to all claims secured by a chapter 13 debtor's principal residence when the plan proposes to maintain mortgage payments postpetition and (2) providing guidance on whether the creditor's obligations under Rule 3002.1 cease to apply if the automatic stay is lifted with respect to the residence.

The Reporter explained that Judge Doyle's suggestion highlights a case law split on whether Rule 3002.1(a) applies only in chapter 13 cases in which an arrearage is being cured under 11 U.S.C. § 1322(b)(5). Among other things, the rule requires a mortgagee to provide certain notices pertaining to payment changes, fees, expenses, and charges, but some courts have ruled that these reporting requirements arise only if the chapter 13 plan is curing an arrearage. Others, including Judge Doyle, have concluded that the reporting requirements apply so long as the plan provides for maintaining current payments on the debtor's mortgage.

The Subcommittees agreed with Judge Doyle that Rule 3002.1(a) should be amended to clarify that it requires compliance with the rule whenever a plan provides for the maintenance of postpetition mortgage payments. If a debtor is trying to remain current on a home mortgage, he or she needs to know if the amount required to be paid has changed, whether or not an arrearage is being cured. The Subcommittees also recommended amending the rule to clarify that it applies regardless of whether the debtor or the trustee is making plan payments. **The Advisory Committee agreed with both recommendations.**

The Subcommittees further agreed that the rule should be amended to clarify that the creditor's reporting requirements cease at some point after a motion to lift the automatic stay is granted with respect to the debtor's principal residence. There was no agreement, however, as to when that point arrives. The views coalesced around two positions: (1) effective date of the order terminating the stay and (2) transfer of title from the debtor.

The Advisory Committee discussed the two alternatives proposed by the Subcommittees. Some members favored termination of the reporting requirements when the stay is lifted because the date is easy to determine and would be uniform throughout national bankruptcy practice. A title transfer date, in contrast, would vary depending on state foreclosure law. Members supporting the title transfer date pointed out, however, that the debtor and creditor often continue to negotiate after the stay is lifted, with the mortgage eventually being reinstated. The Chair said that either proposal would merely be a default provision and that a court could order that reporting requirements continue if that made sense is a particular situation. **After further discussion, and over three dissents, the Committee recommended publishing the "stay termination" alternative as the default date for ending a creditor's Rule 3002.1(a) reporting requirements.** One member also suggested adding language to the Committee Note to encourage courts to consider requests for continued reporting in appropriate circumstances, but no particular language was recommended.

(B) Oral report concerning Suggestion 11-BK-N by David S. Yen for a rule and form for applications to waive fees other than filing fees under 28 U.S.C. § 1930(f)(2) and (f)(3).

Judge Harris said that the Subcommittee tabled the suggestion until the Judicial Conference approved guidelines for fee waivers under 28 U.S.C. § 1930(b). As reported by Judge Smith at Item 3C above, fee waiver guidelines have now been approved. Judge Harris said that the Subcommittee will review the new guidelines, consider the suggestion, and report back at the spring meeting.

8. Report by the Subcommittee on Forms and the Forms Modernization Project.

(A) Report on the status of the Forms Modernization Project and preliminary review of filing forms for non-individual debtors, including a chapter 15 petition.

Judge Perris provided an overview of the Forms Modernization Project and the Next Generation of CM/ECF. She said that the code for CM/ECF NextGen is being written now and that testing should begin in four test courts in January 2014. The test courts are scheduled to go live next summer, and the rest of the courts will follow later. She said that it would probably not be until early- to mid-2015 that all courts will be live on the first release of NextGen. The projected rollout is compatible with the release of the modernized bankruptcy forms, she said, because the bulk of the forms will not be ready to go into effect until December 1, 2015, shortly after most courts are expected to be using the first release of NextGen.

Judge Perris said that the individual debtor forms are currently out for public comment and that the Forms Subcommittee and Forms Modernization Project (FMP) will make recommendations for any needed changes and for final approval at the spring meeting. The recommended effective date for the individual debtor forms will be no earlier than December 1, 2015, however, because the new form numbering scheme developed for bankruptcy forms makes it necessary to put the bulk of the new forms into effect at the same time, and the non-individual debtor version of case opening forms will not be published for comment until next year. Mr. Myers briefly described the form numbering scheme and reported that an updated chart showing current and projected form numbers was included in the agenda materials beginning at page 281.

For this meeting, Judge Perris said that the FMP was seeking preliminary feedback on the non-individual debtor instruction booklet, case opening forms for non-individual debtors, B201, B202, B204, B205, B206Sum, B206A/B, B206D, B206E/F, B206G, B206H, B207, an Official Form for opening a chapter 15 case, B401, and the proof of claim form, B410. She said that the forms and their Committee Notes started at page 147 of the agenda materials. Members suggested a number of changes, and Judge Perris explained that the suggestions and any others she received would be evaluated by FMP working groups over the winter in the next round of form revisions.

(B) Recommendation concerning Suggestion 13-BK-B by Judges Eric L. Frank and Bruce I. Fox to amend the Voluntary Petition to include checkboxes for the documents small business debtors are required to file under § 1116(1) of the Bankruptcy Code.

The Reporter said that the Subcommittee considered the suggestion and agreed that the following language should be added to both versions of the voluntary petition: "If you indicate that the debtor is a small business as defined in 11 U.S.C. § 101(51D), you must append the attachments required under 11 U.S.C. § 1116(a)(1)." **The Advisory Committee agreed with the recommendation.**

(C) Oral report on the revision of the bankruptcy subpoena forms as a consequence of the amendment of Civil Rule 45 effective December 1, 2013.

Judge Harris explained that pending changes to Civil Rule 45 require revisions to the bankruptcy subpoena forms, which incorporate language directly from the rule. Although Director's Procedural Forms are not required to be used, Subcommittee members and AO staff revised the bankruptcy subpoena forms to more closely follow the presentation and organization of the civil rule subpoena forms. Form 255 is to be used to compel testimony at a hearing or trial, Form 256 for a deposition, and Form 257 for production or inspection. As is the case currently, Form 254 is to be used as a subpoena for Rule 2004 examinations. Judge Harris said that because the subpoena forms are Director's Procedural Forms, formal approval by the Advisory Committee is not necessary. He added that the forms are scheduled to go into effect on December 1, 2013, when revised Rule 45 becomes effective.

9. Report by the Subcommittee on Business Issues

(A) Oral report on the status of the proposed amendments to Rules 7008, 7012, 7016, 9027, and 9033 scheduled to take effect on December 1, 2013, and other amendments proposed in response to the Supreme Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011).

The Assistant Reporter said that the *Stern* rules (proposed amendments to Rules 7008, 7012, 7016, 9027, and 9033) have been approved by the Judicial Conference and are on track to become effective December 1, 2014, if approved by the Supreme Court and if Congress does not act to the contrary. He said that the timing was somewhat complicated, however, because after the Advisory Committee and the Standing Committee recommended the proposed amendments for final approval, the Supreme Court granted review of *Executive Benefits Insurance Agency v. Arkison*, No. 12-1200. One question presented in *Arkison* is whether bankruptcy judges are constitutionally authorized, based on the express or implied consent of the parties, to resolve a proceeding otherwise entitled to an Article III forum.

The Chair explained that the proposed *Stern* amendments are premised on the idea that parties can expressly consent to final adjudication by a bankruptcy judge. Because both *Arkison* and the proposed *Stern* amendments raise the issue of consent, he said, the Supreme Court may decide to hold any decision on the *Stern* rules until after *Arkison* is decided. If the Court holds consideration of the *Stern* rules past May 1, 2014, he said, the rules would not go into effect until December 1, 2015, at the earliest.

NOTE: After the meeting, the Advisory Committee and the Standing Committee reconsidered the decision to recommend submitting the *Stern* amendments to the Supreme Court. The rules package was submitted to the Court earlier than usual this year to give the Court the option of handling its Rules Enabling Act work at the beginning of its term. Including the *Stern* amendments in the rules package undermines the goal of presenting a clean package that the Court could consider and potentially resolve early in the term. In addition, concerns were raised that the proposed *Stern* amendments could be perceived as favoring one side of the *Arkison* debate, and that amendments to the rules might be required after the case was decided. Based on the new recommendations of the Advisory Committee and the Standing Committee, the Executive Committee of the Judicial Conference withdrew the proposed *Stern* amendments from the rules package submitted to the Supreme Court.

(B) Recommendation concerning Suggestion 13-BK-D by David Tilem to add a checkbox for other voting parties to Official Form 14, the ballot for confirmation of a Chapter 11 plan.

The Assistant Reporter said that Mr. Tilem suggested the need for an "other" checkbox on Official Form 14, Ballot for Accepting or Rejecting Plan, to accommodate claims such as lease rejections. The Subcommittee considered the suggestion and concluded that no change was necessary. Official Form 14 is a generic ballot that is designed to incorporate the classes of

claims and interests described in the plan of reorganization. The plan proponent modifies the ballot form as needed so that each class identified in the plan has a ballot. If the plan proposes to separately classify lease rejection damages, for example, the proponent would incorporate that class name into the version of Official Form 14 given to members of the class.

After a short discussion, no member opposed the Subcommittee's recommendation that no further action be taken on the suggestion.

10. Report by the Subcommittee on Privacy, Public Access, and Appeals.

(A) Recommendation concerning Suggestion 13-BK-A by David W. Ostrander to include the debtor's age on the Statement of Financial Affairs or the Schedules of Assets and Liabilities.

The Assistant Reporter said that the Advisory Committee has historically required debtors to disclose information on publicly available bankruptcy forms only if that information is deemed necessary to the bankruptcy process. For example, the means-test forms require information about whether the debtor is over or under age 65 because that information is necessary in order to apply the IRS national standards for health care costs. The Subcommittee was unable, however, to determine a more general bankruptcy administration need for public disclosure of the debtor's specific age on bankruptcy forms, and therefore recommended that no further action be taken on the suggestion. **No member opposed the recommendation.**

(B) Recommendations concerning amendments to the bankruptcy appellate rules.

Judge Jordon said that the Subcommittee reviewed a number of previously tabled comments with respect to the restyled Part VIII bankruptcy appellate rules that are on track to become effective December 1, 2014. The Subcommittee concluded that some of the comments should be rejected at this time, and that others should be put in the bullpen or dugout until after the revised Part VIII rules take effect and there has been sufficient experience with them to determine whether any additional amendments will be needed.

The Reporter presented the suggestions and noted the Subcommittee's recommendation as to whether: (1) no change should be made, (2) a proposed amendment should be put in the bullpen for recommended implementation at a later date, or (3) a proposed amendment should be held in the dugout to be considered at a later date.

Rule 8002 (Time for Filing Notices of Appeal)

Comment 12-BK-033—Judge Christopher M. Klein: *Rule 8002 should include a provision like FRAP 4(a)(6), which permits the district court to reopen the time to file an appeal for someone who did not receive notice of entry of the judgment within 21 days after its entry.*

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The Reporter said that FRAP 4(a)(6) is not incorporated into the existing appellate rules, and that, in light of the need for finality of a bankruptcy court order or judgment, the Subcommittee recommended against incorporating it into the restyled appellate rules. No committee member opposed the recommendation.

Comment 12-BK-033—Judge Christopher M. Klein : *It would be useful for Rule 8002 to have a provision similar to FRAP 4(a)(7), which addresses when a judgment or order is entered for purposes of Rule 4(a). The provision helps clarify timing issues presented by the separate-document requirement.*

The Subcommittee concluded that the rules specifying when a separate document is required and the impact of the requirement on the date of entry of the judgment are sufficiently confusing that, as suggested by Judge Klein, Rule 8002 would likely be improved by adding a provision similar to FRAP 4(a)(7). A proposed new Rule 8002(a)(5) was set out in the agenda materials beginning at page 324. **The Advisory Committee agreed to recommend the proposed change and placed it in the bullpen.**

Rule 8003 (Appeal as of Right—How Taken; Docketing the Appeal) and Rule 8004 (Appeal by Leave—How Taken; Docketing the Appeal)

Comment 12-BK-036—Mary P. Sharon, Clerk (1st Cir. BAP): *There is an inconsistency between Rule 8003 and Rule 8004. Rule 8003(c) requires the bankruptcy clerk to serve the notice of appeal, whereas Rule 8004(a) places that duty on the appellant.*

The Subcommittee recommends that no change be made to the service provisions of revised Rules 8003 and 8004. The rules are consistent with the parallel FRAP provisions. Because an appellant seeking leave to appeal under Rule 8004 will have to serve its motion on other parties, the Subcommittee concluded that it makes sense to require service of the notice of appeal along with the motion. No member opposed the Subcommittee's recommendation.

Rule 8004 (Appeal by Leave—How Taken; Docketing the Appeal): In response to a comment suggesting that an appellate court be allowed to treat a motion for leave to appeal as a notice of appeal if a notice of appeal is not filed, the Subcommittee raised the following issue for further consideration: Should the requirement that a notice of appeal be filed, in addition to a motion for leave to appeal, be eliminated from revised Rule 8004?

Subcommittee members observed that the requirement that a notice of appeal be filed along with a motion for leave to appeal has been as been a longstanding part of the rule on leave to appeal. No one outside the Subcommittee has questioned the need for a notice in this circumstance, and after careful consideration, the Subcommittee recommended that no change be made to the rule. No Advisory Committee member opposed the recommendation.

Rule 8005 (Election to Have an Appeal Heard by the District Court Instead of the BAP)

Comment 12-BK-033—Judge Christopher M. Klein: *Rule 8005 does not retain the provision of current Rule 8001(e)(2), which provides for the withdrawal of an election with the district court's acquiescence.*

For reasons described in the agenda materials, Subcommittee members recommended no change to revised Rule 8005. No Advisory Committee member opposed the recommendation.

Rule 8006 (Certifying a Direct Appeal to the Court of Appeals)

12-BK-033—Judge Christopher M. Klein: *Rule 8006(c) should provide an opportunity for the bankruptcy court to comment on the proceeding's suitability for direct appeal when a certification is jointly made by all appellants and appellees.*

Subcommittee members agreed that the court of appeals would likely benefit from the court's statement about whether the appeal satisfies one of the grounds for certification. The Subcommittee decided, however, that authorization should not be limited to the bankruptcy court. Because under Rule 8006(b) the matter might be deemed to be pending in the district court or BAP at the time or shortly after the parties file the certification, those courts should also be authorized to file a statement with respect to appeals pending before them. The Subcommittee's recommended amendment to Rule 8006(b) was set forth at page 330 of the agenda materials. **The Advisory Committee approved the proposed revisions to Rule 8006(b) for the bullpen. In addition, the Subcommittee was asked to consider whether a deadline for certifying a direct appeal should be added to the rule.**

Rule 8009 (Record on Appeal; Sealed Documents)

12-BK-005—Judge Robert J. Kressel; 12-BK-015—Judge Barry S. Schermer 12-BK-040—Bankruptcy Clerks Advisory Group: *Designation of the record should not be required.*

Because the recently appointed CM/ECF Subcommittee of the Standing Committee will likely consider this issue, the Subcommittee recommended deferring consideration of the suggestion until after the CM/ECF Subcommittee submits its report. **The Advisory Committee agreed and the suggestion was put in the dugout.**

Rule 8010 (Completing and Transmitting the Record)

12-BK-008—National Conference of Bankruptcy Judges; 12-BK-034—Oregon State Bar Debtor-Creditor Section Local Rules and Forms Committee; 12-BK-040—Bankruptcy Clerks Advisory Group: *Rule 8010(b)(1) should be revised to fix an outside deadline for the clerk's transmission of the record, even if parties are slow to designate the record.*

The suggestion would be moot if the suggestion to revise Rule 8009 to eliminate designation of the record is approved. The Subcommittee therefore recommended that consideration of this suggestion be deferred until after the CM/ECF Subcommittee submits its

report and the Subcommittee takes up the proposed amendment to Rule 8009. **The Advisory Committee agreed, and the suggestion was put in the dugout.**

12-BK-014—Judge Dennis Montali: *In some cases when the appellate court orders paper copies of the record to be delivered, it may be appropriate for the appellee to provide them. Add to the end of the first sentence of Rule 8010(b)(4), "or the appellee where appropriate."*

The Subcommittee recommended no change because the issue of furnishing paper copies will likely diminish as courts continue to adapt to the use of electronic storage and transmittal of documents. No member of the Advisory Committee objected to the Subcommittee's recommendation.

Rule 8011 (Filing and Service; Signature)

12-BK-005—Judge Robert J. Kressel; 12-BK-026—Judge S. Martin Teel, Jr.: *Rule 8011(a)(2) should not follow the ill-advised rule of FRAP 25(a)(2)(B) of having different filing rules for briefs and appendices. The filing rules should be the same for those documents as for all others—requiring receipt by the clerk by the deadline.*

The Subcommittee recommended no change. Currently, briefs are timely if mailed on or before the last day for filing. This practice is longstanding and is consistent with FRAP, which is one of the goals of amending the Part VIII rules. Moreover, as electronic filing of briefs becomes more prevalent, the mailing rules become less significant. No Advisory Committee member objected to the recommendation.

Other Issues

The Reporter said that the Subcommittee has retained three other comments on the revised Part VIII rules for further consideration. They concern whether a provision should be added to the rules providing for the issuance of a mandate by the district court and BAP upon the disposition of a bankruptcy appeal, and whether revised Rule 8023 should be amended to clarify the procedure for voluntary dismissal of appeals when (1) the appeal concerns an objection to discharge or (2) the trustee is a party to the appeal. It has been suggested that the requirements of Rules 7041 and 9019 for bankruptcy court review in those situations should also apply to appeals. The Subcommittee will make recommendations to the Advisory Committee regarding those comments at a later meeting.

11. Report by the Subcommittee on Technology and Cross Border Insolvency.

Oral report concerning Suggestion 13-BK-F by Judge Barry Schermer to amend portions of the Bankruptcy Rules that apply to chapter 15 proceedings.

Mr. Baxter said that the Subcommittee concluded that the rules are inconsistent about the requirement of a summons when a chapter 15 petition is filed. In practice, he said, most courts do not issue a summons regardless of whether the case seeks recognition of a foreign main or a foreign non-main proceeding. He said that the Subcommittee is considering several alternatives and will bring a recommendation to the Advisory Committee at the spring meeting.

12. Report by the Subcommittee on Attorney Conduct and Health Care.

> Oral report concerning Suggestion 13-BK-C by the American Bankruptcy Institute's Task Force on National Ethics Standards to amend Rule 2014 to specify the relevant connections that must be described in the verified statement accompanying an application to employ professionals.

The Chair acknowledged Professor Rappaport, who authored the suggestion and was at the meeting, and thanked her for her efforts on the suggestion.

Judge Jonker said that ABI's Ethics Task Force suggestion asserts that the Rule 2014 requirement to disclose all of a professional's "connections" to the debtor and other bankruptcy case parties in an employment application is overbroad and leads to voluminous "telephone-book" disclosures of every conceivable connection, thereby making it hard for courts and interested parties to find and evaluate those connections that are actually relevant. The suggestion would require disclosure only of "relevant connections," and it offered a definition of the term "relevant."

Judge Jonker reminded the Advisory Committee that a very similar suggestion was considered approximately ten years ago, but it was eventually withdrawn. He said that the current suggestion seems to make sense, but that the Subcommittee needs more information prior to making a decision. The Assistant Reporter is researching the issue, and there will be an update at the spring 2014 meeting**.**

Discussion Items

13. Oral report concerning Suggestion 13-BK-G by Gary Streeting to amend Rule 1015(b).

Referred to the Consumer Subcommittee.

14. Oral report concerning Suggestion 13-BK-H by Dan Dooley to amend Rule 2016 to require attorneys and other professionals employed by the estate to submit weekly reports and fee applications.

Referred to the Business Subcommittee.

15. Oral report concerning Suggestion 13-BK-I by Judge Stuart Bernstein to amend Official Forms 9F and 9F(Alt.).

Referred to the Business Subcommittee.

Information Items

16. Oral report on the status of bankruptcy-related legislation.

Mr. Wannamaker reviewed bankruptcy-related legislation that has been introduced in Congress. None of the bills, he said, seemed likely to move forward anytime soon.

17. Bullpen.

Mr. Wannamaker explained that the "bullpen" is a designation for items that have been approved by the Advisory Committee but are held for a time pending submission to the Standing Committee. He said that the bullpen was empty before this meeting, but as a result of Advisory Committee's actions over the past two days, the following items had been approved to be held in the bullpen for submission to the Standing Committee in the future: (a) proposed revisions to Rule 8002(a)(5) (see Item 10B); and (b) proposed revisions to Rule 8006(b) (see Item 10B).

18. Dugout.

Mr. Wannamaker said that the "dugout" is a newly created designation for suggestions or issues that require further study before the Advisory Committee is asked to make a recommendation. A list of dugout items was included in the agenda materials.

The following items were added to the dugout during the meeting: (a) Recommendation for conforming change to Rule 1001 to track proposed changes to Fed. R. Civ. Pro 1; (b) Suggestion 12-BK-M (see Item 4E); and (c) Comments 12-BK-005, 12-BK-15, and 12-BK-040 regarding designation of the record in bankruptcy appeals (see Item 10B, Rule 8009).

19. Rules Docket.

Mr. Wannamaker asked members to review the Rules Docket and email any proposed changes to him.

20. Future meetings.

The spring 2014 meeting will be held April 22 – 23, in Austin, Texas. The fall 2014 meeting will be held September 29 – 30 in Charleston, South Carolina.

21. New business.

No new business.

22. Adjourn.

Respectfully submitted,

Scott Myers

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

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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APPELLATE RULES

EUGENE R. WEDOFF
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DAVID G. CAMPBELL
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REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

TO: **Hon. Jeffrey S. Sutton, Chair**
Standing Committee on Rules of Practice and Procedure

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

RE: **Report of Advisory Committee on Criminal Rules**

DATE: **December 20, 2013**

I. Introduction

The Advisory Committee on the Federal Rules of Criminal Procedure ("the Committee") was unable to meet as scheduled on October 18 in Salt Lake City because of the lapse in appropriated funds, and the meeting was not rescheduled. This report discusses briefly four information items:

(1) a proposal by the Department of Justice to amend Rule 4 to permit service of a summons on a foreign organization that has no agent or principal place of business within the United States;
(2) a new proposal by the Department of Justice to amend Rule 41 to enlarge the territorial limits for warrants to search electronic storage media and electronically stored information;
(3) a proposal (parallel to that being proposed by the Advisory Committee on Civil Rules) to amend Rule 45(c) to eliminate the 3-day rule for service by electronic means; and
(4) proposals to consider amendments to Rules 53, 11, and 32.

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II. Information Items

A. Rule 4

The Department of Justice has submitted a proposal to amend Rule 4 to permit effective service of a summons on a foreign organization that has no agent or principal place of business within the United States. The Department recommends that Rule 4 be amended in two key respects:

(1) to remove the requirement that a copy of the summons be sent to the organization's last known mailing address within the district or principal place of business within the United States; and
(2) to provide the means to serve a summons upon an organization located outside the United States.

The proposed amendment would ensure organizations that are committing domestic offenses are not able to avoid liability through the simple expedient of declining to maintain an agent, place of business and mailing address within the United States.

A subcommittee met by teleconference throughout the summer and early fall, and it approved a proposed amendment for discussion at the October meeting. Because of the cancellation of that meeting, discussion of the proposed amendment has been deferred to the Committee's April meeting.

B. Rule 41

The Department of Justice has submitted a proposal to amend Rule 41 to enlarge the territorial limits for warrants to search electronic storage media and electronically stored information. The purpose of the proposed amendment is enable law enforcement to investigate and prosecute botnets and crimes involving Internet anonymizing technologies. Rule 41(b) does not directly address the circumstances that arise when officers seek to execute search warrants, via remote access, over modern communications networks such as the Internet.

The proposed amendment is intended to address two increasingly common situations: (1) where the warrant sufficiently describes the computer to be searched but the district within which that computer is located is unknown, and (2) where the investigation requires law enforcement to coordinate searches of numerous computers in numerous districts.

The proposed amendment would authorize a court in a district where activities related to a crime have occurred to issue a warrant to be executed by remote access for electronic storage media and electronically stored information whether located within or outside the district. At present, Rule 41(b) authorizes search warrants for property located outside the judge's district in only four situations: (1) for property in the district that might be removed before execution of the warrant; (2)

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for tracking devices installed in the district, which may be monitored outside the district; (3) for investigations of domestic or international terrorism; and (4) for property located in a U.S. territory or a U.S. diplomatic or consular mission. The proposed amendment would add an additional exception to the territorial limitations for electronic storage media and electronically stored information.

This proposal has been referred to a subcommittee, which has met once by teleconference and is expected to report at the April meeting.

C. Rule 45 and Other Proposals Arising from the CM/ECF Committee

Rule 45(c) and Rule 6(d) of the Federal Rules of Civil Procedure contain parallel provisions providing additional time for actions after certain modes of service, identifying those modes by reference to Civil Rule 5(b)(2). The CM/ECF Committee has concluded that it is no longer necessary or desirable to provide additional time when service has been made by electronic means.

Parallel amendments to Rule 45(c) and Rule 6(d) have been drafted, and the Civil Rule amendment will be presented at the January meeting of the Standing Committee. If the Civil Rules proposal is approved, the Committee will move forward with the parallel amendment to Rule 45, taking note of any relevant discussion in the Standing Committee.

It is possible that other proposals from the CM/ECF Committee may be ripe for consideration at the April meeting.

D. Other Proposals

The Advisory Committee has also received two other requests to consider amendments to (1) Rule 53 and (2) Rules 11 and 32.

Acting at the request of Magistrate Judge Clay D. Land, the Judicial Conference Criminal Law Committee referred the question whether there is any need to clarify Rule 53, which prohibits "broadcasting" judicial proceedings in order to clarify the rule's application to tweets from the courtroom. This proposal has been referred to a subcommittees that has not met.

Professor Gabriel Chin requested that the Advisory Committee consider amending Rules 11 and 32 to make presentence reports available in advance of a guilty plea so that all parties will be aware of the potential sentence. The Administrative Office is researching prior action and consideration of related issues.

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
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WASHINGTON, D.C. 20544

JEFFREY S. SUTTON
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SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

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

FROM: **Honorable Sidney A. Fitzwater, Chair**
Advisory Committee on Evidence Rules

DATE: **December 2, 2013**

RE: **Report of the Advisory Committee on Evidence Rules**

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") was scheduled to meet on October 11, 2013 at the University of Maine School of Law, in Portland, Maine. A symposium to consider the intersection of the Evidence Rules and emerging technologies was to have been held in conjunction with the meeting. The meeting and symposium were canceled, however, due to the government shutdown. Both have been rescheduled for April 4, 2014 at the University of Maine School of Law.

II. Action Items

No action items.

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III. Information Items

A. Proposed Amendment to Rule 803(10)

The amendment to Rule 803(10) that the Standing Committee approved at its June 2012 meeting took effect on December 1, 2013.

B. Proposed Amendments to Rules 801(d)(1)(B) and 803(6)-(8)

The proposed amendments to Rules 801(d)(1)(B) and 803(6)-(8) that the Standing Committee approved at its June 2013 meeting for transmittal to the Judicial Conference were approved by the Judicial Conference on the consent calendar at its September 2013 meeting and have been transmitted to the Supreme Court for consideration.

C. *Crawford v. Washington* and the Hearsay Exceptions in the Evidence Rules

As previous reports have noted, the Committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*, in which the Court held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to confront and cross-examine the declarant.

The Reporter regularly provides the Committee a case digest of all federal circuit cases discussing *Crawford* and its progeny. The goal of the digest is to enable the Committee to keep current on developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions.

D. "Continuous Study" of the Evidence Rules

The Committee is responsible for engaging in a "continuous study" of the need for any amendments to the Federal Rules of Evidence. The grounds for possible amendments include (1) a split in authority about the meaning of a rule; (2) a disparity between the text of a rule and the way that the Rule is actually being applied in courts; and (3) difficulties in applying a rule, as experienced by courts, practitioners, and academic commentators.

Under this standard, the Reporter has raised the following possible amendments for the Committee's consideration: (1) amending Rule 106 to provide that statements may be used for completion even if they are hearsay; (2) clarifying that Rule 607 does not permit a party to impeach its own witness if the only reason for calling the witness is to present otherwise inadmissible evidence to the jury; (3) clarifying that Rule 803(5) can be used to admit statements made by one person and recorded by another; (4) clarifying the business duty requirement in Rule 803(6); and (5) resolving a dispute in the courts over whether prior testimony in a civil case may be admitted against one who was not a party at the time the testimony was given. The Reporter is also working on other proposals with respect to the hearsay rule (e.g., to abrogate Rule 803(16), the ancient documents exception).

IV. Minutes of the Fall 2013 Meeting

Because the meeting was canceled, there are no draft of the minutes of the Committee's fall 2013 meeting.

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
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MEMORANDUM

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

FROM: **Honorable Michael A. Chagares, Chair**
Inter-Committee CM/ECF Subcommittee

DATE: **December 4, 2013**

RE: **Draft Report to the Standing Committee**

The CM/ECF Subcommittee has worked on several matters to determine how and whether the Advisory Committees can employ an integrated approach to developing amendments that will accommodate the technological advances in case filing that are part of NextGen. This Report discusses the Subcommittee's progress.

1. Electronic Signatures: Proposed Amendment to Bankruptcy Rule 5005

The Subcommittee has previously reported on suggestions it made regarding the proposed amendment to Bankruptcy Rule 5005, covering signatures on documents filed electronically. The Subcommittee approved proposed Rule 5005(a)(3)(A), which provides that the username and password of a filing user will serve as that individual's signature on any electronically filed document. That proposal is consistent with the general practice and is uncontroversial. The Subcommittee suggested changes to proposed Rule 5005(a)(3)(B) to address the concern that once a non-filing user has a signature scanned, there is no assurance that the signature was to the original document. Those changes were incorporated into the version of Rule 5005(a)(3)(B) that was issued for public comment. The Subcommittee will, together with the Bankruptcy Committee, review the public comments on the proposal at the end of the public comment period.

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2. Reports by Advisory Committee Reporters on Possible Changes That Might Be Necessary Due to Advances in Electronic Case Filing.

The Reporters to the respective Advisory Committees prepared lengthy and incisive reports on changes that might be considered by the Advisory Committees in light of future developments in electronic case filing. These reports were reviewed by Subcommittee members and will provide a blueprint for consideration by each of the Advisory Committees. The Subcommittee is grateful to the Reporters for their excellent work. The reports are attached to this Report as Appendix A.

3. Abrogation of the Three-Day Rule

The Subcommittee determined that the Three-Day Rule in the Civil, Criminal, Bankruptcy, and Appellate Rules should be abrogated as applied to electronic service. The Subcommittee approved a template to effectuate that change. This template had to be adjusted to accommodate special concerns in the Appellate Rules. The respective Committee Notes to the proposed amendments where prepared through a collective effort by the Reporters and are uniform to the extent possible. The proposed amendments and Committee Notes are being considered by each of the concerned Advisory Committees. The Civil Rules Committee has already approved amending Civil Rule 6(d) to eliminate the extra three days to respond to something served electronically. That proposal is being submitted to the Standing Committee for its consideration at the January meeting. It is expected that the other Advisory Committees will take up the common proposal at their Spring meetings.

4. Civil Rule Requiring Electronic Filing

The Subcommittee has discussed whether the Civil Rules should be amended to provide that a court can require electronic filing subject to certain exceptions. This is a Civil and Criminal Rules matter as Civil Rule 5(d)(3) and Criminal Rule 49(e) both provide that a court "may allow" electronic filing. The Civil Rules Committee's consideration of a mandatory electronic filing rule is discussed in the minutes submitted by the Civil Rules Committee. The Bankruptcy Rule already allows a court to require electronic filing. *See, e.g.*, Bankruptcy Rule 5005.

The Subcommittee resolved that it would be useful to determine whether local rules generally required electronic filing. Ben Robinson and Laura Erdman of the Administrative Office conducted a review of all the sets of local rules and determined that almost all of the local rules mandate electronic filing subject to certain (varying) exceptions. Their summary report is set forth as Attachment B to this Report. (The data set describing all the pertinent local rules in each district is not included but is available upon request.)

5. Consideration of a Uniform Approach to Amending Rules to Accommodate Electronic Filing and Information.

Professor Capra, the Reporter to the Subcommittee, has prepared for discussion purposes a template that perhaps could be used to provide a "universal fix" for language in the current rules that does not appear to accommodate electronic filing and information. That template is as follows:

Information in Electronic Form and Action by Electronic Means

> **a) Information in Electronic Form:** In these rules, [unless otherwise provided] a reference to information in written form includes electronically stored information.
>
> **b) Action by Electronic Means:** In these rules, [unless otherwise provided] any action that can or must be completed by filing or sending paper may also be accomplished by electronic means [that are consistent with any technical standards established by the Judicial Conference of the United States].

It is apparent that much work needs to be done before it can be assured that a template will sufficiently cover all the situations throughout the rules in which electronic action and information will be presented. There will undoubtedly be necessary exceptions throughout the rules. A memorandum by Professors Beale and King, on problems that might arise in adapting the template to the Criminal Rules, is set forth as Attachment C to this Report — as an example of issues that will probably arise in trying to implement a uniform approach to electronic filing and information.

The Subcommittee will continue to consider and discuss whether any kind of universal fix is feasible.

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APPENDIX A

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FORDHAM
University School of Law

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra
Philip Reed Professor of Law

Phone: 212-636-6855
e-mail:dcapra@law.fordham.edu

Memorandum To: CM/ECF Subcommittee
From: Cathie Struve and Dan Capra, Reporters[1]
Re: Possible Amendment of Appellate Rules to accommodate CM/ECF
Date: July 1, 2013

This memorandum discusses the Appellate Rules that might be affected by CM/ECF, and provides comments and suggestions on whether any amendment to the Appellate Rules is necessary or advisable.

This memo focuses on eight aspects of appellate practice that could be affected by the shift to CM/ECF. Part I discusses provisions that require court clerks to serve certain documents on parties. Part II discusses provisions relating to electronic filing and service by parties. Part III considers the treatment of the record. Part IV notes a proposal concerning the use of audio recordings in lieu of transcripts. Part V discusses the appendix. Part VI turns to the format requirements for briefs and other papers. Part VII discusses requirements concerning paper copies of filings. Part VIII briefly notes provisions that refer to "original" documents.

1. Rules Requiring Service By the Clerk

A number of provisions in the Appellate Rules require service (or notice) by the district clerk (or Tax Court clerk) or circuit clerk.

[1] The work here is all Cathie Struve's. Capra just formatted it and added the text of the rules that are being discussed.

a. Rule 3(d): Appeal as of right.[2]

(d) Serving the Notice of Appeal.

(1) The district clerk must ***serve notice of the filing of a notice of appeal by mailing a copy*** to each party's counsel of record — excluding the appellant's — or, if a party is proceeding pro se, to the party's last known address. When a defendant in a criminal case appeals, the clerk must also ***serve a copy*** of the notice of appeal on the defendant, ***either by personal service or by mail*** addressed to the defendant. The clerk must promptly ***send a copy*** of the notice of appeal and of the docket entries — and any later docket entries — to the clerk of the court of appeals named in the notice. The district clerk must ***note, on each copy***, the date when the notice of appeal was filed.

* * *

(3) The district clerk's failure to ***serve notice*** does not affect the validity of the appeal. The clerk must ***note on the docket the names of the parties to whom the clerk mails copies, with the date of mailing***. Service is sufficient despite the death of a party or the party's counsel.

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c. Rule 12(c): Docketing the Appeal:[3]

(c) Filing the Record, Partial Record, or Certificate. Upon receiving the record, partial record, or district clerk's certificate as provided in Rule 11, ***the circuit clerk must file it and immediately notify*** all parties of the filing date.

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[2] *See also* Rule 6(b)(1) (Rule 3(d) applies to appeals from bankruptcy appellate panels and, in such appeals, "district court" includes "appellate panel"); Rule 13(a)(1) [proposed new 13(a)(1)(A)] (Tax Court clerk to serve notice of filing of notice of appeal). (N.B.: Pending amendments that are on track to take effect – absent contrary action by Congress – on Dec. 1, 2013, would revise Rule 13. We note in brackets any ways in which the amendments would affect the citations in this memo.)

[3] *Cf.* proposed new Rule 6(b)(2)(D) ("When the district clerk or bankruptcy-appellate-panel clerk has made the record available, the circuit clerk must note that fact on the docket. The date noted on the docket serves as the filing date of the record. The circuit clerk must immediately notify all parties of the filing date."); proposed new Rule 6(c)(2)(D) (similar provision for use in permissive appeals directly from bankruptcy court to court of appeals).

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d. Rule 15(c): Review of agency determination

(c) ***Service*** **of the Petition or Application.** The circuit clerk ***must serve a copy*** of the petition for review, or an application or cross-application to enforce an agency order, on each respondent as prescribed by Rule 3(d), unless a different manner of ***service*** is prescribed by statute. At the time of filing, the petitioner must:

(1) ***serve, or have served, a copy*** on each party admitted to participate in the agency proceedings, except for the respondents;

(2) file with the clerk a list of those so served; and

(3) give the clerk enough ***copies*** of the petition or application to ***serve*** each respondent.

---

e. Rule 21(b)(2): Writs of Mandamus and Prohibition

(b) Denial; Order Directing Answer; Briefs; Precedence.

(1) The court may deny the petition without an answer. Otherwise, it must order the respondent, if any, to answer within a fixed time.

(2) The clerk ***must serve the order*** to respond on all persons directed to respond.

---

f. Rule 36(b): Entry of Judgment; Notice

(b) Notice. On the date when judgment is entered, ***the clerk must serve on all parties a copy*** of the opinion — or the judgment, if no opinion was written — and a notice of the date when the judgment was entered.

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g. Rule 45(c): Clerk's Duties

(c) Notice of an Order or Judgment. Upon the entry of an order or judgment, the circuit clerk ***must immediately serve a notice of entry on each party with a copy of any opinion***, and must note the date of service on the docket. Service on a party represented by counsel must be made on counsel.

Professor Struve's Comment on Clerk-Service provisions:[4]

Some observers have suggested that it makes little sense to require the clerk to serve notice of an electronic filing on parties who are participating in CM/ECF. Thus, for example, in 2008 Judge Kravitz drew to the Committee's attention a comment by the Connecticut Bar Association Federal Practice Section's Local Rules Committee ("CBA Local Rules Committee") concerning Appellate Rule 3(d). The CBA Local Rules Committee pointed out that due to the advent of electronic filing, there is a "discrepancy between FRAP 3(d), which indicates that the District Court Clerk's office will handle service of notices of appeals and the reality that it does not serve civil notices of appeals." Professor Steven Gensler relayed to the Committee a suggestion by an attorney, Harvey D. Ellis, Jr., that "FRAP 3(d)(1) could use an amendment to allow a notice of electronic filing to suffice in a district with ECF procedures." And most recently, Judge S. Martin Teel, Jr. – in commenting on the proposed amendments to Rule 6 – stated that "in this day of electronic filing it makes little sense to require the clerk to serve the notice of appeal instead of requiring that the appellant ... file a certificate of service of the notice of appeal."

When the Committee discussed this question in 2008, it seemed prudent to take a wait-and-see approach rather than amending Rule 3(d). At that time, not all the district courts that were on CM/ECF for filing permitted the notice of appeal to be filed electronically. Moreover, the appellate courts' transition to electronic filing was still in process. Now, electronic filings are accepted by most district courts, at least some bankruptcy appellate panels, and all courts of appeals. The Tax Court now requires most counseled parties to file electronically,[5] but the Tax Court's electronic filing system, eAccess, does not appear to be linked with PACER or the CM/ECF system,[6] and the Tax Court does not permit notices of appeal to be filed electronically.[7]

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[4] All the comments from Professor Struve are taken from her memo to the Appellate Rules Committee on this subject, dated September 2011, as updated in a short 2012 memo to the Committee.

[5] See Tax Court Rule 26(a) ("The Court will accept for filing documents submitted, signed, or verified by electronic means that comply with procedures established by the Court."); *id.* Rule 26(b) (generally requiring e-filing for filings by represented parties, but listing exceptions).

[6] PACER's list of CM/ECF courts (Individual Court PACER Sites, available at http://www.pacer.gov/psco/cgi-bin/links.pl, last visited June 24, 2013) does not mention the Tax Court, and the Tax Court's eAccess site does not mention PACER or CM/ECF.

[7] *See* United States Tax Court, eFiling Instructions for Practitioners 26.

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The prevalence of electronic filing does not mean that notices of appeal will always be filed electronically in the lower court. For one thing, a lower court that generally permits electronic filing may make an exception for notices of appeal. For another, filers who are exempt from electronic filing (e.g., many pro se litigants) will file notices of appeal in paper form. And even when a notice of appeal is filed electronically in the lower court, the lower court's clerk presumably must serve paper copies of the notice of appeal on any litigants who are not on the CM/ECF system.[8]

Thus, any amendment (to the Appellate Rules that require service by a clerk) should take account of the likely persistence of paper filings and paper service by or on certain parties (such as inmates[9] or other pro se litigants). The provisions might usefully be amended to exempt the relevant clerk from the relevant service requirement as to parties who automatically receive notice of the relevant filing through the CM/ECF system. However, it would not seem to make sense to adopt this approach for Rule 15(c), which concerns notice of the filing of a petition for review of agency action. Unlike appeals from district court or bankruptcy appellate panel judgments, petitions for review of agency action are filed in the court of appeals itself, and one could not assume that the respondents

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[8] Rule 3(d)(1)'s requirement that when a criminal defendant appeals "the clerk must also serve a copy of the notice of appeal on the defendant" is somewhat ambiguous: Does this require service on the attorney for a represented defendant, or on the defendant himself or herself? The 1966 Committee Note to Criminal Rule 37(a)(1) explained this requirement by stating that "The duty imposed on the clerk by the sixth sentence is expanded in the interest of providing a defendant with actual notice that his appeal has been taken and in the interest of orderly procedure generally." This might suggest that the defendant himself or herself is to be notified. On the other hand, when this provision was originally adopted in Criminal Rule 37(a)(1) the Rule also spoke of service of the notice on "all parties other than the appellant," perhaps suggesting that the drafters used "party" to refer to counsel in the case of represented parties. The notification provided by Rule 3(d)(1) may be particularly useful to a defendant who has availed himself or herself of the option – provided by Criminal Rule 32(j)(2) – to ask the clerk to prepare and file a notice of appeal on the defendant's behalf.

To the extent that Rule 3(d)(1) requires a criminal defendant-appellant to be personally served with the notice of appeal – even if represented – this would add another category of appeals in which paper service by the clerk would ordinarily be necessary.

[9] When an inmate confined in an institution files a notice of appeal under Rule 4(c), that filing will typically (for the foreseeable future) be in paper form. With respect to such inmate filings, Rule 3(d)(2) requires the clerk to alert counsel (and pro se parties) to the *date of docketing* of the notice; this is important because in such instances Rule 4(c) provides that certain periods that would run from the date of the inmate's filing are counted from the date of docketing rather than the date of filing. I am unsure whether parties who participate in CM/ECF would receive notice of the date of docketing through the CM/ECF electronic notification system, but if not, then Rule 3(d)(2)'s requirement would continue to be important even for participants in CM/ECF.

would be registered in CM/ECF as of the date that the circuit clerk would be serving the copy of the petition.[10]

Assuming that Rules 3(d), 13(a)(1),[11] 21(b)(2), 36(b), and 45(c) are to be amended in this manner, it would make sense to consider whether any amendments are needed in the provisions that currently require litigants to furnish sufficient copies to be used by the clerk to comply with service requirements. *See* Rule 3(a)(1) ("[T]he appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d)."); Rule 13(a)(1) [proposed Rule 13(a)(1)(A)] (similar requirement). I see no need for any amendment to Rules 3(a)(1) and 13(a)(1). Those rules currently direct the litigant to provide "enough copies," and that phrase is flexible: If all parties are CM/ECF participants, then zero copies would be enough copies.

Another requirement that should probably be retained for the moment is Rule 3(d)(1)'s requirement that the district clerk notify the court of appeals of the filing of the notice of appeal and of any later district-court filings that may affect the progress of the appeal (e.g., motions that may suspend the effectiveness of the notice of appeal). I imagine that when CM/ECF is fully operational in all the courts of appeals, one benefit may be that such notifications become automatic. But until then, I would guess that the Rule's requirement will continue to be important. Like all the other issues discussed here, this is one as to which the guidance of the Clerks will be important.

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[10] Admittedly, the respondents will be agencies who are repeat players, so perhaps my assumption will not always hold true; but the likely pattern does seem significantly different in the context of agency review than elsewhere.

[11] As noted above, the Tax Court has its own electronic filing system and does not currently permit electronic filing of the notice of appeal. Thus, the desirability and nature of any amendments to Rule 13(a)(1) [proposed Rule 13(a)(1)(A)] would require separate consideration.

12b-008543

2. Rules Relating to Electronic Filing and Service by Parties:

a. Rule 25(a)(2)(D): Authorizing local rule on electronic filing.

(a) (2)(D) Electronic filing. A court of appeals may by local rule permit or require papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A local rule may require filing by electronic means only if reasonable exceptions are allowed. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.[12]

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b. Rule 25(c): Manner of Service

(c) Manner of Service.

(1) Service may be any of the following:

(A) personal, including delivery to a responsible person at the office of counsel;

(B) by mail;

(C) by third-party commercial carrier for delivery within 3 days; or

(D) ***by electronic means, if the party being served consents in writing.***

(2) if authorized by local rule, a party may use the court's transmission equipment to make electronic service under Rule 25(c)(1)(D).

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[12] The last sentence of this rule serves the same purpose as the definitional section of Rule 101(b)(6) of the Evidence Rules. It avoids the need to update paper-based language. For rules referring to writings, see, e.g., Rule 11(f) ("written stipulation filed in the district court"); Rule 17(b)(2) ("parties may stipulate in writing that no record or certified list be filed"); Rule 27(a)(1) ("A motion must be in writing unless the court permits otherwise."); Rule 41(d)(2)(B) (notification to circuit clerk "in writing"); Rules 44(a) and (b) ("written notice to the circuit clerk").

Of course, if the electronic filing provisions are to be lifted from local rules to the national rules, then Rule 25(a)(2)(D) would have to be amended to so provide.

(3) When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court.

(4) Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on transmission, unless the party making service is notified that the paper was not received by the party served.

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c. Rule 26(c): The three-day rule.

(c) Additional Time after Service. When a party may or must act within a specified time after service, ***3 days are added after the period would otherwise expire under Rule 26(a), unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.***

Professor Struve's Comments on Electronic Service Provisions:

The Appellate Rules currently acknowledge the possibility of electronic filing and service. In the context of an overall review of the Rules' treatment of electronic filings, it makes sense to review Rule 25's provisions for electronic service and filing as well as Rule 26(c)'s treatment of the three-day rule.

Rule 25(a)(2)(D) authorizes each circuit to adopt a local rule permitting or requiring electronic filing, subject to the proviso that any electronic filing requirement include reasonable exceptions. Rule 25(a)(2)(D) also helpfully defines an electronically filed paper as a "written paper" for purposes of the Appellate Rules.

Rule 25(c)(1) permits electronic service "if the party being served consents in writing." (I believe that such consent is ordinarily required as a condition of registration in CM/ECF.) Rule 25(c)(2) permits parties to use the court's transmission equipment to make electronic service if authorized by local rule. Rule 25(c)(3) directs parties to serve other parties in "a manner at least as expeditious as the manner used to file the paper with the court," when "reasonable" in light of

relevant factors. Presumably, parties who are filing electronically should serve other parties electronically unless those parties are not registered in CM/ECF.[13] Rule 25(c)(4) provides that "[s]ervice by electronic means is complete on transmission, unless the party making service is notified that the paper was not received by the party served."

Rule 26(c) sets out the three-day rule. The three additional days apply not only to service by mail or commercial carrier, but also to electronic service. Chief Judge Easterbrook has proposed abolishing the three-day rule; he argues that the three-day rule is particularly incongruous as applied to electronic service.[14] Though Chief Judge Easterbrook's suggestion relates only to the Appellate Rules, the criticism of the three-day rule is relevant, as well, to Civil Rule 6(d), Criminal Rule 45(c), and Bankruptcy Rule 9006(f). For more than a decade, there have been periodic discussions of whether electronic service ought to be included within the three-day rule. The Appellate, Bankruptcy, and Civil Rules Advisory Committees, and the Standing Committee, have discussed the question, as did participants in the time-computation project. Though there has been some support, in those discussions, for excluding electronic service from the three-day rule, ultimately the decision was taken to include electronic service within the three-day rule for the moment.

Some of the reasons given for including electronic service may be somewhat less weighty now than they were a decade ago: Concerns that electronic service may be delayed by technical glitches or that electronically served attachments may arrive in garbled form are perhaps less urgent in districts (or circuits) where electronic service occurs as part of smoothly-running CM/ECF programs. It may also be the case that when CM/ECF is mandatory for counsel, counsel no longer (as a practical matter) has the inclination or, perhaps, ability to decline consent to electronic service; in those districts or circuits, there would be no need to give counsel an incentive to consent to electronic service (or to avoid giving counsel a disincentive to consent to electronic service) by maintaining the three-day rule for electronic service. However, the concern remains that counsel might strategically serve an opponent by electronic means on a Friday night in order to inconvenience the opponent. Thus, though some of the rationales for including electronic service in the three-day rule may have become less persuasive over time, the concern over possible strategic misuse of electronic filing persists.

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[13] Even if a party is not registered in CM/ECF, if the party has consented in writing to electronic service, then service by email may be most appropriate when documents are filed electronically.

[14] Chief Judge Easterbrook favors eliminating the three-day rule entirely, in part because its application interferes with the Rules' preference for setting time periods in increments of seven days. However, during the Appellate Rules Committee's spring 2013 meeting, participants noted the possible need for more time by those who respond to pro se filings. For example, in cases involving the federal government, pro se papers tend to reach the Department of Justice belatedly because all mail bound for the DOJ is screened for security reasons. If the three-day rule were eliminated, it was suggested, the DOJ would move more frequently for extensions of time to respond to pro se filings.

12b-008546

3. Rules on Treatment of the Record

a. Rule 5(d)(3): Appeal by Permission – Filing the Record

(d) Grant of Permission; Fees; Cost Bond; *Filing the Record.*

> (3) The district clerk must notify the circuit clerk once the petitioner has paid the fees. Upon receiving this notice, the circuit clerk must enter the appeal on the docket. The ***record must be forwarded and filed in accordance with Rules 11 and 12(c).***

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b. Rule 10: The Record on Appeal:

(a) Composition of the Record on Appeal. The following items constitute the record on appeal:

> **(1)** the original papers and exhibits filed in the district court;
>
> **(2)** the transcript of proceedings, if any; and
>
> **(3)** ***a certified copy of the docket entries*** prepared by the district clerk.

* * *

(c) Statement of the Evidence When the Proceedings Were Not Recorded or When a Transcript Is Unavailable. If the transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement must be served on the appellee, who may serve objections or proposed amendments within 14 days after being served. The statement and any objections or proposed amendments must then be submitted to the district court for settlement and approval. As settled and approved, the statement ***must be included by the district clerk in the record on appeal.***

(d) Agreed Statement as the Record on Appeal. In place of the record on appeal as defined in Rule 10(a), the parties may prepare, sign, and submit to the district court a statement of the case showing how the issues presented by the appeal arose and were decided in the district court. The statement must set forth only those facts averred and proved or sought to be proved that are essential to the court's resolution of the issues. If the statement is truthful, it — together with any additions that the district court may consider necessary to a full presentation of the issues on appeal — must be approved by the district court and must then be certified to the court of appeals ***as the record on appeal. The district clerk must then send it to the circuit clerk*** within the time provided by Rule 11. A copy of the agreed statement may be filed in place of the appendix required by Rule 30.

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c. Rule 11: Forwarding the Record:

(a) Appellant's Duty. An appellant filing a notice of appeal must comply with Rule 10(b) and must do whatever else is necessary to enable the clerk to assemble and ***forward the record***. If there are multiple appeals from a judgment or order, the clerk must forward a ***single record***.

(b) Duties of Reporter and District Clerk.

* * *

(2) District Clerk's Duty to Forward. When the record is complete, the district clerk must ***number the documents constituting the record and send them promptly to the circuit clerk*** together with a list of the documents correspondingly numbered and reasonably identified. Unless directed to do so by a party or the circuit clerk, the district clerk will not send to the court of appeals ***documents of unusual bulk or weight***, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals. If the exhibits are unusually bulky or heavy, a party must arrange with the clerks in advance for their transportation and receipt.

(c) ***Retaining the Record*** **Temporarily in the District Court for Use in Preparing the Appeal.** The parties may stipulate, or the district court on motion may order, that the district clerk ***retain the record*** temporarily for the parties to use in preparing the ***papers on appeal***. In that event the district clerk must certify to the circuit clerk that the record on appeal is complete. Upon receipt of the appellee's brief, or earlier if the court orders or the parties agree, the appellant must request the district clerk to ***forward the record***.

* * *

(e) Retaining the Record by Court Order.

(1) The court of appeals may, by order or local rule, provide that a ***certified copy of the docket entries be forwarded instead of the entire record***. But a party may at any time during the appeal request that designated parts of the ***record be forwarded***.

(2) The district court may order the record or some part of it ***retained*** if the court needs it while the appeal is pending, subject, however, ***to call by the court of appeals***.

(3) ***If part or all of the record is ordered retained***, the district clerk must send to the court of appeals a copy of the order and the docket entries together with the parts of the original record allowed by the district court and ***copies of any parts of the record*** designated by the parties.

(f) ***Retaining Parts of the Record*** **in the District Court by Stipulation of the Parties**. The parties may agree by written stipulation filed in the district court that designated ***parts of the record be retained in the district court*** subject to call by the court of appeals or request by a party. The parts of the record so designated remain a part of the record on appeal.

(g) Record for a Preliminary Motion in the Court of Appeals. If, before the ***record is forwarded,*** a party makes any of the following motions in the court of appeals:

- for dismissal;
- for release;
- for a stay pending appeal;
- for additional security on the bond on appeal or on a supersedeas bond; or
- for any other intermediate order —

the district clerk must ***send the court of appeals any parts of the record*** designated by any party.

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c. Rule 12(c): Filing the record.

(c) Filing the Record, Partial Record, or Certificate. ***Upon receiving the record, partial record,*** or district clerk's certificate as provided in Rule 11, the circuit clerk must file it and immediately notify all parties of the filing date.

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d. Rule 28(e): Appellate Briefs

(e) References to the Record. References to the parts of ***the record*** contained in the appendix filed with the appellant's brief must be to the pages of the appendix. If the appendix is prepared after the briefs are filed, a party referring to ***the record*** must follow one of the methods detailed in Rule 30(c). If the original record is used under Rule 30(f) and is not consecutively paginated, or if the brief refers to an unreproduced part of the record, any reference must be to the page of the original document.

For example:

- Answer p. 7;
- Motion for Judgment p. 2;
- Transcript p. 231.

Only clear abbreviations may be used. A party referring to evidence whose admissibility is in controversy must cite the pages of the appendix or of the transcript at which the evidence was

identified, offered, and received or rejected.

General comment by Professor Struve on provisions concerning the record:

One of the most significant changes that CM/ECF may bring to appellate practice is the treatment of the record. If the appellate judges and clerks can access the district court record by means of links in the electronic docket, then the need for a paper record may eventually dissipate.

The proposed amendments to Appellate Rule 6(b)— set forth below — illustrate an approach that could be generalized to the non-bankruptcy context by means of similar amendments to Appellate Rules 11 and 12.[15] However, it seems likely that a different approach to the record would be taken in certain contexts, such as appeals from the Tax Court[16] and petitions for review of agency action.

It would also make sense to review Rule 28(e)'s treatment of references to the record. It could be useful to require references that make it easy to find the relevant document on PACER, for example by referring to the document's docket number. It may also be worthwhile to consider whether to note the possibility of providing hyperlinks to relevant record documents.

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[15] Local circuit provisions provide additional models and should also be studied.

[16] Under Rule 13(d)(1) [proposed Rule 13(a)(4)(A)], the provisions in Rules 10, 11, and 12 concerning the record [generally] also apply to appeals from the Tax Court. Unless the Tax Court's electronic filing system becomes linked to CM/ECF, it seems unlikely that a Tax Court record could be transmitted electronically to a court of appeals. Thus, if Rules 11 and 12 are amended to contemplate electronic transmission of the record, it may also be necessary to amend Rule 13 to provide separately for records on appeals from the Tax Court. *Cf.* Sixth Circuit Rule 13 cmt. ("Tax Court appeals will generally be handled the same as district court appeals. However, the Tax Court's electronic records are not easily transferable to the court of appeals. Therefore, as set out in 6 Cir. R. 30, in Tax Court appeals there will be appendices instead of an electronic record on appeal.").

12b-008550

Proposed Amendment to Appellate Rule 6; approved by the Standing Committee, June 2013, for referral to the Judicial Conference.

Rule 6. Appeal in a Bankruptcy Case ~~From a Final Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel~~

* * *

(b) Appeal From a Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel Exercising Appellate Jurisdiction in a Bankruptcy Case.

* * *

(2) Additional Rules. In addition to the rules made applicable by Rule 6(b)(1), the following rules apply:

* * *

(B) The r~~R~~ecord on ~~a~~Appeal.

(i) Within 14 days after filing the notice of appeal, the appellant must file with the clerk possessing the record assembled in accordance with Bankruptcy Rule ~~8006~~ 8009 – and serve on the appellee – a statement of the issues to be presented on appeal and a designation of the record to be certified and ~~sent~~ ***made available*** to the circuit clerk.

(ii) An appellee who believes that other parts of the record are necessary must, within 14 days after being served with the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included.

(iii) The record on appeal consists of:

- the redesignated record as provided above;
- the proceedings in the district court or bankruptcy appellate panel; and
- a certified copy of the docket entries prepared by the clerk under Rule 3(d).

(C) ~~Forwarding~~ *Making the r~~R~~ecord Available*.

(i) When the record is complete, the district clerk or bankruptcy-appellate-panel clerk must number the documents constituting the record and ~~send~~ promptly ***make it available*** ~~them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified~~ to the circuit clerk. ~~Unless directed to do so by a party or the circuit clerk~~ If the clerk makes the record available in paper form, the clerk will not send ~~to the court of appeals~~ documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals, unless directed to do so by a party or the circuit clerk. If ~~the exhibits are~~ unusually bulky or heavy exhibits are to be made available in paper form, a party must arrange with the clerks in advance for their transportation and receipt.

12b-008551

(ii) All parties must do whatever else is necessary to enable the clerk to assemble the record and ~~forward the record~~ make it available. When the record is made available in paper form, t~~T~~he court of appeals may provide by rule or order that a certified copy of the docket entries be ~~sent~~ made available in place of the redesignated record~~, b~~. But any party may request at any time during the pendency of the appeal that the redesignated record be ~~sent~~ made available.

(D) Filing the rRecord. ~~Upon receiving the record – or a certified copy of the docket entries sent in place of the redesignated record – the circuit clerk must file it and immediately notify all parties of the filing date~~ When the district clerk or bankruptcy-appellate-panel clerk ***has made the record available***, the circuit clerk must note that fact on the docket. The date noted on the docket serves as the filing date of the record. The circuit clerk must immediately notify all parties of the filing date.

(c) Direct Review by Permission Under 28 U.S.C. § 158(d)(2).

* * *

(2) Additional Rules. In addition, the following rules apply:

(A) The Record on Appeal. Bankruptcy Rule 8009 governs the record on appeal.

(B) Making the Record Available. Bankruptcy Rule 8010 governs completing the record and making it available.

(C) Stays Pending Appeal. Bankruptcy Rule 8007 applies to stays pending appeal.

(D) Duties of the Circuit Clerk. When the bankruptcy clerk has made the record available, the circuit clerk must note that fact on the docket. The date noted on the docket serves as the filing date of the record. The circuit clerk must immediately notify all parties of the filing date.

* * *

4. Treatment of the Transcript.

a. Rule 10: Record on Appeal:

(a) Composition of the Record on Appeal. The following items constitute the record on appeal:

(1) the original papers and exhibits filed in the district court;

(2) the ***transcript*** of proceedings, if any; and

(3) a certified copy of the docket entries prepared by the district clerk.

(b) The *Transcript* of Proceedings.

(1) Appellant's Duty to Order. Within 14 days after filing the notice of appeal or entry of an order disposing of the last timely remaining motion of a type specified in Rule 4(a)(4)(A), whichever is later, the appellant must do either of the following:

(A) order from the reporter a ***transcript*** of such parts of the proceedings not already on file as the appellant considers necessary, subject to a local rule of the court of appeals and with the following qualifications:

(i) the order must be ***in writing***;

(ii) if the cost of the ***transcript*** is to be paid by the United States under the Criminal Justice Act, the order must so state; and

(iii) the appellant must, within the same period, file a copy of the order with the district clerk; or

(B) file a certificate stating that no ***transcript*** will be ordered.

(2) Unsupported Finding or Conclusion. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the ***record a transcript*** of all evidence relevant to that finding or conclusion.

(3) Partial *Transcript*. Unless the entire ***transcript*** is ordered:

(A) the appellant must - within the 14 days provided in Rule 10(b)(1) - file a statement of the issues that the appellant intends to present on the appeal and must serve on the appellee a copy of both the order or certificate and the statement;

(B) if the appellee considers it necessary to have a ***transcript*** of other parts of the proceedings, the appellee must, within 14 days after the service of the order or certificate and the statement of the issues, file and serve on the appellant a designation of additional parts to be ordered; and

(C) unless within 14 days after service of that designation the appellant has ordered all such parts, and has so notified the appellee, the appellee may within the following 14 days either order the parts or move in the district court for an order requiring the appellant to do so.

(4) Payment. At the time of ordering, a party must make satisfactory arrangements with the reporter for paying the cost of the ***transcript.***

Professor Struve's Comments on references to the transcript:

Digital audio recording has been an approved method of making the record of district court proceedings for more than a decade. Some five years ago, Judge Michael Baylson suggested that the Appellate Rules Committee consider the possibility of allowing the use of digital audio recordings in place of written transcripts for the purposes of the record on appeal. The Committee discussed this proposal at meetings in 2009, 2010, and 2013. Although there are several ways in which the existing procedures under the Appellate Rules would be a somewhat awkward fit in cases where audio files are used instead of the transcript, and although some participants expressed interest in the possible uses of digital recordings in lieu of transcripts, other participants expressed skepticism about the feasibility of such a change in federal appellate practice. At the Committee's spring 2013 meeting, no member favored substituting digital recordings for transcripts, and the Committee voted to remove this suggestion from the Committee's agenda. Accordingly, this memo does not discuss the matter in detail.

5. Treatment of the appendix

Rule 30. Appendix to the Briefs

(a) Appellant's Responsibility.

(1) Contents of the Appendix. The appellant must ***prepare and file an appendix*** to the briefs containing:

(A) the relevant docket entries in the proceeding below;

(B) the relevant portions of the pleadings, charge, findings, or opinion;

(C) the judgment, order, or decision in question; and

(D) other parts of the record to which the parties wish to direct the court's attention.

(2) Excluded Material. Memoranda of law in the district court should not be included in the appendix unless they have independent relevance. Parts of the record may be relied on by the court or the parties even though not included in the appendix.

(3) Time to File; ***Number of Copies***. Unless filing is deferred under Rule 30(c), the appellant must file ***10 copies of the appendix*** with the brief and must serve one copy on counsel for each party separately represented. An unrepresented party proceeding in forma pauperis must file 4 legible copies with the clerk, and one copy must be served on counsel for each separately represented party. The court may by local rule or by order in a particular case require the filing or service of a different number.

(b) All Parties' Responsibilities.

(1) Determining the Contents of the Appendix. The parties are encouraged to agree on the contents of the appendix. In the absence of an agreement, the appellant must, within 14 days after the record is filed, serve on the appellee a designation of the parts of the record the appellant intends to include in the appendix and a statement of the issues the appellant intends to present for review. The appellee may, within 14 days after receiving the designation, serve on the appellant a designation of additional parts to which it wishes to direct the court's attention. The appellant must include the designated parts in the appendix. The parties must not engage in unnecessary designation of parts of the record, because the entire record is available to the court. This paragraph applies also to a cross-appellant and a cross-appellee.

(2) Costs of Appendix. Unless the parties agree otherwise, the appellant must pay the cost of the appendix. If the appellant considers parts of the record designated by the appellee to

be unnecessary, the appellant may advise the appellee, who must then advance the cost of including those parts. The cost of the appendix is a taxable cost. But if any party causes unnecessary parts of the record to be included in the appendix, the court may impose the cost of those parts on that party. Each circuit must, by local rule, provide for sanctions against attorneys who unreasonably and vexatiously increase litigation costs by including unnecessary material in the appendix.

(c) Deferred Appendix.

(1) Deferral Until After Briefs Are Filed. The court may provide by rule for classes of cases or by order in a particular case that preparation of the appendix may be deferred until after the briefs have been filed and that the appendix may be filed 21 days after the appellee's brief is served. Even though the filing of the appendix may be deferred, Rule 30(b) applies; except that a party must designate the parts of the record it wants included in the appendix when it serves its brief, and need not include a statement of the issues presented.

(2) References to the Record.

(A) If the deferred appendix is used, the parties may cite in their briefs the pertinent pages of the record. When the appendix is prepared, the record pages cited in the briefs must be indicated by inserting record page numbers, in brackets, at places in the appendix where those pages of the record appear.

(B) A party who wants to refer directly to ***pages of the appendix*** may serve and file copies of the brief within the time required by Rule 31(a), containing appropriate references to pertinent pages of the record. In that event, within 14 days after the appendix is filed, the party must serve and file copies of the brief, containing references to the pages of the appendix in place of or in addition to the references to the pertinent pages of the record. Except for the correction of typographical errors, no other changes may be made to the brief.

(d) Format of the Appendix. The appendix must begin with a table of contents identifying the page at which each part begins. The relevant docket entries must follow the table of contents. Other parts of the record must follow chronologically. When pages from the transcript of proceedings are placed in the appendix, the ***transcript page numbers*** must be shown in brackets immediately before the included pages. Omissions in the text of papers or of the transcript must be indicated by asterisks. Immaterial formal matters (captions, subscriptions, acknowledgments, etc.) should be omitted.

(e) Reproduction of Exhibits. Exhibits designated for inclusion in the appendix may be reproduced in a separate volume, or volumes, suitably indexed. Four copies must be filed with the appendix, and one copy must be served on counsel for each separately represented party. If a transcript of a proceeding before an administrative agency, board, commission, or officer was used in a district-court action and has been designated for inclusion in the appendix, the transcript must be

placed in the appendix as an exhibit.

(f) Appeal on the Original Record Without an Appendix. The court may, either by rule for all cases or classes of cases or by order in a particular case, dispense with the appendix and permit an appeal to proceed on the original record with any copies of the record, or relevant parts, that the court may order the parties to file.

Comment by Professor Struve on treatment of the appendix:

At present, Rule 30 provides circuits with flexibility to put in place their preferred requirements concerning the appendix. Though those local circuit requirements vary, it seems likely that the general purpose of the appendix is similar across circuits – namely, to collect in one place the most salient portions of the record.

Even if the transition to electronic filing renders it appropriate to transmit the record in electronic form, my intuition is that some courts will continue to want the parties to distill that record into an appendix.[17] An appendix – even if filed electronically – provides conveniences that an electronic record would not. To access the electronic record, a judge or clerk would need internet access. An electronic copy of the appendix, by contrast, could be read even without internet access; and the appendix would also serve to highlight the parties' view of the most important portions of the record.[18] Moreover, some courts may prefer to require a paper appendix, because judges and law clerks may find that paper rather than electronic copies of the appendix better lend themselves to skimming, highlighting, and the like. If a paper copy of the appendix is not filed, the work of preparing a hard copy would be shifted from a law firm paralegal to the clerk's office or chambers staff, and the cost of printing and binding would be shifted from private parties to taxpayers.

It is thus unclear to me whether the transition to electronic filing warrants amendments to Rule 30. However, it is possible that a study of local circuit practices would reveal aspects of the Rule that could be altered in response to electronic filing.

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[17] *But see* Sixth Circuit Rule 30(a) ("An appendix is required only in [certain specified cases], unless the court directs otherwise. In other cases, an appendix is unnecessary and must not be filed. The court will have the district court record available.").

[18] Admittedly, there are other ways to highlight those portions. *See, e.g.*, Sixth Circuit Rule 30(g)(1) ("To facilitate the court's reference to the electronic record, each party must include in its principal brief a designation of documents.").

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6. Rules Regarding Format of Briefs and Other Papers

a. Rule 27(d): Motions

(d) Form of Papers; Page Limits; and Number of Copies.

(1) Format.

(A) Reproduction. A motion, response, or reply may be reproduced by any process that yields a clear black image on light paper. ***The paper must be opaque and unglazed. Only one side of the paper may be used.***

(B) Cover. A cover is not required but there must be a caption that includes the case number, the name of the court, the title of the case, and a brief descriptive title indicating the purpose of the motion and identifying the party or parties for whom it is filed. ***If a cover is used, it must be white.***

(C) Binding. The document must be ***bound in any manner that is secure, does not obscure the text, and permits the document to lie reasonably flat when open.***

(D) Paper size, line spacing, and margins. The document must be on 8½ by 11 inch ***paper.*** The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there.

(E) Typeface and type styles. The document must comply with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6).

(2) Page Limits. A motion or a response to a motion must not exceed 20 pages, exclusive of the corporate disclosure statement and accompanying documents authorized by Rule 27(a)(2)(B), unless the court permits or directs otherwise. A reply to a response must not exceed 10 pages.

(3) Number of Copies. An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case.

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b. Rule 28.1(d): Cross-appeals

(d) *Cover.* Except for filings by unrepresented parties, ***the cover of the appellant's principal brief must be blue; the appellee's principal and response brief, red; the appellant's response and reply brief, yellow; the appellee's reply brief, gray; an intervenor's or amicus curiae's brief, green; and any supplemental brief, tan.*** The front cover of a brief must contain the information required by Rule 32(a)(2).

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c. Rule 32: Form of Briefs, Appendices, and Other Papers

(a) Form of a Brief.

(1) ***Reproduction.***

(A) A brief may be ***reproduced by any process that yields a clear black image on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used.***

(B) Text must be ***reproduced with a clarity*** that equals or exceeds the output of a laser printer.

(C) Photographs, illustrations, and tables may be reproduced by any method that results in a good copy of the original; a ***glossy finish is acceptable if the original is glossy.***

(2) ***Cover.*** Except for filings by unrepresented parties, ***the cover of the appellant's brief must be blue; the appellee's, red; an intervenor's or amicus curiae's, green; any reply brief, gray; and any supplemental brief tan.*** * * *

(3) ***Binding. The brief must be bound in any manner that is secure, does not obscure the text, and permits the brief to lie reasonably flat when open.***

(4) ***Paper Size***, Line Spacing, and Margins. The brief must be on 8½ by 11 inch ***paper.*** The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear

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there.

* * *

(b) Form of an Appendix. An appendix must comply with Rule 32(a)(1), (2), (3), and (4), with the following exceptions:

(1) The ***cover of a separately bound*** appendix must be white.

(2) An appendix may include a legible photocopy of any document found in the record or of a printed judicial or agency decision.

(3) When necessary to facilitate inclusion of odd-sized documents such as technical drawings, an appendix may be a size other than 8½ by 11 inches, and need not lie reasonably flat when opened.

(c) Form of Other *Papers.*

(2) *Other Papers*. Any other ***paper,*** including a petition for panel rehearing and a petition for hearing or rehearing en banc, and any response to such a petition, must be reproduced in the manner prescribed by Rule 32(a), with the following exceptions:

(A) A ***cover*** is not necessary if the caption and signature page of the ***paper*** together contain the information required by Rule 32(a)(2). If a ***cover is used, it must be white***.

* * *

(d) Signature. Every brief, motion, or ***other paper*** filed with the court must be signed by the party filing the ***paper*** or, if the party is represented, by one of the party's attorneys.

(e) Local Variation. Every court of appeals must accept documents that comply with the form requirements of this rule. By local rule or order in a particular case a court of appeals may accept documents that do not meet all of the form requirements of this rule.

Comment by Professor Struve on rules regarding format:

Some of the Appellate Rules' detailed instructions concerning the format of briefs and other papers may be unnecessary for electronic filings. Requirements that seem unnecessary include those concerning the following:

- Opaque and unglazed paper. *See* Rule 27(d)(1)(A); Rule 32(a)(1)(A).
- Single-sided printing. *See* Rule 27(d)(1)(A); Rule 32(a)(1)(A).[19]
- Color of covers. *See* Rule 27(d)(1)(B); Rule 28.1(d); Rule 32(a)(2); Rule 32(b)(1); Rule 32(c)(2)(A).
- Binding. *See* Rule 27(d)(1)(C); Rule 32(a)(3); Rule 32(b)(3).
- Paper size. *See* Rule 27(d)(1)(D); Rule 32(a)(4).
- Glossy reproductions of photographs. *See* Rule 32(a)(1)(C).

Although these requirements seem beside the point with respect to electronic filings, it is not clear that there is an urgent need to amend the rules to acknowledge these requirements' inapplicability to electronic filings. It is difficult to imagine a clerk's office rejecting an electronically filed paper (filed in conformance with local CM/ECF rules) for failure to comply with any of the requirements in the bullet point list above.[20] Moreover, the Rules will need to continue to account for pro se filers.

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[19] The Appellate Rules Committee recently discussed whether to amend the Rules to permit double-sided printing. After discussion, the Committee voted at its spring 2013 meeting not to proceed further with this idea; it also voted to remove from its agenda a proposal to amend the Rules to permit 1.5-spacing instead of double-spacing.

[20] Rule 32(e) provides that "[b]y local rule or order in a particular case a court of appeals may accept documents that do not meet all of the form requirements of this rule."

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7. Rules on Required number of copies

a. Rule 5(c): Appeal by Permission

(c) Form of Papers; Number of Copies. * * * ***An original and 3 copies*** must be filed unless the court requires a different number by local rule or by order in a particular case.

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b. Rule 21(d): Writs of Mandamus and Prohibition

(d) Form of Papers; Number of Copies. * * * ***An original and 3 copies*** must be filed unless the court requires a different number by local rule or by order in a particular case.

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c. Rule 26.1(c): Corporate Disclosure Statement

(c) Number of Copies. If the Rule 26.1 statement is filed before the principal brief, or if a supplemental statement is filed, the party must file ***an original and 3 copies*** unless the court requires a different number by local rule or by order in a particular case.

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d. Rule 27(d)(3): Motions

(d) Form of Papers; Page Limits; and Number of Copies.

* * *

> **(3) Number of Copies.** ***An original and 3 copies*** must be filed unless the court requires a different number by local rule or by order in a particular case.

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e. Rule 31 (b): Serving and Filing Briefs

(b) Number of Copies. ***Twenty-five copies of each brief*** must be filed with the clerk and ***2 copies*** must be served on each unrepresented party and on counsel for each separately represented party. An unrepresented party proceeding in forma pauperis must file ***4 legible copies*** with the clerk, and

one copy must be served on each unrepresented party and on counsel for each separately represented party. The court may by local rule or by order in a particular case require the filing or service of ***a different number.***

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f. Rule 35(d): En Banc Determination

(d) Number of Copies. The ***number of copies to be filed must be prescribed by local*** rule and may be altered by order in a particular case.

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g. Rule 40(b): Petition for Panel Rehearing

(b) Form of Petition; Length. The petition must comply in form with Rule 32. ***Copies must be served and filed as Rule 31 prescribes***. Unless the court permits or a local rule provides otherwise, a petition for panel rehearing must not exceed 15 pages.

Comment by Professor Struve Concerning Rules on Number of Copies

As set forth above, several provisions in the Appellate Rules require a litigant to provide a certain number of copies of a filing, presumably for the internal use of the court.[21] Rule 25(e) provides generally that "[w]hen these rules require the filing or furnishing of a number of copies, a court may require a different number by local rule or by order in a particular case."

As judges become accustomed to using electronic copies of briefs and other papers, courts may decide to adopt local rules lowering the number of required paper copies. But that choice depends on the preferences of a particular circuit's judges. Under the Appellate Rules, each circuit is currently free to specify that it requires a different number of paper copies, or no paper copies. It does not seem to me that any change in the Appellate Rules on this topic is warranted at this time.

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[21] I omit from this discussion Rules 3(a)(1) and 13(a)(1), which require the provision of copies to be served on other litigants and which are discussed in Part 1.

8. References to "Original" Documents

Rule 10(a): The Record on Appeal

(a) Composition of the Record on Appeal. The following items constitute the record on appeal:

(1) the ***original papers*** and exhibits filed in the district court;

(2) the transcript of proceedings, if any; and

(3) a certified copy of the docket entries prepared by the district clerk.

Rule 24(c): Proceeding *in forma pauperis*

(c) Leave to Use *Original* Record. A party allowed to proceed on appeal in forma pauperis may request that the appeal be heard on the ***original record*** without reproducing any part.

Rule 30(f): Appendix to the Briefs

(f) Appeal on the *Original* Record Without an Appendix. The court may, either by rule for all cases or classes of cases or by order in a particular case, dispense with the appendix and permit an appeal to proceed on the ***original record*** with any copies of the record, or relevant parts, that the court may order the parties to file.

Rule 45(d): Clerk's Duties

(d) Custody of Records and Papers. The circuit clerk has custody of the court's records and papers. Unless the court orders or instructs otherwise, the clerk must not permit an original record or paper to be taken from the clerk's office. Upon disposition of the case, ***original papers*** constituting the record on appeal or review must be returned to the court or agency from which they were received. The clerk must preserve a copy of any brief, appendix, or other paper that has been filed.

See also Rules 5(c), 21(d), 26.1(c), and 27(d)(3), all discussed in Section 7 because they refer to number of copies. All of these rules also refer to an original to be filed with the copies.

Comment by Professor Struve on Rules Referring to Original Documents

When applied to a case in which all papers were electronically filed, the reference to "originals" may seem anachronistic. A few of those references may be worth updating in connection with other amendments relating to electronic filing.[22] In particular, if Rules 11 and 12 are amended to provide for electronic transmission of the record, it might make sense to amend Rule 10(a) to provide that the record includes the original filings or electronic versions thereof. And provisions that contemplate the appeal being heard on the "original record" might be amended to provide, as an alternative, that the appeal can be heard on the basis of the electronic record. *See, e.g.,* Rules 24(c) and Rule 30(f), above.

9. Conclusion

Not all of the topics discussed in this memo merit Rule amendments. In some instances, a practice may not yet be sufficiently widespread to warrant treatment in the Rules. In other instances, the existing Rules may be flexible enough to permit new practices relating to electronic service and filing. In drafting any amendments to the Rules, it will be important to provide the capacity to accommodate future technological advances.

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[22] Other instances seem harmless, as where a rule provides for the use of "originals or copies." *See* Rule 8(a)(2)(B)(ii) (required contents of motion for stay include originals or copies of affidavits); Rule 18(a)(2)(B) (similar requirement regarding motion for stay pending review of agency determination). And in some instances the reference to originals continues to make sense. For example, on review of an agency determination Rule 17(b)(1) requires the agency to file "the original or a certified copy of the entire record or parts designated by the parties." And where multiple appeals are taken from a Tax Court decision, Rule 13(d)(2) [proposed Rule 13(a)(4)(B)] allocates the "original record" to the "court named in the first notice of appeal filed."

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MEMORANDUM

TO: CM/ECF SUBCOMMITTEE

FROM: ELIZABETH GIBSON, REPORTER TO ADVISORY COMMITTEE ON BANKRUPTCY RULES

SUBJECT: AMENDMENT OF BANKRUPTCY RULES TO ACCOMMODATE CM/ECF

DATE: JULY 1, 2013

This memorandum identifies Bankruptcy Rules that refer to the use of paper documents or the physical transmission of documents to or by courts or among parties and do not refer to electronic transmission as an alternative. These rules would be the ones most affected by a decision to amend the various sets of rules to reflect the use of electronic filing and transmission of documents by means of CM/ECF.

The Bankruptcy Rules contain numerous references to filing; service; creating or transmitting a record; entry of an order or judgment; and providing notice, all of which are affected by CM/ECF. Where the rules do not specify the method of carrying out those actions, however, I have not included them in this memorandum because the rules, as written, are compatible with CM/ECF.

Part VIII of the Bankruptcy Rules (Bankruptcy Appeals), as recently revised, would create a presumption that documents are transmitted electronically. The revision project therefore was intended to accommodate CM/ECF. The revised rules were approved by the Standing Committee in June, and if promulgated by the Supreme Court next spring, will go into effect on December 1, 2014. I have therefore not included the current version of those rules in my search. Any references to 8000 rules in this memorandum are to the pending revised rules.

Finally, as members of the Subcommittee are aware, the Standing Committee has approved for publication this summer an amendment to Bankruptcy Rule 5005(a)(2) to provide for the use of electronic signatures of persons who are not registered with the CM/ECF system. This Subcommittee has already provided input on the proposed amendment, and therefore I have not included that provision of Rule 5005 among the rules listed in the memorandum.

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A. Rules with references to "paper" documents

Comment: For most of the rules listed below, the word "document" could be substituted for "paper" in order to accommodate the use of CM/ECF. I have emphasized other language in a few of the rules that suggests the existence of a tangible document—language that is incompatible with electronic documents.

1. Rule 1007(k)

"[T]he court may order the trustee, a petitioning creditor, committee, or other party to prepare and file any of these **papers** within a time fixed by the court."

2. Rule 1008

Title: "Verification of Petitions and Accompanying **Papers**"

3. Rule 2002(j)

"(4) if the **papers** in the case disclose a debt to the United States . . . ; (5) if the filed **papers** disclose a stock interest of the United States . . . ."

4. Rule 2018(e)

"The court may enter orders governing the service of notice and **papers** on entities permitted to intervene or be heard pursuant to this rule."

5. Rule 5001(a)

"The courts shall be deemed always open for the purpose of filing any pleading or other proper **paper** . . . ."

6. Rule 5003(d)

"On request, the clerk shall make a search of any index and **papers in the clerk's custody** . . . ."

7. Rule 5005

Title: "Filing and Transmittal of **Papers**"

(a)(1) "The lists, schedules, statements, proofs of claim or interest, . . . and other **papers** required to be filed by these rules . . . shall be filed with the clerk in the district where the case under the Code is pending. The judge of that court may permit the **papers to be filed with the judge**, in which event the **filing date shall be noted thereon** . . . . The clerk shall not refuse to accept for filing any petition or other **paper** presented for the purpose of filing solely because it is not presented in proper form . . . ."

(b)(1) "The complaints, motions, applications, objections and other **papers** required to be transmitted to the United States trustee by these rules shall be mailed or delivered to an office of the United States trustee . . . ."

(b)(2) "The entity, other than the clerk, transmitting a **paper** to the United States trustee shall promptly file as proof of such transmittal a verified statement identifying the **paper** and stating the date on which it was transmitted to the United States trustee."

(b)(3) "Nothing in these rules shall require the clerk to transmit any **paper** to the United States trustee if the United States trustee requests in writing that the **paper** not be transmitted."

(c) "A **paper** intended to be filed with the clerk but erroneously delivered . . . shall, after the date of its receipt has been **noted thereon**, be transmitted forthwith to the clerk of the bankruptcy court. A **paper** intended to be transmitted to the United States trustee but erroneously delivered . . . shall, after the date of its receipt has been **noted thereon**, be transmitted forthwith to the United States trustee. In the interest of justice, the court may order that a **paper** erroneously delivered shall be deemed filed with the clerk or transmitted to the United States trustee as of the date of its original delivery."

8. **Rule 5006**

Title: "Certification of Copies of **Papers**"

"The clerk shall issue a certified copy of the record of any proceeding in a case under the Code or of any **paper** filed with the clerk on payment of any prescribed fee."

9. **Rule 7005**

Title: "Service and Filing of Petitions and Other **Papers**"

10. **Rule 8015**

Title: "Form and Length of Briefs; Form of Appendices and Other **Papers**"

11. **Rule 9004**

(a) "All petitions, pleadings, schedules and other **papers** shall be clearly legible."

(b) "Each **paper** filed shall contain a caption setting forth the name of the court, the title of the case, the bankruptcy docket number, and a brief designation of the character of the **paper**."

12. **Rule 9011**

Title: "Signing of **Papers**; Representations to the Court; Sanctions; Verification and Copies of **Papers**"

(a) "Signing of **papers**. Every petition, pleading, written motion, and other **paper**, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name. A party who is not represented by an attorney shall sign all **papers**. Each **paper** shall state the signer's address and telephone number, if any. An unsigned **paper** shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party."

(b) "By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other **paper**, an attorney or unrepresented party is certifying . . . ."

(c)(1)(A) "The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged **paper**, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected . . . ."

(e) "Except as otherwise specifically provided by these rules, **papers** filed in a case under the Code need not be verified."

(f) "Copies of signed or verified **papers**. When these rules require copies of a signed or verified **paper**, it shall suffice if the original is signed or verified and the copies are conformed to the original."

13. **Rule 9014(b)**

"Any **paper** served after the motion shall be served in the manner provided by Rule 5(b) F. R. Civ. P."

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14. **Rule 9018**

"[T]he court may make any order which justice requires . . . (2) to protect any entity against scandalous or defamatory matter contained in any **paper** filed in a case under the Code . . . ."

15. **Rule 9034**

Title: "Transmittal of Pleadings, Motion **Papers**, Objections, and Other **Papers** to the United States Trustee"

"[A]ny entity that files a pleading, motion, objection, or similar **paper** relating to any of the following matters shall transmit a copy thereof to the United States trustee within the time required by these rules for service of the **paper**:

. . .

(k) any other matter in which the United States trustee requests copies of filed **papers** or the court orders copies transmitted to the United States trustee."

B. Rules with references to "writing"

Comment: The use of the term "writing" (either "in writing" or "the writing") is not necessarily incompatible with electronic documents, but the term might be interpreted by some as referring to tangible documents. An efficient way to eliminate any ambiguity would be to follow the approach of Evidence Rule 101(b)(6) by adding to the Bankruptcy Rules a definition of "writing" that includes electronic documents. I have attempted to list below only the rules that refer to "writing" in a context that could be affected by CM/ECF. I have therefore excluded references to writings made prior to or outside of bankruptcy. I have also not included Rule 7004(h), a rule provision that was enacted by Congress and would therefore have to be amended by statute.

1. **Rule 2003(b)(3)**

"In a chapter 7 liquidation case, a creditor is entitled to vote at a meeting if, at or before the meeting, the creditor has filed a proof of claim or a **writing** setting forth facts evidencing a right to vote . . . . A creditor of a partnership may file a proof of claim or **writing** evidencing a right to vote for the trustee for the estate of a general partner notwithstanding that a trustee for the estate of the partnership has previously qualified."

2. **Rule 2008**

"A trustee that has filed a blanket bond pursuant to Rule 2010 and has been selected as trustee in a chapter 7, chapter 12, or chapter 13 case that does not notify the court and the United States trustee in **writing** of rejection of the office within seven days after receipt of

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notice of selection shall be deemed to have accepted the office. Any other person selected as trustee shall notify the court and the United States trustee in **writing** of acceptance of the office within seven days after receipt of notice of selection or shall be deemed to have rejected the office."

3. **Rule 3001**

(c)(1) "Claim Based on a Writing. Except for a claim governed by paragraph (3) of this subdivision, when a claim, or an interest in property of the debtor securing the claim, is based on a writing, a copy of the **writing** shall be filed with the proof of claim. If the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim."

4. Rule 3007(a)

"An objection to the allowance of a claim shall be in **writing** and filed."

5. **Rule 3014**

"The election shall be in **writing** and signed unless made at the hearing on the disclosure statement."

6. **Rule 3017(a)**

"The plan and the disclosure statement shall be mailed with the notice of the hearing only to the debtor, any trustee or committee appointed under the Code, the Securities and Exchange Commission and any party in interest who requests in **writing** a copy of the statement or plan."

7. **Rule 3018(c)**

"An acceptance or rejection shall be in **writing**, identify the plan or plans accepted or rejected, be signed by the creditor or equity security holder or an authorized agent, and conform to the appropriate Official Form."

8. **Rule 3019(a)**

"If the court finds . . . that the proposed modification does not adversely change the treatment of the claim of any creditor or the interest of any equity security holder who has not accepted

in **writing** the modification, it shall be deemed accepted by all creditors and equity security holders who have previously accepted the plan."

9. **Rule 4001(a)(2)**

"Relief from a stay under § 362(a) or a request to prohibit or condition the use, sale, or lease of property pursuant to § 363(e) may be granted without prior notice only if . . . (B) the movant's attorney certifies to the court in **writing** the efforts, if any, which have been made to give notice and the reasons why notice should not be required."

10. **Rule 4002(a)**

"In general. In addition to performing other duties prescribed by the Code and rules, the debtor shall:

. . .

(3) inform the trustee immediately in **writing** as to the location of real property in which the debtor has an interest and the name and address of every person holding money or property subject to the debtor's withdrawal or order if a schedule of property has not yet been filed pursuant to Rule 1007 . . . ."

11. **Rule 5005(b)(3)**

"Nothing in these rules shall require the clerk to transmit any paper to the United States trustee if the United States trustee requests in **writing** that the paper not be transmitted."

12. **Rule 7004(b)(9)**

"Upon the debtor, after a petition has been filed by or served upon the debtor and until the case is dismissed or closed, by mailing a copy of the summons and complaint to the debtor at the address shown in the petition or to such other address as the debtor may designate in a filed **writing**."

13. **Rule 9036**

"Whenever the clerk or some other person as directed by the court is required to send notice by mail and the entity entitled to receive the notice requests in **writing** that, instead of notice by mail, all or part of the information required to be contained in the notice be sent by a specified type of electronic transmission, the court may direct the clerk or other person to send the information by such electronic transmission."

C. Rules with references to "copies" of documents

Comment: Many Bankruptcy Rules refer to providing a copy or copies of documents, a concept that applies to tangible, not electronic, documents. Because the number of rules in this category is so large, I have listed the specific provisions below without quoting them. To accommodate CM/ECF, in many rules "copy of" could be deleted or "document" could be substituted for "copy."

1. **Rule 1002(b)**
2. **Rule 1003(a)**
3. **Rule 1004**
4. **Rule 1007(b)(1)(E), (b)(2), (i), (*l*)**
5. **Rule 1009(d)**
6. **Rule 1010(a)**
7. **Rule 1017(f)(3)**
8. **Rule 1019(5)(D)**
9. **Rule 2002(i), (j)**
10. **Rule 2003(c), (d)(2)**
11. **Rule 2006(e)(1)**
12. **Rule 2007.1(b)(3)(B)**
13. **Rule 2013(b)**
14. **Rule 2014(a)**
15. **Rule 2015(e)**
16. **Rule 2015.1(a)**
17. **Rule 2015.3(b)**
18. **Rule 2016(a)**
19. **Rule 2019(c)(4)**

20. **Rule 3001(c)(1), (c)(3)(B), (e)(5)**

21. **Rule 3007(a)**

22. **Rule 3015(d), (e), (g)**

23. **Rule 3017(a), (f)(2)**

24. **Rule 3019(b)**

25. **Rule 3020(b)(1)**

26. **Rule 4001(a)(2), (c)(1)(A), (d)(1)(A)**

27. **Rule 4002(b)(2), (b)(3), (b)(4)**

28. **Rule 4003(b)(4)**

29. **Rule 4004(f), (g)**

30. **Rule 5003(c)**

31. **Rule 5006 (including title)**

32. **Rule 5007(a), (b)**

33. **Rule 5012**

34. **Rule 6004(f)(1)**

35. **Rule 7004(b)(1)-(10), (c) [Note: this rule refers to service of copies of the summons and complaint, and it is unlikely that CM/ECF affects it.]**

36. **Rule 7007.1(a)**

37. **Rule 8003(c)(1)**

38. **Rule 8004(b)(1)(E)**

39. **Rule 8006(f)(2)(E)**

40. **Rule 8009(d)**

41. **Rule 8013(a)(2)(C)(iii), (g)**

42. **Rule 8024(b)**

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43. **Rule 9011 title, (f)**

44. **Rule 9022(a), (b)**

45. **Rule 9027(a)(1), (b), (e)(2), (e)(3), (g), (h)**

46. **Rule 9033(a), (b)**

47. **Rule 9034**

48. **Rule 9037(e)**

D. Rules with references to "mail"

Comment: I have probably been overinclusive in listing rules in this category. I believe that CM/ECF allows provision of notice and service of documents after the summons and complaint to be made electronically on registered users of the system. Some of the rules listed may require parties to mail documents in contexts that are not affected by CM/ECF, but in cases of uncertainty, I included them.

1. **Rule 2002**

(a) "[T]he clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees at least 21 days' notice by **mail** . . . ."

(b) "[T]he clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees not less than 28 days' notice by **mail** . . . ."

(f) "[T]he clerk, or some other person as the court may direct, shall give the debtor, all creditors, and indenture trustees notice by **mail** . . . ."

(h) "[T]he court may direct that all notices required by subdivision (a) of this rule be **mailed** only to the debtor, the trustee, all indenture trustees, creditors that hold claims for which proofs of claim have been filed, and creditors, if any, that are still permitted to file claims . . . . [T]he court may order that notices required by subdivision (a)(2), (3) and (6) of this rule be transmitted to the United States trustee and be **mailed** only to the committees elected under § 705 or appointed under § 1102 of the Code or to their authorized agents and to the creditors and equity security holders who serve on the trustee or debtor in possession and file a request that all notices be **mailed** to them."

(o) "In a voluntary case commenced by an individual debtor whose debts are primarily consumer debts, the clerk or some other person as the court may direct shall give the trustee and all creditors notice by **mail** of the order for relief within 21 days from the date thereof."

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(q)(1) "The clerk, or some other person as the court may direct, shall forthwith give the debtor, all persons or bodies authorized to administer foreign proceedings of the debtor, all entities against whom provisional relief is being sought under § 1519 of the Code, all parties to litigation pending in the United States in which the debtor is a party at the time of the filing of the petition, and such other entities as the court may direct, at least 21 days' notice by **mail** of the hearing on the petition for recognition of a foreign proceeding."

(q)(2) Similar to (q)(1) but concerns notice of the court's intention to communicate with a foreign court or foreign representative.

2. **Rule 2003(d)(2)**

"No later than the date on which the report is filed, the United States trustee shall **mail** a copy of the report to any party in interest that has made a request to receive a copy of the report."

3. **Rule 2007.1(b)(3)(B)**

"Not later than the date on which the report of the disputed election is filed, the United States trustee shall **mail** a copy of the report and each verified statement to any party in interest that has made a request to convene a meeting under § 1104(b) or to receive a copy of the report, and to any committee appointed under § 1102 of the Code."

4. **Rule 2015(e)**

"In a chapter 11 case the court may direct that copies or summaries of annual reports and copies or summaries of other reports shall be **mailed** to the creditors, equity security holders, and indenture trustees."

5. **Rule 3001**

(e)(2) and (e)(4) "The clerk shall immediately notify the alleged transferor by **mail** of the filing of the evidence of transfer and that objection thereto, if any, must be filed within 21 days of the **mailing** of the notice or within any additional time allowed by the court."

(e)(3) "If either the transferor or the transferee files a proof of claim, the clerk shall immediately notify the other by **mail** of the right to join in the filed claim."

(e)(5) "A copy of an objection filed pursuant to paragraph (2) or (4) or a motion filed pursuant to paragraph (3) or (4) of this subdivision together with a notice of a hearing shall

be **mailed** or otherwise delivered to the transferor or transferee, whichever is appropriate, at least 30 days prior to the hearing."

6. **Rule 3002**

(c)(5) "If notice of insufficient assets to pay a dividend was given to creditors under Rule 2002(e), and subsequently the trustee notifies the court that payment of a dividend appears possible, the clerk shall give at least 90 days' notice by **mail** to creditors of that fact and of the date by which proofs of claim must be filed."

(c)(6) "If notice of the time to file a proof of claim has been **mailed** to a creditor at a foreign address, on motion filed by the creditor before or after the expiration of the time, the court may extend the time by not more than 60 days if the court finds that the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim."

7. **Rule 3007(a)**

"An objection to the allowance of a claim shall be in writing and filed. A copy of the objection with notice of the hearing thereon shall be **mailed** or otherwise delivered to the claimant, the debtor or debtor in possession, and the trustee at least 30 days prior to the hearing."

8. **Rule 3015**

(d) "The plan or a summary of the plan shall be included with each notice of the hearing on confirmation **mailed** pursuant to Rule 2002."

(g) "The clerk, or some other person as the court may direct, shall give the debtor, the trustee, and all creditors not less than 21 days' notice by **mail** of the time fixed for filing objections . . . ."

9. **Rule 3017**

(a) "The plan and the disclosure statement shall be **mailed** with the notice of the hearing only to the debtor, any trustee or committee appointed under the Code, the Securities and Exchange Commission and any party in interest who requests in writing a copy of the statement or plan."

(d) "[N]otice of the time fixed for filing objections and the hearing on confirmation shall be **mailed** to all creditors and equity security holders in accordance with Rule 2002(b), and a form of ballot conforming to the appropriate Official Form shall be **mailed** to creditors and

equity security holders entitled to vote on the plan. . . . If the court orders that the disclosure statement and the plan or a summary of the plan shall not be **mailed** to any unimpaired class, notice that the class is designated in the plan as unimpaired and notice of the name and address of the person from whom the plan or summary of the plan and disclosure statement may be obtained upon request and at the plan proponent's expense, shall be **mailed** to members of the unimpaired class together with the notice of the time fixed for filing objections to and the hearing on confirmation."

10. **Rule 3019(b)**

"The clerk, or some other person as the court may direct, shall give the debtor, the trustee, and all creditors not less than 21 days' notice by **mail** of the time fixed to file objections . . . ."

11. **Rule 3020(c)(2)**

"Notice of entry of the order of confirmation shall be **mailed** promptly to the debtor, the trustee, creditors, equity security holders, other parties in interest . . . ."

12. **Rule 4001(d)(2)**

"Notice of the motion and the time within which objections may be filed and served on the debtor in possession or trustee shall be **mailed** to the parties on whom service is required by paragraph (1) of this subdivision and to such other entities as the court may direct."

13. **Rule 4003**

(b)(2) "The trustee shall deliver or **mail** the objection to the debtor and the debtor's attorney, and to any person filing the list of exempt property and that person's attorney."

(b)(4) "A copy of any objection shall be delivered or **mailed** to the trustee, the debtor and the debtor's attorney, and the person filing the list and that person's attorney."

14. **Rule 4004(g)**

"The clerk shall promptly **mail** a copy of the final order of discharge to those specified in subdivision (a) of this rule."

15. **Rule 5003(e)**

Title: "Register of **mailing** addresses of federal and state governmental units and certain taxing authorities." The provision includes several references to mailing addresses.

16. **Rule 5005(b)(1)**

"The complaints, motions, applications, objections and other papers required to be transmitted to the United States trustee by these rules shall be **mailed** or delivered to an office of the United States trustee, or to another place designated by the United States trustee, in the district where the case under the Code is pending."

17. **Rule 6004(d)**

"An objection to any such sale may be filed and served by a party in interest within 14 days of the **mailing** of the notice, or within the time fixed by the court."

18. **Rule 6007(a)**

"A party in interest may file and serve an objection within 14 days of the **mailing** of the notice, or within the time fixed by the court."

19. **Rule 6011(b)**

Title: "Notice by mail under § 351(1)(B)"

"Any notice under this subdivision shall be **mailed** to the patient and any family member or other contact person whose name and address have been given to the trustee or the debtor for the purpose of providing information regarding the patient's health care, to the Attorney General of the State where the health care facility is located, and to any insurance company known to have provided health care insurance to the patient."

20. **Rule 7004**

This rule includes numerous provisions for service of the summons and complaint by mail. These provisions are probably not affected by CM/ECF.

21. **Rule 9027(e)(3)**

"Any party who files a statement pursuant to this paragraph shall **mail** a copy to every other party to the removed claim or cause of action."

22. **Rule 9033(a)**

"The clerk shall serve forthwith copies on all parties by **mail** and note the date of **mailing** on the docket."

23. **Rule 9036**

"Whenever the clerk or some other person as directed by the court is required to send notice by **mail** and the entity entitled to receive the notice requests in writing that, instead of notice by **mail**, all or part of the information required to be contained in the notice be sent by a specified type of electronic transmission, the court may direct the clerk or other person to send the information by such electronic transmission."

E. Rules with references to "deliver"

Comment: "Deliver" suggests the physical transmission of a document, which is not required with CM/ECF. Whatever broad term might be adopted for referring in the rules to getting a document from one person or place to another—such as "transmit" or "send"—could be substituted for "deliver" when the reference is to documents rather than property.

1. **Rule 3001(e)(5)**

"A copy of an objection filed pursuant to paragraph (2) or (4) or a motion filed pursuant to paragraph (3) or (4) of this subdivision together with a notice of a hearing shall be mailed or otherwise **delivered** to the transferor or transferee, whichever is appropriate, at least 30 days prior to the hearing."

2. **Rule 3007(a)**

"An objection to the allowance of a claim shall be in writing and filed. A copy of the objection with notice of the hearing thereon shall be mailed or otherwise **delivered** to the claimant, the debtor or debtor in possession, and the trustee at least 30 days prior to the hearing."

3. **Rule 4003**

(b)(2) "The trustee shall **deliver** or mail the objection to the debtor and the debtor's attorney, and to any person filing the list of exempt property and that person's attorney."

(b)(4) "A copy of any objection shall be **delivered** or mailed to the trustee, the debtor and the debtor's attorney, and the person filing the list and that person's attorney."

4. **Rule 5005**

(b)(1) "The complaints, motions, applications, objections and other papers required to be transmitted to the United States trustee by these rules shall be mailed or **delivered** to an office of the United States trustee, or to another place designated by the United States trustee, in the district where the case under the Code is pending."

(c) "A paper intended to be filed with the clerk but erroneously **delivered** to the United States trustee, the trustee, the attorney for the trustee, a bankruptcy judge, a district judge, the clerk of the bankruptcy appellate panel, or the clerk of the district court shall, after the date of its receipt has been noted thereon, be transmitted forthwith to the clerk of the bankruptcy court. A paper intended to be transmitted to the United States trustee but erroneously **delivered** to the clerk, the trustee, the attorney for the trustee, a bankruptcy judge, a district judge, the clerk of the bankruptcy appellate panel, or the clerk of the district court shall, after the date of its receipt has been noted thereon, be transmitted forthwith to the United States trustee. In the interest of justice, the court may order that a paper erroneously **delivered** shall be deemed filed with the clerk or transmitted to the United States trustee as of the date of its original **delivery**."

5. **Rule 7004**

(a)(1) "Personal service under Rule 4(e)-(j) F.R.Civ.P. may be made by any person at least 18 years of age who is not a party, and the summons may be **delivered** by the clerk to any such person."

(e) "Service made under Rule 4(e), (g), (h)(1), (i), or (j)(2) F.R.Civ.P. shall be by **delivery** of the summons and complaint within 14 days after the summons is issued. If service is by any authorized form of mail, the summons and complaint shall be deposited in the mail within 14 days after the summons is issued. If a summons is not timely **delivered** or mailed, another summons shall be issued and served. This subdivision does not apply to service in a foreign country." [This provision is probably not affected by CM/ECF.]

F. A Final Issue

Revised Rule 8009 will continue the current bankruptcy practice of requiring parties to an appeal to designate the portions of the bankruptcy court record that are to be included in the record on appeal to the district court or bankruptcy appellate panel. The Advisory Committee received several comments in response to publication of the rule that

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proposed the adoption of the practice currently being followed in some bankruptcy appellate panels and at least one court of appeals of not requiring designation of the record or even creation of a record on appeal. With CM/ECF, appellate judges can access the lower court docket electronically, and the parties to the appeal can refer the appellate court to specific parts of the trial court record by docket number. The Bankruptcy Rules Committee designated the issue as one for future consideration. It may be an issue that this Subcommittee will want to consider.

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Civil Rules E-Technology Issues

These notes describe a number of issues that should be considered in a thorough review of the ways in which the Civil Rules might be amended to reflect advances in electronic communication. Some of the issues, perhaps many of them, will prove not yet ripe for present action. They will be roughly grouped along a scale from those that obviously deserve consideration now to those that seem too complex or uncertain to be taken up and resolved in a relatively short time frame. They build on suggestions, lists, and improvements made by Laura Briggs, Richard Marcus, and Solomon Oliver.

The "Obvious Issues," "CM/ECF Issues," and "Other CACM Issues" are matters that clearly deserve present attention. Present attention need not lead to imminent action — many of these issues may better be put off into the future.

The "Bold Possibilities" that follow probably are not ripe, particularly if the subcommittee aims to complete its work within a year. Concerns with the security of e-systems need be reckoned with, but little more is said on that score. The final and largest block illustrates words that appear throughout the rules and that may or may not encompass electronic forms of action. As noted there, it would be unwise to attempt to address each of these words individually. And it may prove difficult to attempt some overarching authorization for doing by electronic means whatever can be done by paper. Some exceptions would have to be made, most obviously for parties who do not have electronic means of communication. The day will come when physical paper seems the dream of antiquarians, but we are not there yet.

Obvious Issues

Comprehensive "Definitional" Approach: Rather than change many rules separately, it may be possible to adopt a rule that authorizes reliance on electronic systems to do whatever may be done with paper.

In the Civil Rules, a new Rule 5(a) might be as good a location as any:

> (a) Electronic filing and transmission. Electronic filing or transmission satisfies a rule [that provides] for delivering, entering, filing, issuing, producing, sending, or serving if [it][the filing or transmission]
>
> (1) satisfies the requirements of form applied to a physical writing; and
>
> (2) is transmitted by authorized means.

One obvious question is the long but likely incomplete list of acts that can be done by electronic means. Is there a better way? And of course there is the question whether we want to do this. For one example, if we are not prepared to authorize service of the summons and complaint by electronic means — and likely we are not prepared to do that — an exception will have to be added.

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Rule 4(a)(1), (2); (b): These suggestions come from Laura Briggs. The idea is that the clerk and attorneys can save time if the clerk can sign and seal a summons electronically. This happens now, but may not comport with the rule text:

> Rule 4. Summons
>
> (a) Contents; Amendments.
>
> (1) *Contents*. A summons must:
>
> (F) be signed by the clerk, either physically or electronically; and
>
> (G) bear the court's seal, either physically or electronically.[1] * * *
>
> (b) Issuance. On or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant. When issued on paper, a ~~A~~ summons — or a copy of a summons that is addressed to multiple defendants — must be issued for each defendant to be served [with a paper summons].

This form assumes that paper service is required. It is implicit that the plaintiff may present the summons to the clerk electronically, and that the clerk may sign, seal, and return the electronic version of the summons to the plaintiff. The plaintiff then prints out the summons. But if the plaintiff brings paper to the clerk, the clerk must issue a paper summons for each defendant to be served. At least some courts are already signing and sealing by electronic means.

Rule 5(b)(2)(E), (3): E-service of papers after the summons and complaint now requires consent "in writing" of the person served. Should consent be required at all? Is the writing element satisfied if a local e-filing rule reaches? So for (3), should we continue to rely on local rules to authorize use of the court's facilities for e-service?

Most courts obtain the written consent on the CM/ECF system on the CM/ECF registration form, or some variation of the form, when service will be made through the CM/ECF system. "The form must be reviewed for completeness (including wet signature), and the attorney information manually entered into CM/ECF (after we call for assistance deciphering handwriting). Then courts must deal with the issue of retention of the registration form." In ND Ohio — and apparently others — consent is required as a condition of the

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[1] Of course drafting variations are possible: "be signed physically or electronically by the clerk"; "bear the court's physical or electronic seal."

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attorney admission process. If coerced consent is the norm, and has not caused any apparent problems, it makes sense to discard a general requirement of consent.

If consent is not required for most cases, it will be necessary to identify cases in which e-service is not allowed. Rule 11(a) requires that every pleading, written motion, and other paper must be signed; the signature must include an e-mail address. A party who does not have an e-mail address presumably does not have to supply one. An exception could be made for serving a party who does not have an e-mail address. But it may be that some people have e-mail addresses but no readily available means of checking for e-mail. Prisoners and homeless people are likely examples. Some exceptions seem inevitable:

5. Serving and Filing Pleadings and Other Papers * * *

(b) Service: How Made. * * *

(2) *Service in General.* A paper is served under this rule by: * * *

(E) sending it by electronic means, ~~— if the person consented in writing —~~ in which event service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served, but a party may elect to refuse to be served by electronic means by filing the refusal [at the time of the party's first appearance in the action];

A different approach would be to require consent for e-service on a pro se party. That seems common. But it seems likely that many pro se litigants are regular users of the internet. It might suffice to rely on clerks' offices to provide notice of the right to opt out to any pro se plaintiff.

It may be unwise to limit the opportunity to refuse e-service by insisting that the refusal be made at the first appearance or some other early time. A party may find good reasons for opting out only after some experience with the case.

Rule 5(d): "Paper" Generally: Rule 5(d) repeatedly refers to filing a "paper." 5(d)(3) concludes: "A paper filed electronically in compliance with a local rule is a written paper for purposes of these rules." At a minimum, we should strike "in compliance with a local rule" if we move to a uniform national practice, see the next item. If we continue to rely on local rules, there might be some advantage in substituting "document" for "paper," to reduce the dissonance. Remember Rule 34 seems to treat electronically stored information as something distinct from a document, an irritant that is noted in the "vocabulary" section below without hope of winning support for an improvement.

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Rule 5(d)(3): Again, should we continue to rely on local rules for e-filing, on technical standards established by the Judicial Conference, and local determination of what the "reasonable exceptions" are?

Laura Briggs notes that as a practical matter, most courts require parties to file electronically, with an exception for pro se parties. This is necessary "to cope with dwindling resources." Here too, it seems inevitable that exceptions will be necessary. It might suffice to except pro se parties and to allow other exceptions only for compelling reasons. Or present local rules could be studied as the source of inspiration. Or it would be possible to continue to rely on local exemptions — Briggs advises that "it would be impossible to draft a national rule that could cover all possible situations."

(d) Filing. * * *

(3) *Electronic Filing, Signing, or Verification.* ~~A court may, by local rule, allow papers to be filed~~ All filings must be made, signed, or verified by electronic means unless the [filing] party is unrepresented or the court [clerk?] finds good cause to permit physical filing ~~that are consistent with any technical standards established by the Judicial Conference of the United States. A local rule may require electronic filing only if reasonable exceptions are allowed.~~

Rule 5.2(b): Is it time to rethink the exemptions from the redaction requirement? If there is an e-record for an administrative or agency proceeding, or a state-court proceeding, why not require redaction? Laura Briggs thinks it is not yet time to reconsider for reasons quoted in the margin.[2] Judge Solomon agrees.

It may be better not to reconsider the limits on remote access in social security appeals and immigration cases, Rule 5.2(c). But this was sensitive. If e-filings are made and redacted, remote

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[2] "I hope we do not rethink the exemptions from the redaction requirement. Redaction of a large administrative record could be quite burdensome. Also, effective redaction requires mastery of Adobe's redaction tool or knowledge of how to "flatten" documents so that annotations (such as black boxes placed over words) are not movable (thus allowing access to the 'redacted' material). I think that filing attorneys are 'not there yet' from a technological perspective. In addition, it seems that parties rarely take the time to fully redact (or redact at all). In Southern Indiana, it is the Clerk's Office staff who find names of minors (and financial account numbers) appearing in filings. While it may not be a Clerk's Office burden to check for redaction, it is a societal obligation which is taken seriously."

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access may be less dangerous. Here too, Laura Briggs thinks it may be better not to reconsider. It is asking for trouble to expect parties to know when to redact, and how to do it effectively. But if we come to a time when administrative records are filed electronically and are effectively redacted, nonparty remote access may become sensible.

Rule 6(a)(4)(A): Indiana alone: Laura Briggs suggests a small change in the definition of the "last day's" end: (A) for electronic filing, at midnight in the ~~court's~~ time zone of the court office in which the matter is pending * * *." The point is that S.D.Ind. is in two time zones. She is frequently asked whether time is measured by court's time zone or the filer's time zone. "I don't know that we have a problem with lawyers filing at midnight central time for a division in the eastern time zone," so perhaps it is not an issue worth addressing. [Until some zealous advocate decides to make a point that a central midnight filing is late by eastern time...]

Rule 6(d): The question of additional time after service by various means has been put off for a few years, anticipating that a broader e-action project would be launched. The time has come. Because other sets of rules confront the same questions, this note is brief. One common issue is that adding three days reduces the simplicity of counting by weeks when time periods are set at 7, 14, or 21 days. After considerable debate, the three extra days in Rule 6(d) were provided for e-service from concerns that electronic transmission was not always as instantaneous as it seems, and that completed transmission did not ensure that recipients could access the message — attachments were a particular source of difficulty. Technology may have alleviated those concerns. On the other hand, Judge Solomon notes that the present rule "has allowed for a simplified application of the rule and has not raised any practical problems that I am aware of in our court." It facilitates correction of glitches arising from mistake or technical problems. And it averts the need for short motions for extensions of time.

Deleting the three extra days for e-mail would not mean deleting them for postal mail. The questions whether to retain the three extra days for service by leaving with the court clerk or by means consented to in writing seem debatable.

It is possible that glitches in e-service are more common in civil actions than under other sets of rules. The value of uniformity among the sets of rules, however, suggests that only good reasons would justify holding out against a change recommended for the other rules.

Rule 6(c) may suggest a converse question. It provides for service "at least 14 days before the time specified," or "at least 7 days before the hearing." This seems to provide an incentive to serve by postal mail, reducing the time available to the other parties. Should the time periods distinguish between e-service and other modes?

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Rule 7.1: Rule 7.1 requires a nongovernmental corporate party to "file 2 copies of a disclosure statement." Memory suggests that the purpose of requiring two copies was to have one for the judge. (Appellate Rule 26.1 was amended in 1994 to require 3 copies if the statement is filed before the principal brief; the Committee Note observed that there is no need for copies otherwise because the statement is included in each copy of the brief.) Notice to the judge is now accomplished by the EF system, or should be. This suggests an amendment:

Rule 7.1 Disclosure Statement

(a) Who Must File; Contents. A nongovernmental corporate party must file ~~2 copies of~~ a disclosure statement * * *.

Rule 11(a): "Paper" appears repeatedly throughout Rule 11; as with Rule 5, it may be tempting to substitute "document." But going down this road opens endless opportunities for failing to achieve a truly uniform vocabulary throughout the rules.

Rule 11(a) could be a good location for a general electronic signature provision, whether in competition with Rule 5(d)(3) or as a replacement. Rule 11 requires that a "pleading, written motion, and other paper" be signed. Instead of focusing on filing, as Rule 5(d)(3) does, Rule 11 would provide a more general requirement. A simple version would be:

> "(a) Signature. Every pleading, written motion, and other paper [document?] must be signed — physically or electronically — by at least * * *."

That simple version does not cover signatures of other sorts. A party might verify a pleading. Affidavits or declarations are routinely filed. The proposed Bankruptcy Rule would require notarization of these signatures. It is not clear how notarization would be accomplished. To the extent that the purpose is to ensure that the signature on the document really was affixed to the document, it may be necessary to accomplish notarization as part of the e-filing process, or else to have the notary retain the notarized original and participate in the e-filing process. Putting aside that concern, Laura Briggs notes that compliance with a notarization requirement can be a nuisance for attorneys, and also will become a nuisance for the court in dealing with documents that do not comply with the requirement. Judge Solomon agrees that "notorization of signatures is a very unattractive option."

An alternative may be to provide that the physical or electronic signature of the person filing the document certifies the genuineness of any other signature on the filed documents.

It may be that this problem is better held in abeyance pending public comments on the proposed Bankruptcy Rule.

Rule 33: Rule 33 now calls for written interrogatories, to "be answered separately and fully in writing under oath." The answers and objections, moreover, must be signed. It has been several years

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since outside suggestions have been made that Rule 33 should provide for submitting interrogatories in e-form, with provision for providing answers by filling in the same e-file. Are we there yet? Some doubts have been expressed. Perhaps it is enough for now to rely on the inventiveness of litigants — explicit or tacit consent to e-exchanges should be acceptable.

Rule 71.1(c)(5): Rule 71.1(c)(5) requires the plaintiff in an eminent domain action to give at least one copy of the complaint to the clerk for the defendants' use, "and additional copies at the request of the clerk or a defendant." Rule 71.1(d) requires the plaintiff to deliver to the clerk "joint or several notices directed to the named defendants." Additional notices must be delivered when the plaintiff adds defendants. (d)(3) calls for personal service of the notice, without a copy of the complaint, on each defendant (with exceptions). Rule 71.1(f) directs that notice of filing an amended pleading, but not the pleading, be served. At least one additional copy of the amendment must be filed with the clerk, with more at the request of the clerk, in parallel with the requirement of copies in 71.1(c)(5). All of these copies seem an unnecessary nuisance if the complaint is e-filed and the complaint and amended pleadings are not served anyway. We should find out, presumably from the Department of Justice, whether it is enough to carry forward the requirement that the notice and answer be served. All parties would have access to the court file to get the complaint and amended pleadings. (It also might be enlightening to see whether it would make better sense to require that service of notice under Rule 71(d) be supplemented by at least an e-mail link to the complaint on file with the court.)

Rule 72(b)(1):

> * * * The magistrate judge must enter a recommended disposition, including, if appropriate, proposed findings of fact. The clerk must promptly ~~mail~~ serve a copy ~~to~~ on each party.
>
> Self-explanatory. This is existing practice.

Rule 79(a)(2),(3): Rule 79(a)(2) and (3) refer to docketing requirements for papers. If we do not manage a generic resolution of this problem, here too "documents" might be substituted, still subject to the uneasiness generated by the Rule 34 distinction between documents and electronically stored information.

Rule 79(b):

> (b) Civil Judgments and Orders. The clerk must keep a copy of every final judgment and appealable order; of every order affecting title to or a lien on real or personal property; and of any other order that the court directs to be kept. The clerk must keep these, either physically or electronically, in the form and manner prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the

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United States.

The purpose of this suggestion seems plain. But why is it not enough to ask the Director to approve electronic form and win approval of the Judicial Conference?

Rule 79(c):

(c) Indexes; Calendars. Under the court's direction, the clerk must:

(1) keep indexes of the docket and of the judgments ~~and orders~~ described in Rule 79(b);

The basic question is whether the clerk should be directed to keep an index of orders, or whether an index of judgments should suffice. The argument is that orders can be found electronically within a case, and a quick search can be made for all judgments issued within a particular date range. This might be a bit tricky. Rule 79(b), quoted above, requires the clerk to keep a copy of every "appealable order," every order affecting title or a lien on property, and any other order the court directs to be kept. Rule 79(a)(2)(C) directs that all orders be marked with the file number and entered chronologically on the docket. Just to make matters more complicated, Rule 54(a) provides that "'Judgment'" as used in these rules includes * * * any order from which an appeal lies." Those orders still would be covered by the proposed Rule 79(c)(1), and the clerk still would be left to guess which orders may be appealable. One common example of uncertainty would be the collateral-order appealability of an order denying a motion for summary judgment on official-immunity grounds.

CM/ECF Issues

At a minimum, this will require coordination with CACM. We already have two questions at least. Should a Notice of Electronic Filing do duty as a proof of service? And the now-familiar question of dealing with the "wet" signature on filing that reflects a paper original (what about filing something that never had more than an e-signature: is it necessary to print it out, sign it, and then convert back to e-form for filing? Rule 5(d)(3) can be read to dispense with the need for any physical embodiment.)

Other CACM Issues

CACM and the rules committees have been asked to consider the possibility that a district judge could use videoconferencing to preside at a bench trial physically occurring in a courtroom in another district. For the Civil Rules, this question implicates at least Rule 43(a) and Rule 77(b). Rule 43(a) allows testimony "in open court by contemporaneous transmission from a different location," but only "[f]or good cause in compelling circumstances and with appropriate safeguards." Rule 77(d) provides that "no hearing — other than one ex parte — may be conducted outside the

district unless all the affected parties consent."

BOLD POSSIBILITIES

Rule 4 Service of Summons and Complaint: Has the time come to explore e-service of the summons and complaint? How would the reliability of e-service compare to the present alternatives to actual in-hand service? One problem may be the reliability of addresses, if indeed it is easier to change an e-address than a postal address. Another may be that e-mail service addressed to an entity stands a greater chance of being lost in the bureaucratic maze. Proof of service also may be a practical problem; short of accepting the lack of a "nondeliverable" message or an automatic notice of receipt, each of which leave substantial doubts, what could be done to prove actual receipt-service?

One timid approach is to hope that some state take the plunge. Rule 4(e)(1), for example, authorizes service on an individual "following state law for serving a summons." Other parts of Rule 4 also invoke state law methods of service.

A request to waive service may be "sent by first-class mail or other reliable means." Rule 4(d)(1)(G). This is not service, but it could be an interesting beginning. But it may be useful to clarify that e-mail is a reliable means. Other requirements are that the request be "in writing" — Rule 5(d)(3) allows an e-filing to be a writing, but it depends on filing. The request must be accompanied by a copy of the complaint, two copies of a waiver form, "and a prepaid means for returning the form": even if the e-file is a copy, how do you prepay a means of returning that incurs no marginal cost?

Group Actions: If not for in personam actions among individual entities, should some form of group notice be provided for group actions or in rem proceedings? The obvious possibilities do not seem available now, but it may be possible to start laying foundations. Supplemental Rule G provides for publishing notice of civil forfeiture proceedings "on an official internet government forfeiture site." See G(4)(a)(iii)(B), (4)(a)(iv)(C), (5)(a)(ii)(B). Something similar might be desirable for class actions, or even for opt-in group actions under the Fair Labor Standards Act and Age Discrimination in Employment Act. If not that, why not allow internet publication in lieu of newspaper publication, whether when borrowing from state law or when newspaper publication is now provided in a Civil Rule? See Rule 71.1(d)(3)(B).

SECURITY AND AUTHENTICITY

How far should we be concerned with the vulnerability of e-files to unauthorized access? Taking account not only of the security of the court's system, but also of all the outside systems that interact with the court system and also interact with each other outside the court system?

default judgment.

"certifies in writing," Rule 65(b)(1)(B).

12b-008592

To: **The CM/ECF Subcommittee**

From: **Professors Sara Sun Beale and Nancy King**

Re: **Possible Amendments to Federal Rules of Criminal Procedure to accommodate CM/ECF**

Date: **July 5, 2013**

This memo discusses the Criminal Rules that might be affected by CM/ECF (and technology more generally), and it provides comments and suggestions on whether any amendment is necessary or advisable. However, our analysis at this stage is necessarily preliminary and general because of the uncertainty about how CM/ECF may change. Because of the large number of rules that might conceivably be affected, we provide the full text only for selected rules, giving a brief description of others.

In the sections that follow, we discuss:

I. Rules referring to "recording," "the record," actions and events that must occur "on the record," handing of or access to recordings, etc.
II. Rules requiring that a document or record be signed
III. Rules requiring writing
IV. Rules governing filing
V. Rules requiring sending and return of files or grand jury material to another district
VI. Rules requiring mailing
VII. Rules requiring the entry of information on documents, and the entry of orders
VIII. Rules requiring the preservation records or testimony
IX. Rules governing service

This memo does not discuss the Rules Governing Actions Under Sections 2254 and 2255, which pose distinctive issues.

I. Rules referring to "recording," "the record," actions and events that must occur "on the record," handing of or access to recordings, etc.

The Criminal Rules contain a myriad of references to "the record," to "recording," to events or actions that must occur or be made "on the record," to the making and handling of recordings. Because of the large number of rules involved, we have grouped the rules, describe each briefly (rather than providing the relevant text), and provide comments about the various categories of record-related rules.

A. Rules referring to "recording" or a "recording device" or "recorded statement"

Rule 4.1. authorizes a number of different options for recording the testimony taken during an application for warrant by electronic means, including recording the conversation by an "electronic recording device," but all recordings must be transcribed, certified, and filed.

Rule 5.1(g) requires that the preliminary hearing be recorded "by a court reporter or by a suitable recording device"; a copy of both the recording of the preliminary hearing and the transcript "may" be provided to any party upon request for the fee specified by the Judicial Conference.

Rule 6(e) states that grand jury proceedings (except deliberations and voting) "must be recorded by a court reporter or by a suitable recording device," and that the government will ordinarily retain control of "the recording, the reporter's notes, and any transcript prepared from those notes."

Rules 11(g) and 12(f) requires plea and motion hearing proceedings to be recorded by a court reporter or a "suitable recording device" and say nothing about a transcript.

Rule 26(f) defines statement, includes "recorded recital" of statement contained in any "recording" or transcription of "recording."

Rule 32.1 requires preliminary hearings in revocations to be recorded by reporter or suitable device as well and says nothing about transcripts.

Rule 41(d)(2) requires testimony in support of a warrant application to be recorded by reporter or suitable device, and requires the judge to file the transcript or recording with the clerk.

Rule 58(e) states proceedings under Rule 58 must be recorded by "a court reporter or a suitable recording device."

Rule 58(g)(2)(C) defines the record for an appeal from a magistrate judge's order as "the original papers and exhibits in the case; any transcript, tape, or other recording of the proceedings; and a certified copy of the docket entries." It also requires that "a copy of the record or proceedings" must be made available to a defendant who establishes his inability to pay.

Reporters' Comments

If audio or video recordings are ever accepted in place of written transcripts (see discussion in Professor Struve's CM/ECF report on the Appellate Rules), the Criminal Rules that reference transcripts of recordings may warrant a second look. Also, to the extent recordings are conditioned upon payment of a fee, if technology changes allow linking the recordings to the file, the cost of providing a "copy" of the recording could be eliminated for those with access. Those without access to CM/ECF or equipment to play an electronic recording (pro se defendants and petitioners) would presumably require a written transcript. Rule 58(g)(2)(C) so provides in the particular situation of an appeal from magistrate's order.

B. Rules referencing actions or events or statements that must be made or appear in "the record"

Rule 6(b) and (c) state that the foreperson or another designated juror must record how many qualified grand jurors concurred in an indictment in the record.

Rule 11(c)(5) states that if the court rejects certain plea agreements it must provide certain advice to the defendant "on the record and in open court (or, for good cause, in camera)." Rule 11(g) requires the proceedings in which the defendant enters a plea to be "recorded by a court reporter or by a suitable recording device," and states that "the record" must include the plea colloquy.

Rule 12(d) requires the court to state factual findings "on the record" when deciding pretrial motions.

Rule 26(c) requires the court to "preserve the entire statement" if redacted, "under seal, as part of the record."

Rule 26(e) requires the court to strike testimony "from the record."

Rule 32(c) requires the submission of a presentence report unless the court finds "information in the record" sufficient to meaningfully exercise sentencing authority and "explains its finding on the record."

Rule 32.2(d) bars transfer of property interest without defendant's consent "on the record" or in writing.

Rule 58(b)(3)(A) allows magistrates to take a plea only if defendant consents "either in writing or on the record."

Rule 59(b)(1) requires magistrate judge to "enter on the record" an oral or written order in nondispositive matters, make "[a] record" of any evidentiary proceedings, and "enter on the record" any recommendation and proposed findings.

Rule 60(a)(2) requires a court to state reason for excluding a crime victim "on the record."

Reporters' Comments

If CM/ECF changes how items are made part of the record – by filing or ensuring that it is part of a recording or transcript of a proceeding – all of these rules, or at least the practice under these rules, may be affected. If a change in CM/ECF affects how items are placed under seal or how items are removed from the record, these rules may have to be addressed as well. More information is needed about any changes in CM/ECF to determine whether any rules changes would be desirable.

C. Rules addressing access to or handling of "the record" or "recording"

Rule 6(d) and (e) refer to the "operator of a recording device" as an authorized person in a grand jury session, and require "all proceedings" to be "recorded by a court reporter or by a suitable recording device."

Rule 6(c) states that "the record" of number of jurors concurring in every indictment may not be made public without court order.

Rule 6(e) notes that unless the court orders otherwise, the government must retain the recording, notes, and any transcript of grand jury proceedings, and that the person who operates a recording device or transcribes recorded testimony is bound to secrecy. It also requires all "records" "relating to grand jury proceedings" to be kept under seal.

Rule 16(a)(3) exempts grand jury's recorded proceedings from discovery, except as noted.

Rule 26.2(c) states that if a witness's prior testimony is redacted before being produced, the court must "preserve the entire statement with the excised portion indicated, under seal, as part of the record."

Rule 25(a) requires a judge to certify "familiarity with the trial record" before substituting in a jury trial.

Rule 36 allows court to "correct a clerical error in a judgment, order, or other part of the record, or correct an error in the record arising from oversight or omission."

Rule 49.1(d) allows filing under seal without redaction and provides for later unsealing or fling of a redacted version "for the public record" and Rule 49.1(f) requires court to retain unredacted copies "as part of the record."

Rule 55 requires the clerk to "keep records of criminal proceedings" and enter in "the records" every order or judgment and date of entry.

Reporters' Comments

There are many records in criminal cases that are filed under seal or to which access is limited. Grand jury records and presentence reports are always secret. Plea agreements are also unavailable electronically on PACER in many districts, in part because of concerns about retaliation against cooperators. There will be an ongoing need to limit access to some documents that are part of the public record, even as the court's own record itself becomes digitized.

Rule 49.1 seems to be the only Criminal Rule that refers to the "public record" separately from "the record."

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D. Rules referencing records or recordings or transcripts to be produced by parties

Rule 15 states that a court may order a deponent to produce a "record, or recording" at a deposition. It says nothing about what is done with the material so produced.

Rule 16(a) requires the government to disclose records, recorded statements, and recorded testimony to the defendant.

Rule 49(a) says a party must serve every other party the "designation of the record on appeal."

Rule 59 says "the objecting party" must arrange for "transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient."

Reporters' Comment

We are uncertain whether proposed changes in CM/ECF will change the way discovery is conducted. Is it envisioned that the material that is produced will be electronically stored?

II. Rules requiring that a document or record be signed

Thirteen Criminal Rules require that one or more documents or records be signed or make some reference to signatures or signing. The most important of these rules is Rule 49(e), which provides for local rules permitting the use of electronic signatures, and thus provides a basis for the application of local rules to the specific Criminal Rules requiring signing and signatures. It provides:

Rule 49. Serving and Filing Papers

* * * * *

(e) Electronic Service and Filing. A court may, by local rule, allow papers to be filed, **signed, or verified by electronic means** that are consistent with any technical standards established by the Judicial Conference of the United States. **A local rule may require electronic filing only if reasonable exceptions are allowed. A paper filed electronically in compliance with a local rule is written or in writing under these rules.**

The remaining rules requiring signatures are summarized below, grouped according to whose signature is required: the judge, the clerk, the attorney for the government, the defendant (and his counsel), a detained material witness, or the grand jury foreperson. We provide a brief description of the rules falling within these categories. Because the categories do generally raise distinctive issues, our comments refer to all.

A. Rules requiring the judge's signature on a warrant, summons, the judgment, or a contempt order

Rule 4(b)(1)(D) requires a warrant to be signed by a judge, and (b)(2)(B)(iii) requires that a judge who considers both materials by reliable electronic means and other testimony or exhibits to sign any other record and verify its accuracy.

Rule 4.1(b)(2)(6) requires the judge issuing a warrant or summons to sign the original documents or direct the applicant to sign the judge's name on the duplicate original.

Rule 32(k) requires the judge to sign the judgment.

Rule 42(b) requires the judge to sign a contempt order.

B. Rules requiring the clerk's signature

Rule 9(b)(1) requires the clerk to sign an arrest warrant or summons.

Rule 17(c) requires the clerk to sign and seal blank subpoenas provided to the parties.[1]

C. Rules requiring the signature of the defendant and defendant's counsel where the defendant is waiving a right

Rule 10(b)(2) requires both the defendant and defense counsel to sign a waiver of the defendant's presence at arraignment.

Rule 17.1 provides that the government may use a statement made at a pretrial conference only if the statement was in writing and signed by the defendant and defendant's attorney.

Rule 26.2(f) defines a statement for purposes of that rule, inter alia, as a written statement the defendant makes or signs.

D. Other rules requiring a signature

Three other rules require the signature on particular documents of the grand jury foreperson, an attorney for the government, or a detained material witness:

Rule 6(c) requires the foreperson or deputy foreperson to sign all indictments.

Rule 7(c) requires an attorney for the government to sign the indictment or information.

Rule 15 requires a detained material witness who has been deposed at the witness's request to sign a transcript of the deposition under oath before the witness is discharged.

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[1]Rule 17(c) requires the clerk to "issue a blank subpoena–signed and sealed–to the party requesting it." We interpret this to mean that the clerk must sign the subpoena.

Reporters' Comments

Digital records, electronic filings, and digital signatures are now ubiquitous, and the rules need to take account of that fact. Concerns of that nature prompted the current proposal to amend the Bankruptcy Rule 5005(3)(B) to provide for electronic signatures by persons other than registered users of the court's electronic filing system.

The Criminal Rules now have in place a general mechanism to accommodate electronic signatures. Rule 49 allows local rules to provide for electronic signatures, and when local rules provide for electronic signatures Rule 49(e) allows the substitution of an electronic signature that complies with the local rules. To the extent it is desirable to allow for electronic signatures on routine court documents, Rule 49.1 provides at least a stop gap basis for authorization pursuant to local rules.

We have not collected or evaluated the local rules providing for electronic signatures, and we believe that such a study would be a necessary first step for any attempt to modify the Criminal Rules that currently govern signing. The discussion concerning proposed Bankruptcy Rule 5005(3)(B) would also provide useful information if the Advisory Committee were to consider amending the Criminal Rules to deal more specifically with electronic signatures. If the Advisory Committee were to do so, we expect it would draw distinctions between the electronic signatures by judges and other registered users of the court's electronic filing system and third parties such as the defendant, a detained material witness, and the grand jury's foreperson.

We discuss in the next section of this memo the more general question whether it would be useful to amend the language of Rule 49.1 (modeled on Civil Rule 5(d)(3)), which presently refers to the filing of "paper[s]" as the norm and allows for electronic filing of papers only pursuant to the authority of local rules.

III. Rules requiring writing

Twenty-eight Criminal Rules require a writing or refer to written materials. The writing requirement in these rules serves a variety of purposes. Rules 3 and 7(c) – which define a complaint and indictment as "a written statement of the essential facts constituting the offense charged" – by implication require that any charge be in writing to be treated as an official complaint, indictment, or information. The other rules discussed in this section generally require that a filing, motion, request, consent, notice, approval, evaluation, summary, statement of reasons, disclosure, or waiver be "written" or made or provided "in writing."

All are subject to Rule 49, which allows electronic filings made in accordance with local rules to be treated as if they were made in writing. It provides (emphasis added):

Rule 49. Serving and Filing Papers

* * * * *

(e) Electronic Service and Filing. A court may, by local rule,

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> allow papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. A local rule may require electronic filing only if reasonable exceptions are allowed. **A paper filed electronically in compliance with a local rule is written or in writing under these rules.**

Because of the large number of rules that require a writing or refer to written materials, we have attempted to group the rules for purposes of discussion (though admittedly there is some overlap and some rules are difficult to characterize). We discuss below rules governing (a) motions, (b) requests or notifications to be made by the parties, (c) disclosures by the parties, (d) judgments and judicial orders, findings, and statements of reasons, (e) consents, approvals, and stipulations, (f) other miscellaneous rules.

A. Rules governing motions

Rule 47 requires motions to be made in writing unless otherwise permitted by the court (and includes general rules for the time of filing). It provides (emphasis added):

Rule 47. Motions and Supporting Affidavits

> **(b) Form and Content of a Motion. A motion—except when made during a trial or hearing—must be in writing, unless the court permits the party to make the motion by other means**. A motion must state the grounds on which it is based and the relief or order sought. A motion may be supported by affidavit.
>
> **(c) Timing of a Motion.** A party must serve a **written motion**—other than one that the court may hear ex parte—and any hearing notice at least 7 days before the hearing date, unless a rule or court order sets a different period. For good cause, the court may set a different period upon ex parte application.

In addition, Rule 15(a)(2) provides that a detained material witness may file a written motion requesting to be deposed. The reference to a "written" motion appears to be superfluous in light of Rule 47(b).

B. Rules governing other requests or notification by the parties

Many Criminal Rules do not refer to "motions," but they require one or both parties to make a formal request or provide required forms of notification in writing.

Rule 12.1(a) allows the attorney for the government to request in writing notification of any intended alibi defense and then requires the defendant to respond in writing.

Rule 12.2(a) and (b) require a defendant intending to assert an insanity defense or introduce expert evidence of a mental disease or defect to notify the attorney for the government in writing.

Rule 12.3(a) and (b) require a defendant asserting a public-authority defense to notify the attorney for the government and requires the attorney for the government to respond in writing.

Rule 15(b)(1) requires a party seeking to take a deposition to provide the other party with "reasonable written notice."

Rule 16(d) provides that the court may permit a party to show good cause for a protective order restricting discovery by a "written statement" to be inspected ex parte.

Rule 26.1 provides that a party intending to raise an issue of foreign law must provide all parties with "reasonable written notice."

Rule 30 provides that a party may request "in writing" that the court give an instruction to the jury.

Rule 32(f) provides that the parties may "state in writing" any objections to the presentence report.

Rule 59(b)(2) provides that a party may file "specific written objections" to a magistrate judge's proposed findings and recommendations.

C. Rules governing disclosures by the parties

Several Criminal Rules governing discovery require the parties to make disclosures of various kinds in writing.

As noted above, Rule 12.1(a) allows the government to make a written request for notification of an intended alibi defense. Rule 12.1(b)(1) mandates reciprocal disclosure "in writing" by the attorney for the government to a defendant who has served notice of an alibi defense, and Rule 12.1(c) mandates a continuing duty to disclose "in writing."

Rule 12.3(a)(4) provides that the attorney for the government may "request in writing" disclosure of witnesses intended to establish a public-authority defense, and requires reciprocal written witness disclosures by the government and the defense; (b)(1) imposes a continuing duty to disclose "in writing."

Rule 16(a)(1)(B) requires the government to disclose the defendant's "written or recorded statement" and the portion of any "written record" containing the substance of an oral statement.

Rule 16(a)(1)(G) and (b)(1)(c) require the government and the defense to provide a "written summary" of certain testimony the government or defense intends to introduce.

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D. Rules governing judgments, orders, findings, and statements of reasons

The following Criminal Rules require that the court's orders, judgments, and other judicial statements or findings be "written" or "made in writing."

Rule 4.1(b)(2)(A) requires a judge acting under the rule to "acknowledge the attestation in writing" if the applicant for a warrant or summons does no more than attest to the contents of a written affidavit submitted by telephone or other reliable electronic means. If the judge considers additional testimony or exhibits, (b)(1)(B) requires the judge to "sign any other written record, certify its accuracy, and file it."

Rule 6(e)(3) requires the transferring court to provide a "written evaluation of the need for continued grand jury secrecy" when transferring a petition for the release of grand jury materials.

Rule 23(c) requires the court to state its specific findings of fact in open court or a written decision or opinion.

Rule 32(i)(1)(B) provides that the court must provide the parties with a "written summary of" (or summarize in camera) any information excluded from the presentence report upon which the court intends to rely.

Rule 40(c) states the court may modify a previous release or detention order issued in another district but must state the reasons for do so "in writing."

Rule 59(a) allows a magistrate judge to enter a written or oral order in a nondispositive matter referred by the district court.

E. Rules governing consent, approval, reservation of rights, or stipulations

Many Criminal Rules require that a party (usually the defendant) who waives a right or consents a certain procedure do so in writing, and other rules require that approvals, stipulations and the like be in writing. These rules provide a record of the waiver, consent, or other action, and may also draw the party's attention to the importance of the decision being made.

Rule 10(b) provides that a defendant who has signed a written waiver of appearance, affirmed receipt of the indictment or information, and is pleading not guilty need not be present if the court accepts the waiver.

Rule 11(a) allows entry of a conditional guilty or nolo plea (with the consent of the court and government) "reserving in writing" appellate review of a specified pretrial motion.

Rule 15(c)(1) provides that a defendant may "waive[] in writing" the right to be present at a deposition.

Rule 17.1 provides that the government may not use any statement by the defendant or counsel made at a pretrial conference unless the statement is "in writing and signed by the defendant and

the defendant's attorney." In this context, the provision of a written statement operates to waive the general rule preventing admission.

Rule 20(a) provides that a prosecution may be transferred to another district if the defendant states "in writing" a wish to plead guilty, consents "in writing" to disposition in the transferee district, and the U.S. Attorneys in both districts "approve the transfer in writing."

Ruler 20(d) provides for transfer of a case involving a juvenile when, inter alia, the juvenile consents to the transfer "in writing" and the U.S. Attorneys in both districts "approve the transfer in writing."

Rule 23(b) allows the parties to "stipulate in writing" their agreement to proceed with fewer than 12 jurors.

Rule 32(e) provides that unless "the defendant has consented in writing" a presentence report may not be submitted to the court or otherwise disclosed before the defendant has been found guilty or pleaded guilty or nolo contendere.

Rule 32.2 provides for a stay of forfeiture pending appeal and prevents transfer to a third party until the appeal becomes final "unless the defendant consents in writing or on the record."

Rule 43(b)(2) provides that in certain low level misdemeanor cases the defendant need not be present if he or she gives "written consent" and the court agrees to permit arraignment, plea, trial, and sentencing to occur by video teleconferencing or in the defendant's absence.

Rule 58(b)(5) allows a plea to be taken before a magistrate judge if the defendant consents "either in writing or on the record" to be tried before a magistrate judge and specifically waives trial before a district judge.

Rule 58(b)(2)(a) allows waiver of venue if the defendant "state[s] in writing a desire to plead guilty or nolo contendere," to waive venue, and to consent to the court's disposing of the case in the district.

F. Other rules requiring writing or governing the use of written documents[2]

Rule 6(f) requires that when 12 grand jurors do not concur in a pending complaint or information the foreperson must "promptly and in writing report the lack of concurrence to the magistrate judge."

Rule 32.1(b)(2) requires that the court to hold a hearing on the revocation of supervised release and provide the person "written notice of the alleged violation" as well as disclosure of the evidence against the person.

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[2]Additionally, Rule 41(d)(2)(B) provides that under some circumstances the judge "may wholly or partially dispense with a written affidavit and base a warrant on sworn testimony."

Rule 32.2(b)(1)(B) provides that the court may base a forfeiture determination on the record "including any written plea agreement."

Reporters' Comments

In general, the Criminal Rules seem to require that information be in "writing" or be "written" in order to provide initial clarity and to create a record. Additionally, the requirement of a writing signals to the parties the importance of a decision or action. Although the pervasive inclusion of writing requirements reflect the assumption that paper filings are the norm, these requirements are subject to Rule 49, which treats electronic filings to be treated as "written or in writing" under the Criminal Rules if they are authorized by local rules.[3] Thus in districts with local rules authorizing electronic filings, most or all of the "written" submissions could be made electronically.

The current rules raise two main questions.

First, are the local rules governing electronic filing operating in a satisfactory fashion? For example, are there problems in certain districts, or with certain kinds of filings? Has a consensus best practice emerged, making it time for a uniform rule? We are agnostic on these issues. We have made no study of the relevant local rules and their operation. We think such a study would require the assistance of the Federal Judicial Center and/or the Administrative Office, and it would be important to involve clerks of court, magistrate judges, the Department of Justice, Federal Defenders, and others who deal with the rules on a day to day basis. Moreover, it would be beneficial to consider whether such a study should consider local rules governing civil as well as criminal cases. Discussions in the CM/ECF Subcommittee may be helpful in determining whether such a study is warranted at the present time.

The second question raised by the current structure – reflected in Rule 49 as well as the other rules noted above -- is whether it is time to reconsider the assumption that paper filings are the norm, and that electronic filings should be permitted only when authorized by local rules. Since Rule 49 was based on and tracks Civil Rule 5(d)(3), such a determination should certainly consider civil as well as criminal practice, though there are significant differences that might ultimately dictate different results. It seems likely that eventually paper filings will be the exception rather than the rule, but we are not certain that whatever changes may be made in the CM/ECF system signal that the time is ripe for a change of this magnitude. Again, we look forward to a discussion of these issues in the CM/ECF Subcommittee.

IV. Rules governing filing

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[3]Rule 49 authorizes only "papers" to be filed electronically pursuant a valid local rule, and the Criminal, Rules do not generally refer to "papers." In this context, however, the term "papers" is understood to be a generic term encompassing a wide variety of writings such as those encompassed by the Criminal Rules discussed above: notices, discovery disclosures, consents, requests, etc.

Twenty-four Criminal Rules make reference to filing. Most reference the duty, need, or option to file. These rules govern filings by the clerk,[4] by the judge,[5] by the government,[6] by the defendant,[7] by either party,[8] by the grand jury foreperson,[9] by a third party claimants in forfeiture proceedings,[10] by

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[4]Rule 32(j)(2) (requires clerk to prepare and file a notice of appeal on defendant's behalf if so requested).

[5]The following rules refer to filing by the judge: Rule 4.1(b)(2) (judge must file transcription of notes of testimony, exhibits, modified original warrant, etc. considered during application for warrant); Rule 41(d)(2)(C) (same); Rule 42(b) (summary contempt orders must "be filed with the clerk").

[6]The following rules refer to filing by the government: Rule 5(a) (complaint must be promptly filed in district where offense committed after warrantless arrest); Rule 5.1(a) (magistrate judge must hold a preliminary hearing unless government files an indictment or information); Rule 6(e) (attorney for government must file under seal a notice of certain disclosures); Rule 7(f) (court may direct government to file a bill of particulars); Rule 12(g) (if court grants motion to dismiss, it may order defendant to be detained until new indictment or information has been filed); Rule 12.4(a)(2) (government must file statement identifying organizational victim upon the defendant's initial appearance).

[7]The following rules refer to filing by the defendant: Rule 12.2(a) (requires defendant to notify government if he intends to assert insanity defense or introduce expert evidence on a mental condition and to file copy of notice "with the clerk"); Rule 12.3(a) (requires defendant to notify government of intent to rely on public authority defense and to file copy of the notice "with the clerk"; also requires notice to be filed under seal if defendant identifies intelligence agency as alleged source of authority); Rule 12.4(a)(1) (requires nongovernmental corporate party to file statement that identifies any parent corporation and any publicly held corporation that owns 10% of its stock): Rule 20(a) & (d) (requires adult and juvenile defendants seeking transfer to file in "the transferee district" a statement waiving proceedings in original district); Rule 33 (requires motion for new trial to be filed at certain times).

[8]The following rules implicitly or explicitly refer to filings by either party: Rule 15(e) (requires filing of deposition in same matter as in civil action); Rule 32.2(b)(2)(C) (governing appeals from forfeiture order by either party); Rule 49(d) (requires parties to file "with the court a copy of any paper the party is required to serve"); Rule 49(e) (court may allow papers to be filed by electronic means); Rule 49.1(b) (governs required privacy protections for "filings," requiring redactions, providing for exemptions from redaction requirements, filing under seal without redaction, filing of redacted version, protective orders including orders limiting remote access, filing of reference list, and waiver by filing of person's own information without redaction); Rule 58(g)(2) (party appealing from magistrate's order must file notice "with the clerk"); Rule 59(a) & (b) (party objecting to magistrate judge's order on nondispositive matter or findings and recommendations on dispositive matter must "file" objections).

[9]Rule 6(c) states the foreperson "will" record the number of jurors concurring in each indictment and "will" file the record with the clerk.

[10]Rule 32.2 contains multiple references to claims filed by third party in forfeiture proceedings, including requirement in Rule 32.2(c) that the court conduct an ancillary proceeding if a third party files a petition asserting interest in property sought to be forfeited.

persons seeking the return of seized property,[11] and by anyone (including the defendant) seeking disclosure of grand jury materials.[12] Additionally, although the rules on filing do not refer to victims, victims are also affected by rules concerning the filing of motions. Rule 60 recognizes that victims have various rights, Rule 60(b)(1) references motions to assert a victim's rights, and Rule 60(b)(2) provides that a victim or a victim's lawful representative may assert those rights.

A few Criminal Rules describe or refer to a relationship between documents or items that have been filed:

Rule 4(a) references "affidavits filed with the complaint."

Rule 5(d)(1)(A) references "affidavits filed with the complaint"

Rule 49.1(b)(9) exempts from redaction an affidavit filed "in support of any charging document."

Rule 49.1(g) states that a filing containing redacted information may be filed "together with" a reference list.

Reporters' Comments

In general, the Criminal Rules direct that certain filings be made or reference documents that have been filed, but they do not specify how filing is to be accomplished and make no reference to the mechanics of the CM/ECF system. However, all of these people who file under the Criminal Rules – including not only the clerk and the judge, but also the government, persons seeking grand jury disclosure, third parties claiming a right to property the government is seeking to forfeit, and the grand jury foreperson – must have access to system to "file" these things. Is it contemplated that CM/ECF will make any changes that would affect the various groups? Are there any problems with access now? For example, the Advisory Committee was informed that victims in some courts had problems filing motions asserting their rights because the system did not accommodate such filings; the Committee was later advised changes had been made to address the problem. Also, some criminal filings are to be non-public. The grand jury foreperson's filing under Rule 6(c) "may not be made be public" without judicial authorization, under Rule 12.3 certain filings regarding the defense of public authority must be filed under seal, and Rule 49.1 makes provision for sealed filings. We do not know whether the changes being contemplated would affect how such filings would work.

In our view, the rules that refer to the relationship between documents and items that are filed raise questions. These rules assume that there is a way to determine when a document is filed "with" or "in support of" another document. We don't know how that works now, and we wonder whether it might change. For example, if related paper documents are now stapled together, what is the analogous mechanism for electronic filing?

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[11]Rule 41(g) requires a person aggrieved by unlawful search and seizure to file motion for return of property to be filed in district where the property was seized.

[12]Rule 6(e)(3)(F) provides that anyone seeking disclosure of grand jury matter must file a petition in district where grand jury convened.

We also note that the language used to describe filings varies. For example, some rules refer to filing "with the clerk"[13] or "with the court." Indeed, the caption of Rule 49.1 (the rule governing privacy protections) refers to "Filings Made With the Court," and the rule uses the terms "filing," "court filing," and "a document filed with the court." Civil Rule 5.2, which parallels Rule 49.1, also refers to "filing with the court" and "filing made with the court." We don't know what is adding by a reference to the court or to the clerk. In this context, are there filings not made with the clerk and the court? Is there anything about the move toward electronic filing that makes it less desirable to refer to filing with the clerk or with the court?

Finally, we note that Rules 20 and 21 – which govern transfers for plea and sentence, or for trial – use the term "file" in a difference context, referring to sending "the file, or a certified copy" to the transferee district clerk. We are not certain why these rule refer to the file rather than the "record" as other rules do. (We note that Rule 58(g)(2) defines the "record" for purposes of an appeal from the decision of a magistrate judge, and do not use the term "file.") As noted in the next section of this memo, another feature of Rules 20 and 21 also suggests that it may be appropriate to consider revisions to both rules.

V. Rules requiring sending and return of files or grand jury material to another district

Rules 20 and 21 require "send[ing]" the file of a case to another district. Rule 20 requires the clerk of court to send the case file (or a certified copy) to the clerk of another district and requires the return of the "papers" under certain circumstances. Rule 21 similarly requires the clerk to send "the file" in a case involving a juvenile. Rule 6 requires the clerk "to send" grand jury material to another district under certain circumstances.

Rule 20, which governs transfer for plea and sentence, provides (emphasis added):

> **(b) Clerk's Duties.** After receiving the defendant's statement and the required approvals, **the clerk where the indictment, information, or complaint is pending must send the file, or a certified copy, to the clerk in the transferee district.**
>
> **(c) Effect of a Not Guilty Plea.** If the defendant pleads not guilty after the case has been transferred under Rule 20(a), **the clerk must return the papers to the court where the prosecution began, and that court must restore the proceeding to its docket.** The defendant's statement that the defendant wished to plead guilty or nolo contendere is not, in any civil or criminal proceeding, admissible against the defendant.

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[13] E.g., Rule 12.2(a) (copy of notice regarding insanity defense must be "filed with the clerk"), and Rule 42(b) (judge's summary contempt order must be "filed with the clerk").

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(d) Juveniles.

* * * * *

> **(2) Clerk's Duties. After receiving the juvenile's written consent and the required approvals, the clerk where the indictment, information, or complaint is pending or where the alleged offense occurred must send the file, or a certified copy, to the clerk in the transferee district.**

Rule 21(c), which governs transfer for trial, also requires "the file" (or a certified copy) be "sent" to the district in which trial will be held. It provides (emphasis added):

> **(c) Proceedings on Transfer. When the court orders a transfer, the clerk must send to the transferee district the file, or a certified copy, and any bail taken.** The prosecution will then continue in the transferee district.

And finally, Rule 6, which governs the grand jury, provides in pertinent part (emphasis added):

(e) Recording and Disclosing the Proceedings.

* * * * *

(3) *Exceptions.*

> (G) If the petition to disclose arises out of a judicial proceeding in another district, the petitioned court must transfer the petition to the other court unless the petitioned court can reasonably determine whether disclosure is proper. **If the petitioned court decides to transfer, it must send to the transferee court the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand-jury secrecy**. The transferee court must afford those persons identified in Rule 6(e)(3)(F) a reasonable opportunity to appear and be heard.

Reporters' Comments

Although we are not certain exactly how the technology will work, it seems likely that there are – or soon will be – more efficient options than sending a case file or certified copy to another district. Accordingly, study of those options would be appropriate. Rule 6 poses somewhat different issues because it does not require an entire case file to be sent, and it deals with grand jury materials, which are afforded a high degree of secrecy.

One option would be to amend Rules 20 and 21 to adopt a variant of the language in the proposed amendment to Appellate Rule 6, which refers to "making the record available." That language

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would accommodate both providing electronic access and physical delivery of the file (or a certified copy) to the receiving district. However, adoption of the "make available" language in Rule 20(b) would raise a question about Rule 20(c), which currently provides for restoring the proceeding to the sending court's docket if the case is returned. If electronic access is provided, would the case be removed from the court's docket? The time may be ripe for an evaluation of Rules 20 and 21 considering both the requirement of "sending" the case and the question whether to retain the references to the "file" and the "papers" discussed in the previous section of this memo.

It may also be appropriate to consider amending Rule 6 to provide that the district court would "make available" grand jury materials to the court to which a petition to disclose is being transferred. However, before making such a change it would be desirable to determine whether that would be consistent with the general principle of grand jury secrecy.

VI. Rules requiring mailing

Four rules – Rules 4, 41, 46, and 58 – require the mailing of a summons, warrant for a tracking device, motion to enforce bail forfeiture, and notice to appear in a misdemeanor or petty offense case. In each case, the rule provides that the mailing is to be made to the recipient's "last known address."

Reporters' Comments

Although technology is increasingly replacing the use of the mails, three (or perhaps all four) of these rules govern situations in which there may be no means of electronic communication and mailing remains the best alternative.

Rule 4(c)(3) governs the service of a summons on an individual or organization. The purpose of the summons is to initiate the case, and at this stage there will often be no mechanism to accomplish electronic service (even in the case of a defendant who will be represented by counsel who may be later be served electronically). Where personal service cannot be made, Rule 4(c)(3) requires service by mail is required in addition to another form of service. In the case of an individual, Rule 4(c)(3)(B)(ii) governs cases in which service is not made in person, but by leaving a copy with a third party at the defendant's residence. In such cases, Rule 4(c)(3)(B)(ii) requires that service also be made by mailing to the defendant's last known address. Similarly, in the case of a corporation, Rule 4(c)(3)(C) requires service both by delivery to an agent of the corporation and by a mailing to the organization's last known address withing the district or its principal place of business. In the absence of effective means of accomplishing electronic service, the mailing provisions continue to provide the only means of service for many defendants. We note that the Advisory Committee is presently considering a proposal by the Department of Justice to amend Rule 4 to revise the provisions on service on corporations to enable effective service on foreign corporations that have no known address within the district or principal place of business in the U.S. This proposal would affect the mailing requirement.

Rule 41(f)(2)(C) requires that after the use of a tracking device has ended, the officer who executed the warrant must serve the warrant on the person whose property was tracked. As under Rule 4(c)(3)(B)(ii), where service is not made in person, but by leaving a copy with a third party at the

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defendant's residence, the officer must also mail the warrant to the defendant's last know address. As with Rule 4, the mailing provisions continue to provide the only means of service for many defendants.

Rule 58(d) provides that in certain petty offense and misdemeanor cases the court may allow the defendant to pay a lump sum in lieu of appearance and end the case. Subdivision (d)(2) states that if a defendant in such a case has neither paid the fixed sum, requested a hearing, nor appeared in response to the citation or violation notice, the clerk or the magistrate judge "may" issue a notice giving the defendant an additional opportunity to pay the fixed sum. In such a case, the clerk is required to mail the notice of this additional opportunity to the defendant's last known address. Because this rule applies in cases in which the defendant has not appeared or responded by other means to the citation or violation notice, there are no obvious alternatives to mailing.

Rule 46(f)(3)(B) & (C), which govern bail forfeiture, stand on a somewhat different footing and it is possible that electronic service may be (or soon be) plausible. The Rule provides that a bail surety consents to the court's jurisdiction and irrevocably appoints the clerk as its agent for receipt of service for any filings. The rule also provides for the service of a motion to enforce the surety's liability to be made upon the clerk, with the proviso that the clerk must promptly mail a copy to the surety at its last known address. Since the surety has consented to the court's jurisdiction, as electronic communication becomes increasingly ubiquitous it may become possible to require the surety to provide the court with an electronic address. Electronic service of the motion provided for in Rule 46(f)(3)(C) would be more efficient for the clerk, and at some point it may also be more likely to reach the surety than a mailing to the surety's last known address. It may be useful for the Committee to study this issue.

VII. Rules requiring the entry of information on documents, and the entry of orders

A large number of Criminal Rules refer to the entry of the judgment or various orders,[14] but other rules refer to the entry of information on documents related to the issuance of complaints, warrants, and summonses. Although the rules regarding the entry of orders or the judgment seem to pose no distinctive questions for purposes of the CM/ECF Subcommittee, the rules regarding the entry of information on a documents related to the issuance of complaints, warrants, or summonses may be affected by technological changes. The most elaborate provisions appear in Rule 4.1, which provides (emphasis added):

> **Rule 4.1. Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means.**
>
> **(B) Procedures. ....**

---

[14]E.g., Rule 16(d)(2) (court may enter any other order for failure to comply with discovery obligations); Rule 17(c) (requiring court to give notice to victims before entering an order for subpoena for victim's confidential information); Rule 29(a) & (c)(2) (court must enter a judgement of acquittal at close of government's case if evidence is insufficient to sustain a conviction and may enter a judgment of acquittal if jury fails to return a verdict); Rule 32(k) (judge must sign and clerk must enter the judgment).

(4) *Preparing an Original Complaint, Warrant, or Summons.* **If the applicant reads the contents of the proposed duplicate original, the judge must enter those contents into an original complaint, warrant, or summons**. If the applicant transmits the contents by reliable electronic means, the transmission received by the judge may serve as the original.

* * * * *

(6) *Issuance.* To issue the warrant or summons, **the judge must**:

(A) sign the original documents;
(B) **enter the date and time of issuance on the warrant or summons**; and
(C) transmit the warrant or summons by reliable electronic means to the applicant **or direct the applicant to sign the judge's name and enter the date and time on the duplicate original**.

Rule 41 also contains some parallel provisions (emphasis added):

Rule 41. Search and Seizure.

* * * * *

(f) Executing and Returning the Warrant.
(1) *Warrant to Search for and Seize a Person or Property.*
(A) *Noting the Time.* The officer executing the warrant must **enter on it the exact date and time it was executed.**

* * * * *

(2) *Warrant for a Tracking Device.*
(A) *Noting the Time.* The officer executing a tracking-device warrant must **enter on it the exact date and time** the device was installed and the period during which it was used.

Reporters' Comments

The rules do not specify how information is to be "entered." In the past, this was likely done in handwriting on the documents. As the technology changes, we expect that the form in which a judge or an officer executing a warrant "enters" information will change as well. Although we have had no indication that issues have arisen under these rules that should be addressed by an amendment, this seems to be an issue worth watching.

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VIII. Rules requiring the preservation records or testimony

Rules 16 and 26.2 explicitly impose an obligation to "preserve" certain materials that are not disclosed during pretrial discovery or after a witness has testified.

In the context of pretrial discovery, Rule 16(d) requires the preservation of an statement seeking a protective order limiting discovery. It provides (emphasis added):

> **Rule 16. Discovery and Inspection**
>
> > **(d) Regulating Discovery.**
> >
> > > **(1)** ***Protective and Modifying Orders.*** At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. **The court may permit a party to show good cause by a written statement that the court will inspect ex parte. If relief is granted, the court must preserve the entire text of the party's statement under seal.**

Rule 16 does not permit pretrial discovery of prior statements by witnesses, but Rule 26.2 provides for the production of the relevant portion of a witness's prior statements after the witness testifies at the trial or other proceedings governed by the rule. Like Rule 16, Rule 26.2(c) imposes an obligation to preserve material that was not produced. It provides (emphasis added):

> **Rule 26.2. Producing a Witness's Statement.**
>
> > **(c) Producing a Redacted Statement.** If the party who called the witness claims that the statement contains information that is privileged or does not relate to the subject matter of the witness's testimony, the court must inspect the statement in camera. **After excising any privileged or unrelated portions, the court must order delivery of the redacted statement to the moving party. If the defendant objects to an excision, the court must preserve the entire statement with the excised portion indicated, under seal, as part of the record.**

Reporters' Comments

The rules requiring the preservation of particular testimony not disclosed to the opposing party or a written statement examined ex parte make no reference to the technology needed to meet this requirement. Thus they are consistent with any modifications in the CM/ECF system. We include them here, however, because the requirements for preservation so starkly highlight the need for electronic systems of information storage and retrieval to provide not merely short term, but also long term access to the courts' records.

IX. Rules governing service

Many Criminal Rules require a variety of documents to be served on the parties and others (e.g., victims, sureties for bail, and claimants to property being forfeited). All are subject to Rule 49, which provides (emphasis added):

Rule 49. Serving and Filing Papers

> **(a) When Required.** A party must **serve** on every other party any written motion (other than one to be heard ex parte), written notice, designation of the record on appeal, or similar paper.
>
> **(b) How Made. Service must be made in the manner provided for a civil action. When these rules or a court order requires or permits service on a party represented by an attorney, service must be made on the attorney instead of the party, unless the court orders otherwise.**
>
> **(c) Notice of a Court Order.** When the court issues an order on any post-arraignment motion, the clerk must provide notice in a manner provided for in a civil action. Except as Federal Rule of Appellate Procedure 4(b) provides otherwise, the clerk's failure to give notice does not affect the time to appeal, or relieve—or authorize the court to relieve—a party's failure to appeal within the allowed time.
>
> **(d) Filing.** A party must file with the court a copy of any paper the party is required to serve. A paper must be filed in a manner provided for in a civil action.
>
> **(e) Electronic Service and Filing. A court may, by local rule, allow papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. A local rule may require electronic filing only if reasonable exceptions are allowed. A paper filed electronically in compliance with a local rule is written or in writing under these rules.**

In addition, Rule 4(c) contains more specific provisions regarding service:

Rule 4. Arrest Warrant or Summons on a Complaint

(c) Execution or Service, and Return.

* * * * *

(3) ***Manner.***

* * * * *

(B) A summons is served on an individual defendant:

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(I) by delivering a copy to the defendant personally; or

(ii) by leaving a copy at the defendant's residence or usual place of abode with a person of suitable age and discretion residing at that location and by mailing a copy to the defendant's last known address.

(C) A summons is served on an organization by delivering a copy to an officer, to a managing or general agent, or to another agent appointed or legally authorized to receive service of process. A copy must also be mailed to the organization's last known address within the district or to its principal place of business elsewhere in the United States.

Reporters' Comments

Since Rule 49 provides that service in criminal cases generally follows the Civil Rules, changes in CM/ECF that would affect service in civil cases would affect criminal cases as well. However, Rule 4 does provide distinctive procedures for serving a summons on individual and corporate defendants. As noted above, the requirement of mailing to the last known address may be affected by changes in technology, and the mailing requirement in cases involving corporate defendants outside the U.S. is presently under study by the Criminal Rules Committee.

The more general issues raised by permitting electronic service only when and to the extent permitted by local rules are discussed above.

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Memorandum To: CM/ECF Subcommittee
From: Daniel Capra, Reporter
Re: Amendment of Evidence Rules to accommodate CM/ECF
Date: July 1, 2013

This memorandum discusses the Evidence Rules that might be affected by CM/ECF, and provides comments and suggestions on whether any amendment to the Evidence Rules is necessary or advisable.

The list of possibly affected rules is small, for two reasons:

1) CM/ECF, including Next Gen, does not appear to be intended to impact the introduction of evidence at trial. Therefore any rule governing admissibility or inadmissibility of evidence is unlikely to require an amendment. I checked with CACM staffers and they could not think of anything in CM/ECF that was directly designed to have an evidentiary impact, other than electronic signatures — and the Evidence Rules Committee has already determined that a rule permitting the use of electronic signatures requires no change to the Federal Rules of Evidence. The CACM staffers did caution that there are thousands of changes that will be implemented in the Next Gen CM/ECF system, and some of them may have evidentiary implications, but they couldn't think of anything specific. So while there may be issues down the line when Next Gen is implemented, it seems inadvisable to try to pre-think some evidentiary implication that is not apparent at this point.

2) As to admission of electronic evidence, the Restyling accommodates its use throughout the Evidence Rules by way of definition. FRE 101(b)(6) provides that "a reference to any kind of written material or any other medium includes electronically stored information." Thus there should be no concern, for example, that a reference in the hearsay exceptions to "periodicals" (see FRE 803(18)) or "publications" (see FRE 803 (17)), or "records" (see Rule 803(6)) would fail to accommodate electronic versions.

With these two very important provisos in mind, what is set forth below are the Evidence Rules that might somehow be affected by CM/ECF. The list is, by intent, overly inclusive.

1. Rules with references to matters "on the record" or "for the record"

a. Rule 103. Rulings on Evidence

(a) Preserving a Claim of Error. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:

(1) if the ruling admits evidence, a party, ***on the record***:

(A) timely objects or moves to strike; and

(B) states the specific ground, unless it was apparent from the context; or

(2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

(b) Not Needing to Renew an Objection or Offer of Proof. Once the court rules definitively ***on the record*** — either before or at trial — a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

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b. Rule 410 (b): Pleas, Plea Discussions, and Related Statements

(b) Exceptions. The court may admit a statement described in Rule 410(a)(3) or (4):

* * *

(2) in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, ***on the record***, and with counsel present.

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c. Rule 612(b): Writing Used to Refresh Memory

(b) Adverse Party's Options; Deleting Unrelated Matter. Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be ***preserved for***

the record.

Comment on references to "the record": The references to "on the record" and "for the record" are not about admitting evidence but are rather about making a record, and accordingly there could be some CM/ECF effect as to the mode of judicial recordkeeping.[1] But there is nothing to indicate that a simple reference to "the record" would not cover records that are prepared and kept pursuant to CM/ECF. For example, the rules do not say, or even imply, that the record must be in hardcopy or kept in a certain way. Moreover, to the extent the references to "on the record" might be thought to refer to a written record, any issue of technological advancement would seem to be covered by the aforementioned Rule 101(b)(6) — *any* reference to written material includes electronically stored information. So it would not seem that an amendment to any of the above rules is necessary.

It should be noted that an amendment to Rule 410(b)(2) would be particularly inadvisable, because the reference to "on the record" in that Rule covers state as well as Federal proceedings.

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[1] Of course, rules governing evidentiary admission of records and writings abound — see, e.g., Rules 803(6) (business records), 803(8) (public records). But these references are not discussed here because they have all been updated to accommodate electronic information by the definitional provision in Rule 101(6).

2. Rules Requiring Notice

a. Rule 404(b)(2)

(2) Permitted Uses; Notice in a Criminal Case.

This evidence may be admissible for another purpose, such as proving motive, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

(A) ***provide reasonable notice*** of the general nature or any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

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c. Rules 413(b) and 414(b) (identical):

(b) **Disclosure to the Defendant.** If the prosecutor intends to offer this evidence, the prosecutor ***must disclose it*** to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.

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d. Rule 415(b):

(b) **Disclosure to the Opponent.** If a party intends to offer this evidence, the party ***must disclose it*** to the party against whom it will be offered, including witnesses' statements or a summary of the expected testimony. The party must do so at lest 15 days before trial or at a later time that the court allows for good cause.

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e. Rule 609(b): Impeachment with old convictions

(b) Limit on Using the Evidence After 10 Years. This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:

> **(1)** its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and
>
> **(2)** the proponent gives an adverse party ***reasonable written notice*** of the intent to use it so that the party has a fair opportunity to contest its use.

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f. Rule 807(b): Residual exception to the hearsay rule

(b) Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party ***reasonable notice*** of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

Comment on notice provisions: A notice provision is not about the presentation of evidence but rather about providing notice, and NextGen will have an effect on how notice is provided to parties in an action. But this does not mean that all of these rules need to be amended. The rules generally say nothing about the *manner* of notice; they only require notice to be provided. It is apparent that these Evidence Rules defer to other rules and procedures outside the FRE to determine the mechanics of how notice is to be provided. This makes sense, as the FRE is generally about admissibility, and not about how to file, plead, etc.

The possible exception is Rule 609(b), which refers to *written* notice. It is true that this is a specification of the manner of notice and thus needs to accommodate the technological changes wrought by CM/ECF. Yet there is a strong argument that the accommodation has already been made in Rule 101(b)(6). Rule 609(b) refers to a writing, and under Rule 101(b)(6), "a reference to any kind

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of written material . . . includes electronically stored information." The definition is not limited to terminology about admissibility of evidence. The Rule refers to any reference to written material anywhere in the Evidence Rules. Thus it is questionable whether it is necessary to amend Rule 609(b) to accommodate CM/ECF. It should be noted, though, that if an amendment is advisable, it is an easy one to make: simply delete the word "written."

3. References to Court Orders

a. Rule 502(d): Court order protecting against waiver of privilege

(d) **Controlling Effect of a *Court Order*.** A federal court may ***order*** that the privilege or protection is not waived by disclosure connected with the litigation pending before the court — in which event the disclosure is also not a waiver in any other federal or state proceeding.

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b. Rule 612(b) and (c): Writing Used to Refresh Memory

(b) **Adverse Party's Options; Deleting Unrelated Matter.** Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and ***order*** that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record. [2]

(c) **Failure to Produce or Deliver the Writing**. If a writing is not produced or is not delivered as ordered, the court ***may issue any appropriate order***. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or — if justice so requires — declare a mistrial.

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c. Rule 615: Sequestration of witnesses

Rule 615. Excluding Witnesses

At a party's request, the ***court must order*** witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. * * *

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[2] The reference to the preparation of a "record" in Rule 612(a) is discussed above in section 1.

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d. Rule 705: Disclosure of expert's basis

Rule 705. Disclosing the Facts or Data Underlying an Expert's Opinion

Unless the court orders otherwise, an expert may state an opinion — and give the reasons for it — without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

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e. Rule 706: Court-appointed experts

Rule 706. Court-Appointed Expert Witnesses

(a) Appointment Process. On a party's motion or on its own, ***the court may order*** the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

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f. Rule 1006: Summaries

Rule 1006. Summaries to Prove Content

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And ***the court may order*** the proponent to produce them in court.

Comment on References to Court Orders: Entry of court orders is surely affected by CM/ECF,

but that would not appear to necessitate an amendment to every — or any — Evidence Rule that refers to a court order. The Evidence Rules references are concerned with the court making an order, but not with the mechanics of entry of an order. Nothing in the Evidence Rules mandates entry of an order that would be inconsistent with a change in technology. (And if it did that reference would be updated in any event by the previously discussed definition in Rule 101(b)(6)).

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4. References to Judgments

a. Hearsay exception for judgments of conviction.

(22) ***Judgment* of a Previous Conviction**. Evidence of a ***final judgment*** of conviction if:

(A) the ***judgment*** was entered after a trial or guilty plea, but not a nolo contendere plea;

(B) the conviction was for a crime punishable by death or by imprisonment for more than a year;

(C) the evidence is admitted to prove any fact essential to the judgment; and

(D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

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b. Hearsay exception for certain judgments

(23) ***Judgments* Involving Personal, Family, or General History, or a Boundary.** A ***judgment*** that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

(A) was essential to the ***judgment***; and

(B) could be proved by evidence of reputation.

Comment on rules referring to judgments: Entry of a judgment is affected by CM/ECF. But the above rules are not concerned with entry of a judgment. They are concerned with *admissibility* of a judgment however it might be entered. As to the form of the judgment for admissibility, the FRE, as previously discussed, already embraces evidence in electronic form. Thus there would appear to be no need to amend these provisions.

5. References to Motions, Filing, Service

b. Rule 412(c)

(c) Procedure to Determine Admissibility

(1) ***Motion.*** If a party intends to offer evidence under Rule 412(b), the party must:

(A) ***file a motion*** that specifically describes the evidence and states the purpose for which it is to be offered;

(B) do so at least 14 days before trial unless the court, for good cause, sets a different time;

(C) ***serve the motion*** on all parties;

(D) notify the victim or, when appropriate, the victim's guardian or representative.[3]

* * *

Rule 706: Court-appointed experts

Rule 706. Court-Appointed Expert Witnesses

(a) Appointment Process. ***On a party's motion or on its own***, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

(b) Expert's Role. The court must inform the expert of the expert's duties. The court may do so ***in writing and have a copy filed with the clerk*** or may do so orally at a conference in which the

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[3] Note that Rule 412(c)(1)(D) requires the party seeking to introduce sexual conduct evidence to *notify* the victim or representative. But even if all of the other notice provisions need to be changed to accommodate CM/ECF, this provision should not be changed. The notification referred to must be flexible because the victim will not always be a party.

parties have an opportunity to participate.

Comment on Rules Referring to Motions, Filing and Service:

Electronic case filing and case management affects the mechanics of making a motion, filing, and service — as opposed to the introduction of evidence. But the mere references to motions, filings and/or service in the above rules would not seem to raise any conflict with CM/ECF. The *manner* of filing and service is generally not specified — there is no implication or suggestion that service must be in person or by mail, or that a motion must be filed in hardcopy — and so, as it was before CM/ECF, the mechanics for complying with the Rule's requirements are generally left to provisions outside the Rules of Evidence.

There is one proviso — the reference in Rule 706(b), which provides that the court may inform the expert of her duties in writing and have a copy filed with the clerk, does deal with the manner of entry as opposed to the admissibility of evidence. The use of the term "writing" is likely not problematic because of the aforementioned definitional Rule 101(b)(6). But the use of the term "copy filed with the clerk" does seem outmoded in light of CM/ECF. The problem, if any, is not earth-shaking — Rule 706 is a little-used rule and the procedure provided is optional in any event. But it might be something that the Evidence Rules Committee would wish to consider as part of a technology package to be submitted with the other Advisory Committees.

6. References to Physical Presence in court for testimony

Rule 804. Exceptions to the Rule Against Hearsay - When the Declarant Is Unavailable as a Witness

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

* * *

(4) ***cannot be present*** or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant's ***attendance***, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

(B) the declarant's ***attendance or testimony***, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

Comment on references to physical presence: Clearly it is possible under CM/ECF for a witness to testify at trial without being physically present. Of course this has been the case for a long time. On first glance, it would appear that Rule 804(a) appears to define availability in terms of physical presence and so might end up admitting some hearsay on the grounds of unavailability even though the declarant could actually be able to testify remotely. The question, then, is whether the definition of unavailability should refer to inability to produce the witness not only physically but also remotely.

That question is already answered in the Rule insofar as absence is the asserted ground of unavailability. Rule 804(a)(5)(B) says a witness is not unavailable if his attendance *or testimony* can be produced. Thus, a witness who is available to testify remotely is *not* absent, for purposes of admitting the unavailability-based hearsay exceptions in Rules 804(b)(2)-(4). Procurement of physical attendance *is* required before prior testimony under Rule 804(b)(1) is admitted — see Rule 804(a)(5)(A) — but that is because the proponent in those circumstances is seeking to offer out-of-court *testimony* and it wouldn't make any sense to preclude that testimony if the alternative was only

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another piece of out-of-court testimony.[4]

What about if a witness — who has made a hearsay statement that would be admissible under Rule 804(b) — is in the hospital, and would be able to testify remotely but cannot be moved to physically testify at the trial? That witness apparently would not be unavailable under Rule 804(a)(4) because he "cannot be present *or* testify at the trial." That is, the term "testify at the trial", fairly read, includes the possibility of remote testimony — a reading that is supported by the fact that testimony "at the trial" is an expressed alternative to physical presence. Thus there appears to be no need to amend Rule 804(a)(4) to accommodate the possibility of remote testimony.

All this discussion of remote testimony has been in the context of whether a hearsay declarant is unavailable when it is possible for the declarant to testify remotely. The broader question is whether the remote testimony should be freely admitted as a substitute for testimony made physically in court. That is a controversial question and it is not directly addressed by the Evidence Rules. Rule 801(c) defines hearsay as a statement made "other than while testifying at the trial or hearing." A witness who is testifying remotely in real-time during a trial would is testifying "at" the trial. Thus, Rule 801 does not automatically exclude real-time trial testimony simply because it is coming from a remote location (as opposed to a canned videotaped deposition, which is not testimony made at trial). Courts have cited Rule 611(a) — allowing the trial court discretion in controlling the mode of examining witnesses — and Fed. R. Civ. P. 43(a) as authority for allowing remote testimony as a substitute for physical presence of the witness at trial, at least in cases where good cause is shown. *See, e.g., Parkhurst v. Belt,* 567 F.3d 995 (8th Cir. 2009) (no error in permitting child-witness to testify by closed circuit).

Nonetheless, studies indicate that live testimony has a stronger impact than testimony that is presented from a remote location. *See Traylor v. Husqvarna Motor,* 988 F.2d 729 (7th Cir. 1993) (reviewing studies). And in criminal cases there are of course Confrontation Clause concerns in using remote testimony as a substitute for live in-court testimony. *See generally Maryland v. Craig,* 497 U.S. 836 (1990) (requiring a specific showing of witness trauma before closed-circuit testimony was permitted). The most that can be said is that the question of evidentiary use of remote testimony in lieu of live in-court testimony is a complex one that would require significant study — probably by a joint effort of Evidence, Criminal, Civil and Bankruptcy.

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[4] As to Rule 804(b)(6), the forfeiture exception, it is conditioned on an inability to procure physical presence, but the chance that an intimidated (or dead) witness is willing to testify remotely but not in person seems a slim one — though perhaps the scenario is plausible enough that the Evidence Rule Committee should take the following question under advisement: whether to move the reference about Rule 804(b)(6) from Rule 804(a)(5)(A) to Rule 804(a)(5)(B).

Conclusion

My initial review indicates that there is very little in the Evidence Rules that requires an amendment to accommodate changes wrought by CM/ECF. But further review will certainly be required as Next Gen rolls out. It should also be noted that the Evidence Rules Committee is holding a symposium in October about the effect of technology on the Federal Rules of Evidence, and it may well be that the participants in that symposium will find other Evidence Rules that warrant amendment to accommodate technology.

APPENDIX B

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MEMORANDUM

TO: Professor Daniel Capra, Reporter, Advisory Committee on Evidence Rules

FROM: Laura Erdman, J.D. Candidate, Washington and Lee University School of Law

RE: Analysis of Local Rules Regarding Electronic Filing

DATE: November 6, 2013

CC: Professor Edward Cooper, Reporter, Advisory Committee on Civil Rules
Mr. Benjamin Robinson

Upon referral from the Rules Committees, I reviewed the local rules of the 94 district courts and a sample of 11 bankruptcy courts to collect information about how electronic filing rules are operating at the local level. In addition to the summary of my findings below, I am providing the spreadsheet that contains the entire data set. The data has important interpretive limitations, which are discussed below under "Notes on Research Methodology and Data Interpretation."

Summary of Findings – U.S. District Courts:

All but two of the federal districts have a local rule on e-filing; two districts—Alabama Southern and Guam—discuss e-filing in a standing order and procedure guide, respectively. Eighty-five "mandatory" districts require e-filing generally but except certain categories of filers, cases, and documents. Nine "permissive" districts permit e-filing but do not require it broadly. There is significant variation within mandatory districts in the excepted categories and the local rules' specificity in describing these categories. Further, the mandatory districts vary in their treatment of excepted categories; some require conventional filing while others simply provide the option to use conventional means. E-filing local rule language is generally inconsistent. Many districts use general language in the local rule and provide details in a separate "Administrative Procedures for Electronic Filing" document. Some mandate e-filing in the local rule but describe exceptions in the procedures document.

Summary of Findings – U.S. Bankruptcy Courts:

All of the 11 bankruptcy courts sampled have a local rule related to e-filing. Nine courts require e-filing. One court permits but does not require e-filing. One court (New York Eastern) requires e-filing in one division but not in another. All of the bankruptcy courts require attorneys to register as filing users but except pro se filers. Seven courts require pro se filers to use conventional means; four courts permit pro se debtors to e-file). Similar to the district courts, local rule language varied greatly.

Additional Findings – U.S. District Courts

Attorneys are Typically Required to File Electronically. Most districts require e-filing by all CM/ECF "Filing Users" and most require all attorneys to register as Filing Users.

Local Rule Language. Most electronic filing local rules use general language; details are typically provided in separate e-filing administrative procedures documents. Some local rules simply state that the court will accept e-filed documents, even if the procedural guide states that e-filing is mandatory. *See, e.g.*, D. Md. Loc. R. 102 ("Electronic filing of documents is permitted in accordance with the policies and procedures established by the Court."). Others specifically mandate e-filing. *See, e.g.*, E.D. Tex. Loc. R. CV-5 ("Except as expressly provided or in exceptional circumstances preventing a Filing User from filing electronically, all documents filed with the court shall be electronically filed in compliance with the following procedures . . . .").

Exemptions for Pro Se Litigants. Eighty-four of 85 mandatory districts exempt pro se litigants from e-filing:

- 36 districts permit nonprisoner pro se litigants to request the court's permission to e-file
- 48 districts do not permit nonprisoner pro se litigants to e-file
- 1 district (Texas Northern) requires pro se litigants to conventionally file the complaint but then e-file thereafter
- 59 districts explicitly bar pro se prisoners from e-filing
    - 2 districts (Kansas & Illinois Central) allow pro se prisoners to e-file through a special program/partnership.

Exemptions for Attorneys or Categories not Specifically Exempted. While all courts reserve the right to deviate from e-filing rules when justice so requires, at least sixty-seven courts specifically mention that litigants can request an exemption from the e-filing requirement for a specific case or document, often requiring proof of hardship or a showing of other good cause. Alaska and the Virgin Islands specifically provide that attorneys without access to the Internet or lacking an e-mail address can gain a longer-term exemption.

Civil Complaints. Thirty-eight districts have a special rule regarding the filing of civil complaints, either permitting or requiring conventional filing. Of these districts, at least 12 require paper filing.

Other Common Exemptions. Courts exempt many other categories of documents. Districts vary in their specificity regarding these documents, with some explicitly stating whether conventional filing is required or permitted and others simply stating the category is exempt from e-filing. Further, category labels are inconsistent (e.g., Social Security "records," "transcripts," or "cases"). The following are frequently excepted categories:

- Sealed cases or documents to be filed under seal (46 districts)
- Criminal case initiating documents (37 districts)
- Administrative records, state court proceeding records, including Social Security transcripts (35 districts)
- Habeas petitions and records related to proceedings (24 districts)
- Exhibits and other documents in which e-filing is not possible (22 districts)
- Criminal documents, other than case-initiating (e.g., warrants, documents signed by the defendant, CJA-related documents) (20 districts)
- Documents filed for in camera review (14 districts)
- Magistrate consents (11 districts)

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- Ex parte submissions (9 districts)
- Grand jury-related documents (8 districts)
- Qui Tam complaints (7 districts)
- Miscellaneous cases (5 districts)
- Handwritten documents (paper required) (5 districts)

Notes on Research Methodology and Data Interpretation

When studying the U.S. District Courts, I looked first at the local rules promulgated by the district. Frequently, the Local Rules referenced an administrative procedures guide or procedural guide specific to electronic filing. If neither of these sources offered insight into the district's e-filing policy or procedure, I reviewed standing orders. If a district used different local rules documents for civil and criminal cases, I reviewed only the civil rules, as I assumed that to be the Committee's primary interest. Likewise, if a district used separate e-filing procedures for criminal and civil matters, I reviewed only the civil procedures document. If a "combined" local rules or procedural document referenced criminal matters, I noted it to the extent possible. Therefore, though my comments above and the attached data refer to criminal documents and procedures in some instances, the data should not be considered complete or form the basis of any conclusion regarding criminal case e-filing trends.

You will note that many columns do not have an entry for every district. I entered a data point only if a particular subject was specifically mentioned. Because of the civil/criminal separation in some court rules noted above, a blank space could represent either a lack of comment by the court or a lack of research on that data point (i.e., the appropriate document was not reviewed).

In general, data on exemptions other than civil complaints and pro se filers should be considered incomplete, as well as indications of conventional filing "required" versus "permitted." Courts were sometimes ambiguous as to the treatment of exempted documents and did not consistently describe their positions on all exempted categories listed in the spreadsheet. In addition, given the scope of my research, especially in the early stages, I did not capture data on some of the less common categories or did not record it with specificity. The spreadsheet is most useful for displaying the range of e-filing policies employed by the districts. It is of less utility to one seeking to develop affirmative conclusions about the prevalence of exemptions for specific categories. If the Committees are interested in such data, however, I would be happy to perform this additional research.

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APPENDIX C

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To: **Dan Capra**
From: **Sara Beale and Nancy King**
Re: **CM/ECF**
Date: **November 10, 2013**

You have circulated the following draft of a potential "universal fix" that each Committee could adopt to accommodate electronic information and electronic action, and have asked the various Reporters to respond. The draft rule reads:

Rule ___. Information in Electronic Form and Action by Electronic Means

a) Information in Electronic Form: In these rules, [unless otherwise provided] a reference to information in written form includes electronically stored information.

b) Action by Electronic Means: In these rules, [unless otherwise provided] any action that can or must be completed by filing or sending paper may also be accomplished by electronic means [that are consistent with any technical standards established by the Judicial Conference of the United States].

In general, we appreciate the advantages of replacing procedures and policies that vary by local rule with uniform standards for electronic information and action. The particular draft above, however, raises several issues for the Criminal rules as well as the Rules Governing 2254 and 2255 cases, issues that we summarize but do not resolve in this memo. At this point, we have not had a chance to consult our committee about the idea of a universal rule. And although we completed a very rough inventory of the use of words like "sending" "writing" "file" etc. earlier this year for the CM/ECF Committee, we have so far examined only the Criminal Rules and not the 2254 or 2255 Rules. We expect that if a draft of a universal fix were to be considered by the Criminal Rules Committee (or a subcommittee), members would identify additional issues not listed here.

A general concern: incarcerated individuals.

One significant concern raised by both sections of the draft new rule relates to the ability of *incarcerated* criminal defendants and petitioners in 2254 and 2255 actions to create, save, access, receive or send electronically stored information. In their email responses to the proposed universal fix other Committee Reporters have suggested that a carve-out for *unrepresented* parties may be needed, but the problem for incarcerated parties in the cases governed by our Rules is not limited to those who are representing themselves pro se. Incarcerated parties, in both state and federal corrections facilities, often have no access to email or computers. Criminal Rule 49(b) anticipates a court may order copies of documents be served directly upon a party even when represented. Filing and response deadlines in these cases make

prompt receipt crucial, the most reliable delivery form is important. Also, a significant proportion of petitioners and defendants in these cases are not able to read,[1] and we suspect they rely on being able to ask fellow prisoners to read to them the hard copies of documents they receive. Additionally, transfers of prisoners from facility to facility are common, and a person incarcerated in a facility that has electronic access one day may find himself somewhere the does not the next. Any rule permitting a court or government to substitute electronic interaction for sending paper copies must anticipate problems such as these and resolve how to respond to them. (We expect these concerns would also apply to appeals in these cases as well.)

Concerns relating to Subsection (b) permitting "electronic means" to substitute for filing or sending.

"Reliable" Electronic Means. The Criminal Rules contain multiple provisions that recognize the option for electronic transmission, but, unlike the draft universal fix, the Criminal Rules limit the transmission of documents electronically to "*reliable* electronic means." E.g., 4(b)(2); 4(c)(4), 4.1 (passim), 5, 9, 32.1(a)(5)(B)(1); 41(b)(3); (f)(1)(D); 41(f)(2)(B). All of these rules could be affected by subsection (b) of the drafted uniform rule because under them "action" "*can* be completed by . . . filing or sending paper." If phrases in our rules such as "transmit the contents" "returning warrant" and "producing copies" fall within the meaning of "filing or sending paper" in the proposed uniform rule, and that rule does not include the word "reliable," then the new uniform rule could be inconsistent with a fairly recent, deliberate decision to allow such actions only "reliable" electronic means. In formulating that standard, "reliable" was included so that that courts in applying the rule would have to determine if and when holograms, dropbox, texts, tweets, instagrams, facebook postings, laser beams and technology we cannot anticipate might be too unreliable to suffice. Reliability includes many different concepts – accuracy in transmission, security from deliberate tampering or inadvertent deletion or modification, likelihood of delivery, etc. Many options for addressing this potential inconsistency exist, including: 1) exempt specific criminal rules provisions from the new rule (e.g., revise the new rule to read except as provided to except as provide in Criminal Rules ___); 2) hope the "unless otherwise provided language" would covers this discrepancy, and flag it in the Committee note; 3) add the word "reliable" to the uniform rule; or 4) do not add the new rule to the Criminal Rules.

Rules involving terms other than "filing or sending." It is not clear whether Rules using terms of conveyance other than "filing or sending" would fall within the uniform rule's reach. Our rules use mailing; entering; serving, and returning, for example. If all of these fall within "sending", then careful consideration on the effect of permitting electronic transmission would be required. Here are some preliminary issues:

- Rules discussing service. Service of process, governed by Rules 4 and 49, raises distinctive and important concerns about notice and formality. The Committee is presently debating a proposal related to the scope service under Rule 4, these are not easy issues. Criminal Rule 49(b) now adopts the methods of service provided in the

[1] "[S]even out of ten inmates fall in the lowest two out of five levels of literacy . . . Many, ... have learning disabilities and mental impairments." Halbert v. Michigan, 545 U.S. 605, 621 (2005).

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Civil Rules, but it is not clear whether further expanding electronic service under the Civil Rules would be ideal policy for the Criminal Rules. This may mean decoupling the Criminal Rules from the Civil Rules, or otherwise opting out of the uniform rule.

- Rules discussing delivery or mailing. Four rules – Rules 4, 41, 46, and 58 -- require the mailing of a summons, warrant for a tracking device, motion to enforce bail forfeiture, and notice to appear in a misdemeanor or petty offense case. In each case, the rule provides that the mailing is to be made to the recipient's "last known address." If the verb "send" in the proposed rule includes "mailing" the propriety of allowing something short of traditional post in these situations should be carefully evaluated, especially because not all of the targeted recipients are parties to the case.
- Rules referencing return. In Rule 6(f) there is specific language limiting the use of anything other than in-court delivery of a hard copy of the indictment. So this would have to be clearly exempted, if not addressed by the "otherwise provided" language in the new proposed rule.

Rules referencing "filing." Various Criminal Rules provide that something is to be filed by the clerk, the judge, the government, the defendant, the grand jury foreperson, third party claimants in forfeiture proceedings, persons seeking the return of seized property, victims, and anyone (including the defendant) seeking disclosure of grand jury materials. The new rule as drafted is permissive, allowing and not requiring electronic transmission, but would there be instances where dispensing with paper would create difficulty?

Concerns related to subsection (a) of the proposed rule: "a reference to information in written form includes electronically stored information." Many of the Criminal Rules contain references to writing:

- *Jencks act meaning.* Rule 16(a)(1)(B) uses written statement and written record but the meaning is keyed to Jencks use of the language "written." Would the new proposed meaning of the word "written" be inconsistent with this?
- *New warrant and complaint rules.* Rule 4.1 requires judge to sign and acknowledge the attestation in writing. We do not know if these actions can or should be accomplished electronically. They may require a hard copy.
- *Physical signatures and the purposes they serve.* Many of the Criminal Rules require written waivers or signed consent, often by the defendant himself, for reasons that may or may not be advanced if electronic documents and signatures are substituted. Signing a hard copy is more formalized, and it may avoid other problems. The heightened formality and paternalistic protection of a signed hard copy may be warranted in the criminal context, even if accomplishing the signature electronically provides cheaper or more efficient evidentiary proof.
- *Access by jurors to electronic devices.* Because jurors and grand jurors are required to do things "in writing" under the Criminal Rules, allowing this to be done electronically may raise special concerns: aren't many courts forbidding jurors access to electronic devices?
- *Formal criminal charges triggering the loss of liberty.* Written criminal charges are arguably qualitatively different than any other writing. An allegation of a criminal violation before trial or before revocation may have to be provided to the accused in

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hard copy. (Would the Ten Commandments have had the same impact if they had not been chiseled in stone?)

Again, this is not an exhaustive list of issues. But we hope this preliminary summary explains our view that any rule intended to permit the substitution of ESI for hard copies and the substitution of electronic transmission for other forms of relaying, delivering, and conveying information under the Criminal Rules will require careful and extended consideration of issues that may be unique to criminal proceedings.

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TAB 7

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University of Michigan Journal of Law Reform
Winter, 2013

Symposium Honoring Professor Edward Cooper

THEY WERE MEANT FOR EACH OTHER: PROFESSOR EDWARD COOPER AND THE RULES ENABLING ACT

The Honorable Mark R. Kravitz[a1] Dean David F. Levi[aa1] The Honorable Lee H. Rosenthal[aaa1]
The Honorable Anthony J. Scirica[aaaa1]

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Introduction

In June 1935, the United States Supreme Court appointed a small committee of distinguished lawyers and academics to write the Federal Rules of Civil Procedure, the first set of rules promulgated under the Rules Enabling Act of 1934. The Committee was charged with assisting the Supreme Court in its responsibility for

the preparation of a unified system of general rules for cases in equity and actions at law in the District Courts of the United States and in the Supreme Court of the District of Columbia, so as to secure one form of civil action and procedure for both classes of cases, while maintaining inviolate the right of trial by jury in accordance with the Seventh Amendment of the Constitution of the United States and without altering substantive rights.[1]

The primary drafting responsibility fell on the Committee's "Reporter," then the Dean of Yale Law School, Charles E. Clark. Although he later became a judge on the Second Circuit Court of ***496** Appeals, the Committee he served included no judges.[2] That, of course, has changed: today, the Judicial Conference Rules Committees[3] include what some view as a disproportionately large number of judges in relation to their practitioner and academic members. But one thing has remained constant. "Reporter" is an inadequate description for the vital role that person plays in the Rules Committees. "Reporter" may also be too modest a title given the stature and contributions of the civil-procedure scholars who have filled that position. To take one's place in this lineup has to be daunting. But in the twenty years since he became Reporter to the Civil Rules Advisory Committee, Professor Edward Cooper has met and exceeded the challenge, over and over. This issue of the University of Michigan Journal of Law Reform attempts to describe how Ed Cooper and the Rules Enabling Act have been such a productive combination.

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This Symposium brings together important participants in the rulemaking process, all of whom share a keen admiration for Ed Cooper the scholar, the person, and the Reporter. Professor Arthur Miller and Professor Paul Carrington provide different perspectives from the two proceduralists who were Ed Cooper's immediate predecessors.[4] Professor Miller's essay includes his personal reflections on his own tenure as Reporter, the evolution of the Advisory Committee's work as the rulemaking process has become more public, and his work with Ed Cooper on the Federal Practice and Procedure treatise. Professor Carrington's essay expresses disquiet about how case law in some areas has moved away from what he celebrates as the "progressive aim of our Rules of Civil Procedure."

Several of the contributors focus on class actions and on how Ed Cooper helped guide the Civil Rules Committee in deciding what aspects of class-action practice could be improved by amending Rule 23 and what aspects were best addressed in other ways. Professor Mary Kay Kane, who was a member of the Standing Committee during Professor Cooper's tenure as Reporter to the Civil Rules ***497** Committee, writes on the Committees' work on Rule 23 and on "restyling" the Civil Rules in 2007 to clarify and simplify them, but without changing their substantive meaning.[5] Professor Richard Marcus, who has served as Associate Reporter to the Civil Rules Committee since 1996, writes on some proposed amendments, including to Rule 23, which did not go forward despite, or perhaps because of, years of work and study under the Rules Enabling Act process.[6] Professor Linda Mullenix writes about the Rule 23 rulemaking work to examine how the Civil Rules Committee adapted to operating in an expanded level of public openness and the growing "synergy" between the Committee and case-law developments in proposing amended rules.[7] Judge Patrick Higginbotham, the second chair Ed Cooper served under as Reporter, further describes the class-action work, particularly the interlocutory appeal amendment and Professor Cooper's careful "crafting" and "drafting" that were essential to its enactment.[8] These articles remind us that Professor Cooper's arrival as the new Committee Reporter and the Committee's launch into the difficult and contentious issues of class-action practice coincided.

The essays bring home the breadth, variety, and importance of the issues the Civil Rules Committee and Professor Cooper have worked through in the past twenty years. Professor Thomas D. Rowe, Jr., a Committee member in the mid-1990s, writes about the proposed amendment to Rule 48 that would have required the seating of twelve-member juries in federal civil trials, an amendment that both the Civil Rules and Standing Committees approved by wide margins but the Judicial Conference rejected.[9] Judge Paul Niemeyer, who was the second chair Ed Cooper worked with as Reporter, examines the proposal for a "simplified" set of Civil Rules, primarily for small money-damage actions. Judge Niemeyer suggests that examining this proposal fifteen years after Professor Cooper's last draft could be useful in the current efforts to control discovery costs and burdens.[10] Professor Catherine Struve focuses on Professor Cooper's contributions to the law and scholarship of appellate ***498** jurisdiction and procedure by looking at work on rules that affected both the Civil and Appellate Rules and required a coordinated approach, including amending all the provisions in the federal Rules of Appellate, Civil, Criminal, and Bankruptcy Procedure that specify how to compute time.[11] Professor Stephen Burbank, who has actively followed and participated in the Rules Committees' work for many

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years, writes about the importance to that work of "thinking small" by engaging in "technical reasoning" and paying close attention to even the smallest details.[12] Professor Steven Gensler, who served as a member of the Civil Rules Committee in the early 2000s, focuses on Judge Charles E. Clark, the first Reporter, and his vision of the Rules and rulemaking, and looks at the Committee's recent work on amending Rule 56 to see how that vision has traveled from the first to the present Reporter.[13] Finally, two of the longest-serving participants in federal rulemaking, Professor Daniel Coquillette, Reporter to the Standing Committee since 1986, and Professor Geoffrey Hazard, member and then consultant to that committee since 1994, have contributed very different pieces. Professor Hazard places the overall enterprise in context, celebrating the achievement of the rules while soberly reminding us of the risks presented by the "politicization of civil procedure" and the importance of the Reporters' competence in meeting those risks.[14] And Professor Coquillette finds parallels between a great law reformer and rulemaker in the 1600s, Francis Bacon, and the Rules Committee Reporters.[15]

This introduction to the essays in this Symposium illuminates Professor Ed Cooper's years as Reporter to the Civil Rules Committee by first briefly describing those who preceded him in the position and his own background. We then describe some of Ed Cooper's many contributions to the Civil Rules Committee, the Federal Rules, rulemaking, and civil procedure by examining the present state of the Rules Committees' work under the Rules Enabling Act. We conclude that after almost eighty years of experience under that Act, it is working well in large part because of the sound ***499** leadership provided by Ed Cooper over his twenty years as Reporter. It was during these years that the Committee developed an approach to rulemaking that was at once transparent and empirical, with multiple opportunities for participation by members of the public, the bench, the academy, and the bar; with many informal opportunities for consultation with members of Congress and the Executive Branch; and with an understanding by the Committee of its role in relation to the courts, Congress, and the Executive.

Two episodes of recent rulemaking and related activity are described as examples of how well the Rules Enabling Act is working, in large part because of the very flexibility and discretion the Act has provided since 1934. One of those episodes occurred when Judge Anthony Scirica chaired the Standing Committee and then-Judge David Levi chaired the Civil Rules Committee. The other occurred when Judge Lee Rosenthal and Judge Mark Kravitz were the chairs of the Standing and Civil Rules Committees, respectively. Both episodes provide a basis for optimism about the future. And they make clear Ed Cooper's continued steady role in supporting and cultivating the robust good health of the rulemaking process and the institutional values it protects.

I. The Reporters Who Came Before

Those who preceded Ed Cooper as Reporter to the Civil Rules Committee were, simply, the giants of the procedural world. The first Reporter, Charles E. Clark, set the bar high.[16] As Professor Steven Gensler describes in his contribution to this issue, Dean Clark was principally responsible for drafting the Federal Rules of Civil Procedure enacted in 1938 and wrote important articles explaining and making the case for the Rules.[17] In 1942, then-Judge ***500**

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Clark served as Reporter to the redesignated Advisory Committee and worked on amendments proposed in 1946, 1951, and 1955.[18] Clark served in this role until 1956, when the Supreme Court disbanded the Advisory Committee on the Rules for Civil Procedure.[19] The Committee was reconstituted in 1960 as part of the Judicial Conference,[20] and Benjamin Kaplan, then a professor at Harvard Law School and later a justice on the Massachusetts Supreme Court, became its Reporter.[21] Professor Kaplan's work as Reporter from 1960 to 1966 included the revision of Rule 23 that created the class action as we know it today. Albert M. Sacks, then the dean and a professor at the Harvard Law School, served as Reporter from 1966 to 1970, followed by Bernard Ward, a professor at the University of Texas Law School, who served until 1978.[22] Dean Sacks was the Reporter during what Professor Richard Marcus described as the "high-water mark" of liberal discovery, during which the discovery rules were made even more expansive.[23] Professor Ward, by contrast, served as Reporter during the development of the rules that ***501** became effective in 1980, narrowing some of the discovery provisions.[24] Professor Arthur Miller, also on the Harvard faculty, served from 1978 to 1985. Professor Miller's work included changes to Rule 16[25] and Rule 26[26] that instituted the case-management tools and the proportionality limits on discovery that are important to the current rulemaking work on electronic discovery.[27] He was succeeded by Paul Carrington, a professor and dean of the Duke Law School, who served as Reporter from 1985 to 1992. Professor Carrington's tenure as Reporter was marked by the passage of the Civil Justice Reform Act,[28] which further complicated the relationship between national rules that are intended to be consistent across federal district courts and local procedures for individual districts that the statute encouraged.[29]

In October 1992, Ed Cooper became the Reporter to the Civil Rules Committee. Like his predecessors, Professor Cooper was supremely qualified by education, experience, and, above all, an abiding passion for the law and procedure, to assume the Reporter responsibilities. Ed Cooper received his undergraduate degree from Dartmouth College and his LLB from Harvard Law School. ***502** He clerked for Judge Clifford O'Sullivan on the United States Court of Appeals for the Sixth Circuit from 1964 to 1965 and spent two years in private practice in Detroit, simultaneously beginning his academic career as an adjunct professor at Wayne State University Law School. He took up full-time teaching at the University of Minnesota Law School in 1967 and in 1972 joined the faculty of the University of Michigan Law School, where his own father had been a professor.[30]

As a scholar, Ed Cooper's contributions have been all the more noteworthy in light of the amount of writing and other work required of him as Reporter to the Civil Rules Committee. His scholarly work includes twenty years of reports for the agenda books for the twice-yearly meetings of the Civil Rules Committee and for the twice-yearly meetings of the Standing Committee on the Rules of Practice and Procedure. It includes twenty years of thorough and thoughtful pieces accompanying the publication of proposed rules and rule amendments for comment. It includes analyses accompanying the proposals when they are transmitted to the Standing Committee, then the Judicial Conference, the Supreme Court, and finally to Congress. This body of work covers a huge range of issues and draws upon Ed's deep learning in the field of civil procedure and federal practice more generally.

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This body of work is preceded and surrounded by an even larger number of analytical documents that Reporter Cooper generates with seemingly impossible speed and fluency. These documents serve many purposes, including conference calls, small and large conferences, subcommittee meetings and drafting sessions, and innumerable other exchanges that are part and parcel of the Advisory Committee's work.

Ed Cooper has also authored treatises, including the volumes of Federal Practice and Procedure and its annual supplements that are among the most important resources for lawyers and judges on difficult and important areas of procedure in practice, especially preclusion, justiciability, and appeals (including appeals timing).[31] He ***503** has written significant articles on topics including extraordinary writs, mass torts, discovery, and pleading.[32] He has been a critical voice in the American Law Institute, serving as a member of the Council and as an adviser on restatements and principles projects on torts, judgments, transnational procedure, aggregate litigation, and international intellectual property. He served as Reporter for the Uniform Transfer of Litigation Act. In addition to serving the Rules Committees, the American Law Institute, and the world of procedure, Ed Cooper has provided years of service to the University of Michigan Law School. That service includes working as Associate Dean for Academic Affairs for over a decade, beginning in 1981. In short, when Professor Cooper became the Reporter to the Civil Rules Committee in 1992, he brought decades of dedicated teaching and proven scholarship, a deep knowledge of the legal academy, and wide experience with judges and lawyers. He brought a record as distinguished as any preceding him and extraordinarily thorough preparation to the role and tasks of Reporter.

II. The Rules Enabling Act Process and the Reporter's Role

Much has been written about the history of civil rulemaking and the changes that have occurred under the Rules Enabling Act.[33] Some of those changes are briefly reviewed here, with a look at how the Committees' and the Reporters' roles have evolved in carrying out the work under the Act.

The task of the first Reporter to the Committee was, of course, different than it has been since. The task then was to draft an entire body of civil rules, from pleading through discovery, pretrial motions, and trial, that would not only merge law and equity but would also replace dynamic conformity between state and federal procedural rules with consistent rules across the nation's federal district ***504** courts. Professor Steven Gensler's contribution to this issue describes Charles Clark's vision of the new Federal Rules of Civil Procedure and of the central role the Reporter played in their creation and after.[34]

In 1942, the Supreme Court charged the Committee with the ongoing responsibility "to advise the Court with respect to proposed amendments or additions to the Rules of Civil Procedure."[35] The Supreme Court needed better institutional support for its rulemaking work. In the 1950s, the Rules Enabling process was changed by legislation designed and endorsed by the Supreme Court to provide a secure source of advice and assistance in rulemaking. The 1958 amendments made the Judicial Conference responsible for the "continuous study of the operation and effect" of the

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Federal Rules, including the Criminal Rules, which had been enacted in 1946.[36] Advisory committees were created to "carry on a continuous study of the operation and effect of rules of practice and procedure" and propose changes "to the Judicial Conference through a standing Committee on Rules of Practice and Procedure."[37] The Advisory Committees' overarching task was to "promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay."[38] The Reporters' role moved from creating an integrated, complete set of new--indeed, revolutionary--rules toward, today, analyzing problems in the practice of law and whether they are amenable to improvement by changing existing rules or adding new rules, writing drafts of proposed rules and accompanying notes, writing documents raising or answering questions and explaining what might be or has been done, and transmitting the results to those tasked with the next stage of review.[39] The Reporters continued to be law professors and the appointments continued ***505** to be made by the Chief Justice of the United States.[40] The tradition of long service in the Reporters' terms was established.[41] That tradition began when Committee members also served extended terms, but even after members were presumptively limited to two three-year terms, the Reporters continued to serve for extended periods, reflecting the greater need for institutional memory and experience in that role.

A study of rulemaking by the Federal Judicial Center (FJC), the education and research agency for the federal courts, summarized how the Reporters' work was intended to proceed under the 1958 Act:

[T]he original intention and early practice [was] that [the] reporters [would] engage in continuing comprehensive study of the rules and of their operation in both federal and state courts, particularly those states that made adaptations to local needs. Such constant study was expected to uncover any restrictive glosses placed on the rules, and any need for additional rules. The reporters were to submit periodic reports on all matters, as well as analyses of filed comments and tentative drafts of [R]ules.[42]

It is an understatement to observe that "such a program of periodic reports based on continuing study" by the hard-working Reporter did not prove "achievable."[43] Instead, the Reporter was fully occupied by tasks that are still at the heart of today's work: receiving information from a variety of sources on ideas for proposals and drafting memoranda analyzing those proposals, the relevant law, the history of previous related proposals, and optional courses of action; circulating proposed drafts for the Advisory Committee to consider; reviewing and summarizing comments on the Civil Rules and proposed amendments and drafting revisions in light of those comments and the Committee's reaction; drafting the Committee Notes; and drafting the reports, memoranda, and other materials needed to explain and transmit the Committee's work. These tasks continue to lie at the heart of the Reporters' work. It is no wonder that the responsibility for preparing periodic reports based on continuing study did not prove "achievable." Since the 1960s, both the ***506** number and variety of the Reporters' tasks, and their complexity, have grown even more.

The Advisory Committees and Standing Committee generated rules and amendments that

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became law with no significant modification by Congress until the controversy over the Evidence Rules submitted in 1972. That controversy is well documented and studied.[44] It sparked a critical reexamination of the Rules Enabling Act's allocation of rulemaking power between the judiciary and Congress and raised questions about whether the judiciary had exceeded the authority delegated to it under the Act. Critics of the proposed Evidence Rules argued that they were not rules of "practice and procedure" but instead made substantive law, particularly in proposed rules that would supersede state-law evidentiary privileges.[45] Congress intervened, indefinitely deferred the effective date of the proposed Evidence Rules, and after extensive hearings, enacted a modified version that eliminated the federal privileges.[46] Amendments to the Rules Enabling Act gave the judiciary explicit authority to amend the Federal Rules of Evidence,[47] but Congress also required affirmative legislation for any rule that created, abolished, or modified an evidentiary privilege.[48] This formed a second limit on the judiciary's delegated rulemaking authority, in addition to the provision in place since 1958 prohibiting any procedural rule from abridging, enlarging, or modifying any substantive right.[49] But when the dust settled, the basic delegation of authority and the process for making, amending, and enacting rules had not changed.[50]

***507** Professor Stephen Burbank has authoritatively identified the predominant purpose of the Rules Enabling Act in 1934 as allocating authority for judicial legislation between Congress and the Court.[51] Under the Act, Congress reserved to itself the right to review proposed rules before they became effective. Unless Congress affirmatively acts to defeat, change, or delay proposed rules, they become effective after a specified period.[52] And of course, Congress also limited the judiciary's delegated rulemaking authority to rules of procedure, prohibiting any rules that enlarged, abridged, or modified substantive rights. This allocation of authority between the judiciary and legislative branches is marked by the absence of details about implementation or process. It gives the judiciary considerable discretion about how to engage in rulemaking. The rulemaking controversy of the 1970s was very much a controversy about the allocation of authority over the Federal Rules. That controversy, followed by a well-publicized dispute between the judiciary and Congress over certain criminal rules (and in the 1980s by a very different set of arguments ignited by the short-lived amendment to Rule 11 of the Federal Rules of Civil Procedure on sanctions for frivolous pleadings), generated proposals to revise the Rules Enabling Act in different ways, including ways to limit the discretion the Act provided.[53]

Some of the proposals for amending the Act were focused on making the rulemaking process more open and participatory, and ***508** resulted in legislative change. In 1988, after years of comprehensive review by the Judicial Conference and its Standing Committee and hearings by the House Judiciary Committee, legislation was proposed to alter the Rules Committee structure and process to make the work more transparent and the Committees less insular. When it was enacted, the legislation codified what had already become the Conference requirement that all Rules Committee meetings be open to the public--while allowing executive sessions for cause--and that minutes be prepared.[54] The legislation provided for the Rules Committees to consist of trial judges, appellate judges, and members of the bar, consistent with existing practice.[55] The legislation approved the Judicial Conference's ability to authorize the appointment of standing and advisory rules committees, again codifying practice.[56] The

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legislation also required the Conference to publish a statement of the Rules Committees' procedures, which had been done since 1983.[57]

The 1988 amendments did not, however, adopt many of the proposals that resulted from the rigorous scrutiny applied to the rulemaking process in the early 1980s. Some of these proposals would have significantly curtailed the discretion and flexibility of the judiciary under the Rules Enabling Act. One proposal, for example, would have required each rules committee to consist of "a balanced cross section of bench and bar, and trial and appellate judges."[58] This directive was not included in the amendments to the Act. Instead, the legislation simply stated that the Rules Committees were to consist of trial and appellate judges and members of the bar, leaving the specific implementation to the judiciary's discretion. Other proposals would have imposed more requirements for earlier and different notice of proposed rulemaking, such as requiring formal public notice that a proposed rule change was being considered in advance of any publication and circulation of a preliminary draft, or requiring even earlier formal notice, at the stage when a problem is first identified.[59] Still other proposals responded to criticism that the documents generated in rulemaking did not disclose minority views, did not explain the reasons for rejecting or changing earlier proposals, and did not "alert interested persons to ***509** controversial matters" or "provide a record to assist review and interpretation."[60] Some of the bills introduced would have specifically required the Conference to record timely "dissenting views" with an explanation of why the rule was nonetheless recommended.[61] Again, this detailed prescription for how the Committees should operate did not make it into the amended Act.

Recounting every one of the proposals to make the rulemaking process more transparent and open to participation is neither necessary nor interesting. By the time the legislation to achieve these goals was enacted, it largely codified what had become the Rules Committees' practice and had Judicial Conference support. This end result reflected the benefits of interaction between Congress and the Rules Committees and the Judicial Conference to produce a confluence of views. The legislation avoided detailed directives to the Judicial Conference about how to implement the Rules Enabling Act and retained the structure provided under the Act essentially without change. That structure--review by the Advisory Committees and then the Standing Committee (with membership chosen by the Chief Justice), public comment, then additional input by the Advisory Committees and Standing Committee, and then review by the Judicial Conference, the Court, and Congress--remained in place. It still does, despite numerous proposals for changing the rulemaking structure, particularly the allocation of rulemaking power between Congress and the courts.[62]

If the structure has remained intact, however, the informal processes of rulemaking have altered over the years in response to some of the criticisms and concerns expressed by thoughtful observers and under the gentle encouragement of Reporter Cooper. For example, although proposals to require that the Rules Committee have dedicated membership slots for representatives from certain groups or constituencies have never formally been adopted as part of the Rules Enabling Act, it is now the Committee's consistent practice to invite participation from the relevant bar and other groups to address and assist the Committee in areas where specialized expertise and experience and differing perspectives could be helpful. Examples of this abound.

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The Committees actively ***510** encourage attendance at meetings by interested parties. Representatives of some of the larger bar organizations regularly attend, including sections of the American Bar Association, the American College of Trial Lawyers, the American Medical Association, the U.S. Equal Employment Opportunity Commission, the National Employment Lawyers Association, the Lawyers for Civil Justice, and the American Association for Justice. Their presence and the observations they make are matters of record.

The Committee has used a variety of other means to get information from the bench, bar, and academy, including "miniconferences," surveys, and large conferences. For a miniconference, the Committee identifies a balanced group of thoughtful experts with diverse views on a specific topic and sends out questions and materials--often extensive--in advance. These miniconferences help provide the Committee with a more accurate picture of what is actually going on in the practice of law and what different segments of the bar view as problematic and helpful. They also provide perspectives on the practicability of initial--often exploratory--rules drafts. A miniconference can be held well in advance of a formal rule proposal, as part of the work to determine if there is a problem a rule change is needed to address, or further along in the process to provide guidance on alternative approaches. The Civil Rules Committee used such miniconferences to help educate itself about electronic discovery during the early stages of what became the 2006 e-discovery rule amendments[63] and, more recently, in studying whether those amendments should be revised to address preservation and spoliation issues more directly.[64]

***511** Less frequently, the Civil Rules Committee has held large conferences to more comprehensively assess what is going on in the practice and to explore whether rules should be changed, whether better ways of making existing rules more effective should be devised, or both. The Civil Rules Committee held large conferences in 1998 and in 2010. The first, at Boston College Law School, focused on discovery. The second, at Duke University School of Law, took a pleadings-through-trial look at civil litigation, including discovery practices and problems. The conferences brought together judges, lawyers, in-house counsel, state-court judges, governmental lawyers, and nonprofit organizations. These meetings examined how to address problems of undue cost, delay, and burdens that can frustrate the goals set forth in Rule 1 since 1938: "to secure the just, speedy, and inexpensive determination of every action and proceeding."[65] The resulting presentations, discussions, papers, and studies have been immensely important in illuminating what is taking place in the practice and providing opportunities to work toward improvement.[66]

Another change in the practices of the Rules Committees is reflected in the way the Committees publicize proposals and invite responses. There have been persistent criticisms that even after the 1988 amendments, the Rules Committees remained too insular and isolated.[67] More recently, the combination of technological developments and changes in how the Committees operate has led to increased openness. The Internet has made it easier to disseminate ***512** proposals broadly and has made the comment period more effective. When the proposals concern such central topics as discovery or class actions, the Committees get many written comments during the public-comment period. The comments are posted on the Rules Committee website. The Committee then gets comments on the comments. A robust national debate can result.

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Each Committee conducts as many as three public hearings around the country on published proposals, at which anyone can testify. This is not new. But additional exposure from the Internet increases the number of those who want to, and do, testify on central or controversial issues. Technology makes it easier for people to testify from remote places. This allows those facing budgetary constraints--such as judges--to testify more often. The public hearings held on the proposals later enacted as the 2010 changes to Rule 56 exemplify the use of such innovations to expand participation and make robust exchange even more so.[68]

As with the proposals to allocate membership spots for particular viewpoints,[69] proposals to increase congressional participation in rulemaking have not found favor.[70] Yet informal consultation with Congress has never been more pronounced and the cooperation of Congress, where statutory amendments were needed in conjunction with rulemaking, never higher. The Committees have welcomed opportunities to work with Congress on improving the Rules. The Committee Chairs, the Reporters, and the staff of the Administrative Office of U.S. Courts have led these efforts to keep ***513** Congress well informed and involved. The Standing Committee Chair and one or more Advisory Committee Chairs routinely meet with the staff of the House and Senate Judiciary Committees--and, on occasion, with members--to let them know what the Supreme Court has approved that they will be reviewing, to preview work that is still in the pipeline, and to discuss proposals for legislation that would affect the Rules. Ed Cooper and other Reporters have aided the Committee Chairs in these communications with Congress.

Proposals for repeal of the supersession clause in the 1934 Act have also not found favor.[71] An effort in an earlier version of the 1988 bill to delete the supersession clause of the 1934 Rules Enabling Act did not succeed.[72] Those who supported it asserted that the reasons the supersession clause was important in 1935--to achieve the merger of law and equity and displace inconsistent legislation--were no longer present, and that the way in which the clause operated to repeal a statute raised constitutional questions.[73] With sound guidance from the Reporter, the Rules Committees have been careful to avoid using supersession authority, instead working with Congress to avoid conflicts with existing statutes.[74]

Other proposals have focused on requiring that rulemaking be more informed by empirical information that demonstrates a need for a rule change and provides a basis to predict its likely impact.[75] ***514** In 1983, the amendment of the sanctions provisions of Rule 11 to, among other things, make attorney's fee awards mandatory on a finding of frivolous filing, led to an explosion of academic criticism over the lack of empirical support for the revisions.[76] Professor Burbank called for an end to any rulemaking unless, and until, there could be a thorough and empirically based study of proposed changes in light of the experience with prior amendments.[77] The 1993 discovery rule amendments led to another outpouring of criticism over the absence of empirical study.[78] Some called for legislation to create a national body to oversee experiments with local rules and create a controlled empirical basis for proposing national changes.[79] Such proposals foundered over uncertainty about who should make up such a national body, how it should function, and whether such rigid requirements would add intolerable amounts of time to a process that is already designed to take at least three years and often takes more.[80] But the

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criticisms were heard. The result is a modern approach to rulemaking that heavily relies on empirical ***515** study by the Federal Judicial Center and the collection of information through national and regional conferences and calls for comment. Ed Cooper has been a leader of this trend to a more empirical rulemaking process.

Over the past two decades, the Committees, led by the Civil Rules Committee, have obtained and studied empirical data as an integral part of the rulemaking process. The Committees recognize that the need for such data is acute when the issue affects a large number or an important aspect of cases. Issues like this often come before the Committees with broad agreement that there is a serious problem under the existing rules but little agreement on a potential solution. Empirical data gathering and analysis help the Committees understand the extent and frequency of the problem, how the existing rules are in fact operating, whether the problem identified is one that can be addressed by changing a rule, and what the effect of a particular proposed rule change is likely to be. This evolution in practice is a good example of how the Committees have listened to criticisms and used the flexibility and discretion the Rules Enabling Act provides to adopt suggestions for change without legislation amending the Act and without the problems that specific legislative directives would inevitably create.

The Civil Rules Committee has been at the forefront of using empirical data, and Ed Cooper has been critical to that work. The Committee has gathered empirical information from a variety of sources throughout the rulemaking process. The Committee has frequently asked the FJC to collect and study empirical information in advance of formal rulemaking and as specific questions arose during rulemaking. Some of the studies rely on sources that have become practically available only recently. Using the tools computers and computerized docketing now provide, the FJC researches case filings to detect trends and causal relationships. This kind of research was extraordinarily difficult and time-consuming before electronic filing, but the Public Access to Court Electronic Records (PACER) system has made docket and case information remotely and efficiently available. A recent example of such work for the Civil Rules Committee is the detailed study of Rule 56 motions in the federal district courts, to help the Committee understand the likely impact of a proposed national "point-counterpoint" rule requiring a detailed statement of undisputed ***516** facts by a party moving for summary judgment and the nonmovant's detailed fact-by-fact response.[81]

The Civil Rules Committee has asked the FJC to conduct surveys of the bench and bar in connection with a number of proposed rule changes. These surveys have included a 1997 closed-case survey done in connection with the changes to Rule 26(b)(1) in 2000 on the scope of discovery, changes to the rules on initial disclosures, and the imposition of presumptive limits on the number of interrogatories and the length of depositions.[82] In 2010, the FJC did a more thorough closed-case survey on costs and discovery than it had been able to do in 1997, giving the Committee information on the number and types of cases with large discovery costs--information critical to the Committee's work on ways to control discovery effectively and fairly.[83] The Committee has also asked the FJC to help analyze and explain surveys of lawyers and litigants and other empirical studies done by other organizations or scholars.[84]

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Through this institutionalized use of empirical information, the Civil Rules Committee has worked to draw out, consider, and address the concerns of competing interests, actively engaging those with diverse views in the discussion. The process has allowed proposals--developed through countless drafts by Ed Cooper and the Committee's Associate Reporter, Richard Marcus--to emerge with language addressing many of the concerns raised that were closely examined and found to have validity. The result is a rule proposal with broad support. That is the type of secure basis for rulemaking that proposals to mandate the use of empirical data were designed to provide. The Rules Enabling Act permitted and facilitated this ***517** change in the Rules Committees' work, and the change has made that work better.[85]

In response to criticisms and suggestions, the Rules Committees implemented these and similar informal changes to the ways that the Committees gather a variety of viewpoints on proposed rules, interact with Congress, avoid supersession, and collect empirical data. The flexibility and discretion provided by the Rules Enabling Act made it possible for the Rules Committees to improve the way in which they operate and adapt to changes affecting their work, without the need for externally imposed requirements. That flexibility and discretion, built into the 1934 Act, has helped produce the continued and current success of the process. This success could not have happened without calls for improvement and suggestions for change. The Rules Committees welcome continued critical examination of the process and proposals to make it work better. The changes to the Committees' procedures, using suggestions from varied voices and sources, have improved the process, within the structure of the Enabling Act.

Developments in the Rules Committees' operations reflect the guidance of the Reporters and, in turn, change the way the Reporters work. Their work, like that of the Committees they serve, has also become more varied, more exposed, and more complex. The fact that work begins on many issues and proposals so far in advance of formal rulemaking extends and expands the Reporters' work. Adding events such as miniconferences, work such as surveys and PACER studies, and duties like periodic meetings with Congress amounts to more work for the Reporter, on top of the long-standing tasks of drafting proposed rule amendments, note language, agenda materials, meeting minutes, analytical and explanatory memos, and transmittal documents. The Reporter's work ***518** is public and may prompt blog posts or listserv dissemination and comments from many quarters. The Reporter for the Civil Rules Committee, which often deals with controversial issues, must work and write extraordinarily quickly, thoroughly, accurately, and clearly; must know and understand the law; must have exquisite judgment; and must be able to engage in diplomacy. The Reporter must help the Committee know when a particular proposal should be changed, adopted, or rejected, even when it represents years of work and effort. We have just described Professor Ed Cooper. His facility with words, phrases, and writing manages to both effectively communicate and entertain.

A brief description of two recent rulemaking episodes provides examples of changes in how the Committee operates and some of Professor Cooper's contributions as Reporter.

III. From Class Actions to Summary Judgment

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In the 1990s, the Civil Rules Committee was looking closely at Rule 23 in response to concerns about both nationwide and multistate mass torts class actions and consumer class actions. Large-scale litigation in state and federal courts had grown significantly.[86] There was significant controversy and disagreement about whether damages class actions were appropriate for personal-injury mass claims and what a feasible alternative would be to resolve such claims efficiently and fairly.[87] There was significant controversy and disagreement over whether so-called negative-value consumer cases, in which individual recoveries were too small to justify individual litigation, were benefitting only the lawyers who filed them, usually on behalf of an uninterested class.[88] Overlapping and duplicative classes simultaneously pending in different federal courts or in federal and state court, and efforts to "shop" settlements that were rejected in one court to other courts perceived to have more relaxed standards, were major and growing concerns.[89] During the same period, what became the Class Action Fairness Act (CAFA)[90] was working its way through Congress, raising in a different way the ***519** question of the proper role of the Rules Committees vis-à-vis Congress. In their essays, Professor Struve, Professor Mullenix, and Professor Kane describe well how the Committees and, in particular, Ed Cooper, recognized the complexities of a rules-based response to these problems.[91] We will only briefly add to those discussions.

The process the Civil Rules Committee used in addressing the class-action issues exemplifies many of the ways the Committees now operate. The work began in the early 1990s, when Judge Sam Pointer was Chair, and continued under the chairmanships of Judge Patrick Higginbotham, Judge Paul Niemeyer, and then-Judge David Levi. The Standing and Civil Rules Committees convened a conference to bring together experienced practitioners, academic experts, and judges to educate the Committees about modern class-action practice.[92] At the Civil Rules Committee's request, the FJC undertook a study of federal class actions.[93] The Committee informally circulated proposals for change to obtain guidance from members of the bar on both sides of the "v." Different proposals were eventually published, including the change to Rule 23 permitting interlocutory appeals from an order of the district court granting or denying class-action certification. This proposal became effective; others did not, in part because the public comments on proposals that added certification factors or called for different certification standards for a settlement class revealed deep divisions and uncertainties about the proposed changes. The empirical studies and extensive public comments gave the Committee a wealth of new information about class-action practice.[94] In 2003, amendments providing better judicial supervision of settlements, class counsel, and attorneys' fees were enacted based largely on the insights that the long rulemaking process provided.[95]

The 2003 amendments did not address two critical questions. One was whether Rule 23 could address overlapping and duplicative class actions pending simultaneously in state and federal courts. ***520** The second was what position the Rules Committees and the Judicial Conference should take on the pending CAFA legislation. The Committee gave careful consideration to both questions. Although that consideration did not result in formal proposals, it was the Rules Enabling Act process that provided the framework for a thoughtful, workable resolution.

Professor Cooper issued a Reporter's call for comment on the issues of overlapping and

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duplicative class actions.[96] The response to that call for comment was thoughtful and copious. It allowed the Civil Rules Committee to explore and persuade itself--and others--of the rulemaking and federalism constraints that counseled against a formal rule change.[97] And the Standing and Civil Rules Committees collaborated with another Judicial Conference Committee--the Committee on Federal-State Jurisdiction--to craft a statement, which the Judicial Conference endorsed, on the pending legislation enacted as CAFA.[98] That statement reflected the Advisory Committee's recommendation to recognize and support "the concept of minimal diversity for large, multi-state class actions, in ***521** which the interests of no one state are paramount, with appropriate limitations or threshold requirements so that the federal courts are not unduly burdened and the states' jurisdiction over in-state class actions is left undisturbed."[99] That process left to Congress what was for Congress, allowed the courts to weigh in, and resulted in the Rules Committees changing Rule 23 in ways that did not implicate jurisdiction or diversity. This reflected and preserved the Rules Enabling Act's allocation of rulemaking and legislative authority between the courts and Congress. It was all done under the structure put into place by that Act in 1934, and Professor Cooper was essential to the work.

The 2010 amendments to Rule 56 also demonstrate the Rules Committee process. As Professor Gensler points out in his essay, the Civil Rules Committee studied Rule 56 as part of the 2007 "Style" project and recognized that it badly needed revisions beyond what could be done in that project.[100] The rule had become so far removed from modern summary-judgment practice as to spawn numerous varying local and individual judge-made rules. About half of the ninety-two districts had local rules requiring movants to set out, in separately numbered paragraphs, the facts that they believed to be undisputed and that entitled them to summary judgment. Of the fifty-six districts with such rules, twenty required the nonmovant to respond in kind. The rest of the districts did not have such a requirement.[101] To improve national consistency, the 2008 proposal included a so-called point-counterpoint provision. The proposed change would have required the party seeking summary judgment to file three items: a motion, a statement of the facts that are asserted to be beyond genuine dispute, and a brief. The response would have included a submission addressing each stated fact and could include a statement of additional facts asserted to preclude summary judgment, along with a brief. The movant could file a reply to any additional facts stated in the response, again with a brief.[102] The proposal to make the point-counterpoint motion and ***522** response the default national standard, subject to the judge's ability to deviate from it by case-specific order but beyond the ability of a district or division to deviate from it by local rule or standing or general order, provoked a robust and deeply divided debate.

During the public comment period on the proposed amendments to Rule 56 published in 2008, it became clear that imposing the point-counterpoint procedure as the default national standard would be viewed as favoring defendants at the expense of plaintiffs.[103] Lawyers representing plaintiffs, who are often opposing summary-judgment motions, argued that having to respond to individual paragraphs identifying facts asserted to be undisputed and entitling the movant to relief, in correspondingly numbered individual paragraphs, imposed yet another burden on the unrepresented and the underrepresented who were already at a disadvantage in summary-judgment practice.[104] These lawyers also argued that the point-counterpoint procedure

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often prevented them from telling their client's story in a way that allowed the inferences as well as the facts to become clear, and instead disaggregated--sliced and diced--the evidence in a way that helped defendants and made ***523** summary judgment easier to grant. In other words, the lawyers argued, the point-counterpoint procedure could itself affect the substantive standard for granting summary judgment in a way that adversely affected plaintiffs.[105] Other lawyers praised the procedure and emphasized how well it had worked in their cases.[106]

And though it is not common to have judges speak out against rule proposals, it happened here. Judges in districts that had tried point-counterpoint and abandoned it came to ask the Civil Rules Committee not to recommend a change to Rule 56 that would impose the procedure on a national basis. Judges with experience both in districts with it and without it made similar pleas. A judge who had extensive experience with summary-judgment motions in districts with a point-counterpoint local rule and in districts with no such rule, having regularly served in different courts, reported on the results of what turned out to be a nice controlled experiment.[107] The comparison did not yield favorable reviews for the point-counterpoint system.[108] Yet other judges in districts with a local rule requiring point-counterpoint presentation in summary-judgment motions and responses praised its benefits and emphasized that it made deciding summary-judgment motions faster and better.[109] The Civil Rules Advisory Committee added to this information the FJC study on differences in the rulings and time to disposition between districts that required point-counterpoint and those that did not.[110] At the end of the day, the Advisory Committee decided not to pursue the published proposal for a national system of point-counterpoint. There were a number of proposed changes to the summary-judgment rule that were enacted in 2010,[111] but they did not include a national system of a point-counterpoint procedure. ***524** The local-rule variations could continue to operate in this area, at the expense of national consistency.

Both rulemaking episodes exemplified, and resulted from, the robust, transparent, and highly effective process under the Rules Enabling Act. They provide reason for optimism about its continued success.

Conclusion

Important changes in how the Civil Rules Committee operates have occurred during Ed Cooper's tenure as Reporter, including increased public access and participation, increased reliance on empirical research, and greater congressional interaction. These changes made his work as Reporter more challenging and the depth of his knowledge and the soundness of his judgment more apparent. As Judge Higginbotham states in recounting some of the controversial proposed amendments to Rule 23, "Professor Cooper's skilled drafting of the many changes urged upon us--his translation of myriad ideas pressed upon the Committee into the language of rules--made openness both possible and workable."[112] The essays in this Symposium reflect Ed Cooper's quiet and steady guidance, helping to keep the Civil and Standing Rules Committees from taking steps that would not work and, through his writing ensuring that the promise of greater transparency is fully kept. Those who are thinking about the forthcoming seventy-fifth birthday of the Civil Rules and the eightieth birthday of the Rules Enabling Act should be of good cheer.

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In a recent article, Ed Cooper offered words of praise about Arthur Miller, another Reporter to the Civil Rules Committee and a contributor to this issue. Those words capture what we wanted to say about Ed Cooper himself, merely by substituting the word "we" for "I": "[We] have learned much from him, and gained much more by association with him, than [we] could hope to repay. At most [we] can hope to pay tribute where tribute is richly deserved, ***525** however far short [we] may fall in the execution."[113] We look forward to his "good work ongoing."[114]

Footnotes

a1 United States District Court for the District of Connecticut; Chair, Standing Committee on Rules of Practice and Procedure (Standing Committee), 2011-2012; Chair, Civil Rules Committee, 2007-2011. Judge Kravitz died after the work on this Article and those it introduces was completed.

aa1 Dean, Duke University School of Law; Chair, Standing Committee, 2003-2007; Chair, Civil Rules Committee, 2000-2003.

aaa1 United States District Court for the Southern District of Texas; Chair, Standing Committee, 2007-2011; Chair, Civil Rules Committee, 2003-2007.

aaaa1 United States Court of Appeals for the Third Circuit; Chair, Standing Committee, 1998-2003. We all thank Andrea Kuperman, whose work has been invaluable to our work for the Rules Committees since 2007 and was invaluable for this introduction as well. We are also very grateful to Judge David Campbell, Judge Jeffrey Sutton, Professor Steven Gensler, and Professor Richard Marcus for their thorough and helpful feedback.

1 Order of the Supreme Court of the United States (June 3, 1935), reprinted in Advisory Committee on Civil Rules, Report of the Advisory Committee on Rules for Civil Procedure iii (1937), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV04-1937.pdf.

2 The first committee included William D. Mitchell, later Attorney General, as Chair; Scott M. Loftin, then President of the American Bar Association; George W. Wickersham, then president of the American Law Institute; Wilbur H. Cherry, professor at the University of Minnesota Law School; Armistead M. Dobie, Dean of the University of Virginia Law School; Edmund M. Morgan, professor at Harvard Law School; Edson R. Sunderland, professor at the University of Michigan Law School; and distinguished lawyers from Boston, New Orleans, Chicago, Seattle, San Francisco, and Des Moines. See id. at iii-iv.

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[3] These committees include the Standing Committee on Rules of Practice and Procedure and its five advisory rules committees--Appellate, Bankruptcy, Civil, Criminal, and Evidence.

[4] See Paul D. Carrington, Protecting the Right of Citizens to Aggregate Small Claims Against Businesses, 46 U. Mich. J.L. Reform 537 (2013); Arthur R. Miller, Some Very Personal Reflections on the Rules, Rulemaking, and Reporters, 46 U. Mich. J.L. Reform 651 (2013).

[5] See Mary Kay Kane, Professor Edward Cooper: The Quintessential Reporter, 46 U. Mich. J.L. Reform 631 (2013).

[6] See Richard Marcus, Shoes That Did Not Drop, 46 U. Mich. J.L. Reform 637 (2013).

[7] See Linda S. Mullenix, Professor Ed Cooper--Zen Minimalist, 46 U. Mich. J.L. Reform 661 (2013).

[8] See Patrick E. Higginbotham, Iron Man of the Rules, 46 U. Mich. J.L. Reform 627 (2013).

[9] See Thomas D. Rowe, Jr., The Twelve-Person Federal Civil Jury in Exile, 46 U. Mich. J.L. Reform 691 (2013).

[10] See Paul V. Niemeyer, Is Now the Time for Simplified Rules of Civil Procedure?, 46 U. Mich. J.L. Reform 673 (2013).

[11] See Catherine T. Struve, What Ed Cooper Has Taught Me About the Realities and Complexities of Appellate Jurisdiction and Procedure, 46 U. Mich. J.L. Reform 697 (2013).

[12] See Stephen B. Burbank, Thinking, Big and Small, 46 U. Mich. J.L. Reform 527 (2013).

[13] See Steven S. Gensler, Ed Cooper, Rule 56, and Charles E. Clark's Fountain of Youth, 46 U. Mich. J.L. Reform 593 (2013).

[14] See Geoffrey Hazard, Edward Cooper as Curator of the Civil Rules, 46 U. Mich. J.L. Reform 623 (2013).

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[15] See Daniel R. Coquillette, Past the Pillars of Hercules: Francis Bacon and the Science of Rulemaking, 46 U. Mich. J.L. Reform 549 (2013).

[16] The height of this bar is demonstrated by the fact that Clark's assistant as Reporter was eminent Yale Law Professor James W. Moore. See Leland L. Tolman, Discovery Under the Federal Rules: Production of Documents and the Work Product of the Lawyer, 58 Colum. L. Rev. 498, 511-12 (1958) (noting that James William Moore was the chief assistant to Charles Clark and contributed greatly to the form of the Rules, and noting that Professor Moore's writings about the Rules are "in a very large degree responsible for their successful application in practice").

[17] See Gensler, supra note 13, at 593-95; see also Charles E. Clark, The Federal Rules of Civil Procedure 1938-1958, 58 Colum. L. Rev. 435 (1958); Charles E. Clark, The New Federal Rules of Civil Procedure: The Last Phase--Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure, 23 A.B.A. J. 976 (1937); Charles E. Clark, The Proposed Federal Rules of Civil Procedure, 22 A.B.A. J. 447 (1936); Charles E. Clark, Simplified Pleading, 2 F.R.D. 456 (1943); Charles E. Clark & James W. Moore, A New Federal Civil Procedure: The Background, 44 Yale L. J. 387 (1935); Charles E. Clark & James W. Moore, A New Federal Civil Procedure: Pleadings and Parties, 44 Yale L. J. 1291 (1935).

[18] See Advisory Committee on Rules for Civil Procedure, Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States (1946), available at http:// www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV06-1946.pdf; Advisory Committee on Rules for Civil Procedure, Report of Proposed Amendments to the Rules of Civil Procedure for the United States District Courts (1955), available at http:// www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV10-1955.pdf; Advisory Committee on Rules for Civil Procedure, Supplementary Report of Proposed Rule to Govern Condemnation Cases in the United States District Courts (1951), available at http:// www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV03-1951.pdf; see also Gensler, supra note 13, at 593 n.1, 598-601.

[19] Order Discharging the Advisory Committee, 352 U.S. 803 (1956).

[20] See Admin. Office of U.S. Courts, Annual Report of the Proceedings of the Judicial Conference of the United States 6 (1958), available at http:// www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/1958-09-ST-JC_ approves_ST_Comm_Adv_Comm.pdf (approving of the creation of the Standing Committee and the appointment by the Chief Justice of five advisory committees); Supreme Court of the U.S., Press Release (1960), available at

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http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/SC_Press_ Release.1960.pdf (announcing the appointment of committees to engage in a continuous study of the federal rules).

21 See Advisory Committee on Civil Rules, Meeting Minutes, December 5, 1960, at 1 (1960), available at http:// www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV12-1960-min.pdf (containing minutes of the first meeting of the Advisory Committee on Civil Rules and listing Benjamin Kaplan as Reporter). That same year, Judge Clark was appointed to serve on the new Standing Committee on Rules of Practice and Procedure. See Supreme Court of the U.S., supra note 20, at 1; see also Gensler, supra note 13, at 595 n.11.

22 The records are somewhat unclear as to the exact date that Dean Sacks's term ended and Professor Ward's began, but the difference is small in terms of the work done.

23 See Richard L. Marcus, Discovery Containment Redux, 39 B.C. L. Rev. 747, 749 (1998) ("Party-controlled discovery reached its high-water mark in the 1970 amendments in terms of rule provisions.").

24 See id. at 756-60 (describing the 1980 amendments and the controversy that the discovery limitations did not go far enough).

25 See Fed. R. Civ. P. 16 advisory committee's notes (1983) (discussing case-management tools implemented by the amendments).

26 See Fed. R. Civ. P. 26(b)(2)(C)(iii) ("On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:... the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues."); Fed. R. Civ. P. 26 advisory committee's notes (1983) (discussing addition of the proportionality limitation on discovery).

27 See, e.g., Advisory Committee on Civil Rules, Agenda Book, Ann Arbor, Michigan, March 22-23, 2012, at 249-304, 375-406 (2012), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda% 20Books/Civil/CV2012-03.pdf (discussing work of the Discovery Subcommittee to address electronic-discovery issues in connection with concerns about preservation and sanctions and discussing work of the Duke Subcommittee on efforts to improve case

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management and address proportionality); see also Advisory Committee on Civil Rules, Agenda Book, Washington, DC, November 7-8, 2011, at 53-469, 567-622 (2012), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2011-11.pdf (same); Advisory Committee on Civil Rules, Agenda Book, Austin, Tx, April 4-5, 2011, at 194-236, 276-302 (2011), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2011-04.pdf (same).

28 Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified as amended at 28 U.S.C. §§ 471-482 (2006)).

29 See, e.g., 28 U.S.C. § 471 (2006) (requiring each district court to implement a civil-justice expense and delay-reduction plan); 28 U.S.C. § 472 (2006) (stating that in developing a civil justice expense and delay reduction plan, a district court could consider the recommendations of an advisory group); 28 U.S.C.A. § 478 (West 2008) (describing the process for selecting advisory groups).

30 Ed Cooper's father was the faculty editor when the University of Michigan Journal of Law Reform, then called Prospectus: A Journal of Law Reform, was created. See 1 U. Mich. J.L. Reform i (1968).

31 See Charles A. Wright et al., Federal Practice and Procedure, vols. 16A-16AA (4th ed. 2008) (co-authored with Charles A. Wright, Arthur R. Miller, and Catherine T. Struve) (addressing the Appellate Rules); Charles A. Wright et al., Federal Practice and Procedure, vols. 13, 13A, 13B, 13C (3d. ed. 2008) (co-authored with Charles A. Wright and Arthur R. Miller) (addressing the federal judicial system and related matters); Charles A. Wright et al., Federal Practice and Procedure, vols. 14, 14A, 14B, 14C, 16A (3d ed. 1998) (co-authored with Charles A. Wright and Arthur R. Miller) (addressing jurisdiction, removal, and the Appellate Rules); Charles A. Wright et al., Federal Practice and Procedure, vols. 13-19 (2d ed. 1984) (co-authored with Charles A. Wright and Arthur R. Miller) (addressing jurisdiction and related matters); Charles A. Wright et al., Federal Practice and Procedure, vols. 13-19 (1975-1982) (co-authored with Charles A. Wright and Arthur R. Miller).

32 See, e.g., Edward H. Cooper, Aggregation and Choice of Law, 14 Roger Williams U. L. Rev. 12 (2009); Edward H. Cooper, Aggregation and Settlement of Mass Torts, 148 U. Pa. L. Rev. 1943 (2000); Edward H. Cooper, Class Action Advice in the Form of Questions, 11 Duke J. Comp. & Int'l L. 215 (2001); Edward H. Cooper, Extraordinary Writ Practice in Criminal Cases: Analogies for the Military Courts, 98 F.R.D. 593 (1983); Edward H.

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Cooper, King Arthur Confronts TwIqy Pleading, 90 Or. L. Rev. 955 (2012); Edward H. Cooper, Rewriting Shutts for Fun, Not to Profit, 74 UMKC L. Rev. 569 (2006).

33 See, e.g., Stephen B. Burbank, The Rules Enabling Act of 1934, 130 U. Pa. L. Rev. 1015 (1982); Peter G. McCabe, Renewal of the Federal Rulemaking Process, 44 Am. U. L. Rev. 1655 (1995).

34 See Gensler, supra note 13, at 593-610.

35 Laurens Walker, A Comprehensive Reform for Federal Civil Rulemaking, 61 Geo. Wash. L. Rev. 455, 465 (1993) (citing Order Continuing Advisory Committee, 314 U.S. 720 (1942)).

36 Act of July 11, 1958, Pub. L. No. 85-513, 72 Stat. 356 (codified as amended at 28 U.S.C. § 331 (2006)). The Federal Rules of Appellate Procedure took effect in 1968, and the initial Bankruptcy Rules became law in 1973. In 1972, the proposed Evidence Rules were transmitted to Congress and, as discussed later, proved controversial. They were enacted by affirmative legislation, after revision by Congress, in 1975. Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (codified as amended at 28 U.S.C. App. at 314 (2006)).

37 Admin. Office of U.S. Courts, supra note 20, at 7.

38 Id.

39 See Winifred R. Brown, Fed. Judicial Ctr., Federal Rulemaking: Problems and Possibilities 12 (1981), available at http:// www.fjc.gov/public/pdf.nsf/lookup/fdrlmkng.pdf/$file/fdrlmkng.pdf (outlining Reporters' role in ongoing study of federal rules and their operation).

40 See id. at 11-12.

41 See id. at 12 n.23.

42 Id. at 12 (citing Albert Maris, Federal Procedural Rule-Making: The Program of the Judicial Conference, 47 A.B.A. J. 772 (1961)).

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[43] Id. at 12-13.

[44] See, e.g., 23 Charles A. Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5421 (1980) (discussing the controversy surrounding the proposed Federal Rules of Evidence); Kenneth S. Broun, Giving Codification a Second Chance--Testimonial Privileges and the Federal Rules of Evidence, 53 Hastings L. J. 769, 777 (2002) ("The controversy over the Proposed Federal Rules of Evidence was not only a controversy over the merits of the proposals, but also about process."); Eileen A. Scallen, Interpreting the Federal Rules of Evidence: The Use and Abuse of the Advisory Committee Notes, 28 Loy. L.A. L. Rev. 1283, 1290 (1995) (discussing the controversy over the initially proposed Federal Rules of Evidence).

[45] See, e.g., 23 Charles A. Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5421 (1980).

[46] See McCabe, supra note 33, at 1660.

[47] See 28 U.S.C. § 2072(a) (2006).

[48] See id. § 2074(b).

[49] See id. § 2072(b).

[50] The legislation also attempted to promote the national uniformity that had been one of the signature goals of the 1938 Civil Rules by limiting inconsistent local-court rules on subjects addressed by the national rules. See 28 U.S.C. § 331 (2006) ("The Judicial Conference shall review rules prescribed under section 2071 of this title by the courts, other than the Supreme Court and the district courts, for consistency with Federal law. The Judicial Conference may modify or abrogate any such rule so reviewed found inconsistent in the course of such a review."). The legislation gave circuit judicial councils authority to modify or abrogate any district court local rules and gave the Judicial Conference authority to modify or abrogate any other rule prescribed by a court other than the Supreme Court. See id. § 2071(c)(1)-(2).

[51] See generally Burbank, supra note 33 (describing the decades of effort culminating in the Act).

[52] The time that Congress has to review proposed rules and amendments-- and when, absent

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congressional action, they become effective--has been modified since 1938. The statute originally stated that proposed rules "shall not take effect until they have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session." Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064. In 1950, this was changed to provide that rule proposals transmitted to Congress by May 1 could become effective ninety days later regardless of the status of the congressional session. Act of May 10, 1950, Pub. L. No. 81-510, § 2, 64 Stat. 158. The 1988 legislation required the Supreme Court to transmit proposed rule changes to Congress by May 1 and provided that the changes would take effect no earlier than December 1 of the year of transmittal. Act of Nov. 19, 1988, Pub. L. No. 100-702, § 401(a), 102 Stat. 4649 (codified at 28 U.S.C. § 2074 (2006)).

[53] See, e.g., H.R. 481, 96th Cong. (1979); H.R. 480, 96th Cong. (1979); Brown, supra note 39, at 35-102 (describing various proposals for change); Jack B. Weinstein, Reform of Court Rule-Making Procedures 89-115, 147-50 (1977); Robert N. Clinton, Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts, 63 Iowa L. Rev. 15, 61-83 (1977); Jack H. Friedenthal, The Rulemaking Power of the Supreme Court: A Contemporary Crisis, 27 Stan. L. Rev. 673, 685 (1975); William L. Hungate, Changes in the Federal Rules of Criminal Procedure, 61 A.B.A. J. 1203, 1207 (1975); Howard Lesnick, The Federal Rule-Making Process: A Time for Re-Examination, 61 A.B.A. J. 579, 580-82 (1975).

[54] See 28 U.S.C. § 2073(c) (2006). The authority to close sessions is rarely used. See McCabe, supra note 33, at 1671 & n.86.

[55] See 28 U.S.C. § 2073(a)(2) (2006).

[56] See id. § 2073(a)(2), (b).

[57] McCabe, supra note 33, at 1667; see 28 U.S.C. § 2073(a)(1) (2006).

[58] McCabe, supra note 33, at 1662 (quoting H.R. Rep. No. 100-889, at 3 (1988)).

[59] See Brown, supra note 39, at 43.

[60] Id. at 54.

[61] Id. (citing H.R. 480, 96th Cong. § 2074(e) (1979); H.R. 481, 96th Cong.

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(1979)).

62 For a discussion of various criticisms and proposals to change the rulemaking process, see Brown, supra note 39, at 35-86.

63 See Memorandum from Myles Lynk and Rick Marcus to Advisory Committee on Civil Rules, Proposal for Effort to Draft Possible Rules Changes to Address the Problems of Electronic Discovery 2 (Apr. 14, 2003), reprinted in Advisory Committee on Civil Rules, Agenda Book, Washington, DC, May 1-2, 2003, Volume II, at 263 (2003), available at http:// www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2003-05%282%29.pdf (noting that the Discovery Subcommittee hosted miniconferences in March 2000 and October 2000 on initial work on electronic-discovery amendments).

64 See Subcommittee on Discovery, Judicial Conference Civil Rules Committee, Materials Produced for Mini-Conference on Preservation and Sanctions, U.S. Courts (Sept. 9, 2011), http:// www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Overview/DallasMiniConfSept2011.aspx (providing agenda and other materials used for the miniconference on preservation and spoliation). The Committee also used miniconferences to learn about problems in litigating summary-judgment motions, in the early stages of considering what became the 2010 amendments to Rule 56; about state-court experience with the type of expert-disclosure requirements that were enacted as part of Rule 26 in 2010; and about experience with subpoenas under Rule 45 in connection with changes to that Rule that, as of this writing, were pending before the Supreme Court. See Advisory Committee on Civil Rules, Meeting Minutes, November 15-16, 2010, at 3 (2010), available at http:// www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV11-2010-min.pdf (noting an October 2010 miniconference on Rule 45); Advisory Committee on Civil Rules, Meeting Minutes, November 8-9, 2007, at 19 (2007), available at http:// www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV11-2007-min.pdf (describing the miniconference held in November 2007 on possible amendments to Rule 56); Advisory Committee on Civil Rules, Meeting Minutes, April 19-20, 2007, at 2 (2007), available at http:// www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV04-2007-min.pdf (noting that two miniconferences were held on disclosure and discovery of expert trial witnesses and that a miniconference on Rule 56 revisions was held in January 2007).

65 Fed. R. Civ. P. 1.

66 See, e.g., Symposium, 2010 Civil Litigation Review Conference, 60 Duke L.J. 537 (2010);

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Symposium, 39 B.C. L. Rev. 517 (1998) (symposium issue on Boston conference on discovery rules).

67 See, e.g., Brooke D. Coleman, Recovering Access: Rethinking the Structure of Federal Civil Rulemaking, 39 N.M. L. Rev. 261, 294-96 (2009) (suggesting reducing the number of judges on the Committee and striving toward greater balance in the backgrounds of lawyer members); Jeffrey W. Stempel, Politics and Sociology in Federal Civil Rulemaking: Errors of Scope, 52 Ala. L. Rev. 529, 614-18, 637 (2001) (asserting that the Civil Rules Committee's composition is not ideologically balanced and arguing that "policymakers should consider fine-tuning the generally wise Rules Enabling Act process to ensure that the various committees are more evenly balanced in socio-political makeup"); Stephen C. Yeazell, Judging Rules, Ruling Judges, 61 Law & Contemp. Probs. 229, 238-39 (1998) (arguing that judges should be removed from the initial drafting process and put in an advisory role).

68 The extensive comments and testimony submitted about the Rule 56 proposals are available at http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/Comments/Proposed0808Comments.aspx.

69 See, e.g., Weinstein, supra note 53, at 106 (supporting Professor Lesnick's view that the "composition of the advisory committees should be more representative") (footnote omitted); Coleman, supra note 67, at 294-96; Lesnick, supra note 53, at 581 ("Greater care needs to be taken that the lawyers appointed to the advisory committees reflect a true cross-section of those segments of the public and of the bar likely to be affected by the rules in the relevant areas."); Stempel, supra note 67, at 614-18, 637.

70 For examples of proposals to increase congressional involvement in rulemaking, see, for example, Clinton, supra note 53, at 62 (arguing that there is a continuum between substance and procedure, and that Congress must either "delineate with more particularity the areas which the Supreme Court cannot unilaterally invade, as it has begun to do in enacting section 2076, or it must again assume for itself the burden of affirmative approval (although not necessarily the initiative and drafting) of the general rules of practice and procedure for the federal judiciary"); Coleman, supra note 67, at 293 (suggesting that increasing congressional involvement in the rulemaking process would be beneficial, because under current procedures, "if the Committee strays from [the goal of court] access, Congress is too busy to notice"); Lesnick, supra note 53, at 583 ("Rule drafting, it seems clear, is legislative work, but the habits of judges and of those dealing with them are not easily altered when they turn to their nonjudicial tasks. A legislative commission, even if staffed partly by judges, would inevitably be more open, less prone to give over-riding weight to confidentiality, insularity, and the muting of controversy than is the Judicial

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Conference.”).

71 The supersession clause states that “[a]ll laws in conflict with... rules [promulgated under the Act] shall be of no further force or effect after such rules have taken effect.” 28 U.S.C. § 2072(b) (2006).

72 See McCabe, supra note 33, at 1662-63.

73 See id.

74 See, e.g., Fed. R. Civ. P. 86(b) advisory committee’s notes (2007) (explaining that Rule 86(b)--which provides that if rule provisions conflict with another law, priority in time for purposes of 28 U.S.C. § 2072(b) is not affected by the 2007 amendments that restyled the Civil Rules-- was added to clarify that the restyled rules were not intended to supersede other laws through the Enabling Act’s supersession clause); Memorandum from Leonidas Ralph Mecham, Dir., Admin. Office of the U.S. Courts, to the Chief Justice of the United States and the Associate Justices of the Supreme Court (Nov. 19, 2001), reprinted in 207 F.R.D. 336 (2002) (transmitting to the Supreme Court proposed stylistic amendments to the Federal Rules of Criminal Procedure; noting that after the Judicial Conference had approved of the proposals, the USA PATRIOT Act added new provisions to two Criminal Rules; and noting that the Advisory Committee was preparing conforming amendments to avoid confusion and possible supersession problems); see also Stephen B. Burbank & Tobias Barrington Wolff, Redeeming the Missed Opportunities of Shady Grove, 159 U. Pa. L. Rev. 17, 41-42 (2010) (“[A]s part of the successful campaign to persuade the House not to insist on repeal of the supersession clause in the 1988 amendments to the Enabling Act, Chief Justice Rehnquist wrote a letter asserting that the Judicial Conference and its committees ‘have always been keenly aware of the special responsibility they have in the rules process and the duty incumbent upon them not to overreach their charter.’”).

75 See, e.g., Stephen B. Burbank, Ignorance and Procedural Law Reform: A Call for a Moratorium, 59 Brook. L. Rev. 841, 841-42 (1993) (arguing for a moratorium on rulemaking until the likely impact of the proposed amendments is understood and supported with empirical evidence); Walker, supra note 35, at 464 (proposing that discretion in exercising the rulemakers’ delegated power be curbed by requiring the Advisory Committee to “make rules based on adequate information” and requiring analyses of all proposed major rule changes to be submitted in advance of any publication for comment to the FJC, which would have the authority to reject the proposal); Thomas E. Willging, Past and Potential Uses of Empirical Research in Civil Rulemaking, 77 Notre Dame L. Rev. 1121, 1204 (2002) (arguing that “what is needed is a statute that would vest the power to create experimental rules in the Standing Committee”).

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[76] See, e.g., Burbank, supra note 75, at 844 ("[A]mended Rule 11 was promulgated in a virtual empirical vacuum, but with numerous warnings from the bar about its potential costs.") (footnote omitted); Carl Tobias, Discovery Reform Redux, 31 Conn. L. Rev. 1433, 1434 (1999) (noting that the 1983 version of Rule 11 proved "troubling" because the rule revisors had not collected empirical data on Rule 11's operation before revising it in 1983); Matthew G. Vansuch, Icing the Judicial Hellholes: Congress' Attempt to Put Out "Frivolous" Lawsuits Burns a Hole Through the Constitution, 30 Seton Hall Legis. J. 249, 304 (2006) ("Rule 11 was changed in 1983 without an empirical justification and then was altered again because the 1983 amendments were perceived to have created all of the problems that the bar had predicted but that the rulemakers had ignored."); Willging, supra note 75, at 1122 ("The tone set by the original rulemakers and their successors came under attack in the late 1980s and early 1990s when commentators decried the lack of empirical support for major rule revisions relating to Rule 11 sanctions in 1983 and Rule 26(a) initial disclosures in 1993."); see also Georgene M. Vairo, Foreword, 37 Loy. L.A. L. Rev. 515, 517 n.4 (2004) ("It is fair to say that the debate about the 1983 version of Rule 11 prompted the need for empirical study in the rulemaking process.").

[77] See Burbank, supra note 75, at 842.

[78] See, e.g., id. at 845 (noting that the 1993 amendments to Rule 26 were based on "little relevant empirical evidence"); Willging, supra note 75, at 1122-23 (explaining criticism of the 1993 amendments that imposed a requirement of initial disclosures in Rule 26(a)).

[79] See, e.g., A. Leo Levin, Local Rules as Experiments: A Study in the Division of Power, 139 U. Pa. L. Rev. 1567, 1585-86 (1991). See generally Willging, supra note 75 (reviewing proposals for, and evolution in the use of, empirical research in rulemaking).

[80] Cf. Linda S. Mullenix, Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking, 69 N.C. L. Rev. 795, 829 (1991) (noting that while empirical study has its benefits, it can also delay solving a problem).

[81] See Memorandum from Joe Cecil & George Cort to Hon. Michael Baylson, Report on Summary Judgment Practice Across Districts with Variations in Local Rules (Aug. 13, 2008), available at http://www.fjc.gov/public/pdf.nsf/lookup/sujulrs2.pdf/$file/sujulrs2.pdf.

[82] See Thomas E. Willging et al., Fed. Judicial Ctr., Discovery and Disclosure Practice, Problems, and Proposals for Change: A Case-Based National Survey of Counsel in Closed

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Federal Civil Cases (1997), available at http:// www.fjc.gov/public/pdf.nsf/lookup/discovry.pdf/$file/discovry.pdf.

83 See Emery G. Lee, III & Thomas E. Willging, Fed. Judicial Ctr., Litigation Costs in Civil Cases: Multivariate Analysis (2010), available at http://www.fjc.gov/public/pdf.nsf/lookup/costciv1.pdf/$file/costciv1.pdf; see also Emery G. Lee, III & Thomas E. Willging, Fed. Judicial Ctr., Case-Based Civil Rules Survey: Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules (2009), available at http:// www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf.

84 See, e.g., Emery G. Lee, III & Thomas E. Willging, Fed. Judicial Ctr., Attorney Satisfaction with the Federal Rules of Civil Procedure: Report to the Judicial Conference Advisory Committee on Civil Rules (2010), available at http://www.fjc.gov/public/pdf.nsf/lookup/costciv2.pdf/$file/costciv2.pdf (collecting and comparing results of surveys given to attorneys in the American College of Trial Lawyers, the American Bar Association Section of Litigation, and the National Employment Lawyers Association (NELA), where the FJC administered the ABA Section and NELA surveys).

85 Of course, other rules committees also rely on empirical data gathering. For example, the Criminal Rules Committee's examination of whether to amend Rule 16 to include a statement of the prosecutors' obligation to disclose exculpatory or impeaching information used a variety of empirical-data-gathering methods. The Committee held a miniconference at which prosecutors, defense attorneys, individuals knowledgeable about victims' rights, and individuals knowledgeable about national security and witness protection issues all appeared. See Criminal Rule 16 Subcommittee, Advisory Committee on Criminal Rules, Agenda Book, Feb. 1, 2010 Miniconference (2010) (on file with Administrative Office of the United States Courts); see also Advisory Committee on Criminal Rules, Agenda Book, April 15-16, 2010, at 168 (2010), available at http:// www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda% 20Books/Criminal/CR2010-04.pdf (discussing the consultative session on Rule 16 held on Feb. 1, 2010). The FJC also did a survey regarding Criminal Rule 16. See Laural Hooper et al., Fed. Judicial Ctr., A Summary of Responses to a National Survey of Rule 16 of the Federal Rules of Criminal Procedure and Disclosure Practices in Criminal Cases: Final Report to the Advisory Committee on Criminal Rules (2011), available at http:// www.fjc.gov/public/pdf.nsf/lookup/Rule16Rep.pdf/$file/Rule16Rep.pdf.

86 See John K. Rabiej, The Making of Class Action Rule 23--What Were We Thinking?, 24 Miss. C.L. Rev. 323, 345 (2005) (noting the growth of class actions).

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[87] See id. at 347-48.

[88] See id. at 356.

[89] See id. at 387 (noting the problems with overlapping and duplicative class actions).

[90] Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified at 28 U.S.C. §§ 1332(d), 1453, 1711-1715 (2006)).

[91] See Kane, supra note 5, at 631-36; Mullenix, supra note 7, at 664-71; Struve, supra note 11, at 697 n.3.

[92] See Advisory Committee on Civil Rules, Meeting Minutes, October 22-23, 2001 (2001), available at http:// www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CRAC1001.pdf (minutes of the October 2001 conference on Rule 23 at the University of Chicago Law School).

[93] See Thomas E. Willging et al., Fed. Judicial Ctr., Empirical Study of Class Actions in Four Federal District Courts: Final Report to Advisory Committee on Civil Rules 1-2 (1996), available at http:// www.fjc.gov/public/pdf.nsf/lookup/rule23.pdf/$file/rule23.pdf.

[94] See Rabiej, supra note 86, at 367-68 (noting the wealth of materials that came from the study of class actions, which led to the 1998 amendments to Rule 23).

[95] See id. at 368-69 (describing the proposals to amend Rule 23 that took effect in 2003 and how they were influenced by the Committee's earlier work on Rule 23).

[96] See David F. Levi, Chair, Advisory Committee on Federal Rules of Civil Procedure, Report of the Civil Rules Advisory Committee 293 (2002), available at http:// www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-2002.pdf.

[97] See id. ("[T]he Committee expressed a unanimous consensus that the problems created by overlapping class actions are worthy of congressional attention and that some form of minimal diversity legislation might provide an appropriate answer to some of the problems."); id. at 13 ("In light of... constraints on rulemaking, and because of the sensitive issues of jurisdiction and federalism implicated by overlapping class actions, Congress would seem the appropriate body to deal with the question.").

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98 The Judicial Conference's Committee on Federal-State Jurisdiction, after extensive discussions with the Standing Committee, recommended, with the Standing Committee's concurrence, adopting the following resolution, which the Judicial Conference unanimously adopted:

The Judicial Conference recognizes that the use of minimal diversity of citizenship may be appropriate to the maintenance of significant multi-state class action litigation in the federal courts, while continuing to oppose class action legislation that contains jurisdictional provisions that are similar to those in the bills introduced in the 106th and 107th Congresses. If Congress determines that certain class actions should be brought within the original and removal jurisdiction of the federal courts on the basis of minimal diversity of citizenship and an aggregation of claims, Congress should be encouraged to include sufficient limitations and threshold requirements so that federal courts are not unduly burdened and states' jurisdiction over in-state class actions is left undisturbed, such as by employing provisions to raise the jurisdictional threshold and to fashion exceptions to such jurisdiction that would preserve a role for the state courts in the handling of in-state class actions. Such exceptions for in-state class actions may appropriately include such factors as whether substantially all members of the class are citizens of a single state, the relationship of the defendants to the forum state, or whether the claims arise from death, personal injury, or physical property damage within the state. Further, the Conference should continue to explore additional approaches to the consolidation and coordination of overlapping or duplicative class actions that do not unduly intrude on state courts or burden federal courts.

Judicial Conference of the U.S., Report of the Proceedings of the Judicial Conference of the U.S. 13-14 (2003), available at http://www.uscourts.gov/uscourts/FederalCourts/judconf/proceedings/2003-03.pdf.

99 Levi, supra note 96, at 17.

100 See Gensler, supra note 13, at 611-12.

101 See Memorandum from Jeffrey Barr & James Ishida to Hon. Michael Baylson, Survey of District Court Local Summary Judgment Rules, at 1-3 (Mar. 21, 2007), reprinted in Hon. Lee H. Rosenthal, Chair, Advisory Committee on Federal Rules of Civil Procedure, Report of the Civil Rules Advisory Committee 110-12 (2007), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2007.pdf.

102 In relevant part, the proposed amendments to Rule 56(c) that were published in 2008 provided:

(2) Motion. The motion must:

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(A) describe each claim, defense, or issue as to which summary judgment is sought; and
(B) state in separately numbered paragraphs only those material facts that the movant asserts are not genuinely in dispute and entitle the movant to judgment as a matter of law.
(3) Response. A response:
(A) must, by correspondingly numbered paragraphs, accept, qualify, or deny-- either generally or for purposes of the motion only--each fact in the Rule 56(c)(2)(B) statement;
(B) may state that those facts do not support judgment as a matter of law; and
(C) may state additional facts that preclude summary judgment.
(4) Reply. The movant may reply to any additional fact stated in the response in the form required for a response.
Rosenthal, supra note 101, at 66-67.

[103] See, e.g., Summary of General Comments: 2008 Rule 56 Proposal (Jan. 26, 2009), reprinted in Advisory Committee on Civil Rules, Agenda Book, April 20-21, 2009, at 120 (2009), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2009-04.pdf (summarizing comments received on proposed amendments to Rule 56 from a professor concerned that "[t]he detailed statement and response procedure may aggravate an already unsatisfactory situation" in civil rights and employment cases in which summary judgment is more frequently sought and granted than in other categories of cases).

[104] See, e.g., id. at 145 (summarizing comments by a lawyer that the point-counterpoint system in his district "doesn't work and unfairly favors the defendants" and that "[t]he point-counterpoint system is, for many reasons, 'biased against plaintiffs and their lawyers in civil rights cases"').

[105] See, e.g., id. at 148 (summarizing comments by a lawyer stating that "[p]oint-counterpoint 'is... very disturbing... because it encourages defendants to set forth excessive, unnecessary facts that must be addressed by the plaintiff in a painstaking piecemeal way"').

[106] See, e.g., id. at 140-60 (summarizing the comments of several lawyers who felt that the procedure was beneficial).

[107] See id. at 140-41 (summarizing the comments of a judge who had experience in both the District of Alaska, which did not use point-counterpoint, and the District of Arizona, which did use it).

[108] See id.

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[109] See, e.g., id. at 147 (summarizing the comments of a judge who supported the proposed revisions). Cf. id. at 155 (summarizing the testimony of a judge describing how his district successfully uses point-counterpoint, but only by placing limits on the briefing that contains the undisputed facts and responses).

[110] See Cecil & Cort, supra note 81.

[111] The amendments that took effect in 2010 require a party asserting a fact that cannot be genuinely disputed to provide a "pinpoint citation" to the record, restore "shall" to express the direction to grant summary judgment when the standard is met, provide courts with "options when an assertion of fact has not been properly supported by the moving party or responded to by the opposing party," and explicitly recognize authority to grant partial summary judgments. See Judicial Conference Committee on Rules of Practice and Procedure, Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States 14-15, 17 (2009), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/Combined_ST_Report_Sept_2009.pdf; see also Fed. R. Civ. P. 56 advisory committee's notes (2010).

[112] Higginbotham, supra note 8, at 629.

[113] Edward H. Cooper, King Arthur Confronts TwIqy Pleading, 90 Or. L. Rev. 955, 955 n.* (2012).

[114] The words "good work ongoing" come from a poem: "What are we sure of? Happiness isn't a town on a map, or an early arrival, or a job well done, but good work ongoing." Mary Oliver, Work, Sometimes, in New and Selected Poems 6 (2005).

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4 Am. U. L. Rev. 1655

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L. Ralph Mecham & Federal Courts Administration: A Decade of Innovation and Progress

***1655** RENEWAL OF THE FEDERAL RULEMAKING PROCESS

Peter G. Mccabe[a]

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INTRODUCTION

The federal rules of practice and procedure regulate litigation in the federal courts and are designed "to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay."[1] The Federal Rules of Civil Procedure, in particular, have been described as "among the most significant accomplishments of American jurisprudence,"[2] setting the standard "against which all other systems of procedure must be judged."[3] The success of the civil rules led to the establishment of federal rules for criminal, appellate, and bankruptcy procedure, as well as federal rules of evidence.

The process by which the federal rules[4] are promulgated, although subject to periodic criticism, has been praised as "perhaps the most thoroughly open, deliberative, and exacting process in the nation for developing substantively neutral rules."[5] The essence of the federal rulemaking process has remained constant for the past sixty years. Its basic features include: (1) the drafting of new rules and rule amendments by prestigious advisory committees composed of judges, lawyers, and law professors; (2) circulation of the committees' drafts to the bench, bar, and public for comment; (3) fresh considerationof ***1657** the proposed changes by the advisory committees, after taking into account the comments of the bench, bar, and public; (4) careful review of the advisory committees' proposals; (5) promulgation of the proposals by the Supreme

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Court; and (6) "enactment" of the proposals into law following the expiration of a statutory period in which Congress is given an opportunity to reject, modify, or defer them.

At various points over the last sixty years both Congress and the judiciary have acted to reaffirm and renew the rulemaking process, with the objective of making it more effective and more open. Significant organizational and procedural improvements have been made as a result both of self-evaluation efforts by the judiciary and criticisms from the bar and Congress. One recommendation in the Proposed Long Range Plan for the Federal Courts,[6] which was recently approved by the Judicial Conference of the United States,[7] reaffirms the judiciary's commitment to periodic, comprehensive reexaminations of the rulemaking process.[8] The Plan recommends that:
rules of practice, procedure, and evidence should be developed exclusively in accordance with the time-tested and orderly process established by the Rules Enabling Act;

the national rules should strive for greater uniformity of practice and procedure in the federal courts, but individual courts should have some limited rulemaking authority to account for differing local circumstances and to experiment with innovative procedures; and

the Judicial Conference and the courts should seek significant participation in rulemaking by the interested public and representatives of the bar, including federal and state judges.[9]

Part I of this Article provides a brief history of the federal rulemaking process. Part II describes the current rulemaking procedures, focusing on how they have been changed to address past criticisms. Part III discusses future initiatives in the rulemaking process.

*1658 I. HISTORICAL BACKGROUND

Although there has been debate among scholars over the authority of the federal judiciary, vis-a-vis Congress, to promulgate procedural rules for the federal courts,[10] the matter was resolved by the Rules Enabling Act of 1934.[11] By virtue of the Act, Congress delegated almost all rulemaking authority to the judiciary, reserving to itself the post facto right to reject, enact, amend, or defer any of the rules. The legislation delegated to the Supreme Court the explicit power to prescribe rules for the district courts governing practice and procedure in civil actions.[12]

In 1935, the Supreme Court appointed a blue ribbon advisory committee to draft the first Federal Rules of Civil Procedure.[13] Over the next two years, the advisory committee widely circulated proposed drafts to the bench and bar for comment, and it made numerous changes to the drafts thanks to extensive assistance from the legal profession.[14] After the Supreme Court adopted the rules andCongress ***1659** did not act to modify them, the civil rules took effect in September 1938.[15]

In 1940, Congress authorized the Supreme Court to promulgate rules governing criminal cases in the district courts.[16] The Supreme Court followed the same procedure it had used to prepare the civil rules. A distinguished advisory committee prepared and circulated draft rule proposals,

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received comments from the bench and bar, and submitted the proposed rules to the Court.[17] The Federal Rules of Criminal Procedure took effect, by operation of law, without congressional action in March 1946.[18]
In 1958, Congress enacted legislation transferring the major respon-sibility for the rulemaking function from the Supreme Court to the Judicial Conference of the United States.[19] The Conference was mandated to "carry on a continuous study of the operation and effect of the [federal] rules" and to recommend appropriate amendments in the rules.[20] The Supreme Court retained its statutory authority to promulgate the rules, but it would henceforth do so by acting on recommendations made by the Judicial Conference.[21]

Following enactment of the 1958 legislation, the Judicial Conference established a Standing Committee on Rules of Practice and Procedure and five advisory committees, to amend or create the civil, criminal, bankruptcy, appellate, and admiralty rules.[22] The Standing Committee's mission was to supervise the rulemaking process for the Conference and to coordinate and approve the work of the advisory committees.[23]

The Admiralty Rules were merged into the Federal Rules of Civil Procedure in 1966.[24] The Federal Rules of Appellate Procedure took effect in 1968,[25] the federal Bankruptcy Rules became law in1973, ***1660** [26] and the rules governing post-conviction collateral remedies for prisoners took effect in 1977.[27] The separate rules for misdemeanor and petty offense cases before magistrate judges were merged into the Federal Rules of Criminal Procedure in 1990.[28]

New proposed rules and amendments to the rules approved by the Supreme Court were accepted by Congress without change for approximately thirty-five years following promulgation of the Federal Rules of Civil Procedure.[29] The picture changed sharply in the 1970s, however, as a result of controversy surrounding the Federal Rules of Evidence.

Chief Justice Earl Warren appointed an advisory committee to draft rules of evidence in 1965, and the Supreme Court transmitted the rules to Congress in 1972.[30] Immediate concern was expressed that the judiciary had exceeded its statutory authority on the grounds that: (1) the Rules Enabling Act, which authorized the Supreme Court to promulgate rules of "practice and procedure," was not broad enough to govern the promulgation of rules of evidence; and (2) the new rules had impermissibly overstepped the boundary between procedure and substance, particularly in attempting to supersede evidentiary privileges established by state law.[31]

Congress deferred the proposed rules indefinitely and held extensive hearings on them. Eventually, the Federal Rules of Evidence were revised by Congress and enacted into law by affirmative legislation.[32] The principal legislative revision was to eliminate the proposed federal evidentiary privileges, thereby continuing to leave the matter to federal common law and applicable state law.[33] Congress also amended the Rules Enabling Act to give the judiciary explicit authority to amend the Federal Rules of Evidence.[34] Itprovided, ***1661** however, that no rule establishing, abolishing, or modifying a privilege has any force unless approved by an act of Congress.[35]

Following enactment of the Federal Rules of Evidence, Congress periodically intervened to

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delay, reject, or modify proposed federal rules.[36] The controversy over the evidence rules also evoked criticism directed at the procedures under which the new rules had been promulgated. Generally, the complaints were that the process was not sufficiently "open" and had not allowed for adequate public input.[37] Accordingly, one member of the House Judiciary Committee suggested that the time was ripe to reexamine the rulemaking process and possibly amend the Rules Enabling Act.[38]

Chief Justice Warren E. Burger, in his 1979 The State of the Federal Judiciary report, took note of the controversy and suggested that it was time to take a "fresh look" at the entire rulemaking process.[39] He requested that the Judicial Conference and the Federal Judicial Center, the judiciary's primary research arm, study the matter in light of the experience under the Rules Enabling Act.[40] In response, the Federal Judicial Center prepared a report to assist the Standing Committee on Rules of Practice and Procedure.[41] The report analyzed the strengths and weaknesses of the process and focused on those aspects of the process that had been singled out for criticisms and change.[42]

The Standing Committee conducted a comprehensive review of rulemaking procedures and instituted a number of changes. The innovations included making the records considered by the rules committees available to the public, documenting all changes made by the committees at the various stages of the process, and conducting public hearings on proposed amendments. The Conference alsocommitted ***1662** its procedures to writing and published them for the benefit of the bench and bar.[43]

In 1983, the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice initiated a comprehensive review of the rulemaking process.[44] The House Subcommittee conducted hearings in both the 98th and 99th Congresses, during which it invited comment on the rulemaking process and engaged in a productive dialogue with the Judicial Conference and the Standing Committee chairman.[45]

Following five years of study, hearings, and dialogue, the House subcommittee marked up a bill to codify formally some of the rulemaking procedures already being used by the Judicial Conference and also to require that all meetings of rules committees be open to the public and that minutes of the meetings be prepared.[46] The legislation ratified the Judicial Conference's authority to appoint a standing committee and appropriate advisory committees.[47]

The House version of the legislation specified "that each rules committee consist of 'a balanced cross section of bench and bar, and trial and appellate judges.'"[48] The judiciary endorsed this provision.[49] As eventually enacted, however, the legislation did not contain the requirement of a balanced cross section, merely providing for the committees to consist of trial judges, appellate judges, and members of the bar.[50]

One of the major objectives of the House sponsors of the legislation was to eliminate the "supersession" clause of the 1934 Act, providing that "all laws in conflict with . . . rules [promulgated under the Act] shall be of no further force or effect after such rules have taken effect."[51] It was asserted that the clause was unnecessary because its original purpose (to

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override various procedural rules scatteredthroughout ***1663** the United States Code) had passed.[52] More importantly, it was argued that the provision was of questionable constitutional validity in light of INS v. Chadha,[53] because the Rules Enabling Act authorizes the repeal of statutes without conforming to the requirements of Article I.[54] The Senate, however, did not accept the House provision,[55] and the Rules Enabling Act amendments were enacted in 1988 without deleting the supersession clause.[56]

The 1988 amendments also attempted to stem the proliferation of local rules of courts and to provide for more public participation in the adoption of local rules. The House subcommittee expressed particular concern that some local court rules were inconsistent with federal rules and statutes.[57] It noted, however, that the Judicial Conference had taken steps to deal with the problems of local rules by: (1) establishing a Local Rules Project to review all local rules, and (2) amending the national rules[58] to require that local court rules be prescribed only after giving appropriate public notice and an opportunity to comment.[59]

Congress codified these local rule requirements in the Rules Enabling Act.[60] It also required each court, other than the Supreme Court, to appoint an advisory committee to study the court's rules of practice and internal operating procedures and make recommendations concerning them.[61] The legislation gave the judicial councils of the circuits authority to modify or abrogate any district court local rules and the Judicial Conference the authority to modify or abrogate the local rules of any court of appeals or other federal court except the Supreme Court.[62]

***1664** Ironically, while Congress attempted to promote national uniformity and limit the proliferation of local court rules in 1988, it took an entirely different approach just two years later in enacting the Civil Justice Reform Act of 1990.[63] That legislation requires each district court to implement its own, individualized civil justice expense and delay reduction plan.[64]

II. CURRENT RULEMAKING PROCEDURES

Although many changes have been made in operating procedures, the rulemaking structure today is essentially the same as that established by the Judicial Conference following the 1958 legislation assigning it the central role in drafting and monitoring the federal rules.[65] The Conference's Standing Committee supervises the rulemaking process and recommends to the Conference such changes to the rules as it believes are necessary to maintain consistency and promote the interest of justice.[66]

The Standing Committee is assisted by five advisory committees, each of which is responsible for one set of federal rules, i.e., civil, criminal, appellate, bankruptcy, or evidence.[67] The advisory committees conduct ongoing studies of the operation of their respective rules, prepare appropriate amendments and new rules, draft explanatory committee notes, conduct hearings, and submit proposed changes through the Standing Committee to the Judicial Conference.

A. Committee Membership

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The committees are composed of federal judges, practicing lawyers, law professors, state chief justices, and representatives of the Department of Justice. Each committee has a Reporter, a law professor withdemonstrated ***1665** expertise in the committee's subject area, who is responsible for coordinating the committee's agenda and drafting appropriate amendments to the rules and explanatory committee notes. The Administrative Office of the United States Courts, through the Office of the Secretary and the Rules Committee Support Office, coordinates the operational aspects of the rules process, provides administrative and legal support to the committees, and maintains the committees' records.

During congressional hearings in the 1970s and 1980s, it was argued that the rulemaking committees were not broadly based and did not adequately reflect the diversity of the legal community.[68] In addition, there has been criticism that there are not enough practicing lawyers on the committees.[69] The present composition of the committees is as follows:

	Committees					
	App.	Bankr.	Civil	Crim.	Evid.	Standing
Attorneys and Professors						
Private Practice Att'ys	3	5	4	3	3	3
Government Att'ys	1	1	1	1	1	1
Law Professors	-	1	1	1	2	2
Federal Judges						
Circuit Judges	4	1	3	1	2	3
District Judges	-	2	3	5	2	5
Other Judges	-	5	-	1	1	-
Other						
State Chief Justice	1	-	1	1	1	1
Total	9	15	13	13	12	15

The advisory committee that drafted the original Federal Rules of Civil Procedure was comprised entirely of lawyers and professors. Judges were added to the committees shortly thereafter and eventuallybecame ***1666** a large majority on each committee. In the past few

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years, however, the number of attorneys vis-a-vis judges on the committees has been increasing. Federal judges presently are a minority on three of the six committees, and they constitute about fifty percent of the membership of the committees as a whole.

The committees' membership is geographically balanced and increasingly represents different perspectives within the legal profession, including members of large and small law firms, government attorneys, "public interest" lawyers, teachers, federal defenders, and criminal defense attorneys. Diversity in membership has increased, but the primary criteria for membership remain professional ability and experience.

Commentators suggested that there be greater turnover in the membership of the committees.[70] This objective has been achieved. At present, members of the rules committees, as with almost all Judicial Conference committees, serve for terms of three years.[71] Only one reappointment is allowed.[72] Thus, a member may serve on a committee for a maximum of six years. Chairs of the committees are normally appointed for just one three-year term.[73] The current chair of the Standing Committee is District Judge Alicemarie H. Stotler of the Central District of California, who was appointed by the Chief Justice in 1993.

Several of the committees invite persons with important and specialized knowledge to assist them as a resource at committee meetings. The appellate and bankruptcy committees, for example, have included a clerk of court in their deliberations for many years. The clerks are extremely helpful in identifying the practical impact of the rules on administrative operations and on case management. In addition, the bankruptcy committee invites the director of the U.S. trustee program to participate in committee meetings.

*1667 B. Publication of Procedures

During the early 1980s, the Judicial Conference was criticized for not having published its rulemaking procedures.[74] In response, in 1983 the Standing Committee developed a written Statement of Pro- cedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure, which incorporated long-standing practices of the rules committees and adopted many suggested procedural improvements.[75] The publication requirement was codified in the 1988 amendments to the Rules Enabling Act.[76]

The rulemaking procedures are now published as an integral part of the public announcement of all proposed rule amendments when they are distributed to the bench and bar. A new easy-to-read pamphlet, The Federal Rules of Practice and Procedure: A Summary for Bench and Bar,[77] is also included with all distributions to the public and is made available to bar groups and others as a means of fostering knowledge about the rulemaking process and stimulating comments on the rules.

C. Soliciting Comments from the Public

A number of people complained that inadequate advance notice had been provided of proposed

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amendments to the rules, thereby depriving the public of a meaningful opportunity to shape the rules before promulgation.[78] In addition, it was said that the mailing list for distribution of proposed amendments was too limited.[79] Accordingly, proposals for amendments in the rules did not reach a sufficiently broad cross section of the legal profession.

Today, extensive efforts are made to reach all segments of the bench and bar, as well as organizations and individuals likely to be interested in or affected by proposed changes to the rules. TheAdministrative ***1668** Office mails all rules proposals to about forty major legal publishing firms, and they are reprinted in advance sheets. They are also mailed to more than 10,000 persons and organizations on its rules mailing list, including --

• federal judges and other federal court officers,

• U.S. Attorneys and other Department of Justice officials,

• other federal government agencies and officials,

• federal defenders,

• state chief justices,

• state attorneys general,

• legal publications,

• law schools,

• bar associations, and

• any lawyer, individual, or organization who requests distribution.

In addition to circulating the full text of all proposed rule amendments and advisory committee notes, the Administrative Office now prepares “user-friendly” pamphlets summarizing the proposed amendments and highlighting the dates of scheduled public hearings and the cut off date for written comments. The pamphlets are distributed together with the full text of the amendments and advisory committee notes. The bench and bar are informed in all publications that further information and materials may be obtained from the Secretary and the Rules Committee Support Office, whose address and telephone number are provided.

To supplement the general mailings, the advisory committees have sought to obtain important input through special mailings to targeted segments of the legal profession and interested organizations. In September 1994, for example, the Advisory Committee on the Rules of Evidence solicited public comment on statutory changes to Federal Rules of Evidence 413, 414, and 415, dealing with evidence of prior, similar acts in cases involving sexual assault or child molestation.[80] The mailing was sent to 900 professors of evidence, 40 women’s rights

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organizations, and 1000 other interested individuals and organizations.

The goal of the committees is to stimulate greater participation by the bar in the rulemaking process by actively encouraging individuals and organizations to comment on specific amendments to the rules and to identify problems in the operation and effect of the rulesgenerally. ***1669** The public comments are extraordinarily helpful and are taken very seriously by the committees. They regularly result in improvements in the amendments, and have led to the withdrawal of proposed amendments.[81]

In addition to increasing the amount, readability, and distribution of printed information on the rules, the advisory committees seek input from the bar outside the context of specific pending amendments. The Advisory Committee on Civil Rules has invited bar organizations to send representatives to attend its meetings, and it has, in appropriate cases, solicited the views of lawyers and professors on preliminary proposals before they were drafted.

The advisory committees have also convened special meetings with lawyers and nonlawyers to assess the potential need for rule changes to certain discrete areas of practice. The civil advisory committee, for example, has invited knowledgeable, experienced lawyers to meet with it to explore the problems of class actions and mass tort litigation. The bankruptcy committee has met with chapter 13 lawyers and trustees to examine the impact of the bankruptcy rules on chapter 13 cases. It has also invited publishers to provide input on the bankruptcy forms.

D. Documentation of Changes

People had voiced complaints that the deliberations of the committees were not adequately documented and that it was difficult to discern the rationale for proposed changes to the rules and to discover the minority views of members.[82] Additionally, some expressed concern that proposed amendments were materially changed after they had been circulated for comment and that no opportunity for further comment had been provided.[83]

Under current procedures, each action taken by a committee with regard to a proposed amendment is documented and included in the public record. The advisory committees are required to submit a separate “Gap” report, summarizing the public comments and explaining any changes made following publication. The Standing Committee submits a report to the Judicial Conference setting forththe ***1670** reasons for all proposed amendments and identifying any changes it made in the recommendations of the advisory committee. After the Conference approves amendments, the Administrative Office transmits to the Supreme Court the text of the proposed amendments, the advisory committee notes, pertinent portions from the advisory committee and Standing Committee reports, and a special report identifying any controversial proposals and explaining the source and nature of the controversy.

If an advisory committee or the Standing Committee makes any “substantial” change in a rule after publication, it normally provides an additional period for public notice and comment. Changes more extensive than the original publication are republished. On the other hand, if a change is similar to, but less extensive than the original publication, it will not generally be

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republished. Similarly, purely technical changes and corrections are not normally published for comment.

E. Public Hearings

During the course of the controversy over adoption of the Federal Rules of Evidence in the early 1970s, there were complaints that the judiciary had not held public hearings on the proposed rules.[84] Written statements were seen as an inadequate substitute for the opportunity of the public to appear in person and engage in a face-to-face dialogue with decisionmakers. Today, public hearings are scheduled on all proposed changes to the rules. Where the subject matter of the changes is controversial, such as the 1992 amendments to Rule 26 of the Federal Rules of Civil Procedure, large numbers of individuals and organizations will ask to testify. On the other hand, many hearings attract few or no requests to testify and are cancelled for lack of public interest.

F. Open Meetings

There had been criticism that the meetings of the Standing Committee and the advisory committees were not open to the public.[85] Until enactment of the 1988 amendments to the Rules Enabling Act, meetings of the Standing Committee and the advisorycommittees ***1671** had generally been closed to the public. The 1988 amendments to the Rules Enabling Act require open meetings, but allow a committee to go into executive session for cause.[86]

All meetings of the rules committees are open to the public and are announced in advance in the Federal Register and leading legal publications. For the most part, though, public attendance is light, except when committees address controversial items.[87]

G. Open Records

There had been complaints that committee agendas and materials relied upon in promulgating rules were not made available to the public.[88] Filed comments were made available only to persons with a “legitimate purpose” in seeing them, and minutes, reporters’ notes, memoranda, and drafts were not made public until 1980.[89]

Today, all records are open and readily available from the Administrative Office, including minutes of committee meetings, suggestions and comments submitted by individuals and organizations, statements of witnesses, transcripts of public hearings, and memoranda prepared by the reporters. In addition, the reports of the Standing Committee to the Judicial Conference and the minutes of Standing Committee and advisory committee meetings are available on-line through computer-assisted legal research.

All records more than two years old -- dating back to 1935 -- have been placed on microfiche and indexed. They are available for review either at the Administrative Office or at a government repository and may be purchased from a commercial service. Planning has begun on developing an electronic docket of all records and expanding the availability of materials electronically.

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H. Length of the Process

The rulemaking process demands exacting and meticulous care in drafting proposed rule changes. It is time-consuming and involves a minimum of seven stages of formal input and review. From beginning to end, it usually takes two to three years for a suggestion to be enacted as a rule, fourteen months of which is directly attributable tothe ***1672** built-in statutory period for review by the Supreme Court and Congress. This seven-step process is discussed below.

1. Initial consideration by the advisory committee

Proposed changes to the rules are initiated in writing by lawyers, judges, clerks of court, law professors, government agencies, or other individuals and organizations. The Secretary acknowledges each suggestion and distributes it to the appropriate advisory committee, whose Reporter analyzes it and makes appropriate recommendations for consideration by the committee. The suggestions and the Reporter's recommendations are placed on the committee's agenda and normally discussed at its next meeting. The Secretary now advises each person making a suggestion of its eventual disposition. When an advisory committee decides that a particular change in the rules has merit, it normally asks its Reporter to prepare a draft amendment to the rules and an explanatory committee note.

2. Publication and public comment

Once an advisory committee has voted initially to pursue a new rule or an amendment to the rules, it must obtain the approval of the Standing Committee, or its chair, to publish the proposal for public comment. In seeking publication, the advisory committee must explain to the Standing Committee the reasons for its proposal, including any minority or separate views.

Once publication is approved, the Secretary arranges for printing and wide distribution of the proposed amendment to the bench and bar, to publishers, and to the general public. The public is normally given six months to comment on the proposal. During the six-month comment period, one or more public hearings on the proposed changes are scheduled.

3. Consideration of the public comments and final approval by the advisory committee

At the end of the public comment period, the Reporter is required to prepare a summary of the written comments received from the public and the testimony presented at the hearings. The advisory committee then takes a fresh look at the proposed rule changes in light of all the written comments and testimony.

If the advisory committee decides to proceed in final form, it submits the proposed rule or amendment to the Standing Committee for approval. Each proposal must be accompanied by a separate report summarizing the comments received from the public andexplaining ***1673** any changes made by the advisory committee following the original publication.[90] The advisory

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committee's report must also include minority views of any members who wish to have their separate views recorded. If, on the other hand, the advisory committee decides to make any substantial change in its proposal, it will republish it for further public comment.

4. Approval by the standing committee

The Standing Committee considers the final recommendations of the advisory committee and may accept, reject, or modify them. If the Standing Committee approves a proposed rule change, it will transmit the change to the Judicial Conference with a recommendation for approval, accompanied by the advisory committee's reports and its own report explaining any changes it made. If the Standing Committee makes a modification that constitutes a substantial change from the recommendation made by the advisory committee, the proposal will normally be returned to the advisory committee with appropriate instructions.

5. Judicial Conference approval

The Judicial Conference normally considers proposed amendments to the rules at its September session each year. If it approves the amendments, they are transmitted to the Supreme Court.

6. Supreme Court approval

The Supreme Court has seven months, from the time the proposed amendments are received from the Conference until May 1, to review them, prescribe them, and transmit them to Congress.[91]

7. Congressional review

Congress has a statutory period of at least seven months to act on any new rules or amendments prescribed by the Supreme Court. If Congress does not enact positive legislation to reject, modify, or defer the rules or amendments, they take effect as a matter of law on December 1.[92]

***1674** The lengthy process may be expedited when there is an urgent need to consider an amendment to the rules. This normally occurs when Congress has requested prompt consideration of a proposal or when legislation has been introduced in Congress to amend the rules directly by statute. The fourteen-month delay for review by the Supreme Court and Congress, however, is established by statute and cannot be reduced by the Judiciary.[93]

I. Supreme Court Review

It has been proposed that the Supreme Court be removed from the rulemaking process and that the rules be promulgated by the Judicial Conference.[94] The original version of the legislation that became the Rules Enabling Act amendments of 1988, for example, would have removed the Supreme Court from the rulemaking process.[95] The provision, however, was withdrawn after

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Chief Justice Burger informed the chairman of the House Judiciary subcommittee that "[t]he Justices conclude that it would be better to keep the ultimate authority of passing on rulemaking within the Court as it is now, but to allow the Court to defer to the decision of the Judicial Conference."[96]

On most occasions, the Court has deferred to the Judicial Conference and has prescribed without change proposed rules amendments submitted by the Judicial Conference.[97] Nevertheless, the Court has accorded serious, independent review to proposed amendments in the1990s, ***1675** deferring a proposed amendment to Rule 4 of the Federal Rules of Civil Procedure in 1991,[98] approving amendments to Rule 11 of the Federal Rules of Civil Procedure and five civil discovery rules[99] over three dissents in 1993,[100] and withholding part of the amendments to Rule 412 of the Federal Rules of Civil Procedure in 1994.[101] The Court's recent orders transmitting rules changes to Congress have specified that: "While the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted."[102]

Although the length of the rulemaking process would be shortened by eliminating the role of the Supreme Court, the Court's enormous prestige clearly contributes to the legitimacy and credibility of the process.

III. CONTINUING RENEWAL EFFORTS

Most of the criticisms of the rulemaking process over the past twenty years have been addressed by procedural improvements made by the Judicial Conference and the 1988 amendments to the Rules Enabling Act. Nevertheless, the rules committees are continuing to examine other important procedural issues that have not been fully resolved.

A. Long Range Planning

The judiciary established a permanent long range planning process designed to identify the mission and future directions of the federal courts. The Proposed Long Range Plan for the Federal Courts (Plan) is the first major product of this planning process. With regard to the federal rules, the Plan encourages significant participation by the barin ***1676** the rulemaking process, exclusive adherence to the Rules Enabling Act process, and greater uniformity in federal practice and procedure.[103]

As part of the long range planning process, the Standing Committee on Rules of Practice and Procedure has appointed a long range planning subcommittee to conduct a study of the rulemaking process and make recommendations for procedural improvements. In addition, the advisory committees have initiated their own long range planning efforts. The Advisory Committee on Bankruptcy Rules, for example, has a standing subcommittee on automation that has been active in evaluating the impact of technology and in considering changes to the bankruptcy rules to take advantage of the benefits of automation.[104]

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Likewise, the bankruptcy, appellate, and civil advisory committees have proposed and circulated for public comment proposed rule amendments that would allow individual courts to permit attorneys to file, sign, and verify documents with the court electronically.[105] If approved through the Rules Enabling Act process, the amendments would take effect on December 1, 1996.[106]

B. Greater Participation by the Bar

Despite substantial efforts to persuade attorneys to take the time to suggest improvements in the rules and comment on proposed amendments, the bar is considerably less active than the committees would like. A handful of bar organizations and individuals respond regularly to requests for public comments by providing comprehensive, balanced analyses of proposed rules amendments. But most judges, lawyers, and professors simply do not respond to requests for comments, and those who do, generally oppose specific amendmentson ***1677** an ad hoc basis.[107] Accordingly, the public responses tend to be moderate in number and not necessarily representative of the bench and bar as a whole.

The Proposed Long Range Plan for the Federal Courts encourages an active partnership with the bar in the rulemaking process, both through membership of practicing attorneys on the rulemaking committees and greater participation by attorneys and bar associations in commenting on proposed amendments to the rules.[108] The Plan asks the rules committees to continue their outreach efforts in stimulating lawyers and bar associations to provide practical advice to the committees.[109]

As one of his many initiatives to improve judicial administration and service, Administrative Office Director L. Ralph Mecham established a Rules Committee Support Office in 1992 to provide legal and operational support to the Secretary and the rules committees and to provide a higher level of information services to the bar. To stimulate additional responses on rules issues by bar associations, individual lawyers, and academia, the mailing list for the rules is being expanded and rejuvenated. Every six months an additional 200 attorneys and 100 law professors selected at random will be added until an additional 2500 names are added. If no comments are received from addressees for three years, their names will be removed from the list and replaced with others.

The Standing Committee has also requested that the bar associations of each of the states designate an attorney as a point of contact to solicit and coordinate bar comments on proposed amendments. It is anticipated that the bar associations will encourage their members to discuss the rules and provide thoughtful and practicalinput ***1678** to the advisory committees. It is also hoped that representatives of the bar will attend committee meetings and hearings.

In an effort to assess the practical operation of the rules, the Advisory Committee on Civil Rules scheduled two conferences in 1995 with members of the bar and academia to discuss class actions and the effectiveness of Rule 23 of the Federal Rules of Civil Procedure. In addition, members of the advisory committee will participate with attorneys and law professors in a conference to consider the strengths and weaknesses of the civil rules generally.

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C. Frequency of Rule Changes

The 1958 statute assigning rulemaking responsibilities to the Judicial Conference requires the Conference to conduct a "continuous study of the operation and effect of the general rules of practice and procedure."[110] Contemporary commentators suggested that the rules committees should have ample staff, should engage in grassroots surveys, and should conduct hearings, regional meetings, and discussions with the bar to monitor the rules in practice.[111] More recently, Justice Scalia stated that it is essential to have constant reform of the federal rules to correct emerging problems.[112]

The requirement to conduct a continuous study of the operation and effect of the rules, however, does not compel the conclusion that amendments should be frequent. Nor does it imply that all perceived problems with the rules and all conflicts in case law should be rectified. To the contrary, one of the most persistent criticisms of the rules process is that there are simply too many amendments.[113]

Some amendments have been criticized as mere "tinkering" with the rules.[114] And it has been suggested that there should be nochange ***1679** in a rule "unless there is substantial need for the change."[115] One critic even has argued for a moratorium on procedural law reform.[116]

Too many minor changes to the rules can lead to uncertainty and confusion in the bench and bar.[117] Constant changes, moreover, tend to undermine the stability and prestige of the rules as a whole. The challenge, therefore, is to weigh the benefits of a proposed improvement in the rules against the inherent cost of introducing change and possible uncertainty.

Some rule amendments, even though minor, are necessary to implement recent legislation,[118] to conform to modern language usage,[119] to correct improper statutory cross-references,[120] and to coordinate with pending congressional action.[121] As a general rule, however, there is now a reluctance to make changes to the rules unless they can be shown to be necessary to correct a serious problem in practice. Although many suggestions for improvements in the rules are received from the bench and bar to clarify or reconcile case law among the circuits, the advisory committees have generally opted to allow case law interpreting the rules take its course.[122]

***1680** In September 1994, for example, the Advisory Committee on the Rules of Evidence published its tentative decisions not to amend twenty-five evidence rules.[123] The committee announced its philosophy that an amendment to a rule should not be undertaken absent a showing either that it is not working well in practice or that it embodies an erroneous policy decision.[124] The advisory committee pointed out that any amendment in the rules of evidence "will create new uncertainties as to interpretation and unexpected problems in practical application."[125]

To avoid the appearance of piecemeal changes, the advisory committees have begun to use the device of deferring and "batching" miscellaneous rule changes into a single package of amendments. One possible option for the advisory committees to consider in the future is to prescribe a set schedule for submitting non-urgent rules changes -- perhaps every three to five years. This approach, although appealing, is complicated by unpredictable congressional activity

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that increasingly tends to interrupt any schedules or planning efforts. The 103d Congress, for example, passed a comprehensive bankruptcy reform law that will require rules changes,[126] and the 104th Congress, as part of the Republican "Contract with America," is considering a number of changes both in civil litigation and criminal law.[127]

It has also been recommended widely that rules changes be predicated on a sounder empirical basis.[128] To that end, the advisory committees have been increasing their requests for assistance from the Federal Judicial Center to conduct research on litigation practices and the impact of the rules. The Federal Judicial Center conducted a major study of Rule 11 of the Federal Rules of Civil Procedure before the Advisory Committee on Civil Rules proceeded with the 1993 amendments to that rule.[129] The civil advisorycommittee ***1681** also asked the Federal Judicial Center to conduct studies on the use and operation of protective orders under Rule 26(c), offers of settlement under Rule 68, consensual settlement of class actions under Rule 23, and the effect of mandatory disclosure under the 1993 amendments to Rule 26. The Advisory Committee on Criminal Rules considered the results of the Federal Judicial Center's study on cameras in the courtroom before approving amendments to Rule 53.[130]

D. Content, Organization, and Style of the Rules

Simplicity and uniformity were central goals of the drafters of the federal rules.[131] There are complaints, however, that the rules are no longer simple and uniform, but have become cumbersome, lengthy, and unpredictable.[132]

Commentators suggest that fundamental changes are needed and that it is time to take a fresh look at the rules.[133] It has also been suggested that it is time to reconsider the trans-substantive character of the rules, so that different categories of cases could be governed by different rules.[134] Obviously, such sweeping changes would take considerable time to effectuate and would require major input from the bar and academia, empirical research, substantial committee deliberations, and public hearings. The civil and bankruptcy advisory committees have, as part of their long range planning efforts, begunto ***1682** think about whether changes of such magnitude will eventually be necessary or desirable.

Apart from changes to substance, there are opportunities to improve the style, consistency, and readability of the rules. Under the leadership of Judge Robert E. Keeton, former chairman of the Standing Committee, efforts have been initiated to redraft the body of rules in clear and concise English -- without substantive change -- following the best conventions of modern statutory revision and the advice of legal writing teachers. There are no present plans to adopt the revised version of the rules, but at an appropriate point in the future -- perhaps integrated with a major revision of the rules -- the "re-styled" language could be substituted for the present language.

The Standing Committee is now assisted by a legal writing consultant and a style subcommittee, and it will publish a guide to clear and simple rule drafting.[135] The consultant works with the advisory committees and their reporters to promote clear and consistent language in proposed rules amendments.

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As part of its long range planning efforts, the committees could also consider eventual integration of all five sets of federal rules into one. The result, for example, might be the consolidation of similar provisions that now appear separately in each of the rules, such as the provisions dealing with computation of time,[136] courts' and clerks' offices,[137] and local rules.[138]

E. The Judiciary and Congress

The success of the rulemaking process relies on a delicate balance of authority and continuing cooperation between the judicial and legislative branches of the government. The Rules Enabling Act of 1934, as reaffirmed by Congress in 1988, establishes a statutory structure under which the judiciary prescribes rules of procedure, practice, and evidence for the federal courts, after giving the bench, bar, and public a generous opportunity for input. Congress then retains the ultimate authority to accept, reject, amend, or defer proposed amendments to the rules. The process works exceedingly well when the procedures by which rules are crafted are credible and when mutual respect prevails between the two branches.

***1683** The credibility of the rulemaking process was seriously questioned during the 1970s' controversy over the Federal Rules of Evidence. Complaints were made that proceedings before the rules committees had been closed and that changes had been made in the proposals without public notice or input. Complaints about the procedures, combined with concerns that the rulemakers had exceeded their authority and abridged substantive rights, led opponents to petition Congress to defer or reject the rules.[139]

The credibility of rulemaking procedures has been enhanced by its current openness and accessibility.[140] When proposed changes to the rules are now submitted to Congress, an extensive public record has been developed to support the changes, including careful consideration by expert advisory committees, public comments, public hearings, and four levels of review. Members of Congress can be assured that the changes received thorough consideration and that all interested parties had an opportunity to comment, both in writing and at hearings. By comparison, it is extremely rare for any product of the legislative process to receive such objective consideration, public input, and expert review.

Congress has a legitimate interest in federal rule amendments because even procedurally neutral rules may affect substantive rights, may give a practical advantage to one type of litigant over another, and may require adjustment of comfortable habits and practices.[141] Persons and organizations displeased with proposed amendments, accordingly, are likely to exercise their political rights by encouraging Congress to reject or modify specific amendments. Congress, of course, is free under the Rules Enabling Act to make its own independent judgment on the merits of any proposal, but it should -- and normally does -- give considerable deference to rules amendments prescribed by the Supreme Court.[142]

***1684** As the Proposed Long Range Plan for the Federal Courts points out, however, "[i]t is troubling . . . that bills are introduced in the Congress to amend federal rules directly by statute, bypassing the orderly and objective process established by the Rules Enabling Act."[143] In the 103d Congress, for example, at least thirteen provisions were introduced to amend the federal

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rules without following the prescribed statutory procedures.

Most of the provisions dealt with matters of considerable political interest, such as victims' rights,[144] evidence in sexual assault and child molestation cases,[145] and other criminal law issues.[146] For some controversial social policy issues, it is inevitable -- or desirable -- to have policy established by the legislature.[147] By avoiding the Rules Enabling Act process entirely, however, Congress loses the benefit of the extensive record developed by the rules committees, including the public comments and professional review by judges, lawyers, and law professors. Moreover, recent experience shows that some legislation amending the rules may be enacted without any hearings at all, without public input, and without thoughtful review by the bench and bar.

Two examples from the 103d Congress illustrate contrasting ways in which Congress has dealt with controversial statutory amendments to the rules. In the Violent Crime Control and Law Enforcement Actof ***1685** 1994,[148] Federal Rule of Evidence 412 was completely revised and new Rules 413, 414, and 415 were added. The former received substantial public input and careful review by bench and bar. The latter did not.

The proposed revision of Rule 412, commonly known as the "rape shield" rule, was first included in comprehensive criminal legislation introduced in the Senate.[149] It was designed to extend to all criminal cases and all civil litigation the rule's long-standing prohibition against admitting evidence of a victim's past sexual behavior in a case where the defendant has been accused of a crime of sexual abuse. After the Senate bill was introduced, the judiciary committees of both the House and the Senate asked the Judicial Conference to consider the merits of the proposed rule on an expedited basis.[150]

The Advisory Committee on the Rules of Evidence drafted a substantially improved version of the Senate rule, circulated it for public comment, and conducted a public hearing.[151] The carefully crafted, revised rule met with overwhelming public approval,[152] including approval from women's rights groups,[153] and was subsequently adopted by the advisory committee, the Standing Committee, and the Judicial Conference.[154] As a result, the House decided not to include a revision of Rule 412 in its version of the crime legislation and chose, instead, to let the rule drafted by the advisory committee take effect in accordance with the normal operation of the Rules Enabling Act.[155]

In contrast to the cooperation between Congress and the judiciary in Rule 412, new Federal Rules of Evidence 413, 414, and 415 were added as floor amendments to the Senate crime control bill withoutpublic ***1686** comment or hearings and without communication with the rules committees.[156] The new rules will admit evidence of a defendant's past similar acts in a criminal or civil case involving a sexual assault or child molestation offense "for its bearing on any matter to which it is relevant."[157] The rules contain no reference to Federal Rule of Evidence 403, which allows a court to exclude evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading of the jury, or needless delay. Neither do they reference the hearsay provisions of Article VIII of the Federal Rules of Evidence. Congressional conferees added a provision to the Senate version of the bill specifying

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that the new rules would take effect 150 days after enactment, unless the Judicial Conference within that period recommends against them or submits alternate recommendations, in which case the effective date of the rules will be delayed for an additional 150 days.[158]

As a practical matter, the only restraints on Congress are self-imposed. They include the existence of the Rules Enabling Act, which has codified a process of openness and inter-branch coordination; the ordinary respect that one branch of government owes the others; and the quality of the work product of the rulemaking process. Obviously, political and social policy imperatives may tempt legislators to bypass the objective and orderly process of the rulemakers in favor of quick and popular results. As the recent experience with Rule 412 shows, however, legislative objectives can be achieved -- with a substantially superior product and in a reasonabletime ***1687** -- through adherence at least to the spirit of the Rules Enabling Act.

On occasion, members of Congress work cooperatively with the rules committees, deferring legislative proposals in order to give the rules committees the opportunity to consider them as part of the rulemaking process.[159] Congress also has the option of requesting that the Judicial Conference study a particular subject and report its findings and recommendations. The 1994 crime control legislation, for example, asked the Judicial Conference to evaluate and report on whether the Federal Rules of Evidence should be amended to guarantee that the confidentiality of communications between sexual assault victims and their therapists or counselors will be adequately protected in federal court proceedings.[160]

Recent experience, thus, suggests that a de facto dual track pro-cedure might emerge to deal with rules amendments. On the one hand, the great majority of rules changes would continue to be handled through the Rules Enabling Act procedure. On the other hand, proposed changes with political implications might be referred by the judiciary committees of Congress to the rules committees of the Judicial Conference for consideration on an expedited basis.

F. National Uniformity and Local Rules

Local court rules have been criticized by Congress and commentators as a threat to the goal of uniform, simple rules of federal practiceand ***1688** a serious trap for lawyers.[161] Criticism has also been directed at the sheer number of local rules, which makes it difficult for lawyers to practice effectively in more than one jurisdiction.[162] It has been argued, too, that some local rules are inconsistent with the national rules.[163]

The 1988 amendments to the Rules Enabling Act were designed in part to restrict the use of local rules. They set forth procedural requirements for courts to follow in adopting rules and provide an oversight mechanism to ensure their consistency with each other and with national rules.[164] Nevertheless, there are more than 5000 local rules regulating civil procedure alone, not including standing orders and other local procedural requirements.[165]

The Standing Committee established a Local Rules Project in 1985 to review the local rules of the district courts and the rules of the courts of appeals.[166] The project's analysis of the rules and internal operating procedures of the courts of appeals led the Advisory Committee on Appellate

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Rules to propose various amendments to the Federal Rules of Appellate Procedure that substitute a single, national rule for local variations.[167] The Local Rules Project has also informed the district courts of problems with their local rules, including inconsistencies with national rules or statutes, and it has devised a uniform numbering system for local civil rules keyed to the numbering of the national rules. Through voluntary cooperation with the courts and the circuit judicial councils, progress is being made toward reducing the number of local rules and improving their content.[168]

Federal rule amendments are pending in the Supreme Court that would require local court rules to conform to any uniform numberingsystem ***1689** that the Judicial Conference may prescribe, thereby making it easier for an increasingly national bar to locate a local rule that applies to a particular procedural issue.[169] The amendments would also provide that no local rule imposing a requirement of form may be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.[170] Finally, the rules would prohibit a court from imposing sanctions or other disadvantages for noncompliance with any requirement not set forth in federal law, federal rule, or local court rule, unless the alleged violator has been furnished with actual notice of the requirement in the particular case.[171]

The Civil Justice Reform Act of 1990 has been seen as an even greater threat to uniformity of federal practice.[172] The Act encourages each court to experiment and innovate procedurally, taking into account the assessments and recommendations of an advisory group of local lawyers and litigants.[173] It requires the courts to consider six case management "principles and guidelines" prescribed in the statute and authorizes them to include in their plan an additional five "techniques" of litigation management and cost and delay reduction.[174] The principles, guidelines, and techniques set forth in the Act, if adopted by a district court, have been claimed to supersede certain provisions of the Federal Rules of Civil Procedure.[175]

Some commentators argue that the Civil Justice Reform Act has resulted in much greater "balkanization"[176] of civil practice and procedure among the ninety-four district courts. In addition, the December 1, 1992 amendments to Federal Rule of Civil Procedure 26,dealing ***1690** with pretrial disclosure and discovery, authorize the district courts individually to "opt out" of its provisions, thereby adding further variations to practice among the district courts.[177]

The Civil Justice Reform Act, however, contemplates a possible return to greater national uniformity following a review of the results of its mandated pilot programs. The Judicial Conference will consider the results of a comprehensive empirical study assessing the extent to which costs and delays will have been reduced as a result of the Act's pilot programs and experimentation.[178] The Conference must submit a report to Congress by December 31, 1996, recommending whether the Act's principles and guidelines should be made mandatory and incorporated in the federal rules. The Conference is further required to "initiate" appropriate changes to the federal rules to implement any changes recommended.[179]

Can greater national uniformity in federal practice and procedure be achieved? Probably so -- but not before the period of experimentation and evaluation required by the Civil Justice Reform Act has been concluded. The Proposed Long Range Plan for the Federal Courts recognizes that some

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local rules are appropriate to account for differing local conditions and to allow experimentation with new procedures.[180] It declares, however, that the long term emphasis of the courts should be on promoting nationally uniform rules of practice and procedure.[181] To this end, the Plan calls for the Judicial Conference and the circuit judicial councils to exercise their statutory authority[182] to review local rules and reduce the numberof ***1691** local rules and standing orders.[183]

CONCLUSION

The organizational structure and the procedural approach of the rulemaking process are largely accepted as fundamentally sound by Congress, the bench, and the bar. Nevertheless, specific procedural aspects of the process have been criticized in recent years. In response, the process has been reexamined and periodically renewed as part of: (1) the Judicial Conference's "fresh look" at the process in the 1980s; (2) the five-year review of rulemaking by Congress that culminated in the 1988 amendments to the Rules Enabling Act; and (3) the judiciary's ongoing long range planning efforts.

Enormous progress has been made toward opening the rulemaking process and to stimulating participation by the bench, bar, academia, and the public. All activities of the rules committees are documented and readily accessible. Several important opportunities and challenges, however, remain to be addressed by the rules committees. The most common complaints are that the rules are not as simple, well written, and predictable as they once were and that federal practice is far less uniform than it should be. Moreover, Congress on occasion does not adhere to the time-tested and orderly process established by the Rules Enabling Act.

The newly approved Long Range Plan for the Federal Courts recognizes these problems and calls upon the judiciary to place greater emphasis on adopting rules that promote simplicity in procedure, fairness in administration, and the just, speedy, and inexpensive determination of litigation. It also calls for adherence to the Rules Enabling Act process, greater uniformity in federal practice, fewer local rules, and greater participation by the bar in the rulemaking process. The recommendations of the Plan, together with ongoing scrutiny by the bench, bar, academia, Congress, and the public, will ensure the continuing renewal of the federal rulemaking process.

Footnotes

[a] J.D., Harvard Law School; A.B., Columbia University. Assistant Director for Judges Programs, Administrative Office of the United States Courts and Secretary to the Judicial Conference Standing Committee on Rules of Practice and Procedure. The views expressed in this Article are the author's own.

[1] 28 U.S.C. s 331 (1988).

[2] Rules Enabling Act: Hearings on H.R. 4144 Before the Subcomm. on Courts, Civil

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Liberties and the Administration of Justice of the House Comm. on the Judiciary, 98th Cong., 1st & 2d Sess. 12 (1983 & 1984) [hereinafter 1983-84 Hearings] (statement of Judge Edward Thaxter Gignoux, Judicial Conference of the United States). The success of the Federal Rules of Civil Procedure has been described as "quite phenomenal." Charles A. Wright, Law of Federal Courts s 62, at 429 (5th ed. 1994); see also Geoffrey C. Hazard, Jr., Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure, 137 U. Pa. L. Rev. 2237, 2237 (1989) (describing Rules as "a major triumph of law reform"); Jack B. Weinstein, After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?, 137 U. Pa. L. Rev. 1901, 1905-07 (1989) (describing Rules as a "great success" and cautioning against utilizing Rules to erect barriers to courts).

3 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure , s 1005 (2d ed. 1987). See, e.g., H.R. Rep. No. 889, 100th Cong., 2d Sess. 27 (1988); Howard Lesnick, The Federal Rule-Making Process: A Time for Re-examination, 61 A.B.A. J. 579, 579 (1975).

4 The term "federal rules" is used to collectively describe the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Bankruptcy Procedure, the Federal Rules of Appellate Procedure, the Federal Rules of Evidence, the Rules Governing Section 2254 Cases in the United States District Courts, and the Rules Governing Proceedings in the United States District Courts Under Section 2255 of Title 28, United States Code.

5 Committee on Long Range Planning, Judicial Conference of the U.S., Proposed Long Range Plan for the Federal Courts recommendation 30, at 54 (2d prtg. 1995) [hereinafter 1995 Proposed Long Range Plan]; see also infra note 7.

6 1995 Proposed Long Range Plan , supra note 5, at 54; see also infra note 7.

7 60 Fed. Reg. 30,317 (1995). The Judicial Conference's Long Range Planning Committee prepared the Plan following consultation with the other Conference committees, wide distribution within and outside the judiciary, and public comments and hearings.

8 See, e.g., Winifred R. Brown, Federal Judicial Ctr., Federal Rulemaking: Problems and Possibilities (1981); Warren E. Burger, The State of the Federal Judiciary, 1979, 65 A.B.A. J. 358, 360 (1979); Symposium: The Rule-Making Function and the Judicial Conference of the United States, 21 F.R.D. 117 (1957) [hereinafter Symposium].

9 See 1995 Proposed Long Range Plan , supra note 5, at 54.

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[10] See, e.g., Wright & Miller , supra note 3, s 1001; see generally Joseph R. Biden, Jr., Congress and the Courts: Our Mutual Obligation, 46 Stan. L. Rev. 1285 (1994); Stephen B. Burbank, The Rules Enabling Act of 1934, 130 U. Pa. L. Rev. 1015 (1982); A. Leo Levin & Anthony G. Amsterdam, Legislative Control over Judicial Rule-Making: A Problem in Constitutional Revision, 107 U. Pa. L. Rev. 291 (1958); Linda S. Mullenix, The Counter-Reformation in Procedural Justice, 77 Minn. L. Rev. 375 (1992) [hereinafter Mullenix, Counter-Reformation]; Linda S. Mullenix, Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers, 77 Minn. L. Rev. 1283 (1993); Roscoe Pound, The Rule-Making Power of the Courts, 12 A.B.A. J. 599 (1926); John H. Wigmore, All Legislative Rules for Judiciary Procedure Are Void Constitutionally, 23 Ill. L. Rev. 276 (1928).

The Supreme Court recognizes the ultimate power of Congress to regulate the practice and procedure of federal courts and has declared that Congress may exercise that power by delegating it to the judiciary to make rules not inconsistent with the Constitution or federal statutes. See Hanna v. Plumer, 380 U.S. 460, 472-74 (1965); Sibbach v. Wilson & Co., 312 U.S. 1, 9-10 (1941).

Judge Weinstein points out that rulemaking falls within an area where activities of the legislative and judicial branches merge and that historically there has been a “practical accommodation” between the two branches. Jack B. Weinstein, Reform of Federal Court Rulemaking Procedures, 76 Colum. L. Rev. 905, 916, 922 (1976). Judge Weinstein’s law review article is an abbreviated version of his book. See Jack B. Weinstein, Reform of Court Rule-Making Procedures (1977).

[11] Act of June 19, 1934, ch. 651, 48 Stat. 1064 (codified as amended at 28 U.S.C. ss 331,2071-77 (1988 & Supp. V 1993)); see also Hanna, 380 U.S. at 472-74.

[12] 28 U.S.C. s 331 (1988 & Supp. V 1993). While the 1934 Act applied explicitly only to civil actions at law, the Court had long-standing rulemaking authority over equity and admiralty practice. See, e.g., Act of May 8, 1792, ch. XXXVI, 1 Stat. 275.

[13] Order of June 3, 1935, Appointment of Committee to Draft Unified System of Equity and Law Rules, 295 U.S. 774, 774-75 (1935) (ordering committee “to prepare and submit to the Court a draft of a unified system of rules”).

[14] Final Report of the Advisory Committee on Rules for Civil Procedure , at V (Nov. 4, 1937).

[15] Fed. R. Civ. P. 86(a).

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[16] Act of June 29, 1940, ch. 445, 54 Stat. 688. This Act was superseded by the Rules Enabling Act amendments of 1988 and is now incorporated in 28 U.S.C. s 2072(a) (1988). The Court had been given authority in 1933 to prescribe rules for criminal proceedings after verdict. Act of Feb. 24, 1933, ch. 119, 47 Stat. 904.

[17] Report of the Advisory Committee on Federal Rules of Criminal Procedure (1944).

[18] Fed. R. Crim. P. 59.

[19] Act of July 11, 1958, Pub. L. No. 85-513, 72 Stat. 356 (codified at 28 U.S.C. s 331 (1988 & Supp. V 1993)).

[20] Id. s 331.

[21] 28 U.S.C. ss 2072, 2073.

[22] Judicial Conference of the U.S. , Reports of the Proceedings of the Judicial Conference of the United States 6-7 (1958).

[23] Id.; see also Albert B. Maris, Federal Procedural Rule-Making: The Program of the Judicial Conference, 47 A.B.A. J. 772, 772 (1961).

[24] 383 U.S. 1029 (1966).

[25] 389 U.S. 1063 (1968).

[26] 411 U.S. 989 (1973). Statutory authority to promulgate bankruptcy rules was provided in 1964. Act of Oct. 3, 1964, Pub. L. No. 88-623, s 1, 78 Stat. 1001 (codified as amended at 28 U.S.C. s 2075 (1988)).

[27] Act of Sept. 28, 1976, Pub. L. No. 94-426, s 1, 90 Stat. 1334 (codified as amended at 28 U.S.C. s 2254, 2255 (1988 & Supp. V 1993)).

[28] Fed. R. Crim. P. 58. This rule was added in 1990 and essentially restated the prior misdemeanor rules.

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[29] Between 1937 and 1972, the Supreme Court transmitted new rules or rules amendments to Congress on 14 occasions.

[30] Order of Nov. 20, 1972, 56 F.R.D. 183, 184 (S. Ct. 1972).

[31] See H.R. Rep. No. 422, 99th Cong., 1st Sess., 12-14, 20-21 (1985); Dissent of Justice Douglas to submission of the proposed Federal Rules of Evidence, 409 U.S. 1132 (1973); see also Charles A. Wright, Book Review of Jack B. Weinstein, Reform of Court Rule-Making Procedures, 9 St. Mary's L.J. 652, 653-54 (1978) [hereinafter Wright, Book Review].

[32] Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (codified at 40 U.S.C. s 472 (1988)).

[33] See Fed. R. Evid. 501.

[34] 28 U.S.C. s 2074(b) (1988).

[35] Id.

[36] A list of the instances of congressional intervention is set forth in H.R. Rep. No. 422, supra note 31, at 8-9. Most recently, in 1994, Congress took the unprecedented step of enacting revised Federal Rule of Evidence 412 that had been approved by the Judicial Conference, enacting portions of the Conference proposal that had been withheld by the Supreme Court. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, s 40141, 108 Stat. 1796, 1918 (codified in scattered sections of 42 U.S.C.).

[37] See Weinstein , supra note 10, at 316-17; Lesnick, supra note 3, at 580-81.

[38] William L. Hungate, Changes in the Federal Rules of Criminal Procedure, 61 A.B.A. J . 1203, 1207 (1975).

[39] Burger, supra note 8, at 360.

[40] Id. The functions of the Federal Judicial Center are set forth generally at 28 U.S.C. s 620.

[41] See Brown , supra note 8.

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[42] See Brown , supra note 8.

[43] See Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure, 98 F.R.D. 337, 347 (1983).

[44] See, e.g., H.R. Rep. No. 889, 100th Cong., 2d Sess. 27 (1988) (describing subcommittee's review of rulemaking process from 1983 to 1988).

[45] See 1983-84 Hearings, supra note 2; Rules Enabling Act of 1985: Hearings on H.R. 2633 and H.R. 3550 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 99th Cong., 1st Sess. (1985) [hereinafter 1985 Hearings].

[46] See H.R. Rep. No. 889, supra note 44, at 3-4. Congress eventually enacted the bill. See Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642, 4649 (1988) (codified as amended at 28 U.S.C. ss 2071-2075 (1988 & Supp. V 1993)).

[47] 28 U.S.C. s 2073(a)(2)(b); see also H.R. Rep. No. 889, supra note 44, at 3.

[48] See H.R. Rep. No. 889, supra note 44, at 3.

[49] 1985 Hearings, supra note 45, at 248 (statement of Judge Edward Thaxter Gignoux).

[50] See 28 U.S.C. s 2073(a)(2).

[51] Id. s 2072(b).

[52] See H.R. Rep. No. 889, supra note 44, at 28.

[53] 462 U.S. 919 (1983).

[54] See H.R. Rep. No. 889, supra note 44, at 28; see also H.R. Rep. No. 422, supra note 31, at 16-17. In Chadha, the Court held that the one-house veto provision of the Immigration and Naturalization Act, under which either the House or the Senate could by resolution invalidate an executive branch decision to allow a deportable alien to remain in the United

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States, was unconstitutional because Article I of the Constitution requires all legislation to be passed by both the House and the Senate and either signed by the President or repassed by both the House and the Senate over the President's veto. See INS v. Chadha, 462 U.S. 919, 956-59 (1983).

55 See H.R. Rep. No. 889, supra note 44, at 3.

56 Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988) (codified as amended at 28 U.S.C. ss 2071-2075 (1988 & Supp. V 1993)).

57 See H.R. Rep. No. 422, supra note 31, at 14-15, 17; see also Daniel R. Coquillette et al., The Role of Local Rules, 75 A.B.A. J. 62, 64-65 (1989); Stephen N. Subrin, Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns, 137 U. Pa. L. Rev. 1999, 2018-26 (1989).

58 Fed. R. Civ. P. 83; Fed. R. Crim. P. 57 .

59 See H.R. Rep. No. 889, supra note 44, at 28-29.

60 28 U.S.C. s 2071(b) (1988).

61 Id. s 2077(b) (Supp. V 1993).

62 Id. ss 331, 2071(c) (1988).

63 Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified at 28 U.S.C. ss 471-482 (Supp. V 1993)). The impetus for the Rules Enabling Act amendments of 1988 came from the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice. See supra notes 44-56 and accompanying text. The driving force behind the Civil Justice Reform Act was the Senate Judiciary Committee and its chairman, Senator Joseph R. Biden, Jr. See, e.g., 136 Cong. Rec. S. 407, S. 414 (daily ed. Jan. 25, 1990) (statement of Sen. Biden).

64 28 U.S.C. ss 471, 472 (Supp. V 1993); see Part III, infra; see also Carl Tobias, Improving the 1988 and 1990 Judicial Improvements Acts, 46 Stan. L. Rev. 1589 (1994) (discussing incon-sistencies between 1988 and 1990 statutes).

65 The 1988 amendments to the Rules Enabling Act codified the committee structure

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established by the Conference in 1958. See 28 U.S.C. s 2073(a), (b) (1988).

66 Id. s 331.

67 The Advisory Committee on the Rules of Evidence was discharged in 1975 and reestablished in 1993. Judicial Conference of the U.S., Reports of the Proceedings of the Judicial Conference of the United States 80 (1992) [[[hereinafter 1992 Judicial Conference Reports].

68 See H.R. Rep. No. 422, supra note 31, at 24; American Bar Association, Policy on the Rules Enabling Act, reprinted in 1983-84 Hearings, supra note 2, at 46, 51; Lesnick, supra note 3, at 581.

69 The American Bar Association, for example, has proposed that “practicing lawyers” comprise a majority of the rules committees. Resolution of the ABA House of Delegates, Aug. 9-10, 1994.

70 See, e.g., 1985 Hearings, supra note 45, at 64 (statement of the American Bar Association).

71 Judicial Conference of the U.S., Reports of Proceedings of the Judicial Conference of the United States 60 (1987) [hereinafter 1987 Judicial Conference Reports] (establishing current membership policies). It has been suggested that the terms of office of committee chairs and members, once viewed as too long in the rules context, now might not be long enough. See 1995 Proposed Long Range Plan , supra note 5, recommendation 46, at 73.

72 See 1987 Judicial Conference Reports , supra note 71, at 60.

73 See 1987 Judicial Conference Reports , supra note 71, at 60.

74 See Lesnick, supra note 3, at 580; see also 1985 Hearings, supra note 45, at 57, 70-71 (statement of Professor Paul F. Rothstein, American Bar Association); 1983-84 Hearings, supra note 2, at 87 (statement of Rep. Kastenmeier); id. at 43-44 (statement of James F. Holderman, American Bar Association).

75 See Rules of Civil Procedure, Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure, 98 F.R.D. 337, 347 (1983). The statement, however, did not include a requirement of open committee meetings.

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[76] See 28 U.S.C. s 2073(a)(1) (1988).

[77] Administrative Office of the U.S. Courts, The Federal Rules of Practice and Procedure: A Summary for Bench and Bar (1993).

[78] See 1983-84 Hearings, supra note 2, at 46 (statement of the American Bar Association's Criminal Justice Section); id. at 36 (statement of Alan B. Morrison, Director, Public Citizen, Litigation Group).

[79] See 1985 Hearings, supra note 45, at 47 (statement of Professor Paul F. Rothstein, American Bar Association).

[80] Congress enacted the new evidence rules as part of the Violent Crime Control and Law Enforcement Act of 1994, supra note 36, s 320935.

[81] For example, the Advisory Committee on Criminal Rules deferred action on proposed amendments to Criminal Rules 10 and 43 in response to generally negative written comments and public testimony. The proposed amendments would have permitted the use of video conferencing in arraignments and in other pretrial sessions when the accused was not present in the courtroom. H.R. Doc. No. 65, 104th Cong., 1st Sess. 15-16 (1995).

[82] See Lesnick, supra note 3, at 580.

[83] See Wright, supra note 31, at 656.

[84] See, e.g., 1983-84 Hearings, supra note 2, at 44 (statement of James F. Holderman, American Bar Association); Lesnick, supra note 3, at 580.

[85] See, e.g., 1983-84 Hearings, supra note 2, at 34-36 (statement of Alan B. Morrison, Director, Public Citizen, Litigation Group) (describing process as "secretive"); id. at 125-28 (statement of Richard M. Schmidt, Jr., General Counsel, American Society of Newspaper Editors).

[86] 28 U.S.C. s 2073(c) (1988). The authority has been exercised rarely.

[87] The April 1994 meeting of the Advisory Committee on Criminal Rules, which included a

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discussion of cameras in the courtroom, was televised on C-SPAN.

88 1983-84 Hearings, supra note 2, at 34, 35 (statement of Alan B. Morrison, Director, Public Citizen Litigation Group).

89 See Brown, supra note 8, at 23, 27; cf. 1983-84 Hearings, supra note 2, at 36-39 (statement of Alan B. Morrison, Director Public Citizen Litigation Group) (noting that filed comments were not widely read).

90 This report is commonly known as the "Gap" report. See supra Part II.D (discussing process of "Gap" report).

91 See 28 U.S.C. ss 2074, 2075 (1988 & Supp. V 1993).

92 See id. The effective date of the Federal Rules of Bankruptcy Procedure (and other procedural requirements) were made consistent with the other federal rules by the Bankruptcy Reform Act of 1994. See Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, s 104(e), (f), 1994 U.S.C.C.A.N. (108 Stat.) 4106. Previously, the effective date had been 90 days after the Chief Justice reported the changes to Congress, i.e., about August 1. See 28 U.S.C. s 2075 (1988).

93 See 28 U.S.C. ss 2074, 2075 (1988 & Supp. V 1993).

94 See Weinstein , supra note 10, at 96-104, 147-49; see also Amendments to Rules of Civil Procedure for the U.S. District Courts, 374 U.S. 861, 869-70 (1963) (statement of Justices Black and Douglas) (opposing submission of proposed amendments to the Federal Rules of Civil Procedure); Reporter's Note on Order of Nov. 20, 1972, 409 U.S. 1132, 1133 (1963) (Douglas, J., dissenting) (arguing that Court is "mere conduit" to Congress and its approval of rules amendments is only perfunctory).

95 H.R. 4144, 98th Cong., 1st Sess. (1983).

96 Letter from Warren E. Burger, Chief Justice of the United States, to Chairman Robert W. Kastenmeier, reprinted in 1983-84 Hearings, supra note 2, at 195. The Conference of Chief Justices of the States also opposed elimination of a role for the Supreme Court, arguing that "the rule-making power is an inherent power necessary to the functioning of the judicial branch of government and ... should be vested only in the Supreme Court itself." Letter of March 6, 1984 from Connecticut Chief Justice John A. Speziale to Robert W. Chairman Kastenmeier, reprinted in 1983-84 Hearings, supra note 2, at 231.

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97 In voting to prescribe the 1993 amendments to the Federal Rules of Civil Procedure, Justice White stated that the Court should defer to the Judicial Conference and its committees if they have a rational basis for the proposed amendments to the rules. Justice White saw the Court's role as limited to transmitting the Judicial Conference's recommendations without change and without careful study, as long as the rules committee system has acted with integrity. See Communication from the Chief Justice, the Supreme Court of the United States, Transmitting Amendments to the Federal Rules of Civil Procedure and Forms, Pursuant to 28 U.S.C. s 2072, 113 S. Ct. 476, 575, 578-79 (1992) [hereinafter Amendments to the Federal Rules of Civil Procedure] (statement of Justice White).

98 Letter of Transmittal from William H. Rehnquist, Chief Justice of the United States to the U.S. Congress, 500 U.S. 964 (1991) (transmitting amendments to Federal Rules of Criminal Procedure).

99 Amendments to the Federal Rules of Civil Procedure, supra note 97, at 478 (granting order approving amendments to Federal Rules of Civil Procedure).

100 Amendments to the Federal Rules of Civil Procedure, supra note 97, at 581-87 (Scalia, Thomas, Souter, J.J., dissenting).

101 Communication from the Chief Justice, the Supreme Court of the United States, Transmitting an Amendment to the Federal Rules of Evidence as Adopted by the Court, Pursuant to 28 U.S.C. s 2076, 114 S. Ct. 682, 684-85 (1994) [hereinafter Communication from the Chief Justice] (noting in letter to John F. Gerry, Chair of the Executive Committee of the Judicial Conference, that Court withheld Rule 412); see infra notes 148-58 and accompanying text.

102 See Letter of Transmittal from William H. Rehnquist, Chief Justice of the United States, to Thomas S. Foley, Speaker of the U.S. House of Representatives (Apr. 22, 1993), reprinted in Amendments to the Federal Rules of Civil Procedure, supra note 97, at 477.

103 1995 Proposed Long Range Plan , supra note 5, recommendation 30, at 54.

104 As a result of the subcommittee's efforts, Rule 9036 of the Federal Rules of Bankruptcy Procedure took effect on August 1, 1993, authorizing the bankruptcy courts, or their designees, to send required notices by electronic means, rather than by mail, with the consent of the recipients. Fed. R. Bankr. P. 9036. The rule is designed to expedite cases

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and reduce costs to litigants and the courts by allowing creditors to receive information on meetings of creditors, discharges, and other events by electronic transmission on their own computer terminals. Id. advisory committee's note.

105 See Fed. R. App. P. 25(a)(2)(D) (proposed amendments); Fed. R. Bankr. P. 5005(a)(2) (proposed amendments); Fed.R.Civ.P. 5(e) (proposed amendments), in Committee on Rules of Practice and Procedure of the Judicial Conference of the U.S., Request for Comment on Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, 156 F.R.D. 339, 15, 113 (1994) [hereinafter Proposed Amendments].

106 See 28 U.S.C. s 2074(a) (1988 & Supp. V 1993).

107 Professor Hazard has suggested that most members of the bar and the public have little that is worth saying about procedural rules and do not take advantage of the abundant opportunity they have to provide input. Geoffrey C. Hazard, Jr., Undemocratic Legislation, 87 Yale L.J. 1284, 1291 (1978) (reviewing Weinstein , supra note 10).

108 1995 Proposed Long Range Plan , supra note 5, recommendation 30 commentary, at 54-55.

109 1995 Proposed Long Range Plan , supra note 5, recommendation 30 commentary, at 54-55. In proposing the 1958 legislation that required the Judicial Conference to conduct a "continuous study of the operation and effect of the [federal] rules," it was contemplated that the bar would have an active and important part in formulating the rules. "[E]very member of the bar [[[should have] an ample opportunity to set forth his views, have them debated, and have them decided." Symposium, supra note 8, at 125 (statement of Chief Judge John Biggs, Jr., former Chief Judge of the Third Circuit). "What ... lawyers expect and have a right to expect is an opportunity to state [their] view and assurances they will be given consideration." Id. at 120 (remarks of Thomas Scanlon, President of the Seventh Circuit Bar Association, former Chairman of the Committee on Civil Procedure of the Indiana Bar Association); see also id. at 118 (statement of Chief Justice Earl Warren) (agreeing with Chief Judge Biggs that bar will have active and important part in formulation of rules).

110 28 U.S.C. s 331 (1988 & Supp. V 1993).

111 See Symposium, supra note 8, at 123-24 (statement of Chief Judge John Biggs, Jr., former Chief Judge of the Third Circuit); id. at 131-32 (statement of Professor James W. Moore). The vision of activist committees with permanent monitoring capabilities, however, never

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came to pass. In fact, for many years Congress included a strict limit on funding for the rules committees in the judiciary's annual appropriations.

112 Amendments to the Federal Rules of Civil Procedure, supra note 97, at 581, 586-87 (Scalia, Thomas, Souter, J.J., dissenting).

113 See Wright , supra note 2, at 435. Professor Wright noted that the criminal rules "have been amended so frequently that even scholars in the field find it difficult to follow the constant changes or to be certain what a particular rule provided at a particular time." Id. Likewise, he pointed out his difficulty in knowing what appellate rules were in effect at a given time, because four different sets of amendments to the Federal Rules of Appellate Procedure had recently been adopted or were proceeding to adoption. Charles A. Wright, Foreword: The Malaise of Federal Rulemaking, 14 Rev. Litig. 1, 9 (1994) [hereinafter Wright, Foreword].

114 Order Prescribing Amendments to the Federal Rules of Civil Procedure, 446 U.S. 995, 1000 (1980) (Powell, J., dissenting); see also Michael E. Tigar, Pretrial Case Management Under the Amended Rules: Too Many Words for a Good Idea, 14 Rev. Litig. 137, 138 (1994) (arguing that there has been such "tinkering and fiddling" with Federal Rules of Civil Procedure that rulemakers are defeating primary objective of a "just, speedy, and inexpensive determination of every action").

115 See John P. Frank, The Rules of Civil Procedure -- Agenda for Reform, 137 U. Pa. L. Rev. 1883, 1884-85 (1989).

116 See Stephen B. Burbank, Ignorance and Procedural Law Reform: A Call for a Moratorium, 59 Brook. L. Rev. 841 (1993).

117 See Frank, supra note 115, at 1884-85.

118 Congress, for example, enacted comprehensive bankruptcy reform legislation in 1984, 1986, and 1994, effecting both substantive and procedural changes, including establishment of a new court system, expansion of the U.S. trustee system, addition of Chapter 12 for family farmers, inclusion of numerous commercial and consumer bankruptcy changes, and addition of new procedural requirements. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333; Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088; Bankruptcy Reform Act of 1994, supra note 92. The first two statutes required extensive changes in the Federal Rules of Bankruptcy Procedure, which took effect in 1987 and 1991. H.R. Doc. No. 54, 100th Cong., 1st Sess.

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152 (1987); H.R. Doc. No. 80, 102d Cong., 1st Sess. 170 (1991). Rules changes to accommodate the 1994 legislation are presently under consideration by the Advisory Committee on Bankruptcy Rules.

119 Each set of federal rules was amended in the mid-1980s to eliminate gender-specific language.

120 For example, the Judicial Conference in September 1994 approved an unpublished amendment to Fed. R. Crim. P. 49(e) to delete a reference to an abrogated section of the U.S. Code. Judicial Conference of the U.S., Reports of the Proceedings of the Judicial Conference of the United States 67 (1994) [[[hereinafter 1994 Judicial Conference Reports].

121 See infra Part III.E (discussing relationship between judiciary and Congress).

122 To the contrary, in 1992 the Advisory Committee on Civil Rules proposed a general revision of the summary judgment rule, Fed. R. Civ. P. 56, that would have codified case law. The proposal, however, was rejected by the Judicial Conference. 1992 Judicial Conference Reports , supra note 67, at 82.

123 Proposed Amendments, supra note 105, at 484.

124 Proposed Amendments, supra note 105, at 484.

125 Proposed Amendments, supra note 105, at 484.

126 Bankruptcy Reform Act of 1994, supra note 92.

127 See Common Sense Legal Reform Act, H.R. 10, 104th Cong., 1st Sess. (1995); Taking Back Our Streets Act, H.R. 3, 104th Cong., 1st Sess. (1995).

128 The 1993 amendments to the Federal Rules of Civil Procedure, for example, were criticized for being promulgated without awaiting the results of the empirical studies carried out under the Civil Justice Reform Act of 1990. See Amendments to the Federal Rules of Civil Procedure, supra note 97, at 585-86 (Scalia, Thomas, Souter, J.J., dissenting); see also Burbank, supra note 116, at 844-46; Linda S. Mullenix, Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking, 46 Stan. L. Rev. 1393, 1396 (1994).

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[129] See Elizabeth C. Wiggins et al., The F.J.C. Study of Rule 11, F.J.C. Directions 3 (Nov. 1991) (summarizing results of three separate analyses of Rule 11 activity in cases filed in five federal district courts); see also Fed. R. Civ. P. 11 advisory committee's note 1993 (listing various empirical studies that committee considered).

[130] Fed. R. Crim. P. 53. The advisory committee and the Standing Committee proposed an amendment to Fed. R. Crim. P. 53 that would have removed the rule's absolute prohibition on cameras in the courtroom in criminal cases, but the proposal was rejected by the Judicial Conference. 1994 Judicial Conference Reports , supra note 120, at 67.

[131] See Burbank, supra note 10, at 1042-98; Lauren Robel, Fractured Procedure: The Civil Justice Reform Act of 1990, 46 Stan. L. Rev. 1447, 1449, 1483 (1994).

[132] See Stephen B. Burbank, The Transformation of American Civil Procedure: The Example of Rule 11, 137 U. Pa. L. Rev. 1925, 1941 (1989) [[[hereinafter Burbank, Transformation]; Frank, supra note 115, at 1884-85.

[133] See generally Frank, supra note 115, at 1884-85.

[134] See Judith Resnik, Failing Faith: Adjudicatory Procedure in Decline, 53 U. Chi. L. Rev. 494, 547 (1986) (arguing that trans-substantive premise of rules has proved "unworkable"); Mark C. Weber, The Federal Civil Rules Amendments of 1993 and Complex Litigation: A Comment on Transsubstantivity and Special Rules for Large and Small Federal Cases, 14 Rev. Litig. 113, 114-15 (1994) (suggesting need for special rules for small cases). Compare Paul D. Carrington, Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Body of Non-Trans-Substantive Rules of Civil Procedure, 137 U. Pa. L. Rev. 2067, 2067 (1989) (arguing that rules must be applied trans-substantively, and that process is not competent to develop process of rules to be applicable to only one subject area) with Burbank, Transformation, supra note 132, at 1934-35 (arguing that legislative history does not support trans-substantive application of rules). The Civil Justice Reform Act requires the district courts to consider systems to separate civil cases into different "tracks," with different pretrial requirements based on the degree of a case's complexity, the time the case requires for trial preparation, and the resources it will require. 28 U.S.C. s 473(a) (Supp. V 1993).

[135] Bryan A. Garner, Guidelines for Drafting and Editing Court Rules (forthcoming 1995).

[136] See Fed. R. Bankr. P. 9006; Fed. R. Civ. P. 6; Fed. R. Crim. P. 45.

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[137] See Fed. R. App. P. 45; Fed. R. Bankr. P. 5001; Fed. R. Civ. P. 77; Fed. R. Crim. P. 56.

[138] See Fed. R. App. P. 47; Fed. R. Bankr. P. 9029; Fed. R. Civ. P. 83; Fed. R. Crim. P. 57.

[139] Representative Kastenmeier suggested that "as a result of the shadowy nature of the rulemaking process, a number of proposed rules changes" were rejected by Congress in the 1970s and early 1980s. 1983-84 Hearings, supra note 2, at 154 (statement of Rep. Kastenmeir from Congressional Record of Oct. 18, 1983).

[140] Professor Wright suggests, however, "that the rulemaking process worked far better when it was carried on in private." Wright, Foreword, supra note 113, at 2-3 n.6.

[141] It has been suggested that some amendments pushed "the rulemaking process into controversial uncharted areas of law and this has been affecting the rights of litigants in a fashion more likely to create the kind of pressure from the public and the legal profession that generates congressional response." Robert N. Clinton, Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts, 63 Iowa L. Rev. 15, 52 (1977). Any amendments, for example, that are seen as affecting the balance between the prosecution and the defense in criminal cases are likely to generate a congressional response.

[142] William L. Hungate, Changes in the Federal Rules of Criminal Procedure, 61 A.B.A. J. 1203, 1207 (1975). Hungate states:

The result of [the judiciary's rulemaking] procedure is that any change proposed by the Supreme Court has received careful consideration by a number of able people. This does not mean that we in Congress should forgo our responsibility to make an independent judgment on the merit of any proposal. It does mean, however, that we should accord a healthy respect to any amendment proposed by the Supreme Court.

Id. Judge Weinstein suggests that Congress should confine itself "to the review of substantial principles," rather than "details of rules." Weinstein , supra note 10, at 963.

[143] 1995 Proposed Long Range Plan , supra note 5, recommendation 30 commentary, at 54.

[144] Violent Crime Control and Law Enforcement Act of 1994, supra note 36, s 230101 (dealing with victim's right of allocution in sentencing).

[145] Violent Crime Control and Law Enforcement Act of 1994, supra note 36, s 320935 (dealing with admissibility of evidence of similar crimes in sex offense cases).

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146 Legislation, however, has also been introduced as a service to particular constituents. Newly enacted Federal Rule of Bankruptcy Procedure 7004(h), for example, requires that service of process on an insured depository institution in certain matters be made by certified mail, rather than first class mail. Bankruptcy Reform Act of 1994, supra note 36, s 114. The judiciary objected to the amendment on the grounds that it violated the Rules Enabling Act, was unnecessary, and added expense to the administration of estates. 1994 Judicial Conference Reports , supra note 120, at 14.

147 Judge Weinstein has suggested that: "If a matter becomes important enough for detailed congressional intervention, legislation is probably desirable, with formal participation by both houses and the President." Weinstein , supra note 10, at 940. It has also been suggested that rulemakers should not propose changes, even in matters of procedure, if the changes will have important effects on substantive rights. Wright, Book Review, supra note 31, at 654.

148 Pub. L. No. 103-322, 108 Stat. 1796 (codified in scattered sections of 42 U.S.C.).

149 Violence Against Women Act, S. 15, 102d Cong., 1st Sess. s E (1991).

150 H.R. Doc. No. 250, 103d Cong., 2d Sess. 5 (1994).

151 Id.

152 Id.

153 Id.

154 Id.

155 The Supreme Court later withheld approval of the portion of the rule approved by the Judicial Conference that extended its reach to civil cases. Members of the Court were concerned that the proposed rule might violate the Rules Enabling Act, which forbids the enactment of rules that "abridge, enlarge or modify any substantive right," and might encroach on the rights of defendants in sexual harassment cases because it might be inconsistent with Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986). Letter from William H. Rehnquist, Chief Justice of the United States, to Judge John F. Gerry, Chairman of the Judicial Conference's Executive Committee (Apr. 29, 1994), reprinted in Communication

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from the Chief Justice, supra note 101, at 684.
Congressional conferees, however, restored the portion of the rule deleted by the Supreme Court, and Congress proceeded to enact revised Rule 412 in the form approved by the Judicial Conference. Violent Crime Control and Law Enforcement Act of 1994, supra note 36, s 40141.

156 Violent Crime Control and Law Enforcement Act of 1994, supra note 36, s 320935 (dealing with admissibility of evidence of similar crimes in sex offense cases).

157 Violent Crime Control and Law Enforcement Act of 1994, supra note 36, s 320935.

158 Violent Crime Control and Law Enforcement Act of 1994, supra note 36, s 320935. The evidence, civil, and criminal advisory committees met and considered the new rules during the 150-day statutory period. The Advisory Committee on the Rules of Evidence also solicited public comment on the rules, sending the rules to 900 evidence professors and 40 women's rights organizations. The overwhelming majority of judges, lawyers, law professors, and organizations responding stated their opposition to the rules, principally on the grounds that they contained numerous drafting problems apparently not intended by their authors and would permit the admission of unfairly prejudicial evidence. The committee received 84 responses, representing 112 individuals and 16 organizations. Of the total responses, 100 individuals and organizations were opposed, 10 were supportive, and 18 either were neutral or recommended modifications. Law professors were opposed to the new rules by 56 to 3.
The Judicial Conference formally asked Congress to reconsider its decision to adopt the new rules, thereby delaying their effective date for another 150 days. Alternatively, the Conference recommended that Congress enact substitute language prepared by the Advisory Committee on the Rules of Evidence that would not change the substance of the congressional enactment but would clarify drafting ambiguities and eliminate possible constitutional infirmities. Judicial Conference of the U.S. , Report of the Judicial Conference of the United States on the Admission of Character Evidence in Certain Sexual Misconduct Cases (1995).

159 In August 1993, Senator Herb Kohl introduced S. 1404, the Sunshine in Litigation Act. The bill proposed amending Rule 26(c) of the Federal Rules of Civil Procedure to require that federal judges make particularized findings before issuing protective orders to ensure that public health and safety would not be jeopardized. S. 1404, 103d Cong, 1st Sess. (1993). No action was taken on Senator Kohl's legislation while the Advisory Committee on Civil Rules reviewed the results of a Federal Judicial Center study on protective orders. The advisory committee completed its work within the Rules Enabling Act process and transmitted proposed amendments to Rule 26(c) to the Judicial Conference for consideration at its March 1995 session. Judicial Conference of the U.S., Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of

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the United States and Members of the Judicial Conference of the United States 6-8 (1995). Assuming approval by the Conference, the amendments would be submitted to the Supreme Court with a recommendation that they be approved and transmitted to Congress.

160 Violent Crime Control and Law Enforcement Act of 1994, supra note 36 s 40153(c) A similar approach has been followed by Congress on other occasions, when it has asked the Judicial Conference to report on such matters as the future of the federal defender program. See Civil Justice Reform Act of 1990, Pub. L. No. 101-650, s 318, 104 Stat. 5089; Judicial Conference of the U.S., Report of the Judicial Conference of the United States on the Federal Defender Program (1993). Also, Congress has asked the Judicial Conference to report on the impact of drug activity on the federal courts. See Anti-Drug Abuse Amendments Act of 1988, Pub. L. No. 100-690, s 6159(b), 102 Stat. 4312; Judicial Conference of the U.S. , Report of the Judicial Conference of the United States to the Congress -- Impact of Drug Related Criminal Activity on the Federal Judiciary (1989).

161 See H.R. Rep. No. 422 , supra note 31, at 14-15; Wright , supra note 2, at 431-32; John P. Frank, Local Rules, 137 U. Pa. L. Rev. 2059 (1989); Subrin, supra note 57, at 2018, 2021. But see Steven Flanders, Local Rules in Federal District Courts: Usurpation, Legislation, or Information?, 14 Loy. L.A. L. Rev. 213, 216 (1981) (arguing that local courts' rulemaking has been "well-reasoned and beneficial").

162 See Coquillette et al., supra note 57, at 62; Subrin, supra note 57, at 2018-26.

163 See H. Rep. No. 422 , supra note 31, at 15; Coquillette et al., supra note 57, at 62.

164 See supra Part I.

165 Committee on Rules of Practice and Procedure, Judicial Conference of the U.S., Local Rules Project, Part I , at 1 (1988).

166 The Local Rules Project is under the direction of the Standing Committee's Reporter, Professor Daniel R. Coquillette of the Boston College Law School. The project director is Mary P. Squiers, Esquire.

167 See Fed. R. App. P. 28 advisory committee's note to 1993 amendment; Report of Advisory Committee on Appellate Rules to the Standing Committee, Dec. 1, 1992, 144 F.R.D. 459 (1992) [hereinafter Appellate Rules].

168 There is evidence, for example, that many courts are conducting thorough reviews of the

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content and numbering of their local rules. In addition, many courts and local rules committees have solicited assistance from the Local Rules Project's director, Mary P. Squiers, on how to re-number the rules and how to draft particular rules more precisely and coherently.

169 H.R. Doc. No. 67, 104th Cong., 1st Sess. 3 (1995) (Bankruptcy Rule 9029); H.R. Doc. No. 66, 104th Cong., 1st Sess. 5 (1995) (Appellate Rule 47); H.R. Doc. No. 65, 104th Cong., 1st Sess. 7 (1995) (Criminal Rule 57); H.R. Doc. No. 64, 104th Cong., 1st Sess. 6 (1995) (Civil Rule 83).

170 See supra note 169.

171 Fed. R. App. P. 47; Fed. R. Bankr. P. 9029; Fed. R. Civ. P. 83; Fed. R. Crim. P. 57. The amendments were approved by the Judicial Conference on September 24, 1994 and transmitted to the Supreme Court on November 2, 1994. See 1994 Judicial Conference Reports , supra note 120, at 66-67.

172 See Wright, supra note 2, at 436.

173 28 U.S.C. ss 471-473, 478 (Supp. V 1993).

174 Id. s 473(a), (b). The Act emphasizes strong judicial case management efforts, separate procedural tracks for different categories of civil cases, and increased use of alternate dispute resolution techniques.

175 See S. Rep. No. 101-416, 101st Cong., 2d Sess. 10-11 (1990). Professor Mullenix argues that the Civil Justice Reform Act effectively repealed the Rules Enabling Act and rendered impotent the federal rulemaking process that has traditionally relied on careful study to achieve simple and uniform national rules. Mullenix, supra note 10, at 379-80. The contrary view is well expressed in Robel, supra note 131, at 1448, 1464-70, 1473.

176 See Carl Tobias, Civil Justice Reform and the Balkanization of Federal Civil Procedure, 24 Ariz. St. L.J. 1393 (1992); Article, Federal Discovery News , Dec. 1994, at 4-7.

177 Fed. R. Civ. P. 26; see Randall Samborn, Districts' Discovery Rules Differ, Nat'l L.J. , Nov. 14, 1994, at A1; Wright, Foreword, supra note 113, at 10-11.

178 The Administrative Office has contracted with the RAND Corporation to conduct the

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statutorily required study. See generally Terence Dunworth & James S. Kakalik, Preliminary Observations on Implementation of the Pilot Program of the Civil Justice Reform Act of 1990, 46 Stan. L. Rev. 1301 (1994).

179 Civil Justice Reform Act of 1990, Pub. L. No. 101-650, sec. 105, 104 Stat. 5089, amended by the Judicial Amendments Act of 1994, s 4, 1994 U.S.C.C.A.N (108 Stat.) 4343.

180 1995 Proposed Long Range Plan , supra note 5, recommendation 30 commentary, at 55.

181 1995 Proposed Long Range Plan , supra note 5, recommendation 30 commentary, at 55.

182 28 U.S.C. ss 331, 2071(c) (1988 & Supp. V 1995). In March 1994, the Judicial Conference was asked for the first time to exercise this statutory oversight authority when five state attorneys general requested that the Judicial Conference modify or abrogate Local Rule 22 of the Ninth Circuit -- regarding the processing of capital cases -- asserting that the local rule was inconsistent with federal law. The request has been considered by the Advisory Committee on Appellate Rules and the Standing Committee and is still pending. Judicial Conference of the U.S., Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States 21-22 (Sept. 1994).

183 1995 Proposed Long Range Plan , supra note 5, recommendation 30 commentary, at 55.

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TAB 8

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

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CHAIR

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CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

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

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

Date: December 6, 2013

Re: Report of the Civil Rules Advisory Committee

Introduction

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts in Washington, D.C., on November 7-8, 2013. The first day of the meeting was a hearing on proposed Civil Rules amendments published for comment in August. Forty-one witnesses testified. The transcript of the hearing is available at the Rules Committee Support Office and will be available on line by the end of December. Draft Minutes of the meeting are attached. This report has been prepared by Professor Cooper, Committee Reporter, with Professor Marcus, Associate Reporter.

Part IA of this Report presents for action a proposal recommending publication at a suitable time for comment on an amendment of Civil Rule 82 that accounts for legislation that revises the venue statutes.

Part IB presents for action a proposal recommending publication at a suitable time for comment on an amendment of Civil Rule 6(d) that would delete service by electronic means from the modes of service that add three days to the time set for

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responding after service by those means. This proposal has been developed in coordination with the other advisory committees through the Subcommittee chaired by Judge Chagares.

Part II presents information on other matters that were discussed at the November meeting. The Committee decided to take no action on the question whether Rule 17(c)(2) should be amended to address the circumstances that may require a court to inquire whether it need appoint a guardian for an unrepresented party who may be incompetent. Other matters remain on the Committee agenda. These include the ongoing, all-committees project to determine how far each set of rules might be amended to better account for the continuing expansion of electronic modes of preserving and sharing information; an initial exploration of the possibility that specific rules provisions might be adopted to identify circumstances in which a requesting party should bear part or all of the costs incurred in responding to discovery; and ongoing coordination with the Committee on Court Administration and Case Management.

Other matters that have been on the agenda for some time were not ripe for further discussion at the November meeting. These include the development of pleading standards in response to the Supreme Court's *Twombly* and *Iqbal* decisions, and emerging issues in class-action practice. The questions posed by evolving pleading standards remain on the agenda, in part to await the results of continuing empirical work by the Federal Judicial Center and others. The Rule 23 Subcommittee has begun work to determine whether it would be useful to generate specific proposals to revise class-action practice, either in matters of detail or in broader form. The preparatory work is likely to take some time.

IA. ACTION: RULE 82: VENUE FOR ADMIRALTY OR MARITIME CLAIMS

The Committee recommends for publication at a suitable time for comment on this revision of Civil Rule 82:

Rule 82. Jurisdiction and Venue Unaffected
These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is not a civil action for purposes of 28 U.S.C. §§ 1390-1391~~–1392~~.

COMMITTEE NOTE

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Rule 82 is amended to reflect the enactment of 28 U.S.C. § 1390 and the repeal of § 1392.

It has long been understood that the general venue statutes do not apply to actions in which the district court exercises admiralty or maritime jurisdiction, except that the transfer provisions do apply. This proposition could become ambiguous when a case either could be brought in the admiralty or maritime jurisdiction or could be brought as an action at law under the "saving to suitors" clause. Rule 82 has addressed this problem by invoking Rule 9(h) to ensure that the Civil Rules do not seem to modify the venue rules for admiralty or maritime actions. Rule 9(h) provides that an action cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for purposes of Rule 82. It further provides that if a claim for relief is within the admiralty or maritime jurisdiction but also is within the court’s subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim.

The occasion for amending Rule 82 arises from legislation that added a new § 1390 to the venue statutes and repealed former § 1392 (local actions). The reference to § 1392 must be deleted. And it is appropriate to add a reference to new § 1390 for reasons that are only slightly more complicated.

New § 1390(b) provides:

> (b) Exclusion of Certain Cases.—Except as otherwise provided by law, this chapter shall not govern the venue of a civil action in which the district court exercises the jurisdiction conferred by section 1333, except that such civil actions may be transferred between district courts as provided in this chapter.

Section 1333 "establishes original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

Section 1390(b), by referring to cases in which the court "exercises the jurisdiction conferred by section 1333," thus ousts application of the general venue statutes for cases that can be brought only in the admiralty or maritime jurisdiction, and also for cases that might have been brought in some other grant of subject-matter jurisdiction but that have been designated as admiralty or maritime claims under Rule 9(h).

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The proposed amendment carries forward the purpose of integrating Rule 9(h) with the venue statutes through Rule 82. It is appropriate to refer to all of § 1390, not subsection (b) alone, because § 1390(a) provides a general definition of venue, while subsection (c) addresses transfer of an action removed from a state court.

Although this revision to respond to new legislation seems straight-forward, the Committee recommends publication rather than adoption as a mere technical amendment. Questions surrounding the "saving to suitors" clause can be complex and difficult. Although the Maritime Law Association has reviewed and approved the proposed Rule 82 amendment, it seems better to err on the side of caution. There is no apparent urgent need for immediate action, and hidden problems might be revealed.

IB. ACTION: RULE 6(d): "3 DAYS ARE ADDED": E-SERVICE

The Committee recommends publication at a suitable time for comment on an amendment of Rule 6(d). The Appellate, Bankruptcy, and Criminal Rules include provisions parallel to the Civil Rule 6(d) provision that adds 3 days to the time allowed to respond after service by, among others, "electronic means" under Civil Rule 5(b)(2)(E). Working through the Subcommittee appointed to coordinate the work of the several advisory committees, it has been agreed that the 3-added-days provision should be dropped for electronic service. The reasons are stated in the Committee Note that follows the rule text. It also has been agreed that it would be helpful to add parenthetical descriptions to illuminate the nature of the means of service that will continue to trigger the 3 added days. That choice presents a style question that can be resolved before publication. The time for publication need not be decided now. It seems likely that the other advisory committees will be prepared to recommend publication of parallel amendments to their rules in time for the May meeting of this Committee. If so, publication in August, 2014 may be in order. If not, it can be decided whether to publish Rule 6(d) as a bellwether.

Rule 6. Computing and Extending Time; Time for Motion Papers

* * *

(d) ADDITIONAL TIME AFTER CERTAIN KINDS OF SERVICE. When a party may or must act within a specified time

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91 after being served[1] and service is made under Rule
92 5(b)(2)(C)(mail), (D)(leaving with the clerk),
93 ~~(E),~~ or (F)(other means consented to),[2] 3 days are
94 added after the period would otherwise expire
95 under Rule 6(a).

96 COMMITTEE NOTE

97 Rule 6(d) is amended to remove service by electronic means
98 under Rule 5(b)(2)(E) from the modes of service that allow 3
99 added days to act after being served.

100 Rule 5(b)(2) was amended in 2001 to provide for service by
101 electronic means. Although electronic transmission seemed
102 virtually instantaneous even then, electronic service was
103 included in the modes of service that allow 3 added days to act
104 after being served. There were concerns that the transmission
105 might be delayed for some time, and particular concerns that
106 incompatible systems might make it difficult or impossible to
107 open attachments. Those concerns have been substantially
108 alleviated by advances in technology and in widespread skill in
109 using electronic transmission.

110 A parallel reason for allowing the 3 added days was that
111 electronic service was authorized only with the consent of the
112 person to be served. Concerns about the reliability of electronic
113 transmission might have led to refusals of consent; the 3 added
114 days were calculated to alleviate these concerns.

115 Deleting the 3 added days to respond after electronic
116 transmission is supported by an affirmative reason in addition to
117 the diminution of the concerns that prompted its adoption. Many
118 rules have been changed to ease the task of computing time by
119 adopting 7-, 14-, 21-, and 28-day periods that allow "day-of-the-

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[1] This anticipates adoption of the proposed amendment published in August, 2013.

[2] The naked cross-references to Rule 5(b)(2) may seem awkward. The parenthetical descriptions are added to relieve much of the flipping back through the rules. It seems likely that e-service will dominate other modes, but absent some descriptions many anxious readers will track down the cross-references just to make sure e-service is not among the means listed. The risk that brief descriptions may mislead or confuse seems minimal. Anyone who wishes to be sure of what a Rule 5(b)(2) subparagraph says can easily find it.

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week" counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

IIA. RULE 17(c)(2): INFORMATION — DUTY OF INQUIRY

Rule 17(c)(2) directs that "The court must appoint a guardian ad litem — or issue another appropriate order — to protect a minor or incompetent person who is unrepresented in an action."

In *Powell v. Symons*, 680 F.3d 301 (3d Cir. 2012), the court struggled to identify the circumstances that might oblige a judge to initiate an inquiry into the competence of an unrepresented litigant. It concluded that the duty of inquiry arises only if there is "verifiable evidence of incompetence," and that the duty is not triggered simply by bizarre behavior. At the same time, it lamented "the paucity of comments on Rule 17" and observed that "We will respectfully send a copy of this opinion to the chairperson of the Advisory Committee to call its attention to" the question.

The Committee discussed this question extensively at its meeting in April, 2013, and carried the matter over for further research. Judge Grimm had an intern and a law clerk survey reported decisions. They found that although there are some variations in expression, the courts that have considered the question limit the duty of inquiry in much the same way as the Third Circuit did.

Three alternatives were considered. One would add an express duty to inquire into the competence of an unrepresented person on motion or when the person’s conduct in the litigation suggests the person is incompetent to act without a representative or other appropriate order. The second would seek to express in rule text something like the approach now taken by the courts. The third was to take no further action on the question.

The decision to take no further action on the question was influenced by several concerns. Expanding the duty to inquire on the court’s own motion could impose heavy burdens in a substantial number of cases, depending in part on the measure used to assess "competence." Should the court ask whether a person is not equal to the task of litigating? Totally overwhelmed? Manifesting bizarre behavior? A foil for this

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question is provided by a Fourth Circuit statement: "[p]arties to a litigation behave in a great variety of ways that might be thought to suggest some degree of mental instability. Certainly the rule contemplates by 'incompetence' something other than mere foolishness or improvidence, garden-variety or even egregious mendacity or even various forms of the more common personality disorders." Hudnall v. Sellner, 800 F.2d 377, 385 (4th Cir. 1986).

The practical problems that may arise from expanding the duty to inquire, whether or not an attempt is made to define a standard of competence, gave further grounds for concern. The decision whether to appoint counsel or a guardian in a particular case is usually a very fact-specific decision that does not lend itself to general principles or guidelines. Such difficult decisions are better handled through the case-by-case development of the common law. And substantial difficulties arise when a court does seek to arrange representation for a party who has none and apparently needs it. The desire to provide adequate representation for those who would benefit from it must confront the reality of limited resources.

Foreseeable problems also generated concern about possible unforeseen problems.

Taken together, these concerns led the Committee to decide against further action. These questions can be restored to the agenda if greater signs of distress emerge.

IIB. INFORMATION: E-RULES

The task of digesting the still developing comments and hearing testimony on the proposed rule amendments published in August, along with other chores, have left little opportunity for the Committee to consider the matters being addressed by the Subcommittee appointed to consider revisions of all the rules to reflect increasing reliance on electronic means of generating, storing, and communicating information. The Committee has made the recommendation to publish Rule 6(d) for comment, described as an action item above. Beyond that, it believes that consideration of other proposals will require more time than it is likely to have before summer.

One broad proposal is to adopt a general rule allowing electrons to be used whenever paper can be used. Proponents of this approach recognize that any general rule must recognize some exceptions. Preliminary study suggests that at least for the

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Civil Rules, identification of the appropriate exceptions will prove difficult. Some, to be sure, may be relatively clear. There is as yet little enthusiasm for authorizing service of the initial summons and complaint by electronic means. Others will prove more elusive. Rule 49, for example, speaks of special "written findings" for a special verdict, or "written questions" to supplement a general verdict. Has the time come to submit Rule 49 verdicts by tablet, laptop, or jury-room computer terminals? It may prove difficult even to choose whether to list all exceptions in the general rule, or to amend each excepted rule under the authorization of an "except as otherwise provided" clause in the general rule. Serious study will be required if this possibility is to be explored further.

Short of a general rule, it may be that the most useful opportunities lie in expanding the already general use of electronic filing and electronic service. Rule 5(b)(2)(E), for example, provides for service by electronic means "if the person [served] consented in writing." The element of consent has been effectively reduced in many districts that require electronic filing, and that require consent to electronic service as a condition of registering for electronic filing. Electronic service seems to work. It could be put on a more regular foundation by simply authorizing electronic service, subject to some exceptions. Identification of the exceptions will require some thought, but the combined forces of the several advisory committees may be able to manage the task with some expedition. The same holds for electronic filing.

It may be that suitable provisions for electronic filing and service, more or less common among the different sets of rules, will satisfy the needs for joint action. If so, that will leave the way open for each advisory committee to consider other opportunities to adjust specific rules for the electronic era. One small example: Civil Rule 7.1 requires a corporate party to file 2 copies of a disclosure statement. Providing one copy for the clerk’s office and one copy for the judge assigned to the case can be convenient in a paper world. But is it useful in a world of electronic dockets? Although it is useful to keep such questions on the agenda, and if possible to treat a package of them together, it may make sense to allow each advisory committee to work at its own pace.

One specific concern arises from the frequent need for an authorized user of an e-filing system to file a document signed by someone else. Authentication of the signature is addressed by alternative provisions in Bankruptcy Rule 5005, which was published for comment last summer. The Civil Rules Committee has

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encountered some perplexity in understanding how the alternative that calls for notarization of the nonfiler's signature would work. This question may be illuminated by comments on the proposed rule.

IIC. Information: Discovery Cost Shifting

Laments about the costs that discovery requests can inflict are common. Various proposals have been made to depart from the presumption that the responding party bears the expense of responding, see Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978). These proposals have been advanced by independent groups that often suggest rules reforms and comment on published proposals. Congress has shown a clear interest in these questions. Present Rule 26(c) authorizes an order to protect a party against "undue burden or expense" that would flow from a discovery request. The proposals published for comment last August include a revision of Rule 26(c) that explicitly calls attention to the authority, already recognized and used in some cases, to order an "allocation of expenses" as part of a protective order. But in order to make sure that the broader suggestions are taken seriously, the Discovery Subcommittee has begun the process of investigating the possibility that it might be useful to consider a more specific provision for transferring some discovery costs to the requesting party. There is no thought that the general rule should be reversed, creating a presumption that the requester pays absent good reason to direct that the responding party bear the costs of responding. The question instead is whether it is possible to identify categorical distinctions between types of requests that continue to fall within the present practice that the responder bears the costs and other types of requests that justify requiring the requester to pay some or all of the costs of responding.

Much work remains to be done before the Subcommittee will be in a position even to determine whether there is any real reason to pursue development of possible amendments. It may be that there will be added reason for caution if the current Rule 26(c) proposal is recommended for adoption and in fact is adopted. Experience under the amendment is likely to develop over a course of some years. Awaiting that experience may be wise.

A general cost-bearing proposal was advanced, but in 1999 the Judicial Conference decided not to recommend adoption. That experience is a reason to be deliberate, but it is not dispositive. Discovery continues to evolve.

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IID. INFORMATION: COURT ADMINISTRATION AND CASE MANAGEMENT PROJECTS

The Court Administration and Case Management Committee has raised a number of topics that may lead to Civil Rules amendments. Action on all of these topics has been deferred pending further development by CACM.

Issues relating to e-filing have been raised in the process of developing the next generation CM/ECF system. One is whether the Notice of Electronic Filing can automatically be treated as a certificate of service. This issue continues to hold a place as part of the overall project to evaluate the impact of electronic case management.

TAB 8B

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DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

NOVEMBER 7-8, 2013

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts in Washington, D.C., on November 7-8, 2013. Participants included Judge David G. Campbell, Committee Chair, and Committee members John M. Barkett, Esq.; Elizabeth Cabraser, Esq.; Hon. Stuart F. Delery; Judge Paul S. Diamond; Judge Robert Michael Dow, Jr.; Parker C. Folse, Esq.; Judge Paul W. Grimm; Peter D. Keisler, Esq.; Dean Robert H. Klonoff; Judge John G. Koeltl; Judge Scott M. Matheson, Jr.; Chief Justice David E. Nahmias; Judge Solomon Oliver, Jr.; and Judge Gene E.K. Pratter. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Judge Jeffrey S.Sutton, Chair, and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge Arthur I. Harris participated as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., the court-clerk representative, also participated. The Department of Justice was further represented by Theodore Hirt, Esq.. Judge Jeremy Fogel and Dr. Emery Lee participated for the Federal Judicial Center. Jonathan C. Rose, Andrea Kuperman, Benjamin J. Robinson, and Julie Wilson represented the Administrative Office. Observers included Judge Lee H. Rosenthal, past chair of the Committee and of the Standing Committee; Jonathan Margolis, Esq. (National Employment Lawyers Association); John K. Rabiej (Duke Center for Judicial Studies); Jerome Scanlan (EEOC); Alex Dahl, Esq. and Robert Levy, Esq. (Lawyers for Civil Justice); John Vail, Esq.; Valerie M. Nannery, Esq., and Andre M. Mura, Esq. (Center for Constitutional Litigation); Thomas Y. Allman, Esq.; Ariana Tadler, Esq.; Henry Kelsen, Esq.; and Elsa Rodriguez Preston, Esq. (Law Department, City of New York).

The first day of the meeting, November 7, was devoted to a public hearing on proposed rule amendments that were published for comment in August, 2013. The testimony of forty-one witnesses is preserved in a separate transcript.

Judge Campbell opened the second day of the meeting, November 8, by welcoming Judge Dow as a new Committee member. Judge Dow has served in the Northern District of Illinois since 2007. He had been serving on the Appellate Rules Committee — "We won the tug-of-war." He has degrees from Yale, Oxford (as a Rhodes Scholar), and Harvard. He served as law clerk to Judge Flaum, and practiced as a litigator and appellate lawyer.

Chief Justice Nahmias and Parker Folse also were welcomed to the first meeting they have been able to attend in person; they were able to participate in their first meeting as members last April only by telephone.

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Judge Pratter and Elizabeth Cabraser have been renewed for their second three-year terms. And, in a welcome departure from the usual two-term limit, the Chief Justice has extended Judge Koeltl's term by one year, to maintain continuity in perfecting the proposed amendments that have grown out of the 2010 Duke Conference.

Judge Gorsuch will be the new liaison from the Standing Committee.

John Vail, who has been a long-time friend of the Committee, has entered private practice. Two new representatives from the Center for Constitutional Litigation are attending this meeting, but all hope that Vail will continue to be involved.

The next meeting will be on April 10 and 11 in Portland, Oregon. The first day will be at the Lewis and Clark Law School; part of the day will be devoted to a conference in tribute to Judge Mark R. Kravitz, the immediate prior chair of this Committee and of the Standing Committee. The second day, to be held at the federal court house, will likely be a full day.

The Standing Committee acted at its June meeting to approve publication of the Civil Rules amendments in August.

Judge Sutton noted that the Standing Committee got the rules proposals recommended for adoption and the Standing Committee meeting minutes to the Judicial Conference earlier than usual. With the Conference's approval of the proposals, this will give the Court a bit more time to consider the proposals in the fall. And, if the Court has concerns, there will be more time for the Committee to respond. As an example of the benefits, it has been possible to consider the question whether one of the Bankruptcy Rule proposals should be withheld because the Court granted certiorari on a related issue late last June.

Judge Campbell observed that the present rules proposals reflect the need for more effective case management in some courts. "We can write rules." But training by the Federal Judicial center is an essential part of making them effective. Judge Fogel observed that there seems to be a perception in Congress that judges do not manage cases effectively enough. The current efforts to encourage early and active case management will provide important reassurance that the rules committees are pursuing these issues vigorously.

The Committee had no proposals for review at the September Judicial Conference meeting.

The Rule 45 Subpoena amendments will take effect December 1. The Administrative Office forms are being revised to account for

the changes. John Barkett will hold an ABA webinar to inform lawyers about the changes. Judge Harris has written an article to inform bankruptcy lawyers of the changes. It is important that the bar learn of the changes and adapt to them — technically, a lawyer who on December 1 issues a subpoena from a district court in Michigan to a witness in Michigan for a deposition in Michigan to support an action in Illinois will be issuing an invalid subpoena, since the new rules direct issuance from the court in Illinois.

Judge Campbell concluded his opening remarks by thanking all the observers for their interest and attendance.

April 2013 Minutes

The draft minutes of the April 2013 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

Legislative Activity

Benjamin Robinson reported on current legislative activity.

Congress is considering bills to amend Rule 11. The House has passed similar bills in recent years. The full House is expected to vote on the Lawsuit Abuse Reduction Act next week. It is not clear whether the Department of Justice will express views on the bill. The rules committees have clearly expressed their opposition. The dissenters in the House have addressed the concerns with the provisions that would make sanctions mandatory. Should the bill pass in the House, prospects in the Senate are uncertain.

Representative Goodlatte has a bill, House 3309, that addresses discovery costs and concerns, especially in patent-infringement actions. Section 6 requires the Judicial Conference, using existing resources, to generate rules. Section 6 further prescribes the content of the rules, mandating discovery cost-shifting for discovery beyond "core" discovery. Judge Sutton and Judge Campbell have submitted a letter expressing concerns about the relationship of these provisions to the Enabling Act procedure that Congress has adopted for revising court rules. Working with staffers on the Hill in the last few months has been productive. The best outcome for the Enabling Act process may be an expression of the sense of Congress on what might be desirable rules. One possibility, for example, would be to generate for patent cases something like the protocol for individual employment cases developed under the leadership of the National Employment Lawyers Association. Much further work should be done in assessing the desirability of a system in which a party requesting discovery pays for the cost of responding to all discovery beyond the "core,"

however the core might be defined. One reason to avoid precipitous action is that there are pilot projects for patent litigation, and much may be learned from them.

Judge Fogel noted that the Federal Judicial Center is studying the pilot projects. The pending bills reflect the sense of both political parties and the White House that something should be done about patent litigation brought by nonpracticing entities, referred to by some as "patent trolls." There is a perception that these plaintiffs use the cost of discovery as a weapon to force settlement. The bill, in its present form, is not very flexible. It prohibits discovery on anything but claim construction before the Markman hearing, absent exceptional circumstances. But there are cases in which claim construction is not a critical issue, and in which prompt discovery on other issues is important. Another provision directs that the nonprevailing party pay the other party's fees unless it can show its position was substantially justified.

Judge Campbell noted that the rules committees comment only on the parts of pending legislation that affect civil procedure directly. Substantive issues — here, substantive patent issues — are beyond the committees' scope. We do urge Congress to respect the Enabling Act. But there are many procedural provisions. Core discovery is limited to documents. The requester pays for everything after that, including non-core documents and attorney fees for depositions. Discovery of electronically stored information is limited to 5 custodians, and search terms must be specified. The committees are pleased to address issues that Congress finds troubling or important, but they ask that Congress not dictate the terms of rules amendments. Staff members in both houses seem receptive to this message.

One specific provision of the patent bill directly abrogates Form 18 of the Rule 84 official forms. Congress knows that the Committee proposes to abrogate Rule 84 and all the forms, but it also knows how much time remains in the full Enabling Act process. Some are impatient with that. "It is an ongoing process."

It also was noted that there are private groups that oppose the patent bill. They believe there should be no distinctions between nonpracticing entities and other patent owners. Free transfer of patent rights is argued to enhance the value of the patent system. There will be vigorous representation of all views.

Benjamin Robinson also described a November 5 hearing by the Senate Judiciary Committee Subcommittee on Bankruptcy and the Courts that was, in substance, deliberate and thoughtful. The witnesses were well-informed and thoughtful. They expressed

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concerns about the adequacy of judicial resources. And there were criticisms of the rules proposals published in August, which are seen to create "procedural stop signs." Many of those at the hearing reflected their interest in the Enabling Act process, and were concerned that the committees work hard to "get it right." Four specific questions were posed at the end: what, specifically, the proposals are intended to accomplish; what failures of the system they are designed to correct; whether the amendments are likely to be effective; and what are the likely costs, including collective costs, and how the costs should be weighed against the hoped-for benefits. Concerns also were expressed that recent procedural developments will impede access to justice — pleading standards and summary judgment are particular subjects of concern.

E-Rules

The Standing Committee has appointed a subcommittee constituted by two representatives from each of the advisory committees, together with the reporters. Judge Chagares serves as chair. Professor Capra is the reporter. Judge Oliver and Clerk Briggs are the delegates from the Civil Rules Committee. The task of the subcommittee is to consider the ways in which developing methods of electronic communication may warrant adoption of common approaches that are adopted in each set of rules. The initial goal has been to produce a set of proposals that can be recommended for publication in time for the June 2014 Standing Committee meeting.

<u>Rule 6(d): "3 days are added"</u>: A proposal to eliminate the "3 days are added" provision for reacting after being served by electronic means has reached a consensus. All committees with this rule will eliminate the 3 added days. A common Committee Note has been drafted. There is one small issue for the text of Civil Rule 6(d). Professor Capra suggested that parenthetical word descriptions should be added to the cross-references to the rules that will continue to activate the 3 added days to respond. The parentheticals could prove useful to avoid repeated flipping back to the corresponding Rule 5 provisions. Although only Rules 5.1 and 5.2 intervene between Rule 5 and Rule 6, the added convenience may be more useful because there are 3 cross-references to service by mail, by leaving with the clerk, and by other means consented to. There is no risk that these simple identifying words will create confusion in the rules. On the other hand, there are many cross-references throughout the rules, and they do not add parenthetical descriptions. Generalizing this practice might encounter greater dangers that parenthetical descriptions would be read as interpretations. And the burden of following cross-references may be reduced by the growing use of hyperlinks in electronic versions of the rules. The Style Consultant will no doubt have views on this proposal.

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The Committee approved recommendation of the draft Rule 6(d) for publication.

Electronic Signatures: Verification of signatures on papers filed by electronic means has raised some disquiet. An amendment of Bankruptcy Rule 5005 addressing these issues was published this summer. The first part provides that the user name and password of a registered user serves as a signature. The second part addresses signatures by persons other than the registered user who makes the filing. Two alternatives are provided. The first alternative states that by filing the document and the signature page, the registered user certifies that the scanned signature was part of the original document. The second alternative directs that the document and signature page must be accompanied by an acknowledgment of a notary public that the scanned signature was part of the original document.

The Civil Rules delegates to the subcommittee are puzzled by the alternative that would require a notary's acknowledgment. The underlying concern seems to be that as compared to paper documents, it easier to misuse an authentic signature many times by electronic submissions. An original paper signature page might be detached from one document and attached to a filed document. An electronic signature might be replicated many times. And bankruptcy practice may involve more frequent needs for the same person to sign several documents than arise in other areas of practice. That of itself may serve to distinguish the bankruptcy rules from the other sets of rules — if they need the notary alternative, there may be good reason to adopt a different approach in the other sets of rules. Interest in adopting a different approach stems from uncertainty about how the notary will participate in a way that reduces the perceived danger. If the paper is signed before it is filed, the notary could guarantee authenticity only by retaining the electronic file and being present at the time of filing — indeed, perhaps, making the filing to ensure there is no legerdemain in the filing process. Or the notary could be present at the time of signing and simultaneous filing. Either alternative seems cumbersome at best. And it could apply to many filings — the affidavits or declarations of several witnesses might be needed for a summary-judgment motion, for example. Involving a notary also seems inconsistent with the movement away from requiring notarization, as reflected in 28 U.S.C. § 1746. Relying on the filer to ensure authenticity has seemed to work for paper filings. It is not clear that anything more should be required for e-filings.

These observations were elaborated by comments that e-signatures have generated much discussion. The Evidence Rules Committee planned to present a panel on these issues, developed by

the Department of Justice, at the conference scheduled for October but cancelled for the government shutdown. The IRS has used scanned e-signatures, under a statute that relieves the prosecutor of the burden. The FBI argues that it is impossible to verify forgeries of scanned signatures. One solution is to require that lawyers keep "wet signature" documents. Lawyers do not want that burden. Nor are lawyers eager to have to produce documents that harm their clients' positions. The Department of Justice has discussed these issues extensively, and finds them complicated.

It was noted that the problems of filing are complemented by evolving concepts of admissibility in evidence. Social media postings, for example, may be offered to show motive and intent. Evidence Rules 803(6)(E) and (8)(B), and 901(a), are not much help in telling you what needs to be done to show a source is trustworthy. Addressing what need be done to file a paper is like the tail wagging the dog — the more important questions are what can be done with the paper. "This is a moving target."

Further discussion confirmed that the signature rule is addressed to all papers signed by someone other than the registered user. The example of affidavits or declarations submitted with a summary-judgment motion recurred. The rule applies to anything filed. A settlement agreement would be another example. And the fear indeed is that a lawyer will cheat. But fraudsters will cheat in either medium, paper or electronic filing. The burden of invoking notarization would be great. It was urged again that we should continue to rely, as we do now, on the integrity of lawyers.

<u>e=Paper</u>: Continuing advances in electronic technology and parallel advances in its use raise the question whether the time has come to adopt a general rule that electrons equal paper. The subcommittee has prepared a generic draft rule that provides that any reference to information in written form includes electronically stored information, and that any act that may be completed by filing or sending paper may also be accomplished by electronic means. The draft recognizes that any particular set of rules may need to provide exceptions — that could be done either by adding "unless otherwise provided" to the general rule and adding specific provisions to other rules, or by listing a presumably small number of exceptions in the general rule. The task of identifying suitable exceptions may be challenging; multiple questions are suggested in the materials. It will be helpful to think about the need for a general provision by starting with e-service and e-filing. If those rules cover most of the important issues, and if it is difficult to be confident in creating exceptions to a more general rule, it may be that the provisions for service and filing will suffice for now.

<u>e-Service, e-Filing</u>: Rule 5(b)(2)(E) now provides for electronic

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service of papers after the initial summons and complaint if the person served consented in writing. This "consent" provision has been stretched in many courts by local rules that require consent as an element in registering to participate in electronic filing. At least some courts would be more comfortable with open authority to require e-service. The agenda includes a draft that begins by authorizing service by electronic means, and then suggests a number of alternative exceptions — "unless" good cause is shown for exemption, or a person files a refusal at the time of first appearing in the action, or the person has no e-mail address, or local rules provide exemptions. The initial temptation to exempt pro se filers was resisted because some courts are experimenting successfully with programs that require prisoners to participate in e-filing and e-service.

Rule 5(d)(3) authorizes a court to adopt a local rule that allows e-filing, so long as reasonable exceptions are allowed. Here too it may be desirable to put greater emphasis on e-action. The agenda materials include a draft directing that all filings must be by electronic means, but also directing that reasonable exceptions must be allowed by local rule.

Judge Oliver opened the discussion by noting that many courts effectively require consent to e-service, and that the subcommittee is interested in emphasizing e-service. At the same time, some exceptions will prove useful. Clerk Briggs noted that her court has a good-cause exception, but it has been invoked only once — and that was eight or nine years ago. They have a prisoner e-filing project that has been surprisingly successful. Another committee member observed that e-service is done routinely; "this is the world we live in."

The value of allowing exceptions by local rules was supported by suggesting that this is an area where geography may make a difference. Some areas may encounter distinctive circumstances that warrant a general exception by local rule.

A question was raised about a pro se litigant who wants to be served electronically but may present difficulties. One has argued an equal protection right to be treated the same as litigants represented by counsel.

Benjamin Robinson reported that a survey of all districts uncovered 92 local rules and 2 administrative orders. Eighty-five districts mandate e-filing. Nine are permissive. One difficulty in unraveling this is that some local rules treat civil and criminal proceedings together. All have various exceptions. The variety may make life difficult for a lawyer who practices in multiple jurisdictions, but registration itself is the biggest hassle.

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Without going further into the agenda materials — and particularly without returning to the question whether to recommend a general rule that equates electrons with paper, and electronic action with paper action, it was asked whether these issues alone suggest that it may be too ambitious to attempt to develop recommendations for rules that warrant publication next summer. One reason for caution is the hope that courts and lawyers will be able to work together to develop sensible solutions to problems as they arise, and that this process will provide a better foundation for new rules than more abstract consideration. If there are no general calls for help, no widespread complaints that the rules need to be brought into the present and near future, perhaps there is no need to rush ahead on a broad basis.

One committee member offered his own experience as an anecdote. "I practice all over the country. I do not see these issues as problems." It makes sense to do the simple and obvious things now. Leaving the rest to the future is not a bad idea. These questions do not impact daily practice, even though 99% of practice is accomplished by electronic means.

A judge observed that he had never seen a problem with e-communications. They are happening, and working.

Caution was urged with respect to service of the initial summons and complaint under Rule 4, and similar acts that bring a party into the court’s jurisdiction. Expanding e-service to this area could affect the "finality" of judgments, both directly and in terms of recognition and enforcement in other courts. This caution was seconded.

Discussion returned to the concern that local rules that impose consent to e-service as a condition of registering with the court’s sytem are potentially inconsistent with the national rule that recognizes e-service only with the consent of the person served.

On the other hand, "the big problem is the people who are not in the e-system." Pilot projects that are bringing prisoners into the e-system are really important.

A committee member suggested that it is worthwhile to look at these questions more thoughtfully, but not immediately. "There are issues out there, but they are not yet big issues. Time will bring more information." We should do the obvious things now, and find out whether lawyers are complaining about other things.

A broader view noted that this discussion reflects a regular pattern in rulemaking. We often confront a choice. We could attempt

395 to anticipate the future and provide for it. Or we can wait and
396 codify what the world has come to do, at least generally. "We do
397 want to reflect what people are doing. But perhaps not just yet."

398 States "may get ahead of us." And we can learn from them.

399 So there are any number of cybersecurity experts who worry
400 about many of these problems. They are working, for example, to
401 develop electronic notary seals. "Answers may emerge and be used."

402 The discussion concluded by suggesting three steps. First, the
403 Committee agrees to the proposal to delete the "3 added days" to
404 respond after e-service. And it will wait to see what can be
405 learned from public comments on the Bankruptcy Rule proposal for
406 dealing with e-signatures. Second, a few Committee members should
407 be assigned to talk to bar groups and state groups to learn what
408 problems may be out there and what efforts are being made to
409 address them. Finally, the Committee believes that it may be better
410 not to attempt broad action as soon as a recommendation to publish
411 next June, although the 3 added days question itself seems to be
412 rightly resolved.

413 Separate note was made of a suggestion by the Committee on
414 Court Administration and Case Management that a notice of
415 electronic filing should serve as a certificate of service. The
416 agenda materials include a sketch of Rule 5(d)(1) that so provides,
417 while maintaining the certificate requirement for any party that
418 was not served by means that provide a notice of electronic filing.
419 Preliminary consideration of this question suggested a further
420 question. It is not clear on the face of the rules whether a
421 certificate of service need be served on the parties, or whether
422 filing suffices. The Rule 5(a)(1)(E) reference to "any similar
423 paper" is open to interpretation. These questions will be held in
424 abeyance pending further advice from CACM.

425 *Rule 17(c)(2)*

426 The second sentence of Rule 17(c)(2) provides: "The court must
427 appoint a guardian ad litem — or issue another appropriate order —
428 to protect a minor or incompetent person who is unrepresented in an
429 action." The court grappled with this provision in *Powell v.*
430 *Symons*, 680 F.3d 301 (3d Cir.2012), finding a relative dearth of
431 case guidance that would help a court determine whether it is
432 obliged to act on its own to open an inquiry into the competence of
433 an unrepresented party. It urged the Advisory Committee to consider
434 whether something might be done to provide greater direction. This
435 question was considered at the April meeting, and postponed for
436 further research in the case law. Judge Grimm enlisted an intern
437 and a law clerk to undertake the research. The results of their

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work are described in a memorandum and a circuit-by-circuit breakdown in the agenda materials.

The additional research has found the state of the law much as the Third Circuit found it. Although there are variations in expression, there is a clear consensus that a court is not obliged to open an inquiry into the competence of an unrepresented litigant unless there is something like "verifiable evidence of incompetence." If the inquiry is opened, whether on the court's own or by request, the court has broad discretion both in determining competence and in choosing an appropriate order if a party is found not competent. An adjudication of incompetence for other purposes, for example, need not automatically compel a finding of incompetence to conduct litigation.

The questions of initiating the inquiry and of dealing with a party who is not competent to litigate are both independent and, in part, interdependent. What circumstances might trigger a duty to inquire will be shaped by the concepts applied in measuring competence. So too, practical constraints on what can be done to secure a guardian ad litem or other representation may be considered in determining whether it is practical to pursue further development of Rule 17(c)(2).

So the present question is whether the Committee should pursue this question further by developing a rule amendment that might be recommended for publication and comment. The agenda materials provide initial sketches of two different approaches. The first would expand the duty to inquire: "The court must inquire into a person's competence on motion or when the person's litigating behavior [strongly] suggests the person is incompetent to act without a representative [or other appropriate order]." The second approach would attempt to capture the present approach, for more reassuring guidance: "The court must inquire into a person's competence when evidence is presented to it that [*alternative 1* the person has been adjudicated incompetent] [*alternative 2* strongly suggests the person is incompetent] [*alternative 3* the person is incompetent to manage the litigation without appointment of a guardian ad litem or other appropriate order]." The third approach, to do nothing and remove the question from the agenda, does not require an illustrative sketch.

Judge Grimm opened the discussion by noting that his intern and law clerk had done a good job of researching the issue. The threshold that imposes an obligation to open an inquiry into an unrepresented party's competence is high. The Fourth Circuit has provided an illustrative statement of the behavior that may not trigger an inquiry: "Parties to a litigation behave in a great variety of ways that might be thought to suggest some degree of

483 mental instability. Certainly the rule contemplates by
484 'incompetence' something other than mere foolishness or
485 improvidence, garden-variety or even egregious mendacity or even
486 various forms of the more common personality disorders." *Hudnall v.*
487 *Sellner*, 800 F.2d 377, 385 (4th Cir.1986).

488 The problem may not be a need for more guidance; at most, it
489 is lack of familiarity with the guidance that in fact is provided
490 by the cases. A real part of the challenge, however, is to do
491 something effective after a party is found to lack competence. One
492 pending case provides an illustration. A person confined in a state
493 mental hospital has filed a petition for habeas corpus complaining
494 of events in the hospital. State courts have appointed a guardian
495 for her property and for her person. On inquiry put to the
496 guardians, the petitioner objected that she did not want them to
497 represent her. What should be done? "We cannot by rule address the
498 problems of what to do when you find incompetence."

499 It would ask too much to impose a duty to inquiry when a court
500 sees something irregular. It would be better to leave the rule as
501 it is.

502 Another example was provided of a pro se litigant who asked
503 for counsel in a § 1983 action against prison guards. He was found
504 incompetent on the basis of a state criminal court finding that he
505 was not competent. Now the challenge is to find a lawyer to
506 represent him. It has not been easy. But how could we write a rule
507 that gives the court more guidance?

508 Another judge suggested that these questions verge into the
509 broader questions characterized as "civil Gideon." "Now is not the
510 time to wade into this."

511 Yet another judge suggested that it is difficult to imagine a
512 rule that would do much to help with the question put by the Third
513 Circuit. The issue often arises in § 2254 petitions and § 2255
514 motions. Can we appoint guardians ad litem for them?

515 An illustration of the problems was provided by the example of
516 a child pornography prosecution of the child victim's father. The
517 statute directs that a guardian ad litem be appointed for the
518 child. But the statute does not provide a source of funding, and
519 none can be found.

520 The Committee concluded to remove this topic from the agenda.

521 *Rule 82*

522 Rule 82 provides that the rules do not extend or limit

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523 jurisdiction or venue. The second sentence cross-refers to a venue
524 statute that has been repealed. And there is a new venue statute to
525 be considered. Rule 82 must be amended in some way. The proposal is
526 to adopt this version:

527 An admiralty or maritime claim under Rule 9(h) is not a
528 civil action for purposes of 28 U.S.C. §§ 1390-1391 ~~-~~
529 ~~1392~~.

530 New section 1390 provides that the general venue statutes do
531 not govern "a civil action in which the district court exercises
532 the jurisdiction conferred by section 1333." Section 1333
533 establishes exclusive federal jurisdiction of "[a]ny civil case of
534 admiralty or maritime jurisdiction, saving to suitors in all cases
535 all other remedies to which they are otherwise entitled."

536 The complication addressed by Rule 9(h) and invoked in Rule 82
537 arises from the "saving to suitors" clause. Some claims are
538 intrinsically admiralty claims. For such claims, a federal court
539 inherently exercises the § 1333 jurisdiction. But there are other
540 claims that can be brought either as an admiralty claim or as a
541 general civil action. Rule 9(h) gives the pleader an option in such
542 cases. The pleader may designate the claim as an admiralty claim
543 for purposes of Rules 14(c), 38(e), and 82.

544 The effect of invoking Rule 9(h) to designate a claim as an
545 admiralty claim is that the court is then exercising § 1333
546 jurisdiction. Section 1390(b) confirms the longstanding
547 understanding that in such cases the general venue statutes do not
548 apply. It makes sense to add § 1390 to the cross-reference in Rule
549 82.

550 The other step is simpler. Congress has repealed § 1392, which
551 applied to "local actions." The cross-reference to § 1392 must be
552 deleted from Rule 82.

553 The Committee voted to recommend the proposed Rule 82
554 amendment to the Standing Committee for publication. Although the
555 amendment seems on its face to be a clearly justified technical
556 change to conform to recently enacted legislation, it seems better
557 to publish for comment. Admiralty jurisdiction involves some
558 questions that are arcane to most, and complex even to those who
559 are familiar with the field. A period for comment will provide
560 reassurance that there are no unwelcome surprises.

561 *Rule 67(b)*

562 The final sentence of Rule 67(b) provides that money paid into
563 court under Rule 67 "must be deposited in an interest-bearing

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564 account or invested in a court-approved, interest-bearing
565 instrument." In 2006 the IRS adopted a regulation dealing with
566 "disputed ownership funds on deposit." Interpleader actions are a
567 common illustration. The regulation requires a separate account and
568 administrator for each fund, and quarterly tax reports. The
569 Administrative Office became aware of the regulation in 2011. The
570 practice has been to deposit these funds in a common account. The
571 burden of establishing a separate account for each fund, with
572 separate administration, and providing quarterly tax reports, would
573 be considerable. The estimated annual cost is $1,000 per fund, with
574 an additional $400 for the quarterly tax reports. This cost
575 compares to the report that the average fund is $36,000. And the
576 clerk of court cannot be appointed as administrator. But the IRS
577 has taken the position that it will look to the clerks to assure
578 compliance.

579 The Administrative Office staff initially proposed that rule
580 67(b) should be amended to delete the interest-bearing account
581 requirement. But further discussion has led to a preferred position
582 that would carry forward with a common depository fund, with a
583 single administrator. Preparing a common quarterly tax report would
584 not be much burden. The opportunity to garner some income on the
585 deposited funds would be maintained — an opportunity that seems
586 likely to become more important as interest rates return closer to
587 historically normal levels. This approach is functionally better.
588 And it avoids the need to embark on a rule amendment that would
589 draw strong opposition — forgoing interest on deposited funds does
590 not make any obvious sense.

591 The Administrative Office has begun discussions with the IRS
592 to explore the preferred solution. This should be to the advantage
593 of the IRS as well as the court system and claimants to deposited
594 funds. A single fund is likely to generate greater aggregate income
595 than many separate, and often rather small, funds. The IRS will get
596 as much or more tax revenue, and it will have to deal with only a
597 single return. Everyone will be better off.

598 Further consideration of these questions will await the
599 outcome of negotiations with the IRS.

600 *Requester Pays For Discovery*

601 Judge Campbell opened discussion of "requester pays" discovery
602 issues by noting that various groups, including members of
603 Congress, have asked the Committee to explore expansion of the
604 circumstances in which a party requesting discovery can have
605 discovery only by paying the costs incurred by the responding
606 party. The suggestions are understood to stop short of a general
607 rule that the requesting party must always bear the cost of

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608 responding to any discovery request. Instead they look for more
609 modest ways of shifting discovery costs among the parties.

610 Judge Grimm outlined the materials included in the agenda
611 book. There is an opening memorandum describing the issues; a copy
612 of his own general order directing discovery in stages and
613 contemplating discussion of cost-shifting after core discovery is
614 completed; notes of the September 16 conference-call meeting of the
615 Discovery Subcommittee; and Professor Marcus' summary of a cost-
616 shifting proposal that the Standing Committee approved for adoption
617 in 1998, only to face rejection by the Judicial Conference.

618 Several sources have recommended further consideration of
619 cost-shifting. Congress has held a hearing. Patent-litigation
620 reform bills provide for it. Suggestions were made at the Duke
621 Conference. The proposed amendments published for comment this
622 August include a revision of Rule 26(c) to confirm in explicit rule
623 text the established understanding that a protective order can
624 direct discovery on condition that the requester pay part or all of
625 the costs of responding. That builds on the recently added
626 provisions in Rule 26(b)(2)(B).

627 The Subcommittee has approached these questions by asking
628 first whether it is possible to get beyond the "anecdata" to find
629 whether there are such problems as to justify rules amendments. Are
630 such problems as may be found peculiar to ESI? to particular
631 categories of actions? What are the countervailing risks of
632 limiting access to justice? How do we get information that carries
633 beyond the battle cries uttered on both sides of the debate?

634 The 1998 experience with a cost-bearing proposal that
635 ultimately failed in the Judicial Conference is informative. The
636 Committee began by focusing on Rule 34 requests to produce as a
637 major source of expense. Document review has been said to be 75% of
638 discovery costs. Technology assisted review is being touted as a
639 way to save costs, but it is limited to ESI. The 1998 Committee
640 concluded that a cost-bearing provision would better be placed as
641 a general limit on discovery in Rule 26(b), as a lead-in sentence
642 to the proportionality factors.

643 Discussions since 1998 have suggested that a line should be
644 drawn between "core" discovery that can be requested without paying
645 the costs of responding and further discovery that is available
646 only if the requester pays.

647 Emery Lee is considering the question whether there is a way
648 to think about getting some sense of pervasiveness and types of
649 cases from the data gathered for the 2009 case study. Andrea
650 Kuperman will undertake to survey the literature on cost shifting.

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651 Other sources also will be considered. There may be standing
652 orders. Another example is the Federal Circuit e-mail discovery
653 protocol, which among other provisions would start with presumptive
654 limits on the number of custodians whose records need be searched
655 and on the number of key words to be used in the search.

656 One of the empirical questions that is important but perhaps
657 elusive is framed by the distinction between "recall" and
658 "precision." Perfect recall would retrieve every responsive and
659 relevant document; it can be assured only if every document is
660 reviewed. Perfect precision would produce every responsive and
661 relevant document, and no others. Often there is a trade-off. Total
662 recall is totally imprecise. There is no reason to believe that
663 responses to discovery requests for documents, for example, ever
664 achieve perfect precision. But such measures as limiting requests
665 to 5 key words are likely to backfire — one of the requests will
666 use a word so broad as to yield total recall, and no precision.

667 Judge Grimm continued by describing his standard discovery
668 order as designed to focus discovery on the information the parties
669 most need. It notes that a party who wants to pursue discovery
670 further after completing the core discovery must be prepared to
671 discuss the possibility of allocating costs. This approach has not
672 created any problems. Case-specific orders work. For example, it
673 might be ordered that a party can impose 40 hours of search costs
674 for free, and then must be prepared to discuss cost allocation if
675 it wants more.

676 Although this approach works on a case-by-case basis,
677 "drafting a transsubstantive rule that defines core discovery would
678 be a real challenge."

679 The question is how vigorously the Subcommittee should
680 continue to pursue these questions.

681 Professor Marcus suggested that the "important policy issues
682 have not changed. Other things have changed." It will be important
683 to learn whether we can gather reliable data to illuminate the
684 issues.

685 Emery Lee sketched empirical research possibilities. Simply
686 asking lawyers and judges for their opinions is not likely to help
687 with a topic like this. It might be possible to search the CM/ECF
688 system for discovery disputes to identify the subjects of the
689 disputes and the kinds of cases involved. That would be pretty easy
690 to do. Beyond that, William Hubbard has pointed out that discovery
691 costs are probably distributed with a "very long tail of very
692 expensive cases." The 2009 Report provided information on the costs
693 of discovery. Extrapolating from the responses, it could be said

that the costs of discovery force settlement in about 6,000 cases a year. That is a beginning, but no more. Interviewing lawyers to get more refined explanations "presents a lot of issues." One illustration is that we have had little success in attempts to survey general counsel — they do not respond well, perhaps because as a group they are frequently the subjects of surveys. A different possibility would be to create a set of hypothetical cases and ask lawyers what types of discovery they would request to compare to the assumptions about core and non-core discovery made in developing the cases. The questions could ask whether requester-pays rules would make a difference in the types of discovery pursued.

Discussion began with a Subcommittee member who has reflected on these questions since the conference call and since the testimony at the November 6 congressional hearing. Any proposal to advance cost-bearing beyond the modest current proposal to amend Rule 26(c) would draw stronger reactions than have been drawn by the comments on the "Duke Package" proposals. "So we need data. But what kind? What *is* the problem?" Simply learning how much discovery costs does not tell us much. E-discovery is a large part of costs. But expert witnesses also are a large part of costs. So is hourly billing. But if the problems go beyond the cost of discovery, what do we seek? Whether cost is in some sense disproportionate, whether the same result could be achieved at lower cost? How do we measure that? Would it be enough to find — if we can find it — whether costs have increased over time? Then let us suppose that we might find cost is a problem. Can rulemaking solve it? And will a rule that addresses costs by some form of requester pays impede access to the courts? There is a risk that if we do not do it, Congress will do it for us. But it is so difficult to grapple with these questions that we should wait a while to see what may be the results of the current proposed amendments.

Another member said that these questions are very important. "The time needed to consider, and to decide whether to advance a proposal, is enormous." It took two years to plan the Duke Conference, which was held in 2010. It took three years more to advance the proposed amendments that were published this summer. That is a lot of preparation. It is, however, not too early to start now. Among the questions are these: Does discovery cost "too much"? How would that be defined? Requester-pays rules could reduce the incidence of settlements reached to avoid the costs of discovery; in some cases that would unnecessarily discourage trial, but there also are cases that probably should settle. A different measure of excess cost is more direct — does discovery cost more than necessary to resolve the case, resulting in wasted resources? What data sources are available? We have not yet mined a lot of the empirical information provided for the Duke Conference. The RAND

741 report reviewed corporate general counsel, assuring anonymity; its
742 results can be considered. We might enlist the FJC to interview
743 people who have experience with the protocol developed for
744 individual employment cases under the leadership of NELA — it would
745 be good to know what information they got by exchanges under the
746 protocol, and how much further information they gathered by
747 subsequent discovery. All of these things take time. The pilot
748 project for patent cases is designed for ten years. FJC study can
749 begin, but will take a long time to complete. And other pilot
750 projects will help, remembering that they depend on finding lawyers
751 who are willing to participate. All of this shows that it is
752 important to keep working on these questions, without expecting to
753 generate proposed rules amendments in the short-term future.

754 A member expressed great support for case management, but
755 asked how far it is feasible to approach these problems by general
756 national rules. "What is our jurisdiction"?

757 A partial response was provided by another member who agreed
758 that this is a very ambitious project. "Apart from 'jurisdiction,'
759 what is our capacity to do this?" Forty-one witnesses at the
760 hearing yesterday divided in describing the current proposals —
761 some found them modest, others found them a sea-change in discovery
762 as we know it. Requester-pays proposals are far more sensitive. A
763 literature search may be the best starting point. What is already
764 out there? And we can canvass and inventory the pilot projects.
765 That much work will provide a better foundation for deciding
766 whether to go further. If the current proposals are adopted — no
767 earlier than December 1, 2015 — they may work some real changes
768 that will affect any decisions about requester-pays proposals.

769 A lawyer member observed that Rule 26(b)(2)(B) provides for
770 cost shifting in ordering discovery of ESI that is difficult to
771 access. "There have been a number of orders. We could follow up
772 with experience." One anecdote: in one case a plaintiff seeking
773 discovery of 94 backup tapes, confronted by an order to pay 25% of
774 the search costs, reacted by reducing the request to 4 tapes.
775 Beyond that, Texas Rule 196.4 has long provided for requester
776 payment of extraordinary costs of retrieving ESI. We might learn
777 from experience. So, reacting to the Federal Circuit model order
778 for discovery in patent actions, the Eastern District of Texas has
779 raised the initial limit from 5 custodians to 8, and has omitted
780 the provision for cost-shifting if the limit is exceeded; it
781 prefers to address cost-shifting on a case-by-case basis. And we
782 should remember that "cloud" storage may have an impact on
783 discovery costs.

784 The Committee was reminded that if the proposed Rule 26(c)
785 amendment is adopted, experience in using it could provide a source

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786 of data to support further study.

787 The discussion concluded by determining to keep this topic on
788 the agenda. The Duke data can be mined further. We can look for
789 cases that follow in the wake of the Supreme Court's recognition
790 that the presumption is that the responding party bears the expense
791 of response, *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358
792 (1978).

793 *CACM*

794 The agenda materials describe continuing exchanges with the
795 Committee on Court Administration and Case Management. The question
796 whether pro se filers should be required to provide social security
797 numbers to assist in identifying problem filers can be put off
798 because the current version of the "NextGen" CM/ECF system does not
799 include a field for this information. And CACM agrees that there is
800 no present need to consider rules amendments to address the
801 prospect that a judge in one district might, as part of accepting
802 assignment to help another district, conduct a bench trial by
803 videoconferencing.

804 The meeting concluded with thanks to all participants and
observers for their interest and hard work.

Respectfully submitted,

Edward H. Cooper
Reporter

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 9-10, 2014
Phoenix, Arizona

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ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Phoenix, Arizona, on Thursday and Friday, January 9 and 10, 2014. The following members were present:

Judge Jeffrey S. Sutton, Chair
Dean C. Colson, Esquire
Roy T. Englert, Jr., Esquire
Gregory G. Garre, Esquire
Judge Neil M. Gorsuch
Judge Susan P. Graber
Chief Justice Wallace B. Jefferson
Dean David F. Levi
Judge Patrick J. Schiltz
Judge Amy J. St. Eve
Larry D. Thompson, Esquire
Judge Richard C. Wesley
Judge Jack Zouhary

Deputy Attorney General James M. Cole was unable to attend. Elizabeth J. Shapiro, Esq., represented the Department of Justice.

Professor Geoffrey C. Hazard, Jr., consultant to the committee, and Professor R. Joseph Kimble, the committee's style consultant, participated. Judge Jeremy D. Fogel, Director of the Federal Judicial Center, also participated.

Professor Daniel R. Coquillette, the committee's reporter, chaired a panel discussion on the political and professional context of rulemaking with the following panelists: Judge Lee H. Rosenthal, former chair of the committee; Judge Diane P. Wood, former member of the committee; Judge Marilyn L. Huff, former member of the committee; Judge Anthony J. Scirica (by telephone), former chair of the committee; Peter G. McCabe, Esq., former secretary to the committee.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Jonathan C. Rose	The committee's secretary and Rules Committee Officer
Benjamin J. Robinson	Deputy Rules Officer
Julie Wilson	Rules Office Attorney
Andrea L. Kuperman	Chief Counsel to the Rules Committees
Tim Reagan	Senior Research Associate, Federal Judicial Center
Frances F. Skillman	Rules Office Paralegal Specialist
Toni Loftin	Rules Office Administrative Specialist

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
- Judge Steven M. Colloton, Chair
- Professor Catherine T. Struve, Reporter (by telephone)

Advisory Committee on Bankruptcy Rules —
- Judge Eugene R. Wedoff, Chair
- Professor S. Elizabeth Gibson, Reporter (by telephone)
- Professor Troy A. McKenzie, Associate Reporter

Advisory Committee on Civil Rules —
- Judge David G. Campbell, Chair
- Professor Edward H. Cooper, Reporter
- Professor Richard L. Marcus, Associate Reporter

Advisory Committee on Criminal Rules —
- Judge Reena Raggi, Chair

Professor Sara Sun Beale, Reporter (by telephone)
Professor Nancy J. King, Associate Reporter (by telephone)
Advisory Committee on Evidence Rules —
Judge Sidney A. Fitzwater, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Sutton opened the meeting by welcoming everyone and thanking the Rules Office staff for arranging the logistics of the meeting, including a very economical rate for the hotel.

Committee Membership Changes

Judge Sutton announced that the terms of Judges Huff and Wood had ended on October 1, 2013. He thanked them for their distinguished service on the committee, described their many contributions to the committee's work, and presented each with a plaque. Judge Sutton also announced that Mr. McCabe, who had served as secretary to the committee for 21 years, had recently retired from the Administrative Office. Judge Sutton noted that Mr. McCabe had been the longest serving employee of the Administrative Office and had dedicated 49 years to government service. Judge Sutton thanked Mr. McCabe for his extraordinary service to the committee and the courts. He also noted that the committee would be losing three great musicians, as Judges Huff and Wood and Mr. McCabe were all talented musicians.

Judge Sutton introduced the new committee members, Judge Graber and Judge St. Eve, and he summarized their impressive legal backgrounds.

Judge Sutton noted that the representatives from the Civil Rules Committee were at the courthouse holding a hearing on the proposals that are currently out for public comment, but that they would be joining the second day of the meeting.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee, without objection and by voice vote, approved the minutes of the last meeting, held on June 3–4, 2013.

REPORT OF THE ADMINISTRATIVE OFFICE

Judge Sutton reported that the rules committees had been engaged with Congress recently. He said that last June Congress had introduced legislation to deal with patent assertion entities. He said the first draft from the House was aggressive in attempting to

preempt the Rules Enabling Act process. He reported that he and Judge Campbell had met several times with congressional staffers, that the original draft legislation had been modified, that there were several bills under consideration, and that discussions are continuing.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Colloton and Professor Struve presented the report of the advisory committee, as set out in Judge Colloton's memorandum and attachments of December 16, 2013 (Agenda Item 3). Judge Colloton reported that the advisory committee's fall meeting had been cancelled due to the lapse in appropriations during the government shutdown and that it had no action items to present.

Informational Items

Judge Colloton highlighted a few items that the advisory committee currently has on its agenda.

FED. R. APP. P. 4(a)(4)

Judge Colloton reported that a lopsided circuit split has developed concerning whether a motion filed within a purported extension of a non-extendable deadline under Civil Rules 50, 52, or 59 counts as "timely" under Appellate Rule 4(a)(4), which provides that the "timely" filing of certain motions tolls the time to appeal. The advisory committee is considering whether and how to amend the rule to answer this question. Civil Rule 6(b) provides that a district court may not extend the time for filing motions under Civil Rules 50, 52, or 59. Nonetheless, district courts sometimes extend the time to file such motions even though Civil Rule 6(b) does not allow it. In other instances, a party files a motion late, the opposing party does not object, and the district court rules on it on the merits. Thus, the question has arisen whether a motion is "timely" under Appellate Rule 4(a)(4) if it is not within the time set in the Civil Rules but is nonetheless considered on the merits by the district court either because of an erroneous extension or the failure of the opposing party to object.

The Sixth Circuit has held that where the non-movant forfeits its objection to the motion's untimeliness, the motion is timely for purposes of Rule 4(a)(4). However, the Third, Seventh, Ninth, and Eleventh Circuits have held to the contrary. The courts holding that such motions are not timely reason that Rule 4(a)(4) was designed to provide a uniform deadline for the named motions in order to set a definite point in time when litigation would come to an end. Making the time for filing these motions depend on developments in the district court introduces a disparity that Rule 4(a)(4) was designed to eliminate. Judge Colloton noted that the Seventh Circuit has commented that the Sixth

Circuit's approach was uncomfortably close to the "unique circumstances" doctrine that was overruled in *Bowles v. Russell*, 551 U.S. 205 (2007). He added that the advisory committee will address these issues at its spring meeting.

A member stated that he supported the minority view that would forgive a late filing if it was done in reliance on a court order. Judge Sutton questioned whether doing so would overrule *Bowles*. The member responded that it would not; the rules could provide that if the deadline is set by rule and the judge purports to extend it in error, then a litigant who has relied on the erroneous extension is excused from the consequences of late filing. Another member noted it is different if the deadline is set by statute.

Another member suggested a wording change to one of the tentative sketches of possible amendments to address this issue, asking if there was a more sensitive way to reference the limits on judicial authority in the phrase: "a court order that exceeds the court's authority (if any) to extend the deadline . . . ." The reporter responded that she understood the concern, but she did not want the rule language to imply that a court had authority to extend deadlines outside the time allowed in the rules, as judges exceeding their authority in this regard is the root of the problem. She said that all suggestions on wording are welcome. Another member suggested instead using language along the lines of: "a court order that extends the deadline beyond that otherwise permitted by the rules . . . ."

FED. R. APP. P. 4(c)

Judge Colloton reported that the advisory committee has also begun a project to examine Rule 4(c)(1)'s inmate-filing provision for notices of appeal. The advisory committee is considering amendments to the rule that might address, among other things, whether an inmate must prepay postage in order to benefit from the inmate-filing rule; whether and when an inmate must provide a declaration attesting to the circumstances of the filing; whether the inmate must use a legal mail system when one exists in the relevant institution; and whether a represented inmate can benefit from the inmate-filing rule. The project grew out of a 2007 suggestion by Judge Diane Wood, suggesting that the committee consider clarifying whether Rule 4(c)(1)'s inmate-filing rule requires prepayment of postage. Judge Colloton reported that there is ambiguity in the case law on whether prepayment of postage is required; whether inmates must file a declaration; and the meaning of the sentence in the rule that says that if a legal mail system exists, the inmate must use the system. He said that a subcommittee is working on these and related issues.

LENGTH LIMITS

Judge Colloton reported that the Appellate Rules have some length limits set out in type-volume terms and some set out in pages. He said that the advisory committee is considering whether all the limits should be measured by type-volume given the

ubiquitous use of computers, and if so, the best means of appropriately converting current limits that are set in pages to type-volume limits. He noted that when the rules governing the length of briefs were changed to convert to type-volume limits, the rules set a type-volume limit that approximated the conversion from a page limit and provided a shorter safe harbor set in pages. The advisory committee is considering the option of taking a similar approach for other limits that are currently set in pages.

Judge Colloton stated that a safe harbor set in pages must be shorter than the type-volume limit to prevent lawyers from using the safe harbor to get around the type-volume limit, but the shorter page limit can create a hardship for pro se litigants. As a result, another option the advisory committee is considering would differentiate between papers prepared on a computer and papers prepared without the aid of a computer. Judge Colloton noted that it was unlikely that lawyers would switch to using typewriters in order to get around the type-volume limits. Another issue is that there is evidence that when the brief page limit was converted from 50 pages to a type-volume limit of 14,000 words, it resulted in an increase in the permitted length of a brief. The advisory committee is considering whether to adjust that limit to 12,500 or 13,000 words as part of the length-limit project.

AMICUS BRIEFS ON REHEARING

Judge Colloton reported that the advisory committee is also considering the possibility of addressing amicus filings in connection with petitions for panel rehearing and/or rehearing en banc. He stated that the advisory committee had heard that lawyers are frustrated that there is no rule with respect to rehearing that sets out when an amicus brief must be filed or how long it must be. The committee is considering whether there should be a national rule on these topics. Judge Colloton noted that some circuits have no local rule on these matters. However, there is a concern that any rule that addresses amicus briefs on petitions for rehearing might stimulate more such amicus briefs, which some courts do not desire. Judge Colloton noted that some courts even have rules that generally prohibit amicus filings on rehearing, or that only allow them with leave of court. Matters that could be addressed by a proposed rule include length, timing, and other topics that Rule 29 addresses with respect to amicus filings at the merits-briefing stage.

A judge member noted that amicus briefs are usually helpful on rehearing. She stated that sometimes there are sleeper issues that the appellate court may not be aware of and that she favored explicitly clarifying that such amicus briefs are permissible. Judge Colloton noted that the suggestion, if implemented, would not require allowing amicus briefs on rehearing, but instead would set out the procedure to be followed if the circuit allowed such amicus briefs.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Wedoff and Professors Gibson and McKenzie presented the report of the advisory committee, as set out in Judge Wedoff's memorandum and attachments of December 12, 2013 (Agenda Item 4).

Amendment for Final Approval

FED. R. BANKR. P. 1007(a)

Judge Wedoff reported that the advisory committee was seeking approval to make a technical and conforming amendment to Rule 1007(a). Subdivisions (a)(1) and (a)(2) of Rule 1007 require the filing at the outset of a case of the names and addresses of all entities included on "Schedules D, E, F, G, and H." The restyled schedules for individual cases that were published for comment in August 2013 use slightly different designations. Under the new numbering and lettering protocol of the proposed forms, the schedules referred to in Rule 1007(a)(1) and (a)(2) will become Official Forms 106 D, E/F, G, and H—reflecting a combination of what had been separate Schedules E and F into a single Schedule E/F. Judge Wedoff stated that in order to make Rule 1007(a) consistent with the new form designations, the advisory committee was proposing a conforming amendment to subdivisions (a)(1) and (a)(2) of that rule. Judge Wedoff reported that the revised schedules would not go into effect until December 1, 2015, so he asked that the conforming rule change be held back to go into effect on the same date.

The committee, without objection and by voice vote, approved the proposed amendment to Rule 1007(a) for transmission to the Judicial Conference for final approval without publication.

Informational Items

CHAPTER 13 PLAN FORM

Professor McKenzie reported on comments received on the published proposed chapter 13 plan form and related rule amendments. The advisory committee had drafted an official form for plans in chapter 13 cases and had proposed related amendments to nine of the Bankruptcy Rules. Professor McKenzie reported that the form and rule amendments were published in August 2013 and have drawn over 30 comments so far. He said that very few comments expressed opposition to the form, but many were long and detailed. Professor McKenzie reported that since so many comments had already come in, the working group had already begun categorizing and reviewing the comments, although of course its work could not be completed until the comment period closed in February and all the comments were received.

Professor McKenzie said that one common theme that had emerged was what to do when the form provides a number of choices to the debtor even though some choices may not be available in the debtor's district. The advisory committee did not take a position on the differences in these choices between districts, but one concern is that providing the choice of various options on the form might indicate that the committee was stating that both choices are available to a debtor. Professor McKenzie noted that the concern is that this might lead to confusion and increased litigation. Judge Wedoff provided an example. He said one open question is, if the debtor wants to pay a mortgage, whether he can pay the mortgagee directly or instead must pay the trustee. If the payment is to the trustee, there is a fee assessed on the payment, meaning that more has to be paid on the mortgage claim. Some jurisdictions require it to be paid through the trustee, while others allow the debtor to be the payment manager. Judge Wedoff noted that providing both options on the form might imply that both options are available in all jurisdictions. Professor McKenzie added that one way to respond to the comments would be to include a warning on the form that the provision of an option does not mean it is available in the debtor's district. The working group will report to the advisory committee at the spring meeting.

A participant asked whether the advisory committee had gotten feedback that the form will be confusing to pro se debtors. Professor McKenzie responded that so far there had only been a couple of comments on how the form might impact pro se litigants. One comment had said it might attract additional pro se litigants, and the other had said it would be confusing to pro se litigants. The participant asked how the advisory committee could get more input from pro se litigants, since such litigants do not often comment on published proposals. Professor McKenzie stated that the advisory committee hopes to get comments from consumer bankruptcy groups, who often think about the nature of pro se litigation, and he noted that it is very difficult for pro se litigants to get through chapter 13 bankruptcies successfully. He said that one thing the working group is considering is more prominent language about that difficulty. Judge Wedoff noted that providing a plan form might help pro se litigants because it would set out what needs to be done and might allow some debtors to do it on their own without an attorney.

Judge Wedoff noted that as part of its Forms Modernization Project, the advisory committee had been looking closely at whether the forms can be used by pro se debtors. He said one of the goals of that project is to make the forms more user-friendly. Another participant noted that law students use the forms when they represent clients in bankruptcy clinics, and he suggested that the advisors for such clinics might be a good source of information on how the forms might be used by law students, which can be analogized to the pro se context. Judge Wedoff noted that the advisory committee, with the help of the Federal Judicial Center, had been vetting the proposed forms with a group of law students.

ELECTRONIC SIGNATURES

Judge Wedoff reported on the comments received on proposed amendments to Rule 5005 on filing and transmittal of papers, which is designed to address the question of how to deal with electronic signatures by someone other than the attorney who is filing a document in a bankruptcy case. He noted that there is no problem with signatures of attorneys who file documents because they have to have a login and password, which constitutes their signature. To date, the rules have not addressed the signatures of nonfilers, which in bankruptcy is primarily the debtor. Judge Wedoff noted that the typical practice has been for local rules to require the filing attorney to retain the original document signed by the nonfiler for a period of time, usually five years. Attorneys have pointed out that this becomes a problem in terms of storage space. Some bankruptcy firms may generate thousands of case filings a year, making the volume of original documents to retain substantial. In addition, some lawyers have reported that they are uncomfortable retaining documents that might later be used to prosecute a crime against their clients. Further, the prosecutor in a future criminal prosecution will be relying on the attorney's good faith in retaining documents with the original signatures.

The proposal published for comment provides that, instead of requiring the retention of a "wet" signed copy, the original signature could be scanned into a computer readable document and the scanned signature would be usable in lieu of the original for all purposes. Judge Wedoff noted that the published proposal asked for comment on two alternatives. One would have a notary certify that it is the debtor signing and that it is the complete document. The other would deem filing by a registered person equivalent to the person's certification that the scanned signature was part of the original document.

Professor Gibson said that only four comments had been received so far. One expressed confusion about when original documents must be retained under the proposed rule. Another erroneously read the proposal to require the entire document, not just the signature page, to be scanned, which would require much more electronic storage space. She said that two recent comments support the proposed amendment and urge adoption without requiring a notary's certification.

The representative for the Department of Justice noted that the Evidence Rules Committee had been planning to host a symposium on electronic evidence this past fall, which would have included a discussion of this issue of electronic signatures, but that the symposium was cancelled due to the government shutdown. She noted that the scheduling of the symposium had nonetheless prompted the Department to come to some tentative conclusions on this issue. While the Department will be submitting formal comments, the representative previewed the initial views of the Department. She reported that there was resistence in the Department to removing the retention of original signatures. She noted that there was a great amount of work done within the Department

in examining this issue. There was a working group that cut across disciplines and there was a survey conducted of U.S. Attorney's offices. She said that prosecutors overwhelmingly thought there was no problem with the current system. They also reported that taking away the requirement of retaining originals would lead to more cases where signatures were repudiated. The vast majority of survey respondents thought the proposed rule would make it much harder to prove authenticity in situations where the signatures were repudiated. She noted that the FBI has a policy that it will not provide definitive testimony to authenticate a signature without the original document. With an electronic signature, the FBI cannot determine certain characteristics that they would look at in comparing signatures, like pressure points and whether there were tremors. Without having an FBI expert, prosecutors would have to resort to circumstantial evidence to prove authenticity, which would often involve measures such as getting warrants to search computers to show that a document was generated from that computer, conducting forensic analysis, tracing IP addresses, and similar actions that would add burden and expense.

The Department's representative explained that the Department also looked at the tax experience because Evidence Rule 902(10) makes certain types of documents self-authenticating when a statute provides for prima facie presumption of authenticity. The advisory committee note states that the tax statute is one example. However, in looking into the possibility of creating a statutory presumption, the Department found that it would have to be either a generic statute that addressed this subject holistically or a bankruptcy-specific statute. The problem with a bankruptcy-specific statute, she said, was that the Department had found at least 101 different crimes that require the authenticity of the signature to be proven as an element of the crime. If a bankruptcy-specific statute were implemented, she said, there was the possibility of needing to do seriatim statutes because bankruptcy might just be the first area to start doing everything electronically. She said eventually there might need to be dozens of statutes. Yet, the alternative of crafting a generic statute now to address the subject holistically created the concern that it would have unintended consequences if all the possibly affected criminal statutes were not first examined. Thus, she noted, it was premature to start trying to get a statute without knowing all of the ramifications. She also stated that survey respondents felt the tax statute was somewhat unique in that taxpayers are required by law to sign a return and if they repudiate their signature on the return that means they have violated the law by not filing a tax return if there is no other valid tax return with their signature. She noted that Judge Wedoff has explained that there are some parallels in bankruptcy.

The Department participant also stated that the working group did not find persuasive the concerns that have been raised about why the rule should be changed. She stated that publicly-filed documents are not privileged, so an attorney should not be concerned about being called upon to produce a client's documents. Further, professional responsibility rules prohibit an attorney from assisting with a crime or fraud. She said

that while storage can be burdensome, there are retention periods, so there should be recycling of the documents and not an ever-increasing amount of documents needing to be retained. She noted that one possibility raised by Judge Wedoff was that perhaps the whole document could be scanned and saved electronically and only the signature page would need to be kept in its original format, and she noted that this option was something to think about. Finally, the working group was not persuaded by the rationale that there are varying retention periods across the country. The group felt that if that was a concern, then it could be fixed simply by creating a uniform retention period. The prosecutors thought that the varying periods actually hurt them the most because the retention periods are often shorter than the statute of limitations for the crimes being prosecuted. In sum, she said, the Department feels that it is premature to remove the retention requirements. There was a feeling in the Department, she said, that technology is continuing to move forward. It might be that in the near future things like thumb prints and biometrics will serve as signatures, which would solve the problem of authenticating without the need to store lots of documents. The participant stated that the Department would have presented this summary of its views in greater detail at the symposium, and that the Department is committed to working with the committee on this issue.

Judge Wedoff said that the advisory committee will await the formal comment from the Department and expressed gratitude for hearing their initial views in the interim. He noted that the prosecuting community has not had the experience of having to use scanned signatures in lieu of having an FBI expert testify to the validity of a wet signature. Whether scanned signatures would present a problem in persuading the trier of fact is not yet clear. Bankruptcy presents a special circumstance, he said. Even without the change to Rule 5005, he said, every document filed by a debtor's attorney is filed under Civil Rule 11, which requires certifying that the filing is authentic. Rule 5005 would only underline the Rule 11 requirement that the signature is authentic. So, the debtor who asserts that a signature on a filed document is not his own will have to overcome the fact that the signature appears to be his own and will have to assert that his attorney lied when the document was filed. It may be that it is not that difficult to persuade a trier of fact of the legitimacy of a debtor's signature on a bankruptcy document. He also noted that, in this regard, there may be some source of empirical evidence as to the difficulty of not having wet signatures because there is at least one jurisdiction in the country—Chicago—that does not have a requirement for retaining wet signatures for debtors' filings for several years. Any prosecutions that have taken place in that district would have taken place on the basis of the debtor's scanned copy. He stated that there are not a lot of these types of prosecutions that come up and that when they do come up, debtors do not contest the legitimacy of their signature. He noted that he had encountered situations where a United States Trustee had filed a motion to deny the debtor a discharge because the debtor supplied deliberately false information on the debtor's schedules. The debtors defend against those arguments not on the basis that they did not sign the schedules, but by arguing things like they told their attorney about the

matter at issue and the attorney did not put it in the schedule or they did not realize it was required to be put on the schedule. He stated that he had never encountered a case where the debtor denied his own signature. Judge Wedoff reported that the Department of Justice representative had agreed to look into the Department's survey results that had come from Chicago.

A member questioned whether the concern was with ensuring the integrity of the judicial process or collateral consequences and enabling future prosecutions. Judge Wedoff responded that the advisory committee's initial approach was designed to ensure the integrity of the judicial process. We want to make sure, he said, that the documents being filed are legitimately signed by the debtor. The informal feedback from the Department has to do with collateral consequences, and the concern is the potential difficulty in proving malfeasance by the debtor. The member responded that a similar concern may be true in many areas of the law and he wondered whether the rules committees' focus ought to be on the judicial process, not necessarily to make it easier or harder for the Department of Justice to prosecute crimes years later.

Judge Sutton emphasized that this is just now out for publication and the advisory committee is awaiting the formal response from the Department. He asked whether the rescheduled Evidence Rules technology symposium will include this issue. Professor Capra responded that it would not because the original idea had been to get ahead of the public comment and to get the Department's views on this issue, which has already been accomplished. While others were going to participate, they now had the ability to comment during the public comment process, which would be over by the time a new symposium could be scheduled. Professor Capra noted that one thing that came up in putting the original symposium together is that the issue is not forgery, but that the true signature might be improperly attached to the document. He said that is the issue that concerned the CM/ECF Subcommittee—someone could just scan a signature and put it on any document. Judge Wedoff said that this is why the two alternative means of assuring that the signature was authentic and was attached to the proper document were published for public comment. The Department's representative noted that the Department did not think that the option of requiring a notary's signature was a good one.

Judge Wedoff noted that it might be that bankruptcy could serve as an experiment for testing this. There are extra protections in bankruptcy, he said, like the attorney certification, that would not necessarily exist in other areas. He said that the advisory committee would have a better idea of what to do next after the comment period ends. The Department of Justice's representative noted that as a matter of evidence, the attorney's certification could not be introduced because it would be hearsay, so there would still be the need for a witness to testify to the person's signature, which might lead to calling lawyers to testify.

A member noted that the Department's concerns were about collateral prosecutions years down the road, and that he was not sure the judiciary should be too concerned about that. He said the requirements to authenticate the signature might impose a burden in current proceedings for the benefit of possible later collateral proceedings. He added that the advisory committee's concerns should be that this document in this litigation is what it purports to be. A certification by the attorney, as an officer of the court, should normally be sufficient for that purpose, he said. He said he was open to the possibility of the need for further assurances, but that the question should be focused on assuring that the document is authentic for the current litigation, not on assuring its authenticity for use in possible later collateral proceedings.

Professor Coquillette commented that the rules committees have a goal of transsubstantive rulemaking, but bankruptcy is really different in this area because of the factors mentioned by Judge Wedoff, such as attorney certification.

A member asked whether the advisory committee is studying what is going on in Chicago, where there is no requirement to retain wet signatures. Judge Wedoff reported that the Department of Justice had done a survey and was going to see if it could pull out data on prosecutions in Chicago. Judge Wedoff said that he would talk to the local United States Trustee's office to find out their experience. He noted that he is not aware of any criminal prosecutions for bankruptcy fraud in Chicago that raised a question of validity of the debtor's signature. The number of prosecutions for bankruptcy fraud is very small to begin with, he said, and then it would be a very small subset of that small subset that would involve the validity of the debtor's signature. So, he said, there would not be a huge amount of empirical data to gather on this.

Judge Sutton thanked Judge Wedoff for the summary of the issues and thanked the Department's representative for previewing the results of the Department's work on this issue.

FORMS MODERNIZATION PROJECT

Judge Wedoff provided an update on the advisory committee's Forms Modernization Project, a multi-year project to revise many of the official bankruptcy forms. The work began in 2008 and is being carried out by an ad hoc group composed of members of the advisory committee's subcommittee on forms, working with representatives of other relevant Judicial Conference committees. The goals of the project are to improve the official bankruptcy forms by providing a uniform format and using non-legal terminology, and to make the forms more accessible for data collection and reporting. The advisory committee decided to implement the modernized forms in stages in order to allow for fuller testing of the technological features and to facilitate a smoother transition. Judge Wedoff said that the first two phases of the project were

nearly complete: a small number of the modernized forms became effective on December 1, 2013, and the balance of the forms used by individual debtors is currently out for comment. Their effective date will be delayed until December 1, 2015, to coincide with the effective date of the non-individual forms. Judge Wedoff said that, surprisingly, not many comments had been received yet on the individual forms out for public comment. He said the comment period was not yet over, but that so far the revised forms seem to have been met with general acceptance.

The final batch will be non-individual forms, which were separated from individual forms because they ask for different information in many situations, and which would be expected to become effective on December 1, 2015. Judge Wedoff noted that people filling out non-individual forms are likely to have access to a more sophisticated legal understanding of the bankruptcy system. Non-individuals have to be represented by an attorney, and are usually associated with corporations or other entities that are likely to have a better understanding of the information called for on the forms.

Judge Wedoff said the agenda materials provided an example of a non-individual form to show the differences from the individual form. The non-individual form is shorter and uses more technical accounting language than the individual form, but not legalese. He said that this is a preview of what the advisory committee will likely be presenting for approval for publication at the Spring 2014 Standing Committee meeting. When this last batch of forms is approved, he said, the advisory committee will be finished with the complete package of form changes.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell and Professors Cooper and Marcus presented the report of the advisory committee, as set forth in Judge Campbell's memorandum and attachments of December 6, 2013 (Agenda Item 9).

Amendments for Publication

FED. R. CIV. P. 82

Professor Cooper reported that the advisory committee sought approval to publish at an appropriate time changes to Rule 82 on venue for admiralty or maritime claims to reflect changes Congress had made to the venue statutes. It has long been understood that the general venue statutes do not apply to actions in which the district court exercises admiralty or maritime jurisdiction, except that the transfer provisions do apply. This proposition could become ambiguous when a case either could be brought in the admiralty or maritime jurisdiction or could be brought as an action at law under the "saving to suitors" clause. Rule 82 has addressed this problem by invoking Rule 9(h) to ensure that the Civil Rules do not appear to modify the venue rules for admiralty or

maritime actions. It provides that an admiralty or maritime claim under Rule 9(h) is not a civil action for purposes of 28 U.S.C. §§ 1391–1392. Rule 9(h) provides that an action cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for purposes of Rule 82. It further provides that if a claim for relief is within the admiralty or maritime jurisdiction but also is within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim.

Professor Cooper reported that legislation had added a new § 1390 to the venue statutes and repealed the former § 1392. The reference to § 1392 in current Rule 82 clearly needs to be deleted as a technical amendment, he said. The advisory committee also thought it was appropriate to add a reference to § 1390, but the reason was a little more complicated.

Professor Cooper explained that new § 1390(b) provides that the whole chapter on venue, apart from the transfer provisions, does not apply in a civil action when the district court exercises jurisdiction conferred by § 1333. Section 1333 provides jurisdiction for admiralty and maritime cases, "saving to suitors in all cases all other remedies to which they are otherwise entitled." By referring to § 1333, § 1390(b) removes application of the general venue statutes for cases that can be brought only in the admiralty or maritime jurisdiction and for cases that might have been brought in some other grant of subject-matter jurisdiction but that have been designated as admiralty or maritime claims under Rule 9(h). Since the general venue provisions do not apply when the court is exercising admiralty or maritime jurisdiction, it seems wise to add § 1390 to Rule 82. Doing so would make claims designated as admiralty or maritime claims under Rule 9(h) exempt from the general venue provisions just as those that get admiralty or maritime jurisdiction under § 1333 are so exempt. Professor Cooper noted that the advisory committee had sent the proposed revision to the Maritime Law Association, which had approved of the proposal. Nonetheless, the advisory committee recommended the proposal for publication, not for approval as a technical amendment, because of the complexity of the subject matter.

The committee, without objection and by voice vote, approved the proposed amendment to Civil Rule 82 for publication.

FED. R. CIV. P. 6(d)

Judge Campbell reported that the advisory committee recommended for publication at a suitable time an amendment to Rule 6(d), which currently provides three extra days for responding to certain types of service, including service by electronic means. The proposed amendment would strike the reference in Rule 6(d) to Rule 5(b)(2)(E), which references electronic service. This change would remove the three extra days for electronic service. Judge Campbell said that the Appellate, Bankruptcy,

and Criminal Rules Committees were working through this same issue now with respect to parallel provisions in each set of rules. He stated that, depending on the timing of approval of similar changes to the other sets of rules, they could all be published together, or the Civil Rules change could be published first as a bellwether. He added that the advisory committee also recommended adding parenthetical explanations to Rule 6(d) that would provide brief explanations of the type of service referenced. This would prevent users from having to flip back to the cross-referenced rules to find the types of service that receive the three added days. The committee note, he said, could explain that service via CM/ECF does not constitute service under Rule 5(b)(2)(F), which covers service by other means to which the party being served has consented, and which is subject to the three-day rule.

A member asked whether the advisory committee had considered removing "consent" from the three-day rule as well. Judge Campbell responded that it had not; the issue was just brought to his attention this morning. The member noted that the three-day rule was invented for mail. He questioned the rationale behind applying it to leaving papers with the clerk when no one knows where the party is. He suggested that the advisory committee consider restricting the three-day rule to service by mail. Judge Campbell said that the advisory committee could consider this point. He added that these other methods of service have always been subject to the three-day rule and the advisory committee had not heard of a problem. Clearly, he said, electronic service no longer requires three extra days; the committee could look more broadly at whether three extra days are warranted in other circumstances. Judge Wedoff noted that there is a proposal to remove the added three days as widely as possible in the Bankruptcy Rules. Judge Sutton added that the member's point about whether three extra days were needed in other circumstances was a good one. At least, he said, the question could be raised in publication as to whether to remove other types of service from the three-day rule. He suggested that the advisory committee discuss it at their next meeting.

Judge Campbell said that the advisory committee would consider these issues and that he would want to hear the views of court clerks as well. However, he said, the advisory committee's plate was so full right now with considering the next steps for the proposals that were published last August, that he would prefer not to do that investigation now. One option, he said, would be to publish the proposal to eliminate electronic service from the three-day rule and ask for comment on whether the committee should also eliminate service by leaving the paper with the clerk or by other means consented to. Judge Sutton noted that the simplest route would be to delay publication during the investigation into the other means of service, but he saw no reason to hold off on removing the extra three days for electronic service. The member who had made the suggestion stated that he would not oppose publication, but that he thought it should ask for comment on whether the three-day rule should be abolished altogether. He noted that service by mail is now mostly limited to pro se litigants or people who do not have

computers. He said the committee could publish the proposal to remove electronic service from the three-day rule and ask for comments as to whether it would be wise to restrict it just to service by mail or to abolish it altogether.

Professor Capra noted that the idea of restricting the three-day rule came from the CM/ECF Subcommittee, and the idea was to have a uniform approach. He said all of the advisory committees would be considering this issue, except for the Evidence Rules Committee, but it was unlikely that it would be resolved by the spring.

A member asked whether there should be a separate three-day rule for pro se litigants. She noted that this is an issue primarily affecting pro se litigants, who often only receive service by mail. Judge Campbell noted that some courts do have CM/ECF for pro se litigants, so some do get instantaneous service.

Judge Sutton suggested that the committee could tentatively approve the proposal for publication with a slight variation in the committee note and questions requesting comment on whether the three-day rule should be deleted altogether or limited to service by mail. The hope, he said, would be for publication this summer. Judge Campbell agreed that this sounded like a fine approach.

The committee, without objection and by voice vote, tentatively approved the proposed amendment to Civil Rule 6(d) for publication, with a slight change in the committee note to address service under Rule 5(b)(2)(F), together with questions on whether the three-day rule should be abolished altogether or limited to service by mail. The committee will consider the final proposal again before publication, likely at its spring meeting.

Informational Items

FED. R. CIV. P. 17(c)(2)

Judge Campbell reported that the advisory committee had decided against further action on Rule 17(c)(2), which directs that "[t]he court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action." He stated that in *Powell v. Symons*, 680 F.3d 301 (3d Cir. 2012), the Third Circuit had noted the lack of guidance as to when a court should appoint a lawyer or guardian to assist an unrepresented party. He said that research had revealed that six circuits have adopted standards similar to that of the Third Circuit, which is that there is no obligation to *sua sponte* inquire into competence. Under this view, Rule 17(c)(2) only applies when there is verifiable evidence of incompetence. Judge Campbell said that all circuits agree that there is no obligation to appoint a guardian just because a party exhibits odd behavior.

The advisory committee had concluded that it should not attempt to write a rule in this area. Judge Campbell explained that if judges were obligated to inquire about a guardian whenever they saw something less than full competence, the issue would become unmanageable. Further, he said, there were no resources readily available to pay for guardians. In fact, he said, there were not usually funds available to pay for appointed lawyers either. Judge Campbell said that to write a rule that sets standards for the wide variety of circumstances in which this could arise would be nearly impossible. He added that relevant considerations would include evidence of incompetence, other resources available to assist the person, the merits of the claim, the risk to the opposing party in terms of time and delay, case management steps, and more. The advisory committee concluded that this was best left to the common law. Judge Campbell said the advisory committee felt that these issues need to be decided on a case-by-case basis and that principles will develop over time. As a result, he said the advisory committee recommended no action at this time.

A member stated that he agreed with the advisory committee's conclusion, noting that it is a case-by-case judgment call as to how to handle incompetence. Further, he said, there can be verifiable evidence of incompetence even with lawyers involved.

E-RULES

Judge Campbell reported that the advisory committee, along with the other advisory committees, is in the early stages of addressing the question of what to do with electronic communications under the rules. He said one option is to adopt a rule that says anything that can be done in writing can be done electronically, but that raises all kinds of complications. Another option is to go rule by rule and determine what to do with the issue of electronic communications.

DISCOVERY COST SHIFTING

Judge Campbell stated that the advisory committee's discovery subcommittee is in the early stages of examining the question of whether the rules should expand the circumstances in which a party requesting discovery should pay part or all of the costs of responding. He said that Congress and some bar groups had asked for a review of this issue. The proposals published for comment last August include revision of Rule 26(c) to make explicit the authority to enter a protective order that allocates the costs of responding to discovery. If this proposal is adopted, experience in administering it may provide some guidance on the question of whether more specific rule provisions may be useful. Judge Campbell said the advisory committee is in the early stages of examining this issue and will report on its progress in the future.

CACM PROJECTS

Judge Campbell reported that the Court Administration and Case Management Committee (CACM) has raised a number of topics that may lead to Civil Rules amendments, but that action on all of these topics has been deferred pending further development by CACM.

PUBLISHED PROPOSALS

Judge Campbell reported that the advisory committee had held two of the three scheduled public hearings on the proposals published for comment. He said 40 more witnesses were scheduled for an upcoming hearing in Dallas, with 29 more on the waiting list. He said the advisory committee was not scheduling another hearing because it would be too difficult to fit a fourth hearing in all of the members' schedules, and the advisory committee was committed to reading all of the written submissions. He said 405 submissions had already been received and that the committee will review them all carefully. He noted that the hearings have been very valuable and there is work to do to refine the proposals. He added that the advisory committee will decide what to do at its April meeting and will make a recommendation to the Standing Committee at its May meeting.

A participant asked if that schedule was too expedited. He asked whether the advisory committee would have enough time to do the job by the May meeting. Judge Campbell said he thought there was sufficient time. He noted that the advisory committee had been working on the published proposals for five years. He said the committee's task in April will not be gathering information, but using its best judgment in light of everything it had heard through public comment.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raggi and Professors Beale and King presented the report of the advisory committee, as set forth in Judge Raggi's memorandum of December 20, 2013 (Agenda Item 5), and her supplemental memorandum of December 30, 2013.

Amendment for Final Approval

FED. R. CRIM. P. 12

Judge Sutton reported that the advisory committee had been considering amendments to FED. R. CRIM. P. 12 on motions that must be raised before trial and the consequences of late-filed motions since 2006. He provided some background on the current proposals. He noted that the Judicial Conference had approved the proposed

amendment to Rule 12 that the committee had approved at its last meeting and had transmitted it to the Supreme Court. The Court had raised several questions about the proposed amendment. Judge Sutton noted that the package of proposals, including Criminal Rule 12, had been submitted to the Court earlier than in years past to give the Court flexibility in terms of timing its review of the proposals. He noted that one benefit of submitting the proposals early is that if the Court had questions, they might be able to be addressed within the same rulemaking cycle. He stated that this was uncharted territory because in the past, when the proposals were submitted to the Court later, if the Court had questions about the proposals, it would simply recommit them to the advisory committee for further consideration. In this case, however, there might be time to propose changes and have them considered by the Court in the same rulemaking cycle.

Judge Sutton noted that the Court had raised several questions about the Rule 12 proposal. First, as transmitted to the Court, the proposed amendment had stated that the court could consider an untimely motion raising a claim of failure to state an offense (FTSO) if the defendant showed prejudice. The Court had asked to whom the required prejudice would be. Judge Sutton noted that the intent of the amendment was that it would be prejudice to the defendant. Second, the Court had asked, if the prejudice is to the defendant, how the defendant would show prejudice before trial. Judge Sutton stated that one form of prejudice is lack of notice, and another occurs if the grand jury did not properly indict under the elements of the crime. Third, the Court had noted the anomaly of having in proposed Rule 12(c)(3)(A) a required showing of "good cause" for relief from the consequences of failing to timely raise most Rule 12(b)(3) motions, while proposed Rule 12(c)(3)(B) would require prejudice for consideration of late-raised FTSO claims. Judge Sutton noted that by requiring "good cause" alone in (A) and "prejudice" alone in (B), the implication was that there was no requirement of showing "prejudice" in (A). That is not what the committee intended. On the other hand, by requiring "good cause" in (A), and only "prejudice" in (B), the committee had intended the negative implication to be that there was no requirement of showing "cause" under (B) for claims of failure to state an offense. Judge Sutton added that it was odd to have language in the same subsection that intended one negative implication but not another negative implication.

Judge Raggi then explained that the advisory committee recommended resolving the third concern raised by the Court by having one standard for relief from failure to timely raise all Rule 12(b)(3) motions — "good cause," the standard currently used in the rule. She noted that there was disquiet, especially among the members of the defense bar on the committee, about making an FTSO claim a required pre-trial motion when for so long it had been viewed as the equivalent of jurisdiction and something that could be raised at any time. She added that, faced with the fact that it is now recognized as something that should be raised early on, some members of the defense bar had suggested that the committee use a different standard for FTSO claims that would be easier to meet

than "good cause." That is why the advisory committee eventually decided to use just "prejudice" for FTSO claims, no matter what the cause for failing to raise it in timely manner. She noted that everyone recognized that it was a bit curious to have two standards for granting relief from the consequences of belatedly filing a required pretrial motion. She said that the advisory committee has now had more time to think about the proposal. The advisory committee did not want to put the Rule 12 proposal in jeopardy by insisting on two standards. The subcommittee had given it enormous thought and decided that pursuing a separate standard for FTSO claims was not worth the risk to the whole proposal and that "good cause" would be adequate for those claims.

Judge Raggi noted that no one stands convicted of a crime unless every element of the crime is proven beyond a reasonable doubt. The proposed rule addresses only those situations where even though a defendant is proven guilty beyond a reasonable doubt on every element, a failure to charge it correctly should for some reason be heard late on a showing of prejudice. But, she asked, what would the prejudice be in that situation? The advisory committee, she said, had asked what they were really putting at risk by insisting on two standards. She stated that it was now the subcommittee's view and the unanimous view of the advisory committee that it was not worthwhile to pursue a separate standard for FTSO claims, and that a "good cause" standard should apply for all late-raised claims that are not jurisdictional.

Judge Raggi noted that, at the suggestion of a member of the advisory committee, the committee note had been revised to explain that "good cause" is "a flexible standard that requires consideration of all interests in the particular case." She said that this language was in brackets, but that it would be part of the text of the committee note, if approved. This language, she said, would make clear that the court should consider cause, consider prejudice, and consider everything that might be relevant. She explained that the reason the words "cause and prejudice" were not used was to avoid confusion with the use of that phrase in the habeas corpus context. Instead, the revised note language is intended to make clear that "good cause" is a holistic inquiry. She stated that it made sense to trust the district judges to understand that.

Judge Raggi requested that the committee approve the revised proposed amendment to Rule 12 and the accompanying committee note. Finally, Judge Raggi noted that the advisory committee was unsure about whether the change could be accomplished in the current rulemaking cycle. One of the questions the advisory committee had raised, she said, was whether this was a change that would require republication. She reported that the advisory committee was not sure and had consulted with Professor Coquillette, who did not think republication was necessary. She noted that if the committee approved the revised proposal, it could potentially go back to the Court and be considered in this year's rulemaking cycle. She said it was the Standing Committee's decision whether to republish.

Professor Coquillette noted that traditionally the committee republishes when anyone would be surprised by the changes after publication and would feel that they did not have a chance to debate the proposal. But, he noted that in this case, the appropriate standard for relief from late-raised FTSO claims had been debated back and forth for the seven year history of this proposal. Everyone had notice that the appropriate standard was at issue and had a chance to comment on that during the public comment period. Judge Sutton also noted that for the past eight years or so, everyone has known that the rule was being changed to require FTSO claims to be brought before trial and the standard for raising such claims late has been on the table the whole time.

A member stated that his initial reaction was to republish, but that he realized that the Court had the authority to make changes to the committee's proposals itself. If the Court wanted to make a change and just wanted to make sure the rules committees agreed, then it would seem to be a procedure contemplated by the Rules Enabling Act. However, if the proposal is really back in the committee's court, then he said he would have to grapple with the republication question. He stated that he tended to think it is better to republish in the case of a "tie."

Judge Sutton stated that the Court could have proceeded in different ways and this is uncharted territory, but that he believed the committee should treat the proposal as if it were back in front of the committee. Another member asked what the procedure would be if the proposal had gone to a vote in the Court and been rejected. Judge Sutton responded that it depends, and that if a subsequent change by the committees had already been fully vetted, it would not be republished. The reason for republication is if the committee thinks it will get new insights or if someone will be surprised by a change. The member noted that the republication question is similar to a court amending an opinion and giving another opportunity for filing a petition for rehearing. She said that if the changes on rehearing are responsive to the comments already received, the courts usually do not give another opportunity for rehearing.

Professor Beale noted that there had been a previous occasion in which the advisory committee had made changes in response to a remand from the Supreme Court and the committee had not republished. Professor Capra noted that the Evidence Rules Committee had not republished when it made changes after a proposed amendment to Evidence Rule 804(b)(3) was returned by the Court.

Judge Raggi noted that not only had the advisory committee heard lots on this subject, but what it is proposing now is to leave the standard in the current rule in place.

Another member stated that he had no views on the need to republish, but questioned whether there is a negative implication in the new proposed committee note language describing "good cause" as a "flexible standard that requires consideration of all

interests in the particular case." The member explained that the existing standard has been interpreted to require showing, among other things, prejudice, and he wondered whether the note language could potentially be understood to relieve a defendant of having to show prejudice.

Judge Raggi responded that she could not foreclose the possibility of the language being read that way, but from a practical perspective, this is how Rule 12 now treats FTSO claims. She added that, up until the time the jury is empaneled and jeopardy attaches, Rule 12, in another section, lets a trial judge entertain any motion. She stated that presumably on appeal, circuit courts will continue to apply a plain error standard to late-raised claims. So, she said, we are talking about what the judge will entertain in the window of time between when jeopardy attaches and when judgment is entered. Judge Raggi stated that she would be surprised if trial judges would entertain such late motions without a showing of prejudice once jeopardy has attached. She added that if the committee were to see that happening in practice, it could consider amending the rule to spell out a prejudice requirement in the rule, but, given that district judges are constrained by this portion of the rule only in the time between jeopardy attaching and judgment, she thought most judges would require a showing of prejudice. The member stated that as a practical matter that is true, but that he was not sure that the new language in the note added anything. He stated that if it does not add anything substantive, it is not needed.

Judge Raggi explained that the note language explaining that "good cause" is a "flexible standard" makes one of the defense bar members supportive of the proposal, which is something that should not be discounted. She stated that all three advisory committee members who represent defendants voted for this rule in part because of this new language in the note. In fact, she said, something even more detailed had been proposed originally by a defense bar member.

Judge Sutton noted that "good cause" suggests flexibility and that to the extent some have concerns about putting FTSO defenses with all other claims required to be raised before trial, emphasizing flexibility is important to make clear that courts might treat different types of late-raised motions differently, depending on the circumstances.

Another member asked if the new note language is a comfort blanket for some members of the advisory committee. Judge Raggi agreed that it was in part, but noted that the language was derived from the fact that some members wanted to ensure that judges would understand that the seriousness of the motion should also be taken into account in deciding the consequences of a late-raised motion, while recognizing that it would not be appropriate to assume that every FTSO motion is more important than every multiplicity motion, for example.

A member questioned whether there are examples of a change like this going through without being republished. Judge Sutton responded that there were, both with respect to Criminal Rules proposals and Evidence Rules proposals, but the fact that there were other instances in which the committee had made changes after remand from the Supreme Court without republishing does not mean that there should never be republication in response to comments from the Court. But here, he noted, the Rule 12 proposed changes seemed more like the instances in which the committees had not republished. Judge Raggi noted that the advisory committee had already made changes to the Rule 12 proposal after publication without republishing. She added that the advisory committee had received many comments from the defense bar on the published proposals and that while there is the possibility that someone might argue that the last version they saw had a separate standard for FTSO claims, she was not sure that the committee was ever obliged to have two different standards as opposed to the one that is there. The cost of republishing, she noted, would be putting off the effective date of the rule change by another two years. She was comforted by the fact that not one of the defense members of the advisory committee had urged republication.

Judge Sutton noted that the advisory committee had made more substantive changes after publication and before sending it back to the Standing Committee than the current proposed change. Judge Raggi agreed, but noted that the changes after public comment had been made in response to comments received during the public comment period. Professor Coquillette noted that the history of this rule proposal did not require republication here, where the defense bar members of the advisory committee did not have concerns and the issues have been fully discussed. He added that none of the defense bar members of the advisory committee had argued that this change would be a surprise.

A member moved to approve the proposed amendment to Rule 12. The member who had questioned the note language seconded the motion, explaining that as a practical matter, district judges will have no problem applying the amendment and note language. The committee unanimously approved the proposed amendment without republication. Judge Sutton noted that if the proposal is approved in the rest of the Rules Enabling Act process, the committees will closely monitor what happens with FTSO defenses and the "good cause" standard. Judge Sutton thanked Professors Beale and King for their hard work on this proposal.

The committee, without objection and by voice vote, approved the proposed amendment to Criminal Rule 12 for transmission to the Judicial Conference for final approval.

Informational Items

Judge Raggi noted that the advisory committee did not meet in the fall because of the lapse in appropriations due to the government shutdown, but that the advisory committee had a full agenda for its spring meeting.

FED. R. CRIM. P. 4

Judge Raggi reported that the advisory committee was considering the Department of Justice's request to amend Rule 4, which deals with service of summons. The Department had suggested that the rule is deficient for serving foreign organizations who have no agent or place of business in the United States, but whose conduct has criminal consequences in the United States. The current rule allows serving organizations at their last known mailing address in the United States, but these foreign entities do not have any such address. Until there is an appearance by the foreign entity, it cannot be prosecuted, but the Department asserted that if there was a way to properly serve such entities, many of them would enter an appearance rather than risk consequences like forfeiture. Judge Raggi noted that the request appeared to be driven by a desire to have a means of service that would either get foreign entities to respond or would permit the Department to begin forfeiture proceedings if the foreign entity did not respond. Judge Raggi noted that whether it is appropriate for forfeiture proceedings to be instituted based on service is a matter for future litigation.

As to what methods a proposed rule might approve for service, Judge Raggi reported that it is clear that the advisory committee will recommend that if there is an applicable treaty that provides for service in a particular manner, such service will suffice. Similarly, she said, compliance with an agreement with a foreign country on the proper means of service will also suffice. Judge Raggi added that the Department also seeks to have a "catch-all" provision that anything that a judge signs off on will suffice, but some members of the advisory committee were uncomfortable with that because a judge might order service by a U.S. official that would violate the foreign country's laws. She noted that if the object of service is a person, it does not matter how he or she got before the court. She said that the proposal has moved towards including a catch-all provision that would instruct the Department to serve in whatever manner it thinks is reasonable and then the court can deal with the issue of due process once the defendant enters an appearance.

The proposed amendment would ensure organizations that are committing domestic offenses are not able to avoid liability through the expedient of declining to maintain an agent, place of business, or mailing address within the United States. A subcommittee has been assigned to consider the proposal and has approved a proposed amendment for discussion by the full advisory committee. The advisory committee will

take it up at its April meeting.

FED. R. CRIM. P. 41

Judge Raggi reported that the Department has also submitted a proposal to amend Rule 41 to enlarge the territorial limits for warrants to search electronic storage media and electronically stored information. The purpose of the proposed amendment is to enable law enforcement to investigate and prosecute botnets and crimes involving Internet anonymizing technologies. Rule 41(b) does not directly address the circumstances that arise when officers seek to execute search warrants, via remote access, over modern communications networks such as the Internet. The proposed amendment is intended to address two increasingly common situations: (1) where the warrant sufficiently describes the computer to be searched but the district within which that computer is located is unknown, and (2) where the investigation requires law enforcement to coordinate searches of numerous computers in numerous districts. The Department reports problems with determining the district in which to seek the warrant when it does not know where the computer to be searched is located.

The proposed amendment would authorize a court in a district where activities related to a crime have occurred to issue a warrant to be executed by remote access for electronic storage media and electronically stored information whether located within or outside the district. Judge Raggi noted that there were potential concerns about the particularity requirements of warrants when the Department does not know exactly what it is searching. Thus, the advisory committee had asked the Department to draft some warrants of the sort that it thinks might need judicial authorization. Judge Raggi added that once the advisory committee sees examples of the types of warrants that might be presented to federal judges, it will have a better idea of how to proceed. She said that the proposal has been referred to a subcommittee, which is expected to report at the advisory committee's April meeting.

OTHER PROPOSALS

Judge Raggi noted that other proposals under consideration were in the agenda materials and did not need an oral report at this time. One such proposal involved the question of whether there is any need to clarify Rule 53, which prohibits "broadcasting" judicial proceedings in order to clarify the rule's application to tweets from the courtroom. Another requests the committee to consider amending Rules 11 and 32 to make presentence reports available in advance of a guilty plea so that all parties will be aware of the potential sentence. Another proposal under consideration would amend Rule 45(c) to eliminate the three extra days currently provided to respond when service is made by electronic means.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Fitzwater and Professor Capra presented the report of the advisory committee, as set forth in Judge Fitzwater's memorandum of December 2, 2013 (Agenda Item 6). Judge Fitzwater noted that the advisory committee had no action items to present.

Informational Items

Judge Fitzwater reported that the proposed amendment to Rule 803(10), the hearsay exception for the absence of public records, which the Standing Committee approved in June 2012, took effect on December 1, 2013.

He noted that four proposals from the advisory committee were pending before the Supreme Court. The proposed amendments to Rules 801(d)(1)(B) and 803(6)–(8) had been approved by the Standing Committee in June 2013, were approved by the Judicial Conference on the consent calendar at its September 2013 meeting, and had been transmitted to the Supreme Court for consideration.

Judge Fitzwater reported that the Fall 2013 meeting, which would have included a technology symposium and which had been cancelled due to the government shutdown, was rescheduled at the same location for Spring 2014. He said the Department of Justice would not be presenting on the electronic signature issue, as had been planned for the original symposium, although the advisory committee would be willing to host them if continuing dialogue would be desirable. Judge Sutton commented that the advisory committee should think about whether it would be useful to bring people together to discuss the electronic signature issue. Judge Fitzwater noted that it does dovetail with the technology symposium that the advisory committee is planning in conjunction with its next meeting. He added that the symposium might examine things like the ancient document exception to the hearsay rule, which may seem anachronistic in the current era of data storage.

Judge Sutton noted that Professor Capra recently appeared on the cover of the *Fordham Lawyer*, a magazine published by the Fordham Law School, and that the complimentary article featured Professor Capra's work for the rules committees.

PANEL DISCUSSION ON THE POLITICAL AND PROFESSIONAL CONTEXT OF RULEMAKING

Professor Coquillette presided over a panel discussion on the political and professional context of rulemaking. The other panelists included Judge Huff, a former committee member; Judge Wood, a former committee member; Judge Rosenthal, former chair of the Standing and Civil Rules Committees; Judge Anthony Scirica (by phone),

former chair of the committee and former chair of the Executive Committee of the Judicial Conference; and Peter G. McCabe, former secretary to the committee. Professor Coquillette introduced each member and stated their relevant background.

PROFESSOR COQUILLETTE

Professor Coquillette provided background on opposition to the rules committees' work. He noted that historically there have been three groups who are suspicious about the rules committees' work, including the traditional formalists, who believed that the judge's role is to decide cases, not to do anything prospective; the rule skeptics, who thought that uniformity through codification, with transsubstantive rules that apply in all types of cases, was not practical; and the political populists, who believe that rulemaking ought to be done by elected representatives of the people. Professor Coquillette noted that while the rules committees could never please these three groups, they should continue to be sensitive to their concerns.

PETER G. MCCABE

Mr. McCabe provided background on the history of the Rules Enabling Act. He discussed changes the rules committees made over time to make the process more open, transparent, and easily accessible. Mr. McCabe also discussed the committees' efforts to make sure there was a strong empirical basis for amendments. He also emphasized the committees' efforts to ensure evenhandedness and the nonpolitical nature of their role. To get a wide range of views, the rules committees take measures such as inviting members of the bar to come to meetings, conducting surveys and miniconferences, and reaching out to congressional members and staff to inform them about the rulemaking process and about pending rule amendments. Mr. McCabe concluded that the rulemaking system is healthy, effective, and credible, but that the challenge of balancing authority between the judicial and legislative branches will continue to exist and will be an area that the committees will continuously need to focus their attention.

JUDGE ANTHONY J. SCIRICA

Judge Scirica spoke about his experience with the Private Securities Litigation Reform Act and the Class Action Fairness Act and their impact on the rules committees' work. He emphasized the benefits of delegating rulemaking authority to the judiciary through the careful process set out in the Rules Enabling Act, but noted that substantive matters are best addressed by Congress.

JUDGE LEE H. ROSENTHAL

Judge Rosenthal discussed how the rules committees can engage with Congress without becoming politicized. She emphasized the importance of effective and energetic

explanation of the careful, transparent, open, and deliberate nature of the Rules Enabling Act and its process, as well as clear explanation of the purpose behind the delegation of authority under that Act. She noted that the rules committees have worked closely with Congress on a number of issues, including the enactment of Evidence Rule 502 and statutory changes to correspond to recent changes to the Appellate Rules and to the recent Time Computation Project. She concluded that the rules committees need to continue to be vigilant in explaining the importance of the rulemaking process under the Rules Enabling Act and in informing Congress of upcoming changes, while remaining distant from political pressures.

JUDGE MARILYN L. HUFF

Judge Huff discussed her experience with the Time Computation Project, which went through each set of rules to make counting time uniform and easier to apply. She said that as part of the project, the committees had examined the federal statutes that would be affected by such changes and that Congress ultimately amended 29 statutes in conjunction with the project. Judge Huff also discussed her experience as the liaison to the Evidence Rules Committee and as a member of the Standing Committee's Style Subcommittee during the project to restyle the Evidence Rules. Finally, Judge Huff discussed her experience serving on the Standing Committee's Forms Subcommittee. She concluded that these examples show that, consistent with the Rules Enabling Act process, there are often workable solutions within the judiciary, with congressional involvement, to some concerns about the litigation process.

JUDGE DIANE P. WOOD

Judge Wood discussed the triggers for rules committee action, and said triggers include legislative changes; Supreme Court decisions; suggestions from judges, academics, and empirical researchers; and examination of state court practices. She discussed instances in which the rules committees should be skeptical of these triggers. She also introduced the idea of a qualification to the generally accepted norm that the rules are transsubstantive, noting that the committees aim for more than transsubstantivity and seek to make rules that have a broad generality that can be applied in every case in federal court. She concluded that the committees now have the challenge of dealing with problems that may change more quickly than the rulemaking process and that the committees may need another model for that type of problem. She noted that some problems are best addressed outside the rulemaking arena.

REPORT OF THE CM/ECF SUBCOMMITTEE

Professor Capra reported on the work of the CM/ECF Subcommittee, as set out in Judge Michael Chagares's memorandum and attachments of December 4, 2013 (Agenda Item 7). He said there are five main items that the subcommittee has been working on,

and that its work would probably move forward in stages. He added that the reporters to the advisory committees had done outstanding work for the subcommittee.

The first issue the subcommittee was working on was electronic signatures, as explained during the Bankruptcy Rules Committee's report. Professor Capra explained that if the Bankruptcy Rules proposal works, other committees will likely follow with similar proposals, and the CM/ECF Subcommittee will oversee the process. He said that the problem the rule is trying to deal with is not forgery, but using a single signature line and putting it on multiple documents.

Professor Capra said that the second step the subcommittee took was for the reporters to look through their respective rules to see where use of CM/ECF may conflict with existing language. He said addressing all of the items found would be a daunting task. For example, he said, there were dozens of places in the Criminal and Bankruptcy Rules that may not accommodate use of CM/ECF.

The third matter the subcommittee looked at was abrogation of the three-day rule. Professor Capra said that he would take the comments received today on the Civil Rules proposal back to the subcommittee. He added that he thought it was likely that the committees could coordinate a uniform committee note and that the goal would be for the rules to be changed in as uniform a manner as possible. He added that the reporters had been working hard on this issue.

Fourth, Professor Capra said that the subcommittee was looking at the proposal for a civil rule requiring electronic filing. He said he thought this was possibly feasible, but that there are issues about what the exceptions should be. He added that one reason it may be desirable to have a requirement of electronic filing in the federal rules is that the local rules already require it almost universally. On the other hand, he said, the local rules have a lot of exceptions and are not uniform in terms of the exceptions, and that is something that needs to be worked through.

Professor Capra reported that the final issue the subcommittee was considering was whether it would be useful and feasible to have a universal rule that would essentially say that "paper equals electrons." The subcommittee is examining whether, instead of going through all of the rules and changing each rule to accommodate electronic filing and information, there is the possibility of a universal fix. Professor Capra noted that there is a proposed template for such an approach in the agenda materials. The first part of the template would say, "In these rules, [unless otherwise provided] a reference to information in written form includes electronically stored information." Professor Capra said that this tracks what the Evidence Rules have done, but that there can be problems with this approach. For example, he said, the Criminal Rules would need carve-outs. The second part of the template would state: "In these rules, [unless otherwise provided] any action that can or must be completed by filing or sending paper may also be

accomplished by electronic means [that are consistent with any technical standards established by the Judicial Conference of the United States]." He said that there were still a lot of issues and potential problems to think through, including the need for exceptions, as to whether such an approach would work.

Professor Capra said that the subcommittee was working with CACM because the "CM/ECF Next Gen" was being overseen by that committee and it would clearly have implications for the subcommittee's work. He added that the committee does not yet know what Next Gen will do and there is a concern in the subcommittee that the rules committees should be cautious about getting too far out in advance of a problem that does not yet exist. He said that to try to change the rules in advance of Next Gen, when Next Gen might not be what the committees think it is, could create problems. He said that the subcommittee is therefore proceeding with caution.

A member noted that Next Gen is behind schedule and it might be at least two years away from completion. Professor Capra added that there are CACM members on the subcommittee and CACM staff in the Administrative Office who are helping with the subcommittee's work as well.

NEXT COMMITTEE MEETING

Judge Sutton concluded the meeting by thanking the AO staff for the wonderful job in planning the meeting and coordinating all of the logistics. The committee will hold its next meeting on May 29–30, 2014, in Washington, D.C.

Respectfully submitted,

Jonathan C. Rose
Secretary

Andrea L. Kuperman
Chief Counsel

(Rev. 2/21/14)

Agenda E-19 (Summary)
Rules
March 2014

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

1. Approve the proposed amendments to Bankruptcy Rule 1007(a)(1) and (2), and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law. . . . . .pp. 5-6

2. Approve the proposed amendments to Criminal Rule 12, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law . . . . . Addendum pp. 1-3

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

- Federal Rules of Appellate Procedure. . . . . pp. 2-5
- Federal Rules of Bankruptcy Procedure.. . . . . pp. 6-9
- Federal Rules of Civil Procedure.. . . . . pp. 9-11
- Federal Rules of Criminal Procedure.. . . . . pp. 12-13
- Federal Rules of Evidence. . . . . .p. 14

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

Agenda E-19
Rules
March 2014

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure met on January 9-10, 2014. All members attended except Deputy Attorney General James M. Cole and Judge Richard C. Wesley.

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

Also participating in the meeting were Professor Daniel R. Coquillette, the Committee's Reporter; Professor Geoffrey C. Hazard, Jr., and Professor R. Joseph Kimble, consultants to the Committee; Jonathan C. Rose, the Committee's Secretary and Chief of the Administrative

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Office's Rules Committee Support Staff; Benjamin J. Robinson, Counsel and Deputy Chief of the Rules Committee Support Staff; Julie Wilson, Attorney on the Rules Committee Support Staff; Andrea L. Kuperman, Chief Counsel to the Rules Committees; Judge Jeremy D. Fogel, Director of the Federal Judicial Center; and George Everly, Supreme Court Fellow. Elizabeth J. Shapiro attended on behalf of the Department of Justice.

In addition, the Committee held a panel discussion on the political and professional context of rulemaking with the following panelists: Professor Daniel R. Coquillette; Judge Marilyn L. Huff, U.S. District Court for the Southern District of California; Peter G. McCabe, Esq.; Judge Lee H. Rosenthal, U.S. District Court for the Southern District of Texas; Judge Anthony J. Scirica, United States Court of Appeals for the Third Circuit; and Chief Judge Diane P. Wood, United States Court of Appeals for the Seventh Circuit.

FEDERAL RULES OF APPELLATE PROCEDURE

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

Informational Items

The advisory committee canceled its Fall 2013 meeting due to the lapse in appropriations in October 2013. Its next meeting is scheduled for April 28-29, 2014.

Currently, the advisory committee is involved with two projects that address possible amendments to Appellate Rule 4's treatment of the deadlines for filing notices of appeal. First, a circuit split has developed as to whether a motion filed within a purported extension of a non-extendable deadline under Civil Rules 50, 52, or 59 counts as "timely" filed under Appellate Rule 4(a)(4).

Caselaw in the wake of *Bowles v. Russell*, 551 U.S. 205 (2007),[1] holds that statutory appeal deadlines are jurisdictional, but that nonstatutory appeal deadlines are nonjurisdictional claim-processing rules. Rule 4(a)(4) provides that "[i]f a party timely files in the district court" certain post-judgment motions, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." The statutory provision setting the deadlines for civil appeals — 28 U.S.C. § 2107 — does not mention such tolling motions.

A number of circuits have ruled that the Civil Rules' deadlines for post-judgment motions are nonjurisdictional claim-processing rules. Under this interpretation, where a district court purports to extend the time for making such a motion, and no party objects to that extension, the district court has authority to decide the motion on its merits. The question that arises is whether the motion counts as a "timely" one that, under Appellate Rule 4(a)(4), tolls the time to appeal. The Third, Seventh, Ninth, and Eleventh Circuits have issued post-*Bowles* rulings stating that such a motion does not toll the appeal time, and pre-*Bowles* caselaw from the Second Circuit accords with this position. However, the Sixth Circuit has held to the contrary.

There is consensus within the advisory committee that the meaning of "timely" should be clarified. This provision tolls a jurisdictional appeal period, and its meaning should be clear and uniform across the circuits. In its consideration of the issue, the advisory committee is weighing whether to implement the majority approach or the minority approach.

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[1]In *Bowles*, the district court, pursuant to its authority under Appellate Rule 4(a)(6) and 28 U.S.C. § 2107(c), extended the 30-day time period for filing a civil notice of appeal. Instead of the 14-day extension permitted by Rule 4(a)(6) and § 2107(c), however, the court extended the time period by 17 days. 551 U.S. at 207. The Supreme Court held that the court of appeals lacked jurisdiction to entertain the appeal because it was filed outside the 14-day window allowed by statute. *Id.* at 213. The Court based its holding on the "longstanding treatment of statutory time limits for taking an appeal as jurisdictional." *Id.* at 210.

The second Rule 4 project concerns the inmate-filing provision for notices of appeal in subdivision (c)(1). The study of the inmate-filing rule was initiated by a suggestion that the advisory committee consider clarifying whether the rule requires prepayment of postage, and has evolved into consideration of several amendments to the rule, including whether an inmate must prepay postage in order to benefit from the inmate-filing rule; whether and when an inmate must provide a declaration attesting to the circumstances of the filing; whether the inmate must use a legal mail system when one exists in the relevant institution; and whether a represented inmate can benefit from the inmate-filing rule. The advisory committee also has discussed the possibility of promulgating an official form that would walk an inmate through statements that would suffice to establish eligibility for the inmate-filing rule, as well as whether to amend the rule to make clear that the declaration mentioned in the rule suffices to show timely filing but is not required if timeliness can be shown by other evidence. In sum, the advisory committee continues to consider the issue and will continue its discussion at its Spring 2014 meeting.

The advisory committee is also working on projects concerning requirements for filings in the courts of appeals. First, the advisory committee is considering whether to address in a new rule amicus filings in connection with petitions for panel rehearing and/or rehearing en banc. Matters that could be addressed by a proposed rule include length, timing, and other topics that Rule 29 addresses with respect to amicus filings at the merits-briefing stage. The advisory committee is considering several options, but first and foremost, it must consider the principal policy question of whether the federal rules should address this matter at all.

Second, as previously reported, the advisory committee is reviewing the treatment of length limits in the Appellate Rules. Currently, the Appellate Rules set length limits for briefs using a type-volume formula plus a safe harbor in the form of a shorter page limit. At the same

time, the length limits for rehearing petitions and some other papers are set in pages. Members have reported that these page limits invite manipulation of fonts and margins, and that such manipulation wastes time, disadvantages opponents, and makes filings harder to read.

The advisory committee is considering two options. One would replace the page limits with a type-volume-plus-safe-harbor provision modeled on the rules' length limits for briefs. The other option would retain the current page limits for papers prepared without the aid of a computer, but would set roughly equivalent type-volume limits for papers prepared on computers. The advisory committee's research on this issue has at the same time revealed evidence suggesting that the 1998 amendments to Rule 32(a)(7), adopting a type-volume limitation of 14,000 words for a principal brief to replace the former 50-page limit, caused an increase in the permitted length of a brief. Therefore, the advisory committee may also consider whether the word count should also be adjusted as part of the length-limit project.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Bankruptcy Rule 1007(a)(1) and (2), with a recommendation that they be approved and transmitted to the Judicial Conference. Because the amendments are technical and conforming in nature, prior publication for public comment is unnecessary.

Subdivisions (a)(1) and (a)(2) of Rule 1007 require the filing at the outset of a case of the names and addresses of all entities included on "Schedules D, E, F, G, and H." The restyled schedules for individual cases that were published for comment in August 2013 use slightly different designations. Under the new numbering and lettering protocol of the proposed forms, the schedules referred to in Rule 1007(a)(1) and (a)(2) will become Official Forms 106 D, E/F,

G, and H — reflecting a combination of what had been separate Schedules E and F into a single Schedule E/F. In order to make Rule 1007(a) consistent with the new form designations, the advisory committee voted unanimously at its Fall 2013 meeting to propose a conforming amendment to subdivisions (a)(1) and (a)(2) of that rule. The conforming amendments change references to Schedules E and F to Schedule E/F.

The schedules and other individual forms published in 2013 (other than the means-test forms) are proposed to take effect on December 1, 2015 — a year later than normal — in order to coincide with the effective date of the restyled non-individual forms. Given that the amendments to Rule 1007(a)(1) and (a)(2) are conforming in nature, the advisory committee recommended that the Committee approve the amendments without publication, thereby enabling them to go into effect at the same time as the forms.

The Committee concurred with the advisory committee's recommendation.

Recommendation: That the Judicial Conference approve the proposed amendments to Bankruptcy Rule 1007(a)(1) and (2), and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

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

Informational Items

On August 15, 2013, proposed amendments to Bankruptcy Rules 2002, 3002, 3007, 3012, 3015, 4003, 5005, 5009, 7001, 9006, 9009, and Official Forms 17A, 17B, 17C, 22A-1, 22A-1Supp, 22A-2, 22B, 22C-1, 22C-2, 101, 101A, 101B, 104, 105, 106 Summary, 106A/B, 106C, 106D, 106E/F, 106G, 106H, 106Dec, 107, 112, 113, 119, 121, 318, 423, and 427 were published for public comment.

The proposed amendments include a draft national chapter 13 plan form. As previously reported, a working group created by the advisory committee worked on this project for more than 2 years. The twin goals of the project have been to bring more uniformity to chapter 13 practice and to simplify the review of chapter 13 plans by debtors, courts, trustees, and creditors. The proposed amendments to Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, as well as proposed Official Form 113, the national chapter 13 plan form, require use of the plan form and establish the authority needed to implement some of the form's provisions.

As anticipated, the proposed form and rule amendments have drawn a significant number of comments, including an omnibus submission from the National Association of Chapter Thirteen Trustees that combines comments from individual chapter 13 trustees around the country. The great majority of comments relate to the proposed official form rather than the rule amendments. In the main, the comments submitted thus far are detailed and constructive, and only a small number oppose adoption of the form or amended rules. The working group will consider all of the suggestions set out in the comments and will make recommendations for any changes in the form and rules at the advisory committee's Spring 2014 meeting. At that time, the advisory committee will determine the extent to which it will recommend final approval of the form and rules or propose changes that would require republication.

Also of note is the proposed amendment to Rule 5005(a), which governs the filing and transmittal of papers. The amendment would permit the use of electronic signatures of debtors and other individuals who are not registered users of CM/ECF without requiring the retention of the original document bearing a handwritten signature. This national rule would supersede the current array of local rules, many of which require the registered user (usually an attorney) who is filing documents electronically to preserve the originals of all filed documents bearing the

signature of a debtor or other non-registered user for a specified period of time. Under the proposed amendment to Rule 5005, new subdivision (a)(3) would allow scanned signatures of non-registered users to be treated the same as handwritten signatures — without requiring the retention of the hand-signed documents — if the scanned signature page bearing the individual's original signature is part of a single filing.

On the recommendation of a CM/ECF subcommittee comprised of representatives from all of the rules committees to coordinate the work of the advisory committees as they address issues presented by changing technology (inter-committee CM/ECF subcomittee), the advisory committee voted to include within the published amendments alternative means of providing assurance that a scanned signature was actually part of the original document filed electronically. Under one option, the act of filing by a registered person would be deemed the person's certification that the scanned signature was part of the original document. The other option would require a certification by a notary public. The publication materials called attention to these options and specifically invited comment on them.

Finally, as previously reported, the forms modernization project, a multi-year endeavor of the advisory committee, has been working in conjunction with the Federal Judicial Center and the Administrative Office, to revise many of the official bankruptcy forms. The dual goals of the forms modernization project are to improve the official bankruptcy forms and to improve the interface between the forms and available technology. The advisory committee decided to implement the modernized forms in stages in order to allow for fuller testing of the technological features and to facilitate a smoother transition. A small number of the modernized forms became effective on December 1, 2013; others will become effective December 1, 2014; and the majority of the forms are expected to become effective on December 1, 2015.

At its Fall 2013 meeting, the advisory committee reviewed drafts of the revised forms for non-individual debtors, and the forms modernization project continues to revise the forms in response to comments and feedback provided by members of the advisory committee. It is anticipated that the advisory committee will vote to recommend the non-individual forms for publication at its upcoming Spring 2014 meeting and present them to the Committee in May 2014.

FEDERAL RULES OF CIVIL PROCEDURE

Rules Approved for Publication and Comment

The advisory committee submitted proposed amendments to Civil Rules 6(d) and 82, with a request that they be published for comment at a suitable time. The Committee approved the advisory committee's recommendation.

Rule 6(d)

Rule 6(d) adds 3 days to the time allowed to respond after service by, among other things, "electronic means" under Rule 5(b)(2)(E). The Appellate, Bankruptcy, and Criminal Rules contain parallel provisions. The inter-committee CM/ECF subcommittee has determined that the 3-days provision should be eliminated for electronic service. The proposed amendment to Rule 6(d) does just that and the proposed committee note provides an in-depth explanation of the reasons for deleting the 3 added days.

The Committee tentatively approved the proposed amendment for publication with the understanding that the advisory committee may make slight changes to the committee note and add questions for public comment on eliminating the 3-day rule altogether or limiting it to service by mail. The Committee hopes that the proposal will be published in August 2014.

Rule 82

Civil Rule 82 addresses venue for admiralty and maritime claims. By way of background, it has long been understood that the general venue statutes do not apply to actions in which the district court exercises admiralty or maritime jurisdiction, except that the transfer provisions do apply. This proposition could become ambiguous when a case could be brought either in the admiralty or maritime jurisdiction or as an action at law under the "saving to suitors" clause, 28 U.S.C. § 1333(1). Rule 82 has addressed this problem by invoking Rule 9(h) to ensure that the Civil Rules do not seem to modify the venue rules for admiralty or maritime actions. Rule 9(h) provides that an action cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for purposes of Rule 82. It further provides that if a claim for relief is within the admiralty or maritime jurisdiction but also is within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim.

The proposed amendment to Rule 82 arises from legislation that added a new § 1390 to the venue statutes in Title 28 and repealed former § 1392 (local actions). The reference to § 1392 must therefore be deleted. The proposed amendment adds a reference to new § 1390 in order to carry forward the purpose of integrating Rule 9(h) with the venue statutes through Rule 82.

Informational Items

On August 15, 2013, proposed amendments to Civil Rules 1, 4, 16, 26, 30, 31, 33, 34, 36, 37, 84, and the Appendix of Forms were published for public comment. As expected, the proposed amendments have generated significant response. To date, the advisory committee has received over 400 comments, and has held 3 public hearings. The public hearings, which were

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held in Washington, D.C., Phoenix, Arizona, and Dallas, Texas, were well attended by the public and the bar, and the advisory committee heard testimony from more than 120 witnesses.

As previously reported, the proposed amendments to Rules 1, 4, 16, 26, 30, 31, 33, 34, 36, and 37 are aimed at reducing the costs and delays in civil litigation, increasing realistic access to the courts, and furthering the goals of Rule 1 "to secure the just, speedy, and inexpensive determination of every action and proceeding." The proposed amendments are grouped into three sets. The first set seeks to improve early and effective judicial case management. The second seeks to enhance the means of keeping discovery proportional to the action. The third set encourages cooperation.

The proposed new Rule 37(e) concerns the failure to preserve discoverable information. The objective of the proposal is to address the overbroad preservation many litigants and potential litigants feel they have to undertake to ensure they will not later face sanctions. The proposal introduces uniformity among the federal courts and focuses on sanctions rather than attempting to directly regulate the details of preservation.

Also published for public comment are proposed amendments that would abrogate Rule 84 and the Official Forms, and amend Rule 4(d)(1)(D) to append present Forms 5 and 6. As previously reported, the proposed amendments follow months of gathering information about how often forms are used and whether they provide meaningful help to litigants. After carefully studying the issue, the advisory committee determined that abrogation was the best course. Two forms required special consideration. Rule 4(d)(1)(D) requires that a request to waive service of process be made by Form 5. The Form 6 waiver of service of summons is not required, but is closely tied to Form 5. Accordingly, the advisory committee determined that Forms 5 and 6 should be preserved by amending Rule 4(d)(1)(D) to attach them to Rule 4.

FEDERAL RULES OF CRIMINAL PROCEDURE

The Advisory Committee on Criminal Rules presented no items for the Committee's action. The advisory committee canceled its Fall 2013 meeting due to the lapse in appropriations in October 2013. Its next meeting is scheduled for April 7-8, 2014.

Informational Items

The advisory committee continues to discuss a proposal submitted by the Department of Justice to amend Rule 4 to permit effective service of a summons on a foreign organization that has no agent or principal place of business within the United States. The Department recommends that Rule 4 be amended to (1) remove the requirement that a copy of the summons be sent to the organization's last known mailing address within the district or principal place of business within the United States, and (2) provide the means to serve a summons upon an organization located outside the United States. A subcommittee met by teleconference throughout the summer and early fall, and it approved a proposed amendment for discussion at the advisory committee's Fall 2013 meeting. Because of the cancellation of that meeting, discussion of the proposed amendment has been deferred to the advisory committee's upcoming Spring 2014 meeting.

The Department of Justice has submitted a proposal to amend Rule 41 to enlarge the territorial limits for warrants to search electronic storage media and electronically stored information. The proposed amendment is intended to address two increasingly common situations (1) where the warrant sufficiently describes the computer to be searched but the district within which that computer is located is unknown, and (2) where the investigation requires law enforcement to coordinate searches of numerous computers in numerous districts. The purpose of the proposed amendment is to enable law enforcement officials to investigate and prosecute

botnets and crimes involving internet anonymizing technologies. Rule 41(b) does not directly address the circumstances that arise when officers seek to execute search warrants, via remote access, over modern communications networks such as the internet.

The proposed amendment would authorize a court in a district where activities related to a crime have occurred to issue a warrant to be executed by remote access for electronic storage media and electronically stored information, whether located within or outside the district. At present, Rule 41(b) authorizes search warrants for property located outside the judge's district in only four situations: (1) for property in the district that might be removed before execution of the warrant; (2) for tracking devices installed in the district, which may be monitored outside the district; (3) for investigations of domestic or international terrorism; and (4) for property located in a U.S. territory or a U.S. diplomatic or consular mission. The proposed amendment would add an additional exception to the territorial limitations for electronic storage media and electronically stored information. This proposal has been referred to a subcommittee, which has met once by teleconference and is expected to report at the advisory committee's Spring 2014 meeting.

The advisory committee is also considering several issues arising out of the work of the inter-committee CM/ECF subcommittee. For example, Criminal Rule 45(c) and Civil Rule 6(d) contain parallel provisions providing additional time for actions after certain modes of service, identifying those modes by reference to Civil Rule 5(b)(2). As stated above, the inter-committee CM/ECF subcommittee has concluded that it is no longer necessary or desirable to provide additional time when service has been made by electronic means. With the Committee's approval of publication of the proposed amendment to Civil Rule 6(d), the advisory committee will move forward with a parallel amendment to Criminal Rule 45(c).

FEDERAL RULES OF EVIDENCE

The Advisory Committee on Evidence Rules presented no items for the Committee's action. The advisory committee canceled its Fall 2013 meeting and symposium due to the lapse in appropriations in October 2013. Its next meeting is scheduled for April 4, 2014.

Informational Items

In conjunction with its Spring 2014 meeting, the advisory committee will host a symposium to consider the intersection of the Evidence Rules and emerging technologies.

Respectfully submitted,

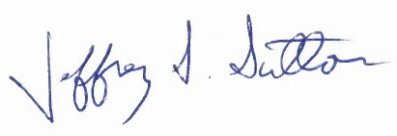

Jeffrey S. Sutton, Chair

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Dean C. Colson
Roy T. Englert, Jr.
Gregory G. Garre
Neil M. Gorsuch
Susan P. Graber
Wallace B. Jefferson
David F. Levi
Patrick J. Schiltz
Amy J. St. Eve
Larry D. Thompson
Richard C. Wesley
Jack Zouhary

Appendix A – Proposed Amendments to the Federal Rules of Bankruptcy Procedure

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

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

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

FROM: Honorable Eugene R. Wedoff, Chair
Advisory Committee on Bankruptcy Rules

DATE: December 12, 2013

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on September 24 and 25, 2013, at the University of St. Thomas School of Law in Minneapolis, Minnesota. The draft minutes of that meeting are set out in Appendix C to this report.

At the meeting the Advisory Committee discussed a number of suggestions for rule and form amendments that were submitted by bankruptcy judges, members of the bar, and court personnel. It also discussed several ongoing projects.

The Committee is presenting one action item at this time—a technical, conforming amendment to Rule 1007(a). Part II of this report discusses that amendment.

* * * * *

II. Action Item—Rule 1007(a)(1) and (2) for Final Approval Without Publication

Subdivisions (a)(1) and (a)(2) of Rule 1007 require the filing at the outset of a case of the names and addresses of all entities included on "Schedules D, E, F, G, and H." The restyled schedules for individual cases that were published for comment in August 2013 use slightly different designations. Under the new numbering and lettering protocol of the proposed forms, the schedules referred to in Rule 1007(a)(1) and (a)(2) will become Official Forms 106 D, E/F, G, and H—reflecting a combination of what had been separate Schedules E and F into a single Schedule E/F. In order to make Rule 1007(a) consistent with the new form designations, the Advisory Committee voted unanimously at the fall meeting to propose a conforming amendment to subdivision (a)(1) and (a)(2) of that rule. The text of the proposed amendment is included in Appendix A.

The schedules and other individual forms published in 2013 (other than the means test forms) are proposed to take effect on December 1, 2015—a year later than normal—in order to coincide with the effective date of the restyled non-individual forms. That timeline means that if the Standing Committee approves without publication the conforming amendments to Rule 1007(a)(1) and (a)(2) at this or the June 2014 meeting, the rule amendments will be able to go into effect at the same time as the forms.

The Advisory Committee recommends that conforming amendments to Rule 1007(a)(1) and (a)(2), which change references to Schedules E and F to Schedule E/F, be approved and forwarded to the Judicial Conference.

* * * * *

Appendix A

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

For Final Approval and Transmittal to the Judicial Conference

Rule 1007. Lists, Schedules, Statements, and Other Documents; Time Limits

(a) CORPORATE OWNERSHIP STATEMENT, LIST OF CREDITORS AND EQUITY SECURITY HOLDERS, AND OTHER LISTS.

(1) *Voluntary Case*. In a voluntary case, the debtor shall file with the petition a list containing the name and address of each entity included or to be included on Schedules D, ~~E, F~~ E/F, G, and H as prescribed by the Official Forms. If the debtor is a corporation, other than a governmental unit, the debtor shall file with the petition a corporate ownership statement containing the information described in Rule 7007.1. The debtor shall file a supplemental statement promptly upon any change in circumstances that renders the corporate ownership statement inaccurate.

(2) *Involuntary Case*. In an involuntary case, the debtor shall file, within seven days after entry of the order for relief, a list containing the name and address of each entity included or to be included on Schedules D, ~~E, F~~ E/F, G, and H as prescribed by the Official Forms.

* * * * *

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

12b-008806

COMMITTEE NOTE

In subdivisions (a)(1) and (a)(2), the references to Schedules are amended to reflect the new designations adopted as part of the Forms Modernization Project.

Because this amendment is made to conform to a change in the designation of the Official Forms that the rule refers to and is technical in nature, final approval is sought without publication.

ADDENDUM TO THE REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Committee on Rules of Practice and Procedure asks the Judicial Conference to modify the rules package that it approved on September 17, 2013, specifically the amendment to Criminal Rule 12(c).

In 2006, the Department of Justice requested that the Advisory Committee on Criminal Rules consider amending Rule 12(b)(3)(B) to require defendants to raise before trial any objection that the indictment failed to state an offense. The rule currently in effect allows a motion raising failure to state an offense at any time, in part because such a failure was thought to be jurisdictional. The Supreme Court's decision in *United States v. Cotton,* 535 U.S. 625, 629-31 (2002), which held that "failure to state an offense" is not a jurisdictional defect, undercuts this rationale.

The proposal evolved substantially between 2006 and publication in 2011, with the advisory committee ultimately deciding to address other features of Rule 12's treatment of pretrial motions in general. The proposed amendments were published for public comment in 2011.

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

The advisory committee received 47 pages of public comments. As a result of those comments, as well as its own further review, the advisory committee made revisions, none of which required republication. In the end, the revised proposed amendments to Rule 12 presented to the Judicial Conference and approved on September 17, 2013, effected the original request by the Justice Department, clarified other aspects of the rule, and took into account public comments received.

In September 2013, the proposed amendments to Rule 12 were transmitted to the Supreme Court as part of a larger rules package. In December, the Court identified four concerns with respect to the Criminal Rule 12 proposal, one related to the committee note, three related to subdivision (c)(3).

With regard to the committee note, the second sentence of the committee note for Rule 12(b)(3) says "reasonably available" rather than "then reasonably available," as the text of the rule says. The advisory committee unanimously agreed to change this part of the committee note to say "then reasonably available." The standing committee unanimously approved this change.

The Court asked three questions with respect to subdivision 12(c)(3): (1) to whom is prejudice relevant – the government, the defendant, both?; (2) how does one show prejudice pre-trial?; and (3) why use good cause alone as the test in subdivision (c)(3)(A) and prejudice alone as the test in subdivision (c)(3)(B), and does this anomaly create unintended consequences?

The advisory committee has answers to the first two questions: the prejudice is to the defendant, and lack of notice and failure of the grand jury to charge the defendant properly all could apply before a criminal trial.

With regard to the third question, the advisory committee agrees that the anomaly of mentioning cause in subdivision (c)(3)(A) and prejudice in subdivision (c)(3)(B) does indeed

create an unintended implication. The absence of prejudice in (c)(3)(A) suggests it does not apply there, and the absence of good cause in (c)(3)(B) suggests it does not apply there. The advisory committee did not intend the first negative implication, but did intend the second. As a result, the advisory committee unanimously agreed to change the proposed amendment to subdivision (c)(3) to apply a good cause standard to *all* late-filed non-jurisdictional motions. The standing committee unanimously approved this change.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Criminal Rule 12, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendments to Federal Rule of Criminal Procedure 12 are set forth in Appendix B. A document comparing the amendments proposed herein to the proposed amendments approved by the Conference on September 17, 2013, is included as Appendix C. The changes to the September 2013 proposed amendments are shaded.

Respectfully submitted,

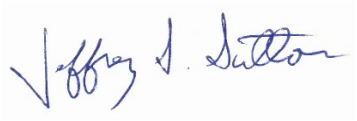

Jeffrey S. Sutton, Chair

Appendix B – Proposed Amendments to Criminal Rule 12
Appendix C – Comparison of Proposed Amendments to Criminal Rule 12

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

1 **Rule 12. Pleadings and Pretrial Motions**

2 * * * * *

3 **(b) Pretrial Motions.**

4 **(1)** ***In General.*** A party may raise by pretrial motion
5 any defense, objection, or request that the court
6 can determine without a trial on the merits.
7 Rule 47 applies to a pretrial motion.

8 **(2)** ~~***Motions That May Be Made Before Trial.*** A~~
9 ~~party may raise by pretrial motion any defense,~~
10 ~~objection, or request that the court can determine~~
11 ~~without a trial of the general issue.~~***Motions That***
12 ***May Be Made at Any Time***. A motion that the

---

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

13 court lacks jurisdiction may be made at any time

14 while the case is pending.

15 **(3)** ***Motions That Must Be Made Before Trial***. The

16 following defenses, objections, and requests must

17 be raised by pretrial motion ~~before trial~~if the

18 basis for the motion is then reasonably available

19 and the motion can be determined without a trial

20 on the merits:

21 (A) ~~a motion alleging~~ a defect in instituting the

22 prosecution~~;~~, including:

23 (i) improper venue;

24 (ii) preindictment delay;

25 (iii) a violation of the constitutional right to

26 a speedy trial;

27 (iv) selective or vindictive prosecution; and

28 (v) an error in the grand-jury proceeding

29 or preliminary hearing;

30 (B) ~~a motion alleging~~ a defect in the indictment

31 or information, including:

32 (i) joining two or more offenses in the

33 same count (duplicity);

34 (ii) charging the same offense in more than

35 one count (multiplicity);

36 (iii) lack of specificity;

37 (iv) improper joinder; and

38 (v) failure to state an offense;

39 ~~— but at any time while the case is pending,~~

40 ~~the court may hear a claim that the~~

41 ~~indictment or information fails to invoke the~~

42 ~~court's jurisdiction or to state an offense;~~

43 (C) ~~a motion to~~ suppression of evidence;

44 (D) ~~a Rule 14 motion to sever~~severance of

45 charges or defendants under Rule 14; and

46 (E) ~~a Rule 16 motion for~~ discovery under

47 Rule 16.

125-008813

(4) ***Notice of the Government's Intent to Use Evidence.***

(A) *At the Government's Discretion.* At the arraignment or as soon afterward as practicable, the government may notify the defendant of its intent to use specified evidence at trial in order to afford the defendant an opportunity to object before trial under Rule 12(b)(3)(C).

(B) *At the Defendant's Request.* At the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)(C), request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.

66 **(c)** ~~**Motion Deadline.**~~ **Deadline for a Pretrial Motion;**

67 **Consequences of Not Making a Timely Motion.**

68 **(1)** ***Setting the Deadline.*** The court may, at the

69 arraignment or as soon afterward as practicable,

70 set a deadline for the parties to make pretrial

71 motions and may also schedule a motion hearing.

72 If the court does not set one, the deadline is the

73 start of trial.

74 **(2)** ***Extending or Resetting the Deadline.*** At any

75 time before trial, the court may extend or reset

76 the deadline for pretrial motions.

77 **(3)** ***Consequences of Not Making a Timely Motion***

78 ***Under Rule 12(b)(3).*** If a party does not meet

79 the deadline for making a Rule 12(b)(3) motion,

80 the motion is untimely. But a court may consider

81 the defense, objection, or request if the party

82 shows good cause.

83 **(d) Ruling on a Motion.** The court must decide every
84 pretrial motion before trial unless it finds good cause
85 to defer a ruling. The court must not defer ruling on a
86 pretrial motion if the deferral will adversely affect a
87 party's right to appeal. When factual issues are
88 involved in deciding a motion, the court must state its
89 essential findings on the record.

90 **(e) [Reserved]~~Waiver of a Defense, Objection, or~~**
91 **~~Request.~~** ~~A party waives any Rule 12(b)(3) defense,~~
92 ~~objection, or request not raised by the deadline the~~
93 ~~court sets under Rule 12(c) or by any extension the~~
94 ~~court provides. For good cause, the court may grant~~
95 ~~relief from the waiver.~~

96 * * * * *

Committee Note

Rule 12(b)(1). The language formerly in (b)(2), which provided that "any defense, objection, or request that the court can determine without trial of the general issue" may be raised by motion before trial, has been relocated here. The more modern phrase "trial on the merits" is substituted for the more archaic phrase "trial of the general issue."

No change in meaning is intended.

Rule 12(b)(2). As revised, subdivision (b)(2) states that lack of jurisdiction may be raised at any time the case is pending. This provision was relocated from its previous placement at the end of subsection (b)(3)(B) and restyled. No change in meaning is intended.

Rule 12(b)(3). The amendment clarifies which motions must be raised before trial.

The introductory language includes two important limitations. The basis for the motion must be one that is "then reasonably available" and the motion must be one that the court can determine "without trial on the merits." The types of claims subject to Rule 12(b)(3) generally will be available before trial and they can – and should – be resolved then. The Committee recognized, however, that in some cases, a party may not have access to the information needed to raise particular claims that fall within the general categories subject to Rule 12(b)(3) prior to trial. The "then reasonably available" language is intended to ensure that a claim a party could not have raised on time is not subject to the limitation on review imposed by Rule 12(c)(3). Additionally, only those issues that can be determined "without a trial on the merits" need be raised by motion before trial. Just as in (b)(1), the more modern phrase "trial on the merits" is substituted for the more archaic phrase "trial of the general issue." No change in meaning is intended.

The rule's command that motions alleging "a defect in instituting the prosecution" and "errors in the indictment or information" must be made before trial is unchanged. The amendment adds a nonexclusive list of commonly raised claims under each category to help ensure that such claims

are not overlooked. The Rule is not intended to and does not affect or supersede statutory provisions that establish the time to make specific motions, such as motions under the Jury Selection and Service Act, 18 U.S.C. § 1867(a).

Rule 12(b)(3)(B) has also been amended to remove language that allowed the court at any time while the case is pending to hear a claim that the "indictment or information fails . . . to state an offense." This specific charging error was previously considered fatal whenever raised and was excluded from the general requirement that charging deficiencies be raised prior to trial. The Supreme Court abandoned any jurisdictional justification for the exception in *United States v. Cotton,* 535 U.S. 625, 629-31 (2002) (overruling *Ex parte Bain*, 121 U.S. 1 (1887), "[i]nsofar as it held that a defective indictment deprives a court of jurisdiction").

Rule 12(c). As revised, subdivision (c) governs both the deadline for making pretrial motions and the consequences of failing to meet the deadline for motions that must be made before trial under Rule 12(b)(3).

As amended, subdivision (c) contains three paragraphs. Paragraph (c)(1) retains the existing provisions for establishing the time when pretrial motions must be made, and adds a sentence stating that unless the court sets a deadline, the deadline for pretrial motions is the start of trial, so that motions may be ruled upon before jeopardy attaches. Subdivision (e) of the present rule contains the language "or by any extension the court provides," which anticipates that a district court has broad discretion to extend, reset, or decline to extend or reset, the deadline for pretrial motions. New paragraph (c)(2) recognizes this discretion explicitly and relocates the Rule's mention of it to a more logical place – after the provision concerning

setting the deadline and before the provision concerning the consequences of not meeting the deadline. No change in meaning is intended.

New paragraph (c)(3) governs the review of untimely claims, previously addressed in Rule 12(e). Rule 12(e) provided that a party "waives" a defense not raised within the time set under Rule 12(c). Although the term waiver in the context of a criminal case ordinarily refers to the intentional relinquishment of a known right, Rule 12(e) has never required any determination that a party who failed to make a timely motion intended to relinquish a defense, objection, or request that was not raised in a timely fashion. Accordingly, to avoid possible confusion the Committee decided not to employ the term "waiver" in new paragraph (c)(3).

New paragraph 12(c)(3) retains the existing standard for untimely claims. The party seeking relief must show "good cause" for failure to raise a claim by the deadline, a flexible standard that requires consideration of all interests in the particular case.

Rule 12(e). The effect of failure to raise issues by a pretrial motion has been relocated from (e) to (c)(3).

Changes Made After Publication and Comment

Language that had been deleted from Rule 12(b)(2) as unnecessary was restored and relocated in (b)(1). The change begins the Rule's treatment of pretrial motions with an appropriate general statement and responds to concerns that the deletion might have been perceived as unintentionally restricting the district courts' authority to

rule on pretrial motions. The references to "double jeopardy" and "statute of limitations" were dropped from the nonexclusive list in (b)(3)(A) to permit further debate over the treatment of such claims. New paragraph (c)(2) was added to state explicitly the district court's authority to extend or reset the deadline for pretrial motions; this authority had been recognized implicitly in language being deleted from Rule 12(e). In subdivision (c), the cross reference to Rule 52 was omitted as unnecessarily controversial. In subparagraph (c)(3), the current language "good cause" was retained for all claims and subparagraph (c)(3)(B) was omitted. Finally, the Committee Note was amended to reflect these post-publication changes and to state explicitly that the rule is not intended to change or supersede statutory deadlines under provisions such as the Jury Selection and Service Act.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

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2 * * * * *

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12 ***May Be Made at Any Time***. A motion that the

* New material is underlined; matter to be omitted is lined through. Shaded areas show changes made to language approved by the Judicial Conference on September 17, 2013, both additions and deletions.

13 court lacks jurisdiction may be made at any time

14 while the case is pending.

15 **(3)** ***Motions That Must Be Made Before Trial***. The

16 following defenses, objections, and requests must

17 be raised by pretrial motion ~~before trial~~if the

18 basis for the motion is then reasonably available

19 and the motion can be determined without a trial

20 on the merits:

21 (A) ~~a motion alleging~~ a defect in instituting the

22 prosecution~~;~~, including:

23 (i) improper venue;

24 (ii) preindictment delay;

25 (iii) a violation of the constitutional right to

26 a speedy trial;

27 (iv) selective or vindictive prosecution; and

28 (v) an error in the grand-jury proceeding

29 or preliminary hearing;

30 (B) ~~a motion alleging~~ a defect in the indictment

31 or information, including:

32 (i) joining two or more offenses in the

33 same count (duplicity);

34 (ii) charging the same offense in more than

35 one count (multiplicity);

36 (iii) lack of specificity;

37 (iv) improper joinder; and

38 (v) failure to state an offense;

39 ~~— but at any time while the case is pending,~~

40 ~~the court may hear a claim that the~~

41 ~~indictment or information fails to invoke the~~

42 ~~court's jurisdiction or to state an offense;~~

43 (C) ~~a motion to~~ suppression of evidence;

44 (D) ~~a Rule 14 motion to sever~~severance of

45 charges or defendants under Rule 14; and

46 (E) ~~a Rule 16 motion for~~ discovery under

47 Rule 16.

125-008823

(4) ***Notice of the Government's Intent to Use Evidence.***

(A) *At the Government's Discretion.* At the arraignment or as soon afterward as practicable, the government may notify the defendant of its intent to use specified evidence at trial in order to afford the defendant an opportunity to object before trial under Rule 12(b)(3)(C).

(B) *At the Defendant's Request.* At the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)(C), request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.

66 **(c)** ~~**Motion Deadline.**~~ **Deadline for a Pretrial Motion;**

67 **Consequences of Not Making a Timely Motion.**

68 **(1)** ***Setting the Deadline.*** The court may, at the

69 arraignment or as soon afterward as practicable,

70 set a deadline for the parties to make pretrial

71 motions and may also schedule a motion hearing.

72 If the court does not set one, the deadline is the

73 start of trial.

74 **(2)** ***Extending or Resetting the Deadline.*** At any

75 time before trial, the court may extend or reset

76 the deadline for pretrial motions.

77 **(3)** ***Consequences of Not Making a Timely Motion***

78 ***Under Rule 12(b)(3).*** If a party does not meet

79 the deadline for making a Rule 12(b)(3) motion,

80 the motion is untimely. But a court may consider

81 the defense, objection, or request if the party

82 shows good cause.~~:~~

83 ~~(A) the party shows good cause; or~~

125-008825

84 ~~(B) for a claim of failure to state an offense, the~~

85 ~~defendant shows prejudice.~~

86 **(d) Ruling on a Motion.** The court must decide every

87 pretrial motion before trial unless it finds good cause

88 to defer a ruling. The court must not defer ruling on a

89 pretrial motion if the deferral will adversely affect a

90 party's right to appeal. When factual issues are

91 involved in deciding a motion, the court must state its

92 essential findings on the record.

93 **(e) [Reserved]~~Waiver of a Defense, Objection, or~~**

94 ~~**Request.** A party waives any Rule 12(b)(3) defense,~~

95 ~~objection, or request not raised by the deadline the~~

96 ~~court sets under Rule 12(c) or by any extension the~~

97 ~~court provides. For good cause, the court may grant~~

98 ~~relief from the waiver.~~

99 * * * * *

Committee Note

Rule 12(b)(1). The language formerly in (b)(2), which provided that "any defense**,** objection, or request that the

court can determine without trial of the general issue" may be raised by motion before trial, has been relocated here. The more modern phrase "trial on the merits" is substituted for the more archaic phrase "trial of the general issue." No change in meaning is intended.

Rule 12(b)(2). As revised, subdivision (b)(2) states that lack of jurisdiction may be raised at any time the case is pending. This provision was relocated from its previous placement at the end of subsection (b)(3)(B) and restyled. No change in meaning is intended.

Rule 12(b)(3). The amendment clarifies which motions must be raised before trial.

The introductory language includes two important limitations. The basis for the motion must be one that is "then reasonably available" and the motion must be one that the court can determine "without trial on the merits." The types of claims subject to Rule 12(b)(3) generally will be available before trial and they can – and should – be resolved then. The Committee recognized, however, that in some cases, a party may not have access to the information needed to raise particular claims that fall within the general categories subject to Rule 12(b)(3) prior to trial. The "then reasonably available" language is intended to ensure that a claim a party could not have raised on time is not subject to the limitation on review imposed by Rule 12(c)(3). Additionally, only those issues that can be determined "without a trial on the merits" need be raised by motion before trial. Just as in (b)(1), the more modern phrase "trial on the merits" is substituted for the more archaic phrase "trial of the general issue." No change in meaning is intended.

The rule's command that motions alleging "a defect in instituting the prosecution" and "errors in the indictment or information" must be made before trial is unchanged. The amendment adds a nonexclusive list of commonly raised claims under each category to help ensure that such claims are not overlooked. The Rule is not intended to and does not affect or supersede statutory provisions that establish the time to make specific motions, such as motions under the Jury Selection and Service Act, 18 U.S.C. § 1867(a).

Rule 12(b)(3)(B) has also been amended to remove language that allowed the court at any time while the case is pending to hear a claim that the "indictment or information fails . . . to state an offense." This specific charging error was previously considered fatal whenever raised and was excluded from the general requirement that charging deficiencies be raised prior to trial. The Supreme Court abandoned any jurisdictional justification for the exception in *United States v. Cotton,* 535 U.S. 625, 629-31 (2002) (overruling *Ex parte Bain*, 121 U.S. 1 (1887), "[i]nsofar as it held that a defective indictment deprives a court of jurisdiction").

Rule 12(c). As revised, subdivision (c) governs both the deadline for making pretrial motions and the consequences of failing to meet the deadline for motions that must be made before trial under Rule 12(b)(3).

As amended, subdivision (c) contains three paragraphs. Paragraph (c)(1) retains the existing provisions for establishing the time when pretrial motions must be made, and adds a sentence stating that unless the court sets a deadline, the deadline for pretrial motions is the start of trial, so that motions may be ruled upon before jeopardy attaches. Subdivision (e) of the present rule contains the language "or by any extension the court provides," which

anticipates that a district court has broad discretion to extend, reset, or decline to extend or reset, the deadline for pretrial motions. New paragraph (c)(2) recognizes this discretion explicitly and relocates the Rule's mention of it to a more logical place – after the provision concerning setting the deadline and before the provision concerning the consequences of not meeting the deadline. No change in meaning is intended.

New paragraph (c)(3) governs the review of untimely claims, previously addressed in Rule 12(e). Rule 12(e) provided that a party "waives" a defense not raised within the time set under Rule 12(c). Although the term waiver in the context of a criminal case ordinarily refers to the intentional relinquishment of a known right, Rule 12(e) has never required any determination that a party who failed to make a timely motion intended to relinquish a defense, objection, or request that was not raised in a timely fashion. Accordingly, to avoid possible confusion the Committee decided not to employ the term "waiver" in new paragraph (c)(3).

~~The standard for review of untimely claims under n~~New paragraph 12(c)(3) retains the existing standard for untimely claims~~depends on the nature of the defense, objection, or request~~. The ~~general standard for claims that must be raised before trial under Rule 12(b)(3) is stated in (c)(3)(A), which – like the present rule – requires that the~~ party seeking relief must show "good cause" for failure to raise a claim by the deadline, a flexible standard that requires consideration of all interests in the particular case. ~~The Supreme Court and lower federal courts have interpreted the "good cause" standard under Rule 12(e) to require both (1) "cause" for the failure to raise the claim on time, and (2) "prejudice" resulting from the error. *Davis v. United States*, 411 U.S. 233, 242 (1973); *Shotwell Mfg. Co.*~~

125-008829

~~*v. United States*, 371 U.S. 341, 363 (1963).~~

~~New subparagraph (c)(3)(B) provides a different standard for one specific claim: the failure of the charging document to state an offense. The Committee concluded that judicial review of these claims, which go to adequacy of the notice afforded to the defendant, and the power to bring a defendant to trial or to impose punishment, should be available without a showing of "good cause." Rather, review should be available whenever a defendant shows prejudice from the failure to state a claim. Accordingly, subparagraph (c)(3)(B) provides that the court can consider these claims if the party "shows prejudice." Unlike plain error review under Rule 52(b), the standard under Rule (12)(c)(3)(B) does not require a showing that the error was "plain" or that the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." Nevertheless, it will not always be possible for a defendant to make the required showing of prejudice. For example, in some cases in which the charging document omitted an element of the offense, the defendant may have admitted the element as part of a guilty plea after having been afforded timely notice by other means.~~

Rule 12(e). The effect of failure to raise issues by a pretrial motion has been relocated from (e) to (c)(3).

Changes Made After Publication and Comment

Language that had been deleted from Rule 12(b)(2) as unnecessary was restored and relocated in (b)(1). The change begins the Rule's treatment of pretrial motions with an appropriate general statement and responds to concerns that the deletion might have been perceived as

unintentionally restricting the district courts' authority to rule on pretrial motions. The references to "double jeopardy" and "statute of limitations" were dropped from the nonexclusive list in (b)(3)(A) to permit further debate over the treatment of such claims. New paragraph (c)(2) was added to state explicitly the district court's authority to extend or reset the deadline for pretrial motions; this authority had been recognized implicitly in language being deleted from Rule 12(e). In subdivision (c), the cross reference to Rule 52 was omitted as unnecessarily controversial. In subparagraph (c)(3)~~(A)~~, the current language "good cause" was retained~~.~~ for all claims and ~~In~~ subparagraph (c)(3)(B)~~, the reference to "double jeopardy"~~ was omitted~~ to mirror the omission from (b)(3)(A), and the word "only" was deleted from the phrase "prejudice only" because it was superfluous~~. Finally, the Committee Note was amended to reflect these post-publication changes and to state explicitly that the rule is not intended to change or supersede statutory deadlines under provisions such as the Jury Selection and Service Act.

12b-008831

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Washington, DC
May 29-30, 2014

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AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Washington, DC
May 29-30, 2014

I. Welcome and Opening Business

A. Welcome and opening remarks by Judge Jeffrey S. Sutton

B. Report on March 2014 Judicial Conference session

C. Transmission of Supreme Court-approved proposed rules amendments to Congress

D. **ACTION:** Approving Minutes of the January 2014 Committee Meeting

II. Report of the Advisory Committee on Civil Rules – Judge David G. Campbell

Items for Final Approval

A. **ACTION:** Approving and transmitting to the Judicial Conference proposed amendments to:

1. Rules 1, 4, 16, 26, 30, 31, 33, 34, and 37: Duke Civil Litigation Conference Rules Package

2. Rule 37(e): Failure to Preserve ESI

3. Rule 84 and the Appendix of Forms, Rule 4, and Forms 5 and 6**:** Abrogation of Civil Forms

4. Rule 6(d): "Being Served"

5. Rule 55(c): "Final" Default Judgment

Items for Publication

B. **ACTION:** Approving publishing for public comment proposed amendments to:

1. Rule 6(d): Elimination of Electronic Service from 3-Day Rule

2. Rule 82: Conform to Admiralty Venue

3. Rule 4(m): Serving a Corporation Abroad

III. Report of the Inter-Committee CM/ECF Subcommittee – Judge Michael A. Chagares

A. **ACTION:** "3-Day Rule" Package

IV. Report of the Advisory Committee on Criminal Rules – Judge Reena Raggi

Items for Publication

A. **ACTION:** Approving publishing for public comment proposed amendments to:

1. Rule 4: Service of Summons on Organizational Defendants

2. Rule 41: Venue for Approval of Warrant for Certain Remote Electronic Searches

3. Rule 45: Elimination of Electronic Service from 3-Day Rule

V. Report of the Advisory Committee on Appellate Rules – Judge Steven M. Colloton

Items for Publication

A. **ACTION:** Approving publishing for public comment proposed amendments to:

1. Rules 4(c) and 25(a)(2)(C), Forms 1 and 5, and new Form 7: Inmate-Filing Rule

2. Rule 4(a)(4): "Timely" Tolling Motions

3. Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6: Length Limits

4. Rule 29: Amicus Briefs on Rehearing

5. Rule 26(c): Elimination of Electronic Service from 3-Day Rule

VI. Report of the Advisory Committee on Evidence Rules – Chief Judge Sidney A. Fitzwater

VII. Report of the Advisory Committee on Bankruptcy Rules – Judge Eugene R. Wedoff

Items for Final Approval

A. **ACTION:** Approving and transmitting to the Judicial Conference proposed amendments to:

1. Rule 9006(f)

2. Official Forms 17A, 17B, and 17C (December 1, 2014 effective date)

3. Official Forms 22A-1, 22A-1Supp, 22A-2, 22B, 22C-1, and 22C-2 (December 1, 2014 effective date)

4. Official Forms 3A and 3B (December 1, 2014 effective date)

5. Official Forms 101, 101A, 101B, 104, 105, 106Sum, 106A/B, 106C, 106D, 106E/F, 106G, 106H, 106Dec, 107, 112, 119, 121, 318, 423, and 427 (December 1, 2015 or later effective date)

Items for Republication

B. **ACTION:** Approving republishing for public comment proposed amendments to:

1. Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009

2. Official Form 113

Items for Publication

C. **ACTION:** Approving publishing for public comment proposed amendments to:

1. Rules 1010, 1011, 2002, and new Rule 1012

2. Rule 3002.1

3. Rule 9006(f): Elimination of Electronic Service from 3-day Rule

4. Official Form 401

5. Official Form 410A

6. Official Forms 11A (Abrogated), 11B (Abrogated), 106J, 106J-2, 201, 202, 204, 205, 206Sum, 206A/B, 206D, 206E/F, 206G, 206H, 207, 309A, 309B, 309C, 309D, 309E, 309F, 309G, 309H, 309I, 312, 313, 314, 315, 410, 410S1, 410S2, 416A, 416B, 416D, 424, and Instructions

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To carry on a continuous study of the operation and effect of the general rules of practice and procedure.

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 9-10, 2014
Phoenix, Arizona
Draft Minutes as of March 13, 2014

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ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Phoenix, Arizona, on Thursday and Friday, January 9 and 10, 2014. The following members were present:

Judge Jeffrey S. Sutton, Chair
Dean C. Colson, Esquire
Roy T. Englert, Jr., Esquire
Gregory G. Garre, Esquire
Judge Neil M. Gorsuch
Judge Susan P. Graber
Chief Justice Wallace B. Jefferson
Dean David F. Levi
Judge Patrick J. Schiltz
Judge Amy J. St. Eve
Larry D. Thompson, Esquire
Judge Richard C. Wesley
Judge Jack Zouhary

Deputy Attorney General James M. Cole was unable to attend. Elizabeth J. Shapiro, Esq., represented the Department of Justice.

Professor Geoffrey C. Hazard, Jr., consultant to the committee, and Professor R. Joseph Kimble, the committee's style consultant, participated. Judge Jeremy D. Fogel, Director of the Federal Judicial Center, also participated.

Professor Daniel R. Coquillette, the committee's reporter, chaired a panel discussion on the political and professional context of rulemaking with the following panelists: Judge Lee H. Rosenthal, former chair of the committee; Judge Diane P. Wood, former member of the committee; Judge Marilyn L. Huff, former member of the committee; Judge Anthony J. Scirica (by telephone), former chair of the committee; Peter G. McCabe, Esq., former secretary to the committee.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Jonathan C. Rose	The committee's secretary and Rules Committee Officer
Benjamin J. Robinson	Deputy Rules Officer
Julie Wilson	Rules Office Attorney
Andrea L. Kuperman	Chief Counsel to the Rules Committees
Tim Reagan	Senior Research Associate, Federal Judicial Center
Frances F. Skillman	Rules Office Paralegal Specialist
Toni Loftin	Rules Office Administrative Specialist

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
- Judge Steven M. Colloton, Chair
- Professor Catherine T. Struve, Reporter (by telephone)

Advisory Committee on Bankruptcy Rules —
- Judge Eugene R. Wedoff, Chair
- Professor S. Elizabeth Gibson, Reporter (by telephone)
- Professor Troy A. McKenzie, Associate Reporter

Advisory Committee on Civil Rules —
- Judge David G. Campbell, Chair
- Professor Edward H. Cooper, Reporter
- Professor Richard L. Marcus, Associate Reporter

Advisory Committee on Criminal Rules —
- Judge Reena Raggi, Chair

Professor Sara Sun Beale, Reporter (by telephone)
Professor Nancy J. King, Associate Reporter (by telephone)
Advisory Committee on Evidence Rules —
Judge Sidney A. Fitzwater, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Sutton opened the meeting by welcoming everyone and thanking the Rules Office staff for arranging the logistics of the meeting, including a very economical rate for the hotel.

Committee Membership Changes

Judge Sutton announced that the terms of Judges Huff and Wood had ended on October 1, 2013. He thanked them for their distinguished service on the committee, described their many contributions to the committee's work, and presented each with a plaque. Judge Sutton also announced that Mr. McCabe, who had served as secretary to the committee for 21 years, had recently retired from the Administrative Office. Judge Sutton noted that Mr. McCabe had been the longest serving employee of the Administrative Office and had dedicated 49 years to government service. Judge Sutton thanked Mr. McCabe for his extraordinary service to the committee and the courts. He also noted that the committee would be losing three great musicians, as Judges Huff and Wood and Mr. McCabe were all talented musicians.

Judge Sutton introduced the new committee members, Judge Graber and Judge St. Eve, and he summarized their impressive legal backgrounds.

Judge Sutton noted that the representatives from the Civil Rules Committee were at the courthouse holding a hearing on the proposals that are currently out for public comment, but that they would be joining the second day of the meeting.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee, without objection and by voice vote, approved the minutes of the last meeting, held on June 3–4, 2013.

REPORT OF THE ADMINISTRATIVE OFFICE

Judge Sutton reported that the rules committees had been engaged with Congress recently. He said that last June Congress had introduced legislation to deal with patent assertion entities. He said the first draft from the House was aggressive in attempting to

preempt the Rules Enabling Act process. He reported that he and Judge Campbell had met several times with congressional staffers, that the original draft legislation had been modified, that there were several bills under consideration, and that discussions are continuing.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Colloton and Professor Struve presented the report of the advisory committee, as set out in Judge Colloton's memorandum and attachments of December 16, 2013 (Agenda Item 3). Judge Colloton reported that the advisory committee's fall meeting had been cancelled due to the lapse in appropriations during the government shutdown and that it had no action items to present.

Informational Items

Judge Colloton highlighted a few items that the advisory committee currently has on its agenda.

FED. R. APP. P. 4(a)(4)

Judge Colloton reported that a lopsided circuit split has developed concerning whether a motion filed within a purported extension of a non-extendable deadline under Civil Rules 50, 52, or 59 counts as "timely" under Appellate Rule 4(a)(4), which provides that the "timely" filing of certain motions tolls the time to appeal. The advisory committee is considering whether and how to amend the rule to answer this question. Civil Rule 6(b) provides that a district court may not extend the time for filing motions under Civil Rules 50, 52, or 59. Nonetheless, district courts sometimes extend the time to file such motions even though Civil Rule 6(b) does not allow it. In other instances, a party files a motion late, the opposing party does not object, and the district court rules on it on the merits. Thus, the question has arisen whether a motion is "timely" under Appellate Rule 4(a)(4) if it is not within the time set in the Civil Rules but is nonetheless considered on the merits by the district court either because of an erroneous extension or the failure of the opposing party to object.

The Sixth Circuit has held that where the non-movant forfeits its objection to the motion's untimeliness, the motion is timely for purposes of Rule 4(a)(4). However, the Third, Seventh, Ninth, and Eleventh Circuits have held to the contrary. The courts holding that such motions are not timely reason that Rule 4(a)(4) was designed to provide a uniform deadline for the named motions in order to set a definite point in time when litigation would come to an end. Making the time for filing these motions depend on developments in the district court introduces a disparity that Rule 4(a)(4) was designed to eliminate. Judge Colloton noted that the Seventh Circuit has commented that the Sixth

Circuit's approach was uncomfortably close to the "unique circumstances" doctrine that was overruled in *Bowles v. Russell*, 551 U.S. 205 (2007). He added that the advisory committee will address these issues at its spring meeting.

A member stated that he supported the minority view that would forgive a late filing if it was done in reliance on a court order. Judge Sutton questioned whether doing so would overrule *Bowles*. The member responded that it would not; the rules could provide that if the deadline is set by rule and the judge purports to extend it in error, then a litigant who has relied on the erroneous extension is excused from the consequences of late filing. Another member noted it is different if the deadline is set by statute.

Another member suggested a wording change to one of the tentative sketches of possible amendments to address this issue, asking if there was a more sensitive way to reference the limits on judicial authority in the phrase: "a court order that exceeds the court's authority (if any) to extend the deadline . . . ." The reporter responded that she understood the concern, but she did not want the rule language to imply that a court had authority to extend deadlines outside the time allowed in the rules, as judges exceeding their authority in this regard is the root of the problem. She said that all suggestions on wording are welcome. Another member suggested instead using language along the lines of: "a court order that extends the deadline beyond that otherwise permitted by the rules . . . ."

FED. R. APP. P. 4(c)

Judge Colloton reported that the advisory committee has also begun a project to examine Rule 4(c)(1)'s inmate-filing provision for notices of appeal. The advisory committee is considering amendments to the rule that might address, among other things, whether an inmate must prepay postage in order to benefit from the inmate-filing rule; whether and when an inmate must provide a declaration attesting to the circumstances of the filing; whether the inmate must use a legal mail system when one exists in the relevant institution; and whether a represented inmate can benefit from the inmate-filing rule. The project grew out of a 2007 suggestion by Judge Diane Wood, suggesting that the committee consider clarifying whether Rule 4(c)(1)'s inmate-filing rule requires prepayment of postage. Judge Colloton reported that there is ambiguity in the case law on whether prepayment of postage is required; whether inmates must file a declaration; and the meaning of the sentence in the rule that says that if a legal mail system exists, the inmate must use the system. He said that a subcommittee is working on these and related issues.

LENGTH LIMITS

Judge Colloton reported that the Appellate Rules have some length limits set out in type-volume terms and some set out in pages. He said that the advisory committee is considering whether all the limits should be measured by type-volume given the

ubiquitous use of computers, and if so, the best means of appropriately converting current limits that are set in pages to type-volume limits. He noted that when the rules governing the length of briefs were changed to convert to type-volume limits, the rules set a type-volume limit that approximated the conversion from a page limit and provided a shorter safe harbor set in pages. The advisory committee is considering the option of taking a similar approach for other limits that are currently set in pages.

Judge Colloton stated that a safe harbor set in pages must be shorter than the type-volume limit to prevent lawyers from using the safe harbor to get around the type-volume limit, but the shorter page limit can create a hardship for pro se litigants. As a result, another option the advisory committee is considering would differentiate between papers prepared on a computer and papers prepared without the aid of a computer. Judge Colloton noted that it was unlikely that lawyers would switch to using typewriters in order to get around the type-volume limits. Another issue is that there is evidence that when the brief page limit was converted from 50 pages to a type-volume limit of 14,000 words, it resulted in an increase in the permitted length of a brief. The advisory committee is considering whether to adjust that limit to 12,500 or 13,000 words as part of the length-limit project.

AMICUS BRIEFS ON REHEARING

Judge Colloton reported that the advisory committee is also considering the possibility of addressing amicus filings in connection with petitions for panel rehearing and/or rehearing en banc. He stated that the advisory committee had heard that lawyers are frustrated that there is no rule with respect to rehearing that sets out when an amicus brief must be filed or how long it must be. The committee is considering whether there should be a national rule on these topics. Judge Colloton noted that some circuits have no local rule on these matters. However, there is a concern that any rule that addresses amicus briefs on petitions for rehearing might stimulate more such amicus briefs, which some courts do not desire. Judge Colloton noted that some courts even have rules that generally prohibit amicus filings on rehearing, or that only allow them with leave of court. Matters that could be addressed by a proposed rule include length, timing, and other topics that Rule 29 addresses with respect to amicus filings at the merits-briefing stage.

A judge member noted that amicus briefs are usually helpful on rehearing. She stated that sometimes there are sleeper issues that the appellate court may not be aware of and that she favored explicitly clarifying that such amicus briefs are permissible. Judge Colloton noted that the suggestion, if implemented, would not require allowing amicus briefs on rehearing, but instead would set out the procedure to be followed if the circuit allowed such amicus briefs.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Wedoff and Professors Gibson and McKenzie presented the report of the advisory committee, as set out in Judge Wedoff's memorandum and attachments of December 12, 2013 (Agenda Item 4).

Amendment for Final Approval

FED. R. BANKR. P. 1007(a)

Judge Wedoff reported that the advisory committee was seeking approval to make a technical and conforming amendment to Rule 1007(a). Subdivisions (a)(1) and (a)(2) of Rule 1007 require the filing at the outset of a case of the names and addresses of all entities included on "Schedules D, E, F, G, and H." The restyled schedules for individual cases that were published for comment in August 2013 use slightly different designations. Under the new numbering and lettering protocol of the proposed forms, the schedules referred to in Rule 1007(a)(1) and (a)(2) will become Official Forms 106 D, E/F, G, and H—reflecting a combination of what had been separate Schedules E and F into a single Schedule E/F. Judge Wedoff stated that in order to make Rule 1007(a) consistent with the new form designations, the advisory committee was proposing a conforming amendment to subdivisions (a)(1) and (a)(2) of that rule. Judge Wedoff reported that the revised schedules would not go into effect until December 1, 2015, so he asked that the conforming rule change be held back to go into effect on the same date.

The committee, without objection and by voice vote, approved the proposed amendment to Rule 1007(a) for transmission to the Judicial Conference for final approval without publication.

Informational Items

CHAPTER 13 PLAN FORM

Professor McKenzie reported on comments received on the published proposed chapter 13 plan form and related rule amendments. The advisory committee had drafted an official form for plans in chapter 13 cases and had proposed related amendments to nine of the Bankruptcy Rules. Professor McKenzie reported that the form and rule amendments were published in August 2013 and have drawn over 30 comments so far. He said that very few comments expressed opposition to the form, but many were long and detailed. Professor McKenzie reported that since so many comments had already come in, the working group had already begun categorizing and reviewing the comments, although of course its work could not be completed until the comment period closed in February and all the comments were received.

Professor McKenzie said that one common theme that had emerged was what to do when the form provides a number of choices to the debtor even though some choices may not be available in the debtor's district. The advisory committee did not take a position on the differences in these choices between districts, but one concern is that providing the choice of various options on the form might indicate that the committee was stating that both choices are available to a debtor. Professor McKenzie noted that the concern is that this might lead to confusion and increased litigation. Judge Wedoff provided an example. He said one open question is, if the debtor wants to pay a mortgage, whether he can pay the mortgagee directly or instead must pay the trustee. If the payment is to the trustee, there is a fee assessed on the payment, meaning that more has to be paid on the mortgage claim. Some jurisdictions require it to be paid through the trustee, while others allow the debtor to be the payment manager. Judge Wedoff noted that providing both options on the form might imply that both options are available in all jurisdictions. Professor McKenzie added that one way to respond to the comments would be to include a warning on the form that the provision of an option does not mean it is available in the debtor's district. The working group will report to the advisory committee at the spring meeting.

A participant asked whether the advisory committee had gotten feedback that the form will be confusing to pro se debtors. Professor McKenzie responded that so far there had only been a couple of comments on how the form might impact pro se litigants. One comment had said it might attract additional pro se litigants, and the other had said it would be confusing to pro se litigants. The participant asked how the advisory committee could get more input from pro se litigants, since such litigants do not often comment on published proposals. Professor McKenzie stated that the advisory committee hopes to get comments from consumer bankruptcy groups, who often think about the nature of pro se litigation, and he noted that it is very difficult for pro se litigants to get through chapter 13 bankruptcies successfully. He said that one thing the working group is considering is more prominent language about that difficulty. Judge Wedoff noted that providing a plan form might help pro se litigants because it would set out what needs to be done and might allow some debtors to do it on their own without an attorney.

Judge Wedoff noted that as part of its Forms Modernization Project, the advisory committee had been looking closely at whether the forms can be used by pro se debtors. He said one of the goals of that project is to make the forms more user-friendly. Another participant noted that law students use the forms when they represent clients in bankruptcy clinics, and he suggested that the advisors for such clinics might be a good source of information on how the forms might be used by law students, which can be analogized to the pro se context. Judge Wedoff noted that the advisory committee, with the help of the Federal Judicial Center, had been vetting the proposed forms with a group of law students.

ELECTRONIC SIGNATURES

Judge Wedoff reported on the comments received on proposed amendments to Rule 5005 on filing and transmittal of papers, which is designed to address the question of how to deal with electronic signatures by someone other than the attorney who is filing a document in a bankruptcy case. He noted that there is no problem with signatures of attorneys who file documents because they have to have a login and password, which constitutes their signature. To date, the rules have not addressed the signatures of nonfilers, which in bankruptcy is primarily the debtor. Judge Wedoff noted that the typical practice has been for local rules to require the filing attorney to retain the original document signed by the nonfiler for a period of time, usually five years. Attorneys have pointed out that this becomes a problem in terms of storage space. Some bankruptcy firms may generate thousands of case filings a year, making the volume of original documents to retain substantial. In addition, some lawyers have reported that they are uncomfortable retaining documents that might later be used to prosecute a crime against their clients. Further, the prosecutor in a future criminal prosecution will be relying on the attorney's good faith in retaining documents with the original signatures.

The proposal published for comment provides that, instead of requiring the retention of a "wet" signed copy, the original signature could be scanned into a computer readable document and the scanned signature would be usable in lieu of the original for all purposes. Judge Wedoff noted that the published proposal asked for comment on two alternatives. One would have a notary certify that it is the debtor signing and that it is the complete document. The other would deem filing by a registered person equivalent to the person's certification that the scanned signature was part of the original document.

Professor Gibson said that only four comments had been received so far. One expressed confusion about when original documents must be retained under the proposed rule. Another erroneously read the proposal to require the entire document, not just the signature page, to be scanned, which would require much more electronic storage space. She said that two recent comments support the proposed amendment and urge adoption without requiring a notary's certification.

The representative for the Department of Justice noted that the Evidence Rules Committee had been planning to host a symposium on electronic evidence this past fall, which would have included a discussion of this issue of electronic signatures, but that the symposium was cancelled due to the government shutdown. She noted that the scheduling of the symposium had nonetheless prompted the Department to come to some tentative conclusions on this issue. While the Department will be submitting formal comments, the representative previewed the initial views of the Department. She reported that there was resistence in the Department to removing the retention of original signatures. She noted that there was a great amount of work done within the Department

in examining this issue. There was a working group that cut across disciplines and there was a survey conducted of U.S. Attorney's offices. She said that prosecutors overwhelmingly thought there was no problem with the current system. They also reported that taking away the requirement of retaining originals would lead to more cases where signatures were repudiated. The vast majority of survey respondents thought the proposed rule would make it much harder to prove authenticity in situations where the signatures were repudiated. She noted that the FBI has a policy that it will not provide definitive testimony to authenticate a signature without the original document. With an electronic signature, the FBI cannot determine certain characteristics that they would look at in comparing signatures, like pressure points and whether there were tremors. Without having an FBI expert, prosecutors would have to resort to circumstantial evidence to prove authenticity, which would often involve measures such as getting warrants to search computers to show that a document was generated from that computer, conducting forensic analysis, tracing IP addresses, and similar actions that would add burden and expense.

The Department's representative explained that the Department also looked at the tax experience because Evidence Rule 902(10) makes certain types of documents self-authenticating when a statute provides for prima facie presumption of authenticity. The advisory committee note states that the tax statute is one example. However, in looking into the possibility of creating a statutory presumption, the Department found that it would have to be either a generic statute that addressed this subject holistically or a bankruptcy-specific statute. The problem with a bankruptcy-specific statute, she said, was that the Department had found at least 101 different crimes that require the authenticity of the signature to be proven as an element of the crime. If a bankruptcy-specific statute were implemented, she said, there was the possibility of needing to do seriatim statutes because bankruptcy might just be the first area to start doing everything electronically. She said eventually there might need to be dozens of statutes. Yet, the alternative of crafting a generic statute now to address the subject holistically created the concern that it would have unintended consequences if all the possibly affected criminal statutes were not first examined. Thus, she noted, it was premature to start trying to get a statute without knowing all of the ramifications. She also stated that survey respondents felt the tax statute was somewhat unique in that taxpayers are required by law to sign a return and if they repudiate their signature on the return that means they have violated the law by not filing a tax return if there is no other valid tax return with their signature. She noted that Judge Wedoff has explained that there are some parallels in bankruptcy.

The Department participant also stated that the working group did not find persuasive the concerns that have been raised about why the rule should be changed. She stated that publicly-filed documents are not privileged, so an attorney should not be concerned about being called upon to produce a client's documents. Further, professional responsibility rules prohibit an attorney from assisting with a crime or fraud. She said

that while storage can be burdensome, there are retention periods, so there should be recycling of the documents and not an ever-increasing amount of documents needing to be retained. She noted that one possibility raised by Judge Wedoff was that perhaps the whole document could be scanned and saved electronically and only the signature page would need to be kept in its original format, and she noted that this option was something to think about. Finally, the working group was not persuaded by the rationale that there are varying retention periods across the country. The group felt that if that was a concern, then it could be fixed simply by creating a uniform retention period. The prosecutors thought that the varying periods actually hurt them the most because the retention periods are often shorter than the statute of limitations for the crimes being prosecuted. In sum, she said, the Department feels that it is premature to remove the retention requirements. There was a feeling in the Department, she said, that technology is continuing to move forward. It might be that in the near future things like thumb prints and biometrics will serve as signatures, which would solve the problem of authenticating without the need to store lots of documents. The participant stated that the Department would have presented this summary of its views in greater detail at the symposium, and that the Department is committed to working with the committee on this issue.

Judge Wedoff said that the advisory committee will await the formal comment from the Department and expressed gratitude for hearing their initial views in the interim. He noted that the prosecuting community has not had the experience of having to use scanned signatures in lieu of having an FBI expert testify to the validity of a wet signature. Whether scanned signatures would present a problem in persuading the trier of fact is not yet clear. Bankruptcy presents a special circumstance, he said. Even without the change to Rule 5005, he said, every document filed by a debtor's attorney is filed under Civil Rule 11, which requires certifying that the filing is authentic. Rule 5005 would only underline the Rule 11 requirement that the signature is authentic. So, the debtor who asserts that a signature on a filed document is not his own will have to overcome the fact that the signature appears to be his own and will have to assert that his attorney lied when the document was filed. It may be that it is not that difficult to persuade a trier of fact of the legitimacy of a debtor's signature on a bankruptcy document. He also noted that, in this regard, there may be some source of empirical evidence as to the difficulty of not having wet signatures because there is at least one jurisdiction in the country—Chicago—that does not have a requirement for retaining wet signatures for debtors' filings for several years. Any prosecutions that have taken place in that district would have taken place on the basis of the debtor's scanned copy. He stated that there are not a lot of these types of prosecutions that come up and that when they do come up, debtors do not contest the legitimacy of their signature. He noted that he had encountered situations where a United States Trustee had filed a motion to deny the debtor a discharge because the debtor supplied deliberately false information on the debtor's schedules. The debtors defend against those arguments not on the basis that they did not sign the schedules, but by arguing things like they told their attorney about the

matter at issue and the attorney did not put it in the schedule or they did not realize it was required to be put on the schedule. He stated that he had never encountered a case where the debtor denied his own signature. Judge Wedoff reported that the Department of Justice representative had agreed to look into the Department's survey results that had come from Chicago.

A member questioned whether the concern was with ensuring the integrity of the judicial process or collateral consequences and enabling future prosecutions. Judge Wedoff responded that the advisory committee's initial approach was designed to ensure the integrity of the judicial process. We want to make sure, he said, that the documents being filed are legitimately signed by the debtor. The informal feedback from the Department has to do with collateral consequences, and the concern is the potential difficulty in proving malfeasance by the debtor. The member responded that a similar concern may be true in many areas of the law and he wondered whether the rules committees' focus ought to be on the judicial process, not necessarily to make it easier or harder for the Department of Justice to prosecute crimes years later.

Judge Sutton emphasized that this is just now out for publication and the advisory committee is awaiting the formal response from the Department. He asked whether the rescheduled Evidence Rules technology symposium will include this issue. Professor Capra responded that it would not because the original idea had been to get ahead of the public comment and to get the Department's views on this issue, which has already been accomplished. While others were going to participate, they now had the ability to comment during the public comment process, which would be over by the time a new symposium could be scheduled. Professor Capra noted that one thing that came up in putting the original symposium together is that the issue is not forgery, but that the true signature might be improperly attached to the document. He said that is the issue that concerned the CM/ECF Subcommittee—someone could just scan a signature and put it on any document. Judge Wedoff said that this is why the two alternative means of assuring that the signature was authentic and was attached to the proper document were published for public comment. The Department's representative noted that the Department did not think that the option of requiring a notary's signature was a good one.

Judge Wedoff noted that it might be that bankruptcy could serve as an experiment for testing this. There are extra protections in bankruptcy, he said, like the attorney certification, that would not necessarily exist in other areas. He said that the advisory committee would have a better idea of what to do next after the comment period ends. The Department of Justice's representative noted that as a matter of evidence, the attorney's certification could not be introduced because it would be hearsay, so there would still be the need for a witness to testify to the person's signature, which might lead to calling lawyers to testify.

A member noted that the Department's concerns were about collateral prosecutions years down the road, and that he was not sure the judiciary should be too concerned about that. He said the requirements to authenticate the signature might impose a burden in current proceedings for the benefit of possible later collateral proceedings. He added that the advisory committee's concerns should be that this document in this litigation is what it purports to be. A certification by the attorney, as an officer of the court, should normally be sufficient for that purpose, he said. He said he was open to the possibility of the need for further assurances, but that the question should be focused on assuring that the document is authentic for the current litigation, not on assuring its authenticity for use in possible later collateral proceedings.

Professor Coquillette commented that the rules committees have a goal of transsubstantive rulemaking, but bankruptcy is really different in this area because of the factors mentioned by Judge Wedoff, such as attorney certification.

A member asked whether the advisory committee is studying what is going on in Chicago, where there is no requirement to retain wet signatures. Judge Wedoff reported that the Department of Justice had done a survey and was going to see if it could pull out data on prosecutions in Chicago. Judge Wedoff said that he would talk to the local United States Trustee's office to find out their experience. He noted that he is not aware of any criminal prosecutions for bankruptcy fraud in Chicago that raised a question of validity of the debtor's signature. The number of prosecutions for bankruptcy fraud is very small to begin with, he said, and then it would be a very small subset of that small subset that would involve the validity of the debtor's signature. So, he said, there would not be a huge amount of empirical data to gather on this.

Judge Sutton thanked Judge Wedoff for the summary of the issues and thanked the Department's representative for previewing the results of the Department's work on this issue.

FORMS MODERNIZATION PROJECT

Judge Wedoff provided an update on the advisory committee's Forms Modernization Project, a multi-year project to revise many of the official bankruptcy forms. The work began in 2008 and is being carried out by an ad hoc group composed of members of the advisory committee's subcommittee on forms, working with representatives of other relevant Judicial Conference committees. The goals of the project are to improve the official bankruptcy forms by providing a uniform format and using non-legal terminology, and to make the forms more accessible for data collection and reporting. The advisory committee decided to implement the modernized forms in stages in order to allow for fuller testing of the technological features and to facilitate a smoother transition. Judge Wedoff said that the first two phases of the project were

nearly complete: a small number of the modernized forms became effective on December 1, 2013, and the balance of the forms used by individual debtors is currently out for comment. Their effective date will be delayed until December 1, 2015, to coincide with the effective date of the non-individual forms. Judge Wedoff said that, surprisingly, not many comments had been received yet on the individual forms out for public comment. He said the comment period was not yet over, but that so far the revised forms seem to have been met with general acceptance.

The final batch will be non-individual forms, which were separated from individual forms because they ask for different information in many situations, and which would be expected to become effective on December 1, 2015. Judge Wedoff noted that people filling out non-individual forms are likely to have access to a more sophisticated legal understanding of the bankruptcy system. Non-individuals have to be represented by an attorney, and are usually associated with corporations or other entities that are likely to have a better understanding of the information called for on the forms.

Judge Wedoff said the agenda materials provided an example of a non-individual form to show the differences from the individual form. The non-individual form is shorter and uses more technical accounting language than the individual form, but not legalese. He said that this is a preview of what the advisory committee will likely be presenting for approval for publication at the Spring 2014 Standing Committee meeting. When this last batch of forms is approved, he said, the advisory committee will be finished with the complete package of form changes.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell and Professors Cooper and Marcus presented the report of the advisory committee, as set forth in Judge Campbell's memorandum and attachments of December 6, 2013 (Agenda Item 9).

Amendments for Publication

FED. R. CIV. P. 82

Professor Cooper reported that the advisory committee sought approval to publish at an appropriate time changes to Rule 82 on venue for admiralty or maritime claims to reflect changes Congress had made to the venue statutes. It has long been understood that the general venue statutes do not apply to actions in which the district court exercises admiralty or maritime jurisdiction, except that the transfer provisions do apply. This proposition could become ambiguous when a case either could be brought in the admiralty or maritime jurisdiction or could be brought as an action at law under the "saving to suitors" clause. Rule 82 has addressed this problem by invoking Rule 9(h) to ensure that the Civil Rules do not appear to modify the venue rules for admiralty or

maritime actions. It provides that an admiralty or maritime claim under Rule 9(h) is not a civil action for purposes of 28 U.S.C. §§ 1391–1392. Rule 9(h) provides that an action cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for purposes of Rule 82. It further provides that if a claim for relief is within the admiralty or maritime jurisdiction but also is within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim.

Professor Cooper reported that legislation had added a new § 1390 to the venue statutes and repealed the former § 1392. The reference to § 1392 in current Rule 82 clearly needs to be deleted as a technical amendment, he said. The advisory committee also thought it was appropriate to add a reference to § 1390, but the reason was a little more complicated.

Professor Cooper explained that new § 1390(b) provides that the whole chapter on venue, apart from the transfer provisions, does not apply in a civil action when the district court exercises jurisdiction conferred by § 1333. Section 1333 provides jurisdiction for admiralty and maritime cases, "saving to suitors in all cases all other remedies to which they are otherwise entitled." By referring to § 1333, § 1390(b) removes application of the general venue statutes for cases that can be brought only in the admiralty or maritime jurisdiction and for cases that might have been brought in some other grant of subject-matter jurisdiction but that have been designated as admiralty or maritime claims under Rule 9(h). Since the general venue provisions do not apply when the court is exercising admiralty or maritime jurisdiction, it seems wise to add § 1390 to Rule 82. Doing so would make claims designated as admiralty or maritime claims under Rule 9(h) exempt from the general venue provisions just as those that get admiralty or maritime jurisdiction under § 1333 are so exempt. Professor Cooper noted that the advisory committee had sent the proposed revision to the Maritime Law Association, which had approved of the proposal. Nonetheless, the advisory committee recommended the proposal for publication, not for approval as a technical amendment, because of the complexity of the subject matter.

The committee, without objection and by voice vote, approved the proposed amendment to Civil Rule 82 for publication.

FED. R. CIV. P. 6(d)

Judge Campbell reported that the advisory committee recommended for publication at a suitable time an amendment to Rule 6(d), which currently provides three extra days for responding to certain types of service, including service by electronic means. The proposed amendment would strike the reference in Rule 6(d) to Rule 5(b)(2)(E), which references electronic service. This change would remove the three extra days for electronic service. Judge Campbell said that the Appellate, Bankruptcy,

and Criminal Rules Committees were working through this same issue now with respect to parallel provisions in each set of rules. He stated that, depending on the timing of approval of similar changes to the other sets of rules, they could all be published together, or the Civil Rules change could be published first as a bellwether. He added that the advisory committee also recommended adding parenthetical explanations to Rule 6(d) that would provide brief explanations of the type of service referenced. This would prevent users from having to flip back to the cross-referenced rules to find the types of service that receive the three added days. The committee note, he said, could explain that service via CM/ECF does not constitute service under Rule 5(b)(2)(F), which covers service by other means to which the party being served has consented, and which is subject to the three-day rule.

A member asked whether the advisory committee had considered removing "consent" from the three-day rule as well. Judge Campbell responded that it had not; the issue was just brought to his attention this morning. The member noted that the three-day rule was invented for mail. He questioned the rationale behind applying it to leaving papers with the clerk when no one knows where the party is. He suggested that the advisory committee consider restricting the three-day rule to service by mail. Judge Campbell said that the advisory committee could consider this point. He added that these other methods of service have always been subject to the three-day rule and the advisory committee had not heard of a problem. Clearly, he said, electronic service no longer requires three extra days; the committee could look more broadly at whether three extra days are warranted in other circumstances. Judge Wedoff noted that there is a proposal to remove the added three days as widely as possible in the Bankruptcy Rules. Judge Sutton added that the member's point about whether three extra days were needed in other circumstances was a good one. At least, he said, the question could be raised in publication as to whether to remove other types of service from the three-day rule. He suggested that the advisory committee discuss it at their next meeting.

Judge Campbell said that the advisory committee would consider these issues and that he would want to hear the views of court clerks as well. However, he said, the advisory committee's plate was so full right now with considering the next steps for the proposals that were published last August, that he would prefer not to do that investigation now. One option, he said, would be to publish the proposal to eliminate electronic service from the three-day rule and ask for comment on whether the committee should also eliminate service by leaving the paper with the clerk or by other means consented to. Judge Sutton noted that the simplest route would be to delay publication during the investigation into the other means of service, but he saw no reason to hold off on removing the extra three days for electronic service. The member who had made the suggestion stated that he would not oppose publication, but that he thought it should ask for comment on whether the three-day rule should be abolished altogether. He noted that service by mail is now mostly limited to pro se litigants or people who do not have

computers. He said the committee could publish the proposal to remove electronic service from the three-day rule and ask for comments as to whether it would be wise to restrict it just to service by mail or to abolish it altogether.

Professor Capra noted that the idea of restricting the three-day rule came from the CM/ECF Subcommittee, and the idea was to have a uniform approach. He said all of the advisory committees would be considering this issue, except for the Evidence Rules Committee, but it was unlikely that it would be resolved by the spring.

A member asked whether there should be a separate three-day rule for pro se litigants. She noted that this is an issue primarily affecting pro se litigants, who often only receive service by mail. Judge Campbell noted that some courts do have CM/ECF for pro se litigants, so some do get instantaneous service.

Judge Sutton suggested that the committee could tentatively approve the proposal for publication with a slight variation in the committee note and questions requesting comment on whether the three-day rule should be deleted altogether or limited to service by mail. The hope, he said, would be for publication this summer. Judge Campbell agreed that this sounded like a fine approach.

The committee, without objection and by voice vote, tentatively approved the proposed amendment to Civil Rule 6(d) for publication, with a slight change in the committee note to address service under Rule 5(b)(2)(F), together with questions on whether the three-day rule should be abolished altogether or limited to service by mail. The committee will consider the final proposal again before publication, likely at its spring meeting.

Informational Items

FED. R. CIV. P. 17(c)(2)

Judge Campbell reported that the advisory committee had decided against further action on Rule 17(c)(2), which directs that "[t]he court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action." He stated that in *Powell v. Symons*, 680 F.3d 301 (3d Cir. 2012), the Third Circuit had noted the lack of guidance as to when a court should appoint a lawyer or guardian to assist an unrepresented party. He said that research had revealed that six circuits have adopted standards similar to that of the Third Circuit, which is that there is no obligation to *sua sponte* inquire into competence. Under this view, Rule 17(c)(2) only applies when there is verifiable evidence of incompetence. Judge Campbell said that all circuits agree that there is no obligation to appoint a guardian just because a party exhibits odd behavior.

The advisory committee had concluded that it should not attempt to write a rule in this area. Judge Campbell explained that if judges were obligated to inquire about a guardian whenever they saw something less than full competence, the issue would become unmanageable. Further, he said, there were no resources readily available to pay for guardians. In fact, he said, there were not usually funds available to pay for appointed lawyers either. Judge Campbell said that to write a rule that sets standards for the wide variety of circumstances in which this could arise would be nearly impossible. He added that relevant considerations would include evidence of incompetence, other resources available to assist the person, the merits of the claim, the risk to the opposing party in terms of time and delay, case management steps, and more. The advisory committee concluded that this was best left to the common law. Judge Campbell said the advisory committee felt that these issues need to be decided on a case-by-case basis and that principles will develop over time. As a result, he said the advisory committee recommended no action at this time.

A member stated that he agreed with the advisory committee's conclusion, noting that it is a case-by-case judgment call as to how to handle incompetence. Further, he said, there can be verifiable evidence of incompetence even with lawyers involved.

E-RULES

Judge Campbell reported that the advisory committee, along with the other advisory committees, is in the early stages of addressing the question of what to do with electronic communications under the rules. He said one option is to adopt a rule that says anything that can be done in writing can be done electronically, but that raises all kinds of complications. Another option is to go rule by rule and determine what to do with the issue of electronic communications.

DISCOVERY COST SHIFTING

Judge Campbell stated that the advisory committee's discovery subcommittee is in the early stages of examining the question of whether the rules should expand the circumstances in which a party requesting discovery should pay part or all of the costs of responding. He said that Congress and some bar groups had asked for a review of this issue. The proposals published for comment last August include revision of Rule 26(c) to make explicit the authority to enter a protective order that allocates the costs of responding to discovery. If this proposal is adopted, experience in administering it may provide some guidance on the question of whether more specific rule provisions may be useful. Judge Campbell said the advisory committee is in the early stages of examining this issue and will report on its progress in the future.

CACM PROJECTS

Judge Campbell reported that the Court Administration and Case Management Committee (CACM) has raised a number of topics that may lead to Civil Rules amendments, but that action on all of these topics has been deferred pending further development by CACM.

PUBLISHED PROPOSALS

Judge Campbell reported that the advisory committee had held two of the three scheduled public hearings on the proposals published for comment. He said 40 more witnesses were scheduled for an upcoming hearing in Dallas, with 29 more on the waiting list. He said the advisory committee was not scheduling another hearing because it would be too difficult to fit a fourth hearing in all of the members' schedules, and the advisory committee was committed to reading all of the written submissions. He said 405 submissions had already been received and that the committee will review them all carefully. He noted that the hearings have been very valuable and there is work to do to refine the proposals. He added that the advisory committee will decide what to do at its April meeting and will make a recommendation to the Standing Committee at its May meeting.

A participant asked if that schedule was too expedited. He asked whether the advisory committee would have enough time to do the job by the May meeting. Judge Campbell said he thought there was sufficient time. He noted that the advisory committee had been working on the published proposals for five years. He said the committee's task in April will not be gathering information, but using its best judgment in light of everything it had heard through public comment.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raggi and Professors Beale and King presented the report of the advisory committee, as set forth in Judge Raggi's memorandum of December 20, 2013 (Agenda Item 5), and her supplemental memorandum of December 30, 2013.

Amendment for Final Approval

FED. R. CRIM. P. 12

Judge Sutton reported that the advisory committee had been considering amendments to FED. R. CRIM. P. 12 on motions that must be raised before trial and the consequences of late-filed motions since 2006. He provided some background on the current proposals. He noted that the Judicial Conference had approved the proposed

amendment to Rule 12 that the committee had approved at its last meeting and had transmitted it to the Supreme Court. The Court had raised several questions about the proposed amendment. Judge Sutton noted that the package of proposals, including Criminal Rule 12, had been submitted to the Court earlier than in years past to give the Court flexibility in terms of timing its review of the proposals. He noted that one benefit of submitting the proposals early is that if the Court had questions, they might be able to be addressed within the same rulemaking cycle. He stated that this was uncharted territory because in the past, when the proposals were submitted to the Court later, if the Court had questions about the proposals, it would simply recommit them to the advisory committee for further consideration. In this case, however, there might be time to propose changes and have them considered by the Court in the same rulemaking cycle.

Judge Sutton noted that the Court had raised several questions about the Rule 12 proposal. First, as transmitted to the Court, the proposed amendment had stated that the court could consider an untimely motion raising a claim of failure to state an offense (FTSO) if the defendant showed prejudice. The Court had asked to whom the required prejudice would be. Judge Sutton noted that the intent of the amendment was that it would be prejudice to the defendant. Second, the Court had asked, if the prejudice is to the defendant, how the defendant would show prejudice before trial. Judge Sutton stated that one form of prejudice is lack of notice, and another occurs if the grand jury did not properly indict under the elements of the crime. Third, the Court had noted the anomaly of having in proposed Rule 12(c)(3)(A) a required showing of "good cause" for relief from the consequences of failing to timely raise most Rule 12(b)(3) motions, while proposed Rule 12(c)(3)(B) would require prejudice for consideration of late-raised FTSO claims. Judge Sutton noted that by requiring "good cause" alone in (A) and "prejudice" alone in (B), the implication was that there was no requirement of showing "prejudice" in (A). That is not what the committee intended. On the other hand, by requiring "good cause" in (A), and only "prejudice" in (B), the committee had intended the negative implication to be that there was no requirement of showing "cause" under (B) for claims of failure to state an offense. Judge Sutton added that it was odd to have language in the same subsection that intended one negative implication but not another negative implication.

Judge Raggi then explained that the advisory committee recommended resolving the third concern raised by the Court by having one standard for relief from failure to timely raise all Rule 12(b)(3) motions — "good cause," the standard currently used in the rule. She noted that there was disquiet, especially among the members of the defense bar on the committee, about making an FTSO claim a required pre-trial motion when for so long it had been viewed as the equivalent of jurisdiction and something that could be raised at any time. She added that, faced with the fact that it is now recognized as something that should be raised early on, some members of the defense bar had suggested that the committee use a different standard for FTSO claims that would be easier to meet

than "good cause." That is why the advisory committee eventually decided to use just "prejudice" for FTSO claims, no matter what the cause for failing to raise it in timely manner. She noted that everyone recognized that it was a bit curious to have two standards for granting relief from the consequences of belatedly filing a required pretrial motion. She said that the advisory committee has now had more time to think about the proposal. The advisory committee did not want to put the Rule 12 proposal in jeopardy by insisting on two standards. The subcommittee had given it enormous thought and decided that pursuing a separate standard for FTSO claims was not worth the risk to the whole proposal and that "good cause" would be adequate for those claims.

Judge Raggi noted that no one stands convicted of a crime unless every element of the crime is proven beyond a reasonable doubt. The proposed rule addresses only those situations where even though a defendant is proven guilty beyond a reasonable doubt on every element, a failure to charge it correctly should for some reason be heard late on a showing of prejudice. But, she asked, what would the prejudice be in that situation? The advisory committee, she said, had asked what they were really putting at risk by insisting on two standards. She stated that it was now the subcommittee's view and the unanimous view of the advisory committee that it was not worthwhile to pursue a separate standard for FTSO claims, and that a "good cause" standard should apply for all late-raised claims that are not jurisdictional.

Judge Raggi noted that, at the suggestion of a member of the advisory committee, the committee note had been revised to explain that "good cause" is "a flexible standard that requires consideration of all interests in the particular case." She said that this language was in brackets, but that it would be part of the text of the committee note, if approved. This language, she said, would make clear that the court should consider cause, consider prejudice, and consider everything that might be relevant. She explained that the reason the words "cause and prejudice" were not used was to avoid confusion with the use of that phrase in the habeas corpus context. Instead, the revised note language is intended to make clear that "good cause" is a holistic inquiry. She stated that it made sense to trust the district judges to understand that.

Judge Raggi requested that the committee approve the revised proposed amendment to Rule 12 and the accompanying committee note. Finally, Judge Raggi noted that the advisory committee was unsure about whether the change could be accomplished in the current rulemaking cycle. One of the questions the advisory committee had raised, she said, was whether this was a change that would require republication. She reported that the advisory committee was not sure and had consulted with Professor Coquillette, who did not think republication was necessary. She noted that if the committee approved the revised proposal, it could potentially go back to the Court and be considered in this year's rulemaking cycle. She said it was the Standing Committee's decision whether to republish.

Professor Coquillette noted that traditionally the committee republishes when anyone would be surprised by the changes after publication and would feel that they did not have a chance to debate the proposal. But, he noted that in this case, the appropriate standard for relief from late-raised FTSO claims had been debated back and forth for the seven year history of this proposal. Everyone had notice that the appropriate standard was at issue and had a chance to comment on that during the public comment period. Judge Sutton also noted that for the past eight years or so, everyone has known that the rule was being changed to require FTSO claims to be brought before trial and the standard for raising such claims late has been on the table the whole time.

A member stated that his initial reaction was to republish, but that he realized that the Court had the authority to make changes to the committee's proposals itself. If the Court wanted to make a change and just wanted to make sure the rules committees agreed, then it would seem to be a procedure contemplated by the Rules Enabling Act. However, if the proposal is really back in the committee's court, then he said he would have to grapple with the republication question. He stated that he tended to think it is better to republish in the case of a "tie."

Judge Sutton stated that the Court could have proceeded in different ways and this is uncharted territory, but that he believed the committee should treat the proposal as if it were back in front of the committee. Another member asked what the procedure would be if the proposal had gone to a vote in the Court and been rejected. Judge Sutton responded that it depends, and that if a subsequent change by the committees had already been fully vetted, it would not be republished. The reason for republication is if the committee thinks it will get new insights or if someone will be surprised by a change. The member noted that the republication question is similar to a court amending an opinion and giving another opportunity for filing a petition for rehearing. She said that if the changes on rehearing are responsive to the comments already received, the courts usually do not give another opportunity for rehearing.

Professor Beale noted that there had been a previous occasion in which the advisory committee had made changes in response to a remand from the Supreme Court and the committee had not republished. Professor Capra noted that the Evidence Rules Committee had not republished when it made changes after a proposed amendment to Evidence Rule 804(b)(3) was returned by the Court.

Judge Raggi noted that not only had the advisory committee heard lots on this subject, but what it is proposing now is to leave the standard in the current rule in place.

Another member stated that he had no views on the need to republish, but questioned whether there is a negative implication in the new proposed committee note language describing "good cause" as a "flexible standard that requires consideration of all

interests in the particular case." The member explained that the existing standard has been interpreted to require showing, among other things, prejudice, and he wondered whether the note language could potentially be understood to relieve a defendant of having to show prejudice.

Judge Raggi responded that she could not foreclose the possibility of the language being read that way, but from a practical perspective, this is how Rule 12 now treats FTSO claims. She added that, up until the time the jury is empaneled and jeopardy attaches, Rule 12, in another section, lets a trial judge entertain any motion. She stated that presumably on appeal, circuit courts will continue to apply a plain error standard to late-raised claims. So, she said, we are talking about what the judge will entertain in the window of time between when jeopardy attaches and when judgment is entered. Judge Raggi stated that she would be surprised if trial judges would entertain such late motions without a showing of prejudice once jeopardy has attached. She added that if the committee were to see that happening in practice, it could consider amending the rule to spell out a prejudice requirement in the rule, but, given that district judges are constrained by this portion of the rule only in the time between jeopardy attaching and judgment, she thought most judges would require a showing of prejudice. The member stated that as a practical matter that is true, but that he was not sure that the new language in the note added anything. He stated that if it does not add anything substantive, it is not needed.

Judge Raggi explained that the note language explaining that "good cause" is a "flexible standard" makes one of the defense bar members supportive of the proposal, which is something that should not be discounted. She stated that all three advisory committee members who represent defendants voted for this rule in part because of this new language in the note. In fact, she said, something even more detailed had been proposed originally by a defense bar member.

Judge Sutton noted that "good cause" suggests flexibility and that to the extent some have concerns about putting FTSO defenses with all other claims required to be raised before trial, emphasizing flexibility is important to make clear that courts might treat different types of late-raised motions differently, depending on the circumstances.

Another member asked if the new note language is a comfort blanket for some members of the advisory committee. Judge Raggi agreed that it was in part, but noted that the language was derived from the fact that some members wanted to ensure that judges would understand that the seriousness of the motion should also be taken into account in deciding the consequences of a late-raised motion, while recognizing that it would not be appropriate to assume that every FTSO motion is more important than every multiplicity motion, for example.

A member questioned whether there are examples of a change like this going through without being republished. Judge Sutton responded that there were, both with respect to Criminal Rules proposals and Evidence Rules proposals, but the fact that there were other instances in which the committee had made changes after remand from the Supreme Court without republishing does not mean that there should never be republication in response to comments from the Court. But here, he noted, the Rule 12 proposed changes seemed more like the instances in which the committees had not republished. Judge Raggi noted that the advisory committee had already made changes to the Rule 12 proposal after publication without republishing. She added that the advisory committee had received many comments from the defense bar on the published proposals and that while there is the possibility that someone might argue that the last version they saw had a separate standard for FTSO claims, she was not sure that the committee was ever obliged to have two different standards as opposed to the one that is there. The cost of republishing, she noted, would be putting off the effective date of the rule change by another two years. She was comforted by the fact that not one of the defense members of the advisory committee had urged republication.

Judge Sutton noted that the advisory committee had made more substantive changes after publication and before sending it back to the Standing Committee than the current proposed change. Judge Raggi agreed, but noted that the changes after public comment had been made in response to comments received during the public comment period. Professor Coquillette noted that the history of this rule proposal did not require republication here, where the defense bar members of the advisory committee did not have concerns and the issues have been fully discussed. He added that none of the defense bar members of the advisory committee had argued that this change would be a surprise.

A member moved to approve the proposed amendment to Rule 12. The member who had questioned the note language seconded the motion, explaining that as a practical matter, district judges will have no problem applying the amendment and note language. The committee unanimously approved the proposed amendment without republication. Judge Sutton noted that if the proposal is approved in the rest of the Rules Enabling Act process, the committees will closely monitor what happens with FTSO defenses and the "good cause" standard. Judge Sutton thanked Professors Beale and King for their hard work on this proposal.

The committee, without objection and by voice vote, approved the proposed amendment to Criminal Rule 12 for transmission to the Judicial Conference for final approval.

Informational Items

Judge Raggi noted that the advisory committee did not meet in the fall because of the lapse in appropriations due to the government shutdown, but that the advisory committee had a full agenda for its spring meeting.

FED. R. CRIM. P. 4

Judge Raggi reported that the advisory committee was considering the Department of Justice's request to amend Rule 4, which deals with service of summons. The Department had suggested that the rule is deficient for serving foreign organizations who have no agent or place of business in the United States, but whose conduct has criminal consequences in the United States. The current rule allows serving organizations at their last known mailing address in the United States, but these foreign entities do not have any such address. Until there is an appearance by the foreign entity, it cannot be prosecuted, but the Department asserted that if there was a way to properly serve such entities, many of them would enter an appearance rather than risk consequences like forfeiture. Judge Raggi noted that the request appeared to be driven by a desire to have a means of service that would either get foreign entities to respond or would permit the Department to begin forfeiture proceedings if the foreign entity did not respond. Judge Raggi noted that whether it is appropriate for forfeiture proceedings to be instituted based on service is a matter for future litigation.

As to what methods a proposed rule might approve for service, Judge Raggi reported that it is clear that the advisory committee will recommend that if there is an applicable treaty that provides for service in a particular manner, such service will suffice. Similarly, she said, compliance with an agreement with a foreign country on the proper means of service will also suffice. Judge Raggi added that the Department also seeks to have a "catch-all" provision that anything that a judge signs off on will suffice, but some members of the advisory committee were uncomfortable with that because a judge might order service by a U.S. official that would violate the foreign country's laws. She noted that if the object of service is a person, it does not matter how he or she got before the court. She said that the proposal has moved towards including a catch-all provision that would instruct the Department to serve in whatever manner it thinks is reasonable and then the court can deal with the issue of due process once the defendant enters an appearance.

The proposed amendment would ensure organizations that are committing domestic offenses are not able to avoid liability through the expedient of declining to maintain an agent, place of business, or mailing address within the United States. A subcommittee has been assigned to consider the proposal and has approved a proposed amendment for discussion by the full advisory committee. The advisory committee will

take it up at its April meeting.

FED. R. CRIM. P. 41

Judge Raggi reported that the Department has also submitted a proposal to amend Rule 41 to enlarge the territorial limits for warrants to search electronic storage media and electronically stored information. The purpose of the proposed amendment is to enable law enforcement to investigate and prosecute botnets and crimes involving Internet anonymizing technologies. Rule 41(b) does not directly address the circumstances that arise when officers seek to execute search warrants, via remote access, over modern communications networks such as the Internet. The proposed amendment is intended to address two increasingly common situations: (1) where the warrant sufficiently describes the computer to be searched but the district within which that computer is located is unknown, and (2) where the investigation requires law enforcement to coordinate searches of numerous computers in numerous districts. The Department reports problems with determining the district in which to seek the warrant when it does not know where the computer to be searched is located.

The proposed amendment would authorize a court in a district where activities related to a crime have occurred to issue a warrant to be executed by remote access for electronic storage media and electronically stored information whether located within or outside the district. Judge Raggi noted that there were potential concerns about the particularity requirements of warrants when the Department does not know exactly what it is searching. Thus, the advisory committee had asked the Department to draft some warrants of the sort that it thinks might need judicial authorization. Judge Raggi added that once the advisory committee sees examples of the types of warrants that might be presented to federal judges, it will have a better idea of how to proceed. She said that the proposal has been referred to a subcommittee, which is expected to report at the advisory committee's April meeting.

OTHER PROPOSALS

Judge Raggi noted that other proposals under consideration were in the agenda materials and did not need an oral report at this time. One such proposal involved the question of whether there is any need to clarify Rule 53, which prohibits "broadcasting" judicial proceedings in order to clarify the rule's application to tweets from the courtroom. Another requests the committee to consider amending Rules 11 and 32 to make presentence reports available in advance of a guilty plea so that all parties will be aware of the potential sentence. Another proposal under consideration would amend Rule 45(c) to eliminate the three extra days currently provided to respond when service is made by electronic means.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Fitzwater and Professor Capra presented the report of the advisory committee, as set forth in Judge Fitzwater's memorandum of December 2, 2013 (Agenda Item 6). Judge Fitzwater noted that the advisory committee had no action items to present.

Informational Items

Judge Fitzwater reported that the proposed amendment to Rule 803(10), the hearsay exception for the absence of public records, which the Standing Committee approved in June 2012, took effect on December 1, 2013.

He noted that four proposals from the advisory committee were pending before the Supreme Court. The proposed amendments to Rules 801(d)(1)(B) and 803(6)–(8) had been approved by the Standing Committee in June 2013, were approved by the Judicial Conference on the consent calendar at its September 2013 meeting, and had been transmitted to the Supreme Court for consideration.

Judge Fitzwater reported that the Fall 2013 meeting, which would have included a technology symposium and which had been cancelled due to the government shutdown, was rescheduled at the same location for Spring 2014. He said the Department of Justice would not be presenting on the electronic signature issue, as had been planned for the original symposium, although the advisory committee would be willing to host them if continuing dialogue would be desirable. Judge Sutton commented that the advisory committee should think about whether it would be useful to bring people together to discuss the electronic signature issue. Judge Fitzwater noted that it does dovetail with the technology symposium that the advisory committee is planning in conjunction with its next meeting. He added that the symposium might examine things like the ancient document exception to the hearsay rule, which may seem anachronistic in the current era of data storage.

Judge Sutton noted that Professor Capra recently appeared on the cover of the *Fordham Lawyer*, a magazine published by the Fordham Law School, and that the complimentary article featured Professor Capra's work for the rules committees.

PANEL DISCUSSION ON THE POLITICAL AND PROFESSIONAL CONTEXT OF RULEMAKING

Professor Coquillette presided over a panel discussion on the political and professional context of rulemaking. The other panelists included Judge Huff, a former committee member; Judge Wood, a former committee member; Judge Rosenthal, former chair of the Standing and Civil Rules Committees; Judge Anthony Scirica (by phone),

former chair of the committee and former chair of the Executive Committee of the Judicial Conference; and Peter G. McCabe, former secretary to the committee. Professor Coquillette introduced each member and stated their relevant background.

PROFESSOR COQUILLETTE

Professor Coquillette provided background on opposition to the rules committees' work. He noted that historically there have been three groups who are suspicious about the rules committees' work, including the traditional formalists, who believed that the judge's role is to decide cases, not to do anything prospective; the rule skeptics, who thought that uniformity through codification, with transsubstantive rules that apply in all types of cases, was not practical; and the political populists, who believe that rulemaking ought to be done by elected representatives of the people. Professor Coquillette noted that while the rules committees could never please these three groups, they should continue to be sensitive to their concerns.

PETER G. MCCABE

Mr. McCabe provided background on the history of the Rules Enabling Act. He discussed changes the rules committees made over time to make the process more open, transparent, and easily accessible. Mr. McCabe also discussed the committees' efforts to make sure there was a strong empirical basis for amendments. He also emphasized the committees' efforts to ensure evenhandedness and the nonpolitical nature of their role. To get a wide range of views, the rules committees take measures such as inviting members of the bar to come to meetings, conducting surveys and miniconferences, and reaching out to congressional members and staff to inform them about the rulemaking process and about pending rule amendments. Mr. McCabe concluded that the rulemaking system is healthy, effective, and credible, but that the challenge of balancing authority between the judicial and legislative branches will continue to exist and will be an area that the committees will continuously need to focus their attention.

JUDGE ANTHONY J. SCIRICA

Judge Scirica spoke about his experience with the Private Securities Litigation Reform Act and the Class Action Fairness Act and their impact on the rules committees' work. He emphasized the benefits of delegating rulemaking authority to the judiciary through the careful process set out in the Rules Enabling Act, but noted that substantive matters are best addressed by Congress.

JUDGE LEE H. ROSENTHAL

Judge Rosenthal discussed how the rules committees can engage with Congress without becoming politicized. She emphasized the importance of effective and energetic

explanation of the careful, transparent, open, and deliberate nature of the Rules Enabling Act and its process, as well as clear explanation of the purpose behind the delegation of authority under that Act. She noted that the rules committees have worked closely with Congress on a number of issues, including the enactment of Evidence Rule 502 and statutory changes to correspond to recent changes to the Appellate Rules and to the recent Time Computation Project. She concluded that the rules committees need to continue to be vigilant in explaining the importance of the rulemaking process under the Rules Enabling Act and in informing Congress of upcoming changes, while remaining distant from political pressures.

JUDGE MARILYN L. HUFF

Judge Huff discussed her experience with the Time Computation Project, which went through each set of rules to make counting time uniform and easier to apply. She said that as part of the project, the committees had examined the federal statutes that would be affected by such changes and that Congress ultimately amended 29 statutes in conjunction with the project. Judge Huff also discussed her experience as the liaison to the Evidence Rules Committee and as a member of the Standing Committee's Style Subcommittee during the project to restyle the Evidence Rules. Finally, Judge Huff discussed her experience serving on the Standing Committee's Forms Subcommittee. She concluded that these examples show that, consistent with the Rules Enabling Act process, there are often workable solutions within the judiciary, with congressional involvement, to some concerns about the litigation process.

JUDGE DIANE P. WOOD

Judge Wood discussed the triggers for rules committee action, and said triggers include legislative changes; Supreme Court decisions; suggestions from judges, academics, and empirical researchers; and examination of state court practices. She discussed instances in which the rules committees should be skeptical of these triggers. She also introduced the idea of a qualification to the generally accepted norm that the rules are transsubstantive, noting that the committees aim for more than transsubstantivity and seek to make rules that have a broad generality that can be applied in every case in federal court. She concluded that the committees now have the challenge of dealing with problems that may change more quickly than the rulemaking process and that the committees may need another model for that type of problem. She noted that some problems are best addressed outside the rulemaking arena.

REPORT OF THE CM/ECF SUBCOMMITTEE

Professor Capra reported on the work of the CM/ECF Subcommittee, as set out in Judge Michael Chagares's memorandum and attachments of December 4, 2013 (Agenda Item 7). He said there are five main items that the subcommittee has been working on,

and that its work would probably move forward in stages. He added that the reporters to the advisory committees had done outstanding work for the subcommittee.

The first issue the subcommittee was working on was electronic signatures, as explained during the Bankruptcy Rules Committee's report. Professor Capra explained that if the Bankruptcy Rules proposal works, other committees will likely follow with similar proposals, and the CM/ECF Subcommittee will oversee the process. He said that the problem the rule is trying to deal with is not forgery, but using a single signature line and putting it on multiple documents.

Professor Capra said that the second step the subcommittee took was for the reporters to look through their respective rules to see where use of CM/ECF may conflict with existing language. He said addressing all of the items found would be a daunting task. For example, he said, there were dozens of places in the Criminal and Bankruptcy Rules that may not accommodate use of CM/ECF.

The third matter the subcommittee looked at was abrogation of the three-day rule. Professor Capra said that he would take the comments received today on the Civil Rules proposal back to the subcommittee. He added that he thought it was likely that the committees could coordinate a uniform committee note and that the goal would be for the rules to be changed in as uniform a manner as possible. He added that the reporters had been working hard on this issue.

Fourth, Professor Capra said that the subcommittee was looking at the proposal for a civil rule requiring electronic filing. He said he thought this was possibly feasible, but that there are issues about what the exceptions should be. He added that one reason it may be desirable to have a requirement of electronic filing in the federal rules is that the local rules already require it almost universally. On the other hand, he said, the local rules have a lot of exceptions and are not uniform in terms of the exceptions, and that is something that needs to be worked through.

Professor Capra reported that the final issue the subcommittee was considering was whether it would be useful and feasible to have a universal rule that would essentially say that "paper equals electrons." The subcommittee is examining whether, instead of going through all of the rules and changing each rule to accommodate electronic filing and information, there is the possibility of a universal fix. Professor Capra noted that there is a proposed template for such an approach in the agenda materials. The first part of the template would say, "In these rules, [unless otherwise provided] a reference to information in written form includes electronically stored information." Professor Capra said that this tracks what the Evidence Rules have done, but that there can be problems with this approach. For example, he said, the Criminal Rules would need carve-outs. The second part of the template would state: "In these rules, [unless otherwise provided] any action that can or must be completed by filing or sending paper may also be

accomplished by electronic means [that are consistent with any technical standards established by the Judicial Conference of the United States]." He said that there were still a lot of issues and potential problems to think through, including the need for exceptions, as to whether such an approach would work.

Professor Capra said that the subcommittee was working with CACM because the "CM/ECF Next Gen" was being overseen by that committee and it would clearly have implications for the subcommittee's work. He added that the committee does not yet know what Next Gen will do and there is a concern in the subcommittee that the rules committees should be cautious about getting too far out in advance of a problem that does not yet exist. He said that to try to change the rules in advance of Next Gen, when Next Gen might not be what the committees think it is, could create problems. He said that the subcommittee is therefore proceeding with caution.

A member noted that Next Gen is behind schedule and it might be at least two years away from completion. Professor Capra added that there are CACM members on the subcommittee and CACM staff in the Administrative Office who are helping with the subcommittee's work as well.

NEXT COMMITTEE MEETING

Judge Sutton concluded the meeting by thanking the AO staff for the wonderful job in planning the meeting and coordinating all of the logistics. The committee will hold its next meeting on May 29–30, 2014, in Washington, D.C.

Respectfully submitted,

Jonathan C. Rose
Secretary

Andrea L. Kuperman
Chief Counsel

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TAB 2

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TAB 2A

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

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
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EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

TO: **Hon. Jeffrey S. Sutton, Chair**
Committee on Rules of Practice and Procedure

FROM: **Hon. David G. Campbell**
Advisory Committee on Civil Rules

RE: **Report of Advisory Committee on Civil Rules**

DATE: **May 2, 2014**

Introduction

The Civil Rules Advisory Committee met at the Lewis & Clark Law School in Portland, Oregon, on April 10-11, 2014. Draft Minutes of this meeting are attached. This report has been prepared by Professor Cooper, Committee Reporter, with Professor Marcus, Associate Reporter, and various subcommittee chairs.

Part I of this Report presents recommendations to approve for adoption several proposals that were published for comment in August, 2013.

Part IA of this Report presents for action a proposal recommending adoption of revisions to Rules 1, 4, 16, 26, 30, 31, 33, 34, and 37. For the most part, these recommendations are little changed from the proposals that were published for comment last summer. The most obvious changes are encompassed by a recommendation to withdraw amendments that would tighten presumptive numerical limits on some forms of discovery. The remaining amendments form a package developed in response to the central themes that emerged from the conference held at the Duke Law School in May, 2010. Participants urged the need for increased cooperation; proportionality in using procedural tools, most particularly discovery; and early, active judicial case management.

Part IB presents for action a proposal recommending adoption of a revised Rule 37(e). Publication was approved at the January 2013 meeting of the Standing Committee, recognizing that the Advisory Committee would consider several matters discussed at the January meeting and report back to the June 2013 meeting. A substantially revised version was approved for publication at the June meeting. The invitation for comments included five specific questions on points highlighted in the Standing Committee discussion. Many concerns were raised in extensive testimony and voluminous comments that addressed these five questions and many other matters as well. The rule text has been revised extensively in response to the testimony and comments, and was further revised in light of comments on the draft that appeared in the agenda materials for the April Civil Rules Committee meeting. The core of the published rule, however, remains.

Part IC presents for action a recommendation to approve for adoption a proposal that would abrogate Rule 84 and the Rule 84 official forms. This proposal includes amendments of Rule 4(d)(1)(C) and (D) that direct use of official Rule 4 Forms that adopt what now are the Form 5 request to waive service and the Form 6 waiver.

Part ID presents for action a recommendation to approve adoption of an amendment that clarifies an ambiguity inadvertently introduced to Rule 6(d) in 2005. It may be appropriate to defer submission to the Judicial Conference pending action on other proposals to amend Rule 6(d) that have not yet been published for comment.

Part IE presents for action a recommendation to approve adoption of an amendment that clarifies a longstanding ambiguity in Rule 55(c).

Part IIA presents the recommendation to publish an amendment that deletes the provision in Rule 6(d) that allows 3 added days to respond after service by electronic means. The recommendation was approved last January. It is presented here to complete the package of parallel amendments proposed for publication by the Appellate, Bankruptcy, and Criminal Rules Committees.

Part IIB presents for action a recommendation to approve publication of an amendment of Rule 4(m) to make it clear that service on a foreign corporation outside any judicial district of the United States is exempt from Rule 4(m) time limits.

Part IIC presents for action a recommendation to approve for publication a revised rule text that seeks to better accomplish the purpose of a Rule 82 amendment that was approved for publication, subject to further consideration of the rule text, at the January, 2014 Standing Committee meeting.

I. RECOMMENDATIONS TO APPROVE FOR ADOPTION

I.A. DUKE RULES PACKAGE

The Standing Committee approved the August, 2013 publication of a package of proposed amendments developed by the Duke Conference Subcommittee. Amendments were proposed for Rules 1, 4, 16, 26, 30, 31, 33, 34, 36, and 37. The proposals, along with other proposals published at the same time, were explored at three maximum-capacity hearings in November (Washington, D.C.), January (Phoenix, Arizona), and February (Dallas, Texas). They were also addressed in more than 2,000 written comments submitted to the Committee. A summary of the comments and testimony is attached.

The Civil Rules Committee unanimously recommends that the Standing Committee recommend most of the published proposals for approval by the Judicial Conference and adoption by the Supreme Court. The Committee recommends that the Standing Committee withdraw these proposed amendments: to reduce the presumptive numbers of depositions under Rules 30 and 31 and interrogatories under Rule 33; to limit the number of requests to admit under Rule 36; and to reduce the length of an oral deposition from seven hours to six hours. The reasons for these recommendations are described below.

These proposals were carefully developed as a package in response to the advice offered by some 200 voices at the Duke Conference in 2010. There was nearly unanimous agreement that the disposition of civil actions could be improved, reducing cost and delay, by advancing cooperation among the parties, proportionality in the use of available procedures, and early and active judicial case management. It also was agreed that these goals should be pursued by several means. Continuing education of bench and bar was one means; the Federal Judicial Center has acted on this advice and worked toward enhanced education programs. A second means was exploration through pilot projects structured to facilitate rigorous evaluation. The Federal Judicial Center is actively monitoring some of these projects. Careful appraisal of state-court procedures is a related activity, advanced in part by work of the Institute for the Advancement of the American Legal System. The Conference also prompted a project launched by the Committee and the National Employment Lawyers Association to develop protocols for initial discovery in individual employment cases. The protocols were developed by a team of lawyers evenly balanced between those who commonly represent employees and those who commonly represent employers. The protocols have been adopted by numerous District Judges; experience with the protocols has led to calls for more widespread adoption, and the hope that similar protocols might be developed for other categories of litigation. These programs of education and innovative pilot projects continue.

Rule amendments were the third component of the response to the Duke Conference. There was widespread agreement that the present rule structure is basically sound, that the time has not come to consider fundamental revision of the familiar structure. But there is room to pursue careful changes that will advance the goals of cooperation, proportionality, and active judicial case

management. The proposed amendments were published as a package of integrated measures that would work toward those goals. The parts that are carried forward toward adoption remain an integrated package aimed at the same goals. The parts that are omitted were designed to contribute to these ends, but the remaining package will function well without them.

The Committee has carefully studied the public testimony and comments. The comments were divided, but largely supportive, on the proposal to amend Rule 1 to advance cooperation among the parties, and on the proposals to amend Rules 4 and 16 to enhance early and active case management. Reactions to the discovery proposals were mixed. Many comments, often identifiable as reflecting pro-plaintiff or pro-defendant views, divided sharply between strong opposition and strong support. Other comments provided more balanced assessments of possible advantages and disadvantages. Many of these comments came from public agencies or from organized bar groups that generated their positions by a process that sought to establish a consensus acceptable to all sides. After considering all points of view, the Committee is convinced that the recommended amendments will make the civil litigation process work better for all parties.

Rather than take the package in numerical rule order, these recommendations begin with the discovery proposals. Rules 1, 4, and 16 follow at the end.

(1) Discovery Proposals

The Committee recommends that the Standing Committee forward most of the published discovery proposals for adoption, with a few revisions in rule texts and with considerably expanded Committee Notes. The Committee also recommends, however, that the Standing Committee put aside the proposals for new and reduced presumptive limits for discovery under Rules 30, 31, 33, and 36. All that remains of these proposals are the parts that amend Rules 30, 31, and 33 to reflect the proposal to transfer the operative provisions of present Rule 26(b)(2)(C)(iii) to Rule 26(b)(1).

(a) Rule 26(b)(1): Four Elements

The Rule 26(b)(1) proposal includes four major elements. The cost-benefit factors included in present Rule 26(b)(2)(C)(iii) are moved up to become part of the scope of discovery, identifying elements to be considered in determining whether requested discovery is proportional to the needs of the case. The examples recognizing discovery of the existence of documents or tangible things and the identity of persons who have knowledge of discoverable matter are eliminated as no longer necessary. The distinction between discovery of matter relevant to the parties' claims or defenses and discovery of matter relevant to the subject matter of the action, on a showing good cause, is also eliminated. And the provision allowing discovery of inadmissible information "reasonably calculated to lead to the discovery of admissible evidence" is rewritten. Each element deserves separate consideration.

(i) Scope of Discovery: Proportionality

There was widespread support at the Duke Conference for the proposition that discovery should be limited to what is proportional to the needs of the case. But discussions at the two miniconferences sponsored by the Subcommittee revealed significant discomfort with simply adding a bare reference to "proportional" discovery to Rule 26(b)(1). Standing alone, the phrase seemed too open-ended, too dependent on the eye of the beholder. To illuminate and constrain the concept of proportionality, the Committee recommended that the factors already prescribed by Rule 26(b)(2)(C)(iii), which courts now are to consider in limiting "the frequency or extent of discovery," be relocated to Rule 26(b)(1) and included in the scope of discovery. All discovery is currently subject to those factors by virtue of a cross-reference in Rule 26(b)(1), and the Committee was informed that these factors are understandable and work well.

This proposed change provoked a stark division in the comments. Those who wrote and testified about experience representing plaintiffs saw proportionality as a new limit designed only to favor defendants. They criticized the factors from Rule 26(b)(2)(C)(iii) as subjective and so flexible as to defy any uniform application among different courts. They asserted that "proportionality" will become a new automatic and blanket objection to all discovery requests, or would encourage reluctant parties to withhold relevant and responsive information by making unspoken and self-serving determinations of nonproportionality, leading to increased motion practice with attendant costs and delays. And they were particularly concerned that proportionality would routinely defeat the rather extensive discovery ordinarily needed to prove many claims that involve modest amounts of money but principles important not only to the plaintiffs but also to the public interest. These problems were particularly emphasized in noting categories of cases that typically involve "asymmetric information" — plaintiffs in many employment and civil rights actions have little relevant information, while defendants hold all the important information and reveal it only through extensive discovery. Many asserted that proportionality would impose a new burden on the requesting party to justify each and every discovery request. Finally, some argued that the proportionality proposal is a solution in search of a problem — that discovery in civil litigation already is proportional to the needs of cases. These arguments were often coupled with the assertion that there is no empirical evidence to support concerns that disproportional discovery is sought in a worrisome number of cases.

The Committee has considered these comments carefully, as well as those that favored the change, and remains convinced that transferring the Rule 26(b)(2)(C)(iii) factors to the scope of discovery — with some modifications as described below — would constitute a significant improvement to the rules governing discovery. The Committee reaches this conclusion for three primary reasons.

1. Findings from Duke

A principal conclusion of the Duke conference was that discovery in civil litigation would

more often achieve the goal of Rule 1 — the just, speedy, and inexpensive determination of every action — through an increased emphasis on proportionality. This conclusion was expressed often by speakers and panels at the conference and was supported by a number of surveys done in preparation for the conference. In a report to the Chief Justice on the Duke conference, the Committee summarized findings from the conference as follows: "One area of consensus in the various surveys . . . was that district or magistrate judges must be considerably more involved in managing each case from the outset, to tailor the motions practice and shape the discovery to the reasonable needs of the case." The report added: "What is needed can be described in two words — cooperation and proportionality — and one phrase — sustained, active, hands-on judicial case management." The Committee remains convinced that these conclusions are correct, and that emphasizing proportionality in Rule 26(b)(1) will help achieve the just, speedy, and efficient resolution of civil cases.

Some comments on the proportionality change suggest that the change is not needed — that discovery in civil litigation already is proportional to the needs of cases. Many of these comments rely on a closed-case survey prepared by the Federal Judicial Center for the Duke Conference at the Committee's request. The Committee does not agree that the FJC survey or other surveys prepared for the conference suggest no need for change.

Although the FJC study found that a majority of lawyers thought that the discovery in a specific case they handled generated the "right amount" of information, and more than half reported that the costs of discovery were the "right amount" in proportion to their client's stakes in the closed cases, a quarter of attorneys viewed discovery costs in their cases as too high relative to their clients' stakes in the case. A little less than a third reported that discovery costs increased or greatly increased the likelihood of settlement, or caused the case to settle, with that number increasing to 35.5 percent of plaintiff attorneys and 39.9 percent of defendant attorneys in cases that actually settled. On the question whether the cost of litigating in federal court, including the cost of discovery, had caused at least one client to settle a case that would not have settled but for the cost, those representing primarily defendants and those representing both plaintiffs and defendants agreed or strongly agreed 58.2% and 57.8% of the time, respectively, and those representing primarily plaintiffs agreed or strongly agreed 38.6% of the time. The FJC study revealed agreement among lawyers representing plaintiffs, defendants, and both about equally, that the rules should be revised to enforce discovery obligations more effectively.

Other surveys prepared for the Duke conference showed even greater dissatisfaction with the costs and extent of civil discovery. In surveys of lawyers from the American College of Trial Lawyers ("ACTL"), the ABA Section of Litigation, and the National Employment Lawyers Association ("NELA"), more lawyers agreed than disagreed with the proposition that judges do not enforce Rule 26(b)(2)(C) to limit discovery. A report from the ACTL Task Force on Discovery and the Institute for the Advancement of the American Legal System ("IAALS") reported on a survey of ACTL fellows, who generally tend to be more experienced trial lawyers than those in other groups. A primary conclusion from the survey was that today's civil litigation system takes too long

and costs too much, resulting in some deserving cases not being brought and others being settled to avoid the costs of litigation. Almost half of the ACTL respondents believed that discovery is abused in almost every case, with responses being essentially the same for both plaintiff and defense lawyers. The report reached this conclusion: "Proportionality should be the most important principle applied to all discovery."

The surveys of the ABA Section of Litigation and NELA attorneys found more than 80% agreement that discovery costs are disproportionately high in small cases, with more than 40% of respondents saying they are disproportionate in large cases. In the survey of the ABA Section of Litigation, 78% percent of plaintiffs' attorneys, 91% of defense attorneys, and 94% of mixed-practice attorneys agreed that litigation costs are not proportional to the value of small cases, and 33% of plaintiffs' lawyers, 44% of defense lawyers, and 41% of mixed-practice lawyers agreed that litigation costs are not proportional in large cases. In the NELA survey, which surveyed primarily plaintiffs' lawyers, more than 80% said that litigation costs are not proportional to the value of small cases, with a fairly even split on whether they are proportional to the value of large cases. An IAALS survey of corporate counsel found 90% agreement with the proposition that discovery costs in federal court are not generally proportional to the needs of the case, and 80% disagreement with the suggestion that outcomes are driven more by the merits of the case than by costs. In its report summarizing the results of some of the Duke empirical research, IAALS noted that between 61% and 76% of the respondents in the ABA, ACTL, and NELA surveys agreed that judges do not enforce proportionality limitations on their own.

2. The history of proportionality and Rule 26(b)(1).

The proportionality factors to be added to Rule 26(b)(1) are not new. As detailed in the expanded Committee Note, they were added to Rule 26 in 1983 and originally resided in Rule 26(b)(1). Their original intent, according to the 1983 Committee Note, was "to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry," and "to encourage judges to be more aggressive in identifying and discouraging discovery overuse." Although the factors were later moved to Rule 26(b)(2)(C) when section (b)(1) was divided, they remain part of the scope of discovery. The last sentence of current Rule 26(b)(1) specifically states that "All discovery is subject to the limitations imposed by Rule 26(b)(2)(C)." And several of the proportionality factors are found in Rule 26(g), which provides that a lawyer's signature on a discovery request, objection, or response constitutes a certification that it is "neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the litigation."

The adoption of the proportionality factors in 1983 was followed by amendments in 1993 and 2000 that were designed to encourage courts to enforce them. Despite these efforts, the clear sense of the Duke conference was that a greater emphasis on proportionality is needed. The purpose of moving these factors explicitly into Rule 26(b)(1) is to make them more prominent, encouraging

parties and courts alike to remember them and take them into account in pursuing discovery and resolving discovery disputes. Four different advisory committees acting independently across many years have independently concluded that proportionality is an important dimension of discovery practice. If the expressions of concern in the testimony and comments reflect widespread disregard of principles that have been in the rules for thirty years, it is time to prompt widespread respect and implementation.

3. Adjustments to the 26(b)(1) proposal.

The Committee has listened carefully to concerns expressed about the move of the proportionality factors to Rule 26(b)(1) — that it will shift the burden of proving proportionality to the party seeking discovery, that it will provide a new basis for refusing to provide discovery, and that it will increase litigation costs. None of these predicted outcomes is intended, and the proposed Committee Note has been revised to address them. The Note explains that the change does not place a burden of proving proportionality on the party seeking discovery and explains how courts should apply the proportionality factors. The Note also states that the change does not support boilerplate refusals to provide discovery on the ground that it is not proportional, but should instead prompt a dialogue among the parties and, if necessary, the court. And the Committee remains convinced that the proportionality considerations — which already govern discovery and parties' conduct in discovery — should not and will not increase the costs of litigation. To the contrary, the Committee believes that more proportional discovery will decrease the cost of resolving disputes in federal court without sacrificing fairness.

One proposed revision in the published rule text is to invert the order of the first two factors so now they are "the importance of the issues at stake, the amount in controversy * * *." This rearrangement adds prominence to the importance of the issues at stake, avoiding any possible implication that the amount in controversy is the first and therefore most important concern. In addition, the Committee Note is expanded to address in depth the need to take account of private and public values that cannot be addressed by a monetary award. The Note discussion draws heavily on the Committee Note from 1983 to show that from the beginning, the rule has been framed to recognize the importance of nonmonetary remedies.

A second revision in published rule text adds a new factor drawn from the Utah discovery rules: "the parties' relative access to relevant information." This factor addresses the common concern that the frequently asymmetric distribution of information means that discovery often will impose greater burdens on one party than on another. These differential burdens are often entirely appropriate. They can be taken into account under the familiar factors already in Rule 26(b)(2)(C)(iii) and transposed by the amendment to (b)(1), and should be. But it is useful to underscore this element of the analysis. The Committee Note elaborates on this theme.

(ii) Discovery of Discoverable Matters

Rule 26(b)(1) now illustrates discoverable matters as "including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter." These words do no harm; there is no indication that the absence of any reference to electronically stored information has supported untoward negative implications. But Rule 26 is more than twice as long as the next longest rules (Rules 71.1 and 45 vie for that dubious distinction), the point illustrated in this language is now widely understood by courts and attorneys, and removing excess language is a positive step. Some of the comments expressed doubt about the Committee's assertion that discovery of these matters is so well entrenched that the language is no longer needed. They urged that the Committee Note should include this statement, so as to thwart any ill-founded attempts to draw negative inferences from the deletion. The Note has been revised to address this concern. And the Note also mentions discovery of information about a party's information system as an example of permitted discovery that is not expressly covered by the deleted language.

(iii) Subject-Matter Discovery

Up to 2000, Rule 26(b)(1) provided for discovery of any nonprivileged matter "relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party." Responding to repeated suggestions that discovery should be confined to the parties' claims or defenses, the 2000 amendments narrowed the scope of discovery by preserving subject-matter discovery, but allowing discovery to extend beyond what was relevant to the pleaded claims or defenses only on court order for good cause. The 2000 Committee Note conceded that the dividing line that separates discovery relevant to the subject matter from discovery relevant to the pleaded claims or defenses "cannot be defined with precision." The change was "designed to involve the court more actively in regulating the breadth of sweeping or contentious discovery." The distinction between lawyer-managed discovery and court-managed discovery, however, has not had any noticeable effect in encouraging judges who remain reluctant to provide more active management of discovery to become more active.

Some comments have sought to defend discovery of information relevant to the subject matter of the action by explaining that allowing discovery on this theory avoids the need to draw fine lines in determining what is relevant to the claim or defense of any party and proportional to the needs of the case. The proposal reflects the view that it is better to think carefully, when need be, about what is relevant to the parties' claims and defenses. The expanded Committee Note describes three examples the 2000 Note provided of information that, suitably focused, would be relevant to claims or defenses: other incidents similar to those at issue in the litigation; information about organizational arrangements or filing systems; and information that could be used to impeach a likely witness. Suitable focus is the key. The Committee Note also recognizes that if discovery relevant to the pleaded claims or defenses reveals information that would support new claims or

defenses, the information can be used to support amended pleadings.

(iv) "Reasonably calculated to lead"

The final change in Rule 26(b)(1) substitutes this sentence: "Information within this scope of discovery need not be admissible in evidence to be discoverable," for the current sentence: "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." The new provision carries forward the central principle — nonprivileged information is discoverable so long as it is within the scope of discovery, even though the information is in a form that would not be admissible in evidence. The change is designed to curtail reliance on the "reasonably calculated" phrase to expand discovery beyond the permitted scope.

Original Rule 26 governed depositions. An amendment of Rule 26(b) adopted by the Supreme Court in 1946 that took effect in 1948 provided: "It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence." The 1946 Committee Note explained that the purpose of the sentence was to prevent parties from refusing discovery of relevant information on admissibility grounds. In 2000, this provision was amended to limit it to "[r]elevant information." The 2000 Committee Note expressed concern that this provision "might swallow any other limitation on the scope of discovery." It explained that "relevant" as added to the sentence "means within the scope of discovery as defined in this subdivision [(b)(1)]." In other words, the sentence has never been intended to define the scope of discovery. It is merely a ban on admissibility-based refusals to provide relevant discovery. And yet lawyers and courts often rely on this provision as an independent definition of the scope of discovery that extends beyond information relevant to the parties' claims or defenses, or even the subject matter of the action.

The perception that the "reasonably calculated" language has taken on an independent role in defining the scope of discovery is implicitly bolstered by many comments on the published proposal. These comments describe the "reasonably calculated" language as a bedrock definition of the scope of discovery. That perception is itself reason to attempt to make good on the purpose the 2000 amendment may have failed to achieve in a uniform way.

(b) Rule 26(b)(2)(C)(iii): Reflect (b)(1)

Rule 26(b)(2)(C)(iii) would be amended to reflect transposition of its operative elements to Rule 26(b)(1).

(c) Rule 26(c)(1): Allocation of Expenses

Rule 26(c)(1)(B) would be amended to include "the allocation of expenses" among the terms that may be included in a protective order.

Rule 26(c)(1) now authorizes an order to protect against "undue burden or expense." This authority includes authority to allow discovery only on condition that the requesting party bear part or all of the costs of responding. Some courts are exercising that authority now. It is useful to make the authority explicit on the face of the rule to ensure that courts and the parties will consider this choice as an alternative to either denying requested discovery or ordering it despite the risk of imposing undue burdens and expense on the party who responds to the request.

The Committee Note admonishes that recognizing the authority to shift the costs of discovery does not mean that cost-shifting should become a common practice. The assumption remains that the responding party ordinarily bears the costs of responding. The Discovery Subcommittee plans to explore the question whether it may be desirable to develop more detailed provisions to guide the determination whether a requesting party should pay the costs of responding.

(d) Rule 34: Specific Objections, Production, Withholding

Three proposals would amend Rule 34 (a fourth, dealing with requests served before the Rule 26(f) conference, is described later).

The first change would require that an objection to a request to produce must be stated "with specificity." The second permits a responding party to state that it will produce copies of documents or ESI instead of permitting inspection, and may state a reasonable time for the response. The third requires that an objection state whether any responsive materials are being withheld on the basis of that objection.

These Rule 34 proposals have been well supported by the testimony and comments, although some qualms have been expressed. It has been noted, for example, that a party may state a reasonable time to produce but later find that more time is needed. Such events are common in discovery, and can be handled as they are now.

A particular concern is that a party who limits the scope of its search may not know what documents or ESI it has not found, and cannot state whether any responsive materials are being "withheld." This concern has been addressed by expanding the brief comment in the published Committee Note. A party who does not intend to search all sources that would be covered by a request should object to the request by stating that it is overbroad and by specifying the bounds of the search it plans to undertake. The objection, for example, could state that the search will be limited to sources created after a specified date, or to identified custodians. This objection serves also as a statement that anything outside the described limits is being "withheld." That is all the requesting party needs to know if it wishes to seek more searching discovery.

The proposals also amend Rule 37(a)(3)(B) to reflect the increased emphasis in proposed Rule 34 on responding by way of producing.

(e) Early Discovery Requests: Rule 26(d)(2)

The proposals would add Rule 26(d)(2) to allow a party to deliver a Rule 34 request before the Rule 26(f) conference. The request is treated as served at the first Rule 26(f) conference for measuring the time to respond. Rule 34(b)(2)(A) would be amended by adding a parallel provision for the time to respond. The purpose is to facilitate discussion at the conference by providing concrete discovery proposals.

The comments on this proposal are mixed. Some express the concerns that the Committee considered at length before recommending publication. Doubts are expressed whether anyone will seize this new opportunity, in part by wondering why a party would want to disclose its discovery plans before the conference. And fears are expressed that requests formed before the conference will be inappropriately broad, and will encourage the requesting party to adhere to them without taking account of good-faith objections expressed at the conference.

Other comments, however, echoed the Committee's thoughts. Lawyers who represent plaintiffs have been more likely to say they would use this opportunity to provide advance notice of what should be discussed at the Rule 26(f) conference. Lawyers who represent defendants are more likely to say that they would welcome receiving advance requests than to say that they would likely make them.

The Committee recommends that this proposal be approved for adoption.

(f) Numerical Limits: Rules 30, 31, 33, 36

The published proposals sought to encourage more active case management, and to advance the efficient use of discovery, by amending the presumptive numerical limits on discovery. The intent was to promote efficiency and prompt a discussion, early in the case, about the extent of discovery truly needed to resolve the dispute. Rules 30 and 31 would have been amended to reduce from 10 to 5 the presumptive limit on the number of depositions taken by the plaintiffs, the defendants, or the third-party defendants. Rule 30(d) would have been amended by reducing the presumptive limit for an oral deposition from one day of 7 hours to one day of 6 hours. Rule 33 would have been amended to reduce from 25 to 15 the presumptive number of interrogatories a party may serve on any other party. And, for the first time, a presumptive limit of 25 would have been introduced for requests to admit under Rule 36, excluding requests to admit the genuineness of documents from the count.

These proposals garnered some support. They also encountered fierce resistance. The most basic ground of resistance was that the present limits in Rules 30, 31, and 33 work well. Many expressed the fear that presumptive limits would become hard limits in some courts and would deprive parties of the evidence needed to prove their claims and defenses. The comments further suggested that there is no shown need or reason to change them, nor is there any experience that

would suggest that requests to admit are so frequently over-used as to require introduction of a first-time presumptive limit.

The proposals addressing depositions were further resisted by urging that many types of cases, including cases that seek relatively modest monetary recoveries, require more than 5 depositions. Fears were expressed that opposing parties could not be relied upon to recognize and agree to the reasonable number needed; that any agreement among the parties might be reached only by paying inappropriate trade-off prices in other areas; and that the rule would be seen to express a presumptive judgment that 5 depositions ordinarily are the ceiling of reasonableness — that the sorts of showings now required to justify an 11th or 12th deposition would come to be required to justify a 6th or 7th deposition. All of these concerns were commonly bundled into the argument that reduced limits would generate more contentiousness and increased motion practice. It also was commonly observed that contingent-fee attorneys have every incentive to hold the numbers of depositions down to what is necessary to the case.

Resistance to the reduction of the presumptive number of interrogatories, and to introducing a presumptive limit on requests to admit, was similar. But it also reflected repeated observations that written discovery by interrogatories or requests to admit is a low-cost, effective way to exchange information and to identify the witnesses that should be deposed. It should be encouraged, not further limited. And numerical limits could encourage parties to frame broader questions and requests, perhaps inflicting greater burdens than a greater number of better-focused requests and perhaps leading to less useful responses.

Narrower concerns addressed the proposal to reduce the presumptive time for an oral deposition from one day of 7 hours to one day of 6 hours. The Committee originally contemplated a 4-hour limit, based on successful experience in some state courts. A reduction of that magnitude could have significant advantages in cost and efficiency. But prepublication comments expressed such grave concerns that the Committee decided to recommend a more generous 6-hour limit. That recommendation rested as much on concerns for the burdens imposed on the deponent as on hopes for reduced cost and increased efficiency. Many comments, however, suggested the need for at least the full 7 hours in cases that involve several parties, questioning based on lengthy documents that the deponent must review, or obstructive behavior such as speaking objections or other tactics designed to "run the clock."

These concerns have persuaded the Committee that it is better not to press ahead with these proposals. Some of the more extreme expressions of concern may be overblown, but the body of comments suggests reasonable ground for caution. The intent of the proposals was never to limit discovery unnecessarily, but many worry that the changes would have that effect on judges and litigants. Other changes in the proposed amendments, such as the renewed emphasis on proportionality and steps to prompt earlier and more informed case management should achieve many of the objectives of the proposed presumptive limits. In addition, an increased emphasis on early and active case management in judicial education programs and by other means will encourage

all judges to take a more active case management role.

(2) Early Case Management

The proposals aimed at encouraging early and active case management drew far fewer comments than the discovery proposals. The proposals to add to Rule 16 met general, although not unanimous, approval. The Committee recommends the Rule 16 proposals for adoption without change. The proposal to reduce the time for service under Rule 4(m) encountered substantial opposition. The Committee considered these comments and recommends that the time to serve be reduced from 120 to 90 days, rather than the earlier proposal to reduce the time to 60 days.

(a) Rule 16

Four sets of changes are proposed for Rule 16.

The words allowing a scheduling conference to be held "by telephone, mail, or other means" are deleted. The rule text now requires "a scheduling conference." The Committee Note explains that such a conference can be held by any means of direct simultaneous communication among the court and the parties. A telephone conference remains permitted; mail or an exchange of messages by other means is not permitted, nor are any "other means" that do not involve direct simultaneous communication. But Rule 16(b)(1)(A) continues to allow the court to base a scheduling order on the parties' report under Rule 26(f) without holding a conference.

The time for the scheduling conference is set at the earlier of 90 days after any defendant has been served, down from 120 days in the present rule, or to 60 days after any defendant has appeared, down from 90 days in the present rule. But the proposal also adds, for the first time, a provision allowing the judge to set a later time on finding good cause for delay. The concerns about these shortened times expressed in the testimony and comments echoed concerns the Committee considered in recommending publication. The concerns rest on the fear that the new times may not suffice to prepare adequately for the conference, particularly when the case is complex or when a large institutional party needs time to work through the complexities of its internal organization. The Department of Justice has expressed special concerns in this connection. The Committee, however, recommends that the proposal be recommended for adoption as published. It remains desirable to get the case started sooner, not later. Adding the new provision to delay the conference for good cause addresses the concern that some cases may properly require more time if the first scheduling conference is to be effective. The Committee Note has been expanded to emphasize this flexibility.

The proposal also adds two subjects to the list of contents permitted in a scheduling order: the preservation of ESI, and agreements reached under Evidence Rule 502. Parallel provisions are added to the subjects for the parties' Rule 26(f) discovery plan. There is no significant objection to these provisions.

Finally, the proposal also lists as a permitted topic a direction in the scheduling order that before moving for an order relating to discovery, the movant must request a conference with the court. The Committee originally thought it might be desirable to adopt the pre-motion conference as a requirement, not simply a topic permitted for a scheduling order. A good number of courts have adopted such requirements by local rule or scheduling order. Experience shows that this practice is effective in resolving discovery disputes quickly and at low cost. But what works for some courts may not work for all. Simply calling attention to this practice, as a means of encouraging it, carries no noticeable costs.

(b) Rule 4(m): Time to Serve

Rule 4(m) now sets 120 days as the presumptive limit for serving process. The published proposal sought to expedite actual initiation of the litigation by reducing this period to 60 days. The comments and testimony have led the Committee to recommend that the period be set at 90 days.

Many comments offered reasons why 60 days is not enough time to serve process. Some cases involve many defendants. Some defendants are difficult to identify through chains of interlocking or changing corporate relationships. Some defendants seek to evade service. Pro se plaintiffs may find it difficult to accomplish service. The Marshal's Service may find it difficult to effect service when ordered to do so under Rule 4(c)(3) for an in forma pauperis plaintiff or for a seaman. Some comments even suggested that the time between filing and actual service can be put to good use in satisfying Rule 11 obligations that cannot effectively be met within the time to file required by a limitations period, or to negotiate a settlement.

Other comments suggested that a 60-day period will effectively undercut the opportunity to request a waiver of service. Very little time will be left to effect service after it becomes clear that the defendant will not waive service. This point seemed particularly persuasive.

After considering all of the comments, the Committee has concluded that the time should be set at 90 days. Language has been added to the Committee Note to recognize that even at 90 days, the new limit "will increase the frequency of occasions to extend the time for good cause."

Finally, several comments asked whether the Committee has thought about the relationship between Rule 4(m) and Rule 15(c)(1)(C), which governs relation back of an amendment changing or adding a party against whom a claim is made. Rule 15(c)(1)(C) requires high quality notice of the action to the new party "within the period provided by Rule 4(m) for serving the summons and complaint." This relationship has in fact been considered throughout the development of this proposal. The Committee Note is revised to note this relationship.

(3) Cooperation

The published proposal amends Rule 1 to direct that the rules "be construed, ~~and~~

administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." The Committee recommends approval of this proposal for adoption without change to either rule text or Committee Note.

Cooperation among the parties was a theme heavily and frequently emphasized at the Duke Conference. It has been vigorously urged, and principles of cooperation have been drafted by concerned organizations. There is little opposition to the basic concept of cooperation.

Such doubts as have emerged go in different directions. One concern is that Rule 1 is "iconic," and should not be touched. Another is that the rules directly provide procedural requirements, while the rules of professional responsibility add requirements both for effective representation and responsible use of procedural rules. Attempting to complicate these provisions by a vague concept of "cooperation" may invite confusion and ill-founded attempts to seek sanctions for violating a duty to cooperate.

Doubts also were expressed on more practical grounds. Many comments suggested that the proposed rule is attractive as an abstract proposition, but argued that it should be withdrawn because it will prompt the strategic use of "Rule 1 motions" for dilatory purposes.

A more specific question, largely ignored in the comments, asks whether the parties should be directed to construe and administer the rules, as well as to employ them, to the desired ends. The rule could be written: "construed and administered by the court, and employed by the parties, to secure * * *." But on balance it seems better to retain the hint that the parties should undertake to construe the rules for their intended purposes, and — to the extent that the parties commonly administer the rules, as in discovery — to administer them for the same purposes.

None of these concerns has seemed to warrant any change of the published proposal.

DUKE RULES PACKAGE[1]

Rule 1. Scope and Purpose

* * * [These rules] should be construed, ~~and~~ administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

Committee Note

Rule 1 is amended to emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, so the parties share the responsibility to employ the rules in the same way. Most lawyers and parties cooperate to achieve these ends. But discussions of ways to improve the administration of civil justice regularly include pleas to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay. Effective advocacy is consistent with — and indeed depends upon — cooperative and proportional use of procedure.

Gap Report

No changes were made in the rule text or Committee Note as published.

Rule 4. Summons

* * *

(m) Time Limit for Service. If a defendant is not served within ~~120~~ 90 days after the complaint is filed, the court * * * must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1) or to service of a notice under Rule 71.1(d)(3)(A).

Committee Note

The presumptive time for serving a defendant is reduced from 120 days to 90 days. This change, together with the shortened times for issuing a scheduling order set by amended Rule 16(b)(2), will reduce delay at the beginning of litigation.

Shortening the presumptive time for service will increase the frequency of occasions to

[1] The rule texts use overlining and underlining to show changes from the present rule texts. The Committee Notes use underlining to show additions to the Notes as published.

extend the time for good cause. More time may be needed, for example, when a request to waive service fails, a defendant is difficult to serve, or a marshal is to make service in an in forma pauperis action.

The final sentence is amended to make it clear that the reference to Rule 4 in Rule 71.1(d)(3)(A) does not include Rule 4(m). Dismissal under Rule 4(m) for failure to make timely service would be inconsistent with the limits on dismissal established by Rule 71.1(i)(1)(C).

Shortening the time to serve under Rule 4(m) means that the time of the notice required by Rule 15(c)(1)(C) for relation back is also shortened.

Gap Report

The time to serve was set at 60 days in the published proposal. It has been changed to 90 days. Text was added to the Committee Note to address occasions to extend the time, and to call attention to the relationship between Rule 4(m) and Rule 15(c)(1)(C).

Rule 16. Pretrial Conferences; Scheduling; Management

(b) Scheduling.

(1) *Scheduling Order*. Except in categories of actions exempted by local rule, the district judge — or a magistrate judge when authorized by local rule — must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference ~~by telephone, mail, or other means~~.

(2) *Time to Issue*. The judge must issue the scheduling order as soon as practicable, but ~~in any event~~ unless the judge finds good cause for delay, the judge must issue it within the earlier of ~~120~~ 90 days after any defendant has been served with the complaint or ~~90~~ 60 days after any defendant has appeared.

(3) *Contents of the Order*. * * *

(B) *Permitted Contents*. The scheduling order may: * * *

(iii) provide for disclosure, ~~or~~ discovery, or preservation of electronically stored information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502;

(v) direct that before moving for an order relating to discovery, the movant must request a conference with the court;

[present (v) and (vi) would be renumbered] * * *

62 Committee Note

63 The provision for consulting at a scheduling conference by "telephone, mail, or other means"
64 is deleted. A scheduling conference is more effective if the court and parties engage in direct
65 simultaneous communication. The conference may be held in person, by telephone, or by more
66 sophisticated electronic means.

67 The time to issue the scheduling order is reduced to the earlier of 90 days (not 120 days) after
68 any defendant has been served, or 60 days (not 90 days) after any defendant has appeared. This
69 change, together with the shortened time for making service under Rule 4(m), will reduce delay at
70 the beginning of litigation. At the same time, a new provision recognizes that the court may find
71 good cause to extend the time to issue the scheduling order. In some cases it may be that the parties
72 cannot prepare adequately for a meaningful Rule 26(f) conference and then a scheduling conference
73 in the time allowed. Litigation involving complex issues, multiple parties, and large organizations,
74 public or private, may be more likely to need extra time to establish meaningful collaboration
75 between counsel and the people who can supply the information needed to participate in a useful
76 way. Because the time for the Rule 26(f) conference is geared to the time for the scheduling
77 conference or order, an order extending the time for the scheduling conference will also extend the
78 time for the Rule 26(f) conference. But in most cases it will be desirable to hold at least a first
79 scheduling conference in the time set by the rule.

80 Three items are added to the list of permitted contents in Rule 16(b)(3)(B).

81 The order may provide for preservation of electronically stored information, a topic also
82 added to the provisions of a discovery plan under Rule 26(f)(3)(C). Parallel amendments of
83 Rule 37(e) recognize that a duty to preserve discoverable information may arise before an action is
84 filed.

85 The order also may include agreements incorporated in a court order under Evidence
86 Rule 502 controlling the effects of disclosure of information covered by attorney-client privilege or
87 work-product protection, a topic also added to the provisions of a discovery plan under
88 Rule 26(f)(3)(D).

89 Finally, the order may direct that before filing a motion for an order relating to discovery the
90 movant must request a conference with the court. Many judges who hold such conferences find
91 them an efficient way to resolve most discovery disputes without the delay and burdens attending
92 a formal motion, but the decision whether to require such conferences is left to the discretion of the
93 judge in each case.

94 Gap Report

95 No changes were made in the published rule text. Language was added to the Committee

Note to address examples of circumstances that may establish good cause to delay issuing the scheduling order.

Rule 26. Duty to Disclose; General Provisions; Governing Discovery

* * *

(b) Discovery Scope and Limits.

(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable. ~~— including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~

(2) *Limitations on Frequency and Extent.*

* * *

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: * * *

(iii) the ~~burden or expense of the~~ proposed discovery is outside the scope permitted by Rule 26(b)(1) ~~outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues~~.

* * *

(c) Protective Orders.

(1) *In General.* * * * The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense,

including one or more of the following: * * *
(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery; * * *

(d) Timing and Sequence of Discovery. * * *
(2) *Early Rule 34 Requests.*
(A) *Time to Deliver.* More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:
(i) to that party by any other party, and
(ii) by that party to any plaintiff or to any other party that has been served.
(B) *When Considered Served.* The request is considered ~~as~~ to have been served at the first Rule 26(f) conference.
(~~2~~3) *Sequence.* Unless~~, on motion,~~ the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:
(A) methods of discovery may be used in any sequence; and
(B) discovery by one party does not require any other party to delay its discovery.

* * *

(f) Conference of the Parties; Planning for Discovery. * * *
(3) *Discovery Plan.* A discovery plan must state the parties' views and proposals on: * * *
(C) any issues about disclosure, ~~or~~ discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;
(D) any issues about claims of privilege or of protection as trial-preparation materials, including — if the parties agree on a procedure to assert these claims after production — whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;

Committee Note

~~The scope of discovery is changed in several ways. Rule 26(b)(1) is revised to limit the scope of discovery to what is proportional to the needs of the case. The considerations that bear on proportionality are moved from present Rule 26(b)(2)(C)(iii). Although the considerations are familiar, and have measured the court's duty to limit the frequency or extent of discovery, the change incorporates them into the scope of discovery that must be observed by the parties without court order.~~

Rule 26(b)(1) is changed in several ways.

Information is discoverable under revised Rule 26(b)(1) if it is relevant to any party's claim or defense and is proportional to the needs of the case. The considerations that bear on

165 proportionality are moved from present Rule 26(b)(2)(C)(iii), slightly rearranged and with one
166 addition.

167 Most of what now appears in Rule 26(b)(2)(C)(iii) was first adopted in 1983. The 1983
168 provision was explicitly adopted as part of the scope of discovery defined by Rule 26(b)(1).
169 Rule 26(b)(1) directed the court to limit the frequency or extent of use of discovery if it determined
170 that "the discovery is unduly burdensome or expensive, taking into account the needs of the case,
171 the amount in controversy, limitations on the parties' resources, and the importance of the issues at
172 stake in the litigation." At the same time, Rule 26(g) was added. Rule 26(g) provided that signing
173 a discovery request, response, or objection certified that the request, response, or objection was "not
174 unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already
175 had in the case, the amount in controversy, and the importance of the issues at stake in the
176 litigation." The parties thus shared the responsibility to honor these limits on the scope of discovery.

177 The 1983 Committee Note stated that the new provisions were added "to deal with the
178 problem of over-discovery. The objective is to guard against redundant or disproportionate
179 discovery by giving the court authority to reduce the amount of discovery that may be directed to
180 matters that are otherwise proper subjects of inquiry. The new sentence is intended to encourage
181 judges to be more aggressive in identifying and discouraging discovery overuse. The grounds
182 mentioned in the amended rule for limiting discovery reflect the existing practice of many courts in
183 issuing protective orders under Rule 26(c). * * * On the whole, however, district judges have been
184 reluctant to limit the use of the discovery devices."

185 The clear focus of the 1983 provisions may have been softened, although inadvertently, by
186 the amendments made in 1993. The 1993 Committee Note explained: "[F]ormer paragraph (b)(1)
187 [was] subdivided into two paragraphs for ease of reference and to avoid renumbering of paragraphs
188 (3) and (4)." Subdividing the paragraphs, however, was done in a way that could be read to separate
189 the proportionality provisions as "limitations," no longer an integral part of the (b)(1) scope
190 provisions. That appearance was immediately offset by the next statement in the Note: "Textual
191 changes are then made in new paragraph (2) to enable the court to keep tighter rein on the extent of
192 discovery."

193 The 1993 amendments added two factors to the considerations that bear on limiting
194 discovery: whether "the burden or expense of the proposed discovery outweighs its likely benefit,"
195 and "the importance of the proposed discovery in resolving the issues." Addressing these and other
196 limitations added by the 1993 discovery amendments, the Committee Note stated that "[t]he
197 revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose
198 additional restrictions on the scope and extent of discovery * * *."

199 The relationship between Rule 26(b)(1) and (2) was further addressed by an amendment
200 made in 2000 that added a new sentence at the end of (b)(1): "All discovery is subject to the
201 limitations imposed by Rule 26(b)(2)(i), (ii), and (iii)[now Rule 26(b)(2)(C)]." The Committee Note

202 recognized that "[t]hese limitations apply to discovery that is otherwise within the scope of
203 subdivision (b)(1)." It explained that the Committee had been told repeatedly that courts were not
204 using these limitations as originally intended. "This otherwise redundant cross-reference has been
205 added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive
206 discovery."

207 The present amendment restores the proportionality factors to their original place in defining
208 the scope of discovery. This change reinforces the Rule 26(g) obligation of the parties to consider
209 these factors in making discovery requests, responses, or objections.

210 Restoring the proportionality calculation to Rule 26(b)(1) does not change the existing
211 responsibilities of the court and the parties to consider proportionality, and the change does not place
212 on the party seeking discovery the burden of addressing all proportionality considerations.

213 Nor is the change intended to permit the opposing party to refuse discovery simply by
214 making a boilerplate objection that it is not proportional. The parties and the court have a collective
215 responsibility to consider the proportionality of all discovery and consider it in resolving discovery
216 disputes.

217 The parties may begin discovery without a full appreciation of the factors that bear on
218 proportionality. A party requesting discovery, for example, may have little information about the
219 burden or expense of responding. A party requested to provide discovery may have little
220 information about the importance of the discovery in resolving the issues as understood by the
221 requesting party. Many of these uncertainties should be addressed and reduced in the parties' Rule
222 26(f) conference and in scheduling and pretrial conferences with the court. But if the parties
223 continue to disagree, the discovery dispute could be brought before the court and the parties'
224 responsibilities would remain as they have been since 1983. A party claiming undue burden or
225 expense ordinarily has far better information — perhaps the only information — with respect to that
226 part of the determination. A party claiming that a request is important to resolve the issues should
227 be able to explain the ways in which the underlying information bears on the issues as that party
228 understands them. The court's responsibility, using all the information provided by the parties, is
229 to consider these and all the other factors in reaching a case-specific determination of the appropriate
230 scope of discovery.

231 The direction to consider the parties' relative access to relevant information adds new text
232 to provide explicit focus on considerations already implicit in present Rule 26(b)(2)(C)(iii). Some
233 cases involve what often is called "information asymmetry." One party — often an individual
234 plaintiff — may have very little discoverable information. The other party may have vast amounts
235 of information, including information that can be readily retrieved and information that is more
236 difficult to retrieve. In practice these circumstances often mean that the burden of responding to
237 discovery lies heavier on the party who has more information, and properly so.

238 Restoring proportionality as an express component of the scope of discovery warrants
239 repetition of parts of the 1983 and 1993 Committee Notes that must not be lost from sight. The 1983
240 Committee Note explained that "[t]he rule contemplates greater judicial involvement in the
241 discovery process and thus acknowledges the reality that it cannot always operate on a self-
242 regulating basis." The 1993 Committee Note further observed that "[t]he information explosion of
243 recent decades has greatly increased both the potential cost of wide-ranging discovery and the
244 potential for discovery to be used as an instrument for delay or oppression." What seemed an
245 explosion in 1993 has been exacerbated by the advent of e-discovery. The present amendment again
246 reflects the need for continuing and close judicial involvement in the cases that do not yield readily
247 to the ideal of effective party management. It is expected that discovery will be effectively managed
248 by the parties in many cases. But there will be important occasions for judicial management, both
249 when the parties are legitimately unable to resolve important differences and when the parties fall
250 short of effective, cooperative management on their own.

251 It also is important to repeat the caution that the monetary stakes are only one factor, to be
252 balanced against other factors. The 1983 Committee Note recognized "the significance of the
253 substantive issues, as measured in philosophic, social, or institutional terms. Thus the rule
254 recognizes that many cases in public policy spheres, such as employment practices, free speech, and
255 other matters, may have importance far beyond the monetary amount involved." Many other
256 substantive areas also may involve litigation that seeks relatively small amounts of money, or no
257 money at all, but that seeks to vindicate vitally important personal or public values.

258 So too, consideration of the parties' resources does not foreclose discovery requests
259 addressed to an impecunious party, nor justify unlimited discovery requests addressed to a wealthy
260 party. The 1983 Committee Note cautioned that "[t]he court must apply the standards in an even-
261 handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce
262 a party, whether financially weak or affluent."

263 A portion of present Rule 26(b)(1) is omitted from the proposed revision. After allowing
264 discovery of any matter relevant to any party's claim or defense, the present rule adds: "including
265 the existence, description, nature, custody, condition, and location of any documents or other
266 tangible things and the identity and location of persons who know of any discoverable matter."
267 Discovery of such matters is so deeply entrenched in practice that it is no longer necessary to clutter
268 the long text of Rule 26 with these examples. The discovery identified in these examples should still
269 be permitted under the revised rule when relevant and proportional to the needs of the case. Framing
270 intelligent requests for electronically stored information, for example, may require detailed
271 information about another party's information systems and other information resources.

272 The amendment deletes the former provision authorizing the court, for good cause, to order
273 discovery of any matter relevant to the subject matter involved in the action. The Committee has
274 been informed that this language is rarely invoked. Proportional discovery relevant to any party's
275 claim or defense suffices, given a proper understanding of what is relevant to a claim or defense.

The distinction between matter relevant to a claim or defense and matter relevant to the subject matter was introduced in 2000. Until then, the scope of discovery reached matter "relevant to the subject matter involved in the pending action." Rule 26(b)(1) was amended in 2000 to limit the initial scope of discovery to matter "relevant to the claim or defense of any party." Discovery could extend to "any matter relevant to the subject matter involved in the action" only by court order based on good cause. The Committee Note observed that the amendment was "designed to involve the court more actively in regulating the breadth of sweeping or contentious discovery." But even with court supervision, discovery should be limited to matter relevant to the parties' claims or defenses, recognizing that the parties may amend their claims and defenses in the course of the litigation. The uncertainty generated by the broad reference to subject matter is reflected in the 2000 Note's later recognition that "[t]he dividing line between information relevant to the claims and defenses and that relevant only to the subject matter of the action cannot be defined with precision." Because the present amendment limits discovery to matter relevant to any party's claim or defense, it is important to focus more carefully on that concept. The 2000 Note offered three examples of information that, suitably focused, would be relevant to the parties' claims or defenses. The examples were "other incidents of the same type, or involving the same product"; "information about organizational arrangements or filing systems"; and "information that could be used to impeach a likely witness." Such discovery is not foreclosed by the amendments. Discovery that is relevant to the parties' claims or defenses may also support amendment of the pleadings to add a new claim or defense that affects the scope of discovery.

The former provision for discovery of relevant but inadmissible information that appears "reasonably calculated to lead to the discovery of admissible evidence" is also deleted. ~~Hearsay is a common illustration. The qualifying phrase — "if the discovery appears reasonably calculated to lead to the discovery of admissible evidence" — is omitted. Discovery of inadmissible information is limited to matter that is otherwise within the scope of discovery, namely that which is relevant to a party's claim or defense and proportional to the needs of the case. The discovery of inadmissible evidence should not extend beyond the permissible scope of discovery simply because it is "reasonably calculated" to lead to the discovery of admissible evidence.~~ The phrase has been used by some, incorrectly, to define the scope of discovery. As the Committee Note to the 2000 amendments observed, use of the "reasonably calculated" phrase to define the scope of discovery "might swallow any other limitation on the scope of discovery." The 2000 amendments sought to prevent such misuse by adding the word "Relevant" at the beginning of the sentence, making clear that "'relevant' means within the scope of discovery as defined in this subdivision * * *." The "reasonably calculated" phrase has continued to create problems, however, and is removed by these amendments. It is replaced by the direct statement that "Information within this scope of discovery need not be admissible in evidence to be discoverable." Discovery of nonprivileged information not admissible in evidence remains available so long as it is otherwise within the scope of discovery.

Rule 26(b)(2)(C)(iii) is amended to reflect the transfer of the considerations that bear on proportionality to Rule 26(b)(1). The court still must limit the frequency or extent of proposed discovery, on motion or on its own, if it is outside the scope permitted by Rule 26(b)(1).

Rule 26(c)(1)(B) is amended to include an express recognition of protective orders that allocate expenses for disclosure or discovery. Authority to enter such orders is included in the present rule, and courts already exercise this authority. Explicit recognition will forestall the temptation some parties may feel to contest this authority. Recognizing the authority does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding.

Rule 26(d)~~(1)(B)~~ (2) is added ~~is amended~~ to allow a party to deliver Rule 34 requests to another party more than 21 days after that party has been served even though the parties have not yet had a required Rule 26(f) conference. Delivery may be made by any party to the party that has been served, and by that party to any plaintiff and any other party that has been served. Delivery does not count as service; the requests are considered to be served at the first Rule 26(f) conference. Under Rule 34(b)(2)(A) the time to respond runs from service. This relaxation of the discovery moratorium is designed to facilitate focused discussion during the Rule 26(f) conference. Discussion at the conference may produce changes in the requests. The opportunity for advance scrutiny of requests delivered before the Rule 26(f) conference should not affect a decision whether to allow additional time to respond.

Rule 26(d)(3) is renumbered and amended to recognize that the parties may stipulate to case-specific sequences of discovery.

Rule 26(f)(3) is amended in parallel with Rule 16(b)(3) to add two items to the discovery plan — issues about preserving electronically stored information and court orders under Evidence Rule 502.

Gap Report

The published text of Rule 26(b)(1) is revised to place "the importance of the issues at stake" first in the list of factors to be considered in measuring proportionality, and to add a new factor, "the parties' relative access to relevant information." The proposal to amend Rule 26(b)(2)(A) to adjust for the proposal to add a presumptive numerical limit on Rule 36 requests to admit is omitted to reflect withdrawal of the Rule 36 proposal. The result restores the authority to limit the number of Rule 36 requests by local rule. The proposal to amend Rule 26(b)(2)(C) to adjust for elimination of the local-rule authority is withdrawn to reflect restoration of that authority. Style changes were made in Rule 26(d)(1), deleting the only proposed change, and in 26(d)(2). The Committee Note was expanded to emphasize the importance of observing proportionality by recounting the history of repeated efforts to encourage it. Other new material in the Note responds to concerns expressed in testimony and comments, particularly the concern that restoring proportionality to the scope of discovery might somehow change the "burdens" imposed on a party requesting discovery when faced with a proportionality objection.

351 **Rule 30. Depositions by Oral Examination**

352 **(a) When a Deposition May Be Taken.** * * *
353 (2) *With Leave.* A party must obtain leave of court, and the court must grant leave to the
354 extent consistent with Rule 26(b)(1) and (2): * * *

355 **(d) Duration; Sanction; Motion to Terminate or Limit.**
356 (1) *Duration.* Unless otherwise stipulated or ordered by the court, a deposition is limited to
357 one day of 7 hours. The court must allow additional time consistent with
358 Rule 26(b)(1) and (2) if needed to fairly examine the deponent or if the deponent,
359 another person, or any other circumstance impedes or delays the examination.

360 Committee Note

361 Rule 30 is amended in parallel with Rules 31 and 33 to reflect the recognition of
362 proportionality in Rule 26(b)(1).

363 Gap Report

364 The proposals to reduce the presumptive number of depositions from 10 to 5, and to shorten
365 the presumptive length of an oral deposition from one day of 7 hours to one day of 6 hours, were
366 withdrawn. The Committee Note was changed accordingly.

367 **Rule 31. Depositions by Written Questions**

368 **(a) When a Deposition May Be Taken.** * * *
369 (2) *With Leave.* A party must obtain leave of court, and the court must grant leave to the
370 extent consistent with Rule 26(b)(1) and (2): * * *

371 Committee Note

372 Rule 31 is amended in parallel with Rules 30 and 33 to reflect the recognition of
373 proportionality in Rule 26(b)(1).

374 Gap Report

375 The proposal to reduce the presumptive number of depositions from 10 to 5 was withdrawn.
376 The Committee Note was changed accordingly.

Rule 33. Interrogatories to Parties

(a) In General.

(1) *Number.* * * * Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(1) and (2).

Committee Note

Rule 33 is amended in parallel with Rules 30 and 31 to reflect the recognition of proportionality in Rule 26(b)(1).

Gap Report

The proposal to reduce the presumptive number of interrogatories from 25 to 15 was withdrawn. The Committee Note was changed accordingly.

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes * * *

(b) Procedure. * * *

(2) *Responses and Objections.* * * *

(A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served or — if the request was delivered under Rule 26(d)(2) — within 30 days after the parties' first Rule 26(f) conference. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request ~~with specificity~~, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection stated in the request or ~~a later~~ another reasonable time stated in the response.

(C) *Objections*. An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest. * * *

Committee Note

Several amendments are made in Rule 34, aimed at reducing the potential to impose unreasonable burdens by objections to requests to produce.

Rule 34(b)(2)(A) is amended to fit with new Rule 26(d)(2). The time to respond to a Rule 34 request delivered before the parties' Rule 26(f) conference is 30 days after the first Rule 26(f) conference.

Rule 34(b)(2)(B) is amended to require that objections to Rule 34 requests be stated with specificity. This provision adopts the language of Rule 33(b)(4), eliminating any doubt that less specific objections might be suitable under Rule 34. The specificity of the objection ties to the new provision in Rule 34(b)(2)(C) directing that an objection must state whether any responsive materials are being withheld on the basis of that objection. An objection may state that a request is overbroad, but if the objection recognizes that some part of the request is appropriate the objection should state the scope that is not overbroad. Examples would be a statement that the responding party will limit the search to documents or electronically stored information created within a given period of time prior to the events in suit, or to specified sources. When there is such an objection, the statement of what has been withheld can properly identify as matters "withheld" anything beyond the scope of the search specified in the objection.

Rule 34(b)(2)(B) is further amended to reflect the common practice of producing copies of documents or electronically stored information rather than simply permitting inspection. The response to the request must state that copies will be produced. The production must be completed either by the time for inspection stated in the request or by ~~a later~~ another reasonable time specifically identified in the response. When it is necessary to make the production in stages the response should specify the beginning and end dates of the production.

Rule 34(b)(2)(C) is amended to provide that an objection to a Rule 34 request must state whether anything is being withheld on the basis of the objection. This amendment should end the confusion that frequently arises when a producing party states several objections and still produces information, leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objections. The producing party does not need to provide a detailed description or log of all documents withheld, but does need to alert other parties to the fact that documents have been withheld and thereby facilitate an informed discussion of the objection. An objection that states the limits that have controlled the search for responsive and relevant materials qualifies as a statement that the materials have been "withheld."

Gap Report

Style changes were made in the published text of Rule 34(b)(2)(B). The Committee Note was expanded to emphasize the interplay between a specific objection that defines the scope of the search made for responsive information and the requirement to state whether any responsive materials are being withheld.

444 **Rule 36. Requests for Admission**

445 Gap Report

446 The published proposal to add a presumptive limit of 25 requests to admit, not counting
447 requests to admit the genuineness of described documents, was withdrawn.

448 **Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions**

449 **(a) Motion for an Order Compelling Disclosure or Discovery.** * * *
450 (3) *Specific Motions.* * * *
451 (B) *To Compel a Discovery Response.* A party seeking discovery may move for an
452 order compelling an answer, designation, production, or inspection. This
453 motion may be made if: * * *
454 (iv) a party <u>fails to produce documents or</u> fails to respond that inspection
455 will be permitted — or fails to permit inspection — as requested
456 under Rule 34.

457 Committee Note

458 Rule 37(a)(3)(B)(iv) is amended to reflect the common practice of producing copies of
459 documents or electronically stored information rather than simply permitting inspection. This change
460 brings item (iv) into line with paragraph (B), which provides a motion for an order compelling
461 "production, or inspection."

RULES TEXT

Rule 1. Scope and Purpose

* * * [These rules] should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

Rule 4. Summons

*** * ***

(m) Time Limit for Service. If a defendant is not served within 90 days after the complaint is filed, the court * * * must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1) or to service of a notice under Rule 71.1(d)(3)(A).

Rule 16. Pretrial Conferences; Scheduling; Management

*** * ***

(b) Scheduling.

(1) *Scheduling Order*. Except in categories of actions exempted by local rule, the district judge — or a magistrate judge when authorized by local rule — must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference.

(2) *Time to Issue*. The judge must issue the scheduling order as soon as practicable, but unless the judge finds good cause for delay, the judge must issue it within the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared.

(3) *Contents of the Order*. * * *

(B) *Permitted Contents*. The scheduling order may: * * *

(iii) provide for disclosure, discovery, or preservation of electronically stored information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502;

(v) direct that before moving for an order relating to discovery, the movant must request a conference with the court;

[present (v) and (vi) would be renumbered] * * *

Rule 26. Duty to Disclose; General Provisions; Governing Discovery

* * *

(b) Discovery Scope and Limits.

(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

(2) *Limitations on Frequency and Extent.*

* * *

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: * * *

(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

* * *

(c) Protective Orders.

(1) *In General.* * * * The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: * * *

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery; * * *

(d) Timing and Sequence of Discovery. * * *

(2) *Early Rule 34 Requests.*

(A) *Time to Deliver.* More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:

(i) to that party by any other party, and

(ii) by that party to any plaintiff or to any other party that has been served.

(B) *When Considered Served.* The request is considered to have been served at the first Rule 26(f) conference.

69 (3) *Sequence.* Unless the parties stipulate or the court orders otherwise for the parties' and
70 witnesses' convenience and in the interests of justice:
71 (A) methods of discovery may be used in any sequence; and
72 (B) discovery by one party does not require any other party to delay its discovery.

73 * * *

74 **(f) Conference of the Parties; Planning for Discovery.** * * *
75 (3) *Discovery Plan.* A discovery plan must state the parties' views and proposals on: * * *
76 (C) any issues about disclosure, discovery, or preservation of electronically stored
77 information, including the form or forms in which it should be produced;
78 (D) any issues about claims of privilege or of protection as trial-preparation
79 materials, including — if the parties agree on a procedure to assert these
80 claims after production — whether to ask the court to include their agreement
81 in an order under Federal Rule of Evidence 502;

82 **Rule 30. Depositions by Oral Examination**

83 **(a) When a Deposition May Be Taken.** * * *
84 (2) *With Leave.* A party must obtain leave of court, and the court must grant leave to the
85 extent consistent with Rule 26(b)(1) and (2): * * *

86 **(d) Duration; Sanction; Motion to Terminate or Limit.**
87 (1) *Duration.* Unless otherwise stipulated or ordered by the court, a deposition is limited to
88 one day of 7 hours. The court must allow additional time consistent with
89 Rule 26(b)(1) and (2) if needed to fairly examine the deponent or if the deponent,
90 another person, or any other circumstance impedes or delays the examination.

91 **Rule 31. Depositions by Written Questions**

92 **(a) When a Deposition May Be Taken.** * * *
93 (2) *With Leave.* A party must obtain leave of court, and the court must grant leave to the
94 extent consistent with Rule 26(b)(1) and (2): * * *

95 **Rule 33. Interrogatories to Parties**

96 **(a) In General.**
97 (1) *Number.* * * * Leave to serve additional interrogatories may be granted to the extent
98 consistent with Rule 26(b)(1) and (2).

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes * * *

(b) Procedure. * * *

(2) *Responses and Objections.* * * *

(A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served or — if the request was delivered under Rule 26(d)(2) — within 30 days after the parties' first Rule 26(f) conference. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection stated in the request or another reasonable time stated in the response.

(C) *Objections.* An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest. . * * *

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(a) Motion for an Order Compelling Disclosure or Discovery. * * *

(3) *Specific Motions.* * * *

(B) *To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if: * * *

(iv) a party fails to produce documents or fails to respond that inspection will be permitted — or fails to permit inspection — as requested under Rule 34.

SUMMARY OF TESTIMONY & COMMENTS, AUGUST 2013 PUBLICATION

Three sets of summaries capture the core of the public testimony and written comments on the package of proposals published for comment in August, 2013. One set is devoted exclusively to Rule 37(e). Two sets cover the remaining proposals. One summary, much more compact, describes the pre-publication comments. It is set out separately. The second summarizes in some detail the testimony at the three hearings and the post-publication comments through number 486. Comments after number 486 are treated differently. Some are described in some detail, whether because they provide new thoughts, or because they reflect the considered views of organizations that attempt to explore and resolve competing interests, or because they come from official sources, or because they are elegant expressions of points made in many other comments. Comments between number 487 and 600 that are not covered by more extensive notes are counted at the end as if votes on the points they address. This format was adopted to illustrate the waste that would be involved in counting every comment in this way. Comments after number 600 that add nothing of new substance to the discussion are not listed separately.

It should be emphasized that the decision to forgo summaries of many of the higher-numbered comments does not reflect on the qualities of those comments. Many thoughtful, sophisticated, elegantly nuanced observations are made in them. But a summary of a thousand pages would not serve the purpose of providing a reminder of the points that must be considered in reviewing the published proposals. The summaries are designed to capture all elements of the comments, including those that support the proposals, those that oppose them, and those that seek to improve them. Constant repetition of the same points could get in the way of refreshing memories of all the testimony heard and all the comments read.

The comments include many suggestions for adding to the Committee Notes. Many of the suggestions are attractive. Failure to add many of them to the Notes does not reflect on their merit. It seems better to have the merits of these ideas tested in actual cases that will provide specific context and more thorough development.

— Edward H. Cooper

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GENERAL COMMENTS

[This category was added late in the venture to reflect some very brief comments in the early set, up to number 486. A few of the later comments offered general observations on the nature of the rulemaking process that merit a quick note.]

415, Bill Luckett: Favors all the proposals, apart from some suggestions to modify proposed Rule 37(e).

418, Harlan I. Prater, IV: Generally supports all the proposals, with specific support of Rule 26(b)(1) and some suggestions to change Rule 37(e).

422, Thomas Schwab: "I strongly support the proposed changes."

425, David Hudgins: Supports the proposed amendments "as a means to help control runaway costs of litigation which increasing[ly] threaten our justice system and the Constitutional right to trial by jury in civil cases."

427, John F. Schultz for Hewlett-Packard Co.: Supports the proposals generally, recommending a few changes, and "also supports the active and early judicial involvement contemplated * * *."

443, Grant Rahmeyer: The proposed rules "are completely one-sided, as in, they only favor major corporations." "The real purpose is to try and prevent cases from going before a jury."

444, James Cocke: Offers strong support for many of the proposed changes — as a medium sized company, a true attempt to comply with all discovery demands would shut down our operation.

729, Stephen B. Burbank: (1) "[T]he comments and testimony already submitted suggest that some interested observers regard repetition as an important means of influencing the rulemaking process." But if "the Enabling Act process is to be distinguishable from the legislative process, it must be in substantial part because reason and reliable data are more important than interest group talking points, self-serving assertions or cosmic anecdotes, however often or vigorously espoused." (2) "[I]f these proposals become effective, rulemaking would be destined for controversies, professional and political, akin to those which led to the 1988 amendments to the Enabling Act and attended the 1993 amendments — controversies that this Committee's predecessors worked hard to put behind them." Indeed, "forcing these changes through to effectiveness" would seriously undermine the integrity of the Enabling Act process. "That would be unfortunate."

735, Nicholas Wooten: "I am also dismayed that every 'tort-reform' group in the country has a link to the comment page here and is running an organized campaign to their members asking them to comment in support of these unnecessary amendments."

784, Michael Millen: "[Q]uestions such as proportionality call into question a very difficult political balance (e.g., economic realities of the defense versus the trial preparation realities of the plaintiffs) which I believe is best made by the people's representatives rather than a technical committee." The Committee should report that some of the proposals "are so politically charged that Congress should make the first move."

1221, Kris Aleksov: "The seventy emails I have received from my colleagues tell me that this is the most important issue that has graced my email this year."

1379, James R. Maxeiner: Comprehensive reform is needed. "The Duke Rules Package does not go there." So for Rule 4, courts should serve complaints, and should in every case review them before making service. Proportionality in discovery should not be left to the parties; judges should control discovery, which should take place in court and require the judge to evaluate the testimony and veracity of the witnesses. Comprehensive reform would include a general loser-pays rule. Cooperation should be made mandatory — including cooperation in disclosing all the facts available to a party.

1870, David Stevens: Delayed rulings on motions to dismiss are a real problem; parties "blow through" discovery deadlines because no one wants to waste money on useless discovery until the motion to dismiss is decided.

1906, Herbert C. Wamsley for Intellectual Property Owners Assn.: Agrees that federal civil procedure should be adopted through the Enabling Act process. On December 10, 2013, the IPO adopted this resolution:

> *RESOLVED*, IPO opposes Congress dictating the outcome of deliberations of the Judicial Conference of the United States, or bypassing the Judicial Conference and its rulemaking entirely, relative to the rules of civil procedure such as (a) the scope and sequencing of discovery in patent cases including claim construction, (b) the setting of pleading standards for patent infringement, and (c) the initial disclosure and joinder of interested parties.

Pointing to local rules in some districts for patent cases, a second resolution urges that the Judicial Conference "develop and adopt rules to address issues of case management and discovery in patent cases in a timely manner."

January Hearing, Jon L. Kyl: p. 45 It is important to move this rulemaking process to a conclusion. "[F]rustrated parties and interests * * * have other options, such as * * * congressional action * * *."

February Hearing, John W. Griffin: p 57 As a member of defense groups, I have been implored to get my testimony in. As a member of plaintiff groups, I have been told I need to make my views known. "[T]his is not an election for people to get their votes in. This is serious business."

RULE 1

267, Lawyers for Civil Justice, by Alex Dahl: "While we believe cooperation is a valid aspirational goal, we do not believe the rules should be used as a tool to enforce it." Creating rule text will seem to create "a duty, the breach of which could lead to sanctions and more." The result will be the same as the experience under the prior version of Rule 11. In any event, the Committee Note should be revised to delete any reference to cooperation. The Committee decided not to add a duty to cooperate to rule text. The same considerations apply to the Note, which could be read to enshrine a duty to cooperate into the rule itself. The Sedona Conference sources on cooperation show how vague the concept is. Is a lawyer obliged to cooperate by disclosing information helpful to the adversary and damaging to the lawyer's client? Even despite the duties of loyalty and diligence? "Cooperation" has no settled meaning or usage: it is not fit for rules use.

298, Philip J. Favro: The first part is a copy of Favro & Pullan, "New Utah Rule 26: A Blueprint for Proportionality." Although indirect, p. 942, n. 63, seems to support adding parties to Rule 1 by invoking the Committee Note to the 1993 amendment. The Note recognizes "the affirmative duty of the court to exercise the authority conferred by these rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay. As officers of the court, attorneys share this responsibility with the judge to whom the case is assigned."

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: "[I]f Rule 1 is to be amended to encourage cooperation, it should be done explicitly and not indirectly through" the Committee Note. The 1993 Committee Note states that attorneys share responsibility with the judge. If greater cooperation is to be achieved, the proposal does not go far enough. "To enshrine cooperation as a touchstone of federal procedure, it needs to be made explicit in Rule 1. If such were to occur, the litigation that would ensue over compliance might very well be worth it." As it stands, the Section does not support the proposal.

311, James Coogan: (This is indirect, not a comment on Rule 1 as such:) "Consider that the rules often do not affect reasonable litigants. The rules become an issue when parties to litigation are not reasonable."

327, Malini Moorthy for Pfizer Inc.: "[S]upports the proposed additional goals of increasing cooperation among lawyers * * *."

331, Robert DiCello: "The proposals are not likely to encourage collegiality among lawyers — something much desired and needed today." (From the context, this appears to be directed to the discovery proposals, not Rule 1.)

333, Racine Miller: Similar to 331 above.

335, Rebecca Heinegg: This comment seems at most an indirect reflection on Rule 1: "[T]he proposals are not likely to encourage collegiality among lawyers. If anything, they make it more likely that there will be contentious motion practice over the scope of discovery."

337, Timothy A. Pratt, for Federation of Defense & Corporate Counsel: Opposes the proposal. Cooperation is desirable, but the change will encourage wasteful motion practice. Imposing duties in addition to those exacted by the Rules of Professional Conduct should be considered carefully, especially with respect to "conflict with the notions of this country's adversary

system."

345, Kim Stone for Civil Justice Association of California: applauds the goal to improve cooperation among lawyers.

346, Kenneth J. Withers, for The Sedona Conference Working Group 1 Steering Committee: Endorses the proposed rule text and the Committee Note. These proposals are consistent with The Sedona Conference Cooperation Proclamation. 494, Charles R. Ragan seems to endorse the Sedona language: "construed, complied with, and administered." But also illustrates an alternative within the framework of the published language: "and employed by the court, counsel, and the parties."

355, Advisory Committee on Civil Litigation, E.D.N.Y., by Guy Miller Struve: Endorses the proposal, "which is designed to embody the principle that the parties should cooperate in achieving the goals of" the Rules. This principle has been established in E.D.N.Y. since it was first adopted in standing orders in 1982.

356, Richard McCormack: "Please add ‘parties’ to Rule 1 * * *."

359, Andrew B. Downs: Rule 1 should be repealed. The judges who cite it do so "to justify some unfair personal modification to the generally understood mores of practice in a particular district," to "run roughshod over all counsel."

366, Paul D. Carrington: "[D]o we need to empower judges to make a more generalized disapproval of the role of an advocate in failing to maintain a cooperative spirit in the conduct of adversary litigation"? Extending the power to punish parties and counsel for excessive zeal is questionable.
November Hearing, Paul D. Carrington: p 60, 68 The Rule 1 proposal "kind of suggests that lawyers are supposed to be not too vigorous on behalf of their clients if it would somehow be a pain to the other side." "I would certainly not want to go very far down the road of burdening plaintiffs’ lawyers with duties that diminish their ability to bring their cases * * *." The plaintiff’s lawyer should not be made responsible for the outcome. Rule 1 is a good rule. "[B]ut trying to impose an independent duty on the part of a lawyer representing the plaintiffs to try to save costs and prevent this from being too vigorous a dispute is I think subject to the same kind of complaint" that was made to the original 1993 version of initial disclosure, which required an attorney to identify witnesses and documents harmful to the client.

378, Jeffrey S. Jacobson for Debevoise & Plimpton LLP: The firm practice is to use discovery cooperatively and collegially, not as a club to inflict unnecessary costs. "We therefore applaud the goals * * * to inject a more cooperative spirit into the discovery rules * * *."

383, Alan B. Morrison: Without supporting or opposing, observes: (1) The Note says the change is to foster cooperation — if so, cooperation should be added to the rule text: "the parties are [expected] to cooperate to achieve * * *." That would lead to deleting "employed by the court and parties." (2) Speedy and inexpensive are achieved by reducing the prospect of a just result. The tension should be reflected in rule text — "to secure by an appropriate balance the just," etc.

390, J. Mitchell Smith for International Assn. of Defense Counsel: Approves without further comment.

399, Edward Miller: "Creating a duty to cooperate is a well-intentioned idea that is sure to lead

to unintended negative consequences, including abusive motions * * *. The meaning of 'cooperation' is vague, and the tension between cooperation and a lawyer's duties to the client are (sic) already complicated."

407, David J. Kessler: The language on cooperation should be removed from the Committee Note. If anything is to be said about cooperation, it should track *The Case for Cooperation*, The Sedona Conference Journal, Vol. 10 Supp., 339. "We are starting to see cooperation become a weapon and courts chastise parties for not being cooperative even when they follow the rules and simply decline to provide information to their opponents to which they are not entitled." Cooperation should not be available as a "meta-threat" used by courts to coerce parties into providing discovery not required by the rules. But if the Committee chooses to say something about cooperation in the Note, it should be this: "Cooperation means undertaking litigation and discovery in compliance with these Rules and acting in good faith. Parties and Counsel should refrain from abusing these rules. Parties are encouraged to cooperate and reach agreements to resolve disputes amicably during litigation, but cooperation does not require such agreements and parties that comply with these Rules need not voluntarily cooperate if they believe in good faith that it is not in their best interest."

412, Mark S. Stewart for Ballard Spahr LLP: More than 120 United States district courts have signed on to the Sedona Cooperation Proclamation. The spirit of Rule 26(f) mandates cooperation in discovery, and Rule 37(f) permits sanctions for failure to participate in good faith in a Rule 26(f) conference. The proposal to amend Rule 1 does not clearly define cooperation and may provide a new basis for motion practice without altering the parties' obligations in any material way. The proposal should be abandoned.

421, Louis A. Jacobs: "Amending Rule 1 to encourage parties to play nice and responsibly is swell but in no way changes the adversarial system. In my experience [representing employment plaintiffs] defense counsel are honorable and represent their clients zealously." That means producing only the discovery that a judge would require be produced.

427, John F. Schultz for Hewlett-Packard Co.: Opposes the Rule 1 proposal. An exhortation to cooperate is well-intentioned, but "it is likely to lead to abusive motion practice whereby parties accuse each other of failing to cooperate."

455, W. Michael Scott for CrownQuest Operating, LLC: Opposes. "The possibility of motions * * * for the failure to cooperate will only encourage wasteful motion practice." The Rules of Professional Responsibility should be supplemented only with great care, especially to the extent that the proposal could be considered at conflict with the notions of an adversary system.

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Supports the Rule 1 initiative. The rule text should not incorporate the principle of cooperation, which is better incorporated in the Committee Note. [This may be ambiguous. The Note cannot say anything unless the rule text is revised. The proposed rule text does not refer to cooperation.]

462, George E. Schulman, Robert B. McNary for the Antitrust and Unfair Business Practice Section of the Los Angeles Bar Assn.:"We support efforts to encourage cooperation and civility."

473, Paul C. Saunders and Rebecca Love Kourlis for ACTL Task Force and IAALS: pp. 11-12 offer examples of pilot projects and district guidelines mandating cooperation. p. 15 applauds proposed Rule 1, but suggests it should reach attorneys as well as parties.

487, Peter J. Mancuso for Nassau County Bar Assn.: Supports.

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: This comment summarizes the discussion at a day-long conference of about 40 invited lawyers and judges with long experience on "both sides of the 'v'." The participants included a good number who have participated actively in the federal rulemaking process, including two former members of the Civil Rules Advisory Committee (Judge Lee H. Rosenthal and Daniel Girard), and the current chair of the Standing Committee (Judge Jeffrey Sutton). The overall report is a clear and concise summary of views expressed by many others in the public comment process. Familiar divisions of view are found here. But there also is a greater level of consensus on some topics than may be found in the overall comments.

For Rule 1, "there was a mixed response." A slim majority favored the proposed language, hoping for a culture change; they would add "attorneys" to make it explicit that they are included. Some of the opponents did not oppose the concept, but did not want to tamper with the iconic language of Rule 1. Other opponents stressed the importance of vigorous advocacy, suggested there would be limited practical effect, and feared that the new language could be used as a tactical weapon.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn. (The same comments were reposted in a different format as 1196; the duplication is not noted in later summaries.): Endorses the proposal.

624, Joseph E. O'Neil: Able and experienced attorneys cooperate now. Those who are not cannot be educated to change their views or their behavior. The proposal will make no difference in behavior, but it will invite motion practice. It should not be adopted.

645, Allison O. Skinner: Offers several versions of a sentence to be added to the Committee Note. The sentence would point to the advantages of using alternate dispute resolution techniques to encourage cooperation in discovery, or to actually resolve discovery disputes. Three articles are attached, one by Ms. Skinner, another by Judge Waxse, and a third co-authored by Judge Scheindlin. Together the articles run a bit more than 100 pages.

677, Noah G. Purcell for Washington State Attorney General's Office: "[W]elcomes the changes to Rule 1."

922, Pamela Davis for Google Inc.: Welcomes the Rule 1 proposal. But cautions "that cooperation under Rule 1 should not be read to impose discovery obligations beyond good faith and reasonable diligence on the parties." Courts should "start with the presumption that lawyers are behaving ethically in discharging their duties, as evidenced by the certification requirement of Rule 26(g)."

995, William P. Fedullo for Philadelphia Bar Assn.: Endorses the proposal as "mak[ing] explicit what is already implicit," and an attempt to refocus lawyers and courts on the foundational principles of Rule 1.

1123, W. Bryan Smith for Tennessee Assn. for Justice: Supports the proposal. This is "an enforceable mandate. The enforcement * * * will, we hope, lead to a decrease in litigation costs for all parties. We further hope that [it] will provide guidance and a basis for courts to curtail abusive litigation tactics, * * * that we see all too often used by defendants in civil actions."

1457, Peter J. Oesterling for Nationwide Mut. Ins. Co.: Supports the proposal, believing that it

will promote cooperation. "[C]ooperation is often essential in focusing preservation and discovery on the true needs of a case."

1489, Ralph Artigliere: This comment speaks from experience as a litigator, Florida trial judge, and present teacher of electronic discovery. "[C]ooperation is always party neutral." It is not enough to view it as an aspirational principle. It belongs in the rules. Cooperation benefits the client. So long as it is not in the rules, parties and lawyers who seek the cooperative path are at a disadvantage when the opponent does not reciprocate; in turn, that creates a disincentive to cooperation. As a judge, I learned that holding lawyers to a higher standard of behavior caused everyone "to up their game." Professionalism was mandatory in my courtroom. Some lawyers behave unprofessionally with their opponent, then come to court "with a different face for the judge." "Send a message to federal judges [although there are many now who care passionately] that you support their efforts toward fair, unimpeded disclosure in discovery by giving them a rule that says cooperation is a requirement."

1883, Norman E. Siegel: Favors the proposal, and suggests more precise language that puts some of the burden on counsel.

2072, Federal Courts Committee, New York County Lawyers' Assn.: Supports the proposal. "[T]he intent and result of the rule change are to make explicit what is implicit, that parties must cooperate." But "in our experience Rule 1 is rarely invoked. Thus, we do not believe that the changes to Rule 1 will have a major impact on the behavior of parties and their counsel."

2173, Ariana J. Tadler: "Cooperation" should be added to the rule text, with a statement of what is expected in the Committee Note. "Cooperation, when sincerely applied, is widely acknowledged to be the best, if not the only, way to guard against excessive discovery." It is no more amorphous than "speedy," or "inexpensive," or — particularly —"just." And "just" is the ultimate and most important goal. February Hearing, Ariana Tadler: p 325 Supports, but suggests that "cooperation" be added to the rule text. Cooperation "really, really works. It's a win, win." Judges know when the parties do not cooperate, and hold them accountable.

November Hearing, Jack B. McCowan: p. 8: "I support the committee's goals of * * * attorney cooperation."

February Hearing, Mark P. Chalos, for Tennessee Association for Justice: p 104 "I hope [this] will be vigorously enforced by the district courts and by the magistrate judges." That will have a positive impact in reducing the cost of litigation to all parties.

February Hearing, Danya Shocair Reda: p 349 Approves the Rule 1 amendment.

RULE 4

Time to Serve

264, American Association of Justice Transvaginal Mesh Litigation Group, by Martin Crump: Reducing the time to serve to 60 days will undermine the waiver-of-service provisions because a plaintiff will not know about waiver until well into the 60-day period. And it is not time enough to serve a defendant who cannot be found or who actively avoids service. Plaintiffs will be encouraged to move aggressively for extensions.

265, American Association for Justice Civil Rights Section, by Barry H. Dyller: The 60-day limit will effectively eliminate the ability to serve by mail. And there are countless examples of defendants ducking service. An illustration is provided by a doctor at a federal prison that has thwarted service by returning mailings, refusing to "forward" calls to the doctor, and so on. Nor is there any benefit to reducing the time.

266, American Association of Justice Aviation Section, by Michael L. Slack: 60 days is not enough time to serve foreign manufacturers and airlines in compliance with treaties. (This comment flags an ambiguity in Rule 4(m), which "does not apply to service in a foreign country under Rule 4(f) or 4(j)(1)." Rule 4(f) applies directly only to service on an individual in a foreign country. Rule 4(h)(2) provides for service on a corporation or other entity in a foreign country "in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under Rule 4(f)(2)(C)(1)." Service on a foreign corporation thus seems to be "under" Rule 4(h), and only in a manner prescribed by Rule 4(f). If the 120-day limit applies to service on a foreign corporation, this concern is greater.)

267, Lawyers for Civil Justice, by Alex Dahl: The proposal is encouraged as part of a larger package, but standing alone does not address the larger problems.

276, John D. Cooney: The time reduction will discourage plaintiffs from requesting waivers of service because a plaintiff will not know whether the defendant will waive until some time after requesting the waiver, leaving only 30 days to effect service. A plaintiff may need to sue a company he worked for decades ago — extensive research may be required to find the company's current name. Time will be wasted on motions for an extension of time to serve. (321, Timothy M. Whiting, is similar.)

278, Perry Weitz: Changing only a few words, tracks 276, noted above.

279, Kyle McNew: "A lot of cases settle in between filing and service, but 60 days just isn't enough to get a case settled." So fewer cases will settle.

280, Oren P. Noah: 60 days is not enough. In asbestos litigation, "service on entities that have changed names, moved offices, etc. in the decades since they caused the relevant asbestos exposures sometimes take[s] substantially longer." And shortening the period will encourage certain defendants to avoid service.

292, Lyndsey Marcelino for The National Center for Youth Law: Litigation on behalf of children typically involves many parties in many different locations. Social workers have a very high turnover rate. Cutting the time to serve in half "would be a nearly insurmountable burden in situations where we are litigating in different states against individual defendants with unknown locations."

297, Trevor B. Rockstad for the Darvon/Darvocet Litigation Group, AAJ: Similar to 264, the AAJ Transvaginal Mesh Litigation Group.

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: Approves the proposal, but recommends two additions to the Committee note: (1) Extensions for good cause should be liberally granted for the sake of better overall efficiency, and there is no change in the discretion to grant extensions even absent good cause. (2) An example of good cause should be provided — one would be "multi-party actions in which it may be difficult to identify, locate, and serve all defendants in two months (possibly excepting cases where fewer than all defendants must be served via the Hague Convention)." November Hearing, p 287, Michael C. Rakower for the Section: Repeats that the good cause provision is an important limit on the shorter time to serve, and urges that the Note "show situations in which good cause can be employed so that parties don't think that good cause should be a limited form of remedy."

306, William C. Faber, Jr.: "[S]ervice of summons can be more complicated than you imagine."

311, James Coogan: It often takes 60 days to find out that the address initially used for service is outdated. The proposal will increase delays by increasing the need to seek additional time to serve.

317, Steven Banks for the Legal Aid Society in New York City: In forma pauperis cases should be governed by the current 120-day limit. Service is made by the Marshals Service. Marshals frequently fail to make service within 120 days. IFP litigants are not penalized for this, but the failures undermine their faith in the fair administration of their claims. Reducing the time to 60 days will "raise expectations that cannot be satisfied and promote cynicism about government's adherence to the law."

327, Malini Moorthy for Pfizer Inc.: The amendments to Rule 4(m) and 16(b) are "important signals to the judiciary that early and active case management is critical * * *."

358, Dusti Harvey for AAJ Nursing Home Litigation Group: Nursing homes often are owned and managed by way of a complex organizational structure involving several defendants. A 60-day limit could result in costly refiling of complaints because of the logistical difficulties in serving all defendants.

360, Robert Peltz: Often defendants are located in other domestic and foreign jurisdictions. Long-arm service or substituted service can be very time consuming, "even if one knows where the defendant is." It is worse when it is necessary to track down the defendant. And a dismissal nominally without prejudice is with prejudice if the limitations period has run.

361, Caryn Groedel: This is an arbitrary change for the benefit of defendants and to the detriment of plaintiffs.

363, Dean Fuchs, at request of NELA-Georgia Board: Reducing the time to serve will create a perverse incentive for defendants to evade service. It can be difficult to personally serve some defendants. They often utilize P.O. boxes, drop boxes, or other contrivances to obfuscate their actual addresses or whereabouts. "I am often forced to unnecessarily incur the expense of engaging private process servers, and on occasion, more expensive private investigators to stake out and surveil the defendants * * *." Problems with timely service are more likely to arise from evasive defendants than lazy plaintiffs' counsel. There is one circumstance, however, in which

plaintiff's counsel properly delays service. The 90 days available to sue after the EEOC issues a right-to-sue letter are used up in obtaining the EEOC investigative file under FOIA, and most competent attorneys will want to review the file before undertaking a case. A plaintiff may be required to file pro se while seeking representation. After investigation, prospective counsel may advise the plaintiff the case is not worth pursuing and should be voluntarily dismissed. If the case is pursued, counsel will have an opportunity to amend the complaint before it is served. In these circumstances, delay in service will promote judicial economy. The present 120-day period enhances the ability of plaintiffs with viable claims to retain counsel.

365, Edward P. Rowan: Service can be quite difficult. Statutes of limitations are extremely harsh. It is wrong to provide a harsh time period for service.

369, Michael E. Larkin: "The present time limit does not affect the length of litigation." Change achieves nothing meaningful.

372, J. Burton LeBlanc, for American Association for Justice: Reducing the time to 60 days is entirely unnecessary. The 120-day period does not delay a case unnecessarily. It is an important stepping stone for the start of a case. In some kinds of cases, such as admiralty cases where plaintiffs must reach a ship to effect service, 60 days will almost always be inadequate. With the 120-day period, courts do not often confront motions for an extension of time; with a 60-day period, they will confront such motions much more frequently.

383, Alan B. Morrison: (1) Is there any evidence that plaintiffs are deliberately delaying service for tactical advantage? Remember that many statutes of limitations require service in a period shorter than 120 days after filing. (2) Rule 15(c)(1)(C) requires notice to a not-named defendant within the period provided by Rule 4(m) — if shortening this period is intended, the Note should say so. And there are other problems with relying on Rule 4(m) in Rule 15(c)(1)(C): Rule 4(m) does not apply to service in a foreign country, and the proposal also excludes notice under Rule 71.1(d)(3)(A). What of relation back in those settings? The cure is to delete the cross-reference in 15(c)(1)(C), substituting the desired number of days, whether 60 or 120.

390, J. Mitchell Smith for International Assn. of Defense Counsel: Approves without further comment.

403, Donald H. Slavik for AAJ Products Liability Section: Products cases often involve manufacturers and sellers located overseas. Service is time-consuming. 60 days is not enough; 120 days usually are enough. [Note this comment points to an ambiguity in Rule 4. Rule 4(m) does not apply to service in a foreign country "under Rule 4(f) or 4(j)(1)." Rule 4(h)(2) provides for service on a corporation not within any judicial district of the United States "in any manner prescribed by Rule 4(f) for serving an individual. Literally, Rule 4(m) applies to service under Rule 4(h)(2). It may be useful to look into this.]

408, Elliot A. Glicksman for Arizona Association for Justice: "For example, in trucking cases, the very nature of a truck driver's job has them on the road, hard to find, and difficult to serve." 120 days often is extremely difficult; 60 days would often be unworkable. And the change would undermine the system of encouraging defendants to waive service.

409, Michael H. Reed, Fern C. Bomchill, Helen B. Kim, Robert O. Saunooke, and Hon. Shira A. Scheindlin, individual members of ABA Standing Committee on Federal Judicial Improvements: Shortening the time for service is acceptable.

410, John H. Hickey for AAJ Motor Vehicle Collision, Highway, and Premises Liability Section: Plaintiffs have the incentive to serve defendants as soon as possible. In multidefendant cases it is often necessary to request more than 120 days to effect service on individuals and on agent partnerships in limited liability companies that are evading service. 448, Robert D. Curran, tracks 410.

443, Grant Rahmeyer: There is no need to change. "Corporations play shell games and intentionally make it difficult to serve the correct party."

457, Carl A. Piccarreta: "The 120 day limit has * * * allowed for cases to informally resolve so as to avoid service of process and the initiation of formal/expensive litigation." And finding some defendants, for example interstate truckers, can be a problem.

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: The current time period should be retained. The Department often encounters defendants that attempt to evade service. It also often has cases involving multiple defendants, "some of whom can only be located with great difficulty." Shortening the time to 60 days is likely to discourage use of the Rule 4(d) waiver provisions. If the time is to be shortened, it should be to 90 days. And the Committee Note should state that the new limits may need to be extended where a defendant evades service or is difficult to locate. The Note also should say: "More time also may be needed to effect waiver of service under Rule 4(d)."

465, Neil T. O'Donnell: Plaintiffs attempt to serve as soon as possible. But some defendants are hard to find, and some avoid service. Reducing the time to serve also will interfere with the excellent rule for requesting waiver; the plaintiff will not know whether the defendant has waived until perhaps 25 days remain to make service.

475, Jeff Westerman for Litigation Section, Los Angeles County Bar Assn.: 60 days is not enough "in certain types of cases, most especially those with foreign defendants, or defendants who must be served by publication or other non-judicial means." The result will be more motion practice.

479, Earl Blumenauer, Suzanne Bonamici, Peter Defazio, and Kurt Schrader, Members of Congress: Reducing the time to serve will make the process less efficient because parties would often have to seek more time. "It would affect Oregon's robust fishing industry, for instance, because in admiralty litigation plaintiffs often must reach a ship to effectuate service, which often takes more than 60 days."

487, Peter J. Mancuso for Nassau County Bar Assn.: Opposes. The present rule does not prejudice plaintiffs or defendants.

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: Plaintiffs' attorneys at the conference thought there is little need for change; pointed to the potential impairment of requests to waive service; and feared the effects when the "parties are trying to identify the defendant and the statute of limitations is close to expiring."

502, Peter Everett: 120 days allow more opportunity to try to resolve rather than litigate a dispute.

518, Robert Stoney: When a plaintiff comes late to the lawyer, "this requires a quick filing with time needed to prepare the case." 60-day service gives an advantage to the defendant.

609, Stephen D. Phillips and John D. Cooney for Illinois Trial Lawyers Assn.: The proposal will undermine the procedure for waiving service. Finding the current name of a defendant may require research through a dozen mergers and acquisitions.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: The time should be not less than 90 days. Reducing it to 60 days will result in more motions to extend, "especially from parties with fewer resources to track down defendants' addresses and from pro se plaintiffs."

616, Marcia Murdoch: Insurance companies are often unwilling to discuss settlement until suit is actually filed. And "I have had numerous cases where defendants are not even known by the insurance company, and the insurance company requires service as propounded the rules." 60 days are not enough.

703, Jeffrey K. Rubin: "[G]iven that dismissal is without prejudice, at best this rule change increases costs by requiring refiling when a missing defendant is finally located."

726, Mark T. Lavery: "In most of the individual consumer cases that we file, we send a waiver of service to the defendant. * * * [M]ost Defendants who are not interested in ducking service will waive service if given the opportunity." Reducing service time to 60 days will interfere with waiver practice — the plaintiff should have 90 days to serve when there is now waiver.

784, Michael Millen: Plaintiffs often approach me a few days before expiration of the limitations period. When I cannot take the case I help them draft a pro per complaint. Then they look for an attorney to take over the case after filing it in pro per. And they are afraid to attempt to make service themselves while looking, lest they make a mistake. "There is a world of difference between finding an attorney in 60 days versus finding an attorney in 120 days."

995, William P. Fedullo for Philadelphia Bar Assn.: Endorses the proposal. It will require plaintiffs to be more diligent when seeking a waiver of service. The effects on relation back of an amendment changing defendants under Rule 15(c)(1)(C) do not alter the endorsement. In the small numbers of cases where limitations issues force filing before a Rule 11 investigation can be performed, 60 days are adequate.

1025, Senator Jeff Merkley, Senator Ron Wyden: The change "would affect Oregon's robust fishing industry, for instance, because in admiralty litigation plaintiffs often must reach a ship to effectuate service, which often takes more than 60 days."

1054, Assn. of Bar of the City of New York: Generally 60 days is enough. But service under the Hague Convention on a foreign corporation or other entity routinely takes more than 60 days. Application of Rule 4(m) to service under Rule 4(h)(2) is not expressly excluded by the exclusions for service under Rule 4(f) and (j)(1). Courts seem to exclude such service, but offer no clear explanation. Rule 4(m) should be amended to expressly exclude service under Rule 4(h)(2). And the Committee Note might observe that pro se litigants often will deserve more time.

1105, David Ginsburg: "Insurance companies will often 'alert' their insureds of pending service which encourages defendants to evade service. The carriers refuse to accept alternate service and refuse to provide current defendant addresses without court orders."

1209, Christopher Heffelfinger: Provides a nice statement on several familiar arguments that 60 days are too few, including the difficulties of locating individual defendants — "is a stakeout

necessary" to show good cause for an extension when an individual has been absent from the place for attempted service twice, three times, four times?

1210, AAJ Admiralty Section: A reminder that service — arrest — in an in rem admiralty action must be delayed until the vessel is in port.

1335, Aleen Tiffany for Illinois Assn. of Defense Trial Counsel: Moderately opposes. A 60-day period will interfere with requests to waive service. In addition, "obtaining service is sometimes a challenging and time-consuming process." Setting the period at 60 days will increase motion practice.

1651, Michael Jay Leizerman for AAJ Trucking Litigation Group: "The very nature of finding and serving an over-the-road truck driver is problematic."

1672, Michael T. Blotevogel: Cases do not move fast enough in federal courts to benefit from shortening the time for service. But it will increase expenses.

1175, Shawn Spencer: To keep costs down and to avoid service at a person's home or office, I often try service by certified mail. If that is unsuccessful, the Postal Service will not return the complaint to me until at least 21 days have passed. A 60-day period to serve would leave little time.

1290, Michelle C. Harrell, for State Bar of Michigan Committee on United States Courts: "Requiring that service * * * take place within 60 days in most cases makes excellent sense."

1292, George Wailes: Suggests a problem that may be unique to California. When it is not easy to find the defendant, it may be necessary to move to publish summons under Rule 4(n)(2). The rules for publication in California require a court order based on a declaration of diligence, and then provide that service is complete only 28 days after first publication. If the Rule 4(m) period is shortened to 60 days, it will be necessary to file an ex parte application to shorten the time for a motion to publish the summons.

1388, Jonathan Marcus for CFTC: "[M]any defendants named in CFTC civil actions simply do not want to be found. This is especially true for defendants engaged in Ponzi and other schemes who also may attempt to run from criminal prosecution." Shortening the time also will interfere with requests to waive service.

1414, David Abrams: Reducing it to 60 days will discourage initial resort to informal and inexpensive means that may not work. But if it is shortened, the rule should provide an automatic extension if the defendant contests service.

1555, Anthony Tarricone: Spells out the reasons why service under the Hague Convention often takes 90 days, 120 days, or more. One snag is that service must be made by the "Central Authority" in the country where service is made, according to its own rules; the plaintiff has no control over this. Matters are worse in countries that are not signatories to the Convention. And notes that foreign defendants who are provided courtesy copies of service papers through contemporary means rarely waive the formalities of Hague Convention service, or whatever other rules apply, choosing "to delay advancement of the case in court by insisting on the formalities of service * * *."

1588, Leigh Ferrin for Public Law Center: Pro se plaintiffs encounter great difficulty in figuring

out whom to serve, and how. The difficulties are greater when suing a government agency. Some are able to invoke the Marshals Service, but the marshals are overworked and frequently fail to meet even the 120-day deadline.

1932, Brian R. Wilson: The change increases the risk that games will be played with arguments of insufficiency of service. In 2007 the Ohio Supreme Court ruled that a properly raised and preserved insufficiency-of-service defense is not waived by active participation in the litigation — and affirmed dismissal for insufficient service on a motion for directed verdict made after the conclusion of the plaintiff's case in chief.

2002, Hon. Candy Wagahoff Dale for Local Rules Advisory Committee, D. Idaho: In cases where there is good cause to take more than 60 days, there will be increased motion practice. Idaho allows 180 days; even now, the 120-day period in Rule 4(m) "has caused plaintiffs to endure precarious arguments regarding statute of limitations defenses."

2014, Jennifer Verkamp: In False Claims Act cases the complaint remains under seal, unserved, until the government decides whether to intervene in the litigation. The moment when the government decides not to intervene is the first moment when the relator is informed of the results of the government investigation. These cases are often complicated, and the relator must undertake a close analysis and perhaps do further investigation or consultation with new counsel before deciding whether to proceed further. Careful deliberation will be impeded by reducing the time to serve.

2209, Richard Talbot Seymour: "Sometimes, a delay in service is occasioned by nothing more sinister than waiting for a Notice of Right to Sue from the U.S. Equal Employment Opportunity Commission, so that all claims can be made in the same case."

2334, Robert A. Hyde for City of Phoenix: Supports shortening the time to serve. The City "continues to encounter plaintiffs seeming to 'park' cases for nearly four months after filing, only then to rush to accomplish service on the 120th day (or after). The proposed amendment * * * will foster diligence at the earliest stages of a lawsuit * * *."

November Hearing, Barry H. Dyller: p 183 Reducing the time to serve is unnecessary "because it's always in plaintiff's interest to get the summons and complaints served as soon as possible." And this is a de facto repeal of the Rule 4(d) waiver process — by the time I know there will be no response there will be about 25 days to accomplish service, and it is not always possible. I have never had a problem in getting extensions. But I generally serve by requesting waiver because that is most efficient; this will make me think twice about that.

November Hearing, Nicholas Woodfield: p 235 Rule 4(m) is not broken; there is no need to "fix" it. And the reduction to 60 days will cause serious problems. In employment cases you often have a plaintiff appear at the last minute after receiving a right-to-sue letter. You're trying to protect the statute of limitations — "you can prepare pro se complaints over your own name or you can file it." Due diligence standards are lower in these circumstances; remember the defendant controls the evidence. Similar problems can arise in False Claims Act cases, which can be suspended under seal for months while the government decides whether to take over — long down the road, the government may decide not to intervene, but after accumulating much information that the plaintiff should get under the Freedom of Information Act. 120 days is not much time for that, much less 60. The full 120 days to serve may lead to a decision to withdraw the case without serving. And Rule 4(m) is not a major cause of delay in moving to final disposition. Routine motions to dismiss cause much delay. Another source of delay is taking too

much time to decide motions for summary judgment.

January Hearing, P. David Lopez (EEOC): Agrees with the proposal.

February Hearing, Michael M. Slack: p 193 This is one of the several discussions that assumes the present 120-day limit applies to service on a foreign corporation. Even 120 days is not enough to comply with the often complicated treaty provisions that apply. We keep getting agitated calls from federal court asking why we have not made service within the limit. Please, please do not reduce it from 120 days.

Exclude Condemnation Notice

383, Alan B. Morrison: Excluding notice under Rule 71.1(d)(3)(A) from Rule 4(m) will create relation-back problems because Rule 15(c)(1)(C) governs relation back for a new defendant by invoking Rule 4(m). These problems may arise with some frequency because it may be easy to get wrong the names of persons with peripheral or remainder interests.

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: The Department suggested this change. "Service of a notice in condemnation actions is different from service of a complaint in other civil actions." Dismissal under Rule 4(m) for failure to serve the notice in 120 days would adversely affect, not benefit, prior landowners who are entitled to just compensation. The law now is as proposed by the amendment, which serves only to make the law clear.

2072, Federal Courts Committee, New York County Lawyers' Assn.: Notes this aspect in approving the 4(m) revision.

RULE 16: TIME FOR SCHEDULING ORDER

(Some of the comments summarized here address case management generally, without focusing directly on the specific Rule 16 proposals.)

Nonofficial comments: It has been suggested that Rule 16(b)(1) should be revised to authorize standing orders that exempt categories of actions from the scheduling-order requirement. The point is that bankruptcy courts often adopt standing orders like this, and at the same time generally follow the civil rules. The published proposal simply carries forward the present provision: a court must issue a scheduling order "[e]xcept in categories of actions exempted by local rule." It would be easy drafting to add "or by standing order." The questions are whether it would be wise to do this as a general provision in the civil rules; whether the circumstances confronting bankruptcy courts suggest a special need for express authorization of standing orders; and whether, if there is a special need, it is better to meet it in the bankruptcy rules themselves.

This suggestion relates to an ongoing project to reconsider the permission to rely on local rules to exempt categories of cases from the scheduling order requirement. Rule 26(a)(1)(B) exempts nine categories of cases from the initial disclosure requirement. These exemptions are incorporated in Rule 26(d)(1), so the discovery moratorium does not apply. They also are incorporated in Rule 26(f), so the parties need not confer. It could be attractive to extend the exemptions to Rule 16(b)(1), displacing local-rule exemptions, so as to have a uniform set for these related purposes. The next step in this project is to study local-rule exemptions to determine whether they illustrate additional categories of cases that should be added to those now listed in Rule 26(a)(1)(B).

267, Lawyers for Civil Justice, by Alex Dahl: The proposal is encouraged as part of a larger package, but standing alone does not address the larger problems.

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: Approves shortening the time to serve the worthy objective of reducing delay. There is some concern that the "good cause" exception will be routinely applied in cases involving parties with complex infrastructures and complex discovery issues. But, so long as the good-cause exception is retained, the court will have the necessary flexibility. The exception will address the problems that arise in multi-defendant cases when some defendants are served at the close of the 60-day period provided by revised Rule 4(m). The Committee Note should offer such cases as an example of good cause. November Hearing: Michael C. Rakower, p 287: Renews the Section's support, urging that "the good cause exception should be underscored."

327, Malini Moorthy for Pfizer Inc.: "[S]upports the proposed amendments to Rules 4(m) and 16(b) as important signals to the judiciary that early and active case management is critical * * *." This goal can be furthered by using the rules "to encourage judges to develop standard discovery orders or case management plans that outline the scope of discovery and reinforce the parties' obligations to work together to manage discovery." Injecting judicial oversight, casting the judges as gatekeepers to prevent unnecessarily burdensome discovery will help end the use of onerous discovery merely as a leverage for settlement.

342, Stephen C. Yeazell: Exhortations to district judges to manage better are not likely to be effective. "Our experience, with Rule 16 and with the text of various Rules that already vest judges with the power to manage litigation, suggests that some simply will not or cannot." FJC

conferences and manuals might help.

346, Kenneth J. Withers, for The Sedona Conference Working Group 1 Steering Committee: The proposal, adding "unless the judge finds good cause for delay," is "awkward because it implies that the parties have not been diligent, even though the court is to make its finding even before it meets the parties." The proposal should be revised to direct that the judge must issue the scheduling order within the prescribed times "unless the court anticipates that the complexity of the case, the needs of the parties, or the ends of justice warrant additional time."

352, Lee Kaplan: Supports the package as "commonsense recommendations that will speed up the litigation process."

383, Alan B. Morrison: (1) It would be better to state the time directly, rather than work backward from the Rule 26(f) conference. Require the parties to meet within a stated period after the first defendant is served, and set the scheduling conference at 21 days after that. (2) Delete "as soon as practicable." (3) Move "unless the judge finds good cause for delay" to the end of the sentence for better readability.

390, J. Mitchell Smith for International Assn. of Defense Counsel: Approves all of the Rule 16 proposals without further comment.

409, Michael H. Reed, Fern C. Bomchill, Helen B. Kim, Robert O. Saunooke, and Hon. Shira A. Scheindlin, individual members of ABA Standing Committee on Federal Judicial Improvements: "[T]he service of any defendant should not be the trigger for issuing a scheduling order."

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: "[A]ctive case management, particularly at the early stage of the case, is generally effective in reducing delay." But the amendment may be counterproductive. The integration of the discovery moratorium, the parties' Rule 26(f) conference, and the scheduling conference are designed to give the parties sufficient time to analyze the case before conferring and developing an effective discovery plan to present to the court. "[I]n many cases, scheduling orders issued under the accelerated time-lines will have been developed without sufficient time for the parties to discuss and plan proposed discovery and other case-related activities, and therefore to develop a comprehensive, carefully crafted case management proposal." "[P]reserving additional time at the outset of litigation pays dramatic dividends down the road." Acceleration will be a particularly pronounced problem in more factually complicated cases and in cases in which ESI may be produced. Counsel need sufficient time to understand their client's information systems before planning discovery. Acceleration, further, presents unique problems for the federal government. Time is needed to designate the proper litigator within the Department structure. Officials at client agencies also need time to organize and prepare. These needs are reflected in the additional time to answer provided by Rule 12(a)(2) and (3). All of these problems are accentuated in Bivens actions against individual government employees, particularly when time is needed to decide whether there is a conflict of interests that will lead to selection and payment of private counsel to represent the employee. And in districts that do not exempt actions under the Administrative Procedure Act from Rule 16(b), time is needed to understand the size and breadth of the record. Some of these problems may be alleviated by the "good cause" exception added to the proposal, but the Department is concerned that relief "will be granted quite infrequently." At the least, the Note should recognize these problems by stating that good cause to extend the deadline will likely arise in complex cases (specific note language is suggested at p. 11).

473, Paul C. Saunders and Rebecca Love Kourlis for ACTL Task Force and IAALS: Applauds

the proposed change.

479, Earl Blumenauer, Suzanne Bonamici, Peter Defazio, and Kurt Schrader, Members of Congress: Supports; it will improve the discovery process.

487, Peter J. Mancuso for Nassau County Bar Assn.: Supports all the Rule 16(b) proposals "to facilitate case management."

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: Participants in the conference, plaintiff and defense attorneys alike, "agreed that lawyers and parties are more cooperative when the judges are involved from the beginning of a case." Some thought the proposed case-management proposals should be adopted now, deferring the "proportionality" amendment of Rule 26(b)(1) to see whether more active management under present rules will do the job.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: The shortened time may get cases on a schedule earlier, and at least in theory lead to earlier resolution. But there is a risk that the shortened time will interfere with early court-sponsored settlement discussions. Southern District of California at Local Rule 16.1, for example, requires an early neutral evaluation conference within 45 days after any defendant has appeared. Nearly 25% of civil cases there settle before the case management conference. Condensing the time to the scheduling conference may force the parties into an adversarial posture that interferes with early settlement efforts. It would help to state in the Committee Note that there is good cause for delay in a district that has an early neutral evaluation or ADR program.

635, Matthew D. Lango for NELA/Illinois: Supports.

995, William P. Fedullo for Philadelphia Bar Assn.: Endorses, despite concerns that the reduction puts pressure to retain counsel, analyze the complaint, develop a litigation strategy and discovery plan, and prepare for and conduct the Rule 26(f) conference.

1119, Rebecca Love Kourlis for IAALS: The first attachment is the National Center for State Courts evaluation of the New Hampshire pilot project for Proportional Discovery/Automatic Disclosure Rules. The rules, for the first time, require fact pleading and an answer; a meeting of the parties after the answer is filed — the goal is to have the parties file a stipulation that becomes the case scheduling order, but if they fail the court holds a scheduling conference, which may be by telephone; automatic disclosure of some information; limits to 25 interrogatories and 20 hours of deposition time; and a separate meeting to discuss preservation of ESI. Contrary to expectations, the new rules did not reduce the time to disposition during the 2-year study period. The rate of filing answers went from 15% when they were not required to 56% under the regime that required them; there was a statistically significant reduction in the rate of default judgments. The rate of holding court scheduling conferences fell dramatically. "Contrary to expectations, there was not a statistically significant change in the proportion of cases in which a discovery dispute was litigated."

The second attachment is the Final Report on a survey answered by 44 attorneys (25% of the target population) who participated in the Suffolk Superior Court Business Litigation Session Pilot Project. The Project principles were to limit discovery to the magnitude of the claims actually at issue; to stage discovery; to require all parties to produce all reasonably available, nonprotected documents that may be used to support claims, counterclaims, or defenses; and requiring parties to confer early and often on discovery and make periodic reports on the conferences to the court. Participation in the pilot was voluntary; very few of those who

responded to the survey opted out. Answering 10 questions, 80% thought the pilot procedures were better or much better than regular Business Litigation Section practice; a still higher number thought the pilot procedures better or much better than regular Superior Court procedures. The materials are sparse, but it appears that enthusiasm for the pilot practices arose from more intense judicial management and from more efficient discovery.

1290, Michelle C. Harrell, for State Bar of Michigan Committee on United States Courts: "Advancing the deadline for issuance of the initial scheduling order is also worthwhile in order to promote progress earlier in the litigation." And it is hoped that "more judges will see the wisdom in personally conducting those conferences."

1481, George Dent: Accelerating the scheduling conference puts undue pressure on the Rule 26(f) conference and initial disclosures.

1536, Lisa Tate for American Council of Life Insurers: Opposes. "It is extremely difficult, and unrealistic, for a corporate defendant to investigate, hire counsel, and formulate a litigation strategy within the first sixty-to-ninety days after being served."

1540, Benjamin R. Barnett & Eric W. Snapp: Supports the Rule 16 proposals for early and active court involvement.

1594, John Midgley, Columbia Legal Services: Particularly supports.

1746, David Holub: Opposes. "Impromptu conferences lead to ambushes rather than thoughtful briefing and citation to authority."

2072, Federal Courts Committee, New York County Lawyers' Assn.: Supports. Shortening the time "does not create an undue burden on the parties, specifically defendants," and "is not extremely onerous" since additional time can be allowed.

2110, Miriam Hallbauer & Richard Wheelock for LAF: Supports.

2209, Richard Talbot Seymour: The proposal does not, but should, change the current rule that measures time from the date of service on any defendant. A later-served defendant should not be burdened with the results of a conference it was unable to attend. The time should run from service on all defendants, or from "some number of defendants fewer than all." (2252, David J. Lender expresses a similar concern: the shorter time is unfair to later-served defendants, an unfairness that could be exacerbated by serving early Rule 34 requests on the first-served defendant, hoping to set the ground rules for document preservation and production before all defendants can be heard.)

November hearing, Jack B. McCowan: p. 8: "I support the committee's goals of advancing early and effective case management."

November hearing, John C.S. Pierce: p. 24: Favors early case management. It provides an opportunity to consider the proposed presumptive limits and allow more discovery when appropriate.

November Hearing, Darpana M. Sheth, for the Institute for Justice: p 149 "IJ welcomes the amendments encouraging early and active judicial case management."

November Hearing, Frank L. Steeves: p 302 Speaking from experience as General Counsel of Emerson Electric Co.: Our statutes do not function the way they are intended. Civil justice has "become reduced to a series of guides where cases can be just as much about finding and exploiting the other side's errors during pretrial phases as it is about finding what truthfully happened and therefore finding justice." Working with chief legal officers of companies across the globe, many of them cite our legal system as a reason to stay away from the United States. The proposed changes "will go far in knocking down opportunity for abuse." "Shortened discovery" will force a better focus at the outset. "[I]nvolvement of judges will enhance their early understanding," and reduce the "got-cha" mentality that clogs the courts.

January Hearing, Paul V. Avelar: p 250 The Arizona Chapter of the Institute for Justice "welcomes the amendments encouraging early and active case management."

February Hearing, Rebecca Love Kourlis, for IAALS: p. 37 The current system involves gamesmanship. It is geared toward settlement, perhaps not a good thing. It is prohibitively expensive, not a good thing. Everyone agrees that more active judicial case management is a good thing; there is very little disagreement with that set of proposals.

February Hearing, Michael L. Slack: p 193 In several ways, this is a plea for more direct and active involvement by federal judges with their cases. Some do this. Many do not, viewing the process as too formal, too rigid. State-court judges in Texas are involved, with a status conference every 30 days. That is much better.

February Hearing, Conor R. Crowley: p 280 Endorses the Rule 16 proposals, and suggests several additions to "improve preservation, "to include "privacy issues," and to state in the Committee Note that judicial intervention is appropriate only after the parties meet and confer in good faith.

RULE 16: ACTUAL CONFERENCE

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: "[A] scheduling conference is more effective if the court and the parties engage in direct simultaneous communication." E-discovery-specific disagreements should benefit significantly because they present numerous challenges. "Such challenges often manifest themselves in more pugilistic behavior as attorneys may be more willing to fight or use delaying tactics than address a novel issue." Still, geography or limited stakes may justify a conference by direct, simultaneous communication, rather than an in-person conference. And it is good to recognize that there are cases in which the judge can properly rely on the Rule 26(f) report without a conference.

316, Hon. Michael M. Baylson: Telephone conferences can be an effective and inexpensive way of conducting litigation in a great majority of cases. About half of the E.D.Pa. docket is employment discrimination and civil rights cases, with a congenial bar experienced in what discovery is appropriate. "Telephone" should be restored to rule text.

325, Joseph M. Sellers: Requiring telephone, in-person, or "other real-time means" for the conference is unobjectionable. But it does not seem likely that many conferences are held by mail now. And the real problem is that "scheduling conferences are often not focused on achieving early disclosure of key evidence, or are not held at all. Both attorneys and courts would benefit from stronger guidance on how to structure early scheduling conferences to identify key issues and design discovery and pre-trial process accordingly." November Hearing: p 306 Renews the theme. Speaking to civil rights cases, shares the concerns many have expressed as to the proposals on proportionality, numerical limits, and cost shifting. Contingent-fee attorneys are very careful about the discovery they undertake. The problems arise from a one-size-fits-all set of rules. "[M]uch earlier and more active involvement by the courts in the management of discovery would help greatly." Rule 16 should be amended to require this. Courts, working with the parties, could often stage discovery, "focusing on those matters that they believe * * * are especially central to one side or the other or both." Courts now are empowered to do this, but they should be directed to do it. There may be some judges who will resist such a direction in the rules, but they should come to recognize that the investment of time at the beginning will be more than repaid by savings at later stages of the process. And it will be useful to wait to see what lessons can be learned from ongoing pilot projects, such as the complex litigation project in the Southern District of New York.

383, Alan B. Morrison: The idea is sound. It would be clearer to add " * * * at a scheduling conference involving simultaneous communication."

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: "The Department strongly supports the option of conferences by telephone or more sophisticated electronic means," particularly when that saves travel time and expense.

462, George E. Schulman, Robert B. McNary for the Antitrust and Unfair Business Practice Section of the Los Angeles Bar Assn.: A firm and reliable trial date is the best means to speed up an action. This does not mean a "rocket docket." In the past, "every new case filing would result in a status conference with the assigned judge." That no longer happens. But a party ought to be able to request a Rule 16 conference — or, if not a Rule 16 conference, an opportunity to "see the judge to discuss the progress and prospects of a case before the trial starts."

473, Paul C. Saunders and Rebecca Love Kourlis for ACTL Task Force and IAALS: Endorses

the proposal, "but we hope that in time, and with some experience, the Committee will see fit to make initial pretrial conferences mandatory." Even if a Rule 26(f) report provides a sound basis for a scheduling order, an "initial pretrial conference could do more than simply serve as the basis for a scheduling order." It can inform the court about the issues, and may narrow the issues. It provides an opportunity for the judge to get involved, learn the issues, and tailor the case. "Multiple pilot projects have emphasized the importance of the initial pretrial conference." If proportionality is incorporated in the discovery rules, "it reasonably falls to the judge to make that determination, and early engagement by the judge facilitates a fair and appropriate analysis."

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: There was consensus at the conference that in-person conferences are more effective. Some would go further, to require face-to-face conferences absent good cause. But it was recognized that technology can offer creative and less expensive means.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Endorses eliminating "by telephone, mail, or other means" as "outdated and unnecessary."

673, Don Bivens for 22 more "individual members of the Leadership of the American Bar Association Section of Litigation": "[I]t is an improvement to require that scheduling conferences be held by simultaneous and live communication * * *."

995, William P. Fedullo for Philadelphia Bar Assn.: Endorses. Telephone conferences are still permitted, but removing the word from the rule suggests preference for an in-person conference.

2032. Carlo Sabatini:"I agree that an actual conference by direct communication with the court is valuable."

2072, Federal Courts Committee, New York County Lawyers' Assn.: Face-to-face conferences are more conducive to resolving issues, but telephone conferences may be more efficient in some circumstances. The revision is wise.

RULE 16: PRESERVING ESI, RULE 502 AGREEMENTS

287, Lynne Thomas Gordon, for the American Health Information Management Association: AHIMA members "typically manage electronic health record (EHR) systems." They play a key role in e-discovery. Federal statutes and regulations converge and overlap with the Civil Rules "to create an entangled environment ripe for e-discovery requests." The healthcare industry "is still primarily focused on the implementation of EHRs and their use in providing clinical care, rather than establishing new systems, processes, and policies to respond to litigation and regulatory investigations." The early stages of litigation often take far too long. To address this problem, and to ensure that "all forms, formats, and locations of information are preserved," the court should ensure "that qualified and credentialed HIM professionals are actively involved early on in any/all matters involving healthcare litigation or regulatory investigations."

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: Supports adding to the subjects of a scheduling order, and of a Rule 26(f) conference, preservation of ESI and Evidence Rule 502 orders. (1) At the conference the court may modify current preservation practices and set the rules for post-order preservation activity, providing greater certainty. Together with Rule 26(f)(3)(C), this will provide a strong incentive for the parties to cooperate on preservation issues and either agree or clearly identify their disagreements, providing a means to address preservation issues more efficiently. (2) The reference to Rule 502 will likely focus the parties' attention on the importance of such agreements. Increased use of Rule 502(d) orders will be a good thing. November Hearing: Michael C. Rakower, p 287: Renews the support.

346, Kenneth J. Withers, for The Sedona Conference Working Group 1 Steering Committee: Adding "preservation" to the list of topics is endorsed. But greater change is suggested, in part to bring all forms of information into the reach of preservation:

> (iii) ~~provide for disclosure, discovery, or preservation of electronically stored information.~~ address the scope and limitations of discovery or preservation;

Suggests adding these words: "including agreements reached under Federal Rule of Evidence 502 and any agreements addressing legally protected privacy interests." This "would facilitate the resolution of an issue that is of increasing concern in civil litigation.

In Appendix C, an addition is suggested for the Committee Note that comments on providing for preservation of electronically stored information: "judicial intervention is appropriate only after the parties meet and confer in good faith about these issues." This suggestion seems tied to several other suggestions for revising Rule 16(a) and (b). Some of the suggestions are noted in "other" at the end of these summaries; others go to more general preservation and spoliation issues focused on Rule 37(e). 2260, Thomas N. Vanderford, Jr., and Meghan B. Hoffman, for Hyundai Motor America Supports the Sedona recommendation that "privacy" be added to the list of subjects to be addressed, noting a transnational dimension that is reflected in other comments as well: "Hyundai Motor Company is subject to strict privacy laws of Korea."

349, Valerie Shands: This comment bears indirectly on the proposal, suggesting the rules should "enhance claw-back provisions for inadvertent disclosure," so that "one could speed up the process by allowing the producing party to disclose all of the information, then retract the few pieces that may be privileged."

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Supports the proposal.

473, Paul C. Saunders and Rebecca Love Kourlis for ACTL Task Force and IAALS: Supports, but urges that preservation should be discussed by the parties and incorporated in the scheduling order in terms of all evidence, not only ESI.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Strongly endorses the proposal.

673, Don Bivens for 22 more "individual members of the Leadership of the American Bar Association Section of Litigation": Supports inclusion of Rule 502(d) in the list.

995, William P. Fedullo for Philadelphia Bar Assn.: Endorses the proposal, and the parallel provisions in Rule 26(f). The effort to encourage attorneys to discuss Evidence Rule 502(d) orders is desirable. Rule 502(a) is an underused but potentially valuable tool; a well-developed plan framed by a Rule 502(d) order "can all but eliminate the potential waiver of privilege during the production process."

1335, Aleen Tiffany for Illinois Assn. of Defense Trial Counsel: Opposes the proposal. "[T]he scheduling order is often a very premature occasion for" discussing preservation. This topic is too important to be approached hurriedly. And if it is included, the result may be to impede entry of a scheduling order.

2072, Federal Courts Committee, New York County Lawyers' Assn.: Supports. Addressing preservation will enhance cooperation. "FRE 502 is an invaluable tool for lessening the time and expense associated with privilege reviews and waiver issues." The Committee "understand that a typical FRE 502(d) agreement would prevent the waiver of privilege and allow for the claw-back of privileged materials."

2150, Gayla Thal for Union Pacific Corp.: This is one of several comments endorsing the Sedona Conference recommendation that preservation should be added to Rule 16(a) as one of the purposes of a pretrial conference.

RULE 16: CONFERENCE BEFORE DISCOVERY MOTION

292, Lyndsey Marcelino. for The National Center for Youth Law: "[R]equiring an information conference with the court before parties file discovery motions may reduce the time between service and a Rule 16 conference." That will be helpful.

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: Many local rules and many judges require a conference or a short letter before a discovery motion. Anecdotal experience suggests this reduces the number and burden of discovery motions. Some question whether a terse presentation could predispose the court to a decision before an adequate presentation is made by motion papers. So it is wise to make the pre-motion conference an option, not a requirement for all cases.

325, Joseph M. Sellers: This comment provides a strong endorsement of early, active, hands-on case management, summarized with the "discovery generally" comments. The pre-motion conference is such a good idea that it should be made the default — a judge who strongly resists this approach could opt out, but more judges would be encouraged to use it.

349, Valerie Shands: Suggests it will be useful to increase informal resolution of discovery disputes by a brief conference call with the judge.

351, Eric Hemmendinger for Shawe Rosenthal LLP: Supports. "The vast majority of discovery disputes are simple and can be quickly resolved in a telephone conference with the court."

357, Joanne S. Faulkner: Courts already have the discretion to require a pre-motion conference. "[M]y experience is that off-the-cuff discovery rulings are often based on less than adequate information (such as would be contained in a brief)" and are wrong.

409, Michael H. Reed, Fern C. Bomchill, Helen B. Kim, Robert O. Saunooke, and Hon. Shira A. Scheindlin, individual members of ABA Standing Committee on Federal Judicial Improvements: This is acceptable.

473, Paul C. Saunders and Rebecca Love Kourlis for ACTL Task Force and IAALS: "Several jurisdictions around the country * * * have implemented similar procedures * * * with very positive results."

479, Earl Blumenauer, Suzanne Bonamici, Peter Defazio, and Kurt Schrader, Members of Congress: Support, as improving the discovery process.

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: There was broad support at the conference, from both plaintiff and defense attorneys. They reported positive experiences. Some noted that it may be useful to require a one- or two-page letter before the pre-motion conference. And some urged that the pre-motion conferences should be required before dispositive motions, including summary judgment motions.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Because the proposal only permits and does not require a pre-motion conference, the Association is not opposed. But it would oppose a requirement that might conflict with local rules or practices.

623, R. Matthew Cairns: Chief Judge LaPlante, D.N.H., "has this requirement (although his colleagues do not) and it has proven to be highly effective." February hearing,p 6, at 10: says the

same.

635, Matthew D. Lango for NELA/Illinois: "This change will encourage cooperation between the parties, reduce gamesmanship, and generally aid in the efficient and speedy resolution of claims."

673, Don Bivens for 22 more "individual members of the Leadership of the American Bar Association Section of Litigation": Supports.

854, Hon. James G. Carr: The pre-motion conference should be required. It has been required by local rule in the Northern District of Ohio since 1994, and it works. "I probably have no more than two or three formal motions to compel a year. During that time, I will have perhaps a couple dozen phone conferences following a request for assistance. Those conferences rarely last more than a half hour, are always on the record, invariably result in a prompt and binding decision, and move cases along far more quickly * * *."

864, Wendy Butler Curtis: Undertook a docket survey of eight district judges — four who require either a pre-motion conference or a short letter brief before making a discovery motion, and four who do not. The ratio of motions to cases was 5.59% for the judges who do not have such a requirement, and 1.37% for those who do. This practice should be required.

1335, Aleen Tiffany for Illinois Assn. of Defense Trial Counsel: Opposes. "In our experience, such conferences, without a written motion before the court and the parties, lend themselves to quick and less-informed decisions on matters that potentially can have a significant impact on the merits of the case and involves substantial expense."

1413, Jocelyn D. Larkin for Impact Fund and several others: Supports the proposal. "Most discovery disputes (even those in large cases) are not factually complicated and do not warrant extensive (and expensive) briefing on a 35-day motion calendar. Systemic reform cases often present threshold questions about the scope of discovery * * *. Attorneys for government agencies may have less flexibility to cooperate in discovery matters than their private counterparts, making early and active assistance from the court particularly critical."

1883, Norman E. Siegel: Several districts have this rule, including our local district, W.D.Mo. This "is the single most important mechanism to make discovery more efficient and curb discovery abuses." It will not add significant burdens on the courts.

2032, Carlo Sabatini: (1) Some judges in M.D.Pa. issue an order at the beginning of each case that implements this proposal. But "the procedure actually encourages parties to initially take unreasonable discovery positions." That is because if a motion is required, the risk of a fee sanction if an unreasonable party does not abandon unreasonable positions in the pre-motion conference of the parties leads to abandoning unreasonable positions. An informal hearing before a motion means that there is no risk — there is no provision for sanctions for taking unreasonable positions, and any position that remains to be pursued by a formal motion is substantially justified because the court did not force abandonment. (2) But if the proposal goes forward, the rule should require that the conference be on the record.

2072, Federal Courts Committee, New York County Lawyers' Assn.: Many courts require pre-motion conferences. They often serve to resolve discovery disputes without motions.

2110, Miriam Hallbauer & Richard Wheelock for LAF: "This change appears likely to save time,

reduce costs, and generally aid in the efficient and speedy resolution of claims."

November hearing, John C.S. Pierce: p. 24: My clients — defendants — do not like discovery disputes, do not like paying for them. Getting the judge on the phone resolves the issue. "That is a wonderful tool * * *."

February Hearing, Conor R. Crowley, for "consensus" of a Sedona working group: p 280 Fully endorses this proposal.

RULES 26 ET SEQ.: DISCOVERY GENERALLY

261, David McKelvey: The proposals will not streamline litigation, but will favor parties with more financial resources to investigate matters presuit.

283, Christian Mester: Large companies and insurance companies routinely ignore interrogatories and requests for documents, forcing plaintiffs to make motions to compel that are unpopular with judges. The rules changes would prevent discovery that has been available under the present rules, taking procedure back to the days of trial by ambush, and placing plaintiffs at a further disadvantage.

286, Stephen J. Herman: Comments primarily on Rule 26(b)(1), but adds a footnote: "[T]he existing and proposed Rules attempt to 'micro-manage' the litigation process, and legislate issues that are better left to the Court's discretion, to be applied on a case-by-case basis." So generally opposes the proposed changes to Rules 30, 36, and 37, as well as the other changes to Rule 26.

289, Craig B. Shaffer & Ryan T. Shaffer: Magistrate Judge Shaffer begins this 30-page article, 7 Federal Courts Law Review 178, 179, by noting that the proposals "May become a background on which competing philosophical perspectives wage war over the role of civil litigation in today's society."

291, Fred Slough: As it is, in discrimination and consumer cases discovery limits have been closing the federal courts for the ordinary American. Plaintiffs need adequate discovery, but the limits imposed work all to the advantage of defendants who have all the information and need little from plaintiffs.

297, Trevor B. Rockstad for the Darvon/Darvocet Litigation Group, AAJ: "The uncertainty that these changes will inject into discovery will lead to mountainous collateral litigation * * *."

301, Hillary G. Rinehardt: "The proposed changes will negatively impact almost all plaintiffs, but in particular those plaintiffs involved in complex litigation where there are multiple defendants." Typically defendants control the majority of relevant information, and will have new tools to avoid providing it.

302, John K. Rinehardt: Verbatim the same as 301.

306, William C. Faber, Jr.: "The complex organizational structure of organizations demands more discovery than the changes provide." There is little help for senior citizens seriously injured by the neglect of a nursing home or a citizen wounded by international banks' financial fraud."

310, Johnathan J. Smith, for NAACP Legal Defense Fund:"[T]he proposed amendments * * * threaten to undermine the ability of civil rights plaintiffs to obtain relief through the federal courts." And the impact of limiting discovery (and limiting sanctions for failure to preserve discoverable information) should be assessed in the context of other recent developments that have made it more difficult to prevail on civil rights claims. Pleading standards have been raised. Class certification has become more difficult.

318, Brian Sanford: Further restrictions on discovery will mean that summary-judgment records are even more different from trial records. The restrictions will favor the defense and infringe on

the right to jury trial. (319, Christopher Benoit, is verbatim the same. 320, Thomas Padgett Jr., interpolates points of emphasis in between verbatim duplication.)

322, Michelle D. Schwartz, for Alliance for Justice: Includes a long preface to more specific comments. The proposals will not only make it more difficult for plaintiffs to stand up for their rights in court. They also will make it more difficult "for the public to learn of corporate wrongdoing and threats to their health and safety." These effects must be considered in a broader context that is restricting access justice. (1) Courts are understaffed and overburdened. (2) Forced arbitration clauses divert disputes to private proceedings with no discovery and "conducted by an arbitrator of the company's choosing." (3) Access to class actions is being limited. (4) Pleading standards have been heightened. Compounding these problems by restricting discovery will make plaintiffs less willing to come forward, and will make attorneys less willing to take their cases. Private enforcement of public policy will be further limited.

324, Jonathan J. Margolis: Writes primarily for employment plaintiff litigation, but reflects on other types of cases as well. Cumulatively, the proposed changes will favor those who have more information — commonly defendants — and harm those who have less — commonly plaintiffs. Information imbalance is especially rife in civil rights litigation. "The progression that has led to the near-extinction of civil trials will only be exacerbated if less discovery is permitted * * *." The amendments, moreover, will encourage misuse of discovery by obstructionism. Efficiency will be impaired by more frequent motion practice — for example, there are few motions to take more than 10 depositions, but there will be many motions to take more than 5. There is little evidence of any need to impose these changes and costs.

325, Joseph M. Sellers: The proposed discovery changes will unsettle the law, "requiring parties more often to appeal to the courts to obtain discovery in excess of tightened presumptive limits, and providing more hooks on which to hang objections * * *." This comment includes a lengthy statement of the advantages of early, active, hands-on case management, but "agree[s] with the Committee's point that adoption of new, universal mandates regarding judicial case management is likely premature * * *." Much can be learned from pilot projects, such as the NELA protocol for employment cases and the S.D.N.Y. complex-case project. And individual judges, such as Judge Grimm, are helping to mark the way through discovery management orders.

329, Bryan Spoon: "The proposed changes benefit large corporations and add another barrier between a Plaintiff and the materials that could prove, or disprove his/her case." (It is not clear from context whether this addresses only proposed Rule 37(e), or other of the proposals more generally.)

331, Robert DiCello: (These brief comments seem to be addressed to various aspects of the discovery proposals, although only the numerical limits proposals are directly identified.) There is no problem of excessive discovery. The numerical limits are too low for many serious or complicated cases, and will disproportionately impact civil rights case. They are completely one-sided in favor of defendants, and do not do much of anything to penalize obstruction in discovery and unwarranted motion practice. They will not make litigation more accessible to everyday citizens.

332, Samuel Cohen: The proposals will not reduce costs; instead they will increase motion practice. They will disadvantage plaintiffs litigating against well-resourced defendants. The limits on depositions and document requests (?) should not be enacted.

335, Rebecca Heinegg: The proposals are one-sided. They hurt plaintiffs by limiting discovery,

"but do nothing to penalize obstruction in discovery and unwarranted motion practice."

336, William York: The proposals are one-sided. They will limit discovery, hurting plaintiffs' attorneys. They will increase contention and disagreements, leading to more contentious motion practice.

340, Joseph Treese: Seems to be aimed at the full package of proposals in suggesting careful consideration of the expanded case-management burden faced by the judiciary.

341, Karen Larson: "These limitations on discovery are strictly for the benefit of defendants," who hold all the evidence. Plaintiffs largely bear the cost of depositions anyway. Further discovery disputes will result.

342, Stephen C. Yeazell: "[A]vailable empirical evidence does not suggest a crisis in civil litigation of the scope that would merit the proposed changes. The FJC studies "do not portray a system in need of the[se] wide-ranging changes." They show only that occasional bad lawyers or less-than-diligent judges allow pretrial proceedings to impede justice. The studies contradict the proposals.

349, Valerie Shands: "As lawyers and judges, we suffer from perception bias." "[I]t may be that the length of time for discovery is entirely necessary and proper." Hard research is needed. We do not have it. The FJC analysis of surveys, including one by the American Bar Association Litigation Section and one by the American College of Trial Lawyers, shows remarkable inconsistencies of results. Further, "[t]he trial itself requires roughly two times the amount of man hours as the discovery process."

Also suggests amending Rule 37 to increase the use of sanctions to teach many attorneys that they can no longer "get away with frivolous motions, irrelevant discovery requests, and unfounded blanket objections."

351, Eric Hemmendinger for Shawe Rosenthal LLP: Discovery is the major reason for the excessive cost of litigation. It often pressures employers into settling nonmeritorious cases.

354, Joseph Scafetta Jr.: Rather than allocate this one paragraph among the several topics it covers, the point is that the rules should be expanded to allow more discovery. Not 10, but 20 depositions; not 25, but 50 interrogatories; unlimited requests to admit. "[C]ost should never enter into the equation defining what is discoverable."

357, Joanne S. Faulkner: Adopt a rule that discovery objections are waived unless the objector initiates and conducts a good faith conference within two weeks of the objection." "[T]ypically I have to chase objecting counsel for weeks on end to get a 'good faith' discovery conference going."

361, Caryn Groedel: From the plaintiff's perspective in employment law, the proposals appear "overwhelmingly and undeniably aimed at chilling the number of lawsuits filed in the federal courts."

364, Sarah Tankersley: In medical malpractice cases, defendants have vastly superior knowledge and much more documentation. "Restricting the ability of parties to obtain relevant information is going to lead to unfair results."

366, Paul D. Carrington: There are occasional excesses, but the FJC data do not support the

claim that discovery is generally excessive. It has been made expensive by hourly billing, but the hourly fees in responding to requests to produce and sending teams of lawyers to depositions are declining, and technology will bring further reductions. "The central features of the 1938 Rules enabling the enforcement of citizens' legal rights were those confirming the rights of litigants to use the power of government to investigate events and circumstances giving rise to their claims or defenses."

371, AJ Bosman: In civil rights cases, "[I]t is already next to impossible to obtain necessary discovery in an action, with Defense counsel taking full advantage of the current rules to hide evidence essential" to plaintiffs. "Judges routinely interpret the existing rules against Plaintiffs and in favor of Defendants * * *." "Raising the bar to obtain essential and necessary evidence is just going to leave Plaintiffs and their attorneys at the mercy of big companies and their big law firms — and the Judges with another excuse to favor the Defendants." Remember fee-shifting statutes reflect the role of private attorneys general. Please reconsider, or at least provide some protection for plaintiffs.

372, J. Burton LeBlanc, for American Association for Justice: AAJ disagrees with the claim that excessive discovery occurs in a worrisome number of cases, and creates serious problems. These concepts are not defined by the Committee. The FJC study demonstrates there is no pervasive problem with discovery. In complex, high-stakes cases the parties will agree to extend beyond the narrow restrictions set by the proposed rules. The impact will occur only in cases involving smaller plaintiffs against large defendants. And they will create an incentive to maintain information in forms that are costly to access, in order to claim the cost of production outweighs possible benefits.

Additional general observations at pp. 24-25 suggest that the proposals will force plaintiffs "to engage in these mini-trials to prove unknown facts in order to even discover the facts." With less fact discovery, parties will have to rely on more experts to prove their cases; defendants can cover the cost, but plaintiffs cannot.

So, p. 25: "It is worth noting that this Committee and even the enterprise of formulating rules of civil procedure has never embarked on changes to the existing rules where the opposition to it is as uniform and vocal on one side of the bar as it is in this instance. There is no warrant here to depart from that approach."

pp. 27-31 examine the "empirical" studies relied on by defense interests to show a crisis in discovery and conclude that the studies are biased. Other studies show discovery is working well.

The conclusion, pp. 31-33, argues that close analysis shows that discovery problems lie not in disproportionate costs imposed by small plaintiffs on corporate defendants, but in defendants that "deliberately drive up the costs of discovery by fighting discovery, hiding relevant documents, and coming up with excuses to avoid producing discovery that will allow the other side to meet its burden of proof." Taken together, the proposed changes will have a devastating impact, and are a solution to a problem that does not exist.

375, Jennie Lee Anderson for AAJ Class Action Litigation Group: Empirical evidence shows that the discovery system is working well. The presumptive limits would strip judges of the flexibility they now use to manage discovery as they find necessary. The proportionality standard will be impossible to apply.

The proposed changes "are extremely controversial and nearly universally opposed by the plaintiffs' bar." They are not ready for prime time.

376, Laura Jeffs (and many others in the same firm, Cohen & Malad):"[T]hese proposed rules appear to be the Committee's attempt to 'legislate' some form of tort reform."

380, Robert D. Fleischner and Georgia Katsoulmoitis for Advocacy Coordinating Committee, Massachusetts Legal Services Organizations: The proposed changes should be considered in the context of other procedural hurdles — heightened pleading, obstacles to class certification, enforcement of arbitration clauses in consumer contracts, and those imposed by the Prison Litigation Reform Act.

383, Alan B. Morrison: "All of the changes move in one direction — less discovery — not just for the mega-cases, which are the only ones with reported problems, but for all cases. * * * [C]umulatively they will have a very negative impact on many plaintiffs." And they will narrow judges' discretion by putting a heavy thumb on the scale of less discovery. Balanced recommendations would include a softening of the impact of the Twombly and Iqbal pleading decisions. The Committee should step back and ask whether these changes, which reduce a plaintiff's chance of prevailing, achieve a fair balance. When it is prepared to recommend adoption, the Committee should seek another, very brief, period of comment on its style choices, not the substance, to ensure the rules are as clear as possible.

The discovery rules have become very detailed, perhaps because of the process of incremental changes. They can become a trap for those who do not regularly practice in federal court. It may be too much to ask the Committee to take a fresh look at making the rules simpler and better integrated, but the problem of increased complexity should be kept in mind in considering these proposals.

384, Larry E. Coben for The Attorneys Information Exchange Group: On the whole, the pretrial discovery system continues to work well. The rules are not broken and do not need fixing. More importantly, the proposed changes will make discovery more expensive, more time consuming, and less productive. Responding to the submission by the Ford Motor Company, offers examples, illustrated by lengthy attachments, of cases in which courts found inappropriate attempts to avoid discovery.

386, Arthur R. Miller: Decisions and rules amendments have erected a series of procedural stop signs that narrow citizen access to court. The effects both reduce individual remedies and curtail enforcement of important public policies. To a large extent defendants, by general motion practice and resistance to discovery, are to blame for high litigation costs. "Some restoration of the earlier philosophy of the Federal Rules seems necessary." These proposals turn away from the original vision of a relatively unfettered and self-executing discovery regime.

Changes designed to narrow discovery began in 1983. "In retrospect, the Committee's and my collective judgment was impressionistic, not empirical. * * * [T]ime has cast doubt on some of the assertions that were voiced at the time of the 1983 amendments to Rule 26. Those doubts continue to be applicable to the comparable assertions one hears today." And the attack on discovery has continued in the 1993 amendments limiting the numbers of depositions and interrogatories and the 2000 amendment that required court permission to discover matters relevant to the subject matter of the litigation. The present proposals would magnify these limitations.

The problems of e-discovery are likely to resolve themselves as information retrieval science and technology prove to reduce costs, accelerate the process, and enhance the accuracy of retrieval through a combination of statistics, linguistics, and computer science.

"The Committee should focus more on how to make civil justice available to promote our public policies." "[O]ur civil justice system has lost some of its moorings." Much can be achieved through more extensive and sophisticated judicial management, and by promoting cooperation between and among counsel. It might even be wise to seek amendment of the Rules Enabling Act, as by removing the restriction to "general" rules so as to support rules that are specific to types of litigation by complexity, dimension, or substantive subject. January Hearing,

p. 36: Professor Miller repeated the same themes, adding that there is not yet any showing that the amendments made in 1983, 1993, and 2000 to narrow discovery have had any effect. We should not be preoccupied with the cliched invocations of cost, abuse, and extortion. Abuse is in the eyes of the beholder. Extortion is the settlement you just agreed to.
472, Christopher Benoit: Supports the perspectives offered by Professor Miller. Many more invoke Professor Miller.

387, Morgan S. Templeton: (For want of a more obvious place to summarize:) "I want to let the Committee know that I support the proposed changes * * *."

392, Senators Christopher A. Coons, Patrick J. Leahy, Richard J. Durbin, Sheldon Whitehouse, and Al Franken: Specific mention is made of the reduced presumptive limits in Rules 30, 31, 33, and 36, but the general tenor is addressed to all of the discovery package, expressing the fear that the proposals are insufficient to address excessive discovery and susceptible to limiting access to justice. This is the full summary.

The Senate Judiciary Subcommittee on Bankruptcy and the Courts held a hearing on the discovery proposals on November 5, 2013. Four questions were explored.

(1) "We have no doubt that discovery abuses exist and contribute to excessive litigation costs when they occur." But there is a need for "a lot more empirical data." The Advisory Committee recognizes that in most cases discovery is reasonable and proportional to the needs of the case. Corporate structures and profits have grown; it should be expected that discovery costs will vary in proportion to the stakes of the litigation.

(2) It is doubtful whether the proposals will reduce excessive costs in the worrisome number of cases where discovery is said to be excessive. Attempts to curb perceived abuses are reflected in amendments made in 1980 (adding discovery to the pretrial conference); 1983 (adding proportionality); 1993 (adding presumptive numerical limits); 2000 (narrowing the scope); and 2006 (addressing ESI that is difficult to access). Additional "stop signs" have been erected in pleading, summary judgment, and class certification. All of these make litigation costs a persisting problem. Why would we expect proportionality, and tighter numerical limits, to work where other attempts have failed? "We fear that they would not."

(3) The proposals are likely to have significant collateral effects with "civil rights, consumer rights, antitrust, and other litigation where the government lacks sufficient civil and criminal enforcement resources to achieve optimal deterrence of socially injurious behavior." This is especially true in civil rights litigation, where social disapproval of discrimination means there often is no "smoking gun," forcing plaintiffs to rely on circumstantial evidence that is within the power of the defendant. Only one side is likely to benefit from the new limits in these cases. And the proposals will encourage defendants to increase motions practice before any facts are discovered, imposing especially burdensome burdens on clients with few resources.

(4) Rather than throw plaintiffs under the bus because of dramatic stories about million-dollar discovery cases, other means should be tried. Judicial training should be pursued. More judgeships should be created when needed, and qualified nominations promptly confirmed. Technology may offer solutions to the perceived cost of electronic discovery. And clients can monitor counsel to reduce the incentives created by hourly billing.

397, Patrick Barry: "The proposed amendments are wholly unwarranted and would further tilt the balance against those of limited means and limited power." Lawyers should be trusted to behave professionally, not strangled by new rules.

401, Urs Broderick Furrer: Many of the proposals will streamline litigation, reducing time and expense. The Committee should consider adopting the additional proposals made by Lawyers for Civil Justice.

410, John H. Hickey for AAJ Motor Vehicle Collision, Highway, and Premises Liability Section: Begins with a long list of reasons why plaintiffs need much discovery. These are noted with the proposed numerical limits. But includes the observation that defendants in product liability cases commonly disclose the hot documents, plans, prior test results, and prior similar incidents only at the end of discovery, and only after the materials are uncovered after multiple depositions, requests, hearings, and orders. Defendants, further, commonly demand confidentiality agreements as part of settlement, and non-sharing agreements and protective orders to prevent plaintiffs in other cases from easily obtaining the fruits of discovery in concluded cases.

412, Mark S. Stewart for Ballard Spahr LLP: "The high cost of electronic discovery distorts the litigation process." It "tilts toward an asymmetrical burden" because plaintiffs in mass tort or class-action securities cases, and patent assertion entities, generally do not bear the same discovery burdens as defendants. Plaintiffs' counsel "frequently focus on the discovery process itself as a means of obtaining strategic leverage."

424, Patricia Shaler: Supports the discovery proposals "for the reasons set forth by John Kyl, WSJ, Jan 21, 2014." And Rule 11 should be enforced more frequently. "Civil litigation has morphed from its intended purpose to an abusive, pugilistic battleground by lawyers and for lawyers."

426, James Moore: Writes as a non-attorney, inspired by John Kyl's column, noted with 424 above. Supports the proposed changes to Rule 26, having observed actions in which discovery is a fishing expedition, and in which frivolous actions are settled as a business decision to avoid the costs of discovery. Suggests consideration of the British system in which the plaintiff pays defense costs if the plaintiff loses.

428, Dave Stevens: Writes as owner of a small campground to support "any and all rule changes that might reduce the cost of discovery." Discovery and other costs seem to lead insurance companies to just settle. And insurers are no longer willing to cover many of the activities formerly provided at the campground, forcing the owners to withdraw those activities — no diving boards, no rope swing, no renting kayaks, no zip line.

429, Lori Overson: "I second the comments of James Moore [426 above] and Senator Kyl."

430, Attilio Di Marco: Strongly supports the revisions of the discovery rules "because they will decrease the high cost of litigation in federal courts."

431, Tom Ingram: Participated as an "expert witness" in a 9-year litigation. In the first week on the job he wrote a "request for disclosure" that produced the smoking gun. Four years of discovery followed, generating 200,000 pages of discovery that was not nearly as useful. Eventually they settled for $3.5 million, but the CEO who chose to accept this sum repeatedly said they would have been better off to drop the suit and get back to business. Do anything you can to reduce the delay, cost, confusion, and opportunity for lawyer abuse arising from the discovery system.

432, Michael Croson: "I am in favor of the proposed changes to Rule 26."

437, Craig Rothburd: "The way to streamline litigation is not by placing limitations on information gathering, which harms all litigants and only benefits larger more powerful interests, but instead to provide more flexibility to the Courts in fashioning realistic and measured discovery plans." Many courts do that now.

438, Pat Smith: "These rule changes are common sense and should be enacted."

439, Kate Browne: "I have been a lawyer for almost 30 years and strongly believe the proposed rule changes would be very positive for all litigants."

440, Steve Mack: Writes not as a corporate lawyer but as a stockholder in many companies: "I support the proposed changes to discovery rules that will limit in scope the ability of parasitic plaintiffs/plaintiff attorneys to force defendant companies to spend inordinate sums of money" and to settle meritless claims to avoid discovery costs.

441, Cheryl Conway: The current rules of discovery damage nonprofits as well as for-profit enterprises. This very expensive legal process gives the plaintiff a serious advantage, because there is no mechanism in place to ensure the claim has at least some merit, and the plaintiff need only prolong discovery to receive a settlement offer.

442, Christopher Wright: The rules are not broken. Why fix them? The proposals "will only serve to deter meritorious cases, and give corporate defendants a tactical and evidentiary advantage over plaintiffs."

445, Gerald Acker, for Michigan Assn. for Justice: Endorses the comments submitted by AAJ. The proposals lack balance — they help defendants at the expense of plaintiffs, particularly in asymmetric information cases. There is no empirical demonstration of problems that need to be corrected; concerns about e-discovery should not sweep the board. The proposals have a cumulative impact. Less discovery means that more cases will be tried because the parties cannot accurately assess the risks of trial.

447, Charles Crueger: "I have never had a client even suggest that a case should settle because of the cost of discovery." Nor has an opposing party ever settled for this reason.

451, Brian McElwee: Favors the discovery proposals. "You only have to have one experience in a system that requires years to process and costs disproportionate to any possible outcome to know that the system needs to be improved."

452, David Hill: Many years as a chief financial officer of various companies showed the need to seriously curtail fishing expeditions in discovery.

466, Lisa O. Kaufman for Texas Civil Justice League: "[S]trongly supports changes to FRCP 26(b)(1) that limit the scope of discovery to clearly pleaded claims and defenses." Texas has adopted changes that accomplish many of the same goals. "Our members report to us that these changes have reduced discovery costs and promoted better cooperation between parties without in any way impairing full and fair discovery."

471, Robert Fisher: Supports the proposed changes. Discovery is often more about gamesmanship than a legitimate effort to find relevant information.

474, Adam Childers: As an employer representative in employment-related matters, fully supports the proposals as "long past due."

475, Jeff Westerman for Litigation Section, Los Angeles County Bar Assn.: The proposals will lead only to more law and motion practice. There is no empirical evidence to support them; the FJC study shows that discovery generally is working well, reflecting wise exercise of judicial

discretion. Tools to control discovery already exist. Perhaps the time has come to create two tracks for discovery — one for "complex" cases in which no limits apply, another for other cases in which the current limitations apply (perhaps with some modification).

481, J. Paul Allen: Supports. "Please narrow the scope of discovery to that which is necessary to the dispute."

482, Charles Cavas: Supports the proposals, which will restore rationality. "Tactical abuse of the existing rules has created a system where too often fair resolutions do not occur but rather are driven by extortionist discovery demands and resulting expenses."

484, Torgny Nilsson: Supports the discovery proposals, but notes "that no amendments to the Rules will solve discovery abuses in general until the federal courts start aggressively holding both counsel and their clients accountable through monetary and other sanctions for their failure to abide by their discovery obligations."

485, Peter Morse: Supports the Rule 26(b)(1) changes "and believe that even more practical considerations should be made."

486, Timothy Guerriero: In supporting "the proposed e-discovery amendments," seems to embrace the discovery proposals in general as "just a small step in bringing some rationality and common sense to this aspect of our court system."

490, Patricia W. Moore: Professor Moore opposes the proposed amendments, but focuses on discovery. (1) The FJC Study shows discovery does not impose unreasonable cost or delay. (2) Average case disposition times, the best indicator, have remained essentially stable since 1986. (3) Judges and lawyers are well aware of proportionality, and implement it, as shown by many cases easily retrieved on WestLaw. (4) Federal courts are widely perceived as pro-defendant; these proposals will aggravate this perception. 921, Kevin Marshall: (a practicing lawyer) entirely agrees. 929, D. Richard Jones III: Another practicing lawyer fully adopts. 932, Douglas Alexander; 943, Robert Jensen; 954, D. Chris Russell; 956, Sandra Finch; 970, Jeffrey Rowe; and 972, David Mitchell: Ditto. (More endorsements appear later; this gives the flavor.)

494, Charles R. Ragan: "I have no doubt that some requesting parties have used the existing rules to force settlements on the basis of cost, rather than the merits of a case. On the other hand, I have no doubt that some producing parties have sought to delay merits adjudication or obfuscate factual issues through mischievous production tactics. It does not follow from these perceptions that the Committee should try in the rule-making process to legislate against every potential ‘bad actor.’"

540, Alex Dahl for Lawyers for Civil Justice: Supplements comment 267, pointing to the testimony of several witnesses describing the great volumes of information preserved and produced. Discovery is slowing, and often preventing, reaching the merits.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: "Important changes have been made to the rules, especially Rule 26, in recent years. Judges and lawyers need time to learn to use the changed rules, so that we can assess the efficacy of the changes that have been made and what further changes might be productive." Sufficient time should be allowed for any of the proposed changes to become part of the legal culture before undertaking any further changes.(1) The FJC study itself shows that discovery is a problem only in a small fraction of federal cases. (2) Past efforts to reduce the burdens of discovery in these cases — involving high stakes,

complexity, contentiousness, big law firms, and hourly billing — have failed. There is no reason to suppose that the present proposals will succeed on this front. (3) But the proposals will impede desirable discovery in many of the cases that now do not present problems. They will limit access to information, particularly in cases where one party holds much more relevant information than another. They will increase motion practice, in part because they are confusing. (4) The causes of high litigation costs may lie outside the Civil Rules. "Problems that arise outside the procedure rules cannot be eliminated through rule changes." (5) All of the proposed changes to Rule 26(b)(1) "reflect an unsupported but profound distrust of trial-level judges and their exercise of discretion. The current rules give those judges the power and the tools to limit discovery to what is reasonable * * *."

622, Helen Hershkoff, Adam N. Steinman, Lonny Hoffman, Elizabeth M. Schneider, Alexander A. Reinert, and David L. Shapiro: (1) The FJC study shows that discovery is not a problem in the large majority of federal cases. Even cases that involve high levels of discovery may well deserve high levels of discovery. (2) These proposals will not be effective in reducing the burdens of discovery in the cases that do encounter excessive discovery. The causes lie in the nature of the cases — high stakes, complex issues, contentious behavior, big law firms, and hourly billing. Attempts to address these problems in 1993 and 2000 have failed. "Problems that arise outside the procedure rules cannot be eliminated through rule changes." (3) These proposals will limit desirable discovery in cases that are not a problem now. (4) The changes, moreover, will engender confusion and invite increased motion practice. (5) All three of the major changes in Rule 26(b)(1) "reflect an unsupported but profound distrust of trial-level judges and their exercise of discretion. The current rules give those judges the power and the tools to limit discovery to what is reasonable * * *." 2078, Judith Resnik, joined by 170 additional law professors: supporting this comment. 2316, Phillip H. Miller: (a practitioner who represents regular taxpaying citizens): The analysis of these professors "is solid, but they have been too kind * * *."

630, Jon Kyl & E. Donald Elliott: "The process needs to move to conclusion. Frustrated parties and interests have other options, such as the Congressional action being pursued on patent litigation reform." "Congress has generally deferred to the experts in the rules committee; but, if problems become too widespread and are not being dealt with by the judges, the Congress could step in, with results that are not always easy to predict."

634, William W. Large, Mark K. DeLegal, and Matthew H. Mears for The Florida Justice Reform Institute: "The current rules do not adequately protect litigants from excessive discovery." "As a whole, the package of Proposed Amendments will be a decisive step forward."

684, Michael E. Klein for Altria and Philip Morris USA: "PM USA has maintained a public website containing documents it has produced in all products liability litigation. Today, plaintiffs have access to more than five million documents — nearly 25 million pages of information that detail virtually every aspect of PM USA's business since the 1930s."

707, David Angle: "These proposed amendments are transparently corrupt." And reprehensible.

729, Stephen B. Burbank: (1) After a detailed review of discovery rule amendments from 1980 onward, concludes: "Because the only major change in the discovery landscape since 2000 is the growth of e-discovery, because the Advisory Committee addressed the special problems of e-discovery in the 2006 amendments, and because there is no reliable evidence that those amendments have been ineffective, further discovery amendments at this time (other than those that address special problems, as in 2006 and 2010) are at best premature. At worst they are

overkill." (2) "[I]t is disconcerting to see how little attention the Advisory Committee has given to the benefits of litigation and discovery." Congress relied on simplified notice pleading and broad discovery in enacting many statutes that rely on private enforcement to substitute for public enforcement in implementing broad economic, political, and social values. The Enabling Act exercises delegated legislative power. It is not an exercise of Article III judicial power. The proposed reductions in discovery risk destabilizing the infrastructure that Congress has relied on. (3) It is a mistake to fixate on the ideal of transsubstantive rules to adopt amendments that aim at the problems generated by a small subset of contentious, high-stakes litigation but inflict serious costs on the much larger range of ordinary litigation.

730, Langrock Sperry & Wool:"[W]e've watched with growing alarm as the federal courts — once the models of even-handed justice in civil cases, where the 'little guy' could hold accountable even well-funded corporate wrongdoers — increasingly tilt in favor of the defense. We urge the Conference to reject" [the discovery and Rule 4 changes].

853, Kenneth Lipper: This letter to Jon Kyl contributes a public comment. (1) There should be a tight uniform set of rules governing all federal courts to deter forum shopping. (2) This should include much earlier consolidation of related cases to protect "hapless defendants forced to comply with a large number of differing discovery demands and withering motion practice by contingency plaintiff's lawyers." If judges believe there must be some discovery to inform a decision whether to consolidate related cases, the discovery should be limited by law to what is absolutely necessary to decide on consolidation or dismissal.

854, Hon. James G. Carr: The cases that involve "worrisome" discovery problems are few and far between. In the vast majority of cases discovery is self-limiting. Plaintiffs lack the resources. Insurers and corporate defendants are increasingly more attentive to limiting discovery, and are increasingly setting caps on fees and costs. The occasional big case will involve massive discovery, and the proposals will not change that.

874, Lisa P [sic]: Limiting discovery in the ways proposed will affect the vital role of the court system "in bridging the gap between first awareness of a harm and the tipping point of knowledge leading to needed regulation or legislation to correct the status quo."

880, Myles E. Eastwood: The real problem is that lawyers cannot get their discovery disputes resolved promptly. Many federal judges in Georgia screen all e-filings in their cases and hold a conference call or hearing in chambers, "where they cut to the real issues." "Proportionality is dealt with on the spot within the framework of the current rules." Do not adopt the proposed amendments.

1102, Seth R. Lesser: (1) There has been a sea change, dramatically reducing the costs of ESI discovery — do not be taken in by the claims of great costs. (2) The complaints about increasing discovery costs can be explained: "competition in the law world has caused a great many lawyers to use discovery as a profit center in a way that would have been almost unimaginable two decades ago." A clear illustration is the insistence on reviewing every document for privilege, even classes of documents that are quite unlikely to include anything privileged; "in nearly every case, defense counsel now refuse to consider the pragmatic use of Rule 502 clawback agreements." (3) Foreign investors find the United States markets attractive precisely because we have "a legal system in which wrongs can stand a fair opportunity of adjudication."

1023, Brett J. Nomberg: The survey prepared for the ABA Litigation Section was prepared by an attorney at one of the largest defense law firms. "Many lawyers who received the questionnaires

wrote back stating that there was a clear bias in the survey questions." The bias pushed toward responses favoring limitations on discovery.

1118, 1252, John Vail: "[T]he primary role of the federal courts is political, not commercial." The proposals sacrifice the political purpose to serve the commercial purpose. Those involved in the large majority of cases are asking: "we are managing well; why are you doing this to us"? It is appropriate to address the needs of the cases that continue to be worrisome, but not by proposals such as these. The Committee should ask whether transsubstantive rules can be adapted to the purpose, whether it is time to reconsider the principle of transsubstantivity. (And agrees with the views of Professors Miller; Burbank; Thornburg; and Hershkoff et al.)

1164, Stuart Ollanik, for Public Justice: Resubmits a comment submitted in March, 2013, before publication. "The more prudent course would allow rules and systems already in place including changes made in the last decade to continue to develop. * * * The rules discussed here are neither the problem nor the solution." Most of the discovery rule changes since the 1980s have addressed perceived discovery overuse, not the form of abuse that arises from evasion in responses. It is a mistake to substantially rewrite the definition of relevance by deleting the "reasonably calculated" provision and moving proportionality up to Rule 26(b)(1).

1184, Mark Ledbetter: The rules "simply tilt defense-ward with each new ‘vintage.’" "[T]he law has drooped to its nadir as Anacharsis lamented, ‘Written laws are like spider’s webs; they will catch, it is true, the weak and the poor, but would be torn to pieces by the rich and powerful.’"

1199, William Royal Furgeson: 19 years on the federal bench showed that the discovery system is not broken. It does not need to be fixed. The changes are unnecessary, and indeed counterproductive. We should leave it to the trial judges and trial lawyers to grapple with the difficult issues.

1279, Edwin B. Spievack: Suggests in various ways that the problems lie not in our rules, but in the need to educate judges in the techniques for managing litigation and in the structure of the legal business that encourages "misfeasance or intentional malfeasance."

1650, Suzette M. Malveaux: The proposed rules aim at problems encountered in a small fraction of cases. It is a mistake to adopt them as part of a set of rules that remain transsubstantive; applying them to other kinds of cases will work injustice, particularly for individual employment and civil rights claims.

1666, Stanley D. Helinski:"The proposed changes assume that an opposing party will produce, in good faith, the discovery that is requested — and that they will answer interrogatories as written. However, in practice, this is far from the case: the opposing party takes elaborate measures to hide certain evidence. Without a broad scope of discovery, parties will successfully hide relevant and admissible evidence."

1399, Laurie Briggs & John C. Hopkins: quotes from Krueger v. Pelican Prod. Corp., C/A No. 87-2385-A, slip op. (W.D.Okla. Feb. 24, 1989): "If there is a hell to which disputatious, uncivil, vituperative lawyers go, let it be one in which the damned are eternally locked in discovery disputes with other lawyers of equally repugnant attributes."

1732, J. Burton LeBlanc for American Assn. for Justice: There is no empirical evidence to support the Rule 26(b), 30, 31, 33, and 36 proposals. The havoc they will cause on court dockets will resemble the ill-fated period of mandatory Rule 11 sanctions. "[T]his Committee and even

the enterprise of formulating rules of civil procedure has never embarked on changes to the existing rules where the opposition to it is as uniform and vocal on one side of the bar as it is in this instance. There is no warrant here to depart from that approach." "The current attempt fails to honor the liberal discovery regime; it fails to recognize the extent to which intellectual dishonesty and a culture of encouraging cleverness at the expense of truth have infected the profession."

1927, Amar D. Sarwal, Wendy Ackerman, & Evan Slavitt for Association of Corporate Counsel: One consequence of the extreme costs of unnecessary discovery is that "instead of devoting additional resources to compliance and reporting systems that will enhance fidelity to the law, in-house lawyers must redirect limited funds to litigation holds that will preserve documents with no material effect on the underlying disputes."

2026, Roberta L. Steele for National Employment Lawyers Association: Attaches the NELA summary of the FJC survey of NELA members; the summary was prepared for the Duke Conference. The comment itself seeks to offset comments that 80% of the NELA respondents thought that discovery is disproportionate to the stakes in small cases. The survey summary, p. 13, says that "More than 80% agree that litigation costs are not proportional to the value of a small case (with 43% agreeing strongly) * * *." On the other hand, 51% of the respondents agree that counsel use discovery to force settlement. Two-thirds agree that judges do not invoke Rule 26 limitations on their own. Depositions and requests to produce were found to be very important tools of discovery. Methods identified as very or somewhat cost-effective were requests for hard-copy documents (90%), requests to admit (89%), interrogatories (82%), requests to produce ESI (79%), and depositions of fact witnesses (76%). They currently spend 70% of their time and expense on discovery, but think the number should be closer to 50%. 2063, Kathryn Dickson supplements by pointing to p. 11 of the summary. The "abuse" of discovery NELA respondents find is "things like multiple boilerplate objections; delays in turning over documents; deliberately evasive answers to requests for admissions and interrogatories; overbroad subpoenas for medical records and past employment records; and other dilatory tactics. The ‘cost’ concern related to the need for endless ‘meet and confer’ conferences and too many motions to compel to obtain the necessary proof." NELA members overwhelmingly oppose the proposed discovery changes.

2034, William P. Butterfield:(1) The goals of the proposed changes could be achieved without any change in the rules; more active and aggressive case management would suffice. Absent that, two changes are more important than these. (2) "[N]ot until the Rules expressly require meaningful cooperation, rather than obliquely suggest it [as by the proposed Rule 1 amendment], will the costs of discovery, and particularly e-discovery, be meaningfully addressed. "[I]n my experience, even among sophisticated and seasoned practitioners in the federal bar, obstruction, obfuscation and delay in discovery more often rule the day." Some judges exact this now. So do some pilot programs — the Seventh Circuit e-discovery pilot, and the S.D.N.Y. complex litigation pilot. (3) Phased discovery could provide real benefits. "[A] great any courts, under pressure to move cases off their docket, do not allow sufficient time to allow phased discovery to work, setting tight timeframes for conclusion of fact discovery." The result is that, with one bite at the apple, a party must seek out every reasonable piece of discovery, with broad, vague, and ambiguous requests that often must be resolved on motions to compel. Often production is completed under tight time limits, whether necessary to the case or not, for want of time to sort it out.

2154, Jason R. Baron, Bennett B. Borden, Jay Brudz, & Barclay T. Blair, for Information Governance Initiative: An interesting source on the explosion of ESI: Between 2005 and 2020,

the digital universe is expected to grow from 130 exabytes to 40,000 exabytes — 40 trillion gigabytes. The examiner for the Lehman Brothers bankruptcy confronted a universe of 350 billion documents, about 3 petabytes, a volume equivalent to about 300 Libraries of Congress. Attention to information governance should focus on the lifecycle of information, including development of defensible deletion policies. Governance increasingly is seen as including the use of advanced search techniques using predictive analytics and the use of auto-categorization methods for separating out records and information that remain important for long-term retention. The growth of information will dwarf whatever beneficial effects may flow from the proposed amendments of Rules 1, 26, and 37(e).

2178, Michael R. Hugo, for AAJ Section of Toxic, Environmental and Pharmaceutical Litigation: Examines some of the comments and testimony supporting the proposals and urges the Committee not to be fooled or manipulated by the coordinated strategy of the U.S. Chamber of Commerce, "with its obvious bias toward deprivation of individual rights in favor of unfettered corporate hijacking of our judicial system."

2222, Danya S. Reda: The comment provides a copy of Danya Shocair Reda, "The Cost-and-Delay Narrative in Civil Justice reform: Its Fallacies and Functions," 90 Or. L. Rev. 1085 (2012). At 1122: "The very questions implicated by the cost-and-delay narrative — that is, whether civil justice is worth the burdens that it entails — are not questions susceptible to empirical verification." At 1128: "The persistent call to reform civil process to combat (undocumented) cost and delay serves as a proxy for a political struggle over enforcement of legal rights. Paul Carrington characterizes the procedural reform movement as '[o]ne form of deregulation politics' which seeks to limit the regulatory regime established through the grant of broad court access and a multitude of legislative enacted private rights of action." And at 1130: Martha Minow claims that in legal scholarship, "in the latter part of the twentieth century, a broad skepticism had developed about the value of law as a source for truth and justice. [¶] The developments in scholarship reflect the disillusionment with law arising among the elite — and amongst the legal elite in particular." February Hearing, Danya Shocair Reda: p 349 The discovery proposals are too narrow. (1) They overlook "the power to impose costs by discovery avoidance, discovery delay, discovery attrition." (2) They interfere with our societal choice to rely on private enforcement of public regulatory values. Discovery problems are affected not only by information asymmetry, but by the resources a litigant has available to acquire information. They also are affected by fee structure — whether billable hour, contingent, or donor-funded organization.

2266, Stephen N. Subrin: Most of the proposals, including the Rule 16 proposals, will simply add cost and delay to the vast majority of cases where discovery is functioning well and proportionately now. And they will not do much good for the 5% to 15% of cases where something effective should be done.

2267, Brett A. Ross: Approves the changes that will restore "reasonability" to discovery. "If any lawyer with even mediocre skills looks hard enough, he or she will find sufficient prejudicial information against a motor carrier or its driver to leverage a significant settlement. In cases of minimal harm, that should not be the case."

2281, Alex B. Scheingross: This set of proposals "looks like corporate America's wish list to never again be held responsible for anything they do."

November Hearing, Altom M. Maglio: p 28: The proposed changes send the message to magistrate judges and district judges that they have been allowing too much discovery, real

discovery. But real discovery is needed.

November Hearing, Cory L. Andrews for the Washington Legal Foundation: p 42 "[T]he status quo is completely unacceptable." "[D]iscovery-related costs are a competitive drag on the American economy." They deter foreign companies from locating here. They harm the international competitiveness of American business. They are passed on to consumers. This is a matter of fundamental fairness; "[t]he fact that an injustice is visited on litigants with a high net worth is no more reason to ignore it than if an injustice is visited on low net worth litigants." No litigant should be forced to settle an unfounded claim because the discovery costs of defending on the merits are too high. The proposals are "modest, they're incremental, they're common sense. They're not radical. They're not draconian." Costs can run out of control even in commercial litigation between large enterprises — "[T]here's no discounting the role of psychology in litigation."

"[Y]ou might consider adding a materiality element * * *."

November Hearing, Mary Massaron Ross — Immediate Past President, for DRI: p 49 Clients are fleeing the jury litigation system for private arbitrations, or are settling, because of cost. We need to find "an efficient way [to] the key information that will allow the case to be resolved on the merits." This will help both plaintiffs and defendants in § 1983 civil rights cases. Some municipal clients are very tiny townships. In litigation with the government, much government information is freely and widely available. Government operates in the open. FOIA statutes yield further information. Many police activities and jail activities are videotaped. All of this information, plus a limited number of depositions, suffices. But because my practice is appellate, I cannot say confidently whether five depositions are enough in a § 1983 case with policy and customs kinds of issues.

November Hearing, Jonathan M. Redgrave: p 70 "I do not believe that we can wait forever for the ever-elusive empirical data to develop." A fourth category of lies may be the absence of statistics. Electronic information is developing at warp speed. The Duke Conference, and many of the written comments already submitted by disparate groups, reflect a consensus that the discovery rules need further amendments. All parties will benefit.

November Hearing, Michelle D. Schwartz, Alliance for Justice: p 168: The amendments should be viewed in a broader context of events that impede access to justice for victims. Judicial vacancies go unfilled and court budgets suffer draconian cuts. Forced arbitration agreements block access. Class actions face increasing limitations. Pleading standards have increased. Limiting discovery will further discourage victims from going to court.

November Hearing, Lily Fu Claffee — U.S. Chamber of Commerce: p 198 It is good to narrow the scope of discovery. Studies show that discovery costs range from 25% to 90% of litigation costs; proper scope will help keep it at the 25% end. Cost results from the amount of materials available for searching. Cost harms global competitiveness. It also has a great impact on small businesses. Insurance does not cover the costs incurred by the firm itself, the time, energy, and psychic burden. More fundamentally, the cost of discovery makes it economically rational to settle unmeritorious claims. The proposed amendments will not revolutionize litigation behavior, but they remain desirable. It would be desirable to narrow the standard from relevance by requiring both relevance and materiality.

January Hearing, Henry Kelston: p. 52 Opposes altering the scope and amount of discovery through Rules 26, 30, 33, and 36 for broad reasons. Reaction to the proposals has been polarized because "they are highly skewed in favor of large corporate defendants." "By design, these

amendments will reduce discovery costs for large corporations, simply by reducing plaintiffs' access to the information they need to prove their claims." And there is no evidence that there is a problem with discovery now. Better means can be found to reduce costs: Create incentives to cooperate; revitalize initial disclosure; sanction parties for later production of material adverse evidence. 1708, Henry Kelston: Elaborates on these themes, noting that Professors Carrington and Miller "have expressed to the Committee their doubts that the parties advocating most strongly for changes to the discovery rules are being candid about their motives." Likely others share this view, believing the motive is to shield business enterprise against substantive liability. That view helps to explain the sharp and often bitter divide between the reactions of plaintiffs and defendants.

January Hearing, William P. Butterfield: p. 142 The most important means of reducing discovery costs would begin by adopting a cooperation regime with real teeth. Various local rules and pilot projects provide illustrations. And rather than reduced presumptive limits, phased discovery should be adopted in a real way. The power to direct phased discovery exists in the rules now. But local rules often get in the way.

January Hearing, Henry M. Sneath: p 236 (Speaking for DRI) Generally supports all proposals. Offers the perspective of small business firms caught up in business-to-business litigation. The costs of discovery can be disabling. "Narrowing the goalposts" will provide a much better place to begin the conversations between lawyers about discovery.

February Hearing, Rebecca Love Kourlis, for AALS: p. 39 Overall, the proposals move in the right direction. A supplemental comment will note the results of two pilot projects. (1) A pilot project in New Hampshire seemed to show little difference. But attorneys liked what they were being asked to do because it comported with what they were doing anyway. "So it was a culture issue." But there was one interesting difference -- there was a statistically significant reduction in the number of default judgments against defendants. (2) The Boston Litigation Section project was an opt-out program; the evaluation was by survey of participating lawyers. The net conclusion was that the pilot project rules were better than the existing rules in providing a better resolution, speedier and less expensive resolutions.

February Hearing, William B. Curtis: p. 77 Focusing initially on the numerical limits, but also on proportionality: "You're hearing the defense side and the corporations they represent say, we love it, and the plaintiff side and the folks that we represent saying, you're changing the way the game is played and it's unfair. I think that's a very telling point that we ought to be reminding ourselves of." It is not that discovery is too expensive. It is that disputes about discovery are too expensive. "Rather than restricting the scope * * *, let's restrict the fight about the scope." And it is about defendants who produce millions of pages of documents — the Rule 34 proposals are at least a start, but no more, in aiming for responsible answers.

February Hearing, Bradford A. Berenson: p 111 Offers three examples of General Electric's experience to illustrate "the waste, burden and cost of the current regime." Nuisance-value settlements "go on every day * * * because of the explosion in the cost of electronic discovery." And the use of sanctions for spoliation "creates very strong incentives to gin up sideshow litigation and gotcha games. * * * If they can take attention away from the merits, divert it to this game tactical litigation advantage through ginning up a spoliation fight, they can often obtain settlement leverage, or an adverse inference instruction that will help a weak case."

February Hearing, David Werner: p 185 The main focus is on preservation, but agrees that "[t]he scope of discovery allowed by the rule should be narrowed as the committee has proposed."

February Hearing, Michael L. Slack: p 193 If you want to reduce the costs of discovery, do something about the "return or destroy" agreements. I get the 50,000 core documents in discovery. The case is resolved. Then I get another case growing out of the same defect. In federal court I have to litigate my efforts to discover the same 50,000 documents; defendants resist producing exactly what they produced in the earlier case. In state court I tell the judge the documents I want were produced in another case and the judge tells the defendant to produce them. "[W]e start on a slippery slope by putting technical things in rules, and once we get on that slope, we start tinkering with it, it becomes more technical and more technical and more technical. * * * [T]he problem we have today is we're already technical, now we're ratcheting down further."

February Hearing, Megan Jones for COSAL (class-action law firms): p 212 Technology changes every three years. It is likely that in three more years technology will solve the problems we now perceive in discovering ESI.

February Hearing, Lee A. Mickus: p 237 The proposals "are likely to sharpen the focus of the discovery process on the real needs of the parties."

February Hearing, Ashish S. Prasad: p 319 The form of technology assisted review known as predictive coding will, of itself, reduce the costs of discovery searches by about 25%. No more than that because lawyers and clients still want eyes-on review to protect personally identifiable information, trade secrets, business-sensitive information, and such. And this saving will be offset by large increases in data volume.

February Hearing, David Kessler: p 342 I have used TAR in dozens of cases, "I'm a huge proponent, but [do] not believe that this committee should rely on it as a solution, as a panacea, or should encourage it in the rules." There is a disturbing trend to force parties, directly, or indirectly, to produce information that is not relevant, or is privileged, or is outside the scope of discovery, on the theory that TAR facilities identification and Rule 502(d) protects against use of privileged information. A party who wants to review the documents before producing them cannot complain of the cost — that is the party's own choice. But 502(d) does not solve all problems; huge injury can flow from the production.

RULE 26(b)(1): PROPORTIONALITY; TRANSPOSED (B)(2)(C)(III) FACTORS

259, John Scanlon: Opposes all proposed changes. They "unfairly balance the scales against the party seeking information and in favor of a party who is unwilling to produce that information * * *."

263, The Cady Law Firm, by Christopher D. Aulepp: Three of the five factors considered in determining proportionality are criticized, without reflecting that they have been present in Rule 26(b)(2) since 1983. (1) The amount in controversy "sends the message that only multi-million dollar cases are important. This is un-American." Implementation will create a new battleground in litigation. So will the problem presented by cases seeking relief that is not monetary.(2) The importance of the issues: "to my clients, their case is often the most important thing to them." Who decides what is important? If it is Congress, special interests would buy their issue to the top of the list. And it may be difficult to define what the issues are. (3) The parties' resources: No discovery would be available against the bankrupt City of Detroit.

264, American Association of Justice Transvaginal Mesh Litigation Group, by Martin Crump: Mistakenly asserts that the amendment eliminates the discovery of nonprivileged matter relevant to a party's claim or defense. Challenges the "five factor proportionality test" without noting present (b)(2)(C)(iii). These factors "would be devastating to individual women seeking to hold massive corporations accountable for their wrongdoing." "The time, expense, and level of litigation would dramatically increase" as the parties litigate the five factors. Judges will apply the factors differently. And this will make it more difficult to discover "subtle issues," such as the practice of medical device manufacturers to arrange "ghostwritten" articles on outcomes the manufacturers select, to be signed by "handpicked doctors."

265 American Association for Justice Civil Rights Section, by Barry H. Dyller: Eliminating the relevancy standard will increase discovery disputes. The proportionality standard will enable defendants to hide behind the excuse of burden or cost, particularly in asymmetrical information cases.

266, American Association of Justice Aviation Section, by Michael L. Slack: (The first pages of this comment are a detailed illustration of the need to conduct extensive discovery in many "aviation crash" cases.) Proposed 26(b)(1) will "drastically limit[] the scope of discovery, * * * which will inevitably morph into a new art form aimed at frustrating plaintiffs' discovery." (1) "proportional to the needs of the case" "is flypaper for a defense objection." The proposed factors have too many subjective variables to support consistent application. (1) Will the "amount in controversy" be determined by the tests that apply in establishing diversity jurisdiction? (2) "How can discovery be unimportant in an aviation crash case"? Does importance decline if a plaintiff settles with some defendants, with the effect of discouraging early settlements? Does importance vary with how frequently a product fails? (3) What is the measure of "burden"? Can a defendant multiply the burden by throwing legions of first-year associates at a relatively simple task? Can a plaintiff get more discovery from a wealthy defendant than from a nearly bankrupt defendant?

267, Lawyers for Civil Justice, by Alex Dahl: The emphasis on proportionality, currently in Rule 26(b)(2)(C)(iii), is a great benefit. The concept is routinely ignored. But proportionality will be much better advanced if materiality is added to define the scope of discovery: "any non-privileged matter that is relevant and material to any party's claim or defense." Experience in England "has reportedly resulted in significant curtailment of excess discovery." This would align discovery more closely with the needs of individual cases. 540, Alex Dahl for Lawyers for

Civil Justice: Supplements the first comment by refuting the arguments that the proposal effects a change of burden. The burden of showing that proportionality is not met is on the party who opposes discovery. And both requesting and responding parties have a substantial interest in presenting their best arguments. Rule 26(g) shows that the burden of ensuring proportionality falls on all parties. And those who argue that proportionality means "one size fits all" simply miss the point — proportionality means discovery tailored to the needs of each case.

270, Ohio Association for Justice, by John Van Doorn: The proportionality test "favors those accused of wrongdoing, especially in cases where there is an asymmetry of information." Defendants can hide information by objecting to the scope of discovery. They can take positions based on ill-defined factors. How can a plaintiff test a claim that discovery is too costly? There will be more discovery disputes. The change is unnecessary because present Rule 26(b)(2)(C), including (iii), provides protection. The difference is that the proposal shifts the burden — rather than providing for defendant objections, it will impose a burden on plaintiffs to justify the scope of discovery.

273, Cameron Cherry: Defendants control virtually all information. "[C]hanging the purpose of discovery so that each request must be weighed on a sliding scale" measured by the proportionality factors "will not just hamper, but hamstring justice. Rich and powerful corporations can afford to stonewall discovery, bury relevant documents in a barrage of paper, and file unnecessary objection after objection as it stands." The "studies" offered to support these changes are not impartial.

275, Glenn Draper: As Rule 26(b)(2)(C)(iii) now stands, the burden is on the party resisting discovery to seek protection and justify it. Transferring the same factors to define the scope of discovery will shift the burden to the party seeking information, and it will not have detailed knowledge as to what information is available or the cost of producing it. This is "an attempt to insert additional barriers to prevent the average citizen from confronting powerful corporations on an equal footing in court."

276, John D. Cooney: Eliminating the language that provides discovery of any nonprivileged matter relevant to a party's claim or defense, substituting a cost analysis, would severely restrict the ability of plaintiffs to uncover evidence and hold better-financed defendants accountable for their wrongdoing.

277, Marc Weingarten: Proportionality, measured by five subjective factors, will require a hearing, or at least a motion, for virtually every discovery request. If the parties could agree on the amount in controversy, the case would settle. A party objecting to discovery will not concede the importance of the information. So opinions will differ on expense and benefit. The respective resources of the parties "is usually not even contemplated with respect to the defendant until a punitive damage phase * * * is reached."

278, Perry Weitz: Even without considering purposeful attempts to obscure information by corporate bureaucratic manipulation or unfounded claims of privilege, the proposals will have an unfair impact on mass tort plaintiffs. The change in the scope of discovery will eliminate the well-understood language and presumption that any nonprivileged matter relevant to a party's claim or defense is discoverable. Defendants will habitually object on the basis of the five-factor proportionality test. The delays will be devastating, especially to living but in extremis cancer victims who may lose the chance to have their day in court during their lifetime.

279, Kyle McNew: Now does plaintiff personal-injury litigation, but has been a defense

commercial litigator. Changing the standard from relevance to utility will invite discovery fights — every party will believe the utility of requested information is outweighed by the burden of responding.

280, Oren P. Noah: Changing the standard to require both relevance and proportionality will defeat the presumption that relevant discovery is allowed. A party can simply refuse to provide discovery, forcing a motion to compel — and a well-funded corporate client can easily afford to have its attorneys do this. As cases — including asbestos cases — become increasingly complex, the need for accurate and reliable information increases. And asbestos plaintiffs typically do not have any of the information needed to prove their claims.

281, Daniel Garrie: When a company adopts a new and more efficient information system, it has a choice whether to migrate old information into the new system. Courts should not be afraid to impose the burden of retrieving information from the old system if the company chooses not to migrate it to the new system. There is no need to amend the rule; courts understand this now. But if the rule is amended, the amendment should account for this cost calculus.

282, Susan M. Cremer, Chair, AAJ Federal Tort and Military Advocacy Section: Lawyers in the section litigate many Federal Tort Claims Act actions for medical malpractice. These are complex cases, often involving multiple health care providers. "Under the new rule, the plaintiff would have to argue that the likely benefit of the unknown information outweighs the quantifiable cost and time burden to the defendant. This is an impossible burden." This is followed by a case example. The question was whether the anesthesiologist was present in the operating room when the patient emerged from anesthesia, as standard practice requires. The records did not show him present, but he testified that he was. The defendants resisted the discovery request, but the court ordered production of records from three other operating rooms; one record tended to prove he was in a different room. The plaintiff might not have got this crucial discovery under the proposed rule.

285, Cory L. Andrews, Richard A. Samp, Washington Legal Foundation: The Foundation champions individual liberty, free enterprise, and a limited and accountable government. The "ever increasing threat of exorbitant discovery costs [must not be] permitted to distort the substantive rights of parties in litigation." "The overly broad scope of discovery * * * has long been a source of mischief." Adding proportionality establishes a balanced approach that is a meaningful improvement. If discovery confined to the parties' claims or defenses produces information suggesting new claims or defenses, the pleadings can be amended. Transplanting the list of proportionality factors to Rule 26(b)(1) is good, because present (b)(2)(C)(iii) too often is ignored or marginalized in practice. But care should be taken to ensure that the emphasis on the parties' resources does not lead to allowing unjust demands simply because a defendant has a high net worth.

The continuing failure of past amendments intended to rein in the scope of discovery suggests that the scope of discovery should be further reduced: "any non-privileged matter that is relevant and material to any party's claim or defense." (Materiality is defined in the 1968 4th edition of Black's Law Dictionary as information that has a legitimate and effective influence or bearing on decision.)

286, Stephen J. Herman: Has experience representing corporate defendants, but writes on behalf of individual plaintiffs. Untested contentions of defense counsel resisting discovery "frequently prove to be incorrect and/or incomplete." There is a "general disincentive" that dissuades "a defendant and its counsel * * * from conducting a thorough investigation, from asking the tough questions, and from disclosing potentially relevant and material information to opposing counsel

and to the court." Given the extreme disparity in knowledge between plaintiff and defendant, the proposed amendment will lead to one or the other of opposing bad results. Plaintiffs may be permitted to conduct preliminary discovery regarding the defendant's claims of burden or expense. Or plaintiffs will not be permitted to engage in such discovery, "thereby risk[ing] dismissal of the action based solely on the untested assertions of one party regarding the existence and nature of potentially relevant evidence." (There follow descriptions of five cases in which crucial information that was not revealed during early stages of discovery ultimately came to light.) "The proposed amendments, if adopted, would greatly foster the potential for additional, albeit unintentional, injustices; may tempt good lawyers to cross the line; and will aid and assist those few unscrupulous lawyers and companies who do have a win-at-all-costs mindset."

288, Sharon L. Van Dyck for the Railroad Law Litigation Section, AAJ: "The availability of the evidence needed to prove liability in an injury or death case against a railroad is highly skewed." The railroad controls the equipment and access to the property involved. Moving the proportionality factors from Rule 26(b)(2)(C)(iii) to (b)(1), where they become a condition of relevant discovery, not a check on abusive discovery, "will inevitably deprive worthy plaintiffs of access to evidence that is relevant and necessary * * *." "Individual plaintiffs should not be punished for corporate complexity they had no part in creating and have no ability to simplify." Discovery is inevitably extensive, "due to both the sheer size and complexity of the industry and to the railroads' use of obstructionist tactics for as long as possible * * *." (A specific example is given.) It is clear that because the railroad controls the information, the burden of discovery falls primarily on the railroad. The proposal risks raising that fact to become an obstacle to necessary discovery.

289, Craig B. Shaffer & Ryan T. Shaffer: Joins the discussion of proportionality with discussion of the proposal to eliminate the provision for discovery that extends beyond claims or defenses to include the subject-matter of the action. The broad conclusion is that although there is little seeming change, as a practical matter these proposals together will have the not undesirable consequence of reducing overbroad discovery requests. (1) "[R]elevance in the context of discovery should be broadly construed." The only limits are that a party cannot rely on speculation or suspicion, cannot roam in the shadow zones of relevancy on the theory that matter that does not presently seem germane might conceivably become relevant. Nothing in the proposals suggests a different measure of relevance. (2) Moving the proportionality factors from Rule 26(b)(2)(C)(iii) to Rule 26(b)(1) "does not effect any substantive change in the scope of discovery." Rule 26(b)(1) now expressly invokes Rule 26(b)(2)(C) as a limit on all discovery. Rule 26(g)(1)(B)(iii) entrenches the proposition that lawyers are responsible for heeding these concepts on their own. (3) Nonetheless, there may be not undesirable procedural and tactical consequences. All too often discovery requests are recycled or pattern interrogatories and requests for production. The problems are exacerbated when combined with ambiguous or overreaching definitions and instructions. Eliminating the provision for discovery relevant to the subject-matter takes away a safety net that might be relied upon to excuse such excesses. (4) Proportionality is case-specific. The proposed incorporation of proportionality in Rule 26(b)(1) is likely to increase the frequency of objections, but the objections are not likely to be granted more often than other kinds of objections, "particularly in response to carefully drafted interrogatories or requests for production."

290, Randall E. Hart: The present provision for discovery of information reasonably calculated to lead to the discovery of admissible evidence makes the process flow smoothly. Even with it, experience as a contingent-fee attorney finds routine stonewalling and groundless objections, in part responding to the incentives of hourly billing. Adding a multifactor proportionality test will

cause a huge increase in motion practice, impeding the search for the truth.

292, Lyndsey Marcelino for The National Center for Youth Law: The work of this plaintiffs' advocacy group will be impaired by the cost-benefit balancing. Moving this from 26(b)(2)(C)(iii) to become part of the scope of discovery is particularly likely to affect child advocacy work "because the defendants in our cases are likely large public entities with limited financial resources." "'Disproportionate' will become the new 'burdensome,' but with a cruel twist in placing the burden of proof on the plaintiff, in our case — children * * *."

293, John K. Rabiej, Maura R. Grossman, & Gordan V. Cormack: Proposes addition of this paragraph at the end of the first paragraph in the Committee Note to Rule 26(b)(1):

> As part of the proportionality considerations, parties are encouraged, in appropriate cases, to consider the use of advanced analytical software applications and other technologies that can screen for relevant and privileged documents in ways that are at least as accurate as manual review, at far less cost.

The proposal is further supported by 24 persons, expressing a consensus reached at the Duke Law Conference on Technology-Assisted Review held on May 2013. This endorsement of the use of advanced analytical software applications and other technologies to screen for relevance and privilege is offered as an offset to the reluctance of some parties to explore these opportunities, the fear that some courts may not sufficiently understand them, and the risk that "an ill-founded opinion may be issued that would further retard the use of TAR."

The proposal is supported by a link to a RAND Study of litigant expenditures for producing electronic discovery and the full text of two articles. Grossman & Cormack, Technology-Assisted Review in E_Discovery, XVII Richmond Journal of Law and Technology, 1-48, concludes: "Technology-assisted review can (and does) yield more accurate results than exhaustive manual review, with much lower effort. Of course, not all technology-assisted reviews (and not all manual reviews) are created equal." The second, published online, is Roitblat, Kershaw, & Oot, Document Categorization in Legal Electronic Discovery: Computer Classification vs. Manual Review. This article recounts a comparison of manual review in a real proceeding, conducted by 225 lawyers, with a review of a random and representative sample of the same document collection by different teams of lawyers (5 lawyers for each team) and by technology assisted review. The conclusion is that machine categorization can be a reasonable substitute for human review.

296, William B. Curtis, for Reglan Litigation Group, AAJ: Begins by noting: "Experienced plaintiff firms recognize that the 'game'is now to back a truck of virtual documents up to the courthouse and dump it, that may or may not include the real items requested. As a result, a broad net needs to be cast in the form of requests for production * * *." But the proposals will restrict discovery. Offers as an example discovery against a manufacturer of a generic version of Reglan, a drug used to treat stomach disorders. The request as to produce the label used by the defendant, to determine whether it complied with FDA requirements. It took five years to gain production, which showed the label "was inaccurate and missing bolded warning language." Lengthy appendices describe the efforts to gain discovery. The label might never have been disclosed under the proposed proportionality provision, which will require the requesting party to show the need for full discovery rather than require the producing party to show a burden that justifies restricting discovery. Defendant corporations know what is in their files. Plaintiffs do not.

297, Trevor B. Rockstad for the Darvon/Darvocet Litigation Group, AAJ: The proposed change

would eliminate the well-understood language that allows discovery of any non-privileged matter relevant to a party's claim or defense. Different understandings of proportionality will lead to inconsistent standards even with the same jurisdiction. Parties will litigate each of the five factors, causing substantial prejudice to plaintiffs. "[I]t is not difficult to imagine situations in which discovery issues are litigated for the sole purpose of exhausting the resources of the plaintiffs and their attorneys." With Darvocet and generic propoxyphene, for example, it is often necessary to engage in extensive discovery simply to find out which of several different entities made or sold the drug that harmed the plaintiff. And echoes the comments in 264, the AAJ Transvaginal Mesh Group, that limits on discovery will make it difficult to show that manufacturers have arranged for ghost-written articles on their drugs.

298, Philip J. Favro: The first part is a copy of Favro & Pullan, "New Utah Rule 26: A Blueprint for Proportionality," 2012 Mich.St.L.Rev. 933-979. Although the Utah rule is given substantial treatment, most of the focus is on present federal practice and the need to adopt an express proportionality limit on the scope of discovery. (1) Among the current practices commended by the authors is the extensive guidelines provided by the District of Maryland. This is a good model, worthy of incorporation in the national rules, but the national rule must be more concise. "While a local jurisdiction perhaps has the luxury of promulgating voluminous procedures and practices, the Federal Rules cannot be cluttered with forty-three additional pages of rules and requirements * * *." (2) The Rule 26(g) attorney certification requirement is incorporated into discovery-motion practice in N.D. Cal. This should be done in Civil Rule 37(a)(1), so that a party moving to compel discovery must certify "that the discovery being sought satisfies the proportionality limitations imposed by Rule 26[(b)(1) and (b)(2)] and Rule 26(g)(1)(B)(iii)." (3) It is anomalous that a party seeking a Rule 26(c) protective order should have the burden of showing that the discovery request is not proportional. Rule 26(c) should be amended to include a provision that "If the motion raises the proportionality limitations imposed by Rule 26(b)[(1) and (2)] and Rule 26(g)(1)(B)(iii), the party seeking the discovery has the burden of demonstrating that the information being sought satisfies those limitations." (4) Proportionality will work better if initial disclosures are expanded. At a minimum, each party should produce copies, not merely identify, documents it may use, and each should produce all documents it refers to in its pleadings. (5) Utah has divided civil litigation into three tiers. The top tier, for cases involving more than $300,000, imposes limits of 20 interrogatories, 20 document requests, and 20 requests for admissions. Total fact deposition time is restricted to 30 hours. For matters between $50,000 and $300,000, these limits are halved. For matters under $50,000, the limits are reduced to 5 document requests and requests for admissions, and fact depositions are limited to 3 hours total per side; interrogatories are eliminated.

299, Aaron Broussard: If intended to reduce discovery disputes, the proportionality proposal will backfire. Almost every discovery response is preceded by "unduly burdensome"; usually an opposing party thinks your discovery request is worthless, and will not admit its worth even when recognized.

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: Notes the continuing efforts of bar groups and rules committees to narrow the scope of discovery, going back to 1977. (1) "[T]here has been a continued movement toward proportionality in e-discovery as evidenced in the federal case law." "The Section supports these changes, although it does so with caution." (2) The change likely will lead to substantial litigation regarding application of the proportionality requirement, at least in the beginning. Making proportionality part of the scope of discovery may encourage objections, as compared to current reliance on Rule 26(c) motions for protective orders. (3) To avoid any doubt, the Committee Note should state that existing case law interpreting Rule 26(b)(2)(C)(iii)

applies in determining proportionality. (4) "[T]he new Rule's most important function may be to signal strongly that the scope of discovery should be narrowed." The Advisory Committee thought it had solved the problem when it added the provision that has become Rule 26(b)(2)(C)(iii). The problems have not yet been solved. November Hearing: Michael C. Rakower, p 287: For the section: "[W]e continue to support the proposal, but we do so with caution." It is likely to lead to increased litigation during the early stages while parties and courts become comfortable with the notion and boundaries, but this will even out over time.

307, Hon. J. Leon Holmes: Suggests that making proportionality part of the scope of discovery will generate more disputes, and disputes that "will be less susceptible to principled resolution." This is tied to the proposal to revise the provision that allows discovery of relevant information that appears reasonably calculated, etc., as if this "relevant information" provision now defines the scope of discovery. Whether proposed discovery is reasonably calculated to lead to the discovery of admissible evidence is something that can be decided early in the case. Proportionality cannot be decided without understanding the value of the case and the information available through other sources — information that is not available until discovery is completed, or nearly so, and then will be a subjective matter. And adds that dockets should be managed by judges; cases should be managed by lawyers.

309, Kaspar Stoffelmayr: Writing from Bayer Corporation experience with mass tort cases in MDL proceedings, endorses Lawyers for Civil Justice Proposals. Discovery causes our system to cost far more than the procedure of other countries, with no improvement in results. Most discovery costs are wasted; only a very small fraction of discovery materials are used as evidence. The fact that discovery is practiced in proportion to the needs of most cases should not disguise the fact that 5% of cases account for 60% of litigation costs (a study is cited in n. 4); fixing the system for those cases would be an important advance. Excessive discovery costs systematically increase settlement costs: all parties recognize that a defendant saves the large costs of discovery by settling at a figure well above the expected value of the claim. The proportionality test in present Rule 26(b)(2)(C)(iii) is seldom invoked. It is good to move it to become part of the scope of discovery. But more is needed. Discovery should be limited to information that is material to the parties' claims or defenses. January Hearing: p. 88: Similar, with an example of a case that went to an 8-week trial — Bayer produced over 2,000,000 pages of documents; 0.04% were used as exhibits. It would be hard to transfer the procedures of many other countries to our system, but in Britain they have single-event trials and manage with far less discovery.

310, Johnathan J. Smith, for NAACP Legal Defense Fund: Proportionality will frustrate the efforts of plaintiffs in civil rights cases to obtain necessary and vital discovery. Much circumstantial evidence is needed to prove intentional discrimination. Discriminators have learned to "'coat various forms of discrimination with the appearance of propriety,'" or to profess some nondiscriminatory motive.

A special danger is that defendants will self-apply the concept of proportionality in responding to discovery requests, and will monetize the importance of the case. The result will be less diligent efforts to find relevant and responsive information in replying to discovery requests. A defendant will make less effort to respond when a poorly paid plaintiff claims discrimination than when a highly paid executive makes the same claim. Plaintiffs like those who claim widespread abuse of "stop and frisk" police policies will face the same response — individual damages claims are small, or (as in the New York case) no damages are claimed. Present Rule 26(b)(2) leaves implementation of proportionality in the hands of judges. It is a mistake to put it in the hands of those who respond to discovery requests.

Nor is there any showing that discovery costs are a special problem in civil rights cases.

If other types of cases present special problems, changes in the discovery rules should be limited

311, James Coogan: The proposal is "designed to harm a party seeking discovery from a large organization." A party requested to produce will have an incentive to complicate the process in order to complain that discovery is too costly. This "places the burden on the Plaintiff, who is not privy to the operations of a Defendant, to justify the unknown." It will increase disputes and thus delays.

313, Steve Telken: Defending parties will feel compelled to use proportionality "to attempt to block or delay even legitimate discovery requests, lest they be accused of less than zealous advocacy for a corporate client."

314, John F. Murphy, for Shook, Hardy & Bacon (John Barkett was firewalled from the comment): The current discovery system "is unbalanced and in need of repair." (1) Patent litigation often generates high discovery requests, and offers to settle calculated to fall well below discovery costs. (2) Gamesmanship in personal injury litigation leads to requests for sanctions "to discolor a defendant in the judge's eyes." No matter how careful a defendant is, "there can always be allegations that a page, document, or flash drive has not been produced." (3) Discovery has come to be used to challenge the process of responding. "[P]laintiffs have insisted on detailed explanations of the criteria defendants use to review documents; requested up-front production of hold notices and distribution lists; insisted that corporate parties list all of their records and information systems, regardless of a system's relevance to the litigation; and demanded access to non-relevant documents in the review sets that defendants used to make predictive coding decisions." The changes will be significant steps toward addressing the high, asymmetrical costs of excessive discovery.

Proportionality is the most important principle. The amendment will encourage judges to be active in weighing costs and benefits.

315, David Jensen: Proportionality is a "further invitation for large defendants to continue, or increase, their standard objections based on unarticulated burdens."

317, Steven Banks for the Legal Aid Society in New York City: (This long comment begins with a description of many different types of litigation that would suffer from the proposed proportionality limit and from reducing the presumptive numbers of discovery requests. The background is summarized here, but should be recalled with the comments on other specific proposals.)

Section 1983 actions against municipalities require many discovery events to show custom, policy, or practice of violating the law. Jail and prison litigation often requires proof of a claim under a deliberate indifference standard, and a plaintiff must overcome the deference often extended to prison officials. In Fair Labor Standards Act cases it may be necessary to establish joint employment to satisfy statutory thresholds for coverage; discovery of employment records to show wages and hours can be extensive. In discrimination or retaliation employment cases the defendants possess most of the evidence. Wal-Mart v. Dukes means plaintiffs often need discovery for class certification, increasing the number of discovery events. And slashing the limits will be taken as endorsing a more restrictive approach to discovery generally. Finally, many prospective clients must be turned away, and must proceed, if at all, without representation. Their needs should be considered.

The proportionality limit is strongly opposed. Legal Aid clients often have comparatively small damages claims, regardless of the strength of their cases. Discovery should not be curtailed for this reason. Considering the importance of the issues at stake in the litigation "is insufficiently specific to guarantee heightened consideration for civil rights and other

constitutional claims." Rule text or comments should state that constitutional and civil rights claims are presumed to have a high level of importance. And measuring the likely benefit of proposed discovery "is often unknowable at the outset of litigation."

318, Brian Sanford: Excessive discovery is adequately limited now. "The problem is disproportionately low discovery, not high." The $100,000 claim of a cashier may be as complex as the $10,000,000 claim of a business owner. (319, Christopher Benoit, is verbatim the same. 320, Thomas Padgett Jr., interpolates points of emphasis in between verbatim duplication.)

321, Timothy M. Whiting: The proposed changes will have a grossly disproportionate effect on plaintiffs in complex product liability cases. Defendants' information is compartmentalized; plaintiffs' information is a relatively open book. The proposed changes would eliminate the standard that allows discovery of information relevant to the parties' claims or defenses. "By replacing relevance with a cost analysis, these proposed rules would severely restrict the ability of plaintiffs to uncover evidence."

322, Michelle D. Schwartz, for Alliance for Justice: The change "will upset decades of precedent and invite disputes and uncertainty." And the language creates a risk of overreliance on monetary stakes in the cost-benefit analysis.

323, Jonathan Scruggs, Alliance Defending Freedom: "'Proportional to the needs of the case' is an extremely vague standard." "Governmental defendants may try to limit discovery in religious liberty cases by portraying constitutional freedoms as insignificant because of the small damage awards usually at stake * * *."

324, Jonathan J. Margolis: Deleting the classic definition of discoverable information — information reasonably calculated to lead to the discovery of admissible evidence — and replacing it with an overriding proportionality standard will mean that relevant evidence is not discoverable as of right. Application of proportionality will be difficult and inconsistent. The "needs of the case" cannot be defined. The amount in controversy will be difficult to assess at the beginning of the litigation, and the inquiry will be unwieldy when equitable relief is significant. The possibility of multiple or punitive damages also must be counted. And balancing will prove inapt when it is necessary to go through discovery to find out what is at stake. And account should be taken of factors not subject to easy quantification, such as pain and suffering or emotional distress. And damages may increase during the course of the litigation. Looking for the amount in controversy could become a self-fulfilling prophecy by constricting the information needed to show what is at stake.

327, Malini Moorthy for Pfizer, Inc.: This change "has the potential to significantly reduce much of the undue burden that Pfizer routinely faces as a defendant responding to discovery requests." With two examples, also provided at the November 7 hearing: one is a litigation in which Pfizer spent $40,000,000 under a court order to preserve backup tapes for 8 years without any party ever looking for anything there, and also collected multiple millions of documents from 170 custodians and over 75 centralized systems, producing 2,500,000 documents representing more than 25,000,000 pages, to have 400 of those documents marked at trial. Overall, in the year ended October 1, 2013, Pfizer, for as many as 60 ongoing litigation matters, collected roughly 1,000,000,000 pages of documents from 3,000 custodians. Of them about 140,000,000 were identified as potentially responsive. 25,000,000 pages were produced; 5,500,000 of them required at least one (expensive) redaction. "Pfizer is not, and should not be, in the business of discovery." This "is clearly money that could better be spent developing life-saving drugs and improving health outcomes around the world." November Hearing: p 261 Repeats the same

observations.

328, U.S. Chamber Institute for Legal Reform: The proportionality provisions now in Rule 26 have failed to achieve their purpose. Litigants and judges commonly ignore them. Proposed Rule 26(b)(1) "would provide much-needed balance." It would help transform the "anything goes" approach into an approach that protects against the worst abuses. (There are figures for the costs of discovery.)

330, Wade Henderson for The Leadership Conference on Civil and Human Rights: Rule 26(b)(1) is the specific focus of comments addressed to "many of the proposed changes." The proportionality standard will impact plaintiffs, such as victims of employment discrimination, who have the burden of proving their claims "in the face of severe imbalances in access to relevant information. Such information asymmetry requires discovery rules that rectify these imbalances, not exacerbate them." And there is no empirical basis for the proposed changes. The broader statements emphasize the vital importance of private plaintiffs, as private attorneys general, in enforcing civil rights claims. In 2005, out of 36,096 civil rights cases the United States was the plaintiff in 534, 1.5%. The rest were brought by private plaintiffs. And discovery is all the more important in light of recent decisions that "have limited access to the courts for vulnerable Americans," both by substantive rulings and by such procedural rulings as those that heighten pleading standards and expand the reach of arbitration.

343, Doug Lampe for Ford Motor Company: Discovery is used against Ford in personal-injury product liability litigation "to gain tactical or settlement leverage, for discovery-on-discovery, or for satellite litigation." In each of several states Ford has more product litigation than in the rest of the world combined. And it is at a competitive disadvantage because, as a domestic company, most of its documents and witnesses are subject to discovery demands. Its foreign-based competitors have few documents or witnesses subject to discovery compelled by courts in the United States. The emphasis on proportionality invokes factors that are familiar to state and federal courts because they are now in the rules. It makes clear "the reality that discovery necessarily involves a balancing of interests." 450, Vickie E. Turner for Wilson Turner Kosmo LLP: "As counsel for Ford in numerous cases," quotes and adopts the passage quoted above.

344, Shanin Specter, Thomas R. Kline, Andrew J. Stern, Andrew S. Youman: These comments are shaped by experience in catastrophic injury cases. The present rules work reasonably well. The changes will adversely affect our clients. Proportionality will be difficult to manage. The party requesting discovery is least in a position to show the cost of producing or the value of information not yet produced. Will there be an evidentiary hearing? Discovery on respective resources? How can the requesting party show the importance of the discovery in resolving the issues when the information remains hidden? Proportionality objections, further, will become boilerplate.

346, Kenneth J. Withers, for The Sedona Conference Working Group 1 Steering Committee: Endorses moving the proportionality provision and limiting discovery to matter relevant to a party's claim or defense. This will help cabin excessive discovery, and may have an indirect effect on the burdens caused by over-preservation.

But, in line with other suggestions that the rules should expressly define the duty to preserve, suggests adding "or preservation" in Rule 26(b)(2)(C) at three points: "the court must limit the frequency or extent of discovery or preservation"; "the discovery or preservation sought is unreasonably cumulative * * *;" the proposed discovery or preservation is outside the scope permitted by Rule 26(b)(1)."

347, Genie Harrison: It is not clear whether this comment addresses a supposed limit on the number of Rule 34 requests, or instead expresses concern with proportionality. Offers an example of a case in which the documents needed to prove a plaintiff's case could not have been asked for "under the rules change."

348, Stephanie Bradshaw: Proportionality will place plaintiffs at even more of a disadvantage to defendants. The Committee Note says that parties must observe proportionality without court order because it is made part of the scope of discovery. "[I]f parties were to miscalculate the proportionality determination, they could thus be exposed to sanctions, which could result in a chilling effect." Reducing the flow of information also will impede settlement, which is more readily achieved when all parties understand each others' positions. Together with the new numerical limits, plaintiffs will be placed at an informational disadvantage from which they are unable to recover.

349, Valerie Shands: "Working for plaintiffs' firms, I know we value transparency above costs. * * * [W]e need to have that information to *know* that it is irrelevant or duplicative, and because its broad scope does occasionally turn up highly probative information." It is hard enough to get relevant information out of defense counsel as it is. "[T]he cost is worth it to achieve justice."

350, Pennsylvania Bar Association: Today, the proportionality factors "are rarely applied because of the notion of some that parties are entitled to discover all facts, without limit, unless and until a court says otherwise." But the Committee Note should emphasize that cost and burden are simply two factors to be considered along with the others. Part of the risk is that cost is the first factor listed.

351, Eric Hemmendinger for Shawe Rosenthal LLP: Proportionality is particularly important with respect to ESI. In employment cases, "plaintiffs' counsel use electronic discovery requests tactically, to pressure the defendant into settlement or to lay the groundwork for a spoliation claim."

355, Advisory Committee on Civil Litigation, E.D.N.Y., by Guy Miller Struve: The Committee has long recommended proportionality. But suggests that the Committee Note alleviate an ambiguity by stating that the reference to the importance of the issues at stake calls attention to the fact that importance is not measured solely in monetary terms.

357, Joanne S. Faulkner: "For a $1,000 consumer protection case, defendants will surely argue that the consumer should be entitled to no discovery." This will thwart the purposes of consumer statutes that often provide a relatively nominal amount of statutory damages, but also provide for attorney fees. "'Monetary awards understate the real stakes.'"

358, Dusti Harvey for AAJ Nursing Home Litigation Group: Plaintiffs in nursing home litigation typically are unfamiliar with the court system. Defendants are represented by many lawyers and control the necessary information. The proposal "would impose a significantly narrower range of factors for a court to consider when determining whether or not to permit particular discovery." Nursing homes typically utilize written policies and procedures; the proposal would make discovery more difficult. In considering the importance of the issues and the importance of the discovery items, the court could inadvertently usurp the role of the finder of fact.

359, Andrew B. Downs: The Rule 26 amendments do not go far enough. The scope of discovery should be limited to what is material.

360, Robert Peltz: The proportionality factors will have to be applied by the court in every case. The standard is too amorphous to be enforced fairly. Tremendous burdens will be imposed on district judges. And a ruling in one case will be much less significant precedent for other cases because a unique balancing of factors is required for each case.

361, Caryn Groedel: Proportionality will have a chilling effect on discovery and the plaintiff's ability to prove the case.

362, Edward Hawkins: Proportionality "will only encourage rule breaking plaintiffs and defendants to withhold evidence." Current Rule 26 provides protection enough.

363, Dean Fuchs, at request of NELA-Georgia Board: Proportionality will encourage defendants to file motions to narrow the scope of discovery, hoping the court will deny plaintiffs access to the evidence they need to prove their claims.

365, Thomas Osborne and 14 others for AARP Foundation Litigation: Placing on plaintiffs the burden of proving proportionality is harsh; their resources are generally more limited than defendants' resources. "With little or no information, upon what basis can the plaintiff argue the importance of the issue, the importance of the discovery in resolving it, and/or whether the burden or expense outweighs the likely benefit?"

365, Edward P. Rowan: The subjective weighing of cost and benefit will work an injustice "if a judge opines that discovery should not occur."

368, William G. Jungbauer: Replacing discovery relevant to the claims or defenses with a five-factor proportionality test, moved from 26(b)(2)(C)(iii), changes a shield to a sword, "shifting the burden to the party seeking information, who may be at a considerable disadvantage when it comes to having the information necessary to carry such a burden."

369, Michael E. Larkin: The change "flips the burden of proving the utility of discovery on the party seeking the discovery." It will result in parties opposing discovery without having a burden to show why, generating more motion practice. And the addition of "allocation of expenses" to Rule 26(c)(1)(B) makes the change to proportionality unnecessary.

372, J. Burton LeBlanc, for American Association for Justice: Proportionality is examined at great length. The first statement is that introducing proportionality as a limit on the scope of discovery can be viewed as changing it "from a practical consideration to one that renders critical information off-limits merely because it may be expensive to retrieve." That will fundamentally alter the scope of discovery. (1) The amount in controversy is misleading; many cases are in federal court because Congress made federal law to support claims that seek small damages, or only injunctive or declaratory relief. This problem may not resolved by considering the importance of the issues because there is no indication of the extent to which any particular court will rely on the importance of the issues. (2) Who determines how important an issue is? The court is not likely to have enough information to make this determination at the outset of the case. (3) As for the parties' resources, when a small plaintiff sues a large corporate defendant, whose resources determine this? Can the defendant argue for limited discovery because the plaintiff's resources are limited? (4) Defendants will argue in every case that the discovery is not important in resolving the issues. Without discovery, there will be virtually no information to support the court's determination. (5) Balancing likely benefit against burden or expense will support an argument in every case that discovery is too burdensome. It will create an incentive to preserve documents in formats difficult to access. "The proportionality test gives defendants a

step-by-step formula to argue that critical relevant information should not be produced"; the argument will be made in every case.

If moving these factors into the scope of discovery is not intended to change the rule, as some have suggested, why make the change? The Committee Note says the revision limits the scope of discovery. The change "likely will be interpreted as a substantive change." The present rule, further, requires the court to make a determination that discovery should be limited; the proposed rule imposes an insurmountable burden on the party with fewer resources and less access to relevant information. Nor does the argument from Rule 26(g) persuade. The Rule 26(g) certification is made to the best of the party's knowledge, information, and belief formed after a reasonable inquiry. The party requesting discovery does not have to prove the requests are not unduly burdensome or expensive; the proposed rule likely will impose that burden.

373, Michael L. Murphy for AAJ Business Torts Section: Treats the "reasonably calculated" sentence as defining the scope of discovery under present Rule 26(b)(1), and urges that the multi-element test of proportionality should not be substituted. The test is so subjective that a party could file a non-frivolous challenge to almost any discovery request. This tactical motion practice will have disproportionately negative effects on small business and other plaintiffs. In trademark, copyright, trade secret, and occasionally patent litigation it may be difficult to prove actual damages; if only injunctive relief is sought, the stakes may seem small. There is no need to further restrain discovery. The complaint will already have survived heightened pleading standards. Plaintiffs have little economic interest in pursuing voluminous discovery when the amount in controversy is relatively small. Varying standards will develop across the circuits, "further eroding uniform application of justice and the federal rules." Present protective order practice, and the authority to limit discovery under the same factors in present Rule 26(b)(2), afford protection enough. The default limit in 26(b)(2) should not be amplified as a default limit on discovery.

374, Christopher Placitella for AAJ Asbestos Litigation Group: Under the present rule "relevancy" is defined by the "reasonably calculated" sentence. The proposal narrows the scope. It incentivizes a defendant to claim production is too costly, "shift[ing] the burden to the plaintiff to attempt to explain why evidence the plaintiff has never seen is sufficiently beneficial to outweigh the costs unilaterally alleged by the defendant." In asbestos cases this "will result in the inability of a large number of sick and dying people to prove their cases."

375, Jennie Lee Anderson for AAJ Class Action Litigation Group: "[P]roportionality is the comparison of two variables, and it cannot be asserted when the variables are unknown. Defining the scope of discovery using a proportionality standard without requiring the party in possession of all the information needed to evaluate proportionality to disclose it" will lead to uninformed rulings. Defendants regularly overstate the cost of responding. "Elevating proportionality from a protection against abuse to a barrier to access will only incentivize such overstatement because the proposed changes do not require defendants to back up such claims." In product liability cases, for example, liability is often "revealed through email communications between employees rather than the testing and design documents."

376, Laura Jeffs (and many others in the same firm, Cohen & Malad): With proportionality, "plaintiffs would be faced with the impossible task of arguing that the likely benefit of unknown information outweighs the also-unknown cost to the defendant to produce it." The change would provide another tool for corporate defendants to avoid producing relevant information, a tool that is guaranteed to be abused.

378, Jeffrey S. Jacobson for Debevoise & Plimpton LLP: The firm practice is to use discovery

cooperatively and collegially, not as a club to inflict unnecessary costs. Mandating proportionality is desirable. Rule 26(b)(1) generally has it right, but factoring "the amount in controversy" should be placed at the end, and all the factors should be introduced by adding "and also factoring" after the call to consider whether the burden or expense outweighs likely benefit. Surely a party should not be required to take a $50,000 discovery step in a $75,000 case. But if this factor is first in the list, "a court may be too likely to require unnecessarily expensive discovery steps in cases involving high amounts in controversy." The rule text, or at least the Committee Note, should explicitly state that the cost of discovery should not exceed or be disproportionate to the amount in controversy, and a large amount in controversy alone should not justify discovery when the burden or expense outweighs likely benefit.

379, John M. Gallagher: The subjective factors considered in determining proportionality invite every judge to apply a personal concept, and would require numerous mini-trials on the factors.

380, Robert D. Fleischner and Georgia Katsoulmoitis for Advocacy Coordinating Committee, Massachusetts Legal Services Organizations: The proportionality factors should remain in 26(b)(2)(C), to be invoked on review by the judge. Moving it enables a litigant to refuse to provide discovery if it determines in its own opinion that the request is not proportional to the needs of the case. "At least in our cases, this change would only benefit defendants." Most of the clients of these Legal Services Organizations are indigent, holding claims likely to yield small money damages. "Even cases with relatively limited remedies of[ten?] involve complex facts and proof."

381, John H. Beisner: Imposing a strong proportionality requirement is a marked improvement over the "anything goes" approach. It will help winnow overbroad requests and curtail abuse. January Hearing: p. 61: This is not a radical change. It cures the relative obscurity of a rule that has not produced an avalanche of motions, and will not. Nor will making it more prominent change the burdens. A requesting party already is certifying to proportionality under Rule 26(g). A motion will generate a discussion in which both parties have to contribute. The plaintiff declares the amount in controversy. Each party speaks to available resources. The requesting party speaks to the importance of the discovery. The responding party speaks to the burdens.

383, Alan B. Morrison: (1) Must requesters factor proportionality into their requests? May the responding party object to almost any request on this ground? Or is the provision directed only to judges? This language was directed to judges in (b)(2)(C)(iii). It would help to make a new sentence after "claim or defense" on line 9 of the published rule. The sentence would direct the judge to take into account the factors listed. (2) Delete "the scope of discovery is as follows"; it is unnecessary and confusing. (3) What difference is there between "proportional" and "whether the burden or expense * * * outweighs its likely benefit"? The other factors are not independent tests, but factors or considerations. Say first either "proportional" or the "outweighs" test, then direct the judge to consider the factors. (4) What is meant by "the importance of the issues at stake"? Is the focus on each issue, or on the overall claims? If on each issue, what if some issues are routine but there is a liability or damages issue that is of great importance but the discovery does not bear on the important issue? If the focus is on the claim, "is a constitutional claim always more important than a statutory or common law claim? What if there are several claims, and discovery bears on only some of them? If this factor is to balance the amount in controversy factor, it might be revised to address "the nature and extent of any non-monetary relief sought." (5) The importance of the discovery in resolving the issues is similarly ambiguous. It could be fixed as "the importance of the discovery in resolving ~~the~~ [an][a significant] issue~~s~~ to which it is directed." (6) Proportionality and scope are the same; 26(b)(2)(C)(iii) should be "is ~~outside the scope~~ not permitted by Rule 26(b)(1)."

384, Larry E. Coben for The Attorneys Information Exchange Group: The proposals alter the playing field "by placing expediency above relevancy." The "reasonably calculated" sentence has defined the scope of discovery for more than 60 years. Proportionality changes this. "Each factor will benefit defendants at the expense of plaintiffs who need the information." Congress has created many claims that can be brought to federal court regardless of the amount in controversy. How will the court resolve the monetary value of the case — will experts be called? How is a court to determine the importance of the issues, or the importance of the discovery to resolving the issues? Subjective judgment will be called for, and there will not be enough information to make the judgment. Looking to the parties' resources may lead a wealthy defendant to argue that discovery should be limited because the plaintiff is impecunious — a victim's ability to pay for the needed information should not be a determining factor.

The proportionality test will shift the burden to the requesting party to show that discovery is justified. Present practice requires the requesting party to show relevance, and then the burden falls on the responding party to show the reasons to deny discovery of relevant information. Changing the definition of what is discoverable will change the analysis from whether discovery should be limited to whether discovery should be permitted.

Again, how is the court to judge the accuracy of the parties' submissions? Should it, for example, consider that the case before it may be one of many similar cases, so that the burden of assembling the information should be compared to the needs of all the similar cases, and the costs spread across all of them?

386, Arthur R. Miller: Moving 26(b)(2)(C)(iii) to become part of the scope of discovery effectively converts it to an independent limitation on the scope of discovery. The five criteria are highly subjective and fact dependent, with a dangerous potential to reduce the scope of discovery. It is likely to produce a wave of defense motions that will be difficult to decide "when the challenge comes before the discovery itself." There is no empiric support for this change, nor is it justified. January Hearing, p. 36 at 38: Proportionality "is a major shift in the balance of discovery." 535, Herbert Eisenberg, Julian R. Birnbaum, for NELA/NY: Quote Professor Miller extensively with approval. 572, John Kirtley: Adopts Professor Miller's testimony to a Senate Committee, "as edited by me."

388, Nina M. Gussack, Joseph C. Crawford, Anthony Vale: Proportionality "is particularly important in litigation where the burden of discovery is asymmetrical, i.e., where one side, almost always the defendant, faces far greater expense in responding to discovery." The enormous expense of ESI discovery makes this all the more important.

390, J. Mitchell Smith for International Assn. of Defense Counsel: Moving proportionality up from 26(b)(2)(C)(iii) "is a modest edit, but if adopted, it would have the important effect of encouraging judges and parties alike to maintain a pragmatic perspective on what discovery should mean in each individual case."

393, Robert Redmond: Proportionality is important. Negligible claims have been settled because a party noticed a Rule 30(b)(6) deposition. A corporate deposition takes a small business owner away from his work for days at a time. Proportionality is the only reasonable means to prevent this type of tactic.

394, Thomas Crane: Proportionality is a concern in representing employees in discrimination cases. The amount in controversy can fluctuate, depending on whether a fired employee finds new work. Employers have the bulk of discoverable material; they resist discovery, I file a motion to compel, and they become cooperative. The system works now.

396, Steven J. Twist: "[T]he civil justice system is dysfunctional." The costs of discovery drive dispute resolution. Proportionality, together with eliminating subject-matter discovery and the "reasonably calculated" provision, is a much-needed reform. This will not shift the burden — whoever bears the burden on the scope of discovery today will continue to bear it after adopting proportionality. Rule 26(g), further, already imposes the burden of ensuring proportionality on both the requesting and responding parties.

398, Shira A. Scheindlin: (1) Proportionality "invites producing parties to withhold information based on a unilateral determination that the production of certain requested information is not proportional * * *. This could become a common practice * * *." That will mean the requesting party must make a motion, at considerable expense. (2) The rule does not specify which party bears the burden of proof. "[I]t would be very helpful if the Committee would clearly state in the rule or notes that the burden is on the objecting party." (3) Addressing five factors in every motion will be burdensome and not informative. The requesting party says the case is worth $1,000,000, the responding party says it is worth $10,000: how is a court to choose? The responding party says it will cost millions to produce, the requesting party says this is an exaggeration: must the court appoint an expert to determine the true burden? How is a court to balance burden and expense against benefit of producing materials that have been identified only in a very general way, at the beginning of the case? Judge Easterbrook and others have observed that proportionality is doomed: judges cannot prevent what they cannot detect, they cannot detect what they cannot define, and they lack essential information to define what is abusive. (4) The current rule works well, as shown by the FJC study. (5) Proportionality has been available for years. It is not often raised. When it is raised, it is at a time in the case when parties and the court have developed significant information about the case that allows intelligent disposition of the objection. Proportionality may be usefully approached early in a mega case, but not in other cases. (6) Rule 26 was amended in 2006. "It is too soon and too often to once again revise this rule and further contract the scope of discovery." This is part of "a continued and systematic effort to respond to a big business complaint that the American system of litigation is somehow bad for American business and reduces our competitive advantage * * *." 0469, Edward B. Cloutman III: Adopts Judge Scheindlin comments by reference. 470, J. Derek Braziel: agrees with Judge Scheindlin's "Careful analysis and comments." 472, Christopher Benoit: Wholeheartedly supports Judge Scheindlin's perspective, as well as those of Professor Arthur Miller and Honorable James C. Francis IV. 476, John Wall: Concurs with Judge Scheindlin. 477, James Jones: Agrees wholeheartedly with Judge Scheindlin. 492, David Wiley: Agrees with Judge Francis and Judge Scheindlin. 535, Herbert Eisenberg, Julian R. Birnbaum, for NELA/NY: Quote Judge Scheindlin extensively, with approval. Hon. Lois Bloom: Approves Judge Scheindlin's comments. Most problem cases are dealt with by hands-on management.

399, Edward Miller: Moving proportionality to (b)(1) is a modest edit, but will encourage judges and parties to maintain a pragmatic perspective. Proportionality will be an important improvement; the overbroad scope of discovery defined by present (b)(1) "is a fundamental cause of the high costs and burdens of modern discovery." But the rule should be strengthened further by adding a requirement that information be "material" to be discoverable.

400, Gregory P. Stone: Modestly emphasizing the existing authority to insist on proportionality will assist in combating spiraling discovery costs. The ratio between pages produced in discovery and pages used at trial shows that extensive discovery does not aid the parties in preparing their cases. The protests that there is an undue emphasis on the amount in controversy overlook the direction to consider the importance of the issues at stake. "[F]ederal judges and magistrates are well positioned to divine the true stakes in each case — whether important public rights or potential settlement value."

402 Lauren E. Willis, for Harvard Law School Fall 2013 Civil Procedure Section 5 Examination Answers: Of 78 students, 58 opposed the change. It invites parties to decide for themselves what is proportional; disputes will occur routinely, and a party may decide unilaterally on how extensively to search for discoverable materials based on biased views about what is proportional. The burden of seeking court intervention is moved from the party opposing discovery to the party requesting discovery; "it is better for the truth-seeking function of litigation to err on the side of too much discovery rather than on the side of too little." Parties may take advantage of the subjective nature of the calculus to burden their adversaries with the costs of obtaining court intervention [and because it is subjective, the motions will often be "substantially justified" so as to escape sanctions under Rule 37]. Parties with little pecuniary but substantial non-pecuniary interests at stake, parties with fewer resources, and parties with less ability to obtain information outside of discovery, could be systematically disfavored.

403, Donald H. Slavik for AAJ Products Liability Section: The proportionality factors are subjective and will lead to ancillary issues. Must a plaintiff make a record offer of proof of the amount in controversy? Must there be evidence of the parties' resources? The importance of the issues is highly subjective. The importance of the discovery cannot be known without knowing what the information is. And not knowing that important information actually exists makes it difficult to show that the benefit outweighs the cost. It will almost always be the plaintiff who must carry the burden of showing that these factors justify discovery. February hearing, p 14 at 17: Much the same.

404, J. Michael Weston for DRI - The Voice of the Defense Bar: The introductory comments decry the cost of discovery and the use of discovery to gain leverage in litigation and force settlement. The costs seriously undermine the jury trial system. Hourly billing is not to blame — clients demand efficiency, litigation budgets have become the norm, and alternative fee arrangements are used more frequently. Civil defense lawyers often ask courts to limit the use of discovery. "Federal discovery practice, in its current form, is the largest component of the increasing costs and is staggeringly wasteful and inefficient." Thus it is time to look for changes that will not encourage excessive motion practice but will bind practitioners by the rules to narrow the scope of discovery without judicial oversight. The IAALS/ACTL recommendation to adopt proportionality for e-discovery points the way to adopting proportionality generally. The proposal "provides a proportionality requirement that has been completely lacking in modern discovery, and DRI strongly supports" it. Prior efforts to limit the scope of discovery, such as the 2000 amendment, "have not produced a different mindset among the bench and bar. These historically broad notions of discovery and relevance could prevent the proposed amendment from fulfilling its potential." That risk can be avoided by requiring that the matter be "relevant and material" to a claim or defense. The DRI comment "contains an excellent discussion of the associated costs and negative impact e-discovery" has. The 2006 amendments did not go far enough.

405, Congressman Peter Welch: (Draws from 30 years of litigation experience:) The "drastic change" adding proportionality "would have severe consequences." A party could refuse to provide discovery by deciding the request is not proportional. This would enable defendants to avoid producing critical information plaintiffs need. It will be especially detrimental in civil rights, constitutional, and discrimination cases in which information is asymmetrical. Plaintiffs would be forced to use limited time and resources on unnecessary motions and appeals. The five factors would be litigated for each piece of information.

406, Troy A. Tessier: Clarifying the proper scope of discovery is an important improvement to the current rules.

407, David J. Kessler: (1) "While courts, responding parties,and requesting parties will always value cases differently, proportionality should still be a limiting factor." (2) The five factors will incentivize counsel to carefully consider their discovery requests. (3) The fear that proportionality will stimulate motions is unfounded. Parties can and do attempt to limit discovery under Rule 26(b)(2)(C)) now. This mirrors counsel's obligations under Rule 26(g). Bad actors will always seek to lengthen and complicate discovery by motion practice, but moving proportionality to the scope of discovery will give them less ground to stand on. (4) Rule 26(b)(2)(C)(iii) should be eliminated as redundant; retaining it "could lead to mischief and confusion" in implementing Rule 26(b)(1). (5) The Committee has been requested to encourage the use of advanced analytical software in the Committee Note. "I regularly use such technology." But the decision on how to respond to discovery requests should be left to the parties. How they meet their discovery responsibilities is their responsibility. They should not be pressed to use technology they do not want to use, nor need to use. Nor is there any need for encouragement. "The logic and reasonableness of advanced analytical software is winning the day."

408, Elliot A. Glicksman for Arizona Association for Justice: "A plaintiff seeking discovery will have the burden of proof on proportionality." Defendants will resist even clearly relevant discovery. Application of the five factors will lead to inconsistent rulings, endless delays, and collateral litigation. The change will transform federal courts from notice pleading to fact pleading, undercutting a plaintiff's ability to discover facts needed to prove a claim.

410, John H. Hickey for AAJ Motor Vehicle Collision, Highway, and Premises Liability Section: Proportionality will increase discovery disputes and the time required to resolve them. The factors are so vague that defendants will invoke them in every case. (1) Looking to the amount in controversy will require evidentiary hearings, or at least extensive presentations, on the injuries in the case (with multiple examples, including such matters as axonal shearing in traumatic brain injury cases, leading to the need to understand secondary biochemical cascades, all involving differing expert interpretations of neuropsychological testing). And should the amount in controversy focus on each case in isolation, or is the determination affected by a showing of numerous injuries or by the consolidation of cases? Is the value of a case affected when there are catastrophic injuries but "difficult liability"? (2) The importance of the issues is hopelessly vague. Importance to whom — plaintiff? defendant? society? How many defendants? How severe the injuries? If some defendants settle, do the issues become less important? (3) How can the plaintiff show the importance of the discovery before it has the discovery? And discovery that does not establish an essential element of the claim still may be important to present the full context, the big picture, as part of persuasion. (4) Burden or expense also is undefined. The plaintiff will not have access to information about the defendant's financial health, and will need discovery on that. 448, Robert D. Curran, tracks 410.

414, John R. Scott: Proportionality should help reduce overreaching discovery demands.

416, Mark S. Kundla: Of the same firm as Scott, 414, and similar.

417, Barry A. Weprin for National Association of Shareholder and Consumer Attorneys: NASCAT members are involved in the complex, high stakes, contentious cases described by the Advisory Committee and FJC as leading to expensive discovery. But that shows only that discovery is expensive, not that it is disproportionate. Before 2000, except in districts that opted out (?), discovery proceeded apace. But in districts that opted out of mandatory discovery (? disclosure?), defense counsel were essentially encouraged to challenge and defensively parse virtually every request. Such behavior required court involvement. Rule 26(b)(1) proportionality

will fundamentally change the very nature of discovery, inviting litigation of "each of these seven factors in every single federal civil case." The rules already provide means to rein in abuses; Rule 26(b)(2)(C)(iii) already enforces proportionality. Moving proportionality into the scope of discovery will require a plaintiff to justify its requests in advance, without the benefit of knowing what relevant information is in a defendant's possession. The defendant, who knows where the requested information resides, can tailor its objections based on cost. Defendants often are not looking for ways to reduce costs of producing, but to avoid producing. Plaintiffs need discovery to reveal the sources of information not previously known to exist.

420, Daniel A. Edelman: Blends protests about deleting "reasonably calculated" and "subject-matter" discovery into the protest about proportionality. Proportionality will shift the burden to the plaintiff to prove the information it seeks outweighs the burden. That cannot work when the information is almost exclusively controlled by the defendant, so the plaintiff cannot show the benefit. Defendants will take even more aggressive positions than they take now, and will abuse the standard. The result will be greatly increased motion practice. "At a minimum, the defendant shall bear the burden of proof and be required to apply to the court for avoiding discovery on this ground."

421, Louis A. Jacobs: (Writing as a retired professor and long-time employment law practitioner:) The present rules encourage the common practice of cooperative discovery in employment cases. (1) But relocating proportionality to become part of the scope of discovery frontloads it. "[T]he fact that the language is relocated matters." That is why relocation is proposed. The Committee should say so if it means to preserve the law that shifts to the party resisting discovery the burden of adducing specific facts to demonstrate the discovery is beyond the proper scope. If it means to change that approach, it should say so. But still "[t]he proportionality factors tilt against plaintiffs in most employment litigation." Leaving it in Rule 26(b)(2)(C)(iii) forces a motion by the party resisting discovery, and a motion must be preceded by informal efforts that will tell the party requesting discovery the facts that bear on the burden of providing it. If the plaintiff has the burden, the employer will not have much incentive to provide as much information.(2) Damages ceilings for federal statutory discrimination and retaliation claims set the amount in controversy too low to justify extensive discovery. (3) "The importance of the issues at stake depends on the value assigned to equal employment opportunity, protecting whistleblowers, or vindicating constitutional rights. Because that value resides in every case, proportionality can hardly assign it high import." Importance is more likely to reside in the number of plaintiffs. "Proportionality has been rejected in the attorneys' fees context precisely because it undervalues the importance of vindicating civil rights." (4) Looking to the parties' resources is another makeweight. Courts are not likely to count it against employers that they invariably have vastly greater resources than former employees suing them. (5) The importance of discovery in resolving the issues in employment litigation cannot be overstated, so this factor is really just a threshold to cost-benefit analysis." Proportionality will come down to this cost-benefit analysis.

423, Ralph Spooner: "Discovery abuse has grown * * * in the last 15 years. Discovery should be proportional [to] what is at stake in the litigation." Too often the cost of discovery forces parties to resolve a case.

433, Ryan Furgurson: Proportionality "emphasizes the balancing of interests that should take place in any discovery dispute, and is a positive step * * *."

443, Grant Rahmeyer: "Changing the scope of discovery under Rule 26 is an absolute abomination. * * Changing the burden of proof on discovery destroys litigation. It allows

companies to hide documents then claim that the plaintiff isn't 'hurt enough' for us to bother to look for documents." The result will be "mounds of briefs just to get leave to file discovery," followed by more briefs on motions to compel.

445, Gerald Acker, for Michigan Assn. for Justice: This ambiguous standard will mean that discovery will depend on the luck of the draw of judges. Some judges, for example, have likened employment disputes to the divorce cases of federal courts; they will not be sympathetic to the discovery needs of those cases. Nor can a judge determine the importance of a case, or of proposed discovery, without knowing what the discovery will yield.

446, Stephen Aronson: Discovery should be narrowed "to only that truly necessary to address the complaint."

449, Christopher D. Stombaugh, for Wisconsin Assn. for Justice:

(1) As Professor Miller testified to Congress, the proposals lack any empiric justification. Tort case filings are falling.

(2) Relevance and proportionality are contradictory. "If evidence is relevant, how can it not be proportional"?

(3) The proposal makes it clear that the proponent of discovery must show relevance and proportionality. The effect will fall most heavily on important cases of public policy.

(4) Now, by moving proportionality from (b)(2)(C)(iii), the rule directs that courts must limit discovery.

(5) All of the proportionality factors are subjective. Plaintiffs barred from relevant discovery will have little chance of prevailing on appeal.

(6) Looking to the amount in controversy, "given that there is already a monetary threshold for federal jurisdiction in most cases, * * * raises numerous problems, some of which may rise to the level of constitutional issues." Do punitive damages caps limit discovery? Or, as under Wisconsin law, limits on the amount a family can recovery in a death case for loss of companionship and society? Does discovery depend on whether one plaintiff sues, or ten cases are consolidated?

(7) Looking to the importance of the issues invites subjective judgments. These questions should be decided more at the pleading stage, not in limiting discovery.

(8) "There should be no dispute that discovery is important to resolve any dispute." And who is the discovery important to?

(9) The parties' resources raises questions — if the plaintiff is represented on contingency, should the attorney's assets be questioned? Will statements of resources be required? "[T]he lack of resources should never be a factor in determining justice.

(10) "The value of evidence cannot be ascertained until it has been obtained and reviewed." This factor, as the others, will generate, not limit, litigation.

450, Vickie E. Turner for Wilson Turner Kosmo LLP: "Including a proportionality requirement delineates necessary parameters to discovery and remedies the overbroad scope of discovery as defined in the current rule." But a materiality requirement should be added to force the parties to focus on what they really need.

456, Niels P. Murphy writing for eight lawyers: Proportionality is a good idea, but the historically broad notions of discovery and relevance are a factor that could thwart realization of the purpose to reduce the present overbroad scope of discovery. "and material" should be added.

457, Carl A. Piccarreta: "the proposed rule change will undoubtedly have judges acting as referees in evaluating five factors on a repetitive basis." Leave Rule 26(b)(1) alone.

455, Andrew Knight: Supports the amendments to 26(b)(1) to "significantly reduce the wasted effort and great expense of responding to discovery served only to harass."

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Supports incorporating proportionality in (b)(1), but with several suggestions to improve clarity and operation. (1) The Committee Note should state explicitly, in suggested language, that moving these considerations to (b)(1) "is not intended to modify the scope of permissible discovery." The factors should be applied just as they have been. (2) A court may place improper or differential weight on specific factors, such as the amount in controversy or the importance of the issues. The importance of the issues may justify broader discovery even when the dollar stakes are low: "This dynamic is implicated by a large swath of the Department's work * * *." It is also affected by asymmetric information cases, in which the quantity of information available to the defendant is far greater than the information the government has. "Federal agencies also have limited resources to apply to individual cases, and such constraints, which include protection of the public fisc, may warrant imposing limits on discovery." (p. 4 recommends specific note language.)

460, Jo Anne Deaton: Proportionality will reduce the use of discovery "as a tool for 'economic blackmail.'" This technique is used by plaintiffs in employment matters to increase potential fee recoveries, and in product liability cases "where deposition costs, including expert discovery, is used as a hammer to force settlement."

461, an article by Thomas D. Wildingons, Jr. & Thomas M. O'Rourke: Changing proportionality to define the scope of discovery "may on occasion generate inequitable results." This is an amorphous standard. Early in the discovery process, it may be difficult to determine how beneficial discovery will be in resolving the issues. The amount in controversy and the importance of the issues at stake "will likely be the predominate factors," and the parties will on occasion significantly disagree about the amount or the importance. The other proposed changes to the discovery rules, further, may make litigants more inclined to invoke present 26(b)(2)(C)(iii). "If parties more freely file motions invoking the existing proportionality standard in light of these changes, then there is less of a need to realign the available scope of discovery." It might be better to amend Rule 26(b)(1) "to specifically refer to proportionality as an important limiting principle that should be invoked in appropriate cases."

462, George E. Schulman, Robert B. McNary for the Antitrust and Unfair Business Practice Section of the Los Angeles Bar Assn.: The comment on proportionality essentially renews the Rule 16 comment: the proportionality analysis should not be conducted without an in-person conference with counsel to discuss the court's views.

463, Janet L. Poletto for Hardin, Kundla, McKeon & Poletto: Proportionality "will foster greater communication among counsel and allow for more effective case management."

468, Karen Lamp: Proportionality will "allow necessary and relevant discovery without requiring the parties to devote substantial resources to producing routinely requested overbroad discovery that in many instances will never even be read."

473, Paul C. Saunders and Rebecca Love Kourlis for ACTL Task Force and IAALS: The first part of the comment details several pilot projects and state court rules that adopt proportionality as a limit on discovery. Utah Rule 26(b)(2)(F) includes, as one factor bearing on proportionality, whether "The party seeking discovery has not had sufficient opportunity to obtain the information by discovery or otherwise, taking into account the parties' relative access to the information." Utah Rule 26(b)(3) directs that the "party seeking discovery always has the burden

of showing proportionality and relevance." In the second part, commenting on the published proposals, the "attempt to bring a proportionality evaluation to document requests" is applauded, with this further observation: "With specific reference to electronic discovery, we recommend that a proportionality determination should ‘take into account the nature and scope of the case, relevance, importance to the court’s adjudication, expense and burdens.’"

475, Jeff Westerman for Litigation Section, Los Angeles County Bar Assn.: Proportionality is subjective. The five factors "are quite limited in nature." Although the cost of responding can be shown, neither party will be able to objectively describe the value of the proposed discovery, nor can the court make a rational determination, having no idea as to the substance of the evidence. Parties will hide behind expense to avoid producing even relevant and admissible evidence that reasonably should be produced. The results will be catastrophic in cases of asymmetric information.

478, Joseph Goldstein: The proposals "are long overdue." "[T]he rules of discovery are routinely abused for the sole purpose of forcing a settlement of a dubious claim."

479, Earl Blumenauer, Suzanne Bonamici, Peter Defazio, and Kurt Schrader, Members of Congress: As Professor Miller testified, the proportionality proposal is a threat to the jugular of the discovery regime. The scope would be changed from relevance to proportionality. Defendants would be able to avoid producing relevant information a plaintiff needs to prove the case, especially when the cost of discovery is expensive relative to the amount of damages or requested relief. "Civil rights litigants will be the ones most hampered." The gap between the party who controls the information and the one who needs it would widen. And there would be "a massive increase in aggressive collateral discovery motions."

480, James Wilson: Strongly supports, which "will potentially provide a much-needed and common-sense improvement" to reduce runaway discovery costs.

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: Proportionality provoked the most detailed discussion at the conference. (1) Many plaintiffs’ attorneys feared a significant and detrimental limitation of discovery. There is a risk that this will become a subjective standard, administered differently by different judges who have different "know-it-when-you-see-it" visions of proportionality. Many also feared this would shift the burden to the party requesting discovery, and that it is difficult for that party to show proportionality when the responding has all the information about the nature, location, and types of requested information. They feared disproportional effects on some kinds of cases, including "civil rights" cases. (One participant from Colorado offered the anecdotal impression that the Colorado pilot project with proportional discovery has not had the effect of limiting the parties’ ability to get needed discovery.) (2) Most defense attorneys supported proportionality. It will refocus the court and parties on the importance and usefulness of requested discovery. "‘To the extent the changes bring the court into the process * * * this is a good thing.’" This will move away from boilerplate discovery and discovery sought for tactical benefit. And Rule 26(g) already obliges requesting parties to honor proportionality. (3) A judge thought this will encourage and increase judicial involvement. Another suggested that "for judges who are actively managing discovery,this would not change the equation at all." Plaintiff and defense attorneys agreed that increased judicial engagement is a good thing that changes for the better how the attorneys approach a case. "Unfortunately there was also agreement that active judicial engagement was the exception." (4) Some participants thought a different phrase should be substituted for proportionality: "relevant to any party’s claim or defense and consistent with the needs of the case, considering * * *." (5) There was broad support for moving "the amount in

controversy" further down the list; some suggested that if it is removed entirely, "the resources of the parties" also should be removed. (6) A broader proposal was to tie proportionality analysis to the stage of discovery. Discovery could be staged, with initial discovery focused on what is needed for settlement, then on motions for summary judgment and responses.

494, Charles R. Ragan: Participated in the IAALS conference, and proposes the substitution of "consistent with the needs of the case" for "proportionality."

499, Beth Thornburg: Proportionality, subject-matter discovery, and "reasonably calculated" proposals are addressed together (along with the proposed numerical limits). (1) Empirical studies show that discovery works well in most cases; the problems are confined to 5%, or at most 10% of all cases. High stakes cases, complex cases, and contentious litigators will continue to arise no matter what is done with the rules. If large firms and hourly billing continue, that impetus to costly discovery also will remain. Nor is it shown that high costs in these "worrisome" cases are too high as a normative matter. (2) Across-the-board changes are not likely to succeed. More focused reform, based on empirical study of the problem cases, is more likely to succeed. Account should be taken of a study indicating that plaintiffs tend to use discovery to explore the fundamentals of a case, while defendants tend to believe in a more retaliatory model. Past attempts to cabin the problems of the atypical cases have failed. So it is quite unlikely that complex cases will be limited to 5 depositions or 15 interrogatories. (3) Forces outside the procedure rules will persist. Reasonable cooperation is "devilishly difficult to mandate." Many common types of cases "are particularly polarized," and lawyers come to identify with their clients and see only one side. There is a "dramatic lack of trust," and even a feeling of entitlement to use whatever strategies might be necessary to thwart opponents. Small wonder that more judicial involvement is what is most requested by lawyers on both sides of the docket. (4) The proposals will create new problems. Eliminating "subject matter" discovery leaves an unclear claim-or-defense scope that may be infected by arguments that, just as for pleading under Twombly and Iqbal, "conclusions" do not count in defining the claims or defenses. The uncertainty will be magnified by eliminating the "reasonably calculated" language and incorporating proportionality. (5) The result of all of this will inappropriately limit the exchange of information. (6) There is a particular risk that moving proportionality into (b)(1) will lead to a result not intended, imposing the burden of justifying discovery on the requesting party. At the least the Committee Note should make it clear that this is not intended. It would be better to cast proportionality as a defense in the rule text: discovery extends to anything relevant to claim or defense "unless the party opposing discovery proves that the requested discovery is not proportional to the needs of the case, considering * * *."

519, J. David Stradley: In a bad-faith settlement claim against an insurer, discovery of the adjuster's personnel file showed he had been promoted for using "the low and slow method of negotiating," the very wrong claimed. That discovery would not be allowed under the proposal.

520, Ron Elsberry & Linda D. Kilb, for Disability Rights California and Disability Rights Education & Defense Fund: Advances the arguments generally made by civil rights plaintiffs, taking the perspective of disability discrimination actions. In commenting on "the parties' resources," it notes that it often litigates against municipal defendants. What counts as the defendant's resources? The amount budgeted for this action? The amount budgeted for the particular facility or program at issue? The entity's entire budget? These budgets result from political decisions.

524, Joel S. Neckers: Class action plaintiff lawyers have an incentive to propound needless discovery to run up the hours they can claim in attorney fees.

525, Victor M. Glasberg: For plaintiffs' civil rights litigation, proportionality "would have to take into account the life circumstances of the plaintiff and what success would mean to him or her."

528, James Ragan: The problem is that defendants produce thousands of pages of irrelevant documents and either object to producing relevant documents or hide them in the tens of thousands of others.

566, David Addleton: "Proportionality, if considered at all, ought to focus on disparities in power and economic resources between litigants and operate to handicap rich and powerful litigants to level the playing field in our courts * * *."

579, Chet Roberts: To further overcome the gross abuse of justice fostered by current discovery standards, proportionality should require that the benefit of the discovery substantially outweighs its burden or expense.

599, Bradford A. Berenson for General Electric Company: The comment provides specific case examples of multi-million dollar discovery expenses. In civil discovery, "boiling the ocean is the norm." The company's adversaries drive up discovery costs to exert settlement pressure; they cast a very broad net in hopes of supporting a claim of spoliation or discovery misconduct, particularly when their case is weak on the merits; and, since requests carry no marginal cost, they hope for an offchance of discovering something that may have some marginal use. The scope contrasts markedly with the scope of inquiry undertaken in internal investigations, where the company does only what it needs to answer an important legal question for its own internal purposes. That is sharply focused, quick, and inexpensive. The proposed Rule 26(b)(1) revisions will not bring a tradeoff of "just" disposition for "speedy and inexpensive" disposition; to the contrary, they will advance just dispositions and reduce cost and delay. The present scope of discovery is counterproductive. In addition, the change will further the purposes of proposed Rule 37(e) to reduce the pressures to over-preserve.

609, Stephen D. Phillips and John D. Cooney for Illinois Trial Lawyers Assn.: Similar to the concerns expressed by many comments that fear disadvantages to plaintiffs and advantage to defendants.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Endorses the proportionality proposal. Making this part of the scope of discovery, not a mere limitation, "is a significant change in theory and practice." "Relocation * * * underscores the obligation on the part of the discovery proponent to tailor its demands to the needs of the case, and squarely places the burden of defending the scope of those demands on the proponent rather than the recipient."

622, Helen Hershkoff, Adam N. Steinman, Lonny Hoffman, Elizabeth M. Schneider, Alexander A. Reinert, and David L. Shapiro: There is no showing that lawyers or judges fail to read past (b)(1) to find present (b)(2)(C)(iii). The parties are required to observe these requirements now through Rule 26(g); there is no need to highlight them by relocating them. The amendment creates a risk that the present language will be read more restrictively, and will be misinterpreted to place on the requesting party the burden of showing the request is not unduly burdensome. This risk arises precisely because the factors are already established and familiar; that is why so many of the comments perceive the change as one that makes the overall discovery standard more restrictive than it currently is. An alternative would be to suggest discussion of the proportionality factors at the 26(f) conference. 2078, Judith Resnik for 170 added law professors: supporting this comment.

650, Craig Miller: Proportionality should not apply to oral depositions; it will only lead to stonewalling, refusals to answer questions, and motions.

673, Don Bivens for 22 more "individual members of the Leadership of the American Bar Association Section of Litigation": Favors narrowing the scope of discovery, including moving the proportionality factors.

677, Noah G. Purcell for Washington State Attorney General's Office: Strongly supports proportionality. "The state is particularly vulnerable to overreaching discovery demands by opponents due to the state's huge ESI repositories. Private parties often erroneously assume the state has unlimited financial resources to respond to discovery."

720, Phillip Robinson: It is unfair to limit discovery by a plaintiff who did not elect a federal forum, but got there by removal. The list of factors should be revised: "considering the amount in controversy and which party sought the federal forum."

729, Stephen B. Burbank: A major change of course is likely from "the proposal to transmogrify proportionality from a limitation on the discovery of relevant evidence to be raised by a party objecting to discovery or by the court itself — its status since 1983 — into an integral part of the scope definition." The argument that this will not change the burden in discovery disputes is fallacious. Given Rule 26(g), courts now presume the legitimacy of discovery requests and the burden is on the opposing party to demonstrate the opposite. The change will not only increase transaction costs. It also may prevent a party, because of the transaction costs of discovery disputes, from securing discovery necessary to its claims or defenses. Those who discount these risks reflect "inattention to the incentives that drive litigation behavior and the effect that those incentives have on transaction costs." Proportionality will replace burdensomeness as the preferred objection. And this is exacerbated by moving proportionality to the scope of discovery — now it is likely to be faced after discovery is well advanced, so the judge has an informational basis for making the determination. When it is part of the scope of discovery, the judge will be called in at the outset, when there is no sufficient informational basis to make an informed decision.

787, Richard Wynkoop: "Colorado has been under a pilot project for a couple years now that ties proportionality to discovery. It doesn't work. Rather than streamlining litigation it increases it because 'proportionality' has no definition."

799, Mark S. Mandell: "Cases are not static. They exist and develop in a continuum of understanding." Proportionality will impede the flow of information that will redefine the proper scope of discovery, wearing down plaintiffs and hiding relevant information.

850, Henry Butler for Law and Economics Center, George Mason University School of Law: Reports on a survey of 357 state and federal judges conducted in January, 2014. The responses show that the reforms needed to respond to the explosion of discoverable material "has already begun organically, as three-quarters of the judges have started taking costs into account at least some of the time when ruling on discovery issues. However, the judges are looking for more guidance and further codification in the Federal Rules of Civil Procedure * * *."

915, Andy Vickery: "Unlike most of my colleagues in the plaintiff's bar, I do not view" proportionality "as necessarily draconian. In this, as in most civil justice matters, it depends on the judgment and discretion of the trial judge."

916, Steve Garner: "Imagine writing an appellate brief about a case you were not involved in, without benefit of the record, the testimony or any of the exhibits. That is the burden this rule would place on the party seeking discovery."

922, Pamela Davis for Google Inc.: "The positive impact of proportionality and cost-shifting are already palpable in those district courts that have employed similar measures to control the scope and expense of discovery." Examples are those courts that apply the e-discovery model order created by the Federal Circuit advisory committee.

933, Jennifer Mathis for David L. Bazelon Center for Mental Health Law (and others): Although these considerations must be taken into account under Rule 26(b)(2)(C), "having the party from whom discovery is sought make these determinations is very likely to frustrate legitimate discovery."

934, Hon. Anna J. Brown: Experience from 22 years as a trial judge, 15 as a federal judge, gives great concern over the proportionality proposal. It is wholly unnecessary in light of existing authority to control discovery under Rule 16 and 26(c). And it "will undoubtedly spawn needless, expensive, and time-consuming satellite litigation."

995, William P. Fedullo for Philadelphia Bar Assn.: Opposes the proposal. It will deny discovery in cases where counsel consciously overreach under the current rule. (1) The FJC findings that discovery ordinarily is proportional reflects what happens when counsel act in good faith and courts diligently exercise oversight and authority. The rule is addressed only to the uncooperative minority, who might better be controlled by encouraging stricter enforcement of the rule against speaking objections, and by requiring greater clarity in responses to interrogatories and document requests. (2) Much current concern reflects discovery of ESI. It arises from the distrust engendered when a producing party refuses to disclose the means used to search ESI. That problem could be addressed by requiring open discussion prior to production, or disclosure of the means of search with the production, or instructing courts that work-product protection should be narrowly construed in this setting. (3) Summary procedures for resolving discovery disputes are effective — frequent status conferences, pre-motion hearings, submission by brief letters. (4) The small minority of lawyers who create problems should be discouraged by being held to public account; courts should be encouraged to threaten or impose sanctions more frequently than they have in the past. (5) The concept of proportionality is not a standard; it is vague, and will be applied differently by different courts.

1025, Senator Jeff Merkley, Senator Ron Wyden: Proportionality "would risk denying * * * harmed persons access to the documentary proof needed to develop their judicial case * * *." "Civil rights litigants will be particularly hampered by these changes," given the "severe imbalances in access to relevant information. A proportionality standard would only widen the gap between the party who controls the information and the one who needs access to it to pursue justice." And it shifts the burden of production to plaintiffs, entirely upending the system of discovery. A defendant need only object that a request is proportional to force a plaintiff to show that its request meets the proportionality tests.

1028, J. Brad DeBry: The 2011 Utah move to proportionality "has not accomplished its aims, it has made litigation more difficult and expensive, and it has caused a host of ancillary litigation and disputes * * *. To the fullest extent possible, we try and stipulate around the new rule changes because of the burden and lack of effective discovery." Any adoption of proportionality for the federal rules should be postponed for a few years to study the effects in other jurisdictions that have tried similar schemes.

1054, Assn. of Bar of the City of New York: A majority approves adding proportionality and moving the factors to (b)(1). This change is appropriate in light of the substantial increases in discovery, both of ESI and of other forms of information. Properly applied, the principle can aid individual and small-firm litigants as well as large entities. The move from (b)(2)(C)(iii) will make it clear that proportionality applies to initial demands. But the Committee Note should make clear that the amendment does not shift the burden of proving proportionality; that the rule is not intended to shift the playing field in favor of one set of parties or against others; that it is not intended to effect an across-the-board reduction in the scope of discovery, and that in many cases the amendment will have no effect at all; that the amendment is designed for the distinct minority of cases where proportionality is not already being applied in practice. It also should be made clear that all factors must be considered, not only the amount in controversy, and that initial proportionality calculations are subject to recalculation as the case progresses.

1107, Jacob Inwald for Legal Services NYC: Fears that proportionality "will create a presumption that cases brought on behalf of low income individuals and groups, although they may have very substantial impacts on the lives of the plaintiffs and involve complex legal and factual issues, may be deemed undeserving of thorough discovery simply because the monetary sums in controversy are modest * * *."

1127, Hon. John Conyers, Jr., for 12 House Judiciary Committee Democratic Members: The discovery proposals may preclude plaintiffs with meritorious claims from having access to justice. More often than not, the parties have asymmetrical access to relevant information. The barriers to access have already been raised by Supreme Court rulings on arbitration, class certification, and heightened pleading. The proportionality factor has been opposed by a broad cross-section of well-respected public interest organizations: "This fact alone should warrant a reexamination." Proportionality, moreover, has an overwhelming substantive impact if it is made an independent limitation on the scope of discovery. The problem is exacerbated by several of the factors — many important rights are hard to value in dollars, and the difficulty is compounded when considering injunctive relief; the importance of the issues is highly subjective; and it is difficult to weigh cost and burden early in the discovery process.

1147, Joseph D. Garrison: Plaintiffs oppose the proportionality proposal because they perceive that proportionality will impose no limits on discovery in mega cases, while cutting off discovery needed by individual plaintiffs to establish claims of low dollar value. It is difficult to define proportionality through the proposed factors. "The definition of proportionality which has been part of the Rules for years has perhaps been so widely overlooked because its definition is so subjective. To elevate it to the position of importance that it will have, i.e., the equivalent of relevance, with almost complete absence of empirical data verifying what it actually means, is an elevation too soon." Empirical investigation is important, and it must be sophisticated. If proportionality works in Utah and Colorado, it may not work elsewhere. In Connecticut, "the plaintiff and management employment bar * * * is closely knit and cooperative, but I regret to say that when a large New York City firm represents a defendant in Connecticut, the culture of cooperation changes to a much more adversarial process." It may be better to explore the possibilities of improving cooperation, "by Rule if possible."

1157, Edward H. Rippey for Covington & Burling: Supports proportionality, but urges deletion of "the parties' resources." "[W]e believe that discovery limits should apply equally to litigants regardless of real or apparent wealth. Litigation between parties with grossly asymmetric means should not give rise to overly broad and unduly burdensome discovery requests simply because one of the parties has sufficient means to subsidize the other's requests." (The meaning of this is uncertain: it seems to suggest that a poor party should not be able to have discovery that would

be allowed a wealthy party; perhaps the implication is that a poor party should not be allowed to impose the costs of discovery on an adversary when a wealthier party would be allowed the same discovery only on paying part of all of the costs of responding.)

1204, Utah Supreme Court Committee on the Civil Rules of Procedure: For two years, the Utah rules have required proportionality in discovery. They begin with expanded initial disclosures that are subject to a continuing duty to supplement: disclose a brief summary of the expected testimony of each fact witness, and a copy of each document, the party may offer in its case-in-chief. Then cases are assigned to one of three tiers, with different presumptive limits for discovery. Tier 1, in which all parties' claims for damages are $50,000 or less, allow 3 hours for all fact depositions, no interrogatories, 5 requests to produce, 5 requests to admit, and 120 days to complete discovery. Tier 2, for cases between $50,000 and $300,000 (and also cases seeking only injunctive relief) have 15 total fact deposition hours, 10 interrogatories, 10 requests to produce, 10 requests to admit, and 180 days to complete discovery. Tier 3 cases have 30 total fact deposition hours, 20 interrogatories, 20 requests to produce, 20 requests to admit, and 310 days to complete discovery. The factors that bear on proportionality are similar to those in proposed Federal Rule 26(b)(1), adding — to address asymmetric information cases — "taking into account the parties' relative access to the information." The Utah rule states that the party seeking discovery always has the burden of showing proportionality and relevance, but in practical effect this "is really a designation of who goes first." There is an expedited process to resolve discovery disputes; most are decided quickly on letter briefing and with a telephone conference. The National Center for State Courts has done three surveys of Utah attorneys. Many are reserving judgment, but a growing number believe the reform is having its intended effect. Adoption of similar principles in the Federal Rules would encourage other states to move in the same direction — and many states are currently considering discovery reform.

1220, Nancy Gertner, for Legal Momentum (formerly NOW Legal Defense and Education Fund): Whatever the Committee intends, moving proportionality from (b)(2) to (b)(1) will convey a message that the party requesting discovery has the burden of justifying it. Civil rights cases have not involved abuses of discovery. But the defendants hold all the information. The rationale for the proposal is identical to the rationale for Twombly and Iqbal -- to reduce the transaction costs of litigation for defendants who have done no wrong, while ignoring the obstacles placed in the paths of plaintiffs who have been wronged. Defendants in employment cases have been extraordinarily successful in winning summary judgment. And with discovery now limited to "plausible" claims, matters will only get worse. The proportionality test will require the court to make judgments at a time when few if any judges fully understand the merits of the case.

1263, ARMA International: ARMA is an association of more than 27,000 professionals engaged in records and information management. The comment mostly addresses preservation. "A core principle of information governance is that documents have a life cycle." The introduction of proportionality to Rule 26(b)(1), eliminating subject-matter discovery, and eliminating the "reasonably calculated" provision, will all indirectly ease the burdens of over-preservation. The scope of preservation, for example, has been tied to the possibility of subject-matter discovery. So of "reasonably calculated." "When practically any piece of information could be considered 'relevant,' a records manager is left second-guessing otherwise reasonable and efficient data retention policies." "At its heart, proportionality is about 'value and cost,' something that is intrinsic to information governance and records managers."

1290, Michelle C. Harrell, for State Bar of Michigan Committee on United States Courts: Concurs in establishing proportionality as the standard. But suggests that if a request is unduly

burdensome, the court should not simply forbid the discovery. Instead, it should consider conditions that would allow the discovery to proceed, including a condition that the requesting party pay part or all of the costs of production.

1294, Stephen Watters for National Association of Manufacturers: Strongly supports proportionality and the factors. Also supports deletion of the "reasonably calculated" provision.

1339, Sandy D. McDade for Weyerhaeuser Co.: Strongly supports moving proportionality into (b)(1). The parties should have the initial responsibility to consider proportionality — "The court's resources are too precious, and the detailed decisions required for proper ESI preservation too numerous, to have a court undertake these tasks on the motion of a party." Proportionality, moreover, arises in confronting the duty to preserve information before any litigation is filed, "far ahead of the actual discovery phase of a case." The present rule, focusing on action by the court, has no positive impact on these preservation decisions.

1356, Catherine C. Carr for Community Legal Services of Philadelphia: Vigorously opposes the proportionality language, expressing concern that "the 'amount in controversy' is likely to be the one most frequently relied on, and is therefore the most dangerous." Legal Services cases typically involve quite low amounts in controversy. "Yet the issues are of paramount importance to our clients — whether they can save their homes, or their jobs, or have enough money to survive."

1360, Evan S. Stolove for Fannie Mae: Approves deleting the "reasonably calculated" and "subject-matter" provisions, and moving proportionality into Rule 26(b)(1). The proportionality element "would require the responding party to come forward with sufficient facts to show that requested discovery does not violate the proportionality test."

1366, corrected in 1388 Jonathan Marcus for CFTC: The "parties' resources" factor could impede civil prosecutions. "Individuals who orchestrated Ponzi schemes, for example, often have few resources because they have lost substantial money (their own as well as their customers'). This asymmetry of resources should not serve as a barrier to the CFTC's ability to engage in discovery." (A reminder that at times a plaintiff sues a defendant who lacks resources to respond to a money judgment.)

1368, Hon. Donald W. Molloy: "Our district is a trial court. We are not an administrative court predicated on disposition of cases by motion practice." The proposals will inevitably shift trial "to an administrative process," first on the pleadings, then to challenges to proportionality in discovery, then to a challenge to experts, and finally to summary judgment. "The latest amendments create an even greater paradigm shift than did the 1993 and 2000 amendments to the civil rules, a shift that seems to have a purpose to push litigation back into the dark ages of ambush and arcane procedure * * *."

1376, Hon. Charles E. Schumer: This comment springs from a hearing before the Senate Judiciary Subcommittee on Bankruptcy and the Courts. The rules have been amended five times since 1980 in an effort to curb perceived discovery abuses, but seem to have failed. Is there any reason to believe that another amendment will succeed? It may be better to encourage judges to take a more active role in limiting discovery. The factors identified in considering proportionality "include some level of subjectivity, at best, and are weighted towards the defendant, at worst." As Judge Scheindlin has commented, the result will be to encourage defendants to withhold information on the basis of a unilateral determination of proportionality. That forces a plaintiff to move to compel, from the untenable position of having to prove the

importance of material she has not seen. The inexorable result will be a shift in the burden of production, and not just a barrier to entry but what Professor Miller calls a stop sign. Civil rights cases may face the greatest threat of unwarranted roadblocks because they often involve relatively small amounts of money; the importance of the issues may be overlooked. Contingent-fee attorneys may not be able to afford motions to compel. Proportionality may exacerbate the Catch-22 created by the *Twombly* and *Iqbal* decisions — discovery is needed to plead the case, and the ability to get discovery will be subjected to the five-part proportionality test in almost every case.

1411, Jerome Wesevich for Texas RioGrande Legal Aid (and many additional Legal Aid organizations): "The Committee should be much more specific about when it expects small amounts in controversy to be decided on less than full discovery." "[A] valid $10,000 claim should always justify $50,000 in discovery costs." And the costs need not be $50,000. It is the defendant's choice to hire a $500 per-hour lawyer rather than a $100 per-hour lawyer. Defendants pay for luxuries we cannot afford, such as real-time transcript screens. They pay third-party vendors to scan and recognize text in their documents; we do that ourselves. Defendants control the costs of discovery because they have most of the information to be discovered. The Committee should consider adding a statement to the Committee Note for Rule 1, recognizing that the new limits on discovery are based on the expectation that litigants will cooperate in an honest effort to ensure that all information needed to decide cases is available to the parties. (This comment is endorsed by 1560, Arthur N. Read for Friends of Farmworkers, Inc.)

1434, Su Ming Yeh for Pennsylvania Institutional Law Project: "The scope of discovery on the 'importance of the issues at stake' could be problematic due to the unpopularity of our [inmate] clients."

1437, Dimple Chaudhary for Natural Resources Defense Council: Proportionality may require NRDC "to prove or refute arguments about the value of the environmental and public health protections it seeks to uphold, which are often difficult to monetize."

1451, Michael Buddendeck for American Institute of Certified Public Accountants: Adding teeth to the current proportionality requirement "is consistent with the recommendations of multiple commentators and legal analysts." And it is also desirable to eliminate subject-matter discovery and the "reasonably calculated" provision.

1453, Timothy C. Bailey: "I can find no legal precedent that the cost of the truth preempts the discovery of the truth."

1512, Jeanette Zelhof for LEAP: The perspective is that of "a legal advocacy network comprised of ten direct civil legal services providers in New York City." They strongly oppose proportionality, for fear of the impact on all of their cases, which typically involve either very low money claims or injunctive relief only.

1527, Ross Pulkrabek: Experience with proportionality in the Colorado pilot project persuades him to oppose the proposal. A responding party can get away with repeated objections, forcing needless work; judges are reluctant to impose sanctions for this. Some Colorado lawyers like the pilot project rules, but these rules include features missing from the federal rules that help, including mandatory and early initial disclosures, comprehensive expert disclosures, and a ban on expert depositions.

1535, Valerie M. Nannery & Andre M. Mura for Center for Constitutional Litigation: Details the familiar arguments against the proportionality proposal, and proposes that proportionality be left where it is in Rule 26(b)(2)(C)(iii), while making it "part of judicial management by explicitly referencing it in Rule 16. This would foster early attention to the concept of proportionality."

1540, Benjamin R. Barnett & Eric W. Snapp: Supports proportionality, but urges that "the parties' resources" be eliminated. This factor bears on burden as it now appears in 26)(b)(2)(C)(iii), but it does not fit a proportionality calculation — it might imply that more discovery is permitted against a wealthy party.

1554, Lawrence S. Kahn for City of New York, City of Chicago, City of Houston, and International Municipal Lawyers Assn.: Supports proportionality. New York "has approximately 1,700 open cases in federal district court alone." "e-discovery is extremely expensive." "Courts generally see municipalities as 'deep pockets' despite myriad demands on their budgets." In practice, the balance "has often tilted in favor of more (expensive) discovery in the chimerical hope that it will be of significant benefit to the merits." Proportionality will "strik[e] a realistic balance between the needs of a given case and the parties' resources."

1567, Eric Angel, Chinh Q. Le, & Christopher Bates for Legal Aid Socy. of D.C.: In small-dollar cases, proportionality could raise undue limits on discovery in actions against "government agencies with staffing or budget constraints." They might credibly argue that even a small request for documents imposes undue burden or expense, requiring Legal Aid to justify the request.

1572, Hon. Dennis James Hubel: Rule 26 gives all the discretion a magistrate judge needs to embrace and enforce proportionality. It is wrong to shift it to (b)(1) because the shift will suggest to lawyers a major sea change in discovery, generating substantial litigation while they feel their way along the new rule.

1585, Dante A. Stella: This comment devotes 5 pages to Rule 26(b) that are too rich to summarize in fewer than 4 pages. There is extensive discussion of "discovery on discovery," related to "meta discovery." It is urged that the rule text should explicitly address phased discovery as a partial solution to excessive "pro forma" discovery. Shortcomings in technology assisted review mean that it is not a cure-all for the expenses of discovery. Eliminating "subject-matter" discovery and moving proportionality into Rule 26(b)(1) are applauded.

1588, Leigh Ferrin for Public Law Center: Proportionality will complicate every discovery motion, making matters even more difficult for pro se litigants who will be hard-put to articulate the reasons that make their requests proportional.

1594, Richard R. Burke for Utah Assn. for Justice: Urges that experience with the Utah discovery rules adopted in 2011 should not be taken as a guide to federal discovery. The proportionality requirement is set into a 3-tier system. The limits on discovery are so tight that counsel routinely stipulate around them, even in face of uncertainty whether they have authority to do that. Utah explicitly imposes on the requesting party the burden of establishing proportionality; absent clear language to the contrary, the proposed federal rule might be read this way.

1597, Laura Zubulake: As plaintiff in the Zubulake case, reminds the Committee that an individual inspired the case that established the standards for e-discovery. "Limiting depositions, requestor party pay, and proportionality (depending on how it is handled) have the potential to

make it more difficult for individuals to pursue justice."

1608, Jonathan M. Redgrave: "[U]niform application of proportionality is a key missing ingredient to the realization of the promise of Rule 1 * * *." Enhancing proportionality is not an inherent benefit to defendants. "Proportionality, when properly understood, is the holistic understanding of what a case 'means' and the tailoring of the discovery scope to address the needs of that case." Judge Scheindlin "has shed critical light on the need for *the parties* to take initial ownership of the proportionality dialogue." Often the parties fail to provide sufficient grounds for the court to divine a fair resolution. Proportionality "will indeed require greater attention by the parties, more work by their counsel and more case management by the district court at the beginning of a matter. But more work at the outset of the case can yield far greater dividends * * *." The parties must make an effort to have early discussions and resolutions of disputes in terms of relevance and proportionality.

1614, Lea Malani Bays, Tor Gronborg for Robbins Geller Rudman & Dowd LLP: Rule 26(b)(2)(B)(iii) is being utilized. It has been cited in more than 100 opinions in the last 6 months. "In our experience, almost every conversation with opposing counsel regarding discovery issues includes a discussion about the burdens of the proposed discovery and how to minimize those burdens." ESI has not increased the burdens; "the parties should be incentivized to utilize the available tools to more efficiently manage ESI," including many computer-based tools. The proposal will "encourage producing parties to overstate their burdens and strong-arm unilateral decisions regarding search methodology to arbitrarily limit the scope of discovery." Proportionality will be interpreted as effectively shifting the burden to the requesting party — "Any amendment should not reward or encourage blanket and unsupported assertions of burden, but encourage parties to engage in cooperative problem solving on how to expedite discovery." Nor will amending Rule 34 to require specifically stated objections cure the problem — specificity is not likely to reach the necessary details of the burden associated with each request, including information about electronic systems and data resources. The current rule is working. But if proportionality is to be adopted, it should include language to clarify that the burdens have not been shifted and to require the producing party to provide adequate information about the burdens of responding. And it should be made clear that a party's decision to maintain a disorganized system should not become a basis to limit discovery.

1615, Daniel Pariser, Michael Rubin, Sharon Taylor, Joseph Barber: "The concept of proportionality is critical to restoring a balanced approach to discovery." We frequently face "all documents" requests designed as a deliberate effort to pressure our clients to settle. But the Note should make clear that a high demand for damages does not automatically justify costly discovery — the amount in controversy informs the balance of cost and benefit, but is not the only concern.

1634, Ben E. Dupre: Consumer protection cases involve no physical injuries, no real damage. The factors will be used to deny discovery that is essential to expose "the lies, the cheating, and the stealing" business practices that affect many beyond the plaintiff.

1680, Patrick Oot: Illustrates vendor costs for ESI discovery services. Research "reveals great variance in both cost and responsiveness." We need much more emphasis on the reasonable inquiry certification standard under Rule 26(g). "Requesting parties have far too much adversarial oversight into the discovery practices of the producing party, and are demanding a close-to-perfection standard of performance in discovery when the actual standard is a reasonable inquiry. Reasonableness is far from perfection." Requests, responses, and court orders that demand "every and all" documents be produced "completely and entirely" are a matter of

concern.

1685, Stewart W. Fisher & Carlos E. Mahoney: "We also expect governmental and corporate entities to use the proportionality standard to resist depositions of elected officials and corporate officers."

1703, Hon. Michael H. Simon: Applauded Rule 26(b)(2)(C)(iii) proportionality when it was first added, and has applied it when ruling on discovery disputes. It should be available only on motion by a party or on the court's own action. Moving it to the scope of discovery opens the door to responses that purport to be complete but that omit relevant and potentially damaging information because the responding party has made a unilateral determination that full discovery is not proportional to the needs of the case.

1726, M. Megan O'Malley: "[M]aking proportionality a condition to even obtaining discovery goes against the very principles and values of our judicial system."

1878, Roger L. Mandel: The proportionality approach may violate the Rules Enabling Act. Congress has created rights and conferred federal jurisdiction without imposing any amount-in-controversy limit. This proposal "allows courts to decide whether certain cases over which they undisputedly have jurisdiction are 'important' enough or 'significant' enough to proceed by allowing them to prevent persons who cannot proceed without discovery from obtaining that discovery on the subjective basis that the requested discovery is not justified by the uncertain cost of discovery."

1896, Margaret L. Wu for the University of California: The University is the third largest employer in California and the fourth largest health-care provider. It supports proportionality as a means to "fairly provide the parties with the information they need to resolve a particular dispute while minimizing the waste of resources that could be better devoted to supporting the University's public and educational mission."

1906, Herbert C. Wamsley for Intellectual Property Owners Assn.: The IPO supports the proposed amendments to Rule 26(b)(1), including proportionality. "Discovery in patent infringement matters is often prohibitively expensive. Some parties (including both patent holders and accused infringers) use the threat of this expense to extract settlements in cases for reasons other than the merits of the case."

1913, National Assn. of Consumer Advocates: Defendants' motions for protective orders against burdensome requests are fairly routine in litigation over financial transactions with low-income consumers . They "are typically weighed expeditiously and with the appropriate level of care by judges." The responding party bears the burden of proving the request should be disallowed. The proposal unnecessarily shifts the burden to the party with the least information about the volume of documents involved and the costs of producing them. Worse, the proposal intentionally narrows the scope of discovery. It devalues claims that seek few dollars but involve matters of public importance and that may expose bad corporate practices and change bad corporate behavior. The importance of the issues is subjective. And the test will be applied at a time when the potential benefits of discovery cannot be assessed.

1914, Tanya Clay House for Lawyers' Committee for Civil Rights Under Law: Opposes because proportionality "(1) disproportionately affects some parties more than others, (2) overlooks the costs discovery imposes on the requesting party, and (3) ignores the non-pecuniary public benefits of civil rights litigation." So it would be wrong to allow more discovery when a highly

paid employee claims discrimination than when a poorly paid employee claims discrimination. The importance of the public interests involved in civil rights cases is reflected in many rulings that an award of attorney fees need not be proportional to the amount of the judgment.

1927, Amar D. Sarwal, Wendy Ackerman, & Evan Slavitt for Association of Corporate Counsel: Approving elimination of subject-matter discovery and the "reasonably calculated" formula, and approving proportionality, suggests that in applying proportionality "courts can and should take into account the global aspects of a case. The fact that documents and other information are maintained abroad or are not in English may justify a narrower scope of discovery * * *." Key-word searches may not as relevant in the semantics of many other languages as they are in English.

2015, Cynthia R. Wyrick, Allan F. Ramsaur, & Paul Ney for Tennessee Bar Association: "[T]he five part proportionality test provides instructions on what language to use in order to circumvent a discovery request."

2018, Justin Browne: To satisfy the proportionality factors — to show the importance of the issues, the importance of the discovery, and the benefit of discovery — the requesting party will be forced to explain why they need what they need, giving opposing counsel critical insight into mental impressions and strategies well beyond what emerges in typical case management discussions.

2072, Federal Courts Committee, New York County Lawyers' Assn.: Approves. Proportionality is already utilized by many courts.

2073, John Sadwith for Colorado Trial Lawyers Assn.: Opposes the proportionality proposal. Some members would support it because they favor the Colorado Pilot Project rules. But there are important differences. The Colorado Project requires mandatory initial disclosures 21 days after filing a pleading; that allows for early identification of issues and any deficiencies in discovery. It also helps to counteract the negative aspects of the proportionality standard. In addition, the Pilot Project requires comprehensive expert disclosures and prohibits expert depositions, significantly reducing costs and delay.

2109, Hon. Marcia L. Fudge, Hon. G.K. Butterfield, Hon. Terri Sewell, Hon. Cedric Richmond, members of the Congressional Black Caucus: The civil rules were adopted in 1938 to provide access to the courts. The proposed amendments will limit access by civil rights litigants; "[r]obust discovery is especially vital in civil rights cases as a defendant holds most or all of the evidence * * *." The proportionality requirement will shift the discovery process "from one intended to give injured parties access to justice to one that would allow defendants to avoid producing critical and relevant information * * *. Defendants would be able to hide behind the excuse of 'burden' and withhold documents that are critical to the plaintiff's case." Proportionality reviews will inevitably lead to disputes that waste the time and resources of both parties and the court.

2110, Miriam Hallbauer & Richard Wheelock for LAF: (Noted because, as a group devoted to representing or assisting disadvantaged persons, they agree with several of the proposals. Not all:) Proportionality has the potential to arbitrarily decrease discovery in civil rights cases. It may devalue the importance of the rights claimed by persons whose personal damages are small, and also in cases seeking only injunctive or declaratory relief.

2146, John J. Rosenthal: (1) A materiality standard should be added. "[R]elevancy alone can no

longer be the standard, as there is simply too much information available, and the costs of discovering such information is negatively impacting parties (of all sizes) ability to prosecute and defend actions. Proportionality must become more central in defining the scope of information subject to preservation and discovery." (2) "Preservation" should be added to the preamble to Rule 26(b)(2)(C) and to (b)(2)(C)(i), so as to authorize a court to limit preservation that is unreasonably cumulative, duplicative, etc.

2155, Patti Goldman for Earthjustice: Add environmental protection plaintiffs to the lists of those who fear the Rule 26(b)(1) and (c) proposals.

2197, Scott C. LaBarre, for the Disability Rights Bar Assn.: The proposed changes in Rule 26(b)(1) "have the potential, if adopted, to prevent the effective enforcement of important rights of our most underserved citizens."

2205, David E. Hutchinson: A new "consideration" should be added for determining proportionality: "whether the discovery or preservation at issue involves a reasonably tailored protocol on the available technologies for data management and the volume of data covered."

2229, David J. Beck (former member of Standing Committee): Strongly supports the proportionality proposal.

2336, Michael R. Boorman: Similar to quite a few comments that approve proportionality as a means of curtailing "exploitation by discovery," including "discovery on discovery" -- "our opponents interrupt the pursuit of relevant facts in order to attack a defendant's *process* for responding to discovery requests (rather than the *outcome* of that process) in order to uncover a purported basis for a motion for sanctions due to some contrived deficiency in that process."

November Hearing, Jack B. McCowan: pp. 8-14: (Represents defendants in product-liability actions, and a board member of DRI.) Discovery costs drive settlement. Adopting proportionality will help to reduce discovery costs; although the concept is in the rules now, courts continue to issue orders that are too broad. It is important to also revise the "reasonably calculated" provision.

November Hearing, Jeana M. Littrell: p. 15 ff: The criteria of proportionality are embodied in present Rule 26(b)(2)(C)(iii) and (g). The requesting party now has the burden to ensure and certify that requests are proportional. Moving this to the most prominent part of the rule is the best way to educate judges and litigants. The emphasis on proportionality will become increasingly important as there is more and more "discovery on discovery" — even before beginning discovery on the merits, parties seek extensive information about information systems and details of preservation capabilities and efforts. Typically this discovery is disproportionate. Nor will this disadvantage plaintiffs in employment discrimination cases — they must first take a claim to the EEOC, which has investigative powers and subpoena powers far broader than civil discovery. The argument that the change will shift the burden of showing proportionality to the requesting party misses the mark — Rule 26(g) imposes that responsibility now.

November hearing, John C.S. Pierce p. 22, ff: As chair of DRI trial tactics committee, favors the right to jury trial. Expensive discovery often forces settlement of cases that should go to trial. Proportionality is a good concept. "How much are we willing to spend to find needles in haystacks, these peripheral, marginal facts that really don't bear on the substance of a case"?

November Hearing, Altom M. Maglio: p 29 "Almost every discovery request will require a hearing on proportionality." Defendants make proportionality objections now by the often default response that a request is overly burdensome. The defendant has to explain why it is burdensome. By shifting the proportionality calculation from a limit on discovery to the scope of discovery, the new rule will require the plaintiff to explain why the request is not overly burdensome to the defendant — and the plaintiff can do that only by having discovery on discovery. This process will create a perverse incentive for a defendant to make it as burdensome as possible to locate and collect potentially incriminating information.

November Hearing, David R. Cohen: p 32 Trials are disappearing. "[T]he main reason is the expense, and the main driver of expense is the cost of discovery." Cases settle "because the discovery costs are out of proportion. It's not about the merits anymore." My practice group has 65 attorneys devoted to discovery. Our experience reflects the surveys — less than 0.1% of the documents we produce are typically used as exhibits in depositions or trials. My firm has invested in predictive coding technology, but "we frequently can't use it because we can't get the other side to agree." When there are many related cases pending in different courts, we often do not try to get agreement because we know we cannot get it from that many counsel and judges. "Plaintiffs have very little incentive to agree to that technology if it's going to reduce the burden on the defendant because they know that this is great leverage for them * * * and that leads to settlements." Proportionality is already there in Rule 26(g), "but all of us practicing know that most courts ignore it. Moving it to 26(b)(1) is going to get folks' attention."

November Hearing, Paul D. Carrington: p 56 The Competitiveness Commission wanted to get rid of Rules 26 through 37 "because it costs a whole lot of money, and it makes American business less profitable, and consequently we can't compete as well in the international global market." p 63: the underlying purpose seemed to be "to make American business more competitive by protecting it from liability."

The Enabling Act has its roots in the deep troubles of the American legal system at the end of the Nineteenth Century. Roscoe Pound identified the need to convince everyone their rights would be enforced. That was the purpose of the Civil Rules. Efforts to economize can jeopardize someone's interests. The cases where it seems obvious that a lot of money is wasted on discovery tend to be big cases with big enterprises on both sides. Hourly billing has contributed to this. "So the proportionality question is less of a problem than it is sometimes presented to be." We should be cautious about trying to save on discovery costs at the expense of making individual rights harder to enforce. The concern that individual plaintiffs are being denied access to federal court because of the costs of litigating, as compared to being denied access by limitations on discovery, meets "my sense * * * that the individual plaintiffs are not the ones who are complaining very much about the cost of presenting their cases or defending themselves." Apart from episodic cases, the FJC data suggest there is not a serious problem with excessive costs in civil rights cases.

The often lamented costs of discovering electronically stored information may be balanced by "the fact that the same engineering that produces the technology also produces ways of tracing and tracking and getting information out of a huge pile of documents." And document review can be outsourced overseas.

Countries succeed when ordinary citizens have a sense that they have some role, some participation, some sense of mutual commitment. The Civil Rules were designed to do precisely that.

366, Paul D. Carrington: Proportionality will weaken private enforcement of many public laws and further diminish the transparency of the judicial process.

November Hearing, Jonathan M. Redgrave: p 70 The proportionality test is present now in Rule

26(b)(2)(C)(iii) and 26(g). The current proposal "gives meaningful life to the promise of proportionality envisioned by the 1983 amendments." The 1983 effort failed for three reasons. "[P]artisan courts quite frankly ignore the proportionality factors altogether." When parties argue proportionality, they miss the point by failing to focus on the discovery device and whether it's worth the candle — they just cite to a factor. And, since there is no consistent approach, courts tend to default to the view that reversal does not follow for allowing too much discovery. The proposed changes reinforce the need to consider proportionality in every case. Proportionality is "party and position neutral. Proportionality helps those seeking discovery as much as those seeking to limit discovery. What the rule does is require lawyers to do their jobs better." It is not a new tool given to large corporations to beat down individuals. It "will help those requesting parties better translate what they need for their claims to articulate why the discovery they seek from a large entity is proportional." I agree with Professor Carrington that we need a rule set that everyone believes gives them a fair shake in court. Proportionality is consistent with this. It is infinitely elastic. If you can justify enormous discovery, you can have it.

November Hearing, Paul J. Stancil: There are two core problems with proportionality. "[I]t's unlikely in the extreme that * * * judges will be able to make any meaningful assessment of the likely value of the proposed discovery." Typically the problem will arise in cases that involve "significant informational asymmetry." The proponent of discovery will be least likely to demonstrate the likely benefit. Judges will rely on their own prior views of categories of litigation, and that is dangerous because those views are likely to be unreliable. To be sure, proportionality is required by Rule 26 now. But "it turns out to be very difficult to move judges to change behavior." The proposal "very deliberately in a very high profile way make[s] this issue of proportionality much more salient to judges and to litigants to some degree."

November Hearing, Daniel C. Hedlund for Committee to Support the Antitrust Laws: p. 101 (The statements about proportionality also apply to revising the "reasonably calculated" sentence and reducing the presumptive limits in Rules 30 and 33.) These proposals increase costs and the burden of litigation, impairing the ability of litigants to gather evidence from defendants and third parties. Plaintiffs in antitrust cases face information asymmetry. Others control information about the product, market, and alleged conduct — particularly pricefixing. This evidence is dispersed among far-flung third parties. The need for discovery is exacerbated by recent decisions that raise the barriers to class certification, requiring discovery on certification issues. And the Class Action Fairness Act brings into federal court cases that involve the laws of multiple states.

Under the present rule, a party resisting discovery as too burdensome must bear the burden of showing the burden. The proposed rule imposes a multifactor proportionality standard that will place a heavy burden on the party seeking discovery to satisfy proportionality. And proportionality is unworkable at the outset of a complex case — a party who lacks information needs discovery to show that discovery is proportional. The result is to protect larger parties who have a monopoly on information. 1166 is a text for his testimony.

November Hearing, Peter E. Strand on behalf of the Defense Research Institute: p 119 Addresses 26(b)(1) in general terms, and also by applauding revision of the "reasonably calculated" provision. The proposals should be adopted, with the modifications suggested by Lawyers for Civil Justice. We have lost focus on jury trial; today we focus on trial by litigation and trial by discovery. In patent cases, a troll comes in. They demand all documents for all time over everything you have ever done related to all your products. "[I]t will cost $10 million to produce 100 million documents. And the first thing your client says is how fast can we settle this." "By eliminating that reasonably calculated language, you are focusing the issue on what is the claim about." Another example: a Rule 30(b)(6) deposition notice regarding ESI processes. "[W]e're

going to spend $100,000 fighting about ESI discovery right off the bat."

November Hearing, Dan Troy: p 123: (General Counsel, GlaxoSmithKline): "[T]he U.S. legal system harms the U.S. competitiveness in the world marketplace." "[O]ur annual U.S. external litigation case costs have been as much as 50 times higher than our non-U.S. costs." If we can opt out of courts by ADR clauses, we do so. Courts are too expensive, too burdensome. But if we cannot get an ADR clause, we often litigate in the United Kingdom, because it is less burdensome, less costly. "[O]ften in certain kinds of complex cases, I'm a lot better off in front of a judge than I am in front of a judge and a jury." "[O]ur system is the ridicule of the world."

"The current overly broad scope of discovery * * * creates an overwhelming burden for corporate litigants and provides little evidentiary benefit to any party at trial." In one recent federal MDL we produced 1.2 million documents; 646 were included on the plaintiffs' exhibits list. The proposed changes are good, but should be strengthened by adding a materiality requirement. It is difficult to define materiality, but "we know it when we see it. * * * [It] does have a sense of there's something important as opposed to being trivial." Present Rule 26(b)(1) is interpreted to reach anything that could potentially be relevant. Would this simply make document review more costly, by adding a further layer after identifying everything that is relevant and responsive? Well, it could work by shrinking the massive amounts of information that each side is dumping on the other. Plaintiffs' lawyers do not want that much information dumped on them. It becomes a needle-in-the-haystack problem.

(In response to a question whether it would help to expand initial disclosures to require identification of information harmful to a party's position, refused to endorse any specific approach. But did urge "a much more focused approach to discovery.")

November Hearing, Burton LeBlanc, President, American Association for Justice: p 135: The proposals give defendants more tools to avoid discovery. Proportionality "shifts the discovery process from a focus on relevancy to an economic calculation." Each of the five factors will become the focus of collateral litigation. Defendants already argue burden and expense in almost every case, but codifying this factor gives the argument added credibility. And it upends incentives for defendants to preserve documents in an easily accessible format. An example is provided by a recent 6-year qui tam litigation that involved 25 fact depositions, 5 expert depositions, and the files of 350 nursing home patients to prove fraud by billing for services so deficient as to be essentially worthless. That was expensive and a burden for the defendants, but essential to prove the case. Relocating this factor will make it more complicated and challenging for plaintiffs to meet. It works to discuss proportionality in a Rule 16 conference, but it should not be emphasized by codifying it at the beginning of Rule 26.

November Hearing, Wayne B. Mason: p 142 Focuses mainly on eliminating the "reasonably calculated" language, but ties the same arguments to approving proportionality as a way of restraining massive discovery. "The proportionality, those five factors, I don't see how that increases the burden and expense to plaintiffs."

November Hearing, Darpana M. Sheth, for the Institute for Justice: p 149 Proportionality will increase disputes and litigation. It depends on "five subjective and very fact-dependent criteria." Adding materiality would make it even worse. The Institute litigates constitutional claims against governments. The government defendant will resist discovery "based on its own subjective belief that the request is not proportional to the action." Relocating proportionality shifts the burden — under the existing rule a defendant must prove a request is disproportional, while under the proposed rule a plaintiff must prove the request in fact is proportional. Although Rule 26(g) requires a requesting party to consider burden and expense, it "comes into effect where the signing the discovery requests indicates that you are aware of all these factors and

you're considering them." This means you have determined that the requests are relevant to the claims or defenses and do not trespass into discovery of the subject-matter of the litigation that is available only on court order. The revisions will invite more disputes, requiring judicial intervention. It is not clear how Rule 56(d), allowing time for more discovery before disposition of a motion for summary judgment, would work with the proposed rules — now, summary-judgment motions usually happen after discovery is closed. But it does not seem that Rule 56(d) would be an adequate safeguard, or it would come into play a lot more often.

November Hearing, Michelle D. Schwartz, Alliance for Justice: p 168: Moving proportionality up, "make[s] it so that that burden is placed on the proponent of the discovery at the outset."

November Hearing, Andrea Vaughn: p 173: Defining proportionality by the amount in controversy will put low-wage litigants at a distinct disadvantage in litigation for nonpayment of wages. This is in direct conflict with the remedial purpose of the Fair Labor Standards Act. Although this is in the present rules, moving it into the scope of discovery enables parties to resist discovery, "whereas now it would be a question for the court." Yes, litigators would agree that discovery is a collaborative process. In the District of Maryland a discovery motion must be preceded by very extensive discussion among the lawyers, and by an exchange of briefing. But the change allows defendants to resist discovery from the onset. They can do that now, but the difference is that this will make it easier to resist discovery.

November Hearing, Alexander R. Dahl (Lawyers for Civil Justice): p 191 Discovery costs too much. It is abused. Those who say they oppose proportionality are really afraid of not having proportionality. The point of proportionality is that in each case, a party requesting discovery give thought to the case and claims and confine discovery to what is related to the claims and defenses. The concern that somehow the burdens are changed by bringing proportionality into the scope of discovery is surprising. What will happen is what happens now: requests are made, they are resisted, and a motion is made either to compel or for a protective order. As a practical matter, there will be no difference.

November Hearing, Lily Fu Claffee — U.S. Chamber of Commerce: p 198 See the general discovery summary. Favors the proposed changes.

November Hearing, Stephen Z. Chertkof for Metropolitan Washington Employment Lawyers Association: p 216 The risk of proportionality is that discovery will be more limited in employment cases involving low-wage plaintiffs than in cases involving high earners. Much less discovery will translate into a higher rate of dismissal on summary judgment. And the Committee relies on statistics that show that at least 80% of all cases involve five or fewer depositions; that shows there is no serious problem with disproportionate discovery.

November Hearing, Marc E. Williams, President Lawyers for Civil Justice: p 244 Moving proportionality up to the scope of discovery will allow courts and lawyers to focus on the issue early in the case. Proportionality will not eliminate meritorious claims. It will address problems of expensive and extensive discovery at the beginning as lawyers, or lawyers and a judge, craft a discovery plan. It will reduce the use of discovery for leverage, encouraging discovery as a search for truth. This will not provide a new range of tools for objections and satellite litigation. Now, and under the rule as proposed, an objecting party is responsible to show why a request is burdensome or not proportional to the needs of the case. Ultimately, the objections will narrow the focus of the discovery, much as we do now in, for example, negotiating the scope of topics to be covered by a Rule 30(b)(6) deposition.

November Hearing, John P. Relman: p 253 Typical individual discrimination claims — housing, lending, disability, employment — involve damages of $50-60,000. The defendant will almost always say it costs more to search the e-mails, to examine the loan files, than the amount of the claim. But the discovery is essential. (An example was offered of a housing discrimination claim in which the plaintiff offered a cosigner, to prepay a second month's rent as security, then to prepay a whole year's rent. The offered reason was that they did not do that. After the court ordered discovery the files proved this was pretext — they did do that.) Moving proportionality puts the plaintiff at the mercy of the defendant — in every case the plaintiff will have to fight for the discovery, and will have the burden to show the value outweighs to cost. "I think this sets civil rights back."

November Hearing, Jonathan Smith (NAACP Legal Defense and Education Fund): p 268 Relevance now defines the scope of discovery. Limiting it by proportionality will lead to a dramatic reduction that will be particularly harmful to civil rights plaintiffs. Discrimination has become more subtle and sophisticated, so that plaintiffs face an even higher burden in relying on circumstantial evidence. Focus on the amount in controversy is particularly troubling because it will be used to minimize the significance of the civil rights cases that often do not involve large sums of money. The present rule places review for proportionality squarely in the hands of the judge, and federal judges do this job well. There are no empirical data or research showing that civil rights cases are categorically prone to exorbitant discovery costs. Nor has that been our experience. The proposal, indeed, is likely to have the unintended consequence of making discovery processes longer and more costly through greater motion practice. We rely on individual plaintiffs to enforce the civil rights laws as private attorneys general. We should not undermine that function.

November Hearing, Wendy R. Fleishman: p 273 (Speaking for New York State trial lawyers, and AAJ members involved with toxic tort, environmental tort, and product liability litigation.) There is no evidence that the proportionality mechanism in Rule 26(b)(2)(C)(iii) is ineffective. In many instances a Rule 16 conference addresses any issues of abuse of discovery. Moving proportionality into the scope of discovery will, like *Daubert*, generate a plethora of new motions and discovery disputes by encouraging defendants to make more objections. Defendants have huge amounts of money. Individual and small-business plaintiffs do not. "We cannot know the value of a piece of information until we get the information." We got the critical information in the Vioxx litigation only because the judge "used Rule 26(b)(2)(C) to control that discovery." If this becomes part of the scope of limitation, not a judge-managed device, "the plaintiffs would have to show that the information was available, that the information existed. And without doing the discovery, they couldn't show that * * *." Defendants will say it is not proportional. If such cases are aggregated through the MDL process, then "the position of power changes." But the Vioxx cases were not aggregated, and there were many small claims.

November Hearing, Patrick M. Regan: p 278 Concerns with proportionality are explained by discussing the proposal to reduce the presumptive number of depositions to five. The summary appears with Rule 30(a).

November Hearing, Wade Henderson, Leadership Conference on Civil and Human Rights: Proportionality, and the numerical limits on the numbers of requests under Rules 30, 31, 33, and 36 will have a disproportionate and unfair impact on private civil-rights plaintiffs. Congress counts on private attorneys-general to enforce the civil rights statutes. The overwhelming majority of civil-rights actions are brought by private plaintiffs. The Supreme Court has limited access to courts by recent substantive and procedural rulings. "[I]nformation asymmetry requires discovery rules that rectify these imbalances, not exacerbate them." The crisis facing the federal

judiciary would be better approached by confirming pending judicial nominees.

November Hearing, Jane Dolkart, Lawyers Committee for Civil Rights Under Law: p 297 Includes Rule 26(b)(1) in lamenting the unfair burdens the proposals will place on civil-rights plaintiffs, joining it with a more detailed statement opposing the numerical limitations in Rules 30, 31, 33, and 36.

January Hearing, Joseph D. Garrison (NELA): (1) Moving up proportionality will mean that the rote objection becomes "proportionality." It may be administered by requiring the requesting party to show proportionality. That is wrong. The requester should have to show relevance; the objector should have to show lack of proportionality. It will work only if administered that way. (2) The factor looking to the amount in controversy should be stricken, or at least put last in the list. To be sure, this is an appropriate consideration in cases that involve only money. But employment cases involve much more. Suppose similarly wrongful discharges of an employee making $500,000 a year and one making $30,000 a year. The case may be more important to the one making $30,000 who faces foreclosure, losing a car, going on food stamps, and embarrassment. Those of us who know what we are doing look to the value of a case before taking it. Doing $60,000 of discovery in a $30,000 case is six times as much as should be. We can be effective for a client only if the case is effective for us as well.

January Hearing, Timothy A. Pratt for Federation of Defense and Corporate Counsel: p. 26 Moving proportionality to the scope of discovery is "critically important." Administering it will not be a question of burden of proof. p. 34: "This is a balancing of the interests with both parties contributing information that will allow the court, if they can't reach an accommodation mutually, to decide what the level of discovery ought to be allowed."

January Hearing, Jon L. Kyl: p. 45, at 48: "[M]oving the proportionality language * * * will be very helpful."

January Hearing, P. David Lopez (EEOC): p 68 The EEOC often seeks nonmonetary relief. "This is a law enforcement function and it is something that cannot be monetized."

January Hearing, Kaspar J. Stoffelmayr: p 88: Discovery is proportional now in many simple cases. It is not in a very important group of large cases where the disputes are asymmetrical. But in other large cases, where the discovery burdens will by symmetrical, large corporate parties tend to get by with far less discovery.

January Hearing, Thomas A. Saenz: p. 96: MALDEF brings voting rights and immigration rights actions against government defendants. They tend to generate political pressure. The result is that defense counsel often are less willing to cooperate in discovery. Elevating proportionality "could give them another tool to engage in resistance to legitimate discovery requests." 2196, James A. Ferg-Cadima for MALDEF: Elaborates the views stated in the Saenz testimony.

January Hearing, Michael R. Arkfeld: p. 104 Very few cases even discuss proportionality. Litigants do not realize it's there. Moving it up will generate more motions, raising the costs for requesting parties and decreasing access to justice.

January Hearing, Jocelyn D. Larkin: p. 125 Proportionality will impede institutional reform litigation. The important relief is injunctive, not monetary. The amount in controversy is not relevant. And the importance of the issues at stake lies in the eye of the beholder. 1413, Jocelyn D. Larkin for Impact Fund and others: Systemic institutional reform cases "are especially

vulnerable to a defense strategy of obstruction and delay." Often they begin on behalf of only one or two plaintiffs; it is only through discovery that larger policies or systemic breakdowns are uncovered. Proportionality will complicate every discovery motion. Some may believe that the absence of any monetary claim should be counted. The importance of the issues is subjective.

January Hearing, Quentin F. Urquhart for IADC: p 133 Adding proportional as a word, and moving up the factors to become more prominent will "bring a needed degree of pragmatism." Proportionality "isn't just dollars." The inquiry should not "front-load" examination of the merits. Who is right, who wrong, should not be explored at that stage. Lawyers can rationally discuss the importance of a civil rights case, or a purely economic case, in terms of what they are arguing, not who will prevail.

January Hearing, Elise R. Sanguinetti: p. 151 Representing individuals in wrongful death and catastrophic injury cases, proportionality is a radical change. The amount in controversy in a wrongful death action may be limited. Now we generally can reach agreement with defense counsel on the discovery we need. Proportionality will require us to negotiate through the factors; defendants will claim retrieval from storage is costly. The same is true for the importance of the issues, and the burden-benefit analysis. I prefer California courts now because discovery is so open. If proportionality is added, "I'm very concerned about what's going to happen in the future.

January Hearing, Kathryn Burkett Dickson: p 160 Think of proportionality in terms of employment plaintiffs. "I represent female farm workers who are sexually assaulted in the fields, all the way up to corporate executives." The executives "can give me informal discovery" — the names of people, how things are organized. Farm workers generally do not know even the last name of their supervisors. "[I]t's the people at the bottom sometimes who need the most discovery."

January Hearing, Larry E. Coben, Attorneys Information Exchange Group (AAJ Sub group): p 169 Moving up proportionality will change the burden of proof. The plaintiff will have to show the importance of something it does not know, and the court will have to rule in equal ignorance. Consider the design of an automobile fuel system. You need information about system designs for other models, and often generic design guidelines that apply to all vehicles. Suppose, for example, you had a client with a minor burn injury; proportionality could foreclose discovery of information supporting the claims of many victims, many seriously injured or killed.

January Hearing, Paul D. Weiner: p 177 Proportionality is the bedrock principle of any contemporary system of justice. It should apply to preservation not only in proposed Rule 37(e), but also in Rule 26(b)(2)(C): "the court must limit the frequency or extent of preservation and discovery"; "the discovery or preservation sought is unreasonably cumulative," etc.; "the burden or expense of the proposed discovery or preservation," etc.

January Hearing, Hon. Derek P. Pullan: p. 205 (1) None of the factors in the proportionality calculus is primary. (2) Utah Rule 26 was amended two years ago to require that all discovery meet the standards of proportionality, and at the same time beefed up initial disclosures to include a summary of the testimony of each witness a party may call and a copy of each document it may use. In addition to the factors in Federal Rule 26(b)(2)(C)(iii), Utah adds the "opportunity to obtain the information, taking into account the parties' relative access to the information." This factor is intended to address the problem of asymmetric information. (3) The Utah Rule also expressly provides that the party seeking information has the burden of showing proportionality and relevance, no matter whether it is a motion to compel, a motion to strike, or a

motion for a protective order. But it is a "burden of proof soft" — some information bearing on the factors may be more readily available to the responding party. (4) Cost-shifting orders may be entered to ensure proportionality. (5) Beyond that, Utah has divided discovery into three tiers, with presumptive limits that are deemed proportional. Anything beyond these limits is called "extraordinary discovery." Some federal courts have adopted pilot projects or local rules that require proportionality. (6) Without proportionality, "[p]arties with meritorious claims but modest means are denied access to the courts. Specious claims settle to avoid the discovery bill." (7) The IAALS is undertaking a survey of experience with the new rules: younger lawyers really like the changes; many are reserving judgment; a high percentage "have not realized their fears"; a lawyer recently told me he is more and more advising clients to file in state court because discovery costs are more predictable. (8) This is a cultural shift; continuing efforts are made to educate judges.

January Hearing, Richard B. Benenson: p 316 A pilot program in Colorado State courts requires court and parties to address proportionality at all times, beginning with the first meet-and-confer and the initial case management conference, and continuing. "[T]he process is working." Requiring discussion facilitates proportionality, and continuing conversations. This is not one-size-fits all; in asymmetric information cases, the side without much information may need more discovery than the other side. In medium-size business cases, both plaintiffs and defendants benefit. Access to courts actually increases by reducing the need to resolve cases to avoid discovery costs rather than on the merits. (A survey of the program has started.)

February Hearing, Ralph Dewsnup, for Utah Association for Justice: Utah has had an express proportionality rule for two years. The rule goes far beyond the federal proposal. It lists 11 factors, without standards. Counsel often recognize the impracticality of the specific numerical limits, measured by tracks and the amount in controversy, and agree among themselves on more depositions or interrogatories. All a party has to do to halt discovery is to object on proportionality; then the plaintiff has the burden to show compliance with all 11 factors. The federal rules already have sufficient proportionality standards. People are not using the opportunities that exist. The problem is not so much proportionality as the lack of guidance on who has the burdens.

February Hearing, Maja C. Eaton: p 29 (1) Proportionality is important. It would be helpful to add a statement in the Committee Note that an MDL proceeding does not, without more, justify greater discovery on the common issues of liability simply because many cases are combined. What happens today is that MDL proceedings are seen as a carte blanche for unfettered discovery and a "gotcha mentality." (2) The proposal does not change a burden of "proof." Discovery disputes are more a matter of persuasion.

February Hearing, Michael O' Cowles: p. 47 Violations of Title VII and the FLSA are "often done through informal means and off the books." Discovery enables plaintiffs to pursue ancillary documents that color in the full extent of their claims. The burden of proving proportionality undoubtedly will fall on the requesting party. Often we do not know what it is we are looking for. The change will lead to greater discovery conflict.

February Hearing, John W. Griffin: p 57 In litigation on behalf of court security officers deemed unsuitable because they used hearing aids, and FBI agents deemed unsuitable because they had diabetes, we did not know at the beginning that the defendants acted under general policies. There were no written statements. It was only through extensive discovery that we uncovered de facto general policies. It was the discovery that made itself proportional. The defendants did not question proportionality. If they had, we would have been hard-put to get the necessary

discovery.

February Hearing, Mary Nold Larimore: p 68 Although it is true that proportionality is not getting enough attention because it is buried in 26(b)(2), the best reason for moving it to rule 26(b)(1) is that it is not simply something a party should invoke after discovery has gotten out of hand. It is an important part of the process that should be made part of the initial plan for appropriate discovery.

February Hearing, J. Michael Weston: p 87 The discovery process now is very contentious. The Rule 26(f) conference often is no more than a step on the way to a motion to compel. Good practice is illustrated by a recent class action in which the magistrate judge managed discovery, with limited initial discovery, a conference, another level of discovery, and so on until both sides understood the merits and settled. That is how it should work. Moving up proportionality, and eliminating "reasonably calculated," will be "an opportunity to get involved early on at the Rule 167 conference. I think more of them will be held." Magistrate judges will become more involved. And it gives criteria for resolving disputes.

February Hearing, Suja A. Thomas: p 93 The Committee recognizes that discovery is proportional in at least 85% of federal cases. It is a mistake to adopt a rule for atypical cases when the rule also will have an impact on typical cases. It would be better to move away from transsubstantivity and craft a special rule for the atypical cases that create the problems. But if a general rule is devised, Rule 37(a)(1) should be amended to state that the party requested to produce bears the burden of showing the request is not proportionate. And Rule 26(b)(5) should be amended to require a proportionality log. Adding something to the Committee Note is not adequate protection. The surveys that show greater lawyer dissatisfaction with proportionality seek opinions divorced from actual cases; the FJC closed-case survey is stronger research. 1185: Her written comment provides suggested rule text for 37(a)(1) and 26(b)(5), and elaborates on the themes stated in her testimony.

February Hearing, Mark P. Chalos, for Tennessee Association for Justice: p 104 Proportionality gives another battleground, another reason to withhold relevant evidence. Boilerplate objections are made to almost every request. This will add one more threshold motion. And it is unclear where the burden lies.

February Hearing, Michael C. Smith for Texas Trial Lawyers Assn.: p 154 "Proportionality is not the standard right now. It’s something I have to raise * * *." Under the proposal, lawyers will bury the courts with motions. Under the proposal, I can force the other side to file a motion to compel. "I would not just object. I would unilaterally withhold relevant documents based on my client’s subjective evaluation of whether the documents are proportional to the kind of case we’re in." So if the plaintiff’s patent seems weak, I will say there are problems with the case and at this point only limited discovery is proportional. If the case comes to seem stronger after initial discovery, more will be proportional. "I like phased discovery like that." As an alternative to the proportionality language, consider E.D.Texas Rule CV-26(d): "what reasonable and competent counsel would consider reasonably necessary to prepare, evaluate or try a claim or defense."

February Hearing, Thomas R. Kelly, for Pfizer: p 164 Moving proportionality up is desirable to make it part of the scope of discovery, not merely a limitation, and to provide clarity about what the scope of appropriate discovery is. "[I]t will not shift the burdens that are available right now."

February Hearing, John H. Martin: p 172 In the late 1990s Texas adopted as a limitation on discovery the proportionality language that then appeared in Federal Rule 26(b)(2), and placed it up front. Texas requires a party invoking proportionality to file a motion. This practice has not generated a lot of motions. It is discussed far more often in negotiations with opposing lawyers — and those negotiations work better with "the gray-haired lawyers" "than if we had somebody younger."

February Hearing, Michael M. Slack: p 193 Proportionality functions differently in the Texas rules. First, it does not have the primacy it does in the present proposal. Discovery works best by agreement, and by and large that happens. But the proportionality limit is there "for the parties and the court when agreement escapes reason." It facilitates collaboration among the parties and court; Texas courts provide status conferences every 30 days, and informal discussions. "I like phased discovery."

February Hearing, Megan Jones for COSAL (class-action law firms): p 212 We will need discovery to determine what is proportional. There will be fights to determine what is the amount in controversy, what is the importance of the discovery, and so on. "[E]very discovery request becomes a mini trial on the merits or class certification." And objections will be made when I attempt to get discovery of the IT structure when I need to show prejudice from the loss of ESI.

February Hearing, Donald J. Lough: p 248 The comments opposing proportionality show the need to reinvigorate this concept to the role that has been intended since 1983. "The burden of proof is a nonissue. Discovery motions do not get decided on a burden of proof." Courts require both parties to discuss proportionality. There may be more motions during the break-in period, but the incentive to make motions will disappear "once it becomes clear what the rules are, and that they will be enforced."

February Hearing, Gilbert S. Keteltas: p 254 (1) Proportionality should not be raised for the first time in an objection. Proportionality is achieved by talking with your adversaries about what matters, who matters, what are the topics in dispute. When adversaries fail to cooperate, I walk them through the rules. "But it's harder work than it should have to be." It works by leaving room to reconsider proportionality as discovery proceeds. "In reality a lot of proportionality issues and objections will be addressed iteratively. Why don't we start small and get bigger? Maybe we don't know the answer today. We can work through it." (2) "The resources of the parties" should be omitted from the list of factors. "Litigants shouldn't be deprived of the benefits of proportionality simply because they have resources." (3) The fear of routine proportionality objections is countered by the need to meet and confer before making a motion, and by Rule 26(g) — the objection cannot be made unless it is reasonable.

February Hearing, David A. Rosen: p 262 The proportionality proposal, along with Rule 37(e), "would create * * * a path for protection of corporate interest at the expense of the rights of individuals damaged by corporate malfeasance."

February Hearing, Stuart A. Ollanik: p 266 "Discovery costs are driven by the costs of avoiding discovery, not the cost of making discovery." When we overcome the resistance and get the documents, we find that the reason for invoking cost was that the documents prove our case. "Proportionality is too subject to manipulation." And if the burden is on the plaintiff, the plaintiff lacks information on the burden of producing. "It's too easy for defendants to manipulate, misrepresent, inflate those costs, and hide very important relevant truths." 1164 supplements the testimony. Adds an example of a defendant spending a fortune to resist discovery of documents already produced in other cases. And some courts will combine proportionality with cost-

shifting, shutting down access to justice in valid cases.

February Hearing, J. Bernard Alexander, III: p 272 Moving proportionality to the front will let the defendant say this is a big deal. "In my [employment] cases, at the beginning of the case I don't know enough information oftentimes to be able to address why I need this information in detail." "Proportionality is just another arrow on the defense side * * *."

February Hearing, Susan M. Rotkis: p 296 Plaintiffs uniformly oppose the proportionality proposal. From the perspective of consumer credit-statutes cases, the proposal is one-sided. All five factors will establish a threshold that plaintiffs will have to fight to cross at the very front end. Congress created statutory damages and fee shifting to facilitate private enforcement; this proposal will impede it. Our judges and jurists can implement proportionality when it is raised on a motion to compel.

February Hearing, Ariana Tadler: p 325 Proportionality is unfair. It increases burdens on those who already have stringent pleadings and burdens of proof. It will inevitably lead to increased motions practice that actually thwarts effective case management because judicial resources are already stressed.

February Hearing, Brian P. Sanford: p. 356 The proportionality proposal assumes the problem lies in the requests made by plaintiffs. The problem lies instead in obstructive discovery tactics by defendants that force plaintiffs to settle for inadequate sums.

RULE 26(b)(1): ELIMINATE EXAMPLES

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: Agrees, but with caution. Some litigants will argue that deletion of these examples means that such matters are no longer discoverable. The Committee Note should reflect the Committee's view that discovery of such matters is deeply entrenched and that it continues to be available.

398, Shira A.Scheindlin: The examples are useful to encourage early identification of sources and persons with knowledge. It has governed since 1970, without causing difficulty. Eliminating it will lead lawyers to argue that the elimination means a difference. There is no harm in leaving it in.

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: The rule text illustrating examples of discoverable matter should be restored, or at least the Committee Note should include the advice in the Transmittal Memo stating that discovery of such matters "is so deeply entrenched in practice that it is no longer necessary to clutter the rule text with these examples."

487, Peter J. Mancuso for Nassau County Bar Assn.: "Since the concept is still recognized and supported, there is no reason to delete it." Removing it will incorrectly imply it is no longer valid.

494, Charles R. Ragan: It is imperative that the Committee Note explain the Committee's view that discovery of these matters remains proper. The proposal already has led to statements that it would eliminate "discovery about discovery," a grave mistake with respect to the need to identify potential avenues for eDiscovery.

673, Don Bivens for 22 more "individual members of the Leadership of the American Bar Association Section of Litigation": The Note should say that this is not a substantive change. It is only a measure to remove clutter.

995, William P. Fedullo for Philadelphia Bar Assn.: Agrees that discovery of these materials is so well entrenched there is no remaining need to list them in the rule.

1054, Assn. of Bar of the City of New York: Agrees, but urges the Committee Note should state that all of these things remain discoverable.

1209, Christopher Heffelfinger: The language proposed for deletion "is important so that Courts will understand that foundational discovery is fairly contemplated * * * and essential to obtaining admissible evidence, and ensuring that all potentially relevant sources of locations were searched for responsive documents." Consider the foundational requirements to treat the statement of a coconspirator as an admission, or the requirements to satisfy the business records rule.

1690, Vicki R. Slater for Council of State Trial Lawyer Presidents: "This language is not extraneous. * * * Elimination * * * will be used by parties and courts to deny the disclosure of these important, essential facts * * *."

1700, Craig Ball: "The standard practice of e-discovery is malpractice. Parties cannot safely assume their opponent is competent to identify and produce responsive ESI." It is essential to protect discovery of metadata. The language to be deleted does not expressly refer to metadata,

but it is the only anchor in the rules for essential discovery. Opponents already are arguing that the proposed amendment bars inquiry into metadata. The language should be preserved. And the Committee Note — or, better, rule text — should make it clear that matters relevant to any party's claim or defense include: "1. Discovery of relevant or functional metainformation; 2. Inquiry into a party's methods and processes used to store, identify, collect, process, search, review or produce information; or 3. Inquiry into forms of information and production or the use, operation and structure of relevant information systems."

1930, Andrew M. Pardiek: Lawyers will cooperate in discussing ESI discovery if a tool is available to make them reveal the details of their ESI systems. Take away this language and that tool may be weakened. "[P]ractitioners often do not find it manifest or obvious that a party can engage in discovery of meta-information."

2072, Federal Courts Committee, New York County Lawyers' Assn.: This proposal "removes language that appears redundant and unnecessary considering the fact that a party has to disclose any information relevant to a party's claim or defense."

January Hearing, Lea Malani Bays: p 283 (Represents investors in securities class actions.) Sets the importance of rule language allowing discovery of the existence, description, nature, custody, condition, and location of any documents against Rule 26(f) conferences discussing ESI. This language facilitates effective conference discussions. It is important to tailor discovery by exchanging clear, transparent information about the nature and capacities of ESI systems. What sources? Has deduplication been done? What about e-mail threading, concept searching, clustering, predictive coding? Is it useful to sample sources that are expensive to access? Remove this language, and responding parties will argue that none of this information is relevant to the claims or defenses in the action. Already panelists at eDiscovery conferences are saying that after this rule change, they will not have to provide any information about ESI systems. Information about the systems is essential to evaluate the proportionality of discovery. It would help, further, to expand the list of topics for discussion in Rule 26(f), a broader checklist of subjects that must be discussed. The specific-objection requirement proposed for Rule 34 will not do the job alone. 1614, Lea Malani Bays, Tor Gronborg for Robbins Geller Rudman & Dowd LLP: similar.

RULE 26(b)(1): ELIMINATE SUBJECT-MATTER DISCOVERY

267, Lawyers for Civil Justice, by Alex Dahl: It is good to eliminate discovery relevant to the "subject matter involved in the action." The parties' claims and defenses provide a clear anchor, and a tie to what is potentially discoverable.

285, Cory L. Andrews, Richard A. Samp, Washington Legal Foundation: Eliminating the provision for extending discovery to the subject-matter involved in the action is good; it clarifies that discovery is delimited by the claims and defenses found in the pleadings.

289, Craig B. Shaffer & Ryan T. Shaffer: "As a practical matter, eliminating 'court-managed' discovery under Rule 26(b)(1) may have little effect on a party's ability to pursue reasonable discovery." This ties to the broad interpretation given to determining whether information is "relevant" to a claim or defense — relevance is found unless the information can have no possible bearing on a claim or defense, "if it reasonably could lead to other matter that could bear on any issue that is, or may be, in the case." The current proposals do not suggest a narrower or different standard for measuring relevance. But eliminating subject-matter discovery, along with the newly explicit focus on proportionality, may have not undesirable consequences in lawyer behavior in drafting and responding to discovery requests, as summarized with the discussion of proportionality. Removing subject-matter discovery eliminates a safety net that might be invoked to justify over-broad requests.

292, Lyndsey Marcelino for The National Center for Youth Law: Discovery of the subject matter should remain available as a discretionary tool "to retain the ability, upon a showing of good cause, without a consideration of proportionality." [This may mean to say that proportionality should be measured against the subject matter, rather than only the pleaded claims and defenses. Present Rule 26(b)(2)(C)(iii) limits subject-matter discovery.]

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: Agrees with the proposal. "There is no justification for the current system of two-tiered discovery — one tier party-controlled, and the other tier court-controlled."

328, U.S. Chamber Institute for Legal Reform: Supports elimination of the "subject-matter" provision. But one further step should be taken: discovery should be limited to information "not only * * * relevant, but also material to a party's claim or defense."

337, Timothy A. Pratt, for Federation of Defense & Corporate Counsel: Redefining discovery to focus on claims and defenses will help reduce the excessive costs of discovery. It would help to further limit discovery by requiring that the information be material to any party's claim or defense. January Hearing, p 26: Again approves removal of "subject matter" discovery.

345, Kim Stone for Civil Justice Association of California: Applauds limiting discovery to claims and defenses, "and not to 'any matter relevant to the subject matter involved in the action.'

346, Kenneth J. Withers, for The Sedona Conference Working Group 1 Steering Committee: Endorses deletion of discovery relevant to the subject matter involved in the litigation. This will help cabin excessive discovery, and may have a marginal benefit in reducing over-preservation.

349, Valerie Shands: Eliminating subject-matter discovery may reduce the number of "fishing expeditions," but this will be another bar to effective discovery of the information plaintiffs

need.

353, Kenneth D. Peters, John T. Wagener: Substituting proportionality for "any matter relevant to the subject matter" will reduce costs and burdens.

355, Advisory Committee on Civil Litigation, E.D.N.Y., by Guy Miller Struve: There is no evidence that the discretion to extend discovery to the subject matter of the litigation has been abused. Although it is difficult to foresee many circumstances in which distinguishing between claims and defenses and subject matter will be decisive, discretion should not be restricted absent strong reason.

356, Richard McCormack: It is good to make clear that discovery is defined by the claims and defenses identified in the pleadings. Discovery should be further limited by requiring materiality.

365, Thomas Osborne and 14 others for AARP Foundation Litigation: Protests deletion of the court's authority to order discovery of any relevant matter. This may mean to address deletion of the provision for discovery relevant to the subject matter of the action beyond the parties' claims or defenses.

381, John H. Beisner: "Limiting the scope of discovery to matters relevant to a party's claim or defenses is an important step to curtailing abusive discovery." Litigants too often seek information only tangentially related to the claims or defenses at issue.

383, Alan B. Morrison: Courts have been able to use "subject matter" discovery to avoid the need to decide on relevance. With the change, defendants will press the relevance point much harder and judges will be forced to decide it in the early stages when little is known about claims or defenses. Defendants will have an incentive to decline to produce on grounds of relevance. This can be fixed by changing the scope of discovery from "is relevant" to "may be relevant."

386, Arthur R. Miller: Deletion of this language is not justified. Subject-matter discovery has been a safety valve that reduces the need to address relevance. Defendants will be motivated to contest relevance more aggressively. January Hearing, p. 36 at 40: the same.

390, J. Mitchell Smith for International Assn. of Defense Counsel: It is a meaningful improvement to limit discovery to what is relevant to the parties' claims and defenses. But historically broad notions of relevance counsel that this should be tightened further by limiting discovery to matter that is relevant and material.

391, Paul K. Stecker: The 2000 Committee Note says that discovery relevant to the subject matter was not intended to be an entitlement to develop new claims or defenses not already identified in the pleadings. But the distinction has proved unworkable. Defendants are often dissuaded from arguing that proposed discovery is not relevant to the claims or defenses because the plaintiff will argue there is good cause to explore matter relevant to the subject matter. Discovery is frequently ordered on matters far beyond the scope of the pleadings. The Colorado Supreme Court interpreted the identical Colorado Rule in DCP Midstream v. Anadarko Petrol. Corp., 303 P.3d 1187 (Co. 2013), noting that courts seem to apply broad relevancy principles that appear unchanged from pre-amendment practice. Rather than attempt to define the distinction, it took a practical approach, ruling that when judicial intervention is invoked the actual scope of discovery should be determined by the reasonable needs of the action. That is similar to proportionality, and the right approach.

396, Steven J. Twist: Eliminating subject-matter discovery as part of the proportionality revision is good.

398, Shira A. Scheindlin: "I have not heard any disputes regarding the scope of permissible discovery" since the distinction between claims and defenses and subject matter was adopted. "I suspect the parties have had no trouble reaching a general and amicable agreement as to what information is relevant and what is not." Eliminating this distinction will send a signal that the scope of discovery is being narrowed. There is no reason to do that. And some experts have claimed that restricting discovery to what is relevant to a claim or defense "might preclude discovery of significant metadata accompanying electronic records that is necessary to permit the use of technology assisted review."

402, Lauren E. Willis, for Harvard Law School Fall 2013 Civil Procedure Section 5 Examination Answers: This change "will prevent legitimate claims and defenses from being raised." The claim or defense may never come to light, or it may come to light too late and either be precluded or become the subject of a costly second action. And it ignores the plight of parties who reasonably believe they have a claim but lack the information needed to plead it to the standards required by Twombly and Iqbal. It systematically favors parties who have better access to information outside the discovery process.

404, J. Michael Weston for DRI - The Voice of the Defense Bar: It is better to require proportionality and relevance to the parties' claims or defenses "than being guided by the amorphous standard of 'relevant to the subject matter involved in the action.'"

407, David J. Kessler: Eliminating subject-matter discovery is appropriate. "[C]urrent Rule 26(b)(1) is often abused and discovery is allowed into tertiary issues of only marginal relevance * * *." Reducing the scope is necessary; a reactive approach that tries to find cheaper ways to produce is doomed to failure because the exponential increase in the amount of information defeats any ability to control costs once the data is discoverable.

408, Elliot A. Glicksman for Arizona Association for Justice: The proposal turns the focus of discovery from the subject matter of the litigation "to the specifics of often yet unknown but relevant and discoverable facts."

414, John R. Scott: Substituting proportionality for any matter relevant to the subject matter should help reduce costs and ease discovery burdens.

416, Mark S. Kundla: Of the same firm as Scott, 414, and similar.

417, Barry A. Weprin for National Association of Shareholder and Consumer Attorneys: "This deletion removes from a court's discretion the power to order discovery it deems relevant while not expressly connected to the four corners of a complaint." There is no clear dividing line to separate information relevant to the claims or defenses. In securities cases, for example, pre-class period discovery is often permitted to help establish a defendant's state of mind: that seems to bear on the claims or defenses, but why require that the line be drawn? Or in an action based on a false or misleading audit opinion, discovery of audit manuals is allowed: will that still be? One result will be that plaintiffs will draft still longer and more detailed complaints.

418, Harlan I. Prater, IV: Eliminating subject-matter discovery "would reduce the unnecessarily high costs and burdens of modern discovery."

427, John F. Schultz for Hewlett-Packard Co.: It is good to ensure that discovery is limited to the claims and defenses set forth in the pleadings. But this should be tightened further by requiring that the matter be "relevant and material" to the claims or defenses.

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Supports elimination of "subject matter" discovery. "Creating a unitary standard for the scope of permissible discovery will simplify the discovery practice." (p. 4, n. 1, recognizes that the Department opposed separating out subject-matter discovery for a good cause showing in the 2000 amendments, but has concluded that intervening developments warrant the proposed amendment.)

463, Janet L. Poletto for Hardin, Kundla, McKeon & Poletto: Limiting discovery to the claims and defenses, as opposed to the subject matter, "should help to reduce costs and discovery burdens."

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: This comment provides a detailed opposition to the change, strongly recommending that it be abandoned. Very few discovery disputes now focus on the distinction between what is relevant to the claims or defenses and what is relevant to the subject matter. The parties know the court will decide what discovery is appropriate without paying attention to the distinction, and if pushed will decide that what is appropriate relates at least to the subject matter. In most cases, the present rule establishes a "distinction without a difference." But eliminating it will encourage litigious parties to make objections they do not make now. It also will encourage parties to plead broad claims that will become subjects of motions to dismiss on the pleadings. And it will work to the disadvantage of an inarticulate party who cannot explain why requests are relevant to a claim or defense. The 2000 Committee Note offered impeachment information as something properly discoverable "although not otherwise relevant to the claims or defenses"; the change may have the unintended consequence of curtailing such discovery. Time should be allowed to develop experience with the proposed proportionality provision before considering whether to abandon subject-matter discovery.

622, Helen Hershkoff, Adam N. Steinman, Lonny Hoffman, Elizabeth M. Schneider, Alexander A. Reinert, and David L. Shapiro: (1) Decisions applying the provision allowing discovery relevant to the subject matter of the litigation for good cause "suggest that courts have exercised their discretion sparingly and appropriately." (2) "It is unclear how discovery limited to what is already pleaded would provide an information-poor litigant with access to the information needed to expand its legitimate claims." In an action against an individual government official, for example, is discovery that would enable the plaintiff to find the facts necessary to impose liability on the governmental employer relevant to the plaintiff's claim? 2078, Judith Resnik for 170 added law professors: supporting this comment.

673, Don Bivens for 22 more "individual members of the Leadership of the American Bar Association Section of Litigation": Supports limiting discovery to what is relevant to a party's claims or defenses.

729, Stephen B. Burbank: "The elimination of subject matter discovery (upon a demonstration of good cause) can only seem 'modest' or 'moderate' if one neglects the history * * * and uses as the basis of comparison the post-2000 language of Rule 26. To be sure, we do not know whether its wholesale elimination would have substantial effects. The interest groups treating subject matter discovery like a piñata since the 1970s obviously hope so."

785, J. Bernard Alexander III, Wendy Musell, for California Employment Lawyers Assn.: It is

quite normal and necessary to discover information relevant to the subject matter, although not to a claim or defense. Discovery may be needed of a defendant's computer systems or information hierarchies, though this is never relevant at trial. Information may be needed to test a claimed privilege.

797, Michael Murphy: Decries "attempts to discover information in a filed action that is not relevant to the filed action but may be relevant to some other matter being handled or considered by the same plaintiff's attorney in a different venue."

995, William P. Fedullo for Philadelphia Bar Assn.: "[T]he proposed amendment will not impair a party's right to obtain the discovery it actually needs, and it will protect the responding party or nonparty from the burdens imposed by discovery that, in the end, provides no benefit to anyone." Many courts and commentators have observed that the separation of subject-matter discovery from claim-or-defense discovery in 2000 "did not bring about a major shift in the scope of party-managed discovery."

1054, Assn. of Bar of the City of New York: A majority favors the proposal. "It is rare that a party expressly seeks discovery of matters that cannot reasonably be tied to the claims or defenses already presented in the case, and rarer still for the court to grant such discovery." Discovery "was never intended to provide an opportunity to seek evidence to support other claims that have not been alleged." But the Committee Note should say that leave to amend should be freely granted.

1413, Jocelyn D. Larkin for Impact Fund and several others: "There is no evidence that this language has led to excessive or unduly expensive discovery, but it serves as an important safety valve in rare cases. In systemic reform cases, the facts pertaining to the individual plaintiffs' claims may not encompass every aspect of a challenged policy."

1554, Lawrence S. Kahn for City of New York, City of Chicago, City of Houston, and International Municipal Lawyers Assn.: Supports. "The revised language would compel parties to articulate their need for specific discovery in light of practical considerations pertaining to the case and parties."

1651, Michael Jay Leizerman for AAJ Trucking Litigation Group: "For example, if a plaintiff has not specifically alleged that the defendant was driving under the influence of drugs in the complaint, the new rule might limit discovery of mandatory drug tests and prevent discovery whether a driver was on drugs or had a history of driving on drugs."

1692, Jan M. Carroll for Barnes & Thornburg: Approves deletion of the "subject-matter" provision. "All too often, we have seen opposing parties seeking discovery that has no bearing on the present action, and instead is designed to develop theories for future litigation."

1703, Hon. Michael H. Simon: Subject-matter discovery has not created undue burdens for the court or parties. It should remain available in the court's discretion.

2072, Federal Courts Committee, New York County Lawyers' Assn.: Approves. The distinction between information relevant to claims or defenses and information relevant to the subject matter of the action is unclear. The 2000 Committee Note shows that the actual scope of discovery should be what fits the reasonable needs of the action; "ultimately the distinction between the two tiers of discovery is irrelevant. The fact is that the maintenance of a separate category of discovery * * * is likely only to lead to additional satellite litigation." And it is difficult to see

why discovery not relevant to any party's claim or defense should be allowed."

2209, Richard Talbot Seymour: Recent interpretations of Rule 8 combine with Rule 11 to limit the allegations that may properly be made. Eliminating subject-matter discovery will make it much harder to uncover the information needed to plead a meritorious claim that cannot be pleaded without discovery.

November Hearing, Lily Fu Claffee — U.S. Chamber of Commerce: p 198 "The big change is moving away from being able to ask a judge for evidence that's relevant just to subject matter * * *." But "I've never sat down and argued with somebody about whether or not something is discoverable because it's related to subject matter. They always argue that it's relevant, and relevance is a very, very broad concept."

January Hearing, Jocelyn D. Larkin: p. 125 In litigation seeking reform of governmental and corporate conduct, discovery of the subject matter beyond the pleaded claims and defenses can be important. When the object is systemic institutional reform, "it may go beyond the specific facts of that person" who appears as plaintiff claiming one specific form and incident of discrimination. The Committee may contemplate a generous interpretation of what is relevant to claim or defense — a systematic practice of discrimination may help prove the individual claim. But the change will be read to narrow the scope of discovery.

February Hearing, Mary Nold Larimore: p 68 This change will go a long way to culling out the irrelevant custodians whose hundreds of thousands of documents are currently being collected and produced and reviewed.

RULE 26(b)(1): NEED NOT BE ADMISSIBLE — "REASONABLY CALCULATED"

Revealing misquotes: A number of comments quote the current scope of discovery as "relevant or likely to lead to the discovery of relevant evidence."

270, Ohio Association for Justice, by John Van Doorn: It is a mistake to delete the present provision for discovering relevant information that may lead to admissible evidence. Rule 11(b) recognizes the legitimacy of claims founded on a reasonable belief that reasonable opportunity for discovery will provide evidentiary support. The 1946 Committee Note recognizes that discovery that yields useful information is successful, even if it does not produce testimony directly admissible.

285, Cory L. Andrews, Richard A. Samp, Washington Legal Foundation: Striking the sentence allowing discovery of information reasonably calculated, etc., is welcome. "[B]oth practitioners and judges routinely cite the 'reasonably calculated' language as though it somehow defines the outer bounds of discoverable material." The sooner it is deleted, the better.

290, Randall E. Hart: The premise in discussing the proportionality factor is that the "reasonably calculated" provision "creates a presumption of discoverability" that makes discovery flow smoothly. The multifactor proportionality test will undercut this.

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: The "reasonably calculated" provision "has been misapplied by courts and litigants to expand the scope of permissible discovery * * *." The Committee Note "should clarify that the deleted language was misconstrued and that is the reason for the deletion." The substitute language, focusing on information within the scope of discovery as defined by Rule 26(b)(1) is proper.

307, Hon. J. Leon Holmes: See the summary on proportionality. Opposes the change, in terms that seem to rely on the "reasonably calculated" provision to define the scope of discovery as Rule 26(b)(1) stands now.

309, Kaspar Stoffelmayr: Everyone understands that hearsay should be discoverable. But the "reasonably calculated" provision is repeatedly taken by courts "to articulate an extremely broad standard for the scope of discovery." Relevance is interpreted to allow discovery of anything except information that "has no possible bearing on the subject matter of the action." Materiality should be required.

314, John F. Murphy, for Shook, Hardy & Bacon (John Barkett was firewalled from the comment): This proposal "helps focus discovery on relevant information and can stem the tide of overly broad document production."

327, Malini Moorthy for Pfizer, Inc.: Endorses eliminating the "reasonably calculated" language.

328, U.S. Chamber Institute for Legal Reform: This change is important. "[S]ome courts have found that information is presumptively discoverable as long as there is 'any possibility' that the information relates to the 'general subject matter of the case,' and that resisting discovery is only appropriate where the information sought has 'no possible bearing' on the issues pled in the complaint or those that may arise during the litigation."

337, Timothy A. Pratt, for Federation of Defense & Corporate Counsel: The "reasonably

calculated" standard is vague and overly broad. It has driven up the costs and time of discovery.

338, Steven D. Jacobs: Discovery works well now in civil rights and employment discrimination cases. Substituting "a proportionality rule for the broad and eminently workable ‘reasonably calculated’ standard[] will only serve to make the courts essential referees in the discovery process." There are no empirical data showing widespread abuse.

343, Doug Lampe for Ford Motor Company: "[P]arties justify their discovery requests by stating that such requests may ‘lead to the discovery of admissible evidence’ — all but ignoring the rule’s express invocation of a relevance standard — and by identifying a policy expressed nowhere in the rules themselves — that discovery should be ‘liberal and broad.’" Removing this troublesome phrase will require the parties to focus on discovery necessary to assert a claim or present a defense.

344, Shanin Specter, Thomas R. Kline, Andrew J. Stern, Andrew S. Youman: These comments are shaped by experience in catastrophic injury cases. The reasonably calculated standard is well understood. "It does not permit limitless discovery." Lawyers understand this as the scope of discovery standard. Changing it will cause more problems than will be solved. Proportionality will become a boilerplate objection. "The reason that our present Rule works so well is that it recognizes the importance of permitting all potentially relevant information to be uncovered."

345, Kim Stone for Civil Justice Association of California: Applauds deletion of the "reasonably calculated" sentence.

351, Eric Hemmendinger for Shawe Rosenthal LLP: The "reasonably calculated" provision "is commonly misread as allowing virtually unsupervised discovery." The rule should be strengthened by requiring that requested information be material, not only relevant.

353, Kenneth D. Peters, John T. Wagener: Deletion of "reasonably calculated" "should further streamline the discovery process."

365, Thomas Osborne and 14 others for AARP Foundation Litigation: The present standard is well understood and workable. Removing "reasonably calculated" "significantly narrows the scope of discoverable information," severely impacting the ability of those who most need discovery, typically plaintiffs.

372, J. Burton LeBlanc, for American Association for Justice: Removing the "reasonably calculated" phrase broadens the scope of discovery. The new language contains no limits. Proportionality does not provide any guide to what is relevant. And it will become the primary focus, with its five factors.

373, Michael L. Murphy for AAJ Business Torts Section: Treats the "reasonably calculated" sentence as the present definition of the scope of discovery. Substituting proportionality is challenged.

374, Christopher Placitella for AAJ Asbestos Litigation Group: Under the present rule "relevancy" is defined by the "reasonably calculated" sentence. The proposal narrows the scope.

381, John H. Beisner: "[B]oth courts and counsel have interpreted the ‘reasonably calculated’ wording in the rule in a manner" that broadens the scope of discovery beyond relevance and obliterates all limits. It should be deleted.

383, Alan B. Morrison: Couples this with the "subject matter" point: it may be acceptable to delete the "reasonably calculated" part, but this should be ameliorated by changing the scope of discovery from "is relevant" to "may be relevant."

386, Arthur R. Miller: "What is the purpose of this change"?

388, Nina M. Gussack, Joseph C. Crawford, Anthony Vale: The "reasonably calculated" language "too often allowed relatively unfettered acceptance of the need for further discovery." It is properly eliminated.

390, J. Mitchell Smith for International Assn. of Defense Counsel: The "reasonably calculated language" "has erroneously been used to establish a very broad scope of discovery even though it was intended only to clarify that inadmissible evidence such as hearsay could still be within the scope of discovery." Eliminating it would effect substantial reductions in unwarranted discovery.

396, Steven J. Twist: Eliminating the "reasonably calculated" sentence is good.

398, Shira A. Scheindlin: "There is no empirical evidence that this language has caused any real problems." The rule specifically requires that the information be relevant, meaning relevant to a claim or defense. "It does not expand the scope of relevance or create an exception that swallows the rule." This will be seen as another signal narrowing the scope of discovery.

399, Edward Miller: The "reasonably calculated" language "has erroneously been used to establish a very broad scope of discovery." This is a necessary and important change.

404, J. Michael Weston for DRI - The Voice of the Defense Bar: The "reasonably calculated" language "has become a common justification for discovery ‘fishing expeditions.’" It also limits what Courts can do to restrict the volume of information sought. However, the use of this language in this fashion is erroneous. But "both practitioners and judges routinely cite the ‘reasonably calculated’ language as though it somehow defines the outer bounds of discoverable material."

407, David J. Kessler: The Committee is right. "The current formulation of this rule has confused courts and parties, expanding discovery beyond what was intended" by the "reasonably calculated" sentence. "The fact that a party is seeking information that would not be admissible at trial should not prevent it from seeking discovery, but neither should it expand the scope of discovery beyond its defined limits." Indeed the case law reflects a growing trend "to pressure, or even order, responding parties to produce non-relevant or privileged documents to opponents for the sake of speed or cost-effectiveness." The idea seems to be that the availability of clawback agreements and Evidence Rule 502 mitigate the risks of privilege waiver. But these devices do not bear on the many other reasons for review and nonproduction, including withholding data privacy information, culling irrelevant data, and learning about the documents at issue." The Committee Note should state that documents that are actually privileged or not relevant are outside the scope of discovery, and courts should not compel production.

408, Elliot A. Glicksman for Arizona Association for Justice: The "reasonably calculated" language is "some of the most important language that courts have traditionally used to permit broad discovery." The Rule 26(b)(1) proposal significantly narrows the category of potentially discoverable materials.

412, Mark S. Stewart for Ballard Spahr LLP: "Discovery is not an unfettered right." Relevancy has been construed to encompass any matter that reasonably could lead to other matter that could bear on any issue in the case. That leads to such requests as those for "any and all documents" related to a particular topic. Litigants sometimes seek irrelevant data to expand the scope of the issues or to find evidence for other cases. They share general liability documents — in drug cases, for example, they seek documents concerning drugs not specifically relevant to their claims to supplement discovery in other cases or to create a basis for pursuing other cases. And the volume of discovery in multidistrict or coordinated proceedings may become a basis for allocating global settlement costs and fees among plaintiffs' firms. Requiring greater specificity in requests will force more fruitful negotiations about the proper scope of discovery. The "reasonably calculated" approach will be deflated. But to make sure, "materiality" should be an added limit on the scope of discovery, at least in the Committee Note.

414, John R. Scott: Supports abandoning the "reasonably calculated" standard.

416, Mark S. Kundla: Of the same firm as Scott, 414, and similar.

418, Harlan I. Prater, IV: The "reasonably calculated" language "is often erroneously used to establish an overly broad and costly scope of discovery." The proposed amendment preserves the original purpose to clarify that inadmissible evidence such as hearsay can be within the scope of discovery so long as it is relevant.

419, William R. Adams: The "reasonably calculated" language is unnecessarily broad, "and allows for improper 'fishing expeditions' by opponents whose theory of the case has either never been fully developed or, through discovery, has proven to be incorrect." Eliminating it will be a significant step toward reducing unnecessary costs.

421, Louis A. Jacobs: First suggests that "The Committee could remedy excessive discovery by removing the 'reasonably calculated' language; relocating proportionality is overkill." But later suggests that removing this language will hamper party negotiations about the scope of discovery. Starting with the view that discovery abuse is rampant would lead to deleting this sentence. But starting with the view that abuse is sporadic would preserve the sentence and the precedent interpreting it.

434, James Moynihan: The volume of material produced in discovery has grown at an almost incomprehensible rate. Elimination of the "reasonably calculated" phrase is particularly welcome, as is proportionality.

436, William M. Scarff, Jr., and Donald P. Bunnin, for Allergan, Inc.: As both defendant and plaintiff, supports Rule 26(b), endorsing comments by Lawyers for Civil Justice, Bayer Corp., Ford Motor Co., and Pfizer Inc. Rather than repeat those comments, offers several examples of cases in which only a tiny fraction of documents produced in discovery were listed as trial exhibits. In one of the examples, 391,000 documents were produced; the plaintiff listed 805 as trial exhibits, and 146 were admitted.

445, Gerald Acker, for Michigan Assn. for Justice: The "reasonably calculated" standard is relatively objective, calling for discovery "to be directed at possibly locating admissible evidence." It should not be replaced by proportionality.

452, David Hill: Drawing on many years as CFO of various companies, supports focus on the claims and defenses, not any information that might lead to admissible evidence.

454, John Brown: Supports narrowing discovery to focus on the claims and defenses, not "searching for information that might lead to admissible evidence."

455, W. Michael Scott for CrownQuest Operating, LLC: The "reasonably calculated" provision is overly broad. Discovery should be limited to what is actually relevant and material to the claims or defenses.

456, Niels P. Murphy writing for eight lawyers: Eliminating the "reasonably calculated" provision "would help curtail unnecessary discovery and reign [sic] in the very broad scope of discovery erroneously brought about by this language."

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Removing the "reasonably calculated" language is "intended to remove awkward if familiar language rather than change substantive standards." Additional language in the Committee Note could avoid the risk of uncertainty among practitioners, some of whom may see this as narrowing the scope of discovery. Suggested Note language: "Although the ‘reasonably calculated’ language is deleted because it has been misconstrued to permit discovery of non-relevant information without limitation, the scope of what is discoverable under the Rule remains unchanged."

461, an article by Thomas D. Wildingons, Jr. & Thomas M. O’Rourke: Removing the "reasonably calculated" language "marks a significant change in the manner in which relevance is defined * * * and raises questions regarding the continued validity of numerous cases decided based on the existing standard." It would be better to retain it in some form, perhaps: "This scope of discovery includes relevant information that may not be admissible in evidence, provided it is reasonably calculated to lead to the discovery of admissible evidence."Supports abandoning the "reasonably calculated" standard.

467, Michael Freeman: (Tort counsel for Walgreen Co.): The "reasonably calculated" provision "has been broadly interpreted, resulting in significant discovery costs — particularly to corporate defendants." It is good to replace it with proportionality, a limitation that "is reasonable, open to fair interpretation and proper enforcement."

483, Kenneth Wittenauer: The "reasonably calculated" provision "has been broadly interpreted, resulting in significantly increased discovery costs — particularly to corporate defendants." Striking this provision, and inserting proportionality into the scope of discovery, are supported.

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: Defense lawyers at the conference noted that the "reasonably calculated" language "tended to overshadow the rule and distort the scope of relevancy."

501, Martin D. Stern: In both small- and large-stakes litigation, "reasonably calculated" leads to discovery that does not speak to any case issue; courts are hesitant to deny "since there is a plausible argument that it could somehow lead to admissible evidence."

524, Joel S. Neckers: "Reasonably calculated" "has created immense and unsustainable burdens." But the tradition of overly broad discovery is so well established that the amendments may not be effective.

622, Helen Hershkoff, Adam N. Steinman, Lonny Hoffman, Elizabeth M. Schneider, Alexander A. Reinert, and David L. Shapiro: There is no "documented problem" with the "reasonably calculated" provision. The Committee’s concerns seem to rely on anecdotal impressions. Since

2000, the rule requires that the information be relevant. The amendment will suggest that there is an area of information reasonably calculated to the discovery of admissible evidence but is not relevant to the claims or defenses, hence not discoverable. This in turn will be read to narrow the meaning of what is "relevant." 2078, Judith Resnik for 170 added law professors: supporting this comment.

642, Cal Burnton: "[T]he only constants about company records are that things are not organized, easily found, or even generally known to exist." The "reasonably calculated" standard provokes searches far beyond what is warranted.

673, Don Bivens for 22 more "individual members of the Leadership of the American Bar Association Section of Litigation": Supports elimination of the "reasonably calculated" formulation.

995, William P. Fedullo for Philadelphia Bar Assn.: The "reasonably calculated" phrase "has led to an overly expansive definition of the scope of discovery." It tends to creep beyond the original purpose to arguably expand the scope of discovery beyond relevant information and documents. (A dissent argues for retaining this well-developed concept.)

1054, Assn. of Bar of the City of New York: Supports "the objective of this change * * * to better express the scope of discovery that has always been intended." The Committee Note should observe that the amendment will not affect the discoverability of metadata relating to particular electronic documents or information about a party's computer system.

1206, Karen R. Harned for National Federation of Independent Business: "The typical NFIB member employs 10 people and reports gross sales of about $500,000 per year." A 2011 report shows that in 2008 the total tort liability expenses of businesses with less than $10,000,000 in revenue was $105.4 billion, including all expenses and sums paid to plaintiffs. These businesses bore 81% of business tort liability costs, but took in only 22% of total revenue. Their concerns with litigation are different from the concerns of large enterprises. They lack the sophisticated legal advice that in-house counsel can provide. Federal litigation is inefficient, expensive and fraught with uncertainties that have nothing to do with the merits. The Rule 26(b)(1) proposals will provide some measure of relief, particularly deleting the "reasonably calculated" provision.

1228, William E. Partridge: In one case the defendant produced a document with one page missing from the sequential numbers. After many motions, confronting repeated denials that the page existed, the page was produced and proved to be the "smoking gun." The discovery would not have been allowed if the "reasonably calculated" provision had not been available.

1269, Robert L. Levy for 309 companies: 309 companies sign on to this comment. The "reasonably calculated" provision "has been abused by parties and misconstrued by many courts." Eliminating it will bring the scope of discovery back to the reasonable intention of the original drafters.

1608, Jonathan M. Redgrave: "This is a critical change." The reasonably calculated phrase "appears in over 2,400 reported decisions, although few have any discussion of the genesis or meaning of the language. Worse, many of the cases immediately equate the phrase with the concept of 'broad discovery' as a right, resurrecting notions of discovery that pre-date the limitations identified as appropriate in 1983 and 2000."

1615, Daniel Pariser, Michael Rubin, Sharon Taylor, Joseph Barber: The "reasonably calculated"

standard "has, in practice, been used to swallow any reasonable limits on discovery." "Far too often litigants have no explanation as to how the discovery they seek is relevant or conceivably admissible," but fall back on this refrain.

1651, Michael Jay Leizerman for AAJ Trucking Litigation Group: Many forms of information that do not seem to bear on claims or defenses may be vitally important; the "reasonably calculated" provision enables discovery. "For example, a log book and toll booth receipt from a week before the collision may not seem relevant to what occurred the day of the collision, but have led trucking experts to the conclusion that log books were falsely maintained, which has led to further discovery to show the log books were false the day of the crash, or which have been used to show a pattern and practice of log book abuse."

2015, Cynthia R. Wyrick, Allan F. Ramsaur, & Paul Ney for Tennessee Bar Association: Removing the "reasonably calculated" requirement broadens the scope of discovery "such that a litigant conceivably could ask for discovery that has no bearing on the issue at stake." [Misquotes the proposal as "Information within the scope of discovery, rather than "this" scope of discovery. That may account for the comment.]

2072, Federal Courts Committee, New York County Lawyers' Assn.: Approves. The "reasonably calculated" provision "has too often been interpreted to include any and all discovery that may somehow lead to finding some relevant information."

November Hearing, Jack B. McCowan: pp. 8-14: (Represents defendants in product-liability actions; a member of DRI board.) Along with adopting proportionality, it is important to revise the "reasonably calculated" provision. It "is too broad to define." It leads to discovery orders that are too broad. An example is provided by a product liability action involving a medical device. FDA approval rested on predicate devices that are comparable in performance, but not in design or type of technology. But the court in such a case ordered discovery as to all of the predicate products as reasonably calculated to lead to discoverable evidence. That included dissimilar products and adverse events. In this case, all the predicate products were made by the defendant. In other cases, nonparties might be afflicted with the burden of such discovery.

November Hearing, Daniel C. Hedlund for Committee to Support the Antitrust Laws: p. 101 Revising the "reasonably calculated" provision is troubling for all the reasons that make proportionality troubling.

November Hearing, Wayne B. Mason: p 142 The most important proposal is the one that removes the language with respect to "reasonably calculated." Many lawyers mean it believes "you could pretty much have anything you wanted." This happens in state courts and in arbitration as well as in federal courts. Rule 26 has become an issue of leverage. "E-discovery has changed the world." Massive information is available, even from small businesses and individuals who have smartphones and tablets. Once you identify the documents they have to be reviewed for privilege, work-product protection, "and things like that." "Reasonably calculated" means I have to produce 2 million documents, while only two dozen of any significance wind up in trial. The same two dozen would be discovered with a narrower scope of discovery — any lawyer with the intelligence to pass a bar exam can frame requests that will lead to production. Predictive coding is a good idea, "but it is only one step and it is not the answer. * * * You can't get agreement on it. You can't afford to use it. And so, as a practical matter, it's used very little." And you still would have to review a ton of documents.

November Hearing, Michelle D. Schwartz, Alliance for Justice: p 168: Taking out the

"reasonably calculated" language will increase corollary litigation.

November Hearing, Marc E. Williams, President Lawyers for Civil Justice: p 244 It is clear that the "reasonably calculated" provision was never intended to define the scope of discovery, but eliminating it and pushing proportionality into the scope of discovery "will allow us then to focus on proportionality as it relates to the discovery that is necessary for the type of case that is being prepared."

January Hearing, Jon L. Kyl: p. 45, at 47: "Many have misunderstood this language as really reflecting the real standard for discovery."

January Hearing, Quentin F. Urquhart for IADC: p 133 "Reasonably calculated * * * has really swallowed the entire rule," allowing discovery "based on the hope that this search might, quote, lead to, closed quote, some other type of information that might be admissible at trial."

February Hearing, Mary Nold Larimore: p 68 This change will go a long way toward focusing on what is important.

February Hearing, Michael J. Harrington: p 121 Offers examples of vastly expensive discovery, and offers support for Rule 26(b)(1) — the greatest benefit "is the changed language to get away from the old standard, which I think is very broad, and leads to excessive discovery." This seems to reflect not so much proportionality as either "reasonably calculated" or "subject-matter" discovery, or all of them.

February Hearing, Leigh Ann Schell: p 179 Moving away from relevance to the subject matter, and especially eliminating the "reasonably calculated" phrase, is important. "Reasonably calculated" was not intended to expand the scope of discovery, but it has been overused and overblown. The proposal is a return back to what was intended in the first place.

February Hearing, John Sullivan: p 231 "Reasonably calculated" generates "the hugely open-ended standard we have always had." Adopting a tighter standard is good.

February Hearing, Donald J. Lough: p 248 "The root of this over discovery problem is the reasonably calculated clause in Rule 26." The comments that oppose removing this language, arguing that it is the core standard of relevance, show that it is misconstrued. Courts too often delay a determination of relevance until it is too late — they punt on the discovery objections, and then at trial time the documents are excluded as not relevant.

February Hearing, Conor R. Crowley, for "consensus" of a Sedona working group: p 280 Endorses eliminating "reasonably calculated" because it "has turned into a giant loophole."

RULE 26(b)(2)(A): ALTER NUMERICAL LIMITS, RULE 36

No comments. See Rule 36.

RULE 26(b)(2)(C)(III)

358, Dusti Harvey for AAJ Nursing Home Litigation Group: Discovery will be mandatorily narrowed if the court finds an item does not meet the rigors of 26(b)(1). "[O]ther vehicles for discovering those materials will be off-limits."

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Endorses.

RULE 26(C)(1)(B): ALLOCATION OF EXPENSES IN DISCOVERY ORDER

267, Lawyers for Civil Justice, by Alex Dahl: This is a small but important step toward the more important goal of revising the default "rule" that a producing party must pay the costs of responding. 540, Alex Dahl for Lawyers for Civil Justice: And the proposal should go further to recognize expressly that a protective order can protect against overly costly preservation.

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: The Section agrees that this cost-shifting power is implicit in present Rule 26(d). But the rule text, or the Committee Note, should make it clear that allocating expenses does not alter the American Rule and does not authorize allocation of attorney fees incurred in connection with disclosure or discovery. Attorney fees are not the kind of expenses that should be allocated. And notes that "[t]he cases are not uniform on whether courts have authority under the Rule to shift costs associated with the search and review of accessible data." November Hearing: Michael C. Rakower, p 287: The Section does not think the proposal is intended to change the American Rule, but it might be advisable to say so in the Committee Note.

311, James Coogan: Individual plaintiffs may be saddled with immeasurable costs. This creates an incentive for defendants to increase costs.

314, John F. Murphy, for Shook, Hardy & Bacon (John Barkett was firewalled from the comment): "[W]hen our clients have included cost-shifting provisions within their Rule 26(c) protective orders, opposing parties have asked for fewer documents and focused their requests * * *." "[T]he amendment explicitly encourages courts to take an active role in shifting the costs of discovery."

325, Joseph M. Sellers: Present Rule 26(c) authorizes cost allocation. It is a mistake to emphasize it further; if the proposed language is added, "the rule should reflect a reluctance to shift costs from parties with greater resources to those with lesser resources." And as with Comment 303, New York State Bar Association, it should be made clear that attorney fees are not among the expenses to be shifted to the requesting party — that would be an unwarranted departure from the American Rule. And three more points: (1) Cost shifting is unnecessary to deter excessive requests: the requesting party incurs costs to conduct depositions, and to review and analyze responses to interrogatories and documents. This is particularly true with electronically stored information — a party requesting it has ample economic incentive to make narrow requests. (2) The responding party is in the best position to control costs. If it bears the costs, it has every incentive to reduce costs; if it shifts the costs, it has less incentive to maintain records in readily accessible formats or to employ efficient search strategies. (3) Particularly in civil rights and employment cases, there is an asymmetry in the parties' resources and their access to evidence without formal discovery. If ordered to pay, a plaintiff may forgo discovery and be forced to proceed without the information.

328, U.S. Chamber Institute for Legal Reform: The root cause of our broken discovery system is the rule that generally the producing party bears the costs of producing. "This rule is the ultimate driver of expensive discovery because it incentivizes a party to lodge burdensome requests on the other side without any downside risk to itself." The problem is exacerbated by electronically stored information. A RAND study found that the median total cost for ESI discovery among the firms who participated totaled $1.8 million per case. The present practice deprives the producing party of its property — the money spent to produce — without due process of law. There is nothing but the plaintiff's unilateral allegation of liability, no judicial hearing. Even a hearing on

a motion to dismiss or for judgment on the pleadings does not provide the required process before inflicting these costs. The costs of discovery should be placed provisionally on the person asking for it, giving incentives for the optimal level of production. A safety valve can be incorporated for the unusual case considering "whether the party from whom information is sought: (1) retained information in a manner that makes retrieval particularly expensive or cumbersome; (2) failed to provide relevant information during initial disclosures, thereby drawing out discovery; or (3) otherwise drove up the price of discovery through its litigation strategies." "This system would also facilitate greater and more direct court involvement in discovery."

Failing that, a more modest "solution would be presumptive cost-shifting for electronic discovery." The result would be narrower requests, reducing the prospect of infringing a defendant's due process rights. Or, failing that, "[t]he Committee might codify the factors articulated by" the ABA Section of Litigation Civil Discovery Standards, 29b.iv.A-P (2004).

343, Doug Lampe for Ford Motor Company: "In Ford's experience, judges are almost uniformly unwilling to consider meaningful cost-allocation proposals even in cases of clear discovery abuse." Defendants sometimes settle meritless claims to avoid the cost of onerous discovery demands. "Making explicit the provision for protective orders that allocate the costs of discovery would deter parties from engaging in abusive discovery tactics." The problem is illustrated by a specific case in which a state court ordered Ford to retrieve records from more than 1,300 other lawsuits and 1,200 witness transcripts, many involving closed cases and off-site archived records maintained by outside law firms. This effort cost $2,000,000, and yielded nothing actually admitted in evidence at trial. The court allowed Ford to recover only the few thousand dollars incurred for reasonable copying costs.

344, Shanin Specter, Thomas R. Kline, Andrew J. Stern, Andrew S. Youman: This will have a chilling effect on discovery. Individual plaintiffs have no way of assessing the cost of production. "Permitting cost shifting will encourage efforts to thwart discovery by making it expensive to locate and produce evidence and/or artificially inflating the cost of locating and producing evidence." The rule will discourage development and use of archival systems that reduce the cost of production.

351, Eric Hemmendinger for Shawe Rosenthal LLP: "Cost sharing is the best single method of forcing counsel to ask whether discovery is really necessary." Many employment plaintiffs have limited means, but "even partial cost sharing would cause counsel to engage in a cost-benefit analysis before conducting discovery." And it should be remembered that many collective and class actions "are essentially business ventures organized by plaintiffs' counsel."

353, Kenneth D. Peters, John T. Wagener: "This provision * * * will force parties to think twice before seeking large amounts of discovery which may prove marginally useful."

358, Dusti Harvey for AAJ Nursing Home Litigation Group: The amendment is superfluous because the authority is already there. In nursing home litigation, it is common to be allowed discovery of incident reports documenting injuries only under a protective order. "[T]he proposed change appears to deliberately enumerate the awarding of costs as a formalized duty for the court." [This seems to say that costs must be awarded whenever a protective order is granted for any reason.]

360, Robert Peltz: Practices maritime law in S.D.Fla. A combination of a ruling by a Florida appellate court and forum-selection clauses in cruise ship contracts means that the overwhelming majority of actions by injured passengers must be filed in S.D.Fla. Passengers from around the

country can ill afford to litigate there now; adding responsibility for the defendant's costs in responding to discovery would make it economically impossible for many individuals with meritorious cases to bring them.

372, J. Burton LeBlanc, for American Association for Justice: Does not object, but the Committee Note should be expanded to say that these new words do not change the presumption that the responding party should bear the costs of producing discovery. Any more general "requester pays" rule should be limited to litigation between large corporations.

381, John H. Beisner: Writes at length to urge broad expansion of "requester pays." Due process interests are at stake in a system that enables one party to inflict the costs of discovery on another party without any pre-deprivation hearing. One approach would be to establish a general rule that each party pays the costs of discovery it requests, subject to adjustment by the court on considering such factors as whether the responding party preserved information in forms costly to retrieve, failed to provide relevant information during initial disclosures, or drove up the price of discovery through its litigation strategies. Alternatively, the rules might simply mandate that the court consider cost shifting in any case in which discovery of ESI is sought. The need for some such relief will only grow as third-party litigation financing expands. Investors in litigation are almost assured that they can recoup the investment because it is possible to impose such great discovery costs as to coerce settlement on terms that at least cover a plaintiff's litigation expenses.

383, Alan B. Morrison: Allocation of expenses can be a reasonable element of a protective order. But the Committee Note should make it clear that this should not be routine, but used only "where the losing party was unreasonable in either the making of an objection or pursuing the request."

388, Nina M. Gussack, Joseph C. Crawford, Anthony Vale: Considering the cost of discovery will have a welcome tempering effect on the desire for additional discovery.

398, Shira A. Scheindlin: "[C]ost-shifting has crept into the rules and the more often it does, the more likely we are to see a change in the American system of litigation." In 2006 the Committee suggested that cost-shifting can be a condition for producing ESI that is difficult to access. The new rule, in combination with Rule 26(b)(2)(B), "may encourage courts to adopt a practice of requiring parties to pay for the discovery they request or to do without." That should not become our default position.

414, John R. Scott: This proposal "will offer substantial relief from excessive costs of discovery. The mere existence of this rule will likely cause litigants to be more thoughtful in making their discovery demands."

427, John F. Schultz for Hewlett-Packard Co.: "The ability to allocate the expenses of broad discovery requests to the requesting party would likely reduce the scope of such requests and encourage greater cooperation by the parties agreeing to search terms or custodians and taking other measures to reduce the overall burden of discovery * * *."

428, Dave Stevens: Writes as owner of a small campground to support "increasing judicial authority to charge the plaintiffs for unreasonable costs they generate on such things as discovery."

436, William M. Scarff, Jr., and Donald P. Bunnin, for Allergan, Inc.: This may be the most

important, and have the greatest impact, of all the proposals. "[I]f properly and routinely applied by courts, the amended rule should focus discovery on information critical to the parties' claims and defenses." "But the key is the application * * *." The authority exists now, and is seldom used. Change must include consistent application.

446, Stephen Aronson: The rules should adopt a requester-pays system to reduce unreasonable time and cost in discovery.

447, Charles Crueger: (This comment may interpret the proposal as a general requester-pays rule:) It is unwise to have the requesting party pay. The requester almost never knows what documents the other side has, and cannot predict whether the discovery will be worth the cost. The producing party has an incentive to maximize the costs of production. In large cases, the parties have an incentive to opt out of cost shifting. Much expense, for that matter, results from persisting in reviewing ESI as if it were paper; computer retrieval and review can be much less expensive.

450, Vickie E. Turner for Wilson Turner Kosmo LLP: "Holding parties accountable for the cost of excessive requests encourages tempered discovery and reinforces the purpose of the amendments to Rule 26(b)(1)."

452, David Hill: Drawing on many years as CFO of various companies, urges that the requester should pay the costs of discovery, and further that we should switch to a rule that the loser pays the winner's costs.

454, John Brown: Favors confirming authority to allocate the costs of discovery to the requesting party, "because then the requester will decide to pay for information they need."

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Supports the proposal. "The authority already exists, but expressing the authority in the Rule will clarify any uncertainty."

462, George E. Schulman, Robert B. McNary for the Antitrust and Unfair Business Practice Section of the Los Angeles Bar Assn.: In some cases the parties have agreed by contract on who bears the risk of counsel fees and costs. Or a statute allocates the risk. But where there is no contract or statute, this proposal is likely to result in shifting the cost to the more affluent party. (The example is a bit puzzling: a large entity objects to the burden of a request by an individual plaintiff, but may be left to bear the cost of responding.)

463, Janet L. Poletto for Hardin, Kundla, McKeon & Poletto: "the mere presence of this rule will likely cause litigants to be more thoughtful in making discovery demands."

473, Paul C. Saunders and Rebecca Love Kourlis for ACTL Task Force and IAALS: In the first part surveying various state-court practices and pilot projects, it is noted that a New Hampshire pilot project included proportionality in addressing discovery of ESI, and provided that when a request is considered out of proportion, the court may determine the responsibility for the reasonable costs of producing the ESI. The comment on proposed Rule 26(c) observes that the cost of preserving and reviewing ESI generally should be borne by the producing party, but courts should not hesitate to arrive at a different allocation in appropriate cases.

487, Peter J. Mancuso for Nassau County Bar Assn.: The Note should make clear that "expenses" does not include attorney fees; a fee award would violate the American Rule.

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: Participants in the conference generally divided along party lines — plaintiffs oppose, noting the authority is already in the rule and fearing that the amendment will imply that shifting costs to the requesting party is the preferred outcome. One suggested that at least the Committee Note should state that the authority to allocate costs does not include attorney fees; the "American Rule" should be honored. Defense attorneys suggested the proposal does not go far enough. Attorneys seldom talk about how much it will cost to produce requested discovery and whether the costs make sense for the case. And one observed that the Committee Note does not say "should"; the purpose of the proposal is to facilitate conversation about the need and justification for proposed discovery.

499, Beth Thornburg: Cost-shifting has been limited to a handful of e-discovery cases that raise unique problems. It should be studied further before anything is done to encourage it.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Endorses without further elaboration.

630, Jon Kyl & E. Donald Elliott: The "producer pays" system of discovery creates perverse incentives. Rather than create incentives that require judicial management, the rules should provide direct incentives for appropriate behavior. "Requester pays" for discovery does provide proper incentives, with needed exceptions for the poor and for exceptional cases. The Committee Note should provide examples that illuminate appropriate requester-pays orders. (1) If an administrative agency has approved the safety of a drug or chemical substance, a party who seeks to second-guess that determination should pay for discovery. (2) When the need for information is in doubt, judges today typically face a choice between allowing discovery and denying it. Requester-pays orders provide an intermediate option — a modicum of free discovery can be allowed, and beyond that allocating the costs to the requesting party creates the proper incentives. (3) When a claim or defense is barely above the pleading and Rule 11 standards, but implausible — unlikely to prevail — requester pays is appropriate.

673, Don Bivens for 22 more "individual members of the Leadership of the American Bar Association Section of Litigation": Favors the proposal. "Cost sharing is an extremely important issue, and we commend the Committee's plan to focus in the future on potential cost sharing in lieu of the current presumption that the responding party should bear the costs imposed by discovery responses."

677, Noah G. Purcell for Washington State Attorney General's Office: "[S]trongly support[s]" the proposal. The possibility of bearing the financial burden of disproportionate demands "hopefully will encourage reasonableness."

995, William P. Fedullo for Philadelphia Bar Assn.: Endorses the proposal because it does not substantively alter the current rule. Courts have discretion to award expenses in addition to attorney fees. (A dissent urges that this amendment be postponed for consideration in the projected broader study of possible "requester pays" provisions.)

1040, Pamela Davis for Google, Inc.: Many courts and judges have adopted the recommendations for e-discovery created by the Advisory Council to the Federal Circuit. They include presumptive limits on the production of custodial e-mail data, coupled with cost-shifting for requests exceeding those limits. Google's experience is "that when appropriately employed, such rules reduce the burdens of discovery, without interfering with a party's ability to have its case litigated on the merits."

1164, Stuart Ollanik, for Public Justice: Resubmits a comment from March, 2013, submitted before publication. "One author of these comments has faced multiple situations in which parties responding to either discovery requests or subpoenas have presented wildly inflated cost estimates in seeking a protective order, and many other attorneys report the same thing." The proposal will add incentives to make it more expensive and difficult to access archived information.

1213, Melissa B. Kimmel for PhRMA: The experience of pharmaceutical research and manufacturing companies shows that a more aggressive approach to cost-shifting is needed. The presumption that the producing party bears the costs incentivizes over-broad requests; indeed there is a perverse incentive. Asymmetry of information encourages excessive demands by parties who are not subject to countervailing requests. Due process interests are jeopardized by allowing imposition of staggering discovery costs without a preliminary judicial finding of wrongdoing. The rule should establish a presumption that the requesting party pays all or part of the costs of responding. "The presumption could be rebutted by a showing that: (a) the producing party has engaged in intentional, bad faith conduct designed to impede discovery or make production especially burdensome; or (b) the requesting party has established (i) an inability to pay all or a portion of the costs of its requested discovery; and (ii) that the discovery requested is vital or crucial to the litigation." Relevant factors could be discussed in the Committee Note — can costs be shared among a group of plaintiffs, as in MDL proceedings, an organized litigation group, or a class action; or is the lawsuit being financed by the plaintiff's attorney or a third party as part of a profit-making enterprise. The presumption likely would be rebutted on showing that a civil rights lawsuit was initiated by a non-profit organization or an attorney working pro bono.

1461, Larry A. Tawwater for AAJ: This proposal is unnecessary — courts clearly understand they have authority to order cost-shifting under Rule 26(c); see Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978). This proposal is especially problematic when combined with the proposed numerical limits on discovery — it will become routine to insist that the requesting party should pay for any discovery that goes beyond the presumptive limits. The same problem will arise from arguments based on the new proportionality concept. If this proposal is to be adopted, it should be balanced in several ways. The most important is to abandon the proposed numerical limits. Failing that, the Committee should clearly state that exceeding the presumptive limits is not itself a reason to impose cost-shifting. The rule text, or at least the Committee Note, should reaffirm the presumption that the responding party pays the costs of discovery. Language should be added to exclude attorney fees from "expenses." Language also should be added requiring courts to consider the relative resources of the parties and the intent of the party seeking a protective order, "to ensure that a party who can afford the cost of discovery doesn't simply use Rule 26(c) as a tool to crush its opponent."

1540, Benjamin R. Barnett & Eric W. Snapp: "[D]iscovery cost allocation should be the standard in most cases, rather than just an available remedy."

1615, Daniel Pariser, Michael Rubin, Sharon Taylor, Joseph Barber: "When our clients have succeeded in including cost-shifting provisions in their Rule 26(c) protective orders, opposing parties have been far more likely to seek relevant discovery but not discovery that serves only to increase costs and impose additional burdens. We have seen this effect with Rule 45 discovery requests as well: when we offer the subpoenaing party whatever discovery they want as long as they cover costs, requests are dramatically narrowed to what the party truly wants and needs."

1732, J. Burton LeBlanc for American Assn. for Justice: "AAJ does not object to the

Committee's proposed change to Rule 26(c)(1)(B) *per se*." But the Committee Note should make it clear that this does not change the presumption that the responding party should bear the costs of producing discovery.

2072, Federal Courts Committee, New York County Lawyers' Assn.: The 1970 Committee Note to Rule 34 noted that courts have ample power under Rule 26(c) to protect against undue burden or expense, by "requiring that the discovery party pay costs." "The Committee endorses the idea of limited cost shifting as it can reduce overbroad requests, yet cautions against a total abandonment of the American Rule." The Committee Note should state whether this includes cost shifting with respect to attorney fees entailed in fulfilling the discovery requests — presumably it does — and whether it permits allocation of costs "when the data is accessible for search and review but is excessively voluminous."

2146, John J. Rosenthal: Rule 26(c) should be enlarged to reach not only parties, but also a person "who is, or may be, subject to a request to preserve documents, electronically stored information, or tangible things." That would facilitate early resolution of preservation disputes by the court if the parties cannot agree.

2223,Megan Jones for the Committee to Support the Antitrust Laws: This proposal "will likely make stipulated protective orders a thing of the past. * * * Inevitably, before discovery even starts, the parties will be turning to the courts to determine who pays for what at a time when knowledge about what ESI exists is at its most basic."

November Hearing, Jeana M. Littrell: p. 16: This amendment is needed. Experience shows that judges are too reluctant to order the requesting party to bear the cost of discovery in appropriate circumstances.

November hearing, John C.S. Pierce: p. 25: Favors cost allocation.

January Hearing, Jon L. Kyl: p. 45, 48: Allocation "gets the incentives right." "[A] party who determines that he really or she really needs something should have the ability to get it if that party is willing to pay for it." This is not a general requester-pays rule, nor one that assumes that some core of discovery is free while anything more is requester-pays. But to be effective, the rule should explain how the power is to be used. Examples should be given. One example would be a presumption for requester pays when the litigation advances a position contrary to an administrative determination — for example, a determination that a drug is safe.

February Hearing, Mary Nold Larimore: p 68 The Committee Note in 1970 observed that the court has ample power to protect against undue burden and expense, including by a requirement that the discovering party pay costs. This proposal "is going to give judges the opportunity once again to put sensible cost allocation into place." An example is provided by a case in which we won an order allowing us to make available a document repository created by a co-defendant. The order set a price of 8 cents per page for access. Over more than a year, no one has made any effort to look at anything in the repository. "One of the best ways to find out the marginal value of these document productions is to assess the cost." But cost allocation should be routine.

February Hearing, Mark P. Chalos, for Tennessee Association for Justice: p. 104 Some courts and litigants think courts already have this power. If the proposal is adopted, it should be made clear that the default rule is the American Rule that each party bears its own costs. One party should be made to pay another party's efforts to collect and analyze information only in extreme and unusual circumstances.

February Hearing, Donald J. Lough: p 248 In cost-sharing jurisdictions, "when we are able to present a bill to our adversaries for their fair share of the cost of discovery, they very quickly can make a decision about what they need, and what they don't."

RULE 26(d)(2): EARLY RULE 34 REQUESTS

267, Lawyers for Civil Justice, by Alex Dahl: The proposal is encouraged as part of a larger package, but standing alone does not address the larger problems. (The comment is ambiguous as to which part of Rule 26(d) it addresses.)

292, Lyndsey Marcelino, for The National Center for Youth Law: Serving discovery requests before the Rule 26(f) conference is likely to improve discovery for this plaintiffs' advocacy group.

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: Supports the proposal, agreeing that it would facilitate the Rule 26(f) conference. "The Section also does not believe that initial requests made before the Rule 26(f) conference are likely to be any broader than requests served after the conference, although that is a possibility." And over-broad requests can be appropriately narrowed at the conference or, if necessary, by the court. November Hearing: Michael C. Rakower, p 287: Repeats the support. Early Rule 34 requests will mean the parties can face actual, real-life issues during the Rule 26(f) conference.

381, John Stark: There is a need for much greater control of Rule 34 requests. Encouraging even earlier requests goes the wrong way.

383, Alan B. Morrison: (1) Supports the idea, but asks why it is limited to Rule 34. Rule 33 interrogatories and Rule 36 requests to admit will give a better idea of what the case is about. (2) Rather than include a complicated provision for the date of service, it would be better to provide: "(B) Time for Response. The time and place for a response to the request shall be stated in the scheduling order under Rule 16(b)."

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: "[A]ny benefit of the proposal's accelerated schedule likely will be outweighed by a lack of focus in prematurely promulgated discovery requests. Instead, the Department recommends amending Rule 26(f)(3)(B) to clarify that anticipated document requests are to be discussed during the 'meet and confer' process." That will accomplish the goal. The discussions are needed to develop a better understanding of what discovery will be relevant. Pre-Rule 26(f) requests "typically will be less tailored or more burdensome," leading to increased motion practice. The requests may be satisfied or narrowed by agreement as to initial disclosures or the scope of the dispute. And a party who delivers early requests may become committed to them. There is a particular risk with requests formulated before the parties confer on the proper scope of ESI discovery. Finally, the time to respond should be geared to the conclusion of the complete 26(f) conference process, not to the first 26(f) conference.

479, Earl Blumenauer, Suzanne Bonamici, Peter Defazio, and Kurt Schrader, Members of Congress: Support, as improving the discovery process.

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: There was not much discussion at the conference, but there was support. And some suggested that this approach should be extended to other forms of discovery.

494, Charles R. Ragan: Neutral, but the Committee Note should emphasize that the requests should be tailored to the claims and defenses, not the traditional "any and all re X category."

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: "[S]trongly opposes. We believe that it would aggravate rather than reduce the adversarial nature and expense of discovery." Requests will be framed without the advantage of initial disclosures or the Rule 26(f) conference. The proposed provision "will devolve into a routine practice of serving boilerplate, shotgun requests as a means of seeking an adversarial advantage. That, in turn, will lead to disputes at the Rule 26(f) conference that will actually impede the progress of the case."

635, Matthew D. Lango for NELA/Illinois: Supports.

673, Don Bivens for 22 more "individual members of the Leadership of the American Bar Association Section of Litigation": This is not likely to streamline the process, but "most of us do not feel strongly about this change."

995, William P. Fedullo for Philadelphia Bar Assn.: Endorses. This device is already permissible, and "gives the parties the opportunity to address substantive discovery issues concretely at the Rule 26(f) conference and, thereby, promotes a more efficient discovery process."

1054, Assn. of Bar of the City of New York: "This proposed change serves a potentially beneficial purpose with no practical downside." Often additional time will be needed to respond, but the parties and court should continue to be amenable.

1413, Jocelyn D. Larkin for Impact Fund and several others: This is "a small but important change because it allows the parties to immediately begin planning discovery and identifying concrete issues that may require early court intervention."

1463, N. Denise Taylor for Association of Southern California Defense Counsel: "This is beneficial. * * * For parties who choose to take advantage of this rule change, it will make Rule 26 conferences more productive and focused." "

1481, George Dent: "In state court [apparently Alabama], we often serve requests for production with the complaint * * *." This "would make the conference more informed and productive."

1522, Michael P. Lowry: As a matter of professional courtesy, and to move the case forward, I often draft interrogatories, requests for production, and (if necessary) requests to admit and serve them on the parties before discovery opens. My letter explains that the answering party is not yet obligated to respond. When the discovery period opens I send a letter reminding them that responses are due in 30 days. The proposal should be expanded to include interrogatories and requests to admit.

1594, John Midgley, Columbia Legal Services: Particularly supports.

1665, Laurie C. Barbe for Defense Trial Counsel of West Virginia: There should be a provision addressing discovery requests served before an action is removed from state court. The rule should be that discovery must be refiled after removal.

2072, Federal Courts Committee, New York County Lawyers' Assn.: "[I]t is advisable to permit early Rule 34 requests, which may result in the discussion of more substantive discovery issues at the Rule 26(f) conference, promoting efficiency in the discovery process." The Committee Note should advise that the requests designate the form for producing ESI, lest the responding party begin to produce in a form the requesting party does not want, and allowing the parties to

better negotiate the form.

2110, Miriam Hallbauer & Richard Wheelock for LAF: Supports as well designed to reduce costs and delay.

2141, Kevin N. Ainsworth: There is no reason to impose a waiting period, much less one with an anomaly that allows requests to be served without delay on any additional defendant that has been served. It should be simply: "A request under Rule 34 may be delivered before a Rule 26(f) conference."

2209, Richard Talbot Seymour: This proposal is well-taken. A further step would be to require the use of the discovery protocols in employment discrimination cases involving pretext analysis.

November Hearing, Jeana M. Littrell: pp 14-15: (From the perspective of defending employment actions.)The early exchange of discovery requests will support more efficient resolution of cases, with less ancillary litigation. It should be extended beyond requests to produce.

November Hearing, Paul J. Stancil: p. 83,84-85, 90-93 Plaintiffs will want to deliver early Rule 34 requests. But this disturbs the calm that otherwise remains up to the time of the Rule 26(f) conference. Early requests will start the meter running for defendants, as a way to expand the time available to amass the Rule 34 materials. Work will start immediately. That may stiffen the resolve to resist potentially valid claims or defenses, and may increase the temptation to file frivolous claims or defenses. The proposal will disproportionately advantage plaintiffs over defendants.

February Hearing, Ariana Tadler: p 325 Supports.

RULE 26(d)(3): ORDER OF DISCOVERY — STIPULATIONS

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Endorses the proposal.

RULE 26(f): PRESERVATION, RULE 502 ORDERS

267, Lawyers for Civil Justice, by Alex Dahl: The proposal is encouraged as part of a larger package, but standing alone does not address the larger problems.

281, Daniel Garrie: (1) There is no need to add preservation of ESI to the discovery plan. And it will not work because the timing of the 26(f) conference is too early to develop a preservation plan. Before that can be done, the parties must determine the universe of ESI that must be preserved, the software and hardware from which it has to be collected, and the form in which it is currently stored.

(2) Finds an implication that adding "under Federal Rule of Evidence 502" limits the scope of agreements the parties may reach with respect to privilege and trial-preparation materials. It "forecloses discussions of protection that don't fall under" Rule 502.

287, Lynne Thomas Gordon, for the American Health Information Management Association: The comment seems to focus on all of Rule 26(f)(3)(C). As with the parallel Rule 16 changes, the Rule 26(f) conference "is critically important and should not only involve counsel but also a qualified and credentialed HIM professional."

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: Adds to the reasons offered for supporting the parallel amendments to Rule 16(b). There are many preservation issues to be discussed. "Because the duty to preserve is triggered when a party reasonably anticipates litigation, it is almost impossible, if not impractical, for a party not to have begun making critical decisions regarding preservation before conferring with its opposing party." There is fertile ground for dispute. The discovery plan should discuss the issues on which the parties agree, and those on which they disagree. When they disagree, the plan should include a brief summary, devoid of argument, a brief statement of each party's position, and a proposed solution designed to foster agreement. This will put the court in a better position to usher the parties toward middle ground.

The reference to Evidence Rule 502 should refer specifically to a Rule 502(d) order, "to emphasize that the parties should specifically ask the court for such an order — as failure to do so will leave them only with the protections of Rule 502(b) and the case law * * *, rather than the more fulsome protections of a Rule 502(d) order."

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Supports the proposal.

494, Charles R. Ragan: These proposals are modest. Rule 26(f) is crucial in appropriately shaping ESI discovery. It will work better if the parties are required to prepare an executive summary stating, without argument, the issues they agree on and the issues that they do not agree on. That will provide a good introduction to the more detailed report.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Endorses the proposal, "and believes that it will encourage the use of Rule 502 orders."

1654, Kimberly Baldwin-Stried Reich: Supports "in the context of healthcare litigation."

RULE 30(a)(2) NUMBER OF DEPOSITIONS (ALSO RULE 31(a)(2))

(Many comments treat Rule 30, 31, 33, and 36 numerical limits together. Those that pick out Rule 30 as the main focus are summarized here without adding duplicate summaries for the other rules.)

261, David McKelvey: A business can get affidavits from its employees for summary judgment, while the 5-deposition limit will prevent plaintiffs from getting their testimony at all. Five depositions often are not enough even for expert witnesses.

264, American Association of Justice Transvaginal Mesh Litigation Group, by Martin Crump: Often it is necessary to take more than 10 depositions in product-liability actions, involving multiple officers in different branches of the defendant corporation. Five "is overly restrictive."

265 American Association for Justice Civil Rights Section, by Barry H. Dyller: Many civil rights cases involve five or more defendants. Offers an illustration of suit against 8 defendants who placed a child they knew to be a rapist with an adoptive family, and who failed to notify the parents of any of his 12 other victims. 27 depositions were needed to secure the important information.

266, American Association of Justice Aviation Section, by Michael L. Slack: A presumptive limit of 5 depositions is "absurd in aviation cases." The present limit is too restrictive. The limit should be set to allow unlimited depositions of retained experts and unlimited Rule 31 depositions on written questions, and 10 oral depositions of other witnesses. The fear of increased motion practice is exaggerated — as the Note suggests, the parties can be expected to agree in most cases.

267, Lawyers for Civil Justice, by Alex Dahl: The fears expressed by some, particularly those involved in employment litigation, are exaggerated. Rule 30 says the court must grant leave to take more than 5 to the extent consistent with Rule 26(b)(1) and (2). But the Note should be revised by adding the language in the Rule 33 Note: the purpose is to encourage the parties to think carefully about the most efficient and least burdensome use of discovery. The fear of increased motion practice is exaggerated — as the Note suggests, the parties can be expected to agree in most cases.

270, Ohio Association for Justice, by John Van Doorn: This provides a general objection to presumptive limits that will increase inefficiencies, impose additional burdens, and encourage plaintiffs to craft broader requests to obtain the same amount of information while keeping within the presumptive limits. This reads on Rules 31, 33, and 36 as well; there is even a reference to Rule 34.

273, Cameron Cherry: A general statement that limiting the numbers of depositions, interrogatories, and requests for admission, and limiting the duration of depositions, will limit access to full justice.

274, James Jordan: "[W]hen was the last time you had a complex commercial case and could limit it to 5"?

276, John D. Cooney: Mesothelioma cases provide a good example of the need for more than 10 depositions. Reducing it to 5 is overly restrictive. In addition to multiple officers in different branches of a corporate defendant, it may be necessary to depose a plaintiff's coworkers to

preserve their testimony.

278, Perry Weitz: Depositions are critically important to gather evidence not only for trial, but as a prelude to settlement. The need for more than five is manifest. (Then a paragraph using mesothelioma cases as an example; it is verbatim the same as a paragraph in 276, noted above.

279, Kyle McNew: For all the limits, Rules 30, 31, 33, and 36, decreasing the number will spawn more litigation. "This proposal exacerbates the problem by making the one-size-fits-all product smaller * * *."

280, Oren P. Noah: In asbestos litigation, there often are more than five defendants. Plaintiffs would have to pick which defendants to depose. And the problem will be vastly increased if the limit is applied to expert witnesses.

282, Susan M. Cremer, Chair, AAJ Federal Tort Liability and Military Advocacy Section: Medical malpractice cases under the Federal Tort Claims act commonly involve multiple health-care personnel and many experts. Examples are given of cases requiring well over 5 depositions per side.

285, Cory L. Andrews, Richard A. Samp, Washington Legal Foundation: Each of the revised limits in Rules 30, 31, 33, and 36 is welcome. They will help ensure proportionality in discovery. But other presumptive limits should be adopted for document discovery. So Stephen Susman suggests a limit to five custodians for the first round, followed by five more custodians for a second round, and more only for good cause.

288, Sharon L. Van Dyck for the Railroad Law Litigation Section, AAJ: Depositions and document requests are the most effective means of discovery. "Most rail law cases require more than five depositions, even excluding experts. * * * Responsible lawyers do not use the presumptive 10 if 10 are not warranted by the case." Reducing the number will create problems that do not now exist.

289, Craig B. Shaffer & Ryan T. Shaffer: Ties together the proposed numerical limits in Rules 30, 31, 33, and 36, suggesting that rule text should reflect some of the situations that frequently call for greater numbers of discovery events. (1) Some critics of the proposals seem to be inconsistent — they are willing to retain judicial discretion to expand discovery to the subject-matter of the action, but are unwilling to rely on judicial discretion to determine the number of discovery events. (2) Limiting a litigant to 5 depositions may often be unreasonable. Suppose an adversary identifies more than 5 witnesses in the initial disclosures? Or suppose there are several expert witnesses? What if witnesses necessary for trial are beyond reach of a trial subpoena? It can be argued that de bene esse depositions should not count against the limit, or perhaps that expert trial witnesses should be excluded. And the limit may need to be expanded if defendants, heedless of the uncertain impact of *Twombly* and *Iqbal* continue to plead boilerplate defenses in general terms. (3) In seeking relief from numerical limits, counsel should consider the interplay between depositions and interrogatories. Interrogatories are less expensive. But if a party plans a Rule 30(b)(6) deposition of an organization, it may be more difficult to justify an over-limits number of interrogatories. (4) A responding party's patently deficient or obfuscating responses may justify going over the limit, as a mirror of the Rule 26(b)(2)(C)(i) provision for limiting the frequency of discovery where the inquiring party has had ample opportunity to obtain discovery. Similarly, violation of the Rule 26(g) certification requirements may justify an appropriate sanction. [If the "sanction" is discovery above the presumptive limits, it may be wondered whether it need be called a sanction at all.]

292, Lyndsey Marcelino for The National Center for Youth Law: In a class action the Center had 11 plaintiffs who had spent from 10 to 14 years under the care of the State of Nevada. They had multiple caseworkers, doctors, foster parents and therapists. One, for example, had seven caseworkers and seven foster parents. Five depositions are not enough.

295, Andrew Horowitz: Recently completed 9 depositions in a single-plaintiff case under the Age Discrimination in Employment Act. The firm invested substantial time and court reporters' charges — it has an incentive to take only depositions that promise a reasonable chance of securing testimony important to the case. There is a risk that the court would not have granted leave to take 9 depositions, as it would regard the case as a "run of the mill" single-plaintiff case.

296, William B. Curtis, for Reglan Litigation Group, AAJ: Drug manufacturers too often produce corporate representatives for depositions who do not know the information designated in the notice. They can "burn up the five available depositions with no useable information." Deposition transcripts are attached to illustrate this practice. "Oral discovery games are already too prevalent under the current rules."

297, Trevor B. Rockstad for the Darvon/Darvocet Litigation Group, AAJ: In pharmaceutical cases it is often necessary to take more than 10 Rule 30(b)(6) depositions of as many different departments in a single defendant.

299, Aaron Broussard: In 95% of the cases that meet the $75,000 jurisdictional amount, each side will exceed 5 depositions.

300, Maria S. Diamond: Follows up pre-publication comments by offering an example of a recent case in which, following responses to requests to produce and to identify fact witnesses, a series of 7 depositions continually revealed information that should have been provided in response to the initial requests but was not. "This example is by no means unusual in my thirty years of practice as a plaintiff's personal injury attorney."

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: "[T]here is no objectively reasonable basis to justify a reduction" from 10 to 5 depositions. (1) The empirical findings of the FJC belie any need. The numbers of depositions, and the median costs of discovery, are reasonable. (2) There is no showing that the present presumptive limit of 10 depositions has caused widespread problems. The FJC figures suggest that only 11% to 18% of the cases in the narrowed data base involved more than 5 but no more than 10 depositions; the change will affect only a small slice of current practice. (3) Deposition costs are almost always considered in deciding whether to take a deposition. (4) Depositions are often needed to ensure the use of testimony by a witness who is beyond the reach of a trial subpoena. (5) The provision in Rule 30(a)(2) directing that leave be granted to exceed the limit is scant comfort. The burden is on the party seeking to exceed the number, and it will be a burden to overcome a lower presumptive limit. This shifts the leverage in any negotiation. And it will be natural for judges to assume that they should be reluctant to grant leave to go above the presumptive limit. (6) The concerns of "some judges" expressed at the Duke Conference seem to rest in part on the comparison to criminal trials. But in criminal trials the government must disclose witness statements and exculpatory material to the defendant, and the government has effective investigatory powers. (7) The argument that ADR is effective without depositions "ignores the fact that depositions are, in fact, often used in arbitration." (8) That depositions are seldom used for effective impeachment overlooks the fact that one purpose of taking the deposition is to lock the witness into the testimony, so it cannot be changed. (9) "[A] single plaintiff suing multiple defendants already is given the presumptive equivalent of the

number of depositions as all defendants combined." {That is, one plaintiff gets ten depositions; ten defendants share ten, giving one each.} (10) The new proportionality requirement will provide sufficient new restrictions on discovery. Any further restrictions should be implemented by the court during the Rule 16 conference.

The Section separately notes that the Rule 30 revisions do not attempt to address unanswered questions that now arise. How to count Rule 30(b)(6) witnesses? Is it one deposition, or two, if the same person both appears as a corporate witness under Rule 30(b)(6) and is deposed in a personal capacity? Must leave be obtained to take a second Rule 30(b)(6) deposition of the same entity, and does it count against the limit? "[A]gainst whose side [should] third-party defendant depositions" be counted?

November Hearing: Michael C. Rakower, p 287: Renews the Section's questions. The data do not seem to support a reduction in the numbers of discovery requests in any of the rules. The problem of cost is not so much that any side is abusing the system, but rather that costs run up when "parties each take their fair share of depositions collectively." The Section has a cross-section of lawyers, who do not see an extensive amount of abuse.

307, Judge A. Leon Holmes: Opposes all the proposed numerical reductions. The present limits are sufficiently generous that E.D.Arkansas sees few disputes. But many cases cannot be adequately prepared for trial with 5 depositions and 15 interrogatories; those limits will give an advantage to the party with the information, and will generate discovery disputes.

310, Johnathan J. Smith, for NAACP Legal Defense Fund: Offers two generic examples of civil rights claims that require several depositions. Section 1983 claims challenging municipal policies and practices require several depositions to fully understand the issues. And claims brought under statutes with a burden-shifting practice require depositions not only to establish the prima facie case but also to rebut asserted justifications for the challenged conduct. Lowering the presumptive numerical limits will make a difference. Courts "impose a heavy burden on parties seeking to go beyond those limits," and parties will increase their resistance.

311, James Coogan: Many depositions are often needed because "[t]he complexity of modern corporate structures results in widely divided responsibilities for corporate functions." Increased disputes, costs, and delay will result from lowering the limit.

312, Steve Hanagan: If the present limits are too high, a party can seek an order reducing the number.

315, David Jensen: In FELA, employment, and tort cases a plaintiff always faces a need to take more than 5 depositions. Motions to take more will increase.

317, Steven Banks for the Legal Aid Society in New York City: (Background is sketched with Rule 26(b)(1) above.) Examples are given of a case challenging discriminatory enforcement of criminal trespass laws that required 35 depositions, and a case involving excessive force by correction staff that required some 140 depositions — and the number of depositions was accorded favorable consideration as helping support the class-action settlement. And employment cases often involve several individual defendants and several corporate defendants. Even in smaller employment cases, more than 5 depositions are needed — a particular example is cases involving trafficking of domestic servants, which often involve multiple defendants.

318, Brian Sanford: Increased summary-judgment practice makes it necessary to depose a witness for the summary-judgment record, when otherwise the witness would just be called at trial. Reducing the numerical limit is unwise. (319, Christopher Benoit, is verbatim the same.

320, Thomas Padgett Jr., interpolates points of emphasis in between verbatim duplication.)

321, Timothy M. Whiting: Usually 10 depositions are not enough in products liability actions. Mesothelioma cases are an example. Plaintiffs must depose multiple officers in different branches of the corporate defendant. Because of the long latency, retired officers and employees must be deposed. Coworkers must be deposed to preserve their testimony, lest they be too ill by the time of trial to testify. This concern applies to Rule 31 limits as well.

322, Michelle D. Schwartz, for Alliance for Justice: The changes in the limits in Rules 30, 31, and 33 "will increase the difficulty plaintiffs face when pursuing litigation against powerful corporate defendants." Frequently the evidence is in the defendant's hands. More cases will be dismissed before trial because plaintiffs cannot procure the evidence needed to proceed to trial.

323, Jonathan Scruggs, Alliance Defending Freedom: Opposes all of the numerical limitation changes, including the 6-hour time limit for oral depositions. The limits "will prevent civil liberty litigants from uncovering and proving constitutional and statutory violations." The Alliance advocates primarily for First Amendment rights. It must identify a government policy, and prove that a particular official was personally involved, and in some case prove a required level of intent. "But government wrongdoers often hide their actions and purpose behind a morass of administrative bureaucracy and paperwork." Plaintiffs need extensive discovery to cut through the bureaucracy.

324, Jonathan J. Margolis: Reducing the number of depositions is the most questionable of all the proposed changes. Some courts will begin by refusing leave to take more than 5. They will be affirmed because there is no abuse of discretion. The practice will spread. Most defense attorneys will come to resist any increase beyond 5, in part because they believe that adequate representation requires this course. There is no significant evidence that depositions are often so numerous as to be abusive.

325, Joseph M. Sellers: Lawyers engage in cost-benefit analysis now. It costs money to take a deposition. Adopting a one-size-fits-all limit is unwise. "In my civil rights and employment practice, I cannot recall a case against an employer in which depositions were conducted and we took fewer than six." We typically represent plaintiffs on contingency, and advance costs; we engage in only the discovery that is important. And employment cases typically involve plaintiffs who have little discoverable information, while defendants have most of the information necessary to prove the case. And it is a mistake to assume, as the Committee Note does, that the parties will agree on suitable limits in most cases.

327, Malini Moorthy for Pfizer, Inc.: Endorses the limits in Rules 30, 31, 33, and 36. "Viewed through the lens of proportionality, we believe that parties will mutually agree on reasonable discovery limits * * *."

328, U.S. Chamber Institute for Legal Reform: Supports all the numerical limitations, and the 6-hour deposition that will streamline discovery without denying any party the ability to gather information for its claims or defenses.

333, Racine Miller: Addressing police misconduct and prisoner rights cases: there is no problem with excessive discovery. There are incentives to limit it. But there are cases that, in part due to information asymmetry and often due to the sheer numbers of witnesses, require more depositions, and "I have concerns about either getting consent from defendants or an order to enlarge discovery in every case where it would be necessary under the new rules." Ordinary

citizens can get to court only through contingent-fee attorneys, and by making discovery harder the proposals will make representation less accessible. They are completely one-sided; they "do not do much of anything to penalize obstruction in discovery."

334, Rose Weber: "[T]here are often numerous defendants in police misconduct cases and of course all must be deposed. Essentially these rules 'solve' a problem that doesn't exist, and by giving an unfair advantage to one side."

335, Rebecca Heinegg: "Regarding the proposed limitations on depositions, parties already have an incentive to minimize the number and length of depositions, as each side must bear the costs of each deposition[] taken. The new limits are also too low for many serious or complicated cases, and will have a disproportionately negative impact on Section 1983 plaintiffs [as in police misconduct cases], due to the inherent information asymmetry in these cases, and the high burden of proof that such plaintiffs must meet."

336, William York: Excessive discovery is not a problem. No worthwhile practitioner uses every single deposition, interrogatory, or request to admit "just because they are permitted." Some cases — including civil rights and immigration cases — require many discovery devices. Current incentives for self-limiting discovery are adequate. The lower presumptive limits are far too low for many serious or complicated cases. Government works in complex bureaucracies, "and getting to the truth of the matter in five, shortened depositions and only 15 interrogatories * * * would severely limit my effectiveness to litigate." Far from making litigation more accessible to everyday citizens, many clients seek attorneys on a contingent-fee basis; the changes will make representation less available. And the result will be more contentious motion practice.

337, Timothy A. Pratt, for Federation of Defense & Corporate Counsel: All of the proposed numerical limits are welcome. "We fully expect * * * that parties will routinely agree to additional discovery where necessary and motion practice will not be needed." January Hearing: p. 26, at 31-32: Similar.

338, Steven D. Jacobs: The present numerical limits work. The presumption is that the initial disclosure avoids the need for more extensive discovery. The parties resolve most discovery disputes on their own.

342, Stephen C. Yeazell: Reducing discovery "in a number of cases would be a regrettable and unjust result." The reduced limits "will not work injustice in the hands of wise and impartial judges who are also skilled at managing litigation." But other parts of the proposed amendments "express implicit skepticism about how wise, impartial, and skillful these judges are. The asymmetrical limits will be most likely to have an adverse effect on cases involving claims against large institutions — public and private." Although not all cases have merit, it is important not to stack the deck against such claimants, as many of the proposed amendments do.

344, Shanin Specter, Thomas R. Kline, Andrew J. Stern, Andrew S. Youman: Less discovery will mean more trials in cases that should settle. It will have a disproportionate impact on the party with the burden of proof. Reducing the number of depositions sends an implied message that there are too many depositions — it will become more difficult than it is now to get permission to take 12 depositions in a case that needs that many. The Committee relies on data showing that 5 depositions are inadequate for as many as 23% of cases. The suggestion that the parties can be expected to agree when more than 5 depositions are needed "relies upon the faulty assumption that both sides will need more than 5 depositions."

In addition, account should be taken of the cumulative effect of all the reduced limits.

Deposition time is effectively reduced from 70 hours (10 depositions of 7 hours) to 30 hours (5 depositions of 6 hours). But the limits on the less expensive modes of discovery — interrogatories and requests to admit — will leave more work to be done by depositions.

347, Genie Harrison: The proposed limits will make litigation impossible for government employees victimized by first amendment retaliation, whistleblower retaliation, and other unlawful harms. "The illegal acts of governmental employers uniformly involve dozens of actors and witnesses * * *." In a current case a fight was necessary to get leave to take more than 10 depositions. The 20 depositions establish a slam-dunk case. Employers keep people quiet by implied threats of retaliation.

348, Stephanie Bradshaw: The proposed reductions in numerical limits in Rules 30, 31, and 33, together with the new limits in Rule 36, "are minimal, and would not result in a huge savings of time," but they "could be devastating to an information-starved plaintiff hungry for evidence to support his claim."

349, Valerie Shands: The upfront and incidental costs of depositions "ensures that their number almost always remains as low as necessary." The need to seek court permission to take more than five will spawn delay and additional costs.

350, Pennsylvania Bar Association: The default number of depositions should be 7 or 8. And for all the proposed default limits, there is a risk of "a new hesitancy among some judges to alter those limits." A "blind, unreasoned one-size-fits-all discovery plan" is inappropriate. The Committee Note should instruct that each case must be approached with an open mind, allowing more discovery where appropriate.

351, Eric Hemmendinger for Shawe Rosenthal LLP: (From the perspective of defending employment cases.) Five may not be sufficient in all cases, but it is the correct starting place for discussion. (The preface adds that attorney-fee provisions for most employment and employment litigation provide an incentive for plaintiffs to expand the amount of discovery.)

353, Kenneth D. Peters, John T. Wagener: The proposed reductions in time and length of depositions, and in numbers of interrogatories and requests to admit "will * * * cause litigants to carefully think about the evidence they need and go about obtaining it in the least intrusive manner."

355, Advisory Committee on Civil Litigation, E.D.N.Y., by Guy Miller Struve: Without specific comment, notes that the narrowing of presumptive limits "has the potential to increase satellite litigation about the scope of discovery."

356, Richard McCormack: Treating Rules 30, 31, 33, and 36 together, "It's about time this was done."

358, Dusti Harvey for AAJ Nursing Home Litigation Group: Litigation involving nursing home abuse or neglect often requires more than 5 depositions. Deponents often disclaim knowledge and imply that another potential witness is the one to ask.

359, Andrew B. Downs: "While I often take more than five depositions in my cases, I can justify" them. If I cannot justify them, they should not be permitted.

360, Robert Peltz: Five depositions are not enough even in a routine automobile negligence

action — the limit is exhausted by deposing the other party, the investigating police officer, two eye witnesses, and a single doctor. The problem is exacerbated when the limit has to be allocated between multiple parties plaintiff, defendant, or other. It is further exacerbated in courts that count each witness in a Rule 30(b)(6) deposition as a separate deposition. And the frequent circumstance that one party has almost all the necessary information is a further problem. The general provision for protective orders provides all the protection we need.

361, Caryn Groedel: The limit will adversely impact plaintiffs (in employment actions).

362, Edward Hawkins: Even routine cases require more than 5 depositions.

363, Dean Fuchs, at request of NELA-Georgia Board: In employment cases defendants need depose only the plaintiff. The plaintiff needs to depose decision-makers, human resources personnel, currently employed witnesses who observed the discriminatory conduct, the corporation itself, and medical providers to the employee. In wage and hour cases plaintiffs need to depose payroll personnel, supervisors and coworkers who observed when the plaintiff was working, and IT personnel or records custodians. Five is too few.

365, Thomas Osborne and 14 others for AARP Foundation Litigation: Generally suggests that experience may not bear out the belief that judges will exercise sufficient flexibility to ensure fairness in discovery. Offers an example of a case that required depositions of 33 fact witnesses in addition to experts and Rule 30(b)(6) depositions to support a claim that the defendant's 2,500 miles of sidewalks lacked accessibility to persons with visual or mobility disabilities. And another case with more than 30 depositions to support discrimination claims arising from "property flipping."

367, Edward P. Rowan: "In even the most simple cases, fact witness depositions can exceed five depositions. This will violate Plaintiff's right to due process if he cannot bring testimony because of a deposition limit."

368, William G. Jungbauer: In FELA actions, 5 depositions are nowhere near sufficient to prove the negligence of a corporate entity such as a railroad. The defendant may identify multiple witnesses for a Rule 30(b)(6) deposition, "exhausting the plaintiff's deposition limit even faster." Defendants also may be disadvantaged. There may be multiple defendants — not only the railroad, but also the entity that controls a crossing. In an FELA case it would be rare to have five defendants, but when that happens there would be one deposition each. Relief will have to be sought from the court in virtually every case.

370, Thomas D'Amore: Addressing Rule 30, 31, 33, and 36 numerical limitations, says that often he cannot reach agreement with defendants on additional discovery. "The judge, when faced with reduced presumptive discovery limits, may be unlikely to grant me as much discovery as I need." "Depositions are often the most efficient and effective way to gather the evidence * * *." Many more than five are likely to be needed in, for example, a wrongful death case (the victim is deceased), or product liability cases. And restricting the number of depositions may make it impossible to survive the almost certain motion for summary judgment.

372, J. Burton LeBlanc, for American Association for Justice: FJC data do not support the proposed limits, as shown by the reexamination looking for cases involving more than 5, or more than 10, depositions per side. The reduction will have a particularly negative impact in civil rights, employment discrimination, qui tam, and intellectual property cases. Frequently a plaintiff does not even learn who the critical deponents should be until later depositions.

Experience with cross-examinations in criminal trials of witnesses who have not been deposed cannot illuminate the needs for civil trials. Depositions, moreover, serve to gather facts and prepare for trial, not merely to support cross-examination. Introducing the proportionality test will aggravate the consequences of reducing the number — the other side will always object that it is too burdensome or expensive to provide more discovery. This alone will make it much harder to get more than five depositions. The belief that more will be allowed when appropriate ignores the clear demonstration of "anchoring" effects: the rule presumption will become the received standard. The result will incentivize defendants to hide information.
Later, p. 24, adds an observation addressed to all the numerical limits: "most of the proposed amendments would essentially let judges off the hook for having to actively manage cases; when faced with such a marked increase in discovery disputes, judges who do not now manage will simply use the shorthand of the new Rules to limit discovery in most cases to the new limits."

373, Michael L. Murphy for AAJ Business Torts Section: "[T]en depositions would be barely adequate in many, if not most, civil matters." Speaking with practitioners, not a single one took fewer than 5 depositions in any of their cases, nor did any think those cases could have been adequately litigated with fewer than 5. There is no evidence that parties are intentionally taking unwarranted depositions; to the contrary, the incentive is to avoid unnecessary cost. And "there have been numerous reports of plaintiffs having a difficult time securing such an agreement [to exceed the rule number] from the defendants."

374, Christopher Placitella for AAJ Asbestos Litigation Group: "Depositions are the cornerstone of litigation." More than 5 are routinely needed for plaintiffs in personal injury litigation; defendants typically need fewer. "[D]efendants have the ready ability to refuse to stipulate or cooperate in allowing additional depositions," forcing plaintiffs to seek relief from the court. And without sufficient deposition discovery, both plaintiff and defendant are less likely to understand the strengths and weaknesses of their positions. That will deter settlement, leading to more trials.

375, Jennie Lee Anderson for AAJ Class Action Litigation Group: As plaintiffs' attorneys, there is no incentive to spend money on meaningless depositions. But depositions are used as an extremely effective and efficient way of gathering necessary information. Corporate depositions explain the reporting structure, identify core individuals who made the key decisions, and show how ESI is maintained and stored. A limit to 5 depositions would, in many instances, prevent plaintiffs from obtaining the information needed even to certify a class. At the least, the limit should not apply to complex, class action, multidistrict, or other aggregate litigation.

376, Laura Jeffs (and many others in the same firm, Cohen & Malad): 5 is too few.

380, Robert D. Fleischner and Georgia Katsoulmoitis for Advocacy Coordinating Committee, Massachusetts Legal Services Organizations: Treats Rules 30, 31, 33, and 36 together. "Lowering the presumptive limits on discovery has the potential to severely hamper our ability to litigate to redress violations of federal laws. * * * [O]ur experience is that judges consider the current limits * * * as a fairly firm baseline when considering requests to expand the scope of discovery. We fully expect that the proposed limits would increase judicial resistance to increasing discovery."

381, John H. Beisner: Supports all the numerical limits. They will streamline discovery but still enable a party to gather information. The court can modify or alter the limits.

383, Alan B. Morrison: The reduction to 5 may be justified on its own, but not as a cumulative

matter of reducing the ability to gather needed information.

384, Larry E. Coben for The Attorneys Information Exchange Group: Although the parties can agree on, or the court can order, more than 5 depositions, "why propose a rule which will be applied as the exception rather than the rule"? Most cases require more than 5. Strict application will foster motion practice. The better approach is to allow the court to manage each case under Rule 16.

386, Arthur R. Miller: Plaintiffs have learned to live with 10, but they tell us both that they have no incentive to take unnecessary depositions and that 5 is not enough. Relying on court permission to take more simply generates motion practice, and permission will be made difficult because the proposal sends "a restrictive message regarding discovery to the Bench" that defendants will exploit.

388, Nina M. Gussack, Joseph C. Crawford, Anthony Vale: Addressing Rules 30, 31, 33, and 36 together, welcomes the changes in the belief that in MDL and other complex litigation the parties will think harder about the "wish list" of discovery "and will tilt courts and special masters in the direction of imposing less onerous discovery."

390, J. Mitchell Smith for International Assn. of Defense Counsel: Approves all of the Rule 30, 31, 33, and 36 proposals without further comment.

398, Shira A. Scheindlin: Disputes are rare with the 10-deposition limit. Parties in large cases routinely agree. The cost of resolving objections to the number will fall disproportionately on parties in smaller cases. Most lawyers believe the amount of discovery in their cases is just about right. This is a mistake.

399, Edward Miller: Addresses all the limits proposed for Rules 30, 31, 33, and 36 together. They will have a beneficial effect, encouraging parties to make discovery proportional to the true needs of each case.

400, Gregory P. Stone: The reduction will adjust litigant expectations, in line with the renewed emphasis on proportionality. Those who fear courts will become reluctant to increase the number overlook the direction that the court must grant leave when consistent with the scope of discovery. "[T]here is no reason to believe that litigants' general ability to reach agreement on an appropriate number of discovery requests will dissolve in the event that the Committee adjusts the presumptive number of interrogatories." Moreover, "it is in my experience uncommon for parties to agree to a downward adjustment"; better to start at 5, with room to move up.

403, Donald H. Slavik for AAJ Products Liability Section: Most product liability cases require four groups, often with more than 5 witnesses in each group: fact witnesses; a manufacturer's employees; experts; and damages witnesses. In dealing with large international defendants, it often is not possible to get agreement to go beyond 10. It will be at least as difficult to get agreement to go beyond 5, "given the clear message to judges * * * that even less than ten depositions are needed * * *." February Hearing: p. 14 Much the same.

404, J. Michael Weston for DRI - The Voice of the Defense Bar: Treats all of the presumptive limits proposals together. They are "a welcome step in helping to reduce the overall costs and burdens of discovery in many cases."

405, Congressman Peter Welch: (Draws from 30 years of litigation experience:) Depositions are

the cornerstone of litigation. A plaintiff may join five or more defendants, and the defendants could refuse to permit more than five depositions, forcing recourse to the court.

408, Elliot A. Glicksman for Arizona Association for Justice: Addresses the proposed limits in Rules 30, 31, 33, and 36 together. "[P]resumptive limits, regardless of the number, often are the starting point for the maximum number a defendant will consider." The proposals will cause the greatest harm in cases that "are fact intensive, including civil rights, aviation, employment cases, commercial trucking, product liability and bad faith insurance cases."

409, Michael H. Reed, Fern C. Bomchill, Helen B. Kim, Robert O. Saunooke, and Hon. Shira A. Scheindlin, individual members of ABA Standing Committee on Federal Judicial Improvements: "[T]here is no need to change the presumptive limit on the number or duration of depositions."

410, John H. Hickey for AAJ Motor Vehicle Collision, Highway, and Premises Liability Section: The problem addressed by reducing to 5 depositions is not clear. More than 5 are routinely required in personal injury cases. More than 5 may be required on initial matters such as personal jurisdiction and forum non conveniens. There may be several witnesses on a Rule 30(b)(6) deposition; several fact-occurrence witnesses; experts on many subjects including the cause of the accident, the cause of injuries, the extent of injuries, "before and after" witnesses on such matters as loss of the enjoyment of life, the actual cost of future medical care, and so on. Expert witnesses commonly base their testimony on other depositions. The presumptive number should be increased to 15. 448, Robert D. Curran, tracks 410.

411, Richard Smith: Representing plaintiffs of limited financial means in environmental and environmental justice cases, it is common to involve numerous depositions on both sides, to make extensive use of requests to admit, and to use interrogatories up to the limit of 25. Reducing the numbers, and the length of depositions, will interfere with plaintiffs' ability to prosecute their cases, and will increase costs.

414, John R. Scott: Supports the presumptive numbers in Rules 30, 31, 33, and 36, and the 6-hour time for depositions. Counsel will be forced to focus discovery efforts. Abuse for tactical advantage will be avoided. In appropriate cases the parties can agree on more, or the court can so order.

416, Mark S. Kundla: Of the same firm as Scott, 414, and similar.

417, Barry A. Weprin for National Association of Shareholder and Consumer Attorneys: Reducing from 10 to 5 will have no benefit in complex litigation, but will require more court involvement. The real impact will be in the cases that now involve between 5 and 10 depositions — the FJC shows a considerable number. In complex cases today, negotiations up from 10 often fail, and plaintiffs are disadvantaged by the 10 limit.

419, William R. Adams: The presumptive numerical limits in Rules 30, 31, 33, and 36 are welcome. "It has been my experience that the limits currently in place are slightly excessive." If more are needed, a simple application to the court will get them.

420, Daniel A. Edelman: "In complex litigation involving multiple, obstructionist, corporate defendants, depositions are by far the most effective discovery tool [for] over-matched plaintiffs." Cutting the number will in many cases preclude the plaintiff from deposing witnesses with relevant and admissible testimony. "We suggest that five hour depositions be permitted for each corporate party and its officers and employees."

442, Christopher Wright: Treats Rules 30, 31, 33, and 36 together, including the 6-hour time for depositions. "These proposed changes seek only to hamstring a plaintiff's capability to prove his or her case." "I have yet to prosecute a medical malpractice case where discovery of fact witnesses included 5 or fewer witnesses."

445, Gerald Acker, for Michigan Assn. for Justice: Witness lists are almost never limited to 4 or 5. "Counsel should not be in a position of guessing which of a dozen witnesses" to depose.

455, W. Michael Scott for CrownQuest Operating, LLC: Treats all the proposed numerical limits, and deposition time, together. When more discovery is needed, the parties will routinely agree. The court can order it if the parties do not agree.

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Begins with a general statement on presumptive limits. The proposed limits are "insufficient as a general matter for the type of cases in which the Department is involved." The current rules strike the right balance. The Committee should encourage the use of case-specific limits in implementing the proportionality principle.

Turning to depositions, many cases brought by the government involve nationwide investigations, scores of fact witnesses, large corporate defendants, many actors, and a need for fact-intensive showings. Cases brought against the government often share these characteristics. More than 10 depositions are often needed. Department attorneys generally do not encounter difficulty in obtaining leave of court, but there have been situations where courts have refused such requests or granted them reluctantly. These difficulties will become more frequent if the number is reduced to 5. Adversaries now often oppose an increase to 20 by arguing it doubles the limit. Reducing it to 5 will change the argument to opposing an increase that trebles or quadruples the limit. If the reduction goes forward, the rule text should be amended to state that exceptions should be freely allowed when appropriate. The Committee Note could offer examples "including public interest cases in which the government enforces statutory rights or obligations and other similar complex litigation," as well as cases involving multiple parties or expert witnesses.

461, an article by Thomas D. Wildingons, Jr. & Thomas M. O'Rourke: "Lawyers may wonder whether it will be difficult for a party to secure a court order allowing depositions beyond the presumptive number." Courts may view the new presumptive limit as a screening device of an inflexible barrier. And one side may use the limit as a tactical device to stall and constrict discovery. It would be better to amend Rules 30 and 31 to expressly allow motions to limit the number based on the proportionality principle in Rule 26(b)(1).

462, George E. Schulman, Robert B. McNary for the Antitrust and Unfair Business Practice Section of the Los Angeles Bar Assn.: The limit to 5 depositions is the most troubling of all the proposals. (1) The Committee observations about criminal trials are inapposite. The government has vast investigative resources; the defense has Brady, the Jencks Act, and similar statutes. (2) Of course few witnesses are impeached at trial by depositions — very few cases go to trial, and at trial a witness is careful not to contradict the deposition. (3) Deposition testimony may conduce to settlement. (4) A deposition may be needed for a dispositive motion because the witness may be reluctant to provide a declaration. (5) A deposition may be needed to secure testimony at trial when the witness is outside the jurisdiction. (6) The limit "might become enshrined in practice as a ceiling rather than as a starting point." We often need more than 5. Our cases are often complex, involve multiple parties, and transcend state lines.

463, Janet L. Poletto for Hardin, Kundla, McKeon & Poletto: Treating all the limits, including

the 6-hour deposition together, they "will force counsel to be more focused in their discovery." "We are confident that in an appropriate case, the parties will be able to agree to an appropriate number and/or that the court will properly decide applications for relief."

464, Douglas A. Spencer: Describes recent litigation that consolidated a wrongful death claim with two personal injury claimants. Initially there were ten defendants; discovery revealed more defendants the plaintiffs had not known of. The plaintiffs alone identified 12 expert witnesses. It is not uncommon to have ten or more experts even when there is only one defendant. Limiting the number of depositions and other discovery devices "would have tied our hands."

465, Neil T. O'Donnell: Frequently there are more than five defendants. And there are numerous witnesses of various kinds — eyewitnesses, witnesses as to an organization's supervision or policies, information technology providers, damages witnesses, and yet others.

475, Jeff Westerman for Litigation Section, Los Angeles County Bar Assn.: The limit to 5 depositions, and the reduction to 6 hours, will simply lead to a great deal more law and motion time. The FJC study did not specifically identify depositions as a current and general problem. The same concern applies to Rule 31.

479, Earl Blumenauer, Suzanne Bonamici, Peter Defazio, and Kurt Schrader, Members of Congress: Treats the proposals for Rules 30, 31, 33, and 36 together. Plaintiffs "will have to waste limited judicial resources asking for additional" discovery.

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: There was no support among the participants for decreasing the numerical limits on depositions. There is no problem with current limits. Decreasing the limit may be less efficient.

499, Beth Thornburg: The numerical limits will have an anchoring effect, inappropriately limiting discovery.

531, W Michael Wimer: The proposed limits would have defeated my successful discovery from a third party of documents the defendant intentionally hid.

588, Veronica Richards: Defendants commonly provide witnesses with limited information for a Rule 30(b)(6) deposition, necessitating "multiple depositions." (This is one of many comments that seem to overlook the statement in the 1993 Committee Note that a Rule 30(b)(6) deposition counts as one "even though more than one person may be designated to testify." The alternative explanation is that the party noticing the 30(b)(6) deposition gives up and relies on deposing persons designated in the notice.)

609, Stephen D. Phillips and John D. Cooney for Illinois Trial Lawyers Assn.: Ten depositions commonly are not enough in catastrophic injury cases; indeed ten Rule 30(b)(6) depositions may be needed.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: The ten-deposition limit works well. Reducing the limit will lead to more motion practice in cases where one party needs more than 5 and the other party sees a tactical advantage in attempting to limit the number. The number of depositions can be addressed in the initial scheduling order.

622, Helen Hershkoff, Adam N. Steinman, Lonny Hoffman, Elizabeth M. Schneider, Alexander A. Reinert, and David L. Shapiro: All of the proposed numerical limit reductions are ill-advised.

Rules 33 and 36 are efficient, low-cost modes of discovery. The reduction in the number of depositions is the most ill-advised of the lot. No attempt has been made to show empirical justification — the reanalysis of the FJC study data shows that there is none. Nor is it safe to rely on gaining permission to exceed the limit. An express limit in a rule has an anchoring effect. Suppose a case legitimately needs 12 depositions. That is a 20% increase on the present limit of 10. It is a 140% increase on a limit of 5. Judges will naturally require a far stronger showing if the limit is reduced to 5. And if a party confronting the 5-deposition limit guesses wrong in choosing the first 5 deponents, an attempt to show that other deponents are more important to the case will encounter resistance from the appearance that the first 5 were not used wisely. 2078, Judith Resnik for 170 added law professors: supporting this comment.

673, Don Bivens for 22 more "individual members of the Leadership of the American Bar Association Section of Litigation": Supports the limits proposed for Rule 33 and Rule 36, but opposes reducing the presumptive number of depositions. There is no need for the limit; in cases where more than 5 depositions are taken, they are rarely taken for frivolous or improper purposes. A too-low cap "would risk giving one side a powerful tool for limiting discovery unfairly," and will increase contested applications.

729, Stephen B. Burbank: Addresses the number of depositions and interrogatories pretty much together. "[T]he complex, high-stakes cases that, as empirical evidence consistently demonstrates, are most likely to occasion disproportionate discovery, will usually not be affected, because the parties will stipulate out of the limit. No, here the effects will be felt most often in cases with parties that have asymmetric discovery demands and asymmetric resources." "The need to manage down under the current Rules has not been demonstrated in enough cases to cause concern; District Court judges should not be given still more dubious management tasks that keep them out of the courtroom * * *."

786, Frederick B. Goldsmith & E. Richard Ogrodowski: In Jones Act cases we cannot wait for trial to cross-examine the key fact witnesses. Crew members are itinerant — we videotape most crew member depositions. And our expert witnesses rely on the deposition testimony to establish the fact basis for their opinions. (Further, initial disclosures do little to obviate the need for full-on discovery.)

951, Frederick Schlosser: "I have witnessed and participated in trials in which effective cross examination through the use of depositions has been critical to the outcome of a trial."

995, William P. Fedullo for Philadelphia Bar Assn.: Opposes. Many cases need more than 5 depositions. Full discovery enhances settlement. The reduced limit may encourage one party to refuse to stipulate to more. And there is a risk that the court may refuse to approve a stipulation. (A footnote decries the use of discovery cutoffs far too short for the case, increasing costs by the need to go full-bore to meet the deadline.) Encouraging case management is often beneficial, but judicial resources must be spared for substantive issues.

1025, Senator Jeff Merkley, Senator Ron Wyden: Addressing all the limitations, observes: "A plaintiff in an employment discrimination, product liability, or simple personal injury case must often conduct many depositions in order to fully understand an employer's policies, a product's makeup, or the cause of an accident."

1054, Assn. of Bar of the City of New York: Generally more than 5 depositions per side are needed, "and a party should not be dependent upon the reasonableness of its opponent or its ability to persuade a judge in order to be entitled to do the discovery it believes necessary."

Criminal cases are different — and defendants have the benefit of Brady and Giglio rules. Assuming that witnesses are rarely impeached by deposition testimony, depositions are vitally important in pre-trial preparation. If a party seeks an unreasonable number of depositions, relief is available. And if a 5-deposition limit is adopted, it should apply only to fact witnesses; a party may take 3 or 4 fact-witness depositions, only to have another party disclose several expert witnesses.

1109, Robert Kohn for Federal Bar Assn.: Reducing the number will increase the temptation for the deponent to "pass the buck," claiming that someone else is a better source of information. All parties share an incentive to reduce the numbers of depositions.

1127, Hon. John Conyers, Jr., for 12 House Judiciary Committee Democratic Members: All of the proposed numerical limits impede access to justice and should be rejected.

1147, Joseph D. Garrison: The proposals shrink "the fundamental engine of the search for truth from seventy hours to thirty hours." "There is simply no strong empirical evidence, not even weak empirical evidence, that reducing the presumptive limit for depositions will substantially reduce the expense of litigation."

1205, Robert J. Anello for Federal Bar Council (2d Cir.): Opposes. "Depositions are critical for both summary judgment and settlement purposes," and these are the chief ways of resolving federal litigation. There is no showing that the limit set at 10 creates any problems.

1335, Aleen Tiffany for Illinois Assn. of Defense Trial Counsel: Opposes, offering on behalf of defendants the arguments often advanced on behalf of plaintiffs.

1522, Michael P. Lowry: "The Committee's memorandum documented a belief among some judges that depositions are over utilized and offer limited value." In fact they are very valuable, even if not used to impeach a witness at trial. I represent attorneys against malpractice complaints. I do not agree, but there is a view that the standard of care requires an attorney to depose every witness; that weighs against the proposed limit.

1907, James Cudahy for National Court Reporters Assn.: Freelance court reporters, who do depositions, have a front-line experience that shows the importance of depositions in supporting equal access to justice. Neither number nor duration should be reduced.

1547, John P. Relman & Jennifer I. Klar: The present rule works. But if there must be some change, it should adopt a limit on the total hours for depositions — fifty hours per side would work better than the proposal.

1899, Craig Gurian for Anti-Discrimination Center: The faith that attorneys generally will agree to an appropriate number of depositions "has little to do with real-life practice. While there are some honorable exceptions, the fact is that the discrimination defense industry as a whole operates on the principle of minimizing cooperation, maximizing delay, and maximizing the cost to victims of discrimination of getting the discovery to which they are entitled."

1914, Tanya Clay House for Lawyers' Committee for Civil Rights Under Law: Explores at length the "anchoring effect" of suggesting a presumptive number. Even judges who fully understand the authority to permit a greater number will be influenced by "five" to permit fewer depositions than they would permit if the number remained at "ten." And emphasizes the lack of empirical support for the proposed reduction.

2058, Richard Broussard: The presumptive numerical limits in Rules 30, 31, and 33 are truly unworkable. They should be deleted. Even if a party is fortunate to find a judge who understands the need to gather information, it is necessary to disclose the exact intent of the request. "One need not be extremely naive to realize that informing a resourceful corporation what you want to obtain will assure that you don't obtain it."

2072, Federal Courts Committee, New York County Lawyers' Assn.: Supports. Five depositions or fewer suffice for a majority of cases. A court is more likely to order an increase from five than to order a decrease from ten. The reduced limit increases the likelihood of settlement by encouraging earlier negotiation.

2109, Hon. Marcia L. Fudge, Hon. G.K. Butterfield, Hon. Terri Sewell, Hon. Cedric Richmond, members of the Congressional Black Caucus: All of the proposed numerical limits on discovery impede plaintiffs' access to the courts and generate added work for the courts and parties.

2130, Steven Skalet: The change should be in the opposite direction: "ten depositions plus two depositions for each party in any case with more than two parties."

2241, Robert J. Anello for Federal Bar Council: opposes.

November hearing, John C.S. Pierce: The numerical limits are desirable "to make lawyers sit and think about their cases at the very outset."

November Hearing, Altom M. Maglio: p.28 ff As a contingent-fee attorney in medical product cases "I pay the expenses of the deposition out of my own pocket. I have zero incentive to take unnecessary depositions." The first five depositions usually are used to show that the people identified as knowledgeable in response to interrogatories do not know about anything but marketing, and to identify the people who do have the appropriate knowledge and should be deposed. I often need more than ten depositions. I get permission, but it is a fight. The present limit of 10 is taken as a yardstick of what is supposed to be done in a typical case.

November Hearing, David R. Cohen: p 41 Most of the cases my firm handles — mostly for defendants — tend to be bigger cases. Very often there are more than 10 depositions. When shown good cause, most judges allow more than 10. Indeed, the parties usually agree when they know there is good reason. But it is useful to have a numerical limit because it gets people thinking. Contingent-fee attorneys do have an incentive to take only necessary depositions, but all kinds of commercial cases do not involve contingent-fee attorneys; "most cases that have 20 depositions can use far fewer."

November Hearing, Mary Massaron Ross — Immediate Past President, for DRI: p 49 In § 1983 litigation with the government, much government information is freely and widely available. Government operates in the open. FOIA statutes yield further information. Many police activities and jail activities are videotaped. All of this information, plus a limited number of depositions, suffices. But because my practice is appellate, I cannot say confidently whether five depositions are enough in a § 1983 case with policy and customs kinds of issues.

November Hearing, Daniel C. Hedlund for Committee to Support the Antitrust Laws: p. 101 As contingent-fee attorneys, we have an incentive to hold down the cost of discovery. In antitrust cases, which almost always are MDL cases, "dozens of depositions are often required to gather evidence from far-flung witnesses and to preserve testimony of witnesses that will not be available for trial." Experts play a very large role — one side may have more than five experts.

At a minimum, experts should be excluded from the proposed limit. Third-party depositions also should be excluded. And reducing the limit from ten to five "significantly alters the bargaining position of the parties." We get more than ten now, often far more. But if we are allowed 60 now, six times the presumptive limit, there may be a tendency to think that 30 is an appropriate number as six times a presumptive limit of five. And there are litigants who do not have the knowledge they need to rise above the presumptive limit. At the very least, the Committee Note should observe that courts should be expected to vary the presumptive limits in complex and large cases.

Finally, the rule "could include a clarification that the presumptive limit on depositions is per party and not per side."

November Hearing, Anna Benvenutti Hoffman: p 110 From the perspective of "serious police misconduct" and other civil rights cases — offering two examples of actions that followed DNA exoneration of wrongly convicted plaintiffs. One case led to an agreement to videorecord police interrogations, and the other to an audit of a crime lab. There is a strong incentive to keep costs down — the attorney has to carry them for years, and may never recover them. The cases often have to be proved through circumstantial evidence, elicited from "witnesses who generally will not talk to us outside of a deposition, defendants, other police employees, prosecutors, and witnesses who testified against our clients at their criminal trials." Although the needs that require many depositions will remain unchanged — judges will be looking at the same cases — the reduction to five "send[s] a strong signal that you think there's too much discovery." Judges will respond to that." 15 depositions would become three times the presumptive limit, not one and a half. And some judges are hostile to the plaintiffs we represent. Yes, five depositions may be sufficient for the simpler actions that involve less dramatic wrongdoing, but that does not help in the more complex cases. 1918 supplements this testimony.

November Hearing, Burton LeBlanc, President, American Association for Justice: p 135: In toxic tort and environment cases, there once were problems in getting the numbers of depositions needed to prove the case. But practice has matured; "we now generally enter into consent arrangements with the defendants concerning depositions." The concern is that reducing the number will make five the new normal, and it will be much more difficult to get the 25 that are the norm in these kinds of cases.

November Hearing, Wayne B. Mason: p 142 "I'm not here to talk about limits because I'm not exercised about whatever you decide on that * * *."

November Hearing, Darpana M. Sheth, for the Institute for Justice: p 149 The Institute litigates constitutional claims of plaintiffs and defendants that "are moderate in size." Typically they are resolved by summary judgment. Trials last one to five days. "Routinely they require more than five depositions, although rarely more than 10."

November Hearing, Andrea Vaughn: p 173: In actions for nonpayment of wages, we often litigate around labor broker arrangements or rental worker schemes. "These all have multiple employers, which often require several 30(b)(6) depositions" "to take out the facts around control that is required to show joint employment under the federal employment laws." Employers typically control the facts. The only way to get them is through depositions and interrogatories. Decreasing the numbers will leave numbers inadequate to generate the evidence a plaintiff needs to prevail.

November Hearing, Barry H. Dyller: p 183 "[A] limit of five depositions is a disaster." In government wrong cases we have to depose parties, eyewitnesses, supervisors, people involved

in making government policy, document custodians, medical providers, and countless others. This is necessary not only to survive summary judgment, but also to make a convincing case to a jury. And I want defendants to take as many depositions as they want so they can evaluate my case and decide whether to go to trial or to try to resolve it. I do not have empirical studies of how many depositions are needed, but personal experience suggests it is generally more than five. Federal judges are more than capable of stemming abuses. I have never had a problem in getting permission to exceed the limit, but I may encounter a problem — and changing from 10 to 5 "is a message to judges. You know, we want you to limit this."

November Hearing, John F. Karl: p. 208 Employment cases commonly require proof of intent. It is not possible to prepare for summary judgment and trial with only 5 depositions. In some cases, many depositions are required simply to identify the person who made the decision that is being challenged. You need to find corroborating testimony, and also conflicting testimony. Employment plaintiffs cannot afford the extra costs in seeking agreement for more depositions, or for asking court permission. When counsel is experienced, there is no trouble in getting agreement. But a case may be staffed with young attorneys who do not have authority to agree. "I hate to bother the judges." The fear that reducing the number will create problems arises from dealing "with a number of obstreperous attorneys who have given me a hard time on behalf of the institution that they represent." And some employment cases are document-intensive, increasing the number of people who must be deposed.

November Hearing, Stephen Z. Chertkof for Metropolitan Washington Employment Lawyers Association: p 216 Plaintiffs are interested in getting in front of a jury as quickly and efficiently as possible. "Running up the clock and running up the bill are classic defense tactics, not the plaintiffs' bar." The employer controls access to documents and people, and makes broad claims that every employee is represented so as to prevent the plaintiff from talking even with those who are willing. And gag orders in settlement agreements and severance agreements are common, as are broad confidentiality agreements covering even personnel policies and internal evaluation forms. Yes, it is possible to examine a witness at trial without a prior deposition, but to get to trial we have to survive summary judgment. "[S]o we practice defensive lawyering," taking many depositions to prepare for summary judgment.

One common problem is to identify who made the challenged decision. In one case we had to depose nine people to get the first clues — and many depositions remained for other matters.

"[Y]ou never get agreement to exceed the number of depositions in the rules from opposing counsel." They assert the client forbids agreement. And they pay no cost when they lose the motion to take more.

Judges who manage actively under the present rules address these problems. The proposed rules will not prod the other judges to take prompt actions on motions for more depositions. The motions will languish for months. Meanwhile, "we're afraid to use up our five, not knowing if we're going to get seven or eight or 12."

Motions for summary judgment often are supported by the affidavits of people who have not been deposed. A good rule would require advance production of affidavits a party plans to use on summary judgment, paving the way to depose the affiants. Or Rule 56(d) should be revised so that when the defendant has refused to agree to more than the rule number of depositions "you should almost presumptively get more discovery once you see what they put in their summary judgment motion, the people you haven't talked to, people haven't examined yet."

November Hearing, Jennifer I. Klar: p 227 In a recent employment case the initial disclosures listed many witnesses. I had to fight for permission to depose them — the judge "pushed very hard on why is your case so different" that you need extra depositions. The order limited the

depositions to two hours, and required me to pay for my transcript and the transcript for the other side. The defendant called the witnesses at trial — obviously they opposed the depositions while they intended to call them, "which is a gotcha that will happen more and more often if the number is reduced."

November Hearing, Robert C. Seldon: p 240 Describes two cases that manifestly required more than the five that would be allowed if "this awful rule were put in place." One involved retaliation against a whistleblower in the corrections department by generating a phony report that he beat up a first degree murderer. The other involved an employee who "was intentionally exposed to asbestos in the workplace by the Department of Commerce."

November Hearing, Marc E. Williams, President Lawyers for Civil Justice: p 244 The five deposition limit is appropriate. Most cases will fit within it. In 20 years of handling hundreds and hundreds of cases, only once was it necessary to go to the judge to get permission to exceed the present limit; in all other cases, the question was resolved by agreement. There is no problem with the 10-deposition limit. But lowering it to five will encourage lawyers to think more carefully at the beginning of the case about how many depositions they need.

November Hearing, John P. Relman: p 253 For fair housing, fair lending, disability, employment discrimination, the limit will make it much more difficult for plaintiffs and will not affect defendants. The key to individual discrimination cases is to show pretext by showing surrounding circumstances. You have to show how similarly situated people are treated. Ethically, plaintiffs' attorneys are often barred from speaking with employees of companies. When multiple reasons are given for the adverse action, the number of similarly situated people increases. It even takes a deposition or two to find out who was the actual decision-maker. The defendant has access to all of its employees and can conduct informal discovery without restriction — one deposition of the plaintiff is enough. So the defendant has every incentive to insist on observing the presumptive limit. The fear of misuse by plaintiffs is misplaced — contingent-fee attorneys front the costs of litigation, and have no incentive to take unnecessary depositions. If there is to be any limit, it would work better as a limit on the total number of hours of deposition time. That would be more flexible.

November Hearing, Jonathan Smith (NAACP Legal Defense and Education Fund): p 268 Lowering the limit will make it harder for civil rights plaintiffs to get access to the discovery they need.

November Hearing, Patrick M. Regan: p 278 Rests on experience with between 300 and 400 federal-court cases, and trying more than 50 jury trials. Representing the estate of a young construction worker killed by a nail gun, with damages capped at roughly $750,000, the first dozen deponents all said the gun was appropriate for use on construction sites. The 13th or 14th deponent testified that the manufacturer had recommended that the gun be used only in shipyards, where it is used to attach two-inch thick steel plates to each other. The case was resolved, with the great benefit that the guns were taken off construction sites throughout the country. "I would have failed the proportionality test." And if there were a presumptive five-deposition limit, the judge might have allowed seven; I would not have got to the 13th or 14th critical witness. There is no problem with the current limit of ten. Most of my cases involve more than five but fewer than ten. Defense counsel will not agree to go beyond five, because that would make trouble with their clients. So there will be work-making motions. Yes, I have lost cases, but that does not mean that the claims were nonmeritorious or that discovery would better have been curtailed. The current rules provide more than enough tools to curtail abusive practices. There is no incentive for contingent-fee plaintiffs' attorneys to take unnecessary

depositions. Yes, it would help to have the Committee Note explain that five is the norm, and that the rule is not intended to create a presumption that more than five are inappropriate. But it is better not to be subject to even discretionary limits when there is no need for them.

November Hearing, Wade Henderson, Leadership Conference on Civil and Human Rights: p. 293 Lists Rules 30, 31, 33, and 36 along with Rule 26(b)(1) in opposing further restrictions on discovery that will have a disproportionate impact on civil-rights plaintiffs, who commonly litigate in the face of information asymmetry. A more extensive summary is provided by Rule 26(b)(1).

November Hearing, Jane Dolkart, Lawyers Committee for Civil Rights Under Law: p 297 Most of the focus is on the proposed numerical limits in Rules 30, 31, 33, and 36. Federal courts are the last bastion of the disenfranchised. "There should be a compelling reason to roll back the protection," and there is none. The data show that across the board in federal court, most cases conclude with fewer than 5 depositions per side. But there are complex civil rights cases. An informal poll at the Committee found that in recent years no one had litigated a case through most of the discovery process that involved fewer than 10 depositions. Most of these were class actions. The debate over the efficiency of discovery appears intractable. The volume of criticism by corporate defendants has not diminished. Repeated changes in the rules, particularly the 1993 changes, have had a particularly significant impact on civil rights cases." "[C]ontentious litigation is in fact a good part of the reason that there are unnecessary costs in discovery." Early and active case management is a better solution. Letter motions, and hearings by phone, are being used to good effect.

January Hearing, Joseph D. Garrison (NELA): Keep the 10 limit.

January Hearing, P. David Lopez (EEOC): p 68 The numerical limitations are a blunt instrument, particularly in cases with asymmetric information. Over the past three years the EEOC took more than 5 depositions in over 40 percent of systemic cases, and more than 25 requests to admit. Many judges are flexible about the limits, "but not all judges." Cooperation among the parties is more likely in systemic cases because defendants also want to take many depositions. It is a greater problem in a case involving one or two workers and a great asymmetry of information.

January Hearing, Thomas A. Saenz: p. 96: MALDEF brings voting rights and immigration rights actions against government defendants. They tend to generate political pressure. The result is that defense counsel often are less willing to cooperate in discovery, even when they would prefer to be more cooperative. The presumptive limits may exacerbate these problems. Voting rights cases under § 2 rely on a totality of the circumstances test; successful litigation requires a great deal of evidence. Local laws governing immigration rights often are subject to facial attack, but an as-applied challenge looking at specific practices and policies used to implement a law that is unclear on its face again requires much discovery. Some judges, familiar with § 2 litigation, understand the needs for extensive discovery. "In other cases, it’s a lot of education. It’s a lot of argumentation that’s required."

January Hearing, Jocelyn D. Larkin: p. 125 From the perspective of institutional reform litigation, 5 depositions are insufficient. Lowering the limit creates a new first-line defense that will impose transaction costs even if the limit is expanded. And it is much more difficult to plan discovery at the outset when you do not know whether the limit will remain fixed at five.
January Hearing, Quentin F. Urquhart for IADC: p 133 Supports presumptive numerical limits. The reduced number will add support to a lawyer in discussions with a client about discovery

limitations. It is "atmospheric." "It sets a tone for the parties to have discussions with their clients about do we really need all of this"?

January Hearing, William P. Butterfield: p. 142, 149: "When I have 40 parties in a case and when it says I can take five depositions, that is not a meaningful rule anymore."

January Hearing, Elise R. Sanguinetti: p. 151 The lower limit is a big problem in representing single plaintiffs in wrongful death and catastrophic injury cases. Now we attempt to work with the other side, "but I've run across roadblocks many, many times." We seek to hold depositions to a minimum because it is difficult to explain to contingent-fee clients that their recovery is reduced by the cost of the depositions.

January Hearing, Kathryn Burkett Dickson: p 160 The proposed numbers would work if discovery is phased — they are much like the agreements with defense counsel in employment cases, planning an initial phase of discovery to prepare for early mediation. They are not sufficient to prepare to defeat summary judgment or go to trial. Defendants always put on more than 5 witnesses, and they are beautifully scripted witnesses. Cross-examining them without a deposition will be wasteful; limiting discovery will not improve trial advocacy. Counting my cases over the last five years, the number of combined depositions [for both parties?] ranged from 22 to 28 for the cases that went to trial. Employers typically propose 18 to 38 trial witnesses, although they call fewer, usually between 10 and 15. And videotaped depositions are used for trial testimony: "It's not just discovery." And I have had difficulty getting permission for more than 10; indeed, in a recent case in which the defendant agreed that it was appropriate to have 10 to 15 depositions, the judge rejected the stipulation and set the limit at seven.

February Hearing, William T. Hangley, for Leadership of ABA Litigation Section p 1 28: The problem with reducing the number from 10 to 5 is that it creates a mindset "where the young insecure litigator on the other side is going to get locked in and say you got your five and that's it."

February Hearing, Thomas R. Kelly, for Pfizer: p 164 Most routine employment cases today are resolved with fewer than 5 depositions. But it is good to reduce the presumptive limit because that will force the parties to have a discussion about proportionality.

February Hearing, Michael M. Slack: p 193 I just made a deal for 15 depositions. Drop the limit, and "I just don't get that deal. I get six or seven on the best day."

February Hearing, Megan Jones for COSAL (class-action law firms): p 212 Practice has come a long way in cooperation. Lowering the presumptive limits could have a deterrent effect on cooperation.

February Hearing, J. Bernard Alexander, III: p 272 In a typical employment case that goes to trial, at least a dozen depositions are necessary. With a base at 10, there is little difficulty in getting them. If the base is reduced to 5, "it means that there are other things that we have to horse trade in order to get what we need." The rules are no problem when the other attorney is cooperating. They are a problem when there is no cooperation. Often you have to take depositions to get the proper witnesses — "I have oftentimes taken ten depositions in a day, one hour at a time, to get to 20, 25 deponents * * *."

February Hearing, Jennifer Henry: p 334 Five depositions should not be a problem. The lower limit will cause people to be more selective. If they want more than 5, that will happen by

agreement — I have been able to reach agreement in every case in which I have needed more than 10.

February Hearing, Brian P. Sanford: p. 356 In individual employment cases I always bump up against the 10-deposition limit. Many times the other side agrees to go over, but most of the time they do not. The last time I asked, the court denied permission to take more than 10. This is a real problem for employment cases.

RULE 30(d)(1): 6-HOUR DEPOSITIONS

264, American Association of Justice Transvaginal Mesh Litigation Group, by Martin Crump: A deponent's "custodial file" may contain 10,000 to 50,000 documents. Reducing the time for a deposition will eliminate questions on many documents "with discovery value." Often it is necessary to secure agreement to exceed the present 7-hour limit. And time limits encourage evasiveness, failure to cooperate, and failure to give straightforward answers.

266, American Association of Justice Aviation Section, by Michael L. Slack: Reducing it to 6 hours "probably will not make much of a difference in fact witness depositions." But it will make it easier for cagey expert witnesses to run out the clock, avoiding answers to crucial, case-dispositive questions.

274, James Jordan: "7 hours is often not enough in a complex commercial case; and lawyers tell their clients to drag it out so you get less info."

292, Lyndsey Marcelino for The National Center for Youth Law: The reduction in the amount of time, joined with the reduction in the number of depositions, may hurt the chance of getting beyond summary judgment and prejudice the outcome of trial.

296, William B. Curtis, for Reglan Litigation Group, AAJ: "[T]he typical deposition is filled with repeated and unnecessary speaking objections, questions being re-read, and other clock-burning delay tactics. If the deposition is artificially shortened by an hour, the manufacturer's lawyer will have an easier time 'running out the clock.'"

297, Trevor B. Rockstad for the Darvon/Darvocet Litigation Group, AAJ: Reducing the limit to 6 hours "would make it much more difficult to discuss documents in a deposition." And echoes 264, the AAJ Transvaginal Mesh Litigation Group.

299, Aaron Broussard: "I see no problem in decreasing the number of hours * * *, although this is not a major change." (Reducing it to 5 depositions is a major change.)

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: "There are no facts cited to demonstrate what percentage of federal depositions extend past normal business hours, nor whether any parties or litigants cite such 'after hours' work as a major problem in litigation." Anecdotes about lunch breaks and comfort breaks do not mean much. Analogy to the 4-hour limit in Arizona overlooks the strictly enforced disclosure rules in Arizona. And the rule does not address the question whether excessive delays by counsel or by a witness to run out the clock should be counted toward the overall time limit.

317, Steven Banks for the Legal Aid Society in New York City: Seven hours are often needed in many of complex cases. And "[a] six-hour time limit would be especially onerous in our cases in which either or both of the parties need translation." In employment cases, "we have deposed non-English speaking corporate officers or managers * * *.

338, Steven D. Jacobs: Depositions rarely last 7 hours. "I'm curious to know the salutary effect that reducing that time by one hour is thought to have."

344, Shanin Specter, Thomas R. Kline, Andrew J. Stern, Andrew S. Youman: Artificial time limits accomplish little. The time is not solely controlled by the questioner. "An evasive or long-winded witness and/or obstructive lawyer can easily turn a four-hour deposition into an 8 hour

deposition. * * * Time limitations on depositions can actually make depositions longer and more expensive by creating the incentive to cause mischief in order to 'run out the clock.'"

358, Dusti Harvey for AAJ Nursing Home Litigation Group: Depositions of corporate or management personnel in nursing home litigation are often detailed and slow-moving. Witnesses often respond with "I don't know" and "that depends" answers that must be unpackaged. Shortening the time limit will encourage such time-killing tactics.

362, Edward Hawkins: Depositions routinely last more than 6 hours, even in routine case.

363, Dean Fuchs, at request of NELA-Georgia Board: The reduction is unnecessary and will spawn more motion practice.

372, J. Burton LeBlanc, for American Association for Justice: Notes that the reduction to 6 hours is not as dramatic as the reduction to 5 depositions, but that in combination these changes would provide less than half the current time for depositions.

376, Laura Jeffs (and many others in the same firm, Cohen & Malad): Six hours does nothing to address the obstructionist tactics of defense attorneys to use up the limited time allowed now. Witnesses "commonly feign confusion, ask that straightforward questions be repeated or rephrased, take lengthy pauses to review documents or consider an answer, and when they do answer, provide answers that are evasive, non-responsive, or vague and ambiguous such that they require multiple follow-up questions." And counsel improperly inject themselves into the deposition. They engage in lengthy speaking objections or instigate lengthy discussions regarding discoverability, relevance, and admissibility. They commonly instruct witnesses not to answer based on relevance or admissibility, "which is improper."[1]

383, Alan B. Morrison: (1) Reducing it to 6 hours is appropriate. This works in many states. An extra hour at the end of the day is not likely to matter. (2) The cross-reference, here and in the other rules should be to 26(b)(1) alone; (b)(2) adds nothing.

374, Larry E. Coben for The Attorneys Information Exchange Group: 6 hours is a step in the right direction. Limiting the time for expert depositions to 4 or 5 hours would provide a significant saving for all concerned.

388, Nina M. Gussack, Joseph C. Crawford, Anthony Vale: A 7-hour day is quite lengthy, "causing even resilient witnesses to tire in the final hour." "Argumentative questioning" is still common — limiting the time will reduce the practice.

398, Shira A. Scheindlin: Reducing the time limit is worse than reducing the number of depositions. It will lead to disputes that must be resolved by a phone call to chambers. Lawyers will try to run the clock to protect a witness. This is an invitation to mischief and gamesmanship.

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[1] Many lawyers in the Cohen & Malad firm wrote apparently identical letters (examined by comparing the first and last lines on each page). They are noted here only: Scott D. Gilchrist; Irwin B. Levin; TaKeena M. Thompson; Arend J. Abel; Brian K. Zoeller; Greg L. Laker; Melissa L. Keyes; Richard M. Malad; Jeff A. Hammond; Kelly J. Johnson; Julie M. Andrews; Michael W. McBride; Richard E. Shevitz; Lynn A. Toops; Edward B. Mulligan; Maggie L. Sadler; Jonathan A. Knoll; Gabe A. Hawkins; Vess A. Miller; and David Cutshaw.

400, Gregory P. Stone: "Adequate preparation and skillful questioning" is more important than an extra 60 minutes. Six hours will almost always be sufficient, and enable a deposition to be completed in single day, saving time and travel costs. This is true even for Rule 30(b)(6) depositions.

403, Donald H. Slavik for AAJ Products Liability Section: The need for more than 6 hours is graphically illustrated by products cases involving foreign defendants, whose witnesses often require translators. It takes at least three times as long as with witnesses that testify in English.

410, John H. Hickey for AAJ Motor Vehicle Collision, Highway, and Premises Liability Section: The duration should be extended to 8 hours. Depositions can be especially lengthy in document-intensive actions. In a Rule 30(b)(6) deposition, which can be used at trial, it is important to establish the authenticity, best evidence, lack of hearsay, and explanation of documents in order to get them into evidence. "In cruise line cases, for example, the corporate representatives provided are the same every time and are in-house lawyers in the claims department * * *. These representatives are experienced, skilled witnesses who are experts at avoiding and evading answers." 448, Robert D. Curran, tracks 410.

417, Barry A. Weprin for National Association of Shareholder and Consumer Attorneys: Reducing to 6 hours "simply invites more gamesmanship than currently exists." (With an example.) Courts resolve these disputes, but reducing the length will only lead to more disputes.

420, Daniel A. Edelman: A general reduction in the time is ill-advised. Evasive witnesses and delay tactics by defense counsel abound now. Witnesses "commonly feign confusion, ask that straightforward questions be repeated or rephrased, take lengthy pauses to review documents or consider an answer, and when they do answer, provide answers that are evasive, non-responsive, or vague and ambiguous such that they require multiple follow-up questions. And counsel inject themselves by lengthy speaking objections, or lengthy discussions of discoverability, relevance, and admissibility. And they commonly instruct witnesses not to answer on the basis of relevance or admissibility objections, "which is improper." (But concludes by suggesting that 5-hour depositions be permitted of each corporate party and its officers and employees.)

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Reducing it to 6 hours will not be an appreciable time saving. A protective order can be used when necessary to avoid undue inconvenience for the deponent. The full 7 hours are often needed to depose expert witnesses, party representatives, or key witnesses. And "disputes occur over the number of hours that other parties' counsel can question the witness." But if the reduction goes forward, the Committee Note should recognize that extensions often will be needed for such witnesses.

462, George E. Schulman, Robert B. McNary for the Antitrust and Unfair Business Practice Section of the Los Angeles Bar Assn.: In multiparty cases, each party needs to interrogate the witness, "if only for a short time." As the time draws down, there will be disputes where one or more parties did not have time to examine the witness.

465, Neil T. O'Donnell: (Addressing a 4-hour limit) "[I]t will be very easy for intransigent witnesses to frustrate legitimate efforts to obtain information."

487, Peter J. Mancuso for Nassau County Bar Assn.: Little good is accomplished by reducing it to 6 hours. In commercial litigation, written exhibits are submitted to the deponent and are the subject of much questioning. The deponent's review of an exhibit is itself time consuming.

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: There was no support at the conference for decreasing the hourly limits. This may make discovery less efficient.

607, Christopher Carmichael: Illinois state courts limit depositions to 3 hours "and that is generally considered to be enough time even in the most complex and high-stakes cases."

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Endorses the 6-hour limit. "[S]ix hours of actual deposition time easily consumes a full day. The limitation should especially benefit non-parties who are being deposed."

635, Matthew D. Lango for NELA/Illinois: The 6-hour limit is a hardship for employees, who typically cannot interview the witnesses informally. And the limit will force the parties to spend more time preparing for the deposition in order to ensure retrieval of the needed information.

995, William P. Fedullo for Philadelphia Bar Assn.: Takes no position, unless the Committee Note is revised to encourage courts to reopen depositions plagued by speaking objections and other common delay tactics. Absent such supervision, the potential for running out the clock is unacceptably high.

1054, Assn. of Bar of the City of New York: "We do not believe that reducing the time limit by 1 hour will promote efficiency, nor do we see a demonstrated need for this limitation."

1109, Robert Kohn for Federal Bar Assn.: A one-hour reduction will not cause a significant reduction in costs. But it will "increase the perceived effectiveness of evasive witness behaviors and disruptive conduct by counsel that aim to run out the clock."

1205, Robert J. Anello for Federal Bar Council (2d Cir.): "Under the current 7 hour limit, it frequently is difficult to complete the examination, including affording sufficient time for cross-examination, especially in multi-party cases." Experience with 4-hour depositions in Arizona affords little guidance, given the extensive initial disclosures required in Arizona, which "provide a framework for completing the depositions within the 4 hour limit."

1335, Aleen Tiffany for Illinois Assn. of Defense Trial Counsel: Supports. "In Illinois state court, the limit is only 3 hours, and in our experience, most partes are able to complete depositions within that time frame, and will most often agree to a reasonable extension when the circumstances warrant."

2072, Federal Courts Committee, New York County Lawyers' Assn.: "The vast majority of depositions can be completed in six hours, and seven hours 'on the record' is extremely difficult to fit into a single-day deposition."

2255, Michael M. Marick: The 3-hour limit in Illinois works well.
November Hearing, Altom M. Maglio: p. 29 As a contingent-fee attorney in medical product cases, I bear the expense of depositions. "[O]nce I get the information I need in deposition, I have no incentive to take an extra minute of deposition, much less fill up seven hours." p 31: When I find out a deponent is not the person with knowledge, the deposition is "fairly quick once you realize you've got the wrong guy."

November Hearing, David R. Cohen: p 41 "I think most depositions that take seven hours can be done in six * * *."

November Hearing, Daniel C. Hedlund for Committee to Support the Antitrust Laws: p 101 "[O]ftentimes seven hours needs to be split between multiple parties." We have shared time with the Department of Justice, or state attorneys-general, or with opt-outs.

November Hearing, Anna Benvenutti Hoffman: p 110 Most of the witnesses in our police-misconduct civil rights actions are hostile to us. "[T]he depositions are slow-going, with even basic facts conceded only begrudgingly." With lead defendants we often have to take more than 7 hours. "And frankly, a lot of that is because of the obstruction by both the defendants and the defense lawyers. They say they don't remember anything, they won't admit anything. There's lots of speaking objections, all kinds of things which are not permitted by the rules but which everyone does and you don't want to run to the court every single time * * *."

November Hearing, Andrea Vaughn: p 173: In actions for nonpayment of wages, an interpreter is often needed for non-English speakers at deposition. That doubles the time needed. The need to argue for exceptions could deter reliance on such witnesses at all. We have not actually had a judge deny a request for more time to meet this need. Typically we are able to come to agreement with defendants on the number of hours when an interpreter is needed.

November Hearing, Barry H. Dyller: p 183 Most of my depositions are less than 4 hours. But many are more. And reducing the time invites abuse. A deponent who was a corporate president paused 25 to 30 seconds after every question. "What is your name"? "and we would wait and we would wait and we would wait." "I think it's a waste of the judge's time for me to go and say, you know, Mr. Smith, you know, paused a lot, please, judge, make him come back."

November Hearing, John F. Karl: p. 208 The time limit is already severe, but we have learned to live with it. There is an incentive to run out the clock. In document-intensive employment cases you have to go over the documents with the witnesses, asking specific and precise questions. "And sometimes there's just obstreperous conduct on the other side." In one whistleblower case counsel made an average of 3.2 objections per transcript page, taking up time. Shortening it to 6 hours "runs the risk of encouraging this sort of conduct in other cases."

February Hearing, William T. Hangley, for Leadership of ABA Litigation Section: p 128 Supports the reduction to 6 hours. "[A]t 7:00 at night a witness is really tired."

February Hearing, Megan Jones for COSAL (class-action law firms): p 212 7 hours is not enough for a foreign language deposition — and usually the greatest extension we get is 2 hours. Then there may be three groups of plaintiffs fighting for the 7 or 9 hours.

February Hearing, Jennifer Henry: p 334 Texas has a 6-hour limit. Only once have I needed more than 6 hours, and then the parties agreed. The saying is that a good trial lawyer does not need more than 6 hours.

RULE 31: NUMBER OF DEPOSITIONS

266, American Association of Justice Aviation Section, by Michael L. Slack: There should be no limit on the number of depositions on written questions. They are useful to put records in admissible form, and dealing with other matters more efficiently than oral depositions. At the least, there should be a separate 10-deposition limit for Rule 31 that does not count any Rule 30 oral depositions against the limit.

267, Lawyers for Civil Justice, by Alex Dahl: Same as Rule 30. A worthy idea. Amend the Note to add the Rule 33 Note encouragement to think carefully.

358, Dusti Harvey for AAJ Nursing Home Litigation Group: Written depositions are seldom used in nursing home abuse and neglect litigation, but they may be used to substitute for Rule 30(b)(6) corporate depositions. The reduced limit could be exhausted without gaining substantive information.

604, Lawrence Marraffino: "Not relevant as written depositions are rarely used."

RULE 33: 15 INTERROGATORIES

264, American Association of Justice Transvaginal Mesh Litigation Group, by Martin Crump: The present limit "isn't broken." Interrogatories help identify potential witnesses, theories, documents, and even additional defendants.

265 American Association for Justice Civil Rights Section, by Barry H. Dyller: Reducing the number of interrogatories will be wasteful because lawyers, now careful to frame narrow interrogatories, will be forced to write their questions more broadly, leading to more objections.

267, Lawyers for Civil Justice, by Alex Dahl: Same as Rule 30: The Rule 33 Committee Note encouraging parties to think carefully is good. The fear of increased motion practice is exaggerated; generally the parties can agree on an appropriate number of interrogatories.

274, James Jordan: "# of rogs — again, in a simple case maybe that would work. Not in a complex commercial case"

276, John D. Cooney: Reducing the number "will lead to overly broad and compound questions." They are needed to discover additional defendants and, as an example, additional asbestos-containing products that plaintiffs do not recall forty years later.

278, Perry Weitz: All but the final sentence is, with one word change, verbatim the same as 276, noted above. The final sentence predicts that the effect "will be to cause extraordinary and systemic delays and motion practice."

288, Sharon L. Van Dyck for the Railroad Law Litigation Section, AAJ: The reduction is unnecessary and counterproductive, as with reducing the number of depositions.

292, Lyndsey Marcelino for The National Center for Youth Law: Decreasing the number of interrogatories and requests for admissions "will likely lead to less information, an increase in aggressive motion practice, and an increase in collateral litigation."

296, William B. Curtis, for Reglan Litigation Group, AAJ: Typical pharmaceutical cases are complex. "If only 15 interrogatories were allowed, there would be no practical way to discover the basic information needed to intelligently learn how the company makes and sells its drugs." An illustrative first set of interrogatories for Reglan litigation is attached, showing that a reasonable set of questions would exceed the limit.

297, Trevor B. Rockstad for the Darvon/Darvocet Litigation Group, AAJ: Echoes 264, the AAJ Transvaginal Mesh Litigation Group, adding that Darvocet litigation involves a product "marketed for decades by numerous pharmaceutical companies." The universe of discoverable information is massive.

299, Aaron Broussard: This is a Catch-22. "If you make your request too detailed, you can use up half of your interrogatories in one request. If you make your request too wide-open, so that it encompasses everything with fewer words, the opposing party will object to it as vague and you will never know whether you have all of the requested information." It would be more effective to provide that a party answering an interrogatory "shall include all information, including documents, that the language of the request encompasses under all reasonable interpretations." And a party who objects must explain what tasks are not being performed because they are too burdensome, or what terms require further explanation.

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: No data are offered to show the need to reduce the number of interrogatories. No attempt is made to address disputes about whether subparts are discrete or logically related. Reducing the number will encourage more broadly worded and burdensome interrogatories. And the problem will be aggravated by the parallel reductions in other discovery devices.

307, Hon. A. Leon Holmes: Opposes the reduction. See Rule 30.

310, Johnathan J. Smith, for NAACP Legal Defense Fund: Interrogatories and requests to admit often involve only minor expense in answering. Reform should seek to increase use of these devices, not to restrict them.

311, James Coogan: "This rule change is particularly disturbing." Issues often appear that can be resolved only by written answers to written questions. Twenty-five, the present limit, at least has a rational relation to these needs.

312, Steve Hanagan: If the present limits are too high, a party can seek an order reducing the number.

315, David Jensen: In FELA, employment, and tort cases many areas of discovery are inexpensively accomplished by interrogatories. Reducing the number will increase motions for leave to ask more. (Also opposes the new proposed rules' limits on the number of requests for production.)

317, Steven Banks for the Legal Aid Society in New York City: "Interrogatories, used properly, are an efficient means of eliciting factual information (such as the identity of witnesses and involved persons * * *) which would be considerably more burdensome to elicit through depositions." Improper use, as to seek extensive narrative answers that can be got more efficiently through depositions, can be controlled directly.

321, Timothy M. Whiting: Reducing the number "will lead to overly broad and compound questions." In mesothelioma cases interrogatories have led to discovering additional defendants and additional asbestos-containing products.

324, Jonathan J. Margolis: "In employment cases * * * it is far more efficient for a plaintiff to ask the defendant to identify those who made the decision to fire or demote the plaintiff in an interrogatory than to parse out perhaps thousands of documents or to ask multiple deposition witnesses." And interrogatories can be useful to determine whether affirmative defenses are real or mere boiler-plate. Interrogatories also can be an efficient way to identify witnesses. There is no empirical evidence of a need to reduce the number.

325, Joseph M. Sellers: Presumptive limits that are too high for some cases may encourage over-discovery. When too low, they encourage broader requests in lieu of a higher number of more tailored requests, and engender collateral disputes. And it is a mistake to assume, as the Committee Note does, that the parties will agree on suitable limits in most cases.

344, Shanin Specter, Thomas R. Kline, Andrew J. Stern, Andrew S. Youman: "Well-crafted written discovery has always been the cheapest, most reliable and efficient means to obtain information." The severely limited numbers for Rules 33 and 36 will force litigants to ask broader questions, further limiting the usefulness of written discovery.

350, Pennsylvania Bar Association: The default number of interrogatories should be left at 25.

351, Eric Hemmendinger for Shawe Rosenthal LLP: Fifteen is more than sufficient for employment and labor cases (from a defending perspective).

357, Joanne S. Faulkner: "For low income consumers, often written discovery is all they can afford." Interrogatories and requests to admit are often the only way to get beyond evasive answers to the complaint. The number should not be reduced.

358, Dusti Harvey for AAJ Nursing Home Litigation Group: Nursing home litigation often covers a number of different events and circumstances. That requires many interrogatories. And interrogatories often help shape other discovery, including depositions. The reduced limits are a mistake.

359, Andrew B. Downs: "As a general proposition, interrogatories are useless." The questions are cumbersome. The answers are evasive, opaque, "jello-like." They should be abolished. Reducing the number is but a step in the right direction.

360, Robert Peltz: The impracticality of the proposed reduction is illustrated by attaching standard interrogatories approved by the Supreme Court of Florida for general negligence, automobile, and medical malpractice actions. For plaintiffs they run in the 20s, up to 29 in medical malpractice cases.

361, Caryn Groedel: Reducing interrogatories will require plaintiffs to spend more money on depositions.

362, Edward Hawkins: The 15 interrogatory limit "is simply unrealistic."

363, Dean Fuchs, at request of NELA-Georgia Board: Written discovery through Rule 33 and 36 "can be an extremely effective tool to not only discover information * * * about [] claims and defenses, but also * * * to frame cases for a ruling on summary judgment and to narrow issues for trial." The misuse of marginally relevant boilerplate interrogatories should not distract from the importance of carefully drafted interrogatories and requests to admit. Limiting the number will increase satellite litigation in counting disputes and in requests to exceed the limit.

365, Edward P. Rowan: "Interrogatories cut down the complexity of depositions, and even eliminate the need for some depositions." The restriction is unwise.

368, William G. Jungbauer: "Interrogatories allow a party to identify witnesses, additional and relevant facts, and documents." Reducing the limit will lead to overly broad and compound questions.

369, Michael E. Larkin: Interrogatories are efficient. They reduce the likelihood of unnecessary depositions and other discovery. The proposal is unnecessary, and will lead to more work for the court.

370, Thomas D'Amore: "Interrogatories are an unobtrusive way to identify witnesses, additional and relevant facts and documents." Defendants often do not agree to discovery beyond the presumptive limit, and judges may grant fewer if the presumptive limit is lowered.

372, J. Burton LeBlanc, for American Association for Justice: "Interrogatories are a useful,

inexpensive and unobtrusive way to obtain basic background information." They are a critical information-gathering tool. Many comments made in March 2013, several of them by government agencies, protested. There is no evidence supporting a presumptive limit at 15.

373, Michael L. Murphy for AAJ Business Torts Section: Do not lower the limit. Interrogatories are used "for many purposes, including identifying witnesses, gaining an understanding of the organizational structure and lines of responsibility, narrowing or ruling out potential claims and theories, and identifying potentially relevant evidence." A reduction is likely to lead to an increased number of requests for documents.

374, Larry E. Coben for The Attorneys Information Exchange Group: Interrogatories and requests to admit are a simple and inexpensive means of acquiring information. Responses often focus and drive oral discovery. Limiting them will force attorneys to cast a wider net. Consider a product liability case. More than 25 interrogatories may be needed on each of five different topics -- the identity of the employees responsible for design, assembly, or manufacture; the design history, including component part suppliers or manufacturers and other models using the same component or system; computer modeling and physical testing methods used to judge safety of the product before its sale; field performance of the product and claims and lawsuits similar to the instant litigation; alternative designs studied before the product was released for sale.

375, Jennie Lee Anderson for AAJ Class Action Litigation Group: Interrogatories are used "to inexpensively identify witnesses, obtain information relating to damages, and even identify the size of the class for numerosity purposes." They should not be further limited.

376, Laura Jeffs (and many others in the same firm, Cohen & Malad): For both Rules 33 and 36, the Committee should "put more teeth into enforcement, as now, defense counsel pride themselves on finding creative ways not to respond to this discovery or otherwise author mini-briefs detailing each, usually meritless, objection."

379, John M. Gallagher: There is no good reason to reduce the number of interrogatories, nor to limit requests to admit.

383, Alan B. Morrison: Opposes the reduction. Answering interrogatories is rarely burdensome in the way that responding to Rule 34 requests can be. They are an inexpensive way of obtaining information, "and often reveal something about the requester's thinking about the case, from both a legal and factual perspective." There are few cases where requests for interrogatories are the culprit in claims of discovery abuse. And this reduction seems incongruous with the proposed limit to 25 requests to admit — "the burdens of investigating and properly answering these Requests seem very similar to the burdens under Rule 33."

386, Arthur R. Miller: The reduction to 15 "is particularly questionable." Interrogatories are not burdensome and are inexpensive. "There are very few cases, if any, in which interrogatories are the source of discovery abuse." If a question seems onerous, a party can respond as best seem reasonable, and allow the judge to decide whether anything else should be required.

394, Thomas Crane: In employment discrimination cases, 15 interrogatories are not enough. Interrogatories are an efficient way to obtain critical information. Depositions by written questions tend to be costly.

398, Shira A. Scheindlin: "There is no empirical evidence that 25 interrogatories has caused any

problems * * * It is a change only for the purpose of signaling a narrowing of the scope of discovery." It will increase cost and delay in resolving disputes.

400, Gregory P. Stone: Interrogatories are important and cost effective. The information exchanged is important in determining whether to go to trial, and — if trial is had — in avoiding the need to approach a trial "blind."

405, Congressman Peter Welch: (Draws from 30 years of litigation experience:) Limiting the parties to fewer interrogatories will force them to write their questions broadly, leading to litigation over the propriety of the questions.

410, John H. Hickey for AAJ Motor Vehicle Collision, Highway, and Premises Liability Section: The present limit of 25 is severe and unwarranted. The model interrogatories for personal injury actions in Florida list 23 questions. Nor is there any clear problem that warrants a reduction. Interrogatories establish simple facts and stances of the parties, and obtain basic information such as the identity of witnesses, ownership of vehicles, and other important matters. Further limits will require extremely broad interrogatories, eliciting objections and motions. 448, Robert D. Curran, tracks 410 without the Florida interrogatories.

417, Barry A. Weprin for National Association of Shareholder and Consumer Attorneys: Both interrogatories and requests to admit are incredibly useful. They seek very basic information at the beginning of a case, and help prepare the case in later discovery for summary judgment and trial. Often in securities fraud cases the defendant will request that the plaintiff use interrogatories instead of a Rule 30(b)(6) deposition; limiting the number will impede this efficiency. Interrogatories, including contention interrogatories, may lead to elimination of claims and defenses.

420, Daniel A. Edelman: Combines Rules 33 and 36. Do not reduce the numbers. Instead, find ways to put teeth into enforcement, "as now, defense counsel pride themselves on finding creative ways not to respond to this discovery or otherwise author mini-briefs detailing each, usually meritless, objection."

421, Louis A. Jacobs: "As for whether Judges should ‘manage up’ discovery by starting with limits, rather than ‘manage down’ discovery by starting with liberal discovery, the Committee should not drink this law-and-economics flavor of Kook-Aid." Limiting the number of interrogatories is "yet another recipe for more judicial involvement * * *. From my perspective, counting as a discrete interrogatory the subparts of a single interrogatory dooms discovery in employment litigation." "For example, we always ask in a single interrogatory for the identity of the decisionmaker, as well as each individual who provided input on which any decisionmaker relied, for specific employment decisions, ranging from termination and discipline, through evaluating performance or investigating misconduct, to assignments and opportunities." "If each employment decision is deemed a discrete interrogatory, the ceiling is in many cases bumped on the first one."

445, Gerald Acker, for Michigan Assn. for Justice: "[P]arties simply do not produce relevant documents during initial disclosures, as a matter of course." Interrogatories are needed to flesh out the case. And they are efficient.

457, Carl A. Piccarreta: There is no need to reduce the limit. The system is not broken.

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Interrogatories are useful to

narrow the range of disputed issues and as an efficient, low-cost form of discovery. Government cases regularly see the full use of the 25 limit.

461, an article by Thomas D. Wildingons, Jr. & Thomas M. O'Rourke: "In all but the most straightforward cases, 15 interrogatories may not suffice." Either the rule text or the Committee Note should emphasize the need for flexible application.

464, Douglas A. Spencer: Limiting the number of interrogatories would make prosecuting or defending cases next to impossible.

475, Jeff Westerman for Litigation Section, Los Angeles County Bar Assn.: "This proposal will only encourage more aggressive law and motion practice."

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: Participants in the conference agreed that interrogatories are useful, and that there is no general problem with the limits set at 25.

520, Ron Elsberry & Linda D. Kilb, for Disability Rights California and Disability Rights Education & Defense Fund: Offering a not complex disability discrimination example: "15 questions, even if consisting solely of contention interrogatories, would be insufficient."

609, Stephen D. Phillips and John D. Cooney for Illinois Trial Lawyers Assn.: Reducing it to 15 interrogatories "will lead to overly broad and compound questions."

614, Lars A. Lundeen: "I have honed my initial set of interrogatories in the typical auto collision court case, filed in State court, to 33." Setting a limit of 15 for more complex cases is unworkable.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Opposes the proposal, which "will produce more motion practice without meaningful benefit."

995, William P. Fedullo for Philadelphia Bar Assn.: Opposes.

1054, Assn. of Bar of the City of New York: Supports, on condition the proposal is revised to direct that the court must increase the limit consistent with Rule 26(b)(1) and (2). But notes that "interrogatories can (and often do) impose great burdens on litigants, because they can require searching reviews of documents and factual investigation in order to respond, even though the same work could be done by the requesting party based on the documents produced in discovery."

1335, Aleen Tiffany for Illinois Assn. of Defense Trial Counsel: Strongly opposes, advancing for defendants the arguments often advanced for plaintiffs.

1588, Leigh Ferrin for Public Law Center: More than one-third of civil actions in federal courts involve at least one pro-se litigant. They cannot afford depositions. They need interrogatories. In civil rights cases, for example, they often need 5 to 10 interrogatories just to figure out the identities of the individuals who allegedly violated the plaintiffs' constitutional rights.

2072, Federal Courts Committee, New York County Lawyers' Assn.: "Interrogatories have long been disfavored as ineffective, costly and often not justified. * * * An additional reduction in the number * * * would be beneficial in most cases."

November Hearing, Daniel C. Hedlund for Committee to Support the Antitrust Laws: p. 101 The proposed reduction to 15 interrogatories is problematic for the same reasons as the reduction in the number of depositions.

November Hearing, Andrea Vaughn: p 173: For the reasons that reducing the number of depositions will impede actions for unpaid wages, reducing the number of interrogatories will also be an impediment.

November Hearing, Barry H. Dyller: p 183 In litigating constitutional violations by government employees or actors "I rarely use interrogatories, so I don't care how many there are personally."

November Hearing, Jonathan Smith (NAACP Legal Defense and Education Fund): p 268 "Interrogatories and requests for admission are some of the least expensive forms of discovery." Increasing the number should be considered.

January Hearing, Elise R. Sanguinetti: p. 151 For contingent-fee plaintiffs in wrongful-death and catastrophic-injury cases, interrogatories are an inexpensive, "really critical" way to obtain necessary information while holding costs down.

February Hearing, J. Bernard Alexander, III: p 272 Although answers to interrogatories are filtered through counsel, they provide some information, narrow the scope, narrow the issues.

RULE 34(b)(2)(A): EARLY SERVED REQUESTS

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Opposes because it opposes the proposal to permit requests to produce before the Rule 26(f) conference.

February Hearing, Ariana Tadler: p 325 Supports.

RULE 34: SPECIFIC OBJECTIONS

298, Philip J. Favro: In a Utah Bar Journal article describing the proposed amendments, suggests that by adding a "specificity" requirement "the Committee may finally eradicate" the practice of boilerplate objections.

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: The proposal "appear[s] reasonably calculated to address the goal of requiring greater specificity in parties' responses to document requests * * *."

372, J. Burton LeBlanc, for American Association for Justice: Requiring specific objections is a positive step toward preventing parties from evading discovery requests. November Hearing, Burton LeBlanc, President, American Association for Justice: p 139, 141: In general terms, "we support the [Rule 34] proposals as written."

375, Jennie Lee Anderson for AAJ Class Action Litigation Group: It is common for defendants to assert undue burden without articulating what that means, or to assert a general privilege objection. Information is withheld until the court, usually in response to a motion to compel, orders the defendant to provide evidence estimating the costs. "A responding party's inability to back up their vaguely stated objections has, in many cases, led to the production of highly relevant information." Requiring specific objections is desirable.

378, Jeffrey S. Jacobson for Debevoise & Plimpton LLP: "It should not be necessary for a responding party to repeat the same objections to each enumerated request or subpart" when there is a general objection applicable to all of a counterparty's requests. The Committee Note should make this clear.

384, Larry E. Coben for The Attorneys Information Exchange Group: Approves all the proposals for Rule 34(b)(2)(B) and (C).

407, David J. Kessler: (This comment makes many suggestions for the Rule 34 proposals that are difficult to compress into a summary. Detailed rereading is well worthwhile.) The proposed obligation to state objections with specificity should be linked to the particularity of the request. Rule 34 works well only when there is communication between the parties that crystallizes and clarifies the scope of the responding party's search and production. Problems become acute when the parties are not even aware that they disagree about the scope of the requests. The lack of consequences for overbroad requests creates an incentive to make overbroad requests. (1) Many courts have already instituted the specific-objection requirement. (2) The Committee Note might usefully say that when a request on its face violates Rule 26(g) it is enough to make that objection without making any other objections or any obligation to respond. (3) The obligation to object with reasonable particularity should be tied to the specificity of the request.

409, Michael H. Reed, Fern C. Bomchill, Helen B. Kim, Robert O. Saunooke, and Hon. Shira A. Scheindlin, individual members of ABA Standing Committee on Federal Judicial Improvements: Requiring more specific objections is helpful.

473, Paul C. Saunders and Rebecca Love Kourlis for ACTL Task Force and IAALS: Agrees with the proposal.

487, Peter J. Mancuso for Nassau County Bar Assn.: Supports all the Rule 34(b) proposals.

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: The Rule 34 proposals were generally supported by the conference participants.

499, Beth Thornburg: This extremely limited proposal will not prohibit laundry-list objections, nor deter or raise the cost of objecting, nor ease the burdens on the discovering party.

581, James Robson: Eliminating boilerplate objections and baseless assertions of privilege "is an excellent idea."

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Strongly endorses the proposal. It corrects a gap between Rule 33 and Rule 34.

635, Matthew D. Lango for NELA/Illinois: Supports "the proposal to bar generalized discovery objections."

1054, Assn. of Bar of the City of New York: Supports. Particularized objections support reasoned negotiations and the court's assessment of objections. The Committee Note should state that an objection is sufficiently specific if it states the limits that have controlled the search for responsive and relevant materials.

1413, Jocelyn D. Larkin for Impact Fund and several others: Endorses the amendments "regarding responses to document requests. Evasive responses, coupled with vague references to 'rolling' production at some unspecified future time, significantly contribute to delay and inefficiency in the discovery process."

1462, Margaret M. Murray: "Requiring the responding party to state objections with specificity is fundamental and long overdue." "Any process requiring * * * extensive meeting and conferral or judicial intervention to gather information merely to evaluate a responding party's stated objection is not effective."

1502, J. Michael Conley for Massachusetts Academy of Trial Lawyers: Massachusetts Superior courts require specific objections. It works. "Blanket objections are not tolerated."

2072, Federal Courts Committee, New York County Lawyers' Assn.: All the Rule 34 proposals "will clarify discovery obligations and expectations. * * * [T]he requesting party will know if it has reason to consider moving to compel. The procedures set forth are in line with existing law and good practice."

2110, Miriam Hallbauer & Richard Wheelock for LAF: This is "a sensible way to discourage litigants from attempting to evade discovery with rote, essentially meaningless objections."

January Hearing, P. David Lopez (EEOC): p 68 Agrees with the proposal.

January Hearing, Jennie Lee Anderson: p 271 Many inflated discovery costs are inflicted by defendants on themselves. Rule 34 requests to produce are often met with two or three pages of objections to each request, and no production at all. Extended negotiations follow. Defendants refuse to make specific objections, and give no real information on the cost of responding. Then defendants are unable to prove the claimed burden and production is ordered. Requiring specific objections will encourage more candid exchange of information, earlier.

February Hearing, William B. Curtis: p. 77 "[T]he proposals to Rule 34 are a very good start,

because what they do is they eliminate prophylactic objections."

February Hearing, Ariana Tadler: p 325 Supports the "(b)(2)(B)" proposals.

RULE 34: PRODUCTION — TIME FOR PRODUCING

298, Philip J. Favro: In a Utah Bar Journal article describing the proposed amendments, suggests that this provision "should ultimately provide greater clarity and increased understanding surrounding productions of ESI."

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: The Section supports, but believes the Committee Note language should be transferred to rule text stating that when production is made in stages, the response should specify the beginning and end dates of production.

372, J. Burton LeBlanc, for American Association for Justice: Codifying the general practice of producing, and requiring the producing party to disclose when production will occur, will streamline production of documents. And it will allow parties to anticipate when production will occur, particularly when production takes place in stages.

375, Jennie Lee Anderson for AAJ Class Action Litigation Group: "It has become standard practice for responding parties to refuse to produce any documents until all discovery disputes have been resolved," and to start producing on a "rolling" basis without estimating a time to complete production "or, in some cases, even confirm when a production is complete." The proposal is desirable.

374, Larry E. Coben for The Attorneys Information Exchange Group: Approves all the proposals for Rule 34(b)(2)(B) and (C).t

407, David J. Kessler: (This comment addresses the choice to produce, and timing, in great detail.) (1) Producing, rather than permitting inspection, is a well-established practice. But there is a growing tendency in courts to defeat a party's choice whether to produce or permit inspection by too readily providing direct access to documents or computers in an attempt to reduce the overall cost of discovery. "Even if no privileged documents are at stake, this solution is too great an intrusion into a responding party's private affairs." "[A] court should not compel inspection over a responding party's choice to produce except where production is technically impossible or there is evidence of discovery abuse that mandates inspection." The Committee Note should say that "absent abuse, it is the responding party's choice to either produce * * * or permit inspection."

(2) There is an "iron triangle" that joins cost, schedule, and scope. Reducing cost and accelerating the schedule reduces the quality of the production. A large discovery can be done quickly, but that will be expensive. It can be done quickly and inexpensively, but it will not be very good. "[W]hat can be reasonably accomplished in discovery is a question of both time and money." [A] There is little case law on what it means for a requesting party to specify a reasonable time for inspection or production. Nor is it clear how the requesting party's specification bears on a responding party's choice of a time to produce. Because a party does not review documents provided for inspection [?], production takes longer than inspection. [B] It is difficult to determine how long it will take to produce, and the time is controlled by factors that may not be known when the initial response is made. These factors include volume, format, location (both geographically and technically); various languages; the nature of the requests; requirements to issue code or compartmentalize electronic data; whether data is searchable; the amount of privileged information; the complexity of the litigation of review; the amount of redaction; and "etc." These factors may be understood only as discovery unfolds. [C] The time to produce will be affected by changes in the scope of the request in response to negotiations or motions to compel. The proposal may create an incentive for responding parties to make

aggressive objections, hoping to narrow the scope of discovery so they can state a shorter time for production. [D] It is not clear how stating a proposed time to produce "would interact with contingent productions like phased discovery or production from not reasonably accessible data sources under 26(b)(2)(B). Sources not reasonably accessible should be searched only after reasonably accessible sources have been searched and produced. [E] So it is not clear how the stated time to produce would be integrated with the Rule 26(e) duty to supplement — would a party be chastised for supplementing after the stated time to produce?

"Given these concerns, it does not seem practical to include this proposed amendment in the Rules." But if it is, "I would make it clear in the Notes that it is reasonable and expected that responding parties may need to update or supplement the date by which their production will be completed.

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Often it will not be feasible to produce at the time for inspection stated in the request. But referring to a later "reasonable" time "will engender disputes about whether a production has been unreasonably delayed." "Reasonable" should be deleted. "[T]he parties frequently negotiate that productions will be made on a rolling basis." Difficulties arise where there is little or no negotiation, "not because of the terms of the current Rule."

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Strongly endorses the proposal. A response may state that documents will be produced, without specifying a time for production. "That practice is a frequent source of frustration, disputes and motions."

1054, Assn. of Bar of the City of New York: Supports. But the Note should observe that it suffices to state a time when it is anticipated that production will be complete. Precise predictions may be difficult in undertaking large-scale productions.

1462, Margaret M. Murray: "[I]n most of our firm's class action cases, we receive responses to discovery requests without a single responsive document provided." Defendants refuse production of documents until all discovery disputes are resolved. When production begins they say only that it is "rolling," and refuse to identify an estimated date for completion. In some cases, they will not even confirm whether production is complete.

1463, N. Denise Taylor for Association of Southern California Defense Counsel: The amendment reflects common practice, and eliminates discovery battles over access to original files.

1552, Esther L. Klisura for State Bar of California Committee on Federal Courts: As proposed, there is a risk that the rule will be read to give the responding party unilateral control in determining what is a reasonable time. "reasonable" should be deleted, and this sentence added: "*If the later time stated in the response has not been stipulated to or previously ordered by the court, the requesting party may move to compel an earlier production.*"

1608, Jonathan M. Redgrave: Amend the rule to read: "or by a later reasonable time specifically identified in the response taking into account factors such as the volume and complexity of the production. When it is necessary to make the production in stages the response should specify the beginning date of the production and anticipated end dates of the production."

1878, Roger L. Mandel: "The use of boilerplate objections combined with the refusal to state when documents are actually being withheld based on the objections and to commit to document production within reasonable certain periods of times are the single biggest problems with

discovery today and greatly increase the time, expense and difficulty of discovery. I strongly favor the proposals to deal with these issues."

RULE 34: STATEMENT OF WITHHELD ITEMS

298, Philip J. Favro: In a Utah Bar Journal article describing the proposed amendments, suggests that this requirement "could make Rule 34 responses more straightforward and less evasive."

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: The goal is desirable, but there may be unintended consequences. The proposal "would seemingly require a responding party to obtain extensions of time to respond until it knows whether documents [responsive] to a particular request are being withheld. Such a response can only be accurately made after there has been a sufficient document review to enable an accurate response. Yet, it does not appear to be desirable written response for that reason. This problem could be cured by making it clear in the proposed rules that a party can respond by saying in effect, that it has not yet determined whether responsive documents are being withheld to the request, but it will supplement its response to provide that information within a reasonable time."

357, Joanne S. Faulkner: This "is salutary, and a similar provision should be added to Rule 33." Indeed, written discovery should be governed by the same principle as Rule 30(c)(2) applies at depositions — the requested information should be provided along with the objection. Nervous lawyers could be reassured by adding a provision that production does not waive objections to admissibility and relevance.

372, J. Burton LeBlanc, for American Association for Justice: The practice of stating objections and then producing subject to the objections makes it difficult to assess what has not been produced and which objections go to whatever has not been produced. The proposed change will discourage parties from evading discovery on procedural grounds and enable the requesting party to assess whether further discovery will produce evidence to support its claims.

375, Jennie Lee Anderson for AAJ Class Action Litigation Group: "It has * * * become commonplace for parties to respond to discovery with a litany of boilerplate objections without revealing whether they are actually being relied upon to withhold information." It is impossible to determine whether anything has been withheld, and if so on what grounds. Countless hours of meeting and conferring are required. This proposal is desirable.

378, Jeffrey S. Jacobson for Debevoise & Plimpton LLP: Refers to 26(b)(2)(C), but means 34. The idea is good. But if a party objects to making a search at all, either because unduly burdensome or vague, it cannot know whether it is withholding responsive documents. The statement in the Committee Note that a party can state the limits that have controlled the search is adequate to the task, but should be moved into rule text.

381, John Stark: The proposals place greater emphasis on document requests, restricting other modes of discovery. This is mistaken, for the reasons described with the suggestion that numerical limits and many other limits should be placed on Rule 34. So requiring a statement whether responsive materials are withheld goes in the opposite direction.

384, Larry E. Coben for The Attorneys Information Exchange Group: Approves all the proposals for Rule 34(b)(2)(B) and (C).

388, Nina M. Gussack, Joseph C. Crawford, Anthony Vale: This proposal is undesirable. A producing party does not "withhold" a document it believes is not discoverable. The result will approach a need to produce a "log" of "withheld" material. A typical Rule 34 request is broad —

"every document that mentions widget X." The responding party may believe that is too broad, and produce a set of documents it has identified. It should not be required to search for every document mentioning X so as to be able to describe those it is not producing. Such a duty would only encourage broad requests.

407, David J. Kessler: (This the third part of this detailed comment on the Rule 34 proposals). (1) "Withhold" is not an appropriate term. "As a general matter, we have not historically required parties to identify the documents they are not producing or that did not fall within the document request, properly construed." "Requiring responding parties to establish why they did not search in a specific location or produce a specific document turns discovery on its head"; all they need do is object. For example, it is common to use search terms, "but a party is not withholding documents that are not identified by its search terms." Nor should it be required to disclose the search terms, which by all the better authority are protected as work product.

(2) As a practical matter, even responding parties who take their Rule 26(g) responsibilities seriously "may not know exactly how they will search for the documents they agree to produce. Nor may they be aware if any documents are going to be excluded from the production that would otherwise be responsive but for the objections."

(3) The rule should instead focus "on what [the] responding party is agreeing to search for and produce. * * * [T]he court should ask whether the scope of what the responding party has agreed to search for and produce is reasonable and whether the requesting party and the court can clearly understand what the responding party is agreeing to produce. Too often responding parties provide a series of objections and responses, but never describe what they actually agree to search for and produce."

(4) Rule 34(b)(2)(C) should instead be amended:

(C) *Objections.* An objection to part of a request must specify the part and ~~permit inspection of the rest.~~ state with reasonable clarity what information the party will either produce or for which it will allow inspection. Where a party objects to a request in its entirety and does not plan to produce any documents in response to the request, the party should so state.

The Committee Note would be revised in parallel, see p. 11 of the comment. February Hearing, David Kessler: p 342 "Many objections to discovery requests do not withhold any documents whatsoever, but rather limit those stems [sic] of proper scope of discovery under the rules." A party is not withholding anything when it states the limit of the inquiry. It would be better to direct that the responding party state what it is looking for.

421, Louis A. Jacobs: "[E]mployers regularly * * * raise boilerplate general and 'to the extent'objections, and the Committee's effort to eradicate this abuse is wonderful. Conditionally couched discovery responses leave us wondering what information or documents have been withheld, and requiring an indication of that shortfall facilitates resolution of disputes."

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: The Department agrees that some litigants do not disclose whether anything has been withheld. It "supports the proposed amendment insofar as it does not create a detailed disclosure requirement, which would be unworkable." Responses often are due while still gathering information about the categories of documents that will or will not be provided by the agency. The Department supports the proviso in the Committee Note that a statement of the limits that have controlled the search qualifies as a statement that the materials have been withheld.

461, an article by Thomas D. Wildingons, Jr. & Thomas M. O'Rourke: This "will increase transparency, requiring parties to communicate whether otherwise discoverable information is being withheld."

462, George E. Schulman, Robert B. McNary for the Antitrust and Unfair Business Practice Section of the Los Angeles Bar Assn.: This proposal is long overdue. Often the first question at the meet-and-confer after a Rule 34 response asks whether anything has been withheld under the objections. "Usually the response is that nothing has been withheld. Now that information will be in the response." But in cases where production occurs over time, counsel may not yet know whether anything will be withheld. The producing party ought to be able to make the objection, and be required to amend the response to state whether documents have been withheld.

473, Paul C. Saunders and Rebecca Love Kourlis for ACTL Task Force and IAALS: Agrees with the proposal.

540, Alex Dahl for Lawyers for Civil Justice: This proposal imposes an added and unnecessary burden. Any confusion typically is resolved at a meet-and-confer. "The root cause is often a failure to object with specificity." "The requesting party also has a duty to propound specific demands."

558, Richard Alembik: Proposed 34(b)(2)(B) and (C), to eliminate boilerplate discovery objections and baseless privilege assertions, is a very good idea.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Strongly endorses the proposal. "The magistrate judges have seen many motions addressed to the ambiguity" of responses that state objections, and then state that without waiving the objections, certain documents will be produced, but do not state whether other responsive documents will be produced.

635, Matthew D. Lango for NELA/Illinois: Supports.

673, Don Bivens for 22 more "individual members of the Leadership of the American Bar Association Section of Litigation": (Probably fits here:) "We strongly support the amendments of Rule 34 to prevent evasive answers to document requests."

995, William P. Fedullo for Philadelphia Bar Assn.: Endorses, along with the specific objections proposal. This is workable because the Note recognizes that a statement on the scope of the search functions as a statement that anything outside the scope is "withheld."

1054, Assn. of Bar of the City of New York: Sort of supports the proposal. A better method for curbing evasive responses would be to prohibit conditional responses — "subject to, and without waiving" objections. Coupled with the requirement that objections be specific, this could go a long way. The practical difficulty is that objections typically are prepared early on, in the early stages of searching for responsive documents or even before the search has begun. You cannot know then whether anything will be withheld. If the proposal goes forward, it should be modified to require notification of withholding only at the conclusion of the document production.

1123, W. Bryan Smith for Tennessee Assn. for Justice: Supports this and the specific objections proposal.

1290, Michelle C. Harrell, for State Bar of Michigan Committee on United States Courts: Approves both the specific objections proposal and the requirement to "delineate which, if any, responsive documents are being withheld based on any objections."

1393, Camille Godwin: While opposing the other proposals, endorses the Rule 34 changes. They

will reduce "time needlessly spent by courts and litigants ferreting out the basis of routinely overbroad objections which often serve only to mask the existence of materials known to be responsive and which defendants hope will remain uncovered."

1462, Margaret M. Murray: A laundry list of objections "necessitate[s] countless hours of meeting and conferral, simply to determine whether documents were withheld and, if so, why. * * * The change will substantially lower the extent to which court intervention is required."

1463, N. Denise Taylor for Association of Southern California Defense Counsel: "This amendment is extremely helpful."

1476, Zenola Harper for Horizon Blue Cross Blue Shield: "This amendment is problematic because it would likely spawn a new genre of discovery disputes through which the requesting party attacks the log of documents identified as withheld * * *."

1502, J. Michael Conley for Massachusetts Academy of Trial Lawyers: "The Massachusetts Superior Courts adopted this rule and it works. * * * Requiring an objecting party to disclose if it is actually withholding documents saves everyone time."

1521, R. Stanton Dodge for DISH Network: "[I]t is rare that a party knows, at the time it serves its responses, exactly what it has and what it will or will not be producing."

1536, Lisa Tate for American Council of Life Insurers: Overbroad and ambiguous requests to produce make it difficult to know what has been "withheld." The proposal should be withdrawn.

1732, J. Burton LeBlanc for American Assn. for Justice: Supports all the Rule 34 proposals.

1883, Norman E. Siegel: Eliminating "the unfortunately popular tactic of not disclosing whether documents are being withheld based on a particular objection" will eliminate unnecessary discovery disputes.

2110, Miriam Hallbauer & Richard Wheelock for LAF: "This will aid litigants who are at a disadvantage relative to their opponents because they lack sufficient access to know what discoverable information even exists."

2141, Kevin N. Ainsworth: The objection also should state "whether and to what extent the objecting party limited its search for responsive materials."

2264, Scott A. Kane: Common requests ask for all documents relating to any allegation in the complaint. It is difficult to state what is withheld when faced with an overbroad request. The Committee Note should state: "The sufficiency of the identification of materials withheld on the basis of objection should be measured by, among other things, the degree of specificity of the description of materials sought in the request."

November Hearing, Jeana M. Littrell: p. 17-18, 20-22: Opposes this proposal. An affirmative statement that documents are being withheld will undoubtedly lead to follow-on discovery asking what has been withheld, and why. We do not now get such follow-on discovery, even though we do make the common boilerplate objections that a request is overbroad, unduly burdensome, and that subject to these objections we are producing. We should not do that, but we do. What happens next is that the requesting party calls, and we work it out.

January Hearing, Janell M. Adams: "Withheld" creates difficulties when TAR is used — you do not know what documents you have not produced when you have not identified them. We use TAR now only on agreement with the other parties. So they know we may not have identified every relevant document. But we use other methods to sort out responsive documents from the set of relevant documents, and we do not tell other parties "which word searches, which particular methodologies, analytics, whatever" guided the choice of responsive documents. We should not have to provide that information to identify what has been "withheld."

February Hearing, John H. Martin: p 172 Texas requires a statement of withheld items only for privileged items. That has worked well, and should be considered with this proposal.

February Hearing, Stuart A. Ollanik: p 266 Supports the proposal.

RULE 34: NUMERICAL LIMIT

After prolonged discussion, the Advisory Committee decided to abandon drafts that would have amended Rule 34 by imposing a presumptive numerical limit on the number of requests to produce. Many of the prepublication comments addressed this proposal. It is addressed in some post-publication comments as well.

257, Todd Croftchik: "Even a reasonable limit of 50 requests would significantly reduce the attorneys' fees and costs expended in responding to hundreds of requests for production in a single product liability case."

258, Peter Sturmfels: Verbatim the same as 257 above.

260, William LeMire: Verbatim the same as 257 above.

269, Mary Novacheck: Verbatim the same as 257 above.

307, Hon. A. Leon Holmes: the limitations presently in place on requests for production are sufficiently generous that there are few disputes. (This is combined with Rules 30, 31, 33, and 36; it may reflect a local rule.)

318, Brian Sanford: "Rule 34 should not contain a limit on requests."

365, Thomas Osborne and 14 others for AARP Foundation Litigation: Carries forward a pre-publication comment protesting the adoption of a limit on the number of Rule 34 requests.

372, J. Burton LeBlanc, for American Association for Justice: Calls to reinstate the abandoned proposal to impose a numerical limit on Rule 34 requests "are ill-advised."

381, John Stark: Makes a number of suggestions for Rule 34, collected here. Both the number and scope of requests should be limited at the outset of litigation. Indeed, the rules should identify categories of cases — for examples, administrative record cases, absolute or qualified immunity cases, time-barred cases — where discovery planning and discovery requests are presumptively prohibited. It is a mistake to limit the numbers of depositions, interrogatories, and requests to admit; the result will be to force ever more discovery into the costlier Rule 34 requests. Amendments should require "more focused and limited questioning," and allow more than 30 days to respond. Rather than allowing requests for any relevant information, the focus should be on "getting 'just enough' to understand the case." And the requesting party should be made to bear some of the burden of production if there is to be true proportionality.

404, J. Michael Weston for DRI - The Voice of the Defense Bar: "[P]resumptive limits on document discovery should be considered." "Susman's Checklist," for example is an agreement among the parties that discovery be limited to five custodians in the first instance, to be followed by five more custodians in a second round. The requesting party identifies the custodians. After the second round, further custodians can be discovered only on showing good cause.

465, Neil T. O'Donnell: Opposes the abandoned proposal to add a presumptive limit of 25 requests to Rule 34.

635, Matthew D. Lango for NELA/Illinois: Any presumptive limits would lead to broader requests and more discovery disputes.

637, Louis Lehr for Trial Attorneys of America: Recommends a limit setting a presumptive number of Rule 34 requests.

RULE 36: NUMERICAL LIMITS ON REQUESTS TO ADMIT

267, Lawyers for Civil Justice, by Alex Dahl: Same as Rule 30: The Rule 33 Committee Note encouraging parties to think carefully is good. The fear of increased motion practice is exaggerated; generally the parties can agree on an appropriate number of requests.

274, James Jordan: "If you limit everything else and then limit RFAs??""

288, Sharon L. Van Dyck for the Railroad Law Litigation Section, AAJ: The limit is shortsighted. In railroad litigation, requests to admit are frequently used to eliminate the need for fact witnesses and additional expert witnesses. They eliminate the need to prove facts that are truly not in controversy.

289, Craig B. Shaffer & Ryan T. Shaffer: Rule 36 requests are not "discovery" tools. As a practical matter, a motion for summary judgment provides an alternative means to obtain admissions when the nonmovant fails to identify evidence creating a genuine dispute. And if a lawyer raises issues of authentication — most logically at a Rule 26(f) conference — and is rebuffed, that should be a basis for exceeding the limit. [It is not clear whether "authentication" is used in a sense that expands beyond documents, which are not included in the presumptive limit.]

292, Lyndsey Marcelino for The National Center for Youth Law: Decreasing the number of interrogatories and requests for admissions "will likely lead to less information, an increase in aggressive motion practice, and an increase in collateral litigation."

299, Aaron Broussard: Combines Rule 36 limits with Rule 33 limits: the problem is that a smaller number of broad requests will support disingenuous responses.

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: No empirical data are cited to support the proposal. The presumptive limit to 25 requests "will create more issues than any it purports to solve." As with Rule 33, parties will dispute what are discrete subparts. There will be disputes whether a request is truly directed at admitting the genuineness of a document as opposed to some other purpose. Consider, for example, a forgery case: will a request to admit genuineness count against the limit? There is no demonstrated need. Do not make the change.

307, Hon. Leon Holmes: Opposes. See Rule 30.

310, Johnathan J. Smith, for NAACP Legal Defense Fund: Interrogatories and requests to admit often involve only minor expense in answering. Reform should seek to increase use of these devices, not to restrict them.

317, Steven Banks for the Legal Aid Society in New York City:
"Admissions are particularly useful for establishing uncontested background facts such as the staffing of a government agency and the allocation of staff to different locations and functions." In employment cases, requests can be critical where the employer's records show violations on their face. More than 25 requests have proved useful in streamlining important evidentiary disputes. And courts can readily evaluate requests against arguments of burden or other impropriety.

322, Michelle D. Schwartz, for Alliance for Justice: The limits pose a threat to plaintiffs with

limited resources. "High-quality requests for admission serve to reduce the number of issues that must be decided at trial." Limiting the number will force plaintiffs to devote more resources to trial proofs that could have been avoided.

324, Jonathan J. Margolis: Failures to admit can be followed up by interrogatories seeking the supporting facts; that may make lawyers less likely to deny anything they think the other side cannot prove. There is no empirical evidence that abusive numbers of requests are made so often as to warrant a new restriction.

344, Shanin Specter, Thomas R. Kline, Andrew J. Stern, Andrew S. Youman: Written discovery requests are more efficient. Reducing the number will diminish the utility, and force broader requests. And this will increase the need for deposition discovery.

349, Valerie Shands: "Why on Earth would one want to *reduce* the number of things the parties can agree upon before trial?" And if a judge unjustifiably denies an increase, there will be further cost and delay "while one is forced to appeal an issue * * *."

350, Pennsylvania Bar Association: Supports the 25-request limit.

357, Joanne S. Faulkner: Interrogatories and requests to admit are often all that a consumer can afford. A request for admissions can be a poor person's deposition. Do not impose numerical limits.

358, Dusti Harvey for AAJ Nursing Home Litigation Group: Requests to admit are seldom used in nursing home litigation. But they are used to request an admission that documents are admissible. This use should be protected by amending Rule 36(a)(1)(B) to provide for requests to admit the genuineness and admissibility of any described document. (The proposed numerical limit does not apply to requests under 36(a)(1)(B).)

361, Caryn Groedel: Limiting the number of requests will result in plaintiffs having to spend more on depositions.

363, Dean Fuchs, at request of NELA-Georgia Board: Imposing limits on Rule 36 is even worse than reducing the number of interrogatories, "given their great effectiveness in narrowing issues for trial, framing summary judgment motions, and the relative ease to which Requests for Admissions are responded." This should be a non-issue; "I have never heard or experienced any complaint about the abuse of Rule 36."

365, Edward P. Rowan: Limiting requests to admit will increase time and cost, because they are efficient and inexpensive.

369, Michael E. Larkin: Requests to admit are valuable, allowing the parties to resolve issues in an efficient manner and to determine the issues the opposition asserts.

370, Thomas D'Amore: "I often use requests for admission to limit the number of issues in the case so that I don't have to do discovery on issues." Why impose a limit "[i]f efficiency and cost savings is the goal"? "I would question the motives of the proponents."

372, J. Burton LeBlanc, for American Association for Justice: Requests to admit "are cheap but essential discovery tools" that enable smaller plaintiffs to establish critical information and are almost cost-free. Imposing a numerical limit will encourage broader requests, making it even

easier than it is now for defendants to deny. There is no evidence to support the limit. And the exemption of requests to admit the genuineness of documents favors defendants and large corporate interests — most document-heavy cases involve large corporations on both sides, so they do not face the same limits on requests to admit as plaintiffs with smaller cases.

373, Michael L. Murphy for AAJ Business Torts Section: Do not impose a limit. Requests to admit "are used for a host of reasons, including authenticating evidence, establishing the basis for stipulation, and narrowing the fact issues for trial." A limit will lead to an increased number of requests for documents.

374, Larry E. Coben for The Attorneys Information Exchange Group: The reasons to abandon the proposed limit are advanced in opposing the reduction to 15 interrogatories under Rule 33.

375, Jennie Lee Anderson for AAJ Class Action Litigation Group: Requests to admit generally are used sparingly to achieve efficiencies by streamlining issues and focusing discovery, and by establishing undisputed facts related to liability. Limits need not be imposed.

394, Thomas Crane: Requests to admit "are a fairly efficient way to obtain pointed information efficiently." There is no need to create a limit — "I have personally never seen more than perhaps 35."

400, Gregory P. Stone: "I've been able to use fifty to sixty requests to admit to save days of trial testimony in vehicle defect cases."

405, Congressman Peter Welch: (Draws from 30 years of litigation experience:) "Plaintiffs rely on requests for admission to eliminate the need to produce at trial proof of facts that are not in controversy." If plaintiffs are forced by numerical limits to frame broad requests, it will be easier for defendants to deny, increasing litigation costs.

409, Michael H. Reed, Fern C. Bomchill, Helen B. Kim, Robert O. Saunooke, and Hon. Shira A. Scheindlin, individual members of ABA Standing Committee on Federal Judicial Improvements: The limit to 25 requests, excluding requests regarding the authenticity of documents, is reasonable.

410, John H. Hickey for AAJ Motor Vehicle Collision, Highway, and Premises Liability Section: "In a standard personal injury action against a cruise line on behalf of a passenger, we propound a set of approximately 25 requests for admissions." The proposal is a solution in search of a problem. 448, Robert D. Curran, tracks 410 without the cruise line example.

417, Barry A. Weprin for National Association of Shareholder and Consumer Attorneys: Both interrogatories and requests to admit are incredibly useful. (See Rule 33 summary.) Requests to admit may obviate the need for motions in limine with respect to certain exhibits or testimony.

445, Gerald Acker, for Michigan Assn. for Justice: Requests to admit "are cheap and effective tools for discovery." They should not be limited.

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Requests to admit are a useful tool for narrowing the issues for trial. They do not impose the same burdens as requests for documents or testimony. Limitations will gain little in efficiency, and that will be at the risk of increased trial time. "The Department has handled many cases, affirmative and defensive, in which responses to more than 25 requests have been useful to narrow the claims or defenses * *

*."

460, Jo Anne Deaton: The presumptive limit "is long overdue." Plaintiffs' counsel have served large numbers of requests to admit "for no apparent reason other than to 'churn' discovery and increase fees."

461, an article by Thomas D. Wildingons, Jr. & Thomas M. O'Rourke: "This change will require parties to be more selective in their use of requests of admission and to focus on the material issues in dispute * * *."

464, Douglas A. Spencer: Limiting the number of requests to admit is inappropriate. They are an invaluable tool to limit the issues presented at trial.

475, Jeff Westerman for Litigation Section, Los Angeles County Bar Assn.: "Reasonable requests for admission * * * are perhaps the most simple and direct discovery tool allowing the parties to narrow the issues to be tried." No empirical data support imposing a limit.

489, Hon. Rebecca Love Kourlis for The Institute for the Advancement of the American Legal System: There was more discussion of this proposal than the other proposed numerical limits. Some defense attorneys argued that requests to admit are abused, and that 25 is a reasonable presumptive limit. But "multiple plaintiffs attorneys noted that requests for admission are very effective discovery tools, sometimes in larger numbers than 25."

520, Ron Elsberry & Linda D. Kilb, for Disability Rights California and Disability Rights Education & Defense Fund: Requests to admit result in fewer objections than other types of discovery. But defendants tend to deny most requests, and plaintiffs cannot know which they will admit. Adopting a presumptive numerical limit is unwise.

524, Joel S. Neckers: "I have handled several cases in the recent past where opposing counsel filed literally thousands of request for admission," imposing thousands of hours of time to litigate and respond to the requests.

589, Kathleen M. Neary for Employment Rights Section, AAJ: "Requests for admissions are often times utilized to establish that medical or counseling bills that were incurred as a result of the unlawful employment practices are fair, reasonable and were necessitated by the employment practice."

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Endorses. "The magistrate judges have seen instances in which the requests for admissions have been excessive and burdensome." The number can be addressed in a scheduling order. If the question arises later, the parties can work it out or make a motion.

995, William P. Fedullo for Philadelphia Bar Assn.: Opposes. (Also opposes the other proposed numerical limits.)

1054, Assn. of Bar of the City of New York: Supports."[E]xcessive or irrelevant requests for admission can be overly burdensome or harassing." A number of courts have adopted local rules setting a presumptive limit of 25 requests.

1560, Arthur N. Read for Friends of Farmworkers: Rule 36 requests can be linked to requests to produce documents by seeking an admission that requested documents not produced do not exist

— this is particularly valuable as to documents a defendant is required by law to make and keep. Requests to admit are particularly important with respect to defendants who simply ignore discovery requests because failure to timely respond effects an admission. And they can summarize in an undisputable manner the results of document discovery, including the accuracy of summaries of voluminous records.

2072, Federal Courts Committee, New York County Lawyers' Assn.: "Substantive requests for admission have also become disfavored and are largely viewed as unproductive, leading to objections and/or vague or incomplete responses and, sometimes, needless motion practice for additional responses." But it is good to exempt requests concerning the authenticity of potential trial exhibits.

November Hearing, Darpana M. Sheth, for the Institute for Justice: There is no empirical evidence of problems with burdensome or excessive requests to admit. If there is a problem, it is that litigants do not use Rule 36 enough. Admissions serve vital purposes beyond laying the foundation to admit documents into evidence. They narrow the issues, and facilitate proof with respect to the issues that remain. Admissions that the casket monopoly in Louisiana did not serve any health or safety purposes shortened the trial to 3 hours from an expected 3 days.

November Hearing, Jonathan Smith (NAACP Legal Defense and Education Fund): p 268 "Interrogatories and requests for admission are some of the least expensive forms of discovery." Their use should be encouraged, not limited.

November Hearing, Patrick M. Regan: p 278 "The limit on requests for admissions * * * is a solution in search of a problem." The purpose is to narrow the issues. Why should we want to limit that worthy goal? In litigating between 300 and 400 cases in federal courts, and many in state courts, I've never, "ever, ever had a problem with the excessive number of requests for admissions."

January Hearing, P. David Lopez (EEOC): p 68 Requests to admit "can be a very, very effective tool." It is really important to draft them right. And if one formulation triggers an objection, it is often important to craft an alternative.

January Hearing, Thomas A. Saenz: p. 96: MALDEF brings voting rights and immigration rights actions against government defendants. "[O]ften requests for admissions in particular play a significant role in streamlining the pursuit of these cases."

January Hearing, Elise R. Sanguinetti: p. 151 In single-plaintiff wrongful-death and catastrophic-injury cases, requests to admit are often used. It is rare to ask more than 25, but "I want to be able to do that" when necessary to save the client money.

February Hearing, Donald H. Slavik: p. 14 At 22-23: "[O]ur complaint is a set of requests for admissions." The proposed limit may not cause problems for plaintiffs. "The defense may be more harmed. I get requests * * * 40, 50, 60, but if it helps narrow the scope of the issues going to trial, I think they're important."

February Hearing, J. Michael Weston: p 87 In a recent case the plaintiffs served a little under 1,000 requests to admit, asking for authentication of documents that had been produced in other cases around the country, but that were offered here in different forms that made it difficult to figure out which was what.

February Hearing, Leigh Ann Schell: 86 requests to admit have been served in a recent case. Many of them involve matters that must be resolved by expert testimony. Negotiations have failed to win any relief. The present rules allow us to seek relief, and we will. Adopting a presumptive limit will at least encourage the parties to take a more surgical, narrow approach.

February Hearing, J. Bernard Alexander, III: p 272 Requests to admit are a way to whittle down a case. I have never had an issue where an adversary has asked a judge to cut the number of requests.

RULE 37(a)(2): COMPEL PRODUCTION

2072, Federal Courts Committee, New York County Lawyers' Assn.: Approves the corresponding Rule 34 proposal, and so endorses this conforming proposal.

OTHER

256: Hon. Scott Crampton: This comment makes suggestions for AO Form 88, a subpoena form being revised to reflect the 2013 amendments of Rule 45.

263, The Cady Law Firm, by Christopher D. Aulepp: After criticizing parts of Rule 26(b)(1): "We are also opposed to the other proposed changes." The effect will be opposite to promoting justice, efficiency, and economy of resources.

264, American Association of Justice Transvaginal Mesh Litigation Group, by Martin Crump: Overall, the limits on discovery "will * * * make it much more difficult for individuals to find evidence when suing a massive — and sometimes multinational — company."

268, Craig Smith: Do not adopt the changes. Many "would negatively impact almost all plaintiffs, but would particularly harm plaintiffs in cases involving multiple defendants, complex litigation, and cases where the defendant holds a disproportionate amount of information compared to the plaintiff."

271, J.C. Metcalf: Prior rules changes, including disclosure, have been a farce. Corporate defendants produce little or nothing. A successful assertion there is nothing to produce in one case may be followed in another case by producing numerous documents claimed not to exist in the first case. "The proposed rule changes will exacerbate this dynamic." They "are a nightmare for the fair and orderly administration of justice."

285, Cory L. Andrews, Richard A. Samp, Washington Legal Foundation: Rule 8 should be amended to reflect the plausibility standard adopted in the Twombly and Iqbal decisions. At the very least, a new Committee Note should be added to acknowledge those decisions and to explain their relationship to Rule 8.

295, Andrew Horowitz: The Western District of Pennsylvania has an innovative and resoundingly successful early ADR program that has been copied by other districts. And it has "recently launched a voluntary expedited litigation program where the parties consent to mutual limits in discovery and motions practice to reduce costs and bring about faster resolution." Such experiments should be continued.

346, Kenneth J. Withers, for The Sedona Conference Working Group 1 Steering Committee: The Sedona proposals include several recommendations to address preservation in Rule 16 and at various points in the discovery rules. These proposals overlap the comments on Rule 37(e). But several may be described here because they address topics that go beyond preservation.

> **Rule 16(a)** The purposes for a pretrial conference would be expanded:
> (3) resolving any disputed issues involving preservation identified through the meet and confer process described in Rule 26(f)(3)(C);
> ~~(3)~~ (4) managing discovery and discouraging wasteful pretrial activities * * *.
> **Rule 26(c)** The protective order provisions would expressly address preservation:
> **(1)** ***In General.*** A party or any person from whom discovery is sought or who is, or may be, subject to a request to preserve documents, electronically stored information, or tangible things [may move for a protective order] * * *. The court cannot consider the motion ~~must include~~ unless it receives a certification [of meet and confer], and [the motion] is accompanied by a report that conforms to the requirements of Rule 26(f)(5). [Rule 26(f)(5) may be the 26(f)(3)(F) set out below.]

A protective order could specify the terms of preservation; limit the scope of preservation; or "reliev[e] a party from preserving certain documents, electronically stored information, or tangible things."

Rule 26(f) The discovery plan provisions of Rule 26(f) would be expanded to include this as a new (3)(F):

> (F) If the parties are unable to resolve issues discussed during a Conference under Rule 26(f)(2), all persons or parties who participated in the conference are responsible for submitting a joint written report to the court within 14 days containing the following:
>
> > (i) A section stating the issues during the conference and summarizing areas where agreement was reached on each issue;
> > (ii) A section, containing no argument, providing a brief statement identifying each issue for which agreement was not reached, including:
> >
> > > a short and plain statement of the position of each person or party on each issue in contention and;
> > > the proposal of each party for reaching a resolution of the issue.

494, Charles R. Ragan: endorses these Sedona proposals.

636, Jonathan Harris: Supports the proposed change to the rule for expert witness disclosures...

1031, Steven Thompson: "[T]he rules should require a more thorough ‘initial disclosure’ by the defense. The defense should be forced to disclose all documents and information that support or relate to the claim against them, not solely the defense to the claim. In many cases, the defense has all of the documents, drawings, data and other material necessary to get to the truth about the plaintiffs’ case * * *."

1197, Auden Grumet: We should expand the scope of information and evidence produced by mandatory disclosures.

1209, Christopher Heffelfinger: Rule 34(b)(2)(D) should be amended to direct that a privilege log must be served no later than 90 days following service of the request to produce.

1213, Melissa B. Kimmel for PhRMA: The experience of pharmaceutical research and manufacturing companies shows that there is a need to recognize in the rules the problems of discovering information housed in foreign jurisdictions that have privacy laws restricting the transfer of personal information to other countries. The Sedona Conference International Principles on Discovery is a good guide. Rule 26(b) should provide that the court give due consideration and regard to a party’s compliance obligations with any conflicting non-U.S. data protection law. "The burden of establishing that a conflict exists would rest with the producing party." Factors to consider would include availability of the information from another source — as in the United States — not subject to the privacy constraints; whether compliance with both laws is possible, for example by anonymizing the data or producing in redacted form; and phasing discovery to allow additional time to comply with the foreign law. If the producing party proves it impossible to comply with both laws, the burden would shift to the requesting party to show that the information is crucial to the litigation. If discovery is allowed, it should be narrowly targeted to reduce the risk of noncompliance.

1919, Fenn Little: This is one of a few suggesting that Rule 68 should be amended to allow a plaintiff to make an offer of judgment.

November Hearing, Daniel C. Hedlund for Committee to Support the Antitrust Laws: p. 107
Proposes that "contention interrogatories * * * not be required to be answered until the close of discovery."

COLLECTIVE SUMMARIES

Many comments make virtually identical arguments to make the same points, whether to support, criticize, or oppose a proposal. The following pages summarize comments from 487 to 600 in a form that illustrates what a "vote-" counting tally would look like. The count was abandoned at that point on the view that it has no substantial value.

General: Pro

Many brief comments can be summarized as generally supporting or opposing the proposals with little elaboration.

Others decry the costs of discovery. Assertions that the cost of discovery forces defendants to settle meritless claims are common. And there are some comments that the costs of discovery deter plaintiffs from ever filing, or lead to abandoning an action after filing, or force settlement on unfair terms.

490, Wes Blumenshine

510, John Olinde

514, Andy Osterbrock: General support. Deleting "reasonably calculated" is particularly important because it has been misused to stretch discovery beyond any reasonable intention.

517 Jeffrey D. Smith

580, Norman Jetmundsen for Vulcan Materials Company

General: Con

Many opposing comments emphasize the sharp divide between plaintiffs and defendants, and urge that rules amendments should be adopted only with substantial support from both plaintiffs and defendants. In related vein, many comments urge that the proposals will further tilt the balance of federal courts toward favoring defendants and disfavoring plaintiffs. This concern is often tied to laments about recent developments in pleading standards, class actions, and expert witnesses, along with the uses made of summary judgment.

An occasional comment underscores the divide between plaintiffs and defendants by "question[ing] the motivation behind those proposing the" amendments.

Some argue the restrictions will be unconstitutional. The more specific focus is on the right to jury trial, and depriving plaintiffs of the information needed to escape summary judgment or judgment as a matter of law.

It also is common to observe that discovery now works well in most cases. And the present rules give all the power judges need to make discovery work well in all cases.

512, Joseph R. Neal, Jr.

513, Laura Zubulake: As plaintiff in the eponymous series of cases, suggests that limiting oral depositions, requester-pays, and proportionality (depending on how it is handled) "have the potential to make it more difficult for individuals."

516, Dale Irwin

522, Kenneth Allen: The proposals will endanger public safety by hampering product-liability litigation.

523, Craig Davis

527, Samuel Bearman

533, Joanne Doroshow: Much of the discovery costs defendants complain of arise from their efforts to hide information or prevent disclosure of documents.

534, Jeff Schulkin

536, Steve Saks

544, Scott Hunter

546, Tye Smith

547, Chris Nidel (One of those that questions the motivations)

550, Jacob Lebowitz

558, Richard Alembik: Most of the changes are unnecessary.

561, Margaret Simonian

565, Robert Hill: "[T]he corporate defendants control Congress and the Courts, including the rule making process. Sad day. Justice for sale in America."

566, David Addleton: The proposals "violate fundamental fairness, equal protection, and due process principles."

567, Michael Ford

573, Bryden Dow

594, Sidney Cominsky

Rule 1: Pro

The arguments supporting the Rule 1 proposal emphasize the need for cooperation, at times pointing to local rules or standards requiring cooperation. Some urge that "cooperation" should be written into Rule 1 text.

497, Kenneth A. Lazarus for American Medical Assn.

Rule 1: Con

Two basic points are made in opposing the Rule 1 proposal. One is that rules of professional responsibility bear heavily on cooperation; the civil rules should not confuse the subject. Cooperation is a matter of professional aspiration in a system that remains fundamentally adversary. The other is a fear that the proposal is a lure for sanctions, with accompanying motion practice. Experience under the 1983-1993 version of Rule 11 is invoked.

524, Joel S. Neckers

Rule 4: Pro

(None of the comments from 487 to 600 require a note.)

Rule 4: Con

Opposition to shortening the time to serve reflects concerns that some defendants evade service; some are hard to find; some may be buried in layers of interlocking ownership that makes it difficult even to identify the defendant; serving multiple defendants may complicate matters; service by the Marshal's Service often is delayed. Plaintiffs have no incentive to delay service. Unless they want to delay to settle before service, or to perform the Rule 11 inquiry that tardy clients push beyond the limitations period. Requests to waive service will be discouraged because there will be only a brief period to accomplish service after the plaintiff learns that the defendant will not waive. The defendant is not prejudiced if service takes 120 days. Several comments point to the time required to effect service in another country; the most that can be said for this argument is that it implicitly relies on an ambiguity in the provision in Rule 4(m) that excepts service under Rule 4(f) or 4(j)(1) — service on a foreign corporation outside any judicial district of the United States is made under Rule 4(h)(2), which calls for service "in any manner prescribed by Rule 4(f)," not "under" Rule 4(f).

503, Patrick Malone 590, E. Craig Daue, agrees

504, Kenneth Behrman

521, Lincoln Combs

528, James Ragan

537, Victor Bergman

538, A. Laurie Koller: "I have had several cases settle after filing and before service."

541, Jessica Sura

542, Justin Kahn

545, David Rash

548, Kevin Hannon

549, George Wise: "Busy doctors are frequently hard to catch and serve in person."

551, Gregory Smith

552, Daniel Ryan (Draws from 553)

553, William Smith

554, Hubert Hamilton

557, John Lowe

558, Richard Alembik Perhaps 90 days would suffice.

560, Jason Monteleone

562, Teresa McClain

563, James E. Girards 591, David Rudwall, agrees

564, Joel DuBoff

570, Nicole Kruegel

577, Clark Newhall

578, Christian Bataille

581, James Robson

586, Tom Carse

587, Matthew Creech

589, Kathleen M. Neary for Employment Rights Section, AAJ

592, Geoffrey Waggoner

593, Thomas Gorman

595, John McGraw

596 Kenneth Miller

597, Michael Blanchard

598, Mark A. Gould

Rule 16(b) Case Management Pro

The comments favoring the Rule 16(b) proposals tend to be general — enhancing early and active case management is desirable.

497, Kenneth A. Lazarus for American Medical Assn.: Supports.

583, James Howard: Agrees "with the provisions which reduce delays and create earlier deadlines."

Rule 16(b) Case Management Con

Most of the opposition to the Rule 16(b) proposals focuses on the acceleration of the time for the first scheduling conference. 60 days often is not enough, particularly for defendants whose lawyers need to find out what the case is about well enough to participate effectively in the conference. The problem is aggravated when a defendant takes some time interviewing firms before choosing counsel. And with large organizations time may be needed to sort through the layers of bureaucracy. The Department of Justice expresses particular concerns that arise not only from the complexities of the Department's own organization but also from the complexities of the agencies it often represents.

Rule 26(b)(1): Pro

The comments supporting Rule 26(b)(1) generally pick up the themes advanced by the Advisory Committee. Proportionality has been in the rules since 1983, both in what has become Rule 26(b)(2)(C)(iii) and Rule 26(g). The factors are familiar and well understood when someone thinks to invoke them. But proportionality is too often overlooked, or overcome by mistaken expansion of the "reasonably calculated" provision. Making proportionality an express part of the scope of discovery, measured by the factors that have been in force for thirty years, will make good on the promise made in 1983 but not yet fulfilled. Some urge that the proposal should go further, limiting the scope of discovery to matter that is both relevant and "material" to the parties' claims or defenses. Many comments also give specific examples of producing huge volumes of information, as compared to relatively minuscule fractions used as exhibits at trial. The high costs of responding to discovery requests also are detailed, particularly by corporate counsel.

The argument of opponents that bringing proportionality into the scope of discovery will impose a new burden of justification on the party requesting discovery is mistaken. (1) Just as now, argument to the court will not be a question of burdens. Each party will be called on to advance the information best available to it — the requesting party to explain relevance and importance, the responding party to explain costs and burdens. (2) Present Rule 26(g) requires the requesting party to consider all of these matters and to certify to them in making the request.

It is, moreover, important to do something to rein in the costs of discovery. Cost can thwart access to justice by dissuading plaintiffs from filing actions, or from persisting when the cost of discovery becomes apparent. Cost also can force compromise and settlement. The costs of litigation in the United States, moreover, are far higher than in other countries, placing United States firms at an increasing disadvantage in global competition.

487, Peter J. mancuso for Nassau County Bar Assn.

488, Robert Buchbinder

496, James Edwards: (Ambiguous, but seems pro.)

497, Kenneth A. Lazarus for American Medical Assn.

498, Jose I. Rojas

576, Glenn Hamer for Arizona Chamber of Commerce and Industry

January Hearing, Robert Hunter: p. 200 Over the last five years, the amount Altec has paid for settlements is 61% of what it has spent on discovery. In part that is due to succeeding at trial.

January Hearing, Steven J. Twist: p. 243 "The triumph of cost over merit is a direct result of the current rules." Eliminating subject-matter discovery, discarding "reasonably calculated," and moving proportionality up to (b)(1) will cause parties and judges to pay much needed attention to the standard. There will be no change in "burdens" when a dispute is taken to the court.

January Hearing, L. Jill McIntyre: p 259 Proportionality goes hand-in-hand with the Rule 37(e) proposal, to guide preservation by what is proportional.

January Hearing, Patrick J. Paul: p. 265.

January Hearing, John J. Rosenthal: p 305 The package is modest. It will reduce costs, and will not inhibit anyone's ability to put on claim or defense.

January Hearing, Andrew B. Cooke: p 323 "Too often discovery is used * * * to gain tactical or settlement leverage for discovery on discovery or for setting up requests for sanctions."

Rule 26(b)(1): Con

The arguments in opposition focus most intensely on "proportionality." (1) The multiple factors are subjective. (2) Parties asked to make discovery (commonly identified as defendants) will seize the subjective character of the factors to refuse discovery of anything. (3) It is impossible to administer the factors because the importance of discovery, and the benefits to compare to the burdens, cannot be known until the discovery has shown what there is to discover. (4) Emphasis on the amount in controversy invites responding parties and courts to throttle discovery in cases that involve small dollar amounts but matters of great public interest. Individual employee claims are a common example. (5) Moving the factors up from (b)(2)(C)(iii), where they function as a limit, to the scope of discovery in (b)(1), will change the burdens on discovery motions. Now the party resisting discovery has to show the request is outside the limits. Under the proposal, the requesting party will have to show that the request is within the scope of discovery as defined by proportionality factors. Many comments are framed in terms that ignore the obligations imposed by present Rule 26(g).

It also is said that courts accurately understand and enforce proportionality under the present rules.

Omitting the examples of discoverable material — documents, witnesses, and the like — raises concerns that courts will conclude that such things are not relevant to the claims or defenses in the action, and are even more likely to deny discovery needed to understand an adversary's electronic information systems and to identify the custodians whose electronically stored information should be preserved and produced.

Opposition to deleting the phrase that allows discovery of inadmissible matter "reasonably calculated" to lead to the discovery of admissible evidence tends to assert that this sentence has become the operating definition of the scope of discovery.

Opposition to deleting the provision that extends discovery beyond the parties' claims or defenses to include the subject matter of the action on showing good cause urges that this discovery may be necessary to uncover new claims or defenses, or to reach information that is relevant to the original claims or defenses.

As with the proposed numerical limits on depositions, interrogatories, and requests to admit, a great many comments predict that the proposed rules will add to cost and delay by generating many more discovery disputes, disputes that often will be taken to the court.

All of the proposals that seem to curtail present discovery practices also are met with the observation that courts have ample power under the current rules to ensure that discovery is confined to limits appropriate to the needs of the case. The problems with discovery are generated by defendants who obstruct and delay by motions, provide requested information only late in the game, or simply fail to provide relevant and responsive information.

On a broader level, the discovery package as a whole is challenged as a distortion of the transsubstantive structure of the Civil Rules. All of the empirical evidence shows that discovery works well in a high proportion of all cases. Serious problems arise only in a small fraction, cases that typically are complex and involve both high stakes and contentious adversary behavior. Attempting to address these cases in rule provisions that apply to all cases will degrade access through discovery to information necessary to prove the claims of many plaintiffs, particularly in such areas as employment claims, civil rights, and consumer protection.

487, Peter J. Mancuso for Nassau County Bar Assn.

495, Jillian Estes

502, Peter Everett

503, Patrick Malone 539, Craig Currie: "Echo[es]" Malone

506, Richard Davis

505, Jason Itkin

509, Allegra C. Carpenter

511, Les Alderman

515, Steve Conley

518, Robert Stoney

521, Lincoln Combs

526, Jonas Jacobson

529, Robert Palmer

530, Travis Larsen

532, Ann Pinheiro

537, Victor Bergman

538, A. Laurie Koller

541, Jessica Sura

542, Justin Kahn

545, David Rash

547, Chris Nidel

548, Kevin Hannon

549, George Wise

551, Gregory Smith

552, Daniel Ryan (draws from 553)

553, William Smith

554, Hubert Hamilton

555, Patrick Mahoney: Including a lament about removing "reasonably calculated"

556, Jerry Spitz

557, John Lowe

559, Patrick Cruise

560, Jason Monteleone

562, Teresa McClain

563, James E. Girards 591, David Rudwall, agrees

570, Nicole Kruegel

571, Fletcher Handley

574, Barry Julian

575, Eugene Brooks

577, Clark Newhall

578, Christian Bataille

581, James Robson

582, John M. Feder for Consumer Attorneys of California

583, James Howard

584, Christopher Bouslog

585, Dan Mordarski

586, Tom Carse

587, Matthew Creech

589, Kathleen M. Neary for Employment Rights Section, AAJ

592, Geoffrey Waggoner

593, Thomas Gorman

595, John McGraw

596 Kenneth Miller

597, Michael Blanchard

598, Mark A. Gould

600, Corrina Hunt

January Hearing, Janell M. Adams: p. 187.

January Hearing, Paul V. Avelar: p 250 The proposals will shift the burden of justification to the party requesting discovery.

January Hearing, Jennie Lee Anderson: p 271.

January Hearing, Jonathan Scruggs: p 328 Worries about "the amount in controversy" from the perspective of litigating First Amendment religion cases that involve nominal damages.

Rule 30 (and 31): Numerical and Duration Limits: Con

The most common theme in opposing all of the numerical limits proposals is that the result will be increased disagreement, more motions, and more cost and delay.

A second common theme is that the rules are functioning well as they are. There is no evidence to support the belief that a presumptive limit to 10 depositions per side is too high, that 25 interrogatories are too many, that there is a need to limit requests to admit. This position is supported by pointing to many different types of litigation that commonly require more than 5 depositions or 15 interrogatories. Requests to admit simply have not generated problems that require a numerical limit. The need for depositions ranges from individual employment cases to complex and multiparty litigation. Interrogatories are described as inexpensive and efficient means of shaping other discovery, particularly document requests and depositions. Requests to admit are described in similar terms — they may help shape other discovery (most likely requests made early in the process?), and to eliminate issues for summary judgment or trial.

A third theme is commonly put in rather guarded terms. The belief that lawyers will cooperate to expand presumptive limits when appropriate is addressed by recognizing that this cooperation happens frequently now. But in a worrisome number of cases it does not. Lowering the limits will encourage obstruction, often lawyer-driven but at times client-driven. (Cases involving government parties are singled out as leading politically motivated clients to insist on obstructionist tactics.) Bargaining will start at a lower floor. And when the outcome of bargaining is an appropriate level of discovery, the cost often is paid by trading away something else. Trust in the courts to get it right when bargaining among the lawyers fails also is doubted, albeit in respectful tones. The theme is that some judges do not want to be bothered with the burdens of effective discovery management. These judges will present a particular problem with reduced limits because they will take a presumptive limit as a judgment that ordinarily discovery beyond the limit is unwarranted.

487, Peter J. Mancuso for Nassau County Bar Assn.: 10 is appropriate.

492, David Wiley: Plaintiff employment claims.

494, Charles R. Ragan

497, Kenneth A. Lazarus for American Medical Assn.: (All proposed numerical limits.)

500, Arnold White: Employers fight unceasingly to withhold information needed by employees. The proposed numerical limits will destroy "the very concepts upon which the rules were founded."

502, Peter Everett

503, Patrick Malone 590, E. Craig Daue, agrees

505, Jason Itkin (All numerical limits)

506, Richard Davis (All numerical limits)

507, George Garrow (All numerical limits)

508, Sanjay S. Schmidt (All numerical limits)

509, Allegra C. Carpenter (All numerical limits)

511, Les Alderman

512, Joseph R. Neal, Jr.: Explicit focus on numerical limits, but may be more general: the proposals have the unconstitutional effect of killing legitimate cases, depriving plaintiffs of the right to jury trial.

518, Robert Stoney (All numerical limits)

520, Ron Elsberry & Linda D. Kilb, for Disability Rights California and Disability Rights Education & Defense Fund

524, Joel S. Neckers (All numerical limits)

528, James Ragan (All numerical limits)

529, Robert Palmer (All numerical limits)

533, Joanne Doroshow (All numerical limits)

537, Victor Bergman (All numerical limits)

538, A. Laurie Koller: (All numerical limits) "I feel the same way about the proposed rule changes to 33 and 36 that medieval criminals felt about thumbscrews."

541, Jessica Sura (All numerical limits)

542, Justin Kahn (All numerical limits)

543, Robert Hall (All numerical limits, "adding a layer of ‘proportionality’ on top."

545, David Rash (All numerical limits)

547, Chris Nidel (All numerical limits)

548, Kevin Hannon (All numerical limits)

549, George Wise (All numerical limits)

551, Gregory Smith (Depositions and interrogatories)

552, Daniel Ryan (All numerical limits; draws from 553)

553, William Smith

554, Hubert Hamilton (All numerical limits)

557, John Lowe (All numerical limits)

559, Patrick Cruise: Focus on depositions, but has no objection to shortening the length.

560, Jason Monteleone (All numerical limits)

562, Teresa McClain (All numerical limits)

563, James E. Girards (All numerical limits) 591, David Rudwall, agrees

568, Brent Hankins

569, Karen Allen (Depositions; interrogatories reduce the need for depositions — 15 is too few)

570, Nicole Kruegel (All numerical limits)

574, Barry Julian (All numerical limits)

577, Clark Newhall (All numerical limits)

578, Christian Bataille (Depositions and interrogatories)

582, John M. Feder for Consumer Attorneys of California (All numerical limits)

583, James Howard (All numerical limits)

584, Christopher Bouslog (All numerical limits)

585, Dan Mordarski (Depositions and interrogatories; 6-hour depositions OK, although the reduction is not necessary)

586, Tom Carse (All numerical limits)

587, Matthew Creech

589, Kathleen M. Neary for Employment Rights Section, AAJ (All numerical limits)

592, Geoffrey Waggoner (All numerical limits)

595, John McGraw (All numerical limits)

596 Kenneth Miller (All numerical limits)

597, Michael Blanchard

598, Mark A. Gould (All numerical limits)

January Hearing, Paul V. Avelar: p 250

January Hearing, James C. Sturdevant: p 296 Many years of experience with individual and class actions protecting plaintiffs' consumer, employment, civil, and other rights. Examples of cases that legitimately required discovery well beyond the proposed limits. Lower limits will send a message to judges to deny needed discovery, and will increase costs and delay in litigating

discovery disputes.

Rule 33 Numerical Limits: Pro

(None of the comments from 487 to 600 require a note.)

Rule 33 Numerical Limits: Con

One common theme is that the present presumptive limit of 25 interrogatories is working well. There is no evidence of any need to reduce it.

A second theme is that interrogatories are an efficient and inexpensive means to get discovery of some facts and to help frame the use of other, more expensive discovery devices. Identification of documents and witnesses are common examples. Multiple claims require multiple interrogatories.

Reducing the number will mean that interrogatories are drafted in broader terms — 25 better-focused interrogatories will be more productive and less burdensome than 15 broadly focused interrogatories.

As with all proposed limits on discovery, it is asserted that the result will be increased disputes, imposing costs on the parties. Agreement of the parties may be purchased by accepting inadequate discovery. Disagreement of the parties will lead to increased burdens on the courts.

487, Peter J. mancuso for Nassau County Bar Assn.

504, Kenneth Behrman

515, Steve Conley

556, Jerry Spitz

564, Joel DuBoff

600, Corrina Hunt (Also against Rule 36 limits)

Rule 36: Pro

(None of the comments from 487 to 600 require a note.)

Rule 36: Con

The arguments against imposing a presumptive numerical limit of 25 requests to admit parallel the arguments against reducing the presumptive limit in Rule 33.

Requests to admit are said to be useful in narrowing the scope of discovery by showing that some potential issues framed by the pleadings are not in fact disputed. Later in the progress of discovery they help to narrow the issues further. Many comments say that Rule 36 is an inexpensive and useful tool that has not been used to impose undue burdens. And some cases genuinely deserve more than 25.

As with all proposed limits on discovery, it is asserted that the result will be increased disputes, imposing costs on the parties. Agreement of the parties may be purchased by accepting inadequate discovery. Disagreement of the parties will lead to increased burdens on the courts.

487, Peter J. Mancuso for Nassau County Bar Assn.

494, Charles R. Ragan: Rule 36 can be very valuable. If any presumptive limit is imposed, it should be 50, not including requests addressed to the genuineness of documents.

2013 CIVIL RULES PROPOSALS: PREPUBLICATION COMMENTS

Many comments on what became the proposals published for comment in August 2013 were submitted before the Advisory Committee met in April. The comments were based on the Committee's report to the Standing Committee for its January meeting. They were assigned civil comment numbers 3 through 255, although at least a couple of them were assigned two numbers.

Substantial portions of many of these prepublication comments addressed two tentative amendments that were withdrawn before publication. The early sketches included a presumptive limit of 25 requests to produce under Rule 34 and reset the presumptive length of a deposition to 4 hours.

Comments addressed to the proposals that survived to publication focused primarily on the discovery proposals. Proportionality received a fair amount of attention, but the most common focus was the reduction in the presumptive number of Rule 30 and Rule 31 depositions, the reduction in the presumptive number of interrogatories under Rule 33, and the adoption of a presumptive limit on requests to admit under Rule 36 (not counting requests to admit the authenticity of documents).

The comments overwhelmingly, although not universally, opposed the proposed limits on discovery. Most of them reflect the difficulty plaintiffs encounter in discovering information they need to avoid summary judgment and prove their claims. Lawyers representing plaintiffs in employment actions provided a great many of these comments. Some of the comments, particularly from employment lawyers in California, track other comments quite closely, often verbatim in many parts. One of these, number 91, adds this refreshing observation: "Although the rest of this letter may not be my original words, I agree 100% with everything that follows, as it states my position on these matters perfectly."

The concerns expressed by the employment lawyers are faithfully reflected in many post-publication comments. Virtually all of them address the reduced or new presumptive limits on the number of discovery requests. Many address the reduced scope of discovery. Employee plaintiffs typically have little information, while employers command the other employees and files that have what may be much information. Discovery by the employer is likely to be complete on one deposition of the plaintiff employee. The employee, on the other hand, may need several depositions simply to identify the people, or group of people, who made the challenged decision. Plaintiff's counsel typically takes the case for a contingent fee, advancing the costs of discovery, and has strong incentives to take only the most promising steps for discovery. Both interrogatories and requests to admit are efficient, less expensive means of shaping the action and identifying the persons who need be deposed; even 25 interrogatories may be too few, as illustrated by the form interrogatories approved for use in employment actions brought under California state law. The belief that the limits will be expanded when appropriate by agreement among the adversaries or, when needed, by the court, is unrealistic. Some judges now limit depositions to fewer than the presumptive ten. A worrisome number of judges treat the presumptive numbers as limits that should seldom be exceeded. And as to scope, there is a risk that arguments will be made, and perhaps accepted, that information as to treatment of comparably situated employees will be found not relevant to the discrimination claim. The emphasis on the amount in controversy will encourage defendants to protest that the cost of discovery should not exceed what may be a relatively low level of damages, with the confounding complication that a plaintiff who was very well paid may have much greater access to discovery than a low-paid employee who needs the small recovery more desperately than the well-paid employee needs a large recovery. And it is continually emphasized that employment actions (as well as several other categories of litigation) advance important public policies, yet courts may be insensitive to the "importance of the issues at stake." Finally, it is often noted that as discriminatory practices have come to be increasingly shamed, most employers leave no open traces of discrimination. Only discovery that sorts through many circumstances can generate the information needed to prove discrimination.

Many of these prepublication comments provide cogent explanations of the positions they advance. But almost all of the positions and explanations are stated with equal clarity and force in the comments and testimony submitted during the official comment period. Some of those who provided these prepublication comments also provided comments or testimony after publication. Summarizing all the comments now would add needless repetition to the already lengthy summaries of the post-publication comments and testimony. Only a few novel points need be noted here.

118, Robert H. Wilde: Utah state courts adopted rules amendments in 2011 that "are similar in many ways to the proposals now before the Committee. My experience leads me to the conclusion that the proposed amendments are a solution in search of a problem." The present limits on discovery are reasonable for almost all of my cases representing employees or employers. The proposed limits will seriously disadvantage employee plaintiffs. The restrictions on discovery in Utah "were offset to some degree by broader initial disclosure requirements." Implementing the discovery protocols proposed for employment cases would alleviate some of these concerns. If the federal proposals are adopted, broader disclosure requirements should be adopted, at least in employment actions.

119, Michael S. Wilde: (In the same firm as Robert H. Wilde, no. 118 above:) "Utah has recently experimented with cutting back on the amount of discovery that may be performed in cases and created a tiered system whereby cases with more at stake receive more discovery. In my opinion the implementation of these rules, which are similar to ones being considered in the federal system, has been nothing short of a train wreck * * *." The limitations often impose inadequate discovery, forcing motions, dragging the judges
into micromanagement they do not want.

127, Scot G. Dollinger: "In Texas, we can serve discovery with our petitions and I do so in every case. As a result, * * * defendants have answered discovery and made disclosures within 60 to 90 days of filing suit. * * * I almost never have a discovery dispute." 188, Laurie Higginbotham, also suggests adopting the Texas practice.

148, Mark Ledbetter: "[I]t is not only wrong but galling that these back channel corporate believers are making their way again into the procedural rules. Efforts to tilt the table of justice for the tortfeasor abound in the state houses all over America. It is sadder still when the Federal Judiciary begins its own assault on the Plaintiff." "I realize that I cannot remove corporate counsel from this Committee, as Plaintiff's attorneys practice in small firms like mine and do not have the time to serve on these Committees * * *. As if it were not enough to be a member of large firm, representing large corporations, it is unfair and unfaithful to the ideals of the American legal system to shrink and shrivel the rights of the Plaintiff in such a bald effrontery."

158, Richard J. Vaznaugh: Attaches form interrogatories approved for use in employment cases in California Superior Court. After instructions and definitions there are many pages of interrogatories, most with several subparts. 201, Wendy Mussell for California Employment Lawyers Assn.: Also attaches and commends California form interrogatories, both for employment cases and for general cases.

163, Richard R. Renner: Suggests "that the rules require parties to provide discovery responses in searchable electronic forms when a party has the responsive information in such forms." Parties still print out emails and produce the hard copy, or convert documents to PDF forms by scanning hard copy or otherwise making the PDF file non-searchable.

173, Salvatore Graziano v. National Assn. of Shareholder & Consumer Attorneys: (It is not clear whether this suggestion is made only if the presumptive limits on discovery requests are adopted as proposed, or is made for the present rules as well:) Rule 26(b)(2)(A) should encourage expanding

the limits: "By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30, and leave to alter such limits shall be freely granted in complex litigation, consistent with the principles set forth in Rule 26(b)(2)(C)."

189, Mark P. Herron: Suggests discovery could be improved by expanding initial disclosures to require disclosure of witnesses who have discoverable knowledge and documents relevant to all claims and defenses, without regard to whether the disclosing party plans to use them. And initial disclosure should be further expanded to require the exchange of basic information regarding how ESI is maintained; N.D. Ohio has a local rule, Appendix K, requiring this.

[No number -- between 194 and 195], 252 Robert B. Fitzpatrick: Contrasts experience litigating in the 1960s, 70s, and 80s, when lawyers cooperated, with the "warrior mentality" too often encountered today. The fault is not in our rules, but in the warrior approach and the ways it encourages lawyers to use the rules. The focus of reform should be on providing the structure and incentives to ensure the tools are used responsibly. "[T]he judiciary needs to actively and forcefully involve itself at an early stage in requiring counsel to cooperate on a reasonable, enforceable, discovery plan." The Initial Discovery Protocols for Employment Cases are attached; their wider use should be encouraged.

199, John Vail, Center for Constitutional Litigation: (1) Colorado Pilot Project Rule 1.3 requires that all process and costs be proportionate to the needs of the case. AAJ members practicing under the program report that the result is boilerplate objections with the burden on the party requesting discovery to demonstrate proportionality and admissibility. At an initial conference, moreover, the judge may be asked to assess proportionality "based simply on the unsubstantiated assertions of each party about the value of the case." One example: plaintiff asserted a $5,000,000 value in a matter of public importance; the defendant asserted it was a purely private dispute with a maximum value of $300,000.

(2) Relying on rules framed to encourage judges to manage up, rather than manage down, relies too heavily on flexibility informed by judicial discretion. The First Amendment right to petition the government protects the right to bring a lawsuit. See Borough of Duryea, Pa. v. Guarnieri, 131 S.Ct. 2488, 2494 (2011). "In a contest between managerial flexibility and constitutional values, managerial flexibility should lose."

207, Alireza Alivandivafa: In cases not covered by approved form interrogatories, California limits "specially prepared interrogatories" to 35. It also limits requests for admissions to 35 (not counting genuineness of documents). This is noted, not to argue that the limits are set at the right number, but to observe that both for interrogatories and requests to admit the procedure for increasing the number is simply to serve them with a "Declaration of Necessity." The simple procedure works.

221, Richard T. Seymour: The experiment with presumptive limits has failed. Managing up is a myth. "The false assumption of attorney incompetence and the existing restrictions on discovery * * * divert the time and attention of judges into process, and away from the merits." Thus Rule 36 requests to admit used to be useful because each request was accompanied by an interrogatory that asked the reasons for any failure to admit and by a request to produce any documents identified as a reason. The limit to 25 interrogatories ended that practice. It would make more sense to start high, perhaps with 250 interrogatories and 50 depositions per case, and ask the parties to justify managing down.

225, L. Steven Platt: (1) "[T]he agencies charged with the responsibility for investigating charges of discrimination, the local branches of the EEOC, do a dreadful job. They find that there is probable cause to believe that discrimination has occurred in 2.5% of the cases they see." (2) For the length of depositions, "[w]e have lived with a two-hour rule in Illinois and it has worked, much to

everyone's surprise." Limiting depositions to three hours is no problem, so long as more time is allowed on demonstrating need to a judge.

226, Peter J. Neufeld, Barry C. Scheck, Nick Brustin, David Rudovsky, John L. Stainthorp, Jan Susler, Russell Ainsworth: In representing plaintiffs whose convictions have been vacated on proving innocence by DNA evidence, we find civil defendants frequently balk at admitting the DNA proof. "We typically serve similar requests [to admit] on the same issues, breaking down the DNA testing step by step, and often receive admissions to some, but not all, of these requests." Limiting the number will make it less likely that undisputed matters are admitted.

228, Tami Smith for National Court Reporters Assn.: Opposes reductions in the numbers and length of depositions.

I.B. RULE 37(e): FAILURE TO PRESERVE ESI

Introduction

During its meeting in April, 2014, the Civil Rules Advisory Committee voted unanimously to recommend adoption of a new Rule 37(e) to replace current Rule 37(e). The new rule differs from the proposed amendment published for public comment in August, 2013, but the Advisory Committee unanimously decided that republication would not be necessary to achieve adequate public comment and would not assist the work of the Advisory Committee on this subject.

The public comments on the package of Civil Rules amendments were strikingly, perhaps uniquely, comprehensive and vigorous. A total of 2,345 written comments were received and posted on Regulations.gov. Many of the comments submitted later in the process referred to or built upon comments submitted earlier. Three public hearings were held, with a total of more than 120 witnesses speaking. The rule revisions made after publication respond to the public comments.

At the end of this Report is the proposed new Rule 37(e) and the recommended Committee Note. The amendment proposal is presented as an amendment to the current rule, which seemed simpler than presenting it as a revision of the published proposal. For purposes of background, an Appendix to this memorandum presents the published amendment proposal. Also included in the agenda materials should be a summary of written comments and of the testimony on Rule 37(e) at the public hearings.

This Report introduces the issues the Advisory Committee (and its Discovery Subcommittee) have addressed during this redrafting effort, and which inform the rule proposal below.

Background

Present Rule 37(e) was adopted in 2006. The Advisory Committee recognized then that the continual expansion of electronically stored information ("ESI") might provide reasons to consider a more detailed response to problems arising from the loss of ESI. A panel at the Duke Conference in 2010 presented a unanimous recommendation that the time had come for a more detailed rule.

Two goals have inspired this work. One has been to establish greater uniformity in the ways in which federal courts respond to a loss of ESI. The courts agree unanimously that a duty to preserve ESI arises when a party reasonably anticipates litigation. But they differ significantly in the approaches taken after finding a loss of ESI that should have been preserved. A new rule that illuminates the purposes and methods of responding to the loss can do much to promote uniformity and to encourage desirable judicial responses.

The other goal has been to relieve the pressures that have led many potential litigants to engage in what they describe as massive and costly over-preservation. An accumulation of

information from many sources, including detailed examples provided in the public comments and testimony, persuasively supports the proposition that great costs are often incurred to preserve information in anticipation of litigation, including litigation that never is brought. Given the many other influences that bear on the preservation of ESI, however, it is not clear that a rule revision can provide complete relief on this front.

During the two years following the Duke Conference, the Subcommittee considered several basic approaches, including successive drafts that undertook to establish detailed preservation guidelines. These drafts started with an outline proposed by a Duke Conference panel, which called for specific rule provisions on when the duty to preserve arises, its scope and duration in advance of litigation, and the sanctions or other measures a court can take when information is lost. In the end, however, it became apparent that the range of cases in federal court is too broad and too diverse to permit such specific guidelines. The Subcommittee chose instead to pursue a different approach that addresses court actions in response to a failure to preserve information that should have been preserved in the anticipation or conduct of litigation.

Under this approach, as with present Rule 37(e), the proposed Rule 37(e) does not itself create a duty to preserve. The new rule takes the duty as it is established by case law. Cases uniformly hold that a duty to preserve information arises when litigation is reasonably anticipated. Although some comments urged that the rule should eliminate any duty to preserve before an action is actually filed, the Advisory Committee continues to believe that a rule so limited would result in the loss or destruction of much information needed for litigation. The Committee Note, responding to concerns expressed in the comments, also makes clear that this rule does not affect any common-law tort remedy for spoliation that may be established by state law.

The Published Rule 37(e) Proposal

The published rule proposal is in the Appendix. It included a number of features that were modified after the public comment period. It relied on a distinction between curative measures and sanctions, invoking Rule 37(b)(2)(A) as a source for the latter. The published proposal provided that a court could take steps to cure the loss of information such as permitting additional discovery, ordering curative measures, or ordering the party that lost the information to pay the reasonable expenses, including attorney's fees, caused by the loss. It provided that a court generally could not impose sanctions unless it found that the loss of information caused substantial prejudice and was willful or in bad faith. But it also provided that sanctions would be permissible without that finding of culpability in the rare case in which the loss "irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation." The proposed rule also included a list of factors to be applied in determining whether a party failed to retain information it should have retained in anticipation of litigation, and whether its failure was willful or in bad faith.

The invitation for comment included five questions: (1) whether the rule should be limited to ESI; (2) whether the rule should allow sanctions when the loss "irreparably deprived a party of

any meaningful opportunity to present or defend against the claims in the litigation"; (3) whether present Rule 37(e) should be retained; (4) whether the phrase "substantial prejudice" as used in the rule proposal should be defined; and (5) whether the term "willful" should be defined.

As a review of the summary of comments shows, there was a great deal of comment about the language in the published proposal and these five questions. In particular, both the "willful" and "bad faith" standards for sanctions were questioned by many who commented. Many also argued that the "irreparably deprived" provision might "swallow the rule" by permitting judges to circumvent the culpability requirements for sanctions. Other comments stressed that the "substantial prejudice" standard for cases in which actions were proven to be "willful or in bad faith" was too demanding, and that those culpability requirements would be too difficult to satisfy in many cases.

Modifications Based on Public Comments

The Advisory Committee's Discovery Subcommittee began deliberating on appropriate reactions to the public comments with a half day meeting in Dallas immediately after the third public hearing. The Subcommittee held six conference calls after that meeting, carefully examining the issues raised by the public comments. Many of the public comments reinforced conclusions previously reached by the Subcommittee, while others provided valuable new insights. Some of the general conclusions will be addressed here, with more specific explanations provided in the discussion of specific rule recommendations.

The Advisory Committee remains firmly convinced that a rule addressing the loss of ESI in civil litigation is greatly needed. The explosion of ESI in recent years has affected all aspects of civil litigation; the preservation of ESI is a major issue confronting parties and courts; and the loss of ESI has produced a bewildering array of court cases.

Loss of electronically stored information has produced a significant split in the circuits. Some circuits, like the Second, hold that adverse inference jury instructions (viewed by most as a serious sanction) can be imposed for the negligent or grossly negligent loss of ESI. Other circuits, like the Tenth, require a showing of bad faith before adverse inference instructions can be given. The public comments credibly demonstrate that persons and entities over-preserve ESI out of fear that some might be lost, their actions with hindsight might be viewed as negligent, and they might be sued in a circuit that permits adverse inference instructions or other serious sanctions on the basis of negligence. Resolving this circuit split with a more uniform approach to lost ESI remains a primary objective of the Advisory Committee. The Advisory Committee is satisfied that the new proposed rule will resolve the circuit split.

At the same time, the public comments made the Advisory Committee more sensitive to the need to preserve a broad range of trial court discretion for dealing with lost ESI. Among other steps after its Dallas meeting, the Discovery Subcommittee took an intensive look at cases addressing the loss of information relevant to litigation. The public comments and this analysis highlighted the

wide variety of situations faced by trial courts and litigants when information is lost, and strongly underscored the need to preserve broad trial court discretion in fashioning curative remedies. The revised rule proposal therefore retains such discretion.

The public comments also made clear that the explosion of ESI will continue and even accelerate. One industry expert reported to the Advisory Committee that there will be some 26 billion devices on the Internet in six years — more than three for every person on earth. Significant amounts of ESI will be created and stored not only by sophisticated entities with large IT departments, but also by unsophisticated persons whose lives are recorded on their phones, tablets, eye glasses, cars, social media pages, and tools not even presently foreseen. Most of this information will be stored somewhere in the "cloud," complicating the preservation task. In other words, the litigation challenges created by ESI and its loss will increase, not decrease, and will affect unsophisticated as well as sophisticated litigants. The need for broad trial court discretion in dealing with these challenges will likewise increase. The Advisory Committee accordingly concluded that the published proposal's approach of limiting virtually all forms of "sanctions" to a showing of both substantial prejudice and willfulness or bad faith was too restrictive.

The value of preserving judicial flexibility was reinforced by a related conclusion. One reason for significantly limiting sanctions was to reduce the costly over-preservation that had been emphasized by many; the hope was that reducing the risk of sanctions would correspondingly reduce the incentives for over-preservation. The Advisory Committee continues to believe that this is a worthwhile goal, but has realized that the savings to be achieved from reducing over-preservation are quite uncertain. Many who commented noted their high costs of preservation, but none was able to provide any precise prediction of the amount that would be saved by reducing the fear of sanctions. And many incentives for significant preservation will remain — the need for the information in everyday business operations, preservation obligations imposed by statutes and regulations rather than the prospect of litigation, and the desire to preserve information that could be helpful in litigation. So the potential savings from reducing over-preservation, although still worth pursuing, are too uncertain to justify seriously limiting trial court discretion.

The Advisory Committee also concluded that any reference in the new rule to "sanctions," or to Rule 37(b)(2)(A) as a source of sanctions, should be deleted. The Advisory Committee concluded that allowing curative measures was clearly appropriate for the loss of ESI, and found that drafting a rule became quite complicated if it sought to distinguish between curative measures and sanctions. Another concern was that the sanctions listed in Rule 37(b)(2)(A) are justifiably called sanctions because they result from disobeying a court order, whereas the same measures in other settings might rightly be viewed as curative. Some of the (b)(2)(A) sanctions, further, seem inapposite to failure to preserve information in the absence of a court order — for example, (iv) "staying further proceedings until the order is obeyed" and (vii) contempt.

Further questions were raised during the public comment period about the references in the published draft to "substantial prejudice" and "willful or in bad faith." Many comments urged that

further definitions should be adopted. Particularly forceful concerns were raised about the use of the word "willful." Depending on the context, "willful" has been defined by courts in many different ways. Under some definitions, willfulness could be found from an act intentionally done even though there was no thought about the effect on information that should be preserved for anticipated or pending litigation. A party, for example, might "willfully" trade in a smart phone without any thought about preserving the information stored in it. Nor did "bad faith" entirely escape criticism.

The published provision that allowed sanctions when the loss of information "irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation" drew particular criticism. Many expressed concern that it risked undoing the attempt to limit "sanctions" to circumstances of substantial prejudice and either willfulness or bad faith. "[I]rreparably deprived" and "any meaningful opportunity to present or defend against the claims in the litigation" were said to lie in the eye of the beholder. A judge who is not prepared to find willfulness or bad faith might seize on these phrases to justify sanctions in circumstances not covered by what was intended to be a very narrow exception to the requirements of substantial prejudice and willfulness or bad faith.

Although the Rule 37(e) proposal authorizes a wider range of measures to cure demonstrated prejudice, it carefully cabins use of several very severe measures — presuming that the lost information was unfavorable to the party that lost it, giving the jury an instruction that it may or must presume that the information was unfavorable, dismissing the action, or entering a default judgment. These measures may be used only on a finding that the party lost the information with the intent to deprive another party of its use in the litigation. As specified in the revised Committee Note, the rule rejects the view of such cases as *Residential Funding Corp. v. DeGeorge Financial Corp*., 306 F.3d 99 (2d Cir. 2002), that would permit adverse-inference instructions on the basis of negligence or gross negligence.

Finally, after much discussion, the Advisory Committee concluded that the list of "factors" specified in Rule 37(b)(2) of the published proposal was unnecessary and might cause confusion. Accordingly those rule provisions were removed, but Committee Note language retains a discussion of how several of those considerations might affect the application of the revised rule.

The Rule in Detail

Limiting the Rule to ESI

The Advisory Committee recommends that the rule be limited to ESI. That is the subject that launched this venture in the first place, and it clearly is the subject which most requires uniform guidance. Review of numerous cases led to the conclusion that the law of spoliation for non-ESI is well developed and long-standing, and should not be supplanted without good reason. There was little complaint about this body of law as applied to information other than ESI, and the Advisory

Committee concluded that this law should be left undisturbed by a new rule designed to address the unprecedented challenges presented by ESI.

The Advisory Committee recognizes that its decision to confine Rule 37(e) to ESI could be debated. Some contend that there is no principled basis for distinguishing ESI from other forms of evidence, such as hard-copy documents, at least in terms of the approaches set out in Rule 37(e). But repeated efforts have shown that it is very difficult to craft a rule that deals with failure to preserve tangible things. The classic case is *Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir. 2001), which upheld dismissal of the action after the plaintiff failed to preserve the allegedly defective airbag. The published proposal — which was not limited to ESI — sought to accommodate such cases by allowing "sanctions" if a party's actions in failing to preserve information "irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation." As already noted, this provision drew many comments suggesting that it opened the door to avoiding the limits otherwise imposed on "sanctions." Limiting the new rule to ESI avoids this complication.

In addition, there are some pertinent practical distinctions between ESI and other kinds of evidence. ESI is created in volumes previously unheard of and often is duplicated in many places. The potential consequences of its loss in one location often will be less severe than the consequences of the loss of tangible evidence. ESI also is deleted or modified on a regular basis, frequently with no conscious action on the part of the person or entity that created it. These practical distinctions, the difficulty of writing a rule that covers all forms of evidence, and an appropriate respect for the spoliation law that has developed over centuries to deal with the loss of tangible evidence, all persuaded the Advisory Committee that the new Rule 37(e), like the present Rule 37(e), should be limited to ESI.

The Advisory Committee recognizes that the dividing line between ESI and other evidence may in some instances be unclear. But it concludes that courts are well equipped to deal with this dividing line on a case-by-case basis, and that the reasons for limiting the rule to ESI outweigh the potential complication presented by this issue.

Reasonable steps to preserve

The revised rule applies if ESI "that should have been preserved in the anticipation or conduct of litigation of litigation is lost because a party failed to take reasonable steps to preserve it." The rule calls for reasonable steps, not perfection, in preserving ESI, and is thus consistent with other rules on related subjects. For example, Fed. R. Evid. 502(b)(2), dealing with inadvertent disclosure of material that is privileged or work-product material, focuses on whether "the holder of the privilege or protection took reasonable steps to prevent disclosure," and Rule 502(b)(3) asks whether the privilege holder "promptly took reasonable steps to rectify the error."

Revised Rule 37(e) adopts the same approach to preservation for use in litigation. As

explained in the Committee Note, determining the reasonableness of the steps taken includes consideration of party resources and the proportionality of the efforts to preserve. The Note also recognizes that the party's sophistication with regard to litigation may bear on whether it should have realized what should be preserved.

Restoration or replacement of Lost ESI

If reasonable steps were not taken, and information was lost as a result, the rule directs that the next focus should be on whether the lost information can be restored or replaced through additional discovery. As the Committee Note explains, nothing in this rule limits the court's powers under Rules 16 and 26 to order discovery to achieve this purpose. In particular, discovery regarding sources of ESI that might otherwise be regarded as inaccessible or allocation of expenses might be important. At the same time, however, the quest for lost information should take account of whether the lost information likely is only marginally relevant or duplicative of other information that remains available.

(e)(1)

Proposed Rule 37(e)(1) provides that the court may:

> upon finding prejudice to another party from loss of the information, order measures no greater than necessary to cure the prejudice.

This proposal preserves broad trial court discretion to cure prejudice caused by the loss of ESI that cannot be remedied by restoration or replacement of the lost information. Unlike the published preliminary draft, it adds a limit urged by many of the comments – that the measures be no greater than necessary to cure the prejudice. As the Note also makes clear, a court is not required to exhaust all possibilities of curing prejudice.

Proposed (e)(1) says that the court must find prejudice to order corrective measures, but it does not say which party bears the burden of proving prejudice. Many comments raised concerns about assigning such burdens, noting that it is often difficult for a party to prove it was prejudiced by the loss of information it has never seen. Under the proposed rule, each party is responsible for providing such information and argument as it can; the court may draw on its experience in addressing this or similar issues, and may ask one or another party, or all parties, for further information.

This proposed rule departs from the published proposal's approach of limiting all "sanctions" under Rule 37(b)(2)(A) to a showing of substantial prejudice and bad faith. It preserves the trial court's ability to use some measures included in Rule 37(b)(2)(A) to cure prejudice. For example, in cases of serious prejudice, a court may preclude a party from presenting evidence or deem some facts as having been established. *See* Rule 37(b)(2)(A)(i); (ii). The proposed rule does not attempt

to draw fine distinctions as to the measures a trial court may use to cure prejudice under (e)(1), but instead limits those measures in three more general ways — measures under (e)(1) require a finding of prejudice, the measures must be no greater than necessary to cure the prejudice, and the court may not impose the severe measures limited by (e)(2) unless it makes a finding that the party acted with the intent to deprive another party of the information's use in the litigation. Finally, because (e)(1) measures are not "sanctions," there should be no concerns about whether they raise professional responsibility issues.

(e)(2)

Proposed (e)(2) provides that the court may:

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

A primary purpose of this provision is to eliminate the circuit split on when a court may give an adverse inference jury instruction for the loss of ESI. As noted above, some circuits permit such instructions upon a showing of negligence or gross negligence, while others require a showing of bad faith. Subdivision (e)(2) resolves the circuit split by permitting adverse inference instructions only on a finding that the party "acted with the intent to deprive another party of the information's use in the litigation." This intent requirement is akin to bad faith, but is defined even more precisely. The Advisory Committee views this definition as consistent with the historical rationale for adverse inference instructions.

The Advisory Committee's Discovery Subcommittee carefully analyzed the existing cases on the use of adverse inference instructions. Such instructions historically have been based on a logical conclusion — when a party destroys evidence for the purpose of preventing another party from using it in litigation, one reasonably can infer that the evidence was unfavorable to the destroying party. Why else would the party have destroyed it? Some courts hold to this traditional rationale and limit adverse inference instructions to instances of bad faith loss of the information. *See, e.g., Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997) ("The adverse inference must be predicated on the bad faith of the party destroying the records. Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case.")(citations omitted).

Circuits that permit adverse inference instructions on a showing of negligence or gross negligence adopt a different rationale — that the adverse inference restores the evidentiary balance, and that the party that lost the information should bear the risk that it was unfavorable. *See, e.g.*, *Residential Funding Corp. v. DeGeorge Finan. Corp.*, 306 F.3d 99 (2d Cir. 2002). Although this approach has some logical appeal, the Advisory Committee has several concerns with this approach when applied to ESI. First, negligently lost information may have been favorable or unfavorable to the party that lost it. Consequently, an adverse inference may do far more than restore the evidentiary balance; it may tip the balance in ways the lost evidence never would have. Second, in a world where ESI is more easily lost than tangible evidence, particularly by unsophisticated parties, the sanction of an adverse inference instruction imposes a heavy penalty for losses that are likely to become increasingly frequent as ESI multiplies exponentially and moves to the "cloud." Third, permitting an adverse inference for negligence creates powerful incentives to over-preserve, often at great cost. Fourth, the ubiquitous nature of ESI and the fact that it often may be found in many locations presents less risk of severe prejudice from negligent loss than may be present due to the loss of tangible things or hard-copy documents.

These reasons have caused the Advisory Committee to conclude that the circuit split, at least with respect to ESI, should be resolved in favor of the traditional reasons for an adverse inference. ESI-related adverse inferences drawn by courts when ruling on pretrial motions or ruling in bench trials, and adverse inference jury instructions, should be limited to cases where the party who lost the ESI did so with an intent to deprive the opposing party of its use in the litigation. Subdivision (e)(2) extends the logic of the mandatory adverse-inference instruction to the even more severe measures of dismissal or default. The Advisory Committee thought it anomalous to allow dismissal or default in circumstances that do not justify the instruction.

A difficult drafting issue presented by (e)(2) arises from the multiplicity of instructions that may be available to guide a jury's consideration of a failure to preserve ESI. Subdivision (e)(2) covers any instruction that directs or permits the jury to infer from the loss of information that the information was in fact unfavorable to the party that lost it. The subdivision does not apply to jury instructions that do not involve such an inference. For example, subdivision (e)(2) would not prohibit a court from allowing the parties to present evidence to the jury concerning the loss and likely relevance of information and instructing the jury that it may consider that evidence, along with all the other evidence in the case, in making its decision. These measures, which would not involve instructing a jury it may draw an adverse inference from loss of information, would be available under subdivision (e)(1) if no greater than necessary to cure prejudice. In addition, subdivision (e)(2) does not limit the discretion of courts to give traditional missing evidence instructions based on a party's failure to present evidence it has in its possession at the time of trial. These issues are examined in the Committee Note.

Subdivision (e)(2) does not include an express requirement that the court find prejudice to the party deprived of the information. This is because the adverse inference permitted under this section can itself satisfy the prejudice requirement: if a court or jury infers the lost information was

unfavorable to the party that lost it, the same inference suggests that the opposing party was prejudiced by the loss. An express prejudice requirement is also omitted because there may be rare cases where a court concludes that a party's conduct is so reprehensible that serious measures should be imposed even in the absence of prejudice. In such rare cases, however, the court must still find the intent specified in subdivision (e)(2).

Factors in published Rule 37(e)(2)

The published proposal included a list of factors that it said the court should employ in determining whether a party should have retained information and whether it lost the information willfully or in bad faith. Proposed Rule 37(e)(2) was as follows:

> (2) *Factors to be considered in assessing a party's conduct.* The court should consider all relevant factors in determining whether a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation, and whether the failure was willful or in bad faith. The factors include:
>
> (A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable;
>
> (B) the reasonableness of the party's efforts to preserve the information;
>
> (C) whether the party received a request to preserve information, whether the request was clear and reasonable, and whether the person who made it and the party consulted in good faith about the scope of preservation;
>
> (D) the proportionality of the preservation efforts to any anticipated or ongoing litigation; and
>
> (E) whether the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.

This list of factors received much attention during the public comment period. Some saw the factors as providing useful guidance to parties trying to determine what to preserve, and to courts presented with motions under the rule. But many others raised substantial concerns about whether the list was incomplete and possibly misleading. Some factors received particular criticism. Factor (C), for example, raised concerns about whether some courts might read it as requiring compliance with even extremely unreasonable demands to preserve. Factor (E) was criticized on the ground that it offered no help to a party faced with a preservation decision before suit was filed, and also on the ground that it might promote motion practice once a case has commenced.

The arguments against lists of factors are familiar. The list may be mistaken as exclusive,

or the list may become a routine set of items to be checked off, approached without sufficient care. Or the enumerated factors themselves may be less important than other factors omitted from the examples, either when the rule is adopted or as the world changes — and changes in the world of ESI are notoriously rapid. Or a wisely chosen list of factors may be expressed poorly. Or confusion may arise from the proper use of factors that bear differently on different determinations. The reasonableness of efforts to preserve information, for example, may have scant bearing in determining whether the loss caused prejudice — at most, there is a common element in the apparent importance of the information. For reasons like these it is common experience to begin with rule drafts that list factors, then to demote the factors to discussion in a Committee Note, and perhaps to take the final step of expunging all references to suggested factors for decision.

The eventual decision of the Advisory Committee was to remove the factors from the rule. Substantial portions of the Committee Note discussion of the factors have been retained, particularly as they bear on the question whether information should have been retained, and whether reasonable steps to preserve were taken.

Acts of God

The published version attempted to address a concern raised by the Standing Committee — whether the rule would permit sanctions to be imposed for events outside the party's control. The example given was the destruction of a hospital's computer records by flooding from SuperStorm Sandy. The published draft met this problem by providing for "sanctions" only if "the party's actions" caused the loss.

The same protection exists in the current recommendation. The revised rule authorizes the specified measures only when a party fails to "take reasonable steps to preserve" information that should be preserved in anticipation of litigation. As the Committee Note observes generally, such reasonable steps need not lead to perfect preservation. More specifically, the Note also acknowledges that a party cannot be held responsible for loss of information that occurs despite such steps. If the information is not in the party's control, or other events beyond its control — such as a flood, failure of a "cloud" service, or a malign software attack — cause the loss of information, the rule does not authorize measures under either Rule 37(e)(1) or (e)(2).

Replacing Present Rule 37(e)

The published preliminary draft called for replacing present Rule 37(e) with the new rule. The invitation for public comment included the question whether the present rule should be preserved. There were some comments that favored retaining some of the present rule, but the great majority saw no need for retaining the current rule once the new rule is adopted. The Advisory Committee recommends replacing the current rule with the new rule.

The Advisory Committee concluded that retaining the present rule would cause confusion

in light of the new rule's text. For example, the present rule refers to "sanctions," while the new rule does not. The present rule talks in terms of "good faith," while the existing rule focuses on reasonable steps, prejudice, and the specific intent required in (e)(2). The present rule was designed to leave inherent power available for the loss of ESI, while the new rule displaces inherent power. The present rule includes a potentially open-ended exclusion of cases involving "exceptional circumstances," while the new rule does not. In light of these potential sources of confusion, and because the Advisory Committee believes that the proposed rule provides even more protection for parties who act reasonably than does the present rule, the Advisory Committee concluded that present Rule 37(e) should be replaced. Borrowing the language of the present rule, the Committee Note does state that the routine, good-faith operation of an electronic information system would be a relevant factor for the court to consider in evaluating whether a party failed to take reasonable steps to preserve lost information.

Conclusion and Gap Report

The public comment period was very helpful in presenting issues regarding Rule 37(e). The Discovery Subcommittee carefully considered the public comments during a series of meetings and conference calls that produced the proposed rule. The Advisory Committee is confident that the proposed rule strikes the right balance on this important subject. Public comments also confirmed that rulemaking in this area is genuinely needed. For the guidance of the Standing Committee, the Gap Report regarding changes since publication is presented below.

Gap Report

The revised rule is a modification of the published draft in several ways: (1) It applies only to electronically stored information; (2) It removes the provision in the published draft that authorized "sanctions" against a party that lacked the culpable state of mind called for in the rule if the loss of information caused "irreparable prejudice" to another party's ability to litigate; (3) It does not speak in terms of "sanctions" and no longer invokes the list of sanctions contained in Rule 37(b)(2)(A); (4) It places primary emphasis on measures to restore or replace lost electronically stored information; (5) On finding prejudice to a party due to loss of the information, it authorizes the court to order measures "no greater than necessary" to cure the prejudice; (6) It does not use the culpability standard "willful or bad faith", substituting the standard that the party "acted with the intent to deprive another party of the information's use in the litigation"; (7) Only when that culpability standard is met, it authorizes the court to presume that the lost information was unfavorable to the party that lost it, to instruct the jury it may so infer from the loss of the information, or to dismiss the action or enter a default judgment; (8) It no longer includes in the rule a list of factors for the court's consideration in applying the rule. Recognizing that these changes are substantial, the Civil Rules Advisory Committee unanimously decided that republication would not be necessary to achieve adequate public comment and would not assist the work of the rules committees.

PROPOSED RULE 37(e)

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

* * *

(e) Failure to Preserve ~~Provide~~ Electronically Stored Information. ~~Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.~~ If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court may:

(1) upon finding prejudice to another party from loss of the information, order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

Committee Note

Present Rule 37(e), adopted in 2006, provides: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." This limited rule has not adequately addressed the serious problems resulting from the continued exponential growth in the volume of such information. Federal circuits have established significantly different standards for imposing sanctions or curative measures on parties who fail to preserve electronically stored information. These developments have caused litigants to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court finds they did not do enough.

New Rule 37(e) replaces the 2006 rule. It authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures. It therefore forecloses reliance on inherent authority or state law to

31 determine when certain measures should be used. The rule does not affect the validity of an
32 independent tort claim for spoliation if state law applies in a case and authorizes the claim.

33 The new rule applies only to electronically stored information, also the focus of the 2006
34 rule. It applies only when such information is lost. Because electronically stored information often
35 exists in multiple locations, loss from one source may often be harmless when substitute information
36 can be found elsewhere.

37 The new rule applies only if the lost information should have been preserved in the
38 anticipation or conduct of litigation and the party failed to take reasonable steps to preserve it. Many
39 court decisions hold that potential litigants have a duty to preserve relevant information when
40 litigation is reasonably foreseeable. Rule 37(e) is based on this common-law duty; it does not
41 attempt to create a new duty to preserve. The rule does not apply when information is lost before
42 a duty to preserve arises.

43 In applying the rule, a court may need to decide whether and when a duty to preserve arose.
44 Courts should consider the extent to which a party was on notice that litigation was likely and that
45 the information would be relevant. A variety of events may alert a party to the prospect of litigation.
46 Often these events provide only limited information about that prospective litigation, however, so
47 that the scope of information that should be preserved may remain uncertain. It is important not to
48 be blinded to this reality by hindsight arising from familiarity with an action as it is actually filed.

49 Although the rule focuses on the common-law obligation to preserve in the anticipation or
50 conduct of litigation, courts may sometimes consider whether there was an independent requirement
51 that the lost information be preserved. Such requirements arise from many sources — statutes,
52 administrative regulations, an order in another case, or a party's own information-retention
53 protocols. The court should be sensitive, however, to the fact that such independent preservation
54 requirements may be addressed to a wide variety of concerns unrelated to the current litigation. The
55 fact that a party had an independent obligation to preserve information does not necessarily mean
56 that it had such a duty with respect to the litigation, and the fact that the party failed to observe some
57 other preservation obligation does not itself prove that its efforts to preserve were not reasonable
58 with respect to a particular case.

59 The duty to preserve may in some instances be triggered or clarified by a court order in the
60 case. Preservation orders may become more common, in part because Rules 16(b)(3)(B)(iii) and
61 26(f)(3)(C) are amended to encourage discovery plans and orders that address preservation. Once
62 litigation has commenced, if the parties cannot reach agreement about preservation issues, promptly
63 seeking judicial guidance about the extent of reasonable preservation may be important.

64 The rule applies only if the information was lost because the party failed to take reasonable
65 steps to preserve the information. Due to the ever-increasing volume of electronically stored
66 information and the multitude of devices that generate such information, perfection in preserving

67 all relevant electronically stored information is often impossible. As under the current rule, the
68 routine, good-faith operation of an electronic information system would be a relevant factor for the
69 court to consider in evaluating whether a party failed to take reasonable steps to preserve lost
70 information, although the prospect of litigation may call for reasonable steps to preserve information
71 by intervening in that routine operation. This rule recognizes that "reasonable steps" to preserve
72 suffice; it does not call for perfection. The court should be sensitive to the party's sophistication
73 with regard to litigation in evaluating preservation efforts; some litigants, particularly individual
74 litigants, may be less familiar with preservation obligations than others who have considerable
75 experience in litigation.

76 Because the rule calls only for reasonable steps to preserve, it is inapplicable when the loss
77 of information occurs despite the party's reasonable steps to preserve. For example, the information
78 may not be in the party's control. Or information the party has preserved may be destroyed by
79 events outside the party's control — the computer room may be flooded, a "cloud" service may fail,
80 a malign software attack may disrupt a storage system, and so on. Courts may, however, need to
81 assess the extent to which a party knew of and protected against such risks.

82 Another factor in evaluating the reasonableness of preservation efforts is proportionality.
83 The court should be sensitive to party resources; aggressive preservation efforts can be extremely
84 costly, and parties (including governmental parties) may have limited staff and resources to devote
85 to those efforts. A party may act reasonably by choosing a less costly form of information
86 preservation, if it is substantially as effective as more costly forms. It is important that counsel
87 become familiar with their clients' information systems and digital data — including social media
88 — to address these issues. A party urging that preservation requests are disproportionate may need
89 to provide specifics about these matters in order to enable meaningful discussion of the appropriate
90 preservation regime.

91 When a party fails to take reasonable steps to preserve electronically stored information that
92 should have been preserved in the anticipation or conduct of litigation, and the information is lost
93 as a result, Rule 37(e) directs that the initial focus should be on whether the lost information can be
94 restored or replaced through additional discovery. Nothing in the rule limits the court's powers
95 under Rules 16 and 26 to authorize additional discovery. Orders under Rule 26(b)(2)(B) regarding
96 discovery from sources that would ordinarily be considered inaccessible or under Rule 26(c)(1)(B)
97 on allocation of expenses may be pertinent to solving such problems. If the information is restored
98 or replaced, no further measures should be taken. At the same time, it is important to emphasize that
99 efforts to restore or replace lost information through discovery should be proportional to the
100 apparent importance of the lost information to claims or defenses in the litigation. For example,
101 substantial measures should not be employed to restore or replace information that is marginally
102 relevant or duplicative.

103 **Subdivision (e)(1).** This subdivision applies only if information should have been preserved
104 in the anticipation or conduct of litigation, a party failed to take reasonable steps to preserve the

105 information, information was lost as a result, and the information could not be restored or replaced
106 by additional discovery. In addition, a court may resort to (e)(1) measures only "upon finding
107 prejudice to another party from loss of the information." An evaluation of prejudice from the loss
108 of information necessarily includes an evaluation of the information's importance in the litigation.

109 The rule does not place a burden of proving or disproving prejudice on one party or the other.
110 Determining the content of lost information may be a difficult task in some cases, and placing the
111 burden of proving prejudice on the party that did not lose the information may be unfair. In other
112 situations, however, the content of the lost information may be fairly evident, the information may
113 appear to be unimportant, or the abundance of preserved information may appear sufficient to meet
114 the needs of all parties. Requiring the party seeking curative measures to prove prejudice may be
115 reasonable in such situations. The rule leaves judges with discretion to determine how best to assess
116 prejudice in particular cases.

117 Once a finding of prejudice is made, the court is authorized to employ measures "no greater
118 than necessary to cure the prejudice." The range of such measures is quite broad if they are
119 necessary for this purpose. There is no all-purpose hierarchy of the severity of various measures;
120 the severity of given measures must be calibrated in terms of their effect on the particular case. But
121 authority to order measures no greater than necessary to cure prejudice does not require the court
122 to adopt measures to cure every possible prejudicial effect. Much is entrusted to the court's
123 discretion.

124 In an appropriate case, it may be that serious measures are necessary to cure prejudice found
125 by the court, such as forbidding the party that failed to preserve information from putting on certain
126 evidence, permitting the parties to present evidence and argument to the jury regarding the loss of
127 information, or giving the jury instructions to assist in its evaluation of such evidence or argument,
128 other than instructions to which subdivision (e)(2) applies. Care must be taken, however, to ensure
129 that curative measures under subdivision (e)(1) do not have the effect of measures that are permitted
130 under subdivision (e)(2) only on a finding of intent to deprive another party of the lost information's
131 use in the litigation. An example of an inappropriate (e)(1) measure might be an order striking
132 pleadings related to, or precluding a party from offering any evidence in support of, the central or
133 only claim or defense in the case. On the other hand, it may be appropriate to exclude a specific
134 item of evidence to offset prejudice caused by failure to preserve other evidence that might
135 contradict the excluded item of evidence.

136 **Subdivision (e)(2).** This subdivision authorizes courts to use specified and very severe
137 measures to address or deter failures to preserve electronically stored information, but only on
138 finding that the party that lost the information acted with the intent to deprive another party of the
139 information's use in the litigation. It is designed to provide a uniform standard in federal court for
140 use of these serious measures when addressing failure to preserve electronically stored information.
141 It rejects cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d
142 Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or

143 gross negligence.

144 Adverse-inference instructions were developed on the premise that a party's intentional loss
145 or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the
146 evidence was unfavorable to the party responsible for loss or destruction of the evidence. Negligent
147 or even grossly negligent behavior does not logically support that inference. Information lost
148 through negligence may have been favorable to either party, including the party that lost it, and
149 inferring that it was unfavorable to that party may tip the balance at trial in ways the lost information
150 never would have. The better rule for the negligent or grossly negligent loss of electronically stored
151 information is to preserve a broad range of measures to cure prejudice caused by its loss, but to limit
152 the most severe measures to instances of intentional loss or destruction.

153 Similar reasons apply to limiting the court's authority to presume or infer that the lost
154 information was unfavorable to the party who lost it when ruling on a pretrial motion or presiding
155 at a bench trial. Subdivision (e)(2) limits the ability of courts to draw adverse inferences based on
156 the loss of information in these circumstances, permitting them only when a court finds that the
157 information was lost with the intent to prevent its use in litigation.

158 Subdivision (e)(2) applies to jury instructions that permit or require the jury to presume or
159 infer that lost information was unfavorable to the party that lost it. Thus, it covers any instruction
160 that directs or permits the jury to infer from the loss of information that it was in fact unfavorable
161 to the party that lost it. The subdivision does not apply to jury instructions that do not involve such
162 an inference. For example, subdivision (e)(2) would not prohibit a court from allowing the parties
163 to present evidence to the jury concerning the loss and likely relevance of information and
164 instructing the jury that it may consider that evidence, along with all the other evidence in the case,
165 in making its decision. These measures, which would not involve instructing a jury it may draw an
166 adverse inference from loss of information, would be available under subdivision (e)(1) if no greater
167 than necessary to cure prejudice. In addition, subdivision (e)(2) does not limit the discretion of
168 courts to give traditional missing evidence instructions based on a party's failure to present evidence
169 it has in its possession at the time of trial.

170 Subdivision (e)(2) requires a finding that the party acted with the intent to deprive another
171 party of the information's use in the litigation. This finding may be made by the court when ruling
172 on a pretrial motion, when presiding at a bench trial, or when deciding whether to give an adverse
173 inference instruction at trial. If a court were to conclude that the intent finding should be made by
174 a jury, the court's instruction should make clear that the jury may infer from the loss of the
175 information that it was unfavorable to the party that lost it only if the jury first finds that the party
176 acted with the intent to deprive another party of the information's use in the litigation. If the jury
177 does not make this finding, it may not infer from the loss that the information was unfavorable to
178 the party that lost it.

179 Courts should exercise caution in using the measures specified in (e)(2). Finding an intent

180 to deprive another party of the lost information's use in the litigation does not require a court to
181 adopt any of the measures listed in subdivision (e)(2). The remedy should fit the wrong, and the
182 severe measures authorized by this subdivision should not be used when the information lost was
183 relatively unimportant or lesser measures such as those specified in subdivision (e)(1) would be
184 sufficient to redress the loss.

185 Subdivision (e)(2) does not include an express requirement that the court find prejudice to
186 the party deprived of the information. The adverse inference permitted under this subdivision can
187 itself satisfy the prejudice requirement: if a court or jury infers the lost information was unfavorable
188 to the party that lost it, the same inference suggests that the opposing party was prejudiced by the
189 loss. In addition, there may be rare cases where a court concludes that a party's conduct is so
190 reprehensible that serious measures should be imposed even in the absence of prejudice. In such
191 rare cases, however, the court must still find the intent specified in subdivision (e)(2).

APPENDIX
Published Rule 37(e) Amendment Proposal

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

* * * * *

~~**(e) Failure to Provide Electronically Stored Information.** Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.~~

(e) Failure to Preserve Discoverable Information.

(1) *Curative measures; sanctions.* If a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation, the court may:

(A) permit additional discovery, order curative measures, or order the party to pay the reasonable expenses, including attorney's fees, caused by the failure; and

(B) impose any sanction listed in Rule 37(b)(2)(A) or give an adverse-inference jury instruction, but only if the court finds that the party's actions:

(i) caused substantial prejudice in the litigation and were willful or in bad faith; or

(ii) irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation.

(2) *Factors to be considered in assessing a party's conduct.* The court should consider all relevant factors in determining whether a party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation, and whether the failure was willful or in bad faith. The factors include:

(A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable;

(B) the reasonableness of the party's efforts to preserve the information;

(C) whether the party received a request to preserve information, whether the

28 request was clear and reasonable, and whether the person who made it and
29 the party consulted in good faith about the scope of preservation;

30 **(D)** the proportionality of the preservation efforts to any anticipated or ongoing
31 litigation; and

32 **(E)** whether the party timely sought the court's guidance on any unresolved
33 disputes about preserving discoverable information.

1 Committee Note

2 In 2006, Rule 37(e) was added to provide protection against sanctions for loss of
3 electronically stored information under certain limited circumstances, but preservation problems
4 have nonetheless increased. The Committee has been repeatedly informed of growing concern about
5 the increasing burden of preserving information for litigation, particularly with regard to
6 electronically stored information. Many litigants and prospective litigants have emphasized their
7 uncertainty about the obligation to preserve information, particularly before litigation has actually
8 begun. The remarkable growth in the amount of information that might be preserved has heightened
9 these concerns. Significant divergences among federal courts across the country have meant that
10 potential parties cannot determine what preservation standards they will have to satisfy to avoid
11 sanctions. Extremely expensive overpreservation may seem necessary due to the risk that very
12 serious sanctions could be imposed even for merely negligent, inadvertent failure to preserve some
13 information later sought in discovery.

14 This amendment to Rule 37(e) addresses these concerns by adopting a uniform set of
15 guidelines for federal courts, and applying them to all discoverable information, not just
16 electronically stored information. The amended rule is not limited, as is the current rule, to
17 information lost due to "the routine, good-faith operation of an electronic information system." The
18 amended rule is designed to ensure that potential litigants who make reasonable efforts to satisfy
19 their preservation responsibilities may do so with confidence that they will not be subjected to
20 serious sanctions should information be lost despite those efforts. It does not provide "bright line"
21 preservation directives because bright lines seem unsuited to a set of problems that is intensely
22 context-specific. Instead, the rule focuses on a variety of considerations that the court should weigh
23 in calibrating its response to the loss of information.

24 Amended Rule 37(e) supersedes the current rule because it provides protection for any
25 conduct that would be protected under the current rule. The current rule provides: "Absent
26 exceptional circumstances, a court may not impose sanctions under these rules on a party for failing
27 to provide electronically stored information lost as a result of the routine, good-faith operation of
28 an electronic information system." The routine good faith operation of an electronic information
29 system should be respected under the amended rule. As under the current rule, the prospect of
30 litigation may call for altering that routine operation. And the prohibition of sanctions in the

31 amended rule means that any loss of data that would be insulated against sanctions under the current
32 rule would also be protected under the amended rule.

33 Amended Rule 37(e) applies to loss of discoverable information "that should have been
34 preserved in the anticipation or conduct of litigation." This preservation obligation was not created
35 by Rule 37(e), but has been recognized by many court decisions. It may in some instances be
36 triggered or clarified by a court order in the case. Rule 37(e)(2) identifies many of the factors that
37 should be considered in determining, in the circumstances of a particular case, when a duty to
38 preserve arose and what information should have been preserved.

39 Except in very rare cases in which a party's actions cause the loss of information that
40 irreparably deprives another party of any meaningful opportunity to present or defend against the
41 claims in the litigation, sanctions for loss of discoverable information may only be imposed on a
42 finding of willfulness or bad faith, combined with substantial prejudice.

43 The amended rule therefore forecloses reliance on inherent authority or state law to impose
44 litigation sanctions in the absence of the findings required under Rule 37(e)(1)(B). But the rule does
45 not affect the validity of an independent tort claim for relief for spoliation if created by the
46 applicable law. The law of some states authorizes a tort claim for spoliation. The cognizability of
47 such a claim in federal court is governed by the applicable substantive law, not Rule 37(e).

48 An amendment to Rule 26(f)(3) directs the parties to address preservation issues in their
49 discovery plan, and an amendment to Rule 16(b)(3) recognizes that the court's scheduling order may
50 address preservation. These amendments may prompt early attention to matters also addressed by
51 Rule 37(e).

52 **Subdivision (e)(1)(A).** When the court concludes that a party failed to preserve information
53 that should have been preserved in the anticipation or conduct of litigation, it may adopt a variety
54 of measures that are not sanctions. One is to permit additional discovery that would not have been
55 allowed had the party preserved information as it should have. For example, discovery might be
56 ordered under Rule 26(b)(2)(B) from sources of electronically stored information that are not
57 reasonably accessible. More generally, the fact that a party has failed to preserve information may
58 justify discovery that otherwise would be precluded under the proportionality analysis of
59 Rule 26(b)(1) and (2)(C).

60 In addition to, or instead of, ordering further discovery, the court may order curative
61 measures, such as requiring the party that failed to preserve information to restore or obtain the lost
62 information, or to develop substitute information that the court would not have ordered the party to
63 create but for the failure to preserve. The court may also require the party that failed to preserve
64 information to pay another party's reasonable expenses, including attorney fees, caused by the
65 failure to preserve. Such expenses might include, for example, discovery efforts caused by the
66 failure to preserve information. Additional curative measures might include permitting introduction

67 at trial of evidence about the loss of information or allowing argument to the jury about the possible
68 significance of lost information.

69 **Subdivision (e)(1)(B)(i).** This subdivision authorizes imposition of the sanctions listed in
70 Rule 37(b)(2)(A) for willful or bad-faith failure to preserve information, whether or not there was
71 a court order requiring such preservation. Rule 37(e)(1)(B)(i) is designed to provide a uniform
72 standard in federal court for sanctions for failure to preserve. It rejects decisions that have
73 authorized the imposition of sanctions — as opposed to measures authorized by Rule 37(e)(1)(A)
74 — for negligence or gross negligence. It borrows the term "sanctions" from Rule 37(b)(2), and
75 does not attempt to prescribe whether such measures would be so regarded for other purposes, such
76 as an attorney's professional responsibility.

77 This subdivision protects a party that has made reasonable preservation decisions in light of
78 the factors identified in Rule 37(e)(2), which emphasize both reasonableness and proportionality.
79 Despite reasonable efforts to preserve, some discoverable information may be lost. Although loss
80 of information may affect other decisions about discovery, such as those under Rule 26(b)(1),
81 (b)(2)(B), and (b)(2)(C), sanctions may be imposed only for willful or bad faith actions, unless the
82 exceptional circumstances described in Rule 37(e)(2)(B)(ii) are shown.

83 The threshold under Rule 37(e)(1)(B)(i) is that the court find that lost information should
84 have been preserved; if so, the court may impose sanctions only if it can make two further findings.
85 First, the court must find that the loss of information caused substantial prejudice in the litigation.
86 Because digital data often duplicate other data, substitute evidence is often available. Although it
87 is impossible to demonstrate with certainty what lost information would prove, the party seeking
88 sanctions must show that it has been substantially prejudiced by the loss. Among other things, the
89 court may consider the measures identified in Rule 37(e)(1)(A) in making this determination; if
90 these measures can sufficiently reduce the prejudice, sanctions would be inappropriate even when
91 the court finds willfulness or bad faith. Rule 37(e)(1)(B)(i) authorizes imposition of Rule 37(b)(2)
92 sanctions in the expectation that the court will employ the least severe sanction needed to repair the
93 prejudice resulting from loss of the information.

94 Second, it must be established that the party that failed to preserve did so willfully or in bad
95 faith. This determination should be made with reference to the factors identified in Rule 37(e)(2).

96 **Subdivision (e)(1)(B)(ii).** This subdivision permits the court to impose sanctions in
97 narrowly limited circumstances without making a finding of either bad faith or willfulness. The
98 need to show bad faith or willfulness is excused only by finding an impact more severe than the
99 substantial prejudice required to support sanctions under Rule 37(e)(1)(B)(i). It still must be shown
100 that a party failed to preserve discoverable information that should have been preserved. In addition,
101 it must be shown that the party's actions irreparably deprived a party of any meaningful opportunity
102 to present or defend against the claims in the litigation.

103 The first step under this subdivision is to examine carefully the apparent importance of the
104 lost information. Particularly with electronically stored information, alternative sources may often
105 exist. The next step is to explore the possibility that curative measures under subdivision (e)(1)(A)
106 can reduce the adverse impact. If a party loses readily accessible electronically stored information,
107 for example, the court may direct the party to attempt to retrieve the information by alternative
108 means. If such measures are not possible or fail to restore important information, the court must
109 determine whether the loss has irreparably deprived a party of any meaningful opportunity to present
110 or defend against the claims in the litigation.

111 The "irreparably deprived" test is more demanding than the "substantial prejudice" that
112 permits sanctions under Rule 37(e)(1)(B)(i) on a showing of bad faith or willfulness. Examples
113 might include cases in which the alleged injury-causing instrumentality has been lost. A plaintiff's
114 failure to preserve an automobile claimed to have defects that caused injury without affording the
115 defendant manufacturer an opportunity to inspect the damaged vehicle may be an example. Such
116 a situation led to affirmance of dismissal, as not an abuse of discretion, in *Silvestri v. General*
117 *Motors Corp.*, 271 F.3d 583 (4th Cir. 2001). Or a party may lose the only evidence of a critically
118 important event. But even such losses may not irreparably deprive another party of any meaningful
119 opportunity to litigate. Remaining sources of evidence and the opportunity to challenge the
120 evidence presented by the party who lost discoverable information that should have been preserved,
121 along with possible presentation of evidence and argument about the significance of the lost
122 information, should often afford a meaningful opportunity to litigate.

123 The requirement that a party be irreparably deprived of any meaningful opportunity to
124 present or defend against the claims in the litigation is further narrowed by looking to all the claims
125 in the litigation. Lost information may appear critical to litigating a particular claim or defense, but
126 sanctions should not be imposed — or should be limited to the affected claims or defenses — if
127 those claims or defenses are not central to the litigation.

128 A special situation arises when discoverable information is lost because of events outside
129 a party's control. A party may take the steps that should have been taken to preserve the
130 information, but lose it to such unforeseeable circumstances as flood, earthquake, fire, or malicious
131 computer attacks. Curative measures may be appropriate in such circumstances — this is
132 information that should have been preserved — but sanctions are not. The loss is not caused by "the
133 party's actions" as required by (e)(1)(B).

134 **Subdivision (e)(2).** These factors guide the court when asked to adopt measures under
135 Rule 37(e)(1)(A) due to loss of information or to impose sanctions under Rule 37(e)(1)(B). The
136 listing of factors is not exclusive; other considerations may bear on these decisions, such as whether
137 the information not retained reasonably appeared to be cumulative with materials that were retained.
138 With regard to all these matters, the court's focus should be on the reasonableness of the parties'
139 conduct.

140 The first factor is the extent to which the party was on notice that litigation was likely and
141 that the information lost would be discoverable in that litigation. A variety of events may alert a
142 party to the prospect of litigation. But often these events provide only limited information about that
143 prospective litigation, so that the scope of discoverable information may remain uncertain.

144 The second factor focuses on what the party did to preserve information after the prospect
145 of litigation arose. The party's issuance of a litigation hold is often important on this point. But it
146 is only one consideration, and no specific feature of the litigation hold — for example, a written
147 rather than an oral hold notice — is dispositive. Instead, the scope and content of the party's overall
148 preservation efforts should be scrutinized. One focus would be on the extent to which a party should
149 appreciate that certain types of information might be discoverable in the litigation, and also what it
150 knew, or should have known, about the likelihood of losing information if it did not take steps to
151 preserve. The court should be sensitive to the party's sophistication with regard to litigation in
152 evaluating preservation efforts; some litigants, particularly individual litigants, may be less familiar
153 with preservation obligations than other litigants who have considerable experience in litigation.
154 Although the rule focuses on the common law obligation to preserve in the anticipation or conduct
155 of litigation, courts may sometimes consider whether there was an independent requirement that the
156 lost information be preserved. The court should be sensitive, however, to the fact that such
157 independent preservation requirements may be addressed to a wide variety of concerns unrelated
158 to the current litigation. The fact that some information was lost does not itself prove that the efforts
159 to preserve were not reasonable.

160 The third factor looks to whether the party received a request to preserve information.
161 Although such a request may bring home the need to preserve information, this factor is not meant
162 to compel compliance with all such demands. To the contrary, reasonableness and good faith may
163 not require any special preservation efforts despite the request. In addition, the proportionality
164 concern means that a party need not honor an unreasonably broad preservation demand, but instead
165 should make its own determination about what is appropriate preservation in light of what it knows
166 about the litigation. The request itself, or communication with the person who made the request,
167 may provide insights about what information should be preserved. One important matter may be
168 whether the person making the preservation request is willing to engage in good faith consultation
169 about the scope of the desired preservation.

170 The fourth factor emphasizes a central concern — proportionality. The focus should be on
171 the information needs of the litigation at hand. That may be only a single case, or multiple cases.
172 Rule 26(b)(1) is amended to make proportionality a central factor in determining the scope of
173 discovery. Rule 37(e)(2)(D) explains that this calculation should be made with regard to "any
174 anticipated or ongoing litigation." Prospective litigants who call for preservation efforts by others
175 (the third factor) should keep those proportionality principles in mind.

176 Making a proportionality determination often depends in part on specifics about various
177 types of information involved, and the costs of various forms of preservation. The court should be

178 sensitive to party resources; aggressive preservation efforts can be extremely costly, and parties
179 (including governmental parties) may have limited resources to devote to those efforts. A party may
180 act reasonably by choosing the least costly form of information preservation, if it is substantially as
181 effective as more costly forms. It is important that counsel become familiar with their clients'
182 information systems and digital data — including social media — to address these issues. A party
183 urging that preservation requests are disproportionate may need to provide specifics about these
184 matters in order to enable meaningful discussion of the appropriate preservation regime.

185 Finally, the fifth factor looks to whether the party alleged to have failed to preserve as
186 required sought guidance from the court if agreement could not be reached with the other parties.
187 Until litigation commences, reference to the court may not be possible. In any event, this is not
188 meant to encourage premature resort to the court; amendments to Rule 26(f)(3) direct the parties to
189 address preservation in their discovery plan, and amendments to Rule 16(b)(3) invite provisions on
190 this subject in the scheduling order. Ordinarily the parties' arrangements are to be preferred to those
191 imposed by the court. But if the parties cannot reach agreement, they should not forgo available
192 opportunities to obtain prompt resolution of the differences from the court.

SUMMARY OF COMMENTS ON PROPOSED RULE 37(E), AUGUST 2013 PUBLICATION

The following summaries refer to the comments by the numbers assigned to them by the Administrative Office. The full comments should be available through Regulations.gov. The numbers there begin with USC-RULES-CV-2013-0002-, followed by the numbers that appear in these summaries. Since the final number, included below, is the only thing that's different, there seemed no reason to include the rest.

Note also that some commenters appear more than once. Some who submitted written comments also appeared at a hearing, and some submitted more than one written comment.

The review of comments after no. 804 did not attempt to include all those who commented, although every one of the 2345 comments received was reviewed. There were many comments that were very similar in both the pro-amendment and anti-amendment camp. Regarding comments after no. 804, this summary is limited to what seemed to be comments that differed from what's been heard before, and it does not list those who made those same points. It is easy to report that very many additional comments echoed both sets of comments already summarized repeatedly. (For example, it appears that two law firms submitted essentially identical letters from 15 to 20 lawyers each on the last day.) Perhaps, then, it is appropriate to begin with something mentioned in comment 1540, which quoted Rep. Morris Udall, who was a former boss of the submitting lawyer, and who tried to cut long-running hearings by saying "Everything has been said; just not everyone has said it."

The comments are arranged topically as follows

1. Overall
2. Rule 37(e)(1) -- Failure to preserve
3. Rule 37(e)(1) -- Curative measures
4. Rule 37(e)(1)(B)(i)
5. Rule 37(e)(1)(B)(ii)
6. Rule 37(e)(2)
7. Need to retain provisions of current Rule 37(e)
8. Limiting the rule to electronically stored information
9. Additional definition of "substantial prejudice"
10. Additional definition of "willfulness or bad faith"

Summary of Rule 37(e) Comments

1. Overall

Ronald J. Hedges (262): Does the proposed rule violate the Rules Enabling Act? In Interfaith Comm. Org. v. Honeywell Int'l, Inc., No. 11-3813 (3d Cir. June 4, 2013), the Third Circuit considered whether Rule 68 might in infringe on substantive rights provided by the fee-shifting provisions of the Resource Conservation and Recovery Act, but rejected that argument. The district court, however, had held that Rule 68 was incompatible with Congress' purpose in enacting RCRA that applying the rule to cases brought under the act would violated the Rules Enabling Act. "Does proposed Rule 37(e) violate the Rules Enabling Act? Would it simply govern the 'manner and means' by which a party's substantive right to a sanctions award is governed? Or would the rule alter the 'rules of decision' by which a court would adjudicate that right?' Would the requirement that courts find willfulness or bad faith vary a substantive right? Or would negligence still be sufficient for the imposition of serious sanctions? Does not the proposed rule set forth substantive standards for a court to apply -- at least some of which do not now exist?"

Michael L. Slack (266) (on behalf of American Association of Justice Aviation Section): The proposal has little or no deterrent value, which should be the purpose of a rule purporting to sanction unacceptable conduct by a party. The rule change would make it more difficult to obtain sanctions. This is moving in the wrong direction. "At a time when the plaintiffs' aviation bar needs liberalization of the discovery rules to deter and cure the problems being encountered in their technically complex cases, the Committee advances proposals which will make discovery of sophisticated corporate defendants more difficult and spawn new discovery avoidance tactics among defendants and their lawyers."

Lawyers for Civil Justice (267): A new preservation rule is urgently needed. Under current law, courts have created ad hoc litigation hold procedures, and parties struggle to define the line that should apply to the scope of preservation. As a result, they are often forced to incur extraordinary expenses in an attempt to meet the most stringent requirements. This fear has fueled an alarming increase in ancillary satellite litigation. Allegations of spoliation are easy to make because, in the absence of clearly defined limits on preservation, something "more" almost always could have been done to preserve digital information. But the proposal lacks sufficiently clear preservation directives, and also includes sanctions standards that permit sanctions to be imposed based on an insufficient showing of culpability. Beyond that, we need a bright-line rule on the preservation trigger. The rule instead enshrines the vague "foreseeability" standard in the opening sentence. In its place, the Committee should adopt a bold, clear and reasonably balanced "commencement of litigation" trigger for when a party must take *affirmative* preservation steps. Judicial decisions have transformed the traditional spoliation rule that was a brake on plaintiffs' conduct prior to suit into a new rule that places great affirmative burdens on defendants to preserve all potentially relevant material. Under the "reasonable anticipation" trigger standard, decisions must be made before receipt of a scope-defining complaint. Critics of this rule that use hypotheticals involving auto-delete do not make justifiable objections for a variety of reasons.

Washington Legal Foundation (285): WLF fully embraces the overarching objective of proposed 37(e), which is to replace the disparate treatment of preservation and sanctions with a single uniform standard. In particular, the rejection of the Second Circuit's ruling that mere negligence is sufficient to support sanctions (in Residential Funding, Inc. v. DeGeorge Fin. Corp., 306 F.3d 99 (2d Cir. 2002)) is welcome. WLF believes these changes have the potential

to significantly curtail the amount of satellite litigation about spoliation allegations and also reduce the high costs of over-preservation.

Lynne Thomas Gordon (American Health Information Management Association) (287): AHIMA applauds the Committee's efforts to establish uniform guidelines across federal courts, but is concerned that the proposed amendments will not resolve the issues surrounding divergent preservation standards and the perceived need for "over preservation." The absence of definitions for "willful," "bad faith," and "substantial prejudice" may cause variable interpretations of these terms by the courts. AHIMA suggests that Committee may wish to consider further clarification and definition of those terms.

Hon. Craig B. Shaffer & Ryan T. Shaffer (289): This is an article from the Federal Courts Law Review concerning the proposed amendments. It stresses that preservation and spoliation issues are not only concerns for institutional defendants. "In the past, particularly in an asymmetrical case (such as a single employee discrimination action brought under Title VII), plaintiff's counsel might have paid only fleeting attention to his or her client's preservation obligation since it was presumed that the defendant employer had possession, custody or control of all the relevant ESI. That confidence may be misplaced, however, with the advent of social media. * * * Since the plaintiff controls when litigation commences, as well as the nature and scope of any claims asserted, a plaintiff's attorney who does not take early and affirmative steps to preserve social media content risks spoliation sanctions." "[S]ome version of proposed Rule 37(e) may provide relief from the balkanized approach to the spoliation issue that now characterizes the litigation landscape, thereby bringing some predictability to this area of law."

Fred Slough (291): The proposed rule "provides an incentive to destroy records. The opposing party has too high a burden to be able to hold those who destroy evidence responsible. A jury should know that the violator has hidden potentially damaging evidence and the new rules make it more difficult for a Judge to impose such a sanction."

Philip Favro (298): (Includes two articles about the package of proposed changes) By ensuring that the sanctions analysis includes a broad range of considerations, the proposed rule appears to delineate a balanced approach that may benefit companies, which could justify a reasonable document retention strategy on best corporate practices for defensible deletion. The proposed rule also addresses some of the lingering concerns of the plaintiffs' bar. For example, it specifically empowers the court to order additional discovery or other curative measures when a litigant has destroyed information it should have retained.

Gregory Arenson (New York State Bar Ass'n Commer. & Fed. Lit. Section) (303): The Section wholeheartedly supports codifying the obligation to preserve information in anticipation of and during litigation. This measure should promote more consistent application of the standards for triggering and defining the scope of the duty to preserve. The Section also agrees that the appropriate scope of the information to be preserved is "discoverable information" as defined in proposed Rule 26(b)(1), or current Rule 26(b)(1) if that is retained without change.

Thomas Y. Allman (308): Generally speaking, the proposed rule should help to promote a uniform approach and foreclose the current practice of using inherent sanctioning power as an end run around existing Rule 37(e). But a number of aspects of the proposed rule raise concerns that need to be addressed.

Kaspar Stofflemayr (Bayer Corp.) (309): Bayer has experience in mass tort cases involving federal MDL proceedings, and endorses all the comments submitted by LCJ, of which it is a member. It notes that the current system virtually guarantees costly overpreservation of evidence because no clear standards are given about when a party should "reasonably anticipate litigation." For example, in a group of class actions that were recently concluded Bayer preserved an estimated 17,388 GB of information over a period of four years. In response to plaintiffs' discovery requests, we produced 31.1 GB of that information (1.3 million pages). The ratio of information preserved to information produced was 559:1. We believe that the proposed 37(e) amendments would be an improvement, but that they do not go far enough.

Jonathan Smith (NAACP Legal Defense Fund) (310): The proposed changes would permit parties who have failed to preserve discoverable information to suffer minimal consequence, and could have a detrimental effect on civil rights litigation. They place an extremely heavy burden on parties seeking sanctions or adverse-inference instructions as a result of an opposing party's conduct during the discovery process.

Steven Banks (Legal Aid Society - New York City) (317): Instead of simply revising the current rule governing preservation of electronic discovery, the amendment creates a broadly applicable new rule that significantly curtails the trial court's discretion to sanction spoliation of any evidence, electronic or otherwise. This is a significant change in the federal rules, creating a standard for sanctions that would be very difficult for any party affected by the destruction of evidence to meet. Legal Aid opposes the proposed rule. In the Second Circuit, where we typically litigate, sanctions are more broadly available than would be true under the proposed rule. We agree with Judge Scheindlin's comments in Sekisui American Corp. v. Hart, 2013 WL 41163122 (S.D.N.Y., Aug. 15, 2013), that imposing sanctions only where evidence is destroyed willfully creates perverse incentives. In one recent case involving a prisoner who was beaten by another prisoner, employees of the City Department of Correction watched videos of the area where the assaults occurred but then deleted them. In another similar case, the City preserved only fragments of the video of the event. It turned out that the Department had essentially no video preservation policies, despite the obviously critical nature of surveillance videotape to the litigation. It is patently unfair for our clients to have to meet the very stringent threshold proposed by this new rule in order to permit the trial court to impose sanctions.

U.S. Chamber Institute for Legal Reform (328): The rewriting of Rule 37(e) is needed because the current rule's effectiveness has been called into question. Because companies fear that they will be sanctioned for loss of information, preservation costs have continued to mount under the current rule. Fear of sanctions has led some companies to "preserve everything" when it comes to email and other electronically stored information, even though only an infinitesimal fraction ends up being used by the parties in litigation. The proposed new rule is an improvement over the current rule. A rule that gives the court the option of using curative measures is sensible. But the ILR believes that the rule should be improved by strengthening its protections against sanctions.

Bryan Spoon (329): The proposed changes benefit large corporations and add another barrier between a plaintiff and the materials that could prove or disprove the case. Spoliation is already a major issue, and these changes make it easier for corporations to destroy relevant document without appropriate sanctions.

Timothy A. Pratt (Fed. Defense & Corp. Counsel) (337): Preservation issues have taken

on a life of their own. Corporations worry about preserving terabytes of e-discovery that may never be relevant to any of the claims or defenses at issue in any litigation. Many of the preserved documents serve no business purpose and are preserved solely due to fear of sanctions in light of the unsettled legal standard. Before the proliferation of e-discovery, practitioners were faced with the simpler question of what paper documents needed to be maintained. E-discovery creates a completely different dynamic. The volume in exponentially greater. There is a greater risk of inadvertent destruction. The FDCC therefore urges the adoption of a clear, bright-line test to determine when a party is under an affirmative duty to preserve information.

Doug Lampe (343) (Ford Motor Co.): Ford supports revising Rule 37 to establish uniform preservation and sanctions guidelines across courts, and agrees that the revisions would at least somewhat reduce the burden of over-preservation.

Kim Stone (345) (Civil Justice Assoc. of Calif.): We support the proposed changes to Rule 37(e), which should help reduce unnecessary and expensive preservation of information. We agree with the comments of the Lawyers for Civil Justice and the Institute for Legal Reform.

Shanin Specter (344) (Kline & Specter): Our firm represents plaintiffs in catastrophic injury cases, particularly medical malpractice. We believe the proposed rule alters substantive law, and goes beyond practice. The adoption of this rule would preempt the application of the substantive law regulating spoliation of evidence of those states which have addressed the topic.

The Sedona Conference Working Group 1 (346): It is unclear whether the Committee's proposed changes to Rule 37(e) as currently drafted will have a substantial impact on the goal of reducing the burden and costs associated with overbroad preservation or setting forth a uniform national spoliation standard. We ask that the Committee carefully consider our alternative proposals, which we submitted to the Committee in October and December of 2012. We approve of the goal of replacing current Rule 37(e) with a rule that would establish a uniform national culpability and prejudice standard. But we have a number of concerns about the manner in which the current proposal is drafted.

Pennsylvania Bar Assoc. Fed. Practice Comm. (350): The Committee endorses the concept of a uniform approach to spoliation sanctions in federal courts. The proposal has a careful balance with respect to the imposition of an adverse inference. It lowers the degree of malfeasance required by the spoliating party as the prejudice to the opposing party increases, such that only ordinary negligence is required if the prejudice is extreme, bad faith or willful conduct is required for lesser prejudice, and no adverse inference sanctions is available without at least substantial prejudice to the opposing party.

Eric Hemmendinger (Shawe Rosenthal) (351): We support changing Rule 37 to limit motions for sanctions for failure to preserve. The current rule has given rise to discovery which is aimed not at obtaining evidence, but at identifying something arguably relevant which the employer failed to preserve, which then becomes the centerpiece of a spoliation claims. We support limiting such claims to situations in which the failure caused substantial prejudice and was willful. But we fear that the list of factors in the rule may cause trouble, and could encourage parties to seek discovery about those matters. We think that a party seeking such discovery should have to demonstrate substantial prejudice at the outset, before getting any discovery on this ground.

Kenneth D. Peters & John T. Wagener (353): The proposed rule is comprehensive and demonstrates an intent to tie sanctions for failure to preserve discoverable evidence to conduct that is "willful" or "in bad faith" and causes "substantial prejudice." These changes may help to mitigate a litigant's ESI burden, which often results in over preservation. But proposed (B)(ii) is likely to generate substantial motion practice as the courts struggle to define exactly what it means. It should be deleted.

Advisory Comm. on Civil Litigation, E.D.N.Y. (355): We do not support this amendment at this time. We agree that, ideally, there should be a uniform national rule governing the consequences of failure to preserve information. But in view of the rapid and continuing evolution of electronic discovery, we do not believe the time is ripe to promulgate such a rule. The different federal courts diverge about the proper standards for determining the consequences of failure to preserve discoverable information, and the Supreme Court has not yet spoken on the issue. Promulgation of a uniform rule should await further experience and further development of the law in this area.

Richard McCormack (356): It is extremely important that these changes be made in order to ensure fairness to all sides in the litigation. The change should establish a much-needed uniform national standard that would lessen the cost of over-preservation and additional litigation over allegations of spoliation. But I think that (B)(ii) should be removed as the courts are likely to use it to avoid the primary rule. In addition, the Committee should make it clear that sanctions are available only when the party has acted willfully and in bad faith. The list of factors in proposed 37(e)(2) should be removed. Finally, the rule should prescribe a clear, bright-line standard on when the affirmative duty to preserve information is triggered. The best one would be commencement of litigation.

Dusti Harvey (358) (AAJ Nursing Home Litigation Group): The wholesale revamping of Rule 37(e) represents both a broad shifting of the burden in determining whether a discovery violation is subject to court sanction as well as a narrowing of a court's ability to impose sanctions in the first place. The current rule requires the party failing to provide electronic discovery to demonstrate that its conduct was in good faith. The proposed changes appear to limit a court's ability to sanction a party for failing to produce discoverable material generally (not merely electronic discovery). The changes would require the aggrieved party to convince the court of numerous factors, some quite intangible, before sanctions could be imposed. Discovery violations by corporate defendants have become commonplace in all types of litigation. But most acts or omissions giving rise to the destruction, loss, or withholding of discovery would likely not be sanctionable under the proposed rule.

Edward Hawkins (362): Eliminating the adverse inference instruction by changing Rule 37(e) will serve only to encourage rule-breaking plaintiffs and defendants to withhold evidence. The sting of the adverse inference instruction helps to keep both the plaintiff and the defendant forthcoming with discovery.

John M. Gallagher (379): The proposed change to Rule 37(e) purports to insulate a party from sanctions for failure to provide ESI if it has been lost as a result of routine, good faith operation of an electronic storage system. But once one party sends to the other party a "litigation hold" letter, the world of "routine" has been lost in the rearview mirror.

Richard Malad (376): I strongly oppose this rule change. We represent plaintiffs who

confront defendants with a substantial advantage at the outset. The various rule changes will only serve to limit discovery these plaintiffs need. The Rule 37(e) change will place limitations on an adverse inference jury instruction as a cure for negligent failure to preserve evidence, even though numerous state specifically permit it. The rule change also allows the court to consider "proportionality" of the preservation efforts, likely as an appeal to defendants who do not want to preserve large amounts of information.

Jeffrey S. Jacobson (Debevoise & Plimpton) (378): We applaud the effort to develop a national standard for spoliation sanctions and confine the most serious sanctions to a narrower set of situations. But we think that "willful" is the wrong term to use in (B)(i) and that (B)(ii) should be removed entirely from the amended rule.

Alan Morrison (383): I support the back-end approach of focusing on the consequences of failing to preserve, rather than attempting to establish front-end preservation requirements (assuming that would be permissible in a rule). I also agree that curative measures, as opposed to sanctions, are a better option.

Glen Pilie (Adams & Reese) (385): We support the adoption of amended Rule 37(e) and agree with the LCJ comments regarding the need for a clear rule regarding the scope of ESI preservation. We offer an example of a recent case in which our client was the defendant and suffered sanctions due to its failure to preserve temporary internet files that might have shown that its employees accessed the plaintiff's secure website to order forklift parts. The case is NACCO Materials Handling Group v. The Lilly Company, 278 F.R.D. 395 (W.D. Tenn. 2011). Plaintiff was a billion dollar global forklift manufacturer, and it claimed defendant, a small family-owned forklift dealership, had engaged in improper use of access to plaintiff's site. But it did not sue for four months after discovering the alleged access to its website. After suit was filed, defendant issued a litigation hold to key personnel in the parts department, which seemed to be involved. It did not instruct every employee in the company to preserve ESI and did not retain an ESI expert. Instead of an outside expert, it relied on its in-house IT director (who split his duties between that job and serving as a trainer for forklift repair). Defendant did not immediately cease its ordinary retention practices and establish protocols with regard to backup files, and employees were not instructed to disable "auto-delete" functions on web browsers or in temporary internet files. The magistrate judge imposed sanctions for failing to protect this information even though there was no evidence that any relevant information was lost. Moreover, defendant had a pending 12(b)(6) motion at the time. Defendant decided, however, to settle while an appeal of the magistrate judge's ruling was pending before the district judge, largely due to the harshness of the looming sanctions and the potential disruption they could cause to this small business if not reversed.

International Assoc. of Defense Counsel White Paper (390): The proposed rule holds great promise to establish a much-needed uniform national standard that would curtail costly over-preservation and ancillary litigation about allegations of spoliation. It establishes a national standard that would eliminate the court's ability to impose sanctions under "inherent authority" or state law. The amendment should provide practitioners with added security when advising clients on discovery issues.

Hon. James C. Francis IV (395): The proposed rule would radically alter the standards for remedying spoliation. In the process, it would curtail the ability of innocent parties to obtain relief when they are prejudiced by the destruction of information potentially relevant to

litigation. But the rule does not solve the problems it purports to address. Instead, by focusing on the state of mind of the spoliator it introduces additional uncertainty and arbitrariness. Most importantly, it would undermine public perception of the fairness of our justice system. I urge the committee to withdraw the proposed rule or modify it substantially. There is no evidence that courts have imposed disproportionately serious sanctions. To the contrary, default, dismissal, and the imposition of an adverse inference instruction have generally been ordered only in response to the most egregious conduct by a party. Even if the rule were to produce uniformity in federal court, any entity that operates nationally would confront the risk of the most rigorous state court sanctions rules (citing cases from state courts). Moreover, the concept of willfulness varies depending on the context in which it appears (citing cases). A rule that provided more precision and certainty about the preservation obligation itself might hold promise, but this rule does not try to do that. Moreover, overpreservation is not caused solely by the prospect or actuality of litigation; regulatory and other preservation obligations exist. And lawyers do not think like criminals, adjusting their behavior based on the penalty for violating an obligation rather than the obligation itself. Yet the rule leaves that obligation unchanged. The rule might also prevent courts from using narrowly tailored preclusion orders to address the loss of specific information. Focusing on intent invites arbitrariness, because it is one of the most difficult things one can ask a court to resolve, and it would also tend to favor unsophisticated plaintiffs as compared with savvy business defendants. The Advisory Committee has not addressed, much less rebutted, the principle underlying Residential Funding -- that the party responsible for the loss of evidence, not the innocent party, should be responsible for the consequences that result from loss of information. Making sanctions unavailable unless the party deprived of the evidence can demonstrate bad intent of the spoliator would make the judicial system look unjust. A better proposal might look like the following:

(e) Failure to Preserve Discoverable Information

(1) Curative measures. If a party failed to preserve discoverable information that should have been preserved in anticipation or conduct of litigation, the court may impose a remedy no more severe than that necessary to cure any prejudice to the innocent party unless the court finds that the party that failed to preserve acted in bad faith.

(2) Factors to be considered in fashioning a remedy. The court should consider all relevant factors in determining the appropriate remedy where a party failed to preserve discoverable information that should have been preserved in anticipation or conduct of ligation. The factors include:

(A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable;

(B) the reasonableness of the party's efforts to preserve the information;

(C) whether the party received a request to preserve information, whether the request was clear and reasonable, and whether the person who made it an the party consulted in good faith about the scope of preservation;

(D) the proportionality of the preservations to any anticipated or ongoing litigation; and

(E) whether the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.

Steven J. Twist (396): This rule is a much-needed reform. The fear of spoliation sanctions is a major driver of litigation cost. The fear is created by the lack of a nationwide standard that prohibits sanctions for loss of information unless it was in bad faith.

Hon. Shira Scheindlin (398): This rule does not provide a clear standard for preservation, as many urged the Committee to do. It does propose a national standard for imposing sanctions. At the moment, the circuits are in disarray, and I agree that a single national standard for the federal courts would be desirable although such a standard will not bring true national uniformity as the fifty state courts may adopt different standards. The idea of curative measures is good, but the rule is unclear and seems to be too restrictive. In Mali v. Federal Ins. Co., 720 F.3d 387 (2d Cir. 2013), the court addressed an instruction to the jury that it had the power to find that if a party had control over information but failed to preserve it the jury could infer that the lost information was unfavorable to that party. The court said this was not a sanction and that neither the court nor the jury was required to make such a finding. So it sounds like a "curative measure" under the proposed rule, but how many judges would think of a jury instruction as a curative measure? In sum, this proposal will create new problems without solving old ones. Magistrate Judge Francis has proposed a different rule. I agree with his proposal and all of his comments.

Eduarde Miller (Boehringer Ingelheim, USA, Inc.) (399): The proposed rule would appropriately prohibit sanctions for failure to preserve discoverable information unless the failure was "willful or in bad faith" and causes "substantial prejudice." Such a standard is necessary and long overdue. There is no doubt about the need to create a uniform national standard aimed at avoiding costly over-preservation and ancillary litigation over allegations of spoliation. But proposed (B)(ii) is unnecessary and could eviscerate the entire rule by allowing courts to impose sanctions without finding willfulness or bad faith. And the conjunctive should be "and" in (B)(i). Also, the factors in (e)(2) should be removed because they are not relevant to the principal point in the proposed rule and there is a risk that they could be converted into mandates for certain conduct. Finally, it would be better to add a clear, bright-line standard for preservation to the rule.

Donald Slavik (Prod. Liabil. Section, AAJ) (403): The proposed changes only encourage stonewalling and hiding the ball, both of which regularly occur already in product liability litigation. We already know that the failure to produce information by defendants often causes substantial prejudice. But making plaintiffs prove that imposes an unfair burden on them.

John H. Hickey (AAJ Motor Vehicle, Highway and Premises Liability Section) (410): The proposed amendment is a step in the wrong direction. Spoliation of evidence is a chronic problem with regard to certain defendants, especially multinational corporations. But the changes will set the bar for obtaining sanctions so high that they will never be met.

Mark S. Stewart (Ballard Spahr) (412): Currently there is a diversity of judicial views on preservation and sanctions across the country. This diversity means that companies that operate in multiple jurisdictions have to err on the side of over-preservation, which drives up discovery costs. The uniform standard contemplated by the proposed amendment will allow companies to formulate a single strategy geared toward complying with that national standard. A uniform

federal standard will probably also impact state practice. These developments would benefit plaintiffs as well. Before the use of social media was widespread, plaintiffs' counsel generally did not have much reason to pay attention to the possibility of being sanctioned. Today, the increasing importance of social media in cases brought by individuals changes that calculus. The cost of preservation sanctions motions may soon be visited more evenly on plaintiffs and defendants. The 2010 FJC study demonstrated that spoliation motions are infrequently granted, but that they generally double the time it takes to resolve a case, and that it is 27 times more likely that the case will proceed to trial. Limiting sanctions to intentional misconduct will reduce this expensive and time-consuming motion practice and facilitate efficient case disposition that will ultimately benefit all litigants.

Mark Kundla (416): The proposed rule appropriately limits sanctions to situations in which the party's conduct is "willful" or in "bad faith" and causes "substantial prejudice." These changes will help to mitigate a litigant's ESI burden, which often results in excessive costs of document retention.

Harlan Prater (418): The amended rule would establish a much-needed uniform national standard that would curtail costly over-preservation. But the use of the term "willful" as part of the standard is problematical because some courts define it in a way that would make sanctions too easy to obtain. I think that the standard should be "willful and bad faith."

William Adams (419): The proposed rule would alleviate the threat of sanctions for minor or unintentional failures to preserve every piece of potentially relevant evidence.

Daniel Edelman (420): This change, like all the proposed changes, would have a disproportionate impact on a plaintiff's already-limited ability to obtain relevant discovery from evasive corporate defendants. The cumulative effect of these changes would devastate our clients's ability to pursue their legal claims in what is already a David v. Goliath situation.

Dave Stevens (428): I'm not a lawyer, but I favor these changes. I own a small campground in Ohio, and find that I spend about as much time trying to minimize the threat of litigation as I do trying to win more customers. I favor the limit on penalizing businesses for discarding information to cases involving bad faith. The cost of litigation has caused us to eliminate diving boards and the rope swing, and I'm not going to install a zip line due to liability worries.

Ryan Furguson (433): The new sanctions provision is a positive step, which should prevent sanctions being imposed on a party without consideration of the impact of the loss of evidence on the case. The costs of storing and later reviewing this material put undue pressure on the parties to settle without regard to the merits.

Donald Bunnin (Allergan) (436): We favor the amendment because we believe it will clarify litigants' obligations and ease some of their burdens. In one product liability trial, we preserved and collected approximately 10 million documents. But only four thousand needed to be produced to plaintiff. Yet the costs of preserving the data exceeded $275,000. We would support changing the rule to say willful "and" bad faith.

James Cocke (444): I support the amendments. We are a medium sized company that finds that current discovery avenues are so broad that if we were to truly attempt to comply with

all of the discovery demanded of us we would have to shut down our operation and spend all of our time addressing ESI and the endless monster that modern computers and their progeny have created.

Stephen Aronson (446): I agree with Sen. Kyl that creating a national standard against discarding information that would hamper litigation is beneficial.

Robert D. Curran (448): Spoliation of evidence is a chronic problem with regard to certain defendants, especially multinational corporations. In any case involving a car crash that ends up in federal court, the parties anticipate litigation. Indeed, we frequently encounter work product objections to discovery that are premised on the anticipation of litigation. But critical evidence, such as security videos, black box data, automobiles themselves, devices involved in the accident, and the like are often destroyed or lost. The proposed change to Rule 37(e) is a step in the wrong direction because it sets the bar for sanctions so high that it will never be met.

Vickie Turner (450): We agree with LCJ and commend this proposal. We also agree that the standard should be "willfulness and bad faith" and that (B)(ii) should be removed. We also think that there should be a clear standard on when the duty to preserve arises.

David Hill (452): I agree with Sen. Kyl that there should be a clear national standard that says companies can be punished for discarding information only if done in bad faith.

John Brown (454): I support a clear national standard that would allow companies to be punished if they discard information in order to hide something or hamper litigation or if done in any other bad faith. But discarding as part of a records retention system it should not be punished.

Michael Scott (455): E-Discovery has posed new and difficult problems regarding evidence retention. I urge the adoption of a clear, bright-line test to determine when a party is under an affirmative duty to preserve information. I think that commencement of litigation should be the standard. I think that (B)(ii) should be removed became it would "swallow the rule." I also think that in (B)(i) the standard should be "willful and bad faith." I urge the deletion of the factors in 37(e)(2). If they are not deleted, they should be put into the Note.

Niels Murphy (456): The proposal to adopt a rule establishing a national standard holds great promise to curtail costly ancillary litigation about allegations of spoliation. But (B)(ii) could "swallow the rule" and should be removed. There also should be a clear, bright-line standard for the trigger. The "anticipation of litigation" standard in the proposed rule is not sufficient, and a "commencement of litigation standard" would be better.

Andrew Knight (458): I generally support new 37(e). Presently spoliation becomes the focus of the litigation in many cases rather than the merits of the case. I think the "willful or bad faith" standard is troubling because many courts consider a company's establishment of routing auto-delete mechanisms to be "willful." I think that the standard should be "willful and bad faith." I also believe that (B)(ii) should be removed from the rule so as to avoid confusion.

Stuart Delery (U.S. Dep't of Justice) (459): It is important that the Committee keep in mind that this rule will govern not only complex commercial litigation but also all other types of cases. Litigants with less sophistication, such as pro se litigants, do not have access to technical

personnel to advise them on computer-based concerns.

Jo Anne Deaton (460): The proposed amendments to 37(e) would substantially benefit litigants and the courts by providing more guidance on how to proceed when a party fails to preserve evidence. Particularly in the products liability context, on many occasions plaintiffs or their attorneys fail to make any effort to preserve the condition of the subject product, yet still file suit claiming the product was defective. It is challenging indeed for manufacturers to defend a lawsuit when the subject matter of that lawsuit is missing or irrevocably altered post-accidents. The proposed amendments would help provide consistency in dealing with these issues.

George Schulman (L.A. Country Bar Assoc. Antitrust & Unfair Bus. Prac. Section) (462): Our experience in modern litigation is that the amount of electronic information is exploding exponentially. A case involving a singular event, such as a filed contract, can generated thousands of emails among the parties. Matching up electronic production for all of the parties almost always reveals missing emails, whether they are missing because of lack of preservation or just a bad search for evidence requires additional rounds of discovery and often leads nowhere. Thus, while we appreciate the Committee's work in establishing a national standard and exempting mere negligence from severe sanctions, we note that efforts to uncover what is missing and why will surely run into the timing and discovery limits proposed elsewhere in the report.

Janet Poletto (463): We view the proposed amendment as an improvement over the existing situation. It appropriately limits sanctions to situations where a party's conduct is "willful" or "in bad faith" and causes "substantial prejudice." These changes will help mitigate a litigant's ESI burden, which often results in excessive costs of document retention and management for fear of sanctions.

Lisa Kaufman (Texas Civil Justice League) (466): TCJL strongly supports the proposed language for 37(e) requiring a showing of willful or bad faith conduct causing substantial prejudice before sanctions may be imposed. This change will reduce the risk that routine data maintenance will expose a litigant to sanctions simply for performing its day-to-day business operations in a cost-effective and reasonable manner.

Michael Freeman (Director, Tort Litigation, Walgreen Co.) (467): I favor the changes, but think 37(e) should go further. The word "and" should be substituted for the word "or" in (B)(i) on the culpability standard, and (B)(ii) should be deleted.

Kenneth Wittnauer (VP & Gen. Counsel, Britax Child Safety, Inc.) (483): These changes are helpful in providing certainty regarding preservation obligations. But I join others in saying they do not go far enough and urge that the word "and" be used instead of "or" in (B)(i) and that (B)(ii) be removed from the rule.

Peter Mancuso (Nassau County Bar Ass'n) (487): We support the proposed amendments to 37(e) and welcome the general approach of dealing with the failure to preserve ESI in a less onerous and fairer manner. In particular, we support the effort to incorporate directly into the rules an obligation to preserve information in anticipation of litigation. Rather than relying on inherent power, codifying the principle makes sense. We also agree that the correct focus should be on "discoverable information." We agree that sanctions (rather than curative measures) should be imposed only upon a showing of substantial prejudice and willfulness or bad faith.

We disagree with those who have argued that this change will encourage careless or sloppy preservation efforts. We do not believe counsel or their clients will act in such a manner simply because a finding that (B)(i) is not satisfied might enable them to avoid sanctions.

Robert Buchbinder (488): The obligation to preserve evidence and the consequences of noncompliance have, under the current rules, resulted in meritless spoliation arguments that often derail litigation. The proposed changes to 37(e) are most helpful in providing certainty to my clients regarding their preservation obligations.

Rebecca Kourlis (IAALS) (489) (reporting on a Dec. 5, 2013, forum involving many prominent people): Rule 37(e) received a mixed response from the group that did not divide consistently across plaintiff and defense lines. Both plaintiffs and defendants have "skin in the game" when it comes to preservation. A number of participants saw the need for a rule change but felt that the language needs some revision. Regarding (B)(ii), there was concern that the language used is vague and risks swallowing the rule. Because the sanctions turn on the importance of the information rather than culpability, very severe sanctions could result from essentially innocent conduct. There was some concern about including curative measures in a sanctions rule. But one general counsel noted that including those measures allows the parties to take steps to provide substitute information when the originally sought material is no longer available. Several judges who participated also expressed support for the curative measures provision in order to provide the court with flexibility. On the plaintiff side, there was some concern that the rule does not adequately deal with "mid range" cases where severe sanctions are not justified but curative measures do not fully cure the problem. Judges noted that they think that the proposal provides enough flexibility, and that they liked the high bar for culpability in (B)(i). But others raised concerns about the use of "or" in (B)(i) because behavior can be "willful" without any bad intent. There was also concern about what "substantial prejudice" means.

James Edwards (496): Litigation today is inefficient, costly, and uncertain. One reason for these problems is uncertainty about preservation. We lack clear and consistent guidelines for preservation of information, and in many cases parties must settle claims due to the high costs rather than on the merits. Proposed Rule 37(e), along with amended Rule 26(b), should address the burdens of both over-preservation and overbroad discovery.

Kenneth Lazarus (on behalf of American Medical Assoc. and related organizations (497): The trend of federal and state law is toward increasing storage requirements for doctors, and many doctors are now transitioning to use of electronic health records, including adoption of new retention and back-up policies. The proposed amendments move in a constructive direction by focusing on the extent to which a party is placed on notice that litigation is likely and that the information lost would be discoverable in such litigation. We are also pleased with the provisions that emphasize reasonableness in preservation, for these provisions provide some assurances that doctors can make preservation decisions with some confidence that they will not face sanctions should information be lost despite their efforts. We think, however, that the specifics could be sharpened. For one thing, the rule or Committee Note could direct judges to look with favor on preservation standards adopted by professional entities.

Martin Stern (501): I support the proposed amendment to Rule 37(e). But I think that it should be changed in two ways. First, "or" in (B)(i) should be changed to "and," and second, (B)(ii) should be eliminated altogether. Several also urge adoption of clear, bright-line standards

for preservation decisions. Many other comments repeated this support and voiced these two recommendations for change, including those from Andy Osterbrock (Dow Corning Corp.) (514); Joel Neckers (524); Christian Bataille (578); Chet Roberts (579); Jamie Bryan (621); Vincent LaMonaca (on behalf of SVC, Inc) (640); Kenneth Waterway & Kelsey Black (652); L. Neal Ellis, Jr. (665): Tony Hullender (BlueCross BlueShield of Tennessee) (667); Lawrence D. Wade (668); Rex Darrell Berry (669); Scott Barbour (672); Lawrence L. Connelli (675); Lindy H. Scoffield (678), James T. Anwyl (679) and Leigh A. Stepp (680) (the last three letters are identical and come from the partners in Anwyll, Scoffield & Stepp, LLP); Debra L. Stegall (686); Richard Chesney (687), Gregory Bwower (690), Henry D. Nelkin (691), Michael Jenks (692), Lynn H. DeLisa (697), Rudolph Petruzzi (764) (the previous six comments are all from lawyers in the same law firm and endorse the amendments in general and 37(e) in particular); Cheryll L. Corigliano (694); Joyce G. Bigelow (696); Jeffrey Rubin (703); Mark Lavery (726); William Pokorny (731); Lee Mickus (Colorado Civil Justice League (755); Daniel Kuntz (MCU Resources Group, Inc.) (761); Michael I. Thompson (792); Michael Murphy (797); Jennifer B. Johnson (802).

Patrick Malone (503): This amendment is unnecessary. Moreover, the opportunity to obtain an adverse inference jury charge is an important incentive to keep parties honest in their discovery obligations. This rule change would reward wrongdoing. This comment resembles many other comments, both in its objections to the 37(e) proposals, but also in enumerating objections to the proposed changes to Rule 4, Rule 26, Rule 30, Rule 31, Rule 33, and Rule 36. Similar comments were received from many others, including: James Ragan (528); Victor Bergman (537); A. Laurie Koller (538); Justin Kahn (542); David Rash (545); Chris Nidel (547); Kevin Hannon (548); George Wise (549); Gregory Smith (551); Daniel Ryan (552); William Smith (553); John Lowe (557); Margaret Simonian (561); Teresa McClain (562); James E. Girards (563); Nicole Kruegel (570); Clark Newhall (577); James Howard (583); Christopher Bouslog (584); Tom Carse (586); E. Craig Daue (590); David Rudwall (591); Geoffrey Waggoner (592); John McCraw (595); Kenneth Miller (596); Michael Blanchard (597); Mark Gould (598); Herbert Ogden (608); Scott Loarned (611); Lars Lundeen (614); Marcia Murdoch (616); Shane Hudson (620); Thomas Bixby (627); Ian Crawford (628); James Swift (633); Todd Schlossberg (644); Craig Miller (650); John Barylick (651); Thomas Yost (653); Brad Prochaska (658); Peter Ehrhardt (661); Alexander Blewett (685); Benjamin Graybill (704); Craig Wilkerson (718); Emily Joselson (on behalf of Langrock Sperry Woll) (730); Scott Smith (732);Karen Roby (734); Anonymous Anonymous (745); Sam U (746); Lisa Riggs (752); Mark Mandell (799).

Lawyers for Civil Justice (540) (supplementary comment): We strongly support the effort in Rule 37(e) to provide a uniform and predictable national standard that allows parties with potentially discoverable information to use their best judgment to manage their preservation efforts. And we still think that "willful" should be eliminated in (B)(i), and that the (B)(ii) exception should be eliminated. We also favor adding relevance and prejudice to the list of factors in 37(e)(2).

Glenn Hamer (Arizona Chamber of Commerce) (576): "By permitting [sanctions] only where willful conduct was carried out, the Committee's recommended changes to Rule 37(e) allow companies some certainty as they balance protecting themselves from litigation with addressing the needs of the market they serve. We urge the committee to further strengthen this protection by limiting spoliation sanctions only where conduct was committed in 'bad faith.'"

Bradford A. Berenson (General Electric Co.) (599): GE's preservation challenges are enormous. It has over 300,000 employees world-wide, plus another 100,000 contractors who work closely with its employees. Approximately 35,000 employees leave the company or transfer jobs each year. GE operates in over 3,400 locations in 160 countries. In confronting preservation challenges, GE is faced with approximately 4,770 terabytes of email alone. Each time litigation is reasonably anticipated, GE's lawyers have to define some scope for our preservation efforts, and then ensure that the hold is honored. Enterprise-wide, this is a herculean task. The present "gotcha" game some plaintiffs adopt forces GE to engage in tremendous over-preservation. But those costs are overshadowed by the greater costs that arise when discovery actually occurs in litigation. "As costly as it may be to store and preserve massive amounts of data, it is even more expensive to collect, process, and review, a task that typically requires a trained professional to examine each document that might be producible." (The comment offers three examples of situations in which GE incurred huge costs that bore no reasonable relation to the litigation stakes.) GE is particularly struck that the quality of justice in other countries seems relatively comparable with that in the U.S., while the cost of litigation in those countries is much, much lower. "[T]he disproportionate cost of U.S. litigation is a competitive disadvantage for global companies based in the United States. It also means that were participants in the global litigation market have a chance to opt out of the U.S. system, they often do."

Federal Magistrate Judges' Ass'n (615): The FMJA endorses the revision of Rule 37(e). "We believe the drafters have struck a balanced approach by requiring courts initially to look to possible remedies and weighing culpability in imposing sanctions."

Florida Justice Reform Institute (634): We strongly support the basic concept behind the proposed changes to Rule 37(e). A national standard is beneficial to promote the rapid development of a robust body of case law and to promote certainty and efficiency. But we think that (B)(i) should be limited to bad faith and the (B)(ii) should be removed from the rule. In addition, we favor adding a materiality factor to proposed 37(e)(2).

Cal Burnton (642): I favor the change to bring back a sense of professionalism and search for justice, which has been disappearing for our profession. With all the documents and electronic data existing wherever paper and data reside, one can never say that "all documents" have been produced. Yet the "sanctions" game will be played for no reason other than to put pressure on the other side, on the misguided view that if you hurt the other guy, you must be helping your own clients. But the rule should be changed in (B)(i) to require both bad faith and willfulness.

Hon. Lois Bloom (E.D.N.Y.): Along with the proposed changes to Rule 26, 30, and 33, the change to Rule 37(e) will cause more disputes and increase cost and delay. These amendments will only create new problems instead of curing existing ones.

Dana Bieber (Liability Reform Coalition of Washington): We support proposed 37(e), which we believe holds great promise to establish a much-needed uniform national standard that would curtail costly over-preservation.

Richard Valle (656): I am against the proposed changes. "As for the proposed revisions concerning Rule 37(e), I have a current case where it has taken almost a year to obtain all of the different versions of my client's medical records and bills. The court just ordered a forensic

examination of Defendant's computer system. I don't believe we would be learning these things under the proposed revisions to the rules."

Noah Purcell (Solicitor Gen. State of Washington, on behalf of Washington State Attorney General's Office) (677): We enthusiastically agree with the proposed amendment to Rule 37(e). The absence of express proportionality limits in the current rules has the effect of significantly inflating the costs, complexities, and burdens of litigation by incentivizing over-preservation and over-broad discovery. We also favor the idea courts should prefer using curative measures to imposing sanctions.

Michael E. Klein (Altria Client Services) (684): I am manager of discovery support for all Altria and Philip Morris USA litigation. We have repeated experience producing huge amounts of information and finding that virtually none of it actually surfaces in the litigation. In answer to the Committee questions during hearings about whether the Rule 37(e) amendments would really result in measurable relief for businesses, we can report that the answer for us is "yes." The immediate benefit would be a significant reduction in the amount of information subject to preservation in our product liability litigation. So "the proposed Rule 37(e) amendments will provide millions of dollars of relief annually." We think that the rule should not be limited to ESI, that (B)(ii) should ge eliminated, that 37(e) should not be retained, that the rule should define "substantial prejudice", and that (B)(i) should not authorize serious sanctions based on an unmoored concept of "willfulness."

Kenneth Suria (689): This is a welcome change because it offers protection for inadvertent and unintentional misplacing of discoverable material.

James Heavner (The Hartford Financial Serv. Group) (748): The Hartford spends millions of dollars every year preserving and producing documents, and supports this effort to provide a clearer and more reasonable standard for assessing this effort. But we think that looking to the Sedona Conference's emphasis on whether efforts to preserve were made in good faith is more promising. We also think that the rule should be emphasize whether alternative sources exist for the information.

Paul D. Weiner (704): My firm is the largest management-side law firm in the world. I spend full time on E-Discovery and have a team working for me. I want to "underscore the crushing eDiscovery burdens facing employers in today's digital world." Consistency across circuits is critical and is missing. One thing that is a bane is the frequency of overly broad cut-and-paste preservation demands, which are served in a knee-jerk fashion. I think that the mandates of Rule 26(g) should apply to such demands, and that lawyers be directed to make sure they are proportional. There is a dire need for rule amendments.

Wendy Butler Curtis (Orrick) (864): We favor requiring a finding of bad faith before sanctions may be imposed, partly on the theory that this standard will reduce gamesmanship and unjustified sanctions motions. To validate this assertion, we examined sanctions rulings from four circuits -- the 2d, the 8th, the 10th, and the 11th Circuits. Collecting all sanctions orders and opinions from those circuits gave us a pool of 119 cases. We then grouped cases into two categories, those where a finding of bad faith was required and those in which it was not. We hypothesized that a higher proportion of motions would be granted where the more demanding standard applied because the higher standard would deter groundless motions. Of the 119 cases involved, 32 used the bad faith standard and the other 87 used a lesser standard. Under the bad

faith standard, 62% of the cases resulted in sanctions, while under the lesser standard the success rate was 45%. We believe these data show that the higher standard reduces the likelihood of groundless motions.

Philadelphia Bar Ass'n (995): The association endorses proposed 37(e).

Assoc. of the Bar of the City of New York Comm. on Federal Courts (1054): We agree that there is a need to revise Rule 37(e) to address issues of data preservation, spoliation and the availability and generally support the approach adopted in the proposed rule. We also believe that the factors identified in 37(e)(2) are relevant and appropriate in assessing the reasonableness of a party's efforts to preserve information for litigation. Nonetheless, we have reservations regarding some provisions and believe that further study and revised drafting is necessary before a final rule is promulgated. We see this rule as introducing a new concept of "curative measures," but it is very imprecise in defining the contours of what may constitute appropriate measures. The text of proposed 37(e)(1)(A) discusses what appear to be three distinct remedies, but it is not clear why these are not all considered curative measures. We believe it would be useful for the Note to explain more fully that curative measures are intended to be remedial in nature and to restore fairness to the litigation process by putting a party disadvantaged by loss of information in a position as close as possible to what would have been true had the information not been lost.

Seth R. Lesser (1102): The proposed changes reflect changes that may be outdated in some areas of law. In our cases, so far as electronic discovery is concerned, the last few years have evidenced a sea change in the reduction of the expense and time spent on ESI discovery. The increased sophistication of both in-house and hired electronic discovery consultants is notable. At the same time, there are also far more efficient advanced search and review programs. As a result, we are rarely seeing companies having to spend substantial resources in our wage and hour cases to address legacy systems that are not compatible with more advanced programs. This has been a dramatic and marked change.

Robert Kohn (Federal Bar Ass'n) (1109): We support proposed 37(e). By making clear the relevant standards, the proposal simplifies the job of litigating and deciding a spoliation sanctions motion. This may also lead to more compromises to resolve spoliation issues by agreement rather than seeking court intervention.

John Vail (1118): The zeal of the Committee to address the concerns of outsized entities is well illustrated by proposed Rule 37(e), which has received insufficient comment. The goal of the Committee is to address preservation obligations that arise, as it acknowledges, primarily as a matter of substantive state common law. This federal procedural fix to a concern about state substantive law is beyond the ken of the Committee.

David Howard (Microsoft) (1222): The proposed amendment to 37(e) will help reduce the costs of over-preservation. Microsoft preserves data from every custodian at times, even though the lawyers working on the matter know there is a de minimis chance that the vast majority of the employees will ever be relevant to the litigation. If the rule is implemented, Microsoft will engage in this type of over-preservation much less often, because we will know that we can, in good faith, locate and instruct only those employees who are most likely to have relevant information without facing the tactical threat of a spoliation motion. At the same time, there is very little risk that the new rule will lead to insufficient preservation. It is in Microsoft's

best interests to locate the key actors and place them under a litigation hold.

ARMA International (1263): ARMA is comprised of more than 27,000 professionals in the field of records and information management. It is the leading international organization dedicated to information governance. It maintains and designs information governance programs. Its governance programs are affected by judge-made preservation standards. The amendments to Rule 37(e) will therefore directly affect what ARMA does. It generally supports the proposed amendments insofar as they create a single, national standard for evaluating sanctions for spoliation. It does not profess expertise in managing discovery in litigation and does not express an opinion about the best way to prevent spoliation. But it can report that preservation or litigation holds are the largest exceptions to a records manager's maxim to retain document and information for only as long as it has business value or is statutorily required. Simplifying this standard should therefore produce information management benefits.

ARMA disagrees with those commenters who have argued that this standardization is illusory because the Federal Rules do not bind state courts. Not only do many state courts explicitly look to the Federal Rules, but the underlying premise is flawed; establishing a minimum federal standard will matter. It also agrees with the aim to raise the culpability standard above mere negligence. Because of the Second Circuit's Residential Funding decision many organizations have had to manage their preservation behavior according to this broad standard. This has been one of the causes of massive over-preservation. With the potentially devastating effect of spoliation sanctions hanging over their heads, organizations make preservation decisions out of fear as to how they will be second guessed after the fact. Magistrate Judge Francis pointed out that 9% of organizations surveyed by ARMA said that they did not have a records retention policy and 21% did not have policies that covered electronically stored information. But that disregards the fact that about 70% do have such policies, and these organizations are nevertheless over-preserving because they have reasonable policies but must deviate from them to avoid the risks of sanctions. So the reality is that the current low culpability standard does have a practical effect on how organizations manage their data. The specter of sanctions disrupts generally accepted data disposition principles because the cost to an organization of being accused of spoliation is vastly more significant than the large costs of over-preservation. From the perspective of the information governance professional, the uncertainty of the negligence standard drives an over-abundance of caution which not only makes the whole process more expensive, but prevents the deletion of irrelevant data.

George Wailes (1292): The proposed rule is unclear about what standard of conduct it is imposing when it refers to "willfulness." Does it intend to protect parties that ignore their obligations to preserve evidence? That seems to be true if it is rejecting the Residential Funding and Sekisui decisions, which say that intentional destruction does not require malice. Doing so will create pressure on law-abiding bodes to be less zealous in protecting the integrity of the fact-finding process, and would cut against the recently-amended ABA Model Rule 1.1, that says lawyers should keep abreast of technological developments. The rule also fails to say anything about the most important new development -- technology-assisted review of electronically stored information. This technology makes good on the hope of many that the daunting volumes of material can be tamed by technology, but it is not mentioned in connection with Rule 37(e).

P. David Lopez (EEOC) (1353): The EEOC has issued regulations requiring retention of various records. Compliance with these regulations is critical to EEOC's ability to investigate charges of discrimination. It agrees on the need for a preservation rule, and would favor a rule

like the Category 2 rule presented at the Advisory Committee's April 2011 meeting. If a sanctions-only rule is not adopted, something like that should be reconsidered. It provides a useful standard regarding the scope of preservation but avoids the complications of the Category 1 rule. The rule actually proposed says in the Note that reasonable behavior should not be punished. But by definition negligent conduct is not reasonable. Therefore EEOC believes that the rule should permit remedial actions beyond the curative measures referred to in proposed 37(e)(1)(A) when relevant evidence is lost through negligence, and particularly if it is lost due to gross negligence.

Evan Stolove (Fannie Mae) (1360): The current version of Rule 37(e) has proven to be a confusing and difficult standard to apply, and has been rarely used. It also does not take into account the intent of the party that has lost ESI and whether there has been prejudice as a result even though those factors have often been important to judges making sanctions decisions. In that gap in the rules, there has been a proliferation of cases on spoliation that provide no uniform basis upon which to assess a party's preservation efforts. The proposed rule is intended to provide a uniform, national approach to spoliation sanctions. Fannie Mae supports the proposed changes. But it would favor changing proposed (e)(1)(B)(i) to say "willful and bad faith." It also thinks that proposed (e)(1)(B)(ii) should be removed from the rule. It has too many terms that are undefined, and the "irreparably deprived" criterion will probably be heavily litigated if adopted.

Jonathan Marcus (CFTC) (1366): Proposed 37(e) should provide much-needed national uniformity for the preservation of information, especially ESI. Courts across the country have reached different conclusions for many years on the subject of preservation, and that cacophony makes it difficult for an agency like CFTC because it litigates in all federal courts across the nation. The Second Circuit's negligence standard in Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 108 (2d Cir. 2002), is different from the Eighth Circuit standard in Stevenson v. Union Pacific. R.R., 354 F.3d 739, 746 (8th Cir. 2004), which requires intentional destruction to trigger sanctions. The Note to proposed 37(e)(1)(B)(i) rejects Residential Funding and the rule provides uniform guidance on this difficult issue which varies from circuit to circuit. It is crucial for a governmental agency to be able to make consistent agency-wide preservation decisions. We support the proposed rule because it makes this possible.

Michael J. Buddendeck (Am. Inst. of Cert. Pub. Accountants) (1451): The AICPA is the largest membership association in the world that represents the accounting profession. It supports the recommendation of a national, rules-based federal standard for considering sanctions when parties fail to preserve discoverable information. Overhaul of Rule 37(e) is necessary to address the growing phenomenon of over-preservation. This practice is exacerbated by the different standards courts around the country have employed in imposing spoliation sanctions. Parties now use spoliation motions as a strategic tool to drive up the costs of litigation, and many entities have responded by developing preservation policies based on fear of outlier results. The AICPA strongly supports the Committee's efforts to combat these serious problems, and regards proposed 37(e) as a significant step toward reducing the costly practice of over-preservation. There is a pressing need for a uniform, national standard.

Peter Oesterling (Nationwide Mut. Ins. Co.) (1457): "Nationwide disagrees with the proposed changes to rule 37(e). These proposed changes not only do not advance the Committee's stated goal of establishing a uniform, national standard of preservation, these proposed changes would actually undermine that goal." The reliance on findings that a party's

actions were "willful or in bad faith" and that they caused "substantial prejudice" in the litigation would not close the door to imposition of sanctions is a broad array of circumstances. In particular, the term "willful" is vague, ambiguous and susceptible to multiple interpretations. The factors in proposed 37(e)(2) do not provide guidance. "Given the uncertainty with all three of these terms, parties like Nationwide will likely preserve greater amounts of data and information in order to avoid potential sanctions." For similar reasons, Nationwide opposes deletion of the protections of current 37(e). Nationwide urges that the sanctions rule be confined to situations in which sanctions may be imposed only on proof a party acted with the specific intent to deprive its opponent of information relevant to a claim or defense. In addition, the "no culpability" provision in 37(e)1)(B)(ii) should be withdrawn.

Julie Kane (Amer. Ass'n Justice) (1467): Proposed 37(e) would impose an extremely large burden on the party seeking sanctions. Substantial prejudice will be next to impossible to establish. The defense bar's proposal that the standard be "willful and bad faith" would make this worse. "It must be noted that the parties advocating for a narrow standard for sanctions are the same parties that usually possess the most relevant information in civil litigation." Moreover, the "national" standard won't really be national because every jurisdiction has its own set of laws and rules that require varying levels of preservation.

Thomas R. Kelly (Pfizer) (1491): "Pfizer does not expect the proposed amendments to have an immediate or dramatic effect on how and when the company preserves documents. But, under the proposed amendment, we believe Pfizer will gradually be able to lessen the burden with respect to its preservation efforts. Under the proposed rules, we believe Pfizer will be able to take a more practical and proportional approach to preservation, an approach which takes into account the facts and circumstances of each case. These may not be watershed changes, but they will be important and we hope will ultimately mean that company resources can go toward discovery of new medicines, rather than the cost of discovery for civil litigation."

Mark E. Harrington (Guidance Software) (1519): Guidance has deep concerns about this proposed rule. It proposes a radically altered framework regarding discovery sanctions that would severely constrain the ability of the trial judge to exercise sound discretion on a case-by-case basis. It places a burden on the innocent party to prove substantial prejudice and willful or bad faith conduct. Willfulness and bad faith are difficult to establish when the litigant does not have access to the lost evidence. In the Second Circuit, this showing would not be required under Residential Funding. Moreover, it would be extremely rare that the innocent party could show that the loss of information "irreparably deprived" it of any meaningful opportunity to prove its case.

Michael Lowry (1522): "In my Nevada practice, many of my cases now focus not upon the merits but instead litigate whether a spoliation instruction is warranted. 'Spoliation motions are now routinely filed. Trial courts are increasingly being asked to delineate the scope of a party's duty to preserve evidence.' Glover v. Smith's Food & Drug Ctrs., Inc. 2013 WL 5437096 (D. Nev. Sept. 26, 2013). Why? A spoliation instruction dramatically changes the case. I presented a webinar for USLAW in October, 2013, concerning spoliation. In preparing for the webinar I surveyed colleagues, and eventually the participants of the webinar, as to whether anyone had ever tried a case when a spoliation instruction would be issued. I could not find one. I instead received a history of cases that settled, rather than going to verdict, only because of a spoliation instruction. This anecdotal experience is why spoliation motions have become a predominant factor in my practice."

Andre Mura (Center for Constitutional Litigation) (1535): The entities complaining about the burdens of production fail to distinguish between what they preserve solely for litigation purposes and preservation for other reasons. The fact that they preserve far more than they produce is not a problem that will be solved by proposed 37(e). The proposed rule and the problem of over-production are like two ships passing in the night. Parties with a lot of ESI preserve a lot of that information for a variety of purposes, including for litigation. But instead of giving rules of preservation that these parties requested, the Committee has proposed a rule that allows parties to evade sanctions for their behavior unless the innocent party can prove things that are hard to prove. At best, the proposed rule is an experiment. At least a rule limited to ESI will not overturn the rulings of federal courts across the country in cases involving spoliation of other types of evidence. Adopting a bad faith standard is too strict. It is akin to a mens rea requirement in criminal law, but would be more challenging with a corporate party. We think that the "curative measures" provision should be amended to allow a permissive jury instruction that allows the jury to determine whether evidence was lost, and whether that loss was willful or in bad faith.

John P. Relman (1547): By displacing inherent authority, the proposed rule intrudes on the role of judges who must be given adequate tools and sufficiently broad discretion to discipline misconduct by parties appearing before them. The rule may also undermine substantive federal regulations. For example, the EEOC has promulgated regulations requiring employers to preserve certain personnel documents, and various circuits recognize that violation of those regulations may give rise to an inference of spoliation and corresponding remedial measures.

Lawrence Kahn (City of New York Law Dep't, joined by cities of Chicago and Houston and International Municipal Lawyers Assoc.) (1554): The Note's description of the increasing burden of preserving information is absolutely the cities' experience. Harsh spoliation sanctions are incentives to "gotcha" satellite disputes which disproportionately distract from the merits of cases. These problems force cities to expend scarce resources solely to avoid these irresponsible side disputes. The problems encourage over-preservation and unnecessary litigation holds, often followed by over-collection, over-identification of potential custodians, and over-designations of the types of ESI to include even the most remotely relevant. To guard against this activity, the cities propose that bad faith be required to support sanctions. It is also critical to highlight the importance of proportionality to preservation decisions, including those made before litigation is filed.

Jonathan Redgrave (1608): I concur in the concern of the Federal Magistrate Judges' Association and think that the proposed rule should be revised to read: "If a party does not provide information requested in discovery because the party failed to preserve discoverable information that should have been preserved . . ." In addition, I think that proposed Rule 37(e)(1)(A) should require a predicate finding that there was a duty to preserve, and that there should be a finding of prejudice as well. I also agree that "willful" is problematical in (B)(i). Based on further reflection, he also thinks that the rule should be expanded to include a 37(e)(2), (3) and (4) to clarify the meaning of bad faith and substantial prejudice, and to preserve the provisions of current 37(e).

Patrick Oot (Electronic Discovery Institute) (1680): (He also serves as Senior Special Counsel to the Office of the General Counsel of the SEC.) The amendments provide litigants with much-needed tools to alleviate risk and mitigate significant cost. I predict that the growth

in "junk data" will continue to burden producing parties as evidentiary scope creeps across emerging technology. Limitations on scope and emphasis on proportionality are therefore critical. Failure to implement such limitations will have broad cost consequences. Technology is not keeping pace with the growth in volume of data, so that the right place for emphasis among attorneys should be reasonableness of search and collection, not improved tools. Accordingly, the rules must protect reasonable decisions. The submission includes an adaptation from an October, 2013, presentation entitled "At the Crossroads of Bad Faith & Negligence: How Sekisui Shows We Need a New Rule 37(e)."

J. Barton LeBlanc (AAJ) (1732): This proposed rule would disincentivize defendants from preserving critical evidence. Therefore, the rule should be limited to ESI if it is adopted. Better yet, the current rule should not be changed.

Robert Owen (1957): Since the adoption of the Federal Rules in 1938, the biggest changes in American civil litigation have flowed from the digital revolution. The explosion of digital information in the last 20 years means that there is an urgent need for rule reform now. Building on the ancient duty not to destroy known evidence, courts have recently created an entirely different duty -- to take affirmative steps to preserve potential evidence. The Committee's proposal does not tackle several disturbing aspects of this development, but its rule has the potential -- with some editing -- to address the problem of inconsistency and have a small effect on the expense of preservation. The Second Circuit's reliance on negligence as sufficient to support sanctions has skewed preservation practices everywhere, and this should be put right. Particularly given the complexity and variety of sources of ESI, this negligence standard is increasingly unfair. Therefore, "willful" should be removed from the rule as a standard for sanctions, and (B)(ii) should also be removed. In addition, the factors list should be removed. They do not provide definitive answers and leave out some important considerations.

William Butterfield (2034): It is too soon to be making further changes to the rules. The proponents of change started their campaign before the ink was dry on the 2006 amendments. The studies on which they relied were ill conceived, and relied often on unscientific surveys of biased sample populations. In addition to these general reactions to the package, I support efforts to achieve uniformity regarding conduct giving rise to sanctions and provide guidance to avoid imposition of sanctions. I think that the separation between remedial measures and sanctions is sensible, and that avoiding the stigma of calling a minor remedy a "sanction" is desirable. I would therefore revise proposed 37(e)(1)(A) to say "permit non-sanction-based curative measures, such as additional discovery, ordering the party to pay reasonable expenses . . ." I also think that a showing of information loss should not be a condition for the curative measures. Additional discovery, in particular, may often be needed to determine whether curative measures are in order, and if so which ones. The Committee Note should make clear that other rules, particularly Rules 16 and 26, are available to respond to these concerns.

Kirk T. Hartley (2057): I urge the committee to recruit expert economic and scientific advisors about data management. This could cut through the clutter of partisan papers on the economics of data storage and searching through data. It would also be a partial antidote to the reality that the incredible pace of scientific change means that many of yesterday's computer problems have been solved, and that costs continue to plummet. In my view (having done this sort of work for courts under court appointment), the Committee should make decisions on e-discovery only with the benefit of neutral, expert advice about the future and costs. I note also that spoliation of evidence is a tort in most states, but proposed 37(e) seems to set substantive

standards. Moreover, the criteria set seem to have much less salience to toxic tort litigation (my area of experience) than to breach of contract litigation. For example, in my field old insurance policies are often the focus of litigation. Will Rule 37 permit insurers to discard the information about those old policies? An insurer might go to federal court seeking a declaratory judgment that Rule 37(e) permitted it to discard such old information, realizing that the rule is more favorable than state law on the subject.

New York County Lawyers' Ass'n (2072): We endorse the elimination of current 37(e). We believe the new rule should recognize the distinction between case-altering punitive measures, such as an adverse-inference instruction, even a permissive one, dismissal or default, and less punitive measures a court is allowed to use to remedy losses of information. Therefore the Note should say that less drastic measures under 37(a)(2)(B) may be employed, not as sanctions but as curative measures, in appropriate cases. We also think that the "least severe sanction" provision should be in the rule, not the Note.

Jason R. Baron, Bennett B. Borden, Jay Brudz, Barclay T. Blair (Information Governance Initiative) (2154): IGI is a recently formed vendor-neutral industry consortium and think tank dedicated to advancing the adoption of improved information governance practices. It generally supports the amendments in their present form, believing that it will be useful in weighing what constitutes "reasonableness" under Rule 37(e)(2). We believe that, although adopting a nationally uniform rule is desirable, true success in reducing the cost and complexity of litigation will come primarily from technological changes in the corporate office environment, coupled with greater education of the bench and bar on how ESI may be managed appropriately. The growth, and growing importance, of "big data" provide evidence of this technological shift. Arguments about whether "over-preservation" will be reduced by the new rule seem to us to miss what is clearly the essential message, that legal holds in the near future will necessarily involve orders of magnitude of information larger than the levels reached in 2014. Attention to information governance necessarily incorporates greater concern with respect to the life cycle of records and developing defensible deletion policies. Although the use of sophisticated technologies will not by themselves fully conquer the challenges of expanding data, these tolls give lawyers and parties much greater ability to manage their data sets in ways that hold out the potential to drive down e-discovery costs.

David R. Cohen (2174): I disagree with Judges Francis and Schiendlin and believe that these rule changes will reduce over-preservation, and I know that my views are shared by many companies that frequently have to make preservation decisions. Faced with severe consequences, the default response may be to try to comply with the most extreme preservation rules that have been adopted by any judges. Although the concerns about the term "willful or in bad faith" are legitimate, they are not a valid reason for desisting in the effort to generate national standards. So far as objections about the "burden" of showing prejudice or bad faith are concerned, I do not think it is necessary for the rule to try to allocate burdens. Judges are accustomed to making many kinds of decisions where burdens of proof are not pre-assigned. Judges should have the freedom to make these determinations based on the circumstances of the individual case, with neither side having a pre-determined handicap.

Ariana Tadler (2173): I oppose proposed 37(e), which I regard as the most complex and challenging of the amendment proposals. Preservation has long been a difficult feature of e-discovery; in the efforts leading up to the 2006 amendments it was considered but ultimately considered too thorny and set aside. It is not surprising that it was extraordinarily difficult to

develop the current proposal. As late as April 2013, the Committee was still considering alternative versions, and wordsmithing continued until publication. Since the proposal was published, the commentary has featured a vigorous debate about the most fundamental issues, such as the difference between curative measures and sanctions, culpability standards and the bearer of the burden on these questions.

This controversy is mirrored in the experience of Sedona Conference Working Group 1 -- which exists for the very purpose of forging consensus on discovery issues. It could not reach consensus on an acceptable rule governing sanctions. Although the Steering Committee (not the full Working Group) did ultimately submit a proposed rule founded on "good faith" (rather than "bad faith") that process was also extremely difficult and the end result was a proposal that did not reflect a unanimous agreement. The disclaiming footnote was added to the proposal and its significance should be readily apparent. The division about these topics has been deeper and darker than any I have seen on a proposed rule change regarding discovery. That alone should lead the Advisory Committee to reconsider this proposal.

If the costs of preservation are too high, that is not due to a fault in the rules. Prof. Hubbard's study yielded no strong evidence on costs of preservation to support the idea that adopting this rule will produce major savings. Education and information governance -- not rulemaking -- will be the key to controlling preservation costs. And there is finally a real movement afoot on this front. The Sedona Conference is actively working in this area, and information governance was the hottest topic at Legal Tech in New York in Feb., 2014. If empirical evidence in the future shows that there is a problem that a new rule would solve, that would justify adopting a new rule. We are not there yet. But if the Committee decides to proceed, I urge that it give serious consideration to the alternative draft submitted by Judge Francis, with a new public comment period to follow.

Prof. William Hubbard (U. Chicago) (2201): (Prof. Hubbard submitted with his comments a 50-page report on his survey of preservation costs at corporations he studied. This study was commissioned by the Civil Justice Reform Group in Spring, 2011. (That group is an organization formed and directed by general counsel of Fortune 100 companies concerned about America's justice system.) Prof. Hubbard's cover letter clarifies his testimony at the Dallas hearing that the adoption of proposed 37(e) will produce "a modest change from the status quo and should have modest effects." But because the costs of preservation are very high for a number of companies, those effects (say a 3% reduction) would still produce considerable savings (for some companies, over $1 million per year). In addition, it is important to note that this study focused only on preservation activity related to impending litigation or governmental investigations, not to retention activity required by various rules or statutes applicable to companies in various fields. There is also an 11-page Summary of Findings. A review of the full findings, or at least the Summary of Findings, is superior to a summary here, but at least some points may usefully be made:

(1) A total of 128 companies responded to the survey. The companies ranged in size from those with fewer than 1,000 employees (31 companies -- 24%) to those with more than 100,000 employees (18 companies -- 16%). Roughly the same number of the remaining companies had between 1,000 and 10,000 and 10,000 and 100,000 employees. Federal cases are a major concern for companies of all sizes; for the largest companies, government investigations are also a particular concern.

(2) Interviews were conducted with representatives of 13 of these companies, and in those interviews respondents often reported that preservation costs "have become an important factor in whether to litigate or settle."

(3) Preservation problems are most frequent with email and hard drives, but the rating of problems is relatively similar for each of 8 types of preservation mentioned in the survey.

(4) Smaller companies are less likely to have specialized resources to deal with preservation, in part because they are less likely to have in-house expertise. For large companies, fixed (non-case-specific) costs of preservation are high. But for all companies case-specific costs are significant.

(5) A small proportion of cases account for a very large share of the preservation costs. In most litigation matters, preservation scope is not broad. Of 390 matters on which data were available from a sample company, fewer than 20 custodians were subject to a hold in 240 of those matters (60%), while more than 475 employees were subject to a hold in about 15 of the 390 matters (about 4%). See Figure 6, p. 40 of report. With regard to the six companies for which data is available, 5% of the matters account for over half of all litigation hold notices.

(6) The amount of information preserved greatly exceeds the amount collected and processed for litigation. In one company (Figure 8 in the report), more than 5,000 custodians were subject to preservation, but fewer than 10% of those custodians' preservation was actually subject to collection, and a slightly sampler number had their data processed.

(7) Reducing the amount of preservation will have little or no negative impact on the availability of information needed in litigation.

The Executive Summary concludes: "The costs imposed by the uncertainty created by the current environment of conflicting legal precedents is a repeated refrain from companies in this Survey. By addressing the standards for sanctions for failure to preserve, the proposed amendments to Rule 37 focus on an issue of expressed need. A benefit of the proposed amendments is a likely modest but meaningful reduction in preservation costs. Greater stability and less uncertainty in the law of preservation will have its most direct effect on the phenomenon of 'overpreservation.'"

David E. Hutchinson (2205): The focus on "proportionality" underscores a nagging disconnect between the rules and practice that has worsened in recent years and will continue to do so unless it is directly addressed. The greatest factor affecting civil discovery in recent years has been the development of legal technologies. There has been a global paradigm shift in the technologies used to create and store information. One 2013 estimate was that the volume of data is growing at a rate of approximately 33% per year. Because technologies continue to develop at an exponential rate, any "proportionality" requirement for discovery needs to include consideration of the process and technologies underlying preservation and production of electronically stored information. Between 1986 and 2007, the total storage capacity for digital data grew about 100-fold. But the 2007 figures already appeared quaint in 2014, and the ESI landscape will likely continue to develop rapidly and somewhat unpredictably. Focusing on preservation sanctions, the substantial growth in sanctions decisions since 2006 suggests that the

2006 amendments were not sufficient to deal with these issues. But the focus on "proportionality" is limited in its effectiveness because it fails to give due weight to the impact of developing technologies. Proportionality should therefore include consideration of the technologies used and/or available, because they essentially dictate the reasonableness and burdens associated with e-discovery.

David J. Piell (2208): The e-discovery crisis is largely an invented crisis. While it is true that e-discovery costs money, it costs less and provides far more comprehensive information than when armies of associates spent months in warehouses searching through mountains of physical documents. For companies that do not have their ESI organized, forcing them to organize it for litigation purposes leaves them with better access for business purposes. The rules regarding discovery should not be modified to accommodate entities that cannot keep their records in a reasonably ordered and accessible manner. Similarly, the movement to reject Residential Funding is misguided; why should sanctions not be imposed against a party that loses information due to its own negligence?

David Beck (former member of Standing Committee) & Alistair Dawson (2212): The adoption of a consistent standard for issuance of sanctions creates predictability and encourages compliance. We therefore strongly support the proposal to clarify the standard for issuance of sanctions. Despite the implementation of "best practices," data can still be lost unintentionally, but such losses should not be sanctionable. But for sanctions bad faith should be the guiding standard.

Karl A. Schieneman (ReviewLess) (2237): "I do not believe the proposed amendments do enough to encourage the use of more technology to solve e-discovery and specifically they do not promote transparency and motivate litigants to share how technology is being used to improve e-discovery and reduce e-discovery burdens." I have developed a career of creative use of technology to solve discovery problems, including service as a special master in e-discovery cases. I have found that lawyers are not embracing technology to solve what is a technology-driven problem. This situation is due both to unfamiliarity with these technological issues and to the fact that current case law and rules do not promote or foster transparency, leading to expensive motions as parties on the receiving end try to understand what they will be receiving from productions using predictive coding. I think the solution is for the rules committee to encourage the use and experimentation with technology from its pulpit, at least in the Note. The goal should be to reduce the barriers to sharing information between parties created by 80 years of case law that do not require a sharing of information because it would be impractical to have parties second guess each other about production of individual documents. Those sorts of issues are sharply reduced by technology-assisted review. I should emphasize that I am not advocating any particular type of technology (including predictive coding), but only pointing out that technology used properly can result in less ESI being reviewed and produced.

Washington D.C. Hearing

David R. Cohen (Reed Smith): The rule change is absolutely necessary. Sanctions motions are used as tactical devices. The stakes are too high. You can't afford to be wrong about preserving things.

Jonathan Redgrave (Redgrave LLP): Current Rule 37(e) has failed. The replacement has promise, but I have drafting issues. (I will submit detailed comments later.) The Committee

should move forward with these rules. We can't wait forever for the ever-elusive empirical data to develop.

Thomas Allman: I endorse proposed 37(e), and agree it should be used to replace the current rule. My reason is that it cabins inherent power. As Judge Sutton said in U.S. v. Aleo, 681 F.3d 290, 310, that is important; when the rules address something judges should not attempt to escape the limits of the rules by falling back on "inherent power." The current lack of uniformity is an affront to the legal system, and the goal of restoring it is worth the candle. The rule will incentivize reasonable conduct.

Anna Benvenutti Hoffman: We are a small civil rights firm, with a focus on police misconduct. We routinely face difficulty obtaining needed information from defendants. This rule change would encourage stonewalling. An adverse inference is not a heavy sanction. She thinks that the rule change should be rejected entirely. If that does not happen, it should at least be limited to electronically stored information. Overall these amendments send a signal that there is too much discovery. Some judges are hostile to our claims. There is no reason to bolster the arsenal of defendants.

Dan Troy (GlaxoSmithKline): Preservation imposes great waste on his client. Something like 57% of our email is preserved for possible use in litigation. We have about 203 terabytes preserved. That's more than 20 times the entire collection of the Library of Congress. And the amount we have to preserve is rapidly increasing; since 2010 it has gone up a lot. We need a uniform national standard, and we also need a reasonable standard.

Robert Levy (Exxon): Exxon has 5200 people (including former employees) on litigation holds right now. This is a major problem. We have to evaluate all this material on our E-Discovery platforms. Assuming each of these people has to spend ten minutes per day to comply with this extra duty (a reasonable prediction) that means about 327,000 hours per year are used up dealing with litigation holds. This extraordinary effort is necessary because judges evaluate our performance only by hindsight. As a consequence, preservation is a big part of our design of our information systems. Preservation concerns affect our ability to make changes in those systems. Something that would deal with the conflicts among the circuits would be helpful to us. Under the present circumstances, it is very difficult to make a semi-confident decision about how to handle preservation issues. If the standard is negligence, how can I ever feel safe? That's why some people feel they much preserve everything. True, this set of problems is a result of improvements in technology, and any rule will be somewhat imprecise. But a rule could significantly improve on the current corrosive uncertainty.

Lily Claffee (U.S. Chamber of Commerce): Preservation exacts a heavy psychic toll on U.S. business and American global competitiveness. These burdens don't just affect mega-corporations, and may be even more significant (and potentially crippling) for small firms. It would be even better for the rule to go farther and address specifics on trigger, scope, and duration of preservation obligations. "I can drive a truck through relevance" under the current rule. It would be better to say "material and relevant." Without those additional specifics, I would be tempted to continue to overpreserve.

Jennifer I. Klar (Relman, Dane & Colfax): This rule change would produce bad results and also change substantive law. It would impede the search for truth. Indeed, the D.C. Circuit has held that there is a need in employment discrimination cases for adverse inferences where

information is lost. A negligence/gross negligence standard is sufficient protection for defendants. Anything more provides too much protection. So this is a substantive change, not a procedural change. It also raises grave fairness issues. Defendants have documents, and even now the plaintiff must prove negligence in connection with destruction to obtain any relief. To require proof of something more creates a perverse incentive. At least, limit the rule to electronically stored information and don't apply it to paper documents. Those are critical to employment discrimination cases. The cost claims made by big corporations do not provide a ground for this change. Residential Funding gives them sufficient protection.

Malini Moorthy (Pfizer, Inc.) (testimony & no. 327): She is head of the Civil Litigation Group E-Discovery team. Pfizer supports the proposed changes to Rule 37(e). The current situation confronts companies like this one with vastly disparate obligations to preserve. The need for action can be illustrated by an example involving Pfizer. In litigation about hormone therapy, a court ordered the company to preserve 1.2 million backup tapes. That order remained in effect for a long time. These tapes had about 100 gigs per tape, resulting in preservation of a total of about 100 petabytes of data. This preservation cost an estimated $40 million over the six years the order was in effect. But the company never had to use a single one of the backup tapes. It produced a total of 2.5 million documents to the plaintiffs (25 million pages). Only 400 of those documents were used in the litigation, mainly 100 of them produced early in the case and before the huge bills began running up. The shift in the culpability standard in the rule would help avoid this sort of thing, as would the emphasis on proportionality.

Phoenix hearing

Robert Owen: Rule 37(e) is a "tremendous step in the right direction." But it is vital that the rule be tightly written. There must be no wiggle room. Some judges will try to bend the rule. One S.D.N.Y. judge has already construed "willful" very broadly. A particular benefit of adopting the rule would be to prevent courts from relying on inherent authority. The goal should be to (a) establish a single national standard, and (b) make clear that it is higher than the negligence standard that the Second Circuit adopted in Residential Funding. Preservation has become much more complicated than it was in 2002 when Residential Funding was decided, particularly with the advent of multiple portable devices. It's almost impossible to train employees to avoid mistakes or keep everything.

Timothy Pratt: He was general counsel of Boston Scientific, and came to appreciate the litigation costs such an entity must bear. It is certainly not possible to eliminate all costs, but the scale of costs preservation can impose is extremely wasteful. For some years, Boston Scientific had $5 million in costs to outside vendors for preservation. Since 2005, Boston Scientific had preserved about 107 terabytes of information, most of that in the last three years (as the volume of information escalated). "Everyone knows there's huge over-preservation and over-production."

David Howard (Microsoft): Microsoft has updated the report it offered during the Dallas mini-conference. In an average case, it now finds that the breakdown of number of pages preserved as opposed to the number used at trial is huge -- only 1 in 1,000 of the pages produced is used at trial, and only a very small percentage of those preserved is even produced:

Preserved -- 59,285,000 pages
Collected and processed -- 10,544,000 pages

Reviewed -- 350,000 pages
Produced -- 87,500 pages
Used at trial -- 88 pages

Microsoft is forced to over preserve by the current rules, which do not clearly define the duty to preserve. It has spent $600 million to preserve and to manage discovery, including vendor costs. On being asked, witness is uncertain how Microsoft could identify the 88 pages used at trial in the case example above, or the 87,500 produced, before litigation is filed. But the burden is mounting. In 2013, Microsoft found that it was preserving 1.3 million pages per custodian, a 400% increase by this measure since 2010. Proposed 37(e) will help deal with this problem. We have to keep information to prove our side of the case, but the current attitudes towards, and uncertainties about, preservation mean that we must preserve much, much more. This does not really benefit our opponents, but it does really benefit our opponents in terms of availability of needed evidence.

Paul Weiner (Littler, Mendelson): There are recurrent gotcha tactics that exploit the "crushing" burdens of E-Discovery. Plaintiff lawyers rely on overbroad cut-and-paste preservation demands. He would add "preservation" explicitly to Rule 26(b)(2)(C) to address this sort of problem. Rule 37(e) is a good start in dealing with these problems. If it achieves consistency across circuits, it will be a very good thing. The addition of proportionality is a bedrock concern. It would be good also to incorporate a Rule 26(g) undertaking with regard to preservation demands. He has written about the preservation obligations of plaintiffs, and sees that new 37(e) could provide them with benefits also. One way to do so would be the reference to "sophistication" in the Committee Note.

Thomas Howard: Proposed 37(e) will solve real problems. The theme should be to make sure that the rules continue to be predictable. That can minimize motion practice. Note that in products cases (which he handles) most of the defendant's documents offered at trial are offered by the defendant.

Stephen Twist: Preservation and discovery costs amount to more than what his company pays the plaintiff on the merits for cases in which plaintiffs are successful. The leading factor in managing litigation is cost, not the merits of the claims involved. But he is not certain how much he would save if 37(e) were adopted, and intends to submit that information later.

Jill McIntyre: Adoption of 37(e) will enable companies to preserve less without denying adversaries access to any important information.

John Rosenthal: The burdens of preservation are real. Last year, Winston & Strawn lawyers spent 100,000 hours on preservation. He strongly supports the package. Corporations must overpreserve. Proposed 37(e) will provide predictability. But further refinements would be desirable. He co-chaired the Sedona drafting group, and favors its approach. But he does not think that changes that would require re-publication and delay the amendment process a year or two are important enough to justify that delay.

Dallas Hearing

Matthew Cairns: (He is a former officer of DRI, but two officers of DRI will be testifying for the organization later in the hearing.) In his practice, he finds himself representing

municipalities, and finds that they cannot afford the sort of rigors that E-Discovery can impose. One example is a case involving a town that had only one computer, located in the town hall. But to be suitably careful, he concluded it was necessary to impose a hold also on the computers of 10 volunteers, even though their computers included all their personal information. (These volunteers were sued in their individual capacities.) Prof. Hubbard will provide empirical evidence about this topic, but the point is that these burdens are real. Opponents of change use hypotheticals; proponents of change use real life data and examples. Nonetheless, he cannot say that adopting the proposed rule would actually have resulted in doing things differently in the case described.

Rebecca Kourlis: Broad research supports the conclusion that the current system is unduly burdensome for both sides and that it invites gamesmanship. (Almost) all agree that increased judicial management is a good thing. But it cannot be said that there are compelling data on any of the topics addressed by the amendment package. More data might be helpful, but more data are not likely to answer all questions. IAALS believes that the proposed changes are moving in the right direction.

John W. Griffin: It is true that there are myriad standards for preservation. But in essence everybody knows the rule -- if evidence is important it should be preserved, or at least it should not be destroyed. The new rule would seem to accept loss of evidence due to a party's negligence. That should not be accepted, for if it is the system will break down. The courts will suffer if parties that "lose" evidence are "blessed by the courts" despite these failures. Regarding one case he litigated against the government on whether a diabetic could be in the FBI, he was able to prove his case only after getting the medical records of all the current officers in the country and demonstrating how many of them were allowed to serve despite seemingly serious health problems.

Mark P. Chalos: All agree that having a national standard is laudable. We represent plaintiffs, and with corporate defendants we don't see "one document" missing, but rather "big gaps in data." Our concern is that this rule change would make it almost impossible to obtain sanctions to demonstrate the culpability required by the amended rule. The heightened standard of showing that something that was lost is essential to the case is also problematic. Making inadvertence an safe harbor in fact will have broad implications. The burden should be on the spoliator to prove "no harm, no foul."

Bradford A. Berenson (G.E.): (At the hearing, the witness circulated the comment that was designated 599 among the written comments; it is summarized in addition to the testimony here.) G.E. operates in 160 countries and is involved in thousands of civil cases. The burden of preservation can be immense. To illustrate, GE has a Microsoft Outlook Exchange email system with 450,000 mailboxes distributed across 141 servers in 8 locations around the world. Each month, about 550 million emails are sent through those servers, but generally not stored on them. These realities impose great burdens on GE when it tries to comply with its preservation obligations. Focusing on email alone, GE faces a potential universe of 4,770 terabytes of email alone, located in hundreds of thousands of devices around the world. GE's lawyers have to define some sort of litigation hold appropriate to a case, and then send notices and reminders. Enterprise-wide, this is a herculean task. Often we cannot anticipate the twists and turns of litigation, and our efforts will be measured years later using 20/20 hindsight. That retrospective evaluation of preservation will happen in an adversarial atmosphere frequently leading to "gotcha" tactics. Altogether, this situation has led GE to engage in what must be tremendous

over-preservation. Ultimately, very little of the material preserved is actually produced (in those instances where litigation in fact ensues), and very little of what is produced is actually used in the litigation. Since GE operates world-wide, this experience causes it to contrast the U.S. litigation burdens it faces with its experience in other countries. Simply put, there is no comparison; the U.S. system is in a league all its own. The breadth of discovery and the uncertainty of preservation obligations contribute to this wasteful behavior. GE therefore supports the change to Rule 37(e) to provide a nationally uniform standard and limit sanctions to cases involving bad faith destruction of evidence. It also thinks that the word "willful" should be removed and the "no fault" (B)(ii) provision should be removed. GE is also concerned about the "curative measures" provision because it could become the avenue through which judges would reintroduce sanctions under a different heading.

Michael Harrington (Eli Lilly & Co.): Since 2008, he has found that the total litigation spend on discovery has increased 60%; for preservation in particular, the cost may approach $40 million for his company. Rule 37(e) is an improvement, although imperfect. It is not clear, however, that adopting the proposed rule will actually change his company's preservation practices, at least at first. He would look to the factors in 37(e)(2) in making decisions; they would provide guidance, although he does not like all of them as they are presently articulated.

William T. Hangley (ABA Section of Litigation leadership): He represents the ABA Section of Litigation Federal Practice Task Force, and speaks for the leadership, not for the entire section or the entire ABA. "We have a wonderful system, but nobody can afford it." Details are provided in Don Bivens' letter of Feb. 3 (no. 673 -- to be summarized separately). Leadership's view is that sanctions under 37(e) should be limited to cases involving bad faith. The written comments provide details and history on the variety of interpretations associated with "willfulness." Reckelssness can go toward that determination.

Gregory C. Cook: The costs to litigate have gone up, particularly due to E-Discovery. We should have a uniform national standard, and curtail ancillary litigation. Before the advent of ESI, there was no need to tell people that they did not to keep their post-it notes, but with ESI everything might be preserved. (B)(i) should say "willful and bad faith," and (B)(ii) should be removed.

Thomas P. Kelly (Pfizer): The amount of ESI is staggering. For example, Pfizer has about 300 active legal holds involving about 80,000 people. It has 5 billion emails in legacy archives, a number that grows by a billion a year. It also has 250,000 boxes of documents, totalling about 750 million pages of material. It has to engage in preservation of these dimensions because there is no consistent standard on what it has to do. As things are now, we have to keep everything. If proposed 37(e) were adopted Pfizer would not have to preserve as much; standards would develop to guide it.

David Warner (Shell): He is the manager of global litigation information management for Shell. Technology is changing, and opportunity for unintentional mistakes is much greater than it was when Residential Funding was decided. The rules have not kept up with the changes in technology. The current rules are too broad; we have to keep millions of documents on permanent hold. Eventually only 1% of these are actually produced. The constraints mean that he has to stand in the way of Shell technological innovation designed to improve company operations. But technology will not provide solutions to these problems. No search tools exist to search different systems, and systems proliferate and evolve. On one matter, the cost of Shell

of maintaining information on a hold was $20 million to $80 million. What it needs is something that narrows the scope of preservation.

Stephen Puiszis: Favors removing "willful" from (B)(i), which would correspond to the standard for sanctions in the 7th Circuit. He is also unnerved by the idea of curative measures, which involve no element of prejudice or harm. On (e)(2), he would take out Factor C on demands to preserve.

Megan Jones (COSAL): She is a member of Sedona. ESI has only been with us for about ten years. Although it has been a challenge to deal with "the tidal wave of electronic discovery," we should recognize how rapidly things can and do change. What technology created technology can manage. Her organization is focused on enforcing the antitrust laws, and it is concerned that under the proposal emails will be deleted with no recourse for those trying to prove anti-competitive practices. She supports Judge Francis's example for Rule 37(e). How could a plaintiff prove substantial prejudice? For example, suppose an employee testifies that "from time to time he talked to a competitor about pricing." Without emails to prove the details, how can she demonstrate that she has lost critical evidence?

Prof. William H.J. Hubbard (U.Chi.Law School): He has performed an empirical study and provided with his testimony the Summary of Findings of that study: It looked to a sample of 126 companies, including companies of all sizes and in a broad range of industries. Over 79% reported a "great extent" or "moderate extent" of preservation burdens. Companies report "overpreserving" to protect against serious uncertainty under current law. Rules amendments that clarify and define the standards for sanctions should reduce the phenomenon of ovepreservation. Because only a small proportion that preserved information is ever used, reducing overpreservation would likely not have any negative impact on the production and use of data in litigation. The final report will not be ready until Feb., 2015. In testimony, Prof. Hubbard stressed three points: (1) Preservation is not a problem only for big companies; (2) A small fraction of matters generate high costs -- 0.5% of the matters generated 60% of the costs; and (3) Most preserved data is never collected or reviewed. Asked whether adoption of 37(e) would make a change in preservation activities, he said that one could expect a small but meaningful reduction in preservation as a result. At the same time, concerns about detrimental effects of adopting the rule seemed nil to him. Asked about whether much of what's preserved is kept not due to potential litigation but because of other preservation requirements, such as regulatory requirements, he said that the survey did not distinguish between these two types of preservation. Most of what is preserved today will be preserved even if the rule is adopted. Core records will be preserved; we are talking about data and the margins. For example, federal requirements may mandate keeping some kinds of email exchanges.

John Sullivan: There are entire law firms dedicated solely to preservation. These amendments will improve the situation, but (B)(i) should say "willful and bad faith."

Lee A. Mickus: Uniform standards are needed, and "willful" should not be used. There is confusion about what that word means.

Gilbert S. Keteltas: He co-chairs his firm's e-discovery team. He often sees 100 custodians under a hold, and a terabyte or more of information preserved.

David Rosen: Proposed 37(e) is a path for protecting corporate interests. Highlighting

proportionality is not desirable. Although it is true that preservation can be costly, it should be remembered that plaintiffs bear real costs for preservation also.

Stuart Ollanik: He wrote "Full Disclosure" (1994) and joined in comments submitted by Paul Bland. It is important to remember that there is usually a substantial asymmetry of assets between individual plaintiffs and corporate defendants. He challenges the notion that defense discovery costs are a result of overbroad preservation or production efforts. Instead, those costs result from defense efforts to avoid discovery -- defendants litigate very vigorously to keep from turning over evidence. It seems that they now treat that activity of theirs that raises costs and a reason to curtail discovery and preservation. Proposed 37(e) will eliminate disincentives to keep needed information. He agrees with the comments of Judges Francis and Scheindlin.

Conor Crowley: He is Chair of one Sedona Conference Working Group. The bifurcation of curative measures and sanctions does not achieve the goal of a uniform national standard. See Sedona's October, 2012, submission to the Advisory Committee. It would be better for the rule to require that the party act in good faith than to focus on whether it acted in bad faith. If bad faith is the focus, it should be defined as acting with a specific intent to deprive the opposing party of evidence. In addition, "substantial prejudice" should be defined as materially burdening a party in proving its case. (B)(ii) is too broad in suing the "meaningful opportunity" criterion. The list of sanctions should be made more extensive, and the rule should itself direct that the least severe sanction be used. Factor C should be removed from (e)(2). Factor (B) could be interpreted too narrowly. In addition, (e)(2) should be expanded to include another factor -- whether the party destroyed information known to be relevant. He does not favor republishing, and thinks that these changes can be made without republication.

Daniel Regard: He is the CEO of iDiscovery Solutions. He is appearing as a technologist, not to take sides. From that perspective, "willful or bad faith" seems ambiguous. All automatic systems are intentionally set up by somebody. There are myriad such "automatic" activities. Data movement is really copying and deleting of data. Data changes move data and eventually lead to deletion of some. Use of cloud computing means that the cloud provider may be the one specifying or regulating such things; this may result in much less ability for control by the person subject to the duty to preserve. And these challenges are likely to increase. One can forecast 26 billion devices on the internet by 2020. The amount of location and time information all these devices will generate will be enormous, even by contrast to the already enormous amount of big data presently. But it is not reasonable to expect technology to solve all these problems. For one thing, the demand for solutions is simply not comparable to the demand behind the creation of new devices and development of new functions for devices. He recommends moving forward with the amendments.

John D. Martin: He is the manager of an e-discovery practice with 30 professionals. He generally supports the package. But his clients find themselves in "preservation paralysis." In one case, the client preserved about a half million backup tapes at a cost of $1 million per year ($2 per tape?). He supports amending 37(e), but worries about "willful" being too uncertain. As things now stand, there is little real incentive for plaintiffs to tailor their discovery requests. One suggestion is addition of the word "the" before "litigation" to make it clear that this is not about whether certain materials should have been preserved for some litigation, however remote from the present one, but whether they should have been preserved for this case. But he acknowledges that this line should not exclude attention to preservation for the first case involving an allegedly defective product when the current suit is the 50th case.

Ashish Prasad: He is CEO of Discovery Services, LLC. The big ticket over the past five years has been the impact of TAR on e-discovery costs. His prediction is that it will lead to a "small reduction" in review costs, but that other developments will offset this effect. Most lawyers are not comfortable with having only machines look at documents and will insist that lawyers do so. One reason is to identify trade secrets and the like. So the real savings will probably be something like 25%. At the same time, there will be large increases in data volume, so improved methods may largely be a way to stay in place and not fall farther behind.

Ariana Tadler: She represents plaintiffs. She is concerned about an escalation of motions practice under amended 37(e), and also about the challenge of proving substantial prejudice. The current problems were not caused by the rules, but by the behavior of lawyers. The solution is cooperation, not 37(e). How will this rule really stop over-preservation? She supports a rule like Judge Francis's proposal. Sedona really struggled to reach consensus on these issues; they are very difficult. And now Prof. Hubbard reports that there won't be much effect even in terms of what the corporate litigants want.

Jennifer Henry: Amended 37(e) would be an important change to provide guidance for preservation. It would assist litigants. The State of the law is in flux, and parties live in fear of the consequences of failure to preserve. An example is an airline client that has five full-time employees who manage preservation only, not review of materials for production. This leads to massive over-preservation. She would remove "willful" from (B)(i) and add a bad faith requirement to (B)(ii).

David Kessler: He is Chair of the e-discovery practice at Norton Rose Fulbright. He is a huge proponent of using TAR. But it should not be written into the rules. But the requirement of specific objections under Rule 34 will not help so long as plaintiffs are still making overbroad requests.

2. Rule 37(e)(1) -- Failure to preserve

Eli Nelson (284): This provision sets out an ambiguous standard for proof. Who determines whether information should have been preserved? What is the context of such a determination -- a priori or ex post? What test is applicable? I suggest changing the rule to say "which the party knew or should have known needed preservation." This would clarify that the standard is reasonableness.

Washington Legal Foundation (285): The rule should articulate a clear, bright-line trigger that informs litigants precisely when they are under an affirmative duty to preserve information. Much of the wasteful cost of discovery stems directly from the ever-increasing burden of over-preservation, which is largely a result of guesswork resulting from fear of sanctions. The current "anticipation of litigation" standard is largely unworkable and impractical because these decisions must be made before litigation begins, and without the benefit of the scope of discovery provided by the pleadings. Moreover, before suit is filed there is no judge able to resolve discovery disputes or preservation issues. The rule should adopt a decisive and clear-cut "commencement of litigation" standard, triggered by the filing of a complaint. This rule would set uniform expectations while preserving a party's ability to prove or defend a case.

Lynne Thomas Gordon (287) (American Health Information Management Assoc.): Although AHIMA applauds the Committee's efforts to establish uniform guidelines across federal courts and apply them to all discoverable information, the proposed amendments will not resolve the issues surrounding divergent preservation standards and the perceived need for "over preservation." Provisions of the proposed amendments are still subject to considerable interpretation, thereby bringing into question whether these amendments will achieve the goal of uniformity. For example, the lack of definitions for "willful," "bad faith," and "substantial prejudice" may cause variable interpretations of those terms by the courts.

Timothy A. Pratt (Fed. Defense & Corp. Counsel) (337): FDCC urges that the rule adopt a "commencement of the litigation" trigger for determining when preservation obligations are imposed. The proposal would required preservation "in anticipation" of litigation. This trigger is vague and would force parties to make preservation decisions before they know whether a lawsuit is even coming.

Andrew B. Downs (359): Often the prospect of litigation is foreseen far earlier well down the corporate organizational structure than at the level where the individuals with the training, background, and authority to initiate litigation holds are located. The "anticipation of litigation" standard is subjective and fails to recognize the fundamental traits of human nature -- humans are slow to recognize they may have erred, they react slowly to unforeseen events, and do not like to deliver bad news to superiors. For these reasons, I urge you to replace the "anticipation of litigation" standard with a two part either/or standard under which the duty to preserve begins when notice of the suit is received, or when the party receives a written request from the other party to preserve relevant information.

International Assoc. of Defense Counsel White Paper (390): The rule needs a clear, bright-line standard to clarify when the affirmative duty to preserve information is triggered. Currently, over-preservation is driven by a fear of sanctions, and judicial decisions have imposed great affirmative burdens to preserve all relevant material. The "anticipation of litigation" standard requires preservation decisions to be made prior to the receipt of a scope-defining

complaint. Litigants need a clearer roadmap in this area. The IADC recommends that the rule adopt a clear "commencement of litigation" trigger.

William Luckett (415): There should be a defined point in time when a duty is imposed on a party to preserve information. Perhaps it is when a notice of claim letter is received and the claim is defined with relative certainty, or perhaps it should be the date of service or other notice of commencement of litigation. Whatever the "marker" ends up being, it should be clearly stated.

Harlan Prater (418): Though I generally support the amendment, I am concerned with the adoption of the "anticipation of litigation" standard. The new rule needs a clear, bright-line standard to clarify when the affirmative duty to preserve information is triggered. One would be a "commencement of litigation" standard balanced with a prohibition against willful and bad faith destruction of material that causes substantial prejudice to a potential adversary.

Federal Magistrate Judges' Ass'n (615): We note a possible ambiguity in Rule 37(e)(1), which refers to the failure "to preserve discoverable information that should have been preserved in anticipation or conduct of litigation." The predicate of any sanction must be that the information was not only discoverable but actually sought in discovery. Failing to preserve information in the abstract should not result in any sanction. It is the failure to produce information sought in discovery because of the failure to preserve it that justifies sanctions. We recommend inserting qualifying language in the rule to make this meaning clear:

> If a party does not produce information sought in discovery because the party failed to preserve discoverable information that should have been preserved in the anticipation or conduct of litigation, the court may . . .

New York County Lawyers' Ass'n (2072): We agree with the Rules Committee that it is wise not to set "bright line" rules regarding preservation. They are inappropriate in this fact-specific area. The idea of a broader rule encompassing a duty to preserve was considered during the drafting of the 2006 amendments, but it was recognized then that drafting such a rule would be too difficult. But we would like to see clarification on what "anticipation" means. Does it mean that a duty to preserve is triggered when a party "reasonably anticipates litigation" or when a party believes "litigation is imminent"? The rule should make this clear.

Phoenix hearing

Timothy Pratt (Federation of Defense Counsel): What we need is a clear, bright-line test to determine when a party is under an affirmative duty to preserve information. We think that it would be best to adopt a "commencement of litigation" trigger for that obligation. The "anticipation of litigation" test is uncertain and forces parties to make preservation decisions before they know whether a lawsuit is even coming. Such a rule is bound to lead to differing standards in different courts. The "commencement of litigation" standard is desperately needed.

William Butterfield: There should be a clear separation between a curative measure and a sanction. One way to do that would be to refer in the rule to a "non-sanction-based curative measure."

3. Rule 37(e)(1) -- Curative measures

John K. Rabiej (272): The proposed amendments helpfully carve out "curative measures" from what have been sanctions, but in so doing they fail to retain a showing of prejudice as a prerequisite for use of such measures. Because curative measures may have consequences comparable to the severest sanctions, a showing of prejudice should be required. Accordingly, the Committee Note should be amended along the following lines: "Although a party need not make a showing that the opposing party is culpable in losing discoverable information, the party should typically make a showing of the actual degree of prejudice resulting from the lost information before a curative measure is imposed." Examples of serious curative measures include a directive to restore backup tapes, or permitting introduction of evidence at trial concerning the loss of information, along with attorney argument about that subject. Most judges will have the good sense to require a showing of prejudice before employing such measures, but history has taught that outlier decisions can have profound impact on ESI discovery jurisprudence, and that they are rarely subject to appellate review. Unfortunately, the Committee Note as presently written says that the court may impose a curative measure to restore lost ESI even though it would otherwise be precluded under the proportionality test of Rule 26(b)(2)(C). Meanwhile, proposed 37(e)(1)(B)(i) requires "substantial prejudice," and (B)(ii) requires a higher degree of prejudice. Altogether, this may invite arguments that no prejudice at all is required for imposition of curative measures. An early example of judicious consideration of prejudice is Gates Rubber Co. v. Bando Chem. Indus., 167 F.R.D. 90 (D. Colo. 1996), which notes that prejudice is important along with culpability when making sanctions decisions. Typically, the courts have recognized prejudice in later decisions (noting a number of recent decisions). In *Gates Rubber*, plaintiff argued that because terminating sanctions were not involved no showing of prejudice was necessary. It would be best to guard against such arguments in the future; this may seem a small point but an ounce of prevention may be warranted here.

Washington Legal Foundation (285): The proposed rule authorizes imposition of "curative measures" without a showing of willfulness, bad faith or substantial prejudice. Presumably the party needs only to establish that lost information was relevant. But curative measures may sometimes have consequences every bit as severe as sanctions, at least some meaningful threshold should be satisfied before curative measures are authorized. A minimal showing of substantial prejudice should be required in the rule before curative measures are imposed. Unless such substantial prejudice can be shown, no curative measures should be necessary.

Hon. Craig B. Shaffer & Ryan T. Shaffer (289): This is an article from the Federal Courts Law Review concerning the proposed amendments. "The Advisory Committee's proposal has the salutary effect of re-focusing attention on the 'remedial' aspects of a spoliation motion."

Gregory Arenson (New York State Bar Ass'n Commer. & Fed. Lit. Section) (303): The Section applauds the Committee's attempt to bring order out of the chaos of differing standards for remedial measures for spoliation. It agrees that there should be a showing of substantial prejudice and willfulness or bad faith to impose sanctions.

Thomas Y. Allman (308): The distinction between "sanctions" and "curative measures" is quite murky and will allow a district court to avoid the ban in (B)(i) on all but the harshest

sanctions simply by invoking the "curative measures" provision. This suggests that curative measures will become the primary remedy, rather than "sanctions," and that adverse inferences will fall into the former rather than the latter. The Sedona Conference, in comparison, defined the full spectrum of "sanctions" without differentiation, but separately acknowledged the role of case management and remedial orders as necessary to "effectuate discovery or trial preparation."

The Sedona Conference Working Group 1 (346): We have a number of concerns about the curative measures provisions. First, we believe that the Committee Note should be clarified to avoid any misunderstanding of this provision to suggest that courts would be limited in their authority to utilize similar measures to manage their cases, such as ensuring compliance with their orders. More basically, however, we believe that "curative measures" should not be treated separately from "sanctions" under Rule 37(e). Instead, the rule should be limited to addressing the circumstances in which a court may impose punitive or corrective measures and remedies ("sanctions") for failures to preserve relevant information, and that it should emphasize that where a party has acted in good faith in its preservation efforts, such sanctions should only be imposed in exceptional circumstances. The rule could undermine the Committee's goals by permitting "curative measures" without a showing of either exceptional circumstances or of prejudice and culpability. In practice, there is often no difference between the ultimate effect of many "sanctions" and "curative measures." Moreover, courts have characterized serious sanctions, such as a permissive adverse inference jury instruction, as remedial rather than as a "sanction." See Mali v. Fed'l Ins. Co., 720 F.3d 387, 393 (2d Cir. 2013). Interpreted in this way, the "curative measures" provision would undermine the goal of reducing overpreservation. As detailed below, Sedona's October, 2012, proposal would forbid imposition of sanctions "if the party acted in good faith." This approach (with an "exceptional circumstances" exception) should be adopted for sanctions for failure to preserve evidence. When courts use such remedial or case management orders under another rule, neither prejudice to the requesting party nor culpability need be shown. Accordingly, the Sedona submission in Exhibit A says that "Nothing in this section shall prohibit a court from issuance of such remedial or case management orders as are necessary to effectuate discovery or trial preparation." But "curative" sanctions potentially affect parties and counsel long after the case in which those sanctions are issued. For example, *pro hac vice* applications sometimes require counsel to report whether they have ever been sanctioned.

John Beisner (382): I enthusiastically endorse the portion of the proposal that authorizes courts to order curative measures. Under the current rule, the only option for a court faced with a party's loss of information is to sanction that party. But the goal of the rule should not be punishment, and giving the courts the option of ordering curative measures is logically.

Alan Morrison (383): Curative measures are a better option than sanctions.

Hon. James C. Francis IV (395): The differentiation between curative measures and sanctions in the proposed rule is a positive contribution. Particularly because there are professional repercussions for lawyers subjected to sanctions, this is a positive development. But the proposed rule puts the boundary in the wrong place. Each of the so-called "sanctions," including case-ending orders, may be curative if it is necessary to rectify the substantial loss of evidence.

Hon. Shira Scheindlin (398): In Mali v. Federal Ins. Co., 720 F.3d 387 (2d Cir. 2013), the court indicated that a permissive adverse inference instruction is akin to a curative measure,

making a finding of culpable intent unnecessary. But how many judges would so regard a jury instruction?

David Kessler (407): There should be a requirement that a finding of negligence is included in the curative measures provision. That would make it clear that the adverse inference sanction is just that -- a sanction -- and not a "curative measure." In general I support the bifurcation of curative measures and sanctions. But I am concerned that it may not be clear that the listing of curative measures does not seek to limit a court's authority to use similar measures to manage its cases. I agree with Sedona that the Note should clarify this point. I also agree with Sedona that an adverse inference is, in all forms, a punitive sanction. It is very difficult to recover from, and too often case-dispositive. Since discoverable information will almost always get lost (to some extent), it should be absolutely clear that adverse inferences are not available unless the findings required for sanctions are made. Curative measures should not be case-altering (or career-altering). Therefore, courts should be prohibited from using curative measures to correct a failure to preserve discoverable information where the party has acted reasonably or where the requesting party cannot establish some prejudice.

John H. Hickey (AAJ Motor Vehicle, Highway and Premises Liability Section) (410): The changes to 37(e)(1)(A) say that permitting additional discovery is a "sanction." It seems to us that this means plaintiff can only get further discovery on proving spoliation. But discovery should be available without proving spoliation. The rule then says that the court can also "order curative measures." But the only curative measure that will deter spoliation is to strike defenses. The only other curative measure that comes to mind is an adverse jury instruction.

Robert D. Curran (448): The changes to 37(e)(1)(A) propose "sanctions" for failure to preserve. But the first proposed sanction is to "permit additional discovery." Thus, it would seem that the plaintiff has the burden to uncover the spoliation and then is granted only the right to pursue more discovery, a right which should have been accorded anyway. The second sanction is to order curative measures, but the only one that will deter spoliation is to strike defenses. It is unclear what "curative measures" exist other than striking defenses or providing a jury instruction regarding a rebuttable presumption as to what information would have shown. The third sanction is to shift attorney fees, but those fees will usually not amount to much.

Rebecca Kourlis (IAALS) (489) (reporting on a Dec. 5, 2013, forum involving many prominent people): Rule 37(e) received a mixed response from the group that did not divide consistently across plaintiff and defense lines. Both plaintiffs and defendants have "skin in the game" when it comes to preservation. There was some concern about including curative measures in a sanctions rule. But one general counsel noted that including those measures allows the parties to take steps to provide substitute information when the originally sought material is no longer available. Several judges who participated also expressed support for the curative measures provision in order to provide the court with flexibility. On the plaintiff side, there was some concern that the rule does not adequately deal with "mid range" cases where severe sanctions are not justified but curative measures do not fully cure the problem.

Assoc. of the Bar of the City of New York Comm. on Federal Courts (1054): We see this rule as introducing a new concept of "curative measures," but it is very imprecise in defining the contours of what may constitute appropriate measures. The text of proposed 37(e)(1)(A) discusses what appear to be three distinct remedies, but it is not clear why these are not all considered curative measures. We believe it would be useful for the Note to explain more fully

that curative measures are intended to be remedial in nature and to restore fairness to the litigation process by putting a party disadvantaged by loss of information in a position as close as possible to what would have been true had the information not been lost. We think the Note should list examples of measures that might be considered curative measures and make clear that this listing does not preclude other remedial measures that the court may devise in view of the facts of a particular case.

Steven Puiszis (1139) (amplifying comments made in Dallas testimony): I question the assumption that "curative measures" are somehow significantly less harmful and dangerous than "sanctions." The potential for a personal-interest conflict with a client under Rule 1.7 of the Model Rules of Professional Conduct is the same with either type of negative result. And the negative impact on the client is also the same. Practically speaking, there is no principled distinction between the concepts of "curative measures" and "sanctions" under proposed 37(e). So having the curative measure provision will promote motion practice because there is no culpability standard for those outcomes. So at least a meaningful threshold of harm or culpability should be required before these are available.

P. David Lopez (EEOC) (1353): Many measures that are not "adverse inference instructions" should be permitted in the absence of a finding of bad faith or willfulness. Such measures can range from comment by the court regarding a party's loss of information with no suggestion as to which party the information would have favored, to an instruction that if the court determines that the party with control over the information was at fault in the loss of the information it may, but is not required to, infer that the information was unfavorable to that party. EEOC believes a new rule should give the courts maximum flexibility in addressing the loss of information whatever the degree of fault that caused the loss. EEOC also believes that it will be appropriate in some cases to permit attorney comment to the jury about the loss of information even though the court has not commented or instructed on the matter. So long as the evidence would permit a jury to conclude that it was lost due to the fault of a party. EEOC therefore believes the Note should be augmented with something like the following: "Attorney comment to the jury on the loss or destruction of relevant information generally should be permitted when there is sufficient evidence in the record for a reasonable juror to accept the attorney's contentions regarding the reason the information is missing and any inferences the attorney suggests that the jury draw from the loss or destruction of the information."

Michael J. Buddendeck (Am. Inst. of Cert. Pub. Accountants) (1451): The AICPA applauds the emphasis on curative measures. This new authority to "adopt a variety of measures that are not sanctions" represents a common-sense principle that preservation rules should be concerned primarily with fairness in litigation, not with punishing parties for inadvertent spoliation. The rule's emphasis on whether loss of discoverable information was caused by "the party's actions" is also an important clarification to make clear that potential parties need not fear sanctions when they acted in good faith but outside factors resulted in loss of information. The rule should make clear that the measures specified in proposed 37(e)(1)(B)(i), including the adverse inference instruction, are not curative measures. Some courts say that adverse-inference instructions are remedial, and litigants might urge courts to employ them in this guise.

Julie Kane (Amer. Ass'n Justice) (1467): AAJ urges that the rule, if adopted, should allow courts to use some adverse inference jury instructions as curative measures and not sanctions. There are different types of instructions that range form strict mandatory instructions to permissive instructions. Permissive instructions leave the jury with authority to determine

whether relevant facts are missing, and if so whether that information would have been helpful to the party who was innocent in its loss. Such an instruction can level the evidentiary playing field. There should be room to separate the severe adverse inference instructions from less severe ones.

J. Barton LeBlanc (AAJ) (1732): The Committee's proposal blurs the distinction between sanctions and curative measures and thereby inadvertently preempts state common law in diversity cases. The current rule is limited to sanctions "under these rules." That phrase clearly excludes duties under state law and places a breach of that duty to the court, which is within the Enabling Act. But the amended rule does not include that phrase, and it proposes to include a breach of duty to a litigant, even though that is usually a matter of state common law. Many states have found that the failure to preserve evidence is a violation of a duty owed to the litigant and that a curative measure is an adverse inference jury instruction. The use of adverse inference jury instructions as a curative measure is distinct from sanctions and requires no additional standards that must be met. The Judicial Conference should not be in the business of protecting large corporations from having to preserve evidence, particularly when the impact would be to preempt state law.

New York County Lawyers' Ass'n (2072): We endorse the elimination of current 37(e). We believe the new rule should recognize the distinction between case-altering punitive measures, such as an adverse-inference instruction, even a permissive one, dismissal or default, and less punitive measures a court is allowed to use to remedy losses of information. Therefore the Note should say that less drastic measures under 37(a)(2)(B) may be employed, not as sanctions but as curative measures, in appropriate cases.

John Rosenthal (2146): The bifurcation between "sanctions" and "curative measures" should be abandoned. Permitting "curative measures" with no showing of culpability will weaken the rule, as will the absence of prejudice from the requisites for "curative measures." The distinction is basically false, and unsupported by decades of case law. There is often no practical difference between "sanctions" and "curative measures." Moreover, in the overwhelming majority of cases courts granting what they seemed to regard as "sanctions" were doing what the Committee seems to think is using "curative measures." Permissive adverse inference instructions are an example. Mali v. Fed'l Ins. Co., 720 F.3d 387, 395 (2d Cir. 2013), said that such an instruction "is not a sanction" but rather "an explanation of the jury's fact-finding powers." Compare Arch Ins. Co. v. Boran-NuTone LLC, 509 Fed. Appx. 453, 459 (6th Cir. 2012), saying that a permissive adverse inference instruction is a sanction and recognizing that it is "dressed in the authority of the court, giving it more weight than if merely argued by counsel." The rule proposal is also bereft of a standard or guidance as to when and under what circumstances to grant such measures, likely producing years of litigation about what the rule means.

David R. Cohen (2174): Several of those submitting comments question whether any limitations on sanctions is necessary. Some do not seem aware of the devastating impact that any sanctions can have, whether severe or merely intended to be curative, on the reputation of companies and their counsel. One of the great benefits of the proposed amendments to Rule 37(e) is that they retain the ability to allow curative measures in non-egregious circumstances without the stigma of the "sanctions" label. For a company, the reputational impact of having been sanctioned may be far worse than the monetary cost involved. It can have negative impacts for years to come. For counsel, the result may be loss of a job or the ability to practice law. For

example, when I seek admission pro hac vice, one of the invariable questions is whether I have ever been sanctioned by any court in any jurisdiction. If I had to answer "yes," that could disqualify me from many representations.

Washington D.C. Hearing

Jeanna M. Littrell (FedEx Express): As an LCJ member, FedEx urges attention to the comment from John Rabiej about including a prejudice requirement in relation to "curative measures," which can be very serious consequences.

David Cohen: The Committee was wise to leave in remedial measures so that parties can still get additional discovery if they need it, even sometimes with attorney fees as well. We used to call those things "sanctions," but we're no longer placing that bad label on them because you don't have to be guilty of bad conduct for these to be used.

Jonathan Redgrave (Redgrave LLP): The curative measures provision is not tethered to any notion of culpability, which is unfortunate. Supports John Rabiej's suggestion regarding need for showing of prejudice.

Robert Levy (Exxon): We agree with John Rabiej on the need to emphasize prejudice as a prerequisite for "curative measures." Those can be very significant.

Dallas Hearing

Bradford A. Berenson (G.E.): (At the hearing, the witness circulated the comment that was designated 599 among the written comments; it is summarized in addition to the testimony here.) GE is concerend about the introduction of "curative measures." This could become an avenue for preserving the existing sanctions regime under another name, and could undermine the core purpose of requiring bad faith before sanctions may be awarded. Whether denominated "sanctions" or "curative measures," an evidentiary presumption or other jury instruction regarding data loss will still have the same effect on the litigation and, if unwarranted, be equally unfair. Moreover, the absence of any prejudice requirement in (e)(1)(A) means that the curative measures could provide a means to evade the substantial prejudice requirement in (b)(i), creating, in effect, a no-fault, no-prejudice loophole in the rule. That would produce a step backwards in most jurisdictions from the current situation. If the reference to curative measures is to be retained, its scope should be narrowed and defined so that it excludes the types of relief customarily associated with punitive sanctions.

Lee A. Mickus: He generally represents auto companies. He favors dropping (B)(ii). On the other hand, he has no problem with missing evidence instructions.

Brian Sanford: He is a plaintiff lawyer. In his opinion, adverse inference instructions are curative measures and the rule should so recognize.

4. Rule 37(e)(1)(B)(i)

Michael L. Slack (266) (on behalf of American Association of Justice Aviation Section): The burdens on an injured party are so high as to render this "sanctions" provision essentially meaningless. First, it must show that the offending party failed to preserve discoverable information. Then it must establish that it should have preserved that information in anticipation of litigation. Then it must show that due to the loss of this information it has suffered "substantial prejudice." Even if it proves these things, the party must also prove that the failure to preserve was either "willful" or done in "bad faith." These are "both impossibly high (and subjective) standards that tend to be very difficult to establish without the proverbial 'smoking gun' to establish scienter."

Lawyers for Civil Justice (267): The conjunction should be changed from "or" to "and" so that the rule says sanctions may be imposed only on a finding that the failure to preserve was "willful and in bad faith." Permitting a "willful" failure to preserve as sufficient could include any deliberate conduct. This is confirmed by Judge Scheindlin's decision in Sekisui American Corp. v. Hart, 2013 WL 4116322 (S.D.N.Y. Aug. 15, 2013), which applies the following standard: "The culpable state of mind factor is satisfied by a showing that the evidence was destroyed knowingly, even if without intent to [breach a duty to preserve it], or negligently." Under this standard, establishing a standard auto-delete function could be characterized as "willful." The standard should make clear that sanctions are allowed only on a finding that the failure to preserve resulted from a desire to suppress the truth. Alternatively, the rule could define "willful" to include scienter or knowledge.

Daniel B. Garrie (281): The proposed amendment does not adequately deal with how the moving party proves the need for the missing information. As Judge Scheindlin eloquently said in Sekisui American Corp. v. Hart, 2013 WL 4116322: "To shift the burden to the innocent party to describe or produce what has been lost as a result of the opposing party's willful or grossly negligent conduct is inappropriate because it incentivizes bad behavior on the part of would-be spoliators. That is, it would allow parties who have destroyed evidence to profit from that destruction." Now counsel must advise their clients that destroying evidence is risky, as the burden is on the destroying party to prove good faith. If the burden shifts to the innocent party to show prejudice or harm, companies will not be as fearful of deleting evidence. Imagine a corporation who stumbles upon very harmful evidence, but destroys it knowing that the opposing party could never prove the value of its contents. The amended rule inadvertently protects the bad actor. If the rule is amended, "spoliation will run rampant."

Eli Nelson (284): There are currently differing interpretations of the threshold for sanctions, and this rule change will make it harder to order sanctions. Without the teeth of sanctions, there is no credible disincentive for those tempted to act badly. Document preservation is not something on the radar for many lawyers. Sanctions provide an excellent vehicle for promoting ethical behavior by lawyers, and the fact they can be ordered in the judge's discretion provides a desirable prod to lawyers. But requiring a finding of willfulness or bad faith will make it easy to defeat sanctions. With this change, it may become appropriate for counsel to advise their clients to roll the dice, or to remain ignorant of their preservation obligations. If they are "merely negligent" in that regard, the clients will actually improve their chances of winning on the merits. In particular, this strategy will assist them in winning the war of attrition. "Discovery about discovery" will become necessary to vindicate the rights of the victims of such conduct. At a minimum, "gross negligence" or "recklessness" should be added

to willfulness and bad faith as a sufficient finding. This would make litigants pay more attention to the preservation obligations than they have so far.

Washington Legal Foundation (285): WLF believes that the use of the disjunctive is highly problematic. Conduct that is merely willful does not necessarily spring from a desire to suppress the truth, so "willfulness" alone should not suffice to establish the requisite scienter for imposition of sanctions. Some judges will not hesitate to impose sanctions if the rule can plausibly be read to permit them. See Sekisui Am. Corp. v. Hart, 2013 WL 4116322 (S.D.N.Y. Aug. 15, 2013) ("The culpable state of mind factor is satisfied by a showing that the evidence was destroyed knowingly even if without intent to [breach the duty to preserve it], or negligently."). Finding culpability under such circumstances would undermine the goals of this amendment. It would be better to require that the court find that the loss of information was "willful and in bad faith" before sanctions can be imposed.

Lynne Thomas Gordon (American Health Information Management Association) (287): AHIMA is concerned that the proposed amendments shift the burden to prove the need for missing information to the missing party. As Judge Scheindlin noted in Sekisui American Corp. v. Hart: "To shift the burden to the innocent party to describe or produce what has been lost as a result of the opposing party's willful or grossly negligent conduct is inappropriate because it incentivizes bad behavior on the part of would-be spoliators."

National Center for Youth Law (292): This amendment would reject case law that holds negligence to be sufficient culpability to support sanctions. It essentially requires the innocent party to prove that it has been substantially prejudiced by the loss of relevant information, even where the party destroyed information willfully or in bad faith. "Not only does such a change incentivize negligence (as long as it's not 'willful or in bad faith') but it creates an almost insurmountable burden on the plaintiff."

Gregory Arenson (New York State Bar Ass'n Commer. & Fed. Lit. Section) (303): The proposed rule should be clarified to state that the burden of demonstrating that there was no substantial prejudice should fall on the party that acted willfully or in bad faith to spoliate relevant material. Concerns have been raised regarding whether the proposed rule is inconsistent with the goals of sanctions, including deterrence and shifting risks to parties destroying evidence. For precisely such reasons, many courts have applied a presumption of prejudice where a party has willfully destroyed evidence. Burdening parties with the necessity of proving the relevance of information that no longer exists presents obvious problems. Finding alternative sources may often be possible, but often it is not.

Thomas Y. Allman (308): Under (B)(i), a potential producing party will be immune from sanctions even if discoverable information is lost through negligent or grossly negligent conduct, and even if the conduct is deemed "willful" it is still protected unless there is proof that "substantial prejudice" has resulted. A safe harbor of that nature is essential to create predictability, particularly for potential parties implementing preservation obligations prior to suit. But the ambiguity of the word "willful" significantly weakens that effect. It may be described to include anything that is "intentional." Similarly, the requirement that prejudice be shown could be compromised by courts that conclude the "willfulness" implies substantial prejudice. Beyond that, (B)(i) risks being undermined by (B)(ii), which makes sanctions available outside the tangible property realm in the absence of culpability. It would also be desirable to make it clear in the Note that the Committee has rejected *Residential Funding*.

Kaspar Stofflemayr (Bayer Corp.) (309): Granting authority to impose sanctions for loss of information that is "willful" though not in bad faith is not sufficient protection. And the non-exclusive list of factors in proposed 37(e)(2) confuses rather than clarifies the matter. Parties who are concerned to avoid sanctions at all costs will continue to overpreserve evidence unless the Rules delineate a clear line between a bad faith failure to preserve evidence and less culpable failures. We endorse LCJ's proposal to replace "or" with "and" in (B)(i).

Jonathan Smith (NAACP Legal Defense Fund) (310): Moving parties will often be unable to demonstrate the degree of harm suffered since they will not fully know what the lost information
would have revealed. As Judge Scheindlin recently said (Sekisui American Corp. v. Hart, 2013 WL 4116322), this shift "incentivizes bad behavior on the part of would-be spoliators." This does not mean that the moving party should be exempt from having to establish prejudice in order for sanctions to be imposed; those results should occur only in cases in which real harm has occurred. But the proposed amendment places a burden on the moving party that is too heavy. Civil rights plaintiffs, in particular, must often obtain their evidence from the defendants. LDF suggests that the rule be changed so that if the court concludes that the spoliating party has acted culpably (even in only a negligent manner) it bears the burden of demonstrating that the lost information is not relevant to any of the claims being asserted by the other party.

John F. Murphy (Shook, Hardy & Bacon) (314): Proposed Rule 37(e)(1)(B)(i) takes an important step toward establishing a uniform standard for sanctionable conduct by requiring "substantial prejudice" and actions that were "willful or in bad faith." The present divergence in standards has created confusion, particularly for institutional clients such as corporations, businesses or governments. To enhance the revisions, the Committee should consider changing the standard from "willful or in bad faith" to "willful and in bad faith" to prevent the bad faith element from fading away or disappearing altogether. Doing so would be a reasonable extension to the Committee's work on the rule to ensure that those who make reasonable efforts to preserve information not suffer sanctions.

Malini Moorthy (Pfizer) (no. 327): Pfizer believes that the culpability standard should require proof of both wilfulness and bad faith. Allowing sanctions for conduct that is willful but not in bad faith undermines a core purpose of the proposed amendment -- to punish intentionally harmful conduct only. Pursuant to the articulated standard, Pfizer could be sanctioned for loss of material pursuant to an existing document retention policy, even if the policy had been implemented in good faith. Because willfulness does not require bad faith, the current wording of the amended rule appears inconsistent with the intention of the Committee.

U.S. Chamber Institute for Legal Reform (328): The ILR believes that the standard should be willful and in bad faith. At least one judge has interpreted "willful" as including intentional or deliberate conduct that lacks any culpable state of mind. See Sekisui A. Corp. v. Hart, 2013 WL 4116322 at *4 (S.D.N.Y. Aug. 15, 2013) ("The culpable state of mind factor is satisfied that the evidence was destroyed knowingly, even if without intent to [breach a duty to preserve it], or negligently.").

Timothy A. Pratt (Fed. Defense & Corp. Counsel) (337): FDCC is concerned that the use of the word "or" in this subsection would authorize sanctions for willful conduct. That could include deliberate conduct that was void of any evidence of bad faith. One often cited willful act is the use of a standard auto-delete function. The use of such a function could be willful, but not

in bad faith. FDCC recommends that the Committee consider substituting "and" for "or" to make clear that the conduct must be both willful and in bad faith.

The Sedona Conference Working Group 1 (346): Sedona believes that "willful" should be removed from the culpability standard and that "bad faith" should be replaced with "did not act in good faith" for the goal of uniformity. The specific Sedona proposal (submitted to the Committee in October, 2012 and included in Appendix A to this submission) provides as follows:

> Absent exceptional circumstances, a court may not sanction a party for failing to preserve documents, electronically stored information or tangible things relevant to any party's claims or defenses if the party acted in good faith.

This determination should be made with reference to a number of elements:

> In determining whether a party acted in good faith in its preservation efforts * * *, a court must consider whether the party:
>
> (A) knew or reasonably should have known that the action was likely and that the information relevant to the claims and defenses was discoverable;
>
> (B) intentionally destroyed information relevant to the claims or defenses;
>
> (C) made reasonable efforts to preserve information relevant to the claims and defenses, including whether the party timely notified key custodians of the obligation to preserve;
>
> (D) made efforts to preserve information relevant to the claims and defenses that were proportional to the claims and defenses; and
>
> (E) sought timely guidance from the court about any dispute concerning the scope of preservation of information relevant to the claims and defenses.

The Sedona proposal then directs that the court "must select the least severe sanction necessary to redress the failure to preserve" and provides the following enumeration of possible sanctions:

> (A) amending the case management order as deemed appropriate, including the scope of discovery or the schedule;
>
> (B) requiring the non-movant to respond to additional discovery, including the production of documents, answer of interrogatories or production of person(s) for examination;
>
> (C) staying further proceedings until the order is obeyed;
>
> (D) requiring the non-movant or its attorney to pay the reasonable expenses incurred in making the motion for sanctions or opposing it, including attorney's fees;
>
> (E) directing that the matters embraced in the order or other designated facts be taken

as established for purposes of the action as the prevailing party claims;

(F) prohibiting the non-movant party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(G) striking pleadings in whole or in part;

(H) dismissing the action or proceeding in whole or in part;

(I) rendering a default judgment against the non-movant; or

(J) treating the failure as a contempt of court, if there has been a violation of a previous order.

Andrew B. Downs (359): The rule should say that sanctions are unavailable unless the loss was "willful *and* in bad faith," not willful *or* in bad faith. Conduct can often be willful without there being any intent to cause the resulting harm, or even when the actor could not reasonably foresee the resulting harm. Conduct which is willful and in bad faith should not be tolerated. Good faith conduct that is "willful" in a strict meaning of the term should not be sanctionable.

Jeffrey S. Jacobson (Debevoise & Plimpton) (378): We think that "willful" is the wrong term to use if the intention is only to authorize sanctions against one who acted with intent to spoliate. Some courts define "willful" as synonymous with volitional action, but no connotation of bad faith. We think that willful either should be deleted from the proposal, or the disjunctive "or" should be replaced with "and."

John Stark (381): Limiting sanctions to willfulness and bad faith combined with substantial prejudice in the litigation is a wise standard to keep litigation from devolving into a game of document management. Willfulness or bad faith should be defined as intent to destroy evidence to prevent a party from prevailing in litigation. The problem with leaving "willfulness" undefined is that it may be deemed to mean a simply intent to dispose of information. The exception where there is no willfulness or bad faith -- "irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation" -- provides a reasonable escape valve for a truly catastrophic situation caused by the destroying party's actions.

John Beisner (382): I applaud the proposal requiring a party to demonstrate "substantial prejudice" to support a sanctions request. This will limit the parties' ability to exploit spoliation traps. But the culpability standard should focus on whether the party's actions were "willful and in bad faith." Some courts have interpreted "willful" as including intentional or deliberate conduct that lacks any culpable state of mind (citing Sekisui). But sanctions should be authorized only when a party has engaged in intentionally culpable conduct -- knowingly destroying evidence that it knows should have been preserved. With ESI, it may be impossible to keep all information on a given subject. Sanctions for spoliation should be available only when the party knew it had a duty to retain the information.

Alan Morrison (383): I think that one aspect of the sanctions provision should be clarified. It does not appear to authorize the court to impose attorney's fees as a sanction.

Sanctions under Rule 37(e) are limited to those listed in Rule 37(b)(2), but most lawyers would regard attorneys' fees as not included. But Rule 37(b)(2)(C) does allow attorney's fees. It is unclear, however, whether (C) is included. I would add "and (C)" after "Rule 37(b)(2)(A)" on line 22 unless the Committee wants to exclude attorney's fees. I find the standard -- "willful or in bad faith" -- uncertain because there is no definition of those terms. Of the two, bad faith is less problematic; presumably it means something more than lack of effort or sloppiness, but the focus on the party's subjective intent is problematic, particularly when it is an organization with many individuals having potential responsibility for retaining records. Instead, objective tests like recklessness or gross negligence are clearer and should be sufficient, particularly since the level of sanctions can make the punishment proportionate to the level of misconduct. Willful is more of a problem; as Judge Posner has written willful is "a classic weasel word. Sometimes it means with wrongful intent but often it just means with knowledge of something or other." Unless some clear guidance can be provided, I would leave it out and rely solely on an objective standard such as recklessness or gross negligence.

International Assoc. of Defense Counsel White Paper (390): The use of "willful" is problematic because some courts define willfulness as intentional or deliberate conduct without any showing of a culpable state of mind. For example, the act of establishing a standard auto-delete function could be characterized as "willful" because it is intentional, even if not done in bad faith. The problem could be solved by substituting "and" for "or" in (B)(i).

Steven J. Twist (296): The word "willful" should be removed, making it clear that the test is "bad faith." Some courts interpret "willful" to mean simply intentional, and if that word remains in the rule it will remain impossible for companies to make reasonable decisions about preservation. Moreover, several circuits have higher standards, so adopting the published standard would lower the standard in those circuits.

Hon. Shira Scheindlin (398): Substantial prejudice is an open-ended concept that will be interpreted differently by each judge facing the question. It is a subjective determination. Worse yet, "willful" must mean something other than "bad faith" given that the latter term is preceded by "or." What, then, does it mean? My research shows that it varies depending on the context in which it is used. I would not like to see this problem cured by eliminating "willful" and leaving only "bad faith." That sets the bar too high. Such a rule would encourage sloppiness and disregard for the duty to preserve. If the Committee wishes to keep the focus on state of mind, then I would urge that the language include "gross negligence," "reckless," or "bad faith" rather than "willful" or "bad faith." I am very concerned about the burden of proof with regard to "substantial prejudice." It is unreasonable to require the victim to prove not only culpable state of mind but also to prove prejudice when it cannot know the value of the information that it does not have. The better approach would be to presume that the lost information was important if the culpable conduct was done with a sufficiently egregious state of mind. The presumption can be rebutted by the spoliating party. That is the fair approach.

Donald Slavik (Prod. Liabil. Section, AAJ) (403): We already know that the failure to produce information by defendants often causes substantial prejudice. But having to show that failure to preserve was willful or in bad faith imposes an extraordinary burden on a claimant seeking to obtain curative measures or sanctions against a party that destroyed evidence. Defendants will simply claim that their "retention" policies made the evidence unavailable. Then they get a "pass" and no sanctions will ensue. But the cost of keeping information in this electronic age is de minimis. Moreover, locating relevant materials is easy also. "Instead of

manually sorting for weeks through what can often be tens of thousands of pages, or in many of my cases millions of pages, now we do an electronic search in moments to find relevant information to assist in prosecuting or defending a claim. * * * No matter what is claimed about the cost of preserving and producing information electronically, anyone can see that it is far cheaper to handle than on paper."

John Kouris (Defense Research Institute) (404): DRI believes that the use of the disjunctive in this proposal ("willful or in bad faith") is highly problematic. Some courts (see Sekisui) define "willful" as intentional or deliberate conduct without any showing of a culpable state of mind, such as by establishing a standard auto-delete function. We think "or" should be changed to "and."

David Kessler (407): The word "willful" should be stricken. In addition, the rule should be amended to require the court to use the least intrusive curative measure or sanction to remedy the failure to preserve.

Michael Reed (on behalf of members of the ABA Standing Committee on Federal Judicial Improvements (409): We believe that the language is problematic. The term "willful" is hopelessly ambiguous. We believe that the threshold standard for the award of sanctions instead should be a demonstration of gross negligence or recklessness by the movant. We also believe that it's unfair to place an initial burden on the moving party on a spoliation motion to prove prejudice.

John H. Hickey (AAJ Motor Vehicle, Highway and Premises Liability Section) (410): This amendment practically imposes a scienter requirement that will rarely if ever be met. This will cause the plaintiff to engage in massive discovery to prove scienter.

Mark S. Stewart (Ballard Spahr) (412): The rule should be changed to say there must be a finding that the loss of information was "willful and in bad faith." Without that change, some courts may find the willfulness component satisfied because a party had purposefully acted in a way that caused data to be lost without intending to prejudice a litigant. In Sekisui, for example, plaintiff deleted computer files to free server space six months before sending a notice of claim. Despite finding that plaintiff acted without a "malevolent purpose," the court found that the intentional destruction of evidence after the duty to preserve attached amounted to willful destruction. The language of the proposed rule should be revised to avoid this sort of result.

William Adams (419): The rule should say willful "and" bad faith.

Ryan Furguson (433): The rule should say willful "and" bad faith. Merely requiring that the conduct was willful leaves open the possibility that parties will be sanctioned for following what would otherwise be legitimate document retention policies.

Robert D. Curran (448): The requirements for getting sanctions under this provision impose impossible conditions. There is practically a scienter requirement, which will never be met. And it would require plaintiff to engage in massive discovery to prove scienter.

Thomas Wilkinson (461) (with copy of article from Penn. Bar Ass'n Fed. Prac. Comm. Newsletter): Judge Scheindlin's point about the dubious nature of putting the burden on the party seeking sanctions to prove substantial prejudice is persuasive; it is well-established that the

burden should lie with the party best able to provide information about the question at issue. But her further charge that the amendment creates perverse incentives and encourages sloppy behavior is not so persuasive. Although the amendment would limit the court's ability to issues sanctions, it also encourages the court to order curative measures. The court could, for example, direct a party to restore lost information or to develop substitute information or permit the introduction of evidence at trial about the loss of information or allow argument to the jury about the possible significance of that lost information. These adverse consequences serve to encourage litigants to engage in reasonable and diligent document and data preservation practices.

Rebecca Kourlis (IAALS) (489) (reporting on a Dec. 5, 2013, forum involving many prominent people): Rule 37(e) received a mixed response from the group that did not divide consistently across plaintiff and defense lines. Both plaintiffs and defendants have "skin in the game" when it comes to preservation. A number of participants saw the need for a rule change but felt that the language needs some revision. On the plaintiff side, there was some concern that the rule does not adequately deal with "mid range" cases where severe sanctions are not justified but curative measures do not fully cure the problem. Judges noted that they think that the proposal provides enough flexibility, and that they liked the high bar for culpability in (B)(i). But others raised concerns about the use of "or" in (B)(i) because behavior can be "willful" without any bad intent. There was also concern about what "substantial prejudice" means.

Gwen D'Souza (Maryland Employment Lawyers Assoc.) (660): Currently, negligent destruction of evidence will support an adverse instruction allowing the jury to infer the defendant's bad faith and possible retaliatory or discriminatory animus. We oppose the change in (B)(i) Requiring the plaintiff to prove wrongful intent in the destruction of evidence before proving wrongful intent in the underlying employment is too onerous. Placing on the plaintiff the additional and new burden of proving harm is also unwarranted. And these pro-defendant changes are unlikely to produce savings for defendant. It is unclear how it can really save money spent on preservation just because the rule is amended this way.

Don Bivens (on behalf of 26 members of leadership of ABA Section of Litigation) (673): We strongly oppose including "willful" as an alternative to "bad faith." We attach in our Appendix a compilation of citations to varying interpretation of the word "willful" in the various circuits. We also think that any standard less demanding than "bad faith" would be wrong for the serious consequences Rule 37(e) addresses. If the term "willful" really means the same thing as "bad faith," we don't need it, and if it means something else, we do not want it.

Assoc. of the Bar of the City of New York Comm. on Federal Courts (1054): The Committee does not explain why it has decided to treat an "adverse inference jury instruction" as a "sanction" under Rule 37(e)(1)(B) rather than as a "curative measure" under Rule 37(e)(1)(A). Certainly many of the courts that have approved this remedy have viewed it as a necessary corrective to address the particularly discovery failure at issue. If it is a permissible "curative measure" to allow the jury to hear evidence about the loss of information and to allow counsel to argue to the jury about it, it is hard to understand why the court cannot properly give a jury instruction to guide its consideration of that evidence. See Mali v. Federal Ins. Co., 720 F.3d 387, 391-94 (2d Cir. 2013) (explaining that an adverse inference instruction may be appropriate to explain trial testimony even where it is not a sanction). It may be that the adverse inference instruction must be addressed separately from other curative measures. But we think that requiring a high showing of culpability before it can be used sets the bar too high. We also think

that the Committee should explain why it is rejecting the Second Circuit's Residential Funding decision. Requiring a finding of bad faith or willfulness before an adverse inference instruction can be given swings too far the other way even though it is a legitimate concern that negligent behavior could cause this result.

We suggest that the rule be amended to treat the adverse inference instruction separately, and to require a showing of gross negligence or recklessness, plus substantial prejudice, before it can be employed. In addition, we think that the rule should be revised to permit sanctions if the party's "actions or omissions" caused prejudice. We are also uncertain whether the rules process can preclude district courts from imposing sanctions under other sources of authority, particularly when they are authorized by state law in diversity cases. One member of the Committee (Julia Brickell) dissented from this point, urging that a willfulness or bad faith standard should be used for adverse inference instructions because they influence a jury's determination of the merits of a case.

Steven Puiszis (1139) (amplifying comments made in Dallas testimony): Using the term "reckless" in the rule, either to define "willful" or to support an inference of bad faith, should be avoided. It is critical to define "willful" if it is to be used in the rule to avoid possible incorporation of common law meanings of the word. As the Supreme Court has recognized, "'willfully' is a 'word of many meanings whose construction is often dependent on the context in which it appears.'" Safeco Ins. Co. v. Burr, 551 U.S. 47, 57 (2007). The word "willful" should be removed from the proposed rule. If it is retained, it should be defined as the Sedona Conference has recommended -- "acting with the specific intent to deprive the opposing party of material evidence relevant to the claims or defenses." Keeping the term will mean that the standard for sanctions will be lowered in the circuits that now require bad faith. And using "reckless" instead is not a good solution. The critical point is that only bad faith supports the adverse inference that the lost evidence was harmful to the party that lost it. As the Supreme Court also recognized in Safeco, the term "recklessness" is not self-defining. See 551 U.S. at 68. Moreover, recklessness is a quasi-negligence standard.

ARMA International (1263): "Willfulness" is a risky standard if it includes discarding information pursuant to a responsible preservation policy. Such discard of information is consistent with established records management standards. The heart of information governance is the concept that documents have a life cycle, and that means they are intentionally destroyed or discarded when that cycle ends. This is good information governance, and is the part of the rule proposal our members are struggling with the most. The contradictions for information governance professionals would become worse if companies could be sanctioned for spoliation for intentionally deleting data after they have followed,in good faith, a disposition protocol that included reasonable due diligence.

Jonathan Marcus (CFTC) (1366): Courts define "willfulness" in myriad ways across the country and in various contexts. Sometimes a finding of gross negligence is said to suffice. For example, in U.S. v. Krizek, 111 F.3d 934, 941-42 (D.C.Cir. 1997), the court said that "reckless disregard lies on a continuum between gross negligence and intentional harm." In the context of a False Claims Act case, the court regarded reckless disregard as an extension of gross negligence. In Phillips v. U.S., 73 F.3d 939, 943 (9th Cir. 1996), the Ninth Circuit upheld an instruction for recklessness that the lower court had borrowed from an earlier definition of gross negligence in a case in which the government had to prove willfulness under 26 U.S.C. § 6672. "Like Euclid's axiom that 'things equal to the same thing are equal to each other,' courts could

find that reckless conduct equals both willful and grossly negligent conduct." Accordingly, if "willful" and "bad faith" are retained in the rule the Note should define them.

Michael J. Buddendeck (Am. Inst. of Cert. Pub. Accountants) (1451): The AICPA urges adoption of a simple bad faith standard. "Willfulness" could be interpreted to mean mere deliberateness, without any specific intent to destroy information relevant to litigation. Courts could conclude that even activity protected under current Rule 37(e) -- "information lost as the result of the routine, good-faith operation of an electronic-information system" -- describes "willful" conduct in that the system itself was adopted pursuant to an intentional business decision.

Anna Benvenutti Hoffman (1918): "An adverse inference is not a very powerful sanction -- it merely permits the jury to find that evidence that defendants should have kept, but cannot produce, may have been helpful to plaintiffs. But it does provide some incentive for defendants to look for and produce files. With this change, that would be gone, and it would be essentially impossible to meet the threshold required for sanctions."

New York County Lawyers' Ass'n (2072): We are concerned that the rule does not allow a court to sanction an unsuccessful bad faith attempt to destroy crucial information because that can't be said to have caused substantial prejudice. Even where egregious actions did not result in prejudice, we think that the court should have discretion at least to impose monetary penalties.

Washington D.C. Hearing

Jeana Littrell (FedEx Express): If courts interpret "willful" to include settings on an auto-delete function, that might mean we would have to stop using auto-delete on all our systems, or at least all subject to a litigation hold. That would be very costly, and would strain the limits of existing technology for finding responsive ESI.

David R. Cohen (Reed Smith): The present formulation of creates a risk because some courts interpret "willful" very broadly. It would be better to say "willful and in bad faith."

Jonathan Redgrave (Redgrave LLP): Using both "bad faith" and "willful" will lead to disputes. He favors using "bad faith" and defining it. Also, the rule should say that the least severe sanction should be employed; saying that only in the Note is not enough.

Thomas Allman: It is good to reject Residential Funding. But some recent decisions have defined "willfulness" too broadly. It may be that a good definition of willfulness in the Note will be an antidote to that risk. It is important to make very clear that the old Second Circuit view is not to be followed under the new rule.

Peter Strand (Shook, Hardy & Bacon): We think it would be much better to say "willful and bad faith." "Folks don't destroy documents."

Dan Troy (GlaxoSmithKline): We favor having the rule say willfulness and bad faith.

Alexander Dahl (Brownstein Hyatt Farber Schreck): The current formulation that treats "willful" action as sufficient to justify sanctions is too elastic. For example, see Judge Scheindlin's decision in Sekisui, where she defines willfulness in a very broad manner. True, she

also expresses opposition to this committee's current proposal in that decision, but the point is that some judges will regard the current proposal as authorizing sanctions in a broad swath of cases. In short, so long as decisions like the Sekisui ruling scare the people who have to make preservation decisions, the rule change will not achieve its purpose of reducing the hugh burden and cost now resulting from divergent approaches to preservation. The rule should say that bad faith is required, and that it requires a showing of a decision based on consciousness of a weak case or awareness that evidence helpful to the other side would be destroyed.

Jennifer Klar: Negligence or gross negligence would be more appropriate standards than what the Committee has proposed. That would protect parties that have acted reasonably. Under the willfulness or bad faith standard, the destruction of evidence will go unchecked, creating an incentive to destroy evidence. Moreover, including adverse inference instructions with sanctions is wrong because that is a remedial measure, not a sanction. The D.C. Circuit has proclaimed that such measures are "fundamentally remedial."

Michael C. Rakower (N.Y. St. Bar Ass'n): We recommend including a definition of willfulness. It should stress intentional action. It also should focus on a party's "actions or omissions", not just on actions. Omissions may more often be the reason these problems arise.

Phoenix hearing

Robert Owen: Retaining "willful" as sufficient will dilute the rule. One judge in the S.D.N.Y. has already indicated a very broad interpretation of that word. It would be best to substitute "and" for "or" in the rule -- "willful and in bad faith."

William Butterfield: The requirement that a party seeking sanctions prove that the loss of information caused "substantial prejudice" is a large burden. For this reason, the rule should provide that the alleged spoliator should have the burden of proving that there was no substantial prejudice. That would matter only if the court were persuaded that the necessary level of culpability were established. In those cases, given that the alleged spoliator has more knowledge of its own information than the other side, it makes sense to place the initial burden on that party to show that there has been no significant prejudice. "Willful" is also a "problematic" standard in the rule. The Committee Note should provide examples of bad faith. One would be failure to take any steps to preserve, allowing the auto-delete function to destroy evidence.

Stephen Twist: The word "willful" should be removed.

Jill McIntyre: The "substantial prejudice" standard will be helpful to companies. Usually they don't delve into the data to determine what to preserve; no company will make a detailed evaluation of the data at the preservation stage, unless litigation is imminent. So rather than do that, it will avoid risks by overpreserving. Although reducing preservation does not save much money all by itself, it does reduce costs later on for collecting, processing, and producing. Asked how the "substantial prejudice" standard assists companies in making such decisions, witness answers that it shows that it's o.k. to risk loss of some information.

John Rosenthal: The distinction between sanctions and curative measures is illusory and should be abandoned. One illustration of this illusiveness is that "permissive" adverse inference instructions are sometimes regarded as curative measures presently by judges. On the other hand, some case law calls things we seem to regard as curative measures "sanctions." Yet our

draft would allow "curative measures" to be imposed without a showing of either prejudice or culpability. If curative measures are left in, a prejudice requirement should be added.

Dallas Hearing

Bradford A. Berenson (G.E.): (At the hearing, the witness circulated the comment that was designated 599 among the written comments; it is summarized in addition to the testimony here.) Regarding the standard for allowing sanctions should clearly make them unavailable for anything like negligence. Therefore, he would be concerned about adopting a "reckless disregard" standard. The Sedona standard is better.

William T. Hangley (ABA Section of Litigation leadership): He represents the ABA Section of Litigation Federal Practice Task Force, and speaks for the leadership, not for the entire section or the entire ABA. Leadership's view is that sanctions under 37(e) should be limited to cases involving bad faith. The written comments provide details and history on the variety of interpretations associated with "willfulness." Recklessness can go toward that determination.

John H. Martin: Texas has a lot of jurisprudence on what "willful" means. If you use that word, you should define it.

Neva Lusk: (B)(i) should say "willful and bad faith." Otherwise any intentional action could result in sanctions. There are a lot of mom and pop operations that do intentional actions that should not suffice to support sanctions. Does not like "reckless disregard" as a standard either. Instead, one should use a totality of the circumstances standard. Asked whether a party that simply decided not to comply with preservation obligations because of the cost of doing so could be sanctioned if it was indifferent to, but not aware of, what was lost, answered that this conduct would not indicate a specific intent to deprive another party of relevant evidence.

5. Rule 37(e)(1)(B)(ii)

Michael L. Slack (266) (on behalf of American Association of Justice Aviation Section): This proposal is even more troubling than (B)(i). "First of all, the phrase 'irreparably deprived' is past tense and, therefore, suggests that an injured party proceeded with the litigation of its case and was, as a result of the offending party's conduct, not able to pursue its claims during the course of the litigation. But if an injured party has to wait until it has failed on its claims at trial as a result of vital evidence being destroyed then none of the sanctions provided for under Rule 37 will matter." And what does the term "irreparably" add to "deprived"? That seems to establish some higher standard that an injured party must meet to show its entitlement to relief. Finally, the use of the word "present" raises concerns among those who have the burden of proof. "[A]n injured party may be deprived of vital evidence necessary to *prove* its claim by the wrongful conduct of a defendant, but still have a scintilla of evidence sufficient to *present* its claim to a jury."

Lawyers for Civil Justice (267): This provision should be stricken. There is no need to include this provision since ample measures exist to handle the rare kind of case in which this problem can arise. Removing the provision would not weaken existing spoliation law. The Silvestri case, for example, could have been handled the same way it was handled under this rule without (B)(ii) because the court could have deemed plaintiff's conduct to be willful or in bad faith. It was surely prejudicial. Moreover, under the proposed rule remedial or curative measures would have permitted the court to preclude plaintiff's experts from testifying or allowed defendant's attorney to comment at the trial. Other cases confirm that this provision is not needed to justify needed sanctions results. But including this provision will likely result in an increase in motions seeking harsh sanctions. Indeed, this provision provides "a tort-based spoliation recovery" that is beyond the authority of the Rules Enabling Act, for "the authority to impose sanctions for spoliated evidence arises not from substantive law but, rather, from 'a court's inherent power to control the judicial process'" (quoting Adkins v. Wolever, 554 F.3d 650, 652 (6th Cir. 2009)). Moreover, the "irreparably deprived" phrase is too amorphous, and results would tend to differ from judge to judge. In addition, "including the (B)(ii) exception in the new rule will pave the way for litigants and courts to fit their claims of alleged negligent spoliation of key evidence (electronic or physical) into the garb of the 'irreparably deprived' language."

Washington Legal Foundation (285): (B)(ii) creates a risk that it will essentially swallow the rule by inviting courts to impose sanctions in cases where willfulness or bad faith cannot be established. Although the Committee evidently intends that the "irreparably deprived" language will be applied narrowly, litigants claim "irreparable harm" as a matter of course in sanctions battles, and experience suggests that judges and litigants alike will some come to view the expression as a convenient way to circumvent primary operation of the rule. Absent willful or bad faith conduct, there should be no authority to impose sanctions on an innocent or merely negligent party. (B)(ii) should be removed from the proposed rule.

Alex Jennings (294): I think that (B)(ii) should be retained even if 37(e) is limited to electronically stored information. Although limiting the rule to ESI might lessen the effect felt if this part is removed from the rule, it still provides a narrow exception when sanctions are allowed even in the absence of willfulness or bad faith. This narrow exception has been used by courts. Due to the exceptional circumstances that are necessary for relying on this provision, such as tangible evidence, limiting the rule to ESI is not enough. The flexibility of (B)(ii) can be

incredibly necessary.

Gregory Arenson (New York State Bar Ass'n Commer. & Fed. Lit. Section) (303): The Section supports authority to impose sanctions without regard to culpability when a party's actions have "irreparably deprived a party of any meaningful opportunity to present or defend against claims." Were this provision not included, the Section would be concerned that an adverse-inference jury instruction or a direction establishing matters or facts could not be imposed when the spoliated information is central to the action but the spoliator was merely grossly negligent or reckless. The standard in (B)(ii) is sufficiently high that it likely will be only the rare case in which sanctions may be imposed when the spoliator does not act willfully or in bad faith.

Thomas Y. Allman (308): The (B)(ii) provision should be dropped. In its place, the phrase "absent exceptional circumstances" should be added to the rule to avoid overruling *Silvestri* and similar cases. The Committee Note could then explain that this exception is designed to help avoid courts using it inappropriately to impose liability without fault. If the Committee is not prepared to remove (B)(ii), it should consider limiting it to "documents and ESI."

Malini Moorthy (Pfizer) (no. 327): This provision creates a risk that courts will not narrowly apply what is meant to be limited to very exceptional cases. Plaintiffs routinely assert that they have been "irreparably deprived" of critical information.

U.S. Chamber Institute for Legal Reform (328): ILR urges that this section be deleted altogether. Allowing sanctions without a finding of wilfulness and bad faith would exacerbate the problem if spoliation "mini-litigations." It would also be unfair because an adverse inference instruction produces all but a declaration of victory for the side that obtains the instruction against the other side.

Timothy A. Pratt (Fed. Defense & Corp. Counsel) (337): FDCC is concerned that this provision could swallow the rule by enabling judges to impose sanctions without any finding of willfulness or bad faith. It urges removal of the provision.

Thomas Allman (339) (supplementing remarks at Nov. 7 hearing): I was asked whether my suggestion to add "absent extraordinary circumstances" to the beginning of (B)(i) and drop (B)(ii) would lead to greater uncertainty because it would be open ended. That would make the alternative a truly rare exception, not an equivalent alternative as in the current draft.

Doug Lampe (343) (Ford Motor Co.): Ford is concerned that retaining (B)(ii) would eviscerate much of the clarity sought by the Committee. All advocates for sanctions claim they have suffered "irreparable deprivation." All that "irreparable" means is that the information sought is gone, and "deprivation" only means that the loss of the information is regrettable and unfortunate. Ford urges that a bad intent component be included in any rule governing the imposition of sanctions. If that is not done, Ford urges that (B)(ii) be changed to make it clear that the claim or defense must be so restricted by the absence of information that the court would be required to dismiss the claim or defense were there no relief under (B)(ii).

The Sedona Conference Working Group 1 (346): Sedona believes that if the "Absent exceptional circumstances" approach it has recommended is adopted (b)(ii) would not be

necessary. We think that the wording of the Advisory Committee's proposal would be susceptible to inconsistent interpretations because the term "meaningful" is inherently subjective. The "absent exceptional circumstances" approach provides the court with appropriate flexibility to address situations where the loss of evidence has deprived a party of the ability to pursue or defend against the claims. If the Committee proceeds with (B)(ii), we believe it should be rewritten to focus on whether the party has been "irreparably deprived of the ability to present or defend against the claims in the litigation." This language seems to us much less susceptible to inconsistent interpretations than the Committee's "any meaningful opportunity" language.

Kenneth D. Peters & John T. Wagener (353): This provision should be deleted. It will generate motion practice as the courts struggle to determine what it means.

Andrew B. Downs (359): This provision is an invitation to sanctions motions. The irreparable loss of evidence should not convert otherwise unsanctionable acts or omissions into sanctionable ones. If there is an "irreparable deprivation" exception, lawyers will use it, but not as the Advisory Committee contemplates. It takes but one published decision expanding the scope of this provision to encourage yet more sanctions motions and more litigation of collateral issues.

Jeffrey S. Jacobson (Debevoise & Plimpton) (378): We are concerned that courts may overread (B)(ii) because it applies to any loss of information that "irreparably deprives a party of any ability to present or defend the action." The rule should make clear that sanctions are permitted in the absence of culpability only where the adverse party cannot, as a result, submit any evidence in support or defense of the claim. It may be best that this provision be eliminated, but at least it should be explicitly cabined.

Wilbur A. Glahn, III (Amer. Coll. of Trial Lawyers) (377): We believe that sanctions for loss of evidence should be limited to cases of bad faith. To create a lesser standard of culpability for loss of evidence that causes catastrophic prejudice would encourage counsel who cannot show that the loss of evidence was due to bad faith to claim that the impact of the loss satisfies the standard of no "meaningful opportunity" to prosecute or defend. This in turn would require opposing counsel to argue that the party seeking sanctions could nonetheless prevail -- in effect arguing the other side's case.

John Beisner (382): (B)(ii) should be deleted altogether. Allowing sanctions absent a finding of willfulness and bad faith would exacerbate the problem of spoliation claims as a litigation tactic and impose significant costs on American companies by encouraging them to store every last byte of information.

Alan Morrison (383): I believe the use of the word "any" on line 30 of the proposal places too heavy a burden on the party seeking sanctions. I would substitute "a" for "any," to lessen the burden and produce a fairer balance. In line 32, the use of "all claims" seems to mean that the deprivation must affect all claims; should it not be "any" claim. Beyond that, why not use "claim or defense," as used in Rule 26(b)(1) and several other places in the rules. Thus, the provision could read "irreparably deprived a party of a meaningful opportunity to litigate a claim or defense in the action."

International Assoc. of Defense Counsel White Paper (390): (B)(ii) could be problematic and allow courts to impose sanctions absent any willfulness or bad faith. It is likely that some

courts would use the exception to avoid the primary rule. The IADC recommends that the exception be removed from the proposed rule.

Steven J. Twist (396): (B)(ii) should be removed from the rule. It is likely some courts would use the exception to avoid the primary rule.

John Kouris (Defense Research Institute) (404): This provision could swallow the rule and defeat the basic goal of the amendment to constrain use of sanctions for failure to preserve. It is likely that some courts would simply use this provision to sidestep the requirements of (B)(i).

David Kessler (407): This provision should be removed. It makes the responding party the insurer of its opponents' ability to sue.

John H. Hickey (AAJ Motor Vehicle, Highway and Premises Liability Section) (410): This provision at least offers the possibility (compared to (B)(i)) of having some teeth. But we ask, at what point this decision is to be made? Is it only at the end of the trial? If it is toward the beginning of the litigation, it would be almost impossible for plaintiff to prove that it is "irreparably deprived" of a meaningful opportunity to present or defend against the claims in the litigation? This would require massive evidentiary hearings and certainly will be almost impossible to determine at the beginning of the process.

Mark S. Stewart (Ballard Spahr) (412): This provision may paradoxically undermine the amendment's purpose. The exception should theoretically apply only rarely, but courts may use it to avoid the rule. Requiring intentional conduct to justify sanctions is necessary to achieve the amendment's goals. We think that this provision should be removed.

William Luckett (415): This provision should be removed. There is plenty of strength in the rule as written when there is any indication of willfulness or bad faith with respect to failure to preserve evidence.

Thomas Kirby (435): This provision is seriously ambiguous and should be clarified. The language "any meaningful opportunity to present or defend against the claims in the litigation" could be read in several different ways. It could mean that severe sanctions are proper if any one meaningful opportunity to present or defend any one claim is foreclosed, even if other equally meaningful opportunities or defenses remain. Or it could mean that sanctions are proper only if every meaningful opportunity has been foreclosed. I suggest that the rule be rewritten to say "one or more meaningful opportunities to present or defend against one or more claims in the litigation" or "all meaningful opportunities to present or defendant all [or at least one of the] claim[s] in the litigation."

Robert D. Curran (448): At what point is the determination called for by (B)(ii) to be made? Is this only at the end of the trial? If it is toward the beginning of the process, it would be almost impossible for the plaintiff to prove that it is "irreparably deprived" of a meaningful opportunity to litigate. This would require massive evidentiary hearings. And no party would be willing to admit, much less try to prove, that it cannot prove its case.

Jo Anne Deaton (460): The proposed amendments to 37(e) would substantially benefit

litigants and the courts by providing more guidance on how to proceed when a party fails to preserve evidence. Particularly in the products liability context, on many occasions plaintiffs or their attorneys fail to make any effort to preserve the condition of the subject product, yet still file suit claiming the product was defective. It is challenging indeed for manufacturers to defend a lawsuit when the subject matter of that lawsuit is missing or irrevocably altered post-accidents. The proposed amendments would help provide consistency in dealing with these issues.

Rebecca Kourlis (IAALS) (489) (reporting on a Dec. 5, 2013, forum involving many prominent people): There were multiple suggestions on how to address the concerns of the (B)(ii) exception to the requirement to prove culpability. A significant number of participants urged that (B)(ii) should be removed entirely, and that the Committee Note should state that 37(e) does not overrule the Silvestri line of cases. Others raised the issue that the Committee Notes themselves are not approved by the Supreme Court, making this a less-than-ideal way to address these concerns. One participant endorsed an idea proposed by Thomas Allman that would delineate between documents, ESI, and tangible things. This provision could be removed, it was suggested, if new 37(e) were applied only to ESI and documents, but not to tangible things.

Don Bivens (on behalf of 26 members of leadership of ABA Section of Litigation) (673): We support the proposition that, in that rarest of cases where a party's non-bad faith conduct destroys evidence such as to make it impossible for the other party to litigate, extreme sanctions might be appropriate. We do not agree with the suggestion -- implicit in a question the Committee asked -- that such unintentional catastrophic destruction cannot happen to ESI. It can, and the rule should apply to all manner of information.

Philadelphia Bar Ass'n (995): While dropping (B)(ii) might make sense if the rule were limited to ESI, we think that it serves a purpose to provide relief in a case involving a catastrophic harm to a party's ability to litigate that cannot be remedied by any curative measure. We understand that such a finding is limited to extremely rare circumstances and that the harm must be the result of a party's actions, not to an Act of God or of some third party.

Assoc. of the Bar of the City of New York Comm. on Federal Courts (1054): We strongly support retaining this provision. There may well be circumstances where the consequences of the loss of electronically stored information could be so severe as to warrant the imposition of sanctions even in the absence of willfulness or bad faith.

Michael J. Buddendeck (Am. Inst. of Cert. Pub. Accountants) (1451): The AICPA believes that this provision should be eliminated. Allowing sanctions without any culpability would undermine the goal of proposed 37(e). Because the focus is on the value of the information to a potential opposing party, which is not within an organization's control, there is no stopping point under this standard short of "keep everything." Moreover, the sanctions specified, particularly the adverse inference instruction, should depend on whether there has been litigant misconduct.

New York County Lawyers' Ass'n (2072): We think that this provision should be retained. The Note makes it clear that this will apply only in exceedingly rare cases, and even then only when the loss was a result of "the party's actions." It is important to retain judicial authority to use sanctions in such extreme circumstances. Moreover, in such a catastrophic loss of information it seems at least unlikely that negligence would be the explanation. Some in the

legal community claim that this provision will lead to a spate of motions, if those motions are made courts will sensibly use curative measures in most instances, for most cases do not involve such exceptional losses of information. It does not seem likely to us that this provision will "swallow the rule," for the Note makes it clear that this is only for the truly extraordinary case.

Washington D.C. Hearing

Jonathan Redgrave (Redgrave LLP): The focus should be on the importance of the lost information to the action; materiality is key.

Thomas Allman: Drop (B)(ii) from the rule. The better solution is to preface the rule with "Absent exceptional circumstances, . . ." That will take care of any exceptional case that might fall within (B)(ii).

Alexander Dahl (Brownstein Hyatt Farber Schreck): This provision creates a risk that judges seeking a ground for imposing sanctions but unable to fit within (B)(i) will distend (B)(ii) into something much broader than what the Committee has in mind. The provision is unnecessary. Problems of the sort addressed can be solved by curative measures.

Michael Rakower (N.Y. St. Bar Ass'n): We support the Committee's formulation of sanctionable conduct, but recommend that willfulness be defined. We propose that it be either intentional conduct or conduct that's sufficiently reckless so as to enable someone to foresee a high likelihood of harm. Our report is more precise on the formulation of this preferred standard. We also think it is important to add "or omissions" after "actions."

Phoenix hearing

Robert Owen: This provision should be eliminated. It will produce adverse results and dilute the goals of the rule rather than solve a real problem.

Timothy Pratt (Federation of Defense Counsel): This provision should be eliminated.

Thomas Howard: This provision should be limited to tangible things. That is where the problem exists -- loss of the instrumentality of injury. ESI is simply different.

Robert Hunter: Imposing sanctions for nonculpable loss of evidence is wrong. This sort of thing can happen often. For his company, employees servicing units often remove, discard, or alter units as part of servicing. Even if they ask "Have there been any problems?" they may not find out about something that comes up long afterwards.

Stephen Twist: (B)(ii) should be removed.

John Rosenthal: This provision should be eliminated. It deals with a mythical situation and will case myriad problems.

6. Rule 37(e)(2)

Lawyers for Civil Justice (267): The factors in Rule 37(e)(2) do not belong in the rule. Originally (at the time of the Dallas mini-conference in September 2011) the Subcommittee was considering "bright line" rules to specify clear preservation standards and bring certainty to this area. In particular, specificity on the "trigger" would have been welcome. The Subcommittee abandoned this approach, however, leaving it to the courts to determine whether information should have been preserved. But the list of factors is incomplete and potentially misleading. There is no relative ranking of the importance of the various factors. Although some emphasize attention to whether a party behaved reasonably, there is little discussion of the impact of the absence of reasonableness. If these provisions are included in the rule, there is a significant risk that they will spur ancillary discovery. Courts may "cherry-pick the discussion of a specific factor and convert it into a mandate whose violation is seen as justifying sanctions despite the culpability and prejudice requirements of the rule." For example, the Note states that the prospect of litigation may call for altering routine operations and says that issuing a litigation hold is often important. "It was precisely that type of language in the 2006 Committee Note that was misinterpreted as a *per se* mandate." See Arista Records LLC v. Usenet.com, Inc., 608 F.Supp.2d 409 (S.D.N.Y. 2009). The specific factors compound the uncertainty:

> Factor A does not define with any precision the circumstances that constitute notice that litigation is likely or that information would be discoverable.
>
> Factor B calls for evaluating the reasonableness of preservation efforts, but reasonableness is an inherently vague standard and the fact some information was lost does not mean reasonable efforts were not employed.
>
> Factor C regarding good-faith exchanges about preservation could easily give rise to back-and-forth exchanges that would be unfair in asymmetric cases and force the party from whom information is sought to acquiesce in essentially abusive conduct.
>
> Factor D regarding proportionality does not spell out presumptive categories of data which need not be preserved absent prior notice. Such presumptions can help to remove incentives to sand-bag an opponent by not mentioning preservation demands.
>
> Factor E may be useful in some cases, but requiring it as a rule will be largely irrelevant since most preservation questions arise pre-litigation when no court is available to provide guidance.

Washington Legal Foundation (285): The list of factors is not particularly helpful. None of these "reasonableness" factors sheds any relevant light on the central question -- whether the failure to preserve material was willful or in bad faith, resulting in substantial prejudice. Because it is an incomplete catalog of considerations, it risks being misinterpreted as mandates whose violation would justify the imposition of sanctions irrespective of the culpability and prejudice requirements. WLF urges the Committee to eliminate these factors from the rule altogether. At the most, they could be mentioned in the Note.

Hon. Craig B. Shaffer & Ryan T. Shaffer (289): (This is an article from the Federal Courts Law Review concerning the proposed amendments.) Preservation issues are best addressed by the parties as early as possible and from a reasonable, good faith perspective.

Counsel should not send pro forma preservation letters with overbroad demands, and the recipient of a preservation demand should view the request as an opportunity to open a dialogue on the scope of any preservation obligation, rather than an affront to be ignored. "Conferring with opposing counsel does not place the responding party at a tactical disadvantage, particularly if the recipient has already concluded that the preservation demand letter was sufficient to trigger a litigation hold."

Gregory Arenson (New York State Bar Ass'n Commer. & Fed. Lit. Section) (303): Although the Section strongly endorses the concept of describing with particularity these and other such factors in the text of the rule, we are concerned that the language and the factors do not clearly express the Advisory Committee's intent. We think that the factors include everything in current Rule 37(e) and that it should accordingly not be retained if the new provision is adopted. But the introductory language saying that the factors bear on whether discoverable information that should have been retained has been lost singles out willfulness and bad faith as topics without considering the extent to which these factors also bear on whether an action was negligent or grossly negligent, which could affect what is an appropriate corrective measure under proposed 37(e)(1)(A). In addition, although the Committee Note says that the Committee has an "expectation" that only the least severe sanction necessary in the circumstances will be used, there is nothing in the rule that says so. The Section thinks that the introductory material should be revised as follows: "The court should consider all relevant factors in selecting the least severe curative measure or sanction under Rule 37(e)(1) needed to repair any prejudice resulting from the loss of information, including . . . ."

Thomas Y. Allman (308): The Committee rejected the inclusion of a detailed rule on preservation in favor of the "factors" listed in proposed 37(e)(2). But there is a dark side to the choice to merely hint at what the Committee might see as desirable by listing idiosyncratic "factors." The factors listed identify only selected aspects of the mix of issues involved and do provide the type of practice commentaries issued by more nimble entities such as the Sedona Conference. The Committee seems to assume that the factors will ensure that if a potential party makes reasonable preservation planning decisions it will not be branded a "spoliator." But the rule does not allow a party to safely rely on its ex ante assessment of proportionality in designing the scope of an initial preservation effort, even in the absence of access to the opposing parties or to a court. There is also a serious risk that courts will unfairly or inadvertently turn the encouragement of reasonable conduct on its head by determining that the protection from sanctions will be forfeited in the absence of following the advice in the Committee Note. For example, the Note unequivocally advocates the interruption of routine operations and touts the use of litigation holds, implicitly endorsing their use regardless of the circumstances. Courts have so used statements in the Committee Note to the 2006 amendments. The factors listed in Rule 37(e)(2) do not belong in the Civil Rules and should, at most, only be described in the Committee Notes as a checklist of possible issues to consider. But if the current formulation is retained, the Committee should make it clear that sanctions may be imposed only upon proof of heightened culpability and substantial prejudice. In addition, the Note should clarify that the diminished scope of discovery under amended Rule 26(b)(1) due to proportionality concerns is equally applicable to the scope of preservation under proposed 37(e).

Kaspar Stofflemayr (Bayer Corp.) (309): Bayer strongly urges the adoption of a clearly defined and easily identifiable triggering event, such as the commencement of litigation, that would initiate a defendant's obligation to take affirmative steps to preserve information. The ill-defined "reasonable anticipation of litigation" standard under current law is too vague to provide

useful direction to a party who wishes to avoid the risk of sanctions while still limiting preservation and costs to what the law requires. An example illustrates the problems under the present rule: In late 2012, an attorney sent the company a letter attaching a federal court complaint he said he would file if Bayer did not meet certain demands within 30 days. The company immediately issued a litigation hold notice and disabled computer auto-delete features for employees who might have relevant information. It also rejected the demands, but so far as it knows no lawsuit has been filed. Meanwhile, 382 employees remain subject to a legal hold, and the company continues to bear the cost of preserving their information. Current law gives scant guidance on when the company should no longer "anticipate litigation."

U.S. Chamber Institute for Legal Reform (328): This provision should be deleted from the rule. None of the factors relates to whether a failure to preserve information was "willful or in bad faith" and resulted in "substantial prejudice," the central questions underlying the proposed amendment. Instead, the factors emphasize the "reasonableness" of a party's conduct without purporting to define what constitute reasonable conduct in the preservation context.

Timothy A. Pratt (Fed. Defense & Corp. Counsel) (337): FDCC urges deletion of this section of the proposed rule. The factors do not assist in determining whether the failure to preserve information was willful and in bad faith and resulted in substantial prejudice. If the Committee does not delete the factors, FDCC suggests that they be included in the Committee Note rather than the text of the rule itself. Including the factors in the rule suggests that they are mandatory considerations.

The Sedona Conference Working Group 1 (346): Sedona has proposed a set of factors to use in determining whether a party acted in good faith, its preferred standard for sanctions. It believes that its factors are superior to some identified in the Committee's draft. In particular, it believes that receipt of a "preservation letter" should not be mentioned. The existence of a preservation duty really has little to do with such letters; the duty can arise without any such demand, and demands are often made when there is really no duty. This factor may result in gamesmanship. We agree that the reasonableness of the party's preservation efforts should matter, but are concerned that the Committee's language is too narrow and might be read as limited to whether sufficient efforts were made to preserve the specific information that was lost. Instead, the focus should be on the "overall reasonableness" of the party's preservation efforts.

Jeffrey S. Jacobson (Debevoise & Plimpton) (378): Regarding proposed 37(e)(2)(D), we note that it does not say what factors inform proportionality in this context. The Committee Note suggests that courts should consider the same factors that inform the proportionality inquiry under new Rule 26(b)(1), and we expect that most courts will do so. But we think the text of the rule should explicitly refer to the Rule 26(b)(1) factors that courts should consider.

Wilbur A. Glahn, III (Amer. Coll. of Trial Lawyers) (377): In Rule 37(e)(2)(E), we propose changing "the party" in the first line to "any party." There may be circumstances in which it would be reasonable for the requesting party to seek the court's guidance on the responding party's obligation to preserve evidence. In addition, we think that the invitation in the Committee Note (see pp. 45-46) for consideration of a party's lack of sophistication in evidence-preservation practices would encourage lack of diligence or, worse, sharp practices by parties insincerely profess to be "unsophisticated."

John Beisner (382): I think these factors should be deleted from the proposed rule. None

of them relates to whether a failure to preserve information was "willful or in bad faith" and resulted in "substantial prejudice." Instead, they emphasize the "reasonableness" of a party's conduct without purporting to define what constitutes reasonable conduct in the preservation context. Reasonableness is a highly elastic standard, and using it will only foster greater uncertainty over whether a party may or may not delete information. There is also the risk that some courts will view failure to satisfy any one of these factors as sufficient to justify sanctions in a case where the loss of information was not the result of the party's willfulness or bad faith.

Alan Morrison (383): I worry about the focus in factor (A) on whether the information would be "discoverable." Particularly if the change to Rule 26(b)(1) invoking proportionality is adopted, that determination may be quite difficult to make. It also seems to me that requiring this sort of inquiry is ill-advised, and to create incentives for parties to destroy evidence, or allow it to be lost, on the ground that they had a reason to think it would not "discoverable under Rule 26(b)(1)." Similarly, paragraph (D) makes proportionality to "any anticipated or ongoing litigation" pertinent. Is that the same as the proportionality idea now introduced into 26(b)(1)? Does it include all the factors in 26(b)(2)(C)(iii) or 26(b)(1)?

International Assoc. of Defense Counsel White Paper (390): Although (e)(2) is illuminating and potentially helpful, it provides too tempting an opportunity for trial courts of varying judicial temperaments to bend the rule to achieve their own objectives instead of providing a bright line rule for litigants to understand and follow with confidence. The IADC recommends that the list of factors be eliminated, or at most included in the Committee Note rather than the rule text. None of the factors goes to the central point of the proposed rule, which is the determination of whether a failure to preserve information was "willful or in bad faith" and resulted in "substantial prejudice." Rather, the list is largely concerned with "reasonableness" and is an incomplete catalog of issues that is highly unlikely to be useful to lawyers or courts.

Hon. James C. Francis IV (395): Perhaps the most beneficial aspect of the proposed rule is the non-exclusive list of factors that courts are directed to use in assessing a party's conduct. Proposed (e)(2) makes clear that a party's preservation efforts are expected to be proportional and reasonable, not perfect. Further, the factors properly encourage the parties to engage with one another with respect to preservation and to bring disputes that cannot be resolved informally to the court for resolution.

Hon. Shira Scheindlin (398): These factors reveal little or nothing about willfulness or bad faith. Rather, they are factors that assess the reasonableness of the conduct. This creates a disconnect. If the standard for the imposition of sanctions included negligence or gross negligence the factors would make sense. But as the rule is written now they are not helpful.

John Kouris (Defense Research Institute) (404): This list of factors is not helpful and should be deleted or, at most, included in the Committee Note rather than the rule text. What the rule should do is articulate a clear, bright-line standard to clarify when the affirmative duty to preserve information is triggered. The current, ill-defined boundaries of discovery drive over-preservation. The "anticipation of litigation" standard in particular causes real difficulties.

Stuart Delery (U.S. Dep't of Justice) (459): The Department strongly supports including the concept of proportionality, as is included in the current factors. Disputes about the proper scope of ESI discovery or recovery efforts often involve exponentially greater cost than comparable disputes involving paper documents. Too often the accusations of lost information,

and expensive and time-consuming efforts to address or prepare for accusations, or to recover long-discarded emails, outweigh the value of the case. We recommend that the Note clarify that the scope of discovery a party anticipates should be consistent with the scope of Rule 26(b)(1). We are concerned that, absent clarification, the rule revision will trigger ancillary litigation regarding the scope of "discoverable information" because some will claim a disconnect between the scope of information covered by this new rule and the scope of information that is otherwise available in discovery. We also think that factor (A) on foreseeability should be modified. The Department has confronted situations in which a party repeatedly "loses" data while claiming ignorance of its preservation obligations. We think that "was on notice" might not capture this situation, and that the rule should allow the court to take account of prior instances of the same or similar conduct by the party. We therefore propose that (A) be revised as follows:

(A) the extent to which the party reasonably should have known ~~was on notice~~ that litigation was likely and that the information would be discoverable;

Rebecca Kourlis (IAALS) (489) (reporting on a Dec. 5, 2013, forum involving many prominent people): A few expressed support for the factors in (e)(2), but most supported revising them. A significant number favored substantially revising (e)(2) to remove the "laundry list," leaving the analysis flexible to be tailored for specific cases. One participant expressed the concern that the factors include many items that occur after the fact, which could result in gamesmanship. Factors (A) and (B) garnered the most support, and several argued that the rule should be limited to those alone. One participant also suggested collapsing the introductory language. Other factors drew criticism. (E) was said to be confusing and unhelpful, based on the ambiguity of the word "timely." The same thing was argued with respect to "proportional" in factor (D). Others argued that the list of factors should be made explicitly non-exhaustive.

Charles Ragan (494): With respect to the factors listed in (e)(2), I suggest that less would be more, and that the factors should be limited to:

(A) the extent to which the party was on notice that litigation was reasonably likely and that the information would be relevant; and

(B) the reasonableness of the party's efforts to preserve the information.

I think that proposed factors (C) through (E) are subsumed within the first two. I suggest adding "reasonably" to (A) to conform to the majority rule in case law for triggering legal hold obligations. I suggest the substitution of "relevant" for "discoverable" because the scope of relevance is elastic -- it can contract or expand, as claims are modified. In particular, there may information the discoverability of which is not apparent when notice occurs that litigation is reasonably likely. A party should not be subject to sanctions if it secured the core information at the outset, but did not foresee the final configuration of the claims, and that information that is ultimately "discoverable" in regard to added claims but has been lost in the interim might lead to sanctions.

Kenneth Lazarus (on behalf of American Medical Assoc. and related organizations (497): The trend of federal and state law is toward increasing storage requirements for doctors, and many doctors are now transitioning to use of electronic health records, including adoption of new retention and back-up policies. The proposed amendments move in a constructive direction by focusing on the extent to which a party is placed on notice that litigation is likely and that the

information lost would be discoverable in such litigation. We are also pleased with the provisions that emphasize reasonableness in preservation, for these provisions provide some assurances that doctors can make preservation decisions with some confidence that they will not face sanctions should information be lost despite their efforts. We think, however, that the specifics could be sharpened. For one thing, the rule or Committee Note could direct judges to look with favor on preservation standards adopted by professional entities.

Don Bivens (on behalf of 26 members of leadership of ABA Section of Litigation) (673): We believe that including the factors in the rule is a bad idea. It will encourage courts to place too much weight on the enumerated "checklist" elements while ignoring others, and might even erode the essential point that the imposition of extreme sanctions depends on a finding of actual bad faith. Beyond that, we unanimously and particularly object to Factor (C), for it portends sanctions for not "consulting" in response to a request to preserve information. The factor seems to assume that such consultation is always required. This factor should be eliminated even if the factors list is retained. We are also uncomfortable with Factor (E), for it seems to presume that it is the duty of the recipient of the request to go into court to have its decision what information to preserve confirmed.

James Heavner (The Hartford Financial Serv. Group) (748): This list is unnecessary and risk creating uncertainty in application if retained in the body of the rule. Several of the factors listed yield answers that do not contribute to the underlying issues.

Assoc. of the Bar of the City of New York Comm. on Federal Courts (1054): We believe the factors in proposed 37(e)(2) are relevant and appropriate to be considered in assessing the reasonableness of a party's efforts to preserve information for use in litigation. This is one of the reasons we think the rule should apply to all types of information, not only electronically stored information. Those factors should be used for assessing preservations with regard to other types of evidence also.

Robert Kohn (Federal Bar Ass'n) (1109): By providing that whether a party timely sought the court's guidance on any unresolved disputes about preserving discoverable information, the amendment may lead to earlier and more economical case management to resolve preservation issues. More generally, the standards in the rule simplify the job of litigating and deciding a spoliation motion, and may lead to more compromises about these topics, thereby obviating applications to the court.

Steven Puiszis (1139) (amplifying comments made in Dallas testimony): Including pre-suit consultation among the parties is tantamount to implicitly imposing a pre-suit obligation to meet and confer. That is unwarranted. My experience is that pre-suit letters demand that everything be preserved but the kitchen sink, and that nothing is gained by trying to negotiate the issues. But if there are to be factors, the Committee should considering adding a party's good faith in attempting to preserve information, the relevance and materiality of the information and the degree of prejudice or harm suffered because it was lost.

Denise Taylor (Assoc. of So. Cal. Defense Counsel) (1463): Making the adversary's efforts to communicate its preservation expectations part of the calculus for what is reasonable under the circumstances fosters cooperation, and may require it. "Adding a consideration of the proportionality of the preservation efforts to any anticipated or ongoing litigation is another helpful guideline, and it is in line with rule 26(b)(1). This reflects not only the wisdom of

ensuring that litigation resources are not wasted, but also demonstrates the comprehensiveness and uniformity of the proposed rule amendments." Including attention to whether the court's guidance was sought will helpfully encourage parties to seek guidance from judges.

Gregory Cook (1464): (Supplementing testimony and responding further to questions raised during the hearing at which he testified.) I favor eliminating the factors. Judge Grimm asked what factors I would include and indicated a concern about a rule without any guidance. My main concern is that the failure to comply with these factors would be construed to mean bad faith. The factors emphasize reasonableness, which is a markedly less rigorous standard than bad faith. One solution might be to make the factors apply only to curative measures and not to sanctions. I am also concerned that the factors mix together pre-suit and post-suit matters. I also believe that "anticipation . . . of litigation" is uncertain for class actions. Finally, the factors refer to proportionality of the preservation efforts but not of the request to preserve.

William Butterfield (2034): I applaud the Committee's attempt to provide guidance on the factors used to assess whether a party's conduct was willful or in bad faith. But many have assailed proposed factor (C), which focuses on whether there was a preservation demand. I think that factor should remain in the rule. Those who complain about mentioning such communications also complain that they don't know what to preserve. This is inconsistent. These same objectors stress that they regard such letters as often overbroad, but the rule gives weight to the demands only if they are "clear and reasonable" and only if negotiations were conducted in "good faith about the scope of preservation."

Jason R. Baron, Bennett B. Borden, Jay Brudz, Barclay T. Blair (Information Governance Initiative) (2154): IGI is a recently formed vendor-neutral industry consortium and think tank dedicated to advancing the adoption of improved information governance practices. We think that the Note on published factors (B) and (D) (regarding the reasonableness of efforts to preserve and proportionality) would benefit from further commentary that acknowledges the exponentially accumulating growth in the amount of data that institutional actors possess and control. There is a "generic acknowledgement" in the introductory Note material, but we favor greater emphasis with a link to these factors. The larger the corporate or organizational entity, the greater the difficulties faced in terms of its ability to manage data. This reality is a factor that should enter into any calculus of what constitutes "reasonableness." A Note could also mention advanced technologies that may be employed as an aid in preservation efforts (such as the use of email archiving with autocategorization). Thus, the Note on B might be augmented with something like: "Additional considerations might include the volume and complexity of the information subject to a preservation requirement, as well as the familiarity of the party with and its ability to employ advanced technologies in the aid of preservation."

David R. Cohen (2174): I think the factors should be retained. Judge Scheindlin is right that they seem to make more sense in a determination of negligence or recklessness than of bad faith, but I also believe that some courts may still find this non-exclusive list helpful when determining whether a party failed to preserve information that should have been preserved. Indeed, Judge Francis correctly notes that the salutary benefits of listing those factors include "making clear that a party's preservation efforts are expected to be proportional and reasonable, not perfect."

David E. Hutchinson (2205): Factor (B) has a glaring problem because the rule does not provide any reference point for which technologies and/or management processes are relevant,

emerging, or obsolete. And the amendment seems to place the onus on the court to make an informed decisions on these issues. But "proportionality" decisions need to be contextualized in the broader ESI landscape. Discovery rules and decisions are limited in their ability to guide when they are premised on a particular state of technological development. E-discovery under the current rules is problematic because the rules are tacked onto rules written for hard copy discovery. I therefore urge that the "proportionality" consideration include the following: "whether the discovery or preservation at issue involves a reasonably tailored protocol based on the available technologies for data management and the volume of data covered."

Washington D.C. Hearing

Jonathan Redgrave (Redgrave LLP): These factors should not be in the rule. Put this type of material in the Committee Note. On the other hand, the notion that the court must limit itself to the least severe sanction, now only in the Note, should be put into the rule itself.

Thomas Allman: Consider dropping (e)(2) from the rule. The provision is trying to do too much. The goal should be to write a good Committee Note. I am not happy with the factors beyond reasonableness and proportionality. Even if they do foster uniformity they are troubling.

Michael C. Rakower (N.Y. St. Bar Ass'n): The directive that the court use the least severe sanction should be in the rule, not just the Note.

Phoenix hearing

Robert Owen: Factor (C) is troublesome. It seems to invite blanket overbroad preservation demands. Particularly in the pre-litigation setting these are formless demands and provide no content from which the recipient can determine what really needs to be preserved.

Timothy Pratt (Federation of Defense Counsel): The "factors to be considered" should be eliminated from the rule. The discussion should be limited to the Note.

Paul Weiner (Littler, Mendelson): Factor (C) should include a 26(g) feature, making lawyers certify that their preservation demands are justified and not designed to impose costs on the other side.

Thomas Howard: The (e)(2) factors should be removed from the rule. Perhaps discussion should be included in the Note. The concern is that they will be applied uniformly and in a wooden manner. It might be said that consistency on application of the factors is to be avoided.

John Rosenthal: The factors should be revised along the lines recommended by Sedona. For one thing, any judicial "remedy" for loss of information should be proportional to the loss. For another, the rule should say that the court must use the least severe sanction.

Dallas Hearing

Michael Harrington (Eli Lilly & Co.): He is uncertain whether the adoption of proposed 37(e) would produce immediate or dramatic changes in his company's preservation practices. But he would look to the factors spelled out in the rule for guidance. So he likes the idea of

having factors, although he is not entirely happy with all the factors that are in the proposed rule now.

William T. Hangley (ABA Section of Litigation leadership): As a general matter, the idea of having factors is useful and the factors included are useful. But factor C is not helpful. It seems to presume that failure to respond to such a demand is likely to produce trouble. But some demands are not worth answering, so the mere fact of not responding should not support negative actions. He also does not like Factor E. It does not take account of the fact that often these demands are delivered to nonparties or before litigation commences.

Gregory C. Cook: He does not favor the factors. Particularly with class-action litigation, Factor A presents great difficulties before suit is filed. Case law could develop to provide guidance in the way that the factors attempt to provide guidance. But if the list is retained, it will be regarded as an exclusive list, and rigidify the analysis.

Karl Moor (Southern Company): His company is a utility. The factors don't provide much guidance. You have to imagine the largest scope of plaintiff's claim. The proportionality test would help. But I have to help them build their case by informing them about our systems. So even though reasonableness and proportionality factors would help there would still be large burdens.

7. Need to retain provisions of current Rule 37(e)

Lawyers for Civil Justice (267): Because proposed Rule 37(e) covers all of the conduct that the current rule does, LCJ believe that it is unnecessary to retain the current 37(e) language in the proposed rule.

Alex Jennings (294): I think existing 37(e) should be abrogated and completely replaced. The new rule appears to cover all situations in which the current rule would apply. Including the old rule might only serve to confuse lawyers as to when each part might apply, assuming it could be parsed. Additionally, the rule has been invoked only rarely, as the Committee notes. I think that is because it needs to be refined. If the original rule is retained, it might simply encourage courts to continue awarding sanctions for behavior that they deem to be exceptionable, sanctionable under other rules, or not result from good-faith operation.

Thomas Y. Allman (303) I was originally a proponent of targeted amendments to current Rule 37(e). But I have come to believe that the proposed rule is a superior formulation to support a "fresh start" on a meaningful national rule. It comprehensively occupies the spoliation sanction field to the exclusion of inherent sanctioning power. This provides a significant advantage over the current rule. As noted by Judge Sutton in U.S. v. Aleo, 681 F.3d 290, 310 (6th Cir. 2012), "a judge may not use inherent power to end-run a cabined power."

Malini Moorthy (Pfizer) (no. 327): Pfizer believes that current Rule 37(e) need not be retained.

U.S. Chamber Institute for Legal Reform (328): If the Committee makes the changes proposed by the ILR to the proposed new rule, there is no need to retain current 37(e).

Doug Lampe (343) (Ford Motor Co.): Ford believes that there is no reason to retain the current provisions of Rule 37(e).

The Sedona Conference Working Group 1 (346): We believe that existing Rule 37(e) need not be retained if the amended rule adopts a good faith standard, as we have urged. But if the Committee retains the provision authorizing imposition of "curative measures" without regard to culpability or prejudice, we believe that the provisions of current 37(e) should be included lest the protection it currently provides be lost.

Wilbur A. Glahn, III (Amer. Coll. of Trial Lawyers) (377): It would be important to retain the current 37(e) provisions if proposed (B)(ii) is adopted. The current rule precludes the imposition of sanctions for the loss of ESI due to the routine, good faith operation of an electronic information system. Otherwise, parties who claim they have lost "any meaningful opportunity" to prosecute or defend a case as the result of the ordinary, good faith operation of an electronic information system will seek sanctions. If proposed (B)(ii) is not adopted, and if the standard for (B)(i) sanctions is limited to bad faith, there would seem to be no need for current 37(e).

David Kessler (407): The current rule should not be retained. As detailed by the Committee, the current rule has not been effective.

Mark S. Stewart (Ballard Spahr) (412): In practice, Rule 37(e) has not been widely

applied and has done little to stem the tide of discovery sanctions that arise out of the failure to preserve data. It applies only in a very limited situation -- "good faith operation of an electronic information system" -- which has proven to be a nebulous and confusing standard for courts to apply. The rule does not take into account either the intent of the party or whether the loss prejudiced the receiving party.

Vickie Turner (450): We see no reason to retain current Rule 37(e). We agree that the amended rule is sufficient, and the proposed Committee Note clearly explains the robustness of the amended rule.

Stuart Delery (U.S. Dep't of Justice) (459): The Department does not support the proposed removal of current 37(e). Many Executive Branch agencies strongly believe that the current rule should remain and is a necessary protection. Unlike hard-copy documents, electronically stored documents can be generated in almost unlimited quantities and can eventually impose significant burdens in storage and maintenance. Essentially, the removal of 37(e) will suggest that discovery sanctions may be available simply as a result of the typical -- and economically necessary -- routine deletion of old electronic content. Such a revision seems to fail to accord with the realities of modern business and electronic communications. Although the revised rule seems to accommodate some of these concerns, it still leaves an important gap by allowing for sanctions in (B)(ii). Since a governmental entity will be unable to predict the full slate of future claims that may arise against it, this carve-out will work to undermine the safe harbor recognized in the remainder of the rule. Even though the Committee has made it clear that it intends (B)(ii) to be used only rarely, litigation about whether the exception to the required proof of willfulness or bad faith will undoubtedly arise in a much wider set of matters. The amended rule does not expressly provide a safe harbor for routine operation of a computer system. Although the case law is sparse on current 37(e), it is relied on when creating a document retention policy and has been used in litigation in negotiating resolution of discovery issues. Many of the Executive Branch agencies we have consulted do not support the removal of current 37(e). At a minimum, the Department suggests the following modification to (B)(ii):

> (ii) irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation. Subsection (ii) does not apply to electronically stored information that is lost as a result of the routine, good faith operation of electronic information system before the anticipation or conduct of litigation.

Charles Ragan (494): I see no good reason to retain current 37(e). It was initial described as a "safe harbor," but barely served as a shallow cove.

Edwin Lowther, Jr. (629): Retaining the current provisions of 37(e) is unnecessary because the proposed rule covers all the conduct that he current rule covers.

Don Bivens (on behalf of 26 members of leadership of ABA Section of Litigation) (673): We believe that maintaining this provision would serve the salutary purpose of making clear that automated elimination of information is not sanctionable when it is not a product of bad faith. By the same token, the excision of the existing provision might lead some courts, somewhere, to conclude that the existing law is no longer the law.

Wendy Butler Curtis (Orrick) (864): The current rule should be retained because it provides important clarity that loss of information "as a result of the routine, good faith operation

of an electronic information system" will not result in sanctions. That is a crucial point for honest litigants.

Philadelphia Bar Ass'n (995): We see no advantage to retaining the current rule, particularly since it actually runs counter to the more detailed and elaborate analysis under proposed 37(e)(1)(B)(i) and (ii). Retaining the current language would only serve to undermine the analytical processes at work in either of the sections and present a potential unintended "safe harbor" for parties seeking to avoid the type of diligent preservation efforts required under both sections.

Assoc. of the Bar of the City of New York Comm. on Federal Courts (1054): We see no need to retain current 37(e). As the Advisory Committee has noted, it is invoked only rarely. The reason it has not been invoked is that it really does not address or answer the key questions. It is well settled at this point that a party faced with litigation cannot simply allow the continued operation of an electronic information system to result in the loss of relevant electronically stored information, but must impose a litigation hold. Current Rule 37(e) provides no guidance on when such steps must be taken, how broad they should be, etc. The proposed rule provides at least a framework for evaluating the reasonableness of the decisions a party has made in answering those questions, and therefore is a useful step forward.

P. David Lopez (EEOC) (1353): EEOC believes that current 37(e) should not be retained.

Michael J. Buddendeck (Am. Inst. of Cert. Pub. Accountants) (1451): If the changes AICPA recommends are made in the rule, there would no need to retain the current provisions. If those changes are not made, retaining something in the rule that makes clear that loss of information due to the routine good-faith operation of an electronic-information system is not sanctionable is a good idea. Although the Note saying that nothing protected by the current rule should be subject to sanctions under the amended rule, the various interpretations of "willfulness" in court opinions raise concerns.

New York County Lawyers' Ass'n (2072): It would be a mistake to retain current 37(e) as it would run counter to the analysis under the revised rule. Retaining the current rule would perpetuate the practice of "defensive preservation" and lead to continued spoliation/sanction battles. As Judge Scheindlin has said, the current rule "is the flip side of a safe harbor. It says if you don't put in a litigation hold when you should, there's going to be no excuse if you lose information. That's how I read 37(e). It says you are only excused if this was lost as a result of a routine, good-faith effort to destroy records." Panel Discussions, Sanctions in Electronic Discovery Cases: Views from the Judges, 78 Fordham L. Rev. 1, 30-31 (2009).

8. Limiting rule to electronically stored information

Lawyers for Civil Justice (267): The rule should apply to all types of discoverable information. A single standard is vastly superior to having two separate standards. For one thing, distinguishing between ESI and physical evidence is likely to become more complicated in the future.

Lynne Thomas Gordon (American Health Information Management Association) (287): AHIMA applauds the Committee's efforts to establish uniform guidelines across federal courts and apply them to all discoverable information (not just electronically stored information).

Alex Jennings (294): The rule should continue to be limited to electronically stored information. The rules are still struggling to catch up with the volume of material that companies and individuals store electronically, which is the main reason the sanctions issue is a preoccupation for lawyers. Until we find a way to store everything forever in a way that doesn't completely overload the discovery system as well as the storage system, I think that this proposed rule uses a fair standard for ESI. There are other mechanisms already in the rule that allow for proper handling of sanctions in relation to other material. Rule 37(e) does not need to be expanded in this way to give judges another way to assign sanctions with regard to non-electronic materials.

Jonathan Smith (NAACP Legal Defense Fund) (310): LDF recommends that, if it is adopted, new Rule 37(e) be limited to electronically stored information. There are unique costs and challenges associated with that information, particularly as to preservation and spoliation, justify continuing to limit 37(e) (as currently limited) to electronically stored information. Given that these amendments to 37(e) are substantial, it may be best first to limit their effect to electronically stored information.

Malini Moorthy (Pfizer) (no. 327): Pfizer believes that the rule should not be limited to loss of electronically stored information, but should apply to all discoverable information.

U.S. Chamber Institute for Legal Reform (328): The rule should not be limited to electronically stored information. Having separate rules for electronically stored information and other evidence will create confusion for litigants. Because the proposed rule sufficiently addresses the loss of both electronically stored information and physical evidence, the rule should not be restricted to the former category.

Thomas Allman (339) (supplementing remarks at Nov. 7 hearing): Along with dropping (B)(ii), it would be desirable to focus the rule on discoverable "information." As defined in Rule 34(a), that includes (A) any designated documents or electronically stored information, and (B) any designated tangible things. But it might suffice if (B)(ii) were limited to the latter -- excluding not only electronically stored information but also documents. In his ongoing study of current spoliation cases, fully 90 to 95% deal only with documents and electronically stored information, not tangible things. This would greatly assist in pre-litigation efforts, and minimize over-preservation.

Doug Lampe (343) (Ford Motor Co.): Ford does not see a principled basis for distinguishing among different types of discoverable evidence based on the manner in which it is stored. A single standard applicable to all evidence would encourage consistency from courts in

addressing motions for sanctions and provide better guidance to parties.

The Sedona Conference Working Group 1 (346): We do not believe that the rule should be limited to electronically stored information. The issues arise equally with preservation of hard copy documents and other tangible things. Many litigated matters involved significant quantities of hard copy documents, and their preservation should be treated consistently. Moreover, future technologies might involve storage we would not consider "electronic."

Wilbur A. Glahn, III (Amer. Coll. of Trial Lawyers) (377): The rule should not be so limited. ESI may be the biggest issue in discovery today, but the destruction or loss of documents and tangible things is just as important as the destruction or loss of ESI. Limiting the rule to loss of ESI would suggest that there can be different standards for the imposition of sanctions for the loss of other sorts of evidence, leading to divergent rulings form court to court on issues such as whether sanctions can be imposed if the loss of physical evidence is due to negligence. A uniform rule would promote certainty and reduce the likelihood of unproductive satellite litigation.

David Kessler (407): The rule should not be limited to electronically stored information. Not only is a single standard easier to follow and enforce than multiple standards, but there is no principled reason to differentiate between the spoliation of electronic and paper documents.

Vickie Turner (450): We do not think the rule should be limited to electronically stored information. A uniform standard applicable to all evidence would be best. The distinction is murky at best and should not be introduced into the rule.

Stuart Delery (U.S. Dep't of Justice) (459): If a spoliation rule is promulgated, it should apply equally to electronic documents, paper, and tangible things. The Note should make the scope of application clear. There is a risk that divergent, complicated, and confusing spoliation case law sill develop if the rule does not apply equally to all potential evidence. Cases almost always include a mixture of electronic information and documents/objects in other forms. The rules should not provide that a party who diligently saves its email on the one hand, but shreds key hard-copy notes on the other to be treated differently depending on the form of the information lost.

Federal Magistrate Judges' Ass'n (615): The FMJA believes that the rule should not be limited to loss of ESI, but should extend to all discoverable information. Different standards for failure to preserve ESI and failure to preserve other discoverable information would almost certainly generate substantial motion practice about the practical differences between ESI and other discoverable information.

Edwin Lowther, Jr. (629): The rule should adopt one clear standard applicable to all types of discoverable information.

Don Bivens (on behalf of 26 members of leadership of ABA Section of Litigation) (673): The rule should not be limited to ESI. The obligations to preserve ESI and other information should not be different. This will become more true as the line between ESI and other documents blurs and transforms.

James Heavner (The Hartford Financial Serv. Group) (748): A unitary standard is the

most appropriate architecture for the rules going forward. We see no distinction between paper and electronic documents when it comes to defining core preservation obligations. And applying the rule to all preservation would make for more efficient judicial policing.

Philadelphia Bar Ass'n (995): The impetus for the proposed changes to the rules is clearly electronically stored information, but there is a virtue to applying uniform standards to all spoliation issues. Although existing case law is likely adequate to deal with most non-ESI spoliation issues, the factors delineated in proposed Rule 37(e)(2) should prove helpful in assessing the reasonableness or fault surrounding the preservation of all discoverable material. In addition, although dropping proposed 37(e)(1)(B)(ii) might make sense if the rule were limited to ESI, we think that, on balance, the interests in uniformity justify wider application of the rule.

Assoc. of the Bar of the City of New York Comm. on Federal Courts (1054): We see no reason why the principles set out in the proposed rule are not equally applicable to any issue regarding failure to preserve evidence.

P. David Lopez (EEOC) (1353): EEOC believes that the rule should cover all discoverable information.

Michael J. Buddendeck (Am. Inst. of Cert. Pub. Accountants) (1451): There would be no benefit to limiting proposed 37(e) to ESI. Although the costs of preservation may be greater with respect to electronic data, there is no reason to think that these harms are unique to that context. Furthermore, the rule's displacement of inherent authority should not be confined to ESI.

Julie Kane (Amer. Ass'n Justice) (1467): AAJ is opposed to this rule. But if the Committee nevertheless goes forward, AAJ strongly believes that it should not expand the rule to all discoverable information but instead limit the rule to ESI. ESI is the source of the problems the Committee has focused upon, and should be the focus of the rule also.

Washington D.C. Hearing

Thomas Allman: One way to deal with the problem presented by the current inclusion of (B)(ii) is to limit the rule so that cases like Silvestri are excluded from it. But distinguishing between "electronically stored information" and "documents" is unlikely to work. Perhaps a better way would be to exclude "tangible things." Those are treated as a separate category in Rule 34, and seem to be distinct in the sense that they are likely to be the sorts of things that might be so central as to justify sanctions in the absence of willfulness or bad faith.

Phoenix hearing

Thomas Howard: The rule should not be limited to ESI.

9. Additional definition of "substantial prejudice"

Lawyers for Civil Justice (267): Yes. The standard should be that the information is material to claims and defenses. Otherwise, courts will continue to use a much lower standard such as the almost meaningless "reasonable trier of fact could find that [the missing evidence] would support [the] claim or defense" articulation used in Sekisui American Corp. v. Hart, 2013 WL 4116322 (S.D.N.Y.) at *4 FN 48.

Alex Jennings (294): I think a further definition would be helpful. The Committee even observes that prejudice in this part of the rule need not be as cataclysmic as the prejudice that would justify sanctions under other parts of the rule. A definition might look like: "substantial prejudice -- such that it results in the party being unable to present its case successfully, prevents it from substantiating its claim, or results in unfair dismissal of its claim"

Gregory Arenson (New York State Bar Ass'n Commer. & Fed. Lit. Section) (303): The Section sees no reason to define "substantial prejudice" any further. It will always be context specific. The report cites a number of examples of judicial handling of this issue.

Malini Moorthy (Pfizer) (no. 327): Pfizer believes that an additional definition of "substantial prejudice" is important.

U.S. Chamber Institute for Legal Reform (328): Yes a definition would help ensure a national uniform standard. Currently, some courts use highly attenuated standards for determining whether the loss of information has prejudiced the other side. For example, one court says the standard is satisfied whenever a "reasonable trier of fact could find that [the missing evidence] would support [the claim] or defense." Sekisui Am. Corp., 2013 WL 4116322, at *4. But "substantial prejudice" should be defined as a more stringent standard, that the loss of information is somehow material to a party's claims or defenses.

Doug Lampe (343) (Ford Motor Co.): Courts would benefit from additional guidance regarding this term. The courts should be reminded that meeting this factor requires demonstration of a direct and meaningful impairment of a party's ability to advance a claim or defense.

The Sedona Conference Working Group 1 (346): We support the Committee effort to require that a party seeking sanctions show that it has been seriously prejudiced in its ability to prove its case. But we believe that the rule should make clear that sanctions are allowed only if the party was materially hindered in presenting or defending against the claims in the case. For that reason, the rule should specify that a party is not substantially prejudiced where the lost relevant information has not materially prevented a party from presenting or defending against the claims. We also believe it is important that the rule state that the sanctions motion must be timely, a requirement that is currently absent from the proposed rule.

Wilbur A. Glahn, III (Amer. Coll. of Trial Lawyers) (377): We do not believe that any further definition is necessary. Judges routinely exercise their discretion to decide issues of prejudice. Prejudice may arise in myriad factual scenarios, and a rule defining what constitutes prejudice might inadvertently exclude situations in which true prejudice exists that do not strictly fall within the definition. The availability of alternative sources of the information and the importance of the lost information are rather obvious factors to be considered in assessing

prejudice, and incorporating them in the rule appears superfluous.

David Kessler (407): Yes, there should be such a definition, though this conclusion is tied in with how the Committee addresses "willfulness or bad faith" in (B)(i). Although "substantial prejudice" is not easy to define, there are some things it is not. It must be more than just prejudice, which means that it must be more than merely relevant, even if it was supportive of the requesting party's case. Thus, the standard used in Sekisui ("a reasonable trier of fact could find that [the lost evidence] would support [the] claim or defense") is too low. Substantial prejudice should mean that the requesting party is materially impaired in prosecuting its claims or defenses due to the destruction of the evidence, because no other similar evidence of a similar kind and character is available.

Vickie Turner (450): We favor adding a definition, and propose that "substantial prejudice" "equates to significant harm
to a party's ability to advance a material claim or defense."

Stuart Delery (U.S. Dep't of Justice) (459): We believe there should be an additional definition in the rule. We proposed a new 37(e)(3) as follows:

(3) In determining whether a party has been substantially prejudiced by another party's failure to preserve relevant information, the court should consider all relevant factors, including:

(A) The availability of reliable alternative sources of the lost or destroyed information;
(B) the materiality of the lost information to the claims or defenses in the case.

This proposed rule language is consistent with the Committee's intent to have reasonableness incorporated into a court's preservation analysis. This language provides the appropriate and explicit framework for the court's analysis, and provides parties with clear guidance on what elements of prejudice must exist before they consider filing a motion for sanctions. This language also helps the court focus on the actual harm to the requesting party.

Federal Magistrate Judges' Ass'n (615): We do not believe there is a need for an additional definition of "substantial prejudice."

Edwin Lowther, Jr. (629): The rule should provide a definition to clarify when substantial prejudice exists, and it should be tied to materiality of the information to claims and defenses in the case.

Don Bivens (on behalf of 26 members of leadership of ABA Section of Litigation) (673): We do not believe that an additional definition is necessary. Judges will consider all factors relevant to the circumstances. Enumerating factors risks overemphasizing the listed factors and devaluing legitimate factors that do not happen to be included in the list.

James Heavner (The Hartford Financial Serv. Group) (748): We support including an additional definition, and think a focus on materiality to claims and defenses is warranted.

Philadelphia Bar Ass'n (995): An additional definition of this phrase does not, in the

unanimous view of the Association, appear necessary. The variety of factual backgrounds in cases does not seem to allow for such a definition. The requirement of willful or bad faith conduct, coupled with the five factors set forth in proposed 37(e)(2), while not exclusive, seem to provide helpful measures for determining the gravity of the arguably sanctionable conduct. The extent of harm to a litigant's case can only be assessed in the context of the particular claim or defenses allegedly impaired by the fact-specific degree of preservation failure and its causes. Like Justice Stewart's definition of pornography, the court will know it when it sees it.

Assoc. of the Bar of the City of New York Comm. on Federal Courts (1054): These situations are inherently fact-specific, and a further definition would not help.

P. David Lopez (EEOC) (1353): EEOC believes an additional definition is not necessary.

10. Additional definition of "willfulness or bad faith"

Lawyers for Civil Justice (267): The standard in proposed 37(e)(1)(B)(i) could define "willful" to require scienter or knowledge. See, e.g., Micron Tech, Inc. v. Rambus, Inc., 645 F.3d 1311, 1331 (Fed. Cir. 2011) (describing willful as intentional destruction of documents known to be subject to discovery requests): Vadusek v. Bayliner Marine Corp., 71 F.3d 148, 156 (4th Cir. 1995) (sanctioning where "the party knew the evidence was relevant to some issue at trial and . . . his wilful conduct resulted in its loss or destruction"); Goodman v. Praxair Serv., Inc., 632 F.Supp.2d 494, 522 (D. Md. 2009) (finding that willfulness requires a showing that the party knew the evidence was relevant to some issue at trial and that its intentional conduct resulted in the evidence's loss or destruction). In short, willfulness should be defined to include an element of malice. Doing so would make it clear that sanctions are limited to acts executed in bad faith.

Alex Jennings (294): I don't think any additional definition of willfulness or bad faith is required. Courts are familiar with these concepts and the application of them. An additional definition could lead to situations in which they are applying criteria they are not acquainted with.

Thomas Y. Allman (308): The term "willful" would benefit from clarification. The rule could specify the necessity of showing that the conduct was undertaken for the purpose of hiding adverse information or a similar formulation showing purposeful conduct. Connecticut has already done so. Two other viable options are (1) delete the "willfulness" category entirely, or (2) insert "and" for "or" and require that both elements ("willfulness" and "bad faith") be proven.

Malini Moorthy (Pfizer) (327): Pfizer believes that the standard should require a finding that the loss of information was willful and in bad faith. If that is not done, it believes that an additional definition of willfulness would be helpful.

U.S. Chamber Institute for Legal Reform (328): Yes, the rule should specifically define willfulness and bad faith as requiring a degree of scienter. Under this standard, it would not suffice that a loss of evidence was the result of one's intentional conduct where it was done in good faith, such as pursuant to a routine document preservation system. Sanctions should be allowed only when the party acted knowing that it had a duty to retain the information.

Doug Lampe (343) (Ford Motor Co.): Willfulness, standing alone, should not be a sufficient basis for imposing sanctions. If the Committee nevertheless retains it in the disjunctive, it should be clarified that it means purposeful intent to preclude the availability for use in litigation. Millions of documents are destroyed "willfully" every day, but it is only pertinent to the discovery process if the documents were willfully destroyed in apprehension of litigation.

The Sedona Conference Working Group 1 (346): Sedona recommends that the rule should speak in terms of whether the party "did not act in good faith" rather than relying on either willfulness or bad faith. Using "willful or bad faith" risks having courts impose sanctions for negligent or grossly negligent conduct. Additionally, emphasizing good faith would prompt development of a set of factors that incentivize good behavior. But if the Committee is not willing to make this change, we encourage that it clarify that its culpability standard requires a finding that the alleged spoliating party acted with "specific intent" to deprive the opposing party

of material evidence relevant to the claims or defenses. We have rejected the false distinction between curative measures and sanctions. Our standard should apply to all measures adopted to respond to failure to preserve.

Wilbur A. Glahn, III (Amer. Coll. of Trial Lawyers) (377): We believe that the only standard of culpability for the imposition of sanctions should be bad faith, which should be defined to mean "taken with the intent to destroy or delete potentially relevant evidence or in a reckless disregard of the consequences of the party's actions." As a suggestion, we propose that "willful" be deleted but that after "bad faith" the following be added: "that is, were taken with intent to destroy or delete potentially relevant evidence or in reckless disregard of the consequences of the party's actions." This change would accomplish three things: (1) it would eliminate the terribly ambiguous concept of "willfulness"; (2) it would provide a uniform standard that should be easily understood by lawyers, judges, litigants, and witnesses; and (3) it would make clear that the sanctions provided are not to be imposed on a showing of negligence. It is the same as the standard advanced by the Leadership of the ABA Section of Litigation in a letter dated March 13, 2013, to Judge Campbell.

David Kessler (407): Yes, this is the single most important thing the Committee could do to improve the amendment. The standard should be that loss of information is "willful" if it is "the intentional destruction of evidence for the purpose of depriving an opponent or the Court of the evidence." This standard runs closest to the purpose of sanctions and goes furthest in preventing preservation and spoliation being used as weapons in discovery.

Vickie Turner (450): We recommend that both willfulness and bad faith be required. Defining both terms will be necessary to provide clarity. We suggest defining "willful" and "bad faith" to include an element of intent to preclude availability of evidence for use in litigation, as well as knowledge of wrongdoing. The definition should say that only obstructionist efforts plainly meant to gain an unfair advantage in litigation are sanctionable.

Stuart Delery (U.S. Dep't of Justice) (459): We agree with others who have urged clarification for (B)(i). We suggest that "willful" and "bad faith" be defined to require purposeful, harmful intent. One way to do that would be to change the rule to "willful and in bad faith." Spoliation sanctions should not be issued if a party did not take purposeful, intentional action to destroy information. Parties will nevertheless take care to preserve information absent the threat of sanctions because curative measures can also be burdensome, costly, and affect case strategy. Other preservation obligations may also exist, and parties have their own needs to preserve evidence to use to prove their own cases. In addition, the rule should encourage good information management practices in their normal IT operations.

Federal Magistrate Judges' Ass'n (615): We do not believe there is a need for an additional definition of "willfulness or bad faith."

Edwin Lowther, Jr. (629): The rule should include some language making it clear that good faith but intentional acts are not cause for spoliation. "Willful" should be defined to include an element of scienter.

Philadelphia Bar Ass'n (995): We do not recommend an additional definition for "willfulness." It clearly imports intentional conduct and is explicit in its meaning. We do, however, perceive some ambiguity in the term as used in relation to potentially sanctionable

behavior. If a party intentionally disposes of ESI in the ordinary course of business, is that "willful" conduct under the rule, or must the party act for the purpose of preventing discovery? This could be clarified in the Note. We do not recommend a specific definition of "bad faith," given the wide variety of contexts to which the rule might apply. We do, however, think that the Note could refer to the types of sanctionable conduct contemplated so as to provide guidance.

Assoc. of the Bar of the City of New York Comm. on Federal Courts (1054): These situations are inherently fact-specific, and a further definition would not help.

P. David Lopez (EEOC) (1353): EEOC believes an additional definition is not necessary.

Don Bivens (on behalf of 26 members of leadership of ABA Section of Litigation) (673): We believe that the term "willful" should be deleted. But we believe that courts have substantial experience interpreting the concept of bad faith, and that a further definition is not needed.

James Heavner (The Hartford Financial Serv. Group) (748): We believe the conjunction should be "and," not "or." This would relieve uncertainty about the meaning of "willful."

Phoenix hearing

Robert Owen: The definition should be the one offered by Sedona -- an intent to deprive the adverse party of evidence.

Timothy Pratt: Willful should be defined. He favors the Sedona definition. It's not clear that "willful and bad faith" is different from just saying "bad faith."

David Howard (Microsoft): We favor the Sedona definition of willful.

Thomas Howard: Willfulness should be defined. He favors the Sedona definition.

Robert Hunter: The rule should define willfulness as destroying information with knowledge that it will impact a claim.

I.C. ABROGATE RULE 84 AND OFFICIAL FORMS; AMEND RULE 4(d)

The Committee recommends approval for adoption of the proposal to abrogate Rule 84 and the official forms that was published last August. It further recommends approval of the parallel proposal to transfer present Forms 5 and 6 to become incorporated in the Rule 4(d) provisions for requesting a waiver of service.

Abrogation is recommended in large part because this Committee has not been able to spare any significant share of its agenda for regular review and potential revision of the official forms. Any careful discharge of this task would demand much time that should not be diverted from more important tasks.

A secondary consideration has been the tension that may be found between the forms and modern pleadings standards. The forms were initially adopted in 1938, and later made sufficient under the Rules, to illustrate the simplicity and brevity originally contemplated by the pleading rules. Functioning as simple pictures, they played that role well. The original concept of notice pleading came to be well understood, but developments in motions to dismiss under Rule 12(b)(6), Rule 11 requirements, modern statutory causes of action and pleadings requirements, Supreme Court decisions on the requirements of Rule 8, and a general increase in the complexity of litigation now lead most lawyers to plead far more than the minimum thresholds illustrated by the forms. There is serious ground to wonder whether the pleading forms could be revised in a way that would assist lawyers in pleading modern causes of action. Part of the uncertainty lies in extrapolating from the narrow subjects illustrated by most of the forms to the many and frequent types of litigation that have no representation in the forms. And some of the uncertainty lies in determining whether a single form could be crafted to address the wide variety of factual circumstances that might arise with respect to any particular type of claim, such as patent infringement. Developing a suitable generic form complaint for patent infringement could prove surprisingly difficult, to say nothing of the need to confront or sidestep the risks that a form for direct infringement might inadvertently affect a complaint for contributory infringement or the like.

The Committee has been concerned that most of the opposition to abrogation springs from the academic community. Much of the opposition ties to continuing unease over the direction of contemporary federal pleading standards. Some of the opposition is expressed by arguing that the Enabling Act process is not satisfied by simply publishing a proposal to abrogate Rule 84 and the official forms. On this view, each form has become an integral part of the rule it illustrates. Abrogating a form effectively amends the rule as well. So to abrogate the pleading forms, for example, the Enabling Act requires publication of each pleading rule that relates to each form.

The Committee believes that the publication actually made, with the full opportunity to comment, satisfies the Enabling Act. The opportunity to comment has been seized, as evidenced by the comments received on the Rule 84 proposal.

The Committee also believes that abrogation is still the best course. Weighing the competing concerns against the reasons for proposing abrogation, abrogation is appropriate.

Rule 84. Forms

[Abrogated (Apr. __, 2015, eff. Dec. 1, 2015).]

~~The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.~~

Committee Note

Rule 84 was adopted when the Civil Rules were established in 1938 "to indicate, subject to the provisions of these rules, the simplicity and brevity of statement which the rules contemplate." The purpose of providing illustrations for the rules, although useful when the rules were adopted, has been fulfilled. Accordingly, recognizing that there are many excellent alternative sources for forms, including the Administrative Office of the United States Courts, Rule 84 and the Appendix of Forms are no longer necessary and have been abrogated.

Gap Report

No changes were made after publication.

APPENDIX OF FORMS

[Abrogated [(Apr. __, 2015, eff. Dec. 1, 2015).]

Rule 4. Summons

*** * ***

(d) Waiving Service.

(1) ***Requesting a Waiver.*** * * * The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons. The notice and request must:* * *

(C) be accompanied by a copy of the complaint, 2 copies of ~~a~~ the waiver form appended to this Rule 4, and a prepaid means for returning the form;

(D) inform the defendant, using ~~text prescribed in Form 5~~ the form appended to this Rule 4, of the consequences of waiving and not waiving service;

* * *

~~Form 5.~~Rule 4 Notice of a Lawsuit and Request to Waive Service of Summons.

(Caption~~ — See Form 1~~.)

To (*name the defendant or — if the defendant is a corporation, partnership, or association — name an officer or agent authorized to receive service*):

Why are you getting this?

A lawsuit has been filed against you, or the entity you represent, in this court under the number shown above. A copy of the complaint is attached.

This is not a summons, or an official notice from the court. It is a request that, to avoid expenses, you waive formal service of a summons by signing and returning the enclosed waiver. To avoid these expenses, you must return the signed waiver within (*give at least 30 days or at least 60 days if the defendant is outside any judicial district of the United States*) from the date shown below, which is the date this notice was sent. Two copies of the waiver form are enclosed, along with a stamped, self-addressed envelope or other prepaid means for returning one copy. You may keep the other copy.

What happens next?

If you return the signed waiver, I will file it with the court. The action will then proceed as if you had been served on the date the waiver is filed, but no summons will be served on you and you will have 60 days from the date this notice is sent (see the date below) to answer the complaint (or 90 days if this notice is sent to you outside any judicial district of the United States).

If you do not return the signed waiver within the time indicated, I will arrange to have the summons and complaint served on you. And I will ask the court to require you, or the entity you represent, to pay the expenses of making service.

Please read the enclosed statement about the duty to avoid unnecessary expenses.

I certify that this request is being sent to you on the date below.

~~(Date and sign – See Form 2.)~~

Date: _____

_____
(Signature of the attorney
or unrepresented party)

41 _____
42 (Printed name)

43 _____
44 (Address)

45 _____
46 (E-mail address)

47 _____
48 (Telephone number)

49 ~~Form 6.~~Rule 4 Waiver of the Service of Summons.

50 (Caption ~~— See Form 1.~~)

51 To (*name the plaintiff's attorney or the unrepresented plaintiff*):

52 I have received your request to waive service of a summons in this action along with a copy
53 of the complaint, two copies of this waiver form, and a prepaid means of returning one signed copy
54 of the form to you.

55 I, or the entity I represent, agree to save the expense of serving a summons and complaint
56 in this case.

57 I understand that I, or the entity I represent, will keep all defenses or objections to the
58 lawsuit, the court's jurisdiction, and the venue of the action, but that I waive any objections to the
59 absence of a summons or of service.

60 I also understand that I, or the entity I represent, must file and serve an answer or a motion
61 under Rule 12 within 60 days from _____, the date when this request was sent
62 (or 90 days if it was sent outside the United States). If I fail to do so, a default judgment will be
63 entered against me or the entity I represent.

64 ~~(Date and sign – See Form 2.)~~

65 Date: _____

66 _____
67 (Signature of the attorney
68 or unrepresented party)

69 _____

70 (Printed name)

71 _____
72 (Address)

73 _____
74 (E-mail address)

75 _____
76 (Telephone number)

77 (Attach the following ~~to Form 6~~)

78 **Duty to Avoid Unnecessary Expenses of Serving a Summons**

79 Rule 4 of the Federal Rules of Civil Procedure requires certain defendants to cooperate in
80 saving unnecessary expenses of serving a summons and complaint. A defendant who is located in
81 the United States and who fails to return a signed waiver of service requested by a plaintiff located
82 in the United States will be required to pay the expenses of service, unless the defendant shows good
83 cause for the failure.

84 "Good cause" does *not* include a belief that the lawsuit is groundless, or that it has been
85 brought in an improper venue, or that the court has no jurisdiction over this matter or over the
86 defendant or the defendant's property.

87 If the waiver is signed and returned, you can still make these and all other defenses and
88 objections, but you cannot object to the absence of a summons or of service.

89 If you waive service, then you must, within the time specified on the waiver form, serve an
90 answer or a motion under Rule 12 on the plaintiff and file a copy with the court. By signing and
91 returning the waiver form, you are allowed more time to respond than if a summons had been
92 served.

93 ~~(Date and sign – See Form 2.)~~

1 Committee Note

2 Abrogation of Rule 84 and the other official forms requires that former Forms 5 and 6 be
3 directly incorporated into Rule 4.

Rule 84. Forms

[Abrogated (Apr. __, 2015, eff. Dec. 1, 2015).]

APPENDIX OF FORMS

[Abrogated [(Apr. __, 2015, eff. Dec. 1, 2015).]

Rule 4. Summons

* * *

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(C) be accompanied by a copy of the complaint, 2 copies of the waiver form appended to this Rule 4, and a prepaid means for returning the form;

(D) inform the defendant, using the form appended to this Rule 4, of the consequences of waiving and not waiving service;

* * *

Rule 4 Notice of a Lawsuit and Request to Waive Service of Summons.

(Caption)

To (*name the defendant or — if the defendant is a corporation, partnership, or association — name an officer or agent authorized to receive service*):

Why are you getting this?

A lawsuit has been filed against you, or the entity you represent, in this court under the number shown above. A copy of the complaint is attached.

This is not a summons, or an official notice from the court. It is a request that, to avoid expenses, you waive formal service of a summons by signing and returning the enclosed waiver.

To avoid these expenses, you must return the signed waiver within (*give at least 30 days or at least 60 days if the defendant is outside any judicial district of the United States*) from the date shown below, which is the date this notice was sent. Two copies of the waiver form are enclosed, along with a stamped, self-addressed envelope or other prepaid means for returning one copy. You may keep the other copy.

What happens next?

If you return the signed waiver, I will file it with the court. The action will then proceed as if you had been served on the date the waiver is filed, but no summons will be served on you and you will have 60 days from the date this notice is sent (see the date below) to answer the complaint (or 90 days if this notice is sent to you outside any judicial district of the United States).

If you do not return the signed waiver within the time indicated, I will arrange to have the summons and complaint served on you. And I will ask the court to require you, or the entity you represent, to pay the expenses of making service.

Please read the enclosed statement about the duty to avoid unnecessary expenses.

I certify that this request is being sent to you on the date below.

Date: _____

_____
(Signature of the attorney
or unrepresented party)

_____
(Printed name)

_____
(Address)

_____
(E-mail address)

_____
(Telephone number)

Rule 4 Waiver of the Service of Summons.

(Caption)

To (*name the plaintiff's attorney or the unrepresented plaintiff*):

I have received your request to waive service of a summons in this action along with a copy of the complaint, two copies of this waiver form, and a prepaid means of returning one signed copy of the form to you.

I, or the entity I represent, agree to save the expense of serving a summons and complaint in this case.

I understand that I, or the entity I represent, will keep all defenses or objections to the lawsuit, the court's jurisdiction, and the venue of the action, but that I waive any objections to the absence of a summons or of service.

I also understand that I, or the entity I represent, must file and serve an answer or a motion under Rule 12 within 60 days from _____, the date when this request was sent (or 90 days if it was sent outside the United States). If I fail to do so, a default judgment will be entered against me or the entity I represent.

Date: _____

_____
(Signature of the attorney
or unrepresented party)

_____
(Printed name)

_____
(Address)

_____
(E-mail address)

_____
(Telephone number)

(Attach the following)

Duty to Avoid Unnecessary Expenses of Serving a Summons

Rule 4 of the Federal Rules of Civil Procedure requires certain defendants to cooperate in saving unnecessary expenses of serving a summons and complaint. A defendant who is located in

79 the United States and who fails to return a signed waiver of service requested by a plaintiff located
80 in the United States will be required to pay the expenses of service, unless the defendant shows good
81 cause for the failure.

82 "Good cause" does *not* include a belief that the lawsuit is groundless, or that it has been
83 brought in an improper venue, or that the court has no jurisdiction over this matter or over the
84 defendant or the defendant's property.

85 If the waiver is signed and returned, you can still make these and all other defenses and
86 objections, but you cannot object to the absence of a summons or of service.

87 If you waive service, then you must, within the time specified on the waiver form, serve an
88 answer or a motion under Rule 12 on the plaintiff and file a copy with the court. By signing and
89 returning the waiver form, you are allowed more time to respond than if a summons had been
90 served.

RULE 84: OFFICIAL FORMS: RULE 4 FORMS

285, Cory L. Andrews, Richard A. Samp, Washington Legal Foundation: The proposal to abrogate all the forms will certainly help the problems caused by Form 18 for patent litigation. Rule 8 should reflect the new plausibility standard more directly.

303, Gregory K. Arenson, Report of the New York State Bar Association Commercial and Federal Litigation Section: Supports all aspects of the proposal. Doing nothing is unattractive, since "[i]n certain instances, the forms are no longer satisfactory." Devoting the work required to make the forms attractive and to keep them attractive "would require a substantial commitment without a substantial benefit, in light of the understanding that the Official Forms are not widely used." Abandoning the enterprise seems better, particularly given the availability of alternative sources of high-qualify forms, including the Administrative Office. Notice pleading is now well understood, as modified to require something more than the pleading forms seem to require. And the choice to convert present Forms 5 and 6 to become forms attendant to Rule 4 is an "elegant solution."

342, Stephen C. Yeazell: The Forms have taught lawyers that pleadings can, and should be, simple. "That many lawyers eschew simplicity does not seem a good reason for failing to encourage it." Abrogation could be desirable, but only if it is prelude to a project to develop new forms "as a means of providing substantive guidance to litigants who must navigate current pleading doctrine, including *Twombly* and *Iqbal* — a move that, from the rest of the proposals, seems not to be on the Committee's agenda."

389: Professor Yeazell adds a post-script urging that Forms 1 through 6 be retained "clear and uniform." They are directed to members of the public, "some of whom will not have retained counsel." Incorporating Forms 5 and 6 as appendices to Rule 4 is fairly clumsy, at odds with the elegance of the Style Project. Keep them, at least, as they are.

383, Alan B. Morrison: Some of the Forms are outmoded, and their original purpose has been fulfilled. "But they still continue to serve as reminders as to how the Rules, especially Rule 8, should be interpreted." It would be good to arrange to have the Administrative Office forms included in publications of the rules.

390, J. Mitchell Smith for International Assn. of Defense Counsel: Approves the Rule 84 and Forms proposals without further comment.

453, A. Benjamin Spencer: Professor Spencer opposes the amendment of Rule 84 and abolition of the Forms. Rather than abandon the forms, they should be updated and elaborated with additional examples that might give litigants more guidance. At a minimum, they should not be yoked to the monumental discovery proposals that have distracted attention from this important topic.

The forms provide a template for the uninitiated, both the pro se litigant and the novice practitioner. They "provide interpretive guidance to courts and practitioners seeking to understand the meaning of the federal rules," as Judge Clark so clearly pointed out. And they "provide a source for challenging wayward interpretations of the rules by courts." Form 30, for example, demonstrates that the Twombly and Iqbal pleading standards should not be extended to affirmative defenses. Finally, Rule 84 is the only rule after Rule 1 that serves a normative, hortatory function in encouraging simplicity and brevity. 648, Elise E. Singer: Joins this comment.

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Supports the proposal, including

the adoption of present Forms 5 and 6 into Rule 4 to "serve the important interest of encouraging waivers of service of process in appropriate cases."

487, Peter J. Mancuso for Nassau County Bar Assn.: Supports.

493, Jonathan R. Siegel, subscribed by 109 more legal academics: Rule 84 and the Forms should not be abrogated. (1) Twombly and Iqbal "have revived discredited and imprecise fact pleading." No one knows how to plead to satisfy them, even in a simple slip-and-fall case. (2)The point of the Forms is not to provide samples to be used by lawyers — no one uses them — but "to indicate to *judges* how simple and brief pleadings can be." That requires that the forms be official and suffice under the rules. (3) The suggestion that there is a tension between the Forms and emerging pleading standards "is a polite way of saying that the courts are violating the Federal Rules," at least if they dismiss a complaint that Rule 84 proclaims sufficient. 499, Beth Thornburg: Makes substantially the same arguments, and endorses the Siegel comment.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Endorses the proposal, and also endorses appending present Forms 5 and 6 to Rule 4.

622, Helen Hershkoff, Adam N. Steinman, Lonny Hoffman, Elizabeth M. Schneider, Alexander A. Reinert, and David L. Shapiro: (1) The proposal rests on "casual empiricism and self-evident bias." The Committee began believing that no one uses the Forms, then selected a number of unidentified lawyers who confirmed the Committee's belief. (2) The memorandum prepared for the Committee shows the lower courts have struggled with the task of reconciling the Twombly and Iqbal decisions with the Forms. To rely on the "tension" between the Forms and plausibility pleading "resolves a question that the Committee has yet to fully consider." "This is all the more troubling given that one trenchant criticism of *Iqbal* and *Twombly* is that the Court abandoned its previously stated commitment to modifying the Federal Rules through the rulemaking process * * *." Abandoning the forms will effectively shut the door on reform of the pleading rules. (3) It is self-contradictory to assert that the original purpose of the Forms has been fulfilled and at the same time to describe a tension between the Forms and plausibility pleading. 2078, Judith Resnik for 170 added law professors: supporting this comment.

711, Eric Holland: "[W]hen I began to practice in 1991 and began to draft federal court pleadings, I often referred to the forms," including the form complaint for FELA actions. Throwing open the universe of other forms "will only cause confusion and chaos, not the certainty that the FRCP should stand for."

837, R. Seth Crompton: Form 13 shows that the proposed changes are a drastic departure from notice pleading and are designed to codify *Twombly* and *Iqbal*. There is an inherent contradiction in giving corporate entities less discovery and a heightened pleading standard.

915, Andy Vickery: Abrogating Rule 84 "is a travesty wreaked by Twiqbal." Rule 8(a)(2)'s "short and plain statement" "is now a farce from bygone days."

995, William P. Fedullo for Philadelphia Bar Assn.: Takes no position. The Association could not reach a consensus, indeed was greatly fragmented. (1) A lengthy statement opposing abrogation of Rule 84 observes that whatever tension there may be between the pleading reforms and *Twombly* and *Iqbal* does not arise from any form addressing antitrust claims or official-immunity cases. Much of the tension arises from Form 18, a complaint for patent infringement; that can be addressed by modifying or repealing Form 18. The AO has not provided pleading forms. Only anecdotal evidence supports the claim that the forms are not used by attorneys or

pro se litigants; arguably they continue to serve a useful function when employed by pro se litigants or attorneys. The forms have been successful for 75 years, belying the argument that it will take too much work to maintain them. If it is premature to take sides in the developing pleading standards, it is premature to abolish the Forms. (2) A lengthy statement supporting abrogation argues that the choice is between revising the forms or abandoning them. The Committee choice to abandon them should be supported. "[M]ost lawyers are not aware of the pleading forms and even fewer utilize them." "There is no evidence that the forms are used on more than rare occasions, and most lawyers in this Association were unaware of Rule 84 or the forms." Many of the Forms contain labels and conclusions, contrary to current pleading standards; the Forms and the standards conflict in some cases. Courts are split on the approach to reconciliation; most judges find the two standards cannot be reconciled. "The evolution of case law interpreting Rule 8(a) can proceed without Rule 84." Study of Rule 8, and possible amendments, would not be affected by abrogating Rule 84.

1219, John Leubsdorf: "We need more guidance, not less." Rather than force the courts and litigants to endure years of efforts to establish new pleading standards in the wake of Twombly and Iqbal, the Committee should undertake to devise form complaints for "newer kinds of claims." If need be to conform to emerging pleading standards, the current forms should be revised. "The labor and disagreement that could accompany the forging of new forms would help avoid the much greater burdens of trying to resolve that disagreement in court after court until a new consensus emerges." The Forms can provide invaluable guidance to lawyers and judges, and also to law professors and students. The Committee should undertake research into frequently recurring claims and provide forms for them.

1276, Erwin Chemerinsky: There is no pressing need to abrogate Rule 84. Iqbal "is the single most important case decided by the Roberts Court." It will take time and effort to determine whether heightened pleading should be addressed by the Rules and the Forms. But "I emphatically oppose abrogation of Rule 84 and the Forms because such an amendment will acquiesce to heightened pleading before such a rule has been fully considered by the Committee."

1335 Aleen Tiffany for Illinois Assn. of Defense Trial Counsel: Modestly opposes. "The forms still provide their original useful function, and we perceive no benefit from discontinuing their inclusion in future versions of the rules."

1411, Jerome Wesevich for Texas RioGrande Legal Aid (and many additional Legal Aid organizations): None of the excellent alternative forms is authoritative. Eliminating authoritative forms promotes uncertainty. There is no good reason to eliminate them. They may well need to be updated, "but the usefulness and need for authoritative forms has not changed."

1434, Su Ming Yeh for Pennsylvania Institutional Law Project: "PILP assists countless pro se litigants in federal court." They "rely on templates and forms to guide them. If the forms need to be revised and updated, then that is preferable to eliminating them."

1494, Evan C. Zoldan, Elizabeth McCuskey: Abrogating Rule 84 and the Forms is a step "toward unraveling the benefits of transparency and access to justice." The proposal "removes a significant bulwark against the relapse into the opaque world of common law pleading. The Committee should decide what level of pleading is required by the new plausibility standard, and then create forms that will guide unsophisticated litigants. Access to an AO forms website will not help people who have no access to the Internet, "including especially prisoners and others in institutions and many people of low income or who experience language barriers or are people

with disabilities." There should be some way to make forms available to them.

1535, Valerie M. Nannery & Andre M. Mura for Center for Constitutional Litigation: The Forms are the most important part of the rules. "[W]e fear that abrogation * * * will be interpreted as an implicit codification of the pleading standards announced in *Twombly* and *Iqbal*, which, after all, were new interpretations of the existing rules and not compelled by any other consideration."

1906, Herbert C. Wamsley for Intellectual Property Owners Assn.: Urges that Form 18 should be revised and retained. "Litigating the sufficiency of pleadings at the beginning of each patent lawsuit would be expensive and wasteful of judicial resources." A revised Form 18 would "require the identification of at least one patent claim that is infringed, a statement explaining such infringement, and a statement addressing indirect infringement, if alleged." "Pursuant to Rule 9, patent complaints should also specify the party's capacity to sue, the party's authority to sue, or the legal existence of an organized association of persons in all cases where such information is needed to show jurisdiction." [The Rule 9 allegations may reflect an opening line: "Certain entities are attempting to exploit the judicial system for financial gain through the unjustified assertion of patent rights in expensive litigation." Perhaps the theory is that nonpracticing entities may, at times, fail to meet the standards for a genuine "case" within Article III?]

2072, Federal Courts Committee, New York County Lawyers' Assn.: Approves the proposal. In recommending the restyled forms in 2007, the Standing Committee noted that it had refrained from substantive changes, "even though some of the forms represent approaches to pleadings and other submissions that may not be consistent with current principles." Many of the pleading forms contain "labels" and "conclusions," contrary to the standards set by *Twombly* and *Iqbal*. Courts have divided on whether Rule 84 and the Forms control when a Form seems inconsistent with the Court's interpretation of Rule 8(a). And those who choose Rule 84 over Rule 8 divide on whether a claim that is not illustrated by a form "can be evaluated by considering the pleading form for a different substantive claim." This tension between Rule 8(a) and Rule 84 should be resolved. Three alternatives seem available. (1) Modifying the Forms to comply with Rule 8 is attractive, but it would entail a great deal of work. New forms would have to be added now to reflect many substantive areas not now included in the Forms. As substantive law grows or changes, existing forms would have to be revised and still more forms would be needed. And it takes three years to change a form through the Enabling Act process. The view that this would too much work for the process to bear is persuasive. (2) Rule 8(a) could be amended to abrogate the new pleading standards. That "is neither practicable nor desirable." (3) Abrogating Rule 84 and the forms is beneficial because it eliminates the conflict between the forms and Rule 8(a). And it is the least burdensome.

2265, Leigh R. Schachter for Verizon Communications, Inc.: Applauds the proposal, agreeing that some of the forms have come to seem inadequate, particularly Form 18.

2266, Stephen N. Subrin: In deciding Twombly and Iqbal "[t]he Supreme Court acted in a manner that was an assault on the rule-making process * * *." "[T]he tension between the current Forms and the *ultra vires* opinions of the majority of the Supreme Court are better to live with than having" the rules committees and the Judicial Conference "acquiesce in what can only legitimately be called an illegal usurpation of power by some members of the Supreme Court."

January Hearing, Arthur R. Miller: p. 36, at 40: "[O]bliteration of Rule 84 in [sic] the forms is a very stealth-like signal that you're approving Twombly and Iqbal.

January Hearing, Brooke Coleman: p. 114 Rule 84 makes each Form an integral part of the rule it illustrates. Abrogating a Form "necessarily changes the rule to which it corresponds." Form 11, for example, has generated much attention because it remains an authoritative example of what Rule 8(a)(2) means, helping to understand the potential reach of the pleading decisions in the Twombly and Iqbal cases. To abrogate Form 11, it is necessary to publish Rule 8 as well for comment. It is no excuse that the Committee seeks to get out of the Forms business entirely, without taking any position on the impact of any Form on the interpretation of any Rule. 654, Brooke Coleman: These themes are summarized, then supported by a 17-page essay. February Hearing, Danya Shocair Reda: p 349 "I am actually in Professor Coleman's camp on this." "[A] number of the rules are promulgated in conjunction with the forms." Abrogation of Rule 84 "signals an approval of a heightened pleading standard." If the pleading standard is "out of whack with the form[,] [t]hat's a problem of the Supreme Court jurisprudence, and not a problem of our rules."

February Hearing, Michael C. Smith for Texas Trial Lawyers Assn.: p 154 Form 18 sets a much lower standard for pleading direct infringement, so it has an impact on a motion to dismiss, but that is quickly mooted under rules in courts that require the plaintiff to provide detailed infringement contentions soon after filing.

I.D. RULE 6(d) AMBIGUITY

This proposal to amend Rule 6(d) was published for comment in August, 2013. The proposal corrects a potential ambiguity that is explained in the Committee Note. The proposal was supported by the few comments that addressed it. It is ready to be advanced for adoption.

Competing concerns bear on the time to send this proposal to the Judicial Conference. Delay may be appropriate because the further amendment of Rule 6(d) approved for publication last January may be published this summer, either alone or in combination with a parallel package of similar changes in the Appellate, Bankruptcy, and Criminal Rules. There may be some advantage in amending Rule 6(d) once, not twice at an interval of one year.

On the other hand, the professor who originally spotted this problem has reported that several unpublished opinions have read the present language to allow 3 added days for amendments by a party who served the pleading. It does not seem likely that any serious harm is done by a 3-day delay in making a first amendment; it seems likely that most of these amendments would have been allowed as a matter of discretion if they had not been held available as a matter of right. He does not report any cases that address the greater risk — that a party who reads these cases, or otherwise resolves the ambiguity, deliberately waits to the twenty-fourth day only to encounter a court that resolves the ambiguity the other way, finds the amendment untimely as a matter of right, and denies leave to amend as a matter of discretion. There may be some advantage in advancing this clarifying amendment to take effect in eighteen months, not thirty.

Rule 6. Computing and Extending Time; Time for Motion Papers

* * *

(d) Additional Time After Certain Kinds of Service. When a party may or must act within a specified time after ~~service~~ being served and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a).

Committee Note

What is now Rule 6(d) was amended in 2005 "to remove any doubt as to the method for calculating the time to respond after service by mail, leaving with the clerk of court, electronic means, or by other means consented to by the party served." A potential ambiguity was created by substituting "after service" for the earlier references to acting after service "upon the party" if a paper or notice "is served upon the party" by the specified means. "[A]fter service" could be read to refer not only to a party that has been served but also to a party that has made service. That reading would mean that a party who is allowed a specified time to act after making service can extend the time by choosing one of the means of service specified in the rule, something that was never intended by the original rule or the amendment. Rules setting a time to act after making

service include Rules 14(a)(1), 15(a)(1)(A), and 38(b)(1). "[A]fter being served" is substituted for "after service" to dispel any possible misreading.

Gap Report

No changes were made after publication.

Rule 6. Computing and Extending Time; Time for Motion Papers

* * *

(d) Additional Time After Certain Kinds of Service. When a party may or must act within a specified time after being served and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a).

RULE 6: TIME AFTER BEING SERVED

390, J. Mitchell Smith for International Assn. of Defense Counsel: Approves without further comment.

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Supports.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Endorses.

I.E. RULE 55(c) AMBIGUITY

This proposal to amend Rule 55(c) was published for comment in August, 2013. The proposal corrects an ambiguity that is explained in the Committee Note. The small number of comments all approve the proposal without further discussion.

Rule 55. Default; Default Judgment

* * *

(c) Setting Aside a Default or a Default Judgment. The court may set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(b).

* * *

Committee Note

Rule 55(c) is amended to make plain the interplay between Rules 54(b), 55(c), and 60(b). A default judgment that does not dispose of all of the claims among all parties is not a final judgment unless the court directs entry of final judgment under Rule 54(b). Until final judgment is entered, Rule 54(b) allows revision of the default judgment at any time. The demanding standards set by Rule 60(b) apply only in seeking relief from a final judgment.

Gap Report

No changes were made after publication.

Rule 55. Default; Default Judgment

* * *

(c) Setting Aside a Default or a Default Judgment. The court may set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(b).

RULE 55(c): SET ASIDE FINAL DEFAULT JUDGMENT

390, J. Mitchell Smith for International Assn. of Defense Counsel: Approves without further comment.

459, Hon. Stuart F. Delery, for the U.S. Department of Justice: Supports.

615, Sidney I. Schenkier for Federal Magistrate Judges Assn.: Endorses.

TAB 2B

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II. RECOMMENDATIONS TO APPROVE FOR PUBLICATION

II.A. RULE 6(d): 3 DAYS ARE ADDED: E-SERVICE

An amendment of Rule 6(d) was approved for publication last January. The amendment is part of a package of proposals to amend other sets of rules to delete the provision that allows 3 added days to respond after service by electronic means. The parallel proposals are included in the reports of the Advisory Committees for the Appellate, Bankruptcy, and Criminal Rules. Rule 6(d) is set out here in order to complete the package:

Rule 6. Computing and Extending Time; Time for Motion Papers

* * *

(d) Additional Time After Certain Kinds of Service. When a party may or must act within a specified time after being served[2] and service is made under Rule 5(b)(2)(C)(mail), (D)(leaving with the clerk), ~~(E),~~ or (F)(other means consented to), 3 days are added after the period would otherwise expire under Rule 6(a).

Committee Note

Rule 6(d) is amended to remove service by electronic means under Rule 5(b)(2)(E) from the modes of service that allow 3 added days to act after being served.

Rule 5(b)(2) was amended in 2001 to provide for service by electronic means. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and in widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day periods that allow "day-of-the-week" counting. Adding 3 days at the end complicated the counting, and increased the

[2] This anticipates adoption of the proposed amendment published in August, 2013.

occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Eliminating Rule 5(b) subparagraph (2)(E) from the modes of service that allow 3 added days means that the 3 added days cannot be retained by consenting to service by electronic means. Consent to electronic service in registering for electronic case filing, for example, does not count as consent to service "by any other means" of delivery under subparagraph (F).

II.B. RULE 82: ADMIRALTY VENUE

The Standing Committee acted in January to approve publication at a suitable time of a proposal to amend the second sentence of Civil Rule 82 to reflect the enactment of a new venue statute for civil actions in admiralty. Publication was to await incorporation in a package with other rules proposals, and has not yet occurred. Publication was chosen because it was not clear whether the proposed rule text was the best means of accommodating the new statute. This conservative approach has proved wise. It was agreed that the message transmitting the proposal for publication should ask whether to delete the cross-reference to 28 U.S.C. § 1391, an issue explained below. Further reflection before publication suggests that indeed § 1391 should be dropped from the rule text, and that the text should be further revised to reflect the language of new § 1390. The version approved for publication is set out first below, followed by the revised version that was approved by the Advisory Committee in April, followed by a style revision that seems better yet. The Committee renews the recommendation to publish for comment.

Version Approved in January

Rule 82. Jurisdiction and Venue Unaffected

These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is not a civil action for purposes of 28 U.S.C. §§ 1390-1391~~-1392~~.

Committee Revised Version

These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) ~~is not a civil action~~ [invokes][is] an exercise of the jurisdiction conferred by 28 U.S.C. § 1333 [for purposes of 28 U.S.C. §~~§~~ 1390 ~~1391-1392~~].

Style Version

These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is governed by 28 U.S.C. § 1390 ~~not a civil action for purposes of 28 U.S.C. §§ 1391-1392~~.

1 Committee Note

2 Rule 82 is amended to reflect the enactment of 28 U.S.C. § 1390 and the repeal of § 1392.

Discussion

It has long been understood that the general venue statutes do not apply to actions in which the district court exercises admiralty and maritime jurisdiction, except that the transfer provisions do apply. This proposition could become ambiguous when a case either could be brought in the admiralty or maritime jurisdiction or could be brought as an action at law under the "saving to suitors" clause. Rule 82 has addressed this problem by invoking Rule 9(h) to ensure that the Civil Rules do not seem to modify the venue rules for admiralty or maritime actions. Rule 9(h) provides that an action cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for purposes of Rule 82. It further provides that if a claim for relief is within the admiralty or maritime jurisdiction but also is within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim.

The occasion for amending Rule 82 arises from legislation that added a new § 1390 to the venue statutes and repealed former § 1392 (local actions). The reference to § 1392 must be deleted. And it is likely appropriate to add a reference to new § 1390 for reasons that are only slightly more complicated. Deleting the reference to § 1391 also is appropriate.

New § 1390(b) provides:

> (b) Exclusion of Certain Cases. — Except as otherwise provided by law, this chapter shall not govern the venue of a civil action in which the district court exercises the jurisdiction conferred by section 1333, except that such civil actions may be transferred between district courts as provided in this chapter.

Section 1333 establishes "original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

Section 1390(b), by referring to cases in which the court "exercises the jurisdiction conferred by section 1333," thus ousts application of the general venue statutes for cases that can be brought only in the admiralty or maritime jurisdiction, and also for cases that might have been brought in some other grant of subject-matter jurisdiction but that have been designated as admiralty or maritime claims under Rule 9(h).

The proposed amendment carries forward the purpose of integrating Rule 9(h) with the venue statutes through Rule 82. It is appropriate to refer to all of § 1390, not subsection (b) alone, because

§ 1390(a) provides a general definition of venue, while subsection (c) addresses transfer of an action removed from a state court.

The original proposal was submitted to the Maritime Law Association for review and approved. That seemed to provide adequate reassurance for publication. It had the virtue of making only a minimal change, retaining most of the amended sentence and revising only the statutory references.

Further review, however, suggests that the statement that an admiralty or maritime claim is not a civil action cannot be carried forward. This drafting was adopted in 1966 when the admiralty rules were merged with the civil rules. Rule 1 was amended to state that the rules govern "in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty." Rule 2, then as now, stated that there is one form of action — the civil action. The Committee Note to Rule 82 said that by virtue of Rules 1 and 2, suits in admiralty have been converted to civil actions. So Rule 82 was amended to provide that an action that includes a claim designated for admiralty or maritime jurisdiction under Rule 9(h) is not a civil action for purposes of what then were §§ 1391-1393. That avoided disruption of the settled interpretation that those general venue statutes did not apply to admiralty claims.

The difficulty with carrying forward the 1966 qualification of the status of admiralty claims as civil actions is that new § 1390(b) twice describes the exercise of admiralty jurisdiction in "a civil action." To say that a Rule 9(h) claim is not a civil action for purposes of § 1390 would be to attempt to take the claim outside of § 1390, the opposite of the intended accommodation.

Nor is there any apparent need to continue to refer to § 1391. Section 1390(b) takes care of that.

This revised proposal has been sent to the Maritime Law Association for further comment. No response has yet been received.

II.C. RULE 4(m): SERVING A CORPORATION ABROAD

The Committee recommends publication of a clarifying amendment to ensure that service abroad on a corporation is excluded from the time for service set by Rule 4(m). Several of the comments on the version of Rule 4(m) published for comment as part of the Duke Rules Package in August 2013 suggest that many lawyers believe the Rule 4(m) limit applies. There is no apparent reason to believe that service abroad can be accomplished more expeditiously when the defendant is a corporation, not an individual. And the need for extra time will increase with adoption of the proposal to reduce the time from 120 days to 90 days.

Rule 4. Summons

* * *

(m) Time Limit for Service. * * * This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1) * * *.

Committee Note

Rule 4(m) is amended to correct a possible ambiguity that appears to have generated some confusion in practice. Service in a foreign country often is accomplished by means that require more than the 120 days originally set by Rule 4(m)[, or than the 90 days set by amended Rule 4(m)]. This problem is recognized by the two clear exceptions for service on an individual in a foreign country under Rule 4(f) and for service on a foreign state under Rule 4(j)(1). The potential ambiguity arises from the lack of any explicit reference to service on a corporation, partnership, or other unincorporated association. Rule 4(h)(2) provides for service on such defendants at a place outside any judicial district of the United States "in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i)." Invoking service "in the manner prescribed by Rule 4(f)" could easily be read to mean that service under Rule 4(h)(2) is also service "under" Rule 4(f). That interpretation is in keeping with the purpose to recognize the delays that often occur in effecting service in a foreign country. But it also is possible to read the words for what they seem to say — service is under Rule 4(h)(2), albeit in a manner borrowed from almost all, but not quite all, of Rule 4(f).

The amendment resolves this possible ambiguity.

Discussion

The Committee Note explains the proposal. Many of the comments on the 2013 proposal to reduce the time for service under Rule 4(m) argued that more time is needed for service in a foreign country, indeed that even 120 days often is not enough. These comments make sense only on the assumption that service under Rule 4(h)(2) is not exempt from the Rule 4(m) time limit. Among the comments, the comment from the New York City Bar Association notes the ambiguity and expressly recommends that Rule 4(h)(2) be added to the list of exceptions from Rule 4(m). There is no apparent reason to avoid the change. But publication may reveal complications that either defeat the whole proposal or require additional qualifications. If for some unforeseen reason it comes to seem desirable to subject service under Rule 4(h)(2) to the time limits of Rule 4(m), a nice question will be presented: how should the rule text be amended to clarify the ambiguity by going the other way? "This subdivision (m) applies to service outside any judicial district of the United States under Rule 4(h)(2), but does not apply to * * *"? (Any passing regret about the inability to revise a Committee Note without revising rule text is assuaged by reflecting that revising the Committee Note alone would alleviate the ambiguity only after an accumulation of cases, probably over a period of many years, pointing out the new approach.)

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TAB 2C

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DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

April 10-11, 2014

The Civil Rules Advisory Committee met at the Lewis & Clark Law School in Portland, Oregon, on April 10-11, 2014. Participants included Judge David G. Campbell, Committee Chair, and Committee members John M. Barkett, Esq.; Elizabeth Cabraser, Esq.; Hon. Stuart F. Delery; Judge Paul S. Diamond; Judge Robert Michael Dow, Jr.; Parker C. Folse, Esq.; Judge Paul W. Grimm; Peter D. Keisler, Esq.; Dean Robert H. Klonoff; Judge John G. Koeltl; Judge Scott M. Matheson, Jr.; Justice David E. Nahmias; Judge Solomon Oliver, Jr.; and Judge Gene E.K. Pratter. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Judge Jeffrey S.Sutton, Chair, Judge Neil M. Gorsuch, Liaison, and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Standing Committee member Judge Susan P. Graber also attended. Judge Arthur I. Harris participated as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., the court-clerk representative, also participated. The Department of Justice was further represented by Theodore Hirt, Alison Stanton, and James C. Cox. Judge Jeremy Fogel participated for the Federal Judicial Center. Jonathan C. Rose, Andrea Kuperman, Benjamin J. Robinson (by telephone), Julie Wilson, and George Everly represented the Administrative Office. Observers included Judge Lee H. Rosenthal, past chair of the Committee and of the Standing Committee; Professor Steven S. Gensler, a former member of the Civil Rules Committee; Joseph D. Garrison, Esq. (National Employment Lawyers Association); Jerome Scanlan (EEOC); Alex Dahl, Esq. and Robert Levy, Esq. (Lawyers for Civil Justice); Patrick Coyne, Esq. (American Intellectual Property Law Association); John Vail, Esq.; Valerie M. Nannery, Esq. (Center for Constitutional Litigation); Thomas Y. Allman, Esq.; Jonathan Redgrave, Esq.; Ariana Tadler, Esq.; Henry Kelsen, Esq.; and William Butterfield, Esq.

The first morning of the meeting was devoted to a Symposium honoring Judge Mark R. Kravitz, former chair of the Civil Rules Committee and former chair of the Standing Committee. The Symposium included tributes by Chief Justice John G. Roberts (read by Dean Klonoff), Elizabeth Cabraser, Charles Cooper, Judge Jeremy Fogel, Peter Keisler, and Judge Anthony Scirica (also read by Dean Klonoff). Two panels completed the symposium. Judge Sutton moderated a panel on The Rulemaking Process, which explored papers by Edward J. Brunet, Edward Cooper, and Richard Marcus. Judge Campbell moderated a panel on Applying The Rules, which explored papers by Judge Rosenthal and Steven S. Gensler, and by Judge Diane P. Wood. The symposium will be published in the Lewis & Clark Law Review.

Judge Campbell began the afternoon portion of the first day by noting that it was a privilege for all present to be part of the tribute to Judge Kravitz.

Judge Campbell noted that there have been no changes in Committee membership to occasion welcoming introductions or fond farewells. He also expressed the Committee's appreciation of the presence of Judge Sutton, Judge Gorsuch, Judge Graber, and Professor Coquillette for the Standing Committee, and of the presence of Judge Fogel for the Federal Judicial Center.

Judge Campbell concluded the introduction by stating that through the Subcommittees, Committee members had worked harder in preparing the materials for the agenda than any group he had ever observed doing volunteer work purely for the good of the public order. "This is a full-participation rulemaking enterprise."

42 *April 2013 Minutes*

43 The draft minutes of the April 2013 Committee meeting were approved without dissent,
44 subject to correction of typographical and similar errors.

45 **I. PROPOSALS FOR ADOPTION**

46 *A. Duke Rules Package*

47 Many of the proposals published for public comment and testimony in August 2013 were
48 initially prepared by the Duke Conference Subcommittee chaired by Judge Koeltl. They included
49 changes in Rules 1, 4, 16, 26, 30, 31, 33, 34, and 37. Judge Campbell noted that the voluminous
50 public comments and extensive testimony had provided both new reasons for supporting the
51 proposals and serious challenges. The Subcommittee evaluated these ideas and has suggested
52 changes both in rule texts and in Committee Notes. Publication of the April agenda materials
53 prompted a few comments on the proposed revisions that have further illuminated the issues,
54 including a letter from four United States Senators. These comments too have been considered by
55 the Subcommittee and presented to the Committee. Judge Campbell then asked "the indefatigable"
56 Judge Koeltl to present the Duke Conference Subcommittee Report.

57 Judge Koeltl introduced the Subcommittee Report as one that recommends a few changes
58 in some of the published proposals, withdrawal of parts of the proposals, and several changes in
59 Committee Note language to respond to concerns raised in the hearings and comments.

60 The Duke Conference was the inspiration of Judge Kravitz. Preparations began a year and
61 a half before the conference. Participants were broadly representative of the bar, bench, and academy.
62 The lawyer participants in private practice were balanced between those who ordinarily represent
63 plaintiffs and those who ordinarily represent defendants. Other lawyers were drawn from house
64 counsel, combining the perspectives of lawyers with the perspectives of clients, and from
65 government. The enthusiasm of those invited to participate was extraordinary; only one person
66 declined to participate in the two days of panel discussions, and only because of a schedule conflict.
67 The participants accepted the direction to leave their clients at the door. The charge was to seek
68 consensus on measures that can be taken to advance the Rule 1 goals — the just, speedy, and
69 inexpensive determination of civil actions.

70 Three broad areas of agreement were expressed at the Conference. Improvements in civil
71 litigation can be made by enhancing cooperation among the parties and counsel; by limiting use of
72 procedural devices and opportunities to what is proportional to the needs of the case; and by
73 providing early and active case management by judges.

74 The Subcommittee began its work promptly after the Conference concluded in May 2010.
75 It met frequently, both in person and by conference calls. Minutes in the form of Notes were
76 prepared for all its meetings and made public. A diverse group of lawyers and judges were gathered
77 for a miniconference that discussed early drafts of rules proposals, some of which were later
78 abandoned. Notes on the miniconference also were made public.

79 Following publication, more than 120 witnesses testified at the three public hearings, and
80 more than 2,300 comments were submitted. Most of the witnesses and most of the comments
81 addressed parts or all of the Duke Subcommittee proposals. All of this advice was very helpful in
82 refining the published proposals.

The Subcommittee was able to achieve consensus on the recommendations made in the Report. The recommendations are unanimous. The Report appears at pages 79-93 of the agenda book. The proposals appear at pages 95-113. They will advance the goals of cooperation, proportionality, and early and active judicial case management. Rather than follow the order of the rules themselves, the proposals are presented in three steps: those that deal with discovery; those that deal with case management; and the one that deals with cooperation beyond the elements of cooperation built into the discovery and case-management proposals.

DISCOVERY PROPOSALS

Scope: Rule 26(b)(1): Four changes are proposed for Rule 26(b)(1).

Proportionality is emphasized by moving the factors found in present Rule 26(b)(2)(C)(iii) to become part of the scope of discovery. Seven words are added to make proportionality explicit: "proportional to the needs of the case." One consideration in moving this concept up to (b)(1) is that "in fairness, many people never got down to Rule 26(b)(2)(C)(iii)."

Present Rule 26(b)(1) includes a list of examples of discoverable matter: "the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter." The proposal deletes these words. The purpose is to reduce the great length of Rule 26, in the belief that discovery of these matters is so well established that the list is no longer needed or even useful. The Subcommittee recommendations include adding language to the published Committee Note to emphasize that all of these and other matters will remain as fully discoverable as they are now. The new language will defeat attempts to argue that deletion of these examples implies that such matter is not discoverable.

Rule 26(b)(1) now includes two spheres of discovery. Discovery is available as a matter of right as to nonprivileged matter that is relevant to any party's claim or defense. Beyond that, "[f]or good cause, the court may order discovery of any matter relevant to the subject matter involved in the action." The proposals eliminate this distinction between lawyer-managed and court-managed discovery by deleting the provision for discovery of matter relevant to the subject matter. All discovery must be relevant to a party's claim or defense. New language is proposed for the Committee Note to address concerns raised in the comments and testimony. When the distinction between "claims and defenses" discovery and "subject-matter" discovery was adopted in 2000, the Committee Note recognized that it can be difficult to draw the distinction. Examples were given of things that, suitably focused, would be relevant to the parties' claims or defenses. The proposed new Note repeats that such discovery is not foreclosed by the amendments. The proposed new Note language emphasizes the need to focus directly on what is relevant to the claims or defenses, and recognizes that it may be appropriate to amend the pleadings to add new claims or defenses. In addition, new Note language emphasizes the common purpose that was emphasized in the 2000 Committee Note — the purpose is to engage the court more actively in regulating the breadth of discovery.

Finally, the next-to-last sentence of present Rule 26(b)(1) provides: "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." This sentence would be revised to continue the concept that discovery is not limited by the rules that govern admissibility in evidence, but also to make it clear that inadmissibility does not expand the scope of discovery. All discovery is limited to matter relevant to any party's claim or defense and proportional to the needs of the case.

Turning first to proportionality, many of the comments and many parts of the testimony have questioned the need to add an explicit proportionality limit to the Rule 26(b)(1) scope of discovery.

128 But there was a consensus at the Duke Conference on the need for proportionality. It is in the rules
129 now. Several reports show that many lawyers believe that discovery now is often not proportional
130 to what the litigation needs. Rule 26(g) now makes proportionality an obligation of both the party
131 that requests discovery and the party that responds. It was added to the rules in 1983, along with the
132 proportionality requirement that now appears in Rule 26(b)(2)(C)(iii). An effort to reinforce
133 proportionality was made in the 1993 amendments. And yet another effort to reinforce it was made
134 in the 2000 amendments. The revised Committee Note describes these repeated attempts to achieve
135 thorough recognition and enforcement of the 1983 concept. The 2000 amendment is a particular
136 witness to the sense of frustration that surrounds proportionality. It added a completely redundant
137 final sentence to (b)(1); no new or independent meaning was added by the reminder that all discovery
138 is subject to the limitations imposed by Rule 26(b)(2)(C). This compelling sense of need carried
139 through the Style Project, defeating repeated efforts to strike this sentence as the surplusage that it
140 is. The present proposal is a fourth attempt that seeks to fulfill the purpose that has not yet been fully
141 implemented.

142 The Subcommittee recommends two changes in the proportionality factors as published. The
143 first transposes the first two considerations, to be "the importance of the issues at stake in the action,
144 the amount in controversy * * *." This change responds to the concerns expressed in hundreds of
145 comments. Many claims may seek relatively low amounts of money damages, or seek only specific
146 relief without any damages at all. Focus on the importance of the issues at stake was included in the
147 1983 rule as an explicit recognition that many actions that seek minimal or no damages involve
148 matters of personal or public importance beyond, and perhaps far beyond, money alone. Often an
149 individual plaintiff may be functioning in part as a private attorney general. Proportionality cannot
150 be measured by the money alone. Although this principle has been embodied by the rules from the
151 beginning, there is a fear that placing the amount in controversy first in the list may cause courts to
152 impose inappropriate limits on discovery. At the other end of the line, other comments expressed a
153 fear that focus on the money involved might lead some courts to allow absolutely unlimited
154 discovery in actions involving huge sums of money. The reordering in the rule text is further
155 supported by new language proposed for the Committee Note.

156 The second change recommended for the rule text adds a new factor to the list of
157 proportionality considerations: "the parties' relative access to relevant information." This language,
158 along with an explanation proposed for the Committee Note, is meant to address circumstances
159 commonly described as involving "asymmetric information." Some categories of litigation are
160 characterized by an uneven distribution of discoverable information. Civil rights actions in general,
161 and most particularly individual employment claims, are examples identified by many comments and
162 much testimony. An individual plaintiff claiming adverse employment action, for example, may have
163 very little information that the defendant employer needs to discover. The employer, on the other
164 hand, may have relatively large amounts of information that the employee can obtain only through
165 formal discovery, particularly when it is necessary to present evidence of the treatment of other
166 employees in similar circumstances. An asymmetric distribution of discoverable information often
167 means an asymmetric incidence of discovery burdens. This factor recognizes that proportionality
168 may allow one party to request more extensive discovery than its adversary requests.

169 Many of the comments and much of the testimony expressed a fear that moving
170 proportionality from Rule 26(b)(2) to (b)(1) would effect a change in the burdens imposed on the
171 parties in presenting discovery motions. The argument was that the present rule simply expresses a
172 limitation on discovery, so that a party resisting discovery has the "burden" of persuading the court
173 that proposed discovery is disproportional. Characterizing proportionality as part of the scope of
174 discovery, on the other hand, was feared to mean that the party requesting discovery will have the
175 full burden of justifying the request as proportional. Additions to the Committee Note are proposed
176 to address these fears, which arise from quite unintended interpretations of the proportionality

177 proposal that have no basis in either the proposed rule or the Committee Note. The Note now makes
178 it clear that the new rule text "does not change the existing responsibilities of the court and the
179 parties to consider proportionality, and the change does not place on the party seeking discovery the
180 burden of addressing all proportionality considerations." Boilerplate objections are not permitted.
181 Proposed Rule 34, indeed, requires that objections be specific. Nor can a party unilaterally decide
182 to limit its responses to what it considers proportional — "the parties and the court have a collective
183 responsibility to consider the proportionality of all discovery and consider it in resolving discovery
184 disputes."

185 Further additions to the Committee Note are recommended to respond to other concerns
186 expressed in the comments and testimony that the factors to be considered in implementing
187 proportionality are subjective and impossible to define. The basic point is that these factors began
188 with the somewhat shorter list in 1983, and have been expanded since then. They are familiar. When
189 concerns were expressed about the open-ended nature of a simple reference to "proportionality" at
190 the miniconference on early drafts, participants suggested that the concept should be given content
191 by incorporating the factors now listed in Rule 26(b)(2)(C)(iii). They agreed that when a court does
192 turn to consider proportionality, these factors are familiar and work well.

193 Turning to the new formulation of the proposition that discovery is not limited to matter that
194 would be admissible in evidence, Judge Koeltl emphasized that the history of the "reasonably
195 calculated" phrase shows that it was not intended to expand the scope of discovery. This phrase was
196 originally added in 1946, when it applied only to depositions, to overcome decisions ruling that a
197 deponent could not be required to testify to hearsay. The 2000 amendment made it clear that
198 discovery of inadmissible matter is subject to the Rule 26(b)(1) limits on the scope of discovery. But
199 many lawyers and courts continue to treat this provision as expanding, and indeed defining, the scope
200 of discovery. Andrea Kuperman's research provides many examples. This view is incorrect. An
201 attempt was made to correct it in 2000.

202 Most of the organized bar association groups that have commented on the changes to Rule
203 26(b)(1) support them. The Department of Justice also supports it.

204 Discussion began with a Committee member who thought the work extraordinary. "I'm a big
205 believer in proportionality." Proportionality was added to the English Practice Rules in 2009. It is
206 essential. The need for proportionality is demonstrated in long experience as a mediator in federal
207 courts.

208 Another member noted that as a new member he had been impressed by the serious attention
209 both Subcommittees and the Committee had devoted to the public testimony and comments. He had
210 had some concerns about the published proposals. These concerns have been resolved by the
211 proposed changes in rule text and Committee Notes.

212 A judge echoed these observations. He had been concerned by the testimony and comments
213 that worry about the burdens of arguing proportionality, and about what the factors bearing on
214 proportionality mean. All these concerns have been addressed in the Committee Note.

215 Another judge recalled that two witnesses at the Dallas hearing expressed fear that the
216 hearings and comment process were a charade. The changes that have been made show the
217 Committee in fact does listen and respond.

218 It was noted that the Department of Justice generally has supported proportionality. There
219 were some specific issues, but they have been addressed by the Subcommittee recommendations.
220 Support for the proposed rule was confirmed by circulating it within the Department.

Other members made similar observations. Moving "the importance of the issues at stake in the action" up to become the first factor, and adding "the parties' relative access to relevant information" to the factors, make for a better rule and reflect the Committee's responsiveness. The recommendations are "a wonderful job in careful response to comments." The quantity and quality of the comments and testimony show the importance of involvement by all segments of the bar in public rulemaking.

Cost-Bearing: Rule 26(c)(1)(B): Judge Koeltl noted that the new reference to "the allocation of expenses" by a protective order simply confirms authority that is already established by the rule provisions for protecting against undue burden or expense. The authority is exercised now. But adding it to rule text will forestall arguments to the contrary. The proposed Committee Note adds new material that responds to public comments that feared the new rule text would encourage routine cost-bearing orders. The Note now says that cost-shifting should not become a common practice, and also says that courts and parties should continue to assume that a responding party ordinarily bears the costs of responding. A comment responding to this new material has objected that it seems to prejudge the continuing work of the Committee on "requester pays" proposals. That is not so. The work will continue, and will be thorough. But "it will not be easy." The proposed rule and Committee Note, in short, should not change current practice by making cost-shifting a common event.

There was no further discussion of proposed Rule 26(c)(1)(B).

"Early" Rule 34 Requests: Rule 26(d)(2): The Subcommittee does not recommend any changes in the published proposal that would allow early delivery of Rule 34 requests to produce. Present Rule 26(d)(1) establishes a moratorium on discovery, barring discovery before the parties have conferred as required by Rule 26(f), except in cases exempted from initial disclosure. Proposed Rule 26(d)(2) would allow delivery of Rule 34 requests before the parties' conference, but only after 21 days from service of a summons and complaint on a party. Delivery of the requests does not start the time to respond. Instead, the requests are considered to have been served at the parties' first Rule 26(f) conference, starting the time to respond. The advantage of early delivery is that the parties will have a concrete focus for discussion at the conference, making for a more productive conference, and a better Rule 16(b) conference.

Public comments generally were favorable. Many plaintiff-side lawyers like the proposal. Defense lawyers generally say they would not be likely to make early delivery, but some said they would be glad to see plaintiffs' requests before the parties' conference.

Brief discussion focused on the time calculation. The time to respond begins at the first Rule 26(f) conference, and the Committee Note says that the opportunity for advance consideration of early requests should not affect the determination whether to extend the time to respond. The time provisions for early requests should be read carefully. The requests cannot be delivered with the complaint. Initially, an early request may be delivered to a party 21 days after that party has been served with the summons and complaint. That party then can deliver early requests to any plaintiff and also to any other party that has been served.

In deference to a recommendation by the Style Consultant, Rule 26(d)(2)(B) will read: "The request is considered to have been served at the first Rule 26(f) conference," rather than "considered as served."

Rule 34: Judge Koeltl noted that Rule 34 would be revised to reflect the Rule 26(d)(1) provision for early requests, and summarized the three other proposed changes in Rule 34. The proposals reflect experience with responses that often "are absurd." General objections often incorporate boilerplate

266 protests that the requests are overbroad, unduly burdensome, and so on, without providing any
267 specific explanation. The responses then produce materials "subject to these objections" without
268 stating whether anything has been withheld on the basis of the objections. And the responses often
269 fail to state whether anything actually will be produced. All of this "is true abuse. The response is
270 only an invitation to meet and confer, not any real indication of what will be produced." The
271 proposals require that the response "state with specificity" the grounds for objecting; allow a
272 response that rather than permit inspection the requested materials will be produced; and provide that
273 production must be completed no later than the time stated in the request or a later reasonable time
274 stated in the response. In addition, an objection must state whether any responsive materials are
275 being withheld on the basis of the objection.

276 The proposed Committee Note responds to a concern expressed in testimony and comments.
277 A party may limit its search to a scope smaller than the request. A request for "all documents," for
278 example, may be met by a search for all documents back to 2005 and nothing earlier. The party does
279 not know whether relevant and responsive documents might be found if the search were extended
280 back beyond 2005, and does not know whether anything has been "withheld." The Note explains
281 that this potential dilemma ties to the direction to state objections with specificity. The response
282 should object that the request is overbroad and state that the search will be limited to documents
283 created in 2005 and later. This response counts as a statement that anything earlier has been
284 "withheld." The parties are then free to discuss the response and, if they cannot resolve the issue,
285 seek a court order.

286 The Note also anticipates an issue addressed by some of the testimony and comments. It says
287 that the producing party does not need to provide a detailed description or "log" of all documents
288 withheld.

289 In response to a suggestion by the Style Consultant, Rule 34(b)(2)(B) will provide: "state with
290 specificity the grounds for objecting," rather than "state the ground for objecting * * * with
291 specificity."

292 There was no further discussion of the Rule 34 proposals.

293 Numerical Limits: Rules 30, 31, 33, and 36: Judge Koeltl summarized several published proposals
294 that would reduce present presumptive limits on discovery events and add a new presumptive limit.
295 The presumptive limit on the number of depositions under Rules 30 and 31 would be reduced from
296 10 to 5 per side. The presumptive limit on the number of interrogatories under Rule 33 would be
297 reduced from 25 to 15. And, for the first time, Rule 36 would impose a presumptive limit of 25 on
298 requests to admit, excluding from the count requests to admit the genuineness of documents. In
299 addition, the presumptive time limit for oral depositions would be reduced from one day of 7 hours
300 to one day of 6 hours.

301 The Committee expected that these presumptive limits would be only that, simply
302 presumptive. The proposals relied on the parties to understand what numbers are proportional to the
303 needs of individual cases, and to agree on higher numbers whenever appropriate. Failing party
304 agreement, the expectation was that courts would respond flexibly in ordering higher numbers
305 suitable to the needs of each case. The purpose was to encourage realistic appraisal of the level of
306 discovery proportional to individual case needs. "To put it mildly, these proposals generated strong
307 opposition." Opposition came from the organized bar as well as from testimony and comments from
308 individual lawyers. The proposals were seen as counter-productive. Lawyers fear that some courts
309 would view the presumptive numbers as hard ceilings, and that attempts to achieve reasonable
310 accommodations through party discussions would often fail, leading to increased motion practice.

The Subcommittee recommends that these proposals be withdrawn. Such widespread and forceful opposition deserves respect. The hope remains that most parties will continue, as they do now, to discuss reasonable discovery plans at the Rule 26(f) conference and with the court initially and, if need be, as the case unfolds. Failing party agreement, courts have power to shape discovery to the reasonable needs of the case.

A Subcommittee member noted that the testimony and comments on the numbers of depositions were impressive. Only a minority of cases now involve more than 5 depositions per side; withdrawing the proposal will not affect most cases. For the cases that do involve more than 5 depositions per side, it is "better to leave well-enough alone." As to the number of interrogatories, the change is not as important because they are not much used anyway.

One judge reported that colleagues were pleased with the recommendation to withdraw these proposals.

CASE MANAGEMENT

Judge Koeltl began discussion of this segment of the package proposal by noting that early and active judicial case management has encountered little opposition and widespread support from the organized bar. There is concern that the early steps in an action take too long.

Rule 4(m): Time to Serve: The published proposal reduced the time to serve the summons and complaint from 120 days to 60 days. The comments and testimony persuaded the Subcommittee to recommend that the time be set at 90 days.

Several practical observations support the change to 90 days. Many comments suggest the need for time to serve multiple defendants, or defendants who seek to evade service. When service is to made by a marshal, 60 days may strain the Marshals Service. A 60-day period may deter requests to waive service, since not much time will remain when the plaintiff learns that service will not be waived.

In addition to recommending a 90-day period, the Subcommittee proposes adding new language to the Committee Note to reflect some of the circumstances that will justify an extension of the time.

The published proposal also amends Rule 4(m) to exclude service of a notice under Rule 71.1(d)(3)(A). There was almost no comment on this proposal. The Subcommittee recommends it for adoption. The Committee Note should carry forward as published, striking an extraneous clause that was inadvertently carried into the agenda book materials from an earlier sketch.

Many of the comments on Rule 4(m) reflected an assumption that the limit applies to service on a corporation in a foreign country. There are powerful reasons to exclude these cases from Rule 4(m), which does not apply to service abroad on individuals and a foreign state or its subdivision. The Subcommittee's recommendation for publication of a clarifying amendment of Rule 4(m) was discussed later in the meeting.

Rule 16 Scheduling Conferences and Orders: Judge Koeltl described the proposed changes in Rule 16(b).

The proposal continues to allow entry of a scheduling order on the basis of the parties' Rule 26(f) report without a conference. But it emphasizes the value of direct simultaneous communication by deleting the reference to a conference "by telephone, mail, or other means." Telephone

352 conferences remain available. But mail, or other means that do not involve direct simultaneous
353 communication, are excluded.

354 The time to issue a scheduling order is reduced to the earlier of 90, not 120, days after any
355 defendant has been served, or 60, not 90, days after any defendant has appeared. This acceleration
356 is offset by adding a new provision that allows the judge to set a later time on finding good cause for
357 delay. The Department of Justice has continued to be concerned that the reduced time periods may
358 not be enough to support a meaningful conference, a concern that has been echoed by other
359 comments about the needs of complex cases. The Subcommittee proposes new language for the
360 Committee Note to reflect the circumstances that may show good cause to extend the time, including
361 cases that involve "complex issues, multiple parties, and large organizations, public or private."

362 New subjects are added to the list of permitted contents of a scheduling order, as wella s the
363 Rule 26(f) discovery plan, including preservation of electronically stored information and agreements
364 reached under Federal Rule of Evidence 502. These topics are added to emphasize the importance
365 of paying early attention to them.

366 Finally, a new provision would recognize that a scheduling order may direct that before
367 moving for an order relating to discovery, the movant must request a conference with the court. This
368 provision reflects practices adopted by local rule or individual judges in many courts. About one-
369 third of judges now do this. But many do not, and the Subcommittee recognizes that some courts
370 may not be able to do it. So this provision simply provides another option, not a mandate.

371 Discussion began with the question why it is useful to foreclose a scheduling conference by
372 mail or other means that do not involve simultaneous communication among the parties and court.
373 The rule continues to allow entry of the order without any conference at all, relying on the parties'
374 Rule 26(f) report. The initial response focused on the value of allowing entry of the order on the
375 basis of the Rule 26(f) report alone. This can be an effective practice, particularly in "routine" cases
376 in which the judge trusts the lawyers. Some judges would not willingly give up this option to a
377 requirement of an actual conference in all cases. But this response did not satisfy the question: "sure,
378 it can make sense to allow entry of the order without any conference. But why limit the means
379 available for having a conference if the judge chooses to have one? The rule text, moreover, does
380 not directly say that there must be simultaneous communication." A further response stated that a
381 "conference" implies simultaneous communication, not, for example, an exchange of
382 correspondence. And it is desirable to emphasize the value of simultaneous communication by
383 deleting the reference to mail or other means.

384 **COOPERATION**

385 Rule 1: Judge Koeltl introduced the proposed amendment of Rule 1 that directs that the rules be
386 "employed by the court and the parties" to secure the just, speedy, and inexpensive determination
387 of every action. This amendment applies Rule 1 aspirations directly to the parties. The published
388 Committee Note observes that effective advocacy is consistent with, and indeed depends upon,
389 cooperative and proportional use of procedure.

390 The Subcommittee recommends that the Rule 1 proposal go forward without change. The
391 testimony and comments went in different directions. Some urged that "cooperation" be introduced
392 directly into rule text. Others urged that the proposal be abandoned, fearing that although it seems
393 desirable in the abstract it will become the occasion for prompting exactly the sort of behavior it is
394 meant to discourage. "Rule 1 motions" will be made as a strategic means of increasing cost and
395 delay. And still others — including the Sedona Conference — think the proposal gets it just right.

DUKE PACKAGE CONCLUSION

Judge Koeltl concluded the presentation of the Duke Rules Package with thanks to all who have been instrumental in developing it. Judges Kravitz, Rosenthal, Sutton, and Campbell provided great help. Judge Wood provided extraordinary help as liaison from the Standing Committee, working as if a member of both the Advisory Committee and the Subcommittee. All members of the Subcommittee worked with tireless skill and diligence. Professor Gensler has helped throughout. The Subcommittee, further, operated by seeking consensus on a package that is unanimously endorsed by every member. And every member "has fingerprints all over the product." Judge Koeltl thanked Professor Cooper and Professor Marcus for their tireless and invaluable contributions to the work of the Subcommittee.

A Subcommittee member recalled that Chief Justice Roberts approved the concept of the Duke Conference only with the expectation that it would lead to specific proposals. "All these years later, dealing with these sprawling and diffuse questions, we have done it." The patience, care, and creativity that Judge Koeltl showed "were inspirational."

Another Subcommittee member observed that great care was taken in keeping track of each change, large and small. "The result is reliable."

Another Subcommittee member said that "Judge Koeltl made the almost impossible look easy."

Judge Campbell said that Judge Koeltl was the one whose hard work pulled the Duke Conference together. He enlisted the participants and saw to it that all papers were produced on time. The Conference itself was great. Combing through the record and pulling it all together has been a remarkable accomplishment.

Judge Rosenthal added that this work owes a debt to Judge Scirica and Judge Levi who embraced the concept of the Conference and helped to push forward the importance of relying on empirical data to support Committee action, as well as the importance of listening carefully to the many constituencies the Rules serve. And, of course, Dean Levi must be thanked for helping with arrangements for the Conference itself. And Judge Koeltl was closely engaged with all of this and more, never impatient, always cooperative and proportional.

Judge Campbell noted that several comments on the revised proposals in the agenda book have been received and carefully considered. One comment comes from four United States Senators who remain concerned about adding proportionality to Rule 26(b)(1). Committee members have read their letter with care, as the other letters also, and have carefully considered their views. The letters are thoughtful. "With some, we do not fully agree." Those who continue to oppose proportionality are not satisfied with the revised version in the agenda book. They do not think it is needed. The Committee thinks it is needed. Four different advisory committees, going back 30 years, have believed it is needed: it was originally added in 1983, encouraged in 1993, and emphasized in 2000. The present Committee, as the Committees that recommended the 1993 and 2000 amendments, continues to believe that the 1983 rule has never really been applied. It is time to renew the effort.

The Committee voted unanimously to recommend adoption of the entire Duke Rules Package as proposed by the Subcommittee.

Judge Campbell expressed the Committee's thanks to Judges Sutton and Gorsuch and Professor Coquillette for attending this meeting to represent the Standing Committee. Thanks as well were expressed to Judge Fogel for representing the Federal Judicial Center. "We hope the rules will

439 prompt more judicial education."

440 *B. Rule 37(e): Failure to Preserve ESI*

441 Judge Campbell introduced the Report of the Discovery Subcommittee by observing that the
442 Subcommittee had met repeatedly since preparation of the revised Rule 37(e) draft presented in the
443 agenda materials. The result of these further deliberations, which included consideration of several
444 outside comments on the agenda-book version, is a still further revision of the proposed rule text.
445 There was not time to revise the Committee Note to reflect the rule text changes. A revised
446 Committee Note will be prepared by the Subcommittee and circulated to the full Committee with
447 the goal of approving final Note language in time for inclusion in the agenda materials for the
448 Standing Committee meeting at the end of May. The task for today is to work on the rule text,
449 allowing for comments on the ways in which the Note might be revised to respond to whatever rule
450 text is approved for adoption.

451 Judge Grimm presented the Discovery Subcommittee Report. The Report is supplemented
452 by the revised Rule 37(e) text handed out to the Committee.

453 The first step of the Report is a recommendation that the new Rule 37(e) should replace
454 current 37(e), without carrying forward the current language.

455 Revising the proposed rule text began at a Subcommittee meeting held the morning after the
456 February 7 public hearing in Dallas. Several meetings were held by conference call after that,
457 culminating in a two and one-half hour call on Tuesday, April 8. A final meeting was held in the
458 evening of the first day of the present Committee meeting. Subcommittee members have given great
459 amounts of time to the project, as have Judges Campbell and Sutton, and also Andrea Kuperman.

460 Present Rule 37(e) was adopted in 2006 as part of a package of amendments that for the first
461 time expressly brought electronically stored information into Civil Rules texts. It was an attempt to
462 provide a limited safe harbor that some came to see as a limited not-so-safe harbor. It applied only
463 to sanctions "under these rules," leaving inherent power intact. The Note showed that once a duty
464 to preserve arises, there may be a duty to intervene to stop the destruction of ESI by auto-delete
465 functions or by other events.

466 A panel at the Duke Conference, chaired by Gregory Joseph, made a unanimous
467 recommendation for a comprehensive review of ESI preservation. The concern was that large
468 enterprises have felt forced to over-preserve huge amounts of ESI for fear of spoliation sanctions
469 imposed under the most demanding standards adopted by the most demanding court in the country.
470 The common law of spoliation provided the background — all things are presumed against one who
471 spoliates evidence. But ESI is not like traditional evidentiary materials, whether paper documents
472 or tangible things. Different circuits have developed different approaches to the duty to preserve
473 ESI, although all agree that the duty can arise before an action is actually filed. There are differences
474 in looking to the relevance of the information and the prejudice that may arise from its loss, and
475 different standards of culpability have been adopted. The Second Circuit approved sanctions for
476 negligence or gross negligence, based on a remedial focus: who should bear the loss, how do we
477 level the playing field? The Fifth and Tenth Circuits, on the other hand, allow adverse-inference
478 instructions only if there is enough culpability to support an inference that the lost information was
479 unfavorable to the party who lost it. Organizations that are subject to nationwide jurisdiction have
480 to observe the most demanding preservation regimes that may be imposed.

481 The Duke Conference panel asked that a rule be adopted. The Subcommittee was charged
482 with developing a proposal. The Dallas miniconference discussed initial sketches addressing these

483 issues.

484 Repeated attempts to draft a rule defining the duty to preserve failed to find a satisfactory
485 definition. The panel recommendation wanted to establish definitions of when the duty to preserve
486 arises; of the scope of the duty, both backward in time and continuing through the litigation and
487 perhaps beyond; how many custodians should be subject to a "litigation hold"; and still other matters.
488 The further these drafts progressed, the greater the obstacles that were identified. Even articulating
489 the events that might trigger a duty to preserve in anticipation of litigation proved difficult, despite
490 the widespread agreement that the duty can arise before an action is actually filed. The Subcommittee
491 simply could not draft a rule that provided meaningful guidance and at the same time applied fairly
492 to the wide variety of civil cases filed in federal court.

493 The first conclusion, then, was to rely on the common law to establish the duty to preserve.
494 A new Rule 37(e) should address only the procedural consequences when the duty is breached.

495 Subcommittee work, after many drafts and repeated discussion in the full Advisory
496 Committee, led to the proposal that was published for comment last summer. Comments and
497 testimony were expected. The message transmitting Rule 37(e) for publication specifically invited
498 comment on five stated questions. These questions asked whether the new rule should be limited to
499 the loss of ESI; whether to retain a provision that allowed "sanctions" without a showing of bad faith
500 when loss of the information irreparably deprived a party of any meaningful opportunity to present
501 or defend against the claims in the litigation; whether the provisions of present Rule 37(e) should
502 be retained; and whether the rule text should attempt to provide definitions of "substantial prejudice,"
503 "willful," and "bad faith."

504 The volume of comments up to the time of the February hearing led to an expectation that
505 as many as 1,000 comments might be addressed to the full set of proposals published in August. In
506 the end, more than twice that number were received.

507 The comments and testimony persuaded the Subcommittee that the published proposal "is
508 not the best we can do." Several concerns guide the need to adopt a reshaped rule.

509 There is a great need for a rule to address the consequences of losing ESI. Over-preservation
510 and the lack of uniformity in dealing with loss are real problems. It would be good to deal with the
511 circuit disagreements, even if nothing else can be accomplished.

512 It remains important to define responses to failures to preserve ESI that should have been
513 preserved. Over-reactions should be cabined, while preserving needed flexibility. John Barkett
514 generated an encyclopedic review of the case law. This review demonstrates the need to establish
515 a flexible range of responses, a need that is underscored by the prospect that the ESI universe will
516 change greatly in only a few years.

517 The published rule sought to establish a distinction between curative measures and sanctions.
518 The comments and testimony persuaded the Subcommittee that this distinction would not work well.
519 "ESI is so voluminous that you cannot preserve it all." But the volume of it also makes the inevitable
520 losses likely to be less serious than might seem. Often there are exact duplicates of a source that has
521 been lost. Often a lost source can be retrieved. And often measures aimed to cure the loss will
522 involve steps that also might be viewed as "sanctions." Invoking the list of sanctions in Rule
523 37(b)(2)(A) also does not work well. These measures properly are "sanctions" in the context of Rule
524 37(b) because they address violation of a court order. In the context of ESI lost without violating any
525 court order, they seem to serve a remedial purpose. And some of the choices available under
526 (b)(2)(A) do not fit failure to preserve ESI — contempt is not available when there is no court order,

527 and it makes no sense to "stay[] further proceedings until the order is obeyed." The "sanctions" label
528 came to seem inappropriate.

529 Further problems appeared with the concepts of substantial prejudice and willfulness or bad
530 faith, and with some of the factors listed in proposed 37(e)(2). The provisions designed to address
531 loss of unique tangibles — for example the automobile claimed to have been improperly designed
532 — also caused difficulty. And the attempt to deal with losses caused by forces outside a party's
533 control was not easily understood.

534 The Subcommittee set out to improve the rule, maintaining as much of the published version
535 as possible. The goal was to refine the expression in response to the comments and testimony.

536 The starting point remains the same. The revised proposal, as the published proposal,
537 addresses loss of information that should have been preserved in the anticipation or conduct of
538 litigation. And the revised proposal is intended to make it clear that losses of information caused by
539 forces outside a party's control are outside Rule 37(e). The published Note addressed that clearly,
540 and the revised Note will continue to be clear.

541 Further revisions pursue the distinction between curative measures and sanctions by refining
542 the approach to curative measures and abandoning any reference to "sanctions." Curative or remedial
543 measures are addressed in two steps. The introduction focuses on restoring or replacing lost
544 information by additional discovery. If that does not work, the court can order measures no greater
545 than necessary to cure prejudice caused by the loss. But it is not required that the court do everything
546 possible to restore or replace the lost information, nor that it do everything possible to cure prejudice
547 caused by the loss. Great flexibility is maintained. Finally, an intent to deprive another party of the
548 lost information's use in the litigation is required for any of four measures: the court's presumption
549 that the lost information was unfavorable to the party who lost it, an instruction that the jury may or
550 must presume the lost information was unfavorable to party who lost it; or dismissal or a default
551 judgment.

552 This version in part responds to concerns expressed about the dimensions of "curative
553 measures" under (e)(1)(A) of the published proposal. There was a fear that curative measures could
554 come to overlap many of the orders alternatively authorized as sanctions, but without the restrictions
555 that limited sanctions under the published rule.

556 Greater concerns were expressed in comments dealing with "sanctions" under the published
557 (e)(1)(B). The central provision, (i), allowed sanctions only on finding substantial prejudice and
558 willful or bad-faith loss. Many comments, responding to one of the questions inviting comment,
559 urged that there should be a definition of what is "substantial" prejudice. Still greater concerns
560 addressed the concept of willfulness. Many comments pointed to the great range of definitions that
561 appear in judicial opinions. "Wilful" is interpreted differently in different contexts. In many contexts
562 it means only an intent to do the questioned act, without any need to show an intent to produce the
563 act's consequences. An intent to discard an old smart phone, for example, could be willful even
564 though no thought was given to the loss of information stored in the phone. "Bad faith" also drew
565 criticism. Many comments suggested the two concepts should be combined as "willful and in bad
566 faith," or that at least "willful" should be discarded entirely.

567 The comments on the alternative in proposed (e)(1)(B)(ii) were equally strong. Although it
568 was intended to dispense with the requirement of willful or bad-faith conduct only on finding an
569 irreparable defeat of any meaningful opportunity to present or defend against a claim, a consequence
570 far worse than "substantial prejudice," many comments suggested that a court unhappy with the bad-
571 faith requirement would seize on this provision to make an end-run around both the substantial

572 prejudice and willfulness or bad-faith requirements.

573 The version in the agenda book responded to these comments in several ways.

574 The revised version carried forward the starting point: the rule applies only to a failure to
575 preserve information that should have been preserved in the anticipation or conduct of litigation.

576 The next step preserved a separate paragraph (1) for curative measures, but specified that the
577 measures must be no greater than necessary to cure the loss of information. It continued to include
578 examples of curative measures. It did not require a finding of prejudice.

579 The next step, paragraph (2), addressed situations in which the court finds prejudice, and
580 authorized measures no greater than necessary to cure the prejudice. No element of culpability was
581 required.

582 The final step, paragraph (3), addressed four specific measures: a court's presumption that
583 the lost information was unfavorable to the party who lost it; an instruction that a jury may or must
584 presume that the information was unfavorable to the party who lost it; dismissal; or default. Any of
585 these measures could be taken only on finding an intent to deprive another party of the information's
586 use in the action.

587 Comments on the agenda-book version suggested that it did not fully address the challenges
588 made to the published version. They asked what it means to "cure" a loss of information? They
589 questioned the absence of any culpability requirement for curative measures — with no definition
590 of curative measures, this provision could be used to justify powerful measures, such as excluding
591 evidence, defeating the limits of the next two paragraphs. So too, it was noted that no culpability was
592 required to support measures designed to cure prejudice, and that again there were no limiting
593 standards apart from the exclusion of the measures identified in the paragraph that requires an intent
594 to deprive another party of the lost information's use in the action. And the intent paragraph also
595 caused concerns that it could authorize sanctions based on culpable intent without any showing of
596 prejudice.

597 The new draft proposed by the Subcommittee addresses these concerns. It limits the rule to
598 settings in which a party "failed to take reasonable steps to preserve" information that should have
599 been preserved. This standard is meant to encourage reasonable preservation behavior.
600 Proportionality is part of the calculus of reasonableness.

601 The new draft eliminates the separate paragraph covering curative measures for lost
602 information, and instead makes clear in the introduction that the succeeding paragraphs apply only
603 when the lost information "cannot be restored or replaced through additional discovery." The
604 illustrations of additional discovery provided in the abandoned paragraph (1) on curative measures
605 will be explored in the Committee Note, which will be further revised to explore what it means to
606 restore or replace lost information and what is meant by "additional discovery." Additional discovery
607 is authorized by Rules 16 and 26, and includes discovery aimed at determining whether in fact any
608 information was lost. If a source of information was lost, additional discovery may show that the
609 very same information resides in a different source. An e-mail message deleted from the system of
610 one person, for example, may survive intact in another system. Or the court may order discovery
611 under Rule 26(b)(2)(B) from sources that otherwise would be thought not reasonably accessible
612 because of undue burden or cost. The goal is to put other parties effectively back in the position that
613 would have existed if the information had not been lost.

614 If the lost information cannot be restored or replaced, the next step in the revised proposal

615 is paragraph (1). This paragraph remains exactly the same as paragraph (2) in the agenda book: on
616 finding prejudice, the court may order measures no greater than necessary to cure the prejudice.

617 Finally, the revised proposal carries forward unchanged as paragraph (2) the agenda-book
618 paragraph (3) provision for information lost because a party acted with the intent to deprive another
619 party of the information's use in the litigation.

620 The Subcommittee, both in the agenda book proposal and in its revised proposal, has
621 responded to its own question by limiting Rule 37(e) to the loss of ESI. There is much to be said for
622 adopting a rule that establishes a uniform procedure for loss of any form of discoverable information.
623 But the loss of a unique tangible object is difficult to capture in a rule. There may be circumstances
624 that justify the ultimate sanctions of dismissal or default even though there was no intent to deprive
625 another party of the use of the object in the litigation. The *Silvestri* case cited in the published
626 Committee Note is an example of the problem. As comments on the published proposal show, there
627 is a risk that any attempt to draft a rule for this problem may open the door to evade the restrictions
628 embodied in other provisions. Beyond that, there is a well-developed body of law for losses of things
629 other than ESI. Further, the abundance of ESI makes it likely that satisfactory ways can be found to
630 work around the loss.

631 In short, the revised proposal has these features: It is limited to circumstances in which a
632 party failed to take reasonable steps to preserve information that should have been preserved, thus
633 embracing a form of "culpability." The concept of attempting first to cure the loss is maintained by
634 focusing on additional discovery to restore or replace the lost information. If those steps fail, the
635 central focus is on prejudice and measures no greater than necessary to cure the prejudice. The circuit
636 split on serious sanctions is resolved; an intent to deprive another party of the information's use in
637 the litigation is required for adverse inferences, dismissal, and default. Flexibility is the central
638 theme. The court need not order all additional discovery that might restore or replace the lost
639 information. It may, but need not, order all measures that might cure prejudice from the loss. The
640 focus is on what is appropriate in the circumstances, neither too demanding nor too forgiving. Nor
641 must a court impose the most severe sanctions when an intent to deprive is found.

642 Comments and testimony raised the question whether the new rule will affect the burden of
643 proving prejudice. The answer is that the burden is allocated to the party that has the knowledge that
644 bears on the issue. The party who lost the information generally is in the better position to have some
645 idea of what was lost. The party who wants the information generally is in a better position to
646 explain why information in the category of the lost information may have been important to its case.

647 The concept of willfulness or bad faith is abandoned. All that remains is an intent to deprive
648 another party of the lost information's use in the action. This intent is required only for a limited
649 range of powerful measures. The court may presume that the lost information was unfavorable to the
650 party who lost it for such purposes as motion practice, summary judgment, or a bench trial; adverse-
651 inference jury instructions; or dismissal or default.

652 The requirement of an intent to deprive another party of the information's use in the litigation
653 is designed to supersede the *Residential Funding* decision. That decision allows adverse-inference
654 instructions on finding negligence or gross negligence. Superseding this approach may give comfort
655 that will reduce over-preservation, at least in some measure. And restricting the use of adverse-
656 inference jury instructions carries with it the same restriction on the even more definitively fatal
657 measures of dismissal or default.

658 Limiting the use of adverse-inference jury instructions invokes a spectrum of instructions.
659 The rule text refers only to an instruction that the jury may or must "presume" the information was

660 unfavorable to the party that lost it. "Presume" is the language of many opinions. But the mental task
661 involved is inference, not the rebuttable presumption of evidence law. This form of instruction stands
662 at one end of the line. The other end of the line involves instructions that address evidence actually
663 introduced at trial. Evidence may be introduced to show the failure to preserve. That evidence may
664 be met by other evidence that explains the failure. The parties may argue about what inferences the
665 jury should draw from all the evidence about the favorable or unfavorable character of the lost
666 evidence. The court might instruct the jury that it is proper to evaluate the loss as suggested by the
667 evidence and arguments. The distinction invoked by the rule text is explored in the Committee Note
668 provided to explain the agenda-book version, which is the same as the Subcommittee's new proposal
669 on this point. The Subcommittee will work further on the Committee Note. There is a proper
670 evidentiary aspect to lost information, something that is not a "sanction." One example is provided
671 by a case in which the defendant introduced a memorandum to show that an employment plaintiff
672 voluntarily quit his job; the plaintiff was allowed to show that metadata went missing from the ESI
673 file for the memorandum.

674 The "intent to deprive" provision raises another issue: should prejudice be an explicit
675 limitation? That might seem implicit in presuming that the lost evidence was unfavorable, and
676 supported by the inference that deliberate destruction shows awareness that the information is
677 unfavorable. But the Subcommittee concluded that these measures, including dismissal or default,
678 should be available as a deterrent without adding an explicit prejudice requirement. The Committee
679 Note will say that the court should not dismiss or default simply for deliberate loss of immaterial
680 information. But if there is prejudice — including what may be inferred from the deliberate intent
681 to deprive — dismissal or default is available. The choice invokes discretion, and the Note will
682 suggest limits on the sound exercise of discretion.

683 The Subcommittee recommends that the list of factors in the published version, and the
684 revised list of factors in the agenda-book version, be abandoned. In the published version, these
685 factors bore both on determining whether information should have been preserved and on
686 determining whether the failure to preserve was willful or in bad faith. In the agenda-book version,
687 the factors bore generally on "applying Rule 37(e)." In addition to the usual problems that attend an
688 incomplete "laundry list" of factors in rule text, these factors seem less important now that "failure
689 to take reasonable steps" has been added to rule text. Reasonableness includes proportionality. Two
690 of the factors are thus made redundant. And reasonableness also reflects another of the factors, the
691 extent of the party's notice about impending litigation.

692 The Committee Note will be shortened, simplified, and adjusted to reflect the revised
693 proposal. Among other elements, it will explain the "restore or replace" element, along with the
694 related focus on "additional discovery."

695 Judge Campbell observed that Judge Grimm's thorough report "gave a short version of what
696 happened." The revised proposal continues the progress made by the agenda-book version toward
697 a simpler, more modest rule. The failure to preserve ESI presents many problems. The drafting
698 challenge is great. The difficulties push toward doing less, rather than attempting to do more in the
699 rule. And even in attempting less, we can aim only to get a good rule, not to get a perfect rule. This
700 proposal is a good rule. It can be adopted, and then tested in application. We will learn more from
701 how it works.

702 A Subcommittee member agreed that the Subcommittee had decided to be satisfied with a
703 more modest approach. There are great limitations on what we can do by rule to alleviate the burdens
704 of ESI preservation. The rule does not define the duty to preserve. Nor could the rule define duties
705 to preserve imposed by state law. The comments and testimony did not say much about how these
706 rules will alleviate the burden of preservation. The Subcommittee followed many paths. Nothing in

707 the rule requires a court to do anything. All of its provisions are "may." It is an authorization of
708 discretion. And there are limits: there must be a loss of information that should have been preserved,
709 a breach of the duty to preserve; the breach must at least be a failure to take reasonable steps to
710 preserve; and further steps can be taken only if the lost information cannot be restored or replaced.
711 The inquiry passes to prejudice and curing prejudice only if restoration or replacement cannot be
712 accomplished.

713 Another Subcommittee member began by recalling his reaction on first reading the
714 *Residential Funding* decision: "Oh my, look out." The case itself had nothing to do with spoliation,
715 but it had the potential to wreak havoc. It has. Decisions in the Second Circuit and in its district
716 courts have been inconsistent. There is something woefully wrong with them. We need to establish
717 uniformity, and it is not uniformity in the (non-uniform) Second Circuit approach. And we should
718 observe the separation between evidence law and procedure. Several recent decisions in the district
719 courts show that judges are pausing in the approach to lost ESI because they realize the lost
720 information may be restorable or replaceable, or may be merely cumulative even though it is not
721 restored or replaced. They may wait for trial to decide what to do about the loss, based on the trial
722 evidence. Some courts, attempting to level the playing field, have in the past invoked remedies that
723 tilt the playing field in the opposite direction. We should cure that. The "should have been preserved"
724 element brings in relevance, "content" as well as "intent." The Committee Note should mark the line
725 between evidence and procedure, to avoid tilting the playing field one way or the other. This
726 proposal may not be a perfect rule, but it is far better than the undisciplined case law. "I'm not sure
727 what a perfect rule is." But we can establish a measure of uniformity in approaching the loss of ESI,
728 and "this is a HUGE improvement."

729 Another Subcommittee member agreed that "it was a hard rule to write, and it will not be
730 entirely comfortable to apply." We want to preserve authority to maintain the integrity of the ESI
731 discovery process, but without going overboard. The Committee Note should make it clear that the
732 rule does not intrude on jury freedom to find the facts. "To avoid open season," the Note should
733 emphasize "replace or restore," and can draw on court help in ordering additional discovery.
734 Measures in response to prejudice will be the exception.

735 A fourth Subcommittee member described "two realities." First, ESI will be lost. It will be
736 lost a lot in a lot of cases. More often the loss will result from failure to take reasonable steps than
737 from intentional loss. And reasonable steps are not perfect steps; information will be lost even when
738 reasonable steps are taken to preserve it. Second, all of these problems are case-specific.
739 Subcommittee discussions included specific hypothetical cases, eliciting different intuitions. And
740 even if all members shared common intuitions, "we could not draft them." We depend on the court's
741 discretion. But, while depending on discretion, we can guide it in ways that will achieve greater
742 uniformity. Beyond these realities, the rule can cabin discretion in invoking the most severe
743 sanctions. In this dimension, the Subcommittee talked a lot about remedy, as compared to deterrence
744 and punishment. There is agreement that the principal focus is on remedy, even if not complete
745 agreement on the role of deterrence. "Bad intent is the periphery of the rule. The core is in the
746 preface and in curing prejudice."

747 An active participant in the Subcommittee process said that the proposal is a fine rule. The
748 limits in the preface — failure to take reasonable steps, and efforts to restore or replace — are
749 impressive. "The Subcommittee work is brilliant."

750 A fifth Subcommittee member noted that he had come late to the Subcommittee. He was
751 impressed by the seriousness of the attention paid to the testimony and comments, and to the
752 comments on the version in the agenda book. The proposed simplification, focusing on the core
753 things that need to be done, is what we should do. "We cannot write a rule that will deal with all

754 cases."

755 General discussion began with a reminder that in 2009 Judge Kravitz suggested there might
756 be Enabling Act problems in framing a rule to address pre-litigation conduct. It is "brilliant
757 avoidance" to frame a rule that, rather than attempt to establish an independent duty to preserve,
758 takes as given the duty established by court decisions.

759 The Committee Note addressing the parties' burdens in arguing whether a failure to preserve
760 caused prejudice, however, was found confusing. "I would fear the burden may shift during the
761 hearing." Nor is it clear whether the preponderance standard applies. It would help to say that a party
762 seeking remedial measures normally has the burden.

763 The burden question was addressed by noting the difficulty of proving what was in the lost
764 source of information. Imposing a burden on the party seeking to cure the loss "may thwart justice."
765 So it was that every attempt to write a burden provision proved difficult. "Some courts say where
766 the burden lies. Others are silent." There is this much guidance in the rule: the court must find
767 prejudice to invoke paragraph (1), and it must find intent to invoke paragraph (2).

768 The response was the same question, reframed: "Do we require the party who lost
769 information to prove the other party was not prejudiced"? If the party who lost the information has
770 the burden it has no way to know what other information is available to the party who may have been
771 prejudiced. "I fear discretion will be a complete lack of discipline. Allocating the burden may
772 determine the outcome."

773 Another judge reframed the question: "How does a trial judge get through this flexible
774 process? It is very complex. When I start to hear all this, whom do I look to at the starting point,
775 recognizing the burden may change as the hearing moves along"?

776 The response was the same. "We have not attempted to say where the burden rests, nor when
777 it may shift." The aim is only to draft a modest but broad rule, and to establish uniformity. Another
778 Committee member said that the basic law imposes the burden of proving prejudice on the moving
779 party. But when bad faith is shown, there is either a very low threshold on prejudice, or the burden
780 is shifted.

781 A Committee member commended the "restore or replace" provision as "an important and
782 good change." The next steps follow — measures no greater than necessary to cure prejudice, and
783 then intent. But if you cannot cure the prejudice by other means, paragraph (2) allows the court to
784 draw adverse inferences, give an adverse-inference jury instruction, or dismiss or default only on
785 finding an intend to deprive another party of the lost information's use in the litigation. Not even
786 reckless loss will support those measures. So if the court does not find the required intent, it will not
787 ask the jury to find the intent. What does the court say to the jury?

788 One response was that in the (e)(2) situation, the jury has heard what happened — that
789 information was not preserved. An example is proof of the loss of metadata for a document that
790 survives and is introduced in evidence. Even if the loss occurred at a time when there was no duty
791 to preserve, the jury may consider whether the missing evidence would be helpful to a party opposing
792 the party who lost it.

793 It was noted that the Subcommittee will work to refine the part of the Committee Note that
794 deals with the forms of jury instructions that may be given when there is no finding of an intent to
795 deprive another party of the lost information's use. This work will consider the later observation that
796 there is such a broad range from negligent to intentional conduct that we should be clear in reflecting

797 on the cases in which a jury may hear evidence on what was lost. There is a range of remedies not
798 circumscribed by a requirement of finding intent under (e)(2).

799 A Committee member said it is "good not to commoditize, to avoid a one-size-fits-all
800 approach, to tailor reactions to each case." Modesty is a strong mark of intelligence. It is good to
801 encourage a tailor-made approach to each case. But should a greater range of options be made
802 available under (e)(2) when intent is found? It was pointed out that (2) does not require resort to any
803 of the remedies it lists. The Committee Note says explicitly that the court may adopt less severe
804 remedies designed to cure the prejudice, if any, or to otherwise address the party's conduct.

805 A Committee member asked whether prejudice is required to invoke the severe measures
806 provided by paragraph (2) for a failure to preserve for the purpose of depriving another party of the
807 lost information's use in the action. The response was that to a certain extent, a finding of this intent
808 permits the judge to infer from the intent that the information was unfavorable to the party who lost
809 it. It would be confusing to add an explicit prejudice requirement. The case of deliberate intent
810 without prejudice raises the question of deterrence: should we remove any consideration of
811 deterrence from the choice of remedies? The Subcommittee decided that a need for deterrence might
812 justify even dismissal or default, but not if the lost information is truly inconsequential.

813 It was pointed out that if the "incompetent spoliator" is an attorney, the court has another
814 remedy by reporting to the state disciplinary authority.

815 Another Committee member recognized that "the rule presents challenging issues." The
816 proposed draft is in many ways an elegant way of improving on the complexities of the version that
817 was published for comment. And it is good to limit remedies to those that are no greater than
818 necessary to cure prejudice. But what types of loss start you down this path? The draft is not limited
819 to loss of "discoverable" information, nor does it require materiality. Some clarification in the
820 Committee Note would be helpful. It was agreed that the Subcommittee would attempt to do this.

821 The same member asked whether restoring backup tapes fits under the preface as additional
822 discovery to restore or replace lost information, or only under paragraph (1) as a measure to cure
823 prejudice? The preface goes beyond determining whether anything was lost. "Replace or restore can
824 be very expensive": should such measures be available without finding prejudice? Should we build
825 proportionality, a "no greater than necessary" limit into the approach to restoring or replacing the lost
826 information? Again the response was that this would be addressed in the Committee Note. "Often
827 you don't know whether there is prejudice until you've had the added discovery." Facing a renewed
828 protest that restoring or replacing can be very expensive, the response was that this is a matter of
829 discretion. The more reasonable the conduct was, the less likely it is that the judge will order extreme
830 measures. Proportionality concerns may persuade the judge to order phased discovery, as many
831 judges do now. "If there is a cost to some steps, we can talk about who pays."

832 The question whether present Rule 37(e) should be preserved in the text of the new rule was
833 renewed. The value may lie not so much in guiding litigants and courts as in providing a tool for
834 lawyers to use in persuading IT staff to design information systems that facilitate preservation. "Does
835 'reasonable steps' build in this idea"? It was suggested that something can be built into the
836 Committee Note to reflect this concern — it could be something like the portions of the Note that
837 appear in the agenda book at lines 37-47 and 384-385.

838 The question whether to limit the rule to loss of electronically stored information also was
839 renewed. The Subcommittee Report lays out powerful reasons for adopting this limit. But "I'm not
840 as confident there are not ESI equivalents to the vanishing car and air bag: there can be unique ESI
841 in unique sources." Not all ESI is redundant. And is the case law on the loss of tangible things in fact

842 less disuniform than the law on loss of ESI, so less in need of a uniform rule? A further concern is
843 that a single case may involve loss both of ESI and of a tangible thing: do we want to leave it open
844 to take different approaches to the different losses?

845 This question was characterized as a reflection of the reasons that make it unwise to attempt
846 to write a rule for all situations. Examining the cases equivalent to the lost car failed to find any
847 where there was not bad faith and a really critical loss of ESI. At the same time, it must be
848 recognized that some cases may present serious questions whether a particular bit of lost information
849 qualifies as ESI — our running example has been a printout of a vanished e-mail message.

850 A participant confessed to have begun by wanting a rule to address all forms of information.
851 But the complications are great. If the proposed rule is adopted, "we will monitor it closely." If it
852 works, we can think seriously about extending it to other forms of information. If it does not work,
853 we will look at it for that reason.

854 Another participant asked when the proposed rule would permit "issue sanctions, or evidence
855 sanctions." Can the court exclude testimony as a remedy without finding the intent required for
856 paragraph (2) measures, or — shades of Rule 37(b)(2)(A)(i) — direct that designated facts be taken
857 as established? The Committee Note should address this. It was responded that the Note calls these
858 steps "measures." But are they available without a showing of intent? Can the court forbid a witness
859 from testifying to the contents of an e-mail message he wrote and lost when there is "no mens rea"?
860 The Committee Note says, and is expected to say still, that anything that is equivalent to dismissal
861 or default requires intent.

862 A similar question asked whether taking a matter as established can extend to taking
863 "liability" as established? It was agreed that such a measure is equivalent to default, and is available
864 only on finding the intent required by paragraph (e)(2).

865 The Subcommittee agreed with a separate suggestion that the Note should make clear that
866 (e)(2) measures should not be punitive.

867 Brief discussion led to agreement that the "factors" in the published rule and the modified
868 list of factors in the agenda-book proposal would be deleted from rule text. Some discussion of them
869 may be provided in the Committee Note.

870 The Committee voted unanimously to approve the substitute draft proposed by the
871 Subcommittee at this meeting. A revised Committee Note will be prepared and promptly circulated
872 to the Committee.

873 The final question was whether approval of the new rule text should be for adoption or for
874 republication. The sense of the Subcommittee is that republication is not necessary. "We have
875 accomplished the purpose of publication and have had the full benefit of public input. Every issue
876 has been fully explored." The published proposal, moreover, gave full notice of everything that
877 remains in the rule. The new version still applies only to a failure to preserve information that should
878 have been preserved. The first step still is to try to restore, the equivalent of permitting discovery in
879 the language of the published proposal. The next step continues to address prejudice. And the new
880 rule continues to limit the *Residential Funding* decision. Beyond that, "this has been a long process."
881 There is a real need for clarification and uniformity. It is better to avoid further delay.

882 Agreement with this view was expressed. "The rule text is within the four corners of the
883 published proposal." A revised Committee Note that reflects the new rule text does not have to be
884 republished. When other proposals have been republished it has been because the revised version

885 involves a new factor that was not at all involved in what was published.

886 The Committee unanimously agreed that the recommendation should be for adoption without
887 republication.

888 Judge Campbell concluded the discussion with praise for the Subcommittee. "It has been a
889 great Subcommittee." It included a balance of lawyers "on both sides of the v." The judges also did
890 great work. Thanks are due from all for their substantial work.

891 *C. Rule 84*

892 Judge Pratter presented the Report of the Rule 84 Subcommittee.

893 The Subcommittee recommends approval of the published proposal to abrogate Rule 84 and
894 all of the Rule 84 Forms. Form 5, the request to waive service, and Form 6, the waiver, would be
895 carried forward by amending Rule 4(d) to incorporate them.

896 "The Forms from 1938 should be thanked for their service and retired."

897 A number of comments, especially many from the academy, reflect a wish that the Forms
898 remain. The hope is that people will return to them and use them. But there is little evidence of actual
899 use. And there are many readily available sources of excellent forms.

900 Another concern is that the Forms are part of the debate about the consequences of the
901 Supreme Court decisions in the *Twombly* and *Iqbal* cases.

902 The Subcommittee continues to believe, for reasons reflected in its Report, that abrogation
903 will reflect current reality. The Committee cannot be in the business of keeping official Forms up
904 to date in shapes that will be useful in today's litigation world.

905 The recommendation to recommend for adoption the published Rule 84 proposal, and the
906 related Rule 4(d) proposal, was unanimously approved.

907 *D. Rule 6(d)*

908 A modest revision of Rule 6(d) was published for comment in August, 2013. The change
909 corrects an unintended ambiguity created by a style choice to allow 3 added days to respond "after
910 service" by specified means. This formulation could be read to allow the 3 added days for periods
911 set for action by the party who makes service. It was intended to carry forward the original meaning
912 that allows the 3 added days only for a party who is served. The correction is simple: "after ~~service~~
913 being served * * *."

914 Three written comments supported the proposal.

915 The Committee unanimously approved the amendment for adoption. The timing for the next
916 steps should be determined by the Standing Committee in light of the prospect that further changes
917 may be made in Rule 6(d). Last January the Standing Committee approved for publication a revision
918 that would exclude service by electronic means from the categories of service that provide 3 added
919 days to respond. That proposal may be published for comment this summer if the advisory
920 committees for other rules that have similar 3-added-days provisions recommend publication of
921 parallel changes. It also is possible that these questions will be held back for a determination whether
922 to recommend withdrawal of the 3-added-days provision entirely, or for some other modes of

service. There is no urgency about the "being served" amendment. The ambiguity was identified in a law review article, and there is no indication that it has caused any significant problems in actual practice. The advantages of accomplishing all potential revisions of Rule 6(d) in a single package are real.

E. Rule 55(c)

A modest revision of Rule 55(c) was published for comment in August, 2013. The change corrects an ambiguity by adding one word: "The court may * * * set aside a final default judgment under Rule 60(b)." Rule 60(b) authorizes relief from "a final judgment." Rule 54(b) provides that any order or other decision that adjudicates fewer than all the claims among all the parties "may be revised at any time before the entry of a judgment" adjudicating all claims among all parties. Present Rule 55(c) is meant to govern only relief from a final default judgment, whether finality is achieved by an order under Rule 54(b) to enter a partial final judgment or results from complete disposition of all claims among all parties. Courts have reached this result, but often have had to struggle through the three rules to understand that it is the proper result. The amendment makes the point clear, sparing future parties and courts from the need to work through to the correct answer.

Three public comments supported the proposal.

The Committee unanimously approved the proposal for adoption.

II. PROPOSALS FOR PUBLICATION

A. Rule 4(m)

As noted in discussing the Duke Rules Package, many comments on the proposal to reduce the time set by Rule 4(m) for serving the summons and complaint suggested that even 120 days are not enough to accomplish service abroad, whether under the Hague Convention or otherwise. Most of these comments were puzzling. By its express terms, Rule 4(m) "does not apply to service in a foreign country under Rule 4(f) or 4(j)(1)." The apparent source of the confusion is that Rule 4(f) governs service on an individual at a place not within any judicial district of the United States, and Rule 4(j)(1) governs service on a foreign state or its political subdivision, agency, or instrumentality in accordance with 28 U.S.C. § 1608. Service on a corporation, partnership or other unincorporated association outside any judicial district of the United States is governed by Rule 4(h)(2). Rule 4(h)(2) in turn directs service "in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i)." This sequence of cross-references could be construed to mean that service under Rule 4(h)(2), "in any manner prescribed by Rule 4(f)," is service under Rule 4(f). Then the present 120-day limit, and the proposed 90-day limit, would not apply. That construction makes sense; there is no reason to think that service abroad can be any more expeditious when service is to be made on a corporation rather than an individual. But that conclusion is not manifestly required, and the comments suggest that many lawyers have not thought of it. One thoughtful comment pointed to the uncertainties in Rule 4, suggested that courts that have confronted the problem of serving a corporation in another country have reached the right result, albeit without clear analysis, and urged that Rule 4(m) be amended.

The Committee unanimously recommended publication of an amendment to Rule 4(m): "* * * This subdivision does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1) * * *."

966 *B. Rule 82*

967 The Standing Committee at the meeting last January approved publication of a proposal to
968 amend Rule 82 to reflect amendments of the statutory venue provisions governing admiralty or
969 maritime actions. New 28 U.S.C. § 1390(b) provides that apart from the transfer provisions, the
970 venue provisions of Chapter 87 do not govern the venue of a civil action in which the district court
971 exercises the jurisdiction conferred by § 1333 over admiralty or maritime claims. It was agreed that
972 the message transmitting the amended rule for comment would ask whether the rule should continue
973 to refer to 28 U.S.C. § 1391. Further reflection prompted the need for further consideration.

974 Rule 82 serves to make it clear that the Civil Rules do not "extend or limit the jurisdiction
975 of the district courts or the venue of actions in those courts."

976 The second sentence of Rule 82 was added to reflect the well-established rule that the general
977 venue statutes do not apply to admiralty or maritime actions, apart from the transfer provisions. This
978 specific statement reflects potential ambiguities about the exercise of admiralty or maritime
979 jurisdiction. Some admiralty and maritime claims are inescapably admiralty or maritime claims; as
980 to them there is no ambiguity. But other claims, governed by the "saving to suitors" clause in 28
981 U.S.C. § 1333, may be brought either as admiralty or maritime claims within § 1333 jurisdiction or
982 as common-law claims that can be brought in federal court only by asserting a different basis for
983 jurisdiction. Rule 9(h) allows a pleading that states such a claim to designate it as an admiralty or
984 maritime claim. But the merger of the admiralty rules into the general Civil Rules in 1966 made an
985 action asserting an admiralty or maritime claim a "civil action." The remedy was to add the second
986 sentence, stating that an admiralty or maritime claim under Rule 9(h) is not a civil action for
987 purposes of 28 U.S.C. §§ 1391-1393. Section 1393 was deleted from Rule 82 when § 1393 was
988 repealed.

989 The venue amendments enacted in 2012 repeal § 1392. If nothing else, Rule 82 must be
990 revised to strike the reference to § 1392.

991 That leaves the question whether to continue to refer to § 1391. The proposal approved for
992 publication in January was conservative. It retained much of the present language of Rule 82,
993 revising it only to provide that an admiralty or maritime claim under Rule 9(h) is not a civil action
994 for purposes of §§ 1390-1391. The snag is that § 1390(b) twice refers to actions under § 1333 as civil
995 actions. It seems at best incongruous to say in the rule that an admiralty or maritime claim is not a
996 civil action for purposes of § 1391, and flatly inconsistent with § 1390(b) to say it is not a civil action
997 for purposes of § 1390.

998 The revised version proposed in the agenda book was this: "An admiralty or maritime claim
999 under Rule 9(h) is an exercise of the jurisdiction conferred by 28 U.S.C. § 1333, including for
1000 purposes of 28 U.S.C. § 1390." The Committee voted to recommend this revised version for
1001 publication.

1002 Subsequent consultation with Professor Kimble, the Style Consultant, suggested a clearer
1003 version: "An admiralty or maritime claim under Rule 9(h) is governed by 28 U.S.C. § 1390." That
1004 version will be included with the recommendation to the Standing Committee.

1005 **III. INFORMATION**

1006 Judge Dow delivered a report on the preliminary work of the Rule 23 Subcommittee. The
1007 Subcommittee met in Phoenix after the public hearing on the published rules proposals. The sense
1008 of the Subcommittee is that it is timely to start considering possible revisions of Rule 23. Many

1009 developments that affect class actions have occurred since Rule 23 was last revised. The Class
1010 Action Fairness Act and a number of Supreme Court interpretations of Rule 23 have affected
1011 ongoing practice in many ways.

1012 The Subcommittee has considered a number of possible topics, with the sense that a
1013 manageable project should not attempt to address every issue that might be identified. It has worked
1014 up a list that identifies three topics as potential "front burner" subjects, with another half dozen as
1015 potential further subjects.

1016 One subject is presented by settlement classes. Some work identifying issues within this
1017 category has already been done. the issues include criteria for certifying a settlement class; cy pres
1018 provisions; criteria for approving a settlement; and a matter currently on the agenda of the Appellate
1019 Rules Committee, the responses appropriate when an objector appeals approval of a class settlement
1020 and then seeks to dismiss the appeal, perhaps because of an agreement with proponents of the
1021 approved settlement. Most class actions settle. Consideration of settlements seems desirable,
1022 including work with the Appellate Rules Committee on settlements pending appeal.

1023 Issues classes present a second set of issues. Different circuits treat Rule 23(c)(4) differently.
1024 Serious questions arise from integration of Rule 23(c)(4) with the predominance criterion of Rule
1025 23(b)(3).

1026 Notice to class members also presents interesting questions. Contemporary technology
1027 presents many alternative possibilities for accomplishing notice. Different means may be consistent
1028 with due process as an abstract matter, and may in fact be more effective than some contemporary
1029 modes of accomplishing notice.

1030 After these issues come several that have not percolated as much in initial Subcommittee
1031 deliberations and that may not be appropriate for present action. Among those that have been
1032 identified, several seem to present both attractive opportunities to improve the rule and equally
1033 daunting risks of interfering with current practices that may be better than formal rule provisions
1034 could manage. These include: (1) the extent to which consideration of the claims on the merits
1035 should be explored at the certification stage; (2) implementation of the predominance and superiority
1036 requirements in Rule 23(b)(3); (3) the extent to which a mandatory (b)(2) class for injunctive or
1037 declaratory relief should extend to monetary awards; (4) the questions of commonality raised by the
1038 *WalMart* decision, including related questions of consolidation by other means; and (5) amending
1039 the language that prompted the *Shady Grove* ruling that allows certification of a class to enforce
1040 state-law claims that state law excludes from class recovery.

1041 It was noted that the Supreme Court continues to take cases involving class actions, but that
1042 this is not a reason to abandon work on Rule 23.

1043 The prospect that people often junk class-action notices without reading them was noted.

1044 The next step for the Subcommittee will be to generate a more concrete list of topics for
1045 consideration at the fall meeting. More detailed work can be launched after that; when the work has
1046 advanced to an appropriate stage, it is likely that a miniconference will prove helpful. No rule text
1047 drafts have been prepared, apart from an initial sketch of small changes that would supersede the
1048 textual foundation for the Shady Grove result.

1049 *A thank you*

1050 The Committee expressed gratitude and appreciation to Dean Klonoff and the staff of the

Lewis and Clark Law School for their extensive and gracious efforts in hosting the Kravitz symposium and the Committee meeting.

Adjournment

The meeting adjourned. The next meeting will be on October 30 and 31 in Washington, D.C.

Respectfully submitted,

Edward H. Cooper
Reporter

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TAB 3

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

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

TO: **Hon. Jeffrey S. Sutton, Chair**
Committee on Rules of Practice and Procedure

FROM: **Hon. Michael A. Chagares, Chair**
Inter-Committee CM/ECF Subcommittee

RE: **Report to the Standing Committee**

DATE: **May 5, 2014**

The CM/ECF Subcommittee met by conference call on May 2, 2014 to review a number of proposals for changes to the national rules to accommodate electronic case filing. In that conference call, the Subcommittee expressed its support for the proposed amendments to the Appellate, Bankruptcy, Civil, and Criminal Rules that would abrogate the three-day rule as applied to electronic service. It also resolved to continue to study other suggestions for change.

1. Abrogation of the Three-Day Rule as Applied to Electronic Service

The Subcommittee had previously determined that the rules adding three days to the time required to take action after receiving electronic service should be abrogated. The rules to be amended are Appellate Rule 26(c), Bankruptcy Rule 9006, Civil Rule 6 and Criminal Rule 45. The Subcommittee had previously developed — with the assistance of the Reporters to the Advisory Committees — a template that would provide a uniform approach for these changes. This template had to be adjusted to accommodate special concerns in the Appellate Rules. The respective Committee Notes to the proposed amendments were prepared through a collective effort by the Reporters and are uniform to the extent possible. The proposed amendments and Committee Notes were then considered by each of the concerned Advisory Committees. The Civil Rules proposal was tentatively approved for publication by the Standing Committee at its January, 2014 meeting. The Appellate, Bankruptcy and Criminal Rules Committee are — at this meeting of the Standing Committee — seeking approval to publish proposed amendments that would abrogate the three-day rule as applied to electronic service.

The CM/ECF Subcommittee reviewed these proposals and unanimously supports their release for public comment.

The Subcommittee has also considered whether the proposed amendments should be expanded to abrogate the three-day rule as to other — or all — forms of service. After discussion, the Subcommittee determined that any such proposal would require significant study for its impact on litigants, especially pro se litigants — whereas it was clear that there was no continuing justification for adding three days to respond to something that has been served electronically. The Subcommittee concluded that if the Advisory Committees do wish to study the merits of a further limitation on the three-day rule, they could do so and the respective rules could be amended again at a later point — but that delaying the existing proposed amendments as applied to electronic service was not justified. Moreover, it was noted that any further limitation on the three-day rule would involve service other than by electronic means, and so would be a matter for the respective Advisory Committees, and not for the CM/ECF Subcommittee.

2. Electronic Signatures: Proposed Amendment to Bankruptcy Rule 5005

The Subcommittee has previously reported on suggestions it made regarding the proposed amendment to Bankruptcy Rule 5005, covering signatures on documents filed electronically. As discussed in the materials submitted for this meeting by the Bankruptcy Committee, the proposed amendment to Bankruptcy Rule 5005(a)(3) was not approved. That proposal provided that (A) the username and password of a filing user would serve as that individual's signature on any electronically filed document, and (B) a scanned signature of a non-filing user would be considered a valid signature without any requirement that the filing user retain the original signature. The explanation for the Bankruptcy Committee's rejection of the proposal is explained in the materials provided by that Committee in the agenda book for this meeting.

In light of the rejection of the proposed amendment, the Subcommittee considered whether there was any further work to be done on the subject matter of electronic signatures. The Subcommittee noted that local rules now govern the use of electronic signatures. Most of the district and bankruptcy courts have local rules that track the model rules on electronic filing that have been promulgated by CACM and the Judicial Conference; but there are some differences in the local rules with respect to such details as retention requirements of wet signatures and whether to use an s/slash as opposed to a scanned signature. The question is whether it would be useful to propose national rules to provide for uniformity regarding the use of electronic signatures. But the concern is that any national rulemaking could end up being overrun by advances in technology — for example a move from electronic signatures to more high tech means of "signing" documents. Moreover, a nationwide solution may not be ideal where technological capabilities and customs may vary among the districts.

The Subcommittee has obtained the assistance of the Administrative Office to survey the local rules on electronic filing. It will review the survey with the goal of determining whether any

national rules on the subject would be useful.

3. Civil and Criminal Rules Requiring Electronic Filing

The Subcommittee again discussed whether the Civil and Criminal Rules should be amended to provide that a court can require electronic filing subject to certain exceptions. This is a Civil and Criminal Rules matter as Civil Rule 5(d)(3) and Criminal Rule 49(e) both provide that a court "may, by local rule, allow" electronic filing. The Bankruptcy Rule already allows a court to require electronic filing. *See, e.g.*, Bankruptcy Rule 5005.

Last year the Administrative Office, at the request of the Subcommittee, surveyed the local rules and concluded that almost all of the local rules *mandate* electronic filing subject to certain (varying) exceptions. The Subcommittee has concluded that an amendment to the Civil and Criminal Rules should be considered by the Civil and Criminal Rules Committees, because of the tension between the "may allow" language and the local rules requiring electronic filing. Of course, The Subcommittee recognizes that careful consideration must be given to the necessary exceptions.

4. Consideration of a Uniform Approach to Amending Rules to Accommodate Electronic Filing and Information.

Professor Capra, the Reporter to the Subcommittee, has prepared for discussion purposes a template that perhaps could be used to provide a "universal fix" for language in the current rules that does not appear to accommodate electronic filing and information. That template is as follows:

Information in Electronic Form and Action by Electronic Means

> **a) Information in Electronic Form:** In these rules, [unless otherwise provided] a reference to information in written form includes electronically stored information.
>
> **b) Action by Electronic Means:** In these rules, [unless otherwise provided] any action that can or must be completed by filing or sending paper may also be accomplished by electronic means [that are consistent with any technical standards established by the Judicial Conference of the United States].

After discussion, the Subcommittee determined that a universal fix for electronic *information* is probably more viable than a fix for electronic *action.* But both fixes require careful consideration of necessary exceptions. Moreover, it may well be that certain actions might be universally electronic or nearly so and could be subject to an amendment of a particular rule — as opposed to a universal fix. The Subcommittee will continue to consider and discuss whether any kind of universal fix is feasible, and will serve as a forum for exchange of ideas among the Advisory Committees and their Reporters.

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TAB 4

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TAB 4A

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
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WASHINGTON, D.C. 20544

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SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

TO: **Hon. Jeffrey S. Sutton, Chair**
Committee on Rules of Practice and Procedure

FROM: **Hon. Reena Raggi, Chair**
Advisory Committee on Criminal Rules

RE: **Report of Advisory Committee on Criminal Rules**

DATE: **May 5, 2014**

I. Introduction

The Advisory Committee on the Federal Rules of Criminal Procedure ("the Advisory Committee") met on April 7-8, 2014, in New Orleans, Louisiana, and took action on a number of proposals. The Draft Minutes are attached. (Tab E).

This report presents three action items for Standing Committee consideration:

(1) approval to publish a proposed amendment to Rule 4 (service of summons on organizational defendants); and

(2) approval to publish a proposed amendment to Rule 41 (venue for approval of warrant for certain remote electronic searches); and

(3) approval to publish a proposed amendment to Rule 45 (additional time after certain kinds of service).

In addition, the Advisory Committee has several information items to bring to the attention of the Standing Committee, including one proposal that has been referred to subcommittees for further study.

II. Action Items — Recommendations to Publish for Public Comment

1. ACTION ITEM — Rule 4 (service of summons on organizational defendants)

The proposed amendment originated in an October 2012 letter from Assistant Attorney General Lanny Breuer, who advised the Committee that Rule 4 now poses an obstacle to the prosecution of foreign corporations that have committed offenses that may be punished in the United States. In some cases, such corporations cannot be served because they have no last known address or principal place of business in the United States. General Breuer emphasized the "new reality": a truly global economy reliant on electronic communications, in which organizations without an office or agent in the United States can readily conduct both real and virtual activities here. He argued that this new reality has created a "growing class of organizations, particularly foreign corporations" that have gained "'an undue advantage' over the government relating to the initiation of criminal proceedings." The Department's proposal was referred to a subcommittee which met multiple times by teleconference and proposed an amendment for consideration at the New Orleans meeting.

In New Orleans, the Committee unanimously approved a proposed amendment making the following changes in Rule 4:

(1) It specifies that the court may take any action authorized by law if an organizational defendant fails to appear in response to a summons, filling a gap in the current rule.

(2) For service of a summons on an organization within the United States, it:

- eliminates the requirement of a separate mailing to an organizational defendant when delivery has been made to an officer or to a managing or general agent, but

- requires mailing when delivery has been made on an agent authorized by statute, if the statute itself requires mailing to the organization.

(3) It also authorizes service on an organization at a place not within a judicial district of the United States, prescribing a non-exclusive list of methods for service.

Following the meeting, the Committee unanimously approved style changes and slight changes in the committee note that were circulated electronically. The text of the proposed amendment and accompanying committee note are provided at Tab B.

A. Authorizing sanctions if an organizational defendant fails to appear

As a preliminary matter, the Committee identified a gap in the current rule concerning organizational defendants who fail to appear. Rule 4(a) presently provides that both individual and organizational defendants may be served with a summons. Although the rule provides for the issuance of an arrest warrant if an individual defendant fails to appear in response to a summons, it is silent on the procedure to be followed if an organizational defendant fails to appear.

The Committee concluded that this omission should be addressed, and it proposes that the following sentence be added to the end of paragraph (a): "If an organizational defendant fails to appear in response to a summons, a judge may take any action authorized by law."

There is little precedent defining the actions that a court may take if an organizational defendant fails to appear. The Department of Justice emphasized that such cases have rarely arisen, and it anticipates that would continue to be the case if the proposed amendment is adopted. Foreign as well as domestic corporations have many incentives to appear and resolve criminal charges once service is made. Given the paucity of available authority, the Committee concluded it would be premature to attempt any determination of the scope of the courts' authority to employ the sanctions identified by the government. By stating that the court has the authority to "take any action authorized by law" the amendment provides a framework for the courts to evaluate the scope of that authority if and when cases arise in which organizational defendants fail to appear after being served.

B. Restricting the Mailing Requirement When Delivery Is Made in the United States

The current mailing requirement in Rule 4(c)(3)(C) is a major impediment to prosecution of foreign entities, and the Committee agreed that the requirement is unnecessarily overbroad. At present, in every case involving an organizational defendant, the rule requires not only service by delivery to an agent but also mailing to the entity, which must be made "to the organization's last known address within the district or to its principal place of business elsewhere in the United States." Accordingly, it is not possible to serve a foreign entity–even one that conducts both real and virtual business within the United States–that has neither a principal place of business in the U.S. nor a known address within the district of prosecution.

The Committee's proposed amendment follows the approach of the Civil Rule 4(h): it restricts the mailing requirement to cases in which service has been made on a statutorily appointed agent when the statute itself requires a mailing as well as personal service. Moreover, the proposed amendment does not restrict the address to which the mailing may be made.

C. Providing for Service of Organizational Defendants Outside the United States

At present, the Federal Rules of Criminal Procedure provide for service of an arrest warrant or summons only within a judicial district of the United States. Fed. R. Crim. P. 4(c)(2), which governs the location of service, states that an arrest warrant or summons may be served "within the jurisdiction of the United States."[1] In contrast, Fed. R. Civ. P. 4(f) authorizes service on individual defendants in a foreign country, and Fed. R. Civ. P. 4(h)(2) allows service on organizational defendants as provided by Rule 4(f).[2]

Given the increasing number of criminal prosecutions involving foreign entities, the Subcommittee agreed that it would be appropriate for the Federal Rules of Criminal Procedure to provide a mechanism for foreign service on an organization, and it proposes the following addition to Rule 4(c)(2), which governs the location of service: "A summons under Rule 4(c)(3)(D) may also be served at a place not within a judicial district of the United States." This general provision is implemented in the Subcommittee's proposed amendment to Rule 4(c)(3), which governs the manner of service.

The Subcommittee's proposal – like Fed. R. Civ. P. 4 – enumerates a variety of methods of proper service, but also provides a more general provision authorizing other methods. New subdivision (c)(3)(D) authorizes several forms of service "on an organization not within a judicial district of the United States,"[3] and it enumerates a non-exhaustive list of permissible means of service that provide notice to that defendant. Subdivision (i) notes that a foreign jurisdiction's law may authorize delivery of a copy of the criminal summons to an officer, or to a managing or general agent. This is a permissible means of serving an organization outside of the United States, just as it is for organizations within the United States. The subdivision also recognizes that a foreign jurisdiction's law may provide for service of a criminal summons by delivery to an appointed or legally authorized agent in a manner that provides notice to the entity, and states that this is an acceptable means of service.

Subdivision (ii) provides a non-exhaustive list illustrating other permissible means of giving service on organizations outside the United States, all of which must be carried out in a manner that "gives notice."

---

[1] Fed. R. Crim. P. 4(c)(2) does provide, however, that service may also be made "anywhere else a federal statute authorizes an arrest."

[2] Fed. R. Civ. P. 4(h)(2) provides, however, that service on an entity may not be made under Rule 4(f)(2)(c)(i) (delivery "to the individual personally").

[3] Fed. R. Civ. P. 4(h) provides for service on a corporation "at a place not within any judicial district of the United States," but the Subcommittee deliberately omitted the reference to service *at a place* outside a judicial district of the United States. Thus the new provision authorizes additional means of service on *organizations* that are not within a judicial district of the United States. Although the authorized means for such service would generally occur outside any U.S. judicial district, in some cases service by stipulation or service under the general catch-all provision might occur within a U.S. judicial district.

Paragraph (a) recognizes that service may be made by a means stipulated by the parties.

Paragraph (b) recognizes that service may be made by the diplomatic methods of letters rogatory and letters of request, and the last clause of the paragraph provides for service under international agreements that obligate the parties to provide broad measures of assistance, including the service of judicial documents. These include crime-specific multilateral agreements, regional agreements, and bilateral agreements.

Paragraph (c) recognizes that other means of service that provide notice and are permitted by an applicable international agreement are also acceptable when serving organizations outside the United States.

The Committee viewed these methods as uncontroversial. Using these well-developed procedures should ordinarily provide notice to an organizational defendant. However, if notice has not been afforded in an individual case, the Committee Note recognizes that the defendant may later choose to raise a challenge on this basis. The Committee also concluded that the listed means of service posed neither concerns under the principles of international law nor institutional concerns. Service in a manner authorized by the foreign jurisdiction's law is respectful of that nation's sovereignty. The same is true of service that the foreign sovereign itself undertakes in response to the various types of requests identified in proposed subdivision (c)(3)(D)(ii)(b). Moreover, as described more fully in memoranda prepared for the Committee by the Department of Justice, the Criminal Division's Office of International Affairs will be involved in assisting individual prosecutors in determining which means of service will be most effective in individual cases, and will consult with the Department of State regarding any special concerns.

In addition to the enumerated means of service, the proposal contains an open-ended provision in (c)(3)(D)(ii) that allows service "by any other means that gives notice." This provision provides flexibility for cases in which the Department of Justice concludes that service cannot be made (or made without undue difficulty) by the enumerated means.[4] One of the principal issues considered by the Committee was whether to require prior judicial approval of other means of service. Civil Rule 4(f)(3) provides for foreign service on an organization "by other means not prohibited by international agreement, as the court orders."(emphasis added). The Committee concluded the Criminal Rules should not require prior judicial approval before service of a criminal summons could be made in a foreign country by other unspecified means. In its view, a requirement

[4] The Rule 4 Subcommittee considered and rejected a requirement that would have limited service under (D)(ii)(c) to cases in which service in a manner authorized by the foreign jurisdiction's law, undertaken by the foreign authority, or by stipulation was unavailable. The Subcommittee concluded that requiring the government to demonstrate that it had tried and failed to effect service in these ways it would impose unnecessary burdens and delays.

of prior judicial approval might raise difficult questions of international law and the institutional roles of the courts and the executive branch.[5]

The Committee considered the possibility that in rare cases the Department of Justice might seek to make service under (c)(3)(D)(ii) in a foreign nation without its cooperation or consent. Representatives of the Department stated that such service would be made only as a last resort, and only after the Criminal Division's Office of International Affairs and representatives of the Department of State had considered the foreign policy and reciprocity implications of such an action. The Department also stressed the Executive Branch's primacy in foreign relations and its obligation to ensure that the laws are faithfully executed. Finally, the Department noted that the federal courts are not deprived of jurisdiction to try a defendant whose presence before the court was procured by illegal means. This principle was reaffirmed in United States v. Alvarez-Machain, 504 U.S. 655 (1992) (holding that abduction of defendant in Mexico in violation of extradition treaty did not deprive court of jurisdiction). Similarly, if service were made on an organizational defendant in a foreign nation without its consent, the court would not be deprived of jurisdiction. Under the Committee's proposal – which does not require prior judicial approval of the means of service – a court would never be asked to give advance approval of service contrary to the law of another state or in violation of international law.

The Committee noted that eliminating a requirement for prior judicial approval may also be preferable from the defense perspective. Prior judicial approval would place a defendant later challenging the effectiveness of the notice provided in a difficult position. In effect, the defendant would be asking the judge who approved the service to change her mind, rather than to consider a question of first impression.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 4 be published for public comment.

2. ACTION ITEM — Rule 41 (venue for approval of warrant for certain remote electronic searches)

The proposed amendment (Tab C) provides that in two specific circumstances a magistrate judge in a district where the activities related to a crime may have occurred has authority to issue

[5] These issues would be raised most starkly by a request for judicial approval of service of criminal process in a foreign country without its consent or cooperation, and in violation of its laws. Fed. R. Civ. P. 4(f)(3) may permit such a request. Where there is no internationally agreed means of service prescribed, Fed. R. Civ. P. 4(f)(2) then authorizes service by various means, and Fed. R. Civ. P. 4(f)(3) provides for service by "any other means not prohibited by international agreement, as the court orders." Although Fed. R. Civ. P. 4(f)(2)(C) precludes service "prohibited by the foreign country's law," that restriction is absent from Fed. R. Civ. P. 4(f)(3).

a warrant to use remote access to search electronic storage media and seize or copy electronically stored information even when that media or information is or may be located outside of the district. The proposed amendment was unanimously approved by the Committee in New Orleans. Following the meeting, the reporters circulated style changes and new language for the Committee note, which were unanimously approved by an electronic vote.

The proposed amendment had its origins in a letter from Acting Assistant Attorney General Mythili Raman. The proposal was referred to a subcommittee, which held multiple telephone conference calls before approving a proposal to amend Rule 41(b)(6).

The proposal has two parts. The first change is an amendment to Rule 41(b), which generally limits warrant authority to searches within a district,[6] but permits out-of-district searches in specified circumstances.[7] The amendment would add specified remote access searches for electronic information to the list of other extraterritorial searches permitted under Rule 41(b). Language in a new subsection 41(b)(6) would authorize a court to issue a warrant to use remote access to search electronic storage media and seize electronically stored information inside *or outside* of the district in two specific circumstances.

The second part of the proposal is a change to Rule 41(f)(1)(C), regulating notice that a search has been conducted. New language would be added at the end of that provision indicating the process for providing notice of a remote access search.

A. Reasons for the proposal

Rule 41's territorial venue provisions – which generally limit searches to locations within a district – create special difficulties for the Government when it is investigating crimes involving electronic information. The proposal speaks to two increasingly common situations affected by the territorial restriction, each involving remote access searches, in which the government seeks to obtain access to electronic information or an electronic storage device by sending surveillance software over the Internet.

In the first situation, the warrant sufficiently describes the computer to be searched, but the district within which the computer is located is unknown. This situation is occurring with increasing frequency because persons who commit crimes using the Internet are using sophisticated

[6] Rule 41(b)(1) ("a magistrate judge with authority in the district – or if none is reasonably available, a judge of a state court of record in the district – has authority to issue a warrant to search for and seize a person or property located within the district").

[7] Currently, Rule 41(b) (2) – (5) authorize out-of-district or extra-territorial warrants for: (1) property in the district when the warrant is issued that might be moved outside the district before the warrant is executed; (2) tracking devices, which may be monitored outside the district if installed within the district; (3) investigations of domestic or international terrorism; and (4) property located in a United States territory or a United States diplomatic or consular mission.

anonymizing technologies. For example, persons sending fraudulent communications to victims and child abusers sharing child pornography may use proxy services designed to hide their true IP addresses. Proxy services function as intermediaries for Internet communications: when one communicates through an anonymizing proxy service, the communication passes through the proxy, and the recipient of the communication receives the proxy's IP address, not the originator's true IP address. Accordingly, agents are unable to identify the physical location and judicial district of the originating computer.

A warrant for a remote access search when a computer's location is not known would enable investigators to send an email, remotely install software on the device receiving the email, and determine the true IP address or identifying information for that device. The Department of Justice provided the committee with several examples of affidavits seeking a warrant to conduct such a search. Although some judges have reportedly approved such searches, one judge recently concluded that the territorial requirement in Rule 41(b) precluded a warrant for a remote search when the location of the computer was not known, and he suggested that the Committee should consider updating the territorial limitation to accommodate advancements in technology. *In re Warrant to Search a Target Computer at Premises Unknown*, 958 F. Supp. 2d 753 (S.D. Tex. 2013) (noting that "there may well be a good reason to update the territorial limits of that rule in light of advancing computer search technology").

The second situation involves the use of multiple computers in many districts simultaneously as part of complex criminal schemes. An increasingly common form of online crime involves the surreptitious infection of multiple computers with malicious software that makes them part of a botnet, which is a collection of compromised computers that operate under the remote command and control of an individual or group. Botnets may range in size from hundreds to millions of compromised computers, including computers in homes, businesses, and government systems. Botnets are used to steal personal and financial data, conduct large-scale denial of service attacks, and distribute malware designed to invade the privacy of users of the host computers.

Effective investigation of these crimes often requires law enforcement to act in many judicial districts simultaneously. Under the current Rule 41, however, except in cases of domestic or international terrorism, investigators may need to coordinate with agents, prosecutors, and magistrate judges in every judicial district in which the computers are known to be located to obtain warrants authorizing the remote access of those computers. Coordinating simultaneous warrant applications in many districts–or perhaps all 94 districts–requires a tremendous commitment of resources by investigators, and it also imposes substantial demands on many magistrate judges. Moreover, because these cases concern a common scheme to infect the victim computers with malware, the warrant applications in each district will be virtually identical.

B. The proposed amendment

The Committee's proposed amendment is narrowly tailored to address these two increasingly common situations in which the territorial or venue requirements now imposed by Rule 41(b) may hamper the investigation of serious federal crimes. The Committee considered, but declined to adopt, broader language relaxing these territorial restrictions. It is important to note that the proposed amendment changes only the territorial limitation that is presently imposed by Rule 41(b). Using language drawn from Rule 41(b)(3) and (5), the proposed amendment states that a magistrate judge "with authority in any district where activities related to a crime may have occurred" (normally the district most concerned with the investigation) may issue a warrant that meets the criteria in new paragraph (b)(6). The proposed amendment does not address constitutional questions that may be raised by warrants for remote electronic searches, such as the specificity of description that the Fourth Amendment may require in a warrant for remotely searching electronic storage media or seizing or copying electronically stored information. The amendment leaves the application of this and other constitutional standards to ongoing case law development.

The Committee agreed that the use of anonymizing software to mask the location of a computer should not prevent the issuance of a warrant if the investigators can satisfy the Fourth Amendment's threshold requirements for obtaining a warrant, describing the computer to be searched with particularity and demonstrating probable cause to believe that evidence to be sought via the remote search will aid in apprehension or conviction of a particular offense. It is appropriate in such cases to make a narrow exception to the general territorial limitations governing the issuance of search warrants. The proposed amendment addresses this problem by relaxing the venue requirements when "the district where the media or information is located has been concealed through technological means." Because the target of the search has deliberately disguised the location of the media or information to be searched, the amendment allows a magistrate judge in a district in which activities related to a crime may have occurred "to issue a warrant to use remote access to search electronic storage media and to seize or copy electronically stored information *located within or outside that district*." (Emphasis added).

In a very limited class of investigations the Committee's proposed amendment would also eliminate the burden of attempting to secure multiple warrants in numerous districts. The proposed amendment is limited to investigations of violations of 18 U.S.C. § 1030(a)(5),[8] where the media to be searched are "protected computers" that have been "damaged without authorization." The

[8] 18 U.S.C. § 1030(5) provides that criminal penalties shall be imposed on whoever:

(A) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer;

(B) intentionally accesses a protected computer without authorization, and as a result of such conduct, recklessly causes damage; or

(C) intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage and loss.

definition of a protected computer includes any computer "which is used in or affecting interstate or foreign commerce or communication." 18 U.S.C. § 1030(e)(2). The statute defines "damage" as "any impairment to the integrity or availability of data, a program, a system, or information." 18 U.S.C. § 1030(e)(8). In cases involving an investigation of this nature, the amendment allows a single magistrate judge with authority in any district where activities related to a violation of 18 U.S.C. § 1030(a)(5) may have occurred to oversee the investigation and issue a warrant for a remote electronic search if the media to be searched are protected computers located in five or more districts. The proposed amendment would enable investigators to conduct a search and seize electronically stored information by remotely installing software on a large number of affected victim computers pursuant to one warrant issued by a single judge. The current rule, in contrast, requires obtaining multiple warrants to do so, in each of the many districts in which an affected computer may be located.

Finally, the proposed amendment includes a change to Rule 41(f)(1)(C), which requires notice that a search has been conducted. New language would be added at the end of that provision indicating the process for providing notice of a remote access search. The rule now requires that notice of a physical search be provided "to the person from whom, or from whose premises, the property was taken" or left "at the place where the officer took the property." The Committee recognized that when a electronic search is conducted remotely, it is not feasible to provide notice in precisely the same manner as when tangible property has been removed from physical premises. The proposal requires that when the search is by remote access, reasonable efforts be made to provide notice to the person whose information was seized or whose property was searched.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 41 be published for public comment.

3. ACTION ITEM — Rule 45 (additional time after certain kinds of service)

The proposed amendment (Tab D) is part of the work of the Standing Committee's CM/ECF Subcommittee, and it parallels amendments to the civil, criminal, bankruptcy and appellate rules. The proposed amendment of Rule 45 would abrogate the rule providing for an additional three days whenever service is made by electronic means. It reflects the CM/ECF Subcommittee's conclusion that advances in the reliability of technology have undermined the principal justifications for the current rule. Civil Rule 5 was amended in 2001 to allow service by electronic means with the consent of the person served, and a parallel amendment to Rule 45(c) was adopted in 2002. Although electronic transmission seemed virtually instantaneous even then, concerns about the reliability of electronic service were cited as justifications for allowing three additional days to act after electronic service. At that time, there were concerns that (1) the electronic transmission might be delayed, (2) incompatible systems might make it difficult or impossible to open attachments, or (3) parties might withhold their consent to receiving electronic service unless they had three

additional days to act. The CM/ECF Subcommittee concluded that those concerns have been substantially alleviated by advances in technology and in widespread skill in using electronic transmission.

The CM/ECF Subcommittee also noted that elimination of the three day rule for electronic service would also simplify time computation. To ease the task of computing time, many rules were amended in 2009 to adopt 7-, 14-, 21-, and 28-day periods that allow "day-of-the-week" counting. Adding three days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Finally, the proposed amendment (and the parallel amendment to the other rules) includes new parenthetical descriptions of the forms of service for which three days will still be added.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 45 be published for public comment.

III. Information items

The Committee also discussed suggestions for amendments to Rules 29, 52, 53, and Rules 11 and 32. It referred the proposal to amend Rule 52 for in-depth study by a subcommittee, and it declined to proceed further with the others.

1. Rule 52

Judge Jon O. Newman wrote to suggest consideration of an amendment to Rule 52 that would increase the availability of appellate review of sentencing errors. In contrast to the correction of trial errors by retrials, which impose very significant burdens on the judicial system, he noted that the correction of sentencing errors is much less burdensome. Moreover, the cost of sentencing errors can be very high. An uncorrected guideline miscalculation may lead to months or years of unwarranted imprisonment. Accordingly, he proposed an amendment that would permit appellate courts to consider sentencing errors not first raised in the district court–even if they would not meet the standard of plain error–when the error was prejudicial to the defendant and its correction would not require a new trial. The Advisory Committee concluded that this proposal was worthy of further study by a subcommittee (which should coordinate with the Appellate Rules Committee). Judge Raymond Kethledge will chair the subcommittee

2. Rule 29

Jared Kneitel wrote to the Committee suggesting that it consider amending Rule 29 to provide a procedure for making a motion for acquittal in a bench trial. He argued that the current

rule provides a procedure for such motions in a jury trial, but not in a bench trial. The Committee was not persuaded that the current rule has posed a problem for litigants and judges, and it declined to move forward with the proposal.

3. Rule 53

Writing on behalf of the Criminal Law Committee, Judge Irene Keeley forwarded the suggestion of Magistrate Judge Clay Land for an amendment to Rule 53 permitting reporters to Tweet from the courtroom. Prior to the New Orleans meeting the proposal was referred to a subcommittee, and the reporters prepared a research memorandum that discussed (1) the history of Rule 53, (2) Twitter use in the federal courts, (3) developments in the state courts, and (4) issues raised by the limited law review and practice commentary. At the New Orleans meeting, the subcommittee reported its conclusion that it would be premature at this time to undertake a full review of Rule 53. Rather, it would be preferable to defer action, allowing district judges to develop more experience with Twitter (and other forms of technology) before undertaking any revision of Rule 53. The Advisory Committee agreed, and declined to move forward with the proposal.

4. Rules 11 and 32

Professor Gabriel Chin wrote to suggest that the Committee consider amending Rules 11 and 32 to make Pre-Sentence Reports (PSR) available in advance of a guilty plea so that all parties would be aware of the potential sentence. He drew the Committee's attention to the opinion in a 1993 decision of the D.C. Circuit as well as his own article to support this proposal. The Committee decided not to pursue Professor Chin's proposal at this time. The advance preparation of the PSR would be a major change in many districts requiring a duplication of effort and imposing very significant burden on Probation Officers. Advance preparation and disclosure to the defense would also raise concerns about the protection of victims and government witnesses, as well as the need for a mechanism to resolve disputes about the contents of PSRs. In light of these concerns, the Committee was not persuaded that there had been a sufficient showing that change is needed, and it declined to move forward with the proposal.

At the New Orleans meeting Judge Donald Molloy raised a question about Rule 32(i)(2), which states that at sentencing "[t]he court may permit the parties to introduce evidence on the objections." He noted that the district judge has a great deal of discretion in determining how a sentencing will proceed, but wondered whether it is necessary to allow proof in support of a request for a "variance" as opposed to a contest about the guidelines themselves. In light of the many other items on the agenda, the Committee decided not to undertake a study of this aspect of Rule 32 at the present time.

TAB 4B

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Rule 4. Arrest Warrant or Summons on a Complaint

Revised Draft – April 21, 2014

1 **(a) Issuance.** If the complaint or one or more affidavits
2 filed with the complaint establish probable cause to believe
3 that an offense has been committed and that the defendant
4 committed it, the judge must issue an arrest warrant to an
5 officer authorized to execute it. At the request of an attorney
6 for the government, the judge must issue a summons, instead
7 of a warrant, to a person authorized to serve it. A judge may
8 issue more than one warrant or summons on the same
9 complaint. If an individual defendant fails to appear in
10 response to a summons, a judge may, and upon request of an
11 attorney for the government must, issue a warrant. If an
12 organizational defendant fails to appear in response to a
13 summons, a judge may take any action authorized by law.
14 * * *
15 **(c) Execution or Service, and Return.**
16 **(1)** ***By Whom.*** Only a marshal or other authorized
17 officer may execute a warrant. Any person authorized
18 to serve a summons in a federal civil action may serve
19 a summons.
20 **(2)** ***Location.*** A warrant may be executed, or a
21 summons served, within the jurisdiction of the United
22 States or anywhere else a federal statute authorizes an
23 arrest. A summons under Rule 41(c)(3)(D) may also
24 be served at a place not within a judicial district of the
25 United States.
26 **(3)** ***Manner.***
27 (A) A warrant is executed by arresting the
28 defendant. Upon arrest, an officer possessing the

original or a duplicate original warrant must show it to the defendant. If the officer does not possess the warrant, the officer must inform the defendant of the warrant's existence and of the offense charged and, at the defendant's request, must show the original or a duplicate original warrant to the defendant as soon as possible.

(B) A summons is served on an individual defendant:

(i) by delivering a copy to the defendant personally; or

(ii) by leaving a copy at the defendant's residence or usual place of abode with a person of suitable age and discretion residing at that location and by mailing a copy to the defendant's last known address.

(C) A summons is served on an organization in a judicial district of the United States by delivering a copy to an officer, to a managing or general agent, or to another agent appointed or legally authorized to receive service of process. ~~A copy~~ If the agent is one authorized by statute and the statute so requires, a copy must also be mailed to the organization ~~organization's last known address within the district or to its principal place of business elsewhere in the United States~~.

(D) A summons is served on an organization not within a judicial district of the United States:

(i) by delivering a copy, in a manner authorized by the foreign jurisdiction's law, to an officer, to a managing or general agent, or to another agent

59 appointed or legally authorized to receive service of
60 process; or
61 (ii) by any other means that gives notice, including
62 one that is:
63 (a) stipulated by the parties;
64 (b) undertaken by a foreign authority in response
65 to a letter rogatory, a letter of request, or a request
66 submitted under an applicable international
67 agreement; or
68 (c) permitted by an applicable international
69 agreement.

COMMITTEE NOTE

Subdivision (a). The amendment addresses a gap in the current rule, which makes no provision for organizational defendants who fail to appear in response to a criminal summons. The amendment explicitly limits the issuance of a warrant to individual defendants who fail to appear, and provides that the judge may take whatever action is authorized by law when an organizational defendant fails to appear. The rule does not attempt to specify the remedial actions a court may take when an organizational defendant fails to appear.

Subdivision (c)(2). The amendment authorizes service of a criminal summons [on an organization] outside a judicial district of the United States.

Subdivision (c)(3)(C). The amendment makes two changes to subdivision (c)(3)(C) governing service of a summons on an organization. First, like Civil Rule 4(h), the amended provision does not require a separate mailing to the organization when delivery has been made in the United States to an officer or to a managing or general agent. Service of process on an officer, managing, or general agent is in effect service on the principal. Mailing is required when delivery has been made on an agent authorized by statute, if the statute itself requires mailing to the entity.

Second, also like Civil Rule 4(h), the amendment recognizes that service outside the United States requires separate consideration, and it restricts Rule 4(c)(3)(C) and its modified mailing requirement to service on organizations within the United States. Service upon organizations outside the United States is governed by new subdivision (c)(3)(D).

These two modifications of the mailing requirement remove an unnecessary impediment to the initiation of criminal proceedings against organizations that commit domestic offenses but have no place of business and mailing address within the United States. Given the realities of today's global economy, electronic communication, and federal criminal practice, the mailing requirement should not shield a defendant organization when the Rule's core objective — notice of pending criminal proceedings — is accomplished.

Subdivision (c)(3)(D). This new subdivision states that a criminal summons may be served on an organizational defendant outside the United States and enumerates a non-exhaustive list of permissible means of service that provide notice to that defendant.

Although it is presumed that the enumerated means will provide notice, whether notice has been provided may be challenged in an individual case.

Subdivision (c)(3)(D)(i). Subdivision (i) notes that a foreign jurisdiction's law may authorize delivery of a copy of the criminal summons to an officer, to a managing or general agent. This is a permissible means of serving an organization outside of the United States, just as it is for organizations within the United States. The subdivision also recognizes that a foreign jurisdiction's law may provide for service of a criminal summons by delivery to an appointed or legally authorized agent in a manner that provides notice to the entity, and states that this is an acceptable means of service.

Subdivision (c)(3)(D)(ii). Subdivision (ii) provides a non-exhaustive list illustrating other permissible means of giving service on organizations outside the United States, all of which must be carried out in a manner that "give[s] notice."

Paragraph (a) recognizes that service may be made by a means stipulated by the parties.

Paragraph (b) recognizes that service may be made by the diplomatic methods of letters rogatory and letters of request, and the last clause of the paragraph provides for service under international agreements that obligate the parties to provide broad measures of assistance, including the service of judicial documents. These include crime-specific multilateral agreements (e.g., the United Nations Convention Against Corruption (UNCAC), S. Treaty Doc. No. 109-6 (2003)), regional agreements (e.g., the Inter-American Convention on Mutual Assistance in Criminal Matters (OAS MLAT), S. Treaty Doc. No. 105-25 (1995)), and bilateral agreements.

Paragraph (c) recognizes that other means of service that provide notice and are permitted by an applicable international agreement are also acceptable when serving organizations outside the United States.

As used in this rule, the phrase "applicable international agreement" refers to an agreement that has been ratified by the U.S. and the foreign jurisdiction and is in force.

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TAB 4C

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Proposed Amendment to Rule 41
revised draft – April 21, 2014

* * * * *

1 **(b) Authority to Issue a Warrant.** At the request of a
2 federal law enforcement officer or an attorney for the
3 government:

4 * * * * *

5 (6) a magistrate judge with authority in any district
6 where activities related to a crime may have occurred has
7 authority to issue a warrant to use remote access to
8 search electronic storage media and to seize or copy
9 electronically stored information located within or
10 outside that district if:
11 (A) the district where the media or information
12 is located has been concealed through technological
13 means; or
14 (B) in an investigation of a violation of 18
15 U.S.C. § 1030(a)(5), the media are protected
16 computers that have been damaged without
17 authorization and are located in five or more districts.

18 * * * * *

19 **(f) Executing and Returning the Warrant:**
20 **(1) Warrant to Search for and Seize a Person or**

21 **Property**

22 * * * *

23 **(C) Receipt.** The officer executing the warrant
24 must give a copy of the warrant and a receipt for the
25 property taken to the person from whom, or from
26 whose premises, the property was taken or leave a
27 copy of the warrant and receipt at the place where the
28 officer took the property. For a warrant to use remote
29 access to search electronic storage media and seize or
30 copy electronically stored information, the officer
31 must make reasonable efforts to serve a copy of the
32 warrant on the person whose property was searched
33 or whose information was seized or copied. Service
34 may be accomplished by any means, including
35 electronic means, reasonably calculated to reach that
36 person.

COMMITTEE NOTE

Subdivision (b)(6). The amendment provides that in two specific circumstances a magistrate judge in a district where the activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and seize or copy electronically stored information even when that media or information is or may be located outside of the district.

First, subparagraph (b)(6)(A) provides authority to issue a warrant to use remote access within or outside that district when the district in which the media or information is located is not known because of the

use of technology such as anonymizing software.

Second, (b)(6)(B) allows a warrant to use remote access within or outside the district in an investigation of a violation of 18 U.S.C. § 1030(a)(5) if the media to be searched are protected computers that have been damaged without authorization, and they are located in many districts. Criminal activity under 18 U.S.C. § 1030(a)(5) (such as the creation and control of "botnets") may target multiple computers in several districts. In investigations of this nature, the amendment would eliminate the burden of attempting to secure multiple warrants in numerous districts, and allow a single judge to oversee the investigation.

As used in this rule, the terms "protected computer" and "damage" have the meaning provided in 18 U.S.C. §1030(e)(2) & (8).

The amendment does not address constitutional questions, such as the specificity of description that the Fourth Amendment may require in a warrant for remotely searching electronic storage media or seizing or copying electronically stored information, leaving the application of this and other constitutional standards to ongoing case law development.

Subdivision (f)(1)(C). The amendment to Rule is intended to ensure that reasonable efforts are made to provide notice of the search, seizure or copying to the person whose information was seized or copied or whose property was searched.

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TAB 4D

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1 **Rule 45. Computing and Extending Time; Time for**

2 **Motion Papers**

3 * * *

4 **(c) Additional Time After Certain Kinds of Service.**

5 Whenever a party must or may act within a specified time

6 after service and service is made under Federal Rule of Civil

7 Procedure 5(b)(2)(C) (mailing), (D) (leaving with the clerk),

8 ~~(E)~~, or (F) (other means consented to), 3 days are added after

9 the period would otherwise expire under subdivision (a).

Committee Note

Subdivision (c). Rule 45(c) and Rule 6(d) of the Federal Rules of Civil Procedure contain parallel provisions providing additional time for actions after certain modes of service, identifying those modes by reference to Civil Rule 5(b)(2). Rule 45(c) – like Civil Rule 6(d) – is amended to remove service by electronic means under Rule 5(b)(2)(E) from the forms of service that allow 3 added days to act after being served. The amendment also adds clarifying parentheticals identifying the forms of service for which 3 days will still be added.

Civil Rule 5 was amended in 2001 to allow service by electronic means with the consent of the person served, and a parallel amendment to Rule 45(c) was adopted in 2002. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and in widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that

electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns. Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day periods that allow "day-of-the-week" counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Eliminating Rule 5(b) subparagraph (2)(E) from the modes of service that allow 3 added days means that the 3 added days cannot be retained by consenting to service by electronic means. Consent to electronic service in registering for electronic case filing, for example, does not count as consent to service "by any other means of delivery" under subparagraph (F).

TAB 4E

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ADVISORY COMMITTEE ON CRIMINAL RULES

DRAFT MINUTES

April 7-8, 2014, New Orleans, Louisiana

I. Attendance and Preliminary Matters

The Criminal Rules Advisory Committee ("Committee") met in New Orleans, Louisiana, on April 7-8, 2014. The following persons were in attendance:

Judge Reena Raggi, Chair
Carol A. Brook, Esq.
Judge Morrison C. England, Jr.
Mark Filip, Esq.
Chief Justice David E. Gilbertson
Judge John F. Keenan
Professor Orin S. Kerr
Judge David M. Lawson
Judge Donald W. Molloy
Judge Timothy R. Rice
John S. Siffert, Esq.
Jonathan Wroblewski, Esq.
David A. O'Neil, Assistant Attorney General for the Criminal Division
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Reporter

Judge Jeffrey S. Sutton, Standing Committee Chair
Professor Daniel R. Coquillette, Standing Committee Reporter
Judge Amy J. St. Eve, Standing Committee Liaison

The following persons were present to support the Committee:

Laural L. Hooper, Esq.
Jonathan C. Rose, Esq.
Benjamin J. Robinson, Esq.(by phone)
Julie Wilson, Esq.

II. CHAIR'S REMARKS AND OPENING BUSINESS

A. Chair's Remarks

Judge Raggi introduced new member Professor Orin S. Kerr, and new Standing Committee Liaison Judge Amy St. Eve.

B. Review and Approval of Minutes of April 2013 Meeting

A motion to approve the minutes of the April 2013 Committee meeting in Durham, North Carolina, having been seconded:

The Committee unanimously approved the April 2013 meeting minutes by voice vote.

C. Proposed Amendments Approved by the Supreme Court for Transmittal to Congress

Judge Sutton reported that the proposed amendments to the following Criminal Rules were approved by the Supreme Court and transmitted to Congress and will take effect on December 1, 2014, unless Congress acts to the contrary:

Rule 5. Initial Appearance
Rule 6. Grand Jury.
Rule 12. Pleadings and Pretrial Motions
Rule 34. Arresting Judgment
Rule 58. Initial Appearance

Judge Sutton thanked the Committee in particular for its cooperative work on Rule 12, as did Judge Raggi.

III. CRIMINAL RULES ACTIONS

A. Proposed Amendments to Rule 4

Judge Raggi asked Judge Lawson, Chair of the Rule 4 Subcommittee, to report on the Subcommittee's proposal to amend Rule 4. The proposal responds to a request by the Department of Justice to address the difficulty posed by the requirement in the current rule that service be mailed to an address within the United States, in cases where a corporate defendant has no such address. The Subcommittee's proposed amendment, Judge Lawson reported, eliminates the requirement of a separate mailing except when specified by statute, notes that required mailings need not be to an address in the judicial district, and provides for service outside the United States by means roughly analogous to the methods authorized under the Civil Rules. The amendment also notes that the court may impose those sanctions authorized by law should a corporate defendant fail to appear.

As to means of service outside the district, the amendment permits service (1) by delivery

to an officer, managing or general agent, or other agent legally authorized; (2) by stipulation; (3) undertaken by a foreign authority, using letters rogatory, or under request authorized by international agreement and (4) by any means not prohibited by an international agreement. Judge Lawson noted the Subcommittee rejected alternative language that would have allowed service possibly in violation of the foreign jurisdiction's law if authorized by court order.

Professor Beale added that there was agreement on the Subcommittee that an amendment was needed, noting there was no good policy reason to allow certain foreign corporations to evade service because they chose not to have a mailing address in the United States. The discussion in the Subcommittee had focused on the "other means" of service. The proposed amendment does not involve a court order authorizing such service. It does allow a defendant to raise challenges to adequate notice later.

Judge Raggi added that in rejecting the civil rule's language authorizing other means of service when ordered by the court, the Subcommittee recognized that when a person appears in court, the court generally does not question how the party got there, and considers instead whether there was adequate notice. The Subcommittee decided that it would be best to retain this approach to avoid involving courts in ordering action that might violate another nation's laws.

Judge Raggi solicited comments from members of the Subcommittee.

A Subcommittee member noted that one factor supporting the Subcommittee's decision was that the Department has procedures for approving international service, and he asked if the Department planned to include in its procedures review by a Deputy Attorney General or equivalent, rather than just the Office of International Affairs.

Assistant Attorney General O'Neil responded the Department is committed to providing an appropriate level of approval, given the potential impact on foreign relations, and that the Office of International Affairs would give this much thought and consult with appropriate Departments.

Another Subcommittee member reiterated that the Subcommittee's discussion centered on the catch-all means of service at the end of the proposed amendment.

Assistant Attorney General O'Neil expressed gratitude for the Committee's attention to the issue and stated that it was not a theoretical but a very pressing issue for the Department.

Judge Raggi mentioned that the Subcommittee had also addressed what steps might be taken if a corporation did not appear after being served. She mentioned that the Department had

related that corporations do often appear now to contest service because it is in their interest to do so, as they may be involved in other proceedings. She noted that the Department submitted a memorandum included in the materials in the Agenda Book listing the type of actions that might be taken against a corporation that does not appear, including forfeiture. The proposed amendment includes general language on this point, without specifying any particular remedy.

The Subcommittee's recommendation to approve and forward to the Standing Committee an amendment to Rule 4(a) that would add the word "individual" (specifying that the existing language applies to an individual defendant), and a provision referencing actions in response to an organization's failure to appear was moved and seconded. Discussing the motion, a member expressed support for the proposal, noting that she had experience with one of these cases in which the charges had to be dropped as a result of the corporation's objection to service.

The motion to approve the proposed amendment to Rule 4(a) and transmit it to the Standing Committee passed unanimously.

The Subcommittee's recommendation to approve and forward to the Standing Committee language amending Rule 4(c)(2) to add a sentence "A summons may also be served at a place not within a judicial district of the United States under subdivision (c)(3)(D)" was moved and seconded. Without further discussion,

The motion to approve the proposed amendment to Rule 4(c)(2) and transmit it to the Standing Committee passed unanimously.

Turning to the manner of service, the Subcommittee's recommendation to approve and forward to the Standing Committee language amending Rule 4(c)(3)(C), limiting this subsection to service on organizations in the United States, limiting the mailing requirement to mailings required by statute, and eliminating the mailing requirement to the organization's last known address or place of business within the United States, was moved and seconded. Without further discussion,

The motion to approve the proposed amendment to Rule 4(c)(3)(C) and transmit it to the Standing Committee passed unanimously.

Discussion proceeded on the Subcommittee's recommendation to approve and forward the proposed amendments to Rule 4(c)(3)(D). Judge Sutton questioned why the introductory language to (D)(ii) does not read ". . . that gives notice, and that is not prohibited by an applicable international agreement." Professor King and Subcommittee members responded that the means of service could be prohibited by an applicable international agreement but the parties could still agree to it. Another member expressed the view that service should never be in

violation of a treaty. Judge Raggi noted that a court would have jurisdiction over an individual defendant even if he were kidnapped and brought to court, and here the issue is the appropriate rule for a foreign corporate entity. She asked the Department of Justice to clarify whether there are situations in which the United States has an international agreement with another country, but the other country is not honoring that agreement, or perhaps giving "super protection" to their own corporations beyond what is recognized by international law. She expressed her concern about providing more protection in the rules for corporations than for human beings.

Mr. Wroblewski noted, for example, that sometimes a corporation or organization is state-owned, and the state may not enforce an international agreement that is in place. The proposal recognizes such circumstances may arise, and leaves it to the State Department to determine how to proceed. It is appropriate to put in the rule something that references an applicable international agreement. The proposal also notes that service by other means occurs without prior judicial approval, so that a defendant can later come in and raise concerns or constitutional objections. The proposal also parallels the civil rules, he noted, which have a similar provision, though it requires prior court approval.

Professor Beale stated that the Subcommittee also considered a concern about the Rules Enabling Act: could a rule authorize service contrary to a treaty? The Subcommittee decided that the proposed language struck the appropriate balance, by listing any other means consistent with an applicable agreement, recognizing the Department's position that a treaty might have been abrogated, and not precluding later arguments by defendants. It recognizes that a court would not have to bless such service in advance when it would not have heard arguments by both sides.

A member stated that the Subcommittee did not want the rule to effectively authorize the Department to ignore applicable treaties. Another member noted that the word "applicable" allowed the Executive Branch to determine whether the treaty was applicable in the circumstances, or whether it had been abrogated by conduct. Judge Raggi added that the Subcommittee wanted to avoid providing a basis for a defendant to come to court and invoke a treaty and say you haven't served me correctly, noting that the Supreme Court has already expressed concern about Rules of Criminal Procedure giving rights to defendants under foreign treaties.

Judge Sutton pointed out that the list of possible means of service started with "including" so it was already a non-exclusive list.

When Professor Coquillette asked the Department if this proposal had been vetted with the State Department, Mr. Wroblewski indicated that they had many discussions with colleagues in the Executive Branch. The Department also provided written assurance relating this

consultation to the Subcommittee. Those consulted are comfortable with the process. He explained that the United States Attorneys' Manual already provides that whenever prosecutorial steps may implicate foreign policy, such as a foreign deposition, attorneys must consult with the Office of International Affairs.

Discussion turned to the proposed language in (D)(ii)(a) regarding stipulated means of service. Judge Lawson suggested that the word "stipulation" is generally interpreted to be a more formal agreement in writing, and that the style change to the verb "stipulate" may not carry that meaning. Professor Beale noted that the reporters' research found that the noun "stipulation" and the verb "to stipulate," along with the term "agreement," were used throughout the Federal Rules, and do not always signify that writing is required. If the Committee wished to limit the stipulation to a written record, perhaps the words "in writing" should be added. A member suggested that counsel will agree, and that this will not be an issue. Discussion continued on whether either a corporation or the court would benefit if a written stipulation were required. Judge Raggi noted that this could come up if the corporation is not there as well as when the corporation appears.

Without resolving the concern raised about the language referring to stipulated means of service, the discussion returned to the structure of proposed (D)(ii). A member suggested that in response to Judge Sutton's remarks, the proposal be rewritten to require both notice and compliance with international agreement, but also permit the stipulation to trump the international agreement. Another member suggested making notice and applicable international agreement into a catch all. A third member asked for and received clarification that the parties referenced in the stipulation language are the Department of Justice and the indicted defendant.

Judge Raggi postponed further consideration of the proposal until the Subcommittee had a chance to work on new language.

B. Proposed Amendments to Rule 41

Judge Raggi asked Judge Keenan, Chair of the Rule 41 Subcommittee, to introduce the proposal to amend Rule 41. She noted that the Committee had received a detailed memo from the ACLU, which had been distributed by email prior to the meeting.

Judge Keenan explained that this proposal was also initiated by the Justice Department, and involved two aspects of Rule 41: the territorial requirement and the notice requirement. The Subcommittee considered several versions. The revised version it was recommending to the Committee, after styling, was dated April 3. It was circulated before the meeting and was not in the agenda book. The proposal would amend the Rule 41 to add new subdivision (b)(6):

> A magistrate judge with authority in any district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and to seize or copy electronically stored information located within or outside that district.

This amendment would authorize a magistrate to issue a warrant to search allowing officers to remotely search and seize information on a computer, even if that computer is located outside the magistrate's district, so long as criminal activity has occurred within that district. Rule 41 generally limits warrants to searches and seizures within the district, but it already provides authority for a judge to issue a warrant for a search or seizure outside the district in four other situations, including the use of tracking devices. The amendment seeks only to refine the territorial limits; it does not alter the constitutional constraints, such as the particularity requirement. Any constitutional restriction should be addressed by each magistrate with each warrant request.

As to the notice requirement, Judge Keenan continued, the proposed amendment reads:

> For a warrant to use remote access to search electronic storage media and seize or copy electronically stored information, the officer must make reasonable efforts to serve a copy of it on the person whose property was searched or whose information was seized or copied. Service may be accomplished by any means, including electronic means, reasonably calculated to reach that person.

This amendment would clarify that officers must make reasonable efforts to provide notification of the search or seizure.

Judge Keenan reported that the Subcommittee held four telephone conferences and considered several memoranda, which are included in the agenda book. The materials also include sample warrants. In the fourth conference call, the Subcommittee approved the version of the proposed amendment that was identical to the version before the Committee, except for a few style changes. Judge Keenan noted that Judge Kethledge, who could not be at this meeting, served as a member of the Subcommittee, had indicated approval of the proposal, and that one member dissented from the Subcommittee's proposed amendment. Finally, he recognized that some Committee members may not have had time to read and analyze the memorandum from the American Civil Liberties Union.

Judge Raggi asked the Department of Justice to speak to the proposal.

Assistant Attorney General O'Neil said the proposal is meant to address three scenarios. The first is to provide authority for a magistrate to issue a warrant to search with remote access

for the location of a computer whose location is unknown, possibly in another district. The second is to provide authority for a judge to issue a warrant to search multiple computers in known locations outside the district. The third is to provide authority for a judge to issue a warrant to conduct a remote access search in a district outside the district where the warrant is being sought, as an ancillary request to a physical search request.

Assistant Attorney General O'Neil emphasized that the proposal does not provide authority for the government to conduct any new kind of search or to use any new tools. It does not change anything about the substantive standards that the government must satisfy in order to obtain a warrant or address the substantive requirements of particularity or probable cause. All it does, he explained, is address the venue question–the question of which judge can issue a warrant that, as the law develops, the Fourth Amendment allows.

Assistant Attorney General O'Neil spoke to two concerns raised by the proposal. As to forum or judge shopping, he said that the same concern was raised by the Electronic Communications Privacy Act (ECPA), which already allows a judge in one district to issue a warrant in another district. Congress nevertheless approved this scheme, and the Department was not aware of any complaints about this problem under the ECPA. The second concern he noted was that the proposal could be used to circumvent ECPA or as an alternative means that is less protective than ECPA. The Department did not think that was a problem. The same standards of particularity and probable cause apply to both ECPA and warrants under the proposed Rule 41 remote access searches. Also, prosecutors can already obtain warrants for remote access searches under the present rule. The only question is whether the judge who is most familiar with the facts of an investigation can issue a warrant for information stored outside that judge's district.

Mr. Wroblewski stated that when investigators don't know where the computer is, it is very important to be able to learn that information. He recognized that the ACLU has argued that there ought to be oversight of the code that the government uses to do this, that there ought to be more transparency, and that the code has potential to do harm. The Department recognizes those concerns, he explained, but this Committee is not the place to address them. Some of the issues are Constitutional and will be addressed by magistrate judges one warrant at a time. Some of them will ultimately be addressed by Congress in determining what is and is not permissible. What this proposal tries to address are the three practical realities summarized earlier and in the memos included in the materials.

On the first of those scenarios, Mr. Wrobleski continued, there was agreement in the Subcommittee there should be a rule change. The ACLU also suggested that the second scenario involving the botnets should be addressed and that the government should take steps to respond to this important practical reality. Their concern was the proposal would change practice beyond these two particular circumstances, he said, and the Department disagrees.

Mr. Wroblewski stated that there have been concerns that the Department might use a search warrant issued pursuant to the proposed amendment to secretly search for information, rather than proceeding pursuant to ECPA. That won't happen, he argued, because the Department needs to cooperate constantly with the internet service providers. It will be the rare circumstance, he argued, where agents would get a search warrant rather than an ECPA warrant, possibly in a case involving a business, when a stored communications site is open and available, or when the government already has the credentials to obtain access. The proposal seeks the authority the government already has under ECPA to go to the magistrate judge in the district where the crime is being investigated and ask for a warrant. It only identifies the magistrate who can consider the warrant application. There is a practical enforcement problem on the ground that needs to be addressed, he concluded, and the proposed amendment will address it.

Judge Keenan added that the proposal will also allow a magistrate to issue a warrant that would authorize investigators to search computers in several districts simultaneously.

Judge Raggi observed that the Subcommittee at times used the word "hacking" to discuss remote access searches. To the extent it suggests illegality, it is unfortunate, because the proposal is talking about what judges would authorize. She also noted that the Subcommittee's discussion considered concerns about the government's satisfaction of its Fourth Amendment requirements wherever these warrants were sought, whether under the present rule or under an expanded venue rule. That's why the Committee Note says the proposal is not intended to in any way affect the government's obligations under the Fourth Amendment.

Experts joined some of the Subcommittee's phone conferences to try to explain these remote access searches, she said, and judges would have to be educated about what to ask when the government seeks these warrants. She said she spoke to the Federal Judicial Center about possibly providing judges with more relevant information. For example, to the extent that these searches would involve transmittals, should the judge be asking about Title III? She reiterated that these concerns are with us now already under the present rule, and the question before the Committee is whether to expand the venue and change the notice requirement.

One member raised various concerns with the proposal, noting that he opposed the current version because it is far broader than the reasons that have been proposed to justify it. The first scenario, when the location of a computer is not known, is the strongest case the government has for a change in the rule because the alternative is that the government may not be allowed to obtain any warrant. Warrants to obtain information from computers of unknown location have been obtained, he stated, so it may be premature to conclude from a single magistrate judge's opinion rejecting this authority that the government cannot obtain such a warrant under the existing rule. But accepting that one opinion as correct, he thought there is a very good case for changing the rule to address this problem.

The second scenario, the member continued, involves sending many communications to computers around the world that are infected as part of a botnet, remotely taken over by hackers. There could be thousands of these affected computers. The warrant applications provided to the Subcommittee authorize obtaining limited information from those computers affected by that botnet and then sending it back to the government. But as far as he is aware there has never been a judicial opinion stating that a warrant is required in that situation. There may be no reasonable expectation of privacy in this information or the government may argue that reason for the search is to protect the victim-owner of the infected device. Accordingly there are various exceptions that might authorize obtaining this information without a warrant. It is premature to act on the assumption that a warrant is required, he argued.

The third scenario is when the government executes a warrant at one place, and then finds there are servers elsewhere with information relevant to the investigation. The member said it would be helpful to have precedent on how Rule 41 applies to this situation before amending the rule. This same concern arises with physical searches, he said, so it is not clear why an amendment is needed for on-line searches and not physical searches. For example, if the government searches a business and discovers there is a warehouse in another district where more records are stored off site, the government would ordinarily go to the other district and obtain a second warrant to search the warehouse. Why shouldn't the venue requirements for Rule 41 should be eliminated for all such searches, so that the first warrant would support the second search as well? The arguments for and against the venue requirements are the same off-line as online, so it is not clear why Rule 41 should authorize the second search under one warrant in the online setting but not in the physical setting.

Finally, he said he feared that the language as drafted has much broader implications than these three scenarios. On its face the draft allows remote access for all searches. Even if the government does not plan on using these more broadly, he warned, it could. The government might get a warrant, he suggested, to search a person's physical places and virtual places all at once. The drafted language would seem to allow that dramatic shift in practice. He noted that the Department said it has no intent to engage in that practice, but he stated his preference for a version of the rule that on its face does not appear to authorize that possibility. He recognized that the Justice Department has a good relationship with major providers now, but that ten years from now it is difficult to know how the rule might be used.

The member explained that there are narrower options to respond to this problem. One would be allowing case law to develop to see if the current rule will be interpreted to allow the practices the government is seeking, or if the Fourth Amendment requires warrants in all of these situations. Another option would be to propose language that would address the unknown location problem. A slightly broader version of that would be to say if data is in multiple districts, a warrant could be issued to reach that.

The member concluded by raising a concern about the proposed language defining the district in which the warrant could be sought: "where activity related to a crime may occur." This phrase is used earlier in Rule 41, but if it is an effort to identify where there would be venue, the venue in computer crimes cases is tremendously uncertain. He mentioned a case in which the government is asserting that there is effectively universal venue for computer-related crime. He was concerned about using a phrase with an unknown meaning.

Judge Keenan noted that the key aspects of the proposal are contained in the memo from the Department on p. 261 of the agenda book, dated March 5, stating the three scenarios. He asked that if there is agreement on scenario number one, perhaps the Committee could move to scenario number two. He asked the Department to explain why an amendment was needed to address scenario number two.

Mr. Wroblewski responded, stating that he agreed that it is possible courts will decide no warrant is required for scenarios one or two, but the Department thinks the better practice is to get the warrants.

Responding to concern about changing the venue rule for online searches but not physical searches, Mr. Wroblewski noted that Congress has already recognized this in several different aspects, including ECPA. Congress already authorized one judge to issue a warrant in one district for searches for electronic information in another district. There are valid concerns about particularity and universal venue, and how many locations can be identified in a particular warrant, but they aren't something this amendment will impact. All this amendment will determine is which judge can be asked to issue the warrant.

Assistant Attorney General O'Neil added that a botnet (which he defined as a collection of computers infected by the same malware, remotely controlled and commanded by a criminal) will usually affect computers in all 94 districts. The question is whether one prosecutor investigating the case can get a warrant from one judge rather than many going to judges in 94 different districts. On scenario three, he said, the fundamental difference between physical searches and searches for electronic evidence is that electronic information can be destroyed instantaneously. If investigators are conducting a search in one district and want to obtain electronic evidence, they need to do that without going all the way to a district on the other side of the country, educating the judge, and obtaining the warrant, he explained. By the time they could do that the digital evidence may be destroyed.

Another member expressed gratitude for all of the work that has been done and sympathy for the Justice Department's need to disable botnets, which are used to commit crimes and attack businesses by disrupting service. He took the Department's representations about their intent to use this authority sparingly at good faith, but remained troubled by some of the concerns raised

by the ACLU. He suggested that Congress will be interested in the resolution of these issues, which reminded him of the controversy about the Justice Department's practice in the attorney client privilege area. He noted some of the ACLU's concerns (such as judge shopping) were not troubling or were far afield from the Committee's work. But there is the possibility that the authority in Rule 41 will be transformed over time to do things that are not intended. He supported the proposal because it is important to get public comment to confirm whether a limited fix is possible, and the Committee can't wait several years.

Another member expressed his agreement that the proposal is modest. He stated that he was surprised at the suggestion that the rule should not be amended because scenarios two and three may not even require a warrant. In his view, anytime judicial review of searches and seizures can be encouraged that is a good thing. He was concerned about the risk of doing nothing given the reality that computers are how people do business and communicate on the most basic levels. He said this amendment addresses a venue question and a notice issue, it has been unfairly demonized, and a lot of red herrings have been thrown into the debate.

Judge Keenan moved to approve the Subcommittee's recommendation to forward the proposed amendment to Rule 41 to the Standing Committee, the motion was seconded, and discussion on the motion continued.

A member expressed appreciation for the importance of the issue and the work that has been done, but she argued that the proposal was premature and she expressed strong opposition to adopting any amendment. Noting that the Committee has identified only one relevant judicial opinion, she suggested waiting a year or two. Also, she argued, the proposal is too broad, with ramifications that can't be anticipated. She observed that the Committee has been asked to wait on the Rule 53 tweeting proposal to allow more information to develop, but stated that she found the need for more information and law to develop is even more acute in the Rule 41 context. Finally, the member believed the proposal will make what is now the exception–ECPA– into the rule. If Congress wants that to be the rule, it should make it the rule. Congress is the appropriate forum for resolving these conflicting concerns.

Judge Raggi asked the member to specify where the proposal is too broad. The member explained that whatever is intended when something is passed, it almost inevitably gets bigger and bigger and bigger over time. The government may choose a judge far away making it difficult to defend, and they'll be allowed to pick in a way they can't now, because the "may have occurred language" is very broad.

Another member said he was in favor of seeking public comments now. He explained there is not likely to be more case law developing, because notices of searches aren't given right way when there is ongoing criminal activity, and once it is unsealed the issue is seldom whether there was probable cause. He noted that the government already gets to choose where to bring

the case even if it is inconvenient for the defendant. He explained that concerns about privacy are understandable, but that shouldn't matter when the government can show that there is probable cause to believe there is evidence of a crime at a particular place. He also didn't see how the right of a second person on a shared site could cause the government to lose its rights to search a computer when it had probable cause for the search. A valid warrant to search a home is not defeated if one of the owners objects. Although he has confidence in the current administration's good will, we would be giving them a tool that we don't entirely understand, with a standard that is not explained. Judges may not know what questions to ask. If there was a way to publish a rule to seek comment but not a rule we approve, that would be good.

Another member asked the Department if it was really having problems with this. He noted a case in which the destruction of electronic evidence occurred but investigators were able to find a copy of the information from a foreign source. The member also expressed concern that the proposed changes to the territorial authority of magistrates were substance not merely procedure.

Mr. Wroblewski responded that use of anonymizing sites, which transmit information disguising the real addresses, is increasing. The government cannot trace the source without the authority to send something back through the anonymizing site. This is a real problem. He explained that it might be possible to litigate and hope the courts will create an exception to a rule that on its face does not work with these realities. But the better approach is to come to the Committee and change the rule that is creating the issue.

Another member explained that he was opposed to the proposal because it introduced a concept not before mentioned in the rules, that is, using remote access to search electronic media. He said the proposal untethers the venue provision, the former limiting principle governing searches, without replacing it with another principle. This idea is similar conceptually to the problem that arose after the Supreme Court's *Katz* decision, which eventually spawned Title III. Congress should address this problem. Maybe Article III judges should have the authority to approve remote access searches, and there are other issues that the Committee cannot address. Releasing an amendment for comment does not solve the problem. The process authorized by the amendment is complex, raises genuine issues of privacy, and is largely ex parte, without the advantage of adversarial argument. Limits have to be firmly in place before authority is granted, and even a focused rule poses the risk of unintended consequences.

Judge Raggi remarked that the limiting principle under both the old and proposed rule is the probable cause requirement, and a venue change won't leave Rule 41 with no limiting principle. If the overlap with Title III became a sticking point, we could add language to the Committee Note that the Committee is not expressing any view as to Title III as well as the Constitution.

Judge Raggi asked if the reporters would comment.

Professor Beale spoke to the comparison of the Rule 41 and Rule 53 proposals earlier in the discussion. She argued that the proposals are very different and can be distinguished. She stated Rule 41 appears to be a much more serious problem than Rule 53, and is a problem that is caused by the language of the rule. The government is reporting that they are being hampered or at least there is uncertainty about investigations in an important and growing class of cases because of language in Rule 41, while the Rule 53 proposal is based on reporters who want to tweet from the courtroom. The need for us to figure out whether reporters can tweet from the courtroom is on a different scale than whether the government can get access when anonymizing software is used, and where botnets are used in attacks. The present Rule 41 creates the problem, at least scenario one.

Second, she responded to the concern that changing the territorial restriction on magistrate warrant authority might violate the Rules Enabling Act. She noted that Rule 41(b) already contains other narrow exceptions to the territorial authority to issue warrants, and concluded this aspect of the proposal is not a substantive change that would violate the Act.

Third, she noted that there seemed to be agreement that scenario one is a problem, caused by the text of the rule. For scenario two, the Committee has always preferred that a warrant be sought. On scenario three, it does not seem premature to start the three-year rules amendment process now, she concluded.

Professor King agreed with Professor Beale and added that in her view the Committee should not forward a proposed rule to the Standing Committee for publication simply to generate public comment, there needs to be some consensus behind an amendment in order to send it on.

Judge Raggi asked Judge Sutton to comment generally on the rule-making process. Judge Sutton explained that if the Committee cannot agree on all aspects of a proposal, but can agree on some of it, one option would be to limit the proposed amendment to the part the Committee endorses, and ask questions for comment about other aspects on which there is no agreement. When the Civil Rules Committee sent out Rule 37, they were unanimous about some aspects, but they weren't sure about others. So they put five questions at the end of the proposal to try to focus public comments on these issues.

Judge Raggi reminded members that if the Committee were to approve a proposed amendment at the meeting, even if everything goes smoothly, it will be a three-year process. She suggested taking the package apart to attempt to identify where there was agreement and where there wasn't.

Turning to the situation in which the government doesn't know where the computer is, she said that declining to modify the rule leaves the government without a way to get a warrant. One issue is whether the rules should require the government to make a showing that they don't know where the computer is. One member suggested that the proposal require such a showing, while the government sees this as an undue burden.

Judge Raggi asked the Department to comment its opposition to a preliminary showing. Mr. Wroblewski indicated that the Department is concerned that depending upon how it is crafted this requirement could lead to litigation over how much the government knew or could learn, but he noted that it might be possible to draft language that referred to the type of technology.

Judge Raggi asked for an explanation of the rationale for requiring a preliminary showing. A member said that adding language that "the location cannot reasonably be ascertained" would respond to Magistrate Smith's opinion, and would operate like other judicial assessments that a judge makes in the warrant process, none of which form the basis for later litigation. It is not a constitutional argument so there could be no basis for suppression, nor is suppression a remedy for violation of the rule.

Another member pointed out that there are limited resources the government can use to track down the location of a computer that had been disguised by anonymizing software. If there is a showing required, it should be clear that the NSA and CIA need not get involved. The entire federal government shouldn't have to gear up to prove this for each warrant.

Mr. Wroblewski commented that language that does not turn on the government's knowledge but rather on the type of technology used would avoid these concerns. Assistant Attorney General O'Neil suggested that something like "an investigation involving the use of technological means to conceal identity" might work.

A member asked those supporting a preliminary showing why this would be unlike Title III, where the failure to comply with procedural requirements forms the basis for defense litigation. A member favoring a preliminary showing responded that this assessment would be the same as other judicial assessments under the current rule concerning the property's location, which are not currently litigated because suppression is not a remedy for violations of the rule.

A member expressed continuing concern that a rule is not the correct means of authorizing remote access to electronic storage media. Does it authorize eavesdropping on digital communications? The seizure of intellectual property that is already in existence?

Judge Raggi asked the Department to explain why remote access searches do not fall under Title III. Mr. Wroblewski responded that remote access searches are happening under the

rule now, and the amendment concerns only the venue for judicial approval. Rule 41(e)(2)(b), the provision governing warrants seeking electronically stored information, authorizes the seizure of electronic storage media *or* the seizure or copying of electronically stored information. He emphasized that warrants under Rule 41(e)(2) do not authorize the interception of communications, but rather the search and then seizure or copying of previously stored information. Assistant Attorney General O'Neil agreed that the Department is already using remote access searches to seize or copy electronically stored information.

There was further general discussion of remote electronic searches and Title III. A member commented that the means authorizing remote access ought to be prescribed by legislation like Title III, rather than the Rules process. Judge Keenan suggested that something could be added to the Committee Note indicating that there is no intent to affect the limitations imposed by Title III. The first member agreed, offering that the Note could say that the amendment authorizes no more than what is already authorized by Rule 41(e)(2)(b).

Judge Raggi asked for discussion of any concerns about the language defining the district in which a warrant could be sought: "where activities related to a crime that may have occurred." A member expressed concern about the breadth of the language, though she agreed the Committee should not wait to address scenario one. She asked how the government would know where activities related to the crime may have occurred.

Mr. Wroblewski responded with an example that was included in the agenda book. In that case, someone made a threat against a building in Philadelphia. No one knew where the perpetrator was, only the victim's location was known, because the perpetrator was using anonymizing software.

The reporters pointed out that the language in question is already in Rule 41 in the other exceptions to the venue limitation, i.e., Rule 41(b)(3) and (5). Professor Beale noted that departing from that language would generate questions about why this exception is different than the others.

Mr. Wroblewski observed that there are other possible ways to express this idea. ECPA § 2703 refers to "a court with jurisdiction over the offense under investigation," and the concept is the same. A member offered that he had looked for judicial precedent explaining or interpreting the language in question and couldn't find any.

Judge Raggi adjourned the meeting for lunch.

After lunch, Judge Raggi noted that discussion among the members suggested that agreement might be reached on language tailored to meet the problem of anonymizing software,

though the Department of Justice needed time to consult its experts about appropriate language. Accordingly, further discussion on that issue would be deferred until Friday.

Discussion then focused on the second scenario, the botnet investigation, in which the Department seeks authority to get a single warrant rather than separate warrants in many districts. Judge Raggi asked members what concerns this part of the proposal raised.

A member stated that if courts have ruled that a warrant is required in this scenario and also that such warrants are permitted, then it makes sense as a matter of policy to allow a single warrant to be issued in one district. He asked if the Department knew of any instances in which the application for such a warrant in one district had been denied. Mr. Wroblewski responded that he was not aware of such a denial. The member who raised the issue commented that perhaps an amendment is not yet needed.

Judge Raggi noted that the Committee was aware of concerns about the need to require probable cause and particularity to protect privacy interests, and she emphasized that the rule does not address these constitutional considerations. She asked the Committee to focus on the question whether in principle the venue requirements for warrant applications should be amended in the specific situations where technology has been used to disguise the district and there are multiple computers in many districts, as in the case of a botnet investigation.

A member asked whether the government is seeking to disable malware in a botnet investigation, and, if so, what is it "searching" for. Mr. Wroblewski responded that the government may seek to disable malware inserted on many victim computers, but it may also search for and copy information, such as the IP address, from the victim computers. In response to the question whether a warrant is needed to remediate by removing malware, Mr. Wroblewski stated that this is an open question. The Department would like to be able to obtain warrants in these cases and to act under the supervision of the courts. He noted that the ACLU says that such remediation does raise Fourth Amendment concerns, though these interests are not as heightened as they would be if the government were seeking evidence of a crime.

Professor Beale noted that the current draft refers to the authority to issue a warrant to search, seize, and copy; it does not mention remediation. Mr. Wroblewski agreed.

Mr. Wroblewski then described the third scenario, where the government conducts a physical search of a business, the computers are on, and it finds that some files are stored in the cloud on a server in a different district. Because the machines are on and access is available at the moment, the government wants to be able to get the files by remote access from the cloud. Under ECPA, in contrast, the government must go back to the district court, and then obtain and serve an ECPA warrant on the provider. The proposal here is in limited circumstances to continue the search on site and access the data remotely and directly.

Discussion then turned to the relationship between the proposal and ECPA. Concerns have been expressed that allowing a remote search in the government's third scenario would permit evasion of ECPA and also effectively reduce the probable cause requirement.

Mr. Wroblewski argued that in some circumstances it is important not to delay the search of material stored remotely on the cloud, because it can be destroyed or encrypted if there is a delay. He also noted that within the Department there is a debate about whether ECPA already permits the procedure the government recommends. As the ACLU has argued, ECPA itself allows law enforcement to send a preservation request immediately. Mr. Wroblewski stated that this procedure is not always practical. The ECPA process is not instantaneous, and there can be delay in getting a provider to preserve. Accordingly, the government is seeking the authority to immediately access and copy the electronically stored information to prevent its destruction.

A member observed that if there were reasonable grounds to believe a third party would delete the information from a cloud there are exigent circumstances and no warrant would be required. Thus the proposed amendment seems to be addressed to cases in which such a showing could not be made in advance, but the government fears that destruction might occur during the process of seeking an ECPA warrant.

Another member noted that as a practical matter there has to be probable cause to search the second server on which the material in the cloud is actually being stored. Members discussed the question whether that means a second warrant is constitutionally required. Mr. Wroblewski stated that of course probable cause is required for any search or seizure, and this does not change when there are computers in more than one district. The main point for the government, he emphasized, is to be able to get the initial warrant and any subsequent related warrant from a single judge.

Judge Raggi noted that if the government is authorized to extend its search from the physical computer to information stored on a server based in another district it will still have to satisfy the probable cause and particularity requirements. Many warrants now allow a search of more than one location. Similarly, a court might conclude that probable cause had been shown to search one computer and others linked to it as to which probable cause had also been shown. But all seem to agree that the government must show probable cause and meet the particularity requirement for any search of a new device. A member responded that the case law is fluid on the application of the particularity requirement, in some cases allowing a search of all laptops or desktop computers in person X's home.

Another member observed that the third scenario was the most difficult part of the current proposal. Because of the increasing use of cloud computing, we no longer have separate devices that are analogous to individual locked chests.

Mr. Wroblewski noted that from the government's perspective the problem is that when its investigators remove the storage media (computers) they leave the people behind, and those people can go to a different computer and quickly access and destroy or encrypt any information stored elsewhere. Information stored on the cloud is simply stored in another computer, which is often located in a different judicial district. What the government seeks is the authority to go back to the same magistrate judge, who is familiar with the facts, if it needs an second warrant.

Judge Raggi noted that the Committee Note could even more strongly emphasize that the proposed amendment is addressed only to venue, and not to probable cause or particularity. Professor Coquillette agreed that committee notes can properly be used to emphasize the limited nature of an amendment in order to prevent courts from reading in something that is not there.

These issues were referred back to the Subcommittee with the request that it report back to the Committee later in the meeting.

C. Further Discussion of Proposed Amendments to Rule 4

Judge Raggi asked the Committee to return to the issues raised by Rule 4.

The Rule 4 Subcommittee presented two alternative approaches to proposed Rule 4(c)(3)(D)(ii). The first would shorten the text of the rule by moving the illustrative list of means of service to the Committee Note. The text would refer only to "any other means that gives notice." The second alternative would retain the illustrative list of means of service but rephrase the last, about which Judge Sutton had raised questions. Rather than using a double negative, it would recognize service by a means "permitted by an applicable international agreement."

Subcommittee members spoke in favor of each version. One member stated that he preferred the second option because the rule itself (not merely the note) should give guidance, and inclusion in the text implicitly states the listed means of service are good (if not the only) ways to proceed. This would encourage prosecutors to employ the listed means, and their inclusion would also signal our adherence to the rule of law. He later referred to this as a matter of "optics," urging we are best served by rules that clearly emphasize compliance with international processes and laws. Speaking for the Department of Justice, Mr. Wroblewski disagreed. Illustrations belong in a note, not the rule, and putting them into the text suggests that the list is not merely illustrative. If any means that give notice are permitted, then the text of the rule should not hint otherwise.

Judge Raggi observed that in the case of corporate prosecutions there are special concerns about collateral consequences if the corporation fails to appear. No one suggests that any defendant (human or corporate) can be prosecuted without appearing before the court. The

cases involving individual defendants hold that the courts' jurisdiction is not affected by the means used to bring an individual before the court, and she is reluctant to think that a corporate defendant should have more due process rights than an individual. On the other hand, the government might someday seek to forfeit the assets of a foreign corporation that it says received sufficient notice but did not appear. This raises the question whether we should be satisfied if the government can act in such a case without complying with U.S. treaty obligations.

Discussion turned to what other means of service the government might use. Mr. Wroblewski suggested, for example, that the government might use electronic service, or it might be able to serve a person with a strong relationship to the entity when that person was present in a third country.

Professor Beale noted that as a matter of logic there is no difference between the two versions. But professors often see students read in more than is there in language, and courts and litigants may do the same. Here, the intuition is that enumeration may slightly constrain how the rule would be applied and interpreted. A member noted that the Subcommittee had discussed whether there was any priority or need to exhaust the listed means, and he wondered if the option enumerating certain means of service might suggest that.

Professor King took up the question how the proposal compares to the Civil Rule. On the one hand, the proposed amendment expressly requires that any means of service must give notice. This feature is absent from the residual clause of the Civil Rule. On the other hand, the residual clause in the Civil Rule requires that the court approve service by other means in advance, a requirement that the Subcommittee had considered and rejected.

After brief expressions of support for the second alternative, Judge Raggi asked for a motion. Judge Rice moved that the Committee approve the second alternative for amending Rule 4(c)(3)(D)(ii), containing the non-exhaustive list of means by which service can be made.

The motion to was seconded and it passed unanimously.

Judge Lawson then moved that the Subcommittee's proposal, as amended, be transmitted to the Standing Committee with the recommendation that it be published for public comment.'

The motion to transmit the revised proposal to amend Rule 4 to the Standing Committee with the recommendation that it be published passed unanimously.

Judge Sutton complimented the Committee on its work on the proposed amendment.

D. Proposal to Study an Amendment to Rule 53

Judge Raggi then asked Judge England to present the recommendation of the Rule 53 Subcommittee, which he chaired. Judge England explained that as originally adopted Rule 53 banned "radio broadcasting" of judicial proceedings from the courtroom, but in the restyling of the Criminal Rules this was shortened to "broadcasting." In one case brought to the Subcommittee's attention a magistrate judge concluded that the term broadcasting includes Twitter, and accordingly he denied a reporter's request to Tweet from the courtroom. Tweets are limited to 140 characters, and they are a live method of providing information. The reporter sought to use this method to provide quick reports from inside the courtroom. Judge England noted that except for limited pilot programs the federal courts prohibit radio or television broadcasts from the courtroom. In contrast, in the California state court on which he previously served each judge had discretion to decide what to allow, including multiple cameras, a pool camera, and limitations on what could be recorded (excluding for example any views of witnesses or jurors). His view and that of the Subcommittee is that we do not have enough information at this point to consider revising Rule 53 to take account of new technologies, and we should wait for more experience to develop.

Judge Raggi stated that unless there is a need for a one-size-fits-all rule, she did not favor an amendment that would tell judges how to run their courtrooms. She asked if any members felt that there was such a need.

A member noted one aspect of Twitter that might be relevant: since one can subscribe to a Twitter account, a juror might have subscribed to a reporter's Twitter account and receive messages posted from the courtroom. This poses a slightly different problem than jurors seeking out news accounts.

Professor Beale noted that there is also a significant overlap with traditional forms of reporting, since reporters generally Tweet to their broadcaster's or paper's news site. Judge England noted that in high profile cases we already have the problem of making sure jurors do not read about the case.

Discussion turned to the current practice in various courts. A member reported that in the Northern District of Illinois individuals can bring their phones into the courtroom and there is an executive order permitting individual judges to determine whether Twitter is permitted from their courtroom. In other courts, phones are not permitted without the court's permission. A member noted that in South Dakota's Supreme Court all reporters may Tweet. At the trial level, it is up to the individual judge. If they allow Tweeting, the judges give specific instructions that cover subscribers. There have been no problems with these policies in South Dakota.

Other members stated that they favored taking no action at this time. One commented that although there has been one ruling from a magistrate judge that Rule 53 bars Tweeting, other judges have read the rule differently. Thus the matter is not settled. Another member

noted that if the Committee were to take up the matter, it should coordinate with Committee on Court Administration and Case Management (CACM).

Judge Lawson moved that the Committee not further pursue an amendment to Rule 53, and the motion passed unanimously.

E. Proposed Amendment to Rule 45

Discussion then turned to the proposal to amend Rule 45, which is the first action item coming from the work of a special subcommittee established by the Standing Committee to consider changes in the rules related to the CM/ECF system. The CM/ECF Subcommittee is chaired by Judge Michael Chagares, and is composed of all reporters as well as liaison members from all of the Advisory Committees. Judge Molloy is our liaison.

Professor Beale explained that when the rules initially authorized electronic service there were concerns that it might be problematic for a variety of reasons, such as difficulty in opening attachments. Accordingly, all of the rules (including Criminal Rule 45) provided for an additional three days to act whenever service was made electronically. The CM/ECF Subcommittee concluded that the concerns that justified the additional three days were no longer applicable. Moreover, the simplified rules for time computation–which converted all times for action to 7, 14, 21, and 28 days without excluding weekends and holidays–also counsel against adding three days when service is made electronically. Accordingly, the CM/ECF Subcommittee requested that all of the Advisory Committees consider elimination of the three-days-added rules at their spring meetings. Parallel amendments and committee notes are being considered by each Advisory Committee. The Civil Rules Committee approved the proposed change at its fall meeting, and its proposed amendment was approved for publication by the Standing Committee in January. The proposed amendment to Rule 45 tracks the change in the Civil Rule.

The Committee voted unanimously to transmit the proposed amendment to Rule 45 to the Standing Committee with the recommendation that it be published for public comment.

F. Other Suggestions for Possible Amendments

The Committee next turned to suggestions received from members of the public and the judiciary for amendments.

Professor Gabriel Chin proposed a change in the timing of the disclosure of presentence reports to make them available in advance of a guilty plea. As the reporters' memorandum in the agenda book explains, this might be accomplished by amendments to Rule 32 (and perhaps Rule 11). After a brief discussion of the procedures now followed it various districts, the burden

on parole officers, and other potential problems, Judge Raggi asked if any member wished to move to place this issue on the Committee's agenda for more study. Since no member made such a motion, the matter will not be pursued at this time.

Judge Jon Newman wrote to urge consideration of an amendment to Rule 52 that would increase the availability of appellate review of sentencing errors. After a brief discussion in which members expressed interest in further consideration, Judge Raggi stated that she would appoint a subcommittee to study the proposal in depth, in coordination with the Appellate Rules Committee. Judge Raymond Kethledge will chair the subcommittee.

Jared Kneitel wrote to propose an amendment to Rule 29 to provide a procedure for making a motion for a judgment of acquittal in a bench trial. After a brief discussion, there was a consensus that there was no pressing need for an amendment at this time.

Judge Raggi then adjourned the meeting for the day.

G. Further Discussion of Proposed Amendments to Rule 41

On Friday morning, Judge Keenan presented the Rule 41 Subcommittee's revised recommendations. He thanked the Department of Justice representatives, the other subcommittee members, and the reporters for what he called yeoman work to develop a revised proposal.

The Subcommittee unanimously agreed that an amendment is warranted in two kinds of cases: those where anonymizing technologies have been used to mask the district in which a computer is located, and botnet investigations in which victim computers are located in a very large number of districts. The revised proposal is tailored to respond to these two problems: subdivision (a) of the proposal deals with the first problem, and subdivision (b) the second. The redrafted amendment is intended to clearly identify for the Standing Committee and general public the limited purpose and effect of the proposed change.

Mr. Wroblewski explained that in botnet investigations a large number of computers have been infected with malware. The language in proposed amendment focuses on these cases in several ways. The proposal is limited to investigations of violations of 18 U.S.C. § 1030(a)(5) where the media to be searched is a protected victim computer. Professor Beale briefly summarized Section 1030(a)(5), which criminalizes various forms of conduct–unauthorized transmission of programs, information, codes or commands as well as intentional access without authorization–that causes damage to protected computers. The proposal is limited to investigations under § 1030(a)(5) in which warrants are sought in five or more districts, where the burden of seeking separate warrants would be very substantial.

A member spoke in favor of the proposal's targeted approach. He termed it sensible in proposed subsection (6)(a) to allow cross-district remote searches when the district has been deliberately concealed. He thought that proposed subsection (b) was a good effort to draft narrow language. The media to be searched must be "protected computers that have been damaged without authorization" by a violation of § 1030(a)(5). This would cover what is popularly called hacking, when a computer has been harmed by the insertion of code or taken off line. He noted the possibility that (6)(b) it might apply to some investigations that did not involve a botnet, and stated that the particularity requirement is likely to be the real limitation. In his view, if a warrant is constitutionally required, there will be a question whether it can be obtained.

Professor King noted that the terms "damage" and "protected computer" are defined in §§ 1030(e)(2) and (8). An addition to the Committee Note could make clear that the rule is adopting the statutory definitions.

A member expressed strong support for the proposal, which he saw as a very sound approach to real problems. He found the Department of Justice's flexibility very helpful, noting the strong public interest and importance of being clear about what the government is doing and why.

Judge Keenan moved to approve the Subcommittee's revised proposal to the Standing Committee with the recommendation that it be published for public comment. Discussion followed.

A member questioned whether it would be better to use the term "electronic search" rather than "remote access." Judge Raggi and the reporters responded that focus of the proposal was not on all electronic searches, but only those authorizing remote access searches outside the district in which the warrant would be issued. This is proposed as a narrow exception to the general rule that a magistrate judge has authority to issue warrants only within the district.

The member also expressed concern about limiting proposed (6)(a) to cases in which "the district ... has been concealed," because that suggests that the entire district has somehow been hidden. Judge Raggi and others noted that because the focus of the provision is on the authority to issue warrants to search outside the district, the rule needed to refer to the concealment of the district, not merely the location.

The member questioned whether the proposal could be modified to limit the use of remote searches only to the situations specified in (6)(a) and (b). The reporters and other members emphasized that remote searches are now authorized by Rule 41(e)(2)(B), provided that they occur within the district in which the warrant has been issued. Remote electronic searches are not new, and are not being authorized by this proposal. Rather, the proposed

language in (6)(a) and (b) seeks *only* to authorize magistrate judges to issue warrants for remote electronic searches *outside the issuing district* in two narrowly defined situations. Another member commented that warrants for remote electronic searches within the issuing district are routinely issued now.

Other members raised various questions about the language of the proposal and suggested alternative phrasing. Judge Raggi requested that the Committee focus first on the substance of the proposal. She noted that if the proposal were adopted it would be subject to review for style, and there would be a further opportunity for members to comment on the language. Professor Beale noted that the committee note would also require revision to refer to the newly tailored language, and Judge Raggi stated that the proposed note language would be circulated.

A member noted that he had not initially thought it would be possible for the Committee to reach agreement on this proposal. He praised the Committee's collaborative effort and expressed support for the approach of narrowing the language to focus on the enforcement of an important statute.

With the proviso that the proposal was subject to review for style and the note would require revision, the Committee unanimously approved the Subcommittee's revised proposal to amend Rule 41(b) for transmission to the Standing Committee.

Discussion then turned to the proposed amendment to Rule 41(f)(1)(C), which requires service of a copy of the warrant and a receipt for property that has been seized.

Noting that the Subcommittee's proposal required service "on the person whose property was searched *or* whose information was seized," a member proposed that the service should be required on both (changing "or" to "and"). Judge Raggi responded that in the case of a physical search of a home, investigators now leave only one notice, even if they seize property belonging to multiple individuals. The member suggested that remote searches are different because they are generally surreptitious, and in the case of cloud computing they take place away from the owner. Thus the owner would not naturally be aware of the search. If only one party is to receive notice, he thought it should be the person whose information was seized or copied. The reporters noted some parallel situations under present law. Professor King noted that the notice of a warrant for a tracking device under Rule 41(f)(2)(C) uses "or." Professor Beale noted that if a warrant were served on Duke University today for a search of information on its servers, Duke would receive notice, not all of the faculty, staff, and students whose digital files and information on university servers was searched, seized, or copied. Similarly, Judge Raggi noted that in the case of a physical search of a storage unit facility investigators would normally leave a single copy of the warrant and receipt. Mr. Wroblewski noted that under ECPA service is made only on the provider, such as Google, not the subscriber. As a matter of policy, however,

many providers provide notice to their subscribers. Professor Beale agreed that in her hypothetical Duke would probably provide notice to its faculty and students.

Judge Raggi observed that whether to expand the existing requirements for providing notice of a search is a policy question. This could be taken up separately, but is not a part of the current proposal.

Discussion turned to the question whether the language of concern to the member (which specified who would receive notice of a remote electronic search) was a necessary part of the proposal. Professor King noted that as drafted the new language in (f)(1)(C) encompassed all remote electronic searches. Mr. Wroblewski explained that although the proposal did not seek to alter *who* should receive notice; in that respect it parallels the current provisions in (f)(1)(C) as well as the notice provisions of ECPA. However, it does seek to change *how* notice would be provided. The current language–which refers to the "premises" where the search is conducted–is not adapted to remote electronic searches. Because there are no premises where a notice may be left, the proposal allows service by "any means, including electronic means, reasonably calculated to reach" the person who must receive notice.

In response to another member's view that the proposal should require service on both the person whose property has been searched "and" the person whose information has been seized or copied, Judge Raggi noted that when the government is investigating the hacking of a provider, this might require the government to notify thousands of account holders. From a practical perspective, this may be too great a burden to impose on the government.

A member expressed support for requiring notice to the target whose information has been seized. More fundamentally, he argued, a remote electronic search is a different animal than a physical search. In his view, a separate rule or statute should deal comprehensively with remote electronic searches, which raise distinctive concerns about technology and privacy that should inform the approach to a range of issues concerning seizure, notice, and copying. The public is sensitized to these issues, and it needs to be reassured that the government is acting to protect privacy while pursuing criminal activity.

Judge Raggi observed that the constitutional requirement of probable cause for the issuance of a warrant is the primary protection for privacy interests.

A member stated that he supported the language proposed by the Subcommittee. It is helpful to be specific about how notice should be given for remote electronic searches. Especially in cases under proposed Rule 41(b)(6), the government may have very little information about whose property it is. It's very hard to be specific here about how notice must be given, but still helpful to have language that does not refer to leaving notice on the "premises." Another member agreed that a new provision on notice is needed. In an

investigation of the intrusion at Target that affected thousands of customer accounts, there is nowhere to go to give notice.

Judge Raggi adjourned the meeting to permit the Rule 41 Subcommittee to consider the issues raised in the discussion. Following this recess, Judge Keenan reported the Subcommittee's recommendations concerning the proposed amendment to Rule 41(e)(1)(C). First, the Subcommittee agreed to delete the bracketed language Professor Kimble viewed as redundant. However, the Subcommittee disagreed with another style suggestion. It recommended that the proposed amendment require "reasonable efforts to serve *a copy of the warrant*" (not of "it"). The amendment itself refers to copying in a different sense (seizure or copying of electronically stored information). To avoid confusion, it is necessary to refer to service of a copy of the warrant. This is substance, not a matter of style. Finally, he asked a member of the Subcommittee to summarize the reasons for requiring service on the person whose property was searched "or" the person whose information was seized or copied.

The member explained there were three reasons for the Subcommittee's recommendation for "or" (rather than "and"):

First, the Subcommittee thought it appropriate to follow the precedent for physical searches. In the non-electronic search world the approach recommended by the Subcommittee has long been the rule. If the government had searched the New York Stock Exchange in the 1950s and seized the records of individual accounts, it would have given notice only to the Exchange, and not to individuals whose records might have been seized. The second reason was practicality. It would impose too great a burden to require notifications of all putative victims in a botnet case, which could be 1,000, or 100,000, or more. Finally, it would be possible in some cases only to search and not to seize or copy information, and accordingly the requirement for providing notice should be disjunctive.

Judge Keenan moved the approval of the Subcommittee's proposal to amend Rule 41(f)(1)(C).

A member who had argued in favor of "and" rather than "or" stated that he intended to vote in favor of the proposal. He explained that in the case of a remote electronic search what is really being searched is intellectual property. Once it has been viewed, it has been seized. By this reasoning, the person whose property has been searched is the same as the person whose property has been seized or copied.

The motion to transmit the Subcommittee's revised proposal to amend Rule 41(f)(1)(C) to the Standing Committee for publication passed unanimously.

Before the meeting concluded, Judge Raggi acknowledged the many contributions of Judge Keenan and Judge Molloy, noting this was their last meeting as members of the Committee.

TAB 5

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TAB 5A

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

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CHAIR

JONATHAN C. ROSE
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DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

TO: **Hon. Jeffrey S. Sutton, Chair**
Committee on Rules of Practice and Procedure

FROM: **Hon. Steven M. Colloton, Chair**
Advisory Committee on Appellate Rules

RE: **Report of Advisory Committee on Appellate Rules**

DATE: **May 8, 2014**

I. Introduction

The Advisory Committee on Appellate Rules met on April 28 and 29 in Newark, New Jersey. The Committee approved for publication five sets of proposed amendments, relating to (1) the inmate-filing provisions under Rules 4(c) and 25(a); (2) tolling motions under Rule 4(a)(4); (3) length limits for appellate filings; (4) amicus briefs in connection with rehearing; and (5) Rule 26(c)'s "three-day rule." The Committee discussed a number of other items and removed seven items from its study agenda.

Part II of this report discusses the proposals for which the Committee seeks approval for publication. Part III covers other matters.

The Committee has scheduled its next meeting for October 20, 2014, in Washington, DC.

Detailed information about the Committee's activities can be found in the Reporter's draft of the minutes of the April meeting and in the Committee's study agenda, both of which are attached to this report.

II. Action Items – for Publication

The Committee seeks approval for publication of five sets of proposed amendments as set forth in the following subsections.

A. Inmate filings: Rules 4(c)(1) and 25(a)(2)(C), Forms 1 and 5, and new Form 7

Under the Federal Rules of Appellate Procedure, documents are timely filed if they are received by the court on or before the due date. Rules 4(c)(1) and 25(a)(2)(C) offer an alternative way for inmates to establish timely filing of documents. If the requirements of the relevant rule are met, then the filing date is deemed to be the date the inmate deposited the document in the institution's mail system rather than the date the court received the document. *See generally Houston v. Lack*, 487 U.S. 266 (1988).

The Committee has studied the workings of the inmate-filing rules since 2007, in light of concerns expressed about conflicts in the case law, unintended consequences of the current language, and ambiguity in the current text. Must an inmate prepay postage to benefit from the rule? There are decisions saying that an inmate need not prepay postage if he uses a prison's system designed for legal mail, but must prepay postage if he does not use that system. Must an inmate file a declaration or notarized statement averring the date of filing to benefit from the rule? One court held, over a dissent from denial of rehearing en banc, that a document is untimely if there is no declaration or notarized statement, even when other evidence such as a postmark shows that the document was timely deposited in the prison mail system. When must an inmate submit a declaration designed to demonstrate timeliness? One circuit has published inconsistent decisions, holding in one case that the declaration must accompany the notice and in another that the declaration may be filed at a later date.

The Committee seeks approval to publish proposed amendments that are designed to clarify and improve the inmate-filing rules. The proposed amendments to Rules 4(c)(1) and 25(a)(2)(C) and Forms 1 and 5, and proposed new Form 7, are set out in the enclosure to this report.

The amendments to Rules 4(c)(1) and 25(a)(2)(C) would make clear that prepayment of postage is required for an inmate to benefit from the inmate-filing provisions, but that the use of an institution's legal mail system is not. The amendments clarify that a document is timely filed if it is accompanied by evidence—a declaration, notarized statement, or other evidence such as postmark and date stamp—showing that the document was deposited on or before the due date and that postage was prepaid. New Form 7 is a suggested form of declaration that would satisfy the Rule. Forms 1 and 5 (which are suggested forms of notices of appeal) are revised to include a reference alerting inmate filers to the existence of Form 7. The amendments also clarify that if sufficient evidence does not accompany the initial filing, then the court of appeals has discretion to permit the later filing of a declaration or notarized statement to establish timely deposit.

B. Tolling motions: Rule 4(a)(4)

The Committee seeks approval to publish the proposed amendment to Appellate Rule 4(a)(4) set out in the enclosure to this report. The amendment addresses a circuit split concerning whether a motion filed outside a non-extendable deadline under Civil Rules 50, 52, or 59 counts as "timely" under Rule 4(a)(4) if a court has mistakenly ordered an "extension" of the deadline for filing the motion.

Caselaw in the wake of *Bowles v. Russell*, 551 U.S. 205 (2007), holds that statutory appeal deadlines are jurisdictional but that nonstatutory appeal deadlines are nonjurisdictional claim-processing rules. The statutory appeal deadline for civil appeals is set by 28 U.S.C. § 2107. The statute does not mention so-called "tolling motions" filed in the district court that have the effect of extending the appeal deadline, but "§ 2107 was enacted against a doctrinal backdrop in which the role of tolling motions had long been clear." 16A Wright et al., Federal Practice & Procedure § 3950.4. At the time of enactment, "caselaw stated that certain postjudgment motions tolled the time for taking a civil appeal." *Id*. Commentators have presumed, therefore, that Congress incorporated the preexisting caselaw into § 2107, and that appeals filed within a recognized tolling period may be considered timely consistent with *Bowles*.

The federal rule on tolling motions, Appellate Rule 4(a)(4), provides that "[i]f a party timely files in the district court" certain post-judgment motions, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." A number of circuits have ruled that the Civil Rules' deadlines for post-judgment motions are nonjurisdictional claim-processing rules. On this view, where a district court mistakenly "extends" the time for making such a motion, and no party objects to that extension, the district court has authority to decide the motion on its merits. But does the motion count as a "timely" one that, under Rule 4(a)(4), tolls the time to appeal? The Third, Seventh, Ninth, and Eleventh Circuits have issued post-*Bowles* rulings stating that such a motion does not toll the appeal time. *E.g.*, *Blue v. Int'l Bhd. of Elec. Workers Local Union 159*, 676 F.3d 579, 582-84 (7th Cir. 2012); *Lizardo v. United States*, 619 F.3d 273, 278-80 (3d Cir. 2010). Pre-*Bowles* caselaw from the Second Circuit accords with this position. The Sixth Circuit, however, has held to the contrary. *Nat'l Ecological Found. v. Alexander*, 496 F.3d 466, 476 (6th Cir. 2007).

The Committee feels it is important to clarify the meaning of "timely" in Rule 4(a)(4), because the conflict in authority arises from arguable ambiguity in the current Rule, and timely filing of a notice of appeal is a jurisdictional requirement. The Committee proposes to publish for comment an amendment to the Rule that would adopt the majority view—i.e., that postjudgment motions made outside the deadlines set by the Civil Rules are not "timely" under Rule 4(a)(4). The proposed amendment would work the least change in current law. And, as Judge Diane Wood noted for the court in *Blue*, 676 F.3d at 583, the majority approach tracks the spirit of the Court's decision in *Bowles*, which held that the Court has "no authority to create equitable exceptions to jurisdictional requirements." 551 U.S. at 214.

C. Length limits: Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6

The Committee seeks approval to publish for comment amendments to Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6, as set out in the enclosure to this report.

The genesis of this project was the suggestion that length limits set in terms of pages have been overtaken by advances in technology, and that use of page limits rather than type-volume limits invites gamesmanship by attorneys. The proposal would amend Rules 5, 21, 27, 35, and 40 to impose type-volume limits for documents prepared using a computer. For documents prepared without the aid of a computer, the proposed amendments would maintain the page limits currently set out in those rules.

A change from page limits to type-volume limits requires a conversion ratio from pages to words. The 1998 amendments transmuted the prior 50-page limit for briefs into a 14,000-word limit. This change appears to have been based on the assumption that one page was equivalent to 280 words (or 26 lines). While the estimate of 26 lines per page appears sound, research indicates that the estimate of 280 words per page is too high. A study of briefs filed under the pre-1998 rules shows that 250 words per page is closer to the mark. (See attached letter of D.C. Circuit Advisory Committee on Procedures, July 14, 1993.) The proposed amendments employ a conversion ratio of 250 words per page for Rules 5, 21, 27, 35, and 40. Although there was a division of opinion within the advisory committee about whether to alter the existing limits for briefs, the proposed amendments approved by the committee shorten Rule 32's word limits for briefs so as to reflect the pre-1998 page limits multiplied by 250 words per page. The proposals correspondingly shorten the word limits set by Rule 28.1 for cross-appeals. A court that desired to maintain the longer word limits could choose, of course, to accept longer briefs.

During consideration of the proposed shift to type-volume limits, the Committee also observed that the rules do not provide a uniform list of the items that can be excluded when computing a document's length. The proposed amendments would add a new Rule 32(f) setting forth such a list.

D. Amicus filings in connection with rehearing: Rule 29

The Committee seeks approval to publish for comment proposed amendments to Rule 29, as set out in the enclosure to this report. The amendments would re-number the existing Rule as Rule 29(a) and would add a new Rule 29(b) to set default rules for the treatment of amicus filings in connection with petitions for rehearing. The proposed amendment would not require any circuit to accept amicus briefs, but would establish guidelines for the filing of briefs when they are permitted.

Attorneys who file amicus briefs in connection with petitions for rehearing understandably seek clear guidance about the filing deadlines for, and permitted length of, such briefs. There is no

federal rule on the topic. *See Fry v. Exelon Corp. Cash Balance Pension Plan*, 576 F.3d 723, 725 (7th Cir. 2009) (Easterbrook, C.J., in chambers). Most circuits have no local rule on point, and attorneys have reported frustration with their inability to obtain accurate guidance.

The proposed amendments would establish default rules concerning timing and length of amicus briefs in connection with petitions for rehearing. In addition, they would incorporate (for the rehearing stage) most of the features of current Rule 29, including the authorization for certain governmental entities to file amicus briefs without party consent or court permission. A circuit could alter the default federal rules on timing, length, and other matters by local rule or by order in a case.

E. Amending the "three-day rule": Rule 26(c)

The Committee seeks approval to publish for comment the proposed amendment to Rule 26(c) that is set out in the enclosure to this report. The amendment would implement a recommendation by the Standing Committee's CM/ECF Subcommittee that the "three-day rule" in each set of national Rules be amended to exclude electronic service. The three-day rule adds three days to a given period if that period is measured after service and service is accomplished by certain methods. Now that electronic service is well-established, it no longer makes sense to include that method of service among the types of service that trigger application of the three-day rule.

The proposed amendment to Rule 26(c) accomplishes the same result as the proposed amendments to Civil Rule 6, Criminal Rule 45, and Bankruptcy Rule 9006, but does so using different wording in light of Appellate Rule 26(c)'s current structure. Under that structure, the applicability of the three-day rule depends on whether the paper in question is delivered on the date of service stated in the proof of service; if so, then the three-day rule is inapplicable. The change would thus be accomplished by amending the rule to state that a paper served electronically is deemed (for this purpose) to have been delivered on the date of service stated in the proof of service.

III. Information Items

The Committee is studying proposals to amend the Rules to address appeals by class-action objectors. The Committee has heard from proponents of two different approaches. The first proposal would amend Appellate Rule 42 to bar the dismissal of an objector appeal if the objector received anything of value in exchange for dismissing the appeal. The second proposal would authorize the requirement of a cost bond (and the later imposition of costs) reflecting the full costs of delay in implementation of the class settlement as a result of the appeal. The Committee has benefited from informative research by Marie Leary of the FJC, who has studied class-action-objector appeals in three circuits. The Committee intends to consider the matter further, in consultation with the Civil Rules Committee's Rule 23 Subcommittee.

The Committee is considering whether to clarify the operation of Appellate Rule 41,

concerning issuance of the mandate. Two recent cases – *Ryan v. Schad*, 133 S. Ct. 2548 (2013) (per curiam), and *Bell v. Thompson*, 545 U.S. 794 (2005), raise several issues concerning Rule 41. One issue is whether Rule 41 requires (or should require) a court of appeals to issue the mandate immediately after the filing of the Supreme Court's order denying the petition for writ of certiorari in a case. Another is whether a court of appeals may extend the time for the mandate to issue through mere inaction or must act by order. A third is whether Rule 41(d) should be amended to clarify whether a stay of the mandate continues through denial of a petition for rehearing by the Supreme Court.

The Committee is also considering whether the disclosure provisions in Appellate Rules 26.1 and 29 elicit all the information that a judge would wish to know in considering recusal or disqualification issues. Exploration of this topic likely would benefit from consultation with the Judicial Conference Committee on Codes of Conduct.

The Committee has received a suggestion to consider the appealability of orders concerning attorney-client privilege. This agenda item arises from the Court's observation in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), and *Swint v. Chambers County Commission*, 514 U.S. 35 (1995), that the rulemaking process is the preferred means for determining whether and when prejudgment orders should be immediately appealable. Recognizing that a project aimed at a global overhaul of interlocutory appeal jurisdiction would be unmanageable, the Committee intends to focus more narrowly on specific categories of appeals where a proponent urges an amendment to the rules.

The Committee removed seven items from its agenda. One of those items related to a proposal that Appellate Rules 3 and 6 be amended in light of the shift to electronic filing; although that proposal may eventually merit consideration as part of a broader package of e-filing-related amendments, the Committee decided to focus for the moment on matters prioritized by the CM/ECF Subcommittee, such as the three-day rule amendment noted in Part II.E of this memo. Two items related to the Appellate Rules' disclosure requirements, but raised particular issues that did not warrant continued study in connection with the Committee's ongoing consideration (noted above) of possible changes to those requirements. A fourth item concerned a suggestion by Justices Ginsburg, Scalia, and Breyer that the Rules Committees consider ways to expedite proceedings under the International Child Abduction Remedies Act. The Committee's consensus is that this issue is best addressed, in the first instance, by judicial education rather than by an attempt to establish docket priorities by court rule.

The Committee also removed from its agenda an item concerning audiorecordings of appellate arguments. Although Committee members point out the desirability of prompt online posting of such audiorecordings, this matter appears to fall within the primary jurisdiction of the Judicial Conference Committee on Court Administration and Case Management. The Committee considered, and removed from its agenda, a proposal to peg the due date for amicus briefs to the due date, rather than the filing date, of the brief of the party supported by the amicus. The Committee

reasoned that putative amici have ready access to electronic dockets in cases of interest, and that the proposed change would pose a significant risk of interfering with the parties' briefing schedule, given the default rule that the appellee's deadline runs from the date of service (not the due date) of the appellant's brief. The Committee also rejected a proposal to permit party consent to extend the amicus's filing deadline, out of concern that such a change was not needed and could meet with opposition by judges who wish to avoid delay in case processing. Finally, the Committee removed from its agenda an item relating to a proposal by Judge Jon O. Newman to amend Criminal Rule 52 concerning the standard of appellate review for sentencing errors. The Committee noted that the Criminal Rules Committee has appointed a subcommittee to study this proposal, and felt that the proposal to amend a Criminal Rule is within the jurisdiction of that Committee.

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TAB 5B

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U.S. Department of Justice

DNLetter:lcb

Telephone:
(202) 514-3602

Washington, D.C. 20530

JUL 14 1993

Honorable Abner J. Mikva
Chief Judge, United States Court of Appeals
for the District of Columbia Circuit
333 Constitution Ave., N.W.
Washington, D.C. 20001-2866

Honorable Ruth Bader Ginsburg
Circuit Judge, United States Court of Appeals
for the District of Columbia Circuit
333 Constitution Ave., N.W.
Washington, D.C. 20001-2866

Dear Chief Judge Mikva and Judge Ginsburg:

When I sent you the final version of the Advisory Committee's recommended local rule changes, I indicated that we would be conducting a survey to determine the proper number of words to allow in briefs under the new proposed Rule 28. (As you recall, the Committee recommended that the length requirement for briefs be shifted from a page maximum to a word maximum.) Jack Goodman of the Advisory Committee, and I have now conducted that survey, although we have had difficulty gathering data from law firms.

For the reasons described below, we recommend that the Court adopt a maximum word rule based on an average of 250 words per page, which would translate to a limit of 12,500 words for a party's main brief, 6,250 for a reply brief, and 8,750 for an intervenor or amicus curiae brief. (For shorter documents, such as petitions for rehearing and motions, the Committee had recommended that the Court retain the current page limits rather than switching to a word count, although these documents could now be prepared in proportional fonts of acceptable size.)

Mr. Goodman and I analyzed data first from the Department of Justice Civil Division archive of appellate briefs. We took ten briefs that were approximately 50 pages in length, and which did not contain what could reasonably be considered an excessive

number of single spaced footnotes or block quotes. We then also obtained from that archive ten reply briefs of approximately 25 pages in length, also avoiding briefs with too many footnotes or block quotes. By computer, we determined the total number of words in these briefs. In doing so, we began counting with the first page of the brief, and excluded the cover, the tables, and any addenda. Thus, we determined the number of words that would be contained in an acceptable 50 or 25 page brief that begins on the first page with a case caption and ends with a signature block. This computer counting included names and numbers in citations.

We found that the briefs of approximately 50 pages had an average total word count of 12,275 words, but some of the briefs were only 49 pages long. The average per page word count for this group was 247. For the reply briefs of approximately 25 pages, the average total word count was 6,244, with an average per page word count of 251.

We then obtained data from eight appellate briefs filed by the Federal Communications Commission and the law firm of Wilmer, Cutler & Pickering. The combined total average words per page from these briefs was 250 (although the briefs from the FCC averaged higher than that amount and the briefs from Wilmer, Cutler averaged lower than that amount).

Based on these data, a brief with a maximum average of 250 words per page appears to be close to what the Court would expect to be the limit for "normal" briefs under the current rules. Consequently, Mr. Goodman and I think that if the Court adopted the word limits proposed above, those limits will on average be close to what the Court would currently find as the maximum allowed (although reply briefs would be longer than currently allowed since the Court has accepted our recommendation that, if a page length limit were used, reply briefs could be 25 pages -- as FRAP allows -- rather than the current 20).

We note that this proposal means that there will be some variations in brief page numbers, and briefs within the maximum word limit will sometimes exceed 50 pages. As described in our earlier recommendation, however, we expect that adoption of this proposed rule will lead to extensive use of proportional fonts, and many briefs will actually be shorter in pages than currently received briefs, but more easily legible.

Mr. Goodman and I will continue to attempt to obtain data from several law firms to make sure that the data we have

developed are not unusual in some unknown way. I have attached to this letter a copy of the gross data that we developed. Please contact me if any further explanation is needed.

Sincerely,

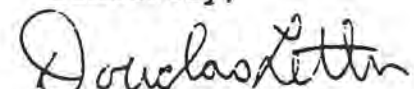

Douglas Letter
Chairman
Advisory Committee on Procedures

cc: Ron Garvin
Clerk, U.S. Court of Appeals for the
District of Columbia Circuit
333 Constitution Ave., N.W., Room 5423
Washington, D.C. 20001-2866

Mark Langer
Chief Staff Counsel
U.S. Court of Appeals for the
District of Columbia Circuit
333 Constitution Ave., N.W.
Washington, D.C. 20001-2866

OVERALL WORDS PER PAGE: 249 WORDS PER 54 LINES W/DOUBLE SPACE

LIST OF BRIEFS WITH 49 TO 50 PAGES

	WORD COUNT
ANESTHESIOLOGISTS AFFILIATED (49 PAGES)	b11,371/pp232
ARMSTRONG (50 PAGES)	b11,793/pp236
TREASURY V. FLRA (50 PAGES)	b12,070/pp241
PARKER V. RYAN (50 PAGES)	b12,777/pp256
WABASH VALLEY POWER ASSOCIATION, INC.(49 PAGES) .	b12,438/pp254
KHADER MUSA HAMIDE (50 PAGES)	b11,402/pp228
MT. DIABLO HOSPITAL MEDICAL CENTER (50 PAGES) . .	b13,292/pp266
PENTHOUSE INTERNATIONAL, LTD. (49 PAGES)	b13,246/pp270
PETER ROSETTI (50 PAGES)	b12,345/pp247
AMALGAMATED TRANSIT UNION (50 PAGES)	b12,019/pp240
TOTAL AVERAGE WORDS PER BRIEF/PAGE	b12,275/pp247

LIST OF REPLY BRIEFS WITH 24 TO 25 PAGES

CARTERET REPLY (25 PAGES)	r5,977/pp239
DAVIDSON V. SULLIVAN (24 PAGES)	r5,864/pp244
HAITIAN REFUGEE CENTER, INC. (25 PAGES)	r6,787/pp271
JONES V. SULLIVAN (25 PAGES)	r6,141/pp246
MARTINEZ V. LANNOM (25 PAGES).	r6,856/pp274
TASHIMA (25 PAGES)	r6,297/pp252
ANNI WATERFLOW (25 PAGES).	r6,417/pp257
WINSTAR (25 PAGES)	r5,667/pp227
JOHNSON V. HHS (25 PAGES).	r6,382/pp255
FARMER (25 PAGES).	r6,053/pp242
TOTAL AVERAGE WORDS PER 25 REPLY/PAGE	r6,244/pp251

BRIEFS

SOURCE	NO. OF PAGES	NO. OF WORDS	WORDS PER PAGE
FCC	49	11660	237.9591837
FCC	48	13836	288.25
FCC	50	13585	271.7
FCC	47	12408	264
FCC	47	12563	267.2978723
WC&P	14	3037	216.9285714
WC&P	21	4806	228.8571429
WC&P	19	4230	222.6315789
AVGE.	34	7945	230.2953813

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TAB 5C

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Rule 4. Appeal as of Right–When Taken

* * *

(c) Appeal by an Inmate Confined in an Institution.

(1) If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing~~. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.~~ and:

(A) it is accompanied by:

(i) a declaration in compliance with 28 U.S.C. § 1746 – or a notarized statement – setting out the date of deposit and stating that first-class postage is being prepaid; or

(ii) evidence (such as a postmark and date stamp) showing that it was so deposited and that postage was prepaid; or

(B) the court of appeals exercises its discretion to permit the later filing of a declaration or notarized statement that meets the requirements of Rule 4(c)(1)(A)(i).

* * *

Committee Note

Rule 4(c)(1) is revised to streamline and clarify the operation of the inmate-filing rule. The second sentence of the former Rule – which had required the use of a "system designed for legal mail" when one existed – is deleted. This change is designed to clarify that an inmate receives the benefit of the rule whether the inmate uses a prison's legal mail system or a prison's general mail system, and that an inmate is required to show timely deposit and prepayment of postage whether or not the inmate uses a prison's legal mail system.

The Rule is amended to specify that a notice is timely if it is accompanied by a declaration or notarized statement stating the date the notice was deposited in the institution's mail system and attesting to the prepayment of first-class postage. The declaration must state that first-class postage "is being prepaid," not (as directed by the former Rule) that first-class postage "has been prepaid." This change reflects the fact that inmates may need to rely upon the institution to affix postage subsequent to the deposit of the document in the institution's mail system. New Form 7 in the Appendix of Forms sets out a suggested form of the declaration.

The amended rule also provides that a notice is timely without a declaration or notarized statement if other evidence accompanying the notice shows that the notice was deposited on or before the due date and that postage was prepaid. If the notice is not accompanied by evidence that establishes timely deposit and prepayment of postage, then the court of appeals has discretion to accept a declaration or notarized statement at a later date.

Rule 25. Filing and Service

(a) Filing.

* * *

(2) Filing: Method and Timeliness.

* * *

(C) Inmate filing. A paper filed by an inmate confined in an institution is timely if it is deposited in the institution's internal mail~~ing~~ system on or before the last day for filing~~. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.~~ and:

(i) it is accompanied by:

(a) a declaration in compliance with 28 U.S.C. § 1746 – or a notarized statement – setting out the date of deposit and stating that

first-class postage is being prepaid; or

(b) evidence (such as a postmark and date stamp) showing that it was so deposited and that postage was prepaid; or

(ii) the court of appeals exercises its discretion to permit the later filing of a declaration or notarized statement that meets the requirements of Rule 25(a)(2)(C)(i)(a).

* * *

Committee Note

Rule 25(a)(2)(C) is revised to streamline and clarify the operation of the inmate-filing rule. The second sentence of the former Rule – which had required the use of a "system designed for legal mail" when one existed – is deleted. The purposes of the Rule are served whether the inmate uses a system designed for legal mail or a system designed for nonlegal mail.

The Rule is amended to specify that a paper is timely if it is accompanied by a declaration or notarized statement stating the date the paper was deposited in the institution's mail system and attesting to the prepayment of first-class postage. The declaration must state that first-class postage "is being prepaid," not (as directed by the former Rule) that first-class postage "has been prepaid." This change reflects the fact that inmates may need to rely upon the institution to affix postage subsequent to the deposit of the document in the institution's mail system. New Form 7 in the Appendix of Forms sets out a suggested form of the declaration.

The amended rule also provides that a paper is timely without a declaration or notarized statement if other evidence accompanying the paper shows that the paper was deposited on or before the due date and that postage was prepaid. If the paper is not accompanied by evidence that establishes timely deposit and prepayment of postage, then the court of appeals has discretion to accept a declaration or notarized statement at a later date.

Form 1. Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court

United States District Court for the _____
District of _____
File Number _____

A.B., Plaintiff v. C.D., Defendant	Notice of Appeal

Notice is hereby given that ___(here name all parties taking the appeal)__, (plaintiffs) (defendants) in the above named case,[1] hereby appeal to the United States Court of Appeals for the _____ Circuit (from the final judgment) (from an order (describing it)) entered in this action on the _____ day of _____, 20___.

(s) _____
Attorney for _____
Address:_____

*[**Note to inmate filers:** If you are an inmate confined in an institution and you seek the benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration along with the Notice of Appeal.]*

[1] See Rule 3(c) for permissible ways of identifying appellants.

Form 5. Notice of Appeal to a Court of Appeals from a Judgment or Order of a District Court or a Bankruptcy Appellate Panel

United States District Court for the _____
District of _____

In re _____, Debtor _____, Plaintiff v. _____, Defendant	File No. _____

Notice of Appeal to United States Court of Appeals for the
_____ Circuit

_____, the plaintiff [or defendant or other party] appeals to the United States Court of Appeals for the _____ Circuit from the final judgment [or order or decree] of the district court for the district of _____ [or bankruptcy appellate panel of the _____ circuit], entered in this case on _____, 20__ [here describe the judgment, order, or decree] _____

The parties to the judgment [or order or decree] appealed from and the names and addresses of their respective attorneys are as follows:

Dated _____
Signed _____
Attorney for Appellant
Address: _____
_____

*[**Note to inmate filers:** If you are an inmate confined in an institution and you seek the benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration along with the Notice of Appeal.]*

Form 7. Declaration of Inmate Filing

_____

[insert name of court, for example,
United States District Court for the District of Minnesota]

A.B., Plaintiff

v. Case No. _____

C.D., Defendant

I am an inmate confined in an institution. I deposited the _____ *[insert title of document, for example, "notice of appeal"]* in this case in the institution's internal mail system on _____ *[insert date]*, and first-class postage is being prepaid either by me or by the institution on my behalf.

I declare under penalty of perjury that the foregoing is true and correct (see 28 U.S.C. § 1746; 18 U.S.C. § 1621).

Sign your name here _____

Executed on _____ *[insert date]*

Rule 4. Appeal as of Right–When Taken

(a) Appeal in a Civil Case.

* * *

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party ~~timely~~ files in the district court any of the following motions under the Federal Rules of Civil Procedure~~;~~ – and does so within the time allowed by those rules – the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

* * *

Committee Note

A clarifying amendment is made to subdivision (a)(4). Former Rule 4(a)(4) provided that "[i]f a party timely files in the district court" certain post-judgment motions, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." Responding to a circuit split concerning the meaning of "timely" in this provision, the amendment adopts the majority approach and rejects the approach taken in *National Ecological Foundation v. Alexander*, 496 F.3d 466 (6th Cir. 2007). A motion made after the time allowed by the Civil Rules will not qualify as a motion that, under Rule 4(a)(4)(A), re-starts the appeal time – and that fact is not altered by, for example, a court order that sets a due date that is later than permitted by the Civil Rules, another party's consent or failure to object to the motion's lateness, or the court's disposition of the motion without explicit reliance on untimeliness.

Rule 5. Appeal by Permission

* * *

(c) **Form of Papers; Number of Copies**. All papers must conform to Rule 32(c)(2). ~~Except by the court's permission, a paper must not exceed 20 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 5(b)(1)(E).~~ An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case. Except by the court's permission, and excluding the accompanying documents required by Rule 5(b)(1)(E):

(1) a handwritten or typewritten paper must not exceed 20 pages; and

(2) a paper produced using a computer must comply with Rule 32(g) and not exceed:

(A) 5,000 words; or

(B) 520 lines of text printed in a monospaced face.

* * *

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by type-volume limits. The type-volume limits were

derived from the current page limits using the assumption that one page is equivalent to 250 words or to 26 lines of text. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the type-volume limits and the page limit, the calculation excludes the accompanying documents required by Rule 5(b)(1)(E) and any items listed in Rule 32(f).

Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary Writs

* * *

(d) **Form of Papers; Number of Copies**. All papers must conform to Rule 32(c)(2). ~~Except by the court's permission, a paper must not exceed 30 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 21(a)(2)(C).~~ An original and 3 copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case. Except by the court's permission, and excluding the accompanying documents required by Rule 21(a)(2)(C):

(1) a handwritten or typewritten paper must not exceed 30 pages; and

(2) a paper produced using a computer must comply with Rule 32(g) and not exceed:

(A) 7,500 words; or

(B) 780 lines of text printed in a monospaced face.

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by type-volume limits. The type-volume limits were derived from the current page limits using the assumption that one page is equivalent to 250 words or to 26 lines of text. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the type-volume limits and the page limit, the calculation excludes the accompanying documents required by Rule 21(a)(2)(C) and any items listed in Rule 32(f).

Rule 27. Motions

* * *

(d) Form of Papers; Page Limits; and Number of Copies.

* * *

(2) **Page Limits**. ~~A motion or a response to a motion must not exceed 20 pages, exclusive of the corporate disclosure statement and accompanying documents authorized by Rule 27(a)(2)(B), unless the court permits or directs otherwise. A reply to a response must not exceed 10 pages.~~ Except by the court's permission, and

excluding the accompanying documents authorized by Rule 27(a)(2)(B):

(A) a handwritten or typewritten motion or response to a motion must not exceed 20 pages;

(B) a motion or response to a motion produced using a computer must comply with Rule 32(g) and not exceed:

(i) 5,000 words; or

(ii) 520 lines of text printed in a monospaced face;

(C) a handwritten or typewritten reply to a response must not exceed 10 pages; and

(D) a reply produced using a computer must comply with Rule 32(g) and not exceed:

(i) 2,500 words; or

(ii) 260 lines of text printed in a monospaced face.

* * *

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by type-volume limits. The type-volume limits were derived from the current page limits using the assumption that one

page is equivalent to 250 words or to 26 lines of text. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the type-volume limits and the page limit, the calculation excludes the accompanying documents required by Rule 27(a)(2)(B) and any items listed in Rule 32(f).

Rule 28.1. Cross-Appeals

* * *

(e) Length.

(1) **Page Limitation**. Unless it complies with Rule 28.1(e)(2)~~ and (3)~~, the appellant's principal brief must not exceed 30 pages; the appellee's principal and response brief, 35 pages; the appellant's response and reply brief, 30 pages; and the appellee's reply brief, 15 pages.

(2) **Type-Volume Limitation**.

(A) The appellant's principal brief or the appellant's response and reply brief is acceptable if <u>it complies with Rule 32(g) and</u>:

(i) ~~it~~ contains no more than ~~14,000~~ <u>12,500</u> words; or

(ii) ~~it~~ uses a monospaced face and contains no more than 1,300 lines of text.

(B) The appellee's principal and response brief is acceptable if it complies with Rule 32(g) and:

(i) ~~it~~ contains no more than ~~16,500~~ 14,700 words; or

(ii) ~~it~~ uses a monospaced face and contains no more than 1,500 lines of text.

(C) The appellee's reply brief is acceptable if it complies with Rule 32(g) and contains no more than half of the type volume specified in Rule 28.1(e)(2)(A).

~~(3) Certificate of Compliance. A brief submitted under Rule 28.1(e)(2) must comply with Rule 32(a)(7)(C).~~

* * *

Committee Note

When Rule 28.1 was adopted in 2005, it modeled its type-volume limits on those set forth in Rule 32(a)(7) for briefs in cases that did not involve a cross-appeal. At that time, Rule 32(a)(7)(B) set word limits based on an estimate of 280 words per page. The basis for the estimate of 280 words per page is unknown, and the 1998 adoption of Rule 32(a)(7)(B) superseded at least one local circuit rule that used an estimate of 250 words per page based on a study of appellate briefs. The committee believes that the use of the estimate of 280 words per page inadvertently increased the length limits for briefs. Rules 28.1 and 32(a)(7)(B) are amended to reduce the word limits accordingly.

Rule 28.1(e) is amended to refer to new Rule 32(g) (which now contains the certificate-of-compliance provision formerly in Rule 32(a)(7)(C)).

Rule 32. Form of Briefs, Appendices, and Other Papers

(a) Form of a Brief.

* * *

(7) Length.

(A) Page Limitation. A principal brief may not exceed 30 pages, or a reply brief 15 pages, unless it complies with Rule 32(a)(7)(B) and (C).

(B) Type-Volume Limitation.

(i) A principal brief is acceptable if it complies with Rule 32(g) and:

- ~~it~~ contains no more than ~~14,000~~ 12,500 words; or
- ~~it~~ uses a monospaced face and contains no more than 1,300 lines of text.

(ii) A reply brief is acceptable if it complies with Rule 32(g) and contains no more than half of the type volume specified in Rule 32(a)(7)(B)(I).

1 ~~(iii) Headings, footnotes, and~~
2 ~~quotations count toward the word and line~~
3 ~~limitations. The corporate disclosure~~
4 ~~statement, table of contents, table of~~
5 ~~citations, statement with respect to oral~~
6 ~~argument, any addendum containing~~
7 ~~statutes, rules or regulations, and any~~
8 ~~certificates of counsel do not count toward~~
9 ~~the limitation.~~
10 * * *
11 **(f) Items Excluded from Length.** In computing any
12 length limit, headings, footnotes, and quotations count toward the
13 limit but the following items do not:
14 ● the cover page
15 ● a corporate disclosure statement
16 ● a table of contents
17 ● a table of citations
18 ● a statement regarding oral argument
19 ● an addendum containing statutes, rules, or
20 regulations
21 ● certificates of counsel
22 ● the signature block

1 ● the proof of service

2 ● any item specifically excluded by rule.

3 **(g) Certificate of compliance.**

4 (1) **Briefs and Papers That Require a Certificate.**
5 A brief submitted under Rules 28.1(e)(2) or 32(a)(7)(B) –
6 and a paper submitted under Rules 5(c)(2), 21(d)(2),
7 27(d)(2)(B), 27(d)(2)(D), 35(b)(2)(B), or 40(b)(2) – must
8 include a certificate by the attorney, or an unrepresented
9 party, that the document complies with the type-volume
10 limitation. The person preparing the certificate may rely on
11 the word or line count of the word-processing system used
12 to prepare the document. The certificate must state the
13 number of words – or the number of lines of monospaced
14 type – in the document.

15 (2) **Acceptable Form.** Form 6 in the Appendix of
16 Forms meets the requirements for a certificate of
17 compliance.

18 **Committee Note**
19
20 When Rule 32(a)(7)(B)'s type-volume limits for briefs
21 were adopted in 1998, the word limits were based on an estimate
22 of 280 words per page. The basis for the estimate of 280 words
23 per page is unknown, and the 1998 rules superseded at least one
24 local circuit rule that used an estimate of 250 words per page based
25 on a study of appellate briefs. The committee believes that the
26 1998 amendments inadvertently increased the length limits for

briefs. Rule 32(a)(7)(B) is amended to reduce the word limits accordingly.

A new subdivision (f) is added to set out a global list of items excluded from length computations, and the list of exclusions in former subdivision (a)(7)(B)(iii) is deleted. The certificate-of-compliance provision formerly in Rule 32(a)(7)(C) is relocated to a new Rule 32(g) and now applies to filings under all type-volume limits, including the new type-volume limits in Rules 5, 21, 27, 35, and 40. Conforming amendments are made to Form 6.

Rule 35. En Banc Determination

* * *

(b) **Petition for Hearing or Rehearing En Banc**. A party may petition for a hearing or rehearing en banc.

* * *

(2) Except by the court's permission~~, a petition for an en banc hearing or rehearing must not exceed 15 pages, excluding material not counted under Rule 32.~~:

(A) a handwritten or typewritten petition for an en banc hearing or rehearing must not exceed 15 pages; and

(B) a petition for an en banc hearing or rehearing produced using a computer must comply with Rule 32(g) and not exceed:

(i) 3,750 words; or

(ii) 390 lines of text printed in a monospaced face.

(3) For purposes of the ~~page~~ limits in Rule 35(b)(2), if a party files both a petition for panel rehearing and a petition for rehearing en banc, they are considered a single document even if they are filed separately, unless separate filing is required by local rule.

* * *

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by type-volume limits. The type-volume limits were derived from the current page limits using the assumption that one page is equivalent to 250 words or to 26 lines of text. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the type-volume limits and the page limit, the calculation excludes any items listed in Rule 32(f).

Rule 40. Petition for Panel Rehearing

* * *

(b) **Form of Petition; Length**. The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. ~~Unless the court permits or a local rule provides~~

1 ~~otherwise, a petition for panel rehearing must not exceed 15 pages.~~

2 Except by the court's permission:

3 (1) a handwritten or typewritten petition for panel

4 rehearing must not exceed 15 pages; and

5 (2) a petition for panel rehearing produced using a

6 computer must comply with Rule 32(g) and not exceed:

7 (A) 3,750 words; or

8 (B) 390 lines of text printed in a

9 monospaced face.

10 **Committee Note**

11

12 The page limits previously employed in Rules 5, 21, 27, 35,
13 and 40 have been largely overtaken by changes in technology. For
14 papers produced using a computer, those page limits are now
15 replaced by type-volume limits. The type-volume limits were
16 derived from the current page limits using the assumption that one
17 page is equivalent to 250 words or to 26 lines of text. Papers
18 produced using a computer must include the certificate of
19 compliance required by Rule 32(g); Form 6 in the Appendix of
20 Forms suffices to meet that requirement. Page limits are retained
21 for papers prepared without the aid of a computer (i.e., handwritten
22 or typewritten papers). For both the type-volume limits and the
23 page limit, the calculation excludes any items listed in Rule 32(f).

Form 6. Certificate of Compliance with ~~Rule 32(a)~~ Type-Volume Limit

Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This ~~brief~~ document complies with the type-volume limitation of Fed. R. App. P. ~~32(a)(7)(B)~~ [*insert Rule citation, e.g., 32(a)(7)(B)*] because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) [and [*insert applicable Rule citation if any*]]:

[ ] this ~~brief~~ document contains [*state the number of*] words, ~~excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii),~~ *or*

[ ] this ~~brief~~ document uses a monospaced typeface and contains [*state the number of*] lines of text~~,~~ ~~excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)~~.

2. This ~~brief~~ document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

[ ] this ~~brief~~ document has been prepared in a proportionally spaced typeface using [*state name and version of word processing program*] in [*state font size and name of type style*], *or*

[ ] this ~~brief~~ document has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

(s)_____

Attorney for _____

Dated: _____

Rule 29. Brief of an Amicus Curiae

(a) During Initial Consideration of a Case on the Merits.

(1) Applicability. This Rule 29(a) governs amicus filings during a court's initial consideration of a case on the merits.

(2) When Permitted. The United States or its officer or agency or a state may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.

~~**(b)**~~ **(3) Motion for Leave to File.** The motion must be accompanied by the proposed brief and state:

~~(1)~~ (A) the movant's interest; and

~~(2)~~ (B) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.

~~**(c)**~~ **(4) Contents and Form.** An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports

1 affirmance or reversal. An amicus brief need not comply
2 with Rule 28, but must include the following:
3 ~~(1)~~ (A) if the amicus curiae is a corporation,
4 a disclosure statement like that required of parties
5 by Rule 26.1;
6 ~~(2)~~ (B) a table of contents, with page
7 references;
8 ~~(3)~~ (C) a table of authorities–cases
9 (alphabetically arranged), statutes, and other
10 authorities–with references to the pages of the brief
11 where they are cited;
12 ~~(4)~~ (D) a concise statement of the identity of
13 the amicus curiae, its interest in the case, and the
14 source of its authority to file;
15 ~~(5)~~ (E) unless the amicus curiae is one listed
16 in the first sentence of Rule 29(a)(2), a statement
17 that indicates whether:
18 ~~(A)~~ (i) a party's counsel authored the
19 brief in whole or in part;
20 ~~(B)~~ (ii) a party or a party's counsel
21 contributed money that was intended to fund
22 preparing or submitting the brief; and

1 ~~(C)~~ (iii) a person–other than the
2 amicus curiae, its members, or its
3 counsel–contributed money that was
4 intended to fund preparing or submitting the
5 brief and, if so, identifies each such person;
6 ~~(6)~~ (F) an argument, which may be preceded
7 by a summary and which need not include a
8 statement of the applicable standard of review; and
9 ~~(7)~~ (G) a certificate of compliance, if
10 required by Rule 32(a)(7).
11 **~~(d)~~ (5) Length.** Except by the court's permission, an
12 amicus brief may be no more than one-half the maximum
13 length authorized by these rules for a party's principal
14 brief. If the court grants a party permission to file a longer
15 brief, that extension does not affect the length of an amicus
16 brief.
17 **~~(e)~~ (6) Time for Filing.** An amicus curiae must file
18 its brief, accompanied by a motion for filing when
19 necessary, no later than 7 days after the principal brief of
20 the party being supported is filed. An amicus curiae that
21 does not support either party must file its brief no later than
22 7 days after the appellant's or petitioner's principal brief is

1 filed. A court may grant leave for later filing, specifying
2 the time within which an opposing party may answer.
3 ~~(f)~~ (7) **Reply Brief.** Except by the court's
4 permission, an amicus curiae may not file a reply brief.
5 ~~(g)~~ (8) **Oral Argument.** An amicus curiae may
6 participate in oral argument only with the court's
7 permission.
8 **(b) During Consideration of Whether to Grant**
9 **Rehearing.**
10 **(1) Applicability.** This Rule 29(b) governs amicus
11 filings during a court's consideration of whether to grant
12 panel rehearing or rehearing en banc, unless a local rule or
13 order in a case provides otherwise.
14 **(2) When Permitted.** Rule 29(a)(2) applies.
15 **(3) Motion for Leave to File.** Rule 29(a)(3)
16 applies to the motion for leave.
17 **(4) Contents, Form, and Length.** Rule 29(a)(4)
18 applies to the amicus brief. The brief must comply with
19 Rule 32(g) and not exceed:
20 (i) 2,000 words; or
21 (ii) 208 lines of text printed in a
22 monospaced face.

1 **(5) Time for Filing.** An amicus curiae supporting
2 the petition for rehearing or supporting neither party must
3 file its brief, accompanied by a motion for filing when
4 necessary, no later than 3 days after the petition is filed.
5 An amicus curiae opposing the petition must file its brief,
6 accompanied by a motion for filing when necessary, no
7 later than the date set by the court for the response.

8 **Committee Note**
9
10 Rule 29 is amended to address amicus filings in connection
11 with requests for panel rehearing and rehearing en banc. Existing
12 Rule 29 is renumbered Rule 29(a), and language is added to that
13 subdivision (a) to state that its provisions apply to amicus filings
14 during the court's initial consideration of a case on the merits.
15 New subdivision (b) is added to address amicus filings in
16 connection with a petition for panel rehearing or rehearing en
17 banc. Subdivision (b) sets default rules that apply when a court
18 does not provide otherwise by local rule or by order in a case. A
19 court remains free to adopt different rules governing whether
20 amicus filings are permitted in connection with petitions for
21 rehearing, and governing the procedures when such filings are
22 permitted.

Rule 26. Computing and Extending Time

* * *

(c) Additional Time after Certain Kinds of Service. When a party may or must act within a specified time after ~~service~~ being served, 3 days are added after the period would otherwise expire under Rule 26(a), unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is ~~not~~ treated as delivered on the date of service stated in the proof of service.

Committee Note

Rule 26(c) is amended to remove service by electronic means under Rule 25(c)(1)(D) from the modes of service that allow 3 added days to act after being served.

Rule 25(c) was amended in 2002 to provide for service by electronic means. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and in widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added

days were calculated to alleviate these concerns. [If we eliminate consent from Rule 25(c)(1)(D), we can add that here.][1]

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28- day periods that allow "day-of-the-week" counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Rule 26(c) has also been amended to refer to instances when a party "may or must act … after being served" rather than to instances when a party "may or must act … after service." If, in future, an Appellate Rule sets a deadline for a party to act after *that party itself effects service* on another person, this change in language will clarify that Rule 26(c)'s three added days are not accorded to the party who effected service.

[1] Rule 25(c)(1)(D) authorizes service "by electronic means, if the party being served consents in writing." Another question that the CM/ECF Subcommittee is likely to consider is whether to propose eliminating this consent requirement.

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TAB 5D

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Advisory Committee on Appellate Rules
Table of Agenda Items — May 2014

FRAP Item	Proposal	Source	Current Status
07-AP-E	Consider possible FRAP amendments in response to Bowles v. Russell (2007).	Mark Levy, Esq.	Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 04/11 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee
07-AP-I	Consider amending FRAP 4(c)(1) to clarify the effect of failure to prepay first-class postage.	Hon. Diane Wood	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08
08-AP-C	Abolish FRAP 26(c)'s three-day rule.	Hon. Frank H. Easterbrook	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee
08-AP-H	Consider issues of "manufactured finality" and appealability	Mark Levy, Esq.	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 10/10 Discussed and retained on agenda 04/11 Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13

FRAP Item	Proposal	Source	Current Status
08-AP-L	Amend FRAP 6(b)(2)(A)(ii) to remove ambiguity	Reporter	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09 Discussed and retained on agenda 10/10 Discussed jointly with Bankruptcy Rules Committee and retained on agenda 04/11 Discussed and retained on agenda 10/11 Draft approved 04/12 for submission to Standing Committee Approved for publication by Standing Committee 06/12 Published for comment 08/12 Draft approved 04/13 for submission to Standing Committee Approved by Standing Committee 06/13 Approved by Judicial Conference 09/13 Approved by Supreme Court 04/14
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/14
09-AP-B	Amend FRAP 1(b) to include federally recognized Indian tribes within the definition of "state"	Daniel I.S.J. Rey-Bear, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed and retained on agenda 10/11 Discussed and retained on agenda 04/12; Committee will revisit in 2017
09-AP-C	Consider possible FRAP amendments in the light of project to revise Part VIII of the Bankruptcy Rules	Bankruptcy Rules Committee	Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed jointly with Bankruptcy Rules Committee and retained on agenda 04/11 Discussed and retained on agenda 10/11 Draft approved 04/12 for submission to Standing Committee Approved for publication by Standing Committee 06/12 Published for comment 08/12 Draft approved 04/13 for submission to Standing Committee Approved by Standing Committee 06/13 Approved by Judicial Conference 09/13 Approved by Supreme Court 04/14

FRAP Item	Proposal	Source	Current Status
09-AP-D	Consider implications of Mohawk Industries, Inc. v. Carpenter	John Kester, Esq.	Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14
11-AP-C	Amend FRAP 3(d)(1) to take account of electronic filing	Harvey D. Ellis, Jr., Esq.	Discussed and retained on agenda 04/13
11-AP-D	Consider changes to FRAP in light of CM/ECF	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/11 Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14
11-AP-F	Consider amendment authorizing discretionary interlocutory appeals from attorney-client privilege rulings	Amy M. Smith, Esq.	Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14
12-AP-B	Consider amending FRAP Form 4's directive concerning institutional-account statements for IFP applicants	Peter Goldberger, Esq., on behalf of the National Association of Criminal Defense Lawyers (NACDL)	Discussed and retained on agenda 09/12
12-AP-D	Consider the treatment of appeal bonds under Civil Rule 62 and Appellate Rule 8	Kevin C. Newsom, Esq.	Discussed and retained on agenda 09/12
12-AP-E	Consider treatment of length limits, including matters now governed by page limits	Professor Neal K. Katyal	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee
12-AP-F	Consider amending FRAP 42 to address class action appeals	Professors Brian T. Fitzpatrick and Brian Wolfman and Dean Alan B. Morrison	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14
13-AP-B	Amend FRAP to address permissible length and timing of an amicus brief in support of a petition for rehearing and/or rehearing en banc	Roy T. Englert, Jr., Esq.	Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee

FRAP Item	Proposal	Source	Current Status
13-AP-H	Consider possible amendments to FRAP 41 in light of Bell v. Thompson, 545 U.S. 794 (2005), and Ryan v. Schad, 133 S. Ct. 2548 (2013)	Hon. Steven M. Colloton	Discussed and retained on agenda 04/14

TAB 5E

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Minutes of Spring 2014 Meeting of
Advisory Committee on Appellate Rules
April 28 and 29, 2014
Newark, New Jersey

I. Introductions

Judge Steven M. Colloton called the meeting of the Advisory Committee on Appellate Rules to order on Monday, April 28, 2014, at 10:00 a.m. at the Seton Hall University School of Law. The following Advisory Committee members were present: Judge Michael A. Chagares, Justice Allison H. Eid,[1] Judge Peter T. Fay, Judge Richard G. Taranto, Professor Amy Coney Barrett, Mr. Gregory G. Katsas, Professor Neal K. Katyal, and Mr. Kevin C. Newsom. Mr. Douglas Letter, Director of the Appellate Staff of the Civil Division, U.S. Department of Justice ("DOJ"), was present representing the Solicitor General. Judge Jeffrey S. Sutton, Chair of the Standing Committee; Mr. Jonathan C. Rose, the Standing Committee's Secretary and Rules Committee officer; Mr. Gregory G. Garre, liaison from the Standing Committee; Ms. Julie Wilson, Attorney Advisor in the Administrative Office ("AO"); Mr. Michael Ellis Gans, liaison from the appellate clerks; and Ms. Marie Leary from the Federal Judicial Center ("FJC") were also present. Judge Adalberto Jordan, liaison from the Advisory Committee on Bankruptcy Rules, and Professor Daniel R. Coquillette, Reporter for the Standing Committee, participated in portions of the meeting by telephone.

Judge Colloton began by expressing thanks to Patrick E. Hobbs, the Dean of Seton Hall University School of Law, for hosting the Committee's meeting. Dean Hobbs in turn thanked Judge Chagares for suggesting that the meeting be held at Seton Hall, and noted that the Law School would welcome future visits from any of the Rules Committees.

Judge Colloton welcomed the Committee's newest member. Mr. Katsas, a partner at Jones Day, has a distinguished record of appellate arguments in every circuit as well as in the United States Supreme Court. Mr. Letter observed that during Mr. Katsas's service in senior positions in the DOJ, Mr. Katsas gained high regard among the career civil servants there.

II. Approval of Minutes of April 2013 Meeting

A motion was made and seconded to approve the minutes of the Committee's April 2013 meeting. The motion passed by voice vote without dissent.

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[1] Justice Eid attended the meeting on April 28 but not on April 29.

III. Report on January 2014 Meeting of Standing Committee

Judge Colloton noted that he had given a report on the activities of the Appellate Rules Committee at the Standing Committee's January 2014 meeting. Due to the cancellation of the Appellate Rules Committee's fall 2013 meeting, he observed, there were no Appellate Rules action items for the January 2014 Standing Committee meeting.

The Reporter reminded the Committee that amendments to Appellate Rules 13, 14, 24, 28, and 28.1, and to Form 4, had taken effect on December 1, 2013. The proposed amendments to Appellate Rule 6, concerning appeals in bankruptcy cases, have been adopted by the Supreme Court and submitted to Congress; absent any contrary action by Congress, those amendments will take effect on December 1, 2014.

Judge Sutton observed that some lawyers are slow to adjust to the requirements of amended Rule 28(a) concerning the "statement of the case." Mr. Gans reported that his office has been educating lawyers about the new rule.

IV. Action Items – For Publication

Judge Colloton recalled that the Committee's fall 2013 meeting had been cancelled due to the lapse in appropriations. During the year that passed between the spring 2013 and spring 2014 meetings, he asked members of the Committee to work with him and the Reporter on proposals to address a number of items on the Committee's agenda.

A. Item No. 07-AP-I (FRAP 4(c) / inmate filing)

Judge Colloton reminded the Committee that Item No. 07-AP-I arises from a suggestion by Judge Diane Wood that courts have experienced difficulty in interpreting Rule 4(c)(1)'s inmate-filing provision. Some courts treat the question of prepayment of postage differently depending on whether the inmate uses an institution's legal mail system (in which event these courts do not require prepayment of postage) or an institution's general mail system (in which event prepayment of postage is a precondition for applying Rule 4(c)(1)'s inmate-filing provision). Questions also have arisen concerning the declaration mentioned by Rule 4(c)(1); is such a declaration necessary in cases where other evidence shows the timely deposit of the notice of appeal in the institution's mail system? And, when a declaration is required, must it be included with the notice of appeal or can the inmate supply the declaration later?

The working group that addressed these questions included Justice Eid, Professor Barrett, and Mr. Letter. The group took as a starting point Supreme Court Rule 29.2, which provides in part: "If submitted by an inmate confined in an institution, a document is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing and is accompanied by a notarized statement or declaration in compliance with 28 U.S.C. § 1746 setting out the date of deposit and stating that first-class postage has been prepaid."

The group set out to answer three policy questions: First, should Rule 4(c)(1) require prepayment of postage as a condition for the application of the provision's inmate-filing rule? The working group suggested that the rule should require prepayment of postage. Second, should the availability of Rule 4(c)(1)'s inmate-filing rule depend on the inmate's use of an institution's legal mail system? The working group suggested that the provision should not require the inmate to use a legal mail system. The input received from the federal Bureau of Prisons (BOP) indicates that the distinction between legal mail systems and general mail systems often serves other goals, such as assuring the privacy of legal mail. There does not appear to be any institutional interest that would be served by requiring the inmate to use the legal (as opposed to general) mail system. Third, how should Rule 4(c)(1) treat the role of the declaration? The proposal set forth in the agenda materials would provide that a filing is timely if it is timely deposited in the institution's mail system with postage prepaid and is accompanied by the declaration. If the inmate does not include the declaration with the initial filing and other evidence accompanying the filing does not show its timeliness, then the court would have discretion whether or not to permit the inmate to establish timeliness by belatedly filing the declaration.

Judge Colloton invited the Reporter to introduce, for comment by the Committee members, the proposed text of the amendment and the proposed Committee Note. The Reporter pointed out that two restyled options for the text of Rule 4(c) were set out in her April 25 memorandum to the Committee and that the proposed Committee Note was set out in her April 22 memorandum; although the April 25 memo did not include a draft of Rule 25(a)(2)(C), the Rule 25(a)(2)(C) proposal could be revised to track the approach selected for Rule 4(c)(1).

With respect to the second restyled draft of Rule 4(c)(1) in the April 25 memo, a member suggested reordering subparts (c)(1)(A)(i) and (ii) so that the Rule would refer to the contemporaneously-provided declaration before going on to discuss other evidence of timeliness or a later-filed declaration. This ordering is preferable, she explained, because it highlights the preferred course of action – namely, including the declaration along with the filing. An appellate judge member expressed agreement with this reordering. Another appellate judge member also agreed with this proposed reordering, and stated that, more generally, she supports the proposed amendments to Rule 4(c). The current Rule's reference to a "system designed for legal mail" is undesirable, she suggested, because the Rule does not make clear what qualifies as such a system. Mr. Letter agreed that the reference to a "system designed for legal mail" should be deleted. Informal consultations with Chris Vasil, the Chief Deputy Clerk of the U.S. Supreme Court, and with Kenneth Hyle, the Deputy General Counsel of the BOP, disclosed no reason for retaining the legal-mail-system provision. And, Mr. Letter suggested, it seems preferable for the Appellate Rules' inmate-filing provisions to track the U.S. Supreme Court's inmate-filing provision as closely as possible.

Judge Colloton observed that Supreme Court Rule 29.2, unlike current Appellate Rule 4(c)(1), appears to require that the declaration "accompan[y]" the document that is being filed. In practice, though, if an inmate files a document without the declaration or notarized statement, the Supreme Court will return the document to the inmate but then will accept it as timely filed if

the inmate refiles the document with a declaration stating that the original mailing was deposited in the prison mailbox before the last date for filing with postage prepaid. The proposed amendments to Appellate Rules 4(c)(1) and 25(a)(2)(C) take a similar approach: They provide that the document is timely if "accompanied by" a satisfactory declaration, but also give the courts of appeals discretion to permit the later filing of a declaration.

An attorney member expressed agreement with the substantive choices reflected in the proposed amendments. He raised a question about the second restyled version of Rule 4(c)(1); as set out in the April 25 memo, the restyled rule would offer two alternatives – subdivision (A) and subdivision (B) – for establishing timeliness under the inmate-filing provision. Subdivision (B) includes the term "such a declaration or notarized statement." To know which declaration or statement this refers to, the reader must turn to subdivision (A) – but it does not make sense to rely on a referent located in subdivision (A), because (A) and (B) are alternatives. The Reporter suggested that this difficulty could be addressed by revising subdivision (B) to refer to subdivision 4(c)(1)(A)(i).

An appellate judge member noted that the text of the proposed rule addresses three possible ways to show timeliness: by means of a declaration included with the filing; by means of other evidence that accompanies the filing; or by means of a later-filed declaration. He asked whether this rule text would accommodate an instance where evidence other than a declaration is proffered after the fact. It was suggested that, in such an instance, the inmate could append copies of the relevant evidence to a declaration. Turning to the proposed Form 7 – which shows the suggested contents of the declaration – the judge member noted that the Form states that "first-class postage is being prepaid either by me or by the institution on my behalf." The member asked whether "is being prepaid" should be placed in brackets and paired with another bracketed alternative, "was prepaid." The latter, he suggested, would be the appropriate choice if the inmate were to file the declaration belatedly. The Reporter responded that "is being prepaid" was designed to reflect the overall preference that the inmate include the declaration along with the initial filing.

The appellate judge member also asked whether the Form, when referring to payment of postage by the institution, should say something like "based on my understanding, postage is being paid by the institution on my behalf." Such a formulation, he suggested, might be preferable because an inmate might not know with certainty whether the institution will pay the postage. Other participants, though, suggested that an inmate would be justified in saying "is being prepaid" if he or she has a reasonable expectation (grounded in the institution's policy) that the institution will pay the postage.

Another appellate judge member noted that a few institutions have begun to allow inmates to file court papers electronically. Would an inmate in such an institution, he asked, have to comply with Rule 4(c)(1)'s requirements? Judge Colloton responded that Rule 4(c)(1) provides the inmate with an option for showing timely filing of the notice of appeal, but recourse to Rule 4(c)(1) is not mandatory.

An appellate judge asked whether proposed subdivision (c)(1)(B) – concerning later-filed declarations – would tempt inmates to omit the declaration from their initial filing. In response, the Reporter undertook to propose revised language for subdivision (c)(1)(B) that would highlight the fact that the court of appeals would have discretion to reject (as well as accept) later-filed declarations.

An attorney participant asked whether there are real problems (with the inmate-filing provisions) that necessitate rule amendments. Judge Colloton responded that the amendments will be worthwhile if they clarify the inmate-filing rule's operation. Mr. Gans stated that the proposed amendments will greatly improve the rule. He stated that in 2013 he had surveyed his fellow circuit clerks. The clerks reported that they have developed ways of handling inmate filings under the current rule. Typically, they look at the filing and if there is evidence of timeliness they accept it – but if a filing seems obviously untimely (as, for instance, when the date next to the inmate's signature post-dates the due date), the clerk will flag the timeliness issue. In the Eighth Circuit, Mr. Gans observed, from 35 to 40 percent of the appeals involve pro se litigants.

After the first day of the meeting concluded, the Chair and Reporter prepared a revised draft of the proposed amendments. The revisions reordered the two subparts of Rule 4(c)(1)(A), and revised Rule 4(c)(1)(B) to underscore the court of appeals' discretion concerning whether to permit a later-filed declaration. On the second day of the meeting, copies of the revised drafts were circulated to Committee members. After the Reporter summarized the changes to the drafts, a member moved to approve for publication the proposed amendments to Rules 4(c)(1) and 25(a)(2)(C), the proposed amendments to Forms 1 and 5, and the proposed new Form 7, as shown in the revised drafts circulated to the Committee that morning. The motion was seconded and passed by voice vote without dissent.

B. Item No. 12-AP-E (length limits, including matters now governed by page limits)

Judge Colloton noted that Item No. 12-AP-E grew out of Professor Katyal's suggestion that the length limit for petitions for rehearing en banc be stated using type-volume limits rather than word limits. The project expanded to encompass other questions relating to length limits. One question is whether the Rules should be amended to ensure uniform treatment (across different types of documents) concerning items to be excluded when computing length. Another question relates to the choice – made in connection with the 1998 amendments that produced current Rule 32 – to replace the old 50-page brief length limit with a new 14,000-word type-volume limit. While deliberating over the formulae to use when converting existing page limits into type-volume limits, the Committee became aware that the premise of the 1998 amendments – namely, that one page was equivalent to 280 words – appears to have been mistaken. Based on earlier research by Mr. Letter on behalf of the D.C. Circuit's rules committee, a better estimate appears to be 250 words per page, which would have translated into a brief length limit of 12,500 words.

The proposed amendments, as restyled by Professor Kimble, were set out in the Reporter's April 22 memorandum to the Committee. Judge Colloton explained that, for briefs prepared using a computer, the proposals would replace existing page limits in Rules 5, 21, 27, 35, and 40 with type-volume limits. For briefs prepared without the use of a computer, the proposals would retain the existing page limits set forth in Rules 5, 21, 27, 35, and 40. A new Rule 32(f) would set forth one globally-applicable list of items to be excluded when computing length. The new type-volume limits in Rules 5, 21, 27, 35, and 40 would reflect an assumption that one page is equivalent to 250 words or to 26 lines of text. The amendments would also shorten the type-volume briefing length limits currently set out in Rules 28.1(e)(2) and 32(a)(7)(B), to reflect the more realistic estimate of 250 words per page. The Reporter mentioned that the draft tentatively included, in Rules 5, 21, 27, 35, and 40, cross-references to new Rule 32(f)'s list of exclusions. Professor Kimble, however, has explained that these cross-references are unnecessary and undesirable.

Judge Colloton invited Professor Katyal to discuss the proposals. Professor Katyal thanked the Committee for its work on this topic. The shift from page limits to type-volume limits, he said, will helpfully remove an opportunity for gamesmanship by lawyers who sought to manipulate page limits. The distinction between briefs produced by computer and briefs produced without a computer is analogous, Professor Katyal suggested, to the distinction made in the U.S. Supreme Court's rules between documents set out on 8 ½ by 11 inch paper and documents printed in booklet format. Professor Katyal suggested deleting, from Rule 32(f)'s list of exclusions, the amicus-brief authorship-and-funding disclosure; omitting that item from the list of exclusions would ensure that the Appellate Rules continue to parallel the Supreme Court's Rules in this regard. Professor Katyal noted that proposed Rule 32(f) carries forward the exclusion (currently set out in Rule 32(a)(7)(B)(iii)) of any "addendum containing statutes, rules, or regulations." In contrast to Supreme Court Rule 33.1(d) – which excludes " verbatim quotations required under [Supreme Court] Rule 14.1(f) and Rule 24.1(f)" even when they are set out in the text of the brief rather than in an appendix – Rule 32 does not exclude statutory quotations when they are in the body of the brief.

Professor Katyal predicted that, in contrast to the salutary shift to type-volume limits, the proposed reduction in briefing length limits would be much more controversial. In complex cases, lawyers need the full 14,000 words, and a reduction to 12,500 would force lawyers to spend time trying to reduce the length yet further or seeking permission to file an over-length brief. Recently, Professor Katyal reported, he had been involved in briefing some appeals for which it was very difficult to stay within the 14,000-word limit. Another attorney participant, however, suggested that shortening the briefing length limits would be acceptable. Briefs, he stated, seem to have become longer in recent years. This participant suggested adding the cover page to Rule 32(f)'s list of items to be excluded when computing length. He also suggested revising the Committee Note's statement that the page limits in Rules 5, 21, 27, 35, and 40 had been "subject to manipulation by lawyers."

An appellate judge member stated that she supported rationalizing the treatment of exclusions. Another appellate judge member stated that he supported shortening the length

limits; he reported that briefs seem to be about 60 pages long now, and 50 pages would be preferable. Mr. Letter noted his belief that the choice of 280 words per page as the conversion formula in connection with the 1998 amendments had indeed been a mistake. On the other hand, he said, some cases really are complex. And a number of Assistant United States Attorneys have reported to him that some circuits are unwilling to grant permission to file an over-length brief; accordingly, the prospect of a reduction (of the briefing length limit) to 12,500 words worries those AUSAs. And, Mr. Letter suggested, traditionally the Rules Committees do not amend a rule unless there is a very good reason to do so. The more stringent the length limit, the more likely that a litigant might fail to brief an issue that the court believes should have been addressed.

As for changing the page limits in Rules 5, 21, 27, 35, and 40 to type-volume limits, Mr. Letter noted that he had not heard many complaints about the page limits, and he wondered whether the type-volume limits would be cumbersome for clerks' offices to administer. Mr. Gans acknowledged that it is easier to check for compliance with a page limit than for compliance with a word limit, but he stated that the type-volume limits are administrable so long as the document includes a certificate of compliance with the limit.

Reflecting on his analysis of a sample of briefs filed in 2008 (i.e., under the current type-volume limits), Mr. Gans noted that he had been surprised to see how many of those briefs would actually have complied with a 12,500-word limit. An appellate judge member reported a different experience; in the Eleventh Circuit, he said, lawyers tend to use all the space that is permitted to them. This judge member noted that the choice of length limit presents a tradeoff: One prefers shorter briefs when possible, but in complex cases one wants the briefs to help work out all the issues. An attorney member stated that he favored reducing the length limits of briefs.

An appellate judge member asked whether a circuit could adopt a local rule setting a more generous length limit than the Appellate Rules. The Reporter stated that Rule 32(e) authorizes local rules that would set longer limits than those in Rule 32(a). Although no similar provision exists in Rule 28.1, the Reporter suggested that a circuit that wished to accept longer briefs could, in practice, make clear that it was willing to do so. The judge member, noting that the proposed amendments distinguish between "handwritten or typewritten" papers and papers "produced using a computer," asked which of those categories would encompass a typewriter with memory. The Reporter observed that there is a California state court rule that distinguishes between briefs "produced on a computer" and briefs "produced on a typewriter"; it might be useful, she suggested, to investigate whether the relevant California courts have encountered issues with respect to the use of typewriters with memory.

An attorney member stated that he opposed the reduction in briefing length limits. If attorneys use the full permitted length, it is because the case requires it. An appellate judge member responded that things seemed to work well, prior to the 1998 amendments, under the shorter length limit. Another appellate judge member observed that the Eleventh Circuit is willing to permit over-length briefs in complex cases. An attorney member responded that he is

generally hesitant to request such permission; another attorney member noted that he shares this reluctance. Mr. Letter noted that the circuits vary in their willingness to permit over-length briefs. An attorney member suggested that, since 1998, circumstances may have changed; perhaps the law is more complex, and perhaps lawyers are more prone to prolixity.

An appellate judge observed that the discussion evidenced a clear divide between the perspectives of judges and the perspectives of attorneys. His court, he observed, often asks the lawyers for further briefing on particular issues. He wondered whether the bar would be shocked by a proposal to reduce length limits to 12,500 words, and he asked whether it would be useful to publish alternative proposals for comment.

An appellate judge member suggested removing the cross-references to new Rule 32(f) in the rules that set specific length limits. The Reporter asked whether the Committee wished to include – among the items to be excluded when computing length – the Rule 35(b)(1) statement concerning the reasons for en banc hearing or rehearing. An attorney participant suggested that the statement should be excluded from the length limit because such statements tend to be short. An appellate judge member disagreed, explaining that this statement is the heart of the petition for en banc rehearing. Nothing, this judge member said, requires the statement to be formulaic; and excluding the statement from the length limit might tempt lawyers to expand the statement. Mr. Gans agreed with the appellate judge member's prediction. The Reporter, noting that the local-rule equivalent of this statement is excluded from the length limit in the Eleventh Circuit, asked whether lawyers in that circuit abuse that exclusion by expanding the statement. An appellate judge member said that they do not.

A motion was made to adopt the proposed amendments as set out in the Reporter's April 22 memorandum, but with revisions that would (1) delete the cross-references to Rule 32(f); (2) include the Rule 35(b)(1) statement when computing length; (3) add the cover page to Rule 32(f)'s list of excluded items; (4) omit the authorship-and-funding disclosure statement from Rule 32(f)'s list; (5) revise the reference to "rules" in Rule 32(f)'s final bullet point so as to encompass exclusions set out in local circuit rules; and (6) revise the Committee Notes' discussion of the disadvantages of page limits. The motion was seconded, and it passed by a vote of six to four. It was observed that, when the proposed amendments are published for comment, the transmittal memo could point out the possibility that a circuit has authority to expand the length limit if it wishes to do so. On the evening of April 28, the Chair and Reporter compiled a revised draft of the proposed amendments. The Committee reviewed the revised draft when it met the following morning.

C. Item No. 13-AP-B (amicus briefs on rehearing)

Judge Colloton introduced Item No. 13-AP-B, which concerns amicus filings in connection with rehearing petitions. Mr. Roy T. Englert, Jr. has pointed out that the Appellate Rules currently do not provide guidance concerning the length or timing of such filings. Judge Colloton directed the Committee's attention to the proposed draft amendments set out in the Reporter's April 22 memorandum, and noted that the bracketed options in the draft highlighted

choices for the Committee if it decided to proceed with the proposals.

The first and most basic choice, Judge Colloton noted, is whether there should be a national rule on this topic. If so, then should the rule provide that all amici need leave of court to file briefs at the rehearing stage, or should the rule take the same approach currently taken (for the merits-briefing stage) by Rule 29(a), which permits certain governmental amici to file without party consent or court leave? Judge Colloton pointed out that the proposed draft would re-number the existing portions of Rule 29 as Rule 29(a), and would add a new Rule 29(b) to address the rehearing stage. Proposed Rule 29(b) would merely set default rules, and would allow circuits to opt out of those default rules by local rule or order in a case.

An appellate judge member reported that the Eleventh Circuit's local rule on this topic works well. An attorney member underscored how important it is for practitioners to know what the rules are. Judge Colloton solicited the Committee's views on proposed Rule 29(b)(2), which would state when court leave is required for amicus filings at the rehearing stage. Mr. Letter stated that the rule should allow the United States to file amicus briefs without court leave or party consent. Such filings, he noted, would occur rarely, and only with the approval of the Solicitor General. Dispensing with the requirement of court leave will save the court's time (by avoiding the need for motions for leave) and would assist the government in situations where the need to file an amicus brief arises suddenly. An attorney member asked whether States would be treated the same as the United States in this respect. Judge Colloton responded that they would. An appellate judge stated that he favored extending to the rehearing stage the Rule 29(a) approach. Another appellate judge member agreed. A third appellate judge member concurred, noting that requiring court leave would not make a difference in practice because the court will always grant the government leave to make an amicus filing.

Judge Colloton next asked the Committee what the default length limit should be for amicus filings at the rehearing stage. An attorney member suggested that half of the party's length limit would be appropriate, and another attorney participant agreed. Half of 15 pages would be 7 ½ pages. Rounding up to 8 pages and multiplying by 250 words per page would yield a limit of 2,000 words. The Reporter asked whether it would be worthwhile to distinguish, in this provision, between typewritten briefs and briefs produced using a computer. The consensus was that it would not be worthwhile: Would-be amici will prepare their briefs using computers, and the access-to-court concerns that weigh in favor of setting page limits (in addition to type-volume limits) for parties' filings would not apply with the same force to amicus filings.

Judge Colloton asked Committee members for their views on the timing of amicus filings in support of a rehearing petition. A deadline of three days after the filing of the rehearing petition, he suggested, might be best because it provides the amicus with a time lag but the time lag is not so long that it will interfere with the processing of the petition. An appellate judge member agreed that a relatively short deadline is desirable; the Third Circuit, this judge observed, processes rehearing petitions expeditiously. Another appellate judge member noted that the practice in the Federal Circuit is somewhat different. A petition for rehearing in the

Federal Circuit goes first to the panel that decided the appeal, and only after that to the en banc court. Thus, the Federal Circuit takes somewhat longer to process rehearing petitions. This appellate judge member also noted that amicus filings can serve a particularly important function when the party's rehearing petition is poorly done.

An appellate judge member asked whether amici and parties tend to coordinate with each other at this stage of the litigation. An attorney member responded that coordination is customary. This member observed that, in setting the timing for amicus briefs in support of the petition, it is important not to allow so much time to the amicus that the party opposing the petition will be rushed when preparing the response. Another attorney member agreed that, in a typical instance, the party opposing rehearing is more rushed than the party seeking rehearing. Judge Colloton asked whether, in that case, it would be preferable to require the amicus to file simultaneously with the party seeking rehearing. An attorney member said that simultaneous filing could result in amici needlessly duplicating arguments made in the rehearing petition. Another attorney member suggested that the three-day time lag made the most sense. Mr. Letter asked whether the Committee Note should urge would-be amici to coordinate, when possible, with the party seeking rehearing so as to be able to file the amicus brief simultaneously with the rehearing petition.

An attorney member noted that Supreme Court Rule 37.2 addresses the timing for amici supporting either side, and he asked whether proposed Rule 29(b) should likewise address the timing of an amicus filing in opposition to rehearing. Mr. Letter suggested that such filings should be due on the same date as any response.

By consensus, the Committee resolved to consider a revised draft of the proposed Rule 29 amendments and to vote on the proposal the next day. On the evening of April 28, the Chair and Reporter prepared a revised draft that reflected the Committee's choices concerning the default rules in proposed Rule 29(b). Those choices were to (1) track current Rule 29's approach to the question of when amicus filings are permitted; (2) set a type-volume limit of 2,000 words in proposed Rule 29(b)(4); and (3) revise the timing provision in proposed Rule 29(b)(5).

The Committee reviewed the revised proposal on the morning of April 29. After the Committee made a few style changes to proposed Rule 29(b)(5), a motion was made to approve the proposed amendments (as revised) for publication. The motion was seconded and passed by voice vote without dissent.

D. Item Nos. 08-AP-A, 08-AP-C, 11-AP-C, and 11-AP-D (possible amendments relating to electronic filing)

Judge Colloton invited Judge Chagares – who chairs the Standing Committee's CM/ECF Subcommittee – to introduce the topic of potential changes relating to electronic filing. Judge Chagares reported that the Subcommittee had asked the Reporters to the Advisory Committees to identify rules that might warrant amendment in the light of the shift to electronic filing. The Subcommittee also is moving forward with proposals to amend the "three-day rule" in each set

of rules. The three-day rule in Appellate Rule 26(c) adds three days to a given period if that period is measured after service and service is accomplished electronically or by a non-electronic means that does not result in delivery on the date of service. The rules, Judge Chagares explained, should be amended to reflect the fact that the extra three days are no longer needed when service is accomplished electronically.

The Reporter asked the Committee members for their thoughts on the two possible alternatives – shown in the agenda materials – for amending Rule 26(c) to exclude electronic service from the three-day rule. The first approach would retain the structure of existing Rule 26(c). The current Rule makes the three extra days available "unless the paper is delivered on the date of service stated in the proof of service," and then explains that "a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service." To exclude electronic service from the compass of the three-day rule, one could simply delete "not," so that the Rule would specify that "a paper that is served electronically is treated as delivered on the date of service stated in the proof of service." The second approach would restructure the Rule to track the three-day rules in the other sets of Rules. Under the second approach, the Rule would state that "[w]hen a party may or must act within a specified time after being served and service is made under Rule 25(c)(1)(B) (mail) or (C) (third-party commercial carrier), 3 days are added after the period would otherwise expire under Rule 26(a)." The only downside to this approach, the Reporter suggested, would be the possibility that a party who is served might not always be able to distinguish readily between personal service (which would not trigger the three-day rule) and service by third-party commercial carrier (which would).

An attorney member suggested adopting the second approach; it would be very unlikely, he said, for confusion between personal service and service by a commercial carrier to cause a problem. An appellate judge member, however, expressed support for the first approach. Another attorney member stated that he favored the first approach because it is explicit. An appellate judge observed that the Committee might in future decide to make further changes to Rule 26(c); in the meantime, he suggested, the first approach might be appropriately incremental. A motion was made to approve the proposed amendment to Rule 26(c) as shown in the first approach (i.e., deleting the word "not"). The motion was seconded and passed by voice vote without opposition.

Mr. Letter noted that the DOJ does not oppose the deletion of electronic service from the types of service that trigger the three-day rule. He observed, however, that a problem does exist when attorneys take unfair advantage of their opponents by serving papers electronically the last thing on a Friday night. An attorney member concurred, and expressed a broader concern that midnight deadlines for electronic filing are very unhealthy for the family life of lawyers and their staffs.

The Reporter observed that the CM/ECF Subcommittee may also consider, in future, whether to recommend eliminating the three-day rule entirely. Such a change, she suggested, might raise concerns with respect to cases involving pro se litigants, who typically serve papers by mail. Mr. Letter noted that the DOJ already experiences a significant time lag in processing

papers served on it by mail, due to the need to screen the mail for security reasons.

Judge Chagares reported that the CM/ECF Subcommittee had asked Professor Capra to prepare a template for a rule that would provide two definitions designed to accommodate electronic methods. First, it would define references to writings so as to encompass electronically stored information. Second, it would define references to filing, sending, and similar actions so as to encompass instances when those actions are accomplished electronically.

The Subcommittee also has been considering whether a rule amendment would be warranted on the topic of electronically filed documents that include signatures by someone other than the electronic filer. The question arises in the bankruptcy context with respect to attorney filings containing debtors' signatures, but the issue is not limited to that context. The Bankruptcy Rules Committee, at its spring meeting, considered adopting a rule on electronic signatures but decided not to proceed with the proposal. Mr. Letter noted that problems arise with respect to fraudulent signatures on bankruptcy petitions. The FBI, he reported, requires an original signature for purposes of handwriting analysis.

Judge Chagares noted, as well, Mr. Rabiej's recent proposal that the requirement of proof of service be eliminated for instances when service is accomplished through CM/ECF. The Civil Rules Committee is considering a similar proposal.

Finally, Judge Chagares mentioned Item No. 13-AP-D, which concerns suggestions submitted by Judge S. Martin Teel, Jr., concerning Rules 6(b)(2)(B)(iii) and 3(d)(1). Judge Teel, a United States Bankruptcy Judge, suggests deleting Rule 6(b)(2)(B)(iii)'s reference to "a certified copy of the docket entries prepared by the clerk under Rule 3(d)" and inserting "the docket entries maintained by the clerk of the district court or bankruptcy appellate panel." Judge Teel explains that the reference to certification is unnecessary, that the lower-court clerk maintains rather than prepares the docket entries, and that the cross-reference to Appellate Rule 3(d) is superfluous. Judge Teel also questions why Rule 3(d) requires the lower-court clerk to transmit a copy of the docket entries to the court of appeals now that docket entries are available electronically. Judge Chagares suggested that there does not appear to be any current problem arising from these features of Rules 3 and 6. By consensus, the Committee decided to remove Item No. 13-AP-D from its study agenda.

E. Item No. 07-AP-E (FRAP 4(a)(4) and "timely")

Judge Colloton introduced Item No. 07-AP-E, which concerns whether to amend Rule 4(a)(4) to address a circuit split that has developed as to whether a motion filed within a purported extension of a non-extendable deadline under Civil Rules 50, 52, or 59 counts as "timely" under Rule 4(a)(4). A majority of the circuits to address this issue have concluded that such a motion does not count as timely; but the Sixth Circuit has held to the contrary.

Judge Colloton reviewed possible options for amending Rule 4(a)(4) to adopt either the majority or minority approach. To adopt the majority approach, one might simply revise the

current rule to refer, not to timely motions, but to motions filed "within the time allowed by" the Federal Rules of Civil Procedure; this could be called the "concise" approach. Or one might retain the word "timely" and add a new subdivision to define what "timely" means (and does not mean); one could call this the "definitional" approach. Judge Colloton solicited the Committee's views on whether it would be worthwhile to amend Rule 4(a)(4) to clarify this question – and, if so, what position the Rule should be amended to take.

An appellate judge member stated that, among the options for implementing the majority view, he preferred the concise approach. The Reporter asked which approach would be most informative for lawyers with less experience in appellate practice. Another appellate judge member observed that it may be natural (though erroneous) for district judges to assume that they can extend the deadlines for motions under Civil Rules 50, 52, and 59. An attorney member agreed, and noted that in such instances it would also be natural for lawyers to assume that they could rely on such an extension. The appellate judge member suggested that a definitional approach would not be out of place in Rule 4(a); that rule already includes subdivision (a)(7), which defines entry of judgment.

It was suggested that the proposed Committee Note set forth on page 288 of the agenda book was too long, and that some of the Note could be replaced by a cite to the relevant Sixth Circuit decision. An appellate judge member suggested that the Committee amend the Rule to adopt the majority approach. The sense of the Committee proving to be in agreement with this suggestion, the Committee next turned to the choice between the "concise" and "definitional" approaches. A straw poll disclosed a vote of 7 to 2 in favor of the "concise" approach. One of the attorney members who voted in favor of the concise approach stated, however, that he wished to ensure that the Committee Note provided some instruction to lawyers about the problem of non-extendable deadlines.

On the evening of April 28, the Chair and Reporter revised the Committee Note to reflect the Committee's discussion. On the morning of April 29, the Committee reviewed the revised Committee Note. Professor Coquillette confirmed that, in this context, it was permissible for the Committee Note to cite a case (namely, the Sixth Circuit decision that the amendment is designed to reject). The Committee made one further change, to the Committee Note's characterization of the circuit split. A motion was made to approve the proposed amendment – namely, the "concise" approach adopting the majority view of "timely" – and the revised Committee Note. The motion was seconded and passed by voice vote without opposition.

V. Discussion Items

A. Item Nos. 08-AP-J, 08-AP-R, and 09-AP-A (disclosure requirements)

Judge Colloton introduced these agenda items, which relate to disclosure requirements.

Item No. 08-AP-J concerns a 2008 suggestion by the Judicial Conference Committee on Codes of Conduct that the Rules Committees consider possible rule amendments having to do

with conflict screening. Two of the three aspects of the Codes of Conduct Committee's inquiry focused on criminal and bankruptcy practice. Neither the Criminal Rules Committee nor the Bankruptcy Rules Committee proceeded with proposals in response to the Codes of Conduct Committee's suggestion, and those aspects of Item No. 08-AP-J thus present no issues for the Appellate Rules Committee. However, the Committee's inquiry also highlighted possible overlaps among Appellate Rule 26.1, local circuit provisions, and prompts in the CM/ECF system. That topic, Judge Colloton suggested, may be worth pursuing. Some circuits require disclosures beyond those mandated by the Appellate Rules. The Appellate Rules Committee, working with the Codes of Conduct Committee, may wish to consider whether any additional disclosures should be required by the Appellate Rules. Judges would like to be apprised of information that is relevant to a possible need to recuse from a case.

An attorney member agreed that this question is worth pursuing. Another attorney member suggested that, conversely, Appellate Rule 26.1's existing disclosure requirement may be overbroad. Rule 26.1 requires nongovernmental corporate parties to identify any parent corporation and any publicly held corporation that owns 10 percent or more of the party's stock. The attorney member asked why this requirement should encompass instances when an entity holds the stock in a beneficial capacity as trustee. Stock ownership frequently changes, the member observed, and the Rule could be read to require updates each time such changes put ownership above the 10 percent threshold.

The Reporter mentioned that Item Nos. 08-AP-R and 09-AP-A arise from comments submitted on a proposed amendment to Appellate Rule 29(c). The ABA Council of Appellate Lawyers suggested revisions to the portion of Rule 29(c) that requires corporate would-be amici to submit "a disclosure statement like that required of parties by Rule 26.1." The Council's suggestion appeared to proceed from the premise that the current language of Rule 29(c) could be read to permit "some degree of difference" between the Rule 29(c) corporate-disclosure statement and the Rule 26.1 corporate-disclosure statement. But it is difficult to imagine what sort of difference would arise. A corporate amicus should understand that its obligation is to (a) identify any parent corporation and any publicly held corporation that owns 10 % or more of its stock or (b) state there is no such corporation. The Council does not suggest any variations that would be likely to arise under the Rules' current language. The Reporter suggested that the Committee consider removing Item 09-AP-A from its agenda.

Item No. 08-AP-R arises from suggestions made by Chief Judge Easterbrook. He points out that the term "corporation" in Rules 26.1 and 29(c) encompasses entities from which a disclosure is unnecessary because they do not have stock – such as the Catholic Bishop of Chicago. But while the Rule requires such entities to disclose that they have no stock and no parents, that is not necessarily a downside; by requiring that explicit statement, the Rule makes it easy to tell whether a corporate filer has complied with the disclosure requirement. The Reporter suggested that the Committee not proceed further with this aspect of Chief Judge Easterbrook's comments. Chief Judge Easterbrook's other critique is that the corporate-disclosure requirements in Rules 26.1 and 29(c) fail to elicit all of the information that would be relevant to a judge in considering whether to recuse. This aspect of Item No. 08-AP-R, the Reporter

suggested, provides an apt vehicle for pursuing the sorts of inquiries Judge Colloton noted.

By consensus, the Committee removed Item Nos. 08-AP-J and 09-AP-A from, but retained Item No. 08-AP-R on, its agenda.

B. Item Nos. 09-AP-D & 11-AP-F (response to *Mohawk Industries*)

Judge Colloton reminded the Committee that Item Nos. 09-AP-D and 11-AP-F arise from the Supreme Court's decision in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009). In *Mohawk*, the Court held that a district court's order to disclose information that the producing party contends is protected by attorney-client privilege does not qualify for an immediate appeal under the collateral order doctrine. The *Mohawk* Court stated that choices concerning the appealability of interlocutory orders ideally should be made through the rulemaking process rather than by judicial decision – a point that echoed the Court's earlier, similar statement in *Swint v. Chambers County Commission*, 514 U.S. 35 (1995).

The Committee asked Andrea Kuperman to perform some initial research on the doctrinal landscape of the appealability of prejudgment orders. Judge Colloton observed that the agenda materials included a memorandum by Ms. Kuperman that surveys types of interlocutory decisions that are clearly appealable (or not appealable) under current Supreme Court caselaw, as well as types of interlocutory decisions the treatment of which has divided the lower courts. Judge Colloton expressed appreciation for Ms. Kuperman's hard work and helpful memorandum. The initial question for the Committee, he suggested, is whether a general overhaul of the treatment of interlocutory orders would be a manageable project for the Committee, or whether it would be wiser for the Committee to consider the appealability of particular types of interlocutory orders as and when a suggestion brings that specific type of order to the Committee's attention.

Judge Sutton recalled that the Committee has, in the past, noted complexities and difficulties in the treatment of decisions concerning qualified immunity. That appealability question, he noted, is presented in a case before the Supreme Court this Term (*Plumhoff v. Rickard* (No. 12-1117)). An attorney member stated that it would be wildly unrealistic to attempt a global project to overhaul the treatment of appealability of interlocutory orders. Even a project focused solely on addressing the appealability of qualified-immunity rulings, he suggested, would take several years to complete.

An appellate judge member proposed removing this item from the Committee's agenda. Mr. Katsas, though, suggested that it would be useful for the Committee to discuss further the appealability of attorney-client privilege rulings. Mr. Letter agreed, noting that the Court in *Mohawk* had highlighted the possibility of rulemaking on the privilege-appeals topic. In response to an invitation by Judge Colloton, Mr. Katsas and Mr. Letter agreed to work with the Reporter on the topic of attorney-client-privilege appeals, with a view to presenting a report to the Committee at its fall 2014 meeting.

C. Item No. 12-AP-F (class action objector appeals)

Judge Colloton introduced this item, which concerns a proposal for addressing appeals by objectors to a class action settlement. He invited the Reporter to summarize briefly the Committee's research thus far. The Reporter noted that district judges may lack full information concerning the fairness of a proposed settlement, and that objectors can be a helpful source of such information. Civil Rule 23(e) is designed to promote careful scrutiny of a proposed class settlement; it requires notice, a hearing, and a finding that the proposed settlement is fair, reasonable, and adequate. Rule 23(e) authorizes objections by any class member, and requires court approval for the withdrawal of such an objection once it has been made.

Concerns have been raised that some objectors lodge objections for the purpose of extracting a side payment from class counsel in exchange for dropping the objection. Rule 23(e)'s requirement of court approval for the withdrawal of objections constrains such pay-offs while the case is in the trial court, but no rule imposes a similar constraint during an objector's appeal from a district court order approving the settlement. If an objector appeals but then drops the appeal in exchange for a side payment, two costs arise: First, the extraction of the side payment functions as a tax on class counsel and could be viewed as unseemly; and second, the discontinuance of an appeal that raised serious issues about the fairness of the class settlement deprives class members of the opportunity to benefit from the resolution of the merits of the appeal.

Various strategies have been proposed for addressing the problem. The objector-appellant's leverage for extracting a side payment arises from the fact that, in practice, such an appeal will often delay implementation of the settlement. Thus, one approach focuses on decreasing the objector-appellant's leverage by speeding the implementation of the settlement despite the pendency of the appeal. Quick-pay provisions (allowing for payment of some or all of class counsel's fees while the appeal is pending) provide an example of this approach.

Another approach would be to set hurdles that an objector must surmount in order to appeal. Some courts have, for example, required sizeable appeal bonds as a condition for taking such an appeal; but there are questions about whether the size of a bond for costs on appeal (under Appellate Rule 7) can be enlarged to take account of anticipated attorney fees and costs associated with delay in implementation of the settlement. At the Committee's spring 2013 meeting, Judge D. Brooks Smith and Professor John E. Lopatka presented their proposal for amendments to Appellate Rules 7 and 39 that would presumptively require objector-appellants to post a bond for costs on appeal that would include costs and attorney fees attributable to the pendency of the appeal (and that would presumptively require imposition of those fees and costs if the court of appeals affirms the order approving the settlement). An appellate judge member suggested that it would be worthwhile for the Committee to consider the appeal-bond possibility further; another appellate judge member noted the need to take care not to deter objector appeals that raise valid questions about a settlement's propriety.

Another way of setting a hurdle for objector appeals would be to impose a "certificate of

appealability" ("COA") requirement – akin to that imposed on habeas petitioners, who must make "a substantial showing of the denial of a constitutional right" in order to obtain the COA that is a requisite for an appeal of the denial of a habeas petition. The Reporter questioned, however, whether a COA requirement could be imposed by rulemaking without an accompanying statutory change.

Judge Colloton observed that the Committee was indebted to Marie Leary for her painstaking and informative study concerning class-action-objector appeals. He invited Ms. Leary to summarize her findings for the Committee. Ms. Leary explained that she had searched the CM/ECF district court databases for cases (filed in 2008 or later) in the Second, Seventh, and Ninth Circuits in which an appeal was taken from an order approving a class settlement. Objector appeals tend to be relatively rare as a proportion of each circuit's overall appellate caseload; however, they are a significant feature in large multidistrict litigation and nationwide class actions.

Ms. Leary found that the trend concerning disposition of objector appeals in the Second Circuit differs from the trend concerning disposition of such appeals in the Seventh and Ninth Circuits. In the Seventh and Ninth Circuits, objector appeals tend to be voluntarily dismissed (under Appellate Rule 42(b)) within 200 days after the appeal was filed (and before the appellant files its brief). By contrast, in the Second Circuit a majority of terminated appeals were decided on the merits (by unpublished summary orders). Ms. Leary observed that the explanation for this difference is not clear; she wondered whether the Second Circuit puts the appeals on an expedited track for disposition.

Ms. Leary noted a feature of practice in the Ninth Circuit concerning Rule 7 cost bonds. In instances where the district court ordered the objector to post a cost bond but the objector failed to do so, the Ninth Circuit did not dismiss the appeal for failure to post the bond; rather, the court deferred (until the time of argument) its ruling on the consequences of the failure. Although the Ninth Circuit thus appears not to have responded immediately to the failure to post the bond, that failure did not go unnoticed in the court below; in some cases, it was followed by contempt findings and the imposition of sanctions by the district court.

Judge Colloton reported that he had discussed with Ms. Leary, and with Judge Jeremy Fogel (the Director of the FJC), the possibility of conducting a survey of attorneys who practice in this field. Judge Fogel and others within the FJC had expressed concern about possible obstacles to conducting an effective survey study on the topic of class-action-objector appeals. Instead, Judge Fogel proposed that the Committee consider co-sponsoring (with the Civil Rules Committee) a mini-conference on class action practice. Such a mini-conference could bring together knowledgeable participants to discuss review of class settlements both in the district court and on appeal. Judge Sutton observed that the Civil Rules Committee has already discussed the possibility of planning a mini-conference on class action practice. Judge Colloton noted that the Appellate Rules Committee would be glad to work with Judge Robert Michael Dow, Jr. – the Chair of the Civil Rules Committee's Rule 23 Subcommittee – on the planning for such a mini-conference.

A member asked whether it would be useful for Ms. Leary to examine how objector appeals fare in other circuits, such as the Fifth Circuit. Judge Colloton invited Ms. Leary to discuss the methodology for her study, which has been, of necessity, very labor-intensive. Ms. Leary explained that there is no quick way to identify the relevant appeals using the CM/ECF databases at the level of the courts of appeals; thus, one must start by searching for class actions at the level of the district court and then identifying, within that pool of cases, the subset of cases that feature an appeal from a judgment approving a class settlement.

An appellate judge member asked whether it would be possible to address inappropriate objector appeals by sanctioning the objector's attorney. The Reporter noted reports that district judges tend not to want to spend time on such sanctions motions. Likewise, Professor Coquillette has observed a reluctance to pursue the possibility of attorney discipline under Model Rules 3.4 and 8.4.

Mr. Letter suggested that the general topic warranted further consideration by the Appellate Rules Committee, in conjunction with the Civil Rules Committee. By consensus, the Committee retained this item on its agenda.

D. Item No. 13-AP-C (*Chafin v. Chafin* / ICARA appeals)

Judge Colloton invited the Reporter to introduce Item No. 13-AP-C, which arose from the suggestion by three Justices, in *Chafin v. Chafin*, 133 S. Ct. 1017 (2013), that the Committee consider whether to propose rules to expedite appellate proceedings under the Hague Convention on the Civil Aspects of International Child Abduction (the "Convention"). The Convention requires courts in the United States to order a child returned to his or her country of habitual residence if the child has been wrongfully removed to the United States. In *Chafin*, the Court held that an appeal from such an order did not become moot upon the child's return to the country of habitual residence. In response to concerns that being sent back and forth across national borders would harm the children involved, the *Chafin* Court observed that the goals of the Convention (and the federal legislation that implements it) could be served by a combination of expedited proceedings and (where appropriate) stays. Justice Ginsburg, joined by Justices Scalia and Breyer, concurred in *Chafin* and suggested that the rulemakers consider this topic.

The Civil and Appellate Rules Committees discussed the Justices' suggestion at their spring 2013 meetings, as did the Standing Committee at its June 2013 meeting. In September 2013, Judge Sutton wrote to Justice Ginsburg to thank her for her suggestion and to report the Committees' view that the best course, as an initial matter, would be to address the topic by judicial education rather than rulemaking. Many courts already do expedite child custody matters under the Convention, and Appellate Rule 2 gives courts of appeals the flexibility to do so. Judge Fogel has committed, on behalf of the FJC, to educating judges about the need, and existing tools, for expediting disposition of such matters. Judge Sutton reported that Justice Ginsburg had responded that she viewed this approach as a sound one and that she appreciated the Committees' attention to the matter.

By consensus, the Committee removed this item from its agenda.

VI. Additional Old Business and New Business

A. Item No. 13-AP-E (audiorecordings of appellate arguments)

Judge Colloton invited the Reporter to summarize her research concerning Item No. 13-AP-E, which arose from Mr. Garre's suggestion that the Committee consider adopting a rule concerning the release of audiorecordings of appellate arguments.

The Reporter noted that the circuits take widely differing approaches to the release of such audio, although the trend appears to be toward more and faster access. The Second and Eleventh Circuits provide the least access to audio recordings; they do not post audio online, though they permit attorneys to buy the audio on CDs. The Tenth Circuit posts online what appears to be audio of a few selected arguments; as to other arguments, one must make a motion to obtain the audio. At the other end of the spectrum are circuits that provide quick and full online access to argument audio. The DC Circuit and Eighth Circuits post the audio on the same day as the argument; the Ninth Circuit, on the day after argument; and the Fourth Circuit, two days after argument. The other six circuits make audio available online, but the Reporter had been unable to discern (from online sources) precisely how quick and how comprehensive their postings are.

An attorney member voiced support for a national rule requiring prompt posting of audio; the Second Circuit, he reported, had recently taken three weeks to provide an audio CD of a particular argument. Judge Chagares pointed out that the Third Circuit is currently studying questions relating to videorecordings of court proceedings, and he expressed interest in hearing any views that participants might have on that topic.

An appellate judge member asked whether problems have arisen, in any cases, concerning references made during an argument to information that is subject to redaction requirements. The Reporter noted her tentative recollection that at least one circuit has a local provision setting out a procedure for seeking to have the audio sealed in such an instance.

Judge Sutton suggested that this matter seems to fall within the primary jurisdiction of the Judicial Conference Committee on Court Administration and Case Management ("CACM"). He observed that Judge Amy J. St. Eve, who now serves as a member of the Standing Committee, used to be a member of CACM.

By consensus, the Committee decided to remove this item from its study agenda, with the understanding that Judge Colloton would communicate to Judge Julie A. Robinson (the Chair of CACM) the interest in this topic that had been expressed by members of the Committee.

B. Item No. 13-AP-H (*Ryan v. Schad* and *Bell v. Thompson* / FRAP 41)

Judge Colloton introduced this item, which the operation of Appellate Rule 41 in light of the Supreme Court's decisions in *Ryan v. Schad*, 133 S. Ct. 2548 (2013) (per curiam), and *Bell v. Thompson*, 545 U.S. 794 (2005). Rule 41(b) provides that "[t]he court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later," but also provides that "[t]he court may shorten or extend the time." Under Rule 41(d)(1), a timely rehearing petition or stay motion presumptively "stays the mandate until disposition of the petition or motion." A party can seek a stay pending the filing of a certiorari petition; if the court grants such a stay and the party who sought the stay files the certiorari petition, then Rule 41(d)(2)(B) provides that "the stay continues until the Supreme Court's final disposition." Rule 41(d)(2)(D) directs that "[t]he court of appeals must issue the mandate immediately when a copy of the Supreme Court order denying the petition for writ of certiorari is filed."

One question is whether Rule 41 requires the court of appeals to issue the mandate immediately after the filing of the Supreme Court's order denying a petition for a writ of certiorari. Does Rule 41(b) allow the court of appeals discretion to continue to stay the mandate even after the Supreme Court's denial of certiorari and rehearing? The Court did not decide this question in either *Bell* or *Schad*; it ruled that even if the court of appeals has authority to stay the mandate following the denial of certiorari, it could only do so if warranted by extraordinary cirumstances (which, the Court held, were not present in either *Bell* or *Schad*).

An attorney member asked why a court of appeals would ever extend the stay of the mandate after the Supreme Court has denied certiorari. The Reporter noted that both *Bell* and *Schad* were death penalty cases. In *Bell*, the court of appeals had affirmed the denial of a death row prisoner's habeas petition, but later (having called for and examined the district court record) vacated and remanded for an evidentiary hearing. The problem was that, months before this vacatur, the Supreme Court had denied the inmate's petition for rehearing with respect to the Court's denial of the inmate's petition for certiorari. In the interim that followed the Supreme Court's final disposition of the petition for certiorari, the court of appeals had failed to notify the parties that it had stayed its mandate, and the state had proceeded in its preparations for the inmate's execution in reliance on its belief that the court of appeals was done with the case.

Judge Colloton noted that this fact pattern presents a second question – namely, whether a court of appeals can stay the issuance of the mandate, under Rule 41(b), merely through inaction, or whether the court must act affirmatively in order to accomplish such a stay. The original Rule 41 had provided that the mandate would issue 21 days after entry of the court of appeals' judgment "unless the time is shortened or enlarged by order." The words "by order" were deleted during the 1998 restyling of Rule 41. An appellate judge participant suggested that there may be a problematic lack of transparency in a case where the court of appeals stays the mandate without telling the parties that it is doing so. Another appellate judge responded that this particular issue could be addressed by "unstyling" Rule 41(b) – i.e., by returning to the Rule the "by order" that had been deleted during the restyling.

When considering whether to amend Rule 41 to remove the court of appeals' discretion to extend the stay of the mandate after the Supreme Court's final disposition of a certiorari petition, Judge Colloton noted, the Committee might also wish to consider the relevance of the caselaw recognizing an inherent authority, in the courts of appeals, to recall their mandates when warranted by extraordinary circumstances. Even if Rule 41 were amended to remove the court of appeals' discretion to *stay* the mandate after the Supreme Court's final disposition of a certiorari petition, presumably the courts of appeals would retain this inherent authority to recall the mandate in extraordinary circumstances. Are there reasons, Judge Colloton asked, to require a court of appeals to first issue and then recall its mandate in such circumstances (rather than permitting the court of appeals simply to stay the mandate)?

An appellate judge participant suggested that it is important for courts of appeals to retain some flexibility in these matters. An attorney member responded that he thought the court of appeals' discretion concerning stays of the mandate should be less after the Supreme Court has finished with the case than it is before the Supreme Court has ruled on the case. Another attorney member, though, wondered why the Court's denial of certiorari should mark a change in the scope of the court of appeals' discretion; this member noted that, as a formal matter, the denial of certiorari leaves the judgment below untouched.

The agenda materials mentioned, in addition, a quirk in the wording of Rule 41(d). Rule 41(d)(2)(B) provides that if the court grants a request for a stay pending the filing of a certiorari petition, the petition is filed, and appropriate notice is given to the circuit clerk, then "the stay continues until the Supreme Court's final disposition." Rule 41(d)(2)(D) directs that "[t]he court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed." When rehearing is sought in the Supreme Court after a denial of certiorari, the "Supreme Court's final disposition" can occur later than the date when "a copy of a Supreme Court order denying the petition for writ of certiorari is filed." An appellate judge member stated that the Committee should consider whether to adjust Rule 41(d)(2)(D)'s wording to fit more closely with that in Rule 41(d)(2)(B). This issue, he stated, had raised questions in cases that he had litigated before he became a judge.

An attorney member voiced support for considering ways to clarify Rule 41's operation. Another attorney member agreed, and suggested that the Rule should be revised so as to make clear that the court of appeals cannot stay a mandate through mere inaction.

C. Item No. 14-AP-A (FRAP 29(e) and timing of amicus briefs)

Judge Colloton invited the Reporter to introduce Item No. 14-AP-A, which arises from a suggestion by Dean Alan Morrison that Rule 29(e) be revised to set the time period for filing an amicus brief by reference to the due date, rather than the filing date, of the relevant party's brief and to permit extensions of the amicus-brief due date based on party consent. Rule 29(e)'s due date for amicus filings is "no later than 7 days after the principal brief of the party being supported is filed." Dean Morrison points out that if the party files its brief before the due date, the would-be amicus might find that its deadline is very short (or even that the deadline has

already passed) by the time that the amicus becomes aware of the occasion for filing the brief. It would be better, Dean Morrison suggests, if the amicus could rely on having 7 days after the original due date for the party's brief, even if the party files its brief early.

The Reporter noted that pegging the amicus-brief deadline to the due date, rather than the filing date, of the party's brief might pose no problems in a case where the briefing schedule is set by scheduling order. In such a case, the early filing of the appellant's brief would not move up the due date for the appellee's brief, and so the appellee would have sufficient time to review any amicus briefs filed in support of the appellant before filing its own brief. However, in instances when no scheduling order sets the briefing schedule, Rule 31(a)(1) provides that the appellee's brief is due 30 days after service of the appellant's brief – which means that early filing of the appellant's brief moves up the deadline for the appellee's brief as well. In such instances, leaving the amicus-brief deadline at 7 days after the appellant's original filing deadline could leave the appellee with insufficient time to take account of the amicus filing when drafting its own brief.

Thus, the Reporter suggested, the proposal to peg the amicus-brief deadline to the due date for the party's brief seems unlikely to succeed. If the Committee were to agree with that view, that would leave for consideration the proposal to revise Rule 29(e) to allow the extension of the amicus-brief due date by consent of the parties.

An attorney member asked why a rule amendment on this topic is needed; under the current Rule, a would-be amicus can ask the court to extend the deadline. It was also noted that a would-be amicus who is interested in a particular appeal can sign up to receive electronic notifications of docket activity in that appeal, and can obtain electronic copies of the parties' briefs.

Another attorney member asked whether there is any reason not to permit extensions of the Rule 29(e) deadline by party consent. The Reporter observed that, if all parties consent to the extension of the amicus-brief deadline, that would seem to address the concern that an extension of the amicus's deadline would disadvantage the appellee. She asked whether judges would object if extensions were available based on party consent without court leave. An appellate judge member responded that judges would have concerns with such an approach, because it is important to keep cases moving. Another appellate judge member expressed agreement with this view. Another appellate judge predicted that such extensions would generate motions by appellees seeking additional time to file their own briefs; Mr. Letter asked, however, whether a consented-to extension would be likely to throw off the parties' briefing schedule. Mr. Gans suggested that there would be complexities associated with changing Rule 29(e)'s timing provision.

By consensus, the Committee decided to remove this item from its agenda.

D. Item No. 14-AP-B (standard for appellate review of sentencing errors)

Judge Colloton introduced this item, which arises from a suggestion by Judge Jon O. Newman that the Criminal Rules Committee and the Appellate Rules Committee consider a rule amendment to provide "that a sentencing error to which no objection was made in the district court should be corrected on appeal without regard to the requirements of 'plain error' review, unless the error was harmless." Judge Colloton voiced an expectation that the Criminal Rules Committee would take the lead in addressing this suggestion. Judge Reena Raggi, the Chair of the Criminal Rules Committee, has asked a subcommittee (headed by Judge Raymond M. Kethledge) to examine the proposal.

Mr. Letter agreed that it would make sense for the Appellate Rules Committee to wait and see what the Criminal Rules Committee decided with respect to Judge Newman's proposal. An appellate judge member suggested that the Committee not proceed with the proposal.

By consensus, the Committee decided to remove this item from its agenda. Judge Colloton undertook to write to Judge Newman about the Committee's discussion.

E. Information item (proposal by Lawyers for Civil Justice, et al., regarding Civil Rule 23(f))

Judge Colloton invited the Reporter to summarize this information item. The Reporter explained that Lawyers for Civil Justice, Federation of Defense & Corporate Counsel, DRI – The Voice of the Defense Bar, and the International Association of Defense Counsel (collectively, "LCJ") had submitted a collection of class-action-related proposals to the Civil Rules Committee, and that the excerpt from those proposals that was included in the Appellate Rules Committee's agenda materials concerned appeals, under Civil Rule 23(f), from orders concerning class certification. LCJ states that the circuits vary widely in both the standards for granting permission to appeal under Civil Rule 23(f) and also the frequency with which they grant such permission. LCJ suggests that Civil Rule 23(f) be amended to authorize appeals as of right from class certification rulings.

The Reporter observed that she is skeptical about the desirability of such an amendment. Professors Cooper and Marcus have noted that a significant body of appellate caselaw concerning class certification has developed since the adoption of Civil Rule 23(f) in 1998. Other topics concerning class certification – such as the standards for certification of settlement classes, or the proper role of "issues" classes – seem like more productive targets for inquiry.

An appellate judge, however, observed that the low rate at which some circuits grant permission for Rule 23(f) appeals is noteworthy.

F. Information item (*Ray Haluch Gravel Co.*)

Judge Colloton invited the Reporter to summarize the Court's recent decision in *Ray Haluch Gravel Co. v. Central Pension Fund of International Union of Operating Engineers and*

Participating Employers, 134 S. Ct. 773 (2014). The Reporter reminded the Committee that in *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988), the Court had held that a district court's decision on the merits of a case is final for purposes of 28 U.S.C. § 1291 even if the court has not yet ruled on a request for attorney's fees. In *Ray Haluch Gravel*, the Court held that the *Budinich* rule applies even if the basis for the request for attorney fees is contractual rather than statutory.

Responding to the argument that this ruling would result in piecemeal appeals in instances where it would be more desirable for the fee appeal and the merits appeal to be adjudicated together, the *Ray Haluch Gravel* Court reasoned that piecemeal appeals could be avoided, where necessary, by recourse to the Civil Rule 58(e) mechanism that permits a Civil Rule 54(d)(2) motion for attorney fees to be treated the same as a timely Civil Rule 59 motion for purposes of tolling the time to appeal. The Court noted the possibility that some contractual attorney fee requests might not qualify for this mechanism because Rule 54(d)(2) appears not to encompass attorney-fee claims that must, under the relevant substantive law, "be proved at trial as an element of damages." The Court did not seem concerned by the possibility that the Civil Rule 58(e) mechanism might be unavailable in some cases involving claims for contractual attorney fees. Nor has the Appellate Rules Committee received reports of problems arising from such a gap in Rule 58(e)'s coverage. Accordingly, the Reporter did not suggest that the Committee investigate this issue further, though it may be useful to monitor the caselaw for any further developments.

VII. Adjournment

The Committee adjourned at 10:30 a.m. on April 29, 2014.

Respectfully submitted,

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Catherine T. Struve
Reporter

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TAB 6A

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

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

TO: **Hon. Jeffrey S. Sutton, Chair**
Committee on Rules of Practice and Procedure

FROM: **Hon. Sidney A. Fitzwater, Chair**
Advisory Committee on Evidence Rules

RE: **Report of Advisory Committee on Evidence Rules**

DATE: **April 10, 2014**

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on April 4, 2014 at the University of Maine School of Law, Portland, Maine. The meeting was preceded by a Symposium on the Challenges of Electronic Evidence that the University of Maine School of Law hosted at the Committee's request. The Committee is not proposing any action items for the Standing Committee at its May 2014 meeting.

II. Action Items

No action items.

III. Information Items

A. Symposium on the Challenges of Electronic Evidence

Prior to the commencement of the spring meeting, at the request of the Committee, the University of Maine School of Law hosted a Symposium on the Challenges of Electronic Evidence. Symposium panelists addressed topics focused on the intersection between the Evidence Rules and emerging technologies. Their presentations included several thoughtful and detailed proposals that will provide valuable assistance to the Committee as it considers whether to propose amendments

to the Rules of Evidence, or to recommend best practices to the Bench and Bar, to accommodate ever-increasing changes in technology.

The Committee was particularly pleased that Judge Jeffrey S. Sutton, Chair of the Standing Committee, was able to participate as a panelist and present an overview of the challenges of addressing technological change through rulemaking. In addition to Judge Sutton, Judge Paul Grimm (District of Maryland), Chief Judge John A. Woodcock (District of Maine, and a member of the Committee), Gregory P. Joseph, Esquire (private practice, New York City), and John Haried, Esquire (Department of Justice) addressed authenticity issues; Professor Jeffrey Bellin (William and Mary Marshall-Wythe College of Law), Paul Shechtman, Esquire (private practice, New York City, and a member of the Committee), and Professor Deirdre Smith (University of Maine School of Law) discussed hearsay and related issues; Judge Shira A. Scheindlin (Southern District of New York) and David Shonka, Esquire (Federal Trade Commission) addressed adverse inferences; Daniel Gelb, Esquire (private practice, Boston) discussed expert witness issues; Andrew Goldsmith, Esquire (Department of Justice) made a presentation concerning Fed. R. Evid. 502(d) orders in grand jury proceedings; and George Paul, Esquire (private practice, Phoenix), and Paul Lippe, Esquire (CEO, Legal OnRamp) addressed possible forthcoming changes in electronic technology. Committee Reporter, Professor Daniel J. Capra, organized the Symposium and served as moderator.

The proceedings will be published in the *Fordham Law Review*.

B. Proposed Amendments to Rules 801(d)(1)(B) and 803(6)-(8)

As previously reported, the proposed amendments to Rules 801(d)(1)(B) and 803(6)-(8) that the Standing Committee approved at its June 2013 meeting for transmittal to the Judicial Conference were approved by the Judicial Conference on the consent calendar at its September 2013 meeting. The amendments were subsequently adopted by the Supreme Court pursuant to Section 2072 of Title 28, United States Code. The Court submitted the proposed amendments to Rules 801(d)(1)(B) and 803(6)-(8) to the Congress on April 25, 2014.

C. Possible Amendment to Rule 803(16)

The Committee engaged in a preliminary discussion about whether Rule 803(16) — which provides a hearsay exception for "ancient documents" — should be amended or repealed. The Committee intends to discuss this matter further at its fall meeting.

Rule 803(16) provides that, if a document is more than 20 years old and appears authentic, it is admissible for the truth of its contents. Although the rationale for this exception has been questioned, it appears that the exception has been tolerated because it has been used so infrequently, and usually because there is no other evidence on point. This exception may prove to be more problematic, however, with the development and exploding use of electronically stored information ("ESI"). If the premise that ESI can easily be retained for more than 20 years proves to be true over

time, it is possible that the ancient documents exception will be used much more frequently. And Rule 803(16) could be relied on to introduce unreliable hearsay, because reliable hearsay is often admissible under one of the reliability-based exceptions, such as for business records. Moreover, the need for an ancient documents exception is questionable as applied to ESI because there may well be ample reliable electronic data available to prove any dispute of fact.

The Committee identified questions that should be addressed before a decision could be made concerning proposing an amendment to, or the repeal of, Rule 803(16), and this matter will be on the agenda for the Committee's fall meeting.

D. Possible Amendment to Rule 609(a)(2)

The Committee discussed whether Rule 609(a)(2) should be amended and concluded unanimously that it should not.

Rule 609(a)(2) provides that a witness's recent conviction involving dishonesty or false statement is automatically admissible to impeach the witness in any case — no matter how serious the conviction. It is the only Evidence Rule that requires evidence to be admitted automatically, without any consideration of prejudice or cumulative effect. Several law review articles have suggested that Rule 609(a)(2) should be amended to allow the judge to balance probative value against prejudicial and cumulative effect.

Committee members expressed various reasons for retaining Rule 609(a)(2) in its present form, and they voted unanimously to retain it.

E. Possible Amendments to the Hearsay Exceptions

In response to a referral from the Clerk of Court of the Seventh Circuit, the Committee discussed proposed changes to hearsay exceptions in the Rules of Evidence that Judge Posner suggested in his concurring opinion in *United States v. Boyce*, 742 F.3d 792 (7th Cir. 2013). The Committee unanimously concluded that no such changes should be made at this time.

Judge Posner proposed the following three amendments: (1) Rule 803(1) (the exception for present sense impressions) should be abrogated because its premise — that declarants do not have time to lie if their statements are made at or near the time of an event — is empirically unsupported and belied by social science research; (2) Rule 803(2) (the exception for excited utterances) should be abrogated because its premise — that declarants cannot lie if they are startled — is empirically unsupported and belied by social science research; and (3) Rule 807 (the residual exception) should replace most or all of the hearsay exceptions, so that the trial judge would admit hearsay evidence whenever the judge determines it to be reliable. Judge Posner opined that the hearsay rule and its exceptions are "too complex, as well as being archaic."

Although Committee members agreed with Judge Posner in certain respects, there was no sentiment to change hearsay exceptions that have been addressed by the Supreme Court of the United States itself, or to take the significant step of replacing specific, known hearsay exceptions with a balancing test to be applied on an individual-judge basis — a proposal that was rejected when the Rules of Evidence were adopted originally.

Although Judge Posner's suggestions were not adopted, it is possible that the Committee will consider as part of its study of the impact of technological changes on the Rules of Evidence whether changes are needed to any of the hearsay exceptions, including Rule 803(1) and Rule 803(2).

F. Report on the Effect of CM/ECF on the Evidence Rules

The Committee Reporter made a presentation concerning the Standing Committee's Subcommittee on Electronic Case Filing and Case Management ("CM/ECF") and the possible effect of CM/ECF on the Evidence Rules. He concluded that very few, if any, changes needed to be made to the Evidence Rules because (1) the Restyled Evidence Rules already cover electronic information, because Rule 101(b)(6) provides that any reference in the Rules to any kind of written material "includes electronically stored information"; and (2) the Evidence Rules are concerned with admissibility, and generally not with such physical acts as filing and mailing.

The Committee considered the presentation and reviewed the Reporter's written report and determined that there was no need to consider any amendment to the Evidence Rules to accommodate electronic case filing using CM/ECF.

G. *Crawford v. Washington* and the Hearsay Exceptions in the Evidence Rules

As previous reports have noted, the Committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*, in which the Court held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to confront and cross-examine the declarant.

The Reporter regularly provides the Committee a case digest of all federal circuit cases discussing *Crawford* and its progeny. The goal of the digest is to enable the Committee to keep current on developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions.

H. "Continuous Study" of the Evidence Rules

The Committee is responsible for engaging in a "continuous study" of the need for any amendments to the Federal Rules of Evidence. The grounds for possible amendments include (1) a split in authority about the meaning of a rule; (2) a disparity between the text of a rule and the way that the Rule is actually being applied in courts; and (3) difficulties in applying a rule, as

experienced by courts, practitioners, and academic commentators. Under this standard, the Reporter periodically presents possible amendments for Committee consideration.

I. Privileges Report

At the spring 2014 meeting, Professor Kenneth S. Broun, the Committee's consultant on privileges, presented his analysis of the state secrets privilege, the informant's privilege, the political vote privilege, and the deliberative process privilege. Professor Broun stated that he had finished all of the survey rules for the privileges that were worthy of treatment in a survey of federal common law.

Professor Broun's work on privileges is informational and is part of his continuing work to develop an article that he will publish on the federal common law of privileges. It neither represents the work of the Committee itself nor suggests explicit or implicit approval by the Standing Committee or the Committee.

IV. Minutes of the Spring 2014 Meeting

The draft of the minutes of the Committee's spring 2014 meeting is attached to this report. These minutes have not yet been approved by the Committee.

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Advisory Committee on Evidence Rules

Minutes of the Meeting of April 4, 2014

Portland, Maine

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on April 4, 2014, at the University of Maine School of Law.

The following members of the Committee were present:

Hon. Sidney A. Fitzwater, Chair
Hon. Brent R. Appel
Hon. Debra Ann Livingston
Hon. William K. Sessions, III
Hon. John A. Woodcock, Jr.
Edward C. DuMont, Esq.
Paul Shechtman, Esq.
Elizabeth J. Shapiro, Esq., Department of Justice
A.J. Kramer, Esq., Public Defender

Also present were:

Hon. Jeffrey S. Sutton, Chair of the Committee on Rules of Practice and Procedure
Hon. Arthur L. Harris, Liaison from the Bankruptcy Committee
Hon. Paul Diamond, Liaison from the Civil Rules Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Kenneth S. Broun, Consultant to the Committee
Professor Daniel Coquillette, Reporter to the Standing Committee
Catherine R. Borden, Esq., Federal Judicial Center
Jonathan Rose, Chief, Rules Committee Support Office

Professor Deirdre Smith, University of Maine Law School
Professor Jeffrey Bellin, William and Mary Law School
Peter Murray, Esq.
George Paul, Esq.
Daniel Gelb, Esq.

I. Opening Business

Welcoming Remarks

Judge Fitzwater, the Chair of the Committee, greeted the members and thanked Dean Pitegoff and Professor Deirdre Smith of the University of Maine School of Law for hosting the Committee meeting and the Symposium on Electronic Evidence.

Approval of Minutes

The minutes of the Spring 2013 Committee meeting were approved. (The Fall meeting was canceled due to the government shutdown).

New Members and Other Business

Judge Fitzwater introduced and welcomed the new Committee member, Judge Livingston of the Second Circuit Court of Appeals. He also introduced A.J. Kramer, Public Defender for the District of Columbia, who was attending his first meeting in person.

Judge Fitzwater also noted that this would be his last meeting presiding as Chair of the Committee. He congratulated the incoming Chair, Judge Sessions. The Reporter stated that Judge Fitzwater will be honored at the next meeting for his stellar service to and leadership of the Evidence Rules Committee for the past four years.

June Meeting of the Standing Committee

The Chair reported on the January meeting of the Standing Committee. The Evidence Rules Committee presented no action items at the meeting. The Standing Committee did discuss the proposal to amend the Bankruptcy Rules to provide for electronic signatures — a proposal that the Evidence Rules Committee had previously reviewed.

Discussion of the Electronic Evidence Symposium

Judge Fitzwater extended his compliments to all of the panelists at the Symposium on the challenges of electronic evidence, which took place on the morning of the Committee meeting. He noted that a number of detailed and credible proposals for change to the Evidence Rules — to accommodate electronic evidence — were made and discussed by the panelists. The Reporter stated that these proposals will form the bulk of the Committee's agenda in the next year.

Judge Sutton observed that even if some of the proposals made at the Symposium might not end up to be appropriate for rule amendment — because, for example, they may be too specific or subject to obsolescence due to changes in technology — the Committee might consider working on those proposals with the goal of establishing a "best practices" template that could be distributed to judges and litigants.

II. Privileges Report

Professor Broun, the Committee's consultant on privileges, presented his analysis of the state secrets privilege, the informant's privilege, the political vote privilege and the deliberative process privilege. This presentation was part of Professor Broun's continuing work to develop an article that he will publish on the federal common law of privileges. Professor Broun stated that he had finished all of the survey rules for the privileges that were worthy of treatment in a survey of federal common law. He noted that instead of a general rule on waiver, he had included separate waiver rules on each of the privileges, as the waiver rules differed somewhat among the privileges.

The Chair emphasized that Professor Broun's work, when it is published, will neither represent the work of the Committee nor suggest explicit or implicit approval by the Standing Committee or the Advisory Committee.

Professor Broun asked for the Committee's guidance on where to publish the survey rules. The Committee agreed that it would be better to have the survey published in a law review article, or the Federal Rules Decisions, rather than under the auspices of the FJC — in order to avoid any inference that the survey rules had received an imprimatur from the Committee. Once it is published independently, the FJC and the Committee could use Professor Broun's extensive work as a valuable resource.

Committee members expressed profound gratitude to Professor Broun for his excellent work in keeping the Committee apprised of developments in the area of privileges.

III. Possible Amendment to Rule 803(16)

Rule 803(16) provides a hearsay exception for "ancient documents." If a document is more than 20 years old and appears authentic, it is admissible for the truth of its contents. The rationale for the exception has always been questionable, for the simple reason that a document does not become reliable just because it is old; and a document does not magically become reliable enough to escape the rule against hearsay on the day it turns 20. The Reporter noted that the exception has been tolerated because it has been used so infrequently, and usually because there is no other evidence on point. The Committee considered the Reporter's memorandum raising the possibility that Rule 803(16) should be amended because of the development of electronically stored

information. If it is the case that electronically stored information can easily be retained for more than 20 years, it is then possible that the ancient documents exception will be used much more frequently in the coming years. And it could be used to admit only unreliable hearsay, because if the hearsay is in fact reliable it will probably be admissible under other reliability-based exceptions, such as the business records exception. Moreover, the need for an ancient documents exception is questionable as applied to ESI, for the very reason that there may well be a lot of *reliable* electronic data available to prove any dispute of fact.

The Reporter noted that the memorandum on the ancient documents exception and its relationship to ESI was preliminary, and he was simply asking whether the Committee was interested in considering a formal proposal for amendment at the next meeting. A member responded that he was very interested in considering the proposal, noting that the possible widespread application of Rule 803(16) to ESI was an issue that the Committee should address before it becomes a serious problem. That member suggested that the most viable proposal would be to limit applicability of the exception to situations of necessity, i.e., the exception should only apply where the proponent could not find other more reliable information through reasonable efforts. Another Committee member suggested that the exception should be eliminated "before people discover it exists."

Other Committee members noted that before a rule amendment is actually proposed, the Committee has to be sure that its factual premises are sound. That involves two questions: 1) is it really the case that ESI will be preserved for more than 20 years, given the prevalence of data destruction programs?; and 2) even if ESI is preserved unchanged for such a long period, will it be easy to retrieve? The Reporter stated that he would research these questions and seek to provide answers before the next meeting.

The Committee resolved to further consider a possible amendment to Rule 803(16) at the next meeting.

IV. Report on Effect of cm/ecf on the Evidence Rules

The Reporter discussed the work of the Standing Committee's Subcommittee on electronic case filing and case management. The Subcommittee is chaired by Judge Chagares and has members from each of the Advisory Committees. Judge Woodcock is serving as the representative of the Evidence Rules Committee. The Advisory Committee Reporters serve as consultants, and each of the Reporters prepared a memorandum on changes that might be necessary to their respective rules due to electronic case filing. For example, if a rule referred to hardcopy (e.g., covers on a brief, written notice, copies, etc.), or to a physical act (e.g., mailing), it might need to be amended to accommodate electronic information and electronic filing.

The Reporter to the Evidence Rules Committee prepared a report on the possible effect of cm/ecf on the Evidence Rules, and that report was included in the agenda book for the Fall meeting.

The report concluded that very few, if any, changes needed to be made to the Evidence Rules, for two reasons: 1) the Restyled Rules already cover electronic information, because Rule 101(b)(6) provides that any reference in the Rules to any kind of written material "includes electronically stored information"; and 2) the Evidence Rules are concerned with admissibility and generally not with such physical acts as filing and mailing.

The Evidence Rules Committee reviewed the report and determined that there was no need at this point to consider any amendment to the Evidence Rules to accommodate electronic case filing.

V. Consideration of Changes to the Hearsay Exceptions

In his concurring opinion in *United States v. Boyce*, 742 F.3d 792 (7th Cir. 2013), Judge Posner proposed three changes to the Federal Rules of Evidence hearsay exceptions:

> 1) Rule 803(1) (the exception for present sense impressions) should be abrogated, because its premise — that declarants don't have time to lie if their statement is made at or near the time of an event — is empirically unsupported and belied by social science research.
>
> 2) Rule 803(2) (the exception for excited utterances) should be abrogated, because its premise — that declarants can't lie if they are startled — is empirically unsupported and belied by social science research.
>
> 3) Rule 807 (the residual exception) should "swallow" most or all of the hearsay exceptions, so that the trial judge would allow hearsay evidence to be admitted whenever the court determines it to be reliable. This proposal was based on Judge Posner's conclusion that the hearsay rule and its exceptions are "too complex, as well as being archaic."

The clerk of the Seventh Circuit referred Judge Posner's opinion to the Advisory Committee for its consideration.

Committee members generally agreed that the empirical support for the stated justifications for Rules 803(1) and 803(2) was weak. But one member argued that statements fitting into these exceptions could be justified on another ground — that they are made at or near an event, so are not memory-dependent and unlikely to be generated for purposes of litigation. Moreover, the Evidence Rules are now operating in a time of great technological change, and abrogating well-established hearsay exceptions may result in unintended consequences. Another member pointed out that in its cases construing the Confrontation Clause, the Supreme Court has expressly relied on the justifications of the excited utterance exception in finding statements in response to an emergency to be properly admitted. In sum, the Committee determined that at this point the case had not been made for abrogating the hearsay exceptions for excited utterances and present sense impressions.

As to the proposal to scrap the hearsay exceptions in favor of a single rule allowing hearsay to be admitted whenever it was found reliable, Committee members noted that a similar proposal was made by the Advisory Committee when the Federal Rules were being drafted. That proposal was roundly criticized by judges and litigants. Judges opposed the rule because they wanted to have the guidance of categorical rules to apply — they did not want to have to reinvent the reliability wheel for every piece of hearsay offered at a trial. And litigants were concerned about unpredictable results depending on the judge's personal approach to hearsay — thus undermining the possibility of settlement. Committee members saw no reason to think that these criticisms were any less valid today than they were in 1970. Moreover, members expressed concern that there would be little or no effective appellate review of a trial court's hearsay rulings. Finally, the Reporter observed that experience under the residual exception indicated that courts applying a totality of circumstances approach often admitted hearsay of dubious reliability against criminal defendants — until that practice was curtailed by the Supreme Court's Confrontation Clause cases starting with *Crawford.* Thus the track record for a rigorous application of a case-by-case approach to reliability is not strong.

No Committee member moved for further consideration of a proposed amendment to the hearsay exceptions along the lines suggested in *United States v. Boyce.*

VI. Possible Amendment to Rule 609(a)(2)

Evidence Rule 609(a)(2) provides that a witness's recent conviction involving dishonesty or false statement is automatically admissible to impeach the witness in any case — no matter how serious the conviction. It is the only Evidence Rule that requires evidence to be admitted automatically, without any consideration of prejudice or cumulative effect. Several law review articles have suggested that Rule 609(a)(2) should be amended to allow the judge to balance probative value against prejudicial and cumulative effect. The Reporter prepared a memorandum setting forth these suggestions for change.

Committee members found that the Rule rationally distinguished convictions that involved dishonesty or false statement from those that did not. Convictions involving dishonesty or false statement are logically more probative of a witness's character for truthfulness than those that are not. Indeed Congress — which devoted more time and consideration to Rule 609(a)(2) than any other rule — could reasonably have thought that a balancing test would be of little use because a trial judge could plausibly find that falsity-based convictions are probative enough to satisfy any balancing test.

Other Committee members noted that Rule 609(a)(2) has the virtue of simplicity and predictability. They observed that the practice in some states such as New York, in which the courts employ balancing tests for all convictions, results in different rulings from different judges. Other members stated that Rule 609(a) was already a complex and detailed rule, with two separate balancing tests for non-falsity based convictions, and a distinction between falsity-based misdemeanors (automatically admitted) and non-falsity based misdemeanors (never admitted). So

any attempt to add a third balancing test in the rule, for falsity-based convictions, would only add to the complexity of the rule.

The Committee unanimously rejected the proposal to add a balancing test to Rule 609(a)(2).

VI. *Crawford* Developments — Presentation on *Williams v. Illinois*

The Reporter provided the Committee with a case digest and commentary on all federal circuit cases discussing *Crawford v. Washington* and its progeny. The cases are grouped by subject matter. The goal of the digest is to allow the Committee to keep apprised of developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions.

The Reporter's memorandum noted that the law of Confrontation was in flux, and suggested that it was not appropriate at this point to consider any amendment to the Evidence Rules to deal with Confrontation issues. The Committee resolved to continue monitoring developments on the relationship between the Federal Rules of Evidence and the accused's right to confrontation.

VII. Next Meeting

The Fall 2014 meeting of the Committee is scheduled for Friday, October 24, at Duke Law School.

Respectfully submitted,

Daniel J. Capra

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TAB 7A

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

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

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

FROM: Honorable Eugene R. Wedoff, Chair
Advisory Committee on Bankruptcy Rules

DATE: May 6, 2014

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on April 22 and 23, 2014, in Austin, Texas, at the University of Texas School of Law. The draft minutes of that meeting accompany this report in Appendix C. The Committee's actions fall into two categories.

First, the Advisory Committee took action on the proposed rule and form amendments that were published for comment in August 2013. One hundred and sixty-four comments were submitted in response to the publication, some of which addressed multiple rules and forms. The comments were considered in a series of subcommittee and working group conference calls prior to the spring meeting and in Committee discussions in Austin. The Advisory Committee now seeks the Standing Committee's final approval of some of the published items: one rule amendment and 29 revised or new forms, most of which were products of the Forms Modernization Project. Because the Committee made significant changes after publication to the chapter 13 plan form and related rules, it requests that the revised form and rules be republished.

The Committee voted not to proceed further with the electronic signature amendment to Rule 5005(a). The reasons for the Committee's decision to withdraw the proposed amendment are discussed below under Information Items.

Second, the Advisory Committee took action on new proposed rule and form amendments. The Committee requests publication for public comment of (1) the remaining group of modernized forms; (2) a new chapter 15 petition and related rule amendments; (3) an amendment to clarify the scope of Rule 3002.1; (4) an amendment to Rule 9006(f) that parallels amendments proposed by other Advisory Committees to eliminate the three-day rule following electronic service; and (5) a revised proof-of-claim attachment form for claims secured by home mortgages.

Part II of this report discusses the action items, grouped as follows:

(A1) matters published in August 2013 for which the Advisory Committee seeks approval for transmission to the Judicial Conference—amendments to Rule 9006(f) and Official Forms 17A, 17B, 17C, 22A-1, 22A-1Supp, 22A-2, 22B, 22C-1, 22C-2, 101, 101A, 101B, 104, 105, 106Sum, 106A/B, 106C, 106D, 106E/F, 106G, 106H, 106Dec, 107, 112, 119, 121, 318, 423, 427;

(A2) minor amendments to Official Forms 3A and 3B, for which the Advisory Committee seeks approval for transmission to the Judicial Conference without publication;

(B1) amendments to Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, 9009, and Official Form 113, for which the Committee seeks approval for republication in August 2014; and

(B2) matters for which the Advisory Committee seeks approval for publication in August 2014—amendments to Rules 1010, 1011, 2002, 3002.1, 9006(f), and new Rule 1012; modernized Official Forms 106J, 106J-2, 201, 202, 204, 205, 206Sum, 206A/B, 206D, 206E/F, 206G, 206H, 207, 309A, 309B, 309C, 309D, 309E, 309F, 309G, 309H, 309I, 312, 313, 314, 315, 401, 410,410A, 410S1, 410S2, 416A, 416B, 416D, 424, and instructions; and the abrogation of Official Forms 11A and 11B.

Part III of this report discusses two information items.

II. Action Items

A. <u>Items for Final Approval</u>

A1. Amendments Published for Comment in August 2013. **The Advisory Committee recommends that the Standing Committee approve the proposed rule and form**

amendments that were published for comment in August 2013 and are discussed below. The discussion of each action item indicates its proposed effective date. Appendix A includes the text of the amended rule and forms that are in this group.

Action Item 1. Rule 9006(f) would be amended to change the words "after service" to "after being served," so that the rule would begin, "When there is a right or requirement to act or undertake some proceedings within a prescribed period after being served, ..." The amendment, which parallels an amendment to Civil Rule 6(d) that was published at the same time, is intended to clarify that only the party that is served by mail or under the specified provisions of Civil Rule 5—and not the party making service—is permitted to add three days to any prescribed period for taking action after service is made

No comments were submitted in response to the publication, and the Advisory Committee unanimously approved it as published. Because the Advisory Committee is requesting publication this summer of an additional amendment to Rule 9006(f) (see Action Item 10), the Committee expects that, if the pending amendment is approved, the Standing Committee will hold it in abeyance to allow both amendments to be sent together to the Judicial Conference. Following this course would likely result in a December 1, 2016, effective date for both amendments.

Action Item 2. Official Forms 17A, 17B, and 17C were proposed in connection with the revision of the bankruptcy appellate rules. Form 17A (Notice of Appeal and Statement of Election) would be amended and renumbered, and Forms 17B (Optional Appellee Statement of Election to Proceed in District Court) and 17C (Certificate of Compliance With Rule 8015(a)(7)(B) or 8016(d)(2)) would be new.

Proposed Form 17A and new Form 17B would implement the provisions of 28 U.S.C. § 158(c)(1) that permit an appellant and an appellee to elect to have an appeal heard by the district court in districts for which appeals to a bankruptcy appellate panel have been authorized. New Form 17C would be used by a party to certify compliance with the provisions of the bankruptcy appellate rules that prescribe limitations on brief length based on number of words or lines of text (the "type-volume limitation").

No comments were submitted in response to the publication of these forms, and the Advisory Committee unanimously approved them at the spring meeting. The Committee requests that the Standing Committee approve these forms and forward them to the Judicial Conference, with the recommendation that they go into effect on December 1, 2014, the presumptive effective date of the revised Part VIII bankruptcy rules. These forms will be renumbered as Official Forms 417A, 417B, and 417C when the remaining modernized forms go into effect.

Action Item 3. Official Forms 22A-1, 22A-1Supp, 22A-2, 22B, 22C-1, and 22C-2 are the modernized "means test" forms that were initially published in 2012 as part of the first phase

of the Forms Modernization Project ("FMP"). The Advisory Committee revised these forms after their initial publication, and the Standing Committee republished them in 2013. In response to the republication, six comments were submitted.

Commenters generally viewed the revisions of the means test forms positively. The National Conference of Bankruptcy Judges ("NCBJ"), for example, thought that the reorganization and revision of the forms made them easier to read and understand, thereby making them easier for debtors to complete and providing clearer information to creditors and trustees.

The comments made a number of detailed suggestions about the wording or content of specific provisions of the means test forms. In response the Advisory Committee made several changes. The changes of greatest significance include the following:

- An instruction about asking for help at the clerk's office was revised to make it clear that the clerk's office could help a filer locate means test data, but that it could not help in completing the form. In addition, the applicable web address for accessing the necessary data was moved to the instructions, where it can be updated as necessary without having to go through the form amendment process.

- The instruction about the grounds for denying chapter 7 relief was revised to state more accurately that "Chapter 7 relief can be denied to a person who has primarily consumer debts if the court finds that the person has enough income to repay creditors an amount that, under the Bankruptcy Code, would be a sufficient portion of their claims."

- An error on line 33 of Form 22A-2 was corrected by removing the instruction "Do not deduct mortgage payments previously deducted as an operating expense in Line 9."

- The omission of a space on Form 22B for claiming a marital deduction if the debtor has a non-filing spouse was corrected by adding space for the marital deduction on lines 12-14 of the revised form.

Some of the comments raised issues that had previously been debated and resolved by the Advisory Committee in promulgating the existing forms. The Advisory Committee voted not to revisit those legal issues in the context of modernizing the forms. The proposed forms would therefore continue the existing treatment with respect to the following issues:

- Whether the income of a nondebtor spouse not used for household expenses of the debtor or the debtor's dependents is included in current monthly income as defined by §101(10A).

- Whether a chapter 7 debtor who completes the means-test-exemption form (B22A-1Supp) must also complete the Statement of Your Current Monthly Income (B22A-1).

- Whether the means test exemption for reservists and National Guard members is temporary.

- Whether space should be provided in Forms 22A-2 and 22C-2 for a debtor to deduct additional expenses beyond those already listed.

- Whether business expenses should be deducted before, rather than after, calculation of the applicable commitment period.

- Whether the forms should expressly provide a debtor the option of using a different method for determining the number of dependents, along with an explanation of why a different method was used.

- In Forms 22A-2 and 22C-2, whether taxes and insurance included in the mortgage payment should be identified on line 9b (monthly amounts due for debts secured by debtor's residence) rather than on line 33 (deductions for debt payments).

- Whether vehicle ownership expenses should be a predetermined allowance based on the IRS Standards rather than the debtor's actual expenses.

- Whether the debtor should be allowed to deduct ongoing retirement plan contributions as specified in § 541(b)(7).

In drafting revised Form 22C-2, the Advisory Committee made a substantive change in addition to the stylistic and formatting changes proposed by the FMP. It added Part 3 in response to the Supreme Court's decision in *Hamilton v. Lanning*, 560 U.S. 505 (2010), which held that changes to income or expenses reported elsewhere on the 22C forms that have occurred by the time of confirmation or are virtually certain to occur must be considered by the court in determining the debtor's projected disposable income. One comment suggested that debtors should be required to report expected changes only if they are virtually certain to occur within one year of the filing. The Advisory Committee rejected the suggestion because *Lanning* did not specify any time limit for changes that are virtually certain to occur.

The Advisory Committee requests that the Standing Committee approve Official Forms 22A-1, 22A-1Supp, 22A-2, 22B, 22C-1, and 22C-2 and send them to the Judicial Conference for approval, with an effective date of December 1, 2014. When the remaining modernized forms become effective, the means test forms will be renumbered Official Forms 108-1, 108-1Supp, 108-2, 109, 110-1, and 110-2.

Action Item 4. Official Forms 101, 101A, 101B, 104, 105, 106Sum, 106A/B, 106C, 106D, 106E/F, 106G, 106H, 106Dec, 107, 112, 119, 121, 318, 423, and 427 are the modernized forms for individual-debtor cases that were published in 2013. They are the products of the second phase of the FMP, and they include forms filed at the commencement of an individual case (petition, schedules, and accompanying documents), the debtor's statement of financial affairs, and other documents required in individual-debtor cases.

Twenty-five formal comments were submitted by the February 18, 2014, deadline, and one other letter was informally submitted to the Committee. The overall evaluation of the published forms was mixed—some of the comments were positive, some were negative, and many made constructive suggestions for specific changes to particular forms. The Advisory Committee made a number of changes suggested by the comments but concluded that the changes do not require republication. The following discussion addresses the most significant comments and the changes made by the Advisory Committee in response.

General Comments. Some of the comments—including ones submitted by the NCBJ, Robert G. Drummond, Rommel Jairam, and Mike Waters—praised the new forms as representing a step in the right direction because they are more readable, easier to fill out, and easier to understand than the current forms. Several others, however, made critical comments similar to ones that were considered by the Advisory Committee and the Standing Committee last year in connection with the initial group of modernized forms. They included criticisms that the new forms will encourage *pro se* filings because they are easier to understand; that they improperly provide legal advice; and that they are too long.

There was nothing in the comments that caused the Advisory Committee to reconsider either its decision to proceed with the project or its earlier responses to these particular criticisms. Whether the use of plain English, clearer instructions, and a cleaner format will encourage more filing without the assistance of counsel has been the subject of discussion since the beginning of the FMP. Members of the Committee believe that comprehensive instructions that explain the magnitude of what the bankruptcy filing requires and that provide ample warnings about the significance of the forms and the possible consequences of inadequate filings should deter, not encourage, uninformed *pro se* filings. In addition, members think that it is important that forms be understandable to all debtors, whether or not represented, because debtors are required to sign the forms under penalty of perjury. The Committee also concluded that eliminating all instructions that provided legal statements would reduce the value of the instructions in explaining both the meaning of the forms and the information necessary to complete them. The instructions were revised, however, to clarify that the person completing the forms is responsible for doing so properly. Finally, the Committee continues to believe that the changes in format that contribute to greater length are likely to prompt more accurate, usable information. The forms also direct the debtor to skip inapplicable questions or sections. The ability of debtors to truncate answers—when the questions either do not apply or have been fully answered—should reduce the length of many of the filed forms.

The Petition and Related Forms—Official Forms 101, 101A, 101B, 104, and 105. The Advisory Committee made one change to the petition in response to an original suggestion rather than a comment made after publication, and the Committee made several other changes to both the petition and Forms 101A and 101B in response to comments made by the NCBJ following publication.

Line 13 of the petition was revised to remind small business debtors to attach their most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return or, if any of the documents do not exist, to follow the procedure in § 1116(1)(B) of the Bankruptcy Code. This change responded to Suggestion 13-BK-B, submitted by Bankruptcy Judge Eric Frank (E.D. Pa.), which noted that there is a frequent lack of compliance with § 1116(1), and suggested that the problem might be addressed by calling attention to the statutory requirement on the petition.

In response to the NCBJ's comments on the petition and eviction judgment forms, the Advisory Committee made several changes, including the following:

- The language regarding fee waivers on line 8 of Form 101 was clarified to explain that a judge has discretion regarding whether to waive fees.

- The description of a sole proprietorship on line 12 of Form 101 was revised to make clearer that a sole proprietor is not a separate entity.

- Among the statements in Part 7 of Form 101 that a chapter 7 debtor must sign under penalty of perjury is the statement that the debtor is aware of the option to proceed under chapters 7, 11, 12, and 13. This statement was revised to limit it to chapters for which the debtor is eligible.

- Space was added to Form 101A for a debtor to indicate whether an eviction judgment had been entered against him and to provide information about the landlord who obtained the judgment.

- The debtor's certifications in Forms 101A and 101B were revised to clarify that the debtor is required to pay only the amount in default, not the entire amount that would ultimately be owed on the lease.

Schedules—Official Forms 106Sum, 106A/B, 106C, 106D, 106E/F, 106G, 106H, 106Dec. The publication of the revised schedules prompted a number of comments. The most significant ones are listed below, along with the Committee's response.

Schedule A/B: Property

- Several comments questioned the instruction to separately list and describe property worth more than $500. This dollar amount had been included to avoid the listing of *de minimis* property items. In response to the comments, the $500 minimum was deleted because it has no basis in the Code or rules.

- Several comments said that Schedule A/B should include information about any liens on listed property. The Committee chose not to make this change because the information is available on Schedule D, and software permits the integration of information from various schedules.

- In the description of vehicles, the published draft sought information about a vehicle's mileage in broad categories. Based on a comment that actual mileage would be more helpful in assessing the value of a vehicle, the FMP revised line 3 to ask the approximate mileage of each vehicle.

- In response to a comment, the Committee added an inquiry about the nature of the debtor's ownership interest, if known, for each item of real property.

- The Committee decided not to adopt several changes from existing practice that were proposed by commenters. It reasoned that the proposed changes were outside the scope of the modernization project and were not necessitated by changes in the law.

Schedule C: The Property You Claim as Exempt

The published version of this form included a substantive change in response to *Schwab v. Reilly*, 560 U.S. 770 (2010). In that decision the Supreme Court stated that "Where . . . it is important to the debtor to exempt the full market value of the asset or the asset itself, our decision will encourage the debtor to declare the value of her claimed exemption in a manner that makes the scope of the exemption clear, for example, by listing the exempt value as 'full fair market value (FMV)' or '100% of FMV.'" *Id.* at 792-93.

Over the past several years, the Advisory Committee has considered several different ways to revise Schedule C so as to allow debtors to exercise the *Schwab* option. A proposed amendment to Schedule C was published in 2011, but the Committee withdrew after it met with substantial opposition, particularly from bankruptcy trustees. They stated that the option to claim as exempt "Full fair market value of the exempted property" would encourage debtors to claim the full fair market value of an asset as exempt, even when using an exemption capped at an amount less than the asset's value. They argued that the increase in such exemption claims would then lead to a "plethora of objections."

A later revision of the form that the FMP proposed was previewed by the Standing Committee at the January 2013 meeting. Some members found that attempt unclear. They

suggested ways that the form might be improved, including highlighting the instructions about the *Schwab* option and allowing a debtor to claim as exempt "100% of fair market value, up to any applicable statutory limit." That wording was incorporated into the proposed draft of Schedule C that was published last summer.

Once again this aspect of the revision of Schedule C proved to be controversial. Several of the comments were critical, but from different perspectives. The National Association of Consumer Bankruptcy Attorneys objected that the form as drafted would not provide a debtor finality regarding his exemptions. It suggested that Schedule C and Rule 4003(b) be amended in a way that would allow the debtor to clearly claim as exempt the entire value of the debtor's interest in property and that would require interested parties to object by the deadline for objections to exemptions, even if the objection was based on valuation of the asset claimed as exempt. The National Conference of Bankruptcy Judges thought that the form was confusing and that it would lead to increased exemption litigation. It recommended that the second option be changed to "100% of fair market value *(for exemptions unlimited in dollar amount).*" The National Association of Bankruptcy Trustees ("NABT") objected to the second option for much the same reason that it had opposed the 2011 proposed amendment of Schedule C. It supported the change suggested by the NCBJ.

The Committee voted to retain the published wording of the second option. It allows the debtor an exemption choice of 100% fair market value, as *Schwab* authorized, without disregarding exemption limits. Unlike the NCBJ's proposal, proposed Schedule C permits a debtor to exempt all of her interest in certain property even when there is an exemption cap, so long as the value of that interest does not exceed the cap.

Schedule D: Creditors Who Have Claims Secured by Property; Schedule E/F: Creditors Who Have Unsecured Claims

Many of the comments on Schedules D and E/F addressed narrow wording or technical issues. One comment objected to requiring claims to be listed in the alphabetical order of the creditors' names. The Committee revised the instruction to require an alphabetical listing "as much as possible." Another comment objected to the instruction to list creditors holding multiple claims separately for each claim and to list the last four digits of the account number for each claim. The Committee concluded that this information facilitates claims audits and assists creditors in identifying the debtor. Because some creditors are abandoning the practice of using social security numbers to identify account holders, they need account numbers. The Bankruptcy Clerks Advisory Group suggested the deletion in Part 4 of the explanation that certain totals from Schedule E/F are needed for statistical reasons. The Committee rejected this suggestion because Congress requires the collection and submission to it of the data, and debtors should be informed why the information is being sought.

Schedule G: Executory Contracts and Unexpired Leases, and Schedule H: Your Codebtors

The Committee made minor wording changes to the beginning of these forms in response to the NCBJ's editing suggestions.

Official Form 106Dec

In response to comments from the NCBJ and the US Trustee Program, the criminal penalty explanation was revised to say that individuals who commit one of the enumerated crimes related to the schedules can be fined up to $250,000, rather than $500,000, and can be imprisoned for up to 20 years, rather than 5 years.

Official Form 107—Statement of Financial Affairs for Individuals Filing For Bankruptcy. The following changes were made to Form 107 in response to comments:

- In response to comments about the omission of the debtor's marital status from the published form, the Advisory Committee added new question 1, which asks the debtor's current marital status. It does not ask, as some wanted, whether the debtor has previously been married or for the name of any former spouse. The Committee concluded that, if that information might be significant, the trustee can ask the debtor for it without having the information on forms in the public record.

- The NABT commented that line 5, which asked about whether the debtor's debts are primarily consumer debts, failed to recognize that the response for Debtor 1 and Debtor 2 in a jointly administered case could be different. As a result of this comment, line 6 (formerly line 5) was changed from "My debts are not primarily consumer debts" to "Neither Debtor 1 nor Debtor 2 has primarily consumer debts."

- At the suggestion of NCBJ, on line 18 an example of a transfer made as security was inserted in order to clarify the information requested.

- On line 22, the instruction that the debtor not include information about storage units that are part of the building where the debtor lives was deleted in response to NCBJ's comment that a debtor should provide information about storage units located elsewhere in his apartment building.

- At NCBJ's suggestion, and in order to be consistent throughout the forms, a warning to the debtor about the consequences of a false statement was added to Part 12.

Official Form 112—Statement of Intention of Individuals Filing Under Chapter 7. Two comments observed that the word "give" on the published form is not the equivalent of "surrender," which is the word used in the pertinent statutes. The Advisory Committee agreed and made the appropriate change. The options regarding what a debtor intends to do with property that secures a debt were clarified by changing the wording and format of the debtor's options.

Official Form 119—Bankruptcy Petition Preparer's Notice, Declaration, and Signature. In response to a comment that a petition preparer should separately sign each document prepared, the Advisory Committee revised Form 119 to state that the declaration on that form is made part of each document identified as having been prepared by the petition preparer. Form 119 follows the existing practice of providing a specific declaration that petition preparers can use with multiple documents.

Official Form 121—Statement About Your Social Security Numbers. Several changes were made to the introductory instructions in response to the comments. The following sentence was moved from the second paragraph to the first paragraph: "Please consult local court procedures for submission requirements." In the second paragraph, the last sentence was deleted in order to eliminate a potential misimpression about the extent to which the debtor's full social security number will be made available to creditors. The warning regarding potential criminal penalties was rewritten to make it consistent with the other warnings in the individual case commencement documents.

Official Form 318—Order of Discharge. The NCBJ suggested several changes in the discharge order, including that the information regarding the discharge be merged, rather than having separate notices to creditors and to the debtor. The Advisory Committee agreed with that suggestion and revised the discharge order to make clear that the information provided pertains to both debtors and creditors. The NABT requested that information be provided that points out the limited impact of discharge on case administration and the debtor's on-going duties to cooperate in administration. The Committee concluded that the NABT's request required going into greater detail than is necessary on this form.

Official Form 423—Certification About a Financial Management Course. The Bankruptcy Clerks Advisory Group suggested that the form explain what happens if the course provider advises the clerk of court of the debtor's completion of the course. The Advisory Committee added a sentence stating that in that situation the debtor does not need to file the certificate.

Official Form 427—Cover Sheet for Reaffirmation Agreement. The Advisory Committee made a change to the Cover Sheet after publication in response to Suggestion 13-BK-K submitted by Mike Bates. Agreeing with his suggestion, the Committee revised line 3 of the form to clarify that § 524(k)(3)(E)(i)(I) and (ii)(I) allows, under some circumstances, disclosure of the simple rate of interest rather than the annual percentage rate.

The Advisory Committee requests that the Standing Committee approve Official Forms 101, 101A, 101B, 104, 105, 106Sum, 106A/B, 106C, 106D, 106E/F, 106G, 106H, 106Dec, 107, 112, 119, 121, 318, 423, and 427 but that the forms not be forwarded to the Judicial Conference until the Standing Committee gives final approval to the modernized forms that will be published this summer (see Action Item 13). Because of the new numbering system for the forms and because there will be separate case-opening forms for individual and non-individual cases rather

than the current unified forms, both groups of forms need to take effect on the same date. The Advisory Committee recommends that the effective date be December 1, 2015, or as soon thereafter as is technologically feasible.

A2. Amendments for Which Final Approval Is Sought Without Publication. **The Advisory Committee recommends that amendments to Official Forms 3A and 3B be approved and forwarded to the Judicial Conference and that the amended forms become effective on December 1, 2014.** Because the amendments are minor, technical changes, the Advisory Committee concluded that publication for comment is not required. The text of the amended forms is set out in Appendix A.

Action Item 5. **Official Form 3A** is filed by individual debtors who request to pay the filing fee in installments, as authorized by 28 U.S.C. § 1930(a). **Official Form 3B** is filed by individual chapter 7 debtors who request to have the filing fee waived, as authorized by § 1930(f). The modernized version of Form 3A, which went into effect on December 1, 2013, includes at line 1 the filing fee amount for each chapter. The version of 3B that went into effect at the same time refers to the specific chapter 7 filing fee amount in the order that is part of the form. Because these amounts are subject to periodic change by the Judicial Conference, the Advisory Committee voted unanimously to remove them from the forms. Filing fee amounts will continue to be stated in Director's Forms that are used by clerk's offices to provide information about bankruptcy to individual debtors (current Director's Form 200 and 201). The proposed change will permit fee information provided to debtors to remain current without having to go through the formal forms amendment process.

B. Items for Publication in August 2014

The Advisory Committee recommends that the proposed rule and form amendments that are discussed below be published for public comment. The texts of the amended rules and official forms are set out in Appendix B.

B1. Rule and Form Amendments for Which Republication Is Sought

Action Item 6. Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009

As the Advisory Committee has previously reported, it has undertaken a multi-year project to create an official form for plans in chapter 13 cases. The chapter 13 plan form project is intended to eliminate the current anomaly of a major aspect of consumer bankruptcy practice not having a national form for presenting essential information to parties in interest. The Committee sees the adoption of a form for chapter 13 plans as bringing greater coherence to the presentation of information in chapter 13 cases and improving the procedures for preparing, reviewing, and confirming chapter 13 plans. The form (Official Form 113) was published for public comment in August 2013 along with related amendments to nine of the Bankruptcy Rules (Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009). After considering the public

comments, the Advisory Committee has proposed a number of changes to the plan form and rule amendments. Accordingly, the Advisory Committee seeks republication of both the plan form and the package of accompanying rule amendments.

The Advisory Committee anticipated that the plan form and related rule amendments would generate significant interest, and, as expected, a large number of comments were submitted. The Advisory Committee received approximately 150 public comments related to the chapter 13 plan form project. In addition, two witnesses testified about the project at a public hearing in January 2014. The Advisory Committee's Chapter 13 Plan Form Working Group exhaustively reviewed and discussed the comments received. In all, the Working Group convened for nine multi-hour conference calls to consider issues and concerns raised by the comments.

The current proposals for changes to the plan form are discussed below at Action Item 7. The principal comments and resulting changes to the rule amendments are discussed in this section.

Rule 2002

The published amendment to Rule 2002 would require giving 21 days' notice of the time to object to confirmation of a chapter 13 plan and 28 days' notice of the date of the confirmation hearing. Few comments were submitted on this amendment, and the Advisory Committee made no changes to the published rule. One comment suggested altering Rule 2002 to limit the required notice of pre-confirmation plan modifications. The Working Group, however, recommended against making changes to the basic notice provisions already included in the Bankruptcy Rules. A more comprehensive project on noticing may be undertaken by the Advisory Committee, and reconsideration of these issues would be more appropriate in that context.

Rule 3002

The published amendment to Rule 3002 included two significant changes to the rule. The first would alter Rule 3002(a) to state that the holder of a secured claim must file a proof of claim in order to have an allowed claim. The second would alter Rule 3002(c) principally to shorten the bar date—that is, the deadline by which a creditor must file a timely proof of claim—to 60 days after the petition is filed. The published amendment to Rule 3002(c) would provide an additional period of 60 days after the initial 60-day bar date. This additional 60-day period would allow holders of mortgage claims to file the supplemental documents required by Bankruptcy Rule 3001(c)(1) and (d). These changes drew a large number of comments.

Although in general the comments supported the thrust of the amended rule, they raised a number of issues. A comment from the NCBJ urged the removal of language stating that the failure of an entity to file a proof of claim does not void a creditor's lien. Apart from criticism of the phrasing of the statement, the comment objected that the provision strayed into an area of substantive law. Nevertheless, the Advisory Committee retained the language, which makes

clear that the change in Rule 3002(a) to require secured creditors to file proofs of claim is not in tension with the general rule that a secured creditor's lien survives bankruptcy even if no proof of claim is filed. The language used in the published amendment is drawn directly (and intentionally) from § 506(d)(2) of the Bankruptcy Code. Several comments took issue with the bifurcated bar date for mortgage claims on the ground that a 120-day period gave unwarranted favored treatment to mortgage creditors. By contrast, a comment by a group of large mortgage servicers expressed the concern that a bifurcated bar date might give rise to new disputes about proofs of claim. The Advisory Committee is satisfied that the general 60-day bar date will usually be sufficient time for filing proofs of claim. The bifurcated bar date for mortgage claims reflects the concern that retrieval of required supporting documents for those claims may take longer than 60 days. This proposal was generated through discussions at a mini-conference held in Chicago in January 2013 in which representatives from a number of stakeholders in the chapter 13 process (including mortgage servicers) participated. The Advisory Committee believes that the additional supporting documents to be filed by the end of the 120-day period will generate significant disputes in very few cases.

The Advisory Committee has approved two changes to the language of amended Rule 3002(c). One is a wording change to ensure consistency of terminology throughout the rule with respect to the starting point for calculating the bar date. The second clarifies that the listed exceptions to Rule 3002(c) apply to all cases—and not only involuntary chapter 7 cases—included in the subdivision.

Rule 3007

The Advisory Committee received a limited number of comments on the published amendment to Rule 3007, which governs objections to claims. Some of the comments offered stylistic suggestions that the Advisory Committee did not adopt. Others were more substantive and touched on service requirements. The Advisory Committee addressed service requirements for objections to claims at its fall 2013 meeting, when it approved amendments to Rule 3007(a) that were published for comment in 2011. Under amended Rule 3007(a), service of a claim objection would be made on most claimants by mailing notice to the person listed on the proof of claim. Service on federal government and insured depository institution claimants, however, would be made according to the applicable provisions of Rule 7004. The amended rule would also clarify that a hearing need not be held on every claim objection, so long as the claimant received notice and an opportunity for a hearing. Finally, the Committee voted at the fall 2013 meeting to delete the following language that was included in the proposed amendment to Rule 3007(a) published for comment last summer: "Except to the extent that the amount of a claim is determined under Rule 3012 in connection with plan confirmation in a chapter 12 or 13 case, a . . . ." This deletion was made because Rule 3012 does not address objections to claims, which is the subject of Rule 3007. Thus no exception to the latter rule is required.

Rule 3012

Amended Rule 3012 would govern the valuation of secured claims and priority claims. The published amendment drew support and opposition. A number of comments endorsed the

key change in the rule—an express provision permitting a chapter 13 plan to include a request for the determination of allowed secured claim values. Other comments opposed this change to the rules on various grounds, including concerns about due process and concerns about the amended rule's treatment of claims by governmental units. The Advisory Committee did not find the due process objections persuasive in light of the heightened service requirements the amended rules would impose when a request for valuation is made through a chapter 13 plan. The objection to the treatment of governmental units (their secured claims could not be valued in a plan) was also unpersuasive. The different treatment of these claims is driven by the statutory grant of a longer bar date for the claims of governmental units.

The Advisory Committee approved a change to the published Rule 3012(c) to clarify that a request to determine the amount of a secured claim of a governmental unit may be made only by motion or in a claim objection after the governmental unit files a proof of claim. The Advisory Committee also approved amendments to Rule 3012(b) at the fall 2013 meeting. With the amendments, Rule 3012(b) would require service in the manner provided in Rule 7004 for a chapter 12 or 13 plan that requests determination of the amount of a secured claim, but would leave to Rules 3007(a) and 9014(b) the method of service for claim objections and motions to determine the amount of a secured claim, respectively.

Rule 3015

The published amendments to Rule 3015 proposed several changes in the rule. Amended Rule 3015(c) would require that plans filed in chapter 13 cases must "be prepared as prescribed by the appropriate Official Form" and that provisions deviating from the Official Form are effective only if they are placed in the part of the form reserved for nonstandard provisions. Amended Rule 3015(f) would require that objections to plan confirmation be made at least seven days before the confirmation hearing. Amended Rule 3015(g) would make clear that the valuation of a secured claim in a confirmed plan is binding on the holder of the claim. And Amended Rule 3015(h) governs the service of a plan modified after confirmation.

Most of the comments critical of the amended rule objected to the provision in Rule 3015(c) requiring use of the Official Form for chapter 13 plans. The Advisory Committee's consideration of the question whether to go forward with the chapter 13 plan form is discussed below in Action Item 7. Although the Advisory Committee has decided to continue pursuing a mandatory plan form, the published amended rule does not account for the possibility that a national plan form might not be adopted at a time when the rule is in effect. The Advisory Committee altered the language of Rule 3015(c) to account for this possibility.

The Advisory Committee made two other changes to the published version of Rule 3015. First, language has been added to Rule 3015(f) to require objections to be filed "at least seven days before the *date set for the* hearing on confirmation." This change responds to comments pointing out that some districts, while setting confirmation hearing dates, ordinarily confirm plans without a hearing if there are no objections. Under the new language, a deadline for objections would be clear even if no hearing is held. Second, prompted by a comment from the

IRS's Office of General Counsel, the Advisory Committee has made a small change to Rule 3015(g). The language of amended Rule 3012(g) has been altered to provide that any "determination made *in accordance with Rule 3012*"—rather than "under Rule 3012"—will be binding.

Finally, the Advisory Committee has added a sentence to the Committee Note for Rule 3015 to make clear that service under Rule 3015(h) does not necessarily require heightened Rule 7004 service. Another change to the Committee Note regarding Rule 3015(h) was made to point out that the option to serve a summary of a proposed plan modification remains in the rule.

Rule 4003

The published amendment to Rule 4003(d) would permit a lien avoidance proceeding under § 522(f) of the Bankruptcy Code to be commenced through a chapter 13 plan as well as by motion. Several comments raised questions about an ambiguity in the amended rule as to the requirements for service of a plan seeking lien avoidance. The Advisory Committee added clarifying language stating that only the affected creditors need to receive the heightened service provided under Rule 7004.

Rule 5009

Several comments raised concerns about the published amendment to Rule 5009(d). That provision would permit a debtor to request "an order determining that the lien on" property of the estate "has been satisfied." The final sentence of the amended rule provides further than an "order entered under this subdivision is effective as a release of the lien." The comments questioned whether the terms "satisfied" and "release" were used appropriately, while other comments questioned whether a bankruptcy court has the authority to enter the order contemplated by the amended rule.

The Advisory Committee decided to alter the amendment. The phrase "an order declaring that the secured claim has been satisfied and the lien has been released under the terms of a confirmed plan" has been substituted in the first sentence of the rule. This language clarifies that the order would merely seek a declaration of the effects of a confirmed plan. Furthermore, the Advisory Committee decided to remove the final sentence as unnecessary.

Rule 7001

Few comments addressed the amendment to Rule 7001, which makes clear that an adversary proceeding is not needed for proceedings under Rule 3012 or 4003(d). Although a number of comments supported the amendment, the NCBJ expressed reservations. In particular, the NCBJ viewed Rule 3012 as addressing relief by motion, which would not be a "proceeding" that would need to be excluded from Rule 7001(2). The Advisory Committee understood the meaning of proceedings to be broader than adversary proceedings—in other words, something could be called a proceeding and not be categorized as an adversary proceeding. Accordingly, the additional clarity of amended Rule 7001 was deemed worthwhile.

The Advisory Committee decided to make a change to the wording of the amendment, however. The published amendment referred to "a proceeding to determine the validity, priority, or extent of a lien or other interest in property, not including a proceeding under Rule 3012 or Rule 4003(d)." The Advisory Committee concluded that it would be more accurate to substitute "but not a proceeding under Rule 3012 or Rule 4003(d)" at the end of the amended sentence.

Rule 9009

The published amendment to Rule 9009, which governs the use and alteration of Official Forms, would have effected significant changes to the current rule. In general, current Rule 9009 requires only substantial compliance with Official Forms and expressly provides that "[f]orms may be combined and their contents rearranged to permit economies in their use." The published amendment to Rule 9009 is more restrictive and would require the use of Official Forms "without alteration, except as otherwise provided in these rules or in a particular Official Form." This more restrictive version of Rule 9009 was prompted by the confluence of the Advisory Committee's Forms Modernization Project and the publication of the chapter 13 plan form project. For each project, the Advisory Committee had devoted a great deal of attention to the format, sequencing, and presentation of information. In particular, the chapter 13 plan form requires nonstandard provisions to appear only in one portion of the form, and it would defeat the purpose of this feature if the form could be rearranged freely.

The amended rule drew approximately twenty comments. Many of the comments opposed the amended rule principally out of opposition to the chapter 13 plan form. Even comments that expressed support for the plan form, however, raised concerns about the amended rule. These comments read the amended rule as requiring nearly "pixel by pixel" reproduction of an Official Form, which would be impractical in many circumstances—particularly when forms are generated (as is increasingly common) by bankruptcy preparation software or by court electronic case filing systems. The Working Group and the Subcommittee on Forms, after reviewing the comments, agreed that the rule should permit a greater degree of flexibility in the use and reproduction of forms. The revised amendment would allow deviations from an Official Form if permitted by the national instructions for the form in addition to those deviations permitted by the Bankruptcy Rules or the form itself. It would also allow "minor changes not affecting wording or the order of presenting information" on a form. The five specified exceptions to the general rule in the published amendment have accordingly been pared down to three, and these are now given as examples of permissible "minor changes" to a form.

Action Item 7. Official Form 113

As noted above, the chapter 13 plan form generated a large number of public comments. Although few of the comments submitted early in the public comment period expressed outright opposition to adoption of any national plan form, later comments more commonly expressed general opposition to a national form. The expressions of opposition prompted the Working Group to question whether the Advisory Committee should consider abandoning the project or proposing a plan form merely as an option that might be adopted by individual bankruptcy courts

or judges. After thorough deliberation, the Working Group concluded that the chapter 13 plan form and rule amendments should be recommended as currently structured and that it would defeat the goal of greater uniformity in chapter 13 practice if the form were turned into an optional one.

At the same time, the Working Group proposed a number of significant changes to the published form in response to the concerns raised by the comments. The Advisory Committee agreed with the Working Group's recommended changes and seeks republication of the form in light of these changes.

Public Comments on the Plan Form

A significant number of negative comments criticized the plan form for diminishing the freedom of debtors to propose lawful chapter 13 plans and infringing upon the authority of bankruptcy judges to adjudicate and administer chapter 13 cases. This concern was—by far—the most commonly expressed criticism of the project. For example, a significant number of comments opposed the plan form because it presents the option (in a choice of checkboxes) for a debtor to make ongoing payments directly to secured creditors rather than through the "conduit" of a chapter 13 trustee. This point was made in concrete form by Chief Judge Robert Nugent (D. Kan.), on behalf of the bankruptcy judges of the district, who objected that the form would disrupt his court's policy of requiring debtors to make ongoing mortgage payments through the chapter 13 trustee—a policy that Chief Judge Nugent believes has led to the successful administration of chapter 13 cases in the district. Many comments from similar "conduit" districts echoed Chief Judge Nugent's concern. On the other hand, Judge S. Martin Teel (Bankr. D.D.C.) expressed the inverse concern—that the form gave debtors the option of making ongoing payments to secured creditors through the trustee, even though his court is not a conduit district.

The Working Group decided that this concern rested on a misapprehension of the purpose and function of the chapter 13 plan form. The form is merely that—a form. It is not, in itself, a plan. Rather, it presents features typically found in chapter 13 plans in an ordered sequence. Nothing in the form diminishes the debtor's ability to propose a plan of the debtor's choosing. Similarly, the form does not mandate that a court accept the debtor's choice of a particular option included on the form. The Working Group recommended the addition of an explicit warning to the form—as the first item of the form text—to remind debtors of this point, and the Advisory Committee accepted that recommendation. The proposed warning states: "This form sets out options that may be appropriate in some cases, but the presence of an option on the form does not indicate that the option is appropriate in your circumstances or that it is permissible in your judicial district."

Three other concerns were most commonly expressed by the public comments. First, a number of comments objected that the plan form would be too long and complex, which would mean increased attorney time (and cost) to complete the form, increased court time to review it, increased confusion and litigation, and a costly transition period from current practices. Second,

some comments objected that the form should *not* seek to promote greater uniformity, because local variations are valuable—and perhaps inevitable—in chapter 13. Third, comments raised the related concern that the plan form was an unwise attempt by the Advisory Committee to regionalize or nationalize consumer bankruptcy practice. The Advisory Committee concluded that these concerns, while understandable, were misplaced.

First, the length of the form as published would not reflect the length of the form when used to file a typical chapter 13 plan. The various parts of the form, as explicitly stated on the document, need not be reproduced if the debtor does not include information in a particular section. For that reason, the Advisory Committee intends to include in a revised committee note a partially "collapsed" form showing the length of a typical plan in practice. The Working Group also received feedback from "real world" implementations of the form. Debra Miller, a chapter 13 trustee (N.D. Ind.), reported in a comment and in testimony at the public hearing that her district had adopted the draft plan form a year ago. Although Ms. Miller provided suggestions for clarifying and streamlining the form, she explained that it had not led to confusion or an increase in litigation.

Second, the Advisory Committee continues to see great value in encouraging more uniformity in chapter 13 procedures. A national plan form would benefit debtors, creditors, and courts by simplifying the preparation and review of chapter 13 plans and by allowing lower cost software programs and legal education programs for attorneys practicing in chapter 13 cases. Similarly, although the Advisory Committee cannot abridge, enlarge, or modify substantive rights in bankruptcy, more uniform procedures would have the beneficial effect of encouraging the clarification of open questions of law in chapter 13 cases. Because current chapter 13 procedures across the country are so fragmented, an appeal in one case arising in a particular district has limited persuasive force elsewhere. Having a common plan form would thereby lead to greater clarity in the law governing chapter 13 cases.

Third, the Advisory Committee believes the concerns about regionalize or nationalized consumer bankruptcy practice are unwarranted. The Advisory Committee did not set out to restructure the consumer debtor bar. And it does not believe that any such restructuring would be the likely outcome of adopting a national plan form. Other areas of consumer debtor practice in which forms are more uniform (most significantly, in chapter 7) have not been transformed in the manner feared by these comments.

Changes to the Published Form

In addition to the changes discussed above, the Advisory Committee has altered a number of parts of the plan form. Three changes are particularly worthy of note. First, the revised plan form provides for greater flexibility as to the manner in which a debtor funds a chapter 13 plan, including the provision of payments by multiple "steps" of varying durations and the provision of more options concerning the commitment of a debtor's tax refund. Second, the Advisory Committee altered Part 7 of the plan form, which sets forth the order of distribution of payments to creditors. As published, Part 7 listed payments of the trustee's fee, followed by payments to

secured creditors, with the remaining spaces left blank. Part 7 generated a heavy volume of comments, with a split between those seeking a more detailed order of distributions, those seeking no order of distributions at all (in favor of having the trustee determine the order), and those seeking a completely blank order of distributions. The Advisory Committee decided to leave this part blank with the exception of the provision of payment of the trustee's fee. The revised Committee Note, however, now states that the debtor may choose to leave the order of distribution to the trustee's direction. Third, the Advisory Committee altered the signature box (Part 10). As published, this part of the plan form required only debtors' attorneys and pro se debtors to sign the form. On further reflection, the Advisory Committee has decided to make signatures by represented debtors optional. A number of comments noted that debtors' attorneys might want their clients to sign the plan, both to increase the evidentiary value of the plan in the proceedings and also to verify that the debtor has reviewed the plan's contents.

Republication of the Plan Form and Rule Amendments as a Package

The Advisory Committee wishes to republish both the plan form and rule amendments, with many members supporting the adoption of the rule amendments only in conjunction with a national plan form. The Committee recommends soliciting public comment on whether the form and rules should be considered as an integrated package. Two members of the Committee dissented from this aspect of the republication request.

B2. Rule and Form Amendments for Which Publication Is Sought

Action Item 8. Rules 1010, 1011, 1012, 2002

The Advisory Committee will seek permission to publish amendments to the Bankruptcy Rules in order to improve procedures for international bankruptcy cases. Under chapter 15 of the Bankruptcy Code, a representative of a foreign debtor may petition a United States court to recognize a foreign proceeding in a cross-border insolvency case. If the recognition petition is granted, certain provisions of the Bankruptcy Code will apply to assist the foreign representative in administering the debtor's assets or in pursuing other relief. Shortly after chapter 15 was added to the Bankruptcy Code in 2005, the Bankruptcy Rules were amended to insert new provisions governing cross-border cases. Among the new provisions were changes to Rules 1010 and 1011, which previously governed only involuntary bankruptcy cases, and Rule 2002, which governs notice. The proposed amendments to the Bankruptcy Rules would make three changes: (i) remove the chapter 15-related provisions from Rules 1010 and 1011; (ii) create a new Rule 1012 to govern responses to a chapter 15 petition; and (iii) augment Rule 2002 to clarify the procedures for giving notice in cross-border proceedings.

The explanation for these amendments requires a brief background on the chapter 15 process. Chapter 15 defines two categories of foreign proceeding. Section 1502(4) defines a "foreign main proceeding" as a foreign proceeding pending in the country where the debtor has the "center of its main interests." Section 1502(5), on the other hand, defines a "foreign nonmain proceeding," as a foreign proceeding (other than a foreign main proceeding) pending in a country

"where the debtor has an establishment." Section 1517(c) requires that a petition for recognition be decided "at the earliest possible time" after notice and a hearing. Section 1520(a) provides that upon recognition of a foreign main proceeding, the automatic stay under § 362 applies to the debtor and the property of the debtor in the United States. With a foreign nonmain proceeding, however, the foreign representative must apply for a grant of "any appropriate relief," including a stay of actions against the debtor and the property of the debtor. § 1521(a).

The Advisory Committee's Subcommittee on Technology and Cross-Border Insolvency noted a number of oddities in the Bankruptcy Rules' treatment of the two types of foreign proceedings. Rule 1010 requires the clerk to issue a summons for service when a petition for the recognition of a foreign *non*main proceeding is filed—but not when a petition for the recognition of a foreign main proceeding is filed. Yet Rule 1011, which governs responses to a petition for recognition of a foreign proceeding, appears to contemplate that service of the summons will be made in all cases. Rule 1011(b) provides that "[d]efenses and objections to the petition shall be presented in the manner prescribed by Rule 12 F.R.Civ.P. and shall be filed and served within 21 days *after service of the summons*." (emphasis added). Thus, under Rule 1011(b), service of the summons triggers the time period for responding to a petition for recognition of a foreign main or nonmain proceeding, yet no summons issues with a foreign main proceeding under Rule 1010. Rule 2002(q) further complicates the picture. That rule requires service of at least 21 days' notice of the hearing on a recognition petition. But the rule does not explicitly address when the court should set the hearing. This raises the concern that if the court must wait until the expiration of the response times under Civil Rule 12 (generally 21 days), as possibly indicated by Rule 1011(b), then an unnecessary delay may occur between the petition's filing and the recognition hearing date. That delay would be contrary to the Code's requirement of prompt adjudication of a petition for recognition. Rule 2002(q) also contains another gap. It does not address how courts should treat requests for provisional relief—a commonplace part of chapter 15 practice—in advance of a recognition hearing.

The Subcommittee concluded that the Bankruptcy Rules contain procedures that are ill suited for chapter 15 cases. The amendments would drop the requirement of issuing a summons after the filing of a petition for recognition—a requirement that appears to be honored in the breach in some courts entertaining chapter 15 cases. Procedures for objections and other responses to a petition would be governed by a new Rule 1012. Rule 2002(q) would be amended in three respects. First, the rule would expressly require a prompt hearing on a petition for recognition. Second, the rule would indicate the contents of the hearing notice. Third, the rule would permit the court to combine a hearing on provisional relief with the recognition hearing in a manner similar to that contemplated by Rule 65 of the Civil Rules (made applicable in bankruptcy under Rules 1018 and 7065). These changes are intended to ensure that the Bankruptcy Rules set forth more accurate and effective procedures for the adjudication of chapter 15 cases.

Acting on the Subcommittee's recommendation, the Advisory Committee voted to seek permission to publish these amendments to the Bankruptcy Rules. The amendments would be

published together with a new form for chapter 15 petitions (Official Form 401), discussed separately in Action Item 11.

Action Item 9. Rule 3002.1 applies in chapter 13 cases and requires creditors whose claims are secured by a security interest in the debtor's principal residence to provide the debtor and trustee certain information about the mortgage while the bankruptcy case is pending. It requires the creditor to give notice of any changes in the periodic payment amount and notice of any fees, expenses, or charges that are incurred after the bankruptcy case is filed. The proposed amendments would clarify when the rule applies and when its requirements cease.

Since the rule went into effect in 2011, a conflict in the case law has arisen over whether the rule applies to a case in which the debtor is not curing a prepetition mortgage default under the plan but is maintaining mortgage payments while the case is pending. The source of the confusion is the rule's reference to "claims . . . provided for under § 1322(b)(5) of the Code in the debtor's plan." That statutory provision authorizes a chapter 13 plan to "provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending." Some courts have read that provision as not applying unless the debtor has defaulted on the mortgage prior to commencement of the chapter 13 case. As a result, they have held that the reporting obligations under Rule 3002.1 do not apply if no default is being cured. *See, e.g., In re* Weigel, 485 B.R. 327, 328 (Bankr. E.D. Va. 2012); *In re* Wallett, 2012 WL 4062657 at * 2 (Bankr. D. Vt. 2012). Other courts have interpreted § 1322(b)(5) as authorizing maintenance of mortgage payments even when there is no need to cure a default. Based on that view, they have applied Rule 3002.1 to cases with a maintenance-only plan. *See, e.g., In re* Tollios, 491 B.R. 886 (Bankr. N.D. Ill. 2013); *In re* Cloud, 2013 WL 441543 at * 2 (Bankr. S.D. Ga. 2013).

The Advisory Committee concluded unanimously that a creditor's obligations under Rule 3002.1 to keep a debtor informed about the status of a mortgage should apply whenever a chapter 13 plan provides for continuing payments on the mortgage while the bankruptcy case is pending. The goal of Rule 3002.1 is to allow a debtor to be current on a home mortgage at the end of a successful chapter 13 case. Whether or not there was a prepetition default, proper payment of the mortgage during the case requires accurate information about any changes in payment amounts and the assessment of any fees and charges. The Committee therefore acted positively on the suggestion of Bankruptcy Judge Carol Doyle (N.D. Ill.) (Suggestion 13-BK-E) that the rule be amended to clarify that it applies to any chapter 13 plan that provides for the maintenance of home mortgage payments. The proposed amendment would remove the reference to § 1322(b)(5) in subdivision (a) and add in its place the requirement that the plan "provides that either the trustee or the debtor will make contractual installment payments."

In proposing that amendment, the Advisory Committee is also attempting to resolve another case conflict—whether Rule 3002.1 applies only when the chapter 13 trustee makes the ongoing mortgage payments (sometimes incorrectly referred to as "payments under the plan") or whether the rule also applies when the debtor makes the mortgage payments directly (sometimes incorrectly referred to as "payments outside the plan"). The Committee's intent in promulgating

the rule was for the rule to apply in either situation, and the Committee Note so stated. Because a few courts have limited the rule's applicability to trustee-payment cases, however, the Committee voted unanimously to clarify in the proposed amendment that the rule applies to plans in which either the trustee or the debtor will maintain mortgage payments.

Finally, the Advisory Committee voted to propose an amendment of Rule 3002.1(a) to address an issue on which the rule is currently silent—when do the creditor's obligations under the rule cease? If during a chapter 13 case a creditor obtains relief from the automatic stay in order to foreclose on the home mortgage, there would generally be no reason to continue to inform the debtor about changes in payment amounts or assessment of fees, since payment will usually be discontinued. Based on the current rule's silence, however, some courts have concluded that there is no basis for relieving the creditor of its obligations under the rule in that situation. *See, e.g., In re* Kraska, 2012 WL 1267993 (Bankr. N.D. Ohio 2012); *In re* Full, 2012 Bankr. LEXIS 4704 (Bankr. D.S.C. 2012).

The Committee voted, with 3 dissents, to propose the addition of the following sentence at the end of Rule 3002.1(a): "Unless the court orders otherwise, the notice requirements of this rule cease to apply when an order terminating or annulling the automatic stay becomes effective with respect to the residence securing the claim." Members who opposed the amendment noted that in some cases debtors have a continuing need for the mortgage information because they will seek to cure their postpetition default or obtain a mortgage modification. A paragraph was added to the Committee Note to encourage courts in appropriate situations to be open to requests to continue the reporting requirements after stay relief is granted.

Action Item 10. Rule 9006(f) is proposed to be amended in response to a recommendation of the Standing Committee's CM/ECF Subcommittee. The amendment would eliminate the three-day extension to time periods when service is effected electronically. It would therefore parallel amendments to Civil Rule 6(d), which was presented to the Standing Committee at its January meeting, and Appellate Rule 26(c) and Criminal Rule 45(c), which are being proposed for publication at this meeting.

The Advisory Committee agreed with the CM/ECF Subcommittee's rationale for eliminating the three-day rule in the case of electronic service. Now that electronic service is widely used, reliable, and generally instantaneous, there is no reason to extend the time in which the party served must take action following service. Elimination of the three additional days when electronic service is used also facilitates day-of-the-week counting, which the Time Computation Project brought to the rules.

The Advisory Committee discussed whether the amendment should go beyond electronic service and either eliminate the three-day rule altogether or eliminate it for some additional methods of service. In the end the Committee voted unanimously to propose an amendment that is limited to electronic service. Members concluded that it is important to have uniformity in

how time is computed under the various federal rules, and the Committee therefore favored proposing an amendment that is consistent with the CM/ECF Subcommittee's recommendation.

Action Item 11. Official Form 401

The Advisory Committee will seek publication of an Official Form for chapter 15 petitions. The creation of the form arose from the ongoing work of the Forms Modernization Project. While drafting a new voluntary petition form for non-individual debtors, the FMP received comments suggesting that a separate chapter 15 petition form should be drafted. In particular, the U.S. Trustee Program recommended the creation of a separate form to allow the deletion of information on the voluntary petition form that is relevant only to chapter 15 cases.

A draft chapter 15 petition form, designated as Official Form 401, was presented to the Advisory Committee for preliminary discussion at its fall 2013 meeting. The Subcommittee on Technology and Cross-Border Insolvency then sought further input from a group of outside reviewers with expertise in chapter 15 cases. These reviewers—from judicial, academic, and practice backgrounds—noted a number of suggested changes to the draft form. On the whole, the reviewers' comments are positive and helpful, and the Subcommittee found a number of their suggested changes to be improvements that were incorporated into a revised draft. The Advisory Committee accepted the Subcommittee's recommendation and voted to seek publication of the form.

As described in Action Item 8, the Advisory Committee anticipates that the new petition form will be published together with the chapter 15-related amendments to the Bankruptcy Rules.

Action Item 12. Official Form 410A (currently Form 10A) is the Mortgage Proof of Claim Attachment. The form is required to be filed in an individual debtor case with the proof of claim of a creditor that asserts a security interest in the debtor's principal residence. The form currently requires a statement of the principal and interest due as of the petition date; a statement of prepetition fees, expenses, and charges that remain unpaid; and a statement of the amount necessary to cure any default as of the petition date. The Advisory Committee seeks publication for public comment of a revised form that would replace the existing form with one that requires a mortgage claimant to provide a loan payment history and other information about the mortgage claim, including calculations of the claim and the arrearage amounts.

When the Advisory Committee was considering the promulgation of Official Form 10A, it heard from some commenters that a full or partial mortgage account history should be required. The Committee concluded then that a more summary form would better convey the necessary information, but it determined to reconsider the issue after a period of experience with the new form.

The Committee held a mini-conference of interested entities in September 2012. There was general agreement among participants on the following suggestions for revision of the attachment form:

- A detailed payment history should be attached to the proof of claim. The payment history should be in a form that can be automated.
- Disclosure requirements should be uniform nationwide; local variations should be prohibited.
- The proof of claim attachment should include the amount of the regular mortgage payment applicable as of the petition date.
- The proof of claim attachment should show the calculation of the total claim as of the petition date.

The Advisory Committee later created a Mortgage Forms Working Group to follow up on suggestions that emerged at the mini-conference. The Group consists of several members of the Committee, an invited bankruptcy judge, a chapter 13 trustee, and an attorney for a mortgage lender and servicer. The Working Group drafted a new attachment form and presented it to the Advisory Committee at the spring meeting, where it was unanimously approved for publication.

The new form would require a home mortgage claimant to provide a history of the loan account starting with the "First Date of Default." As explained in the Committee Note and Instructions, that date is the first date on which the borrower failed to make a payment in accordance with the terms of the note and mortgage, unless the note was subsequently brought current with no principal, interest, fees, escrow payments, or other charges immediately payable. The loan history would show when payments were due; when the debtor made payments and how those payments were applied; when fees and charges were incurred; and what the balances were for the various components of the loan after amounts were received or fees and charges were incurred. Advocates of requiring a loan history have stated that disclosure of this information would enable a debtor to see the basis for a mortgage claim and the arrearage amount, thereby facilitating resolution of disputes about mortgage amounts in some cases and providing a basis for objecting to claim amounts in others.

From the mortgage claimant's perspective, the proposed attachment form has the advantage of being in a format that can be automated, unlike the existing form that must be completed by hand. Outreach to various lenders indicated that automation of the form would be feasible for them. The pending amendments to Rule 9009 would require the uniform implementation of the new form in all districts, thereby allowing creditors to develop universally applicable software for form completion.

In addition to requiring a loan history, the proposed Form 410A would provide spaces for calculating the total amount of the debt and any prepetition arrearage. It also calls for the claimant to state the amount of the monthly mortgage payment as of the petition date.

The Advisory Committee requests that the proposed form be published this summer, along with its Instructions and a sample form that shows how the form would be completed in an illustrative case.

Action Item 13. The nearly final installment of the Forms Modernization Project. The restyled forms for which the Advisory Committee is now seeking publication constitute the last major group of Official Forms that will be revised by the Forms Modernization Project ("FMP").[1] This group of forms consists primarily of case opening forms for non-individual cases, chapter 11-related forms, the proof of claim form and supplements, and orders and court notices for use in all types of cases. Also to be published are two revised individual debtor forms and the announcement of the proposed abrogation of two Official Forms.

Specifically, the modernized forms for which publication is sought are the following (in addition to the three forms that were separately discussed in Action Items 7, 11, and 12):

11A	**General Power of Attorney (Abrogated)**
11B	**Special Power of Attorney (Abrogated)**
106J	**Schedule J: Your Expenses**
106J-2	**Schedule J-2: Expenses for Separate Household of Debtor 2**
201	**Voluntary Petition for Non-Individuals Filing for Bankruptcy**
202	**Declaration Under Penalty of Perjury for Non-Individual Debtors**
204	**Chapter 11 or Chapter 9 Cases: List of Creditors Who Have the 20 Largest Unsecured Claims and Are Not Insiders**
205	**Involuntary Petition Against a Non-Individual**
206Sum	**Summary of Assets and Liabilities for Non-Individuals**
206A/B	**Schedule A/B: Assets—Real and Personal Property**
206D	**Schedule D: Creditors Who Have Claims Secured by Property**
206E/F	**Schedule E/F: Creditors Who Have Unsecured Claims**
206G	**Schedule G: Executory Contracts and Unexpired Leases**
206H	**Schedule H: Codebtors**
207	**Statement of Financial Affairs for Non-Individuals Filing for Bankruptcy**
309A	**Notice of Chapter 7 Bankruptcy Case—No Proof of Claim Deadline (For Individuals or Joint Debtors)**

[1] The forms that remain to be restyled are current Official Forms 25A (Plan of Reorganization in Small Business Case Under Chapter 11), 25B (Disclosure Statement in Small Business Case Under Chapter 11), 25C (Small Business Monthly Operating Report), and 26 (Periodic Report Regarding Value, Operations and Profitability of Entities in Which the Debtor's Estate Holds a Substantial or Continuing Interest).

309B	**Notice of Chapter 7 Bankruptcy Case—Proof of Claim Deadline Set (For Individuals or Joint Debtors)**
309C	**Notice of Chapter 7 Bankruptcy Case—No Proof of Claim Deadline (For Corporations or Partnerships)**
309D	**Notice of Chapter 7 Bankruptcy Case—Proof of Claim Deadline Set (For Corporations or Partnerships)**
309E	**Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors)**
309F	**Notice of Chapter 11 Bankruptcy Case (For Corporations or Partnerships)**
309G	**Notice of Chapter 12 Bankruptcy Case (For Individuals or Joint Debtors)**
309H	**Notice of Chapter 12 Bankruptcy Case (For Corporations or Partnerships)**
309I	**Notice of Chapter 13 Bankruptcy Case**
312	**Order and Notice for Hearing on Disclosure Statement**
313	**Order Approving Disclosure Statement and Fixing Time for Filing Acceptances and Rejections of Plan, Combined With Notice Thereof**
314	**Class [ ] Ballot for Accepting or Rejecting Plan of Reorganization**
315	**Order Confirming Plan**
410	**Proof of Claim**
410S1	**Notice of Mortgage Payment Change**
410S2	**Notice of Postpetition Mortgage Fees, Expenses, and Charges**
416A	**Caption (Full)**
416B	**Caption (Short Title)**
416D	**Caption for Use in Adversary Proceeding**
424	**Certification to Court of Appeals by All Parties**

An instruction booklet for non-individuals is also included for comment.

Before the spring 2012 meeting of the Advisory Committee, the FMP adopted the following guidelines for drafting the non-individual debtor forms:

- Eliminate requests for information that pertain only to individuals.
- To the extent possible, parallel how businesses commonly keep their financial records.
- Include information identifying where and how the requested information departs from information maintained according to standard accounting practices.
- Provide better instructions about how to value assets listed in the schedules, and provide a valuation methodology that will allow people who commonly sign schedules to respond without needing expert asset valuations.
- Revise the secured debt schedule to clarify when debts are cross-collateralized and the relative priority of secured creditors.

- Require responsive information to be set out in the forms themselves and not simply included as attachments.

- Use a more open-ended response format, as compared to the draft individual debtor forms.

- Keep interdistrict variations to a minimum, particularly with respect to the mailing matrix.

The drafting of the modernized non-individual forms was done using an iterative approach. A drafting group of the FMP prepared drafts of the non-individual forms. Then, with assistance of Beth Wiggins and Molly Johnson from the Federal Judicial Center, research was done on ways in which the non-individual forms could be improved. They obtained input from the groups of professionals who reviewed the individual forms, as well as groups of chapter 11 attorneys, the National Association of Bankruptcy Trustees, representatives of the U.S. Trustee Program, a Western District of Michigan group assembled by Bankruptcy Judge Jeffrey Hughes, an Eastern District of California group assembled by Bankruptcy Judge Christopher Klein, and form software vendors. The Advisory Committee also had an opportunity to review the forms and make suggestions at its fall 2013 meeting. After additional revisions were made, the forms were presented to the Advisory Committee at the spring meeting. The Committee unanimously approved them for publication.

The proposed revisions to this group of forms consist primarily of creating separate case-opening forms for non-individual cases, renumbering all of the forms, and making changes to style and format. In addition, the Advisory Committee is proposing the changes noted below to a few of the forms in this group.

Official Forms 11A and 11B. The Committee is proposing the abrogation of these Official Forms and their replacement with Director's Forms. Parties routinely modify these power of attorney forms to conform to state law, the needs of the case, or local practice. There is no reason that the exact language of these forms needs to be used. Because the proposed amendment to Rule 9009 would restrict alteration of Official Forms, except as provided in the rules, form instructions, or in a particular Official Form, the Committee determined that the subject of these forms would be better handled by Director's Forms. The latter forms may be altered as needed, and their use is not mandatory unless required by a local rule.

Official Forms 106J and 106J-2. These forms are part of the debtors' schedules in a joint case. Official Form 106J-2 (Schedule J-2: Expenses for Separate Household of Debtor 2) is new. It would be used only in a joint case in which the spouses maintain separate households. Debtor 2's monthly expenses would be itemized and totaled on Form 106J-2, and then that total would be listed on line 22b of Form 106J (Schedule J: Your Expenses) to be used in the calculation of

the debtors' total monthly expenses. Form 106J would be amended to add line 22b and to include references to Official Form 106J-2 at lines 1 and 22b.

Combination of Forms. In four instances, the Advisory Committee has combined two existing forms into one. Official Form 206A/B (Schedule A/B: Assets—Real and Personal Property) is a combination of existing Forms 6A and 6B for use in non-individual cases. Similarly, Official Form 206E/F (Schedule E/F: Creditors Who Have Unsecured Claims) is a combination of existing Forms 6E and 6F for use in non-individual cases. Two sets of notices of a bankruptcy case filing were also merged. Official Form 309E (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors)) combines existing Forms 9E and 9E(Alt), and Official Form 309F (Notice of Chapter 11 Bankruptcy Case (For Corporations or Partnerships)) does the same for existing Forms 9F and 9F(Alt).

Publication of this last group of modernized forms this summer means that they could go into effect on December 1, 2015, if no further publication is required and the Judicial Conference approves them. The timing of the implementation of the next generation of the CM/ECF system, however, may require a delayed implementation of the modernized forms to ensure that it is technologically feasible to capture the data reported on them. For that reason the Advisory Committee suggests that the effective date of these forms and the ones discussed under Action Item 4 be December 1, 2015, or as soon thereafter as the available technology allows.

III. Information Items

A. Withdrawal of Rule 5005 Amendment. On the Advisory Committee's recommendation, the Standing Committee last August published an amendment to Rule 5005(a) to govern electronic signatures. As proposed, this national rule would have replaced local rules and permitted the filing of a scanned signature page of a document bearing the signature of an individual who is not a registered user of the CM/ECF system. That scanned signature could have been used with the same force and effect as an original signature, and retention of the original document with the wet signature would not have been required.

The rule was published with alternative provisions suggested by the CM/ECF Subcommittee for ensuring the integrity of a scanned signature. Alternative 1 deemed the filing attorney's act of filing the document and the scanned signature to certify that the signature was part of the original document, and Alternative 2 required the acknowledgment of a notary public that the scanned signature was part of the original document. The publication package contained a note that called attention to the alternative provisions and specifically sought comment on whether one of the provisions was preferable.

Nineteen comments were submitted on the Rule 5005(a) amendment. Everyone who commented on the alternatives preferred Alternative 1. Most of those comments explained the reasons for the preference without commenting more broadly on the desirability of the overall amendment. Seven comments expressed opposition to adoption of the amendment. Included in

that group was the detailed comment submitted by the Deputy Attorney General. Among the reasons for the commenters' opposition were that current procedures work fine and scanning of signatures would be more complicated, scanned documents would require greater electronic storage capacity, there is or soon will be superior technology that will assure the validity of electronic signatures, and elimination of the retention requirement would make prosecutions and civil enforcement actions for bankruptcy fraud and abuse more difficult. Four of the comments gave suggestions for revising the wording or scope of the amendment.

Several of the comments favoring Alternative 1 stated that requiring the acknowledgment of a notary public would be at odds with 28 U.S.C. § 1746, which dispenses with notarization. Some also stated that the requirement would entail additional delay and expense and would be infeasible because many law offices no longer have notaries readily available. Clerks commented that Alternative 2 would impose additional work on the clerk's office, as they would be required to perform a new quality assurance step for each filing covered by the rule. The general view expressed was that Alternative 2 would be awkward, cumbersome, and a step backwards.

Commenters who said that using scanned signature pages would require more work than current procedures require appeared to be accustomed to using an s/ electronic signature for debtors, and they did not express any dissatisfaction with having to retain documents with an original signature. They said the current procedures work well and have streamlined the filing of documents in bankruptcy courts. A couple of these comments stated that some debtors' attorneys do not have scanners or do not know how to merge scanned and electronically created documents. One clerk questioned whether software packages allow the use of scanned pages and asserted that a majority of attorneys probably do not know how to file documents using the CM/ECF system. An attorney stated that filing a 50-page petition and related documents would require the scanning of a number of signature pages, which would be a burden on the filing attorney and the court. One comment stated that the clerk's office in her district has been discouraging the uploading of scanned signatures for years.

The main basis for the Department of Justice's opposition to the proposed rule was that eliminating the requirement for retaining original signatures would adversely affect the Department's ability to successfully prosecute bankruptcy crimes and to pursue civil enforcement actions for bankruptcy fraud and abuse. The Deputy Attorney General's comment was informed by a poll of federal prosecutors who are involved in prosecuting white collar crime. Ninety-two percent of respondents indicated that they saw no problem that needs fixing, and 57% said that eliminating the retention of original signatures would make their job of prosecuting bankruptcy crimes more difficult. They expressed concern that debtors' repudiation of signatures is more likely with electronic signatures and that proving that a signature belongs to the defendant would be more difficult. Circumstantial proof of authenticity would be required because the FBI will not provide conclusive expert testimony on handwriting analysis without the original signatures.

The Department of Justice comment also questioned the need for a change in the procedure regarding electronic signatures. The Deputy Attorney General argued that the adverse impact on law enforcement would outweigh the reasons given for the proposed amendment. He stated that any concern that the retention requirement could be inconsistent with a lawyer's duty to the client is unwarranted, that having different retention periods among the districts is no different than other local rule differences, and that the burden on attorneys to retain documents is a fairly constant one, as older documents can be destroyed each year as their retention period expires.

The issue of the retention of documents that are filed electronically with the debtor's signature was initially brought to the Advisory Committee by the Forms Modernization Project. It raised the issue in response to concerns expressed by debtors' attorneys about their need to retain petitions, schedules, and other individual-debtor filing documents that will be lengthier in the proposed restyled format. Representatives of the Department of Justice also expressed concerns about the retention of original documents by debtors' attorneys and the lack of uniformity regarding the retention period. The Department made a recommendation to the Next Gen's Additional Stakeholders Functional Requirements Group that documents bearing wet signatures, signed under penalty of perjury, be retained by the clerk of court for five years—the statute of limitations for fraud and perjury proceedings—unless a national rule were adopted declaring that electronic copies of such documents in the court's ECF system constitute legally sufficient best evidence in the absence of an original signed document. In response to that request, in August 2012 the Committee on Court Administration and Case Management ("CACM") requested the various rules committees to consider creating "a federal rule regarding electronic signatures and the retention of paper documents containing original signatures." CACM's preferred approach was the promulgation of a national rule specifying that an electronic signature in the CM/ECF system is *prima facie* evidence of a valid signature.

After reviewing the comments submitted in response to publication, the Advisory Committee voted unanimously to withdraw the amendment to Rule 5005(a). Comments from attorneys did not indicate dissatisfaction with current procedures. No comment expressed relief that retention would no longer be required, and some attorneys said that the current procedures work well. While the concerns of the Department of Justice about existing procedures for the retention of documents with wet signatures had prompted the Committee's pursuit of an amendment to Rule 5005(a), the Department's current position is one of opposition to the proposed amendment. The Committee attached significant weight to the Department's views and concluded that, given the lack of indication of a need for change, the Committee should not proceed further with the amendment.

B. <u>Announcement of New Advisory Committee Chair</u>. The Advisory Committee welcomed the news that current Committee member Judge Sandra Ikuta (9th Cir.) will become its chair beginning on October 1.

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TAB 7B

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The draft minutes of the April 22-23, 2014 meeting of the
Advisory Committee on Bankruptcy Rules will be distributed separately.

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APPENDIX A

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APPENDIX A.1

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Appendix A

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

Rule 9006. Computing and Extending Time

* * * * *

(f) ADDITIONAL TIME AFTER SERVICE BY MAIL OR UNDER RULE 5(b)(2)(D), (E), OR (F) F.R. CIV. P. When there is a right or requirement to act or undertake some proceedings within a prescribed period after ~~service~~ being served and that service is by mail or under Rule 5(b)(2)(D), (E), or (F) F.R. Civ. P., three days are added after the prescribed period would otherwise expire under Rule 9006(a).

* * * * *

COMMITTEE NOTE

Subdivision (f) is amended to conform to a corresponding amendment of Civil Rule 6(d). The amendment clarifies that only the party that is served by mail or under the specified provisions of Civil Rule 5—and not the party making service—is permitted to add three days to any prescribed period for taking action after service is made.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

No comments were submitted.

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

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COMMITTEE NOTE

The amounts of the bankruptcy filing fees for various chapters listed on page one of the form were removed from the form. The correct fee amounts are listed on Director's Forms 200 and 201A where they can be updated as necessary without having to go through the official form amendment process.

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APPENDIX A.2

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Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form B 3A

Application for Individuals to Pay the Filing Fee in Installments

12/14

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information.

Part 1: Specify Your Proposed Payment Timetable

1. Which chapter of the Bankruptcy Code are you choosing to file under?

❑ Chapter 7
❑ Chapter 11
❑ Chapter 12
❑ Chapter 13

2. You may apply to pay the filing fee in up to four installments. Fill in the amounts you propose to pay and the dates you plan to pay them. Be sure all dates are business days. Then add the payments you propose to pay.

You must propose to pay the entire fee no later than 120 days after you file this bankruptcy case. If the court approves your application, the court will set your final payment timetable.

You propose to pay…		
$_____	❑ With the filing of the petition ❑ On or before this date.....	_____ MM / DD / YYYY
$_____	On or before this date.....	_____ MM / DD / YYYY
$_____	On or before this date.....	_____ MM / DD / YYYY
+ $_____	On or before this date.....	_____ MM / DD / YYYY
Total $_____	◀ Your total must equal the entire fee for the chapter you checked in line 1.	

Part 2: Sign Below

By signing here, you state that you are unable to pay the full filing fee at once, that you want to pay the fee in installments, and that you understand that:

- You must pay your entire filing fee before you make any more payments or transfer any more property to an attorney, bankruptcy petition preparer, or anyone else for services in connection with your bankruptcy case.
- You must pay the entire fee no later than 120 days after you first file for bankruptcy, unless the court later extends your deadline. Your debts will not be discharged until your entire fee is paid.
- If you do not make any payment when it is due, your bankruptcy case may be dismissed, and your rights in other bankruptcy proceedings may be affected.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

✘ _____
Your attorney's name and signature, if you used one

Date _____
MM / DD / YYYY

12b-009522

Fill in this information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Chapter filing under:

- ❑ Chapter 7
- ❑ Chapter 11
- ❑ Chapter 12
- ❑ Chapter 13

Order Approving Payment of Filing Fee in Installments

After considering the *Application for Individuals to Pay the Filing Fee in Installments* (Official Form B 3A), the court orders that:

[ ] The debtor(s) may pay the filing fee in installments on the terms proposed in the application.

[ ] The debtor(s) must pay the filing fee according to the following terms:

	You must pay…	**On or before this date…**
	$_____	_____ Month / day / year
	$_____	_____ Month / day / year
	$_____	_____ Month / day / year
+	$_____	_____ Month / day / year
Total	$_____	

Until the filing fee is paid in full, the debtor(s) must not make any additional payment or transfer any additional property to an attorney or to anyone else for services in connection with this case.

_____ **By the court:** _____
Month / day / year United States Bankruptcy Judge

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form B 3B

Application to Have the Chapter 7 Filing Fee Waived

12/14

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known).

Part 1: Tell the Court About Your Family and Your Family's Income

1. What is the size of your family?

Your family includes you, your spouse, and any dependents listed on *Schedule J: Current Expenditures of Individual Debtor(s)* (Official Form 6J).

Check all that apply:

❑ You
❑ Your spouse
❑ Your dependents _____ How many dependents? _____ Total number of people

2. Fill in your family's average monthly income.

Include your spouse's income if your spouse is living with you, even if your spouse is not filing.

Do not include your spouse's income if you are separated and your spouse is not filing with you.

Add your income and your spouse's income. Include the value (if known) of any non-cash governmental assistance that you receive, such as food stamps (benefits under the Supplemental Nutrition Assistance Program) or housing subsidies.

If you have already filled out *Schedule I: Your Income,* see line 10 of that schedule.

		That person's average monthly net income (take-home pay)
You		$_____
Your spouse ...	+	$_____
Subtotal.....		$_____
Subtract any non-cash governmental assistance that you included above.	−	$_____
Your family's average monthly net income Total.....		$_____

3. Do you receive non-cash governmental assistance?

❑ No
❑ Yes. Describe.....

Type of assistance

4. Do you expect your family's average monthly net income to increase or decrease by more than 10% during the next 6 months?

❑ No
❑ Yes. Explain. .....

5. Tell the court why you are unable to pay the filing fee in installments within 120 days. If you have some additional circumstances that cause you to not be able to pay your filing fee in installments, explain them.

Part 2: Tell the Court About Your Monthly Expenses

6. Estimate your average monthly expenses.
Include amounts paid by any government assistance that you reported on line 2.

If you have already filled out *Schedule J, Your Expenses,* copy line 22 from that form.

$_____

7. Do these expenses cover anyone who is not included in your family as reported in line 1?

❑ No
❑ Yes. Identify who .....

8. Does anyone other than you regularly pay any of these expenses?
If you have already filled out *Schedule I: Your Income*, copy the total from line 11.

❑ No
❑ Yes. How much do you regularly receive as contributions? $_____ monthly

9. Do you expect your average monthly expenses to increase or decrease by more than 10% during the next 6 months?

❑ No
❑ Yes. Explain .....

Part 3: Tell the Court About Your Property

If you have already filled out *Schedule A: Real Property (Official Form B 6A)* and *Schedule B: Personal Property (Official Form B 6B)*, attach copies to this application and go to Part 4.

10. How much cash do you have?
Examples: Money you have in your wallet, in your home, and on hand when you file this application

Cash: $_____

11. Bank accounts and other deposits of money?
Examples: Checking, savings, money market, or other financial accounts; certificates of deposit; shares in banks, credit unions, brokerage houses, and other similar institutions. If you have more than one account with the same institution, list each. Do not include 401(k) and IRA accounts.

	Institution name:	Amount:
Checking account:	_____	$_____
Savings account:	_____	$_____
Other financial accounts:	_____	$_____
Other financial accounts:	_____	$_____

12. Your home? (if you own it outright or are purchasing it)
Examples: House, condominium, manufactured home, or mobile home

_____
Number Street
_____
City State ZIP Code

Current value: $_____
Amount you owe on mortgage and liens: $_____

13. Other real estate?

_____
Number Street
_____
City State ZIP Code

Current value: $_____
Amount you owe on mortgage and liens: $_____

14. The vehicles you own?
Examples: Cars, vans, trucks, sports utility vehicles, motorcycles, tractors, boats

Make: _____
Model: _____
Year: _____
Mileage _____

Current value: $_____
Amount you owe on liens: $_____

Make: _____
Model: _____
Year: _____
Mileage _____

Current value: $_____
Amount you owe on liens: $_____

15. Other assets?

Do not include household items and clothing.

Describe the other assets:

Current value: $_____

Amount you owe on liens: $_____

16. Money or property due you?

Examples: Tax refunds, past due or lump sum alimony, spousal support, child support, maintenance, divorce or property settlements, Social Security benefits, Workers' compensation, personal injury recovery

Who owes you the money or property?

_____

_____

How much is owed?

$_____

$_____

Do you believe you will likely receive payment in the next 180 days?

❑ No

❑ Yes. Explain:

Part 4: Answer These Additional Questions

17. Have you paid anyone for services for this case, including filling out this application, the bankruptcy filing package, or the schedules?

❑ No

❑ Yes. **Whom did you pay?** *Check all that apply:*

- ❑ An attorney
- ❑ A bankruptcy petition preparer, paralegal, or typing service
- ❑ Someone else _____

How much did you pay?

$_____

18. Have you promised to pay or do you expect to pay someone for services for your bankruptcy case?

❑ No

❑ Yes. **Whom do you expect to pay?** *Check all that apply:*

- ❑ An attorney
- ❑ A bankruptcy petition preparer, paralegal, or typing service
- ❑ Someone else _____

How much do you expect to pay?

$_____

19. Has anyone paid someone on your behalf for services for this case?

❑ No

❑ Yes. **Who was paid on your behalf?** *Check all that apply:*

- ❑ An attorney
- ❑ A bankruptcy petition preparer, paralegal, or typing service
- ❑ Someone else _____

Who paid? *Check all that apply:*

- ❑ Parent
- ❑ Brother or sister
- ❑ Friend
- ❑ Pastor or clergy
- ❑ Someone else _____

How much did someone else pay?

$_____

20. Have you filed for bankruptcy within the last 8 years?

❑ No

❑ Yes. District _____ When _____ (MM/ DD/ YYYY) Case number _____

District _____ When _____ (MM/ DD/ YYYY) Case number _____

District _____ When _____ (MM/ DD/ YYYY) Case number _____

Part 5: Sign Below

By signing here under penalty of perjury, I declare that I cannot afford to pay the filing fee either in full or in installments. I also declare that the information I provided in this application is true and correct.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

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Fill in this information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Order on the Application to Have the Chapter 7 Filing Fee Waived

After considering the debtor's *Application to Have the Chapter 7 Filing Fee Waived* (Official Form B 3B), the court orders that the application is:

[ ] Granted. However, the court may order the debtor to pay the fee in the future if developments in administering the bankruptcy case show that the waiver was unwarranted.

[ ] Denied. The debtor must pay the filing fee according to the following terms:

	You must pay…	**On or before this date…**
	$_____	_____ Month / day / year
	$_____	_____ Month / day / year
	$_____	_____ Month / day / year
+	$_____	_____ Month / day / year
Total		

If the debtor would like to propose a different payment timetable, the debtor must file a motion promptly with a payment proposal. The debtor may use *Application for Individuals to Pay the Filing Fee in Installments* (Official Form B 3A) for this purpose. The court will consider it.

The debtor must pay the entire filing fee before making any more payments or transferring any more property to an attorney, bankruptcy petition preparer, or anyone else in connection with the bankruptcy case. The debtor must also pay the entire filing fee to receive a discharge. If the debtor does not make any payment when it is due, the bankruptcy case may be dismissed and the debtor's rights in future bankruptcy cases may be affected.

[ ] Scheduled for hearing.

A hearing to consider the debtor's application will be held

on _____ at _____ AM / PM at _____.
Month / day / year Address of courthouse

If the debtor does not appear at this hearing, the court may deny the application.

_____ **By the court:** _____
Month / day / year United States Bankruptcy Judge

12b-009528

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COMMITTEE NOTE

The amount of the chapter 7 filing fee is no longer preprinted on the blank order attached to the form. If the request for a fee waiver is denied, and the court instead orders payment by installments, the court or clerk will prepare the order with correct fee amount.

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Draft: May 10, 2013

[Caption as in Form 16A, 16B, or 16D, as appropriate]

NOTICE OF APPEAL AND STATEMENT OF ELECTION

Part 1: Identify the appellant(s)

1. Name(s) of appellant(s):
   _____

2. Position of appellant(s) in the adversary proceeding or bankruptcy case that is the subject of this appeal:

For appeals in an adversary proceeding.

- ❑ Plaintiff
- ❑ Defendant
- ❑ Other (describe) _____

For appeals in a bankruptcy case and not in an adversary proceeding.

- ❑ Debtor
- ❑ Creditor
- ❑ Trustee
- ❑ Other (describe) _____

Part 2: Identify the subject of this appeal

1. Describe the judgment, order, or decree appealed from: _____

2. State the date on which the judgment, order, or decree was entered: _____

Part 3: Identify the other parties to the appeal

List the names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their attorneys (attach additional pages if necessary):

1. Party: _____ Attorney: _____
   _____
   _____
   _____

2. Party: _____ Attorney: _____
   _____
   _____
   _____

Part 4: Optional election to have appeal heard by District Court (applicable only in certain districts)

If a Bankruptcy Appellate Panel is available in this judicial district, the Bankruptcy Appellate Panel will hear this appeal unless, pursuant to U.S.C. § 158(c)(1), a party elects to have the appeal heard by the United States District Court. If an appellant filing this notice wishes to have the appeal heard by the United States District Court, check below. Do not check the box if the appellant wishes the Bankruptcy Appellate Panel to hear the appeal.

- ❑ Appellant(s) elect to have the appeal heard by the United States District Court rather than by the Bankruptcy Appellate Panel.

Part 5: Sign below

_____ Date: _____

Signature of attorney for appellant(s) (or appellant(s) if not represented by an attorney)

Name, address, and telephone number of attorney (or appellant(s) if not represented by an attorney):

_____
_____
_____
_____

Fee waiver notice: If appellant is a child support creditor or its representative and appellant has filed the form specified in § 304(g) of the Bankruptcy Reform Act of 1994, no fee is required.

COMMITTEE NOTE

The form is amended and renumbered. It is amended to add to the Notice of Appeal an optional Statement of Election to have the appeal heard by the district court rather than by the bankruptcy appellate panel. Current Rule 8005(a) eliminates the requirement, imposed by former Rule 8001(e), that a separate document be used in making an election to have an appeal heard by the district court rather than the bankruptcy appellate panel. It instead requires a statement that conforms substantially to the Official Form for such an election. Form 17A effectuates Rule 8005(a)'s requirement for election by an appellant by combining the notice of appeal and statement of election. It thereby facilitates compliance with the statutory requirement that an appellant wishing to make an election do so at the time of filing the appeal. 28 U.S.C. § 158(c)(1)(A).

The statement of election in Part 4 is applicable only in districts for which appeals to a bankruptcy appellate panel have been authorized. If an appeal is being taken from a bankruptcy court located in a circuit that does not have a bankruptcy appellate panel or in a district that has not authorized appeals to be heard by the circuit's bankruptcy appellate panel, the appellant should not complete Part 4.

When a bankruptcy appellate panel is available to hear an appeal, completion of Part 4 is optional. An appellant that wants its appeal heard by the bankruptcy appellate panel should not complete this part.

The form is renumbered as Official Form 17A because a new companion form—Optional Appellee Statement of Election to Proceed in the District Court—is designated as Official Form 17B, and another bankruptcy appellate form— Certificate of Compliance with Rule 8015(a)(7)(B) or 8016(d)(2)—is designated as Official Form 17C.

The fixed caption has been deleted because the short title caption on the current form is not appropriate if the debtor is the appellant or if the appeal is in an adversary proceeding. *See* 11 U.S.C. § 342(c); Rule 7008; Rule 9004(b). The form should be captioned as in Official Form 16A, Caption (Full); Official Form 16B, Caption (Short Title); or Official Form 16D, Caption for Use in Adversary proceeding, as appropriate.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comments

There were no comments.

Draft: May 10, 2013

[Caption as in Form 16A, 16B, or 16D, as appropriate]

OPTIONAL APPELLEE STATEMENT OF ELECTION TO PROCEED IN DISTRICT COURT

This form should be filed only if all of the following are true:

- this appeal is pending in a district served by a Bankruptcy Appellate Panel,
- the appellant(s) did not elect in the Notice of Appeal to proceed in the District Court rather than in the Bankruptcy Appellate Panel,
- no other appellee has filed a statement of election to proceed in the district court, and
- you elect to proceed in the District Court.

Part 1: Identify the appellee(s) electing to proceed in the District Court

1. Name(s) of appellee(s):
   _____

2. Position of appellee(s) in the adversary proceeding or bankruptcy case that is the subject of this appeal:

For appeals in an adversary proceeding.

- ❑ Plaintiff
- ❑ Defendant
- ❑ Other (describe) _____

For appeals in a bankruptcy case and not in an adversary proceeding.

- ❑ Debtor
- ❑ Creditor
- ❑ Trustee
- ❑ Other (describe) _____

Part 2: Election to have this appeal heard by the District Court (applicable only in certain districts)

I (we) elect to have the appeal heard by the United States District Court rather than by the Bankruptcy Appellate Panel.

Part 3: Sign below

_____
Signature of attorney for appellee(s) (or appellee(s) if not represented by an attorney)

Date: _____

Name, address, and telephone number of attorney (or appellee(s) if not represented by an attorney):
_____
_____
_____

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COMMITTEE NOTE

This form is new. It is the Official Form for an appellee to state its election to have an appeal heard by the district court rather than by the bankruptcy appellate panel. If an appellee desires to make that election and the appellant or another appellee has not already done so, the appellee must file a statement that conforms substantially to this form within 30 days of service of the Notice of Appeal. 28 U.S.C. § 158(c)(1)(B).

The form is applicable only in districts for which appeals to a bankruptcy appellate panel have been authorized. If an appeal is being taken from a bankruptcy court located in a circuit that does not have a bankruptcy appellate panel or in a district that has not authorized appeals to be heard by the circuit's bankruptcy appellate panel, the appellee should not complete this form.

When a bankruptcy appellate panel is available to hear an appeal, completion of the form is optional. An appellee that wants its appeal heard by the bankruptcy appellate panel should not complete this form.

The form should be captioned as in Official Form 16A, Caption (Full); Official Form 16B, Caption (Short Title); or Official Form 16D, Caption for Use in Adversary proceeding, as appropriate. *See* 11 U.S.C. § 342(c); Rule 7008; Rule 9004(b).

Changes Made After Publication

No changes were made after publication.

Summary of Public Comments

There were no comments.

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Draft: May 10, 2013

[This certification must be appended to your brief if the length of your brief is calculated by maximum number of words or lines of text rather than number of pages.]

Certificate of Compliance With Rule 8015(a)(7)(B) or 8016(d)(2)

This brief complies with the type-volume limitation of Rule 8015(a)(7)(B) or 8016(d)(2) because:

- ❑ this brief contains [*state the number of*] words, excluding the parts of the brief exempted by Rule 8015(a)(7)(B)(iii) or 8016(d)(2)(D), or
- ❑ this brief uses a monospaced typeface having no more than 10½ characters per inch and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Rule 8015(a)(7)(B)(iii) or 8016(d)(2)(D).

_____ Date: _____
Signature

Print name of person signing certificate of compliance:
_____

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COMMITTEE NOTE

This form is new. When the length of a brief is calculated by the maximum number of words or lines of text rather than by number of pages, Rules 8015(a)(7)(C) and 8016(d)(3) require an attorney or unrepresented party to certify that the brief complies with the applicable type-volume limitation. Completion of this form satisfies that certification requirement. This form is not needed if the brief meets the applicable page limitation under Rule 8015(a)(7)(A) or 8016(d)(1).

The form does not include a caption because it is included in the brief.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comments

There were no comments.

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Official Forms 22A–1, 22A-1Supp, and 22A–2

Instructions for the Chapter 7 Statement of Your Current Monthly Income and Means Test Calculation

United States Bankruptcy Court 12/01/14

If you are filing under chapter 11, 12, or 13, do not fill out this form.

How to fill out these forms

Official Forms 22A–1 and 22A –2 determine whether your income and expenses create a presumption of abuse that may prevent you from obtaining relief from your debts under chapter 7 of the Bankruptcy Code. Chapter 7 relief can be denied to a person who has primarily consumer debts if the court finds that the person has enough income to repay creditors an amount that, under the Bankruptcy Code, would be a sufficient portion of their claims.

You must file 22A –1, the *Chapter 7 Statement of Your Current Monthly Income* (Official Form 22A –1) if you are an individual filing for bankruptcy under chapter 7. This form will determine your current monthly income and compare whether your income is more than the median income for households of the same size in your state. If your income is not above the median, there is no presumption of abuse and you will not have to fill out the second form.

Similarly, *Statement of Exemption from Presumption of Abuse Under § 707(b)(2)* (Official Form 22A-1Supp) determines whether you may be exempted from the presumption of abuse because you do not have primarily consumer debts or because you have provided certain military or homeland defense services. If one of these exemptions applies, you should file a supplement, Form 22A-1Supp, and verify the supplement by completing Part 3 of Form 22A-1. If you qualify for an exemption, you are not required to fill out any part of Form 22A-1 other than the verification. If the exemptions do not apply, you should complete all of the parts of Form 22A-1 and file it without the supplemental form.

If you and your spouse are filing together, you and your spouse may file a single Form 22A-1. However, if an exemption on Form 22A-1Supp applies to only one of you, separate forms may be required.
11 U.S.C. § 707(b)(2)(C).

If your completed Form 22A-1 shows income above the median, you must file the second form, *Chapter 7 Means Test Calculation* (Official Form 22A –2). The calculations on this form—sometimes called the *Means Test*—reduce your income by living expenses and payment of certain debts, resulting in an amount available to pay other debts. If this amount is high enough, it will give rise to a *presumption of abuse*. A presumption of abuse does not mean you are actually trying to abuse the bankruptcy system. Rather, the presumption simply means that you are presumed to have enough income that you should not be granted relief under chapter 7. You may overcome the presumption by showing special circumstances that reduce your income or increase your expenses.

If you cannot obtain relief under chapter 7, you may be eligible to continue under another chapter of the Bankruptcy Code and pay creditors over a period of time.

Read each question carefully. You may not be required to answer every question on this form. For example, your military status may determine whether you must fill out the entire form. The instructions will alert you if you may skip questions.

If you have nothing to report for a line, write $0.

Information for completing the forms

To fill out several lines of the forms, you must look up information provided on websites or from other sources. For information to complete line 13 of Form 22A-1 and lines 6-15, 30, and 36 of Form 22A-2, go to: www.justice.gov/ust/eo/bapcpa/meanstesting.htm.

For the *Bankruptcy Basics* information referred to on line 36 of Form 22A-2, go to: www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics.aspx.

If you do not have a computer with internet access, you may be able to use a public computer at the bankruptcy clerk's office or at a public library.

Understand the terms used in the form

This form uses *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, this form uses *you* to ask for information from both debtors. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Things to remember when filling out these forms

- Be as complete and accurate as possible.
- If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known).
- If two married people are filing together, both are equally responsible for supplying correct information.

Do not include these instructions when you submit your bankruptcy forms to the court. Keep them for your records.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number _____
(If known)

Check one box only as directed in this form and in Form 22A-1Supp:

❑ 1. There is no presumption of abuse.

❑ 2. The calculation to determine if a presumption of abuse applies will be made under *Chapter 7 Means Test Calculation* (Official Form 22A–2).

❑ 3. The Means Test does not apply now because of qualified military service but it could apply later.

❑ Check if this is an amended filing

Official Form 22A–1

Chapter 7 Statement of Your Current Monthly Income

12/14

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for being accurate. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known). If you believe that you are exempted from a presumption of abuse because you do not have primarily consumer debts or because of qualifying military service, complete and file *Statement of Exemption from Presumption of Abuse Under § 707(b)(2)* (Official Form 22A-1Supp) with this form.

Part 1: Calculate Your Current Monthly Income

1. **What is your marital and filing status?** Check one only.
   - ❑ **Not married.** Fill out Column A, lines 2-11.
   - ❑ **Married and your spouse is filing with you.** Fill out both Columns A and B, lines 2-11.
   - ❑ **Married and your spouse is NOT filing with you. You and your spouse are:**
     - ❑ **Living in the same household and are not legally separated.** Fill out both Columns A and B, lines 2-11.
     - ❑ **Living separately or are legally separated**. Fill out Column A, lines 2-11; do not fill out Column B. By checking this box, you declare under penalty of perjury that you and your spouse are legally separated under nonbankruptcy law that applies or that you and your spouse are living apart for reasons that do not include evading the Means Test requirements. 11 U.S.C. § 707(b)(7)(B).

Fill in the average monthly income that you received from all sources, derived during the 6 full months before you file this bankruptcy case. 11 U.S.C. § 101(10A). For example, if you are filing on September 15, the 6-month period would be March 1 through August 31. If the amount of your monthly income varied during the 6 months, add the income for all 6 months and divide the total by 6. Fill in the result. Do not include any income amount more than once. For example, if both spouses own the same rental property, put the income from that property in one column only. If you have nothing to report for any line, write $0 in the space.

			Column A **For you**	*Column B* **Debtor 2 or non-filing spouse**
2. **Your gross wages, salary, tips, bonuses, overtime, and commissions** (before all payroll deductions).			$_____	$_____
3. **Alimony and maintenance payments.** Do not include payments from a spouse if Column B is filled in.			$_____	$_____
4. **All amounts from any source which are regularly paid for household expenses of you or your dependents, including child support.** Include regular contributions from an unmarried partner, members of your household, your dependents, parents, and roommates. Include regular contributions from a spouse only if Column B is not filled in. Do not include payments you listed on line 3.			$_____	$_____
5. **Net income from operating a business, profession, or farm**				
Gross receipts (before all deductions)	$_____			
Ordinary and necessary operating expenses	– $_____			
Net monthly income from a business, profession, or farm	$_____	**Copy here➔**	$_____	$_____
6. **Net income from rental and other real property**				
Gross receipts (before all deductions)	$_____			
Ordinary and necessary operating expenses	– $_____			
Net monthly income from rental or other real property	$_____	**Copy here➔**	$_____	$_____
7. **Interest, dividends, and royalties**			$_____	$_____

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

	Column A For you	Column B Debtor 2 or non-filing spouse
8. **Unemployment compensation**	$_____	$_____
Do not enter the amount if you contend that the amount received was a benefit under the Social Security Act. Instead, list it here: ..... ➔		
For you ..... $_____		
For your spouse..... $_____		
9. **Pension or retirement income.** Do not include any amount received that was a benefit under the Social Security Act.	$_____	$_____
10. **Income from all other sources not listed above.** Specify the source and amount. Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, a crime against humanity, or international or domestic terrorism. If necessary, list other sources on a separate page and put the total on line 10c.		
10a. _____	$_____	$_____
10b. _____	$_____	$_____
10c. Total amounts from separate pages, if any.	+$_____	+ $_____
11. **Calculate your total current monthly income.** Add lines 2 through 10 for each column. Then add the total for Column A to the total for Column B.	$_____ +	$_____ = $_____ **Total current monthly income**

Part 2: Determine Whether the Means Test Applies to You

12. **Calculate your current monthly income for the year.** Follow these steps:

12a. Copy your total current monthly income from line 11..... **Copy line 11 here**➔ 12a. $_____

Multiply by 12 (the number of months in a year). x 12

12b. The result is your annual income for this part of the form. 12b. $_____

13. **Calculate the median family income that applies to you.** Follow these steps:

Fill in the state in which you live. [ ]

Fill in the number of people in your household. [ ]

Fill in the median family income for your state and size of household. .....13. $_____

To find a list of applicable median income amounts, go online using the link specified in the separate instructions for this form. This list may also be available at the bankruptcy clerk's office.

14. **How do the lines compare?**

14a. ❑ Line 12b is less than or equal to line 13. On the top of page 1, check box 1, *There is no presumption of abuse.* Go to Part 3.

14b. ❑ Line 12b is more than line 13. On the top of page 1, check box 2, *The presumption of abuse is determined by Form 22A-2*. Go to Part 3 and fill out Form 22A–*2.*

Part 3: Sign Below

By signing here, I declare under penalty of perjury that the information on this statement and in any attachments is true and correct.

✘ _____ ✘ _____
Signature of Debtor 1 Signature of Debtor 2

Date _____ Date _____
MM / DD / YYYY MM / DD / YYYY

If you checked line 14a, do NOT fill out or file Form 22A–2.

If you checked line 14b, fill out Form 22A–2 and file it with this form.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number (If known) _____

❑ Check if this is an amended filing

Official Form 22A–1Supp

Statement of Exemption from Presumption of Abuse Under § 707(b)(2) 12/14

File this supplement together with *Chapter 7 Statement of Your Current Monthly Income* (Official Form 22A-1), if you believe that you are exempted from a presumption of abuse. Be as complete and accurate as possible. If two married people are filing together, and any of the exclusions in this statement applies to only one of you, the other person should complete a separate Form 22A-1 if you believe that this is required by 11 U.S.C. § 707(b)(2)(C).

Part 1: Identify the Kind of Debts You Have

1. **Are your debts primarily consumer debts?** *Consumer debts* are defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose." Make sure that your answer is consistent with the "Nature of Debts" box on page 1 of the *Voluntary Petition* (Official Form 1).

   ❑ No. Go to Form 22A-1; on the top of page 1 of that form, check box 1, *There is no presumption of abuse,* and sign Part 3. Then submit this supplement with the signed Form 22A-1.

   ❑ Yes. Go to Part 2.

Part 2: Determine Whether Military Service Provisions Apply to You

2. **Are you a disabled veteran** (as defined in 38 U.S.C. § 3741(1))**?**

   ❑ No. Go to line 3.

   ❑ Yes. Did you incur debts mostly while you were on active duty or while you were performing a homeland defense activity? 10 U.S.C. § 101(d)(1)); 32 U.S.C. § 901(1).

   ❑ No. Go to line 3.

   ❑ Yes. Go to Form 22A-1; on the top of page 1 of that form, check box 1, *There is no presumption of abuse,* and sign Part 3. Then submit this supplement with the signed Form 22A-1.

3. **Are you or have you been a Reservist or member of the National Guard?**

   ❑ No. Complete Form 22A-1. Do not submit this supplement.

   ❑ Yes. Were you called to active duty or did you perform a homeland defense activity? 10 U.S.C. § 101(d)(1); 32 U.S.C. § 901(1)

   ❑ No. Complete Form 22A-1. Do not submit this supplement.

   ❑ Yes. Check any one of the following categories that applies:

   ❑ **I was called to active duty after September 11, 2001**, for at least 90 days and remain on active duty**.**

   ❑ **I was called to active duty after September 11, 2001,** for at least 90 days and was released from active duty on _____, which is fewer than 540 days before I file this bankruptcy case.

   ❑ **I am performing a homeland defense activity for at least 90 days.**

   ❑ **I performed a homeland defense activity for at least 90 days**, ending on _____, which is fewer than 540 days before I file this bankruptcy case.

If you checked one of the categories to the left, go to Form 22A-1. On the top of page 1 of Form 22A-1, check box 1, *There is no presumption of abuse,* and sign Part 3. Then submit this supplement with the signed Form 22A-1. You are not required to fill out the rest of Official Form 22A-1 during the exclusion period. The *exclusion period* means the time you are on active duty or are performing a homeland defense activity, and for 540 days afterward. 11 U.S.C. § 707(b)(2)(D)(ii).

If your exclusion period ends before your case is closed, you may have to file an amended form later.

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Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number _____
(If known)

Check the appropriate box as directed in lines 40 or 42:

According to the calculations required by this Statement:

❑ 1. There is no presumption of abuse.

❑ 2. There is a presumption of abuse.

❑ Check if this is an amended filing

Official Form 22A–2

Chapter 7 Means Test Calculation

12/14

To fill out this form, you will need your completed copy of *Chapter 7 Statement of Your Current Monthly Income* (Official Form 22A-1).

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for being accurate. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).

Part 1: Determine Your Adjusted Income

1. **Copy your total current monthly income.** .....**Copy line 11 from Official Form 22A-1 here➔**.....1. $_____

2. **Did you fill out Column B in Part 1 of Form 22A–1?**

❑ No. Fill in $0 on line 3d.

❑ Yes. Is your spouse filing with you?

❑ No. Go to line 3.

❑ Yes. Fill in $0 on line 3d.

3. **Adjust your current monthly income by subtracting any part of your spouse's income not used to pay for the household expenses of you or your dependents.** Follow these steps:

On line 11, Column B of Form 22A–1, was any amount of the income you reported for your spouse NOT regularly used for the household expenses of you or your dependents?

❑ No. Fill in 0 on line 3d.

❑ Yes. Fill in the information below:

State each purpose for which the income was used For example, the income is used to pay your spouse's tax debt or to support people other than you or your dependents	**Fill in the amount you are subtracting from your spouse's income**
3a. _____	$_____
3b. _____	$_____
3c. _____	+ $_____
3d. **Total.** Add lines 3a, 3b, and 3c.	$_____

Copy total here ➔ .....3d. − $_____

4. **Adjust your current monthly income.** Subtract line 3d from line 1. $_____

Part 2: Calculate Your Deductions from Your Income

The Internal Revenue Service (IRS) issues National and Local Standards for certain expense amounts. Use these amounts to answer the questions in lines 6-15. To find the IRS standards, go online using the link specified in the separate instructions for this form. This information may also be available at the bankruptcy clerk's office.

Deduct the expense amounts set out in lines 6-15 regardless of your actual expense. In later parts of the form, you will use some of your actual expenses if they are higher than the standards. Do not deduct any amounts that you subtracted from your spouse's income in line 3 and do not deduct any operating expenses that you subtracted from income in lines 5 and 6 of Form 22A–1.

If your expenses differ from month to month, enter the average expense.

Whenever this part of the form refers to *you*, it means both you and your spouse if Column B of Form 22A–1 is filled in.

5. **The number of people used in determining your deductions from income**

   Fill in the number of people who could be claimed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support. This number may be different from the number of people in your household. [ ]

National Standards You must use the IRS National Standards to answer the questions in lines 6-7.

6. **Food, clothing, and other items:** Using the number of people you entered in line 5 and the IRS National Standards, fill in the dollar amount for food, clothing, and other items. $_____

7. **Out-of-pocket health care allowance:** Using the number of people you entered in line 5 and the IRS National Standards, fill in the dollar amount for out-of-pocket health care. The number of people is split into two categories—people who are under 65 and people who are 65 or older—because older people have a higher IRS allowance for health care costs. If your actual expenses are higher than this IRS amount, you may deduct the additional amount on line 22.

People who are under 65 years of age

7a. Out-of-pocket health care allowance per person $_____

7b. Number of people who are under 65 X _____

7c. **Subtotal.** Multiply line 7a by line 7b. $_____ **Copy line 7c here➔** ..... $_____

People who are 65 years of age or older

7d. Out-of-pocket health care allowance per person $_____

7e. Number of people who are 65 or older X _____

7f. **Subtotal.** Multiply line 7d by line 7e. $_____ **Copy line 7f here➔** ..... + $_____

7g. **Total**. Add lines 7c and 7f..... $_____ **Copy total here➔** .....7g. $_____

Local Standards You must use the IRS Local Standards to answer the questions in lines 8-15.

Based on information from the IRS, the U.S. Trustee Program has divided the IRS Local Standard for housing for bankruptcy purposes into two parts:

- **Housing and utilities – Insurance and operating expenses**
- **Housing and utilities – Mortgage or rent expenses**

To answer the questions in lines 8-9, use the U.S. Trustee Program chart.

To find the chart, go online using the link specified in the separate instructions for this form. This chart may also be available at the bankruptcy clerk's office.

8. **Housing and utilities – Insurance and operating expenses:** Using the number of people you entered in line 5, fill in the dollar amount listed for your county for insurance and operating expenses. $_____

9. **Housing and utilities – Mortgage or rent expenses:**

9a. Using the number of people you entered in line 5, fill in the dollar amount listed for your county for mortgage or rent expenses. 9a. $_____

9b. Total average monthly payment for all mortgages and other debts secured by your home.

To calculate the total average monthly payment, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Then divide by 60.

Name of the creditor	Average monthly payment
_____	$_____
_____	$_____
_____	+ $_____
9b. Total average monthly payment	$_____

Copy line 9b here➔ — $_____ Repeat this amount on line 33a.

9c. Net mortgage or rent expense.
Subtract line 9b (*total average monthly payment*) from line 9a (*mortgage or rent expense*). If this amount is less than $0, enter $0. 9c. $_____ **Copy line 9c here➔** $_____

10. **If you claim that the U.S. Trustee Program's division of the IRS Local Standard for housing is incorrect and affects the calculation of your monthly expenses, fill in any additional amount you claim.** $_____

Explain why: _____
_____

11. **Local transportation expenses:** Check the number of vehicles for which you claim an ownership or operating expense.

- ❑ 0. Go to line 14.
- ❑ 1. Go to line 12.
- ❑ 2 or more. Go to line 12.

12. **Vehicle operation expense:** Using the IRS Local Standards and the number of vehicles for which you claim the operating expenses, fill in the *Operating Costs* that apply for your Census region or metropolitan statistical area. $_____

13. **Vehicle ownership or lease expense:** Using the IRS Local Standards, calculate the net ownership or lease expense for each vehicle below. You may not claim the expense if you do not make any loan or lease payments on the vehicle. In addition, you may not claim the expense for more than two vehicles.

Vehicle 1 **Describe Vehicle 1:** _____

_____

13a. Ownership or leasing costs using IRS Local Standard 13a. $_____

13b. Average monthly payment for all debts secured by Vehicle 1.
Do not include costs for leased vehicles.

To calculate the average monthly payment here and on line 13e, add all amounts that are contractually due to each secured creditor in the 60 months after you filed for bankruptcy. Then divide by 60.

Name of each creditor for Vehicle 1	Average monthly payment
_____	$_____

Copy 13b here ➔ — $_____ Repeat this amount on line 33b.

13c. Net Vehicle 1 ownership or lease expense
Subtract line 13b from line 13a. If this amount is less than $0, enter $0. 13c. $_____ **Copy net Vehicle 1 expense here** ..... ➔ $_____

Vehicle 2 **Describe Vehicle 2:** _____

_____

13d. Ownership or leasing costs using IRS Local Standard 13d. $_____

13e. Average monthly payment for all debts secured by Vehicle 2. Do not include costs for leased vehicles.

Name of each creditor for Vehicle 2	Average monthly payment
_____	$_____

Copy 13e here ➔ — $_____ Repeat this amount on line 33c.

13f. Net Vehicle 2 ownership or lease expense
Subtract line 13e from 13d. If this amount is less than $0, enter $0. 13f. $_____ **Copy net Vehicle 2 expense here** ..... ➔ $_____

14. **Public transportation expense**: If you claimed 0 vehicles in line 11, using the IRS Local Standards, fill in the *Public Transportation* expense allowance regardless of whether you use public transportation. $_____

15. **Additional public transportation expense:** If you claimed 1 or more vehicles in line 11 and if you claim that you may also deduct a public transportation expense, you may fill in what you believe is the appropriate expense, but you may not claim more than the IRS Local Standard for *Public Transportation*.

$_____

Other Necessary Expenses In addition to the expense deductions listed above, you are allowed your monthly expenses for the following IRS categories.

16. **Taxes:** The total monthly amount that you will actually owe for federal, state and local taxes, such as income taxes, self-employment taxes, social security taxes, and Medicare taxes. You may include the monthly amount withheld from your pay for these taxes. However, if you expect to receive a tax refund, you must divide the expected refund by 12 and subtract that number from the total monthly amount that is withheld to pay for taxes.
    Do not include real estate, sales, or use taxes. $_____

17. **Involuntary deductions:** The total monthly payroll deductions that your job requires, such as retirement contributions, union dues, and uniform costs.
    Do not include amounts that are not required by your job, such as voluntary 401(k) contributions or payroll savings. $_____

18. **Life insurance:** The total monthly premiums that you pay for your own term life insurance. If two married people are filing together, include payments that you make for your spouse's term life insurance. Do not include premiums for life insurance on your dependents, for a non-filing spouse's life insurance, or for any form of life insurance other than term. $_____

19. **Court-ordered payments:** The total monthly amount that you pay as required by the order of a court or administrative agency, such as spousal or child support payments.
    Do not include payments on past due obligations for spousal or child support. You will list these obligations in line 35. $_____

20. **Education:** The total monthly amount that you pay for education that is either required:
    - as a condition for your job, or
    - for your physically or mentally challenged dependent child if no public education is available for similar services. $_____

21. **Childcare:** The total monthly amount that you pay for childcare, such as babysitting, daycare, nursery, and preschool.
    Do not include payments for any elementary or secondary school education. $_____

22. **Additional health care expenses, excluding insurance costs:** The monthly amount that you pay for health care that is required for the health and welfare of you or your dependents and that is not reimbursed by insurance or paid by a health savings account. Include only the amount that is more than the total entered in line 7.
    Payments for health insurance or health savings accounts should be listed only in line 25. $_____

23. **Optional telephones and telephone services:** The total monthly amount that you pay for telecommunication services for you and your dependents, such as pagers, call waiting, caller identification, special long distance, or business cell phone service, to the extent necessary for your health and welfare or that of your dependents or for the production of income, if it is not reimbursed by your employer. + $_____
    Do not include payments for basic home telephone, internet and cell phone service. Do not include self-employment expenses, such as those reported on line 8 of Official Form 22A-1, or any amount you previously deducted.

24. **Add all of the expenses allowed under the IRS expense allowances.**
    Add lines 6 through 23. $_____

Additional Expense Deductions These are additional deductions allowed by the Means Test.
Note: Do not include any expense allowances listed in lines 6-24.

25. **Health insurance, disability insurance, and health savings account expenses.** The monthly expenses for health insurance, disability insurance, and health savings accounts that are reasonably necessary for yourself, your spouse, or your dependents.

Health insurance	$_____		
Disability insurance	$_____		
Health savings account	+ $_____		
Total	$_____	**Copy total here➔**	$_____

Do you actually spend this total amount?

❑ No. How much do you actually spend? $_____
❑ Yes

26. **Continued contributions to the care of household or family members.** The actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses. $_____

27. **Protection against family violence.** The reasonably necessary monthly expenses that you incur to maintain the safety of you and your family under the Family Violence Prevention and Services Act or other federal laws that apply. $_____

By law, the court must keep the nature of these expenses confidential.

28. **Additional home energy costs.** Your home energy costs are included in your non-mortgage housing and utilities allowance on line 8.

If you believe that you have home energy costs that are more than the home energy costs included in the non-mortgage housing and utilities allowance, then fill in the excess amount of home energy costs. $_____

You must give your case trustee documentation of your actual expenses, and you must show that the additional amount claimed is reasonable and necessary.

29. **Education expenses for dependent children who are younger than 18.** The monthly expenses (not more than $156.25* per child) that you pay for your dependent children who are younger than 18 years old to attend a private or public elementary or secondary school. $_____

You must give your case trustee documentation of your actual expenses, and you must explain why the amount claimed is reasonable and necessary and not already accounted for in lines 6-23.

* Subject to adjustment on 4/01/16, and every 3 years after that for cases begun on or after the date of adjustment.

30. **Additional food and clothing expense.** The monthly amount by which your actual food and clothing expenses are higher than the combined food and clothing allowances in the IRS National Standards. That amount cannot be more than 5% of the food and clothing allowances in the IRS National Standards. $_____

To find a chart showing the maximum additional allowance, go online using the link specified in the separate instructions for this form. This chart may also be available at the bankruptcy clerk's office.

You must show that the additional amount claimed is reasonable and necessary.

31. **Continuing charitable contributions.** The amount that you will continue to contribute in the form of cash or financial instruments to a religious or charitable organization. 26 U.S.C. § 170(c)(1)-(2). $_____

32. **Add all of the additional expense deductions.** $_____

Add lines 25 through 31.

Deductions for Debt Payment

33. **For debts that are secured by an interest in property that you own, including home mortgages, vehicle loans, and other secured debt, fill in lines 33a through 33g.**

To calculate the total average monthly payment, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Then divide by 60.

		Average monthly payment
	Mortgages on your home:	
33a.	Copy line 9b here ..... ➔	$_____
	Loans on your first two vehicles:	
33b.	Copy line 13b here. ..... ➔	$_____
33c.	Copy line 13e here. ..... ➔	$_____

	Name of each creditor for other secured debt	Identify property that secures the debt	Does payment include taxes or insurance?	
33d.	_____	_____	❑ No ❑ Yes	$_____
33e.	_____	_____	❑ No ❑ Yes	$_____
33f.	_____	_____	❑ No ❑ Yes	+ $_____

33g. Total average monthly payment. Add lines 33a through 33f. ..... $_____ **Copy total here➔** $_____

34. **Are any debts that you listed in line 33 secured by your primary residence, a vehicle, or other property necessary for your support or the support of your dependents?**

❑ No. Go to line 35.

❑ Yes. State any amount that you must pay to a creditor, in addition to the payments listed in line 34, to keep possession of your property (called the *cure amount*). Next, divide by 60 and fill in the information below.

Name of the creditor	Identify property that secures the debt	Total cure amount		Monthly cure amount
_____	_____	$_____	÷ 60 =	$_____
_____	_____	$_____	÷ 60 =	$_____
_____	_____	$_____	÷ 60 =	+ $_____
			Total	$_____

Copy total here➔ $_____

35. **Do you owe any priority claims such as a priority tax, child support, or alimony — that are past due as of the filing date of your bankruptcy case?** 11 U.S.C. § 507.

❑ No. Go to line 36.

❑ Yes. Fill in the total amount of all of these priority claims. Do not include current or ongoing priority claims, such as those you listed in line 19.

Total amount of all past-due priority claims ..... $_____ ÷ 60 = $_____

36. **Are you eligible to file a case under Chapter 13?** 11 U.S.C. § 109(e).
For more information, go online using the link for *Bankruptcy Basics* specified in the separate instructions for this form. *Bankruptcy Basics* may also be available at the bankruptcy clerk's office.

❑ No. Go to line 37.

❑ Yes. Fill in the following information.

Projected monthly plan payment if you were filing under Chapter 13 $_____

Current multiplier for your district as stated on the list issued by the Administrative Office of the United States Courts (for districts in Alabama and North Carolina) or by the Executive Office for United States Trustees (for all other districts). x _____

To find a list of district multipliers that includes your district, go online using the link specified in the separate instructions for this form. This list may also be available at the bankruptcy clerk's office.

Average monthly administrative expense if you were filing under Chapter 13 $_____ **Copy total here➔** $_____

37. **Add all of the deductions for debt payment.**
Add lines 33g through 36. $_____

Total Deductions from Income

38. **Add all of the allowed deductions.**

Copy line 24, *All of the expenses allowed under IRS expense allowances*..... $_____

Copy line 32, *All of the additional expense deductions*..... $_____

Copy line 37, *All of the deductions for debt payment*..... + $_____

Total deductions $_____ **Copy total here ➔** $_____

Part 3: Determine Whether There Is a Presumption of Abuse

39. **Calculate monthly disposable income for 60 months**

39a. Copy line 4, *adjusted current monthly income*..... $_____

39b. Copy line 38, *Total deductions*..... − $_____

39c. Monthly disposable income. 11 U.S.C. § 707(b)(2). Subtract line 39b from line 39a. $_____ **Copy line 39c here➔** $_____

For the next 60 months (5 years)..... x 60

39d. **Total**. Multiply line 39c by 60. ..... 39d. $_____ **Copy line 39d here➔** $_____

40. **Find out whether there is a presumption of abuse.** Check the box that applies:

❑ **The line 39d is less than $7,475*.** On the top of page 1 of this form, check box 1, *There is no presumption of abuse.* Go to Part 5.

❑ **The line 39d is more than $12,475*.** On the top of page 1 of this form, check box 2, *There is a presumption of abuse.* You may fill out Part 4 if you claim special circumstances. Then go to Part 5.

❑ **The line 39d is at least $7,475*, but not more than $12,475*.** Go to line 41.

* Subject to adjustment on 4/01/16, and every 3 years after that for cases filed on or after the date of adjustment.

41. 41a. **Fill in the amount of your total nonpriority unsecured debt.** If you filled out *A Summary of Your Assets and Liabilities and Certain Statistical Information Schedules* (Official Form 6), you may refer to line 3b on that form.

38a. $_____

x .25

41b. **25% of your total nonpriority unsecured debt.** 11 U.S.C. § 707(b)(2)(A)(i)(I)
Multiply line 41a by 0.25.

$_____ **Copy here➔** $_____

42. **Determine whether the income you have left over after subtracting all allowed deductions is enough to pay 25% of your unsecured, nonpriority debt.**
Check the box that applies:

❑ **Line 39d is less than line 41b.** On the top of page 1 of this form, check box 1, *There is no presumption of abuse.* Go to Part 5.

❑ **Line 39d is equal to or more than line 41b.** On the top of page 1 of this form, check box 2, *There is a presumption of abuse.* You may fill out Part 4 if you claim special circumstances. Then go to Part 5.

Part 4: Give Details About Special Circumstances

43. **Do you have any special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative?** 11 U.S.C. § 707(b)(2)(B).

❑ No. Go to Part 5.

❑ Yes. Fill in the following information. All figures should reflect your average monthly expense or income adjustment for each item. You may include expenses you listed in line 25.

You must give a detailed explanation of the special circumstances that make the expenses or income adjustments necessary and reasonable. You must also give your case trustee documentation of your actual expenses or income adjustments.

Give a detailed explanation of the special circumstances	Average monthly expense or income adjustment
_____	$_____
_____	$_____
_____	$_____
_____	$_____

Part 5: Sign Below

By signing here, I declare under penalty of perjury that the information on this statement and in any attachments is true and correct.

✘ _____
Signature of Debtor 1

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

Date _____
MM / DD / YYYY

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Official Form 22B

Instructions for the Chapter 11 Statement of Your Current Monthly Income

United States Bankruptcy Court 12/01/14

If you are filing under chapter 7, 12, or 13, do not fill out this form.

How to Fill Out this Form

You must file the *Chapter 11 Statement of Your Current Monthly Income* (Official Form 22B) if you are an individual filing for bankruptcy under Chapter 11.

If you have nothing to report for a line, write $0.

Understand the terms used in the form

This form uses *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, this form uses *you* to ask for information from both debtors. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Things to remember when filling out this form

- Be as complete and accurate as possible.
- If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies On the top of any additional pages, write your name and case number (if known).
- If two married people are filing together, both are equally responsible for supplying correct information.

Do not include these instructions when you submit your bankruptcy forms to the court. Keep them for your records.

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Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Draft March 14, 2014

❒ Check if this is an amended filing

Official Form 22B

Chapter 11 Statement of Your Current Monthly Income

12/14

You must file this form if you are an individual and are filing for bankruptcy under Chapter 11. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).

Part 1: Calculate Your Average Monthly Income

1. **What is your marital and filing status?** Check one only.

❑ **Not married.** Fill out Column A, lines 2-11.

❑ **Married and your spouse is filing with you.** Fill out both Columns A and B, lines 2-11.

❑ **Married and your spouse is NOT filing with you.** Fill out Column A, lines 2-11.

Fill in the average monthly income that you received from all sources, derived during the 6 full months before you file this bankruptcy case. 11 U.S.C. § 101(10A). For example, if you are filing on September 15, the 6-month period would be March 1 through August 31. If the amount of your monthly income varied during the 6 months, add the income for all 6 months and divide the total by 6. Fill in the result.
Do not include any income amount more than once. For example, if both spouses own the same rental property, put the income from that property in one column only. If you have nothing to report for any line, write $0 in the space.

			Column A **For Debtor 1**	*Column B* **Debtor 2 or non-filing spouse**
2. **Your gross wages, salary, tips, bonuses, overtime, and commissions** (before all payroll deductions).			$_____	$_____
3. **Alimony and maintenance payments.** Do not include payments from a spouse if Column B is filled in.			$_____	$_____
4. **All amounts from any source which are regularly paid for household expenses of you or your dependents, including child support.** Include regular contributions from an unmarried partner, members of your household, your dependents, parents, and roommates. Include regular contributions from a spouse only if Column B is not filled in. Do not include payments you listed on line 3.			$_____	$_____
5. **Net income from operating a business, profession, or farm**				
Gross receipts (before all deductions)	$_____			
Ordinary and necessary operating expenses	– $_____			
Net monthly income from a business, profession, or farm	$_____	**Copy here➔**	$_____	$_____
6. **Net income from rental and other real property**				
Gross receipts (before all deductions)	$_____			
Ordinary and necessary operating expenses	– $_____			
Net monthly income from rental or other real property	$_____	**Copy here➔**	$_____	$_____

	Column A For Debtor 1	Column B Debtor 2 or non-filing spouse
7. **Interest, dividends, and rovalties**	$_____	$_____
8. **Unemployment compensation**	$_____	$_____

Do not enter the amount if you contend that the amount received was a benefit under the Social Security Act. Instead, list it here: ..... ➔

For you ..... $_____

For your spouse..... $_____

9. **Pension or retirement income.** Do not include any amount received that was a benefit under the Social Security Act.	$_____	$_____
10. **Income from all other sources not listed above.** Specify the source and amount. Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, a crime against humanity, or international or domestic terrorism. If necessary, list other sources on a separate page and put the total on line 10c.		
10a. _____	$_____	$_____
10b. _____	$_____	$_____
10c. Total amounts from separate pages, if any.	+ $_____	+ $_____
11. **Calculate your total average monthly income.** Add lines 2 through 10 for each column. Then add the total for Column A to the total for Column B.	$_____ +	$_____ = $_____

Total average monthly income

Part 2: Deduct any applicable marital adjustment

12. **Copy your total average monthly income from line 11.** $_____

13. **Calculate the marital adjustment.** Check one:

- ❑ You are not married. Fill in 0 in line 13d.
- ❑ You are married and your spouse is filing with you. Fill in 0 in line 13d.
- ❑ You are married and your spouse is not filing with you.
  Fill in the amount of the income listed in line 11, Column B, that was NOT regularly paid for the household expenses of you or your dependents, such as payment of the spouse's tax liability or the spouse's support of someone other than you or your dependents.

  In lines 13a-c, specify the basis for excluding this income and the amount of income devoted to each purpose. If necessary, list additional adjustments on a separate page.

  If this adjustment does not apply, enter 0 on line 13d.

13a. _____	$_____
13b. _____	$_____
13c. _____	+ $_____
13d. Total	$_____ Copy here. ➔ 13d. − _____

14. **Your current monthly income.** Subtract line 13d from line 12. 14. $ _____

Part 2: Sign Below

By signing here, under penalty of perjury I declare that the information on this statement and in any attachments is true and correct.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date_____
MM / DD / YYYY

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Official Forms 22C–1 and 22C–2

Instructions for the Chapter 13 Statement of Your Current Monthly Income, Calculation of Commitment Period and Chapter 13 Calculation of Your Disposable Income

United States Bankruptcy Court 12/01/14

If you are filing under chapter 7, 11, or 12, do not fill out this form.

How to Fill Out these Forms

Official Forms 22C─1 and 22C─2 determine the commitment period for your payments to creditors, how the amount you may be required to pay to creditors is established, and, in some situations, how much you must pay.

You must file 22C ─1, the *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period* (Official Form 22C ─1) if you are an individual and you are filing under chapter 13. This form will report your current monthly income and determine whether your income is at or below the median income for households of the same size in your state. If your income is equal to or less than the median, you will not have to fill out the second form. Form 22C -1 also will determine your applicable commitment period─the time period for making payments to your creditors, unless the court orders otherwise.

If your income is above the median, you must file the second form, 22C─2, *Chapter13 Calculation of Your Disposable Income*. The calculations on this form—sometimes called the *Means Test*—reduce your income by living expenses and payment of certain debts, resulting in an amount available to pay unsecured debts. Your chapter 13 plan may be required to provide for payment of this amount toward unsecured debts.

Read each question carefully. You may not be required to answer every question on this form. The instructions will alert you if you may skip questions.

Some of the questions require you to go to other sources for information. In those cases, the form has instructions for where to find the information you need.

Generally, if you and your spouse are filing together, you should file one statement together.

Understand the terms used in these form

These forms use *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, these forms use *you* to ask for information from both debtors. When information is needed about the spouses separately, the forms use *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Information for completing the forms

To fill out several lines of the forms, you must look up information provided on websites or from other sources. For information to complete line 16c of Form 22C-1 and lines 6-15, 30, and 36 of Form 22C-2, go to: www.justice.gov/ust/eo/bapcpa/meanstesting.htm.

If you do not have a computer with internet access, you may be able to use a public computer at the bankruptcy clerk's office or at a public library.

Things to remember when filling out this form

- Be as complete and accurate as possible.
- If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).
- If two married people are filing together, both are equally responsible for supplying correct information.

Do not include these instructions when you submit your bankruptcy forms to the court. Keep them for your records.

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Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Check as directed in lines 17 and 21:

According to the calculations required by this Statement:

- ❑ 1. Disposable income is not determined under 11 U.S.C. § 1325(b)(3).
- ❑ 2. Disposable income is determined under 11 U.S.C. § 1325(b)(3).
- ❑ 3. The commitment period is 3 years.
- ❑ 4. The commitment period is 5 years.

❑ Check if this is an amended filing

Official Form 22C–1

Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period

12/14

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for being accurate. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).

Part 1: Calculate Your Average Monthly Income

1. **What is your marital and filing status?** Check one only.
   - ❑ **Not married.** Fill out Column A, lines 2-11.
   - ❑ **Married.** Fill out both Columns A and B, lines 2-11.

Fill in the average monthly income that you from all sources, derived during the 6 full months before you file this bankruptcy case. 11 U.S.C. § 101(10A). For example, if you are filing on September 15, the 6-month period would be March 1 through August 31. If the amount of your monthly income varied during the 6 months, add the income for all 6 months and divide the total by 6. Fill in the result. Do not include any income amount more than once. For example, if both spouses own the same rental property, put the income from that property in one column only. If you have nothing to report for any line, write $0 in the space.

			Column A **For Debtor 1**	*Column B* **Debtor 2 or non-filing spouse**
2. **Your gross wages, salary, tips, bonuses, overtime, and commissions** (before all payroll deductions).			$_____	$_____
3. **Alimony and maintenance payments.** Do not include payments from a spouse if Column B is filled in.			$_____	$_____
4. **All amounts from any source which are regularly paid for household expenses of you or your dependents, including child support.** Include regular contributions from an unmarried partner, members of your household, your dependents, parents, and roommates. Include regular contributions from a spouse only if Column B is not filled in. Do not include payments you listed on line 3.			$_____	$_____
5. **Net income from operating a business, profession, or farm**				
Gross receipts (before all deductions)	$_____			
Ordinary and necessary operating expenses	– $_____			
Net monthly income from a business, profession, or farm	$_____	**Copy here➔**	$_____	$_____
6. **Net income from rental and other real property**				
Gross receipts (before all deductions)	$_____			
Ordinary and necessary operating expenses	– $_____			
Net monthly income from rental or other real property	$_____	**Copy here➔**	$_____	$_____

	Column A **For Debtor 1**	*Column B* **Debtor 2 or non-filing spouse**
7. **Interest, dividends, and royalties**	$_____	$_____
8. **Unemployment compensation**	$_____	$_____
Do not enter the amount if you contend that the amount received was a benefit under the Social Security Act. Instead, list it here: ..... ➔		
For you ..... $_____		
For your spouse ..... $_____		
9. **Pension or retirement income.** Do not include any amount received that was a benefit under the Social Security Act.	$_____	$_____
10. **Income from all other sources not listed above.** Specify the source and amount. Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, a crime against humanity, or international or domestic terrorism. If necessary, list other sources on a separate page and put the total on line 10c.		
10a. _____	$_____	$_____
10b. _____	$_____	$_____
10c. Total amounts from separate pages, if any.	+ $_____	+ $_____
11. **Calculate your total average monthly income.** Add lines 2 through 10 for each column. Then add the total for Column A to the total for Column B.	$_____ +	$_____ = $_____ **Total average monthly income**

Part 2: Determine How to Measure Your Deductions from Income

12. **Copy your total average monthly income from line 11.** ..... $_____

13. **Calculate the marital adjustment.** Check one:

- ❑ You are not married. Fill in 0 in line 13d.
- ❑ You are married and your spouse is filing with you. Fill in 0 in line 13d.
- ❑ You are married and your spouse is not filing with you.
  Fill in the amount of the income listed in line 11, Column B, that was NOT regularly paid for the household expenses of you or your dependents, such as payment of the spouse's tax liability or the spouse's support of someone other than you or your dependents.

  In lines 13a-c, specify the basis for excluding this income and the amount of income devoted to each purpose. If necessary, list additional adjustments on a separate page.

  If this adjustment does not apply, enter 0 on line 13d.

13a. _____ $_____

13b. _____ $_____

13c. _____ + $_____

13d. Total ..... $_____ **Copy here.** ➔ 13d. — _____

14. **Your current monthly income.** Subtract line 13d from line 12. 14. $ _____

15. **Calculate your current monthly income for the year.** Follow these steps:

15a. Copy line 14 here ➔ ..... 15a. $ _____

Multiply line 15a by 12 (the number of months in a year). x 12

15b. The result is your current monthly income for the year for this part of the form. 15b. $_____

16. **Calculate the median family income that applies to you.** Follow these steps:

16a. Fill in the state in which you live. _____

16b. Fill in the number of people in your household. _____

16c. Fill in the median family income for your state and size of household. ..... 16c. $_____
To find a list of applicable median income amounts, go online using the link specified in the separate instructions for this form. This list may also be available at the bankruptcy clerk's office.

17. **How do the lines compare?**

17a. ❑ Line 15b is less than or equal to line 16c. On the top of page 1 of this form, check box 1, *Disposable income is not determined under 11 U.S.C. § 1325(b)(3)*. **Go to Part 3.** Do NOT fill out *Calculation of Disposable Income* (Official Form 22C–2).

17b. ❑ Line 15b is more than line 16c. On the top of page 1 of this form, check box 2, *Disposable income is determined under 11 U.S.C. § 1325(b)(3).* **Go to Part 3 and fill out Calculation of Disposable Income (Official Form 22C–2).** On line 35 of that form, copy your current monthly income from line 14 above.

Part 3: Calculate Your Commitment Period Under 11 U.S.C. §1325(b)(4)

18. **Copy your total average monthly income from line 11.** ..... 18. $_____

19. **Deduct the marital adjustment if it applies.** If you are married, your spouse is not filing with you, and you contend that calculating the commitment period under 11 U.S.C. § 1325(b)(4) allows you to deduct part of your spouse's income, copy the amount from line 13d.
If the marital adjustment does not apply, fill in 0 on line 19a. 19a. – $_____

Subtract line 19a from line 18. 19b. $_____

20. **Calculate your current monthly income for the year.** Follow these steps:

20a. Copy line 19b. ..... 20a. $_____

Multiply by 12 (the number of months in a year). x 12

20b. The result is your current monthly income for the year for this part of the form. 20b. $_____

20c. Copy the median family income for your state and size of household from line 16c. ..... $_____

21. **How do the lines compare?**

❑ Line 20b is less than line 20c. Unless otherwise ordered by the court, on the top of page 1 of this form, check box 3, *The commitment period is 3 years*. Go to Part 4.

❑ Line 20b is more than or equal to line 20c. Unless otherwise ordered by the court, on the top of page 1 of this form, check box 4, *The commitment period is 5 years*. Go to Part 4.

Part 4: Sign Below

By signing here, under penalty of perjury I declare that the information on this statement and in any attachments is true and correct.

✘ _____ ✘ _____
Signature of Debtor 1 Signature of Debtor 2

Date _____ Date _____
MM / DD / YYYY MM / DD / YYYY

If you checked 17a, do NOT fill out or file Form 22C–2.

If you checked 17b, fill out Form 22C–2 and file it with this form. On line 35 of that form, copy your current monthly income from line 14 above.

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Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Draft March 18, 2014

❑ Check if this is an amended filing

Official Form 22C–2

Chapter 13 Calculation of Your Disposable Income

12/14

To fill out this form, you will need your completed copy of *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period* (Official Form 22C–1).

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for being accurate. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).

Part 1: Calculate Your Deductions from Your Income

The Internal Revenue Service (IRS) issues National and Local Standards for certain expense amounts. Use these amounts to answer the questions in lines 6-15. To find the IRS standards, go online using the link specified in the separate instructions for this form. This information may also be available at the bankruptcy clerk's office.

Deduct the expense amounts set out in lines 6-15 regardless of your actual expense. In later parts of the form, you will use some of your actual expenses if they are higher than the standards. Do not include any operating expenses that you subtracted from income in lines 5 and 6 of Form 22C–1, and do not deduct any amounts that you subtracted from your spouse's income in line 13 of Form 22C–1.

If your expenses differ from month to month, enter the average expense.

Note: Line numbers 1-4 are not used in this form. These numbers apply to information required by a similar form used in chapter 7 cases.

5. **The number of people used in determining your deductions from income**
Fill in the number of people who could be claimed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support. This number may be different from the number of people in your household. ☐

National Standards You must use the IRS National Standards to answer the questions in lines 6-7.

6. **Food, clothing, and other items:** Using the number of people you entered in line 5 and the IRS National Standards, fill in the dollar amount for food, clothing, and other items. $_____

7. **Out-of-pocket health care allowance:** Using the number of people you entered in line 5 and the IRS National Standards, fill in the dollar amount for out-of-pocket health care. The number of people is split into two categories—people who are under 65 and people who are 65 or older—because older people have a higher IRS allowance for health care costs. If your actual expenses are higher than this IRS amount, you may deduct the additional amount on line 22.

People who are under 65 years of age

7a. Out-of-pocket health care allowance per person $_____

7b. Number of people who are under 65 X _____

7c. Subtotal. Multiply line 7a by line 7b. $_____ **Copy line 7c here➔** $_____

People who are 65 years of age or older

7d. Out-of-pocket health care allowance per person $_____

7e. Number of people who are 65 or older X _____

7f. Subtotal. Multiply line 7d by line 7e. $_____ **Copy line 7f here➔** + $_____

7g. **Total**. Add lines 7c and 7f. ..... $_____ **Copy total here➔** ..... 7g. $_____

Local Standards You must use the IRS Local Standards to answer the questions in lines 8-15.

Based on information from the IRS, the U.S. Trustee Program has divided the IRS Local Standard for housing for bankruptcy purposes into two parts:

- **Housing and utilities – Insurance and operating expenses**
- **Housing and utilities – Mortgage or rent expenses**

To answer the questions in lines 8-9, use the U.S. Trustee Program chart. To find the chart, go online using the link specified in the separate instructions for this form. This chart may also be available at the bankruptcy clerk's office.

8. **Housing and utilities – Insurance and operating expenses:** Using the number of people you entered in line 5, fill in the dollar amount listed for your county for insurance and operating expenses. $_____

9. **Housing and utilities – Mortgage or rent expenses:**

9a. Using the number of people you entered in line 5, fill in the dollar amount listed for your county for mortgage or rent expenses. $_____

9b. Total average monthly payment for all mortgages and other debts secured by your home.

To calculate the total average monthly payment, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Next divide by 60.

Name of the creditor	Average monthly payment
_____	$_____
_____	$_____
_____	+ $_____

9b. Total average monthly payment ..... $_____ **Copy line 9b here➔** – $_____ Repeat this amount on line 33a.

9c. Net mortgage or rent expense.

Subtract line 9b (*total average monthly payment*) from line 9a (*mortgage or rent expense*). If this number is less than $0, enter $0. $_____ **Copy 9c here➔** $_____

10. **If you claim that the U.S. Trustee Program's division of the IRS Local Standard for housing is incorrect and affects the calculation of your monthly expenses, fill in any additional amount you claim.** $_____

Explain why: _____

_____

11. **Local transportation expenses:** Check the number of vehicles for which you claim an ownership or operating expense.

- ❑ 0. Go to line 14.
- ❑ 1. Go to line 12.
- ❑ 2 or more. Go to line 12.

12. **Vehicle operation expense:** Using the IRS Local Standards and the number of vehicles for which you claim the operating expenses, fill in the *Operating Costs* that apply for your Census region or metropolitan statistical area. $_____

13. **Vehicle ownership or lease expense:** Using the IRS Local Standards, calculate the net ownership or lease expense for each vehicle below. You may not claim the expense if you do not make any loan or lease payments on the vehicle. In addition, you may not claim the expense for more than two vehicles.

Vehicle 1 **Describe Vehicle 1:** _____
_____

13a. Ownership or leasing costs using IRS Local Standard 13a. $_____

13b. Average monthly payment for all debts secured by Vehicle 1.
Do not include costs for leased vehicles.

To calculate the average monthly payment here and on line 13e, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Then divide by 60.

Name of each creditor for Vehicle 1	Average monthly payment
_____	$_____

Copy13b here➔ — $_____ Repeat this amount on line 33b.

13c. Net Vehicle 1 ownership or lease expense
Subtract line 13b from line 13a. If this number is less than $0, enter $0. 13c. $_____ **Copy net Vehicle 1 expense here➔** $_____

Vehicle 2 **Describe Vehicle 2:** _____
_____

13d. Ownership or leasing costs using IRS Local Standard 13d. $_____

13e. Average monthly payment for all debts secured by Vehicle 2.
Do not include costs for leased vehicles.

Name of each creditor for Vehicle 2	Average monthly payment
_____	$_____

Copy here➔ — $_____ Repeat this amount on line 33c.

13f. Net Vehicle 2 ownership or lease expense
Subtract line 13e from 13d. If this number is less than $0, enter $0. 13f. $_____ **Copy net Vehicle 2 expense here ➔** $_____

14. **Public transportation expense**: If you claimed 0 vehicles in line 11, using the IRS Local Standards, fill in the *Public Transportation* expense allowance regardless of whether you use public transportation. $_____

15. **Additional public transportation expense:** If you claimed 1 or more vehicles in line 11 and if you claim that you may also deduct a public transportation expense, you may fill in what you believe is the appropriate expense, but you may not claim more than the IRS Local Standard for *Public Transportation*. $_____

Other Necessary Expenses In addition to the expense deductions listed above, you are allowed your monthly expenses for the following IRS categories.

16. **Taxes:** The total monthly amount that you actually pay for federal, state and local taxes, such as income taxes, self-employment taxes, social security taxes, and Medicare taxes. You may include the monthly amount withheld from your pay for these taxes. However, if you expect to receive a tax refund, you must divide the expected refund by 12 and subtract that number from the total monthly amount that is withheld to pay for taxes. $_____

    Do not include real estate, sales, or use taxes.

17. **Involuntary deductions:** The total monthly payroll deductions that your job requires, such as retirement contributions, union dues, and uniform costs.

    Do not include amounts that are not required by your job, such as voluntary 401(k) contributions or payroll savings. $_____

18. **Life insurance:** The total monthly premiums that you pay for your own term life insurance. If two married people are filing together, include payments that you make for your spouse's term life insurance.

    Do not include premiums for life insurance on your dependents, for a non-filing spouse's life insurance, or for any form of life insurance other than term. $_____

19. **Court-ordered payments:** The total monthly amount that you pay as required by the order of a court or administrative agency, such as spousal or child support payments. $_____

    Do not include payments on past due obligations for spousal or child support. You will list these obligations in line 35.

20. **Education:** The total monthly amount that you pay for education that is either required:
    - as a condition for your job, or
    - for your physically or mentally challenged dependent child if no public education is available for similar services.

    $_____

21. **Childcare:** The total monthly amount that you pay for childcare, such as babysitting, daycare, nursery, and preschool. Do not include payments for any elementary or secondary school education. $_____

22. **Additional health care expenses, excluding insurance costs:** The monthly amount that you pay for health care that is required for the health and welfare of you or your dependents and that is not reimbursed by insurance or paid by a health savings account. Include only the amount that is more than the total entered in line 7. $_____

    Payments for health insurance or health savings accounts should be listed only in line 25.

23. **Optional telephones and telephone services:** The total monthly amount that you pay for telecommunication services for you and your dependents, such as pagers, call waiting, caller identification, special long distance, or business cell phone service, to the extent necessary for your health and welfare or that of your dependents or for the production of income, if it is not reimbursed by your employer. + $_____

    Do not include payments for basic home telephone, internet or cell phone service. Do not include self-employment expenses, such as those reported on line 5 of Form 22C-1, or any amount you previously deducted.

24. **Add all of the expenses allowed under the IRS expense allowances.**
    Add lines 6 through 23. $_____

Additional Expense Deductions These are additional deductions allowed by the Means Test.
Note: Do not include any expense allowances listed in lines 6-24.

25. **Health insurance, disability insurance, and health savings account expenses.** The monthly expenses for health insurance, disability insurance, and health savings accounts that are reasonably necessary for yourself, your spouse, or your dependents.

Health insurance	$_____	
Disability insurance	$_____	
Health savings account	+ $_____	
Total	$_____	**Copy total here➔** ..... $_____

Do you actually spend this total amount?

- ❑ No. How much do you actually spend? $_____
- ❑ Yes

26. **Continuing contributions to the care of household or family members.** The actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses. $_____

27. **Protection against family violence.** The reasonably necessary monthly expenses that you incur to maintain the safety of you and your family under the Family Violence Prevention and Services Act or other federal laws that apply. $_____

    By law, the court must keep the nature of these expenses confidential.

28. **Additional home energy costs.** Your home energy costs are included in your non-mortgage housing and utilities allowance on line 4.

If you believe that you have home energy costs that are more than the home energy costs included in the non-mortgage housing and utilities allowance, then fill in the excess amount of home energy costs. $_____

You must give your case trustee documentation of your actual expenses, and you must show that the additional amount claimed is reasonable and necessary.

29. **Education expenses for dependent children who are younger than 18.** The monthly expenses (not more than $156.25* per child) that you pay for your dependent children who are younger than 18 years old to attend a private or public elementary or secondary school. $_____

You must give your case trustee documentation of your actual expenses, and you must explain why the amount claimed is reasonable and necessary and not already accounted for in lines 6-23.

* Subject to adjustment on 4/01/16, and every 3 years after that for cases begun on or after the date of adjustment.

30. **Additional food and clothing expense.** The monthly amount by which your actual food and clothing expenses are higher than the combined food and clothing allowances in the IRS National Standards. That amount cannot be more than 5% of the food and clothing allowances in the IRS National Standards. $_____

To find a chart showing the maximum additional allowance, go online using the link specified in the separate instructions for this form. This chart may also be available at the bankruptcy clerk's office.

You must show that the additional amount claimed is reasonable and necessary.

31. **Continuing charitable contributions.** The amount that you will continue to contribute in the form of cash or financial instruments to a religious or charitable organization. 11 U.S.C. § 548(d)3 and (4). + _____

Do not include any amount more than 15% of your gross monthly income.

32. **Add all of the additional expense deductions.**
Add lines 25 through 31. $_____

Deductions for Debt Payment

33. **For debts that are secured by an interest in property that you own, including home mortgages, vehicle loans, and other secured debt, fill in lines 33a through 33g.**

To calculate the total average monthly payment, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Then divide by 60.

	Average monthly payment
Mortgages on your home	
33a. Copy line 9b here ..... ➔	$_____
Loans on your first two vehicles	
33b. Copy line 13b here. ..... ➔	$_____
33c. Copy line 13e here. ..... ➔	$_____

	Name of each creditor for other secured debt	Identify property that secures the debt	Does payment include taxes or insurance?	
33d.	_____	_____	No Yes	$_____
33e.	_____	_____	No Yes	$_____
33f.	_____	_____	No Yes	+ $_____

33g. Total average monthly payment. Add lines 33a through 33f..... $_____ **Copy total here➔** $_____

34. **Are any debts that you listed in line 33 secured by your primary residence, a vehicle, or other property necessary for your support or the support of your dependents?**

❑ No. Go to line 35.
❑ Yes. State any amount that you must pay to a creditor, in addition to the payments listed in line 34, to keep possession of your property (called the *cure amount*). Next, divide by 60 and fill in the information below.

Name of the creditor	Identify property that secures the debt	Total cure amount		Monthly cure amount
_____	_____	$_____	÷ 60 =	$_____
_____	_____	$_____	÷ 60 =	$_____
_____	_____	$_____	÷ 60 = +	$_____
			Total	$_____

Copy total here ➔ $_____

35. **Do you owe any priority claims—such as a priority tax, child support, or alimony— that are past due as of the filing date of your bankruptcy case?** 11 U.S.C. § 507.

❑ No. Go to line 36.
❑ Yes. Fill in the total amount of all of these priority claims. Do not include current or ongoing priority claims, such as those you listed in line 19.

Total amount of all past-due priority claims. ..... $_____ ÷ 60 $_____

36. **Projected monthly Chapter 13 plan payment** $_____

Current multiplier for your district as stated on the list issued by the Administrative Office of the United States Courts (for districts in Alabama and North Carolina) or by the Executive Office for United States Trustees (for all other districts).
To find a list of district multipliers that includes your district, go online using the link specified in the separate instructions for this form. This list may also be available at the bankruptcy clerk's office. x _____

Average monthly administrative expense $_____ **Copy total here** ➔ $_____

37. **Add all of the deductions for debt payment.** Add lines 33g through 36. $_____

Total Deductions from Income

38. **Add all of the allowed deductions.**

Copy line 24, *All of the expenses allowed under IRS expense allowances*..... $_____

Copy line 32, *All of the additional expense deductions*..... $_____

Copy line 37, *All of the deductions for debt payment*..... + $_____

Total deductions $_____ **Copy total here** ➔ $_____

Part 2: Determine Your Disposable Income Under 11 U.S.C. § 1325(b)(2)

39. **Copy your total current monthly income from line 14 of Form 22C-1, *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period*.** ..... $_____

40. **Fill in any reasonably necessary income you receive for support for dependent children.** The monthly average of any child support payments, foster care payments, or disability payments for a dependent child, reported in Part I of Form 22C-1, that you received in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child. $_____

41. **Fill in all qualified retirement deductions.** The monthly total of all amounts that your employer withheld from wages as contributions for qualified retirement plans, as specified in 11 U.S.C. § 541(b)(7) plus all required repayments of loans from retirement plans, as specified in 11 U.S.C. § 362(b)(19). $_____

42. **Total of all deductions allowed under 11 U.S.C. § 707(b)(2)(A)**. Copy line 38 here ..... ➔ $_____

43. **Deduction for special circumstances.** If special circumstances justify additional expenses and you have no reasonable alternative, describe the special circumstances and their expenses. You must give your case trustee a detailed explanation of the special circumstances and documentation for the expenses.

Describe the special circumstances	Amount of expense
43a. _____	$_____
43b. _____	$_____
43c. _____	+ $_____
43d. **Total**. Add lines 43a through 43c.....	$_____ Copy 43d here ➔ + $_____

44. **Total adjustments.** Add lines 40 and 43d. ..... ➔ $_____ Copy total here ➔ − $_____

45. **Calculate your monthly disposable income under § 1325(b)(2).** Subtract line 44 from line 39. $_____

Part 3: Change in Income or Expenses

46. **Change in income or expenses.** If the income in Form 22C-1 or the expenses you reported in this form have changed or are virtually certain to change after the date you filed your bankruptcy petition and during the time your case will be open, fill in the information below. For example, if the wages reported increased after you filed your petition, check 22C-1 in the first column, enter line 2 in the second column, explain why the wages increased, fill in when the increase occurred, and fill in the amount of the increase.

Form	Line	Reason for change	Date of change	Increase or decrease?	Amount of change
❑ 22C–1 ❑ 22C–2	____	_____	_____	❑ Increase ❑ Decrease	$_____
❑ 22C–1 ❑ 22C–2	____	_____	_____	❑ Increase ❑ Decrease	$_____
❑ 22C–1 ❑ 22C–2	____	_____	_____	❑ Increase ❑ Decrease	$_____
❑ 22C–1 ❑ 22C–2	____	_____	_____	❑ Increase ❑ Decrease	$_____

Part 4: Sign Below

By signing here, under penalty of perjury you declare that the information on this statement and in any attachments is true and correct.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

COMMITTEE NOTE

Official Forms 22A-1, 22A-1Supp, 22A-2, 22C-1, and 22C-2 are new versions of the "means test" forms used by individuals in chapter 7 and 13, formerly Official Forms 22A and 22C. The original forms were substantially revised as part of the Forms Modernization Project. Official Form 22B, used by individuals in chapter 11, has also been revised as part of the project, which was designed so that the individuals completing the forms would do so more accurately and completely.

The revised versions of the means test forms present the relevant information in a format different from the original forms. For chapter 7, former Official Form 22A has been split into two forms: 22A-1 and 22A-2. The first form, Official Form 22A-1, *Chapter 7 Statement of Your Current Monthly Income*, is to be completed by all chapter 7 debtors. It calculates a debtor's current monthly income and compares that calculation to the median income for households of the same size in the debtor's state. The second form, Official Form 22A-2, *Chapter 7 Means Test Calculation*, is to be completed only by those chapter 7 debtors whose income is above the applicable state median. The prior version of Official Form 22A was introduced by several questions bearing on the applicability of the means test. Debtors who do not have primarily consumer debts, as well as certain members of the armed forces, are exempt from a presumption of abuse under the means test, and so are excused from completing the form. However, the great majority of individual debtors in chapter 7 do not fall within the exemptions. Accordingly, the exemptions from means testing have been placed in a separate supplement, Official Form 22A-1Supp, that will be filed only where applicable, making Form 22A present the relevant information more directly and in a manner consistent with the parallel chapter 13 form.

For chapter 13, there is a similar split of income and expense calculations. All chapter 13 debtors must complete Official Form 22C-1, *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period*, which calculates current monthly income and the plan commitment period. Debtors only need to complete the second form, Official Form 22C-2, *Chapter13 Calculation of Your Disposable Income*, if their current monthly income exceeds the applicable median. Form 22C-2 calculates disposable income under 11 U.S.C. § 1325(b)(3), through a report of allowed expense deductions.

Line 60 of former Official Form 22C has not been repeated in Official Form 22C-2. This line allowed debtors to list, but not deduct from income, "Other Necessary Expense" items that are not included within the categories specified by the Internal Revenue Service. Because debtors are separately allowed to list—and deduct—any expenses arising from special circumstances, former Line 60 was rarely used.

Form 22C-2 also reflects the Supreme Court's decision in *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010). Adopting a forward-looking approach, the Court held in *Lanning* that the calculation of a chapter 13 debtor's projected disposable income under § 1325(b) required consideration of changes to income or expenses reported elsewhere on former Official Form 22C that, at the time of plan confirmation, had occurred or were virtually certain to occur. Those changes could result in either an increased or decreased projected disposable income. Because only debtors whose annualized current monthly income exceeds the applicable median family income have their projected disposable income determined by the information provided on Official Form 22C-2, only these debtors are required to provide the information about changes to income and expenses on Official Form 22C-2. Part 3 of Official Form 22C-2 provides for the reporting of those changes.

In reporting changes to income a debtor must indicate whether the amounts reported in Official Form 22C-1—which are monthly averages of various types of income received during the six months prior to the filing of the bankruptcy case—have already changed or are virtually certain to change during the pendency of the case. For each change, the debtor must indicate the line of Official Form 22C-1 on which the amount to be changed was reported, the reason for the change, the date of its occurrence, whether the change is an increase or decrease of income, and the amount of the change. Similarly, in reporting changes to expenses, a debtor must list changes to the debtor's actual expenditures reported in Part 1 of Official Form 22C-2 that are virtually certain to occur while the case is pending. With respect to the deductible amounts reported in Part 1 that are determined by the IRS national and local standards, only changed amounts that result from changed circumstances in the debtor's life—such as the addition of a family member or the surrender of a vehicle—should be reported. For each change in expenses, the same information required to be provided for income changes must be reported.

Unlike former Official Forms 22A and 22C, Official Forms 22A-2 and 22C-2 permit, at line 23, the deduction of cell phone

expenses necessary for the production of income if those expenses have not been reimbursed by the debtor's employer or deducted by the debtor in calculating net self-employment income. The same line also states that expenses for internet service may be deducted as a telecommunication services expense only if necessary for the production of income. Under IRS guidelines adopted in 2011, expenses for home internet service used for other purposes are included in the Local Standards for Housing and utilities—Insurance and operating expenses. Also, Official Forms 22A-2 and 22C-2 now provide, at line 18, for deductions of the premiums paid by one jointly filing debtor on term life insurance policies of the other joint debtor as well for premium payments on the debtor's own policies.

Changes Made After Publication

Official Form 22A-1

The statement for Option 2 at the top of the form was changed to "The calculation to determine if a presumption of abuse applies will be made under *Chapter 7 Means Test Calculation* (Official Form 22A–2)."

The title of Official Form 22A-1Supp, "Statement of Exemption from Presumption of Abuse Under §707(b)(2)" was added to the text above Part 1.

A reference at line 13 to a web address was removed and added to the separate instructions.

References in Part 3 to Official Form 22A-2 were shortened to the form number.

Official Form 22A-1Supp

Stylistic changes were made.

Official Form 22A-2

References throughout the form to web addresses were removed and added to the separate instructions.

The instruction and check boxes at line 9b pertaining to whether the listed payments include taxes or insurance was removed.

Line 10 was reworded.

The title of line 23 was changed to "Optional telephones and telephone services" and stylistic changes were made.

At line 33, the instruction "Do not deduct mortgage payments previously deducted as an operating expense at line 9" was removed.

A direction was added to second sentence under the "yes" check box at line 36 explaining that chapter 13 expense multipliers for districts in Alabama and North Carolina are maintained by the Administrative Office of the United States Courts, not the Executive Office for United States Trustees.

Official Form 22B

The heading for Part 1 was changed to "Calculate Your Average Monthly income."

Stylistic changes were made to the instructions after the check boxes in line 1.

Line 11 was changed to "Calculate your total average monthly income."

Part 2, "Deduct any applicable marital adjustment," consisting of lines 12 – 14, was added.

Official Form 22C-1

Stylistic changes were made to the instructions after the check boxes in line 1.

A reference at line 16c to a web address was removed and added to the separate instructions.

References in Part 4 to Official Form 22-C2 were shortened to the form number.

Official Form 22C-2

References throughout the form to web addresses were removed and added to the separate instructions.

Line 10 was reworded.

The title of line 23 was changed to “Optional telephones and telephone services” and stylistic changes were made.

A direction was added at line 36 explaining that chapter 13 expense multipliers for districts in Alabama and North Carolina are maintained by the Administrative Office of the United States Courts, not the Executive Office for United States Trustees.

Summary of Public Comment on Official Forms 22A-1 and 22A-1Supp.

13-BK-42. Henry Sommer, NACBA. The language in the box at the upper right hand corner of 22A-1 should be revised to recognize that the debtor may disagree with the way the means test is calculated on the forms.

Form 22A-1 is also inaccurate in stating that it is a calculation of current monthly income (CMI) because CMI does not include income of a nondebtor spouse unless it used for the household expenses of the debtor or the debtor’s dependents.

Form 22A-1 repeats an error in the current form by including nondebtor spousal income in calculating the section 707(b)(7) exemption.

As to the Form 22A-1 supplement, if a debtor completes this form, at least if a verification is added to it, why is Form 22A-1 necessary at all? The NACBA also does not believe an exemption from the means test for reservists or National Guard members is only temporary.

13-BK-56. Scott Ford, Bankruptcy Clerks’ Advisory Group. All references on the forms that encourage the debtor to “ask for help at the clerks’ office of the bankruptcy court” should be replaced with “consult your attorney.”

13-BK-59. National Conference of Bankruptcy Judges.

Suggested several formatting, punctuation and stylistic changes.

Summary of Public Comment on Official Form 22A-2

13-BK-42. Henry Sommer, NACBA. Form 22A-2 continues the error in the current forms of providing no space for a debtor to deduct other expenses permitted by the Internal Revenue Service Expense standards.

Line 33. What is meant by "Do not deduct mortgage payments previously deducted as an operating expense in Line 9"? If we don't understand it, no pro se debtor will understand it.

13-BK-56. Scott Ford, Bankruptcy Clerks' Advisory Group. All references on the forms that encourage the debtor to "ask for help at the clerks' office of the bankruptcy court" should be replaced with "consult your attorney."

Summary of Public Comment on Official Form 22B

13-BK-42. Henry Sommer, NACBA. This form contains the same error as Official Form 22A-1. Although labeled as a calculation of current monthly income, it does not take into account the "marital deduction" necessary to calculate the debtor's current monthly income when there is a nonfiling spouse whose income is listed in Column B. Without that deduction, the calculation simply does not conform to the definition of "current monthly income."

Summary of Public Comment on Official Forms 22C-1 and 22C-2

13-BK-24. Chapter 13 trustees, Central District of California. The revised form at line 5 and possibly line 6 perpetuate an error in the current form by allowing debtors to deduct business expenses before determining the applicable commitment period, contrary to case law in many districts. See, In re Weigand, 386 B.R. 238 (9th Cir. B.A.P. 2008). Same issue raised by **13-BK- 35,** Chapter 13 trustee, Robert G. Drummond, **13-BK-153**, Attorney James M. Davis.

13-BK-24. Chapter 13 trustees, Central District of California. The form continues to tie the vehicle ownership expense to the IRS Local Standards, in violation of 11 U.S.C. 707(b)(2)(A)(ii)(I) which provides: " . . . Notwithstanding any other provision of this clause, the monthly expenses of the debtor

[to be determined by reference to the IRS Standards] shall not include any payments for debts."

13-BK- 35, Chapter 13 trustee, Robert G. Drummond. Part 2, Line 41 of Form 22C-2 allows the debtor to deduct ongoing retirement plan contributions "as specified in 11 U.S.C. § 541(b)(7)." The Ninth Circuit Bankruptcy Appellate Panel in Parks v. Drummond (In re Parks), 475 B.R. 703 (9th Cir. B.A.P. 2012) held that deductions for a debtor's post-petition voluntary 401(k) contributions are not allowed by Section 541(b)(7) when calculating projected disposable income. The proposed Form 22C-l incorrectly instructs debtors to deduct voluntary contributions to retirement plans when calculating projected disposable income. See also, Burden v. Sea/art (In re Sea/art), 669 F.3d 662 (6th Cir. 2012).

13-BK-42. Henry Sommer, NACBA. The language added in Part 3 of the form in response to the Lanning decision covers a time period that is far too long. It is neither possible nor appropriate to predict the debtor's financial situation several years into the case based simply on a change in 1 or 2 items of income or expense.

13-BK-56. Scott Ford, Bankruptcy Clerks' Advisory Group. All references on the forms that encourage the debtor to "ask for help at the clerks' office of the bankruptcy court" should be replaced with "consult your attorney."

13-BK-59. National Conference of Bankruptcy Judges.

Suggested several formatting, punctuation and stylistic changes.

13-BK-153, Attorney James M. Davis. The proposed forms' distinction and line 5 between "household size" and the number of people used in determining deductions from income is an excellent revision. I also agree that the number of tax exemptions is a reasonable reference point for establishing the number of people used in determining deductions from income. I would suggest, however, revising the instructions to remove the implications about the proper number, an issue on which courts disagree.

I would suggest adding check boxes to indicate whether the payments listed on Line 9b includes taxes and insurance.

I think the language at line 10 is imprecise and would suggest the following rewrite: :"If you claim that the U.S. Trustee Program's division of the IRS Local Standard for housing ~~does not accurately compute the amount that applies to you~~, is incorrect and affects the calculation of your monthly expenses, fill in any additional amount you claim."

It would be helpful if the form required debtors to show the calculation when estimating taxes using withholding and estimated tax refunds.

At line 23, I would suggest mirroring the language of the IRS Collection Financial Standards in the 1st sentence of the 2nd paragraph – in particular, adding cable television to the list of telecommunications services that should not be included.

I would suggest including an itemization for line 41. It would be helpful, at a minimum, to break out the amount claimed as retirement contributions from the amount claimed as retirement loan payments. The statutory basis for these deductions is different, and some courts have reached different conclusions about the permitted deductions. See, e.g., Seafort v. Burden (In re Seafort), 669 F.3d 662, 674 n.7 (6th Cir. 2012).

I would suggest revising Line 46 so that it provides a final calculation of monthly projected disposable income.

Fill in this information to identify your case:

United States Bankruptcy Court for the:

_____ District of _____
(State)

Case number (*If known*): _____

Chapter you are filing under:
- ❑ Chapter 7
- ❑ Chapter 11
- ❑ Chapter 12
- ❑ Chapter 13

❑ Check if this is an amended filing

Official Form 101

Voluntary Petition for Individuals Filing for Bankruptcy

12/15

The bankruptcy forms use *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, these forms use *you* to ask for information from both debtors. For example, if a form asks, "Do you own a car," the answer would be *yes* if either debtor owns a car. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Identify Yourself

	About Debtor 1:	About Debtor 2 (Spouse Only in a Joint Case):
1. Your full name Write the name that is on your government-issued picture identification (for example, your driver's license or passport). Bring your picture identification to your meeting with the trustee.	First name Middle name Last name Suffix (Sr., Jr., II, III)	First name Middle name Last name Suffix (Sr., Jr., II, III)
2. All other names you have used in the last 8 years Include your married or maiden names.	First name Middle name Last name First name Middle name Last name	First name Middle name Last name First name Middle name Last name
3. Only the last 4 digits of your Social Security number or federal Individual Taxpayer Identification number (ITIN)	xxx – xx – ____ ____ ____ ____ OR 9 xx – xx – ____ ____ ____ ____	xxx – xx – ____ ____ ____ ____ OR 9 xx – xx – ____ ____ ____ ____

	About Debtor 1:	About Debtor 2 (Spouse Only in a Joint Case):
4. Any business names and Employer Identification Numbers (EIN) you have used in the last 8 years Include trade names and *doing business as* names	❑ I have not used any business names or EINs. _____ Business name _____ Business name ___ ___ – ___ ___ ___ ___ ___ ___ ___ EIN ___ ___ – ___ ___ ___ ___ ___ ___ ___ EIN	❑ I have not used any business names or EINs. _____ Business name _____ Business name ___ ___ – ___ ___ ___ ___ ___ ___ ___ EIN ___ ___ – ___ ___ ___ ___ ___ ___ ___ EIN
5. Where you live	_____ Number Street _____ _____ City State ZIP Code _____ County **If your mailing address is different from the one above, fill it in here.** Note that the court will send any notices to you at this mailing address. _____ Number Street _____ P.O. Box _____ City State ZIP Code	**If Debtor 2 lives at a different address:** _____ Number Street _____ _____ City State ZIP Code _____ County **If Debtor 2's mailing address is different from yours, fill it in here.** Note that the court will send any notices to this mailing address. _____ Number Street _____ P.O. Box _____ City State ZIP Code
6. Why you are choosing *this district* to file for bankruptcy	*Check one:* ❑ Over the last 180 days before filing this petition, I have lived in this district longer than in any other district. ❑ I have another reason. Explain. (See 28 U.S.C. § 1408.) _____ _____ _____ _____	*Check one:* ❑ Over the last 180 days before filing this petition, I have lived in this district longer than in any other district. ❑ I have another reason. Explain. (See 28 U.S.C. § 1408.) _____ _____ _____ _____

Part 2: Tell the Court About Your Bankruptcy Case

7. The chapter of the Bankruptcy Code you are choosing to file under

Check one. (For a brief description of each, see *Notice Required by 11 U.S.C. § 342(b) for Individuals Filing for Bankruptcy* (Form B2010)). Also, go to the top of page 1 and check the appropriate box.

- ❑ Chapter 7
- ❑ Chapter 11
- ❑ Chapter 12
- ❑ Chapter 13

8. How you will pay the fee

- ❑ **I will pay the entire fee when I file my petition**. Please check with the clerk's office in your local court for more details about how you may pay. Typically, if you are paying the fee yourself, you may pay with cash, cashier's check, or money order. If your attorney is submitting your payment on your behalf, your attorney may pay with a credit card or check with a pre-printed address.
- ❑ **I need to pay the fee in installments**. If you choose this option, sign and attach the *Application for Individuals to Pay Your Filing Fee in Installments* (Official Form 103A).
- ❑ **I request that my fee be waived** (You may request this option only if you are filing for Chapter 7. By law, a judge may, but is not required to, waive your fee, and may do so only if your income is less than 150% of the official poverty line that applies to your family size and you are unable to pay the fee in installments). If you choose this option, you must fill out the *Application to Have the Chapter 7 Filing Fee Waived* (Official Form 103B) and file it with your petition.

9. Have you filed for bankruptcy within the last 8 years?

- ❑ No
- ❑ Yes. District _____ When _____ Case number _____
  MM / DD / YYYY
  District _____ When _____ Case number _____
  MM / DD / YYYY
  District _____ When _____ Case number _____
  MM / DD / YYYY

10. Are any bankruptcy cases pending or being filed by a spouse who is not filing this case with you, or by a business partner, or by an affiliate?

- ❑ No
- ❑ Yes. Debtor _____ Relationship to you _____
  District _____ When _____ Case number, if known_____
  MM / DD / YYYY
  Debtor _____ Relationship to you _____
  District _____ When _____ Case number, if known_____
  MM / DD / YYYY

11. Do you rent your residence?

- ❑ No. Go to line 12.
- ❑ Yes. Has your landlord obtained an eviction judgment against you and do you want to stay in your residence?
  - ❑ No. Go to line 12.
  - ❑ Yes. Fill out *Initial Statement About an Eviction Judgment Against You* (Form 101A) and file it with this bankruptcy petition.

Part 3: Report About Any Businesses You Own as a Sole Proprietor

12. Are you a sole proprietor of any full- or part-time business?

A sole proprietorship is a business you operate as an individual, and is not a separate legal entity such as a corporation, partnership, or LLC.

If you have more than one sole proprietorship, use a separate sheet and attach it to this petition.

❑ No. Go to Part 4.

❑ Yes. Name and location of business

_____
Name of business, if any

_____
Number Street

_____

_____ _____ _____
City State ZIP Code

Check the appropriate box to describe your business:

❑ Health Care Business (as defined in 11 U.S.C. § 101(27A))

❑ Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))

❑ Stockbroker (as defined in 11 U.S.C. § 101(53A))

❑ Commodity Broker (as defined in 11 U.S.C. § 101(6))

❑ None of the above

13. Are you filing under Chapter 11 of the Bankruptcy Code and are you a *small business debtor*?

For a definition of *small business debtor*, see 11 U.S.C. § 101(51D).

If you are filing under Chapter 11, the court must know whether you are a small business debtor so that it can set appropriate deadlines. If you indicate that you are a small business debtor, you must attach your most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return or if any of these documents do not exist, follow the procedure in 11 U.S.C. 1116(1)(B).

❑ No. I am not filing under Chapter 11.

❑ No. I am filing under Chapter 11, but I am NOT a small business debtor according to the definition in the Bankruptcy Code.

❑ Yes. I am filing under Chapter 11 and I am a small business debtor according to the definition in the Bankruptcy Code.

Part 4: Report if You Own or Have Any Hazardous Property or Any Property That Needs Immediate Attention

14. Do you own or have any property that poses or is alleged to pose a threat of imminent and identifiable hazard to public health or safety? Or do you own any property that needs immediate attention?

For example, do you own perishable goods, or livestock that must be fed, or a building that needs urgent repairs?

❑ No

❑ Yes. What is the hazard? _____

_____

If immediate attention is needed, why is it needed? _____

_____

Where is the property? _____
Number Street

_____

_____ _____ _____
City State ZIP Code

Part 5: Explain Your Efforts to Receive a Briefing About Credit Counseling

15. Tell the court whether you have received briefing about credit counseling.

The law requires that you receive a briefing about credit counseling before you file for bankruptcy. You must truthfully check one of the following choices. If you cannot do so, you are not eligible to file.

If you file anyway, the court can dismiss your case, you will lose whatever filing fee you paid, and your creditors can begin collection activities again.

About Debtor 1:

You must check one:

❑ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.**

Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.

❑ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.**

Within 14 days after you file this bankruptcy petition, you MUST file a copy of the certificate and payment plan, if any.

❑ **I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and exigent circumstances merit a 30-day temporary waiver of the requirement.**

To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the briefing, why you were unable to obtain it before you filed for bankruptcy, and what exigent circumstances required you to file this case.

Your case may be dismissed if the court is dissatisfied with your reasons for not receiving a briefing before you filed for bankruptcy.

If the court is satisfied with your reasons, you must still receive a briefing within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed.

Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.

❑ **I am not required to receive a briefing about credit counseling because of:**

❑ **Incapacity.** I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.

❑ **Disability.** My physical disability causes me to be unable to participate in a briefing in person, by phone, or through the internet, even after I reasonably tried to do so.

❑ **Active duty.** I am currently on active military duty in a military combat zone.

If you believe you are not required to receive a briefing about credit counseling, you must file a motion for waiver of credit counseling with the court.

About Debtor 2 (Spouse Only in a Joint Case):

You must check one:

❑ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.**

Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.

❑ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.**

Within 14 days after you file this bankruptcy petition, you MUST file a copy of the certificate and payment plan, if any.

❑ **I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and exigent circumstances merit a 30-day temporary waiver of the requirement.**

To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the briefing, why you were unable to obtain it before you filed for bankruptcy, and what exigent circumstances required you to file this case.

Your case may be dismissed if the court is dissatisfied with your reasons for not receiving a briefing before you filed for bankruptcy.

If the court is satisfied with your reasons, you must still receive a briefing within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed.

Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.

❑ **I am not required to receive a briefing about credit counseling because of:**

❑ **Incapacity.** I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.

❑ **Disability.** My physical disability causes me to be unable to participate in a briefing in person, by phone, or through the internet, even after I reasonably tried to do so.

❑ **Active duty.** I am currently on active military duty in a military combat zone.

If you believe you are not required to receive a briefing about credit counseling, you must file a motion for waiver of credit counseling with the court.

Part 6: Answer These Questions for Reporting Purposes

16. What kind of debts do you have?

16a. **Are your debts primarily consumer debts?** *Consumer debts* are defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose."

- ❑ No. Go to line 16b.
- ❑ Yes. Go to line 17.

16b. **Are your debts primarily business debts?** *Business debts* are debts that you incurred to obtain money for a business or investment or through the operation of the business or investment.

- ❑ No. Go to line 16c.
- ❑ Yes. Go to line 17.

16c. State the type of debts you owe that are not consumer debts or business debts.

_____

17. Are you filing under Chapter 7?

Do you estimate that after any exempt property is excluded and administrative expenses are paid that funds will be available for distribution to unsecured creditors?

- ❑ No. I am not filing under Chapter 7. Go to line 18.
- ❑ Yes. I am filing under Chapter 7. Do you estimate that after any exempt property is excluded and administrative expenses are paid that funds will be available to distribute to unsecured creditors?
  - ❑ No
  - ❑ Yes

18. How many creditors do you estimate that you owe?

❑ 1-49	❑ 1,000-5,000	❑ 25,001-50,000
❑ 50-99	❑ 5,001-10,000	❑ 50,001-100,000
❑ 100-199	❑ 10,001-25,000	❑ More than 100,000
❑ 200-999		

19. How much do you estimate your assets to be worth?

❑ $0-$50,000	❑ $1,000,001-$10 million	❑ $500,000,001-$1 billion
❑ $50,001-$100,000	❑ $10,000,001-$50 million	❑ $1,000,000,001-$10 billion
❑ $100,001-$500,000	❑ $50,000,001-$100 million	❑ $10,000,000,001-$50 billion
❑ $500,001-$1 million	❑ $100,000,001-$500 million	❑ More than $50 billion

20. How much do you estimate your liabilities to be?

❑ $0-$50,000	❑ $1,000,001-$10 million	❑ $500,000,001-$1 billion
❑ $50,001-$100,000	❑ $10,000,001-$50 million	❑ $1,000,000,001-$10 billion
❑ $100,001-$500,000	❑ $50,000,001-$100 million	❑ $10,000,000,001-$50 billion
❑ $500,001-$1 million	❑ $100,000,001-$500 million	❑ More than $50 billion

Part 7: Sign Below

For you

I have examined this petition, and I declare under penalty of perjury that the information provided is true and correct.

If I have chosen to file under Chapter 7, I am aware that I may proceed, if eligible, under Chapter 7, 11,12, or 13 of title 11, United States Code. I understand the relief available under each chapter, and I choose to proceed under Chapter 7.

If no attorney represents me and I did not pay or agree to pay someone who is not an attorney to help me fill out this document, I have obtained and read the notice required by 11 U.S.C. § 342(b).

I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

I understand making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to $250,000, or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

✘ _____ ✘ _____

Signature of Debtor 1 Signature of Debtor 2

Executed on _____ Executed on _____
MM / DD / YYYY MM / DD / YYYY

For your attorney, if you are represented by one

If you are not represented by an attorney, you do not need to file this page.

I, the attorney for the debtor(s) named in this petition, declare that I have informed the debtor(s) about eligibility to proceed under Chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each chapter for which the person is eligible. I also certify that I have delivered to the debtor(s) the notice required by 11 U.S.C. § 342(b) and, in a case in which § 707(b)(4)(D) applies, certify that I have no knowledge after an inquiry that the information in the schedules filed with the petition is incorrect.

✘ _____ Date _____
Signature of Attorney for Debtor MM / DD / YYYY

_____
Printed name

_____
Firm name

_____
Number Street

_____

_____ _____ _____
City State ZIP Code

Contact phone _____ Email address _____

_____ _____
Bar number State

For you if you are filing this bankruptcy without an attorney

If you are represented by an attorney, you do not need to file this page.

The law allows you, as an individual, to represent yourself in bankruptcy court, but **you should understand that many people find it extremely difficult to represent themselves successfully. Because bankruptcy has long-term financial and legal consequences, you are strongly urged to hire a qualified attorney.**

To be successful, you must correctly file and handle your bankruptcy case. The rules are very technical, and a mistake or inaction may affect your rights. For example, your case may be dismissed because you did not file a required document, pay a fee on time, attend a meeting or hearing, or cooperate with the court, case trustee, U.S. trustee, bankruptcy administrator, or audit firm if your case is selected for audit. If that happens, you could lose your right to file another case, or you may lose protections, including the benefit of the automatic stay.

You must list all your property and debts in the schedules that you are required to file with the court. Even if you plan to pay a particular debt outside of your bankruptcy, you must list that debt in your schedules. If you do not list a debt, the debt may not be discharged. If you do not list property or properly claim it as exempt, you may not be able to keep the property. The judge can also deny you a discharge of all your debts if you do something dishonest in your bankruptcy case, such as destroying or hiding property, falsifying records, or lying. Individual bankruptcy cases are randomly audited to determine if debtors have been accurate, truthful, and complete. **Bankruptcy fraud is a serious crime; you could be fined and imprisoned.**

If you decide to file without an attorney, the court expects you to follow the rules as if you had hired an attorney. The court will not treat you differently because you are filing for yourself. To be successful, you must be familiar with the United States Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and the local rules of the court in which your case is filed. You must also be familiar with any state exemption laws that apply.

Are you aware that filing for bankruptcy is a serious action with long-term financial and legal consequences?

❑ No
❑ Yes

Are you aware that bankruptcy fraud is a serious crime and that if your bankruptcy forms are inaccurate or incomplete, you could be fined or imprisoned?

❑ No
❑ Yes

Did you pay or agree to pay someone who is not an attorney to help you fill out your bankruptcy forms?

❑ No
❑ Yes. Name of Person_____.
Attach *Bankruptcy Petition Preparer's Notice, Declaration, and Signature* (Official Form 119).

By signing here, I acknowledge that I understand the risks involved in filing without an attorney. I have read and understood this notice, and I am aware that filing a bankruptcy case without an attorney may cause me to lose my rights or property if I do not properly handle the case.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

Contact phone _____

Cell phone _____

Email address _____

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

Contact phone _____

Cell phone _____

Email address _____

COMMITTEE NOTE

Official Form 101, *Voluntary Petition for Individuals Filing for Bankruptcy*, applies only in cases of individual debtors. Form 101 replaces Official Form 1, Voluntary Petition. It is renumbered to distinguish it from the forms used by non-individual debtors, such as corporations, and includes stylistic changes throughout the form. It is revised as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. Because the goals of the Forms Modernization Project include improving the interface between technology and the forms so as to increase efficiency and reduce the need to produce the same information in multiple formats, many of the open-ended questions and multiple-part instructions have been replaced with more specific questions.

Official Form 101 has been substantially reorganized. References to Exhibits A, B, C, and D, and the exhibits themselves, have been eliminated because the requested information is now asked in the form or is not applicable to individual debtors.

Part 1, *Identify Yourself*, line 6, replaces the venue box from page 2 of Official Form 1 and deletes venue questions that pertain only to non-individuals.

Part 2, *Tell the Court About Your Bankruptcy Case*, line 7, removes choices for chapters 9 and 15 filings because they do not pertain to individuals. The status of "being filed" is added to the question regarding bankruptcy cases pending or filed by a spouse, business partner, or affiliate (line 10). Lastly, the question "Do you rent your residence?" (line 11) and Official Forms 101A, *Initial Statement About an Eviction Judgment Against You*, and 101B, *Statement About Payment of An Eviction Judgment Against You*, replace "certification by a debtor who resides as a tenant of residential property," on page 2 of Official Form 1.

Part 3, *Report About Any Businesses You Own as a Sole Proprietor*, line 12, incorporates options from the "nature of

business" box from page 1 of Official Form 1 that would apply to individual debtors, thus eliminating checkboxes for railroads and clearing banks. Part 3, line 13, also eliminates a checkbox to report whether a plan was filed with the petition, or if plan acceptances were solicited prepetition. Additionally, line 13 rephrases the question relating to whether a debtor filing under Chapter 11 is a small business debtor.

Part 4, *Report if You Own or Have Any Hazardous Property or Any Property That Needs Immediate Attention*, line 14, replaces Exhibit C from Official Form 1 and adds the category of "property that needs immediate attention."

Part 5, *Explain Your Efforts to Receive Credit Counseling* (line 15), replaces Exhibit D from Official Form 1. Additionally, this part describes incapacity and disability using a simplified definition, tells the debtor of the ability to file a motion for a waiver, and eliminates statutory reference about districts where credit counseling does not apply because such districts are rare.

Part 6, *Answer These Questions for Reporting Purposes* (line 16c), provides a text field for the debtor to describe the type of debts owed if the debtor believes they are neither primarily consumer nor business debts.

Part 7, *Sign Here*, deletes from the debtor's declaration the phrase "to the best of my knowledge, information, and belief" in order to conform to the language of 28 U.S.C. § 1746. *See* Rule 1008. This part combines the two attorney signature blocks into one certification and eliminates signature lines for corporations/partnerships and chapter 15 Foreign Representative. The declaration and signature section for a non-attorney bankruptcy petition preparer (BPP) has also been removed as unnecessary. The same declaration, required under 11 U.S.C. § 110, is contained in Official Form 119. That form must be completed and signed by the BPP and filed with each document prepared by a BPP.

Changes Made After Publication

The term "bankruptcy filing package" was replaced with either "petition," "bankruptcy," or "forms." The box containing the fee amounts was removed from Part 2, Line 8. Also in Line 8, the modifying language "but is not required to" was added to the explanation that a judge may waive the filing fee. The following instruction was added to Part 3, Line 13: "If you indicate that you are a small business debtor, you must attach your most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return or if any of these documents do not exist, follow the procedure in 11 U.S.C. 1116(1)(B)." "A building that needs urgent repairs" was added as an example to Part 4, Line 14. The signature line in Part 7 was changed to revise the warning language. Other stylistic changes were made throughout the form.

Summary of Public Comment

13-BK-59 – National Conference of Bankruptcy Judges. The explanation about waiver of the filing fee may create unrealistic expectations on the part of debtors about the probability that the fee will be waived.

The explanation of what constitutes a "sole proprietorship" in Line 12 would be more accurate if it referred to a sole proprietorship as a business "operated" by the debtor rather than one "owned" by him.

In Line 14, the examples under the initial question should be expanded to include something more common than perishable goods or hungry livestock, such as a building that urgently needs repairs.

The phrase "bankruptcy filing package" should not be used in Line 15 or elsewhere in the proposed forms. The phrase should be replaced by the words "this bankruptcy case" or perhaps "this bankruptcy petition."

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Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Draft February 28, 2014

Official Form 101A

Initial Statement About an Eviction Judgment Against You

12/15

File this form with the court and serve a copy on your landlord when you first file bankruptcy only if:

- **you rent your residence; and**
- **your landlord has obtained a judgment for possession in an eviction, unlawful detainer action, or similar proceeding (called *eviction judgment*) against you to possess your residence.**

Landlord's name _____

Landlord's address _____
Number Street

_____ _____ _____
City State ZIP Code

If you want to stay in your rented residence after you file your case for bankruptcy, also complete the certification below.

Certification About Applicable Law and Deposit of Rent

I certify under penalty of perjury that:

☐ Under the state or other nonbankruptcy law that applies to the judgment for possession (*eviction judgment*), I have the right to stay in my residence by paying my landlord the entire delinquent amount.

☐ I have given the bankruptcy court clerk a deposit for the rent that would be due during the 30 days after I file the *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101).

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

Stay of Eviction: (a) **First 30 days after bankruptcy.** If you checked both boxes above, signed the form to certify that both apply, and served your landlord with a copy of this statement, the automatic stay under 11 U.S.C. § 362(a)(3) will apply to the continuation of the eviction against you for 30 days after you file your *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101).

(b) **Stay after the initial 30 days.** If you wish to stay in your residence after that 30-day period and continue to receive the protection of the automatic stay under 11 U.S.C. § 362(a)(3), you must pay the entire delinquent amount to your landlord as stated in the eviction judgment before the 30-day period ends. You must also fill out *Statement About Payment of an Eviction Judgment Against You* (Official Form 101B), file it with the bankruptcy court, and serve your landlord a copy of it before the 30-day period ends.

Check the Bankruptcy Rules (www.uscourts.gov/rulesandpolicies/rules.aspx) and the local court's website (to find your court's website, go to www.uscourts.gov/Court_Locator.aspx) for any specific requirements that you might have to meet to serve this statement.
11 U.S.C. §§ 362(b)(22) and 362(l)

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The debtor's declarations about awareness of the criminal penalties for making false statements should be worded consistently throughout the forms.

In Part 7, a debtor filing under chapter 7 is obliged to state that he is "aware that I may proceed under Chapter 7, 11, 12, or 13 of title 11, United States Code, understand the relief available under each such chapter, and choose to proceed under Chapter 7." Although this text appears in the current form, it should be narrowed or deleted. For many debtors, the statement will be untrue: a debtor without regular income, for example, is eligible to file a chapter 7 case but not a case under chapter 13. Pro se debtors, moreover, are unlikely to understand the relief available under other chapters and cannot truthfully make the statement. No purpose is served in forcing them to make it, and the statement is redundant. The debtor is required to state that he has obtained and read the section 342(b) notice (which the clerk of the court is obligated to provide). That notice contains a description of the other chapters.

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Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Draft February 28, 2014

Official Form 101B

Statement About Payment of an Eviction Judgment Against You

12/15

Fill out this form only if:

- **you filed *Initial Statement About an Eviction Judgment Against You* (Official Form 101A); and**
- **you served a copy of Form 101A on your landlord; and**
- **you want to stay in your rented residence for more than 30 days after you file your *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101).**

File this form within 30 days after you file your *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101). Also serve a copy on your landlord within that same time period.

Certification About Applicable Law and Payment of Eviction Judgment

I certify under penalty of perjury that (*Check all that apply*):

❑ Under the state or other nonbankruptcy law that applies to the judgment for possession (*eviction judgment*), I have the right to stay in my residence by paying my landlord the entire delinquent amount.

❑ Within 30 days after I filed my *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101), I have paid my landlord the entire amount I owe as stated in the judgment for possession (*eviction judgment*).

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

You must serve your landlord with a copy of this form.

Check the Bankruptcy Rules (www.uscourts.gov/rulesandpolicies/rules.aspx) and the court's local website (go to http://www.uscourts.gov/Court_Locator.aspx to find your court's website) for any specific requirements that you might have to meet to serve this statement.

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COMMITTEE NOTE

Official Form 101A, *Initial Statement About an Eviction Judgment Against You*, and Official Form 101B, *Statement About Payment of an Eviction Judgment Against You*, are new forms promulgated as part of the Forms Modernization Project. They replace the "*Certification by a Debtor Who Resides as a Tenant of Residential Property*" section on Official Form 1, *Voluntary Petition*. The forms apply only in cases of individual debtors.

Official Form 101A explains that debtors need to complete and file the form only if their landlord has a judgment for possession or an eviction judgment against them and they rent their residence. The form further explains that if the debtor wishes to stay in their residence for 30 days after filing their bankruptcy petition, the certification must be completed. The form adds references to the provisions in the Bankruptcy Code that specify when debtor-tenants subject to eviction may remain in their residence after filing for bankruptcy.

The form eliminates the checkboxes that the debtor has served the landlord with the certification and paid the court the rent that would be due during the 30 days after the filing of the bankruptcy petition. Instead, debtors are required to certify under penalty of perjury that the rent has been paid to the court, and the instructions direct debtors to serve a copy of the statement on the landlord.

The form eliminates the checkbox that the debtor claims there are circumstances under applicable nonbankruptcy law under which the debtor would be permitted to cure the monetary default that gave rise to the judgment for possession (or eviction judgment) and remain in residence. Instead, debtors are required to certify under penalty of perjury that they have the right to stay in their residence under state law or other nonbankruptcy law by paying their landlord the entire delinquent amount.

Official Form 101B is new. If debtors wish to stay in their residence for more than 30 days after filing the petition, they must complete, file, and serve the form within 30 days after the petition is filed. Under Official Form 101B, debtors certify under penalty of perjury that they have the right to stay in their residence under state law or other

nonbankruptcy law by paying their landlord the entire delinquent amount and that they have paid their landlord the entire amount owed as stated in the judgment for possession or in the eviction judgment.

Changes Made After Publication

Official Form 101A

The instructions were changed to state that the debtor should file the form and serve a copy on the landlord if the debtor rents a residence and the landlord obtained a judgment for possession in an eviction, unlawful detainer action, or similar proceeding against the debtor to possess the residence. The form was changed to first require the landlord's name and address. Then the form requires the debtor to complete a certification about applicable law and deposit of rent if the debtor wishes to stay in the residence. The phrase "amount I owe" was changed to "entire delinquent amount." Stylistic changes were made throughout the form.

Official Form 101B

The full title of Official Form 101A was added to the reference to that form in the instructions. The phrase "amount I owe" was changed to "entire delinquent amount."

Summary of Public Comment

13-BK-59 – National Conference of Bankruptcy Judges. Form 101A should be redesigned to permit the form to perform two required functions: (1) provide a place for a debtor to indicate that he has a pre-petition judgment against him, and (2) provide a way for the debtor comply with the requirements for remaining in the property during the first 30 days post-petition. As drafted, Form 101A only performs the second function. But section 362(l)(5)(A) of the Code requires a debtor to indicate "on the bankruptcy petition" whether "there was a judgment for possession of the residential real property in which the debtor resides" regardless of whether the debtor wants to remain in the property.

Form 101A does not offer the debtor a place to give the required statutory indication.

Forms 101A and 101B should indicate more plainly—in large, bold type—the different functions of each form.

The second sentence in each form requires the debtor to certify that he has the right to stay in his residence by paying the landlord "the entire amount I owe." The phrase is inconsistent with section 362(l) which uses the phrase "entire monetary default." See 11 U.S.C. § 362(l)(1)(A). To avoid misinterpretation and make the provision consistent with the statutory language, replace the words "I owe" with "in default."

The instructional note in bold below the line at the bottom of Form 101A should be turned into an expression of the debtor's awareness of what he must do to take advantage of the statute.

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Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 104

For Individual Chapter 11 Cases: List of Creditors Who Have the 20 Largest Unsecured Claims Against You and Are Not Insiders

12/15

If you are an individual filing for bankruptcy under Chapter 11, you must fill out this form. If you are filing under Chapter 7, Chapter 12, or Chapter 13, do not fill out this form. Do not include claims by anyone who is an *insider*. Insiders include your relatives; any general partners; relatives of any general partners; partnerships of which you are a general partner; corporations of which you are an officer, director, person in control, or owner of 20 percent or more of their voting securities; and any managing agent, including one for a business you operate as a sole proprietor. 11 U.S.C. § 101. Also, do not include claims by secured creditors unless the unsecured claim resulting from inadequate collateral value places the creditor among the holders of the 20 largest unsecured claims.

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information.

Part 1: List the 20 Unsecured Claims in Order from Largest to Smallest. Do Not Include Claims by Insiders.

		Unsecured claim
1	**What is the nature of the claim?** _____	$_____
Creditor's Name _____	**As of the date you file, the claim is:** Check all that apply.	
Number Street _____	❑ Contingent	
_____	❑ Unliquidated	
City State ZIP Code _____	❑ Disputed	
Contact _____	❑ None of the above apply	
Contact phone _____	**Does the creditor have a lien on your property?**	
	❑ No	
	❑ Yes. Total claim (secured and unsecured): $_____	
	Value of security: - $_____	
	Unsecured claim $_____	
2	**What is the nature of the claim?** _____	$_____
Creditor's Name _____	**As of the date you file, the claim is:** Check all that apply.	
Number Street _____	❑ Contingent	
_____	❑ Unliquidated	
City State ZIP Code _____	❑ Disputed	
Contact _____	❑ None of the above apply	
Contact phone _____	**Does the creditor have a lien on your property?**	
	❑ No	
	❑ Yes. Total claim (secured and unsecured): $_____	
	Value of security: - $_____	
	Unsecured claim $_____	

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

Unsecured claim

3

Creditor's Name _____
Number Street _____
City State ZIP Code _____
Contact _____
Contact phone _____

What is the nature of the claim? _____ $_____

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $_____
  - Value of security: - $_____
  - Unsecured claim $_____

4

Creditor's Name _____
Number Street _____
City State ZIP Code _____
Contact _____
Contact phone _____

What is the nature of the claim? _____ $_____

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $_____
  - Value of security: - $_____
  - Unsecured claim $_____

5

Creditor's Name _____
Number Street _____
City State ZIP Code _____
Contact _____
Contact phone _____

What is the nature of the claim? _____ $_____

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $_____
  - Value of security: - $_____
  - Unsecured claim $_____

6

Creditor's Name _____
Number Street _____
City State ZIP Code _____
Contact _____
Contact phone _____

What is the nature of the claim? _____ $_____

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $_____
  - Value of security: - $_____
  - Unsecured claim $_____

7

Creditor's Name _____
Number Street _____
City State ZIP Code _____
Contact _____
Contact phone _____

What is the nature of the claim? _____ $_____

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $_____
  - Value of security: - $_____
  - Unsecured claim $_____

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

Unsecured claim

8

Creditor's Name _____
Number Street _____
City State ZIP Code _____
Contact _____
Contact phone _____

What is the nature of the claim? _____ $_____

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $_____
  - Value of security: - $_____
  - Unsecured claim $_____

9

Creditor's Name _____
Number Street _____
City State ZIP Code _____
Contact _____
Contact phone _____

What is the nature of the claim? _____ $_____

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $_____
  - Value of security: - $_____
  - Unsecured claim $_____

10

Creditor's Name _____
Number Street _____
City State ZIP Code _____
Contact _____
Contact phone _____

What is the nature of the claim? _____ $_____

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $_____
  - Value of security: - $_____
  - Unsecured claim $_____

11

Creditor's Name _____
Number Street _____
City State ZIP Code _____
Contact _____
Contact phone _____

What is the nature of the claim? _____ $_____

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $_____
  - Value of security: - $_____
  - Unsecured claim $_____

12

Creditor's Name _____
Number Street _____
City State ZIP Code _____
Contact _____
Contact phone _____

What is the nature of the claim? _____ $_____

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $_____
  - Value of security: - $_____
  - Unsecured claim $_____

Unsecured claim

13

Creditor's Name _____
Number Street _____
City State ZIP Code _____
Contact _____
Contact phone _____

What is the nature of the claim? _____ $_____

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $_____
  - Value of security: - $_____
  - Unsecured claim $_____

14

Creditor's Name _____
Number Street _____
City State ZIP Code _____
Contact _____
Contact phone _____

What is the nature of the claim? _____ $_____

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $_____
  - Value of security: - $_____
  - Unsecured claim $_____

15

Creditor's Name _____
Number Street _____
City State ZIP Code _____
Contact _____
Contact phone _____

What is the nature of the claim? _____ $_____

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $_____
  - Value of security: - $_____
  - Unsecured claim $_____

16

Creditor's Name _____
Number Street _____
City State ZIP Code _____
Contact _____
Contact phone _____

What is the nature of the claim? _____ $_____

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $_____
  - Value of security: - $_____
  - Unsecured claim $_____

17

Creditor's Name _____
Number Street _____
City State ZIP Code _____
Contact _____
Contact phone _____

What is the nature of the claim? _____ $_____

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $_____
  - Value of security: - $_____
  - Unsecured claim $_____

Unsecured claim

18

Creditor's Name

Number Street

City State ZIP Code

Contact

Contact phone

What is the nature of the claim? _____

$_____

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?

- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $_____
  - Value of security: - $_____
  - Unsecured claim $_____

19

Creditor's Name

Number Street

City State ZIP Code

Contact

Contact phone

What is the nature of the claim? _____

$_____

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?

- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $_____
  - Value of security: - $_____
  - Unsecured claim $_____

20

Creditor's Name

Number Street

City State ZIP Code

Contact

Contact phone

What is the nature of the claim? _____

$_____

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?

- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $_____
  - Value of security: - $_____
  - Unsecured claim $_____

Part 2: Sign Below

Under penalty of perjury, I declare that the information provided in this form is true and correct.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

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COMMITTEE NOTE

Official Form 104, *For Individual Chapter 11 Cases: List of Creditors Who Have the 20 Largest Unsecured Claims Against You and Are Not Insiders*, is revised as part of the Forms Modernization Project. It replaces Official Form 4, *List of Creditors Holding 20 Largest Unsecured Claims* in chapter 11 cases filed by individuals or joint debtors. The form is renumbered to distinguish it from the version to be used in chapter 11 cases filed by non-individuals, such as corporations and partnerships, and in chapter 9 cases.

Form 104 is reformatted to make it easier to complete and understand and to be more visually appealing. Blanks and checkboxes are provided for specific information about each claim, replacing columns for listing information. A separate, numbered section is provided for each of the 20 claims.

The instruction not to include fully secured claims is restated in less technical terms. Debtors are instructed to include a secured creditor only if the creditor has an unsecured claim resulting from inadequate collateral value that is among the 20 largest unsecured claims. Blanks are provided to calculate the value of the unsecured portion of a partially secured claim.

Examples of “insiders” are provided in addition to the statutory reference. The form adds an explicit instruction not to file the form in a chapter 7, chapter 12, or chapter 13 case. An instruction to be as complete and accurate as possible is added, along with a warning that, if two married people are filing jointly, both are equally responsible for supplying correct information.

With respect to children who may be creditors, the direction to state only the initials of a minor child and the name and address of the child's parent or guardian, rather than the child’s full name, is moved to the general instruction booklet for the forms because it applies to all of the forms.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

No public comments were submitted.

Fill in this information to identify the case:

United States Bankruptcy Court for the:

_____ District of _____
(State)

Case number (*If known*): _____ Chapter _____

❑ Check if this is an amended filing

Official Form 105

Involuntary Petition Against an Individual

12/15

Use this form to begin a bankruptcy case against an individual you allege to be a debtor subject to an involuntary case. If you want to begin a case against a non-individual, use the *Involuntary Petition Against a Non-individual* (Official Form 205). Be as complete and accurate as possible. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write name and case number (if known).

Part 1: Identify the Chapter of the Bankruptcy Code Under Which Petition Is Filed

1. Chapter of the Bankruptcy Code

Check one:

❑ Chapter 7
❑ Chapter 11

Part 2: Identify the Debtor

2. Debtor's full name

_____
First name

_____
Middle name

_____
Last name

_____
Suffix (Sr., Jr., II, III)

3. Other names you know the debtor has used in the last 8 years

Include any assumed, married, maiden, or trade names, or *doing business as* names.

_____
_____
_____

4. Only the last 4 digits of debtor's Social Security Number or federal Individual Taxpayer Identification Number (ITIN)

❑ Unknown

xxx – xx – ____ ____ ____ ____ OR 9xx – xx – ____ ____ ____ ____

5. Any Employer Identification Numbers (EINs) used in the last 8 years

❑ Unknown

__ __ – __ __ __ __ __ __ __
EIN

__ __ – __ __ __ __ __ __ __
EIN

6. Debtor's address

Principal residence

_____
Number Street

_____

_____
City State ZIP Code

_____
County

Mailing address, if different from residence

_____
Number Street

_____

_____
City State ZIP Code

Principal place of business

_____
Number Street

_____

_____
City State ZIP Code

_____
County

7. Type of business

❑ Debtor does not operate a business

Check one if the debtor operates a business:

❑ Health Care Business (as defined in 11 U.S.C. § 101(27A))
❑ Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))
❑ Stockbroker (as defined in 11 U.S.C. § 101(53A))
❑ Commodity Broker (as defined in 11 U.S.C. § 101(6))
❑ None of the above

8. Type of debt

Each petitioner believes:

❑ **Debts are primarily consumer debts.** *Consumer debts* are defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose."

❑ **Debts are primarily business debts.** *Business debts* are debts that were incurred to obtain money for a business or investment or through the operation of the business or investment.

9. Do you know of any bankruptcy cases pending by or against any partner, spouse, or affiliate of this debtor?

❑ No

❑ Yes. Debtor _____ Relationship _____

District _____ Date filed _____ Case number, if known_____
MM / DD / YYYY

Debtor _____ Relationship _____

District _____ Date filed _____ Case number, if known_____
MM / DD / YYYY

Part 3: Report About the Case

10. Venue

Reason for filing in this court.

Check one:

- ❑ Over the last 180 days before the filing of this bankruptcy, the debtor has resided, had the principal place of business, or had principal assets in this district longer than in any other district.
- ❑ A bankruptcy case concerning debtor's affiliates, general partner, or partnership is pending in this district.
- ❑ Other reason. Explain. (See 28 U.S.C. § 1408.) _____

11. Allegations

Each petitioner is eligible to file this petition under 11 U.S.C. § 303(b).

The debtor may be the subject of an involuntary case under 11 U.S.C. § 303(a).

At least one box must be checked:

- ❑ The debtor is generally not paying such debts as they become due, unless they are the subject of a bona fide dispute as to liability or amount.
- ❑ Within 120 days before the filing of this petition, a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.

12. Has there been a transfer of any claim against the debtor by or to any petitioner?

- ❑ No
- ❑ Yes. Attach all documents that evidence the transfer and any statements required under Bankruptcy Rule 1003(a).

13. Each petitioner's claim

Name of petitioner	Nature of petitioner's claim	Amount of the claim above the value of any lien
		$ _____
		$ _____
		$ _____
	Total	$ _____

If more than 3 petitioners, attach additional sheets with the statement under penalty of perjury, each petitioner's (or representative's) signature under the statement, along with the signature of the petitioner's attorney, and the information on the petitioning creditor, the petitioner's claim, the petitioner's representative, and the attorney following the format on this form.

Part 4: Request for Relief

Petitioners request that an order for relief be entered against the debtor under the chapter specified in Part 1 of this petition. If a petitioning creditor is a corporation, attach the corporate ownership statement required by Bankruptcy Rule 1010(b). If any petitioner is a foreign representative appointed in a foreign proceeding, a certified copy of the order of the court granting recognition is attached.

Petitioners declare under penalty of perjury that the information provided in this petition is true and correct to the best of their knowledge, information, and belief. Petitioners understand that if they make a false statement, they could be fined up to $250,000 or imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571. If relief is not ordered, the court may award attorneys' fees, costs, damages, and punitive damages. 11 U.S.C. § 303(i).

Petitioners or Petitioners' Representative

✘ _____

Signature of petitioner or representative, including representative's title

_____

Printed name of petitioner

Date signed _____
MM / DD / YYYY

Mailing address of petitioner

_____

Number Street

_____

City State ZIP Code

If petitioner is an individual and is not represented by an attorney:

Contact phone _____

Email _____

Name and mailing address of petitioner's representative, if any

_____

Name

_____

Number Street

_____

City State ZIP Code

Attorneys

✘ _____

Signature of attorney

_____

Printed name

_____

Firm name, if any

_____

Number Street

_____

City State ZIP Code

Date signed _____
MM / DD / YYYY

Contact phone _____ Email _____

✘ _____

Signature of petitioner or representative, including representative's title

_____

Printed name of petitioner

Date signed _____
MM / DD / YYYY

Mailing address of petitioner

_____

Number Street

_____

City State ZIP Code

Name and mailing address of petitioner's representative, if any

_____

Name

_____

Number Street

_____

City State ZIP Code

✘ _____

Signature of Attorney

_____

Printed name

_____

Firm name, if any

_____

Number Street

_____

City State ZIP Code

Date signed _____
MM / DD / YYYY

Contact phone _____ Email _____

✘ _____

Signature of petitioner or representative, including representative's title

_____

Printed name of petitioner

Date signed _____
MM / DD / YYYY

Mailing address of petitioner

_____

Number Street

_____

City State ZIP Code

Name and mailing address of petitioner's representative, if any

_____

Name

_____

Number Street

_____

City State ZIP Code

✘ _____

Signature of Attorney

_____

Printed name

_____

Firm name, if any

_____

Number Street

_____

City State ZIP Code

Date signed _____
MM / DD / YYYY

Contact phone _____ Email _____

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COMMITTEE NOTE

Official Form 105, *Involuntary Petition Against an Individual*, which is used only in cases of individual debtors, is revised in its entirety as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. In addition, the form is renumbered to distinguish it from the version to be used in non-individual cases, and stylistic changes were made throughout the form.

The form is derived from Official Form 5, *Involuntary Petition*. The new form separates questions into four parts likely to be more familiar to non-lawyers, groups questions of a similar nature together, and eliminates questions unrelated to individual debtors.

Part 1, *Identify the Chapter of the Bankruptcy Code Under Which Petition is Filed*, moves to the beginning of the form the question regarding the chapter of the Bankruptcy Code under which the petition is filed.

Part 2, *Identify the Debtor*, includes the questions regarding the debtor's name, prior names, Social Security Number, Individual Taxpayer Identification Number, and Employer Identification Number. Petitioners must list the address for the debtor's principal residence, mailing address (if different), and principal place of business. Petitioners must indicate whether the debtor operates a business, and, if so, use checkboxes to indicate whether the business falls into certain categories. The statutory definition of "consumer debts" is provided, as well as a definition of "business debts."

Part 3, *Report About the Case*, amends the question regarding venue to advise that venue is "the reason to file in this court" and amends the choices for venue. The first option is revised to read: "Over the last 180 days before the filing of this bankruptcy, the debtor has resided, had the principal place of business, or had principal assets in this district longer than any other district." Also, the form adds an option for "Other reason. Explain," with a statutory reference. In the question for Allegations, the exact citation to the Bankruptcy Code is provided for the second allegation, and checkboxes are provided for the last allegation. Petitioners must check "yes" or "no" to answer whether there has been a transfer of any claim against the debtor by or to a petitioner. The information regarding the petitioner's

claims is moved to this part of the form, and the portion listing the amount of the claim is amended to ask about the amount of the claim that exceeds the value of the lien, if any.

Part 4, *Request for Relief*, amends the instructions to include a warning about making a false statement, and adds a separate requirement for each petitioner's mailing address. Also, petitioners' attorneys must provide their email addresses, or if a petitioner is an individual and not represented by an attorney, the contact phone and email address of that petitioner must be provided.

Changes Made After Publication

No changes were made after publication.

Summary of Public Comment

No public comments were submitted.

Fill in this information to identify your case and this filing:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____

❑ Check if this is an amended filing

Official Form 106A/B

Schedule A/B: Property

12/15

In each category, separately list and describe items. List an asset only once. If an asset fits in more than one category, list the asset in the category where you think it fits best. Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Describe Each Residence, Building, Land, or Other Real Estate You Own or Have an Interest In

1. **Do you own or have any legal or equitable interest in any residence, building, land, or similar property?**

❑ No. Go to Part 2.
❑ Yes. Where is the property?

1.1. _____
Street address, if available, or other description

_____

_____
City State ZIP Code

_____
County

What is the property? Check all that apply.
❑ Single-family home
❑ Duplex or multi-unit building
❑ Condominium or cooperative
❑ Manufactured or mobile home
❑ Land
❑ Investment property
❑ Timeshare
❑ Other _____

Who is an owner of the property? Check one.
❑ Debtor 1 only
❑ Debtor 2 only
❑ Debtor 1 and Debtor 2 only
❑ At least one of the debtors and another

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule D: Creditors Who Have Claims Secured by Property.*

Current value of the entire property? $_____
Current value of the portion you own? $_____

Describe the nature of your ownership interest (such as fee simple, tenancy by the entireties, or a life estate), if known.

_____

❑ **Check if this is community property** (see instructions)

Other information you wish to add about this item, such as local property identification number: _____

If you own or have more than one, list here:

1.2. _____
Street address, if available, or other description

_____

_____
City State ZIP Code

_____
County

What is the property? Check all that apply.
❑ Single-family home
❑ Duplex or multi-unit building
❑ Condominium or cooperative
❑ Manufactured or mobile home
❑ Land
❑ Investment property
❑ Timeshare
❑ Other _____

Who is an owner of the property? Check one.
❑ Debtor 1 only
❑ Debtor 2 only
❑ Debtor 1 and Debtor 2 only
❑ At least one of the debtors and another

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule D: Creditors Who Have Claims Secured by Property.*

Current value of the entire property? $_____
Current value of the portion you own? $_____

Describe the nature of your ownership interest (such as fee simple, tenancy by the entireties, or a life estate), if known.

_____

❑ **Check if this is community property** (see instructions)

Other information you wish to add about this item, such as local property identification number: _____

1.3. _____
Street address, if available, or other description

_____

_____
City State ZIP Code

_____
County

What is the property? Check all that apply.

- ❑ Single-family home
- ❑ Duplex or multi-unit building
- ❑ Condominium or cooperative
- ❑ Manufactured or mobile home
- ❑ Land
- ❑ Investment property
- ❑ Timeshare
- ❑ Other _____

Who is an owner of the property? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule D: Creditors Who Hold Claims Secured by Property.*

Current value of the entire property? $_____

Current value of the portion you own? $_____

Describe the nature of your ownership interest (such as fee simple, tenancy by the entireties, or a life estate), if known.

_____

❑ **Check if this is community property** (see instructions)

Other information you wish to add about this item, such as local property identification number: _____

2. **Add the dollar value of the portion you own for all of your entries from Part 1, including any entries for pages you have attached for Part 1. Write that number here.** ……➔ $_____

Part 2: Describe Your Vehicles

Do you own, lease, or have legal or equitable interest in any vehicles, whether they are registered or not? Include any vehicles you own that someone else drives. If you lease a vehicle, also report it on *Schedule G: Executory Contracts and Unexpired Leases.*

3. **Cars, vans, trucks, tractors, sport utility vehicles, motorcycles**

- ❑ No
- ❑ Yes

3.1. Make: _____
Model: _____
Year: _____
Approximate mileage: _____
Other information:

Who is an owner of the property? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is community property** (see instructions)

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule D: Creditors Who Have Claims Secured by Property.*

Current value of the entire property? $_____

Current value of the portion you own? $_____

If you own or have more than one, describe here:

3.2. Make: _____
Model: _____
Year: _____
Approximate mileage: _____
Other information:

Who is an owner of the property? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is community property** (see instructions)

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule D: Creditors Who Have Claims Secured by Property.*

Current value of the entire property? $_____

Current value of the portion you own? $_____

3.3. Make: _____
Model: _____
Year: _____
Approximate mileage: _____
Other information:

Who is an owner of the property? Check one.
- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is community property** (see instructions)

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule D: Creditors Who Have Claims Secured by Property.*

Current value of the entire property? $_____ **Current value of the portion you own?** $_____

3.4. Make: _____
Model: _____
Year: _____
Approximate mileage: _____
Other information:

Who is an owner of the property? Check one.
- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is community property** (see instructions)

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule D: Creditors Who Have Claims Secured by Property.*

Current value of the entire property? $_____ **Current value of the portion you own?** $_____

4. **Watercraft, aircraft, motor homes, ATVs and other recreational vehicles, other vehicles, and accessories**
Examples: Boats, trailers, motors, personal watercraft, fishing vessels, snowmobiles, motorcycle accessories
- ❑ No
- ❑ Yes

4.1. Make: _____
Model: _____
Year: _____
Other information:

Who is an owner of the property? Check one.
- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is community property** (see instructions)

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule D: Creditors Who Have Claims Secured by Property.*

Current value of the entire property? $_____ **Current value of the portion you own?** $_____

If you own or have more than one, list here:

4.2. Make: _____
Model: _____
Year: _____
Other information:

Who is an owner of the property? Check one.
- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is community property** (see instructions)

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule D: Creditors Who Have Claims Secured by Property.*

Current value of the entire property? $_____ **Current value of the portion you own?** $_____

5. **Add the dollar value of the portion you own for all of your entries from Part 2, including any entries for pages you have attached for Part 2. Write that number here** ..... ➔ $_____

Part 3: Describe Your Personal and Household Items

Do you own or have any legal or equitable interest in any of the following items?	Current value of the portion you own? Do not deduct secured claims or exemptions.

6. **Household goods and furnishings**
   Examples: Major appliances, furniture, linens, china, kitchenware
   ❑ No
   ❑ Yes. Describe..... $_____

7. **Electronics**
   Examples: Televisions and radios; audio, video, stereo, and digital equipment; computers, printers, scanners; music collections; electronic devices including cell phones, cameras, media players, games
   ❑ No
   ❑ Yes. Describe..... $_____

8. **Collectibles of value**
   Examples: Antiques and figurines; paintings, prints, or other artwork; books, pictures, or other art objects; stamp, coin, or baseball card collections; other collections, memorabilia, collectibles
   ❑ No
   ❑ Yes. Describe..... $_____

9. **Equipment for sports and hobbies**
   Examples: Sports, photographic, exercise, and other hobby equipment; bicycles, pool tables, golf clubs, skis; canoes and kayaks; carpentry tools; musical instruments
   ❑ No
   ❑ Yes. Describe..... $_____

10. **Firearms**
    Examples: Pistols, rifles, shotguns, ammunition, and related equipment
    ❑ No
    ❑ Yes. Describe..... $_____

11. **Clothes**
    Examples: Everyday clothes, furs, leather coats, designer wear, shoes, accessories
    ❑ No
    ❑ Yes. Describe..... $_____

12. **Jewelry**
    Examples: Everyday jewelry, costume jewelry, engagement rings, wedding rings, heirloom jewelry, watches, gems, gold, silver
    ❑ No
    ❑ Yes. Describe..... $_____

13. **Non-farm animals**
    Examples: Dogs, cats, birds, horses
    ❑ No
    ❑ Yes. Describe..... $_____

14. **Any other personal and household items you did not already list, including any health aids you did not list**
    ❑ No
    ❑ Yes. Give specific information..... $_____

15. **Add the dollar value of all of your entries from Part 3, including any entries for pages you have attached for Part 3. Write that number here** ..... ➔ $_____

Part 4: Describe Your Financial Assets

Do you own or have any legal or equitable interest in any of the following?	**Current value of the portion you own?** Do not deduct secured claims or exemptions.

16. **Cash**
Examples: Money you have in your wallet, in your home, in a safe deposit box, and on hand when you file your petition

❑ No
❑ Yes..... Cash: ..... $_____

17. **Deposits of money**
Examples: Checking, savings, or other financial accounts; certificates of deposit; shares in credit unions, brokerage houses, and other similar institutions. If you have multiple accounts with the same institution, list each.

❑ No
❑ Yes..... Institution name:

17.1. Checking account: _____ $_____
17.2. Checking account: _____ $_____
17.3. Savings account: _____ $_____
17.4. Savings account: _____ $_____
17.5. Certificates of deposit: _____ $_____
17.6. Other financial account: _____ $_____
17.7. Other financial account: _____ $_____
17.8. Other financial account: _____ $_____
17.9. Other financial account: _____ $_____

18. **Bonds, mutual funds, or publicly traded stocks**
Examples: Bond funds, investment accounts with brokerage firms, money market accounts

❑ No
❑ Yes..... Institution or issuer name:

_____ $_____
_____ $_____
_____ $_____

19. **Non-publicly traded stock and interests in incorporated and unincorporated businesses, including an interest in an LLC, partnership, and joint venture**

❑ No
❑ Yes. Give specific information about them. .....

Name of entity:	% of ownership:	
_____	_____%	$_____
_____	_____%	$_____
_____	_____%	$_____

20. **Government and corporate bonds and other negotiable and non-negotiable instruments**

Negotiable instruments include personal checks, cashiers' checks, promissory notes, and money orders.
Non-negotiable instruments are those you cannot transfer to someone by signing or delivering them.

- ❑ No
- ❑ Yes. Give specific information about them. ..... Issuer name:

_____ $_____
_____ $_____
_____ $_____

21. **Retirement or pension accounts**

Examples: Interests in IRA, ERISA, Keogh, 401(k), 403(b), thrift savings accounts, or other pension or profit-sharing plans

- ❑ No
- ❑ Yes. List each account separately.. Type of account: Institution name:

401(k) or similar plan: _____ $_____
Pension plan: _____ $_____
IRA: _____ $_____
Retirement account: _____ $_____
Keogh: _____ $_____
Additional account: _____ $_____
Additional account: _____ $_____

22. **Security deposits and prepayments**

Your share of all unused deposits you have made so that you may continue service or use from a company
Examples: Agreements with landlords, prepaid rent, public utilities (electric, gas, water), telecommunications companies, or others

- ❑ No
- ❑ Yes..... Institution name or individual:

Electric: _____ $_____
Gas: _____ $_____
Heating oil: _____ $_____
Security deposit on rental unit: _____ $_____
Prepaid rent: _____ $_____
Telephone: _____ $_____
Water: _____ $_____
Rented furniture: _____ $_____
Other: _____ $_____

23. **Annuities** (A contract for a periodic payment of money to you, either for life or for a number of years)

- ❑ No
- ❑ Yes..... Issuer name and description:

_____ $_____
_____ $_____
_____ $_____

24. **Interests in an education IRA** as defined in 26 U.S.C. § 530(b)(1) or under a qualified state tuition plan as defined in 26 U.S.C. § 529(b)(1).

- ❑ No
- ❑ Yes ..... Institution name and description. Separately file the records of any interests.11 U.S.C. § 521(c):

_____ $_____
_____ $_____
_____ $_____

25. **Trusts, equitable or future interests in property (other than anything listed in line 1), and rights or powers exercisable for your benefit**

- ❑ No
- ❑ Yes. Give specific information about them. .. $_____

26. **Patents, copyrights, trademarks, trade secrets, and other intellectual property**
Examples: Internet domain names, websites, proceeds from royalties and licensing agreements

- ❑ No
- ❑ Yes. Give specific information about them. .. $_____

27. **Licenses, franchises, and other general intangibles**
Examples: Building permits, exclusive licenses, cooperative association holdings, liquor licenses, professional licenses

- ❑ No
- ❑ Yes. Give specific information about them. .. $_____

Money or property owed to you? **Current value of the portion you own?** Do not deduct secured claims or exemptions.

28. **Tax refunds owed to you**

- ❑ No
- ❑ Yes. Give specific information about them, including whether you already filed the returns and the tax years. .....

Federal: $_____
State: $_____
Local: $_____

29. **Family support**
Examples: Past due or lump sum alimony, spousal support, child support, maintenance, divorce settlement, property settlement

- ❑ No
- ❑ Yes. Give specific information. .....

Alimony: $_____
Maintenance: $_____
Support: $_____
Divorce settlement: $_____
Property settlement: $_____

30. **Other amounts someone owes you**
Examples: Unpaid wages, disability insurance payments, disability benefits, sick pay, vacation pay, workers' compensation, Social Security benefits; unpaid loans you made to someone else

- ❑ No
- ❑ Yes. Give specific information. ..... $_____

31. **Interests in insurance policies**
Examples: Health, disability, or life insurance; health savings account (HSA); credit, homeowner's, or renter's insurance

❑ No
❑ Yes. Name the insurance company of each policy and list its value. ...

Company name:	Beneficiary:	Surrender or refund value:
_____	_____	$_____
_____	_____	$_____
_____	_____	$_____

32. **Any interest in property that is due you from someone who has died**
If you are the beneficiary of a living trust, expect proceeds from a life insurance policy, or are currently entitled to receive property because someone has died.

❑ No
❑ Yes. Give specific information. ..... $_____

33. **Claims against third parties, whether or not you have filed a lawsuit or made a demand for payment**
Examples: Accidents, employment disputes, insurance claims, or rights to sue

❑ No
❑ Yes. Describe each claim. ..... $_____

34. **Other contingent and unliquidated claims of every nature, including counterclaims of the debtor and rights to set off claims**

❑ No
❑ Yes. Describe each claim. ..... $_____

35. **Any financial assets you did not already list**

❑ No
❑ Yes. Give specific information. ..... $_____

36. **Add the dollar value of all of your entries from Part 4, including any entries for pages you have attached for Part 4. Write that number here** ..... ➔ $_____

Part 5: Describe Any Business-Related Property You Own or Have an Interest In. List any real estate in Part 1.

37. **Do you own or have any legal or equitable interest in any business-related property?**

❑ No. Go to Part 6.
❑ Yes. Go to line 38.

Current value of the portion you own?
Do not deduct secured claims or exemptions.

38. **Accounts receivable or commissions you already earned**

❑ No
❑ Yes. Describe..... $_____

39. **Office equipment, furnishings, and supplies**
Examples: Business-related computers, software, modems, printers, copiers, fax machines, rugs, telephones, desks, chairs, electronic devices

❑ No
❑ Yes. Describe..... $_____

40. **Machinery, fixtures, equipment, supplies you use in business, and tools of your trade**

❑ No
❑ Yes. Describe..... $_____

41. **Inventory**

❑ No
❑ Yes. Describe..... $_____

42. **Interests in partnerships or joint ventures**

❑ No
❑ Yes. Describe.....

Name of entity:	% of ownership:	
_____	_____%	$_____
_____	_____%	$_____
_____	_____%	$_____

43. **Customer lists, mailing lists, or other compilations**

❑ No
❑ Yes. **Do your lists include personally identifiable information** (as defined in 11 U.S.C. § 101(41A))**?**

❑ No
❑ Yes. Describe..... $_____

44. **Any business-related property you did not already list**

❑ No
❑ Yes. Give specific information .....

_____ $_____
_____ $_____
_____ $_____
_____ $_____
_____ $_____
_____ $_____

45. **Add the dollar value of all of your entries from Part 5, including any entries for pages you have attached for Part 5. Write that number here** ..... ➔ $_____

Part 6: Describe Any Farm- and Commercial Fishing-Related Property You Own or Have an Interest In.

If you own or have an interest in farmland, list it in Part 1.

46. **Do you own or have any legal or equitable interest in any farm- or commercial fishing-related property?**

❑ No. Go to Part 7.
❑ Yes. Go to line 47.

Current value of the portion you own?
Do not deduct secured claims or exemptions.

47. **Farm animals**

Examples: Livestock, poultry, farm-raised fish

❑ No
❑ Yes..... $_____

48. **Crops—either growing or harvested**

❑ No
❑ Yes. Give specific information. ..... $_____

49. **Farm and fishing equipment, implements, machinery, fixtures, and tools of trade**

❑ No
❑ Yes..... $_____

50. **Farm and fishing supplies, chemicals, and feed**

❑ No
❑ Yes..... $_____

51. **Any farm- and commercial fishing-related property you did not already list**

❑ No
❑ Yes. Give specific information. ..... $_____

52. **Add the dollar value of all of your entries from Part 6, including any entries for pages you have attached for Part 6. Write that number here** ..... ➔ $_____

Part 7: Describe All Property You Own or Have an Interest in That You Did Not List Above

53. **Do you have other property of any kind you did not already list?**
Examples: Season tickets, country club membership

❑ No
❑ Yes. Give specific information. ..... $_____ $_____ $_____

54. **Add the dollar value of all of your entries from Part 7. Write that number here** ..... ➔ $_____

Part 8: List the Totals of Each Part of this Form

55. **Part 1: Total real estate, line 2**..... ➔ $_____

56. **Part 2: Total vehicles, line 5** $_____

57. **Part 3: Total personal and household items, line 15** $_____

58. **Part 4: Total financial assets, line 36** $_____

59. **Part 5: Total business-related property, line 45** $_____

60. **Part 6: Total farm- and fishing-related property, line 52** $_____

61. **Part 7: Total other property not listed, line 54** + $_____

62. **Total personal property.** Add lines 56 through 61..... $_____ Copy personal property total ➔ + $_____

63. **Total of all property on Schedule A/B.** Add line 55 + line 62..... $_____

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 106C

Schedule C: The Property You Claim as Exempt

12/15

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. Using the property you listed on *Schedule A/B: Property* (Official Form 106A/B) as your source, list the property that you claim as exempt. If more space is needed, fill out and attach to this page as many copies of *Part 2: Additional Page* as necessary. On the top of any additional pages, write your name and case number (if known).

For each item of property you claim as exempt, you must specify the amount of the exemption you claim. One way of doing so is to state a specific dollar amount as exempt. Alternatively, you may claim the full fair market value of the property being exempted up to the amount of any applicable statutory limit. Some exemptions—such as those for health aids, rights to receive certain benefits, and tax-exempt retirement funds—may be unlimited in dollar amount. However, if you claim an exemption of 100% of fair market value under a law that limits the exemption to a particular dollar amount and the value of the property is determined to exceed that amount, your exemption would be limited to the applicable statutory amount.

Part 1: Identify the Property You Claim as Exempt

1. **Which set of exemptions are you claiming?** *Check one only, even if your spouse is filing with you.*
   - ❑ You are claiming state and federal nonbankruptcy exemptions. 11 U.S.C. § 522(b)(3)
   - ❑ You are claiming federal exemptions. 11 U.S.C. § 522(b)(2)

2. **For any property you list on *Schedule A/B* that you claim as exempt, fill in the information below.**

Brief description of the property and line on *Schedule A/B* that lists this property	**Current value of the portion you own** Copy the value from *Schedule A/B*	**Amount of the exemption you claim** *Check only one box for each exemption.*	**Specific laws that allow exemption**
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____

3. **Are you claiming a homestead exemption of more than $155,675?**
   (Subject to adjustment on 4/01/16 and every 3 years after that for cases filed on or after the date of adjustment.)
   - ❑ No
   - ❑ Yes. Did you acquire the property covered by the exemption within 1,215 days before you filed this case?
     - ❑ No
     - ❑ Yes

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

Part 2: Additional Page

Brief description of the property and line on *Schedule A/B* that lists this property	Current value of the portion you own Copy the value from *Schedule A/B*	Amount of the exemption you claim *Check only one box for each exemption*	Specific laws that allow exemption
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 106D

Schedule D: Creditors Who Have Claims Secured by Property

12/15

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, copy the Additional Page, fill it out, number the entries, and attach it to this form. On the top of any additional pages, write your name and case number (if known).

1. **Do any creditors have claims secured by your property?**
   - ❑ No. Check this box and submit this form to the court with your other schedules. You have nothing else to report on this form.
   - ❑ Yes. Fill in all of the information below.

Part 1: List All Secured Claims

2. **List all secured claims.** If a creditor has more than one secured claim, list the creditor separately for each claim. If more than one creditor has a particular claim, list the other creditors in Part 2. As much as possible, list the claims in alphabetical order according to the creditor's name.	*Column A* **Amount of claim** Do not deduct the value of collateral.	*Column B* **Value of collateral that supports this claim**	*Column C* **Unsecured portion** If any
2.1 _____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code **Who owes the debt?** Check one. ❑ Debtor 1 only ❑ Debtor 2 only ❑ Debtor 1 and Debtor 2 only ❑ At least one of the debtors and another ❑ **Check if this claim relates to a community debt** **Date debt was incurred** _____	**Describe the property that secures the claim:** **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ Liquidated and neither contingent nor disputed **Nature of lien**. Check all that apply. ❑ An agreement you made (such as mortgage or secured car loan) ❑ Statutory lien (such as tax lien, mechanic's lien) ❑ Judgment lien from a lawsuit ❑ Other (including a right to offset) _____ **Last 4 digits of account number** ___ ___ ___ ___	$_____	$_____	$_____
2.2 _____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code **Who owes the debt?** Check one. ❑ Debtor 1 only ❑ Debtor 2 only ❑ Debtor 1 and Debtor 2 only ❑ At least one of the debtors and another ❑ **Check if this claim relates to a community debt** **Date debt was incurred** _____	**Describe the property that secures the claim:** **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ Liquidated and neither contingent nor disputed **Nature of lien**. Check all that apply. ❑ An agreement you made (such as mortgage or secured car loan) ❑ Statutory lien (such as tax lien, mechanic's lien) ❑ Judgment lien from a lawsuit ❑ Other (including a right to offset) _____ **Last 4 digits of account number** ___ ___ ___ ___	$_____	$_____	$_____
Add the dollar value of your entries in Column A on this page. Write that number here:		$_____	

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

Part 1: Additional Page

After listing any entries on this page, number them beginning with 2.3, followed by 2.4, and so forth.

		Column A **Amount of claim** Do not deduct the value of collateral.	*Column B* **Value of collateral that supports this claim**	*Column C* **Unsecured portion** If any
☐ _____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code **Who owes the debt?** Check one. ☐ Debtor 1 only ☐ Debtor 2 only ☐ Debtor 1 and Debtor 2 only ☐ At least one of the debtors and another ☐ **Check if this claim relates to a community debt** **Date debt was incurred** _____	**Describe the property that secures the claim:** **As of the date you file, the claim is:** Check all that apply. ☐ Contingent ☐ Unliquidated ☐ Disputed ☐ Liquidated and neither contingent nor disputed **Nature of lien**. Check all that apply. ☐ An agreement you made (such as mortgage or secured car loan) ☐ Statutory lien (such as tax lien, mechanic's lien) ☐ Judgment lien from a lawsuit ☐ Other (including a right to offset) _____ **Last 4 digits of account number** ___ ___ ___ ___	$_____	$_____	$_____
☐ _____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code **Who owes the debt?** Check one. ☐ Debtor 1 only ☐ Debtor 2 only ☐ Debtor 1 and Debtor 2 only ☐ At least one of the debtors and another ☐ **Check if this claim relates to a community debt** **Date debt was incurred** _____	**Describe the property that secures the claim:** **As of the date you file, the claim is:** Check all that apply. ☐ Contingent ☐ Unliquidated ☐ Disputed ☐ Liquidated and neither contingent nor disputed **Nature of lien**. Check all that apply. ☐ An agreement you made (such as mortgage or secured car loan) ☐ Statutory lien (such as tax lien, mechanic's lien) ☐ Judgment lien from a lawsuit ☐ Other (including a right to offset) _____ **Last 4 digits of account number** ___ ___ ___ ___	$_____	$_____	$_____
☐ _____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code **Who owes the debt?** Check one. ☐ Debtor 1 only ☐ Debtor 2 only ☐ Debtor 1 and Debtor 2 only ☐ At least one of the debtors and another ☐ **Check if this claim relates to a community debt** **Date debt was incurred** _____	**Describe the property that secures the claim:** **As of the date you file, the claim is:** Check all that apply. ☐ Contingent ☐ Unliquidated ☐ Disputed ☐ Liquidated and neither contingent nor disputed **Nature of lien**. Check all that apply. ☐ An agreement you made (such as mortgage or secured car loan) ☐ Statutory lien (such as tax lien, mechanic's lien) ☐ Judgment lien from a lawsuit ☐ Other (including a right to offset) _____ **Last 4 digits of account number** ___ ___ ___ ___	$_____	$_____	$_____

Add the dollar value of your entries in Column A on this page. Write that number here: $_____

If this is the last page of your form, add the dollar value totals from all pages. Write that number here: $_____

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

Part 2: List Others to Be Notified for a Debt That You Already Listed

Use this page only if you have others to be notified about your bankruptcy for a debt that you already listed in Part 1. For example, if a collection agency is trying to collect from you for a debt you owe to someone else, list the creditor in Part 1, and then list the collection agency here. Similarly, if you have more than one creditor for any of the debts that you listed in Part 1, list the additional creditors here. If you do not have additional persons to be notified for any debts in Part 1, do not fill out or submit this page.

☐ Name _____
Number Street _____
City State ZIP Code

On which line in Part 1 did you enter the creditor? _____
Last 4 digits of account number ___ ___ ___ ___

☐ Name _____
Number Street _____
City State ZIP Code

On which line in Part 1 did you enter the creditor? _____
Last 4 digits of account number ___ ___ ___ ___

☐ Name _____
Number Street _____
City State ZIP Code

On which line in Part 1 did you enter the creditor? _____
Last 4 digits of account number ___ ___ ___ ___

☐ Name _____
Number Street _____
City State ZIP Code

On which line in Part 1 did you enter the creditor? _____
Last 4 digits of account number ___ ___ ___ ___

☐ Name _____
Number Street _____
City State ZIP Code

On which line in Part 1 did you enter the creditor? _____
Last 4 digits of account number ___ ___ ___ ___

☐ Name _____
Number Street _____
City State ZIP Code

On which line in Part 1 did you enter the creditor? _____
Last 4 digits of account number ___ ___ ___ ___

12b-009640

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Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Draft March 14, 2014

❑ Check if this is an amended filing

Official Form 106E/F

Schedule E/F: Creditors Who Have Unsecured Claims

12/15

Be as complete and accurate as possible. Use Part 1 for creditors with PRIORITY claims and Part 2 for creditors with NONPRIORITY claims. List the other party to any executory contracts or unexpired leases that could result in a claim. Also list executory contracts on *Schedule A/B: Property* (Official Form 106A/B) and on *Schedule G: Executory Contracts and Unexpired Leases* (Official Form 106G). Do not include any creditors with partially secured claims that are listed in *Schedule D: Creditors Who Hold Claims Secured by Property*. If more space is needed, copy the Part you need, fill it out, number the entries in the boxes on the left. Attach the Continuation Page to this page. If you have no information to report in a Part, do not file that Part. On the top of any additional pages, write your name and case number (if known).

Part 1: List All of Your PRIORITY Unsecured Claims

1. **Do any creditors have priority unsecured claims against you?**
   - ❑ No. Go to Part 2.
   - ❑ Yes.

2. **List all of your priority unsecured claims.** If a creditor has more than one priority unsecured claim, list the creditor separately for each claim. For each claim listed, identify what type of claim it is. If a claim has both priority and nonpriority amounts, list that claim here and show both priority and nonpriority amounts. As much as possible, list the claims in alphabetical order according to the creditor's name. If you have more than two priority unsecured claims, fill out the Continuation Page of Part 1. If more than one creditor holds a particular claim, list the other creditors in Part 3.
(For an explanation of each type of claim, see the instructions for this form in the instruction booklet.)

		Total claim	Priority amount	Nonpriority amount
2.1	_____ Priority Creditor's Name _____ Number Street _____ _____ City State ZIP Code **Who incurred the debt?** Check one. ❑ Debtor 1 only ❑ Debtor 2 only ❑ Debtor 1 and Debtor 2 only ❑ At least one of the debtors and another ❑ **Check if this claim is for a community debt** **Is the claim subject to offset?** ❑ No ❑ Yes	**Last 4 digits of account number** ___ ___ ___ ___ **When was the debt incurred?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ Liquidated and neither contingent nor disputed **Type of PRIORITY unsecured claim:** ❑ Domestic support obligations ❑ Taxes and certain other debts you owe the government ❑ Claims for death or personal injury while you were intoxicated ❑ Other. Specify _____	$_____	$_____	$_____
2.2	_____ Priority Creditor's Name _____ Number Street _____ _____ City State ZIP Code **Who incurred the debt?** Check one. ❑ Debtor 1 only ❑ Debtor 2 only ❑ Debtor 1 and Debtor 2 only ❑ At least one of the debtors and another ❑ **Check if this claim is for a community debt** **Is the claim subject to offset?** ❑ No ❑ Yes	**Last 4 digits of account number** ___ ___ ___ ___ **When was the debt incurred?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ Liquidated and neither contingent nor disputed **Type of PRIORITY unsecured claim:** ❑ Domestic support obligations ❑ Taxes and certain other debts you owe the government ❑ Claims for death or personal injury while you were intoxicated ❑ Other. Specify _____	$_____	$_____	$_____

12b-009642

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

Part 1: Your PRIORITY Unsecured Claims — Continuation Page

After listing any entries on this page, number them beginning with 2.3, followed by 2.4, and so forth.

		Total claim	Priority amount	Nonpriority amount
_____ Priority Creditor's Name _____ Number Street _____ _____ City State ZIP Code **Who incurred the debt?** Check one. ❑ Debtor 1 only ❑ Debtor 2 only ❑ Debtor 1 and Debtor 2 only ❑ At least one of the debtors and another ❑ **Check if this claim is for a community debt** **Is the claim subject to offset?** ❑ No ❑ Yes	**Last 4 digits of account number** ___ ___ ___ ___ **When was the debt incurred?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ Liquidated and neither contingent nor disputed **Type of PRIORITY unsecured claim:** ❑ Domestic support obligations ❑ Taxes and certain other debts you owe the government ❑ Claims for death or personal injury while you were intoxicated ❑ Other. Specify _____	$_____	$_____	$_____
_____ Priority Creditor's Name _____ Number Street _____ _____ City State ZIP Code **Who incurred the debt?** Check one. ❑ Debtor 1 only ❑ Debtor 2 only ❑ Debtor 1 and Debtor 2 only ❑ At least one of the debtors and another ❑ **Check if this claim is for a community debt** **Is the claim subject to offset?** ❑ No ❑ Yes	**Last 4 digits of account number** ___ ___ ___ ___ **When was the debt incurred?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ Liquidated and neither contingent nor disputed **Type of PRIORITY unsecured claim:** ❑ Domestic support obligations ❑ Taxes and certain other debts you owe the government ❑ Claims for death or personal injury while you were intoxicated ❑ Other. Specify _____	$_____	$_____	$_____
_____ Priority Creditor's Name _____ Number Street _____ _____ City State ZIP Code **Who incurred the debt?** Check one. ❑ Debtor 1 only ❑ Debtor 2 only ❑ Debtor 1 and Debtor 2 only ❑ At least one of the debtors and another ❑ **Check if this claim is for a community debt** **Is the claim subject to offset?** ❑ No ❑ Yes	**Last 4 digits of account number** ___ ___ ___ ___ **When was the debt incurred?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ Liquidated and neither contingent nor disputed **Type of PRIORITY unsecured claim:** ❑ Domestic support obligations ❑ Taxes and certain other debts you owe the government ❑ Claims for death or personal injury while you were intoxicated ❑ Other. Specify _____	$_____	$_____	$_____

12b-009643

Part 2: List All of Your NONPRIORITY Unsecured Claims

3. Do any creditors have nonpriority unsecured claims against you?

- ❑ No. You have nothing to report in this part. Submit this form to the court with your other schedules.
- ❑ Yes

4. List all of your nonpriority unsecured claims in the alphabetical order of the creditor who holds each claim. If a creditor has more than one priority unsecured claim, list the creditor separately for each claim. For each claim listed, identify what type of claim it is. Do not list claims already included in Part 1. If more than one creditor holds a particular claim, list the other creditors in Part 3.If you have more than four priority unsecured claims fill out the Continuation Page of Part 2.

Total claim

4.1

_____
Nonpriority Creditor's Name

_____
Number Street

_____
City State ZIP Code

Who incurred the debt? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this claim is for a community debt**

Is the claim subject to offset?

- ❑ No
- ❑ Yes

Last 4 digits of account number ___ ___ ___ ___

When was the debt incurred? _____

$_____

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ Liquidated and neither contingent nor disputed

Type of NONPRIORITY unsecured claim:

- ❑ Student loans
- ❑ Obligations arising out of a separation agreement or divorce that you did not report as priority claims
- ❑ Debts to pension or profit-sharing plans, and other similar debts
- ❑ Other. Specify _____

4.2

_____
Nonpriority Creditor's Name

_____
Number Street

_____
City State ZIP Code

Who incurred the debt? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this claim is for a community debt**

Is the claim subject to offset?

- ❑ No
- ❑ Yes

Last 4 digits of account number ___ ___ ___ ___

When was the debt incurred? _____

$_____

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ Liquidated and neither contingent nor disputed

Type of NONPRIORITY unsecured claim:

- ❑ Student loans
- ❑ Obligations arising out of a separation agreement or divorce that you did not report as priority claims
- ❑ Debts to pension or profit-sharing plans, and other similar debts
- ❑ Other. Specify _____

4.3

_____
Nonpriority Creditor's Name

_____
Number Street

_____
City State ZIP Code

Who incurred the debt? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this claim is for a community debt**

Is the claim subject to offset?

- ❑ No
- ❑ Yes

Last 4 digits of account number ___ ___ ___ ___

When was the debt incurred? _____

$_____

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ Liquidated and neither contingent nor disputed

Type of NONPRIORITY unsecured claim:

- ❑ Student loans
- ❑ Obligations arising out of a separation agreement or divorce that you did not report as priority claims
- ❑ Debts to pension or profit-sharing plans, and other similar debts
- ❑ Other. Specify _____

Part 2: Your NONPRIORITY Unsecured Claims — Continuation Page

After listing any entries on this page, number them beginning with 4.5, followed by 4.6, and so forth. **Total claim**

☐

_____
Nonpriority Creditor's Name

_____
Number Street

_____
City State ZIP Code

Who incurred the debt? Check one.

- ☐ Debtor 1 only
- ☐ Debtor 2 only
- ☐ Debtor 1 and Debtor 2 only
- ☐ At least one of the debtors and another

☐ **Check if this claim is for a community debt**

Is the claim subject to offset?

- ☐ No
- ☐ Yes

Last 4 digits of account number ___ ___ ___ ___

When was the debt incurred? _____

As of the date you file, the claim is: Check all that apply.

- ☐ Contingent
- ☐ Unliquidated
- ☐ Disputed
- ☐ Liquidated and neither contingent nor disputed

Type of **NONPRIORITY** unsecured claim:

- ☐ Student loans
- ☐ Obligations arising out of a separation agreement or divorce that you did not report as priority claims
- ☐ Debts to pension or profit-sharing plans, and other similar debts
- ☐ Other. Specify_____

$_____

☐

_____
Nonpriority Creditor's Name

_____
Number Street

_____
City State ZIP Code

Who incurred the debt? Check one.

- ☐ Debtor 1 only
- ☐ Debtor 2 only
- ☐ Debtor 1 and Debtor 2 only
- ☐ At least one of the debtors and another

☐ **Check if this claim is for a community debt**

Is the claim subject to offset?

- ☐ No
- ☐ Yes

Last 4 digits of account number ___ ___ ___ ___

When was the debt incurred? _____

As of the date you file, the claim is: Check all that apply.

- ☐ Contingent
- ☐ Unliquidated
- ☐ Disputed
- ☐ Liquidated and neither contingent nor disputed

Type of **NONPRIORITY** unsecured claim:

- ☐ Student loans
- ☐ Obligations arising out of a separation agreement or divorce that you did not report as priority claims
- ☐ Debts to pension or profit-sharing plans, and other similar debts
- ☐ Other. Specify_____

$_____

☐

_____
Nonpriority Creditor's Name

_____
Number Street

_____
City State ZIP Code

Who incurred the debt? Check one.

- ☐ Debtor 1 only
- ☐ Debtor 2 only
- ☐ Debtor 1 and Debtor 2 only
- ☐ At least one of the debtors and another

☐ **Check if this claim is for a community debt**

Is the claim subject to offset?

- ☐ No
- ☐ Yes

Last 4 digits of account number ___ ___ ___ ___

When was the debt incurred? _____

As of the date you file, the claim is: Check all that apply.

- ☐ Contingent
- ☐ Unliquidated
- ☐ Disputed
- ☐ Liquidated and neither contingent nor disputed

Type of **NONPRIORITY** unsecured claim:

- ☐ Student loans
- ☐ Obligations arising out of a separation agreement or divorce that you did not report as priority claims
- ☐ Debts to pension or profit-sharing plans, and other similar debts
- ☐ Other. Specify_____

$_____

Part 3: List Others to Be Notified About a Debt That You Already Listed

5. Use this page only if you have others to be notified about your bankruptcy, for a debt that you already listed in Parts 1 or 2. For example, if a collection agency is trying to collect from you for a debt you owe to someone else, list the original creditor in Parts 1 or 2, then list the collection agency here. Similarly, if you have more than one creditor for any of the debts that you listed in Parts 1 or 2, list the additional creditors here. If you do not have additional persons to be notified for any debts in Parts 1 or 2, do not fill out or submit this page.

Name _____
Number Street _____
_____
City State ZIP Code _____

On which entry in Part 1 or Part 2 did you list the original creditor?

Line _____ of (*Check one*): ❑ Part 1: Creditors with Priority Unsecured Claims
❑ Part 2: Creditors with Nonpriority Unsecured Claims

Last 4 digits of account number ___ ___ ___ ___

Name _____
Number Street _____
_____
City State ZIP Code _____

On which entry in Part 1 or Part 2 did you list the original creditor?

Line _____ of (*Check one*): ❑ Part 1: Creditors with Priority Unsecured Claims
❑ Part 2: Creditors with Nonpriority Unsecured Claims

Last 4 digits of account number ___ ___ ___ ___

Name _____
Number Street _____
_____
City State ZIP Code _____

On which entry in Part 1 or Part 2 did you list the original creditor?

Line _____ of (*Check one*): ❑ Part 1: Creditors with Priority Unsecured Claims
❑ Part 2: Creditors with Nonpriority Unsecured Claims

Last 4 digits of account number ___ ___ ___ ___

Name _____
Number Street _____
_____
City State ZIP Code _____

On which entry in Part 1 or Part 2 did you list the original creditor?

Line _____ of (*Check one*): ❑ Part 1: Creditors with Priority Unsecured Claims
❑ Part 2: Creditors with Nonpriority Unsecured Claims

Last 4 digits of account number ___ ___ ___ ___

Name _____
Number Street _____
_____
City State ZIP Code _____

On which entry in Part 1 or Part 2 did you list the original creditor?

Line _____ of (*Check one*): ❑ Part 1: Creditors with Priority Unsecured Claims
❑ Part 2: Creditors with Nonpriority Unsecured Claims

Last 4 digits of account number ___ ___ ___ ___

Name _____
Number Street _____
_____
City State ZIP Code _____

On which entry in Part 1 or Part 2 did you list the original creditor?

Line _____ of (*Check one*): ❑ Part 1: Creditors with Priority Unsecured Claims
❑ Part 2: Creditors with Nonpriority Unsecured Claims

Last 4 digits of account number ___ ___ ___ ___

Name _____
Number Street _____
_____
City State ZIP Code _____

On which entry in Part 1 or Part 2 did you list the original creditor?

Line _____ of (*Check one*): ❑ Part 1: Creditors with Priority Unsecured Claims
❑ Part 2: Creditors with Nonpriority Unsecured Claims

Last 4 digits of account number ___ ___ ___ ___

Part 4: Add the Amounts for Each Type of Unsecured Claim

6. Total the amounts of certain types of unsecured claims. This information is for statistical reporting purposes only. 28 U.S.C. §159. Add the amounts for each type of unsecured claim.

			Total claim
Total claims from Part 1	6a. **Domestic support obligations**	6a.	$_____
	6b. **Taxes and certain other debts you owe the government**	6b.	$_____
	6c. **Claims for death or personal injury while you were intoxicated**	6c.	$_____
	6d. **Other.** Add all other priority unsecured claims. Write that amount here.	6d.	+ $_____
	6e. **Total.** Add lines 6a through 6d.	6e.	$_____

			Total claim
Total claims from Part 2	6f. **Student loans**	6f.	$_____
	6g. **Obligations arising out of a separation agreement or divorce that you did not report as priority claims**	6g.	$_____
	6h. **Debts to pension or profit-sharing plans, and other similar debts**	6h.	$_____
	6i. **Other.** Add all other nonpriority unsecured claims. Write that amount here.	6i.	+ $_____
	6j. **Total.** Add lines 6f through 6i.	6j.	$_____

Fill in this information to identify your case:

Debtor _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse If filing) First Name Middle Name Last Name

United States Bankruptcy Court for the:_____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 106G

Schedule G: Executory Contracts and Unexpired Leases

12/15

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, copy the additional page, fill it out, number the entries, and attach it to this page. On the top of any additional pages, write your name and case number (if known).

1. **Do you have any executory contracts or unexpired leases?**
   - ❑ No. Check this box and file this form with the court with your other schedules. You have nothing else to report on this form.
   - ❑ Yes. Fill in all of the information below even if the contracts or leases are listed on *Schedule A/B: Property* (Official Form 106A/B).

2. **List separately each person or company with whom you have the contract or lease. Then state what each contract or lease is for (for example, rent, vehicle lease, cell phone).** See the instructions for this form in the instruction booklet for more examples of executory contracts and unexpired leases.

	Person or company with whom you have the contract or lease	State what the contract or lease is for
1	Name Number Street City State ZIP Code	
2	Name Number Street City State ZIP Code	
3	Name Number Street City State ZIP Code	
4	Name Number Street City State ZIP Code	
5	Name Number Street City State ZIP Code	

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

Additional Page if You Have More Contracts or Leases

Person or company with whom you have the contract or lease	What the contract or lease is for
Name Number Street City State ZIP Code	
Name Number Street City State ZIP Code	
Name Number Street City State ZIP Code	
Name Number Street City State ZIP Code	
Name Number Street City State ZIP Code	
Name Number Street City State ZIP Code	
Name Number Street City State ZIP Code	
Name Number Street City State ZIP Code	

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the:_____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 106H

Schedule H: Your Codebtors

12/15

Codebtors are people or entities who are also liable for any debts you may have. Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, copy the Additional Page, fill it out, and number the entries in the boxes on the left. Attach the Additional Page to this page. On the top of any Additional Pages, write your name and case number (if known). Answer every question.

1. **Do you have any codebtors?** (If you are filing a joint case, do not list either spouse as a codebtor.)
   - ❑ No
   - ❑ Yes
2. **Within the last 8 years, have you lived in a community property state or territory?** (*Community property states and territories* include Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington, and Wisconsin.)
   - ❑ No. Go to line 3.
   - ❑ Yes. Did your spouse, former spouse, or legal equivalent live with you at the time?
     - ❑ No
     - ❑ Yes. In which community state or territory did you live? _____. Fill in the name and current address of that person.

       _____
       Name of your spouse, former spouse, or legal equivalent

       _____
       Number Street

       _____
       City State ZIP Code
3. **In Column 1, list all of your codebtors. Do not include your spouse as a codebtor if your spouse is filing with you. List the person shown in line 2 again as a codebtor only if that person is a guarantor or cosigner. Make sure you have listed the creditor on *Schedule D* (Official Form 106D), *Schedule E/F* (Official Form 106E/F), or Schedule G (Official Form 106G). Use *Schedule D, Schedule E/F, or Schedule G* to fill out Column 2.**

Column 1: **Your codebtor**	*Column 2:* **The creditor to whom you owe the debt** Check all schedules that apply:
3.1 _____ Name _____ Number Street _____ City State ZIP Code	❑ Schedule D, line _____ ❑ Schedule E/F, line _____ ❑ Schedule G, line _____
3.2 _____ Name _____ Number Street _____ City State ZIP Code	❑ Schedule D, line _____ ❑ Schedule E/F, line _____ ❑ Schedule G, line _____
3.3 _____ Name _____ Number Street _____ City State ZIP Code	❑ Schedule D, line _____ ❑ Schedule E/F, line _____ ❑ Schedule G, line _____

12b-009650

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

Additional Page to List More Codebtors

Column 1: **Your codebtor**	*Column 2:* **The creditor to whom you owe the debt** Check all schedules that apply:
Name Number Street City State ZIP Code	❑ Schedule D, line _____ ❑ Schedule E/F, line _____ ❑ Schedule G, line _____
Name Number Street City State ZIP Code	❑ Schedule D, line _____ ❑ Schedule E/F, line _____ ❑ Schedule G, line _____
Name Number Street City State ZIP Code	❑ Schedule D, line _____ ❑ Schedule E/F, line _____ ❑ Schedule G, line _____
Name Number Street City State ZIP Code	❑ Schedule D, line _____ ❑ Schedule E/F, line _____ ❑ Schedule G, line _____
Name Number Street City State ZIP Code	❑ Schedule D, line _____ ❑ Schedule E/F, line _____ ❑ Schedule G, line _____
Name Number Street City State ZIP Code	❑ Schedule D, line _____ ❑ Schedule E/F, line _____ ❑ Schedule G, line _____
Name Number Street City State ZIP Code	❑ Schedule D, line _____ ❑ Schedule E/F, line _____ ❑ Schedule G, line _____
Name Number Street City State ZIP Code	❑ Schedule D, line _____ ❑ Schedule E/F, line _____ ❑ Schedule G, line _____

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 106Sum

Summary of Your Assets and Liabilities and Certain Statistical Information 12/15

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. Fill out all of your schedules first; then complete the information on this form. If you are filing amended schedules after you file your original forms, you must fill out a new *Summary* and check the box at the top of this page.

Part 1: Summarize Your Assets

	Your assets Value of what you own
1. ***Schedule A/B: Property*** (Official Form 106A/B)	
1a. Copy line 55, Total real estate, from *Schedule A/B*	$ _____
1b. Copy line 62, Total personal property, from *Schedule A/B*	$ _____
1c. Copy line 63, Total of all property on *Schedule A/B*	$ _____

Part 2: Summarize Your Liabilities

	Your liabilities Amount you owe
2. *Schedule D: Creditors Who Have Claims Secured by Property* (Official Form 106D)	
2a. Copy the total you listed in Column A, *Amount of claim,* at the bottom of the last page of Part 1 of *Schedule D*	$ _____
3. *Schedule E/F: Creditors Who Have Unsecured Claims* (Official Form 106E/F)	
3a. Copy the total claims from Part 1 (priority unsecured claims) from line 6e of *Schedule E/F*	$ _____
3b. Copy the total claims from Part 2 (nonpriority unsecured claims) from line 6j of *Schedule E/F*	+ $ _____
Your total liabilities	$ _____

Part 3: Summarize Your Income and Expenses

4. *Schedule I: Your Income* (Official Form 106I) Copy your combined monthly income from line 12 of *Schedule I*	$ _____
5. *Schedule J: Your Expenses* (Official Form 106J) Copy your monthly expenses from line 22, Column A, of *Schedule J*	$ _____

Part 4: Answer These Questions for Administrative and Statistical Records

6. **Are you filing for bankruptcy under Chapters 7, 11, or 13?**

❑ No. You have nothing to report on this part of the form. Check this box and submit this form to the court with your other schedules.
❑ Yes

7. **What kind of debt do you have?**

❑ **Your debts are primarily consumer debts.** *Consumer debts* are those "incurred by an individual primarily for a personal, family, or household purpose." 11 U.S.C. § 101(8). Fill out lines 8-10 for statistical purposes. 28 U.S.C. § 159.

❑ **Your debts are not primarily consumer debts**. You have nothing to report on this part of the form. Check this box and submit this form to the court with your other schedules.

8. **From the *Statement of Your Current Monthly Income*** (Official Form 108-1, 109, or 110-1):
Copy your total current monthly income from line 11. $ _____

9. **Copy the following special categories of claims from Part 4, line 6 of *Schedule E/F***:

	Total claim
From Part 4 on *Schedule E/F*, copy the following:	
9a. Domestic support obligations (Copy line 6a.)	$_____
9b. Taxes and certain other debts you owe the government. (Copy line 6b.)	$_____
9c. Claims for death or personal injury while you were intoxicated. (Copy line 6c.)	$_____
9d. Student loans. (Copy line 6f.)	$_____
9e. Obligations arising out of a separation agreement or divorce that you did not report as priority claims. (Copy line 6g.)	$_____
9f. Debts to pension or profit-sharing plans, and other similar debts. (Copy line 6h.)	+ $_____
9g. **Total.** Add lines 9a through 9f.	$_____

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 106Dec

Declaration About an Individual Debtor's Schedules

12/15

If two married people are filing together, both are equally responsible for supplying correct information.

You must file this form whenever you file bankruptcy schedules or amended schedules. Making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to $250,000, or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

Sign Below

Did you pay or agree to pay someone who is NOT an attorney to help you fill out bankruptcy forms?

❑ No

❑ Yes. Name of person_____. Attach *Bankruptcy Petition Preparer's Notice, Declaration, and Signature* (Official Form 119).

Under penalty of perjury, I declare that I have read the summary and schedules filed with this declaration and that they are true and correct.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

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COMMITTEE NOTE

The schedules to be used in cases of individual debtors are revised as part of the Forms Modernization Project, making them easier to read and, as a result, likely to generate more complete and accurate responses. The goals of the Forms Modernization Project include improving the interface between technology and the forms so as to increase efficiency and reduce the need to produce the same information in multiple formats. Therefore, many of the open-ended questions and multiple-part instructions have been replaced with more specific questions. The individual debtor schedules are also renumbered, starting with the number 106 and followed by the letter or name of the schedule to distinguish them from the versions to be used in non-individual cases.

Official Form 106Sum, *Summary of Your Assets and Liabilities and Certain Statistical Information*, replaces Official Form 6, *Summary of Schedules and Statistical Summary of Certain Liability and Related Data (28 U.S.C. § 159)*, in cases of individual debtors.

The form is reformatted and updated with cross-references indicating the line numbers of specific schedules from which the summary information is to be gathered. In addition, because most filings are now done electronically, the form no longer requires the debtor to indicate which schedules are attached or to state the number of sheets of paper used for the schedules.

Official Form 106A/B, *Schedule A/B: Property*, consolidates information about an individual debtor's real and personal property into a single form. It replaces Official Form 6A, *Real Property*, and Official Form 6B, *Personal Property*, in cases of individual debtors. In addition to specific questions about the assets, the form also includes open text fields for providing additional information regarding particular assets when appropriate.

The layout and categories of property on Official Form 106A/B have changed. Instead of dividing property interests into two categories (real or personal property), the new form uses seven categories likely to be more familiar to non-lawyers: real estate, vehicles, personal household items, financial assets, business-related property, farm- and commercial fishing-related property, and a catch-all category for property that was not listed elsewhere in the form. The new form categories and the examples provided

in many of the categories are designed to prompt debtors to be thorough and list all of their interests in property. The debtor may describe generally items of minimal value (such as children's clothes) by adding the value of the items and reporting the total.

Although a particular item of property may fit into more than one category, the instructions for the form explain that it should be listed only once.

In addition, because property that falls within a particular category may not be specifically elicited by the particular line items on the form, the debtor is asked in Parts 3–6 (lines 14, 35, 44, and 51) to specifically identify and value any other property in the category.

In Part 1, *Describe Each Residence, Building, Land, or Other Real Estate You Own or Have an Interest In*, the debtor is asked to state the "current value of the portion you own," and to also state whether ownership is shared with someone else. In addition, the debtor is asked for the nature of the ownership interest, if known by the debtor. Furthermore, instead of asking for an open-ended description of the property, the form guides the debtor in answering the description question by providing eight options from which to choose: single-family home, duplex or multi-unit building, condominium or cooperative, manufactured or mobile home, land, investment property, timeshare, and other.

Part 2, *Describe Your Vehicles*, also guides the debtor in answering the question, asking for the make, model, year, and mileage of the car or other vehicle. Because mileage is just a general indication of vehicle value, the debtor is not required to list the exact mileage, but instead is prompted to provide the approximate mileage.

Part 3, *Describe Your Personal and Household Items*, simplifies wording, updates categories, and uses more common terms. For example, "Wearing apparel" is changed to "Clothes" and examples include furs, which were previously grouped with jewelry. Firearms, on the other hand, which were previously grouped with sports and other hobbies, are now set out as a separate category. Additionally, because a new Part 6 has been added to separately describe-farm related property, Part 3 includes a category for "Non-farm animals."

Part 4, *Describe Your Financial Assets*, prompts a listing of the debtor's financial assets through several questions providing separate space, after each listed type of account or deposit, for the

institution or issuer name and the value of the debtor's interest in the asset. Two new categories of financial assets are added: "Bonds, mutual funds, or publicly traded stocks" and "Claims against third parties, whether or not you have filed a lawsuit or made a demand for payment."

Part 5, *Describe Any Business-Related Property You Own or Have an Interest In*, provides prompts for listing business-related property, such as accounts receivable, inventory, and machinery, and includes a direction to list business-related real estate in Part 1, to avoid listing real estate twice.

Part 6, *Describe Any Farm- and Commercial Fishing-Related Property You Own or Have an Interest In*, provides prompts for listing farm- or commercial fishing-related property, such as farm animals, crops, and feed. It also includes a direction to list any farm- or commercial fishing-related real estate in Part 1.

Part 7, *Describe All Property You Own or Have an Interest in That You Did Not List Above*, is a catch-all provision that allows the debtor to report property that is difficult to categorize.

Part 8, *List the Totals of Each Part of this Form*¸ tabulates the total value of the debtor's interest in the listed property. The tabulation includes two subtotals, one for real estate, which corresponds to the real property total that was reported on former Official Form 6A. The second subtotal is of Parts 2-7, which corresponds to the personal property total that was reported on former Official Form 6B.

Official Form 106C, *Schedule C: The Property You Claim as Exempt*, replaces Official Form 6C, *Property Claimed as Exempt*, in cases of individual debtors.

Part 1, *Identify the Property You Claim as Exempt*, includes a table to list the property the debtor seeks to exempt, the value of the property owned by the debtor, the amount of the claimed exemption, and the law that allows the exemption. The first column asks for a brief description of the exempt property, and it also asks for the line number where the property is listed on Schedule A/B. The second column asks for the value of the portion of the asset owned by the debtor, rather than the entire asset. The third column asks for the amount, rather than the value, of the exemption claim.

The form has also been changed in light of the Supreme Court's ruling in *Schwab v. Reilly*, 560 U.S. 770 (2010). Entries in

the "amount of the exemption you claim" column may now be listed as either a dollar limited amount or as 100% of fair market value, up to any applicable statutory limit. For example, a debtor might claim 100% of fair market value for a home covered by an exemption capped at $15,000, and that limit would be applicable. This choice would impose no dollar limit where the exemption is unlimited in dollar amount, such as some exemptions for health aids, certain governmental benefits, and tax-exempt retirement funds.

Official Form 106D, *Schedule D: Creditors Who Hold Claims Secured by Property*, replaces Official Form 6D, *Creditors Holding Secured Claims*, in cases of individual debtors.

Part 1, *List Your Secured Claims*, now directs the debtor to list only the last four digits of the account number. Part 1 also adds four checkboxes with which to describe the nature of the lien: an agreement the debtor made (such as mortgage or secured car loan); statutory lien (such as tax lien, mechanic's lien); judgment lien from a lawsuit; and other.

The form adds Part 2, *List Others to Be Notified for a Debt That You Already Listed*. The debtor is instructed to use Part 2 if there is a need to notify someone about the bankruptcy filing other than the creditor for a debt listed in Part 1. For example, if a collection agency is trying to collect for a creditor listed in Part 1, the collection agency would be listed in Part 2.

Official Form 106E/F, *Schedule E/F: Creditors Who Have Unsecured Claims*, consolidates information about priority and nonpriority unsecured claims into a single form. It replaces Official Form 6E, *Creditors Holding Unsecured Priority Claims*, and Official Form 6F, *Creditors Holding Unsecured Nonpriority Claims*, in cases of individual debtors.

Although both priority and nonpriority unsecured claims are reported in Official Form 106E/F, the two types of claims are separately grouped so that the total for each type can be reported for case administration and statistical purposes. The form eliminates the question "consideration for claim" and instructs debtors to list claims in the alphabetical order of creditors as much as possible.

Part 1, *List All of Your PRIORITY Unsecured Claims*, includes four checkboxes for identifying the type of priority that applies to the claim: domestic support obligations; taxes and certain other debts owed to the government; claims for death or

personal injury while intoxicated; and "other." The first three categories are required to be separately reported for statistical purposes. If the debtor selects "other," the debtor must specify the basis of the priority, *e.g.*, wages or employee benefit plan contribution.

Part 2, *List All of Your NONPRIORITY Unsecured Claims*, contains four checkboxes, including three for types of claims that must be separately reported for statistical purposes: student loans; obligations arising out of a separation agreement or divorce not listed as priority claims; and debts to pension or profit-sharing plans and other similar debts. The remaining "other" checkbox treats claims not subject to separate reporting. If the debtor selects "other," the debtor must specify the basis of the claim.

Part 3, *List Others to Be Notified About a Debt That You Already Listed*, is new. The debtor is instructed to use Part 3 only if there is a need to give notice of the bankruptcy to someone other than a creditor listed in Parts 1 and 2. For example, if a collection agency is trying to collect for a creditor listed in Part 1, the collection agency would be listed in Part 3.

Finally, Part 4, *Add the Amounts for Each Type of Unsecured Claim*, requires the debtor to provide the total amounts of particular types of unsecured claims for statistical reporting purposes and the overall totals of the priority and nonpriority unsecured claims reported in this form.

Official Form 106G, *Schedule G: Executory Contracts and Unexpired Leases*, replaces Official Form 6G, *Executory Contracts and Unexpired Leases*, in cases of individual debtors.

The form is simplified. Instead of requiring the debtor to make multiple assertions about each potential executory contract or unexpired lease, the form simply requires the debtor to identify the name and address of the other party to the contract or lease, and to state what the contract or lease deals with. Definitions and examples of executory contracts and unexpired leases are included in the separate instructions for the form.

An additional page is provided in case the debtor has so many executory contracts and unexpired leases that the available page is not adequate. If the debtor needs to use the additional page, the debtor is required to fill in the entry number.

Official Form 106H, *Schedule H: Your Codebtors*, replaces Official Form 6H, *Codebtors*, in cases of individual debtors.

The form breaks out the questions about whether there are any codebters, and whether the debtor has lived with a spouse, former spouse, or legal equivalent in a community property state in the prior eight years. It also removes Alaska from the listed community property states. Finally, it asks the debtor to indicate where the debt is listed on Schedule D, Schedule E/F, or Schedule G, thereby eliminating the need to list the name and address of the creditor.

Official Form 106I, *Schedule I: Your Income*, replaces Official Form 6I, *Your Income*, in cases of individual debtors.

The form is one of an initial set of forms that were published as part of the Forms Modernization Project in 2012. It is renumbered and internal cross references are updated to conform to the new numbering system now being introduced by the Forms Modernization Project.

Official Form 106J, *Schedule J: Your Expenses*, replaces Official Form 6J, *Your Expenses*, in cases of individual debtors.

The form is one of an initial set of forms that were published as part of the Forms Modernization Project in 2012. It is renumbered and internal cross references are updated to conform to the new numbering system now being introduced by the Forms Modernization Project.

Official Form 106Dec, *Declaration About an Individual Debtor's Schedules*, replaces Official Form 6, *Declaration Concerning Debtor's Schedules*, in cases of individual debtors.

The form, which is to be signed by the debtor and filed with the debtor's schedules, deletes the Declaration and Signature of Bankruptcy Petition Preparer (BPP). Instead, the debtor is directed to complete and file Official Form 119, *Bankruptcy Petition Preparer's Notice, Declaration, and Signature*, if a BPP helped fill out the bankruptcy forms.

Because the form applies only to individual debtors, it no longer contains the Declaration Under Penalty of Perjury on Behalf of a Corporation or Partnership. It also deletes from the declaration the phrase "to the best of my knowledge, information,

and belief" in order to conform to the language of 28 U.S.C. § 1746. *See* Rule 1008.

Changes Made After Publication

Official Form 106A/B

The $500 limitation for listing assets was removed from the instructions. In Part 1, Line 1, an instruction was added to describe the nature of the ownership interest, with examples. Vehicle leases were added to Part 2, Line 3, and the debtor is asked to provide the approximate mileage, rather than indicating a range of mileage. In Part 6, Line 48, "machinery, fixtures, and tools of trade" were added to the question. Other minor stylistic changes were made throughout the form.

Official Form 106D

In Part 1, Line 2, the instruction to list creditors in alphabetical order was revised to require that creditors be listed in alphabetical order as much as possible. The term "major" was deleted before "creditor." "Community claim" was changed to "community debt." The box labeled "none" was deleted as an option for describing the claim, replaced by "liquidated and neither contingent nor disputed." In the category of "Nature of claim," "offset" is added to the subcategory of "other." Other stylistic changes were made throughout the form.

Official Form 106E/F

An instruction is added: "List the other party to any executory contracts or unexpired leases that could result in a claim. Also list executory contracts on Schedule A/B: Property (Official Form 106A/B) and on Schedule G: Executory Contracts and Unexpired Leases (Official Form 106G)." In Part 1, Line 2, the instruction to list the creditors in alphabetical order was revised to require creditors to be listed in alphabetical order as much as possible. An instruction was added: "If a claim has both priority and nonpriority amounts, list that claim here and show both priority and nonpriority amounts." A question was added to indicate whether the claim is subject to offset. The box labeled "none" was deleted as an option for describing the claim, replaced by "liquidated and neither contingent nor disputed." Other stylistic changes were made throughout the form.

Official Form 106G

The form was revised to provide new examples in Line 2.

Official Form 106H

Language was added to the instructions to define "co-debtor." In Part 1, Line 2, "Name of your spouse" was changed to "Name of your spouse, former spouse, or legal equivalent." The definition of co-debtor was deleted from Line 3, and an instruction to list cross-references to Official Form 106G was added. Other stylistic changes were made throughout the form.

Official Form 106Sum

Minor stylistic changes were made throughout the form.

Official Form 106Dec

The warning language in the instruction was revised. In the signature line, "forms" was changed to "summary and schedules."

Summary of Public Comment on Official Form 106Sum

13-BK-59 – National Conference of Bankruptcy Judges. The National Conference of Bankruptcy Judges ("NCBJ") made stylistic suggestions.

Summary of Public Comment on Official Form 106A/B

13-BK-59 –NCBJ. The instructions for Form 106A/B are confusing as a result of the different terms the instructions use for what a debtor must list. In the space of a few lines, a debtor is told to list "property," "items," and "assets." An effort should be made to arrive at a uniform term. Of the possibilities, "property" is preferable since that is the term that appears in section 541(a) of the Code, 11 U.S.C. § 541(a).

The first sentence of the instructions is inaccurate. A debtor is told to list and describe items "worth more than $500"; however, the $500 threshold is not explained and is inconsistent with section 541(a), which contains no dollar amount in defining the "property" that makes up the bankruptcy estate, as well as with Rules 1007(b)(1)(A) and 1007(h), which also contain no dollar limit.

13-BK-89 – William Doyle. Knowing a vehicle's actual mileage at the time of filing is important, because if you know the mileage on the vehicle at the time of filing, you can run an accurate NADA estimate of the value for that date of a vehicle in normal condition. You can also subtract the mileage on the vehicle at the time of the issuance of the certificate of title and determine the average miles per month the vehicle has been driven.

13-BK-116 – Stanley Kartchner. Concurs with the NCBJ's discussion and recommendations concerning the $500 asset disclosure threshold. For each listed asset two data fields should be added that tie into the information contained in proposed Forms 106C and 106D, either by dollar amount if such is available (which is especially helpful with real property and personal property assets such as vehicles), or at least a check box to indicate that there is a lien or exemption affecting the particular asset.

13-BK-135 – William Pierce. Concurs with the comments, concerns and recommendations of NCBJ regarding the $500 asset disclosure. It is very important to keep any asset showing a lien on Schedule D tied to Schedule A and B assets that have liens.

13-BK-151 – National Association of Bankruptcy Trustees ("NABT"). In scheduling real property interests, the form eliminates information regarding both the Nature of the Debtor's Interest and the Amount of Secured Claim as currently provided in Official Form B6A. This will make it harder for chapter 7 trustees to assess whether there is an asset to administer without reference to other Schedules or independent documents. Concurs with NCBJ about the direction to list items "worth more than $500." In Part 1 the listing of a property record card number should be made mandatory. In many areas of the country, an actual deed book and page is necessary in order to determine where the property is located. It would also be helpful to have available space for the debtor to indicate out how the current value was determined, including the valuation for vehicles in Part 1.

Part 3 of the form eliminated information regarding who is the owner of the property, which is provided in Part 1 and 2. This will make it harder for chapter 7 trustees to assess whether there is an asset to administer without reference to independent information. The inclusion of ownership is necessary in a jointly administered case.

In Part 4 the form should include under "Cash" additional language to address electronic or other forms of cryptocurrency or digital currency. As to the "Deposits of Money," in addition to the

institutional name, it is necessary to have the identifying account number (the last 4 digits) to insure all bank statements that are provided to the trustee are accounted for.

The number of shares held of publicly held stocks would be helpful, when not part of a brokerage account, as well as the identifying account number (the last 4 digits). For interests in insurance policies, in addition to the institutional name, it is necessary to have the identifying account number (the last 4 digits) to initiate verification or inquiry.

The debtor should be required to provide the name of the counsel handling the claims against third parties and that counsel's contact information, including address and telephone number.

13-BK-153 – James M. Davis. Revise the "other information" field to add a prompt for the nature of the ownership interest, if known.

The secured claim information that is required on the current Schedule A should be retained, and it would also be helpful to carry over exemption information onto Schedule A/B, so that the Schedule would provide a straightforward statement of the non-exempt equity the debtor holds in property.

Summary of Public Comment on Official Form 106C

13-BK-42 – Henry Sommer, National Association of Consumer Bankruptcy Attorneys. The new language attempting to resolve the issues raised by the Supreme Court's *Schwab v. Reilly* decision, 560 U.S. 770 (2010), fails to accomplish its goal. By limiting the claim of exemption to "100% of fair market value, up to the statutory limit," the form does not provide the debtor finality. For every single asset subject to a monetary exemption limit, there is a possibility that a trustee could later claim that it exceeded the statutory limit. In asset cases, this possibility would exist until the case was closed, often a year or even several years. During that time, a debtor disposing of or otherwise dissipating an asset would be subject to possible sanctions or even a revocation of discharge if those assets were later claimed by the trustee. The only way for a debtor to avoid this outcome would be to file a motion for abandonment of the property, completely reversing the burdens of going forward and proof set forth in Rule 4003.

If debtors are allowed to claim 100% fmv without a limit, trustees will not have to object to every exemption. In districts where there is a firm deadline for objections on valuation issues, trustees object

only when there is a reasonable argument that the value of an asset exceeds the exemption limits.

Because the deadline for objecting to exemptions runs from the conclusion of the meeting of creditors, if a trustee wishes to investigate the value of an asset, the trustee can adjourn the meeting for that purpose, thus delaying the running of the deadline. The trustee also can seek an extension of the deadline from the court, which would routinely be granted for any reasonable cause.

Trustees have argued that debtors would just claim 100 percent of every asset as exempt, regardless of its value. This argument has no basis in past experience, makes assumptions about debtor honesty that are inconsistent with experience in the vast majority of cases, and ignores the fact that virtually every debtor with significant assets is represented by attorney bound by Rule 9011.

The schedule should list: 1) the value of the debtor's interest in the property on the petition date (see § 522(a)(2)); 2) the amount of that interest the debtor claims exempt, and 3) whether the debtor asserts that the value claimed exempt is 100 percent of the value of the debtor's interest in the asset.

13-BK-59 – NCBJ. The proposed form and its instructions conflict. The instructions better implement the spirit of *Schwab v. Reilly*. *Schwab* adopted a relatively straightforward "what-you-see-is-what-you-get" approach to a debtor's claimed exemptions. Under that approach, the debtor must express what he wants, leaving no room for interpretation.

Taken together, the instructions and the 2nd check box encourage debtors always to claim the "100% of FMV, up to any applicable statutory limit" option because the only negative consequence will be to scale back an excessive claim. Litigation is particularly likely in jurisdictions that allow people to exempt a broad category of property (such as tangible personal property) and place no dollar limit on specific types of property (such as motor vehicles) within that category.

To avoid these problems, a debtor should be required to state a particular dollar amount for an exemption that has a dollar limit, and the 100 percent of fair market value option should be restricted to exemptions that are unlimited. After the 2nd check box, the phrase "up to any applicable statutory limit" should be deleted and a parenthetical added, as follows: "100% of fair market value, up to any applicable statutory limit (for exemptions unlimited in

dollar amount). The instructions (in bold type, preceding part 1) should also be changed to delete the last sentence.

13-BK-106 – Annette Crawford, M.D. Louisiana, National Association of Chapter 13 Trustees. Form 106C does not include "totals" information needed in order to complete the required Final Account, which requires "total assets exempted".

13-BK-135 – William Pierce. 100 percent FMV should not be used on Form 106C. Trustees would be required to object to most if not all exemptions as debtors and debtors' attorneys do not put the real market value on the schedules most of the time.

13-BK-140 – Penelope Souhrada. Part 3 on page 1 asks about homestead exemptions of more than $155,675. This applies only in jurisdictions that use the federal exemptions. Opt-out states each have different homestead exemptions, and using this number in this form will be extremely confusing for debtors.

13-BK-151 – NABT. Many of the same deficiencies with the use of a 100% FMV exemption checkbox as commented upon by NABT in 2011 still exist.

The information regarding who is the owner of the property, which is provided in Part 1 and 2 of Form 106A/B, has been eliminated from the rest of the form. This will make it harder for chapter 7 trustees to assess whether there is a proper exemption. The inclusion of ownership is necessary in a jointly administered case.

Parts 1 and 2 of the form provide two alternatives for the amount claimed as exempt. The first alternative is a dollar amount ($_____) while the second is for "100% of fair market value, up to any applicable statutory limit." The form of the 100% FMV checkbox for dollar limited exemptions will only create confusion and increased litigation over exemptions as described in the NCBJ Comment.

The 30–day time limit in Bankruptcy Rule 4003 only applies to objections based on "three, and only three" entries on a debtor's claim of exemptions in Schedule C: (1) the description of the property claimed as exempt; (2) the Bankruptcy Code provisions governing the exemption claimed; and (3) the amount listed in the column titled "value of claimed exemption." Where the basis of the objection is on any other entry, such as the fair market value assigned to the exempt property by the debtor, the 30–day time limit does not apply.

Unless applicable federal or state law allows debtors to exempt their entire interest in an item itself regardless of value, they have no right to utilize language claiming an exemption equal to 100% of the fair market value.
Additional columns, which would clearly set forth what properties and values are subject to administration, should be added. A modified form would allow for quick verification, in summary fashion of the property, the exemption, and if there is an administrable asset, which would benefit debtors, their counsel, as well as the judiciary and chapter 7 trustees.

Summary of Official Comment on Official Form 106D

13-BK-59 – NCBJ. Part 1, line 2 requires a debtor to list secured claims in alphabetical order of "the major creditor" who holds each claim. The term "major" requires debtors to determine which creditors are "major" or "minor" and then apparently not disclose the "minor" ones. The word "major" should be deleted so that all creditors must be listed.

The meaning of the term "community claim" in line 2 is unclear. The term is not defined in the proposed form, in the instructions, in the Bankruptcy Code, or in the Bankruptcy Rules. The check box and accompanying text should either be clarified or deleted.

13-BK-5 – David S. Yen. Schedules D and E/F should not require that creditors be listed alphabetically. This will not be a problem for attorneys who use commercial software programs, but it will impose an unjustified burden on pro se debtors. They may have forgotten that a debt was owed, or mistakenly thought that a creditor did not have to be listed because the debtor does not believe that the debt is owed at all. To make the debtor redo the schedules just so that the creditors would appear in alphabetical order is a burden that is not justified by any possible benefit.

Schedules D and E/F should not require that creditors be listed repeatedly and account numbers should be optional. Many debtors receive separate bills from hospitals or other medical providers for every visit. Some creditors assign a different account number for each visit, even though they also have a unique patient identifier number. The burden of listing the creditor separately for each account number, and of sending separate notices for each account, is not justified by the benefit to creditors. Account numbers have a limited value for creditors and listing them should be optional.

Summary of Public Comment on Official Form E/F

13-BK-42 – Henry Sommer, NACBA. The instruction paragraph at the top of this schedule uses the word "priority" twice where the word "nonpriority" should be used. In addition, there is no need to list separate claims of the same creditor separately. The purpose of the schedule is to identify creditors and the amount owed to them. If a debtor has purchased several items from the same creditor, the identity of the creditor and the total debt should be sufficient for all parties. Likewise, the approach of the current forms, which makes including account number information an optional item should be retained.

13-BK-56 – Scott Ford, Bankruptcy Clerks Advisory Group. The language addressing what is needed for "statistical purposes" should be removed because this is an internal requirement for the judiciary, and it might create confusion on the part of the debtor.

13-BK-59 – NCBJ. The NCBJ's comments on Form 106E/F, Parts 1 and 3, are identical to the its comments on proposed changes to Parts 1 and 2 of Proposed Form 106D. Also the term "community debts" is not a defined term.

Summary of Public Comments on Official Form 106G

13-BK-0059 – NCBJ – The parenthetical examples of possible contracts or leases in Line 2 are confusing, since no one contracts for or leases "rent" or a "vehicle lease." The examples provided should be parallel, describing an item or premises contracted for or leased. The parenthetical phrase should be changed to: "an apartment, a car or truck, a cell phone."

Summary of Public Comment on Official Form 106H

13-BK-59 – NCBJ. The proposed form would be clearer if the definition of "co-debtor" were moved from line 3 to become the first sentence in the form (before "Be as complete and accurate as possible").

Summary of Public Comment on Official Form 106Dec

13-BK-59 – NCBJ. The third sentence misstates the criminal penalties for false statements and should be re-written.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 107

Statement of Financial Affairs for Individuals Filing for Bankruptcy

12/15

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Give Details About Your Marital Status and Where You Lived Before

1. What is your current marital status?

❑ Married
❑ Not married

2. **During the last 3 years, have you lived anywhere other than where you live now?**

❑ No
❑ Yes. List all of the places you lived in the last 3 years. Do not include where you live now.

Debtor 1:	Dates Debtor 1 lived there	Debtor 2:	Dates Debtor 2 lived there
_____ Number Street _____ _____ City State ZIP Code	From _____ To _____	❑ Same as Debtor 1 _____ Number Street _____ _____ City State ZIP Code	❑ Same as Debtor 1 From _____ To _____
_____ Number Street _____ _____ City State ZIP Code	From _____ To _____	❑ Same as Debtor 1 _____ Number Street _____ _____ City State ZIP Code	❑ Same as Debtor 1 From _____ To _____

3. Within the last 8 years, did you ever live with a spouse or legal equivalent in a community property state or territory? (*Community property states and territories* include Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington, and Wisconsin.)

❑ No
❑ Yes. Make sure you fill out *Schedule H: Your Codebtors* (Official Form 106H).

Part 2: Explain the Sources of Your Income

4. **Did you have any income from employment or from operating a business during this year or the two previous calendar years?**
Fill in the total amount of income you received from all jobs and all businesses, including part-time activities.
If you are filing a joint case and you have income that you receive together, list it only once under Debtor 1.

❑ No
❑ Yes. Fill in the details.

	Debtor 1		Debtor 2	
	Sources of income Check all that apply.	**Gross income** (before deductions and exclusions)	**Sources of income** Check all that apply.	**Gross income** (before deductions and exclusions)
From January 1 of current year until the date you filed for bankruptcy:	❑ Wages, commissions, bonuses, tips ❑ Operating a business	$_____	❑ Wages, commissions, bonuses, tips ❑ Operating a business	$_____
For last calendar year: (January 1 to December 31, _____) YYYY	❑ Wages, commissions, bonuses, tips ❑ Operating a business	$_____	❑ Wages, commissions, bonuses, tips ❑ Operating a business	$_____
For the calendar year before that: (January 1 to December 31, _____) YYYY	❑ Wages, commissions, bonuses, tips ❑ Operating a business	$_____	❑ Wages, commissions, bonuses, tips ❑ Operating a business	$_____

5. **Did you receive any other income during this year or the two previous calendar years?**
Include income regardless of whether that income is taxable. Examples of *other income* are alimony; child support; Social Security, unemployment, and other public benefit payments; pensions; rental income; interest; dividends; money collected from lawsuits; royalties; and gambling and lottery winnings. If you are filing a joint case and you have income that you received together, list it only once under Debtor 1.

List each source and the gross income from each source separately. Do not include income that you listed in line 4.

❑ No
❑ Yes. Fill in the details.

	Debtor 1		Debtor 2	
	Sources of income Describe below.	**Gross income from each source** (before deductions and exclusions)	**Sources of income** Describe below.	**Gross income from each source** (before deductions and exclusions)
From January 1 of current year until the date you filed for bankruptcy:	_____	$_____	_____	$_____
	_____	$_____	_____	$_____
	_____	$_____	_____	$
For last calendar year:	_____	$_____	_____	$_____
(January 1 to December 31, _____) YYYY	_____	$_____	_____	$_____
	_____	$_____	_____	$_____
For the calendar year before that:	_____	$_____	_____	$_____
(January 1 to December 31, _____) YYYY	_____	$_____	_____	$_____
	_____	$_____	_____	$_____

Part 3: List Certain Payments You Made Before You Filed for Bankruptcy

6. Are either Debtor 1's or Debtor 2's debts primarily consumer debts?

❑ No. **Neither Debtor 1 nor Debtor 2 has primarily consumer debts.** *Consumer debts* are defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose."

During the 90 days before you filed for bankruptcy, did you pay any creditor a total of $6,225* or more?

❑ No. Go to line 7.

❑ Yes. List below each creditor to whom you paid a total of $6,225* or more in one or more payments and the total amount you paid that creditor. Do not include payments for domestic support obligations, such as child support and alimony. Also, do not include payments to an attorney for this bankruptcy case.

* Subject to adjustment on 4/01/16 and every 3 years after that for cases filed on or after the date of adjustment.

❑ Yes. **Debtor 1 or Debtor 2 or both have primarily consumer debts.**

During the 90 days before you filed for bankruptcy, did you pay any creditor a total of $600 or more?

❑ No. Go to line 7.

❑ Yes. List below each creditor to whom you paid a total of $600 or more and the total amount you paid that creditor. Do not include payments for domestic support obligations, such as child support and alimony. Also, do not include payments to an attorney for this bankruptcy case.

	Dates of payment	Total amount paid	Amount you still owe	Was this payment for…
_____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code	_____ _____ _____	$_____	$_____	❑ Mortgage ❑ Car ❑ Credit card ❑ Loan repayment ❑ Suppliers or vendors ❑ Other _____
_____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code	_____ _____ _____	$_____	$_____	❑ Mortgage ❑ Car ❑ Credit card ❑ Loan repayment ❑ Suppliers or vendors ❑ Other _____
_____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code	_____ _____ _____	$_____	$_____	❑ Mortgage ❑ Car ❑ Credit card ❑ Loan repayment ❑ Suppliers or vendors ❑ Other _____

7. **Within 1 year before you filed for bankruptcy, did you make a payment on a debt you owed anyone who was an insider?**
Insiders include your relatives; any general partners; relatives of any general partners; partnerships of which you are a general partner; corporations of which you are an officer, director, person in control, or owner of 20% or more of their voting securities; and any managing agent, including one for a business you operate as a sole proprietor. 11 U.S.C. § 101. Include payments for domestic support obligations, such as child support and alimony.

❑ No
❑ Yes. List all payments to an insider.

	Dates of payment	Total amount paid	Amount you still owe	Reason for this payment
Insider's Name Number Street City State ZIP Code		$	$	
Insider's Name Number Street City State ZIP Code		$	$	

8. **Within 1 year before you filed for bankruptcy, did you make any payments or transfer any property on account of a debt that benefited an insider?**
Include payments on debts guaranteed or cosigned by an insider.

❑ No
❑ Yes. List all payments that benefited an insider.

	Dates of payment	Total amount paid	Amount you still owe	Reason for this payment Include creditor's name
Insider's Name Number Street City State ZIP Code		$	$	
Insider's Name Number Street City State ZIP Code		$	$	

Part 4: Identify Legal Actions, Repossessions, and Foreclosures

9. **Within 1 year before you filed for bankruptcy, were you a party in any lawsuit, court action, or administrative proceeding?**
List all such matters, including personal injury cases, small claims actions, divorces, collection suits, paternity actions, support or custody modifications, and contract disputes.

❑ No
❑ Yes. Fill in the details.

	Nature of the case	Court or agency	Status of the case
Case title_____ _____ Case number _____		_____ Court Name _____ Number Street _____ City State ZIP Code	❑ Pending ❑ On appeal ❑ Concluded
Case title_____ _____ Case number _____		_____ Court Name _____ Number Street _____ City State ZIP Code	❑ Pending ❑ On appeal ❑ Concluded

10. **Within 1 year before you filed for bankruptcy, was any of your property repossessed, foreclosed, garnished, attached, seized, or levied?**
Check all that apply and fill in the details below.

❑ No. Go to line 11.
❑ Yes. Fill in the information below.

	Describe the property	Date	Value of the property
_____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code	**Explain what happened** ❑ Property was repossessed. ❑ Property was foreclosed. ❑ Property was garnished. ❑ Property was attached, seized, or levied.	_____	$_____
	Describe the property	**Date**	**Value of the property**
_____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code	**Explain what happened** ❑ Property was repossessed. ❑ Property was foreclosed. ❑ Property was garnished. ❑ Property was attached, seized, or levied.	_____	$_____

11. Within 90 days before you filed for bankruptcy, did any creditor, including a bank or financial institution, set off any amounts from your accounts or refuse to make a payment because you owed a debt?

- ❑ No
- ❑ Yes. Fill in the details.

	Describe the action the creditor took	Date action was taken	Amount
_____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code	Last 4 digits of account number: XXXX–___ ___ ___ ___	_____	$_____

12. **Within 1 year before you filed for bankruptcy, was any of your property in the possession of an assignee for the benefit of creditors, a court-appointed receiver, a custodian, or another official?**

- ❑ No
- ❑ Yes

Part 5: List Certain Gifts and Contributions

13. **Within 2 years before you filed for bankruptcy, did you give any gifts with a total value of more than $600 per person?**

- ❑ No
- ❑ Yes. Fill in the details for each gift.

Gifts with a total value of more than $600 per person	Describe the gifts	Dates you gave the gifts	Value
_____ Person to Whom You Gave the Gift _____ _____ Number Street _____ City State ZIP Code Person's relationship to you _____		_____ _____	$_____ $_____

Gifts with a total value of more than $600 per person	Describe the gifts	Dates you gave the gifts	Value
_____ Person to Whom You Gave the Gift _____ _____ Number Street _____ City State ZIP Code Person's relationship to you _____		_____ _____	$_____ $_____

14. Within 2 years before you filed for bankruptcy, did you give any gifts or contributions with a total value of more than $600 to any charity?

- ❑ No
- ❑ Yes. Fill in the details for each gift or contribution.

Gifts or contributions to charities that total more than $600	Describe what you contributed	Date you contributed	Value
_____ Charity's Name _____ _____ Number Street _____ City State ZIP Code		_____ _____	$_____ $_____

Part 6: List Certain Losses

15. **Within 1 year before you filed for bankruptcy or since you filed for bankruptcy, did you lose anything because of theft, fire, other disaster, or gambling?**

- ❑ No
- ❑ Yes. Fill in the details.

Describe the property you lost and how the loss occurred	Describe any insurance coverage for the loss Include the amount that insurance has paid. List pending insurance claims on line 33 of *Schedule A/B: Property.*	Date of your loss	Value of property lost
		_____	$_____

Part 7: List Certain Payments or Transfers

16. **Within 1 year before you filed for bankruptcy, did you or anyone else acting on your behalf pay or transfer any property to anyone you consulted about seeking bankruptcy or preparing a bankruptcy petition?**
Include any attorneys, bankruptcy petition preparers, or credit counseling agencies for services required in your bankruptcy.

- ❑ No
- ❑ Yes. Fill in the details.

	Description and value of any property transferred	Date payment or transfer was made	Amount of payment
_____ Person Who Was Paid _____ Number Street _____ _____ City State ZIP Code _____ Email or website address _____ Person Who Made the Payment, if Not You		_____ _____	$_____ $_____

	Description and value of any property transferred	Date payment or transfer was made	Amount of payment
_____ Person Who Was Paid _____ Number Street _____ _____ City State ZIP Code _____ Email or website address _____ Person Who Made the Payment, if Not You		_____ _____	$_____ $_____

17. Within 1 year before you filed for bankruptcy, did you or anyone else acting on your behalf pay or transfer any property to anyone who promised to help you deal with your creditors or to make payments to your creditors?
Do not include any payment or transfer that you listed on line 16.

❑ No
❑ Yes. Fill in the details.

	Description and value of any property transferred	Date payment or transfer was made	Amount of payment
_____ Person Who Was Paid _____ Number Street _____ _____ City State ZIP Code		_____ _____	$_____ $_____

18. **Within 2 years before you filed for bankruptcy, did you sell, trade, or otherwise transfer any property to anyone, other than property transferred in the ordinary course of your business or financial affairs?**
Include both outright transfers and transfers made as security (such as the granting of a security interest or mortgage on your property).
Do not include gifts and transfers that you have already listed on this statement.

❑ No
❑ Yes. Fill in the details.

	Description and value of property transferred	Describe any property or payments received or debts paid in exchange	Date transfer was made
_____ Person Who Received Transfer _____ Number Street _____ _____ City State ZIP Code Person's relationship to you _____			_____
_____ Person Who Received Transfer _____ Number Street _____ _____ City State ZIP Code Person's relationship to you _____			_____

19. **Within 10 years before you filed for bankruptcy, did you transfer any property to a self-settled trust or similar device of which you are a beneficiary?** (These are often called *asset-protection devices*.)

❑ No
❑ Yes. Fill in the details.

	Description and value of the property transferred	Date transfer was made
Name of trust _____		_____

Part 8: List Certain Financial Accounts, Instruments, Safe Deposit Boxes, and Storage Units

20. **Within 1 year before you filed for bankruptcy, were any financial accounts or instruments held in your name, or for your benefit, closed, sold, moved, or transferred?**
Include checking, savings, money market, or other financial accounts; certificates of deposit; shares in banks, credit unions, brokerage houses, pension funds, cooperatives, associations, and other financial institutions.

❑ **No**
❑ **Yes. Fill in the details.**

	Last 4 digits of account number	Type of account or instrument	Date account was closed, sold, moved, or transferred	Last balance before closing or transfer
Name of Financial Institution Number Street City State ZIP Code	XXXX–___ ___ ___ ___	❑ Checking ❑ Savings ❑ Money market ❑ Brokerage ❑ Other_____	_____	$_____
Name of Financial Institution Number Street City State ZIP Code	XXXX–___ ___ ___ ___	❑ Checking ❑ Savings ❑ Money market ❑ Brokerage ❑ Other_____	_____	$_____

21. **Do you now have, or did you have within 1 year before you filed for bankruptcy, any safe deposit box or other depository for securities, cash, or other valuables?**

❑ **No**
❑ **Yes. Fill in the details.**

	Who else had access to it?	Describe the contents	Do you still have it?
Name of Financial Institution Number Street City State ZIP Code	Name Number Street City State ZIP Code		❑ No ❑ Yes

22. Have you stored property in a storage unit or place other than your home within 1 year before you filed for bankruptcy?

- ❑ **No**
- ❑ **Yes. Fill in the details.**

	Who else has or had access to it?	Describe the contents	Do you still have it?
Name of Storage Facility Number Street City State ZIP Code	Name Number Street City State ZIP Code		❑ No ❑ Yes

Part 9: Identify Property You Hold or Control for Someone Else

23. Do you hold or control any property that someone else owns? Include any property you borrowed from, are storing for, or hold in trust for someone.

- ❑ **No**
- ❑ **Yes. Fill in the details.**

	Where is the property?	Describe the property	Value
Owner's Name Number Street City State ZIP Code	Number Street City State ZIP Code		$_____

Part 10: Give Details About Environmental Information

For the purpose of Part 10, the following definitions apply:

- ***Environmental law*** **means any federal, state, or local statute or regulation concerning pollution, contamination, releases of hazardous or toxic substances, wastes, or material into the air, land, soil, surface water, groundwater, or other medium, including statutes or regulations controlling the cleanup of these substances, wastes, or material.**
- ***Site*** **means any location, facility, or property as defined under any environmental law, whether you now own, operate, or utilize it or used to own, operate, or utilize it, including disposal sites.**
- ***Hazardous material*** **means anything an environmental law defines as a hazardous waste, hazardous substance, toxic substance, hazardous material, pollutant, contaminant, or similar term.**

Report all notices, releases, and proceedings that you know about, regardless of when they occurred.

24. Has any governmental unit notified you that you may be liable or potentially liable under or in violation of an environmental law?

- ❑ **No**
- ❑ **Yes. Fill in the details.**

	Governmental unit	Environmental law, if you know it	Date of notice
Name of site Number Street City State ZIP Code	Governmental unit Number Street City State ZIP Code		_____

25. Have you notified any governmental unit of any release of hazardous material?

- ❑ **No**
- ❑ **Yes. Fill in the details.**

	Governmental unit	Environmental law, if you know it	Date of notice
Name of site Number Street City State ZIP Code	Governmental unit Number Street City State ZIP Code		_____

26. Have you been a party in any judicial or administrative proceeding under any environmental law? Include settlements and orders.

- ❑ **No**
- ❑ **Yes. Fill in the details.**

	Court or agency	Nature of the case	Status of the case
Case title_____ Case number	Court Name Number Street City State ZIP Code		❑ Pending ❑ On appeal ❑ Concluded

Part 11: Give Details About Your Business or Connections to Any Business

27. Within 4 years before you filed for bankruptcy, did you own a business or have any of the following connections to any business?

- ❑ **A sole proprietor or self-employed in a trade, profession, or other activity, either full-time or part-time**
- ❑ **A member of a limited liability company (LLC) or limited liability partnership (LLP)**
- ❑ **A partner in a partnership**
- ❑ **An officer, director, or managing executive of a corporation**
- ❑ **An owner of at least 5% of the voting or equity securities of a corporation**

- ❑ **No. None of the above applies. Go to Part 12.**
- ❑ **Yes. Check all that apply above and fill in the details below for each business.**

	Describe the nature of the business	Employer Identification number Do not include Social Security number or ITIN.
Business Name Number Street City State ZIP Code		EIN: ___ ___ – ___ ___ ___ ___ ___ ___ ___
	Name of accountant or bookkeeper	**Dates business existed**
		From _____ To _____

	Describe the nature of the business	Employer Identification number Do not include Social Security number or ITIN.
Business Name Number Street City State ZIP Code		EIN: ___ ___ – ___ ___ ___ ___ ___ ___ ___
	Name of accountant or bookkeeper	**Dates business existed**
		From _____ To _____

	Describe the nature of the business	Employer Identification number Do not include Social Security number or ITIN.
Business Name Number Street City State ZIP Code		EIN: ___ ___ – ___ ___ ___ ___ ___ ___ ___
	Name of accountant or bookkeeper	Dates business existed
		From _____ To _____

28. Within 2 years before you filed for bankruptcy, did you give a financial statement to anyone about your business? Include all financial institutions, creditors, or other parties.

- ❑ **No**
- ❑ **Yes. Fill in the details below.**

	Date issued
Name Number Street City State ZIP Code	MM / DD / YYYY

Part 12: Sign Below

I have read the answers on this *Statement of Financial Affairs* and any attachments, and I declare under penalty of perjury that the answers are true and correct. I understand that making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to $250,000, or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

✘ _____ ✘ _____

Signature of Debtor 1 **Signature of Debtor 2**

Date _____ **Date** _____

Did you attach additional pages to *Your Statement of Financial Affairs for Individuals Filing for Bankruptcy* (Official Form 107)?

- ❑ No
- ❑ Yes

Did you pay or agree to pay someone who is not an attorney to help you fill out bankruptcy forms?

- ❑ No
- ❑ Yes. Name of person_____. Attach the *Bankruptcy Petition Preparer's Notice, Declaration, and Signature* (Official Form 119).

COMMITTEE NOTE

Official Form 107, *Statement of Financial Affairs for Individuals Filing for Bankruptcy*, which applies only in cases of individual debtors, is revised in its entirety as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. The goals of the Forms Modernization Project include improving the interface between technology and the forms so as to increase efficiency and reduce the need to produce the same information in multiple formats. Therefore, many of the open-ended questions and multiple-part instructions have been replaced with more specific questions. In addition, the form is renumbered to distinguish it from the version to be used in non-individual cases, and stylistic changes were made throughout the form.

The form is derived from former Official Form 7, *Statement of Financial Affairs*. The new form uses eleven sections likely to be more understandable to non-lawyers, groups questions of a similar nature together, and eliminates questions unrelated to individual debtors. The new form deletes the instruction, previously found in many questions, that married debtors filing under chapter 12 or chapter 13 must include information applicable to their spouse, even if their spouse is not filing with them, unless the spouses are separated. This change was made because a non-filing spouse's general financial affairs are not relevant to the debtor's bankruptcy case.

Part 1, *Give Details About Where You Lived Before*, moves the questions regarding the debtor's prior addresses, as well as residences in a community property state, to the beginning of the form. The form eliminates the "name used" question in reference to prior addresses. Also, the debtor is no longer required to list the name of a spouse or former spouse who lived with the debtor in a community property state since that information will be provided in Official Form 106F.

Part 2, *Explain the Sources of Your Income*, consolidates the questions regarding income, adding "wages, commissions, bonuses, tips" as a category for sources of income, and it

eliminates the option to report income on a fiscal year basis. In addition, the form provides examples of types of "other income." The time period is clarified to indicate that the prior two years means two calendar years, plus the portion of the calendar year in which the bankruptcy is filed.

Part 3, *List Certain Payments You Made Before You Filed for Bankruptcy*, includes questions related to payments made in the 90 days prior to bankruptcy, with a separate question for payments made to insiders within one year before filing for bankruptcy. The statutory definition of consumer debt is provided. The question regarding the nature of the debtor's debts requires the debtor to use checkboxes to indicate whether or not they are primarily consumer debts. The form instructs debtors not to include payments for domestic support obligations in the section regarding insider payments. The form provides a separate question regarding payments or transfers on account of a debt that benefited an insider. For both questions regarding payments to insiders, the debtor is required to provide a reason for the payment. Partnerships of which the debtor is a general partner have been added to the examples of "insiders."

Part 4, *Identify Legal Actions, Repossessions, and Foreclosures*, consolidates questions regarding actions against the debtor's property. The form provides examples of types of legal actions, and requires the debtor to indicate the status of any action. The form adds the requirements that a debtor include any property levied on within a year of filing for bankruptcy and that the debtor provide the last four digits of any account number for any setoffs. Also, a debtor must list any assignment for the benefit of creditors made within one year of filing for bankruptcy.

Part 5, *List Certain Gifts and Contributions*, changes the reporting threshold to $600 per person or charity and increases the look-back period from one to two years.

Part 6, *List Certain Losses*, clarifies how to report insurance coverage for losses. It provides that the debtor must include on this form amounts of insurance that have been paid, but must list pending insurance claims on Official Form 106A/B.

Part 7, *List Certain Payments or Transfers*, includes questions regarding payments or transfers of property by the debtor. The question regarding payments or transfers to anyone who was consulted about seeking bankruptcy or preparing a bankruptcy petition requires the email or website address of the person who was paid, as well as the name of the person who made the payment if it was not the debtor. There is a separate question asked about payments or transfers to anyone who promised to help the debtor deal with creditors or make payments to creditors, reminding the debtor not to include any payments or transfers already listed. Also, the debtor must list any transfers of property, outright or for security purposes, made within two years of filing for bankruptcy, unless the transfer was made in the ordinary course of the debtor's business. There is a reminder not to list gifts or other transfers already included elsewhere on the form. The question regarding self-settled trusts adds an explanation that such trusts are often referred to as asset-protection devices.

Part 8, *List Certain Financial Accounts, Safety Deposit Boxes, and Storage Units*, adds money market accounts to the examples provided for the question regarding financial accounts or instruments and removes "other instruments" from the examples. Also, the form adds a question about whether the debtor has or had property stored in a storage unit within one year of filing for bankruptcy. The debtor must provide the name and address of the storage facility and anyone who has or had access to the unit, as well as a description of the contents and whether the debtor still has access to the storage unit. Storage units that are part of the building in which the debtor resides are excluded.

Part 9, *Identify Property You Hold or Control for Someone Else*, instructs that the debtor should include any property that the debtor borrowed from, is storing for, or is holding in trust for someone.

Part 10, *Give Details About Environmental Information*, requires the debtor to list the case title and nature of the case for any judicial or administrative proceeding under any environmental law and to indicate the status of the case.

Part 11, *Give Details About Your Business or Connections to Any Business*, eliminates instructions that apply only to corporations and partnerships. The debtor must indicate if, within four years (previously six years) before filing for bankruptcy, the debtor owned a business or had certain connections to a business, with five categories of businesses provided as checkboxes. If the debtor has a connection to a business, the debtor must list the name, address, nature, and Employer Identification number of the business, the dates the business existed, and the name of an accountant or bookkeeper for the business. Accounting information requested is truncated; the debtor is simply required to provide the name of the business bookkeeper or accountant.

Part 12, *Sign Below*, eliminates the signature boxes for a partnership or corporation and a non-attorney bankruptcy petition preparer. Also, the debtor is asked to indicate through checkboxes whether additional pages are attached to the form.

Changes Made After Publication

A question was added to Part 1 about the debtor's current marital status. In Part 3, Line 6, "Neither Debtor 1 nor Debtor 2" was substituted for "My debts are not" before "primarily consumer debts." Similarly, "Debtor 1 or Debtor 2 or both" was substituted for "My debts are" before "primarily consumer debts." The requirement to fill in details was eliminated from Part 4, Line 12 regarding whether there was an assignment for the benefit of creditors in the year prior to bankruptcy. In Part 7, Line 18, a security interest or mortgage on property was added as an example of types of property transfers made as security within the two years prior to bankruptcy. In Part 8, "Instruments" was added as a category for Line 20. In Line 22, the question was clarified to state that the debtor should list storage units other than their home. In Part 12, the declaration language was modified, and the warning language was revised. Other minor stylistic changes were made throughout the form.

Summary of Public Comment

13-BK-35 – Chapter 13 Trustee Robert G. Drummond. Line 18 requests information regarding transfers to self-settled trusts within the ten years prior to the filing of the bankruptcy case. The

2005 changes to the Code added 11 U.S.C. § 522(o) which reduces the value of the homestead exemption to the extent that the value is attributable to property disposed by the debtor in the prior 10 years with the intent to hinder, delay, or defraud. An additional question about dispositions that increased equity in the homestead within the prior ten years would be helpful.

13-BK-59 – The National Conference of Bankruptcy Judges. Line 10 limits the information a debtor must provide to instances where a set-off has occurred "without your permission." In the interest of fuller disclosure, this limitation should be removed so that parties can evaluate whether the set off was improper or otherwise avoidable.

The sentence following Line 17 instructs: "Include both outright transfers and transfers made as security." The phrase "made as security" may be unclear to lay people. A parenthetical example would lessen the likelihood of confusion.

Line 21 requires a debtor to list the location of storage units in which the debtor has stored property within 1 year of the bankruptcy filing and instructs the debtor to not include storage units that are part of the building in which the debtor lives. In the interest of fuller disclosure, the instruction should be removed.

Line 26 should be restructured to make the provision clearer. Part 12 requires the debtor's signature; there should be an explicit warning about the consequences of making a false statement.

13-BK-105 – Annette Crawford, National Association of Chapter 13 Trustees. The requirement to give the name of a current or ex-spouse should not be removed because marital status is important when investigating the debtor's financial situation.

13-BK-0151 – The National Association of Bankruptcy Trustees –Line 5 fails to distinguish between Debtor 1 and Debtor 2 in a jointly administered case in which the responses could be different. Inclusion of ownership or designation as between debtors is necessary in a jointly administered case. Lines 6 and 7 should include the category of "insider" that the transferee comes within.

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Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 112

Statement of Intention for Individuals Filing Under Chapter 7

12/15

If you are an individual filing under chapter 7, you must fill out this form if:

- **creditors have claims secured by your property, or**
- **you have leased personal property and the lease has not expired.**

You must file this form with the court within 30 days after you file your bankruptcy petition or by the date set for the meeting of creditors, whichever is earlier, unless the court extends the time for cause. You must also send copies to the creditors and lessors you list on the form.

If two married people are filing together in a joint case, both are equally responsible for supplying correct information. Both debtors must sign and date the form.

Be as complete and accurate as possible. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known).

Part 1: List Your Creditors Who Hold Secured Claims

1. **For any creditors that you listed in Part 1 of *Schedule D: Creditors Who Hold Claims Secured by Property* (Official Form 106D), fill in the information below.**

Identify the creditor and the property that is collateral	What do you intend to do with the property that secures a debt?	Did you claim the property as exempt on Schedule C?
Creditor's name: Description of property securing debt:	❑ Surrender the property. ❑ Retain the property and redeem it. ❑ Retain the property and enter into a *Reaffirmation Agreement*. ❑ Retain the property and [explain]: _____	❑ No ❑ Yes
Creditor's name: Description of property securing debt:	❑ Surrender the property. ❑ Retain the property and redeem it. ❑ Retain the property and enter into a *Reaffirmation Agreement*. ❑ Retain the property and [explain]: _____	❑ No ❑ Yes
Creditor's name: Description of property securing debt:	❑ Surrender the property. ❑ Retain the property and redeem it. ❑ Retain the property and enter into a *Reaffirmation Agreement*. ❑ Retain the property and [explain]: _____	❑ No ❑ Yes
Creditor's name: Description of property securing debt:	❑ Surrender the property. ❑ Retain the property and redeem it. ❑ Retain the property and enter into a *Reaffirmation Agreement*. ❑ Retain the property and [explain]: _____	❑ No ❑ Yes

Your name _____
First Name Middle Name Last Name

Case number (*If known*)_____

Part 2: List Your Unexpired Personal Property Leases

For any unexpired personal property lease that you listed in *Schedule G: Executory Contracts and Unexpired Leases* (Official Form 106G), fill in the information below. Do not list real estate leases. *Unexpired leases* are leases that are still in effect; the lease period has not yet ended. You may assume an unexpired personal property lease if the trustee does not assume it. 11 U.S.C. § 365(p)(2).

Describe your unexpired personal property leases	Will the lease be assumed?
Lessor's name: Description of leased property:	❑ No ❑ Yes
Lessor's name: Description of leased property:	❑ No ❑ Yes
Lessor's name: Description of leased property:	❑ No ❑ Yes
Lessor's name: Description of leased property:	❑ No ❑ Yes
Lessor's name: Description of leased property:	❑ No ❑ Yes
Lessor's name: Description of leased property:	❑ No ❑ Yes
Lessor's name: Description of leased property:	❑ No ❑ Yes

Part 3: Sign Below

Under penalty of perjury, I declare that I have indicated my intention about any property of my estate that secures a debt and any personal property that is subject to an unexpired lease.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

COMMITTEE NOTE

Official Form 112, *Statement of Intention for Individuals Filing Under Chapter* 7, is revised in its entirety as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. In addition, the form is renumbered, and stylistic changes are made throughout the form.

The form is derived from former Official Form 8, *Chapter 7 - Individual Debtor's Statement of Intention*. The new form uses language likely to be understandable to non-lawyers. In addition, the instructions are more extensive, advising an individual Chapter 7 debtor that the form must be completed and filed within 30 days and that the debtor must deliver copies of the form to creditors and lessors listed on the form.

Part 1, *Your Creditors Who Hold Secured Claims*, refers to entering into a "Reaffirmation Agreement" rather than asking whether the debtor intends to "reaffirm the debt." In addition, the debtor is asked if the property is claimed as exempt on Schedule C (Official Form 106C).

Part 2, *List Your Unexpired Personal Property Leases*, defines unexpired leases and explains that a debtor may assume an unexpired personal property lease if the trustee does not assume it.

Changes Made After Publication

The instruction that chapter 7 individual debtors must fill out the form was moved to the first sentence of the instructions. Various wording changes were made to Part 1 in the section regarding the debtor's intention regarding secured property. The full names of Forms 106D and 106G were added. An instruction not to list real estate leases was added to Part 2. Minor stylistic changes were made throughout the form.

Summary of Public Comment

13-BK-59 – National Conference of Bankruptcy Judges. The 1st checkbox says "give the property to the creditor." The word "give" should be changed to "surrender." "Surrender" is the term used in the Code, see 11 U.S.C. § 521(a)(2)(A), and courts disagree on what constitutes the "surrender" of property.

13-BK-78 – Sheryl K. Ith of Cooksey, Toolen, Gage, Duffy & Woog. The Committee Note to Official Form 112, Statement of Intention for Individuals Filing Under Chapter 7, states that the form was revised to "make it easier to read" and "uses language likely to be understandable to non-lawyers." The Note goes on to say that Part 1 "refers to signing a 'Reaffirmation Agreement' rather than asking whether the debtor intends to 'reaffirm the debt.'" If a debtor does not understand what it means to reaffirm a debt, then that same debtor is not likely to understand what it means to sign a "Reaffirmation Agreement."

Further, the change in the form allowing a debtor to state his intent to "sign a Reaffirmation Agreement" infers that, by merely signing the agreement, the debtor will have complied with the duties set forth in 11 USC §§521 and 524. However, this is not the case according to Bankruptcy Code §§ 521(a)(2)(A), 521(a)(6), 524(c), and 524(d).

13-BK-155 – David S. Yen. The form should use the word "surrender," not the word "give." This form is required by section 521(a)(2) of the Code. That section requires that a debtor who has debts secured by property of the estate state his or her intention with respect to "retention or surrender" of such property. Use of the word "give" may also be misconstrued as requiring the debtor to take affirmative steps and incur expenses in doing so.

13-BK-0042 – Henry Sommer, National Association of Consumer Bankruptcy Attorneys. The instructions for the Chapter 7 Statement of Intention are substantively inaccurate. They describe "surrender" as "You may give the property to the creditor." Numerous courts have held that this is not required by the statute. In addition, the instructions diverge substantively from the language of section 365(p) regarding personal property leases. Also, it is not clear that the conditions can include cure of a default "before" the lease is assumed. The instructions should track the statute.

Fill in this information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____ Chapter _____
(If known)

Official Form 119

Bankruptcy Petition Preparer's Notice, Declaration, and Signature

12/15

Bankruptcy petition preparers as defined in 11 U.S.C. § 110 must fill out this form every time they help prepare documents that are filed in the case. If more than one bankruptcy petition preparer helps with the documents, each must sign in Part 3. A bankruptcy petition preparer who does not comply with the provisions of title 11 of the United States Code and the Federal Rules of Bankruptcy Procedure may be fined, imprisoned, or both. 11 U.S.C. § 110; 18 U.S.C. § 156.

Part 1: Notice to Debtor

Bankruptcy petition preparers must give the debtor a copy of this form and have the debtor sign it before they prepare any documents for filing or accept any compensation. A signed copy of this form must be filed with any document prepared.

Bankruptcy petition preparers are not attorneys and may not practice law or give you legal advice, including the following:

- whether to file a petition under the Bankruptcy Code (11 U.S.C. § 101 et seq.);
- whether filing a case under chapter 7, 11, 12, or 13 is appropriate;
- whether your debts will be eliminated or discharged in a case under the Bankruptcy Code;
- whether you will be able to keep your home, car, or other property after filing a case under the Bankruptcy Code;
- what tax consequences may arise because a case is filed under the Bankruptcy Code;
- whether any tax claims may be discharged;
- whether you may or should promise to repay debts to a creditor or enter into a reaffirmation agreement;
- how to characterize the nature of your interests in property or your debts; or
- what procedures and rights apply in a bankruptcy case.

The bankruptcy petition preparer _____ **has notified me of**
Name

any maximum allowable fee before preparing any document for filing or accepting any fee.

_____ Date _____
Signature of Debtor 1 acknowledging receipt of this notice MM / DD / YYYY

_____ Date _____
Signature of Debtor 2, acknowledging receipt of this notice MM / DD / YYYY

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

Part 2: Declaration and Signature of the Bankruptcy Petition Preparer

Under penalty of perjury, I declare that:

- I am a bankruptcy petition preparer or the officer, principal, responsible person, or partner of a bankruptcy petition preparer;
- I or my firm prepared the documents listed below and gave the debtor a copy of them and the *Notice to Debtor by Bankruptcy Petition Preparer* as required by 11 U.S.C. §§ 110(b), 110(h), and 342(b); and
- if rules or guidelines are established according to 11 U.S.C. § 110(h) setting a maximum fee for services that bankruptcy petition preparers may charge, I or my firm notified the debtor of the maximum amount before preparing any document for filing or before accepting any fee from the debtor.

_____ _____ _____
Printed name Title, if any Firm name, if it applies

_____
Number Street

_____ _____ _____ _____
City State ZIP Code Contact phone

I or my firm prepared the documents checked below and the completed declaration is made a part of each document that I check:
(Check all that apply.)

- ❑ Voluntary Petition (Form 101)
- ❑ Statement About Your Social Security Numbers (Form 121)
- ❑ Your Assets and Liabilities and Certain Statistical Information (Form 106Sum)
- ❑ Schedule A/B (Form 106A/B)
- ❑ Schedule C (Form 106C)
- ❑ Schedule D (Form 106D)
- ❑ Schedule E/F (Form 106E/F)
- ❑ Schedule G (Form 106G)
- ❑ Schedule H (Form 106H)
- ❑ Schedule I (Form 106I)
- ❑ Schedule J (Form 106J)
- ❑ Declaration About an Individual Debtor's Schedules (Form 106Dec)
- ❑ Statement of Financial Affairs (Form 107)
- ❑ Statement of Intention for Individuals Filing Under Chapter 7 (Form 112)
- ❑ Chapter 7 Statement of Your Current Monthly Income (Form 108-1)
- ❑ Statement of Exemption from Presumption of Abuse Under § 707(b)(2) (Form 108-1Supp)
- ❑ Chapter 7 Means Test Calculation (Form 108-2)
- ❑ Chapter 11 Statement of Your Current Monthly Income (Form 109)
- ❑ Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period (Form 110-1)
- ❑ Chapter 13 Calculation of Your Disposable Income (Form 110-2)
- ❑ Application to Pay Filing Fee in Installments (Form 103A)
- ❑ Application to Have Chapter 7 Filing Fee Waived (Form 103B)
- ❑ A list of names and addresses of all creditors (*creditor or mailing matrix*)
- ❑ Other _____

Bankruptcy petition preparers must sign and give their Social Security numbers. If more than one bankruptcy petition preparer prepared the documents to which this declaration applies, the signature and Social Security number of each preparer must be provided. 11 U.S.C. § 110.

_____ ___ ___ ___ -- ___ ___ -- ___ ___ ___ ___ Date _____
Signature of bankruptcy petition preparer or officer, principal, responsible person, or partner Social Security number of person who signed MM / DD / YYYY

_____
Printed name

_____ ___ ___ ___ -- ___ ___ -- ___ ___ ___ ___ Date _____
Signature of bankruptcy petition preparer or officer, principal, responsible person, or partner Social Security number of person who signed MM / DD / YYYY

_____
Printed name

COMMITTEE NOTE

Official Form 119, *Bankruptcy Petition Preparer's Notice, Declaration, and Signature*, applies only in cases of individual debtors. It is revised as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. In addition, the form is renumbered, and stylistic changes are made throughout the form.

The form is derived from former Official Form 19, *Declaration and Signature of Non-Attorney Bankruptcy Petition Preparer*. An instruction is added to the form that provides statutory citations. Filers are advised that if more than one bankruptcy petition preparer helped with the documents, each must sign the form.

Part 1, *Notice to Debtor*, is moved to the beginning of the form and revised. An instruction is added that bankruptcy petition preparers must give the debtor a copy of the form and have the debtor sign it before they prepare any documents for filing or accept compensation, and that the form must be filed with any document prepared. It warns the debtor that bankruptcy petition preparers are not attorneys and may not practice law or give legal advice, with a list of examples of advice that may not be provided by a bankruptcy petition preparer. The signature line of this part includes a statement that the debtor acknowledges receipt of the notice.

Part 2, *Declaration and Signature of the Bankruptcy Petition Preparer*, revises the declaration by the bankruptcy petition preparer to include an officer, principal, responsible person, or partner of a bankruptcy petition preparer. The bankruptcy petition preparer must provide a firm name, if applicable, as well as a contact phone, and must indicate which documents the bankruptcy petition preparer prepared from a list of documents. An "other" option is provided for any additional documents. The signature line includes spaces for the bankruptcy petition preparer to enter a social security number, and language

regarding an officer, principal, responsible person, or partner of the bankruptcy petition preparer.

Changes Made After Publication

The warning language in the introductory paragraph of the form was changed to advise that a bankruptcy petition preparer who fails to comply with requirements of the Bankruptcy Code or Rules "may be fined, imprisoned, or both." Part 2's title was changed to "Declaration and Signature," with checkboxes to indicate the documents that were prepared by the bankruptcy petition preparer and with the added language that the completed declaration is made a part of each document checked. Minor stylistic changes were made throughout the form.

Summary of Public Comment

13-BK-0042 – Henry Sommer, National Association of Consumer Bankruptcy Attorneys –The forms omit the sections that are to be signed by a non-attorney bankruptcy petition preparer. Section 110(b)(1) requires each document prepared by a petition preparer to be signed by the preparer, with the preparer's name, address and corporate information, if any. The statute does not permit these separate signatures to be combined into one form.

13-BK-0059 – National Conference of Bankruptcy Judges –The introductory paragraph's final sentence concerning potential penalties for non-compliance should be rewritten to make its structure consistent with the structure of similar sentences in other forms and to be accurate. The inaccuracy is in the warning that petition preparers who do not "comply with the provisions" of title 11 or the Bankruptcy Rules may be "fined and imprisoned." Under 18 U.S.C. § 156(b), however, the offense is committed if a case or related proceeding is "dismissed" because of a petition preparer's "knowing attempt" to disregard the Bankruptcy Code or Rules, and the penalty is a fine, imprisonment, or both.

Fill in this information to identify your case:

United States Bankruptcy Court for the:

_____ District of _____
State

Case number (*If known*): _____

Draft March 14, 2014

Official Form 121

Statement About Your Social Security Numbers

12/15

Use this form to tell the court about any Social Security or federal Individual Taxpayer Identification numbers you have used. Do not file this form as part of the public case file. This form must be submitted separately and must not be included in the court's public electronic records. Please consult local court procedures for submission requirements.

To protect your privacy, the court will not make this form available to the public. You should not include a full Social Security Number or Individual Taxpayer Number on any other document filed with the court. The court will make only the last four digits of your numbers known to the public. However, the full numbers will be available to your creditors, the U.S. Trustee or bankruptcy administrator, and the trustee assigned to your case.

Making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to $250,000, or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

Part 1: Tell the Court About Yourself and Your spouse if Your Spouse is Filing With You

	For Debtor 1:	For Debtor 2 (Only If Spouse Is Filing):
1. Your name	First name	First name
	Middle name	Middle name
	Last name	Last name

Part 2: Tell the Court About all of Your Social Security or Federal Individual Taxpayer Identification Numbers

2. All Social Security Numbers you have used	___ ___ ___ – ___ ___ – ___ ___ ___ ___	___ ___ ___ – ___ ___ – ___ ___ ___ ___
	___ ___ ___ – ___ ___ – ___ ___ ___ ___	___ ___ ___ – ___ ___ – ___ ___ ___ ___
	❑ You do not have a Social Security number.	❑ You do not have a Social Security number.
3. All federal Individual Taxpayer Identification Numbers (ITIN) you have used	9 ___ ___ – ___ ___ – ___ ___ ___ ___	9 ___ ___ – ___ ___ – ___ ___ ___ ___
	9 ___ ___ – ___ ___ – ___ ___ ___ ___	9 ___ ___ – ___ ___ – ___ ___ ___ ___
	❑ You do not have an ITIN.	❑ You do not have an ITIN.

Part 3: Sign Below

Under penalty of perjury, I declare that the information I have provided in this form is true and correct.	Under penalty of perjury, I declare that the information I have provided in this form is true and correct.
✘ _____	✘ _____
Signature of Debtor 1	Signature of Debtor 2
Date _____ MM / DD / YYYY	Date _____ MM / DD / YYYY

12b-009696

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COMMITTEE NOTE

Official Form 121, *Statement About Your Social Security Numbers*, is revised as part of the Forms Modernization Project. The form, which applies only in cases of individual debtors, replaces former Official Form 21, *Statement of Social Security Number(s)*. It is renumbered to distinguish it from the forms used by non-individual debtors, such as corporations and partnerships.

To make Form 121 easier to understand and complete, the form is divided into three sections, and directions on the form are simplified. The debtors' Employer Tax-Identification number (EIN) is eliminated from the form, and the debtor's name is moved from the caption to the body of the form.

Changes Made After Publication

The warning that full Social Security numbers may appear on some notices to creditors was deleted, and the language regarding making a false statement was revised. Other stylistic changes were made throughout the form.

Summary of Public Comment

13-BK-56 – Bankruptcy Clerks Advisory Group. Remove the sentence on the form regarding full Social Security numbers on some notices.

13-BK-89 – Scott W. Ford, Clerk of Court. The introductory language should be clarified to ensure that this form is not filed in paper but submitted in CM/ECF as a private entry available to internal court users only.

13-BK-140 – Penelope Souhrada. The instructions imply that it is legal to use more than one Social Security number.

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Information to identify the case:

Debtor 1 _____ Last 4 digits of Social Security number or ITIN _ _ _ _
First Name Middle Name Last Name

EIN _ _ - _ _ _ _ _ _ _ _

Debtor 2 _____ Last 4 digits of Social Security number or ITIN _ _ _ _
(Spouse, if filing) First Name Middle Name Last Name

EIN _ _ - _ _ _ _ _ _ _ _

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number: _____

Order of Discharge

IT IS ORDERED: A discharge under 11 U.S.C. § 727 is granted to:

_____ [_____]
[include all names used by each debtor, including trade names, within the 8 years prior to the filing of the petition]

_____ **By the court:** _____
MM / DD / YYYY United States Bankruptcy Judge

Explanation of Bankruptcy Discharge in a Chapter 7 Case

This order does not close or dismiss the case, and it does not determine how much money, if any, the trustee will pay creditors.

Creditors cannot collect discharged debts

This order means that no one may make any attempt to collect a discharged debt from the debtors personally. For example, creditors cannot sue, garnish wages, assert a deficiency, or otherwise try to collect from the debtors personally on discharged debts. Creditors cannot contact the debtors by mail, phone, or otherwise in any attempt to collect the debt personally. Creditors who violate this order can be required to pay debtors damages and attorney's fees.

However, a creditor with a lien may enforce a claim against the debtors' property subject to that lien unless the lien was avoided or eliminated. For example, a creditor may have the right to foreclose a home mortgage or repossess an automobile.

This order does not prevent debtors from paying any debt voluntarily or from paying reaffirmed debts according to the reaffirmation agreement.
11 U.S.C. § 524(c), (f).

Most debts are discharged

Most debts are covered by the discharge, but not all. Generally a discharge removes the debtors' personal liability for debts owed before the debtors' bankruptcy case was filed.

Also, if this case began under a different chapter of the Bankruptcy Code and was later converted to chapter 7, debts owed before the conversion are discharged.

In a case involving community property: Special rules protect certain community property owned by the debtor's spouse, even if that spouse did not file a bankruptcy case.

For more information, see page 2 ►

Some debts are not discharged

Examples of some debts that are not discharged are:

debts that are domestic support obligations;

debts for most student loans;

debts for most taxes;

debts that the bankruptcy court has decided or will decide are not discharged in this bankruptcy case;

debts for most fines, penalties, forfeitures, or criminal restitution obligations;

some debts which the debtors did not properly list;

debts for certain types of loans owed to pension, profit sharing, stock bonus, or retirement plans; and

debts for death or personal injury caused by operating a vehicle while intoxicated.

Also, debts covered by a valid reaffirmation agreement are not discharged.

In addition, this discharge does not stop creditors from collecting from anyone else who is also liable on the debt, such as an insurance company or a person who cosigned or guaranteed a loan.

This information is only a general summary of the bankruptcy discharge; some exceptions exist. Because the law is complicated, you should consult an attorney to determine the exact effect of the discharge in this case.

COMMITTEE NOTE

Official Form 318, *Order of Discharge*, is revised and renumbered as part of the Forms Modernization Project. The form is used to issue a discharge in chapter 7 cases filed by individuals or joint debtors. It replaces former Official Form 18, *Discharge of Debtor*, Director's Procedural Form 18J, *Discharge of Joint Debtors*, and Director's Procedural Form 18JO, *Discharge of One Joint Debtor*.

To make the discharge order and the explanation of it easier to read and understand, legal terms are explained more fully or replaced with commonly understood terms, and the form is reformatted.

Reaffirmed debts are explained more fully, and readers are informed that a discharge will not stop creditors from collecting debts from any property in which they have a valid lien. In addition, readers are advised that the discharge does not stop creditors from collecting from anyone else who is liable on the debt, such as a cosigner on the loan or an insurance company.

Director's Procedural Forms 18J and 18JO are no longer needed because Form 318 specifies the names of the debtors, or debtor, to whom the discharge is issued. Any alternate names of the debtor or debtors appear in the order not in the information box at the top of the form.

Changes Made After Publication

The wording was changed to make clear that the form should be read by both debtors and creditors, and certain parts of the warning language were deleted. A requirement to list other names used by the debtor over the last eight years was added. Other stylistic changes were made throughout the form.

Summary of Public Comment

13-BK-59 – National Conference of Bankruptcy Judges. The form number should be placed at the top of the form, and the distinction between information "to the creditors" and "to the debtor" is artificial. The revised format misleadingly suggests that debtors need only read the "Notice to the debtor" and creditors should only read the "Notice to the creditors."

13-BK-0151 – National Association of Bankruptcy Trustees – The Order of Discharge should include an explanation that the trustee's administration of the case can extend beyond the discharge date. Further, the form should include a warning that property, even with a lien, remains property of the estate until the case is closed or the property abandoned.

Fill in this information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Draft February 25, 2014

Official Form 423

Certification About a Financial Management Course

12/15

If you are an individual, you must take an approved course about personal financial management if:

- **you filed for bankruptcy under chapter 7 or 13, or**
- **you filed for bankruptcy under chapter 11 and § 1141 (d)(3) does not apply.**

In a joint case, each debtor must take the course. 11 U.S.C. §§ 727(a)(11) and 1328(g).

After you finish the course, the provider will give you a certificate. The provider may notify the court that you have completed the course. If the provider does notify the court, you need not file this form. If the provider does not notify the court, then Debtor 1 and Debtor 2 must each file this form with the certificate number before your debts will be discharged.

- If you filed under chapter 7 and you need to file this form, file it within 60 days after the first date set for the meeting of creditors under § 341 of the Bankruptcy Code.
- If you filed under chapter 11 or 13 and you need to file this form, file it before you make the last payment that your plan requires or before you file a motion for a discharge under § 1141(d)(5)(B) or § 1328(b) of the Bankruptcy Code. Fed. R. Bankr. P. 1007(c).

In some cases, the court can waive the requirement to take the financial management course. To have the requirement waived, you must file a motion with the court and obtain a court order.

Part 1: Tell the Court About the Required Course

You must check one:

❑ **I completed an approved course in personal financial management:**

Date I took the course _____
MM / DD / YYYY

Name of approved provider _____

Certificate number _____

❑ **I am not required to complete a course in personal financial management because the court has granted my motion for a waiver of the requirement based on** *(check one)***:**

❑ **Incapacity.** I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.

❑ **Disability.** My physical disability causes me to be unable to complete a course in personal financial management in person, by phone, or through the internet, even after I reasonably tried to do so.

❑ **Active duty.** I am currently on active military duty in a military combat zone.

❑ **Residence.** I live in a district in which the United States trustee (or bankruptcy administrator) has determined that the approved instructional courses cannot adequately meet my needs.

Part 2: Sign Here

I certify that the information I have provided is true and correct.

_____ _____ Date _____
Signature of debtor named on certificate Printed name of debtor MM / DD / YYYY

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COMMITTEE NOTE

Official Form 423, *Certification About a Financial Management Course*, is revised as part of the Forms Modernization Project. The form replaces former Official Form 23, *Debtor's Certification of Completion of Postpetition Instructional Course Concerning Personal Financial Management*. Form 423 is renumbered to distinguish it from the forms used by non-individual debtors, such as corporations and partnerships.

To make Form 423 easier to understand, legal terms are explained more fully or replaced with commonly understood terms, and the form is reformatted. Part 1, *Tell the Court About the Required Course*, provides definitions for "incapacity" and "disability," rather than providing statutory citations.

A statement is added that, in some cases, the court can waive the requirement to complete the financial management course. To have the requirement waived, the debtor must file a motion with the court and obtain a court order.

Changes Made After Publication

The instruction language was clarified regarding when an approved course about financial management must be completed, and an instruction was added that the debtor should file the certificate regarding completing the course if the provider does not file it. Other stylistic changes were made throughout the form.

Summary of Public Comment

13-BK-56 – Bankruptcy Clerks Advisory Group – The second paragraph to the introductory information to this form includes only a "does not" scenario. The Bankruptcy Clerks Advisory Group suggested adding a "does" scenario.

13-BK-59 – National Conference of Bankruptcy Judges – The National Conference of Bankruptcy Judges made stylistic suggestions.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Draft March 31, 2014

Official Form 427

Cover Sheet for Reaffirmation Agreement

12/14

Anyone who is a party to a reaffirmation agreement may fill out and file this form. Fill it out completely, attach it to the reaffirmation agreement, and file the documents within the time set under Bankruptcy Rule 4008.

Part 1: Explain the Repayment Terms of the Reaffirmation Agreement

1. **Who is the creditor?**

_____
Name of the creditor

2. **How much is the debt?**

On the date that the bankruptcy case is filed $_____

To be paid under the reaffirmation agreement $_____

$_____ per month for _____ months (if fixed interest rate)

3. **What is the Annual Percentage Rate (APR) of interest? (See Bankruptcy Code § 524(k)(3)(E).)**

Before the bankruptcy case was filed _____%

Under the reaffirmation agreement _____% ❑ Fixed rate
❑ Adjustable rate

4. **Does collateral secure the debt?**

❑ No
❑ Yes. Describe the collateral. _____

Current market value $_____

5. **Does the creditor assert that the debt is nondischargeable?**

❑ No
❑ Yes. Attach an explanation of the nature of the debt and the basis for contending that the debt is nondischargeable.

6. **Using information from *Schedule G: Your Income*** (Official Form 106G) **and *Schedule H: Your Expenses*** (Official Form 106H)**, fill in the amounts.**

Income and expenses reported on Schedules G and H		**Income and expenses stated on the reaffirmation agreement**	
6a. Combined monthly income from line 12 of Schedule G	$ _____	6e. Monthly income from all sources after payroll deductions	$ _____
6b. Monthly expenses from Column A, line 22 of Schedule H	– $ _____	6f. Monthly expenses	– $ _____
6c. Monthly payments on all reaffirmed debts not listed on Schedule H	– $ _____	6g. Monthly payments on all reaffirmed debts not included in monthly expenses	– $ _____
6d. **Scheduled net monthly income** Subtract lines 6b and 6c from 6a. If the total is less than 0, put the number in brackets.	$ _____	6h. **Present net monthly income** Subtract lines 6f and 6g from 6e. If the total is less than 0, put the number in brackets.	$ _____

7. **Are the income amounts on lines 6a and 6e different?**	❑ No ❑ Yes.	Explain why they are different and complete line 10._____
8. **Are the expense amounts on lines 6b and 6f different?**	❑ No ❑ Yes.	Explain why they are different and complete line 10._____
9. **Is the net monthly income in line 6h less than 0?**	❑ No ❑ Yes.	A presumption of hardship arises (unless the creditor is a credit union). Explain how the debtor will make monthly payments on the reaffirmed debt and pay other living expenses. Complete line 10.
10. **Debtor's certification about lines 7-9** If any answer on lines 7-9 is *Yes*, the debtor must sign here. If all the answers on lines 7-9 are *No*, go to line 11.		I certify that each explanation on lines 7-9 is true and correct. ✘ _____ Signature of Debtor 1 ✘ _____ Signature of Debtor 2 (Spouse Only in a Joint Case)
11. **Did an attorney represent the debtor in negotiating the reaffirmation agreement?**	❑ No ❑ Yes.	Has the attorney executed a declaration or an affidavit to support the reaffirmation agreement? ❑ No ❑ Yes

Part 2: Sign Here

Whoever fills out this form must sign here.

I certify that the attached agreement is a true and correct copy of the reaffirmation agreement between the parties identified on this *Cover Sheet for Reaffirmation Agreement*.

✘ _____ Date _____
Signature MM / DD / YYYY

_____
Printed Name

Check one:

❑ Debtor or Debtor's Attorney

❑ Creditor or Creditor's Attorney

COMMITTEE NOTE

Line 3 of the form has been changed to clarify the requirement to disclose an annual percentage rate of interest. Section 524(k)(3)(E) of the Bankruptcy Code defines the "Annual Percentage Rate" to be disclosed in connection with a reaffirmation agreement. Line 3 of the form now includes a reference to that Code provision, which in appropriate circumstances permits disclosure of the simple interest rate as the Annual Percentage Rate.

COMMITTEE NOTE

Official Form 427, *Cover Sheet for Reaffirmation Agreement*, is revised and renumbered as part of the Forms Modernization Project. The form replaces former Official Form 27, *Reaffirmation Agreement Cover Sheet*. To make it easier to understand, the form is reformatted, and legal terms are explained more fully or replaced with commonly understood terms.

The calculation of the debtor's net monthly income is expanded to include the debtor's net monthly income at the time the bankruptcy petition is filed, as well as the debtor's net monthly income at the time of the reaffirmation agreement. Rather than requiring filers to state their relationship to the case, checkboxes are provided for the debtor or the debtor's attorney and for the creditor or the creditor's attorney.

Line 3 of the form has been changed to clarify the requirement to disclose an annual percentage rate of interest. Section 524(k)(3)(E) of the Bankruptcy Code defines the "Annual Percentage Rate" to be disclosed in connection with a reaffirmation agreement. Line 3 of the form now includes a reference to that Code provision, which in appropriate circumstances permits disclosure of the simple interest rate as the Annual Percentage Rate.

Changes Made After Publication

A statutory citation was added to line 3 of Part 1, and the term "counsel" was changed to "attorney" in line 11. Other stylistic changes were made throughout the form.

Summary of Public Comment

13-BK-0056 – Bankruptcy Clerks Advisory Group - The instructions before Part 1 of this form should be modified to remove "attach it to the reaffirmation agreement," and instead include "file it as one document with the reaffirmation agreement." Clarify which forms require the submission of this cover sheet.

12-BK-0059 – National Conference of Bankruptcy Judges - Use the statutory language in line 11 regarding attorney representation and the requirement of a declaration. In addition, split the inquiry in line 11 into two questions, one concerning the debtor's representation by an attorney, the other concerning the attorney's execution of the declaration.

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APPENDIX B

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APPENDIX B.1

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Appendix B

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

For Publication for Public Comment

Rule 1010. Service of Involuntary Petition and Summons~~; Petition for Recognition of a Foreign Nonmain Proceeding~~

(a) SERVICE OF INVOLUNTARY PETITION AND SUMMONS~~;~~ ~~SERVICE OF PETITION FOR RECOGNITION OF FOREIGN NONMAIN PROCEEDING~~. On the filing of an involuntary petition~~ or a petition for recognition of a foreign nonmain proceeding~~, the clerk shall forthwith issue a summons for service. When an involuntary petition is filed, service shall be made on the debtor. ~~When a petition for recognition of a foreign nonmain proceeding is filed, service shall be made on the debtor, any entity against whom provisional relief is sought under § 1519 of the Code, and on any other party as the court may direct.~~ The summons shall be served with a copy of the petition in the manner provided for service of a summons and complaint by Rule 7004(a) or (b). If service cannot be so made, the court may order that the summons and petition be served by mailing copies to the party's last known address, and by at least one publication in a manner and form directed by the court. The summons and petition may be served on the party anywhere. Rule 7004(e) and Rule 4(*l*) F.R.Civ.P. apply when service is made or attempted under this rule.

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

* * * * *

COMMITTEE NOTE

Subdivision (a) of this rule is amended to remove provisions regarding the issuance of a summons for service in certain chapter 15 proceedings. The requirements for notice and service in chapter 15 proceedings are found in Rule 2002(q).

Rule 1011. Responsive Pleading or Motion in Involuntary ~~and Cross-Border~~ Cases

(a) WHO MAY CONTEST PETITION. The debtor named in an involuntary petition~~, or a party in interest to a petition for recognition of a foreign proceeding,~~ may contest the petition. In the case of a petition against a partnership under Rule 1004, a nonpetitioning general partner, or a person who is alleged to be a general partner but denies the allegation, may contest the petition.

* * * * *

(f) CORPORATE OWNERSHIP STATEMENT. If the entity responding to the involuntary petition ~~or the petition for recognition of a foreign proceeding~~ is a corporation, the entity shall file with its first appearance, pleading, motion, response, or other request addressed to the court a corporate ownership statement containing the information described in Rule 7007.1.

COMMITTEE NOTE

This rule is amended to remove provisions regarding chapter 15 proceedings. The requirements for responses to a petition for recognition of a foreign proceeding are found in Rule 1012.

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Rule 1012. Responsive Pleading in Cross-Border Cases

1 (a) WHO MAY CONTEST PETITION. The debtor or any party in interest
2 may contest a petition for recognition of a foreign proceeding.
3 (b) OBJECTIONS AND RESPONSES; WHEN PRESENTED. Objections
4 and other responses to the petition shall be presented no later than seven days
5 before the date set for the hearing on the petition, unless the court prescribes some
6 other time or manner for responses.
7 (c) CORPORATE OWNERSHIP STATEMENT. If the entity responding
8 to the petition is a corporation, then the entity shall file a corporate ownership
9 statement containing the information described in Rule 7007.1 with its first
10 appearance, pleading, motion, response, or other request addressed to the court.

COMMITTEE NOTE

This rule is added to govern responses to petitions for recognition in cross-border cases. It incorporates provisions formerly found in Rule 1011. Subdivision (a) provides that the debtor or a party in interest may contest the petition. Subdivision (b) provides for presentation of responses no later than 7 days before the hearing on the petition, unless the court directs otherwise. Subdivision (c) governs the filing of corporate ownership statements by entities responding to the petition.

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Rule 2002. Notices to Creditors, Equity Security Holders, Administrators in Foreign Proceedings, Persons Against Whom Provisional Relief is Sought in Ancillary and Other Cross-Border Cases, United States, and United States Trustee

(a) TWENTY-ONE-DAY NOTICES TO PARTIES IN INTEREST. Except as provided in subdivisions (h), (i), (*l*), (p), and (q) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees at least 21 days' notice by mail of:

* * * * *

(7) the time fixed for filing proofs of claims pursuant to Rule 3003(c); ~~and~~

(8) the time fixed for filing objections and the hearing to consider confirmation of a chapter 12 plan; and

(9) the time fixed for filing objections to confirmation of a chapter 13 plan.

(b) TWENTY-EIGHT-DAY NOTICES TO PARTIES IN INTEREST. Except as provided in subdivision (*l*) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees not less than 28 days' notice by mail of the time fixed

(1) for filing objections and the hearing to consider approval of a disclosure statement or, under §1125(f), to make a final determination whether the plan provides adequate information so that a separate disclosure statement is not necessary; ~~and~~

(2) for filing objections and the hearing to consider confirmation of

a chapter 9~~,~~ or chapter 11~~, or chapter 13~~ plan; and

(3) for the hearing to consider confirmation of a chapter 13 plan.

* * * * *

(q) NOTICE OF PETITION FOR RECOGNITION OF FOREIGN PROCEEDING AND OF COURT'S INTENTION TO COMMUNICATE WITH FOREIGN COURTS AND FOREIGN REPRESENTATIVES.

(1) *Notice of Petition for Recognition*. After the filing of a petition for recognition of a foreign proceeding, the court shall promptly schedule and hold a hearing on the petition. The clerk, or some other person as the court may direct, shall forthwith give the debtor, all persons or bodies authorized to administer foreign proceedings of the debtor, all entities against whom provisional relief is being sought under §1519 of the Code, all parties to litigation pending in the United States in which the debtor is a party at the time of the filing of the petition, and such other entities as the court may direct, at least 21 days' notice by mail of the hearing ~~on the petition for recognition of a foreign proceeding~~. The notice shall state whether the petition seeks recognition as a foreign main proceeding or foreign nonmain proceeding and shall include the petition and any other document the court may require. If the court consolidates the hearing on the petition with the hearing on a request for provisional relief, the court may set a shorter notice period, with notice to the entities listed in this subdivision.

COMMITTEE NOTE

Subdivisions (a) and (b) are amended and reorganized to alter the provisions governing notice under this rule in chapter 13 cases. Subdivision (a)(9) is added to require at least 21 days' notice of the time for filing objections to confirmation of a chapter 13 plan. Subdivision (b)(3) is added to provide separately for 28 days' notice of the date of the confirmation hearing in a chapter 13 case. These amendments conform to amended Rule 3015, which governs the time for presenting objections to confirmation of a chapter 13 plan. Other changes are stylistic.

Subdivision (q) is amended to clarify the procedures for giving notice in cross-border proceedings. The amended rule provides, in keeping with Code § 1517(c), for the court to schedule a hearing to be held promptly on the petition for recognition of a foreign proceeding. The amended rule contemplates that a hearing on a request for provisional relief may sometimes overlap substantially with the merits of the petition for recognition. In that case, the court may choose to consolidate the hearing on the request for provisional relief with the hearing on the petition for recognition, see Rules 1018 and 7065, and accordingly shorten the usual 21-day notice period.

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Rule 3002. Filing Proof of Claim or Interest

(a) NECESSITY FOR FILING. ~~An~~ A secured creditor, unsecured creditor, or an equity security holder must file a proof of claim or interest for the claim or interest to be allowed, except as provided in Rules 1019(3), 3003, 3004, and 3005. A lien that secures a claim against the debtor is not void due only to the failure of any entity to file a proof of claim.

(b) PLACE OF FILING. A proof of claim or interest shall be filed in accordance with Rule 5005.

(c) TIME FOR FILING. In a voluntary chapter 7 ~~liquidation~~ case, chapter 12 ~~family farmer's debt adjustment~~ case, or chapter 13 ~~individual's debt adjustment~~ case, a proof of claim is timely filed if it is filed not later than ~~90~~ 60 days after the order for relief or the date of the order of conversion to a case under chapter 12 or chapter 13. In an involuntary chapter 7 case, a proof of claim is timely filed if it is filed not later than 90 days after the order for relief is entered. ~~the first date set for the meeting of creditors called under § 341(a) of the Code~~ But in all these cases, the following exceptions apply:

* * * * *

(6) ~~If notice of the time to file a proof of claim has been mailed to a creditor at a foreign address, o~~On motion filed by ~~the~~ a creditor before or after the expiration of the time to file a proof of claim, the court may extend the time by not more than 60 days from the date of the order granting the motion. The

21 motion may be granted if the court finds that ~~the notice was insufficient under the~~

22 ~~circumstances to give the creditor a reasonable time to file a proof of claim~~

23 (A) the notice was insufficient under the circumstances to

24 give the creditor a reasonable time to file a proof of claim because the debtor

25 failed to timely file the list of creditors' names and addresses required by Rule

26 1007(a); or

27 (B) the notice was insufficient under the circumstances to

28 give the creditor a reasonable time to file a proof of claim, and the notice was

29 mailed to the creditor at a foreign address.

30 (7) A proof of claim filed by the holder of a claim that is secured

31 by a security interest in the debtor's principal residence is timely filed if:

32 (A) the proof of claim, together with the attachments

33 required by Rule 3001(c)(2)(C), is filed not later than 60 days after the order for

34 relief is entered; and

35 (B) any attachments required by Rule 3001(c)(1) and (d)

36 are filed as a supplement to the holder's claim not later than 120 days after the

37 order for relief is entered.

COMMITTEE NOTE

Subdivision (a) is amended to clarify that a creditor, including a secured creditor, must file a proof of claim in order to have an allowed claim. The amendment also clarifies, in accordance with § 506(d), that the failure of a secured creditor to file a proof of claim does not render the creditor's lien void. The inclusion of language from § 506(d) is not intended to effect any change of law with respect to claims subject to setoff under § 553. The amendment preserves the existing exceptions to this rule under Rules 1019(3), 3003, 3004, and 3005. Under Rule 1019(3), a creditor does not need to file another proof of

claim after conversion of a case to chapter 7. Rule 3003 governs the filing of a proof of claim in chapter 9 and chapter 11 cases. Rules 3004 and 3005 govern the filing of a proof of claim by the debtor, trustee, or another entity if a creditor does not do so in a timely manner.

Subdivision (c) is amended to alter the calculation of the bar date for proofs of claim in chapter 7, chapter 12, and chapter 13 cases. The amendment changes the time for filing a proof of claim in a voluntary chapter 7 case, a chapter 12 case, or a chapter 13 case from 90 days after the § 341 meeting of creditors to 60 days after the petition date. If a case is converted to chapter 12 or chapter 13, the 60-day time for filing runs from the order of conversion. In an involuntary chapter 7 case, a 90-day time for filing applies and runs from the entry of the order for relief.

Subdivision (c)(6) is amended to expand the exception to the bar date for cases in which a creditor received insufficient notice of the time to file a proof of claim. The amendment provides that the court may extend the time to file a proof of claim if the debtor fails to file a timely list of names and addresses of creditors as required by Rule 1007(a). The amendment also clarifies that if a court grants a creditor's motion under this rule to extend the time to file a proof of claim, the extension runs from the date of the court's decision on the motion.

Subdivision (c)(7) is added to provide a two-stage deadline for filing mortgage proofs of claim secured by an interest in the debtor's principal residence. Those proofs of claim must be filed with the appropriate Official Form mortgage attachment within 60 days of the order for relief. The claim will be timely if any additional documents evidencing the claim, as required by Rule 3001(c)(1) and (d), are filed within 120 days of the order for relief. The order for relief is the commencement of the case upon filing a petition, except in an involuntary case. See § 301 and § 303(h). The confirmation of a plan within the 120-day period set forth in subdivision (c)(7)(B) does not prohibit an objection to any proof of claim.

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Rule 3002.1. Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence

1 (a) IN GENERAL. This rule applies in a chapter 13 case to claims (1)
2 that are ~~(1)~~ secured by a security interest in the debtor's principal residence, and
3 (2) for which the plan provides that either the trustee or the debtor will make
4 contractual installment payments ~~provided for under § 1322(b)(5) of the Code in~~
5 ~~the debtor's plan~~. Unless the court orders otherwise, the notice requirements of
6 this rule cease to apply when an order terminating or annulling the automatic stay
7 becomes effective with respect to the residence that secures the claim.

* * * * *

COMMITTEE NOTE

Subdivision (a) is amended to clarify the applicability of the rule. Its provisions apply whenever a chapter 13 plan provides that contractual payments on the debtor's home mortgage will be maintained, whether they will be paid by the trustee or directly by the debtor. The reference to § 1322(b)(5) of the Code is deleted to make clear that the rule applies even if there is no prepetition arrearage to be cured. So long as a creditor has a claim that is secured by a security interest in the debtor's principal residence and the plan provides that contractual payments on the claim will be maintained, the rule applies.

Subdivision (a) is further amended to provide that, unless the court orders otherwise, the notice obligations imposed by this rule cease on the effective date of an order granting relief from the automatic stay with regard to the debtor's principal residence. Debtors and trustees typically do not make payments on mortgages after the stay relief is granted, so there is generally no need for the holder of the claim to continue providing the notices required by this rule. Sometimes, however, there may be reasons for the debtor to continue receiving mortgage information after stay relief. For example, the debtor may intend to seek a mortgage modification or to cure the default. When the court determines that the debtor has a need for the information required by this rule, the court is authorized to order that the notice obligations remain in effect or be reinstated after the relief from the stay is granted.

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Rule 3007. Objections to Claims

(a) ~~OBJECTIONS TO CLAIMS~~TIME AND MANNER OF SERVICE. An objection to the allowance of a claim and a notice of objection that substantially conforms to the appropriate Official Form shall be ~~in writing and~~ filed~~.~~ and served at least 30 days before any scheduled hearing on the objection or any deadline for the claimant to request a hearing. ~~A copy of the objection with notice of the hearing thereon shall be mailed or otherwise delivered to the claimant, the debtor or debtor in possession, and the trustee at least 30 days prior to the hearing.~~ The objection and notice shall be served as follows:

(1) on the claimant by first-class mail to the person most recently designated on the claimant's original or amended proof of claim as the person to receive notices, at the address so indicated; and

(A) if the objection is to a claim of the United States, or any of its officers or agencies, in the manner provided for service of a summons and complaint by Rule 7004(b)(4) or (5); or

(B) if the objection is to a claim of an insured depository institution, in the manner provided by Rule 7004(h); and

(2) on the debtor or debtor in possession and on the trustee by first-class mail or other permitted means.

COMMITTEE NOTE

Subdivision (a) is amended to specify the manner in which an objection to a claim and notice of the objection must be served. It clarifies that Rule 7004 does not apply to the service of most claim objections. Instead, a claimant must be served by first-class mail addressed to the person that the claimant most recently designated on its proof of claim to receive notices, at the address so indicated. If, however, the claimant is the United States, an officer or agency of the United States, or an insured depository institution, service must also be made according to the method prescribed by the appropriate provision of Rule 7004. The service methods for the depository institutions are statutorily mandated, and the size and dispersal of the decision-making and litigation authority of the federal government necessitate service on the appropriate United States attorney's office and the Attorney General, as well as the person designated on the proof of claim.

As amended, subdivision (a) no longer requires that a hearing be scheduled or held on every objection. The rule requires the objecting party to provide notice and an opportunity for a hearing on the objection, but, by deleting from the subdivision references to "the hearing," it permits local practices that require a claimant to timely request a hearing or file a response in order to obtain a hearing. The official notice form served with a copy of the objection will inform the claimant of any actions it must take. However, while a local rule may require the claimant to respond to the objection to a proof of claim, the court will still need to determine if the claim is valid, even if the claimant does not file a response to a claim objection or request a hearing.

Rule 3012. ~~Valuation of Security~~ Determining the Amount of Secured and Priority Claims

~~The court may determine the value of a claim secured by a lien on property in which the estate has an interest on motion of any party in interest and after a hearing on notice to the holder of the secured claim and any other entity as the court may direct.~~

(a) DETERMINATION OF AMOUNT OF CLAIM. On request by a party in interest and after notice—to the holder of the claim and any other entity the court designates—and a hearing, the court may determine

(1) the amount of a secured claim under § 506(a) of the Code, or

(2) the amount of a claim entitled to priority under § 507 of the Code.

(b) REQUEST FOR DETERMINATION; HOW MADE. Except as provided in subdivision (c), a request to determine the amount of a secured claim may be made by motion, in a claim objection, or in a plan filed in a chapter 12 or chapter 13 case. When the request is made in a chapter 12 or chapter 13 plan, the plan shall be served on the holder of the claim and any other entity the court designates in the manner provided for service of a summons and complaint by Rule 7004. A request to determine the amount of a claim entitled to priority may be made only by motion after a claim is filed or in a claim objection.

19 (c) CLAIMS OF GOVERNMENTAL UNITS. A request to determine the

20 amount of a secured claim of a governmental unit may be made only by motion or

21 in a claim objection after the governmental unit files a proof of claim or after the

22 time for filing one under Rule 3002(c)(1) has expired.

COMMITTEE NOTE

This rule is amended and reorganized.

Subdivision (a) provides, in keeping with the former version of this rule, that a party in interest may seek a determination of the amount of a secured claim. The amended rule provides that the amount of a claim entitled to priority may also be determined by the court.

Subdivision (b) is added to provide that a request to determine the amount of a secured claim may be made in a chapter 12 or chapter 13 plan, as well as by a motion or a claim objection. When the request is made in a plan, the plan must be served on the holder of the claim and any other entities the court designates according to Rule 7004. Secured claims of governmental units are not included in this subdivision and are governed by subdivision (c). The amount of a claim entitled to priority may be determined through a motion or a claim objection.

Subdivision (c) clarifies that a determination under this rule with respect to a secured claim of a governmental unit may be made only by motion or in a claim objection, but not until the governmental unit has filed a proof of claim or its time for filing a proof of claim has expired.

Rule 3015. Filing, Objection to Confirmation, Effect of Confirmation, and Modification of a Plan in a Chapter 12 ~~Family Farmer Debt Adjustment~~ or a Chapter 13 ~~Individual's Debt Adjustment~~ Case

(a) FILING OF CHAPTER 12 PLAN. The debtor may file a chapter 12 plan with the petition. If a plan is not filed with the petition, it shall be filed within the time prescribed by § 1221 of the Code.

(b) FILING OF CHAPTER 13 PLAN. The debtor may file a chapter 13 plan with the petition. If a plan is not filed with the petition, it shall be filed within 14 days thereafter, and such time may not be further extended except for cause shown and on notice as the court may direct. If a case is converted to chapter 13, a plan shall be filed within 14 days thereafter, and such time may not be further extended except for cause shown and on notice as the court may direct.

(c) ~~DATING. Every proposed plan and any modification thereof shall be dated.~~FORM OF CHAPTER 13 PLAN. If there is an Official Form for a plan filed in a chapter 13 case, that form must be used. Provisions not otherwise included in the Official Form or deviating from it are effective only if they are included in a section of the Official Form designated for nonstandard provisions and are also identified in accordance with any other requirements of the Official Form.

(d) NOTICE ~~AND COPIES~~. If the plan ~~The plan or a summary of the plan shall be~~ is not included with the ~~each~~ notice of the hearing on confirmation mailed pursuant to Rule 2002, the debtor shall serve the plan on the trustee and all creditors when it is filed with the court. ~~If required by the court, the debtor shall~~

~~furnish a sufficient number of copies to enable the clerk to include a copy of the plan with the notice of the hearing.~~

(e) TRANSMISSION TO UNITED STATES TRUSTEE. The clerk shall forthwith transmit to the United States trustee a copy of the plan and any modification thereof filed pursuant to subdivision (a) or (b) of this rule.

(f) OBJECTION TO CONFIRMATION; DETERMINATION OF GOOD FAITH IN THE ABSENCE OF AN OBJECTION. An objection to confirmation of a plan shall be filed and served on the debtor, the trustee, and any other entity designated by the court, and shall be transmitted to the United States trustee, ~~before confirmation of the plan~~ at least seven days before the date set for the hearing on confirmation. An objection to confirmation is governed by Rule 9014. If no objection is timely filed, the court may determine that the plan has been proposed in good faith and not by any means forbidden by law without receiving evidence on such issues.

(g) EFFECT OF CONFIRMATION. In a chapter 12 or chapter 13 case, any determination made in accordance with Rule 3012 of the amount of a secured claim under § 506(a) of the Code is binding on its holder, even if the holder files a contrary proof of claim under Rule 3002 or the debtor schedules that claim under § 521(a) of the Code, and regardless of whether an objection to the claim has been filed under Rule 3007.

~~(g)~~ (h) MODIFICATION OF PLAN AFTER CONFIRMATION. A request to modify a plan pursuant to § 1229 or § 1329 of the Code shall identify the proponent and shall be filed together with the proposed modification. The

clerk, or some other person as the court may direct, shall give the debtor, the trustee, and all creditors not less than 21 days notice by mail of the time fixed for filing objections and, if an objection is filed, the hearing to consider the proposed modification, unless the court orders otherwise with respect to creditors who are not affected by the proposed modification. A copy of the notice shall be transmitted to the United States trustee. A copy of the proposed modification, or a summary thereof, shall be included with the notice. ~~If required by the court, the proponent shall furnish a sufficient number of copies of the proposed modification, or a summary thereof, to enable the clerk to include a copy with each notice.~~ If a copy is not included with the notice and the proposed modification is sought by the debtor, a copy shall be served on the trustee and all creditors in the manner provided for service of the plan by subdivision (d) of this rule. Any objection to the proposed modification shall be filed and served on the debtor, the trustee, and any other entity designated by the court, and shall be transmitted to the United States trustee. An objection to a proposed modification is governed by Rule 9014.

COMMITTEE NOTE

This rule is amended and reorganized.

Subdivision (c) is amended to require use of an Official Form if one is adopted for chapter 13 plans. The amended rule also provides that nonstandard provisions in a chapter 13 plan must be set out in the section of the Official Form specifically designated for such provisions and identified in the manner required by the Official Form.

Subdivision (d) is amended to ensure that the trustee and creditors are served with the plan in advance of confirmation. Service may be made either at the time the plan is filed or with the notice under Rule 2002 of the hearing to consider confirmation of the plan.

Subdivision (f) is amended to require service of an objection to confirmation at least seven days before the hearing to consider confirmation of a plan. The seven-day notice period may be altered in a particular case by the court under Rule 9006.

Subdivision (g) is amended to provide that the amount of a secured claim under § 506(a) may be determined through a chapter 12 or chapter 13 plan in accordance with Rule 3012. That determination controls over a contrary proof of claim, without the need for a claim objection under Rule 3007, and over the schedule submitted by the debtor under § 521(a). The amount of a secured claim of a governmental unit, however, may not be determined through a chapter 12 or chapter 13 plan under Rule 3012.

Subdivision (h) was formerly subdivision (g). It is redesignated and amended to clarify that service of a proposed plan modification must be made in accordance with subdivision (d) of this rule. The option to serve a summary of the proposed modification has been retained. Unless required by another rule, service under this subdivision does not need to be made in the manner provided for service of a summons and complaint by Rule 7004.

Rule 4003. Exemptions

* * * * *

1 (d) AVOIDANCE BY DEBTOR OF TRANSFERS OF EXEMPT
2 PROPERTY. A proceeding under § 522(f) ~~by the debtor~~ to avoid a lien or other
3 transfer of property exempt under ~~§ 522(f) of~~ the Code shall be commenced by
4 motion in the manner provided by ~~in accordance with~~ Rule 9014, or by serving a
5 chapter 12 or chapter 13 plan on the affected creditors in the manner provided by
6 Rule 7004 for service of a summons and complaint. Notwithstanding the
7 provisions of subdivision (b), a creditor may object to a ~~motion filed~~ request
8 under § 522(f) by challenging the validity of the exemption asserted to be
9 impaired by the lien.

COMMITTEE NOTE

Subdivision (d) is amended to provide that a request under § 522(f) to avoid a lien or other transfer of exempt property may be made by motion or by a chapter 12 or chapter 13 plan. A plan that proposes lien avoidance in accordance with this rule must be served as provided under Rule 7004 for service of a summons and complaint. Lien avoidance not governed by this rule requires an adversary proceeding.

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Rule 5009. Closing Chapter 7 ~~Liquidation~~, Chapter 12 ~~Family Farmer's Debt Adjustment~~, Chapter 13 ~~Individual's Debt Adjustment~~, and Chapter 15 ~~Ancillary and Cross-Border~~ Cases; Order Declaring Lien Satisfied

(a) CLOSING OF CASES UNDER CHAPTERS 7, 12, AND 13. If in a chapter 7, chapter 12, or chapter 13 case the trustee has filed a final report and final account and has certified that the estate has been fully administered, and if within 30 days no objection has been filed by the United States trustee or a party in interest, there shall be a presumption that the estate has been fully administered.

* * * * *

(d) ORDER DECLARING LIEN SATISFIED. In a chapter 12 or chapter 13 case, if a claim that was secured by property of the estate is subject to a lien under applicable nonbankruptcy law, the debtor may request entry of an order declaring that the secured claim has been satisfied and the lien has been released under the terms of a confirmed plan. The request shall be made by motion and shall be served on the holder of the claim and any other entity the court designates in the manner provided by Rule 7004 for service of a summons and complaint.

COMMITTEE NOTE

Subdivision (d) is added to provide a procedure by which a debtor in a chapter 12 or chapter 13 case may request an order declaring a secured claim satisfied and a lien released under the terms of a confirmed plan. A debtor may need documentation for title purposes of the elimination of a second mortgage or other lien that was secured by property of the estate. Although requests for such orders are likely to be made at the time the case is being closed, the rule does not prohibit a request at another time if the lien has been released and any other requirements for entry of the order have been met.

Other changes to this rule are stylistic.

Rule 7001. Scope of Rules of Part VII

1 An adversary proceeding is governed by the rules of this Part VII. The
2 following are adversary proceedings:
3 * * * * *
4 (2) a proceeding to determine the validity, priority, or extent of a lien or
5 other interest in property, ~~other than~~ but not a proceeding under Rule 3012 or
6 Rule 4003(d);
* * * * *

COMMITTEE NOTE

Subdivision (2) is amended to provide that the determination of the amount of a secured claim under Rule 3012 or the validity, priority, or extent of a lien under Rule 4003(d) does not require an adversary proceeding. The determination of the amount of a secured claim may be sought through a chapter 12 or chapter 13 plan in accordance with Rule 3012. Thus, a debtor may propose to eliminate a wholly unsecured junior lien in a chapter 12 or chapter 13 plan without a separate adversary proceeding. Similarly, the avoidance of a lien on exempt property may be sought through a chapter 12 or chapter 13 plan in accordance with Rule 4003(d). An adversary proceeding continues to be required for lien avoidance not governed by Rule 4003(d).

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Rule 9006. Computing and Extending Time; Time for Motion Papers

* * * * *

1 (f) ADDITIONAL TIME AFTER SERVICE BY MAIL OR UNDER RULE
2 5(b)(2)(D)~~, (E),~~ OR (F) F.R. CIV. P. When there is a right or requirement to act or
3 undertake some proceedings within a prescribed period after being served[1] and that
4 service is by mail or under Rule 5(b)(2)(D) (leaving with the clerk)~~, (E),~~ or (F) (other
5 means consented to) F.R. Civ. P., three days are added after the prescribed period would
6 otherwise expire under Rule 9006(a).

* * * * *

Committee Note

Subdivision (f) is amended to remove service by electronic means under Civil Rule 5(b)(2)(E) from the modes of service that allow three added days to act after being served.

Rule 9006(f) and Civil Rule 6(d) contain similar provisions providing additional time for actions after being served by mail or by certain modes of service that are identified by reference to Civil Rule 5(b)(2). Rule 9006(f)—like Civil Rule 6(d)—is amended to remove the reference to service by electronic means under Rule 5(b)(2)(E). The amendment also adds clarifying parentheticals identifying the forms of service under Rule 5(b)(2) for which three days will still be added.

Civil Rule 5(b)—made applicable in bankruptcy proceedings by Rules 7005 and 9014(b)—was amended in 2001 to allow service by electronic means with the consent of the person served. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow three added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and in widespread skill in using electronic transmission.

[1] This wording anticipates adoption of the proposed amendment published in August 2013.

A parallel reason for allowing the three added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the three added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the three added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day periods that allow "day-of-the-week" counting. Adding three days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Eliminating Rule 5(b) subparagraph (2)(E) from the modes of service that allow three added days means that the three added days cannot be retained by consenting to service by electronic means. Consent to electronic service in registering for electronic case filing, for example, does not count as consent to service "by any other means" of delivery under subparagraph (F).

Rule 9009. Forms

(a) OFFICIAL FORMS. ~~Except as otherwise provided in Rule 3016(d), the~~ The Official Forms prescribed by the Judicial Conference of the United States shall be ~~observed and~~ used ~~with alterations as may be appropriate~~ without alteration, except as otherwise provided in these rules, in a particular Official Form, or in the national instructions for a particular Official Form. ~~Forms may be combined and their contents rearranged to permit economies in their use.~~Official Forms may be modified to permit minor changes not affecting wording or the order of presenting information, including changes that

(1) expand the prescribed areas for responses in order to permit complete responses;

(2) delete space not needed for responses; or

(3) delete items requiring detail in a question or category if the filer indicates—either by checking “no” or “none” or by stating in words—that there is nothing to report on that question or category.

(b) DIRECTOR’S FORMS. The Director of the Administrative Office of the United States Courts may issue additional forms for use under the Code.

17 (c) CONSTRUCTION. The forms shall be construed to be consistent with

18 these rules and the Code.

COMMITTEE NOTE

This rule is amended and reorganized into separate subdivisions.

Subdivision (a) addresses permissible modifications to Official Forms. It requires that an Official Form be used without alteration, except when another rule, the Official Form itself, or the national instructions applicable to an Official Form permit alteration. The former language generally permitting alterations has been deleted, but the rule preserves the ability to make minor modifications to an Official Form that do not affect the wording or the order in which information is presented on a form. Permissible changes include those that merely expand or delete the space for responses as appropriate or delete inapplicable items so long as the filer indicates that no response is intended. For example, when more space will be necessary to completely answer a question on an Official Form without an attachment, the answer space may be expanded. Similarly, varying the width or orientation of columnar data on a form for clarity of presentation would be a permissible minor change. On the other hand, many Official Forms indicate on their face that certain changes are not appropriate. Any changes that contravene the directions on an Official Form would be prohibited by this rule.

The creation of subdivision (b) and subdivision (c) is stylistic.

APPENDIX B.2

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Official Form 11A
12/15

United States Bankruptcy Court

_____ District Of _____

In re _____ ,
Debtor

Case No. _____
Chapter

GENERAL POWER OF ATTORNEY

[Abrogated]

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2015 COMMITTEE NOTE

The form is abrogated. Former Official Form 11A , although abrogated as an Official Form, continues to be available as a Director's Procedural Form.

Parties routinely modify the General Power of Attorney form to conform to state law, the needs of the case, or local practice. The exact language of the form is not needed. The proposed amendment to Rule 9009, however, restricts alteration of the Official Forms, except as provided in the rules or in a particular Official Form.

The Director's Procedural Forms are issued by the Director of the Administrative Office pursuant to Rule 9009 as an accommodation for the courts and parties. The procedural forms may be altered as needed and their use is not mandatory, unless required by local rule.

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Official Form 11B
12/15

United States Bankruptcy Court

_____ District Of _____

In re _____ ,
Debtor

Case No. _____
Chapter

SPECIAL POWER OF ATTORNEY

[Abrogated]

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2015 COMMITTEE NOTE

The form is abrogated. Former Official Form 11B , although abrogated as an Official Form, continues to be available as a Director's Procedural Form.

Parties routinely modify the Special Power of Attorney form to conform to state law, the needs of the case, or local practice. The exact language of the form is not needed. The proposed amendment to Rule 9009, however, restricts alteration of the Official Forms, except as provided in the rules or in a particular Official Form.

The Director's Procedural Forms are issued by the Director of the Administrative Office pursuant to Rule 9009 as an accommodation for the courts and parties. The procedural forms may be altered as needed and their use is not mandatory, unless required by local rule.

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Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Check if this is:

- ❑ An amended filing
- ❑ A supplement showing post-petition chapter 13 expenses as of the following date:

_____
MM / DD / YYYY

Official Form 106J

Schedule J: Your Expenses

12/15

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach another sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Describe Your Household

1. **Is this a joint case?**

   ❑ No. Go to line 2.
   ❑ Yes. **Does Debtor 2 live in a separate household?**

   ❑ No
   ❑ Yes. Debtor 2 must file Official Forms 106J-2, *Expenses for Separate Household of Debtor 2*.

2. **Do you have dependents?**

   Do not list Debtor 1 and Debtor 2.

   Do not state the dependents' names.

   ❑ No
   ❑ Yes. Fill out this information for each dependent.....

Dependent's relationship to Debtor 1 or Debtor 2	Dependent's age	Does dependent live with you?
_____	_____	❑ No ❑ Yes
_____	_____	❑ No ❑ Yes
_____	_____	❑ No ❑ Yes
_____	_____	❑ No ❑ Yes
_____	_____	❑ No ❑ Yes

3. **Do your expenses include expenses of people other than yourself and your dependents?**

   ❑ No
   ❑ Yes

Part 2: Estimate Your Ongoing Monthly Expenses

Estimate your expenses as of your bankruptcy filing date unless you are using this form as a supplement in a Chapter 13 case to report expenses as of a date after the bankruptcy is filed. If this is a supplemental *Schedule J*, check the box at the top of the form and fill in the applicable date.

Include expenses paid for with non-cash government assistance if you know the value of such assistance and have included it on *Schedule I: Your Income* (Official Form B 6I.)

		Your expenses
4. **The rental or home ownership expenses for your residence.** Include first mortgage payments and any rent for the ground or lot.	4.	$_____
If not included in line 4:		
4a. Real estate taxes	4a.	$_____
4b. Property, homeowner's, or renter's insurance	4b.	$_____
4c. Home maintenance, repair, and upkeep expenses	4c.	$_____
4d. Homeowner's association or condominium dues	4d.	$_____

		Your expenses
5. **Additional mortgage payments for your residence**, such as home equity loans	5.	$_____
6. **Utilities:**		
6a. Electricity, heat, natural gas	6a.	$_____
6b. Water, sewer, garbage collection	6b.	$_____
6c. Telephone, cell phone, Internet, satellite, and cable services	6c.	$_____
6d. Other. Specify: _____	6d.	$_____
7. **Food and housekeeping supplies**	7.	$_____
8. **Childcare and children's education costs**	8.	$_____
9. **Clothing, laundry, and dry cleaning**	9.	$_____
10. **Personal care products and services**	10.	$_____
11. **Medical and dental expenses**	11.	$_____
12. **Transportation.** Include gas, maintenance, bus or train fare. Do not include car payments.	12.	$_____
13. **Entertainment, clubs, recreation, newspapers, magazines, and books**	13.	$_____
14. **Charitable contributions and religious donations**	14.	$_____
15. **Insurance.** Do not include insurance deducted from your pay or included in lines 4 or 20.		
15a. Life insurance	15a.	$_____
15b. Health insurance	15b.	$_____
15c. Vehicle insurance	15c.	$_____
15d. Other insurance. Specify:_____	15d.	$_____
16. **Taxes.** Do not include taxes deducted from your pay or included in lines 4 or 20. Specify: _____	16.	$_____
17. **Installment or lease payments:**		
17a. Car payments for Vehicle 1	17a.	$_____
17b. Car payments for Vehicle 2	17b.	$_____
17c. Other. Specify:_____	17c.	$_____
17d. Other. Specify:_____	17d.	$_____
18. **Your payments of alimony, maintenance, and support that you did not report as deducted from your pay on line 5, *Schedule I, Your Income* (Official Form 6I).**	18.	$_____
19. **Other payments you make to support others who do not live with you.** Specify:_____	19.	$_____
20. **Other real property expenses not included in lines 4 or 5 of this form or on *Schedule I*: *Your Income.***		
20a. Mortgages on other property	20a.	$_____
20b. Real estate taxes	20b.	$_____
20c. Property, homeowner's, or renter's insurance	20c.	$_____
20d. Maintenance, repair, and upkeep expenses	20d.	$_____
20e. Homeowner's association or condominium dues	20e.	$_____

21. **Other**. Specify: _____ 21. +$_____

22. **Calculate your monthly expenses.**
22a. Add lines 4 through 21.
22b. Copy line ___ (monthly expenses for Debtor 2), if any, from Official Form 106J-2
22c. Add line 22a and 22b. The result is your monthly expenses. 22. $_____ $_____ $_____

23. **Calculate your monthly net income.**

23a. Copy line 12 (*your combined monthly income*) from *Schedule I.* 23a. $_____

23b. Copy your monthly expenses from line 22 above. 23b. – $_____

23c. Subtract your monthly expenses from your monthly income.
The result is your *monthly net income*. 23c. $_____

24. **Do you expect an increase or decrease in your expenses within the year after you file this form?**

For example, do you expect to finish paying for your car loan within the year or do you expect your mortgage payment to increase or decrease because of a modification to the terms of your mortgage?

- ❑ No.
- ❑ Yes. Explain here:

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Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Check if this is:

❑ An amended filing

❑ A supplement showing post-petition chapter 13 expenses as of the following date:

_____
MM / DD / YYYY

Official Form 106J-2

Schedule J-2: Expenses for Separate Household of Debtor 2

12/15

Use this form for Debtor 2's separate household expenses ONLY IF Debtor 1 and Debtor 2 maintain separate households. ***Answer the questions on this form with respect to Debtor 2 only. If Debtor 1 and Debtor 2 have one or more dependents in common, list the dependent on both Schedule J and Schedule J-2.*** **Be as complete and accurate as possible. If more space is needed, attach another sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.**

Part 1: Describe Your Household

Do you and Debtor 1 maintain separate households? ___ **Yes**
___ **No (Do not complete this form)j**

1. **Do you have dependents?**

   Do not list Debtor 1 but list all other dependents of Debtor 2 regardless of whether listed as a dependent of Debtor 1 on Schedule J.

   Only list dependents

   Do not state the dependents' names.

   ❑ No
   ❑ Yes. Fill out this information for each dependent.....

Dependent's relationship to Debtor 2:	Dependent's age	Does dependent live with you?
_____	_____	❑ No ❑ Yes
_____	_____	❑ No ❑ Yes
_____	_____	❑ No ❑ Yes
_____	_____	❑ No ❑ Yes
_____	_____	❑ No ❑ Yes

2. **Do your expenses include expenses of people other than yourself, your dependents, and Debtor 1?**

   ❑ No
   ❑ Yes

Part 2: Estimate Your Ongoing Monthly Expenses

Estimate your expenses as of your bankruptcy filing date unless you are using this form as a supplement in a Chapter 13 case to report expenses as of a date after the bankruptcy is filed.

Include expenses paid for with non-cash government assistance if you know the value of such assistance and have included it on ***Schedule I: Your Income*** **(Official Form 106I.)**

		Your expenses
3. **The rental or home ownership expenses for your residence.** Include first mortgage payments and any rent for the ground or lot.	4.	$_____
If not included in line 4:		
4a. Real estate taxes	4a.	$_____
4b. Property, homeowner's, or renter's insurance	4b.	$_____
4c. Home maintenance, repair, and upkeep expenses	4c.	$_____
4d. Homeowner's association or condominium dues	4d.	$_____

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

		Your expenses
4. **Additional mortgage payments for your residence**, such as home equity loans	5.	$_____
5. **Utilities:**		
6a. Electricity, heat, natural gas	6a.	$_____
6b. Water, sewer, garbage collection	6b.	$_____
6c. Telephone, cell phone, Internet, satellite, and cable services	6c.	$_____
6d. Other. Specify: _____	6d.	$_____
6. **Food and housekeeping supplies**	7.	$_____
7. **Childcare and children's education costs**	8.	$_____
8. **Clothing, laundry, and dry cleaning**	9.	$_____
9. **Personal care products and services**	10.	$_____
10. **Medical and dental expenses**	11.	$_____
11. **Transportation.** Include gas, maintenance, bus or train fare. Do not include car payments.	12.	$_____
12. **Entertainment, clubs, recreation, newspapers, magazines, and books**	13.	$_____
13. **Charitable contributions and religious donations**	14.	$_____
14. **Insurance.** Do not include insurance deducted from your pay or included in lines 4 or 20.		
15a. Life insurance	15a.	$_____
15b. Health insurance	15b.	$_____
15c. Vehicle insurance	15c.	$_____
15d. Other insurance. Specify:_____	15d.	$_____
16. **Taxes.** Do not include taxes deducted from your pay or included in lines 4 or 20. Specify: _____	16.	$_____
17. **Installment or lease payments:**		
17a. Car payments for Vehicle 1	17a.	$_____
17b. Car payments for Vehicle 2	17b.	$_____
17c. Other. Specify:_____	17c.	$_____
17d. Other. Specify:_____	17d.	$_____
18. **Your payments of alimony, maintenance, and support that you did not report as deducted from your pay on line 5, *Schedule I, Your Income* (Official Form 106I).**	18.	$_____
19. **Other payments you make to support others who do not live with you.** Specify:_____	19.	$_____
20. **Other real property expenses not included in lines 4 or 5 of this form or on *Schedule I*: *Your Income.***		
20a. Mortgages on other property	20a.	$_____
20b. Real estate taxes	20b.	$_____
20c. Property, homeowner's, or renter's insurance	20c.	$_____
20d. Maintenance, repair, and upkeep expenses	20d.	$_____
20e. Homeowner's association or condominium dues	20e.	$_____

21. **Other**. Specify: _____ 21. **+**$_____

22. **Your monthly expenses.** Add lines 4 through 21.
The result is the monthly expenses of Debtor 2. Copy the result to line 22b of Schedule J to calculate the total expenses for Debtor 1 and Debtor 2. 22. $_____

23. Line not used on this form.

_____

24. **Do you expect an increase or decrease in your expenses within the year after you file this form?**

For example, do you expect to finish paying for your car loan within the year or do you expect your mortgage payment to increase or decrease because of a modification to the terms of your mortgage?

- ❑ No.
- ❑ Yes. Explain here:

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COMMITTEE NOTE

Schedule J: Your Expenses (Official Form 106J), formally Official Form 6J, has been revised to include references to new *Schedule J-2: Expenses for Separate Household of Debtor 2* (Official Form 106J-2) at line 1 and new line 22b. The revisions clarify how to calculate monthly net income in joint cases where Debtor 1 and Debtor 2 maintain separate households. Line 22b is added so Schedule J and Schedule J-2 are easily coordinated. Schedule J is also renumbered to conform to the three digit numbering system that was developed for official bankruptcy forms as part of the Forms Modernization Project.

Schedule J-2 is new. It is used to report the monthly expenses of Debtor 2 in a joint debtor case only if Debtor 1 and Debtor 2 maintain separate households.

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Debtor _____

United States Bankruptcy Court for the:_____
[Bankruptcy district]

Case number: _____

❑ Check if this is an amended plan

Official Form 113
Chapter 13 Plan

12/16

Part 1: Notices

To Debtors: **This form sets out options that may be appropriate in some cases, but the presence of an option on the form does not indicate that the option is appropriate in your circumstances or that it is permissible in your judicial district.**
In the following notice to creditors, you must check each box that applies.

To Creditors: **Your rights may be affected by this plan. Your claim may be reduced, modified, or eliminated.**

You should read this plan carefully and discuss it with your attorney, if you have one in this bankruptcy case. If you do not have an attorney, you may wish to consult one.

If you oppose the plan's treatment of your claim or any provision of this plan, you or your attorney must file an objection to confirmation at least 7 days before the date set for the hearing on confirmation, unless otherwise ordered by the Bankruptcy Court. The Bankruptcy Court may confirm this plan without further notice if no objection to confirmation is filed. See Bankruptcy Rule 3015. In addition, you may need to file a timely proof of claim in order to be paid under any plan.

The following matters may be of particular importance to you. ***Boxes must be checked by debtor(s) if applicable.***

❑ **The plan seeks to limit the amount of a secured claim, as set out in Part 3, Section 3.2, which may result in a partial payment or no payment at all to the secured creditor.**

❑ **The plan requests the avoidance of a judicial lien or nonpossessory, nonpurchase-money security interest as set out in Part 3, Section 3.4.**

❑ **The plan sets out nonstandard provisions in Part 9.**

Part 2: Plan Payments and Length of Plan

2.1 Debtor(s) will make regular payments to the trustee as follows:

$ _____ per_____ for _____ months

[and $ _____ per_____ for _____ months.] *Insert additional lines if needed.*

If fewer than 60 months of payments are specified, additional monthly payments will be made to the extent necessary to make the payments to creditors specified in Parts 3 through 6 of this plan.

2.2 Regular payments to the trustee will be made from future earnings in the following manner:

Check all that apply.

❑ Debtor(s) will make payments pursuant to a payroll deduction order.

❑ Debtor(s) will make payments directly to the trustee.

❑ Other (specify method of payment):_____.

2.3 Federal income tax refunds.

Check one.

- ❑ Debtor(s) will retain any federal tax refunds received during the plan term.
- ❑ Debtor(s) will supply the trustee with a copy of each federal tax return filed during the plan term within 14 days of filing the return and will turn over to the trustee all federal income tax refunds, other than earned income tax credits, received during the plan term.
- ❑ Debtor(s) will supply the trustee with federal tax returns filed during the plan term and will turn over to the trustee a portion of any federal income tax refunds received during the plan term as specified below.

_____

_____

2.4 Additional payments.

Check one.

- ❑ **None.** *If "None" is checked, the rest of § 2.4 need not be completed or reproduced.*
- ❑ Debtor(s) will make additional payment(s) to the trustee from other sources, as specified below. Describe the source, estimated amount, and date of each anticipated payment.

_____

_____

2.5 The total amount of estimated payments to the trustee provided for in §§ 2.1 and 2.4 is $ _____.

Part 3: Treatment of Secured Claims

3.1 Maintenance of payments and cure of any default.

Check one.

- ❑ **None.** *If "None" is checked, the rest of § 3.1 need not be completed or reproduced.*
- ❑ The debtor(s) will maintain the contractual installment payments on the claims listed below, with any changes required by the applicable contract, and cure any default in payments on the secured claims listed below. The allowed claim for any arrearage amount will be paid under the plan, with interest, if any, at the rate stated. Unless otherwise ordered by the court, the amounts listed on a proof of claim or modification of a proof of claim filed before the filing deadline under Bankruptcy Rule 3002(c) control over any contrary amounts listed below as to the current installment payment and arrearage. If relief from the automatic stay is ordered as to any item of collateral listed in this paragraph, then, unless otherwise ordered by the court, all payments under this paragraph as to that collateral will cease and all secured claims based on that collateral will no longer be treated by the plan. The final column includes only payments disbursed by the trustee rather than by the debtor.

Name of creditor	**Collateral**	**Current installment payment** (including escrow)	**Amount of arrearage**	**Interest rate on arrearage** (if applicable)	**Monthly plan payment on arrearage**	**Estimated total payments by trustee**
_____	_____	$_____ Disbursed by: ❑ Trustee ❑ Debtor(s)	$_____	_____%	$_____	$_____
_____	_____	$_____ Disbursed by: ❑ Trustee ❑ Debtor(s)	$_____	_____%	$_____	$_____

Insert additional claims as needed.

3.2 Request for valuation of security and claim modification. *Check one.*

❑ **None.** *If "None" is checked, the rest of § 3.2 need not be completed or reproduced.*

The remainder of this paragraph will be effective only if the applicable box in Part 1 of this plan is checked.

❑ The debtor(s) request that the court determine the value of the secured claims listed below. For each non-governmental secured claim listed below, the debtor(s) state that the value of the secured claim should be as stated below in the column headed *Amount of secured* claim. For secured claims of governmental units, unless otherwise ordered by the court, the amounts listed in proofs of claim filed in accordance with the Bankruptcy Rules control over any contrary amounts listed below. For each listed secured claim, the controlling amount of the claim will be paid in full under the plan with interest at the rate stated below.

The portion of any allowed claim that exceeds the amount of the secured claim will be treated as an unsecured claim under Part 5 of this plan. If the amount of a creditor's secured claim is listed below as having no value, the creditor's allowed claim will be treated in its entirety as an unsecured claim under Part 5 of this plan. Unless otherwise ordered by the court, the amount of the creditor's total claim listed on the proof of claim controls over any contrary amounts listed in this paragraph.

The holder of any claim listed below as having value in the column headed *Amount of secured claim* will retain the lien until the earlier of:

(a) payment of the underlying debt determined under nonbankruptcy law, or

(b) discharge under 11 U.S.C. § 1328, at which time the lien will terminate and be released by the creditor. See Bankruptcy Rule 3015.

Name of creditor	Estimated amount of creditor's total claim	Collateral	Value of collateral	Amount of claims senior to creditor's claim	Amount of secured claim	Interest rate	Monthly payment to creditor	Estimated total of monthly payments
_____	$_____	_____	$_____	$_____	$_____	___%	$_____	$_____
_____	$_____	_____	$_____	$_____	$_____	___%	$_____	$_____
_____	$_____	_____	$_____	$_____	$_____	___%	$_____	$_____

Insert additional claims as needed.

3.3 Secured claims excluded from 11 U.S.C. § 506.

Check one.

❑ **None.** *If "None" is checked, the rest of § 3.3 need not be completed or reproduced.*

❑ The claims listed below were either:

(1) incurred within 910 days before the petition date and secured by a purchase money security interest in a motor vehicle acquired for the personal use of the debtor(s), or

(2) incurred within 1 year of the petition date and secured by a purchase money security interest in any other thing of value.

These claims will be paid in full under the plan with interest at the rate stated below. Unless otherwise ordered by the court, the claim amount stated on a proof of claim or modification of a proof of claim filed before the filing deadline under Bankruptcy Rule 3002(c) controls over any contrary amount listed below. The final column includes only payments disbursed by the trustee rather than by the debtor.

Name of creditor	Collateral	Amount of claim	Interest rate	Monthly plan payment	Estimated total payments by trustee
_____	_____	$_____	_____%	$_____ Disbursed by: ❑ Trustee ❑ Debtor(s)	$_____
_____	_____	$_____	_____%	$_____ Disbursed by: ❑ Trustee ❑ Debtor(s)	$_____

Insert additional claims as needed.

3.4 Lien avoidance.

Check one.

❑ **None.** *If "None" is checked, the rest of § 3.4 need not be completed or reproduced.*

The remainder of this paragraph will be effective only if the applicable box on Part 1 of this plan is checked.

❑ The judicial liens or nonpossessory, nonpurchase money security interests securing the claims listed below impair exemptions to which the debtor(s) would have been entitled under 11 U.S.C. § 522(b). A judicial lien or security interest securing a claim listed below will be avoided to the extent that it impairs such exemptions upon entry of the order confirming the plan. The amount of the judicial lien or security interest that is avoided will be treated as an unsecured claim in Part 5. The amount, if any, of the judicial lien or security interest that is not avoided will be paid in full as a secured claim under the plan. See 11 U.S.C. § 522(f) and Bankruptcy Rule 4003(d). *If more than one lien is to be avoided, provide the information separately for each lien.*

Information regarding judicial lien or security interest	Calculation of lien avoidance		Treatment of remaining secured claim
Name of creditor _____	a. Amount of lien	$_____	**Amount of secured claim after avoidance** (line a minus line f) $_____
	b. Amount of all other liens	$_____	
Collateral _____	c. Value of claimed exemptions	+ $_____	**Interest rate** (if applicable) _____ %
	d. Total of adding lines a, b, and c	$_____	
Lien identification (such as judgment date, date of lien recording, book and page number) _____ _____	e. Value of debtor's interest in property	− $_____	**Monthly plan payment** $_____
	f. Subtract line e from line d.	$_____	**Estimated total payments on secured claim** $_____

Extent of exemption impairment (*Check applicable box*):

❑ **Line f is equal to or greater than line a**.
The entire lien is avoided. *(Do not complete the next column.)*

❑ **Line f is less than line a.**
A portion of the lien is avoided. (*Complete the next column.)*

Insert additional claims as needed.

3.5 Surrender of collateral.

Check one.

❑ **None.** *If "None" is checked, the rest of § 3.5 need not be completed or reproduced.*

❑ The debtor(s) elect to surrender to each creditor listed below the collateral that secures the creditor's claim. The debtor(s) consent to termination of the stay under 11 U.S.C. § 362(a) and § 1301 with respect to the collateral upon confirmation of the plan. Any allowed unsecured claim resulting from the disposition of the collateral will be treated in Part 5 below.

Name of creditor	Collateral
_____	_____
_____	_____

Insert additional claims as needed.

Part 4: Treatment of Trustee's Fees and Priority Claims

4.1 General

Trustee's fees and all allowed priority claims other than those treated in § 4.5 will be paid in full without interest.

4.2 Trustee's fees

Trustee's fees are estimated to be _____% of plan payments; and during the plan term, they are estimated to total $_____.

4.3 Attorney's fees

The balance of the fees owed to the attorney for the debtor(s) is estimated to be $_____.

4.4 Priority claims other than attorney's fees and those treated in § 4.5.

Check one.

- ❑ **None.** *If "None" is checked, the rest of § 4.4 need not be completed or reproduced.*
- ❑ The debtor estimates the total amount of other priority claims to be _____.

4.5 Domestic support obligations assigned or owed to a governmental unit and paid less than full amount.

Check one.

- ❑ **None**. *If "None" is checked, the rest of § 4.5 need not be completed or reproduced.*
- ❑ The allowed priority claims listed below are based on a domestic support obligation that has been assigned to or is owed to a governmental unit and will be paid less than the full amount of the claim under 11 U.S.C. § 1322(a)(4), but not less than the amount that would have been paid on such claim if the estate of the debtor were liquidated under chapter 7, see 11 U.S.C. § 1325(a)(4).

	Name of creditor	Amount of claim to be paid
a.	_____	$_____
c.	_____	$_____

Insert additional claims as needed.

Part 5: Treatment of Nonpriority Unsecured Claims

5.1 General

Nonpriority unsecured claims will be paid to the extent allowed as specified in this Part.

5.2 Nonpriority unsecured claims not separately classified.

Allowed nonpriority unsecured claims that are not separately classified will be paid, pro rata. If more than one option is checked, the option providing the largest payment will be effective. *Check all that apply.*

- ❑ The sum of $_____.
- ❑ _____% of the total amount of these claims.
- ❑ The funds remaining after disbursements have been made to all other creditors provided for in this plan.

If the estate of the debtor(s) were liquidated under chapter 7, nonpriority unsecured claims would be paid approximately $_____. Regardless of the options checked above, payments on allowed nonpriority unsecured claims will be made in at least this amount.

5.3 Interest on allowed nonpriority unsecured claims not separately classified. *Check one.*

❑ **None.** *If "None" is checked, the rest of § 5.3 need not be completed or reproduced.*

❑ Interest on allowed nonpriority unsecured claims that are not separately classified will be paid at an annual percentage rate of ____ % under 11 U.S.C. §1325(a)(4), and is estimated to total $ _____.

5.4 Maintenance of payments and cure of any default on nonpriority unsecured claims. *Check one.*

❑ **None.** *If "None" is checked, the rest of § 5.4 need not be completed or reproduced.*

❑ The debtor(s) will maintain the contractual installment payments and cure any default in payments on the unsecured claims listed below on which the last payment is due after the final plan payment. The allowed claim for the arrearage amount will be paid under the plan.

Name of creditor	Current installment payment	Amount of arrearage to be paid	Estimated total payments by trustee
_____	$_____ Disbursed by: ❑ Trustee ❑ Debtor(s)	$_____	$_____
_____	$_____ Disbursed by: ❑ Trustee ❑ Debtor(s)	$_____	$_____

Insert additional claims as needed.

5.5 Other separately classified nonpriority unsecured claims. *Check one.*

❑ **None.** *If "None" is checked, the rest of § 5.5 need not be completed or reproduced.*

❑ The nonpriority unsecured allowed claims listed below are separately classified and will be treated as follows:

Name of creditor	Basis for separate classification and treatment	Amount to be paid on the claim	Interest rate (if applicable)	Estimated total amount of payments
_____	_____	$_____	_____%	$_____
_____	_____	$_____	_____%	$_____

Insert additional claims as needed.

Part 6: Executory Contracts and Unexpired Leases

6.1 The executory contracts and unexpired leases listed below are assumed and will be treated as specified. All other executory contracts and unexpired leases are rejected. *Check one.*

❑ **None.** *If "None" is checked, the rest of § 6.1 need not be completed or reproduced.*

❑ **Assumed items.** The final column includes only payments disbursed by the trustee rather than by the debtor.

Name of creditor	Property description	Treatment (Refer to other plan section if applicable)	Current installment payment	Amount of arrearage to be paid	Estimated total payments by trustee
_____	_____	_____ _____	$_____ Disbursed by: ❑ Trustee ❑ Debtor(s)	$_____	$_____
_____	_____	_____ _____	$_____ Disbursed by: ❑ Trustee ❑ Debtor(s)	$_____	$_____

Insert additional contracts or leases as needed.

Part 7: Order of Distribution of Trustee Payments

7.1 The trustee will make the monthly payments required in Parts 3 through 6 in the following order, with payments other than those listed to be made in the order determined by the trustee:

a. Trustee's fees

b. _____

c. _____ *Insert additional lines if needed.*

Part 8: Vesting of Property of the Estate

8.1 Property of the estate shall revest in the debtor(s) upon

Check the applicable box:

❑ plan confirmation.

❑ closing of the case.

❑ other: _____.

Part 9: Nonstandard Plan Provisions

❑ **None.** *If "None" is checked, the rest of Part 9 need not be completed or reproduced.*

Under Bankruptcy Rule 3015(c), nonstandard provisions are required to be set forth below.

These plan provisions will be effective only if the applicable box in Part 1 of this plan is checked.

_____

_____

_____

_____

_____

Part 10: Signatures

✘ _____ Date_____

Signature of Attorney for Debtor(s)

✘ _____ Date_____

✘ _____ Date_____

Signature(s) of Debtor(s) (required if not represented by an attorney; otherwise optional)

Chapter 13 Plan Exhibit: Estimated Amounts of Trustee Payments

The trustee will make the following estimated payments on allowed claims in the order set forth in Section 7.1:

a.	**Maintenance and cure payments on secured claims** (*Part 3, Section 3.1 total*):		$_____
b.	**Modified secured claims** (*Part 3, Section 3.2 total*):		$_____
c.	**Secured claims excluded from 11 U.S.C. § 506** (*Part 3, Section 3.3 total*):		$_____
d.	**Judicial liens or security interests partially avoided** (*Part 3, Section 3.4 total*):		$_____
e.	**Administrative and other priority claims** (*Part 4 total*):		$_____
f.	**Nonpriority unsecured claims** (*Part 5, Section 5.2 total*):		$_____
g.	**Interest on allowed unsecured claims** (*Part 5, Section 5.3 total*)		$_____
h.	**Maintenance and cure payments on unsecured claims** (*Part 5, Section 5.4 total*)		$_____
i.	**Separately classified unsecured claims** (*Part 5, Section 5.5 total*)		$_____
j.	**Arrearage payments on executory contracts and unexpired leases** *(Part 6, Section 6.1 total)*	+	$_____

Total of lines a through j..... $_____

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COMMITTEE NOTE

Official Form 113 is new and is the required plan form in all chapter 13 cases. See Bankruptcy Rule 3015. Alterations to the text of the form or the order of its provisions, except as permitted by the form itself, must comply with Bankruptcy Rule 9009. As the form explains, spaces for responses may be expanded or collapsed as appropriate, and sections that are inapplicable do not need to be reproduced. Portions of the form provide multiple options for provisions of a debtor's plan, but some of those options may not be appropriate in a given debtor's situation or may not be allowed in the court presiding over the case. Debtors are advised to refer to applicable local rulings.

Part 1. This part sets out warnings to both debtors and creditors. For creditors, if the plan includes one or more of the provisions listed in this part, the appropriate boxes must be checked. For example, if Part 9 of the plan proposes a provision not included in, or contrary to, the Official Form, that nonstandard provision will be ineffective if the appropriate check box in Part 1 is not selected.

Part 2. This part states the proposed periodic plan payments, the estimated total plan payments, and sources of funding for the plan. Section 2.1 allows the debtor or debtors to propose periodic payments in other than monthly intervals. For example, if the debtor receives a paycheck every week and wishes to make plan payments from each check, that should be indicated in § 2.1. If the debtor proposes to make payments according to different "steps," the amounts and intervals of those payments should also be indicated in § 2.1. Section 2.2 provides for the manner in which the debtor will make regular payments to the trustee. If the debtor selects the option of making payments pursuant to a payroll deduction order, that selection serves as a request by the debtor for entry of the order. Whether to enter a payroll deduction order is determined by the court. See Code § 1325(c). If the debtor selects the option of making payments other than by direct payments to the trustee or by a payroll deduction order, the alternative method (*e.g.*, a designated third party electronic funds transfer program) must be specified.

Part 3. This part provides for the treatment of secured claims.

Section 3.1 provides for the treatment of claims under Code § 1322(b)(5) (maintaining current payments and curing any arrearage). For the claim of a secured creditor listed in § 3.1, an estimated arrearage amount should be given. A contrary arrearage amount listed on the creditor's proof of claim, unless contested by objection or motion, will control over the amount given in the plan.

In § 3.2, the plan may propose to determine under Code § 506(a) the value of a secured claim. For example, the plan could seek to reduce the secured portion of a creditor's claim to the value of the collateral securing it. For the secured claim of a non-governmental creditor, that determination would be binding upon confirmation of the plan. For the secured claim of a governmental unit, however, a contrary valuation listed on the creditor's proof of claim, unless contested by objection or motion, would control over the valuation given in the plan. See Bankruptcy Rule 3012. Bankruptcy Rule 3002 contemplates that a debtor, the trustee, or another entity may file a proof of claim if the creditor does not do so in a timely manner. See Bankruptcy Rules 3004 and 3005. Section 3.2 will not be effective unless the appropriate check box in Part 1 is selected.

Section 3.3 deals with secured claims that may not be bifurcated into secured and unsecured portions under Code § 506(a), but it allows for an interest rate other than the contract rate to be applied to payments on such a claim. If appropriate, a claim may be treated under § 3.1 instead of § 3.3.

In § 3.4, the plan may propose to avoid certain judicial liens or security interests encumbering exempt property in accordance with Code § 522(f). This section includes space for the calculation of the amount of the judicial lien or security interest that is avoided. A plan proposing avoidance in § 3.4 must be served in the manner provided by Bankruptcy Rule 7004 for service of a summons and complaint. See Bankruptcy Rule 4003. Section 3.4 will not be effective unless the appropriate check box in Part 1 is selected.

Section 3.5 provides for elections to surrender collateral and consent to termination of the stay under § 362(a) and § 1301 with respect to the collateral surrendered. Termination will be effective upon confirmation of the plan.

Part 4. This part provides for the treatment of trustee's fees and claims entitled to priority status. Section 4.1 provides that trustee's fees and all allowed priority claims (other than those domestic support obligations treated in § 4.5) will be paid in full. In § 4.2, the plan lists an estimate of the trustee's fees. Although the estimate may indicate whether the plan will be feasible, it does not affect the trustee's entitlement to fees as determined by statute. In § 4.3, the form requests the balance of attorney's fees owed. Additional details about payments of attorney's fees, including information about their timing and approval, are left to the requirements of local practice. In § 4.4, the plan calls for an estimated amount of priority claims. A contrary amount listed on the creditor's proof of claim, unless changed by court order in response to an objection or motion, will control over the amount given in § 4.4. In § 4.5, the plan

may propose to pay less than the full amount of a domestic support obligation that has been assigned to, or is owed to, a governmental unit, but not less than the amount that claim would have received in a chapter 7 liquidation.

Part 5. This part provides for the treatment of unsecured claims that are not entitled to priority status. In § 5.2, the plan may propose to pay nonpriority unsecured claims in accordance with several options. One or more options may be selected. For example, the plan could propose simply to pay unsecured creditors any funds remaining after disbursements to other creditors, or also provide that a defined percentage of the total amount of unsecured claims will be paid. In § 5.4, the plan may provide for the separate classification of nonpriority unsecured claims (such as co-debtor claims) as permitted under Code § 1322(b)(1).

Part 6. This part provides for executory contracts and unexpired leases. An executory contract or unexpired lease is rejected unless it is listed in this part. If the plan proposes neither to assume nor reject an executory contract or unexpired lease, that treatment would have to be set forth as a nonstandard provision in Part 9.

Part 7. This part provides an order of distribution of payments under the plan. Other than the trustee's fees, the order of distribution is left to be completed by the debtor in keeping with the requirements of the Code. The debtor may instead elect to have the trustee direct the order of distribution.

Part 8. This part defines when property of the estate will revest in the debtor or debtors. One choice must be selected—upon plan confirmation, upon closing the case, or upon some other specified event. This plan provision is subject to a contrary court order under Code § 1327(b).

Part 9. This part gives the debtor or debtors the opportunity to propose provisions that are not otherwise in, or are contrary to, the Official Form. All such nonstandard provisions must be set forth in this part and nowhere else in the plan. This part will not be effective unless the appropriate check box in Part 1 is selected. See Bankruptcy Rule 3015.

Part 10. The plan must be signed by the attorney for the debtor or debtors. If the debtor or debtors are not represented by an attorney, they must sign the plan, but the signature of represented debtors is optional.

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2014 Published Form, with most expandable lines marked "none"

United States Bankruptcy Court for the District of _____

Debtor(s): John and Mary Smith

Case No.: 14 B 12345

Date: December 2, 2016

☐ Check if this is an amended plan

Official Form 113
Chapter 13 Plan

12/15

Part 1: Notices

To Debtors: This form sets out options that may be appropriate in some cases, but the presence of an option on the form does not indicate that the option is appropriate in your circumstances or that it is permissible in your judicial district. *In the following notice to creditors, you must check each box that applies.*

To Creditors: Your rights may be affected by this plan. Your claim may be reduced, modified, or eliminated.

You should read this plan carefully and discuss it with your attorney, if you have one in this bankruptcy case. If you do not have an attorney, you may wish to consult one.

If you oppose the plan's treatment of your claim or any provision of this plan, you or your attorney must file an objection to confirmation at least 7 days before the date set for the hearing on confirmation, unless otherwise ordered by the Bankruptcy Court. The Bankruptcy Court may confirm this plan without further notice if no objection to confirmation is filed. See Bankruptcy Rule 3015. In addition, you may need to file a timely proof of claim in order to be paid under any plan.

The following matters may be of particular importance to you. ***Boxes must be checked by debtor(s) if applicable.***

☐ **The plan seeks to limit the amount of a secured claim, as set out in Part 3, Section 3.2, which may result in a partial payment or no payment at all to the secured creditor.**

☐ **The plan requests the avoidance of a judicial lien or nonpossessory, nonpurchase-money security interest as set out in Part 3, Section 3.4.**

☐ **The plan sets out nonstandard provisions in Part 9.**

Part 2: Plan Payments and Length of Plan

2.1 Debtor(s) will make regular payments to the trustee as follows:

$ 2500 per month for 56 months

If fewer than 60 months of payments are specified, additional monthly payments will be made to the extent necessary to make the payments to creditors specified in Parts 3 through 6 of this plan.

2.2 Regular payments to the trustee will be made from future earnings in the following manner: *Check all that apply.*

☐ Debtor(s) will make payments pursuant to a payroll deduction order.

☒ Debtor(s) will make payments directly to the trustee.

☐ Other (specify method of payment):_____.

2.3 Federal income tax refunds. *Check one.*

☒ Debtor(s) will retain any federal tax refunds received during the plan term.

☐ Debtor(s) will supply the trustee with a copy of each federal tax return filed during the plan term within 14 days of filing the return and will turn over to the trustee all federal income tax refunds, other than earned income tax credits, received during the plan term.

☐ Debtor(s) will supply the trustee with federal tax returns filed during the plan term and will turn over to the trustee a portion of any federal income tax refunds received during the plan term as specified below.

_____

_____

SAMPLE

2.4 Additional payments. *Check one.*

☒ **None** *If "None" is checked, the rest of § 2.4 need not be completed or reproduced.*

2.5 The total amount of estimated payments to the trustee provided for in §§ 2.1 and 2.4 is $ 140,000.

Part 3: Treatment of Secured Claims

3.1 Maintenance of payments and cure of any default. *Check one.*

❑ **None** *If "None" is checked, the rest of § 3.1 need not be completed or reproduced.*

☒ The debtor(s) will maintain the contractual installment payments on the claims listed below, with any changes required by the applicable contract, and cure any default in payments on the secured claims listed below. The allowed claim for any arrearage amount will be paid under the plan, with interest, if any, at the rate stated. Unless otherwise ordered by the court, the amounts listed on a proof of claim or modification of a proof of claim filed before the filing deadline under Bankruptcy Rule 3002(c) control over any contrary amounts listed below as to the current installment payment and arrearage. If relief from the automatic stay is ordered as to any item of collateral listed in this paragraph, then, unless otherwise ordered by the court, all payments under this paragraph as to that collateral will cease and all secured claims based on that collateral will no longer be treated by the plan. The final column includes only payments disbursed by the trustee rather than by the debtor.

Name of creditor	**Collateral**	**Current installment payment** (including escrow)	**Amount of arrearage**	**Interest rate on arrearage** (if applicable)	**Monthly plan payment on arrearage**	**Estimated total payments by trustee**
Mortgage Servicer, Inc.	**Home at 123 Main St City, State**	**$1,500** Disbursed by: ☒ Trustee ❑ Debtor(s)	**$3,000**		**100**	**$87,000**

3.2 Request for valuation of security and claim modification. *Check one.*

☒ **None** *If "None" is checked, the rest of § 3.2 need not be completed or reproduced.*

3.3 Secured claims excluded from 11 U.S.C. § 506. *Check one.*

❑ **None** *If "None" is checked, the rest of § 3.3 need not be completed or reproduced.*

☒ The claims listed below were either:

(1) incurred within 910 days before the petition date and secured by a purchase money security interest in a motor vehicle acquired for the personal use of the debtor(s), or

(2) incurred within 1 year of the petition date and secured by a purchase money security interest in any other thing of value.

These claims will be paid in full under the plan with interest at the rate stated below. Unless otherwise ordered by the court, the claim amount stated on a proof of claim or modification of a proof of claim filed before the filing deadline under Bankruptcy Rule 3002(c) controls over any contrary amount listed below. The final column includes only payments disbursed by the trustee rather than by the debtor.

Name of creditor	**Collateral**	**Amount of claim**	**Interest rate**	**Monthly plan payment**	**Estimated total payments by trustee**
Mortgage Servicer, Inc.	**2012 Model Make Pickup Truck**	**$8,400**	**3.0%**	**$150** Disbursed by: ❑ Trustee ☒ Debtor(s)	**$400**

3.4 Lien avoidance. *Check one.*

☒**None** *If "None" is "checked, the rest of Section § 3.4 need not be completed or reproduced.*

3.5 Surrender of collateral. *Check one.*

☒**None** *If "None" is checked, the rest of § 3.5 need not be completed or reproduced.*

SAMPLE

Part 4: Treatment of Trustee's Fees and Priority Claims

4.1 General

Trustee's fees and all allowed priority claims other than those treated in § 4.5 will be paid in full without interest.

4.2 Trustee's fees

Trustee's fees are estimated to be 10 % of plan payments; and during the plan term, they are estimated to total $ $14,000.

4.3 Attorney's fees

The balance of the fees owed to the attorney for the debtor(s) is estimated to be $ 4,000.

4.4 Priority claims other than attorney's fees and those treated in § 4.5. *Check one.*

☒ **None** *If "None" is checked, the rest of § 4.4 need not be completed or reproduced.*

4.5 Domestic support obligations assigned or owed to a governmental unit and paid less than full amount. *Check one.*

☒ **None** *If "None" is checked, the rest of § 4.5 need not be completed or reproduced.*

Part 5: Treatment of Nonpriority Unsecured Claims

5.1 General

Nonpriority unsecured claims will be paid to the extent allowed as specified in this Part.

5.2 Nonpriority unsecured claims not separately classified.

Allowed nonpriority unsecured claims that are not separately classified will be paid, pro rata. If more than one option is checked, the option providing the largest payment will be effective. *Check all that apply.*

❑ The sum of $_____.

❑ _____% of the total amount of these claims.

❑ The funds remaining **after** disbursements have been made to all other creditors provided for in this plan.

If the estate of the debtor(s) were liquidated under chapter 7, nonpriority unsecured claims would be paid approximately $_____. Regardless of the options checked above, payments on allowed nonpriority unsecured claims will be made in at least this amount.

5.3 Interest on allowed nonpriority unsecured claims not separately classified. *Check one.*

☒ **None** *If "None" is checked, the rest of § 5.3 need not be completed or reproduced.*

5.4 Maintenance of payments and cure of any default on nonpriority unsecured claims. *Check one.*

☒ **None** *If "None" is checked, the rest of § 5.4 need not be completed or reproduced.*

5.5 Other separately classified nonpriority unsecured claims. *Check one.*

5.6 ☒ **None** *If "None" is checked, the rest of § 5.5 need not be completed or reproduced.*

Part 6: Executory Contracts and Unexpired Leases

6.1 The executory contracts and unexpired leases listed below are assumed and will be treated as specified. All other executory contracts and unexpired leases are rejected. *Check one.*

☒ **None** *If checked, the rest of § 6.1 need not be completed or reproduced.*

Part 7: Order of Distribution of Trustee Payments

7.1 The trustee will make the monthly payments required in Parts 3 through 6 in the following order, with payments other than those listed to be made in the order determined by the trustee:

a. Trustee's fees

b. _____

c. _____ *Insert additional lines if needed.*

SAMPLE

Part 8: Vesting of Property of the Estate

8.1 Property of the estate shall revest in the debtor(s) upon *(Check the applicable box):*

- ❑ plan confirmation.
- ❑ closing of the case.
- ❑ other: _____.

Part 9: Nonstandard Plan Provisions

☒ **None** *If "None" is checked, the rest of Part 9 need not be completed or reproduced.*

Part 10: Signatures

✘ _____ Date_____

Signature of Attorney for Debtor(s)

✘ _____ Date_____

✘ _____ Date_____

Signature(s) of Debtor(s) (required if not represented by an attorney; otherwise optional)

Chapter 13 Plan Exhibit: Estimated Amounts of Trustee Payments

The trustee will make the following estimated payments on allowed claims in the order set forth in Section 7.1:

a. Maintenance and cure payments on secured claims (*Part 3, Section 3.1 total*):	$ 87,000
b. Modified secured claims (*Part 3, Section 3.2 total*):	0
c. Secured claims excluded from 11 U.S.C. § 506 (*Part 3, Section 3.3 total*):	400
d. Judicial liens or security interests partially avoided (*Part 3, Section 3.4 total*):	0
e. Administrative and other priority claims (*Part 4 total*):	18,000
f. Nonpriority unsecured claims (*Part 5, Section 5.2 total*):	34,600
g. Interest on allowed unsecured claims (*Part 5, Section 5.3 total*)	0
h. Maintenance and cure payments on unsecured claims (*Part 5, Section 5.4 total*)	0
i. Separately classified unsecured claims (*Part 5, Section 5.5 total*)	0
j. Arrearage payments on executory contracts and unexpired leases *(Part 6, Section 6.1 total)*	$0
Total of lines a through j	$140,000

SAMPLE

Instructions

For Bankruptcy Forms for Non-Individuals

U.S. Bankruptcy Court | December 2015

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General Instructions

This document provides instructions for completing selected forms that entities other than individuals and municipalities filing for bankruptcy must submit to the U.S. Bankruptcy Court. All of the required forms can be downloaded without charge from:

http://www.uscourts.gov/FormsAndFees/Forms/BankruptcyForms.aspx.

The instructions are designed to accompany the forms and are intended to help in understanding what information is required to properly file. The representatives of the debtor working on the forms should review each form and any pertinent instructions before supplying the information for each form.

Although the forms often parallel how businesses commonly keep their financial records, it is not always possible to do so because information needed in a bankruptcy case is often different from that prescribed under generally accepted accounting principles. These instructions highlight some of the differences between the bankruptcy documents and accounting records. The debtor must provide all information required.

These instructions are not a substitute for legal advice about bankruptcy and the required forms. Completing the forms is only a part of the bankruptcy process.

Non-individual debtors must have an attorney to file for bankruptcy. Although the attorney may prepare the forms using information supplied by the debtor, representatives of the debtor must ensure that the forms are accurate and complete and must sign the forms under penalty of perjury.

Read This Important Warning

Non-individual debtors must be represented by an attorney.

Bankruptcy can have serious long-term financial and legal consequences, including loss of property. Only an attorney can give legal advice regarding the possible consequences of filing for bankruptcy and the various options that are available.

Entities may not file bankruptcy if they are not eligible to file or do not intend to file the documents necessary to complete the bankruptcy.

Bankruptcy fraud is a serious crime. Making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to $500,000 or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

Overview of the bankruptcy forms and filing bankruptcy

Use the forms in the 200 series if the debtor is a non-individual, such as a corporation, partnership, or limited liability company (LLC). Forms in the 100 series are used by individuals or married couples. Sole proprietors must use the forms in the 100 series.

When a bankruptcy petition is filed, the U.S. Bankruptcy Court opens a case. It is important that the answers to the questions on the forms be complete and accurate so that the case proceeds smoothly. A person who gives false information in connection with a bankruptcy case could be charged with a federal crime, and the debtor may lose the benefits of filing for bankruptcy.

Filing a bankruptcy case is not private. Anyone has a right to see a debtor's bankruptcy forms after the debtor files them. In some circumstances, the bankruptcy court may issue a protective order to keep trade secrets or other confidential proprietary information from being disclosed to the public. 11 U.S.C. § 107 and Bankruptcy Rule 9037.

Follow these privacy restrictions

- Do not list a minor child's full name on any form. Instead, fill in only the child's initials and the full name and address of the child's parent or guardian. For example, write A.B., a minor child (*John Doe, parent, 123 Main St., City, State*). 11 U.S.C. § 112; Bankruptcy Rules 1007(m) and 9037.
- Do not list a person's date of birth.
- Do not list anyone's full Social Security number on any form.

Understand the terms used in the forms

To understand terms used in the forms and the instructions, see the *Glossary* at the end of this document.

Things to remember when filling out and filing these forms

- Be as complete and accurate as possible.
- If more space is needed, attach a separate sheet to the form. On the top of any pages added, write the debtor's name and case number, if known. Also identify the form and line number to which the additional information applies.
- Do not file these instructions with the bankruptcy forms that the debtor files with the court.
- For the debtor's records, be sure to keep a copy of the debtor's bankruptcy documents and all attachments that the debtor files.

Filing amended forms

Check the box on the top of the form to show that the debtor is submitting an amendment.

On what date was a debt incurred?

When a debt was incurred on a single date, fill in the actual date that the debt was incurred.

When a debt was incurred on multiple dates, fill in the range of dates. For example, if the debt is from a credit card, fill in the month and year of the first and last transactions, if known.

About the Process for Filing a Bankruptcy Case for Non-Individuals

To file for bankruptcy, the debtor must give the court several forms and documents. Some must be filed at the time the debtor files the case. Others may be filed up to 14 days later.

When the debtor files its bankruptcy case

The debtor must pay the entire filing fee when the case is filed. The debtor must file the forms listed below on the date the debtor files its bankruptcy case. For copies of the forms listed here, go to http://www.uscourts.gov/FormsAndFees/Forms/BankruptcyForms.aspx.

- *Voluntary Petition for Non-Individuals Filing for Bankruptcy* (Official Form 201). This form opens the case. Directions for completing it are included in the form itself.
- *A list of names and addresses of all of the debtor's creditors*, formatted as a mailing list according to instructions from the bankruptcy court in which the debtor files. (The bankruptcy court may call this a *creditor matrix* or *mailing matrix*.)
- *Chapter 11 Cases: List of Creditors Who Have the 20 Largest Unsecured Claims Against Debtor and Are Not Insiders* (Official Form 204). Fill out this form only if the debtor files under chapter 11.
- *Attachment to Voluntary Petition for Non-Individuals Filing for Bankruptcy Under Chapter 11* (Official Form 201A). This form is filed only by non-individual debtors who file under chapter 11 and who are required to file periodic reports (for example, Forms 10K and 10Q) with the Securities and Exchange Commission pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934.

When the debtor files its bankruptcy case or within 14 days after filing

The debtor must file the forms listed below with its *Voluntary Petition for Non-Individuals Filing for Bankruptcy* (Official Form 201) or within 14 days, or such additional time as the court may order, after filing. If the debtor does not do so, the case may be dismissed. Although it is possible to open a case by submitting only the documents listed under *When the debtor files its bankruptcy case*, the debtor should file the entire set of forms at one time to help its case proceed smoothly.

The debtor must fill out all of the forms completely even though some forms may ask similar questions.

The list below identifies the documents that all non-individuals must file as well as those that are specific to each chapter. For copies of the official forms, go to http://www.uscourts.gov/FormsAndFees/Forms/BankruptcyForms.aspx.

All non-individuals who file for bankruptcy must file these forms and the forms for the specific chapter:

- *Schedules of Assets and Liabilities* (Official Form 206) which includes these forms:
  - *Schedule A/B: Real and Personal Property* (Official Form 206A/B)
  - *Schedule D: Creditors Who Have Claims Secured by Property* (Official Form 206D)
  - *Schedule E/F: Creditors Who Have Unsecured Claims* (Official Form 206E/F)
  - *Schedule G: Executory Contracts and Unexpired Leases* (Official Form 206G)
  - *Schedule H: Codebtors* (Official Form 206H)
  - *Summary of Assets and Liabilities for Non-Individuals* (Official Form 206Sum). This form gives an overview of the totals on the schedules.
- *Declaration Under Penalty of Perjury for Non-Individual Debtors* (Official Form 202–Declaration)
- *Statement of Financial Affairs for Non-Individuals Filing for Bankruptcy* (Official Form 207)
- *Disclosure of Compensation to Debtor's Attorney* — Unless local rules provide otherwise, Director's Form 2030 may be used.
- Statement of current income and current expenditures — Unless local rules provide otherwise, debtors may use *Schedule I/J: Monthly Receipts and Disbursements of Non-Individual Debtors Where Current Accounting Statements Are Unavailable* (Form 2060 I/J)

If a small business debtor files under chapter 11, the debtor must also file:

If the debtor files under chapter 11 and meets the criteria and debt limits outlined in 11 U.S.C. § 101(51D), the debtor qualifies as a small business debtor and must file with the petition its most recent

- balance sheet,
- statement of operations,
- cash-flow statement, and
- federal income tax return.

If the debtor does not have these documents, the debtor must file a statement made under penalty of perjury that the debtor has not prepared either a balance sheet, statement of operations, or cash-flow statement or the debtor has not filed a federal tax return.

Instructions for Selected Forms

Schedule A/B: Real and Personal Property (Official Form 206A/B)

Schedule A/B: Assets – Real and Personal Property (Official Form 206A/B) requires debtors to list most of the property interests that are involved in a bankruptcy case. All debtors filing for bankruptcy must honestly list everything they own or in which they have a legal, equitable, or future interest. *Legal, equitable, or future interest* are broad terms and include all kinds of property interests in both tangible and intangible property, whether or not anyone else has an interest in that property.

The information in this form is grouped by asset category and, in general, follows the layout and order of liquidity found in a balance sheet. Examples are included for some items and are meant to give debtors an idea of what to include in the categories. The examples are not intended to be complete lists of everything within that category.

An authorized representative of the debtor must verify under penalty of perjury that the information provided is true and correct. Bankruptcy Rule 1008.

If the debtor makes a false statement or conceals property, the debtor may lose the property, be fined up to $500,000, or be imprisoned for up to 20 years or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

Understand the terms used in this form

Current value

In this form, the debtor must report the *current value of the debtor's interest* in any property that it owns in each category. *Current value* is sometimes called *fair market value* and, for this form, it is the fair market value as of the date of filing the bankruptcy petition. *Current value* is how much the property is currently worth, which may be more or less than the amount the debtor paid for the property or the book value of the property.

Valuation method used for current value

In certain asset categories, the debtor must also provide the valuation method used to calculate the current value. Select a reasonable method that provides an accurate estimation of current value.

Examples of valuation methods may include:

- **Appraisal** (provide the date the appraisal was conducted);
- **Comparable sales** (for example, blue-book values or comparable sales provided by a broker);
- **Revenue-based** (for example, present value of revenue streams calculated for a hotel or apartment complex based on rents and available rooms);

- **Liquidation value** (for example, the price of the property when it is not allowed sufficient time to sell in the open market—this figure is typically provided by a professional);
- **Expert** (for example, an accountant or advisor who has special expertise with regard to the property);
- **Replacement value** (the cost of replacing the property);
- **Tax records** (for example, the value assessed on the property by the county appraisal);
- **Recent cost-based valuations** (for example, first-in first-out inventory valuation method).

Net book value of debtor's interest (where available)

If the debtor does not prepare a balance sheet for its financial records or for its tax returns, then it does not need to provide information in this column.

If the debtor prepares a balance sheet for its financial records or for its tax returns, then it must also provide the *net book value of debtor's interest* for certain types of property. For purposes of this form, use the book value reported on the most recent balance sheet prepared before filing this case.

Net book value is the carrying value of an asset on the debtor's books or financial records and is generally calculated by taking the original cost of the property and subtracting depreciation or amortization expenses (if any).

Depreciation and amortization expenses are calculated using accounting procedures that allocate the cost of certain property over its useful life. It represents the decline in value over time due to wear and tear, obsolescence, or other factors.

How to list items on this form

- List items only once on this form; do not list an item in more than one category. If an item could fit into more than one category, select the category the debtor thinks is the most suitable and list the item there. For example, a car dealership may report vehicles under *Part 4: Inventory* instead of under *Part 8: Machinery, equipment, and vehicles*.
- List property held for resale in *Part 4: Inventory*. If the debtor separates manufactured items into raw materials, work in progress, and finished goods, report those items in the categories provided as appropriate. If the debtor only purchases items and holds them for resale and does not do any manufacturing, then report the items under finished goods, not as raw materials or work in progress.
- The values reported on this form must match the values reported on *Schedule D: Creditors Who Have Claims Secured by Property* (Official Form 206D).
- In Schedule A/B, list any executory contracts or unexpired lease contracts that have a net value (for example, an unexpired lease for a building, a real estate listing agreement, or leases for machinery or equipment). Also list them on *Schedule G: Executory Contracts and Unexpired Leases* (Official Form 206G).

Schedule D: Creditors Who Have Claims Secured by Property (Official Form 206D)

The people or organizations to whom the debtor owes money are called its *creditors*. A *claim* is a creditor's right to payment.

Creditors may have different types of claims:

- **Secured claims**. Report these on *Schedule D: Creditors Who Have Claims Secured by Property* (Official Form 206D).
- **Unsecured claims**. Report these on *Schedule E/F: Creditors Who Have Unsecured Claims* (Official Form 206E/F).

Creditors with secured claims may be able to get paid from specific property in which that creditor has a security interest, such as a mortgage or a lien. That property is sometimes called *collateral* for the debt. Creditors with unsecured claims do not have rights against specific property.

Claims may be contingent, unliquidated, or disputed

Many claims have a specific amount which the debtor clearly owes. But some claims are uncertain or become due only after the bankruptcy petition is filed. All claims must be listed in the schedules, even if they are contingent, unliquidated, or disputed.

A claim is *contingent* if the debtor is not obligated to pay it unless a particular event occurs after the bankruptcy petition is filed.

A claim is *unliquidated* if the amount of the debt cannot be readily determined, such as by referring to an agreement or by a simple computation. An unliquidated claim is one for which there may be a definite liability but where the amount of the claim has not been determined.

A claim is *disputed* if the debtor disagrees that it owes all or a portion of the debt.

A single claim can have one, more than one, or none of these characteristics.

Do not omit any secured creditors

In alphabetical order, list all creditors that have judgment liens, garnishments, statutory liens, mortgages, deeds of trust, and purchase money security interests or other consensual liens against property of the debtor. These categories can be used to describe the lien.

The form is divided into parts. List a debt in Part 1 only once and list any other entities that should be notified about that debt in Part 2. For example, if an attorney is trying to collect a debt that the debtor owes to someone else, list the person to whom the debtor owes the debt in Part 1 and list the attorney in Part 2. If the case is a chapter 11 case and the amount of the creditor's unsecured claim in Column C makes it one of the 20 largest unsecured creditors, the creditor must also be included on *Chapter 11 or Chapter 9 Cases: List of Creditors Who Have the 20 Largest Unsecured Claims Who Are Not Insiders* (Official Form B204).

Determine the amount of each secured creditor's claim or claims

To determine the amount of a secured claim, compare the amount of the claim to the value of the debtor's interest in the property that is collateral for the claim. If that value is greater than the amount of the claim, then the entire amount of the claim is *secured*.

If the value of the property that is collateral for the claim is less than the amount of the claim, the difference is *unsecured*.

For example, if the outstanding balance due on an equipment loan is $100,000 and the equipment is worth $80,000, the lender has a secured claim of $80,000 and an unsecured claim of $20,000. In that situation, list the creditor only once on *Schedule D: Creditors Who Have Claims Secured by Property* (Official Form 206D). Do not list the creditor again on *Schedule E/F: Creditors Who Have Unsecured Claims* (Official Form 206E/F). In addition, if the case is a chapter 11 case and the creditor's unsecured claim makes it one of the 20 largest unsecured creditors, the creditor must also be included on *Chapter 11 or Chapter 9 Cases: List of Creditors Who Have the 20 Largest Unsecured Claims Who Are Not Insiders* (Official Form 204).

List a creditor in Schedule D even if it appears that no value exists to support that creditor's secured claim, as long as the creditor has a security interest in some property owned by the debtor. If the claim is secured only by property owned by a non-debtor, list the claim in Schedule E/F.

If there is more than one secured claim against the same property, the amount of the claim that is entitled to be paid first must be subtracted from the property value to determine how much value remains for the next claim.

For example, if a building worth $300,000 has a first mortgage of $200,000 and a second mortgage of $150,000, the first mortgage would be fully secured, and there would be $100,000 of property value for the second mortgage, and the claim secured by the second mortgage would have an unsecured portion of $50,000.

	$300,000	value of a building
-	$200,000	first mortgage
	$100,000	remaining property value
	$150,000	second mortgage
-	$100,000	remaining property value
	$ 50,000	unsecured portion of second mortgage claim

Show the amount of any unsecured portion of a secured claim on Schedule D in Column C.

Schedule E/F: Creditors Who Have Unsecured Claims (Official Form 206E/F)

The people or organizations to whom the debtor owes money are called its *creditors*. A claim is a creditor's right to payment.

Creditors may have different types of claims:

- **Secured claims**. Report these on *Schedule D: Creditors Who Have Claims Secured by Property* (Official Form 206D).
- **Unsecured claims**. Report these on *Schedule E/F: Creditors Who Have Unsecured Claims* (Official Form 206E/F).

Creditors with unsecured claims typically do not have liens on or other security interests in the debtor's property.

Use *Schedule E/F: Creditors Who Have Unsecured Claims* (Official Form 206E/F) to identify everyone who holds an unsecured claim against the debtor as of the date the bankruptcy petition is filed unless that creditor is already listed on *Schedule D: Creditors Who Have Claims Secured by Property* (Official Form 206D).

Creditors with secured claims have a right to take property from the debtor if the debtor does not pay them. They should be listed on *Schedule D: Creditors Who Have Claims Secured by Property* (Official Form 206D).

If a secured creditor's full claim exceeds the value of the property securing that claim, the creditor may have a secured claim for the value of the property and an unsecured claim for the deficiency. In that situation, list the creditor only once on *Schedule D: Creditors Who Have Claims Secured by Property* (Official Form 206D). Do not list the creditor again on *Schedule E/F: Creditors Who Have Unsecured Claims* (Official Form 206E/F).

List a creditor in Schedule D even if it appears that no value exists to support that creditor's secured claim.

Claims may be contingent, unliquidated, or disputed

Many claims have a specific amount which the debtor clearly owes. But some claims are uncertain or become due only after the date the bankruptcy petition is filed. All claims, whether they are certain or uncertain as of the date of the filing, must be listed in the schedules, even if the claims are contingent, unliquidated, or disputed.

A claim is *contingent* if the debtor is not obligated to pay it unless a particular event occurs after the petition is filed.

A claim is *unliquidated* if the amount of the debt cannot be readily determined, such as by referring to an agreement or by a simple computation. An unliquidated claim is one for which there may be a definite liability but where the amount of the claim has not been set.

A claim is *disputed* if the debtor disagrees that it owes all or a portion of the debt.

A single claim can have one, more than one, or none of these characteristics.

Unsecured claims may be either priority or nonpriority claims

What are priority unsecured claims?

In bankruptcy cases, *priority unsecured claims* are those debts that the Bankruptcy Code requires to be paid before most other unsecured claims are paid. The most common priority unsecured claims are certain tax debts. Priority unsecured claims include those the debtor owes for:

- **Taxes and certain other debts owed to the government**—If the debtor owes certain federal, state, or local government taxes, customs duties, or penalties. 11 U.S.C. § 507(a)(8).
- **Wages, salaries, and commissions**—If the debtor owes wages, salaries, and commissions, including vacation, severance, and sick leave pay and those amounts were earned within 180 days before the bankruptcy petition was filed or the debtor ceased business. In either instance, only the first $12,475 per claim is a priority claim.* 11 U.S.C. § 507(a)(4).
- **Contributions to employee benefit plans**—If the debtor owes contributions to an employee benefit plan for services an employee rendered within 180 days before the bankruptcy petition was filed, or within 180 days before the debtor ceased business. Only the first $12,475 per employee, less any amounts owed for wages, salaries, and commissions, is a priority claim.* 11 U.S.C. § 507(a)(5).
- **Certain claims of farmers and fishermen**— Only the first $6,150 per farmer or fisherman is a priority claim.* 11 U.S.C. § 507(a)(6).
- **Deposits by individuals** — If the debtor obtained from an individual a deposit for the purchase, lease, or rental of property or services for the individual or the individual's family, the deposit may be a priority claim. Unredeemed gift certificates are deposits. The priority is limited to $2,775.* 11 U.S.C. § 507(a)(7).

Other categories exist.

What are nonpriority unsecured claims?

Nonpriority unsecured claims are those debts that generally will be paid after priority unsecured claims are paid. The most common examples of nonpriority unsecured claims are trade debts, bank loans, contract obligations, and fees for professional services.

In Part 2, list every creditor owed money by the debtor not listed before, regardless of the amount and even if the debtor plans to pay a particular debt.

What if a claim has both priority and nonpriority amounts?

If a claim has both priority and nonpriority amounts, list that claim in Part 1 and show both priority and nonpriority amounts. Do not list it again in Part 2.

On what date was a debt incurred?

When a debt was incurred on a single date, fill in the actual date that the debt was incurred.

When a debt was incurred on multiple dates, fill in the range of dates. For example, if the debtor has a line of credit with multiple draws, fill in the month and year of the first and last transactions, if known.

* Subject to adjustment on 4/1/16, and every 3 years after that for cases begun on or after the date of adjustment.

Schedule G: Executory Contracts and Unexpired Leases (Official Form 206G)

Use *Schedule G: Executory Contracts and Unexpired Leases* (Official Form 206G) to identify the debtor's ongoing leases and certain contracts. List all of the debtor's executory contracts and unexpired leases.

Executory contracts are contracts between the debtor and another party in which neither party has performed all of the requirements by the time the debtor files for bankruptcy. *Unexpired leases* are leases that are still in effect.

The debtor must list all agreements that may be executory contracts or unexpired leases, even if they are listed on *Schedule A/B: Property* (Official Form 206A/B) or *Schedule E/F: Creditors Who Have Unsecured Claims*, (Official Form 206 E/F) including the following:

- Equipment leases;
- Vehicle leases;
- Leases for business or investment property (for example, office or warehouse space);
- Contracts to sell a building, land, or other real property;
- Service provider agreements (for example, maintenance contracts for office equipment, and contracts for cell phones, personal electronic devices, internet, and cable);
- Sales contracts;
- Supplier or service contracts;
- Leases or timeshare contracts;
- Employment contracts;
- Real estate listing agreements;
- Intellectual property license agreements (such as copyright, patent, trademark, and industrial rights);
- Development contracts; and
- Insurance contracts.

State the contract number of any government contract.

Glossary

Definitions Used in the Forms for Non-Individuals Filing for Bankruptcy

Here are definitions for some of the important terms used in the forms for non-individuals who are filing for bankruptcy. See *Bankruptcy Basics* (http://www.uscourts.gov/FederalCourts) for more information about filing for bankruptcy and other important terms.

Affiliate — As used in the Bankruptcy Code and Rules, an affiliate of the debtor is:

(a) an entity that directly or indirectly owns, controls, or holds with power to vote at least 20% of the outstanding voting securities of the debtor (excluding entities that hold such securities in a fiduciary or agency capacity without sole discretionary power to vote such securities or solely to secure a debt, if the entity has not in fact exercised such power to vote);

(b) a corporation 20% or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor, or by an entity that directly or indirectly owns, controls, or holds with power to vote, 20% or more of the outstanding voting securities of the debtor (again excluding entities that hold such securities in a fiduciary or agency capacity without sole discretionary power to vote such securities or solely to secure a debt, if the entity has not in fact exercised such power to vote);

(c) a person whose business is operated under a lease or operating agreement by a debtor, or person substantially all of whose property is operated under an operating agreement with the debtor; or

(d) an entity that operates the business or substantially all of the property of the debtor under a lease or operating agreement.

Amortization — 1. A non-cash accounting method that allocates the cost of an intangible asset over its useful life. 2. Paying off a liability in regular installments over a period of time.

Amortization schedule — A report that contains a listing of intangible assets and the amount of amortization and accumulated amortization that has been allocated over the life of those assets. These reports are typically maintained for purposes of calculating tax deductions and preparing tax returns.

Annuity — A contract for the periodic payment of money, either for the life of the recipient or for a fixed number of years.

Book value or **net book value** — The carrying value of an asset on the debtor's books or financial records. This amount is generally calculated by taking the original cost of the property and subtracting depreciation or amortization expenses (if any).

Causes of action — Claims where the debtor is entitled to money or other relief from a third party or where a third party is entitled to money or other relief from the debtor.

Claim — A creditor's right to payment, even if contingent, disputed, unliquidated, or unmatured.

Codebtor —A person or entity that may also be responsible for paying a claim against the debtor.

Collateral — Property that secures a debt.

Contingent claim — Debt that is only payable if certain events occur.

Creditor matrix or mailing matrix — A list of names and addresses of all of the debtor's creditors, formatted as a mailing list according to instructions from the bankruptcy court in which the debtor files the case.

Creditor — The person or organization to whom the debtor owes money.

Current value or **fair market value** — how much the property is worth, which may be more or less than the purchase price or the book value. See the instructions for specific forms regarding whether the value requested is as of the date of the filing of the petition, the date the debtor completes the form, or some other date.

Debt — Liability on a claim.

Depreciation — A non-cash accounting method that allocates the cost of a tangible asset over its useful life.

Depreciation schedule — A report that contains a listing of tangible assets and the amount of depreciation and accumulated depreciation that has been allocated over the life of those assets. These reports are typically maintained for purposes of calculating tax deductions and preparing tax returns.

Discharge — A discharge in bankruptcy relieves a debtor from having to pay certain debts. For non-individuals, it applies only in certain chapter 11 and chapter 12 cases.

Disputed claim —A claim about which there is a disagreement. A claim is disputed if the debtor disagrees about either the validity or amount of the claim.

Doubtful or uncollectible accounts — Receivables that the debtor has little or no expectation of collecting. This amount is deducted from total receivables to calculate the amount that the debtor reasonably expects will be collected on its receivables.

Executory contract — Contract between the debtor and another party as to which neither the debtor nor the other party has performed all of the requirements by the time the bankruptcy case is filed.

Goodwill — Amount of a purchase price that exceeds the net tangible assets. It can also be the value of an intangible asset that has a quantifiable value in business. Examples include a strong brand or reputation or, in an acquisition, goodwill.

Gross income — A company's gross revenue minus cost of goods sold.

Gross revenue — Amount generated by all of a company's operations before deductions for expenses.

Insider — Insiders include officers, directors, and anyone in control of a corporate debtor and their relatives; general partners of a partnership debtor and their relatives; affiliates of a debtor and insiders of such affiliates, and any managing agent of a debtor.
11 U.S.C. § 101.

Intangible assets — Types of property that are not physical in nature and cannot be touched, seen, or held. Examples include intellectual property and name recognition.

Intellectual property — An intangible asset that consists of human knowledge and ideas. Examples include patents, copyrights, trademarks, and software.

Legal or equitable interest — Any interest of the debtor in both tangible and intangible property, whether or not anyone other than the debtor also has an interest in that property.

Lien — A charge against or interest in property to secure a debt.

Nature of claim — The legal type of a claim, not the factual basis for it. Examples include breach of contract, personal injury, malpractice, and fraud.

Negotiable instrument — A written and signed unconditional promise or order to pay a specified sum of money on demand or at a definite time payable to order or bearer. Negotiable instruments include government bonds, corporate bonds, personal checks, cashiers' checks, promissory notes, and money orders.

Net operating loss (NOL) — Occurs when allowable tax deductions exceed taxable income, resulting in negative taxable income. NOLs can generally be used to recover past tax payments (*carry-back*) or reduce future tax payments (*carry-forward*).

Non-individual debtor — A non-individual entity such as a corporation, partnership, or limited liability company (LLC), on whose behalf or against whom a bankruptcy case is filed.

Non-negotiable instrument — Financial instrument of the debtor that cannot be transferred to another party by signing or delivering it.

Nonpriority unsecured claim — Debt that generally will be paid after priority unsecured claims are paid. Examples include amounts due for products purchased, professional services, and utilities.

Priority unsecured claim — Debt that the Bankruptcy Code requires to be paid before most other unsecured claims are paid. Examples include certain income tax debts and certain employee wage claims.

Secured claim — A claim that may be satisfied in whole or in part either

- through collateral,
- through a charge against or an interest in the debtor's property, or
- through a right of setoff.

Setoff — Occurs when a creditor pays itself with money belonging to the debtor that it is holding, or by canceling a debt it owes to the debtor. The Bankruptcy Code gives the trustee power to avoid some but not all setoffs that are made pre-petition.

Sole proprietorship — A business that a debtor owns as an individual, rather than a separate legal entity such as a corporation, partnership, or LLC. Sole proprietors must use the bankruptcy forms in the 100 series.

Tangible asset — Types of property that have physical form and can be seen, touched, or held. Examples include cash, machinery, buildings, and land.

Unexpired lease — Lease that is in effect at the time the bankruptcy petition is filed.

Unliquidated claim — A debt for which the amount cannot be readily determined, such as by referring to an agreement or by a simple computation. For instance, an unliquidated claim would arise from the debtor's sale of a defective product if the amount of damage it caused has not been determined.

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Fill in this information to identify the case:

United States Bankruptcy Court for the:

_____ District of _____
(State)

Case number (*If known*): _____ Chapter _____

❑ Check if this is an amended filing

Official Form 201

Voluntary Petition for Non-Individuals Filing for Bankruptcy

12/15

If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write the debtor's name and the case number (if known). For more information, a separate document, *Instructions for Bankruptcy Forms for Non-Individuals,* is available.

1. Debtor's name _____

2. All other names debtor used in the last 8 years

Include any assumed names, trade names and *doing business as* names

_____
_____
_____
_____
_____

3. Debtor's federal Employer Identification Number (EIN)

__ __ – __ __ __ __ __ __ __

4. Debtor's address

Principal place of business

_____
Number Street

_____

_____
City State ZIP Code

_____
County

Mailing address, if different from principal place of business

_____
Number Street

_____
P.O. Box

_____
City State ZIP Code

Location of principal assets, if different from principal place of business

_____
Number Street

_____

_____
City State ZIP Code

5. Debtor's website (URL) _____

6. Type of debtor

❑ Corporation (including Limited Liability Company (LLC) and Limited Liability Partnership (LLP))
❑ Partnership (excluding LLP)
❑ Other. Specify: _____

7. Describe debtor's business

A. *Check one:*

- ❑ Health Care Business (as defined in 11 U.S.C. § 101(27A))
- ❑ Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))
- ❑ Railroad (as defined in 11 U.S.C. §101(44))
- ❑ Stockbroker (as defined in 11 U.S.C. § 101(53A))
- ❑ Commodity Broker (as defined in 11 U.S.C. § 101(6))
- ❑ Clearing Bank (as defined in 11 U.S.C. §781(3))
- ❑ None of the above

B. *Check all that apply:*

- ❑ Tax-exempt entity (as described in 26 U.S.C. §501)
- ❑ Investment company, including hedge fund or pooled investment vehicle (as defined in 15 U.S.C. § 80a-3)
- ❑ Investment advisor (as defined in 15 U.S.C. § 80b-2(a)(11))

C. NAICS (North American Industry Classification System) 6-digit code that best describes debtor. See www.naics.com/search.htm.

___ ___ ___ ___ ___ ___

8. Under which chapter of the Bankruptcy Code is the debtor filing?

Check one:

- ❑ Chapter 7
- ❑ Chapter 9
- ❑ Chapter 11. *Check all that apply*:
  - ❑ Debtor's aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than $2,490,925 (amount subject to adjustment on 4/01/16 and every 3 years after that).
  - ❑ The debtor is a small business debtor as defined in 11 U.S.C. § 101(51D). If the debtor is a small business debtor, attach the most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return or if all of these documents do not exist, follow the procedure in 11 U.S.C. 1116(1)(B).
  - ❑ A plan is being filed with this petition.
  - ❑ Acceptances of the plan were solicited prepetition from one or more classes of creditors, in accordance with 11 U.S.C. § 1126(b).
  - ❑ The debtor is required to file periodic reports (for example, 10K and 10Q) with the Securities and Exchange Commission according to § 13 or 15(d) of the Securities Exchange Act of 1934. File the *Attachment to Voluntary Petition for Non-Individuals Filing for Bankruptcy Under Chapter 11* (Official Form 201A) with this form.
  - ❑ The debtor is a shell company as defined in the Securities Exchange Act of 1934 Rule 12b-2.
- ❑ Chapter 12

9. Were prior bankruptcy cases filed by or against the debtor within the last 8 years?

If more than 2 cases, attach a separate list.

- ❑ No
- ❑ Yes. District _____ When _____ Case number _____
  MM / DD / YYYY
  District _____ When _____ Case number _____
  MM / DD / YYYY

10. Are any bankruptcy cases pending or being filed by a business partner or an affiliate of the debtor?

List all cases. If more than 1, attach a separate list.

❑ No

❑ Yes. Debtor _____ Relationship _____

District _____ When _____
MM / DD / YYYY

Case number, if known _____

11. Why is venue proper in *this district*?

Check all that apply:

❑ Debtor has had its domicile, principal place of business, or principal assets in this district for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other district.

❑ A bankruptcy case concerning debtor's affiliate, general partner, or partnership is pending in this district.

12. Does the debtor own or have possession of any real property or personal property that needs immediate attention?

❑ No

❑ Yes. Answer below for each property that needs immediate attention. Attach additional sheets if needed.

Why does the property need immediate attention? (*Check all that apply.*)

❑ It poses or is alleged to pose a threat of imminent and identifiable hazard to public health or safety.

What is the hazard? _____

❑ It needs to be physically secured or protected from the weather.

❑ It includes perishable goods or assets that could quickly deteriorate or lose value without attention (for example, livestock, seasonal goods, meat, dairy, produce, or securities-related assets or other options).

❑ Other _____

Where is the property?_____
Number Street

_____

_____ _____ _____
City State ZIP Code

Is the property insured?

❑ No

❑ Yes. Insurance agency _____

Contact name _____

Phone _____

Statistical and administrative information

13. Debtor's estimation of available funds

Check one:

❑ Funds will be available for distribution to unsecured creditors.

❑ After any administrative expenses are paid, no funds will be available for distribution to unsecured creditors.

14. Estimated number of creditors

❑ 1-49
❑ 50-99
❑ 100-199
❑ 200-999
❑ 1,000-5,000
❑ 5,001-10,000
❑ 10,001-25,000
❑ 25,001-50,000
❑ 50,001-100,000
❑ More than 100,000

15. Estimated assets

- ❑ $0-$50,000
- ❑ $50,001-$100,000
- ❑ $100,001-$500,000
- ❑ $500,001-$1 million
- ❑ $1,000,001-$10 million
- ❑ $10,000,001-$50 million
- ❑ $50,000,001-$100 million
- ❑ $100,000,001-$500 million
- ❑ $500,000,001-$1 billion
- ❑ $1,000,000,001-$10 billion
- ❑ $10,000,000,001-$50 billion
- ❑ More than $50 billion

16. Estimated liabilities

- ❑ $0-$50,000
- ❑ $50,001-$100,000
- ❑ $100,001-$500,000
- ❑ $500,001-$1 million
- ❑ $1,000,001-$10 million
- ❑ $10,000,001-$50 million
- ❑ $50,000,001-$100 million
- ❑ $100,000,001-$500 million
- ❑ $500,000,001-$1 billion
- ❑ $1,000,000,001-$10 billion
- ❑ $10,000,000,001-$50 billion
- ❑ More than $50 billion

Request for Relief, Declaration, and Signatures

WARNING -- Bankruptcy fraud is a serious crime. Making a false statement in connection with a bankruptcy case can result in fines up to $500,000 or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

17. Declaration and signature of authorized representative of debtor

The debtor requests relief in accordance with the chapter of title 11, United States Code, specified in this petition.

I have been authorized to file this petition on behalf of the debtor.

I have examined the information in this petition and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____
MM / DD / YYYY

✘ _____ _____
Signature of authorized representative of debtor Printed name

Title _____

18. Signature of attorney

✘ _____ Date _____
Signature of attorney for debtor MM / DD / YYYY

_____
Printed name

_____
Firm name

_____
Number Street

_____ _____ _____
City State ZIP Code

_____ _____
Contact phone Email address

_____ _____
Bar number State

COMMITTEE NOTE

Official Form 201, *Voluntary Petition for Non-Individuals Filing for Bankruptcy*, replaces Official Form 1, *Voluntary Petition*, for non-individual debtors. It is renumbered to distinguish it from the forms used by individual debtors and includes formatting and stylistic changes throughout the form.

Official Form 201 is revised as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. The goals of the Forms Modernization Project include improving the interface between technology and the forms so as to increase efficiency and reducing the need to produce the same information in multiple formats.

The Forms Modernization Project made a preliminary decision that separate forms should be created for individual debtors and for non-individual debtors because separate areas of inquiry apply to each group. The forms for non-individuals do not include questions that pertain only to individuals and use a more open-ended response format. Also, where possible, the forms for non-individuals parallel how businesses commonly keep their financial records.

Official Form 201 has been substantially reformatted and reorganized. References to Exhibits B, C, and D, and the exhibits themselves, have been eliminated because the requested information is now asked in the form or is not applicable to non-individual debtors. Official Form 201A, *Attachment to Voluntary Petition for Non-Individuals Filing for Bankruptcy Under Chapter 11*, has replaced Exhibit A. The debtor is instructed to file Official Form 201A if the debtor is filing under chapter 11 and is required to file periodic reports with the Securities and Exchange Commission. A checkbox has been added to the form to indicate whether it is an amended filing.

In Question 2, *All other names debtor used in the last 8 years*, instructions pertaining only to individuals have been deleted, and an instruction to include *doing business as* names and assumed names has been added. In Question 3, *Debtor's federal Employee Identification Number (EIN)*, references to social security numbers and individual taxpayer I.D. numbers have been deleted. In Question 4, *Debtor's address*, the order of listing the various addresses for the debtor has been rearranged, and an address for the location of principal assets is required if different from the principal place of business. Also, the form has been revised to include a space for listing the debtor's website in Question 5.

In Question 6, *Type of Debtor*, options pertaining only to individual debtors have been deleted, and an instruction that the "partnership" option does not include LLPs has been added. Question 7, *Describe debtor's business*, is revised to include a statutory citation for each business type, to add an option for "none of the above," and to delete the option for "other." A new instruction requires the debtor to indicate if the debtor is an investment company, including a hedge fund or pooled investment vehicle; an investment advisor; or a tax exempt entity. The definition of "tax exempt entity" has been removed and replaced with a statutory citation. Additionally, an instruction has been added to require the debtor to list its North American Industry Classification System 6-digit code. A hyperlink is provided for information on finding the correct code.

In *Question 8, Under which chapter of the Bankruptcy Code is the debtor filing*, several separate boxes have been combined, and the options for Chapter 13 and Chapter 15 have been deleted. More detailed options have been added for Chapter 11. The question regarding the nature of the debtor's debts has been removed.

Question 9, *Were prior bankruptcy cases filed by or against the debtor within the last 8 years*, has been revised to instruct the debtor to include prior bankruptcy cases filed against the debtor and to list the district rather than location of the prior filings. In Question 10, *Are any bankruptcy cases pending or being filed by a business partner or an affiliate of the debtor*, the reference to

spouse and the requirement to list the judge in any other cases have been removed.

Question 11, *Why is venue proper in this district*, has been revised to delete references that pertain only to individuals.

Question 12, *Does the debtor own or have possession of any real property or personal property that needs immediate attention*, replaces Exhibit C from Official Form 1. The category of "property that needs immediate attention" has been added, as well as options to indicate why the property needs immediate attention. Additionally, the form has been revised to require the debtor to list the location of the property and whether or not the property is insured and, if so, the insurance details.

Statistical and administrative information has been moved to immediately above the signature line, and the reference to exempt property has been removed. The maximum values for "Estimated Assets" and "Estimated Liabilities" have been increased from "more than $1 billion" to "more than $50 billion." *Request for Relief, Declaration, and Signatures* has been reformatted and the signature lines for individual debtors and non-attorney bankruptcy petition preparers have been removed.

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Fill in this information to identify the case and this filing:

Debtor Name _____

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number (*If known*): _____

Official Form 202

Declaration Under Penalty of Perjury for Non-Individual Debtors

12/15

An individual who is authorized to act on behalf of a non-individual debtor, such as a corporation or partnership, must sign and submit this form for the schedules of assets and liabilities, any other document that requires a declaration that is not included in the document, and any amendments of those documents. This form must state the individual's position or relationship to the debtor, the identity of the document, and the date. Bankruptcy Rules 1008 and 9011.

WARNING -- Bankruptcy fraud is a serious crime. Making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to $500,000 or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

Declaration and signature

I am the president, another officer, or an authorized agent of the corporation; a member or an authorized agent of the partnership; or another individual serving as a representative of the debtor in this case.

I have examined the information in the documents checked below and I have a reasonable belief that the information is true and correct:

- ❑ *Schedule A/B: Assets–Real and Personal Property* (Official Form 206A/B)
- ❑ *Schedule D: Creditors Who Have Claims Secured by Property* (Official Form 206D)
- ❑ *Schedule E/F: Creditors Who Have Unsecured Claims* (Official Form 206E/F)
- ❑ *Schedule G: Executory Contracts and Unexpired Leases* (Official Form 206G)
- ❑ *Schedule H: Codebtors* (Official Form 206H)
- ❑ *A Summary of Assets and Liabilities for Non-Individuals* (Official Form 206–Summary)
- ❑ Amended *Schedule* ____
- ❑ Other document that requires a declaration_____

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____
MM / DD / YYYY

✘ _____
Signature of individual signing on behalf of debtor

_____
Printed name

_____
Position or relationship to debtor

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COMMITTEE NOTE

Official Form 202, *Declaration Under Penalty of Perjury for Non-Individual Debtors*, replaces Official Form 2, *Declaration Under Penalty of Perjury on Behalf of a Corporation or Partnership*, and the section of Official Form 6 Declaration, *Declaration Concerning Debtor's Schedules* containing a corporation's or partnership's declaration. It is renumbered to distinguish it from the forms used by individual debtors and includes formatting and stylistic changes throughout the form.

Official Form 202 is revised as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. The goals of the Forms Modernization Project include improving the interface between technology and the forms so as to increase efficiency and reducing the need to produce the same information in multiple formats.

Official Form 202 has been substantially reformatted and reorganized with elements from both Official Form 2 and the section of Official Form 6 for a corporation or partnership. Instructions have been added, along with warning language regarding bankruptcy fraud. Checkboxes are provided so the declaration will indicate the schedules included with the declaration or, if the declaration accompanies another document, a description of the attached document. The phrase "to the best of my information and belief" has been deleted from the declaration in order to conform to the language of 28 U.S.C. § 1746. *See* Rule 1008. The form, however, includes a statement that the person signing the declaration has examined the information in the documents subject to the declaration and has "a reasonable belief that the information is true and correct." Finally, the person signing the declaration must indicate his or her position or relationship to the debtor.

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Fill in this information to identify the case:

Debtor name _____

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number (If known): _____

❑ Check if this is an amended filing

Official Form 204

Chapter 11 or Chapter 9 Cases: List of Creditors Who Have the 20 Largest Unsecured Claims and Are Not Insiders

12/15

A list of creditors holding the 20 largest unsecured claims must be filed in a Chapter 11 or Chapter 9 case. Include claims which the debtor disputes. Do not include claims by any person or entity who is an *insider,* as defined in 11 U.S.C. § 101(31). Also, do not include claims by secured creditors, unless the unsecured claim resulting from inadequate collateral value places the creditor among the holders of the 20 largest unsecured claims.

	Name of creditor and complete mailing address, including zip code	**Name, telephone number, and email address of creditor contact**	**Nature of the claim** (for example, trade debts, bank loans, professional services, and government contracts)	**Indicate if claim is contingent, unliquidated, or disputed**	**Amount of unsecured claim** If the claim is fully unsecured, fill in only unsecured claim amount. If claim is partially secured, fill in total claim amount and deduction for value of collateral or setoff to calculate unsecured claim.		
					Total claim, if partially secured	**Deduction for value of collateral or setoff**	**Unsecured claim**
1							
2							
3							
4							
5							
6							
7							
8							

Debtor _____ Case number (*if known*)_____
Name

	Name of creditor and complete mailing address, including zip code	Name, telephone number, and email address of creditor contact	Nature of the claim (for example, trade debts, bank loans, professional services, and government contracts)	Indicate if claim is contingent, unliquidated, or disputed	Amount of unsecured claim If the claim is fully unsecured, fill in only unsecured claim amount. If claim is partially secured, fill in total claim amount and deduction for value of collateral or setoff to calculate unsecured claim.		
					Total claim, if partially secured	Deduction for value of collateral or setoff	Unsecured claim
9							
10							
11							
12							
13							
14							
15							
16							
17							
18							
19							
20							

COMMITTEE NOTE

Official Form 204, *Chapter 11 or Chapter 9 Cases: List of Creditors Who Have the 20 Largest Unsecured Claims and Are Not Insiders*, replaces Official Form 4, *List of Creditors Holding 20 Largest Unsecured Claims*, for non-individual debtors. It is renumbered to distinguish it from the forms used by individual debtors and includes formatting and stylistic changes throughout the form.

Official Form 204 is revised as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. The goals of the Forms Modernization Project include improving the interface between technology and the forms so as to increase efficiency and reducing the need to produce the same information in multiple formats.

The Forms Modernization Project made a preliminary decision that separate forms should be created for individual debtors and for non-individual debtors because separate areas of inquiry apply to each group. The forms for non-individuals do not include questions that pertain only to individuals and use a more open-ended response format. Also, where possible, the forms for non-individuals parallel how businesses commonly keep their financial records.

Official Form 204 has been reformatted and reorganized. The instructions have been shortened and revised to include a full cite to the definition of "insider" and a revised explanation of when to include a secured creditor's unsecured claim. The warning regarding the disclosure of a minor child's name has been deleted as a caution has been added to the general instructions for all forms regarding listing a minor child's name.

The heading of the second column of the form has been revised to require the "name, telephone number, and email address of creditor contact," eliminating the need to provide a complete

mailing address for the creditor contact. Additional examples of "nature of claim" have been provided in the third column. In the fourth column, "subject to setoff" has been removed as an option.

The fifth column has been revised to include three separate potential entries to be used to list the value of the unsecured claim: the total claim, if partially secured; the deduction for value of collateral or setoff; and unsecured claim. The new instructions for the fifth column contain an explanation that if a claim is a fully unsecured claim, only the final sub-column needs to be completed, and that all of the columns must be completed if a claim is partially secured.

The signature line and the instruction to include a declaration have been deleted from the form.

Fill in this information to identify the case:

United States Bankruptcy Court for the:

_____ District of _____
(State)

Case number (*If known*): _____ Chapter _____

❑ Check if this is an amended filing

Official Form 205

Involuntary Petition Against a Non-Individual

12/15

Use this form to begin a bankruptcy case against a non-individual you allege to be a debtor subject to an involuntary case. If you want to begin a case against an individual, use the *Involuntary Petition Against an Individual* (Official Form 105). Be as complete and accurate as possible. If more space is needed, attach any additional sheets to this form. On the top of any additional pages, write debtor's name and case number (if known).

Part 1: Identify the Chapter of the Bankruptcy Code Under Which Petition Is Filed

1. Chapter of the Bankruptcy Code

Check one:

❑ Chapter 7
❑ Chapter 11

Part 2: Identify the Debtor

2. Debtor's name _____

3. Other names you know the debtor has used in the last 8 years

Include any assumed names, trade names, or *doing business as* names.

_____
_____
_____

4. Debtor's federal Employer Identification Number (EIN)

❑ Unknown

__ __ – __ __ __ __ __ __ __
EIN

5. Debtor's address

Principal place of business

_____
Number Street

_____

_____ _____ _____
City State ZIP Code

_____
County

Mailing address, if different

_____
Number Street

_____
P.O. Box

_____ _____ _____
City State ZIP Code

Location of principal assets, if different from principal place of business

_____
Number Street

_____

_____ _____ _____
City State ZIP Code

6. Debtor's website (URL) _____

7. Type of debtor

- ❑ Corporation (including Limited Liability Company (LLC) and Limited Liability Partnership (LLP))
- ❑ Partnership (excluding LLP)
- ❑ Other type of debtor. Specify: _____

8. Type of debtor's business

Check one:

- ❑ Health Care Business (as defined in 11 U.S.C. § 101(27A))
- ❑ Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))
- ❑ Railroad (as defined in 11 U.S.C. §101(44))
- ❑ Stockbroker (as defined in 11 U.S.C. § 101(53A))
- ❑ Commodity Broker (as defined in 11 U.S.C. § 101(6))
- ❑ Clearing Bank (as defined in 11 U.S.C. §781(3))
- ❑ None of the types of business listed.
- ❑ Unknown type of business.

9. To the best of your knowledge, are any bankruptcy cases pending by or against any partner or affiliate of this debtor?

- ❑ No
- ❑ Yes. Debtor _____ Relationship _____

District _____ Date filed _____ Case number, if known_____
MM / DD / YYYY

Debtor _____ Relationship _____

District _____ Date filed _____ Case number, if known_____
MM / DD / YYYY

Part 3: Report About the Case

10. Venue

Check one:

- ❑ Over the last 180 days before the filing of this bankruptcy, the debtor had a domicile, principal place of business, or principal assets in this district longer than in any other district.
- ❑ A bankruptcy case concerning debtor's affiliates, general partner, or partnership is pending in this district.

11. Allegations

Each petitioner is eligible to file this petition under 11 U.S.C. § 303(b).

The debtor may be the subject of an involuntary case under 11 U.S.C. § 303(a).

At least one box must be checked:

- ❑ The debtor is generally not paying its debts as they become due, unless they are the subject of a bona fide dispute as to liability or amount.
- ❑ Within 120 days before the filing of this petition, a custodian, other than a trustee, receiver, or an agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.

12. Has there been a transfer of any claim against the debtor by or to any petitioner?

- ❑ No
- ❑ Yes. Attach all documents that evidence the transfer and any statements required under Bankruptcy Rule 1003(a).

13. **Each petitioner's claim**	**Name of petitioner**	**Nature of petitioner's claim**	**Amount of the claim above the value of any lien**
	_____	_____	$ _____
	_____	_____	$ _____
	_____	_____	$ _____
		Total of petitioners' claims	$ _____

If more space is needed to list petitioners, attach additional sheets. Write the alleged debtor's name and the case number, if known, at the top of each sheet. Following the format of this form, set out the information required in Parts 3 and 4 of the form for each additional petitioning creditor, the petitioner's claim, the petitioner's representative, and the petitioner's attorney. Include the statement under penalty of perjury set out in Part 4 of the form, followed by each additional petitioner's (or representative's) signature, along with the signature of the petitioner's attorney.

Part 4: Request for Relief

WARNING -- Bankruptcy fraud is a serious crime. Making a false statement in connection with a bankruptcy case can result in fines up to $500,000 or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

Petitioners request that an order for relief be entered against the debtor under the chapter of 11 U.S.C. specified in this petition. If a petitioning creditor is a corporation, attach the corporate ownership statement required by Bankruptcy Rule 1010(b). If any petitioner is a foreign representative appointed in a foreign proceeding, attach a certified copy of the order of the court granting recognition.

I have examined the information in this document and have a reasonable belief that the information is true and correct.

Petitioners or Petitioners' Representative

Name and mailing address of petitioner

_____
Name

_____
Number Street

_____ _____ _____
City State ZIP Code

Name and mailing address of petitioner's representative, if any

_____
Name

_____
Number Street

_____ _____ _____
City State ZIP Code

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____
MM / DD / YYYY

✘ _____
Signature of petitioner or representative, including representative's title

Attorneys

_____
Printed name

_____
Firm name, if any

_____
Number Street

_____ _____ _____
City State ZIP Code

Contact phone _____ Email _____

Bar number _____

State _____

✘ _____
Signature of attorney

Date signed _____
MM / DD / YYYY

Name and mailing address of petitioner

_____
Name

_____
Number Street

_____ _____ _____
City State ZIP Code

Name and mailing address of petitioner's representative, if any

_____
Name

_____
Number Street

_____ _____ _____
City State ZIP Code

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____
MM / DD / YYYY

✘ _____
Signature of petitioner or representative, including representative's title

_____
Printed name

_____
Firm name, if any

_____
Number Street

_____ _____ _____
City State ZIP Code

Contact phone _____ Email _____

Bar number _____

State _____

✘ _____
Signature of attorney

Date signed _____
MM / DD / YYYY

Name and mailing address of petitioner

_____
Name

_____
Number Street

_____ _____ _____
City State ZIP Code

Name and mailing address of petitioner's representative, if any

_____
Name

_____
Number Street

_____ _____ _____
City State ZIP Code

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____
MM / DD / YYYY

✘ _____
Signature of petitioner or representative, including representative's title

_____
Printed name

_____
Firm name, if any

_____
Number Street

_____ _____ _____
City State ZIP Code

Contact phone _____ Email _____

Bar number _____

State _____

✘ _____
Signature of attorney

Date signed _____
MM / DD / YYYY

COMMITTEE NOTE

Official Form 205, *Involuntary Petition Against a Non-Individual*, replaces Official Form 5, *Involuntary Petition*, for non-individual debtors. It is renumbered to distinguish it from the forms used by individual debtors and includes formatting and stylistic changes throughout the form.

Official Form 205 is revised as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. The goals of the Forms Modernization Project include improving the interface between technology and the forms so as to increase efficiency and reducing the need to produce the same information in multiple formats.

The Forms Modernization Project made a preliminary decision that separate forms should be created for individual debtors and for non-individual debtors because separate areas of inquiry apply to each group. The forms for non-individuals do not include questions that pertain only to individuals and use a more open-ended response format. Also, where possible, the forms for non-individuals parallel how businesses commonly keep their financial records.

Part 1, *Identify the Chapter of the Bankruptcy Code Under Which Petition is Filed*, has been moved to the beginning of the form.

In Part 2, *Identify the Debtor*, instructions pertaining only to individuals have been deleted, and an instruction to include doing-business-as names and assumed names has been added. The references to social security numbers and individual taxpayer I.D. numbers have been deleted. The order of listing the various addresses for the debtor have been rearranged in Line 5, and an address for the location of principal assets is required if different from the principal place of business. The form has been revised to include a space for listing the debtor's website in Line 6.

Also in Part 2, the options for type of debtor that pertained only to individuals have been deleted, and an instruction that the "partnership" option does not include LLPs has been added. The options regarding the type of debtor's business have been revised to include a statutory citation for each business type, to add an option for "none of the above," and to delete the option for "other." The question regarding pending bankruptcy cases has been revised to remove the reference to spouse and the requirement to list the judge in any other cases.

In Part 3, *Report About the Case*, the question regarding venue has been revised in Line 10 to read "[o]ver the past 180 days before the filing of this bankruptcy, the debtor had a domicile, principal place or business, or principal assets in this district longer than in any other district." In the question for Allegations, "each" has been added to the first allegation, the exact citation to the Bankruptcy Code has been provided for the second allegation, and checkboxes have been provided for the last allegation. Also, in Line 12, petitioners must check "yes" or "no" to answer whether there has been any transfer of any claim against the debtor by or to a petitioner.

The information regarding the petitioner's claims has been moved to Part 3, and the portion listing the amount of the claim is amended to ask about the amount of the claim that exceeds the value of the lien, if any.

Part 4, *Request Relief*, has been amended to include a warning about making a false statement, and the declaration under penalty of perjury has been revised in order to conform to the language of 28 U.S.C. § 1746. See Rule 1008. A statement has been added that each petitioner, or the petitioner's representative, has reviewed the information in the petition and has "a reasonable belief that the information is true and correct." A requirement has been added for each petitioner's mailing address. Also, petitioners' attorneys must provide their email addresses, bar number, and state of bar membership.

Fill in this information to identify the case:

Debtor name _____

United States Bankruptcy Court for the:_____ District of _____ (State)

Case number (If known): _____

❑ Check if this is an amended filing

Official Form 206A/B

Schedule A/B: Assets — Real and Personal Property

12/15

Disclose all property, real and personal, which the debtor owns or in which the debtor has any other legal, equitable, or future interest. Include all property in which the debtor holds rights and powers exercisable for the debtor's own benefit. Also include assets and properties which have no book value, such as fully depreciated assets or assets that were not capitalized. In Schedule A/B, list any executory contracts or unexpired leases with a net value. Also list them on *Schedule G: Executory Contracts and Unexpired Leases* (Official Form 206G).

Be as complete and accurate as possible. If more space is needed, attach a separate sheet to this form. At the top of any pages added, write the debtor's name and case number (if known). Also identify the form and line number to which the additional information applies. If an additional sheet is attached, include the amounts from the attachment in the total for the pertinent part.

For Part 1 through Part 11, list each asset under the appropriate category or attach separate supporting schedules, such as a fixed asset schedule or depreciation schedule, that gives the details for each asset in a particular category. List each asset only once. In valuing the debtor's interest, do not deduct the value of secured claims. See the instructions to understand the terms used in this form.

Part 1: Cash and cash equivalents

1. **Does the debtor have any cash or cash equivalents?**

❑ No. Go to Part 2.

❑ Yes. Fill in the information below.

All cash or cash equivalents owned or controlled by the debtor	Current value of debtor's interest
2. **Cash on hand**	$_____
3. **Checking, savings, money market, or financial brokerage accounts** *(Identify all)*	
Name of institution (bank or brokerage firm) / Type of account / Last 4 digits of account number	
3.1. _____ _____ ___ ___ ___ ___	$_____
3.2. _____ _____ ___ ___ ___ ___	$_____
4. **Other cash equivalents** *(Identify all)*	
4.1. _____	$_____
4.2. _____	$_____
5. **Total of Part 1** Add lines 2 through 4 (including amounts on any additional sheets). Copy the total to line 80.	$_____

Part 2: Deposits and prepayments

6. **Does the debtor have any deposits or prepayments?**

❑ No. Go to Part 3.

❑ Yes. Fill in the information below.

	Current value of debtor's interest
7. **Deposits, including security deposits and utility deposits**	
Description, including name of holder of deposit	
7.1. _____	$_____
7.2._____	$_____

8. **Prepayments, including prepayments on executory contracts, leases, insurance, taxes, and rent**

Description, including name of holder of prepayment

8.1._____ $_____

8.2._____ $_____

9. **Total of Part 2.**
Add lines 7 through 8. Copy the total to line 81. $_____

Part 3: Accounts receivable

10. **Does the debtor have any accounts receivable?**

❑ No. Go to Part 4.

❑ Yes. Fill in the information below.

				Current value of debtor's interest
11. **Accounts receivable**				
11a. 90 days old or less:	_____ face amount	– _____ doubtful or uncollectible accounts	= ..... ➔	$_____
11b. Over 90 days old:	_____ face amount	– _____ doubtful or uncollectible accounts	= ..... ➔	$_____

12. **Total of Part 3**
Current value on lines 11a + 11b = line 12. Copy the total to line 82. $_____

Part 4: Investments

13. **Does the debtor own any investments?**

❑ No. Go to Part 5.

❑ Yes. Fill in the information below.

	Valuation method used for current value	Current value of debtor's interest
14. **Mutual funds or publicly traded stocks not included in Part 1**		
Name of fund or stock:		
14.1. _____	_____	$_____
14.2. _____	_____	$_____

15. **Non-publicly traded stock and interests in incorporated and unincorporated businesses, including any interest in an LLC, partnership, or joint venture**

Name of entity:	% of ownership:		
15.1._____	_____%	_____	$_____
15.2._____	_____%	_____	$_____

16. **Government bonds, corporate bonds, and other negotiable and non-negotiable instruments not included in Part 1**

Describe:

16.1._____ _____ $_____

16.2._____ _____ $_____

17. **Total of Part 4**
Add lines 14 through 16. Copy the total to line 83. $_____

Part 5: Inventory, excluding agriculture assets

18. **Does the debtor own any inventory (excluding agriculture assets)?**
    - ❑ No. Go to Part 6.
    - ❑ Yes. Fill in the information below.

General description	Date of the last physical inventory	Net book value of debtor's interest (Where available)	Valuation method used for current value	Current value of debtor's interest
19. **Raw materials**				
_____	_____ MM / DD / YYYY	$_____	_____	$_____
20. **Work in progress**				
_____	_____ MM / DD / YYYY	$_____	_____	$_____
21. **Finished goods, including goods held for resale**				
_____	_____ MM / DD / YYYY	$_____	_____	$_____
22. **Other inventory or supplies**				
_____	_____ MM / DD / YYYY	$_____	_____	$_____

23. **Total of Part 5**
    Add lines 19 through 22. Copy the total to line 84. $_____

24. **Is any of the property listed in Part 5 perishable?**
    - ❑ No
    - ❑ Yes. Is any of the property listed in Part 5 subject to or part of a possible PACA claim?
      - ❑ No
      - ❑ Yes

25. **Has any of the property listed in Part 5 been purchased within 20 days before the bankruptcy was filed?**
    - ❑ No
    - ❑ Yes. Book value _____ Valuation method_____ Current value_____

26. **Has any of the property listed in Part 5 been appraised by a professional within the last year?**
    - ❑ No
    - ❑ Yes

Part 6: Agricultural assets (other than titled motor vehicles and land)

27. **Does the debtor own any agricultural assets (other than titled motor vehicles and land)?**
    - ❑ No. Go to Part 7.
    - ❑ Yes. Fill in the information below.

General description	Net book value of debtor's interest (Where available)	Valuation method used for current value	Current value of debtor's interest
28. **Crops—either planted or harvested**			
_____	$_____	_____	$_____
29. **Farm animals** *Examples*: Livestock, poultry, farm-raised fish			
_____	$_____	_____	$_____

30. **Farm machinery and equipment** (Other than titled motor vehicles)

_____ $_____ _____ $_____

31. **Farm and fishing supplies, chemicals, and feed**

_____ $_____ _____ $_____

32. **Other farm-related property not already listed in Part 5.**

_____ $_____ _____ $_____

33. **Total of Part 6.**
Add lines 28 through 32. Copy the total to line 85. $_____

34. **Is the debtor a member of an agricultural cooperative?**
- ❑ No
- ❑ Yes. Is any of the debtor's property stored at the cooperative?
  - ❑ No
  - ❑ Yes

35. **Has any of the property listed in Part 6 been purchased within 20 days before the bankruptcy was filed?**
- ❑ No
- ❑ Yes. Book value $_____ Valuation method _____ Current value $_____

36. **Is a depreciation schedule available for any of the property listed in Part 6?**
- ❑ No
- ❑ Yes

37. **Has any of the property listed in Part 6 been appraised by a professional within the last year?**
- ❑ No
- ❑ Yes

Part 7: Office furniture, fixtures, and equipment; and collectibles

38. **Does the debtor own any office furniture, fixtures, equipment, or collectibles?**
- ❑ No. Go to Part 8.
- ❑ Yes. Fill in the information below.

General description	Net book value of debtor's interest (Where available)	Valuation method used for current value	Current value of debtor's interest
39. **Office furniture**			
_____	$_____	_____	$_____
40. **Office fixtures**			
_____	$_____	_____	$_____
41. **Office equipment, including all computer equipment and communication systems equipment and software**			
_____	$_____	_____	$_____
42. **Collectibles** *Examples:* Antiques and figurines; paintings, prints, or other artwork; books, pictures, or other art objects; china and crystal; stamp, coin, or baseball card collections; other collections, memorabilia, or collectibles			
42.1_____	$_____	_____	$_____
42.2_____	$_____	_____	$_____
42.3_____	$_____	_____	$_____

43. **Total of Part 7.**
Add lines 39 through 42. Copy the total to line 86. $_____

44. **Is a depreciation schedule available for any of the property listed in Part 7?**
- ❑ No
- ❑ Yes

45. **Has any of the property listed in Part 7 been appraised by a professional within the last year?**
- ❑ No
- ❑ Yes

Part 8: Machinery, equipment, and vehicles

46. **Does the debtor own any machinery, equipment, or vehicles?**
- ❑ No. Go to Part 9.
- ❑ Yes. Fill in the information below.

General description Include year, make, model, and identification numbers (i.e., VIN, HIN, or N-number)	**Net book value of debtor's interest** (Where available)	**Valuation method used for current value**	**Current value of debtor's interest**
47. **Automobiles, vans, trucks, motorcycles, trailers, and titled farm vehicles**			
47.1_____	$_____	_____	$_____
47.2_____	$_____	_____	$_____
47.3_____	$_____	_____	$_____
47.4_____	$_____	_____	$_____
48. **Watercraft, trailers, motors, and related accessories** Examples: Boats, trailers, motors, floating homes, personal watercraft, and fishing vessels			
48.1_____	$_____	_____	$_____
48.2_____	$_____	_____	$_____
49. **Aircraft and accessories**			
49.1_____	$_____	_____	$_____
49.2_____	$_____	_____	$_____
50. **Other machinery, fixtures, and equipment (excluding farm machinery and equipment)**			
_____	$_____	_____	$_____

51. **Total of Part 8.**
Add lines 47 through 50. Copy the total to line 87.

$_____

52. **Is a depreciation schedule available for any of the property listed in Part 8?**
- ❑ No
- ❑ Yes

53. **Has any of the property listed in Part 8 been appraised by a professional within the last year?**
- ❑ No
- ❑ Yes

Part 9: Real property

54. **Does the debtor own any real property?**
    - ❑ No. Go to Part 10.
    - ❑ Yes. Fill in the information below.

55. **Any building, other improved real estate, or land which the debtor owns or in which the debtor has an interest**

Description and location of property Include street address or other description such as Assessor Parcel Number (APN), and type of property (for example, acreage, factory, warehouse, apartment or office building), if available.	**Nature and extent of debtor's interest in property**	**Net book value of debtor's interest** (Where available)	**Valuation method used for current value**	**Current value of debtor's interest**
55.1_____	_____	$_____	_____	$_____
55.2_____	_____	$_____	_____	$_____
55.3_____	_____	$_____	_____	$_____
55.4_____	_____	$_____	_____	$_____
55.5_____	_____	$_____	_____	$_____
55.6_____	_____	$_____	_____	$_____

56. **Total of Part 9.**
    Add the current value on lines 55.1 through 55.6 and entries from any additional sheets. Copy the total to line 88.

    $_____

57. **Is a depreciation schedule available for any of the property listed in Part 9?**
    - ❑ No
    - ❑ Yes

58. **Has any of the property listed in Part 9 been appraised by a professional within the last year?**
    - ❑ No
    - ❑ Yes

Part 10: Intangibles and Intellectual Property

59. **Does the debtor have any interests in intangibles or intellectual property?**
    - ❑ No. Go to Part 11.
    - ❑ Yes. Fill in the information below.

	General description	**Net book value of debtor's interest** (Where available)	**Valuation method used for current value**	**Current value of debtor's interest**
60.	**Patents, copyrights, trademarks, and trade secrets** _____	$_____	_____	$_____
61.	**Internet domain names and websites** _____	$_____	_____	$_____
62.	**Licenses, franchises, and royalties** _____	$_____	_____	$_____
63.	**Customer lists, mailing lists, or other compilations** _____	$_____	_____	$_____
64.	**Other intangibles, or intellectual property** _____	$_____	_____	$_____
65.	**Goodwill** _____	$_____	_____	$_____

66. **Total of Part 10.**
    Add lines 60 through 65. Copy the total to line 89.

    $_____

67. **Do your lists or records include personally identifiable information of customers** (as defined in 11 U.S.C. §§ 101(41A) and 107)**?**
- ❑ No
- ❑ Yes

68. **Is there an amortization or other similar schedule available for any of the property listed in Part 10?**
- ❑ No
- ❑ Yes

69. **Has any of the property listed in Part 10 been appraised by a professional within the last year?**
- ❑ No
- ❑ Yes

Part 11: All other assets

70. **Does the debtor own any other assets that have not yet been reported on this form?**
- ❑ No. Go to Part 12.
- ❑ Yes. Fill in the information below.

Current value of debtor's interest

71. **Notes receivable**
Description (include name of obligor)
_____ _____ – _____ = ➔ $_____
Total face amount — doubtful or uncollectible amount

72. **Tax refunds and unused net operating losses (NOLs)**
Describe (for example, federal, state, local)
_____ Tax year _____ $_____
_____ Tax year _____ $_____
_____ Tax year _____ $_____

73. **Interests in insurance policies or annuities**
_____ $_____

74. **Causes of action against third parties (whether or not a lawsuit has been filed)**
_____ $_____
Nature of claim _____
Amount requested $_____

75. **Other contingent and unliquidated claims or causes of action of every nature, including counterclaims of the debtor and rights to set off claims**
_____ $_____
Nature of claim _____
Amount requested_ $_____

76. **Trusts, equitable or future interests in property**
_____ $_____

77. **Other property of any kind not already listed** *Examples:* Season tickets, country club membership
_____ $_____
_____ $_____

78. **Total of Part 11.**
Add lines 71 through 77. Copy the total to line 90. $_____

79. **Has any of the property listed in Part 11 been appraised by a professional within the last year?**
- ❑ No
- ❑ Yes

Part 12: Summary

In Part 12 copy all of the totals from the earlier parts of the form.

Type of property	Current value of personal property		Current value of real property
80. **Cash, cash equivalents, and financial assets.** *Copy line 45, Part 1.*	$_____		
81. **Deposits and prepayments.** *Copy line 9, Part 2.*	$_____		
82. **Accounts receivable.** *Copy line 12, Part 3.*	$_____		
83. **Investments.** *Copy line 17, Part 4.*	$_____		
84. **Inventory.** *Copy line 23, Part 5.*	$_____		
85. **Agricultural assets.** *Copy line 33, Part 6.*	$_____		
86. **Office furniture, fixtures, and equipment, and collectibles.** *Copy line 43, Part 7.*	$_____		
87. **Machinery, equipment, and vehicles.** *Copy line 51, Part 8.*	$_____		
88. **Real property.** *Copy line 56, Part 9.* ..... ➔			$_____
89. **Intangibles and intellectual property.** *Copy line 66, Part 10.*	$_____		
90. **All other assets.** *Copy line 78, Part 11.*	+ $_____		
91. **Total.** Add lines 80 through 90 for each column..... 91a.	$_____	+ 91b.	$_____

92. **Total of all property on Schedule A/B.** Lines 91a + 91b = 92. ..... $_____

Fill in this information to identify the case:

Debtor name _____

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number (If known): _____

☐ Check if this is an amended filing

Official Form 206D

Schedule D: Creditors Who Have Claims Secured by Property

12/15

Be as complete and accurate as possible.

1. **Do any creditors have claims secured by debtor's property?**
   - ☐ No. Check this box and submit page 1 of this form to the court with debtor's other schedules. Debtor has nothing else to report on this form.
   - ☐ Yes. Fill in all of the information below.

Part 1: List Creditors Who Have Secured Claims

2. **List in alphabetical order all creditors who have secured claims.** If a creditor has more than one secured claim, list the creditor separately for each claim.

		Column A **Amount of claim** Do not deduct the value of lien.	*Column B* **Value of debtor's property that secures this claim**
2.1 **Creditor's name** _____ **Creditor's mailing address** _____ _____ **Creditor's email address, if known** _____ **Date debt was incurred** _____ **Last 4 digits of account number** __ __ __ __ **Do multiple creditors have an interest in the same property?** ☐ No ☐ Yes. Specify each creditor, including this creditor, and its relative priority. _____ _____	**Describe debtor's property that is subject to a lien** _____ _____ _____ **Describe the lien** _____ **Is the creditor an insider or related party?** ☐ No ☐ Yes **Is anyone else liable on this claim?** ☐ No ☐ Yes. Fill out *Schedule H: Codebtors* (Official Form 206H). **As of the petition filing date, the claim is:** Check all that apply. ☐ Contingent ☐ Unliquidated ☐ Disputed ☐ Liquidated and neither contingent nor disputed	$_____	$_____
2.2 **Creditor's name** _____ **Creditor's mailing address** _____ _____ **Creditor's email address, if known** _____ **Date debt was incurred** _____ **Last 4 digits of account number** __ __ __ __ **Do multiple creditors have an interest in the same property?** ☐ No ☐ Yes. Have you already specified the relative priority? ☐ No. Specify each creditor, including this creditor, and its relative priority. _____ _____ ☐ Yes. The relative priority of creditors is specified on lines _____	**Describe debtor's property that is subject to a lien** _____ _____ _____ **Describe the lien** _____ **Is the creditor an insider or related party?** ☐ No ☐ Yes **Is anyone else liable on this claim?** ☐ No ☐ Yes. Fill out *Schedule H: Codebtors* (Official Form 206H). **As of the petition filing date, the claim is:** Check all that apply. ☐ Contingent ☐ Unliquidated ☐ Disputed ☐ Liquidated and neither contingent nor disputed	$_____	$_____

3. **Total of the dollar amounts from Part 1, Column A, including the amounts from the Additional Page, if any.** $_____

12b-009840

Debtor _____ Case number (*if known*)_____
Name

Part 1: Additional Page

Copy this page only if more space is needed. Continue numbering the lines sequentially from the previous page.

		Column A **Amount of claim** Do not deduct the value of lien.	*Column B* **Value of debtor's property that secures this claim**
2._ **Creditor's name** _____	**Describe debtor's property that is subject to a lien** _____	$_____	$_____

Creditor's mailing address

_____
_____

Creditor's email address, if known

_____

Date debt was incurred _____

Last 4 digits of account number __ __ __ __

Do multiple creditors have an interest in the same property?

- ❑ No
- ❑ Yes. Have you already specified the relative priority?
  - ❑ No. Specify each creditor, including this creditor, and its relative priority.
    _____
    _____
    _____
  - ❑ Yes. The relative priority of creditors is specified on lines _____

Describe the lien

_____

Is the creditor an insider or related party?

- ❑ No
- ❑ Yes

Is anyone else liable on this claim?

- ❑ No
- ❑ Yes. Fill out *Schedule H: Codebtors* (Official Form 206H).

As of the petition filing date, the claim is:
Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ Liquidated and neither contingent nor disputed

2._ **Creditor's name** _____	**Describe debtor's property that is subject to a lien** _____	$_____	$_____

Creditor's mailing address

_____
_____

Creditor's email address, if known

_____

Date debt was incurred _____

Last 4 digits of account number __ __ __ __

Do multiple creditors have an interest in the same property?

- ❑ No
- ❑ Yes. Have you already specified the relative priority?
  - ❑ No. Specify each creditor, including this creditor, and its relative priority.
    _____
    _____
    _____
  - ❑ Yes. The relative priority of creditors is specified on lines _____

Describe the lien

_____

Is the creditor an insider or related party?

- ❑ No
- ❑ Yes

Is anyone else liable on this claim?

- ❑ No
- ❑ Yes. Fill out *Schedule H: Codebtors* (Official Form 206H).

As of the petition filing date, the claim is:
Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ Liquidated and neither contingent nor disputed

Debtor _____ Case number (*if known*)_____
Name

Part 2: List Others to Be Notified for a Debt Already Listed in Part 1

List in alphabetical order any others who must be notified for a debt already listed in Part 1. Examples of entities that may be listed are collection agencies, assignees of claims listed above, and attorneys for secured creditors.

If no others need to be notified for the debts listed in Part 1, do not fill out or submit this page. If additional pages are needed, copy this page.

Name and address	On which line in Part 1 did you enter the related creditor?	Last 4 digits of account number for this entity
	Line 2. __	___ ___ ___ ___
	Line 2. __	___ ___ ___ ___
	Line 2. __	___ ___ ___ ___
	Line 2. __	___ ___ ___ ___
	Line 2. __	___ ___ ___ ___
	Line 2. __	___ ___ ___ ___
	Line 2. __	___ ___ ___ ___
	Line 2. __	___ ___ ___ ___
	Line 2. __	___ ___ ___ ___
	Line 2. __	___ ___ ___ ___
	Line 2. __	___ ___ ___ ___
	Line 2. __	___ ___ ___ ___
	Line 2. __	___ ___ ___ ___
	Line 2. __	___ ___ ___ ___
	Line 2. __	___ ___ ___ ___

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Fill in this information to identify the case:

Debtor _____

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number (If known) _____

❑ Check if this is an amended filing

Official Form 206E/F

Schedule E/F: Creditors Who Have Unsecured Claims

12/15

Be as complete and accurate as possible. Use Part 1 for creditors with PRIORITY unsecured claims and Part 2 for creditors with NONPRIORITY unsecured claims. List the other party to any executory contracts or unexpired leases that could result in a claim. Also list executory contracts on *Schedule A/B: Real and Personal Property* (Official Form 206A/B) and on *Schedule G: Executory Contracts and Unexpired Leases* (Official Form 206G). Number the entries in Parts 1 and 2 in the boxes on the left. If more space is needed for Part 1 or Part 2, fill out and attach the Additional Page of that Part included in this form.

Part 1: List All Creditors with PRIORITY Unsecured Claims

1. **Do any creditors have priority unsecured claims?** (See 11 U.S.C. § 507).
   - ❑ No. Go to Part 2.
   - ❑ Yes. Go to line 2.

2. **List in alphabetical order all creditors who have unsecured claims that are at least partially entitled to priority.** If the debtor has more than 3 creditors with priority unsecured claims, fill out and attach the Additional Page of Part 1.

		Total claim	Priority amount
2.1	**Priority creditor's name and mailing address** _____ _____ _____ **Date or dates debt was incurred** _____ **Last 4 digits of account number** ___ ___ ___ ___ **Specify Code subsection of PRIORITY unsecured claim:** 11 U.S.C. § 507(a) (_____)	**As of the petition filing date, the claim is:** *Check all that apply.* ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ Liquidated and neither contingent nor disputed **Basis for the claim:** _____ **Is the claim subject to offset?** ❑ No ❑ Yes	$_____	$_____
2.2	**Priority creditor's name and mailing address** _____ _____ _____ **Date or dates debt was incurred** _____ **Last 4 digits of account number** ___ ___ ___ ___ **Specify Code subsection of PRIORITY unsecured claim:** 11 U.S.C. § 507(a) (_____)	**As of the petition filing date, the claim is:** *Check all that apply.* ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ Liquidated and neither contingent nor disputed **Basis for the claim:** _____ **Is the claim subject to offset?** ❑ No ❑ Yes	$_____	$_____
2.3	**Priority creditor's name and mailing address** _____ _____ _____ **Date or dates debt was incurred** _____ **Last 4 digits of account number** ___ ___ ___ ___ **Specify Code subsection of PRIORITY unsecured claim:** 11 U.S.C. § 507(a) (_____)	**As of the petition filing date, the claim is:** *Check all that apply.* ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ Liquidated and neither contingent nor disputed **Basis for the claim:** _____ **Is the claim subject to offset?** ❑ No ❑ Yes	$_____	$_____

Part 1. Additional Page

Copy this page if more space is needed. Continue numbering the lines sequentially from the previous page. If no additional PRIORITY creditors exist, do not fill out or submit this page.

		Total claim	Priority amount
2._ **Priority creditor's name and mailing address** _____ **Date or dates debt was incurred** _____ **Last 4 digits of account number** ___ ___ ___ ___ **Specify Code subsection of PRIORITY unsecured claim:** 11 U.S.C. § 507(a) (_____)	**As of the petition filing date, the claim is:** *Check all that apply.* ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ Liquidated and neither contingent nor disputed **Basis for the claim:** _____ **Is the claim subject to offset?** ❑ No ❑ Yes	$_____	$_____
2._ **Priority creditor's name and mailing address** _____ **Date or dates debt was incurred** _____ **Last 4 digits of account number** ___ ___ ___ ___ **Specify Code subsection of PRIORITY unsecured claim:** 11 U.S.C. § 507(a) (_____)	**As of the petition filing date, the claim is:** *Check all that apply.* ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ Liquidated and neither contingent nor disputed **Basis for the claim:** _____ **Is the claim subject to offset?** ❑ No ❑ Yes	$_____	$_____
2._ **Priority creditor's name and mailing address** _____ **Date or dates debt was incurred** _____ **Last 4 digits of account number** ___ ___ ___ ___ **Specify Code subsection of PRIORITY unsecured claim:** 11 U.S.C. § 507(a) (_____)	**As of the petition filing date, the claim is:** *Check all that apply.* ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ Liquidated and neither contingent nor disputed **Basis for the claim:** _____ **Is the claim subject to offset?** ❑ No ❑ Yes	$_____	$_____
2._ **Priority creditor's name and mailing address** _____ **Date or dates debt was incurred** _____ **Last 4 digits of account number** ___ ___ ___ ___ **Specify Code subsection of PRIORITY unsecured claim:** 11 U.S.C. § 507(a) (_____)	**As of the petition filing date, the claim is:** *Check all that apply.* ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ Liquidated and neither contingent nor disputed **Basis for the claim:** _____ **Is the claim subject to offset?** ❑ No ❑ Yes	$_____	$_____

Part 2: List All Creditors with NONPRIORITY Unsecured Claims

3. Do any creditors have unsecured claims not listed on Part 1 of this form or on Schedule G?

- ❑ No. Go to Part 3.
- ❑ Yes. Go to line 4.

4. List in alphabetical order all of the creditors with nonpriority unsecured claims. If the debtor has more than 4 creditors with nonpriority unsecured claims, fill out and attach the Additional Page of Part 2.

Amount of claim

4.1 Nonpriority creditor's name and mailing address

_____
_____
_____

As of the petition filing date, the claim is:
Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ Liquidated and neither contingent nor disputed

$_____

Basis for the claim: _____

Date or dates debt was incurred _____

Last 4 digits of account number ___ ___ ___ ___

Is the claim subject to offset?
- ❑ No
- ❑ Yes

4.2 Nonpriority creditor's name and mailing address

_____
_____
_____

As of the petition filing date, the claim is:
Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ Liquidated and neither contingent nor disputed

$_____

Basis for the claim: _____

Date or dates debt was incurred _____

Last 4 digits of account number ___ ___ ___ ___

Is the claim subject to offset?
- ❑ No
- ❑ Yes

4.3 Nonpriority creditor's name and mailing address

_____
_____
_____

As of the petition filing date, the claim is:
Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ Liquidated and neither contingent nor disputed

$_____

Basis for the claim: _____

Date or dates debt was incurred _____

Last 4 digits of account number ___ ___ ___ ___

Is the claim subject to offset?
- ❑ No
- ❑ Yes

4.4 Nonpriority creditor's name and mailing address

_____
_____
_____

As of the petition filing date, the claim is:
Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ Liquidated and neither contingent nor disputed

$_____

Basis for the claim: _____

Date or dates debt was incurred _____

Last 4 digits of account number ___ ___ ___ ___

Is the claim subject to offset?
- ❑ No
- ❑ Yes

4.5 Nonpriority creditor's name and mailing address

_____
_____
_____

As of the petition filing date, the claim is:
Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above

$_____

Basis for the claim: _____

Date or dates debt was incurred _____

Last 4 digits of account number ___ ___ ___ ___

Is the claim subject to offset?
- ❑ No
- ❑ Yes

Part 2: Additional Page

Copy this page only if more space is needed. Continue numbering the lines sequentially from the previous page. If no additional NONPRIORITY creditors exist, do not fill out or submit this page.

Amount of claim

4.__ **Nonpriority creditor's name and mailing address**

_____

_____

_____

Date or dates debt was incurred _____

Last 4 digits of account number ___ ___ ___ ___

As of the petition filing date, the claim is:
Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ Liquidated and neither contingent nor disputed

Basis for the claim: _____

Is the claim subject to offset?
- ❑ No
- ❑ Yes

$_____

4.__ **Nonpriority creditor's name and mailing address**

_____

_____

_____

Date or dates debt was incurred _____

Last 4 digits of account number ___ ___ ___ ___

As of the petition filing date, the claim is:
Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ Liquidated and neither contingent nor disputed

Basis for the claim: _____

Is the claim subject to offset?
- ❑ No
- ❑ Yes

$_____

4.__ **Nonpriority creditor's name and mailing address**

_____

_____

_____

Date or dates debt was incurred _____

Last 4 digits of account number ___ ___ ___ ___

As of the petition filing date, the claim is:
Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ Liquidated and neither contingent nor disputed

Basis for the claim: _____

Is the claim subject to offset?
- ❑ No
- ❑ Yes

$_____

4.__ **Nonpriority creditor's name and mailing address**

_____

_____

_____

Date or dates debt was incurred _____

Last 4 digits of account number ___ ___ ___ ___

As of the petition filing date, the claim is:
Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ Liquidated and neither contingent nor disputed

Basis for the claim: _____

Is the claim subject to offset?
- ❑ No
- ❑ Yes

$_____

4.__ **Nonpriority creditor's name and mailing address**

_____

_____

_____

Date or dates debt was incurred _____

Last 4 digits of account number ___ ___ ___ ___

As of the petition filing date, the claim is:
Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ Liquidated and neither contingent nor disputed

Basis for the claim: _____

Is the claim subject to offset?
- ❑ No
- ❑ Yes

$_____

Part 3: List Others to Be Notified About Unsecured Claims

5. Does the debtor want to notify additional parties about the claims listed in Parts 1 and 2 or for some other reason?

Examples of entities that may be listed are collection agencies, assignors or assignees of claims listed above, and attorneys for unsecured creditors.

- ❑ No. If no others are to be notified of the debtor's unsecured debts, go to Part 4.
- ❑ Yes. Fill in the information below.

	Name and mailing address	On which line in Part 1 or Part 2 is the related creditor (if any) listed?	Last 4 digits of account number, if any
5.1.		Line ____ ❑ Not listed. Explain _____	— — — —
5.2.		Line ____ ❑ Not listed. Explain _____	— — — —
5.3.		Line ____ ❑ Not listed. Explain _____	— — — —
5.4.		Line ____ ❑ Not listed. Explain _____	— — — —
5.1.		Line ____ ❑ Not listed. Explain _____	— — — —
5.5.		Line ____ ❑ Not listed. Explain _____	— — — —
5.6.		Line ____ ❑ Not listed. Explain _____	— — — —
5.7.		Line ____ ❑ Not listed. Explain _____	— — — —
5.8.		Line ____ ❑ Not listed. Explain _____	— — — —
5.9.		Line ____ ❑ Not listed. Explain _____	— — — —
5.10.		Line ____ ❑ Not listed. Explain _____	— — — —
5.11.		Line ____ ❑ Not listed. Explain _____	— — — —

Debtor _____ Case number (*if known*)_____
Name

Part 3: Additional Page for Others to Be Notified About Unsecured Claims

	Name and mailing address	On which line in Part 1 or Part 2 is the related creditor (if any) listed?	Last 4 digits of account number, if any
5.__		Line ____ ❑ Not listed. Explain _____	__ __ __ __
5.__		Line ____ ❑ Not listed. Explain _____	__ __ __ __
5.__		Line ____ ❑ Not listed. Explain _____	__ __ __ __
5.__		Line ____ ❑ Not listed. Explain _____	__ __ __ __
5.__		Line ____ ❑ Not listed. Explain _____	__ __ __ __
5.__		Line ____ ❑ Not listed. Explain _____	__ __ __ __
5.__		Line ____ ❑ Not listed. Explain _____	__ __ __ __
5.__		Line ____ ❑ Not listed. Explain _____	__ __ __ __
5.__		Line ____ ❑ Not listed. Explain _____	__ __ __ __
5.__		Line ____ ❑ Not listed. Explain _____	__ __ __ __
5.__		Line ____ ❑ Not listed. Explain _____	__ __ __ __
5.__		Line ____ ❑ Not listed. Explain _____	__ __ __ __
5.__		Line ____ ❑ Not listed. Explain _____	__ __ __ __
5.__		Line ____ ❑ Not listed. Explain _____	__ __ __ __
5.__		Line ____ ❑ Not listed. Explain _____	__ __ __ __

12b-009849

Part 4: Total Amounts of the Priority and Nonpriority Unsecured Claims

6. Add the amounts of priority and nonpriority unsecured claims.

			Total of claim amounts
6a. **Total claims from Part 1**	6a.		$_____
6b. **Total claims from Part 2**	6b.	+	$_____
6c. **Total of Parts 1 and 2** Lines 6a + 6b = 6c.	6c.		$_____

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Fill in this information to identify the case:

Debtor name _____

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number (If known): _____ Chapter _____

❑ Check if this is an amended filing

Official Form 206G

Schedule G: Executory Contracts and Unexpired Leases

12/15

Be as complete and accurate as possible. If more space is needed, copy and attach the additional page, numbering the entries consecutively.

1. **Does the debtor have any executory contracts or unexpired leases?**
   - ❑ No. Check this box and file this form with the court with the debtor's other schedules. There is nothing else to report on this form.
   - ❑ Yes. Fill in all of the information below even if the contracts or leases are listed on *Schedule A/B: Real and Personal Property* (Official Form 206A/B).

2. List all contracts and unexpired leases		State the name and mailing address for all other parties with whom the debtor has an executory contract or unexpired lease
2.1	State what the contract or lease is for and the nature of the debtor's interest State the term remaining List the contract number of any government contract	
2.2	State what the contract or lease is for and the nature of the debtor's interest State the term remaining List the contract number of any government contract	
2.3	State what the contract or lease is for and the nature of the debtor's interest State the term remaining List the contract number of any government contract	
2.4	State what the contract or lease is for and the nature of the debtor's interest State the term remaining List the contract number of any government contract	
2.5	State what the contract or lease is for and the nature of the debtor's interest State the term remaining List the contract number of any government contract	

Debtor _____ Case number (*if known*)_____
Name

Additional Page if Debtor Has More Executory Contracts or Unexpired Leases

Copy this page only if more space is needed. Continue numbering the lines sequentially from the previous page.

	List all contracts and unexpired leases	State the name and mailing address for all other parties with whom the debtor has an executory contract or unexpired lease
2._	**State what the contract or lease is for and the nature of the debtor's interest** **State the term remaining** **List the contract number of any government contract**	
2._	**State what the contract or lease is for and the nature of the debtor's interest** **State the term remaining** **List the contract number of any government contract**	
2._	**State what the contract or lease is for and the nature of the debtor's interest** **State the term remaining** **List the contract number of any government contract**	
2._	**State what the contract or lease is for and the nature of the debtor's interest** **State the term remaining** **List the contract number of any government contract**	
2._	**State what the contract or lease is for and the nature of the debtor's interest** **State the term remaining** **List the contract number of any government contract**	
2._	**State what the contract or lease is for and the nature of the debtor's interest** **State the term remaining** **List the contract number of any government contract**	
2._	**State what the contract or lease is for and the nature of the debtor's interest** **State the term remaining** **List the contract number of any government contract**	

12b-009853

Fill in this information to identify the case:

Debtor name _____

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number (If known): _____

❑ Check if this is an amended filing

Official Form 206H

Schedule H: Codebtors

12/15

Be as complete and accurate as possible. If more space is needed, copy the Additional Page, numbering the entries consecutively. Attach the Additional Page to this page.

1. **Does the debtor have any codebtors?**
   - ❑ No. Check this box and submit this form to the court with the debtor's other schedules. Nothing else needs to be reported on this form.
   - ❑ Yes

2. **In Column 1, list as codebtors all of the people or entities who are also liable for any debts listed by the debtor in the schedules of creditors, *Schedules D-G*.** Include all guarantors and co-obligors. In Column 2, identify the creditor to whom the debt is owed and each schedule on which the creditor is listed. If the codebtor is liable on a debt to more than one creditor, list each creditor separately in Column 2.

	Column 1: **Codebtor**		*Column 2:* **Creditor**	
	Name	**Mailing address**	**Name**	*Check all schedules that apply:*
2.1	_____	Street City State ZIP Code	_____	❑ D ❑ E/F ❑ G
2.2	_____	Street City State ZIP Code	_____	❑ D ❑ E/F ❑ G
2.3	_____	Street City State ZIP Code	_____	❑ D ❑ E/F ❑ G
2.4	_____	Street City State ZIP Code	_____	❑ D ❑ E/F ❑ G
2.5	_____	Street City State ZIP Code	_____	❑ D ❑ E/F ❑ G
2.6	_____	Street City State ZIP Code	_____	❑ D ❑ E/F ❑ G

Additional Page if Debtor Has More Codebtors

Copy this page only if more space is needed. Continue numbering the lines sequentially from the previous page.

	Column 1: **Codebtor**				*Column 2:* **Creditor**	
	Name	**Mailing address**			**Name**	*Check all schedules that apply:*
2.__	_____	_____ Street _____ _____ City	State	ZIP Code	_____	❑ D ❑ E/F ❑ G
2.__	_____	_____ Street _____ _____ City	State	ZIP Code	_____	❑ D ❑ E/F ❑ G
2.__	_____	_____ Street _____ _____ City	State	ZIP Code	_____	❑ D ❑ E/F ❑ G
2.__	_____	_____ Street _____ _____ City	State	ZIP Code	_____	❑ D ❑ E/F ❑ G
2.__	_____	_____ Street _____ _____ City	State	ZIP Code	_____	❑ D ❑ E/F ❑ G
2.__	_____	_____ Street _____ _____ City	State	ZIP Code	_____	❑ D ❑ E/F ❑ G
2.__	_____	_____ Street _____ _____ City	State	ZIP Code	_____	❑ D ❑ E/F ❑ G
2.__	_____	_____ Street _____ _____ City	State	ZIP Code	_____	❑ D ❑ E/F ❑ G

Fill in this information to identify the case:

Debtor name _____

United States Bankruptcy Court for the:_____ District of _____ (State)

Case number (If known): _____

☐ Check if this is an amended filing

Official Form 206Sum

Summary of Assets and Liabilities for Non-Individuals

12/15

Part 1: Summary of Assets

1. ***Schedule A/B: Assets–Real and Personal Property*** (Official Form 206A/B)

1a. **Real property:**
Copy line 88 from *Schedule A/B* ..... $ _____

1b. **Total personal property:**
Copy line 91A from *Schedule A/B* ..... $ _____

1c. **Total of all property:**
Copy line 92 from *Schedule A/B* ..... $ _____

Part 2: Summary of Liabilities

2. ***Schedule D: Creditors Who Hold Claims Secured by Property*** (Official Form 206D)
Copy the total dollar amount listed in Column A, *Amount of claim,* at the bottom of page 1 of *Schedule D* ..... $ _____

3. ***Schedule E/F: Creditors Who Have Unsecured Claims*** (Official Form 206E/F)

3a. **Total claim amounts of priority unsecured claims:**
Copy the total claims from Part 1 from line 6a of *Schedule E/F* ..... $ _____

3b. **Total amount of claims of non-priority amount of unsecured claims:**
Copy the total of the amount of claims from Part 2 from line 6b of *Schedule E/F* ..... + $ _____

4. **Total liabilities** .....
Lines 2 + 3a + 3b $ _____

12b-009856

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COMMITTEE NOTE

The schedules to be used in cases of non-individual debtors have been revised as part of the Forms Modernization Project, making them easier to read and, as a result, likely to generate more complete and accurate responses. The goals of the Forms Modernization Project include improving the interface between technology and the forms so as to increase efficiency and reduce the need to produce the same information in multiple formats.

The Forms Modernization Project made a preliminary decision that separate forms should be created for individual debtors and for non-individual debtors because separate areas of inquiry apply to each group. The forms for non-individuals eliminate questions that pertain only to individuals and use a more open-ended response format. Also, where possible, the forms for non-individuals parallel how businesses commonly keep their financial records. The non-individual debtor schedules are also renumbered, starting with the number 206 and followed by the letter or name of the schedule to distinguish them from the versions to be used in individual cases. Each form includes a checkbox to indicate whether it is an amended filing.

Official Form 206Sum, *Summary of Assets and Liabilities for Non-Individuals*, replaces Official Form 6, *Summary of Schedules and Statistical Summary of Certain Liability and Related Data (28 U.S.C. § 159)*, in cases of non-individual debtors. The form is reformatted and updated with cross-references indicating the line numbers from specific schedules from which the summary information is to be gathered, and the Statistical Summary is deleted because it only applies to individual debtors. In addition, because most filings are now done electronically, the form no longer requires the debtor to indicate which schedules are attached or to state the number of sheets of paper used for the schedules.

Official Form 206A/B, *Schedule A/B: Assets – Real and Personal Property*, consolidates information about a non-

individual debtor's real and personal property into a single form and replaces Official Form 6A - *Real Property* and Official Form 6B - *Personal Property*, in cases of non-individual debtors. The layout and categories of property on Official Form 206A/B have changed. Instead of dividing property interests into two categories (real or personal property), the new form uses eleven categories of property types. For each part, the specific items are broken out and debtors are instructed to total the part and list the total on a specific line later in the form.

Part 1: *Cash and cash equivalents*, includes cash and cash equivalents and a shortened list of examples. All financial assets other than cash or cash equivalents are moved to Part 4: *Investments*. In the section to list checking, savings, money market, or financial brokerage accounts, debtors are instructed to include the name of the institution and the last 4-digits of any account number.

In Part 2: *Deposits and prepayments*, adds prepayments and examples. A requirement has been added to include the name of the holder of any deposit.

Part 3: *Accounts receivable*, has been revised to divide accounts receivable into two categories depending on age and asks for separate values for the two categories.

Part 4: *Investments*, has been expanded and includes more detail.

Part 5: *Inventory, excluding agricultural assets*, has been amended to separate non-agricultural from agricultural assets, and has been expanded to include more detail. Categories of inventory are listed, and debtors must include the last date of physical inventory, the net book value of debtor's interest (if available), the valuation method used for current value, and the current value of debtor's interest. The form has been further amended to require the debtor to indicate whether the properties listed are perishable, whether any of the property was purchased within 20 days of the bankruptcy filing, and whether any of the property was appraised by a professional within the year prior to the bankruptcy filing.

In Part 6: *Agricultural assets (other than titled motor vehicles and land)*, the form has been amended to require more detailed responses and to require the debtor to indicate the net book value of the debtor's interest, the valuation method used for current value, and the current value of debtor's interest. A requirement to list fishing supplies has been added. The form has been further amended to require the debtor to indicate whether the properties listed are perishable, whether any of the property was purchased within 20 days of the bankruptcy filing, whether a depreciation schedule is available for any of the property listed, and whether any of the property was appraised by a professional within the year prior to the bankruptcy filing.

Part 7: *Office furniture, fixtures, and equipment; and collectibles*, has been amended to combine several categories of assets and to require more detail, including requiring the debtor to indicate the net book value of the debtor's interest, the valuation method used for current value, and the current value of debtor's interest. Examples of collectibles are provided. The form has been further amended to require the debtor to indicate whether a depreciation schedule is available for any property listed and whether any of the property listed was appraised by a professional within the year prior to the bankruptcy filing.

Part 8: *Machinery, equipment, and vehicles*, has been amended to combine several categories of property and to require more detail, including requiring the debtor to indicate the net book value of the debtor's interest, the valuation method used for current value, and the current value of debtor's interest. More examples are provided for each property type. The form has been further amended to indicate whether a depreciation schedule is available for any property listed and whether any of the property listed was appraised by a professional within the year prior to the bankruptcy filing.

Part 9: *Real property*, includes the elements of Official Form 6A, *Real Property*, and has been amended to expand the required information to include the net book value of the debtor's interest and the valuation method used for current value. Also, an instruction has been added for the description and location of the property. The form has been further amended to indicate whether

a depreciation schedule is available for any property listed and whether any of the property listed was appraised by a professional within the year prior to the bankruptcy filing.

Part 10: *Intangibles and intellectual property*, includes amendments to combine several categories of property and to include more property types. The debtor is required to list the net book value of the debtor's interest and the valuation method used for current value. The question regarding personally identifiable information has been revised, and the form has been amended to require the debtor to indicate if there is an amortization schedule or similar schedule available for any property listed and whether any of the property listed was appraised by a professional within the year prior to the bankruptcy filing.

Part 11: *All other assets*, includes a new category for notes receivable, which requires a description, including the name of the obligor, the face amount, and any uncollectible amount. In addition, the form has been amended to combine tax refunds and net operating losses into a single question and to require more detail, to delete the requirement to list the insurance company name for any interests in insurance policies, to expand the question regarding contingent and unliquidated claims, and to include examples of other property. The form has been further amended to include a question regarding whether the property listed was appraised by a professional within the year prior to the bankruptcy filing.

Part 12, *Summary*, has been amended to list relevant line numbers for each type of property.

Official Form 206D, *Schedule D: Creditors Who Hold Claims Secured by Property*, replaces Official Form 6D, *Creditors Holding Secured Claims*, for non-individual debtors and has been revised to eliminate instructions that pertain only to individuals. The form has been further amended to instruct debtors that if a creditor has more than one secured claim, to list the creditor separately for each claim; to list the creditor's email address, if known; to indicate if multiple creditors have an interest in the same collateral; to list the order of each creditor's priority interest in the collateral; and to indicate whether the creditor is an insider or

related party. The debtor is also instructed to describe the lien and to fill out *Schedule H: Codebtors*, if anyone else is liable on the claim. A new category for describing claims has been added—"unliquidated and neither contingent nor disputed". Finally, the form has been amended to require the debtor to list the value of the debtor's property that secures the claim.

A new Part 2: *List Others to be Notified for a Debt Already Listed in Part 1* has been added, with instructions to list any others who must be notified about the bankruptcy for a debt listed in Part 1 of the form. Examples are provided. The debtor must include the relevant line from Part 1 and the last 4 digits of the account number for the entity.

A new Part 3: *Total Amounts of Claims and the Unsecured Portion of Claims*, has been added.

Official Form 206E/F, *Schedule E/F: Creditors Who Hold Unsecured Claims*, has been amended to combine Official Form 6E, *Schedule E – Creditors Holding Unsecured Priority Claims* and Official Form 6F, *Schedule F – Creditors Holding Unsecured Nonpriority Claims* for non-individual debtors. Priority unsecured claims are listed in Part 1, and nonpriority unsecured claims are listed in Part 2. The instructions have been revised to require the debtor to list the other party to any executory contract or unexpired lease on this schedule and on *Schedule A/B Real and Personal Property* and *Schedule G: Executory Contracts and Unexpired Leases* (Official Forms 206A/B and 206G).

Part 1, *List All Creditors with PRIORITY Unsecured Claims*, has been revised to delete the requirement to list the amount not entitled to priority and to add requirements to specify the Code section for the priority unsecured claim and whether the claim is subject to offset. A new category of "liquidated and neither contingent nor disputed" has been added to Part 2, *List All Creditors with NONPRIORITY Unsecured Claims*, along with the requirement to indicate if the claim is subject to offset . The instructions have also been significantly shortened. Part 3, *List Others to be Notified About Unsecured Claims*, has been added, with instructions to list any others that the debtor wants to notify about claims listed in Parts 1 and 2. Examples are given. The

debtor must include the relevant line from Part 1 or 2 and the last 4 digits of the account number for the entity. A new Part 4: *Total Amounts of the Priority and Nonpriority Unsecured Claims* has been added.

Official Form 206G, *Schedule G: Executory Contracts and Unexpired Leases*, replaces Official Form 6G - *Executory Contracts and Unexpired Leases* for non-individual debtors. The form has been amended to delete the instruction regarding the listing of a minor child's name from the form as a caution is included in the general instructions for all forms regarding listing a minor child's name. A new requirement has been added to state the remaining term for any contract or lease listed.

Official Form 206H, *Schedule H: Codebtors*, replaces Official Form 6H – *Codebtors* for non-individual debtors. The form has been amended to delete the instruction regarding the listing of a minor child's name from the form as a caution is included in the general instructions for all forms regarding listing a minor child's name. A new requirement is added to indicate by checkbox what schedule applies to each co-debtor.

Schedules C, *Exemptions*, I, *Income* and J, *Expenses*. There are no Official Forms for Schedules C, I, and J in non-individual debtor cases. There is no need for an Official Form 206C for non-individual debtors because exemptions are inapplicable to non-individual debtors. And, although section 521(a) of the Bankruptcy Code requires all debtors, including non-individual debtors, to provide schedules of income and expenses, uncertainty about the state of the debtor's business on the petition date – whether it is operating or not, for example – makes it difficult to create standard income and expense forms for non-individual debtors. Some bankruptcy courts have adopted local rules and forms for reporting the income and expenses of non-individual debtors, and Director's Procedural Forms 2060I and 2060J, can be used and modified as appropriate if there are no applicable local rules and forms.

***Declaration*.** There is no Official Form 206, Declaration. The portion of Official Form 6 Declaration for a declaration on behalf of a corporation or partnership has been replaced by Official

Form 202, *Declaration Under Penalty of Perjury for Non-Individual Debtors.* Official Form 202 includes checkboxes for the schedules included in Official Form 206.

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Fill in this information to identify the case:

Debtor name _____

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number (If known): _____

☐ Check if this is an amended filing

Official Form 207

Statement of Financial Affairs for Non-Individuals Filing for Bankruptcy 12/15

The debtor must answer every question. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write the debtor's name and case number (if known).

Part 1: Income

1. **Gross revenue from business**

☐ None

Identify the beginning and ending dates of the debtor's fiscal year, which may be a calendar year				Sources of revenue Check all that apply	Gross revenue (before deductions and exclusions)
From the beginning of the fiscal year to filing date:	From _____ MM / DD / YYYY	to	Filing date	☐ Operating a business ☐ Other _____	$_____
For prior year:	From _____ MM / DD / YYYY	to	_____ MM / DD / YYYY	☐ Operating a business ☐ Other _____	$_____
For the year before that:	From _____ MM / DD / YYYY	to	_____ MM / DD / YYYY	☐ Operating a business ☐ Other _____	$_____

2. **Non-business revenue**

Include revenue regardless of whether that revenue is taxable. *Non-business income* may include interest, dividends, money collected from lawsuits, and royalties. List each source and the gross revenue for each separately. Do not include revenue listed in line 1.

☐ None

				Description of sources of revenue	Gross revenue from each source (before deductions and exclusions)
From the beginning of the fiscal year to filing date:	From _____ MM / DD / YYYY	to	Filing date	_____	$_____
For prior year:	From _____ MM / DD / YYYY	to	_____ MM / DD / YYYY	_____	$_____
For the year before that:	From _____ MM / DD / YYYY	to	_____ MM / DD / YYYY	_____	$_____

Part 2: List Certain Transfers Made Before Filing for Bankruptcy

3. Certain payments or transfers to creditors within 90 days before filing this case

List payments or transfers—including expense reimbursements—to any creditor, other than regular employee compensation, within 90 days before filing this case unless the aggregate value of all property transferred to that creditor is less than $6,225. (This amount may be adjusted on 4/01/16 and every 3 years after that with respect to cases filed on or after the date of adjustment.)

❑ None

	Creditor's name and address	Dates	Total amount or value	Reasons for payment or transfer *Check all that apply*
3.1.	_____ Creditor's name _____ Street _____ _____ City State ZIP Code	_____ _____ _____	$_____	❑ Secured debt ❑ Unsecured loan repayments ❑ Suppliers or vendors ❑ Services ❑ Other _____
3.2.	_____ Creditor's name _____ Street _____ _____ City State ZIP Code	_____ _____ _____	$_____	❑ Secured debt ❑ Unsecured loan repayments ❑ Suppliers or vendors ❑ Services ❑ Other _____

4. Payments or other transfers of property made within 1 year before filing this case that benefited any insider

List payments or transfers, including expense reimbursements, made within 1 year before filing this case on debts owed to an insider or guaranteed or co-signed by an insider unless the aggregate value of all property transferred to or for the benefit of the insider is less than $6,225. (This amount may be adjusted on 4/01/16 and every 3 years after that with respect to cases filed on or after the date of adjustment.) Do not include any payments listed in line 3. *Insiders* include officers, directors, and anyone in control of a corporate debtor and their relatives; general partners of a partnership debtor and their relatives; affiliates of the debtor and insiders of such affiliates; and any managing agent of the debtor. 11 U.S.C. § 101(31).

❑ None

	Insider's name and address	Dates	Total amount or value	Reasons for payment or transfer
4.1.	_____ Insider's name _____ Street _____ _____ City State ZIP Code **Relationship to debtor** _____	_____ _____ _____	$_____	_____ _____ _____
4.2.	_____ Insider's name _____ Street _____ _____ City State ZIP Code **Relationship to debtor** _____	_____ _____ _____	$_____	_____ _____ _____

5. Repossessions, foreclosures, and returns

List all property of the debtor that was obtained by a creditor within 1 year before filing this case, including property repossessed by a creditor, sold at a foreclosure sale, transferred by a deed in lieu of foreclosure, or returned to the seller. Do not include property listed in line 6.

❑ None

	Creditor's name and address	Description of the property	Date	Value of property
5.1.	Creditor's name Street City State ZIP Code			$_____
5.1.	Creditor's name Street City State ZIP Code			$_____

6. Setoffs

List any creditor, including a bank or financial institution, that within 90 days before filing this case set off or otherwise took anything from an account of the debtor without permission or refused to make a payment at the debtor's direction from an account of the debtor because the debtor owed a debt.

❑ None

Creditor's name and address	Description of the action creditor took	Date action was taken	Amount
Creditor's name Street City State ZIP Code	Last 4 digits of account number: XXXX– __ __ __ __		$_____

Part 3: Legal Actions or Assignments

7. Legal actions, administrative proceedings, court actions, executions, attachments, or governmental audits

List the legal actions, proceedings, investigations, arbitrations, mediations, and audits by federal or state agencies in which the debtor was involved in any capacity—within 1 year before filing this case.

❑ None

	Case title / Case number	Nature of case	Court or agency's name and address	Status of case
7.1.			Name Street City State ZIP Code	❑ Pending ❑ On appeal ❑ Concluded
7.2.			Name Street City State ZIP Code	❑ Pending ❑ On appeal ❑ Concluded

8. Assignments and receivership

List any property in the hands of an assignee for the benefit of creditors during the 120 days before filing this case and any property in the hands of a receiver, custodian, or other court-appointed officer within 1 year before filing this case.

❑ None

Custodian's name and address	Description of the property	Value
_____ Custodian's name _____ Street _____ _____ City State ZIP Code	_____	$_____
	Case title	**Court name and address**
	_____	_____ Name _____ Street _____ _____ City State ZIP Code
	Case number	
	_____	
	Date of order or assignment	
	_____	

Part 4: Certain Gifts and Charitable Contributions

9. List all gifts or charitable contributions the debtor gave to a recipient within 2 years before filing this case unless the aggregate value of the gifts to that recipient is less than $1,000

❑ None

	Recipient's name and address	Description of the gifts or contributions	Dates given	Value
9.1.	_____ Recipient's name _____ Street _____ _____ City State ZIP Code	_____ _____	_____	$_____
	Recipient's relationship to debtor			
	_____			
9.2.	_____ Recipient's name _____ Street _____ _____ City State ZIP Code	_____ _____	_____	$_____
	Recipient's relationship to debtor			
	_____			

Part 5: Certain Losses

10. **All losses from fire, theft, or other casualty within 1 year before filing this case.**

❑ None

Description of the property lost and how the loss occurred	Amount of payments received for the loss If you have received payments to cover the loss, for example, from insurance, government compensation, or tort liability, list the total received. List unpaid claims on *Schedule A/B: Property.*	Date of loss	Value of property lost
_____ _____	_____	_____	$_____

Part 6: Certain Payments or Transfers

11. Payments related to bankruptcy

List any payments of money or other transfers of property made by the debtor or person acting on behalf of the debtor within 1 year before the filing of this case to another person or entity, including attorneys, that the debtor consulted about debt consolidation or restructuring, seeking bankruptcy relief, or filing a bankruptcy case.

❑ None

	Who was paid or who received the transfer?	If not money, describe any property transferred	Dates	Total amount or value
11.1.	_____ **Address** _____ Street _____ City State ZIP Code **Email or website address** _____ **Who made the payment, if not debtor?** _____	_____ _____	_____	$_____
11.2.	_____ **Address** _____ Street _____ City State ZIP Code **Email or website address** _____ **Who made the payment, if not debtor?** _____	_____ _____	_____	$_____

12. Self-settled trusts of which the debtor is a beneficiary

List any payments or transfers of property made by the debtor or a person acting on behalf of the debtor within 10 years before the filing of this case to a self-settled trust or similar device.
Do not include transfers already listed on this statement.

❑ None

Name of trust or device	Describe any property transferred	Dates transfers were made	Total amount or value
_____ **Trustee** _____	_____ _____	_____	$_____

13. Transfers not already listed on this statement

List any transfers of money or other property—by sale, trade, or any other means—made by the debtor or a person acting on behalf of the debtor within 2 years before the filing of this case to another person, other than property transferred in the ordinary course of business or financial affairs. Include both outright transfers and transfers made as security. Do not include gifts or transfers previously listed on this statement.

❑ None

	Who received transfer?	Description of property transferred or payments received or debts paid in exchange	Date transfer was made	Total amount or value
13.1.	_____	_____	_____	$_____
	Address	_____		
	_____ Street			
	_____			
	_____ City State ZIP Code			
	Relationship to debtor			
	_____			
	Who received transfer?	_____	_____	$_____
13.2.	_____	_____		
	Address			
	_____ Street			
	_____			
	_____ City State ZIP Code			
	Relationship to debtor			
	_____			

Part 7: Previous Locations

14. Previous addresses

List all previous addresses used by the debtor within 3 years before filing this case and the dates the addresses were used.

❑ Does not apply

	Address	Dates of occupancy
14.1.	_____ Street	From _____ To _____
	_____	
	_____ City State ZIP Code	
14.2.	_____ Street	From _____ To _____
	_____	
	_____ City State ZIP Code	

Part 8: Healthcare Bankruptcies

15. Healthcare bankruptcies

Is the debtor primarily engaged in offering services and facilities for:

— diagnosing or treating injury, deformity, or disease, or

— providing any surgical, psychiatric, drug treatment, or obstetric care?

❑ No. Go to Part 9.

❑ Yes. Fill in the information below.

	Facility name and address	Nature of the business operation, including type of services the debtor provides	If debtor provides meals and housing, number of patients in debtor's care
15.1.	_____ Facility name _____ Street _____ _____ City State ZIP Code	_____ _____ **Location where patient records are maintained** (if different from facility address). If electronic, identify any service provider. _____ _____	_____ **How are records kept?** *Check all that apply:* ❑ Electronically ❑ Paper

	Facility name and address	Nature of the business operation, including type of services the debtor provides	If debtor provides meals and housing, number of patients in debtor's care
15.2.	_____ Facility name _____ Street _____ _____ City State ZIP Code	_____ _____ **Location where patient records are maintained** (if different from facility address). If electronic, identify any service provider. _____ _____	_____ **How are records kept?** *Check all that apply:* ❑ Electronically ❑ Paper

Part 9: Personally Identifiable Information

16. Does the debtor collect and retain personally identifiable information of customers?

❑ No.

❑ Yes. State the nature of the information collected and retained. _____

Does the debtor have a privacy policy about that information?

❑ No

❑ Yes

17. Within 6 years before filing this case, have any employees of the debtor been participants in any ERISA, 401(k), 403(b) or other pension or profit-sharing plan made available by the debtor as an employee benefit?

❑ No. Go to Part 10.

Yes. Does the debtor serve as plan administrator?

❑ No. Go to Part 10.

❑ Yes. Fill in below:

Name of plan	Employer identification number of the plan
_____	EIN: ___ ___ – ___ ___ ___ ___ ___ ___ ___

Has the plan been terminated?

❑ No

❑ Yes

Part 10: Certain Financial Accounts, Safe Deposit Boxes, and Storage Units

18. Closed financial accounts

Within 1 year before filing this case, were any financial accounts or instruments held in the debtor's name, or for the debtor's benefit, closed, sold, moved, or transferred?

Include checking, savings, money market, or other financial accounts; certificates of deposit; and shares in banks, credit unions, brokerage houses, cooperatives, associations, and other financial institutions.

❑ None

	Financial institution name and address	Last 4 digits of account number	Type of account	Date account was closed, sold, moved, or transferred	Last balance before closing or transfer
18.1.	_____ Name _____ Street _____ _____ City State ZIP Code	XXXX–___ ___ ___ ___	❑ Checking ❑ Savings ❑ Money market ❑ Brokerage ❑ Other_____	_____	$_____
18.2.	_____ Name _____ Street _____ _____ City State ZIP Code	XXXX–___ ___ ___ ___	❑ Checking ❑ Savings ❑ Money market ❑ Brokerage ❑ Other_____	_____	$_____

19. Safe deposit boxes

List any safe deposit box or other depository for securities, cash, or other valuables the debtor now has or did have within 1 year before filing this case.

❑ None

Depository institution name and address	Names of anyone with access to it	Description of the contents	Does debtor still have it?
_____ Name _____ Street _____ _____ City State ZIP Code	_____ _____ _____ **Address** _____ _____	_____ _____ _____	❑ No ❑ Yes

20. Off-premises storage

List any property kept in storage units or warehouses within 1 year before filing this case. Do not include facilities that are in a part of a building in which the debtor does business.

❑ None

Facility name and address	Names of anyone with access to it	Description of the contents	Does debtor still have it?
_____ Name _____ Street _____ _____ City State ZIP Code	_____ _____ _____ **Address** _____ _____	_____ _____ _____	❑ No ❑ Yes

Part 11: Property the Debtor Holds or Controls That the Debtor Does Not Own

21. Property held for another

List any property that the debtor holds or controls that another entity owns. Include any property borrowed from, being stored for, or held in trust. Do not list leased or rented property.

❑ None

Owner's name and address	Location of the property	Description of the property	Value
_____ Name _____ Street _____ _____ City State ZIP Code	_____ _____ _____	_____ _____ _____	$_____

Part 12: Details About Environmental Information

For the purpose of Part 12, the following definitions apply:

- *Environmental law* means any statute or governmental regulation that concerns pollution, contamination, or hazardous material, regardless of the medium affected (air, land, water, or any other medium)
- *Site* means any location, facility, or property, including disposal sites, that the debtor now owns, operates, or utilizes or that the debtor formerly owned, operated, or utilized.
- *Hazardous material* means anything that an environmental law defines as hazardous or toxic, or describes as a pollutant, contaminant, or a similarly harmful substance.

Report all notices, releases, and proceedings known, regardless of when they occurred.

22. **Has the debtor been a party in any judicial or administrative proceeding under any environmental law?** Include settlements and orders.

❑ No
❑ Yes. Provide details below.

Case title	Court or agency name and address	Nature of the case	Status of case
_____ **Case number** _____	_____ Name _____ Street _____ _____ City State ZIP Code	_____ _____ _____	❑ Pending ❑ On appeal ❑ Concluded

23. **Has any governmental unit otherwise notified the debtor that the debtor may be liable or potentially liable under or in violation of an environmental law?**

❑ No
❑ Yes. Provide details below.

Site name and address	Governmental unit name and address	Environmental law, if known	Date of notice
_____ Name _____ Street _____ _____ City State ZIP Code	_____ Name _____ Street _____ _____ City State ZIP Code	_____ _____ _____	_____

24. **Has the debtor notified any governmental unit of any release of hazardous material?**

❑ No

❑ Yes. Provide details below.

Site name and address	Governmental unit name and address	Environmental law, if known	Date of notice
Name Street City State ZIP Code	Name Street City State ZIP Code		

Part 13: Details About the Debtor's Business or Connections to Any Business

25. **Other businesses in which the debtor has or has had an interest**

List any business for which the debtor was an owner, partner, member, or otherwise a person in control within 6 years before filing this case. Include this information even if already listed in the Schedules.

❑ None

	Business name and address	Describe the nature of the business	Employer Identification number Do not include Social Security number or ITIN.
25.1.	Name Street City State ZIP Code		EIN: ___ ___ – ___ ___ ___ ___ ___ ___ ___ **Dates business existed** From _____ To _____
25.2.	Name Street City State ZIP Code		EIN: ___ ___ – ___ ___ ___ ___ ___ ___ ___ **Dates business existed** From _____ To _____
25.3.	Name Street City State ZIP Code		EIN: ___ ___ – ___ ___ ___ ___ ___ ___ ___ **Dates business existed** From _____ To _____

26. **Books, records, and financial statements**

26a. List all accountants and bookkeepers who maintained the debtor's books and records within 2 years before filing this case.

❑ None

	Name and address	Dates of service
26a.1.	Name Street City State ZIP Code	From _____ To _____
26a.2.	Name Street City State ZIP Code	From _____ To _____

26b. List all firms or individuals who have audited, compiled, or reviewed debtor's books of account and records or prepared a financial statement within 2 years before filing this case.

❑ None

	Name and address	Dates of service
26b.1.	Name Street City State ZIP Code	From _____ To _____
26b.2.	Name Street City State ZIP Code	From _____ To _____

26c. List all firms or individuals who were in possession of the debtor's books of account and records when this case is filed.

❑ None

	Name and address	If any books of account and records are unavailable, explain why
26c.1.	Name Street City State ZIP Code	

	Name and address	If any books of account and records are unavailable, explain why
26c.2.	_____ Name _____ Street _____ _____ City State ZIP Code	_____ _____ _____

26d. List all financial institutions, creditors, and other parties, including mercantile and trade agencies, to whom the debtor issued a financial statement within 2 years before filing this case.

❑ None

	Name and address
26d.2.	_____ Name _____ Street _____ _____ City State ZIP Code

	Name and address
26d.2.	_____ Name _____ Street _____ _____ City State ZIP Code

27. **Inventories**

Have any inventories of the debtor's property been taken within 2 years before filing this case?

❑ No

❑ Yes. Give the details about the two most recent inventories.

Name of the person who supervised the taking of the inventory	Date of inventory	The dollar amount and basis (cost, market, or other basis) of each inventory
_____	_____	$_____

	Name and address of the person who has possession of inventory records
27.1.	_____ Name _____ Street _____ _____ City State ZIP Code

Name of the person who supervised the taking of the inventory	Date of inventory	The dollar amount and basis (cost, market, or other basis) of each inventory
_____	_____	$_____

Name and address of the person who has possession of inventory records

27.2. _____
Name
_____
Street
_____
_____
City State ZIP Code

28. **List the debtor's officers, directors, managing members, general partners, members in control, controlling shareholders, or other people in control of the debtor at the time of the filing of this case.**

Name	Address	Position and nature of any interest	% of interest, if any
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

29. **Within 1 year before the filing of this case, did the debtor have officers, directors, managing members, general partners, members in control of the debtor, or shareholders in control of the debtor who no longer hold these positions?**

❑ No
❑ Yes. Identify below.

Name	Address	Position and nature of any interest	Period during which position or interest was held
_____	_____	_____	From _____ To _____
_____	_____	_____	From _____ To _____
_____	_____	_____	From _____ To _____
_____	_____	_____	From _____ To _____

30. **Payments, distributions, or withdrawals credited or given to insiders**

Within 1 year before filing this case, did the debtor provide an insider with value in any form, including salary, other compensation, draws, bonuses, loans, credits on loans, stock redemptions, and options exercised?

❑ No
❑ Yes. Identify below.

Name and address of recipient	Amount of money or description and value of property	Dates	Reason for providing the value
30.1. _____ Name _____ Street _____ _____ City State ZIP Code **Relationship to debtor** _____	_____	_____ _____ _____ _____ _____	_____

Name and address of recipient

_____
Name

_____
Street

_____

_____
City State ZIP Code

Relationship to debtor

_____

31. **Within 6 years before filing this case, has the debtor been a member of any consolidated group for tax purposes?**
- ❑ No
- ❑ Yes. Identify below.

Name of the parent corporation	**Employer Identification number of the parent corporation**
_____	EIN: ___ ___ – ___ ___ ___ ___ ___ ___ ___

32. **Within 6 years before filing this case, has the debtor as an employer been responsible for contributing to a pension fund?**
- ❑ No
- ❑ Yes. Identify below.

Name of the pension fund	**Employer Identification number of the pension fund**
_____	EIN: ___ ___ – ___ ___ ___ ___ ___ ___ ___

Part 14: Signature and Declaration

WARNING -- Bankruptcy fraud is a serious crime. Making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to $500,000 or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

I have examined the information in this *Statement of Financial Affairs* and any attachments and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____
MM / DD / YYYY

✘ _____ Printed name _____
Signature of individual signing on behalf of the debtor

Position or relationship to debtor _____

Are additional pages to *Statement of Financial Affairs for Non-Individuals Filing for Bankruptcy* (Official Form 207) attached?
- ❑ No
- ❑ Yes

COMMITTEE NOTE

Official Form 207, *Statement of Financial Affairs for Non-Individuals Filing for Bankruptcy*, replaces Official Form 7, *Statement of Financial Affairs*, for non-individual debtors. It is renumbered to distinguish it from the forms used by individual debtors and includes formatting and stylistic changes throughout the form.

Official Form 207 is revised as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. The goals of the Forms Modernization Project include improving the interface between technology and the forms so as to increase efficiency and reducing the need to produce the same information in multiple formats.

The Forms Modernization Project made a preliminary decision that separate forms should be created for individual debtors and for non-individual debtors because separate areas of inquiry apply to each group. The forms for non-individuals do not include questions that pertain only to individuals and use a more open-ended response format. Also, where possible, the forms for non-individuals parallel how businesses commonly keep their financial records.

The form is derived from Official Form 7, *Statement of Financial Affairs*, and has been substantially reorganized. The form is divided into 14 sections grouping similar questions together. Many of the instructions have been shortened, and questions and instructions pertaining to individual debtors have been deleted. The instructions at the beginning of the form have been shortened, and the definitions deleted or moved to other parts of the form.

In Part 1, *Income*, the questions regarding gross revenue from business and non-business revenue have been consolidated, and checkboxes have been added to indicate the source of revenue.

A definition of gross revenue has been added. Also, the debtor is instructed to include revenue only once.

In Part 2, *List Certain Transfers Made Before Filing for Bankruptcy*, information that pertains only to individuals has been eliminated, and the questions related to payments made in the 90 days prior to bankruptcy, payments made to insiders within one year prior to bankruptcy, repossessions, and setoffs have been consolidated. Instructions have been added to include expense reimbursements in answer to the questions regarding payments and to exclude regular employee compensation from the question regarding payments within 90 days. A dollar limitation has been added to the instructions for the question regarding payments to insiders. Checkboxes have been added to both questions to provide a reason for the payment, and the explanation that the dollar limitation changes every three years has been moved to the instructions from the footnotes. "Amount still owing" has been removed, and a definition of "insider" has been added along with a statutory citation to the question regarding insiders. Partnerships have been added to examples of "insiders." The question regarding setoffs includes a revised definition and has been revised to require that the debtor provide a description of the creditor's actions and the last four digits of any account number.

In Part 3, *Legal Actions or Assignments*, several questions have been consolidated, instructions pertaining only to individuals have been removed, and additional examples have been added. Checkboxes have been added to indicate the status of the legal action. The requirement to list the terms of any assignment or settlement has been removed.

In Part 4, *Certain Gifts and Charitable Contributions*, instructions pertaining only to individuals have been removed, and the reporting threshold has been changed to $1,000 per recipient. The look-back period has been increased from one to two years.

Part 5, *Certain Losses*, has been revised to expand the types of payments for losses, and an instruction has been added to list unpaid claims on Official Form 206A/B (*Schedule A/B – Property*). Portions of the instructions that pertain only to

individuals have been removed. Losses due to gambling have been excluded from this part.

In Part 6, *Certain Payments or Transfers*, the questions regarding payments related to bankruptcy, payments to self-settled trusts, and other payments or transfers have been consolidated. Instructions and questions that relate only to individuals have been eliminated. An instruction has been added to include payments related to restructuring, and the email or website of the person who received the money or transfer is added as a requirement. In response to the question regarding self-settled trusts and other transfers not already listed, debtors are instructed to include payments or transfers of property made by a person acting on behalf of the debtor. A requirement has been added to the question regarding self-settled trusts to list the name of the trustee. The relationship to the debtor must be included for all transfers not already listed, as well as any debts paid in exchange. There is a reminder added not to include transfers already listed.

Part 7, *Previous Locations*, has been revised in the instructions, and information pertaining only to individuals has been deleted.

Part 8, *Healthcare Bankruptcies*, is new. Part 8 requires additional information if the debtor is primarily engaged in offering services and facilities for diagnosing or treating injury, deformity, or disease or providing any surgical, psychiatric, drug treatment or obstetric care. This part has been added to comply with the special requirements imposed by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

Part 9, *Personally Identifiable Information*, is also new and includes questions about pension and profit sharing plans and adds a question about whether the debtor collects and retains personally identifiable information of customers. Questions are added about whether the debtor is the plan administrator of any pension or profit sharing plan and if any such plan is terminated. Similar to Part 8, this part has been added to comply with the special requirements imposed by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

In Part 10, *Certain Financial Accounts, Safe Deposit Boxes, and Storage Units*, money market accounts have been added to the examples provided for the question regarding financial accounts, and checkboxes have been added to indicate the type of account. The requirement of the date of surrender of any safe deposit box has been removed. A question has been added about whether the debtor has property kept in storage units or warehouses within one year of filing, and the debtor must provide the facility name and address, the name and address of anyone with access to the facility, the description of the contents, and whether the debtor still has the storage unit or warehouse. Facilities that are in a part of a building in which the debtor does business are excluded.

In Part 11, *Property the Debtor Holds or Controls That the Debtor Does Not Own*, an instruction has been added to include any property borrowed from, being stored for, or held in trust, and to exclude leased or rented property.

Part 12, *Details About Environmental Information*, has been revised to include new definitions of "Environmental law," "Site," and "Hazardous materials." An instruction to report all notices, releases, and proceedings known, regardless of when they occurred, has been added.

In Part 13, *Details About the Debtor's Business or Connections to Any Business*, questions regarding various business issues have been consolidated, and instructions that pertain only to individuals have been eliminated. The five-percent ownership limitation has been eliminated. The phrase "kept or supervised the keeping of books or account and records" has been replaced with "maintained the debtor's books and records." The instructions for the question regarding auditing or preparation of financial records have been revised to add compiling and reviewing the debtor's books of account and records. A requirement has been added to explain if the debtor's books of account and records are unavailable. The questions regarding current and former officers, directors, managing members, general partners, members in control, or controlling shareholders have combined the formerly separate corporate and partnership questions. The question regarding former officers and partners has been changed to add the

requirement of indicating the start and end dates for each listing. The instruction for withdrawals from a partnership or distribution by a corporation has been changed to add salary, other compensation, and draws to the list of examples.

In Part 14, *Signature and Declaration*, the declaration under penalty of perjury has been revised in order to conform to the language of 28 U.S.C. § 1746. See Rule 1008. A statement has been added that the individual signing on behalf of the debtor has reviewed the information in the Statement of Financial Affairs and any attachments and has "a reasonable belief that the information is true and correct." The signature boxes for bankruptcy petition preparers have been eliminated, and checkboxes for the debtor to indicate whether additional pages are attached to the form have been added.

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Information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Last 4 digits of Social Security number or ITIN ___ ___ ___ ___

EIN __ __ - __ __ __ __ __ __ __

Debtor 2 (Spouse, if filing) _____
First Name Middle Name Last Name

Last 4 digits of Social Security number or ITIN ___ ___ ___ ___

EIN __ __ - __ __ __ __ __ __ __

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number: _____

[Date case filed for chapter 7 _____ MM / DD / YYYY OR

[Date case filed in chapter _____ _____ MM / DD / YYYY

Date case converted to chapter 7 _____] MM / DD / YYYY

Official Form 309A (For Individuals or Joint Debtors)

Notice of Chapter 7 Bankruptcy Case — No Proof of Claim Deadline 12/15

For the debtors listed above, a case has been filed under chapter 7 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors, debtors, and trustees. Read it carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtors or the debtors' property. For example, while the stay is in effect, creditors cannot sue, garnish wages, assert a deficiency, repossess property, or otherwise try to collect from the debtors. Creditors cannot demand repayment from debtors by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although debtors can ask the court to extend or impose a stay.

The debtors are seeking a discharge. Creditors who assert that the debtors are not entitled to a discharge of any debts or who want to have a particular debt excepted from discharge may be required to file a complaint in the bankruptcy clerk's office within the deadlines specified in this notice. (See line 9 for more information.)

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at www.pacer.gov).

The staff of the bankruptcy clerk's office cannot give legal advice.

To help creditors correctly identify debtors, debtors submit full Social Security or Individual Taxpayer Identification Numbers, which may appear on a version of this notice. However, the full numbers must not appear on any document filed with the court.

Do not file this notice with any proof of claim or other filing in the case. Do not include more than the last four digits of a Social Security or Individual Taxpayer Identification Number in any document, including attachments, that you file with the court.

	About Debtor 1:	About Debtor 2:
1. **Debtor's full name**		
2. **All other names used in the last 8 years**		
3. **Address**		**If Debtor 2 lives at a different address:**
4. **Debtor's attorney** Name and address		Contact phone _____ Email _____
5. **Bankruptcy trustee** Name and address		Contact phone _____ Email _____

For more information, see page 2 ▶

6. Bankruptcy clerk's office Documents in this case may be filed at this address. You may inspect all records filed in this case at this office or online at www.pacer.com.		Hours open _____ Contact phone _____
7. Meeting of creditors Debtors must attend the meeting to be questioned under oath. In a joint case, both spouses must attend. Creditors may attend, but are not required to do so.	_____ at _____ Date Time The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.	Location:
8. Presumption of abuse If the presumption of abuse arises, you may have the right to file a motion to dismiss the case under 11 U.S.C. § 707(b). Debtors may rebut the presumption by showing special circumstances.	[The presumption of abuse does not arise.] [The presumption of abuse arises.] [Insufficient information has been filed to permit the clerk to determine whether the presumption of abuse arises. If more complete information is filed and shows that the presumption has arisen, the clerk will notify creditors.]	
9. Deadlines The bankruptcy clerk's office must receive these documents and any required filing fee by the following deadlines.	**File by the deadline to object to discharge or to challenge whether certain debts are dischargeable:** **You must file a complaint**: if you assert that the debtor is not entitled to receive a discharge of any debts under any of the subdivisions of 11 U.S.C. § 727(a)(2) through (7), or if you want to have a debt excepted from discharge under 11 U.S.C. § 523(a)(2), (4), or (6). **You must file a motion** if you assert that the discharge should be denied under § 727(a)(8) or (9).	**Filing deadline:** _____
	Deadline to object to exemptions: The law permits debtors to keep certain property as exempt. If you believe that the law does not authorize an exemption claimed, you may file an objection.	**Filing deadline**: 30 days after the *conclusion* of the meeting of creditors
10. Proof of claim Please do not file a proof of claim unless you receive a notice to do so.	No property appears to be available to pay creditors. Therefore, please do not file a proof of claim now. If it later appears that assets are available to pay creditors, the clerk will send you another notice telling you that you may file a proof of claim and stating the deadline.	
11. Creditors with a foreign address	If you are a creditor receiving a notice mailed to a foreign address, you may file a motion asking the court to extend the deadlines in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.	
12. Exempt property	The law allows debtors to keep certain property as exempt. Fully exempt property will not be sold and distributed to creditors. Debtors must file a list of property claimed as exempt. You may inspect that list at the bankruptcy clerk's office or online at www.pacer.gov. If you believe that the law does not authorize an exemption that the debtors claim, you may file an objection. The bankruptcy clerk's office must receive the objection by the deadline to object to exemptions in line 9.	

Information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Last 4 digits of Social Security number or ITIN ___ ___ ___ ___

EIN __ __ – __ __ __ __ __ __ __

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

Last 4 digits of Social Security number or ITIN ___ ___ ___ ___

EIN __ __ – __ __ __ __ __ __ __

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number: _____

[Date case filed for chapter 7 _____ MM / DD / YYYY OR

[Date case filed in chapter _____ _____ MM / DD / YYYY

Date case converted to chapter 7 _____] MM / DD / YYYY

Official Form 309B (For Individuals or Joint Debtors)

Notice of Chapter 7 Bankruptcy Case — Proof of Claim Deadline Set 12/15

For the debtors listed above, a case has been filed under chapter 7 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors, debtors, and trustees. Read it carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtors or the debtors' property. For example, while the stay is in effect, creditors cannot sue, garnish wages, assert a deficiency, repossess property, or otherwise try to collect from the debtors. Creditors cannot demand repayment from debtors by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although debtors can ask the court to extend or impose a stay.

The debtors are seeking a discharge. Creditors who assert that the debtors are not entitled to a discharge of any debts or who want to have a particular debt excepted from discharge may be required to file a complaint in the bankruptcy clerk's office within the deadlines specified in this notice. (See line 9 for more information.)

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at www.pacer.gov).

The staff of the bankruptcy clerk's office cannot give legal advice.

To help creditors correctly identify debtors, debtors submit full Social Security or Individual Taxpayer Identification Numbers, which may appear on a version of this notice. However, the full numbers must not appear on any document filed with the court.

Do not file this notice with any proof of claim or other filing in the case. Do not include more than the last four digits of a Social Security or Individual Taxpayer Identification Number in any document, including attachments, that you file with the court.

	About Debtor 1:	About Debtor 2:
1. **Debtor's full name**		
2. **All other names used in the last 8 years**		
3. **Address**		**If Debtor 2 lives at a different address:**
4. **Debtor's attorney** Name and address		Contact phone _____ Email _____
5. **Bankruptcy trustee** Name and address		Contact phone _____ Email _____

For more information, see page 2 ▶

6. Bankruptcy clerk's office Documents in this case may be filed at this address. You may inspect all records filed in this case at this office or online at www.pacer.com.		Hours open _____ Contact phone _____
7. Meeting of creditors Debtors must attend the meeting to be questioned under oath. In a joint case, both spouses must attend. Creditors may attend, but are not required to do so.	_____ at _____ Date Time The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.	Location:
8. Presumption of abuse If the presumption of abuse arises, you may have the right to file a motion to dismiss the case under 11 U.S.C. § 707(b). Debtors may rebut the presumption by showing special circumstances.	[The presumption of abuse does not arise.] [The presumption of abuse arises.] [Insufficient information has been filed to permit the clerk to determine whether the presumption of abuse arises. If more complete information is filed and shows that the presumption has arisen, the clerk will notify creditors.]	
9. Deadlines The bankruptcy clerk's office must receive these documents and any required filing fee by the following deadlines.	**File by the deadline to object to discharge or to challenge whether certain debts are dischargeable:** **You must file a complaint**: ▪ if you assert that the debtor is not entitled to receive a discharge of any debts under any of the subdivisions of 11 U.S.C. § 727(a)(2) through (7), or ▪ if you want to have a debt excepted from discharge under 11 U.S.C. § 523(a)(2), (4), or (6). **You must file a motion** if you assert that ▪ the discharge should be denied under § 727(a)(8) or (9).	**Filing deadline**: _____
	Deadline for all creditors to file a proof of claim (except governmental units):	**Filing deadline:** _____
	Deadline for governmental units to file a proof of claim:	**Filing deadline:** _____
	Deadlines for filing proof of claim: A proof of claim is a signed statement describing a creditor's claim. If a proof of claim form is not included with this notice, obtain one at www.uscourts.gov or any bankruptcy clerk's office. If you do not file a proof of claim by the deadline, you might not be paid on your claim. To be paid, you must file a proof of claim even if your claim is listed in the schedules that the debtor filed. Secured creditors retain rights in their collateral regardless of whether they file a proof of claim. Filing a proof of claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a proof of claim may surrender important nonmonetary rights, including the right to a jury trial.	
	Deadline to object to exemptions: The law permits debtors to keep certain property as exempt. If you believe that the law does not authorize an exemption claimed, you may file an objection.	**Filing deadline:** 30 days after the *conclusion* of the meeting of creditors
10. Creditors with a foreign address	If you are a creditor receiving a notice mailed to a foreign address, you may file a motion asking the court to extend the deadlines in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.	
11. Liquidation of the debtor's property and payment of creditors' claims	The bankruptcy trustee listed on the front of this notice will collect and sell the debtor's property that is not exempt. If the trustee can collect enough money, creditors may be paid some or all of the debts owed to them in the order specified by the Bankruptcy Code. To ensure you receive any share of that money, you must file a proof of claim as described above.	
12. Exempt property	The law allows debtors to keep certain property as exempt. Fully exempt property will not be sold and distributed to creditors. Debtors must file a list of property claimed as exempt. You may inspect that list at the bankruptcy clerk's office or online at www.pacer.gov. If you believe that the law does not authorize an exemption that the debtors claim, you may file an objection. The bankruptcy clerk's office must receive the objection by the deadline to object to exemptions in line 9.	

Information to identify the case:

Debtor _____ EIN __ __ - __ __ __ __ __ __ __
Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number: _____

[Date case filed for chapter 7 _____ MM / DD / YYYY OR

[Date case filed in chapter _____ _____ MM / DD / YYYY

Date case converted to chapter 7 _____] MM / DD / YYYY

Official Form 309C (For Corporations or Partnerships)

Notice of Chapter 7 Bankruptcy Case — No Proof of Claim Deadline 12/15

For the debtor listed above, a case has been filed under chapter 7 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors, debtors, and trustees. Read it carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtor or the debtor's property. For example, while the stay is in effect, creditors cannot sue, assert a deficiency, repossess property, or otherwise try to collect from the debtor. Creditors cannot demand repayment from debtors by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees.

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at www.pacer.gov).

The staff of the bankruptcy clerk's office cannot give legal advice.

Do not file this notice with any proof of claim or other filing in the case.

1. **Debtor's full name**		
2. **All other names used in the last 8 years**		
3. **Address**		
4. **Debtor's attorney** Name and address		Contact phone _____ Email _____
5. **Bankruptcy trustee** Name and address		Contact phone _____ Email _____
6. **Bankruptcy clerk's office** Documents in this case may be filed at this address. You may inspect all records filed in this case at this office or online at www.pacer.com.		Hours open _____ Contact phone _____
7. **Meeting of creditors** The debtor's representative must attend the meeting to be questioned under oath. Creditors may attend, but are not required to do so.	_____ at _____ Date Time The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.	Location:
8. **Proof of claim** Please do not file a proof of claim unless you receive a notice to do so.	No property appears to be available to pay creditors. Therefore, please do not file a proof of claim now. If it later appears that assets are available to pay creditors, the clerk will send you another notice telling you that you may file a proof of claim and stating the deadline.	
9. **Creditors with a foreign address**	If you are a creditor receiving a notice mailed to a foreign address, you may file a motion asking the court to extend the deadlines in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.	

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Information to identify the case:

Debtor _____ EIN __ __ – __ __ __ __ __ __ __
Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number: _____

[Date case filed for chapter 7 _____ MM / DD / YYYY OR

[Date case filed in chapter _____ _____ MM / DD / YYYY

Date case converted to chapter 7 _____] MM / DD / YYYY

Official Form 309D (For Corporations or Partnerships)

Notice of Chapter 7 Bankruptcy Case — Proof of Claim Deadline Set 12/15

For the debtor listed above, a case has been filed under chapter 7 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors, debtors, and trustees. Read it carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtor or the debtor's property. For example, while the stay is in effect, creditors cannot sue, assert a deficiency, repossess property, or otherwise try to collect from the debtor. Creditors cannot demand repayment from debtors by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees.

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at www.pacer.gov).

The staff of the bankruptcy clerk's office cannot give legal advice.

Do not file this notice with any proof of claim or other filing in the case.

1. **Debtor's full name**		
2. **All other names used in the last 8 years**		
3. **Address**		
4. **Debtor's attorney** Name and address	Contact phone _____ Email _____	
5. **Bankruptcy trustee** Name and address	Contact phone _____ Email _____	
6. **Bankruptcy clerk's office** Documents in this case may be filed at this address. You may inspect all records filed in this case at this office or online at www.pacer.com.	Hours open _____ Contact phone _____	
7. **Meeting of creditors** The debtor's representative must attend the meeting to be questioned under oath. Creditors may attend, but are not required to do so.	_____ at _____ Date Time The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.	Location:

For more information, see page 2 ▶

8. Deadlines The bankruptcy clerk's office must receive proofs of claim by the following deadlines.	**Deadline for all creditors to file a proof of claim (except governmental units):** **Deadline for governmental units to file a proof of claim:** A proof of claim is a signed statement describing a creditor's claim. If a proof of claim form is not included with this notice, obtain one at www.uscourts.gov or any bankruptcy clerk's office. If you do not file a proof of claim by the deadline, you might not be paid on your claim. To be paid, you must file a proof of claim even if your claim is listed in the schedules that the debtor filed. Secured creditors retain rights in their collateral regardless of whether they file a proof of claim. Filing a proof of claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a proof of claim may surrender important nonmonetary rights, including the right to a jury trial.	**Filing deadline:** _____ **Filing deadline:** _____
9. Creditors with a foreign address	If you are a creditor receiving a notice mailed to a foreign address, you may file a motion asking the court to extend the deadlines in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.	
10. Liquidation of the debtor's property and payment of creditors' claims	The bankruptcy trustee listed on the front of this notice will collect and sell the debtor's property. If the trustee can collect enough money, creditors may be paid some or all of the debts owed to them, in the order specified by the Bankruptcy Code. To ensure you receive any share of that money, you must file a proof of claim, as described above.	

Information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Last 4 digits of Social Security number or ITIN ___ ___ ___ ___

EIN __ __ – __ __ __ __ __ __ __

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

Last 4 digits of Social Security number or ITIN ___ ___ ___ ___

EIN __ __ – __ __ __ __ __ __ __

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number: _____

[Date case filed in chapter 11 _____
MM / DD / YYYY] OR

[Date case filed in chapter _____ _____
MM / DD / YYYY

Date case converted to chapter 11 _____]
MM / DD / YYYY

Official Form 309E (For Individuals or Joint Debtors)

Notice of Chapter 11 Bankruptcy Case

12/15

For the debtors listed above, a case has been filed under chapter 11 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors and debtors. Read it carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtors or the debtors' property. For example, while the stay is in effect, creditors cannot sue, garnish wages, assert a deficiency, repossess property, or otherwise try to collect from the debtors. Creditors cannot demand repayment from debtors by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although debtors can ask the court to extend or impose a stay.

Confirmation of a chapter 11 plan may result in a discharge of debt. Creditors who assert that the debtors are not entitled to a discharge of any debts or who want to have a particular debt excepted from discharge may be required to file a complaint in the bankruptcy clerk's office within the deadlines specified in this notice. (See line 10 below for more information.)

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at www.pacer.gov).

The staff of the bankruptcy clerk's office cannot give legal advice.

To help creditors correctly identify debtors, debtors submit full Social Security or Individual Taxpayer Identification Numbers, which may appear on a version of this notice. However, the full numbers must not appear on any document filed with the court.

Do not file this notice with any proof of claim or other filing in the case. Do not include more than the last four digits of a Social Security or Individual Taxpayer Identification Number in any document, including attachments, that you file with the court.

	About Debtor 1:	About Debtor 2:
1. **Debtor's full name**		
2. **All other names used in the last 8 years**		
3. **Address**		**If Debtor 2 lives at a different address:**
4. **Debtor's attorney** Name and address		Contact phone _____ Email _____
5. **Bankruptcy clerk's office** Documents in this case may be filed at this address. You may inspect all records filed in this case at this office or online at www.pacer.com.		Hours open _____ Contact phone _____

For more information, see page 2 ▶

6. Meeting of creditors Debtors must attend the meeting to be questioned under oath. In a joint case, both spouses must attend. Creditors may attend, but are not required to do so.	_____ at _____ Date Time The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.	Location:
7. Deadlines The bankruptcy clerk's office must receive these documents and any required filing fee by the following deadlines.	**File by the deadline to object to discharge or to challenge whether certain debts are dischargeable:** **You must file a complaint**: ■ if you assert that the debtor is not entitled to receive a discharge of any debts under 11 U.S.C. § 1141(d)(3) or ■ if you want to have a debt excepted from discharge under 11 U.S.C. § 523(a)(2), (4), or (6).	First date set for hearing on confirmation of plan. The court will send you a notice of that date later. **Filing deadline for dischargeability complaints:** _____
	Deadline for filing proof of claim:	[Not yet set. If a deadline is set, the court will send you another notice.] or [date, if set by the court)]
	A proof of claim is a signed statement describing a creditor's claim. If a proof of claim form is not included with this notice, obtain one at www.uscourts.gov or any bankruptcy clerk's office. Your claim will be allowed in the amount scheduled unless: ■ your claim is designated as *disputed*, *contingent*, or *unliquidated*; ■ you file a proof of claim in a different amount; or ■ you receive another notice. If your claim is not scheduled or if your claim is designated as *disputed*, *contingent*, or *unliquidated*, you must file a proof of claim or you might not be paid on your claim and you might be unable to vote on a plan. You may file a proof of claim even if your claim is scheduled. You may review the schedules at the bankruptcy clerk's office or online at www.pacer.gov. Secured creditors retain rights in their collateral regardless of whether they file a proof of claim. Filing a proof of claim submits a creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a proof of claim may surrender important nonmonetary rights, including the right to a jury trial.	
	Deadline to object to exemptions: The law permits debtors to keep certain property as exempt. If you believe that the law does not authorize an exemption claimed, you may file an objection.	**Filing deadline:** 30 days after the *conclusion* of the meeting of creditors
8. Creditors with a foreign address	If you are a creditor receiving mailed notice at a foreign address, you may file a motion asking the court to extend the deadlines in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.	
9. Filing a Chapter 11 bankruptcy case	Chapter 11 allows debtors to reorganize or liquidate according to a plan. A plan is not effective unless the court confirms it. You may receive a copy of the plan and a disclosure statement telling you about the plan, and you may have the opportunity to vote on the plan. You will receive notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. Unless a trustee is serving, the debtor will remain in possession of the property and may continue to operate the debtor's business.	
10. Discharge of debts	Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of a debt. See 11 U.S.C. § 1141(d). However, unless the court orders otherwise, the debts will not be discharged until all payments under the plan are made. A discharge means that creditors may never try to collect the debt from the debtors personally except as provided in the plan. If you believe that a particular debt owed to you should be excepted from the discharge under 11 U.S.C. § 523 (a)(2), (4), or (6), you must file a complaint and pay the filing fee in the bankruptcy clerk's office by the deadline. If you believe that the debtors are not entitled to a discharge of any of their debts under 11 U.S.C. § 1141 (d)(3), you must file a complaint and pay the filing fee in the clerk's office by the first date set for the hearing on confirmation of the plan. The court will send you another notice telling you of that date.	
11. Exempt property	The law allows debtors to keep certain property as exempt. Fully exempt property will not be sold and distributed to creditors, even if the case is converted to chapter 7. Debtors must file a list of property claimed as exempt. You may inspect that list at the bankruptcy clerk's office or online at www.pacer.gov. If you believe that the law does not authorize an exemption that the debtors claim, you may file an objection. The bankruptcy clerk's office must receive the objection by the deadline to object to exemptions in line 7.	

Information to identify the case:

Debtor _____ EIN __ __ – __ __ __ __ __ __ __
Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number: _____

[Date case filed in chapter 11 _____ MM / DD / YYYY OR

[Date case filed in chapter _____ _____ MM / DD / YYYY

Date case converted to chapter 11 _____] MM / DD / YYYY

Official Form 309F (For Corporations or Partnerships)

Notice of Chapter 11 Bankruptcy Case

12/15

For the debtor listed above, a case has been filed under chapter 11 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors, debtors, and trustees. Read it carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtor or the debtor's property. For example, while the stay is in effect, creditors cannot sue, assert a deficiency, repossess property, or otherwise try to collect from the debtor. Creditors cannot demand repayment from the debtor by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees.

Confirmation of a chapter 11 plan may result in a discharge of debt. A creditor who wants to have a particular debt excepted from discharge may be required to file a complaint in the bankruptcy clerk's office within the deadline specified in this notice. (See line 11 below for more information.)

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at www.pacer.gov).

The staff of the bankruptcy clerk's office cannot give legal advice.

Do not file this notice with any proof of claim or other filing in the case.

1. **Debtor's full name**		
2. **All other names used in the last 8 years**		
3. **Address**		
4. **Debtor's attorney** Name and address		Contact phone _____ Email _____
5. **Bankruptcy clerk's office** Documents in this case may be filed at this address. You may inspect all records filed in this case at this office or online at www.pacer.com.		Hours open _____ Contact phone _____
6. **Meeting of creditors** The debtor's representative must attend the meeting to be questioned under oath. Creditors may attend, but are not required to do so.	_____ at _____ Date Time The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.	Location:

For more information, see page 2 ▶

7. Proof of claim deadline	**Deadline for filing proof of claim:**	[Not yet set. If a deadline is set, the court will send you another notice.] or [date, if set by the court)]
	A proof of claim is a signed statement describing a creditor's claim. If a proof of claim form is not included with this notice, obtain one at www.uscourts.gov or any bankruptcy clerk's office. Your claim will be allowed in the amount scheduled unless: ■ your claim is designated as *disputed*, *contingent*, or *unliquidated*; ■ you file a proof of claim in a different amount; or ■ you receive another notice. If your claim is not scheduled or if your claim is designated as *disputed*, *contingent*, or *unliquidated*, you must file a proof of claim or you might not be paid on your claim and you might be unable to vote on a plan. You may file a proof of claim even if your claim is scheduled. You may review the schedules at the bankruptcy clerk's office or online at www.pacer.gov. Secured creditors retain rights in their collateral regardless of whether they file a proof of claim. Filing a proof of claim submits a creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a proof of claim may surrender important nonmonetary rights, including the right to a jury trial.	
8. Exception to discharge deadline The bankruptcy clerk's office must receive a complaint and any required filing fee by the following deadline.	You must start a judicial proceeding by filing a complaint if you want to have a debt excepted from discharge under 11 U.S.C. § 1141(d)(6)(A). **Deadline for filing the complaint:**	_____
9. Creditors with a foreign address	If you are a creditor receiving notice mailed to a foreign address, you may file a motion asking the court to extend the deadlines in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.	
10. Filing a Chapter 11 bankruptcy case	Chapter 11 allows debtors to reorganize or liquidate according to a plan. A plan is not effective unless the court confirms it. You may receive a copy of the plan and a disclosure statement telling you about the plan, and you may have the opportunity to vote on the plan. You will receive notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. Unless a trustee is serving, the debtor will remain in possession of the property and may continue to operate its business.	
11. Discharge of debts	Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of your debt. See 11 U.S.C. § 1141(d). A discharge means that creditors may never try to collect the debt from the debtor except as provided in the plan. If you want to have a particular debt owed to you excepted from the discharge under 11 U.S.C. § 1141(d)(6)(A), you must start a judicial proceeding by filing a complaint and paying the filing fee in the bankruptcy clerk's office by the deadline.	

Information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Last 4 digits of Social Security number or ITIN ___ ___ ___ ___

EIN __ __ – __ __ __ __ __ __ __

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

Last 4 digits of Social Security number or ITIN ___ ___ ___ ___

EIN __ __ – __ __ __ __ __ __ __

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number: _____

[Date case filed for chapter 12 _____ MM / DD / YYYY OR

[Date case filed in chapter _____ _____ MM / DD / YYYY

Date case converted to chapter 12 _____] MM / DD / YYYY

Official Form 309G (For Individuals or Joint Debtors)

Notice of Chapter 12 Bankruptcy Case

12/15

For the debtors listed above, a case has been filed under chapter 12 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors, debtors, and trustees. Read it carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtors, from the debtors' property, or from certain codebtors. For example, while the stay is in effect, creditors cannot sue, garnish wages, assert a deficiency, repossess property, or otherwise try to collect from the debtors. Creditors cannot demand repayment from debtors by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees.

Confirmation of a chapter 12 plan may result in a discharge of debt. Creditors who want to have a particular debt excepted from discharge may be required to file a complaint in the bankruptcy clerk's office within the deadline specified in this notice. (See line 13 below for more information.)

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at www.pacer.gov).

The staff of the bankruptcy clerk's office cannot give legal advice.

To help creditors correctly identify debtors, debtors submit full Social Security or Individual Taxpayer Identification Numbers, which may appear on a version of this notice. However, the full numbers must not appear on any document filed with the court.

Do not file this notice with any proof of claim or other filing in the case. Do not include more than the last four digits of a Social Security or Individual Taxpayer Identification Number in any document, including attachments, that you file with the court.

	About Debtor 1:	About Debtor 2:
1. **Debtor's full name**		
2. **All other names used in the last 8 years**		
3. **Address**		**If Debtor 2 lives at a different address:**
4. **Debtor's attorney** Name and address		Contact phone _____ Email _____
5. **Bankruptcy trustee** Name and address		Contact phone _____ Email _____
6. **Bankruptcy clerk's office** Documents in this case may be filed at this address. You may inspect all records filed in this case at this office or online at www.pacer.com.		Hours open _____ Contact phone _____

For more information, see page 2 ▶

7. Meeting of creditors Debtors must attend the meeting to be questioned under oath. In a joint case, both spouses must attend. Creditors may attend, but are not required to do so.	_____ at _____ Location: Date Time The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.
8. Deadlines The bankruptcy clerk's office must receive these documents and any required filing fee by the following deadlines.	**Deadline to file a complaint to challenge dischargeability of certain debts:** **Filing deadline:** _____ You must start a judicial proceeding by filing a complaint if you want to have a debt excepted from discharge under 11 U.S.C. § 523(a)(2), (4), or (6).
	Deadline for all creditors to file a proof of claim (except governmental units): **Filing deadline:** _____ **Deadline for governmental units to file a proof of claim:** **Filing deadline:** _____ **Deadlines for filing proof of claim:** A proof of claim is a signed statement describing a creditor's claim. If a proof of claim form is not included with this notice, obtain one at www.uscourts.gov or any bankruptcy clerk's office. If you do not file a proof of claim by the deadline, you might not be paid on your claim. To be paid, you must file a proof of claim even if your claim is listed in the schedules that the debtor filed. Secured creditors retain rights in their collateral regardless of whether they file a proof of claim. Filing a proof of claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a proof of claim may surrender important nonmonetary rights, including the right to a jury trial.
	Deadline to object to exemptions: **Filing deadline:** 30 days after the *conclusion* of the meeting of creditors The law permits debtors to keep certain property as exempt. If you believe that the law does not authorize an exemption claimed, you may file an objection.
9. Filing of plan	[The debtor has filed a plan. The plan or a summary of the plan is enclosed. The hearing on confirmation will be held on: _____ at _____ Location:_____ Date Time] Or [The debtor has filed a plan. The plan or a summary of the plan and notice of confirmation hearing will be sent separately.] Or [The debtor has not filed a plan as of this date. A copy of the plan or summary and a notice of the hearing on confirmation will be sent separately.]
10. Creditors with a foreign address	If you are a creditor receiving a notice mailed to a foreign address, you may file a motion asking the court to extend the deadlines in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.
11. Filing a Chapter 12 bankruptcy case	Chapter 12 allows family farmers and family fishermen to reorganize according to a plan. A plan is not effective unless the court confirms it. You may receive a copy of the plan. You may object to confirmation of the plan and attend the confirmation hearing. The debtor will remain in possession of the property and may continue to operate the business unless the court orders otherwise.
12. Discharge of debts	Confirmation of a chapter 12 plan may result in a discharge of debts, which may include all or part of your debt. Unless the court orders otherwise, the discharge will not be effective until all payments under the plan are made. A discharge means that you may never try to collect the debt from the debtor except as provided in the plan. If you want to have a particular debt excepted under 11 U.S.C. § 523(a)(2), (4), or (6), you must start a judicial proceeding by filing a complaint and paying the filing fee in the clerk's office by the deadline.
13. Exempt property	The law allows debtors to keep certain property as exempt. Fully exempt property will not be sold and distributed to creditors, even if the case is converted to chapter 7. Debtors must file a list of property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that the law does not authorize an exemption that the debtors claim, you may file an objection. The bankruptcy clerk's office must receive the objection by the deadline to object to exemptions in line 8.

Information to identify the case:

Debtor _____ EIN __ __ - __ __ __ __ __ __ __
Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number: _____

[Date case filed for chapter 12 _____ MM / DD / YYYY OR

[Date case filed in chapter _____ _____ MM / DD / YYYY

Date case converted to chapter 12 _____] MM / DD / YYYY

Official Form 309H (For Corporations or Partnerships)

Notice of Chapter 12 Bankruptcy Case

12/15

For the debtor listed above, a case has been filed under chapter 12 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors, debtors, and trustees. Read it carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtor, the debtor's property, or certain codebtors. For example, while the stay is in effect, creditors cannot sue, assert a deficiency, repossess property, or otherwise try to collect from the debtor. Creditors cannot demand repayment from the debtor by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees.

Confirmation of a chapter 12 plan may result in the discharge of debt. Creditors who want to have a particular debt excepted from discharge may be required to file a complaint in the bankruptcy clerk's office within the deadline specified in this notice. (See line 13 below for more information.)

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at www.pacer.gov).

The staff of the bankruptcy clerk's office cannot give legal advice.

Do not file this notice with any proof of claim or other filing in the case.

1. **Debtor's full name**		
2. **All other names used in the last 8 years**		
3. **Address**		
4. **Debtor's attorney** Name and address	Contact phone Email	_____ _____
5. **Bankruptcy clerk's office** Documents in this case may be filed at this address. You may inspect all records filed in this case at this office or online at www.pacer.com.	Hours open Contact phone	_____ _____
6. **Bankruptcy trustee** Name and address	Contact phone Email	_____ _____

For more information, see page 2 ▶

7. Meeting of creditors The debtor's representative must attend the meeting to be questioned under oath. Creditors may attend, but are not required to do so.	_____ at _____ Date Time The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.	Location:
8. Exception to discharge deadline The bankruptcy clerk's office must receive a complaint and any required filing fee by the following deadline.	You must start a judicial proceeding by filing a complaint if you want to have a debt excepted from discharge under 11 U.S.C. § 523(a)(2), (4), or (6).	**Deadline for filing the complaint:** _____
9. Filing of plan	[The debtor has filed a plan. The plan or a summary of the plan is enclosed. The hearing on confirmation will be held on: _____ at _____ Location:_____ Date Time] Or [The debtor has filed a plan. The plan or a summary of the plan and notice of confirmation hearing will be sent separately.] Or [The debtor has not filed a plan as of this date. A copy of the plan or summary and a notice of the hearing on confirmation will be sent separately.]	
10. Deadlines	**Deadline for all creditors to file a proof of claim (except governmental units):**	**Filing deadline:** _____
	Deadline for governmental units to file a proof of claim:	**Filing deadline:** _____
	A proof of claim is a signed statement describing a creditor's claim. If a proof of claim form is not included with this notice, obtain one at www.uscourts.gov or any bankruptcy clerk's office. If you do not file a proof of claim by the deadline, you might not be paid on your claim. To be paid, you must file a proof of claim even if your claim is listed in the schedules that the debtor filed. Secured creditors retain rights in their collateral regardless of whether they file a proof of claim. Filing a proof of claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a proof of claim may surrender important nonmonetary rights, including the right to a jury trial.	
11. Creditors with a foreign address	If you are a creditor receiving a notice mailed to a foreign address, you may file a motion asking the court to extend the deadlines in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.	
12. Filing a chapter 12 bankruptcy case	Chapter 12 allows family farmers and family fishermen to reorganize according to a plan. A plan is not effective unless the court confirms it. You may receive a copy of the plan. You may object to confirmation of the plan and attend the confirmation hearing. The debtor will remain in possession of the property and may continue to operate the business.	
13. Discharge of debts	Confirmation of a chapter 12 plan may result in a discharge of debts, which may include all or part of your debt. Unless the court orders otherwise, the discharge will not be effective until all payments under the plan are made. A discharge means that you may never try to collect the debt from the debtor except as provided in the plan. If you want to have a particular debt excepted from discharge under 11 U.S.C. § 523(a)(2), (4), or (6), you must start a judicial proceeding by filing a complaint and paying the filing fee in the bankruptcy clerk's office by the deadline.	

Information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Last 4 digits of Social Security number or ITIN ___ ___ ___ ___

EIN __ __ – __ __ __ __ __ __ __

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

Last 4 digits of Social Security number or ITIN ___ ___ ___ ___

EIN __ __ – __ __ __ __ __ __ __

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number: _____

[Date case filed for chapter 13 _____
MM / DD / YYYY OR

[Date case filed in chapter _____ _____
MM / DD / YYYY

Date case converted to chapter 13 _____]
MM / DD / YYYY

Official Form 309I

Notice of Chapter 13 Bankruptcy Case

12/15

For the debtors listed above, a case has been filed under chapter 13 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors, debtors, and trustees. Read it carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtors, the debtors' property, and certain codebtors. For example, while the stay is in effect, creditors cannot sue, garnish wages, assert a deficiency, repossess property, or otherwise try to collect from the debtors. Creditors cannot demand repayment from debtors by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although debtors can ask the court to extend or impose a stay.

Confirmation of a chapter 13 plan may result in a discharge. Creditors who assert that the debtors are not entitled to a discharge under 11 U.S.C. § 1328(f) must file a motion objecting to discharge in the bankruptcy clerk's office within the deadline specified in this notice. Creditors who want to have their debt excepted from discharge may be required to file a complaint in the bankruptcy clerk's office by the same deadline. (See line 14 below for more information.)

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at www.pacer.gov).

The staff of the bankruptcy clerk's office cannot give legal advice.

To help creditors correctly identify debtors, debtors submit full Social Security or Individual Taxpayer Identification Numbers, which may appear on a version of this notice. However, the full numbers must not appear on any document filed with the court.

Do not file this notice with any proof of claim or other filing in the case. Do not include more than the last four digits of a Social Security or Individual Taxpayer Identification Number in any document, including attachments, that you file with the court.

	About Debtor 1:	About Debtor 2:
1. **Debtor's full name**		
2. **All other names used in the last 8 years**		
3. **Address**		**If Debtor 2 lives at a different address:**
4. **Debtor's attorney** Name and address		Contact phone _____ Email _____
5. **Bankruptcy trustee** Name and address		Contact phone _____ Email _____
6. **Bankruptcy clerk's office** Documents in this case may be filed at this address. You may inspect all records filed in this case at this office or online at www.pacer.com.		Hours open _____ Contact phone _____

For more information, see page 2 ▶

7. Meeting of creditors Debtors must attend the meeting to be questioned under oath. In a joint case, both spouses must attend. Creditors may attend, but are not required to do so.	_____ at _____ Date Time The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.	Location:
8. Deadlines The bankruptcy clerk's office must receive these documents and any required filing fee by the following deadlines.	**Deadline to file a complaint to challenge dischargeability of certain debts:** **You must file:** a motion if you assert that the debtors are not entitled to receive a discharge under U.S.C. § 1328(f), or a complaint if you want to have a particular debt excepted from discharge under 11 U.S.C. § 523(a)(2) or (4).	**Filing deadline**: _____
	Deadline for all creditors to file a proof of claim (except governmental units):	**Filing deadline:** _____
	Deadline for governmental units to file a proof of claim:	**Filing deadline:** _____
	Deadlines for filing proof of claim: A proof of claim is a signed statement describing a creditor's claim. If a proof of claim form is not included with this notice, obtain one at www.uscourts.gov or any bankruptcy clerk's office. If you do not file a proof of claim by the deadline, you might not be paid on your claim. To be paid, you must file a proof of claim even if your claim is listed in the schedules that the debtor filed. Secured creditors retain rights in their collateral regardless of whether they file a proof of claim. Filing a proof of claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a proof of claim may surrender important nonmonetary rights, including the right to a jury trial.	
	Deadline to object to exemptions: The law permits debtors to keep certain property as exempt. If you believe that the law does not authorize an exemption claimed, you may file an objection.	**Filing deadline:** 30 days after the *conclusion* of the meeting of creditors
9. Filing of plan	[The debtor has filed a plan. The plan or a summary of the plan is enclosed. The hearing on confirmation will be held on: _____ at _____ Location:_____ Date Time] Or [The debtor has filed a plan. The plan or a summary of the plan and notice of confirmation hearing will be sent separately.] Or [The debtor has not filed a plan as of this date. A copy of the plan or summary and a notice of the hearing on confirmation will be sent separately.]	
10. Creditors with a foreign address	If you are a creditor receiving a notice mailed to a foreign address, you may file a motion asking the court to extend the deadline in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.	
11. Filing a chapter 13 bankruptcy case	Chapter 13 allows an individual with regular income and debts below a specified amount to adjust debts according to a plan. A plan is not effective unless the court confirms it. You may object to confirmation of the plan and appear at the confirmation hearing. A copy of the plan [is included with this notice] or [will be sent to you later], and [the confirmation hearing will be held on the date shown in line 9 of this notice] or [the court will send you a notice of the confirmation hearing]. The debtor will remain in possession of the property and may continue to operate the business, if any, unless the court orders otherwise.	
12. Exempt property	The law allows debtors to keep certain property as exempt. Fully exempt property will not be sold and distributed to creditors, even if the case is converted to chapter 7. Debtors must file a list of property claimed as exempt. You may inspect that list at the bankruptcy clerk's office or online at www.pacer.gov. If you believe that the law does not authorize an exemption that debtors claimed, you may file an objection by the deadline.	
13. Discharge of debts	Confirmation of a chapter 13 plan may result in a discharge of debts, which may include all or part of a debt. However, unless the court orders otherwise, the debts will not be discharged until all payments under the plan are made. A discharge means that creditors may never try to collect the debt from the debtors personally except as provided in the plan. If you want to have a particular debt excepted from discharge under 11 U.S.C. § 523(a)(2) or (4), you must file a complaint and pay the filing fee in the bankruptcy clerk's office by the deadline. If you believe that the debtors are not entitled to a discharge of any of their debts under 11 U.S.C. § 1328(f), you must file a motion. The bankruptcy clerk's office must receive the objection by the deadline to object to exemptions in line 8.	

COMMITTEE NOTE

Official Forms 309A-I, collectively the Bankruptcy Case Commencement Notices, have been revised as part of the Forms Modernization Project to make them easier to read and understand. The notices, derived from Official Forms 9A-I are renumbered and stylistic changes have been made.

References to the limitations on the automatic stay imposed by 11 U.S.C. § 362(c)(3) and (4) in some repeat bankruptcy filings by individuals have been deleted from the three versions of the notice for cases filed by corporations and partnerships. Email addresses for the debtor's attorney and the trustee have been added to the form.

The parties are informed that they may review papers filed in the case through the judiciary's PACER system (Public Access to Court Electronic Records) as well as at the bankruptcy clerk's office.

The lettering scheme for the versions of Official Form 309 track the versions of Official Form 9 used in different types of bankruptcy cases with following exceptions. Official Forms 9E(Alt.) and 9F(Alt.) have been eliminated by including alternative language in Official Forms 309E and 309F to be used if the court sets a deadline for filing claims at the start of the chapter 11 case. In addition, the B and C versions have been reversed in order. That is, Official Form 9C has been designated 309B and Official Form 9B as 309C. This groups together the notices for chapter 7 individual debtors and for non-individual debtors. Finally, as a result of the reformatting, Official Form 309C has been reduced to a single page.

The four versions of the form for chapter 7 cases have been renamed to state whether the notice specifies a deadline for filing proofs of claim, rather than whether the case is an "asset" or "no-asset" case.

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Official Form 312
(12/15)

[Caption as in 416A]

Order and Notice for Hearing on Disclosure Statement

To the debtor, its creditors, and other parties in interest:

A disclosure statement and a plan under chapter 11 [or chapter 9] of the Bankruptcy Code having been filed by _____ on _____,

IT IS ORDERED and notice is hereby given, that:

1. The hearing to consider the approval of the disclosure statement shall be held at:

   _____,

   on _____, at _____ o'clock __.m.

2. _____ is fixed as the last day for filing and serving in accordance with Fed. R. Bankr. P. 3017(a) written objections to the disclosure statement.

3. Within _____ days after entry of this order, the disclosure statement and plan shall be distributed in accordance with Fed. R. Bankr. P. 3017(a).

4. Requests for copies of the disclosure statement and plan shall be mailed to the debtor in possession [or trustee or debtor or _____] at the following mailing address:

   [_____].

_____
MM / DD / YYYY

By the court: _____
United States Bankruptcy Judge

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COMMITTEE NOTE

Official Form 312, *Order and Notice for Hearing on Disclosure Statement* replaces Official Form 12, *Order and Notice for Hearing on Disclosure Statement*. It is renumbered as part of the Forms Modernization Project, and includes stylistic changes throughout the form.

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Official Form 313
(12/15)

[Caption as in 416A]

Order Approving Disclosure Statement and Fixing Time for Filing Acceptances or Rejections of Plan, Combined with Notice Thereof

A disclosure statement under chapter 11 of the Bankruptcy Code having been filed by _____ on _____ [*if appropriate*, and by _____, on _____], referring to a plan under chapter 11 of the Code filed by _____, on _____ [*if appropriate*, and by _____, on _____ respectively] [*if appropriate*, as modified by a modification filed on _____]; and

It having been determined after hearing on notice that the disclosure statement [or statements] contain[s] adequate information:

IT IS ORDERED, and notice is hereby given, that:

A. The disclosure statement filed by _____ dated _____ [*if appropriate*, and by _____, dated _____] is [are] approved.

B. _____ is fixed as the last day for filing written acceptances or rejections of the plan [or plans] referred to above.

C. Within _____ days after the entry of this order, the plan [or plans] or a summary or summaries thereof approved by the court, [and [if appropriate] a summary approved by the court of its opinion, if any, dated _____, approving the disclosure statement [or statements]], the disclosure statement [or statements], and a ballot conforming to *Ballot for Accepting or Rejecting Plan of Reorganization* (Official Form 314) shall be mailed to creditors, equity security holders, and other parties in interest, and shall be transmitted to the United States trustee, as provided in Fed. R. Bankr. P. 3017(d).

D. If acceptances are filed for more than one plan, preferences among the plans so accepted may be indicated.

E. [*If appropriate*] _____ is fixed for the hearing on confirmation of the plan [or plans].

F. [*If appropriate*] _____ is fixed as the last day for filing and serving pursuant to Fed. R. Bankr. P. 3020(b)(1) written objections to confirmation of the plan.

_____
MM / DD / YYYY

By the court: _____
United States Bankruptcy Judge

[If the court directs that a copy of the opinion should be transmitted in lieu of or in addition to the summary thereof, the appropriate change should be made in paragraph C of this order.]

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COMMITTEE NOTE

Official Form 313, *Order Approving Disclosure Statement and Fixing Time for Filing Acceptances or Rejections of Plan, Combined with Notice Thereof* replaces Official Form 13, *Order Approving Disclosure Statement and Fixing Time for Filing Acceptances or Rejections of Plan, Combined with Notice Thereof*. It is renumbered as part of the Forms Modernization Project, and includes stylistic changes throughout the form.

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Official Form 314
(12/15)

[Caption as in 416A]

Class [ ] Ballot for Accepting or Rejecting Plan of Reorganization

[Proponent] filed a plan of reorganization dated [Date] (the *Plan*) for the Debtor in this case. The Court has [conditionally] approved a disclosure statement with respect to the Plan (the *Disclosure Statement*). The Disclosure Statement provides information to assist you in deciding how to vote your ballot. If you do not have a Disclosure Statement, you may obtain a copy from [name, address, telephone number and telecopy number of proponent/proponent's attorney.]

Court approval of the disclosure statement does not indicate approval of the Plan by the Court.

You should review the Disclosure Statement and the Plan before you vote. You may wish to seek legal advice concerning the Plan and your classification and treatment under the Plan. Your [claim] [equity interest] has been placed in class [ ] under the Plan. If you hold claims or equity interests in more than one class, you will receive a ballot for each class in which you are entitled to vote.

If your ballot is not received by [name and address of proponent's attorney or other appropriate address] on or before [date], and such deadline is not extended, your vote will not count as either an acceptance or rejection of the Plan.

If the Plan is confirmed by the Bankruptcy Court, it will be binding on you whether or not you vote.

Acceptance or Rejection of the Plan

[At this point the ballot should provide for voting by the particular class of creditors or equity holders receiving the ballot using one of the following alternatives;]

[If the voter is the holder of a secured, priority, or unsecured nonpriority claim:]

The undersigned, the holder of a Class [ ] claim against the Debtor in the unpaid amount of Dollars ($)

[or, if the voter is the holder of a bond, debenture, or other debt security:]

The undersigned, the holder of a Class [ ] claim against the Debtor, consisting of Dollars ($) principal amount of [describe bond, debenture, or other debt security] of the Debtor (For purposes of this Ballot, it is not necessary and you should not adjust the principal amount for any accrued or unmatured interest.)

[or, if the voter is the holder of an equity interest:]

The undersigned, the holder of Class [ ] equity interest in the Debtor, consisting of _____ shares or other interests of [describe equity interest] in the Debtor Official Form 14 continued (12/03)

[In each case, the following language should be included:]

Check one box only

❑ **Accepts the plan**

❑ **Rejects the plan**

Dated: _____

Print or type name: _____

Signature: _____ Title (if corporation or partnership) _____

Address: _____

_____

_____

Return this ballot to:

[Name and address of proponent's attorney or other appropriate address]

COMMITTEE NOTE

Official Form 314, *Ballot for Accepting or Rejecting Plan* replaces Official Form 14, *Ballot for Accepting or Rejecting Plan*. It is renumbered as part of the Forms Modernization Project, and includes stylistic changes throughout the form.

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Official Form 315
(12/15)

[Caption as in 416A]

Order Confirming Plan

The plan under chapter 11 of the Bankruptcy Code filed by _____, on _____ [*if applicable*, as modified by a modification filed on _____,] or a summary thereof, having been transmitted to creditors and equity security holders; and

It having been determined after hearing on notice that the requirements for confirmation set forth in 11 U.S.C. § 1129(a) [or, *if appropriate*, 11 U.S.C. § 1129(b)] have been satisfied;

IT IS ORDERED that:

The plan filed by _____, on _____,

[*If appropriate*, include dates and any other pertinent details of modifications to the plan] is confirmed. [*If the plan provides for an injunction against conduct not otherwise enjoined under the Code, include the information required by Rule 3020*.]

A copy of the confirmed plan is attached.

_____
MM / DD / YYYY

By the court: _____
United States Bankruptcy Judge

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COMMITTEE NOTE

Official Form 315, *Order Confirming Plan* replaces Official Form 15, *Order Confirming Plan*. It is renumbered as part of the Forms Modernization Project, and includes stylistic changes throughout the form.

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Fill in this information to identify the case:

United States Bankruptcy Court for the:

_____ District of _____
(State)

Case number (*If known*): _____ Chapter 15

❑ Check if this is an amended filing

Official Form 401

Chapter 15 Petition for Recognition of a Foreign Proceeding

12/15

If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write debtor's name and case number (if known).

1. Debtor's name _____

2. Debtor's unique identifier

For non-individual debtors:

❑ Federal Employer Identification Number (EIN) ___ ___ – ___ ___ ___ ___ ___ ___ ___

❑ Other _____. Describe identifier _____.

For individual debtors:

❑ Social Security number: xxx – xx– ____ ____ ____ ____

❑ Individual Taxpayer Identification number (ITIN): **9** xx – xx – ____ ____ ____ ____

❑ Other _____. Describe identifier _____.

3. Name of foreign representative(s) _____

4. Foreign proceeding in which appointment of the foreign representative(s) occurred _____

5. Nature of the foreign proceeding

Check one:

❑ Foreign main proceeding
❑ Foreign nonmain proceeding
❑ Foreign main proceeding, or in the alternative foreign nonmain proceeding

6. Evidence of the foreign proceeding

❑ A certified copy, translated into English, of the decision commencing the foreign proceeding and appointing the foreign representative is attached.

❑ A certificate, translated into English, from the foreign court, affirming the existence of the foreign proceeding and of the appointment of the foreign representative, is attached.

❑ Other evidence of the existence of the foreign proceeding and of the appointment of the foreign representative is described below, and relevant documentation, translated into English, is attached.

_____

_____

7. Is this the only foreign proceeding with respect to the debtor known to the foreign representative(s)?

❑ No. (Attach a statement identifying each country in which a foreign proceeding by, regarding, or against the debtor is pending.)

❑ Yes

8. Others entitled to notice

Attach a list containing the names and addresses of:

(i) all persons or bodies authorized to administer foreign proceedings of the debtor,

(ii) all parties to litigation pending in the United States in which the debtor is a party at the time of filing of this petition, and

(iii) all entities against whom provisional relief is being sought under § 1519 of the Bankruptcy Code.

9. Addresses

Country where the debtor has the center of its main interests:

_____

Debtor's registered office:

_____
Number Street

_____
P.O. Box

_____
City State/Province/Region ZIP/Postal Code

_____
Country

Individual debtor's habitual residence:

_____
Number Street

_____
P.O. Box

_____
City State/Province/Region ZIP/Postal Code

_____
Country

Address of foreign representative(s):

_____
Number Street

_____
P.O. Box

_____
City State/Province/Region ZIP/Postal Code

_____
Country

10. Debtor's website (URL)

_____

11. Type of debtor

Check one:

❑ Non-individual (*check one*):

❑ Corporation. Attach a corporate ownership statement containing the information described in Fed. R. Bankr. P. 7007.1.

❑ Partnership

❑ Other. Specify: _____

❑ Individual

12. Why is venue proper in *this district*?

Check one:

- ❑ Debtor's principal place of business or principal assets in the United States are in this district.
- ❑ Debtor does not have a place of business or assets in the United States, but the following action or proceeding in a federal or state court is pending against the debtor in this district:

  _____.
- ❑ If neither box is checked, venue is consistent with the interests of justice and the convenience of the parties, having regard to the relief sought by the foreign representative, because:

  _____.

13. Signature of foreign representative(s)

I request relief in accordance with chapter 15 of title 11, United States Code.

I am the foreign representative of a debtor in a foreign proceeding, the debtor is eligible for the relief sought in this petition, and I am authorized to file this petition.

I have examined the information in this petition and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct,

✘ _____ _____
Signature of foreign representative Printed name

Executed on _____
MM / DD / YYYY

✘ _____ _____
Signature of foreign representative Printed name

Executed on _____
MM / DD / YYYY

14. Signature of attorney

✘ _____ Date _____
Signature of Attorney for foreign representative MM / DD / YYYY

_____
Printed name

_____
Firm name

_____
Number Street

_____ _____
City State ZIP Code

_____ _____
Contact phone Email address

_____ _____
Bar number State

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COMMITTEE NOTE

Official Form 401 is required for any petition seeking recognition of a foreign proceeding under chapter 15 of the Bankruptcy Code. The form, which applies to foreign proceedings involving individual and non-individual debtors, consolidates information formerly included on Official Form 1 (Voluntary Petition). The petition must be signed by the foreign representative, under penalty of perjury, and by the foreign representative's attorney.

The petition requires disclosure of the foreign proceeding in which the foreign representative has been appointed (Line 4) and whether it is a foreign main proceeding or foreign nonmain proceeding (Line 5). If the foreign representative seeks recognition of the foreign proceeding as a foreign main proceeding or, in the alternative, a foreign nonmain proceeding, that request should be indicated in Line 5. Each country where any additional foreign proceeding known to the foreign representative is pending must be disclosed on Line 7. See Bankruptcy Rule 1004.2. Evidence of the foreign proceeding and of the foreign representative's appointment must accompany the petition. See 11 U.S.C. § 1515(b). These documents must be translated into English in accordance with 11 U.S.C. § 1515(d). The foreign representative must also attach a list of persons or bodies entitled to notice. See Bankruptcy Rule 2002(q).

The petition calls for information about the debtor, including the debtor's name (Line 1), other unique identifying information, if available (Line 2), and center of main interest (Line 9). The type of debtor is also requested (Line 11).

The foreign representative must indicate the basis for venue in the district by selecting an appropriate checkbox and, if necessary, providing additional information, such as a statement explaining why venue in the district is appropriate (Line 12). See 28 U.S.C. § 1410.

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Official Form 410

Instructions for Proof of Claim

United States Bankruptcy Court 12/15

These instructions and definitions generally explain the law. In certain circumstances, such as bankruptcy cases that debtors do not file voluntarily, exceptions to these general rules may apply. You should consider obtaining the advice of an attorney, especially if you are unfamiliar with the bankruptcy process and privacy regulations.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both.
18 U.S.C. §§ 152, 157 and 3571.

How to fill out this form

- **Fill in all of the information about the claim as of the date the case was filed.**
- **Attach any supporting documents to this form.** Attach redacted copies of any documents that show that the debt exists, a lien secures the debt, or both. (See the definition of *redaction* on the next page.)

  Also attach copies of documents that show perfection of any security interest or any assignments or transfers of the debt. In addition to the documents, a summary may be added. Federal Rule of Bankruptcy Procedure (called "Bankruptcy Rule") 3001(c) and (d).
- **Do not attach original documents because attachments may be destroyed after scanning.**
- **If the claim is based on delivering health care goods or services, do not disclose confidential health care information. Leave out or redact confidential information both in the claim and in the attached documents.**
- **A *Proof of Claim* form and any attached documents must show only the last 4 digits of any social security number, individual's tax identification number, or financial account number, and only the year of any person's date of birth.** See Bankruptcy Rule 9037.
- **For a minor child, fill in only the child's initials and the full name and address of the child's parent or guardian.** For example, write *A.B., a minor child* (*John Doe, parent, 123 Main St., City, State*). See Bankruptcy Rule 9037.

Confirmation that the claim has been filed

To receive confirmation that the claim has been filed, either enclose a stamped self-addressed envelope and a copy of this form or go to the court's PACER system (www.pacer.psc.uscourts.gov) to view the filed form.

Understand the terms used in this form

Administrative expense: Generally, an expense that arises after a bankruptcy case is filed in connection with operating, liquidating, or distributing the bankruptcy estate. 11 U.S.C. § 503.

Claim: A creditor's right to receive payment for a debt that the debtor owed on the date the debtor filed for bankruptcy. 11 U.S.C. §101 (5). A claim may be secured or unsecured.

Creditor: A person, corporation, or other entity to whom a debtor owes a debt that was incurred on or before the date the debtor filed for bankruptcy. 11 U.S.C. §101 (10).

Debtor: A person, corporation, or other entity who is in bankruptcy. Use the debtor's name and case number as shown in the bankruptcy notice you received. 11 U.S.C. § 101 (13).

Evidence of perfection: Evidence of perfection of a security interest may include a mortgage; lien; certificate of title; financing statement; in some instances, the original security agreement, or other document showing that a security interest has been filed or recorded.

Information that is entitled to privacy: A *Proof of Claim* form and any attached documents must show only the last 4 digits of any social security number, an individual's tax identification number, or a financial account number, only the initials of a minor's name, and only the year of any person's date of birth. If a claim is based on delivering health care goods or services, limit the disclosure of the goods or services to avoid embarrassment or disclosure of confidential health care information. You may later be required to give more information if the trustee or someone else in interest objects to the claim.

Priority claim: A claim within a category of unsecured claims that is entitled to priority under 11 U.S.C. §507(a). These claims are paid from the available money or property in a bankruptcy case before other unsecured claims are paid. Common priority unsecured claims include alimony, child support, taxes, and certain unpaid wages.

Proof of claim: A form that shows the amount of debt the debtor owed to a creditor on the date of the bankruptcy filing. The form must be filed with the clerk of the same bankruptcy court in which the bankruptcy case was filed.

Redaction of information: Masking, editing out, or deleting certain information to protect privacy. Filers must redact or leave out information entitled to privacy on the *Proof of Claim* form and any attached documents.

Secured claim under 11 U.S.C. §506(a): A claim backed by a lien on particular property of the debtor. A claim is secured to the extent that a creditor has the right to be paid from the property before other creditors are paid. The amount of a secured claim usually cannot be more than the value of the particular property on which the creditor has a lien. Any amount owed to a creditor that is more than the value of the property normally may be an unsecured claim. But exceptions exist; for example, see 11 U.S.C. § 1322(b) and the final sentence of 1325(a).

Examples of liens on property include a mortgage on real estate or a security interest in a car. A lien may be voluntarily granted by a debtor or may be obtained through a court proceeding. In some states, a court judgment may be a lien.

Setoff: Occurs when a creditor pays itself with money belonging to the debtor that it is holding, or by canceling a debt it owes to the debtor.

Uniform claim identifier: An optional 24-character identifier that certain large creditors use to facilitate electronic payment in chapter 13 cases.

Unsecured claim: A claim that does not meet the requirements of a secured claim. A claim may be unsecured in part if the amount of the claim is more than the value of the property on which a creditor has a lien.

Offers to purchase a claim

Certain entities purchase claims for an amount that is less than the face value of the claims. These entities may contact creditors offering to purchase their claims. Some written communications from these entities may easily be confused with official court documentation or communications from the debtor. These entities do not represent the bankruptcy court, the bankruptcy trustee, or the debtor. A creditor has no obligation to sell its claim. However, if a creditor decides to sell its claim, any transfer of that claim is subject to Bankruptcy Rule 3001(e), any provisions of the Bankruptcy Code (11 U.S.C. § 101 et seq.) that apply, and any orders of the bankruptcy court that apply.

Do not file these instructions with your form.

Fill in this information to identify the case:

Debtor 1 _____

Debtor 2 _____
(Spouse, if filing)

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____

Draft Jan. 17, 2014

Official Form 410

Proof of Claim

12/15

Read the instructions before filling out this form. Use this form to make a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

The law requires that filers **must leave out or redact** information that is entitled to privacy on this form or on any attached documents. Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. **Do not send original documents;** they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) **that you received.**

Part 1: Identify the Claim

1. Who is the current creditor?

_____
Name of the current creditor (the person or entity to be paid for this claim)

Other names the creditor used with the debtor _____

2. Has this claim been acquired from someone else?

❑ No
❑ Yes. From whom? _____

3. Where should notices and payments to the creditor be sent?

Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)

Where should notices to the creditor be sent?	**Where should payments to the creditor be sent?** (if different)
Name	Name
Number Street	Number Street
City State ZIP Code	City State ZIP Code
Contact phone	Contact phone
Contact email	Contact email

Uniform claim identifier for electronic payments in chapter 13 (if you use one):

__ __

4. Does this claim amend one already filed?

❑ No
❑ Yes. Claim number on court claims registry (if known) _____ Filed on _____
MM / DD / YYYY

5. Do you know if anyone else has filed a proof of claim for this claim?

❑ No
❑ Yes. Who made the earlier filing? _____

Debtor 1 _____ Case number _____
First Name Middle Name Last Name

Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. **Do you have any number you use to identify the debtor?**
   - ❑ No
   - ❑ Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____ ____ ____ ____

7. **How much is the claim?** $_____. **For leases state only the amount of default.**

   Does this amount include interest or other charges?
   - ❑ No
   - ❑ Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).

8. **What is the basis of the claim?**

   Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card.

   Attach any documents supporting the claim required by Bankruptcy Rule 3001(c).

   Limit disclosing information that is entitled to privacy, such as healthcare information.

   _____

9. **Is all or part of the claim secured?**
   - ❑ No
   - ❑ Yes. The claim is secured by a lien on property.

   Nature of property:
   - ❑ Real estate. If the claim is secured by the debtor's principal residence, file a *Mortgage Proof of Claim Attachment* (Official Form 410-A) with this *Proof of Claim.*
   - ❑ Motor vehicle
   - ❑ Other. Describe: _____

   Basis for perfection: _____

   Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.)

   Value of property: $_____

   Amount of the claim that is secured: $_____

   Amount of the claim that is unsecured: $_____ (The sum of the secured and unsecured amounts should match the amount in line 7.)

   Amount necessary to cure any default as of the date of the petition: $_____

   Annual Interest Rate (when case was filed)_____%
   - ❑ Fixed
   - ❑ Variable

10. **Is this claim based on a lease?**
    - ❑ No
    - ❑ Yes. **Amount necessary to cure any default as of the date of the petition.** $_____

11. **Does this claim involve a right to setoff?**
    - ❑ No
    - ❑ Yes. Explain: _____

12. **Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?**

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

❑ No

❑ Yes. *Check all that apply:*

	Amount entitled to priority
❑ Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).	$_____
❑ Up to $2,775* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).	$_____
❑ Wages, salaries, or commissions (up to $12,475*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).	$_____
❑ Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).	$_____
❑ Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).	$_____
❑ Other. Specify subsection of 11 U.S.C. § 507(a)(__) that applies.	$_____

* Amounts are subject to adjustment on 4/1/16 and every 3 years after that for cases begun on or after the date of adjustment.

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157 and 3571.

Check the appropriate box:

❑ I am the creditor.

❑ I am the creditor's attorney or authorized agent.

❑ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.

❑ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date _____
MM / DD / YYYY

_____
Signature

Print the name of the person who is completing and signing this claim:

Name _____
First name Middle name Last name

Title _____

Company _____
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address _____
Number Street

_____
City State ZIP Code

Contact phone _____ Email _____

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Official Form 410A

Instructions for Mortgage Proof of Claim Attachment

United States Bankruptcy Court 12/15

Introduction

This form is used only in individual debtor cases. When required to be filed, it must be attached to *Proof of Claim* (Official Form B410) with other documentation required under the Federal Rules of Bankruptcy Procedure.

Applicable Law and Rules

Rule 3001(c)(2)(A) of the Federal Rules of Civil Procedure requires for the bankruptcy case of an individual that any proof of claim be accompanied by a statement itemizing any interest, fees, expenses, and charges that are included in the claim.

Rule 3001(c)(2)(B) requires that a statement of the amount necessary to cure any default be filed with the claim if a security interest is claimed in the debtor's property.

If a security interest is claimed in property that is the debtor's principal residence, Rule 3001(c)(2)(C) requires this form to be filed with the proof of claim. The form implements the requirements of Rule 3001(c)(2)(A) and (B).

If an escrow account has been established in connection with the claim, Rule 3001(c)(2)(C) also requires an escrow statement to be filed with the proof of claim. The statement must be prepared as of the date of the petition and in a form consistent with applicable nonbankruptcy law.

Directions

Definition

This form must list all transactions on the claim from the *first date of default* to the petition date. The *first date of default* is the first date on which the borrower failed to make a payment in accordance with the terms of the note and mortgage, unless the note was subsequently brought current with no principal, interest, fees, escrow payments, or other charges immediately payable.

Information required in Part 1: Mortgage and Case Information

Insert on the appropriate lines:

- the case number;
- the names of Debtor 1 and Debtor 2;
- the last 4 digits used to identify the mortgage loan number (i.e., the last 4 digits of the loan account number or any other information to identify the account);
- the creditor's name;
- the servicer's name, if applicable; and
- the method used to calculate interest on the debt (i.e., fixed accrual, daily simple interest, or other method).

Information required in Part 2: Total Debt Calculation

Insert:

- the principal balance on the debt;
- the interest due and owing;
- any fees or costs owed under the note or mortgage and outstanding as of the date of the bankruptcy filing; and
- any *Escrow deficiency for funds advanced*—that is, the amount of any prepetition payments for taxes and insurance that the servicer or mortgagee made out of its own funds and for which it has not been reimbursed.

Also disclose the *Total amount of funds on hand*. This amount is the total of the following, if applicable:

- a positive escrow balance,
- unapplied funds, and
- amounts held in suspense accounts.

Total the amounts owed—subtracting total funds on hand—to determine the total debt due.

Insert this amount under *Total debt*.

Information required in the Part 3: Arrearage as of the Date of Petition

Insert the amount of the principal and interest portion of all prepetition monthly installments that remain outstanding as of the petition date. The escrow portion of prepetition monthly installment payments should not be included in this figure.

Insert the amount of fees and costs outstanding as of the petition date. This amount should equal the *Fees/Charges balance* as shown in the last entry in Part 5, Column P.

Insert any *escrow deficiency for funds advanced*. This amount should be the same as the amount of *escrow deficiency* stated in Part 2.

Insert the *Projected escrow shortage* as of the date the bankruptcy petition was filed. The *projected escrow shortage* is the amount the claimant asserts should exist in the escrow account as of the petition date, less the amount actually held. The amount actually held should equal the amount of a positive escrow account balance as shown in the last entry in Part 5, Column O.

This calculation should result in the amount necessary to cure any prepetition default on the note or mortgage that arises from the failure of the borrower to satisfy the amounts required under the Real Estate Settlement Practices Act (RESPA). The amount necessary to cure should include 1/6 of the anticipated annual charges against the escrow account or 2 months of the monthly pro rata installments due by the borrower as calculated under RESPA guidelines. The amount of the projected escrow shortage should be consistent with the escrow account statement attached to the *Proof of Claim*, as required by Rule 3001(c)(2)(C).

Insert the amount of funds on hand that are unapplied or held in a suspense account as of the petition date.

Total the amounts due listed in Part 3, subtracting the funds on hand, and insert the calculated amount in *Total prepetition arrearage*.

Information required in Part 4: Monthly Mortgage Payment

Insert the principal and interest payment amount of the monthly payment as of the petition date.

Insert the monthly escrow portion of the monthly payment. This amount should take into account the receipt of any amounts claimed in Part 3 as escrow deficiency and projected escrow shortage. Therefore, a claimant should assume that the

escrow deficiency and shortage will be paid through a plan of reorganization and provide for a credit of a like amount when calculating postpetition escrow installment payments.

Claimants should also add any monthly private mortgage insurance amount.

Insert the sum of these amounts in *Total monthly payment*.

Information required in Part 5: Loan Payment History from the First Date of Default

Beginning with the First Date of Default, enter:

- the date of the default in Column A;
- amount incurred in Column D;
- description of the charge in Column E;
- principal balance, escrow balance, and unapplied or suspense funds balance as of that date in Columns M, O, and Q, respectively.

For (1) all subsequently accruing installment payments; (2) any subsequent payment received; (3) any fee, charge, or amount incurred; and (4) any escrow charge satisfied since the date of first default, enter the information in date order, showing:

- the amount paid, accrued, or incurred;
- a description of the transaction;
- the contractual due date, if applicable;
- how the amount was applied or assessed; and
- the resulting principal balance, accrued interest balance, escrow balance, outstanding fees or charges balance, and the total unapplied funds held or in suspense.

If more space is needed, fill out and attach as many copies of *Mortgage Proof of Claim Attachment: Additional Page* as necessary.

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Mortgage Proof of Claim Attachment

(12/15)

If you file a claim secured by a security interest in the debtor's principal residence, you must use this form as an attachment to your proof of claim. See separate instructions.

Part 1: Mortgage and Case Information		Part 2: Total Debt Calculation		Part 3: Arrearage as of Date of the Petition		Part 4: Monthly Mortgage Payment	
Case number:	_____	Principal balance:	_____	Principal & interest due:	_____	Principal & interest:	_____
Debtor 1:	_____	Interest due:	_____	Prepetition fees due:	_____	Monthly escrow:	_____
Debtor 2:	_____	Fees, costs due:	_____	Escrow deficiency for funds advanced:	_____	Private mortgage insurance:	_____
Last 4 digits to identify:	___ ___ ___ ___	Escrow deficiency for funds advanced:	_____	Projected escrow shortage:	_____	Total monthly payment:	_____
Creditor:	_____	Less total funds on hand:	– _____	Less funds on hand:	– _____		
Servicer:	_____	Total debt:	_____	Total prepetition arrearage:	_____		
Fixed accrual/daily simple interest/other:	_____						

Part 5 : Loan Payment History from First Date of Default

		Account Activity					How Funds Were Applied/Amount Incurred					Balance After Amount Received or Incurred				
A. Date	**B.** Contractual payment amount	**C.** Funds received	**D.** Amount incurred	**E.** Description	**F.** Contractual due date	**G.** Prin, int & esc past due balance	**H.** Amount to principal	**I.** Amount to interest	**J.** Amount to escrow	**K.** Amount to fees or charges	**L.** Unapplied funds	**M.** Principal balance	**N.** Accrued interest balance	**O.** Escrow balance	**P.** Fees / Charges balance	**Q.** Unapplied funds balance

Mortgage Proof of Claim Attachment: **Additional Page** (12/15)

Case number: _____

Debtor 1: _____

Part 5 : Loan Payment History from First Date of Default

		Account Activity					How Funds Were Applied/Amount Incurred					Balance After Amount Received or Incurred				
A. Date	**B.** Contractual payment amount	**C.** Funds received	**D.** Amount incurred	**E.** Description	**F.** Contractual due date	**G.** Prin, int & esc past due balance	**H.** Amount to principal	**I.** Amount to interest	**J.** Amount to escrow	**K.** Amount to fees or charges	**L.** Unapplied funds	**M.** Principal balance	**N.** Accrued interest balance	**O.** Escrow balance	**P.** Fees / Charges balance	**Q.** Unapplied funds balance

Mortgage Proof of Claim Attachment

(12/15)

If you file a claim secured by a security interest in the debtor's principal residence, you must use this form as an attachment to your proof of claim. See separate instructions.

Part 1: Mortgage and Case Information		Part 2: Total Debt Calculation		Part 3: Arrearage as of Date of the Petition		Part 4: Monthly Mortgage Payment	
Case number:	14-00001	Principal balance:	$103,000.00	Principal & interest due:	$2,000.00	Principal & interest:	$500.00
Debtor 1:	John Smith	Interest due:	$1900.00	Prepetition fees due:	$1,000.00	Monthly escrow:	$200.00
Debtor 2:	Jane Smith	Fees, costs due:	$1,000.00	Escrow deficiency for funds advanced:	$1,600.00	Private mortgage insurance:	n/a
Last 4 digits to identify:	6789	Escrow deficiency for funds advanced:	$1,600.00	Projected escrow shortage:	$1,000.00	Total monthly payment:	$700.00
Creditor:	Mortgage Trust 2012	Less total funds on hand:	– $200.00	Less funds on hand:	– $200.00		
Servicer:	Mortgage Servicer A	Total debt:	$107,900.00	Total prepetition arrearage:	$5,400.00		
Fixed accrual/daily simple interest/other:	Fixed Accrual						

Part 5 : Loan Payment History from First Date of Default

		Account Activity					How Funds Were Applied/Amount Incurred					Balance After Amount Received or Incurred				
A. Date	**B.** Contractual payment amount	**C.** Funds received	**D.** Amount incurred	**E.** Description	**F.** Contractual due date	**G.** Prin, int & esc past due balance	**H.** Amount to principal	**I.** Amount to interest	**J.** Amount to escrow	**K.** Amount to fees or charges	**L.** Unapplied funds	**M.** Principal balance	**N.** Accrued interest balance	**O.** Escrow balance	**P.** Fees / Charges balance	**Q.** Unapplied funds balance
4/1/13	$700.00			Monthly payment	4/1/2013	$700.00						$103,050			0	
4/16/13			$50.00	Late fee	4/1/2013	$700.00				$50.00		$103,050			$50.00	
4/25/14			$600.00	Property taxes	4/1/2013	$700.00			$600.00			$103,050		-$600.00	$50.00	
5/1/13	$700.00			Monthly payment	4/1/2013	$1400.00						$103,050		-$600.00	$50.00	
5/16/13			$50.00	Late fee	4/1/2013	$1400.00				$50.00		$103,050		-$600.00	$100.00	
6/1/13	$700.00			Monthly payment	4/1/2013	$2100.00						$103,050		-$600.00	$100.00	
6/16/13			$50.00	Late fee	4/1/2013	$2100.00				$50.00		$103,050		-$600.00	$150.00	
6/25/13			$1200.00	Insurance	4/1/2013	$2100.00			$1200.00			$103,050		-$1800.00	$150.00	
7/1/13	$700.00			Monthly payment	4/1/2013	$2800.00						$103,050		$1800.00	$150.00	
7/16/13			$50.00	Late fee	4/1/2013	$2800.00						$103,050		$1800.00	$150.00	
7/25/13			$850.00	Foreclosure fee	4/1/2013	$2800.00				$850.00		$103,050		$1800.00	$1000.00	
7/27/13`		$820.00		Payment	5/1/2013	$2100.00	$50.00	$450.00	$200.00		$120.00	$103,000		$1600.00	$1000.00	$120.00
8/1/13	$700.00			Monthly payment	6/1/2013	$2800.00						$103,000		$1600.00	$1000.00	
8/3/13				Bankruptcy Filed												

SAMPLE

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Fill in this information to identify the case:

Debtor 1 _____

Debtor 2 (Spouse, if filing) _____

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number _____

Draft March 31, 2014

Official Form 410S1

Notice of Mortgage Payment Change

12/15

If you file a claim secured by a security interest in the debtor's principal residence provided for under the debtor's plan pursuant to § 1322(b)(5), you must use this form to give notice of any changes in the installment payment amount. File this form as a supplement to your proof of claim at least 21 days before the new payment amount is due. See Bankruptcy Rule 3002.1.

Name of creditor: _____

Court claim no. (if known): _____

Last 4 digits of any number you use to identify the debtor's account: ____ ____ ____ ____

Date of payment change:
Must be at least 21 days after date of this notice ____/____/_____

New total payment:
Principal, interest, and escrow, if any $ _____

Part 1: Escrow Account Payment Adjustment

1. **Will there be a change in the debtor's escrow account payment?**

❑ No
❑ Yes. Attach a copy of the escrow account statement prepared in a form consistent with applicable nonbankruptcy law. Describe the basis for the change. If a statement is not attached, explain why: _____

Current escrow payment: $ _____ **New escrow payment:** $ _____

Part 2: Mortgage Payment Adjustment

2. **Will the debtor's principal and interest payment change based on an adjustment to the interest rate in the debtor's variable-rate note?**

❑ No
❑ Yes. Attach a copy of the rate change notice prepared in a form consistent with applicable nonbankruptcy law. If a notice is not attached, explain why: _____

Current interest rate: _____% **New interest rate:** _____%

Current principal and interest payment: $ _____ **New principal and interest payment:** $ _____

Part 3: Other Payment Change

3. **Will there be a change in the debtor's mortgage payment for a reason not listed above?**

❑ No
❑ Yes. Attach a copy of any documents describing the basis for the change, such as a repayment plan or loan modification agreement. (*Court approval may be required before the payment change can take effect.*)

Reason for change: _____

Current mortgage payment: $ _____ **New mortgage payment:** $ _____

Debtor 1 _____ Case number (*if known*) _____
First Name Middle Name Last Name

Part 4: Sign Here

The person completing this Notice must sign it. Sign and print your name and your title, if any, and state your address and telephone number.

Check the appropriate box.

- ❑ I am the creditor.
- ❑ I am the creditor's authorized agent. (Attach copy of power of attorney, if any.)

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

✘ _____ Date ____/_____/_____
Signature

Print: _____ Title _____
First Name Middle Name Last Name

Company _____

Address _____
Number Street

_____
City State ZIP Code

Contact phone (_____) _____– _____ Email _____

Fill in this information to identify the case:

Debtor 1 _____

Debtor 2 _____
(Spouse, if filing)

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____

Draft March 31, 2014

Official Form 410S2

Notice of Postpetition Mortgage Fees, Expenses, and Charges 12/15

If you hold a claim secured by a security interest in the debtor's principal residence, you must use this form to give notice of any postpetition fees, expenses, and charges that you assert are recoverable against the debtor or against the debtor's principal residence. File this form as a supplement to your proof of claim. See Bankruptcy Rule 3002. 1.

Name of creditor: _____ **Court claim no**. (if known): _____

Last 4 digits of any number you use to identify the debtor's account: ____ ____ ____ ____

Does this notice supplement a prior notice of postpetition fees, expenses, and charges?

- ❑ No
- ❑ Yes. Date of the last notice: ____/____/_____

Part 1: Itemize Postpetition Fees, Expenses, and Charges

Itemize the fees, expenses, and charges incurred on the debtor's mortgage account after the petition was filed. Do not include any escrow account disbursements or any amounts previously itemized in a notice filed in this case or ruled on by the bankruptcy court.

Description	Dates incurred		Amount
1. Late charges	_____	(1)	$ _____
2. Non-sufficient funds (NSF) fees	_____	(2)	$ _____
3. Attorney fees	_____	(3)	$ _____
4. Filing fees and court costs	_____	(4)	$ _____
5. Bankruptcy/Proof of claim fees	_____	(5)	$ _____
6. Appraisal/Broker's price opinion fees	_____	(6)	$ _____
7. Property inspection fees	_____	(7)	$ _____
8. Tax advances (non-escrow)	_____	(8)	$ _____
9. Insurance advances (non-escrow)	_____	(9)	$ _____
10. Property preservation expenses. Specify:_____	_____	(10)	$ _____
11. Other. Specify:_____	_____	(11)	$ _____
12. Other. Specify:_____	_____	(12)	$ _____
13. Other. Specify:_____	_____	(13)	$ _____
14. Other. Specify:_____	_____	(14)	$ _____

The debtor or trustee may challenge whether the fees, expenses, and charges you listed are required to be paid.
See 11 U.S.C. § 1322(b)(5) and Bankruptcy Rule 3002. 1.

Debtor 1 _____ Case number (*if known*) _____
First Name Middle Name Last Name

Part 2: Sign Here

The person completing this Notice must sign it. Sign and print your name and your title, if any, and state your address and telephone number.

Check the appropriate box.

❑ I am the creditor.

❑ I am the creditor's authorized agent. (Attach copy of power of attorney, if any.)

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

✘ _____ Date ____/_____/_____
Signature

Print: _____ Title _____
First Name Middle Name Last Name

Company _____

Address _____
Number Street

_____
City State ZIP Code

Contact phone (_____) _____– _____ Email _____

COMMITTEE NOTE

Official Form 410, *Proof of Claim*, applies in all cases. Form 410 replaces Official Form 10, Proof of Claim. It is renumbered to distinguish it from the forms used by debtors for case opening, and includes stylistic changes throughout the form. It is revised as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. Because the goals of the Forms Modernization Project include improving the interface between technology and the forms so as to increase efficiency and reduce the need to produce the same information in multiple formats, many of the open-ended questions and multiple-part instructions have been replaced with more specific questions.

Official Form 410 has been substantially reorganized. A new question has been added at line 10 that solicits information about claims based on leases.

Official Form 410A, *Mortgage Proof of Claim Attachment*, is revised in its content and format. Rather than requiring a home mortgage claimant to fill in blanks with itemized information about the principal, interest, and fees due as of the petition date and the amount necessary to cure a prepetition default, the form now requires the claimant to provide a loan history that reveals when payments were received, how they were applied, when fees and charges were incurred, and when escrow charges were satisfied. Because completion of the revised form can be automated, it will permit claimants to comply with Rule 3001(c)(2)(C) with efficiency and accuracy. Attachment of a loan history with a home mortgage proof of claim will also provide transparency about the basis for the claimant's calculation of the claim and arrearage amount.

The loan history should begin with the first date on which the borrower failed to make a payment in accordance with the terms of the note and mortgage, unless the note was subsequently

brought current with no principal, interest, fees, escrow payments, or other charges immediately payable.

Official Forms 410S1 and 410S2, *Notice of Mortgage Payment Change* and *Notice of Postpetition Mortgage Fees, Expenses, and Charges*, are revised as part of the Forms Modernization Project. There are formatting changes throughout the forms.

Debtor [1] _____

Other names used by the debtor within the last 8 years

_____

Address

_____

_____

_____

Last 4 digits of Social Security number or ITIN __ __ __ __

[Employer Identification Number __ __–__ __ __ __ __ __ __]

[Debtor 2] _____

[Other names used by the debtor within the last 8 years]

_____

[Address, if Debtor 2 lives at a different address

_____

_____

_____]

Last 4 digits of Social Security number or ITIN __ __ __ __

[Employer Identification Number __ __–__ __ __ __ __ __ __]

United States Bankruptcy Court for the _____

[Bankruptcy district]

Case number _____

Chapter you are filing under _____

[Designation of Character of Paper]

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COMMITTEE NOTE

Official Form 416A, *Caption*, applies on all forms where prescribed. Form 416A replaces Official Form 16A, *Caption*. It is renumbered as part of the Forms Modernization Project, and includes stylistic changes throughout the form.

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B416B (Official Form 416B) (12/15) Form 416B. CAPTION (Short Title) *(May be used if 11 U.S.C. § 342(c) does not apply)*

Debtor _____

United States Bankruptcy Court for the _____

[Bankruptcy district]

Case number: _____ Chapter you are filing under: _____

[Designation of Character of Paper]

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COMMITTEE NOTE

Official Form 416B, *Caption*, applies on all forms where prescribed. Form 416B replaces Official Form 16B, *Caption*. It is renumbered as part of the Forms Modernization Project, and includes stylistic changes throughout the form.

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Debtor 1 _____ Plaintiff _____

Defendant _____

United States Bankruptcy Court for the _____

[Bankruptcy district]

Case number: _____ Chapter you are filing under: _____ Adv. Proc. No. _____

Complaint [or other designation]

[If in a *Notice of Appeal* (see Form 417A) or other notice filed and served by a debtor, this caption must be altered to include the the debtor's address and Employer's Tax Identification Numbers (EIN), last four digits of Social Security numbers, or Individual Taxpayer Identification number (ITIN) as in Form 416A.]

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COMMITTEE NOTE

Official Form 416D, *Caption for Use in Adversary Proceeding Other Than for a Complaint Filed by a Debtor*, applies on all forms where prescribed. Form 416D replaces Official Form 16D, *Caption for Use in Adversary Proceeding Other Than for a Complaint Filed by a Debtor*. It is renumbered as part of the Forms Modernization Project, and includes stylistic changes throughout the form.

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Official Form 424
(12/15)

[Caption as described in Fed. R. Bankr. P. 7010 or 9004(b), as applicable]

Certification to Court of Appeals by All Parties

A notice of appeal having been filed in the above-styled matter on _____[Date], _____, _____, and _____, [names of all the appellants and all the appellees, if any], who are all the appellants [and all the appellees] hereby certify to the court under 28 U.S.C. § 158(d)(2)(A) that a circumstance specified in 28 U.S.C. § 158(d)(2) exists as stated below.

Leave to appeal in this matter:

- ❑ is required under 28 U.S.C. § 158(a)
- ❑ is not required under 28 U.S.C. § 158(a).

[If from a final judgment, order, or decree] This certification arises in an appeal from a final judgment, order, or decree of the United States Bankruptcy Court for the _____ District of _____ entered on _____[Date].

[If from an interlocutory order or decree] This certification arises in an appeal from an interlocutory order or decree, and the parties hereby request leave to appeal as required by 28 U.S.C. § 158(a).

[The certification shall contain one or more of the following statements, as is appropriate to the circumstances.]

The judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for this circuit or of the Supreme Court of the United States, or involves a matter of public importance.

Or

The judgment, order, or decree involves a question of law requiring resolution of conflicting decisions.

Or

An immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken.

[The parties may include or attach the information specified in Rule 8001.]

Signed: [If there are more than two signatories, all must sign and provide the information requested below. Attach additional signed sheets if needed.]

Attorney for Appellant (or Appellant, if not represented by an attorney):	_____	_____
Printed name of signer:	_____	_____
Address:	_____	_____
	_____	_____
	_____	_____
Telephone number:	(_____)_____–_____	(_____)_____–_____
Date:	_____/_____/_____ MM / DD / YYYY	_____/_____/_____ MM / DD / YYYY

COMMITTEE NOTE

Official Form 424, *Certification to Court of Appeal by All Parties* replaces Official Form 424, *Certification to Court of Appeal by All Parties*. It is revised as part of the Forms Modernization Project, and includes stylistic changes throughout the form.

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of May 29–30, 2014
Washington, D.C.

Minutes

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C., on Thursday and Friday, May 29 and 30, 2014. The following members participated in the meeting:

Judge Jeffrey S. Sutton, Chair
Dean C. Colson, Esquire
Roy T. Englert, Jr., Esquire
Gregory G. Garre, Esquire
Judge Neil M. Gorsuch
Judge Susan P. Graber
Chief Justice Wallace B. Jefferson
Dean David F. Levi
Judge Patrick J. Schiltz
Judge Amy J. St. Eve
Larry D. Thompson, Esquire
Judge Richard C. Wesley
Judge Jack Zouhary

Deputy Attorney General James M. Cole was unable to attend. Stuart Delery, Esq., Assistant Attorney General for the Civil Division, Elizabeth J. Shapiro, Esq., Theodore Hirt, Esq., Allison Stanton, Esq., Rachel Hines, Esq., and J. Christopher Kohn, Esq., represented the Department of Justice at various times throughout the meeting.

Professor R. Joseph Kimble, the committee's style consultant, participated. Judge Jeremy D. Fogel, Director of the Federal Judicial Center, also participated. Judge Michael A. Chagares, member of the Appellate Rules Committee and chair of the CM/ECF Subcommittee, also participated. Judge John G. Koeltl, member of the Civil Rules Committee and chair of that committee's Duke Subcommittee, participated in part of the meeting by telephone.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Jonathan C. Rose	The committee's secretary and Rules Committee Officer
Benjamin J. Robinson	Deputy Rules Officer
Julie Wilson	Rules Office Attorney
Andrea L. Kuperman	Chief Counsel to the Rules Committees
Tim Reagan	Senior Research Associate, Federal Judicial Center
Emery G. Lee, III	Senior Research Associate, Federal Judicial Center
Catherine Borden	Research Associate, Federal Judicial Center
Scott Myers	Attorney in the Bankruptcy Judges Division
Bridget M. Healy	Attorney in the Bankruptcy Judges Division
Frances F. Skillman	Rules Office Paralegal Specialist
Toni Loftin	Rules Office Administrative Specialist

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
- Judge Steven M. Colloton, Chair
- Professor Catherine T. Struve, Reporter

Advisory Committee on Bankruptcy Rules —
- Judge Eugene R. Wedoff, Chair
- Professor S. Elizabeth Gibson, Reporter
- Professor Troy A. McKenzie, Associate Reporter

Advisory Committee on Civil Rules —
- Judge David G. Campbell, Chair
- Professor Edward H. Cooper, Reporter
- Professor Richard L. Marcus, Associate Reporter

Advisory Committee on Criminal Rules —
- Judge Reena Raggi, Chair
- Professor Sara Sun Beale, Reporter

Professor Nancy J. King, Associate Reporter
Advisory Committee on Evidence Rules —
Judge Sidney A. Fitzwater, Chair

Professor Daniel J. Capra, Reporter to the Evidence Rules Committee, was unable to attend.

INTRODUCTORY REMARKS

Judge Sutton opened the meeting by welcoming everyone and thanking the Rules Office staff for arranging the logistics of the meeting and the committee dinner. Judge Sutton reported that all of the rules proposals that were before the Supreme Court were approved in April, including the proposed amendment to Criminal Rule 12, which had been modified as agreed at the January Standing Committee meeting. The proposals to amend the Bankruptcy Rules to respond to *Stern v. Marshall* were withdrawn for the time being, while the committee waits to see what the Supreme Court does in *Executive Benefits Insurance Agency v. Arkison*, which may address an issue involved in the *Stern* proposals.

Judge Sutton also noted that the term of Chief Justice Wallace Jefferson, the committee's state court representative, was coming to a close. He said that Chief Justice Brent Dickson, of the Indiana Supreme Court, would succeed Chief Justice Jefferson as the state court representative. Judge Sutton thanked Chief Justice Jefferson for his wonderful service to the committee, described some of Justice Jefferson's outstanding contributions to the committee's work and some of his accomplishments outside the committee, and presented him with a plaque signed by Judge John Bates, Director of the Administrative Office, and by Chief Justice John G. Roberts. Chief Justice Jefferson expressed his thanks to the committee for a terrific experience and for doing such good work for the nation.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee unanimously approved the minutes of the last meeting, held on January 9–10, 2014.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell and Professors Cooper and Marcus presented the report of the advisory committee, as set out in Judge Campbell's memorandum and attachments of May 2, 2014 (Agenda Item 2).

Amendments for Final Approval

DUKE RULES PACKAGE
(FED. R. CIV. P. 1, 4, 16, 26, 30, 31, 33, 34, AND 37)

Judge Campbell reported that the Civil Rules Committee had a final proposed package of amendments to implement the ideas from the Civil Litigation Conference held at Duke Law School in May 2010 ("Duke Conference"). He noted that the Duke Conference was intended to look at the Civil Rules generally and whether they are working and what needs to be improved. The conclusion from that Conference, he said, was that the rules generally work well, but that improvement was needed in three areas: (1) proportionality; (2) cooperation among counsel; and (3) early, active judicial case management. The advisory committee had eventually narrowed the list of possible amendments to address these areas and had published its proposals for public comment in August 2013. Judge Campbell reported that there was great public interest in the proposals, with the public comment period generating over 2,300 comments and over 40 witnesses at each of three public hearings. Judge Campbell believed that the response of the bar and the public demonstrated the continuing vitality of the Rules Enabling Act process, and he stated that the comments the committee received were very helpful in refining the proposals. He also expressed gratitude to the reporters for their excellent work in reviewing and summarizing all of the testimony and comments.

Judge Campbell next explained that the advisory committee had made a number of changes to the published proposals to address issues raised during the public comment period. In addition, the advisory committee had decided not to recommend for final adoption the published proposals to place presumptive limits on certain types of discovery devices.

Judge Campbell and Professor Cooper reported that the advisory committee proposed a few changes to some committee note language that appeared in the Standing Committee agenda materials. First, the advisory committee proposed to take out some language in the committee note for Rule 26. The proposed revised committee note would remove the language in the committee note appearing in the agenda book at page 85, lines 277 to 289. The deleted matter provided additional background on the 2000 amendment to Rule 26 that had moved subject-matter discovery from party-controlled discovery to court-managed discovery. Professor Cooper explained that the deleted language was unnecessary. Second, a paragraph was added after line 262 on page 84 of the agenda materials, to encourage courts and parties to consider computer-assisted searches as a means of reducing the cost of producing electronically stored information, thereby addressing possible proportionality concerns that might arise in ESI-intensive cases.[1] Third, Judge Campbell reported

[1] The added language stated:

The burden or expense of proposed discovery should be determined in a realistic way. This includes the burden or expense of producing electronically stored information. Computer-based methods of searching such information continue to develop, particularly for cases involving large volumes of electronically stored information. Courts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery as reliable means of searching electronically stored

that the proposal to amend Rule 1, which will emphasize that the court and the parties bear responsibility for securing the just, speedy, and inexpensive resolution of the case, now includes some added committee note language that was not in the agenda materials. The added language would make it clear that the change was not intended to create a new source for sanctions motions. The proposed added language would state: "This amendment does not create a new or independent source of sanctions. Neither does it abridge the scope of any other of these rules."

A member commented that the Duke package is "awesome" and that the advisory committee had done a marvelous job. He added that the problems being addressed are intractable, difficult problems, complicated by the commitment to transsubstantivity. He said that the advisory committee had invited as much participation as possible and he believed the proposals could make a real difference in meeting the goals of Rule 1. He added that the committee would need to continue to evaluate the rules to make sure the system is working well. He congratulated Judge Koeltl (the chair of the Duke Subcommittee), Judge Campbell, Judge Sutton, and the reporters for putting together a great package. Other members added their gratitude and commended the good work and extraordinary effort.

A member asked whether a portion of the proposal to amend Rule 34(b)(2)(B)—that "The production must then be completed no later than the time for inspection stated in the request or another reasonable time stated in the response"—would allow a responding party to simply state that it would produce documents at a reasonable time without providing a specific date. Another member suggested a friendly amendment that would revise the proposal to state: "If production is not to be completed by the time for inspection stated in the request, then the response must identify another date by which production will occur." After conferring with the reporters, Judge Campbell reported that the idea was to make the provision in Rule 34(b)(2)(B) parallel Rule 34(b)(1)(B), which states that a request "must specify a reasonable *time* . . . for the inspection . . ." (emphasis added). For that reason, it was necessary to retain "time" in the proposed revision to Rule 34(b)(2)(B), instead of substituting "date." However, the advisory committee changed its proposal to refer to "specified" instead of "stated," to emphasize that it would not be sufficient to generally state that the production would occur at a reasonable time. He noted that the proposed advisory committee note already stated that "[w]hen it is necessary to make the production in stages the response should specify the beginning and end dates of the production." A motion was made to change "stated" to "specified" in the proposal, so that it would read: "The production must then be completed no later than the time for inspection <u>specified</u> in the request or another reasonable time <u>specified</u> in the response." The motion passed unanimously.

The Duke package of proposed amendments passed by a unanimous vote. Judge Sutton thanked Judge Koeltl for his tireless work on the Duke Conference and on this very promising set of proposed amendments, as well as Judge Campbell and the rest of his team.

The committee unanimously approved the Duke package of proposed amendments to

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information become available.

the Civil Rules, revised as stated above, to be submitted for final approval by the Judicial Conference.

FED. R. CIV. P. 37(e)

Judge Campbell reported on the proposed amendment to Rule 37(e), which is intended to give better guidance to courts and litigants on the consequences of failing to preserve information for use in litigation. He said that comments on the version that was published for public comment were extensive, and the advisory committee had substantially revised the rule to address issues raised by the comments. The subcommittee and the advisory committee decided that the following guiding principles should be implemented in the revised proposal: (1) It should resolve the circuit split on the culpability standard for imposing certain severe sanctions; (2) It should preserve ample trial court discretion to deal with the loss of information; (3) It should be limited to electronically stored information; and (4) It should not be a strict liability rule that would automatically impose serious sanctions if information is lost. Judge Campbell explained that the rule text and committee note had been revised after publication in line with these principles.[2]

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[2] Judge Campbell also noted that the advisory committee's final proposal revised the committee note that was included in the agenda materials for the Standing Committee's meeting. Specifically, the paragraphs on pages 322–23, lines 170–91 were revised as follows:

> Subdivision (e)(2) requires a finding that the party acted with the intent to deprive another party of the information's use in the litigation. This finding may be made by the court when ruling on a pretrial motion, when presiding at a bench trial, or when deciding whether to give an adverse inference instruction at trial. If a court were to conclude that the intent finding should be made by a jury, the court's instruction should make clear that the jury may infer from the loss of the information that it was unfavorable to the party that lost it only if the jury first finds that the party acted with the intent to deprive another party of the information's use in the litigation. If the jury does not make this finding, it may not infer from the loss that the information was unfavorable to the party that lost it.
>
> Subdivision (e)(2) does not include a requirement that the court find prejudice to the party deprived of the information. This is because the finding of intent required by the subdivision can support not only an inference that the lost information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced by the loss of information that would have favored its position. Subdivision (e)(2) does not require any further finding of prejudice.
>
> Courts should exercise caution, however, in using the measures specified in (e)(2). Finding an intent to deprive another party of the lost information's use in the litigation does not require a court to adopt any of the measures listed in subdivision (e)(2). The remedy should fit the wrong, and the severe measures authorized by this subdivision should not be used when the information lost was relatively unimportant or lesser measures such as those specified in subdivision (e)(1) would be sufficient to redress the loss.
>
> ~~Subdivision (e)(2) does not include an express requirement that the court find prejudice to the party deprived of the information. The adverse inference permitted under this subdivision can itself satisfy the prejudice requirement: if a court or jury infers the lost information was unfavorable to the party that lost it, the same inference suggests that the opposing party was prejudiced by the loss.~~

The committee discussed the proposal. After considering some suggestions and discussing them with the reporters, the advisory committee agreed to make a suggested change to delete "may" in line 9 on page 318 of the agenda materials, and to add "may" on line 10 before "order," and on line 13 after "litigation." Judge Campbell stated that he and the reporters agreed that this change adds more emphasis to the word "only" on line 12, underscoring the intent that (e)(2) measures are not available under (e)(1).

A member commented that, in looking at this proposal from multiple perspectives, it is going to be very helpful and is clearly needed. He added his congratulations to the advisory committee for their terrific work.

The committee unanimously approved the proposed amendment to Rule 37(e), revised as stated above, to be submitted for final approval by the Judicial Conference.

FORMS
(FED. R. CIV. P. 84 AND 4 AND APPENDIX OF FORMS)

Judge Campbell reported on the proposal to abrogate Rule 84 and the Appendix of Forms. He said that there were relatively few comments on this proposal and that the advisory committee remained persuaded after reading the comments that the forms are rarely used and that the best course is abrogation. Professor Cooper added that Forms 5 and 6 on waiver of service would be incorporated into Rule 4.

A member suggested that he thought the sense of the committee was that forms can be and are extremely important in helping lawyers and pro se litigants, but that the advisory committee should no longer bear responsibility for them. He added that he favored abrogation, but the advisory committee should continue to have a role in shaping the forms, perhaps by participating in a group at the Administrative Office (AO) that can handle the forms, helping to draft model forms, and/or having a right of first refusal on forms drafted by the AO. Judge Sutton agreed that forms are very useful and that this proposal is simply about getting them out of the Rules Enabling Act process. He added that there are many options in terms of how civil forms are handled if the abrogation goes into effect and suggested that the advisory committee consider what it thinks its role should be in shaping the forms going forward. He suggested that the advisory committee present its suggestion in that regard for discussion at the next Standing Committee meeting in January.

The committee unanimously approved the proposed amendments to abrogate Rule 84 and the Appendix of Forms, and to amend Rule 4 to incorporate Forms 5 and 6, to be submitted for final approval by the Judicial Conference.

~~In addition, there may be rare cases where a court concludes that a party's conduct is so reprehensible that serious measures should be imposed even in the absence of prejudice. In such rare cases, however, the court must still find the intent specified in subdivision (e)(2).~~

Judge Sutton congratulated and praised Judge Campbell, the reporters, and the subcommittee chairs for all their hard work and terrific leadership and insight in bringing the Duke proposals, the Rule 37(e) amendments, and the Rule 84 amendment to the Standing Committee. He added that all three sets of proposals were done through consensus, which is a credit to the chairs of the subcommittees and the chair of the advisory committee. He also said that many of these proposals started with former Civil Rules Committee and Standing Committee chairs Judge Lee H. Rosenthal and Judge Mark R. Kravitz. This package of amendments, he said, was a wonderful tribute to Judge Kravitz's memory. Judge Sutton added that the way to thank the chairs and reporters for all of their work on these proposals is to make sure they make a difference in practice. He said that in the near future, the Standing Committee should discuss these amendments in terms of broader reform, including pilot projects and judicial education efforts, to make sure that they are making a difference on the ground. Judge Campbell expressed his thanks to Judge Grimm, for his tireless efforts on Rule 37, and to Judge Sutton for all of his insight and time in overseeing the work on these proposals.

FED. R. CIV. P. 6(d)

Professor Cooper reported that an amendment to Rule 6(d) was published that would revise the rule to provide that the three added days provided for actions taken after certain types of service apply only after being served, not after "service" more generally. Few comments were received and no changes were made after publication. Judge Campbell said that the advisory committee recommended approving this proposal, but not sending it on to the Judicial Conference yet, so that it can be presented together with another proposed amendment to Rule 6(d), which would remove the three added days for electronic service and which was being proposed for publication.

The committee unanimously approved the proposed amendment to Rule 6(d), to be submitted for final approval by the Judicial Conference at the appropriate time.

FED. R. CIV. P. 55(c)

Professor Cooper reported that the final proposal that was published for public comment in 2013 was a proposal to amend Rule 55(c) to make explicit that a motion under Rule 60(b) is needed only to set aside a final default judgment.

The committee unanimously approved the proposed amendment to Rule 55(c) to be submitted for final approval by the Judicial Conference.

Amendments for Publication

FED. R. CIV. P. 82

Professor Cooper reported that at its January 2014 meeting, the Standing Committee had approved for publication at a suitable time an amendment to Rule 82 to reflect enactment of a new venue statute for civil actions in admiralty. Since January, further reflection had led the advisory

committee to believe that a cross-reference in the rule to 28 U.S.C. § 1391 should be deleted and that the text should be further revised to reflect the language of new § 1390. The advisory committee renewed its recommendation to publish the proposal, as revised.

The committee unanimously approved publication of the proposed amendment to Rule 82.

FED. R. CIV. P. 4(m)

Professor Cooper reported on the recommendation to publish a clarifying amendment to Rule 4(m) to ensure that service abroad on a corporation is excluded from the time for service set by Rule 4(m).

The committee unanimously approved publication of the proposed amendment to Rule 4(m).

REPORT OF THE INTER-COMMITTEE CM/ECF SUBCOMMITTEE

Judge Chagares presented the report of the CM/ECF Subcommittee, as set out in his memorandum of May 5, 2014 (Agenda Item 3).

Amendments for Publication

FED. R. APP. P. 26(c), FED. R. BANKR. P. 9006, FED. R. CIV. P. 6, FED. R. CRIM. P. 45

Judge Chagares reported that the subcommittee had been working with the advisory committees for the Appellate, Bankruptcy, Civil, and Criminal Rules on proposals to remove the provisions in each set of rules that currently provide three extra days for acting after electronic service. Each advisory committee recommended an amendment to its set of rules for publication. The subcommittee had unanimously supported the recommendation of the advisory committees to publish these amendments for public comment. The amendments to eliminate the "three-day rule" as applied to electronic service would be to Appellate Rule 26(c), Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rule 45.

Judge Sutton noted that a Standing Committee member had asked at the last Standing Committee meeting whether other types of service should be removed from the three-day rule. Judge Chagares said that question would take some study and for the time being the only recommendation of the subcommittee was to take electronic service out of the three-day rule. Judge Sutton added that the advisory committees would each study that question separately.

A member suggested removing "in" before "widespread skill" in the last sentence of the second paragraph of each of the draft committee notes. The reporters all agreed to make that change.

The committee unanimously approved publication of the proposed amendments to Appellate Rule 26(c), Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rule 45, with the change to the committee notes described above.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raggi and Professors Beale and King presented the report of the advisory committee, as set out in Judge Raggi's memorandum and attachments of May 5, 2014 (Agenda Item 4).

Amendments for Publication

FED. R. CRIM. P. 4

Judge Raggi reported that the advisory committee recommended publication of an amendment to Rule 4 to address service of summons on organizational defendants who are abroad. The proposed amendment would: (1) specify that the court may take any action authorized by law if an organizational defendant fails to appear in response to a summons, filling a gap in the current rule; (2) for service of a summons on an organization within the United States, eliminate the requirement of a separate mailing to an organizational defendant when delivery has been made to an officer or to a managing or general agent, but require mailing when delivery has been made on an agent authorized by statute, if the statute requires mailing to the organization; and (3) authorize service on an organization at a place not within a judicial district of the United States, prescribing a non-exclusive list of methods for service.

A member suggested making it clearer in the proposed additional sentence in Rule 4(c)(2) that the reference to the summons under Rule 41(c)(3)(D) is to summons to an organization. Judge Raggi agreed to change the sentence to: "A summons to an organization under Rule 41(c)(3)(D) may also be served at a place not within a judicial district of the United States."

Another member asked about the phrase "authorized by law" in the proposed amendment to Rule 4(a), asking whether it clarifies what actions a judge can take if an organizational defendant fails to appear in response to a summons. The committee discussed whether to add "United States" before "law," and decided to include that addition in the version published for public comment, noting that including it would be more likely to elicit comments on whether it was helpful.

Another member suggested that, in the illustrative list of means of giving notice in proposed Rule 4(c)(3)(D)(ii), "stipulated by the parties" be changed to "agreement of the organization" or that the list add "agreed to by the party." Judge Raggi explained that a stipulation implied a certain level of formality and that the list was merely illustrative. She said she could not agree to this change without going back to the advisory committee. The member stated that his suggestion could just be considered the first comment of the public comment period.

The member also suggested that on page 492, line 58, in proposed Rule 4(c)(3)(D)(i),

"another agent" be changed to "an agent" to avoid implying that foreign law always authorizes officers and managing or general agents to receive notice. Judge Raggi agreed to accept that suggestion, noting that it reflected the advisory committee's intent.

The committee unanimously approved publication of the proposed amendment to Rule 4, revised as noted above.

FED. R. CRIM. P. 41

Judge Raggi reported that the advisory committee recommended publishing an amendment to Rule 41, to provide that in two specific circumstances a magistrate judge in a district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and seize or copy electronically stored information even when the media or information is or may be located outside of the district. Judge Raggi explained that this proposal came about because the Department of Justice had encountered special difficulties with Rule 41's territorial venue provisions—which generally limit searches to locations within a district—as applied to investigating crimes involving electronic information.

The current limits on where a warrant application must be made make it difficult to secure a search warrant in two specific situations: First, when the location of the storage media or electronic information to be searched, copied, or seized is not known because the location has been disguised through the use of anonymizing software, and second, when a criminal scheme involves multiple computers located in many different districts, such as a "botnet" in which perpetrators obtain control over numerous computers of unsuspecting victims. Judge Raggi explained that proposed new subparagraph (b)(6)(A) addresses the first scenario. It would provide authority to issue a warrant to use remote electronic access to search electronic storage media and to seize or copy electronically stored information within or outside the district when the district in which the media or information is located has been concealed through technological means. Proposed (b)(6)(B) addresses the second scenario. It would eliminate the burden of attempting to secure multiple warrants in numerous districts and allow a single judge to issue a warrant to search, seize, or copy electronically stored information by remotely accessing multiple affected computers within or outside a district, but only in investigations of violations of 18 U.S.C. § 1030(a)(5), where the media to be searched are "protected computers" that have been "damaged without authorization" (terms defined in 18 U.S.C. § 1030(e)(2) & (8)) and are located in at least five different districts. Judge Raggi added that the proposed amendments affect only the district in which a warrant may be obtained and would not alter the requirements of the Fourth Amendment for obtaining warrants, including particularity and probable cause showings.

She noted that the proposal also includes a change to Rule 41(f)(1)(C), to ensure that notice that a search has been conducted will be provided for searches by remote access as well as physical searches. The rule now requires that notice of a physical search be provided "to the person from whom, or from whose premises, the property was taken" or left "at the place where the officer took the property." The proposed addition to the rule would require that when the search is by remote

access, reasonable efforts must be made to provide notice to the person whose information was seized or whose property was searched.

The committee unanimously approved publication of the proposed amendment to Rule 41.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Colloton and Professor Struve presented the report of the advisory committee, as set out in Judge Colloton's memorandum and attachments of May 8, 2014 (Agenda Item 5).

Amendments for Publication

Judge Colloton reported that the advisory committee had five proposals it recommended for publication. The first, the proposed amendment to Rule 26(c) to eliminate the three-day rule for electronic service, was already addressed during the CM/ECF Subcommittee's report.

INMATE FILING RULES
(FED. R. APP. P. 4(c)(1) AND 25(a)(2)(C), FORMS 1 AND 5, AND NEW FORM 7)

Judge Colloton reported that the advisory committee recommended publishing a set of amendments designed to clarify and improve the inmate-filing rules. The amendments to Rules (4)(c)(1) and 25(a)(2)(C) would make clear that prepayment of postage is required for an inmate to benefit from the inmate-filing provisions, but that the use of an institution's legal mail system is not. The amendments clarify that a document is timely filed if it is accompanied by evidence—a declaration, notarized statement, or other evidence such as a postmark and date stamp—showing that the document was deposited on or before the due date and that postage was prepaid. New Form 7 is a suggested form of declaration that would satisfy the rule. Forms 1 and 5 (suggested forms of notices of appeal) are revised to include a reference alerting filers to the existence of Form 7.

Professor Struve noted that a few stylistic changes had been made to the proposals in the Standing Committee's agenda materials. First, in Rule 4(c)(1)(B), on page 560, lines 3–4, "meets the requirements of" was changed to "satisfies." A similar change was made to Rule 25(a)(2)(C)(ii), on page 562, lines 9–10. In Rule 25(a)(2)(C)(i), subdivisions (a) and (b), on pages 561 and 562, would become bullet points. As a result, in Rule 25(a)(2)(C)(ii), the cross-reference to Rule 25(a)(2)(C)(i)(a) would refer only to Rule 25(a)(2)(C)(i).

A member noted that in Rule 4(c)(1)(A)(ii), the "it" on page 559, line 20, referred to the "notice" referenced quite a bit earlier in the rule. Judge Colloton agreed to make revisions to clarify the reference. In Rule 4(c)(1)(A)(ii), "it" was changed to "the notice." A corresponding change was made to Rule 25(a)(2)(C)(i), changing "it" to "the paper" on page 562, line 5. Finally, the advisory committee agreed to change "and" to "or" in Rule 25(a)(2)(C)(i), on page 562, line 4, and in Rule 4(c)(1)(A)(ii), page 559, line 20, so that evidence such as a postmark <u>or</u> a date stamp would suffice.

Professor Struve said that, at the suggestion of a committee member, the advisory committee would consider whether to change the references in Rule 4(c)(1)(B) and Rule 25(a)(2)(C)(ii) from "exercises its discretion to permit" to simply "permits." She said that the committee would also consider a member's suggestion that the rules need not suggest the option of getting a notarized statement when a declaration would suffice. She said these suggestions would be brought to the advisory committee for consideration as it works through the comments on the published draft.

The committee unanimously approved publication of the proposed amendments to Rules 4(c)(1) and 25(a)(2)(C), revised as noted above, and to Appellate Forms 1 and 5, and proposed new Form 7.

FED. R. APP. P. 4(a)(4)

Judge Colloton reported that the advisory committee recommended publishing a proposed amendment to Rule 4(a)(4) to address a circuit split on whether a motion filed outside a non-extendable deadline under Civil Rules 50, 52, or 59 counts as "timely" under Rule 4(a)(4) if a court has mistakenly ordered an "extension" of the deadline for filing the motion. The proposal is to adopt the majority approach, which is that postjudgment motions made outside the deadlines set by the Civil Rules are not "timely" under Rule 4(a)(4).

The committee unanimously approved publication of the proposed amendment to Rule 4(a)(4).

LENGTH LIMITS
(FED. R. APP. P. 5, 21, 27, 28.1, 32, 35, AND 40, AND FORM 6)

Judge Colloton reported that the advisory committee recommended publishing a set of proposals to address length limits. The proposed amendments to Rules 5, 21, 27, 35, and 40 would impose type-volume limits for documents prepared using a computer, and would maintain the page limits currently set out in the rules for documents prepared without the aid of a computer. They would also employ a conversion ratio of 250 words per page for these rules. The proposed amendments also shorten Rule 32's word limits for briefs to reflect the pre-1998 page limits multiplied by 250 words. The word limits set by Rule 28.1 for cross-appeals are correspondingly shortened. Finally, the proposals add a new Rule 32(f), setting out a list of items that can be excluded when computing a document's length.

A member asked why it was necessary to have line limits in addition to word limits. Judge Colloton agreed that the advisory committee would examine that question in the future, but he said that it would require careful consideration and the advisory committee recommended publishing the current proposals for now.

The committee unanimously approved publication of the proposed amendments to

Appellate Rules 5, 21, 27, 28.1, 32, 35, and 40, and to Form 6.

FED. R. APP. P. 29

Judge Colloton reported that the advisory committee recommended publishing an amendment to Rule 29, addressing amicus filings in connection with rehearing. The amendment would re-number the existing rule as Rule 29(a) and would add Rule 29(b) to set default rules for the treatment of amicus filings in connection with petitions for rehearing.

Judge Colloton noted that two stylistic changes were made to the version that appeared in the Standing Committee's agenda materials. First, on page 584, line 14, in proposed Rule 29(b)(2), "Rule 29(a)(2) applies" was changed to "Rule 29(a)(2) governs the need to seek leave." Second, on page 584, line 16, in proposed Rule 29(b)(3), "the" was changed to "a."

The committee discussed whether Rule 29(b)(2) should incorporate any of the language of Rule 29(a)(2). Some members noted that some appellate courts do not allow the filing of amicus briefs without leave of court, because a practice had developed of filing amicus briefs in order to force recusals. Judge Colloton agreed, on behalf of the advisory committee, to borrow some of the language from Rule 29(a)(2) for use in Rule 29(b)(2). The proposed amendment to Rule 29(b)(2) would read: "The United States or its officer or agency or a state may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court." Judge Sutton noted that Rule 29(a), which allows filing amicus briefs by consent during initial consideration of a case on the merits, may be in tension with some circuits' practice, and suggested that the advisory committee consider whether it should be changed in the future. Judge Colloton agreed that the advisory committee would add Rule 29(a) to its agenda.

The committee unanimously approved publication of the proposed amendment to Rule 29, revised as stated above.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Fitzwater presented the report of the advisory committee, as set out in his memorandum and attachment of April 10, 2014 (Agenda Item 6). Judge Fitzwater noted that the advisory committee had no action items to present.

Informational Items

Judge Fitzwater reported that, in connection with its spring meeting, the advisory committee had worked with the University of Maine School of Law to host a symposium on the challenges of electronic evidence. He said that no concrete rules proposals came out of the symposium, but that it set the stage for issues that the advisory committee will need to monitor going forward.

Judge Fitzwater said that the advisory committee is examining a possible amendment to Rule

803(16), the hearsay exception for "ancient documents," and that it will discuss the matter further at its fall meeting.

The Standing Committee's liaison to the Evidence Rules Committee commented that Judge Fitzwater's term as chair was drawing to a close and that he had greatly admired Judge Fitzwater's leadership. He expressed his personal gratitude for Judge Fitzwater's exceptional leadership and reported that Judge Bill Sessions would serve as the next chair. Judge Sutton echoed the praise and gratitude.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Wedoff and Professors Gibson and McKenzie presented the report of the advisory committee, as set out in Judge Wedoff's memorandum and attachments of May 6, 2014 (Agenda Item 7).

Amendments for Final Approval

OFFICIAL FORMS 17A, 17B, AND 17C

Professor Gibson reported that an amendment to Form 17A and new Forms 17B and 17C had been published for comment in connection with the revision of the bankruptcy appellate rules. Form 17A and new Form 17B would implement the provisions of 28 U.S.C. § 158(c)(1) that permit an appellant and an appellee to elect to have an appeal heard by the district court in districts for which appeals to a bankruptcy appellate panel have been authorized. New Form 17C would be used by a party to certify compliance with the provisions of the bankruptcy appellate rules that prescribe limitations on brief length based on number of words or lines of text. Professor Gibson reported that no comments had been received, that the advisory committee had unanimously approved the proposals, and that the advisory committee recommended them to be approved and take effect in December of this year. Professor Gibson noted that there was a typographical error on page 702 of the agenda materials, and that the reference to "U.S.C. § 158(c)(1)" should say "28 U.S.C. § 158(c)(1)."

The committee unanimously approved the proposed amendments to Form 17A and new Forms 17B and 17C, with the revision stated above, for submission to the Judicial Conference for final approval.

OFFICIAL FORMS 3A AND 3B

Judge Wedoff reported that the advisory committee recommended amending Forms 3A and 3B to eliminate references to filing fees, because those amounts are subject to periodic changes by the Judicial Conference that can render the forms inaccurate. Judge Wedoff said that since the amendments were technical in nature, publication was not needed.

The committee unanimously approved the proposed amendments to Forms 3A and 3B for submission to the Judicial Conference for final approval without publication.

OFFICIAL FORMS 22A-1, 22A-1 SUPP, 22A-2, 22B, 22C-1, AND 22C-2

Judge Wedoff reported that the advisory committee recommended approval of the amendments to the modernized "means test" forms that were originally published in 2012 and then republished in 2013. Judge Wedoff said that the comments on the republished drafts were generally favorable, but that the advisory committee had made several changes after publication to take account of some of the suggestions made during the public comment period.

The committee unanimously approved the proposed amendments to Forms 22A-1, 22A-1 Supp, 22A-2, 22B, 22C-1, and 22C-2 for submission to the Judicial Conference for final approval.

MODERNIZED INDIVIDUAL FORMS
(OFFICIAL FORMS 101, 101A, 101B, 104, 105, 106SUM, 106A/B,
106C, 106D, 106E/F, 106G, 106H, 106DEC, 107, 112, 119, 121, 318, 423, AND 427)

Professor Gibson reported that the advisory committee recommended approving the modernized forms for individual-debtor cases that were published in 2013. She explained the process used by the subcommittee and the advisory committee to carefully review the comments and make changes as needed. She added that some of the comments had made suggestions outside the scope of the modernization project, and that the advisory committee had noted those for consideration at a later date. Professor Gibson said that the advisory committee recommended approving the forms, but making their effective date correspond with the non-individual modernized forms recommended for publication this summer, making the earliest possible effective date December 1, 2015.

The committee unanimously approved the proposed amendments to the modernized forms for individual-debtor cases for submission to the Judicial Conference for final approval at the appropriate time, likely in 2015.

Amendments for Publication

MODERNIZED FORMS FOR NON-INDIVIDUALS
(OFFICIAL FORMS 11A, 11B, 106J, 106J-2, 201, 202, 204, 205,
206SUM, 206A/B, 206D, 206E/F, 206G, 206H, 207, 309A, 309B, 309C, 309D, 309E)

Professor Gibson reported that the nearly final installment of the Forms Modernization Project consisted primarily of case-opening forms for non-individual cases, chapter 11-related forms, the proof of claim form and supplements, and orders and court notices for use in all types of cases. The advisory committee also sought to publish two revised individual debtor forms and the

abrogation of two official forms.

At the suggestion of a committee member, Judge Wedoff agreed to revise the instructions at the top of Form 106J-2 to make it clear that the form requests only expenses personally incurred, not those that overlap with the expenses reported on Form 106J.

The committee unanimously approved publication of the modernized forms for non-individuals, described above and with the revision described above.

CHAPTER 13 PLAN FORM AND RELATED AMENDMENTS
(OFFICIAL FORM 113 AND FED. R. BANKR. P. 2002, 3002,
3007, 3012, 3015, 4003, 5009, 7001, AND 9009)

Judge Wedoff reported that the chapter 13 plan form had been published for comment in August 2013, that the advisory committee had revised the form in response to public comments, and that it now recommended republication in August 2014. Judge Wedoff noted that one improvement in the revised form is that it adds an instruction that clarifies that the form sets out options that may be appropriate in some cases, but the presence of an option on the form does not indicate that the option is appropriate in all circumstances or that it is permissible in all judicial districts. A member asked whether that should be done on all of the forms to avoid needing to tweak forms every time a decision changes the applicability of some aspect of a form. Judge Wedoff said that the advisory committee would consider whether it might be appropriate to amend Rule 9009 to state that the presence of an option on a form does not mean that it is always applicable. But he said that such an amendment should be pursued separately from the current proposal to amend the chapter 13 plan form.

Judge Wedoff explained that because of the significant changes to the proposed form, the advisory committee recommended republication. As to the related rule amendments that were published in 2013, Judge Wedoff said that republication was probably not necessary, but that the advisory committee recommended republication of the rule amendments so that they could remain part of the same package as the plan form. He said that republication of the rules would delay the package by a year because, under the Rules Enabling Act, the rules would not go into effect until at least 2016 if they are republished this year. But, he said, the advisory committee did not think it wise to put the rule amendments into effect without the related form that was the driving force behind the amendments. Professor McKenzie described the proposed rule amendments and the changes made after publication, most of which were minor. He said the request for comment would seek input as to whether the rule amendments should go into effect even if the advisory committee were to decide not to proceed with the plan form.

The committee unanimously approved publication of the revised chapter 13 plan form and related amendments to Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009.

FED. R. BANKR. P. 3002.1

Judge Wedoff reported that the advisory committee recommended proposed amendments to Rule 3002.1, which applies in chapter 13 cases and requires creditors whose claims are secured by a security interest in the debtor's principal residence to provide the debtor and trustee certain information about the mortgage while the bankruptcy case is pending. The proposed amendments would clarify when the rule applies and when its requirements cease.

The committee unanimously approved publication of the proposed amendment to Rule 3002.1.

OFFICIAL FORM 410A

Judge Wedoff reported that the advisory committee recommended publication of amendments to Official Form 410A (currently Form 10A), the Mortgage Proof of Claim Attachment that is required to be filed in an individual debtor case with the proof of claim of a creditor that asserts a security interest in the debtor's principal residence. The advisory committee recommended publication of a revised form that would replace the existing form with one that requires a mortgage claimant to provide a loan payment history and other information about the mortgage claim, including calculations of the claim and the arrearage amounts. Judge Wedoff noted that there was one typographical error in the draft in the Standing Committee's agenda materials. On page 1103, the reference to Rule 3001(c)(2)(A) should be to the Federal Rules of Bankruptcy Procedure, not the Federal Rules of Civil Procedure.

The committee unanimously approved publication of the proposed amendments to Official Form 410A, with the revision noted above.

CHAPTER 15 FORM AND RULES AMENDMENTS
(OFFICIAL FORM 401 AND FED. R. BANK. P. 1010, 1011, 1012, AND 2002)

Professor McKenzie reported that the advisory committee recommended publication of an official form for petitions under chapter 15, which covers cross-border insolvencies. The proposed form grew out of the work of the Forms Modernization Project. Professor McKenzie said that the advisory committee also recommended publishing amendments to the Bankruptcy Rules to improve procedures for international bankruptcy cases. The proposals would: (1) remove the chapter 15-related provisions from Rules 1010 and 1011; (2) create a new Rule 1012 to govern responses to a chapter 15 petition; and (3) augment Rule 2002 to clarify the procedures for giving notice in cross-border proceedings.

The committee unanimously approved publication of proposed Official Form 401, the proposed amendments to Rules 1010, 1011, and 2002, and proposed new Rule 1012.

Informational Items

Professor Gibson reported that the advisory committee had withdrawn its proposed amendment to Rule 5005, which was published in 2013 and which would have replaced local rules on electronic signatures and permitted the filing of a scanned signature page of a document bearing the signature of an individual who is not a registered user of the CM/ECF system. The amendment would have allowed the scanned signature to have the same force and effect as the original signature and would have removed any requirement of retaining the original document with the wet signature. Professor Gibson said that the advisory committee had been persuaded by the public comments that the amendment was not needed and could be problematic.

Judge Wedoff said that his term as chair of the advisory committee was coming to a close and that Judge Sandra Ikuta would be taking over as chair. He added that he had very much appreciated the opportunity to serve as chair.

Judge Sutton said that Judge Wedoff had done amazing work, together with the reporters and the subcommittees. He added that Judge Wedoff's enthusiasm was infectious and that he was a national treasure for the Bankruptcy Rules. Judge Sutton said the committee was grateful for Judge Wedoff's service and his leadership.

REPORT OF THE ADMINISTRATIVE OFFICE

Julie Wilson and Ben Robinson provided the report of the Administrative Office. Ms. Wilson said that the Rules Office had been watching legislation that would attempt to address issues related to patent assertion entities. She said that a bill did pass in the House in December, but that recent developments indicated that the legislation was not moving forward in the Senate for now. She said that the Rules Office would continue to monitor the legislation.

Judge Sutton thanked the Rules Office for all its great work on the preparations for the committee's meeting.

NEXT COMMITTEE MEETING

The committee will hold its next meeting on January 8–9, 2014, in Phoenix, Arizona.

Respectfully submitted,

Andrea L. Kuperman
Chief Counsel

Jonathan C. Rose
Secretary

Agenda E-19 (Summary)
Rules
September 2014

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

1. Approve the proposed revisions of Official Bankruptcy Forms 3A, 3B, 6 Summary, 17 (to become 17A), 22A (to become 22A-1, 22A-1Supp, and 22A-2), 22B, and 22C (to become 22C-1 and 22C-2), and new Forms 17B and 17C, to take effect on December 1, 2014. . . . . pp. 6-8

2. Approve the proposed amendments to Civil Rules 1, 4, 16, 26, 30, 31, 33, 34, 37, and 55, and a proposed abrogation of Rule 84 and the Appendix of Forms, and transmit these changes to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.. . pp. 13-18

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

- Federal Rules of Appellate Procedure. . . . . pp. 2-6
- Federal Rules of Bankruptcy Procedure.. . . . . pp. 8-13
- Federal Rules of Civil Procedure.. . . . . p. 18
- Federal Rules of Criminal Procedure.. . . . . pp. 18-20
- Federal Rules of Evidence. . . . . p. 21

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

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure met on May 29-30, 2014. All members attended except Deputy Attorney General James M. Cole. Judge Amy J. St. Eve participated by telephone.

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

Also participating in the meeting were Judge Michael A. Chagares, Chair of the CM/ECF Subcommittee and member of the Advisory Committee on Appellate Rules; Professor Daniel R. Coquillette, the Committee's Reporter; Professor R. Joseph Kimble, consultant to the Committee; Jonathan C. Rose, the Committee's Secretary; Benjamin J. Robinson, Counsel and

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Deputy Rules Committee Officer; Julie Wilson, Scott Myers, and Bridget M. Healy, Attorneys on the Rules Committee Support Staff; Andrea L. Kuperman, Chief Counsel to the Rules Committees; Judge Jeremy D. Fogel, Director, Dr. Tim Reagan, and Dr. Emery G. Lee, of the Federal Judicial Center; and George Everly, Michael Shenkman, David Sidhu, and Stephanie Tai, Supreme Court Fellows. Stuart F. Delery, Principal Deputy Assistant Attorney General for the Civil Division, Theodore Hirt, J. Christopher Kohn, Elizabeth J. Shapiro, and Allison Stanton attended on behalf of the Department of Justice.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Approved for Publication and Comment

The advisory committee submitted proposed amendments to Rules 4, 5, 21, 25, 26, 27, 28.1, 29, 32, 35, and 40, and Forms 1, 5, and 6, as well as new Form 7, with a request that they be published for comment. The Committee approved the advisory committee's request.

Inmate-Filing Rules

Rules 4(c)(1) and 25(a)(2)(C), Forms 1 and 5, and new Form 7. Proposed amendments to Rules 4(c)(1) and 25(a)(2)(C), Forms 1 and 5, and new Form 7 are designed to clarify and improve the inmate-filing rules. Proposed amendments to Rules 4(c)(1) and 25(a)(2)(C) make clear that prepayment of postage is required for an inmate to benefit from the inmate-filing provisions, but that the use of an institution's legal mail system is not. The amendments clarify that a document is timely filed if it is accompanied by evidence demonstrating that the document was deposited in the institution's internal mail system on or before the due date and that postage was prepaid. New Form 7 is a suggested form of declaration that would satisfy that requirement. Forms 1 and 5, which are suggested forms of notices of appeal, are revised to include a reference alerting inmate filers to the existence of new Form 7. The proposed amendments also make clear

that where an inmate fails to submit sufficient evidence with the initial filing, the court of appeals has discretion to permit the later filing of a declaration or notarized statement to establish timely deposit.

"Timely" Tolling Motions

Rule 4(a)(4). As previously reported, a circuit split exists regarding whether a motion filed within a purported extension of a non-extendable deadline under Civil Rules 50, 52, or 59 counts as timely filed under Appellate Rule 4(a)(4). The proposed amendment addresses the circuit split by clarifying the meaning of the word "timely" as it is used in Rule 4(a)(4).

Rule 4(a)(4) provides that "[i]f a party timely files in the district court" certain post-judgment motions, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." However, the statutory provision setting the deadlines for civil appeals—28 U.S.C. § 2107—does not mention such tolling motions.

Following the Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007),[1] several courts held that statutory appeal deadlines are jurisdictional, but that nonstatutory appeal deadlines, such as the Civil Rules' deadlines for post-judgment motions, are nonjurisdictional claim-processing rules. Under this interpretation, where a district court purports to extend the time for making such a post-judgment motion, and no party objects to that extension, the district court has authority to decide the motion on its merits. The question that therefore arises is whether the motion counts as a timely one that tolls the time to appeal under Rule 4(a)(4). The

[1]In *Bowles*, the district court, pursuant to its authority under Appellate Rule 4(a)(6) and 28 U.S.C. § 2107(c), extended the 30-day time period for filing a civil notice of appeal. Instead of the 14-day extension permitted by Rule 4(a)(6) and § 2107(c), however, the court extended the time period by seventeen days. 551 U.S. at 207. The Supreme Court held that the court of appeals lacked jurisdiction to entertain the appeal because it was filed outside the 14-day window allowed by statute. *Id.* at 213. The Court based its holding on the "longstanding treatment of statutory time limits for taking an appeal as jurisdictional." *Id.* at 210.

Third, Seventh, Ninth, and Eleventh Circuits have issued post-*Bowles* rulings stating that such a motion does not toll the appeal time, and pre-*Bowles* case law from the Second Circuit is in accord with that position. However, the Sixth Circuit has held to the contrary.

The advisory committee determined that a clarification of the meaning of "timely" in Rule 4(a)(4) was necessary because the conflict in authority arguably arises from ambiguity in the current rule, and timely filing of a notice of appeal is a jurisdictional requirement. The proposed amendment adopts the majority view that postjudgment motions made outside the deadlines set by the Civil Rules are not "timely" under Rule 4(a)(4). The proposed amendment would affect the least change in current law and is consistent with the Court's decision in *Bowles*, which held that the Court has "no authority to create equitable exceptions to jurisdictional requirements." 551 U.S. at 214.

Length Limits

Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6. The advisory committee has determined that length limits for documents prepared with a computer should be prescribed in terms of number of words or lines of text ("type-volume" limits). For documents prepared without the aid of a computer, the proposed amendments retain the page limits currently prescribed in the rules.

A change from page limits to type-volume limits requires a conversion from pages to words. The proposed amendments employ a conversion ratio of 250 words per page for Rules 5, 21, 27, 35, and 40. The proposed amendment to Rule 32 would amend that rule's word limits for briefs to reflect the pre-1998 page limits multiplied by 250 words per page. The proposals correspondingly shorten the word limits set by Rule 28.1 for cross-appeals. A court that desired to maintain the longer word limits would have the discretion to accept longer briefs. The

proposed amendments also add a new Rule 32(f) setting forth a uniform list of the items that can be excluded when computing a document's length, and make conforming changes to Form 6.

3-Day Rule

Rule 26(c). The CM/ECF subcommittee has recommended that the "3-day rule"[2] in each set of national rules be amended to exclude electronic service. The proposed amendment to Rule 26(c) parallels proposed amendments to Civil Rule 6(d), Criminal Rule 45(c), and Bankruptcy Rule 9006(f) discussed *infra*, but does so using different wording in light of Rule 26(c)'s current structure. Under that structure, the 3-day rule is not applicable if the paper in question is delivered on the date of service stated in the proof of service. The change would therefore be accomplished by amending the rule to state that a paper served electronically is deemed (for this purpose) to have been delivered on the date of service stated in the proof of service.

Amicus Briefs on Rehearing

Rule 29. Proposed new Rule 29(b) sets default rules for the treatment of amicus filings in connection with petitions for rehearing. No national rule exists that addresses the filing deadlines for and permitted length of amicus briefs in connection with petitions for rehearing, and most circuits have no local rule on point. Attorneys have reported frustration with the lack of guidance.

The proposal does not require any circuit to accept amicus briefs, but establishes guidelines for the filing of briefs when they are permitted. In addition, most of the features of current Rule 29 are incorporated for the rehearing stage, including the authorization for certain governmental entities to file amicus briefs without party consent or court permission. A circuit

[2]The 3-day rule adds three days to a given period if that period is measured after service and service is accomplished by certain methods. Now that electronic service is well established, the consensus among the rules committees is that it no longer makes sense to include electronic service among the types of service that trigger application of the 3-day rule.

could alter the default federal rules on timing, length, and other matters by local rule or by order in a case.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Official Forms Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed revisions of Official Forms 3A, 3B, 6 Summary, 17 (to become 17A), 22A (to become 22A-1, 22A-1Supp, and 22A-2), 22B, and 22C (to become 22C-1 and 22C-2), and new Forms 17B and 17C, with a recommendation that they be approved and transmitted to the Judicial Conference. Except as noted below, the proposed amendments were circulated to the bench, bar, and public for comment in August 2013.

Official Forms 3A and 3B

Official Form 3A is filed by individual debtors who request to pay the filing fee in installments, as authorized by 28 U.S.C. § 1930(a). Official Form 3B is filed by individual chapter 7 debtors who request to have the filing fee waived, as authorized by 28 U.S.C. § 1930(f). Both forms state the specific filing fee amounts even though those fees are subject to periodic change by the Judicial Conference; therefore, the advisory committee unanimously recommended that the reference to these fee amounts be removed from the forms. Filing fee amounts would continue to be stated in Director's Forms that are used by clerk's offices to provide information about individual debtors. This proposed change would permit fee information provided to debtors to remain current without having to amend the relevant forms each time there is a change in filing fees. Because the proposed amendments are minor and technical in nature, the advisory committee concluded that publication for public comment was not required.

Official Forms 17A, 17B, and 17C

Official Form 17 would be amended and renumbered as Form 17A and new Forms 17B and 17C as part of the comprehensive revision of the bankruptcy appellate rules. Proposed Form 17A and new Form 17B would implement the provisions of 28 U.S.C. § 158(c)(1) that permit an appellant and an appellee to elect to have an appeal heard by the district court in districts for which appeals to a bankruptcy appellate panel have been authorized. New Form 17C is based on Appellate Form 6 and would be used by a party to certify compliance with the provisions of the bankruptcy appellate rules that prescribe length limits as type-volume limits.

No comments were submitted in response to the publication of these forms and the advisory committee unanimously approved them with a recommendation that they go into effect on December 1, 2014, the anticipated effective date of the revised Part VIII bankruptcy rules approved by the Judicial Conference at its September 2013 session.

Official Forms 6 Summary, 22A-1, 22A-1Supp, 22A-2, 22B, 22C-1, and 22C-2

The modernized means test forms for individual debtors under chapters 7, 11, and 13 were initially published for comment in 2012 as part of the first phase of the forms modernization project, a multi-year endeavor to revise many of the official bankruptcy forms to improve both the forms and the interface between the forms and available technology. As a result of the comments received following publication, the forms were revised and republished in August 2013 along with a new Official Form 22A-1Supp, which was created in response to the comments. In addition, the advisory committee approved conforming revisions to the line number references to the means test forms in Official Form 6 Summary.

The six comments received following republication were generally positive. The advisory committee made several stylistic and formatting revisions as a result of detailed

suggestions about the wording or content of certain provisions. The advisory committee also made a substantive change to Form 22C-2, adding Part 3 ("Change in Income or Expenses") in response to the Supreme Court's decision in *Hamilton v. Lanning*, 560 U.S. 505 (2010).[3]

The Committee concurred with the advisory committee's recommendation.

> **Recommendation:** That the Judicial Conference approve the proposed revisions of Official Bankruptcy Forms 3A, 3B, 6 Summary, 17 (to become 17A), 22A (to become 22A-1, 22A-1Supp, and 22A-2), 22B, and 22C (to become 22C-1 and 22C-2), and new Forms 17B and 17C, to take effect on December 1, 2014.

The proposed revisions to the Official Bankruptcy Forms and proposed new forms are set forth in Appendix A, with an excerpt from the advisory committee report.

Rules and Forms Approved for Publication and Comment

The advisory committee submitted proposed amendments to Rules 1010, 1011, 2002, 3002, 3002.1, 3007, 3012, 3015, 4003, 5009, 7001, 9006(f), 9009, and new Rule 1012, and revisions of Official Forms 106J, 201, 202, 204, 205, 206Sum, 206A/B, 206D, 206E/F, 206G, 206H, 207, 309A, 309B, 309C, 309D, 309E, 309F, 309G, 309H, 309I, 312, 313, 314, 315, 401, 410, 410A, 410S1, 410S2, 416A, 416B, 416D, 424, and Instructions, new Forms 106J-2 and 113, and abrogation of Official Forms 11A and 11B, with a request that they be published for comment. The Committee approved the advisory committee's recommendation.

Chapter 15 Cases

Rules 1010, 1011, 2002, new Rule 1012, and Official Form 401. The proposed amendments to Rules 1010, 1011, and 2002, along with a proposed new Rule 1012, are designed to improve procedures for chapter 15 cases.

[3]In *Hamilton*, the Court held that changes to income or expenses that are known or virtually certain at the time of confirmation may be considered by the court in determining the debtor's projected disposable income. *Id.* at 509.

Chapter 15 was added to the Bankruptcy Code by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, and is the domestic adoption of the Model Law on Cross-Border Insolvency promulgated by the United Nations Commission on International Trade Law in 1997. The purpose of chapter 15, and the model law on which it is based, is to provide effective mechanisms for dealing with insolvency cases involving debtors, assets, claimants, and other parties of interest involving more than one country. Under chapter 15, a representative of a foreign debtor may petition a United States court to recognize a foreign proceeding in a cross-border insolvency case. If the recognition petition is granted, certain provisions of the Bankruptcy Code will apply to assist the foreign representative in administering the debtor's assets or in pursuing other relief. Shortly after chapter 15 was added to the Bankruptcy Code, the rules were amended to insert new provisions governing cross-border cases. Among the new provisions were changes to Rules 1010 and 1011, which previously governed only involuntary bankruptcy cases, and Rule 2002, which governs notice.

Chapter 15 defines two categories of foreign proceedings. Section 1502(4) defines a "foreign main proceeding" as a foreign proceeding pending in the country where the debtor has the "center of its main interests." Section 1502(5) defines a "foreign nonmain proceeding" as a foreign proceeding (other than a foreign main proceeding) pending in a country "where the debtor has an establishment." The advisory committee's subcommittee on technology and cross-border insolvency noted a number of oddities in the rules' treatment of the two types of foreign proceedings, and also noted that the rules contain procedures ill suited for chapter 15 cases.

The goal of the proposed amendments is to improve chapter 15 procedures. The proposed amendments for publication (1) remove the chapter 15-related provisions from Rules 1010 and 1011; (2) create a new Rule 1012 to govern responses to a chapter 15 petition; and

(3) augment Rule 2002 to clarify the procedures for giving notice in cross-border proceedings.

Along with the proposed rules amendments, a form for chapter 15 petitions (Official Form 401) was approved for publication. The creation of the form arose from the work of the forms modernization project.

Chapter 13 Cases

Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, and Official Form 113. As previously reported, the advisory committee is in the process of creating a national chapter 13 plan form. The goals of this multi-year effort are to bring more uniformity to chapter 13 practice and to simplify the review of chapter 13 plans by debtors, courts, trustees, and creditors. The proposed rule and form amendments require use of the plan form and establish the authority needed to implement some of the form's provisions.

The proposed plan form (Official Form 113) and the related amendments to Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, were published for public comment in August 2013. The advisory committee received approximately 150 written comments, and two witnesses testified at a public hearing in January 2014. A number of commenters opposed a national form altogether, prompting the advisory committee's working group to reconsider the plan form, specifically whether to make it an option that could be adopted by individual courts or judges.

After careful consideration, the working group concluded that an optional plan form would defeat the goal of greater uniformity in chapter 13 practice. At the same time, the working group proposed a number of significant revisions to the published form in response to the concerns raised by the comments. The advisory committee concurred and determined that the revisions made after publication warrant republication.

The revisions include three changes to the plan form worthy of note. First, the revised plan form provides for greater flexibility as to the manner in which a debtor funds a chapter 13 plan, including the provision of payments by multiple "steps" of varying durations and the provision of more options concerning the commitment of a debtor's tax refund. Second, the advisory committee altered Part 7 of the plan form, which sets forth the order of distribution of payments to creditors. As published, Part 7 listed payments of the trustee's fee, followed by payments to secured creditors, with the remaining spaces left blank. Part 7 generated a heavy volume of comments, with a split between those seeking a more detailed order of distributions, those seeking no order of distributions at all (in favor of having the trustee determine the order), and those seeking a completely blank order of distributions. The advisory committee decided to leave this part blank with the exception of the provision of payment of the trustee's fee. However, the revised committee note now states that the debtor may choose to leave the order of distribution to the trustee's direction. Lastly, the advisory committee altered Part 10, the signature box. As published, it required only debtors' attorneys and pro se debtors to sign the form. On further reflection, the advisory committee decided to make signatures by represented debtors optional. A number of comments noted that debtors' attorneys might want their clients to sign the plan, both to increase the evidentiary value of the plan in the proceedings and also to verify that the debtor has reviewed the plan's contents.

Rule 3002.1. Rule 3002.1 applies in chapter 13 cases and requires creditors whose claims are secured by a security interest in the debtor's principal residence to provide the debtor and trustee certain information about the mortgage while the bankruptcy case is pending. It requires the creditor to give notice of any changes in the periodic payment amount and notice of any fees,

expenses, or charges that are incurred after the bankruptcy case is filed. The proposed amendments for publication would clarify when the rule applies and when its requirements cease.

3-Day Rule

Rule 9006(f). The proposed amendment to Rule 9006(f) is in response to the recommendation by the CM/ECF subcommittee that the 3-day rule in each set of national rules be amended to exclude electronic service. The proposed amendment parallels the proposed amendments to Appellate Rule 26(c), Civil Rule 6, and Criminal Rule 45.

Official Forms

Official Forms 11A, 11B, 106J, 106J-2, 201, 202, 204, 205, 206Sum, 206A/B, 206D, 206E/F, 206G, 206H, 207, 309A, 309B, 309C, 309D, 309E, 309F, 309G, 309H, 309I, 312, 313, 314, 315, 410, 410S1, 410S2, 416A, 416B, 416D, 424, and Instructions. These forms constitute the last major group of forms that will be revised by the forms modernization project. All of these forms derive from existing forms, but reflect a new numbering system. This group of forms consists primarily of case opening forms for non-individual cases, chapter 11-related forms, the proof of claim form and supplements, and orders and court notices for use in all types of cases. Also approved for publication are two revised individual debtor forms, an instruction booklet for non-individuals, and the announcement of the proposed abrogation of two Official Forms.

Official Form 410A. Official Form 410A (current Form 10A) is the mortgage proof of claim attachment. The form is required to be filed in an individual debtor case with the proof of claim of a creditor that asserts a security interest in the debtor's principal residence. The form currently requires a statement of the principal and interest due as of the petition date; a statement of prepetition fees, expenses, and charges that remain unpaid, and a statement of the amount

necessary to cure any default as of the petition date. The existing form would be replaced with one that requires a mortgage claimant to provide a loan payment history and other information about the mortgage claim, including calculation of the claim and the arrearage amounts.

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The advisory committee unanimously approved and submitted proposed amendments to Rules 1, 4, 16, 26, 30, 31, 33, 34, 37, and 55, and a proposed abrogation of Rule 84 and the Appendix of Forms, with a recommendation that these changes be approved and transmitted to the Judicial Conference. The proposed amendments summarized below are more fully explained in the report from the chair of the advisory committee, attached as Appendix B.

Duke Rules Package

Rules 1, 4, 16, 26, 30, 31, 33, 34, and 37. During the advisory committee's May 2010 Conference on Civil Litigation held at Duke University School of Law, there was nearly unanimous agreement that the disposition of civil actions could be improved. Participants also agreed that this goal should be pursued by several means: education of the bench and the bar; implementation of pilot projects; and rules amendments.

The advisory committee formed a subcommittee to develop rules amendments consistent with the overarching goal of improving the disposition of civil cases by reducing the costs and delays in civil litigation, increasing realistic access to the courts, and furthering the goals of Rule 1 "to secure the just, speedy, and inexpensive determination of every action and proceeding."

A package of rules amendments was developed through numerous subcommittee conference calls, a mini-conference held in October 2012, and discussions during advisory

committee and Committee meetings. The proposed amendments published for comment in August 2013 sought to improve early and active judicial case management through amendments to Rules 4(m) and 16; enhance the means of keeping discovery proportional to the action through amendments to Rules 26, 30, 31, 33, 34, and 36; and encourage increased cooperation among the parties through an amendment to Rule 1.

As expected, the proposed amendments generated significant response; the advisory committee received over 2,300 comments and held three public hearings. The public hearings—held in Washington, D.C.; Phoenix, Arizona; and Dallas, Texas—were well attended by the public and the bar, and the advisory committee heard testimony from more than 120 witnesses. The proposed amendments submitted to the Committee for approval are largely unchanged from those published for public comment. The one significant change as a result of the comments is the withdrawal of amendments that would have reduced the presumptive length and numbers of depositions under Rules 30 and 31, the presumptive numerical limit of interrogatories under Rule 33, and would have established a presumptive numerical limit of requests to admit under Rule 36.

Failure to Preserve Electronically Stored Information

Rule 37(e). Present Rule 37(e) was adopted in 2006 and provides: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." Since the rule's adoption, it has become apparent that a more detailed response to problems arising from the loss of electronically stored information (ESI) is required. This is consistent with a unanimous recommendation by a panel at the Duke Conference that a more detailed rule was necessary.

The advisory committee's discovery subcommittee began work on revising Rule 37(e) with the goal of establishing greater uniformity in how federal courts respond to the loss of ESI. The lack of uniformity—some circuits hold that adverse inference jury instructions can be imposed for the negligent loss of ESI and others require a showing of bad faith—has resulted in a tendency to over preserve ESI out of a fear of serious sanctions if actions are viewed in hindsight as negligent.

When it first began its work, the subcommittee considered many approaches, including establishing detailed preservation guidelines—to establish when the duty to preserve arises, its scope and duration in advance of litigation, and actions available to a court when information is lost. The subcommittee ultimately concluded that a detailed rule specifying the trigger, scope, and duration of a preservation obligation is not feasible. The subcommittee chose instead to draft a rule focused on court actions in response to a failure to preserve information that should have been preserved in anticipation of litigation.

Therefore, the resulting proposal focuses on the actions a court may take when ESI "that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery." The proposal uses the duty to preserve that has been uniformly established by case law: the duty arises when litigation is reasonably anticipated.

Proposed Rule 37(e)(1) provides that the court, "upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice." This proposal preserves broad trial court discretion to cure prejudice caused by the loss of ESI that cannot be remedied by restoration or replacement of the lost information. It further provides that the measures be no greater than necessary to cure the prejudice.

Proposed Rule 37(e)(2) eliminates the circuit split on when a court may give an adverse inference jury instruction for the loss of ESI. It permits adverse inference instructions only on a finding that the party "acted with the intent to deprive another party of the information's use in the litigation."

Abrogation of Civil Forms

Rules 4 and 84, and the Appendix of Forms. Proposed amendments to Rules 4 and 84 would abrogate Rule 84 and the Appendix of Forms, and amend Rule 4(d)(1)(D) to append present Forms 5 and 6. As previously reported, the proposed amendments follow significant efforts to gather information about how often the forms are used and whether they provide meaningful help to litigants. After carefully studying the issue, the advisory committee determined that abrogation was the best course.

However, two forms required special consideration. Rule 4(d)(1)(D) requires that a request to waive service of process be made by Form 5. The Form 6 waiver of service of summons is not required, but is closely tied to Form 5. Accordingly, the advisory committee determined that Forms 5 and 6 should be preserved by amending Rule 4(d)(1)(D) to attach them to Rule 4.

Most of the comments submitted were supportive of the proposal. Members of the academic community expressed concern that the Rules Enabling Act process is not satisfied by publishing a proposal to abrogate Rule 84 and the Appendix of Forms. They reasoned that each form has become an integral part of the rule it illustrates; therefore, abrogating the form abrogates the rule as well. The advisory committee carefully considered this perspective but unanimously determined that the publication process and the opportunity to comment on the proposal fully satisfies the Rules Enabling Act.

Final Default Judgment

Rule 55(c). Also published in August 2013 was a proposed amendment to Rule 55(c), the rule that deals with setting aside a default or a default judgment. Three comments were submitted, each of which favored the proposed amendment.

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

Reading these rules together establishes that relief from a default judgment is limited by the demanding standards of Rule 60(b) only if the default judgment is made final under Rule 54(b) or when there is a final judgment adjudicating all claims among all parties. However, some courts have read Rule 55(c) as directing them to consider even nonfinal default judgments within the demanding standards of Rule 60(b). The proposed amendment therefore clarifies that the standards set by Rule 60(b) apply only in seeking relief from a final judgment, by adding in Rule 55(c) the word "final" before "default judgment."

The Committee concurred with the advisory committee's recommendation.

Recommendation: That the Judicial Conference approve the proposed amendments to Civil Rules 1, 4, 16, 26, 30, 31, 33, 34, 37, and 55, and a proposed abrogation of Rule 84 and the Appendix of Forms, and transmit these changes to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendments to the Federal Rules of Civil Procedure are set forth in Appendix B, along with a report from the chair of the advisory committee.

Rules Approved for Publication and Comment

As previously reported, in January 2014 the Committee approved publication at a suitable time of Rules 6(d), eliminating electronic service from the 3-day rule, and 82, addressing venue for admiralty and maritime claims. In June 2014, the Committee additionally approved the advisory committee's recommendation to publish Rule 4(m), and approved publication of all of the amendments—the amendments to Rules 6(d), 82, and 4(m)—in August 2014.

The proposed amendment to Rule 4(m), the rule addressing time limits for service, corrects an apparent ambiguity regarding service abroad on a corporation. Comments received on the proposed amendment to Rule 4(m) published as part of the Duke Rules Package revealed that many practitioners believe the time for service set forth in Rule 4(m) applies to foreign corporations. This ambiguity arises because there are two clear exceptions for service on an individual in a foreign country under Rule 4(f) and for service on a foreign state under Rule 4(j)(1), but there is no explicit reference to service on a corporation. The proposed amendment clarifies that service abroad on a corporation is excluded from the time set forth in Rule 4(m).

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Approved for Publication and Comment

The advisory committee submitted proposed amendments to Rules 4, 41, and 45, with a request that they be published for comment. The Committee approved the advisory committee's recommendation.

Rule 4

The proposed amendments to Rule 4 ("Arrest Warrant or Summons on a Complaint") address service of summonses on organizational defendants. The proposal originated from a suggestion by the Department of Justice to amend Rule 4 to permit effective service of a summons on a foreign organization that has no agent or principal place of business within the United States. The Department advised that current Rule 4 poses an obstacle to the prosecution of foreign corporations charged with offenses that may be punished in the United States. In some cases, such corporations cannot be served because they have no last known address or principal place of business in the United States.

The proposed amendments make several changes to Rule 4. First, they fill a gap in the current rule by authorizing sanctions if an organizational defendant fails to appear. Second, the amendments restrict the mailing requirement for service of a summons on an organization within the United States by eliminating the requirement of a separate mailing to an organizational defendant when delivery has been made to an officer or to a managing or general agent, but requiring mailing when delivery has been made on an agent authorized by statute, if the statute itself requires mailing to the organization. Third, the amendments address the reality that, while an increasing number of criminal prosecutions involve foreign entities, the rules do not provide for service outside a judicial district of the United States; therefore, the proposed amendments provide a mechanism for service on an organizational defendant outside of the United States. Similar to Civil Rule 4, a non-exclusive list of methods for service is included.

Rule 41

Rule 41 concerns searches and seizures. The proposed amendments to Rule 41's territorial venue provisions—which generally limit searches to locations within a district—would

allow a magistrate judge to issue a warrant to use remote access to search electronic storage media and seize or copy ESI even when that media or information is or may be located outside of the magistrate judge's district. The proposed amendments address two increasingly common situations affected by the territorial restriction: (1) where the warrant sufficiently describes the computer to be searched but the district within which that computer is located is unknown; and (2) where the investigation requires law enforcement to coordinate searches of numerous computers in numerous districts.

Current Rule 41(b) generally limits warrant authority to searches within a district, but it contains four exceptions where out-of-district or extra-territorial warrants are permitted.[4] The proposed amendments would authorize an additional exception for the two specific circumstances described above.

Lastly, the proposed amendments include a change to Rule 41(f)(1)(C), regulating notice that a search has been conducted. New language would be added indicating the process for providing notice of a remote access search.

Rule 45

The proposed amendment to Rule 45(c) parallels the proposed amendments to Appellate Rule 26(c), Bankruptcy Rule 9006(f), and Civil Rule 6(d) discussed *supra*. It eliminates the 3-day extension of time periods when service is effected electronically.

[4]Current Rule 41(b) authorizes search warrants for property located outside the district in four circumstances: (1) for property in the district that might be removed before execution of the warrant; (2) for tracking devices installed in the district, which may be monitored outside the district; (3) for investigations of domestic or international terrorism; and (4) for property located in a United States territory or a United States diplomatic or consular mission. Fed. R. Crim. P. 41(b)(2)-(5).

FEDERAL RULES OF EVIDENCE

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

Respectfully submitted,

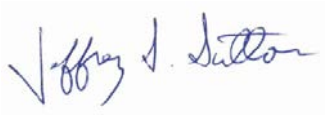

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Neil M. Gorsuch	Jack Zouhary
Susan P. Graber	

Appendix A – Proposed Amendments to the Official Bankruptcy Forms
Appendix B – Proposed Amendments to the Federal Rules of Civil Procedure

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

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REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

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

FROM: Honorable Eugene R. Wedoff, Chair
Advisory Committee on Bankruptcy Rules

DATE: May 6, 2014

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on April 22 and 23, 2014, in Austin, Texas, at the University of Texas School of Law. The draft minutes of that meeting accompany this report in Appendix C. The Committee's actions fall into two categories.

* * * * *

Part II of this report discusses the action items, grouped as follows:

(A1) matters published in August 2013 for which the Advisory Committee seeks approval for transmission to the Judicial Conference—amendments to Rule 9006(f) and Official Forms 17A, 17B, 17C, 22A-1, 22A-1Supp, 22A-2, 22B, 22C-1, 22C-2, 101, 101A, 101B, 104, 105, 106Sum, 106A/B, 106C, 106D, 106E/F, 106G, 106H, 106Dec, 107, 112, 119, 121, 318, 423, 427;

(A2) minor amendments to Official Forms 3A and 3B, for which the Advisory Committee seeks approval for transmission to the Judicial Conference without publication;

* * * * *

II. Action Items

A. Items for Final Approval

A1. Amendments Published for Comment in August 2013.

* * * * *

Action Item 2. Official Forms 17A, 17B, and 17C were proposed in connection with the revision of the bankruptcy appellate rules. Form 17A (Notice of Appeal and Statement of Election) would be amended and renumbered, and Forms 17B (Optional Appellee Statement of Election to Proceed in District Court) and 17C (Certificate of Compliance With Rule 8015(a)(7)(B) or 8016(d)(2)) would be new.

Proposed Form 17A and new Form 17B would implement the provisions of 28 U.S.C. § 158(c)(1) that permit an appellant and an appellee to elect to have an appeal heard by the district court in districts for which appeals to a bankruptcy appellate panel have been authorized. New Form 17C would be used by a party to certify compliance with the provisions of the bankruptcy appellate rules that prescribe limitations on brief length based on number of words or lines of text (the "type-volume limitation").

No comments were submitted in response to the publication of these forms, and the Advisory Committee unanimously approved them at the spring meeting. The Committee requests that the Standing Committee approve these forms and forward them to the Judicial Conference, with the recommendation that they go into effect on December 1, 2014, the presumptive effective date of the revised Part VIII bankruptcy rules. These forms will be renumbered as Official Forms 417A, 417B, and 417C when the remaining modernized forms go into effect.

Action Item 3. Official Forms 22A-1, 22A-1Supp, 22A-2, 22B, 22C-1, and 22C-2 are the modernized "means test" forms that were initially published in 2012 as part of the first phase of the Forms Modernization Project ("FMP"). The Advisory Committee revised these forms after their initial publication, and the Standing Committee republished them in 2013. In response to the republication, six comments were submitted.

Commenters generally viewed the revisions of the means test forms positively. The National Conference of Bankruptcy Judges ("NCBJ"), for example, thought that the reorganization and revision of the forms made them easier to read and understand, thereby making them easier for debtors to complete and providing clearer information to creditors and trustees.

The comments made a number of detailed suggestions about the wording or content of specific provisions of the means test forms. In response the Advisory Committee made several changes. The changes of greatest significance include the following:

- An instruction about asking for help at the clerk's office was revised to make it clear that the clerk's office could help a filer locate means test data, but that it could not help in completing the form. In addition, the applicable web address for accessing the necessary data was moved to the instructions, where it can be updated as necessary without having to go through the form amendment process.

- The instruction about the grounds for denying chapter 7 relief was revised to state more accurately that "Chapter 7 relief can be denied to a person who has primarily consumer debts if the court finds that the person has enough income to repay creditors an amount that, under the Bankruptcy Code, would be a sufficient portion of their claims."

- An error on line 33 of Form 22A-2 was corrected by removing the instruction "Do not deduct mortgage payments previously deducted as an operating expense in Line 9."

- The omission of a space on Form 22B for claiming a marital deduction if the debtor has a non-filing spouse was corrected by adding space for the marital deduction on lines 12-14 of the revised form.

Some of the comments raised issues that had previously been debated and resolved by the Advisory Committee in promulgating the existing forms. The Advisory Committee voted not to revisit those legal issues in the context of modernizing the forms. The proposed forms would therefore continue the existing treatment with respect to the following issues:

- Whether the income of a nondebtor spouse not used for household expenses of the debtor or the debtor's dependents is included in current monthly income as defined by §101(10A).

- Whether a chapter 7 debtor who completes the means-test-exemption form (B22A-1Supp) must also complete the Statement of Your Current Monthly Income (B22A-1).

- Whether the means test exemption for reservists and National Guard members is temporary.

- Whether space should be provided in Forms 22A-2 and 22C-2 for a debtor to deduct additional expenses beyond those already listed.

- Whether business expenses should be deducted before, rather than after, calculation of the applicable commitment period.

- Whether the forms should expressly provide a debtor the option of using a different method for determining the number of dependents, along with an explanation of why a different method was used.

- In Forms 22A-2 and 22C-2, whether taxes and insurance included in the mortgage payment should be identified on line 9b (monthly amounts due for debts secured by debtor's residence) rather than on line 33 (deductions for debt payments).

- Whether vehicle ownership expenses should be a predetermined allowance based on the IRS Standards rather than the debtor's actual expenses.

- Whether the debtor should be allowed to deduct ongoing retirement plan contributions as specified in § 541(b)(7).

In drafting revised Form 22C-2, the Advisory Committee made a substantive change in addition to the stylistic and formatting changes proposed by the FMP. It added Part 3 in response to the Supreme Court's decision in *Hamilton v. Lanning*, 560 U.S. 505 (2010), which held that changes to income or expenses reported elsewhere on the 22C forms that have occurred by the time of confirmation or are virtually certain to occur must be considered by the court in determining the debtor's projected disposable income. One comment suggested that debtors should be required to report expected changes only if they are virtually certain to occur within one year of the filing. The Advisory Committee rejected the suggestion because *Lanning* did not specify any time limit for changes that are virtually certain to occur.

The Advisory Committee requests that the Standing Committee approve Official Forms 22A-1, 22A-1Supp, 22A-2, 22B, 22C-1, and 22C-2 and send them to the Judicial Conference for approval, with an effective date of December 1, 2014. When the remaining modernized forms become effective, the means test forms will be renumbered Official Forms 108-1, 108-1Supp, 108-2, 109, 110-1, and 110-2.

* * * * *

A2. Amendments for Which Final Approval Is Sought Without Publication. **The Advisory Committee recommends that amendments to Official Forms 3A and 3B be approved and forwarded to the Judicial Conference and that the amended forms become effective on December 1, 2014.** Because the amendments are minor, technical changes, the Advisory Committee concluded that publication for comment is not required. The text of the amended forms is set out in Appendix A.

Action Item 5. **Official Form 3A** is filed by individual debtors who request to pay the filing fee in installments, as authorized by 28 U.S.C. § 1930(a). **Official Form 3B** is filed by individual chapter 7 debtors who request to have the filing fee waived, as authorized by § 1930(f). The modernized version of Form 3A, which went into effect on December 1, 2013, includes at line 1 the filing fee amount for each chapter. The version of 3B that went into effect at the same time refers to the specific chapter 7 filing fee amount in the order that is part of the form. Because these amounts are subject to periodic change by the Judicial Conference, the

Advisory Committee voted unanimously to remove them from the forms. Filing fee amounts will continue to be stated in Director's Forms that are used by clerk's offices to provide information about bankruptcy to individual debtors (current Director's Form 200 and 201). The proposed change will permit fee information provided to debtors to remain current without having to go through the formal forms amendment process.

* * * * *

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form B 3A

Application for Individuals to Pay the Filing Fee in Installments

12/14

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information.

Part 1: Specify Your Proposed Payment Timetable

1. **Which chapter of the Bankruptcy Code are you choosing to file under?**

❑ Chapter 7
❑ Chapter 11
❑ Chapter 12
❑ Chapter 13

2. **You may apply to pay the filing fee in up to four installments. Fill in the amounts you propose to pay and the dates you plan to pay them. Be sure all dates are business days. Then add the payments you propose to pay.**

You must propose to pay the entire fee no later than 120 days after you file this bankruptcy case. If the court approves your application, the court will set your final payment timetable.

You propose to pay…		
$_____	❑ With the filing of the petition ❑ On or before this date.....	_____ MM / DD / YYYY
$_____	On or before this date.....	_____ MM / DD / YYYY
$_____	On or before this date.....	_____ MM / DD / YYYY
+ $_____	On or before this date.....	_____ MM / DD / YYYY
Total $_____	◀ Your total must equal the entire fee for the chapter you checked in line 1.	

Part 2: Sign Below

By signing here, you state that you are unable to pay the full filing fee at once, that you want to pay the fee in installments, and that you understand that:

- You must pay your entire filing fee before you make any more payments or transfer any more property to an attorney, bankruptcy petition preparer, or anyone else for services in connection with your bankruptcy case.
- You must pay the entire fee no later than 120 days after you first file for bankruptcy, unless the court later extends your deadline. Your debts will not be discharged until your entire fee is paid.
- If you do not make any payment when it is due, your bankruptcy case may be dismissed, and your rights in other bankruptcy proceedings may be affected.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

✘ _____
Your attorney's name and signature, if you used one

Date _____
MM / DD / YYYY

12b-010010

Fill in this information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Chapter filing under:

- ❑ Chapter 7
- ❑ Chapter 11
- ❑ Chapter 12
- ❑ Chapter 13

Order Approving Payment of Filing Fee in Installments

After considering the *Application for Individuals to Pay the Filing Fee in Installments* (Official Form B 3A), the court orders that:

[ ] The debtor(s) may pay the filing fee in installments on the terms proposed in the application.

[ ] The debtor(s) must pay the filing fee according to the following terms:

	You must pay…	**On or before this date…**
	$_____	_____ Month / day / year
	$_____	_____ Month / day / year
	$_____	_____ Month / day / year
+	$_____	_____ Month / day / year
Total	$_____	

Until the filing fee is paid in full, the debtor(s) must not make any additional payment or transfer any additional property to an attorney or to anyone else for services in connection with this case.

_____ **By the court:** _____
Month / day / year United States Bankruptcy Judge

COMMITTEE NOTE

The amounts of the bankruptcy filing fees for various chapters listed on page one of the form were removed from the form. The correct fee amounts are listed on Director's Forms 200 and 201A where they can be updated as necessary without having to go through the official form amendment process.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form B 3B

Application to Have the Chapter 7 Filing Fee Waived

12/14

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known).

Part 1: Tell the Court About Your Family and Your Family's Income

1. What is the size of your family?

Your family includes you, your spouse, and any dependents listed on *Schedule J: Current Expenditures of Individual Debtor(s)* (Official Form 6J).

Check all that apply:

❑ You
❑ Your spouse
❑ Your dependents _____ How many dependents? _____ Total number of people

2. Fill in your family's average monthly income.

Include your spouse's income if your spouse is living with you, even if your spouse is not filing.

Do not include your spouse's income if you are separated and your spouse is not filing with you.

Add your income and your spouse's income. Include the value (if known) of any non-cash governmental assistance that you receive, such as food stamps (benefits under the Supplemental Nutrition Assistance Program) or housing subsidies.

If you have already filled out *Schedule I: Your Income,* see line 10 of that schedule.

		That person's average monthly net income (take-home pay)
You		$_____
Your spouse ...	+	$_____
Subtotal.....		$_____
Subtract any non-cash governmental assistance that you included above.	−	$_____
Your family's average monthly net income	Total.....	$_____

3. Do you receive non-cash governmental assistance?

❑ No
❑ Yes. Describe.....

Type of assistance

4. Do you expect your family's average monthly net income to increase or decrease by more than 10% during the next 6 months?

❑ No
❑ Yes. Explain. .....

5. Tell the court why you are unable to pay the filing fee in installments within 120 days. If you have some additional circumstances that cause you to not be able to pay your filing fee in installments, explain them.

Debtor 1 _____ Case number (*if known*) _____
First Name Middle Name Last Name

Part 2: Tell the Court About Your Monthly Expenses

6. Estimate your average monthly expenses.
Include amounts paid by any government assistance that you reported on line 2.

If you have already filled out *Schedule J, Your Expenses,* copy line 22 from that form.

$_____

7. Do these expenses cover anyone who is not included in your family as reported in line 1?

❑ No
❑ Yes. Identify who .....

8. Does anyone other than you regularly pay any of these expenses?
If you have already filled out *Schedule I: Your Income*, copy the total from line 11.

❑ No
❑ Yes. How much do you regularly receive as contributions? $_____ monthly

9. Do you expect your average monthly expenses to increase or decrease by more than 10% during the next 6 months?

❑ No
❑ Yes. Explain .....

Part 3: Tell the Court About Your Property

If you have already filled out *Schedule A: Real Property (Official Form B 6A)* and *Schedule B: Personal Property (Official Form B 6B)*, attach copies to this application and go to Part 4.

10. How much cash do you have?
Examples: Money you have in your wallet, in your home, and on hand when you file this application

Cash: $_____

11. Bank accounts and other deposits of money?
Examples: Checking, savings, money market, or other financial accounts; certificates of deposit; shares in banks, credit unions, brokerage houses, and other similar institutions. If you have more than one account with the same institution, list each. Do not include 401(k) and IRA accounts.

	Institution name:	Amount:
Checking account:	_____	$_____
Savings account:	_____	$_____
Other financial accounts:	_____	$_____
Other financial accounts:	_____	$_____

12. Your home? (if you own it outright or are purchasing it)
Examples: House, condominium, manufactured home, or mobile home

_____
Number Street
_____
City State ZIP Code

Current value: $_____
Amount you owe on mortgage and liens: $_____

13. Other real estate?

_____
Number Street
_____
City State ZIP Code

Current value: $_____
Amount you owe on mortgage and liens: $_____

14. The vehicles you own?
Examples: Cars, vans, trucks, sports utility vehicles, motorcycles, tractors, boats

Make: _____
Model: _____
Year: _____
Mileage _____

Current value: $_____
Amount you owe on liens: $_____

Make: _____
Model: _____
Year: _____
Mileage _____

Current value: $_____
Amount you owe on liens: $_____

Debtor 1 _____ Case number (*if known*) _____
First Name Middle Name Last Name

15. Other assets?

Do not include household items and clothing.

Describe the other assets:

Current value: $_____

Amount you owe on liens: $_____

16. Money or property due you?

Examples: Tax refunds, past due or lump sum alimony, spousal support, child support, maintenance, divorce or property settlements, Social Security benefits, Workers' compensation, personal injury recovery

Who owes you the money or property?

_____

_____

How much is owed?

$_____

$_____

Do you believe you will likely receive payment in the next 180 days?

❑ No

❑ Yes. Explain:

Part 4: Answer These Additional Questions

17. Have you paid anyone for services for this case, including filling out this application, the bankruptcy filing package, or the schedules?

❑ No

❑ Yes. **Whom did you pay?** *Check all that apply:*

- ❑ An attorney
- ❑ A bankruptcy petition preparer, paralegal, or typing service
- ❑ Someone else _____

How much did you pay?

$_____

18. Have you promised to pay or do you expect to pay someone for services for your bankruptcy case?

❑ No

❑ Yes. **Whom do you expect to pay?** *Check all that apply:*

- ❑ An attorney
- ❑ A bankruptcy petition preparer, paralegal, or typing service
- ❑ Someone else _____

How much do you expect to pay?

$_____

19. Has anyone paid someone on your behalf for services for this case?

❑ No

❑ Yes. **Who was paid on your behalf?** *Check all that apply:*

- ❑ An attorney
- ❑ A bankruptcy petition preparer, paralegal, or typing service
- ❑ Someone else _____

Who paid? *Check all that apply:*

- ❑ Parent
- ❑ Brother or sister
- ❑ Friend
- ❑ Pastor or clergy
- ❑ Someone else _____

How much did someone else pay?

$_____

20. Have you filed for bankruptcy within the last 8 years?

❑ No

❑ Yes. District _____ When _____ (MM/ DD/ YYYY) Case number _____

District _____ When _____ (MM/ DD/ YYYY) Case number _____

District _____ When _____ (MM/ DD/ YYYY) Case number _____

Part 5: Sign Below

By signing here under penalty of perjury, I declare that I cannot afford to pay the filing fee either in full or in installments. I also declare that the information I provided in this application is true and correct.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

Fill in this information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Order on the Application to Have the Chapter 7 Filing Fee Waived

After considering the debtor's *Application to Have the Chapter 7 Filing Fee Waived* (Official Form B 3B), the court orders that the application is:

[ ] Granted. However, the court may order the debtor to pay the fee in the future if developments in administering the bankruptcy case show that the waiver was unwarranted.

[ ] Denied. The debtor must pay the filing fee according to the following terms:

	You must pay…	**On or before this date…**
	$_____	_____ Month / day / year
	$_____	_____ Month / day / year
	$_____	_____ Month / day / year
+	$_____	_____ Month / day / year
Total		

If the debtor would like to propose a different payment timetable, the debtor must file a motion promptly with a payment proposal. The debtor may use *Application for Individuals to Pay the Filing Fee in Installments* (Official Form B 3A) for this purpose. The court will consider it.

The debtor must pay the entire filing fee before making any more payments or transferring any more property to an attorney, bankruptcy petition preparer, or anyone else in connection with the bankruptcy case. The debtor must also pay the entire filing fee to receive a discharge. If the debtor does not make any payment when it is due, the bankruptcy case may be dismissed and the debtor's rights in future bankruptcy cases may be affected.

[ ] Scheduled for hearing.

A hearing to consider the debtor's application will be held

on _____ at _____ AM / PM at _____.
Month / day / year Address of courthouse

If the debtor does not appear at this hearing, the court may deny the application.

_____ **By the court:** _____
Month / day / year United States Bankruptcy Judge

12b-010016

COMMITTEE NOTE

The amount of the chapter 7 filing fee is no longer preprinted on the blank order attached to the form. If the request for a fee waiver is denied, and if the court instead orders payment by installments, the court or clerk will prepare the order with the correct fee amount.

UNITED STATES BANKRUPTCY COURT

_____ District of _____

In re _____,
Debtor

Case No. _____

Chapter _____

SUMMARY OF SCHEDULES

Indicate as to each schedule whether that schedule is attached and state the number of pages in each. Report the totals from Schedules A, B, D, E, F, I, and J in the boxes provided. Add the amounts from Schedules A and B to determine the total amount of the debtor's assets. Add the amounts of all claims from Schedules D, E, and F to determine the total amount of the debtor's liabilities. Individual debtors also must complete the "Statistical Summary of Certain Liabilities and Related Data" if they file a case under chapter 7, 11, or 13.

NAME OF SCHEDULE	ATTACHED (YES/NO)	NO. OF SHEETS	ASSETS	LIABILITIES	OTHER
A - Real Property			$		
B - Personal Property			$		
C - Property Claimed as Exempt					
D - Creditors Holding Secured Claims				$	
E - Creditors Holding Unsecured Priority Claims (Total of Claims on Schedule E)				$	
F - Creditors Holding Unsecured Nonpriority Claims				$	
G - Executory Contracts and Unexpired Leases					
H - Codebtors					
I - Current Income of Individual Debtor(s)					$
J - Current Expenditures of Individual Debtors(s)					$
TOTAL			$	$	

12b-010018

UNITED STATES BANKRUPTCY COURT

_____ District of _____

In re _____, Case No. _____

Debtor

Chapter _____

STATISTICAL SUMMARY OF CERTAIN LIABILITIES AND RELATED DATA (28 U.S.C. § 159)

If you are an individual debtor whose debts are primarily consumer debts, as defined in § 101(8) of the Bankruptcy Code (11 U.S.C. § 101(8)), filing a case under chapter 7, 11 or 13, you must report all information requested below.

☐ Check this box if you are an individual debtor whose debts are NOT primarily consumer debts. You are not required to report any information here.

This information is for statistical purposes only under 28 U.S.C. § 159.

Summarize the following types of liabilities, as reported in the Schedules, and total them.

Type of Liability	**Amount**
Domestic Support Obligations (from Schedule E)	$
Taxes and Certain Other Debts Owed to Governmental Units (from Schedule E)	$
Claims for Death or Personal Injury While Debtor Was Intoxicated (from Schedule E) (whether disputed or undisputed)	$
Student Loan Obligations (from Schedule F)	$
Domestic Support, Separation Agreement, and Divorce Decree Obligations Not Reported on Schedule E	$
Obligations to Pension or Profit-Sharing, and Other Similar Obligations (from Schedule F)	$
TOTAL	$

State the following:

Average Income (from Schedule I, Line 12)	$
Average Expenses (from Schedule J, Line 22)	$
Current Monthly Income (from Form 22A-1 Line 11; **OR**, Form 22B Line 14; **OR**, Form 22C-1 Line 14)	$

State the following:

1. Total from Schedule D, "UNSECURED PORTION, IF ANY" column		$
2. Total from Schedule E, "AMOUNT ENTITLED TO PRIORITY" column.	$	
3. Total from Schedule E, "AMOUNT NOT ENTITLED TO PRIORITY, IF ANY" column		$
4. Total from Schedule F		$
5. Total of non-priority unsecured debt (sum of 1, 3, and 4)		$

COMMITTEE NOTE

Summary of Schedules (Official Forms 6 Summary), is updated on page 2 to give line number references to the amended means-test forms (Official Forms 22A-1, 22B, and 22C-1) for Current Monthly Income.

[Caption as in Form 16A, 16B, or 16D, as appropriate]

NOTICE OF APPEAL AND STATEMENT OF ELECTION

Part 1: Identify the appellant(s)

1. Name(s) of appellant(s):
   _____

2. Position of appellant(s) in the adversary proceeding or bankruptcy case that is the subject of this appeal:

For appeals in an adversary proceeding.

- ❑ Plaintiff
- ❑ Defendant
- ❑ Other (describe) _____

For appeals in a bankruptcy case and not in an adversary proceeding.

- ❑ Debtor
- ❑ Creditor
- ❑ Trustee
- ❑ Other (describe) _____

Part 2: Identify the subject of this appeal

1. Describe the judgment, order, or decree appealed from: _____

2. State the date on which the judgment, order, or decree was entered: _____

Part 3: Identify the other parties to the appeal

List the names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their attorneys (attach additional pages if necessary):

1. Party: _____ Attorney: _____
   _____
   _____
   _____

2. Party: _____ Attorney: _____
   _____
   _____
   _____

Part 4: Optional election to have appeal heard by District Court (applicable only in certain districts)

If a Bankruptcy Appellate Panel is available in this judicial district, the Bankruptcy Appellate Panel will hear this appeal unless, pursuant to 28 U.S.C. § 158(c)(1), a party elects to have the appeal heard by the United States District Court. If an appellant filing this notice wishes to have the appeal heard by the United States District Court, check below. Do not check the box if the appellant wishes the Bankruptcy Appellate Panel to hear the appeal.

- ❑ Appellant(s) elect to have the appeal heard by the United States District Court rather than by the Bankruptcy Appellate Panel.

Part 5: Sign below

_____ Date: _____

Signature of attorney for appellant(s) (or appellant(s) if not represented by an attorney)

Name, address, and telephone number of attorney (or appellant(s) if not represented by an attorney):

_____
_____
_____
_____

Fee waiver notice: If appellant is a child support creditor or its representative and appellant has filed the form specified in § 304(g) of the Bankruptcy Reform Act of 1994, no fee is required.

COMMITTEE NOTE

The form is amended and renumbered. It is amended to add to the Notice of Appeal an optional Statement of Election to have the appeal heard by the district court rather than by the bankruptcy appellate panel. Current Rule 8005(a) eliminates the requirement, imposed by former Rule 8001(e), that a separate document be used in making an election to have an appeal heard by the district court rather than the bankruptcy appellate panel. It instead requires a statement that conforms substantially to the Official Form for such an election. Form 17A effectuates Rule 8005(a)'s requirement for election by an appellant by combining the notice of appeal and statement of election. It thereby facilitates compliance with the statutory requirement that an appellant wishing to make an election do so at the time of filing the appeal. 28 U.S.C. § 158(c)(1)(A).

The statement of election in Part 4 is applicable only in districts for which appeals to a bankruptcy appellate panel have been authorized. If an appeal is being taken from a bankruptcy court located in a circuit that does not have a bankruptcy appellate panel or in a district that has not authorized appeals to be heard by the circuit's bankruptcy appellate panel, the appellant should not complete Part 4.

When a bankruptcy appellate panel is available to hear an appeal, completion of Part 4 is optional. An appellant that wants its appeal heard by the bankruptcy appellate panel should not complete this part.

The form is renumbered as Official Form 17A because a new companion form—Optional Appellee Statement of Election to Proceed in the District Court—is designated as Official Form 17B, and another bankruptcy appellate form— Certificate of Compliance with Rule 8015(a)(7)(B) or 8016(d)(2)—is designated as Official Form 17C.

The fixed caption has been deleted because the short title caption on the current form is not appropriate if the debtor is the appellant or if the appeal is in an adversary proceeding. *See* 11 U.S.C. § 342(c); Rule 7008; Rule 9004(b). The form should be captioned as in Official Form 16A, Caption (Full); Official Form 16B, Caption (Short Title); or Official Form 16D, Caption for Use in Adversary proceeding, as appropriate.

[Caption as in Form 16A, 16B, or 16D, as appropriate]

OPTIONAL APPELLEE STATEMENT OF ELECTION TO PROCEED IN DISTRICT COURT

This form should be filed only if all of the following are true:

- this appeal is pending in a district served by a Bankruptcy Appellate Panel,
- the appellant(s) did not elect in the Notice of Appeal to proceed in the District Court rather than in the Bankruptcy Appellate Panel,
- no other appellee has filed a statement of election to proceed in the district court, and
- you elect to proceed in the District Court.

Part 1: Identify the appellee(s) electing to proceed in the District Court

1. Name(s) of appellee(s):
   _____

2. Position of appellee(s) in the adversary proceeding or bankruptcy case that is the subject of this appeal:

For appeals in an adversary proceeding.

- ❑ Plaintiff
- ❑ Defendant
- ❑ Other (describe) _____

For appeals in a bankruptcy case and not in an adversary proceeding.

- ❑ Debtor
- ❑ Creditor
- ❑ Trustee
- ❑ Other (describe) _____

Part 2: Election to have this appeal heard by the District Court (applicable only in certain districts)

I (we) elect to have the appeal heard by the United States District Court rather than by the Bankruptcy Appellate Panel.

Part 3: Sign below

_____
Signature of attorney for appellee(s) (or appellee(s) if not represented by an attorney)

Date: _____

Name, address, and telephone number of attorney (or appellee(s) if not represented by an attorney):
_____
_____
_____

12b-010024

COMMITTEE NOTE

This form is new. It is the Official Form for an appellee to state its election to have an appeal heard by the district court rather than by the bankruptcy appellate panel. If an appellee desires to make that election and the appellant or another appellee has not already done so, the appellee must file a statement that conforms substantially to this form within 30 days of service of the Notice of Appeal. 28 U.S.C. § 158(c)(1)(B).

The form is applicable only in districts for which appeals to a bankruptcy appellate panel have been authorized. If an appeal is being taken from a bankruptcy court located in a circuit that does not have a bankruptcy appellate panel or in a district that has not authorized appeals to be heard by the circuit's bankruptcy appellate panel, the appellee should not complete this form.

When a bankruptcy appellate panel is available to hear an appeal, completion of the form is optional. An appellee that wants its appeal heard by the bankruptcy appellate panel should not complete this form.

The form should be captioned as in Official Form 16A, Caption (Full); Official Form 16B, Caption (Short Title); or Official Form 16D, Caption for Use in Adversary proceeding, as appropriate. *See* 11 U.S.C. § 342(c); Rule 7008; Rule 9004(b).

[This certification must be appended to your brief if the length of your brief is calculated by maximum number of words or lines of text rather than number of pages.]

Certificate of Compliance With Rule 8015(a)(7)(B) or 8016(d)(2)

This brief complies with the type-volume limitation of Rule 8015(a)(7)(B) or 8016(d)(2) because:

- ❑ this brief contains [*state the number of*] words, excluding the parts of the brief exempted by Rule 8015(a)(7)(B)(iii) or 8016(d)(2)(D), or
- ❑ this brief uses a monospaced typeface having no more than 10½ characters per inch and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Rule 8015(a)(7)(B)(iii) or 8016(d)(2)(D).

_____ Date: _____
Signature

Print name of person signing certificate of compliance:
_____

COMMITTEE NOTE

This form is new. When the length of a brief is calculated by the maximum number of words or lines of text rather than by number of pages, Rules 8015(a)(7)(C) and 8016(d)(3) require an attorney or unrepresented party to certify that the brief complies with the applicable type-volume limitation. Completion of this form satisfies that certification requirement. This form is not needed if the brief meets the applicable page limitation under Rule 8015(a)(7)(A) or 8016(d)(1).

The form does not include a caption because it is included in the brief.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number _____
(If known)

Check one box only as directed in this form and in Form 22A-1Supp:

❑ 1. There is no presumption of abuse.

❑ 2. The calculation to determine if a presumption of abuse applies will be made under *Chapter 7 Means Test Calculation* (Official Form 22A–2).

❑ 3. The Means Test does not apply now because of qualified military service but it could apply later.

❑ Check if this is an amended filing

Official Form 22A–1

Chapter 7 Statement of Your Current Monthly Income

12/14

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for being accurate. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known). If you believe that you are exempted from a presumption of abuse because you do not have primarily consumer debts or because of qualifying military service, complete and file *Statement of Exemption from Presumption of Abuse Under § 707(b)(2)* (Official Form 22A-1Supp) with this form.

Part 1: Calculate Your Current Monthly Income

1. **What is your marital and filing status?** Check one only.
   - ❑ **Not married.** Fill out Column A, lines 2-11.
   - ❑ **Married and your spouse is filing with you.** Fill out both Columns A and B, lines 2-11.
   - ❑ **Married and your spouse is NOT filing with you. You and your spouse are:**
     - ❑ **Living in the same household and are not legally separated.** Fill out both Columns A and B, lines 2-11.
     - ❑ **Living separately or are legally separated**. Fill out Column A, lines 2-11; do not fill out Column B. By checking this box, you declare under penalty of perjury that you and your spouse are legally separated under nonbankruptcy law that applies or that you and your spouse are living apart for reasons that do not include evading the Means Test requirements. 11 U.S.C. § 707(b)(7)(B).

Fill in the average monthly income that you received from all sources, derived during the 6 full months before you file this bankruptcy case. 11 U.S.C. § 101(10A). For example, if you are filing on September 15, the 6-month period would be March 1 through August 31. If the amount of your monthly income varied during the 6 months, add the income for all 6 months and divide the total by 6. Fill in the result. Do not include any income amount more than once. For example, if both spouses own the same rental property, put the income from that property in one column only. If you have nothing to report for any line, write $0 in the space.

			Column A **Debtor 1**	*Column B* **Debtor 2 or non-filing spouse**
2. **Your gross wages, salary, tips, bonuses, overtime, and commissions** (before all payroll deductions).			$_____	$_____
3. **Alimony and maintenance payments.** Do not include payments from a spouse if Column B is filled in.			$_____	$_____
4. **All amounts from any source which are regularly paid for household expenses of you or your dependents, including child support.** Include regular contributions from an unmarried partner, members of your household, your dependents, parents, and roommates. Include regular contributions from a spouse only if Column B is not filled in. Do not include payments you listed on line 3.			$_____	$_____
5. **Net income from operating a business, profession, or farm**				
Gross receipts (before all deductions)	$_____			
Ordinary and necessary operating expenses	− $_____			
Net monthly income from a business, profession, or farm	$_____	**Copy here➔**	$_____	$_____
6. **Net income from rental and other real property**				
Gross receipts (before all deductions)	$_____			
Ordinary and necessary operating expenses	− $_____			
Net monthly income from rental or other real property	$_____	**Copy here➔**	$_____	$_____
7. **Interest, dividends, and royalties**			$_____	$_____

	Column A Debtor 1	Column B Debtor 2 or non-filing spouse
8. **Unemployment compensation**	$_____	$_____
Do not enter the amount if you contend that the amount received was a benefit under the Social Security Act. Instead, list it here: ..... ↓		
For you ..... $_____		
For your spouse..... $_____		
9. **Pension or retirement income.** Do not include any amount received that was a benefit under the Social Security Act.	$_____	$_____
10. **Income from all other sources not listed above.** Specify the source and amount. Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, a crime against humanity, or international or domestic terrorism. If necessary, list other sources on a separate page and put the total on line 10c.		
10a. _____	$_____	$_____
10b. _____	$_____	$_____
10c. Total amounts from separate pages, if any.	+$_____	+ $_____
11. **Calculate your total current monthly income.** Add lines 2 through 10 for each column. Then add the total for Column A to the total for Column B.	$_____ +	$_____ = $_____ **Total current monthly income**

Part 2: Determine Whether the Means Test Applies to You

12. **Calculate your current monthly income for the year.** Follow these steps:

12a. Copy your total current monthly income from line 11..... **Copy line 11 here**➔ 12a. $_____

Multiply by 12 (the number of months in a year). **x** 12

12b. The result is your annual income for this part of the form. 12b. $_____

13. **Calculate the median family income that applies to you.** Follow these steps:

Fill in the state in which you live. [ ]

Fill in the number of people in your household. [ ]

Fill in the median family income for your state and size of household. .....13. $_____

To find a list of applicable median income amounts, go online using the link specified in the separate instructions for this form. This list may also be available at the bankruptcy clerk's office.

14. **How do the lines compare?**

14a. ❑ Line 12b is less than or equal to line 13. On the top of page 1, check box 1, *There is no presumption of abuse.* Go to Part 3.

14b. ❑ Line 12b is more than line 13. On the top of page 1, check box 2, *The presumption of abuse is determined by Form 22A-2*. Go to Part 3 and fill out Form 22A–*2.*

Part 3: Sign Below

By signing here, I declare under penalty of perjury that the information on this statement and in any attachments is true and correct.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

If you checked line 14a, do NOT fill out or file Form 22A–2.

If you checked line 14b, fill out Form 22A–2 and file it with this form.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 22A–1Supp

Statement of Exemption from Presumption of Abuse Under § 707(b)(2) 12/14

File this supplement together with *Chapter 7 Statement of Your Current Monthly Income* (Official Form 22A-1), if you believe that you are exempted from a presumption of abuse. Be as complete and accurate as possible. If two married people are filing together, and any of the exclusions in this statement applies to only one of you, the other person should complete a separate Form 22A-1 if you believe that this is required by 11 U.S.C. § 707(b)(2)(C).

Part 1: Identify the Kind of Debts You Have

1. **Are your debts primarily consumer debts?** *Consumer debts* are defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose." Make sure that your answer is consistent with the "Nature of Debts" box on page 1 of the *Voluntary Petition* (Official Form 1).

   ❑ No. Go to Form 22A-1; on the top of page 1 of that form, check box 1, *There is no presumption of abuse,* and sign Part 3. Then submit this supplement with the signed Form 22A-1.

   ❑ Yes. Go to Part 2.

Part 2: Determine Whether Military Service Provisions Apply to You

2. **Are you a disabled veteran** (as defined in 38 U.S.C. § 3741(1))**?**

   ❑ No. Go to line 3.

   ❑ Yes. Did you incur debts mostly while you were on active duty or while you were performing a homeland defense activity? 10 U.S.C. § 101(d)(1)); 32 U.S.C. § 901(1).

   ❑ No. Go to line 3.

   ❑ Yes. Go to Form 22A-1; on the top of page 1 of that form, check box 1, *There is no presumption of abuse,* and sign Part 3. Then submit this supplement with the signed Form 22A-1.

3. **Are you or have you been a Reservist or member of the National Guard?**

   ❑ No. Complete Form 22A-1. Do not submit this supplement.

   ❑ Yes. Were you called to active duty or did you perform a homeland defense activity? 10 U.S.C. § 101(d)(1); 32 U.S.C. § 901(1)

   ❑ No. Complete Form 22A-1. Do not submit this supplement.

   ❑ Yes. Check any one of the following categories that applies:

   ❑ **I was called to active duty after September 11, 2001**, for at least 90 days and remain on active duty**.**

   ❑ **I was called to active duty after September 11, 2001,** for at least 90 days and was released from active duty on _____, which is fewer than 540 days before I file this bankruptcy case.

   ❑ **I am performing a homeland defense activity for at least 90 days.**

   ❑ **I performed a homeland defense activity for at least 90 days**, ending on _____, which is fewer than 540 days before I file this bankruptcy case.

If you checked one of the categories to the left, go to Form 22A-1. On the top of page 1 of Form 22A-1, check box 1, *There is no presumption of abuse,* and sign Part 3. Then submit this supplement with the signed Form 22A-1. You are not required to fill out the rest of Official Form 22A-1 during the exclusion period. The *exclusion period* means the time you are on active duty or are performing a homeland defense activity, and for 540 days afterward. 11 U.S.C. § 707(b)(2)(D)(ii).

If your exclusion period ends before your case is closed, you may have to file an amended form later.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number _____
(If known)

Check the appropriate box as directed in lines 40 or 42:

According to the calculations required by this Statement:

❑ 1. There is no presumption of abuse.

❑ 2. There is a presumption of abuse.

❑ Check if this is an amended filing

Official Form 22A–2

Chapter 7 Means Test Calculation

12/14

To fill out this form, you will need your completed copy of *Chapter 7 Statement of Your Current Monthly Income* (Official Form 22A-1).

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for being accurate. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).

Part 1: Determine Your Adjusted Income

1. **Copy your total current monthly income.** .....**Copy line 11 from Official Form 22A-1 here➔** .....1. $_____

2. **Did you fill out Column B in Part 1 of Form 22A–1?**

❑ No. Fill in $0 on line 3d.

❑ Yes. Is your spouse filing with you?

❑ No. Go to line 3.

❑ Yes. Fill in $0 on line 3d.

3. **Adjust your current monthly income by subtracting any part of your spouse's income not used to pay for the household expenses of you or your dependents.** Follow these steps:

On line 11, Column B of Form 22A–1, was any amount of the income you reported for your spouse NOT regularly used for the household expenses of you or your dependents?

❑ No. Fill in 0 on line 3d.

❑ Yes. Fill in the information below:

State each purpose for which the income was used For example, the income is used to pay your spouse's tax debt or to support people other than you or your dependents	**Fill in the amount you are subtracting from your spouse's income**
3a. _____	$_____
3b. _____	$_____
3c. _____	+ $_____
3d. **Total.** Add lines 3a, 3b, and 3c.	$_____

Copy total here ➔ .....3d. — $_____

4. **Adjust your current monthly income.** Subtract line 3d from line 1. $_____

Part 2: Calculate Your Deductions from Your Income

The Internal Revenue Service (IRS) issues National and Local Standards for certain expense amounts. Use these amounts to answer the questions in lines 6-15. To find the IRS standards, go online using the link specified in the separate instructions for this form. This information may also be available at the bankruptcy clerk's office.

Deduct the expense amounts set out in lines 6-15 regardless of your actual expense. In later parts of the form, you will use some of your actual expenses if they are higher than the standards. Do not deduct any amounts that you subtracted from your spouse's income in line 3 and do not deduct any operating expenses that you subtracted from income in lines 5 and 6 of Form 22A–1.

If your expenses differ from month to month, enter the average expense.

Whenever this part of the form refers to *you*, it means both you and your spouse if Column B of Form 22A–1 is filled in.

5. **The number of people used in determining your deductions from income**

   Fill in the number of people who could be claimed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support. This number may be different from the number of people in your household. [ ]

National Standards You must use the IRS National Standards to answer the questions in lines 6-7.

6. **Food, clothing, and other items:** Using the number of people you entered in line 5 and the IRS National Standards, fill in the dollar amount for food, clothing, and other items. $_____

7. **Out-of-pocket health care allowance:** Using the number of people you entered in line 5 and the IRS National Standards, fill in the dollar amount for out-of-pocket health care. The number of people is split into two categories—people who are under 65 and people who are 65 or older—because older people have a higher IRS allowance for health care costs. If your actual expenses are higher than this IRS amount, you may deduct the additional amount on line 22.

People who are under 65 years of age

7a. Out-of-pocket health care allowance per person $_____

7b. Number of people who are under 65 X _____

7c. **Subtotal.** Multiply line 7a by line 7b. $_____ **Copy line 7c here➔** ..... $_____

People who are 65 years of age or older

7d. Out-of-pocket health care allowance per person $_____

7e. Number of people who are 65 or older X _____

7f. **Subtotal.** Multiply line 7d by line 7e. $_____ **Copy line 7f here➔** ..... + $_____

7g. **Total**. Add lines 7c and 7f..... $_____ **Copy total here➔** .....7g. $_____

Local Standards You must use the IRS Local Standards to answer the questions in lines 8-15.

Based on information from the IRS, the U.S. Trustee Program has divided the IRS Local Standard for housing for bankruptcy purposes into two parts:

- **Housing and utilities – Insurance and operating expenses**
- **Housing and utilities – Mortgage or rent expenses**

To answer the questions in lines 8-9, use the U.S. Trustee Program chart.

To find the chart, go online using the link specified in the separate instructions for this form. This chart may also be available at the bankruptcy clerk's office.

8. **Housing and utilities – Insurance and operating expenses:** Using the number of people you entered in line 5, fill in the dollar amount listed for your county for insurance and operating expenses. $_____

9. **Housing and utilities – Mortgage or rent expenses:**

9a. Using the number of people you entered in line 5, fill in the dollar amount listed for your county for mortgage or rent expenses. 9a. $_____

9b. Total average monthly payment for all mortgages and other debts secured by your home.

To calculate the total average monthly payment, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Then divide by 60.

Name of the creditor	Average monthly payment
_____	$_____
_____	$_____
_____	+ $_____
9b. Total average monthly payment	$_____

Copy line 9b here➔ — $_____ Repeat this amount on line 33a.

9c. Net mortgage or rent expense.
Subtract line 9b (*total average monthly payment*) from line 9a (*mortgage or rent expense*). If this amount is less than $0, enter $0. 9c. $_____ **Copy line 9c here➔** $_____

10. **If you claim that the U.S. Trustee Program's division of the IRS Local Standard for housing is incorrect and affects the calculation of your monthly expenses, fill in any additional amount you claim.** $_____

Explain why: _____
_____

11. **Local transportation expenses:** Check the number of vehicles for which you claim an ownership or operating expense.

- ❑ 0. Go to line 14.
- ❑ 1. Go to line 12.
- ❑ 2 or more. Go to line 12.

12. **Vehicle operation expense:** Using the IRS Local Standards and the number of vehicles for which you claim the operating expenses, fill in the *Operating Costs* that apply for your Census region or metropolitan statistical area. $_____

13. **Vehicle ownership or lease expense:** Using the IRS Local Standards, calculate the net ownership or lease expense for each vehicle below. You may not claim the expense if you do not make any loan or lease payments on the vehicle. In addition, you may not claim the expense for more than two vehicles.

Vehicle 1 **Describe Vehicle 1:** _____

_____

13a. Ownership or leasing costs using IRS Local Standard 13a. $_____

13b. Average monthly payment for all debts secured by Vehicle 1.
Do not include costs for leased vehicles.

To calculate the average monthly payment here and on line 13e, add all amounts that are contractually due to each secured creditor in the 60 months after you filed for bankruptcy. Then divide by 60.

Name of each creditor for Vehicle 1	Average monthly payment
_____	$_____

Copy 13b here ➔ — $_____ Repeat this amount on line 33b.

13c. Net Vehicle 1 ownership or lease expense
Subtract line 13b from line 13a. If this amount is less than $0, enter $0. 13c. $_____ **Copy net Vehicle 1 expense here** ..... ➔ $_____

Vehicle 2 **Describe Vehicle 2:** _____

_____

13d. Ownership or leasing costs using IRS Local Standard 13d. $_____

13e. Average monthly payment for all debts secured by Vehicle 2. Do not include costs for leased vehicles.

Name of each creditor for Vehicle 2	Average monthly payment
_____	$_____

Copy 13e here ➔ — $_____ Repeat this amount on line 33c.

13f. Net Vehicle 2 ownership or lease expense
Subtract line 13e from 13d. If this amount is less than $0, enter $0. 13f. $_____ **Copy net Vehicle 2 expense here** ..... ➔ $_____

14. **Public transportation expense**: If you claimed 0 vehicles in line 11, using the IRS Local Standards, fill in the *Public Transportation* expense allowance regardless of whether you use public transportation. $_____

15. **Additional public transportation expense:** If you claimed 1 or more vehicles in line 11 and if you claim that you may also deduct a public transportation expense, you may fill in what you believe is the appropriate expense, but you may not claim more than the IRS Local Standard for *Public Transportation*.

$_____

Other Necessary Expenses In addition to the expense deductions listed above, you are allowed your monthly expenses for the following IRS categories.

16. **Taxes:** The total monthly amount that you will actually owe for federal, state and local taxes, such as income taxes, self-employment taxes, social security taxes, and Medicare taxes. You may include the monthly amount withheld from your pay for these taxes. However, if you expect to receive a tax refund, you must divide the expected refund by 12 and subtract that number from the total monthly amount that is withheld to pay for taxes.
    Do not include real estate, sales, or use taxes. $_____

17. **Involuntary deductions:** The total monthly payroll deductions that your job requires, such as retirement contributions, union dues, and uniform costs.
    Do not include amounts that are not required by your job, such as voluntary 401(k) contributions or payroll savings. $_____

18. **Life insurance:** The total monthly premiums that you pay for your own term life insurance. If two married people are filing together, include payments that you make for your spouse's term life insurance. Do not include premiums for life insurance on your dependents, for a non-filing spouse's life insurance, or for any form of life insurance other than term. $_____

19. **Court-ordered payments:** The total monthly amount that you pay as required by the order of a court or administrative agency, such as spousal or child support payments.
    Do not include payments on past due obligations for spousal or child support. You will list these obligations in line 35. $_____

20. **Education:** The total monthly amount that you pay for education that is either required:
    - as a condition for your job, or
    - for your physically or mentally challenged dependent child if no public education is available for similar services. $_____

21. **Childcare:** The total monthly amount that you pay for childcare, such as babysitting, daycare, nursery, and preschool.
    Do not include payments for any elementary or secondary school education. $_____

22. **Additional health care expenses, excluding insurance costs:** The monthly amount that you pay for health care that is required for the health and welfare of you or your dependents and that is not reimbursed by insurance or paid by a health savings account. Include only the amount that is more than the total entered in line 7.
    Payments for health insurance or health savings accounts should be listed only in line 25. $_____

23. **Optional telephones and telephone services:** The total monthly amount that you pay for telecommunication services for you and your dependents, such as pagers, call waiting, caller identification, special long distance, or business cell phone service, to the extent necessary for your health and welfare or that of your dependents or for the production of income, if it is not reimbursed by your employer. + $_____
    Do not include payments for basic home telephone, internet and cell phone service. Do not include self-employment expenses, such as those reported on line 5 of Official Form 22A-1, or any amount you previously deducted.

24. **Add all of the expenses allowed under the IRS expense allowances.**
    Add lines 6 through 23. $_____

Additional Expense Deductions These are additional deductions allowed by the Means Test.
Note: Do not include any expense allowances listed in lines 6-24.

25. **Health insurance, disability insurance, and health savings account expenses.** The monthly expenses for health insurance, disability insurance, and health savings accounts that are reasonably necessary for yourself, your spouse, or your dependents.

Health insurance	$_____		
Disability insurance	$_____		
Health savings account	+ $_____		
Total	$_____	**Copy total here➔**	$_____

Do you actually spend this total amount?

❑ No. How much do you actually spend? $_____
❑ Yes

26. **Continued contributions to the care of household or family members.** The actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses. $_____

27. **Protection against family violence.** The reasonably necessary monthly expenses that you incur to maintain the safety of you and your family under the Family Violence Prevention and Services Act or other federal laws that apply. $_____

By law, the court must keep the nature of these expenses confidential.

28. **Additional home energy costs.** Your home energy costs are included in your non-mortgage housing and utilities allowance on line 8.

If you believe that you have home energy costs that are more than the home energy costs included in the non-mortgage housing and utilities allowance, then fill in the excess amount of home energy costs. $_____

You must give your case trustee documentation of your actual expenses, and you must show that the additional amount claimed is reasonable and necessary.

29. **Education expenses for dependent children who are younger than 18.** The monthly expenses (not more than $156.25* per child) that you pay for your dependent children who are younger than 18 years old to attend a private or public elementary or secondary school. $_____

You must give your case trustee documentation of your actual expenses, and you must explain why the amount claimed is reasonable and necessary and not already accounted for in lines 6-23.

* Subject to adjustment on 4/01/16, and every 3 years after that for cases begun on or after the date of adjustment.

30. **Additional food and clothing expense.** The monthly amount by which your actual food and clothing expenses are higher than the combined food and clothing allowances in the IRS National Standards. That amount cannot be more than 5% of the food and clothing allowances in the IRS National Standards. $_____

To find a chart showing the maximum additional allowance, go online using the link specified in the separate instructions for this form. This chart may also be available at the bankruptcy clerk's office.

You must show that the additional amount claimed is reasonable and necessary.

31. **Continuing charitable contributions.** The amount that you will continue to contribute in the form of cash or financial instruments to a religious or charitable organization. 26 U.S.C. § 170(c)(1)-(2). $_____

32. **Add all of the additional expense deductions.** $_____

Add lines 25 through 31.

Deductions for Debt Payment

33. **For debts that are secured by an interest in property that you own, including home mortgages, vehicle loans, and other secured debt, fill in lines 33a through 33g.**

To calculate the total average monthly payment, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Then divide by 60.

		Average monthly payment
Mortgages on your home:		
33a. Copy line 9b here	➔	$_____
Loans on your first two vehicles:		
33b. Copy line 13b here.	➔	$_____
33c. Copy line 13e here.	➔	$_____

Name of each creditor for other secured debt	Identify property that secures the debt	Does payment include taxes or insurance?	
33d. _____	_____	❑ No ❑ Yes	$_____
33e. _____	_____	❑ No ❑ Yes	$_____
33f. _____	_____	❑ No ❑ Yes	+ $_____
33g. Total average monthly payment. Add lines 33a through 33f.			$_____

Copy total here➔ $_____

34. **Are any debts that you listed in line 33 secured by your primary residence, a vehicle, or other property necessary for your support or the support of your dependents?**

❑ No. Go to line 35.

❑ Yes. State any amount that you must pay to a creditor, in addition to the payments listed in line 33, to keep possession of your property (called the *cure amount*). Next, divide by 60 and fill in the information below.

Name of the creditor	Identify property that secures the debt	Total cure amount		Monthly cure amount
_____	_____	$_____	÷ 60 =	$_____
_____	_____	$_____	÷ 60 =	$_____
_____	_____	$_____	÷ 60 =	+ $_____
			Total	$_____

Copy total here➔ $_____

35. **Do you owe any priority claims such as a priority tax, child support, or alimony — that are past due as of the filing date of your bankruptcy case?** 11 U.S.C. § 507.

❑ No. Go to line 36.

❑ Yes. Fill in the total amount of all of these priority claims. Do not include current or ongoing priority claims, such as those you listed in line 19.

Total amount of all past-due priority claims ..... $_____ ÷ 60 = $_____

36. **Are you eligible to file a case under Chapter 13?** 11 U.S.C. § 109(e).
For more information, go online using the link for *Bankruptcy Basics* specified in the separate instructions for this form. *Bankruptcy Basics* may also be available at the bankruptcy clerk's office.

❑ No. Go to line 37.

❑ Yes. Fill in the following information.

Projected monthly plan payment if you were filing under Chapter 13 $_____

Current multiplier for your district as stated on the list issued by the Administrative Office of the United States Courts (for districts in Alabama and North Carolina) or by the Executive Office for United States Trustees (for all other districts). x _____

To find a list of district multipliers that includes your district, go online using the link specified in the separate instructions for this form. This list may also be available at the bankruptcy clerk's office.

Average monthly administrative expense if you were filing under Chapter 13 $_____ **Copy total here➔** $_____

37. **Add all of the deductions for debt payment.**
Add lines 33g through 36. $_____

Total Deductions from Income

38. **Add all of the allowed deductions.**

Copy line 24, *All of the expenses allowed under IRS expense allowances*..... $_____

Copy line 32, *All of the additional expense deductions*..... $_____

Copy line 37, *All of the deductions for debt payment*..... + $_____

Total deductions $_____ **Copy total here ➔** $_____

Part 3: Determine Whether There Is a Presumption of Abuse

39. **Calculate monthly disposable income for 60 months**

39a. Copy line 4, *adjusted current monthly income*..... $_____

39b. Copy line 38, *Total deductions*..... − $_____

39c. Monthly disposable income. 11 U.S.C. § 707(b)(2). Subtract line 39b from line 39a. $_____ **Copy line 39c here➔** $_____

For the next 60 months (5 years)..... x 60

39d. **Total**. Multiply line 39c by 60. ..... 39d. $_____ **Copy line 39d here➔** $_____

40. **Find out whether there is a presumption of abuse.** Check the box that applies:

❑ **The line 39d is less than $7,475*.** On the top of page 1 of this form, check box 1, *There is no presumption of abuse.* Go to Part 5.

❑ **The line 39d is more than $12,475*.** On the top of page 1 of this form, check box 2, *There is a presumption of abuse.* You may fill out Part 4 if you claim special circumstances. Then go to Part 5.

❑ **The line 39d is at least $7,475*, but not more than $12,475*.** Go to line 41.

* Subject to adjustment on 4/01/16, and every 3 years after that for cases filed on or after the date of adjustment.

41. 41a. **Fill in the amount of your total nonpriority unsecured debt.** If you filled out *A Summary of Your Assets and Liabilities and Certain Statistical Information Schedules* (Official Form 6), you may refer to line 5 on that form.

41a. $_____

x .25

41b. **25% of your total nonpriority unsecured debt.** 11 U.S.C. § 707(b)(2)(A)(i)(I)
Multiply line 41a by 0.25.

$_____ **Copy here➔** $_____

42. **Determine whether the income you have left over after subtracting all allowed deductions is enough to pay 25% of your unsecured, nonpriority debt.**
Check the box that applies:

❑ **Line 39d is less than line 41b.** On the top of page 1 of this form, check box 1, *There is no presumption of abuse.* Go to Part 5.

❑ **Line 39d is equal to or more than line 41b.** On the top of page 1 of this form, check box 2, *There is a presumption of abuse.* You may fill out Part 4 if you claim special circumstances. Then go to Part 5.

Part 4: Give Details About Special Circumstances

43. **Do you have any special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative?** 11 U.S.C. § 707(b)(2)(B).

❑ No. Go to Part 5.

❑ Yes. Fill in the following information. All figures should reflect your average monthly expense or income adjustment for each item. You may include expenses you listed in line 25.

You must give a detailed explanation of the special circumstances that make the expenses or income adjustments necessary and reasonable. You must also give your case trustee documentation of your actual expenses or income adjustments.

Give a detailed explanation of the special circumstances	Average monthly expense or income adjustment
_____	$_____
_____	$_____
_____	$_____
_____	$_____

Part 5: Sign Below

By signing here, I declare under penalty of perjury that the information on this statement and in any attachments is true and correct.

✘ _____
Signature of Debtor 1

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

Date _____
MM / DD / YYYY

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❒ Check if this is an amended filing

Official Form 22B

Chapter 11 Statement of Your Current Monthly Income

12/14

You must file this form if you are an individual and are filing for bankruptcy under Chapter 11. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).

Part 1: Calculate Your Average Monthly Income

1. **What is your marital and filing status?** Check one only.

   ❑ **Not married.** Fill out Column A, lines 2-11.

   ❑ **Married and your spouse is filing with you.** Fill out both Columns A and B, lines 2-11.

   ❑ **Married and your spouse is NOT filing with you.** Fill out Column A, lines 2-11.

Fill in the average monthly income that you received from all sources, derived during the 6 full months before you file this bankruptcy case. 11 U.S.C. § 101(10A). For example, if you are filing on September 15, the 6-month period would be March 1 through August 31. If the amount of your monthly income varied during the 6 months, add the income for all 6 months and divide the total by 6. Fill in the result.
Do not include any income amount more than once. For example, if both spouses own the same rental property, put the income from that property in one column only. If you have nothing to report for any line, write $0 in the space.

			Column A **Debtor 1**	*Column B* **Debtor 2**
2. **Your gross wages, salary, tips, bonuses, overtime, and commissions** (before all payroll deductions).			$_____	$_____
3. **Alimony and maintenance payments.** Do not include payments from a spouse if Column B is filled in.			$_____	$_____
4. **All amounts from any source which are regularly paid for household expenses of you or your dependents, including child support.** Include regular contributions from an unmarried partner, members of your household, your dependents, parents, and roommates. Include regular contributions from a spouse only if Column B is not filled in. Do not include payments you listed on line 3.			$_____	$_____
5. **Net income from operating a business, profession, or farm**				
Gross receipts (before all deductions)	$_____			
Ordinary and necessary operating expenses	− $_____			
Net monthly income from a business, profession, or farm	$_____	**Copy here➔**	$_____	$_____
6. **Net income from rental and other real property**				
Gross receipts (before all deductions)	$_____			
Ordinary and necessary operating expenses	− $_____			
Net monthly income from rental or other real property	$_____	**Copy here➔**	$_____	$_____

	Column A Debtor 1	Column B Debtor 2
7. **Interest, dividends, and rovalties**	$_____	$_____
8. **Unemployment compensation**	$_____	$_____
Do not enter the amount if you contend that the amount received was a benefit under the Social Security Act. Instead, list it here: ..... ➔		
For you ..... $_____		
For your spouse..... $_____		
9. **Pension or retirement income.** Do not include any amount received that was a benefit under the Social Security Act.	$_____	$_____
10. **Income from all other sources not listed above.** Specify the source and amount. Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, a crime against humanity, or international or domestic terrorism. If necessary, list other sources on a separate page and put the total on line 10c.		
10a. _____	$_____	$_____
10b. _____	$_____	$_____
10c. Total amounts from separate pages, if any.	+ $_____	+ $_____
11. **Calculate your total average monthly income.** Add lines 2 through 10 for each column. Then add the total for Column A to the total for Column B.	$_____ +	$_____ = $_____ **Total average monthly income**

Part 2: Deduct any applicable marital adjustment

12. **Copy your total average monthly income from line 11.** $_____

13. **Calculate the marital adjustment.** Check one:

- ❑ You are not married. Fill in 0 in line 13d.
- ❑ You are married and your spouse is filing with you. Fill in 0 in line 13d.
- ❑ You are married and your spouse is not filing with you.
  Fill in the amount of the income listed in line 11, Column B, that was NOT regularly paid for the household expenses of you or your dependents, such as payment of the spouse's tax liability or the spouse's support of someone other than you or your dependents.

  In lines 13a-c, specify the basis for excluding this income and the amount of income devoted to each purpose. If necessary, list additional adjustments on a separate page.

  If this adjustment does not apply, enter 0 on line 13d.

13a. _____	$_____
13b. _____	$_____
13c. _____	+ $_____
13d. Total	$_____ Copy here. ➔ 13d. − _____

14. **Your current monthly income.** Subtract line 13d from line 12. 14. $ _____

Part 3: Sign Below

By signing here, under penalty of perjury I declare that the information on this statement and in any attachments is true and correct.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date_____
MM / DD / YYYY

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Check as directed in lines 17 and 21:

According to the calculations required by this Statement:

❑ 1. Disposable income is not determined under 11 U.S.C. § 1325(b)(3).

❑ 2. Disposable income is determined under 11 U.S.C. § 1325(b)(3).

❑ 3. The commitment period is 3 years.

❑ 4. The commitment period is 5 years.

❑ Check if this is an amended filing

Official Form 22C–1

Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period

12/14

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for being accurate. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).

Part 1: Calculate Your Average Monthly Income

1. **What is your marital and filing status?** Check one only.
   - ❑ **Not married.** Fill out Column A, lines 2-11.
   - ❑ **Married.** Fill out both Columns A and B, lines 2-11.

Fill in the average monthly income that you received from all sources, derived during the 6 full months before you file this bankruptcy case. 11 U.S.C. § 101(10A). For example, if you are filing on September 15, the 6-month period would be March 1 through August 31. If the amount of your monthly income varied during the 6 months, add the income for all 6 months and divide the total by 6. Fill in the result. Do not include any income amount more than once. For example, if both spouses own the same rental property, put the income from that property in one column only. If you have nothing to report for any line, write $0 in the space.

			Column A **Debtor 1**	*Column B* **Debtor 2 or non-filing spouse**
2. **Your gross wages, salary, tips, bonuses, overtime, and commissions** (before all payroll deductions).			$_____	$_____
3. **Alimony and maintenance payments.** Do not include payments from a spouse if Column B is filled in.			$_____	$_____
4. **All amounts from any source which are regularly paid for household expenses of you or your dependents, including child support.** Include regular contributions from an unmarried partner, members of your household, your dependents, parents, and roommates. Include regular contributions from a spouse only if Column B is not filled in. Do not include payments you listed on line 3.			$_____	$_____
5. **Net income from operating a business, profession, or farm**				
Gross receipts (before all deductions)	$_____			
Ordinary and necessary operating expenses	− $_____			
Net monthly income from a business, profession, or farm	$_____	**Copy here➔**	$_____	$_____
6. **Net income from rental and other real property**				
Gross receipts (before all deductions)	$_____			
Ordinary and necessary operating expenses	− $_____			
Net monthly income from rental or other real property	$_____	**Copy here➔**	$_____	$_____

	Column A Debtor 1	Column B Debtor 2 or non-filing spouse
7. **Interest, dividends, and royalties**	$_____	$_____
8. **Unemployment compensation**	$_____	$_____
Do not enter the amount if you contend that the amount received was a benefit under the Social Security Act. Instead, list it here: ..... ➔		
For you ..... $_____		
For your spouse ..... $_____		
9. **Pension or retirement income.** Do not include any amount received that was a benefit under the Social Security Act.	$_____	$_____
10. **Income from all other sources not listed above.** Specify the source and amount. Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, a crime against humanity, or international or domestic terrorism. If necessary, list other sources on a separate page and put the total on line 10c.		
10a. _____	$_____	$_____
10b. _____	$_____	$_____
10c. Total amounts from separate pages, if any.	+ $_____	+ $_____
11. **Calculate your total average monthly income.** Add lines 2 through 10 for each column. Then add the total for Column A to the total for Column B.	$_____ +	$_____ = $_____ Total average monthly income

Part 2: Determine How to Measure Your Deductions from Income

12. **Copy your total average monthly income from line 11.** ..... $_____

13. **Calculate the marital adjustment.** Check one:

- ❑ You are not married. Fill in 0 in line 13d.
- ❑ You are married and your spouse is filing with you. Fill in 0 in line 13d.
- ❑ You are married and your spouse is not filing with you.
  Fill in the amount of the income listed in line 11, Column B, that was NOT regularly paid for the household expenses of you or your dependents, such as payment of the spouse's tax liability or the spouse's support of someone other than you or your dependents.

  In lines 13a-c, specify the basis for excluding this income and the amount of income devoted to each purpose. If necessary, list additional adjustments on a separate page.

  If this adjustment does not apply, enter 0 on line 13d.

13a. _____ $_____

13b. _____ $_____

13c. _____ + $_____

13d. Total ..... $_____ **Copy here.** ➔ 13d. — _____

14. **Your current monthly income.** Subtract line 13d from line 12. 14. $ _____

15. **Calculate your current monthly income for the year.** Follow these steps:

15a. Copy line 14 here ➔ ..... 15a. $ _____

Multiply line 15a by 12 (the number of months in a year). **x** 12

15b. The result is your current monthly income for the year for this part of the form. 15b. $_____

16. **Calculate the median family income that applies to you.** Follow these steps:

16a. Fill in the state in which you live. _____

16b. Fill in the number of people in your household. _____

16c. Fill in the median family income for your state and size of household. ..... 16c. $_____
To find a list of applicable median income amounts, go online using the link specified in the separate instructions for this form. This list may also be available at the bankruptcy clerk's office.

17. **How do the lines compare?**

17a. ❑ Line 15b is less than or equal to line 16c. On the top of page 1 of this form, check box 1, *Disposable income is not determined under 11 U.S.C. § 1325(b)(3)*. **Go to Part 3.** Do NOT fill out *Calculation of Disposable Income* (Official Form 22C–2).

17b. ❑ Line 15b is more than line 16c. On the top of page 1 of this form, check box 2, *Disposable income is determined under 11 U.S.C. § 1325(b)(3).* **Go to Part 3 and fill out Calculation of Disposable Income (Official Form 22C–2).** On line 39 of that form, copy your current monthly income from line 14 above.

Part 3: Calculate Your Commitment Period Under 11 U.S.C. §1325(b)(4)

18. **Copy your total average monthly income from line 11.** ..... 18. $_____

19. **Deduct the marital adjustment if it applies.** If you are married, your spouse is not filing with you, and you contend that calculating the commitment period under 11 U.S.C. § 1325(b)(4) allows you to deduct part of your spouse's income, copy the amount from line 13d.
If the marital adjustment does not apply, fill in 0 on line 19a. 19a. – $_____

Subtract line 19a from line 18. 19b. $_____

20. **Calculate your current monthly income for the year.** Follow these steps:

20a. Copy line 19b. ..... 20a. $_____

Multiply by 12 (the number of months in a year). x 12

20b. The result is your current monthly income for the year for this part of the form. 20b. $_____

20c. Copy the median family income for your state and size of household from line 16c. ..... $_____

21. **How do the lines compare?**

❑ Line 20b is less than line 20c. Unless otherwise ordered by the court, on the top of page 1 of this form, check box 3, *The commitment period is 3 years*. Go to Part 4.

❑ Line 20b is more than or equal to line 20c. Unless otherwise ordered by the court, on the top of page 1 of this form, check box 4, *The commitment period is 5 years*. Go to Part 4.

Part 4: Sign Below

By signing here, under penalty of perjury I declare that the information on this statement and in any attachments is true and correct.

✘ _____ ✘ _____
Signature of Debtor 1 Signature of Debtor 2

Date _____ Date _____
MM / DD / YYYY MM / DD / YYYY

If you checked 17a, do NOT fill out or file Form 22C–2.

If you checked 17b, fill out Form 22C–2 and file it with this form. On line 39 of that form, copy your current monthly income from line 14 above.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 22C–2

Chapter 13 Calculation of Your Disposable Income

12/14

To fill out this form, you will need your completed copy of *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period* (Official Form 22C–1).

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for being accurate. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).

Part 1: Calculate Your Deductions from Your Income

The Internal Revenue Service (IRS) issues National and Local Standards for certain expense amounts. Use these amounts to answer the questions in lines 6-15. To find the IRS standards, go online using the link specified in the separate instructions for this form. This information may also be available at the bankruptcy clerk's office.

Deduct the expense amounts set out in lines 6-15 regardless of your actual expense. In later parts of the form, you will use some of your actual expenses if they are higher than the standards. Do not include any operating expenses that you subtracted from income in lines 5 and 6 of Form 22C–1, and do not deduct any amounts that you subtracted from your spouse's income in line 13 of Form 22C–1.

If your expenses differ from month to month, enter the average expense.

Note: Line numbers 1-4 are not used in this form. These numbers apply to information required by a similar form used in chapter 7 cases.

5. **The number of people used in determining your deductions from income**
Fill in the number of people who could be claimed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support. This number may be different from the number of people in your household. [ ]

National Standards You must use the IRS National Standards to answer the questions in lines 6-7.

6. **Food, clothing, and other items:** Using the number of people you entered in line 5 and the IRS National Standards, fill in the dollar amount for food, clothing, and other items. $_____

7. **Out-of-pocket health care allowance:** Using the number of people you entered in line 5 and the IRS National Standards, fill in the dollar amount for out-of-pocket health care. The number of people is split into two categories—people who are under 65 and people who are 65 or older—because older people have a higher IRS allowance for health care costs. If your actual expenses are higher than this IRS amount, you may deduct the additional amount on line 22.

People who are under 65 years of age

7a. Out-of-pocket health care allowance per person $_____

7b. Number of people who are under 65 X _____

7c. Subtotal. Multiply line 7a by line 7b. $_____ **Copy line 7c here➔** $_____

People who are 65 years of age or older

7d. Out-of-pocket health care allowance per person $_____

7e. Number of people who are 65 or older X _____

7f. Subtotal. Multiply line 7d by line 7e. $_____ **Copy line 7f here➔** + $_____

7g. **Total**. Add lines 7c and 7f. ..... $_____ **Copy total here➔** ..... 7g. $_____

Local Standards You must use the IRS Local Standards to answer the questions in lines 8-15.

Based on information from the IRS, the U.S. Trustee Program has divided the IRS Local Standard for housing for bankruptcy purposes into two parts:

- **Housing and utilities – Insurance and operating expenses**
- **Housing and utilities – Mortgage or rent expenses**

To answer the questions in lines 8-9, use the U.S. Trustee Program chart. To find the chart, go online using the link specified in the separate instructions for this form. This chart may also be available at the bankruptcy clerk's office.

8. **Housing and utilities – Insurance and operating expenses:** Using the number of people you entered in line 5, fill in the dollar amount listed for your county for insurance and operating expenses. $_____

9. **Housing and utilities – Mortgage or rent expenses:**

9a. Using the number of people you entered in line 5, fill in the dollar amount listed for your county for mortgage or rent expenses. $_____

9b. Total average monthly payment for all mortgages and other debts secured by your home.

To calculate the total average monthly payment, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Next divide by 60.

Name of the creditor	Average monthly payment
_____	$_____
_____	$_____
_____	+ $_____

9b. Total average monthly payment ..... $_____ **Copy line 9b here➔** – $_____ Repeat this amount on line 33a.

9c. Net mortgage or rent expense.

Subtract line 9b (*total average monthly payment*) from line 9a (*mortgage or rent expense*). If this number is less than $0, enter $0. $_____ **Copy 9c here➔** $_____

10. **If you claim that the U.S. Trustee Program's division of the IRS Local Standard for housing is incorrect and affects the calculation of your monthly expenses, fill in any additional amount you claim.** $_____

Explain why: _____

_____

11. **Local transportation expenses:** Check the number of vehicles for which you claim an ownership or operating expense.

- ❑ 0. Go to line 14.
- ❑ 1. Go to line 12.
- ❑ 2 or more. Go to line 12.

12. **Vehicle operation expense:** Using the IRS Local Standards and the number of vehicles for which you claim the operating expenses, fill in the *Operating Costs* that apply for your Census region or metropolitan statistical area. $_____

13. **Vehicle ownership or lease expense:** Using the IRS Local Standards, calculate the net ownership or lease expense for each vehicle below. You may not claim the expense if you do not make any loan or lease payments on the vehicle. In addition, you may not claim the expense for more than two vehicles.

Vehicle 1 **Describe Vehicle 1:** _____
_____

13a. Ownership or leasing costs using IRS Local Standard 13a. $_____

13b. Average monthly payment for all debts secured by Vehicle 1.
Do not include costs for leased vehicles.

To calculate the average monthly payment here and on line 13e, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Then divide by 60.

Name of each creditor for Vehicle 1	Average monthly payment
_____	$_____

Copy13b here➔ — $_____ Repeat this amount on line 33b.

13c. Net Vehicle 1 ownership or lease expense
Subtract line 13b from line 13a. If this number is less than $0, enter $0. 13c. $_____ **Copy net Vehicle 1 expense here➔** $_____

Vehicle 2 **Describe Vehicle 2:** _____
_____

13d. Ownership or leasing costs using IRS Local Standard 13d. $_____

13e. Average monthly payment for all debts secured by Vehicle 2.
Do not include costs for leased vehicles.

Name of each creditor for Vehicle 2	Average monthly payment
_____	$_____

Copy here➔ — $_____ Repeat this amount on line 33c.

13f. Net Vehicle 2 ownership or lease expense
Subtract line 13e from 13d. If this number is less than $0, enter $0. 13f. $_____ **Copy net Vehicle 2 expense here ➔** $_____

14. **Public transportation expense**: If you claimed 0 vehicles in line 11, using the IRS Local Standards, fill in the *Public Transportation* expense allowance regardless of whether you use public transportation. $_____

15. **Additional public transportation expense:** If you claimed 1 or more vehicles in line 11 and if you claim that you may also deduct a public transportation expense, you may fill in what you believe is the appropriate expense, but you may not claim more than the IRS Local Standard for *Public Transportation*. $_____

Other Necessary Expenses In addition to the expense deductions listed above, you are allowed your monthly expenses for the following IRS categories.

16. **Taxes:** The total monthly amount that you actually pay for federal, state and local taxes, such as income taxes, self-employment taxes, social security taxes, and Medicare taxes. You may include the monthly amount withheld from your pay for these taxes. However, if you expect to receive a tax refund, you must divide the expected refund by 12 and subtract that number from the total monthly amount that is withheld to pay for taxes. $_____

    Do not include real estate, sales, or use taxes.

17. **Involuntary deductions:** The total monthly payroll deductions that your job requires, such as retirement contributions, union dues, and uniform costs.

    Do not include amounts that are not required by your job, such as voluntary 401(k) contributions or payroll savings. $_____

18. **Life insurance:** The total monthly premiums that you pay for your own term life insurance. If two married people are filing together, include payments that you make for your spouse's term life insurance.

    Do not include premiums for life insurance on your dependents, for a non-filing spouse's life insurance, or for any form of life insurance other than term. $_____

19. **Court-ordered payments:** The total monthly amount that you pay as required by the order of a court or administrative agency, such as spousal or child support payments. $_____

    Do not include payments on past due obligations for spousal or child support. You will list these obligations in line 35.

20. **Education:** The total monthly amount that you pay for education that is either required:
    - as a condition for your job, or
    - for your physically or mentally challenged dependent child if no public education is available for similar services.

    $_____

21. **Childcare:** The total monthly amount that you pay for childcare, such as babysitting, daycare, nursery, and preschool. Do not include payments for any elementary or secondary school education. $_____

22. **Additional health care expenses, excluding insurance costs:** The monthly amount that you pay for health care that is required for the health and welfare of you or your dependents and that is not reimbursed by insurance or paid by a health savings account. Include only the amount that is more than the total entered in line 7. $_____

    Payments for health insurance or health savings accounts should be listed only in line 25.

23. **Optional telephones and telephone services:** The total monthly amount that you pay for telecommunication services for you and your dependents, such as pagers, call waiting, caller identification, special long distance, or business cell phone service, to the extent necessary for your health and welfare or that of your dependents or for the production of income, if it is not reimbursed by your employer. + $_____

    Do not include payments for basic home telephone, internet or cell phone service. Do not include self-employment expenses, such as those reported on line 5 of Form 22C-1, or any amount you previously deducted.

24. **Add all of the expenses allowed under the IRS expense allowances.**
    Add lines 6 through 23. $_____

Additional Expense Deductions These are additional deductions allowed by the Means Test.
Note: Do not include any expense allowances listed in lines 6-24.

25. **Health insurance, disability insurance, and health savings account expenses.** The monthly expenses for health insurance, disability insurance, and health savings accounts that are reasonably necessary for yourself, your spouse, or your dependents.

    Health insurance $_____

    Disability insurance $_____

    Health savings account + $_____

    Total $_____ **Copy total here➔** ..... $_____

    Do you actually spend this total amount?

    ❑ No. How much do you actually spend? $_____
    ❑ Yes

26. **Continuing contributions to the care of household or family members.** The actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses. $_____

27. **Protection against family violence.** The reasonably necessary monthly expenses that you incur to maintain the safety of you and your family under the Family Violence Prevention and Services Act or other federal laws that apply. $_____

    By law, the court must keep the nature of these expenses confidential.

28. **Additional home energy costs.** Your home energy costs are included in your non-mortgage housing and utilities allowance on line 8.

If you believe that you have home energy costs that are more than the home energy costs included in the non-mortgage housing and utilities allowance, then fill in the excess amount of home energy costs. $_____

You must give your case trustee documentation of your actual expenses, and you must show that the additional amount claimed is reasonable and necessary.

29. **Education expenses for dependent children who are younger than 18.** The monthly expenses (not more than $156.25* per child) that you pay for your dependent children who are younger than 18 years old to attend a private or public elementary or secondary school. $_____

You must give your case trustee documentation of your actual expenses, and you must explain why the amount claimed is reasonable and necessary and not already accounted for in lines 6-23.

* Subject to adjustment on 4/01/16, and every 3 years after that for cases begun on or after the date of adjustment.

30. **Additional food and clothing expense.** The monthly amount by which your actual food and clothing expenses are higher than the combined food and clothing allowances in the IRS National Standards. That amount cannot be more than 5% of the food and clothing allowances in the IRS National Standards. $_____

To find a chart showing the maximum additional allowance, go online using the link specified in the separate instructions for this form. This chart may also be available at the bankruptcy clerk's office.

You must show that the additional amount claimed is reasonable and necessary.

31. **Continuing charitable contributions.** The amount that you will continue to contribute in the form of cash or financial instruments to a religious or charitable organization. 11 U.S.C. § 548(d)3 and (4). + _____

Do not include any amount more than 15% of your gross monthly income.

32. **Add all of the additional expense deductions.** $_____
Add lines 25 through 31.

Deductions for Debt Payment

33. **For debts that are secured by an interest in property that you own, including home mortgages, vehicle loans, and other secured debt, fill in lines 33a through 33g.**

To calculate the total average monthly payment, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Then divide by 60.

			Average monthly payment
Mortgages on your home			
33a. Copy line 9b here ..... ➔			$_____
Loans on your first two vehicles			
33b. Copy line 13b here. ..... ➔			$_____
33c. Copy line 13e here. ..... ➔			$_____
Name of each creditor for other secured debt	**Identify property that secures the debt**	**Does payment include taxes or insurance?**	
33d. _____	_____	❑No ❑Yes	$_____
33e. _____	_____	❑No ❑Yes	$_____
33f. _____	_____	❑No ❑Yes	+ $_____
33g. Total average monthly payment. Add lines 33a through 33f.....			$_____

Copy total here➔ $_____

34. **Are any debts that you listed in line 33 secured by your primary residence, a vehicle, or other property necessary for your support or the support of your dependents?**

❑ No. Go to line 35.
❑ Yes. State any amount that you must pay to a creditor, in addition to the payments listed in line 33, to keep possession of your property (called the *cure amount*). Next, divide by 60 and fill in the information below.

Name of the creditor	Identify property that secures the debt	Total cure amount		Monthly cure amount
_____	_____	$_____	÷ 60 =	$_____
_____	_____	$_____	÷ 60 =	$_____
_____	_____	$_____	÷ 60 = +	$_____
			Total	$_____

Copy total here ➔ $_____

35. **Do you owe any priority claims—such as a priority tax, child support, or alimony— that are past due as of the filing date of your bankruptcy case?** 11 U.S.C. § 507.

❑ No. Go to line 36.
❑ Yes. Fill in the total amount of all of these priority claims. Do not include current or ongoing priority claims, such as those you listed in line 19.

Total amount of all past-due priority claims. ..... $_____ ÷ 60 $_____

36. **Projected monthly Chapter 13 plan payment** $_____

Current multiplier for your district as stated on the list issued by the Administrative Office of the United States Courts (for districts in Alabama and North Carolina) or by the Executive Office for United States Trustees (for all other districts).
To find a list of district multipliers that includes your district, go online using the link specified in the separate instructions for this form. This list may also be available at the bankruptcy clerk's office. x _____

Average monthly administrative expense $_____ **Copy total here** ➔ $_____

37. **Add all of the deductions for debt payment.** Add lines 33g through 36. $_____

Total Deductions from Income

38. **Add all of the allowed deductions.**

Copy line 24, *All of the expenses allowed under IRS expense allowances*..... $_____

Copy line 32, *All of the additional expense deductions*..... $_____

Copy line 37, *All of the deductions for debt payment*..... + $_____

Total deductions $_____ **Copy total here** ➔ $_____

Part 2: Determine Your Disposable Income Under 11 U.S.C. § 1325(b)(2)

39. **Copy your total current monthly income from line 14 of Form 22C-1, *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period*.** ..... $_____

40. **Fill in any reasonably necessary income you receive for support for dependent children.** The monthly average of any child support payments, foster care payments, or disability payments for a dependent child, reported in Part I of Form 22C-1, that you received in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child. $_____

41. **Fill in all qualified retirement deductions.** The monthly total of all amounts that your employer withheld from wages as contributions for qualified retirement plans, as specified in 11 U.S.C. § 541(b)(7) plus all required repayments of loans from retirement plans, as specified in 11 U.S.C. § 362(b)(19). $_____

42. **Total of all deductions allowed under 11 U.S.C. § 707(b)(2)(A)**. Copy line 38 here ..... ➔ $_____

43. **Deduction for special circumstances.** If special circumstances justify additional expenses and you have no reasonable alternative, describe the special circumstances and their expenses. You must give your case trustee a detailed explanation of the special circumstances and documentation for the expenses.

Describe the special circumstances	Amount of expense
43a. _____	$_____
43b. _____	$_____
43c. _____	+ $_____
43d. **Total**. Add lines 43a through 43c.....	$_____ Copy 43d here ➔ + $_____

44. **Total adjustments.** Add lines 40 and 43d. ..... ➔ $_____ Copy total here ➔ − $_____

45. **Calculate your monthly disposable income under § 1325(b)(2).** Subtract line 44 from line 39. $_____

Part 3: Change in Income or Expenses

46. **Change in income or expenses.** If the income in Form 22C-1 or the expenses you reported in this form have changed or are virtually certain to change after the date you filed your bankruptcy petition and during the time your case will be open, fill in the information below. For example, if the wages reported increased after you filed your petition, check 22C-1 in the first column, enter line 2 in the second column, explain why the wages increased, fill in when the increase occurred, and fill in the amount of the increase.

Form	Line	Reason for change	Date of change	Increase or decrease?	Amount of change
❑ 22C–1 ❑ 22C–2	____	_____	_____	❑ Increase ❑ Decrease	$_____
❑ 22C–1 ❑ 22C–2	____	_____	_____	❑ Increase ❑ Decrease	$_____
❑ 22C–1 ❑ 22C–2	____	_____	_____	❑ Increase ❑ Decrease	$_____
❑ 22C–1 ❑ 22C–2	____	_____	_____	❑ Increase ❑ Decrease	$_____

Part 4: Sign Below

By signing here, under penalty of perjury you declare that the information on this statement and in any attachments is true and correct.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

COMMITTEE NOTE

Official Forms 22A-1, 22A-1Supp, 22A-2, 22C-1, and 22C-2 are new versions of the "means test" forms used by individuals in chapter 7 and 13, formerly Official Forms 22A and 22C. The original forms were substantially revised as part of the Forms Modernization Project. Official Form 22B, used by individuals in chapter 11, has also been revised as part of the project, which was designed so that the individuals completing the forms would do so more accurately and completely.

The revised versions of the means test forms present the relevant information in a format different from the original forms. For chapter 7, former Official Form 22A has been split into two forms: 22A-1 and 22A-2. The first form, Official Form 22A-1, *Chapter 7 Statement of Your Current Monthly Income*, is to be completed by all chapter 7 debtors. It calculates a debtor's current monthly income and compares that calculation to the median income for households of the same size in the debtor's state. The second form, Official Form 22A-2, *Chapter 7 Means Test Calculation*, is to be completed only by those chapter 7 debtors whose income is above the applicable state median. The prior version of Official Form 22A was introduced by several questions bearing on the applicability of the means test. Debtors who do not have primarily consumer debts, as well as certain members of the armed forces, are exempt from a presumption of abuse under the means test, and so are excused from completing the form. However, the great majority of individual debtors in chapter 7 do not fall within the exemptions. Accordingly, the exemptions from means testing have been placed in a separate supplement, Official Form 22A-1Supp, that will be filed only where applicable, making Form 22A present the relevant information more directly and in a manner consistent with the parallel chapter 13 form.

For chapter 13, there is a similar split of income and expense calculations. All chapter 13 debtors must complete Official Form 22C-1, *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period*, which calculates current monthly income and the plan commitment period. Debtors only need to complete the second form, Official Form 22C-2, *Chapter13 Calculation of Your Disposable Income*, if their current monthly income exceeds the applicable median. Form 22C-2 calculates disposable income under 11 U.S.C. § 1325(b)(3), through a report of allowed expense deductions.

Line 60 of former Official Form 22C has not been repeated in Official Form 22C-2. This line allowed debtors to list, but not deduct from income, "Other Necessary Expense" items that are not included within the categories specified by the Internal Revenue Service. Because debtors are separately allowed to list—and deduct—any expenses arising from special circumstances, former Line 60 was rarely used.

Form 22C-2 also reflects the Supreme Court's decision in *Hamilton v. Lanning*, 560 U.S. 505 (2010). Adopting a forward-looking approach, the Court held in *Lanning* that the calculation of a chapter 13 debtor's projected disposable income under § 1325(b) required consideration of changes to income or expenses reported elsewhere on former Official Form 22C that, at the time of plan confirmation, had occurred or were virtually certain to occur. Those changes could result in either an increased or decreased projected disposable income. Because only debtors whose annualized current monthly income exceeds the applicable median family income have their projected disposable income determined by the information provided on Official Form 22C-2, only these debtors are required to provide the information about changes to income and expenses on Official Form 22C-2. Part 3 of Official Form 22C-2 provides for the reporting of those changes.

In reporting changes to income a debtor must indicate whether the amounts reported in Official Form 22C-1—which are monthly averages of various types of income received during the six months prior to the filing of the bankruptcy case—have already changed or are virtually certain to change during the pendency of the case. For each change, the debtor must indicate the line of Official Form 22C-1 on which the amount to be changed was reported, the reason for the change, the date of its occurrence, whether the change is an increase or decrease of income, and the amount of the change. Similarly, in reporting changes to expenses, a debtor must list changes to the debtor's actual expenditures reported in Part 1 of Official Form 22C-2 that are virtually certain to occur while the case is pending. With respect to the deductible amounts reported in Part 1 that are determined by the IRS national and local standards, only changed amounts that result from changed circumstances in the debtor's life—such as the addition of a family member or the surrender of a vehicle—should be reported. For each change in expenses, the same information required to be provided for income changes must be reported.

Unlike former Official Forms 22A and 22C, Official Forms 22A-2 and 22C-2 permit, at line 23, the deduction of cell phone

expenses necessary for the production of income if those expenses have not been reimbursed by the debtor's employer or deducted by the debtor in calculating net self-employment income. The same line also states that expenses for internet service may be deducted as a telecommunication services expense only if necessary for the production of income. Under IRS guidelines adopted in 2011, expenses for home internet service used for other purposes are included in the Local Standards for Housing and Utilities—Insurance and Operating Expenses. Also, Official Forms 22A-2 and 22C-2 now provide, at line 18, for deductions of the premiums paid by one jointly filing debtor on term life insurance policies of the other joint debtor as well as for premium payments on the debtor's own policies.

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

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EVIDENCE RULES

MEMORANDUM

TO: **Judge Jeffrey Sutton**
Chair, Standing Committee on Rules of Practice and Procedure

FROM: **Judge David G. Campbell**
Chair, Advisory Committee on Federal Rules of Civil Procedure

RE: **Proposed Amendments to the Federal Rules of Civil Procedure**

DATE: **June 14, 2014**

Over the course of the last four years, the Advisory Committee on the Federal Rules of Civil Procedure has developed, published, and refined a set of proposed amendments that will implement conclusions reached at a May 2010 Conference on Civil Litigation held at Duke University Law School. The Committee has also proposed and published amendments that would abrogate Rule 84 and the forms appended to the civil rules, and make a modest change to Rule 55. Final versions of the proposals were approved unanimously by the Committee at its meeting in Portland, Oregon on April 10-11, 2014, and approved unanimously by the Standing Committee at its meeting in Washington, D.C. on May 29-30, 2014.

This report explains the proposed amendments. The text of the proposed rules and the proposed Advisory Committee Notes immediately follow this report. The Committee respectfully requests that you forward the proposed amendments for consideration by the Judicial Conference, the Supreme Court, and Congress.

I. THE DUKE CONFERENCE.

The 2010 Duke Conference was organized by the Committee for the specific purpose of examining the state of civil litigation in federal courts and exploring better means to achieve Rule 1's goal of the just, speedy, and inexpensive determination of every action. The Committee invited 200 participants to attend, and all but one accepted. Participants were selected to ensure diverse views and expertise, and included trial and appellate judges from federal and state courts; plaintiff, defense, and public interest lawyers; in-house counsel from governments and corporations; and many law professors. Empirical studies were conducted in advance of the conference by the Federal Judicial Center ("FJC"), bar associations, private and public interest research groups, and academics. More than seventy judges, lawyers, and academics made presentations to the conference, followed by a broad-ranging discussion among all participants. The Conference was streamed live by the FJC.

The conference planning committee and its chair, Judge John Koeltl of the Southern District of New York, spent more than one year assembling the panels and commissioning, coordinating, and reviewing the empirical studies and papers. Materials prepared for the Conference can be found at http://www.uscourts.gov, and include more than 40 papers, 80 presentations, and 25 compilations of empirical research. The Duke Law Review published some of the papers in Volume 60, Number 3 (December 2010).

The Conference concluded that federal civil litigation works reasonably well –major restructuring of the system is not needed. There was near-unanimous agreement, however, that the disposition of civil actions could be improved by advancing cooperation among parties, proportionality in the use of available procedures, and early judicial case management. A panel on e-discovery unanimously recommended that the Committee draft a rule to deal with the preservation and loss of electronically stored information ("ESI").

Following the conference, the Committee created a Duke Subcommittee, chaired by Judge Koeltl, to consider recommendations made during the Duke Conference. The Committee also assigned the existing Discovery Subcommittee to draft a rule addressing the preservation and loss of ESI. The work of these subcommittees led to two categories of proposed amendments discussed below: the Duke proposals drafted by the Duke Subcommittee, and proposed new Rule 37(e) drafted by the Discovery Subcommittee. The proposed abrogation of Rule 84 and the proposed amendment to Rule 55 were developed independently of the Duke Conference initiatives.

This report will discuss separately the Duke proposals, proposed Rule 37(e), the abrogation of Rule 84, and the amendment to Rule 55. Additional insight can be gained by reviewing the proposed rule language and committee notes in the Appendix.

II. THE DUKE PROPOSALS.

In a report to the Chief Justice following the Duke Conference, the Committee provided this summary of key conference conclusions: "What is needed can be described in two words – cooperation and proportionality – and one phrase – sustained, active, hands-on judicial case

management." Since the conference, the Committee and others have sought to promote cooperation, proportionality, and active judicial case management through several means.

First, the FJC has sought to develop enhanced education programs. Among other measures, in 2013 the FJC published a new Benchbook for Federal District Court Judges with a new, comprehensive chapter on judicial case management written with substantial input from members of the Committee and the Standing Committee.

Second, the Committee and the National Employment Lawyers Association ("NELA") worked cooperatively with the Institute for Advancement of the American Legal System ("IAALS") to develop protocols for initial disclosures in employment cases. The protocols were developed by a team of experienced plaintiff and defense lawyers and include substantial mandatory disclosures required of both sides at the beginning of employment cases. The protocols are now being used by more than 50 federal district judges. The FJC and the Committee intend to monitor this pilot program and other innovative changes made in several state and federal courts.

Third, the Committee developed proposed rule amendments through the Duke Subcommittee. The Subcommittee began with a list of proposals made at the Duke Conference and held numerous conference calls, circulated drafts of proposed rules, and sponsored a mini-conference with 25 invited judges, lawyers, and law professors to discuss possible rule amendments. The Subcommittee presented recommendations for full discussion by the Committee and the Standing Committee during meetings held in 2011, 2012, and 2013.

The proposed Duke amendments were published as a package in August 2013 along with the other proposed amendments discussed in this report. More than 2,300 written comments were received and more than 120 witnesses appeared and addressed the Committee in public hearings held in Washington, D.C., Phoenix, and Dallas. Following the public comment process, the Subcommittee withdrew some proposals, amended others, and proposed the package of amendments discussed below.

We believe that this process has resulted in fully-informed rulemaking at its best. The original Duke Conference, the lengthy and detailed deliberations of the Duke Subcommittee, the mini-conference held by the Subcommittee, repeated reviews of the proposals by the full Committee and the Standing Committee, and the vigorous public comment process have provided a sound basis for proposing changes to the civil rules.

Rather than discuss the proposed Duke amendments in numerical rule order, this report will address the discovery proposals, followed by proposals on judicial case management and cooperation.

A. Discovery Proposals.

1. Withdrawn Proposals.

The proposals published last August sought to encourage more active case management and advance the proportional use of discovery by amending the presumptive numerical limits on discovery. The intent was to promote efficiency and prompt a discussion early in each case about the amount of discovery needed to resolve the dispute. Under these proposals, Rules 30 and 31 would have been amended to reduce from 10 to 5 the presumptive number of depositions permitted for plaintiffs, defendants, and third-party defendants; Rule 30(d) would have been amended to reduce the presumptive time limit for an oral deposition from 7 hours to 6 hours; Rule 33 would have been amended to reduce from 25 to 15 the presumptive number of interrogatories a party may serve on any other party; and a presumptive limit of 25 would have been introduced for requests to admit under Rule 36, excluding requests to admit the genuineness of documents.

These proposals received some support in the public comment process, but they also encountered fierce resistance. Many expressed fear that the new presumptive limits would become hard limits in some courts and would deprive parties of the evidence needed to prove their claims or defenses. Some asserted that many types of cases, including cases that seek relatively modest monetary recoveries, require more than 5 depositions. Fears were expressed that opposing parties could not be relied upon to recognize and agree to the reasonable number needed; that agreement among the parties might require unwarranted trade-offs in other areas; and that the showing now required to justify an 11th or 12th deposition would be needed to justify a 6th or 7th deposition, reducing the overall number of depositions permitted under the rules.

After reviewing the public comments, the Subcommittee and Committee decided to withdraw these recommendations. The intent of the proposals was never to limit discovery unnecessarily, but many worried that the changes would have that effect. The Committee concluded that it could promote the goals of proportionality and effective judicial case management through other proposed rule changes, such as the renewed emphasis on proportionality and steps to promote earlier and more informed case management, without raising the concerns spawned by the new presumptive limits.

2. Amendments to Rule 26(b)(1): Four Elements.

The proposed amendments to Rule 26(b)(1) include four elements: (1) the factors included in present Rule 26(b)(2)(C)(iii) are moved up to become part of the scope of discovery in Rule 26(b)(1), identifying elements to be considered in determining whether discovery is proportional to the needs of the case; (2) language regarding the discovery of sources of information is removed as unnecessary; (3) the distinction between discovery of information relevant to the parties' claims or defenses and discovery of information relevant to the subject matter of the action, on a showing of good cause, is eliminated; (4) the sentence allowing discovery of information "reasonably calculated to lead to the discovery of admissible evidence" is rewritten. Each proposal will be discussed separately.

a. Scope of Discovery: Proportionality.

There was widespread agreement at the Duke Conference that discovery should be proportional to the needs of the case, but subsequent discussions at the mini-conference sponsored by the Subcommittee revealed significant discomfort with simply adding the word "proportional" to Rule 26(b)(1). Standing alone, the phrase seemed too open-ended, too dependent on the eye of the beholder. To provide clearer guidance, the Subcommittee recommended that the factors already prescribed by Rule 26(b)(2)(C)(iii), which currently are incorporated by cross-reference in Rule 26(b)(1), be relocated to Rule 26(b)(1) and included in the scope of discovery. Under this amendment, the first sentence of Rule 26(b)(1) would read as follows:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.[1]

This proposal produced a division in the public comments. Many favored the proposal. They asserted that costs of discovery in civil litigation are too often out of proportion to the issues at stake in the litigation, resulting in cases not being filed or settlements made to avoid litigation costs regardless of the merits. They stated that disproportionate litigation costs bar many from access to federal courts and have resulted in a flight to other dispute resolution fora such as arbitration. They noted that the proportionality factors currently found in Rule 26(b)(2)(C)(iii) often are overlooked by courts and litigants, and that the proposed relocation of those factors to Rule 26(b)(1) will help achieve the just, speedy, and inexpensive determination of every action.

Many others saw proportionality as a new limit that would favor defendants. They criticized the factors from Rule 26(b)(2)(C)(iii) as subjective and so flexible as to defy uniform application. They asserted that "proportionality" will become a new blanket objection to all discovery requests. They were particularly concerned that proportionality would impose a new burden on the requesting party to justify each and every discovery request. Some argued that the proposed change is a solution in search of a problem – that discovery in civil litigation already is proportional to the needs of cases.

After considering these public comments carefully, the Committee remains convinced that transferring the Rule 26(b)(2)(C)(iii) factors to the scope of discovery, with some

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[1]The current version of this language in Rule 26(b)(2)(C)(iii) reads as follows: "On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: . . . (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues."

modifications as described below, will improve the rules governing discovery. The Committee reaches this conclusion for three primary reasons.

Findings from the Duke Conference.

As already noted, a principal conclusion of the Duke Conference was that discovery in civil litigation would more often achieve the goals of Rule 1 through an increased emphasis on proportionality. This conclusion was expressed often by speakers and panels at the conference and was supported by a number of surveys. In its report to the Chief Justice, the Committee observed that "[o]ne area of consensus in the various surveys . . . was that district or magistrate judges must be considerably more involved in managing each case from the outset, to tailor the motions practice and shape the discovery to the reasonable needs of the case."

The FJC prepared a closed-case survey for the Duke Conference. The survey questioned lawyers in 3,550 cases terminated in federal district courts for the last quarter of 2008. Although the survey found that a majority of lawyers thought the discovery in their case generated the "right amount" of information, and more than half reported that the costs of discovery were the "right amount" in proportion to their clients' stakes in the case, a quarter of attorneys viewed discovery costs in their cases as too high relative to their clients' stakes in the case. A little less than a third reported that discovery costs increased or greatly increased the likelihood of settlement, or caused the case to settle, with that number increasing to 35.5% of plaintiff attorneys and 39.9% of defendant attorneys in cases that actually settled. On the question of whether the cost of litigating in federal court, including the cost of discovery, had caused at least one client to settle a case that would not have settled but for the cost, those representing primarily defendants and those representing both plaintiffs and defendants agreed or strongly agreed 58.2% and 57.8% of the time, respectively, and those representing primarily plaintiffs agreed or strongly agreed 38.6% of the time. The FJC study revealed agreement among lawyers representing plaintiffs and defendants that the rules should be revised to enforce discovery obligations more effectively.

Other surveys prepared for the Duke Conference showed greater dissatisfaction with the costs of civil discovery. In surveys of lawyers from the American College of Trial Lawyers ("ACTL"), the ABA Section of Litigation, and NELA, more lawyers agreed than disagreed with the proposition that judges do not enforce Rule 26(b)(2)(C) to limit discovery. The ACTL Task Force on Discovery and IAALS reported on a survey of ACTL fellows, who generally tend to be more experienced trial lawyers than those in other groups. A primary conclusion from the survey was that today's civil litigation system takes too long and costs too much, resulting in some deserving cases not being filed and others being settled to avoid the costs of litigation. Almost half of the ACTL respondents believed that discovery is abused in almost every case, with responses being essentially the same for both plaintiff and defense lawyers. The report reached this conclusion: "Proportionality should be the most important principle applied to all discovery."

Surveys of ABA Section of Litigation and NELA attorneys found more than 80% agreement that discovery costs are disproportionately high in small cases, with more than 40% of respondents saying they are disproportionate in large cases. In the survey of the ABA Section of

Litigation, 78% percent of plaintiffs' attorneys, 91% of defense attorneys, and 94% of mixed-practice attorneys agreed that litigation costs are not proportional to the value of small cases, with 33% of plaintiffs' lawyers, 44% of defense lawyers, and 41% of mixed-practice lawyers agreeing that litigation costs are not proportional in large cases. In the NELA survey, which included primarily plaintiffs' lawyers, more than 80% said that litigation costs are not proportional to the value of small cases, with a fairly even split on whether they are proportional to the value of large cases. An IAALS survey of corporate counsel found 90% agreement with the proposition that discovery costs in federal court are not generally proportional to the needs of the case, and 80% disagreement with the suggestion that outcomes are driven more by the merits than by costs. In its report summarizing the results of some of the Duke empirical research, IAALS noted that between 61% and 76% of the respondents in the ABA, ACTL, and NELA surveys agreed that judges do not enforce the rules' existing proportionality limitations on their own.

The History of Proportionality in Rule 26.

The proportionality factors to be moved to Rule 26(b)(1) are not new. Most of them were added to Rule 26 in 1983 and originally resided in Rule 26(b)(1). The Committee's original intent was to promote more proportional discovery, as made clear in the 1983 Committee Note which explained that the change was intended "to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry," and "to encourage judges to be more aggressive in identifying and discouraging discovery overuse." The 1983 amendments also added Rule 26(g), which now provides that a lawyer's signature on a discovery request, objection, or response constitutes a certification that it is "neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action." The 1983 amendments thus made proportionality a consideration for courts in limiting discovery and for lawyers in issuing and responding to discovery requests.

The proportionality factors were moved to Rule 26(b)(2)(C) in 1993 when section (b)(1) was divided, but their constraining influence on discovery remained important in the eyes of the Committee. The 1993 amendments added two new factors: whether "the burden or expense of the proposed discovery outweighs its likely benefit," and "the importance of the proposed discovery in resolving the issues." The 1993 Committee Note stated that "[t]he revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery[.]"

The proportionality factors were again addressed by the Committee in 2000. Rule 26(b)(1) was amended to state that "[a]ll discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii) [now Rule 26(b)(2)(C)]." The 2000 Committee Note explained that courts were not using the proportionality limitations as originally intended, and that "[t]his otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery."

As this summary illustrates, three previous Civil Rules Committees in three different decades have reached the same conclusion as the current Committee – that proportionality is an important and necessary feature of civil litigation in federal courts. And yet one of the primary conclusions of comments and surveys at the 2010 Duke Conference was that proportionality is still lacking in too many cases. The previous amendments have not had their desired effect. The Committee's purpose in returning the proportionality factors to Rule 26(b)(1) is to make them an explicit component of the scope of discovery, requiring parties and courts alike to consider them when pursuing discovery and resolving discovery disputes.

Adjustments to the 26(b)(1) Proposal.

The Committee considered carefully the concerns expressed in public comments: that the move will shift the burden of proving proportionality to the party seeking discovery, that it will provide a new basis for refusing to provide discovery, and that it will increase litigation costs. None of these predicted outcomes is intended, and the proposed Committee Note has been revised to address them. The Note now explains that the change does not place a burden of proving proportionality on the party seeking discovery and explains how courts should apply the proportionality factors. The Note also states that the change does not authorize boilerplate refusals to provide discovery on the ground that it is not proportional, but should instead prompt a dialogue among the parties and, if necessary, the court, concerning the amount of discovery reasonably needed to resolve the case. The Committee remains convinced that the proportionality considerations will not increase the costs of litigation. To the contrary, the Committee believes that more proportional discovery will decrease the cost of resolving disputes without sacrificing fairness.

In response to public comments, the Committee also reversed the order of the initial proportionality factors to refer first to "the importance of the issues at stake" and second to "the amount in controversy." This rearrangement adds prominence to the importance of the issues and avoids any implication that the amount in controversy is the most important concern. The Committee Note was also expanded to emphasize that courts should consider the private and public values at issue in the litigation – values that cannot be addressed by a monetary award. The Note discussion draws heavily on the Committee Note from 1983 to show that, from the beginning, the rule has been framed to recognize the importance of nonmonetary remedies and to ensure that parties seeking such remedies have sufficient discovery to prove their cases.

Also in response to public comments, the Committee added a new factor: "the parties' relative access to relevant information." This factor addresses the reality that some cases involve an asymmetric distribution of information. Courts should recognize that proportionality in asymmetric cases will often mean that one party must bear greater burdens in responding to discovery than the other party bears.

With these adjustments, the Committee believes that moving the factors from Rule 26(b)(2)(C) to Rule 26(b)(1) will satisfy the need for proportionality in more civil cases, as identified in the Duke Conference, while avoiding the concerns expressed in some public comments.

b. Discovery of Information in Aid of Discovery.

Rule 26(b)(1) now provides that discoverable matters include "the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter." The Committee believes that these words are no longer necessary. The discoverability of such information is well established. Because Rule 26 is more than twice as long as the next longest civil rule, the Committee believes that removing excess language is a positive step.

Some public comments expressed doubt that discovery of these matters is so well entrenched that the language is no longer needed. They urged the Committee to make clear in the Committee Note that this kind of discovery remains available. The Note has been revised to make this point.

c. Subject-Matter Discovery.

Before 2000, Rule 26(b)(1) provided for discovery of information "relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party." Responding to repeated suggestions that discovery should be confined to the parties' claims or defenses, the Committee amended Rule 26(b)(1) in 2000 to narrow the scope of discovery to matters "relevant to any party's claim or defense," but preserved subject-matter discovery upon a showing of good cause. The 2000 Committee Note explained that the change was "designed to involve the court more actively in regulating the breadth of sweeping or contentious discovery."

The Committee proposes that the reference to broader subject matter discovery, available upon a showing of good cause, be deleted. In the Committee's experience, the subject matter provision is virtually never used, and the proper focus of discovery is on the claims and defenses in the litigation.

Only a small portion of the public comments addressed this proposal, with a majority favoring it. The Committee Note includes three examples from the 2000 Note of information that would remain discoverable as relevant to a claim or defense: other incidents similar to those at issue in the litigation, information about organizational arrangements or filing systems, and information that could be used to impeach a likely witness. The Committee Note also recognizes that if discovery relevant to the pleaded claims or defenses reveals information that would support new claims or defenses, the information can be used to support amended pleadings.

d. "Reasonably calculated to lead."

The final proposed change in Rule 26(b)(1) deletes the sentence which reads: "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." The proposed amendment would replace this sentence with the following language: "Information within this scope of discovery need not be admissible in evidence to be discoverable."

This change is intended to curtail reliance on the "reasonably calculated" phrase to define the scope of discovery. The phrase was never intended to have that purpose. The "reasonably calculated" language was added to the rules in 1946 because parties in depositions were objecting to relevant questions on the ground that the answers would not be admissible at trial. Inadmissibility was used to bar relevant discovery. The 1946 amendment sought to stop this practice with this language: "It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."

Recognizing that the sentence had this original intent and was never designed to define the scope of discovery, the Committee amended the sentence in 2000 to add the words "relevant information" at the beginning: "*Relevant information* need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." The Committee Note explained that "relevant means within the scope of discovery as defined in this subdivision [(b)(1)]." Thus, the "reasonably calculated" phrase applies only to information that is otherwise within the scope of discovery set forth in Rule 26(b)(1); it does not broaden the scope of discovery. As the 2000 Committee Note explained, any broader reading of "reasonably calculated" "might swallow any other limitation on the scope of discovery."

Despite the original intent of the sentence and the 2000 clarification, lawyers and courts continue to cite the "reasonably calculated" language as defining the scope of discovery. Some even disregard the reference to admissibility, suggesting that any inquiry "reasonably calculated" to lead to something helpful in the litigation is fair game in discovery. The proposed amendment will eliminate this incorrect reading of Rule 26(b)(1) while preserving the rule that inadmissibility is not a basis for opposing discovery of relevant information.

Most of the comments opposing this change complained that it would eliminate a "bedrock" definition of the scope of discovery, reflecting the very misunderstanding the amendment is designed to correct.

3. Rule 26(b)(2)(C)(iii).

Rule 26(b)(2)(C)(iii) would be amended to reflect the move of the proportionality factors to Rule 26(b)(1).

4. Rule 26(c)(1): Allocation of Expenses.

Rule 26(c)(1)(B) would be amended to include "the allocation of expenses" among the terms that may be included in a protective order. Rule 26(c)(1) already authorizes an order to protect against "undue burden or expense," and this includes authority to allow discovery only on condition that the requesting party bear part or all of the costs of responding. The Supreme Court has acknowledged that courts have that authority now, *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978), and it is useful to make the authority explicit on the face of the rule to ensure that courts and the parties will consider this choice as an alternative to either denying requested discovery or ordering it despite the risk of imposing undue burdens and expense on the party who responds to the request.

The Committee Note explains that this clarification does not mean that cost-shifting should become a common practice. The assumption remains that the responding party ordinarily bears the costs of responding.

5. Rules 34 and 37(a): Specific Objections, Production, Withholding.

The Committee proposes three amendments to Rule 34. (A fourth, dealing with requests served before the Rule 26(f) conference, is described later.) The first requires that objections to requests to produce be stated "with specificity." The second permits a responding party to state that it will produce copies of documents or ESI instead of permitting inspection, and should specify a reasonable time for the production. A corresponding change to Rule 37(a)(3)(B)(iv) adds authority to move for an order to compel production if "a party fails to produce documents" as requested. The third amendment to Rule 34 requires that an objection state whether any responsive materials are being withheld on the basis of the objection.

These amendments should eliminate three relatively frequent problems in the production of documents and ESI: the use of broad, boilerplate objections that provide little information about the true reason a party is objecting; responses that state various objections, produce some information, and do not indicate whether anything else has been withheld from discovery on the basis of the objections; and responses which state that responsive documents will be produced in due course, without providing any indication of when production will occur and which often are followed by long delays in production. All three practices lead to discovery disputes and are contrary to Rule 1's goals of speedy and inexpensive litigation.

6. Early Discovery Requests: Rule 26(d)(2).

The Committee proposes to add Rule 26(d)(2) to allow a party to deliver a Rule 34 document production request before the Rule 26(f) meeting between the parties. For purposes of determining the date to respond, the request would be treated as having been served at the first Rule 26(f) meeting. Rule 34(b)(2)(A) would be amended by adding a parallel provision for the time to respond. The purpose of this change is to facilitate discussion between the parties at the Rule 26(f) meeting and with the court at the initial case management conference by providing concrete discovery proposals.

Public comments on this proposal were mixed. Some doubt that parties will seize this new opportunity. Others expressed concern that requests formed before the case management conference will be inappropriately broad. Lawyers who represent plaintiffs appeared more likely to use this opportunity to provide advance notice of what should be discussed at the Rule 26(f) meeting. The Committee continues to view this amendment as a worthwhile effort to focus early case management discussions.

B. Early Judicial Case Management.

The Committee recommends several changes to Rules 16 and 4 designed to promote earlier and more active judicial case management.

1. Rule 16.

Four sets of changes are proposed for Rule 16.

First, participants at the Duke Conference agreed that cases are resolved faster, fairer, and with less expense when judges manage them early and actively. An important part of this management is an initial case management conference where judges confer with parties about the needs of the case and an appropriate schedule for the litigation. To encourage case management conferences where direct exchanges occur, the Committee proposes that the words allowing a conference to be held "by telephone, mail, or other means" be deleted from Rule 16(b)(1)(B). The Committee Note explains that such a conference can be held by any means of direct simultaneous communication, including telephone. Rule 16(b)(1)(A) continues to allow the court to base a scheduling order on the parties' Rule 26(f) report without holding a conference, but the change in the text and the Committee Note hopefully will encourage judges to engage in direct exchanges with the parties when warranted.

Second, the time for holding the scheduling conference is set at the earlier of 90 days after any defendant has been served (reduced from 120 days in the present rule) or 60 days after any defendant has appeared (reduced from 90 days in the present rule). The intent is to encourage early management of cases by judges. Recognizing that these time limits may not be appropriate in some cases, the proposal also allows the judge to set a later time on finding good cause. In response to concerns expressed by the Department of Justice, the Committee Note states that "[l]itigation involving complex issues, multiple parties, and large organizations, public or private, may be more likely to need extra time to establish meaningful collaboration between counsel and the people who can supply the information needed to participate in a useful way."

Third, the proposed amendments add two subjects to the list of issues that may be addressed in a case management order: the preservation of ESI and agreements reached under Federal Rule of Evidence 502. ESI is a growing issue in civil litigation, and the Committee believes that parties and courts should be encouraged to address it early. Similarly, Rule 502 was designed in part to reduce the expense of producing ESI or other voluminous documents, and the parties and judges should consider its potential application early in the litigation. Parallel provisions are added to the subjects for the parties' Rule 26(f) meeting.

Fourth, the proposed amendments identify another topic for discussion at the initial case management conference – whether the parties should be required to request a conference with the court before filing discovery motions. Many federal judges require such pre-motion conferences, and experience has shown them to be very effective in resolving discovery disputes quickly and inexpensively. The amendment seeks to encourage this practice by including it in the Rule 16 topics.

2. Rule 4(m): Time to Serve.

Rule 4(m) now sets 120 days as the time limit for serving the summons and complaint. The Committee initially sought to reduce this period to 60 days, but the public comments

persuaded the Committee to recommend a limit of 90 days. The intent, as with the similar Rule 16 change, is to get cases moving more quickly and shorten the overall length of litigation. The experience of the Committee is that most cases require far less than 120 days for service, and that some lawyers take more time than necessary simply because it is permitted under the rules.

Public comments noted that a 60-day service period could be problematic in cases with many defendants, defendants who are difficult to locate or serve, or defendants who must be served by the Marshals Service. Others suggested that a 60-day period would undercut the opportunity to request a waiver of service because little time would be left to effect service after a defendant refuses to waive service. After considering these and other comments, the Committee concluded that the time should be set at 90 days. Language has been added to the Committee Note recognizing that additional time will be needed in some cases.

C. Cooperation.

Rule 1 now provides that the civil rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." The proposed amendment would provide that the rules "be construed, administered, *and employed by the court and the parties* to secure the just, speedy, and inexpensive determination of every action and proceeding."

As already noted, cooperation among parties was a theme heavily emphasized at the Duke Conference. Cooperation has been vigorously urged by many other voices, and principles of cooperation have been embraced by concerned organizations and adopted by courts and bar associations. The Committee proposes that Rule 1 be amended to make clear that parties as well as courts have a responsibility to achieve the just, speedy, and inexpensive resolution of every action. The proposed Committee Note explains that "discussions of ways to improve the administration of civil justice regularly include pleas to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay. Effective advocacy is consistent with – and indeed depends upon – cooperative and proportional use of procedure."

The public comments expressed little opposition to the concept of cooperation, but some expressed concerns about the proposed amendment. One concern was that Rule 1 is iconic and should not be altered. Another was that this change may invite ill-founded attempts to seek sanctions for violating a duty to cooperate. To avoid any suggestion that the amendment authorizes such sanctions or somehow diminishes procedural rights provided elsewhere in the rules, the Committee Note provides: "This amendment does not create a new or independent source of sanctions. Neither does it abridge the scope of any other of these rules."

The Committee recognizes that a rule amendment alone will not produce reasonable and cooperative behavior among litigants, but believes that the proposed amendment will provide a meaningful step in that direction. This change should be combined with continuing efforts to educate litigants and courts on the importance of cooperation in reducing unnecessary costs in civil litigation.

D. Summary: The Duke Proposals as a Whole.

The Committee views the Duke proposals as a package. While each proposed amendment must be judged on its own merits, the proposals are designed to work together. Case management will begin earlier, judges will be encouraged to communicate directly with the parties, relevant topics are emphasized for the initial case management conference, early Rule 34 requests will facilitate a more informed discussion of necessary discovery, proportionality will be considered by all participants, unnecessary discovery motions will be discouraged, and obstructive Rule 34 responses will be eliminated. At the same time, the change to Rule 1 will encourage parties to cooperate in achieving the just, speedy, and inexpensive resolution of every action. Combined with the continuing work of the FJC on judicial education and the continuing exploration of discovery protocols and other pilot projects, the Committee believes that these changes will promote worthwhile objectives identified at the Duke Conference and improve the federal civil litigation process.

III. RULE 37(e): FAILURE TO PRESERVE ESI.

Present Rule 37(e) was adopted in 2006 and provides: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." The Committee recognized in 2006 that the continuing expansion of ESI might provide reasons to adopt a more detailed rule. A panel at the Duke Conference unanimously recommended that the time has come for such a rule.

The Committee agrees. The explosion of ESI in recent years has affected all aspects of civil litigation. Preservation of ESI is a major issue confronting parties and courts, and loss of ESI has produced a significant split in the circuits. Some circuits hold that adverse inference jury instructions (viewed by most as a serious sanction) can be imposed for the negligent loss of ESI. Others require a showing of bad faith.

The Committee has been credibly informed that persons and entities over-preserve ESI out of fear that some ESI might be lost, their actions might with hindsight be viewed as negligent, and they might be sued in a circuit that permits adverse inference instructions or other serious sanctions on the basis of negligence. Many entities described spending millions of dollars preserving ESI for litigation that may never be filed. Resolving the circuit split with a more uniform approach to lost ESI, and thereby reducing a primary incentive for over-preservation, has been recognized by the Committee as a worthwhile goal.

During the two years following the Duke Conference, the Discovery Subcommittee, now chaired by Judge Paul Grimm of the District of Maryland, considered several different approaches to drafting a new rule, including drafts that undertook to establish detailed preservation guidelines. These drafts started with an outline proposed by the Duke Conference panel which called for specific provisions on when the duty to preserve arises, its scope and duration in advance of litigation, and the sanctions or other measures a court can take when information is lost. The Subcommittee conducted research into existing spoliation law, canvassed statutes and regulations that impose preservation obligations, received comments and

suggestions from numerous sources (including proposed draft rules from some sources), and held a mini-conference in Dallas with 25 invited judges, lawyers, and academics to discuss possible approaches to an ESI-preservation rule.

The Subcommittee ultimately concluded that a detailed rule specifying the trigger, scope, and duration of a preservation obligation is not feasible. A rule that attempts to address these issues in detail simply cannot be applied to the wide variety of cases in federal court, and a rule that provides only general guidance on these issues would be of little value to anyone. The Subcommittee chose instead to craft a rule that addresses actions courts may take when ESI that should have been preserved is lost.

Thus, the proposed Rule 37(e) does not purport to create a duty to preserve. The new rule takes the duty as it is established by case law, which uniformly holds that a duty to preserve information arises when litigation is reasonably anticipated. Although some urged the Committee to eliminate any duty to preserve information before an action is actually filed in court, the Committee believes such a rule would result in the loss or destruction of much information needed for litigation. The Committee Note, responding to concerns expressed in public comments, also makes clear that this rule does not affect any common-law tort remedy for spoliation that may be established by state law.

Proposed Rule 37(e) applies when "electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery." Subdivisions (e)(1) and (e)(2) then address actions a court may take when this situation arises.

A. Limiting the Rule to ESI.

Like current Rule 37(e), the proposed rule is limited to ESI. Although the Committee considered proposing a rule that would apply to all forms of information, it ultimately concluded that an ESI-only rule was appropriate for several reasons.

First, as already noted, the explosion of ESI in recent years has presented new and unprecedented challenges in civil litigation. This is the primary fact motivating an amendment of Rule 37(e).

Second, the remarkable growth of ESI will continue and even accelerate. One industry expert reported to the Committee that there will be some 26 billion devices on the Internet in six years – more than three for every person on earth. Significant amounts of ESI will be created and stored not only by sophisticated entities with large IT departments, but also by unsophisticated persons whose lives are recorded on their phones, tablets, cars, social media pages, and tools not even presently foreseen. Most of this information will be stored somewhere on remote servers, often referred to as the "cloud," complicating the preservation task. Thus, the litigation challenges created by ESI and its loss will increase, not decrease, and will affect unsophisticated as well as sophisticated litigants.

Third, the law of spoliation for evidence other than ESI is well developed and longstanding, and should not be supplanted without good reason. There has been little complaint to the Committee about this body of law as applied to information other than ESI, and the Committee concludes that this law should be left undisturbed by a new rule designed to address the unprecedented challenges presented by ESI.

The Advisory Committee recognizes that its decision to confine Rule 37(e) to ESI could be debated. Some contend that there is no principled basis for distinguishing ESI from other forms of evidence, but repeated efforts made clear that it is very difficult to craft a rule that deals with failure to preserve tangible things. In addition, there are some clear practical distinctions between ESI and other kinds of evidence. ESI is created in volumes previously unheard of and often is duplicated in many places. The potential consequences of its loss in one location often will be less severe than the consequences of the loss of tangible evidence. ESI also is deleted or modified on a regular basis, frequently with no conscious action on the part of the person or entity that created it. These practical distinctions, the difficulty of writing a rule that covers all forms of evidence, as well as an appropriate respect for the spoliation law that has developed over centuries to deal with the loss of tangible evidence, all persuaded the Advisory Committee that the new Rule 37(e) should be limited to ESI.

B. Reasonable Steps to Preserve.

The proposed rule applies if ESI "that should have been preserved in the anticipation or conduct of litigation of litigation is lost because a party failed to take reasonable steps to preserve it." The rule calls for reasonable steps, not perfection. As explained in the Committee Note, determining the reasonableness of the steps taken includes consideration of party resources and the proportionality of the efforts to preserve. The Note also recognizes that a party's level of sophistication may bear on whether it should have realized that information should have been preserved.

C. Restoration or Replacement of Lost ESI.

If reasonable steps were not taken and information was lost as a result, the rule directs that the next focus should be on whether the lost information can be restored or replaced through additional discovery. As the Committee Note explains, nothing in this rule limits a court's powers under Rules 16 and 26 to order discovery to achieve this purpose. At the same time, however, the quest for lost information should take account of whether the information likely was only marginally relevant or duplicative of other information that remains available.

D. Subdivision (e)(1).

Proposed Rule 37(e)(1) provides that the court, "upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice." This proposal preserves broad trial court discretion to cure prejudice caused by the loss of ESI that cannot be remedied by restoration or replacement of the lost information. It further provides that the measures be no greater than necessary to cure the prejudice.

Proposed subdivision (e)(1) does not say which party bears the burden of proving prejudice. Many public comments raised concerns about assigning such burdens, noting that it often is difficult for an opposing party to prove it was prejudiced by the loss of information it never has seen. Under the proposed rule, each party is responsible for providing such information and argument as it can; the court may draw on its experience in addressing this or similar issues, and may ask one or another party, or all parties, for further information.

The proposed rule does not attempt to draw fine distinctions as to the measures a trial court may use to cure prejudice under (e)(1), but instead limits those measures in three general ways: there must be a finding of prejudice, the measures must be no greater than necessary to cure the prejudice, and the court may not impose the severe measures listed in subdivision (e)(2).

E. Subdivision (e)(2).

Proposed (e)(2) provides that the court:

> only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation, may:
>
> (A) presume that the lost information was unfavorable to the party;
>
> (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
>
> (C) dismiss the action or enter a default judgment.

A primary purpose of this provision is to eliminate the circuit split on when a court may give an adverse inference jury instruction for the loss of ESI. As already noted, some circuits permit such instructions upon a showing of negligence, while others require bad faith. Subdivision (e)(2) permits adverse inference instructions only on a finding that the party "acted with the intent to deprive another party of the information's use in the litigation." This intent requirement is akin to bad faith, but is defined even more precisely. The Committee views this definition as consistent with the historical rationale for adverse inference instructions.

The Discovery Subcommittee analyzed the existing cases on the use of adverse inference instructions. Such instructions historically have been based on a logical conclusion: when a party destroys evidence for the purpose of preventing another party from using it in litigation, one reasonably can infer that the evidence was unfavorable to the destroying party. Some courts hold to this traditional rationale and limit adverse inference instructions to instances of bad faith loss of the information. *See, e.g.*, *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997) ("The adverse inference must be predicated on the bad faith of the party destroying the records. Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case.") (citations omitted).

Circuits that permit adverse inference instructions on a showing of negligence adopt a different rationale: the adverse inference restores the evidentiary balance, and the party that lost

the information should bear the risk that it was unfavorable. *See, e.g.*, *Residential Funding Corp. v. DeGeorge Finan. Corp.*, 306 F.3d 99 (2d Cir. 2002). Although this approach has some equitable appeal, the Committee has several concerns when it is applied to ESI. First, negligently lost information may have been favorable or unfavorable to the party that lost it – negligence does not necessarily reveal the nature of the lost information. Consequently, an adverse inference may do far more than restore the evidentiary balance; it may tip the balance in ways the lost evidence never would have. Second, in a world where ESI is more easily lost than tangible evidence, particularly by unsophisticated parties, the sanction of an adverse inference instruction imposes a heavy penalty for losses that are likely to become increasingly frequent as ESI multiplies. Third, permitting an adverse inference for negligence creates powerful incentives to over-preserve, often at great cost. Fourth, the ubiquitous nature of ESI and the fact that it often may be found in many locations presents less risk of severe prejudice from negligent loss than may be present due to the loss of tangible things or hard-copy documents.

These reasons have caused the Committee to conclude that the circuit split should be resolved in favor of the traditional reasons for an adverse inference. ESI-related adverse inferences drawn by courts when ruling on pretrial motions or ruling in bench trials, and adverse inference jury instructions, should be limited to cases where the party who lost the ESI did so with an intent to deprive the opposing party of its use in the litigation. Subdivision (e)(2) extends the logic of the mandatory adverse-inference instruction to the even more severe measures of dismissal or default. The Committee thought it incongruous to allow dismissal or default in circumstances that do not justify the instruction.

Subdivision (e)(2) covers any instruction that directs or permits the jury to infer from the loss of information that the information was in fact unfavorable to the party that lost it. The subdivision does not apply to jury instructions that do not involve such an inference. For example, subdivision (e)(2) would not prohibit a court from allowing the parties to present evidence to the jury concerning the loss and likely relevance of information and instructing the jury that it may consider that evidence, along with all the other evidence in the case, in making its decision. These measures, which would not involve instructing a jury that it may draw an adverse inference from loss of information, would be available under subdivision (e)(1) if no greater than necessary to cure prejudice. In addition, subdivision (e)(2) does not limit the discretion of courts to give traditional missing evidence instructions based on a party's failure to present evidence it has in its possession at the time of trial.

Subdivision (e)(2) does not include a requirement that the court find prejudice to the party deprived of the information. This is because the finding of intent required by the subdivision can support not only an inference that the lost information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced by the loss of that favorable information.

The Committee Note states that courts should exercise caution in using the measures specified in (e)(2). Finding an intent to deprive another party of the lost information's use in the litigation does not require a court to adopt the measures listed in subdivision (e)(2). The remedy should fit the wrong, and the severe measures authorized by this subdivision should not be used

when the information lost was relatively unimportant or lesser measures such as those specified in subdivision (e)(1) would be sufficient to redress the loss.

IV. ABROGATION OF RULE 84.

The Federal Rules of Civil Procedure are followed by an Appendix of Forms. The Appendix includes 36 separate forms illustrating things such as the proper captions for pleadings, proper signature blocks, and forms for summonses, requests for waivers of service, complaints, answers, judgments, and other litigation documents. Rule 84 provides that the forms "suffice under these rules and illustrate the simplicity and brevity that these rules contemplate."

Many of the forms are out of date. The sample complaints, for example, embrace far fewer causes of action than now exist in federal court and illustrate a simplicity of pleading that has not been used in many years. The increased use of Rule 12(b)(6) motions to dismiss, the enhanced pleading requirements of Rule 9 and some federal statutes, the proliferation of statutory and other causes of action, and the increased complexity of most modern cases have resulted in a detailed level of pleading that is far beyond that illustrated in the forms.

Amendment of the civil forms is cumbersome. It requires the same process as amendment of the civil rules themselves – amendments proposed by the Committee must be approved by the Standing Committee, the Judicial Conference, the Supreme Court, and Congress. Public notice and comment are also required. The process ordinarily takes at least three years.

In addition to being out of date and difficult to amend, the Committee's perception was that the forms are rarely used. The Committee established a Rule 84 Subcommittee, chaired by Judge Gene Pratter of the Eastern District of Pennsylvania, to consider the current forms and the process of their revision, and to recommend possible changes. Members of the Subcommittee canvassed judges, law firms, public interest law offices, and individual lawyers, and found that virtually none of them use the forms.

Many alternative sources of civil forms are available. These include forms created by private publishing companies and a set of non-pleading forms created and maintained by a Forms Working Group at the Administrative Office of the United States Courts ("AO"). The Working Group consists of six federal judges and six clerks of court, and the forms they create in consultation with the various rules committees can be downloaded from the AO website at http://www.uscourts.gov/FormsAndFees/Forms/CourtFormsByCategory.aspx. A May 2012 survey of the websites maintained by the 94 federal district courts around the country found that 88 of the 94 either link electronically to the AO forms or post some of the AO forms on their websites. Only six of the 94 mention the Rule 84 forms on their websites or in their local rules, confirming that the rules forms are rarely used.

The Subcommittee ultimately recommended that the Committee get out of the forms business. The Committee agreed, and published a proposal in August 2013 to abrogate Rule 84 and eliminate the forms appended to the rules. The two exceptions to this recommendation are

forms 5 and 6, which are referenced in Rule 4 and would, under the proposal, be appended to that specific rule.

Very few of the public comments addressed the abrogation of Rule 84. Among the objections, most asserted that the elimination of the forms would be viewed as an indirect endorsement of the *Twombly* and *Iqbal* pleading standards. A few argued that the forms assist pro se litigants and new lawyers, but of these, only one stated that the writer had ever actually used the forms. The general lack of response to the Rule 84 proposal reinforced the Committee's view that the forms are seldom used.

After considering the public comments, the Committee continues to believe that the forms and Rule 84 should be eliminated. The forms are not used; revising them is a difficult and time-consuming process; other forms are readily available; and the Committee can better use its time addressing more relevant issues in the rules. The Committee continues to review the effects of *Twombly* and *Iqbal*. If it decides action is needed in this area, the more direct approach will be to amend the rules, not the forms.

V. RULE 55.

The Committee proposes that Rule 55(c) be amended to clarify that a court must apply Rule 60(b) only when asked to set aside a final judgment. The reason for the change is explained in the proposed Committee Note.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

1 **Rule 1. Scope and Purpose**

2 These rules govern the procedure in all civil actions
3 and proceedings in the United States district courts, except
4 as stated in Rule 81. They should be construed, ~~and~~
5 administered, and employed by the court and the parties to
6 secure the just, speedy, and inexpensive determination of
7 every action and proceeding.

Committee Note

Rule 1 is amended to emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, so the parties share the responsibility to employ the rules in the same way. Most lawyers and parties cooperate to achieve these ends. But discussions of ways to improve the administration of civil justice regularly include pleas to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay. Effective advocacy is

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

consistent with — and indeed depends upon — cooperative and proportional use of procedure.

This amendment does not create a new or independent source of sanctions. Neither does it abridge the scope of any other of these rules.

Rule 4. Summons

* * * * *

(m) Time Limit for Service. If a defendant is not served within ~~120~~90 days after the complaint is filed, the court — on motion or on its own after notice to the plaintiff — must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1) or to service of a notice under Rule 71.1(d)(3)(A).

* * * * *

Committee Note

Subdivision (m). The presumptive time for serving a defendant is reduced from 120 days to 90 days. This

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change, together with the shortened times for issuing a scheduling order set by amended Rule 16(b)(2), will reduce delay at the beginning of litigation.

Shortening the presumptive time for service will increase the frequency of occasions to extend the time for good cause. More time may be needed, for example, when a request to waive service fails, a defendant is difficult to serve, or a marshal is to make service in an in forma pauperis action.

The final sentence is amended to make it clear that the reference to Rule 4 in Rule 71.1(d)(3)(A) does not include Rule 4(m). Dismissal under Rule 4(m) for failure to make timely service would be inconsistent with the limits on dismissal established by Rule 71.1(i)(1)(C).

Shortening the time to serve under Rule 4(m) means that the time of the notice required by Rule 15(c)(1)(C) for relation back is also shortened.

Rule16. Pretrial Conferences; Scheduling; Management

* * * * *

(b) Scheduling.

(1) ***Scheduling Order.*** Except in categories of actions exempted by local rule, the district judge — or a magistrate judge when authorized by local rule — must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference~~ by telephone, mail, or other means~~.

(2) ***Time to Issue.*** The judge must issue the scheduling order as soon as practicable, but ~~in any event~~unless the judge finds good cause for

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17 delay, the judge must issue it within the earlier of
18 ~~120~~90 days after any defendant has been served
19 with the complaint or ~~90~~60 days after any
20 defendant has appeared.
21 **(3)** ***Contents of the Order.***
22 * * * * *
23 **(B)** *Permitted Contents*. The scheduling order
24 may:
25 * * * * *
26 **(iii)** provide for disclosure, ~~or~~discovery,
27 or preservation of electronically
28 stored information;
29 **(iv)** include any agreements the parties
30 reach for asserting claims of
31 privilege or of protection as trial-
32 preparation material after

33 information is produced, including
34 agreements reached under Federal
35 Rule of Evidence 502;
36 **(v)** direct that before moving for an
37 order relating to discovery, the
38 movant must request a conference
39 with the court;
40 **(~~v~~vi)** set dates for pretrial conferences and
41 for trial; and
42 **(~~vi~~vii)** include other appropriate matters.
43 * * * * *

Committee Note

The provision for consulting at a scheduling conference by "telephone, mail, or other means" is deleted. A scheduling conference is more effective if the court and parties engage in direct simultaneous communication. The conference may be held in person, by telephone, or by more sophisticated electronic means.

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The time to issue the scheduling order is reduced to the earlier of 90 days (not 120 days) after any defendant has been served, or 60 days (not 90 days) after any defendant has appeared. This change, together with the shortened time for making service under Rule 4(m), will reduce delay at the beginning of litigation. At the same time, a new provision recognizes that the court may find good cause to extend the time to issue the scheduling order. In some cases it may be that the parties cannot prepare adequately for a meaningful Rule 26(f) conference and then a scheduling conference in the time allowed. Litigation involving complex issues, multiple parties, and large organizations, public or private, may be more likely to need extra time to establish meaningful collaboration between counsel and the people who can supply the information needed to participate in a useful way. Because the time for the Rule 26(f) conference is geared to the time for the scheduling conference or order, an order extending the time for the scheduling conference will also extend the time for the Rule 26(f) conference. But in most cases it will be desirable to hold at least a first scheduling conference in the time set by the rule.

Three items are added to the list of permitted contents in Rule 16(b)(3)(B).

The order may provide for preservation of electronically stored information, a topic also added to the provisions of a discovery plan under Rule 26(f)(3)(C). Parallel amendments of Rule 37(e) recognize that a duty to preserve discoverable information may arise before an action is filed.

The order also may include agreements incorporated in a court order under Evidence Rule 502 controlling the effects of disclosure of information covered by attorney-client privilege or work-product protection, a topic also added to the provisions of a discovery plan under Rule 26(f)(3)(D).

Finally, the order may direct that before filing a motion for an order relating to discovery the movant must request a conference with the court. Many judges who hold such conferences find them an efficient way to resolve most discovery disputes without the delay and burdens attending a formal motion, but the decision whether to require such conferences is left to the discretion of the judge in each case.

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1 **Rule 26. Duty to Disclose; General Provisions;**
2 **Governing Discovery**

3 * * * * *

4 **(b) Discovery Scope and Limits.**

5 **(1)** ***Scope in General.*** Unless otherwise limited by
6 court order, the scope of discovery is as follows:
7 Parties may obtain discovery regarding any
8 nonprivileged matter that is relevant to any
9 party's claim or defense and proportional to the
10 needs of the case, considering the importance of
11 the issues at stake in the action, the amount in
12 controversy, the parties' relative access to
13 relevant information, the parties' resources, the
14 importance of the discovery in resolving the
15 issues, and whether the burden or expense of the
16 proposed discovery outweighs its likely benefit.
17 Information within this scope of discovery need

18 not be admissible in evidence to be discoverable.
19 ~~including the existence, description, nature,~~
20 ~~custody, condition, and location of any~~
21 ~~documents or other tangible things and the~~
22 ~~identity and location of persons who know of~~
23 ~~any discoverable matter. For good cause, the~~
24 ~~court may order discovery of any matter relevant~~
25 ~~to the subject matter involved in the action.~~
26 ~~Relevant information need not be admissible at~~
27 ~~the trial if the discovery appears reasonably~~
28 ~~calculated to lead to the discovery of admissible~~
29 ~~evidence. All discovery is subject to the~~
30 ~~limitations imposed by Rule 26(b)(2)(C).~~
31 **(2)** ***Limitations on Frequency and Extent.***
32 * * * * *

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33 **(C)** *When Required.* On motion or on its own,
34 the court must limit the frequency or extent
35 of discovery otherwise allowed by these
36 rules or by local rule if it determines that:
37 * * * * *
38 **(iii)** the ~~burden or expense of the~~ proposed
39 discovery is outside the scope
40 permitted by Rule 26(b)(1)~~outweighs~~
41 ~~its likely benefit, considering the~~
42 ~~needs of the case, the amount in~~
43 ~~controversy, the parties' resources, the~~
44 ~~importance of the issues at stake in the~~
45 ~~action, and the importance of the~~
46 ~~discovery in resolving the issues~~.
47 * * * * *

48 **(c) Protective Orders.**

49 **(1)** ***In General.*** A party or any person from whom
50 discovery is sought may move for a protective
51 order in the court where the action is pending —
52 or as an alternative on matters relating to a
53 deposition, in the court for the district where the
54 deposition will be taken. The motion must
55 include a certification that the movant has in
56 good faith conferred or attempted to confer with
57 other affected parties in an effort to resolve the
58 dispute without court action. The court may, for
59 good cause, issue an order to protect a party or
60 person from annoyance, embarrassment,
61 oppression, or undue burden or expense,
62 including one or more of the following:

63 * * * * *

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64 **(B)** specifying terms, including time and
65 place or the allocation of expenses, for the
66 disclosure or discovery;
67 * * * * *
68 **(d) Timing and Sequence of Discovery.**
69 * * * * *
70 **(2)** ***Early Rule 34 Requests.***
71 **(A)** *Time to Deliver.* More than 21 days after
72 the summons and complaint are served on a
73 party, a request under Rule 34 may be
74 delivered:
75 **(i)** to that party by any other party, and
76 **(ii)** by that party to any plaintiff or to any
77 other party that has been served.

78 **(B)** *When Considered Served.* The request is
79 considered to have been served at the first
80 Rule 26(f) conference.
81 **(~~2~~3)** ***Sequence.*** Unless~~, on motion,~~ the parties
82 stipulate or the court orders otherwise for the
83 parties' and witnesses' convenience and in the
84 interests of justice:
85 **(A)** methods of discovery may be used in any
86 sequence; and
87 **(B)** discovery by one party does not require any
88 other party to delay its discovery.
89 * * * * *
90 **(f) Conference of the Parties; Planning for Discovery.**
91 * * * * *
92 **(3)** ***Discovery Plan.*** A discovery plan must state the
93 parties' views and proposals on:

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94 * * * * *

95 **(C)** any issues about disclosure, ~~or~~discovery, or
96 preservation of electronically stored
97 information, including the form or forms in
98 which it should be produced;

99 **(D)** any issues about claims of privilege or of
100 protection as trial-preparation materials,
101 including — if the parties agree on a
102 procedure to assert these claims after
103 production — whether to ask the court to
104 include their agreement in an order under
105 Federal Rule of Evidence 502;

106 * * * * *

Committee Note

Rule 26(b)(1) is changed in several ways.

Information is discoverable under revised Rule 26(b)(1) if it is relevant to any party's claim or defense and is proportional to the needs of the case. The considerations that bear on proportionality are moved from present Rule 26(b)(2)(C)(iii), slightly rearranged and with one addition.

Most of what now appears in Rule 26(b)(2)(C)(iii) was first adopted in 1983. The 1983 provision was explicitly adopted as part of the scope of discovery defined by Rule 26(b)(1). Rule 26(b)(1) directed the court to limit the frequency or extent of use of discovery if it determined that "the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." At the same time, Rule 26(g) was added. Rule 26(g) provided that signing a discovery request, response, or objection certified that the request, response, or objection was "not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation." The parties thus shared the responsibility to honor these limits on the scope of discovery.

The 1983 Committee Note stated that the new provisions were added "to deal with the problem of over-discovery. The objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry. The

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new sentence is intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse. The grounds mentioned in the amended rule for limiting discovery reflect the existing practice of many courts in issuing protective orders under Rule 26(c). . . . On the whole, however, district judges have been reluctant to limit the use of the discovery devices."

The clear focus of the 1983 provisions may have been softened, although inadvertently, by the amendments made in 1993. The 1993 Committee Note explained: "[F]ormer paragraph (b)(1) [was] subdivided into two paragraphs for ease of reference and to avoid renumbering of paragraphs (3) and (4)." Subdividing the paragraphs, however, was done in a way that could be read to separate the proportionality provisions as "limitations," no longer an integral part of the (b)(1) scope provisions. That appearance was immediately offset by the next statement in the Note: "Textual changes are then made in new paragraph (2) to enable the court to keep tighter rein on the extent of discovery."

The 1993 amendments added two factors to the considerations that bear on limiting discovery: whether "the burden or expense of the proposed discovery outweighs its likely benefit," and "the importance of the proposed discovery in resolving the issues." Addressing these and other limitations added by the 1993 discovery amendments, the Committee Note stated that "[t]he revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery . . . ."

The relationship between Rule 26(b)(1) and (2) was further addressed by an amendment made in 2000 that added a new sentence at the end of (b)(1): "All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii)[now Rule 26(b)(2)(C)]." The Committee Note recognized that "[t]hese limitations apply to discovery that is otherwise within the scope of subdivision (b)(1)." It explained that the Committee had been told repeatedly that courts were not using these limitations as originally intended. "This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery."

The present amendment restores the proportionality factors to their original place in defining the scope of discovery. This change reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses, or objections.

Restoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations.

Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional. The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.

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The parties may begin discovery without a full appreciation of the factors that bear on proportionality. A party requesting discovery, for example, may have little information about the burden or expense of responding. A party requested to provide discovery may have little information about the importance of the discovery in resolving the issues as understood by the requesting party. Many of these uncertainties should be addressed and reduced in the parties' Rule 26(f) conference and in scheduling and pretrial conferences with the court. But if the parties continue to disagree, the discovery dispute could be brought before the court and the parties' responsibilities would remain as they have been since 1983. A party claiming undue burden or expense ordinarily has far better information — perhaps the only information — with respect to that part of the determination. A party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them. The court's responsibility, using all the information provided by the parties, is to consider these and all the other factors in reaching a case-specific determination of the appropriate scope of discovery.

The direction to consider the parties' relative access to relevant information adds new text to provide explicit focus on considerations already implicit in present Rule 26(b)(2)(C)(iii). Some cases involve what often is called "information asymmetry." One party — often an individual plaintiff — may have very little discoverable information. The other party may have vast amounts of information, including information that can be readily

retrieved and information that is more difficult to retrieve. In practice these circumstances often mean that the burden of responding to discovery lies heavier on the party who has more information, and properly so.

Restoring proportionality as an express component of the scope of discovery warrants repetition of parts of the 1983 and 1993 Committee Notes that must not be lost from sight. The 1983 Committee Note explained that "[t]he rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis." The 1993 Committee Note further observed that "[t]he information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression." What seemed an explosion in 1993 has been exacerbated by the advent of e-discovery. The present amendment again reflects the need for continuing and close judicial involvement in the cases that do not yield readily to the ideal of effective party management. It is expected that discovery will be effectively managed by the parties in many cases. But there will be important occasions for judicial management, both when the parties are legitimately unable to resolve important differences and when the parties fall short of effective, cooperative management on their own.

It also is important to repeat the caution that the monetary stakes are only one factor, to be balanced against other factors. The 1983 Committee Note recognized "the significance of the substantive issues, as measured in

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philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved." Many other substantive areas also may involve litigation that seeks relatively small amounts of money, or no money at all, but that seeks to vindicate vitally important personal or public values.

So too, consideration of the parties' resources does not foreclose discovery requests addressed to an impecunious party, nor justify unlimited discovery requests addressed to a wealthy party. The 1983 Committee Note cautioned that "[t]he court must apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent."

The burden or expense of proposed discovery should be determined in a realistic way. This includes the burden or expense of producing electronically stored information. Computer-based methods of searching such information continue to develop, particularly for cases involving large volumes of electronically stored information. Courts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery as reliable means of searching electronically stored information become available.

A portion of present Rule 26(b)(1) is omitted from the proposed revision. After allowing discovery of any matter relevant to any party's claim or defense, the present rule

adds: "including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter." Discovery of such matters is so deeply entrenched in practice that it is no longer necessary to clutter the long text of Rule 26 with these examples. The discovery identified in these examples should still be permitted under the revised rule when relevant and proportional to the needs of the case. Framing intelligent requests for electronically stored information, for example, may require detailed information about another party's information systems and other information resources.

The amendment deletes the former provision authorizing the court, for good cause, to order discovery of any matter relevant to the subject matter involved in the action. The Committee has been informed that this language is rarely invoked. Proportional discovery relevant to any party's claim or defense suffices, given a proper understanding of what is relevant to a claim or defense. The distinction between matter relevant to a claim or defense and matter relevant to the subject matter was introduced in 2000. The 2000 Note offered three examples of information that, suitably focused, would be relevant to the parties' claims or defenses. The examples were "other incidents of the same type, or involving the same product"; "information about organizational arrangements or filing systems"; and "information that could be used to impeach a likely witness." Such discovery is not foreclosed by the amendments. Discovery that is relevant to the parties' claims or defenses may also support amendment of the

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pleadings to add a new claim or defense that affects the scope of discovery.

The former provision for discovery of relevant but inadmissible information that appears "reasonably calculated to lead to the discovery of admissible evidence" is also deleted. The phrase has been used by some, incorrectly, to define the scope of discovery. As the Committee Note to the 2000 amendments observed, use of the "reasonably calculated" phrase to define the scope of discovery "might swallow any other limitation on the scope of discovery." The 2000 amendments sought to prevent such misuse by adding the word "Relevant" at the beginning of the sentence, making clear that "'relevant' means within the scope of discovery as defined in this subdivision . . . ." The "reasonably calculated" phrase has continued to create problems, however, and is removed by these amendments. It is replaced by the direct statement that "Information within this scope of discovery need not be admissible in evidence to be discoverable." Discovery of nonprivileged information not admissible in evidence remains available so long as it is otherwise within the scope of discovery.

Rule 26(b)(2)(C)(iii) is amended to reflect the transfer of the considerations that bear on proportionality to Rule 26(b)(1). The court still must limit the frequency or extent of proposed discovery, on motion or on its own, if it is outside the scope permitted by Rule 26(b)(1).

Rule 26(c)(1)(B) is amended to include an express recognition of protective orders that allocate expenses for

disclosure or discovery. Authority to enter such orders is included in the present rule, and courts already exercise this authority. Explicit recognition will forestall the temptation some parties may feel to contest this authority. Recognizing the authority does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding.

Rule 26(d)(2) is added to allow a party to deliver Rule 34 requests to another party more than 21 days after that party has been served even though the parties have not yet had a required Rule 26(f) conference. Delivery may be made by any party to the party that has been served, and by that party to any plaintiff and any other party that has been served. Delivery does not count as service; the requests are considered to be served at the first Rule 26(f) conference. Under Rule 34(b)(2)(A) the time to respond runs from service. This relaxation of the discovery moratorium is designed to facilitate focused discussion during the Rule 26(f) conference. Discussion at the conference may produce changes in the requests. The opportunity for advance scrutiny of requests delivered before the Rule 26(f) conference should not affect a decision whether to allow additional time to respond.

Rule 26(d)(3) is renumbered and amended to recognize that the parties may stipulate to case-specific sequences of discovery.

Rule 26(f)(3) is amended in parallel with Rule 16(b)(3) to add two items to the discovery plan —

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issues about preserving electronically stored information and court orders under Evidence Rule 502.

Rule 30. Depositions by Oral Examination

(a) When a Deposition May Be Taken.

* * * * *

(2) ***With Leave.*** A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2):

* * * * *

(d) Duration; Sanction; Motion to Terminate or Limit.

(1) ***Duration.*** Unless otherwise stipulated or ordered by the court, a deposition is limited to one day of 7 hours. The court must allow additional time consistent with Rule 26(b)(1) and (2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

* * * * *

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Committee Note

Rule 30 is amended in parallel with Rules 31 and 33 to reflect the recognition of proportionality in Rule 26(b)(1).

1 **Rule 31. Depositions by Written Questions**

2 **(a) When a Deposition May Be Taken.**

3 * * * * *

4 **(2)** ***With Leave.*** A party must obtain leave of court,

5 and the court must grant leave to the extent

6 consistent with Rule 26(b)(1) and (2):

7 * * * * *

Committee Note

Rule 31 is amended in parallel with Rules 30 and 33 to reflect the recognition of proportionality in Rule 26(b)(1).

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1 **Rule 33. Interrogatories to Parties**

2 **(a) In General.**

3 **(1)** ***Number.*** Unless otherwise stipulated or ordered
4 by the court, a party may serve on any other
5 party no more than 25 written interrogatories,
6 including all discrete subparts. Leave to serve
7 additional interrogatories may be granted to the
8 extent consistent with Rule 26(b)(1) and (2).

9 * * * * *

Committee Note

Rule 33 is amended in parallel with Rules 30 and 31 to reflect the recognition of proportionality in Rule 26(b)(1).

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

* * * * *

(b) Procedure.

* * * * *

(2) ***Responses and Objections.***

(A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served or — if the request was delivered under Rule 26(d)(2) — within 30 days after the parties' first Rule 26(f) conference. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) *Responding to Each Item.* For each item or category, the response must either state that

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19 inspection and related activities will be
20 permitted as requested or state ~~an objection~~
21 with specificity the grounds for objecting to
22 the request, including the reasons. The
23 responding party may state that it will
24 produce copies of documents or of
25 electronically stored information instead of
26 permitting inspection. The production must
27 then be completed no later than the time for
28 inspection specified in the request or
29 another reasonable time specified in the
30 response.
31 **(C)** *Objections*. An objection must state
32 whether any responsive materials are being
33 withheld on the basis of that objection. An

34 objection to part of a request must specify

35 the part and permit inspection of the rest.

36 * * * * *

Committee Note

Several amendments are made in Rule 34, aimed at reducing the potential to impose unreasonable burdens by objections to requests to produce.

Rule 34(b)(2)(A) is amended to fit with new Rule 26(d)(2). The time to respond to a Rule 34 request delivered before the parties' Rule 26(f) conference is 30 days after the first Rule 26(f) conference.

Rule 34(b)(2)(B) is amended to require that objections to Rule 34 requests be stated with specificity. This provision adopts the language of Rule 33(b)(4), eliminating any doubt that less specific objections might be suitable under Rule 34. The specificity of the objection ties to the new provision in Rule 34(b)(2)(C) directing that an objection must state whether any responsive materials are being withheld on the basis of that objection. An objection may state that a request is overbroad, but if the objection recognizes that some part of the request is appropriate the objection should state the scope that is not overbroad. Examples would be a statement that the responding party will limit the search to documents or electronically stored information created within a given period of time prior to

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the events in suit, or to specified sources. When there is such an objection, the statement of what has been withheld can properly identify as matters "withheld" anything beyond the scope of the search specified in the objection.

Rule 34(b)(2)(B) is further amended to reflect the common practice of producing copies of documents or electronically stored information rather than simply permitting inspection. The response to the request must state that copies will be produced. The production must be completed either by the time for inspection specified in the request or by another reasonable time specifically identified in the response. When it is necessary to make the production in stages the response should specify the beginning and end dates of the production.

Rule 34(b)(2)(C) is amended to provide that an objection to a Rule 34 request must state whether anything is being withheld on the basis of the objection. This amendment should end the confusion that frequently arises when a producing party states several objections and still produces information, leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objections. The producing party does not need to provide a detailed description or log of all documents withheld, but does need to alert other parties to the fact that documents have been withheld and thereby facilitate an informed discussion of the objection. An objection that states the limits that have controlled the search for responsive and relevant materials qualifies as a statement that the materials have been "withheld."

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(a) Motion for an Order Compelling Disclosure or Discovery.

* * * * *

(3) ***Specific Motions.***

* * * * *

(B) *To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

* * * * *

(iv) a party fails to produce documents or fails to respond that inspection will be permitted — or fails to permit

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17 inspection — as requested under
18 Rule 34.
19 * * * * *
20 **(e) Failure to ~~Provide~~Preserve Electronically Stored**
21 **Information.** ~~Absent exceptional circumstances, a~~
22 ~~court may not impose sanctions under these rules on a~~
23 ~~party for failing to provide electronically stored~~
24 ~~information lost as a result of the routine, good-faith~~
25 ~~operation of an electronic information system.~~If
26 electronically stored information that should have
27 been preserved in the anticipation or conduct of
28 litigation is lost because a party failed to take
29 reasonable steps to preserve it, and it cannot be
30 restored or replaced through additional discovery, the
31 court:

32 **(1)** upon finding prejudice to another party from loss
33 of the information, may order measures no
34 greater than necessary to cure the prejudice; or
35 **(2)** only upon finding that the party acted with the
36 intent to deprive another party of the
37 information's use in the litigation may:
38 **(A)** presume that the lost information was
39 unfavorable to the party;
40 **(B)** instruct the jury that it may or must
41 presume the information was unfavorable to
42 the party; or
43 **(C)** dismiss the action or enter a default
44 judgment.
45 * * * * *

Committee Note

Subdivision (a). Rule 37(a)(3)(B)(iv) is amended to reflect the common practice of producing copies of documents or electronically stored information rather than simply permitting inspection. This change brings item (iv) into line with paragraph (B), which provides a motion for an order compelling "production, or inspection."

Subdivision (e). Present Rule 37(e), adopted in 2006, provides: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." This limited rule has not adequately addressed the serious problems resulting from the continued exponential growth in the volume of such information. Federal circuits have established significantly different standards for imposing sanctions or curative measures on parties who fail to preserve electronically stored information. These developments have caused litigants to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court finds they did not do enough.

New Rule 37(e) replaces the 2006 rule. It authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures. It therefore forecloses reliance on inherent authority or state law to determine when certain measures should be used. The rule does not affect the validity of an independent tort claim for

spoliation if state law applies in a case and authorizes the claim.

The new rule applies only to electronically stored information, also the focus of the 2006 rule. It applies only when such information is lost. Because electronically stored information often exists in multiple locations, loss from one source may often be harmless when substitute information can be found elsewhere.

The new rule applies only if the lost information should have been preserved in the anticipation or conduct of litigation and the party failed to take reasonable steps to preserve it. Many court decisions hold that potential litigants have a duty to preserve relevant information when litigation is reasonably foreseeable. Rule 37(e) is based on this common-law duty; it does not attempt to create a new duty to preserve. The rule does not apply when information is lost before a duty to preserve arises.

In applying the rule, a court may need to decide whether and when a duty to preserve arose. Courts should consider the extent to which a party was on notice that litigation was likely and that the information would be relevant. A variety of events may alert a party to the prospect of litigation. Often these events provide only limited information about that prospective litigation, however, so that the scope of information that should be preserved may remain uncertain. It is important not to be blinded to this reality by hindsight arising from familiarity with an action as it is actually filed.

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Although the rule focuses on the common-law obligation to preserve in the anticipation or conduct of litigation, courts may sometimes consider whether there was an independent requirement that the lost information be preserved. Such requirements arise from many sources — statutes, administrative regulations, an order in another case, or a party's own information-retention protocols. The court should be sensitive, however, to the fact that such independent preservation requirements may be addressed to a wide variety of concerns unrelated to the current litigation. The fact that a party had an independent obligation to preserve information does not necessarily mean that it had such a duty with respect to the litigation, and the fact that the party failed to observe some other preservation obligation does not itself prove that its efforts to preserve were not reasonable with respect to a particular case.

The duty to preserve may in some instances be triggered or clarified by a court order in the case. Preservation orders may become more common, in part because Rules 16(b)(3)(B)(iii) and 26(f)(3)(C) are amended to encourage discovery plans and orders that address preservation. Once litigation has commenced, if the parties cannot reach agreement about preservation issues, promptly seeking judicial guidance about the extent of reasonable preservation may be important.

The rule applies only if the information was lost because the party failed to take reasonable steps to preserve the information. Due to the ever-increasing volume of electronically stored information and the multitude of

devices that generate such information, perfection in preserving all relevant electronically stored information is often impossible. As under the current rule, the routine, good-faith operation of an electronic information system would be a relevant factor for the court to consider in evaluating whether a party failed to take reasonable steps to preserve lost information, although the prospect of litigation may call for reasonable steps to preserve information by intervening in that routine operation. This rule recognizes that "reasonable steps" to preserve suffice; it does not call for perfection. The court should be sensitive to the party's sophistication with regard to litigation in evaluating preservation efforts; some litigants, particularly individual litigants, may be less familiar with preservation obligations than others who have considerable experience in litigation.

Because the rule calls only for reasonable steps to preserve, it is inapplicable when the loss of information occurs despite the party's reasonable steps to preserve. For example, the information may not be in the party's control. Or information the party has preserved may be destroyed by events outside the party's control — the computer room may be flooded, a "cloud" service may fail, a malign software attack may disrupt a storage system, and so on. Courts may, however, need to assess the extent to which a party knew of and protected against such risks.

Another factor in evaluating the reasonableness of preservation efforts is proportionality. The court should be sensitive to party resources; aggressive preservation efforts can be extremely costly, and parties (including

governmental parties) may have limited staff and resources to devote to those efforts. A party may act reasonably by choosing a less costly form of information preservation, if it is substantially as effective as more costly forms. It is important that counsel become familiar with their clients' information systems and digital data — including social media — to address these issues. A party urging that preservation requests are disproportionate may need to provide specifics about these matters in order to enable meaningful discussion of the appropriate preservation regime.

When a party fails to take reasonable steps to preserve electronically stored information that should have been preserved in the anticipation or conduct of litigation, and the information is lost as a result, Rule 37(e) directs that the initial focus should be on whether the lost information can be restored or replaced through additional discovery. Nothing in the rule limits the court's powers under Rules 16 and 26 to authorize additional discovery. Orders under Rule 26(b)(2)(B) regarding discovery from sources that would ordinarily be considered inaccessible or under Rule 26(c)(1)(B) on allocation of expenses may be pertinent to solving such problems. If the information is restored or replaced, no further measures should be taken. At the same time, it is important to emphasize that efforts to restore or replace lost information through discovery should be proportional to the apparent importance of the lost information to claims or defenses in the litigation. For example, substantial measures should not be employed to restore or replace information that is marginally relevant or duplicative.

Subdivision (e)(1). This subdivision applies only if information should have been preserved in the anticipation or conduct of litigation, a party failed to take reasonable steps to preserve the information, information was lost as a result, and the information could not be restored or replaced by additional discovery. In addition, a court may resort to (e)(1) measures only "upon finding prejudice to another party from loss of the information." An evaluation of prejudice from the loss of information necessarily includes an evaluation of the information's importance in the litigation.

The rule does not place a burden of proving or disproving prejudice on one party or the other. Determining the content of lost information may be a difficult task in some cases, and placing the burden of proving prejudice on the party that did not lose the information may be unfair. In other situations, however, the content of the lost information may be fairly evident, the information may appear to be unimportant, or the abundance of preserved information may appear sufficient to meet the needs of all parties. Requiring the party seeking curative measures to prove prejudice may be reasonable in such situations. The rule leaves judges with discretion to determine how best to assess prejudice in particular cases.

Once a finding of prejudice is made, the court is authorized to employ measures "no greater than necessary to cure the prejudice." The range of such measures is quite broad if they are necessary for this purpose. There is no all-purpose hierarchy of the severity of various measures;

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the severity of given measures must be calibrated in terms of their effect on the particular case. But authority to order measures no greater than necessary to cure prejudice does not require the court to adopt measures to cure every possible prejudicial effect. Much is entrusted to the court's discretion.

In an appropriate case, it may be that serious measures are necessary to cure prejudice found by the court, such as forbidding the party that failed to preserve information from putting on certain evidence, permitting the parties to present evidence and argument to the jury regarding the loss of information, or giving the jury instructions to assist in its evaluation of such evidence or argument, other than instructions to which subdivision (e)(2) applies. Care must be taken, however, to ensure that curative measures under subdivision (e)(1) do not have the effect of measures that are permitted under subdivision (e)(2) only on a finding of intent to deprive another party of the lost information's use in the litigation. An example of an inappropriate (e)(1) measure might be an order striking pleadings related to, or precluding a party from offering any evidence in support of, the central or only claim or defense in the case. On the other hand, it may be appropriate to exclude a specific item of evidence to offset prejudice caused by failure to preserve other evidence that might contradict the excluded item of evidence.

Subdivision (e)(2). This subdivision authorizes courts to use specified and very severe measures to address or deter failures to preserve electronically stored information, but only on finding that the party that lost the

information acted with the intent to deprive another party of the information's use in the litigation. It is designed to provide a uniform standard in federal court for use of these serious measures when addressing failure to preserve electronically stored information. It rejects cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence.

Adverse-inference instructions were developed on the premise that a party's intentional loss or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the evidence was unfavorable to the party responsible for loss or destruction of the evidence. Negligent or even grossly negligent behavior does not logically support that inference. Information lost through negligence may have been favorable to either party, including the party that lost it, and inferring that it was unfavorable to that party may tip the balance at trial in ways the lost information never would have. The better rule for the negligent or grossly negligent loss of electronically stored information is to preserve a broad range of measures to cure prejudice caused by its loss, but to limit the most severe measures to instances of intentional loss or destruction.

Similar reasons apply to limiting the court's authority to presume or infer that the lost information was unfavorable to the party who lost it when ruling on a pretrial motion or presiding at a bench trial. Subdivision (e)(2) limits the ability of courts to draw

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adverse inferences based on the loss of information in these circumstances, permitting them only when a court finds that the information was lost with the intent to prevent its use in litigation.

Subdivision (e)(2) applies to jury instructions that permit or require the jury to presume or infer that lost information was unfavorable to the party that lost it. Thus, it covers any instruction that directs or permits the jury to infer from the loss of information that it was in fact unfavorable to the party that lost it. The subdivision does not apply to jury instructions that do not involve such an inference. For example, subdivision (e)(2) would not prohibit a court from allowing the parties to present evidence to the jury concerning the loss and likely relevance of information and instructing the jury that it may consider that evidence, along with all the other evidence in the case, in making its decision. These measures, which would not involve instructing a jury it may draw an adverse inference from loss of information, would be available under subdivision (e)(1) if no greater than necessary to cure prejudice. In addition, subdivision (e)(2) does not limit the discretion of courts to give traditional missing evidence instructions based on a party's failure to present evidence it has in its possession at the time of trial.

Subdivision (e)(2) requires a finding that the party acted with the intent to deprive another party of the information's use in the litigation. This finding may be made by the court when ruling on a pretrial motion, when presiding at a bench trial, or when deciding whether to give an adverse inference instruction at trial. If a court were to

conclude that the intent finding should be made by a jury, the court's instruction should make clear that the jury may infer from the loss of the information that it was unfavorable to the party that lost it only if the jury first finds that the party acted with the intent to deprive another party of the information's use in the litigation. If the jury does not make this finding, it may not infer from the loss that the information was unfavorable to the party that lost it.

Subdivision (e)(2) does not include a requirement that the court find prejudice to the party deprived of the information. This is because the finding of intent required by the subdivision can support not only an inference that the lost information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced by the loss of information that would have favored its position. Subdivision (e)(2) does not require any further finding of prejudice.

Courts should exercise caution, however, in using the measures specified in (e)(2). Finding an intent to deprive another party of the lost information's use in the litigation does not require a court to adopt any of the measures listed in subdivision (e)(2). The remedy should fit the wrong, and the severe measures authorized by this subdivision should not be used when the information lost was relatively unimportant or lesser measures such as those specified in subdivision (e)(1) would be sufficient to redress the loss.

1 **Rule 55. Default; Default Judgment**

2 * * * * *

3 **(c) Setting Aside a Default or a Default Judgment.**

4 The court may set aside an entry of default for good

5 cause, and it may set aside a final default judgment

6 under Rule 60(b).

7 * * * * *

Committee Note

Rule 55(c) is amended to make plain the interplay between Rules 54(b), 55(c), and 60(b). A default judgment that does not dispose of all of the claims among all parties is not a final judgment unless the court directs entry of final judgment under Rule 54(b). Until final judgment is entered, Rule 54(b) allows revision of the default judgment at any time. The demanding standards set by Rule 60(b) apply only in seeking relief from a final judgment.

1 **Rule 84. Forms**

2 **[Abrogated (Apr. __, 2015, eff. Dec. 1, 2015).]**

3 ~~The forms in the Appendix suffice under these rules~~

4 ~~and illustrate the simplicity and brevity that these rules~~

5 ~~contemplate.~~

Committee Note

Rule 84 was adopted when the Civil Rules were established in 1938 "to indicate, subject to the provisions of these rules, the simplicity and brevity of statement which the rules contemplate." The purpose of providing illustrations for the rules, although useful when the rules were adopted, has been fulfilled. Accordingly, recognizing that there are many excellent alternative sources for forms, including the Administrative Office of the United States Courts, Rule 84 and the Appendix of Forms are no longer necessary and have been abrogated.

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1 **APPENDIX OF FORMS**

2 **[Abrogated (Apr. __, 2015, eff. Dec. 1, 2015).]**

1 **Rule 4. Summons**

2 * * * * *

3 **(d) Waiving Service.**

4 **(1)** ***Requesting a Waiver.*** An individual,
5 corporation, or association that is subject to
6 service under Rule 4(e), (f), or (h) has a duty to
7 avoid unnecessary expenses of serving the
8 summons. The plaintiff may notify such a
9 defendant that an action has been commenced
10 and request that the defendant waive service of a
11 summons. The notice and request must:

12 * * * * *

13 **(C)** be accompanied by a copy of the complaint,
14 2 copies of ~~a~~the waiver form appended to
15 this Rule 4, and a prepaid means for
16 returning the form;

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17 **(D)** inform the defendant, using ~~text prescribed~~
18 ~~in Form 5~~the form appended to this Rule 4,
19 of the consequences of waiving and not
20 waiving service;

21 * * * * *

22 **Rule 4 Notice of a Lawsuit and Request to Waive**
23 **Service of Summons.**

24 (Caption)

25 To (*name the defendant or — if the defendant is a*
26 *corporation, partnership, or association — name an officer*
27 *or agent authorized to receive service*):

28 **Why are you getting this?**

29 A lawsuit has been filed against you, or the entity you
30 represent, in this court under the number shown above. A
31 copy of the complaint is attached.

32 This is not a summons, or an official notice from the
33 court. It is a request that, to avoid expenses, you waive
34 formal service of a summons by signing and returning the
35 enclosed waiver. To avoid these expenses, you must return
36 the signed waiver within (*give at least 30 days or at least*
37 *60 days if the defendant is outside any judicial district of*
38 *the United States*) from the date shown below, which is the

39 date this notice was sent. Two copies of the waiver form
40 are enclosed, along with a stamped, self-addressed
41 envelope or other prepaid means for returning one copy.
42 You may keep the other copy.

43 **What happens next?**

44 If you return the signed waiver, I will file it with the
45 court. The action will then proceed as if you had been
46 served on the date the waiver is filed, but no summons will
47 be served on you and you will have 60 days from the date
48 this notice is sent (see the date below) to answer the
49 complaint (or 90 days if this notice is sent to you outside
50 any judicial district of the United States).

51 If you do not return the signed waiver within the time
52 indicated, I will arrange to have the summons and
53 complaint served on you. And I will ask the court to
54 require you, or the entity you represent, to pay the expenses
55 of making service.

56 Please read the enclosed statement about the duty to
57 avoid unnecessary expenses.

58 I certify that this request is being sent to you on the
59 date below.

60 Date: _____

61 _____
62 (Signature of the attorney
63 or unrepresented party)

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64 _____
65 (Printed name)

66 _____
67 (Address)

68 _____
69 (E-mail address)

70 _____
71 (Telephone number)

72 **Rule 4 Waiver of the Service of Summons.**

73 (Caption)

74 To (*name the plaintiff's attorney or the unrepresented*
75 *plaintiff*):

76 I have received your request to waive service of a
77 summons in this action along with a copy of the complaint,
78 two copies of this waiver form, and a prepaid means of
79 returning one signed copy of the form to you.

80 I, or the entity I represent, agree to save the expense
81 of serving a summons and complaint in this case.

82 I understand that I, or the entity I represent, will keep
83 all defenses or objections to the lawsuit, the court's
84 jurisdiction, and the venue of the action, but that I waive
85 any objections to the absence of a summons or of service.

86 I also understand that I, or the entity I represent, must
87 file and serve an answer or a motion under Rule 12 within
88 60 days from _____, the date when this
89 request was sent (or 90 days if it was sent outside the
90 United States). If I fail to do so, a default judgment will be
91 entered against me or the entity I represent.

92 Date: _____

93 _____
94 (Signature of the attorney
95 or unrepresented party)

96 _____
97 (Printed name)

98 _____
99 (Address)

100 _____
101 (E-mail address)

102 _____
103 (Telephone number)

104 (Attach the following)

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105 **Duty to Avoid Unnecessary Expenses**
106 **of Serving a Summons**

107 Rule 4 of the Federal Rules of Civil Procedure
108 requires certain defendants to cooperate in saving
109 unnecessary expenses of serving a summons and complaint.
110 A defendant who is located in the United States and who
111 fails to return a signed waiver of service requested by a
112 plaintiff located in the United States will be required to pay
113 the expenses of service, unless the defendant shows good
114 cause for the failure.

115 "Good cause" does not include a belief that the
116 lawsuit is groundless, or that it has been brought in an
117 improper venue, or that the court has no jurisdiction over
118 this matter or over the defendant or the defendant's
119 property.

120 If the waiver is signed and returned, you can still
121 make these and all other defenses and objections, but you
122 cannot object to the absence of a summons or of service.

123 If you waive service, then you must, within the time
124 specified on the waiver form, serve an answer or a motion
125 under Rule 12 on the plaintiff and file a copy with the
126 court. By signing and returning the waiver form, you are
127 allowed more time to respond than if a summons had been
128 served.

Committee Note

Subdivision (d). Abrogation of Rule 84 and the other official forms requires that former Forms 5 and 6 be directly incorporated into Rule 4.

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Phoenix, AZ
January 8-9, 2015

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AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Phoenix, Arizona
January 8-9, 2015

1. **Welcome and Opening Remarks**

   - **Welcome and opening remarks by Hon. Jeffrey S. Sutton**

   - **Report on September 2014 Judicial Conference session**

   - **Report on transmission of Judicial Conference-approved proposed rules amendments to the Supreme Court**

     - Bankruptcy Rule 1007 (approved in March 2014)
     - Civil Rules 1, 4, 6, 16, 26, 30, 31, 33, 34, 37, and 55, and proposed abrogation of Rule 84 and the Appendix of Forms (approved in September 2014)

   - **Report on rules amendments and Official Bankruptcy Forms effective December 1, 2014**

     - Appellate Rule 6
     - Bankruptcy Rules 1014, 7004, 7008, 7054, 8001–8028, 9023, and 9024; and Official Bankruptcy Forms 3A, 3B, 6 Summary, 17A, 17B, 17C, 22A-1, 22A-1 Supp, 22A-2, 22B, 22C-1 and 22C-2
     - Civil Rule 77
     - Criminal Rules 5, 6, 12, 34, and 58
     - Evidence Rules 801(d)(1)(B) and 803(6)–(8)

2. **ACTION: Approving Minutes of May 2014 Committee Meeting**

3. **Report of the Advisory Committee on Appellate Rules – Hon. Steven M. Colloton**

   - **Rules and Forms published for public comment:** Appellate Rules 4, 5, 21, 25, 26, 27, 28.1, 29, 32, 35, and 40, and Forms 1, 5, 6, and New Form 7

   - **Minutes and other informational items**

4. **Report of the Advisory Committee on Bankruptcy Rules – Hon. Sandra Segal Ikuta**

   - **ACTION:** Approving publishing for public comment proposed amendment to Rule 1001

- **Rules and Official Forms published for public comment:** Bankruptcy Rules 1010, 1011, 2002, 3002, 3002.1, 3007, 3012, 3015, 4003, 5009, 7001, 9006, and 9009, and New Rule 1012, and Official Forms 11A, 11B, 106J, 201, 202, 204, 205, 206Sum, 206A/B, 206D, 206E/F, 206G, 206H, 207, 309A, 309B, 309C, 309D, 309E, 309F, 309G, 309H, 309I, 312, 313, 314, 315, 401, 410, 410A, 410S1, 410S2, 416A, 416B, 416D, 424, and Instructions, and new Official Forms 106J-2 and 113

- **Minutes and other informational items**

5. Report of the Advisory Committee on Civil Rules – Hon. David G. Campbell

- **Rules published for public comment:** Civil Rules 4, 6, and 82

- **Minutes and other informational items**

6. Report of the Advisory Committee on Criminal Rules – Hon. Reena Raggi

- **Rules published for public comment and report on November 5, 2014 public hearing:** Criminal Rules 4, 41, and 45

- **Minutes and other informational items**

7. Report of the Advisory Committee on Evidence Rules – Hon. William K. Sessions III

- **Minutes and other informational items**

8. Report of the Inter-Committee CM/ECF Subcommittee – Hon. Michael A. Chagares

9. Panel Discussion: ***Creation of Pilot Projects in Conjunction with the Federal Judicial Center to Facilitate Discovery Reform Efforts***

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- Request for proposed changes to the *Strategic Plan for the Federal Judiciary*

- Educational efforts concerning new rules amendments

11. Next meeting in Washington, D.C. on May 28-29, 2015

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Committee on Rules of Practice and Procedure

To carry on a continuous study of the operation and effect of the general rules of practice and procedure.

Members	Position	District/Circuit	Start Date	End Date
Jeffrey S. Sutton, Chair	C	Sixth Circuit	2012	2015
James M. Cole*	DOJ	Washington, DC	----	Open
Dean C. Colson	ESQ	Florida	2009	2015
Brent E. Dickson	CJUST	Indiana	2014	2017
Roy T. Englert, Jr.	ESQ	Washington, DC	2010	2016
Gregory G. Garre	ESQ	Washington, DC	2011	2017
Neil M. Gorsuch	C	Tenth Circuit	2010	2016
Susan P. Graber	C	Ninth Circuit	2013	2016
David F. Levi	ACAD	North Carolina	2009	2015
Patrick J. Schiltz	D	Minnesota	2010	2016
Amy J. St. Eve	D	Illinois (Northern)	2013	2016
Larry D. Thompson	ESQ	Georgia	2011	2017
Richard C. Wesley	C	Second Circuit	2011	2017
Jack Zouhary	D	Ohio (Northern)	2012	2015
Daniel Coquillette, Reporter	ACAD	Massachusetts	1985	Open

Secretary and Principal Staff: Jonathan C. Rose 202-502-1820

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* Ex-officio

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Liaison for the Advisory Committee on Bankruptcy Rules	**Roy T. Englert, Jr., Esq.**	***(Standing)***
Liaison for the Advisory Committee on Civil Rules	**Judge Arthur I. Harris**	***(Bankruptcy)***
Liaison for the Advisory Committee on Civil Rules	**Judge Neil M. Gorsuch**	***(Standing)***
Liaison for the Advisory Committee on Criminal Rules	**Judge Amy J. St. Eve**	***(Standing)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Paul S. Diamond**	***(Civil)***
Liaison for the Advisory Committee on Evidence Rules	**Judge James C. Dever III**	***(Criminal)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Richard C. Wesley**	***(Standing)***

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of May 29–30, 2014
Washington, D.C.
Draft Minutes as of September 22, 2014

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C., on Thursday and Friday, May 29 and 30, 2014. The following members participated in the meeting:

Judge Jeffrey S. Sutton, Chair
Dean C. Colson, Esquire
Roy T. Englert, Jr., Esquire
Gregory G. Garre, Esquire
Judge Neil M. Gorsuch
Judge Susan P. Graber
Chief Justice Wallace B. Jefferson
Dean David F. Levi
Judge Patrick J. Schiltz
Judge Amy J. St. Eve
Larry D. Thompson, Esquire
Judge Richard C. Wesley
Judge Jack Zouhary

Deputy Attorney General James M. Cole was unable to attend. Stuart Delery, Esq., Assistant Attorney General for the Civil Division, Elizabeth J. Shapiro, Esq., Theodore Hirt, Esq., Allison Stanton, Esq., Rachel Hines, Esq., and J. Christopher Kohn, Esq., represented the Department of Justice at various times throughout the meeting.

Professor R. Joseph Kimble, the committee's style consultant, participated. Judge Jeremy D. Fogel, Director of the Federal Judicial Center, also participated. Judge Michael A. Chagares, member of the Appellate Rules Committee and chair of the CM/ECF Subcommittee, also participated. Judge John G. Koeltl, member of the Civil Rules Committee and chair of that committee's Duke Subcommittee, participated in part of the meeting by telephone.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Jonathan C. Rose	The committee's secretary and Rules Committee Officer
Benjamin J. Robinson	Deputy Rules Officer
Julie Wilson	Rules Office Attorney
Andrea L. Kuperman	Chief Counsel to the Rules Committees
Tim Reagan	Senior Research Associate, Federal Judicial Center
Emery G. Lee, III	Senior Research Associate, Federal Judicial Center
Catherine Borden	Research Associate, Federal Judicial Center
Scott Myers	Attorney in the Bankruptcy Judges Division
Bridget M. Healy	Attorney in the Bankruptcy Judges Division
Frances F. Skillman	Rules Office Paralegal Specialist
Toni Loftin	Rules Office Administrative Specialist

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
- Judge Steven M. Colloton, Chair
- Professor Catherine T. Struve, Reporter

Advisory Committee on Bankruptcy Rules —
- Judge Eugene R. Wedoff, Chair
- Professor S. Elizabeth Gibson, Reporter
- Professor Troy A. McKenzie, Associate Reporter

Advisory Committee on Civil Rules —
- Judge David G. Campbell, Chair
- Professor Edward H. Cooper, Reporter
- Professor Richard L. Marcus, Associate Reporter

Advisory Committee on Criminal Rules —
- Judge Reena Raggi, Chair
- Professor Sara Sun Beale, Reporter

Professor Nancy J. King, Associate Reporter
Advisory Committee on Evidence Rules —
Judge Sidney A. Fitzwater, Chair

Professor Daniel J. Capra, Reporter to the Evidence Rules Committee, was unable to attend.

INTRODUCTORY REMARKS

Judge Sutton opened the meeting by welcoming everyone and thanking the Rules Office staff for arranging the logistics of the meeting and the committee dinner. Judge Sutton reported that all of the rules proposals that were before the Supreme Court were approved in April, including the proposed amendment to Criminal Rule 12, which had been modified as agreed at the January Standing Committee meeting. The proposals to amend the Bankruptcy Rules to respond to *Stern v. Marshall* were withdrawn for the time being, while the committee waits to see what the Supreme Court does in *Executive Benefits Insurance Agency v. Arkison*, which may address an issue involved in the *Stern* proposals.

Judge Sutton also noted that the term of Chief Justice Wallace Jefferson, the committee's state court representative, was coming to a close. He said that Chief Justice Brent Dickson, of the Indiana Supreme Court, would succeed Chief Justice Jefferson as the state court representative. Judge Sutton thanked Chief Justice Jefferson for his wonderful service to the committee, described some of Justice Jefferson's outstanding contributions to the committee's work and some of his accomplishments outside the committee, and presented him with a plaque signed by Judge John Bates, Director of the Administrative Office, and by Chief Justice John G. Roberts. Chief Justice Jefferson expressed his thanks to the committee for a terrific experience and for doing such good work for the nation.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee unanimously approved the minutes of the last meeting, held on January 9–10, 2014.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell and Professors Cooper and Marcus presented the report of the advisory committee, as set out in Judge Campbell's memorandum and attachments of May 2, 2014 (Agenda Item 2).

Amendments for Final Approval

DUKE RULES PACKAGE
(FED. R. CIV. P. 1, 4, 16, 26, 30, 31, 33, 34, AND 37)

Judge Campbell reported that the Civil Rules Committee had a final proposed package of amendments to implement the ideas from the Civil Litigation Conference held at Duke Law School in May 2010 ("Duke Conference"). He noted that the Duke Conference was intended to look at the Civil Rules generally and whether they are working and what needs to be improved. The conclusion from that Conference, he said, was that the rules generally work well, but that improvement was needed in three areas: (1) proportionality; (2) cooperation among counsel; and (3) early, active judicial case management. The advisory committee had eventually narrowed the list of possible amendments to address these areas and had published its proposals for public comment in August 2013. Judge Campbell reported that there was great public interest in the proposals, with the public comment period generating over 2,300 comments and over 40 witnesses at each of three public hearings. Judge Campbell believed that the response of the bar and the public demonstrated the continuing vitality of the Rules Enabling Act process, and he stated that the comments the committee received were very helpful in refining the proposals. He also expressed gratitude to the reporters for their excellent work in reviewing and summarizing all of the testimony and comments.

Judge Campbell next explained that the advisory committee had made a number of changes to the published proposals to address issues raised during the public comment period. In addition, the advisory committee had decided not to recommend for final adoption the published proposals to place presumptive limits on certain types of discovery devices.

Judge Campbell and Professor Cooper reported that the advisory committee proposed a few changes to some committee note language that appeared in the Standing Committee agenda materials. First, the advisory committee proposed to take out some language in the committee note for Rule 26. The proposed revised committee note would remove the language in the committee note appearing in the agenda book at page 85, lines 277 to 289. The deleted matter provided additional background on the 2000 amendment to Rule 26 that had moved subject-matter discovery from party-controlled discovery to court-managed discovery. Professor Cooper explained that the deleted language was unnecessary. Second, a paragraph was added after line 262 on page 84 of the agenda materials, to encourage courts and parties to consider computer-assisted searches as a means of reducing the cost of producing electronically stored information, thereby addressing possible proportionality concerns that might arise in ESI-intensive cases.[1] Third, Judge Campbell reported

[1] The added language stated:

> The burden or expense of proposed discovery should be determined in a realistic way. This includes the burden or expense of producing electronically stored information. Computer-based methods of searching such information continue to develop, particularly for cases involving large volumes of electronically stored information. Courts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery as reliable means of searching electronically stored

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that the proposal to amend Rule 1, which will emphasize that the court and the parties bear responsibility for securing the just, speedy, and inexpensive resolution of the case, now includes some added committee note language that was not in the agenda materials. The added language would make it clear that the change was not intended to create a new source for sanctions motions. The proposed added language would state: "This amendment does not create a new or independent source of sanctions. Neither does it abridge the scope of any other of these rules."

A member commented that the Duke package is "awesome" and that the advisory committee had done a marvelous job. He added that the problems being addressed are intractable, difficult problems, complicated by the commitment to transsubstantivity. He said that the advisory committee had invited as much participation as possible and he believed the proposals could make a real difference in meeting the goals of Rule 1. He added that the committee would need to continue to evaluate the rules to make sure the system is working well. He congratulated Judge Koeltl (the chair of the Duke Subcommittee), Judge Campbell, Judge Sutton, and the reporters for putting together a great package. Other members added their gratitude and commended the good work and extraordinary effort.

A member asked whether a portion of the proposal to amend Rule 34(b)(2)(B)—that "The production must then be completed no later than the time for inspection stated in the request or another reasonable time stated in the response"—would allow a responding party to simply state that it would produce documents at a reasonable time without providing a specific date. Another member suggested a friendly amendment that would revise the proposal to state: "If production is not to be completed by the time for inspection stated in the request, then the response must identify another date by which production will occur." After conferring with the reporters, Judge Campbell reported that the idea was to make the provision in Rule 34(b)(2)(B) parallel Rule 34(b)(1)(B), which states that a request "must specify a reasonable *time* . . . for the inspection . . ." (emphasis added). For that reason, it was necessary to retain "time" in the proposed revision to Rule 34(b)(2)(B), instead of substituting "date." However, the advisory committee changed its proposal to refer to "specified" instead of "stated," to emphasize that it would not be sufficient to generally state that the production would occur at a reasonable time. He noted that the proposed advisory committee note already stated that "[w]hen it is necessary to make the production in stages the response should specify the beginning and end dates of the production." A motion was made to change "stated" to "specified" in the proposal, so that it would read: "The production must then be completed no later than the time for inspection <u>specified</u> in the request or another reasonable time <u>specified</u> in the response." The motion passed unanimously.

The Duke package of proposed amendments passed by a unanimous vote. Judge Sutton thanked Judge Koeltl for his tireless work on the Duke Conference and on this very promising set of proposed amendments, as well as Judge Campbell and the rest of his team.

The committee unanimously approved the Duke package of proposed amendments to

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information become available.

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the Civil Rules, revised as stated above, to be submitted for final approval by the Judicial Conference.

FED. R. CIV. P. 37(e)

Judge Campbell reported on the proposed amendment to Rule 37(e), which is intended to give better guidance to courts and litigants on the consequences of failing to preserve information for use in litigation. He said that comments on the version that was published for public comment were extensive, and the advisory committee had substantially revised the rule to address issues raised by the comments. The subcommittee and the advisory committee decided that the following guiding principles should be implemented in the revised proposal: (1) It should resolve the circuit split on the culpability standard for imposing certain severe sanctions; (2) It should preserve ample trial court discretion to deal with the loss of information; (3) It should be limited to electronically stored information; and (4) It should not be a strict liability rule that would automatically impose serious sanctions if information is lost. Judge Campbell explained that the rule text and committee note had been revised after publication in line with these principles.[2]

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[2] Judge Campbell also noted that the advisory committee's final proposal revised the committee note that was included in the agenda materials for the Standing Committee's meeting. Specifically, the paragraphs on pages 322–23, lines 170–91 were revised as follows:

> Subdivision (e)(2) requires a finding that the party acted with the intent to deprive another party of the information's use in the litigation. This finding may be made by the court when ruling on a pretrial motion, when presiding at a bench trial, or when deciding whether to give an adverse inference instruction at trial. If a court were to conclude that the intent finding should be made by a jury, the court's instruction should make clear that the jury may infer from the loss of the information that it was unfavorable to the party that lost it only if the jury first finds that the party acted with the intent to deprive another party of the information's use in the litigation. If the jury does not make this finding, it may not infer from the loss that the information was unfavorable to the party that lost it.
>
> Subdivision (e)(2) does not include a requirement that the court find prejudice to the party deprived of the information. This is because the finding of intent required by the subdivision can support not only an inference that the lost information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced by the loss of information that would have favored its position. Subdivision (e)(2) does not require any further finding of prejudice.
>
> Courts should exercise caution, however, in using the measures specified in (e)(2). Finding an intent to deprive another party of the lost information's use in the litigation does not require a court to adopt any of the measures listed in subdivision (e)(2). The remedy should fit the wrong, and the severe measures authorized by this subdivision should not be used when the information lost was relatively unimportant or lesser measures such as those specified in subdivision (e)(1) would be sufficient to redress the loss.
>
> ~~Subdivision (e)(2) does not include an express requirement that the court find prejudice to the party deprived of the information. The adverse inference permitted under this subdivision can itself satisfy the prejudice requirement: if a court or jury infers the lost information was unfavorable to the party that lost it, the same inference suggests that the opposing party was prejudiced by the loss.~~

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The committee engaged in discussion on the proposal. After considering some suggestions and discussing them with the reporters, the advisory committee agreed to make a suggested change to delete "may" in line 9 on page 318 of the agenda materials, and to add "may" on line 10 before "order," and on line 13 after "litigation." Judge Campbell stated that he and the reporters agreed that this change adds more emphasis to the word "only" on line 12, underscoring the intent that (e)(2) measures are not available under (e)(1).

A member commented that, in looking at this proposal from multiple perspectives, it is going to be very helpful and is clearly needed. He added his congratulations to the advisory committee for their terrific work.

The committee unanimously approved the proposed amendment to Rule 37(e), revised as stated above, to be submitted for final approval by the Judicial Conference.

FORMS
(FED. R. CIV. P. 84 AND 4 AND APPENDIX OF FORMS)

Judge Campbell reported on the proposal to abrogate Rule 84 and the Appendix of Forms. He said that there were relatively few comments on this proposal and that the advisory committee remained persuaded after reading the comments that the forms are rarely used and that the best course is abrogation. Professor Cooper added that Forms 5 and 6 on waiver of service would be incorporated into Rule 4.

A member suggested that he thought the sense of the committee was that forms can be and are extremely important in helping lawyers and pro se litigants, but that the advisory committee should no longer bear responsibility for them. He added that he favored abrogation, but the advisory committee should continue to have a role in shaping the forms, perhaps by participating in a group at the Administrative Office (AO) that can handle the forms, helping to draft model forms, and/or having a right of first refusal on forms drafted by the AO. Judge Sutton agreed that forms are very useful and that this proposal is simply about getting them out of the Rules Enabling Act process. He added that there are many options in terms of how civil forms are handled if the abrogation goes into effect and suggested that the advisory committee consider what it thinks its role should be in shaping the forms going forward. He suggested that the advisory committee present its suggestion in that regard for discussion at the next Standing Committee meeting in January.

The committee unanimously approved the proposed amendments to abrogate Rule 84 and the Appendix of Forms, and to amend Rule 4 to incorporate Forms 5 and 6, to be submitted for final approval by the Judicial Conference.

~~In addition, there may be rare cases where a court concludes that a party's conduct is so reprehensible that serious measures should be imposed even in the absence of prejudice. In such rare cases, however, the court must still find the intent specified in subdivision (e)(2).~~

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Judge Sutton congratulated and praised Judge Campbell, the reporters, and the subcommittee chairs for all their hard work and terrific leadership and insight in bringing the Duke proposals, the Rule 37(e) amendments, and the Rule 84 amendment to the Standing Committee. He added that all three sets of proposals were done through consensus, which is a credit to the chairs of the subcommittees and the chair of the advisory committee. He also said that many of these proposals started with former Civil Rules Committee and Standing Committee chairs Judge Lee H. Rosenthal and Judge Mark R. Kravitz. This package of amendments, he said, was a wonderful tribute to Judge Kravitz's memory. Judge Sutton added that the way to thank the chairs and reporters for all of their work on these proposals is to make sure they make a difference in practice. He said that in the near future, the Standing Committee should discuss these amendments in terms of broader reform, including pilot projects and judicial education efforts, to make sure that they are making a difference on the ground. Judge Campbell expressed his thanks to Judge Grimm, for his tireless efforts on Rule 37, and to Judge Sutton for all of his insight and time in overseeing the work on these proposals.

FED. R. CIV. P. 6(d)

Professor Cooper reported that the advisory committee had also published an amendment to Rule 6(d) that would revise the rule to provide that the three added days provided for actions taken after certain types of service apply only after being served, not after "service" more generally. Few comments were received and no changes were made after publication. Judge Campbell said that the advisory committee recommended approving this proposal, but not sending it on to the Judicial Conference yet, so that it can be presented together with another proposed amendment to Rule 6(d), which would remove the three added days for electronic service and which was being proposed for publication.

The committee unanimously approved the proposed amendment to Rule 6(d), to be submitted for final approval by the Judicial Conference at the appropriate time.

FED. R. CIV. P. 55(c)

Professor Cooper reported that the final proposal that was published for public comment in 2013 was a proposal to amend Rule 55(c) to make explicit that only a final default judgment could be set aside under Rule 60(b).

The committee unanimously approved the proposed amendment to Rule 55(c) to be submitted for final approval by the Judicial Conference.

Amendments for Publication

FED. R. CIV. P. 82

Professor Cooper reported that at its January 2014 meeting, the Standing Committee had approved for publication at a suitable time an amendment to Rule 82 to reflect enactment of a new

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venue statute for civil actions in admiralty. Since January, further reflection had led the advisory committee to believe that a cross-reference in the rule to 28 U.S.C. § 1391 should be deleted and that the text should be further revised to reflect the language of new § 1390. The advisory committee renewed its recommendation to publish the proposal, as revised.

The committee unanimously approved publication of the proposed amendment to Rule 82.

FED. R. CIV. P. 4(m)

Professor Cooper reported on the recommendation to publish a clarifying amendment to Rule 4(m) to ensure that service abroad on a corporation is excluded from the time for service set by Rule 4(m).

The committee unanimously approved publication of the proposed amendment to Rule 4(m).

REPORT OF THE INTER-COMMITTEE CM/ECF SUBCOMMITTEE

Judge Chagares presented the report of the CM/ECF Subcommittee, as set out in his memorandum of May 5, 2014 (Agenda Item 3).

Amendments for Publication

FED. R. APP. P. 26(c), FED. R. BANKR. P. 9006, FED. R. CIV. P. 6, FED. R. CRIM. P. 45

Judge Chagares reported that the subcommittee had been working with the advisory committees for the Appellate, Bankruptcy, Civil, and Criminal Rules on proposals to remove the provisions in each set of rules that currently provide three extra days for acting after electronic service. Each advisory committee recommended an amendment to its set of rules for publication. The subcommittee had unanimously supported the recommendation of the advisory committees to publish these amendments for public comment. The amendments to eliminate the "three-day rule" as applied to electronic service would be to Appellate Rule 26(c), Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rule 45.

Judge Sutton noted that a Standing Committee member had asked at the last Standing Committee meeting whether other types of service should be removed from the three-day rule. Judge Chagares said that question would take some study and for the time being the only recommendation of the subcommittee was to take electronic service out of the three-day rule. Judge Sutton added that the advisory committees would each study that question separately.

A member suggested removing "in" before "widespread skill" in the last sentence of the second paragraph of each of the draft committee notes. The reporters all agreed to make that change.

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The committee unanimously approved publication of the proposed amendments to Appellate Rule 26(c), Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rule 45, with the change to the committee notes described above.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raggi and Professors Beale and King presented the report of the advisory committee, as set out in Judge Raggi's memorandum and attachments of May 5, 2014 (Agenda Item 4).

Amendments for Publication

FED. R. CRIM. P. 4

Judge Raggi reported that the advisory committee recommended publication of an amendment to Rule 4 to address service of summons on organizational defendants who are abroad. The proposed amendment would: (1) specify that the court may take any action authorized by law if an organizational defendant fails to appear in response to a summons, filling a gap in the current rule; (2) for service of a summons on an organization within the United States, eliminate the requirement of a separate mailing to an organizational defendant when delivery has been made to an officer or to a managing or general agent, but require mailing when delivery has been made on an agent authorized by statute, if the statute requires mailing to the organization; and (3) authorize service on an organization at a place not within a judicial district of the United States, prescribing a non-exclusive list of methods for service.

A member suggested making it clearer in the proposed additional sentence in Rule 4(c)(2) that the reference to the summons under Rule 41(c)(3)(D) is to summons to an organization. Judge Raggi agreed to change the sentence to: "A summons to an organization under Rule 41(c)(3)(D) may also be served at a place not within a judicial district of the United States."

Another member asked about the phrase "authorized by law" in the proposed amendment to Rule 4(a), asking whether it clarifies what actions a judge can take if an organizational defendant fails to appear in response to a summons. The committee discussed whether to add "United States" before "law," and decided to include that addition in the version published for public comment, noting that including it would be more likely to elicit comments on whether it was helpful.

Another member suggested that, in the illustrative list of means of giving notice in proposed Rule 4(c)(3)(D)(ii), "stipulated by the parties" be changed to "agreement of the organization" or that the list add "agreed to by the party." Judge Raggi explained that a stipulation implied a certain level of formality and that the list was merely illustrative. She said she could not agree to this change without going back to the advisory committee. The member stated that his suggestion could just be considered the first comment of the public comment period.

The member also suggested that on page 492, line 58, in proposed Rule 4(c)(3)(D)(i),

12b-010163

"another agent" be changed to "an agent" to avoid implying that foreign law always authorizes officers and managing or general agents to receive notice. Judge Raggi agreed to accept that suggestion, noting that it reflected the advisory committee's intent.

The committee unanimously approved publication of the proposed amendment to Rule 4, revised as noted above.

FED. R. CRIM. P. 41

Judge Raggi reported that the advisory committee recommended publishing an amendment to Rule 41, to provide that in two specific circumstances a magistrate judge in a district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and seize or copy electronically stored information even when the media or information is or may be located outside of the district. Judge Raggi explained that this proposal came about because the Department of Justice had encountered special difficulties with Rule 41's territorial venue provisions—which generally limit searches to locations within a district—as applied to investigating crimes involving electronic information.

The current limits on where a warrant application must be made make it difficult to secure a search warrant in two specific situations: First, when the location of the storage media or electronic information to be searched, copied, or seized is not known because the location has been disguised through the use of anonymizing software, and second, when a criminal scheme involves multiple computers located in many different districts, such as a "botnet" in which perpetrators obtain control over numerous computers of unsuspecting victims. Judge Raggi explained that proposed new subparagraph (b)(6)(A) addresses the first scenario. It would provide authority to issue a warrant to use remote electronic access to search electronic storage media and to seize or copy electronically stored information within or outside the district when the district in which the media or information is located has been concealed through technological means. Proposed (b)(6)(B) addresses the second scenario. It would eliminate the burden of attempting to secure multiple warrants in numerous districts and allow a single judge to issue a warrant to search, seize, or copy electronically stored information by remotely accessing multiple affected computers within or outside a district, but only in investigations of violations of 18 U.S.C. § 1030(a)(5), where the media to be searched are "protected computers" that have been "damaged without authorization" (terms defined in 18 U.S.C. § 1030(e)(2) & (8)) and are located in at least five different districts. Judge Raggi added that the proposed amendments affect only the district in which a warrant may be obtained and would not alter the requirements of the Fourth Amendment for obtaining warrants, including particularity and probable cause showings.

She noted that the proposal also includes a change to Rule 41(f)(1)(C), to ensure that notice that a search has been conducted will be provided for searches by remote access as well as physical searches. The rule now requires that notice of a physical search be provided "to the person from whom, or from whose premises, the property was taken" or left "at the place where the officer took the property." The proposed addition to the rule would require that when the search is by remote

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access, reasonable efforts must be made to provide notice to the person whose information was seized or whose property was searched.

The committee unanimously approved publication of the proposed amendment to Rule 41.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Colloton and Professor Struve presented the report of the advisory committee, as set out in Judge Colloton's memorandum and attachments of May 8, 2014 (Agenda Item 5).

Amendments for Publication

Judge Colloton reported that the advisory committee had five proposals it recommended for publication. The first, the proposed amendment to Rule 26(c) to eliminate the three-day rule for electronic service, was already addressed during the CM/ECF Subcommittee's report.

INMATE FILING RULES
(FED. R. APP. P. 4(c)(1) AND 25(a)(2)(C), FORMS 1 AND 5, AND NEW FORM 7)

Judge Colloton reported that the advisory committee recommended publishing a set of amendments designed to clarify and improve the inmate-filing rules. The amendments to Rules (4)(c)(1) and 25(a)(2)(C) would make clear that prepayment of postage is required for an inmate to benefit from the inmate-filing provisions, but that the use of an institution's legal mail system is not. The amendments clarify that a document is timely filed if it is accompanied by evidence—a declaration, notarized statement, or other evidence such as a postmark and date stamp—showing that the document was deposited on or before the due date and that postage was prepaid. New Form 7 is a suggested form of declaration that would satisfy the rule. Forms 1 and 5 (suggested forms of notices of appeal) are revised to include a reference alerting filers to the existence of Form 7.

Professor Struve noted that a few stylistic changes had been made to the proposals in the Standing Committee's agenda materials. First, in Rule 4(c)(1)(B), on page 560, lines 3–4, "meets the requirements of" was changed to "satisfies." A similar change was made to Rule 25(a)(2)(C)(ii), on page 562, lines 9–10. In Rule 25(a)(2)(C)(i), subdivisions (a) and (b), on pages 561 and 562, would become bullet points. As a result, in Rule 25(a)(2)(C)(ii), the cross-reference to Rule 25(a)(2)(C)(i)(a) would refer only to Rule 25(a)(2)(C)(i).

A member noted that in Rule 4(c)(1)(A)(ii), the "it" on page 559, line 20, referred to the "notice" referenced quite a bit earlier in the rule. Judge Colloton agreed to make revisions to clarify the reference. In Rule 4(c)(1)(A)(ii), "it" was changed to "the notice." A corresponding change was made to Rule 25(a)(2)(C)(i), changing "it" to "the paper" on page 562, line 5. Finally, the advisory committee agreed to change "and" to "or" in Rule 25(a)(2)(C)(i), on page 562, line 4, and in Rule 4(c)(1)(A)(ii), page 559, line 20, so that evidence such as a postmark <u>or</u> a date stamp would suffice.

Professor Struve said that, at the suggestion of a committee member, the advisory committee would consider whether to change the references in Rule 4(c)(1)(B) and Rule 25(a)(2)(C)(ii) from "exercises its discretion to permit" to simply "permits." She said that the committee would also consider a member's suggestion that the rules need not suggest the option of getting a notarized statement when a declaration would suffice. She said these suggestions would be brought to the advisory committee for consideration as it works through the comments on the published draft.

The committee unanimously approved publication of the proposed amendments to Rules 4(c)(1) and 25(a)(2)(C), revised as noted above, and to Appellate Forms 1 and 5, and proposed new Form 7.

FED. R. APP. P. 4(a)(4)

Judge Colloton reported that the advisory committee recommended publishing a proposed amendment to Rule 4(a)(4) to address a circuit split on whether a motion filed outside a non-extendable deadline under Civil Rules 50, 52, or 59 counts as "timely" under Rule 4(a)(4) if a court has mistakenly ordered an "extension" of the deadline for filing the motion. The proposal is to adopt the majority approach, which is that postjudgment motions made outside the deadlines set by the Civil Rules are not "timely" under Rule 4(a)(4).

The committee unanimously approved publication of the proposed amendment to Rule 4(a)(4).

LENGTH LIMITS
(FED. R. APP. P. 5, 21, 27, 28.1, 32, 35, AND 40, AND FORM 6)

Judge Colloton reported that the advisory committee recommended publishing a set of proposals to address length limits. The proposed amendments to Rules 5, 21, 27, 35, and 40 would impose type-volume limits for documents prepared using a computer, and would maintain the page limits currently set out in the rules for documents prepared without the aid of a computer. They would also employ a conversion ratio of 250 words per page for these rules. The proposed amendments also shorten Rule 32's word limits for briefs to reflect the pre-1998 page limits multiplied by 250 words. The word limits set by Rule 28.1 for cross-appeals are correspondingly shortened. Finally, the proposals add a new Rule 32(f), setting out a list of items that can be excluded when computing a document's length.

A member asked why it was necessary to have line limits in addition to word limits. Judge Colloton agreed that the advisory committee would examine that question in the future, but he said that it would require careful consideration and the advisory committee recommended publishing the current proposals for now.

The committee unanimously approved publication of the proposed amendments to

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Appellate Rules 5, 21, 27, 28.1, 32, 35, and 40, and to Form 6.

FED. R. APP. P. 29

Judge Colloton reported that the advisory committee recommended publishing an amendment to Rule 29, addressing amicus filings in connection with rehearing. The amendment would re-number the existing rule as Rule 29(a) and would add Rule 29(b) to set default rules for the treatment of amicus filings in connection with petitions for rehearing.

Judge Colloton noted that two stylistic changes were made to the version that appeared in the Standing Committee's agenda materials. First, on page 584, line 14, in proposed Rule 29(b)(2), "Rule 29(a)(2) applies" was changed to "Rule 29(a)(2) governs the need to seek leave." Second, on page 584, line 16, in proposed Rule 29(b)(3), "the" was changed to "a."

The committee discussed whether Rule 29(b)(2) should incorporate any of the language of Rule 29(a)(2). Some members noted that some appellate courts do not allow the filing of amicus briefs without leave of court, because a practice had developed of filing amicus briefs in order to force recusals. Judge Colloton agreed, on behalf of the advisory committee, to borrow some of the language from Rule 29(a)(2) for use in Rule 29(b)(2). The proposed amendment to Rule 29(b)(2) would read: "The United States or its officer or agency or a state may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court." Judge Sutton noted that Rule 29(a), which allows filing amicus briefs by consent during initial consideration of a case on the merits, may be in tension with some circuits' practice, and suggested that the advisory committee consider whether it should be changed in the future. Judge Colloton agreed that the advisory committee would add Rule 29(a) to its agenda.

The committee unanimously approved publication of the proposed amendment to Rule 29, revised as stated above.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Fitzwater presented the report of the advisory committee, as set out in his memorandum and attachment of April 10, 2014 (Agenda Item 6). Judge Fitzwater noted that the advisory committee had no action items to present.

Informational Items

Judge Fitzwater reported that, in connection with its spring meeting, the advisory committee had worked with the University of Maine School of Law to host a symposium on the challenges of electronic evidence. He said that no concrete rules proposals came out of the symposium, but that it set the stage for issues that the advisory committee will need to monitor going forward.

Judge Fitzwater said that the advisory committee is examining a possible amendment to Rule

803(16), the hearsay exception for "ancient documents," and that it will discuss the matter further at its fall meeting.

The Standing Committee's liaison to the Evidence Rules Committee commented that Judge Fitzwater's term as chair was drawing to a close and that he had greatly admired Judge Fitzwater's leadership. He expressed his personal gratitude for Judge Fitzwater's exceptional leadership and reported that Judge Bill Sessions would serve as the next chair. Judge Sutton echoed the praise and gratitude.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Wedoff and Professors Gibson and McKenzie presented the report of the advisory committee, as set out in Judge Wedoff's memorandum and attachments of May 6, 2014 (Agenda Item 7).

Amendments for Final Approval

OFFICIAL FORMS 17A, 17B, AND 17C

Professor Gibson reported that an amendment to Form 17A and new Forms 17B and 17C had been published for comment in connection with the revision of the bankruptcy appellate rules. Form 17A and new Form 17B would implement the provisions of 28 U.S.C. § 158(c)(1) that permit an appellant and an appellee to elect to have an appeal heard by the district court in districts for which appeals to a bankruptcy appellate panel have been authorized. New Form 17C would be used by a party to certify compliance with the provisions of the bankruptcy appellate rules that prescribe limitations on brief length based on number of words or lines of text. Professor Gibson reported that no comments had been received, that the advisory committee had unanimously approved the proposals, and that the advisory committee recommended them to be approved and take effect in December of this year. Professor Gibson noted that there was a typographical error on page 702 of the agenda materials, and that the reference to "U.S.C. § 158(c)(1)" should say "28 U.S.C. § 158(c)(1)."

The committee unanimously approved the proposed amendments to Form 17A and new Forms 17B and 17C, with the revision stated above, for submission to the Judicial Conference for final approval.

OFFICIAL FORMS 3A AND 3B

Judge Wedoff reported that the advisory committee recommended amending Forms 3A and 3B to eliminate references to filing fees, because those amounts are subject to periodic changes by the Judicial Conference that can render the forms inaccurate. Judge Wedoff said that since the amendments were technical in nature, publication was not needed.

The committee unanimously approved the proposed amendments to Forms 3A and 3B for submission to the Judicial Conference for final approval without publication.

OFFICIAL FORMS 22A-1, 22A-1 SUPP, 22A-2, 22B, 22C-1, AND 22C-2

Judge Wedoff reported that the advisory committee recommended approval of the amendments to the modernized "means test" forms that were originally published in 2012 and then republished in 2013. Judge Wedoff said that the comments on the republished drafts were generally favorable, but that the advisory committee had made several changes after publication to take account of some of the suggestions made during the public comment period.

The committee unanimously approved the proposed amendments to Forms 22A-1, 22A-1 Supp, 22A-2, 22B, 22C-1, and 22C-2 for submission to the Judicial Conference for final approval.

MODERNIZED INDIVIDUAL FORMS
(OFFICIAL FORMS 101, 101A, 101B, 104, 105, 106SUM, 106A/B,
106C, 106D, 106E/F, 106G, 106H, 106DEC, 107, 112, 119, 121, 318, 423, AND 427)

Professor Gibson reported that the advisory committee recommended approving the modernized forms for individual-debtor cases that were published in 2013. She explained the process used by the subcommittee and the advisory committee to carefully review the comments and make changes as needed. She added that some of the comments had made suggestions outside the scope of the modernization project, and that the advisory committee had noted those for consideration at a later date. Professor Gibson said that the advisory committee recommended approving the forms, but making their effective date correspond with the non-individual modernized forms recommended for publication this summer, making the earliest possible effective date December 1, 2015.

The committee unanimously approved the proposed amendments to the modernized forms for individual-debtor cases for submission to the Judicial Conference for final approval at the appropriate time, likely in 2015.

Amendments for Publication

MODERNIZED FORMS FOR NON-INDIVIDUALS
(OFFICIAL FORMS 11A, 11B, 106J, 106J-2, 201, 202, 204, 205,
206SUM, 206A/B, 206D, 206E/F, 206G, 206H, 207, 309A, 309B, 309C, 309D, 309E)

Professor Gibson reported that the nearly final installment of the Forms Modernization Project consisted primarily of case-opening forms for non-individual cases, chapter 11-related forms, the proof of claim form and supplements, and orders and court notices for use in all types of cases. The advisory committee also sought to publish two revised individual debtor forms and the

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abrogation of two official forms.

At the suggestion of a committee member, Judge Wedoff agreed to revise the instructions at the top of Form 106J-2 to make it clear that the form requests only expenses personally incurred, not those that overlap with the expenses reported on Form 106J.

The committee unanimously approved publication of the modernized forms for non-individuals, described above and with the revision described above.

CHAPTER 13 PLAN FORM AND RELATED AMENDMENTS
(OFFICIAL FORM 113 AND FED. R. BANKR. P. 2002, 3002,
3007, 3012, 3015, 4003, 5009, 7001, AND 9009)

Judge Wedoff reported that the chapter 13 plan form had been published for comment in August 2013, that the advisory committee had revised the form in response to public comments, and that it now recommended republication in August 2014. Judge Wedoff noted that one improvement in the revised form is that it adds an instruction that clarifies that the form sets out options that may be appropriate in some cases, but the presence of an option on the form does not indicate that the option is appropriate in all circumstances or that it is permissible in all judicial districts. A member asked whether that should be done on all of the forms to avoid needing to tweak forms every time a decision changes the applicability of some aspect of a form. Judge Wedoff said that the advisory committee would consider whether it might be appropriate to amend Rule 9009 to state that the presence of an option on a form does not mean that it is always applicable. But he said that such an amendment should be pursued separately from the current proposal to amend the chapter 13 plan form.

Judge Wedoff explained that because of the significant changes to the proposed form, the advisory committee recommended republication. As to the related rule amendments that were published in 2013, Judge Wedoff said that republication was probably not necessary, but that the advisory committee recommended republication of the rule amendments so that they could remain part of the same package as the plan form. He said that republication of the rules would delay the package by a year because, under the Rules Enabling Act, the rules would not go into effect until at least 2016 if they are republished this year. But, he said, the advisory committee did not think it wise to put the rule amendments into effect without the related form that was the driving force behind the amendments. Professor McKenzie described the proposed rule amendments and the changes made after publication, most of which were minor. He said the request for comment would seek input as to whether the rule amendments should go into effect even if the advisory committee were to decide not to proceed with the plan form.

The committee unanimously approved publication of the revised chapter 13 plan form and related amendments to Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009.

FED. R. BANKR. P. 3002.1

Judge Wedoff reported that the advisory committee recommended proposed amendments to Rule 3002.1, which applies in chapter 13 cases and requires creditors whose claims are secured by a security interest in the debtor's principal residence to provide the debtor and trustee certain information about the mortgage while the bankruptcy case is pending. The proposed amendments would clarify when the rule applies and when its requirements cease.

The committee unanimously approved publication of the proposed amendment to Rule 3002.1.

OFFICIAL FORM 410A

Judge Wedoff reported that the advisory committee recommended publication of amendments to Official Form 410A (currently Form 10A), the Mortgage Proof of Claim Attachment that is required to be filed in an individual debtor case with the proof of claim of a creditor that asserts a security interest in the debtor's principal residence. The advisory committee recommended publication of a revised form that would replace the existing form with one that requires a mortgage claimant to provide a loan payment history and other information about the mortgage claim, including calculations of the claim and the arrearage amounts. Judge Wedoff noted that there was one typographical error in the draft in the Standing Committee's agenda materials. On page 1103, the reference to Rule 3001(c)(2)(A) should be to the Federal Rules of Bankruptcy Procedure, not the Federal Rules of Civil Procedure.

The committee unanimously approved publication of the proposed amendments to Official Form 410A, with the revision noted above.

CHAPTER 15 FORM AND RULES AMENDMENTS
(OFFICIAL FORM 401 AND FED. R. BANK. P. 1010, 1011, 1012, AND 2002)

Professor McKenzie reported that the advisory committee recommended publication of an official form for petitions under chapter 15, which covers cross-border insolvencies. The proposed form grew out of the work of the Forms Modernization Project. Professor McKenzie said that the advisory committee also recommended publishing amendments to the Bankruptcy Rules to improve procedures for international bankruptcy cases. The proposals would: (1) remove the chapter 15-related provisions from Rules 1010 and 1011; (2) create a new Rule 1012 to govern responses to a chapter 15 petition; and (3) augment Rule 2002 to clarify the procedures for giving notice in cross-border proceedings.

The committee unanimously approved publication of proposed Official Form 401, the proposed amendments to Rules 1010, 1011, and 2002, and proposed new Rule 1012.

Informational Items

Professor Gibson reported that the advisory committee had withdrawn its proposed amendment to Rule 5005, which was published in 2013 and which would have replaced local rules on electronic signatures and permitted the filing of a scanned signature page of a document bearing the signature of an individual who is not a registered user of the CM/ECF system. The amendment would have allowed the scanned signature to have the same force and effect as the original signature and would have removed any requirement of retaining the original document with the wet signature. Professor Gibson said that the advisory committee had been persuaded by the public comments that the amendment was not needed and could be problematic.

Judge Wedoff said that his term as chair of the advisory committee was coming to a close and that Judge Sandra Ikuta would be taking over as chair. He added that he had very much appreciated the opportunity to serve as chair.

Judge Sutton said that Judge Wedoff had done amazing work, together with the reporters and the subcommittees. He added that Judge Wedoff's enthusiasm was infectious and that he was a national treasure for the Bankruptcy Rules. Judge Sutton said the committee was grateful for Judge Wedoff's service and his leadership.

REPORT OF THE ADMINISTRATIVE OFFICE

Julie Wilson and Ben Robinson provided the report of the Administrative Office. Ms. Wilson said that the Rules Office had been watching legislation that would attempt to address issues related to patent assertion entities. She said that a bill did pass in the House in December, but that recent developments indicated that the legislation was not moving forward in the Senate for now. She said that the Rules Office would continue to monitor the legislation.

Judge Sutton thanked the Rules Office for all its great work on the preparations for the committee's meeting.

NEXT COMMITTEE MEETING

The committee will hold its next meeting on January 8–9, 2014, in Phoenix, Arizona.

Respectfully submitted,

Andrea L. Kuperman
Chief Counsel

Jonathan C. Rose
Secretary

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TAB 2

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TAB 2A

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

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

SANDRA SEGAL IKUTA
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

TO: Hon. Jeffrey S. Sutton, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Steven M. Colloton, Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

DATE: December 15, 2014

I. Introduction

The Advisory Committee on Appellate Rules met on October 20, 2014 in Washington, D.C. The Committee discussed four projects, removed one of those projects from its study agenda, and discussed (but did not add to its agenda) an additional proposal.

The Committee has scheduled its next meeting for April 23 and 24, 2015, in Philadelphia.

Part II of this report provides an overview of the Committee's projects. Detailed information about the Committee's activities can be found in the Reporter's draft of the minutes of the October meeting and in the Committee's study agenda, both of which are attached to this report.

II. Information Items

The Committee is considering whether to propose amending the Appellate Rules to require disclosures in addition to those currently required by Appellate Rules 26.1 and 29(c). A number of circuits have local provisions that require such additional disclosures, and the question is whether such disclosures elicit information that may affect a judge's analysis of his or her recusal obligations. Topics on which the Committee is focusing include disclosures in bankruptcy matters; disclosures concerning victims in criminal cases; disclosures by intervenors and amici; and disclosures by non-governmental, non-human entities other than corporations. The Committee is working in close coordination with the Committee on Codes of Conduct and will likely seek additional guidance from that Committee as the project progresses.

The Committee is also considering the possibility of amending Rule 41 to address whether a court of appeals has authority to stay its mandate following a denial of certiorari, and whether such a stay requires an order or can result from the court's inaction. Rule 41 provides in relevant part as follows:

> **Rule 41. Mandate: Contents; Issuance and Effective Date; Stay**
>
> * * *
>
> (b) WHEN ISSUED. The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.
>
> * * *
>
> (d) STAYING THE MANDATE.
>
> * * *
>
> (2) *Pending Petition for Certiorari.*
>
> * * *
>
> (D) The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed.

The Supreme Court twice has reserved judgment on whether Rule 41(d)(2)(D) requires a court of appeals to issue its mandate immediately after the Supreme Court files an order denying a petition for certiorari, or whether Rule 41(b) allows a court of appeals to "extend the time" for

issuing a mandate even after certiorari is denied. The Court also has noted an open question whether Rule 41(b) allows a court of appeals to "extend the time" for issuing its mandate by mere inaction, or whether an order is required.

A number of Committee members have expressed support for adopting language that would require that stays be effected "by order." As to the authority of the court of appeals to stay the mandate after denial of certiorari, the Supreme Court, in *Ryan v. Schad*, 133 S. Ct. 2548 (2013) (per curiam), and *Bell v. Thompson*, 545 U.S. 794 (2005), held that if such authority exists it can be exercised only in extraordinary circumstances. In *Calderon v. Thompson*, 523 U.S. 538 (1998), the Court opined that the courts of appeals are recognized to have an inherent power *to recall* their mandates, in extraordinary circumstances, subject to review for an abuse of discretion.

The Committee is considering whether to propose incorporating the extraordinary-circumstances requirement into Rule 41; whether to propose instead amending Rule 41 to ban stays of the mandate after the denial of certiorari; or whether to propose no amendment addressing the court's authority to stay the mandate after the denial of certiorari. The opinions concurring in and dissenting from the grant of rehearing en banc in *Henry v. Ryan*, 766 F.3d 1059 (9th Cir. 2014), illustrate the continuing salience of these issues.

The Committee, like the other advisory committees, has been considering the possibility of amendments that would take account of the shift to electronic filing and service. Committee members have expressed interest in adopting the first part of the template rule prepared by the Case Management / Electronic Case Filing ("CM/ECF") Subcommittee; such a rule would define "information in written form" to include electronic materials. Committee members have also expressed interest in considering the possibility of amending the Appellate Rules to mandate electronic filing and authorize electronic service, subject to an exception based on good cause and an additional exception based on local rules that permit or require paper filing or service. The Committee will also consider whether to amend Appellate Rule 25(d) so that it would no longer require a proof of service in instances when service was effected by means of the notice of docket activity generated by CM/ECF.

The Committee looks forward to working with the Civil Rules Committee on matters of mutual interest. The Civil / Appellate Subcommittee has been reconstituted and will consider two projects in the near future. One of those projects concerns the doctrine of "manufactured finality" – i.e., the doctrine that addresses instances when a would-be appellant seeks to manufacture appellate jurisdiction over an appeal from the disposition of fewer than all the claims in an action by dismissing the remaining claims. The Subcommittee will also consider possible amendments to Civil Rule 62's treatment of supersedeas bonds. Meanwhile, the Committee anticipates that the mini-conferences currently being planned by the Civil Rules Committee's Rule 23 Subcommittee will provide an opportunity to gather further information concerning appeals by class action objectors.

The Committee removed from its agenda an item relating to appeals from orders concerning attorney-client privilege. In the wake of the Supreme Court's decision in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), the Committee received a suggestion that it draft a rule that would authorize permissive interlocutory appeals from attorney-client privilege rulings. The Committee gave this proposal serious consideration and noted the difficulty that a litigant can face in seeking immediate appellate review of such rulings. However, members foresaw challenges in drafting appropriately tailored language. And some members questioned the need for rulemaking on this topic, particularly in light of the possibility of mandamus review.

The Committee discussed, but decided not to add to its agenda, a suggestion that the Appellate Rules be amended to state that Appellate Rule 29 furnishes the sole means by which a non-litigant may communicate with the court about a pending case. The suggestion arose after an incident in which such communications had been made directly to judges of a court of appeals. Participants in the Committee's discussion felt that there exist other, less formal means for channeling such communications to the clerk's office, and participants also questioned whether the conduct of non-party non-lawyers is an appropriate topic for treatment in the Appellate Rules.

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Advisory Committee on Appellate Rules
Table of Agenda Items — December 2014

FRAP Item	Proposal	Source	Current Status
07-AP-E	Consider possible FRAP amendments in response to Bowles v. Russell (2007).	Mark Levy, Esq.	Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 04/11 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14
07-AP-I	Consider amending FRAP 4(c)(1) to clarify the effect of failure to prepay first-class postage.	Hon. Diane Wood	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08
08-AP-C	Abolish FRAP 26(c)'s three-day rule.	Hon. Frank H. Easterbrook	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14
08-AP-H	Consider issues of "manufactured finality" and appealability	Mark Levy, Esq.	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 10/10 Discussed and retained on agenda 04/11 Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13

FRAP Item	Proposal	Source	Current Status
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14
09-AP-B	Amend FRAP 1(b) to include federally recognized Indian tribes within the definition of "state"	Daniel I.S.J. Rey-Bear, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed and retained on agenda 10/11 Discussed and retained on agenda 04/12; Committee will revisit in 2017
11-AP-C	Amend FRAP 3(d)(1) to take account of electronic filing	Harvey D. Ellis, Jr., Esq.	Discussed and retained on agenda 04/13
11-AP-D	Consider changes to FRAP in light of CM/ECF	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/11 Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14
12-AP-B	Consider amending FRAP Form 4's directive concerning institutional-account statements for IFP applicants	Peter Goldberger, Esq., on behalf of the National Association of Criminal Defense Lawyers (NACDL)	Discussed and retained on agenda 09/12
12-AP-D	Consider the treatment of appeal bonds under Civil Rule 62 and Appellate Rule 8	Kevin C. Newsom, Esq.	Discussed and retained on agenda 09/12
12-AP-E	Consider treatment of length limits, including matters now governed by page limits	Professor Neal K. Katyal	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14
12-AP-F	Consider amending FRAP 42 to address class action appeals	Professors Brian T. Fitzpatrick and Brian Wolfman and Dean Alan B. Morrison	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14

FRAP Item	Proposal	Source	Current Status
13-AP-B	Amend FRAP to address permissible length and timing of an amicus brief in support of a petition for rehearing and/or rehearing en banc	Roy T. Englert, Jr., Esq.	Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14
13-AP-H	Consider possible amendments to FRAP 41 in light of Bell v. Thompson, 545 U.S. 794 (2005), and Ryan v. Schad, 133 S. Ct. 2548 (2013)	Hon. Steven M. Colloton	Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14
14-AP-C	Address issues of appellate procedure identified in the certiorari petition in Morris v. Atchity (No. 13-1266)	Margaret Morris	Awaiting initial discussion
14-AP-D	Consider possible changes to Rule 29's authorization of amicus filings based on party consent	Standing Committee	Awaiting initial discussion

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Minutes of Fall 2014 Meeting of
Advisory Committee on Appellate Rules
October 20, 2014
Washington, D.C.

I. Introductions

Judge Steven M. Colloton called the meeting of the Advisory Committee on Appellate Rules to order on Monday, October 20, 2014, at 9:00 a.m. at the Mecham Conference Center in the Thurgood Marshall Federal Judiciary Building in Washington, D.C. The following Advisory Committee members were present: Judge Michael A. Chagares, Justice Allison H. Eid, Judge Peter T. Fay, Judge Richard G. Taranto, Professor Amy Coney Barrett, Mr. Gregory G. Katsas, Professor Neal K. Katyal, and Mr. Kevin C. Newsom. Mr. Douglas Letter, Director of the Appellate Staff of the Civil Division, U.S. Department of Justice ("DOJ"), and Mr. H. Thomas Byron III, also of the Civil Division, were present representing the Solicitor General. Professor Daniel R. Coquillette, Reporter for the Standing Committee; Mr. Jonathan C. Rose, the Standing Committee's Secretary and Rules Committee officer; Mr. Gregory G. Garre, liaison from the Standing Committee; Ms. Julie Wilson, Attorney Advisor in the Administrative Office ("AO"); Mr. Michael Ellis Gans, liaison from the appellate clerks; and Ms. Marie Leary from the Federal Judicial Center ("FJC") were also present. Mr. Robert Deyling, Counsel to the Committee on Codes of Conduct and Assistant General Counsel at the AO, attended part of the meeting, as did Mr. Joe S. Cecil and Ms. Catherine R. Borden of the FJC.

II. Approval of Minutes of April 2014 Meeting

A motion was made and seconded to approve the minutes of the Committee's April 2014 meeting. The motion passed by voice vote without dissent.

III. Report on June 2014 Meeting of Standing Committee

Judge Colloton noted that the Standing Committee had approved for publication the Advisory Committee's proposals concerning inmate-filing provisions, length limits, and amicus filings in connection with rehearing. The Standing Committee, he observed, had made a few changes to the proposals prior to publication, and the Appellate Rules Committee had ratified those changes by email after the meeting.

The Reporter noted that Standing Committee members had provided additional guidance on aspects of the proposals. Two of those suggestions concern the inmate-filing provisions. The

published proposal would amend Rules 4(c)(1) and 25(a)(2)(C) to make clear that a document filed by an inmate is timely if it is accompanied by evidence showing that the document was deposited in the institution's internal mail system on or before the due date and that postage was prepaid. If such evidence does not accompany the filing, proposed Rules 4(c)(1)(B) and 25(a)(2)(C)(ii) provide that the filing is nonetheless timely if the court of appeals "exercises its discretion to permit" the later filing of an appropriate declaration or notarized statement establishing timely deposit and prepayment of postage. A member suggested that "exercises its discretion to permit" be shortened to "permits"; one question for the Committee will be whether the longer phrase is worth retaining in order to emphasize the court of appeals' discretion whether to permit the later filing of the declaration or statement. A member also suggested that the rules be revised to omit any reference to notarized statements; the question here is whether there is any reason to include notarized statements as an alternative, given that executing a declaration in compliance with 28 U.S.C. § 1746 presumably is easier for inmates than finding a notary.

Other suggestions concerned the proposed revisions to Rule 29. Proposed Rule 29(b) addresses amicus filings in connection with rehearing. Proposed Rule 29(b)(2) provides that non-governmental amici must obtain court leave to make such amicus filings; the prior draft's provision permitting non-governmental amicus filings based on party consent was deleted during the Standing Committee meeting in response to members' concerns about the possibility of strategic use of amicus filings to prompt recusal of particular judges. The discussion of such efforts to cause recusals through amicus filings also prompted a suggestion that the Committee consider whether the current Rule 29 – which authorizes amicus filings at the merits stage based on party consent – should be revised.

Another suggestion concerned the proposal to amend the length limits in the Appellate Rules. The proposal would set type-volume limits for filings prepared using a computer; as with Rule 32's current type-volume limits, the new type-volume limits would state alternatives in terms of line limits and word limits. A Standing Committee member asked whether it is necessary to retain line limits in addition to word limits. Mr. Gans noted that line limits would make type-volume limits a viable alternative for those who prepare their briefs using a typewriter.

Judge Colloton observed that, with respect to length limits, one important question is whether the proposals would permit a circuit to enlarge the length limits for briefs. The Reporter responded that Rule 32(e) explicitly permits the adoption of local rules that enlarge the length limits for briefs. However, Rule 28.1 – which applies to cross-appeals – does not include a provision similar to Rule 32(e); it might be worthwhile, the Reporter suggested, for the Committee to consider adding such a provision to Rule 28.1. The Reporter surmised that such an addition would not require re-publication of the proposals. A judge member of the Appellate Rules Committee observed that, in voting on the proposal at the Committee's spring 2014 meeting, he had relied on the idea that circuits could choose to authorize longer length limits for briefs.

Judge Colloton pointed out that the fall 2014 agenda materials included a memo describing the deliberations that led to the adoption of the 1998 amendments to Rule 32. The Committee's records, the Reporter observed, indicated that the 1998 amendments were supported repeatedly by the assertion that, for briefs prepared on a computer, 50 pages was roughly equivalent to 14,000 words.

IV. Discussion Items

A. Item No. 08-AP-R (disclosure requirements)

Judge Colloton introduced this item, which concerns local circuit provisions that impose disclosure requirements beyond those set by the Appellate Rules. Judge Colloton noted that Judge Chagares, Professor Katyal, and Mr. Newsom had agreed to form a subcommittee on this topic, and he thanked them for their research. He thanked Mr. Deyling for attending the meeting in order to share the perspective of the Committee on Codes of Conduct. A central question, Judge Colloton noted, is whether there is information currently elicited by local circuit provisions but not required by the Appellate Rules that would be relevant to a judge's determination whether to recuse from a matter. A related question is whether, as to some types of information, the Appellate Rules Committee needs further guidance in order to assess the implications of such information for recusal determinations. Judge Colloton reported that the Chair of the Committee on Codes of Conduct had designated Judge Paul Kelly of the Tenth Circuit, a member of the Codes of Conduct Committee, to serve as a liaison to the Appellate Rules Committee in connection with this project.

Judge Colloton invited Judge Chagares, Professor Katyal, and Mr. Newsom to summarize the results of their research. Judge Chagares observed that recusal issues present a minefield for judges; despite judges' best efforts, it is possible that something relevant to recusal might be overlooked. He stated that, of the topics on which he had focused, the two key sets of issues concerned criminal appeals and bankruptcy appeals. Appellate Rule 26.1, Judge Chagares noted, applies to all types of appeals. However, some attorneys assert that Rule 26.1 does not apply to criminal appeals. The Third Circuit Clerk, at Judge Chagares's request, surveyed the other Circuit Clerks concerning corporate disclosures in criminal cases. The responses reported some resistance by attorneys to the application of Rule 26.1 in criminal cases, as well as a few instances in which a circuit had not been enforcing the rule in criminal cases. A benefit of the survey, Judge Chagares noted, was that it had sensitized the Circuit Clerks to the issue, which should improve enforcement of the Rule. Because appeals involving corporate criminal defendants are very rare, Judge Chagares suggested, it should not be necessary to consider amending Rule 26.1 to address this issue. Judge Chagares pointed out that, unlike Criminal Rule 12.4, Appellate Rule 26.1 does not require disclosures concerning crime victims. As to local provisions on this topic, the Third Circuit requires disclosures concerning organizational victims, while the Eleventh Circuit requires disclosures concerning all victims.

Judge Chagares noted the distinct challenges posed by bankruptcy appeals. Not everyone

involved in the bankruptcy proceeding below is a party for purposes of analyzing recusal issues. An Advisory Opinion on this topic (Advisory Opinion No. 100), Judge Chagares observed, provided helpful guidance. The opinion states that parties, for this purpose, include the debtor, members of the creditors' committee, the trustee, parties to an adversary proceeding, and participants in a contested matter. The Third Circuit's local provision on point roughly tracks this guidance; so does the Eleventh Circuit's provision, but that provision also requires disclosure of entities whose value may be substantially affected by the outcome.

Judge Colloton invited Judge Chagares to summarize his findings on the third topic that he had investigated – namely, a judge's connection with participants in the litigation. Judge Chagares noted that instances may arise when a judge on an appellate panel previously participated in the litigation. For example, Judge Chagares recalled an instance when a then-recently-elevated appellate judge discovered that an appeal involved a defendant whom he had arraigned while serving as a trial judge.

The Reporter noted that Criminal Rule 12.4 requires the government to make disclosures concerning organizational victims. In 2009, the Criminal Rules Committee – at the suggestion of the Codes of Conduct Committee – considered whether to expand Rule 12.4 to require disclosures concerning individual victims and to require disclosures by the organizational victims themselves. The Committee ultimately decided not to propose amendments making such changes; participants in the Committee discussions noted that requiring disclosures concerning individual victims would raise privacy concerns.

Professor Coquillette reminded the Committee that, under Appellate Rule 47, local circuit rules must be consistent with federal statutes and with the Appellate Rules. He observed that the requirement of "consistency" raises interesting questions: For instance, if the Appellate Rules impose a limited set of requirements concerning a given topic, can circuits impose additional local requirements concerning that same topic? The Reporter observed that, when Rule 26.1 was initially adopted, the drafters saw the Rule as setting minimum requirements to which a particular circuit was free to add.

An appellate judge member asked what disclosure requirements apply in proceedings under 28 U.S.C. §§ 2254 and 2255. The Reporter undertook to research this question. The member also asked whether Criminal Rule 12.4 defines the term "victim." The Reporter responded that Criminal Rule 1(b)(12) defines "victim" to mean a "crime victim" as defined in the Crime Victims' Rights Act.

Mr. Deyling stated that the topics discussed thus far seemed to him like topics worth exploring. He explained that the Codes of Conduct Committee's 2009 suggestion concerning crime victims arose from the Committee's desire to ensure that the courts' electronic conflicts screening program was picking up all the relevant conflicts. The Codes of Conduct Committee has altered its view, over time, concerning the significance of a judge's interest in a crime victim. The Committee's current view – which accords with the view found in relevant caselaw – is that

recusal is necessary only if a judge has a substantial interest in a victim.

Judge Colloton, summarizing the Committee's discussion up to this point, suggested that the Appellate Rules Committee might consider whether to adopt a provision reflecting Advisory Opinion No. 100's guidance concerning bankruptcy matters. The Committee could also consider adopting a provision requiring some disclosures concerning victims. On the other hand, he suggested, perhaps some caution is warranted because a provision requiring broad disclosure might suggest that certain interests require recusal when in fact they do not. It was noted that, in some instances, the recusal standard presents a judgment call that the judge must make based upon adequate information.

Judge Colloton invited Mr. Newsom to present his findings concerning the topics that he researched. Mr. Newsom turned first to disclosures by intervenors. It is rare, he observed, for intervention to occur in the first instance on appeal. But when such intervention does occur, the intervenor should be required to make the same disclosures as any party. Indeed, Mr. Newsom noted, some circuits have local provisions requiring intervenors to make the same types of disclosures as named parties.

Mr. Newsom next discussed local provisions requiring disclosures by amici. Local provisions take varying approaches concerning which amici must make disclosures and what those amici must disclose. As to the nature of the disclosure, a few circuits require amici to identify parent corporations (or, in one rule, parent companies); some other circuits require disclosure of any entities with a financial interest in the amicus brief. The subcommittee did not feel that it would be necessary for a national rule to require the latter sort of disclosure.

Mr. Newsom also noted local provisions that require disclosure of the identity and nature of parties to the litigation – such as the identity of pseudonoymous parties, or the members of a trade association. The idea behind such provisions, he observed, is to require disclosure concerning interested persons whose identity is not otherwise ascertainable from the filings on appeal.

Judge Colloton invited Mr. Deyling to comment on recusal issues that might be raised by amicus participation. Mr. Deyling conceded that the Codes of Conduct Committee had not provided comprehensive guidance on that topic, even in the Committee's unpublished compendium of summaries of its unpublished opinions. (That compendium, he explained, contains responses to specific requests for advice.) For the most part, Mr. Deyling noted, the Committee had not required recusal because of the participation of an organizational amicus, except in rare situations – for example, where a judge's spouse was involved in the affairs of an amicus. Advisory Opinion No. 63 states that the participation of an amicus that is a corporation does not require recusal if the judge's interest in the amicus would not be substantially affected by the outcome of the litigation and if the judge's impartiality could not reasonably be questioned. Judge Colloton noted that the Appellate Rules Committee might seek further guidance from the Codes of Conduct Committee concerning recusal issues raised by amicus

filings.

A member asked whether there might be a concern that parties might engineer the participation of a particular amicus in an effort to generate a recusal. Another member agreed that this could be a concern; he noted that when he is considering whether to file an amicus brief, he tries to avoid doing so in situations where the filing might trigger a recusal.

Mr. Deyling expressed agreement with Mr. Newsom's suggestion that an intervenor should be treated like any other party for purposes of disclosures. He noted as well that if an intervenor's participation raises a recusal issue, that issue will arise – even before intervention is granted – in connection with the *request* to intervene.

Judge Colloton observed that, when a judge owns shares in a member of a trade association and the trade association is a party to a lawsuit, the recusal issue will focus on whether the judge's interest in the member would be substantially affected by the outcome of the proceeding. Disclosure of the trade association's members would permit the judge to assess this question. Mr. Deyling noted that the question is who has the burden of discerning and disclosing such information.

Mr. Newsom pointed out that questions concerning real parties in interest can arise in a variety of situations. Mr. Byron noted that the Appellate Rules do not define who is a "party" or who counts as an "appellee"; what about those who do not actually participate in the litigation but who may benefit from it? Mr. Letter recalled that the Committee had previously considered defining "appellee" in the Appellate Rules, but the Committee had decided not to do so.

Summarizing this portion of the discussion, Judge Colloton noted that the Committee would further investigate questions relating to intervenors and amici, and that the Committee might seek further guidance concerning recusal obligations triggered by an amicus's participation.

Judge Colloton invited Professor Katyal to report on the results of his research. Professor Katyal noted that he had focused on disclosures concerning corporate relationships. The bottom line, he suggested, is that there is no need to change the disclosure requirements to address these topics. However, if the Committee is considering other possible amendments concerning disclosure requirements, then it might consider what parties other than corporations should be required to make disclosures under Rule 26.1. The D.C. Circuit's local provision, he observed, requires all nongovernmental, non-individual entities to make disclosures under Rule 26.1; this requirement encompasses, for example, joint ventures and partnerships. A prudent attorney representing such an entity would likely comply with existing Rule 26.1, but the Rule could be amended to cover such entities explicitly. The Reporter noted that Judge Easterbrook's comment – which initially provided one of the sources for this agenda item – had pointed out that Rule 26.1 is underinclusive because it covers only corporations and not other types of business entities.

The Committee might also consider what types of ownership interests might be encompassed within an amended disclosure rule. The D.C. Circuit's local provision requires disclosure of any ownership interest – not merely stock ownership – that is greater than 10 percent. Professor Katyal noted that if the Committee were inclined to expand Rule 26.1 in this respect, it could propose amending the Rule to refer to "any publicly held entity that owns 10 percent or more of an ownership interest in the party." Such an amendment, he suggested, could be modestly helpful.

By contrast, Professor Katyal said, some other local requirements – such as the Eleventh Circuit's requirement that corporate parties disclose their full corporate title and stock ticker symbol – do not seem worthwhile candidates for inclusion in the national Rule. An appellate judge noted that the Eleventh Circuit had adopted its local disclosure requirements in an effort to avoid recusal problems. Mr. Gans reported that the Circuit Clerks face a complex task when assessing corporate disclosures; sometimes he finds that it is necessary to call counsel to obtain further information (including both some information currently required by Rule 26.1 and some additional information). Mr. Deyling noted that a judge's interest in a party's *subsidiary* would not trigger a recusal obligation.

By consensus, the Committee retained this item on its agenda. Judge Colloton noted that the Committee might seek further guidance from the Codes of Conduct Committee on particular issues.

B. Item Nos. 09-AP-D & 11-AP-F (response to Mohawk Industries)

Judge Colloton noted that, over the summer, he and the Reporter had worked with Judge Fay, Mr. Katsas, and Mr. Letter to consider whether it would be advisable to pursue an amendment that would address the appealability of orders concerning attorney-client privilege. He invited the Reporter to introduce the topic. The Reporter noted that it is difficult for a party aggrieved by a trial court's denial of a claim of attorney-client privilege to obtain review of that ruling. Mandamus review is relatively narrow. Disobeying a disclosure order in the hopes of generating a criminal contempt sanction is a problematic strategy, both because it requires a party to violate a court order and because there is no guarantee that the resulting sanction would fit within the category of *criminal* contempt sanctions (which are immediately appealable) rather than *civil* contempt sanctions (which typically are not). To obtain review under 28 U.S.C. § 1292(b), the would-be appellant not only must meet the criteria stated in that statute but also must obtain permission from both the district court and the court of appeals.

These difficulties, the Reporter noted, have generated proposals – such as that by Ms. Amy Smith – to grant the court of appeals discretion to hear interlocutory appeals from attorney-client privilege rulings. The subcommittee had taken seriously the possibility of creating such an avenue. But such a project would present drafting challenges. Which sorts of attorney-client privilege rulings should be encompassed within the provision? Should the provision also encompass work-product-protection rulings? Rulings concerning other types of privilege?

The Reporter noted that one relevant consideration is the degree to which such a new provision would burden the courts of appeals. This question had been the subject of some debate in the *Mohawk Industries* case itself. The petitioner in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), and the Chamber of Commerce of the United States of America as an amicus in that case, had attempted to assess the experience of the Third, Ninth, and D.C. Circuits – each of which permitted collateral-order appeals from privilege rulings at the time that the Court decided *Mohawk Industries*. They found that on average only one such appeal per year had occurred in the three circuits combined. This finding accorded with Justice Alito's observation, during oral argument in *Mohawk Industries*, that he did not recall such appeals presenting problems in the Third Circuit while he was serving as a judge of that court. On the other hand, the Reporter pointed out, the one-appeal-per-year figure might be unduly low, because during the early part of the twelve-year period that was studied the availability of collateral-order review for privilege orders may not have been clear in all three circuits. And most of the appeals that occurred were taken by sophisticated litigators; if a Rule were adopted to create an avenue for interlocutory appeal, the greater visibility of such a provision might raise awareness and, thus, increase the number of attempted appeals. The Reporter pointed out that the pool of attorney-client privilege rulings is a large one. A search on WestlawNext for one year's worth of district-court opinions that used the term "attorney client privilege" pulled up over 1,000 decisions (mostly unreported).

During discussions held in summer 2014, members of the subcommittee had expressed interest in knowing the extent to which parties, post-*Mohawk Industries*, were able to obtain mandamus review of attorney-client privilege rulings. The Reporter had performed a non-exhaustive search for cases on point. She noted that, in order to obtain a writ of mandamus, the applicant must show that there is no other adequate means of relief, that the applicant has a clear and indisputable right to the writ, and that issuance of the writ is appropriate under the circumstances. The courts of appeals have considerable flexibility in deciding whether to employ mandamus review. While circuits vary in their willingness to employ mandamus review of privilege rulings, it seems plain that mandamus provides a tool with which a court of appeals, if it chooses, can address lower-court confusion or remedy severe adverse effects that would otherwise result from a disclosure order. Sometimes a court of appeals will deny redress on the ground that relief will later be available on review of the final judgment. But a strong showing of harm increases the chances of mandamus review, especially if an amicus filing or other information indicates that the ruling is also adversely affecting third parties. Novel and important questions are more likely to trigger mandamus review, but review can also occur where the lower court badly misapplied established law, where the ruling is especially harmful, or where federalism or separation-of-powers concerns are present.

Because issuance of the writ requires an elevated showing of error on the lower court's part, some have noted that there is a stigma attached to having entered an order that triggers issuance of the writ. But, the Reporter noted, it is possible that a petitioner might achieve its goal even if the court of appeals decides not to issue the writ. The order of decision sketched by the D.C. Circuit in *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014) ("*KBR*"), is

interesting in this regard. In *KBR*, the court of appeals granted a writ of mandamus and vacated a district court order that, the court found, had created a lot of uncertainty about the scope of the attorney-client privilege in business settings. The *KBR* court stated that the first question, in reviewing a request for such a writ, is whether the district court's privilege ruling was erroneous; if the ruling was erroneous, then the remaining question is whether the error is of a kind that would warrant issuance of the writ. *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011), also illustrates the potential for a party to secure a desired ruling even if it does not actually secure issuance of the writ. The Federal Circuit had found no error and denied a writ of mandamus; the Supreme Court reversed. The Court left it for the Federal Circuit to determine on remand whether to issue the writ in the light of the Court's opinion – but the Court also stated its assumption that, even if the writ did not issue, the Court of Federal Claims would follow the Court's holding on the relevant attorney-client privilege question.

Judge Colloton invited members of the subcommittee to share their thoughts on the matter. An attorney member stated that, with reluctance, he had concluded that it would not make sense to proceed with an amendment on this topic. The difficulty of obtaining interlocutory review is troubling, he noted, because while review of a final judgment can redress the erroneous *use* in a lawsuit of privileged information, such review cannot remedy the actual *disclosure* of that information. If mandamus review were unavailable for privilege rulings, he would be concerned; and even though such review does appear to be available, he is concerned that courts will not employ mandamus where the challenged ruling presents a close question. However, it would be an ambitious undertaking to draft a rule similar to Civil Rule 23(f) (which authorizes the courts of appeals to permit appeals from class certification orders). And, at present, there is not a great deal of evidence that key rulings are slipping through the cracks.

Mr. Letter expressed agreement with this analysis. An appellate judge member stated that it would be undesirable to create an avenue for permissive appeals from privilege rulings, because there would be a large number of requests for permission to take such appeals.

A motion was made and seconded to remove this item from the Committee's agenda. The motion passed by voice vote without opposition.

C. Item No. 13-AP-H (Ryan v. Schad and Bell v. Thompson / FRAP 41)

Judge Colloton introduced this item, which encompasses two principal questions: whether a court of appeals has discretion to stay its mandate following a denial of certiorari, and whether such a stay can result from mere inaction (i.e., from the court's failure to issue the mandate). Judge Colloton noted that a group composed of Justice Eid, Judge Taranto, and Professor Barrett had worked over the summer to consider possible amendments addressing these questions. Judge Colloton invited the Reporter to provide an overview of those discussions.

The Reporter first discussed the proposal to amend Rule 41(b) to require that stays of the mandate be effected by order rather than by inaction. Original Rule 41(b) had referred to the

court's ability to enlarge "by order" the time before the mandate would issue. The words "by order" were deleted during the 1998 restyling of the Appellate Rules. The Eleventh Circuit has adopted a local rule that helps to address the problem of stays through inaction, but most circuits do not have local provisions addressing this issue. And the opinions concurring in and dissenting from the grant of rehearing en banc in *Henry v. Ryan*, 766 F.3d 1059 (9th Cir. 2014), illustrate that this issue will continue to arise periodically.

On the question of the court of appeals' authority (if any) to stay the mandate after the denial of certiorari, the Reporter observed that the subcommittee had considered three options: Rule 41 could be amended to state explicitly that there is no such authority; or the Rule could be amended to provide for such stays in extraordinary circumstances; or the Committee could decide not to amend the Rule. Existing caselaw suggests that the authority to stay the mandate may arise not only from Rule 41 but also partly from the courts' inherent authority and partly from statutory authority. Caselaw suggests, for instance, that courts have inherent authority to stay the mandate in order to investigate whether a party committed a fraud on the court of appeals (caselaw recognizes power to recall the mandate in such circumstances, and logically, that caselaw should also support the authority to stay the mandate before it issues). 28 U.S.C. § 2106, which authorizes an appellate court to "require such further proceedings to be had as may be just under the circumstances," may also authorize stays of the mandate. The Reporter suggested that a Rule amendment could validly channel the courts' inherent authority in this area – for example, by banning stays of the mandate after denial of certiorari but leaving in place the courts of appeals' authority to *recall* the mandate in extraordinary circumstances.

An appellate judge member of the subcommittee stated that he was on the fence about the choices to be made here. He wondered whether the Rule could be amended to refer to the Supreme Court's discussion of the power to recall the mandate in "grave, unforeseen contingencies." This member expressed concern about the idea of amending the Rule in a way that relies (as a safety valve) on a power (to recall the mandate) that the Rules do not mention. If the Committee simply left the Rule untouched, this member said, he would worry less about the possibility that a court would conclude that the Rule displaces the inherent power to recall the mandate.

Another appellate judge member of the subcommittee stated that she favored the option (shown on pages 204-05 of the agenda materials) that would amend Rule 41(d)(2)(D) to state that "[u]nless it finds that extraordinary circumstances justify it in ordering a further stay, the court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed." The third member of the subcommittee stated that she did not think the amendments that were under consideration would transgress the limits set by the Rules Enabling Act. This member expressed support for amending Rule 41 to require that any stays be accomplished "by order." She was torn about whether to amend the Rule to address the question of the court's power to stay the mandate; if such an amendment were to be pursued, she too would favor the option shown on pages 204-05 of the agenda materials.

Judge Colloton observed that Judge Fletcher, concurring in the grant of rehearing en banc in *Henry v. Ryan*, argued that the "extraordinary circumstances" test discussed in *Ryan v. Schad*, 133 S. Ct. 2548 (2013) (per curiam), and *Bell v. Thompson*, 545 U.S. 794 (2005), applies only when the mandate was stayed solely for the purposes of allowing time for a party to petition for certiorari – not when there were other reasons for the stay.

An appellate judge member stated that he did not like the way that the current Rule is written. He suggested that the Rule should permit the court of appeals to issue a further stay "if it finds that extraordinary circumstances exist," and he stated that the Rule should require that the court explain those findings in the order. Another appellate judge suggested that the Committee consider whether there is a phrase, other than "extraordinary circumstances," that better captures the very narrow set of circumstances that the *Schad* and *Bell* Courts envisioned as potential bases for a further stay of the mandate.

The Reporter asked whether an amendment inserting the extraordinary-circumstances test into Rule 41(d)(2)(D) should be accompanied by an amendment to Appellate Rule 2. Rule 2 states that "a court of appeals may—to expedite its decision or for other good cause—suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b)." Would the availability of authority to suspend the rules under Rule 2 frustrate the purpose of amending Rule 41? The Reporter suggested that it would not be necessary to amend Rule 2; it seems unlikely that a court would, in a given case, find that no extraordinary circumstances warranted a stay under Rule 41, but that there was good cause under Rule 2 to suspend the requirements of Rule 41. Committee members indicated agreement with the view that no amendment to Rule 2 was needed.

A member asked whether it would be worthwhile to hold off on any amendment to Rule 41 in order to see whether the Supreme Court grants review on the question of the stay of the mandate in *Henry v. Ryan*. An appellate judge asked, though, whether there would be any harm in proceeding with a proposed amendment in the meantime. The member responded that it might be better to hold off on the amendment if the Committee believes that the circumstance addressed by the amendment occur only rarely. And, this member suggested, there is always some risk of unintended consequences any time that a rule is amended.

An attorney member asked whether the Committee could publish for comment the proposal to amend Rule 41 to require that stays be effected "by order," and simultaneously solicit comment on whether the Rule should be amended to address the question of the court of appeals' authority to stay the mandate after denial of certiorari. Professor Coquillette responded that the typical way to solicit such comment would be to publish a proposed amendment addressing the authority question and also to highlight the issue in the memo that accompanies the published proposals. The attorney member observed that, if the Committee were to commence the process for adopting an amendment addressing the authority question, the Committee could withdraw the proposal if subsequent developments rendered it moot. Mr. Letter expressed agreement with this point. An appellate judge member noted that the Ninth Circuit's en banc decision in *Henry v.*

Ryan would be informative.

Turning back to the language of the option favored by some Committee members – which would amend Rule 41(d)(2)(D) to forbid a court of appeals to order a further stay "[u]nless it finds that extraordinary circumstances justify" such a stay – an appellate judge member asked whether it is necessary to include the reference to a finding, or whether instead "it finds that" could be deleted. Another appellate judge member noted that if the propriety of such a stay is challenged in the Supreme Court, the party defending the stay will articulate the basis for the stay. Mr. Letter suggested, though, that including the requirement of a finding might help to ensure that the court of appeals carefully considers the basis for the stay before entering the stay order.

By consensus, the Committee retained this item on the agenda, with the expectation of discussing it further at the Committee's spring 2015 meeting.

D. Item Nos. 08-AP-A, 11-AP-C, and 11-AP-D (changes to FRAP in light of CM/ECF)

Judge Colloton invited the Reporter to introduce these items, which concern matters relating to the shift to electronic filing and service. The Standing Committee's Case Management / Electronic Case Filing ("CM/ECF") Subcommittee, with Judge Chagares as its Chair and Professor Capra as its Reporter, has been leading a discussion among the advisory committees concerning possible amendments that would take account of the shift to electronic transmission and storage of documents and information. The Appellate Rules Committee has published for comment an amendment to Appellate Rule 26 that would abrogate the "three-day rule" as it applies to electronic service; similar proposals concerning the relevant Civil, Criminal, and Bankruptcy Rules have also been published for comment.

The Subcommittee has also discussed the possibility of drafting amendments that would adopt global definitions to adjust the Rules to the world of electronic filing and case management. The first portion of the Subcommittee's proposed template rule on this subject (set out at page 226 of the agenda book) would define "information in written form" to include electronic materials. This provision, the Reporter noted, seems both unproblematic and useful. The second portion of the template would define various actions that can be done with paper documents to include the analogous action performed electronically.

Adopting that second part of the template in the Appellate Rules would, the Reporter suggested, be more complicated. Such a rule should not pose problems for the operation of the starting points and end points of time periods under the Appellate Rules. The proposed template rule allows action to be taken electronically but does not address the ancillary effects of an actor's choice of electronic or other means of taking the action; thus, provisions addressing whether a filing is timely by reference to the filing method should be unaffected by the adoption of the template. It is more important, the Reporter argued, to focus on rules that discuss actions

that might be taken electronically, rather than on Rules that address the ancillary timing effects of choices among different methods of filing or service.

One key topic concerns the filing of a notice of appeal as of right from a judgment of a district court, a bankruptcy appellate panel ("BAP"), or the United States Tax Court. The Appellate Rules set the time period for filing the notice of appeal, and they specify that the notice must be filed in the relevant lower court. As to notices of appeal filed in the Tax Court, the Appellate Rules specify the manner of filing the notice and they also specify how to determine the timeliness of the notice. The Appellate Rules also set special timeliness rules that can be employed by an inmate who files a notice of appeal. And the Appellate Rules (like the other sets of national Rules) include a time-computation provision that says how to determine when the "last day" of a period ends. But the Appellate Rules do not specify how to file a notice of appeal in a district court or with a BAP. Rather, Appellate Rule 1(a)(2) directs litigants who file a document in a district court to comply with the district court's practices. The template rule says that it governs actions discussed "[i]n these rules," so adopting that template as part of the Appellate Rules would not affect the manner of filing a notice of appeal in a district court or with a BAP. However, the template would affect the operation of Appellate Rule 13(a)(2), which specifies how to file the notice of appeal in the Tax Court; when read together with Rule 13(a)(2), the template would authorize electronic filing in the Tax Court. That would countermand the current practice of the Tax Court, which does not permit notices of appeal to be filed electronically (though it does have an electronic filing system for other types of filings). If the Appellate Rules Committee were to propose adopting the second part of the template, it would seem advisable to make an exception for notices of appeal from the Tax Court.

To get a sense of other types of actions on which the Committee might wish to focus when considering the operation of the second part of the template rule, the Reporter reviewed local circuit provisions relating to electronic filing and service. Some local circuit provisions state that certain actions may be taken electronically; other such provisions state that certain actions may *not* be taken electronically. Using those sets of provisions as a starting point, it is possible to see that there are some types of actions for which the application of the template rule would be harmless and even beneficial. Thus, for example, it may be useful to provide that actions such as the entry of judgments, or service by the clerk on a CM/ECF user, or non-case-initiating filings by a CM/ECF user, or service between parties who are CM/ECF users, can be done electronically. But there might be problems with a national rule that permits electronic completion of some other types of actions – such as filing case-initiating documents, or filing documents prior to a matter's docketing in the court of appeals, or filings under seal. It might not be easy, the Reporter suggested, to draft exemptions that would cover all of these areas.

Instead, the Reporter proposed that the Committee consider the possibility of adopting provisions that would mandate electronic filing and authorize electronic service, subject to certain exceptions. Currently, Appellate Rule 25(a)(2)(D) authorizes local rules to mandate electronic filing (subject to reasonable exceptions). The Appellate Rules do not currently authorize local rules to require electronic service; rather, the Appellate Rules allow electronic

service only with the litigant's written consent. However, all of the circuits have local provisions specifying that registration to use CM/ECF constitutes consent to electronic service (which typically would mean service by means of the notice of docket activity generated by CM/ECF). The circuits all presumptively require attorneys to file electronically, though they permit exemptions on a showing of sufficient cause. The circuits vary in whether and when they permit pro se litigants to file electronically.

The Reporter noted that the Civil Rules Committee, at its fall meeting, would be considering a proposal for a national rule that would make electronic filing mandatory (subject to exceptions based on good cause or on local rules). The proposal would also authorize electronic service (other than for initial process) irrespective of party consent (also subject to the good-cause and local-rule exceptions). The Reporter suggested that the Appellate Rules Committee might wish to consider amending the Appellate Rules to require CM/ECF filing (unless good cause is shown for, or a local rule permits or requires, paper or another non-CM/ECF mode of filing) and authorize service by means of the CM/ECF system's notice of docket activity (unless good cause is shown for exempting, or a local rule exempts, the person to be served from using CM/ECF). Judge Colloton noted that the Reporter's suggested language would authorize local rules to "permit or require" paper filings, whereas the language to be considered by the Civil Rules Committee referred only to local rules that "allow" paper filings. The Reporter argued that it would be desirable to authorize local rules to require paper filings, given the range of circumstances in which local circuit provisions currently evince a preference for paper filings.

Professor Coquillette noted that the importance of paper filings for certain purposes had also been a topic of discussion in the Bankruptcy Rules Committee. In particular, he observed, the Bankruptcy Rules Committee had discussed in some detail the topic of "wet" versus electronic signatures. Mr. Letter noted that the question of signatures has not seemed to present problems outside of the bankruptcy context. Professor Coquillette asked whether the e-filing and e-service provisions would be affected by the adoption of the next generation (NextGen) version of CM/ECF. Mr. Gans noted that the NextGen system is already being tested in the Second Circuit. One relevant change, he reported, would concern payment for filing case-initiating documents. Currently, the need to pay the filing fee presents a barrier to electronic filing of some case-initiating documents. The NextGen system will enable filers to make such payments via pay.gov.

Judge Colloton, summarizing the discussion thus far, noted that the Reporter was proposing that the Committee consider adopting part (a) of the Subcommittee's template rule (the portion stating that "[i]n these rules, [unless otherwise provided] a reference to information in written form includes electronically stored information") and that the Committee consider adopting national rules presumptively requiring electronic filing and presumptively authorizing electronic service (subject to the noted exceptions). He suggested that the Reporter convey to the Civil Rules Committee's Reporter the Appellate Rules Committee's discussion about the desirability of authorizing local rules to require, as well as to allow, paper filings. The Reporter

undertook to draft proposed amendments to Appellate Rule 25 (concerning electronic filing and service) for consideration at the Committee's spring meeting.

The Reporter turned next to the proposal to amend Appellate Rule 25(d) so that it no longer requires a proof of service in instances when service is accomplished by means of the notice of docket activity generated by CM/ECF. Because twelve of the thirteen circuits have local provisions that make clear that the notice of docket activity does not replace the certificate of service, the Chair and Reporter had asked Mr. Gans to survey his colleagues to ascertain their views on this topic.

Mr. Gans reported that the local circuit provisions likely reflected the view that it would be improper to dispense with the certificate of service so long as Rule 25(d) seemed to require one. A majority of the Circuit Clerks favor amending Rule 25(d) to remove the certificate-of-service requirement in cases where all the litigants participate in CM/ECF – though they think that Rule 25(d) should continue to require the certificate of service when any of the parties is served by a means other than CM/ECF. But a substantial minority of the Circuit Clerks favor retaining the certificate-of-service requirement across the board. Sometimes attorneys may err in thinking that a particular litigant can be served through CM/ECF when that is not in fact the case (for instance, when a party who was filing electronically in the district court has not yet registered to file electronically in the appellate court). And when the clerk's office is checking to ensure that proper service occurred, the certificate of service can provide a starting point. But, Mr. Gans noted, the existence of a certificate of service does not remove the need for the clerk's office to check each filing against the service list to make sure that proper service occurred. It is time, he suggested, to eliminate the certificate-of-service requirement for cases where all filers are CM/ECF participants.

Judge Colloton directed the Committee's attention to the sketch on pages 242-43 of the agenda materials, which illustrated a possible amendment to Rule 25(d). An appellate judge member questioned the sketch's reference to "a notice of docket activity generated by CM/ECF." The Rules, he noted, do not usually use acronyms such as "CM/ECF," and it would be better to refer instead to the "official electronic filing system." The Reporter promised to revise the wording of the sketch in preparation for the Committee's spring meeting.

V. New Business

Judge Colloton noted that a federal appellate judge had suggested that the Committee consider amending the Appellate Rules to state that Appellate Rule 29 establishes the exclusive means by which a non-litigant may communicate with the court about a pending case, and that non-litigants must not contact judges of the court directly. Judge Colloton invited the Reporter to discuss this suggestion.

The Reporter noted that, in certain rare emergencies, it may be necessary for a litigant's counsel to make direct contact with a judge of the court of appeals – for example, to make an

emergency request for a stay of execution. But it is difficult to imagine circumstances that would justify a non-litigant in making a direct contact with an appellate judge about a pending case. Indeed, if a judge received such a communication, Canon 3(A)(4) of the Code of Conduct for United States Judges would direct the judge to notify the parties about the communication and allow them an opportunity to respond. However, most circuits do not have local provisions specifying that such communications are inappropriate. The only pertinent provision (encompassing non-party communications) that the Reporter was able to find was Federal Circuit Rule 45(d), which provides that all correspondence and calls concerning cases "must be directed to the clerk." Other circuits may use less formal means to make the same point; for example, the Seventh Circuit's web page on "Contact Information" makes clear that all inquiries and contacts should be directed to the Clerk's Office.

An initial question for the Committee, the Reporter suggested, is whether national rulemaking on this topic is warranted. Mr. Letter noted that care would be required in drafting rules concerning non-party communications to the court. In cases involving national security issues, the government – as a non-party – might engage in ex parte, in camera communications with a district judge. Thus, any rule limiting ex parte communications by non-parties might require a carve-out for situations implicating national security. An attorney member noted as well that if such a rule were adopted, it might be implicated by casual mentions of a case at a cocktail party.

An appellate judge member suggested that this issue is likely to arise only very rarely and that there is no need for a national rule on the subject. Two other appellate judge members expressed agreement with this suggestion. Judge Colloton asked Mr. Gans what would happen if the Judge received an unsolicited letter from a non-party and forwarded it to the Clerk's Office. Mr. Gans stated that he would send the non-party a generic response; the Clerk's Office, he noted, often receives communications forwarded to the Office by the Chief Judge. Mr. Gans expressed doubt about the need for rulemaking on this topic.

Judge Colloton wondered if the reason for the rulemaking suggestion is that a judge might wish to have a provision in the Rules that can be cited to a lay person. Professor Coquillette suggested, however, that if the goal is to educate non-lawyers, a statement on the court's website is likely to be more effective than a provision in the Rules. Mr. Byron questioned whether it would be appropriate for the Appellate Rules to attempt to regulate the conduct of non-lawyers who are not parties to a proceeding in the court of appeals.

A motion was made that this item not be added to the Committee's study agenda. The motion was seconded and passed by voice vote without opposition.

VI. Other information items

Judge Colloton noted that the Civil / Appellate Subcommittee has been re-convened. Judge Scott Matheson will chair the Subcommittee. Judge Fay, Mr. Newsom, and Mr. Letter

have agreed to serve as the Appellate Rules Committee's representatives on the Subcommittee. The Subcommittee will focus its efforts on two items. One is the topic of "manufactured finality" – i.e., the doctrine that addresses efforts by a would-be appellant to "manufacture" appellate jurisdiction over an appeal from the disposition of fewer than all the claims in an action by dismissing the remaining claims. The second item concerns the operation of Civil Rule 62, which addresses supersedeas bonds.

Judge Colloton reported that the Criminal Rules Committee had formed a subcommittee to consider a proposal by Judge Jon Newman that Criminal Rule 52(c) be amended to permit appellate review of unraised sentencing error that did not rise to the level of plain error so long as the error was prejudicial and redressing it would not require a new trial. The Appellate Rules Committee's Reporter had participated in the Subcommittee's conference calls on this topic. After speaking with Judge Newman by telephone to discuss his proposal, the Subcommittee members had decided not to recommend proceeding with the proposed amendment.

Judge Colloton observed that the Civil Rules Committee's Rule 23 Subcommittee is planning to convene mini-conferences to obtain the views of knowledgeable participants concerning various aspects of class action practice. Judge Robert Dow, the Chair of the Subcommittee, has agreed that the topics of inquiry will include appeals by class action objectors. Mr. Rose noted that the Subcommittee might hold such an event in connection with the Civil Rules Committee's April 2015 meeting in Washington, D.C.

VII. Date of spring 2015 meeting

Judge Colloton reminded the Committee members that the Committee's spring meeting would be held on April 23 and 24, 2015.

VIII. Adjournment

The Committee adjourned at 1:45 p.m. on October 20, 2014.

Respectfully submitted,

_____

Catherine T. Struve
Reporter

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TAB 3A

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

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

SANDRA SEGAL IKUTA
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

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

FROM: Honorable Sandra Segal Ikuta, Chair
Advisory Committee on Bankruptcy Rules

DATE: December 11, 2014

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on September 29 and 30, 2014, in Charleston, South Carolina. The draft minutes of that meeting appear in Appendix B to this report.

At the meeting the Advisory Committee discussed a number of suggestions for rule and form amendments that were submitted by bankruptcy judges, members of the bar, and bankruptcy organizations. It also received and discussed updates on several ongoing projects.

The Advisory Committee is presenting one action item at this meeting—an amendment to Rule 1001 to bring it into conformity with Civil Rule 1. Part II of this report discusses that amendment. In addition, the report provides information about other rule and form amendments considered at the fall meeting. Part III provides an overview of the comments that have been received to date on the proposed official form for chapter 13 plans and implementing rule amendments, which were republished in August. Part IV reports on the status of the Forms Modernization Project and plans for its implementation. Finally, Part V discusses the

Committee's consideration of several proposals referred by the Standing Committee's Subcommittee on CM/ECF.

II. Action Item—Rule 1001 for Approval For Publication

Rule 1001 is the bankruptcy counterpart to Civil Rule 1. Rather than incorporating Civil Rule 1 by reference, Rule 1001 generally tracks the language of the civil rule. The last sentence of Rule 1001 states, "These rules shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding," while Civil Rule 1 states, "[These rules] should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."

The pending amendment to Rule 1, which is expected to become effective on December 1, 2015, revises the current rule to state, "[These rules] should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." The Committee Note explains that "Rule 1 is amended to emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, so the parties share the responsibility to employ the rules in the same way."

The Advisory Committee concluded that for purposes of consistency, we should revise Rule 1001 to track the language of Rule 1. The amendment to Rule 1 was part of the Duke Rules Package, and the other rule amendments in that group—to Civil Rules 4(m), 16, 26, 30, 31, 33, 34, 36, and 37—will automatically become part of the Bankruptcy Rules because those rules are made applicable in adversary proceedings. Moreover, deviation from the civil rule's language could give rise to a negative inference that the bankruptcy rule differs in the extent to which it encourages cooperation.

In considering whether to amend Rule 1001 to include the pending amendment to Rule 1, the Committee noted that the bankruptcy rule has never been amended to reflect the 1993 amendment to Rule 1, which added the words "and administered" to the last sentence. The Committee concluded that the language of the 1993 amendment should also be included in Rule 1001 so that the command of the two rules will be the same ("construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every case and proceeding").

The Advisory Committee unanimously recommends that the proposed amendment to Rule 1001, which is set out in Appendix A, be approved for publication.

III. Comments on the Proposed Chapter 13 Plan Form (Official Form 113) and Related Rule Amendments

The Advisory Committee has been at work for several years on a chapter 13 plan form project. The project has produced a proposed Official Form 113 for chapter 13 plans and related amendments to Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009. The plan form and rule amendments were first published in August 2013 and generated a large number of comments. Based on those comments, many of which were critical, the Advisory Committee made significant changes to the plan form and sought approval to republish it and the rule amendments. The Advisory Committee also received approval to ask for public comment on the question whether the rule amendments should be adopted even if the form is not adopted. The form and rules, together with that request for comment, were published in August 2014.

The plan form and rules have generated fewer comments so far than did the initial round of publication in 2013. To date, only seven comments have been received (compared to approximately two dozen received by the same point last year). We have not yet received any comments addressing the question whether the rule amendments should proceed even if the plan form is not adopted.

With respect to the rule amendments, we have received a number of comments criticizing the proposed amendment to Rule 3002. Under the current rule, creditors must file a proof of claim no later than 90 days after the meeting of creditors under Code § 341. Under the proposed amendment, creditors would have to file their proof of claim 60 days after the order for relief (which means the petition date in the vast majority of bankruptcy cases). Three comments—two of them using substantially similar language—express the view that creditors should be allowed to file their proof of claim 90 days after the order for relief, because a 60-day time frame does not give creditors sufficient time. A chapter 13 trustee in Kansas submitted a comment criticizing a different aspect of the proposed change to Rule 3002. The current rule gives a single time period for filing a proof of claim, with no extra time to file supplemental materials for the claim. The amended rule would give a mortgage creditor 60 days to file its initial proof of claim but allow an additional 60 days to file supporting documents required by Rule 3001(c)(1) and (d) (namely, written mortgage documents and documents evidencing that the creditor's security interest has been perfected). In the commenter's view, giving the mortgage creditor an additional 60-day period to file supporting documents will delay confirmation of many chapter 13 plans.

With respect to the plan form itself, the comments submitted so far are mixed. The trustee in Kansas and a group of trustees in the Central District of California raised specific concerns about various parts of the form. Bankruptcy Judge Robert E. Grant (N.D. Ind.) submitted a comment reiterating the position taken by judges of his district that the Code does not permit a court to mandate the use of a particular form, national or otherwise, for chapter 13 plans. In contrast, Bankruptcy Judge Keith Lundin (M.D. Tenn.) submitted a lengthy comment endorsing the Advisory Committee's proposed plan form. Judge Lundin predicts that there will be opposition to the proposed form and rule amendments based on adherence to "local culture"

in chapter 13 practice. He urges the Advisory Committee to consider the costs of deferring to local preferences, including the inefficiencies produced by wide variations in the way the same information is presented in different courts. In Judge Lundin's estimation, adoption of the plan form and rule amendments is long overdue and "will be a huge improvement in Chapter 13 practice."

The Advisory Committee has also received two requests so far to testify at a public hearing about the plan form and rule amendments. In addition, we understand that different groups of bankruptcy judges are soliciting signatures on two different letters, one supporting the plan form and one opposing it, with the intent of submitting the signed letters as comments.

The Advisory Committee expects to receive many more comments near the close of the public comment period. After the close of the public comment period, we intend to circulate comment summaries to the full Advisory Committee before the spring meeting agenda book is finalized, and make some preliminary decisions, based on the nature and volume of comments received. Among the options we will consider are whether we should recommend: (1) moving forward with final adoption of the plan form and rules, (2) making further significant adjustments to the package to address specific comments, or (3) proceeding in an incremental fashion by first issuing the plan form as a Director's Form, rather than as an Official Form.

IV. Update on the Status of the Forms Modernization Project

The Advisory Committee is approaching the conclusion of its multi-year forms modernization project ("FMP") to revise many of the Official Bankruptcy Forms. The dual goals of the FMP are to improve the bankruptcy forms so that questions are clearer and answers more accurate, and to improve the interface between the forms and available technology. Among other things, the Judiciary's CM/ECF system ("NextGen") should be able to extract data from the modernized forms so that each clerk's office or chambers could produce customized reports containing the desired data in any desired format.

The Advisory Committee decided to implement the modernized forms in stages in order to allow for fuller testing of the technological features and to facilitate a smoother transition. The first group of forms was published for comment in August 2012, and four of those forms (fee waiver and fee installment forms, and income and expenses schedules) went into effect on December 1, 2013.

In August 2013, appellate forms and most of the modernized forms for individual debtor cases were published, and revised means test forms were republished. The Standing Committee gave its final approval to this second group of forms at the May 2014 meeting. On December 1, 2014, the appellate forms and the means test forms went into effect. The Standing Committee held the other individual debtor forms in abeyance to allow them to go into effect simultaneously with the modernized forms for non-individual debtor cases.

The third group of modernized forms, including the ones for non-individual debtor cases, was published in August 2014. So far no comments have been submitted in response to this publication. The Advisory Committee will review any comments that are submitted at its spring meeting. If the Advisory Committee approves the forms, it will seek the Standing Committee's final approval of the third group at the May 2015 meeting. At that point, if approved, we will be ready to send the non-individual debtor forms as well as the previously approved individual debtor forms to the Judicial Conference for approval, which would give the forms a December 1, 2015, effective date.

At our September meeting, we learned that there might be delays in upgrading the NextGen system to allow the bankruptcy courts to use the data in these bankruptcy forms to prepare customized reports. We also heard concerns that the issuance of the modernized forms could impact a pilot project that allows pro se debtors to input bankruptcy information directly into the court system (eSR/Pathfinder), which is in use at three bankruptcy courts. Based on recent discussions with the Case Management Systems Office of the Administrative Office, we are cautiously optimistic about both issues. The chief of the Case Management Systems Office has indicated that the technology necessary for the bankruptcy courts to extract data from the modernized forms and write customizable reports should be ready by December 2015. The chief also indicated his intent to support the eSR/Pathfinder project in a timely manner.

Even if our optimism turns out to be unwarranted, the Advisory Committee anticipates that it will ask the Standing Committee in May to approve the release of the individual and non-individual modernized forms on schedule. The modernized forms are far superior to the existing ones for both bankruptcy practitioners and pro se debtors, and we expect only a brief delay (if any) for the technology to catch up. Because the Advisory Committee has been preparing the bankruptcy community and software vendors for the release of the new forms for several years, there seems to be no reason to delay implementation even though the full benefit of the new forms may not be immediately achievable.

There remains one small group of modernized forms (Official Forms 25A, 25B, 25C, and 26) that has not yet been published. The Advisory Committee intends to seek the publication of this last group at the May 2015 Standing Committee meeting.

V. Consideration of Proposals Referred by the Subcommittee on CM/ECF

At the fall meeting, the Advisory Committee considered three matters referred by the Standing Committee's Subcommittee on CM/ECF.

(1) One issue, prompted by possible action by the Civil Rules Committee, is whether there should be a national rule mandating the use of electronic filing, subject to certain exceptions.

(2) A second set of issues is whether to have a national rule allowing electronic service of documents after the summons and complaint without obtaining the consent of the person served and whether to allow a notice of electronic filing to replace a certificate of service.

(3) The third issue the Advisory Committee considered is whether the Bankruptcy Rules should contain a rule that would provide that references to paper documents and to physical transmission include electronically stored information and electronic transmission.

Required Electronic Filing. Bankruptcy Rule 5005(a)(2) provides that local rules may "permit or require" electronic filing, whereas Civil Rule 5(d)(3) provides that local rules may "allow" electronic filing. Both rules, however, go on to provide that a "local rule may require electronic filing only if reasonable exceptions are allowed." The Advisory Committee understands that the Civil Committee intends to consider a possible amendment to Rule 5(d)(3) to create a national requirement for electronic filing, subject to an exception for good cause and ones imposed by local rule. The Advisory Committee voted to wait to see what action the Civil Committee takes before considering whether Rule 5005(a)(2) should be similarly amended.

Electronic Service Without Consent. The Advisory Committee also discussed other possible amendments to Rule 5 under consideration by the Civil Rules Committee. We understand the Civil Rules Committee is considering the following amendments: (i) amending Rule 5(b)(2)(E) to eliminate the consent requirement for the use of electronic service and (ii) amending Rule 5(d)(1) to allow a notice of electronic filing to take the place of a certificate of service. Bankruptcy Rule 7005 adopts Civil Rule 5 for adversary proceedings, and there is not a separate bankruptcy rule that addresses these service issues. Therefore any amendment to Rule 5 would become applicable in bankruptcy adversary proceedings unless the bankruptcy rule were amended to deviate from the civil rule. The Advisory Committee voted to defer further consideration of the matter until the Civil Committee decides whether to propose any amendments.

Amendment of Rules to Accommodate Electronic Filing and Information. The final issue referred by the CM/ECF Subcommittee was whether the various federal rules should be amended to have them more fully reflect the ubiquity of electronic filing and transmission of court documents. The CM/ECF Subcommittee asked each of the Advisory Committees (other than Evidence) to consider the following template for a rule that would expand the meaning of various terms to include electronically stored information and electronic transmission:

Rule ___. Information in Electronic Form and Action by Electronic Means

a) Information in Electronic Form: In these rules, [unless otherwise provided] a reference to information in written form includes electronically stored information.

b) Action by Electronic Means: In these rules, [unless otherwise provided] any action that can or must be completed by filing or sending paper may also be

> accomplished by electronic means [that are consistent with any technical standards established by the Judicial Conference of the United States].

The Advisory Committee noted that, if such a rule were proposed, we would need to consider whether to make exceptions to either provision in order to require some documents to be in written form or some actions to be accomplished by physical delivery and whether we should add terms in addition to "filing" and "sending" in subdivision (b). Bankruptcy Rule 5005(a)(2) currently states that a "document filed by electronic means in compliance with a local rule constitutes a written paper for the purposes of applying these rules, the Federal Rules of Civil Procedure made applicable by these rules, and § 107 of the Code." The Advisory Committee referred the CM/ECF Subcommittee's template to its Subcommittee on Technology and Cross Border Insolvency for consideration of whether the current provision in Rule 5005(a)(2) is sufficient, whether it should be expanded to cover documents that are not filed (as in subdivision (a) of the template) and to cover actions referred to in the rules (as in subdivision (b) of the template), and whether we should add exceptions to either provision.

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APPENDIX

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Appendix A

PROPOSED AMENDMENT TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

For Publication for Public Comment

Rule 1001. Scope of Rules and Forms; Short Title

The Bankruptcy Rules and Forms govern procedure in cases under title 11 of the United States Code. The rules shall be cited as the Federal Rules of Bankruptcy Procedure and the forms as the Official Bankruptcy Forms. These rules shall be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every case and proceeding.

Committee Note

The last sentence of the rule is amended to incorporate the changes to Rule 1 F.R. Civ. P. made in 1993 and 2015.

The word "administered" is added to recognize the affirmative duty of the court to exercise the authority conferred by these rules to ensure that bankruptcy cases and the proceedings within them are resolved not only fairly, but also without undue cost or delay. As officers of the court, attorneys share this responsibility with the judge to whom the case is assigned.

The addition of the phrase "employed by the court and the parties" emphasizes that parties share in the duty of using the rules to secure the just, speedy, and inexpensive determination of every case and proceeding. Achievement of this goal depends upon cooperative and proportional use of procedure by lawyers and parties.

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

This amendment does not create a new or independent source of sanctions. Nor does it abridge the scope of any other of these rules.

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ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of September 29-30, 2014
Charleston, S.C.

The following members attended the meeting:

Bankruptcy Judge Eugene R. Wedoff, Chair
Circuit Judge Sandra Segal Ikuta
Circuit Judge Adalberto Jordan
District Judge Jean Hamilton
District Judge Robert J. Jonker
District Judge Amul R. Thapar
Bankruptcy Judge Arthur I. Harris
Bankruptcy Judge Elizabeth L. Perris
Bankruptcy Judge Stuart M. Bernstein
Professor Edward R. Morrison
Michael St. Patrick Baxter, Esquire
Richardo I. Kilpatrick, Esquire
Matthew Troy, Esquire
David A. Lander, Esquire
Jill Michaux, Esquire

The following persons also attended the meeting:

Professor S. Elizabeth Gibson, reporter
Professor Troy A. McKenzie, assistant reporter
Circuit Judge Jeffrey S. Sutton, Chair of the Committee on Rules of Practice and Procedure (Standing Committee)
Roy T. Englert, Jr., Esq., liaison from the Standing Committee
Professor Daniel Coquillette, reporter for the Standing Committee
Jonathan Rose, Secretary, Standing Committee and Rules Committee Officer
Ramona D. Elliott, Deputy Director /General Counsel, Executive Office for U.S. Trustees
Bankruptcy Judge John E. Waites, liaison from the Committee on the Administration of the Bankruptcy System
James J. Waldron, Clerk, U.S. Bankruptcy Court for the District of New Jersey
Scott Myers, Esq., Administrative Office
Bridget Healy, Esq., Administrative Office
Molly Johnson, Senior Research Associate, Federal Judicial Center
Michael T. Bates, Senior Company Counsel, Wells Fargo
Jon M. Waage, Chapter 13 Trustee, Middle District of Florida
Raymond J. Obuchowski, National Association of Bankruptcy Trustees
Patricia Ketchum, consultant to the Committee

James Wannamaker, consultant to the Committee
Michael McCormick, McCalla Raymer LLC, Atlanta, GA

Introductory Items

1. Greetings and expression of appreciation

Judge Eugene Wedoff opened the meeting and expressed his appreciation to those members leaving the Committee, including Judge Elizabeth Perris, Michael St. Patrick Baxter, and David Lander. Judge Sandra Ikuta thanked Judge Wedoff for his service to the Committee, and Judge Wedoff thanked the group for their work, specifically noting the work by Judge Perris on the Forms Modernization Project (FMP).

Judge Wedoff welcomed new members Judge Stuart Bernstein, Judge Dennis Dow, Judge A. Benjamin Goldgar, Jeffery Hartley, and Thomas Mayer. Finally, he noted that Judge John Waites was attending the meeting in place of Judge Erithe Smith to report on the work of the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee).

2. Approval of minutes of Austin meeting of April 22-23, 2014.

The minutes of the meeting of April 22-23, 2014 were approved.

3. Oral reports on meetings of other committees:

(A) May 2014 meeting of the Committee on Rules of Practice and Procedure

Judge Wedoff noted that the draft minutes from the May 2014 Standing Committee meeting were included in the agenda materials at Tab 3A. All of the recommendations from this Committee were approved by the Standing Committee. The non-individual forms were approved for publication, along with the revised version of the chapter 13 plan form and related rules, the chapter 15 petition and related rules, Official Form 410A (attachment to the proof of claim form), and amended Bankruptcy Rule 9006(f) to eliminate the three-day extension of service for electronic service. These were published in August 2014.

(B) Intercommittee - CM/ECF Subcommittee.

The Reporter updated the Committee on the work on the subcommittee. The subcommittee is reviewing whether the national rules should be amended to make electronic filing mandatory, rather than leaving the decision up to local rules. She advised that Bankruptcy Rule 5005 authorizes local rules to require electronic filing and all districts have exercised this authority, but because Bankruptcy Rule 7005 refers to

Civil Rule 5, the Committee should review Bankruptcy Rule 7005 if Civil Rule 5 is amended to mandate electronic filing subject to local rules exceptions. The subcommittee is also looking at whether the requirement of consent should be eliminated from rules allowing electronic service; however, such a change is likely to have little practical impact on bankruptcy practice since registration with the CM/ECF system is deemed to constitute consent to electronic service.

The Reporter stated that the Committee on Court Administration and Case Management (CACM) asked the subcommittee to look at the issue of whether a notice of electronic filing (NEF) can be considered the equivalent of a certificate of service**.** If this change is made, the Committee should consider whether there are any amendments required to the bankruptcy rules as a result. Judge Elizabeth Perris noted a caveat with allowing the NEF as proof of service, stating that it would increase the work for bankruptcy courts because it would require judges to check various places to determine if service was properly completed.

The Reporter concluded that the final issue being considered by the subcommittee is whether electronic alternatives should be added to any definitions in the rules regarding transmitting or filing documents. The Committee discussed the specific issues that could impact bankruptcy courts if this change was adopted. The Chair referred the matter to the Subcommittee on Technology and Cross Border Insolvency for further consideration.

(C) June 2014 meeting of the Committee on the Administration of the Bankruptcy System.

Judge Waites reported on the June 2014 Bankruptcy Committee meeting. He stated that the Bankruptcy Committee determined to support converting temporary judgeships to permanent judgeship positions and creating new permanent judgeships. In connection with this issue, Judge Waites advised that the bankruptcy case weights formula was changed for evaluating the need for new judgeships. To assist with current judgeship needs, the Bankruptcy Committee recommended that districts with open judgeship positions “lend” the judgeships to districts with a need for judgeships. The new judge would be appointed for a 14 year term but would spend approximately five years in the district with the need for a new judgeship. This recommendation was approved by the Judicial Conference. Currently, this impacts the District of South Dakota, the Middle District of Florida, the District of Iowa, and the Eastern District of Michigan.

Judge Waites noted several other issues under consideration by the Bankruptcy Committee, including its oversight of the Bankruptcy Administrator program. In addition, the Bankruptcy Committee is reviewing a pilot program run by the Third Circuit in which funds obtained through savings in chambers costs remain within the circuit.

Finally, Judge Waites stated that the Judicial Resources Committee raised several issues for consideration by the Bankruptcy Committee: the administration of smaller courts; the desirability of the continuation of the Bankruptcy Administrator program, and the operation of bankruptcy clerks' offices. The Bankruptcy Committee is reviewing these issues and will respond in due course.

(D) Spring 2014 meeting of the Advisory Committee on Civil Rules and hearing on rules published for comment.

Judge Arthur Harris reported that the proposed amended civil rules, including a package of proposed amendments focusing on changes to discovery rules, frequently referred to as the "Duke Rules Package," which was published in August 2014, and the new electronic discovery sanctions, were approved by the Standing Committee and the Judicial Conference.

(E) April 2014 meeting of the Advisory Committee on Appellate Rules.

Judge Adalberto Jordan reported that the Advisory Committee on Appellate Rules considered three main issues. First, the time at which a mailing is effective if filed from prison by an inmate. Second, the change from page count to word count for appellate briefs. Third, whether amicus briefs can be permitted at the rehearing stage. The Appellate Committee considered a few other items, but none of them impacts bankruptcy practice.

(F) Bankruptcy Next Generation of CM/ECF Working Group.

This report was provided as part of the Forms Modernization Project report.

At the conclusion of the reports from other committees, Judge Wedoff noted that the Committee will no longer maintain liaisons to the Appellate and Evidence Committees.

Subcommittee Reports and Other Action Items

4. Report by the Subcommittee on Consumer Issues.

(A) Suggestion 14-BK-B from CACM to amend various rules regarding redaction of private information in closed cases.

Judge Arthur Harris provided a brief overview of the issue, referring to the memo at Tab 4A. The Judicial Conference adopted a policy that a case does not need to be reopened to redact a previously filed document. CACM has suggested that Rule 5010 be amended to reflect this policy. The subcommittee preliminarily concluded that such an

amendment should be made to Rule 9037 instead, along with the inclusion of procedures for redacting previously filed documents. There was no recommendation for specific language from the Consumer Subcommittee, but it will present language at the spring 2015 meeting. Judge Harris explained that Bankruptcy Rule 9037 prohibits the inclusion of certain information on filed documents and there were several cases involving large creditors redacting large numbers of previously filed documents. The method of redaction varies among districts, including how notice is provided. The subcommittee will consider several issues related to redaction, including when and how notice of a request for redaction should be provided to affected persons.

(B) Report concerning Suggestion 12-BK-I by Judge John Waites (on behalf of the Bankruptcy Judges Advisory Group) to amend Bankruptcy Rule 1006(b) to provide that courts may require a minimum initial payment with requests to pay filing fees in installments.

Judge Harris explained that this issue has been under consideration for several years and that a report on the topic was completed by the Federal Judicial Center (FJC). Professor Gibson's memo on the topic was included at Tab 4B, and Molly Johnson's memo and research were included at Tab 4B.1. As background, Judge Harris stated that a debtor may seek to pay filing fees in installments. Often debtors do not complete the installment payments if a case is dismissed prior to completion of payment. Some courts instituted required minimum payments with applications to pay in installments. The subcommittee determined that minimum payments are permissible under the current rules with the limitations that (1) Rule 1017 does not permit a case to be summarily dismissed for lack of payment of the minimum fee and (2) a clerk cannot refuse to accept a petition if the upfront installment payment is not provided. Judge Harris concluded that the subcommittee does not believe any change to the current rules is required to permit upfront installment payments, so long as petitions are not refused or summarily dismissed for failure to make upfront installment payments.

Judge Harris advised that the research regarding upfront minimum payments showed a very small percentage difference in the number of fee waiver requests for courts that require an upfront payment for applications to pay in installments. Molly Johnson provided further detail about her report, stating that there was a very low rate of fee waiver filings, making it difficult to draw any conclusions about the potential impact on the level of fee waiver filings in courts that require upfront installment payments.

Judge Wedoff summarized that the subcommittee determined that the underlying Bankruptcy Code and rule provisions permit the practice of requiring upfront minimum payments with applications to pay in installments and that making a rule governing judges' discretion would be inappropriate. Several members commented that the FJC research includes evidence that some courts are rejecting filings when debtors do not have the upfront payments. Judge Wedoff responded that the legal requirements will be

communicated to judges through the minutes of this Committee, the response to the Bankruptcy Judges Advisory Group, and the educational programs of the FJC. A separate but related question was raised regarding the proper procedure in a case in which a debtor has unpaid fees from a prior case and requests to pay the filing fee for a subsequent case in installment payments. Judge Wedoff referred this matter as well as the issue of dismissing or rejecting petitions for failure to pay upfront minimum installment payments to the Consumer Subcommittee. For this reason, any communication to the Bankruptcy Judges Advisory Group will be delayed until after the spring 2015 meeting.

(C) Report concerning Suggestion 12-BK-M by Judge Scott W. Dales to amend Rule 2002(h) to mitigate the cost of giving notice to creditors who have not filed proofs of claim.

Judge Harris reported that the subcommittee suggested setting up a working group to consider whether an overall review of noticing in the Bankruptcy Code and Bankruptcy Rules is necessary, and if so, the process for doing so. He advised that there were several suggestions for revising noticing procedures, and that each of the suggestions could be reviewed by the working group. These suggestions are outlined in memos at Tabs 4C and 7C.

Judge Stuart Bernstein spoke about the second suggestion (Item 7C), which was considered by the Business Subcommittee and stated that subcommittee supports the suggestion to create a working group.

(D) Oral report concerning suggestion 11-BK-N by David Yen regarding fee waiver forms to implement 28 U.S.C. § 1930(f)(3).

Judge Harris explained that the suggestion had been under consideration for some time. Given that there is no current guidance from the Judicial Conference to assist with consideration of the issue, the subcommittee recommended that the suggestion no longer remain under consideration. If the Conference does issue guidance, the suggestion can be revisited. For this reason, the subcommittee recommended taking no action on this suggestion, and the Committee agreed.

(E) Oral report concerning suggestion 13-BK-G that Rule 1015(b) be changed to use the word “spouse.”

Judge Harris reminded the group that the suggestion was discussed at the spring 2014 meeting and the Committee recommended waiting for further legal developments before making any changes to the rule given that this issue will likely be before the Supreme Court in the future. He further explained in response to a question that even if a change is made to the rule, a change is also required to the Bankruptcy Code; therefore it

makes sense to wait for further guidance from the Supreme Court. Several members noted that this issue exists in many federal statutes and Supreme Court precedent may make the wording of a rule or statute irrelevant.

Judge Sutton noted that the Committee could, but did not have to, make a conditional recommendation to the Standing Committee, one that would be dependent on the Supreme Court's resolution of the constitutional status of same-sex marriages. Judge Wedoff reminded the group that if the Committee makes a recommendation at either the winter or summer meeting of the Standing Committee, the timing for publication would be the same.

5. Joint Report by the Subcommittees on Consumer Issues and Forms.

(A) Issues Related to Home Equity Loans and Lines of Credit: (1) Suggestion 14-BK-A by Michael Bates, Senior Company Counsel, Wells Fargo, to amend Bankruptcy Rule 3002.1 to address notices related to home equity loans and lines of credit, and (2) additional proposed amendments to Bankruptcy Rule 3002.1: (i) suggestion to add procedures for objecting to notice of payment changes; (ii) suggestion for declaring mortgage current when no arrearage is provide for in the chapter 13 plan; (iii) suggestion to clarify whether court approved charges must be reported; and (iv) whether the claims docket should continue to be used for filing notices of fees and expenses.

The Reporter explained the history of the mortgage forms revisions and the differences between traditional mortgage loans and home equity loans and lines of credit (HELOCs). The differences between the types of loans were discussed at the mini-conference held in the fall of 2012 and it was agreed that HELOCs should be treated differently than other mortgage loans for the reporting of payment changes during the course of a chapter 13 plan. The suggestion from Mr. Bates would retain a notice requirement for HELOC payment changes but would reduce the burden on servicers by limiting who must receive notice in some situations and by making easier the means of providing notice. The notice procedure would vary depending on whether the debtor makes the HELOC payments directly (non-conduit) or the trustee makes them (conduit). If the debtor is making payments directly, the mortgage servicer would provide notice of the change to the debtor only through a regular monthly statement. If the trustee is making the payments, the servicer would provide an electronic file to the trustee with the old payment amount and the new payment amount. If the change in payment amount is less than $25, the servicer would provide also provide notice to the debtor in the same manner as it provides notice of payment changes outside of bankruptcy. For changes exceeding $25, the servicer would have to comply with the current notice requirements of Bankruptcy Rule 3002.1(b) in addition to providing the electronic file to the trustee. A memo on the topic was included in the materials at Tab 5A.

The subcommittees concluded that the suggestion was too complex, and they recommended a simpler solution of adding a sentence that the notice requirements for payment changes for HELOCs could be modified by court order. In addition, the subcommittee recommended a Committee Note explaining the reasoning behind the added language and suggesting that local rules could be adopted or that procedures could be adopted in each case. The subcommittees asked that the Committee approve the language but not send it to the Standing Committee pending other changes that are in progress. A motion was made to approve the language, and the motion was approved.

Professor Edward Morrison asked about current practice. Judge Harris stated that Bankruptcy Rule 9006 can be used to modify the time requirements of Bankruptcy Rule 3002.1 in cases involving HELOCs, and he has not seen opposition to these types of requests by creditors. Professor Coquillette noted his continued concern regarding straying from uniformity in national practice.

Michael Bates provided some background regarding changes in payment amounts for HELOCs, stating that most changes are the result of a variable interest rate or because of the number of days in a month and are generally *de minimis*. The monthly statements debtors receive comply with other legal requirements such as the Truth in Lending Act.

A motion was made to hold the recommendation rather than to send it to the Standing Committee and the motion was adopted.

The Reporter continued with a suggested change to Official Form 410S1's language to reflect the fact that HELOCs are based on an account rather than a note. The subcommittees recommended this change; however because the form is currently out for publication, this suggestion will be considered with other comments at the spring 2015 meeting. The Reporter suggested that a language change could be made at that time with a notation that it was a change made after publication.

The Reporter concluded her report by stating that the remaining outstanding issues regarding the mortgage rules and forms were considered by the subcommittees and they recommended that a working group review these issues and suggest any possible amendments to Bankruptcy Rule 3002.1. With regard to the suggestion to place mortgage actions on the main docket rather than on the claims docket, the subcommittees recommended no action. The Committee accepted the subcommittees' recommendation.

(B) Suggestion from the National Association of Chapter 13 Trustees (NACTT) Mortgage Liaison Committee for proposed forms to implement Rule 3002.1(f) and (g).

The Reporter discussed the suggestion for proposed forms to implement Bankruptcy Rule 3002.1(f) and (g) and referred to the memo at Tab 5B. The

subcommittees considered the suggestion regarding proposed forms and reviewed the draft forms submitted by the NACTT's Mortgage Liaison Committee. The subcommittees agreed that the forms were well-drafted and believed that they would be useful as Director's Forms after review by a broader group. The subcommittees suggested that a working group review the forms, and the Committee agreed with the recommendation.

Judge Wedoff referred the review of the proposed forms to a working group and explained the difference between Official Forms and Director's Forms. Official Forms are reviewed and approved by the Committee, published, approved by the Standing Committee, and approved by the Judicial Conference. Director's Forms are drafted by the Administrative Office and often reviewed by the Committee, but are not mandatory and do not require any official approval or recommendation.

(C) Suggestion 14-BK-C from Professor Timothy Tarvin to amend Director's Form 201A to provide pre-filing notice of the privilege against self-incrimination in consumer bankruptcy cases.

The Assistant Reporter discussed the suggestion to add a warning to Director's Form 201A about the privilege against self-incrimination. A memo was provided at Tab 5C of the agenda materials. The subcommittees discussed the issue and noted that while this type of warning is provided in some other legal materials and the privilege against self-incrimination exists in bankruptcy, there are a number of issues with including the warning on Director's Form 201A. First, there is case law suggesting that a case may be dismissed if it cannot be administered because a debtor invoked the privilege, and second, including the language would be complicated and potentially incomplete. Another factor considered by the subcommittees was that the cases cited in the suggestion to support the inclusion of the warning may not have been decided differently if the privilege was invoked. Based on these reasons, the subcommittees recommended that no further action be taken on the suggestion, and the Committee agreed with the recommendation.

6. Report by the Subcommittee on Forms and the Forms Modernization Project.

(A) Report on the status of the Forms Modernization Project (FMP) including: (1) clean up issues pertaining to the means test forms; (2) proposed technical changes to previously approved individual debtor forms; (3) renumbering modernized Official Forms 3A, 3B, 6I, 22A-1, 22A-1Supp, 22A-2, 22B, 22C-1, 22C-2; and (4) renumbering proposed Official Form 112 to Official Form 108.

Judge Perris started the discussion with an explanation of the basis of the FMP, explaining that at the time the project started the forms had not been reviewed in total for over 20 years. The Next Generation of CM/ECF (Next Gen) project started at

approximately the same time and it made sense to plan to utilize the newly modernized CM/ECF system in connection with the forms.

Prior to giving a more detailed report on the FMP, Judge Perris provided an update on the work on the Next Gen CM/ECF Working Group (Next Gen Working Group). She provided a brief overview of the work of the Next Gen Working Group, stating that the group was reduced to a smaller group to prioritize the tasks to be done for Next Gen. The modernized forms are not a priority for completion for the Next Gen Working Group. Representatives of the Administrative Office's (AO) technology group were involved with the FMP from its inception and represented that the forms would be data-enabled and expandable. In addition, the AO technology group indicated that the data could be used to create a number of reports, both existing and to be developed. At some point after the creation of the modernized forms, the AO technology group determined that the development of the data elements on the forms would be delayed beyond the first release of Next Gen and that a business objects program would be used with the data. Jim Waldron explained the business objects program and advised that the issue of providing data to outside users is on hold.

Several members noted experiences with court employees assisting with program development for the AO, and they suggested that this procedure may assist with the completion of the work required to make the modernized forms useful in Next Gen.

Judge Perris stated that the Committee needs to continue pressuring the AO to complete the work on the forms. David Lander made the point that the cost to the bar, trustees, and debtors should not be overlooked, and that the new forms will have a real impact on cost without the technology piece.

Judge Perris cited the form chart included at Tab 6 listing the status of each form, and advised that all the forms are drafted and almost all have been published or approved by the Standing Committee. The few remaining forms, which have been reviewed and drafted, include the small business forms. The FMP recommended that these forms be referred to the Business Subcommittee for review, along with Exhibit A to current Official Form 1 (to be renamed Official Form 201A, see below). Tom Mayer explained the issue with this form, mainly that many companies de-register their companies prior to filing for bankruptcy. The form could be revised to reflect this practice, as well as to expand the time period for required reporting. A motion was made to refer the small business forms and Exhibit A to Official Form 1 to the Business Subcommittee for review, and the motion was approved. Judge Perris stated that a final project to be completed is the modernization of the Director's Forms.

Next Judge Wedoff explained a small change required to Official Form 22B to reflect the fact that a non-filing spouse's income is not relevant in an individual debtor case if it is not used to support the debtor or debtor's dependents. The change - the

deletion of lines 12-14 - will be made when the re-numbered forms are made effective with the other modernized forms (discussed below). Judge Wedoff confirmed that this is not a change that would require publication. A memo explaining the change was included in the materials at Tab 6.

Scott Myers reported on the modernized forms that must be renumbered to match the remainder of the modernized forms. Mr. Myers advised that the forms were included within the agenda materials at Tab 6 and he provided background regarding the purpose of the renumbering of the forms. A suggestion was submitted to renumber Official Forms 22A-1 through 22C-2 to Official Form 122A-1 through 122C-2. As a result, Official Form 8 will be renumbered as Official Form 108 rather than Official Form 112. The form number changes do not need to be published and can go into effect with the remainder of the modernized forms. A motion was made to approve the revised and renumbered forms and the motion was approved.

Mr. Myers continued that Exhibit A to Official Form 1 should be renumbered as Official Form 201A until any revised version of the form becomes effective. A motion was made to revise the motion previously made to include the renumbering of Exhibit A, and the motion was approved. The revised motion to approve the revised and renumbered forms was approved.

7. Report by the Subcommittee on Business Issues.

(A) Recommendation concerning *Stern* amendments to Bankruptcy Rules 7008, 7012, 7016, 9027, and 9033 previously approved by the Judicial Conference, but withdrawn from presentation to the Supreme Court in light of the pending *Arkison* matter.

The Assistant Reporter explained the history of the *Stern*-related amendments, namely that *Executive Benefits Insurance Agency v. Arkison* was heard by the Supreme Court during the 2013 Term, causing the Standing Committee to withdraw from Supreme Court consideration its proposed rule amendments based on *Stern*. The Court has now granted certiorari in *Wellness Int'l Network v. Sharif*, and the issue of consent may be considered in that case. The amendments will be held pending a decision in *Wellness*.

(B) Recommendation concerning suggestion 12-BK-I by Judge Stuart Bernstein, that Official Forms 9F and 9F(Alt.) be amended to address complaints to deny discharge for a debt "of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a) that is owed to a domestic governmental unit."

Judge Bernstein explained that this was a suggestion he made prior to membership on the Committee. The issue raised concerns with the language used on Official Forms 9F and 9F(Alt.) regarding the commencement of a dischargeability action

and the deadline for filing such an action. The subcommittee's suggested change was to narrow the language in the forms by limiting the statutory reference to section 523(c) of the Bankruptcy Code to reflect a potential ambiguity in section 1141(d)(6)(A) of the Bankruptcy Code. A motion was made to accept the recommendation to change line 8 on Official Forms 9F and 9F(Alt.) (to be renumbered Form 309F), and the motion was approved. Judge Wedoff asked the group to consider whether this change requires republication, and the Reporter reminded the group that it is instructional language on the form. Judge Bernstein stated that parties rely on this language in litigation, so the conclusion was that the form should likely be republished. A decision about publication will be made at the spring 2015 meeting.

(C) Suggestion by David Lander for a rule change to address limiting notice in large cases for motions that do not impact all creditors.

This issue was discussed as part of Agenda Item 4C.

(D) Suggestion by Judge Harris to amend Bankruptcy Rule 1001 to track pending changes to Civil Rule 1.

The Reporter discussed the suggestion to amend Bankruptcy Rule 1001. An amendment to Civil Rule 1 to emphasize the need for cooperation among parties has been approved by the Judicial Conference, and Rule 1001 is largely based on Civil Rule 1 (with the exception of the term "administered"). The related amended civil discovery rules will be automatically incorporated in the Bankruptcy Rules, so it the subcommittee determined that it made sense to ensure that the language of Bankruptcy Rule 1001 parallels Civil Rule 1 with an explanation of the change in the Committee Note.

Professor Coquillette suggested that the reference to attorneys be removed from the Committee Note, given that the language was objected to as part of the revision of Civil Rule 1. Judge Harris suggested that the language be revised to incorporate the Civil Rule 1 amendments by reference. Further discussion was had regarding the reference to attorneys, and Professor Coquillette explained that the American Bar Association and other groups objected to the idea that all attorneys have the same types of practice and responsibilities with regard to Civil Rule 1. The Reporter explained that the reference to attorneys appears in the Committee Note accompanying an earlier amendment to Civil Rule 1 that is now being incorporated into Rule 1001. A motion was made to adopt the suggested changes to the rule and Committee Note and the motion was approved.

8. Report by the Subcommittee on Privacy, Public Access, and Appeals.

(A) Suggestion 12-BK-H by Alan Resnick to amend Rule 8013 to allow an appellate body to treat a bankruptcy court's judgment, order, or decree as proposed findings and conclusions if there is a constitutional issue in the bankruptcy court's ruling.

The Assistant Reporter provided the report, citing a memo included at Tab 8A of the agenda materials. The subcommittee discussed this suggestion and determined to wait for further developments in light on the uncertainty in this area. The Supreme Court will consider *Wellness Int'l Network v. Sharif* this Term, and following a decision in that case, the subcommittee will revisit the issue.

(B) Status report concerning issues pending in: (1) the bullpen - amendments previously approved for publication to Rules 8002, 8006, and to 8023; and (2) the dugout - consideration of Comments 12-BK - 005, 12-BK-015, 12-BK040 regarding designation of the record in bankruptcy appeals.

Judge Jordan provided the report on these issues, citing a memo included at Tab 8B. He advised that there are three matters currently in the bull pen that relate to appellate issues. The amended rules will be effective December 1, 2014, so these issues will remain in the bull pen until after the effective date of the rules. Judge Jordan explained the various items in the bull pen, and there was no objection from the Committee to retaining the issues in the bull pen. He noted that for the issue regarding the record on appeal, the subcommittee is waiting for action from several other Judicial Conference committees.

9. Report by the Subcommittee on Technology and Cross Border Insolvency.

There was no report from this subcommittee.

10. Report by the Subcommittee on Attorney Conduct and Health Care.

(A) Status report concerning the subcommittee's consideration of Suggestion 13-BK-C by the American Bankruptcy Institute's (ABI) Task Force on National Ethics Standards to amend Rule 2014 to specify the relevant connections that must be described in the verified statement accompanying an application to employ professionals.

Judge Robert Jonker discussed the subcommittee's work on this issue. A memo was included in the materials at Tab 10. The suggestion is from the ABI to make changes to Bankruptcy Rule 2014 governing the retention of professionals. The broad language of the rule has led to some problems for attorneys in larger cases. The subcommittee felt that the suggestion was too elaborate but that some change should be made to the rule. The subcommittee noted that there was a suggestion similar to the ABI's suggestion put forward fifteen years ago and there was objection from the Judicial Conference.

The subcommittee's current working draft revises the "all connections" language by providing an exception for "cause shown" to limit the broad nature of the required

disclosures. Members of the subcommittee raised a concern that any discretion regarding disclosure should not be left to the attorney making the disclosure. Another concern was that the lack of disclosure of relevant connections rarely causes any problems. The subcommittee determined to seek the input of various experts in the field, including judges and attorneys, to evaluate the best way forward.

Several members asked about the supplemental filing suggestion and whether an attorney would be required to disclose supplemental information relevant to another member of his or her firm but not relevant to the attorney. It was suggested that the subcommittee consider this issue. A suggestion was made to provide a "safe harbor" for any inadvertent lack of disclosure through a narrative describing the nature of the attorney's employment.

Information Items

11. Recommended revisions to proposed chapter 13 plan form.

Judge Wedoff updated the group on the proposed revisions to the chapter 13 plan form. He reviewed the changes to the chapter 13 plan form that the Working Group proposed in response to suggestions and comments that were made since the spring 2014 Committee meeting. Judge Wedoff stated Judge Ikuta has asked him to remain involved with the Working Group after he leaves the Committee.

12. Oral update on opinions interpreting section 109(h) of the Bankruptcy Code.

Professor Gibson explained that the opinions involved a technical change regarding the timing of consumer debtor's completion of credit-counseling briefing. The issue is whether it is permissible for debtors to complete the credit-counseling briefing on the day of the filing of the petition but after the time of the filing of the petition. The majority of the cases have held that the briefing had to occur prior to the filing of the petition but one case held the opposite. This case was appealed directly to the Seventh Circuit. The case may be moot because the underlying chapter 13 case was dismissed for other reasons. The Reporter will continue to monitor case law interpreting section 109(h).

13. Oral report on the status of bankruptcy-related legislation.

Judge Wedoff stated that there is a pending piece of legislation called the Financial Institutions Bankruptcy Act which concerns Systematically Important Financial Institutions (or "too big to fail companies") that are currently covered by the Dodd Frank Act. Under the legislation, in certain circumstances the Federal Reserve would file a petition in support of the bankruptcy of the institution with a bankruptcy judge (one of 10 on a panel selected by the Chief Justice). If the petition is opposed, the bankruptcy judge

would have 18 hours to make a decision and any appeal would have to be filed in one hour. The court of appeals would be required to decide the appeal within 14 hours. The concept is that the decision would be made while the world markets are closed. Judge Wedoff advised there is little chance that this legislation will be passed in this session of Congress, but it is possible in the next session.

14. *Bullpen*: The following items have been approved for submission to the Committee on Practice and Procedure in the future:

    (A) Proposed revisions to Rule 8002(a)(5) in response to Comment 12-BK-033. *Approved at the fall 2013 Advisory Committee meeting, see Agenda Item 8(B);*

    (B) Proposed revisions to Rule 8006(b) in response to Comment 12-BK-033. *Approved at the fall 2013 Advisory Committee meeting, see Agenda Item 8(B);*

    (C) Proposed revisions to Rule 8023. *Approved at the spring 2014 Advisory Committee meeting, see Agenda Item 8(B);*and

    (D) Suggestion 13-BK-G that Rule 1015(b) be changed to use the word "spouse." Approved at the spring 2014 meeting, s*ee Agenda Item 4(E).*

15. *Dugout*. Suggestions and issues deferred for future consideration.

    (A) Recommendation concerning Suggestion 11-BK-N by David S. Yen for fee waiver forms addressing fees other than the chapter 7 filing fee. *See Agenda Item 4(D)*.

    (B) Suggestion 12-BK-M by Judge Scott Dales to amend Rule 2001(h) to mitigate the cost of giving notice to creditors who have not filed proof of claim. *Placed in dugout at fall 2013 meeting pending receipt of comments on the Chapter 13 Plan Form and related rules amendments, see Agenda Item 4(C).*

16. Future meetings: Spring 2015 meeting, April 21-22 in Pasadena, California.

    Judge Ikuta welcomed everyone to Pasadena on April 21-22, 2015. The meeting will be held at the courthouse. As for the fall 2015 meeting, the Committee may meet in Washington D.C.

17. New business.

    There was no new business.

18. Adjourn.

Judge Wedoff thanked everyone for attending and for the work of each member of the Committee.

TAB 4

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TAB 4A

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

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

SANDRA SEGAL IKUTA
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

TO: Hon. Jeffrey S. Sutton, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. David G. Campbell
Advisory Committee on Civil Rules

RE: Report of Advisory Committee on Civil Rules

DATE: December 2, 2014

Introduction

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts on October 30, 2014, concluding in one day an agenda that had been scheduled to carry over to October 31. Draft Minutes of this meeting are attached. This report has been prepared by Professor Cooper, Committee Reporter, with Professor Marcus, Associate Reporter, and various subcommittee chairs.

The Committee has no action items to recommend.

Deliberations at the October meeting fell into four areas.

The consideration of e-rules amendments has been assigned to the all-committees subcommittee, and will be reflected in its report.

The second bundle of topics focused on a number of proposed rules amendments that have been submitted to the Committee over the last few years. These proposals and the Committee's deliberations on them are described extensively in the draft Minutes. They will be summarized in Part II, some rather fully and others briefly. The summaries follow the order of discussion in the draft Minutes, facilitating reference when curiosity prompts a search for greater detail.

The third kind of work involved ongoing subcommittee projects. Part III summarizes the Rule 23 Subcommittee report, and notes the projects pending before other subcommittees.

Finally, Part IV reports briefly on the hope that ways may be found to encourage the development of pilot projects to test innovations in civil litigation and provide empirical data regarding their effectiveness. It also reflects discussion of ways to advance early understanding and implementation of rules amendments when they have been prescribed and are to take effect.

I. E-RULES

The Committee has reported these tentative recommendations to the all-committees Subcommittee:

The Civil Rules should mandate e-filing. Exceptions should be allowed for good cause. Paper filing also may be permitted or required by local rule. Any provision for electronic signatures remains open for further consideration. Reactions to the rule published by the Bankruptcy Rules Committee in 2013 suggest that it would be unwise to go forward with a general provision for electronic signatures. But it might be useful to provide for electronic signing by the person who makes the filing. Filing by an authorized user could count automatically as the user's signature. This approach would not address the questions raised by other signatures, such as signatures on affidavits or declarations filed to support a summary-judgment motion. And, although present Rule 5(d)(3) authorizes local rules that cover electronic verification, it may be safer to leave verification out of the rule unless consideration by the subcommittee produces a persuasive provision.

The Civil Rules also should provide for e-service of the papers described in Rule 5(a), deleting the requirement in present Rule 5(b)(2)(E) that consent be obtained from the person served. Here too, exemptions could be made for good cause or by local rule.

Rule 5(d)(1) would be amended to provide that a notice of electronic filing is a certificate of service on any party served through the court's transmission facilities.

The Committee considered the "template" rule that would equate electrons with paper for all purposes throughout the Civil Rules, "unless otherwise provided." The template comes in two parts. The first provides that any reference to information in written form includes electronically stored information. The second provides that any action that can or must be completed by filing or sending paper may also be accomplished by electronic means. It has been recognized from the beginning that these approaches may fit some sets of rules better than other sets. The Committee concluded that it is too early to attempt to adapt these approaches to the Civil Rules. Many different words in many different rules can be understood to imply paper. Great and at times risky effort will be required to sort through all of them to determine whether electronic modes are

equally suitable. Emerging problems in practice may come to justify the effort. But the Committee is not aware of any pressing needs to act now, and recognizes that the most satisfactory resolutions may well arise from practice in the continual migration to the electronic universe.

Short of a generic rule, several individual Civil Rules could be revised to equate electrons with paper. One simple example is Rule 72(b)(1), which directs that the clerk must promptly "mail" to each party a copy of a magistrate judge's recommended disposition. "No one mails." "Serve" could easily be substituted. And it may be substituted when a general package of e-rules proposals is ready for publication. But there is no need to act now.

II. ACCUMULATED DOCKET MATTERS

Signatures on Notice of Removal. Several removal statutes allow any one defendant to remove an action from state court. Some are ambiguous. 28 U.S.C. § 1441(a) provides for removal "by the defendant or the defendants." Section 1446(b)(1)(A) provides that if an action is "removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal * * *." The circuits have taken different approaches to a simple question: Can one defendant sign a notice of removal, representing that all other defendants authorize and join in the removal? A uniform answer to this question could be given by amending Civil Rule 81(c)(2). The answer might be that all defendants must sign separately. It might be that one can sign on behalf of all, expressly representing authority to sign for all. Or some combination could be found, with a joint notice for some and separate notices for all others. One reason to hesitate is that the circuits disagree on the question whether § 1452 authorizes a single defendant to remove a claim related to a bankruptcy case. A Rule 81 provision limited to removals under § 1441(a) might create uncertainty in the current circumstance, and might require revision if a uniform answer is given. A provision addressed to any removal that must be joined by all defendants might solve that problem. But deeper questions remain: Does the Committee have power under the Rules Enabling Act to resolve judicial disagreements on the meaning of a statute? And even if it has the power, is it wise to do so? A lawyer contemplating removal should take care to discover and comply with circuit practice. Most lawyers are careful to ensure that all parties join in removal when the underlying statute requires unanimity. Matters that bear on removal statutes should be approached only if there is a serious need, and even then should be approached with caution. The Committee concluded that this subject should be tabled.

Third-Party Litigation Financing. This proposal would amend Civil Rule 26(a)(1)(A) to require automatic initial disclosure of third-party litigation financing agreements. Contingent-fee agreements would not be included in the concept. An analogy is offered to the initial disclosure of liability insurance. The proponents suggest several advantages. Disclosure may promote settlement. It will protect against unknown conflicts of interest by ensuring judges have access to information, not provided by Rule 7.1 disclosures, identifying third-party financing entities in which the judge may have an interest. The defendant has an intrinsic interest in knowing who the true adversaries are. Knowing of third-party financing may affect rulings on motions to shift the

costs of discovery, or for sanctions.

Discussion reflected concerns that third-party financing is a relatively new and evolving phenomenon. It takes many forms that may present distinctive questions. A study paper for the ABA 20/20 Commission on Ethics expressed the hope that work will continue to study the impact of funding on counsel's independence, candor, confidentiality, and undivided loyalty.

The Committee agreed that the questions raised by third-party financing are important. But they have not been fully identified, and may change as practices develop further. In addition, the Committee agreed that judges currently have the power to obtain information about third-party funding when it is relevant in a particular case. An attempt to craft rules now would be premature. These questions will not be pursued now.

Nonparty Rule 30(b)(6) Depositions. This proposal describes a concern that notices of a Rule 30(b)(6) deposition of an entity that is not a party to the underlying action often set an unreasonably short time for deposing the persons designated to testify for the entity. Rule 30(b)(6) presents other possible problems; several years ago the Committee considered a lengthy proposal that addressed attempts to elicit testimony outside the matters described for the examination. The rule was the subject of an exacting review and evaluation that extended over several Committee meetings. Discussion noted that the Committee had recently devoted substantial work to considering Rule 45 subpoenas — the means used to compel a nonparty to appear for a deposition — without having encountered the "short notice" issue. Nor were Committee members aware of the problem as described. This proposal was set aside.

Attorney-Client Privilege Appeals. In *Mohawk Industries, Inc. v. Carpenter*, 130 S.Ct. 599 (2009), the Supreme Court ruled that the collateral-order appeal doctrine does not support appeal from orders that reject claims of attorney-client privilege. The opinion suggested that the Rules Enabling Act process is the best means of considering the question whether appellate review should be expanded beyond the infrequent opportunities provided by disobedience and contempt, certification under 28 U.S.C. § 1292(b), and extraordinary writ review. The Appellate Rules Committee has considered these questions and has decided not to propose any new rule. The Civil Rules Committee reached the same conclusion.

Rule 41. This submission came in the form of a law review article, Bradley Scott Shannon, "Dismissing Federal Rule of Civil Procedure 41," 52 U. of Louisville L. Rev. 265 (2014). The first part of the article describes several well-known shortcomings in the rule text, including these: (1) The unilateral right to dismiss without prejudice should be cut off by a motion to dismiss as well as by an answer or motion for summary judgment. (2) The reference to dismissing "an action" should be elaborated to reach dismissal of part of an action, whether a particular claim or a particular party. (3) Rule 41(c) should be expanded to address dismissal of all claims after the complaint, not only counterclaims, crossclaims, or third-party claims. (4) The events that cut off the right to unilaterally dismiss under Rule 41(c) should be expanded. The

second part of the article criticizes the reliance in Rule 41 on such concepts as "prejudice," "without prejudice," and "on the merits." The suggested remedy is to substitute more direct references to "preclusion." Although Professor Shannon has identified some shortcomings in the Rule 41 text, no member of the Committee has encountered problems in practice. The Committee also expressed concern about the potential complexity of writing precise preclusion rules into Rule 41, as well as the significant risk of unintended consequences. Revision will not be undertaken.

Rule 48: Non-Unanimous Verdicts in Diversity Cases. This proposal would amend Rule 48 to direct that state majority-verdict rules be applied in diversity cases. Several reasons were offered. Defendants often believe that majority-verdict rules favor plaintiffs, creating an incentive to remove to federal court cases that otherwise would remain in state court. State majority-verdict rules, further, may reflect substantive state values that should be respected by federal courts when enforcing state-law claims. And majority-verdict rules may be better than the antiquated unanimity requirement enshrined in Rule 48 and federal tradition. Adopting a majority-verdict rule for all cases, not diversity cases alone, would have a further advantage. If majority verdict rules were limited to state-law claims, there could be significant difficulties in asking a single jury to reach unanimity as to federal-question claims in the same case.

Discussion revealed cogent arguments on all sides of these considerations. It seems inevitable that those who oppose a shift to majority verdicts will invoke the Seventh Amendment, whether the shift is limited to diversity (and supplemental jurisdiction) cases or is adopted for all cases in federal court. At the end of this vigorous discussion, the Committee voted to remove the proposal from the docket.

Rule 56: Summary-judgment Standards. This submission is an article, Suja A. Thomas, "Summary Judgment and the Reasonable Jury Standard," 97 Judicature 222 (2014). Parts of the article intimate that judges are simply incapable of understanding what it may be reasonable for a jury to find. But the proposal at the end is not to abolish summary judgment, nor even to undertake a present restatement of the standard for summary judgment. Instead, study of the standard is proposed, likely invoking the aid of the Federal Judicial Center. The Federal Judicial Center has undertaken several studies of summary-judgment practice. But its researchers have not been able to design a study that would advance understanding of what the summary-judgment standard means in actual application. The Committee removed this proposal from the agenda.

Rule 68: Invigorate Offers of Judgment. The Committee published proposals to amend Rule 68 in 1983. Active responses led to publication of a substantially revised proposal in 1984. The project was then abandoned. Rule 68 was taken up again more than 20 years ago. Successive drafts became increasingly complicated in attempting to respond to discoveries of ever-increasing complications. That effort was abandoned in 1994 without publishing any proposals. Rule 68, however, remains a popular subject as measured by the regular appearance of proposals by bar groups and others that revisions should be made. The proposals vary, but the common theme is

that Rule 68 is not much used, that its use should be encouraged, and that encouragement should come by adding "teeth" in the form of stronger sanctions for failing to win a judgment better than a rejected offer. Most of the proposals would add a provision for offers by plaintiffs, not only defendants as in present Rule 68. These proposals commonly suggest that an award of attorney fees is the appropriate sanction when a defendant rejects an offer and then loses even more by judgment — the successful plaintiff ordinarily would recover statutory costs in any event, so the costs sanctions in present Rule 68 would have no meaning.

Reliance on attorney fees as sanctions stirs deep concerns about the "American Rule." It also invites an evaluation of the Supreme Court's reading of present Rule 68. Relying on "plain meaning," the Court ruled that a plaintiff loses the right to statutory attorney fees incurred after rejecting an offer that was better than a lower judgment the plaintiff actually wins. This consequence follows, however, only if the underlying statute provides a fee award as "costs," the word in Rule 68(d). If the statute simply provides a fee award, failure to win a judgment better than the offer does not cut off the statutory right.

Nor is the statutory fee issue the only Supreme Court interpretation that must be evaluated if a Rule 68 project is launched. Rule 68(d) provides for sanctions "[i]f the judgment that the offeree finally obtains is not more favorable than the unaccepted offer." So if a defendant offers $10,000 and the judgment is for $9,000 or $1, the defendant is entitled to costs incurred after the offer was made. But if judgment is for the defendant, Rule 68 sanctions disappear because the plaintiff did not "obtain" a judgment. So long as the only consequence is an award of costs, this makes little difference since the prevailing defendant ordinarily would be entitled to costs. But if more substantial sanctions are adopted, the distinction becomes important.

The Committee recognizes that the persistence of Rule 68 proposals warrants serious consideration of possible revisions, or even potential abrogation. The vigorous responses that met the proposals published in 1983 and 1984, and the challenging complexities encountered in attempting to draft a more elaborate rule 20 years ago, will have to be faced if any new project is undertaken. One avenue that can be explored without yet facing these challenges will be to study counterpart rules in the state courts. The Committee concluded that state rules should be studied before deciding what, if anything, should be done next. A review of state rules and any available empirical studies will be completed before the Committee's April meeting.

Rule 4(c)(1): "Copy" of the Complaint. This proposal comes from a federal judge who was faced with the cost of printing more than 9,000 pages to serve 30 defendants with 300 pages of a complaint and exhibits filed by a pro se prisoner plaintiff. The suggestion is that an electronic medium, such as a CD, should be counted as a "copy" of the complaint to be served with the summons. Discussion reflected the concern that not all defendants will be able to use whatever e-medium is used, and the belief that this subject should be addressed as part of the continuing effort to bring the rules into the era of e-communication. It also was noted that informal arrangements have been made in some courts with defendants who agree to accept e-form copies.

The conclusion was to take no action on this suggestion.

Rule 30(b)(2). Rule 30(b)(2) provides that a notice of a party's deposition may be accompanied by a request under Rule 34 to produce "documents and tangible things at the deposition." The suggestion is to add ESI: "documents, electronically stored information, and tangible things." The suggestion reflects a deliberate choice made in developing the 2006 amendments that brought ESI directly into rule text. The basic choice was to treat ESI separately in Rule 34(a)(1)(A), not as a subcategory of "documents." The secondary choice was to add "ESI" to the text of some of the other rules that refer to "documents," but not to add it to other rules that also refer to "documents." The Committee concluded that this deliberate choice has not produced any problems in practice, and that there is no point now in either making ESI a category of "documents" or adding ESI to every rule that now refers to documents.

Rule 4(e)(1). Rule 4(e)(1) provides for service on an individual by following state law. State law may provide for leaving the summons and complaint unattended at the individual's dwelling or usual place of abode. The suggestion is that the server should take and file a picture of the process affixed to the dwelling. As a practical matter, a person intent on depriving the defendant of actual notice could take the picture and then remove the process. More generally, this specific proposal does not address the problem of "sewer service" — the deliberate filing of false proofs of service after discarding the summons and complaint after minimal or no efforts to accomplish actual service. The Committee recognizes that problems persist with falsified proofs of service. But it does not believe that amending the rules will provide a satisfactory answer.

Rule 15(a)(3): "Any required response". Rule 15(a)(3) sets the time for "any required response" to an amended pleading. The suggestion is that this wording, adopted in the Style Project, has introduced an ambiguity. There is no doubt about amendment of a pleading that does not require a response — an answer that does not include a counterclaim, for example. But does every amendment of a pleading that does require a response require amendment of a responsive pleading that already has been filed? The Committee concluded that it is better to leave the rule as it stands. Court files might be neater if there is always an amended responsive pleading to correspond to an amended pleading, but trivial amendments that do not affect the responsive pleading may be addressed by less formal but equally effective measures.

Rule 55(b): Partial Default Judgment. This suggestion appears to rest on a misreading of present Rule 55(b). It will be removed from the agenda.

New Rule 33(e). This proposal would adopt a new Rule 33(e) that would provide a precisely worded interrogatory that would not count against the presumptive limit of 25 interrogatories. The interrogatory would ask for specific and detailed information about the grounds for failing to respond to a Rule 36 request to admit with an "unqualified admission." The Committee decided to remove the proposal from the agenda.

Rule 8: Format for Complaint. The Committee will not take up this proposal to amend Rule 8 to provide a general format for a complaint. The proposal would, in addition to other matters, direct inclusion of "alleged acts and omissions of the parties, with times and places"; "alleged law regarding the facts"; and "the civil remedy or criminal relief requested." The time may come when pleading issues should be restored to an active place on the agenda, but this proposal does not prompt present action.

Rule 15(a)(1) cut-off of amendments as a matter of course; Rule 12(f) expanded to strike material in a motion; Discovery times Each of these proposals was removed from the docket. Elaboration seems unnecessary.

e-discovery. A number of proposals addressing e-discovery were made while the recent work went on. They were all considered — many of them provided valuable help — in framing the proposals now before the Supreme Court. They too have been removed from the docket.

III. SUBCOMMITTEE ACTIVITY

Rule 23 Subcommittee. The Rule 23 Subcommittee continues to reach out to other groups for advice that will inform the decision whether to recommend that work begin on possible class-action amendments. This decision will depend on identifying current practices that seem troubling in ways that might be improved by amending Rule 23. All Subcommittee members appeared for a panel at the ABA National Class Action Institute to seek input. The Subcommittee will appear on the program for the afternoon before the formal opening of the American Law Institute Annual Meeting next May. Other organized events may be sought out, and less formal inquiries also are being pursued. The Subcommittee also hopes to arrange a miniconference at some time during 2015. The Subcommittee plans to present conceptual drafts of possible rules amendments at the April 2015 Advisory Committee meeting, on the understanding that the drafts are not a recommendation whether to recommend rules for publication and possible adoption.

A number of issues have been identified as subjects for further development. But it remains important to solicit suggestions for other subjects, recognizing that it will be difficult to expand the range of possible revisions once any project is well under way.

A cluster of issues persist with respect to settlement, the eventual outcome of almost all class actions.

The criteria for certifying a settlement class are important. It is understood that concerns of manageability are substantially changed when a class is certified for settlement, not for trial. But it is not clear what other differences there may be. Does the prospect of settlement, for example, reduce concerns about the variability of state law that might defeat a finding that common questions predominate for a Rule 23(b)(3) certification?

Criteria for reviewing whether a settlement is "fair, reasonable, and adequate" might be added to rule text. A lengthy list of criteria was considered for rule text in developing the proposals that led to the 2003 amendments. This list was then transferred to the Committee Note, and eventually abandoned. But it may remain useful to provide some guidance, perhaps by developing a list of a few rather broad factors rather than the dozen or more factors that have been identified in the cases.

Cy pres awards have drawn particular attention in recent years. Some courts have already adopted the approach recommended in the ALI Principles of Aggregate Litigation. But fair questions remain. One approach is to reduce the amount left over for cy pres distribution to the minimum that can be achieved after all feasible distributions to class members, including a second round of distributions after the rate of initial claiming fails to deplete a settlement fund. Another is to rely on cy pres distribution of whatever remains unclaimed after a first round of claims. Still another is to recognize that there may be circumstances in which the difficulty of identifying and compensating class members who were actually injured, or the cost of distributing relatively trivial sums, justify a cy pres or "fluid" recovery that will provide some public benefit and enforce the policies reflected in outlawing the activities challenged by the class.

One of the reasons for disquiet about cy pres awards is the perception that at times they are made to recipients that will use the award for purposes that have little or no relation to the interests of the class. Awards to educational institutions favored by counsel or the court are an example. Could cy pres provisions in Rule 23 effectively direct that the award go to an entity that has interests closely aligned with class members' interests?

Whatever may be made of cy pres awards, it will be important to consider possible Enabling Act limitations on the scope of any Rule 23 provisions that might be proposed.

Objectors to settlements present another set of longstanding issues. Once the class and its adversaries have worked out a settlement, they join in lauding its virtues. The independent advice of objectors may play a vital role in aiding the court's review. A variety of proposals to enhance the effectiveness of objectors were considered in the most recent round of Rule 23 studies, but were put aside. If potential objectors are not to be included in evaluating the conduct of the litigation up to the point where serious settlement negotiations begin, and are not to be included in the negotiations, the cost of providing them with information to evaluate the proposed settlement can be high. Beyond that, parties to a settlement commonly distrust an objector's motives. Some objectors are genuinely motivated by a desire to improve the settlement, both for the benefit of class members and to enhance enforcement of the underlying law. Some may not be so motivated. It remains an open question whether it is possible to identify rules provisions that would prove helpful. If these questions are pursued, it will be important to identify and learn from lawyers who frequently appear as objectors.

A special set of issues arise when an objector appeals and then settles pending appeal. The Appellate Rules Committee is considering approaches that might constrain the temptation to appeal in order to capitalize on the nuisance value of the appeal. The two committees will work together to develop these issues.

The role of "issues" classes under Rule 23(c)(4) has long seemed uncertain to many observers, including the relation to the "predominance" requirement in Rule 23(b)(3). Some observers contend that disagreements among the circuits on the interpretation of Rule 23(c)(4) may be on the way to a resolution that will forestall any role for rule amendments. But the point deserves further investigation.

Notice issues also remain. Most of the current discussion focuses on the wish for less expensive means of effecting notice. Individual mail is expensive. Publication in traditional newspapers is expensive. In some circumstances widespread notice can be effected at lower cost, and perhaps more effectively, by various electronic means such as e-mail and social media. There are sensitive concerns about due process and protecting a meaningful right to opt out of a (b)(3) class, but these issues deserve at least an inquiry to determine whether meaningful improvements can be made in the rule. A subset of notice questions might ask whether the present optional notice provisions for (b)(1) and (b)(2) classes might be tightened.

A number of other topics have been identified. It is important to gain advice on the value of adding them to an active agenda. The Supreme Court has spoken on the award of damages incident to a Rule 23(b)(2) class certified for injunctive or declaratory relief, but there may be room to clarify or modify the rule. Consideration of the "merits" at the certification stage has continued to grow: is there room for regulation or improvement? Recent cases have sharpened the focus on the "ascertainability" of class membership — again, is there both reason and opportunity to address this concern by new rule text? Rule 68 offers of judgment seem to be coming into increasing favor as attempts to moot individual class representatives before certification, hoping to moot the entire action. There is no reason to suppose that the mooting effect of an offer of complete relief should depend on the choice whether to clothe it in Rule 68 garb, but the question might be addressed in part through Rule 68 or more generally in Rule 23. There is a sensitive tie to Article III mootness doctrine, but this concern might be readily overcome.

A new issue emerged for the first time at the Committee meeting. The Department of Justice is concerned that the 14-day period allowed to seek permission to appeal an order granting or denying class-action certification is too short for the Department of Justice. The Department would favor an amendment that, like the provisions in Rule 12, would allow more time when the United States is a party.

Other possible issues have been identified but placed on hold. What is most important now is to encourage further suggestions, beginning with this meeting of the Standing Committee.

Other Subcommittees. The Discovery Subcommittee carries forward on its agenda the question whether additional "requester pays" provisions might be included in the discovery rules.

The Appellate Rules Committee has formed a joint subcommittee with this Committee to work on issues that involve both sets of rules. The current agenda includes two sets of issues. One is a long-pending effort to decide whether rules provisions should be adopted to address efforts to manufacture a final judgment by voluntarily dismissing what remains of an action after an unfavorable ruling. The other addresses discontinuities in the Civil Rule 62 provisions for stays and bonds pending appeal.

IV(A). PILOT PROJECTS

The Committee devoted substantial time to exploring the possibilities of enhancing rules reform by means of pilot projects that put possible new rules into actual practice. Rules revisions have often relied heavily on the lessons of practical experience as reported by lawyers and judges. Information of this sort can be invaluable, and may be the best available foundation for work. In recent years the committees have turned increasingly to empirical work, frequently asking the Federal Judicial Center to frame studies of the ways in which current rules work in real cases. These studies also have proved valuable, and often are evaluated both in their own terms and by drawing from subjective reports of experience to help understand the events that are measured by the empirical inquiry.

Beyond these efforts, much may be learned by controlled experiments in forms that may be called "pilot projects." A pilot project is designed to implement new rules in real cases. It should be designed carefully, beginning with an attempt to identify the kinds of questions that may be fruitfully tested. What reasons suggest that a new procedure might prove beneficial? What fact information will help prove or disprove those reasons? How can a project be structured so as to yield the fact information in measurable form? If structured from the beginning with the help of empirical experts who can encourage a design that will yield reliable information that addresses the intended questions without introducing confounding variables, pilot projects could become a particularly valuable means of improving the rules.

One general problem that must be faced is whether to make participation in a pilot project mandatory. If parties and lawyers are allowed to opt out of the project, the results may be skewed because the cases that remain are not representative of the population that must be studied. There even may be too few cases remaining to support evaluation, no matter how well the few may resemble the entire class. Mandatory participation, however, presents serious questions if the project modifies the national rules. A local rule must be consistent with the national rules. Finding other authority, such as adoption by order on an individual case-by-case basis, may encounter resistance.

A different limit appears when searching for empirical information about standards. Framing a pilot project to measure the effect of different pleading standards, for example, would be difficult. Outcomes could be measured, but evaluating any differences would be difficult at best. Evaluating the differences may be addressed by interviewing lawyers or judges; interviews can advance understanding, but are vulnerable to challenge as subjective, as not rigorous.

Three pilot projects in the Southern District of New York were described. One is adoption of the discovery protocols for individual employment cases that have been adopted by some 50 judges around the country. The second, for some commonly encountered types of actions brought under 42 U.S.C. § 1983, adopts mandatory disclosure of core discovery and requires that plaintiffs make a settlement demand. The case goes automatically to mediators. The third, now concluded, tested a set of best practices for complex cases. Although it may be difficult to evaluate the best practices after a mere 3 years, "there is a value in generating experiences to discuss even if their actual effect cannot be measured statistically."

The Seventh Circuit e-discovery project also was discussed. The project has helped to develop "great expertise in e-discovery," and has "changed the culture in our Circuit."

The nationwide 10-year pilot project for patent cases also was discussed.

The success of the discovery protocols for individual employment cases has encouraged suggestions that similar protocols should be developed for other types of cases. Suitable candidates might be employment class actions, or actions under the Individuals with Disabilities Education Act or the Fair Credit Reporting Act. The process of generating the protocols for individual employment cases was arduous. The participants were very good lawyers from both plaintiff and defense practices. Three judges engaged in the Enabling Act process provided support and encouragement. The Institute for the Advancement of the American Legal System promoted the work. But with all of those advantages, the work resembled a labor negotiation, with much hard bargaining and several moments that prompted legitimate fears of a breakdown. Still, the result is worth it. All sides seem satisfied with the product.

Less formal projects also were noted. The Northern District of California adopted an expedited trial process that has been abandoned for lack of takers. A Committee member reported an experiment with case-specific orders that offered a trial in 4 months with minimal or no discovery and no motions for summary judgment. After 1,100 cases the order was discontinued because almost no one had seized the opportunity.

IV(B). PROMOTING NEW RULES

A number of important proposed Civil Rules amendments are now before the Supreme Court. If the Court prescribes them and Congress acquiesces, they will take effect next December 1.

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Lawyers and even judges may lag in coming to recognize and understand new rules provisions. Means to encourage understanding and thoughtful implementation are always useful. Finding effective means to bring these new rules into effective practice will be important.

The Federal Judicial Center takes the lead in creating educational programs for judges, and will be ready if the proposed changes are adopted.

There may be new ways in which the Committees can encourage the development of programs to educate the bar in the new rules. It might help to prepare descriptive materials that can be used by groups that offer continuing education, bar groups, Circuit conferences, Inns of Court, and others. The Committee is considering what it may be able to do.

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TAB 4B

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DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

OCTOBER 30, 2014

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts in Washington, D.C., on October 30, 2014. (The meeting was scheduled to carry over to October 31, but all business was concluded by the end of the day on October 30.) Participants included Judge David G. Campbell, Committee Chair, and Committee members John M. Barkett, Esq.; Hon. Joyce Branda; Elizabeth Cabraser, Esq.; Judge Paul S. Diamond; Judge Robert Michael Dow, Jr.; Parker C. Folse, Esq.; Judge Paul W. Grimm; Dean Robert H. Klonoff; Judge Scott M. Matheson, Jr.; Justice David E. Nahmias; Judge Solomon Oliver, Jr.; Judge Gene E.K. Pratter; Virginia A. Seitz, Esq.; and Judge Craig B. Shaffer. Outgoing members Peter D. Keisler, Esq. and Judge John G. Koeltl also attended. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge Arthur I. Harris participated as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., the court-clerk representative, also participated. The Department of Justice was further represented by Theodore Hirt. Jonathan C. Rose and Julie Wilson represented the Administrative Office. Emery Lee attended for the Federal Judicial Center. Observers included Donald Bivens (ABA Litigation Section); Joseph D. Garrison, Esq. (National Employment Lawyers Association); Ken Lazarus, Esq. (AMA); Jerome Scanlan (EEOC); Alex Dahl, Esq. (Lawyers for Civil Justice); John Beisner, Esq.; John Vail, Esq.; Valerie M. Nannery, Esq. (Center for Constitutional Litigation); Ariana Tadler, Esq.; Henry Kelsen, Esq.; and William Butterfield, Esq.

Judge Campbell opened the meeting by noting that Judge Sutton, Chair of the Standing Committee, was unable to maintain his usual practice of attending the meeting because he is in Australia.

Judge Campbell continued by marking the "comings and goings." Both of the outgoing members, Peter Keisler and John Koeltl, have been kind enough to attend this meeting to lend their help in committee deliberations. Both will be sorely missed.

Judge Koeltl won a rare one-year extension after the conclusion of his second three-year term to enable him to carry through to conclusion in the Standing Committee and Judicial Conference the proposed rules amendments that came to be described as the "Duke package." It would be more honest to describe them as the Koeltl Package. He single-handedly brought the Duke Conference together, and then guided the Duke Conference Subcommittee through an examination of countless possible amendments before settling on the package that is now before the Supreme Court. It is difficult to imagine anyone working harder than he has worked. Judge Koeltl responded that working with the Committee "has been a wonderful

experience." The Duke Rules package "has been a true group production, in Subcommittee and Committee." "I treasure my time on the Committee."

Peter Keisler will be equally missed. "He has a unique ability to clarify complexity, to see purpose and policy beneath the details." Most recently, he has worked hard with both the Duke Conference Subcommittee and the Discovery Subcommittee as it worked through Rule 37(e) on the failure to preserve electronically stored information. The Committee was graced by his presence not only through the six years of his two terms as a member from the bar but also during his earlier years as Assistant Attorney General for the Civil Division. Peter Keisler responded that his first contact with the Rules Committees was when Judge Scirica and Judge Levi visited him at the Department of Justice to urge that the Department actively urge Congress to defer to the Rules Committees as Rule 23 amendments were being developed. At the time, he wondered why Congress should not take up such matters when it wishes. But now the advantages of the Enabling Act process are clear. The Committees are open-minded, impartial, richly experienced in the real world of procedure. "I am glad for term limits on Committee membership. But I am also glad that there are no term limits on friendship."

Two new members were welcomed.

Judge Shaffer has been a magistrate judge in Colorado for many years. "I knew him years ago from reading his opinions." His recent opinions have helped the Committee work through the proposed revisions of Rule 37(e). His earlier career included litigation in private practice, following litigation in the Department of Justice in environmental cases and civil rights cases. He also served as a lawyer in the Navy.

Virginia Seitz is a partner of Peter Keisler. She has recently served as Assistant Attorney General for the Office of Legal Counsel. She has a long-established appellate practice.

Acting Assistant Attorney General for the Civil Division, Joyce Branda, was also welcomed.

Donald Bivens was welcomed as the new liaison from the ABA Section of Litigation.

Judge Campbell reported that the Duke Package and Rule 37(e) proposals went through the Judicial Conference on the consent calendar. The next step is review by the Supreme Court. If the proposals succeed there, they will go on to Congress.

November 20, 2014

87 *April 2014 Minutes*

88 The draft minutes of the April 2014 Committee meeting were
89 approved without dissent, subject to correction of typographical
90 and similar errors.

91 *Legislative Report*

92 Julie Wilson provided the legislative report for the
93 Administrative Office. It does not seem likely that the remainder
94 of this Congress will enact laws that bear on the rules committees'
95 work. Variations of bills made familiar from past Congresses have
96 been introduced, including a lawsuit abuse reduction act, a
97 sunshine in litigation act, and a job creations act. Patent
98 legislation passed in the House, but it was pulled from the
99 discussion calendar in the Senate. Some form of patent legislation
100 may be introduced in the new Congress. There also have been efforts
101 to federalize some parts of trade secret law through bills that
102 invoke Civil Rule 65, the injunctions rule. These matters are being
103 monitored by the Administrative Office staff.

104 The Committee was reminded that the recent patent litigation
105 bills would create a lot of work for the Committee. Virtually every
106 version directed the rules committees to write new rules; some of
107 these provisions directed that the rules be prepared within a
108 period of six months.

109 *Forms*

110 Judge Campbell reported that the Forms Working Group in the
111 Administrative Office has already begun deliberating what response
112 they might make if the proposed abrogation of Rule 84 and the Rule
113 84 Forms is approved by the Supreme Court and Congress. They have
114 begun to think about new forms that might be created. This
115 Committee will keep in touch with the Working Group, perhaps by
116 means as formal as appointing a liaison member.

117 *Rule 67*

118 Judge Diamond reported that Rule 67(b) directs that money paid
119 into court under Rule 67(a) "must be deposited in an interest-
120 bearing account or invested in a court-approved, interest-bearing
121 instrument." Most often, the money paid into court is a relatively
122 modest sum. By statute, the clerk of the district court cannot
123 administer the funds. There must be some other administrator. And
124 the IRS recently decided that quarterly tax forms are required. The
125 burdens of complying with these tax-reporting obligations led some
126 Administrative Office staff to suggest that Rule 67(b) be amended
127 to delete the requirement that money be deposited in an interest-

128 bearing account. But it seemed foolish to forgo interest, whether
129 at present low interest rates or at the rates that may prevail in
130 the future. Working with AO staff, Judge Diamond urged a different
131 approach. The IRS has at last agreed that it will be proper to
132 establish a single general interest-bearing account, administered
133 by the Administrative Office, to receive all Rule 67 deposits. All
134 can be reported in a single tax form. Any need to consider Rule 67
135 amendments seems to have passed.

136 Judge Campbell thanked Judge Diamond for his successful work
137 on this project.

138 *e-Rules*

139 Judge Campbell introduced the e-Rules topic by observing that
140 the Rules straddle the old world of paper and the new e-world. The
141 Standing Committee has established a subcommittee chaired by Judge
142 Chagares and constituted by members from each advisory committee.
143 Judge Oliver and Laura Briggs represent this Committee.

144 Judge Oliver noted that the subcommittee is looking at all of
145 the sets of rules to determine whether there are common problems
146 that may yield to common solutions. There indeed appears to be some
147 commonality, but it also has been agreed that there is no one-size-
148 fits-all resolution.

149 All committees have published for comment rules amendments
150 that would eliminate the allowance of "3 added days" to respond to
151 a paper served by electronic means.

152 Attention has turned to e-filing and e-service.

153 e-filing: e-filing now is left to local rules. 92 districts have e-
154 filing rules. 85 districts require e-filing, with various
155 exceptions. Rule 5(b)(2)(E) provides for service of papers
156 described by Rule 5(a) by electronic means, but only if the person
157 served consented in writing. Despite the requirement for consent,
158 many districts effectively force consent by requiring e-filing and
159 making consent to e-service a condition of entering the e-filing
160 system.

161 Laura Briggs noted that she, Judge Oliver, and the Reporter
162 agree that mandatory e-filing should be adopted as a general
163 national matter. Mandatory e-service also seems ripe for adoption.
164 So too, it seems time to provide that a Notice of Electronic
165 filing, automatically generated on e-filing, serves as a
166 certificate of service on anyone served through the court's system.
167 The question of what to do about e-signatures, on the other hand,
168 is a mess. A proposal addressing e-signatures was published by the

Bankruptcy Rules Committee in the summer of 2013 but has been withdrawn in the face of the comments it generated.

The e-filing draft Rule 5(d)(3) on page 82 of the agenda materials was presented for discussion, with a revision suggested by Laura Briggs and also by the Appellate Rules Committee (the revision is double-underlined):

(d) Filing. * * *

(3) *Electronic Filing, Signing, or Verification*. ~~A court may, by local rule, allow papers to be filed~~ All filings must be made, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. Paper filing must be allowed for good cause, and may be required, or may be allowed for other reasons, by local rule. ~~A local rule may require electronic filing only if reasonable exceptions are allowed.~~

Discussion began with the observation that the series "made, signed, or verified" should not be carried over in the disjunctive from the present rule. The question of e-signatures has continued to cause trouble. It may be useful to allow local rules that experiment with e-signatures, as the present rule seems to allow, but it is not yet time to require them. Verification is tightly tied to signatures. Alternative drafting should be found. The drafting will depend on choices yet to be made. If, for example, it is determined that courts should be allowed to experiment with electronic signing or verification, the rule could be recast: "All filings must be made by electronic means * * *. A court may, by local rule, allow papers to be signed or verified by such electronic means. Paper filing must be allowed * * *." This approach is subject to the perennial "cosmic issue" posed by local rules. Do we want 94 approaches to e-signing or verification? But it is hard to establish a uniform rule at this stage of practice. And it is at least possible that there may be geographic or demographic differences that make different approaches suitable in different areas.

Why, it was asked, do 9 districts not require electronic filing? If there are good local reasons, should we defer? Or if it seems likely they will gradually move to require e-filing, should we simply await the outcome? No one could recall any suggestions from the bar that the present rule is not working. But it was answered that a uniform rule will be useful. At the same time, exceptions must be allowed. "Good cause" may not be sufficient to capture the need for exceptions. Local conditions may vary in ways that support categorical exceptions suitable to one district but

not others.

e-service: The draft in the agenda book, pages 83-84, adapts present Rule 5(b)(2)(E):

(b) Service: How made. * * *

(2) *Service in General.* A paper is served under this rule by: * * *

(E) sending it by electronic means — unless ~~if~~ the person ~~consented in writing~~ shows good cause to be exempted from such service or is exempted from electronic service by local rule — in which event service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served; or * * *

The first suggestion was that the long phrase set off by em dashes is too long to support easy reading. An easy fix may work by framing this subparagraph as two sentences:

(E) sending it by electronic means, unless the person shows good cause to be exempted from such service or is exempted by local rule. Electronic service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served; or * * *

The exemption for good cause provoked a question asking who would show good cause? A pro se litigant? A prisoner? Will it be difficult to show good cause? Laura Briggs answered that in her court she had never encountered a request to be exempt. But her court automatically excludes pro se litigants. A judge observed that his court automatically exempts pro se litigants from e-service unless a judge authorizes it. Another judge observed that a "good cause" showing is something separate from a categorical exemption — it implies that a judge will be involved. His court had some requests for exemptions in the early days of e-service.

Notice of Electronic Filing: The Committee on Court Administration and Case Management has suggested that a notice of electronic filing automatically generated by the court's filing system should count as a certificate of service. The simpler of the versions in the agenda materials, set out at pages 84-85, would add this provision at the end of Rule 5(d)(1):

(d) Filing.

(1) *Required Filings; Certificate of Service.* Any paper after the complaint that is required to be served ~~— together~~

~~with a certificate of service —~~ must be filed within a reasonable time after service; a certificate of service also must be filed, but a notice of electronic filing is a certificate of service on any party served through the court's transmission facilities.

It was reported that two districts in the Seventh Circuit have local rules to this effect. The rules also provide that a certificate must be filed to show service on parties that were not served by electronic means.

The circuit clerk representative on the Appellate Rules Committee surveyed other circuit clerks. A majority of them were comfortable with allowing a notice of electronic filing to stand as a certificate of service. But a minority preferred to require a separate certificate of service because that may prompt the party making service to think about the need to make paper service on parties who are not participating in the e-filing system.

This proposal was not much discussed. The agenda materials opened a further question by asking whether there must be a certificate of service for the certificate of service; Rule 5(a)(1)(E), requiring service of "[a] written notice, appearance, demand, or offer of judgment, or any similar paper," is ambiguous. Discussion was limited to the observation that in one district lawyers include a certificate of service at the end of the document that is served, so that the certificate of service is itself served with the document. There was no interest in addressing this question by rule amendment.

Generic e=paper Rule: The Standing Committee subcommittee has prepared a template rule that in generic terms provides that electrons are equal to paper. The first part provides that a reference in a set of rules to information in written form includes electronically stored information. The second part provides that any action that can or must be completed by filing or sending paper may also be accomplished by electronic means. Each part could include an "unless otherwise provided" qualification.

The "otherwise provided" provision could be adapted to any particular set of rules by either of two approaches. One would list all of the exceptions as part of the generic rule. The other would include only the bland "otherwise provided" provision in the generic rule, but then provide exemptions — with or without a cross-reference to the generic rule — in individual rules. The subcommittee discussions have recognized that different approaches may be suitable in different sets of rules, and that any particular set of rules may raise so many questions about exceptions that it is better to avoid any generic provision.

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298 The Appellate Rules Committee is attracted to the first part,
299 providing that any reference to paper embraces electrons. It is
300 more concerned about the complications of providing that electronic
301 means can be used to effect any act that can be effected with
302 paper.

303 The questions for the Civil Rules may be distinct from the
304 questions presented by other sets of rules. It is clear that many
305 exceptions are likely to be desirable, beginning with several rules
306 that provide for initiating process — not only the familiar Rule 4
307 provisions for serving summons and complaint, but also process
308 under Rule 4.1, third-party complaints, warrants in admiralty
309 proceedings, and others. A great many different words in the rules
310 may imply paper. A simple example, complicated by evolving
311 technology and social mores, is the references to "newspaper" for
312 notice in condemnation proceedings, Rule 71.1(3)(B), and in
313 limitation-of-liability proceedings, Supplemental Rule F(4). What
314 counts as a "newspaper" today? Tomorrow? Sorting through all these
315 words, carefully, will not only be a lengthy chore. It may tax
316 understanding of present and evolving realities in an ever more
317 complex network world.

318 Discussion began with the observation that Evidence Rule
319 101(b)(6) already includes a generic provision: "a reference to any
320 kind of written material or any other medium includes
321 electronically stored information." But the Evidence Rules deal
322 with a totally different set of problems. The Civil Rules, for
323 example, embody due process notions of notice. The Civil Rules,
324 further, include a great many different words that would have to be
325 studied as possible occasions for exceptions from the equation of
326 electrons with paper.

327 The discussion turned to an open question put to the judge and
328 lawyer members: are there actual problems in practice caused by
329 uncertainties about what can be done by electronic means? No
330 committee member had encountered such problems. No one knew of any
331 local rules that address this question, apart from Local Rule 5.1
332 in the Northern, Eastern, and Western Districts of Oklahoma: "Any
333 paper filed electronically constitutes a written paper for purposes
334 of applying these rules and the Federal Rules of Civil Procedure."
335 It would be possible to ask the Federal Judicial Center to do a
336 study, but their research capacities are finite and may be better
337 devoted to more important topics. It also was observed that no
338 matter what the form of service, the common problem arises when a
339 party protests "I did not get it."

340 The Committee concluded that the very complex and time-
341 consuming task of reviewing and revising the Civil Rules to reflect
342 modern e-developments is not warranted in the absence of actual

343 problems. Because no one has encountered such problems and the
344 rules seem to be working well in the modern electronic world, the
345 Committee concluded that the time has not yet come for the Civil
346 Rules to adopt either part of the generic template.

347 Other Civil Rule e-issues: The agenda materials, pages 89-93, list
348 a number of rules that might include specific provisions equating
349 electrons with paper. Brief discussion narrowed the list to Rule
350 72(b)(1), which directs that the clerk must promptly "mail" to each
351 party a copy of a magistrate judge's recommended disposition. "No
352 one mails." Changing it to a direction that the clerk "serve" a
353 copy is an easy and quite safe change. But this may be an
354 illustration of a gradual phenomenon in which it will come to be
355 accepted that "mail" embraces both postal and electronic delivery.
356 This rule change might be included at a time when other e-rule
357 changes are proposed. But there is no urgent need to bless what
358 clerks are doing now.

359 A particular example was discussed briefly. Rule 7.1 requires
360 that 2 copies of a disclosure statement be filed. The apparent
361 purpose was to provide one copy for the court file and one copy for
362 the judge assigned to the case. In an era of electronic court
363 records, there is no apparent need for 2 copies. But the Appellate
364 Rules Committee is considering possible substantive changes in
365 their disclosure rule, Rule 26.1. Changes in one disclosure rule
366 will require reconsideration of other disclosure rules — the rules
367 were adopted in common, through joint deliberations. It is better
368 to hold off on a minor amendment today when there is a real
369 prospect of more serious amendments in the near future.

370 It was concluded that the "other civil rules" changes to
371 embrace electronic practice should be deferred.

372 **Rule 81: Signatures on Notice of Removal**

373 The general removal provision, 28 U.S.C. § 1441(a), provides
374 for removal "by the defendant or the defendants." Section
375 1446(b)(2)(A) provides that "When a civil action is removed solely
376 under section 1441(a), all defendants who have been properly joined
377 and served must join in or consent to the removal of the action."
378 Several circuits have taken different approaches to a simple
379 question: can the attorney for one party file a notice of removal
380 on behalf of all, expressly stating that all other defendants join
381 in or consent to the removal?

382 It has been suggested that it might be useful to resolve this
383 circuit split by amending Rule 81(c)(2). Either answer could be
384 given: each defendant must separately sign, or one could sign on
385 behalf of all with an express statement that all others consent or

386 join in the removal. Drafting would have to resolve a particular
387 question. Some removal statutes clearly provide that any defendant
388 can remove the entire action. Others are, by their terms,
389 ambiguous. Section 1442 provides that an action against United
390 States officers "may be removed by them." It is said that this
391 statute, and the similar provisions in §§ 1442a and 1443, allow
392 removal by any one defendant. But it is not clear that it would be
393 wise to assume this answer in drafting Rule 81. Beyond that, there
394 is a split in the circuits with respect to removal under the § 1452
395 provision for claims related to bankruptcy cases — some hold that
396 all defendants must join in removing, while others allow any one
397 defendant to remove. If a Rule 81 provision were drafted to apply
398 only to removals under § 1441(a), reflecting § 1446(b)(2)(A), it
399 would at least leave the question of § 1452 removal in limbo. But
400 it would hardly do to take sides on this question of statutory
401 interpretation. An alternative might be to draft a rule that
402 applies to any removal that requires joinder of all defendants who
403 have been properly joined and served. That approach would be
404 neutral on the questions of statutory interpretation.

405 Discussion began with an expression of hesitancy. Should the
406 Committee become involved in resolving a circuit split in
407 interpreting, not a Civil Rule, but a statute, and a statute that
408 deals with jurisdiction at that? A parallel example is provided by
409 an issue that has divided members of this judge's court — what to
410 do when a defendant who has diversity of citizenship with the
411 plaintiff removes before diversity-destroying defendants are
412 served. Should we try to address questions like that?

413 A lawyer observed that when the question of consent by all
414 arises, the practice is to make sure that everyone in fact joins in
415 the notice.

416 Another observation was framed as a question whether anyone
417 had encountered a situation in which a case was remanded because
418 one party had attempted to sign on behalf of all, with an express
419 statement that all had agreed? Removal tends to be approached with
420 care to meet all requirements. Lawyers are likely to find out how
421 the local circuit interprets the statute. This question probably
422 does not lead to "gotcha" problems.

423 A further observation was that it is wise to show caution in
424 using § 2072 to approach statutory problems. "The preemption power
425 is precious," and should be jealously protected by sparing use.

426 It was agreed that this question will be tabled.

427 **Pending Docket Matters**

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428 Judge Campbell introduced a long series of pending docket
429 matters by noting that it is important to undertake periodic
430 surveys of public proposals that have accumulated during periods of
431 intense work on other matters. It is important to provide close
432 attention to every proposal.

433 *Third-Party Litigation Financing: Dkt. 14-CV-B*

434 This proposal would add automatic initial disclosure of third-
435 party litigation financing agreements to Rule 26(a)(1)(A).

436 Third-party litigation financing is, or seems to be, a
437 relatively new phenomenon. It is not clear just what forms of
438 financial assistance to a lawyer or to a party might be included
439 under this label, nor is it clear whether the label itself should
440 be adopted. Many ads offering financial support to lawyers seem to
441 involve general loans to the firm, or to be ambiguous on the
442 relationship between possible financing terms and specific
443 individual litigation.

444 The proposal seeks to exclude contingent-fee agreements from
445 the disclosure requirement, referring to "any agreement under which
446 any person, other than an attorney permitted to charge a contingent
447 fee representing a party, has a right to receive compensation that
448 is contingent on, and sourced from any proceeds of the civil
449 action, by settlement, or otherwise." This language could include
450 assignments. If work proceeds, the rule language will require
451 careful attention to capturing the arrangements that seem fair
452 subjects for mandatory disclosure, excluding others.

453 The proposal has been supplemented in the few days before this
454 meeting by submissions from opponents and proponents of the
455 proposal addressing some issues raised in the Committee's agenda
456 memo.

457 The proponents of disclosure may be concerned more with
458 generating information to support careful examination of third-
459 party litigation financing in general than with the impact on
460 disclosure in any particular action.

461 Supporters of disclosure invoke the provision for initial
462 disclosure of liability insurance. This disclosure provision grew
463 out of 1970 amendments that resolved a disagreement among district
464 courts by allowing discovery of liability insurance. The idea was
465 that liability insurance plays an important role in the practical
466 decisions lawyers make in determining whether to settle and in
467 preparing to litigate. Permission for discovery was converted to
468 initial disclosure in 1993, making it routine. But the analogy is
469 not perfect. Long before 1970, liability insurance had come to play

470 a central role in supporting actual effectuation of general tort
471 principles. Litigation financing is too new, and experience with it
472 too limited, to come squarely within the same principle. The effect
473 on settlement negotiations, for example, may be rather different.
474 The 1970 Committee Note recognized that discovery of insurance
475 terms and limits might encourage settlement, but in other cases
476 might make settlement more difficult. The role of insurers in
477 settlement negotiations is familiar, and in many states has led to
478 rules of liability for bad-faith refusal to settle. What role
479 litigation financing firms may play in settlement decisions,
480 properly or otherwise, is a thorny question.

481 The settlement question is one example of a broader range of
482 questions. Some third-party financing arrangements may, by their
483 terms or in operation, raise questions of professional
484 responsibility. How far may the lender intrude on the client's
485 freedom to decide whether to accept a settlement — for example, an
486 offer on terms that would reward the lender but leave very little
487 for the client? How far may the lender, either in making the
488 arrangement initially or as the action progresses, ask for
489 disclosures that intrude on confidentiality — and what protections
490 may there be to ensure truly informed client consent?

491 The proponents offer several policy reasons for disclosure.

492 First, it is urged that disclosure will help ensure that
493 judges do not have conflicts of interest arising from the judge's
494 stake in an enterprise that, directly or indirectly, is providing
495 the litigation financing. Present Rule 7.1 does not seem to extend
496 this far. Third-party litigation financing, further, may be
497 provided for the first time pending appeal, when the case is no
498 longer in the district court. Should a disclosure rule attempt to
499 reach this far, or should the Appellate Rules be revised in
500 parallel?

501 Another argument is that a defendant should know who is really
502 on the other side of the action. This can affect settlement
503 decisions, for example by knowing that the plaintiff has financial
504 support to stay in the litigation for the long haul. But is it
505 desirable to facilitate settlement at lower values when the
506 defendant knows there is no outside support and that it may be
507 easier to wear out the plaintiff's reserves? Third-party financing
508 firms, moreover, assert that they are always interested in quick,
509 sure payment through settlement.

510 Disclosure also is supported by arguing that it may be
511 important in deciding motions that seek to shift the burden of
512 litigation expenses. Even before the current pending proposals, the
513 rules provide that a court determining the proportionality of

514 discovery should consider the parties' resources. The pending
515 proposals would amend Rule 26(c) to include an express reference to
516 allocating the expense of discovery as part of a protective order,
517 reflecting established practice. The argument is that it would be
518 unfair, or worse, to allow a party to pretend to have no more than
519 the party's own resources to bear the expenses of discovery. But
520 cost-shifting does not seem to happen often, and an inquiry into
521 third-party financing can always be made at the time of a cost-
522 shifting motion.

523 Finally, it is argued that information about third-party
524 financing can be useful in determining sanctions. Support is found
525 in a case from a Florida state court.

526 These questions are interesting. There is much to learn.
527 DePaul Law School held a conference on third-party financing last
528 year, generating more than 500 pages of articles. They provide a
529 fascinating introduction, but not a complete picture.

530 Discussion after this introduction began with the observation
531 that the question is not whether third-party financing agreements
532 are discoverable. They might — or might not — be discoverable as an
533 incident to settlement negotiations. The question whether to
534 provide for automatic initial disclosure may be premature. Whether
535 characterized as a range of phenomena or a broad phenomenon that
536 includes many variations, there are too many things involved to
537 justify adopting a disclosure requirement now. "This is too much
538 different from insurance." These views were echoed by others.

539 Another member offered an analogy to Supreme Court Rule 37.6,
540 which requires disclosures for briefs amicus curiae. The lawyer who
541 files the brief must reveal "whether counsel for a party authored
542 the brief in whole or in part and whether such counsel or a party
543 made a monetary contribution intended to fund the preparation or
544 submission of the brief," and identify contributors other than the
545 identified friend. The Court's interest in knowing who may be
546 masquerading as an amicus is perhaps different from third-party
547 financing of litigation as a whole, but suppose the identified
548 plaintiff has actually been paid off and is as much a shell as a
549 purported amicus?

550 A different member stated that he deals with third-party
551 financing in about half his cases, often in representing plaintiffs
552 in patent cases. The cost of litigating patent actions is ever
553 increasing. Simple out-of-pocket expenses can run into the millions
554 of dollars. Fewer lawyers are able to take these cases on
555 contingent-fee agreements alone. "Third-party litigation financing
556 makes it possible to bring cases that deserve to be brought." At
557 the same time, the ethical issues are real. Attention has been paid

558 to these issues, and more attention will be paid to them. It is not
559 clear that initial disclosure will advance consideration of these
560 questions. And, although it seems clear that knowledge of third-
561 party financing can advance decision of specific issues in an
562 individual case — cost-shifting is an example — that is better
563 dealt with in the case than by adopting initial disclosure. So too,
564 the analogy to insurance disclosure is not close. It is hard to
565 follow the argument that disclosure will remove a deterrent to
566 settlement. Knowing the specific terms of the financing agreement
567 will not contribute to that. There are, moreover, many different
568 forms of financing: it may be as simple as a loan, with contingent
569 repayment, that leaves the lender entirely out of the conduct of
570 the litigation. But some funders want to be involved in developing
571 and pursuing the case, and in settlement. These arrangements bear
572 on attorney-client privilege, and may lead to divided loyalties as
573 between lender and client. Again, those problems do not have much
574 to do with the disclosure proposal.

575 A judge expressed doubts about the need for disclosure. He
576 routinely requires the person with settlement authority to be
577 present at conferences; "I can get the information I need."
578 Similarly, the information can be got if it is relevant to cost-
579 shifting.

580 Another judge agreed that the proposal is premature. We do not
581 yet know enough about the many kinds of financing arrangements to
582 be able to make rules.

583 A member noted that the ABA 20/20 Commission on Ethics
584 produced a white paper on alternative litigation funding. The paper
585 noted that these practices are evolving. The paper expressed a hope
586 that work would continue toward studying the impact of funding on
587 counsel’s independence, candor, confidentiality, and undivided
588 loyalty.

589 A third judge thought third-party funding "is like ghost-
590 writing; I like to know who’s writing what I read." The judges on
591 her court have not yet agreed whether they can compel disclosure of
592 third-party financing. But this belongs in the array of things that
593 judges should be aware of.

594 A fourth judge agreed with a different analogy. Professional-
595 looking filings appear in pro se cases. It is useful to know
596 whether the party has had professional help in order to decide
597 whether to measure a pleading by the more forgiving standards that
598 apply to pro se parties. "I do ask questions at status hearings;
599 some of my colleagues are more aggressive." His court is
600 considering a local rule to address this question. The third judge
601 agreed — she has a standing order that requires identification of

602 the actual author.

603 A fifth judge suggested that the concern about potential
604 conflicts extends beyond judges to include opposing counsel. But
605 this is not a study for this Committee to undertake.

606 And a sixth judge agreed that courts have the tools to get the
607 information needed to rule on discovery issues, and to order
608 appearance by a person with settlement authority, and so on. The
609 task of determining the author of nominally pro se papers presents
610 a different question.

611 Discussion concluded with the observation that no one has
612 argued that these questions are unimportant. Nor has it been argued
613 that they should be ignored. But third-party financing practices
614 are in a formative stage. They are being examined by others. They
615 have ethical overtones. We should not act now.

616 Another member agreed that the question is premature. There
617 has been a flurry of articles. "The authors are all over the
618 place." Some, highly respected, have suggested that the concerns
619 reflected by this proposal are premature.

620 The Committee decided not to act on these issues now.

621 *Nonparty Rule 30(b)(6) Depositions: Dkt. 13-CV-E*

622 The Committee on Federal Courts of the New York City Bar
623 submits proposals to address problems they believe arise from
624 notices to take Rule 30(b)(6) depositions of entities that are not
625 parties to the underlying litigation. The central problem is that
626 notices set the deposition at a time too early to enable the
627 nonparty to properly educate the witnesses who will appear to
628 provide testimony for the nonparty named as the deponent. The
629 response to this problem takes two forms: Objections are advanced
630 as to the scope of the subpoena, and the witnesses are prepared
631 only on subjects within the scope accepted by the nonparty entity.
632 The nonparty also may move for a protective order, and take the
633 position that it need not appear for the deposition before the
634 court rules on the objections.

635 The proposal rejects one possible remedy, adaptation of the
636 Rule 45(d)(2)(B) procedure that allows an objection to a subpoena
637 to produce and suspends the subpoena until the court orders
638 enforcement. This approach is thought too severe for depositions,
639 because a deposition is a discrete event and does not provide the
640 opportunities for negotiation that occur in the course of a
641 "rolling" response to a subpoena to produce. Instead, it is urged
642 that the rules should require a minimum 21-day notice of the

643 deposition. In addition, the proposal would require that a subpoena
644 addressed to a nonparty entity for a Rule 30(b)(6) deposition state
645 the reasons for seeking discovery of the matters identified in the
646 notice. Finally, the suggestion would amend Rule 30, probably by
647 adding a new subdivision, to provide that a motion for a protective
648 order or to quash or modify the subpoena voids the time stated for
649 the deposition.

650 Reasons for caution were sketched. This proposal is the first
651 indication of the problem it describes. Rule 30(b)(6) was explored
652 in some depth a few years ago in response to suggestions made by a
653 committee of the New York State Bar Association; the question of
654 inadequate notice to a nonparty Rule 30(b)(6) deponent was not even
655 mentioned then. Nor have there been any other suggestions of this
656 problem.

657 Discussion began with a similar observation that the Committee
658 recently engaged in an in-depth exploration of Rule 45. The work
659 began with identification of 17 possible topics that might be
660 addressed, and narrowed the list to the changes that became
661 effective less than a year ago. This proposal comes as describing
662 a surprise set of issues.

663 Judge Koeltl said that any suspicion that the proposal may
664 reflect problems unique to practice in the Southern or Eastern
665 Districts of New York should be laid to rest. "I do not see it as
666 a problem." He expressed enormous respect for the City Bar's
667 Federal Courts Committee. It did wonderful work for the Duke
668 Conference, and again in its comments on the Duke Rules Package.
669 But this should not be a problem in the Southern District. Local
670 rules require a conference with the court before making a discovery
671 motion. "I've never seen this as a problem."

672 Another judge observed that if the nonparty deponent is in
673 another state, enforcement of the subpoena will be in the court
674 where compliance is expected. And the party serving the subpoena is
675 required to take steps to avoid imposing unreasonable burdens on
676 the deponent. Rule 45(d)(3)(A) provides further protection,
677 requiring the court to quash or modify a subpoena that fails to
678 allow a reasonable time to comply. "The rules provide pretty good
679 protection" now.

680 A third judge suggested that generally the Committee seeks to
681 frame rules of general application. "This seems a very specific
682 problem; a rule addressed to it could create collateral problems.
683 If there's a problem, it arises from judges who are not tending to
684 their cases."

685 A fourth judge thought that the problem reflects the kinds of

686 concerns that underlie the pending proposal to amend Rule 1 to
687 include the parties in the obligation to construe and administer
688 the rules to achieve the just, speedy, and inexpensive
689 determination of the action. The deponent's lawyer should describe
690 the problem to the lawyer who issued the subpoena, and they should
691 work out a suitable time for the deposition. It is in no one's
692 interest to have an ill-prepared witness.

693 Still another judge observed that in some circumstances a
694 lawyer may have strategic reasons to hope for an ill-prepared
695 witness testifying under Rule 30(b)(6) for an entity that is a
696 party — that was the subject of the earlier Rule 30(b)(6) inquiry.
697 But there is no similar potential for strategic advantage when the
698 witness testifies for a nonparty entity. "Lawyers should be able to
699 resolve this."

700 A member noted that the ABA Litigation Section Pretrial Task
701 Force has Rule 30(b)(6) on its agenda, and may eventually bring
702 forward proposals for revision. The question of setting the time
703 for a nonparty Rule 30(b)(6) deposition too soon has not been on
704 its list.

705 It was concluded that this proposal should be set aside.

706 *Attorney-Client Privilege Appeals: Dkt. 10-CV-A*

707 Professor Marcus introduced this proposal, which would amend
708 Rule 37 to authorize a court of appeals to grant a petition for
709 immediate interlocutory review of a ruling that grants or denies a
710 motion to compel discovery of information claimed to be protected
711 by attorney-client privilege. The revision would be drawn on lines
712 that parallel permissive Rule 23(f) appeals from orders granting or
713 denying class certification. A similar provision has been submitted
714 to the Appellate Rules Committee, which has decided not to pursue
715 it. Their view is that existing opportunities for review suffice,
716 although they are not often invoked. The traditional remedy is to
717 disobey the order to produce, be held in contempt, and appeal the
718 contempt order — and even that approach is limited by the rule that
719 a party can appeal only a criminal contempt order, not a civil
720 contempt order. Another remedy is by extraordinary writ; mandamus
721 may be somewhat more freely available to test questions of
722 privilege and other confidentiality concerns, but still is
723 carefully limited. Extending beyond the limits of these remedies —
724 and recognizing the possible availability of § 1292(b) appeals by
725 permission of both the district court and the court of appeals —
726 will create difficult problems of drawing lines that promote
727 desirable opportunities for appeal without stimulating many ill-
728 founded attempts.

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729 The question arises from the decision in Mohawk Industries,
730 Inc. v. Carpenter, 130 S.Ct. 599 (2009). The Court ruled that the
731 collateral-order doctrine supports "finality" only as to all cases
732 within a described "category," or as to none of them. An order
733 compelling production of materials found to have been initially
734 protected by attorney-client privilege, but to have lost the
735 protection by waiver, was in a category that did not fit the
736 criteria for collateral-order appeal in all cases. Alternative
737 means of review provide adequate protection. At the same time, the
738 Court suggested that if it is desirable to provide somewhat greater
739 opportunities for interlocutory review, it is better that they be
740 established through the Rules Enabling Act than by judicial
741 elaboration of § 1291 or other judicial doctrines.

742 Invocation of the Rule 23(f) analogy helps to frame the
743 question. Grant or denial of class certification can have an
744 enormous impact on the case — denials were once held appealable as
745 the "death knell" of actions that could not be expected to survive
746 if only individual claims remained to be litigated (another example
747 of collateral-order appeal doctrine rejected by the Supreme court),
748 while grants can exert a hydraulic pressure to settle while facing
749 the great costs of defending a class action and the risks of "bet-
750 the-company" judgments. The stakes are high. And, although there
751 are many class actions and no small number of requests for Rule
752 23(f) appeals, the occasions for potential appeals remain finite.
753 Even if the categories of appeal were limited to attorney-client
754 issues, these issues arise far more often, and are likely to be
755 much less momentous.

756 A judge observed that the opportunities for appellate review
757 that remain available after the Mohawk decision "are not much
758 help." But attorney-client privilege is invoked in an overwhelming
759 number of cases. And it often is raised without even attempting to
760 comply with the requirements of Rule 26(b)(5)(A) to describe the
761 nature of the matters objected to in a way that will enable other
762 parties to assess the claim of privilege. "The potential
763 applications are enormous."

764 A lawyer noted that if the problem involves waiver of the
765 privilege, Evidence Rule 502(d) and the proposed Civil Rules
766 amendments that provide express reminders of Rule 502(d) "reflect
767 a big effort to reduce the occasions for waiver." Judges, moreover,
768 generally do a really good job in ruling on privilege issues. These
769 issues come up far more often than reported cases might suggest.
770 The Appellate Rules Committee seems to have got it right.

771 Another judge noted that there are many privileges apart from
772 the attorney-client privilege beloved by lawyers. Why should a
773 special appeal provision be limited to just this one privilege? And

774 what of work-product protection? We should stay away from these
775 issues.

776 The Committee concluded that this subject should be removed
777 from the agenda.

778 *Rule 41: Dkt. 14-CV-D; 10-CV-C*

779 Docket item 14-CV-D was the submission of a law review article
780 by Professor Bradley Scott Shannon, "Dismissing Federal Rule of
781 Civil Procedure 41," 52 U. of Louisville L.Rev. 265 (2014).

782 The article advances two basic packages of suggestions. The
783 first identifies several well-known shortcomings in Rule 41. The
784 second bewails the reliance of Rule 41 on the often-criticized
785 terms "with prejudice," "without prejudice," and "on the merits."

786 Among the perceived shortcomings are these: (1) The unilateral
787 right to dismiss without prejudice should be terminated by a motion
788 to dismiss as well as by an answer or a motion for summary
789 judgment. There is an obvious analogy to the right to amend a
790 pleading once as a matter of course under Rule 15(a)(1)(A) — Rule
791 15 was recently amended to cut off this right 21 days after a
792 motion under Rule 12(b), (e), or (f). (2) Rule 41(a)(1)(A)
793 addresses dismissal of "an action." Provision should be made for
794 dismissing part of an action, whether it be one of several claims
795 or one of several parties. Dismissal of a claim might better be
796 accomplished by Rule 15 amendment of the pleading — Rule 15 covers
797 not only an initial period when amendment does not require court
798 permission but also later times in the action when leave is
799 required but is freely granted. Addressing dismissal of a "claim"
800 without prejudice, further, might invite confusion about the
801 various approaches that define what is a "claim" according to the
802 context of inquiry. There is a risk of confusing what is a "claim"
803 for the claim-preclusion aspect of res judicata with what might
804 suitably be treated as a "claim" for voluntary abandonment.
805 Dismissal of all claims against a party also can be accomplished
806 through Rule 15, but Rule 41 might be amended to address this. (3)
807 Rule 41(c) addresses voluntary dismissal of a counterclaim,
808 crossclaim or third-party claim; other claims are not addressed. As
809 just one example, a third-party defendant may file a claim against
810 the original plaintiff. The suggestion is that Rule 41(c) should be
811 amended to provide that it "applies similarly" to dismissal of any
812 type of claim not enumerated. (4) A related possibility would be to
813 add a motion for summary judgment (or a Rule 12 motion) to the
814 events that cut of unilateral dismissal without prejudice of a
815 counterclaim, crossclaim, or third-party claim under Rule 41(c).
816 (There is a respectable view that "summary judgment" was omitted
817 from Rule 41(c) by simple absent-mindedness.)

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818 The difficulties that inhere in the concepts of "prejudice,"
819 "on the merits," and the like also are well known. For example,
820 Rule 41(b) provides that a dismissal for lack of jurisdiction is
821 not on the merits. But the dismissal in fact establishes issue
822 preclusion on any matter necessarily decided in finding a lack of
823 jurisdiction. The claim, on the other hand, is not precluded if a
824 subsequent action is brought in a court that does have
825 jurisdiction. The proposed remedy is to amend Rule 41 to refer
826 directly to preclusion consequences — "does not preclude,"
827 "precludes," and so on. Reasons for caution on this score begin
828 with the proposition that the intricacies of applying present Rule
829 41 are well known and have been thoroughly addressed by the courts
830 and in the literature. So there is a real prospect that abandoning
831 the familiar and familiarly interpreted phrases in favor of open-
832 ended invocations of general preclusion law could invite new
833 confusions and unsettling arguments. There is little reason to
834 believe that better preclusion results would be reached.

835 Discussion began by asking the Committee whether they see
836 these problems in practice.

837 A judge said that these problems are easily worked out in
838 practice. For example, a motion may be made for default judgment
839 against one defendant when another defendant has not been properly
840 served. To get to and through a hearing on damages, the plaintiff
841 may amend the complaint to dismiss the defendant not served. Or on
842 a motion to review a proposed settlement under the Fair Labor
843 Standards Act, the parties may discover that they have unresolved
844 issues as to attorney fees and prefer to dismiss so they can work
845 out a full settlement.

846 The conclusion was that Professor Shannon has pointed to ways
847 in which Rule 41 can be improved. But the Committee operates in the
848 instinctive belief that it is better to resist the temptation to
849 make abstract improvements in the rules. The risk of unintended
850 consequences counsels caution. Amendments to address real-world
851 problems are more important. For Rule 41, that holds for these
852 proposals. They will be put aside.

853 *Rule 48: Non-Unanimous Verdicts in Diversity Cases: Dkt. 13-CV-A*

854 This proposal would amend Rule 48 to adopt state majority-
855 verdict rules for diversity cases. The suggested reason is that
856 defendants commonly view majority-verdict rules as something that
857 favors plaintiffs. When an action that could be brought in federal
858 diversity jurisdiction is brought in a state court that has a
859 majority-verdict rule, a defendant has an incentive to remove for
860 the purpose of invoking the federal unanimity requirement. Cases
861 are brought to federal courts that would not come there if the

862 federal courts adhered to the state-court majority-verdict rule.

863 The first issues raised by this proposal are whether majority-
864 verdict rules are better than a unanimity requirement, and, if so,
865 whether the Seventh Amendment permits a majority-verdict without
866 the parties' consent. If majority verdicts are better, and if the
867 Seventh Amendment permits — almost certainly a requisite even for
868 a rule limited to diversity cases — then Rule 48 should provide for
869 majority verdicts in all cases, or at least for all diversity and
870 supplemental jurisdiction cases. Otherwise, the question is whether
871 it is better to defer to state practice either from a pragmatic
872 desire to reduce removals or from an Erie-like sensitivity to the
873 prospect that majority verdicts are sufficiently "bound up" with
874 state substantive principles to deserve relief from the general
875 Rule 48 command for uniformity.

876 The majority-verdict question may intersect the question of
877 jury size. A couple of decades ago the Committee explored
878 restoration of the 12-person civil jury, expressly deferring
879 consideration of majority-verdict rules pending resolution of that
880 issue. That attempt failed. But the underlying questions remain:
881 how far do the dynamics of deliberation in a 12-person jury differ
882 from those in a 6-person jury? How far are the dynamics of
883 deliberation affected by allowing a majority verdict? How do these
884 effects interact if a verdict can be reached by a majority of a 6-
885 person jury?

886 Discussion began with the observation that many considerations
887 affect a defendant's decision whether to remove an action, whether
888 it is a diversity action or a federal-question action. "If we are
889 to start addressing the reasons defendants have for removing, it
890 will be a daunting task. The premise is troubling."

891 Agreement was expressed as to strategic concerns. A variety of
892 strategic factors may lead to removal. But "this one is
893 significant." Generally plaintiffs like majority verdicts, which
894 may facilitate horsetrading between damages and liability. There
895 are sound Erie-like reasons to honor state rules on jury size and
896 unanimity. "We should not distrust state policymaking on this."
897 There is no important federal policy to be served by deferring to
898 defendants' strategic choices. The proposal can be drafted easily.
899 But it will generate a lot of controversy. It is not clear whether
900 the value of the change will be worth enduring the controversy.

901 The problem of supplemental jurisdiction was raised. Many
902 cases present federal questions and state-law questions that
903 involve many of the same issues of fact. There may be diversity
904 jurisdiction as well as federal-question jurisdiction, or there may
905 be only supplemental jurisdiction over the state-law questions, or

906 — in a particularly convoluted area of jurisdiction — there may be
907 federal-question jurisdiction over a state-created claim that
908 centers on a federal question. Should the majority-verdict rule
909 that would apply to the state-law questions extend to the federal
910 questions as well, so as to avoid the grim spectacle of telling the
911 jury it must answer common questions unanimously as to part of the
912 case, but can answer the same questions by majority verdict as to
913 other parts?

914 Professor Coquillette recalled an article he wrote with David
915 Shapiro on the fetish of jury trials. The majority-verdict question
916 is a complicated one.

917 Another member agreed with the view that clear drafting can be
918 achieved. She also agreed with the view that it is a good thing to
919 reduce the strategic use of diversity jurisdiction. Courts and
920 others are interested anew in the importance of jury trials. Any
921 proposal will be controversial, but this is a matter of genuine
922 interest to the present and future of jury trials. We ask juries to
923 apply different standards of persuasion to different issues in a
924 single trial, and expect them to perform this feat. They could
925 likewise manage to apply majority-verdict rules to some elements,
926 and a unanimity requirement to others. Or we could draft a
927 compromise rule that gives the court discretion whether to apply a
928 majority-verdict rule.

929 Brief discussion found no confident answer to the question of
930 how many states permit majority verdicts.

931 Doubts about adopting state practice were expressed by noting
932 that "this is not like service of process," a purely technical
933 matter. There may be substantial federal interests involved in the
934 unanimity requirement.

935 The question turned to other aspects of jury practice. Some
936 states are beginning to follow Arizona, which has been a leader in
937 relaxing many traditional practices. Jurors can ask questions. They
938 can take notes. They can deliberate throughout the trial. Should a
939 federal court follow these practices in diversity cases that would
940 be tried in such a state, even if it would not do so in a federal-
941 question case? Or, to take a nonjury example, cases have been
942 removed by defendants because they like the expert-witness report
943 requirements of Rule 26(a)(2), or because they like the Daubert
944 approach to expert witnesses. Do we want to eliminate all federal
945 practices that may affect the outcome?

946 A similar question asked whether the federal court should be
947 required to draw the jury from the same area that would supply
948 jurors to the state court. An example was offered of experience in

949 criminal cases, where state authorities may cede the lead to
950 federal prosecutors in order to draw the jury from a broader area
951 than would supply the state-court jurors. There are areas where it
952 is appropriate to follow federal-court jury practices; it is
953 difficult to see why the unanimity issues should be different.

954 Turning back to reasons that may support the proposal, it was
955 noted that a defendant's hope for a unanimity requirement may be
956 different from other strategic concerns. Majority-verdict rules
957 reflect long-held state policies. The federal unanimity requirement
958 can be seen as archaic, even odd.

959 A related phenomenon was noted. A case is removed, dismissed
960 by the plaintiff, then filed again in state court with an added
961 defendant that destroys diversity. If removal is attempted again,
962 the federal court does not evaluate the plaintiff's strategic
963 choices; it asks only whether the new party is properly joined.

964 A judge observed that under Rule 81(c), federal procedures
965 apply after removal. We should adhere to that principle here.

966 Discussion turned to the policies that underlie the grant of
967 diversity jurisdiction in § 1332. It would be difficult to
968 attribute any intent to Congress with respect to jury unanimity —
969 § 1332 goes back to the First Judiciary Act, and its perpetuation
970 by successive Congresses in confronting periodic attempts to revise
971 or eliminate the jurisdiction leaves too many uncertainties to
972 support any attribution of relevant intent. Nor does it seem that
973 the question can be usefully approached as an attempt to rebalance
974 strategic motivations. The purpose of § 1332 "is to alleviate
975 perceived unfairness." The change "would be a large move."

976 A related suggestion was that diversity jurisdiction was
977 established "to avoid hometown advantage." This purpose is
978 difficult to apply across the wide range of practices that can
979 affect outcome. Maryland, for example, does not have individual
980 judge case assignments. The District of Maryland does. That can
981 have a strong influence on the cost and speed of bringing the case
982 to a conclusion. Or, for a different example, the summary-judgment
983 rules in state and federal court look the same on paper. But there
984 are significant differences in actual practice.

985 The question whether to take up this proposal was put to a
986 voice vote. A clear majority voted to remove it from the docket.

987 *Rule 56: Summary-Judgment Standards: Dkt. 14-CV-E*

988 Professor Suja A. Thomas submitted for the docket her article
989 on Rule 56, "Summary Judgment and the Reasonable Jury Standard," 97

990 Judicature 222 (2014). The article suggests that it is not really
991 possible for a single trial judge, nor even a panel of three
992 appellate judges, to know or imagine what facts a reasonable jury
993 might find with the benefit of reasoning together in the dynamic
994 process of deliberation. That part of it ties to her earlier
995 writing, which casts doubt on the constitutionality of summary
996 judgment under the Seventh Amendment. The conclusion, however, is
997 that the standard for summary judgment "is ripe for reexamination.
998 The rules committee, if so inclined, would be an appropriate body
999 to engage in this study with assistance from the Federal Judicial
1000 Center, and such study would be welcome."

1001 The suggestion for study goes beyond work of the sort the
1002 Federal Judicial Center has already done. A broad study of pretrial
1003 motions is now underway. But these studies count such things as the
1004 frequency of motions; the rate of grants, partial grants, and
1005 denials; variations along these dimensions according to categories
1006 of cases; variations among courts; and other objective matters that
1007 yield to counting. There has not been an attempt to evaluate the
1008 faithfulness of actual decisions to the announced standard.
1009 Consultation with the Federal Judicial Center staff suggests that
1010 there are good reasons for this. The only way to appraise the
1011 actual operation of the summary-judgment standard in the hands of
1012 judges would be to provide an independent redetermination of a
1013 large number of decisions. To be fully reliable, the
1014 redetermination would have to be made by judges believing they were
1015 actually resolving a real motion in a real case — a determination
1016 made without that pressure might be reached casually because it is
1017 only for research, not real life. Substituting lawyers or scholars
1018 or other researchers would lose not only the reality but also the
1019 training and experience of judges. It has not seemed possible to
1020 frame such a study.

1021 Discussion began with a statement that Professor Thomas
1022 believes that summary judgment violates the Seventh Amendment. "The
1023 idea that judges cannot determine the limits of reasonableness is
1024 wrong." Even in a criminal case, a judge may refuse to submit a
1025 proffered defense to the jury if it lacks evidentiary support.

1026 Another judge observed that experience with Professor Thomas
1027 while she was in practice showed her to be a wonderful lawyer. Rule
1028 56 is a subject that has concerned the plaintiff’s bar because of
1029 the ways in which it is administered. Professor Arthur Miller is
1030 another who thinks that summary judgment is at times granted
1031 unreasonably, leading to dismissal without trial. "There are too
1032 many Rule 56 motions that should not be made." "I try to discourage
1033 some of them in pre-motion conferences, but they get made." But it
1034 is difficult to know what could be done to improve application by
1035 changing the rule language.

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1036 Still another judge suggested that "the problem is with
1037 judges, not the rule." Motions invoking qualified immunity provide
1038 an example — we regularly entrust to judges the determination of
1039 what a reasonable officer would know. No doubt judges bring their
1040 own biases to bear. "We can educate judges about this, but we
1041 cannot dehumanize judges."

1042 Similar observations were offered by another judge. Judges
1043 make determinations of reasonableness all the time. They decide
1044 motions for judgment as a matter of law. They decide motions for
1045 acquittal in criminal cases. They make determinations under the
1046 Evidence Rules.

1047 A member said that the article was entertaining, but left an
1048 uncertain impression as to what the Committee should do, apart from
1049 undertaking a study.

1050 This discussion turned to the question whether judgment as a
1051 matter of law violates the Seventh Amendment. The summary-judgment
1052 standard is anchored in judgment as a matter of law. The 1991
1053 amendments of Rule 50, indeed, were undertaken in part to emphasize
1054 the continuity of the standard between Rules 50 and 56. But if we
1055 were to take literally the general statement that the Seventh
1056 Amendment measures the right to jury trial by practice in 1791, it
1057 would be difficult to support judgment as a matter of law. In 1794,
1058 a unanimous Supreme Court instructed a jury in an original-
1059 jurisdiction trial that although the general rule assigns
1060 responsibility for the law to the court and responsibility for the
1061 facts to the jury, still the jury has lawful authority to determine
1062 what is the law. If a jury can determine that the law is something
1063 different from what the judges think is the law, it would be nearly
1064 impossible to imagine judgment "as a matter of law." But by 1850
1065 the Supreme Court recognized the directed verdict, and the standard
1066 has evolved ever since. Professor Coquillette added that there were
1067 many differences among the colonies-states in jury-trial practices
1068 as of 1791. A member added that it is clear a court may direct
1069 acquittal in a criminal case, a power that exists for the
1070 protection of the defendant.

1071 The Committee unanimously agreed to remove this proposal from
1072 the agenda.

1073 *Rule 68: Dockets 13-CV-B, C, D. 10-CV-D, 06-CV-D, 04-CV-H, 03-CV-B,*
1074 *02-CV-D*

1075 Rule 68, dealing with offers of judgment, has a long history
1076 of Committee deliberations followed by decisions to avoid any
1077 suggested revisions. Proposed amendments were published for comment
1078 in 1983. The force of strong public comments led to publication of

1079 a substantially revised proposal in 1984. Reaction to that proposal
1080 led the Committee to withdraw all proposed revisions. Rule 68 came
1081 back for extensive work early in the 1990s, in large part in
1082 response to suggestions made by Judge William W Schwarzer while he
1083 was Director of the Federal Judicial Center. That work concluded in
1084 1994 without publishing any proposals for comment. The Minutes for
1085 the October 20-21 1994 meeting reflect the conclusion that the time
1086 had not come for final decisions on Rule 68. Public suggestions
1087 that Rule 68 be restored to the agenda have been considered
1088 periodically since then, including a suggestion in a Second Circuit
1089 opinion in 2006 that the Committee should consider the standards
1090 for comparing an offer of specific relief with the relief actually
1091 granted by the judgment.

1092 Although there are several variations, the most common feature
1093 of proposals to amend Rule 68 is that it should provide for offers
1094 by claimants. From the beginning Rule 68 has provided only for
1095 offers by parties opposing claims. Providing mutual opportunities
1096 has an obvious attraction. The snag is that the sanction for
1097 failing to better a rejected offer by judgment has been liability
1098 for statutory costs. A defendant who refuses a $80,000 offer and
1099 then suffers a $100,000 judgment would ordinarily pay statutory
1100 costs in any event. Some more forceful sanction would have to be
1101 provided to make a plaintiff's Rule 68 offer more meaningful than
1102 any other offer to settle. The most common proposal is an award of
1103 attorney fees. But that sanction would raise all of the intense
1104 sensitivities that surround the "American Rule" that each party
1105 bears its own expenses, including attorney fees, win or lose.
1106 Recognizing this problem, alternative sanctions can be imagined —
1107 double interest on the judgment, payment of the plaintiff's expert-
1108 witness fees, enhanced costs, or still other painful consequences.
1109 The weight of many of these sanctions would vary from case to case,
1110 and might be more difficult to appraise while the defendant is
1111 considering the consequences of rejecting a Rule 68 offer.

1112 Another set of concerns is that any reconsideration of Rule 68
1113 would at least have to decide whether to recommend departure from
1114 two Supreme Court interpretations of the present rule. Each rested
1115 on the "plain meaning" of the present rule text, so no disrespect
1116 would be implied by an independent examination. One case ruled that
1117 a successful plaintiff's right to statutory attorney fees is cut
1118 off for fees incurred after a rejected offer if the judgment falls
1119 below a rejected Rule 68 offer, but only if the fee statute
1120 describes the fee award as a matter of "costs." It is difficult to
1121 understand why, apart from the present rule text, a distinction
1122 should be based on the likely random choice of Congress whether to
1123 describe a right to fees as costs. More fundamentally, there is a
1124 serious question whether the strategic use of Rule 68 should be
1125 allowed to defeat the policies that protect some plaintiffs by

1126 departing from the "American Rule" to encourage enforcement of
1127 statutory rights by an award of attorney fees. The prospect that a
1128 Rule 68 offer may cut off the right to statutory fees, further, may
1129 generate pressures on plaintiff's counsel that might be seen as
1130 creating a conflict of interests with the plaintiff. The other
1131 ruling is that there is no sanction under Rule 68 if judgment is
1132 for the defendant. A defendant who offers $10,000, for example, is
1133 entitled to Rule 68 sanctions if the plaintiff wins $9,000 or $1,
1134 but not if judgment is for the defendant. Rule 68 refers to "the
1135 judgment that the offeree finally obtains," and it may be read to
1136 apply only if the plaintiff "obtains" a judgment, but the result
1137 should be carefully reexamined.

1138 The desire to put "teeth" into Rule 68, moreover, must
1139 confront concerns about the effect of Rule 68 on a plaintiff who is
1140 risk-averse, who has scant resources for pursuing the litigation,
1141 and who has a pressing need to win some relief. The Minutes for the
1142 October, 1994 meeting reflect that "[a] motion to abrogate Rule 68
1143 was made and seconded twice. Brief discussion suggested that there
1144 was support for this view * * *." Abrogation remains an option that
1145 should be part of any serious study.

1146 Finally, it may be asked whether it is better to leave Rule 68
1147 where it lies. It is uniformly agreed that it is not much used,
1148 even in cases where it might cut off a statutory right to attorney
1149 fees incurred after the offer is rejected. It has become an
1150 apparently common means of attempting to defeat certification of a
1151 class action by an offer to award complete relief to the putative
1152 class representative, but those problems should not be affected by
1153 the choice to frame the offer under Rule 68 as compared to any
1154 other offer to accord full relief. Courts can work their way
1155 through these problems absent any Rule 68 amendment; whether Rule
1156 23 might be amended to address them is a matter for another day.

1157 Discussion began with experience in Georgia. Attorney-fee
1158 shifting was adopted for offers of judgment in 2005, as part of
1159 "tort reform" measures designed to favor defendants. "It creates
1160 enormously difficult issues. Defendants take advantage." And it is
1161 almost impossible to frame a rule that accurately implements what
1162 is intended. Already some legislators are thinking about repealing
1163 the new provisions. If Rule 68 is to be taken up, the work should
1164 begin with a study of the "enormous level of activity at the state
1165 level."

1166 Any changes, moreover, will create enormous uncertainty, and
1167 perhaps unintended consequences.

1168 Another member expressed fear that the credibility of the
1169 Committee will suffer if Rule 68 proposals are advanced, no matter

1170 what the proposals might be. Debates about "loser pays" shed more
1171 heat than light.

1172 A judge expressed doubts whether anything should be done, but
1173 asked what effects would follow from a provision for plaintiff
1174 offers? One response was that the need to add "teeth" would likely
1175 lead to fee-shifting, whether for attorneys or expert witnesses.

1176 It was noted that California provides expert-witness fees as
1177 consequences. But expert fees are variable, not only from expert to
1178 expert but more broadly according to the needs for expert testimony
1179 in various kinds of cases.

1180 The value of undertaking a study of state practices was
1181 repeated. "I pause about setting it aside; this has prompted
1182 several suggestions." State models might provide useful guidance.

1183 Another member agreed — "If anything, let's look to the
1184 states." When people learn he's a Committee member, they start to
1185 offer Rule 68 suggestions. Part 36 of the English Practice Rules —
1186 set in a system that generally shifts attorney fees to the loser —
1187 deals with offers in 22 subsections; this level of complication
1188 shows the task will not be easy. There is ground to be skeptical
1189 whether we will do anything — early mediation probably is a better
1190 way to go. Still, it is worthwhile to look to state practice.

1191 A member agreed that "studies do little harm. But I suspect a
1192 review will not do much to help us." It is difficult to measure the
1193 actual gains and losses from offers of judgment.

1194 One value of studying offers of judgment was suggested:
1195 Arguments for this practice have receded from the theory that it
1196 increases the rate of settlement — so few cases survive to trial
1197 that it is difficult to imagine any serious gain in that dimension.
1198 Instead, the argument is that cases settle earlier. If study shows
1199 that cases do not settle earlier, that offers are made only for
1200 strategic purposes, that would undermine the case for Rule 68.

1201 Another member suggested that in practice the effect of Rule
1202 68 probably is to augment cost and delay. In state courts much time
1203 and energy goes into the gamesmanship of statutory offers.
1204 "Reasonable settlement discussion is unlikely. The Rule 68 timing
1205 is wrong; it's worse in state courts."

1206 It also was observed that early settlement is not necessarily
1207 a good thing if it reflects pressure to resolve a case before there
1208 has been sufficient discovery to provide a good sense of the
1209 claim's value. This was supplemented by the observation that early
1210 mediation may be equally bad.

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1211 Another member observed that a few years ago he was struck by
1212 the quagmire aspects of Rule 68, by the gamesmanship, by the fear
1213 of unintended consequences from any revision. There is an analogy
1214 to the decision of the Patent Office a century ago when it decided
1215 to refuse to consider any further applications to patent a
1216 perpetual motion machine. "The prospect of coming up with something
1217 that will be frequently utilized to good effect is dim." There is
1218 an unfavorable ratio between the probability of good results and
1219 the effort required for the study.

1220 A judge responded that the effort could be worth it if the
1221 study shows such a dim picture of Rule 68 that the Committee would
1222 recommend abrogation.

1223 The Department of Justice reported little use of Rule 68,
1224 either in making or receiving offers. When it has been used, it is
1225 at the end, when settlement negotiations fail. In two such cases,
1226 it worked in one and not the other.

1227 A member observed that if Rule 68 is little used, is
1228 essentially inconsequential, "we don't gain much by abrogating it."
1229 He has used it twice.

1230 The discussion closed by concluding that the time has not come
1231 to appoint a Subcommittee to study Rule 68, but that it will be
1232 useful to undertake a study of state practices in time for
1233 consideration at the next meeting.

1234 *Rule 4(c)(1): "Copy" of Complaint: Dkt. 14-CV-C*

1235 Rule 4(c)(1) directs that "[a] summons must be served with a
1236 copy of the complaint." Rule 10(c) provides that "a copy of a
1237 written instrument that is an exhibit to a pleading is a part of
1238 the pleading for all purposes." A federal judge has suggested that
1239 it may be useful to interpret "copy" to allow use of an electronic
1240 copy, on a CD or other computer-readable medium. The suggestion was
1241 prompted by a case brought by a pro se prisoner with a complaint
1242 and exhibits that ran 300 pages and 30 defendants. The cost of
1243 copying and service was substantial.

1244 The suggestion is obviously attractive. But there will be
1245 defendants who do not have access to the technology required to
1246 read whatever form is chosen, no matter how basic and widespread in
1247 general use. This practice might be adopted for requests to waive
1248 service, and indeed there is no apparent reason why a plaintiff
1249 could not request waiver by attaching a CD to the request. Consent
1250 to waive would obviate concerns for the defendant's ability to use
1251 the chosen form.

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1252 A more general concern is that this proposal approaches the
1253 general question of initial service by electronic means, although
1254 it seems to contemplate physical delivery of the storage medium.
1255 These issues may be better resolved as part of the overall work on
1256 adapting the Civil Rules and all other federal rules to ever-
1257 evolving technology.

1258 A practical example was offered. In the Southern District of
1259 Indiana, the court has an agreement with prison officials who agree
1260 to accept e-copies on behalf of multiple defendants. It works. But
1261 it works by agreement, a simpler matter than drafting a general
1262 rule.

1263 It was concluded that no action should be taken on this
1264 matter.

1265 *Rule 30(b)(2): Adding "ESI": 13-CV-F*

1266 Rule 30(b)(2) addresses service of a subpoena duces tecum on
1267 a deponent, and provides that the notice to a party deponent may be
1268 accompanied by a request under Rule 34 to produce "documents and
1269 tangible things at the deposition." This suggestion would add
1270 "electronically stored information" to the list of things to
1271 produce at a deposition.

1272 This suggestion revisits a question that was deliberately
1273 addressed during the course of developing the 2006 amendments that
1274 explicitly recognized discovery of electronically stored
1275 information. It was decided then that ESI should not be folded into
1276 the definition of "document," but should be recognized as a
1277 separate category in Rule 34. At the same time, it was decided that
1278 references to ESI might profitably be added at some points where
1279 other rules refer to documents, but that other rules that refer to
1280 documents need not be supplemented by adding ESI. Rule 30(b)(2) was
1281 one of those that was not revised to refer to ESI.

1282 Professor Marcus noted that there may be room to argue that it
1283 would have been better to add references to ESI everywhere in the
1284 rules that refer to documents, or at least to add more references
1285 to ESI than were added. But those choices were made, and it might
1286 be tricky to attempt to change them now. Rule 26(b)(3), protecting
1287 trial materials, is an example: on its face, it covers only
1288 documents and tangible things. Surely electronically generated and
1289 preserved work product deserves protection. But any proposal to
1290 amend Rule 26(b)(3) might stir undesirable complications. So for
1291 other rules.

1292 There is no indication that the omission of "ESI" from Rule
1293 30(b)(2) has caused any difficulties in practice.

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1294 Discussion began with the observation that the 2006 amendments
1295 have created a general recognition that "documents" includes ESI.
1296 This judge has never seen a party respond to a request to produce
1297 documents by failing to include ESI in the response. An attempt to
1298 fix Rule 30(b)(2) would start us down the path to revising all the
1299 rules that were allowed to remain on the wayside in generating the
1300 2006 amendments. This concern was echoed by another member, who
1301 asked whether undertaking to amend Rule 30(b)(2) would require an
1302 overall effort to consider every rule that now refers to documents
1303 but not to ESI.

1304 Another judge suggested that rather than refer to documents,
1305 ESI, and tangible things, Rule 30(b)(2) could be revised to refer
1306 simply and generally to "a request to produce under Rule 34."

1307 A lawyer observed that the 2006 Committee Note says that a
1308 request to produce documents should be understood to include ESI.
1309 Most state courts have followed the path of defining "documents" to
1310 include ESI.

1311 Discussion concluded with the observation that no problems
1312 have been observed. There is no need to act on this suggestion.

1313 *Rule 4(e)(1): Sewer Service: Dkt. 12-CV-A*

1314 This proposal arises from Rule 4(e)(1), which provides for
1315 service on an individual by following state law. State law may
1316 provide for leaving the summons and complaint unattended at the
1317 individual's dwelling or usual place of abode. The suggestion is
1318 that photographic evidence should be required when service is made
1319 by this means. Apparently the photograph would show the summons and
1320 complaint affixed to the place.

1321 The proposal does not address the more general problem of
1322 deliberately falsified proofs of service. Nor does it explain how
1323 a server intent on making ineffective service would be prevented
1324 from removing the summons and complaint after taking the picture.
1325 The picture requirement might serve as an inducement to actually go
1326 to the place, alleviating faked service arising from a desire to
1327 avoid that chore, but that may not be a great advantage.

1328 Discussion began with a suggestion that this proposal is
1329 unnecessary.

1330 Another member agreed that the suggestion should not be taken
1331 up. But he recounted an experience representing a pro bono client
1332 who had lost a default judgment in state court and who could not
1333 remember having been served or having learned about the lawsuit by
1334 any other means. State court records were of no avail, because the

1335 state practice is to discard all records after judgment enters. The
1336 matter was eventually resolved without needing to resolve the
1337 question whether service had actually been made, but he remains
1338 doubtful whether it was.

1339 Another member said that "the problem is very real. It bothers
1340 me a lot. Paper service can be difficult and costly. Process
1341 servers cut corners." But it is difficult to do anything by rule
1342 that will correct these practical shirkings. What we need is a
1343 technology for cost-effective service. "I don't know that this
1344 Committee is the body to fix it." Another member agreed that
1345 advancing technology may eventually provide the answer. That is
1346 better suited to the agenda of the e-rules subcommittee.

1347 This proposal was set aside.

1348 *Rule 15(a)(3): Any required response: Dkt 12-CV-B*

1349 Rule 15(a)(3) sets the time for "any required response" to an
1350 amended pleading. Before the Style Project, the rule directed that
1351 "a party shall plead in response" within the designated times. The
1352 question is whether an ambiguity has been introduced, and whether
1353 it should be fixed.

1354 The earlier direction that a party "shall plead in response"
1355 relied on the tacit understanding that there is no need to plead in
1356 response to an amended pleading when the original pleading did not
1357 require a response. A plaintiff is not required to reply to an
1358 answer absent court order, and is not required to reply to an
1359 amended answer. The same understanding should inform "any required
1360 response," but that may not end the question. What of an amendment
1361 to a pleading that does require a response? If there was a response
1362 to the original pleading — the most common illustration will be an
1363 answer to a complaint — must there always be an amended responsive
1364 pleading, no matter how small the amendments to the original
1365 pleading and no matter how clearly the original responsive pleading
1366 addresses everything that remains in the amended pleading?

1367 There is something to be said for a simple and clear rule that
1368 any amendment of a pleading that requires a responsive pleading
1369 should be followed by an amended response, even if the only effect
1370 is to maintain a tidy court file. But is this always necessary?

1371 A judge opened the discussion by stating that the need for an
1372 amended responsive pleading depends on the nature of the amendment
1373 to the original pleading. If it is something minor, it suffices to
1374 put it on the record that the answer stands. There is no need for
1375 a rule that requires that there always be an amended answer. But
1376 generally he asks for an amended answer to provide a clear record.

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1377 Another judge noted that when lawyers are involved in the
1378 litigation, they virtually always file an amended response.

1379 A lawyer recounted a current case with a 400-page complaint
1380 and, initially, 27 defendants. "One defendant has been let out. We
1381 reached a deal that our 45-page answer would stand for the
1382 remaining 26 defendants. Everyone was happy."

1383 It was agreed that no further action should be taken on this
1384 suggestion.

1385 *Rule 55(b): Partial Default Judgment: Dkt. 11-CV-A*

1386 This proposal arises from a case that included requests for
1387 declaratory, injunctive, and damages relief on a trademark. The
1388 defendant defaulted. The apparent premise is that the clerk is
1389 authorized to enter a default judgment granting injunctive and
1390 declaratory relief, while the amount of damages must be determined
1391 by the court. And the wish is for a way to make final the judgment
1392 for declaratory and injunctive relief, in the expectation that if
1393 the defendant does not take a timely appeal the plaintiff may
1394 decide to abandon the request for damages rather than attempt to
1395 prove them. The problem is that Rule 55(b)(1) allows the clerk to
1396 enter judgment only if the claim is for a sum certain or a sum that
1397 can be made certain by computation. The court must act on a request
1398 for declaratory or injunctive relief. Since it is the court that
1399 must act, the court has whatever authority is conferred by Rule
1400 54(b) to enter a partial final judgment. Since Rule 54(b) requires
1401 finality as to at least a "claim," there may be real difficulty in
1402 arguing that the request for damages is a claim separate from the
1403 claim for specific relief. But that question is addressed by the
1404 present rule and an ample body of precedent.

1405 It was concluded without further discussion that this
1406 suggestion should not be considered further.

1407 *New Rule 33(e): 11-CV-B*

1408 This suggestion would add a new Rule 33(e) that would embody
1409 specific language for an interrogatory that would not count against
1410 the presumptive limit of 25 interrogatories and that would ask for
1411 detailed specific information about the grounds for failing to
1412 respond to any request for admission with an "unqualified
1413 admission." The suggestion is drawn from California practice.

1414 Brief discussion suggested that adopting specific
1415 interrogatory language in Rule 33 seems to fit poorly with the
1416 current proposal to abrogate Rule 84 and all of the official forms
1417 that depend on Rule 84. Apart from that, there are always risks in

1418 choosing any specific language.

1419 The Committee decided to remove this proposal from the docket.

1420 *Rule 8: Pleading: Dkt. 11-CV-H*

1421 This proposal would amend Rule 8 to establish a general format
1422 for a complaint. There should be a brief summary of the case, not
1423 to exceed 200 words; allegations of jurisdiction; the names of
1424 plaintiffs and defendants; "alleged acts and omissions of the
1425 parties, with times and places"; "alleged law regarding the facts";
1426 and "the civil remedy or criminal relief requested."

1427 Pleading has been on the Committee agenda since 1993. The
1428 Twombly and Iqbal cases, and reactions to them, brought it to the
1429 forefront. Active consideration has yielded to review of empirical
1430 studies, particularly those done by the Federal Judicial Center,
1431 and to anticipation of another Federal Judicial Center study that
1432 remains ongoing. There has been a growing general sense that
1433 pleading practice has evolved to a nearly mature state under the
1434 Twombly and Iqbal decisions. The time may come relatively soon to
1435 decide whether there is any role that might profitably be played by
1436 attempting to formulate rules amendments that might either embrace
1437 current practice or attempt to revise it.

1438 The Committee concluded that the time to take up pleading
1439 standards has not yet come, and that this specific proposal does
1440 not deserve further consideration.

1441 *Rule 15(a)(1): Dkt. 10-CV-E, F*

1442 These proposals, submitted by the same person, address the
1443 time set by Rule 15(a)(1) for amending once as a matter of course
1444 a pleading to which a responsive pleading is required. The present
1445 rule allows 21 days after service of a responsive pleading or 21
1446 days after service of a motion under Rule 12(b), (e), or (f),
1447 whichever is earlier. The concern is that the time to file a motion
1448 may be extended. The nature of the concern is not entirely clear,
1449 since the time to amend runs from actual service. The initial
1450 proposal sets the cutoff at 21 days before the time to respond to
1451 any of the listed Rule 12 motions. The revised proposal sets the
1452 cutoff at 21 days after the time to respond after service of one of
1453 the Rule 12 motions.

1454 It was agreed that no action need be taken on this proposal

1455 *Rule 12(f): Motion to strike from motion: Dkt 10-CV-F*

1456 This proposal would expand the Rule 12(f) motion to strike to

1457 reach beyond striking matters from a pleading to include striking
1458 matters from a motion.

1459 The Committee agreed that there is no apparent need to act on
1460 this proposal. It will be removed from the docket.

1461 *Discovery Times: Dkt. 11-CV-C*

1462 This proposal, submitted by a pro se litigant, suggests
1463 extension of a vaguely described 28-day time limit to 35 days. It
1464 touches on the continuing concerns whether the rules should be
1465 adapted to make them more accessible to pro se litigants. Those
1466 concerns are familiar, and until now have been resolved by
1467 attempting to frame rules as good as can be drawn for
1468 implementation by professional lawyers. This proposal does not seem
1469 to provide any specific occasion to rethink that general position.

1470 The Committee agreed that there is no need to act on this
1471 proposal. It will be removed from the docket.

1472 *e-Discovery: Dkts. 11-CV D, E, G, I*

1473 All of these docket items address questions that were
1474 thoroughly examined in preparing the discovery rules amendments
1475 that are now pending in the Supreme Court. They were carefully
1476 evaluated, and were often helpful, in that process. Only one issue
1477 was raised that was put aside in that work. That issue goes to "the
1478 current lack of guidance as to reasonable preservation conduct (and
1479 standards for sanctions) in the context of cross-border discovery
1480 for U.S. based litigation." That issue was found complex,
1481 difficult, and subject to evolving standards of privacy in other
1482 countries, particularly within the European Union. The time does
1483 not seem to have come to take it up.

1484 The Committee agreed that there is no need to act further on
1485 these proposals. They will be removed from the docket.

1486 **Rule 23 Subcommittee**

1487 Judge Dow presented the report of the Rule 23 Subcommittee.
1488 The Subcommittee is in the stage of refining the agenda for deeper
1489 study of specific issues. All Subcommittee members appeared for a
1490 panel at the ABA National Class Action Institute in Chicago on
1491 October 23 to seek input on the subjects that might be usefully
1492 concluded in ongoing work. It was emphasized at the outset that the
1493 first question is whether it is now possible to undertake changes
1494 that promise more good than harm. Many interesting suggestions were
1495 advanced and will be considered.

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1496 The Appellate Rules Committee is considering proposals to
1497 address the problems of settlement pending appeal by class-action
1498 objectors. The Subcommittee will continue working with the
1499 Appellate Rules Committee in refining those efforts.

1500 A miniconference will be planned for some time in 2015.

1501 It may prove too ambitious to attempt to present draft
1502 proposals for discussion in 2015. The target is to present polished
1503 proposals for discussion in the spring meeting in 2016.

1504 The Chicago discussions helped to give a better sense that
1505 some potential problems "are not real, or are evolving in ways that
1506 may thwart any opportunity for present improvement."

1507 One broad category of issues surround settlement classes. Not
1508 even Arthur Miller could have predicted in 1966 what could emerge
1509 as settlement-class practices. The questions include the criteria
1510 for certifying a settlement class as compared to certification of
1511 a trial class, and whether the rule text should include specific
1512 criteria for evaluating a settlement.

1513 Cy pres recoveries have generated a lot of interest. A
1514 conference of MDL judges this week prompted many questions on this
1515 topic.

1516 The Chicago discussion also reflected widespread objections to
1517 objectors among lawyers who represent plaintiffs, lawyers who
1518 represent defendants, and academics.

1519 Discussions of notice requirements regularly raise questions
1520 whether more efficient and effective notice can be accomplished by
1521 electronic means.

1522 And there has been a lot of attention to issues classes, and
1523 the relationship between Rule 23(c)(4) and Rule 23(b)(3).

1524 Beyond these front-burner issues, a few side-burner issues
1525 remain open. Can anything be done to address consideration of the
1526 merits at the certification stage? There has been a lot of concern
1527 about the newly emerging criterion of the "ascertainability" of
1528 class membership, focused by recent Third Circuit decisions. The
1529 use of Rule 68 offers of judgment to moot individual
1530 representatives has prompted a practice that may be specific to the
1531 Seventh Circuit's views — plaintiffs file a motion for
1532 certification with the complaint to forestall a Rule 68 offer
1533 designed to moot the representatives, and then ask that
1534 consideration of the motion be deferred. Courts in the Seventh
1535 Circuit work around the problem; perhaps it need not be addressed

1536 in the rules.

1537 What other questions might offer promising opportunities for
1538 consideration? What is missing from this tentative set of issues?

1539 Professor Marcus noted that the work will either desist, or
1540 will proceed down the paths that seem promising. It is important to
1541 identify those paths now, because it becomes increasingly difficult
1542 to forge off in new directions after traveling a good way along the
1543 paths initially chosen.

1544 The Administrative Office will establish some form of
1545 repository to gather and retain suggestions from all sources.

1546 A Subcommittee member suggested that the ABA group showed a
1547 good bit of agreement that it will be useful to consider objectors,
1548 notice, and settlements. There is a lot of disagreement on other
1549 issues.

1550 A Committee member suggested that settlement-class issues are
1551 difficult. We know that the standard for certification is
1552 different, but we do not know how or why.

1553 This suggestion was followed by the observation that one set
1554 of settlement issues goes to how many criteria for reviewing a
1555 proposed settlement might be written into the rule. Another goes to
1556 certification criteria, a question addressed by advancing and then
1557 withdrawing a "Rule 26(b)(4)" settlement-class provision in 1996.
1558 A Federal Judicial Center study undertaken after the Amchem
1559 decision asked whether settlement classes had been impeded.
1560 Settlement classes seem to continue, but there may be complicated
1561 relationships to the continually growing number of MDL
1562 consolidations.

1563 Another Subcommittee member noted that settlement-class issues
1564 had presented real challenges to the ALI Principles of Aggregate
1565 Litigation work, but that they managed to work through to unanimous
1566 agreement.

1567 Another suggestion was that partial settlements should be part
1568 of the process. In MDL consolidations, some defendants settle on a
1569 class basis. Does that pre-decide class certification as to other
1570 defendants? Some settlements include a most-favored-nations clause
1571 that expands the definition of the class with respect to the
1572 settling defendant upon each successive settlement with another
1573 defendant.

1574 A new issue was suggested by the observation that the 14-day
1575 time limit to seek permission for an interlocutory appeal under

1576 Rule 23(f) is not long enough for the Department of Justice. The
1577 rule should be amended to provide a longer period in cases that
1578 include the United States (etc.) as a party.

1579 The question of cy pres settlements came on for discussion.
1580 The issues include the perception that an increasing number of
1581 cases settle on terms that provide only cy pres recovery; other
1582 cases where cy pres recovery is a significant part of the original
1583 settlement terms; and still others where cy pres recovery is
1584 provided only for a residuum of funds that cannot be effectively
1585 distributed to class members. Another issue asks whether the
1586 recipient of a cy pres award should be closely aligned in interest
1587 with the class members. Cy pres seems a useful option. Some
1588 defendants like it because it supports a fixed dollar limit on
1589 liability, and a way to distribute the dollars.

1590 The ALI proposal on cy pres recovery is linked to the proposal
1591 on settlement classes. The Principles collapse the criteria for
1592 reviewing a proposed settlement from the 14 or 16 factors that can
1593 be identified in the cases to a shorter, more manageable number.
1594 For certification, they establish that there is no need to consider
1595 either manageability (as recognized in the Amchem decision) or
1596 predominance. The Principles that address cy pres recovery have
1597 been more often cited and relied on by courts than any other of the
1598 Principles. They establish an order of preference: first,
1599 distribute to as many class members as possible; second, if funds
1600 remain, make a second distribution to class members who have
1601 already participated in the first distribution; and finally, when
1602 that is exhausted, try to distribute to a recipient that is closely
1603 aligned with class interests.

1604 The ALI cy pres provisions were said to have gained traction
1605 in the early going. "But there are problems with views of what
1606 class actions are designed to do." Different states have different
1607 policies. California, with its civil-law heritage, is predisposed
1608 to embrace cy pres awards more eagerly than most states.

1609 A related suggestion was made: it is important to seek real
1610 value through the claims process. The defendant may have an
1611 incentive to have undistributed settlement funds revert to the
1612 defendant. Cy pres recovery can address that.

1613 California practice provides a means of avoiding review of cy
1614 pres recipients by approving distribution of unclaimed settlement
1615 funds to Legal Aid. "There is a cycle that relates cy pres to the
1616 question of undistributed funds." And this ties to settlement
1617 review: will the defendant actually wind up paying what seems to be
1618 a fair amount, or will the fair amount provided by the overall
1619 figure be diminished by reversion to the defendant. There can be a

1620 surprise surplus. But usually that is dealt with in the settlement
1621 agreement. And it can be resolved in proceedings to approve the
1622 settlement. But there may be a growing problem when, in response to
1623 increasing uneasiness about cy pres recoveries, the parties seek to
1624 avoid the issue by not addressing cy pres in the settlement terms.
1625 There may, moreover, be suits in which only a group remedy is
1626 appropriate — it may be enough that the amount is fair, reasonable,
1627 and adequate even though none of it goes to individual class
1628 members.

1629 Cy pres recoveries also figure in determining attorney fees.
1630 The question is whether cy pres distributions should be counted in
1631 the same way as actual distributions to class members.

1632 It was urged that cy pres issues can be profitably addressed
1633 through rules amendments.

1634 An observer suggested that cy pres practices depend on the
1635 jurisdiction. It is common to address it in general terms in the
1636 settlement, but delaying identification of the recipient until
1637 distribution to class members has been accomplished. This is
1638 appropriate because the choice of recipient may depend on how much
1639 money is left for cy pres distribution.

1640 Turning to objectors, it was asked whether there is "a bar of
1641 objectors." If there is, the Committee should learn their views
1642 before framing rules for objections. A response was that there are
1643 objectors who seek to improve the settlement, and to gain a share
1644 of the fee in return, while other objectors act for principle —
1645 Public Citizen is an example. We do not want to discourage useful
1646 objections. It was noted again that the Appellate Rules Committee
1647 has been considering the subset of issues that arise from
1648 settlement with an objector pending appeal. That work included
1649 hearing from two professors "who had different views." No objectors
1650 appeared at that meeting. It also was noted that the 2013 ABA
1651 National Institute had a panel that featured a "repeat objector."

1652 An observer suggested that the question of awarding damages
1653 incident to a (b)(2) class deserves consideration. Rule 23(b)(2) is
1654 a perfect vehicle for certifying low-dollar consumer claims, but it
1655 is tied to "equitable relief. There is no real reason to maintain
1656 this tie to equity. Due process is satisfied by adequate
1657 representation. We could establish a mandatory class without the
1658 cost of notice. The origins of class actions are very practically
1659 oriented."

1660 A response noted that a professor at the recent ABA National
1661 Institute said that she would be making suggestions on other (b)(2)
1662 issues. The question of the "ascertainability" of class membership

1663 ties to this. The Carrera case in the Third Circuit is an
1664 illustration of small-stakes consumer classes. But it should be
1665 remembered that (b)(2) speaks of injunctive relief or corresponding
1666 declaratory relief, not equity. It can be invoked for traditional
1667 legal claims. A further response suggested that due process may
1668 require notice and an opportunity to opt out when money damages are
1669 at issue. But the observer rejoined that the Committee should study
1670 this question — he believes that due process allows a no opt-out
1671 class, and that individual notice can be discarded when there is no
1672 opportunity to act on it by opting out.

1673 A look to the past recalled that in 2001 the Committee
1674 proposed mandatory notice for (b)(1) and (b)(2) classes, but
1675 retreated in face of protests that the cost would defeat some
1676 potential civil-rights actions before they are even brought. But
1677 the ABA National Institute reflected the growing sense that due
1678 process may allow notice by social media and other internet means
1679 that work better, at lower cost, than mail or newspaper
1680 publication. "Perhaps we should remember there are a lot of balls
1681 in the air."

1682 Judge Campbell expressed thanks to the Subcommittee for its
1683 ongoing work.

1684 **Pilot Projects**

1685 Judge Campbell opened the discussion of pilot projects by
1686 praising the panelists and papers at the Duke Conference for
1687 teaching many good lessons about current successes and failures of
1688 the Civil Rules. But these lessons were based on the experience of
1689 the participants more often than solid empirical measurement. And
1690 some empirical work that looks good still may not be complete
1691 enough to support heavy reliance. Carefully structured pilot
1692 projects may be a better means of providing information. The
1693 employment protocols are a good example. So what would a pilot
1694 project look like if it is to provide reliable information?

1695 Emery Lee began by observing that "‘Data’ is a plural that we
1696 use a lot. No one uses ‘datum.’ A datum is a piece of information.
1697 Data are plural pieces of information." What we need to do is to
1698 organize pieces of information into useful information. That task
1699 has to be addressed during the design phase of a project. The first
1700 question is what information can be collected that will be helpful
1701 in considering reforms? What will the end product look like? What
1702 are the questions to be answered? It can be important to enlist the
1703 help of the Federal Judicial Center at this initial point. "Call
1704 me. I can get the ball rolling."

1705 Lee further observed that he met with some of the architects

1706 of the SDNY Complex Case pilot project at its inception. That is
1707 helpful. For the Seventh Circuit e-discovery project, the FJC did
1708 two surveys. "Judges always evaluate a program higher than the
1709 attorneys do." The world is complicated. Attorneys see a lot more
1710 of the case than the judges see. And "parties have interests. Cases
1711 that go to trial are weird cases — someone does not want to
1712 settle." And a pilot project cannot address differences that arise
1713 from the level of litigation resources available to the parties.
1714 Nor can a pilot project tamper with the law.

1715 Surveys can be a really useful way of gathering information.
1716 But the FJC has become concerned that too many surveys from too
1717 many sources may have worn out the collective welcome, partciularly
1718 from judges. "Surveys will be dead in 10 years. No one wants to
1719 respond."

1720 Docket-level data are available in employment cases. That may
1721 provide a secure foundation for evaluating the employment
1722 protocols.

1723 Turning to pilot projects, the first question was whether they
1724 should be voluntary. If parties have a choice whether to
1725 participate on the experimental side of the project, is there a
1726 risk that self-selection will skew the results? But if cases are
1727 assigned on a random but mandatory basis, is the implementation
1728 invalid whenever the terms of the pilot are inconsistent with the
1729 national rules?

1730 Emery Lee replied that opt-out programs are a problem. IAALS
1731 did a survey of a Colorado program for managed litigation and found
1732 that parties represented by attorneys tended to opt out. So a large
1733 percentage of the cases involved in the first round wound up as
1734 defaults. And the lawyers opted out because they thought the
1735 program unattractive.

1736 Judge Dow noted that there are 35 judges in the Northern
1737 District of Illinois. Many are dead set against cameras in the
1738 court room. But they agreed to participate in a pilot program "so
1739 we could be heard, not because we like it."

1740 Another suggestion was that it is possible to imagine pilot
1741 programs on such things as cameras in the courtroom or initial
1742 disclosure. But is it possible to have a pilot that addresses
1743 "standards"? Emery Lee replied that it is possible to do empirical
1744 work on standards, but not in the form of a pilot project. It would
1745 take the form of comparing different regimes. And there are
1746 different problems. With the survey of final pretrial conferences,
1747 for example, the FJC found only a small number of cases that
1748 actually had final pretrial conferences. That makes it difficult to

1749 draw any sustainable conclusions.

1750 A different form of research was brought into the discussion
1751 by asking whether interviews establish data? The FJC closed-case
1752 survey of discovery relied on interviews. Is it possible to get
1753 hard data? Emery Lee replied that the question can be viewed
1754 through the prism of Rule 1. It is easy to measure speed. So for
1755 cost, it is easy enough to measure cost, and to measure costs
1756 incurred by different parties and in different types of cases. But
1757 how do you count "just"? "We can count motions filed. We can look
1758 at discovery disputes in a broad swath of discovery cases. We can
1759 compare protocol data with cases that do not use the protocol." But
1760 for other things, we need interviews. The greater the number of
1761 sources, the better. "Interviews can shed light on the numbers." In
1762 like fashion the Committee looks at the numbers and helps the
1763 researchers understand what the numbers mean, or may mean.

1764 Judge Koeltl described three projects.

1765 The employment discovery protocols developed out of the Duke
1766 Conference. A group of lawyers engaged for plaintiffs or for
1767 defendants in individual employment cases worked to define core
1768 discovery that should be provided automatically in every case. The
1769 protocol directs what information plaintiffs should provide to
1770 defendants, and what defendants should provide to plaintiffs, 30
1771 days after the defendant files a response. For this initial stage
1772 there is no need for Rule 34 requests, or initial disclosures under
1773 Rule 26(a)(1). The Southern District of New York has mandatory
1774 mediation in employment cases; lawyers say the protocols are
1775 helpful for that. Some 14 judges in the District have adopted the
1776 protocol; nationwide, some 50 judges use it. It is hard to imagine
1777 a more attractive way of beginning an employment case than by
1778 providing automatic disclosure of information that otherwise will
1779 be dragged out through costly and time-consuming discovery. Judge
1780 Koeltl implements it by a uniform order entered in each case to
1781 which the protocols apply; that seems suitable. He has never had an
1782 objection. Some judges incorporate the protocols as part of their
1783 individual rules so that parties are aware of them and use the
1784 protocols in applicable cases.

1785 SDNY also has a pilot project for § 1983 cases that involve
1786 false arrest, unreasonable use of force, unlawful searches, and the
1787 like. Mandatory disclosure of core discovery is required. The
1788 plaintiff is required to make a settlement demand and the defendant
1789 is required to respond. The case goes automatically to mediators;
1790 this ties to settlement. Either plaintiff or defendant can opt out
1791 of the program; parties often opt out in cases that are unlikely to
1792 settle. And judges can remove a case from the program, as may be
1793 done when they think a case will settle early. This program is

1794 established by local rule. 70% of the cases in the program have
1795 settled without any intervention by the assigned judge. It is not
1796 clear whether a judge can override a party's choice to opt out of
1797 the program. Plaintiffs may opt out if they think the process takes
1798 too long. The City opts out when it takes the position that it will
1799 not settle a particular case.

1800 Finally, SDNY has a complex case pilot project. After the Duke
1801 Conference the Judicial Improvements Committee put together a set
1802 of best practices for complex cases. It was adopted by the court as
1803 a whole. It was designed to last for 18 months. It was renewed for
1804 an additional 18 months. Now it has met its sunset limit. But it is
1805 on the SDNY website, and the court has a resolution encouraging
1806 attorneys and judges to consider the best practices. "It covers all
1807 steps." There is a detailed checklist for what should be discussed
1808 at the parties' conferences. There is an e-discovery checklist. And
1809 a checklist for the pretrial conference itself. It includes a limit
1810 of 25 requests to admit, not counting requests to admit the
1811 genuineness of documents. Furthermore, a request to admit can be no
1812 longer than 20 words. There are procedures for motion conferences,
1813 and encouragement for oral argument on motions. The local rules
1814 call for a "Rule 56.1 statement" and a response in similar form,
1815 like the published but then withdrawn proposal to add a "point-
1816 counterpoint" procedure to Rule 56 itself. Some SDNY lawyers think
1817 the Rule 56.1 statement is more trouble than it is worth; so the
1818 best practices provide that the parties can ask the judge to let
1819 them dispense with this procedure. It has proved hard to define
1820 what is a complex action. Class actions are included, for example,
1821 in terms that reach collective actions under the Fair Labor
1822 Standards Act, but those cases are less complex than most class
1823 actions; some judges take FLSA cases out of the project

1824 Thirty-six months is not a long time to study complex cases.
1825 It is hard to say that there has been enough experience to evaluate
1826 the best practices. "But there is a value in generating experiences
1827 to discuss even if their actual effect cannot be measured
1828 statistically." As a small and unrelated illustration, one judge of
1829 the court came back from a conference enthusiastic about what he
1830 had heard about the "struck juror" procedure for selecting a jury.
1831 "We tried it, and most of us came to prefer it even without any
1832 empirical data."

1833 Judge Dow reported on the Seventh Circuit e-discovery project.
1834 All districts in the Circuit are covered. It is "an enormous,
1835 ongoing project." The first year recruited a few judges and
1836 magistrate judges to attempt to identify cases that would involve
1837 extensive e-discovery. The second phase drew in many more judges.
1838 The third phase is ongoing. The web site includes a lot of reports,
1839 and orders, and protocols. "This changed the culture in our

1840 Circuit." Great expertise in e-discovery has developed, especially
1841 among the magistrate judges. The early focus on complex cases
1842 helped. Judge Dow was led to introduce proportionality, aiming to
1843 first discover the important 20% of information as a basis for
1844 planning further discovery. One particularly successful idea is to
1845 require each side to appoint a "technology liaison." These
1846 technologists work together to solve problems, not to try to spin
1847 problems to partisan advantage as lawyers do. Getting them in to
1848 deal with the judge as problem solvers has been a great change in
1849 culture. The program has anticipated many of the provisions in the
1850 discovery rules amendments that are now pending in the Supreme
1851 Court. "Judges love it. The lawyers do the work and may not love it
1852 as much. The culture change is very valuable." The work has been
1853 sustained by volunteers: all sorts of people "wanted in." A
1854 Committee member who has participated in some parts of developing
1855 the Seventh Circuit program, although he does not practice there,
1856 agreed. The initial work of drafting principles was done by
1857 volunteer lawyers — he was one of them. No cost was involved.

1858 Discussion turned to more general approaches that might
1859 advance the cause of more effective procedure.

1860 A historic note was sounded by quoting from an article by
1861 Charles Clark written in 1950, appearing a 12 F.R.D. 131. He noted
1862 that the 1938 Federal Rules, drawing from many sources, established
1863 a discovery regime more detailed and sweeping than anything that
1864 had been before. But he also noted that as of 1950, there was not
1865 yet any clear picture of its actual operation, not even in all
1866 experience and with 1948 surveys and interviews in five circuits.
1867 Nothing has really changed.

1868 The Seventh Circuit pilot project was noted as something
1869 designed to enforce cooperation, to urge lawyers to work together
1870 and to authorize sanctions when they agree to the principles. This
1871 is of a piece with the current proposals to emphasize in Rule 1
1872 that the parties are charged with construing and administering the
1873 rules to achieve the goals of Rule 1.

1874 It also may be useful to expand the Seventh Circuit approach
1875 to technology liaisons by establishing a position for technology
1876 experts on court staffs. These experts could come to the help of
1877 parties who need it.

1878 Other suggestions will be submitted for Committee
1879 consideration.

1880 It was observed that there are categories of cases that may
1881 have discrete characteristics that yield to routinized discovery.
1882 Individual employment cases seem to have these characteristics. The

1883 same may be true of police-conduct cases under § 1983. But it
1884 should be asked how many more such categories of cases can be
1885 identified. It is not clear how many will fit this paradigm. It was
1886 agreed that the issue is to get plaintiffs and defendants to work
1887 together to establish a protocol acceptable on all sides. It has
1888 been suggested that employment class actions may be suitable, but
1889 work has not started. "It takes enthusiasm and impetus to bring
1890 them together." It was suggested that other categories of cases
1891 that would be ideal candidates include actions under the
1892 Individuals with Disabilities Education Act and actions under the
1893 Fair Credit Reporting Act.

1894 The nationwide pilot project for patent cases was noted. It
1895 was established by Congress, and is designed to last for 10 years.
1896 Without knowing a lot about it, it can be described as relying on
1897 designating judges who are willing to do patent cases, and
1898 providing them with training packages and model local rules that
1899 can be used as orders. But patent cases are still assigned at
1900 random; the assigned judge can transfer the case to a designated
1901 patent judge, but some assigned judges do not give up their cases.
1902 The idea of identifying judges who volunteer to learn and develop
1903 best practices is intriguing.

1904 A judge asked how do you get buy-in from lawyers for
1905 experimental programs? The employment protocol experience was
1906 described as an example. The plaintiff side was led by Joseph
1907 Garrison, a past president of the National Employment Lawyers
1908 Association. The defense side was led by Chris Kitchel, the liaison
1909 from the American College of Trial Lawyers to the Civil Rules
1910 Committee. Encouragement was provided by Judges Kravitz, Rosenthal,
1911 and Koeltl. The IAALS promoted it. "It almost fell apart." It was
1912 like a labor negotiation, in which the sides took turns at walking
1913 out of the negotiations and then returning to the table. The judges
1914 who were involved then actively promoted the protocols in their own
1915 courts.

1916 A judge suggested that many judges revel in being generalists,
1917 and believe that they can do anything. Programs to provide special
1918 training to some judges may not work if they depend on voluntary
1919 transfer by judges who draw cases by random selection. But it was
1920 noted that one benefit of the pilot project for patent cases is
1921 that the specialized judges become a resource for other judges on
1922 the same court.

1923 The IAALS is tracking innovative practices in the states,
1924 mostly innovations in discovery. Their report will be available for
1925 consideration at the April meeting.

1926 Discovery problems may be affected by the observation offered

1927 by many participants at the Duke Conference. "We live in a
1928 discovery-centered world." Lawyers do not ask — indeed, too often
1929 do not know how to ask — for information that will be needed at
1930 trial. They think about, and get paid for, vast discovery. Criminal
1931 trials without discovery of this kind seem to be just as effective
1932 as civil trials, at about a tenth of the cost. "Surely there must
1933 be cases where the parties want trial." But an experiment to test
1934 this failed. In every case this judge offered a trial within 4
1935 months, with minimal or no discovery and no motions for summary
1936 judgment. The order directed the lawyers to discuss this option
1937 with their clients, and to provide a budget for proceeding with
1938 this option and an alternative budget for proceeding without taking
1939 it up. The experiment was abandoned after using the order in more
1940 than 1,100 cases. The option was picked up in 3 cases, and then
1941 rejected within a week in one of them. Neither of the other 2 went
1942 to trial. "How is it that we have come to depend so much on
1943 discovery"?

1944 It was noted that the same fate had met the expedited trial
1945 project in the Northern District of California. It died for want of
1946 takers. And it was wondered whether perhaps these outcomes could be
1947 changed by getting "buy-in" from insurers who bear the costs of
1948 defending.

1949 A judge suggested that "lawyers are trained to do discovery,
1950 and get paid for it. It has got to the point of too much."

1951 Another judge observed that "we don’t have a chance to talk to
1952 the clients. Should I require them to come to the Rule 16
1953 conference? If not to require attendance, to invite them"?

1954 Another observation was that most young lawyers to not get any
1955 training in trial, unlike earlier days when many were given many
1956 small trials to develop trial competence.

1957 The comparison to criminal cases was taken up by the
1958 observation that the prosecution has "discovery" through
1959 investigators and then a grand jury. Some or all of this
1960 information makes its way to the defendant at some point. And
1961 criminal lawyers have more trial experience. Together, these
1962 phenomena may help to explain the relative success of criminal
1963 trials as compared to civil trials that follow vast civil
1964 discovery. But another judge countered that federal prosecutors on
1965 average try less than one case per year per lawyer in the office.
1966 On the state side, however, there are trials in low-dollar, low-
1967 significance cases. A young lawyer who wants trial experience can
1968 go to a district attorney’s office, or a solicitor’s office for
1969 misdemeanor cases, or a 2-person personal injury firm trying low-
1970 dollar cases.

November 20, 2014

1971 A lawyer suggested that it is premature to despair of
1972 expedited trial programs. In MDL cases there are bellwether trials
1973 that are expensive and protracted, in part because they are
1974 symbolic. But the post-bellwether trials tend to be much more
1975 compact; they can be tried in a few days or even hours.

1976 These problems will continue to be part of the Committee
1977 agenda.

1978 **Pending Rules Amendments**

1979 Important amendments are now pending in the Supreme Court. If
1980 the Court decides to adopt them, and if Congress allows them to
1981 proceed, they will go into effect on December 1, 2015. "We as a
1982 Committee should try to spearhead an effort to get word out about
1983 what they are intended to do, and what not."

1984 Judge Fogel has brought the Federal Judicial Center on board
1985 with efforts to educate judges in the new rules should they take
1986 effect. Experience shows that simply adopting new rules does not
1987 automatically transfer into prompt implementation in practice.
1988
1989 Beyond FJC programs aimed at judges, the word can be got out
1990 through conferences, articles, and related efforts. Circuit
1991 conferences seem to be reviving — they would be a good focus. Inns
1992 of Court will be another good forum. A prepared packet of materials
1993 for use by these and other groups, such as Federal Bar
1994 Associations, could be useful.

1995 An observer noted that programs are already being offered to
1996 explore the proposed amendments. She attended one in which
1997 discovery hypotheticals were presented to magistrate judges with
1998 arguments on both sides. The judges then addressed the outcome
1999 under present rules and under the proposed rules. It was effective.

2000 Once it becomes clear that the proposed rules will go into
2001 effect — a desirable outcome that cannot be presumed — the
2002 Administrative Office may find some role to play in getting out the
2003 word.

2004 **Subcommittee Projects**

2005 Judge Campbell noted ongoing Subcommittee work in addition to
2006 the Rule 23 Subcommittee.

2007 The Appellate and Civil Rules Committees have formed a joint
2008 subcommittee to explore two topics. Judge Matheson and Virginia
2009 Seitz are the Civil Rules members. The Subcommittee will study
2010 manufactured finality devices that are treated differently by the

2011 circuits. It also will study a number of problems that seem to
2012 affect stays and appeal bonds under Rule 62.

2013 The Discovery Subcommittee will begin work on a proposal that
2014 it expand the use of "requester pays" in discovery.

2015 **Future Meetings**

2016 The next meeting will be on April 9-10, 2015, at the
2017 Administrative Office. The fall meeting will be at the University
2018 of Utah Law School.

Respectfully submitted,

Edward H. Cooper
Reporter

November 20, 2014

TAB 5

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TAB 5A

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

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

SANDRA SEGAL IKUTA
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

To: **Hon. Jeffrey S. Sutton, Chair**
Committee on Rules of Practice and Procedure

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

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

Date: **December 11, 2014**

I. Introduction

The Advisory Committee on the Federal Rules of Criminal Procedure ("the Committee") met on November 4-5 in Washington, D.C. This report discusses briefly the following information items:

(1) the Committee's decision not to purse suggested amendments to Rules 11 and 52 of the Federal Rules of Criminal Procedure and Habeas Rule 5;
(2) the appointment of new subcommittees to review the issues raised by the work of the Standing Committee's CM/ECF Subcommittee and to consider a proposal to amend Rule 35; and
(3) the first public hearing on the proposed amendment to Rule 41 regarding venue for applications to conduct remote electronic searches.

II. Action on Suggested Amendments to Rules 11 and 52 of the Federal Rules of Criminal Procedure and Rule 5 of the Habeas Rules

After discussion, the Committee decided not to pursue further three possible amendments that had been proposed by judges.

A. Rule 11

The Committee heard the report of the Rule 11 Subcommittee, chaired by Judge Morrison England, which considered a proposal by Chief Judge Claudia Wilken to amend Rule 11. Chief Judge Wilken sought an amendment that would allow trial judges to refer criminal cases to other judicial officers for the purpose of exploring settlement. At least six districts in the Ninth Circuit had employed this procedure before the Supreme Court's decision in *United States v. Davila*, 133 S.Ct. 2139 (2013), which indicated that the practice violated Rule 11. Judge Wilken reported that although the procedure was employed only rarely, it had great value in those cases, saving resources for the courts, the prosecution, and the defense.

After extended discussion, the Committee decided, by a divided vote, not to pursue the proposed amendment. Although judges in several districts (including the Northern District of California, Chief Judge Wilken's district) have found the procedure to be helpful, the Committee was not persuaded there was an urgent need for an amendment. Since guilty plea rates exceed 95% both nationwide and in the districts that had employed this procedure, there is no problem of courts being overwhelmed by trials. Additionally, members of the Committee identified a variety of serious concerns raised by the proposal. These included concerns that judges engaged in settlement discussions might intrude into the authority allocated to the executive branch or the attorney-client relationship, be unequipped to make sound sentencing recommendations, or compromise their neutrality when proposing a particular disposition. Additionally, the proposal would require the Committee to grapple with a variety of legal and ethical concerns, and might generate collateral challenges.

B. Rule 52

The Committee heard the report of the Rule 52 Subcommittee, chaired by Judge Raymond Kethledge, which considered a proposal by Judge Jon Newman to amend Rule 52. Judge Newman proposed an amendment to allow for appellate review of unpreserved sentencing errors without satisfying the requirements of plain error if the error caused prejudice and correction would not require a new trial. The Subcommittee concluded that there was not enough of a problem to warrant an amendment. Most defaulted Guidelines calculation errors that increase a defendant's sentence are now being corrected on plain error review. Although there may be a limited number of cases in which relief is not now being granted, the Subcommittee concluded that the benefit of the proposed amendment would probably be outweighed by additional litigation about the exception's reach, including determining when a judge would have imposed a lesser sentence but for the Guidelines error. The Subcommittee also noted that the proposed amendment could reduce the incentives to raise issues in a timely fashion, and would work a change in a Rule that the Supreme Court has cited with approval and relied upon.

The Committee unanimously accepted the Subcommittee's recommendation not to pursue the suggested amendment.

C. Rule 5 of the Habeas Rules

The Committee also voted unanimously not to pursue the suggestion of Judge Michael Baylson that it amend Rule 5 of the Rules Governing 2255 Proceedings. Judge Baylson proposed that the rule not require the state to serve a petitioner with the exhibits that accompany the state's answer unless the district judge so orders. Committee members emphasized that there is presently no disagreement among the courts of appeals on this issue, and that the proposed change would generate less uniformity. Other members noted that it was accepted practice to serve petitioners with all materials filed with the court. The states' attorneys have not requested a change, suggesting that the current rule is not posing a problem requiring amendment. In light of the other matters already under consideration, the Committee decided not to appoint a subcommittee to pursue this issue.

III. Electronic Filing

After discussion of the work of the Standing Committee's CM/ECF Subcommittee and the need for coordinated action by all of the advisory committees, Judge Raggi announced the appointment of a new subcommittee to be chaired by Judge David Lawson. Judge Lawson was also appointed to serve as the Criminal Rules liaison to the Standing Committee's CM/ECF Subcommittee. The new subcommittee will consider the issues raised by the Civil Rules Advisory Committee's approval of a proposed rule requiring e-filing (subject to exceptions) in civil cases.

The proposed change in the Civil Rule requires reconsideration of subdivisions (b) and (e) of Rule 49 of the Federal Rules of Criminal Procedure. Subdivision (b) presently provides that service "must be made in the manner provided for a civil action," and subdivision (e) provides that a local rule may allow (not require) electronic filing if reasonable exceptions are allowed. The proposed changes in the Civil Rule raise several issues: whether it is time for a national rule on electronic filing in criminal cases; whether the Criminal Rules should now require (rather than permit) electronic filing; and, if so, what exceptions should be made.

The subcommittee will also address two other proposals by Professor Dan Capra, the reporter for the Standing Committee's CM/ECF Subcommittee. Professor Capra has proposed a template rule providing that (1) all references in the rules to information include electronically stored information and (2) any reference to filing or sending papers includes transmission by electronic means.

IV. Rule 35

Judge Raggi appointed a new subcommittee, chaired by Judge James Dever, to consider a proposal from the New York Council of Defense Lawyers to amend Rule 35 to afford judges additional discretion to reduce sentences after they become final. The proposal would allow a

district judge, upon defense motion, to reduce the sentence of a defendant who had served two thirds of his term in three circumstances: (1) newly discovered scientific evidence casting doubt on the validity of the conviction; (2) substantial rehabilitation of the defendant; or (3) deterioration of defendant's medical condition (providing an alternative compassionate release). Members noted that the proposal raised many issues, including how it would operate in light of statutory limits on collateral review under §§ 2241 and 2255, as well as statutorily mandated minimum sentences.

V. Public Hearing on Proposed Amendment to Rule 41

At the conclusion of its regular business, the Committee held the first of two scheduled public hearings on the amendments published for public comment. The Committee heard eight witnesses, most of whom had also provided written comments. All of the witnesses focused on the proposed amendment to Rule 41, which provides venue for remote electronic searches outside the district where the application is made in two situations: (1) when technology has been used to conceal the location of the media to be searched, and (2) in an investigation into violation of the Computer Fraud and Abuse Act, 18 U.S.C. 1030(a)(5), when the media to be searched are damaged computers located in five or more districts.

Seven of the eight witnesses opposed the proposed amendment. In general, these witnesses focused on the policy and constitutional concerns raised by remote electronic searches generally, rather than the new venue provisions. Some witnesses argued that remote electronic searches raise a host of policy decisions that should be resolved by Congress before further rule-making action. Witnesses argued that remote electronic searches raise a variety of Fourth Amendment problems including the inability to comply with particularity and notice requirements, the reasonableness of the proposed surreptitious entry into electronic devices, and the types of information that may be seized. Although the draft Committee Note states that the proposed amendment does not address the Fourth Amendment issues and leaves the application of constitutional standards "to ongoing case law development," the witnesses who opposed the proposed amendment found this disclaimer insufficient to address their concerns. Some viewed the proposed amendment as an endorsement of the constitutionality of such searches despite the disavowal in the Committee Note. Others expressed concern that litigation would not be able to satisfactorily address the constitutional issues, pointing to inadequate notice, and the dearth of decisions evaluating remote electronic searches to date. Several witnesses also expressed concern for the practical consequences and unintended effects that may be caused by remote electronic searches. These serious consequences may affect not only the target device but other devices, including those that are part of the same network, that are hosted on the same server, or that visit the same web sites. Additionally, several witnesses expressed concern that the proposed amendment would necessarily involve the federal courts in authorizing extraterritorial searches in some cases in which technology has been used to hide the location of the target device. The execution of such warrants could violate international law as well as particular treaties and mutual legal assistance agreements, they argued.

Committee members actively questioned witnesses throughout, seeking clarification and potential avenues for addressing the problem that prompted the proposed amendment while also avoiding the concerns raised.

Judge Raggi thanked all of the witnesses for their statements and testimony, noting that they had been extremely helpful and had provided this information early in the process to give the Committee ample time to consider their views. She encouraged the witnesses to provide any further comments in writing as soon as possible. Judge Raggi also reminded Committee members that the second hearing date is January 30, 2015, in Nashville at Vanderbilt Law School.

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TAB 5B

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ADVISORY COMMITTEE ON CRIMINAL RULES
MINUTES
November 4-5, Washington D.C.

I. Attendance and Preliminary Matters

The Criminal Rules Advisory Committee ("Committee") met Washington D.C. on November 4-5, 2014. The following persons were in attendance:

Judge Reena Raggi, Chair
Carol A. Brook, Esq.
Hon. Leslie Caldwell[1]
Judge Morrison C. England, Jr.
Judge James C. Dever
Judge Gary Feinerman Mark
Filip, Esq. (Nov. 5 only)
Chief Justice David E. Gilbertson
Professor Orin S. Kerr
Judge Raymond Kethledge
Judge David M. Lawson
Judge Timothy R. Rice
John S. Siffert, Esq.
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Reporter
Professor Daniel R. Coquillette, Standing Committee Reporter
Judge Amy J. St. Eve, Standing Committee Liaison

The following persons were present to support the Committee:

Laural L. Hooper, Federal Judicial Center
Jonathan C. Rose, Rules Committee Officer
Julie Wilson, Rules Office Attorney

II. CHAIR'S REMARKS AND OPENING BUSINESS

A. Chair's Remarks

Judge Raggi introduced new members Judge James C. Dever, Judge Gary Feinerman, Judge Raymond Kethledge, and Leslie Caldwell, the new Assistant Attorney General for the Criminal Division. She welcomed observers Peter Goldberger of the National Association of

[1] The Department of Justice was represented at various times throughout the meeting by Leslie Caldwell, Assistant Attorney General for the Criminal Division; Marshall Miller, Principal Deputy Assistant Attorney General for the Criminal Division; David Bitkower, Deputy Assistant Attorney General for the Criminal Division; and Jonathan Wroblewski, Director, Office of Policy and Legislation in the Criminal Division.

12b-010322

Criminal Defense Lawyers and Catherine Recker of American College of Trial Lawyers. Judge Raggi noted that Jonanthan Rose had indicated he might not be able to attend the March meeting and she therefore wished to thank him for his service now in the event she could not do it then. She also thanked all of the staff members who made the arrangements for the meeting and the hearings.

For the benefit of new members, Judge Raggi reviewed the process by which the Committee considered new or amended rules of procedure and how its recommendations then proceeded to the Standing Committee on the Federal Rules, the Judicial Conference of the United States, the Supreme Court, and Congress.

B. Review and Approval of Minutes of April 2014 Meeting

A motion to approve the minutes of the April 2014 Committee meeting in New Orleans, having been seconded:

The Committee unanimously approved the April 2014 meeting minutes by voice vote.

C. Proposed Amendments Approved by the Supreme Court for Transmittal to Congress

Jonathan Rose reported that the proposed amendments to the following Criminal Rules were approved by the Supreme Court and transmitted to Congress and will take effect on December 1, 2014, unless Congress acts to the contrary:

Rule 12. Pleadings and Pretrial Motions
Rule 34. Arresting Judgment
Rule 5. Initial Appearance
Rule 58. Petty Offenses and Other Misdemeanors
Rule 6. The Grand Jury

D. Proposed Amendments Published for Comment

The comment period for the proposed amendments to the following rules concludes February 17, 2015. Committee action on these amendments will be deferred until the spring meeting, following the close of the comment period.

Rule 4. Arrest Warrant or Summons on a Complaint
Rule 41. Search and Seizure
Rule 45. Computing and Extending Time; Time for Motion Papers

Judge Raggi reported that the only comment received to date on the proposed amendment to Rule 4 was supportive. A member reported that those to whom he had spoken about the amendment were satisfied that their earlier expressed concerns were addressed by the language

of the published rule. Many comments have been received on Rule 41, and the Committee would conduct a hearing on that rule on November 5. No comments have been received to date on the proposed amendment to Rule 45.

III. CRIMINAL RULES ACTIONS

A. Proposed Amendment to Rule 11

Judge Raggi asked Judge England, Chair of the Rule 11 Subcommittee, to report on the Subcommittee's review of the proposal from Chief Judge Claudia Wilken of the Northern District of California to amend Rule 11 to state that it did not prevent trial judges from referring criminal cases to other judicial officers for the purpose of exploring settlement.

Judge England summarized the proposal and the Subcommittee's work, also described in the memorandum to the Committee in the agenda book. He reported that at least six districts had engaged in settlement conferences before the Supreme Court's decision in *United States v. Davila,* 133 S.Ct. 2139 (2013), indicated that this practice violated Rule 11. He noted that the Committee had already considered, and not acted favorably on, three prior proposals to approve judicial participation in settlement conferences or plea bargaining. He summarized concerns raised by the proposal, including (1) judicial intrusion on the prosecutorial role of the executive, (2) adverse effects on judicial impartiality if a judge is privy to plea negotiations, and (3) the risk of coercing defendants into plea dispositions that they would otherwise not accept.

Judge England reported that the Subcommittee met twice by telephone, and on the second occasion heard directly from Chief Judge Wilken. The Subcommittee also considered memoranda from the Committee's Reporters and from the Department of Justice. The Subcommittee was unable to reach consensus as to how to proceed and sought full Committee discussion to learn whether the proposal should be pursued.

Subcommittee members were then invited to comment.

A subcommittee member reported on an informal survey of eight federal defenders from the districts where judicial officers had participated in settlement conferences. These defenders unanimously thought the practice was valuable and should be permitted. They reported that it was used very rarely, and they did not feel judicial pressure or interference. They mentioned its most frequent use in three types of cases: (1) large, complex cases, particularly those in which the government was seeking a global disposition by all defendants; (2) cases in which parties were close to agreement on disposition but could not quite get there on their own; and (3) cases where parties wanted a plea disposition but were far apart. Judicial involvement was also helpful in rare cases when a defendant was not heeding his attorney and needed to hear the reality of his situation from a neutral third party. The surveyed defenders reported no cases in which a settlement conference failed to produce an acceptable plea agreement. To the extent defenders feel that circumstances such as mandatory minimum sentences and the Sentencing Guidelines slant the "playing field" in favor of the government, they view judicial involvement in plea negotiations as something that helps level the field. The subcommittee member characterized judicial involvement in plea negotiations as a useful tool that each district could

decide if and how to use.

Another subcommittee member reported that surveyed prosecutors in the districts where judges participated in settlement discussions had mixed reactions, with the vast majority opposed, mostly because they felt the process was designed to put pressure on both the defendant and the prosecution to come to an agreement and to avoid trial. In some cases this is uncomfortable for all parties, and not a healthy dynamic. The member emphasized that the vast majority of cases are already disposed of by plea, so there is no urgent need for the procedure to ensure efficient use of court resources.

A third subcommittee member also expressed concern about the potential for coercion on both parties. When there is a global plea offer that one defendant is reluctant to accept, judicial involvement could exert tremendous pressure on that defendant. This concern can be minimized somewhat by not allowing the trial judge to become involved in the plea negotiation. But a referral judge will not be as familiar with the evidence and the strengths or the weaknesses of the case. The effort necessary for the referral judge to familiarize herself with the case will reduce the efficiencies cited to support the process. The member also agreed with concerns about separation of powers, judicial neutrality, and the perception that this is more a docket management tool than one focused on securing a "right outcome."

A subcommittee member reported that the practice is not followed in this member's district. Despite the government's concerns, this member was of the opinion that if the procedure is limited to cases where there has been a joint request by parties who agree that they need help, it is a good idea for a judge not involved in the case to provide help. State courts have been doing this for years, and the Committee can build sufficient safeguards into a rule to avoid possible abuse.

Another subcommittee member opposed the proposal on three grounds. First, the need for a rule change had not been demonstrated. If there is no significant difference in guilty plea rates as between districts that do and do not involve judges in plea bargaining, why amend the Rule? If defendants now feel coercion to plead from the prosecutor, exposing them to pressure from a judge is not a good idea. Second, although judges routinely mediate civil cases to encourage settlement, criminal cases are different. The former can often be resolved with monetary compensation, while what is at stake in the latter is liberty. The role played by the judiciary in the criminal process thus needs to be purely neutral. Third, there may be troubling consequences if dissatisfied defendants challenge convictions based on judicial conduct in plea negotiations Will judges have to testify regarding what was said at the conference? Must there be a transcript of what goes on? If there is a transcript, will people speak as freely about offers and demands, and, if they do not, will that compromise the process? In sum, even if judicial

involvement in plea bargaining might increase dispositions in some cases, the member concluded that efficiency should not drive the decision to adopt an amendment.

Another subcommittee member stated that even if there is no constitutional prohibition on judicial involvement in the plea process, a risk remains that, at some point, judicial participation can cross the line and interfere with the voluntariness of the plea. How will the judge accepting the plea know whether that line was crossed in the settlement conference?

A subcommittee member saw no need for this procedure, which no court in his circuit employs. The clarity of the present rule is beneficial; judges know what they can and cannot do. Even a true joint request does not eliminate concerns about the independence of the executive's prosecutorial role. This member was also concerned about how the process might work. In cases in which the plea is not pursuant to an agreed-upon Rule 11(c)(1)(C) sentence, any defendant who receives a more severe sentence than that discussed with the settlement judge will be upset and likely try to challenge his conviction. A Magistrate Judge might say a certain sentence would be fair based on the information available at the settlement conference, but later at sentencing the District Judge who received the presentence report (PSR) would have more information and might impose a higher sentence. This will result in an appeal or a 2255 motion. There are also practical issues about either transcribing the conferences or later requiring a Magistrate Judge to submit an affidavit stating what he or she said.

Judge Raggi then reminded the Committee of the specific language of Judge Wilken's proposal and opened the floor for discussion by all Committee members. She noted that it would be particularly helpful to hear whether members who favored the proposal thought the Committee should set safeguards in a rule or whether that should be left to each district that chose to involve judges in plea bargaining. Specifically, should a rule require that settlement conferences be recorded and that the defendant be present? Should a rule indicate whether statements made during negotiations can or cannot be used at any subsequent proceeding?

A Committee member stated that defense attorneys did not have a problem with Judge Wilken's proposal. He noted that the dynamic in criminal cases is different from that in civil cases, where the dispute is often about money, and the parties are eager to have a neutral intermediary help them reach a reasonable settlement. Nevertheless, in criminal cases, defendants often have difficulty accepting the reality of what they have done and what they are facing. At the point of charging and plea, counsel is sometimes helping a defendant pass from someone with no record and a good self-image, to someone who admits he has been guilty of a criminal offense. It is a very emotional and trying experience. Having a third party assist with that transition can be very helpful. There are times when the defense wants help, and if the government consents, why not make this process available to help some defendants with this transition? Maybe the practical difficulties are too difficult to overcome, but the Committee should consider the proposal further.

When another Committee member asked what a judge could do in this situation to help, other than suggest a better offer for the defense, the member responded that when a client has a crisis of confidence in his attorney, just hearing counsel's position reiterated by someone else helps.

A Committee member asked how the referral judge will be sufficiently educated about a case to make an informed plea recommendation. A Subcommittee member responded that some federal defenders write memos for the judge laying everything out. The member was not sure whether that memo also goes to the prosecution, but assumed it does. The settlement judge's main contribution is not providing sentencing information. Defenders reported that the Magistrate Judges conducting these sessions were prior defense attorneys or prosecutors, and are able to comfort the defendant in a way that his attorney cannot. The member emphasized that settlement conferences are not used for clients who are maintaining their innocence; no attorney would agree to it in that situation. It is helpful for a client who has authorized plea discussions, or who says, "I want to see what is out there, but I don't know how."

Another Committee member expressed concern and skepticism, noting how simple it was for a judge to telegraph a preference for plea negotiations, thereby overcoming the safeguard of joint consent. Counsel appearing frequently before the court would be motivated to conform to the apparent wish of the referring judge for a settlement conference or to the recommendation of the referral judge. The member stated that he did not understand how judges are supposed to help with the "transition" defense counsel are talking about.

A Subcommittee member stated that there is already tremendous pressure under the Guidelines to plead guilty in order to get acceptance of responsibility consideration.

A Committee member reported that in state court, judges have long participated in plea negotiations, and it did not produce more appeals or habeas petitions perhaps because the process is initiated by the lawyers, the defendant has bought into the process, and it is always about sentencing.

A Subcommittee member noted a significant difference between state and federal criminal proceedings. The member expressed concern about cases in which a District Judge did not agree with the Magistrate Judge who conducted the settlement conference. The member also voiced concern about conferences at which the defendant was not present or that were not on the record. Acknowledging that judges in some districts had used the practice and favored it, the member nevertheless stated that he did not see the need for it.

Another Subcommittee member stated that the point of negotiating an agreement is to come to an agreement. But the sentencing judge has to be part of the process for there to be a true agreement. In the courts of the member's state it is common for the parties to have a conversation with the judge about sentence and to get an indication from the judge about the likely sentence. This process works because the parties are dealing directly with the decision

maker. In the proposal for the federal system, however, the ultimate decision maker would not conduct the conference, and the member opined that will not work.

Judge Raggi advised the Committee that District Judge Jed Rakoff of the Southern District of New York had recently published an article (copies of which were circulated to the Committee) that, inter alia, also advocated judicial involvement in plea bargaining. But unlike the N.D. Cal. proposal, which emphasized that such involvement facilitated guilty pleas, Judge Rakoff urged judicial involvement to counter what he perceived as too many guilty pleas, including guilty pleas from "innocent" persons, which he attributed in part to the inadequate plea allocutions conducted by "most judges." Judge Raggi noted her own disagreement with the last assertion and observed that, even if such a concern were warranted, it was not apparent that the solution to that problem was to get another judicial officer involved in plea negotiations.

Judge Raggi then suggested that the Committee consider whether to pursue the pending proposal by reference to two questions, focusing first the threshold inquiry for all rules amendments -- Is there a problem that needs to be addressed by a rule?—and second, Would the benefits of the proposed rule outweigh any concerns?

As to need, the N.D. Cal. proposal urged an amendment to Rule 11 to facilitate plea dispositions, particularly in complex cases. Judge Raggi noted that the national guilty plea rate is over 95% (a number that had climbed steadily in recent decades), and that districts urging judicial involvement in plea negotiations were right in the mainstream. So there appears to be no problem of courts being overwhelmed with trials that needs to be addressed by amending Rule

Thus, the benefits of the amendment would seem to apply in only a small number of cases.

Turning to concerns, Judge Raggi attempted to summarize the concerns raised in memoranda received by the Committee and in the Committee discussions.

1. Separation of Powers. The responsibility for prosecuting crimes---which includes discretion to decide what crimes to charge and the pleas satisfactory to dispose of the charges---vests in the Executive branch, just as the responsibility for sentencing vests in the judiciary. Should the judiciary assign itself a role in the former area?

2. Competency. How equipped are judicial officers to make sound plea recommendations, given the need for a thorough knowledge of the case and its context? Acquisition of such knowledge may require a substantial expenditure of resources (both by judges and probation departments). Thus, predictions that judicial plea bargaining will save resources in an area of judicial competence (trials) must be considered in light of increased demands on resources in an area of lesser competence (crafting plea bargains.

3. Transforming Judicial Role. The neutrality that characterizes the judicial rule is nowhere more important---as a matter of fact and of perception---than in criminal cases. That neutrality must be manifested by every judicial officer whom the defendant encounters. Will that

neutrality by undermined once any judicial officer is seen as urging a particular disposition? Will that concern be aggravated if the judicial recommendation matches that of the prosecution?

4. Intrusion on Attorney-Client Relationship. This may be mitigated by the parties' consent. Nevertheless, having judges reinforce or undermine the recommendation made by counsel intrudes on the attorney-client relationship in a way that warrants pause. Further, to the extent it has been suggested that judicial involvement in plea bargaining is helpful because many defendants do not "trust" court-appointed lawyers and will be more inclined to accept recommendations from a neutral judge, query how likely it is that a defendant who does not trust his appointed attorney will trust the judge who appointed his attorney?

5. Legal and Ethical Considerations.

- Does defendant have a right to be present for plea negotiations. It had not been N.D. Cal. practice to require.
- What protections should be afforded defendant for statements he or counsel make to the judicial officer in settlement discussions?
- Are there limits on what the judge can say? Can the judge ask about guilt?
- If defendant or counsel maintains innocence, can a judge ever recommend a guilty plea?
- If defendant later testifies contrary to what he or counsel said during conference what are the referral judge's responsibilities regarding perjury?
- Although the N.D. Cal. had not required settlement conferences to be recorded, query whether any contact between a judicial officer and a criminal defendant should be "off the record." Does a record of the conference stifle candor?

6. Accepting a Guilty Plea. To the extent proponents contemplate that plea negotiations are not revealed to the trial judge, does this apply only if the case proceeds to trial? If negotiations result in a guilty plea, can a trial judge responsibly conclude that the plea is knowing and voluntary without reviewing the record of proceedings before the referral judge? Consider this in light of the error in Davila, which rendered the plea involuntary.

7. Increased Litigation. Will defendants who now invariably bring collateral challenges to conviction based on the ineffective assistance of counsel likely find fault with the conduct of judicial officers during plea negotiations, giving rise to increased litigation about judicial promises or coercion?

Judge Raggi indicated that she herself thought that these concerns, along with the advantages of uniformity, far outweighed the benefits of the proposed amendment.

The Committee's Liaison member opined that having a judge than the sentencing judge

making recommendations about sentencing is asking for trouble. The referral judge will not have the benefit of the PSR, an important document to give a full picture of the defendant. Sometimes the PSR raises criminal history points that the parties may not know about, and the settlement judge would not have the benefit of that information. In addition, judges have different views of sentencing, and may not agree with one another on the appropriate sentence. Plus, whatever efficiency you get on the front end, you will lose on the 2255 end. The member did not want to see judges having to submit affidavits. Finally, the member expressed concern with allowing diverse district practices respecting guilty pleas. The Standing Committee has traditionally favored uniformity on major issues.

Professor Coquillette agreed that the Standing Committee has been concerned about local rules on matters where judicial procedures should be uniform throughout the courts. Congress has also expressed concern that local rules might be used to evade its power to review rules pursuant to the Rules Enabling Act. Thus, local rules may be appropriate when they reflect real demographic or geographic differences between districts, but nothing has been said about why certain districts have a special need for the proposed settlement procedure.

A Committee member questioned how the process would work. Would the defendant be promised a particular sentence during the settlement conference? At the plea colloquy, before the defendant says "yes I am guilty," does the judge accept the agreement reached at the conference, including the sentence expected by defendant? Members agreed that the process would play out differently in cases in which the parties agreed to an 11(c)(1)(C) plea. Some thought judicial involvement would pose fewer problems in such cases because the sentencing judge would not need to know about the give and take during the negotiation. On the other hand, any 11(c)(1)(C) plea must be accepted by the sentencing judge, and injecting a second judge into this process could create problems. A member noted that in one district in New York, 11(c)(1)(C) pleas are unusual, disfavored, and subject to a special review in the U.S. Attorney's Office. That USAO has a committee that reviews all 11(c)(1)(C) proposals before submitting them for approval by the United States Attorney. This process ensures uniformity within a large office, something that could be adversely affected if a judge were to participate in the plea process, and make a recommendation before committee and U.S. Attorney review.

Another member observed that under current practice the District Judge would be telling only the United States Attorney that she is not prepared to accept the plea agreement, but with the proposed amendment, that judge could be telling another judicial officer she is not prepared to accept what that referral judge had agreed to.

With discussion concluded, Judge Raggi asked the Committee to vote on the question of whether the Rule 11 Subcommittee should be asked further to consider Chief Judge Wilken's proposal to amend Rule 11.

The question of whether to pursue further the proposal to amend Rule 11 was put the Committee; it failed with 4 in favor and 6 opposed to continued consideration.

B. Proposed Amendment to Rule 52

Judge Raggi invited Judge Kethledge, Chair of the Rule 52 Subcommittee, to report the Subcommittee's recommendation regarding the proposal from Judge Jon Newman of the Second Circuit Court of Appeals to amend Rule 52 to allow for review of defaulted sentencing errors without satisfying the requirements of plain error if the error caused prejudice and correction would not require a new trial.

Judge Kethledge summarized the proposal and the questions addressed by the Subcommittee and detailed in the Reporters' Memorandum to the Committee included in the agenda book. These questions focused on the frequency with which sentencing errors are not being corrected under the present rule; the scope of the proposal, particularly which types of error would be included; and the extent to which the proposal would generate additional litigation in circuit and district courts. Judge Kethledge noted the Subcommittee's receipt of a memorandum from the Department of Justice responding to the proposal, and that the deliberations of the Subcommittee were informed by the perspective of trial judges and defense attorneys, as well as the government. At the end of its first telephone meeting, the Subcommittee was skeptical of the proposal, but scheduled a second telephone meeting to hear from Judge Newman. Before that call, Judge Newman provided the Subcommittee with a memorandum responding to the points raised by the Department of Justice and revising his proposal to apply only to sentencing errors that increased a defendant's sentence. After hearing from Judge Newman, the Subcommittee discussed the proposal further, and ultimately voted unanimously to recommend that the Committee not take any action on the proposal.

Judge Kethledge explained that the Subcommittee determined that there was not enough of a problem to warrant an amendment. Judge Newman identified a handful of cases in which, he argued, his proposal would have changed the outcome. The Subcommittee was not convinced it would have made a difference in all those cases. As to Guidelines calculation errors increasing sentences, most of those are being corrected on plain error review. Even if there are a small number of cases where this is not happening, the Subcommittee considered the benefit of a rule amendment outweighed by the additional litigation regarding the exception's reach and the causation question of whether a judge would have imposed a lesser sentence but for the Guidelines error. The Subcommittee also discussed whether the proposed amendment could create incentives for counsel to be less vigilant in raising sentencing errors in the district court. Finally there were questions about how receptive the Supreme Court would be to the proposed amendment in light of its decision in *Puckett v. United States*, 556 U.S. 129 (2009), applying the plain error test of *United States v. Olano*, 507 U.S. 725 (1993) and Rule 52(b) to errors in the plea process.

Thus, after extensive discussion, the Subcommittee unanimously agreed to recommend no further action on the proposal.

The Committee then voted unanimously not to pursue the proposal to amend Rule 52.

Judge Raggi thanked both the Rule 11 and Rule 52 Subcommittees and the reporters for the work they had put into considering both proposals for amendment. She also noted that Chief Judge Wilken and Judge Newman seemed appreciative of the opportunity to be heard orally and in writing by the Subcommittees.

C. Proposal to Amend Habeas Rule 5

Professor Beale described a request received from District Judge Michael Baylson of the Eastern District of Pennsylvania for the Committee to consider amending Rule 5 of the Rules Governing 2254 Proceedings to provide that the state is not required to serve a petitioner with the exhibits that accompany an answer unless the District Judge so orders. A discussion ensued regarding whether the proposal should go to a subcommittee.

A member expressed the view that the creation of a subcommittee and further consideration was not warranted. There is no disagreement in the courts on this issue, which expect the state to serve petitioner with all documents accompanying an answer, and the proposed change would generate different practices and less uniformity.

Another member noted that if this proposal is referred to a subcommittee the Department of Justice would want to consider recognizing judicial discretion to order that certain documents not be provided to habeas petitioners, either because they are voluminous or because there is a special concern about releasing certain documents within a correctional facility.

Another member who had worked in the office of a state attorney general stated that it would never have occurred to the attorneys in that office that they could send something to the court that wouldn't also go to the petitioner.

Judge Raggi asked Professor King for her views in light of her extensive scholarship in the area of 2254 motions. Professor King opined that the current rule is not posing a problem. She noted that no concern about the present Rule was being raised by the states' attorneys, who would be the logical ones to complain if there was a problem.

The Committee then voted unanimously not to pursue the proposal to amend Rule 5 of the Rules Governing 2254 Proceedings.

D. CM/ECF

Professor Beale described the work of the CM/ECF Subcommittee of the Standing Committee, on which Judge Lawson is now the Committee's Liaison (replacing Judge Malloy whose term on the Committee has expired). She reported that this Committee will have to decide whether it is time for a uniform, national rule for electronic filing in criminal cases. Criminal Rule 49(e) (which was based on the Civil Rules) presently leaves the question whether to permit

e-filing to local rules. At its October 2014 meeting, the Civil Rules Committee approved a national rule requiring e-filing in all civil cases (with exceptions). Thus, this Committee might create a subcommittee to consider whether to amend Rule 49. Professor Coquillette explained that with the courts moving to the next generation system for electronic filing, there is a lot of experimentation. But it is difficult to get districts to give up a local rule once they have tried it.

Judge Lawson, the liaison to the CM/ECF effort, noted that Criminal Rule 49(b) incorporates the civil rules. If those rules are amended to require e-filing and electronic signatures, that may no longer work for the Criminal Rules. He noted that his district created a set of CM/ECF policies and procedures that can be changed quickly without going through the local rule changing process, in order to adapt to changes in technology more quickly. He also noted it will be important to address these issues in conjunction with the other advisory committees.

Judge Raggi reported she had asked Judge Lawson to chair a new subcommittee that will consider whether the civil rule adequately addresses the concerns in criminal cases to support this Committee's adoption of an identical criminal rule or whether a different electronic filing rule is necessary to address the distinctive needs of criminal cases.

Professor Coquillette stated that the Department of Justice looks at these issues closely, in the past expressing concern about the use of electronic signatures in certain contexts. The views of defense counsel will also be important to defining where carve outs are necessary.

A member responded that the Criminal Division expects to work on this with the entire Justice Department, including investigative agencies, as it did when considering electronic warrants.

E. New Proposal to Amend Rule 35.

Judge Raggi reported that, after the agenda book closed, the Committee received a proposal from the New York Council of Defense Lawyers to amend Rule 35 to afford judges' discretion to reduce sentences after they became final. She asked a member familiar with the proposal to describe it.

The member explained that the proposal would allow a district judge, upon motion, to reduce the sentence of a defendant who had served two thirds of his term in three circumstances: (1) newly discovered scientific evidence cast doubt on the validity of the conviction; (2) substantial rehabilitation of the defendant; or (3) deterioration of defendant's medical condition (providing an alternative compassionate release). Another member expressed support for the proposal, noting that this would provide another means for reducing the prison population.

Another member questioned how the proposal would operate in light of temporal statutory limits on collateral review under §§ 2241 and 2255. The member also questioned the Committee's ability to use a procedural rule to authorize sentence reductions below statutorily mandated minimums. At the same time, the member acknowledged that judges with experience

under the old Rule 35 (prior to the Sentencing Reform Act) thought that version of the Rule was beneficial.

Professor Beale reported that the American Law Institute is also considering including a "second look" provision in its draft model sentencing law.

Professor Coquillette stated that the Rules Enabling Act's supersession clause does permit the adoption of rules that supersede existing statutes. But injudicious invocation of that clause may prompt Congress to reconsider it. Thus, the Rules Committees have often pursued a different approach, i.e., sponsored legislation.

A member noted that the proposal intersects with many statutes and policies as well as current pending legislation. For example, a bill just approved by the Senate Judiciary Committee includes a "second look" provision that would apply earlier than the timing of the proposal.

F. New Subcommittees

The Committee adjourned for lunch, and when it reconvened Judge Raggi announced the membership of two new subcommittees:

Rule 35 Subcommittee
Judge Dever, Chair
Ms. Brook
Judge Feinerman
Judge Lawson
Mr. Siffert
Mr. Wroblewski

CM/ECF Subcommittee
Judge Lawson, Chair
Ms. Brook
Judge England
Prof. Kerr Judge
Judge Rice
Mr. Wroblewski

Judge Raggi also announced that Judge Dever would serve as the Committee's liaison to the Evidence Committee, a position formerly held by Judge Keenan, whose term on the Committee expired.

G. Preparation for the Committee's Public Hearing

Judge Raggi then asked the Reporters to provide the Committee with an overview of issues raised in public comments to Rule 41 in preparation for the next day's hearing.

Professor Beale said the issues fell into three categories: (1) whether an alternate venue for remote access searches should be established by rule or by legislation; (2) Fourth Amendment issues as to particularity, the reasonableness of the proposed surreptitious entry into electronic devices, adequate notice, the types of information seized, the nature of the intervention and potential damage to targets and non-targets; and (3) concerns about the unintended effects of remote searches, including unintended damage to both the device to be searched and third parties.

Professor King added that some comments voiced concern that even if Rule 41 is amended only to expand venue, once such an amendment took effect, it would be difficult to litigate the identified constitutional issues.

Judge Raggi asked Professor Kerr to share his views. Professor Kerr stated that every remote access search raised numerous interesting questions beyond the venue issue addressed in the amendment. Some of these questions fall outside the Committee's authority. He noted that the proposed amendment does not affirmatively approve remote access searches, the constitutional status of which is presently unsettled. As for concerns about the adequacy of suppression motions to address all concerns, he observed that not all Title III issues could be raised in a motion to suppress. Some could be litigated only in collateral civil litigation. He thought the comments most helpful to the Committee's work were those that addressed (1) the adequacy of the proposed language about reasonable notice in cases in which a computer is affected by a botnet and the government has obtained a warrant to obtain the IP address, and (2) whether the "concealing" language could be applied more broadly to scenarios beyond those envisioned by the Committee. He also hoped that at the hearing commenters would expand on their concerns about applications of the Computer Fraud and Abuse Act. Professor Kerr observed that although the Justice Department's original proposal had been narrowed considerably by the Committee in the published rule, some of the comments appeared to address the original proposal, not the published rule, or were raising concerns to remote access searches generally. Commenters generally assume that the Committee has approved remote access searches, but the amendment does not do so.

Judge Raggi then asked the Department of Justice member for his views. She noted for the Committee that she had discouraged the Department of Justice from filing a written response to each critical public comment received, urging it to do so only after the November hearing.

Mr. Wroblewski stated that the government acknowledges commenters' legitimate concerns about particularity, nature of entry, ability to find vendors, nature of the procedure, and delayed notice. But those concerns are not implicated by the proposed rule, which only establishes venue. On the question of notice, he indicated that the government provides notice electronically, which when it has only an IP address, is all it can possibly do. He indicated that the government may still have to struggle with notice issues. He also acknowledged that some cases may raise Title III issues. But he noted that a well-established process exists for dealing with these issues if they arise. The government is not trying to avoid those issues, but they are

not part of this proposal. Most of the comments presented interesting questions about the use of various techniques; the use of these techniques is also not really raised by the proposed rule amendment.

A member asked about the Electronic Communications Privacy Act (ECPA), referenced by some commenters. Professor Kerr responded that the ECPA regulates access to remotely stored information, text messages, email, and cloud data. The original proposal presented a possible conflict with the statute because it might have allowed government to go around the provider and, instead, access email accounts directly. But the narrower published rule poses no such concern. If the government does not know where the data is located, the search would not involve data known to be controlled by the provider, so it could not use the ECPA process. And the second prong of the proposed amendment applies to damaged computers.

Professor Beale stated that some of the comments seemed not to understand that the proposed venue amendment did not relieve the government of its constitutional obligation to demonstrate probable cause for a warrant regardless of venue. Thus, the use of technology such as virtual private networks (VPNs) would not support a remote search under the proposed amendment absent probable cause.

Responding to some commenters' concerns that, when a company uses a VPN, the government could get remote access warrant without endeavoring to determine the location of the server, Professor Kerr suggested that the concern was not likely to be a significant issue in practice because it would be easier to find the server location than to do a remote search under the proposed amendment.

Professor Beale added that commenters had also raised concerns about the possible extraterritorial application of warrants issued under the published rule. Is it predictable that the computers to be searched will be outside the U.S.? If so, would this violate MLATs specifically or international law generally? If the foreign country in which the computer is located defines unauthorized access as a crime, could agents carrying out the remote search be charged with crimes by those countries?

Judge Raggi asked whether the government expected to advise United States judges of the possibility that a remote access search could reach beyond this country's borders.

Professor Beale noted that commenters' concern about collateral damage to non-targets, for example, in "watering hole" operations. Might the government exploit vulnerabilities in security protections, affecting computers networked to target computers?

A member observed that these and other concerns about do not seem to be generated by the proposed rule amendment itself, but from a concern that the amendment would increase the likelihood techniques having such effects would be used. In sum, the problems already exist, but the concern is that an amendment would exacerbate them.

Professor Beale also noted that although the proposed rule authorizes searches but not remediation, the government may want to do more than just search. The amendment may make it possible for government to do this in a greater number of cases.

Professor King noted that other rule amendments had established procedures for government conduct whose constitutionality had not yet been conclusively determined. For example, Rule 15 establishes procedures for depositions outside the U.S. where the defendant is not present, even though the admissibility of such a deposition at trial is not established under the Confrontation Clause. Rule 11 requires advice about appellate waivers that might not be deemed valid. Rule 41 established procedures for tracking devices, though at the time of the amendment it was unsettled whether such installations constituted searches subject to the Fourth Amendment. So there are some precedents for the Committee approving a rule of procedure for a process whose constitutionality is not yet settled.

A member noted that the examples just cited were distinguishable in that injury depended on later action (such as the admission of evidence). The injury of concern in the published rule would occur when the search and seizure authorized by the judge in the alternate venue occurs.

Another member noted that the details needed to address the myriad concerns identified by commenters may be more than a procedural rule can handle. But such detail is not needed if we are not attempting to legitimate remote access searches, but merely to provide a procedural framework addressing venue. This might even provoke legislative activity on the larger issues. Perhaps this could be made clearer by having the proposed rule say something such as "a magistrate can issue extraterritorial warrant according to law."

A member suggested that the Committee Note might flag issues raised by commenters, and note that the Committee is not taking any position on them.

Professor Beale responded that the Standing Committee does not want elaborate Committee Notes and generally discourages the citation of cases therein. But she agreed the Committee should be as clear as possible in communicating that the amendment does not foreclose or prejudge any constitutional challenges to remote access searches.

Professor Coquillette added that the philosophy has always been to have each Advisory Committee draft the best rule possible and let the Standing Committee worry about reactions from Congress or the Supreme Court. The Standing Committee has adopted new procedures for previewing rules amendments for the Supreme Court in advance of formal approval by the Judicial Conference, thereby giving the Court more time to consider amendments. He noted two rules philosophies on the Court. One views the Court's promulgation of a rule as a signal of its general constitutionality. The other views promulgation as simply sending the rule forth for application and review on a case-by-case basis. Professor Coquillette observed that the Court now seems to want unanimity on rules it approves. In short, one justice's reservations can defeat a rule.

Professor Beale agreed that although, in the past, some rules were adopted over a justice's dissent, the Supreme Court now generally approves proposed rules only by consensus.

Members agreed on the need for clarity in the Committee Notes. One emphasized the need to disavow any assessment of constitutional issues. Another noted that the Committee may be underestimating the concern about privacy, and public confusion about what the rule does and does not do. The Committee Note needs to make it clear what we are and are not doing.

At the conclusion of this discussion, the meeting adjourned for the day, with the Committee to reconvene on November 5 for public hearings, which were transcribed separately.

Judge Raggi announced that the next regular meeting of the Committee would take place on March 15-16, 2015 at the federal courthouse in Orlando, Florida.

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

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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CIVIL RULES

REENA RAGGI
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

TO: **Hon. Jeffery S. Sutton, Chair**
Committee on Rules of Practice and Procedure

FROM: **Hon William K. Sessions, Chair**
Advisory Committee on Evidence Rules

RE: **Report of the Advisory Committee on Evidence Rules**

DATE: **November 15, 2014**

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on October 24, 2014 in Durham, North Carolina, at Duke University School of Law. At the meeting, the Committee considered a number of proposals developed from its April, 2014 Symposium on the Challenges of Electronic Evidence. The proceedings from the Symposium will be published in the next edition of the Fordham Law Review.

The Committee also continues to monitor the need for rule changes necessitated by the Supreme Court's decision in *Crawford v. Washington* and its progeny. The Committee is not proposing any action items for the Standing Committee at its January 2015 meeting.

II. Action Items

No action items.

III. Information Items

A. Proposal to Amend or Abrogate the Hearsay Exception for Ancient Documents in Response to Electronically Stored Information.

Rule 803(16) provides a hearsay exception for "ancient documents." If a document is more than 20 years old and appears authentic, it is admissible for the truth of its contents, no matter how unreliable those contents may be. For the last year, the Committee has been investigating the possibility of amending or abrogating Rule 803(16), due to the risk that it will become a loophole for admitting unreliable electronically stored information, simply because that information has been stored for 20 years. The ancient documents exception has been tolerated because it has been used so infrequently, and usually because there is no other evidence on point. But because electronically stored information can easily be retained for more than 20 years it is possible that the ancient documents exception will be used much more frequently in the coming years. And it could be used to admit unreliable hearsay, because if the hearsay is in fact reliable it will probably be admissible under other reliability-based exceptions, such as the business records exception. Moreover, the need for an ancient documents exception is questionable as applied to ESI, for the very reason that there will likely be significant amounts of *reliable* electronic data available to prove any dispute of fact.

At the Fall meeting, Committee members unanimously agreed that Rule 803(16) was problematic, as it was based on the false premise that authenticity of a document means that the assertions in the document are reliable. The Committee also unanimously agreed that an amendment to Rule 803(16) would be appropriate to prevent the ancient documents exception from providing a loophole to admit large amounts of old, unreliable ESI. But the Committee was divided on two matters: 1) whether an amendment was necessary at this point, given the fact that no reported cases have been found in which old ESI has been admitted under the ancient documents exception; and 2) which alternative for amendment should be chosen — whether the exception should simply be abrogated, or narrowed to exclude ESI, or amended to require a showing of necessity or reliability before an old document is admitted. The Committee ultimately determined to revisit the proposed amendment to Rule 803(16) at the next meeting. The Reporter was directed to work up a formal proposal for each of the alternatives discussed. If the Committee decides to propose any amendment to Rule 803(16), it will be held up until it can be proposed as part of a package of amendments.

B. Proposal to Add Hearsay Exceptions for Statements of Recent Perception, to Accommodate "eHearsay"

At the Advisory Committee's Symposium on electronic evidence, held in April 2014, Professor Jeffrey Bellin proposed an amendment to the Evidence Rules that would add two new hearsay exceptions: one to Rule 804(b), which is the category for hearsay exceptions applicable only when the declarant is unavailable to testify; the other to Rule 801(d)(1), for certain hearsay statements made by testifying witnesses. Both exceptions are intended to address the phenomenon of electronic communication by way of text message, tweet, Facebook post, etc. Professor Bellin

contends that the existing hearsay exceptions, written before these kinds of electronic communications were contemplated, are an ill-fit for them and will result in many important and reliable electronic communications being excluded.

To solve the perceived problem, Professor Bellin proposes a modified version of the hearsay exception for recent perceptions --- an exception that the original Advisory Committee approved but which was rejected by Congress. Professor Bellin contends that the proposal will allow most of the important and reliable tweets and texts to be admitted, while retaining sufficient reliability guarantees that will exclude the most suspect of this category of statements.

At the Fall meeting, the Committee considered the proposed amendments for recent perception in detail. It determined unanimously that an amendment to Rule 801(d)(1) was not warranted, most importantly because it would create problems in integrating with the other Rule 801(d)(1) exceptions. For example, the amendment would allow certain prior inconsistent statements to be admitted substantively even though they would not be admissible under the constraints imposed by Congress in Rule 801(1)(d)(1)(A) — the rule allowing only prior inconsistent statements made under oath to be admissible for their truth. The Committee decided that if any change to Rule 801(d)(1) were to be made, it should be done pursuant to a systematic review of whether prior statements of testifying witnesses should even be defined as hearsay and, if so, what exceptions are appropriate. Thus, a systematic review of the entire category of prior statements of testifying witnesses was thought preferable to adding another hearsay exception to that category without working through how it might affect the other exceptions. The Committee will begin that systematic review at the next meeting.

With regard to the proposal to amend Rule 804, the Committee was concerned that a recent perceptions exception would be likely to allow the admission of unreliable hearsay, and it determined that at least as of now, the existing hearsay exceptions appeared to be working adequately to allow admission of those texts, tweets and other personal electronic communications that are in fact reliable. The Committee directed the Reporter and its consultant Professor Ken Broun to monitor the state and federal case law on how personal electronic communications are being treated in the courts. If it appears that reliable statements are being excluded, or that they are being admitted but only through misinterpretation of existing exceptions, then that might justify a hearsay exception for recent perceptions conditioned on the unavailability of the declarant. The Committee will continue its consideration of a recent perceptions exception at the next meeting, and will review the original Advisory Committee's proposal to determine whether it might be an appropriate starting point if an exception is deemed necessary.

C. Proposal to Amend Rules 901 and 902 to Provide Specific Grounds for Authenticating Certain Electronic Evidence

At the Fall meeting, the Committee considered whether to develop and propose amendments to the Evidence Rules that would add specific provisions detailing how certain forms of electronic evidence (email, web pages, etc.) could be authenticated. There are of course many reported cases, both Federal and State, that set forth standards for authenticating electronic evidence. These cases apply the existing, flexible provisions on authenticity currently found in Federal Rules 901 and 902 and their state counterparts. The Committee considered whether amendments could usefully codify all this case law. The Committee eventually concluded that setting forth a detailed list of factors in an authenticity rule might do more harm than good. The result would be a highly detailed and complicated rule, when in fact authentication of electronic evidence is in many cases simple and straightforward. Moreover, listing authenticity factors in a rule might lose sight of the point that the factors must be weighed in each individual case, and that some factors might weigh more in some cases than others. That weighing process cannot be encapsulated easily in a rule. Finally, there is a danger that rulemaking would not be able to keep up with technological advances, so that specifically stated grounds of authenticity for electronic evidence might become outmoded, thus requiring constant amendment of those rules.

The Committee concluded that it would not proceed at this time with a rule amendment that would provide guidance on how to establish the authenticity of electronic evidence. But Committee members unanimously determined that it should develop a best practices manual that would assist courts and litigants in negotiating the difficulties of authenticating electronic evidence. The Committee will begin working on a best practices manual and will review possible materials and formats at its next meeting. Once the best practices manual is prepared and approved, the Committee will determine (after consultation with the Standing Committee) on the best way to have it published, whether under the auspices of the Committee or with some other designation.

D. Proposed Amendment to Rule 902 to Allow Certification of Authenticity of Certain Electronic Evidence

At its Fall meeting the Committee considered a proposal for two additions to Rule 902, the provision on self-authentication. The first would allow self-authentication of machine-generated information (such as a web page) upon a submission of a certificate prepared by a qualified person. The second proposal would provide a similar certification procedure for a copy of an electronic device, media or file that would be authenticated by a digital process for identification. These proposals are analogous to Rule 902(11) of the Federal Rules of Evidence, which permits a foundation witness to establish the authenticity and admissibility of business records by way of

certification. The goal of the proposals is to make authentication easier for certain kinds of electronic evidence that are, under current law, likely to be authenticated under Rule 901 but only by calling a witness to testify to authenticity. The contention behind the proposals is that the types of electronic evidence covered by the two rules are rarely the subject of a legitimate authenticity dispute, so the proponent should not have to go to the expense and inconvenience of producing an authentication witness. These self-authentication proposals, by following Rule 902(11)'s provision covering business records, essentially leave the burden of going forward on authenticity questions to the opponent of the evidence.

The Committee unanimously agreed that it would be useful to promote rules that would make the process of proving authenticity for electronic evidence simpler, cheaper, and more efficient. Many Committee members remarked on the unnecessary expense, in the current practice, of having to call a witness to authenticate a web page or other machine-produced evidence, when it ordinarily ends up that the witness is not cross-examined or that authenticity is stipulated at the last minute.

The Committee unanimously decided to consider, at its next meeting, formal amendments to add Rule 902 (13) (for machine-generated evidence) and 902(14) (for copies of devices, storage media, etc.) to the Evidence Rules. The Committee discussed the possible Confrontation Clause problem posed by submitting certificates of authentication in criminal cases. But it determined that the proposals did not raise a confrontation issue, because the Supreme Court has stated in *Melendez-Diaz v. Massachusetts* that admitting a certificate does not violate the right to confrontation if the certificate does nothing more than authenticate another document or item of evidence. The Committee was also persuaded by the uniform lower court authority holding that certificates prepared under Rule 902(11) do not violate the right to confrontation — authority that relies on the Supreme Court's statement in *Melendez-Diaz.* The Committee resolved that if the proposals are approved, the Committee Notes would specifically caution that the certification would only establish authenticity --- not the evidentiary significance or reliability of the proffered evidence.

E. *Crawford v. Washington* and the Hearsay Exceptions in the Evidence Rules

As previous reports have noted, the Committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*, in which the Court held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to confront and cross-examine the declarant.

The Reporter regularly provides the Committee a case digest of all federal circuit cases discussing *Crawford* and its progeny. The goal of the digest is to enable the Committee to keep

current on developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions. If the Committee determines that it is appropriate to propose amendments to prevent one or more of the Evidence Rules from being applied in violation of the Confrontation Clause, it will propose them for the Standing Committee's consideration.

IV. Minutes of the Fall 2011 Meeting

The Reporter's draft of the minutes of the Committee's Fall 2014 meeting is attached to this report. These minutes have not yet been approved by the Committee.

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Advisory Committee on Evidence Rules

Draft Minutes of the Meeting of October 24, 2014

Durham, North Carolina

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on October 24, 2014, at Duke University School of Law.

The following members of the Committee were present:

Hon. William K. Sessions, Chair
Hon. Brent R. Appel
Hon. Debra Ann Livingston
Hon. John T. Marten
Hon. John A. Woodcock, Jr.
Daniel P. Collins, Esq.
Paul Shechtman, Esq.
Elizabeth J. Shapiro, Esq., Department of Justice
A.J. Kramer, Esq., Public Defender

Also present were:

Hon. Sidney A. Fitzwater, Former Chair of the Committee
Hon. Richard Wesley, Liaison from the Committee on Rules of Practice and Procedure
Professor Daniel J. Capra, Reporter to the Committee
Professor Kenneth S. Broun, Consultant to the Committee
Catherine R. Borden, Esq., Federal Judicial Center
Jonathan C. Rose, Chief, Rules Committee Support Office
Julie Wilson, Rules Committee Support Office
John K. Rabiej, Duke University Law School
David Levi, Dean, Duke University Law School
Donald Beskind, Duke University Law School

I. Opening Business

Welcoming Remarks

Judge Sessions welcomed everyone to the Committee meeting. He noted that it was his first meeting as Chair, and that he was grateful to the outgoing Chair, Judge Fitzwater, for doing so much to assure a smooth transition. He expressed his appreciation to Duke Law School, and especially to Dean David Levi and John Rabiej, for hosting the Committee.

Approval of Minutes

The minutes of the Spring 2014 Committee meeting were approved.

New Members

Judge Sessions introduced and welcomed the new Committee members, Judge Marten of the District of Kansas, and Daniel Collins, Esq., partner in the law firm of Munger, Tolles & Olsen.

Tribute to Judge Fitzwater

The Committee gave a well-deserved tribute to Judge Fitzwater, the departing Chair. The Reporter commented that Judge Fitzwater led the Committee with brilliance, dignity and grace, and that it was his guidance that let the Committee to sponsor three important Symposia — on the Restyling effort, Rule 502, and electronic evidence. The proceedings from all three Symposia have been published in law reviews, and the Electronic Evidence Symposium helped the Committee to establish its agenda for the current meeting and meetings going forward. The Reporter also noted that it was Judge Fitzwater who crafted the language for the amendment to Rule 801(d)(1)(A) that solved the problems that some had raised with the initial draft of the rule, and that led to the passage of the rule. Judge Sessions complimented Judge Fitzwater for his remarkable contributions to the rulemaking process and for his stellar qualities as a person and a leader.

Judge Fitzwater spoke and stated that being the Chair of the Evidence Rules Committee was the "best job" he ever had. He emphasized the importance of the Committee's work and the brilliance and dedication of members of the Committee, who were "the best and the brightest.". He thanked the AO staff for their dedicated efforts on behalf of the Committee. Judge Fitzwater noted that he had worked with the Reporter on the egovernment project when he was a member of the Standing Committee and that he and the Reporter continued that productive partnership while working on the Evidence Committee. He complimented the Reporter for his efforts for the Committee. Finally, Judge Fitzwater stated that Judge Sessions was an outstanding selection for the new Chair, and that the appointment of a person as accomplished as Judge Sessions was a tribute to the Evidence Rules Committee and the importance of its work.

June Meeting of the Standing Committee

Judge Fitzwater reported on the January meeting of the Standing Committee. The Evidence Rules Committee presented no action items at the meeting. Judge Fitzwater reported to the Standing Committee on the Electronic Evidence Symposium held in April 2014, and told the Standing Committee that the Evidence Committee's agenda in the future would be influenced by the ideas expressed at the Symposium.

II. Possible Amendment to Rule 803(16)

Rule 803(16) provides a hearsay exception for "ancient documents." If a document is more than 20 years old and appears authentic, it is admissible for the truth of its contents. At the Spring meeting, the Committee considered the Reporter's memorandum raising the possibility that Rule 803(16) should be amended because of the development of electronically stored information. The rationale for the exception has always been questionable, for the simple reason that a document does not become reliable just because it is old; and a document does not magically become reliable enough to escape the rule against hearsay on the day it turns 20. The Reporter's memorandum noted that the exception has been tolerated because it has been used so infrequently, and usually because there is no other evidence on point. But if it is the case that electronically stored information can easily be retained for more than 20 years, it is then possible that the ancient documents exception will be used much more frequently in the coming years. And it could be used to admit only unreliable hearsay, because if the hearsay is in fact reliable it will probably be admissible under other reliability-based exceptions, such as the business records exception. Moreover, the need for an ancient documents exception is questionable as applied to ESI, for the very reason that there may well be a lot of *reliable* electronic data available to prove any dispute of fact.

The Reporter prepared three possible alternatives for amending the Rule: 1) abrogation; 2) limiting the rule to hardcopy; and 3) adding the necessity-based language from the residual exception, so that information could not be admitted under Rule 803(16) unless the proponent could show that it was more probative than any other reasonably available evidence that could be admitted under one of the reliability-based exceptions.

Committee members at the Spring meeting expressed interest in a proposed amendment but asked the Reporter to provide more information on the factual premises supporting the change — specifically, whether ESI that is more than 20 years old is and will be widespread (as opposed to deleted), and whether it is easily retrievable.

At the Fall meeting, the Reporter prepared a detailed memo indicating that old ESI in fact is and will become even more prevalent, and that much of it is easily retrievable. Examples include the materials from every posted web page, which can easily be found on and retrieved from the

Internet Archive; personal emails, texts, and social media postings; information in cloud storage; and databases of old books and public documents.

At the Fall meeting, Committee members unanimously agreed that Rule 803(16) was problematic, as it was based on the false premise that authenticity of a document means that the assertions in the document are reliable — this is patently not the case. The Committee also unanimously agreed that an amendment would be necessary to prevent the ancient documents exception from providing a loophole to admit large amounts of old, unreliable ESI. But the Committee was divided on two matters: 1) whether an amendment was necessary at this point, given the fact that no reported cases have been found in which old ESI has been admitted under the ancient documents exception; and 2) which alternative for amendment should be chosen.

On the first question of whether an amendment is necessary at this point: Some members argued that the obscurity of the ancient documents exception will not last now that ESI either has reached or is reaching the 20-year-old point. They noted that litigation incentives will be bound to lead to proffers of old, unreliable ESI that could not be admitted under any other exception. As one member stated, "this is a time bomb." But others, including the DOJ representative (after speaking with others at the Department) thought it appropriate to wait and monitor developments; the worst that could happen is that there would be a period of time in which old ESI would be admitted before an amendment would take effect. Another member observed that the time period required for admissibility provided at least some protection against widespread abuse, as it is unusual that a document more than 20 years old will be useful in a litigation; thus the risks involved in waiting were not overwhelming. But another member noted that especially in criminal cases, where statutes of limitation have been lengthened as to many crimes, the risk of admitting old and unreliable ESI was quite real — especially user-sourced information such as texts, tweets and social media postings. Another member stated that if the rule is wrong, something should be done about it — there is no reason to wait and have a rule that is wrong on the merits remain on the books.

Finally, members, as well as Judge Fitzwater, noted that in any case the proposal should be held up until it could be packaged with other amendments.

On the second question of which alternative to adopt: A number of Committee members felt that the rule should just be abrogated, as it is based on a fundamentally flawed premise that authenticity of a document means that its contents are reliable. One member argued that the exception was especially pernicious because if unreliable hearsay is admitted, it will be especially hard to rebut after the passage of so much time. Another member stated that if the Committee were drafting the rules from scratch, it should not propose an ancient documents exception, but that abrogating an exception was a somewhat radical step.

One member preferred the proposal that would distinguish between paper documents and ESI. That member worried about the growing volume of ESI that is in fixed form, and noted that people don't stockpile paper the way they stockpile ESI. But other members noted that there might be a problem in distinguishing between ESI and paper. For example, why is a printout of a

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newspaper article on a website any different from the hardcopy of the newspaper? What rule would apply to a scan of an old hardcopy document?

One member suggested that the necessity-based alternative was preferable because abrogation seems extreme and it is appropriate to leave the matter of admissibility to the judge, with the instruction that the judge should be more careful in admitting old and potentially unreliable information. The necessity-based model is just telling the judge to be more careful.

Another member suggested yet another alternative, in the nature of burden-shifting. Under this alternative, hearsay could be admitted under the ancient documents exception unless the opponent could show that it was untrustworthy. The Reporter noted that this alternative could be effectuated by importing the untrustworthiness clause of the business records exception (Rule 803(6)) into the ancient documents exception. Another member argued, however, that this alternative would not be sufficiently protective, because with ancient documents, the very problem is that they are so old that it will be difficult to prove their untrustworthiness.

The Committee ultimately determined to revisit the proposed amendment to Rule 803(16) at the next meeting. The Reporter was directed to work up a formal proposal for each of the alternatives discussed. If the Committee decides to propose any amendments to other rules at that time, then any proposed change to Rule 803(16) might be part of a package.

III. Possible Addition of Hearsay Exceptions for Recent Perceptions (eHearsay)

At the Advisory Committee's Symposium on Electronic Evidence, Professor Jeffrey Bellin proposed amending the Evidence Rules to add two new hearsay exceptions: one to Rule 804(b), which is the category for hearsay exceptions applicable only when the declarant is unavailable to testify; the other to Rule 801(d)(1), for certain hearsay statements made by testifying witnesses. Both exceptions are intended to address the phenomenon of electronic communication by way of text message, tweet, Facebook post, etc. Professor Bellin contended that the existing hearsay exceptions, written before these kinds of electronic communications were contemplated, are an ill-fit for them and will result in many important and reliable electronic communications being excluded.

To solve the perceived problem, Professor Bellin proposed a modified version of the hearsay exception for recent perceptions --- an exception that the original Advisory Committee approved but which was rejected by Congress. Professor Bellin contended that the proposal will allow most of the important and reliable tweets and texts to be admitted, while retaining sufficient reliability guarantees that will exclude the most suspect of this category of statements. And he contended that the proposal fits well within evidentiary doctrine because it derives from a hearsay exception that the Advisory Committee approved --- an exception that though rejected by Congress has actually been adopted and applied in a handful of states.

The Committee considered the recent perceptions proposal at the Fall meeting. Preliminarily, there was general agreement that one part of the proposal — amending Rule 801(d)(1) to add an exception for recent perceptions — should not be adopted. The Committee was concerned that admitting prior statements of a testifying witness, on the ground that they are based on a recent perception, would create problems in integrating with the other Rule 801(d)(1) exceptions. For example, the amendment would allow certain prior inconsistent statements to be admitted substantively even though they would not be admissible under the constraints imposed by Congress in Rule 801(1)(d)(1)(A) — the rule allowing only prior inconsistent statements made under oath to be admissible for their truth. The rule would also allow certain prior consistent statements to be admitted substantively even though they would not be admissible under the recently amended Rule 801(d)(1)(B). Moreover, the recent perceptions exception adopted by the original Advisory Committee was addressed to situations in which the declarant was unavailable. The Committee was not convinced that the reasons for admitting a recent perceptions statement when the declarant was unavailable were equally applicable to situations in which the witness *was* available for cross-examination.

The Reporter proposed that if the Committee were interested in revisiting the entire category of hearsay exceptions for prior statements of testifying witnesses, then he would provide the Committee with the necessary background for a systematic review of the subject at a future meeting. That review would include consideration of whether prior statements of testifying witnesses ought to be defined as hearsay in the first place, given the fact that by definition the person who made the statement is subject to cross-examination about it. The Committee agreed that a systematic review of the entire category of prior statements of testifying witnesses would be preferable to adding another hearsay exception to that category without working through how it might affect the other exceptions.

The Committee then turned its attention to the proposal to add a recent perceptions exception to Rule 804. One member found that the requirements that Professor Bellin proposed to add to the original Advisory Committee proposal were problematic. For example, Professor Bellin proposed to limit the exception to “communications” rather than any statement; but this member found that distinction to be unwarranted because private statements can be just as reliable, or unreliable, as communications. Thus the distinction resulted in line-drawing without any payoff in terms of differentiating reliability. This member concluded that if an exception for recent perceptions were found appropriate, then the Committee should propose the exception as it was proposed to Congress in the 1970's. As to that proposal, he wondered whether there should be deference to the Congressional decision to reject the proposed amendment back then.

On the question of deference, another member responded that times had changed since the 1970's, most particularly in the explosion of electronic communications such as texts, tweets, and Facebook status updates. If the proposed exception covers the most reliable of those statements — and those statements would not otherwise be covered by the existing exceptions — then that would be sufficient justification for revisiting the recent perceptions exception as the Advisory Committee had proposed it, to be revised as necessary.

Professor Broun, the consultant to the Committee, then reported on the research he had done into how the recent perceptions exception had been applied in the few states that had adopted it. His review of the reported case law led to the following conclusions: 1) the exceptions had not been subject to widespread abuse and in fact had been used relatively infrequently — most often in cases involving domestic abuse; 2) in many of the cases in which the exception was used, the hearsay statement might well have been admitted as a present sense impression or an excited utterance; 3) that said, the exception had been usefully applied in a number of cases where the statement was made a few hours or more after the event — more than would be permitted under the present sense impression exception — but appeared to be reliable under the circumstances.

Professor Broun acknowledged that a review of reported decisions does not provide a completely accurate account of how the exception is working, because the real work on the exception is done in trial courts, and a trial court's evidentiary rulings either admitting or rejecting the proffered hearsay are unlikely to be reviewed. A Committee member suggested that if the Committee decided to continue its work on the amendment, then it might be useful to call prosecutors and other litigators in the states using the exception to see how it has affected their practice.

Several members then expressed the concern that a recent perceptions exception would lead to the admission of unreliable evidence. One member noted that a written text or tweet might be difficult to interpret, given the lack of context that would exist with an oral communication. That member also noted that the more time that passes between the event and the statement, the more likely it is that the person who sends the text or tweet is relying not only on his own personal knowledge but also the texts or tweets of others about the event. Thus there is a risk that electronic communications well after the event are the result of crowdsourcing without any guarantee of reliability. Moreover, the nature of text messages and tweets is that they often describe an event that can't be verified as having occurred. This member suggested that if recent-but-not immediate statements are in fact reliable, they could be admitted under the residual exception. This member suggested that the residual exception might be more appropriate because it would focus the judge directly on questions of reliability — perhaps more effectively than the categorical requirements of a new exception.

Another member, in response, argued that the problem of determining whether a person who sends a text is relying on his personal knowledge as opposed to crowdsourcing is a question of foundation — adopting a recent perceptions exception would not mean that all statements made recently after an event would be admissible automatically, because the proponent would also have to establish a foundation of personal knowledge. This member also stated that the residual exception solution is problematic because the residual exception was intended to be used in only rare and exception circumstances; it would not be appropriate to essentially create a new exception for reliable texts and tweets in the residual exception, as that would lead to unpredictability and too much judicial discretion.

Another member contended that to the extent the recent perceptions exception was intended

to expand admissibility of personal electronic communications, it would lead to the collateral cost of more disputes on authenticity. Questions would abound on whether a particular text or tweet was actually made by a particular person. While courts are of course already deciding authenticity questions presented by electronic evidence, a new exception embracing this evidence would raise more authenticity questions.

Both the public defender and the DOJ representative reported that an informal survey of their respective constituencies indicated uniform opposition to a proposed exception for recent perceptions. The public defender found no shortage of hearsay being introduced in a criminal trial, particularly under the broad exception for coconspirator statements. He contended that there was no need for another potentially broad exception that would admit texts and posts made so far after the event that memory has faded. He argued that experience shows that texts and other electronic personal communications can be quite unreliable, and unverified. The DOJ representative reported that the prosecutors and bureau chiefs she had contacted were opposed to the exception because it might open up a Pandora's box, and that they had found no problem in admitting reliable hearsay under the existing exceptions.

Other members expressed concern that with all the volume of potentially low quality material being produced by text and tweet — with information misreported and then those misreports widely distributed.

Ultimately, the Committee decided not to proceed on Professor Bellin's proposal to add a recent perceptions exception to Rule 804. It did not reject a possible reconsideration of a recent perceptions exception, however. The Committee asked the Reporter and Professor Broun to monitor both federal and state case law to see how personal electronic communications are being treated in the courts. Are there reliable statements being excluded? Are such statements being admitted but only through misinterpretation of existing exceptions, or overuse of the residual exception? The Reporter also suggested that he could go back to the original Advisory Committee proposal for recent perceptions and try to refine it for consideration by the Committee at the next meeting. The Committee agreed with the Reporter's suggestion. The Committee resolved to continue its consideration of a recent perceptions exception at the next meeting.

IV. Proposal to Amend Rules 901 and 902 to Provide Specific Grounds for Authenticating Certain Electronic Evidence

At the Electronic Evidence Symposium in April, Greg Joseph made a presentation intended to generate discussion about whether standards could be added to Rules 901 to 902 that would specifically treat authentication of electronic evidence. There are dozens of reported cases, both Federal and State, that set forth standards for authenticating electronic evidence. These cases apply the existing, flexible provisions on authenticity currently found in Federal Rules 901 and 902 and their state counterparts. Greg crafted specialized authenticity rules to cover email, website evidence

and texts; these draft rules are intended to codify the case law, as indicated by the extensive footnoted authority that Greg provided. Greg suggested that analogous standards could be set up for other forms of electronic evidence such as online chats.

At the Fall meeting, the Committee reviewed the draft rules to determine whether to propose them, along with any revisions, as amendments to Rule 901 and 902. One member noted that the proposed rule on emails had been adapted from Rule 901(b)(6), governing authentication of phone calls. He argued that the telephone rule was different at least in part because the major purpose of that rule was to establish who it was that answered the call; in the email situation, there is rarely a question of who received the email. Another member noted that the question of receipt of an email is not really about authenticity but rather about a presumption, that something properly sent is received.

One member argued that the proposal was a very helpful compendium of factors that might go into the authenticity question, but that it was too detailed for a rule. In many cases, none of the details in the proposal would actually be applicable, because the evidence could be authenticated in a simpler manner. He noted that the telephone rule itself was not detailed — it did not lay out all the factors that could ever be relevant to the authenticity question.

Another Committee member noted that listing authenticity factors in a rule might lose sight of the point that the factors must be weighed in each individual case, and that some factors might weigh more in some cases than others. That weighing process cannot be encapsulated easily in a rule. Other Committee members noted that the deliberate nature of the rulemaking process raises the danger that specifically stated grounds of authenticity for electronic evidence will be outmoded before they are even enacted. Such rules would probably have to be constantly amended to keep up with technology — which does not appear to be a problem with the flexible and broadly stated standards in the existing rules.

Another Committee member observed that none of the other Evidence Rules provide a list of factors that are relevant in determining whether an admissibility requirement is met — much less text that would provide the court guidance on how to weigh those factors. And while such guidance might once have been provided in a Committee Note — such as the Committee Note to the 2000 amendment to Rule 702 — the Standing Committee has recently discouraged the use of Committee Notes to provide significant detail that is not covered by the text.

In the end, the Committee determined that it would not proceed at this time with a rule amendment that would provide guidance on how to establish the authenticity of electronic evidence. But Committee members unanimously determined that the Committee could provide significant assistance to courts and litigants in negotiating the difficulties of authenticating electronic evidence, by preparing and publishing a best practices manual —along the lines of the work done by Greg Joseph in footnoting the support for his draft amendments. A best practices manual could be amended as necessary, avoiding the problem of having to amend rules to keep up with technological changes. It could include copious citations, which a rule could not. And it could be set forth in any

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number of formats, such as draft rules with comments, or all text with no rule.

The Committee directed the Reporter to prepare a memorandum on how a best practices manual on authentication of electronic evidence might be developed and prepared. The Reporter will provide a sample format on one or more types of electronic evidence. Once the best practices manual is prepared and approved, the Committee will determine (after consultation with the Standing Committee) on the best way to have it published, whether under the auspices of the Committee or with some other designation.

Finally, the Committee considered, and rejected, a possible amendment to Rule 901 that would provide that production of an item in an action would constitute authentication of that item. The Reporter noted that the courts were divided on whether production equals authentication, and that it could be argued that the act of production of an item in discovery is tantamount to saying that the item is what the producer says it is. But several members of the Committee argued that a party to a litigation might produce a document knowing that it is inauthentic, e.g., a forged check. Thus it would be overbroad to conclude that all production concedes authenticity.

V. Proposed Amendment to Rule 902 to Allow Certification of Authenticity of Certain Electronic Evidence

At the Electronic Evidence Symposium in April, John Haried made a proposal for two additions to Rule 902, the provision on self-authentication. The first would allow self-authentication of machine-generated information, upon a submission of a certificate prepared by a qualified person. The second proposal would provide a similar certification procedure for a copy of an electronic device, media or file by its "hash value" or other indication of reliability. These proposals are analogous to Rule 902(11) of the Federal Rules of Evidence, which permits a foundation witness to establish the authenticity and admissibility of business records by way of certification.

The proposals have a common goal of making authentication easier for certain kinds of electronic evidence that are, under current law, likely to be authenticated under Rule 901 but only by calling a witness to testify to authenticity. Mr. Haried argued that the types of electronic evidence covered by the two rules are rarely the subject of a legitimate authenticity dispute but that the proponent is nonetheless forced to produce an authentication witness, often at great expense and inconvenience --- and often, at the last minute, opposing counsel ends up stipulating to authenticity in any event.

The self-authentication proposals, by following Rule 902(11)'s provision covering business records, essentially leave the burden of going forward on authenticity questions to the opponent of the evidence. Under Rule 902(11), a business record is authenticated by a certificate, but the opponent is given "a fair opportunity" to challenge both the certificate and the underlying record.

The proposals for a new Rule 902(13) and 902(14) would have the same effect of shifting to the opponent the burden of going forward (not the burden of proof) on authenticity disputes.

The Committee engaged in discussion on the certification proposals. Members uniformly agreed that it would be useful to promote rules that would make the process of proving authenticity for electronic evidence simpler, cheaper, and more efficient. Many Committee members remarked on the unnecessary expense, in the current practice, of having to call a witness to authenticate a web page or other machine-produced evidence, when it ordinarily ends up that the witness is not cross-examined or that authenticity is stipulated at the last minute.

Discussion indicated three concerns about the proposal. First, in a criminal case, would admission of the certificates under the proposed rules violate the defendant's right to confrontation? As to this question, the Reporter commented that the Supreme Court has stated in *Melendez-Diaz v. Massachusetts* that admitting a certificate prepared for litigation does not violate the right to confrontation if the certificate does nothing more than authenticate another document or item of evidence. The Reporter also stated that the lower courts had uniformly held that certificates prepared under Rule 902(11) do not violate the right to confrontation, relying on the Supreme Court's statement in *Melendez-Diaz.* The problem with the affidavit found testimonial in *Melendez-Diaz* was that it certified the accuracy of a drug test that was itself prepared for purposes of litigation. The certificates that would be prepared under proposed Rules 902(13) and (14) would not be certifying the accuracy of any contents or any factual assertions. They would only be certifying that the evidence to be introduced was generated by the machine (Rule 902(13)) or is a copy of the original (Rule 902(14)).

One Committee member observed that any constitutional concern about the certification provisions would be satisfied by including a notice-and-demand provision in each of the proposed rules. Under a notice-and-demand provision, the government would provide pretrial notice of the intent to use the certification process, and authentication could then be proved by certificate unless the defendant timely demanded production of the foundation witness. But after consideration, the Committee unanimously determined that a notice-and-demand provision was unnecessary. Such provisions cure confrontation concerns because they are a means of obtaining a waiver of the defendant's confrontation rights — a means approved by the Supreme Court in *Melendez-Diaz.* But because the certification process itself does not appear to raise confrontation concerns (as all that is being done is certifying authenticity) there is no reason to provide for the notice-and-demand procedure. Moreover, adding a notice-and-demand procedure to proposed Rules 902(13) and (14) would raise a question about why similar provisions are not added to the rules permitting certification of business records in criminal cases: Rule 902(11) for domestic records and 18 U.S.C. § 3505 for foreign records.

The second expressed concern about the proposed certification provisions was related to the first: any proposed Rule would have to clarify that all that the certification is doing is establishing that the proffered evidence is authentic. That is, there can be no certification about the accuracy of the underlying information in the proffered item. Thus, when Rule 902(13) provides for certification of authenticity for records generated "by a process or system that produces an accurate result" the

certification would not mean that the specific results were indisputably reliable, only that the system described in the certificate produced the item that is authenticated. Similarly, a certificate offered as proof of authenticity of a web page does not dispose of a hearsay exception with respect to the content of the webpage. And a certification that the proffered item is a copy of the hard drive from the defendant's computer does not alleviate the government from having to prove that the defendant is the one who downloaded the information onto the original harddrive. Committee members resolved that the necessary clarification about the limits of the certification proposals should be set forth in the Committee Notes to the proposed rules.

The final expressed concern was about proposed Rule 902(14) specifically. That proposal would permit authentication of a copy of an electronic device or storage medium by way of certification where the copy is shown to be authentic by its "hash value or a similar process of digital identification." Committee members concluded that the use of the term "hash value" was problematic because that term would be unknown to many people, and more importantly it could become outmoded by technological advances. The Committee unanimously agreed that the proposal should be changed to allow certification of authenticity of a copy that is found to be authentic by a "process of digital identification."

The Committee unanimously determined to proceed with drafting a formal amendment and Committee Note for proposed Rules 902(13) and (14), for consideration at the Spring 2015 meeting. The Reporter was directed to prepare language to the Committee Note that would specifically address any concern that certification of a copy of on electronic device or storage medium might be misused as certification of content, or as proof of any underlying connection between the defendant and the item in a criminal case.

VI. *Crawford* Developments

The Reporter provided the Committee with a case digest and commentary on all federal circuit cases discussing *Crawford v. Washington* and its progeny. The cases are grouped by subject matter. The goal of the digest is to allow the Committee to keep apprised of developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions.

The Reporter's memorandum noted that the law of Confrontation continued to remain in flux. The Supreme Court has denied certiorari in a number of cases raising the question about the meaning of the Supreme Court's muddled decision in *Williams v. Illinois*: meaning that courts are still trying to work through how and when it is permissible for an expert to testify on the basis of testimonial hearsay. Moreover, the Supreme Court has recently granted certiorari to review whether statements made by a victim of abuse to a teacher are testimonial, when the teacher is statutorily required to report such statements. The Court's activity, and the uncertainty created by *Williams* and other decisions, suggests that it is not appropriate at this point to consider any amendment to the Evidence Rules to deal with Confrontation issues. The Committee resolved to continue monitoring

developments on the relationship between the Federal Rules of Evidence and the accused's right to confrontation.

VI. Next Meeting

The Spring 2015 meeting of the Committee is scheduled for Friday, April 17 at Fordham Law School.

Respectfully submitted,

Daniel J. Capra

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

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CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

TO: **Hon. Jeffrey S. Sutton, Chair**
Committee on Rules of Practice and Procedure

FROM: **Hon. Michael A. Chagares, Chair**
Inter-Committee CM/ECF Subcommittee

RE: **Report to the Standing Committee**

DATE: **November 30, 2014**

The CM/ECF Subcommittee (the "Subcommittee") continues to develop and monitor a number of proposals for changes to the national rules to accommodate electronic case filing. What follows is a short description of the status of those changes. A more complete discussion can be found in the minutes of the Fall meetings of the respective Advisory Committees.

1. Abrogation of the Three-Day Rule as Applied to Electronic Service

The Subcommittee had previously determined that the rules adding three days to the time required to take action after receiving electronic service should be abrogated. The rules to be amended are Appellate Rule 26(c), Bankruptcy Rule 9006, Civil Rule 6 and Criminal Rule 45. The Subcommittee had previously developed — with the assistance of the Reporters to the Advisory Committees — a template that would provide a uniform approach for these changes. This template had to be adjusted to accommodate special concerns in the Appellate Rules. The respective Committee Notes to the proposed amendments were prepared through a collective effort by the Reporters and are uniform to the extent possible. The proposed amendments have been released for public comment. The Subcommittee will review the public comments after the comment period is over, and work with the Advisory Committees to prepare the amendments for final approval.

125-010368

2. Electronic Signatures

The Subcommittee has previously reported on suggestions it made regarding the proposed amendment to Bankruptcy Rule 5005, covering signatures on documents filed electronically. That proposal provided that (A) the username and password of a filing user would serve as that individual's signature on any electronically filed document, and (B) a scanned signature of a non-filing user would be considered a valid signature without any requirement that the filing user retain the original signature. After public comment, the Bankruptcy Committee withdrew the proposed amendment.

In light of the rejection of the proposed amendment, the Subcommittee has considered whether there was any further work to be done on the subject matter of electronic signatures. The Subcommittee noted that local rules now govern the use of electronic signatures. Most of the district and bankruptcy courts have local rules that track the model rules on electronic filing that have been promulgated by CACM and the Judicial Conference; but there are some differences in the local rules with respect to such details as retention requirements of wet signatures and whether to use an s/slash as opposed to a scanned signature. The question is whether it would be useful to propose national rules to provide for uniformity regarding the use of electronic signatures. But the concern is that any national rulemaking could end up being overrun by advances in technology — for example a move from electronic signatures to more high tech means of "signing" documents. Moreover, a nationwide solution may not be ideal because technological capabilities and customs may vary among the districts.

The Subcommittee has obtained the assistance of the Administrative Office, which conducted a survey on the local rules regarding signatures for electronically filed documents. That survey is attached to this Report. The survey indicates that, in general, there is uniformity among the local rules in providing that the use of the log-in and password of a Filing User constitutes a signature. There is some variation among the districts with regard to what constitutes the signature of a non-attorney, but most require the Filing User to obtain the ink signature of the signatory, then electronically file the document with a "/s/" and retain the wet signature. The Subcommittee will consider whether to make any recommendations for a national rule in light of these findings.

3. Civil and Criminal Rules Requiring Electronic Filing

The Subcommittee previously recommended that the Civil and Criminal Rules Committees should consider whether to amend their rules regarding electronic filing. Currently Civil Rule 5(d)(3) and Criminal Rule 49(e) both provide that a court "may, by local rule, allow" electronic filing. The question of a mandatory filing rule was considered by those Committees at their respective Fall meetings. The proposal for mandatory electronic filing, subject to appropriate exceptions, remains a work in progress. The Civil Rules Committee is also considering the possibility of amending Rule 5(b)(2)(E) to allow electronic service without requiring consent of the party served, and Rule 5(d)(1) to provide that a notice of electronic filing generated by the court's filing system would constitute a certificate of service. (Any change to Rule 5 on issues of service will automatically apply to the

Bankruptcy Rules). Also, the Appellate Rules Committee is now considering proposed amendments that would require electronic filing and permit electronic service (both subject to exceptions), as well as a proposal to eliminate the certificate of service requirement where all parties were served by means of the notice of docket activity in CM/ECF. The Subcommittee will continue to monitor, assist, and integrate if possible the efforts of the Advisory Committees on issues of electronic filing and service.

4. Consideration of a Uniform Approach to Amending Rules to Accommodate Electronic Filing and Information.

The Subcommittee has prepared, for discussion purposes, a template that might be used to provide a "universal fix" for language in the current rules that does not appear to accommodate electronic filing and information. That template is as follows:

Information in Electronic Form and Action by Electronic Means

a) **Information in Electronic Form:** In these rules, [unless otherwise provided] a reference to information in written form includes electronically stored information.

b) **Action by Electronic Means:** In these rules, [unless otherwise provided] any action that can or must be completed by filing or sending paper may also be accomplished by electronic means [that are consistent with any technical standards established by the Judicial Conference of the United States].

After discussion, the Subcommittee determined that a universal fix for electronic *information* is probably more viable than a fix for electronic *action.* But both fixes require careful consideration of necessary exceptions. Moreover, it may well be that certain actions might be universally electronic or nearly so and could be subject to an amendment of a particular rule — as opposed to a universal fix.

The template was on the agenda for the Fall meetings of the Appellate, Bankruptcy, Civil and Criminal Advisory Committees. (Subdivision (a) of the template is already incorporated into the Evidence Rules, and the Evidence Rules Committee has determined that a provision covering electronic actions is unnecessary in the Evidence Rules as those rules pertain to admissibility and not filing, submitting, etc.). The Bankruptcy and Criminal Rules Committees have submitted the template to subcommittees for further study. The Appellate Rules Committee expressed interest in subdivision (a), but concluded that equating paper and electronic actions would not be appropriate at this time. The Civil Rules Committee decided that it would not proceed any further with a universal fix at this time.

The Subcommittee will discuss these developments with the Reporters of the Advisory Committees and determine whether any kind of trans-rules proposal to equate paper with information in electronic form remains viable.

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APPENDIX

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MEMORANDUM

TO: Professor Daniel J. Capra
Reporter to the Intercommittee CM/ECF Subcommittee

FROM: Julie Wilson
Bridget Healy

DATE: November 10, 2014

RE: Survey of Electronic Signature Provisions Among the Federal Districts

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I. Introduction

This memorandum is in response to the Subcommittee's request that the Rules Office conduct a survey of each federal district's local rules—including bankruptcy rules—for provisions on electronic signatures. Specifically, the Subcommittee asked for the following information:

1. Filing Users. Whether there are any variations to the "default rule" that registering as a CM/ECF user and filing is deemed a signature.
2. Non-Filing Users (i.e., a person who is not a Filer).
   a. Whether the local rules provide for an "/s/" or do they instead require a scanned signature.
   b. Whether the Filing User is required to retain the Non-Filing User's original signature.
   c. If there is a requirement that the document containing the original signature be retained, for how long.

The accompanying spreadsheets contain information on all 94 federal judicial districts and bankruptcy courts. The spreadsheets indicate (1) where the signature provisions are located

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(*e.g.*, Local Rule, Standing Order, or in the Electronic Procedures Manual); (2) provisions for Filing Users; and (3) provisions for Non-Filing Users.

II. Overview of Survey

A. District Courts

Federal Rule of Civil Procedure 5(d)(3) and Federal Rule of Criminal Procedure 49(e) provide, in part: "A court may, by local rule, allow papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States." However, the location of provisions regarding electronic signatures is not exclusively within the local rules. In fact, there is little uniformity among the federal districts with regard to the location of a district's electronic signature provisions. Among the federal districts, 26 have electronic signature provisions in their local rules. In the remaining districts, the electronic signature provisions are located either in a standing or general order or in the CM/ECF Administrative Procedures Manual. In some districts, the electronic signature provisions are located in more than one of these locations.

Regarding what constitutes a signature, for Filing User's (which most often does not include pro se litigants), the rule in an overwhelming majority of the federal districts is that the Filing User's CM/ECF log-in and password constitute the Filing User's signature. Most districts also have specific signature block requirements that must be included in the electronically filed document.

For Non-Filing Users, the electronic signature provisions address 3 different types of signatories: non-attorneys, criminal defendants, and parties or attorneys other than the Filing User (*e.g.*, a joint stipulation that requires the signatures of all counsel). There is some variation among the districts with regard to what constitutes the signature of a non-attorney, but most

require the Filing User to obtain the ink signature of the signatory and then electronically file the document with a "/s/" (or some variation thereof). Most districts require that a document requiring the signature of a criminal defendant be scanned and filed. With regard to documents requiring multiple signatures, most districts give the Filing User the option to file either a document that includes scanned signatures or a "/s/" (or some variation thereof) for each signatory.

Finally, almost all of the federal districts have provisions requiring the retention of original documents. Most districts also have provisions for challenging the authenticity of a signature.

B. Bankruptcy Courts

Federal Rule of Bankruptcy Procedure 5005(b)(2) applies in bankruptcy courts and provides: "A court may by local rule permit or require documents to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes." For the various bankruptcy courts, the location of provisions regarding electronic signatures is not exclusively the local rules; electronic signature provisions are located in local rules, administrative procedures, and standing or general orders, or sometimes in more than one of these locations.

Regardless of their location, many of the local rules or procedures regarding electronic signatures are based on the Model Rules for Electronic Case Filing that were approved by the Judicial Conference of the United States in 2001 and modified in 2003 (specifically, Model Rule 8 (Signatures) and Model Rule 9 (Retention Requirements)). These local rules or procedures provide that a filer's CM/ECF user name and password constitute an electronic signature and that a "/s/" (or some variation thereof) is to be used on the signature line of the filed document.

In addition, most bankruptcy courts have local rules or procedures that require the filing attorney to preserve original documents bearing the debtor's signature for a specified period of time and the retention periods vary. A few bankruptcy courts do not require retention of the original document so long as the attorney submits a declaration manually signed by the debtor attesting to the truth of the information electronically filed or, in other courts, files a scanned image of the signature page with the debtor's original signature.

In completing the survey of bankruptcy courts' requirements regarding electronic signatures, it was sometimes difficult to find the requirements. While most bankruptcy courts have local rules, administrative procedures or orders dealing with electronic signatures, these were located in varying places on courts' websites. In some cases, additional rules regarding signatures that were relevant to electronic signatures were in the local rules, but not in every case.

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Alabama Middle	No. LR 5.3(b) refers to General Order(s) and the Civil and Criminal Administrative Procedures regarding Electronic Case Filing	Sets forth signature format requirements	Documents which must contain original signatures or which require either verification or an unsworn declaration under any rule or statute, shall be filed electronically with originally executed copies maintained by the filer. The pleading or other document electronically filed shall indicate a signature, e.g., "s/Jane Doe", or the original may be scanned and electronically filed in the ECF System. The filing party or attorney shall retain the hard copy of the document containing the original signatures for 2 years after final resolution of the action. Mulitple signature documents: file either by submitting a scanned document containing all necessary signatures or by certifying within the document that all parties have agreed.	
Alabama Northern	No. LR 5.3 refers to General Order regarding Electronic Case Filing Policies and Procedures http://www.alnd.uscourts.gov/CM-CF/Administrative%20Procedure%20Manuals/Civil%20Administrative%20Procedures%20Manual%206-13.pdf and http://www.alnd.uscourts.gov/CM-CF/Administrative%20Procedure%20Manuals/Criminal%20Administrative%20Procedures%206-13.pdf	Same as M.D. Ala.	Same as M.D. Ala.	

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U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Alabama Southern	No. Standing Order 29 In Re Procedural Rules for Electronic Case Filing (February 25, 2003); Administrative Procedures for Filing, Signing, and Verifying Pleadings and Documents by Electronic Means http://www.alsd.uscourts.gov/documents/forms/AdminPro.pdf	Same as M.D. Ala.	Same as M.D. Ala.	
Alaska	Yes. LR 5.3(d)	Filing constitutes signature	Filing user may sign for a non-registered user by "s/ James Smith for Jane Doe"; must send proof of service to the person whose signature was affixed. All other documents require scanned copy with original signature.	

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U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Arizona	Yes. LR 5.5(g); Administrative Policies & Procedures Manual	Registered User's log-in and password constitute signature	Manual: original signature must be scanned, or in the case of multiple signatories, s/ may be used by filer for other parties with permission. Filer must keep hard copy for the duration of the case.	
Arkansas Eastern	No. LR 5.1 refers to CM/ECF Administrative Manual. Civil: http://www.are.uscourts.gov/sites/are d/files/cvmanual.pdf and Criminal: http://www.are.uscourts.gov/sites/are d/files/crmanual.pdf	Signature block requirements.	Non-Attorneys: filing party or clerk's office scans the original document and files electronically. Mulitple Signatures: Ffiling Attorney shall file the document electronically indicating the signatories, (e.g., "/s/ Jane Doe," "/s/ John Smith," etc.) for each attorney's signature after confirming content of the document with all attorneys	
Arkansas Western	No. LR 5.1 refers to CM/ECF Administrative Manual. General Order 36 (Civil): http://www.arwd.uscourts.gov/sites/ar wd/files/civilfilings_Manual.pdf and General Order 37 (Criminal): http://www.arwd.uscourts.gov/sites/ar wd/files/criminalfilings_Manual.pdf	Signature block requirements.	Non-Attorneys: If the original document requires the signature of a nonattorney, the filing party or the Clerk's office will scan the original document, and then file it on the system electronically. Mulitple Signatures: Filing Attorney shall file the document electronically indicating the signatories, (e.g., "/s/ Jane Doe," "/s/ John Smith," etc.) for each attorney's signature after confirming content of the document with all attornies.	

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
California Central	Yes. L.R. 5-4.3.4	User log-in and password constitute signature; signature block requirements.	Non-Filing Users: original document with signature must be scanned and filed. Attorney must keep original signed document for 1 year following conclusion of the action, including appeals Multiple Signatures: Filing User should file, and use /s/ or digitized signature for other signatories	
California Eastern	Yes. LR 131	User log-in and password constitute signature; signature block requirements.	Non-Filing Users: may use /s/ form, and must retain a signed original for one year after exhaustion of appeals. Mulitple Signature Documents: Filing Attorney may get permission from others and use "/s/ counsel's name (as authorized on __[date]__)." for such documents. May also have original signatures and scan in a signature page as attachement to the filed document. Certain non-attorney signatures in criminal cases can be scanned and filed electronically.	

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U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
California Northern	Yes. L.R. 5-1(i)	User log-in and password constitute signature.	"Other" Signatures: ECF user can file with agreement of all other signatories, and must either keep record of their agreement for a year after the conclusion of final appeal, or scan a signature page with all original signatures and attach it to the electronic filing. Criminal cases: documents requiring defendant's signature or multiple signature must be scanned and filed	
California Southern	No. LR 5.4(f) refers to CM/ECF Administrative Policies and Procedures Manual https://www.casd.uscourts.gov/CMECF/Lists/Policies%20and%20Procedures/Attachments/2/CASDPolicies.pdf. Also Gen. Order 550.	Registered User's log-in and password constitute signature; signature block requirements.	Non-Registered Signatories and Criminial Defendants: file and scan; retain for 5 years. Multiple Signatures: Filer must certify that the content of the document is acceptable to all persons required to sign the document by obtaining either physical signatures or authorization for the electronic signatures of all parties on the document. Physical, facsimile or electronic signatures are permitted.	
Colorado	No. LR 5.1 and LCrR 49.1 refer to Electronic Case Filing Procedures. Civil: http://www.cod.uscourts.gov/Portals/0/Documents/CMECF/ECF-Rev_CP-V-6-0_Final_4-4-14.pdf and Criminal: http://www.cod.uscourts.gov/Portals/0/Documents/CMECF/ECF-Rev_CRIMINAL-FINAL_4-4-14.pdf	User log-in and password constitute signature; signature block requirements.	Required to sign copy in ink, with electronic version filed with "s/." Scanning and filing is discouraged; filer is to maintain original. Mulitple Signature Documents: confirm acceptance of document by all signatories and use s/ signature for each.	

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Connecticut	No. Electronic Filing Policies and Procedures (Standing Order) http://ctd.uscourts.gov/sites/default/files/forms/PPADMIN-ORDER%20rev%2010.10.13.pdf	Login and password constitute signature; signature block requirements.	Other Signatures: counsel may either scan physically signed document, or use s/ for non-filing user and maintain the original signature copy. Criminal Defendants: a document containing the signature of a defendant in a criminal case may be filed either in paper form or in a scanned format that contains an image of the defendant's signature, upon approval by the Court. Multiple Signatures: counsel may file a scanned document with all signatures, a form representing consent of other attorneys on the document, or by filing a document noting the other parties necessary with those parties submitting a notice of endorsement no later than 3 days after the document is filed	

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Delaware	No. LR 5.1 refers to Administrative Procedures Governing Filing and Service by Electronic Means (the "CM/ECF Procedures") http://www.ded.uscourts.gov/sites/default/files/cm-ecf/CMECF-DEAdminProc-Final-101614.pdf	Login and password constitute signature; signature block requirements	Affidavits: Affidavits shall be filed electronically; however, the electronically filed version must contain a "/s/_____" block indicating that the paper document bears an original signature. By submitting such a document, the filing attorney certifies that each of the other signatories has expressly agreed to the form and substance of the document and that the filing attorney has their actual authority to submit the document electronically. The filing attorney shall retain the original for future production, if necessary, for two (2) years after the expiration of the time for filing a timely appeal. Mulitple Signatures: Filer electronically files document with "/s/" for each signatory; 2-year retention requirement.	
District of Columbia	Yes. L.R. 5.4(b)(4)	Use of log-in and password constitutes signature.	No.	Pro se litigants can obtain ECF log-in and password.

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U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Florida Middle	No. CM/ECF Administrative Procedures http://www.flmd.uscourts.gov/CMECF/CM-ECF_ADMINISTRATIVE_PROCEDURES_03-15-07-FINAL.pdf	Signature block requirements.	Other Signatures: If the document requires the signature of a person who is neither an attorney of record nor an authorized pro se filer, the filer or the Clerk shall scan the document with original signatures and then file it electronically. Multiple Signatures: Filiing Attorney must obtain all signatories' signatures and then file electronically with a signature block for each.	No retention requirements.
Florida Northern	Yes. L.R. 5.1(A)(7). Also CM/ECF Attorney User's Guide http://www.flnd.uscourts.gov/attorneys/cmecf/User_Manual/Ch9_Docs_Orig_Signatures_Joint_Filings_Sealed.pdf	Filing User log-in and password constitute signature. Guide specifies signature block requirments.	Guide has provisions, not local rules. Documents that must contain original signatures or require either verification or an unsworn declaration under any rule or statute shall be filed electronically in PDF format. The originally executed paper documents must be maintained by the filer for a period of two years or until the appeal time has expired, whichever is greater. Standard provisions regarding Mulitple Signature documents.	
Florida Southern	No. LR 5.1 refers to CM/ECF Administrative Procedures	User log-in and password constitute signature; signature block requirments.	Documents that require original signatures or that require either a verification or a sworn declaration shall be filed electronically with the original signed document maintainted by the Filer for 1 year. Standard provisions regarding mulitple signature documents.	

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Georgia Middle	No. CM/ECF Administrative Procedures http://www.gamd.uscourts.gov/cm-ecf/Administrative%20Procedures%20Rev05-12.pdf	Participant's log-in and password constitute signature; signature block requirements.	Multiple Signatures: Filer should indicate those with "s/(name)" for each signature; retain records evincing concurrence of signatories 2 years after expiration of the time for filing a timely appeal. Affidavits: Filed electronically and original retained for 2 years. Non-Particpant signatures: Filer must obtain actual signature and scan the original document to file	
Georgia Northern	No. LR 5.1 refers to Standing Order, In Re: Electronic Case Filing and Procedures, as contained in Appendix H	A pleading or other document requiring an attorney's signature shall be signed in the following manner, when filed electronically: "s/ (attorney name) ."	Standard provisions regarding mulitple signature documents. If the original document requires the signature of a non-attorney, the filing party or the Clerk's Office shall scan the original document, then electronically file it on ECF.	No retention language.
Georgia Southern	No. LR 5.5 refers to Administrative Procedures http://www.gasd.uscourts.gov/pdf/EcfProcedures.pdf	Attorney's signature signed in the following manner: "s/(attorney name"; signature block requirements.	Non-Attorney: If the original document requires the signature of a non-attorney, the filing party or the Clerk's Office shall scan the original document, then electronically file it on ECF. Standard provisions regarding multiple signature documents.	No retention language.

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Guam	No. General Order No. 13-0003 http://www.gud.uscourts.gov/sites/default/files/orders/genord13-03.pdf	ECF User's log-in and password constitute signature; signature block requirements.	Non-Parties: original document must be scanned and filed electronically and retained for (2) years after all time periods for appeals expire. Multiple Signatures (civil): standard with 2-year retention requirement. Mulitple Signatures (criminal): Documents requiring signatures of more than one party must be electronically filed by submitting a scanned document containing all necessary signatures in addition to standard provisions	
Hawaii	No. LR 5.3 refers to Administrative Procedures http://www.hid.uscourts.gov/ecf/guides/UserGuide2013_10.pdf	The electronic filing of any document by a Registered Participant shall constitute the signature of that person. Pleadings should indicate the signature by inserting a "/s/(attorney's name)."		
Idaho	No. LR 5.1 refers to ECF Procedures http://www.id.uscourts.gov/Content_Fetcher/index.cfml/ECF_Procedures_1972.pdf?Content_ID=1972	The electronic fiing of a Registered User constitutes signature; signature block requirements.	Provisions for a Registered User to file Verfied Documents; retention requirements. Documents in criminal cases that require certain third-party signatures must be scanned and filed.	

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Illinois Central	Yes. LR 11.4	Log-in and password constitute Electronic Filer's signature.	**Non-Electronic Filers:** Filer must obtain signature of any Non-Filer, redact the original document, and then file redacted document electronically with a "s/(name)"; 1-year retention requirement. **Multiple Signatures**: Where multiple attorney signatures are required, such as on a joint motion or a stipulation, the filing attorney may enter the "s/" of the other attorneys to reflect their agreement.	
Illinois Northern	No. LR 5.2 refers to General Order on Electronic Case Filing or other similar order. General Order 14-0009 http://www.ilnd.uscourts.gov/home/clerksoffice/rules/admin/pdf-orders/General%20Order%2014-0009%20-%20Electronic%20Case%20Filing%20General%20Order%20Redline.pdf	E-Filer's log-in and password constitute signature; signature block requirements.	**Non-Filers:** None. **Multiple Signatures:** E-Filer may file a scanned document with signatures; represent consent of parties on the document; identify on the document whose signature is needed and submit an endorsement no later than 3 days after filing.	No retention language.
Illinois Southern	No. E-Filing Rules http://www.ilsd.uscourts.gov/documents/ECFRules.pdf	Rule 8: Upon registration, Filing Users automatically endorse their electronic signature for purposes of the Local Rules, Federal Rules, etc.	None.	Retention requirements: manually signed original documents must be retained for 5 years after final resolution of the action.

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Indiana Northern	No. LR 5-1(a)refers to CM/ECF User Manual http://www.innd.uscourts.gov/docs/CMECF/User%20Manual.pdf	Attorney's/participant's log-in and password constitute signature. (p.2)	Signatures of those other than Participating Attorney, or for unsworn declarations and those documents requiring verification: Filer files electronically and mainatins original (no time period specified). In criminal cases, such documents must also be filed in paper form with original signature.	
Indiana Southern	Yes. LR 5-7. See also LCrR 49.1	A pleading, motion, brief, or notice filed electronically under an attorney's ECF log-in and password must be signed by that attorney. Can be an "s/."	Non-Attorney Signature: must be an original handwritten signature and must be scanned into .pdf format for electronic filing. Standard provisions for multiple signature documents. LR 5-9 states a 2-year retention period for documents requiring an original signature. Documents requiring signature of criminal defendant must be scanned and filed.	
Iowa Northern	Yes. LR 5.2(h)-(i). Also refers to ECF Procedures Manual http://www.iand.uscourts.gov/e-web/Documents.nsf/0/9F37CD9E4A0332AF862573C000017FDB/$File/ECF+Procedures+Manual+April+17+2013+-+Fillable+Form.pdf	Filer's log-in and password constitutes signature; signature block requirements	**Non-Lawyer Signatures:** Manual states that the signature of a non-lawyer must be scanned and filed. LR 5.2 specifies retention period of (5) years for hard copy of original document signed by non-lawyer after filing of document electronically. **Mulitple Signatures:** standard provisions.	Inconsistencies between LR and Manual. 5-year retention for non-lawyer signed documents in the LR, but the Manual only specifies a time period for documents in criminal cases.
Iowa Southern	Same as N.D. Iowa			

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Kansas	Yes. LR 5.4.8. Civil Administrative Procedures http://www.ksd.uscourts.gov/civil-cases-administrative-procedure-for-filing-signing-and-verifying-pleadings-and-papers-by-electronic-means/ Criminal Administrative Procedures http://www.ksd.uscourts.gov/ecf-administrative-procedures-criminal/	Filing User's log-in and password constitute signature; signature block requirements	Non-Filing User signatures must be filed electronically either as a scanned image or with the signature represented by an "s/" and the name typed in the space where the signature would otherwise appear. Mulitple signature documents must be electronically filed by: (1) submitting a scanned document containing all necessary signatures; (2) representing the consent of the other parties on the document as permitted by the administrative procedure governing multiple signatures; (3) identifying on the document the parties whose signatures are required and by the submission of a notice of endorsement by the other parties no later than 7 days after filing; or (4) in any other manner the court approves.	Differences in LR and Administrative Procedures?

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Kentucky Eastern	No. LR 5.4 directs to General Order 05-03; ECF Manual http://www.kywd.uscourts.gov/sites/kywd/files/court_docs/ECF_User_Manual.pdf	A filing user is an individual who has a court-issued login and password. The user login and password required to submit documents to the Electronic Filing System serve as the Filing User's signature on all electronic documents filed with the court. They serve as a signature for purposes of Fed. R. Civ. P. 11, all other Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Joint Local Rules of this court, and any other purpose for which a signature is required in connection with proceedings before the court. . . . An electronically filed document must include a signature block in compliance with Joint Local Rule 5.2(a), and must set forth the name, address, telephone number, fax number and e-mail address. In addition, the name of the Filing User under whose login and password the document is submitted must be preceded by an "s/" and typed in the space where the signature would otherwise appear. (ECF Manual, p. 11)	No provision per se; however, the ECF Manual states that "A document containing the signature of a defendant in a criminal case shall be electronically filed as a scanned document in PDF format containing an image of the defendant's original signature. The Filing User is required to verify the scanned document is legible before filing it electronically." (ECF Manual, p. 11)	Also, there is a provision for "non-filing signatory or party who disputes the authenticity of an electronically filed document with a non-attorney signature, or the authenticity of the signature on that document" etc. (ECF Manual, pp. 11-12)
Kentucky Western	Same as E.D. Ky.			

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U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Louisiana Eastern	No. LR 5.1 refers to the Administrative Procedures for Electronic Case Filings and Unique Procedures and Practices for Electronic Filings http://www.laed.uscourts.gov/case-information/procedures-and-practices-e-filing	Admin. Procedures R 8: Filing User's log-in and password constitute signature; signature block requirements	Mulitple signature documents must list all the names of other signatories by means of a "s/ [Name of Signatory]" for each. By submitting such a document, the Filing User certifies that each ofthe other signatories has expressly agreed to the form and substance of the document and that the Filing User has the actual authority of each other signatory to submit the document electronically.	
Louisiana Middle	No. LR 5.5 Filing by Electronic Means refers to Administrative Procedures for Filing Electronic Documents http://www.lamd.uscourts.gov/sites/default/files/pdf/adminproceduresciviland criminal%20REVISED%20MAY%202014.pdf	Attorney signatures: user log-in and password constitute signature; signature block requirements.	Non-Attorney signatures, generally: Filing User may scan and file electronically (includes notarized documents); must retain for 1 year after time to appeal expires. Criminal Defendants: may scan and file or file paper copy with original signature. Mulitple signature documents: file the document electronically indicating the signatories, (e.g., “s/Jane Doe,” “s/John Smith,” etc.) for each attorney’s signature or by scanning the document containing the original signatures and uploading the scanned PDF document; 1-year retention requirement	

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U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Louisiana Western	No. LR 5.7.01 refers to Adminstrative Procedures http://www.lawd.uscourts.gov/sites/default/files/UPLOADS/Administrative_Procedures-8th_REVjuly_2013.pdf	The user login and password constitute the User's signature "for all purposes." (LR 5.7.08 Signatures) Signature of filing attorney indicated on document with "/s." Provision for challenging authenticity. Id.	None. However, there are provisions for documents requiring multiple signatures (can submit scanned document or indicate consent by "s/"; retention requirments imposed on the filing attorney. (Administrative Procedures, p. 14)	Provisions for documents requiring signatures of more than one party and retention requirements for the filing attorney. (LR 5.7.08 Signatures) Exceptions to electronic filing: (1) documents filed by pro se litigants; (2) oversized objects or documents and color photographs; (3) documents filed by attorneys exempted by the court for filing in the CM/ECF system. (Administrative Procedures, p. 6) Provisions for challenging authenticity of documents with mulitple signatures or signatures themselves. (Administrative Procedures, p. 14)
Maine	No. But Administrative Procedures Governing the Filing and Service by Electronic Means are incorporated into Appendix IV of the Local Rules	For Attorney Users, the login and password serve as that user's signature. All electronically filed documents must include a signature blick and their name must be preceded aby a "/s/."	None; however, there are provisions for documents requiring multiple signatures. Such documents must list all the names of other signatories, preceded by a "/s/" in the space where the signatures would otherwise appear. Provisions regarding challenges to authenticity as well as retention requirements imposed on the filing attorney.	Attorneys and non-prisoner pro se litigants can register as filing users. Electronic filing is mandatory for attorneys, but optional for pro se litigants. Some types of documents are exempted from ECF requirements and must be filed in paper and then scanned and uploaded by the clerk's office. Some other types of documents are wholesale exempted from ECF.

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Maryland	Yes. LR 102	Filing attorney's login and password constitute signature. Attorneys may, but are not required to, place an electronic signature on documents and papers (i.e., "/s/")	None; however, there are provisions for documents requiring multiple signatures. Such documents must list all the names of other signatories, preceded by a "/s/" in the space where the signatures would otherwise appear. Provisions regarding challenges to authenticity as well as retention requirments imposed on the filing attorney	Some types of cases are exempt from ECF
Massachusetts	No. LR 5.4(B) refers to ECF Administrative Procedures http://www.mad.uscourts.gov/caseinfo/pdf/ECFadminProc.pdf	For Attorney User's, the login and password serve as that user's signature. All electronically filed documents must include a signature blick and their name must be preceded aby a "/s/."	None; however, there are provisions for documents requiring multiple signatures. Such documents must list all the names of other signatories, preceded by a "/s/" in the space where the signatures would otherwise appear. Provisions regarding challenges to authenticity and retention requirements for the filing attorney. There are also provisions regarding affidavits -- the electronically filed version must contain a "/s/ name of signatory" block indicating that the paper document bears an original signature. Retention of 2 years after the expiration of time to appeal. Court will also accept a scanned version of the original, signed document.	Certain documents are exempted from electronic filing; others are categorized as "need not be" filed electronically. (LR 5.4)

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U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Michigan Eastern	No. Electronic Filing Policies and Procedures are an appendix to the local rules http://www.mied.uscourts.gov/CMECF/Policies/policies_procedures.pdf	User login and password seve as the filing user's signature on all papers filed electronically with the Court. (ECF Procedures,R9(a)) Electronically filed paper must include a signature block of the filing user represented by "s/", "/s/" or a scanned signature. (ECF Procedures, R9(b))	A paper containing the signature or a criminal defendant must be scanned and filed by a filing user or court personnel; an affidavit, declaration, or paper containing the signature of a non-attorney must be scanned and filed electronically; a paper requiring signature of more than one party must be filed electronically by submitted scanned paper with all signatures or representing consent with separate signature blocks and "s/ with consent of [name]" (ECF Procedures R9(c)-(e))	
Michigan Western	Yes. LCR 5.7 http://www.miwd.uscourts.gov/sites/miwd/files/local_civil_rule_5_7.pdf; and LCrR 49.10 http://www.miwd.uscourts.gov/sites/miwd/files/local_criminal_rule_49_10.pdf	A registered attorney's use of the assigned login name and password to submit an electronically filed document serves as the registered attorney's signature; must indicate identity with an "s/" signature block. Provisions for signatures of court reporters, judges, court officials and officers, U.S. Marshal, etc. For all, login and password serve as signature. Multiple attorney documents filed with "s/" for each attorney with filing attorney certifying.	Filers who are not registered attorneys, must file paper.	Authenticity may be challenged for mulitple signature documents; retention requirements for the filing attorney.

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U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Minnesota	No. LR 5.1 refers to Electronic Case Filing Procedures Guides http://www.mnd.uscourts.gov/cmecf/reference_guides.shtml	s/ name constitutes signature	Rule regarding non-attorney/third party signatures is that filing attorney must obtain original ink signature of the signatory before filing, and then sign the electronic version with an "s/." The filing attorney then files electronic version; the filing of which certifies that the original is available for inspection. There are also the "standard" provisions for multiple signature documents.	
Mississippi Northern	No. LR 5(c) refers to Administrative Procedures for Electronic Case Filing http://www.msnd.uscourts.gov/sites/msnd/files/forms/Doc_Adm_Proc_ECF_12-1-12.pdf	A pleading or document requiring an attorney's signature will be signed "s/Jane Doe"	All documents which must contain original signatures, other than those of a participating attorney, or which require either verification or an unsworn declaration under any rule or statute, will be filed electronically, with originally executed copies maintained by the filer until all time periods for the appeal have expired	Documents that require signature by two or more attorneys may require a Notice of Endorsement
Mississippi Southern	Same as N.D. Miss.			
Missouri Eastern	No. Administrative Procedures for Case Management/Electronic Case Filing (CM/ECF) http://www.moed.uscourts.gov/sites/default/files/CMECF_AdminProcedures.pdf	The attorney's electronic filing login and password constitutes the signature on that documents for purposes of Fed. R. Civ. P. 11. However, every document must include an attorney signature block and a representation of the filing attorney's signature; a faxcimilie signature can also be submitted.	None. ECF Procedures only refer to filing attorney's signature and no provisions on multiple signatures. Certain types of cases are exempted from electronic filing, including pro se litigants.	Failure to include signature block or faxed copy of signature can result in the document being stricken by the Court.

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Missouri Western	No. General Order (Electronic Filing Procedures) http://www.mow.uscourts.gov/district/rules/go.pdf	Attorney's login and password constitutes the attorney's signature for all purposes. It is preferred that any document containing original signatures indicated on the electronically filed document a signature by "s/Jane Doe." Retention of originally executed copy by filer (2 years). Provisions to disputes authenticity.	None.	
Montana	Yes. LR 11.1	Registered user's log-in and password constitute signature; signature block requirements.	All other signatures must be "hand signatures." When it's a document requring multiple signatures, all must use "/s/" or hand signatures (cannot be a combination).	
Nebraska	Yes. LCR 11.1; LCrR 49.2	User login and password consitute the filer's signature. Pro se litigants can obtain user login and passwords too. Documents that require an attorney's signature must have a signature block and "s/[Name]" and there is a provison to challenge authenticity.	Documents that require a non-attorney's signature, the filer may either scan and upload or electronically file the document with the non attorney signature represented by an "s/" and then retain original signed document. Similar provisions for documents requiring several signatures.	Pro se litigants can be "filers" for ECF purposes
Nevada	No. LR 5-3 states that documents "may be filed and signed by electronic means . . . ." The website contains a "Recommended Best Practices" http://www.nvd.uscourts.gov/CMECFBestPractices.aspx	Filers have a choice of scanning an original signature and filing, or use an "/s/" on the signature line.	None.	

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
New Hampshire	No. But appended to the local rules are Supplemental Rules for Electronic Case Filing http://www.nhd.uscourts.gov/book/export/html/1265	Filing user's log in and password serve as the signature. All electronically filed documents must include a signature block and must set forth the Filing User's name, bar registration number, address, telephone number, and e-mail address. The name of the Filing User under whose log-in and password the document is submitted must be preceded by a "/s/ [Insert Signatory's Name]" and typed in the space where the signature would otherwise appear.	Provisions for mulitple signature documents. For non-filing user signatures, preexisting documents must be filed in a scanned PDF format. Other documents are filed in electronic format and shall contain a "/s/name" block indicating that the paper document bears an original signature.	
New Jersey	Yes. LR 5.2	Username and login constitute signature; documents should also contain a "/s"	None. Pro ses must file paper documents. Standard provisions for documents requiring multiple signatures. Signatures of non-attorneys are scanned and filed; retention requirements	
New Mexico	No. LR 5.2 refers to the CM/ECF Administrative Procedures Manual http://www.nmcourt.fed.us/web/DCDOCS/dcindex.html	Filing constitutes signature; requirments for signature block	Provisions for filing and retention of "verified documents" (e.g., documents requiring a 3rd party signature)	
New York Eastern	No. LR 5.2 states that CM/ECF instructions should be followed			

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U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
New York Northern	No. LR 5.1.1 incorporates General Order #22 http://www.nynd.uscourts.gov/sites/nynd/files/general-ordes/GO22_0.pdf	Attorney login and password constitute signature; signature block requirements	Non-attorney signatures can be scanned and filed, or can contain "/s" with the filing attorney retaining the document. Order also contains provisions for mulitple signature documents as well as ways to challenge authenticity	
New York Southern	No. Electronic Case Filing Rules and Instructions http://www.nysd.uscourts.gov/ecf/ECF%20Rules%20Revision%20031714.pdf	Filing User's log-in and password constitute signature; signature block requirements	Document requiring the signature of a defendant in a criminal case must be a scanned signature; provisions for mulitple signature documents (all scanned signatures or indicate consent of all signatories)	Retention Requirements: Documents that are electronically filed and require original signatures other than that of the Filing User must be maintained in paper form by the Filing User until one year after all time periods for appeals expire, except that affidavits, declarations and proofs of service must be maintained in paper form by the Filing User until five years after all time periods for appeals expire. On request of the Court, the Filing User must provide original documents for review.
New York Western	No. LR 5.1(a) refers to CM/ECF Administrative Procedures Guide http://www.nywd.uscourts.gov/sites/default/files/Administrative%20Guide%20-%20amended%20April%202014_1.pdf	Username and password serve as signature. Pleadings, certificates of service, affidavits, affirmations, and declarations require a signature block.	Non-attorney signatures: if original document requires signtuare, the filing party must obtain the non-attorney's signature on that document, then file the document electronically with an "s/(name)." Provisions regarding challenges to authenticity. For a defendant in a criminal case, the scanned signature must be filed. Standard provisions for multiple signature documents and for retention requirements.	

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
North Carolina Eastern	No. Standing Order 06-PLR-2 (Jan. 30, 2006); Electronic Cae Filing Administrative Policies and Procedures Manual http://www.nced.uscourts.gov/pdfs/cmecfPolicyManual.pdf	¶ 7 states that the electronic filing by a registered user consitutes the signature of that user ; p. 13 of Manual states that user log-in and password constitute an attorney's signature. Signature block requirements (including requirement that criminal defense attorney must state whether appointed or retained).	p. 16 of Manual states that "if the document requires the signature of a non-attorney, the filing party or the cler's office shall scan the original document, then electronically file it." There are also provisions for mulitple signatures (all signatories listed with "/s/" and filing attorney's submission constitutes certification)	
North Carolina Middle	No. Electronic Filing Policies and Procedures Manual http://www.ncmd.uscourts.gov/sites/ncmd/files/ecfprocman.pdf	Attorney login and password constitute signature; signature block requirements	p. 12 of the Manual states that "if the document requires the signature of a non-attorney, the filing party or the Clerk's Office shall scan the original document, and then electronically file it on the system." Retention requirement if an attorney believes the document has "instrinsic value." Standard provisions for mulitple signature documents.	

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
North Carolina Western	No. LR 5.2 authorizes and refers to Administrative Procedures http://www.ncwd.uscourts.gov/ECFDocs/ADMINORDER.pdf	p. 8 of Administrative Procedures states that "a pleading or other document requiring an attorney's signature shall be signed in the following manner, whether filed electronically or submitted on disk to the Clerk's Office: "s/(attorney name)."	p. 8 of Administrative Procedures states that "if the original document requires the signature of a non-attorney, e.g., an affidavit, the filing party shall scan the original document . . .then electronically file it on the System." Retention requirements. Standard provisions for mulitple signature documents. Criminal defendants must sign and the original document is then scanned and filed electronically. Procedures also address Probation Officers and other documents filed in criminal cases requiring the signature of a non-attorney filer.	
North Dakota	No. LR 5.1(A) refers to Administrative Policy Governing Electronic Filing and Service http://www.ndd.uscourts.gov/ecf/cm_ecf_policy.pdf	Attorneys and pro se users - user log-in and password serve as the user's signature; must also have a signature block.	Criminal defendants must actually sign documents requiring their signature. Probation and pretrial services oficers may submit an /s/ if they retain the original signature of a probationer. Standard provisions for mulitple signature documents. Affidavits must be filed electronically and the original retained by the user. Provisions for clerk's office and probation and pretrial services staff: they may use /s/.	

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Northern Mariana Islands	No. LR 5.1a refers to the Administrative Procedures for Electronic Filing and Electronic Service, located in Appendix A	User log-in and password serve as Filing Users signature; must also have a signature block. However, In criminal cases, the charging documents shall have an original signature on paper or an imaged signature.	Documents requiring signature of a non-Filing User are to be filed electronically with a /s/ and the name, with the original retained by the Filing User. May also filed a scanned image of the original document.	
Ohio Northern	No. LR 5.1(b) and LCrR 49.2 refer to Electronic Filing Policies and Procedures Manual, located in Appendix B http://www.ohnd.uscourts.gov/assets/Rules_and_Orders/Local_Civil_Rules/AppendixB.pdf	User log-in and password serve as Filing Users signature; must also have a signature block.	None. Standard provisions for mulitple signature documents	

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Ohio Southern	No. LR 5.1 refers to ECF Manual http://www.ohsd.uscourts.gov/sites/ohsd/files/Electronic%20Filing%20Policies%20and%20Procedures.%202013.0222.pdf; LCrR 49.1 addresses signatures of criminal defendants	Signature block requirement for documents with attorney signatures	LCrR 49.1(b) states that a document containing the signature of a criminal defendant may be filed in either paper form or in a scanned format that contains an image of the defendant's signature. Counsel must retain the signed original. Manual requires that other signaturs in criminal cases (e.g., probation officer, grand jury foreperson) must be scanned and electronically filed. Manual also states that for documents signed by non-attorneys and affidavits, the filing party or clerk's office shall scan the original document and then electronically file. Standard provisions for multiple signature documents	
Oklahoma Eastern	No. LR 5.1 and LCrR 49.1 refer to the CM/ECF Administrative Guide of Policies and Procedures	User log-in and password function as the Filing User's signature; signature block requirements	Provisions for non-Filing Attorney signatures: s/ electronically filed and Filing Attorney must retain proof of how and when permission was obtained; Filing Attorney may also scan the signature page and file as an attachment. Provisions for Non-User signatures: Manual provides options for electronically filing as long as the Filing User maintains the signed original until all appearls have been exhausted or the stime for seeking appellate review or any other post conviction relief has expired.	

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Oklahoma Northern	No. LR 5.1 and LCrR 49.3 refer to the CM/ECF Administrative Guide of Policies and Procedures http://www.oknd.uscourts.gov/docs/08906891-22d0-4806-9544-b574b9932935/CMECFAdminManual.pdf	User log-in and password serve as the User's signature; signature block requirements	Non-Filing Attorney or Non-Filing Pro Se Party Signature: efiler is responsible for maintaining record (including original documents) until all appeals have been exhausted or time for seeking appellate review has expired. Non-User Signature: Manual provides options for electronically filing as long as the efiler maintains the signed original until all appeals have been exhausted or the time for seeking appellate review has expired.	
Oklahoma Western	No. LR 5.1 and LCrR 49.1 refer to Electronic Case Filing Policies and Procedures Manual (ECF Policy Manual) http://www.okwd.uscourts.gov/files/ecfmanual_2_13.pdf	A document requiring an attorney's signature must be signed by attorney of record above signature block. Signature can be scanned, electronic, or s/.	Stamdard provisions for mulitple signature documents. Non-Attorney signatures: several options but filer must maintain original. In criminal cases, the Clerk will scan all documents signed by non-attorneys (e.g., grand jury foreperson, defendant, Marshal).	Requires attorney's ink signature.
Oregon	No. LR 5.2 and LCrR 3001 refer to the CM/ECF User Manual http://www.ord.uscourts.gov/index.php/about-cmecf-and-pacer/user-manual. Signature Requirements in LR 11	Log-in and password constitute Registered User's signature. Format for Registered Users and pro se litigants authorized to file documents electronically must include their name preceded by an "s/" and signature block.	Multiple signature documents must be electronically filed by submitting a scanned document containing all signatures; representing the consent of all parties; identifying necessary signatures and submitted written confirmation within 7 days of the filing.	Registered User can include pro se litigants.

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Pennsylvania Eastern	Yes. LR 5.1.2 "Electronic Case Filing Procedures"	User log-in and password function as the Filing User's signature; signature block requirements	No instructions regarding non-Filing User signatures except that Filing User must retain original for 3 years. Multiple signature documents must be electronically filed by submitting a scanned document containing all signatures; representing the consent of all parties; identifying necessary signatures and submitted written confirmation within 7 days of the filing.	
Pennsylvania Middle	No. LR 5.6 refers to Standing Order and to ECF User Manual http://www.pamd.uscourts.gov/sites/default/files/ecf_manualv2.pdf	User log-in and password function as the Filing User's signature; signature block requirements	Document requiring the signature of a defendant in a criminal case must be a scanned signature. Mulitple signature documents must be electronically filed by (1) submitting a scanned document containing all necessary signatures; (2) representing the consent of the other parties on the document; (3) identifying on the document the parties whose signatures are required and by the submission of a notice of endorsement by the other parties no later than three business days after filing; or (4) in any other manner approved by the court	

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Pennsylvania Western	No. LR 5.5 and LCrR 49 refer to the Court's Standing Order regarding Electronic Case Filing Policies and Procedures and the ECF User Manual	User log-in and password function as the Filing User's signature; signature block requirements	Retention requirments for documents that are electronically filed and require an original signature other than that of the Filing User. A document requiring signatures of more than one party must be filed electronically either by: (1) submitting a scanned document containing all necessary signatures; (2) representing the consent of the other parties on the document; or (3) in any other manner approved by the court.	
Puerto Rico				
Rhode Island	Yes. L Gen. 308	User log-in and password function as the Filing User's signature; signature block requirments.	Standard provisions regarding mulitple signature documents	

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U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
South Carolina	No. LR 5.02 and LCrR 49.02 refer to ECF Policies and Procedures Manual http://www.scd.uscourts.gov/AttorneyResourceManuals/ECF/ECF_Policy_and_Procedures.pdf	The Filing User's login, password, and s/ [typed name] or digital signature serve as the Filing User's signature on all electronically filed documents. Documents submitted under a Filing User's login and password must include a digital signature or s/ followed by the Filing User's name typed in the space where the Filing User's signature would otherwise appear. Signature block requirements.	Documents containing the signature of persons other than Filing Users are to be filed electronically as a scanned image. Retention requirements. Multiple signature documents can be filed by: (1) the Filing User who files the document may obtain original signatures on a paper copy of the document to be filed. The Filing User will then electronically file the document,representing the consent of the signatories by an s/ and the name typed in the space where a signature would appear; or (2) the Filing User who files the document may obtain digital signatures on the document and electronically file the document with the digital signatures.	
South Dakota	Yes. LR 5.1(B)(4) and (5); LCrR 49.1(B)(2)c, (B)(4)-(5)	The user login and password required to submit documents to the CM/ECF System serve as the filing user's signature on all electronic documents filed with the court.	Documents requiring signatures of more than one party may be electronically filed either by: (1) submitting a scanned document containing all necessary signatures; and (b) in any other manner approved by the court. Not persmissible to insert a "/s/" for another person's signature. Any document requiring the signature of a criminal defendant must be filed in original delivered to the clerk of court.	

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Tennessee Eastern	No. LR 5.2 refers to Electronic Filing Rules and Procedures http://tned.uscourts.gov/docs/ecf_rules_procedures.pdf	§ 6: log-in and password of Filing User consitutes signature; signature block requirements	Documents containing the signature of persons other than Filing Users are to be filed electronically as a scanned image. Retention requirements. Documents requiring criminal defendant's signature may be filed in paper form with original signature, or scanned and filed electronically. Mulitple signature documents may be scanned and filed with all signatures, or electronically with representation by Filing User that consent was obtained	
Tennessee Middle	No. LR 5.03 refers to Administrative Order No. 167, Administrative Practices and Procedures for Electronic Case Filing (ECF) http://www.tnmd.uscourts.gov/files/AO%20167%20Practices%20Procedures-revised%206-27-12.pdf	Filing User's log-in and password constitutes signature; signature block requirements.	A document requiring the signature of a person other than Filing User must be scanned andf iled electronically. A document containing the signature of a defendant in a criminal case may, at the option of the presiding judge be filed: (1) in paper form with the original signatuare; or (2) in electronic form with scanned signature. Standard provisions regarding mulitple signature documents.	

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Tennessee Western	No. Electronic Case Filing Policies and Procedures Manual located in Appendix A to the Local Rules	E-Filing User's log-in and password constitutes signature; signature block requirements.	Documents with signatures other than the E-Filing User's must be scanned and electronically filed; retention requirements. For multiple signature documents, E-Filing User must submit one document with "/s/" for each signatory and it is strongly recommended that the E-Filing User indicate date and time of consent of other signatories.	
Texas Eastern	Yes. LR CV-5(5). LCrR CR-49 states that criminal cases should generally conform to LR CV-5.	User log-in and password constitute signature; signature block requirements.	No.	
Texas Northern	Yes. LR 11.1 and LCrR 49.5	Attorney's log-in and password constitute signature. ECF Administrative Procedures Manual specifies signature block requirements.	Yes, attorney must either file a scanned image of the other person's signature or indicate consent was obtained; retention requirements.	
Texas Southern	No. Administrative Procedures for Electronic Filing http://www.txs.uscourts.gov/attorneys/cmecf/district/admcvcrproc.pdf	Filing User's log-in and password constitutes signature; signature block requirements.	Standard provisions regarding mulitple signature documents. A document requiring the signature of a criminal defendant must be scanned and electronically filed.	LR 11 addresses signature requirements of attorney in charge but not in context of ECF

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Texas Western	No. LR 5 refers to Administrative Policies and Procedures for Electronic Filing in Civil and Criminal Cases ("Electronic Filing Procedures") LCrR 49 incorporates LR 5.	A Filing User's log-in and password constitute signature; signature block requirements.	Unless otherwise required by law, a Filing User who electronically files any document requirng the signature of other individuals must either: (1) submit a scanned document containing the necessary signatures; or (2) use "/s/" to indicate original was signed. A document requiring signature of a criminal defendant must be scanned and electronically filed. Retention requirements.	
Utah	No. LR 5-1 refers to ECF Procedures http://www.utd.uscourts.gov/documents/utahadminproc.pdf LCrR 49 incorporates LR 5-1.	A Filing Attorney's log-in and password constitute signature; signature block requirments.	When a document requires signature of attorneys other than Filing Attorney, the Filing Attorney may file scanned signatures, indicate permission, or indicate original is in Filing Attorney's possession. A document requiring signature of a non-attorney can be filed by Filing User indicating permission, with a "/s/" and scanned signature as attachment, or scanned and then filed electronically. A document requiring signature of a criminal defendant must be scanned and electronically filed.	

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Vermont	No. LR 5 refers to Administrative Procedures for Electronic Case Filing http://www.vtd.uscourts.gov/sites/vtd/files/ECFAdminProc.pdf	An attorney's log-in and password constitute signature; signature block requirements.	For multiple signature documents, Filing Attorney must put a "/s/" for each signatory which indicates that each signatory consents. Filing attorney must retain proof of consent for 2 years after expiration of time to file an appeal. Affidavits and other documents requring non-attorney signature may be filed electronically using the signature block indicating the paper document bears an original signature. Filing Attorney must retain document for two (2) years after the expiration of the time for filing a timely appeal.	Electronic filing is voluntary.

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Virgin Islands	Yes. LR 5.4	Filing User's log-in and password constitutes signature; signature block requirements.	Documents containing the signature of non-Filing Users are to be filed electronically with the signature represented by an "s/" and the name typed in the space where a signature would otherwise appear, or a as a scanned image. Mulitple signature documents must be electronically filed either by: (i) submitting a scanned document containing all necessary signatures; (ii) representing the consent of the other parties on the document; (iii) identifying on the document the parties whose signatures are required and by the submission of a notice of endorsement by the other parties no later than three business days after filing; or (iv) in any other manner approved by the Court.	

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Virginia Eastern	No. E-Filing Policies and Procedures Manual http://www.vaed.uscourts.gov/ecf/documents/ECF%20Procedures%20Manual/Chapter%20Three/15%20-%20Policies%20and%20Procedures-Signatures.pdf	Filing User's log-in and password constitutes signature; "9 element" signature block required.	Filing User's filing documents with a non-Filing User's signature must obtain the non-user's actual signature on a paper version of the document, scan and file the document electronically, and retain the signed paper version of the document for the duration of the case, including any period of appeal. Mulitple signature documents are filed by the Filing User by obtaining the signatures, creating an electronic version of the document with the filing user's regular signature block, as well as a typed signature block for all other parties/signatories, creating a PDFof the electronically signed version of the document, and then filing the electronically signed document; retention requirements.	
Virginia Western	Yes. LR 7(c). More rules in the Administrative Procedures for Filing, Signing and Verifying http://www.vawd.uscourts.gov/media/3355/ecfprocedures.pdf	LR 7(c): The electronic filing of a petition, pleading, motion, or other paper by an attorney who is a registered user shall constitute the signature of that attorney. Manual specifies signature block requirements.	Manual specifies that Filing Attorney must obtain signatures of all signatories and then file electronically with correct signature blocks for all signatories.	

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Washington Eastern	No. LR 5.1 refers to Administrative Procedures for Electronic Case Filing. Civil: http://www.waed.uscourts.gov/sites/default/files/court%20documents/ECF_Civil_Procedures-20140625.pdf Criminal: http://www.waed.uscourts.gov/sites/default/files/court%20documents/ECF_Criminal_Procedures-20140625.pdf	The login and password required to file documents in ECF serve as the attorney's or Court-approved pro se filer's signature; signature block requirements	**Non-Attorney Signature:** if the original document requires the signature of a non-attorney, the filing party shall scan the original document, then electronically file it in ECF; 2-year retention requirement. **Mulitple Signatures:** standard provisions; 2-year retention requirements. In criminal cases, the clerk's office maintains original charging documents.	Pro se litigants can obtain ECF log-in and password.
Washington Western	Yes. LR 11(a) states that a document signed electronically (by either a digital signature or by using the "s/ Name" convention) has the same force and effect as if the person had affixed a signature to a paper copy of the document. Electronic signatures must be in conformance with this district's Electronic Filing Procedures for Civil and Criminal Cases. LR 5(d) allows papers to be filed and signed by electronic means. http://www.wawd.uscourts.gov/sites/wawd/files/ECFFilingProceduresAmended12.20.12.pdf LCrR 1(a) incorporates LR 5(d)	LR 11(a) allows for digital signature or "s/Name." Manual specifies signature block requirements and states that pro se litigants are governed by the attorney signature rule.	**Non-Attorney signatures**: the filing party may scan the entire document, including the signature page, or attach the scanned signature page to an electronic version of the filing; retention requirements. Standard provisions for **mulitple signature** documents.	Manual specifies that pro se litigant are governed by the attorney signature rule.

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
West Virginia Northern	Yes. LR Gen P 5.03(c). Also Administrative Procedures for Electronic Case Filing http://www.wvnd.uscourts.gov/sites/wvnd/files/Adminstrative%20Procedures%20For%20Electronic%20Filing%20Effective%20June%2011%2C%202012%20page%20numbers%20corrected.pdf	Attorney signature is "s/(attorney name)." Manual specifies that attorney's log-in and password constitute signature; signature block requirements.	Manual 15.3 Non-Attorney Signature/Multiple Signatures: If an original document contains the signature of a non-attorney, or multiple signatures of attorneys or non attorneys, the filer may scan the original document with the original signature(s) to electronically file on CM/ECF. In the alternative, the filer may convert the document into PDF text format and submit using "s/" for the signature(s) of all signatories. The filer shall retain all documents containing original signatures of anyone other than the filer for a period of not less than 60 days after all dates for appellate review have expired. Should the authenticity of the document be questioned, the presiding judge may require the filer to produce the original document.	
West Virginia Southern	No. LR 5.1 LCrR 49.2 refer to and incorporate Administrative Procedures for Electronic Case Filing	Manual 15.1: attorney's log-in and password constitute signature; signature block requirements.	Manual 15.3: If the original document requires the signature of a non-attorney other than a pro se filer, the filing party or the clerk's office can: (1) scan and electronically file; or (2) converted to PDF with "s/"; 2-year retention requirement. Manual 15.4: filing party may file the scanned document, or file the document electronically, indicating the signatories, "s/(Name)."	

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Wisconsin Eastern	No. Electronic Case Filing Policies and Procedures Manual file:///Users/juliemwilson10/Downloads/072811%20ECF%20Policies%20and%20Procedures%20-%20FINAL.pdf	Attorney's log-in and password constitute signature; signature block requirements.	Non-attorney signatures generally: if the original document requires the signature of a non-attorney, the filing attorney must: (1) obtain the signature of the non-attorney on the original document; (2) electronically file the document indicating the signatory in the following format: “s/Signatory Name”; (3) maintain the original document in paper form until one year has passed after the time period for appeal expires; and (4) provide the original document for review upon request of the judge. Documents requiring signature of criminal defendant, a third-party custodian, a United States Marshal, an officer from the U.S. Probation Office, or some other federal officer or agent, the Clerk's Office will scan the document, upload it into ECF, and dispose of the document as provided for in the Manual. Standard provisions for multiple signature documents; retention requirements. Also provisions for notary signatures.	Notary signature provisions (obtain original and then file electronically indicating notary's Certificate of Notarial Acts and "s/(Notary's name).")

U.S. District Court	Local Rule on Point?	Provision for Filing Users	Provision for Non-filing Users (i.e., the signature of a person who is not the filer)	Notes
Wisconsin Western	No. LR 5.1 refers to Electronic Filing Procedures http://www.wiwd.uscourts.gov/electronic-filing-procedures	Fiing User's log-in and password constitute signature; signature block requirements.	Signatures of someone other than Filing User: Filing User obtains original signature and then electronically files the document by either typing "s/ full name" of the signatory or by scanning the signed document, and retains for 2 years. Mulitple signature documents: the Filing User electronically files the document by either typing "s/ full name" of the signer in place of the signature line or by filing a scanned document containing all necessary signatures, and retains for 2 years. Documents requiring signature of criminal defendant must be scanned and filed; filing user must maintain for 2 years.	
Wyoming	No. LR 5.2(b) and LCrR 49.2(b) refer to CM/ECF Procedures Manual http://www.wyd.uscourts.gov/pdfforms/cmprocmanual.pdf	Filer's log-in and password constitute signature.	Multiple signature documents: filer must obtain written confirmation that content of document is acceptable and then file using one of the acceptable signature options for each signatory. Non-Attorney/Third-Party signatures: Filer must obtain the wet signature and have available for inspection, and file electronically using one of the acceptable signature options.	CM/ECF Procedures Manual gives options for electronic signatures: /s/ Signature, Signature Stamp, and No Signature

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
Alabama Middle	9011-1	9011-1; http://www.almb.uscourts.gov/sites/almb/files/local_rules/120109%20Amended%20Local%20Rules.pdf	Electronic submission constitutes signature. /s/ may be used to indicate signature.	Hard copy may be signed and scanned, or electronic version indicating signature may be filed with original signed document kept by filer for (4) years after closing of the case by the court	
Alabama Northern	Rule 5005-4 directs to Administrative Procedures Manual for CM/ECF	5005-4, http://www.alnb.uscourts.gov/sites/default/files/Local%20Rules%2010-1-13_0.pdf Directs to: http://www.alnb.uscourts.gov/sites/default/files/proCMECFfiling.pdf (Part II, Section C)	Filing by registered user electronically constitutes signature, should indicate signature with /s/ name and signature block	For documents requiring original signatures, may file electronically and filer keeps originals for (3) years after closing of the case Pro Se filers may submit all documents to Clerk of Court, who will scan and then retain the originals for (1) year after closing of case	
Alabama Southern	No	n/a	n/a	n/a	
Alaska	LR 5005-4(c)	LR 5005-4(c); http://www.akb.uscourts.gov/pdfs/2012_lbr.pdf	Filing by registered user electronically constitutes signature	Debtor must submit Declaration Re: Electronic Filing bearing original signature for all statements requiring original signature of debtor	"verified documents" must include scanned original signature page
Arizona	LR 5005-2(f)	http://www.azb.uscourts.gov/Documents/Local_Rules.pdf	Filing by registered user electronically constitutes signature. Must keep original copy of signed document for (1) year after conclusion of all appeals	Filer must maintain copy of any document signed by someone other than the filer for (1) year after close of case	Doesn't specifically address non-filing users
Arkansas Eastern & Western	LR 5005-4 directs to Administrative Procedures of CM/ECF	Administrative procedures: http://www.arb.uscourts.gov/orders-rules-opinions/orders/APGo19(7).pdf	All electronic filings must contain either original scanned signature page or indicate with /s/ name	None	

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
California Central	General Order 06-03	http://www.cacb.uscourts.gov/sites/cacb/files/documents/general-orders/GO%2006-03.pdf	Filing with login and password constitutes signature, denote with /s/ name	Electronically filed document requiring debtor's signature shall indicate signature with /s/ name and scanned copy of "Electronic Filing Declaration" signed by debtor. Filer must maintain signed declaration for (5) years following close of case	
California Eastern	LR 9004-1(c)	http://www.caeb.uscourts.gov/documents/Forms/LocalRules/12.Local_Rules.pdf	Filing with login and password constitutes signature, denote with /s/ name	Signatures of Other Persons. Signatures of persons other than the registered user may be indicated by either: (if) Submitting a scanned copy of the originally signed document; (ii) Attaching a scanned copy of the signature page(s) to the electronic document; or (iii) Through the use of "/s/ Name" or a software-generated electronic signature in the signature block where signatures would otherwise appear. Electronically filed documents on which "/s/ Name" or a software-generated electronic signature is used to indicate the signatures of persons other than the registered user shall be subject	For scanned documents or where signature is indicated electronically with /s/, original signed document must be kept by filer for (3) years after close of case
California Northern	LR 5005-2	http://www.canb.uscourts.gov/rules/dist/bankruptcy-local-rules#_Toc267554436	Filing constitutes signature, should type name where signature is indicated on document	Registered user, by filing document with signature of non-filer, is certifying that he or she has the original signed document, and shall retain it for (5) years after close of case	
California Southern	General Order 162-A	http://www.casb.uscourts.gov/pdf/GO162a.pdf	Filing by registered user electronically constitutes signature	Debtor must submit Declaration Re: Electronic Filing bearing original signature for all statements requiring original signature of debtor	

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
Colorado	LR 9011-4	http://www.cob.uscourts.gov/files/mrfa.pdf Any petition, schedule, statement, declaration, claim, order, opinion, judgment, notice, minutes of proceeding or other document filed and authorized or subscribed under any method (digital, electronic, scanned) will be treated for all purposes (both civil and criminal, including penalties for perjury) in the same manner as though manually signed or subscribed.	None specific	None specific	
Connecticut	Standing Order No. 7	http://www.ctb.uscourts.gov/Doc/sorders/STorder7-1.pdf	Filing constitutes signature	Filer must maintain original document signed by non-filer for (5) years following close of case	
Delaware	LR 9011-4	http://www.deb.uscourts.gov/sites/default/files/local_rules/LocalRules_2014.pdf	Filing electronically along with typed signature constitutes signature	Unclear	Rule language is unnecessarily complicated
District of Columbia	Administrative Order Relating to Electronic Case Filing	http://www.dcb.uscourts.gov/dcb/sites/www.dcb.uscourts.gov.dcb/files/AdmOrderSigned.pdf	Electronic submission constitutes signature. /s/ may be used to indicate signature, or may include scanned copy of signature	Filed document may indicate that a signature was authorized in writing by a non-filing user	Filer must maintain hard copies of signed documents for 5 years from the date of filing the document

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
Florida Middle	LR 9011-4	http://www.flmb.uscourts.gov/localrules/rules/9011-4.pdf	Filing by registered user electronically constitutes signature, should indicate signature with /s/ name and signature block	For documents requiring more than one signature: may scan signature page, or may provide attestation of agreement by all signatories	Filer must keep original documents in case Court asks to review (no time period specified)
Florida Northern	Standing Order #11 Part II, C	http://www.flnb.uscourts.gov/sites/default/files/standing_orders/so11.pdf	Signature when filed with valid user name/password as well as either /s/ name indicated, or scanned original document with signatures	None	
Florida Southern	LR 9011-4	http://www.flsb.uscourts.gov/	Filing with login and password constitutes signature	Unclear	
Georgia Middle	LR 5005-4(b)	http://www.gamb.uscourts.gov/USCourts/sites/default/files/local_rules/Updated_Local_Rules.pdf	Filing with login and password constitutes signature, along with /s/ name or scan of original signature	Individuals or parties that must file frequently with the court may register as a filing user with the Clerk of Court	
Georgia Northern	LR 5005-7(b)	http://www.ganb.uscourts.gov/cmecf/research/lrulesusbc.html#TOC1_23	/s/ name on document of filing user constitutes signature	/s/ name of non-filing user on document is filer's assertion that the individual has consented to signing the document	No mention of keeping original signed documents. May scan original signed documents instead of /s/ name convention.
Georgia Southern	General Order for Administrative Procedures	http://www.gasb.uscourts.gov/usbcGenOrders.htm#go_2010_1	Login and password constitute signatures.	No specific provisions.	

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
Hawaii	Local Rule 5005-4	http://www.hib.uscourts.gov/localrules/LBRs.pdf	Login and password constitute signature.	The declarations or certifications required of a debtor in these documents must be made by submitting a paper copy of a declaration substantially conforming to the local form (Declaration re: Electronic Filing [hib_5005-4f2]) with the original signature of each individual or joint debtor, or the original signature of an authorized individual on behalf of a debtor that is an artificial entity.	Documents with original signatures must be retained for one year after a case is closed. In lieu of producing an originally signed paper document, an ECF User may produce the document's scanned image with the digital file's "date modified" information attached.
Idaho	ECF Procedures	http://www.id.uscourts.gov/announcements/ECFProcedures_Final.pdf	Login and password constitutes signature, should indicate on form with /s/ name		In bankruptcy cases, the Registered Participant must electronically submit a scanned pdf copy of the original signature page of the original and any amended petition, schedules and statement of financial affairs to the Clerk at the time of electronically filing these documents with the Court in CM/ECF.
Illinois Central	Standing Order	http://www.ilcb.uscourts.gov/sites/ilcb/files/3rd%20amd%20GO%20re%20ECF.pdf	Login and password constitute signature, should indicate on form with /s/ name	/s/ name of non-filing user on document is filer's assertion that the individual has consented to signing the document	
Illinois Northern	ECF Procedures	http://www.ilnb.uscourts.gov/sites/default/files/Procedures_for_CMECF.pdf	Login and password constitute signature, should indicate on form with /s/ name	Any document signed by a non-filer must be accompanied by a declaration with an original signature.	

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
Illinois Southern	Electronic Filing Rules	http://www.ilsb.uscourts.gov/sites/default/files/ElectronicFilingRulesDec2013.pdf	Login and password constitute signature, should indicate on form with /s/ name or include a scanned copy of the signature.	Parties with legal representation follow the rules for electronic filing. Pro se parties must submit documents with original signatures to the court for scanning.	
Indiana Northern	Standing Order	http://www.innb.uscourts.gov/pdfs/6thAmendedECFOrder.pdf	Login and password constitute signature; unless document includes a scanned signature, should indicate on form with a /s/ for signature.	A debtor's signature may be submitted via scanned document, attached to the filed document or submitted separately.	
Indiana Southern	Administrative Manual	http://www.insb.uscourts.gov/AdminManual/Attorney/Admin_Policies_and_Procedures.htm	For documents filed electronically through CM/ECF, use of the e-filer's user ID and password when filing documents electronically, combined with the use of the /s/ as a replacement for a wet signature.	The /s/ format is acceptable for debtors as well, as long as the electronic filer retains the document with the wet signature.	Scanned signatures are also permitted. For consent agreements or other similar documents, the filer may obtain permission to use /s/ from other authorized electronic filers. For everyone else, the filer must retain the wet signature document.

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
Iowa Northern	Standing Order	http://www.ianb.uscourts.gov/publicweb/sites/default/files/standing-ordes/ExhibitOnetoStandingOrder1-Revised11-08.pdf	Login and password constitute signature and documents should include a /s/ with the name of the filer.	The filing user must retain wet signatures for five years for any non-filing users.	Papers requiring signatures of more than one party must be electronically filed by either (1) submitting a scanned paper containing all necessary signatures; (2) representing the consent of the other parties on the paper; (3) identifying on the paper the parties whose signatures are required and by the submission of a notice of endorsement by the other parties no later than seven (7) business days after filing; or (4) in any other manner approved by the court.
Iowa Southern	CM/ECF Filing Manual	http://www.iasb.uscourts.gov/cmecf/external/IA_Southern_Bk_Manual.htm	All documents must be filed with a /s/ for the signature or a scanned signature. The original wet signature must be retain by the attorney until the appeal time expires.		
Kansas	Local Rule	http://www.ksb.uscourts.gov/images/local_rules/2014_Local_Rules.pdf	Login and password constitute signature; should indicate /s/ on documents.	Filing user must retain the original signature on any document for 6 years.	
Kentucky Eastern	Administrative Procedures Manual	http://www.kyeb.uscourts.gov/sites/kyeb/files/June%202014%20APM%20with%20TOC%20Web%20Version_0.pdf	All documents must be filed with a /s/ for the signature or a scanned signature.	The original wet signature must be retain by the attorney until the appeal time expires or until one year after the closing of the case.	

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U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
Kentucky Western	Local Rule 5005-4	http://www.kywb.uscourts.gov/fpweb/local_rules_online.htm#5005-4	Login and password serve as the filer's signature. A /s must be included on the signature line.		
Louisiana Eastern	Administrative Manual	http://www.laeb.uscourts.gov/sites/laeb/files/AdminProcManual121213.pdf	Login and password constitute signature; must indicate /s/ on signature line in documents or submit scanned signature.		
Louisiana Middle	Administrative Procedures Manual	http://www.lamb.uscourts.gov/sites/lamb/files/adminprocedures-2013-12.pdf	Login and password constitute signature; must indicate s/ on signature line in documents or submit scanned signature.	A document filed electronically shall either contain a scanned signature or a s/ on the signature line.	
Louisiana Western	Administrative Manual		Login and password constitute signature. Any document containing an original signature shall indicate the signature on the filed document with an /s/ and shall be retained by the filer.	Documents must contain either original signatures or verification by unsworn declaration under any applicable rule or statute. These documents will be scanned by the Office of the Clerk and the original documents will be retained by the Clerk of Court for at least five (5) years after the case is closed. Attorneys filing documents with original signatures must retain the documents for five years after the case is closed.	Each electronic filer shall execute and file, no later than forty-eight (48) hours following the date the petition was electronically filed, a Declaration Re: Electronic Filing of Petition, Schedules, & Statements form.
Maine	Administrative Manual	http://www.meb.uscourts.gov/Pdf/Administrative%20Procedures_%203_2011.pdf	Login and password constitute signature, and signature should be indicated on documents with /s/.	Documents with original signatures other than the filer shall be retained by the filer for two years following the closing of the case or the expiration of the appeals period.	For stipulations and other similar documents, a non-filing party who disputes the authenticity of his or her signature must file an objection within 10 days of the notice of electronic filing.

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
Maryland	General Order	http://www.mdb.uscourts.gov/sites/default/files/general-orders/03-02.pdf	Login and password constitute signature, and signature should be indicated on documents with /s/.	Documents that are electronically filed and require original signatures other than that of the Filing User must be maintained in paper form by the Filing User until three (3) years after the bankruptcy case is closed	
Massachusetts	Appendix 8 of the Local Rules.	http://www.mab.uscourts.gov/pdfdocuments/localrules/appendix/8.pdf	Login and password constitute signature, and signature should be indicated on documents with /s/. Where an electronically filed document sets forth the consent of more than one party, the additional consents may be supplied by: (1) a scanned document containing all of the necessary signatures; or (2) a representation that the Registered User has authority to consent on behalf of the other parties who are purported signatories to the document; or (3) a notice of endorsement filed by the other signatories no later than three business days after filing of the document; or (4) any other manner approved by the Court.	Unless the Court orders otherwise, all electronically filed documents, (including, without limitation, affidavits or a debtor's petition, schedules, statement of affairs, or amendments thereof) requiring signatures of a non-Registered User under the penalties of perjury shall also be executed in paper form, together with a Declaration Re: Electronic Filing in the form of MLBR Official Local Form 7. The Declaration Re: Electronic Filing shall be filed with the Court as an imaged, and not electronically created, document, together with or in addition to the document electronically filed with the Court. Said Declaration shall be valid for the declarant for all subsequently filed documents requiring a signature in	All original signatures shall be retained by the registered user until 5 years after the closing of the case and are considered property of the court.

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
Michigan Eastern	Administrative Procedures	http://www.mieb.uscourts.gov/sites/default/files/courtinfo/ECFAdminProc.pdf	Login and password constitutes signature, should indicate on form with /s/ name	Each Paper that must contain an original signature by a person other than the Filer or User, or that is required to be verified under Rule 1008 or as provided in 28 U.S.C. §1746 by a person other than the Filer or User, shall be filed electronically by a Filer or a User. The Paper containing the original signature shall be retained by the Filer or User who files the Paper for five years after the closing of the case or adversary proceeding.	
Michigan Western	Administrative Procedures	http://www.miwb.uscourts.gov/cms/assets/Rules-and-Forms/AdminOrders/AdminProc.pdf	Login and password constitutes signature with /s/ to indicate signature on the document.	When the original petition is filed electronically, the attorney for the debtor(s) shall file in paper form, the originally executed "Declaration Re: Electronic Filing" with the Court within five (5) business days of the electronic filing. The Court will	Any document filed by a filing user with an original signature must be retained by the filing user for a period of 5 years after the closing of the case and all time periods for
Minnesota	Local Rule 9011-4	http://www.mnb.uscourts.gov/content/rule-9011-4-signatures	Login and password constitutes signature and the filer should indicate /s/ on the document.	The Filing User shall submit either a scanned image of the Form ERS 1 Signature Declaration signed by the debtor(s) or the electronic document with a scanned image of the signature page signed by the debtor(s). When an original signature of a non-Filing User is required on a verification, affidavit or other similar document, the Filing User shall submit a scanned image of the signature page of the document signed by the non-Filing User. The scanning of documents is governed by Local Rule 9004-1(e).	

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Mississippi Northern	Administrative Procedures	http://www.msnb.uscourts.gov/cmecf/pdfs/AdminProcMSNB.pdf	Login and password constitutes signature and the filer should indicate /s/ on the document.		The original signed document shall be maintained by the attorney of record or the party originating the document until the case or adversary proceeding is closed and all maximum allowable times for final orders in appeals in that case or adversary proceeding have expired, and the time within which a discharge of the debtor may be revoked has passed.
Mississippi Southern	Administrative Procedures	http://www.mssb.uscourts.gov/media/96910/Website%20Notice%20MSSB%20Admn%20Procedures%20Rev.%2002-26-2014.pdf	Login and password constitutes signature and the filer should indicate /s/ on the document.		Registered ECF Users must maintain originally executed copies of signed documents for one year after the case is closed in the bankruptcy court.
Missouri Eastern	Procedures Manual	http://www.moeb.uscourts.gov/pdfs/local_rules/2013/Procedures_Manual_2013.pdf	Login and password constitutes signature.	Login and password constitutes the filing users representation regarding others' signatures.	
Missouri Western	Administrative Procedures	http://www.mow.uscourts.gov/bankruptcy/rules/bk_ecf_procedures.pdf	Login and password constitutes signature.	Login and password constitutes the filing users representation regarding others' signatures.	On the day the original petition is filed electronically, the attorney for the debtor(s) shall electronically file the “Declaration Re: Electronic Filing."

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
Montana	Local Rule 9011-1	http://www.mtb.uscourts.gov/Reports/2009BKRulesFinal.pdf	Login and password constitutes signature and the filer should indicate /s/ on the document or print name.	The original declaration under penalty of perjury relating to the petition, statements, schedules, and any amendment to any of these types of documents, shall be transmitted by personal delivery, mail, or electronic means to the Clerk and, if necessary, shall be scanned into the CM/ECF system. The signature appearing on the electronic document shall be the original.	The original signed documents must be retained in paper form by the filer for five years after the case is closed.
Nebraska	Local Rule 9011-1	https://www.neb.uscourts.gov/Robohelp_Manuals/Local_Rules/index.htm	The pleading or other document electronically filed may indicate a signature, e.g., "s/Jane Doe." The CM/ECF filer login and password may constitute the signature of said party on any electronically filed pleading (i.e., affidavits, petition, schedules). The attorney of record or the party originating the document shall maintain the original signed	See column D.	
Nevada	Administrative Procedures	http://www.nvb.uscourts.gov/downloads/cm-ecf/procedure-electronic-filing.pdf	The User Log-In and Password that are required to submit documents to the Electronic Filing System serve as the Filing User's signature on all electronic documents filed with the court.		

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
New Hampshire	Administrative Order 5005-4	http://www.nhb.uscourts.gov/OrdersRulesForms/LocalRulesOrdersPDFs/2012%20LBRs%20IBRs%20AOs%20and%20LBFs%20-%20Clean.pdf	Login and password constitute signature, along with /s/ on signature line.	If a document that is electronically filed contains an original signature under oath, other than that of the Filing User, a paper copy of a Declaration Regarding Electronic Filing must be submitted to the court within seven (7) days in the form of LBF 5005-4, signed under oath, and must have attached to it a copy of the Notice of Electronic Filing for that document, which includes the electronic document stamp. The clerk retains declarations for three (3) years after the case is closed.	
New Jersey	Appendix to Local Rules; Administrative Procedures	http://www.njb.uscourts.gov/sites/default/files/local_rules/August_1_2012_LR_Package.pdf#page=57	Login and password constitute signature, along with /s/ on signature line.	Documents that are electronically filed and require original signatures, other than that of the filer must be maintained in paper form by the filer for not less than seven years from the date of closure of the case or proceeding in which the document is filed. The document requiring third party signatures must be electronically filed either by (1) submitting a scanned document containing the third party signature; or (2) by submitting a document displaying the name of the person with an "/s/".	
New Mexico	Electronic Filing Procedures	http://nmb.uscourts.gov/efp	Login and password constitute signature; an /s/ on the signature block may be used but is not a requirement.	Documents which require the verified signature of a person other than the electronically filing attorney may be electronically filed utilizing scanning technology	

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New York Eastern	Electronic Filing Procedures; Local Rule 9011-1	http://www.nyeb.uscourts.gov/sites/nyeb/files/general-ordes/ord_559.pdf	Either an /s/ on the signature line or a scanned copy of the signature.	Petitions, lists, schedules, statements, amendments, pleadings, affidavits, stipulations and other documents which must contain original signatures, documents requiring verification under FRBP 1008, and unsworn declarations under 28 U.S.C.§ 1746, shall be filed electronically and bear "electronic signatures" that conform to E.D.N.Y. LBR 9011-1(b). The hard copy of the originally executed document, and/or original exhibits, shall be maintained by the filer for two years after the entry of a final order terminating the case or proceeding to which the document relates.	
New York Northern	Electronic Filing Procedures	http://www.nynb.uscourts.gov/sites/default/files/CMECF/AdminProc010112.pdf	Registered attorneys must indicate signature on electronically filed documents with an /s/.	Petitions, lists, schedules and statements, amendments, pleadings, affidavits, and other documents which must contain original signatures or which require verification under Fed. R. Bankr.P. 1008 or an unsworn declaration as provided in 28 U.S.C. § 1746, may be filed electronically by attorneys registered with the electronic filing system.	

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
New York Southern	Rule 9011-1; Administrative Procedures		Registered attorneys must indicate signature on electronically filed documents with an /s/.	Petitions, lists, schedules, statements, amendments, pleadings, affidavits, stipulations and other documents which must contain original signatures, documents requiring verification under Federal Rule of Bankruptcy Procedure 1008, and unsworn declarations under 28 U.S.C. § 1746, shall be filed electronically and all signatures in any PDF document shall conform to the following format: "/s/ Jane Doe" or "s/ Jane Doe." The filer must maintain a hard copy of the originally executed document for the later of two years or the entry of a final order terminating the case or proceeding to which the document relates.	

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
New York Western	Administrative Procedures	http://www.nywb.uscourts.gov/sites/nywb/files/ECF_Administrative_Procedures_Oct_2010_update.pdf	An /s/ is required on the signature block or a scanned signature.	Filing a document electronically is the filer's representation that the original signature was obtained prior to electronic filing.	For a period of not less than five (5) years after the closing of the bankruptcy case, the ECF Registered Participant that made the filing of each pleading, paper or other document must retain the original paper version of such pleading, paper or other document bearing original ink signatures pursuant to the verification requirements under Bankruptcy Rule 1008 or 28 U.S.C. § 1746, whether the signature is that of the ECF Registered Participant or made by someone other than the ECF Registered Participant.

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
North Carolina Eastern	Local Rule 5005-4	http://www.nceb.uscourts.gov/sites/nceb/files/local-rules.pdf	The login and password constitute the filing user's signature.	The filing user is certifying the authenticity of any signatures when filing a document.	A Filing User must obtain original signatures prior to filing on all electronically filed documents that require original signatures from any person other than the Filing User which documents must be maintained by the Filing User in paper form, bearing the original signatures, for four years after the closing of the case or proceeding in which the documents were filed.
North Carolina Middle	Local Rule 5005-4	http://www.ncmb.uscourts.gov/sites/default/files/local_rules/LR%20July%201%202014%20update%20final%20with%20TOC.pdf	Login and password constitute signature. Any document containing an original signature shall indicate the signature on the filed document with an /s/ or be a scanned version of the original signature.	The filing user is certifying the authenticity of any signatures when filing a document.	A Filing User must obtain original signatures prior to filing on all electronically filed documents that require original signatures from any person other than the Filing User which documents must be maintained by the Filing User in paper form, bearing the original signatures, for four years after the closing of the case or proceeding in which the documents were filed.

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
North Carolina Western	Local Rule 5005-4	http://www.ncwb.uscourts.gov/pdf/LR_web_revised.pdf	Login and password constitute signature.	Filing by an authorized user shall constitute that user's certification that the documents were signed in original signatures prior to electronic filing.	The registered user must retain any documents with original signatures for four years post case closing.
North Dakota	Administrative Procedures	http://www.ndb.uscourts.gov/CM-ECF%20Administrative%20Procedures/CM-ECF_Administrative_Procedures.htm	The user login and password or the signature block on documents filed using court approved software (as provided for by general order dated November 27, 2013) serves as the electronic filer's signature. An /s/ should be used on the signature line.	Documents containing the signature of a nonelectronic filer are to be filed electronically with the signature represented by the name of the nonelectronic filer preceded by a "/s/," "/s" or "s/" or other similar format and where a signature would otherwise appear, or file a scanned image of the signature.	Documents electronically filed that require original signatures, other than that of the electronic filer, must be maintained in paper form by the electronic filer until six years after the case is closed. This retention period does not affect or replace any other retention periods required by other applicable laws or rules.
Ohio Northern	Administrative Procedures	https://www.ohnb.uscourts.gov/ecf/repository/administrative_procedures_manual.pdf	The signature block must contain s/ on the signature line.	Any document requiring the debtor's signature shall first be signed by the debtor, followed by the electronic submission of a copy of the document with the debtor's signature indicated as s/name. Whenever the initial document requiring the debtor's signature is electronically filed in a case, it must be followed by the filing with the clerk of the signature declaration form. The debtor's handwritten signature is required on a reaffirmation agreement or a proposed reaffirmation agreement, even if the signature declaration form has been signed by the debtor. The agreement shall be scanned and filed electronically.	All documents bearing the handwritten signature of the user, or the handwritten signature of any signer on whose behalf the user files such documents, shall be maintained by the user for a period of one year following the closing of the case.

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
Ohio Southern	Administrative Procedures	https://www.ohsb.uscourts.gov/New%20Local%20Rules/AdminProcs_Clean.pdf	The transmission by a Filer or User to ECF of any document constitutes any required signature of that Filer or User on such document. The signature block should contain an /s/.	A document transmitted to ECF requiring or containing signatures of entities who are not the transmitting Filers or Users shall either (a) show an image of such signature as it appears in the original signed document, or (b) bear the name of the signatory preceded by "/s/ Name" typed in the space where the signature would otherwise appear in a signed document.	Petitions, lists, schedules, statements, amendments, pleadings, affidavits, and other documents that must contain original signatures or that require verification under Rule 1008 or an unsworn declaration as provided in 28 U.S.C. § 1746 shall be retained by the Filer or User who files such a pleading, document, or other paper for a minimum of two years from the closing of the case or proceeding.
Oklahoma Eastern	Administrative Procedures; Local Rule 9011-1	http://www.okeb.uscourts.gov/sites/default/files/AdmGuide10-01-09.pdf	Login and password constitute signature; signature line must contain an /s/,	CM/ECF Users filing documents that require the signature of a non-filing attorney (e.g., joint motion, stipulation, etc.) shall indicate the signature of the non-filing attorney with an "s/" and the name typed in the space where a signature would otherwise appear, or shall file a scanned image of the document containing the nonfiling attorney's signature.	The attorney of record or the party originating the document shall maintain documents with original signatures filed in a bankruptcy case for at least one year after the case is closed. In adversary proceedings, the attorney of record or party originating the document shall maintain documents with original signatures filed in the proceeding until after the proceeding is concluded and one year after case is closed.

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
Oklahoma Northern	Local Rules 9011-1 and 9011-4	http://www.oknb.uscourts.gov/sites/default/files/Local%20Rules.pdf	The electronic filing of a petition, pleading, motion, or other paper by an attorney constitutes the signature of that attorney. An /s/ should be used on the signature line in the document.	Petitions, lists, schedules, statements, amendments, pleadings, affidavits, motions, and other documents which must contain original signatures or which require verification under Bankruptcy Rule 1008 or an unsworn declaration, as provided in 28 U.S.C. § 1746, shall be filed electronically.	The attorney of record or the party originating the document shall maintain documents with original signatures filed in a bankruptcy case for at least one year after the case is closed.
Oklahoma Western	Appendix A to the Local Rules	http://www.okwb.uscourts.gov/sites/okwb/files/local_rules_ECF.pdf	The filing of a document bearing the filer's personal or electronic signature using the filer's login shall be deemed the electronic signature of the Registered Participant. An s/ must appear on the signature line.	The electronic filing of a document electronically signed by a client of the Registered Participant, including but not limited to the petition, statement of financial affairs and schedules of assets and liabilities, shall be deemed a certification by the Registered Participant that he or she has the document bearing the person's original signature in his or her physical possession.	Certain documents, such as affidavits and sworn statements, must bear the personal signature of the person under oath and the notary public. The notarial seal must be visible on any sworn statement.

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Oregon	Local Rules 5005 and 9011.	http://www.orb.uscourts.gov/sites/orb/files/documents/general/Local_Rules_clean.pdf	Login and password constitute signature; an /s/ on the signature block must be used.	A document filed electronically must contain, in each location a signature is required, the electronic signature of the filer and of any other signer of the document as follows: "/s/ (Name)." By affixing the "/s/ (Name)" of another signer to an electronically filed petition or other document described in FRBP 1008, the filing ECF Participant certifies under FRBP 9011 that, when filing the document, the filer possesses a counterpart of the document bearing an original signature for each signer.	An electronically filed document described in FRBP 1008 or a properly completed, signed, and filed LBF #5005 with respect to the document and a scanned electronic replica of the signed document must be maintained by the filing ECF Participant or the firm representing the party on whose behalf the document was filed in its original paper form until the later of the closing of the case or the fifth anniversary of the filing of the document.
Pennsylvania Eastern	Procedures for Electronic Filing	http://www.paeb.uscourts.gov/sites/paeb/files/general-ordes/StandingOrder1.pdf	Login and password constitute signature; an s/ must appear on the signature line.	Documents requiring original signatures must be filed electronically with an s/. The filing is the filing user's representation that he/she has the original signed document.	Documents with original signatures must be retained for three years after the case is closed.
Pennsylvania Middle	Administrative Procedures; General Order	http://www.pamb.uscourts.gov/sites/default/files/general-ordes/Miscellaneous%20Order%205-04-mp-50007.pdf	Login and password constitute signature; an s/ must appear on the signature line.	All documents filed that contain signatures other than the filing user shall contain /s/ on the signature line or a scanned copy.	There are various retention requirements depending on the type of case.
Pennsylvania Western	Local Rule 5005-6	http://www.pawb.uscourts.gov/sites/default/files/lrules2013/LocalRule5005-6.pdf	Login and password constitute signature; an /s/ must appear on the signature line.	No specific provisions.	Documents with original signatures must be retained for six years after the case is closed.

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Puerto Rico	Local Rule 5005-4	http://www.prb.uscourts.gov/sites/default/files/local_rules/LBR-5005-4.pdf	Login and password constitute signature. The document should contain /s/ on the signature line.	Petitions, lists, plans, schedules, statements, amendments, pleadings, affidavits, stipulations, and other documents which must contain original signatures, documents requiring verification under Fed. R. Bankr. P. 1008, and unsworn declarations under 28 U.S.C. § 1746, shall be filed electronically and bear "electronic signatures" including	The Electronic Filer shall retain the original documents containing the original signatures for two (2) years after the case is closed.
Rhode Island	Local Rule 5005-4	http://www.rib.uscourts.gov/newhome/rulesinfo/flashhelp/Local_Rules.html	Any document signed and filed electronically, or filed conventionally and converted to an electronic document by the clerk, including a proof of claim filed electronically on this court's website, shall constitute the filer's approved signature and have the same force and effect as if the individual signed a paper copy of the document. Documents required to be verified or contain an unsworn declaration that are filed electronically shall be treated, for all purposes (both civil and criminal, including penalties for perjury), the same as though signed or subscribed.	Petitions, lists, schedules, statements, amendments, pleadings, affidavits, proofs of claim, stipulations and other documents which must contain original signatures shall be filed electronically and bear "electronic signatures", including the /s/.	Documents that are electronically filed and require original signatures other than that of the registered user must be maintained in paper form at least two years after the case is closed.

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
South Carolina	Local Rule 9011-4	http://www.scb.uscourts.gov/pdf/Local_Rules/lr2013_amended_04292014.pdf	Login and password constitute signature; an /s/ must appear on the signature line or a scanned version of the signature.	The electronic filing of a bankruptcy petition; lists; schedules and statements, all amendments thereto; original plans; amended plans; claims; monthly or periodic financial reports; affidavit; and/or unsworn declaration constitutes an attorney's representation that the original signature of the debtor(s) or other signing party has been affixed to the original document. With regard to documents signed by debtor(s), the electronic filing by the attorney constitutes the attorney's representation that the debtor(s) authorized the filing of the documents.	The filing party must retain the original signature in paper form of any document that requires an original signature and must retain any documentation memorializing the consent of a party to the filing of a document with the party's signature where permitted by these rules and where original signatures are not required until the case or adversary proceeding is closed and all maximum allowable times for appeals in that case or adversary proceeding have expired, and, if applicable, the time within which a discharge of the debtor may be revoked has passed. In the event a case is dismissed, all original signed petitions or other documents signed by debtor or other verifying party shall be maintained by the attorney of record
South Dakota	None				
Tennessee Eastern	Local Rule 9011-4	http://www.tneb.uscourts.gov/sites/default/files/localrules.pdf	Login and password constitutes signature.		

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
Tennessee Middle	Administrative Procedures for Electronic Filing	http://www.tnmb.uscourts.gov/documents/ecf_procedures[1].pdf	The transmission by a Filer or User to ECF of any document constitutes any required signature of that Filer or User on that document. An /s/ should be used on the signature line.	Documents filed with non-filers signatures shall contain /s/ on the signature line. Other than this requirement, there is nothing specific in the Local Rules or Procedures regarding signatures of non-filing users.	
Tennessee Western	ECF Guidelines	http://www.tnwb.uscourts.gov/PDFs/ECF/ECF_guidelines.pdf	All signature lines must contain /s/ on the signature line.	The signatures of a debtor or joint debtors upon all verifications or unsworn declarations accompanying petitions, statements, schedules, and amendments thereto shall be made upon the documents filed electronically of record on the docket of the Court or, if the declaration, verification, etc., is on diskette or CD in PDF format by means of a signature designation: "/s/(name of signatory)."	Attorneys must maintain the original signature documents for five years after the case is closed.
Texas Eastern	Local Rule 5005	http://www.txeb.uscourts.gov/LBRs%2012_09/5005.pdf	The filing of any document using a login and password constitutes the electronic signature of the filer.	Within five (5) business days of the filing by electronic means of a bankruptcy petition, list, schedule, or statement that requires verification or an unsworn declaration under Fed. R. Bankr. P. 1008, the Electronic Filer shall tender to the Court in paper format the appropriate "Declaration for Electronic Filing," substantially conforming either to Exhibit "B-1," "B-2," or "B-3," which has been executed by any individual debtor or by the authorized representative of any corporate or partnership debtor.	Any documents with original signatures must be retained by the filer for not less than five years after the closing of the case, other than the Declaration for Electronic Filing. That document is retained by the court.

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U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
Texas Northern	General Order	http://www.txnb.uscourts.gov/sites/txnb/files/general-ordes/2004-06%281%29.pdf	The filing of any document using a login and password constitutes the electronic signature of the filer.	Within five (5) business days of the filing by electronic means of a bankruptcy petition, list, schedule, or statement that requires verification or an unsworn declaration under Fed. R. Bankr. P. 1008, the Electronic Filer shall tender to the Court in paper format the appropriate "Declaration for Electronic Filing," substantially conforming either to Exhibit "B-1," "B-2," or "B-3," which has been executed by any individual debtor or by the authorized representative of any corporate or partnership debtor.	Any documents with original signatures must be retained by the filer for not less than five years after the closing of the case, other than the Declaration for Electronic Filing. That document is retained by the court.
http://www.txs.uscourts.gov/bankruptcy/	Administrative Procedures	http://www.txs.uscourts.gov/attorneys/cmecf/bankruptcy/adminproc.pdf	Login and password constitute the filing user's signature.	Within five (5) business days of the filing by electronic means of a bankruptcy petition, list, schedule, or statement that requires verification or an unsworn declaration under Fed. R. Bankr. P. 1008, the Electronic Filer shall tender to the Court in paper format the appropriate "Declaration for Electronic Filing," substantially conforming either to Exhibit "B-1," "B-2," or "B-3," which has been executed by any individual debtor or by the authorized representative of any corporate or partnership debtor.	Any documents with original signatures must be retained by the filer for not less than five years after the closing of the case, other than the Declaration for Electronic Filing. That document is retained by the court.

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
Texas Western	Administrative Procedures	administrative_procedures_electronic_filing-2.pdf	Login and password constitute the filing user's signature.	Within five (5) business days of the filing by electronic means of a bankruptcy petition, list, schedule, or statement that requires verification or an unsworn declaration under Fed. R. Bankr. P. 1008, the Electronic Filer shall tender to the Court in paper format the appropriate "Declaration for Electronic Filing," substantially conforming either to Exhibit "B-1," "B-2," or "B-3," which has been executed by any individual debtor or by the authorized representative of any corporate or partnership debtor.	Any documents with original signatures must be retained by the filer for not less than five years after the closing of the case, other than the Declaration for Electronic Filing. That document is retained by the court.
Utah	Electronic Case Filing Protocols.		Login and password constitute signature and documents should include a /s/ with the name of the filer.	Unclear from local rules and protocol document.	Documents that are electronically filed and require original signatures other than that of the Filing User must be maintained in paper form by the Filing User until 5 years after all time periods for appeals expire.
Vermont	Local Rule 9011-4	http://www.vtb.uscourts.gov/sites/vtb/files/Local_Rules_2012.pdf	Login and password constitute signature, and the filer must use /s/ on the signature line.	All documents submitted for filing by a nonattorney must be signed in ink (the "original signature") by the non-attorney. An electronic image of the non-attorney's original signature is acceptable and may be deemed the original signature for purposes of Fed. R. Bankr. P. 9011, all other Federal Rules of Bankruptcy Procedure, these Rules, and for any other purpose for which a signature is required in connection with matters before the Court.	The debtor's attorney must retain paper originals of all documents that are filed electronically and require original signatures (other than that of the party registered to use the CM/ECF System) for five years from the date of the filing of the document.

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
Virginia Eastern	Local rule 5005 and Electronic Filing Procedures	https://www.vaeb.uscourts.gov/wordpress/?wpfb_dl=546	Login and password constitute signature.	Non-attorneys shall indicate signature with /s/. Pro se debtors must submit original signatures where necessary.	Documents that are electronically filed and require original signatures shall be maintained by the User until 3 years after the closing of the case. If in the ordinary course of the User's business, the User maintains imaged copies of that person's records, the user may retain an imaged copy in lieu of the document with the original signature to the same extent that the User otherwise retains imaged records in the ordinary course of the User's business.
Virginia Western	Local Rule 5005	http://www.vawb.uscourts.gov/sites/default/files/Local%20Rules%202014%20Final.pdf	Login and password constitute signature.	There is no specific language in the local rules regarding non-filing users, but the language can be interpreted that when a filing user files a document signed by another person, the user is representing that any electronic signature is authorized.	The User shall retain the duly signed paper original of any document required under the preceding paragraph for a period of no less than three (3) years following such case's dismissal or closing, unless otherwise ordered by the Court.

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
Washington Eastern	Local Rule 5005-3	http://www.waeb.uscourts.gov/sites/default/files/waeb/local_rules/Local_Rules_Complete_Set.pdf	Login and password constitute signature.	A scanned copy of an original signature or /s/ constitute signature. Documents that require a signature under penalty of perjury that are submitted electronically must be accompanied by a statement that the signature was witnessed and by whom.	Original versions of all signed documents must be retained for at least five years.
Washington Western	Local Rule 5005 and Administrative Procedures	http://www.wawb.uscourts.gov/read_file.php?file=3812&id=919	Login and password constitute signature. The document should contain /s/ on the signature line.	Documents with signatures may be filed electronically with an /s/ on the signature line.	Original versions of all signed documents must be retained for at least five years.
West Virginia Northern	Local Rule 5005.4-09	http://www.wvnb.uscourts.gov/sites/wvnb/files/local_rules/N.D.W.V.%20LBR%205005-4.09.pdf	Login and password constitute signature. The document should contain /s/ on the signature line.	The existence of a scanned pdf signature or a properly executed Declaration Re: Electronic Filing and debtor(s)'s testimony at the Section 341 meeting of creditors are prima facie evidence of the existence, authenticity and validity of the signatures on the original petition, schedules, and statement of affairs.	Any documents with original signatures must be retained for seven years after filing.
West Virginia Southern	General Order re: Administrative Procedures for Electronic Filing	http://www.wvsb.uscourts.gov/sites/wvsb/files/general-ordes/genord08-07.pdf	Login and password constitute a signature. The document should contain /s/ on the signature line.	Can indicate signature with an /s/ or a scanned version of the signature. Pro se debtors must file any documents with original signatures.	An electronic filer must retain the original of a signed document for a period of no less than seven (7) years after the closing of the case.
Wisconsin Eastern	Local Rule 5005.1 and Administrative Procedures	http://www.wieb.uscourts.gov/index.php/orders-rules/rules/local-rules16	Login and password constitute a signature.	Login and password constitutes a signature. Local Rule 5005.1 requires completion of a declaration regarding electronic filing.	The filer user must maintain any original signatures for five years after the closing of the case.

U.S. Bankruptcy Court	Local Rule/Order/Procedures	Local Rule, Order or Procedures link (if	Filing Users Signatures	Non-Filing Users/Non-Attorney Users Signatures	Notes
Wisconsin Western	Electronic Filing User Manual	http://www.wiwb.uscourts.gov/webhelp/ecf_atty_manual.htm	Login and password constitute signature on electronically filed documents. The signature line on the document should indicate /s/.	The filing user must obtain a Declaration Regarding Electronic Filing and indicate /s/ on the documents.	The attorney must obtain a signature on a declaration regarding electronic filing for non-filers and should retain it for a minimum of two years.
Wyoming	Local Rule 5005-2	http://www.wyb.uscourts.gov/sites/default/files/pdf-files/local-rules-20120701.pdf	Login and password constitute a signature; filer must indicate in some way a signature on the filed document.	The filer's login and password constitute a signature, and the document filed must indicate that the original document contains a signature.	

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 8–9, 2015
Phoenix, Arizona

Minutes

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ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Phoenix, Arizona, on January 8 and 9, 2015. The following members were present:

Judge Jeffrey S. Sutton, Chair
Dean C. Colson, Esquire
Associate Justice Brent E. Dickson
Roy T. Englert, Jr., Esquire
Gregory G. Garre, Esquire
Judge Neil M. Gorsuch
Judge Susan P. Graber
Dean David F. Levi
Judge Patrick J. Schiltz
Judge Amy J. St. Eve
Judge Richard C. Wesley
Judge Jack Zouhary

Elizabeth J. Shapiro, Esq., represented the Department of Justice in place of Deputy Attorney General James M. Cole. Larry D. Thompson, Esq., was unable to attend.

Also present were Professor Geoffrey C. Hazard, Jr., consultant to the committee; Professor R. Joseph Kimble, the committee's style consultant; and Judge Jeremy D. Fogel, director of the Federal Judicial Center. Judge Anthony J. Scirica, Judge Sidney A. Fitzwater, and Judge Eugene R. Wedoff participated in a panel discussion chaired by Judge Sutton. Associate Justice Sandra Day O'Connor attended as an observer.

The advisory committees were represented by:

Advisory Committee on Appellate Rules —
Judge Steven M. Colloton, Chair
Professor Catherine T. Struve, Reporter (tel)
Advisory Committee on Bankruptcy Rules —
Judge Sandra Segal Ikuta, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Troy A. McKenzie, Associate Reporter
Advisory Committee on Civil Rules —
Judge David G. Campbell, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate Reporter
Advisory Committee on Criminal Rules —
Judge Reena Raggi, Chair
Professor Sara Sun Beale, Reporter (tel)
Advisory Committee on Evidence Rules —
Judge William K. Sessions III, Chair
Professor Daniel J. Capra, Reporter (tel)
Subcommittee on CM/ECF
Judge Michael A. Chagares, Chair

The committee's support staff consisted of:

Professor Daniel R. Coquillette	Reporter, Standing Committee
Jonathan C. Rose	Secretary, Standing Committee; Rules Committee Officer
Julie Wilson	Attorney, Rules Committee Support Staff (tel)
Scott Myers	Attorney, Rules Committee Support Staff (tel)
Bridget M. Healy	Attorney, Rules Committee Support Staff (tel)
Andrea L. Kuperman	Chief Counsel to the Rules Committee
Frances F. Skillman	Rules Office Paralegal Specialist
Toni Loftin	Rules Office Administrative Specialist
Michael Shih	Law Clerk to Judge Jeffrey S. Sutton

INTRODUCTORY REMARKS

Judge Sutton called the meeting to order by thanking the Rules Office staff and the marshals for their service. He introduced one new member of the Committee, Associate Justice Brent E. Dickson of the Indiana Supreme Court. He also introduced Judge Sandra Segal Ikuta of the Ninth Circuit, the new chair of the Bankruptcy Committee, and Judge William K. Sessions III of the District of Vermont, the new chair of the Evidence Committee. Finally, he introduced Judge Anthony Scirica of the Third Circuit, who helped coordinate the afternoon's panel discussion on pilot projects.

He then summarized the results of the September 2014 Judicial Conference, which unanimously approved both the Bankruptcy Committee's one proposal and the entire Duke Package. The proposed amendments are now before the Supreme Court of the United States.

Finally, Judge Sutton announced that, on December 1, 2014, many other proposals took effect, including Criminal Rule 12 and a multitude of changes to the Bankruptcy Rules and Forms. He thanked Judge Raggi and Judge Wedoff for their efforts in making those proposals law.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The Committee, by voice vote and without objection, approved the minutes of its previous meeting, held on May 29–30, 2014, as well as a set of technical amendments to those minutes proposed by Professor Cooper.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Colloton presented the advisory committee's report, set out in his memorandum and attachments of December 15, 2014 (Agenda Item 3). He reported that the committee has published a package of rules changes for public comment. It plans to consider those comments after the February deadline expires, and to give a complete report at the upcoming spring meeting. He then highlighted three items currently on the committee's agenda.

Informational Items

FED. R. APP. P. 41

The advisory committee is considering how to relieve the tension between two provisions of Appellate Rule 41. Rule 41(d)(2) requires a court of appeals to issue its mandate immediately after the Supreme Court denies a petition for certiorari. However, Rule 41(b) allows courts of appeals to "extend the time" for issuing mandates under certain circumstances. These provisions present two questions. May a court of appeals stay its mandate after certiorari is denied? If so, must it do so in an order, or does mere inaction suffice?

The Supreme Court has twice considered these questions. As to the first issue, it has assumed without deciding that a court of appeals has authority to delay issuing a mandate, but

only if "extraordinary circumstances" exist. As to the second, it has concluded that Rule 41(b) does not clearly foreclose delay through inaction.

Judge Colloton reported that the committee is inclined to insert the words "by order" into Rule 41(b) to clarify that a court of appeals may not delay a mandate by letting the matter lie fallow. (Those words had actually been removed from a previous version of the Rule, most likely to reduce redundancy). However, it is still working through the more fundamental question of whether such authority exists. It has considered reaffirming what Rule 41(d)(2) already appears to say: A mandate must issue immediately after certiorari is denied. But if appellate courts retain authority to recall an already-issued mandate under extraordinary circumstances, any change to Rule 41(d)(2) would serve little purpose. It thus might make more sense to codify the "extraordinary circumstances" rule. In either case, the committee will make a formal proposal to the Standing Committee, perhaps as early as the spring meeting.

DISCLOSURE RULES

The advisory committee has been considering what disclosures parties must make in briefs for a long time. Its review revealed a bevy of local disclosure requirements that augment the Appellate Rules to different degrees. Concerned that the Rules are insufficiently thorough, the committee is considering expanding their scope: for example, by extending them to intervenors, partnerships, victims in criminal cases, and amici curiae. It is also consulting the Committee on Codes of Conduct for additional guidance. Judge Colloton reported that, because the project remains ongoing, the committee may or may not be able to present a concrete proposal at the spring meeting.

One member proposed that, instead of taking the lead, the Appellate Committee should coordinate with judges at all levels of the federal judiciary. Another suggested that the Appellate Committee coordinate with its sister advisory committees, all of which have an interest in the outcome. In response, Judge Colloton noted that the project was still in a nascent stage and expressed willingness to solicit input from other committees once it had crystallized its thinking.

CM/ECF PROPOSALS

The advisory committee has been working with Judge Chagares and the CM/ECF subcommittee to resolve issues related to electronic filing. Judge Colloton deferred consideration of those issues to Judge Chagares's presentation.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Ikuta presented the advisory committee's report, set out in her memorandum and attachments of December 11, 2014 (Agenda Item 4).

Amendment for Final Approval

FED. R. BANKR. P. 1001

On behalf of the advisory committee, Judge Ikuta sought approval to amend Bankruptcy Rule 1001, the bankruptcy counterpart to Civil Rule 1. Rather than incorporate the Civil Rule by reference, the Bankruptcy Rule echoes its language. However, Rule 1001 does not reflect recent amendments—approved and pending—to Rule 1. The proposal brings Rule 1001 in line with those changes, stating that "These rules shall be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every case and proceeding."

The committee, without objection and by voice vote, approved the proposed amendment to Rule 1001 for publication.

Informational Items

PROPOSED CHAPTER 13 NATIONAL PLAN FORM

The advisory committee has been working on a national chapter 13 plan form since 2011. Currently, more than a hundred chapter 13 forms exist. Led by Judge Wedoff, the committee distilled those forms into one. It also developed amendments to the Bankruptcy Rules to bring them in line with that form. After publishing the first version of the form and amendments in 2013, the committee received many critical comments. So it went back to the drawing board and published a revised proposal in 2014. The comment period has not yet expired, but the reaction to the revisions has been mixed.

Judge Ikuta reported that, in her view, the committee can fix specific concerns about the form. The real question is whether the need for national uniformity should override local preferences. She recommends implementing the national form incrementally—for instance, by making the form optional and asking various bankruptcy districts to opt into the form.

A professor wondered whether it was possible to make the national form an alternative to local ones. Judge Ikuta confirmed that his question tracked the committee's proposed incremental approach. By making the national form optional and soliciting compliance from individual districts, the committee hoped to build support for it over time.

An appellate judge asked why a national form was necessary. Professor McKenzie gave four reasons. First, the existing forms have generated a tremendous amount of confusion. Second, bankruptcy judges have an independent duty to scrutinize proposed plans, and a national form would reduce uncertainty about where such information may be found. Third, a national form could generate data more effectively. Finally, a national form would let entrepreneurs develop cheaper software for debtors' use.

Judge Wedoff explained why the committee decided to devise a national form in the first place. One bankruptcy judge said that, in the form's absence, bankruptcy courts could not easily

discharge their duty to independently scrutinize chapter 13 plans. And a bankruptcy lawyers' association said that its members had trouble processing chapter 13 forms from different jurisdictions—and lacked the resources to obtain local counsel. Professor McKenzie added that the committee surveyed the chief judge of every bankruptcy court in the country before getting the project started. The response was overwhelmingly positive.

A district judge asked about the reaction from bankruptcy practitioners. Their comments, Professor McKenzie said, were mixed. Some lawyers liked the idea so long as this word or that word could be changed. Others opposed it. A few lawyers candidly explained that they feared the competition an easily accessible national form would create.

FORMS MODERNIZATION PROJECT

The advisory committee's forms modernization project is almost complete. Unfortunately, the Administrative Office is having trouble integrating the new forms into its new CM/ECF system and may miss its December 2015 deadline—when the forms are scheduled to take effect. The question is whether to delay rolling out the forms until all technological kinks have been ironed out.

Judge Ikuta reported that the committee will discuss the issue at its April meeting, but she recommends releasing the forms on schedule. Doing so, she said, would not disrupt operations in the vast majority of courts. True, three bankruptcy districts give pro se debtors access to forms software on court-run computer terminals. But not enough debtors use that service to justify delaying the forms' national release.

A district judge said that the AO had told her that forms integration was mutually exclusive with the CM upgrade project. As it turns out, Judge Ikuta received that same answer too, but the AO changed its mind once it realized what the forms integration project entailed.

CM/ECF PROPOSALS

The advisory committee considered three of the CM/ECF subcommittee's proposals at its fall meeting. It will defer decision on two of them until the Civil Rules Committee acts. It is independently considering whether to redefine the word "information" to include electronic documents and the word "action" to include electronic action.

REPORT OF THE INTER-COMMITTEE CM/ECF SUBCOMMITTEE

Judge Chagares presented the subcommittee's report, set out in his memorandum and attachments of November 30, 2014 (Agenda Item 8). He announced that the subcommittee had successfully completed its work.

Informational Items

ABROGATION OF THE THREE-DAY RULE AS APPLIED TO ELECTRONIC SERVICE

The subcommittee previously proposed that parties should not receive three extra days to take action after electronic service. It worked with the relevant advisory committees to draft amendments to Appellate Rule 26(c), Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rule 45. These amendments, Judge Chagares reported, thus far have been well received.

ELECTRONIC SIGNATURES

The subcommittee previously proposed that Bankruptcy Rule 5005 be changed to provide for more flexible electronic signatures, but the Bankruptcy Committee withdrew that proposed amendment after public comment. After that withdrawal, the subcommittee asked the Administrative Office to figure out how local rules treated electronic signatures. Judge Chagares thanked the AO for its diligence and hard work.

The AO's exhaustive survey revealed that nearly every local rule treats filing users' login and password as an electronic signature. The various districts are not nearly so uniform when it comes to nonfilers, but the most prevalent rule requires the user to obtain and retain the signatory's ink signature. In light of these findings, Judge Chagares concluded, the Bankruptcy Committee's decision was probably correct. The local rules appeared sufficient to meet present needs, and any formal rulemaking risked being overtaken by rapid technological developments.

CIVIL AND CRIMINAL RULES REQUIRING ELECTRONIC FILING

The subcommittee previously recommended that Civil Rule 5(d)(3) and Criminal Rule 49(e) be amended to mandate electronic filing as opposed to merely permitting it. Judge Chagares reported that the advisory committees are still considering those proposals.

UNIFORM AMENDMENTS TO ACCOMMODATE ELECTRONIC FILING AND INFORMATION

The current rules do not appear to accommodate electronic filing and information. Thus, the subcommittee proposed defining "information" to include electronic documents and "action" to include electronic action. The advisory committees considered these proposals but reached different conclusions. For example, the Appellate and Civil Rules Committees have decided not to adopt them, while the Bankruptcy and Criminal Rules Committees have submitted them to subcommittees for further study. Judge Chagares reported that the proposal to redefine "information" appears to be the more viable of the two.

Dissolution of the Subcommittee

Judge Sutton thanked Judge Chagares, Professor Capra, Julie Wilson, and Bridget Healy for their hard work, and praised the subcommittee for fulfilling its mandate quickly and efficiently. Professor Capra reiterated Judge Sutton's comments and thanked his fellow reporters.

Judge Sutton and Judge Chagares have agreed that, now that the subcommittee has run its course, there is no need to keep it in place.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rose presented the Administrative Office's report (Agenda Item 10).

Informational Items

The Administrative Office is preparing an updated version of its 2010 *Strategic Plan for the Federal Judiciary*. Because the Long-Range Planning Committee will be meeting in March, Mr. Rose noted, the time for input is now.

Mr. Rose asked anybody corresponding with the Office to copy both the head of the Rules Office and Frances Skillman. That, he said, is the best way to ensure the message gets where it needs to go. He also summarized recent personnel arrivals and departures at the AO.

Finally, Mr. Rose announced that this meeting would be his last as head of the Rules Office. He thanked the committee for the opportunity to work with and learn from such talented people. Judge Sutton thanked Mr. Rose for his leadership and lauded his commitment to public service over a long and distinguished career. He also introduced Rebecca Womeldorf, Mr. Rose's successor, and described her impressive background.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raggi presented the advisory committee's report, set out in her memorandum and attachments of December 11, 2014 (Agenda Item 6). She announced that the amendments to Criminal Rule 12 have now taken effect.

Informational Items

FED. R. CRIM. P. 4

The Standing Committee previously approved for comment a proposed amendment to Rule 4 that would govern service of process abroad. Judge Raggi reported that the advisory committee has received no critical feedback on that proposal.

FED. R. CRIM. P. 41

The Standing Committee previously approved for comment a proposed amendment to Rule 41 to govern venue for searches of electronic devices whose location is unknown. The advisory committee held a lengthy hearing and reviewed extensive public comments. Judge Raggi reported that the critical response has largely focused not on the amendment itself but on concerns about electronic searches more generally.

These thought-provoking comments led the committee to request a response from the U.S. Department of Justice. The Department endorsed the proposal and suggested ways for the government to satisfy the particularity requirement if the amendment takes effect. Judge Raggi noted that the Federal Judicial Center might consider educating judges about how to analyze such warrant applications down the road. But that, she concluded, is a question for later. For now, the committee is debating whether the amendment needs to be changed. Judge Raggi expects the committee to propose something at the spring meeting, although the current proposal may be tweaked.

SUGGESTED AMENDMENT TO RULE 52

A Second Circuit judge asked the advisory committee to consider amending Rule 52 to provide fresh review—as opposed to plain-error review—for defaulted sentencing errors. He reasoned that, unlike a new trial, a resentencing proceeding imposes an incidental burden on the judiciary. And it is unfortunate when a prisoner is forced to remain in jail longer than he deserves.

Judge Raggi reported that the committee decided not to proceed with this request. Professor Nancy King, the committee's associate reporter, surveyed cases in this area and discovered that the number of defaulted sentencing errors is not high—and were typically corrected on plain-error review. The committee was also concerned that the proposal would generate extensive frivolous litigation. Finally, drawing on its experience with the 2014 Rule 12 amendments, it expressed doubts that the Supreme Court would be willing to create an exception to the general rule that defaulted claims are reviewed for plain error.

One appellate judge proposed an alternative. He suggested that the rules might be amended to reflect what many circuits have already held: that a clear guidelines-calculation error presumptively satisfies the last two elements of plain-error review. The judge acknowledged, however, that his suggestion came close to the edge of the committee's rulemaking authority. Another appellate judge wondered whether a different approach might solve the problem. In his circuit, a defendant can never forfeit a substantive reasonableness challenge, so arguments that a sentence is unjustly long are always reviewed afresh. Judge Raggi responded that, in her view, no judge should ever rely on the guidelines unless that sentence also satisfies the § 3553 factors. Plain-error review is enough to fix the vast majority of problems, and loosening Rule 52's standards would open the floodgates to a host of defaulted sentencing claims. She suggested instead that circuits interested in these alternative proposals adopt them as a local rule or as circuit-specific precedent.

FED. R. CRIM. P. 11

The judges of the Northern District of California asked the advisory committee to let judges refer criminal cases to their colleagues to explore the possibility of a plea bargain. Judges in that district had routinely used this procedure until the Supreme Court held that the Criminal Rules barred it.

Judge Raggi reported that the committee decided not to proceed with this request either. 95% of criminal cases are already resolved by plea bargains nationally, and the Northern District is no exception to that norm. More, implementing this change would create a host of practical problems—and might raise separation-of-powers concerns to boot.

Judge Raggi also reported that, at around the same time, a judge from the Southern District of New York published an article advocating judicial involvement in plea bargaining to reduce the risk that someone would plead guilty to a crime he didn't commit. The committee was not persuaded by this argument either. If a district judge is not convinced that a defendant is guilty of the crime to which he pleaded guilty, the judge should reject that plea under Criminal Rule 11.

HABEAS RULE 5

A judge from the Eastern District of Pennsylvania asked the advisory committee to amend Habeas Rule 5. Currently, that Rule requires a State to give a habeas petitioner copies of all exhibits attached to its response. The judge proposed relieving the State of that obligation in the absence of a judicial order to the contrary.

Judge Raggi reported that the advisory committee unanimously rejected this proposal. Every court expects these documents to be provided, and the States themselves have not complained about the problem.

FED. R. CRIM. P. 35

The New York Council of Defense Attorneys asked the committee to grant judges authority to reduce a sentence if (1) the defendant can identify new evidence casting doubt on his conviction, (2) the defendant can show he has been fully rehabilitated, or (3) the defendant can point to medical problems justifying his release.

Judge Raggi reported that a subcommittee is still examining this proposal, but she thinks it will not ultimately succeed. Proposal 1 effectively repeals AEDPA's statutory time limits on presenting such evidence in a habeas petition. Proposal 2 would subject the courts to a flood of rehabilitation claims. And Proposal 3 is redundant, since prisoners can already be released on humanitarian grounds when appropriate.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell presented the advisory committee's report, set out in his memorandum and attachments of December 2, 2014 (Agenda Item 5).

Informational Items

CM/ECF PROPOSALS

Judge Campbell reported that the advisory committee has finished considering the CM/ECF Subcommittee's proposals. It recommended that the Civil Rules mandate electronic filing and service with appropriate exceptions for good cause. It recommended against changing the Rules' approach to electronic signatures, having observed the Bankruptcy Rules Committee's experience. It also recommended against defining "information" or "action" to include "electrons" (e.g., electronic filing), although it remains open to making that change if the existing regime becomes unworkable.

FED. R. CIV. P. 68

The advisory committee considered several proposals to amend Civil Rule 68, which governs offers of judgment. The committee has studied the Rule twice in the last two decades, and it provoked a storm of controversy both times. Nevertheless, Judge Campbell reported that the committee is once again looking at the question—this time by surveying how the States implement their own offer-of-judgment procedures. The committee will consider next steps at its April meeting.

FED. R. CIV. P. 26

The advisory committee considered a proposal to add the presence of third-party litigation financing to the list of Civil Rule 26(a) disclosures. The committee agreed that the issue is important but determined that rulemaking is not yet appropriate. Litigation finance is a relatively new field. Besides, judges already have tools to obtain this information when relevant. And the absence of a mandatory-disclosure rule does not appear to hinder the resolution of cases involving litigation financing.

FED. R. CIV. P. 23 SUBCOMMITTEE ACTIVITY

The advisory committee appointed a subcommittee to consider issues related to Civil Rule 23. Currently, it is charged with gathering facts to identify questions worth further study. So far, Judge Campbell reported, the subcommittee has spotted six primary issues. It plans to present a set of conceptual proposals to the full committee at its April meeting that may generate more concrete proposals for the fall. It is also considering convening a mini-conference over the next year to evaluate any suggestions that might emerge.

One member asked the subcommittee to examine the procedures governing multidistrict litigation. He said that mass-tort MDLs make up half the federal courts' civil docket, and the rules regulating them may be worth reexamining. He also observed that the MDL bar is a small and tightly knit group of lawyers with links to the MDL Panel. None of this is to say that MDLs are being mishandled. But because MDLs occupy such a large part of the civil system, the subcommittee ought to ensure that the process is working.

Two members responded that, judging from their past experience with the subject, they doubted whether Rule 23—and for that matter the Rule 23 subcommittee—was the best place to address any problems MDLs might pose. Two judges who have presided over MDL cases also expressed their doubts. One reported that, in his experience, the MDL process *was* working. The other reported hearing complaints about the system, but those focused more on the process of MDL certification and counsel selection than on the process of trying MDL cases once certified. Both questioned whether a one-size-fits-all approach was possible or desirable. Finally, a practitioner pointed out that a small bar is an efficient bar. MDL trial firms get along with MDL defense firms, so MDL cases tend to run smoothly. And from most firms' perspective, the cost of entering the MDL arena is prohibitively high, making MDL cases poor investments.

A member observed that while the class action world has gotten smaller in the post-*Amchem* era, the MDL world has expanded. Several members noted the long history of consideration of MDL issues by different Judicial Conference committees; it is not clear that MDL-specific rulemaking is desirable or necessary. Judge Sutton stated that discussion of MDL procedures should continue, and that the Rule 23 Subcommittee could solicit input about MDLs in the course of its study and consider what role, if any, the rules committees may have with respect to MDLs. The importance of seeking input from others—including the JPML, and various Judicial Conference Committees with overlapping jurisdiction over MDL issues—was stressed.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Sessions presented the advisory committee's report, set out in his memorandum and attachments of November 15, 2014 (Agenda Item 7). The committee considered proposals developed from its April 2014 Symposium on the Challenges of Electronic Evidence. The *Fordham Law Review* has published the proceedings from that Symposium.

Informational Items

FED. R. EVID. 803(16)

Evidence Rule 803(16) provides a hearsay exception for authenticated documents over twenty years old. Judge Sessions reported that this Rule has almost never been used, but it may become more significant in an era of electronic evidence. The advisory committee thinks this Rule is inappropriate but is still deciding what to do about it. One option is to leave it be. Another is to abrogate it or narrow it to exclude electronically stored information. Still another is to amend it to require a showing of necessity or reliability.

RECENT PERCEPTIONS

The advisory committee considered whether to add a new hearsay exception for electronically reported recent perceptions to Evidence Rules 801(d)(1) and 804(b). This change would arguably prevent reliable statements made in texts, tweets, and Facebook posts from being excluded.

Judge Sessions reported that the committee is continuing to study whether these changes are necessary. With respect to Rule 801(d)(1), the committee has decided not to change that provision without first asking whether prior statements of testifying witnesses should even be defined as hearsay. It will begin that study at its next meeting. With respect to Rule 804(b), the committee is continuing to monitor the caselaw to see if courts have actually been excluding reliable evidence of this sort. A district judge asked the committee to study whether a witness's prior statement should be treated as hearsay when that witness is available to testify. Professor Capra responded that such a rule might open the door to all prior consistent statements.

STANDARDS FOR AUTHENTICATING ELECTRONIC EVIDENCE

The advisory committee considered whether to amend Evidence Rules 901 and 902 to provide specific grounds for authenticating electronic evidence. Judge Sessions reported that, in the committee's view, devising authentication standards against a rapidly changing technological backdrop would create more problems than they would solve. However, it unanimously decided to develop a best-practices manual to guide courts and litigants.

FED. R. EVID. 902

The advisory committee considered two proposals to make it easier for litigants to authenticate certain kinds of electronic evidence. They mirror the self-authentication procedure for business records in Evidence Rule 902(11) by shifting the burden for proving inadmissibility to the opposing party. Judge Sessions reported that the committee unanimously supports these proposals and will consider introducing them as formal amendments at its next meeting.

CONCLUDING REMARKS

Judge Sutton concluded this portion of the meeting by recognizing four departing individuals for their service: Jonathan Rose, Andrea Kuperman, Judge Sidney Fitzwater, and Judge Eugene Wedoff. He summarized their remarkable achievements and thanked them all for their tremendous work on the committee's behalf.

PROMOTING JUDICIAL EDUCATION THROUGH VIDEOS

The committee considered the Federal Judicial Center's proposal to produce videos that would educate judges and lawyers about changes to the Federal Rules. Judge Sutton explained how the proposal came to be. Education has always been a key component of the Duke Package, which was designed in part to change the culture of civil litigation. Judge Fogel came up with the idea of disseminating information through video presentations. Initially, the FJC planned to create test videos for all of the rules that took effect in December 2014. However, the committee expressed concern that such videos—if released to the public—would constitute a form of post-enactment legislative history. So it postponed a final decision on the FJC's proposal until it could review a sample video.

Judge Fogel showed a sample film featuring Judge Sessions and Professor Capra, who discussed recent amendments to Evidence Rules 801 and 803. He acknowledged concerns about

post-enactment legislative history but argued that the video format was a much more dynamic way to communicate information. He also explained that the videos would reach a wide audience even if restricted to judges and judicial employees. For example, a thousand viewers watched a recent webinar on § 1983 litigation.

Many members supported the FJC proposal. The Duke Package depends on education for its success, and videos might help reach previously inaccessible constituencies. Several judges recommended presenting the videos to their law clerks and at judicial meetings both private and public. As for the legislative-history concern, that issue can be solved with a disclaimer—or a rule that no such video could be used in court.

One appellate judge expressed reservations. He argued that the written word is superior to video in conveying this sort of information. In response, a member proposed releasing the transcript of the video with the video itself. Another member suggested that the videos might be more useful if they provided practice tips. This triggered concerns that expanding the videos beyond the text of the committee notes would stretch the bounds of proper rulemaking.

Judge Sutton recommended that the FJC proceed slowly. He asked it to work with any committee chairs and reporters willing to produce videos describing significant rule changes that took effect in December 2014. Those videos would be then placed on the private judicial intranet. The committee could then use that experience to determine whether to continue the program and whether to make the videos public. He thanked Judge Fogel, Judge Sessions, and Professor Capra for putting together the demonstration video.

PANEL DISCUSSION ON THE CREATION OF PILOT PROJECTS

Introduction

Judge Sutton presided over a panel discussion on the creation of pilot projects to facilitate civil discovery reform. When coupled with the Duke Package reforms, pilot projects offer a powerful way to change litigation norms for the better and to gather data for future reforms in the process. By convening the panel, he hoped to give the Civil Rules Committee some potential projects to consider. Judge Sutton introduced the panelists: Judge Eugene Wedoff of the Bankruptcy Court for the Northern District of Illinois, Judge Anthony Scirica of the Third Circuit, and Judge Sidney Fitzwater of the Northern District of Texas. Finally, he welcomed a special guest: Associate Justice Sandra Day O'Connor, who joined the Standing Committee for this panel discussion and for the dinner that followed.

Judge Wedoff: Improving the Speed of Case Administration

PRESENTATION

Judge Wedoff spoke about the impact of "rocket dockets" on case administration. The term was first applied to the Eastern District of Virginia, which implemented a series of procedural reforms in the 1970s. It has since been applied to several other jurisdictions that have adopted similar procedures, including the Western District of Wisconsin and the Eastern District

of Texas. But their reputations sometimes do not match the data. The Eastern District of Virginia is truly one of the fastest courts in the country—but the Eastern District of Texas operates *above* the nation's median case disposition time, and the Western District of Wisconsin has fallen off substantially. Meanwhile the Southern District of Florida works with remarkable speed despite not being labeled a rocket-docket court.

Based on this study, Judge Wedoff concluded that judges affect case-disposition time more powerfully than rules. Judges who impose credible deadlines, for example, resolve cases faster than judges who don't. At the same time, efficient districts have certain procedural rules in common. For example, the Eastern District of Virginia sets short deadlines for discovery and trial that cannot be altered without a substantial showing to the court. For its part, the Southern District of Florida places every case into one of three tracks: expedited, standard, and complex. None of these tracks allows discovery to exceed one year.

DISCUSSION

The first question is whether to encourage district courts to adopt rocket-docket procedures district-wide. Many members said yes. Competition for litigants among courts can help everyone, said one professor, pointing to the creation of an omnibus hearing as an example of a useful procedural innovation that arose from one bankruptcy district's attempt to entice debtors to file there. Other committee members observed that, even if rocket-docket procedures make things harder for lawyers and judges, such procedures are *always* good for clients. And pilot projects implementing them may well change attorneys' hearts and minds in the process.

Attendees made several suggestions about what such pilot projects might look like. One recommended setting hard and credible trial deadlines. Another recommended capping not only a party's total deposition hours but also the number of hours he has available to conduct each deposition. He also recommended creating a system of tracks for document production. And everybody who spoke emphasized the importance of making the pilot project mandatory.

The committee then moved to the question of implementation. Certain rocket-docket procedures—like the Eastern District of Virginia's weekly argument day—might conflict with local rules mandating one judge per case. More fundamentally, creating a rocket docket from scratch would be much harder than studying the ones that already exist, since district courts are unlikely to change in the absence of a strong leader backing the project.

One member counseled against implementing pilot projects too quickly. He recommended letting the FJC study the existing projects first, and moving only when the committee was sure that the projects' contents would work. Judge Sutton responded that he saw no reason why pilot-project advocacy should stop—especially since such advocacy isn't designed to mandate effective procedures but to suggest potentially useful ones. Another member agreed, and pointed out that studies and pilot projects could always take place simultaneously.

Finally, members sounded a note of caution about research methodology. One stressed the importance of getting independent opinions from participants, recalling an instance where

rocket-docket practitioners were asked about their views on the process in full view of rocket-docket judges. Two district judges reiterated that numbers do not tell the whole story. Sometimes a case gets delayed for wholly appropriate reasons. And sometimes statistics are skewed by background factors not immediately apparent.

Judge Scirica: Requiring Initial Disclosure of Unfavorable Material

PRESENTATION

Judge Scirica explored the feasibility of requiring parties to disclose material unfavorable to their side by rule. In the 1990s, he said, the committee tried to do just that, but the proposal triggered a firestorm. Opponents argued that most cases did not require adverse disclosures, and that aggressive discovery techniques would ferret out such information in the cases that did. They also invoked the adversarial nature of the American justice system, arguing that a "civil *Brady* regime" would disrupt the attorney-client relationship. Eventually, the committee settled on a compromise position—explored through pilot projects in the Central District of California and the Northern District of Alabama—that retained initial disclosures but eliminated the requirement to disclose unfavorable material.

Today, Judge Scirica continued, an expanded initial disclosure regime might find a warmer reception. To test the waters, he envisioned two separate types of pilot projects. One would apply a robust but general initial disclosure regime to all civil cases. Another would apply a tailored initial disclosure requirement to certain categories of cases—say, employment discrimination or civil rights. The former is best left to the Standing and Civil Rules Committee, he advised; the latter, to a committee of experienced lawyers from both sides of the podium.

DISCUSSION

Every member who spoke expressed support for an expanded initial disclosure regime. One provided an especially powerful example from Arizona. In 1991, the Arizona Supreme Court adopted a robust mandatory disclosure rule that covered favorable and unfavorable material. The same debate took place. Now, however, Arizona's local rules have overwhelming support. In fact, seventy percent of lawyers who practice in both federal and Arizona state court prefer the state disclosure system to the federal one.

Another speaker, who served on the committee during its first attempt to mandate adverse disclosures, argued that the committee should not be traumatized by that experience. The committee, he said, had been right all along. And this time, it knows what pitfalls to avoid. For example, it will not keep the bar in the dark until the very end of the process.

The committee also endorsed category-specific disclosures. Many district judges have already embraced the Federal Initial Discovery Protocols for Employment Cases. One member reported that, although the Protocols encountered initial resistance, the employment bar now loves them because they generate information that would otherwise require a six- to seven-month discovery battle to get. Another member explained that the Southern District of New York had successfully implemented similar protocols for § 1983 cases that helped clear out its cluttered

docket. One district judge advised the committee to make sure it doesn't define categories too narrowly. She has used the Employment Protocols for two years, in which time only three cases have qualified under its definition of "employment." Finally, one member reiterated his belief that the committee should not endorse new pilot projects without studying the existing ones more thoroughly.

Judge Sutton concluded that the committee appears to support studying an expanded initial disclosure system. This, he said, might be the time to try again.

Judge Fitzwater: Streamlined Procedure

PRESENTATION

Judge Fitzwater surveyed the many existing pilot projects that offer litigants streamlined procedures. According to the Institute for the Advancement of the American Legal System (IAALS), successful projects have five key features:

- a short trial that limits time to present evidence,
- a credible trial date,
- an expedited and focused pretrial process,
- relaxed evidentiary standards that encourage parties to agree to admission, and
- voluntary participation.

Judge Fitzwater then summarized two examples of what such a pilot project might look like. He could not find data about how often summary procedures had been used, but the procedures themselves are well-known. He started with the short-trial regime established by the District of Nevada in 2013. Litigants who opt into that system lose their right to discovery. In return, they receive a trial within 150 days of initial assignment, with a 60-day continuance available in limited circumstances. Evidence may be admitted without authentication or foundation by a live witness, and parties are encouraged to submit expert testimony through reports and not live testimony. At the trial itself, each party receives 9 hours to allocate among all trial phases as it chooses. The litigants present their arguments before a condensed jury—and once the trial is over, their ability to file post-trial motions is limited.

He then contrasted Nevada's system with the short-trial process in the Western District of Pennsylvania. That district does not eliminate a party's right to discovery but instead puts numerical limits upon it. Each party only has three hours to present evidence to the jury, with additional time for jury selection allocated at the judge's discretion. Finally, and most critically, the system bars parties from filing motions for summary judgment or motions in limine. Other pretrial motions may be filed only with leave of court.

Judge Fitzwater placed particular emphasis on this last provision. In the mine-run civil case, dispositive motions—not discovery disputes—were the main source of delay. Ironically, the Civil Justice Reform Act's reporting procedures reinforce the incentive to work on motions, not cases: Judges must report a motion as pending after six months, but need not report a case as pending until three years elapse.

DISCUSSION

Many committee members expressed skepticism that a voluntary program would succeed. One pointed out that the Northern District of California abandoned a similar short-trial procedure after litigants declined to use it. Several district judges on the committee who have given litigants an expedited-trial option encountered the same problem. In light of that experience, they recommended that any pilot project in this area be mandatory, not voluntary.

Judge Sutton asked Professor Cooper why his proposal in the 1990s to apply simplified procedural rules to small-stakes cases failed to gain traction. Professor Cooper explained that the proposal failed after a district judge pronounced it "elegant on paper but of no practical use." He also pointed out two potential implementation issues: First, different lawyers define a "small-stakes case" differently; and second, how should a simplified system treat a small-stakes case with a demand for injunctive relief?

One appellate judge recommended against defining "small stakes" using a dollar amount. She cited her experience with the Class Action Fairness Act, which contains a similar dollar-amount requirement, and collateral litigation over manipulation of that requirement. Another appellate judge warned that mandating streamlined procedures for certain categories of cases, but not others, will be tricky.

* * *

Judge Sutton summed up the conversation. At a minimum, he said, everybody agrees that the committee should study the many pilot projects in existence. And nobody thinks the committee should refrain from considering the possibility of civil litigation reform; the only worry is that specific reforms might be more complicated than anticipated. As such, he asked the Civil Rules Committee to study this topic and give its thoughts at the upcoming May meeting. He also advised it to consult Judge Fogel to see what FJC resources are available, and to coordinate with IAALS and the legal academy as well.

NEXT COMMITTEE MEETING

Judge Sutton concluded the meeting by announcing that the committee will next convene on May 28–29, 2015, in Washington, D.C.

Respectfully submitted,

Judge Jeffrey S. Sutton
Chair

(Rev. 2/20/15)

Agenda E-19 (Summary)
Rules
March 2015

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

Approve modifications to the committee notes accompanying proposed amendments to Civil Rules 4(m) and 84 approved by the Conference on September 16, 2014 . . . . . .Addendum pp. 1-2

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

- Federal Rules of Appellate Procedure. . . . . pp. 2-4
- Federal Rules of Bankruptcy Procedure . . . . . pp. 4-7
- Federal Rules of Civil Procedure. . . . . pp. 7-9
- Federal Rules of Criminal Procedure . . . . . pp. 9-10
- Federal Rules of Evidence. . . . . pp. 10-13
- Other Matters . . . . . .p. 13

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

Agenda E-19
Rules
March 2015

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure met on January 8-9, 2015. All members attended except Deputy Attorney General James M. Cole and Larry D. Thompson.

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

Also participating in the meeting were Professor Daniel R. Coquillette, the Committee's Reporter; Judge Michael A. Chagares, Chair of the Committee's CM/ECF subcommittee and member of the Advisory Committee on Appellate Rules; Professor Geoffrey C. Hazard, Jr., and Professor R. Joseph Kimble, consultants to the Committee; Jonathan C. Rose, the Committee's Secretary and Chief of the Administrative Office's Rules Committee Support Staff; Julie Wilson,

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

Scott Myers, and Bridget M. Healy (by telephone), Attorneys of the Rules Committee Support Staff; Andrea L. Kuperman, Chief Counsel to the Rules Committee; Michael Shih, Law Clerk to Judge Jeffrey S. Sutton; and Judge Jeremy D. Fogel, Director of the Federal Judicial Center. Elizabeth J. Shapiro attended on behalf of the Department of Justice. Sandra Day O'Connor, Associate Justice (Retired), U.S. Supreme Court, also attended as an observer.

In addition, the following individuals participated in a panel discussion on the creation of pilot projects in conjunction with the Federal Judicial Center to facilitate civil discovery reform: Judge Jeremy D. Fogel; and three former rules committee chairs, Circuit Judge Anthony J. Scirica, District Judge Sidney A. Fitzwater, and Bankruptcy Judge Eugene R. Wedoff.

FEDERAL RULES OF APPELLATE PROCEDURE

The Advisory Committee on Appellate Rules presented no action items.

Informational Items

On August 15, 2014, proposed amendments to Appellate Rules 4, 5, 21, 25, 26, 27, 28.1, 29, 32, 35, and 40, and Forms 1, 5, and 6, as well as a proposed new Form 7, were published for public comment. The comment period closes February 17, 2015.

As previously reported, the proposed amendments to Rules 4(c)(1) and 25(a)(2)(C), and Forms 1 and 5, and the proposed new Form 7 are designed to clarify and improve the inmate-filing rules. The proposed amendment to Rule 4(a)(4) addresses a circuit split concerning whether a motion filed within a purported extension of a non-extendable deadline under Civil Rules 50, 52, or 59 counts as timely under Appellate Rule 4(a)(4). The proposed amendments to Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6 seek to specify the length of computer-prepared documents in terms of the number of words or lines of text ("type-volume" limits), as opposed to the number of pages. The proposed amendment to Rule 32 would also adopt a reduced word

count for briefs that approximates the page limit that prevailed prior to the 1998 amendments. The proposed amendment to Rule 26(c) would exclude electronic service from the "3-day rule."[1] Finally, the proposed new Rule 29(b) would set default rules for the treatment of amicus filings in connection with petitions for rehearing. A public hearing on the proposed amendments is scheduled to be held in Washington, D.C., on February 17, 2015.

At its fall 2014 meeting, the advisory committee discussed at length four proposals on its agenda and decided to continue its consideration of three of those proposals. First, the advisory committee is considering whether to propose amending the Appellate Rules to require disclosures in addition to those currently required by Appellate Rules 26.1 and 29(c).[2] A number of circuits have local provisions that require such additional disclosures. The advisory committee is considering disclosures in bankruptcy matters, disclosures concerning victims in criminal cases, disclosures by intervenors and amici, and disclosures by nongovernmental, nonhuman entities other than corporations. The advisory committee is working in close coordination with the Committee on Codes of Conduct and will likely seek additional guidance from that committee as the project progresses.

Second, the advisory committee is considering the possibility of amending Rule 41 to address whether a court of appeals has authority to stay its mandate following a denial of certiorari, and whether such a stay requires an order or can result from the court's inaction.

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[1]The 3-day rule adds three days to a period of time if that period is measured after service and service is accomplished by certain methods. Now that electronic service is well-established, the consensus among the rules committees is that it no longer makes sense to include that method of service among the types of service that trigger application of the 3-day rule. The proposed amendment to Rule 26(c) parallels proposed amendments to Civil Rule 6(d), Criminal Rule 45(c), and Bankruptcy Rule 9006(f).

[2]Appellate Rule 26.1 requires any nongovernmental corporate party to a proceeding in a court of appeals to file a corporate disclosure statement. Appellate Rule 29(c) addresses the disclosures required of amici curiae.

The Supreme Court has twice reserved judgment as to whether Rule 41(d)(2)(D) requires a court of appeals to issue its mandate immediately after the Supreme Court denies a petition for certiorari, or whether Rule 41(b) allows a court of appeals to "extend the time" for issuing a mandate even after certiorari is denied. The Court also has noted an open question as to whether Rule 41(b) allows a court of appeals to "extend the time" for issuing its mandate by mere inaction, or whether an order is required.

Finally, along with the other advisory committees, the advisory committee continues to consider possible amendments that take into account the shift to electronic filing and service. Under consideration is the adoption of part of the template rule prepared by the CM/ECF subcommittee for consideration by the advisory committees. The relevant part of the template rule would define "information in written form" to include electronically stored information. Another matter under consideration is whether to mandate electronic filing and authorize electronic service in most cases. The advisory committee also is considering whether to amend Appellate Rule 25(d) so that it would no longer require a separate proof of service in instances when service was effected by means of the notice of docket activity generated by CM/ECF.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted a proposed amendment to Bankruptcy Rule 1001 with a request that it be published for comment at a suitable time. The Committee approved the advisory committee's recommendation.

Rule 1001 is the bankruptcy counterpart to Civil Rule 1 and generally tracks the language of that rule. Presently pending before the Supreme Court is a proposed amendment to Civil Rule 1 that would provide that the Civil Rules "be construed, administered, *and employed by the court*

and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding" (emphasis on amendment added). The proposed amendment to Civil Rule 1 is intended to make clear that parties, as well as courts, have a responsibility to achieve the just, speedy, and inexpensive resolution of every action.

The advisory committee concluded that, for purposes of consistency, it should propose revision of Bankruptcy Rule 1001 to track the proposed amended language of Civil Rule 1. The amendment to Civil Rule 1 is part of the package of proposals that emerged from the May 2010 Conference on Civil Litigation held at Duke University School of Law ("Duke Rules Package"). If adopted by the Supreme Court and no action is taken by Congress, the other rule amendments in that package will automatically become part of the Bankruptcy Rules on December 1, 2015 because those rules apply in adversary proceedings. Moreover, deviation from the language of Civil Rule 1 could give rise to a negative inference that Rule 1001 differs in the extent to which it encourages cooperation.

In its consideration of whether to amend Rule 1001 to include the pending amendment to Civil Rule 1, the advisory committee noted that Rule 1001 was never amended to reflect the 1993 amendment to Rule 1. The advisory committee therefore concluded that the language of the 1993 amendment should also be included in Rule 1001 so that the admonition of the two rules will be the same.

Informational Items

On August 15, 2014, proposed amendments to Bankruptcy Rules 1010, 1011, 2002, 3002, 3002.1, 3007, 3012, 3015, 4003, 5009, 7001, 9006(f), 9009, a proposed new Rule 1012, proposed amendments to Official Forms 106J, 201, 202, 204, 205, 206Sum, 206A/B, 206D, 206E/F, 206G, 206H, 207, 309A, 309B, 309C, 309D, 309E, 309F, 309G, 309H, 309I, 312, 313,

314, 315, 401, 410, 410A, 410S1, 410S2, 416A, 416B, 416D, 424, and Instructions, proposed new Official Forms 106J-2 and 113, and a proposed abrogation of Official Forms 11A and 11B, were published for public comment. The comment period closes February 17, 2015.

As previously reported, the advisory committee is in the process of creating a national chapter 13 plan form. The proposed national chapter 13 plan form (new Official Form 113) and the related amendments to Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009 have generated the most comments, and a public hearing was held in Washington, D.C. on January 23, 2015. The multi-year effort to create a national chapter 13 plan form has two goals: to bring more uniformity to chapter 13 practice and to simplify the review of chapter 13 plans by debtors, courts, trustees, and creditors. The proposed rule and form amendments require use of the plan form and establish the authority needed to implement some of the form's provisions. The plan form and rule amendments were first published in August 2013 and generated a large number of comments. Based on those comments, the advisory committee made significant changes to the plan form and received approval to republish both the plan form and the rule amendments. The advisory committee also received approval to ask for public comment on the question of whether the rule amendments should be adopted even if the plan form is not adopted.

The advisory committee is approaching the conclusion of the forms modernization project, a multi-year endeavor to revise many of the Official Bankruptcy Forms. As previously reported, the advisory committee decided to implement the modernized forms in stages in order to facilitate a smoother transition. The first group of forms went into effect on December 1, 2013. The second group of forms—the appellate forms and the means-test forms—went into effect on December 1, 2014. The third group of forms, including the ones for non-individual debtor cases, are included in the forms that were published for public comment in August 2014.

There remains one small group of modernized forms (Official Forms 25A, 25B, 25C, and 26) that has not yet been published. The advisory committee intends to recommend publication of this last group to the Committee at its May 2015 meeting.

Finally, the advisory committee, in conjunction with the other advisory committees and the CM/ECF subcommittee, continues to consider possible rules amendments regarding electronic filing and service. The advisory committee referred for consideration to its subcommittee on technology and cross-border insolvency the template rule developed by the CM/ECF subcommittee that would expand the definition of various terms to include electronically stored information and electronic transmission.

FEDERAL RULES OF CIVIL PROCEDURE

The Advisory Committee on Civil Rules presented no action items.

Informational Items

On August 15, 2014, proposed amendments to Civil Rules 4(m), 6(d), and 82 were published for public comment. The comment period closes February 17, 2015.

The proposed amendment to Rule 4(m) would make clear that service abroad on a corporation is excluded from the time for service set by Rule 4(m). The proposed amendment to Rule 6(d) would eliminate electronic service from the 3-day rule. The proposed amendment to Rule 82, the rule that addresses venue for admiralty and maritime claims, arises from legislation that added a new § 1390 (district courts; scope of venue) to the venue statutes in Title 28 and repealed former § 1392 (local actions). The proposed amendment would delete the reference to § 1392 and add a reference to new § 1390.

At its fall 2014 meeting, the advisory committee considered numerous suggestions and proposals. After careful consideration of each, the advisory committee declined to pursue most

of them, but decided to continue considering various proposals to amend Rule 68 (Offer of Judgment). The advisory committee plans to first study analogous rules in the state courts before deciding whether or how to amend Rule 68.

The advisory committee's Rule 23 (Class Actions) subcommittee is currently refining the specific issues it will study and is seeking input on the subjects that warrant ongoing consideration. In its effort to seek input from a cross-section of interested parties, all members of the subcommittee appeared for a panel at the ABA National Class Action Institute in Chicago, and there are plans to hold a mini-conference on Rule 23 issues sometime in 2015. Discussions thus far have included a multitude of issues including the criteria for certifying a settlement class, whether criteria for reviewing whether a settlement is "fair, reasonable, and adequate" should be added to the rule, cy pres awards, objector issues, and notice requirements.

Two other subcommittees are also at work. The advisory committee has formed a joint subcommittee with the Advisory Committee on Appellate Rules to address two sets of issues: manufactured finality and Rule 62 matters relating to stays and bonds pending appeal. The discovery subcommittee will examine "requester pays" proposals submitted to the advisory committee by various groups.

The advisory committee continues to consider rules amendments addressing the reality of electronic filing and service. The advisory committee has determined that the national rules should mandate electronic filing, subject to an exception for good cause, and provide for electronic service of the papers described in Rule 5(a), deleting the requirement in Rule 5(b)(2)(E) that consent be obtained from the person served. It has also determined that Rule 5(d)(1) should be amended to provide that a Notice of Electronic Filing generated by CM/ECF serves as a certificate of service. The advisory committee will continue reviewing these issues.

The advisory committee is considering possible pilot programs to make civil litigation more efficient and less expensive. The advisory committee also is considering ways to publicize and promote the Duke Rules Package if those proposals become effective on December 1, 2015.

FEDERAL RULES OF CRIMINAL PROCEDURE

The Advisory Committee on Criminal Rules presented no action items.

Informational Items

On August 15, 2014, proposed amendments to Criminal Rules 4, 41, and 45 were published for public comment. The comment period closes February 17, 2015. The proposed amendments to Rule 4 (Arrest Warrant or Summons on a Complaint) address service of summonses on organizational defendants. The proposed amendment to Rule 45 would eliminate the 3-day extension of time for electronic service.

The proposed amendments to the territorial venue provisions of Rule 41 (Search and Seizure)—which generally limit searches to locations within a district—would allow a magistrate judge to issue a warrant to use remote access to search electronic storage media and seize or copy electronically stored information outside the magistrate judge's district in two situations: (1) when a suspect has used technology to conceal the location of the media to be searched; and (2) in an investigation into a violation of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(5), when the media to be searched are damaged computers located in five or more districts. As expected, the proposed amendments to Rule 41 have generated significant interest. A public hearing was held in Washington, D.C., on November 5, 2014. At the hearing, the advisory committee heard eight witnesses, most of whom also provided written comments.

At its fall 2014 meeting, the advisory committee carefully considered and declined to pursue suggested amendments to Criminal Rules 11 and 52, and Rule 5 of the Rules Governing

Section 2254 Cases in the United States District Courts. Shortly before its meeting, the advisory committee received a defense bar proposal to amend Rule 35 (Correcting or Reducing a Sentence) to afford judges additional discretion to reduce sentences after they become final. The proposal would allow a district judge, upon defense motion, to reduce the sentence of a defendant who has served two-thirds of a term of imprisonment in three circumstances: (1) newly discovered scientific evidence casting doubt on the validity of the conviction; (2) substantial rehabilitation of the defendant; or (3) deterioration of defendant's medical condition (providing an alternative to compassionate release). A subcommittee was formed to consider the proposed amendment and will report its recommendations at the next advisory committee meeting.

A second subcommittee was formed to consider suggestions made by the CM/ECF subcommittee. The subcommittee will also consider issues raised by the decision of the Advisory Committee on Civil Rules to pursue a national rule requiring electronic filing in civil cases. That decision, discussed *supra*, requires reconsideration of Criminal Rule 49 (Serving and Filing Papers) because Rule 49(b) presently provides that service "must be made in the manner provided for a civil action," and subdivision (e) provides that a local rule may require electronic filing only if reasonable exceptions are allowed. The subcommittee will consider whether the criminal rules should also mandate electronic filing and, if so, what exceptions should be made.

FEDERAL RULES OF EVIDENCE

The Advisory Committee on Evidence Rules presented no action items.

Informational Items

In conjunction with its spring 2014 meeting, the advisory committee held a symposium to consider the intersection of the Evidence Rules and emerging technologies. The discussion was

productive and helped define the agenda of the advisory committee's fall 2014 meeting. The proceedings from the symposium were published in the *Fordham Law Review*.

Among the proposals developed at the symposium was a suggestion to add two new hearsay exceptions intended to address the phenomenon of electronic communication—one to Rule 804(b), which is the category for hearsay exceptions applicable only when the declarant is unavailable to testify, and the other to Rule 801(d)(1), which is the category for hearsay statements made by testifying witnesses. The proposal is a modified version of the previously proposed hearsay exception for recent perceptions.

Upon consideration, the advisory committee determined that an amendment to Rule 801(d)(1) was not warranted for several reasons, most importantly because it would be problematic to integrate with the other Rule 801(d)(1) exceptions. The advisory committee therefore determined that any future change to Rule 801(d)(1) should be made pursuant to a systematic review of the entire category of prior statements of testifying witnesses. That review should specifically consider whether prior statements of testifying witnesses should even be defined as hearsay and, if so, what exceptions are appropriate. The advisory committee will begin that systematic review at its next meeting.

With regard to the proposal to amend Rule 804, the advisory committee determined that a recent perceptions exception in that rule would lead to the admission of unreliable hearsay because some electronic communications might be difficult to interpret without the benefit of context for that communication. In addition, it was the consensus of the advisory committee that the existing hearsay exceptions appeared to be working adequately to allow the admission of reliable electronic communications. However, the advisory committee directed its reporter and consultant to monitor the state and federal case law on how personal electronic communications

are being treated in the courts. If it appears that reliable statements are being excluded, or that they are being admitted but only through misinterpretation of existing exceptions, the addition of a hearsay exception for recent perceptions conditioned on the unavailability of the declarant may be warranted.

At its fall 2014 meeting, the advisory committee considered a proposal to amend Rules 901 and 902 to add specific provisions detailing how to authenticate certain forms of electronic evidence. For several reasons, the advisory committee declined to pursue the proposal to amend Rules 901 and 902, but decided to develop a best-practices manual that would assist courts and litigants in negotiating the difficulties of authenticating electronic evidence. The advisory committee will continue working on this issue.

Finally, the advisory committee considered a proposal to amend Rule 902, the provision on self-authentication, to add two provisions. The first would allow self-authentication of machine-generated information (such as a web page) upon a submission of a certificate prepared by a qualified person. The second would provide a similar certification procedure for a copy of an electronic device, media, or file that would be authenticated by a digital process for identification. These proposals are analogous to Rule 902(11), which permits a foundation witness to establish the authenticity and admissibility of business records by way of certification. The goal of the proposals is to make authentication easier for certain kinds of electronic evidence that, under current law, would likely be authenticated under Rule 901 but only by calling a witness to testify to authenticity. The advisory committee unanimously agreed that it would be useful to promote rules that would make the process of proving authenticity for electronic evidence simpler, cheaper, and more efficient. Accordingly, the advisory committee unanimously decided to consider, at its next meeting, formal amendments to add new subsections

to Rule 902—subsection 13 for machine-generated evidence and subsection 14 for copies of devices, storage media, and the like.

OTHER MATTERS

At its meeting, the Committee reviewed the planning timetable for the 2015 update of the *Strategic Plan for the Federal Judiciary*. The rules committees are currently involved in several efforts to achieve the strategic initiatives identified by the Committee in June 2012. For example, through the work of the CM/ECF subcommittee, all of the advisory committees are assessing the impact of electronic filing and evaluating ways to take advantage of technological advances. The Committee is also involved in several efforts to implement the Duke Rules Package. Such efforts include working with the Federal Judicial Center on judicial education efforts and pilot projects.

The Committee also reviewed the work of the CM/ECF subcommittee and its proposals for changes to the national rules to accommodate electronic case filing. The Committee determined that the subcommittee had fulfilled its purpose and could be disbanded.

Respectfully submitted,

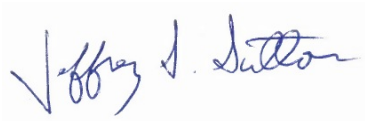

Jeffrey S. Sutton, Chair

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ADDENDUM TO THE REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Committee on Rules of Practice and Procedure asks the Judicial Conference to approve modifications to two committee notes that were approved by the Conference on September 16, 2014, specifically the amendments to Civil Rules 4(m) and 84.

The proposed amendment to Rule 4(m)—the rule addressing time limits for service of process—reduces the time for service from 120 to 90 days. The proposed amendment to Rule 84 abrogates Rule 84 and the Appendix of Forms that appears at the end of the civil rules. These amendments were transmitted to the Supreme Court in September 2014 as part of a larger rules package. By letter dated February 11, 2015, the Court recommended modest changes to the committee notes to Rules 4(m) and 84.

The first suggested change would delete the words "for good cause" from the end of the first sentence in the second paragraph of the committee note for Rule 4(m). The revised sentence would read: "Shortening the presumptive time for service will increase the frequency of occasions to extend the time." This change is consistent with the intent of the advisory and standing committees.

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

The second suggestion is to revise the committee note for the Rule 84 abrogation in two respects: to clarify that the abrogation does not alter existing pleading standards and to identify other sources for civil procedure forms. Consistent with this suggestion, the advisory committee recommends two changes to the committee note. First, the advisory committee added a sentence to the end of the note stating: "The abrogation of Rule 84 does not alter existing pleading standards or otherwise change the requirements of Civil Rule 8." Second, the advisory committee revised the current final sentence of the note to say: "Accordingly, recognizing that there are many alternative sources for forms, including the website of the Administrative Office of the United States Courts, the websites of many district courts, and local law libraries that contain many commercially published forms, Rule 84 and the Appendix of Forms are no longer necessary and have been abrogated." These changes are also consistent with the intent of the advisory and standing committees.

It is recommended that the Judicial Conference approve these changes to the Rule 4(m) and 84 committee notes. A copy of the committee notes with the changes highlighted is attached as an appendix.

> **Recommendation:** That the Judicial Conference approve modifications to the committee notes accompanying proposed amendments to Civil Rules 4(m) and 84 approved by the Conference on September 16, 2014.

Respectfully submitted,

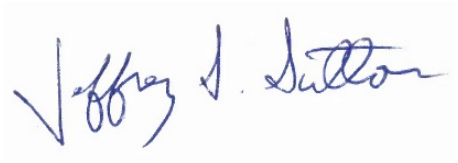

Jeffrey S. Sutton, Chair

Appendix – Proposed Amendments to the Federal Rules of Civil Procedure

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

Rule 4. Summons

* * * * *

(m) Time Limit for Service. If a defendant is not served within ~~120~~90 days after the complaint is filed, the court — on motion or on its own after notice to the plaintiff — must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1) or to service of a notice under Rule 71.1(d)(3)(A).

---

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

14 * * * * *

Committee Note

Subdivision (m). The presumptive time for serving a defendant is reduced from 120 days to 90 days. This change, together with the shortened times for issuing a scheduling order set by amended Rule 16(b)(2), will reduce delay at the beginning of litigation.

Shortening the presumptive time for service will increase the frequency of occasions to extend the time ~~for good cause~~. More time may be needed, for example, when a request to waive service fails, a defendant is difficult to serve, or a marshal is to make service in an in forma pauperis action.

The final sentence is amended to make it clear that the reference to Rule 4 in Rule 71.1(d)(3)(A) does not include Rule 4(m). Dismissal under Rule 4(m) for failure to make timely service would be inconsistent with the limits on dismissal established by Rule 71.1(i)(1)(C).

Shortening the time to serve under Rule 4(m) means that the time of the notice required by Rule 15(c)(1)(C) for relation back is also shortened.

1 **Rule 84. Forms**

2 **[Abrogated (Apr. __, 2015, eff. Dec. 1, 2015).]**

3 ~~The forms in the Appendix suffice under these rules~~

4 ~~and illustrate the simplicity and brevity that these rules~~

5 ~~contemplate.~~

Committee Note

Rule 84 was adopted when the Civil Rules were established in 1938 "to indicate, subject to the provisions of these rules, the simplicity and brevity of statement which the rules contemplate." The purpose of providing illustrations for the rules, although useful when the rules were adopted, has been fulfilled. Accordingly, recognizing that there are many ~~excellent~~ alternative sources for forms, including the website of the Administrative Office of the United States Courts, the websites of many district courts, and local law libraries that contain many commercially published forms, Rule 84 and the Appendix of Forms are no longer necessary and have been abrogated. The abrogation of Rule 84 does not alter existing pleading standards or otherwise change the requirements of Civil Rule 8.

APPENDIX OF FORMS

[Abrogated (Apr. __, 2015, eff. Dec. 1, 2015).]

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Washington, DC
May 28-29, 2015

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125-010492

JUDICIAL CONFERENCE OF THE UNITED STATES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
MAY 28-29, 2015

AGENDA

I. Opening Business

A. Welcome and opening remarks by Judge Jeffrey S. Sutton

B. Report on March 2015 Judicial Conference Session

C. Report on proposed amendments adopted by the Supreme Court and transmitted to Congress
- Bankruptcy Rule 1007
- Civil Rules 1, 4, 16, 26, 30, 31, 33, 34, 37, and 55, and abrogation of Rule 84 and the Appendix of Forms

II. ACTION: Approving Minutes of the January 2015 Committee Meeting

III. Inter-Committee Work on Electronic Filing, Service, and Notice

A. **ACTION:** Approving and transmitting "3-Day Rule" Package to the Judicial Conference
1. Appellate Rule 26(c). Computing and Extending Time
2. Bankruptcy Rule 9006(f). Computing and Extending Time; Time for Motion Papers
3. Civil Rule 6(d). Computing and Extending Time; Time for Motion Papers
4. Criminal Rule 45(c). Computing and Extending Time

B. Discussion of additional possible rules amendments
- "E-Rules"
- Criminal Rule 49 and Rules Governing Sections 2254 and 2255 Cases

IV. Report of the Advisory Committee on Criminal Rules – Judge Reena Raggi

A. **ACTION:** Approving and transmitting to the Judicial Conference proposed amendments to:
1. Rule 4. Arrest Warrant or Summons on a Complaint
2. Rule 41. Search and Seizure

125-010493

B. Information item

- Suggestions to amend Criminal Rule 35

V. Report of the Advisory Committee on Civil Rules – Judge David G. Campbell

A. **ACTION:** Approving and transmitting to the Judicial Conference proposed amendments to:

1. Rule 82. Jurisdiction and Venue Unaffected
2. Rule 4(m). Summons

B. Discussion items

1. Education efforts regarding the Duke Rules Package
2. Report on the work of the Rule 23 Subcommittee
   - Mini-conference scheduled for September 11, 2015 in Dallas, Texas
3. Report on the work of the Discovery Subcommittee
   - Requester pays issues
4. Report on the work of the Pilot Project Subcommittee
5. Report on the work of the Appellate-Civil Subcommittee

VI. Report of the Advisory Committee on Appellate Rules – Judge Steven M. Colloton

- **ACTION:** Approving and transmitting to the Judicial Conference proposed amendments to:
  1. Inmate Filings: Rules 4(c)(1) and 25(a)(2)(C), Forms 1 and 5, and new Form 7
  2. Tolling Motions: Rule 4(a)(4)
  3. Length Limits: Rules 5, 21, 27, 28.1, 32, 35, 40, and Form 6
  4. Amicus Filings in Connection with Rehearing: Rule 29
  5. Rule 26(a)(4)(C): technical amendment without publication to update cross-reference to Rule 13

VII. Report of the Advisory Committee on Bankruptcy Rules – Judge Sandra Segal Ikuta

A. **ACTION:** Approving and transmitting to the Judicial Conference:

1. Matters published in August 2014 for which the Advisory Committee seeks final approval—amendments to Rules 1010, 1011, 2002, 3002.1, 9006(f), and new Rule 1012, and modernized Official Forms 106J, 106J-2, 201, 202, 204, 205, 206Sum, 206A/B, 206D, 206E/F, 206G, 206H, 207, 309A, 309B, 309C, 309D, 309E, 309F, 309G, 309H, 309I, 312, 313, 314, 315, 401, 410, 410A, 410S1, 410S2, 424; and the abrogation of Official Forms 11A and 11B

125-010494

2. Modernized forms previously approved by the Standing Committee for which the Advisory Committee seeks approval of renumbering and/or minor revisions that do not require publication—modernized Official Forms 3A, 3B, 17A, 17B, 17C, 6I, 22A-1, 22A-1Supp, 22A-2, 22B, 22C-1, 22C-2, 106A/B, 106D, 106E/F, 112, and the Committee Note to Official Form 107

3. Forms for which the Advisory Committee seeks approval of renumbering—Exhibit A to Official Form 1, and Official Forms 16A, 16B, and 16D

B. **ACTION:** Transmitting to the Judicial Conference the following modernized Official Bankruptcy Forms approved at the Committee's May 2014 meeting:

- Official Bankruptcy Forms 101, 101A, 101B, 104, 105, 106 Summary, 106 Declaration, 106A/B (as revised at Action Item A), 106C, 106D (as revised at Action Item A), 106E/F (as revised at Action Item A), 106G, 106H, 107 (Committee Note as revised at Action Item A), 112 (as revised at Action Item A), 119, 121 318, 423, and 427

C. **ACTION:** Approving publishing for public comment proposed amendments to Bankruptcy Rule 1006(b)

D. Information item

- Consideration of compromise proposal regarding proposed Official Form 113, *Chapter 13 Plan Form*, and related amendments to Bankruptcy Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009

VIII. Report of the Advisory Committee on Evidence Rules – Judge William K. Sessions III

A. **ACTION:** Approving publishing for public comment proposed amendments to:
1. Rule 803(16). Hearsay Exception for Statements in Ancient Documents
2. Rule 902. Evidence that is Self-Authenticating

B. Information items
1. Mini-conference planned in conjunction with fall meeting regarding hearsay exceptions for prior statements of testifying witnesses and possible expansion of the residual exception
2. Possible amendments to the notice provisions in the Evidence Rules
3. Best practices manual for authenticating electronic evidence

IX. Report of the Administrative Office

X. Next meeting: January 7-8, 2016 in Phoenix, Arizona

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To carry on a continuous study of the operation and effect of the general rules of practice and procedure.

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Dean C. Colson	ESQ	Florida	2009	2015
Brent E. Dickson	CJUST	Indiana	2014	2017
Roy T. Englert, Jr.	ESQ	Washington, DC	2010	2016
Gregory G. Garre	ESQ	Washington, DC	2011	2017
Neil M. Gorsuch	C	Tenth Circuit	2010	2016
Susan P. Graber	C	Ninth Circuit	2013	2016
David F. Levi	ACAD	North Carolina	2009	2015
Patrick J. Schiltz	D	Minnesota	2010	2016
Amy J. St. Eve	D	Illinois (Northern)	2013	2016
Larry D. Thompson	ESQ	Georgia	2011	2017
Richard C. Wesley	C	Second Circuit	2011	2017
Jack Zouhary	D	Ohio (Northern)	2012	2015
Daniel Coquillette Reporter	ACAD	Massachusetts	1985	Open

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* Ex-officio

125-010503

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Liaison for the Advisory Committee on Civil Rules	**Judge Arthur I. Harris**	***(Bankruptcy)***
Liaison for the Advisory Committee on Civil Rules	**Judge Neil M. Gorsuch**	***(Standing)***
Liaison for the Advisory Committee on Criminal Rules	**Judge Amy J. St. Eve**	***(Standing)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Paul S. Diamond**	***(Civil)***
Liaison for the Advisory Committee on Evidence Rules	**Judge James C. Dever III**	***(Criminal)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Richard C. Wesley**	***(Standing)***

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FEDERAL JUDICIAL CENTER

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 8–9, 2015
Phoenix, Arizona

Draft Minutes

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ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Phoenix, Arizona, on January 8 and 9, 2015. The following members were present:

Judge Jeffrey S. Sutton, Chair
Dean C. Colson, Esquire
Associate Justice Brent E. Dickson
Roy T. Englert, Jr., Esquire
Gregory G. Garre, Esquire
Judge Neil M. Gorsuch
Judge Susan P. Graber
Dean David F. Levi
Judge Patrick J. Schiltz
Judge Amy J. St. Eve
Judge Richard C. Wesley
Judge Jack Zouhary

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Elizabeth J. Shapiro, Esq., represented the Department of Justice in place of Deputy Attorney General James M. Cole. Larry D. Thompson, Esq., was unable to attend.

Also present were Professor Geoffrey C. Hazard, Jr., consultant to the committee; Professor R. Joseph Kimble, the committee's style consultant; and Judge Jeremy D. Fogel, director of the Federal Judicial Center. Judge Anthony J. Scirica, Judge Sidney A. Fitzwater, and Judge Eugene R. Wedoff participated in a panel discussion chaired by Judge Sutton. Associate Justice Sandra Day O'Connor attended as an observer.

The advisory committees were represented by:

Advisory Committee on Appellate Rules —
Judge Steven M. Colloton, Chair
Professor Catherine T. Struve, Reporter (tel)
Advisory Committee on Bankruptcy Rules —
Judge Sandra Segal Ikuta, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Troy A. McKenzie, Associate Reporter
Advisory Committee on Civil Rules —
Judge David G. Campbell, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate Reporter
Advisory Committee on Criminal Rules —
Judge Reena Raggi, Chair
Professor Sara Sun Beale, Reporter (tel)
Advisory Committee on Evidence Rules —
Judge William K. Sessions III, Chair
Professor Daniel J. Capra, Reporter (tel)
Subcommittee on CM/ECF
Judge Michael A. Chagares, Chair

The committee's support staff consisted of:

Professor Daniel R. Coquillette	Reporter, Standing Committee
Jonathan C. Rose	Secretary, Standing Committee; Rules Committee Officer
Julie Wilson	Attorney, Rules Committee Support Staff (tel)
Scott Myers	Attorney, Rules Committee Support Staff (tel)
Bridget M. Healy	Attorney, Rules Committee Support Staff (tel)
Andrea L. Kuperman	Chief Counsel to the Rules Committee
Frances F. Skillman	Rules Office Paralegal Specialist
Toni Loftin	Rules Office Administrative Specialist
Michael Shih	Law Clerk to Judge Jeffrey S. Sutton

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INTRODUCTORY REMARKS

Judge Sutton called the meeting to order by thanking the Rules Office staff and the marshals for their service. He introduced one new member of the Committee, Associate Justice Brent E. Dickson of the Indiana Supreme Court. He also introduced Judge Sandra Segal Ikuta of the Ninth Circuit, the new chair of the Bankruptcy Committee, and Judge William K. Sessions III of the District of Vermont, the new chair of the Evidence Committee. Finally, he introduced Judge Anthony Scirica of the Third Circuit, who helped coordinate the afternoon's panel discussion on pilot projects.

He then summarized the results of the September 2014 Judicial Conference, which unanimously approved both the Bankruptcy Committee's one proposal and the entire Duke Package. The proposed amendments are now before the Supreme Court of the United States.

Finally, Judge Sutton announced that, on December 1, 2014, many other proposals took effect, including Criminal Rule 12 and a multitude of changes to the Bankruptcy Rules and Forms. He thanked Judge Raggi and Judge Wedoff for their efforts in making those proposals law.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The Committee, by voice vote and without objection, approved the minutes of its previous meeting, held on May 29–30, 2014, as well as a set of technical amendments to those minutes proposed by Professor Cooper.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Colloton presented the advisory committee's report, set out in his memorandum and attachments of December 15, 2014 (Agenda Item 3). He reported that the committee has published a package of rules changes for public comment. It plans to consider those comments after the February deadline expires, and to give a complete report at the upcoming spring meeting. He then highlighted three items currently on the committee's agenda.

Informational Items

FED. R. APP. P. 41

The advisory committee is considering how to relieve the tension between two provisions of Appellate Rule 41. Rule 41(d)(2) requires a court of appeals to issue its mandate immediately after the Supreme Court denies a petition for certiorari. However, Rule 41(b) allows courts of appeals to "extend the time" for issuing mandates under certain circumstances. These provisions present two questions. May a court of appeals stay its mandate after certiorari is denied? If so, must it do so in an order, or does mere inaction suffice?

The Supreme Court has twice considered these questions. As to the first issue, it has assumed without deciding that a court of appeals has authority to delay issuing a mandate, but

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only if "extraordinary circumstances" exist. As to the second, it has concluded that Rule 41(b) does not clearly foreclose delay through inaction.

Judge Colloton reported that the committee is inclined to insert the words "by order" into Rule 41(b) to clarify that a court of appeals may not delay a mandate by letting the matter lie fallow. (Those words had actually been removed from a previous version of the Rule, most likely to reduce redundancy). However, it is still working through the more fundamental question of whether such authority exists. It has considered reaffirming what Rule 41(d)(2) already appears to say: A mandate must issue immediately after certiorari is denied. But if appellate courts retain authority to recall an already-issued mandate under extraordinary circumstances, any change to Rule 41(d)(2) would serve little purpose. It thus might make more sense to codify the "extraordinary circumstances" rule. In either case, the committee will make a formal proposal to the Standing Committee, perhaps as early as the spring meeting.

DISCLOSURE RULES

The advisory committee has been considering what disclosures parties must make in briefs for a long time. Its review revealed a bevy of local disclosure requirements that augment the Appellate Rules to different degrees. Concerned that the Rules are insufficiently thorough, the committee is considering expanding their scope: for example, by extending them to intervenors, partnerships, victims in criminal cases, and amici curiae. It is also consulting the Committee on Codes of Conduct for additional guidance. Judge Colloton reported that, because the project remains ongoing, the committee may or may not be able to present a concrete proposal at the spring meeting.

One member proposed that, instead of taking the lead, the Appellate Committee should coordinate with judges at all levels of the federal judiciary. Another suggested that the Appellate Committee coordinate with its sister advisory committees, all of which have an interest in the outcome. In response, Judge Colloton noted that the project was still in a nascent stage and expressed willingness to solicit input from other committees once it had crystallized its thinking.

CM/ECF PROPOSALS

The advisory committee has been working with Judge Chagares and the CM/ECF subcommittee to resolve issues related to electronic filing. Judge Colloton deferred consideration of those issues to Judge Chagares's presentation.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Ikuta presented the advisory committee's report, set out in her memorandum and attachments of December 11, 2014 (Agenda Item 4).

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Amendment for Final Approval

FED. R. BANKR. P. 1001

On behalf of the advisory committee, Judge Ikuta sought approval to amend Bankruptcy Rule 1001, the bankruptcy counterpart to Civil Rule 1. Rather than incorporate the Civil Rule by reference, the Bankruptcy Rule echoes its language. However, Rule 1001 does not reflect recent amendments—approved and pending—to Rule 1. The proposal brings Rule 1001 in line with those changes, stating that "These rules shall be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every case and proceeding."

The committee, without objection and by voice vote, approved the proposed amendment to Rule 1001 for publication.

Informational Items

PROPOSED CHAPTER 13 NATIONAL PLAN FORM

The advisory committee has been working on a national chapter 13 plan form since 2011. Currently, more than a hundred chapter 13 forms exist. Led by Judge Wedoff, the committee distilled those forms into one. It also developed amendments to the Bankruptcy Rules to bring them in line with that form. After publishing the first version of the form and amendments in 2013, the committee received many critical comments. So it went back to the drawing board and published a revised proposal in 2014. The comment period has not yet expired, but the reaction to the revisions has been mixed.

Judge Ikuta reported that, in her view, the committee can fix specific concerns about the form. The real question is whether the need for national uniformity should override local preferences. She recommends implementing the national form incrementally—for instance, by making the form optional and asking various bankruptcy districts to opt into the form.

A professor wondered whether it was possible to make the national form an alternative to local ones. Judge Ikuta confirmed that his question tracked the committee's proposed incremental approach. By making the national form optional and soliciting compliance from individual districts, the committee hoped to build support for it over time.

An appellate judge asked why a national form was necessary. Professor McKenzie gave four reasons. First, the existing forms have generated a tremendous amount of confusion. Second, bankruptcy judges have an independent duty to scrutinize proposed plans, and a national form would reduce uncertainty about where such information may be found. Third, a national form could generate data more effectively. Finally, a national form would let entrepreneurs develop cheaper software for debtors' use.

Judge Wedoff explained why the committee decided to devise a national form in the first place. One bankruptcy judge said that, in the form's absence, bankruptcy courts could not easily

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discharge their duty to independently scrutinize chapter 13 plans. And a bankruptcy lawyers' association said that its members had trouble processing chapter 13 forms from different jurisdictions—and lacked the resources to obtain local counsel. Professor McKenzie added that the committee surveyed the chief judge of every bankruptcy court in the country before getting the project started. The response was overwhelmingly positive.

A district judge asked about the reaction from bankruptcy practitioners. Their comments, Professor McKenzie said, were mixed. Some lawyers liked the idea so long as this word or that word could be changed. Others opposed it. A few lawyers candidly explained that they feared the competition an easily accessible national form would create.

FORMS MODERNIZATION PROJECT

The advisory committee's forms modernization project is almost complete. Unfortunately, the Administrative Office is having trouble integrating the new forms into its new CM/ECF system and may miss its December 2015 deadline—when the forms are scheduled to take effect. The question is whether to delay rolling out the forms until all technological kinks have been ironed out.

Judge Ikuta reported that the committee will discuss the issue at its April meeting, but she recommends releasing the forms on schedule. Doing so, she said, would not disrupt operations in the vast majority of courts. True, three bankruptcy districts give pro se debtors access to forms software on court-run computer terminals. But not enough debtors use that service to justify delaying the forms' national release.

A district judge said that the AO had told her that forms integration was mutually exclusive with the CM upgrade project. As it turns out, Judge Ikuta received that same answer too, but the AO changed its mind once it realized what the forms integration project entailed.

CM/ECF PROPOSALS

The advisory committee considered three of the CM/ECF subcommittee's proposals at its fall meeting. It will defer decision on two of them until the Civil Rules Committee acts. It is independently considering whether to redefine the word "information" to include electronic documents and the word "action" to include electronic action.

REPORT OF THE INTER-COMMITTEE CM/ECF SUBCOMMITTEE

Judge Chagares presented the subcommittee's report, set out in his memorandum and attachments of November 30, 2014 (Agenda Item 8). He announced that the subcommittee had successfully completed its work.

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Informational Items

ABROGATION OF THE THREE-DAY RULE AS APPLIED TO ELECTRONIC SERVICE

The subcommittee previously proposed that parties should not receive three extra days to take action after electronic service. It worked with the relevant advisory committees to draft amendments to Appellate Rule 26(c), Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rule 45. These amendments, Judge Chagares reported, thus far have been well received.

ELECTRONIC SIGNATURES

The subcommittee previously proposed that Bankruptcy Rule 5005 be changed to provide for more flexible electronic signatures, but the Bankruptcy Committee withdrew that proposed amendment after public comment. After that withdrawal, the subcommittee asked the Administrative Office to figure out how local rules treated electronic signatures. Judge Chagares thanked the AO for its diligence and hard work.

The AO's exhaustive survey revealed that nearly every local rule treats filing users' login and password as an electronic signature. The various districts are not nearly so uniform when it comes to nonfilers, but the most prevalent rule requires the user to obtain and retain the signatory's ink signature. In light of these findings, Judge Chagares concluded, the Bankruptcy Committee's decision was probably correct. The local rules appeared sufficient to meet present needs, and any formal rulemaking risked being overtaken by rapid technological developments.

CIVIL AND CRIMINAL RULES REQUIRING ELECTRONIC FILING

The subcommittee previously recommended that Civil Rule 5(d)(3) and Criminal Rule 49(e) be amended to mandate electronic filing as opposed to merely permitting it. Judge Chagares reported that the advisory committees are still considering those proposals.

UNIFORM AMENDMENTS TO ACCOMMODATE ELECTRONIC FILING AND INFORMATION

The current rules do not appear to accommodate electronic filing and information. Thus, the subcommittee proposed defining "information" to include electronic documents and "action" to include electronic action. The advisory committees considered these proposals but reached different conclusions. For example, the Appellate and Civil Rules Committees have decided not to adopt them, while the Bankruptcy and Criminal Rules Committees have submitted them to subcommittees for further study. Judge Chagares reported that the proposal to redefine "information" appears to be the more viable of the two.

Dissolution of the Subcommittee

Judge Sutton thanked Judge Chagares, Professor Capra, Julie Wilson, and Bridget Healy for their hard work, and praised the subcommittee for fulfilling its mandate quickly and efficiently. Professor Capra reiterated Judge Sutton's comments and thanked his fellow reporters.

Judge Sutton and Judge Chagares have agreed that, now that the subcommittee has run its course, there is no need to keep it in place.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rose presented the Administrative Office's report (Agenda Item 10).

Informational Items

The Administrative Office is preparing an updated version of its 2010 *Strategic Plan for the Federal Judiciary*. Because the Long-Range Planning Committee will be meeting in March, Mr. Rose noted, the time for input is now.

Mr. Rose asked anybody corresponding with the Office to copy both the head of the Rules Office and Frances Skillman. That, he said, is the best way to ensure the message gets where it needs to go. He also summarized recent personnel arrivals and departures at the AO.

Finally, Mr. Rose announced that this meeting would be his last as head of the Rules Office. He thanked the committee for the opportunity to work with and learn from such talented people. Judge Sutton thanked Mr. Rose for his leadership and lauded his commitment to public service over a long and distinguished career. He also introduced Rebecca Womeldorf, Mr. Rose's successor, and described her impressive background.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raggi presented the advisory committee's report, set out in her memorandum and attachments of December 11, 2014 (Agenda Item 6). She announced that the amendments to Criminal Rule 12 have now taken effect.

Informational Items

FED. R. CRIM. P. 4

The Standing Committee previously approved for comment a proposed amendment to Rule 4 that would govern service of process abroad. Judge Raggi reported that the advisory committee has received no critical feedback on that proposal.

FED. R. CRIM. P. 41

The Standing Committee previously approved for comment a proposed amendment to Rule 41 to govern venue for searches of electronic devices whose location is unknown. The advisory committee held a lengthy hearing and reviewed extensive public comments. Judge Raggi reported that the critical response has largely focused not on the amendment itself but on concerns about electronic searches more generally.

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These thought-provoking comments led the committee to request a response from the U.S. Department of Justice. The Department endorsed the proposal and suggested ways for the government to satisfy the particularity requirement if the amendment takes effect. Judge Raggi noted that the Federal Judicial Center might consider educating judges about how to analyze such warrant applications down the road. But that, she concluded, is a question for later. For now, the committee is debating whether the amendment needs to be changed. Judge Raggi expects the committee to propose something at the spring meeting, although the current proposal may be tweaked.

SUGGESTED AMENDMENT TO RULE 52

A Second Circuit judge asked the advisory committee to consider amending Rule 52 to provide fresh review—as opposed to plain-error review—for defaulted sentencing errors. He reasoned that, unlike a new trial, a resentencing proceeding imposes an incidental burden on the judiciary. And it is unfortunate when a prisoner is forced to remain in jail longer than he deserves.

Judge Raggi reported that the committee decided not to proceed with this request. Professor Nancy King, the committee's associate reporter, surveyed cases in this area and discovered that the number of defaulted sentencing errors is not high—and were typically corrected on plain-error review. The committee was also concerned that the proposal would generate extensive frivolous litigation. Finally, drawing on its experience with the 2014 Rule 12 amendments, it expressed doubts that the Supreme Court would be willing to create an exception to the general rule that defaulted claims are reviewed for plain error.

One appellate judge proposed an alternative. He suggested that the rules might be amended to reflect what many circuits have already held: that a clear guidelines-calculation error presumptively satisfies the last two elements of plain-error review. The judge acknowledged, however, that his suggestion came close to the edge of the committee's rulemaking authority. Another appellate judge wondered whether a different approach might solve the problem. In his circuit, a defendant can never forfeit a substantive reasonableness challenge, so arguments that a sentence is unjustly long are always reviewed afresh. Judge Raggi responded that, in her view, no judge should ever rely on the guidelines unless that sentence also satisfies the § 3553 factors. Plain-error review is enough to fix the vast majority of problems, and loosening Rule 52's standards would open the floodgates to a host of defaulted sentencing claims. She suggested instead that circuits interested in these alternative proposals adopt them as a local rule or as circuit-specific precedent.

FED. R. CRIM. P. 11

The judges of the Northern District of California asked the advisory committee to let judges refer criminal cases to their colleagues to explore the possibility of a plea bargain. Judges in that district had routinely used this procedure until the Supreme Court held that the Criminal Rules barred it.

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Judge Raggi reported that the committee decided not to proceed with this request either. 95% of criminal cases are already resolved by plea bargains nationally, and the Northern District is no exception to that norm. More, implementing this change would create a host of practical problems—and might raise separation-of-powers concerns to boot.

Judge Raggi also reported that, at around the same time, a judge from the Southern District of New York published an article advocating judicial involvement in plea bargaining to reduce the risk that someone would plead guilty to a crime he didn't commit. The committee was not persuaded by this argument either. If a district judge is not convinced that a defendant is guilty of the crime to which he pleaded guilty, the judge should reject that plea under Criminal Rule 11.

HABEAS RULE 5

A judge from the Eastern District of Pennsylvania asked the advisory committee to amend Habeas Rule 5. Currently, that Rule requires a State to give a habeas petitioner copies of all exhibits attached to its response. The judge proposed relieving the State of that obligation in the absence of a judicial order to the contrary.

Judge Raggi reported that the advisory committee unanimously rejected this proposal. Every court expects these documents to be provided, and the States themselves have not complained about the problem.

FED. R. CRIM. P. 35

The New York Council of Defense Attorneys asked the committee to grant judges authority to reduce a sentence if (1) the defendant can identify new evidence casting doubt on his conviction, (2) the defendant can show he has been fully rehabilitated, or (3) the defendant can point to medical problems justifying his release.

Judge Raggi reported that a subcommittee is still examining this proposal, but she thinks it will not ultimately succeed. Proposal 1 effectively repeals AEDPA's statutory time limits on presenting such evidence in a habeas petition. Proposal 2 would subject the courts to a flood of rehabilitation claims. And Proposal 3 is redundant, since prisoners can already be released on humanitarian grounds when appropriate.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell presented the advisory committee's report, set out in his memorandum and attachments of December 2, 2014 (Agenda Item 5).

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Informational Items

CM/ECF PROPOSALS

Judge Campbell reported that the advisory committee has finished considering the CM/ECF Subcommittee's proposals. It recommended that the Civil Rules mandate electronic filing and service with appropriate exceptions for good cause. It recommended against changing the Rules' approach to electronic signatures, having observed the Bankruptcy Rules Committee's experience. It also recommended against defining "information" or "action" to include "electrons" (e.g., electronic filing), although it remains open to making that change if the existing regime becomes unworkable.

FED. R. CIV. P. 68

The advisory committee considered several proposals to amend Civil Rule 68, which governs offers of judgment. The committee has studied the Rule twice in the last two decades, and it provoked a storm of controversy both times. Nevertheless, Judge Campbell reported that the committee is once again looking at the question—this time by surveying how the States implement their own offer-of-judgment procedures. The committee will consider next steps at its April meeting.

FED. R. CIV. P. 26

The advisory committee considered a proposal to add the presence of third-party litigation financing to the list of Civil Rule 26(a) disclosures. The committee agreed that the issue is important but determined that rulemaking is not yet appropriate. Litigation finance is a relatively new field. Besides, judges already have tools to obtain this information when relevant. And the absence of a mandatory-disclosure rule does not appear to hinder the resolution of cases involving litigation financiers.

FED. R. CIV. P. 23 SUBCOMMITTEE ACTIVITY

The advisory committee appointed a subcommittee to consider issues related to Civil Rule 23. Currently, it is charged with gathering facts to identify questions worth further study. So far, Judge Campbell reported, the subcommittee has spotted six primary issues. It plans to present a set of conceptual proposals to the full committee at its April meeting that may generate more concrete proposals for the fall. It is also considering convening a mini-conference in 2016 to evaluate any suggestions that might emerge.

One member asked the subcommittee to examine the procedures governing multidistrict litigation. He said that mass-tort MDLs make up half the federal courts' civil docket, and the rules regulating them may be worth reexamining. He also observed that the MDL bar is a small and tightly knit group of lawyers with links to the MDL Panel. None of this is to say that MDLs are being mishandled. But because MDLs occupy such a large part of the civil system, the subcommittee ought to ensure that the process is working.

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Two members responded that, judging from their past experience with the subject, they doubted whether Rule 23—and for that matter the Rule 23 subcommittee—was the best place to address any problems MDLs might pose. Two judges who have presided over MDL cases also expressed their doubts. One reported that, in his experience, the MDL process *was* working. The other reported hearing complaints about the system, but those focused more on the process of MDL certification and counsel selection than on the process of trying MDL cases once certified. Both questioned whether a one-size-fits-all approach was possible or desirable. Finally, a practitioner pointed out that a small bar is an efficient bar. MDL trial firms get along with MDL defense firms, so MDL cases tend to run smoothly. And from most firms' perspective, the cost of entering the MDL arena is prohibitively high, making MDL cases poor investments.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Sessions presented the advisory committee's report, set out in his memorandum and attachments of November 15, 2014 (Agenda Item 7). The committee considered proposals developed from its April 2014 Symposium on the Challenges of Electronic Evidence. The *Fordham Law Review* has published the proceedings from that Symposium.

Informational Items

FED. R. EVID. 803(16)

Evidence Rule 803(16) provides a hearsay exception for authenticated documents over twenty years old. Judge Sessions reported that this Rule has almost never been used, but it may become more significant in an era of electronic evidence. The advisory committee thinks this Rule is inappropriate but is still deciding what to do about it. One option is to leave it be. Another is to abrogate it or narrow it to exclude electronically stored information. Still another is to amend it to require a showing of necessity or reliability.

RECENT PERCEPTIONS

The advisory committee considered whether to add a new hearsay exception for electronically reported recent perceptions to Evidence Rules 801(d)(1) and 804(b). This change would arguably prevent reliable statements made in texts, tweets, and Facebook posts from being excluded.

Judge Sessions reported that the committee is continuing to study whether these changes are necessary. With respect to Rule 801(d)(1), the committee has decided not to change that provision without first asking whether prior statements of testifying witnesses should even be defined as hearsay. It will begin that study at its next meeting. With respect to Rule 804(b), the committee is continuing to monitor the caselaw to see if courts have actually been excluding reliable evidence of this sort. A district judge asked the committee to study whether a witness's prior statement should be treated as hearsay when that witness is available to testify. Professor Capra responded that such a rule might open the door to all prior consistent statements.

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STANDARDS FOR AUTHENTICATING ELECTRONIC EVIDENCE

The advisory committee considered whether to amend Evidence Rules 901 and 902 to provide specific grounds for authenticating electronic evidence. Judge Sessions reported that, in the committee's view, devising authentication standards against a rapidly changing technological backdrop would create more problems than they would solve. However, it unanimously decided to develop a best-practices manual to guide courts and litigants.

FED. R. EVID. 902

The advisory committee considered two proposals to make it easier for litigants to authenticate certain kinds of electronic evidence. They mirror the self-authentication procedure for business records in Evidence Rule 902(11) by shifting the burden for proving inadmissibility to the opposing party. Judge Sessions reported that the committee unanimously supports these proposals and will consider introducing them as formal amendments at its next meeting.

CONCLUDING REMARKS

Judge Sutton concluded this portion of the meeting by recognizing four departing individuals for their service: Jonathan Rose, Andrea Kuperman, Judge Sidney Fitzwater, and Judge Eugene Wedoff. He summarized their remarkable achievements and thanked them all for their tremendous work on the committee's behalf.

PROMOTING JUDICIAL EDUCATION THROUGH VIDEOS

The committee considered the Federal Judicial Center's proposal to produce videos that would educate judges and lawyers about changes to the Federal Rules. Judge Sutton explained how the proposal came to be. Education has always been a key component of the Duke Package, which was designed in part to change the culture of civil litigation. Judge Fogel came up with the idea of disseminating information through video presentations. Initially, the FJC planned to create test videos for all of the rules that took effect in December 2014. However, the committee expressed concern that such videos—if released to the public—would constitute a form of post-enactment legislative history. So it postponed a final decision on the FJC's proposal until it could review a sample video.

Judge Fogel showed a sample film featuring Judge Sessions and Professor Capra, who discussed recent amendments to Evidence Rules 801 and 803. He acknowledged concerns about post-enactment legislative history but argued that the video format was a much more dynamic way to communicate information. He also explained that the videos would reach a wide audience even if restricted to judges and judicial employees. For example, a thousand viewers watched a recent webinar on § 1983 litigation.

Many members supported the FJC proposal. The Duke Package depends on education for its success, and videos might help reach previously inaccessible constituencies. Several judges recommended presenting the videos to their law clerks and at judicial meetings both private and

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public. As for the legislative-history concern, that issue can be solved with a disclaimer—or a rule that no such video could be used in court.

One appellate judge expressed reservations. He argued that the written word is superior to video in conveying this sort of information. In response, a member proposed releasing the transcript of the video with the video itself. Another member suggested that the videos might be more useful if they provided practice tips. This triggered concerns that expanding the videos beyond the text of the committee notes would stretch the bounds of proper rulemaking.

Judge Sutton recommended that the FJC proceed slowly. He asked it to work with any committee chairs and reporters willing to produce videos describing significant rule changes that took effect in December 2014. Those videos would be then placed on the private judicial intranet. The committee could then use that experience to determine whether to continue the program and whether to make the videos public. He thanked Judge Fogel, Judge Sessions, and Professor Capra for putting together the demonstration video.

PANEL DISCUSSION ON THE CREATION OF PILOT PROJECTS

Introduction

Judge Sutton presided over a panel discussion on the creation of pilot projects to facilitate civil discovery reform. When coupled with the Duke Package reforms, pilot projects offer a powerful way to change litigation norms for the better and to gather data for future reforms in the process. By convening the panel, he hoped to give the Civil Rules Committee some potential projects to consider. Judge Sutton introduced the panelists: Judge Eugene Wedoff of the Bankruptcy Court for the Northern District of Illinois, Judge Anthony Scirica of the Third Circuit, and Judge Sidney Fitzwater of the Northern District of Texas. Finally, he welcomed a special guest: Associate Justice Sandra Day O'Connor, who joined the Standing Committee for this panel discussion and for the dinner that followed.

Judge Wedoff: Improving the Speed of Case Administration

PRESENTATION

Judge Wedoff spoke about the impact of "rocket dockets" on case administration. The term was first applied to the Eastern District of Virginia, which implemented a series of procedural reforms in the 1970s. It has since been applied to several other jurisdictions that have adopted similar procedures, including the Western District of Wisconsin and the Eastern District of Texas. But their reputations sometimes do not match the data. The Eastern District of Virginia is truly one of the fastest courts in the country—but the Eastern District of Texas operates *above* the nation's median case disposition time, and the Western District of Wisconsin has fallen off substantially. Meanwhile the Southern District of Florida works with remarkable speed despite not being labeled a rocket-docket court.

Based on this study, Judge Wedoff concluded that judges affect case-disposition time more powerfully than rules. Judges who impose credible deadlines, for example, resolve cases

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faster than judges who don't. At the same time, efficient districts have certain procedural rules in common. For example, the Eastern District of Virginia sets short deadlines for discovery and trial that cannot be altered without a substantial showing to the court. For its part, the Southern District of Florida places every case into one of three tranches: expedited, standard, and complex. None of these tranches allows discovery to exceed one year.

DISCUSSION

The first question is whether to encourage district courts to adopt rocket-docket procedures district-wide. Many members said yes. Competition for litigants among courts can help everyone, said one professor, pointing to the creation of an omnibus hearing as an example of a useful procedural innovation that arose from one bankruptcy district's attempt to entice debtors to file there. Other committee members observed that, even if rocket-docket procedures make things harder for lawyers and judges, such procedures are *always* good for clients. And pilot projects implementing them may well change attorneys' hearts and minds in the process.

Attendees made several suggestions about what such pilot projects might look like. One recommended setting hard and credible trial deadlines. Another recommended capping not only a party's total deposition hours but also the number of hours he has available to conduct each deposition. He also recommended creating a tranches system for document production. And everybody who spoke emphasized the importance of making the pilot project mandatory.

The committee then moved to the question of implementation. Certain rocket-docket procedures—like the Eastern District of Virginia's weekly argument day—might conflict with local rules mandating one judge per case. More fundamentally, creating a rocket docket from scratch would be much harder than studying the ones that already exist, since district courts are unlikely to change in the absence of a strong leader backing the project.

One member counseled against implementing pilot projects too quickly. He recommended letting the FJC study the existing projects first, and moving only when the committee was sure that the projects' contents would work. Judge Sutton responded that he saw no reason why pilot-project advocacy should stop—especially since such advocacy isn't designed to mandate effective procedures but to suggest potentially useful ones. Another member agreed, and pointed out that studies and pilot projects could always take place simultaneously.

Finally, members sounded a note of caution about research methodology. One stressed the importance of getting independent opinions from participants, recalling an instance where rocket-docket practitioners were asked about their views on the process in full view of rocket-docket judges. Two district judges reiterated that numbers do not tell the whole story. Sometimes a case gets delayed for wholly appropriate reasons. And sometimes statistics are skewed by background factors not immediately apparent.

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Judge Scirica: Requiring Initial Disclosure of Unfavorable Material

PRESENTATION

Judge Scirica explored the feasibility of requiring parties to disclose material unfavorable to their side by rule. In the 1990s, he said, the committee tried to do just that, but the proposal triggered a firestorm. Opponents argued that most cases did not require adverse disclosures, and that aggressive discovery techniques would ferret out such information in the cases that did. They also invoked the adversarial nature of the American justice system, arguing that a "civil *Brady* regime" would disrupt the attorney-client relationship. Eventually, the committee settled on a compromise position—explored through pilot projects in the Central District of California and the Northern District of Alabama—that retained initial disclosures but eliminated the requirement to disclose unfavorable material.

Today, Judge Scirica continued, an expanded initial disclosure regime might find a warmer reception. To test the waters, he envisioned two separate types of pilot projects. One would apply a robust but general initial disclosure regime to all civil cases. Another would apply a tailored initial disclosure requirement to certain categories of cases—say, employment discrimination or civil rights. The former is best left to the Standing and Civil Rules Committee, he advised; the latter, to a committee of experienced lawyers from both sides of the podium.

DISCUSSION

Every member who spoke expressed support for an expanded initial disclosure regime. One provided an especially powerful example from Arizona. In 1991, the Arizona Supreme Court adopted a robust mandatory disclosure rule that covered favorable and unfavorable material. The same debate took place. Now, however, Arizona's local rules have overwhelming support. In fact, seventy percent of lawyers who practice in both federal and Arizona state court prefer the state disclosure system to the federal one.

Another speaker, who served on the committee during its first attempt to mandate adverse disclosures, argued that the committee should not be traumatized by that experience. The committee, he said, had been right all along. And this time, it knows what pitfalls to avoid. For example, it will not keep the bar in the dark until the very end of the process.

The committee also endorsed category-specific disclosures. Many district judges have already embraced the Federal Initial Discovery Protocols for Employment Cases. One member reported that, although the Protocols encountered initial resistance, the employment bar now loves them because they generate information that would otherwise require a six- to seven-month discovery battle to get. Another member explained that the Southern District of New York had successfully implemented similar protocols for § 1983 cases that helped clear out its cluttered docket. One district judge advised the committee to make sure it doesn't define categories too narrowly. She has used the Employment Protocols for two years, in which time only three cases have qualified under its definition of "employment." Finally, one member reiterated his belief that the committee should not endorse new pilot projects without studying the existing ones more thoroughly.

125-010526

Judge Sutton concluded that the committee appears to support studying an expanded initial disclosure system. This, he said, might be the time to try again.

Judge Fitzwater: Streamlined Procedure

PRESENTATION

Judge Fitzwater surveyed the many existing pilot projects that offer litigants streamlined procedures. According to the Institute for the Advancement of the American Legal System (IAALS), successful projects have five key features:

- a short trial that limits time to present evidence,
- a credible trial date,
- an expedited and focused pretrial process,
- relaxed evidentiary standards that encourage parties to agree to admission, and
- voluntary participation.

Judge Fitzwater then summarized two examples of what such a pilot project might look like. He could not find data about how often summary procedures had been used, but the procedures themselves are well-known. He started with the short-trial regime established by the District of Nevada in 2013. Litigants who opt into that system lose their right to discovery. In return, they receive a trial within 150 days of initial assignment, with a 60-day continuance available in limited circumstances. Evidence may be admitted without authentication or foundation by a live witness, and parties are encouraged to submit expert testimony through reports and not live testimony. At the trial itself, each party receives 9 hours to allocate among all trial phases as it chooses. The litigants present their arguments before a condensed jury—and once the trial is over, their ability to file post-trial motions is limited.

He then contrasted Nevada's system with the short-trial process in the Western District of Pennsylvania. That district does not eliminate a party's right to discovery but instead puts numerical limits upon it. Each party only has three hours to present evidence to the jury, with additional time for jury selection allocated at the judge's discretion. Finally, and most critically, the system bars parties from filing motions for summary judgment or motions in limine. Other pretrial motions may be filed only with leave of court.

Judge Fitzwater placed particular emphasis on this last provision. In the mine-run civil case, dispositive motions—not discovery disputes—were the main source of delay. Ironically, the Criminal Justice Reform Act's reporting procedures reinforce the incentive to work on motions, not cases: Judges must report a motion as pending after six months, but need not report a case as pending until three years elapse.

DISCUSSION

Many committee members expressed skepticism that a voluntary program would succeed. One pointed out that the Northern District of California abandoned a similar short-trial

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procedure after litigants declined to use it. Several district judges on the committee who have given litigants an expedited-trial option encountered the same problem. In light of that experience, they recommended that any pilot project in this area be mandatory, not voluntary.

Judge Sutton asked Professor Cooper why his proposal in the 1990s to apply simplified procedural rules to small-stakes cases failed to gain traction. Professor Cooper explained that the proposal failed after a district judge pronounced it "elegant on paper but of no practical use." He also pointed out two potential implementation issues: First, different lawyers define a "small-stakes case" differently; and second, how should a simplified system treat a small-stakes case with a demand for injunctive relief?

One appellate judge recommended against defining "small stakes" using a dollar amount. She cited her experience with the Class Action Fairness Act, which contains a similar dollar-amount requirement, and collateral litigation over manipulation of that requirement. Another appellate judge warned that mandating streamlined procedures for certain categories of cases, but not others, will be tricky.

* * *

Judge Sutton summed up the conversation. At a minimum, he said, everybody agrees that the committee should study the many pilot projects in existence. And nobody thinks the committee should refrain from considering the possibility of civil litigation reform; the only worry is that specific reforms might be more complicated than anticipated. As such, he asked the Civil Rules Committee to study this topic and give its thoughts at the upcoming May meeting. He also advised it to consult Judge Fogel to see what FJC resources are available, and to coordinate with IAALS and the legal academy as well.

NEXT COMMITTEE MEETING

Judge Sutton concluded the meeting by announcing that the committee will next convene on May 28–29, 2015, in Washington, D.C.

Respectfully submitted,

Judge Jeffrey S. Sutton
Chair

125-010528

TAB 2

125-010529

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TAB 2A

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125-010532

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

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DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

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

FROM: Honorable Reena Raggi, Chair
Advisory Committee on Criminal Rules

DATE: May 6, 2015

RE: Report of the Advisory Committee on Criminal Rules

I. INTRODUCTION

The Advisory Committee on the Federal Rules of Criminal Procedure ("the Advisory Committee") met on March 16-17, 2015, in Orlando, Florida, and took action on a number of proposals. The Draft Minutes are attached. (Tab B).

This report presents three action items for Standing Committee consideration. The Advisory Committee recommends that:

(1) a proposed amendment to Rule 4 (service of summons on organizational defendants), previously published for public comment, be approved as published and transmitted to the Judicial Conference; and

(2) a proposed amendment to Rule 41 (venue for approval of warrant for certain remote electronic searches), previously published for public comment, be approved as amended and transmitted to the Judicial Conference; and

(3) a proposed amendment to Rule 45 (additional time after certain kinds of service), previously published for public comment, be approved as amended and transmitted to the Judicial Conference.

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In addition, the Advisory Committee has two information items to bring to the attention of the Standing Committee.

II. ACTION ITEMS

A. ACTION ITEM—Rule 4 (service of summons on organizational defendants)

After review of the public comments, the Advisory Committee voted unanimously to recommend that the Standing Committee approve the proposed amendment as published and transmit it to the Judicial Conference. The amendment is at Tab C.

1. Reasons for the proposal

The proposed amendment originated in an October 2012 letter from Assistant Attorney General Lanny Breuer, who advised the Committee that Rule 4 now poses an obstacle to the prosecution of foreign corporations that have committed offenses that may be punished in the United States. In some cases, such corporations cannot be served because they have no last known address or principal place of business in the United States. General Breuer emphasized the "new reality": a truly global economy reliant on electronic communications, in which organizations without an office or agent in the United States can readily conduct both real and virtual activities here. He argued that this new reality has created a "growing class of organizations, particularly foreign corporations" that have gained "'an undue advantage' over the government relating to the initiation of criminal proceedings."

At present, the Federal Rules of Criminal Procedure provide for service of an arrest warrant or summons only within a judicial district of the United States. Fed. R. Crim. P. 4(c)(2), which governs the location of service, states that an arrest warrant or summons may be served "within the jurisdiction of the United States."[1] In contrast, Fed. R. Civ. P. 4(f) authorizes service on individual defendants in a foreign country, and Fed. R. Civ. P. 4(h)(2) allows service on organizational defendants as provided by Rule 4(f).

2. The proposed amendment

Given the increasing number of criminal prosecutions involving foreign entities, the Advisory Committee agreed that it would be appropriate for the Federal Rules of Criminal Procedure to provide a mechanism for foreign service on an organization. The Advisory Committee recognized that the government may not be able to prosecute foreign entities that fail to respond to service. Nevertheless, it is expected that entities subject to collateral consequences

[1] Fed. R. Crim. P. 4(c)(2) does provide, however, that service may also be made "anywhere else a federal statute authorizes an arrest."

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(forfeiture, debarment, etc.) will appear. The proposed amendment makes the following changes in Rule 4:

(1) It specifies that the court may take any action authorized by law if an organizational defendant fails to appear in response to a summons. This fills a gap in the current rule, without any expansion of judicial authority.

(2) For service of a summons on an organization within the United States, it:

- eliminates the requirement of a separate mailing to an organizational defendant when delivery has been made to an officer or to a managing or general agent, but

- requires mailing when delivery has been made on an agent authorized by statute, if the statute itself requires mailing to the organization.

(3) It also authorizes service on an organization at a place not within a judicial district of the United States, prescribing a non-exclusive list of methods for service.

In addition to the enumerated means of service, the proposal contains an open-ended provision in (c)(3)(D)(ii) that allows service "by any other means that gives notice." This provision provides flexibility for cases in which the Department of Justice concludes that service cannot be made (or made without undue difficulty) by the enumerated means. One of the principal issues considered by the Advisory Committee was whether to require prior judicial approval of other means of service. Civil Rule 4(f)(3) provides for foreign service on an organization "by other means not prohibited by international agreement, as the court orders."(emphasis added). The Committee concluded the Criminal Rules should not require prior judicial approval before service of a criminal summons could be made in a foreign country by other unspecified means. In its view, a requirement of prior judicial approval might raise difficult questions of international law and the institutional roles of the courts and the executive branch.[2]

[2] These issues would be raised most starkly by a request for judicial approval of service of criminal process in a foreign country without its consent or cooperation, and in violation of its laws, or even in violation of international agreement. Fed. R. Civ. P. 4(f)(3) may permit such a request. Where there is no internationally agreed means of service prescribed, Fed. R. Civ. P. 4(f)(2) then authorizes service by various means, and Fed. R. Civ. P. 4(f)(3) provides for service by "any other means not prohibited by international agreement, as the court orders." Although Fed. R. Civ. P. 4(f)(2)(C) precludes service "prohibited by the foreign country's law," that restriction is absent from Fed. R. Civ. P. 4(f)(3). The proposed amendment to Criminal Rule 4 authorizes service "permitted by an applicable international agreement," but does not prohibit service that is not so permitted, as long as service "gives notice."

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The Committee considered the possibility that in rare cases the Department of Justice might seek to make service under (c)(3)(D)(ii) in a foreign nation without its cooperation or consent. Representatives of the Department stated that such service would be made only as a last resort, and only after the Criminal Division's Office of International Affairs and representatives of the Department of State had considered the foreign policy and reciprocity implications of such an action. The Department also stressed the Executive Branch's primacy in foreign relations and its obligation to ensure that the laws are faithfully executed. Finally, the Department noted that the federal courts are not deprived of jurisdiction to try a defendant whose presence before the court was procured by illegal means. This principle was reaffirmed in United States v. Alvarez-Machain, 504 U.S. 655 (1992) (holding that abduction of defendant in Mexico in violation of extradition treaty did not deprive court of jurisdiction). Similarly, if service were made on an organizational defendant in a foreign nation without its consent, or in violation of international agreement, the court would not be deprived of jurisdiction. Under the Committee's proposal–which does not require prior judicial approval of the means of service–a court would never be asked to give advance approval of service contrary to the law of another state or in violation of international law. Rather, a court would consider any legal challenges to such service only when raised in a proceeding before it.

3. Public Comments and Subcommittee Review

a. Public comments

Six written comments on the proposed amendment were received, and one speaker (from the Federal Bar Council for the Second Circuit) testified about the proposed amendment. The Federal Bar Council, the Federal Magistrate Judges Association (FMJA), Mr. Kyle Druding, and the National Association of Criminal Defense Lawyers (NACDL) all supported the proposed amendment, though the FMJA and NACDL suggested revisions. Robert Feldman, Esq. of Quinn Emanuel Urquart & Sullivan opposed the amendment and urged that it be withdrawn. Additionally, the Department of Justice provided written responses. Each comment is summarized at Tab C.

With the exception of Quinn Emanuel, the commenters generally agreed that the amendment (1) addresses a gap in the current rules that may hinder the prosecution of foreign corporations that commit crimes in the United States but have no physical presence here, (2) provides methods of service that are reasonably calculated to provide notice and comply with applicable laws, and (3) gives courts appropriate discretion to fashion remedies.

b. The Subcommittee's review and recommendations

The Rule 4 Subcommittee, chaired by Judge David Lawson, received both summaries and the full text of the comments, and it held a teleconference to review the comments. The

Subcommittee unanimously recommended that the Advisory Committee approve the proposed amendment as published and transmit it to the Standing Committee.

4. Recommended action

After a full discussion, the Advisory Committee concurred in the recommendation that the proposed amendment as published should be approved for transmission to the Standing Committee.

a. Opposition to the proposed amendment

Only one comment opposed the amendment and recommended that it be withdrawn. The law firm of Quinn Emanuel Urquart & Sullivan represents the Pangang Group Company and affiliated entities, a state-owned Chinese corporation. The Department of Justice has been unable to serve process on Pangang under current Rule 4.[3] The proposal to amend the rule would provide a mechanism for effecting service on foreign corporations that commit serious crimes in the United States without having any physical presence here. The amendment is intended to allow reliable service with adequate notice on these organizations so that U.S. courts can adjudicate the merits of criminal allegations and ensure appropriate accountability.

The Committee carefully considered Quinn Emanuel's arguments, and found them unpersuasive. Quinn Emanuel argued that the proposed amendment would essentially foreclose judicial review of the adequacy of notice to foreign corporations, because "the very act of challenging service might be said to conclusively establish the notice that would make service complete." Corporate defendants who wish to contest service, they argued, would face "a Hobson's choice." The Committee agreed that if a lawyer for a corporation appears in a criminal case it may be difficult to convince the court that the corporation did not receive notice. But this

[3] On July 10, 2014, after a two month jury trial, Walter Liew, the owner and president of a California-based engineering consulting company, was sentenced to 15 years in prison for conspiring to steal trade secrets from E.I. du Pont de Nemours & Company ("DuPont") related to the manufacture of titanium dioxide and for the benefit of Pangang. *See, Walter Liew Sentenced to Fifteen Years in Prison for Economic Espionage,* justice.gov (Jul. 11, 2014), www.justice.(_2,ov/usao-ndca/pr/walter-liew-sentenced-fifteen-years-prison-economic-espiona2,e. Liew was aware that DuPont had developed industry-leading titanium dioxide technology over many years of research and development and assembled a team of former DuPont employees to assist him in his efforts to convey DuPont's titanium dioxide technology to entities in the People's Republic of China, including Pangang. At Liew's sentencing; the Honorable Jeffrey S. White, U.S. District Court Judge, stated that the 15-year sentence was intended, in part, to send a message that the theft and sale of trade secrets for the benefit of a foreign government is a serious crime that threatens our national economic security. *Id.* Despite the fact that Pangang was indicted years ago along with Liew, and has actual notice of the indictment, to date, the United States has been unable to effectively serve Pangang pursuant to the current Rule 4. *See, e.g., United States v. Pangang Group Co., Ltd,* 879 F. Supp. 2d 1052 (N.D. Cal. 2012).

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is appropriate. A court should be able to take into account the appearance of counsel when evaluating a corporation's claim that it did not receive notice. Moreover, nothing in the proposed amendment addresses or limits any authority of the court to allow a special appearance to contest service on other grounds, nor does it address the ability of a corporate defendant to contest notice in a collateral proceeding. Quoting *Omni Capital Int'l v. Wolff & Co.*, 484 U.S. 97, 104 (1987), Quinn Emanuel also argued that in suggesting notice was the sole criterion for service, the Rule would "eliminate a historical function of service." The Committee concluded that the *Omni Capital* decision is fully consistent with the proposed amendment. In the sentence following the language quoted by Quinn Emanuel the Court made it clear that service in compliance with the Civil Rules provided the additional element of "amenability to service." The Court explained, "Absent consent, this means there must be authorization for service of summons on the defendant." Here, the purpose of the proposed amendment is to provide the necessary "authorization for service" (as well as notice to the defendant).

The lawyers from Quinn Emanuel raised another argument that the Committee had considered as it was formulating the proposal, namely, that "other governments may reciprocate by adopting a similar regime" to "ensnare U.S. corporations in criminal prosecutions around the globe." In a related objection, Quinn Emanuel noted that a court might interpret the amendment to permit "a manner of service prohibited by international agreement . . . , so long as it appears to have provided notice to the accused," an interpretation it found objectionable. Both of these concerns were anticipated by the Committee well before the proposal was approved for publication. In response to a specific request from a Committee member, the Department of Justice provided written assurance that it had consulted with appropriate authorities in the Executive Branch about the potential international relations ramifications of the proposed amendment. The Committee agreed that in light of this assurance, concerns about any impact on diplomatic relations were not a basis for rejecting the proposed amendment.

b. Suggested revisions

The FMJA, Quinn Emanuel, and NACDL suggested revisions that the Advisory Committee declined to adopt. The FMJA suggested that an addition to the Committee Note stating that the means of service must satisfy constitutional due process. Quinn Emanuel's attorneys also argued if a corporate defendant did not receive notice and failed to appear, the court might impose sanctions, or appoint counsel and conduct trial in absentia. Similarly, NACDL requested that the amendment be revised to include in the rule's text that actions by a judge upon a corporation's failure to appear must be "consistent with Rule 43(a)," or, in the alternative that this requirement be stated in the Note. The Advisory Committee considered and rejected these suggestions. It is always assumed that a rule will be interpreted against the backdrop of existing rules, statutes, and constitutional doctrine. Absent some compelling reason to believe this point will be misunderstood, adding such a command to a rule's text or Note is unnecessary. Indeed, doing so might have the undesirable effect of suggesting that in the absence of such a cross reference, other statutes and rules are not applicable.

The Advisory Committee also rejected proposed revisions that would add procedural hurdles and might invite extended litigation. NACDL suggested that the proposed amendment be modified to allow service by alternative means only if it was not possible to deliver a copy in a manner authorized by the foreign jurisdiction's law, to a officer, manager or other general agent, or an agent appointed to receive process. The Advisory Committee chose neither to add such a condition nor to prioritize the means of service, as that would invite unnecessary litigation over whether the triggering condition had been met. Similarly, the Committee rejected the further suggestion of NACDL that the new provisions be limited to cases in which "the organization does not have a place of business or mailing address within the United States at or through which actual notice to a principal of the organization can likely be given." As noted by the Department of Justice, litigation in a recent case on the question whether a subsidiary of a foreign corporation could be served took eight months. Finally, the Committee rejected Quinn Emanuel's argument that "any other means that gives notice" renders superfluous the other sections of the proposed amendment. Similarly, the Committee considered and rejected a suggestion that the government be required to show other options were not feasible or had been exhausted before resorting to certain options for service as unnecessarily burdensome and time consuming.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 4 be approved as published and transmitted to the Judicial Conference.

B. ACTION ITEM—Rule 41 (venue for approval of warrant for certain remote electronic searches)

After review of the public comments, the Advisory Committee voted with one dissent to recommend that Standing Committee approve the proposed amendment as revised after publication and transmit it to the Judicial Conference.

The proposed amendment (Tab D) provides that in two specific circumstances a magistrate judge in a district where the activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and seize or copy electronically stored information even when that media or information is or may be located outside of the district.

The proposal has two parts. The first change is an amendment to Rule 41(b), which generally limits warrant authority to searches within a district,[4] but permits out-of-district

[4] Rule 41(b)(1) ("a magistrate judge with authority in the district – or if none is reasonably available, a judge of a state court of record in the district – has authority to issue a warrant to search for and seize a person or property located within the district").

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searches in specified circumstances.[5] The amendment would add specified remote access searches for electronic information to the list of other extraterritorial searches permitted under Rule 41(b). Language in a new subsection 41(b)(6) would authorize a court to issue a warrant to use remote access to search electronic storage media and seize electronically stored information inside *or outside* of the district in two specific circumstances.

The second part of the proposal is a change to Rule 41(f)(1)(C), regulating notice that a search has been conducted. New language would be added at the end of that provision indicating the process for providing notice of a remote access search.

1. Reasons for the proposed amendment

Rule 41's territorial venue provisions–which generally limit searches to locations within a district–create special difficulties for the Government when it is investigating crimes involving electronic information. The proposal speaks to two increasingly common situations affected by the territorial restriction, each involving remote access searches, in which the government seeks to obtain access to electronic information or an electronic storage device by sending surveillance software over the Internet.

In the first situation, the warrant sufficiently describes the computer to be searched, but the district within which the computer is located is unknown. This situation is occurring with increasing frequency because persons who commit crimes using the Internet are using sophisticated anonymizing technologies. For example, persons sending fraudulent communications to victims and child abusers sharing child pornography may use proxy services designed to hide their true IP addresses. Proxy services function as intermediaries for Internet communications: when one communicates through an anonymizing proxy service, the communication passes through the proxy, and the recipient of the communication receives the proxy's IP address, not the originator's true IP address. Accordingly, agents are unable to identify the physical location and judicial district of the originating computer.

A warrant for a remote access search when a computer's location is not known would enable investigators to send an email, remotely install software on the device receiving the email, and determine the true IP address or identifying information for that device. The Department of Justice provided the Committee with several examples of affidavits seeking a warrant to conduct such a search. Although some judges have reportedly approved such searches, one judge recently concluded that the territorial requirement in Rule 41(b) precluded a warrant for a remote

[5] Currently, Rule 41(b) (2) – (5) authorize out-of-district or extra-territorial warrants for: (1) property in the district when the warrant is issued that might be moved outside the district before the warrant is executed; (2) tracking devices, which may be monitored outside the district if installed within the district; (3) investigations of domestic or international terrorism; and (4) property located in a United States territory or a United States diplomatic or consular mission.

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search when the location of the computer was not known, and he suggested that the Committee consider updating the territorial limitation to accommodate advancements in technology. *In re Warrant to Search a Target Computer at Premises Unknown*, 958 F. Supp. 2d 753 (S.D. Tex. 2013) (noting that "there may well be a good reason to update the territorial limits of that rule in light of advancing computer search technology").

The second situation involves the use of multiple computers in many districts simultaneously as part of complex criminal schemes. An increasingly common form of online crime involves the surreptitious infection of multiple computers with malicious software that makes them part of a "botnet," which is a collection of compromised computers that operate under the remote command and control of an individual or group. Botnets may range in size from hundreds to millions of compromised computers, including computers in homes, businesses, and government systems. Botnets are used to steal personal and financial data, conduct large-scale denial of service attacks, and distribute malware designed to invade the privacy of users of the host computers.

Effective investigation of these crimes often requires law enforcement to act in many judicial districts simultaneously. Under the current Rule 41, however, except in cases of domestic or international terrorism, investigators may need to coordinate with agents, prosecutors, and magistrate judges in every judicial district in which the computers are known to be located to obtain warrants authorizing the remote access of those computers. Coordinating simultaneous warrant applications in many districts–or perhaps all 94 districts–requires a tremendous commitment of resources by investigators, and it also imposes substantial demands on many magistrate judges. Moreover, because these cases concern a common scheme to infect the victim computers with malware, the warrant applications in each district will be virtually identical.

2. <u>The proposed amendment</u>

The Committee's proposed amendment is narrowly tailored to address these two increasingly common situations in which the territorial or venue requirements now imposed by Rule 41(b) may hamper the investigation of serious federal crimes. The Committee considered, but declined to adopt, broader language relaxing these territorial restrictions. It is important to note that the proposed amendment changes only the territorial limitation that is presently imposed by Rule 41(b). Using language drawn from Rule 41(b)(3) and (5), the proposed amendment states that a magistrate judge "with authority in any district where activities related to a crime may have occurred" (normally the district most concerned with the investigation) may issue a warrant that meets the criteria in new paragraph (b)(6). The proposed amendment does not address constitutional questions that may be raised by warrants for remote electronic searches, such as the specificity of description that the Fourth Amendment may require in a warrant for remotely searching electronic storage media or seizing or copying electronically

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stored information. The amendment leaves the application of this and other constitutional standards to ongoing case law development.

In a very limited class of investigations the Committee's proposed amendment would also eliminate the burden of attempting to secure multiple warrants in numerous districts. The proposed amendment is limited to investigations of violations of 18 U.S.C. § 1030(a)(5),[6] where the media to be searched are "protected computers" that have been "damaged without authorization." The definition of a protected computer includes any computer "which is used in or affecting interstate or foreign commerce or communication." 18 U.S.C. § 1030(e)(2). The statute defines "damage" as "any impairment to the integrity or availability of data, a program, a system, or information." 18 U.S.C. § 1030(e)(8). In cases involving an investigation of this nature, the amendment allows a single magistrate judge with authority in any district where activities related to a violation of 18 U.S.C. § 1030(a)(5) may have occurred to oversee the investigation and issue a warrant for a remote electronic search if the media to be searched are protected computers located in five or more districts. The proposed amendment would enable investigators to conduct a search and seize electronically stored information by remotely installing software on a large number of affected victim computers pursuant to one warrant issued by a single judge. The current rule, in contrast, requires obtaining multiple warrants to do so, in each of the many districts in which an affected computer may be located.

Finally, the proposed amendment includes a change to Rule 41(f)(1)(C), which requires notice that a search has been conducted. New language would be added at the end of that provision indicating the process for providing notice of a remote access search. The rule now requires that notice of a physical search be provided "to the person from whom, or from whose premises, the property was taken" or left "at the place where the officer took the property." The Committee recognized that when an electronic search is conducted remotely, it is not feasible to provide notice in precisely the same manner as when tangible property has been removed from physical premises. The proposal requires that when the search is by remote access, reasonable efforts be made to provide notice to the person whose information was seized or whose property was searched.

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[6] 18 U.S.C. § 1030(5) provides that criminal penalties shall be imposed on whoever:

(A) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer;
(B) intentionally accesses a protected computer without authorization, and as a result of such conduct, recklessly causes damage; or
(C) intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage and loss.

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3. Public Comments and Subcommittee Review

a. The public comments

During the public comment period the Committee received 44 written comments from individuals and organizations, and eight witnesses testified at the Committee's hearing in November:

> The Federal Bar Council, the Federal Magistrate Judges' Association, the National Association of Assistant United States Attorneys, and former advocate for missing and exploited children Carolyn Atwell-Davis all supported the amendment without change.
>
> The amendment was opposed by the American Civil Liberties Union (ACLU), the National Association of Criminal Defense Attorneys (NACDL), the Pennsylvania Bar Association, the Reporters Committee on the Freedom of the Press, the Clandestine Reporters Working Group, and several foundations and centers that focus on privacy and/or technology. Twenty-eight unaffiliated individuals wrote to oppose the amendment.

The Department of Justice submitted several written responses to issues raised in the public comments.

A summary of the comments is provided at Tab D. The main themes in the comments opposing the amendment are summarized below.

(i) Fourth Amendment concerns

The most common theme in the comments opposing the amendment was a concern that it relaxed or undercut the protections for personal privacy guaranteed by the Fourth Amendment. These comments focused principally on proposed (b)(6)(A), which allows the court in a district in which activities related to a crime may have occurred to grant a warrant for remote access when anonymizing technology has been employed to conceal the location of the target device or information.

Multiple comments argued that remote searches could not meet the Fourth Amendment's particularity requirement, and others emphasized that they would constitute surreptitious entries and invasive or destructive searches requiring a heightened showing of reasonableness. Many of these comments also challenged the constitutional adequacy of the notice provisions. Finally, several comments urged that the serious constitutional issues raised by remote searches would be insulated from judicial review.

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A particular concern raised in many comments was that the use of anonymizing technology, such as Virtual Private Networks (VPNs), would subject law abiding citizens to remote electronic searches.

(ii) Title III

Multiple comments urged that warrant applications for remote electronic searches should be subject to requirements like those under the Wiretap Act, 18 U.S.C. § 2518 (Title III), or a surveillance warrant containing equivalent protections.

(iii) Extraterritoriality and international law concerns

Some comments focused on the possibility that the devices to be searched–whose location was by definition unknown–might be located outside the United States. They urged that the courts should not authorize searches outside the United States that would violate international law and the sovereignty of other nations, as well as any applicable mutual legal assistance treaties.

(iv) The role of Congress

An additional theme running through many of these comments was that the proposed amendment raised policy issues that should be resolved by Congress, not through procedural rulemaking. Some comments argued that only Congress could balance the competing policies and adopt appropriate safeguards. Others urged that the proposed amendment exceeded the authority granted by the Rules Enabling Act.

(v) Notice concerns

Finally, multiple comments expressed concern that the notice provisions were insufficiently protective, because they required only that reasonable efforts be made to provide notice. This, commenters argued, might lead to no notice being given to parties who were subject to remote electronic searches, or to long delays in giving notice. Some commenters also argued that all parties whose rights were affected by a search must be given notice, not either the person whose property was searched or whose information was seized or copied.

b. The Subcommittee's review and recommendation

The Rule 41 Subcommittee, chaired by Judge Raymond Kethledge, received both summaries and the full text of all comments, and it held multiple teleconferences to review the comments. The Subcommittee unanimously recommended that, with several minor revisions, the Advisory Committee should approve the proposed amendment and transmit it to the Judicial Conference.

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4. Recommended action

After extended discussion, the Advisory Committee concurred in the recommendation that the proposed amendment, with minor revisions proposed by the Subcommittee, should be approved for transmission to the Standing Committee.

a. Opposition to the proposed amendment

In general the Committee concluded that the concerns of those opposing the amendment were about the substantive limits on government searches, which are not affected by the proposed amendment. Opposition comments did not address the procedure for designating the district in which a court will initially decide whether substantive requirements have been satisfied in the two circumstances prompting the amendment. Thus they furnished no basis for withdrawing the proposed amendment. The Committee is confident that judges will address Fourth Amendment requirements on a case-by-case basis both in issuing warrants under these amendments and in reviewing them when challenges are made thereafter.

Much of the opposition to the amendment reflected a misunderstanding of current law, the scope of the amendment, and the serious problems that it addresses. First, many commenters who opposed the rule did not recognize that the government must demonstrate probable cause to obtain a warrant. As noted below, the Committee recommends a revision to the caption of the relevant section referring to "venue" in order to draw attention to the limited scope of the amendment. Second, many commenters incorrectly assumed that the amendment created the authority for remote electronic searches. To the contrary, remote electronic searches are currently taking place when the government can identify the district in which an application should be made and satisfy the probable cause requirements for a warrant. Third, the opposing comments do not take account of the real need for amendment to allow the government to respond effectively to the threats posed by technology. Technology now provides the means for identity theft, corporate espionage, terrorism, child pornography, and other serious offenses to jeopardize the economy, national security, and individual privacy. The government can itself use technology to identify the perpetrators of such crimes but needs a rule clarifying the venue where it should make the Fourth Amendment showing necessary for a warrant. At the hearings, those who opposed the amendment were candid in admitting that they could offer no alternative to the proposed amendment (other than the hope that Congress might study the general issues and respond).

The Committee concluded that it was important to provide venue, thus allowing the case law on potential constitutional issues to develop in an orderly process as courts review warrant applications. This is far preferable than after-the-fact rulings on the legality of warrantless searches for which the government claims exigent circumstances. If the New York Stock Exchange were to be hacked tomorrow using anonymizing software, under current Rule 41 there

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is no district in which the government could seek a warrant. It would be preferable, the Committee concluded, to allow the government to seek a warrant from the court where the investigation is taking place, rather than conducting a warrantless search. Judicial review of warrant applications better ensures Fourth Amendment rights and enhances privacy. Any concern that judges may be uninformed about the technology to be used in the searches could be addressed by judicial education. The Federal Judicial Center has recently prepared some information materials about topics such as cloud computing, and additional materials could be developed to help judges review applications for remote electronic searches.

In botnet investigations, the amendment provides venue in one district for the warrant applications, eliminating the burden of attempting to secure multiple warrants in numerous districts and allowing a single judge to oversee the investigation. In prior botnet investigations, the burden of seeking warrants in multiple districts played a role in the government's strategy, providing a strong incentive to rely on civil processes. Again, the amendment addresses only a procedural issue, not the underlying substantive law regulating these searches. Allowing venue in a single district in no way alters the constitutional requirements that must be met before search warrants can be issued.

The Committee declined to make any major changes in the provisions governing notice. However, as noted below, it adopted several small changes recommended by the Subcommittee and also revised the Committee Note to address concerns made in the public comments.

Finally, the Committee concluded that arguments urging that the matter be left to Congress are not persuasive. Venue is not substance. Venue is process, and Rules Enabling Act tells the judiciary to promulgate rules of practice and procedure, not to wait for Congress to act. Instead, Congress responds to proposed rules. The Department came to the Committee with two procedural problems, created by the language of the existing Rule, not by the Constitution or other statute, that are impairing its ability to investigate ongoing, serious computer crimes. The Advisory Committee's role under the Rules Enabling Act is to propose amendments that address these problems and provide a forum for the government to determine the lawfulness of these searches.

One member dissented from the Committee's conclusions on these points and voted against forwarding the amendment to the Standing Committee. The dissenting member thought that the amendment is substantive, not procedural, because it has such important substantive effects, allowing judges to make ex parte determinations about core privacy concerns. The amendment, this member argued, would not permit adversarial testing of the underlying substantive law because defense counsel would not participate until too late in the process, in back-end litigation. For many people, computers are their lives, and the member concluded that these privacy concerns should be considered in the first instance by Congress. The remainder of the Committee was not persuaded; computers are no more sacrosanct than homes, and search warrants for homes have long been issued ex parte and reviewed in back-end litigation.

b. Proposed revisions

The Committee unanimously accepted the Subcommittee's recommendations for several revisions in the rule as published, none of which require republication.

(i) The caption

The Committee accepted the Subcommittee's recommendation for a change in the caption of the affected subdivision of Rule 41, substituting "Venue for a Warrant Application" for the current caption "Authority to Issue a Warrant." This change responds to the many comments that assumed the amendment would allow a remote search in any case falling within the proposed amendment (for example, any case in which an individual had used anonymizing technology such as a VPN). The current caption seems to state an unqualified "authority" to issue warrants meeting the criteria of any of the subsections. Many commenters mistakenly interpreted the rule in this fashion, and strongly opposed it on this ground. The Committee considered and declined to adopt alternative language suggested by our style consultant, Professor Kimble, because it would less clearly indicate the limited purpose and effect of the amendment.

The Committee also adopted the Subcommittee's proposed addition to the Committee Note explaining the change in the caption. The new Note explicitly addresses the common misunderstanding in the public comments, stating what the amendment does (and does not) do: "the word 'venue' makes clear that Rule 41(b) identifies the courts that may consider an application for a warrant, not the constitutional requirements for the issuance of a warrant, which must still be met."

(ii) Notice

The Committee adopted the Subcommittee's two proposed revisions to the notice provisions for remote electronic searches and the accompanying Committee Note. The purpose of both revisions to the text is to parallel, as closely as possible, the requirements for physical searches. The addition to the Committee Note explains the changes to the text, and also responds to a common misunderstanding that underpinned multiple comments criticizing the proposed notice provisions.

The Committee added a requirement that the government provide a "receipt" for any property taken or copied (as well as a copy of the warrant authorizing the search). This parallels the current requirement that a receipt be provided for any property taken in a physical search. The Committee agreed that the omission of this requirement in the published rule was an oversight that should be remedied.

The Committee also rephrased the obligation to provide notice to "the person whose property was searched or who possessed the information that was seized or copied." Again, the purpose was to parallel the requirement for physical searches.

On the other hand, the Committee rejected the suggestion in some public comments that the government should be required to provide notice to both "the person whose property was searched" and whoever "possessed the information that was seized or copied, since that is not required in the case of physical searches. For example, if the Chicago Board of Trade is served with a warrant and files containing information regarding many customers are seized, the government may give notice of the search only to the Board of Trade, and not to each of the customers whose information may be included in one or more files. The same should be true in the case of remote electronic searches.

Finally, the Committee endorsed the Subcommittee's proposed addition to the Committee Note explaining the changes made in the notice provisions after publication, and also responding to the many comments that criticized the proposed notice provisions as insufficiently protective. The addition to the Note draws attention to the other provisions of Rule 41 that preclude delayed notice except when authorized by statute and provides a citation to the relevant statute. Professor Coquillette commented that because of the widespread confusion on this point in the public comments, the proposed addition was an appropriate exception to the general rule that committee notes should not be used to help practitioner.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 41 be approved as amended and transmitted to the Judicial Conference.

C. ACTION ITEM—Rule 45 (additional time after certain kinds of service)

After review of the public comments, the Advisory Committee voted unanimously to recommend that the Standing Committee approve the proposed amendment to Rule 45(c), with three revisions from the published version and transmit it to the Judicial Conference. The proposed amendment is at Tab E.

1. Reasons for the proposal

The proposed amendment to Rule 45(c) is a product of the Standing Committee's CM/ECF Subcommittee; parallel amendments to the civil, criminal, bankruptcy and appellate rules were published for comment. The proposed amendment would abrogate the rule providing for an additional three days whenever service is made by electronic means. It reflects the CM/ECF Subcommittee's conclusion that the reasons for allowing extra time to respond in this situation no longer exist. Concerns about delayed transmission, inaccessible attachments, and consent to service have been alleviated by advances in technology and extensive experience with electronic transmission. In addition, eliminating the extra three days would also simplify time

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computation. The proposed amendment, as well as the parallel amendments to the other Rules, includes new parenthetical descriptions of the forms of service for which three days will still be added.

2. Public Comments

The public comments are summarized at Tab E.

The Pennsylvania Bar Association and the National Association of Criminal Defense Lawyers (NACDL) opposed the amendment. Each noted that the three added days are particularly valuable when a filing is electronically served at inconvenient times. NACDL emphasized that many criminal defense counsel are solo practitioners or in very small firms, where they have little clerical help, and often do not see their ECF notices the day they are received. The Department of Justice expressed a similar concern about situations in which service after business hours, from a location in a different time zone, or during a weekend or holiday may significantly reduce the time available to prepare a response. The Department did not oppose the amendment, however, and instead suggested language be added to the Committee Note to address this issue.

NACDL also questioned the addition of the phrase "Time for Motion Papers" to the caption to Rule 45(c), suggesting that it may lead to confusion.

Ms. Cheryl Siler suggested that as part of the revision the existing language of Rule 45(c) should be amended to parallel Fed. R. Civ. P. 6(d), FRAP 26(c) and Fed. R. Bank. P. 9006(f). In contrast to Rule 45(c), which requires action "within a specified time *after service*," the parallel Civil and Bankruptcy Rules require action "within a specified [or prescribed] time *after being served*." Siler expressed concern that practitioners may interpret the current rule to mean the party serving a document (as well as the party being served) is entitled to 3 extra days.

The Federal Magistrate Judges Association (FMJA) expressed concern that readers of the amended rule might think that three days are still added after electronic service because of the cross reference to Civil Rule 5(b)(2)(F) "(other means consented to)." It suggested either eliminating all of the parentheticals in the proposed rule or revising the rule to refer to "(F) (other means consented to except electronic service)."

The Advisory Committee's CM/ECF Subcommittee, chaired by Judge David Lawson, held a telephone conference to consider the comments. After discussing the FMJA's concerns it decided not to recommend a change in the published rule. The likelihood of confusion did not seem significant, and any confusion that might arise would be short lived because of the efforts underway to eliminate the requirement for consent to electronic service. The parentheticals will be helpful to practitioners, and any revision to the parenthetical reference would require further amendment in the near future. Language in the proposed Committee Note directly addresses this

issue. The Subcommittee recommended to the Criminal Advisory Committee that no change be made in the published rule on this issue, and the Advisory Committee agreed with that recommendation at its March meeting.

The Advisory Committee did approve three other revisions to the proposal, each recommended by its Subcommittee.

3. Suggested Revisions

a. Addition to Committee Note.

The first change is a proposed addition to the Committee Note that addresses the potential need to grant an extension to the time allowed for responding after electronic service. At the Advisory Committee's March meeting, two members initially opposed forwarding the published amendment to the Standing Committee, finding that the concerns voiced by the Pennsylvania Bar Association, NACDL, and the Department of Justice counseled against an amendment that would eliminate the three added days after electronic service. These members noted that the three added days are important for criminal practitioners because it is often necessary to speak directly with clients before filing responses, but speaking with incarcerated clients takes more time, particularly when clients are incarcerated in distant locations. However, the Committee eventually achieved unanimity on a compromise approach: adding language to the Committee Note. The Committee approved an addition to the Note drafted by the Department of Justice and recommended by the Advisory Committee's CM/ECF Subcommittee. The Committee decided that adding language to the Committee Note that mentioned the potential need for extensions was important not only for the reasons voiced by defense attorneys and the Department of Justice, but also because district court discretion to adjust deadlines in criminal cases is essential in order to address matters on the merits when appropriate. Such flexibility is particularly important when a person's liberty is at stake. Granting extensions in some circumstances may also be more efficient because of collateral challenges that frequently follow missed deadlines. This principal was among those that guided the Committee's recent work on Rule 12. The amendments to Rule 12 emphasized the district court's discretion to extend or modify motion deadlines so that issues can be most efficiently resolved on their merits before trial, avoiding litigation under Section 2255.

To facilitate uniformity in the Committee Note that would accompany the parallel rules making their way through the various Advisory Committees, the Criminal Advisory Committee approved the revised Note language with the understanding that modifications may be required. Indeed, subsequent to the March meeting, a much shorter version of the addition was approved by the Criminal Advisory Committee's Subcommittee on CM-ECF, and then by the Chairs of each Advisory Committee. That new language has been added to the published Committee Note in each Committees' parallel proposal. It reads: "Electronic service after business hours, or just

before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice."

b. Change to the Caption

The Advisory Committee also agreed to amend the caption of the Rule published for comment to eliminate the additional words "Time for Motion Papers." These words do not appear in the caption of the existing Rule 45, and were included in the proposed amendment in order to parallel the current caption of Civil Rule 6, on which Rule 45 was patterned, as well as the caption to Bankruptcy Rule 9006. However, the added words do not describe the text of Rule 45. Instead, Rule 12 deals extensively with the time for motions.

c. Substituting "being served" for "service"

Finally, the Advisory Committee agreed to amend the proposed text of the amendment to Rule 45 as published so that it is parallel to the language of the other rules, referring to action "within a specified time after *being served*" instead of "time after *service*." The Committee is unaware of any substantive reason for the slightly different wording of Rule 45 as compared to the Civil and Bankruptcy Rules. The Committee believes it is prudent to revise the language of Rule 45(c) to eliminate the discrepancy while other changes are being made in Rule 45(c).

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 45 be approved as amended and transmitted to the Judicial Conference.

III. INFORMATION ITEMS

A. CM/ECF Proposals Regarding Electronic Filing

1. Discussion at the spring meeting

At the time of the Criminal Rules meeting, a proposed amendment to the Civil Rules would have mandated electronic filing, making no exception for pro se parties or inmates, but allowing exemptions for good cause or by local rule. The reporters for the Bankruptcy and Appellate Committees were also preparing parallel amendments. The proposed Civil amendment was of particular concern to the Advisory Committee on Criminal Rules because Criminal Rule 49 now incorporates the Civil Rules governing service and filing. Rule 49(b) provides that "Service must be made in the manner provided for a civil action," and Rule 49(d) states "A paper must be filed in a manner provided for in a civil action." Accordingly, any changes in the Civil Rules regarding service and filing would be incorporated by reference into the Criminal Rules. Also, the Advisory Committee on Criminal Rules has traditionally taken responsibility for amending the Rules Governing 2254 cases and 2255 Cases, and these rules also incorporate Civil Rules.

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Committee members expressed very strong reservations about requiring pro se litigants, and especially prisoners, to file electronically unless they could show individual good cause not to do so, or the local district had exempted them from the national requirement.

The Committee's Clerk of Court liaison explained the development of the CM/ECF system, the current mechanisms for receiving pro se filings, and his concerns about a rule that would mandate e-filing without exempting pro se or inmate filers. The liaison explained various features of CM/ECF that work well for attorney users, but could cause significant problems with pro se filers, as well as several issues that may arise if CM/ECF filing were to be extended to those in custody or to pro se criminal defendants.

Some of the concerns raised apply to filings by pro se litigants regardless of whether they were accused of crime or in custody, such as lack of training or resources for training for pro se filers, concerns about ability or willingness of pro se litigants to obtain or comply with training, and increased burden on clerk staff to answer questions of pro se filers, particularly those who, unlike attorneys, are not routine filers. One of the most striking points our liaison made was that a person who has credentials to file in one case may, without limitation, file in other cases even those in which he is not a litigant. This feature of the system may pose much greater problems in the case of pro se filers who have not had legal training and are not bound by rules of professional responsibility.

Other issues raised by our liaison and other members were specific to the criminal/custody contexts. These concerns included the lack of email accounts for those in custody, as well as inability to send notice of electronic filing by email. Many federal criminal defendants, and all state habeas petitioners, are housed in state jails and prisons unlikely to give prisoners access to the means to e-file, or to receive electronic confirmations. Additionally, prisoners often move from facility to facility, and in and out of custody.

Committee members from various districts stated that the majority of pro se filers in their districts would not have the ability to file electronically. There is a constitutional obligation to provide court access to prisoners and those accused of crime, and members expressed very serious concerns about applying to pro se criminal defendants and pro se litigants in custody a presumptive e-filing rule that would condition their ability to file in paper upon a showing by the defendant or prisoner that there is good cause to allow paper filing, or upon the prior adoption of a local rule permitting or requiring pro se defendants and prisoners to paper file. Because of constitutionality concerns, members anticipated that most districts would eventually adopt local rules exempting criminal defendants and pro se litigants in custody from the requirement to file electronically, but they were not in favor of a national rule that would require nearly every district to undertake local rule making to opt out.

Because any change to the e-filing provisions in the Civil Rules would impact criminal cases, habeas cases filed by state prisoners, and Section 2255 applications by federal prisoners,

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the Advisory Committee voted unanimously to direct the reporters and chair to share the concerns raised at the meeting with the other reporters, and to request that the Civil Rules Committee consider adding a specific exception for pro se filers to the text of its proposed amendment.

The Advisory Committee recognized that local rules could be adjusted to exempt pro se defendants and plaintiffs in habeas and Section 2255 cases. But there was a strong consensus among the members of the Advisory Committee that the proposed national rule should not be adopted if it will require a revision of the local rules in the vast majority of districts. The Committee members felt that any change in the national rule should carve out pro se filers in the criminal, habeas, and Section 2255 contexts. Although members recognized that a carve out for pro se filers has already been discussed and rejected by those working on the Civil Rules, they favored further consideration of a carve out given the concerns listed above.

Members also expressed support for consideration of revising the Criminal Rules to incorporate independent provisions on filing and service, rather than incorporating the Civil Rules. As demonstrated in the discussion of the issues concerning mandatory electronic filing, the considerations in criminal cases may vary significantly from those in civil cases. This project should also include the Rules Governing 2254 and 2255 cases, for which the Advisory Committee has responsibility.

2. Later events

Following the spring meeting, the reporters and chair shared the Advisory Committee's concerns with their counterparts on other committees, who were very responsive. The Civil Rules Committee received and approved at its spring meeting a revised version of the amendment under consideration that exempts persons not represented by counsel from the requirement to file electronically. The other committees also discussed extensively electronic service and signatures, issues that the Advisory Committee has not yet considered.

The Advisory Committee will benefit from the opportunity to study the provisions now under consideration in by the Civil Rules Committee (as well as the Bankruptcy and Appellate Rules Committee), so that it can determine how best to revise the Criminal Rules. As noted, this will include consideration of new provisions in the Criminal Rules that would replace the current provisions adopting the Civil Rules on filing and service. These issues have been referred to the Advisory Committee's CM/ECF Subcommittee, which will report its views at the Advisory Committee's fall meeting.

The Advisory Committee's goal is to have a proposed amendment that could be published, along with rules from the other committees, in August 2016.

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B. New Proposal

The Committee also discussed a suggested amendment to Rules 35 that would bar appeal waivers before sentencing. It declined to proceed further with the proposal.

TAB 2B

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ADVISORY COMMITTEE ON CRIMINAL RULES
DRAFT MINUTES
March 16-17, Orlando, Florida

I. Attendance and Preliminary Matters

The Criminal Rules Advisory Committee ("Committee") met in Orlando, Florida on March 16-17, 2015. The following persons were in attendance:

Judge Reena Raggi, Chair
Hon. David Bitkower[1]
Judge James C. Dever
Judge Gary S. Feinerman
Mark Filip, Esq.
Chief Justice David E. Gilbertson
Professor Orin S. Kerr
Judge Raymond M. Kethledge
Judge David M. Lawson
Judge Timothy R. Rice
John S. Siffert, Esq.
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Reporter
Professor Daniel R. Coquillette, Standing Committee Reporter
Judge Amy J. St. Eve, Standing Committee Liaison
James N. Hatten, Clerk of Court Liaison[2]

In addition, the following members participated by telephone:

Carol A. Brook, Esq.
Judge Morrison C. England, Jr.

And the following persons were present to support the Committee:

Rebecca A. Womeldorf, Rules Committee Officer and Secretary to the Committee on Practice and Procedure
Bridget M. Healy, Rules Office Attorney
Frances F. Skillman, Rules Committee Support Office
Laural L. Hooper, Federal Judicial Center

[1] The Department of Justice was also represented throughout the meeting by Jonathan Wroblewski, Director of the Criminal Division's Office of Policy & Legislation.
[2] Mr. Hatten was present only on March 17.

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II. CHAIR'S REMARKS AND OPENING BUSINESS

A. Chair's Remarks

Judge Raggi introduced Rebecca Womeldorf, the new Rules Committee Officer and Secretary to the Committee on Practice and Procedure. She welcomed observers Peter Goldberger of the National Association of Criminal Defense Lawyers and Robert Welsh of the American College of Trial Lawyers. She also thanked all of the staff members who made the arrangements for the meeting and the hearings.

B. Minutes of November 2014 Meeting

Judge Raggi reminded Committee members that the minutes, which were included in the Agenda Book, were approved last fall before their inclusion in the Agenda Book for the Standing Committee's January meeting.

III. CRIMINAL RULES ACTIONS

A. Proposed Amendment to Rule 41

Judge Kethledge, chair of the Rule 41 Subcommittee, reported on the history of the proposed amendment, the Subcommittee's review of the responses submitted during the public comment period, and its recommendations.

In September 2013 the Department of Justice came to the Advisory Committee with two problems. The current version of Rule 41 provides (1) no venue to apply for a warrant to search a computer whose physical location is unknown because of anonymizing technology, and (2) only a cumbersome procedure to apply for warrants to search computers that have been damaged by botnets that extend over many districts. Judge Kethledge emphasized these are procedural—not substantive—problems. The Department proposed an amendment to address these procedural problems.

In April 2014, the Advisory Committee significantly revised the Justice Department's original proposal, crafting a narrowly tailored proposed amendment that closely tracked the contours of the two problems that gave rise to it. The Standing Committee approved the publication of the proposed amendment for public comment.

The Rule 41 Subcommittee received and gave careful consideration to the public comments, including more than 40 written comments and three additional memoranda from the Department of Justice. Several hours of public comments were also presented at hearings before the full Advisory Committee in November 2014. The Subcommittee then held three conference calls in which it discussed the testimony, the written comments, the Department's memoranda, and its own concerns about some of the language of the published amendment.

After careful consideration, the Subcommittee unanimously recommended that the Advisory Committee approve several proposed revisions to the amendment as published, and

approve the revised amendment for transmittal to the Standing Committee.

Judge Kethledge summarized the issues raised in the public comments before stating the Subcommittee's specific recommendations for revisions.

In general, the concerns of those opposing the amendment are substantive, not procedural. Commenters argued that searches conducted under the proposed amendment would not satisfy the Fourth Amendment's particularity requirement, or would be conducted in an unreasonably destructive manner, or would violate Title III's restrictions on wiretaps. These are all substantive concerns on which the amendment expressly takes no position. The amendment leaves these issues for the courts to decide on a case-by-case basis, applying the Fourth Amendment to each application for a warrant.

Similarly, arguments that any changes should be left to Congress are unpersuasive. Venue is not substance. It is process, and Congress has authorized the courts "to prescribe general rules of practice and procedure." This amendment would be an exercise of that authority. Judge Kethledge noted that the Department of Justice had acted in conformity with Judicial Conference policy by using the Rules Enabling Act for these procedural issues rather than going to Congress.

The Department came to the Committee with a procedural problem that is impairing its ability to investigate serious computer crimes that are occurring now. Judge Kethledge respectfully submitted that it would be irresponsible for the Advisory Committee not to provide a venue for the government to make a showing to a judicial officer as to the lawfulness of these searches. He then invited other members of the Subcommittee (Judge Dever, Judge Lawson, Judge Rice, Mr. Filip, Professor Kerr, and the representatives of the Department of Justice) to comment.

Subcommittee members noted that the deliberative process had worked well: the proposed amendment had been narrowed to address the problems created by the current rule, and all of the comments had been reviewed and considered with great care. They expressed support for the amendment (with the proposed revisions to be discussed), and agreed that it addresses procedural—not substantive—issues. One member noted that a proposed revision to be discussed later in the meeting, using the term "venue" in the caption, may help to make this clear to the public. Responding to the concern that these matters should be left to Congress, Judge Raggi commented that under the Rules Enabling Act, Congress will necessarily play a significant role: any proposed amendment must be submitted to Congress before it can go into effect.

Professor Beale stated that the proposed amendment also includes provisions describing how notice of remote electronic searches is to be given. This portion of the proposed amendment will be applicable to all remote electronic searches, including those now being made under Rule 41 when the location of the device to be searched is known. The current notice provisions of Rule 41 are not well adapted to searches of this nature, because they refer to leaving a copy of the warrant and a receipt "at the place where the officer took the property." She noted that some of the comments focused on the adequacy of the proposed notice provisions, and that several of the

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Subcommittee's proposed revisions of the amendment concerned the notice provisions.

Professor Beale thanked Ms. Healy for her work in the preparation of the agenda book, and noted that members had before them a hard copy replacement for one tab in the section on Rule 41.

Judge Raggi noted that the Subcommittee members and the staff had worked heroically to review the large number of comments received, including many at the very end of the comment period, and to prepare the agenda book under significant time constraints due to the short interval between the end of the comment period and the date for publication of the Agenda Book. Judge Kethledge concurred and also thanked the reporters.

Judge Raggi then invited comments from members not on the Rule 41 Subcommittee, asking members to focus first on the general issues raised by the proposed amendment. She confirmed that the members on the telephone could hear all of the discussion.

One member, acknowledging the care and hard work that had gone into the drafting and revision of the proposed amendment, nonetheless opposed it, raising concerns heard from the defense community as well as those who filed public comments. The member disagreed with the characterization of this as a procedural rule, arguing that it has too many substantive effects to be regarded as merely procedural. In effect, it opens the door to judges making ex parte decisions about core privacy concerns, and the defense does not participate until too late in the process, in back-end litigation. This is too great a risk. Authority tends to expand, and it is not possible to predict exactly how this authority will develop. Given the importance of the privacy concerns and the many unknowns, it is preferable for Congress to act first, as it did in Title III. In this member's view, the commenters who opposed did not misunderstand the amendment, because the result will not be narrow. In response to an observation that the defense role would be the same under the amendment as it would be for all other searches, the member expressed the view that the privacy concerns are greater here. For many people, computers are their lives, and these privacy concerns should be considered by Congress.

Another member said he was not hearing the same concerns from the criminal defense bar. He emphasized the public's interest in protections against new ways criminals can use technology to jeopardize the economy, national security, and individual privacy by identity theft, terrorism, corporate espionage, child pornography, and other serious offenses. Defense lawyers agree the government must be able to do its job in protecting society. For example, if a trade secret is lost, it is gone forever. The risk of such criminal activity is clear and present. In this member's view, the commenters who opposed the amendment did not recognize that the government must demonstrate probable cause to obtain a warrant, and they did not recognize the importance of affording the government a venue to show that it is entitled to a warrant to take the necessary actions to respond to these threats. There are risks that individual privacy will be invaded, but the greater risk to privacy comes from burgeoning electronic criminal activity, often shielded by anonymizing software, rather than government search warrants that must satisfy probable cause regardless of venue.

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Judge Kethledge stated that it is the Committee's role and responsibility to address new problems when they arise, and this venue concern is a serious new procedural problem. There is a gap in Rule 41 that may prevent the government from obtaining a warrant because there is no way to identify the court that would have venue to consider the warrant application. The Committee should act to remedy this gap, which will allow the case law on the constitutional issues to develop in an orderly process as courts review warrant applications, rather than after the fact following warrantless searches based on exigent circumstances. If the New York Stock Exchange were to be hacked tomorrow using anonymizing software, under current Rule 41 there is no district in which the government could seek a warrant, and it would likely conduct a warrantless search under the exigent search doctrine, without prior judicial review.

Judge Raggi agreed that if the New York Stock Exchange were to be hacked by a computer using anonymizing software, it would be preferable to allow the government to seek a warrant from the court where the investigation is taking place, rather than conducting an exigent warrantless search. Concerns that judges may be uninformed about the technology to be used in the searches could be addressed by judicial education. The Federal Judicial Center has recently prepared some materials about topics such as cloud computing, and additional materials could be developed to help judges review applications for remote electronic searches.

A member observed that much of the public response is based, incorrectly, on the view that the amendment itself authorizes remote electronic searches. In fact, courts now issue such warrants under the current rules when the government knows the location of the subject computer. The only question addressed by this rule is how to proceed when anonymizing technology prevents the government from learning the computer's location so that it may go to the proper court to seek a warrant. Judge Raggi agreed, but noted that providing venue when anonymizing technology has been used may increase the number of warrant applications, and we cannot know how many such searches there will be, or how frequently they will be used in various kinds of cases.

Judge Kethledge and another member both noted that commenters who opposed the rule offered no alternative solution to the real venue problem the government has presented. A member noted that some opponents stated candidly that they did not want to provide a forum. This may immunize people who use anonymizing technology to commit serious crimes. Given the serious nature of the criminal threats requiring investigation, it would be irresponsible for the Committee to decline to take action to fill the current gap in the venue provisions. Here, as in many other situations, judges reviewing search warrants in any venue will have the duty to apply the substantive law to new situations.

On behalf of the government, Mr. Bitkower addressed the opponents' privacy concerns. He challenged the apparent assumption of many commenters that digital privacy concerns are greater than traditional privacy concerns. To the contrary, he said, cases such as the Supreme Court's decision in *Riley v. California* (2014) have recognized that the privacy rights in technology may be *on a par with* traditional privacy rights in the physical world. In the

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government's view we should apply the same rules, as much possible, to technology as to the physical world: the same probable cause rules, the same particularity rules, and as much as possible the same procedural rules. Remote searches are conducted today, and by themselves do not present new issues. What is new is the ease with which someone can conceal his location by anonymizing technology, and the amendment addresses the venue gap created by that reality. The proposed amendment is privacy enhancing, because it provides a venue in which the government can seek advance judicial authorization of a search, just as it would before conducting a search of someone's home. This process allows the courts to apply the basic principles of the Fourth Amendment to new forms of technology, as they have done, for example, with heat sensors and tracking devices. The government's goal here is to secure a warrant, a privacy enhancing process.

Although several commenters argued that the Committee should follow the precedent of Title III and wait for Congress to act, Professor Beale observed that the history of Title III cuts the other way. Title III was enacted *after* the case law on wiretaps developed, just as the case law is doing now with other forms of technology in cases such as *Riley v. California*. In general, Congress has legislated after a sufficient number of cases have been litigated to shed light on the policy issues. In the case of new technology, the courts are grappling with questions of what information is protected by the Fourth Amendment as well as how requirements such as particularity apply in new contexts. The proposed venue provision would permit the same process to operate with remote electronic searches, allowing the courts to rule on the issues of concern to the commenters. Although it is possible that providing venue will increase the number of remote searches, Professor Beale noted that it may instead increase the number of remote searches reviewed by the courts ex ante in the warrant application process, rather than only ex post following a search yielding information that the government seeks to introduce at trial.

Judge Sutton complimented the Committee on narrowing the proposed amendment and being responsive to the public concerns. He observed that approving venue for warrant applications is not the same as approving remote electronic searches. Rather, it permits more litigation as to search warrants that will shed light on the process and issues. He emphasized that the Rules Enabling Act tells the judiciary to promulgate rules of procedure, not to wait for Congress to act first. Instead, Congress responds to proposed rules.

The member who had stated opposition to the proposed amendment acknowledged that courts must deal with the issues raised by new technology but remained unable to support the amendment, characterizing it as substantive and reiterating there are many unknowns.

Discussion turned to the question what would be known or unknown in the warrant applications covered by the amendment. Mr. Bitkower noted that to obtain any warrant the government must know what crime it is investigating and what it is looking for. In the anonymizing software cases covered by the amendment, the only new unknown is the physical location of the device to be searched. Because Rule 41 currently provides no venue for a warrant application in such cases, if the government deems a situation serious but not "exigent," it must

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now either wait or pursue other investigative techniques that may in some cases be more invasive. In botnet cases, he noted, the problem is the large number of computers, not the lack of information.

A member expressed the view that the most significant unknowns would arise in the botnet cases: what information might be sought from thousands or even millions of computers that had been hacked. Moreover, the technology required for different botnets may vary. He also noted that the Committee was being forward thinking in addressing these issues, since there have been relatively few botnet investigations and only one decision holding that a court cannot issue a warrant when anonymizing software has disguised the location of the device to be searched. It was sensible, he concluded, to address both problems with a narrowly tailored "surgical" amendment.

Agreeing that each criminal botnet is unique, Mr. Bitkower explained that one function of warrants under the proposed amendment could be to map a botnet before seeking to shut it down, collecting the IP addresses of the affected computers to determine the botnet's size and where the computers are located. In previous botnet investigations, the cumbersome requirement of seeking a warrant in each district played a role in determining the government's strategy, and civil injunctions were used. He also noted that warrant applications under the amendment would vary widely: in some cases they may be quite simple and narrow (as in the case of a single email account when the government has already obtained the password), but in other cases there will be more significant complications and new issues on which courts will have to rule.

Members compared the procedural options under the current rule and the proposed amendment in the investigation of the hacking of a major corporation or institution such as the New York Stock Exchange. If the NYSE were hacked and anonymizing software disguised the location of a device the government had probable cause to search, members speculated that the government would conduct a search under some legal theory. They identified three possible scenarios under the current rule: (1) the government might persuade a court in the Southern District of New York to grant the warrant, and then claim good faith reliance if the warrant were later invalidated for lack of venue; (2) a court in the Southern District might find probable cause but determine it had no authority to issue a warrant, in which case the government might conduct a warrantless search and argue that the failure to obtain a warrant was harmless error because the search was nevertheless supported by probable cause; or (3) the government might search without a warrant under a claim of exigent circumstances. Members expressed the view that these examples showed why it would be preferable to amend Rule 41 to provide venue for warrant applications, so that courts asked to approve such warrants would be able to focus on the constitutional issues presented by remote computer searches. Concerns about the judiciary's understanding of the technology could be addressed by judicial education.

In response to the question how frequently the government expects to seek warrants under the proposed amendment, Mr. Bitkower noted the use of anonymizing technology by criminals is likely to become much more common. Until recently only sophisticated criminals employed

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anonymizing software, but the technology is now more readily available and easier to use. In the case of botnets, in prior cases the government used non-criminal tools, but the lack of efficient venue provisions skewed the government's choices. So that authority might be employed in future cases.

Judge Raggi then called for a vote on the question whether to move forward with the proposed amendment.

By a vote of 11 to 1, the Committee voted to approve the amendment for transmission to the Standing Committee (subject to further discussion of the minor revisions proposed by the Subcommittee).

At Judge Kethledge's request, Professor Beale described the revisions proposed by the Subcommittee. The first revision was to substitute "Venue for a Warrant Application" for the current caption "Authority to Issue a Warrant." This proposal responded to the many comments that assumed the amendment would allow a remote search in any case falling within the proposed amendment (for example, any case in which an individual had used anonymizing technology such as a VPN). These commenters mistakenly viewed the amendment as providing substantive authority for such remote electronic searches, which they strongly opposed.

Beale noted that after the final Subcommittee call agreeing to amend the caption, Professor Kimble, the style consultant, first opposed making any change on the ground that no reasonable reader of Rule 41 as a whole could fail to see the many additional requirements. When advised that much of the opposition to the rule was founded on this misunderstanding, Kimble proposed an alternative caption "District from Which a Warrant May Issue." Professor King suggested that Professor Kimble may have believed this language would be clearer to lay readers than the term "venue."

Discussion focused on the need for a change in the caption, and the difference between the alternative captions. Professor Beale reminded the Committee that if there were no substantive difference, but only a question of style, it would ordinarily accept the style consultant's proposed language.

Judge Kethledge stated his strong support for amending the caption and using the Subcommittee's language. The current caption is overbroad and misleading, seeming to state an unqualified "authority" to issue warrants meeting the criteria of any of the subsections. Although Professor Kimble suggested this reading would be unreasonable, Judge Kethledge asserted that the current caption is unclear and is causing serious public opposition. By retaining the reference to "issu[ing]" warrants, Professor Kimble's language may perpetuate the misunderstanding. "Venue" is much clearer.

Members discussed the impact of different words and phrases. Several expressed support for the use of "venue," though another noted that it may not be known to non-lawyers and "venue" for the filing of a criminal case is defined differently than "venue" for the warrant applications under Rule 41(b). Judge Raggi observed that "venue" would be very clear to the

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judges applying the rule. A member who agreed with the Subcommittee's recommendation also noted that other references to "authority" in the existing subsections of Rule 41(b) are also unclear; he observed that at some point it might be helpful for the Committee to revise and clarify all of the subsections.

Professor Coquillette commented that the discussion had made it clear that the Committee was grappling with a question of substance, not mere style.

The Committee voted unanimously to amend the caption of Rule 41(b) to "Venue for a Warrant Application."

Professor Beale explained that the Subcommittee also recommended two small changes in the notice provisions, Rule 41(f)(1)(C), both of which are intended to make notice of remote electronic searches parallel to the notice provided for physical searches to the extent possible.

The first change adds the requirement that the government serve a "receipt" for any property taken (as well as the warrant authorizing the search). In drafting the published notice provisions, the Committee had inadvertently omitted this requirement. Since this addition would parallel the requirements Rule 41(f)(1)(C) now imposes when the government makes a physical search and provide an additional protection for privacy, the reporters were confident it would not require republication.

The second change rephrased the obligation to provide notice to "the person whose property was searched or <u>who possessed the information that was seized or copied</u>." Again, the Subcommittee's intent was to parallel the requirement for physical searches. The Subcommittee rejected the suggestion in some public comments that the government should be required to provide notice to both "the person whose property was searched" <u>and</u> whoever "possessed the information that was seized or copied," since that is not required in the case of physical searches. For example, if the Chicago Board of Trade is served with a warrant and files containing information regarding many customers are seized, the government may give notice of the search only to the Board of Trade, and not to each of the customers whose information may be included in one or more files. The same should be true in the case of remote electronic searches. Discussion followed on how the current notice provisions applied to various hypotheticals.

The Committee voted unanimously to revise the amendment as published to require the government to serve a "receipt" as well as the warrant, and to provide notice to "the person whose property was searched or <u>who possessed the information that was seized or copied</u>."

Professor Beale then turned to two proposed revisions to the Committee Note. The first addition explained the new caption:

> **Subdivision (b).** The revision to the caption is not substantive. Adding the word "venue" makes clear that Rule 41(b) identifies the courts that may consider an application for a warrant, not the constitutional requirements for the issuance of a warrant, which must also be met.

Members emphasized that the first sentence was not inconsistent with their earlier conclusion that the language of the caption presented a substantive, not merely a style issue. The

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point made in the Committee Note is that the change in the caption does not alter the meaning of the existing provisions in Rule 41(b). Rather, it clarifies the effect of the amendment, making clear what the amendment does and does not do. The last sentence responds directly to the many public comments misunderstanding the effect of the amendment, stating that there are also constitutional requirements that must be met. A member suggested that the meaning would be clearer if the last sentence were revised to state that the constitutional requirements must "still" be met, and Judge Kethledge accepted this as a friendly amendment.

The Committee voted unanimously to add the following language to the Committee Note:

> **Subdivision (b).** The revision to the caption is not substantive. Adding the word "venue" makes clear that Rule 41(b) identifies the courts that may consider an application for a warrant, not the constitutional requirements for the issuance of a warrant, which must still be met**.**

Finally, Professor Beale asked for approval of the Subcommittee's proposed addition to the Committee Note regarding notice. The proposed addition explains the changes after publication, and also responds to the many comments that criticized the proposed notice provisions as insufficiently protective because they required only reasonable efforts to provide notice. The addition draws attention to the other provisions of Rule 41 that preclude delayed notice except when authorized by statute and then provides a citation to the relevant statute. Professor Coquillette commented that because of the widespread confusion on this point in the public comments, the proposed addition was an appropriate exception to the general rule that committee notes should not be used to help practitioners. Members agreed that the citation "See" is appropriate because at present the statute referenced is the only authority for delayed searches (though other provisions might at some point be added).

The Committee voted unanimously to add the underlined language to the Committee Note:

> **Subdivision (f)(1)(C).** The amendment is intended to ensure that reasonable efforts are made to provide notice of the search, seizure, or copying<u>, as well as a receipt for any information that was seized or copied, to the person whose property was searched or who possessed the information that was seized or copied. Rule 41(f)(3) allows delayed notice only "if the delay is authorized by statute." See 18 U.S.C. § 3103a (authorizing delayed notice in limited circumstances).</u>

B. Proposed Amendment to Rule 4

Judge Lawson, chair of the Rule 4 Subcommittee, described the public comments on the proposed amendment and the Subcommittee's recommendation that the amendment be approved as published and transmitted to the Standing Committee. One speaker at the hearings in November 2014 supported the proposed amendment, and there were six written comments. One comment urged that the proposal be withdrawn. The others supported the amendment, though some suggested modifications in the text or committee note. The Subcommittee met by telephone to consider the comments.

Judge Lawson reminded the Committee that the proposed amendment is intended to fill a

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gap in the current rules, which provide no means of service on an institutional defendant that has committed a criminal offense in the United States but has no physical presence here.

Judge Lawson explained the Subcommittee's views on various issues raised by the law firm of Quinn Emanuel Urquhart & Sullivan (which represents a foreign corporation that the Justice Department has been unable to serve) in support of its recommendation that the proposed amendment should be withdrawn. First, Quinn argued, by stating that any means which provides actual notice is sufficient, the rule creates a situation in which any institutional defendant that appears to contest service has in effect admitted it has been served. The Subcommittee agreed with the Justice Department's response: the point of the amendment is to provide a means of service that gives notice, and there is no legitimate interest in allowing a procedure in which an institutional defendant can feign lack of notice. If the amendment were adopted, there would be, however, objections an institutional defendant might assert by a special appearance (such as a constitutional attack on Rule 4, an objection to a retroactive application of the amendment, or a claim that an institutional defendant has been dissolved.) And, Judge Lawson said, the Subcommittee also found unpersuasive the Quinn law firm's reliance on the Supreme Court's decision in *Omni Capital Int'l v. Wolff*. The Court simply required that service be made in compliance with the Rules of Civil Procedure. Here, by amending Rule 4 to provide for service, the amendment will allow the government to make service in a manner provided for in the Rules of Criminal Procedure.

The Subcommittee was not persuaded by comments of the Quinn firm and the National Association of Criminal Defense Lawyers (NACDL) expressing concern about the consequences of not honoring a summons, particularly a concern that this would permit trials in absentia. Judge Lawson noted that Rule 43 generally prohibits trial in absentia. Institutional defendants may appear by counsel, but their counsel must be present. NACDL suggested that the amendment or Committee Note be revised to include a reference to Rule 43. Noting the general principle that the Rules are to be read as a whole, the Subcommittee concluded it would not be wise to cross reference here to a single rule. Indeed, doing so might have negative implications when other provisions are not cross referenced. Judge Lawson also noted that trial in absentia was not among the long list of possible remedies that the Department of Justice identified in the August 2013 memorandum (included on pages 79-84 of the Agenda Book), which included criminal contempt, injunctive relief, the appointment of counsel, seizure and forfeiture of assets, as well as a variety of non-judicial sanctions (such as economic and trade sanctions, diplomatic consequences, and debarment from government contracting).

The Subcommittee also declined to adopt suggestions that the amendment be revised to provide an order of preference among the permitted methods of service. This issue, Judge Lawson noted, had been considered by the full committee, which previously determined that a requirement of this nature could generate burdensome litigation. The Subcommittee agreed.

The Subcommittee declined the Federal Magistrate Judges Association's suggestion that the committee note be revised to state that the manner of service must comply with Due Process. Judge Lawson explained the Subcommittee's view that this was unnecessary, since the Constitution must always be honored.

The Quinn law firm argued that the amendment was unwise because it would lead to reciprocal action by foreign governments against U.S. firms. Judge Lawson reminded the

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Committee that it had discussed this issue at length before voting to approve the amendment for publication. As explained by the Justice Department's representatives and described in detail in the Department's August 2013 memorandum, federal prosecutors would be required to consult with the Justice Department's Office of International Affairs (which consults with the Department of State) in effecting international service.

Judge Lawson noted a final suggestion by NADCL fell outside the current proposal.

After considering all of the comments, Judge Lawson said, the Subcommittee voted unanimously to recommend that the proposed amendment be approved as published and transmitted to the Standing Committee. He then called on the Subcommittee members, Judge Rice, Mr. Siffert, and Mr. Wroblewski (representing the Department of Justice) for any additional comments.

Mr. Wroblewski thanked Judge Lawson, the Subcommittee members, and the reporters for their efforts, and he noted that the Justice Department's original proposal had been revised and improved. He commented on the reciprocity concerns, noting that federal prosecutors face reciprocity concerns every day in a variety of contexts, such as arrests and witness interviews. The United States Attorneys' Manual provides that whenever a federal prosecutor attempts to do any act outside the United States relating to a criminal investigation or prosecution or takes any other action with foreign policy implications the prosecutor is required to consult with the Office of International Affairs.

Judge Raggi observed that because that the government cannot try a defendant who has not filed a notice of appearance, the amendment might not result in a significant increase in prosecutions if non-U.S. entities don't file a notice of appearance. In such cases, however, if service has been made the government will be able to take a variety of collateral actions. The amendment is not radical. It simply provides a means of service, filling a gap in the rules.

Professor Coquillette recalled occasions when foreign governments raised objections to proposed amendments for the first time very late in the process (even at the point of Congressional consideration). He was happy to hear that the Departments of Justice and State had already consulted about this rule, and he urged the Department of Justice to do whatever it could to encourage counterparts at the State Department to bring to light now any possible objections from other nations. The Department's representatives agreed this was important, noting there had been long discussions between the Departments of State and Justice before the proposal was submitted, and throughout its consideration.

Judge Lawson added one final observation. The Quinn law firm proposed withdrawing the amendment without providing any alternative, which would mean that it would not be possible to make effective service on entities such as the Pangang Group (which the government has been unable to serve under the current rules). He noted that the Quinn law firm represents the Pangang Group, and in effect was seeking to defend it by preventing the initiation of the prosecution. This case, he said, demonstrates the necessity for the amendment. Without it, foreign entities can violate U.S. law with impunity.

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Judge Sutton inquired into the breadth of the language in the proposed amendment to Rule 4(a), allowing the court to take "any action authorized by United States law" if an organization defendant fails to appear after service. Should it be limited to actions against the organizational defendant? Judge Raggi explained that not all appropriate responses would be actions against the organizational defendant itself. Notably, in rem sanctions might be available. And Professor Beale noted that United States law would not authorize sanctions that lacked a sufficient connection to the organizational defendant. Judge Sutton indicated he was satisfied that the broad language was appropriate.

On Judge Lawson's motion, the Committee voted unanimously to approve the proposed amendment as published and transmit it to the Standing Committee.

C. Proposed amendment to Rule 45

Judge Lawson, chair of the CM/ECF Subcommittee, presented the Subcommittee's recommendations regarding the previously published amendment to Rule 45 that would eliminate the three extra days provided after electronic service. The amendment reflects the view that electronic transmission and filing are now commonplace and no longer warrant additional time for action after service. It was published for comment in the fall of 2014. Similar proposals will be considered at the spring meetings of the other Rules Committees.

Judge Raggi noted that with this and other uniform rule changes being considered by all of the Rules Committees, the Criminal Rules Committee ought to consider whether criminal cases require different treatment. For example, in criminal cases there may have to be more play in the procedural joints, both as a matter of fundamental fairness when someone's liberty is at stake, and to avoid collateral challenges when convictions are obtained.

Judge Lawson discussed the Subcommittee's review of the comments received on the amendment to Rule 45. He first noted that the Subcommittee had rejected the Federal Magistrate Judges Association's suggestion either to eliminate all of the parentheticals in the proposed rule or to revise the rule to refer to "(F) (other means consented to except electronic service)." The Subcommittee concluded that the parentheticals were helpful, not confusing, and that the Committee Note clearly states that no extra time is provided after electronic service.

The Subcommittee recommended one change to the Committee Note that was published for comment and two changes to the text.

Judge Lawson first addressed the Subcommittee's recommended change to the Committee Note, which responded to concerns raised in the public comments. The Pennsylvania Bar Association and the National Association of Criminal Defense Lawyers had opposed the proposed amendment's elimination of the additional three days because of the difficulty it would cause practitioners and their clients. They emphasized that many criminal defense counsel are solo practitioners or in very small firms, where they have little clerical help, and do not see their ECF notices the day they are received. The Department of Justice expressed a similar concern

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about situations in which service after business hours or from a location in a different time zone, or an intervening weekend or holiday, may significantly reduce the time available to prepare a response. In those circumstances, a responding party may need to seek an extension.

The Subcommittee recommended that in light of these legitimate concerns, the Committee Note to Rule 45(c) be revised to include language addressing this problem drafted by the Department of Justice:

This amendment is not intended to discourage courts from providing additional time to respond in appropriate circumstances. When, for example, electronic service is effected in a manner that will shorten the time to respond, such as service after business hours or from a location in a different time zone, or an intervening weekend or holiday, that service may significantly reduce the time available to prepare a response. In those circumstances, a responding party may need to seek an extension.

Judge Lawson noted that the Subcommittee thought added language encouraging judges to be flexible when appropriate and to expand those deadlines would allow judges to address matters on the merits. This was consistent with the position the Committee adopted for Rule 12. Liberality is especially important in the criminal context, he explained, because overly rigid application would inevitably result in Section 2255 motions and other collateral attacks. The note language keeps the text of the rule the same among committees but recognizes the particular need for flexibility in this context.

A member opposed to the amendment objected to this "compromise," arguing that Note language is not the same as leaving the extra three days in the text of the Rule. A client may be incarcerated and cannot be reached, and if the lawyer learns about it late Friday night, but the judge says no once there is a chance to seek an extension on Monday, three or four days to respond is not enough. Another member noted that local rules may have seven day limitations even if there are no seven day limitations in the Criminal Rules.

Professor Coquillette asked the Committee to focus on why the criminal rule should be different, if the other committees are comfortable with the elimination of the three extra days after electronic service. A member explained that the client in a criminal case is often incarcerated, which restricts counsel's access, and that responses often must be run by the client face to face in order to be accurate. Another member voiced opposition to eliminating the three days in criminal cases for two reasons. First, it is much more difficult to talk to the client before filing a response because of the distance to the location where the client is incarcerated and second, in some places local rules are interpreted liberally and some not.

Judge Raggi emphasized that there is a strong preference for uniform timing rules, so that a departure for the Criminal Rules must be justified.

After a short break, a member previously expressing opposition to the amendment to the text of the Rule withdrew that opposition based on the expectation that the note language would be included.

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The Committee then unanimously approved adding to the Committee Note as published the additional language concerning extensions that had been proposed by the Department of Justice.

Professor Beale noted that the chair and reporters might need some latitude in moving forward with the new note language, given that each of the other committees will be considering this in the weeks to come and some tweaks might be necessary to achieve uniformity.

Judge Lawson then presented the Subcommittee's two recommendations to modify the text of the published amendment, each based on comments received during the publication period. The Subcommittee did not believe either change required republication.

The first recommended change was to eliminate the added phrase "Time for Motion Papers" from the caption of Rule 45, and keep the caption as it is now. Rule 12 deals extensively with the time for motions and Rule 45 does not.

The second recommendation was to modify the language of Rule 45(c) to parallel the language used in other sets of rules, referring to action "within a specified time after being served" instead of "after service." There was no reason for different phrasing in the Criminal Rule.

A motion was made to approve the text of the rule as published, with these two changes, and adopted unanimously.

D. CM/ECF Subcommittee

Judge Lawson presented the Subcommittee's recommendation regarding a mandatory electronic filing amendment being considered by the Civil Rules Committee (as well as the Appellate and Bankruptcy Committees). He explained that the proposed Civil amendment is of particular concern to the Criminal Rules Committee because Criminal Rule 49 now incorporates the Civil Rules governing service and filing. Rule 49(b) provides that "Service must be made in the manner provided for a civil action," and Rule 49(d) states "A paper must be filed in a manner provided for in a civil action." Accordingly, changes in the Civil Rules regarding service and filing will be incorporated by reference into the Criminal Rules. Also, the Criminal Rules Committee has traditionally taken responsibility for amending the Rules Governing 2254 Cases and 2255 Cases, and these rules also incorporate Civil Rules.

Judge Lawson explained that the Civil Rules Committee is considering a proposal mandating e-filing that does not exempt as a class pro se filers or inmates. Exemption is allowed either by local rule or by a showing of good cause. There are a number of districts that do not permit pro se e-filing except upon motion, and particularly discourage prisoners from e-filing because of the potential for mischief. There are also issues regarding electronic signatures. The question for the Committee is whether criminal cases warrant a different rule than that being considered by the Civil and Appellate Committees.

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Professor King added that the issue is on the agenda now so that the Criminal Rules Committee's views on these issues can be conveyed to the other committees which will be considering this in the weeks to come. Also, she noted that the CM/ECF Subcommittee discussed the pro se issue and was unanimous in rejecting for criminal cases any rule that would require either a local rule or a showing of good cause in order to exempt pro se and prisoner filers. The reporters have conveyed our Subcommittee's view to those working on the rules for the other committees but so far they have not been sympathetic. Professor Beale added that the members of the working group for the Civil Committee preferred allowing districts to handle rules for pro se filers on a district-by-district basis.

The Committee's Clerk of Court Liaison, Mr. Hatten, who had been asked to share his views and experience on this issue with the Committee, presented several concerns raised by a rule that did not include an exception for pro se or inmate filers.

Mr. Hatten noted that because the CM/ECF system is a national platform that individual districts cannot modify, problems raised by extending e-filing to pro se filers will become embedded, and allowing courts to opt out will not avoid those structural problems. He noted various districts have been able to extend e-filing at their own pace, adapting to resource constraints and local challenges, and he knows of no court that extends e-filing to prisoners. Among the variations are differences in whether attorney filers may e-file sealed documents and case initiating documents.

As to pro se electronic filing, Mr. Hatten doubted the system was ready for a mandatory rule. We do not know the number of courts that presently allow this, and the extent of their experience. Many courts, perhaps even a majority, do not allow any electronic filing by pro se litigants. We really don't know how this would work because the experience with it has not been evaluated. He reviewed the history of the development of the CM/ECF system, designed for attorney use, and expressed the concern that many courts may find as a matter of policy that e-filing by pro se litigants is inappropriate or that the system is inadequate. A transition to pro se e-filing, he suggested, would not be facilitated by an opt-out rule, but instead would require further study and adequate resources, including staff resources.

Next, Mr. Hatten reviewed a number of potential problems that might arise. First, the current system anticipates a certain level of legal training and knowledge on the part of the person using the system, including knowledge of the rules as to what to file, when, and in what format. Non-lawyer, untrained filers may incorrectly characterize or describe their filings, tasks that are already a challenge for some lawyers. Pro se filers may file the same thing multiple times, fail to attach required documents, or attach the wrong document. This difficulty would be enhanced if the person is not a recurring user. Judges must use these designations, which may not be clear. Lawyers who must respond to the filing also may experience additional burdens. Court staff review docket entries for accuracy, and if there is an error, the staff must make a separate entry to rename the docket entry; they do not change the original filing. Increased errors would require increased staff resources for review and correction of docket entries. His court has had experience with pro se filers inferring some nefarious motive on the part of court staff when a docket entry is changed. This is in addition to the increased resources needed to train pro se filers.

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Judge Raggi asked whether electronic filing or paper filing is a more efficient use of clerk's office staff. Mr. Hatten responded that for attorney filers there is a great advantage in electronic filing, but there will not be the same advantages for pro se filers. Pro se filers will be calling staff with normal questions you would expect from someone with less experience about how to file and other aspects of the system. And the quality control will be a very significant burden because pro se litigants will not understand the significance of what they are filing.

Mr. Hatten continued that in contrast to paper documents which can be screened before entry in the system, there is no ability to pre-screen materials before they are e-filed to identify any pornographic, confidential, libelous, or otherwise offensive or objectionable materials. E-filing results in immediate access via the internet to whatever is filed, through PACER or through subscription services such as Lexis or RSS feeds. There is no filter on the PACER system, which anyone can use. There are services that provide to a subscriber instantaneous access to anything filed in a particular case. Once captured and broadcast by these services, documents cannot be re-captured. This could lead to the release of personal data or materials that should not have been filed. Because electronic filings made late Friday are not reviewed by staff until Monday, there is a period of time when the unreviewed information would be available to anyone. Issues created by a pro se filer's use of the system could be addressed by a court after the fact, but any harm through unretrievable dissemination of offensive, confidential, or sealed materials would already have taken place. If the filing was in paper and screened first, the staff would review the document, then scan it, give it an appropriate name, and docket it.

Additionally, Mr. Hatten raised the potential of the "loss of docket integrity" if login and password information is made available to non-lawyers. Once issued a password in CM/ECF, any individual using that login information may access and file in any case in the system, regardless whether that person is a party to the case or whether the case is open or closed. For example they can file in any defendant's case. That login and password could be used by anyone who obtains it. There are no means to verify the identity of the actual individual accessing the system, if someone were to suggest that the login information was used without authorization. Potentially, with login information, someone unconstrained by the rules governing attorneys could maliciously interfere in unrelated cases. Expanded access by non-attorneys could even lead to denial of service attacks on the system, he noted, emphasizing that this was speculation. He did not know if expanding access would raise the risk of the introduction of malware or other viruses into the system, which until now has been very reliable. He noted that courts can block use of a password, but it would be "shutting the door after the cow's left the barn." Any information, such as information about a victim, or sealed materials that someone had filed electronically after obtaining them in paper form, would have already been released.

Judge Raggi asked if this ability to file in any case has been the subject of previous discussion. Mr. Hatten noted that it hadn't been a problem as far as he knew, because all filers were attorneys. Judge Lawson noted that this was one of the main reasons his district restricted CM/ECF access to attorneys.

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Mr. Hatten continued that electronic notice of filing requires an individual email account, and it is not known whether pro se filers filing from an institution will be able to receive such notices, because of capacity limits or spam filters. Even in instances with a good lawyer email address, those email accounts are sometimes so full the court gets a bounce back. Sources a pro se party may use for filing, such as a public library, may be unavailable to receive email. The CM/ECF system requires the ability to contact a filer regarding missing information such as address or phone number. If delivery is not available, a paper notice would be required, which would reduce any advantage from e-filing.

Electronic filing, Mr. Hatten observed, may also require that the filer qualify for electronic payment. Those who lack credit cards, such as inmates, may not be able to file case-initiating documents.

Another concern, Mr. Hatten stated, was that the round-the-clock availability of the e-filing system. Past experience with some pro se paper filings suggests that extending e-filing to pro se litigants would significantly increase the volume of prisoner and pro se filings. Courts have experience measuring the filings of vexatious litigants in pounds not pages. Many examples are readily available. He mentioned two in his district: one, using paper filings only, filed 964 appeals in eleven regional circuits and the Federal Circuit and 2637 civil actions nationwide; another, using paper filings only, filed 76 appeals in four circuits, and 33 civil actions in 17 districts.

Perhaps extending e-filing to pro se filers could overcome some of these issues if the system could be modified to allow pro se filings to drop into a box so that court staff could review them before anybody else would see them. That might be better, but it is not possible in the existing system. Moreover, there are no resources available to court staff to implement a program of this potential magnitude, he said.

Mr. Hatten also raised the concern that if the rule changed to require e-filing unless there was a local rule or a showing of good cause, courts may expect demands by pro se and prisoner filers that they are entitled to access CM/ECF. Finally he raised a concern about the language of the proposed change to the Civil Rule referring to the electronic signature.

Judge Raggi asked the Department of Justice to share its views about extending e-filing to pro se and prisoner filers. Mr. Wroblewski stated that it seems clear the CM/ECF system is just not ready to handle all of the types of cases the Department sees, especially the Section 2255 cases. For example, the courts are in the middle of a retroactive guideline change, and in many districts the prisoners have no attorneys, but all are required to file, and although many have access to email, none have access to the internet. And there are tens of thousands of prisoners who are being held by the Marshal's Service, mostly in county jails, not federal facilities, with no computer access. We are just not ready for this, he stated, and are very concerned that we need to provide access to the courts for all of the pro se litigants, including those incarcerated.

On the electronic signature issue, he noted, there had been concern that it might cause problems with prosecuting bankruptcy fraud, but the Department doesn't see a huge problem with the criminal filings, at this point. But they are not ready to jump to a mandatory system.

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In response to a question whether the Department thought the proposed rule provides enough flexibility, Mr. Wroblewski stated they will defer to the courts, but just want to make sure that all criminal litigants, including Section 2254 filers, have a way to access to the courts. If courts want to opt out of a new rule, and guarantee access that way, that is fine, but the courts must be open to these litigants.

Judge Raggi noted that the electronic filing proposal is being advanced with great vigor by the other Committees, but no one has indicated what the fallback plan would be should the system fail, either from an attack on the system itself or some other disaster. There is a real need for courts to operate in times of emergency, such as 9-11 or Hurricane Sandy, but there seems to be no fallback plan should the computers fail. District judges no longer maintain their own dockets, but are subject to the dictates of nationwide technology. She urged that in working with other committees, we should keep in mind that the Criminal Rules' unique concern with liberty. She also observed that requiring e-filing may put more distance between those who use the courts and the courts, and that the added resources needed to allow this to work aggravates these concerns. But the fundamental point is that these are criminal litigants in proceedings about liberty. She encouraged members to think about what is the advantage to them or us of having those papers filed electronically as opposed to hard copy.

In response to her request for input from members about whether this could be handled at the local level, one member related that in his district 10% of pro se filings are being filed electronically. As to pro se filers, this member reported, they have not had any problems. If a pro se filer does not want to file in CM/ECF, it is simple to opt out, and 90% of pro se's do opt out and file with paper. They file a form requesting they not have to file electronically and the magistrate routinely grants it. The good cause is usually "I don't have access to the Internet."

His district also has two state prisons, the member continued, and the state department of corrections has a very new limited pilot program allowing prisoners to file electronically in Section 1983 cases, not habeas actions. This is a good thing, he reported, because it has cut down the many, many pages of hard to decipher handwriting. Prisoners use a computer station to file these documents, so they come in typed in a standard format. Prisoners have time allotted to go to that location and file that document. He noted that there were so many prisoner filings, more than half of the docket, and the program was driven by that volume. He reiterated that the program is in "an infant stage," and that it could go sideways.

Another member noted that her district allows pro se filing in civil cases but requires training first, and she thought that a few districts were working on pilot projects allowing persons in custody to make filings. But this member could not imagine how this could possibly be required in habeas cases because state facilities don't give access.

Another member noted that if there is a top-down rule that says e-filing is required but you can opt out, at least 92 districts will opt out. Those who are detained but not yet convicted are in county jails in his district, with no computers. The state doesn't even have electronic filing for lawyers, and his district doesn't allow pro se e-filing, for some of the reasons stated before. There are ways to work toward this gradually, but having a top-down rule that everyone opts out of is not

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good process, and reflects badly on the credibility of the rules process.

Professor Coquillette noted that local rules have been a matter of concern for Congress for decades, because they don't have the oversight provided by the Rules Enabling Act. Sometimes, however, there is a national rule that says go out and make local rules. This occurs in two situations: where there are real differences district to district, and where the subject matter is so premature it requires experimentation. Both of those conditions may apply here.

Another member noted that in 90% of situations the mandatory e-filing rule is ill advised and out of touch for people in county jails. His state has a tremendous budget crisis, won't fund providing prisoners with facilities to file electronically, and prisoners would file suits alleging denial of access to the courts. It is a top-down rule to fix a problem that doesn't exist. Already there are functioning local rules, and no need for this massive energy to change a system that seems to be working. This member was not aware of any reason that providing internet access to prisoners would be a priority, or that prisoner filings should be lock step with filings in civil cases.

Professor Beale suggested that we could amend Rule 49 in various ways to accommodate a different rule for criminal cases if the Civil Rules Committee proceeds with the existing draft. However, the Civil Rules Committee might put their proposed rule on hold, and study it more, or decide it is ready to publish something now, but agree to slow down later.

Professor Coquillette stated that the Standing Committee would want to hear what the Criminal Rules Committee thinks is best for criminal cases.

Judge Raggi asked the Subcommittee to meet again before the Standing Committee meets to consider what sections might be amended to deal with these concerns as to Rule 49 and also the 2254 and 2255 Rules to the extent we are responsible for them.

A member added that our goal would be to have our own amendment to Rule 49 take effect before 92 districts had to opt out of a mandate.

Judge Lawson expressed appreciation for Mr. Hatten's contribution. He noted the Subcommittee was comfortable with requiring e-filing for lawyers, and had not addressed prisoner filings in 1983 cases. The Subcommittee opposed a Civil Rules amendment that provided no carve out for pro se or prisoner filers. He agreed with the many concerns discussed, and noted that not all of those who file in criminal cases are parties. Witnesses, law enforcement, and third party owners would not necessarily have CM/ECF access. Most importantly, he argued, the rule implicates constitutional rights that do not arise in civil cases, and requiring pro se prisoner filers to demonstrate good cause before they can access the courts would probably raise constitutional issues. He asked the Committee to convey its preference for an approach that carves out pro se filers from any mandatory rule.

A member noted that he is in favor of that motion, that in his district this is not done, and that a top-down rule is a bad idea if clerks and local committees in almost every district wonder how out of touch this is. On the ground, pro se litigants are not filing through CM/ECF.

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Judge Raggi agreed we can make these suggestions to the Civil Rules Committee, and she favored doing so, noting that a litigant who wants to go into every case in a judge's docket could cause a fair amount of trouble. But she also urged that the Criminal Rules Committee should also have an alternative plan in reserve.

A member said our alternative should be to work on delinking our rule from the Civil Rules. Another member noted the Committee may have to recommend amendments to 49(b) and (d), and a third noted that 49(e) may need work as well.

There was discussion about whether the Committee favored retaining current Rule 49(e), to preserve status quo. Judge Lawson thought there may need to be different treatment for those who are incarcerated and those who are not, and said that his initial proposal was not to preserve status quo.

A member stated he was unprepared to vote on specifics. He did not favor going beyond conveying the Committee's concerns to the other Committee at this point. He specifically did not agree with any rule stating pro se or prisoners may have CM/ECF access.

Judge Lawson agreed with Judge Raggi's suggestion that the committee vote on whether to inform the other committees that the Criminal Rules Committee has reservations about requiring mandatory electronic filing for pro se litigants and pro se criminal litigants, because we predict that almost every district would create an exception.

A member agreed that if a Rules Committee gets out in front of what is happening on the ground in 92 of 94 districts, that's a problem. Now Rule 49 allows local rulemaking, and all districts have local rules that are working well. It doesn't make sense to require the local rules committees in all of these districts to reconvene and do something else.

The resolution of the sense of the Committee was adopted unanimously.

Judge Raggi stated that she would voice these concerns,[3] and our Subcommittee will continue to look at our own rule.

E. Proposed Amendment to Rule 35 (15-CR-A)

In a law review article submitted to the Committee in February, Professor Kevin Bennardo urged that Rule 35 be amended to bar appeal waivers before sentencing. Judge Dever, the chair of

[3] Following the meeting, the reporters and chair conveyed these concerns. The chairs, reporters, and members working on the proposed Civil Rule and parallel changes in the Bankruptcy and Appellate Rules were very responsive to the Advisory Committee's concerns, and a revised version of the proposed Civil Rule excluding persons not represented by counsel was presented to the Advisory Committee on Civil Rules. Representatives of all committees will continue to collaborate as the rules on electronic service, filing, and signature move forward.

125-010577

the subcommittee that reviewed another recent proposal to amend Rule 35, was asked to comment on Professor Bennardo's proposal.

Judge Dever concluded that the proposal is trying to solve a nonexistent problem by creating a second Rule 11 process that will not save the appellate courts any time. He recommended that the proposal not be referred to a subcommittee and that it not be pursued further. He noted several problems with the assumptions underlying the proposal. First, the circuits uniformly accept waivers of appeal in plea agreements, rejecting one of the article's central premises, namely that there cannot be a knowing waiver of appeal until the sentence is imposed. Second, the article erroneously assumes that judges do not consider the Section 3553(a) factors if there is an appellate waiver. Finally, the proposal is intended to save the appellate courts time, because it assumes that the appeal would be stayed while the government negotiations an appeal waiver after sentencing, after which there would be a new process in the trial court by which the defendant will receive a lower sentence. The article also asserted that this will lead to fewer defendants who breach the appeal waiver by asking their lawyer to file the notice of appeal.

Judge Raggi asked for members to comment. Hearing no comment, she called for a vote on the recommendation not to pursue this further.

The motion not to pursue the proposal passed unanimously.

F. Other Business

Judge Raggi stated that if the Rule 41 changes are adopted, that would be a good time to help the Federal Judicial Center work on a primer on how electronic searches work. She stated that Judge Kethledge, Chair of the Rule 41 Subcommittee, Professor Kerr, the Department of Justice, Mr. Siffert and she would work with the FJC on this project.

Finally, Judge Raggi noted the next meeting of the Committee will be September 28-29 in Seattle, Washington.

The meeting was adjourned.

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TAB 2C

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

1 **Rule 4. Arrest Warrant or Summons on a Complaint**

2 **(a) Issuance.** If the complaint or one or more affidavits
3 filed with the complaint establish probable cause to
4 believe that an offense has been committed and that
5 the defendant committed it, the judge must issue an
6 arrest warrant to an officer authorized to execute it.
7 At the request of an attorney for the government, the
8 judge must issue a summons, instead of a warrant, to a
9 person authorized to serve it. A judge may issue more
10 than one warrant or summons on the same complaint.
11 If an individual defendant fails to appear in response
12 to a summons, a judge may, and upon request of an
13 attorney for the government must, issue a warrant. If

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

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14 an organizational defendant fails to appear in response
15 to a summons, a judge may take any action authorized
16 by United States law.
17 * * * * *
18 **(c) Execution or Service, and Return.**
19 **(1)** ***By Whom.*** Only a marshal or other authorized
20 officer may execute a warrant. Any person
21 authorized to serve a summons in a federal civil
22 action may serve a summons.
23 **(2)** ***Location.*** A warrant may be executed, or a
24 summons served, within the jurisdiction of the
25 United States or anywhere else a federal statute
26 authorizes an arrest. A summons to an
27 organization under Rule 4(c)(3)(D) may also be
28 served at a place not within a judicial district of
29 the United States.

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30 **(3)** ***Manner*.**

31 (A) A warrant is executed by arresting the
32 defendant. Upon arrest, an officer
33 possessing the original or a duplicate
34 original warrant must show it to the
35 defendant. If the officer does not possess
36 the warrant, the officer must inform the
37 defendant of the warrant's existence and of
38 the offense charged and, at the defendant's
39 request, must show the original or a
40 duplicate original warrant to the defendant
41 as soon as possible.

42 (B) A summons is served on an individual
43 defendant:

44 (i) by delivering a copy to the defendant
45 personally; or

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(ii) by leaving a copy at the defendant's residence or usual place of abode with a person of suitable age and discretion residing at that location and by mailing a copy to the defendant's last known address.

(C) A summons is served on an organization in a judicial district of the United States by delivering a copy to an officer, to a managing or general agent, or to another agent appointed or legally authorized to receive service of process. ~~A copy~~If the agent is one authorized by statute and the statute so requires, a copy must also be mailed to the organization~~organization's last known address within the district or to~~

125-010584

62 ~~its principal place of business elsewhere in~~
63 ~~the United States~~.
64 (D) A summons is served on an organization
65 not within a judicial district of the United
66 States:
67 (i) by delivering a copy, in a manner
68 authorized by the foreign
69 jurisdiction's law, to an officer, to a
70 managing or general agent, or to an
71 agent appointed or legally authorized
72 to receive service of process; or
73 (ii) by any other means that gives notice,
74 including one that is:
75 (a) stipulated by the parties;
76 (b) undertaken by a foreign authority
77 in response to a letter rogatory, a
78 letter of request, or a request

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79 submitted under an applicable

80 international agreement; or

81 (c) permitted by an applicable

82 international agreement.

83 * * * * *

Committee Note

Subdivision (a). The amendment addresses a gap in the current rule, which makes no provision for organizational defendants who fail to appear in response to a criminal summons. The amendment explicitly limits the issuance of a warrant to individual defendants who fail to appear, and provides that the judge may take whatever action is authorized by law when an organizational defendant fails to appear. The rule does not attempt to specify the remedial actions a court may take when an organizational defendant fails to appear.

Subdivision (c)(2). The amendment authorizes service of a criminal summons on an organization outside a judicial district of the United States.

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Subdivision (c)(3)(C). The amendment makes two changes to subdivision (c)(3)(C) governing service of a summons on an organization. First, like Civil Rule 4(h), the amended provision does not require a separate mailing to the organization when delivery has been made in the United States to an officer or to a managing or general agent. Service of process on an officer, managing, or general agent is in effect service on the principal. Mailing is required when delivery has been made on an agent authorized by statute, if the statute itself requires mailing to the entity.

Second, also like Civil Rule 4(h), the amendment recognizes that service outside the United States requires separate consideration, and it restricts Rule 4(c)(3)(C) and its modified mailing requirement to service on organizations within the United States. Service upon organizations outside the United States is governed by new subdivision (c)(3)(D).

These two modifications of the mailing requirement remove an unnecessary impediment to the initiation of criminal proceedings against organizations that commit domestic offenses but have no place of business or mailing address within the United States. Given the realities of today's global economy, electronic communication, and federal criminal practice, the mailing requirement should not shield a defendant organization when the Rule's core objective—notice of pending criminal proceedings—is accomplished.

Subdivision (c)(3)(D). This new subdivision states that a criminal summons may be served on an

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organizational defendant outside the United States and enumerates a non-exhaustive list of permissible means of service that provide notice to that defendant.

Although it is presumed that the enumerated means will provide notice, whether actual notice has been provided may be challenged in an individual case.

Subdivision (c)(3)(D)(i). Subdivision (i) notes that a foreign jurisdiction's law may authorize delivery of a copy of the criminal summons to an officer, to a managing or general agent. This is a permissible means for serving an organization outside of the United States, just as it is for organizations within the United States. The subdivision also recognizes that a foreign jurisdiction's law may provide for service of a criminal summons by delivery to an appointed or legally authorized agent in a manner that provides notice to the entity, and states that this is an acceptable means of service.

Subdivision (c)(3)(D)(ii). Subdivision (ii) provides a non-exhaustive list illustrating other permissible means of giving service on organizations outside the United States, all of which must be carried out in a manner that "gives notice."

Paragraph (a) recognizes that service may be made by a means stipulated by the parties.

Paragraph (b) recognizes that service may be made by the diplomatic methods of letters rogatory and letters of request, and the last clause of the paragraph provides for service under international agreements that obligate the

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parties to provide broad measures of assistance, including the service of judicial documents. These include crime-specific multilateral agreements (e.g., the United Nations Convention Against Corruption (UNCAC), S. Treaty Doc. No. 109-6 (2003)), regional agreements (e.g., the Inter-American Convention on Mutual Assistance in Criminal Matters (OAS MLAT), S. Treaty Doc. No. 105-25 (1995)), and bilateral agreements.

Paragraph (c) recognizes that other means of service that provide notice and are permitted by an applicable international agreement are also acceptable when serving organizations outside the United States.

As used in this rule, the phrase "applicable international agreement" refers to an agreement that has been ratified by the United States and the foreign jurisdiction and is in force.

Changes after publication

No changes were made after publication.

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Public Comments – Rule 4

CR-2014-0004-0006. Robert Anello, Federal Bar Council (letter). Supports amendment, stating it fairly addresses gaps that currently prevent effective prosecution of foreign corporations that commit crimes in the U.S. but have no physical presence here, provides methods of service that are reasonably calculated to provide notice and comply with applicable laws, and gives courts appropriate discretion to fashion remedies.

CR-2014-0004-0015. Robert Anello, Federal Bar Council (prepared testimony). Supports amendment, stating it fairly addresses gaps that currently prevent effective prosecution of foreign corporations that commit crimes in the U.S. but have no physical presence here, provides methods of service that are reasonably calculated to provide notice and comply with applicable laws, and gives courts appropriate discretion to fashion remedies.

CR-2014-0004-0019. Karen Strombom, Federal Magistrate Judges Association. The FMJA "endorses" the proposed amendment, which addresses a gap in the rules and responds to a growing need in a global economy, but suggests that the committee note expressly state that the means of service must satisfy constitutional due process.

CR-2014-0004-0017. Kyle Druding. Supports amendment, noting that although an amendment is needed to close a gap in the current rule, Due Process concerns require reasonably limited means of service under Rule 4 and the responsible exercise of prosecutorial discretion.

CR-2014-0004-0028. Robert Feldman, Quinn Emanuel Urquhart & Sullivan, LLP. Opposes the amendment, stating that it "could foreclose judicial review at any stage in the process, leaving the supposed validity of service entirely in the hands of the executive"; argues that it will be impossible to challenge service for lack of actual notice, because "the very act of challenging service might be said to conclusively establish the notice that would make service complete"; argues that the system of special appearances "may be effectively eviscerated," placing responsible corporate defendants who wish to contest service with "a Hobson's choice." Also notes that other governments may respond with a similar regime.

CR-2014-0004-0031. Peter Goldberger, National Ass'n of Criminal Defense Lawyers. Supports amendment with several revisions (1) adding clarification to Rule 4(a) that the court's actions must be "consistent with Rule 43(a)"; (2) providing that service within the United States under Rule 4(c)(3)(C) is preferred if likely to give actual notice; and (3) providing that service under Rule 4(c)(3)(D)(i) is preferred over service under (c)(3)(D)(i).

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PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CRIMINAL PROCEDURE*

1 **Rule 41. Search and Seizure**

2 * * * * *

3 **(b)** ~~**Authority to Issue a Warrant**~~**Venue for a Warrant**

4 **Application.** At the request of a federal law

5 enforcement officer or an attorney for the

6 government:

7 * * * * *

8 **(6)** a magistrate judge with authority in any district

9 where activities related to a crime may have

10 occurred has authority to issue a warrant to use

11 remote access to search electronic storage media

12 and to seize or copy electronically stored

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

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13 information located within or outside that district
14 if:
15 (A) the district where the media or information
16 is located has been concealed through
17 technological means; or
18 (B) in an investigation of a violation of
19 18 U.S.C. § 1030(a)(5), the media are
20 protected computers that have been
21 damaged without authorization and are
22 located in five or more districts.
23 * * * * *
24 **(f) Executing and Returning the Warrant.**
25 **(1)** ***Warrant to Search for and Seize a Person or***
26 ***Property.***
27 * * * * *
28 (C) *Receipt.* The officer executing the warrant
29 must give a copy of the warrant and a

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30 receipt for the property taken to the person
31 from whom, or from whose premises, the
32 property was taken or leave a copy of the
33 warrant and receipt at the place where the
34 officer took the property. For a warrant to
35 use remote access to search electronic
36 storage media and seize or copy
37 electronically stored information, the
38 officer must make reasonable efforts to
39 serve a copy of the warrant and receipt on
40 the person whose property was searched or
41 who possessed the information that was
42 seized or copied. Service may be
43 accomplished by any means, including
44 electronic means, reasonably calculated to
45 reach that person.
46 * * * * *

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Committee Note

Subdivision (b). The revision to the caption is not substantive. Adding the word "venue" makes clear that Rule 41(b) identifies the courts that may consider an application for a warrant, not the constitutional requirements for the issuance of a warrant, which must still be met.

Subdivision (b)(6). The amendment provides that in two specific circumstances a magistrate judge in a district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and seize or copy electronically stored information even when that media or information is or may be located outside of the district.

First, subparagraph (b)(6)(A) provides authority to issue a warrant to use remote access within or outside that district when the district in which the media or information is located is not known because of the use of technology such as anonymizing software.

Second, (b)(6)(B) allows a warrant to use remote access within or outside the district in an investigation of a violation of 18 U.S.C. § 1030(a)(5) if the media to be searched are protected computers that have been damaged without authorization, and they are located in many districts. Criminal activity under 18 U.S.C. § 1030(a)(5) (such as the creation and control of "botnets") may target multiple computers in several districts. In investigations of this nature, the amendment would eliminate the burden of attempting to secure multiple warrants in numerous

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districts, and allow a single judge to oversee the investigation.

As used in this rule, the terms "protected computer" and "damage" have the meaning provided in 18 U.S.C. §1030(e)(2) & (8).

The amendment does not address constitutional questions, such as the specificity of description that the Fourth Amendment may require in a warrant for remotely searching electronic storage media or seizing or copying electronically stored information, leaving the application of this and other constitutional standards to ongoing case law development.

Subdivision (f)(1)(C). The amendment is intended to ensure that reasonable efforts are made to provide notice of the search, seizure, or copying, as well as a receipt for any information that was seized or copied, to the person whose property was searched or who possessed the information that was seized or copied. Rule 41(f)(3) allows delayed notice only "if the delay is authorized by statute." See 18 U.S.C. § 3103a (authorizing delayed notice in limited circumstances).

Changes after publication

The revised caption including the term "venue" makes clear the limited function of the amendment, which determines only which courts may consider warrant applications, not the standards for the approval of remote electronic search warrants. The notice provision for remote electronic searches was revised to parallel more closely the

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notice presently required for physical searches. As revised, the government must provide not only a copy of the warrant but also a receipt for any property seized or copied in a remote search. It must provide notice to either the person whose property was searched or who possessed the information that was seized or copied. The Committee notes were revised to explain these changes, and to draw attention to restrictions on delayed notice in Rule 41(f)(3).

125-010600

Public Comments Proposed Amendment to Rule 41

CR-2014-0004-0003. Keith Uhl. Raises a question: If a warrant approved in one district is served on a computer in a second district, must the defense travel to the first district to challenge the warrant.

CR-2014-0004-0004. Mr. Anonymity. Opposes the amendment, stating that anonymous speech serves an important constitutional purpose, protecting unpopular people from retaliation; perfect anonymity technology would be widely adopted, facilitating routine communications and financial transactions; attempts to surreptitiously install malware will generate retaliatory responses.

CR-2014-0004-0005. Former Federal Agent. Opposes the amendment, stating many law-abiding people employ anonymizing technology, and the amendment will be read expansively, allowing the government to pierce their anonymity and distribute malware to them.

CR-2014-0004-0006. Robert Anello, Federal Bar Council (letter). Supports the proposal, stating it is "necessary and will be effective in permitting law enforcement to properly investigate crimes involving computers and electronic information"; constitutional questions "can and will be addressed by the courts in due course."

CR-2014-0004-0007. Carolyn Atwell-Davis. Ms. Atwell-Davis, who previously worked for the National Center for Missing & Exploited Children, supports the amendment, stating it provides a necessary and constitutionally valid tool allowing law enforcement to stop the sexual exploitation of children by persons who use technology to evade detection.

CR-2014-0004-0008. Amie Stephanovich, Access and the Electronic Frontier Foundation. Opposes the amendment, stating that allowing a single warrant application for damaged computers in five or more districts would effectively expand investigations of the overbroad Computer Fraud and Abuse Act to victim computers, would give the state access to the personal data of journalists, dissidents, whistleblowers, and world leaders, and would subject victims to a wide range of potentially harmful measures that may interfere with the operation of their computers or their communication with other devices.

CR-2014-0004-0009. Joseph Lorenzo Hall, The Center for Democracy & Technology. Opposes the amendment, stating that the proposal "would make policy decisions about important questions of law that are not currently settled and would best be resolved through legislation"; legal issues include the Fourth Amendment particularity requirement and the effect of treaties and international law on extraterritorial searches; policy issues include implications for users of common technology (such as virtual private networks, or VPNs) and the potential for damage to devices, data, or independent systems.

CR-2014-0004-0010. Alan Butler, Electronic Privacy Information Center (epic.org). Opposes the amendment, stating that the proposed amendment "would authorize searches beyond the scope permissible under the Fourth Amendment," by allowing "surreptitious searches without the required showing of necessity," and not requiring that "notice be served within a

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reasonable time after the search."

CR-2014-0004-0011. Kevin S. Bankston, New America's Open Technology Institute. Opposes the amendment, stating that "the proposed amendment authorizes searches that are unconstitutional for lack of adequate procedural protections tailored to counter those searches' extreme intrusiveness."

CR-2014-0004-0012. Steven Bellovin, Matt Blaze and Susan Landau. Opposes the amendment as circulated, stating that the proposal raises serious concerns that require further study and perhaps legislative action: the use of malware in botnet investigations may cause unanticipated damage to the victim computers and is indistinguishable from a general search; the amendment authorizes searches of legitimate users of VPNs as well as foreign searches; courts must be better informed regarding search techniques; chain of custody and preservation issues will necessarily arise; notice for remote searches is problematic; and computer vulnerabilities should be disclosed to vendors for corrective action, not withheld to provide a means for remote searches. If the proposal is adopted, significant changes are recommended, including greater specification of the area of the computer that is to be searched, requiring cooperation of the host country for most international searches, more explicit guidance regarding the conditions when notice can be omitted, and reworking of authorization to use malware to investigate victims' computers.

CR-2014-0004-0013. Nathan Wessler, American Civil Liberties Union. Opposes the amendment, stating the proposal "raises myriad technological, policy, and constitutional concerns," and constitutes a "dramatic expansion of investigative power." Argues that the proposal should be authorized only by legislation because the use of zero day malware may constitute an unreasonable search; some searches authorized by the amendment require Title III wiretap orders; authorized searches will violate the particularity requirement and result in searches of individuals for whom there is no probable cause; the notice requirement is insufficient; and the courts will not address and resolve these constitutional issues in the foreseeable future.

CR-2014-0004-0014. Duplicate comment. Withdrawn.

CR-2014-0004-0015. Robert Anello, Federal Bar Council (prepared testimony). Supports the amendment, stating the proposal is "necessary and will be effective in permitting law enforcement to properly investigate crimes involving computers and electronic information"; constitutional questions "can and will be addressed by the courts in due course."

CR-2014-0004-0016. Nathan Wessler, American Civil Liberties Union. Letter of April 4, 2014, "recommends that the Advisory Committee exercise extreme caution before granting the government new authority to remotely search individuals' electronic data," stating that "the proposed amendment would significantly expand the government's authority to conduct searches that raise troubling Fourth Amendment, statutory, and policy questions" for consideration at the Advisory Committee's April 2014 meeting.

CR-2014-0004-0018. Anonymous. Opposes the amendment stating that the government should

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not be able to conduct warrantless searches of private computers merely because someone is using a VPN.

CR-2014-0004-0019. Karen Strombom, Federal Magistrate Judges Association (FMJA). The FMJA "endorses" the amendment because it fills a significant gap in authority, noting that the meaning of "remote access" and "reasonable efforts" will be developed as specific cases arise.

CR-2014-0004-0020. Anonymous. Opposes the amendment, stating that the government should not spy on everyone and should mind its own business.

CR-2014-0004-0021. Dan Teshima. Opposes the amendment stating that it will "weaken" the Fourth Amendment.

CR-2014-0004-0022. George Orwell. Opposes the amendment, stating it will allow the government to "hack into our computers for practicing internet privacy," and reflects the view that the "Government must know all, must see all."

CR-2014-0004-0024. Ladar Levison. Opposes the amendment because he believes it permits the issuance of a warrant whenever an individual has used encryption tools that are common, legal, and in some cases industry standards, such as the Payment Card Industry Data Security Standards. Additionally, he states, it "[c]ould be used to legalize the practice of infiltrating service provider networks to ex-filtrate private user data that was previously intercepted as it traveled along trunk lines, but has since been protected by a VPN."

CR-2014-0004-0027. Robert Gay Guthrie/ Bruce Moyer, National Association of Assistant United States Attorneys. Supports the amendment because of "the need to improve Rule 41's territorial venue limitations"; states that increasingly sophisticated technologies pose challenges to law enforcement investigations of offenses such as financial fraud, child pornography, and terrorism, which often require remote electronic searches when sophisticated technology or proxy servers have been used to hide the true IP addresses; supports the change in venue requirements for botnet investigations to avoid wasting judicial and investigative resources and delays.

CR-2014-0004-0029. Richard Salgado, Google Inc. Opposes the amendment; states that it is a substantive expansion of the government's search capabilities that should be left to Congress; asserts that the government cannot seize evidence outside the U.S. pursuant to a search warrant that permits remote access of servers abroad; argues that the amendment "alters constitutional rights and violates the Rules Enabling Act" and "is vague and fails to specify how searches may be conducted and what may be searched"; states that case law addressing the constitutional issues will be slow to develop; contends that proposed (b)(6)(B) would extend beyond botnet searches and reach "millions of computers."

CR-2014-0004-0030; Pennsylvania Bar Association. Opposes the amendment; states that it "substantively expand the government's investigative powers,"conferring authority for "a category of searches that the government is currently barred from conducting"; asserts that these

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issues should be addressed by Congress.

CR-2014-0004-0032. Edward Mulcahy. Opposes the amendment; states that "[t]he government's power is already too vast and secret," and asserts that the amendment "would make using a VPN or TOR sufficient evidence of wrongdoing to justify a search warrant."

CR-2014-0004-0033. Kati Anonymous. Opposes the amendment; states that "The government or who ever has no right to enter someone's home without a warrant therefore entering a private space on a citizens electronic devices is also out of the question and without the owners permission or warrant unlawful."

CR-2014-0004-0034. Jeff Cantwell. Opposes the amendment; states that the government may not "spy on" communications "just from the fact that I try to enforce my right to privacy," which he likens to "saying the government has a right to read my mail just because I've sealed the envelope."

CR-2014-0004-0035. Benoit Clement. Opposes the amendment; states that it is "yet again another move to infringe upon the privacy and freedoms of citizens," and "an unfair practice."

CR-2014-0004-0036. Yani Yancey. Opposes the amendment; states that the federal government "funded development of TOR and encourages people to use both it and VPN for legitimate security reasons," but now "seeks to paint their use as criminals and strip away the 4th amendment rights of people without any real suspicion of wrongdoing"; states that "[a]ttempting to safeguard your personal information and online activity is not a criminal or suspicious act."

CR-2014-0004-0037. Jeffrey Adzima. Opposes the amendment; states that it "appears to be in direct conflict with our current Constitutional protections, specifically, amendment 4 against unwarranted search and seizure of private property," which states that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

CR-2014-0004-0038. Peter Goldberger, National Ass'n of Criminal Defense Lawyers. Opposes the amendment "because it overreaches the authority of judicial branch, which is limited in its rulemaking authority to purely procedural matters – a limitation that calls for particularly sensitive attention in the area of search and seizure – and because it would upset the appropriate balance that must be struck between law enforcement methods and the protection of privacy in a civil society now become digital"; argues that "the rule dismisses the foundational principle that due process has a "place" dimension"; argues that a restriction to the "district where activities related to a crime may have occurred" is too broad and promotes forum shopping; suggests why "reliance on later litigation is not a solution" to the amendment's constitutional infirmities; urges that if the amendment is not rejected, it at least be "revised to ensure that other computers connected to the anonymized computer cannot be within the scope of a warrant specially authorized under Rule 41(b)(6)(A)," and that the warrant be limited to "ascertaining the concealed location" of the media to be searched.

CR-2014-0004-0039. Tadeas Liska. Notes his business routinely uses and accesses VPN's for

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data transfer and meeting sessions to provide confidentiality and privacy, and urges that using this technology should not be treated as suspicious activity.

CR-2014-0004-0040. Jonathan Wroblewski, U.S. Department of Justice. Supports amendment; discusses how remote search warrants can satisfy the Fourth Amendment's particularity requirement, describing investigative scenarios and explaining how warrants can be drafted in those scenarios to satisfy the Fourth Amendment; states that amendment "does not modify the delayed-notice statute,"18 U.S.C. § 3103a; explains that there may be unusual difficulty in providing appropriate notice in cases where the district in which the computer is located is unknown, but when government can provide notice using reasonable efforts, it must do so; states that notice requirements are "consistent with Rule 41's existing requirements for both standard search warrants and for tracking device warrants"; states that search warrants do not permit law enforcement to intercept wire, oral, or electronic communications (unless one of several statutory exceptions), and amendment would make no change in relevant law; notes that some commentators misunderstand reference to concealment by technological means, which is the basis for venue but does not by itself provide a basis for a search warrant; argues that Department is committed to balancing risks involved in technical measures against the importance of the objectives of an investigation in stopping crime and protecting public safety," accordingly its remote searches "have not resulted in the types of collateral damage that the commenters hypothesize," and "careful consideration of any future technical measures will continue."

CR-2014-0004-0041. Martin MacKerel. Opposes amendment; states it dramatically expands law enforcement powers and "should be subject to robust public debate in the appropriate legislative forum," rather that the subject of an administrative rule change.

CR-2014-0004-0042. Timothy Doughty. Opposes amendment; argues that it is "the digital equivalent of "your front door is locked, therefore, you're under suspicion of being a criminal," despite the fact that VPNs are widely used for many legitimate purposes; argues the amendment will drive the tech companies out of the U.S.

CR-2014-0004-0043. Stephen Argen. Opposes amendment; argues that it is "an unconstitutional overreaching," noting that many businesses rely on VPN's for encrypted communication to protect trade secrets and journalists using Tor to protect their identities whilst abroad.

CR-2014-0004-0044. Weymar Osborne. Opposes amendment; states that '[u]sing a VPN or some other way is not a sufficient reason to authorize the warrant."

CR-2014-0004-0045. Anonymous Anonymous. Opposes amendment; states that the amendment violates Fourth Amendment prohibitions against unreasonable searches and general warrants; argues that protecting one's privacy does not create probable cause for a search.

CR-2014-0004-0046. Ryan Hodin. Opposes amendment; notes that the U.S. government has funded research into, and supported the use of, TOR and VPNs, which have many legitimate and wholly legal uses; urges that their use is not illegal and does not constitute "probable cause."

CR-2014-0004-0047. Hannah Bloch-Wehba, Reporters Committee for Freedom of the Press. Opposes amendment; argues that it implicates the constitutional and statutory rights of journalists in multiple ways that should be addressed by Congress if they are to be altered.

CR-2014-0004-0048. Cormac Mannion. Opposes amendment; states that technology such as Tor or VPN encryption to engage in private communications is used by many innocent people and should not be treated as misconduct or suspicious behavior.

CR-2014-0004-0049. Raul Duke. Opposes amendment; states it is "an infringement on first, fourth, and fifth amendment grounds, if not illegal in other ways."

CR-2014-0004-0050. Michael Boucher. Opposes amendment; argues that because anyone's computer can become the victim of a botnet, anyone's computer would become "subject to sweeping new surveillance"; contends that common activities such as the use of cloud computing services conceal the location of media or information not be sufficient to obtain a warrant; contends that procedural safeguards for searches under the amendment are far less protective than those applicable to wiretaps, despite the potential for access to intimate personal information and ability to obtain ongoing surveillance by a camera or recording device.

CR-2014-0004-0051. Staff, Clandestine Reporters Working Group, LLC. Opposes amendment; states that it improperly treats "secret" or "hidden" activity as ipso facto "illicit" activity.

CR-2014-0004-0052. Andrew Gordon. Opposes amendment; states that "[t]he use of software and/or hardware readily available to anyone in order to create a more safe and secure online environment should not be grounds for issuing a warrant."

CR-2014-0004-0053. Ahmed Ghappour. Opposes amendment; states that issuance of remote warrants when location is disguised by technological means "will necessarily result in extraterritorial cyber operations"; contends that such extraterritorial operations would be "a radical shift" that "constitutes an enlargement of law enforcement's substantive authority to conduct investigative activities overseas"; if rule is amended, proposes limiting measures: (1) allowing Network Investigative Techniques to return only country information first, prompting the executing FBI agent to utilize the appropriate protocols and institutional devices," (2) requiring a preliminary showing that less intrusive investigative methods have failed or are unlikely to succeed, (3) limiting the range of techniques that are permitted to law enforcement trickery and deception that result in target-initiated access, and (3) limiting search capabilities to monitoring and duplication of data on the target.

CR-2014-0004-0054. Brett Remsen. Opposes amendment in strong general terms.

CR-2014-0004-0055. David Bitkower, U. S. Department of Justice. Supports the amendment. States that it "has no effect on the FBI's authorities outside the United States," and "would not authorize the government to undertake any search or seizure, use any remote search technique, or

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restrict any required notice in a manner not already permitted under current law"; notes that "[i]n cases where the Fourth Amendment's warrant requirement applies, the procedures for obtaining a warrant in Rule 41 effectively limit the FBI's ability to conduct searches and seizures"; emphasizes that "the Fourth Amendment's warrant requirement does not apply to searches outside of the United States, even searches of United States persons," which are evaluated under the Fourth Amendment's reasonableness requirement. States that "[n]othing in the proposal changes the government's foreign policy considerations, which are also not governed by Rule 41," but rather are followed by the Department "because they are good policy."

CR-2014-0004-0056. David Bitkower, U. S. Department of Justice. Supports the amendment. States that search warrants authorizing remote searches can satisfy the Fourth Amendment's particularity requirement, and provides sample warrant language for three scenarios to demonstrate how particularity can be established; states proposal, like the present requirement for physical searches, "would require that officers either give notice of the warrant when it is executed or seek judicial approval to delay notice under the procedures of 18 U.S.C. § 3103a"; states that "when investigators seek to conduct surveillance that requires a Title III wiretap order, they will need to obtain such an order, whether or not the proposal is adopted"; explains that "proposed rule would not allow the government to obtain a warrant merely because someone is using anonymization techniques," rather "as with all warrants, the issuing court must find that there is probable cause to search for or seize evidence, fruits, or instrumentalities of crime"; states that "Department is mindful of the potential impact of remote search techniques on computer systems and is careful to avoid collateral damage when executing remote searches."

CR-2014-0004-0057. David Bitkower, U. S. Department of Justice. Supports the amendment. Argues that the Rules Committee is an appropriate forum to address venue for warrant applications; the language of the proposed rule is not vague; the botnet amendment is appropriate; and the proposed amendment does not conflict with the Privacy Protection Act.

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1 **Rule 41. Search and Seizure**

2 * * * * *

3 **(b) Authority to Issue a Warrant.** At the request of a
4 federal law enforcement officer or an attorney for the
5 government:

6 * * * * *

7 **(6)** a magistrate judge with authority in any district
8 where activities related to a crime may have
9 occurred has authority to issue a warrant to use
10 remote access to search electronic storage media
11 and to seize or copy electronically stored
12 information located within or outside that district
13 if:
14 (A) the district where the media or information
15 is located has been concealed through
16 technological means; or

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17 (B) in an investigation of a violation of
18 18 U.S.C. § 1030(a)(5), the media are
19 protected computers that have been
20 damaged without authorization and are
21 located in five or more districts.
22 * * * * *
23 **(f) Executing and Returning the Warrant.**
24 **(1)** ***Warrant to Search for and Seize a Person or***
25 ***Property.***
26 * * * * *
27 (C) *Receipt.* The officer executing the warrant
28 must give a copy of the warrant and a
29 receipt for the property taken to the person
30 from whom, or from whose premises, the
31 property was taken or leave a copy of the
32 warrant and receipt at the place where the
33 officer took the property. For a warrant to

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34 use remote access to search electronic
35 storage media and seize or copy
36 electronically stored information, the
37 officer must make reasonable efforts to
38 serve a copy of the warrant on the person
39 whose property was searched or whose
40 information was seized or copied. Service
41 may be accomplished by any means,
42 including electronic means, reasonably
43 calculated to reach that person.
44 * * * * *

Committee Note

Subdivision (b)(6). The amendment provides that in two specific circumstances a magistrate judge in a district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and seize or copy electronically stored information even when that media or information is or may be located outside of the district.

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First, subparagraph (b)(6)(A) provides authority to issue a warrant to use remote access within or outside that district when the district in which the media or information is located is not known because of the use of technology such as anonymizing software.

Second, (b)(6)(B) allows a warrant to use remote access within or outside the district in an investigation of a violation of 18 U.S.C. § 1030(a)(5) if the media to be searched are protected computers that have been damaged without authorization, and they are located in many districts. Criminal activity under 18 U.S.C. § 1030(a)(5) (such as the creation and control of "botnets") may target multiple computers in several districts. In investigations of this nature, the amendment would eliminate the burden of attempting to secure multiple warrants in numerous districts, and allow a single judge to oversee the investigation.

As used in this rule, the terms "protected computer" and "damage" have the meaning provided in 18 U.S.C. §1030(e)(2) & (8).

The amendment does not address constitutional questions, such as the specificity of description that the Fourth Amendment may require in a warrant for remotely searching electronic storage media or seizing or copying electronically stored information, leaving the application of this and other constitutional standards to ongoing case law development.

Subdivision (f)(1)(C). The amendment is intended to ensure that reasonable efforts are made to provide notice

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of the search, seizure, or copying to the person whose information was seized or copied or whose property was searched.

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

1 **Rule 45. Computing and Extending Time**

2 * * * * *

3 **(c) Additional Time After Certain Kinds of Service.**

4 Whenever a party must or may act within a specified

5 time after being served ~~service~~ and service is made

6 under Federal Rule of Civil Procedure 5(b)(2)(C)

7 (mailing), (D) (leaving with the clerk), ~~(E),~~ or (F)

8 (other means consented to), 3 days are added after the

9 period would otherwise expire under subdivision (a).

Committee Note

Subdivision (c). Rule 45(c) and Rule 6(d) of the Federal Rules of Civil Procedure contain parallel provisions providing additional time for actions after certain modes of service, identifying those modes by reference to Civil Rule 5(b)(2). Rule 45(c)—like Civil

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

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Rule 6(d)—is amended to remove service by electronic means under Rule 5(b)(2)(E) from the forms of service that allow 3 added days to act after being served. The amendment also adds clarifying parentheticals identifying the forms of service for which 3 days will still be added.

Civil Rule 5 was amended in 2001 to allow service by electronic means with the consent of the person served, and a parallel amendment to Rule 45(c) was adopted in 2002. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day periods that allow "day-of-the-week" counting. Adding 3 days at the end complicated the counting, and increased the

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occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Eliminating Rule 5(b) subparagraph (2)(E) from the modes of service that allow 3 added days means that the 3 added days cannot be retained by consenting to service by electronic means. Consent to electronic service in registering for electronic case filing, for example, does not count as consent to service "by any other means of delivery" under subparagraph (F).

Electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice.

Changes After Publication

The phrase "Time for Motion Papers" was deleted from the caption as unnecessary, and the phrase "after being served" was substituted for "after service" to parallel the language of Fed. R. Civ. P. 6(d), FRAP 26(c), and Fed. R. Bank. P. 9006(f). Finally, the Committee Note was revised to note that in some circumstances the elimination of the three added days may result in prejudice warranting an extension of time.

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Public Comments – Rule 45

CR-2014-0004-0019. Karen Strombom, Federal Magistrate Judges Association. The FMJA "generally endorses the change," but expresses concern that the interplay with existing Civil Rules 5(b)(2)(E) and 5(b)(2)(F) may engender confusion; it suggests eliminating the parentheticals in the proposed rule or revising them to refer to "(F) (other means consented to except electronic service").

CR-2014-0004-0023. Cheryl Siler, Aderant. Suggests the existing language of Rule 45(c) be revised to parallel Fed. R. Civ. P. 6(d), FRAP 26(c) and Fed. R. Bank. P. 9006(f), which require action "within a specified time after being served" or "within a prescribed period after being served." Is concerned practitioners may interpret the current rule to mean the party serving a document as well as the party being served are entitled to 3 extra days.

CR-2014-0004-0030; Pennsylvania Bar Association. Opposes the amendment; states that "the additional three days serves a useful purpose in alleviating the burdens that can arise if a filing is electronically served at extremely inconvenient times."

CR-2014-0004-0031. Peter Goldberger, National Ass'n of Criminal Defense Lawyers. Opposes the amendment; states that eliminating three additional days for response to electronic filing will "provide little if any benefit to the court or the public, while placing additional burdens on busy practitioners"; states that many defense counsel are solo practitioners or in very small firms, with little clerical help, and they may not see their ECF notices the day they are received; also questions change in the caption, suggesting it may lead to confusion.

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1 **Rule 45. Computing and Extending Time; Time for**
2 **Motion Papers**

3 * * * * *

4 **(c) Additional Time After Certain Kinds of Service.**
5 Whenever a party must or may act within a specified
6 time after service and service is made under Federal
7 Rule of Civil Procedure 5(b)(2)(C) (mailing), (D)
8 (leaving with the clerk), ~~(E),~~ or (F) (other means
9 consented to), 3 days are added after the period would
10 otherwise expire under subdivision (a).

Committee Note

Subdivision (c). Rule 45(c) and Rule 6(d) of the Federal Rules of Civil Procedure contain parallel provisions providing additional time for actions after certain modes of service, identifying those modes by reference to Civil Rule 5(b)(2). Rule 45(c)—like Civil Rule 6(d)—is amended to remove service by electronic means under Rule 5(b)(2)(E) from the forms of service that allow 3 added days to act after being served. The amendment also adds clarifying parentheticals identifying the forms of service for which 3 days will still be added.

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Civil Rule 5 was amended in 2001 to allow service by electronic means with the consent of the person served, and a parallel amendment to Rule 45(c) was adopted in 2002. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day periods that allow "day-of-the-week" counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Eliminating Rule 5(b) subparagraph (2)(E) from the modes of service that allow 3 added days means that the 3

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added days cannot be retained by consenting to service by electronic means. Consent to electronic service in registering for electronic case filing, for example, does not count as consent to service "by any other means of delivery" under subparagraph (F).

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TAB 3

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

JEFFREY S. SUTTON
CHAIR

REBECCA A. WOMELDORF
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DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

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

FROM: Honorable David G. Campbell, Chair
Advisory Committee on Civil Rules

DATE: May 2, 2015

RE: Report of the Advisory Committee on Civil Rules

Introduction

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts on April 9, 2015. Draft Minutes of this meeting are attached. This report has been prepared by Professor Cooper, Committee Reporter, with Professor Marcus, Associate Reporter, and various subcommittee chairs.

Part I of this Report presents recommendations to approve for adoption several proposals that were published for comment in August, 2014. Each deals with distinctive topics presented separately as I.A., Rule 4(m); I.B., Rule 6(d); and I.C., Rule 82.

Part II presents information about pending and possible future Civil Rules work. The first topic explores amendments to Rule 5 addressing electronic filing, electronic service, and electronic certificates of service. Because continuing expansion of electronic communication

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binds these issues together, these drafts are presented as one package. These drafts emerged from the April meeting as recommendations for publication. Prolonged exchanges of messages with the Reporters for the other advisory committees, however, have shown the wisdom of delaying action until all committees have moved as far as possible toward uniform language for parallel rules. The other topics presented as information items are not as far advanced.

I. RECOMMENDATIONS TO APPROVE FOR ADOPTION

I.A. RULE 4(m) - RULE 4(h)(2)

The Standing Committee approved the August, 2014 publication of a proposed amendment of Rule 4(m). The amendment adds service on an entity in a foreign country to the list in the last sentence that exempts service in a foreign country from the presumptive time limit set by Rule 4(m) for serving the summons and complaint. It is recommended that the proposed amendment be recommended for adoption. The reasons are described in the Committee Note.

Rule 4. Summons

* * * * *

(m) Time Limit for Service. If a defendant is not served within 90[1] days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1).

* * * * *

COMMITTEE NOTE

Rule 4(m) is amended to correct a possible ambiguity that appears to have generated some confusion in practice. Service in a foreign country often is accomplished by means that require more than the 120 days originally set by Rule 4(m)[, or than the 90 days set by amended Rule 4(m)]. This problem is recognized by the two clear exceptions for service on an individual in a foreign country under Rule 4(f) and for service on a foreign state under Rule 4(j)(1). The potential ambiguity arises from the lack of any explicit reference to service on a corporation, partnership, or other unincorporated association. Rule 4(h)(2) provides for service on such defendants at a place outside any judicial district of the United States "in any manner prescribed

[1] This anticipates adoption of the proposed amendment transmitted to Congress on April 29, 2015.

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by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i)." Invoking service "in the manner prescribed by Rule 4(f)" could easily be read to mean that service under Rule 4(h)(2) is also service "under" Rule 4(f). That interpretation is in keeping with the purpose to recognize the delays that often occur in effecting service in a foreign country. But it also is possible to read the words for what they seem to say—service is under Rule 4(h)(2), albeit in a manner borrowed from almost all, but not quite all, of Rule 4(f).

The amendment resolves this possible ambiguity.

Gap Report

No changes were made in the published rule text or Committee Note.

I.B. RULE 6(d)

The Standing Committee approved the August, 2014 publication of a proposed amendment of Rule 6(d). Present Rule 6(d) provides 3 added days to respond after service "made under Rule 5(b)(2)(C), (D), (E), or (F)." The amendment deletes (E), service by electronic means consented to by the person served. It also adds parenthetical descriptions of the modes of service that continue to allow the 3 added days: "(C)(mail), (D)(leaving with the clerk), or (F)(other means consented to)." Parallel proposals to delete electronic service from the 3-added days provision were published for the other sets of rules that included it. It is recommended that the proposed amendment be recommended for adoption as published. It is further recommended that a new paragraph be added to the Committee Note to reflect concerns raised by the Department of Justice and several other public comments. This brief new paragraph is discussed below.

A variety of concerns were raised by the public comments. One theme is that the time periods allowed by the Civil Rules are too short as they are. Any provision that allows even some relief should be retained. A related theme focuses on strategic opportunities to manipulate the amount of time practically available to respond after electronic service. This concern is illustrated by electronic filings made just before midnight on a Friday or the eve of a holiday. "No one goes home until after midnight." Suggested remedies include either a rule barring electronic filing after 5:00 or 6:00 p.m., or treating any later filing as made the next day (or on the next day that is not a weekend or legal holiday).

The Federal Magistrate Judges Association expressed a different concern — that some hasty readers would conclude that because Rule 5(b)(2)(E) currently requires consent for electronic service, electronic service is an "other means consented to" under Rule 5(b)(2)(F), restoring the 3 added days after all. Magistrate Judges are all too familiar with the ways in which rule text can be misread. But the Committee decided not to revise the recommended rule text. Apart from the hope that few will fall into this patent misreading, it is unlikely that a court would visit any serious consequences for a filing made 3 days late. The occasion for misreading,

12b-010633

moreover, will be reduced when the proposed amendment of Rule 5(b)(2)(E) described below is approved for publication, and if it survives the public comment process. Consent would no longer be required for service on a registered user through the court's transmission facilities. That is likely to govern an ever-growing swath of civil litigation.

The Department of Justice, after expressing concerns with failed electronic transmission, late-night filing in general, and strategic use of late-night filing in particular, recommended that language be added to the Committee Note to remind courts of the reasons to allow extensions of time when appropriate to respond to such problems. Adding anything to the Committee Note on this account could be resisted as unnecessary. Judges do not need to be told to make reasonable adjustments for these or any of the other myriad circumstances that may counsel that a time limit be extended. Brevity, moreover, is increasingly emphasized in framing Committee Notes. The Department's extensive experience with these and similar problems throughout the country, however, deserves some deference. The several advisory committees have agreed to add the new paragraph underlined in the Committee Note set out below. Considering the question independently, the Committees took different positions. The Civil, Appellate, and Bankruptcy Rules Committees preferred not to add any new language. But the Criminal Rules Committee strongly favored adding some language, moved in part by concern that many criminal defense lawyers are occupied in court or otherwise away from their small offices and may not actually view e-service for some time after it arrives. Each Committee authorized its chair to agree to a common solution. Given the strength of the Criminal Rules Committee's position, and the value of uniformity, the joint recommendation is to adopt a much-shortened version proposed by the Department of Justice in the Committee Notes to each set of rules.

Rule 6. Computing and Extending Time; Time for Motion Papers

* * * * *

(d) ADDITIONAL TIME AFTER CERTAIN KINDS OF SERVICE. When a party may or must act within a specified time after being served[2] and service is made under Rule 5(b)(2)(C) (mail), (D) (leaving with the clerk), ~~(E),~~ or (F) (other means consented to), 3 days are added after the period would otherwise expire under Rule 6(a).

COMMITTEE NOTE

Rule 6(d) is amended to remove service by electronic means under Rule 5(b)(2)(E) from the modes of service that allow 3 added days to act after being served.

[2] This anticipates adoption of the proposed amendment transmitted to Congress on April 29, 2015.

125-010634

Rule 5(b)(2) was amended in 2001 to provide for service by electronic means. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and in widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day periods that allow "day-of-the-week" counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

<u>The ease of making electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice.</u>

Eliminating Rule 5(b) subparagraph (2)(E) from the modes of service that allow 3 added days means that the 3 added days cannot be retained by consenting to service by electronic means. Consent to electronic service in registering for electronic case filing, for example, does not count as consent to service "by any other means" of delivery under subparagraph (F).

Gap Report

No changes are made in the rule text as published. A new paragraph in the Committee Note is underlined.

I.C. RULE 82

The Standing Committee approved the August, 2014 publication of a proposed amendment of Rule 82. It is recommended that the proposed amendment be recommended for adoption.

125-010635

Rule 82. Jurisdiction and Venue Unaffected

These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is governed by 28 U.S.C. § 1390 ~~not a civil action for purposes of 28 U.S.C. §§ 1391-1392~~.

COMMITTEE NOTE

Rule 82 is amended to reflect the enactment of 28 U.S.C. § 1390 and the repeal of § 1392.

Gap Report

No changes are made in the rule text or Committee Note as published.

125-010636

Clean Rules Text

Rule 4(m)

Rule 4. Summons

* * * * *

(m) Time Limit for Service. If a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1).

* * * * *

Rule 6(d)

Rule 6. Computing and Extending Time; Time for Motion Papers

* * * * *

(d) Additional Time After Certain Kinds of Service. When a party may or must act within a specified time after being served and service is made under Rule 5(b)(2)(C) (mail), (D) (leaving with the clerk), or (F) (other means consented to), 3 days are added after the period would otherwise expire under Rule 6(a).

Rule 82

Rule 82. Jurisdiction and Venue Unaffected

These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is governed by 28 U.S.C. § 1390.

125-010637

REPORTER'S SUMMARY OF COMMENTS, AUGUST, 2014 PUBLICATION

The scheduled public hearings on the proposals published in August, 2014 were cancelled for lack of interested witnesses.

Summary of Comments Rule 4(m)

CV-2014-0009, Federal Magistrate Judges Association: Supports the proposal. Experience shows that "significant delays can often occur in effecting service in a foreign country, and that the rules governing service should be uniform and apply equally to individuals, foreign states, corporations, partnerships, and associations."

CV-2014-0010, Association of the Bar of the City of New York: The Association had suggested this amendment in commenting on the 2013 proposal to shorten the presumptive time for service, and agrees with the proposal.

2014-CV-0011, Federal Courts Committee, New York County Lawyers Association: "[S]upports this clarification, which appears to comport with the intent of the rule as originally written." The importance of this amendment will increase if the Supreme Court adopts the proposal to shorten to 90 days the presumptive time for service set by Rule 4(m).

CV-2014-0014, Hon. Joyce R. Branda, U.S. Department of Justice: "The Department supports this proposal."

Summary of Comments Rule 6(d)

CV-2014-0003, Auden L. Grumet, Esq.: Opposes the proposal. (1) Response times throughout the Civil Rules are too restrictive. They should not be shortened further. (2) The idea that this will "simplify" time counting "is absurd and illogical." (a) The 3-added-days provision will continue to apply to some other modes of service, generating opportunities for confusion. (b) Calculating time is far less complex than "the much more convoluted aspects of being a practitioner in federal court." (c) The value of the added 3 days far outweighs any putative confusion. (d) The value of counting days in increments of 7 would be better served by adding 7 days after service.

CV-2014-0004, Deanne Upson: "Being pro se, I completely agree [with Auden L. Grumet, 0003] that more time is warranted and wise, not less."

CV-2014-0007, Jolene Gordo, Esq.: This comment focuses on Rule 5(b)(2)(A) as the place to "make it absolutely clear that using the ECF system is considered 'personal' service." But it ties to the concern that e-filing may be deliberately delayed to 11:59 p.m. The idea is that if e-service

is treated as "personal service," it will have to be made by the standard close of business, 5:00 or 6:00 p.m.

CV-2014-0008, Bryan Neal: Disagrees with the proposal. (1) When e-service is made directly between the parties, not through the ECF system, problems still occur with incompatible systems and spam filters. (2) More importantly, filing may be deliberately delayed to as late as 11:59 p.m. There should be more time to respond than is allowed when personal service is made by hand delivery during business hours. (3) E-service may be made on weekends and holidays: If it is made on Saturday, does Sunday count as Day 1? So if filing and service are made at 11:59 p.m. on Friday, that can effectively shave 2 days off the response time. (4) Why is there any need to shorten time periods? It just makes modern litigation more difficult. (5) Discovery response times typically are set at 30 days, so the advantages of 7-day increments do not apply. It would make more sense to reset the times to 28 days, plus 7 days for anything but personal service. Or, still better, to provide a flat 35 days regardless of the method of service.

Separately, suggests that service by commercial carrier should be allowed under Rule 5 without requiring consent of the person to be served.

CV-2014-0009, Federal Magistrate Judges Association: "[G]enerally endorses" the proposal. But is concerned that the drafting creates a potential confusion that will not be dispelled by the explicit statement in the Committee Note. As published, parentheticals are used to describe the enumerated modes of service that continue to allow 3 added days: "(mail)," "(leaving with the clerk)," and "(other means consented to)." Simply looking at the new rule text will not reveal that e-service, covered by Rule 5(b)(2)(E), has been omitted. An incautious reader may look back to Rule 5(b)(2), discover that consent is required for service by electronic means, and conclude that this is "other means consented to" and continues to allow 3 added days. The confusion could be eliminated by deleting the parenthetical descriptions, or by amending the last one to read: "(F)(other means consented to except electronic service)."

2014-CV-0010, Association of the Bar of the City of New York: Agrees that advances in technology, along with greater sophistication in using electronic communication, "have substantially alleviated concerns over delays and other difficulties in receiving, opening, and reviewing electronic documents." Supports the proposal.

2014-CV-0011, Federal Courts Committee, New York County Lawyers Association: New York courts treat electronic service in the same way as in-hand service; this has not caused any problems. Generally counsel work out briefing schedules, and can address the timing of electronic service in their agreements. The dissenters in the Committee point to problems that are not serious. To be sure, it is possible to effect electronic service at 11:59 pm on Friday, and time is required to print out lengthy filings. A party who needs more time because of such practices will almost invariably get the needed time. (The dissenters believe that the prospect of gamesmanship requires that the present 3-added days provision be retained.)

125-010639

CV-2014-0012, Cheryl Siler, for Aderant CompuLaw: Endorses elimination of the 3 added days. But suggests that Rule 6 should be further amended to provide that a document served electronically after 6:00 p.m. is considered served on the next day. As a practical matter, that will make e-service equivalent to in-hand service. In addition, it will establish a uniform national practice that displaces local rules that establish similar but variable provisions — a document filed or served after 5:00 p.m., or after 6:00 p.m., is treated as filed the next day. It also would affect the many local rules that require filing and service by 11:59 p.m. in the court's time zone.

CV-2014-0013, Pennsylvania Bar Association: Opposes the amendment. "[T]he additional three days serves a useful purpose in alleviating the burdens that can arise if a filing is electronically served at extremely inconvenient times." With one dissent, arguing that service at inconvenient times is not a problem.

CV-2014-0014, Hon. Joyce R. Branda, U.S. Department of Justice: Expresses concerns about the consequences of eliminating the 3 added days. "Unlike personal service, electronic distribution does not assure actual receipt by a party." Prejudice is particularly likely when local rules require a response within 14 or fewer days. A filing in a different time zone can mean that e-service reaches a computer in the Eastern Time zone as late as 3:00 a.m., or even later. And the service may be made on a Friday, or the day before a holiday weekend. A 10-day period could become, in effect, 5 business days. "It is foreseeable that some attorneys will try to take advantage of the elimination of the three additional days * * *." But if the Committee decides to go ahead with the proposal, the Department recommends language for the Committee Note to recognize the need for additional time to respond in appropriate cases. This language is quoted above.

(Largely similar comments have been made in response to the parallel proposals published by the Appellate, Bankruptcy, and Civil Rules Committees.)

Summary of Comments Rule 82

CV-2014-0009, Federal Magistrate Judges Association: Notes but does not comment on the proposal.

2014-CV-0011, Federal Courts Committee, New York County Lawyers Association: "[E]ndorses these proposed amendments."

CV-2014-0014, Hon. Joyce R. Branda, U.S. Department of Justice: "The Department supports the proposal."

125-010640

II. INFORMATION ITEMS

II.A. e-RULES: CIVIL RULE 5

The Standing Committee Subcommittee on matters electronic has suspended operations. The several advisory committees, however, are cooperating in carrying forward consideration of the ways in which the several sets of rules should be revised to reflect the increasing dominance of electronic means of preserving and communicating information. For the Civil Rules, the Committee initially worked through to recommendations to publish three rules amendments for comment in August, 2015: Rule 5(d)(3) on electronic filing; Rule 5(b)(2)(E) on electronic service, with the corresponding abrogation of Rule 5(b)(3) on using the court's transmission facilities; and Rule 5(d)(1) on using the Notice of Electronic Filing as a certificate of service. But, as noted in the Introduction, continuing exchanges with the other advisory committees show that further work is needed to achieve as much uniformity as possible in language, and at times in meaning. The drafts presented here have gone through several variations, but cannot yet be regarded as the assuredly final recommendations to approve for publication. There is no urgent need to publish now, and good reason for delay. Criminal Rule 49(b) now directs that "service must be made in the manner provided for a civil action." The Criminal Rules Committee hopes to move free from this cross-reference, adopting a self-contained provision that will avoid the need to consult another set of rules. And the familiar problems with signing an electronic filing continue to resist confident drafting resolution.

Earlier work considered an open-ended rule that would equate electrons with paper in two ways. The first provision would state that a reference to information in written form includes electronically stored information. The second provision would state that any action that can or must be completed by filing or sending paper may also be accomplished by electronic means. Each provision would be qualified by an "unless otherwise provided" clause. Discussion of these provisions recognized that they might be suitable for some sets of rules but not for others. For the Civil Rules, many different words that seem to imply written form appear in many different rules. The working conclusion has been that at a minimum, several exceptions would have to be made. The time has not come to allow electronic service of initiating process as a general matter — the most common example is the initial summons and complaint, but Rules 4.1, 14, and Supplemental Rules B, C, D, E(3) and G also are involved. And a blanket exception might not be quite right. Rule 4 incorporates state grounds of personal jurisdiction; if state practice recognizes e-service, should Rule 4 insist on other modes of service?

Determining what other exceptions might be desirable would be a long and uncertain task. Developing e-technology and increasingly widespread use of it are likely to change the calculations frequently. And there is no apparent sense that courts and litigants are in fact having difficulty in adjusting practice to ongoing e-reality.

The conclusion, then, has been that the time has not come to propose general provisions that equate electrons with paper for all purposes in all Civil Rules. The Evidence Rules already have a provision. It does not appear that the Appellate, Bankruptcy, or Criminal Rules Committees will move toward proposals for similar rules in the immediate future.

A related general question involves electronic signatures. Many local rules address this question now, often drawing from a Model Rule. A proposal to amend the Bankruptcy Rules to address electronic signatures was published and then withdrawn. There did not seem to be much difficulty with treating an electronic filing by an authorized user of the court's e-filing system as the filer's signature. But difficulty was encountered in dealing with papers signed by someone other than the authorized filer. Affidavits and declarations are common examples, as are many forms of discovery responses.

It seems to have been agreed that it is too early to attempt to propose a national rule that addresses electronic signatures other than the signature of an authorized person who makes an e-filing. The draft Rule 5(d)(3) does provide that the user name and password of an attorney of record serves as the attorney's signature. And some issues may remain in drafting even that proposal.

Rule 5(d)(3): Electronic Filing

The draft Rule 5(d)(3) amendment would establish a uniform national rule that makes e-filing mandatory except for filings made by a person proceeding without an attorney, and with a further exception that paper filing must be allowed for good cause and may be required or allowed for other reasons by local rule. A person proceeding without an attorney may file electronically only if permitted by court order or local rule. And the user name and password of an attorney of record serves as the attorney's signature.

This proposal rests on the advantages that e-filing brings to the court and the parties. Attorneys in most districts already are required to file electronically by local rules. The risks of mistakes have been reduced by growing familiarity with, and competence in, electronic communication. At the same time, deliberation in consultation with other advisory committees showed that the general mandate should not extend to pro se parties. Although pro se parties are thus exempted from the requirement, the proposal allows them access to e-filing by local rule or court order. This treatment recognizes that some pro se parties have already experienced success with e-filing, and reflects an expectation that the required skills and access to electronic systems will expand. The court and other parties will share the benefits when pro se litigants can manage e-filing.

125-010642

RULE 5. SERVING AND FILING PLEADINGS AND OTHER PAPERS

(d) Filing * * *

(3) *Electronic Filing and Signing* ~~*, or Verification*~~.

(A) *When Required or Allowed; Paper Filing.* ~~A court may, by local rule, allow papers to be filed, signed, or verified~~ All filings, except those made by a person proceeding without an attorney, must be made by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. But paper filing must be allowed for good cause, and may be required or allowed for other reasons by local rule.

(B) *Electronic Filing by Unrepresented Party.* A person proceeding without an attorney may file by electronic means only if allowed by court order or by local rule.

(C) *Electronic Signing.* The user name and password of an attorney of record[, together with the attorney's name on a signature block,] serves as the attorney's signature. A paper filed electronically ~~in compliance with a local rule~~ is a written paper for purposes of these rules.

COMMITTEE NOTE

Electronic filing has matured. Most districts have adopted local rules that require electronic filing, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts, except for filings made by a person proceeding without an attorney. But exceptions continue to be available. Paper filing must be allowed for good cause. And a local rule may allow or require paper filing for other reasons.

Filings by a person proceeding without an attorney are treated separately. It is not yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing. Encounters with the court's system may prove overwhelming to some. Attempts to work within the system may generate substantial burdens on a pro se party, on other parties, and on the court. Rather than mandate electronic filing, filing by pro se litigants is left for governing by local rules or court order. Efficiently handled electronic filing works to the advantage of all parties and the court. Many courts now allow electronic filing by pro se litigants with the court's permission. Such approaches may expand with growing experience in these and other courts, along with the growing availability of the systems required for electronic filing and the increasing familiarity of most people with electronic communication.

125-010643

The user name and password of an attorney of record[, together with the attorney's name on a signature block,] serves as the attorney's signature.

Clean Rule Text

(3) *Electronic Filing and Signing.*

(A) *When Required or Allowed; Paper Filing.* All filings, except those made by a person proceeding without an attorney, must be made by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. But paper filing must be allowed for good cause, and may be required or allowed for other reasons by local rule.

(B) *Electronic Filing by Unrepresented Party.* A person proceeding without an attorney may file by electronic means only if allowed by court order or by local rule.

(C) *Electronic Signing.* The user name and password of an attorney of record[, together with the attorney's name on a signature block,] serves as the attorney's signature. A paper filed electronically is a written paper for purposes of these rules.

Rule 5(b)(2)(E): e-Service

Present Rule 5(b)(2)(E) allows service by electronic means only if the person to be served consented in writing. It is complemented by Rule 5(b)(3), which provides that a party may use the court's transmission facilities to make electronic service "[i]f a local rule so authorizes." The proposal deletes the requirement of consent when service is made through the court's transmission facilities on a registered user. It also abrogates Rule 5(b)(3) as no longer necessary.

Consent continues to be required for electronic service in other circumstances, whether the person served is a registered user or not. A registered user might consent to service by other electronic means for papers that are not filed with the court. In civil litigation, a common example is provided by discovery materials that must not be filed until they are used in the action or until the court orders filing. A pro se litigant who is not a registered user — and very few are — is protected by the consent requirement. In either setting, consent may be important to ensure effective service. The terms of consent can specify an appropriate address and format, and perhaps other matters as well.

Although consent remains important when it is required, the Committee recommends deletion of the requirement that consent be in writing. Consent by electronic means is the most likely form; many people now rely routinely on e-communication rather than paper. Beyond that, the Committee believes that in some circumstances less formal means of consent may do, such as a telephone conversation.

125-010644

Rule 5. Serving and Filing Pleadings and Other Papers

(b) Service: How Made. * * *

(2) *Service in General.* A paper is served under this rule by:

(A) handing it to the person * * *

(E) sending it through the court's electronic transmission facilities to a registered user or by other electronic means ~~if~~ that the person consented to ~~in writing — in which event~~. Electronic service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served; or * * *

COMMITTEE NOTE

Provision for electronic service was first made when electronic communication was not as widespread or as fully reliable as it is now. Consent of the person served to receive service by electronic means was required as a safeguard. Those concerns have substantially diminished, but have not disappeared entirely, particularly as to persons proceeding without an attorney.

The amended rule recognizes electronic service through the court's transmission facilities as to any registered user. A court may choose to allow registration only with the court's permission. But a party who registers will be subject to service through the court's facilities unless the court provides otherwise. With the consent of the person served, electronic service also may be made by means that do not utilize the court's facilities. [Consent can be limited to [service at] a prescribed address or in a specified form, and may be limited by other conditions.]

Because Rule 5(b)(2)(E) now authorizes service through the court's facilities as a uniform national practice, Rule 5(b)(3) is abrogated. It is no longer necessary to rely on local rules to authorize such service.

Clean Rule Text

Rule 5. Serving and Filing Pleadings and Other Papers

(b) Service: How Made. * * *

(2) *Service in General.* A paper is served under this rule by:

(A) handing it to the person * * *

125-010645

(E) sending it through the court's electronic transmission facilities to a registered user or by other electronic means that the person consented to. Electronic service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served; or * * *

Permission to Use Court's Facilities: Abrogating Rule 5(b)(3)

As noted above, this package of drafts includes a proposal to abrogate Rule 5(b)(3) to reflect the amendment of Rule 5(b)(2)(E) that allows service through the court's facilities on a registered user without requiring consent. Rule 5(b)(3) reads:

(3) *Using Court Facilities.* If a local rule so authorizes, a party may use the court's transmission facilities to make service under Rule 5(b)(2)(E).

The basic reason to abrogate (b)(3) is to avoid the seeming inconsistency of authorizing service through the court's facilities in (b)(2)(E) and then requiring authorization by a local rule as well. Probably there is no danger that a local rule might opt out of the national rule, but eliminating (b)(3) would ensure that none will. It remains important to ensure that a court can refuse to allow a particular person to become a registered user. It may be safe to rely on the Committee Note to (b)(2)(E), with added support in a Committee Note explaining the abrogation of (b)(3).

The published proposal would look like this:

~~(3) *Using Court Facilities.* If a local rule so authorizes, a party may use the court's transmission facilities to make service under Rule 5(b)(2)(E).~~

COMMITTEE NOTE

Rule 5(b)(3) is abrogated. As amended, Rule 5(b)(2)(E) directly authorizes service on a registered user through the court's transmission facilities. Local rule authority is no longer necessary. The court retains inherent authority to deny registration [or to qualify a registered user's participation in service through the court's facilities].

Notice of Electronic Filing as Proof of Service

Rule 5(d)(1) was amended in 1991 to require a certificate of service. It did not specify any particular form. Many lawyers include a certificate of service at the end of any paper filed in the court's electronic filing system and served through the court's transmission facilities. This practice can be made automatic by amending Rule 5(d)(1) to provide that a Notice of Electronic Filing constitutes a certificate of service on any party served through the court's transmission

125-010646

facilities. The draft amendment does that, retaining the requirement for a certificate of service following service by other means.

Treating the Notice of Electronic Filing as the certificate of service will not save many electrons. The certificates generally included in documents electronically filed and served through the court's facilities are brief. It may be that cautious lawyers will continue to include them. But there is an opportunity for some saving, and protection for those who would forget to add the certificate to the original document, whether the protection is against the burden of generating and filing a separate document or against forgetting to file a certificate at all. Other parties will be spared the need to check court files to determine who was served, particularly in cases in which all parties participate in electronic filing and service.

The Notice of Electronic Filing automatically identifies the means, time, and e-address where filing was made and also identifies the parties who were not authorized users of the court's electronic transmission facilities, thus flagging the need for service by other means. There might be some value in amending Rule 5(d)(1) further to require that the certificate for service by other means specify the date and manner of service; the names of the persons served; and the address where service was made. Still more detail might be required. The Committee considered this possibility but decided that there is no need to add this much detail to rule text. Lawyers seem to be managing nicely without it.

The draft considered by the Committee included, as a subject for discussion, a further provision that the Notice of Electronic Filing is not a certificate of service if "the serving party learns that it did not reach the person to be served." That formula appears in Rule 5(b)(2)(E), both now and in the proposed revision. The Committee concluded that this caution need not be duplicated in Rule 5(d)(1). Learning that the attempted e-service did not work means there is no service. No service, no certificate of service.

Rule 5. Serving and Filing Pleadings and Other Papers

(d) Filing.

(1) *Required Filings: Certificate of Service.*

(A) *Papers after the Complaint.* Any paper after the complaint that is required to be served ~~— together with a certificate of service —~~ must be filed within a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed * * *.

125-010647

(B) *Certificate.* A certificate of service must be filed within a reasonable time after service, but a notice of electronic filing constitutes a certificate of service on any party[3] served through the court's transmission facilities.

COMMITTEE NOTE

The amendment provides that a notice of electronic filing generated by the court's CM/ECF system is a certificate of service on any party served through the court's transmission facilities. But if the serving party learns that the paper did not reach the party to be served, there is no service under Rule 5(b)(2)(E) and there is no certificate of the (nonexistent) service.

When service is not made through the court's transmission facilities, a certificate of service must be filed and should specify the date as well as the manner of service.

Clean Rule Text

Rule 5. Serving and Filing Pleadings and Other Papers

(d) Filing.

(1) *Required Filings: Certificate of Service.*

(A) *Papers after the Complaint.* Any paper after the complaint that is required to be served must be filed within a reasonable time after service.

(B) *Certificate.* A certificate of service must be filed within a reasonable time after service — a notice of electronic filing constitutes a certificate of service on any party served through the court's transmission facilities. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed * * *.

[3] We have yet to resolve the question whether this should change to "person." The Civil Rules participants report that persons who are not yet formal parties are treated as if parties for filing purposes. "Party" in rule text could — and should — be read to include anyone who is asking the court to do something. Opening a miscellaneous docket to enforce a discovery subpoena in aid of litigation pending in another district would be an example. The applicant-movant would count as a party.

125-010648

II.B. RULE 68

The offer-of-judgment provisions of Rule 68 have stirred controversy for many years. Proposals for dramatic amendments were published in 1983 and then again, with many changes, in 1984. They were withdrawn after encountering vigorous protests. Rule 68 was taken up again in the early 1990s. That effort was abandoned without advancing to publication of any proposals. Successive drafts had become increasingly complex in attempts to address the uncertainties that continued to compound as specific difficulties were examined. There also was some doubt about the nature of the Rule 68 enterprise.

If Rule 68 has proved difficult to manage in the rulemaking process, it has continued to be a popular subject of proposals requesting that the Committee amend it. The proposals rest on the shared perception that Rule 68 is not much used, even in cases where it can cut off a statutory right to attorney fees if a plaintiff wins a judgment less favorable than a rejected Rule 68 offer. And most of the proposals advance a common suggestion that Rule 68 should be invigorated by requiring a party who rejected an offer to pay post-offer attorney fees incurred by the offeror if the judgment is not more favorable than the offer.

Discussion at the October, 2014 meeting concluded that Rule 68 should not be put aside again without attempting to learn something more about possible revisions. The first avenue of inquiry will examine state practices to see whether actual experience shows good results from working under a different model. The Administrative Office has done preliminary work in identifying state rules that correspond to Rule 68 and in assembling a bibliography of secondary literature, some of it empirical. Resources were not available to delve deeper into these materials in time for the Committee's April, 2015 meeting. Rule 68 remains on the agenda

The Committee remains eager to receive information about experience with Rule 68 or similar state-court rules, and for suggestions whether Rule 68 should be developed to become more "effective," left alone, or studied for abrogation.

II.C. RULE 23 SUBCOMMITTEE

The Rule 23 Subcommittee has made significant strides in identifying issues on which to focus and in exploring ideas about how rule changes might address those issues. For the Advisory Committee's April, 2015, meeting, it submitted for discussion a series of preliminary sketches of possible amendment ideas, designed to prompt more concrete discussion than presentation of the issues alone would stimulate. A copy of the Subcommittee's memorandum, including the sketches, is attached to this report as Appendix I.

In order to broaden its appreciation of the issues presented, the Subcommittee has undertaken to send representatives to a variety of meetings and conferences convened by a variety of groups. The groups include bar organizations regarded as both plaintiff- and defense-side, ABA conferences, and law professor conferences. The day before the Advisory Committee's April meeting, the George Washington Law School arranged an extremely

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informative roundtable discussion involving prominent judges, lawyers, and law professors. The Subcommittee is also planning to hold a mini-conference to address pending Rule 23 issues on Sept. 11, 2015, and hopes to have draft rule ideas and some Committee Note language available for review by participants in that mini-conference. A complete listing of those events is contained in Appendix I.

The Subcommittee's "outreach" efforts have already borne fruit. Nearly 20 submissions to the Advisory Committee from various groups and individuals have endorsed consideration of various issues. These submissions can be found on the A.O. website via the link for "Archived Rules Suggestions" for the Civil Rules Committee.

The suggestions received so far range from fundamental reformulation of Rule 23 to more focused attention to specific issues. The Subcommittee is not presently inclined to favor major structural changes to the rule.

Instead, the Subcommittee's focus has been on more limited amendment ideas, as presented in Appendix I. In developing these ideas, it has been much aided by the American Law Institute's Principles of Aggregate Litigation (2010). The "front burner" ideas can generally be grouped into seven categories, which are summarized below.

As it has worked forward, the Subcommittee has invited suggestions about additional topics that seem to warrant serious attention, as well as suggestions about removing issues it had identified from the "front burner" list. As noted below, one result of the April Advisory Committee meeting and the George Washington University roundtable has been to identify two additional issues that the Subcommittee intends to examine carefully in the coming months.

"Front burner" issues

1. Settlement Approval Criteria: Until 2003, Rule 23(e) said nothing about how a court was to decide whether to approve the settlement or dismissal of a class action. Every circuit developed criteria, largely during the 1970s, for performing that task. As the ALI put it, this case law "is in disarray" because courts of appeals have "articulate[d] a wide range of factors to consider," leaving district judges with long lists of "checkoff" factors but little guidance on how to weigh those factors. ALI, Principles of Aggregate Litigation § 3.05, Comment a at 205 (2010).

In 2003, Rule 23(e) was amended to specify that the criterion for settlement approval is whether the proposed settlement is "fair, reasonable, and adequate." The ALI proposed substituting a set of four criteria for the long and divergent lists of factors in many circuits, adapted by the Subcommittee as follows in its sketch:

(i) the class representatives and class counsel have been and currently are adequately representing the class;

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(ii) the relief awarded to the class (taking into account any ancillary agreement that may be part of the settlement) is fair, reasonable, and adequate given the costs, risks, probability of success, and delays of trial and appeal;

(iii) class members are treated equitably (relative to each other) based on their facts and circumstances and are not disadvantaged by the settlement considered as a whole; and

(iv) the settlement was negotiated at arm's length and was not the product of collusion.

The Subcommittee's sketch permits settlement approval only if the court finds all four of these criteria satisfied, but it also would permit the court to reject a settlement that supports all four findings on the basis of any other matter pertinent to approval. During the Advisory Committee meeting, it was suggested that the Subcommittee reconsider recognizing authority to reject a settlement that satisfies all four listed criteria, and it will reexamine that question.

The goal of this approach would be to substitute the above four criteria for the variety of additional factors identified in decisions from the various circuits, thus fostering both national uniformity and more focused settlement review. At least some of the criteria used in some circuits — support for the settlement from the lawyers who negotiated it is a recurrent example — seem not to be helpful. But one might argue that the elasticity of the rule sketch may leave courts free to consider most or all of the factors on a given circuit's checklist in determining what is fair, reasonable, and adequate.

The discussions in April focused particular attention on the court's decision whether a proposed settlement has enough apparent merit to justify sending notice to the class. The Subcommittee intends to focus on this subject as it moves forward. The topic is introduced under the heading "additional possible issues" at the end of this section of the agenda book. It is possible that a more focused set of criteria for final approval of a settlement, like the ideas above, might assist both the court and the lawyers in making that initial decision about whether to give notice to the class.

2. Settlement class certification: In 1996, the Committee published a proposal to add a new Rule 23(b)(4), permitting certification for purposes of settlement in a Rule 23(b)(3) class action even though the proposed class might not meet all the certification requirements for purposes of trial. At that time, some prominent cases had stated that, to be certified for settlement, cases had to satisfy the same certification criteria as for certification for trial. Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997), ruled that those seeking certification for settlement need not satisfy everything that is required of certification for trial. But uncertainty remained — particularly about the role of predominance — and there followed a move toward use of MDL procedures to achieve settlements in situations that might also be suitable for class-action treatment.

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The Subcommittee's sketches of a new Rule 23(b)(4) concept have focused attention on several issues. The first is whether present obstacles to achieving settlement class certification actually justify serious consideration of a new category of class action. A related question is whether a new Rule 23(b)(4) should be limited (like the 1996 proposal) to cases seeking certification under Rule 23(b)(3). On that subject, it has been suggested that Rule 23(b)(2) class actions for injunctive relief may often be settled. That still leaves open the question whether a settlement class should be certified for (b)(2)-type relief when the same class could not be certified for trial. Another question is whether a settlement should require satisfaction of all Rule 23(a) factors or only some of them.

Some of the ideas under consideration diverge from the Supreme Court's analysis in *Amchem*. One is to remove predominance as a critical factor in approving settlement certification. Because predominance is required only for Rule 23(b)(3) classes, downplaying it would fit with opening up settlement certification approval for Rule 23(b)(2) class actions. It might be that separate settlement class certification rules could be designed for (b)(2) and (b)(3) cases, but that possibility seems cumbersome and could involve intricate drafting. And there is also the question whether settlement class certification should be available for "mandatory" Rule 23(b)(1) class actions.

Another issue is whether to place primary emphasis on Rule 23(e) review of the fairness of the proposed settlement rather than the Rule 23(a) and (b) factors. In *Amchem*, the Court said that Rule 23(e) is not a substitute for vigorous application of the Rule 23(a) and (b) requirements (even in the settlement context), except to the extent that the Rule 23(b)(3) manageability factor may play a reduced role.

(3) Addressing *cy pres* settlement provisions in the rule: It may be that cy pres provisions are becoming more frequent in proposed settlements. Chief Justice Roberts reflected concerns about this practice in his statement in *Marek v. Lane*, 134 S. Ct. 8 (2013), that the Supreme Court "may need to clarify the limits on the use of such remedies." More recently, the court in *In re BankAmerica Securities Litigation*, 775 F.3d 1060 (8th Cir. 2015), noted a concern about "the substantial history of district courts ignoring and resisting circuit court cy pres concerns." *Id.* at 1064.

Sketches prepared by the Subcommittee have attempted to address these concerns; the present effort is not designed to expand authority for using *cy pres* provisions so much as to develop criteria and guidelines for using them. One recurrent reality is that any claims procedure creates a possibility that a residue will be left once distributions are made in accordance with settlement guidelines to all class members who seek compensation through the claims process. Unless this residue is to revert to the settling defendant, some alternative provision should be made for it. This concern might support vigorous Committee Note admonitions (or even rule provisions) regarding reverter provisions and/or simplified settlement claims processes (to ward off the risk that reverter provisions might tempt defendants to insist on unreasonably demanding claims processes). At the same time, the existence of a possibility there will be a residue may

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justify including *cy pres* provisions in a significant number of settlements, given the possibility that notice might have to be sent to the class a second time (concerning such *cy pres* treatment) if the possibility were not included in the original settlement agreement.

Issues that have been identified in the discussions so far include whether the rule should affirmatively authorize the court to approve *cy pres* provisions. The Subcommittee has not embraced amending the rule to create new authority; as the Eighth Circuit noted (quoted above), it seems that many courts presently are exercising such authority. Instead, the focus of the Subcommittee (building on the proposal of the ALI Principles of Aggregate Litigation, which has already been adopted by some courts) is to provide guidelines for what is already going on. Accordingly, the Subcommittee's current sketch articulates limits on use of *cy pres*:

(A) If individual class members can be identified through reasonable effort, and the distributions are sufficiently large to make individual distributions economically viable, settlement proceeds must be distributed directly to individual class members;

(B) If the proposal involves individual distributions to class members and funds remain after distributions, the settlement must provide for further distributions to participating class members unless the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair;

(C) The proposal may provide that, if the court finds that individual distributions are not viable under Rule 23(e)(3)(A) or (B), a cy pres approach may be employed if it directs payment to a recipient whose interests reasonably approximate those being pursued by the class. [The court may presume that individual distributions are not viable for sums of less than $100.] [If no such recipient can be identified, the court may approve payment to a recipient whose interests do not reasonably approximate the interests being pursued by the class if such payment would serve the public interest.]

This sketch raises questions. A basic one is whether to permit *cy pres* provisions only "if authorized by law." Some states have such statutory authorizations, but it is likely that not many do. More importantly, this is a settlement, and settlements are not usually limited to relief "authorized by law." To the contrary, they may be attractive because they include features (such as an apology) that cannot be obtained by a court judgment. At the same time, settlement by a class representative may differ in important ways from settlement by a participating party. It is not obvious that defendant's agreement, elicited by the desire for res judicata, justifies surrender of class members' interests.

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Bracketed language above identifies further questions. The Subcommittee has been informed that class action settlement administration has improved to a point that makes excusing distributions smaller than $100 (suggested by a proposed uniform class-action law for states) inappropriate. And the question whether to affirmatively authorize distribution to "public service" organizations whose interests do not correspond to the claims asserted in the action may be a step too far.

(4) Issues about objectors: In 2003, Rule 23(e)(5) was added, providing that any class member may object to a settlement submitted for the court's approval, and that any such objection "may be withdrawn only with the court's approval."

The starting point is that objectors play a valuable role for the court, which is ordinarily called upon to evaluate a proposed resolution that is supported by all the lawyers and parties with whom the court has been dealing. The refinement of the factors to be considered in approving such proposed settlements (Issue (1) above), and the possible additional focus on what must be submitted at the outset when the court is asked to direct notice to the class (mentioned below), may make more useful information available to class members in deciding whether to raise questions about the proposed settlement.

But another starting point is that repeated reports indicate that some objectors seek to exploit the process to extract unjustified tribute. The requirement of court approval for withdrawing objections added in 2003 was designed to curtail such activity. Reports indicate that it has worked reasonably well. The problem has been that the Rule 23(e)(5) requirement ceases to constrain objectors after a notice of appeal is filed. And the time necessary to resolve an appeal means that a bad-faith objector gets considerable additional leverage from filing a notice of appeal, while also seemingly escaping from the requirement for court approval to withdraw the appeal.

The problem has drawn suggestions to the Appellate Rules Committee that it amend the FRAP to provide that withdrawal of the appeal also require court approval, and to direct further that the appellate courts may not approve such a withdrawal if anything of value is provided to the objector or the objector's counsel in return for withdrawing the appeal.

Absolutely forbidding any consideration for dropping the appeal might unduly limit the ability to resolve appeals asserting that the objector's special situation justifies special treatment. But permitting some withdrawals to be approved despite consideration could produce further difficulties. Much might be said in favor of having such a decision made, at least initially, by the district court (which is very familiar with the case) rather than by the appellate court (which is not). Moreover, assuming that the appellate court has motions panels to rule on such matters that are constituted separately from merits panels, the issue might be presented to a panel of appellate judges who would never be involved in passing judgment on the underlying settlement approval, imposing a possibly substantial burden on the appellate court when the district court would be entirely up to speed.

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The Rule 23 Subcommittee stands ready to collaborate with the Appellate Rules Committee in addressing methods of achieving the desired goal.

Meanwhile, the Rule 23 Subcommittee has sketched two possible ideas for changing Rule 23. One would add a requirement that "side agreements" be submitted along with a request for permission to withdraw an objection before the district court. The other would add to Rule 23 some sanction authority for bad-faith objections. It is uncertain whether either of these ideas would make productive additions to the rule.

(5) Mootness and Rule 68 offers of judgment: In recent years, Rule 68 offers of judgment have been used with some frequency in efforts to moot proposed class actions by offering "full" relief to the individual plaintiff who brings the suit. They may become more common due to a recent Supreme Court decision in a Fair Labor Standards Act collective action, although the Court was at some pains to say that collective actions and class actions are different in this regard. The Subcommittee has developed various ideas about how to address this issue, seeking a simple solution. The question whether rulemaking is justified by this problem remains also.

(6) Issue Classes: Rule 23(b)(3) says that a court may certify a class only on finding that common questions predominate and that class treatment is superior to individual litigation. Rule 23(c)(4) says that, "if appropriate," a court may certify with regard only to "particular issues." Whether there is an inherent tension between these two provisions can be debated. At least at a point in time, the Fifth and Second Circuits seemed at loggerheads about whether a court could resort to issue certification under (c)(4) only in cases that already have been found certifiable under (b)(3). The Fifth Circuit said that "nimble use" of (c)(4) could not circumvent the predominance requirement of (b)(3). But it may be that more recent Fifth Circuit decisions show that issue certification is (at least sometimes) approved by that court.

The Subcommittee has developed a sketch of a change to Rule 23(b)(3) designed to show that a court may resort to issue certification under (c)(4) even though it cannot conclude that, overall, common issues predominate. That leaves unresolved the question what happens next after the common issues are resolved, since that would not ordinarily lead to entry of a judgment. The Subcommittee therefore has also developed a sketch of an amendment to Rule 23(f) that would permit discretionary court of appeals review of the resolution of the common issue before further (and possibly burdensome) proceedings in the district court or elsewhere to resolve remaining issues. One variation of that provision would require that the district court find that immediate review would be desirable before a petition to the appellate court would be allowed.

(7) Notice: *In Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), the Court said that in (b)(3) actions individual notice (seemingly by first class mail) was required for every class member who could be identified with reasonable effort. Requiring snail mail seems inappropriate in the 21st century. It also seems that courts have moved to embrace more modern methods of giving notice to class members. *See, e.g., In re Online DVD-Rental Antitrust Litigation*, 779 F.3d 934, 941 (9th Cir. 2015): "Initial e-mail notice of the settlement was

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provided to some 35 million class members. Notice was mailed to more than 9 million class members whose email addresses were invalid such that the email notice 'bounced back.' * * * The notice encourages class members to visit the class website for more details."

The Subcommittee sketch would add the phrase "by electronic or other means" to Rule 23(c)(2)(B) to take account of improvements in methods of communication.

In addition, the Subcommittee has had some discussions about whether some notice requirement should exist for litigated (b)(1) and (b)(2) actions. At present, the rule does not require any notice in those cases, although Rule 23(c)(2)(A) does say that "the court may direct appropriate notice to the class." But it is possible that a fully litigated (b)(2) case would proceed to judgment without any notice at all to class members. (If a settlement were proposed, Rule 23(e) would require "notice in a reasonable manner to all class members who would be bound by the settlement.") In 2001, a proposal to direct some notice to class members was published for comment, but then not pursued after adverse public comment, which focused on the cost of giving such notice. Whether technological development since then has changed the situation is uncertain.

Additional possible issues

As noted above, the April Advisory Committee meeting and the George Washington roundtable brought to the fore two additional issues that the Subcommittee expects to examine as it moves forward:

(1) Specifics necessary for decision to order notice to class about proposed settlement: Recent discussions have emphasized the importance of the initial decision whether to direct that notice be sent to the class about the proposed settlement (thereby triggering the time to object). Although the rule does say that notice should be sent to the class, it does not address the standards a court should use in making that decision or the showing that the settling parties should make to support giving notice to the class. In some cases, it may be that the court does not get a full picture of the proposed settlement until later, when the matter is presented for final approval. Similarly, it may be that full information about the proposed settlement would be beneficial to class members in making decisions whether to object, so that having that information before the court from the outset could have the additional advantage of making it available to class members trying to evaluate the proposed resolution.

The Subcommittee expects to examine these issues as it moves forward, with an eye to the possibility of adding something to the rule. The ALI Principles of Aggregate Litigation caution against regarding the decision to send notice as a "preliminary approval" of the settlement, on the ground that class members have not even had a chance to evaluate the settlement and that the court should not already be taking a position in favor of it. But if information roughly identical to that required at the final approval stage must be provided before notice is authorized, it may appear that the decision to give notice should assume even more importance.

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A related potential problem is that, as one increases the information available at this stage, one also strengthens arguments for immediate appellate review under Rule 23(f), even before the class members get a chance to object. If a "preliminary approval" includes approval of settlement class certification, that might arguably fit within Rule 23(f), which authorizes immediate review of "an order granting or denying class-action certification." In *In re National Football League Players Concussion Injury Litigation*, 775 F.3d 570 (3d Cir. 2014), the court held that such approval for purposes only of giving notice is not an event that supports immediate Rule 23(f) appeal. If the Subcommittee goes forward on this issue, that potential problem will be kept in mind; the Subcommittee's current thinking is not to multiply the occasions for interlocutory review.

(2) Ascertainability: Recently there has been much concern about what must be shown to demonstrate that a proposed class is "ascertainable," largely resulting from Third Circuit decisions. This concern seems to be limited to Rule 23(b)(3) class actions. *See Shelton v. Bledsoe*, 775 F.3d 554 (3d Cir. 2014) (ascertainability is not required in a class action seeking only injunctive relief). And the Third Circuit treatment of the issue may be evolving. See, e.g., *Byrd v. Aaron's Inc.*, ___ F.3d ___, 2015 WL 3887938 (3d Cir., April 16, 2015), in which the panel stated that "it is necessary to address the scope and source of the ascertainability requirement that our cases have articulated" and added that "[w]e seek here to dispel any confusion." (Judge Rendell, concurring in reversal of the district court's denial of certification, suggested that "it is time to retreat from our heightened ascertainability requirement in favor of following the historical meaning of ascertainability under Rule 23.")

The Subcommittee intends to examine this issue; it is not certain at present whether a rule change might be indicated.

* * * * *

The Subcommittee continues to seek input on whether the issues listed above should be pursued, and whether others should considered as well.

II.D. DISCOVERY: REQUESTER-PAYS

The Discovery Subcommittee continues to have the "requester pays" topic on its agenda. The Advisory Committee had an initial discussion of these issues at its November, 2013, meeting, but the full Committee was occupied thereafter addressing the public commentary on the amendment package published for public comment in August, 2013. On April 29, 2015, the Supreme Court adopted rule changes resulting from that effort.

In early 2015, the Discovery Subcommittee had two conference calls about these issues. At its April, 2015, meeting the Advisory Committee had a further discussion. The issues appear both difficult and contentious, and the Advisory Committee is not recommending any rulemaking action at this time.

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One reason for caution in proceeding along this line is that the package of amendments approved by the Supreme Court on April 29, 2015, includes changes designed to address the problems some seek to solve with requester pays rules. Those amendments go into effect on Dec. 1, 2015, unless Congress takes action to defer their effective date. Time will be needed to gauge their effects, but knowing about those effects would be important in determining whether to proceed with requester pays ideas.

Another reason for proceeding gradually is the difficulty of predicting the changes that would result from a requester pays system. There are presently a number of provisions that authorize something like requester pays under some circumstances. Examples include:

> Rule 26(g)(1)(B) & (3) say that the signature of a lawyer on a discovery request certifies that the request has not been made for an improper purpose, such as increasing the cost of litigation, and that the request is not unduly burdensome or expensive. If there is an unjustified certification, the court "must impose an appropriate sanction" on the violator, which may include "the reasonable expenses, including attorney's fees, caused by the violation."
>
> Rule 26(b)(2)(C)(iii) requires the court to limit or prohibit discovery that would disproportionately burden the responding party. [The amendments adopted by the Supreme Court on April 29 move this provision up into Rule 26(b)(1), on the scope of discovery, and also revise it a bit.]
>
> Rule 26(c) now authorizes a protective order to protect a party from "undue burden or expense." In *Oppenheimer Fund v. Sanders*, 437 U.S. 340 (1978), the Supreme Court recognized that Rule 26(c) provided authority for "orders conditioning discovery on the requesting party's payment of the costs of discovery." *See id.* at 358.
>
> Rule 26(b)(2)(B) explicitly authorizes the court to condition discovery from sources of electronically stored information that are not reasonably accessible due to burden or expense, and the Committee Note confirms that cost-bearing is one such condition.
>
> Rules 37(a)(5) & 37(b)(2)(C) require the court to impose the expenses incurred in relation to a discovery motion on the losing party on the motion, unless that party's position was "substantially justified."
>
> 28 U.S.C. § 1927 authorizes the court to impose "the excess costs, expenses, and attorneys' fees" on any attorney or party that "multiplies the proceedings in any case unreasonably and vexatiously."

It is not certain how often these provisions are employed, but some assert that the number of such provisions already in existence shows that there is really no need for more such provisions. It may be that abusive discovery that would warrant shifting costs from the producer

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to the requester is not commonplace in civil litigation in federal court, and so adopting across-the-board requester pays rules would be dubious. But it also seems to be true that there are cases in which disproportionate discovery is a serious problem. It will be very difficult to draft a rule that will help courts and litigants distinguish discovery requests that justify imposing on the requester part or all of the cost of responding from those that do not.

Some other legal systems — particularly the UK — have loser pays provisions that might be compared. But it is possible that such a system could even encourage disproportionate expenditures on case preparation if that preparation significantly increased the likelihood of success, which would make the cost of the preparation recoverable. Difficult questions could arise about whether a requester who had to pay for discovery should be able to recoup those costs upon prevailing in the action.

In the UK, the "full indemnity" approach to recovery of litigation costs makes necessary an extensive regime of judicial officers whose job is to assess the propriety of recovery of certain costs. Any effort to calibrate more precisely the cost of responding to specific discovery requests might prove even more challenging. Making such costs recoverable might also prompt responding parties not to be frugal in expenditures on their discovery responses. It might, in addition, raise difficult questions about whether expenditures were actually prompted by the discovery requests or instead trial preparation activities that would have happened in any event.

The UK comparison also suggests another direction in which this discussion could lead — looking again at disclosures as an alternative to formal discovery. In 1991, the Committee published a proposed initial disclosure rule designed to require each side to disclose the "core information" seemingly involved in the case to the other side at the outset. That approach might be a model that would hold some promise, but initial disclosure caused a firestorm of protest when proposed in 1991. Eventually, the 1993 amendments added an initial disclosure requirement that directed disclosure of witnesses and documents with information relevant to disputed facts alleged with particularity in the pleadings, but allowed district courts to opt out of this disclosure requirement. Many districts did opt out, and the rule was amended in 2000 to its current form, which applies nationwide and directs disclosure only of material the disclosing party may use to prove its claim or defense. The possibility of focusing again on initial disclosure was raised during the Advisory Committee discussion of these issues in April.

Something like initial disclosure may already be resulting from adoption by many judges of the protocols for individual employment discrimination actions developed by a committee made up of leading plaintiff- and defense-side lawyers under the guidance of Judge Koeltl over the period of more than a year. The hope is that having this basic information on the table at the outset could obviate much wasted motion that now occurs. But whether a similarly tailored set of disclosures could be designed for other sorts of cases is uncertain.

Yet another comparison may be to various provisions in "patent troll" bills introduced in Congress. Some of those bills call for the requester to pay after "core information" is disclosed.

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It is possible that, if directed by Congress, the Committee will find itself called upon to attempt to draft rules that implement core discovery and requester pays for patent cases.

The whole area is thus beclouded by uncertainties. The prospect that disproportionate discovery costs will cause parties to settle meritless claims or abandon meritorious claims is very troubling. But it is important to appreciate that proceeding with requester pays could generate passionate opposition. In 1998, a proposed amendment to Rule 34 would have permitted the court to order discovery otherwise forbidden under Rule 26(b)(2)(C) as disproportionate if the requesting party had to pay part or all of the cost of responding. Even though that amendment was limited to disproportionate discovery (which the rule said the court was required to forbid entirely), and did not invariably require full payment for it, the proposal drew considerable criticism, and eventually did not go forward.

It is important to appreciate, therefore, that strong access-to-justice concerns bear on any requester pays proposal. Proceeding would likely depend on having a solid empirical basis for identifying the problem and, perhaps, the solution. Yet it is not clear how solid empirical work could be done to provide that information base.

The Committee will undertake further information-gathering efforts. Any suggestions about where or how to obtain useful information would be welcome. Among the questions addressed by the Subcommittee, which it called to the attention of the Advisory Committee, were the following:

(1) Is there a serious problem of over-discovery that might be solved by some form of requester pays rule? We know that in much litigation it seems that the discovery is roughly proportional to the stakes. We know also that in a significant number of cases high discovery costs are reported. How should one try to identify over-discovery? How can one evaluate the potential utility of requester pays approaches to dealing with those problem cases?

(2) Should any rules along this line focus mainly on certain kinds of cases, or on certain kinds of discovery?

(a) In general, the rules are to be "transsubstantive," applying to all cases with relative equality. But there are rules that are keyed to specific types of cases, such as Rule 9(b), with its specific pleading requirements for fraud. Is there a workable way for a rule to identify "problem" or "contentious" cases? [Note that, as mentioned above, "patent troll" legislation may call for rules specific to some or all patent cases.]

(b) Since discovery regarding electronically stored information has assumed such great importance, should a "requester pays" idea be considered only for that sort of discovery? The current Rule 37(e) proposed amendment is similarly limited,

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as is current Rule 37(e). Even more pertinent, current Rule 26(b)(2)(B), with its cost-bearing possibility, is also only about electronically stored information.

(3) Should cost-bearing ever be mandatory? All models of possible rule changes that have been actively considered so far have essentially been discretionary. That means that the court must become involved before cost-bearing is a possibility. Perhaps cost bearing could be presumed in certain situations unless the court directed otherwise. But if so, how would one define those situations? Defining them could be quite difficult, and disputes about whether given discovery fell on one side or the other side of such a line could themselves impose significant costs on the litigants and burdens on judges.

(4) Would it be useful to consider broadening initial disclosure if requester pays changes are actively studied? As amended in 2000, Rule 26(a)(1) only requires disclosure of information the disclosing party may use to prove its claims or defenses. Some question the utility of the current rule. It could be that broadening initial disclosure would be a useful adjunct to adding requester pays provisions.

(5) Could introduction or emphasis on these issues itself justify substantial discovery? If the question is whether providing requested discovery will be highly burdensome, or would not provide useful evidence, it may be that some parties will seek to explore these issues using discovery. One method for making Rule 26(b)(2)(B) determinations about whether to order discovery from "inaccessible" sources of electronically stored information is to see what can be found in a sample of those sources, and at what cost. Perhaps that is a model that would be useful, but it might also suggest "discovery about discovery," something that may be unnerving.

(6) Would requester pays provisions have a significant effect on judicial workload? It is likely such provisions would focus on something like "reasonable expenses." Determining what is "reasonable" could be an effort for the court. But perhaps that inquiry is sufficiently implicated in the basic proportionality analysis -- balancing the cost of proposed discovery against its apparent value -- so that there would not be significant added effort for the court.

II.E. MANUFACTURED FINALITY

The two projects of the Appellate-Civil Subcommittee reported here began in the Appellate Rules Committee. As often happens, potential solutions to problems identified by the Appellate Rules Committee seem to lie as much in the Civil Rules as in the Appellate Rules. Joint subcommittees have proved invaluable in focusing the work of both committees.

Both of the present topics have lingered for some time. Manufactured finality was considered in some depth by an earlier Subcommittee. The provisions of Rule 62 addressing stays of execution pending post-judgment motions and appeal have been considered in the

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Appellate Rules Committee and then transferred to the Subcommittee. Manufactured finality is discussed here. Rule 62 comes next.

"Manufactured finality" refers to attempts to accelerate the time when an appeal can be taken following an interlocutory ruling that is not independently appealable under any other elaboration of the final decision requirement of 28 U.S.C. § 1291 or under the statutes that permit interlocutory appeals.

Many circumstances may lead a party to prefer an immediate appeal to test an interlocutory order that is not appealable without more. A few common illustrations set the stage. A plaintiff may have several demands for relief. An order dismissing some of them may leave only fragments that, standing alone, do not seem to warrant the costs and uncertainties of continuing litigation. Even if the plaintiff can afford to litigate the rest of the way to a final judgment, banking on the prospect that the interlocutory order will be reversed, the cost may be high, and can easily be wasted whether the result on appeal is reversal or affirmance. And delay is an inevitable cost. So too, the court may dismiss some theories that support a single claim, leaving only theories that the plaintiff thinks weaker either as a matter of law or as a matter of available evidence. Or the court may enter an in limine order excluding the most important — and perhaps indispensable — parts of the plaintiff's evidence.

Faced with these, and often enough more complicated circumstances, an attempt may be made to "manufacture" finality by arranging voluntary or stipulated dismissal of all, or substantial parts, of what otherwise remains to be done in the trial court.

Three rough categories of manufactured finality can be identified. Most decisions agree that most of the time a final judgment cannot be manufactured by dismissing without prejudice everything that remains unfinished in the action. Most decisions agree that most of the time a dismissal with prejudice of all unfinished parts of an action does establish finality. And most circuits reject the approach of "conditional prejudice" that has been accepted in the Second Circuit and apparently the Federal Circuit. This tactic dismisses all unfinished parts of the action with prejudice, subject to the condition that they can be revived — the prejudice dissolves — if the interlocutory orders thus made final are reversed on appeal.

The question whether to propose rules provisions addressing manufactured finality is beset by two major concerns.

One major concern is that the cases have recognized circumstances in which a dismissal without prejudice does achieve appealable finality. At times finality is found by finding "de facto prejudice" in circumstances that would bar a new action. A rule that rejects finality for all dismissals without prejudice might come at significant cost.

A related concern is that a rule recognizing that a dismissal with prejudice can achieve finality accomplishes nothing useful. Courts understand that now. A rule that states that only a

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dismissal with prejudice can achieve finality, on the other hand, runs into the same problems as a rule that rejects finality for all dismissals without prejudice.

Discussions of conditional prejudice have tended to divide practicing lawyers from judges. It may be that the division is more accurately described as between practicing lawyers and trial judges on one side and appellate judges on the other. Practicing lawyers believe that a dismissal with conditional prejudice can be a valuable means of achieving finality. Since most appeals lead to affirmance, the opportunity to revive the parts of the action that were dismissed with conditional prejudice will not cause as much risk of repeated appeals in the same action as might be feared. The party who is willing to risk all that remains in the action on the opportunity to win reversal of the interlocutory orders made before the dismissal will be able to continue only if there is reversible error. If the alternative is to persist in litigating to a true final judgment the parts that would be dismissed with conditional prejudice, both the trial court and the opposing party pay a price that is not redeemed even if the eventual appeal leads to affirmance. And those proceedings are likely to become pure waste on reversal of the interlocutory orders that would have been reviewed on a conditional-prejudice appeal.

Judges (at least appellate judges), on the other hand, fear that dismissals with conditional prejudice will threaten the core values of the final-judgment rule. As with an avowedly interlocutory appeal, the result may be added cost and delay and a risk that the appellate court will have to revisit familiar terrain on a subsequent appeal.

One way of viewing the conditional-prejudice issue is to ask whether there is a real need to address it by rules amendments. There is no indication that the Second Circuit regrets its approach. Apart from the Federal Circuit, the other circuits that have confronted the question refuse to allow manufactured finality on these terms. Is there a need to adopt a rule that prohibits reliance on conditional prejudice by the courts that find it a useful adjustment of the final-judgment rule?

The Subcommittee, building on work by an earlier subcommittee, discussed these issues at length. The competing arguments on all sides continue to defy confident resolution. Failing to achieve consensus, the Subcommittee reported four alternatives for Committee consideration.

The first alternative is to do nothing. The reasons for doing nothing are easily summarized. Most situations are governed by two clear rules that are generally recognized. A voluntary dismissal without prejudice, even if it sweeps away an entire action, does not achieve finality. A voluntary dismissal with prejudice that sweeps away an entire action does achieve finality. Little would be accomplished by adopting a rule that states either or both of these points. And so simple a rule would create a risk of undoing decisions that now recognize finality in circumstances that would not seem to fit within the new rule. The most obvious example is conditional prejudice, discussed further below. Other examples were described in a memorandum discussing the choices between simple rules, complex rules, or no rules and providing a welter of examples of complex finality theory.

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The argument for going ahead with simple rules is direct. It is important to have clear rules of appeal jurisdiction. And uniformity across the circuits is an important component of clarity — no matter how clear the rules may seem within any particular circuit, disuniformity will encourage attempts to manufacture finality that backfire against sloppy or risk-taking lawyers. This argument, however, is subject to challenge on the ground that no rule text will be so perfect as to exclude all opportunities for interpretation and thus for disuniform interpretation.

The second alternative is to adopt a rule that says only that a plaintiff — or perhaps any party asserting a claim for relief — can achieve appeal finality by dismissing with prejudice all claims and parties that remain in the action. Although this rule is accepted as a general matter now, recognition in rule text would provide guidance for lawyers who are not expert in the complexities of the final-judgment rule. It also would provide reassurance for lawyers who are familiar with the idea, but feel pressure to confirm their understanding by expensive research.

This simple rule would leave ambiguities at the margin. The clearest example is a dismissal with conditional prejudice. Is that with prejudice or without prejudice? Other examples occur in cases that, on one theory or another, recognize de facto prejudice. One illustration is a dismissal without prejudice in circumstances that seem to preclude any new action because the applicable limitations period has run. Litigants and lawyers would face new uncertainties in the attempt to reconcile existing decisions with the new rule text.

The third alternative is to adopt a rule that says that only a dismissal with prejudice achieves finality. This rule would actually do something, as compared to a rule that recognizes finality on a dismissal with prejudice but that does not expressly foreclose other means of manufacturing finality. But the ambiguities would remain, and expressly foreclosing all but dismissals with prejudice would raise the stakes of uncertainty.

A fourth alternative is to adopt a rule that recognizes or requires that a voluntary dismissal be with prejudice and that also expressly addresses conditional prejudice. Either answer could be given. Conditional prejudice could be recognized as a valid path to finality. This answer might be adopted in a form that would defer to courts that recognize conditional prejudice now, and leave the choice open for courts that have not expressly rejected it, without requiring other circuits to change their views. That path would leave disuniformity. Instead, the rule might require all courts to recognize conditional prejudice. That path likely would stir significant opposition. Or conditional prejudice could be rejected, not so much because of any sense that it has proved undesirable when recognized as because of a desire to achieve national uniformity. A clear majority of the decisions that address the question reject conditional prejudice. There is no indication that it is frequently used in circuits that do recognize it. Uniformity, on this view, would be achieved at little cost, and indeed would be an added benefit if conditional prejudice is in fact a bad means of achieving finality.

A choice among these alternatives will be influenced by a more general sense of the need to prevent further erosion of the final-judgment rule. The rule is far more complicated than the initial statement that finality requires complete disposition of an entire case, leaving nothing to

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be done in the trial court apart from execution of a judgment that provides relief. Expansions, exceptions, and occasional evasions are familiar in practice. The complication reflects case-specific, or at times more general, rebalancing of the competing needs that allocate jurisdiction between trial courts and appellate courts. An openly ad hoc approach that allows a court of appeals to assert jurisdiction whenever a present appeal seems a good idea would destroy the balance achieved by a general requirement of finality. But many more restricted qualifications are recognized by statute, court rule, and interpretation of 28 U.S.C. § 1291 itself. The choices are seldom easy. But it may be difficult to identify any general practical losses incurred by ongoing and somewhat divergent approaches to manufactured finality. If so, the more abstract desire for more precise rules in this particular corner of appeal jurisdiction may not be enough to justify the potential costs of more precise rules.

Discussion of these four alternatives explored the competing pressures that have expanded appeal finality beyond the paradigm judgment that leaves nothing more to be done in the trial court. The best-known example is the collateral-order doctrine, which itself has an uneven history. It does not seem possible to craft a court rule that would accurately identify the circumstances that justify an appeal before the trial court has completely finished its work. At the least, it does not seem possible to craft a rule that would embody the actual and often conflicting decisions on finality. Any clear rule would be bought at the price of sacrificing some desirable, at times important, opportunities to appeal.

In the end, the Committee voted, with one dissent, to advise the Appellate Rules Committee that the Civil Rules Committee does not believe that an effort should be made to draft rules to govern the many phenomena that can be characterized as "manufactured finality." The Reporter for the Appellate Rules Committee has reported that, at least for the time being, they do not intend to pursue further the effort to develop rule text that would address manufactured finality.

II.F. RULE 62: STAYS PENDING APPEAL

Discussion of Rule 62 stays of execution began in the Appellate Rules Committee. The initial focus was on the fit of Rule 62 with a convenient practice adopted by some appellate lawyers. Rather than arrange separate bonds to secure a stay pending post-judgment proceedings and then to secure a stay pending appeal, they arrange a single bond designed to secure a stay until completion of all appeal proceedings. It has not been clear how this strategy fits Rule 62.

Rule 62 is presented for discussion to guide further work in the Subcommittee and the Appellate and Civil Rules Committees. The work has focused on money judgments. The present provisions addressing injunctions, receiverships, and an order for an accounting in an action for patent infringement are carried forward unchanged, at least for the time being.

A particular twist on the single-bond question arises from the fit between the 14-day automatic stay provided by Rule 62(a) and the Rule 62(b) provision for a stay "pending disposition of" post-judgment motions that may be made up to 28 days after entry of judgment.

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Before the Time Calculation Project the Rule 62(a) automatic stay lasted for 10 days, and 10 days also was the period for making the post-judgment motions. The automatic stay was redefined as 14 days (the prior conventions for counting meant that a 10-day period was always at least 14 days, and might run longer). The times for the post-judgment motions, however, were extended to 28 days because experience had shown that more time was needed in many complex cases. The result is an apparent "gap." A district judge wrote to the Civil Rules Committee that the gap creates uncertainty whether the court can order a stay after expiration of the automatic stay but before a post-judgment motion is made. The Committee concluded that a court has inherent power to stay its own judgment, and that there was no need to revise Rule 62(b) unless practice should show persistent confusion.

Consideration of these initial questions led to other questions. Successive sketches of possible Rule 62 revisions have taken on ever more possible changes. Should the court be able to dissolve the automatic stay before it expires of its own force? Should it be able to require that the judgment creditor post security as a condition of dissolving a stay or refusing to grant one? Should it be able to recognize security other than a bond? To set the amount of security less than the judgment? And is it wise to carry forward the supersedeas bond provision of Rule 62(d) that many understand to create a right to a stay pending appeal? And, to return to the questions that launched the inquiry, why not recognize that a single security may be accepted for a stay that continues from expiration (or supersession) of the automatic stay through issuance of the appellate mandate and disposition of proceedings on a petition for certiorari?

Subcommittee consideration of these questions is in mid-stream. It has been supported by detailed memoranda prepared by Professor Struve, Reporter for the Appellate Rules Committee. These memoranda reach beyond the questions that have been actively considered. The Subcommittee has yet to determine whether to recommend that consideration of Rule 62 extend beyond subdivisions (a) through (d).

One simple starting point in exploring Rule 62 was to ask whether Committee members have encountered difficulty as a result of the "gap" between expiration of the automatic Rule 62(a) stay and the time allowed to make the motions that support a stay under Rule 62(b). Rule 62(b) speaks of a stay "pending disposition" of these post-judgment motions. Are courts receptive to ordering a stay before a motion is filed under Rules 50, 52, 59, or 60, either in general or after an express representation that a motion will be, or is quite likely to be, filed? Would problems arise from extending the automatic stay to 28 or 30 days? Would the problems be reduced if Rule 62 is amended to make clear the court's authority to modify or dissolve the automatic stay?

How often do problems arise in agreeing on the form of security, whether a bond or something else? Are there practical difficulties in arranging a convenient and seamless form of security that runs from expiration of the automatic stay through final disposition of an appeal?

More generally, would it be desirable to amend Rule 62 to provide more explicit recognition of the district court's authority to modify, dissolve, or deny any stay? And its

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authority to set appropriate terms both for the form and amount of security? And to exact security as a condition of allowing immediate execution of part or all of a judgment?

These questions are set against the background of Appellate Rule 8(a)(1), which directs that a party must ordinarily move first in the district court for a stay pending appeal or approval of a supersedeas bond. When the court of appeals does act, Rule 8(a)(2)(E) says blandly that it "may condition relief on a party's filing a bond or other appropriate security in the district court." The combination of district-court primacy and appellate-court flexibility suggest the possible value of recognizing a full range of district-court discretion in Rule 62.

Discussion of these issues in the Committee focused on the more adventuresome of two initial drafts presented to illustrate possible approaches to revising Rule 62. This draft aims at explicit statement of the district court's several responsibilities. The automatic stay remains, and is extended to 30 days to reach beyond the 28-day limit for post-judgment motions under Rules 50, 52, and 59. The district court, however, has authority to dissolve the automatic stay or to supersede it during the 30-day period. The district court, further, has authority to order a stay, during or after the period set for the automatic stay, that may last until issuance of the mandate on appeal. The court has discretion as to the form and amount of security. It can modify or dissolve a stay. And it can require security as a condition of refusing or dissolving a stay. The right to obtain a stay on posting a supersedeas bond is tentatively retained, but flagged as a question for further deliberation; if it is retained, the revised rule might direct that the amount be set at 125% of the judgment.

The central point made in Committee discussion was that neither the judges nor the lawyers have encountered difficulties with stays of money judgments pending appeal. Ordinarily the parties work out a reasonable solution, albeit with occasional "power struggles." Still, the draft set out below was addressed by some members as a clear and useful reformulation.

The Subcommittee will continue work on Rule 62.

Rule 62. Stay of Proceedings to Enforce a Judgment.

(a) STAY OF JUDGMENT TO PAY MONEY. Execution on a judgment to pay money, and proceedings to enforce it, are stayed as follows:

(1) *Automatic Stay.* Unless the court orders otherwise, for 30 days after the judgment is entered.[4]

[4] The 30-day period allows only 2 days after expiration of the 28-day period for post-judgment motions under Rules 50, 52, and 59. A longer period could be adopted. Or separate provision could be made for cases in which a timely motion is made under Rules 50, 52, or 59, or a motion is made under Rule 60 within the time allowed to move under Rules 50, 52, or 59.

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(2) *By Court Order*. The court may at any time order a stay until a time designated by the court[, which may be as late as issuance of the mandate on appeal].

(3) *By Supersedeas Bond.*[5] If an appeal is taken, the appellant may obtain a stay by supersedeas bond or other security [in an amount equal to one hundred and twenty-five percent of the amount of the money judgment]. The bond [or other security] may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court approves the bond or other security.

(b) TERMS [OF STAY].

(1) *Terms.* The court may set appropriate terms for the opposing party's security[6] for any[7] stay or on denying or terminating a stay.[8]

(2) *Dissolving or Modifying a Stay*. The court may[, for good cause,] dissolve the stay or modify [the terms set under Rule 62(b)(1)] [its terms].

(c) STAY OF INJUNCTION, RECEIVERSHIP, AND PATENT ACCOUNTING ORDERS.

(1) Unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

(A) an interlocutory or final judgment in an action for an injunction or a receivership; or

---

[5] This is carried forward for the moment, without attempting to answer the question whether a stay should require a court order, compare the injunction provisions carried forward here as subdivision (c).

11 Wright, Miller & Kane, Federal Practice & Procedure: Civil 3d, § 2905, states flatly that a stay on posting a supersedeas bond is a matter of right. It also asserts that the courts have inherent power to dispense with any security, to set the amount at less than the judgment, and to specify a form of security other than a bond.

[6] Is this clear enough to support discretion to deny any security, and discretion as to the form and amount of security?

[7] "any" rather than "a" to emphasize that the court can terminate the automatic stay.

[8] This is new, but seems to make sense: Execution cannot always be undone. It may be useful to allow execution only if there is security for the judgment debtor.

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(B) a judgment or order that directs an accounting in an action for patent infringement.

(2) While an appeal is pending from an interlocutory order or final judgment that grants,[9] dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:

(A) by that court sitting in open session; or

(B) by the assent of all its judges, as evidenced by their signatures.

II.G. PILOT PROJECTS

The discussion of pilot projects at the January meeting of the Standing Committee stimulated further discussion of the opportunities to foster projects that will advance the base of empirical information that can be used in crafting improved rules of procedure.

Rule 83, reflecting 28 U.S.C. § 2071(a), directs that a local rule must be consistent with Enabling Act rules. A proposal to amend Rule 83 to allow experimentation with local rules inconsistent with the national rules, upon approval by the Judicial Conference and with a 5-year time limit, was studied and abandoned more than 20 years ago. The Committee agreed that attention must be paid to the problem of inconsistency when a pilot project is implemented through local court rules, but recognized that many of the national rules are sufficiently flexible to avoid inconsistency with a more directive local rule. Often the pilot project rule will simply prescribe something that could be ordered under the national rule.

Several possible subjects for pilot projects were discussed.

One subject, often identified in the past, is to expand the scope of initial disclosures under Rule 26(a)(1). The project might simply recreate the original version of Rule 26(a)(1) that took effect in 1993, only to be scaled back in 2000 in order to win support for eliminating the provision that allowed districts to opt out by local rule. Or it might test a rule demanding still greater disclosures, perhaps modeled on part or all of Arizona Rule 26.1. In a different direction, developing experience with the protocols for initial discovery in individual employment actions may provide useful empirical data.

Discussion of initial disclosure pointed to an issue that may prove common to many possible pilot projects. Implementing a project on initial disclosure in the District of Arizona

[9] Should this list include the other categories in § 1292(a)(1): orders that modify or continue an injunction? That refuse to dissolve or modify an injunction? For that matter, should "denies" become "refuses" to parallel § 1292(a)(1)?

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would provide a much quicker start up because most lawyers in the federal court would be accustomed to state-court disclosure requirements. On the other hand, information on how a rule would work in a system populated by lawyers with two decades of experience in a similar regime may not be as valuable as information gathered in courts where broad initial disclosure would come as a "shock to the system."

Discussion of docket practices designed to speed cases toward conclusion, including "rocket docket" practices, branched out into discussion of the tracking systems used by some federal courts to assign cases to different procedural regimes depending on general characteristics. These systems might be developed into more formal means to identify simplified procedures that could be adopted more generally. This discussion led to still other means to expedite litigation, including such matters as summary jury trials, e-discovery neutrals, and e-discovery experts on the court's staff. Means of facilitating disposition of cases that require review and decision on an administrative record or an employee-benefit record also were mentioned.

The Committee will develop the opportunities for advancing pilot projects through a newly appointed Subcommittee on Pilot Projects. The Subcommittee has begun its work. It will look for guidance in both state courts and federal courts. Experience with actual pilot projects will be one target. Examples of state rules or practices, and of local federal rules and practices, also may provide inspiration for innovations that might profitably be tested through formal pilot projects in the federal courts.

APPENDIX

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RULE 23 SUBCOMMITTEE REPORT

The Rule 23 Subcommittee has continued to work on the areas it identified before the Advisory Committee's October, 2014, meeting. This work has included conference calls on Dec. 17, 2014, Feb. 6, 2015, and Feb. 12, 2015. Notes on those calls should be included with these agenda materials.

The Subcommittee continues its efforts to become fully informed about pertinent issues regarding Rule 23 practice today. Besides generally keeping an eye out to identify pertinent developments and concerns, Subcommittee members have attended, and expect to attend a considerable number of events about class action practice that together should offer a broad range of views. These events include the following:

ABA 18th Class Action Institute (Chicago, Oct. 23-24, 2014).

Lawyers for Civil Justice Membership Meeting (New York, Dec. 4-5, 2014).

The Impact Fund 13th Annual Class Action Conference (Berkeley, CA, Feb. 26-27, 2015).

George Washington University Roundtable on Settlement Class Actions (Washington, D.C. April 8, 2015).

ALI discussion of Rule 23 issues (Washington, D.C., May 17, 2015).

ABA Litigation Section Meeting (San Francisco, June 19)

American Assoc. for Justice Annual Meeting (Montreal, Canada, July 11-14)

Civil Procedure Professors' Conference (Seattle, WA, July 17)

Duke Law Conference on Class-Action Settlement (Washington, D.C., July 23-24)

Defense Research Institute Conference on Class Actions (Washington, D.C., July 23-24)

Discovery Subcommittee Mini-Conference (DFW Airport, Sept. 11, 2015).

Association of American Law Schools Annual Meeting (New York, Jan. 6-10, 2016) [Participation in this event has not been arranged, but efforts are underway to make such arrangements.]

As should be apparent, the Subcommittee is trying to gather information from many sources as it moves forward. Its present intention is to be in a position to present drafts for possible amendments to the full Committee at its Fall 2015 meeting. If that proves possible, it may be that a preliminary discussion of those amendment ideas can be had with the Standing Committee during its January, 2016, meeting, and a final review of amendment proposals at the Advisory Committee's Spring, 2016, meeting. That schedule would permit submission of proposed preliminary drafts to the Standing Committee at its meeting in May or June of 2016, with a recommended August, 2016,

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date for publication for public comment. If that occurred, rule changes could go into effect as soon as Dec. 1, 2018. But it is by no means clear that this will prove to be a realistic schedule.

For the present, the key point is that **there is no assurance that the Subcommittee will ultimately recommend any amendments. In addition, although it has identified issues that presently seem to warrant serious examination, it has not closed the door on other issues. Instead, it remains open to suggestions about other issues that might justify considering a rule change, as well as suggestions that the issues it has identified are not important or are not likely to be solved by a rule change. Even if the Subcommittee does eventually recommend that the full Committee consider changes to Rule 23, the recommendations may differ from the ideas explored in this memorandum.**

The purpose of this memorandum, therefore, is to share with the full Committee the content and fruit of the Subcommittee's recent discussions. The hope is that the discussion at the full Committee meeting will illuminate the various ideas generated so far, and also call attention to additional topics that seem to justify examination by the Subcommittee.

The time has come for moving beyond purely topical discussion, however. In order to make the discussion more concrete, this memorandum presents conceptual sketches of some possible amendments, sometimes accompanied with possible Committee Note language that can provide an idea of what a Note might actually say if rule changes along the lines presented were proposed. **These conceptual sketches are not intended as initial drafts of actual rule change proposals, and should not be taken as such. By the time the Subcommittee convenes its mini-conference in September, 2015, it may be in a position to offer preliminary ideas about such drafts. But as the array of questions in this memorandum attests, it has not reached that point yet.**

The Subcommittee's work has been greatly assisted by review of the ALI Principles of Aggregate Litigation. Those Principles embody a careful study of some of the issues covered in this memorandum, and occasionally provide a starting point in analysis of those issues, and in drafting possible rule provisions to address them.

The topics covered in this memorandum are:

(1) Settlement Approval Criteria
(2) Settlement Class Certification
(3) Cy Pres Treatment
(4) Dealing With Objectors
(5) Rule 68 Offers and Mootness
(6) Issue Classes
(7) Notice
Appendix I: Settlement Review Factors -- 2000 Draft Note
Appendix II: Prevailing Class Action Settlement Approval Factors Circuit-By-Circuit

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(1) Settlement Approval Criteria

In 2003, Rule 23(e) was amended to expand its treatment of judicial review of proposed class-action settlements. To a considerable extent, those amendments built on existing case law on settlement approval. As amended in 1966, Rule 23(e) required court approval for settlement, compromise, or voluntary dismissal of a class action, but it provided essentially no direction about what the court was to do in reviewing a proposed settlement.[1]

Left to implement the rule's requirement of court approval of settlement, the courts developed criteria. To a significant extent, that case law development occurred during the first two decades after Rule 23 was revised in 1966. It produced somewhat similar, but divergent, lists of factors to be employed in different circuits. The Subcommittee has compiled a list of the factors used in the various circuits that is attached as an Appendix to this memorandum.

Several points emerge from the lists of factors. One is that, although they are similar, they are not the same. Thus, lawyers in different circuits, even when dealing with nationwide class actions, would need to attend to the particular list employed in the particular circuit. A second point is that at least some of the factors that some courts adopted in the 1970s seem not to be very pertinent to contemporary class action practice. Yet they command obeisance in the circuits that employ them even though they probably do not facilitate the court's effort to decide whether to approve a proposed settlement. A third point is that there are other matters, not included in the courts' 1970s-era lists, that contemporary experience suggests should matter in assessing settlements.

The ALI Aggregate Litigation Principles proposed a different approach, which is partly reflected in the conceptual discussion draft below. The ALI explanation for its approach was as follows:

> The current case law on the criteria for evaluating settlements is in disarray. Courts articulate a wide range of factors to consider, but rarely discuss the significance to be given to each factor, let alone why a particular factor is probative. Factors mentioned in the cases include, among others [there follows a list of about 17 factors].
>
> Many of these criteria may have questionable probative value in various circumstances. For instance, although a court might give weight to the fact that counsel for the class or the defendant favors the settlement, the court should keep in mind that the lawyers who negotiated the settlement will rarely offer anything less than a strong favorable endorsement.

ALI Aggregate Litigation Principles § 3.05 Comment (a) at 205-06.

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[1] From 1966 to 2003, Rule 23(e) said, in toto: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal shall be given to all members of the class in such manner as the court directs."

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There are two appendices at the end of the memorandum that offer further details and ideas. Appendix I is the draft Committee Note developed early in the evolution of Rule 23(e) amendments in 2000-02. It offers a list of factors that might be added to a rule revision, or to a Committee Note. The approach of the conceptual draft of the rule amendment idea below, however, trains more on reducing the focus to four specified considerations that seem to be key to approval, adding authority to decline approval based on other considerations even if positive findings can be made on these four topics.

Appendix II offers a review of the current "approval factors" in the various circuits, plus additional information about the California courts' standards for approving settlements and the ALI Principles approach.

As Committee members consider this conceptual draft and the alternative details in Appendix I and Appendix II, one way of approaching the topic is to ask whether adopting a rule like this would provide important benefits. Balanced against that prospect is the likelihood that amending the rule would also produce a period of uncertainty, particularly if it supersedes current prevailing case law in various circuits. At the same time, it may focus attention for courts, counsel, and even objectors, on matters that are more important than other topics included on some courts' lists of settlement-approval factors.

Conceptual Discussion Draft of Rule 23(e)
Amendment Idea

1 **(e)** **Settlement, Voluntary Dismissal, or Compromise.** The claims, issues, or defenses of a
2 certified class may be settled, voluntarily dismissed, or compromised only with the court's
3 approval. The following procedures apply to a proposed settlement, voluntary dismissal, or
4 compromise:
5
6 * * * * *
7
8 **(2)** If the proposal would bind class members,
9
10 *Alternative 1*
11
12 (A) the court may approve it only after a hearing and on finding that it is fair,
13 reasonable, and adequate. The court may make this finding only on finding
14 that:
15
16 *Alternative 2*
17
18 (A) the court may approve it only after a hearing and on finding that: ~~it is fair,~~
19 ~~reasonable, and adequate.~~
20
21
22 (i) the class representatives and class counsel have been and currently are

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23 adequately representing the class;
24
25 (ii) the relief awarded to the class (taking into account any ancillary
26 agreement that may be part of the settlement) is fair, reasonable, and
27 adequate given the costs, risks, probability of success, and delays of
28 trial and appeal;
29
30 (iii) class members are treated equitably (relative to each other) based on
31 their facts and circumstances and are not disadvantaged by the
32 settlement considered as a whole; and
33
34 (iv) the settlement was negotiated at arm's length and was not the product of
35 collusion.
36
37 (B) The court may also consider any other matter pertinent to approval of the
proposal, and may refuse to approve it on any such ground.

Conceptual Sketch of Committee Note Ideas

1 In 2003, Rule 23(e) was amended to direct that a court may approve a settlement proposal
2 in a class action only on finding that it is "fair, reasonable, and adequate." This provision was based
3 in large measure on judicial experience with settlement review. Since 2003, the courts have gained
4 more experience in settlement review.
5
6 Before 2003, many circuits had developed lists of "factors" that bore on whether to approve
7 proposed class-action settlements. Although the lists in various circuits were similar, they differed
8 on various specifics and sometimes included factors of uncertain utility in evaluating proposed
9 settlements. The divergence among the lists adopted in various circuits could sometimes cause
10 difficulties for counsel or courts.
11
12 This rule is designed to supersede the lists of factors adopted in various circuits with a
13 uniform set of core factors[2] that the court must find satisfied before approving the proposal. Rule
14 23(e)(2)(A) makes it clear that the court must affirmatively find all four of the enumerated factors
15 satisfied before it may approve the proposal.
16
17 But this is not a closed list; under Rule 23(e)(2)(B) the court may consider any matter
18 pertinent to evaluating the fairness of the proposed settlement.[3] The rule makes it clear that the court

[2] Is this really accurate? The rule permits the court to refer to "any other matter pertinent to approval of the proposal." Should the point be to offer evaluations of factors endorsed in the past by some courts? See Appendix II regarding the factors presently employed in various circuits.

[3] It might be that a much more extensive discussion of other factors could be added here, along the lines of the material in Appendix I.

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19 may disapprove the proposal on such a ground even though it can make the four findings required
20 by Rule 23(e)(2)(A). Some factors that have sometimes been identified as pertinent seem ordinarily
21 not to be, however. For example, the fact that counsel for the class and the class opponent support
22 the proposal would ordinarily not provide significant support for a court's approval of the proposal.
23 Somewhat similarly, particularly in cases involving relatively small individual relief for class
24 members, the fact the court has received only a small number of objections may not provide
25 significant support for a finding the settlement is fair.[4]
26
27 [Before notice is sent to the class under Rule 23(e)(1), the court should make a preliminary
28 evaluation of the proposal. If it is not persuaded that the proposal provides a substantial basis for
29 possible approval, the court may decline to order notice. But a decision to order notice should not
30 be treated as a "preliminary approval" of the proposal, for the required findings and the decision to
31 approve a proposal must not be made until objections are evaluated and the hearing on the proposal
32 occurs.][5]
33
34 The first factor calls for a finding that the class representatives and class counsel have
35 provided adequate representation. This factor looks to their entire performance in relation to the
36 action. One issue that may be important in some cases is whether, under the settlement, the class
37 representatives are to receive additional compensation for their efforts.[6] Another may in some
38 instances be the amount of any fee for class counsel contemplated by the proposed settlement.[7] In

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[4] Is this discussion of "suspect" factors sufficient?

[5] This paragraph attempts to introduce something endorsed by the ALI Principles – that preliminary authorization for notice to the class not become "preliminary approval." Whether saying so is desirable could be debated. Whether saying so in the Note is sufficient if saying so is desirable could also be debated. One could, for example, consider revising Rule 23(e)(1) along the following lines:

> **(1)** The court must, after finding that giving notice is warranted by the terms of the proposed settlement, direct notice in a reasonable manner to all class members who would be bound by the proposal.

[6] This factor seems worth mentioning, but perhaps it should not be singled out. It could cut either way. In a small-claim case, it might be sensible to provide reasonable additional compensation for the representative, who otherwise might have had to do considerable work for no additional compensation. The better the "bonus" corresponds to efforts expended by the representation working on the case, the stronger this factor may favor the settlement. The more the amount of compensation reflects some sort of "formula" or set amount unrelated to effort from the representative, the more it may call the fairness of the settlement into question. When the individual recovery is small and the incentive bonus for the class representatives is large, that may, standing alone, raise questions about the settlement, given that the class representatives may have much to lose if the settlement is not approved but little to gain if the case goes to trial and the class recovers many times what the settlement provides.

[7] This factor also seems worth mentioning in the Note. Presumably an agreement that says the court will set the attorney fee, and nothing more, raises fewer concerns than one that says the defendant will not oppose a fee up to $*X*. But the amount of the fee is often included in the Rule 23(e) notice of proposed settlement so that an additional notice is not mandated by Rule 23(h)(1).

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some instances, the court has already appointed class counsel under Rule 23(g).[8] The court would then need only review the performance of counsel since that time. In making this determination about the performance of class counsel in connection with the negotiation of the proposal, the court should be as exacting as Rule 23(g) requires for appointment of class counsel.

The second factor calls for the court to assess the relief awarded to the class under the proposed settlement in light of a variety of practical matters that bear on whether it is adequate. In connection with this factor, it may often be important for counsel to provide guidance to the court about how these considerations apply to the present action. For example, the prospects for success on the merits, and the likely dimensions of that success, should be evaluated. It may also be important for the court to attend to the degree of development of the case to determine whether the existing record affords a sufficient basis for evaluation of these factors. There is no "minimum" amount of discovery, or other work, that must be done before the parties reach a proposed settlement, but the court may seek assurance that it has a firm foundation for assessing the considerations listed in the second factor.[9]

The third factor requires the court to find that the proposed method of allocating the benefits of the settlement among members of the proposed class is equitable. A pro rata distribution is not required, but the court may inquire into the proposed method for allocating the benefits of the settlement among members of the class. [It is possible that this inquiry may suggest the need for subclassing.][10]

The fourth factor partly reinforces the first factor, and may take account of any agreements identified pursuant to Rule 23(e)(3). The court should pay close attention to specifics about the manner and content of negotiation of the proposed settlement. Any "side agreements" that emerged from the negotiations deserve scrutiny. These inquiries may shed light on the second and third factors as well.

Any other factors that are pertinent to whether to approve the proposed settlement deserve attention in the settlement-review process. The variety of factors that might bear on a given proposed settlement is too large for enumeration in a rule, although some that have been mentioned by some courts – such as support from the counsel who negotiated the settlement – would ordinarily not be entitled to much weight.

This rule provides guidance not only for the court, but also for counsel supporting a proposed

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[8] This would include the appointment of "interim counsel" under Rule 23(g)(3), and that fact could be mentioned in the Note if it were considered desirable to do so.

[9] This paragraph attempts to invite appropriate judicial scrutiny of the possible risks of a cheap "early bird" settlement, but also to ward off arguments that no settlement can be approved until considerable "merits" discovery has occurred, or something of the sort.

[10] Is this bracketed language a desirable thing to include in the Note? The point seems obvious in some ways, but the consequences of subclassing may be to delay, or perhaps derail, a settlement.

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74 settlement and for objectors to a proposed settlement. [The burden of supporting the proposed
75 settlement falls initially on the proponents of the proposal. As noted above, the court's initial
76 decision that notice to the class was warranted under Rule 23(e)(1) does not itself constitute a
77 "preliminary" approval of the proposal's terms.][11]
78
79 [As noted in Rule 23(e)(4) regarding provision of a second opt-out right, the court may
80 decline to approve a proposed settlement unless it is modified in certain particulars. But it may not
81 "approve" a settlement significantly different from the one proposed by the parties. Modification
82 of the proposed settlement may make it necessary to give notice the class again pursuant to Rule
83 23(e)(1) to permit class members to offer any further objections they may have, or (if the
84 modifications increase significantly the benefits to class members) for class members who opted out
to opt back into the class.][12] [13]

(2) Settlement Class Certification

The Committee is not writing on a blank slate in addressing this possibility. In 1996, it published a proposal to adopt a new Rule 23(b)(4) explicitly authorizing certification for settlement purposes, under Rule 23(b)(3) only, in cases that might not qualify for certification for litigation

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[11] This language about the burden of supporting the settlement seems implicit in the rule, and corresponds to language in ALI § 3.05(c).

[12] This paragraph pursues suggestions in ALI § 3.05(e). Are these ideas worthy of inclusion in the Note?

[13] The above sketch of a draft Note says little about the claims process. It may be that more should be said. ALI § 3.05 comment (f) urges that, when feasible, courts avoid the need for submission of claims, and suggests that direct distributions are usually possible when the settling party has reasonably up-to-date and accurate records. This suggestion is not obviously tied to any black letter provision.

The whole problem of claims processing may deserve attention. It is not currently the focus of any rule provisions. It may relate to the cy pres phenomenon discussed in part (3) below. If defendant gets back any residue of the settlement funds, it may have an incentive to make the claims procedure long and difficult. Keeping an eye on that sort of thing is a valid consideration for the court when it passes on the fairness of the settlement. In addition, in terms of valuing the settlement for the class as part of the attorneys' fee decision, the rate of actual claiming may be an important criterion. Cf. 28 U.S.C. § 1712(a) (requiring, in "coupon settlement" cases, that the focus in setting attorney fees be on "the value to class members of the coupons that are redeemed"). If there is a way to avoid the entire effort of claims submission and review, that might solve a number of problems that have plagued some cases in the past.

At the same time, a "streamlined" claims payment procedure may benefit some class members at the expense of others. A more particularized claims process might differentiate between class members in terms of their actual injuries in ways not readily achievable using only the defendant's records.

Altogether, these issues present challenges. Whether they are suitable topics for a rule provision is another matter. Up until now, they have largely been regarded as matters of judicial management rather than things to be addressed by rule. See Manual for Complex Litigation (4th) § 21.66 (regarding settlement administration).

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purposes. This history may be very familiar to some members of the Committee, but for some it may have receded from view. In order to provide that background, the 1996 rule proposal and accompanying Committee Note are set out. In addition, footnotes call attention to developments since then and contemporary issues that seem relevant to the matter currently before the Committee.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

* * * * *

(4) the parties to a settlement request certification under subdivision (b)(3) for purposes of settlement, even though the requirements of subdivision (b)(3) might not be met for purposes of trial.

* * * * *

The draft Committee Note that accompanied that proposal was as follows (with some footnotes to mention issues presented by doing the same thing as before).

Subdivision (b)(4) is new. It permits certification of a class under subdivision (b)(3) for settlement purposes, even though the same class might not be certified for trial. Many courts have adopted the practice reflected in this new provision. See, e.g., Weinberger v. Kendrick, 698 F.2d 61, 72-73 (2d Cir.1982); In re Beef Industry Antitrust Litigation, 607 F.2d 167, 170-71, 173-78 (5th Cir.1979). Some very recent decisions, however, have stated that a class cannot be certified for settlement purposes unless the same class would be certified for trial purposes. See Georgine v. Amchem Products, Inc., 83 F.3d 610 (3d Cir.1996); In re General Motors Corp. Pick-Up Trick Fuel Tank Litigation, 55 F.3d 768 (3d Cir. 1995). This amendment is designed to resolve this newly apparent disagreement.[14]

Although subdivision (b)(4) is formally separate, any class certified under its terms is a (b)(3) class with all the incidents of a (b)(3) class, including the subdivision (c)(2) rights to notice and to request exclusion from the class. Subdivision (b)(4) does not speak to the question whether a settlement class may be certified under subdivisions (b)(1) or (b)(2).[15]

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[14] Obviously resolving that 1996 circuit conflict is no longer necessary given the Amchem decision; the issue now is whether to modify what Amchem said or implied.

[15] Deleting the limitation to (b)(3) classes would speak to that question. In speaking to it, one could urge that, at least where there really is "indivisible" relief sought, it does seem that a settlement class should be possible. Perhaps a police practices suit would be an example. Could the SDNY stop-and-frisk class action have been resolved as a settlement class action? It may be that using a class action would be essential to avoid standing issues. See City of Los Angeles v. Lyons, 461 U.S. 95 (1983) (holding that plaintiff injured by police use of choke-hold could sue for damages, but not for an injunction because he could not show it would likely be used on him again). Issues of class definition, and particularly ascertainability, may present

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15 As with all parts of subdivision (b), all of the prerequisites of subdivision (a) must be
16 satisfied to support certification of a (b)(4) settlement class.[16] In addition, the predominance
17 and superiority requirements of subdivision (b)(3) must be satisfied.[17] Subdivision (b)(4)
18 serves only to make it clear that implementation of the factors that control certification of
19 a (b)(3) class is affected by the many differences between settlement and litigation of class
20 claims or defenses. Choice-of-law difficulties, for example, may force certification of many
21 subclasses, or even defeat any class certification, if claims are to be litigated.[18] Settlement
22 can be reached, however, on terms that surmount such difficulties. Many other elements are
23 affected as well. A single court may be able to manage settlement when litigants would
24 require resort to many courts. And, perhaps most important, settlement may prove far
25 superior to litigation in devising comprehensive solutions to large-scale problems that defy
26 ready disposition by traditional adversary litigation.[19] Important benefits may be provided
27 for those who, knowing of the class settlement and the opportunity to opt out, prefer to
28 participate in the class judgment and avoid the costs of individual litigation.
29
30 For all the potential benefits, settlement classes also pose special risks. The court's
31 Rule 23(e) obligations to review and approve a class settlement commonly must surmount
32 the information difficulties that arise when the major adversaries join forces as proponents
33 of their settlement agreement.[20] Objectors frequently appear to reduce these difficulties, but

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challenges in such cases. But it may be that recognizing that settlements are available options in such cases as to future conduct is desirable. It is worth noting that Rule 23 currently has no requirement of notice of any sort to the class in (b)(2) actions unless they are settled.

[16] On this score, the application of (a)(2) in Wal-Mart Stores, Inc. v. Dukes may be of particular importance.

[17] This sentence was written before Amchem was decided; the Supreme Court fairly clearly said that predominance remained important, but that manageability (a factor in making both the predominance and superiority decision) did not. Whether to continue to require predominance to be established in (b)(4) class actions is open to discussion and raised by an alternative possible rule change explored below in text.

[18] Choice-of-law challenges might be precisely the sort of thing that could preclude settlement certification under a strong view of the predominance requirement. As Sullivan v. DB Investment suggests, differing state law may be accommodated in the settlement context.

[19] Arguably there is a principled tension among the courts of appeal that is pertinent to this point. The Third Circuit has said several times that class-action settlements are desirable to achieve a nationwide solution to a problem. The Seventh Circuit, on the other hand, has on one occasion at least said that "the vision of 'efficiency' underlying this class certification is the model of the central planner. * * * The central planning model – one case, one court, one set of rules, one settlement price for all involved – suppresses information that is vital to accurate resolution." In re Bridgestone/Firestone, 288 F.3d 1012, 1020 (7th Cir.2002).

[20] It should be noted that when this draft Note was written Rule 23(e) was relatively featureless, directing only that court approval was required for dismissal. In 2003, it was augmented with many specifics, and part (1) of this memorandum offers a proposal to refine and focus those specifics.

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34 it may be difficult for objectors to obtain the information required for a fully informed
35 challenge. The reassurance provided by official adjudication is missing. These difficulties
36 may seem especially troubling if the class would not have been certified for litigation, or was
37 shaped by a settlement agreement worked out even before the action was filed.
38
39 These competing forces are reconciled by recognizing the legitimacy of settlement
40 classes but increasing the protections afforded to class members. Certification of a
41 settlement class under (b)(4) is authorized only on request of parties who have reached a
42 settlement. Certification is not authorized simply to assist parties who are interested in
43 exploring settlement, not even when they represent that they are close to agreement and that
44 clear definition of a class would facilitate final agreement.[21] Certification before settlement
45 might exert untoward pressure to reach agreement, and might increase the risk that the
46 certification could be transformed into certification of a trial class without adequate
47 reconsideration.[22] These protections cannot be circumvented by attempting to certify a
48 settlement class directly under subdivision (b)(3) without regard to the limits imposed by
49 (b)(4).
50
51 Notice and the right to opt out provide the central means of protecting settlement
52 class members under subdivision (b)(3),[23] but the court also must take particular care in
53 applying some of Rule 23's requirements. As to notice, the Federal Judicial Center study
54 suggests that notices of settlement do not always provide the clear and succinct information
55 that must be provided to support meaningful decisions whether to object to the settlement

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[21] Note that, as added in 2003, Rule 23(g)(3) authorizes appointment of interim class counsel, a measure that may enable the court to exercise some control over the cast authorized to negotiate a proposed class settlement in the pre-certification phase of the litigation. The Committee Note accompanying this rule addition in 2003 explained:

> Settlement may be discussed before certification. Ordinarily, such work is handled by the lawyer who filed the action. In some cases, however, there may be rivalry or uncertainty that makes formal designation of interim counsel appropriate. [The new rule provision] authorizes the court to designate interim counsel to act on behalf of the putative class before the certification decision is made. Failure to make the formal designation does not prevent the attorney who filed the action from proceeding in it. Whether or not formally designated interim counsel, an attorney who acts on behalf of the class before certification must act in the best interests of the class as a whole. For example, an attorney who negotiates a pre-certification settlement must seek a settlement that is fair, reasonable, and adequate for the class.

[22] This comment seems designed to make the point in ALI § 3.06(d) – that statements made in support of settlement class certification should not be used against a party that favored such certification but later opposes litigation certification. Perhaps that asks too much of the judge.

[23] Needless to say, this comment is not applicable to (b)(1) or (b)(2) certification, if those were included in (b)(4). It could be noted that 23(e) requires notice (but not opt out) in such cases.

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56 or – if the class is certified under subdivision (b)(3) – whether to request exclusion.[24] One
57 of the most important contributions a court can make is to ensure that the notice fairly
58 describes the litigation and the terms of the settlement. Definition of the class also must be
59 approached with care, lest the attractions of settlement lead too easily to an over-broad
60 definition. Particular care should be taken to ensure that there are not disabling conflicts of
61 interests among people who are urged to form a single class. If the case presents facts or law
62 that are unsettled and that are likely to be litigated in individual actions, it may be better to
63 postpone any class certification until experience with individual actions yields sufficient
information to support a wise settlement and effective review of the settlement.

Conceptual Draft of 23(e) Amendment Idea

The animating objective of the conceptual draft below is to place primary reliance on superiority and the invigorated settlement review (introduced in part (1) of this memorandum) to assure fairness in the settlement context, and therefore to remove emphasis on predominance when settlement certification is under consideration.

An underlying question is whether such an approach should be limited to (b)(3) class actions. There may be much reason to include (b)(2) class actions in (b)(4) but perhaps less reason to include (b)(1) cases.

Another question is whether it should be required that in any case seeking certification for purposes of settlement under (b)(4) the parties demonstrate that all requirements of Rule 23(a) are satisfied. Arguably, some of those – typicality, for example – don't matter much at the settlement stage. Concern that the past criminal history of the class representative might come into evidence at trial (assuming that makes the representative atypical) may not matter then. On the other hand, introducing a new set of "similar" criteria that are different could produce difficulties. This conceptual draft therefore offers an Alternative 2 that does not invoke Rule 23(a), but the discussion focuses on Alternative 1, which does invoke the existing rule. If the Alternative 2 approach is later preferred, adjustments could be made.

1 **(b) Types of Class Actions.** A class action may be maintained if Rule 23(a) is satisfied
2 and if:
3
4 * * * * * *
5
6 *Alternative 1*
7
8
9 (4) the parties to a settlement [in an action to be certified under subdivision (b)(3),]
10 request certification and the court finds that the action satisfies Rule 23(a), that the

[24] Note that, as amended in 2003, Rule 23(c)(2)(B) responds to the sorts of concerns that were raised by the FJC study.

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11 proposed settlement is superior to other available methods for fairly and efficiently
12 adjudicating the controversy, and that it should be approved under Rule 23(e).
13
14 *Alternative 2*
15
16 (4) the parties to a settlement [in an action to be certified under subdivision (b)(3),]
17 request certification and the court finds that significant common issues exist, that the
18 class is sufficiently numerous to warrant classwide treatment, and that the class
19 definition is sufficient to ascertain who is and who is not included in the class. The
20 court may then grant class certification if the proposed settlement is superior to other
21 available methods for fairly and efficiently adjudicating the controversy, and that it should be approved under Rule 23(e).[25]

This approach seems clearly contrary to Amchem, which said that Rule 23(e) review of a settlement was not a substitute for rigorous application of the criteria of 23(a) and (b). It also may appear to invite the sort of "grand compensation scheme" quasi-legislative action by courts that the Court appeared to disavow in Amchem. Particularly if this authority were extended beyond (b)(3),[26] and a right to opt out were not required, this approach seems very aggressive. Below are some thoughts about the sorts of things that might be included in a sketch of a draft Committee Note.

Sketch of Draft Committee Note ideas
[Limited to Alternative 1]

1 Subdivision (b)(4) is new. In 1996, a proposed new subdivision (b)(4) was published for
2 public comment. That new subdivision would have authorized certification of a (b)(3) class for
3 settlement in certain circumstances in which certification for full litigation would not be possible.
4 One stimulus for that amendment proposal was the existence of a conflict among the courts of
5 appeals about whether settlement certification could be used only in cases that could be certified for
6 full litigation. That circuit conflict was resolved by the holding in *Amchem Products, Inc. v.*

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[25] ALI § 3.06(b) says that "a court may approve a settlement class if it finds that the settlement satisfies the criteria of [Rule 23(e)], and it further finds that (1) significant common issues exist; (2) the class is sufficiently numerous to warrant classwide treatment, and (3) the class definition is sufficient to ascertain who is and who is not included in the class. The court need not conclude that common issues predominate over individual issues."

[26] On this score, note that ALI § 3.06(c) said:

> In addition to satisfying the requirements of subsection (b) of this Section [quoted in a footnote above], in cases seeking settlement certification of a mandatory class, the proponents of the settlement must also establish that the claims subject to settlement involve indivisible remedies, as defined in the Comment to § 2.04.

Needless to say, "indivisible remedies" is not a term used in the civil rules. Attempting to define them, or some alternative term, might be challenging. § 2.04 has three subsections, and is accompanied by six pages of comments and six pages of Reporters' Notes.

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Windsor, 521 U.S. 591 (1997), that the fact of settlement is relevant to class certification. The (b)(4) amendment proposal was not pursued after that decision.

Rule 23(f), also in the package of amendment proposals published for comment in 1996, was adopted and went into effect in 1998. As a consequence of that addition to the rule, a considerable body of appellate precedent on class-certification principles has developed. In 2003, Rule 23(e) was amended to clarify and fortify the standards for review of class settlements, and subdivisions (g) and (h) were added to the rule to govern the appointment of class counsel, including interim class counsel, and attorney fees for class counsel. These developments have provided added focus for the court's handling of the settlement-approval process under Rule 23(e).

Concerns have emerged about whether it might sometimes be too difficult to obtain certification solely for purposes of settlement. Some reported that alternatives such as multidistrict processing or proceeding in state courts have grown in popularity to achieve resolution of multiple claims.

This amendment is designed to respond to those concerns by clarifying and, in some instances, easing the path to certification for purposes of settlement. Like the 1996 proposal, this subdivision is available only after the parties have reached a proposed settlement and presented it to the court. Before that time, the court may, under Rule 23(g)(3), appoint interim counsel to represent the interests of the putative class.

[Subdivision (b)(4) is not limited to Rule 23(b)(3) class actions. It is likely that actions brought under subdivision (b)(3) will be the ones in which it is employed most frequently, but foreclosing pre-certification settlement in actions brought under subdivisions (b)(1) or (b)(2) seems unwarranted. At the same time, it must be recognized that approving a class-action settlement is a challenging task for a court in any class action. Amendments to Rule 23(e) clarify the task of the judge and the role of the parties in connection with review of a proposed settlement.[27]]

Like all class actions, an action certified under subdivision (b)(4) must satisfy the requirements of Rule 23(a).[28] Unless these basic requirements can be satisfied, a class settlement should not be authorized.

Increasing confidence in the ability of courts to evaluate proposed settlements, and tools available to them for doing so, provide important support for the addition of subdivision (b)(4). For that reason, the subdivision makes the court's conclusion under Rule 23(e) an essential component

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[27] This treatment may be far too spare. Note that the ALI proposal limited the use of "mandatory class action" settlement to cases involving "indivisible relief," a term that is not presently included in the civil rules and that the ALI spent considerable effort defining.

[28] This is a point at which Alternative 2, modeled on the ALI approach, would produce different Committee Note language. Arguments could be made that Wal-Mart Stores, Inc. v. Dukes has raised the bar under Rule 23(a)(2) too high. The ALI approach is to say that "significant common issues" are presented. See ALI § 3.06(b).

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43 to settlement class certification. Under amended Rule 23(e), the court can make the required
44 findings to approve a settlement only after completion of the full Rule 23(e) settlement-review
45 process. Given the added confidence in settlement review afforded by strengthening Rule 23(e), the
46 Committee is comfortable with reduced emphasis on some provisions of Rule 23(a) and (b).[29]
47
48 Subdivision (b)(4) also borrows a factor from subdivision (b)(3) as a prerequisite for
49 settlement certification – that the court must also find that resolution through a class-action
50 settlement is superior to other available methods for fairly and efficiently adjudicating the
51 controversy. Unless that finding can be made, there seems no reason for the court or the parties to
52 undertake the responsibilities involved in a class action.
53
54 Subdivision (b)(4) does not require, however, that common questions predominate in the
55 action. To a significant extent, the predominance requirement, like manageability, focuses on
56 difficulties that would hamper the court's ability to hold a fair trial of the action. But certification
57 under subdivision (b)(4) assumes that there will be no trial. Subdivision (b)(4) is available only in
58 cases that satisfy the common-question requirements of Rule 23(a)(2), which ensure commonality
59 needed for classwide fairness. Since the Supreme Court's decision in Amchem, the courts have
60 struggled to determine how predominance should be approached as a factor in the settlement
61 context. This amendment recognizes that it does not have a productive role to play and removes it.[30]
62
63 Settlement certification also requires that the court conclude that the class representatives
64 are typical and adequate under Rule 23(a)(3) and (4).[31] Under amended Rule 23(e), the court must
65 also find that the settlement proposal was negotiated at arms length by persons who adequately
66 represented the class interests, and that it provides fair and adequate relief to class members, treating
67 them equitably.
68
69 In sum, together with changes to Rule 23(e), subdivision (b)(4) ensures that the court will
70 give appropriate attention to adequacy of representation and the fair treatment of class members
71 relative to each other and the potential value of their claims. At the same time, it avoids the risk that
72 a desirable settlement will prove impossible due to factors that matter only to a hypothetical trial
73 scenario that the settlement is designed to avoid.
74
75 [Should the court conclude that certification under subdivision (b)(4) is not warranted –
76 because the proposed settlement cannot be approved under subdivision (e) or because the
77 requirements of Rule 23(a) or superiority are not met – the court should not rely on the parties'
78 statements in connection with proposed (b)(4) certification in relation to later class certification or

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[29] Without exactly saying so, this sentence is meant to counter the assertion in Amchem that Rule 23(e) is an additional factor, not a superseding consideration, when settlement certification is proposed.

[30] This material attempts to address Amchem's assertion that superiority continues to be important. Is it persuasive? If so, should the Note say that it is changing what the Supreme Court said in Amchem, perhaps by citing the passage in the decision where the court discussed superiority?

[31] As at other points, adopting Alternative 2 would change this.

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merits litigation.][32]

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[32] The ALI Principles include such a provision in the rule. This suggests a comment the Note. The ALI provision seems to have been prompted by one 2004 Seventh Circuit decision, Carnegie v. Household Int'l, Inc., 376 F.3d 656, 660 (7th Cir. 2004). Carnegie was a rather remarkable case. It first came to the Seventh Circuit in Reynolds v. Beneficial National Bank, 288 F.3d 277 (7th Cir. 2002), after the district judge granted settlement class certification and, on the strength of that, enjoined litigation in various state courts against the same defendants on behalf of statewide classes. The Court of Appeals reversed approval of the proposed settlement in the federal court, "concerned that the settlement might have been the product of collusion between the defendants, eager to minimize their liability, and the class lawyers, eager to maximize their fees." 376 F.3d at 659.

The Court of Appeals (under its Local Rule 36), then directed that the case be assigned on remand to a different judge, and the new judge approved the substitution of a new class representative (seemingly an objector the first time around) and appointed new class counsel. This new judge later certified a litigation class very similar to the settlement class originally certified. Defendants appealed that class-certification decision, objecting that the new judge had improperly directed the defendants initially to state their objections to litigation certification, thereby imposing on them the burden of proving that certification was not justified instead of making plaintiff justify certification. The Seventh Circuit rejected this argument because the new judge "was explicit that the burden of persuasion on the validity of the objections [to certification] would remain on the plaintiffs." 376 F.3d at 662.

The Court of Appeals also invoked the doctrine of judicial estoppel, which it explained involved an "antifraud policy" that precluded defendants "from challenging [the class's] adequacy, at least as a settlement class," noting that "the defendants benefitted from the temporary approval of the settlement, which they used to enjoin the other * * * litigation against them." Id. at 660. At the same time, the court acknowledged "that a class might be suitable for settlement but not for litigation." It added comments about the concern that its ruling might chill class-action settlement negotiations (id. at 663):

> The defendants tell us that anything that makes it easier for a settlement class to molt into a litigation class will discourage the settlement of class actions. * * * * But the defendants in this case were perfectly free to defend against certification; they just didn't put up a persuasive defense.

Whether this decision poses a significant problem is debatable. The situation seems distinctive, if not unique. The value of a rule provision concerning the "binding" effect of defendants' support for certification for settlement, or even a comment in the Note is therefore also debatable. In any event, it might not prevent a state court from doing what it says should not be done. Recall that in the original Reynolds appeal (described above), there was an injunction against state-court litigation. Whether a federal rule can prevent a state court from giving weight to these sorts of matters is an interesting issue. As a general matter, this subject reminds us of other provisions about the preclusive effect of class-certification rulings or to decisions disapproving a proposed class settlement. That has been an intriguing prospect in the past, but one the Advisory Committee has not followed.

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(3) Cy pres

The development of cy pres provisions in settlements has not depended meaningfully on any precise provisions of Rule 23. The situations in which this sort of arrangement might be desired probably differ from one another. Several come to mind:

(1) Specific individual claimants cannot be identified but measures to "compensate" them can be devised. The famous California case of Daar v. Yellow Cab, 433 P.2d 732 (Cal. 1967), is the prototype of this sort of thing – because the Yellow Cab meters had been set too high in L.A. for a period of time, the class action resolution required that the Yellow Cab meters be set a similar amount too low for a similar period, thereby conferring a relatively offsetting benefit on more or less the same group of people, people who used Yellow Cabs in L.A. (Note that competing cab companies in this pre-Uber era may not have liked the possibility that customers would favor Yellow Cab cabs because they would be cheaper.)

(2) Individual claimants could be identified, but the cost of identifying them and delivering money to them would exceed the amount of money to be delivered.

(3) A residue is left after the claims process is completed, and the settlement does not provide that the residue must be returned to the defendant. (If it does provide for return to the defendant, there may be an incentive for the defendant to introduce extremely rigorous criteria class members have to satisfy to make claims successfully.)

Whether all these kinds of situations (and others that come to mind) should be treated the same is not certain. In some places state law may actually address such things. See Cal. Code Civ. Proc. § 384, which contains specific directions to California judges about residual funds left after payments to class members.

Much concern has been expressed in several quarters about questionable use of cy pres provisions, and the courts' role in approving those arrangements under Rule 23. Most notable is the Chief Justice's statement regarding denial of certiorari in Marek v. Lane, 134 S.Ct. 8 (2013) that the Court "may need to clarify the limits on the use of such remedies." Id. at 9. That case involved challenges to provisions in a settlement of a class action against Facebook alleging privacy claims.

§3.07 of the ALI Principles directly addresses cy pres in a manner that several courts of appeals have found useful. One might argue that the courts' adoption of §3.07 makes a rule change unnecessary. On the other hand, the piecemeal adoption by courts of the ALI provision seems a dubious substitute, and it may be wise to have in mind the Chief Justice's suggestion that the Supreme Court may need to take a case to announce rules for the subject.

The ALI provision could be a model for additions to Rule 23(e):

1 **(e) Settlement, Voluntary Dismissal, or Compromise.** The claims, issues, or defenses of a
2 certified class may be settled, voluntarily dismissed, or compromised only with the court's

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3 approval. The following procedures apply to a proposed settlement, voluntary dismissal, or
4 compromise:
5
6 * * * * *
7
8 **(3)** The court may approve a proposal that includes a cy pres remedy [if authorized by
9 law][33] even if such a remedy could not be ordered in a contested case. The court
10 must apply the following criteria in determining whether a cy pres award is
11 appropriate:
12
13 **(A)** If individual class members can be identified through reasonable effort, and the
14 distributions are sufficiently large to make individual distributions
15 economically viable, settlement proceeds must[34] be distributed directly to
16 individual class members;
17
18 **(B)** If the proposal involves individual distributions to class members and funds
19 remain after distributions, the settlement must provide for further
20 distributions to participating class members unless the amounts involved are
21 too small to make individual distributions economically viable or other
22 specific reasons exist that would make such further distributions impossible
23 or unfair;
24
25 **(C)** The proposal may provide that, if the court finds that individual distributions are
26 not viable under Rule 23(e)(3)(A) or (B), a cy pres approach may be
27 employed if it directs payment to a recipient whose interests reasonably
28 approximate those being pursued by the class. [The court may presume that

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[33] This bracketed qualification is designed to back away from creating new authority to use cy pres measures. It is clear that some courts have been authorizing cy pres treatment. Indeed, the Eighth Circuit's recent opinion in In re BankAmerica Corp. Securities Lit., 775 F.3d 1060 (8th Cir. 2015), suggested that it is impatient with their willingness to do so. It is less clear where the authority for them to do so comes from. In some places, like California, there is statutory authority, but there are probably few statutes. It may be a form of inherent power, though that is a touchy subject. Adding a phrase of this sort is designed to make clear that the authority does not come from this rule.

On the other hand, one might say that the inclusion of cy pres provisions in the settlement agreement is entirely a matter of party agreement and not an exercise of judicial power. But one might respond that the binding effect of a settlement class action judgment is dependent on the exercise of judicial power, and that the court has a considerable responsibility to ensure the appropriateness of that arrangement before backing it up with judicial power. So the rule would guide the court in its exercise of that judicial power.

In any event, it may be that there is not need to say "if authorized by law" in the rule because – like many other agreements included in settlements – cy pres provisions do not depend on such legal authorization, even if their binding effect does depend on the court's entry of a judgment.

[34] The ALI uses "should," but "must" seems more appropriate.

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29 individual distributions are not viable for sums of less than $100.][35] [If no
30 such recipient can be identified, the court may approve payment to a recipient
31 whose interests do not reasonably approximate the interests being pursued by
32 the class if such payment would serve the public interest.][36]
33

(4~~3~~) The parties seeking approval * * *

As noted above, the ALI proposal has received considerable support from courts. A recent example is In re BankAmerica Securities Litigation, 775 F.3d 1060 (8th Cir. 2015), in which the majority vigorously embraced ALI § 3.07, in part due to "the substantial history of district courts ignoring and resisting circuit court cy pres concerns and rulings in class action cases." It also resisted the conclusion that the fact those class members who had submitted claims had received everything they were entitled to receive under the settlement is the same as saying they were fully compensated, which might respond to arguments against proposed (3)(B) above that further distributions to class members who made claims should not occur if they already received the maximum they could receive pursuant to the settlement.

The possibility of Enabling Act issues should be noted, but the solution may be that this is an agreement subject to court approval under Rule 23(e), not a new "remedy" provided by the rules for litigated actions. The situation in California may be illustrative.

Cal. Code Civ. Proc. § 384 directs a California state court to direct left-over funds to groups furthering the proposes sought in the class action or to certain public interest purposes. In a federal court in California, one might confront arguments that §384 dictates how such things must be handled. Reports indicate that the federal courts in California do not regard the statute as directly applicable to cases in federal court, but that they do find it instructive as they apply Rule 23.

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[35] There have been reports that in a significant number of cases distributions of amounts less than $100 can be accomplished. This provision is borrowed from a proposed statutory class-action model prepared by the Commissioners on Uniform State Laws. It may be that technological improvements made such an exclusion from the mandatory distribution requirements of (e)(3)(A) and (B) unnecessary.

[36] This bracketed material is drawn from the ALI proposal. It might be questioned on the ground that it goes beyond what the Enabling Act allows a rule to do. But this provision is about approving what the parties have agreed, not inventing a new "remedy" to be used in litigated actions. It may be that in some litigated actions there is a substantive law basis for a court-imposed distribution measure of the sort the bracketed language describes. Claims for disgorgement, for example, might support such a measure. Though the substantive law upon which a claim is based might, therefore, support such a measure, this provision does not seek to authorize such a remedy.

Note that the Class Action Fairness Act itself has a small provision that authorizes something along this line. Thus, 28 U.S.C. § 1712(e) provides: "The court, in its discretion, may also require that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to 1 or more charitable or governmental organizations, as agreed to by the parties." This section of the statute deals with coupon settlements more generally, and not in a manner that encourages parties to use them. It is not certain whether resort to the cy pres aspect of CAFA has been attempted with any frequency.

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An argument in favor of Enabling Act authority could invoke the Supreme Court's Shady Grove decision and say that Rule 23 occupies this territory and the state law provision on cy pres treatment cannot be applied in federal court as a result. If that argument is right, it seems to provide some support for a rule that more explicitly deals with the sort of thing addressed above. But the bracketed sentence at the end of (C) might raise Enabling Act concerns. The bracketed "if authorized by law" suggestion in the draft rule above is a first cut at a way to sidestep these issues.

It may be said that the bracketed language is not necessary because this provision is only about settlement agreements. Settlement agreements can include provisions that the court could not order as a remedy in a litigated case. So there is latitude to give serious attention to adding references to cy pres treatment in the settlement-approval rule. But it can also be emphasized that the real bite behind the agreement comes from the court's judgment, not the agreement itself.

If the rule can provide such authority, should it so provide? Already quite a few federal judges have approved cy pres arrangements. Already some federal courts have approved the principles in the ALI's § 3.07, from which the first sketch above is drawn.

Despite all those unresolved issues, it may nonetheless be useful to reflect on what sorts of things a Committee Note might say:

Sketch of Draft Committee Note ideas

1 When a class action settlement for a payment of a specified amount is approved by the court
2 under Rule 23(e), there is often a claims process by which class members seek their shares of the
3 fund. In reviewing a proposed settlement, the court should focus on whether the claims process
4 might be too demanding, deterring or leading to denial of valid claims.[37] Ideally, the entire fund
5 provided will be used (minus reasonable administrative costs) to compensate class members in
6 accord with the provisions of the settlement.
7
8 On occasion, however, funds are left over after all initial claims have been paid. Courts
9 faced with such circumstances have resorted on occasion to a practice invoking principles of *cy pres*
10 to support distribution of at least some portion of the settlement proceeds to persons or entities not
11 included in the class. In some instances, these measures have raised legitimate concerns.
12
13 Subdivision (e)(3) recognizes and regularizes this activity. The starting point is that the
14 settlement funds belong to the class members and do not serve as a resource for general "public
15 interest" activities overseen or endorsed by the court.[38] Nonetheless, the possibility that there will

[37] It might be attractive to be more forceful (and probably negative) somewhere about reversionary provisions. For example, the Note might say that if there is a reverter clause the court should look at the claims process very carefully to make sure that it does not impose high barriers to claiming. Probably that belongs in the general Rule 23(e) Committee Note about approving settlement proposals. It seems somewhat out of place here, even though it logically relates to the topic at hand.

[38] Is this too strongly worded, or too much a bit of "political" justification?

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be a residue after the settlement distribution program is completed makes provision for this possibility appropriate. Unless there is no prospect of a residue after initial payment of claims, the issue should be included in the initial settlement and evaluated by the court along with the other provisions of that proposal.[39] [If no such provision is included in the initial proposal but a residue exists after initial distribution to the class, the court may address the question at that point, but then should consider whether a further notice to the class should be ordered regarding the proposed disposition of the residue.[40]]

Subdivision (e)(3) does not create a new "remedy" for class actions. Such a remedy may be available for some sorts of claims, such as disgorgement of ill-gotten funds, but this rule does not authorize such a remedy for a litigated class action. The cy pres provision is something the parties have included in their proposal to the court, and the court is therefore called upon to decide whether to approve what the parties have agreed upon to resolve the case.

Subdivision (e)(3) provides rules that must be applied in deciding whether to approve cy pres provisions. Paragraph (A) requires that settlement funds be distributed to class members if they can be identified through reasonable effort when the distributions are large enough to be to make distribution economically viable. It is not up to the court to determine whether the class members are "deserving," or other recipients might be more deserving.[41] Thus, paragraph (A) makes it clear that cy pres distributions are a last resort, not a first resort.

Paragraph (B) follows up on the point in paragraph (A), and provides that even after the first distribution is completed there must be a further distribution to class members of any residue if a further distribution is economically viable. This provision applies even though class members have been paid "in full" in accordance with the settlement agreement. Settlement agreements are compromises, and a court may properly approve one that does not provide the entire relief sought by the class members through the action. Unless it is clear that class members have no plausible legal right to receive additional money, they should receive additional distributions.[42]

---

[39] Is this too strong? It seems that addressing these issues up front is desirable, and giving notice to the class about the provision for a residue is also valuable. That ties in with the idea that this is about the court's general settlement review authority, and it may prompt attention to whether the claims process is too demanding.

[40] Note that the Eighth Circuit raised the question whether, in the latter situation, there would be a need to notice the class a second time about this change in circumstances and the cy pres treatment under consideration. It seems that the better thing is to get the matter on the table at the outset, although that might make it seem that the parties expect the claims process to have faults. Probably devising a "perfect" claims process is very difficult, so a residue is not proof that the claims process was seriously flawed.

[41] This responds to an argument made in the Eight Circuit case -- that the funds distributed would be to institutional investors, who were less deserving than the legal services agencies that would benefit from the cy pres distributions.

[42] This is an effort to deal with the "paid in full" or "overcompensation" point.

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45 Paragraph (C), therefore, deals only with the rare case in which individual distributions are
46 not viable. The court should not assume that the cost of distribution is prohibitive unless presented
47 with evidence firmly supporting that conclusion.[43] It should take account of the possibility that
48 electronic means may make identifying class members and distributing proceeds to them
49 inexpensive in some cases.[44] [The rule does provide that the court may so assume for distributions
50 of less than $100.[45]] When the court finds that individual distributions would be economically
51 infeasible, it may approve an alternative use of the settlement funds if the substitute recipient's
52 interests "reasonably approximate those being pursued by the class." In general, that determination
53 should be made with reference to the nature of the claim being asserted in the case. [Only if no such
54 recipient can be identified may the court authorize distribution to another recipient, and then only
if such distribution would serve the public interest.[46]]

(4) Objectors

The behavior of some objectors has aroused considerable ire among class-action practitioners. But it is clear that objectors play a key role in the settlement-approval process. Rule 23(e)(5) says that class members may object to the proposed settlement, and Rule 23(h)(2) says they may object to the proposed attorney fee award to class counsel. Judges may come to rely on them. CAFA requires that state attorneys general (or those occupying a comparable state office) receive notice of proposed settlements, and they may be a source of useful information to the judge called upon to approve or disapprove a proposed settlement.

The current rules place some limits on objections. Rule 23(e)(5) also says that objections may be withdrawn only with the court's permission. That requirement of obtaining the court's permission was added in 2003 in hopes that it would constrain "hold ups" that some objectors allegedly used to extract tribute from the settling parties.

Proposals have been made to the Appellate Rules Committee to adopt something like the approval requirement under rule 23(e)(5) for withdrawing an appeal from district-court approval of a settlement. Since the delay occasioned by an appeal is usually longer than the period needed to

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[43] If we are to authorize the "only cy pres" method, what can we say about the predicate for using it? The Note language addresses cost. How about cases in which there simply is no way to identify class members? Should those fall outside this provision?

[44] This assertion is based on a hunch.

[45] Should we include such a provision? As noted above, smaller distributions are reportedly done now. Suppose a bank fee case in which the bank improperly charged thousands of account holders amounts less than $100. Assuming the bank could easily identify those account holders and the amount of improperly charged fees, why not direct that their accounts be credited?

[46] This is in brackets in the rule and the Note because, even if the parties agree and the class receives notice of the agreement, it seems a striking use of judicial power. Perhaps, as indicated above in the Note, it is mainly the result of the parties' agreement, not the court's power, which is limited to reviewing and deciding whether to approve the parties' agreement.

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review a proposed settlement at the district-court level, that sort of rule change might produce salutary results. But it might be that the district judge would be better positioned to decide whether to permit withdrawal of the appeal than the court of appeals. The Rule 23 Subcommittee intends to remain in touch with the Appellate Rules Committee on these issues as it proceeds with its attention to the civil rules.

Another set of ideas relates to requiring objectors to post a bond to appeal. In Tennille v. Western Union Co., 774 F.3d 1249 (10th Cir. 2014), the district court, relying on Fed. R. App. P. 7, entered an order requiring objectors who appealed approval of a class-action settlement to post a bond of over $1 million to cover (1) the anticipated cost of giving notice to the class a second time, (2) the cost of maintaining the settlement pending resolution of the appeals, and (3) the cost of printing and copying the supplemental record in the case (estimated at $25,000). The court of appeals ruled that the only costs for which a bond could be required under Appellate Rule 7 were those that could be imposed under a statute or rule, so the first two categories were entirely out, and the third category was possible, but that the maximum amount the appellate court could uphold would be $5,000. Other courts have occasionally imposed bond requirements. But the Subcommittee is not presently suggesting any civil rule changes on this subject.

Regarding the civil rules, it is not certain whether the adoption of the approval requirement in Rule 23(e)(5) in 2003 had a good effect in district court proceedings, although some reports indicate that it has. Two sets of ideas are under consideration. One slightly amplifies the Rule 23(e)(5) process by borrowing an idea from Rule 23(3)(2) -- that the party seeking to withdraw an objection advise the court of any "side agreements" that influenced the decision to withdraw. The other follows a suggestion in the ALI Aggregate Litigation principles for imposition of sanctions on those who make objections for improper purposes.

Adding a reporting obligation to (e)(5)

1 **(e)** **Settlement, Voluntary Dismissal, or Compromise.** The claims, issues, or defenses of a
2 certified class may be settled, voluntarily dismissed, or compromised only with the court's
3 approval. The following procedures apply to a proposed settlement, voluntary dismissal, or
4 compromise:
5
6 * * * * *
7
8 *Alternative 1*
9
10 **(5)** Any class member may object to the proposal if it requires court approval under this
11 subdivision (e); the objection may be withdrawn only with the court's approval, and
12 the parties must file a statement identifying any agreement made in connection with
13 the withdrawal.
14
15 *Alternative 2*
16
17 **(5)** Any class member may object to the proposal if it requires court approval under this

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18 subdivision (e); the objection may be withdrawn only after the filing of a statement
19 identifying any agreement made in connection with the withdrawal, and court approval of the request to withdraw the objection ~~with the court's approval~~.

If it is true that the current provision requiring court approval for withdrawing an objection does the needed job, there may be no reason to add this reporting obligation. There is at least some reason to suspect that class counsel may take the position that there is already some sort of implicit reporting obligation. Experience with the efficacy of the existing reporting provision in (e)(3) may also shed light whether adding one to (e)(5) would be desirable.

Objector sanctions

§ 3.08(d) of the ALI Principles says:

> If the court concludes that objectors have lodged objections that are insubstantial and not reasonably advanced for the purpose of rejecting or improving the settlement, the court should consider imposing sanctions against objectors or their counsel under applicable law.

Comment c to this section says that it "envisions that sanctions will be invoked based upon existing law (e.g., Fed. R. Civ. P. 11, 28 U.S.C. § 1927)."

This proposal raises a number of questions. One idea might be to say explicitly that any objection is subject to Rule 11. That may seem a little heavy handed with lay objectors, and a statement in the class settlement notice appearing to threaten sanctions might do more harm than good. Another idea might be to indicate in a rule that § 1927 is a source of authority to impose sanctions. But that would be a peculiar rule, since it would not provide any authority but only remind the court of its statutory authority. The ALI proposal's "should consider" formulation seems along that line. It does not say the court should do it, but only that the court should think about imposing sanctions.

It seems that a provision along these lines could serve a valuable purpose. In the 2000-02 period, when the 2003 amendments were under consideration, there was much anguish about how to distinguish "good" from "bad" objectors. There is no doubt whatsoever that there are good ones, whose points assist the court and improve the settlement in many instances. But it seems very widely agreed that there are also some bad objectors who seek to profit by delaying final consummation of the deal.

Defining who is a "good" or a "bad" objector in a rule is an impossible task. But there is reason to think that judges can tell in the specific context of a given case and objection. So the goal here would be to rely on the judge's assessment of the behavior of the objector rather than attempt in a rule to specify. Discussion on this topic has only begun in the Subcommittee, but for purposes of broader airing of the issues the following conceptual draft ideas might be informative:

Alternative 1

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1 **(5)** Any class member may, subject to Rule 11, object to the proposal if it requires court
2 approval under this subdivision (3); the objection may be withdrawn only with the
3 court's approval.
4
5 *Alternative 2*
6
7 **(5)** Any class member may object to the proposal if it requires court approval under this
8 subdivision (e); the objection may be withdrawn only with the court's approval. If the
9 court finds that an objector has made objections that are insubstantial [and] {or} not
10 reasonably advanced for the purpose of rejecting or improving the settlement, the
11 court [should] {may} impose sanctions on objectors or their counsel {under
applicable law}.

Simply invoking Rule 11 (Alternative 1) may be simplest. But as noted above, it may also deter potential objectors too forcefully. One might debate whether the certifications of Rule 11(b) are properly applied here. Invoking Rule 11(c) in this rule might be simpler than trying to design parallel features here. On the other hand, (e)(5) says that the objector may withdraw the objection only with the court's approval while Rule 11's safe harbor provision seems not to require any court approval but instead to permit (perhaps to prompt) a unilateral withdrawal. Rule 11(c) also requires that the party who seeks Rule 11 sanctions first prepare and serve (but not file) a motion for sanctions, which might be a somewhat wasteful requirement.

Alternative 2 is more along the lines of the ALI proposal. But perhaps a provision like this one should create authority for imposing sanctions. The ALI approach seems to rely on authority from somewhere else. If the rule does not create such authority, it sounds more like an exhortation than a rule. The choice between possible verbs – "should" or "may" – seems to bear somewhat on this issue. To say "may" is really saying only that courts are permitted to do what the rules already say they may do; it's like a reminder. To say "should" is an exhortation. Does it supplant the "may" that appears in Rule 11? Perhaps judges are to be quicker on the draw with objectors than original parties. One could also consider saying "must," but since that was rejected for Rule 11 it would seem odd here. In any event, if the rule creates authority to impose sanctions, perhaps it should say what sanctions are authorized.

The description in Alternative 2 of the finding that the court must make to proceed to sanctions on the objector deserves attention. There is a choice between "and" and "or" regarding whether objections that are "insubstantial" were also not advanced for a legitimate purpose. Probably a judge would not distinguish between these things; if the objection is substantial, maybe it is nonetheless advanced for improper reasons. But would a judge ever think so? Does the fact of proposed withdrawal show that an objection was insubstantial? Seemingly not. Objectors often abandon objections when they get a full explanation of the details of the proposed settlement. So for them the use of "and" seems important; they withdraw the objections when they learn more about the deal, and that shows that they were not interposing the objections for an improper purpose. Could an objector who raises substantial objections but also has an improper purpose be sanctioned? The ALI proposal does not condition sanctions on a finding that the objection is meritless. Maybe the judge will act on the objection even though the objector has tried to withdraw it.

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It seems worthwhile to mention another question that might arise if sanctions on objectors were considered – should the court consider sanctions on the parties submitting a flawed proposal to settle? If it is really a "reverse auction" type of situation – odious to the core – should the court be reminded that Rule 11 surely does apply to the submissions in support of the proposal? Should it at least be advised to consider replacing class counsel or the class representative or both to give effect to the adequate representation requirements of Rule 23(a)(4)?

It is obvious that much further attention will be needed to sort through the various issues raised by the sanctions possibility. For the present, the main question is whether it is worthwhile to sort through those difficult questions. The sketches above are offered only to provide a concrete focus for that discussion.

(5) Rule 68 Offers and Mootness

The problem of settlement offers made to the proposed class representative that fully satisfy the representative's claim and thereby "pick off" and moot the class action seems to exist principally in the Seventh Circuit. Outside the 7th Circuit there is little enthusiasm for "picking off" the class action with a Rule 68 offer or other sort of settlement offer. Below are three different (perhaps coordinated) ways of dealing with this problem. The first is Ed Cooper's sketch circulated on Dec. 2.

First Sketch: Rule 23 Moot
(Cooper approach)

(x) (1) When a person sues [or is sued] as a class representative, the action can be terminated by a tender of relief only if
(A) the court has denied class certification and
(B) the court finds that the tender affords complete relief on the representative's personal claim and dismisses the claim.
(2) A dismissal under Rule 23(x)(1) does not defeat the class representative's standing to appeal the order denying class certification.

Committee Note

A defendant may attempt to moot a class action before a certification ruling is made by offering full relief on the individual claims of the class representative. This ploy should not be allowed to defeat the opportunity for class relief before the court has had an opportunity to rule on class certification.

If a class is certified, it cannot be mooted by an offer that purports to be for complete class relief. The offer must be treated as an offer to settle, and settlement requires acceptance by the class representative and approval by the court under Rule 23(e).

Rule 23(x)(1) gives the court discretion to allow a tender of complete relief on the representative's claim to moot the action after a first ruling that denies class certification. The tender

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12 must be made on terms that ensure actual payment. The court may choose instead to hold the way
13 open for certification of a class different than the one it has refused to certify, or for reconsideration
14 of the certification decision. The court also may treat the tender of complete relief as mooting the
15 representative's claim, but, to protect the possibility that a new representative may come forward,
16 refuse to dismiss the action.
17
18 If the court chooses to dismiss the action, the would-be class representative retains standing
19 to appeal the denial of certification. [say something to explain this?]
20
21 [If we revise Rule 23(e) to require court approval of a settlement, voluntary dismissal, or compromise of the representative's personal claim, we could cross-refer to that.]

Rule 68 approach

Rule 68. Offer of Judgment

* * * * *

1 **(e)** **Inapplicable in Class and Derivative Actions.** This rule does not apply to class or derivative actions under Rules 23, 23.1, or 23.2.

This addition is drawn from the 1984 amendment proposal for Rule 68. See 102 F.R.D. at 433.

This might solve a substantial portion of the problem, but does not seem to get directly at the problem in the manner that the Cooper approach does. By its terms, Rule 68 does not moot anything. It may be that an offer of judgment strengthens an argument that the case is moot, because what plaintiffs seek are judgments, not promises of payment, the usual stuff of settlement offers. Those judgments do not guarantee actual payment, as the Cooper approach above seems intended to do with its tender provisions. But a Committee Note to such a rule might be a way to support the conclusion that we have accomplished the goal we want to accomplish. Here is what the 1984 Committee Note said:

> The last sentence makes it clear that the amended rule does not apply to class or derivative actions. They are excluded for the reason that acceptance of any offer would be subject to court approval, see Rules 23(e) and 23.1, and the offeree's rejection would burden a named representative-offeree with the risk of exposure to potentially heavy liability that could not be recouped from unnamed class members. The latter prospect, moreover, could lead to a conflict of interest between the named representative and other members of the class. See, Gay v.Waiters & Dairy Lunchmen's Union, Local 30, 86 F.R.D. 500 (N.D. Cal. 1980).

Alternative Approach in Rule 23

Before 2003, there was a considerable body of law that treated a case filed as a class action

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as subject to Rule 23(e) at least until class certification was denied. A proposed individual settlement therefore had to be submitted to the judge for approval before the case could be dismissed. Judges then would try to determine whether the proposed settlement seemed to involve exploiting the class-action process for the individual enrichment of the named plaintiff who was getting a sweet deal for her "individual" claim. If not, the judge would approve it. If there seemed to have been an abuse of the class-action device, the judge might order notice to the class of the proposed dismissal, so that other class members could come in and take up the litigation cudgel if they chose to do so. Failing that, the court might permit dismissal.

The requirement of Rule 23(e) review for "individual" settlements was retained in the published preliminary draft in 2003. But concerns arose after the public comment period about how the court should approach situations in which the class representative did seem to be attempting to profit personally from filing a class action. How could the court force the plaintiff to proceed if the plaintiff wanted to settle? One answer might be that plaintiff could abandon the suit, but note that "voluntary dismissal" is covered by the rule's approval requirement. Another might be that the court could sponsor or encourage some sort of recruitment effort to find another class representative. In light of these difficulties, the amendments were rewritten to apply only to claims of certified classes.

1 **(e) Settlement, Voluntary Dismissal, or Compromise.**
2
3 **(1) Before certification.** An action filed as a class action may be settled, voluntarily
4 dismissed, or compromised before the court decides whether to grant class-action
5 certification only with the court's approval. The [parties] {proposed class
6 representative} must file a statement identifying any agreement made in connection
7 with the proposed settlement, voluntary dismissal, or compromise.
8
9 **(2) Certified class.** The claims, issues, or defenses of a certified class may be settled,
10 voluntarily dismissed, or compromised only with the court's approval. The following
11 procedures apply to a proposed settlement, voluntary dismissal, or compromise:
12
13 **(A~~1~~)** The court must direct notice in a reasonable manner * * * * *
14
15 **(3) Settlement after denial of certification.** If the court denies class-action
16 certification, the plaintiff may settle an individual claim without prejudice to seeking
appellate review of the court's denial of certification.

The Committee Note could point out that there is no required notice under proposed (e)(1). It could also note that prevailing rule before 2003 that the court should review proposed "individual" settlements. The ALI Principles endorsed such an approach:

> This Section favors the approach of requiring limited judicial oversight. The potential risks of precertification settlements or voluntary dismissals that occur without judicial scrutiny warrant a rule requiring that such settlements take effect only with prior judicial approval, after the court has had the opportunity to review the terms of the settlement, including fees paid to counsel. Indeed the very requirement of court approval

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may deter parties from entering into problematic precertification settlements.

ALI Principles § 3.02 comment (b).

Proposed (e)(3) seeks to do something included also in the Cooper approach above -- ensure that the proposed class representative can appeal denial of certification even after settling the individual claim. Whether something of the sort is needed is uncertain. The issues involved were the subject of considerable litigation in the semi-distant past. See, e.g., United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980); Deposit Guaranty Nat. Bank v. Roper, 445 U.S. 326 (1980); United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977). It is not presently clear whether this old law is still good law. It might also be debated whether the class representative should be allowed to appeal denial of certification. Alternatively, should class members be given notification that they can appeal? In the distant past, there were suggestions that class members should be notified when the proposed class representative entered into an individual settlement, so that they could seek to pursue the class action.

(6) Issue Classes

A major reason for considering possible rule amendments to deal with issue classes is that there has seemed to be a split in the circuits about whether they can only be allowed if (b)(3) predominance is established. At a point in time, it appeared that the Fifth and Second Circuits were at odds on this subject. But recent reports suggest that all the circuits are coming into relative agreement that in appropriate cases Rule 23(c)(4) can be used even though full Rule 23(b)(3) certification is not possible due to the predominance requirement. If agreement has arrived, it may be that a rule amendment is not in order. But even if agreement has arrived, an amendment might be in order to permit immediate appellate review of the district court's decision of the issue on which the class was certified, before the potentially arduous task of determination of class members' entitlement to relief begins.

Clarifying that predominance is not
a prerequisite to 23(c)(4) certification

1 **(3)** the court finds that the questions of law or fact common to class members
2 predominate over any questions affecting only individual members<u>, subject to</u>
3 <u>Rule 23(c)(4),</u> and that a class action is superior to other available methods for fairly
4 and efficiently adjudicating the controversy. The matters pertinent to these findings
include: * * * *

The goal of placement here is to say that predominance, but not superiority, is subject to Rule 23(c)(4). A Committee Note could amplify this point. It might also say that a court trying to decide whether issue certification is "appropriate" (as (c)(4) says it should decide) could consider the factors listed in (A) through (D) of (b)(3). It does not seem there would be a need to consider changing (A) through (D) in (b)(3). In 1996, draft amendments to those factors were published for public comment and, after a very large amount of public comment, not pursued further. The relation between (b)(3) and (c)(4) does not seem to warrant considering changes to the factors.

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Allowing courts of appeals to review
decision of the common issues
immediately rather than only after final judgment

Because the resolution of the common issue in a class action certified under Rule 23(c)(4) is often a very important landmark in the action, and one that may lead to a great deal more effort to determine individual class members' entitlement to relief, it seems desirable to offer an avenue of immediate review. Requiring that all that additional effort be made before finding out whether the basic ruling will be reversed may in many instances be a strong reason for granting such immediate review. But there may be a significant number of cases in which this concern is not of considerable importance.

§ 2.09(a) of the ALI Principles endorses this objective: "An opportunity for interlocutory appeal should be available with respect to * * * (2) any class-wide determination of a common issue on the merits * * * ." The ALI links this interlocutory review opportunity to review of class certification decisions (covered in ALI § 2.09(a)(1)). It seems that the logical place to insert such a provision is into Rule 23(f), building on the existing mechanism for interlocutory review of class-certification orders:

1 **(f)** **Appeals.** A court of appeals may permit an appeal from an order granting or
2 denying class-action certification under this rule, or from an order deciding an issue
3 with respect to which [certification was granted under Rule 23(c)(4)] {a class action
4 was allowed to be maintained under Rule 23(c)(4)} [if the district court expressly
5 determines that there is no just reason for delay], if a petition for permission to
appeal is filed with the circuit clerk within 14 days after the order is entered. * * *

The Subcommittee has only recently turned its attention to these issues; as a result the above conceptual sketch is particularly preliminary. Several choices are suggested by the use of brackets or braces around language in the draft above.

One is whether to say "certification was granted under Rule 23(c)(4)" or to stick closer to the precise language of (c)(4) – "was allowed to be maintained under Rule 23(c)(4)." It may be that referring to "class certification" would be preferred because it ties in with the term used in the current provisions of the rule. Rule 23(b) says "may be maintained" but that terminology is not repeated in current 23(f) when addressing the decision that it may be maintained. On the other hand, it is not that decision that would be subject to review under the added provision of the rule. Instead, it is the later resolution of that issue by further proceedings in the district court.

Another choice is suggested by the bracketed language referring to district-court certification that there is no just reason for delay. That is modeled on Rule 54(b). It might be useful to intercept premature or repeated efforts to obtain appellate review with regard to issues as to which (c)(4) certification was granted. For example, could a defendant that moved for summary judgment on the common issue contend that the denial of the summary-judgment motion "decided" the issue? Perhaps it would be desirable to endow the district court with some latitude in triggering the opportunity to seek appellate review, since a significant reason for allowing it is to avoid wasted

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time resolving individual claims of class members in the wake of the decision of the individual issue.

On the other hand, if the goal of the amendment is to ensure the losing party of prompt review of the decision of the common issue, it might be worrisome if the district judge's permission were required. It is not required with regard to class-certification decisions, and there may be instances in which parties contend that the district court has delayed resolution of class certification, thereby defeating their right to obtain appellate review of certification.

Lying in the background is the question whether this additional provision in Rule 23(f) would serve an actual need. As noted above, it appears that use of issue classes has become widespread. What is the experience with the "mop up" features of those cases after that common issue is resolved? Does that "mop up" activity often consume such substantial time and energy that an interlocutory appeal should be allowed to protect against waste? Are those issues straightened out relatively easily, leading to entry of a final judgment from which appeal can be taken in the normal course? Is there a risk that even a discretionary opportunity for interlocutory appeal would invite abuse? Are there cases in which the court declines to proceed with resolution of all the individual issues, preferring to allow class members to pursue them in individual litigation? If so, how is a final appealable judgment entered in such cases? If that route is taken, what notice is given to class members of the need to initiate further proceedings?

So there are many questions to be addressed in relation to this possible addition to the rules. Another might be whether it should be considered only if the amendment to Rule 23(b)(3) went forward. If it seems that amendment is not really needed because the courts have reached a consensus on whether issue classes can be certified even when (b)(3) would not permit certification with regard to the entire claim, there could still be a need for a revision to Rule 23(f) along the lines above. Answers to the questions in the previous paragraph about what happens now might inform that background question about the importance of proceeding on the 23(f) possibility.

(7) Notice

Changing the notice requirement
in (b)(3) cases

In Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), the Court observed (id. at 173-71, emphasis in original):

> Rule 23(c)(2) provides that, in any class action maintained under subdivision (b)(3), each class member shall be advised that he has the right to exclude himself from the action on request or to enter an appearance through counsel, and further that the judgment, whether favorable or not, will bind all class members who not requesting exclusion. To this end, the court is required to direct to class members "the best notice practicable under the circumstances *including individual notice to all members who can be identified through reasonable effort*." We think the import of this language is unmistakable. Individual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort.

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The Advisory Committee's Note to Rule 23 reinforces this conclusion. The Advisory Committee described subdivision (e)(2) as "not merely discretionary" and added that the "mandatory notice pursuant to subdivision (c)(2) . . . is designed to fulfill requirements of due process to which the class procedure is of course subject." [The Court discussed Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), and Schroeder v. City of New York, 371 U.S. 208 (1962), emphasizing due process roots of this notice requirement and stating that "notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable."]

Viewed in this context, the express language and intent of Rule 23(c)(2) leave no doubt that individual notice must be provided to those class members who are identifiable through reasonable effort.

Research would likely shed light on the extent to which more recent cases regard means other than U.S. mail as sufficient to give "individual notice." The reality of 21st century life is that other means often suffice. The question is whether or how to alter Rule 23(c)(2) to make it operate more sensibly. Here are alternatives:

1 **(2) Notice**
2
3 * * * * *
4
5 **(B)** *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct
6 to class members the best notice that is practicable under the circumstances,
7 including individual notice <u>by electronic or other means</u> to all members who can be identified through reasonable effort. * * * * *

It is an understatement to say that much has changed since Eisen was decided. Perhaps it is even correct to say that a communications revolution has occurred. Certainly most Americans are accustomed today to communicating in ways that were not possible (or even imagined) in 1974. Requiring mailed notice of class certification seems an anachronism, and some reports indicate that judges are not really insisting on it.

Indeed, the current ease of communicating with class members has already arisen with regard to the cy pres discussion, topic (3) above. There, the possibility of excusing payouts to class members for amounts smaller than $100 is raised as a possibility, but it is also suggested that much smaller payouts can now be made efficiently using refined electronic means. More generally, it appears that enterprises that specialize in class action administration have gained much expertise in communicating with class members. Particularly in an era of "big data," lists of potential class members may be relatively easy to generate and use for inexpensive electronic communications.

For the present, the main question is whether there is reason not to focus on some relaxation of the current rule that would support a Committee Note saying that first class mail is no longer required by the rule. Such a Note could presumably offer some observations about the variety of alternative methods of communicating with class members, and the likelihood that those methods

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will continue to evolve. The likely suggestion will be that courts should not (as Eisen seemed to do) embrace one method as required over the long term.

Notice in Rule 23(b)(1) or (b)(2) actions

Another question that could be raised is whether these developments in electronic communications also support reconsideration of something that was considered but not done in 2001-02.

The package of proposed amendments published for comment in 2001 included a provision for reasonable notice (not individual notice, and surely not mandatory mailed notice) in (b)(1) and (b)(2) class actions. Presently, the rule contains no requirement of any notice at all in those cases, although Rule 23(c)(2)(A) notes that the court "may direct appropriate notice to the class." In addition, Rule 23(d)(1)(B) invites the court to give "appropriate notice to some or all class members" whenever that seems wise. And if a settlement is proposed, the notice requirement of Rule 23(e)(1) applies and "notice in a reasonable manner" is required. But if a (b)(1) or (b)(2) case is fully litigated rather than settled, the rule does not require any notice at any time.

It is thus theoretically possible that class members in a (b)(1) or (b)(2) class action might find out only after the fact that their claims are foreclosed by a judgment in a class action that they knew nothing about.

In 2001-02, there was much forceful opposition to the proposed additional rule requirement of some reasonable effort at notice of class certification on the ground that it was already difficult enough to persuade lawyers to take such cases, and that this added cost would make an already difficult job of getting lawyers to take cases even more difficult, and perhaps impossible. The idea was shelved.

Is it time to take the idea off the shelf again? One question is whether the hypothetical problem of lack of notice is not real. It is said that (b)(2) classes exhibit more "cohesiveness," so that they may learn of a class action by informal means, making a rule change unnecessary. It may also be that there is almost always a settlement in such cases, so that the Rule 23(e) notice requirement does the needed job. (Of course, that may occur at a point when notice is less valuable than it would have been earlier in the case.) And it may be that the cost problems that were raised 15 years ago have not abated, or have not abated enough, for the vulnerable populations that are sometimes the classes in (b)(2) actions.

The Subcommittee has not devoted substantial attention to these issues. For present purposes, this invitation is only to discuss the possibility of returning to the issues not pursued in 2002. If one wanted to think about how a rule change might be made, one could consider replacing the word "may" in Rule 23(c)(2)(A) with "must." A Committee Note might explore the delicate issues that courts should have in mind in order to avoid unduly burdening the public interest lawyers often called upon to bring these cases, and the public interest organizations that often provide support to counsel, particularly when the actions may not provide substantial attorney fee or cost awards.

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Appendix I

Settlement Review Factors: 2000 Draft Note

As an alternative approach to factors, particularly not on the list of four the conceptual draft rule endorses as mandatory findings for settlement approval, the following is an interim draft of possible Committee Note language considered during the drafting of current Rule 23(e).

Reviewing a proposed class-action settlement often will not be easy. Many settlements can be evaluated only after considering a host of factors that reflect the substance of the terms agreed upon, the knowledge base available to the parties and to the court to appraise the strength of the class's position, and the structure and nature of the negotiation process. A helpful review of many factors that may deserve consideration is provided by *In re: Prudential Ins. Co. America Sales Practice Litigation Agent Actions*, 148 F.3d 283, 316-324 (3d Cir.1998). Any list of these factors must be incomplete. The examples provided here are only examples of factors that may be important in some cases but irrelevant in others. Matters excluded from the examples may, in a particular case, be more important than any matter offered as an example. The examples are meant to inspire reflection, no more.

Many of the factors reflect practices that are not fully described in Rule 23 itself, but that often affect the fairness of a settlement and the court's ability to detect substantive or procedural problems that may make approval inappropriate. Application of these factors will be influenced by variables that are not listed. One dimension involves the nature of the substantive class claims, issues, or defenses. Another involves the nature of the class, whether mandatory or opt-out. Another involves the mix of individual claims — a class involving only small claims may be the only opportunity for relief, and also pose less risk that the settlement terms will cause sacrifice of recoveries that are important to individual class members; a class involving a mix of large and small individual claims may involve conflicting interests; a class involving many claims that are individually important, as for example a mass-torts personal-injury class, may require special care. Still other dimensions of difference will emerge. Here, as elsewhere, it is important to remember that class actions span a wide range of heterogeneous characteristics that are important in appraising the fairness of a proposed settlement as well as for other purposes.

Recognizing that this list of examples is incomplete, and includes some factors that have not been much developed in reported decisions, among the factors that bear on review of a settlement are these:

(A) a comparison of the proposed settlement with the probable outcome of a trial on the merits of liability and damages as to the claims, issues, or defenses of the class and individual class members;

(B) the probable time, duration, and cost of trial;

(C) the probability that the [class] claims, issues, or defenses could be maintained through trial on a class basis;

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(D) the maturity of the underlying substantive issues, as measured by the information and experience gained through adjudicating individual actions, the development of scientific knowledge, and other facts that bear on the ability to assess the probable outcome of a trial and appeal on the merits of liability and individual damages as to the claims, issues, or defenses of the class and individual class members;

(E) the extent of participation in the settlement negotiations by class members or class representatives, a judge, a magistrate judge, or a special master;

(F) the number and force of objections by class members;

(G) the probable resources and ability of the parties to pay, collect, or enforce the settlement compared with enforcement of the probable judgment predicted under Rule 23(e)(5)(A);

(H) the existence and probable outcome of claims by other classes and subclasses;

(I) the comparison between the results achieved for individual class or subclass members by the settlement or compromise and the results achieved — or likely to be achieved — for other claimants;

(J) whether class or subclass members are accorded the right to opt out of the settlement;

(K) the reasonableness of any provisions for attorney fees, including agreements with respect to the division of fees among attorneys and the terms of any agreements affecting the fees to be charged for representing individual claimants or objectors;

(L) whether the procedure for processing individual claims under the settlement is fair and reasonable;

(M) whether another court has rejected a substantially similar settlement for a similar class; and

(N) the apparent intrinsic fairness of the settlement terms.

Apart from these factors, settlement review also may provide an occasion to review the cogency of the initial class definition. The terms of the settlement themselves, or objections, may reveal an effort to homogenize conflicting interests of class members and with that demonstrate the need to redefine the class or to designate subclasses. Redefinition of the class or the recognition of subclasses is likely to require renewed settlement negotiations, but that prospect should not deter recognition of the need for adequate representation of conflicting interests. This lesson is entrenched by the decisions in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), and *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

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Appendix II

Prevailing Class Action Settlement Approval Factors
Circuit-By-Circuit

First Circuit

No "single test." See: In re Compact Disc Minimum Advertised Price Antitrust Litigation, 216 F.R.D. 197-206-207 (D. Me. 2003) (Hornby, J.):

> "There is no single test in the First Circuit for determining the fairness, reasonableness and adequacy of a proposed class action settlement. In making this assessment, other circuits generally consider the negotiating process by which the settlement was reached and the substantive fairness of the terms of the settlement compared to the result likely to be reached at trial. See, e.g., Weinberger v. Kendrick, 698 F.2d 61, 73-74 (2d Cir. 1982). Specifically, the appellate courts consider some or all of the following factors: (1) comparison of the proposed settlement with the likely result of litigation; (2) reaction of the class to the settlement; (3) stage of the litigation and the amount of discovery completed; (4) quality of counsel; (5) conduct of the negotiations; and (6) prospects of the case, including risk, complexity, expense and duration. [citing cases.] Finally, the case law tells me that a settlement following sufficient discovery and genuine arm's-length negotiation is presumed fair." [citing cases.]

Second Circuit

"*Grinnell* Factors"

City of Detroit v. Grinnell, 495 F.2d 448, 463 (2d Cir. 1974):

> ". . (1) the complexity, expense and likely duration of the litigation . . .; (2) the reaction of the class to the settlement . . .; (3) the stage of the proceedings and the amount of discovery completed . . .; (4) the risks of establishing liability . . .; (5) the risks of establishing damages . . .; (6) the risks of maintaining the class action through the trial . . .; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery . . .; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. . . ."

Third Circuit

"*Girsh* Factors" (adopts *Grinnell* factors)

Girsh v. Jepson, 521 F.2d 153, 157 (3rd Cir. 1975)

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Fourth Circuit

"*Jiffy Lube* Factors"

In re Jiffy Lube Securities Litigation, 927 F.2d 155, 158-159 (4th Cir. 1991):

> "In examining the proposed . . . settlement for fairness and adequacy under Rule 23(e), the district court properly followed the fairness factors listed in Maryland federal district cases which have interpreted the Rule 23(e) standard for settlement approval. See In re Montgomery County Real Estate Antitrust Litigation, 83 F.R.D. 305 (D. Md. 1979).) The court determined that the settlement was reached as a result of good-faith bargaining at arm's length, without collusion, on the basis of (1) the posture of the case at the time settlement was proposed, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the negotiations, and (4) the experience of counsel in the area of securities class action litigation. . . .
>
> The district court's assessment of the adequacy of the settlement was likewise based on factors enumerated in Montgomery: (1) the relative strength of the plaintiffs' case on the merits, (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial, (3) the anticipated duration and expense of additional litigation, (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment, and (5) the degree of opposition to the settlement."

Fifth Circuit

"*Reed* Factors"

Reed v. General Motors Corp., 703 F.2d 170, 172 (5th Cir. 1983):

> "(There are six focal facets: (1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of the class counsel, class representatives, and absent members."

Sixth Circuit

"*UAW* Factors"

Int'l Union, United Auto. Workers, etc. v. General Motors Corp., 497 F.3d 615 (Sixth Cir. 2007):

> "Several factors guide the inquiry: (1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest. See

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Granada Invs., Inc. v. DWG Corp., 962 F.2d 1203, 1205 (6th Cir. 1992); Williams v. Vukovich, 720 F.2d 909, 922-23 (6th Cir. 1983).

Seventh Circuit

"*Armstrong* Factors"

Armstrong v. Jackson, 616 F.2d 305, 315 (7th Cir. 1980):

"Although review of class action settlements necessarily proceeds on a case-by-case basis, certain factors have been consistently identified as relevant to the fairness determination. The district court's opinion approving the settlement now before us listed these factors:

Among the factors which the Court should consider in judging the fairness of the proposal are the following:

"(1) " * * * the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement';

"(2) "(T)he defendant's ability to pay';

"(3) "(T)he complexity, length and expense of further litigation';

"(4) "(T)he amount of opposition to the settlement';"

Professor Moore notes in addition the factors of:

"(1) * * *

"(2) Presence of collusion in reaching a settlement;

"(3) The reaction of members of the (class to the settlement;

"(4) The opinion of competent counsel;

"(5) The stage of the proceedings and the amount of discovery completed."

3B Moore's Federal Practice P 23.80(4) at 23-521 (2d ed. 1978)"

Eighth Circuit

"*Grunin* Factors"

Grunin v. International House of Pancakes, 513 F.2d 114, 124 (8th Cir. 1975):

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> "The district court must consider a number of factors in determining whether a settlement is fair, reasonable, and adequate: the merits of the plaintiff's case, weighed against the terms of the settlement; the defendant's financial condition; the complexity and expense of further litigation; and the amount of opposition to the settlement. Grunin, 513 F.2d at 124. . . .; Van Horn v. Trickey, 840 F.2d 604, 607 (8th Cir. 1988)."

Ninth Circuit

"*Hanlon* Factors"

Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998):

> "Assessing a settlement proposal requires the district court to balance a number of factors: the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement."

Tenth Circuit

"*Jones* Factors"

Jones v. Nuclear Pharmacy, 741 F.2d 322 (10th Cir. 1984):

> "In exercising its discretion, the trial court must approve a settlement if it is fair, reasonable and adequate. In assessing whether the settlement is fair, reasonable and adequate the trial court should consider:
>
> (1) whether the proposed settlement was fairly and honestly negotiated;
>
> (2) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt;
>
> (3) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; and
>
> (4) the judgment of the parties that the settlement is fair and reasonable."

Eleventh Circuit

"*Bennett* Factors"

Bennett v. Behring Corp., 737 F.2d 982, 986 (11th Cir. 1984) (quoting Cotton v. Hinton, 559 F.2d at 1330-31 (5th Cir. 1977):

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> "Our review of the district court's order reveals that in approving the subject settlement, the court carefully identified the guidelines established by this court governing approval of class action settlements. Specifically, the court made findings of fact that there was no fraud or collusion in arriving at the settlement and that the settlement was fair, adequate and reasonable, considering (1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved."

D.C. Circuit

No "single test." Courts consider factors from other jurisdictions.

See *In re Livingsocial Marketing and Sales Practice Litigation*, 298 F.R.D. 1, 11 (D.R.C. 2013):

> "There is "no single test" for settlement approval in this jurisdiction; rather, courts have considered a variety of factors, including: "(a) whether the settlement is the result of arms-length negotiations; (b) the terms of the settlement in relation to the strengths of plaintiffs' case; (c) the status of the litigation proceedings at the time of settlement; (d) the reaction of the class; and (e) the opinion of experienced counsel." In re Lorazepam & Clorazepate Antitrust Litig., 205 F. R. D. 369, 375 (D.D.C. 2002) ("Lorazect") (collecting cases)."

Federal Circuit

Dauphin Island Property Owners Assoc. v. United States, 90 Fed. Cl. 95 (2009):

> "The case law and rules of this court do not provide definitive factors for evaluating the fairness of a proposed settlement. Many courts have, however, considered the following factors in determining the fairness of a class settlement:
>
> > (1) The relative strengths of plaintiffs' case in comparison to the proposed settlement, which necessarily takes into account:
> >
> > > (a) The complexity, expense and likely duration of the litigation; (b) the risks of establishing liability; (c) the risks of establishing damages; (d) the risks of maintaining the class action through trial; (e) the reasonableness of the settlement fund in light of the best possible recovery; (f) the reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation; (g) the stage of the proceedings and the amount of discovery completed; (h) the risks of maintaining the class action through trial;
> >
> > (2) The recommendation of the counsel for the class regarding the proposed settlement, taking into account the adequacy of class counsels' representation of the

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class;

(3) The reaction of the class members to the proposed settlement, taking into account the adequacy of notice to the class members of the settlement terms;

(4) The fairness of the settlement to the entire class;

(5) The fairness of the provision for attorney fees;

(6) The ability of the defendants to withstand a greater judgment, taking into account whether the defendant is a governmental actor or a private entity. . . .

Most importantly, this court must compare the terms of the settlement agreement with the potential rewards of litigation and consider the negotiation process through which agreement was reached."

California

Kullar v. Foot Locker Retail Inc., 168 Cal. App. 4th 116, 128 (Cal. App. 2008) (quoting *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (Cal. App. 1996):

"The well-recognized factors that the trial court should consider in evaluating the reasonableness of a class action settlement agreement include "the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement."

Principles of Aggregate Litigation (ALI 2010)

§ 3.05 Judicial Review of the Fairness of a Class Settlement

(a) Before approving or rejecting any classwide settlement, a court must conduct a fairness hearing. A court reviewing the fairness of a proposed class-action settlement must address, in on-the-record findings and conclusions, whether:

(1) the class representatives and class counsel have been and currently are adequately representing the class;

(2) the relief afforded to the class (taking into account any ancillary agreement that may be part of the settlement) is fair and reasonable given the costs, risks, probability of success, and delays of trial and appeal;

(3) class members are treated equitably (relative to each other) based on their

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facts and circumstances and are not disadvantaged by the settlement considered as a whole; and

(4) the settlement was negotiated at arm's length and was not the product of collusion.

(b) The court may approve a settlement only if it finds, based on the criteria in subsection (a), that the settlement would be fair to the class and to every substantial segment of the class. A negative finding on any of the criteria specified in subsections (a)(1)-(a)(4) renders the settlement unfair. A settlement may also be found to be unfair for any other significant reason that may arise from the facts and circumstances of the particular case.

(c) The burden is on the proponents of a settlement to establish that the settlement is fair and reasonable to the absent class members who are to be bound by that settlement. In reviewing a proposed settlement, a court should not apply any presumption that the settlement is fair and reasonable.

(d) A court may approve or disapprove a class settlement but may not of its own accord amend the settlement to add, delete, or modify any term. The court may, however, inform the parties that it will not approve a settlement unless the parties amend the agreement in a manner specified by the court. This subsection does not limit the court's authority to set fair and reasonable attorneys' fees.

(e) If, before or as a result of a fairness hearing, the parties agree to modify the terms of a settlement in any material way, new notice must be provided to any class members who may be substantially adversely affected by the change. In particular:

(1) For opt-out classes, a new opportunity for class members to opt out must be granted to all class members substantially adversely affected by the changes to the settlement.

(2) When a settlement is modified to increase significantly the benefits to the class, class members who opted out before such modifications must be given notice and a reasonable opportunity to opt back into the class.

(f) For class members who did not opt out of the class, new notice and opt-out rights are not required when, as a result of a fairness hearing, a settlement is revised and the new terms would entitle such class members to benefits not substantially less than those proposed in the original settlement.

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TAB 3B

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MINUTES

CIVIL RULES ADVISORY COMMITTEE

APRIL 9, 2015

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts in Washington, D.C., on April 9, 2015. (The meeting was scheduled to carry over to April 10, but all business was concluded by the end of the day on April 9.) Participants included Judge David G. Campbell, Committee Chair, and Committee members John M. Barkett, Esq.; Elizabeth Cabraser, Esq.; Judge Paul S. Diamond; Judge Robert Michael Dow, Jr.; Parker C. Folse, Esq.; Judge Paul W. Grimm; Dean Robert H. Klonoff; Judge Scott M. Matheson, Jr.; Hon. Benjamin C. Mizer; Justice David E. Nahmias; Judge Solomon Oliver, Jr.; Judge Gene E.K. Pratter; Virginia A. Seitz, Esq.; and Judge Craig B. Shaffer. Judge John D. Bates, Chair-designate, also attended. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Judge Jeffrey S. Sutton, Chair, Judge Neil M. Gorsuch, liaison, and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge Arthur I. Harris participated as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., the court-clerk representative, also participated. The Department of Justice was further represented by Theodore Hirt. Rebecca A. Womeldorf and Julie Wilson represented the Administrative Office. Judge Jeremy Fogel and Emery G. Lee attended for the Federal Judicial Center. Observers included Donald Bivens (ABA Litigation Section); Henry D. Fellows, Jr. (American College of Trial Lawyers); Joseph D. Garrison, Esq. (National Employment Lawyers Association); Alex Dahl, Esq. (Lawyers for Civil Justice); John Vail, Esq.; Valerie M. Nannery, Esq. (Center for Constitutional Litigation); Pamela Gilbert, Esq.; Ariana Tadler, Esq.; Henry Kelsen, Esq.; William Butterfield, Esq.; Nathaniel Gryll, Esq., and Michelle Schwartz, Esq. (Alliance for Justice); Andrea B. Looney, Esq. (Lawyers for Civil Justice); Stuart Rossman, Esq. (NACA, NCLC); and Ira Rheingold (National Association of Consumer Advocates).

Judge Campbell opened the meeting by greeting newcomers Acting Assistant Attorney General Benjamin Mizer and Rebecca Womeldorf, the new Rules Committee Officer. He also noted the hope that Sheryl Walter, General Counsel of the Administrative Office, would attend parts of the meeting.

This is the last meeting for Committee members Grimm and Diamond. Deep appreciation was expressed for "both Pauls." Judge Diamond has been a direct and incisive participant in Committee discussions, and has taken on a variety of special tasks, including the task of working with the Internal Revenue Service and the Administrative Office to establish means of paying taxes on funds deposited with the courts that avoided the need to consider amending Rule 67(b). Judge Grimm chaired the Discovery Subcommittee through arduous work, especially including the revision of Rule
37(e) that we hope will take effect this December 1 and advance resolution of disputes arising from the loss of electronically stored information. His contributions in guiding this work were invaluable.

Judge Campbell further noted that Judge Bates has been named by the Chief Justice to become the next chair of this Committee. Judge Bates has recently been Director of the Administrative Office. He also has served as a member of an important parallel committee of the Judicial Conference, the Court Administration and Case Management Committee.

Judge Campbell also reported on the meeting of the Standing Committee in January. The Civil Rules Committee did not seek approval of any proposals at that meeting. But there was a

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stimulating discussion of pilot projects, a topic that will be explored at the end of this meeting.

Judge Sutton said that this Committee did great work on the Duke Rules package. It will be important to support educational efforts that will guide lawyers and judges toward effective implementation of the new rules. He also noted that the Standing Committee is enthusiastic about the prospect that carefully designed pilot projects will help further advance the goals of good procedure.

Judge Campbell reminded the Committee that the Supreme Court had asked whether a couple of changes might be made in the Committee Notes to the amendments now pending before the Court. The changes were approved by an e-mail vote of the Committee, and were approved by the Judicial Conference without discussion. If the Court approves the amendments and transmits them to Congress, it will be important that the Committee find ways to educate people to use the rules and to encourage all judges to engage in active case management. These efforts are not a sign that the Committee is presuming that Congress will approve the rules if transmitted by the Supreme Court. Instead they will just begin the process of preparing people to implement them effectively. Judge Fogel says that the Federal Judicial Center is ready for judicial education programs. The Committee can help to prepare educational materials that can be used in Judicial Conferences in 2016, in bar associations, Inns of Court, and other forums. The Duke Law School is planning a parallel effort. This work can be advanced by designating a Subcommittee of this Committee. Members who are interested in participating should make their interest known.

A member noted that a package of CLE materials "available for free" would be seized by many law firms for their own internal programs. Judge Fogel noted that the Federal Judicial Center "really wants to collaborate with this Committee." The Center has two TV studios, and does many video productions. Videos, webinars, and like means can be used to get the word out.

Judge Campbell suggested that it will be good to use Committee alumni to get the word out, especially those who were involved in shaping the proposals. One important need is to say what is intended, to forestall use of the new rules in ways not intended. The Committee Notes were changed in light of the public comments to dispel several common misunderstandings, but ongoing efforts will be important.

October 2014 Minutes

The draft minute of the October 2014 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

Legislative Report

Rebecca Womeldorf provided the legislative report for the Administrative Office. Two familiar sets of bills have been introduced in this Congress.

The Lawsuit Abuse Reduction Act (LARA) would amend Rule 11 by reinstating the essential aspects of the Rule as it was before the 1993 amendments. Sanctions would be mandatory. The safe harbor would be removed. In 2013 Judge Sutton and Judge Campbell submitted a letter urging respect for the Rules Enabling Act process, rather than undertake to amend a Civil Rule directly.

H.R. 9, the Innovation Act, embodies patent reform measures like those in the bill that passed in the House last year. There are many provisions that affect the Civil Rules. Parallel bills have been introduced in the Senate, or are likely to be introduced. There are some indications that a bipartisan

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bill will be introduced in the Senate.

A participant observed that informal conversations suggest that some form of patent legislation will pass this year. The President agrees with the basic idea. The question for Congress is to reach agreement on the details.

Judge Campbell noted that H.R. 9 directs the Judicial Conference to prepare rules. Logically, the Conference will look to the rules committees. But the bill does not say anything of the Enabling Act process; the simple direction that the Judicial Conference act seems to eliminate the roles that the Supreme Court and Congress play in the final stages of the Enabling Act process.

Parts of H.R. 9 adopt procedure rules directly, without adding them to the Civil Rules. Discovery, for example, is initially limited to issues of claim construction in any action that presents those issues. Discovery expands beyond that only after the court has construed the claims.

Other parts of H.R. 9 direct the Judicial Conference to adopt rules that address specific points. The rules should distinguish between discovery of "core documents," which are to be produced at the expense of the party that produces them, and other documents that are to be produced only if the requester pays the costs of production and posts security or shows financial ability to pay. These rules also are to address discovery of "electronic communications," which may or may not embrace all electronically stored information. The party requesting discovery can designate 5 custodians whose electronic communications must be produced; the court can order that the number be expanded to 10, and there is a possibility for still more.

A participant suggested that Congressional interest in these matters is inspired by the Private Securities Litigation Reform Act.

Experience with the Bankruptcy Abuse Prevention and Consumer Protection Act was recalled. The Bankruptcy Rules Committee was responsible for adopting interim rules on a truly rush basis, and then for adopting final rules on a somewhat less pressed schedule. The press of work was incredible.

It was agreed that it will be important to keep close track of these bills in order to be prepared to act promptly if urgent deadlines are set.

A matter of potential interest also was noted. The Litigation Section of the American Bar Association will present a resolution on diversity jurisdiction to the House of Delegates this August. The recommendation will be to amend 28 U.S.C. § 1332 to treat any entity that can be sued in the same way as a corporation. Partnerships, limited partnerships, limited liability companies, business trusts, unions, and still other organizations would be treated as citizens of any state under which they are organized and also of the state where they have their principal place of business. The effect would be to expand access to diversity jurisdiction because present law treats such entities as citizens of any state of which any member is a citizen. The reasons for this recommendation include experience with the difficulty of ascertaining the citizenship of these organizations before filing suit, the costs of discovery on these issues if suit is filed, and the particularly onerous costs that may result when a defect in jurisdiction is discovered only after substantial progress has been made in an action.

Discussion noted that in the Judicial Conference structure, primary responsibility for issues affecting subject-matter jurisdiction lies with the Federal-State Jurisdiction Committee. The Civil Rules Committee cannot speak to these questions as a committee.

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One question was asked: How would a court determine the citizenship of a law firm — for example a nationwide, or international firm, with offices in many different places. Can a "nerve center" be identified in the way it may be identified for a corporation?

The conclusion was that if individual Committee members have thoughts about this proposal, they can be taken to the Litigation Section.

Rules Recommended for Adoption

Proposals to amend Rules 4(m), 6(d), and 82 were published for comment in August, 2014. This Committee now recommends that the Standing Committee recommend them for adoption, with a possible change in the Committee Note for Rule 6(d).

RULE 4(m)

Rule 4(m) sets a presumptive limit on the time to serve the summons and complaint. The present rule sets the limit at 120 days; the Duke Package of rule amendments now pending in the Supreme court would reduce the limit to 90 days as part of a comprehensive effort to expedite the initial phases of litigation.

It has long been recognized that more time is often needed to serve defendants in other countries. Rule 4(m) now recognizes this by stating that it does not apply to service in a foreign country under Rule 4(f) or Rule 4(j)(1). These cross-references create an ambiguity. Service on a corporation in a foreign country is made under Rule 4(h)(2). Rule 4(h)(2) in turn provides for service outside any judicial district of the United States on a corporation, partnership, or other unincorporated association "in any manner prescribed by Rule 4(f) for serving an individual," except for personal delivery. It can be argued that by invoking service "in any manner prescribed by Rule 4(f)," Rule 4(h)(2) service is made under Rule 4(f). But that is not exactly what the rule says. At the same time, it is clear that the reasons that justify exempting service under Rules 4(f) and 4(j)(1) from Rule 4(m) apply equally to service on corporations and other entities. At least most courts manage to reach this conclusion. But many of the comments responding to the proposal to reduce the Rule 4(m) presumptive time to 90 days reflected a belief that the present 120-day limit applies to service on a corporation in a foreign country. It seems wise to amend Rule 4(m) to remove any doubt.

There were only a few comments on the proposal. All supported it.

The proposed amendment is commended to the Standing Committee with a recommendation to recommend it for adoption as published.

RULE 6(d)

Under Rule 6(d), "3 days are added" to respond after service is made in four described ways, including electronic service. The proposal published last August removes service by electronic means from this list. It also adds parenthetical descriptions of service by mail, leaving with the clerk, or other means consented to, so as to relieve readers of the need to constantly refer back to the corresponding subparagraphs of Rule 5(b)(2).

The 3-added days provision has been the subject of broader inquiry, but it has been decided that for the time being it is better to avoid eliminating the 3 added days for every means of service.

For service by electronic means, however, the conclusion has been that the original concerns

with imperfections in electronic communication have greatly diminished with the rapid expansion of electronic technology and the growing numbers of people who can use it easily.

This conclusion was challenged by some of the comments. One broad theme is that the time periods allowed by the rules are too short as they are. Busy, even harassed practitioners, need every concession they can get. More specific comments repeatedly complained of "gamesmanship." Electronic filing is delayed until a time after the close of the ordinary business day and after the close of the clerk's office. Many comments invoked the image of filings at 11:59 p.m. on a Friday, calculated to reach other parties no earlier than Monday.

A more specific concern was expressed by the Magistrate Judges Association. As published, the rule continues to add 3 days after service under Rule 5(b)(2)"(F)(other means consented to)." They fear that careless readers will look back to present Rule 5(b)(2)(E), which allows electronic service only with the consent of the person served, and conclude that 3 days are added because service by electronic means is an "other means consented to." This is an obvious misreading of Rule 5(b)(2), since (F) embraces only means other than those previously enumerated, including (E)'s provision for service by electronic means. Nonetheless, the magistrate judges have great experience with inept misreading of the rules, and it is difficult to dismiss this prospect out of hand. At the same time, there are reasons to avoid the recommended cures. One would eliminate the parenthetical descriptions added to illuminate the cross-references to subparagraphs (C), (D), and (F). These descriptions have been blessed by the Style Consultant as a useful addition to the rule, and they seem useful. The other would expand the parenthetical to subparagraph (F) to read: "(other means consented to, <u>except electronic service</u>.)" One reason to resist these suggestions is that it seems unlikely that serious consequences will be imposed on a party who manages to misread the rule. A 3-day overrun in responding is likely to be treated leniently. More important is that the proposals to amend Rule 5(b)(2)(E) discussed below will eliminate the consent requirement for registered users of the court's electronic system. The Committee agreed that neither of the recommended changes should be made.

The Department of Justice has expressed concerns about the 3-added days provision, and particularly about the prospect of gamesmanship in filing just before midnight on the eve of a weekend or legal holiday. It has proposed a lengthy addition to the Committee Note to describe these concerns and to state expressly that courts should accommodate those situations and provide additional time to discourage tactical advantage or prevent prejudice. An alternative shorter version was prepared by the Reporter to illustrate possible economies of language: "The ease of making electronic service outside ordinary business hours may at times lead to a practical reduction in the time available to respond. Eliminating the automatic addition of 3 days does not limit the court's authority to grant an extension in appropriate circumstances."

Discussion began with the statement that the Department of Justice feels strongly about adding an appropriate caution to the Committee Note. Some changes might be made in the initial Department draft — the list of examples of filing practices that may shorten the time to respond could be expanded by adding a few words to one example: "or <u>just before or during</u> an intervening weekend or holiday * * *." Their longer language is more helpful than the more compact version. "Our attorneys are often beset by gamesmanship."

A member asked whether there really will be difficulties in getting appropriate extensions of time. His experience is that this is not a problem, and problems seem unlikely. In any event, the shorter version seems better. The second sentence respects what most courts do.

Another member was "not keen on adding admonitions to judges to be reasonable." This is

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not a general practice in Committee Notes. If we are to go down this road, it might be better to have a single general admonition in a Note attached to one rule.

A lawyer member reported that he recently had encountered a problem in delivering an electronic message. The recipient's firm had recently installed a new system and the message was sorted out by the spam filter. "Consent comforted me." It took a few days to clear up the difficulty. That leads to the question: when does the clock start? The sensible answer is not from the time of the transmission that failed, but from the time of sending a transmission that succeeded. On the broader question of gamesmanship, "I'm always served Friday afternoon at the end of the day."

A judge member "shares the ambivalence." Does a judge really need to be told to be reasonable? Should Committee Notes go on to suggest reasonable accommodations for extenuating family circumstances, or clinical depression?

Another lawyer member observed that "Judges are busy. They do not notice the abuses I see all the time." Adding to the Committee Note as the Department suggests serves a useful purpose because it implicitly condemns the abuses that judges do not — and should not — see on a regular basis.

Still another judge member suggested that the Department's draft language is opaque. The first sentence says the amended rule is not intended to discourage judges from granting additional time. The final sentence directs them that they should do so. Whatever else can be said, it needs editing.

A judge suggested that "Much of what we do here is to write rules for colleagues who do not do their jobs. Too often this is simply writing more rules for them to ignore. I do keep aware of counsel's behavior." The Duke Rules Package served the need to encourage judges to manage their cases. "We know this already."

The concern with preaching to judges in a Committee Note was addressed by suggesting that the Note could instead address advice to lawyers that they should not be diffident about seeking extensions in appropriate circumstances.

One more judge suggested that the kinds of gamesmanship feared by the Department "is obviously bad conduct, easily brought to the court's attention." The response for the Department was that "we try not to be whiners about bad lawyers." And the reply was that it can be done without whining.

The Department renewed the suggestion of the member who thought an addition to the Note would be a reminder to lawyers to behave decently. "At least the more economical version is helpful."

Actual practice behavior was described by another member. "Whether or not it's sharp practice, the routine filing is at 11:59 p.m. on Friday, unless the court directs a different time. No one gets to go home until after midnight." It would help to amend the rule to set 6:00 p.m. as the deadline for filing.

This observation was seconded by observing that sometimes late-night filing is bad behavior. Sometimes it is routine habit, or a simple reflection of routine procrastination. Adding something to the Note may be appropriate, but it should be more neutral than the reference to "outside ordinary business hours" in the compact sketch.

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Judge Campbell summarized the discussion as showing that three of four practicing lawyers on the Committee say late filing is a common event. The Department says the same. Other advisory Committees are working on the same issue. Rather than work out final Note language in this Committee, it would be good to delegate to the Chair and Reporter authority to work out common language with the other committees, as well as to resolve with them whether anything at all should be added to the Committee Note.

The Committee voted unanimously to recommend the published text of Rule 6(d) for adoption. And it agreed to delegate to the Chair and Reporter responsibility for working with the other committees to adopt a common approach to the Committee Notes.

RULE 82

The published proposal to amend Rule 82 responds to amendments of the venue statutes. It has long been understood that admiralty and maritime actions are not governed by the general provisions for civil actions. When the admiralty rules were folded into the Civil Rules, this understanding was embodied in Rule 82 by providing that an admiralty or maritime claim under Rule 9(h) is not a civil action for purposes of 28 U.S.C. §§ 1391-1392. The recent statutory amendments repeal § 1392. They also add a new § 1390. Section 1390(b) excludes from the general venue chapter "a civil action in which the district court exercises the jurisdiction conferred by section 1333" over admiralty or maritime claims.

The proposed amendment provides that an admiralty or maritime claim under Rule 9(h) is governed by 28 U.S.C. § 1390, and deletes the statement that the claim is "not a civil action for purposes of 28 U.S.C. §§ 1391-1392." It was not addressed in the comments after publication.

The Committee voted unanimously to recommend the published Rule 82 proposal for adoption.

Rules Recommended for Publication

The rules recommended for publication deal with aspects of electronic filing and service. Judge Solomon and Clerk Briggs were this Committee's members of the all-Committees Subcommittee for matters electronic, and have carried forward with the work after the Subcommittee suspended operations at the beginning of the year. The choice to suspend operations may have been premature. The Appellate, Bankruptcy, Civil, and Criminal Rules Committees are all working on parallel proposals. It is desirable to frame uniform rule text when there is no reason to treat common questions differently, recognizing that different sets of rules may operate in circumstances that create differences in what might have seemed to be common questions. But the process of seriatim preparation for the agendas of different committees meeting a different times has impeded the benefits of simultaneous consideration. For the Civil Rules, the result has been that worthy ideas from other Committees have had to be embraced in something of a hurry, and have been presented to the Civil Rules Committee in a posture that leaves the way open for accommodations for uniformity with the other Committees. The Committee Note language issue for Rule 6(d) is an illustration. The e-filing and e-service rules provide additional illustrations.

These proposals emerge from a process that winnowed out other possible subjects for e-rules. The Minutes for the October 2014 meeting reflect the decision to set aside rules that would equate electrons with paper. Filing, service, and certificates of service remain to be considered.

E-FILING: RULE 5(d)(3)

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Rule 5(d)(3) provides that a court may allow papers to be filed, signed, or verified by electronic means. It further provides that a local rule may require e-filing only if reasonable exceptions are allowed. Great progress has been made in adopting and becoming familiar with e-filing systems since Rule 5(d)(3) was adopted. The amendment described in the original agenda materials directed that all filings must be made by electronic means, but further directed that paper filing must be allowed for good cause and that paper filing may be required or allowed for other reasons by local rule. This approach reflected the great advantages of efficiency that e-filing can achieve for the filer, the court, and other parties. Those advantages accrue to an adept pro se party as well as to represented parties. Indeed the burdens of paper filing may weigh more heavily on a pro se party than on a represented party.

The Criminal Rules Committee considered similar questions at its meeting in mid-March. Criminal Rule 49 incorporates the Civil Rules provisions for filing. Their discussion reflected grave doubts about the problems that could arise from requiring pro se criminal defendants and prisoners to file by electronic means. Access to e-communications systems, and the ability to use them at all are the most basic problems. In addition, training pro se litigants to use the court system could impose heavy burdens on court staff. Means must be found to exact payment for filings that require payment. There are risks of deliberate misuse if a court is unable to limit a defendant or prisoner's access by blocking access to all other cases. Constitutional concerns about access to court would arise if exceptions are not made. This array of problems could be met by adopting local rules, but the burden of adopting new local rules should not be inflicted on the many courts whose local rules do not now provide for these situations.

It was recognized that the problems facing criminal defendants and prisoners may be more severe than those facing pro se civil litigants, but questions were asked whether the differences are so great as to justify different provisions in the Criminal and Civil Rules. The Criminal Rules Committee asked that these issues be considered in addressing Civil Rule 5, and that if this Committee continues to prefer that adjustments for pro se litigants be made by local rules or on a case-by-case basis it consider deferring a recommendation to publish Rule 5 amendments while the Criminal Rules Committee further considers these issues.

A conference call was held by the Chair of the Criminal Rules Committee, the immediate past and current chairs of their subcommittee for e-issues, their Reporters, and the Civil Rules e-rules contingent. Thorough review of the Criminal Rules Committee concerns led to a revised Rule 5(d)(3) proposal. The revised proposal was circulated to the Committee as a supplement to the agenda materials, and endorsed by Judge Campbell, Judge Oliver, and Clerk Briggs.

The version of Rule 5(d)(3) presented to the Committee mandates e-filing as a general matter, except for a person proceeding without an attorney. E-filing is permitted for a person proceeding without an attorney, but only when allowed by local rule or court order. This approach is designed to hold the way open for pro se litigants to seize the benefits of e-filing as they are competent to do so. It well may be that these advantages will become more generally available to pro se civil litigants than to criminal defendants or prisoners filing § 2254 or § 2255 proceedings, but that event will not interfere with adopting local rules that reflect the differences.

Judge Solomon endorsed the revised approach. Although the Civil Rule draft started in a different place, the Criminal Rules Committee's concerns were persuasive. The pro se problem is greater in the criminal arena, but there also are problems in the civil arena. The new approach does no harm in the short run, and it is likely that we can live with it longer than that. And it is an advantage to have rules that are as parallel as can be.

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Clerk Briggs agreed. It will not be burdensome to address pro se civil filings through local rules or by court order. For now, there will not be many pro se litigants that will be trusted with e-filing. But it should be noted that the present CM/ECF system can be used to ensure that a pro se litigant is able to file and access files only in his own case. And the system screens for viruses. And yes, there is a disaster recovery plan — everything is replicated on an essentially constant basis and stored in distant facilities.

A specific drafting question was raised: is there a better way to refer to pro se parties than "a person proceeding without an attorney"? It was agreed that this language seems adequate. One advantage is that it includes an attorney who is proceeding without representation by another attorney — such an attorney party may not be a registered user of the system, and may not be admitted to practice as an attorney in the court.

Another question is whether the rule should continue to say that a paper may be signed by electronic means, or whether it is better to provide only for e-filing, adding a statement that the act of filing constitutes the signature of the person who makes the filing. The reasons for omitting a statement about signing by electronic means are reflected in the history of a Bankruptcy Rule provision that was published for comment and then withdrawn. Many filings include things that are signed by someone other than the filer. Common civil practice examples include affidavits or declarations supporting and opposing summary-judgment motions, and discovery materials. Means for verifying electronic signatures are advancing rapidly, but have not reached a point of common acceptance and practice that would support attempted rules on the issue. It was agreed that the rule text should adhere to the approach that describes only filing by e-means, and then states that the act of filing constitutes the filer's signature. But it also was agreed that it would be better to delete the next-to-last paragraph of the draft Committee Note that discusses these possible signature issues.

Another issue was presented by the bracketed final paragraph in the Committee Note that raised the question whether anything should be said about verification. Present Rule 5(d)(3) recognizes local rules that allow a rule to be verified by electronic means. The proposed amendment omits any reference to verification. Not many rules provide for verification. Rule 23.1 provides for verification of the complaint in a derivative action. Rule 27(a) requires verification of a petition to perpetuate testimony. Rule 65(b)(1)(A) allows use of a verified complaint rather than an affidavit to support a temporary restraining order. Verification or an affidavit may be required in receivership proceedings. Verified complaints are required by Supplemental Rules B(1)(A) and C(2). Although these add up to a fair number of rules by count, they touch only a small part of the docket. It was concluded that it would be better to omit this paragraph from the recommendation to publish.

RULE 5(b)(2)(E): E-SERVICE

Rule 5(b)(2)(E) now allows service by electronic means if the person served consents in writing. Rule 5(b)(3) allows this service to be made through the court's transmission facilities if authorized by local rules. In practice consent has become a fiction as to attorneys — in almost all districts an attorney is required to become a registered user of the court's system, and access to the court's system is conditioned on consent to be served through the system. The proposed revision of Rule 5(b)(2)(E) set out in the agenda materials deletes the consent element, and simply provides that service may be made by electronic means. It further provides that a person may show good cause to be exempted from such service, and that exemptions may be provided by local rule.

This time it is preparation of the agenda materials for an Appellate Rules Committee meeting later this month that has raised complicating issues. The complications again involve pro se litigants. The concern is that many pro se litigants may not have routine, continuous access to means of

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382 electronic communication, and in any event may not be adept in its use. This has not been a problem
383 under the present rule, since it requires consent to e-service. A pro se party need not consent, and
384 is not subject to the fictive consent that applies to attorneys. But eliminating consent will generate
385 substantial work in case-specific court orders or in amending local rules.

386 These questions were presented on the eve of this meeting. Drafting to accommodate them
387 can be considered, but subject to further polishing. The draft presented for consideration responded
388 by distinguishing registered users of the court's system from others. It continues to say simply that
389 service may be made by electronic means on a person who is a registered user of the court's system.
390 But it requires consent for others. The consent can provide ample protection by specifying the
391 electronic address to use, and a form of transmission that can be used by the recipient. Consent also
392 will be available for registered user of the court's system who find it convenient to serve some
393 papers by means other than the court's system. For civil cases, discovery requests and responses are
394 a common example. These papers are not to be filed with the court until they are used in the case
395 or the court orders filing. It may prove desirable to serve them by electronic means outside the
396 court's system. Here too, consent will afford important protections by specifying the address to be
397 used and the form of communication.

398 A judge observed that he encounters many pro se litigants who exchange with attorneys by
399 e-mail.

400 Another judge noted that bankruptcy practice is moving to bar pro se filing, but to recognize
401 consent to service by e-mail. "This saves costs."

402 It was noted that the CM/ECF system allows service without filing. One court, as an
403 example, requires a court order after a litigant moves for permission. It would be good to have a rule
404 that allows consent to serve this function without need for a court order.

405 A separate question was whether written consent should be required, as in the present rule.
406 Why not allow consent in an e-communication? One way written consent can be accomplished
407 would be to add consent to the check list of provisions on the pro se appearance form. Another judge
408 suggested that it would be prudent to get written consent, but the rule should not specify it.

409 If the rule is framed to require consent for service outside the court's system, it was agreed
410 that there is no need to carry forward from the agenda draft the exceptions that allow a person to be
411 exempted for good cause or by local rule.

412 Further discussion reiterated the point that the revised draft distinguishes service through the
413 court system on registered users, which would not require consent, from service by other electronic
414 means, which would require consent. This is an advance over the original suggestion, which focused
415 on service through the court's system. The Committee Note can address consent among the parties,
416 refer to a check-the-box pro se appearance form, the availability of direct e-mail service with
417 consenting parties, and the need for court permission for consent by a person who is not a registered
418 user to receive service through the court system.

419 The Committee agreed to go forward with a recommendation to publish a version of Rule
420 5(b)(2)(E) that distinguishes between service on registered users through the court's system and
421 service by other e-means with consent. Precise rule language and corresponding changes in the
422 Committee Note will be settled, if possible in ways that achieve uniformity with other advisory
423 committees.

(An observer raised a particular question outside the agenda materials. She has twice encountered difficulties with e-filing in this circumstance: A discovery subpoena is served on a nonparty outside the district where the action is pending. A motion to compel compliance becomes necessary in the district where the discovery will be taken. There is no current docket in the district for enforcement. Two courts have refused to allow her to use electronic means to open a miscellaneous docket item. They insisted on a personal appearance. This is an unnecessary inconvenience. There is a patchwork of rules around the country.

(This problem may not be a subject for rulemaking. Certainly it is not fit for rulemaking on the spur of the moment. But the problem may be helped by proposed Rule 5(d)(3), which will allow e-filing unless a local rule requires paper filing. It might be possible to add a comment on this problem to the Committee Note for Rule 5(d)(3). That possibility was taken under advisement.)

NOTICE OF ELECTRONIC FILING AS PROOF OF SERVICE: RULE 5(d)(1)

The agenda materials include an amendment of Rule 5(d)(1) that would provide that a notice of electronic filing constitutes a certificate of service on any party served through the court's transmission facilities. The draft includes in brackets a provision that would add a statement similar to Rule 5(b)(2)(E): the notice of electronic filing does not constitute a certificate of service if the serving party learns that the filing did not reach the party to be served.

Allowing a notice of electronic filing to constitute a certificate of service on any party served through the court's transmission facilities may not seem to do much. A party accustomed to serving through the court's system includes in the filing a certificate that says the paper was served through the court's system. Eliminating those lines is a small gain. But the amendment also protects those who do not think to add those lines, and also avoids the instinctive reaction of cautious filers that prompts filing a separate certificate just to be sure. The amended rule text was approved as a recommendation to publish.

Brief discussion concluded that the bracketed material addressing failed delivery is not necessary. As drafted, it is limited to service through the court's facilities. Ordinarily the court system will flag a failed transmission. It may be that a party will learn that a successful transmission somehow did not come to the recipient's attention, but that situation seems too rare to require rule text. That will be deleted from the recommendation to publish.

Judge Harris, after these questions were discussed in the Bankruptcy Rules Committee, suggested that it would be useful to expand the rule by adding a statement of what should be included in a certificate of service when service is not made through the court's electronic facilities. The added language would address the elements that should be included in a certificate: the date and manner of service; the names of the persons served; and the address used for whatever form of service was made. The advantage of adding this language to the several sets of rules that address certificates of service would be to establish a uniform certificate for all federal courts. Uniformity is desirable in itself, and uniformity would protect against the need to consult local rules, or the ECF manual, for each district. Certificates now may vary. It may be as bland as "I served by mail," or "I served by mail on this date, to this address," and so on. The proposed language is taken from Appellate Rule 25(d)(1)(B) for a proof of service. The language works there, and would work elsewhere.

This proposal was countered: the courts and parties seem to be doing well without help from a detailed rule prescription. And service by these other means is likely to decline continually as electronic service takes over and provides a notice of electronic filing. Another member added that

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he routinely includes all of this information in the certificate of service. It was further noted that the Civil Rules did not provide for certificates of service until 1991. The present provision was added then to supersede a variety of local rules. The Committee then considered a provision that would prescribe the contents of the certificate, but feared that in some situations the party making service would not be able to provide all of the information that might be included.

Brief further discussion showed that no Committee member favored adding a provision that would define the contents of a certificate of service by means other than the court's transmission facilities.

A style question was left for resolution by the Style Consultant. Rule 5(d)(1) now concludes with a sentence introduced by "But." A paper that is required to be served must be filed. "But" disclosure and discovery materials must not be filed except in defined circumstances. The question is whether "but" remains appropriate after lengthening the first sentence.

RULE 68

Judge Campbell summarized the discussion of Rule 68 at the October 2014 meeting. Rule 68 was the subject of two published amendment proposals in 1983 and 1984. The project was abandoned in face of fierce controversy and genuine difficulties. Rule 68 was taken up again early in the 1990s and again the project was abandoned. Multiple problems surround the rule, including the basic question whether it is wise to maintain any rule that augments natural pressures to settle. But, aside from all the discovery rules taken together, Rule 68 is the most frequent subject of public suggestions that amendments should be undertaken. Most of the suggestions seek to add "teeth" to the rule by adding more severe consequences for failing to win a judgment better than a rejected offer. The Committee decided in October that the most fruitful line of attack will be to explore practices in state courts to see whether there are rules that in fact work better than Rule 68. Jonathan Rose undertook preliminary research that produced a chart of state rules, comparing their features to Rule 68. He also provided a bibliography. It was hoped that the Supreme Court Fellow at the Administrative Office could make time to explore these materials, and perhaps to look for state-court decisions. There have been too many competing demands on his time, however, and little progress has been made. This work will be pursued, aiming at a report to the meeting next November.

DISCOVERY: "REQUESTER PAYS"

Judge Grimm opened the subject of requester-pay discovery rules by noting that these questions were opened at the fall meeting in 2013 in response to suggestions that "requester-" or "loser-pays" rules be adopted to shift the costs of responding to discovery requests in cases where the burdens of responding to discovery are disproportionate among the parties or otherwise unfair. The focus of these suggestions ordinarily is Rule 34 document production. The background is the shared assumption, not articulated in any rule but recognized in the 1978 Oppenheimer opinion in the Supreme Court, that ordinarily the responding party bears the burdens and costs of responding. The Court noted then, and it is also widely understood, that a court order can shift the costs, in whole or in part, to the requesting party.

The Rule 26(c) proposal now pending in the Supreme Court as part of the Duke Rules Package expressly confirms the common understanding that a protective order can allocate the expenses of discovery among the parties.

The House of Representatives has held hearings to examine the possibilities of requester-pay practices. Patent law reform bills recently introduced in Congress contain such provisions.

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Subcommittee work on these issues was sidetracked for a year while the Subcommittee concentrated on the Rule 37(e) provisions addressing loss of electronically stored information that now are pending before the Supreme Court. The work is resuming now.

Passionate views are held on all sides of requester pays. Much of the discussion focuses on asymmetric discovery cases in which one party has little discoverable information and is able to impose heavy burdens in discovering vast deposits of information held by an adversary. The explosion of discoverable matter embodied in electronically stored information adds to the passion. And it is often suggested that a data-poor party may deliberately engage in massive discovery for tactical reasons.

The other side of the debate is framed as an issue of access to justice. Often a data-poor party is poor in other resources as well, and cannot afford to pay the expenses of sorting through information held by a data-rich party. This viewpoint was expressed in public comments on many of the discovery rules provisions in the Duke Rules Package, and particularly in the comments on proposed Rule 26(c).

A 2014 publication of the Institute for the Advancement of the American Legal System provides information about these issues. A recent law review article catalogues the current rules that allow shifting litigation costs — most of them discovery rules — and explores many of the surrounding issues, including possible due process implications. The closed-case study done by the Federal Judicial Center in conjunction with the Duke Conference shows that most cases do not generate significant discovery burdens. But it also shows that there are outliers that involve serious burdens and present serious issues for possible reform. It remains a challenge to determine whether these problems are unique to identifiable types of cases. One particular opportunity will be to explore the experience of "patent courts." Other subject-matter areas may be identifiable. Or other characteristics of litigation may be associated with disproportionate discovery, whether or not it is possible to address them in any particular way by court rules.

One line of inquiry will be to attempt to find out through the Federal Judicial Center what kinds of cases are now associated with motions to order a requester to bear the costs of discovery.

Emery Lee reported that it is difficult to sort the cases out of general docket entries. He began an inquiry by key-citing the headnotes in the Zubulake opinions, which are prominent in addressing cost-shifting in discovery of ESI. They have not been much cited. Looking at the cases he found through Pacer, he developed search terms. Then he undertook a docket search in four districts that have high volumes of cases — S.D.N.Y., N.D.Ill, N.D.Cal., and S.D.Tex. A "fuzzy search" turned up nothing useful. There were, to be sure, "lots of hits" in the Northern District of Illinois because the e-pilot there requires the parties to discuss cost bearing. And a lot of the hits involved the costs of depositions, not documents. There were not many hits for document discovery.

Judge Grimm asked what further research might be done: law review articles? State experience? Case law? A survey or other empirical inquiry? The quest would be to refine our understanding of how often burdensome costs are encountered.

Judge Grimm further noted that England has cost shifting, but it also has broad bilateral initial disclosures.

The Subcommittee hopes to narrow what needs be considered. What guidance can be provided?

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Judge Campbell reminded the Committee that the Committee Note to Rule 26(c) in the pending package of Duke Rules amendments was revised after publication to provide reassurance that it is not intended to become a general requester-pays rule. Many comments on the published proposal expressed fears on this score

A judge urged that it is not wise "to write rules for exceptional-exceptional cases. There is a cost of litigation. Part of that is the cost of discovery." It is really depositions that drive the cost of discovery in most cases. And the requesting party pays for most of the costs of a deposition. Document production does not drive discovery costs in most cases. There are not many cases where the plaintiff does not have to bear some discovery costs, especially depositions. The rules already limit the numbers of interrogatories and depositions, and proposals to tighten these limits were rejected for good reasons after publication of the Duke Rules Package. And "counsel has to invest time in depositions." It is better not to attempt to write rules for the massive document discovery cases that do come up.

Another judge asked what is the scope of the problem? We need to know that before making a rule. Whose problem needs to be fixed? Why do we think we should redistribute the costs of discovery?

Judge Grimm responded that the Subcommittee shares these concerns. "We can understand there are problem cases without knowing what to do about them. The source of the problems remains to be determined."

A member asked what protections there are for discovery from third parties who do not have a stake in the game? Rule 45(d)(1) directs that a party or attorney responsible for issuing and serving a subpoena take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. Rule 45(d)(2) further provides that a person directed to produce documents or tangible things may serve objections. An objection suspends the obligation to comply, which revives only when ordered by the court, and the order "must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance." Perhaps that is protection enough.

One possible approach was suggested — to sample a pool of district judges to ask whether they have problems with excessive discovery that should be addressed by explicit requester-pays rules provisions. Much civil litigation now occurs in MDL proceedings; perhaps we could look there.

A different suggestion was that "this looks like a solution in search of a problem. The requester-pays proposals have the air of a strategic effort to deter access to justice in certain types of cases. District judges will have a much better sense of it — whether there are patterns of abuse that can be dealt with by rule, rather than case management. I litigate cases with massive discovery, but the pressures are to be reasonable because it's 2-way, and I have to search through what I get." Perhaps there are problems in asymmetric cases. "But the very fact that the Committee is struggling to figure out whether there is a problem suggests we pause" before plunging in.

Another member said that the mega cases tend to be MDL proceedings. The purpose of MDL is to centralize discovery, to avoid constant duplication. The management orders are for production that occurs once, and for one deposition per witness. MDL proceedings are likely to save costs, reaping the efficiency advantages of economies of scale. MDL judges seek to tailor cost sharing in ways that make sense.

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596 Another lawyer member noted the many protective provisions built into the rules. Rule
597 45(c)(2)(B) expressly protects nonparties. Rule 26(b)(2)(B) regulates discovery of ESI that is not
598 reasonably accessible, and contemplates requester-pays solutions. Rule 26(b)(2)(C)(iii) directs the
599 court to limit discovery on a cost-benefit analysis. Rule 26(c) is used now to invoke requester-pays
600 protections. Rule 26(g) requires counsel to avoid unduly burdensome discovery requests. The Duke
601 Rules package pending before the Supreme Court is designed to invigorate these principles. If the
602 Court and Congress allow the proposed rules to take effect, we will need to find out whether they
603 have the intended effect. Among them is the explicit recognition in Rule 26(c) of protective orders
604 for cost-sharing. Together, these rules provide many opportunities to control unreasonable
605 discovery.

606 Continuing, this member noted that something like 300,000 cases are filed in federal courts
607 every year. Perhaps 15,000 to 30,000 of them will involve document-heavy discovery. The FJC
608 closed-case study shows that most cases have little discovery. We need to find out whether there are
609 types of cases that generate problems. But even that inquiry might be deferred for a while to see how
610 the proposed amended rules will work. "I do not know that it's a big problem now in most cases."
611 Problems are most likely to arise when discovery pairs a data-poor party against a data-rich party.
612 Perhaps we should defer acting on requester-pays rules for a while.

613 It was noted that the Department of Justice has a lot of experience with discovery, both
614 asking and responding. Further inquiry probably is warranted. The Department can undertake further
615 internal inquiries.

616 A judge said that there are not many reported cases invoking Rule 45(c)(2). That may
617 suggest there is little need for new rules to protect nonparties. More generally, the rules we have
618 now seem adequate to address any problems. "The need may be to use them, not to add new rules."

619 A lawyer echoed these views, observing that a great deal of work went into shaping the Duke
620 Rules package with the goal of advancing proportionality in discovery. We should wait to see what
621 effect the new rules have if they are allowed to become effective.

622 Another judge suggested that study of initial disclosure may be a good place to start. It may
623 be helpful to return to the original rule, requiring disclosure of what is relevant to the case as a
624 whole, not merely "your case." The present limited disclosure rule seems to fit awkwardly with our
625 focus on cooperation and proportionality. Initial disclosure rules, indeed, will be discussed later in
626 this meeting as a possible subject for a pilot project.

627 Discussion of initial disclosure continued. The original idea was to get the core information
628 on the table at the outset. That proved too ambitious at the time — local rule opt-outs were provided
629 to meet resistance, and many districts opted out in part or entirely. National uniformity was attained
630 only by narrowing disclosure to "your case." The employment protocols now adopted by 50 judges
631 may show that broad initial disclosure can work. So it was suggested that we could look to state
632 practices. The Institute for the Advancement of the American Legal System has generated reports.
633 Broad initial disclosure remains a controversial idea: "You can be right, but too soon."

634 The final observation was that the Committee undertook to study requester-pays rules in
635 response to a letter from members of Congress.

636 *Appellate-Civil Rules Subcommittee*

637 A joint subcommittee has been reconstituted to explore issues that overlap the Appellate

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638 Rules and Civil Rules. Judge Matheson chairs the Subcommittee. Virginia Seitz is the other Civil
639 Rules member. Appellate Rules Committee members are Judge Fay, Douglas Letter, and Kevin
640 Newsom.

641 The Subcommittee is exploring two sets of issues that first arose in the Appellate Rules
642 Committee. As often happens, if it seems wise to act on these issues, the most likely means will be
643 revisions of Civil Rules. That is why a joint Subcommittee is useful. The issues involve
644 "manufactured finality" and post-judgment stays of execution under Civil Rule 62.

645 MANUFACTURED FINALITY

646 Judge Matheson introduced the manufactured finality issues. "This is not a new topic." An
647 earlier subcommittee failed to reach a consensus. "Nor is consensus likely now." The Subcommittee
648 seeks direction from the Appellate and Civil Rules Committees.

649 "Manufactured finality" refers to a wide variety of strategies that may be followed in an
650 attempt to appeal an interlocutory order that does not fit any of the well-established provisions for
651 appeal. Rule 54(b) partial finality is, for any of many possible reasons, not available. Other
652 elaborations of the final-judgment rule, most obviously collateral-order doctrine, also fail. Avowedly
653 interlocutory appeals under § 1292 are not available. The theoretical possibility of review by
654 extraordinary writ remains extraordinary.

655 Many examples of orders that prompt a wish to appeal could be offered. A simple example
656 is dismissal of one claim while others remain, and a refusal to enter a Rule 54(b) judgment. Or
657 important theories or evidence to support a single claim are rejected, leaving only weak grounds for
658 proceeding further.

659 If the would-be plaintiff manages to arrange dismissal of all remaining claims among all
660 remaining parties with prejudice, courts recognize finality. Finality is generally denied, however,
661 if the dismissal is without prejudice. And an intermediate category of "conditional prejudice" has
662 caused a split among the circuits. This tactic is to dismiss with prejudice all that remains open in the
663 case after a critical interlocutory order, but on terms that allow revival of what has been dismissed
664 if the court of appeals reverses the order that prompted the appeal. Most circuits reject this tactic,
665 but the Second Circuit accepts it, and the Federal Circuit has entertained such appeals. There is a
666 further nuance in cases that conclude a dismissal nominally without prejudice is de facto with
667 prejudice because some other factor will bar initiation of new litigation — a limitations bar is the
668 most common example.

669 The Subcommittee has narrowed its discussion to four options: (1) Do nothing. The courts
670 would be left free to do whatever they have been doing. (2) Adopt a simple rule stating what is
671 generally recognized anyway — a dismissal with prejudice achieves finality. Although this is
672 generally recognized, an explicit rule would provide a convenient source of guidance for
673 practitioners who are not familiar with the wrinkles of appeal jurisdiction and reassurance for those
674 who are. But the rule might offer occasion for arguments about implied consequences for dismissals
675 without prejudice, particularly the "de facto prejudice" and "conditional prejudice" situations. (3)
676 Adopt a clear rule saying that <u>only</u> a dismissal with prejudice establishes finality. Still, that might
677 not be as clear as it seems. Only elaborate rule text could definitively defeat arguments for de facto
678 prejudice or conditional prejudice. Committee Note statements might lend further weight. Assuming
679 a clear rule could be drafted to close all doors, it would remain to decide whether that is desirable.
680 (4) A rule could directly address conditional prejudice, whether to allow it or reject it.

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Rules sketches illustrating the three alternatives for rules approaches are included in the agenda materials. The Subcommittee deliberated its way to the same pattern as the earlier subcommittee. It has not been possible to reach consensus. On the conditional prejudice question, the circuit judges on the Subcommittee would not propose a rule that would manufacture finality in this way. The lawyers seemed to like the idea, and there are indications that district judges also like the idea.

This introduction was followed by reflections on the general setting. The final-judgment rule rests on a compromise between competing values. The paradigm final judgment leaves nothing more to be done by the district court, apart from execution if there is a judgment awarding relief. Insisting on finality is a central element in allocating authority between trial courts and appellate courts. It also conduces to efficiency, both in the trial court and in the appellate court. Many issues that seem to loom large as a case progresses will be mooted by the time the case ends in the district court. Free interlocutory appeal from many orders would delay district-court proceedings and, upon affirmance, produce no offsetting benefit. Periodic interruptions by appeals could wreak havoc with effective case management.

The values of complete finality are offset by the risk that all trial-court proceedings after a critical and wrong ruling will be wasted. Some interlocutory orders, moreover, have real-world consequences or exert pressures on the parties that, if the order is wrong, are distorting pressures. These concerns underlie not only the provision for partial final judgments in Rule 54(b) but a number of elaborations of the final-judgment concept. The best known elaboration is found in collateral-order doctrine, an interpretation of the "final decision" language in § 1291 that allows appeals from orders that do not resemble a traditional final judgment. Other provisions are found in avowedly interlocutory-appeal provisions, most obviously in § 1292 and Rule 23(f) for orders granting or refusing class certification. Extraordinary writ review also provides review in compelling circumstances.

The recent process of elaborating § 1291 seems, on balance, to show continuing pressure from the Supreme Court to restrain the inventiveness shown by the courts of appeals. The courts of appeals embark on lines of decision that expand appeal opportunities, confident in their abilities to achieve a good balance among the competing forces that shape appeal jurisdiction on terms that at times seem to approach case-specific rules of jurisdiction. The Supreme Court believes that it is better to resist these temptations. The clearest illustrations are provided by the line of cases that have restricted collateral-order appeals by insisting that collateral-order appeal is proper only when all cases in a "category" of cases are appealable. Otherwise, no case in a particular "category" will support appeal.

These are the pressures that have shaped approaches to manufactured finality. A bewildering variety of circumstances have been addressed in the cases without generating clear patterns. The concept of "de facto prejudice" is an example. The seemingly clear example of dismissal nominally without prejudice in circumstances that would defeat a new action by a statute of limitations is clear only if the limitations outcome is clear. But the limitations question may depend on fact determinations, and even choice of law, that cannot easily be made in deciding on appeal jurisdiction. Another example is found in cases that have accepted jurisdiction when a dismissal is without prejudice to bringing a new action in a state court — often with very good reason if the critical ruling by the federal court is affirmed on appeal — but the dismissal is on terms that bar filing a new action in federal court. And a particularly clear example is provided by a case in which the University of Alabama filed an action, only to have the state Attorney General appear and dismiss the action without prejudice. The University was allowed to appeal to challenge the Attorney General's authority to assume control if the action.

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728 The Rules Committees have clear authority under § 2072(c) to adopt rules that "define when
729 a ruling of a district court is final for the purposes of appeal under section 1291." But regulating
730 appeal jurisdiction is an important undertaking. There is great value in having clear rules. Attorneys
731 who are not thoroughly familiar with appeal practice may devote countless hours to attempts to
732 determine whether and when an appeal can be taken, and may reach wrong conclusions. Even
733 attorneys who are familiar with these rules may seek reassurance by costly reexamination. And
734 misguided attempts to appeal can disrupt district-court proceedings while imposing unnecessary
735 work on the court of appeals.

736 Clear rules, however, may not always be the best approach. Clarity can sacrifice important
737 nuances. The pattern of common-law elaborations of a simply worded appeal statute shows an
738 astonishing array of subtle distinctions that may provide important protections by appeal.

739 The choice to proceed to recommend a clear rule, any clear rule, is beset by these competing
740 forces.

741 Discussion began by recognizing that these are hard choices. Courts of appeals often believe
742 strongly in the opportunity to shape appeal jurisdiction to achieve an optimal concept of finality.
743 How would they react, for example, to a recommendation that adopts finality by dismissal with
744 conditional prejudice?

745 A related suggestion was that it may be better to leave these issues to resolution by the
746 Supreme Court in the ordinary course of reviewing individual cases. Circuit splits can be identified
747 on some easily defined issues, such as conditional prejudice.

748 It was further suggested that the Committee does not believe that it must always act to
749 resolve identifiable circuit splits. The conditional prejudice issue, for example, "is of first importance
750 to appellate judges." The Subcommittee, as the earlier subcommittee, has shown the difficulty of the
751 question through its divided deliberations. Do we need to act to establish clarity for lawyers?

752 These questions are not for the Civil Rules Committee alone. The Appellate Rules
753 Committee shares responsibility for determining what is best. So far it has happened that actual rules
754 provisions tend to wind up in the Civil Rules, in part because many appeal-affecting provisions
755 remained in the Civil rules when the Appellate Rules were separated out from their original home
756 in the Civil Rules. But it is possible to imagine that new rules could be located in the Appellate
757 Rules, or even in a new and independent Federal Rules of Appeal Jurisdiction.

758 Further discussion suggested that everyone agrees that a dismissal with prejudice is final. It
759 may be useful to say that in a rule. The Committee Note can say that the rule text does not address
760 the question whether "conditional prejudice" qualifies as "with prejudice." It may be worth doing.

761 A response asked what is the value of a rule that states an obvious proposition widely
762 accepted? The reply was that people who are not familiar with appellate practice may benefit.

763 Judge Sutton noted that these questions first came up in 2005. "My first reaction was that this
764 is a manufactured problem." The circuit split on conditional prejudice may be worth addressing, but
765 either answer could prove difficult to advance through the full Enabling Act process. And any more
766 general rule would incur the risk of negative implications. The time has come to fish or cut bait.

767 Judge Matheson observed that it would be useful to have the sense of the Committee to
768 report to the Appellate Rules Committee when it meets in two weeks.

The first question put to the Committee was whether the best choice would be to do nothing. Thirteen members voted in favor of doing nothing. One vote was that it would be better to do something.

STAYS OF EXECUTION: RULE 62

Judge Matheson began by observing that the questions posed by Rule 62 and stays of execution arose in part in the Appellate Rules Committee. They have not been as much explored by the Subcommittee as the manufactured-finality issues. The focus has been on execution of money judgments, not judgments for specific relief. The provisions for injunctions, receiverships, or directing an accounting may be relocated, but have not been considered for revision.

Rule 62(a) provides an automatic stay. Until the Time Computation Project the automatic stay provision dovetailed neatly with the Rule 62(b) provision for a court-ordered stay pending disposition of post-judgment motions under Rules 50, 52, 59, and 60. The automatic stay lasted for 10 days, and the time to make the Rule 50, 52, and 59 motions was 10 days. The Time Computation Project, however, set the automatic stay at 14 days, but extended to 28 days the time to move under Rules 50, 52, and 59. A district judge asked the Committee what to do during this apparent "gap." The Committee concluded at the time that the court has inherent authority to stay its own judgment after expiration of the automatic stay and before a post-judgment motion is made. The question of amending Rule 62 was deferred to determine whether actual difficulties arise in practice.

A separate concern arose in the Appellate Rules Committee. Members of that committee have found it useful to arrange a single bond that covers the full period between expiration of the automatic stay and final disposition on appeal. That bond encompasses the supersedeas bond taken to secure an stay pending appeal, and is already in place when an appeal is filed.

The Subcommittee has begun work focusing on Rule 62(a), (b), and (d). Other parts of Rule 62 have yet to be addressed. A detailed memorandum by Professor Struve, Reporter for the Appellate Rules Committee, addresses other issues that remain for possible consideration.

The Subcommittee brings a sketch of possible revisions to the Committee for reactions. The first question is whether in its present form Rule 62 causes uncertainties or problems.

The second of two sketches in the agenda book became the subject of discussion. This sketch rearranges subdivisions (a), (b), (c), and (d). Revised Rule 62(a) and (b) addresses "execution on a judgment to pay money, and proceedings to enforce it." It carries forward an automatic stay, extending the period to 30 days. But it also recognizes that the court can order a stay at any time after judgment is entered, setting appropriate terms for the amount and form of security or denying any security. The court also can dissolve the automatic stay and deny any further stay, subject to a question whether to allow the court to dissolve a stay obtained by posting a supersedeas bond. An order denying or dissolving a stay may be conditioned on posting security to protect against the consequences of execution. The order may designate the duration of a stay, running as late as issuance of the mandate on appeal. That period could extend through disposition of a petition for certiorari.

The question whether a supersedeas bond should establish a right to stay execution pending appeal remains open for further consideration. Consideration of the amount also remains open — if a stay is to be a matter of right, the rule might set the amount of the bond at 125% of the amount of a money judgment.

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The purpose of this sketch is to emphasize the primary authority of the district court to deny a stay, to grant a stay, and to set appropriate terms for security on granting or denying a stay. It also recognizes authority to modify or terminate a stay once granted. Appellate Rule 8 reflects the primacy of the district court. Explicit recognition of matters that should lie within the district court's inherent power to regulate execution before and during an appeal may prove useful.

Discussion began with a judge's suggestion that he had not seen any problems with Rule 62. The question whether any other judge on the Committee had encountered problems with Rule 62 was answered by silence.

The next question was whether the lack of apparent problems reflects the practice to work out these questions among the parties. A lawyer member responded that "you wind up stipulating to a stay through the decision on appeal." Another lawyer member observed, however, that "there may be power struggles."

It was noted that the "gap" between expiration of the automatic stay and the time to make post-judgment motions seems worrisome, but perhaps there are no great practical problems.

Another member said that the "more efficient" draft presented for discussion is simple, and collects things in a pattern that makes sense. Most cases are resolved without trial. Even recognizing summary judgments for plaintiffs, problems of execution may not arise often. This "little rewrite" seems useful. A judge repeated the thought — this version "makes for a cleaner rule."

Judge Matheson concluded by noting that the Subcommittee is "still in a discussion phase." Knowing that Committee members have not encountered problems with Rule 62 "makes a point. But we can address the 'gap,' and perhaps work toward a better rule."

Rule 23 Subcommittee

Judge Dow began the report of the Rule 23 Subcommittee by pointing to the list of events on page 243 of the agenda materials. The Subcommittee has attended or will attend many of these events; some Subcommittee members will attend others that not all members are able to attend. The events for this year will culminate in a miniconference to be held at the Dallas airport on September 11. The miniconference will be asked to discuss drafts that develop further the approaches reflected in the preliminary sketches included in the agenda materials. The most recent of these events was a roundtable discussion of settlement class actions at George Washington University Law School. It brought together a terrific group of practitioners, judges, and academics. It was very helpful.

Suggestions also are arriving from outside sources and are being posted on the Administrative Office web site. The suggestions include many matters the Subcommittee has not had on its agenda. It is important to have the Committee's guidance on just how many new topics might be added to the Rule 23 agenda. The Subcommittee's sense has been that there is no need for a fundamental rewrite of Rule 23. But some of the submissions suggest pretty aggressive reformulations of Rule 23(a) and (b) that seem to start over from scratch. These suggestions have overtones of a need to strengthen the perspective that class actions should be advanced as a means of increasing private enforcement of public policy values.

A Subcommittee member noted that several professors propose deletion of Rule 23(a)(1), (2), and (3). Adequacy of representation would remain from the present rule. And they would add a new paragraph looking to whether a class action is the best way to resolve the case as compared

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852 to other realistic alternatives. The question for the Committee is whether we should spend time on
853 such fundamental issues.

854 A first reaction was that no compelling justifications have been offered for these suggestions.
855 It was noted that in deciding to take up Rule 23, the Committee did not have a sense that a broad
856 rewrite is needed, but instead focused on specific issues. "The burden of proof for going further has
857 not been carried."

858 The next question was whether new issues should be added to the seven issues listed in the
859 Subcommittee Report that will be brought on for discussion today.

860 Multidistrict proceedings were identified as a topic related to Rule 23. There was a
861 presentation on MDL proceedings to the Judicial Conference in March. MDL proceedings overlap
862 with Rule 23. It will be important to pay attention to developments in MDL practice. And it was
863 noted that discussion at the George Washington Roundtable included the thought that some of the
864 current Rule 23 sketches reflect approaches that could reduce the pressures that mass torts exert on
865 MDL practice. Further development of settlement-class practice might move cases into Rule 23,
866 with the benefits of judicial review and approval of settlements, and away from widespread private
867 settlements of aggregated cases free from any judicial review or supervision. One way of viewing
868 these possibilities is the idea of a "quasi class action" — a sensible system for certifying settlement
869 classes could be helpful. So a big concern is how to settle mass-tort cases after Amchem.

870 Another suggestion was that the "biggest topic not on our list" is the concept of
871 "ascertainability" that has recently emerged from Third Circuit decisions.

872 Settlement class certification: Discussion turned to the question whether there should be an explicit
873 rule provision for certifying settlement classes. One question will be whether the rule should
874 prescribe the information provided to the court on a motion to certify and for preliminary "approval."
875 Should the concept be not preliminary "approval," but instead preliminary "review"? The review
876 could focus on whether the proposed settlement is sufficiently cogent to justify certification and
877 notice to the class. What information does the judge need for taking these steps? Something like
878 what Rule 16 says should be given to the judge? An explicit rule provision could guide the parties
879 in what they present, as well as help the judge in evaluating the proposal. There was a lot of interest
880 in this at the George Washington Roundtable.

881 Further discussion noted that Rule 23(e) does not say anything about the procedure for
882 determining whether to certify a settlement class in light of a proposed settlement. At best there is
883 an oblique implication in the Rule 23(e)(1) provision for directing notice in a reasonable manner to
884 all class members who would be bound by the proposal.

885 A judge observed that once the parties agree on a settlement and take it to the judge, the
886 judge's reaction is likely to be that it is good to settle the action. The result may be that notice is sent
887 to the class without a sufficiently detailed appraisal of the settlement terms. Problems may appear
888 as class members respond to the notice, but the process generates a momentum that may lead to final
889 approval of an undeserving settlement. Another judge observed that there are great variations in
890 practice. Some judges scrutinize proposed settlements carefully. Some do not. It would be helpful
891 to have criteria in the rule.

892 A choice was offered. The rule could call for a detailed "front load" of information to be
893 considered before sending out notice to the class. Or instead it could follow the ALI Aggregate
894 Litigation Project, characterizing the pre-notice review as review, not "approval." Discussion at the

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895 George Washington Roundtable "was almost all for front-loading."

896 A judge said that most of the time in a "big value case" the lawyers know they should front-
897 load the information. "But when the parties are not so sophisticated, the late information that
898 emerges after notice to the class may lead me to blow up the settlement." And if the settlement is
899 rejected after the first notice, a second round of notice is expensive and can "eat up most of the case
900 value."

901 Another judge observed that "it gets dicey when some defendants settle and others do not."
902 What seems fairly straightforward at the time of the early settlement may later turn out to be more
903 complicated.

904 A lawyer thought that front-loading sounds like it makes sense. But the agenda materials do
905 not include rule language for this. What factors should be addressed by the parties and considered
906 by the court? It was suggested that the factors are likely to be much the same as the factors a court
907 considers in determining whether to give final approval. One perspective is similar to the predictions
908 made when considering a preliminary injunction: a "likelihood of approval" test at the first stage.

909 Another judge said that the Third Circuit "is pretty clear on what I should consider. Lawyers
910 who practice class actions understand the factors." But there are many class actions — for example
911 under the Fair Credit Reporting Act — brought by lawyers who do not understand class-action
912 practice. Those lawyers will not be helped by a new rule. There is no problem calling for a more
913 detailed rule. A different judge agreed that the problem lies with the less experienced lawyers.

914 Yet another judge expressed surprise at this discussion. "We go through pretty much the
915 same information as needed for final approval of a settlement." It may help to say that in generic
916 terms in rule text, but it is less clear whether detailed standards should be stated in the rule.

917 And another judge said "I do less work on the front end than at the back end. But the factors
918 are the same."

919 The final comment was that drafting a rule provision will require careful balancing. There
920 are impulses to make the criteria for final approval simpler and clearer, as will be discussed. But
921 there also are impulses to demand more information up front.

922 It was agreed that the Subcommittee agenda would be expanded to include a focus on the
923 procedure for determining whether to approve notice to the class of a settlement, looking toward
924 final certification and approval.

925 Rule 23(f) Appeal of Settlement Class Certification: The question whether a Rule 23(f) appeal can
926 be taken from preliminary approval of a settlement class has come to prominence with the Third
927 Circuit decision in the NFL case. Given the language of Rule 23(f) as it stands, the answer seems
928 to turn on whether preliminary approval of a settlement and sending out notice to the class involves
929 "certification" of the settlement class. The deeper question is whether it is desirable to allow appeal
930 at that point, remembering that appeal is by permission and that it might be hoped that a court of
931 appeals will quickly deny permission to appeal when there are not compelling reasons to risk
932 derailing the settlement by the delays of appeal.

933 The question of appeal at the preliminary review and notice stage is not academic. High
934 profile cases are likely to draw the attention of potential objectors well before the preliminary
935 review. They may view the opportunity to seek permission to appeal at this stage as a powerful

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936 opportunity to exert leverage.

937 The Third Circuit ruled that Rule 23(f) does not apply at this stage. But other courts of
938 appeals have simply denied leave to appeal without saying whether Rule 23(f) would authorize an
939 appeal if it seemed desirable. This issue will arise again. The Third Circuit reasoned that the record
940 at this early stage will not be sufficient to support informed review. But if the rules are amended to
941 require the parties to present sufficient information for a full-scale evaluation of the proposed
942 settlement at the preliminary review stage, that problem may be reduced.

943 A judge observed that Rule 23(f) hangs on the seismic effect of certification or a refusal to
944 certify. Certification of a settlement class is very important. It is rare to go to trial. Certification even
945 for trial tends to end the case by settlement. So what, then, of certification for settlement? Will an
946 opportunity to appeal enable objectors to derail settlements? Given the agreement of class and the
947 opposing parties to settle, a court of appeals will be reluctant to grant permission to appeal.

948 Uncertainty was expressed whether the possibility of a § 1292(b) appeal with permission of
949 the trial court as well as the court of appeals may provide a sufficient safety valve.

950 An observer stated that "the notice process is what brings out objectors." If Rule 23(f) appeal
951 is available on preliminary review, the way may be opened for a second Rule 23(f) appeal after
952 notice has gone out.

953 It was agreed that seriatim Rule 23(f) appeals would be undesirable.

954 The discussion concluded with some sense that the Third Circuit approach seems sensible.
955 Whether Rule 23(f) should be revised to entrench this approach may depend on the text of any rule
956 that formalizes the process of certifying a settlement class. If the rule calls for certification only after
957 preliminary review, notice, review of any objections, and final approval of the settlement, then there
958 will be no room to argue that the preliminary review grants certification, nor, for that matter, that
959 refusal to send out notice after a preliminary review denies certification.

960 A final Rule 23(f) question was noted later in the meeting. The Department of Justice
961 continues to experience difficulties with the requirement that the petition for permission to appeal
962 be filed with the circuit clerk within 14 days after the order is entered. It will explore this question
963 further and present the issue in greater detail in time for the fall meeting.

964 With this, discussion turned to the seven topics listed in the agenda materials.

965 Criteria for Settlement Approval: Rule 23(e) was revised in the last round of amendments to adopt
966 the "fair, reasonable, and adequate" phrase that had developed in the case law to express the multiple
967 factors articulated in somewhat different terms by the several circuits. At first a long list of factors
968 was included in draft rule text. The factors were then demoted to a draft Committee Note that is set
969 out in the agenda materials. Eventually the list of factors as abandoned for fear it would become a
970 "check list" that would promote routinized presentations on each factor, no matter how clearly
971 irrelevant to a particular case, and divert attention from serious exploration of the factors that in fact
972 are important in a particular case.

973 The question now is whether the rule text should elaborate, at least to some extent, on the
974 bland "fair, reasonable, and adequate" phrase. The ALI Aggregate Litigation Project criticized the
975 "grab bag" of factors to be found in the decisions, but provided a model of a more focused set of
976 criteria requiring four findings, looking to adequate representation; evaluation of the costs, risks,

977 probability of success, and delays of trial and appeal; equitable treatment of class members relative
978 to each other; and arm's-length negotiation without collusion. These factors are stated in the agenda
979 sketch as a new Rule 23(e)(2)(A), supplemented by a new (B) allowing a court to consider any other
980 pertinent factor and to refuse approval on the basis of any such other factor. The goal is to focus
981 attention on the matters that are useful. A related goal is to direct attention away from factors that
982 have been articulated in some opinions but that do not seem useful. The common example of factors
983 that need not be considered is the opinion of counsel who shaped the proposed settlement that the
984 settlement is a good one.

985 One reaction to this approach may be "I want my Circuit factors." Another might be that the
986 draft Committee Note touches on too many factors. And of course yet another reaction might be that
987 these are not the right factors.

988 A participant recalled a remark by Judge Posner during the George Washington Roundtable
989 discussion: "why three words? 'Reasonable' says it all" — the appropriate amendment would be to
990 strike "fair" and adequate" from the present rule text. The response was that these three words had
991 become widely used in the cases when Rule 23(e) was amended. They were designed to capture
992 ongoing practice. There is little need to delete them simply to save two words in the body of all the
993 rules.

994 The agenda materials include a spreadsheet comparing the lists of approval factors that have
995 been articulated in each Circuit. It was asked whether each of these factors is addressed in the draft
996 Committee Note. Not all are. Greater detail could be added to the Note. Some factors are addressed
997 negatively in the note, such as support of the settlement by those who negotiated it. The formulation
998 in rule text was built on the foundation provided by the ALI. The question is how far the Committee
999 Note should go in highlighting things that really matter.

1000 A judge observed that the sketch of rule text required the court to consider the four listed
1001 elements, but the text then went on to allow the court to reject a settlement by considering other
1002 matters even though the settlement had been found fair, reasonable, and adequate. Would it not be
1003 better to frame it to make it clear that these other factors bear on the determination whether the
1004 settlement is fair, reasonable, and adequate? What factors might those be?

1005 A response was that this sketch of a Rule 23(e)(2)(B) is a catch-all for case- or settlement-
1006 specific factors. Such factors may be important. It might be used to invoke the old factors lists, but
1007 it seems more important to capture unique circumstances.

1008 Subparagraph (B) also generated this question: Is this structure designed so that passing
1009 inspection under the required elements of subparagraph (A) creates a presumption of fairness that
1010 shifts the burden from the proponents of the settlement to the opponents? The immediate response
1011 was that this question requires further thought, but that often it is not useful to think of sequential
1012 steps of procedure as creating a "presumption" that invokes shifting burdens.

1013 A different approach asked what is gained by this middle ground that avoids any but a broad
1014 list of considerations without providing a detailed list of factors? So long as these open-ended
1015 considerations remain, they can be used to carry forward all of the factors that have been identified
1016 in any circuit. All of those factors were used to elaborate the capacious "fair, reasonable, and
1017 adequate" formula, and they still will be.

1018 A response was that various circuits list 10, or 12, or 15 factors. Some are more important
1019 than others. "Distillation could help." But the reply was that "then we should make clear that these

1020 are the only factors."

1021 The next step was agreement that if a proposal to amend Rule 23(e) emerges from this work,
1022 it should be sent out for comment without the "any other matter pertinent" provision sketched in
1023 subparagraph (B).

1024 Turning back to subparagraph (A), it was noted that it will be difficult to implement criterion
1025 (iv), looking to arm's-length negotiation without collusion. The lawyers will always say that they
1026 negotiated at arm's length and did not collude. The response was that this element is one to be
1027 shown by objectors. If they make the showing of "collusion" — an absence of arm's length
1028 negotiation — the settlement must be disapproved. This was challenged by asking whether a court
1029 should be required to disapprove a settlement that in fact is fair, reasonable, and adequate — perhaps
1030 the best deal that can be made — simply for want of what seems an arm's-length negotiation?

1031 A broader perspective was brought to bear. Courts commonly recognize separate components
1032 in evaluating a proposed settlement, one procedural and other substantive. There may be striking
1033 examples that combine both components, as in one case where a settlement was quickly arranged
1034 for the purpose of preempting a competing class action in a state court. It may be hoped that such
1035 examples are rare.

1036 A twist was placed on the nature of "collusion." One dodge may be that parties who have
1037 engaged in amicable negotiations take the deal to some form of ADR — often a retired judge — for
1038 review and blessing. "If reputable counsel are involved, it's different from a rushed settlement by
1039 an inexperienced lawyer."

1040 Item (iv), then, might be dropped. But the focus on procedural fairness and adequacy may
1041 be important. It may be useful to highlight it in rule text.

1042 Discussion of these issues concluded with a reminder that the federal law of attorney conduct
1043 is growing. Collusion is prohibited by state rules of attorney conduct. These rules are adopted into
1044 the local rules of federal courts. Item (iv) will become "another rule governing attorney conduct."

1045 Settlement Class Certification: A settlement-class rule was published for comment as a new
1046 subdivision (b)(4) at virtually the same time as the Amchem decision in the Supreme Court. The
1047 Committee suspended consideration to allow time to evaluate the aftermath of the Amchem decision.
1048 The idea of reopening the question is that certification to settle is different from certification to try
1049 the case. The ALI Aggregate Litigation Project is something like this. Most participants in the
1050 George Washington Roundtable discussion were of similar views.

1051 One common thread that distinguishes proposals to certify a settlement class from trial
1052 classes is to downplay the role of "predominance" in a (b)(3) class.

1053 Two alternative sketches are presented in the agenda materials. The first expressly invokes
1054 Rule 23(a), and includes an optional provision invoking subdivision (b)(3). Certification focuses on
1055 the superiority of the proposed settlement and on finding that the settlement should be approved
1056 under Rule 23(e). The second includes a possible invocation of Rule 23(b)(3), but focuses on
1057 reducing the Rule 23(a) elements by looking to whether the class is "sufficiently numerous to
1058 warrant classwide treatment," and the sufficiency of the class definition to determine who is in the
1059 class.

1060 Is either alternative a useful addition to Rule 23?

1061 A judge offered no answers, but only questions. "It is a big step to downplay predominance."
1062 At some point a settlement class judgment where common issues do not predominate might violate
1063 Article III or due process. "Huge numbers of cases will be moved from (b)(3) to (b)(4)."

1064 The first response was that many predominance issues are obviated by settlement. The
1065 common illustration is choice of law. By adopting common terms, the settlement avoids the
1066 difficulties that arise when litigation would require applying different bodies of law, emphasizing
1067 different elements, to different groups within the class. But the reply was that the sketch does not
1068 refer to predominance for settlement.

1069 The next observation was that "manageability" appears in the text of Rule 23(b)(3) now, and
1070 at the time of Amchem, but the Court ruled in Amchem that manageability concerns can be obviated
1071 by the terms of settlement. Commonality, on the other hand, provides protection to class members,
1072 even if its significance is reduced by the terms of settlement.

1073 That observation led to the question whether, if Rule 23(a) continues to be invoked for
1074 settlement classes, the result will be to place greater weight on typicality. The first response was that
1075 "typicality is easy." But what of common causation issues, and defenses against individual
1076 claimants, that are not common? The only response was that if class treatment is not recognized,
1077 cases will settle by other aggregated means that provide no judicial review or control.

1078 Cy pres: The agenda materials include a sketch that would add an extensive set of provisions for
1079 evaluating cy pres distributions to Rule 23(e)(1). The sketch is based on the ALI Aggregate
1080 Litigation Project, § 3.07. The value of addressing these issues in rule text turns in part on the fact
1081 that cy pres distributions seem to be rather common, and in part on the hesitations expressed by
1082 Chief Justice Roberts in addressing a denial of certiorari in a cy pres settlement case. Nothing in the
1083 federal rules addresses cy pres issues now. Some state provisions do — California, for example, has
1084 a cy pres statute.

1085 The sketch narrowly limits cy pres recoveries. The first direction is to distribute settlement
1086 proceeds to class members when they can be identified and individual distributions are sufficiently
1087 large to be economically viable. The next step, if funds remain after distributions to individual class
1088 members, is to make a further distribution to the members that have participated in the first
1089 distribution unless the amounts are too small to be economically viable or other specific reasons
1090 make further individual distributions impossible or unfair. Finally, a cy pres approach may be
1091 employed for remaining funds if the recipient has interests that reasonably approximate the interests
1092 of class members, or, if that is not possible, to another recipient if that would serve the public
1093 interest. This cy pres provision includes a bracketed presumption that individual distributions are
1094 not viable for sums less than $100, but recent advice suggests that in fact claims administrators may
1095 be able to provide efficient distributions of considerably smaller sums.

1096 The opening lines of the sketch include, in brackets, a provision that touches a sensitive
1097 question. These words allow approval of a proposal that includes a cy pres remedy "if authorized
1098 by law." There is virtually no enacted authority for cy pres remedies in federal law. The laws of a
1099 few states to address the question. It may be possible to speak to the sources of authority in the
1100 general law of remedies. But the question remains: courts are approving cy pres distributions now.
1101 If the practice is legitimate, there should be authority to regulate it by court rule. If it is not
1102 legitimate, it would be unwise to attempt to legitimate it by court rule.

1103 The value of cy pres distributions depends in large measure on how effective the claims
1104 process is in reducing the amounts left after individual claims are paid. Courts are picking up the

1105 ALI principle. It seems worthwhile to confirm it in Rule 23.

1106 The first question was whether the rule should require the settlement agreement to address
1107 these issues. That would help to reduce the Article III concerns. This observation was developed
1108 further. Suppose the agreement does not address disposition of unclaimed funds. What then? Must
1109 there be a second (and expensive) notice to the class of any later proposal to dispose of them? The
1110 sketch Committee Note emphasizes that cy pres distribution is a matter of party agreement, not court
1111 action.

1112 It was observed that even though a cy pre distribution is agreed to by the parties, it becomes
1113 part of the court's judgment. It can be appealed. And there is a particular problem if cy pres
1114 distribution is the only remedy. Suppose, for example, a defendant's wrong causes a ten-cent injury
1115 to each of a million people. Individual distributions to not seem sensible. But finding an alternative
1116 use for the $100,000 of "damages" seems to be creating a new remedy not recognized by the
1117 underlying substantive law of right and remedy.

1118 Another judge noted that "courts have been doing this, but it's a matter of follow-the-leader."
1119 There is not a lot of endorsement for the practice, particularly at the circuit level. Cy pres theory has
1120 its origins in trust law. Settlement class judgments ordinarily are not designed to enforce a failed
1121 trust. "What is the most thoughtful judicial discussion" that explains the justification for these
1122 practices?

1123 The response was that cy pres recoveries have been discussed in a number of California state
1124 cases. California recognizes "fluid recovery," as illustrated by the famous case of an order reducing
1125 cab fares in Los Angeles — there was likely to be a substantial overlap between the future cab users
1126 who benefit from the period of reduced fares and the past cab users who paid the unlawful high
1127 fares, but the overlap was not complete. The Eighth Circuit has provided a useful review this year.
1128 And cy pres distribution can be made only when the court has found the settlement to be fair,
1129 reasonable, and adequate. That determination itself requires an effort to compensate class members
1130 — by direct distribution if possible, but if that is not possible in some other way.

1131 A judge noted a recent case in his court involving a defendant who sent out 100,000,000
1132 spam fax messages. The records showed the number of faxes, but then the records were spoliated.
1133 There was no record of where the faxes had gone. The liability insurer agreed to settle for $300 for
1134 each of the class representatives. But what could be done with the remaining liability, which — with
1135 statutory damages — was for a staggering sum? Seven states in addition to California provide for
1136 distributing a portion of a cy pres recovery to Legal Services. That still leaves the need to dispose
1137 of the rest. Addressing these questions in rule text must rest on the premise that such distributions
1138 are proper.

1139 It was agreed that these questions are serious. The ALI pursued them to cut back on cy pres
1140 distributions, to make it difficult to bypass class members. Perhaps a rule should say that it is unfair
1141 to have all the settlement funds distributed to recipients other than class members.

1142 Discussion concluded on two notes: these questions cannot be resolved in a single afternoon.
1143 And although it would be possible to adopt a rule that forbids cy pres distributions, that probably
1144 is not a good idea.

1145 Objectors: Objectors play a role that is recognized by Rule 23 and that is an important strand in
1146 reconciling class-action practice with the dictates of due process. Well-framed objections can be
1147 very valuable to the judge. At the same time, it is widely believed that there are "bad objectors" who

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1148 seek only strategic personal gain, not enhancement of values for the class. On this view, some
1149 objectors may seek to exploit their ability to delay a payout to the class in order to extract tribute
1150 from class counsel that may be to the detriment of class interests. Rule 23(e)(5) was added to reflect
1151 the concern with improperly motivated objections by requiring court approval for withdrawal of an
1152 objection. This provision appears to have been "somewhat successful."

1153 The Appellate Rules Committee is studying proposals to regulate withdrawal of objections
1154 on appeal. The Rule 23 Subcommittee is cooperating in this work.

1155 Alternative sketches are presented at page 273 in the agenda materials. In somewhat different
1156 formulations, each requires the parties to file a statement identifying any agreement made in
1157 connection with withdrawal of an objection. An alternative approach is illustrated by sketches at
1158 pages 274-275 of the agenda materials. The first simply incorporates a reminder of Rule 11 in rule
1159 23(e)(5). The second creates an independent authority to impose sanctions on finding that an
1160 objection is insubstantial or not reasonably advanced for the purpose of rejecting or improving the
1161 settlement.

1162 No rule can define who is a "good" or a "bad" objector. The idea of these sketches is to alert
1163 and arm judges to do something about bad objectors when they can be identified.

1164 Another possibility that has been considered is to exact a "bond" from an objector who
1165 appeals. The more expansive versions of the bond would seek to cover not simply the costs of appeal
1166 — which may be considerable — but also "delay costs" reflecting the harm resulting from delay in
1167 implementing the settlement when the appeal fails.

1168 A "good" objector who participated in the George Washington Roundtable commented
1169 extensively on the obstacles that already confront objectors.

1170 The first comment was that sanctions on counsel "are more and more regulation of attorney
1171 conduct."

1172 And the first question from an observer was whether discovery is appropriate to support
1173 objections. The response was that it is not likely that a rule would be written to provide automatic
1174 access to discovery. There is a nexus to opt-out rights. At most such issues might be described in
1175 a Committee Note, recognizing that at times discovery may be valuable.

1176 The next question was whether courts now have authority under Rule 11 and 28 U.S.C. §
1177 1927 to impose sanctions on frivolous objections or objections that multiply the proceedings
1178 unreasonably and vexatiously. The response was that the second alternative, on page 275, seems to
1179 cut free from these sources of authority, creating an independent authority for sanctions. But it
1180 remains reasonable to ask whether independent authority really is needed. One departure from Rule
1181 11, for example, is that Rule 11 creates a safe harbor to withdraw an offending filing as a matter of
1182 right; the Rule 23 sketch does not include this.

1183 Rule 68 Offers: The sketches in the agenda materials, beginning at page 277, provide alternative
1184 approaches to a common problem. Defendants resisting class certification often attempt to moot the
1185 representative plaintiff by offering complete individual relief. Often the offers are made under Rule
1186 68. Although acceptance of a Rule 68 offer leads to entry of a judgment, it is difficult to find any
1187 principled reason to suppose that a Rule 68 offer has greater potential to moot an individual claim
1188 than any other offer, particularly one that may culminate in entry of a judgment. Courts have reacted
1189 to this ploy in different ways. The Supreme Court has held that a Rule 68 offer of complete relief

1190 to the individual plaintiff in an opt-in action under the Fair Labor Standards Act moots the action.
1191 The opinion, however, simply assumed without deciding that the offer had in fact mooted the
1192 representative plaintiff's claim, and further noted that an opt-in FLSA action is different from a Rule
1193 23 class action. Beyond that, courts seem to be increasingly reluctant to allow a defendant to "pick
1194 off" any representative plaintiff that appears, and thus forever stymie class certification. Some of the
1195 strategies are convoluted. In the Seventh Circuit, for example, a class plaintiff is forced to file a
1196 motion for class certification on filing the complaint because only a motion for certification defeats
1197 mooting the case by an offer of complete individual relief. But it also is recognized that an attempt
1198 to rule on certification at the very beginning of the action would be foolish, so the plaintiff also
1199 requests, and the courts understand, that consideration of the certification motion be deferred while
1200 the case is developed. This convoluted practice has not commended itself to judges outside the
1201 Seventh Circuit.

1202 The first sketch attacks the question head-on. It provides that a tender of relief to a class
1203 representative can terminate the action only if the court has denied certification and the court finds
1204 that the tender affords complete individual relief. It further provides that a dismissal does not defeat
1205 the class representative's standing to appeal the order denying certification.

1206 The second sketch simply adopts a provision that was included in Rule 68 amendments
1207 published for comment in 1983 and again in 1984. This provision would direct that Rule 68 does
1208 not apply to actions under Rules 23, 23.1, and 23.2. It did not survive withdrawal of the entire set
1209 of Rule 68 proposals.

1210 The third sketch begins by reviving a one-time practice that was at first embraced and then
1211 abandoned in the 2003 amendments. This practice required court approval to dismiss an action
1212 brought as a class action even before class certification. The parties must identify any agreement
1213 made in connection with the proposed dismissal. The sketch also provides that after a denial of
1214 certification, the plaintiff may settle an individual claim without prejudice to seeking appellate
1215 review of the denial of certification.

1216 The first question was whether these proposals reflect needs that arise from limits on the
1217 ability to substitute representatives when one is mooted. The first response was that it is always safer
1218 to begin with multiple representatives. But it was suggested that the problem might be addressed by
1219 a rule permitting addition of new representatives. That approach is often taken when an initial
1220 representative plaintiff is found inadequate.

1221 The next observation was that substituting representatives may not solve the problem. The
1222 defendant need only repeat the offer to each successive plaintiff. The approach taken in the first
1223 sketch is elegant.

1224 Another member observed that courts allow substitution of representatives at the inadequacy
1225 stage of the certification decision. But substitution may require formal intervention. That is too late
1226 to solve the mootness problem. These issues are worth considering.

1227 The last observation was that the Seventh Circuit work-around seems to be effective. "It's
1228 not that big a deal." But the first and second sketches are simple.

1229 Issues Classes: The relationship of Rule 23(c)(4) issues classes to the predominance requirement in
1230 Rule 23(b)(3) has been a longstanding source of disagreement. One view is that an issue class can
1231 be certified only if common issues predominate in the claims considered as a whole. The other view
1232 is that predominance is required only as to the issues certified for class treatment. There are some

1233 signs that the courts may be converging on the view that predominance is required only as to the
1234 issues.

1235 The first sketch in the agenda materials, page 281, simply adds a few words to Rule 23(b)(3):
1236 the court must find that "questions of law or fact common to the class predominate over any
1237 questions affecting only individual class members, subject to Rule 23(c)(4), and * * *." The "subject
1238 to Rule 23(c)(4)" phrase may seem somewhat opaque, but the meaning could be elaborated in the
1239 Committee Note.

1240 The second sketch, at page 282, would amend Rule 23(f) to allow a petition to appeal from
1241 an order deciding an issue certified for class treatment. The rule might depart from the general
1242 approach of Rule 23(f), which requires permission only from the court of appeals, by adding a
1243 requirement that the district court certify that there is no just reason for delay. This added
1244 requirement, modeled on Rule 54(b), might be useful to avoid intrusion on further management of
1245 the case. An opportunity for immediate appeal could be helpful before addressing other matters that
1246 remain to be resolved.

1247 A judge asked the first question. "Every case I have seen excludes issues of damages. Does
1248 this mean that every class is a (c)(4) issues class that does not need to satisfy the predominance
1249 requirement"? That question led to a further question: What is an issue class? An action clearly is
1250 an issue class if the court certifies a single issue to be resolved on a class basis, and intends not to
1251 address any question of individual relief for any class member. The action, for example, could be
1252 limited to determining whether an identified product is defective, and perhaps also whether the
1253 defect can be a general cause of one or more types of injury. That determination would become the
1254 basis for issue preclusion in individual actions if defect, and — if included — general causation
1255 were found. Issues of specific causation, comparative responsibility, and individual injury and
1256 damages would be left for determination in other actions, often before other courts. But is it an
1257 "issue" class if the court intends to administer individual remedies to some or many or all members
1258 of the class? We have not thought of an action as an issue class if the court sets the questions of
1259 defect and general causation for initial determination, but contemplates creation of a structure for
1260 processing individual claims by class members if liability is found as a general matter.

1261 This plaintive question prompted a response that predominance still is required for an issue
1262 class. This view was repeated. Discussion concluded at that point.

1263 Notice: The first question of class-action notice is illustrated by a sketch at page 285 of the agenda
1264 materials. Whether or not it was wise to read Rule 23(c) to require individualized notice by postal
1265 mail in 1974 whenever possible, that view does not look as convincing today. Reality has
1266 outstripped the Postal Service. The sketch would add a few words to Rule 23(c)(2)(B), directing
1267 individual notice "by electronic or other means to all members who can be identified through
1268 reasonable effort." The Committee Note could say that means other than first class mail may suffice.

1269 This proposal was accepted as an easy thing to do.

1270 The Committee did not discuss a question opened in the agenda materials, but not yet much
1271 explored by the Subcommittee. It may be time to reopen the question of notice in Rule 23(b)(1) and
1272 (2) classes, even though the concern to enable opt-out decisions is not present. It is not clear whether
1273 the Subcommittee will recommend that this question be taken up.

1274 *Pilot Projects*

1275 Judge Campbell opened the discussion of pilot projects by describing the active panel
1276 presentation and responses at the January meeting of the Standing Committee. Panel members
1277 explored three possible subjects for pilot projects: enhanced initial disclosures, simplified tracks for
1278 some cases, and accelerated ("Rocket") dockets.

1279 The Standing Committee would like to encourage this Committee to frame and encourage
1280 pilot projects. It likely will be useful to appoint a subcommittee to study possible projects, looking
1281 to what has been done in state courts and federal courts, and to recommend possible subjects.

1282 One potential issue must be confronted. Implementation of a pilot project through a local
1283 district court rule must come to terms with Rule 83 and the underlying statute, 28 U.S.C. § 2071(a),
1284 which direct that local rules must be consistent with the national Enabling Act rules. The agenda
1285 materials include the history of a tentative proposal twenty years ago to amend Rule 83 to authorize
1286 local rules inconsistent with the national rules, subject to approval by the Judicial Conference and
1287 a 5-year time limit. The proposal was abandoned without publication, in part for uncertainty about
1288 the fit with § 2071(a).

1289 The Rule 83 question will depend in part on the approach taken to determine consistency,
1290 or inconsistency, with the national rules. The current employment protocols employed by 50 district
1291 judges are a good illustration. They direct early disclosure of much information that ordinarily has
1292 been sought through discovery. But they seem to be consistent with the discovery regime established
1293 in Rule 26, recognizing the broad discretion courts have to guide discovery.

1294 Initial Disclosures: Part of the Rule 26(a)(1) history was discussed earlier in this meeting. The rule
1295 adopted in 1993 directed disclosure of witnesses with knowledge, and documents, relevant to
1296 disputed matters alleged with particularity in the pleadings. It included a provision allowing districts
1297 to opt out by local rule; this provision was included under pressure from opponents who disliked the
1298 proposal. The rule was revised in 2000 as part of the effort to eliminate the opt-out provision of the
1299 1993 rule, limiting disclosure to witnesses and documents the disclosing party may use. Arizona
1300 Rule 26.1 requires much broader disclosure even than the 1993 version of Rule 26(a)(1). It is clearly
1301 intended to require disclosure of unfavorable information as well as favorable information. The
1302 proposal for adoption was greeted by protests that such disclosures are inconsistent with the
1303 adversary system. The Arizona court nonetheless persisted in adoption. This broad disclosure is
1304 coupled with restrictions on post-disclosure discovery. Permission is required, for example, to
1305 depose nonparty witnesses. Arizona lawyers were surveyed to gather reactions to this rule in 2008
1306 and 2009. In the 2008 survey, 70% of the lawyers with experience in both state and federal courts
1307 preferred to litigate in state court. (Nationally, only 43% of lawyers with experience in both state
1308 and federal courts prefer their state courts.) The results in the 2009 survey were similar. More than
1309 70% of the lawyers who responded said that initial disclosures help to narrow the issues more
1310 quickly. The Arizona experience could be considered in determining whether to launch a pilot
1311 project in the federal courts.

1312 An observer from Arizona said that debate about the initial disclosure rule declines year-by-
1313 year. "It does require more work up front, but it is, on average, faster and cheaper. Unless a client
1314 wants it slow and expensive, we often recommend state court." An action can get to trial in state
1315 court in 12, or 16, months. Two years is the maximum. It takes longer in federal court. He further
1316 observed that Arizona should be considered as a district to be included in a federal pilot project
1317 because the bar, and much of the bench, understand broad initial disclosures.

1318 The next comment observed that a really viable study should include districts where broad
1319 initial disclosure "is a complete shock to the system." There may be a problem with a project that

1320 exacts disclosures inconsistent with the limited requirements of Rule 26(a)(1). But it is refreshing
1321 to consider a dramatic departure, as compared to the usually incremental changes made in the federal
1322 rules. This comment also observed that even in districts that adhered to the 1993 national rule,
1323 lawyers often agreed among themselves to opt out.

1324 A member asked whether comparative data on case loads were included in the study of
1325 Arizona experience. The answer was that they were not in the study. But Maricopa County has 120
1326 judges. Their dockets show case loads per judge as heavy as the loads in federal court.

1327 A judge observed that a mandatory initial disclosure regime that includes all relevant
1328 information would be an integral part of ensuring proportional discovery. The idea is to identify
1329 what it is most important to get first. A pilot project would generate this information as a guide to
1330 judicial management. The judge could ask: "What more do you need"? This process could be
1331 integrated with the Rule 26(f) plan. This is an extraordinarily promising prospect. There will be
1332 enormous pushback. Justice Scalia, in 1993, wondered about the consistency of initial disclosure
1333 with an adversary system. But the success in Arizona provides a good response.

1334 Accelerated Dockets: This topic was introduced with a suggestion that the speedy disposition rates
1335 recently achieved in the Western District of Wisconsin appear to be fading. The Southern District
1336 of Florida has achieved quick disposition times for some case. "Costs are proportional to time."
1337 Setting a short time for discovery reflects what is generally needed. State-court models exist. The
1338 "patent courts" are experimenting with interesting possibilities. The Federal Judicial Center will
1339 report this fall on experience with the employment protocols.

1340 These and other practices may help determine whether a pilot project on simplified
1341 procedures could be launched. Federal-court tracking systems could be studied at the beginning.
1342 State court practices can be consulted.

1343 A member provided details on the array of cases filed in federal court. The four most
1344 common categories include prisoner actions, tort claims, civil rights actions (labor claims can be
1345 added to this category), and contract actions. Smaller numbers are found for social security cases,
1346 consumer credit cases, and intellectual property cases. Some case types lend themselves to early
1347 resolution. Early case evaluation works if information is shared. Early mediation also works,
1348 although the type of case affects how early it can be used.

1349 One thing that would help would be to have an e-discovery neutral available on the court's
1350 staff to help parties work through the difficulties. Many parties do not know what they're doing with
1351 e-discovery. This member has worked as an e-discovery master. "Weekly phone calls can save the
1352 parties a lot of money." One ploy that works is to begin with a presumption that the parties will share
1353 the master's costs equally, unless the master recommends that one party should bear a larger share.
1354 That provision, and the fact that they're being watched, dramatically reduces costs and delay. And
1355 e-discovery mediation can help.

1356 It also helps when the parties understand the case well enough for early mediation.

1357 And experience as an arbitrator, where discovery is limited to what the arbitrator directs,
1358 shows that it is possible to control costs in a fair process.

1359 Another suggestion was that a statute allows summary jury trial. If the parties agree, it can
1360 be a real help. The trial can be advisory. It may be limited, for example to 3 hours per party.
1361 Summaries of testimony, or live witnesses, may be used. Charts may be used. "Juries love it." After

the jury decides, lawyers can ask the jury why they did what they did. This practice can be a big help in conjunction with a settlement conference.

Another suggestion was that it would help to devise rules to dispose of cases that require the court to review a "record." Social Security cases, IDEA cases, and ERISA fiduciary cases are examples.

Another judge noted that the Northern District of Ohio has a differentiated case management plan. The categories of cases include standard, expedited, complex, mass tort, and administrative. There are ADR options, and summary jury trial. It would be good to study this program to see how it works out over time.

Discussion concluded with the observation that if done well, study of these many alternatives could lead to useful pilot projects.

Judge Sutton concluded the discussion of pilot projects by noting that the Standing Committee is grateful for all the work done on the Duke Rules package and on Rule 37(e). He further noted that Rule 26(a)(1) failed in its initial 1993 form because it was a great change from established habits. It may be worthwhile to restore it, or something much like it, as a pilot project in 10 or 15 districts to see how it might be made to work now.

Judge Sutton concluded the meeting by noting that Judge Campbell's term as Committee Chair will conclude on September 30. Judge Campbell will attend the November meeting, and the Standing Committee meeting in January, for proper recognition of his many contributions to the Rules Committees. "Surely 100% of Arizona lawyers would prefer David Campbell to anyone else." His stewardship of the Committee has been characterized by steadiness, even-handedness, patience, and insight. And he is always cheerful. "Thank you."

Respectfully submitted,

Edward H. Cooper
Reporter

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125-010750

TAB 4

125-010751

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TAB 4A

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

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WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

DATE: May 4, 2015

TO: Judge Jeffrey S. Sutton, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Steven M. Colloton, Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on April 23 and 24 in Philadelphia, Pennsylvania. The Committee gave final approval to six sets of proposed amendments, relating to (1) the inmate-filing provisions under Rules 4(c) and 25(a); (2) tolling motions under Rule 4(a)(4); (3) length limits for appellate filings; (4) amicus briefs in connection with rehearing; (5) Rule 26(c)'s "three-day rule"; and (6) a technical amendment to Rule 26(a)(4)(C). The Committee discussed a number of other items and added one issue to its study agenda.

Part II of this report discusses the proposals for which the Committee seeks final approval. Part III covers other matters.

The Committee has scheduled its next meeting for October 29 and 30, 2015, in Chicago, Illinois.

More information about the Committee's activities can be found in the Committee's study agenda and in the Reporter's forthcoming draft of the minutes of the April meeting.

125-010755

II. Action Items—for Final Approval

The Committee seeks final approval of six sets of proposed amendments.

A. Inmate filings: Rules 4(c)(1) and 25(a)(2)(C), Forms 1 and 5, and new Form 7

Under the Federal Rules of Appellate Procedure, documents are timely filed if they are received by the court on or before the due date. Rules 4(c)(1) and 25(a)(2)(C) offer an alternative way for inmates to establish timely filing of documents. If the requirements of the relevant rule are met, then the filing date is deemed to be the date the inmate deposited the document in the institution's mail system rather than the date the court received the document. *See generally Houston v. Lack*, 487 U.S. 266 (1988).

The Committee has studied the workings of the inmate-filing rules since 2007, in light of concerns expressed about conflicts in the case law, unintended consequences of the current language, and ambiguity in the current text. Must an inmate prepay postage to benefit from the rule? There are decisions saying that an inmate need not prepay postage if he uses a prison's system designed for legal mail, but must prepay postage if he does not use that system. Must an inmate file a declaration or notarized statement averring the date of filing to benefit from the rule? One court held, over a dissent from denial of rehearing en banc, that a document is untimely if there is no declaration or notarized statement, even when other evidence such as a postmark shows that the document was timely deposited in the prison mail system. When must an inmate submit a declaration designed to demonstrate timeliness? One circuit has published inconsistent decisions, holding in one case that the declaration must accompany the notice and in another that the declaration may be filed at a later date.

The Committee seeks final approval of proposed amendments that are designed to clarify and improve the inmate-filing rules. The amendments to Rules 4(c)(1) and 25(a)(2)(C) would make clear that prepayment of postage is required for an inmate to benefit from the inmate-filing provisions. The amendments clarify that a document is timely filed if it is accompanied by evidence—a declaration, notarized statement, or other evidence such as postmark and date stamp—showing that the document was deposited on or before the due date and that postage was prepaid. New Form 7 is a suggested form of declaration that would satisfy the Rule. Forms 1 and 5 (which are suggested forms of notices of appeal) are revised to include a reference alerting inmate filers to the existence of Form 7. The amendments also clarify that if sufficient evidence does not accompany the initial filing, then the court of appeals has discretion to permit the later filing of a declaration or notarized statement to establish timely deposit.

125-010756

1. Text of proposed amendments and Committee Note

The Committee recommends final approval of the proposed amendments to Rules 4(c)(1) and 25(a)(2)(C) and Forms 1 and 5, and proposed new Form 7, as revised after publication and set out in the enclosure to this report.

2. Changes made after publication and comment

After publication, the Committee decided to abandon its proposal to delete the legal-mail-system requirement from Rules 4(c)(1) and 25(c)(2)(C). The Committee also made several improvements to the Forms.

Rules 4(c)(1) and 25(a)(2)(C), as published, would have deleted the requirement that an inmate use a system designed for legal mail (if one is available) in order to receive the benefit of the inmate-filing rules. The Committee proposed deleting that requirement because it perceived no purpose for it. The Committee had learned from the Deputy General Counsel of the U.S. Bureau of Prisons that the distinction between legal and non-legal mail systems, in BOP facilities, had more to do with privacy concerns than other reasons. And an inquiry to the Chief Deputy Clerk of the U.S. Supreme Court had likewise disclosed no reason to retain the legal-mail-system requirement.

Commentators were divided on the question of the legal-mail-system requirement. One commentator specifically expressed support for the published amendments' deletion of the requirement. Another commentator, however, pointed out that correctional institutions in the State of Florida log the date of deposit of inmates' legal mail but do not log the date of deposit of inmates' non-legal mail, and argued that the legal-mail-system requirement provided the State with an important way to provide evidence of the date of inmates' legal mail. The Committee's Reporter, with the assistance of the Director and Chief Counsel of the National Association of Attorneys General Center for Supreme Court Advocacy, investigated whether correctional institutions in jurisdictions other than Florida make a similar distinction (date-logging legal but not non-legal mail). The responses—from 21 states and the District of Columbia—disclosed that an appreciable number of the states do make such a distinction.[1] Further inquiry also determined that the federal Bureau of Prisons date-stamps legal mail, but does not log non-legal mail.

[1] Four states—Colorado, North Carolina, Tennessee, and Washington State—have systems that (like Florida's) log the date of legal mail but not non-legal mail. Two additional states—Alaska and Delaware—have such systems in at least some of their facilities. And though Pennsylvania does not currently date-log any outgoing mail, the Deputy Chief Counsel for Litigation at the Pennsylvania Department of Corrections reports that Pennsylvania is considering date-logging outgoing legal mail in order to provide evidence of the date of filing.

125-010757

This new information, in the view of the Committee, provides reason to retain the legal-mail-system requirement. Requiring an inmate to use a legal mail system where available continues to serve a useful purpose by ensuring that mail is logged or date-stamped and avoiding unnecessary litigation over the timing of deposits. Accordingly, the Committee decided to restore that requirement to proposed Rules 4(c)(1) and 25(a)(2)(C). The Committee also revised proposed new Form 7, and the proposed amendments to Forms 1 and 5, to make all three forms more user-friendly and to make the new form more accurate. In particular, the Committee revised Form 7 to use the present tense ("Today ... I am depositing") rather than the past tense ("I deposited ..."), to reflect that the inmate will fill out the declaration before depositing both the declaration and the underlying filing in the institution's mail system.

The Committee decided not to implement other proposed changes to the amendments. The Committee did not adopt a suggestion that the Rules should *authorize* the later filing of the declaration (as opposed to giving the court the discretion to permit its later filing). Members considered it important to encourage the inmate to provide the declaration contemporaneously, while recollections are fresh. The Committee gave careful consideration to style comments advocating deletion of the Rules' reference to a court's ability to "exercise[] its discretion to permit the later filing" of the declaration (the style suggestion was to say simply "permit[]"). But Committee members were swayed by substantive concerns about the desire to ensure that inmates understand that later filing will not necessarily be permitted. The Committee also did not adopt suggestions that the Rules should authorize courts to excuse an inmate's failure to prepay postage, as courts already have adequate authority to act if an institution refuses to provide postage when it is constitutionally required. The Committee considered whether to delete the Rules' reference to a notarized statement (as an alternative to a declaration), and decided to retain that reference because notaries are available in a number of correctional institutions, and similar language appears in the inmate-filing provisions in the Supreme Court Rules and the rules for habeas and Section 2255 proceedings. There was no opposition to the notarized statement option during the comment period.

B. Tolling motions: Rule 4(a)(4)

The proposed amendment to Appellate Rule 4(a)(4) addresses a circuit split concerning whether a motion filed outside a non-extendable deadline under Civil Rules 50, 52, or 59 counts as "timely" under Rule 4(a)(4) if a court has mistakenly ordered an "extension" of the deadline for filing the motion.

Caselaw in the wake of *Bowles v. Russell*, 551 U.S. 205 (2007), holds that statutory appeal deadlines are jurisdictional but that nonstatutory appeal deadlines are nonjurisdictional claim-processing rules. The statutory appeal deadline for civil appeals is set by 28 U.S.C. § 2107. The statute does not mention so-called "tolling motions" filed in the district court that have the effect of extending the appeal deadline, but "§ 2107 was enacted against a doctrinal backdrop in which the role of tolling motions had long been clear." 16A Wright et al., Federal

125-010758

Practice & Procedure § 3950.4. At the time of enactment, "caselaw stated that certain postjudgment motions tolled the time for taking a civil appeal." *Id*. Commentators have presumed, therefore, that Congress incorporated the preexisting caselaw into § 2107, and that appeals filed within a recognized tolling period may be considered timely consistent with *Bowles*.

The federal rule on tolling motions, Appellate Rule 4(a)(4), provides that "[i]f a party timely files in the district court" certain post-judgment motions, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." A number of circuits have ruled that the Civil Rules' deadlines for post-judgment motions are nonjurisdictional claim-processing rules. On this view, where a district court mistakenly "extends" the time for making such a motion, and no party objects to that extension, the district court has authority to decide the motion on its merits. But does the motion count as a "timely" one that, under Rule 4(a)(4), tolls the time to appeal? The Third, Seventh, Ninth, and Eleventh Circuits have issued post-*Bowles* rulings stating that such a motion does not toll the appeal time. *E.g.*, *Blue v. Int'l Bhd. of Elec. Workers Local Union 159*, 676 F.3d 579, 582-84 (7th Cir. 2012); *Lizardo v. United States*, 619 F.3d 273, 278-80 (3d Cir. 2010). Pre-*Bowles* caselaw from the Second Circuit accords with this position. The Sixth Circuit, however, has held to the contrary. *Nat'l Ecological Found. v. Alexander*, 496 F.3d 466, 476 (6th Cir. 2007).

The Committee feels it is important to clarify the meaning of "timely" in Rule 4(a)(4), because the conflict in authority arises from arguable ambiguity in the current Rule, and timely filing of a notice of appeal is a jurisdictional requirement. The proposed amendment would adopt the majority view—i.e., that postjudgment motions made outside the deadlines set by the Civil Rules are not "timely" under Rule 4(a)(4). Such an amendment would work the least change in current law. And, as the court noted in *Blue*, 676 F.3d at 583, the majority approach tracks the spirit of the Court's decision in *Bowles*, which held that the Court has "no authority to create equitable exceptions to jurisdictional requirements." 551 U.S. at 214.

1. Text of proposed amendment and Committee Note

The Committee recommends final approval of the proposed amendment to Rule 4(a)(4) as set out in the enclosure to this report.

2. Changes made after publication and comment

No changes were made after publication and comment.

All but one of the commentators who addressed this proposal voiced support for it. The sole opponent argued that both the current Rule and the proposed amended Rule set a trap for unwary litigants. That commentator also argued that it is incongruous that a district court has

power to rule on the merits of an untimely postjudgment motion if the opposing party fails to object to the untimeliness but that same motion lacks tolling effect under Rule 4(a)(4).

The commentator's objections tracked concerns that had already been discussed by the Committee in its prior deliberations. After noting the comment, the Committee adhered to its substantive judgment that the Rule should be amended to adopt the majority view. Committee members discussed whether the amendment, as published, could be revised to make its meaning clearer. Specifically, the Committee discussed the possibility of adding rule text specifying that a motion made outside the time permitted by the relevant Civil Rule "is not rendered timely by, for instance: (i) a court order setting a due date that is later than allowed by the Federal Rules of Civil Procedure; (ii) another party's consent or failure to object; or (iii) the court's disposition of the motion." Committee members, however, expressed concern that this addition would distend an already long and complex Rule and that a list of this nature could be read to exclude other possible scenarios. Committee members observed, moreover, that these examples are stated in the Committee Note, so lawyers and litigants should have adequate notice to avoid a "trap."

C. Length limits: Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6

The proposed amendments to Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6—approved unanimously by the Advisory Committee after post-publication changes—would affect length limits set by the Appellate Rules for briefs and other documents. The proposal would amend Rules 5, 21, 27, 35, and 40 to convert the existing page limits to word limits for documents prepared using a computer. For documents prepared without the aid of a computer, the proposed amendments would retain the page limits currently set out in those rules. The proposed amendments employ a conversion ratio of 260 words per page for Rules 5, 21, 27, 35, and 40.

The amendments would also reduce Rule 32's word limits for briefs so as to reflect the pre-1998 page limits multiplied by 260 words per page. The 14,000-word limit for a party's principal brief would become a 13,000-word limit; the limit for a reply brief would change from 7,000 to 6,500 words. The proposals correspondingly reduce the word limits set by Rule 28.1 for cross-appeals. New Rule 32(f) sets out a uniform list of the items that can be excluded when computing a document's length. A new appendix collects in one chart all the length limits stated in the Appellate Rules.

Any court of appeals that wishes to retain the existing limits, including 14,000 words for a principal brief, may do so under the proposed amendments. The local variation provision of existing Rule 32(e) would be amended to highlight a court's ability (by order or local rule) to set length limits that exceed those in the Appellate Rules.

* * *

The genesis of this project was the suggestion that length limits set in terms of pages have been overtaken by advances in technology, and that use of page limits rather than word limits invites gamesmanship by attorneys. As noted, the proposal would amend Rules 5, 21, 27, 35, and 40 to address that concern.

Drafting those amendments required the Committee to select a conversion ratio from pages to words. The 1998 amendments transmuted the prior 50-page limit for briefs into a 14,000-word limit—that is, the 1998 amendments used a conversion ratio of 280 words per page. In formulating the published proposal, the Committee relied upon two studies indicating that a traditional 50-page brief filed in the courts of appeals under the pre-1998 rules contained fewer than 280 words per page. A study in 1993 by the D.C. Circuit Advisory Committee recommended a conversion ratio of 250 words per page; based on this study, the D.C. Circuit applied a length limit of 12,500 words for principal briefs from 1993 to 1998. A 2013 study by the Committee's clerk representative found an average of 259 words per page (or 12,950 per fifty pages) in 210 randomly-selected appellate briefs filed by counsel in the Eighth Circuit from 1995 through 1998. The 1998 Advisory Committee Note to Rule 32 did not explain the reason for the selection of the 280 words per page conversion ratio, and the published proposal said that the basis for the estimate was unknown.

As published for comment, the proposed amendments employed a conversion ratio of 250 words per page for Rules 5, 21, 27, 35, and 40. The published proposal also reduced Rule 32's word limits for briefs so as to reflect the pre-1998 page limits multiplied by 250 words per page—that is, 12,500 words for a principal brief. The proposals correspondingly reduced the word limits set by Rule 28.1 for cross-appeals. The published proposed amendments were subject to the local variation provision of Rule 32(e), which permits a court to increase the length limit by order or local rule.

During consideration of the proposed shift to type-volume limits, the Committee also observed that the rules do not provide a uniform list of the items that can be excluded when computing a document's length. The published proposals would add a new Rule 32(f) setting forth such a list.

1. Text of proposed amendment and Committee Note

The Committee recommends final approval of the proposed amendments to Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6, as revised after publication and set out in the enclosure to this report.

125-010761

2. Changes made after publication and comment

The Committee received a large number of public comments on these proposed amendments. The Committee also received testimony from four appellate lawyers at a public hearing.

For documents other than briefs, a number of commentators voiced support for converting page limits to word limits. Two professional associations expressed support for the proposed amendments to Rules 5, 21, 27, 35, and 40 as published, but several commentators disagreed with the choice of word limits in some or all of those rules. Several of those commentators argued that the page-to-word conversion ratio should be 280 words per page or more, rather than the 250 words per page employed in formulating the published proposals. Commentators advocating a conversion ratio greater than 250 words per page noted that the issues addressed by these documents can be complex and important.

The Committee was not convinced to use a conversion ratio of 280 words per page. The principal basis for that ratio is the 1998 conversion of the limit for principal briefs from 50 pages to 14,000 words. The Committee was advised during the comment period that the 1998 conversion ratio was based on a word count in commercially printed briefs filed at the Supreme Court of the United States. The Committee was not persuaded that it should use the number of words in a commercially printed Supreme Court brief as the measure of equivalence for motions, petitions for rehearing, and other documents filed in the courts of appeals.

Other data informed the Committee's deliberations. Before publication, the Committee received the studies described above, which showed average length of 251 and 259 words per page, respectively, in appellate briefs filed before the conversion from page limits to word counts in 1998. One commentator submitted anecdotal reports that briefs filed under the current Appellate Rules (with 14-point font) average 240 words per page. The clerk's representative sampled twenty-eight rehearing petitions filed in late 2014 in the Eighth Circuit and found that selected pages in those filings averaged 255 words per page, with most pages containing between 245 and 260 words. In sum, the available data suggest that a conversion ratio of 280 words per page would not accurately reflect the number of words that naturally fit on a page. The Committee ultimately determined to employ a conversion ratio of 260 words per page.

On the length of briefs, many appellate lawyers opposed a reduction in the length limit, arguing principally that some complex appeals require 14,000 words. On the other hand, judges of two courts of appeals formally favored the proposal. Judges submitted public comments stating that unnecessarily long briefs interfere with the efficient and expeditious administration of justice. Appellate judges on the Committee shared those concerns and reported informal input from judicial colleagues who expressed similar views. In considering the suggestion of commentators to withdraw the proposal, therefore, the Committee was required to ask whether

the federal rule should continue to require some courts of appeals to accept lengthy briefs that the courts say they do not need and do not want.

During committee deliberations and in public comments, there were two principal reasons advanced for amending the length limit for appellate briefs: (1) concern that the conversion from pages to words in 1998 effectively increased the length limit above the length of traditional briefs filed in the courts of appeals, and (2) concern that regardless of the history, briefs filed under the current rules are too long, and that courts of appeals that wish to apply a shorter limit should be permitted to do so. The Committee received comment and gathered additional data on both points.

Judge Frank Easterbrook submitted a comment explaining that he, as a member of the Standing Committee, drafted the 1998 amendments to Rule 32. According to Judge Easterbrook, the 14,000 word limit came from a Seventh Circuit rule, which in turn was based on a word count of printed briefs filed in the Supreme Court. Judge Easterbrook reported that a similar study of briefs filed by law firms without printing showed an average of about 13,000 words for fifty pages. He wrote that the Advisory Committee selected a limit of 14,000 words, "thinking it best to err on the side of generosity if only because that would curtail the number of motions that counsel would file seeking permission to go longer." Judge Easterbrook reported that "[m]embers of the Advisory Committee (and in turn the Standing Committee) thought it more important to adopt a simple rule that would prevent cheating (by using tracking controls, smaller type, moving text to footnotes, and so on) than to clamp down on the maximum size of a brief."

The Committee also studied the official records of the Advisory Committee and the Standing Committee regarding the 1998 amendments. The 1998 Advisory Committee Note to Rule 32 states that the 14,000 word limit "approximate[s] the current 50-page limit." After hearing testimony that a 50-page brief prepared with an office typewriter would have contained approximately 12,500 words, the Committee in 1994 published a proposal to convert the 50-page limit to 12,500 words. Commentators objected on the ground that the 12,500 limit "reduces the length below the traditional 50 page limit." The Committee then published a new proposal setting a limit of 14,000 words. There was discussion in April 1997 "about reducing the word count from 14,000 to 13,000 because 14,000 is not a good equivalent to the old 50-page brief," and that 14,000 words "is closer to the length of a professionally printed brief." But the minutes of the Advisory Committee reflect that "[i]n order to avoid reopening the controversy" over the length of briefs, "several members spoke in favor of retaining the 14,000 word limit," and "[a] majority favored staying with 14,000." When the chair of the Advisory Committee presented the proposal to the Standing Committee, "[h]e pointed out that a 50-page brief would include about 14,000 words." When the Standing Committee forwarded the 1998 amendment to the Judicial Conference, the Standing Committee's report said that the rule "establishes length limitations of 14,000 words . . . (which equates roughly to the traditional fifty pages)."

Among the commentators supporting the proposed reduction in brief length limits were the judges of the D.C. Circuit; all non-recused active judges of the Tenth Circuit and a majority of the senior judges of the Tenth Circuit; two professional associations; and three individual lawyers. The Department of Justice supported the proposed reduction, while urging the Committee to include language in rule text or a committee note concerning the need for extra length in certain cases. The Solicitor General "agree[d] that in most appeals the parties can and should submit briefs substantially shorter than the current word limits permit," but noted that "in some cases parties will justifiably need to file longer briefs."

Commentators supporting a word-limit reduction asserted that the current word limits allow more length than is needed to brief most appeals. In cases where the full length is unneeded, the 14,000-word limit allows lawyers to avoid pruning away extraneous facts and tenuous arguments. A tighter word limit will drive lawyers to focus on the key facts and dispositive law. Overlong, loosely written briefs divert scarce judicial time. These commentators noted that courts retain authority to grant leave to file overlength briefs in rare cases where 12,500 words are truly inadequate. A circuit that prefers longer limits also may enlarge the limits by local rule.

Among the commentators opposing the reduction in length limits for briefs were one judge; 22 law firms (or practice groups within law firms) or public interest groups; 10 professional associations; 19 non-government lawyers; and two government lawyers. Commentators opposing the reduction in word limits asserted that the current word limit has been unproblematic since its adoption in 1998. They asserted that in simple appeals where even 12,500 words is longer than necessary, the proposed reduction will not address prolixity. These commentators expressed concern that the full 14,000-word length is necessary to brief a complex, important appeal. They noted that inadequately-briefed issues are waived, and stated that it can be difficult to predict which arguments will persuade the court. They warned that motions for extra length will not be an adequate safety valve because a number of circuits strongly discourage such motions. A number of circuits require or instruct that motions for extra length be made a stated time in advance of the brief's due date, and the Fifth Circuit adds the requirement that a draft brief be included with the motion. A summary of all comments is included with this report, and the comments are available for review at Regulations.gov.

One commentator submitted two studies showing that lawyers could fit 300 words (or more) on a page under the pre-1998 Appellate Rules or a similar state-court framework. This information was not surprising, however, given the Standing Committee's conclusion in 1997 that "computer software programs make it possible . . . to create briefs that comply with a limitation stated in a number of pages, but that contain up to 40% more material than a normal brief."

Professor Gregory Sisk submitted a study in which he and his coauthor examined briefs filed in the Ninth Circuit. The Sisk and Heise study reports a correlation between appellant brief

length and reversal. But correlation does not show causation, and the authors caution that it would be "absurd to suggest that greater brief length in itself could have a direct causal link to success on appeal."

In collecting more recent data, the Committee's clerk representative found that only two circuits had readily available data on length of briefs. In the Eighth Circuit, approximately 19 percent of briefs in argued cases contained between 12,500 and 14,000 words; another 4 percent contained more than 14,000. In the D.C. Circuit, 23 percent of all briefs contained between 12,500 and 14,000 words, and 4 percent included more than 14,000; data for argued cases only were unavailable in that circuit.

The Committee members carefully discussed the concerns raised during the public comment period, and decided to revise the published length limits to reflect a conversion ratio of 260 words per page, rather than 250 words per page as published. The length limit for a principal brief (14,000 words under the current rule) is adjusted to 13,000 words from 12,500 in the published proposal. This change addresses to some extent the points raised by commentators while still meaningfully recognizing the validity of the concerns expressed by judges and others about the current rule. For those moved by the historical data, the ratio selected also best approximates the average length of fifty-page briefs filed in courts of appeals governed by a page limit in the years immediately preceding the 1998 amendment. The Committee voted to amend Rule 32(e) to highlight a circuit court's ability to increase any or all of the Appellate Rules' length limits by local rule. The Committee added language to the Committee Notes to Rules 28.1 and 32 to recognize the need for extra length in appropriate cases. The Committee adopted style changes proposed by Professor Kimble. As an aid to users of the Appellate Rules, the Committee endorsed an appendix collecting the length limits stated in the Appellate Rules.

The Committee deleted as unnecessary the alternative line limits from the length limits for documents other than briefs. The Committee retained line limits for briefs, because the length limits for briefs work differently than the proposed length limits for other documents. The 1998 amendments put in place page limits that were significantly more stringent than the new type-volume limits for briefs: For litigants who do not use Rule 32(a)(7)(B)'s type-volume limits, the 1998 amendments reduced the page limits by 40 percent. By including line limits in the type-volume limits for briefs, the 1998 amendments assured that the more generous type-volume limits would be available to litigants who prepared their briefs without the aid of a computer.

A majority of Committee members voiced support for some version of the proposal to reduce the length limit for briefs, while two attorney members spoke in opposition. As noted, the Committee made several changes in an effort to address concerns, and the ultimate vote was unanimous in favor of the proposal as shown in the attachment to this report.

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D. Amicus filings in connection with rehearing: Rule 29

The proposed amendments to Rule 29 would re-number the existing Rule as Rule 29(a) and would add a new Rule 29(b) to set default rules for the treatment of amicus filings in connection with petitions for rehearing. The proposed amendment would not require any circuit to accept amicus briefs, but would establish guidelines for the filing of briefs when they are permitted.

Attorneys who file amicus briefs in connection with petitions for rehearing understandably seek clear guidance about the filing deadlines for, and permitted length of, such briefs. There is no federal rule on the topic. *See Fry v. Exelon Corp. Cash Balance Pension Plan*, 576 F.3d 723, 725 (7th Cir. 2009) (Easterbrook, C.J., in chambers). Most circuits have no local rule on point, and attorneys have reported frustration with their inability to obtain accurate guidance.

The proposed amendments would establish default rules concerning timing and length of amicus briefs in connection with petitions for rehearing. They also would incorporate (for the rehearing stage) most of the features of current Rule 29. A circuit could alter the default federal rules on timing, length, and other matters by local rule or by order in a case, but the new federal rule would ensure that some rule governs the filings in every circuit.

1. Text of proposed amendment and Committee Note

The Committee recommends final approval of the proposed amendment to Rule 29, as revised after publication and set out in the enclosure to this report.

2. Changes made after publication and comment

A number of commentators expressed general support for the idea of amending Rule 29 to address amicus filings in connection with rehearing petitions. Objections and suggestions focused mainly on the issues of length and timing; a third suggestion concerned amicus filings in connection with merits briefing at times other than the initial briefing of an appeal. In response to the public comments, the Committee decided to change the length limit under Rule 29(b) from 2,000 words to 2,600 words and to change the deadline for amicus filings in support of a rehearing petition (or in support of neither party) from three days after the petition's filing to seven days after the petition's filing. The Committee also deleted the alternative line limit from the length limit as unnecessary.

The published proposal's 2,000-word limit had been derived by taking half of the 15-page limit for the party's petition, rounding up (to eight pages), and multiplying by 250 words per page. The published proposal drew from current Rule 29(d), which provides that amicus

filings in connection with the merits briefing of an appeal are limited to half the length of "a party's principal brief."

The ten commentators who specifically addressed this feature of the proposal advocated setting a longer limit. Not all of these commentators stated a preferred alternative, but proposals ranged from 2,240 words to 4,200 words. The arguments in favor of a longer limit related to the nature of the cases, the nature of the issues, the quality of the party's petition, and the required contents of the amicus's brief. Rehearing petitions tend to be filed in difficult cases. Issues may include late-breaking developments in the law. The party's petition may be poorly drafted. The party may neglect the larger implications of a ruling and might not focus on ways that a ruling might usefully be narrowed while preserving the result in the case at hand. Amicus filings must include the statement of the amicus's identity, interest, and authority to file and (usually) the authorship and funding disclosure.

The Committee considered this input and examined the local rules in the four circuits that address the question of length: Two give amici essentially the same length limit as parties, and two give amici more than one-half the length limit for parties but less than the full amount. The Committee then opted to increase the proposed length limit for the federal rule from one-half of the length allowed for a party's petition to two-thirds of that length. Applying the 260-words-per-page conversion ratio noted in Part II.C.2 of this report, the Committee arrived at a revised length limit of 2,600 words.

The published proposal would set a time lag of three days between the filing of the petition and the due date of any amicus filings in support of the petition (or in support of neither party). It would give an amicus curiae opposing the petition the same due date as that set by the court for the response. Two commentators expressed support for the proposed timing rules; eight commentators believed that one or both of the periods would be too short.

Seven of those commentators proposed lengthening the period for amicus filings in support of a rehearing petition and four proposed lengthening the deadline for amicus filings in opposition. Commentators argued that the published proposal's deadlines would generate motions for extensions of time and decrease the quality of amicus filings. They noted that it may not be practicable for an amicus to coordinate with the party whose position it supports. One commentator observed that government lawyers may need time to seek relevant approvals before filing an amicus brief. One commentator advocated adoption of a two-step process, under which the rule would set a three-day deadline by which the amicus must file a notice of intent to file a brief and a further seven- or ten-day deadline for the actual brief.

The Committee noted that in four circuits that have local provisions addressing the timing of amicus filings in support of rehearing petitions, the time allowed ranges from seven to 14 days after the filing of the party's petition. The Committee also recognized that any circuit could shorten the time period by local rule if it were concerned, for example, about inefficiencies

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resulting from an amicus brief arriving after a responding party has drafted a response to a petition. The Committee thus decided to adopt a deadline of seven days after the petition's filing for amicus filings in support of the petition (or in support of neither party). The Committee did not alter the deadline for amicus filings in opposition. It is rare for a court to request a response to a rehearing petition, and when the court does so, the order requesting a response can readily alter the due date for amicus filings if such an alteration is desirable.

One commentator suggested adopting a rule to govern amicus filings after the grant of rehearing en banc or after a remand from the Supreme Court. The proposed rule that was published for comment did not address those topics. In deciding not to address them, the Committee took into account three considerations. First, any new provision addressing those contexts would need to be published for comment, and it would not be worthwhile to hold up the already-published proposal for that purpose. Second, amicus filings in those contexts occur only rarely, giving reason to doubt the need for a national rule on the subject. Third, it seems likely that the courts of appeals take flexible approaches to the procedure in those contexts, suggesting that the wiser course might be to leave those topics for treatment in local provisions and orders in particular cases.

E. Amending the "three-day rule": Rule 26(c)

The proposed amendment to Rule 26(c) implements a recommendation by the Standing Committee's CM/ECF Subcommittee that the "three-day rule" in each set of national Rules be amended to exclude electronic service. The three-day rule adds three days to a given period if that period is measured after service and service is accomplished by certain methods. Now that electronic service is well-established, it no longer makes sense to include that method of service among the types of service that trigger application of the three-day rule.

The proposed amendment to Rule 26(c) accomplishes the same result as the proposed amendments to Civil Rule 6, Criminal Rule 45, and Bankruptcy Rule 9006, but does so using different wording in light of Appellate Rule 26(c)'s current structure. Under that structure, the applicability of the three-day rule depends on whether the paper in question is delivered on the date of service stated in the proof of service; if so, then the three-day rule is inapplicable. The change is thus accomplished by amending the rule to state that a paper served electronically is deemed (for this purpose) to have been delivered on the date of service stated in the proof of service.

1. Text of proposed amendment and Committee Note

The Committee recommends final approval of the proposed amendment to Rule 26(c), as revised after publication and set out in the enclosure to this report.

125-010768

2. Changes made after publication and comment

The Committee voted to approve the amendment as published. But recognizing that the Criminal Rules Committee had voted to add certain language to the Committee Note accompanying the proposed amendment to Rule 45, the Committee gave the chair discretion to accede to the addition of the same language to Rule 26(c)'s Committee Note depending on discussions with the Standing Committee. It now appears that the Bankruptcy and Civil Rules Committees are prepared to accommodate the strongly-held preference of the Criminal Rules Committee. Under those circumstances, the Appellate Rules Committee would not object to including the same language in the Committee Note.

A number of commentators supported the proposal to exclude electronic service from the three-day rule. Others conceded its appeal, but proposed changes to offset its anticipated consequences. Still others opposed the proposal altogether.

Commentators' concerns fall into four basic categories: unfair behavior by opponents, hardship for the party being served, the need for time to draft reply briefs and/or motion papers, and inefficiency that would result from motions for extensions of time. Electronic service, unlike personal service, can occur outside of business hours. For example, it may be made late at night on a Friday before a holiday weekend in a different time zone. Some commentators worried that electronically served papers are more likely to be overlooked. Hardships might fall more heavily on lawyers who operate in small offices or as solo practitioners, and on lawyers who must draft complex response papers. Commentators stated that the three extra days are especially important to provide extra time to draft reply briefs, responses to motions, and replies to such responses. They state that, with the prevalence of electronic filing and service, the extra three days have become a "de facto" part of the time periods for such documents. The Department of Justice notes that government lawyers need time to confer with relevant personnel. Other commentators say that lawyers need time to deal with the competing demands of other cases and to communicate with clients who are incarcerated. Acknowledging that an extension of time could address the problems noted above, commentators argued that such motions do not provide a good solution, because making and adjudicating those motions consume lawyer and court time.

A number of commentators suggested modifications to the proposal or additional amendments that would offset some effects of the proposal. Some of the suggested revisions applied equally to the three-day rules in the Civil, Criminal, and Bankruptcy Rules. Others were specific to the Appellate Rules.

The Department of Justice proposed the addition, to each Committee Note, of language encouraging the grant of extensions when appropriate. After some discussion, the Department circulated a revised proposal that read: "The ease of making electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the

time available to respond. Extensions of time may be warranted to prevent prejudice." The Criminal Rules Committee voted to add the proposed language to the Committee Note to Criminal Rule 45, and noted the importance of taking a flexible approach and resolving issues on their merits in criminal cases. The other Advisory Committees now are prepared to acquiesce in that language.

Other commentators made a variety of suggestions. Two commentators proposed that although electronic service should not give rise to an automatic three-day extension, a more limited automatic extension (of one or two days) would be appropriate. One commentator proposed the adoption of a provision that would address the computation of response time when a document "is submitted with a motion for leave to file or is not accepted for filing." Two sets of comments suggested lengthening the deadline for reply briefs.

The Committee did not adopt the proposals for a one-or-two-day extension or for a provision addressing documents that are not immediately accepted for filing. Some committee members, however, were sympathetic to the concerns about the timing for reply briefs. As the commentators pointed out, the "de facto" deadline for reply briefs is now 17 days (14 day under Rule 31(a)(1), plus three days under Rule 26(c)). Before the advent of electronic service, the three-day rule existed to offset transit time in the mail; if the mail took three days, then the de facto response time would be the same as the nominal deadline, namely, 14 days. But in 2002, Rule 25 was amended to permit electronic service, and as electronic service has become more widespread, lawyers have become accustomed to a period of 17 days for filing a reply brief. A number of Committee members expressed concern that a 14-day deadline is very short and that it can be difficult to seek extensions of time.

Committee members concluded that the amendment to Rule 26(c) should proceed together with the amendments to the three-day rules in the other sets of rules. But the Committee added to its study agenda a new item concerning the deadline for reply briefs. The Committee also discussed that before the amendment to the three-day rule takes effect on December 1, 2016, the chair could alert the chief judges of the courts of appeals about the Committee's work relating to the filing deadline for reply briefs. Such notice would permit local courts to consider whether to extend the deadline for reply briefs by local rule, especially if the Committee is considering a national rule amendment on that topic.

F. Updating a cross-reference in Rule 26(a)(4)(C)

In 2013, Rule 13—governing appeals as of right from the Tax Court—was revised and became Rule 13(a). A new Rule 13(b)—providing that Rule 5 governs permissive appeals from the Tax Court—was added. At that time, Rule 26(a)(4)(C)'s reference to "filing by mail under Rule 13(b)" should have been updated to refer to "filing by mail under Rule 13(a)(2)."

125-010770

The Committee voted to give final approval to an amendment to Rule 26(a)(4)(C) to update this cross-reference. The Committee noted that the change is a technical amendment that can proceed without publication.

III. Information Items

The Committee continues work on two matters that may result in proposed amendments for consideration at the January 2016 meeting of the Standing Committee. One involves Rule 41, concerning issuance of the mandate; the other relates to Rule 25, which governs electronic filing and service and proof of electronic service. The Committee is also working on a project concerning appellate disclosure statements and Rule 26.1, and is coordinating with the Civil Rules Committee on a project about appeal bonds and Civil Rule 62. Also on the study agenda are a question concerning amicus filings by consent of the parties and a proposal to amend the Appellate Rules to address appeals by class action objectors.

The Committee is considering amendments to Rule 41 that would address whether a court of appeals has authority to stay its mandate following a denial of certiorari, and whether such a stay requires an order or can result from the court's inaction. Rule 41 provides in relevant part as follows:

Rule 41. Mandate: Contents; Issuance and Effective Date; Stay

* * *

(b) WHEN ISSUED. The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.

* * *

(d) STAYING THE MANDATE.

* * *

(2) *Pending Petition for Certiorari.*

* * *

(D) The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed.

The Supreme Court twice has reserved judgment on whether Rule 41(d)(2)(D) requires a court of appeals to issue its mandate immediately after the filing of a Supreme Court order denying a petition for certiorari, or whether Rule 41(b) allows a court of appeals to "extend the time" for issuing a mandate even after certiorari is denied. The Court also has noted an open question whether Rule 41(b) allows a court of appeals to "extend the time" for issuing its mandate by mere inaction, or whether an order is required. As to the authority of the court of appeals to stay the mandate after denial of certiorari, the Supreme Court, in *Ryan v. Schad*, 133 S. Ct. 2548 (2013) (per curiam), and *Bell v. Thompson*, 545 U.S. 794 (2005), held that if such authority exists it can be exercised only in extraordinary circumstances. In *Calderon v. Thompson*, 523 U.S. 538 (1998), the Court opined that the courts of appeals are recognized to have an inherent power *to recall* their mandates, in extraordinary circumstances, subject to review for an abuse of discretion. This past spring, Judge Richard C. Tallman wrote to the Committee to propose that Rule 41 be amended to "permit a court of appeals to stay issuance of its mandate only by order and only in exceptional circumstances."

At its fall 2015 meeting, the Committee will consider proposed amendments to Rule 41 that would (1) restore the requirement that stays of the mandate require an order; (2) make clear that stays of the mandate (other than pending a petition for certiorari) require extraordinary circumstances; and (3) streamline the rule by eliminating Rule 41(d)(1).

At the fall meeting, the Committee will give further consideration to amendments to Appellate Rule 25 to address electronic filing and service and proof of electronic service. Like the proposals currently under development by the Civil and Bankruptcy Rules Committees, the Appellate Rule 25 proposal would presumptively require electronic filing (subject to exceptions for good cause and by local rule) and would presumptively authorize electronic service through the court's transmission facilities (subject, again, to exceptions for good cause and by local rule). Pro se litigants would be treated differently, however, in order to take account of concerns about electronic filing and service by and on unrepresented parties (including inmates). The amendments would also provide that the notice of electronic filing generated by CM/ECF constitutes proof of service on any litigant served electronically through the court's transmission facilities.

The Committee is considering whether to propose amending the Appellate Rules to require disclosures in addition to those currently required by Appellate Rules 26.1 and 29(c). A number of circuits have local provisions that require such additional disclosures. The Committee is evaluating whether such disclosures elicit information that may affect a judge's analysis of his or her recusal obligations and, if so, whether the disclosures should be required by national rule. Topics on which the Committee is focusing include disclosures in bankruptcy matters; disclosures concerning victims in criminal cases; disclosures by intervenors and amici; and disclosures by non-governmental, non-human entities other than corporations. The Committee will keep other Advisory Committees apprised of work in this area.

During the past several years, the Civil and Appellate Rules Committees and their joint subcommittee have discussed the possibility of adopting a rule amendment to address the practice of "manufactured finality." A principal topic of discussion has been the practice whereby an appellant seeks to render the ruling on its primary claim final and appealable by dismissing all other remaining claims. There is a conflict in authority about whether one technique—described as "conditional dismissals with prejudice"—suffices to achieve finality. The Civil Rules Committee, however, has opted to take no action on this matter. Recognizing that any rule amendment addressing the conflict in authority likely should be placed in the Civil Rules rather than the Appellate Rules, the Appellate Rules Committee acceded to the Civil Rules Committee's proposal to take no action. The reporters will monitor the caselaw in this area and alert the committees of significant developments.

The Civil-Appellate Subcommittee also has discussed the treatment of appeal bonds in Civil Rule 62. An Appellate Rules Committee member has suggested that it would be useful to clarify a number of aspects of practice under that rule. The subcommittee has begun drafting a possible rule amendment, focusing particularly on current Rules 62(a), (b), and (d). Although discussion in the Civil Rules Committee suggested that members of that Committee do not see problems with the current rule, attorney members of the Appellate Rules Committee have noted that problems with the rule are likely to be felt most keenly by appellate lawyers.

Other topics on the Committee's agenda may receive attention in the next year. One item concerns a proposal that Appellate Rule 42 be amended to bar the dismissal of an appeal from a judgment approving a class action settlement or fee award if there is any payment in exchange for the dismissal of the appeal. The Appellate Rules Committee is hopeful that the work of the Civil Rules Committee's Rule 23 Subcommittee will assist with deliberations in this area. Another item concerns amicus filings during initial consideration of a case on the merits. Current Rule 29(a) provides that the United States or a State may file without consent of the parties or leave of court. It then states: "Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing." Some circuits have local provisions that prevent the filing of amicus briefs that would cause a recusal. The Committee will consider whether a revision to the Rule 29(a) provision on party consent would be desirable.

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PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF APPELLATE PROCEDURE*

1 **Rule 4. Appeal as of Right—When Taken**

2 * * * * *

3 **(c) Appeal by an Inmate Confined in an Institution.**

4 (1) If an institution has a system designed for legal
5 mail, an inmate confined there must use that
6 system to receive the benefit of this Rule 4(c)(1).
7 If an inmate ~~confined in an institution~~ files a
8 notice of appeal in either a civil or a criminal
9 case, the notice is timely if it is deposited in the
10 institution's internal mail system on or before the
11 last day for filing~~. If an institution has a system~~
12 ~~designed for legal mail, the inmate must use that~~
13 ~~system to receive the benefit of this rule. Timely~~
14 ~~filing may be shown by a declaration in~~

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

125-010777

15 ~~compliance with 28 U.S.C. § 1746 or by a~~
16 ~~notarized statement, either of which must set~~
17 ~~forth the date of deposit and state that first-class~~
18 ~~postage has been prepaid.~~ and:
19 (A) it is accompanied by:
20 (i) a declaration in compliance with 28
21 U.S.C. § 1746—or a notarized
22 statement—setting out the date of
23 deposit and stating that first-class
24 postage is being prepaid; or
25 (ii) evidence (such as a postmark or date
26 stamp) showing that the notice was so
27 deposited and that postage was
28 prepaid; or
29 (B) the court of appeals exercises its discretion
30 to permit the later filing of a declaration or

125-010778

31 notarized statement that satisfies

32 Rule 4(c)(1)(A)(i).

33 * * * * *

Committee Note

Rule 4(c)(1) is revised to streamline and clarify the operation of the inmate-filing rule.

The Rule requires the inmate to show timely deposit and prepayment of postage. The Rule is amended to specify that a notice is timely if it is accompanied by a declaration or notarized statement stating the date the notice was deposited in the institution's mail system and attesting to the prepayment of first-class postage. The declaration must state that first-class postage "is being prepaid," not (as directed by the former Rule) that first-class postage "has been prepaid." This change reflects the fact that inmates may need to rely upon the institution to affix postage after the inmate has deposited the document in the institution's mail system. New Form 7 in the Appendix of Forms sets out a suggested form of the declaration.

The amended rule also provides that a notice is timely without a declaration or notarized statement if other evidence accompanying the notice shows that the notice was deposited on or before the due date and that postage was prepaid. If the notice is not accompanied by evidence

125-010779

that establishes timely deposit and prepayment of postage, then the court of appeals has discretion to accept a declaration or notarized statement at a later date. The Rule uses the phrase "exercises its discretion to permit" – rather than simply "permits" – to help ensure that pro se inmate litigants are aware that a court will not necessarily forgive a failure to provide the declaration initially.

Changes Made After Publication and Comment

Rules 4(c)(1) and 25(a)(2)(C), as published, would have deleted the requirement that an inmate use a system designed for legal mail (if one is available) in order to receive the benefit of the inmate-filing rules. The Committee proposed deleting that requirement because it perceived no purpose for it. However, a commentator pointed out that correctional institutions in the State of Florida log the date of deposit of inmates' legal mail but do not log the date of deposit of inmates' non-legal mail. The Committee's subsequent inquiries revealed that a number of other States similarly record the date of inmates' legal mail but not their non-legal mail. This new information, in the view of the Committee, provides reason to retain the legal-mail-system requirement. Requiring an inmate to use a legal mail system where available serves a useful purpose by ensuring that mail is logged or date-stamped and avoiding unnecessary litigation over the timing of deposits. Accordingly, the Committee restored that requirement to proposed Rules 4(c)(1) and 25(a)(2)(C) and made conforming changes to the Committee Notes.

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Summary of Public Comments

The summary of public comments appears at the end of this set of proposed amendments (i.e., the proposals to amend Rules 4 and 25 and Forms 1 and 5, and to add new Form 7).

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Rule 25. Filing and Service

(a) Filing.

* * * * *

(2) **Filing: Method and Timeliness.**

* * * * *

(C) **Inmate F~~f~~iling.** If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 25(a)(2)(C). A paper filed by an inmate ~~confined in an institution~~ is timely if it is deposited in the institution's internal mail~~ing~~ system on or before the last day for filing~~. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely~~

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17 ~~filing may be shown by a declaration in~~
18 ~~compliance with 28 U.S.C. § 1746 or by a~~
19 ~~notarized statement, either of which must~~
20 ~~set forth the date of deposit and state that~~
21 ~~first-class postage has been prepaid.~~ and:
22 (i) it is accompanied by:
23 ● a declaration in compliance with
24 28 U.S.C. § 1746—or a notarized
25 statement—setting out the date of
26 deposit and stating that first-class
27 postage is being prepaid; or
28 ● evidence (such as a postmark or
29 date stamp) showing that the
30 paper was so deposited and that
31 postage was prepaid; or

125-010784

32 (ii) the court of appeals exercises its
33 discretion to permit the later filing of a
34 declaration or notarized statement that
35 satisfies Rule 25(a)(2)(C)(i).
36 * * * * *

Committee Note

Rule 25(a)(2)(C) is revised to streamline and clarify the operation of the inmate-filing rule.

The Rule requires the inmate to show timely deposit and prepayment of postage. The Rule is amended to specify that a paper is timely if it is accompanied by a declaration or notarized statement stating the date the paper was deposited in the institution's mail system and attesting to the prepayment of first-class postage. The declaration must state that first-class postage "is being prepaid," not (as directed by the former Rule) that first-class postage "has been prepaid." This change reflects the fact that inmates may need to rely upon the institution to affix postage after the inmate has deposited the document in the institution's mail system. New Form 7 in the Appendix of Forms sets out a suggested form of the declaration.

The amended rule also provides that a paper is timely without a declaration or notarized statement if other

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evidence accompanying the paper shows that the paper was deposited on or before the due date and that postage was prepaid. If the paper is not accompanied by evidence that establishes timely deposit and prepayment of postage, then the court of appeals has discretion to accept a declaration or notarized statement at a later date. The Rule uses the phrase "exercises its discretion to permit" – rather than simply "permits" – to help ensure that pro se inmate litigants are aware that a court will not necessarily forgive a failure to provide the declaration initially.

Changes Made After Publication and Comment

Rules 4(c)(1) and 25(a)(2)(C), as published, would have deleted the requirement that an inmate use a system designed for legal mail (if one is available) in order to receive the benefit of the inmate-filing rules. The Committee proposed deleting that requirement because it perceived no purpose for it. However, a commentator pointed out that correctional institutions in the State of Florida log the date of deposit of inmates' legal mail but do not log the date of deposit of inmates' non-legal mail. The Committee's subsequent inquiries revealed that a number of other States similarly record the date of inmates' legal mail but not their non-legal mail. This new information, in the view of the Committee, provides reason to retain the legal-mail-system requirement. Requiring an inmate to use a legal mail system where available serves a useful purpose by ensuring that mail is logged or date-stamped and avoiding unnecessary litigation over the timing of deposits. Accordingly, the Committee restored that requirement to

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proposed Rules 4(c)(1) and 25(a)(2)(C) and made conforming changes to the Committee Notes.

Summary of Public Comments

The summary of public comments appears at the end of this set of proposed amendments (i.e., the proposals to amend Rules 4 and 25 and Forms 1 and 5, and to add new Form 7).

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Form 1. Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court

United States District Court for the _____
District of _____
File Number _____

A.B., Plaintiff v. C.D., Defendant	Notice of Appeal

Notice is hereby given that ___(here name all parties taking the appeal)__, (plaintiffs) (defendants) in the above named case,* hereby appeal to the United States Court of Appeals for the _____ Circuit (from the final judgment) (from an order (describing it)) entered in this action on the _____ day of _____, 20___.

(s) _____
Attorney for _____
Address:_____

[***Note to inmate filers:*** *If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration along with the Notice of Appeal.*]

* See Rule 3(c) for permissible ways of identifying appellants.

125-010789

Changes Made After Publication and Comment

The Committee added the word "timing" to the "Note to inmate filers" in order to clarify the reference to Rule 4(c)(1).

Summary of Public Comments

The summary of public comments appears at the end of this set of proposed amendments (i.e., the proposals to amend Rules 4 and 25 and Forms 1 and 5, and to add new Form 7).

125-010790

Form 5. Notice of Appeal to a Court of Appeals from a Judgment or Order of a District Court or a Bankruptcy Appellate Panel

United States District Court for the _____
District of _____

In re _____, Debtor _____, Plaintiff v. _____, Defendant	File No. _____

Notice of Appeal to United States Court of Appeals for the _____ Circuit

_____, the plaintiff [or defendant or other party] appeals to the United States Court of Appeals for the _____ Circuit from the final judgment [or order or decree] of the district court for the district of _____ [or bankruptcy appellate panel of the _____ circuit], entered in this case on _____, 20__ [here describe the judgment, order, or decree] _____

125-010791

17 The parties to the judgment [or order or decree]
18 appealed from and the names and addresses of their
19 respective attorneys are as follows:

20 Dated _____
21 Signed _____
22 *Attorney for Appellant*
23 Address: _____
24 _____

25 [***Note to inmate filers:*** *If you are an inmate confined in an*
26 *institution and you seek the timing benefit of Fed. R. App.*
27 *P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing)*
28 *and file that declaration along with the Notice of Appeal.*]

Changes Made After Publication and Comment

The Committee added the word "timing" to the "Note to inmate filers" in order to clarify the reference to Rule 4(c)(1).

Summary of Public Comments

The summary of public comments appears at the end of this set of proposed amendments (i.e., the proposals to amend Rules 4 and 25 and Forms 1 and 5, and to add new Form 7).

125-010792

1 **Form 7. Declaration of Inmate Filing**

2 _____
3 [*insert name of court; for example,*
4 *United States District Court for the District of Minnesota*]

5 A.B., Plaintiff

v. Case No. _____

C.D., Defendant

6 I am an inmate confined in an institution. Today,
7 _____ [*insert date*], I am depositing the
8 _____ [*insert title of document; for example,*
9 *"notice of appeal"*] in this case in the institution's internal
10 mail system. First-class postage is being prepaid either by
11 me or by the institution on my behalf.

12 I declare under penalty of perjury that the foregoing is
13 true and correct (see 28 U.S.C. § 1746; 18 U.S.C. § 1621).

14 Sign your name here_____

15 Signed on _____ [*insert date*]
16
17
18 [*Note to inmate filers: If your institution has a system*
19 *designed for legal mail, you must use that system in order*

125-010793

20 *to receive the timing benefit of Fed. R. App. P. 4(c)(1) or*
21 *Fed. R. App. P. 25(a)(2)(C).*]
22

Changes Made After Publication and Comment

The Committee revised Form 7 to use the present tense ("Today ... I am depositing") rather than the past tense ("I deposited ..."), to reflect the fact that the inmate will fill out the declaration before depositing both the declaration and the underlying filing in the institution's mail system. The Committee added a "Note to inmate filers" pointing out the legal-mail-system requirement in Rules 4(c)(1) and 25(a)(2)(C). The Committee also made style changes.

Summary of Public Comments

AP-2014-0002-0007: Edward Baskauskas. Objects to "the implicit assumption that a signed declaration can prove the occurrence of an event happening after signing (such as the mailing of the declaration and accompanying document). How can a document deposited in the mail be accompanied by a declaration that says I deposited [the document] . . . in the institutions internal mail system (the language of proposed new Form 7), when no one can truthfully make or sign such a statement until after the document has actually been deposited in the mail and is beyond the signers control?"

125-010794

Suggests "changing the language of proposed new Form 7 to read I am today depositing instead of I deposited. ... Changing to the present tense would be consistent with the Forms later statement that postage is being affixed .... Alternatively, if the past-tense deposited language is retained in proposed new Form 7, the amendments to Appellate Rules 4(c)(1) and 25(a)(2)(C) might be modified to specify that a paper to be filed by an inmate may be accompanied by an unsigned copy of the declaration or statement, and that the signed original of the declaration or notarized statement must be filed separately within a reasonable time." In addition, "the amendments should explicitly permit separate filing of the declaration or notarized statement as a matter of course, rather than leaving the matter to judicial discretion or interpretation."

AP-2014-0002-0013 & AP-2014-0002-0015: James C. Martin (and Charles A. Bird) on behalf of the American Academy of Appellate Lawyers. Supports the proposals.

AP-2014-0002-0020: Dorothy F. Easley, Easley Appellate Practice. In an article appended to her comment, supports this proposal as "clarifying and helpful."

AP-2014-0002-0030: Joshua R. Heller. Opposes the proposed amendments. By "eliminat[ing] the requirement that an inmate use an institution's legal mail system that establishes the date of filing when one is available," the proposed amendments will "significantly harm[] the inmate filing systems that many states, including

125-010795

Florida, have created to establish the date documents are provided to prison officials in federal cases." Inmates have a motive to lie about the filing date.

The State of Florida's procedures for inmate legal mail "permit[] — without the enormous expense of establishing outgoing mail logs for every prisoner in the custody of the State of Florida's Department of Corrections – a date certain that a document is placed by an inmate into the hands of a corrections official for mailing."

The proposed amendments would only affect appellate filings. "Neither inmates nor those who litigate against them benefit from having two sets of inmate-filing rules: one for trial court filings and one for appeals."

AP-2014-0002-0036: Federal Courts Committee of the New York County Lawyers Association. "The Committee endorses the amendments (1) to include a sample declaration of timely filing (Form 7); and (2) to eliminate the distinction between an institution's legal mail system and its general mail system. The Committee does not endorse the proposed amendments to the extent they require inmates to include an affidavit or declaration of timely mailing at the time of mailing itself." Such a requirement "could cause unwitting defaults by pro se prisoner litigants."

Also, in Form 7, "[a]n inmate should not be required to declare that she 'deposited' materials (past tense) as part of a declaration that she is supposed to include in the same envelope as the very materials being deposited." Use of the

125-010796

past tense "may cause further confusion for pro se inmates as to whether the declaration needs to be included in the same mailing as the document being filed."

AP-2014-0002-0039: Peter Goldberger & William J. Genego on behalf of the National Association of Criminal Defense Lawyers. Supports the proposal. "In new paragraphs 4(c)(1)(B) and 25(a)(2)(C)(ii), the Court of Appeals should have discretion not only to accept separate and subsequent proof of timely mailing ... but also to excuse 'for good cause' any failure by the inmate to 'prepay' the postage"; it is hard to take account of variations in institutions' policies for providing postage to inmates. "In the Note proposed to be added to Form 1 (as well as to Form 5), we would add, after the reference to Rule 4(c)(1), a brief explanatory parenthetical, such as '(allowing timely filing by mail).' In Form 7, we would change 'Insert name of court' to say 'Insert name of trial-level court.'"

AP-2014-0002-0058: John Derrick on behalf of the State Bar of California's Committee on Appellate Courts. Supports the proposal, but expresses concern about "potential problems that might arise with inadequate postage, where an inmate relied upon an institution for advising on the proper postage or some other issue arose that prevented the inmate from including proper postage." Proposes the following revision to proposed Rule 4(c)(1)(B) (along with a corresponding revision to proposed Rule 25(a)(2)(C)(ii)): "(B) the court of appeals exercises its discretion to excuse a failure to prepay postage

125-010797

or to permit the later filing of a declaration or notarized statement that satisfies Rule 4(c)(1)(A)(i).”

125-010798

1 **Rule 4. Appeal as of Right—When Taken**

2 **(a) Appeal in a Civil Case.**

3 * * * * *

4 (4) **Effect of a Motion on a Notice of Appeal.**

5 (A) If a party ~~timely~~ files in the district court

6 any of the following motions under the

7 Federal Rules of Civil Procedure~~,~~—and

8 does so within the time allowed by those

9 rules—the time to file an appeal runs for all

10 parties from the entry of the order disposing

11 of the last such remaining motion:

12 * * * * *

Committee Note

A clarifying amendment is made to subdivision (a)(4). Former Rule 4(a)(4) provided that "[i]f a party timely files in the district court" certain post-judgment motions, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion."

125-010799

Responding to a circuit split concerning the meaning of "timely" in this provision, the amendment adopts the majority approach and rejects the approach taken in *National Ecological Foundation v. Alexander*, 496 F.3d 466 (6th Cir. 2007). A motion made after the time allowed by the Civil Rules will not qualify as a motion that, under Rule 4(a)(4)(A), re-starts the appeal time—and that fact is not altered by, for example, a court order that sets a due date that is later than permitted by the Civil Rules, another party's consent or failure to object to the motion's lateness, or the court's disposition of the motion without explicit reliance on untimeliness.

Changes Made After Publication and Comment

The Committee made no changes after publication and comment.

Summary of Public Comments

AP-2014-0002-0013 & AP-2014-0002-0015: James C. Martin (and Charles A. Bird) on behalf of the American Academy of Appellate Lawyers. Supports the proposal.

AP-2014-0002-0020: Dorothy F. Easley, Easley Appellate Practice. In an article appended to her comment, supports this proposal as "clarifying and helpful."

125-010800

AP-2014-0002-0035: Jeffrey R. White, Senior Litigation Counsel, Center for Constitutional Litigation, P.C. "CCL does not oppose the proposed amendment ...."

AP-2014-0002-0036: Federal Courts Committee of the New York County Lawyers Association. Supports the proposal, "which will create uniformity and clarity (and ... will not change the practice in the Second Circuit)."

AP-2014-0002-0040: The Pennsylvania Bar Association (PBA), upon the recommendation of its Federal Practice Committee. "The PBA opposes the proposed amendments to Rule 4(a)(4), governing the timeliness of a notice of appeal when a post-judgment motion is filed, because, without providing greater clarification, it simply substitutes a new trap for the unwary in place of the current trap for the unwary." Encloses a memo regarding the "Report of the PBA Federal Practice Committee Subcommittee on Proposed Amendments to Appellate Rules." The memo notes the desirability of clarifying Rule 4(a)(4) "in light of the consequences of filing a late appeal" but expresses doubt that the proposed language is clear enough. The memo also states it is "anomalous that while a post-judgment motion tolls the time for an appeal and a district court has discretion to extend the time for filing a post-judgment motion, such an implicit extension of time does not toll the time for appeal, notwithstanding the district court's power to enlarge the time for appeal for cause under Rule 4(a)."

AP-2014-0002-0058: John Derrick on behalf of the State Bar of California's Committee on Appellate

125-010801

Courts. Supports the proposal. "Notably, for purposes of our California State Bar Committee, the Ninth Circuit is identified as one of the courts in the majority" with respect to the circuit split concerning whether a motion filed outside a non-extendable deadline under Civil Rules 50, 52, or 59 can count as "timely" under Rule 4(a)(4).

125-010802

1 **Rule 5. Appeal by Permission**

2 * * * * *

3 **(c) Form of Papers; Number of Copies; Length**
4 **Limits.** All papers must conform to Rule 32(c)(2).
5 ~~Except by the court's permission, a paper must not~~
6 ~~exceed 20 pages, exclusive of the disclosure~~
7 ~~statement, the proof of service, and the accompanying~~
8 ~~documents required by Rule 5(b)(1)(E).~~ An original
9 and 3 copies must be filed unless the court requires a
10 different number by local rule or by order in a
11 particular case. Except by the court's permission, and
12 excluding the accompanying documents required by
13 Rule 5(b)(1)(E):
14 (1) a paper produced using a computer must include
15 a certificate under Rule 32(g) and not exceed
16 5,200 words; and

125-010803

17 (2) a handwritten or typewritten paper must not

18 exceed 20 pages.

19 * * * * *

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by word limits. The word limits were derived from the current page limits using the assumption that one page is equivalent to 260 words. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the word limit and the page limit, the calculation excludes the accompanying documents required by Rule 5(b)(1)(E) and any items listed in Rule 32(f).

Changes Made After Publication and Comment

The Committee deleted the proposed line limit and revised the proposed word limit from 5,000 words to 5,200 words. The Committee also made conforming changes to the Committee Note and style changes to the Rule text.

125-010804

Summary of Public Comments

The summary of public comments appears at the end of this set of proposed amendments (i.e., the proposals to amend Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6, and to add a new Appendix concerning length limits stated in the Appellate Rules).

125-010805

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Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary Writs

* * * * *

(d) Form of Papers; Number of Copies; Length Limits. All papers must conform to Rule 32(c)(2). ~~Except by the court's permission, a paper must not exceed 30 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 21(a)(2)(C).~~ An original and 3 copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case. Except by the court's permission, and excluding the accompanying documents required by Rule 21(a)(2)(C):

(1) a paper produced using a computer must include a certificate under Rule 32(g) and not exceed 7,800 words; and

125-010807

18 (2) a handwritten or typewritten paper must not

19 exceed 30 pages.

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by word limits. The word limits were derived from the current page limits using the assumption that one page is equivalent to 260 words. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the word limit and the page limit, the calculation excludes the accompanying documents required by Rule 21(a)(2)(C) and any items listed in Rule 32(f).

Changes Made After Publication and Comment

The Committee deleted the proposed line limit and revised the proposed word limit from 7,500 words to 7,800 words. The Committee also made conforming changes to the Committee Note and style changes to the Rule text.

125-010808

Summary of Public Comments

The summary of public comments appears at the end of this set of proposed amendments (i.e., the proposals to amend Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6, and to add a new Appendix concerning length limits stated in the Appellate Rules).

125-010809

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1 **Rule 27. Motions**

2 * * * * *

3 **(d) Form of Papers; Length Limits; ~~Page Limits; and~~**

4 **Number of Copies.**

5 * * * * *

6 (2) **~~Page~~ Length Limits.** ~~A motion or a response to~~

7 ~~a motion must not exceed 20 pages, exclusive of~~

8 ~~the corporate disclosure statement and~~

9 ~~accompanying documents authorized by~~

10 ~~Rule 27(a)(2)(B), unless the court permits or~~

11 ~~directs otherwise. A reply to a response must not~~

12 ~~exceed 10 pages.~~Except by the court's

13 permission, and excluding the accompanying

14 documents authorized by Rule 27(a)(2)(B):

15 (A) a motion or response to a motion produced

16 using a computer must include a certificate

125-010811

17 under Rule 32(g) and not exceed 5,200
18 words;
19 (B) a handwritten or typewritten motion or
20 response to a motion must not exceed 20
21 pages;
22 (C) a reply produced using a computer must
23 include a certificate under Rule 32(g) and
24 not exceed 2,600 words; and
25 (D) a handwritten or typewritten reply to a
26 response must not exceed 10 pages.
27 * * * * *

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by word limits. The word limits were derived from the current page limits using the assumption that one page is equivalent to 260 words. Papers produced using a computer must include the

125-010812

certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the word limit and the page limit, the calculation excludes the accompanying documents required by Rule 27(a)(2)(B) and any items listed in Rule 32(f).

Changes Made After Publication and Comment

The Committee deleted the proposed line limits. The Committee revised the proposed word limit for motions and responses from 5,000 words to 5,200 words, and revised the proposed word limit for replies from 2,500 words to 2,600 words. The Committee also made conforming changes to the Committee Note and style changes to the Rule text.

Summary of Public Comments

The summary of public comments appears at the end of this set of proposed amendments (i.e., the proposals to amend Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6, and to add a new Appendix concerning length limits stated in the Appellate Rules).

125-010813

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Rule 28.1. Cross-Appeals

* * * * *

(e) Length.

(1) **Page Limitation.** Unless it complies with Rule 28.1(e)(2)~~ and (3)~~, the appellant's principal brief must not exceed 30 pages; the appellee's principal and response brief, 35 pages; the appellant's response and reply brief, 30 pages; and the appellee's reply brief, 15 pages.

(2) **Type-Volume Limitation.**

(A) The appellant's principal brief or the appellant's response and reply brief is acceptable if it includes a certificate under Rule 32(g) and:

(i) ~~it~~ contains no more than ~~14,000~~13,000 words; or

125-010815

17 (ii) ~~it~~ uses a monospaced face and
18 contains no more than 1,300 lines of
19 text.
20 (B) The appellee's principal and response brief
21 is acceptable if it includes a certificate
22 under Rule 32(g) and:
23 (i) ~~it~~ contains no more than ~~16,500~~15,300
24 words; or
25 (ii) ~~it~~ uses a monospaced face and
26 contains no more than 1,500 lines of
27 text.
28 (C) The appellee's reply brief is acceptable if it
29 includes a certificate under Rule 32(g) and
30 contains no more than half of the type
31 volume specified in Rule 28.1(e)(2)(A).

125-010816

32 ~~(3) **Certificate of Compliance.** A brief submitted~~

33 ~~under Rule 28.1(e)(2) must comply with~~

34 ~~Rule 32(a)(7)(C).~~

35 * * * * *

Committee Note

When Rule 28.1 was adopted in 2005, it modeled its type-volume limits on those set forth in Rule 32(a)(7) for briefs in cases that did not involve a cross-appeal. At that time, Rule 32(a)(7)(B) set word limits based on an estimate of 280 words per page.

In the course of adopting word limits for the length limits in Rules 5, 21, 27, 35, and 40, and responding to concern about the length of briefs, the Committee has reevaluated the conversion ratio (from pages to words) and decided to apply a conversion ratio of 260 words per page. Rules 28.1 and 32(a)(7)(B) are amended to reduce the word limits accordingly.

In a complex case, a party may need to file a brief that exceeds the type-volume limitations specified in these rules, such as to include unusually voluminous information explaining relevant background or legal provisions or to respond to multiple briefs by opposing parties or amici. The Committee expects that courts will accommodate those

125-010817

situations by granting leave to exceed the type-volume limitations as appropriate.

Rule 28.1(e) is amended to refer to new Rule 32(g) (which now contains the certificate-of-compliance provision formerly in Rule 32(a)(7)(C)).

Changes Made After Publication and Comment

The Committee revised the proposed word limit for the appellant's principal brief and the appellant's response and reply brief from 12,500 words to 13,000 words, and revised the proposed word limit for the appellee's principal and response brief from 14,700 words to 15,300 words. The Committee made conforming changes to the Committee Note and style changes to the Rule text. The Committee also added language to the Committee Note to recognize the need for extra length in appropriate cases.

Summary of Public Comments

The summary of public comments appears at the end of this set of proposed amendments (i.e., the proposals to amend Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6, and to add a new Appendix concerning length limits stated in the Appellate Rules).

125-010818

1 **Rule 32. Form of Briefs, Appendices, and Other Papers**

2 **(a) Form of a Brief.**

3 * * * * *

4 (7) **Length.**

5 (A) **Page Limitation.** A principal brief may

6 not exceed 30 pages, or a reply brief 15

7 pages, unless it complies with

8 Rule 32(a)(7)(B)~~ and (C)~~.

9 (B) **Type-Volume Limitation.**

10 (i) A principal brief is acceptable if it

11 includes a certificate under Rule 32(g)

12 and:

13 ● ~~it~~ contains no more than

14 ~~14,000~~13,000 words; or

125-010819

15 ● ~~it~~ uses a monospaced face and
16 contains no more than 1,300 lines
17 of text.
18 (ii) A reply brief is acceptable if it
19 includes a certificate under Rule 32(g)
20 and contains no more than half of the
21 type volume specified in Rule
22 32(a)(7)(B)(i).
23 ~~(iii) Headings, footnotes, and quotations~~
24 ~~count toward the word and line~~
25 ~~limitations. The corporate disclosure~~
26 ~~statement, table of contents, table of~~
27 ~~citations, statement with respect to~~
28 ~~oral argument, any addendum~~
29 ~~containing statutes, rules or~~
30 ~~regulations, and any certificates of~~

125-010820

31 ~~counsel do not count toward the~~
32 ~~limitation.~~
33 ~~**(C) Certificate of compliance.**~~
34 ~~(i) A brief submitted under~~
35 ~~Rules 28.1(e)(2) or 32(a)(7)(B) must~~
36 ~~include a certificate by the attorney, or~~
37 ~~an unrepresented party, that the brief~~
38 ~~complies with the type-volume~~
39 ~~limitation. The person preparing the~~
40 ~~certificate may rely on the word or~~
41 ~~line count of the word-processing~~
42 ~~system used to prepare the brief. The~~
43 ~~certificate must state either:~~
44 ~~● the number of words in the brief;~~
45 ~~or~~

125-010821

46 ~~● the number of lines of~~
47 ~~monospaced type in the brief.~~
48 ~~(ii) Form 6 in the Appendix of Forms is a~~
49 ~~suggested form of a certificate of~~
50 ~~compliance. Use of Form 6 must be~~
51 ~~regarded as sufficient to meet the~~
52 ~~requirements of Rules 28.1(e)(3) and~~
53 ~~32(a)(7)(C)(i).~~
54 * * * * *
55 **(e) Local Variation.** Every court of appeals must accept
56 documents that comply with the form requirements of
57 this rule and the length limits set by these rules. By
58 local rule or order in a particular case, a court of
59 appeals may accept documents that do not meet all ~~of~~
60 the form requirements of this rule or the length limits
61 set by these rules.

125-010822

62 **(f) Items Excluded from Length.** In computing any
63 length limit, headings, footnotes, and quotations count
64 toward the limit but the following items do not:
65 ● the cover page;
66 ● a corporate disclosure statement;
67 ● a table of contents;
68 ● a table of citations;
69 ● a statement regarding oral argument;
70 ● an addendum containing statutes, rules, or
71 regulations;
72 ● certificates of counsel;
73 ● the signature block;
74 ● the proof of service; and
75 ● any item specifically excluded by these rules or
76 by local rule.
77 **(g) Certificate of Compliance.**

125-010823

78 (1) **Briefs and Papers That Require a Certificate.**
79 A brief submitted under Rules 28.1(e)(2),
80 29(b)(4), or 32(a)(7)(B)—and a paper submitted
81 under Rules 5(c)(1), 21(d)(1), 27(d)(2)(A),
82 27(d)(2)(C), 35(b)(2)(A), or 40(b)(1)—must
83 include a certificate by the attorney, or an
84 unrepresented party, that the document complies
85 with the type-volume limitation. The person
86 preparing the certificate may rely on the word or
87 line count of the word-processing system used to
88 prepare the document. The certificate must state
89 the number of words—or the number of lines of
90 monospaced type—in the document.
91 (2) **Acceptable Form.** Form 6 in the Appendix of
92 Forms meets the requirements for a certificate of
93 compliance.

125-010824

Committee Note

When Rule 32(a)(7)(B)'s type-volume limits for briefs were adopted in 1998, the word limits were based on an estimate of 280 words per page. In the course of adopting word limits for the length limits in Rules 5, 21, 27, 35, and 40, and responding to concern about the length of briefs, the Committee has re-evaluated the conversion ratio (from pages to words) and decided to apply a conversion ratio of 260 words per page. Rules 28.1 and 32(a)(7)(B) are amended to reduce the word limits accordingly.

In a complex case, a party may need to file a brief that exceeds the type-volume limitations specified in these rules, such as to include unusually voluminous information explaining relevant background or legal provisions or to respond to multiple briefs by opposing parties or amici. The Committee expects that courts will accommodate those situations by granting leave to exceed the type-volume limitations as appropriate.

Subdivision (e) is amended to make clear a court's ability (by local rule or order in a case) to increase the length limits for briefs and other documents. Subdivision (e) already established this authority as to the length limits in Rule 32(a)(7); the amendment makes clear that this authority extends to all length limits in the Appellate Rules.

A new subdivision (f) is added to set out a global list of items excluded from length computations, and the list of exclusions in former subdivision (a)(7)(B)(iii) is deleted.

125-010825

The certificate-of-compliance provision formerly in Rule 32(a)(7)(C) is relocated to a new Rule 32(g) and now applies to filings under all type-volume limits (other than Rule 28(j)'s word limit) – including the new word limits in Rules 5, 21, 27, 29, 35, and 40. Conforming amendments are made to Form 6.

Changes Made After Publication and Comment

The Committee revised the proposed word limit for principal briefs from 12,500 words to 13,000 words. The Committee added an amendment to Rule 32(e) to highlight a circuit court's ability to increase any or all of the Appellate Rules' length limits by local rule. A cross-reference in Rule 32(a)(7)(A) was updated. A reference to Rule 29(b)(4) was added to Rule 32(g)(1), to reflect the Committee's approval of a proposed amendment to Rule 29. The Committee made conforming changes to the Committee Note and style changes to the Rule text. The Committee also added language to the Committee Note to recognize the need for extra length in appropriate cases.

Summary of Public Comments

The summary of public comments appears at the end of this set of proposed amendments (i.e., the proposals to amend Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6, and to add a new Appendix concerning length limits stated in the Appellate Rules).

125-010826

1 **Rule 35. En Banc Determination**

2 * * * * *

3 **(b) Petition for Hearing or Rehearing En Banc.** A
4 party may petition for a hearing or rehearing en banc.

5 * * * * *

6 (2) Except by the court's permission~~, a petition for~~
7 ~~an en banc hearing or rehearing must not exceed~~
8 ~~15 pages, excluding material not counted under~~
9 ~~Rule 32.~~:
10 (A) a petition for an en banc hearing or
11 rehearing produced using a computer must
12 include a certificate under Rule 32(g) and
13 not exceed 3,900 words; and
14 (B) a handwritten or typewritten petition for an
15 en banc hearing or rehearing must not
16 exceed 15 pages.

125-010827

17 (3) For purposes of the ~~page~~ limits in Rule 35(b)(2),
18 if a party files both a petition for panel rehearing
19 and a petition for rehearing en banc, they are
20 considered a single document even if they are
21 filed separately, unless separate filing is required
22 by local rule.
23 * * * * *

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by word limits. The word limits were derived from the current page limits using the assumption that one page is equivalent to 260 words. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the word limit and the page limit, the calculation excludes any items listed in Rule 32(f).

125-010828

Changes Made After Publication and Comment

The Committee deleted the proposed line limit and revised the proposed word limit from 3,750 words to 3,900 words. The Committee also made conforming changes to the Committee Note and style changes to the Rule text.

Summary of Public Comments

The summary of public comments appears at the end of this set of proposed amendments (i.e., the proposals to amend Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6, and to add a new Appendix concerning length limits stated in the Appellate Rules).

125-010829

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125-010830

Rule 40. Petition for Panel Rehearing

* * * * *

(b) Form of Petition; Length. The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. ~~Unless the court permits or a local rule provides otherwise, a petition for panel rehearing must not exceed 15 pages.~~Except by the court's permission:

(1) a petition for panel rehearing produced using a computer must include a certificate under Rule 32(g) and not exceed 3,900 words; and

(2) a handwritten or typewritten petition for panel rehearing must not exceed 15 pages.

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those

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page limits are now replaced by word limits. The word limits were derived from the current page limits using the assumption that one page is equivalent to 260 words. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the word limit and the page limit, the calculation excludes any items listed in Rule 32(f).

Changes Made After Publication and Comment

The Committee deleted the proposed line limit and revised the proposed word limit from 3,750 words to 3,900 words. The Committee also made conforming changes to the Committee Note and style changes to the Rule text.

Summary of Public Comments

The summary of public comments appears at the end of this set of proposed amendments (i.e., the proposals to amend Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6, and to add a new Appendix concerning length limits stated in the Appellate Rules).

125-010832

Form 6. Certificate of Compliance with ~~Rule 32(a)~~ Type-Volume Limit

Certificate of Compliance With Type-Volume Limit~~ation~~, Typeface Requirements, and Type-Style Requirements

1. This ~~brief~~document complies with [the type-volume limit~~ation~~ of Fed. R. App. P. ~~32(a)(7)(B)~~[*insert Rule citation; e.g., 32(a)(7)(B)*]] [the word limit of Fed. R. App. P. [*insert Rule citation; e.g., 5(c)(2)*]] because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) [and [*insert applicable Rule citation, if any*]]:

☐ this ~~brief~~document contains [*state the number of*] words, ~~excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii),~~ **or**

☐ this brief uses a monospaced typeface and contains [*state the number of*] lines of text~~, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)~~.

2. This ~~brief~~document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because:

☐ this ~~brief~~document has been prepared in a proportionally spaced typeface using [*state name and version of word-processing program*] in [*state font size and name of type style*], **or**

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25 ☐ this brief has been prepared in a monospaced
26 typeface using [*state name and version of word-*
27 *processing program*] with [*state number of*
28 *characters per inch and name of type style*].

29 (s)_____

30 Attorney for _____

31 Dated: _____

Changes Made After Publication and Comment

The Committee revised the proposed amendments to Form 6 to reflect the deletion of the proposed line limits for documents other than briefs. The Committee also made style changes to the Form.

Summary of Public Comments

The summary of public comments appears at the end of this set of proposed amendments (i.e., the proposals to amend Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6, and to add a new Appendix concerning length limits stated in the Appellate Rules).

125-010834

Appendix:
Length Limits Stated in the
Federal Rules of Appellate Procedure

This chart shows the length limits stated in the Federal Rules of Appellate Procedure. Please bear in mind the following:

- In computing these limits, you can exclude the items listed in Rule 32(f).
- If you are using a word limit or a line limit (other than the word limit in Rule 28(j)), you must include the certificate required by Rule 32(g).
- If you are using a line limit, your document must be in monospaced typeface. A typeface is monospaced when each character occupies the same amount of horizontal space.
- For the limits in Rules 5, 21, 27, 35, and 40:
  - You must use the word limit if you produce your document on a computer; and
  - You must use the page limit if you handwrite your document or type it on a typewriter.

	Rule	Document type	Word limit	Page limit	Line limit
Permission to appeal	5(c)	· Petition for permission to appeal · Answer in opposition · Cross-petition	5,200	20	Not applicable
Extraordinary writs	21(d)	· Petition for writ of mandamus or prohibition or other extraordinary writ · Answer	7,800	30	Not applicable

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	Rule	Document type	Word limit	Page limit	Line limit
Motions	27(d)(2)	· Motion · Response to a motion	5,200	20	Not applicable
	27(d)(2)	· Reply to a response to a motion	2,600	10	Not applicable
Parties' briefs (where no cross-appeal)	32(a)(7)	· Principal brief	13,000	30	1,300
	32(a)(7)	· Reply brief	6,500	15	650
Parties' briefs (where cross-appeal)	28.1(e)	· Appellant's principal brief · Appellant's response and reply brief	13,000	30	1,300
	28.1(e)	· Appellee's principal and response brief	15,300	35	1,500
	28.1(e)	· Appellee's reply brief	6,500	15	650
Party's supplemental letter	28(j)	· Letter citing supplemental authorities	350	Not applicable	Not applicable

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	Rule	Document type	Word limit	Page limit	Line limit
Amicus briefs	29(a)(5)	· Amicus brief during initial consideration of case on merits	One-half the length set by the Appellate Rules for a party's principal brief	One-half the length set by the Appellate Rules for a party's principal brief	One-half the length set by the Appellate Rules for a party's principal brief
	29(b)(4)	· Amicus brief during consideration of whether to grant rehearing	2,600	Not applicable	Not applicable
Rehearing and en banc filings	35(b)(2) & 40(b)	· Petition for hearing en banc · Petition for panel rehearing; petition for rehearing en banc	3,900	15	Not applicable

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Changes Made After Publication and Comment

The Committee added the Appendix after the public comment period, as an aid to understanding the various length limits that will now be stated in the Appellate Rules.

Summary of Public Comments and Hearing Testimony

AP-2014-0002-0003: Judge Jon O. Newman. Suggests "that 'monospaced face' be defined in Rule 1(b). The definition might be '"Monospaced face" means that the combined width of every letter or other character and the space immediately to the right of the letter or character is the same for all letters and other characters.' ... I realize that the term is now in the current FRAP 32(a)(7)(B)(i), which I had not previously realized, but now that it will be used in several places, it should be defined."

AP-2014-0002-0004: Richard A. Ferraro. Notes that the word "brief" would be changed to "document" (in Form 6), and asks whether this should be a global change throughout the Appellate Rules.

AP-2014-0002-0005: Robert Markle. "I support the Committee's proposed revision to Rule 32(a)(7)(B) reducing the word limit for principal briefs. In the typical case, nothing justifies even approaching, much less reaching or exceeding, 14,000 words. Indeed, I would

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support reducing the limit to 10,000 words, but 12,500 is a good start."

AP-2014-0002-0006: Judge Frank H. Easterbrook. Supports "[t]he replacement of page limits with word limits in all Rules of Appellate Procedure."

Discusses the origin of the current type-volume limits for briefs. "When the 14,000 word limit was being devised, I was a member of the Standing Committee and the liaison to the Appellate Rules Committee. I drafted Rule 32, which was based on a rule that the Seventh Circuit had issued a few years earlier. The 14,000 word limit came from Seventh Circuit Local Rule 32, not from any new calculation and Seventh Circuit Rule 32 came from a detailed count of words in briefs filed in the Supreme Court, not from a word-count or line-count of briefs filed in the court of appeals."

Opposes shortening the length limits for briefs. "[T]he Supreme Court ... chose 15,000 as the replacement for 50 pages. Many cases in courts of appeals are every bit as complex as those in the Supreme Court. Issues may be simpler on average, but cases have more issues on average, and lawyers often must devote substantial space to discussing evidence, which is not so important after a grant of certiorari. Changing to a system in which the old 50-page-printed-brief rule converts to 15,000 words in the Supreme Court, and 12,500 words in the court of appeals, would create an unjustified difference."

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AP-2014-0002-0008: Louis R. Koerner Jr. Opposes shortening briefing length limits because the length is necessary in complex, important cases. "I would keep the limits at 14,000 and 7,000 words and use those limitations as formulaic for other word limitations. I think, however, that the rule should stress that briefs do not have to come close to the word limitations and that briefs that are short and to the point and free from unnecessary repetition are gratefully received."

AP-2014-0002-0009: Hirbod Rashidi. "I would go a step further. In oral argument typically when the appellant wants to have time to rebut, he/she will have to save some of the time for rebuttal. Why not adopt the same rule for briefing? The total limit for briefing, 12.5K or 14K words, should be the total (I think 12.5k in overwhelming cases is plenty)."

AP-2014-0002-0010: Joshua Lee. "I do capital habeas litigation, and such cases are often very legally complex and come with records tens of thousands of pages long. I find that the existing volume limits frequently prevent me from adequately briefing a capital habeas appeal, and reduction of the existing limits would only aggravate the problem, putting the court in a situation when it must either repeatedly adjudicate overlength motions or else have a case that is not adequately briefed."

AP-2014-0002-0011: John J. White, Jr. Opposes reducing the length limits for briefs, because the current length is necessary in complex cases and because reducing the limit will generate requests to file over-length briefs.

Shorter limits will force lawyers to abandon (or to brief inadequately and thus waive) arguments that might have merit. And the time it will take lawyers to pare down their prose will be costly to clients.

AP-2014-0002-0012: Andrew Kennedy. Opposes reducing the length limits for briefs, because the current length is necessary in complex cases and because reducing the limit will generate requests to file over-length briefs.

AP-2014-0002-0013 & AP-2014-0002-0015: James C. Martin (and Charles A. Bird) on behalf of the American Academy of Appellate Lawyers. Opposes the proposal to shorten brief length limits and the proposal to use a 250-word-per-page conversion rate for the new type/volume limits in Rules 5, 21, 27, 35, and 40.

Asserts that, to the extent that the history of the 1998 amendments is discernible, it supports the view that a 280-word-per-page conversion ratio was employed in 1998 "because it appeared wise and reasonable." Suggests that Committee members who voted in 2014 to reduce the length limit for briefs were acting on the basis of "individual preferences, perhaps supported by unreported anecdotal information."

As a policy matter, argues that shortening the length limits would limit the ability to brief complex issues adequately (and to fulfil counsel's reponsibility in criminal cases) and would generate motions for leave to file longer briefs. Suggests that appeals nowadays tend to be more complex than appeals were in 1998. Argues that better

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training for advocates is a preferable way to address verbose briefs.

Opposes the use of the 250-words-per-page conversion ratio for type/volume limits in Rules 5, 21, 27, 35, and 40, based on anecdotal reports that the current page limits permit longer documents than the type/volume limits would. Argues that the downside of shortening the already-short limits for these documents "would likely be even more pronounced." Argues that a 280-word-per-page conversion ratio, rounded up, should be used.

April 2015 testimony, Charles A. Bird, American Academy of Appellate Lawyers. Mr. Bird submitted both written and oral testimony.

Written testimony: The target for improvement "should be bad briefs, not all briefs in the range of 12,500 to 14,000 words." Means of improvement could include a certification for appellate specialists (and perhaps "competency standards for admission to circuit-level practice"), and better education of advocates through circuit bar associations, more oral arguments, and more informative rulings. The Committee could develop a form for pro se briefs, modeled on the Ninth Circuit's informal brief form. The Committee could consider "allowing circuits that actively manage appeals to shorten the 14,000 word limit based on the length of the record and the complexity of the case," with the shortening to be done "by a motions attorney when the briefing schedule is set."

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Oral testimony: The American Academy of Appellate Lawyers' view that complex cases require 14,000 words has been "confirmed in part" by the Sisk & Heise study and "anecdotally validated" by the comments of experienced practitioners. Solicitor General Verrilli's proposal – for rule text and/or a Committee Note stating that more length should be granted when appropriate – would not solve the problem that a 12,500-word limit would create for private practitioners; judges will be more willing to grant extra length to the U.S. Government than to private parties. Currently, the circuits vary widely in their willingness to grant requests for extra length. The D.C. Circuit's rule, like the Fifth Circuit's rule, disfavors requests for extra length. Problems might also arise because, in adjudicating a motion for extra length, a court might pre-judge the issues involved in the appeal.

The American Academy of Appellate Lawyers would be glad to assist in efforts to improve appellate briefs. Courts of appeals could post, on their court websites, short videos outlining how to write a decent brief. Circuit bar associations (in the circuits where they exist) could develop programs that would certify lawyers as competent in federal appellate practice. The courts of appeals could experiment with active case management.

It would be possible to change the structure of appellate briefs in ways that make them shorter. For example, the brief could commence with a short agenda-setting introduction, rather than starting with the basis for jurisdiction. The 2013 amendment, which deleted from

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Rule 28(a) the requirement of separate statements of the case and of the facts, was a useful one.

The American Academy of Appellate Lawyers did not attempt to perform its own study of the history of the 1998 amendments. Most of its members were doing appellate work under the pre-1998 rules. The adoption in 1998 of the 14,000-word limit was a great relief because the prior 50-page limit was subject to a lot of manipulation (for example, through use of single-spaced text). There is reason not to trust any statistical information concerning briefs filed during the bad old days of length-limits manipulation. The pre-1998 50-page limit "was an issue in complex cases more so than 14,000 words." Lawyers tended to deal with that issue by using self-help (i.e., manipulating technicalities in order to fit within the page limit) rather than by making motions for extra length.

It is a good idea to change the remaining page limits to word limits. However, a conversion ratio of 250 words per page is too restrictive. Also, Mr. Bird endorses Mr. Samp's view that the proposed length limit for amicus briefs in support of a petition for rehearing is too short.

Responding to a question about a recent article by Carl S. Kaplan in the Journal of Appellate Practice and Process, Mr. Bird stated that, as a former journalist, he has a great appreciation for good editing. Experienced lawyers try to budget their time and to combat the disincentives to "writing short." However, after the recent recession, clients are much less willing to pay for time spent editing a brief. Also, lawyers might sometimes face unexpectedly

quick deadlines in instances when the record is filed earlier than expected. Clients can be very directive about what should go in the brief; clients and trial counsel tend to suggest additions, not deletions.

AP-2014-0002-0014: Mark Langer on behalf of the U.S. Court of Appeals for the D.C. Circuit. "The Judges of the U.S. Court of Appeals for the D.C. Circuit support the proposal to amend FRAP 32 to reduce the length limitations for briefs."

AP-2014-0002-0016: Molly Dwyer, conveying the views of the Ninth Circuit Court of Appeals' Executive Committee (with the support of the Court's Advisory Committee on Rules of Practice). Opposes the imposition of type/volume limits for petitions for permission to appeal, motions, and petitions for writs of mandamus/prohibition. By referring to the proposal's "more exacting limits" and by asserting a lack of"evidence that lengthy petitions for permission to appeal have presented a problem for the Court," suggests that the type/volume limits would shorten the existing length limits for these documents. And suggests that checking for compliance with type/volume limits would be burdensome.

AP-2014-0002-0017: Judge Laurence H. Silberman. Supports the proposal to shorten the length limits. Under the 14,000 word limit, briefs are "too long to be persuasive." Lawyers include unnecessary fact discussions and brief "marginal issues" (problems which are less likely to afflict briefs filed in the Supreme Court).

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AP-2014-0002-0018: Lisa Perrochet, Chair, Rules and Law Subcommittee, Appellate Courts Section, Los Angeles County Bar Association. Supports the use of word limits, but opposes the reduction from 14,000 to 12,500 words. Argues that there is insufficient evidence that the benefits of lowering the word limit outweigh the costs. Motions to file oversized briefs in complex cases require lawyer and court time, and judges may not be well positioned to evaluate such motions before they are familiar with the appeal. Suggests that judges overestimate the benefits of shorter briefs because they are "more pleasant to read." Advocates further research to investigate, for instance, the following questions:

> "[I]s there a disparity now among circuits as to the number of motions filed seeking oversized brief limits and as to the rate at which such motions are granted? If so, would any undue disparity be exacerbated by a lower word limit? What is the briefing practice in jurisdictions where certain types of filings are subject to no limits at all? Is the quality of advocacy materially worse? And do state courts in jurisdictions with lower word counts see demonstrably higher quality briefs, overall? Are judges better able to perform their functions in those states?"

AP-2014-0002-0019: Committee on Federal Courts, Association of the Bar of the City of New York. Opposes the reduction in length limits for parties' briefs. In complex cases, the shorter limit would often cause either

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inadequate briefing or a request to exceed the length limit. There is no evidence of problems with the current length limits.

The 1993 D.C. Circuit Advisory Committee study is not a good basis for selecting a conversion ratio of 250 words per page. The study used a small and non-random sample of briefs and excluded those which the study's authors deemed to contain an excessive amount of footnotes and block quotes.

Committee members' survey of some recently filed briefs indicates that the word count per page can vary and that papers compliant with the pre-1998 font size and margin guidelines "can significantly exceed 280 words per page."

Supports the introduction of type-volume limits in Rules 5, 21, 27, 35, and 40, but argues that those limits should be based on a conversion ratio of 280 words per page. Current practice features the use of proportional type, and a type-volume limit using a 250-word-per-page conversion ratio would effectively cut the permitted length. Issues addressed in these papers can be important and complex, necessitating the additional length.

AP-2014-0002-0020: Dorothy F. Easley, Easley Appellate Practice. Notes "that arguments in the appellate brief are required to be raised with sufficient specificity and depth or the appellate courts will deem them waived." Argues that if a court decides to address an issue that is insufficiently briefed due to length limits, that will increase

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the court's workload. "Reductions in word count could also trigger more collateral motions and attacks on judgments in the criminal context because of claimed ineffectiveness in appellate counsel."

Reports that the courts of appeals disfavor motions to file over-length briefs. Cites a January 2012 standing order by the Third Circuit which stated "that ... motions to exceed the page/word limitations for briefs are filed in approximately twenty-five percent of cases on appeal, and seventy-one percent of those motions seek to exceed the page/word limitations by more than twenty percent." Argues that the prevalence of such motions under the existing rules shows that a further reduction in limits would be undesirable.

AP-2014-0002-0021: Chief Judge Mary Beck Briscoe. "All of the active judges of our court (except for one who abstains) support the proposed amendment to Fed. R. App. P. 32 to reduce the word limit for briefs. The vast majority of our senior judges have responded and also support this amendment."

Many briefs "are needlessly lengthy." "By excising tangential facts, secondary or tertiary arguments, or issues on which a party is unlikely to prevail, attorneys do both the court and their clients a service by focusing the court's attention on the core facts and dispositive legal issues." When necessary, counsel may seek leave to file an over-length brief.

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AP-2014-0002-0022: P. David Lopez, General Counsel, U.S. Equal Employment Opportunity Commission. Opposes reducing the length limits for parties' briefs and amicus briefs. The appeals in which the EEOC files briefs are often legally and factually complex. A lower length limit would result in motions to file over-length briefs and/or in inadequate briefing.

Supports adopting word limits in Rules 5, 21, 27, 35, and 40, but argues that those limits should be set using a conversion ratio of 280 words per page.

Argues that the 250-words-per-page conversion ratio "is too low and appears to be premised on a mistaken assumption that briefs filed under the old 50-page limit for briefs averaged 250 words per page. On reviewing a number of its briefs filed under the old page limit, the EEOC learned that while some briefs are shorter, several contain more than 14,000 words."

AP-2014-0002-0023: Matthew Stiegler, thirdcircuitblog.com. Opposes the reduction in brief length limits. "Brevity is a reflection of good advocacy, not its cause. Under the current limit, the courts are burdened with too many aimless, bloated 14,000-word briefs. Under the proposed limit, they will get aimless, bloated 12,500-word briefs instead. The problem is real, but the solution proposed will miss the mark."

AP-2014-0002-0024: Charles Roth, Director of Litigation, National Immigrant Justice Center. Agrees that most briefs should be less than 12,500 words. A study

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of "approximately two dozen NIJC briefs filed in recent years" showed that "all or nearly all were less than 12,500 words in length." But "some appeals have involved such a plethora of complex issues that we have approached the current word limit." And such appeals might be decided on the basis of an issue that there was barely space to brief.

"Court of Appeals cases have not had issues narrowed through the certiorari process, and cases may present numerous complex or novel issues; and a court may not be equipped in advance of full briefing and oral argument to perceive all of those issues, much less to choose among the issues which it should address." On balance, "the likely time-savings from a reduction in brief size in some small number of cases would likely be outweighed by the costs of adjudicating those additional motions for leave to file over-length briefs." Moreover, a court might deny a request for extra length, only to find that the resulting brief inadequately covers the issues – which then might lead to supplemental briefing.

Proposes an alternative to shortening the length limit: "a rule which would discourage the filing of briefs exceeding 12,500 words, but do so not by changing the word count limitation, but by requiring an additional attestation by counsel filing briefs between 12,500 and 14,000 words. The attestation could require counsel to attest that the length of the brief is required by the legal or factual complexity of the issues in the case, and that after exercising reasonable diligence, the brief could not be made to fit within 12,500 words."

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AP-2014-0002-0025: Steven L. Mayer, California Academy of Appellate Lawyers. Brief length limits should not be shortened, "and word-count limits for documents that do not now have them should be set based on the same conversion ratio of 280 words per page."

Adopts by reference "section D of the comments by the American Academy of Appellate Lawyers."

The rationale for the proposals is "unpersuasive." Statutes and doctrines are more complex than they were in 1998. In a complex case it does not aid the court to truncate the brief. And shortening the limits will burden the courts with requests for extra length.

AP-2014-0002-0026: The Appellate Practice Group of Reed Smith LLP. Supports the use of word limits, but opposes the reduction in brief length limits and the use of the 250-words-per-page conversion ratio for other documents' length limits. The current rule "has worked well for 17 years" and the proposed changes "would have numerous negative consequences."

Notes that other commenters have questioned the premise "that use of the 250 word conversion ratio is necessary to correct a historical error." Asserts a lack of evidence that unnecessarily long briefs are burdening the courts in ways that cannot be addressed by other means. Poorly written briefs will remain so whatever their length, and this problem is best addressed through education of the bar.

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Meanwhile, skilled lawyers may need the current length. Law, facts, cases, and appeals have become more complex. Cutting the length limits will cause more requests to file over-length briefs and can deprive the courts of information they need to decide a case. As oral arguments become ever rarer, briefs become even more important.

AP-2014-0002-0027: Cynthia K. Timms on behalf of the Appellate Section, State Bar of Texas. Opposes reducing the word limits for briefs. Word limits for documents other than briefs should be set using a conversion ratio of "at least 280 words per page."

The Appellate Section's members located 15 briefs filed in federal courts of appeals under the pre-1998 Appellate Rules; these briefs averaged 294 words per page. "[T]he fewest number of words per page was 263. The maximum number of words per page was 336." The members originally sought "to gather briefs that were 50 pages in length (or more) because it was thought those briefs would probably reflect the attorneys' attempt to put as many words on the page as possible." Of the 15 briefs that were located, "around 60% of the briefs were nearly 50 pages or longer."

Also recounts a "study in 2012, when the Texas Rules of Appellate Procedure were being amended to convert page limits to word limits." This study focused on "shorter briefs filed with the Texas Supreme Court." The study "included 63 briefs and showed the average words per page was 291" (or 293 if outliers at both ends of the spectrum

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were excluded). "Twenty-eight of the 63 briefs had 300 words or more per page, while only 4 of the 63 briefs had 250 words or fewer per page." Ultimately, "the Texas Supreme Court adopted a conversion ratio of 300 words per page."

The two studies described by Ms. Timms' would "support ... conversion ratios between 290 and 300 words per page."

Cases are complex and can involve huge sums of money. Local circuit practices make it difficult to file over-length briefs.

April 2015 testimony, Cynthia K. Timms, Chair, State Bar of Texas Appellate Section. Ms. Timms submitted both written and oral testimony. Her written testimony reiterated the points made in Comment AP-2014-0002-0027.

Oral testimony: Ms. Timms understands the Committee's proposal to stem from the Committee's perception of a flaw in the conversion rate employed when the 14,000-word limit was adopted in 1998. That rationale was articulated in the published materials. If the current proposal stemmed instead from some other impetus, then the Committee should re-think the entire proposal. A properly working process will create buy-in.

It was difficult to find briefs to include in Ms. Timms' study of briefs filed in federal courts of appeals under the pre-1998 Appellate Rules, because lawyers had not saved

all of their briefs from that time. The briefs included in the study were those that people hung onto; Ms. Timms' surmise is that these briefs were filed in complicated, "upper-end" cases. The Texas Supreme Court study looked at documents that were subject to short page limits. The need to fit within the applicable limit may have led lawyers to use techniques such as reducing font size, using shorter words, and/or trimming paragraphs that ended with only one or a few words in their last line. This year, Ms. Timms has filed only one brief that pushed the relevant length limit; so the studies may reflect a sampling difference.

Ms. Timms has always found a way to comply with the length limit – both the pre-1998 50-page limit and the post-1998 14,000-word limit – and she has never requested extra length. (She did, though, recall one instance in which her brief "in its initial form was rejected by the Fifth Circuit." Her client in that instance was "someone who could not drop arguments, ... and loved footnotes." The court "was very nice at working with us to get us to be able to file a[n] acceptable brief, but it was a challenge.") Ms. Timms does not think that she could have lived with a 40-page limit. The nice thing about the 14,000-word limit is that it has cut back dramatically on the number of motions for permission to file an overlength brief. (Ms. Timms made this observation in response to a question about whether, prior to 1998, there were concerns about a 50-page limit being insufficient.)

The 2013 amendment that deleted Appellate Rule 28(a)'s requirement of separate statements of the case and

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of the facts has not substantially decreased the length of briefs. "The only savings is the extra heading."

AP-2014-0002-0028: Steven M. Klepper. Opposes reducing the length limits for briefs. Harmless error analysis "requires the error to be viewed in the context of the entirety of the evidence," which may be copious after a lengthy trial. Warns that shortening the length of briefs might increase the number of instances when arguments are raised for the first time in reply briefs.

AP-2014-0002-0032: Michael Skotnicki. Opposes the change in length limits. "I teach persuasive writing techniques as a continuing education instructor and blog about the process of writing appellate briefs.... While appellate judges may dislike long, poorly written briefs, they'll also dislike shorter, poorly written briefs. Meanwhile, the appellate advocate will undoubtedly be hamstrung in making his or her client's case on appeal when the facts, claims, or both, are complex. The correct focus should be on preparing law students to be better writers and for the Courts to emphasize writing quality."

AP-2014-0002-0033: Stanley Neustadter. States that "a dismaying proportion of briefs fail to prune the secondary and marginal issues; fail to crystallize and sharply define the issues chosen; have a fuzzy grasp of the limits of appellate review; and manage to display a gift for compressing the largest number of often bombastic words into the tiniest and least relevant thoughts, repetitiously to boot. Massive, undisciplined briefs divert judicial time from the skilled and focused briefs, those that actually meet

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the needs of the bench [and therefore perforce of the client] rather than the ego of the brief writer."

"Not only do I favor the reduced word limit, I wouldn't stop there. I would couple the new word limit with a special rule to govern motions to file oversize briefs, a rule that makes it emphatically clear that such motions are looked upon with great disfavor, a rule that explicitly eliminates as a ground counsel's bald assertion that the record is lengthy and complex. It is one of counsel's key functions to reduce and simplify lengthy and complex lower court proceedings, not to replicate those costly features on appeal."

AP-2014-0002-0034: Jason C. Rylander, Senior Attorney, Defenders of Wildlife. Opposes shortening the length limits for briefs. "Environmental law ... is an increasingly complex field. Such cases often depend on evaluation of voluminous administrative records. They may involve numerous claims, intervenors, and amici curiae. By statute, some actions even originate in the Courts of Appeals, so there may be no prior opportunity for resolution of factual disputes." The defense side in an environmental case may have an aggregate briefing length much longer than that allocated to the plaintiffs (given that the defense side may include "a state agency intervenor and multiple interest group intervenors").

AP-2014-0002-0035: Jeffrey R. White, Senior Litigation Counsel, Center for Constitutional Litigation, P.C. "CCL supports the conversion from page limits to type-volume limits for briefs and other documents.

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However, CCL opposes the recommendation that those limits be reduced below current practice." Shortening the length limit will not improve the quality of briefs. Cases that result in appeals tend to be complex, and there is reason to think that the law is becoming more complex. "Supreme Court opinions … have become substantially longer," and there is "no reason to believe federal appellate opinions have not followed suit." Briefing is all the more important in light of the fact that there may be no opportunity for oral argument.

Shorter length limits may create inefficiency in amicus practice. "Whereas now it is common for several amici to sign on to one amicus brief, a reduced word limit for amicus briefs would invite amici in complex cases to seek out other amici to make the arguments that won't fit within the new word limits ...." The length reduction "will affect amicus briefs disproportionately," given that the statement of the amicus's interest and the authorship-and-funding disclosure count toward the length limit.

AP-2014-0002-0036: Federal Courts Committee of the New York County Lawyers Association. "The Committee endorses these proposed amendments." The proposed word limits "better achieve the intended result of maintaining the length limits in place in 1998." And a circuit would be free to adopt a local rule permitting longer briefs.

The "proposed amendments relating to papers other than briefs on the merits ... provide greater uniformity in

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length limits across different types of appellate papers, and greater clarity in calculating a paper's length."

"[T]hese amendments should be adopted or implemented in a manner that applies the changes in length limits only to appeals filed after the Effective Date, because without that specification there will be appeals in which the Appellee's principal brief is subject to the shortened word count even though the Appellant's principal brief was not."

AP-2014-0002-0037: Richard L. Stanley. Voices "strong opposition" to the proposed reduction in length limits in Appellate Rules 28.1 and 32(a)(7). Also argues that the proposed new word limits in other Rules "should be based on a conversion ratio of at least 280 words per page, and preferably ... 300 words per page."

Based on his experience litigating patent cases in the Federal Circuit (as well as other types of cases in the federal appellate courts), reports that "the latter stages of the appellate brief writing process under the current rules is already unduly focused on the labor-intensive, delicate, and often painful task of reducing each brief to the required word count in a manner that does not unduly sacrifice its meaning, clarity, or possible success." Shortening the limit "to 12,500 words will not turn 'bad' brief writers into good ones [but] may turn some 'good' briefs into 'not so good' ones." Briefs in complex cases start out longer than the length limit and are edited down until they are just under the length limit. "[J]ust as it is doubtful that any attorney whose initial draft of a brief contains less than the required word count will add text merely for purposes of increasing

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its length, it is also doubtful that most attorneys whose briefs satisfy the word count will engage in extensive further editing merely to achieve a shorter brief." Gives a sampling of "word processing techniques and word counting tricks" (such as over-use of abbreviations) and predicts that they will proliferate if length limits are shortened. Attorneys will "excise important procedural details [and] incorporate factual background and even substantive material from citation to the record," and tracking down that referenced information will be more burdensome for judges than reading a longer brief.

Asserts "that the courts of appeal will soon realize a need to adopt a formal rule like that in Supreme Court Rule 37.6 to prohibit counsel for parties from authoring any part of a supporting amicus brief and to prohibit both counsel and parties from making any monetary contributions to such amicus briefs." Also predicts "that the courts of appeal will also realize a need to adopt a formal rule to govern and restrict when multiple or related parties on the same side of an appeal can file separate briefs which address different issues while adopting the positions set forth in the parallel brief(s).... Until then, while the briefs may be shorter, it is quite possible that there will be more of them." And predicts an increase in requests for permission to file overlength briefs and requests "for judicial notice."

AP-2014-0002-0038: Walter K. Pyle. The law has become more complex since 1998 – as illustrated by "Supreme Court caselaw interpreting the Antiterrorism and Effective Death Penalty Act." "Judge Easterbrook, who

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should know, says 14,000 [words] was chosen because it was thought to be a good number. It is." Shorter limits will not improve brief quality and will penalize litigants in complex cases. The proposal fails to account for variations in case type and complexity. "In California the word limit for a brief in a civil case is 14,000, and in a criminal appeal it is 25,500. Criminal cases and complex civil cases normally require more words."

AP-2014-0002-0039: Peter Goldberger & William J. Genego on behalf of the National Association of Criminal Defense Lawyers. "NACDL opposes the proposed reduction of type-volume limits and page[] lengths throughout the appellate rules." A conversion ratio of 280 words per page should be used in setting new type-volume limits. The complexity of federal criminal cases has increased, due to the substantive law, the inclusion of multiple counts, and the increasing intricacy of sentencing and habeas issues. Explaining why error was not harmless requires thorough discussion of the record. "[T]he number of precedential opinions required by rules of professional responsibility to be cited is ever-growing." The proposed limits would impair the constitutional effectiveness of NACDL's members (when representing clients) and the efficacy of NACDL's own amicus filings.

"To the listing of excluded portions under Rule 32(f), the Committee should add any required statement of related cases in a brief. For similar reasons, the required statement justifying en banc review under Rule 35(b) should be excluded from the word-count in a rehearing petition."

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AP-2014-0002-0040: The Pennsylvania Bar Association (PBA), upon the recommendation of its Federal Practice Committee. "The PBA supports proposed amendments to Rule 5, Rule 21, Rule 27, Rule 28.1, Rule 32, Rule 35, and Rule 40, governing page and word limits for filings, and Form 6." Encloses a memo regarding the "Report of the PBA Federal Practice Committee Subcommittee on Proposed Amendments to Appellate Rules."

The memo states that "[t]he Committee ... felt the current limits work well and shortening them is likely to result in a greater number of motions for enlargement." At the Committee's suggestion, the Committee Chair solicited the views of the judges of the U.S. Court of Appeals for the Third Circuit. "Judge Michael Chagares ... indicated his strong support for the changes. Comments were received from almost half of the court and two judges expressed strong concern in shortening briefs as less words may ultimately reduce the quality of the product. The Chair of the FPC is also a member of the Third Circuit standing panel to review requests for excess pagination. In 2013-2014 motions were received on 65 cases and relief was denied on 13 cases. This is a relatively small percentage of the court caseload and experienced counsel have learned that excess pagination requests are disfavored. The consensus of the court was that the proposed changes will not impact the frequency of requests. The FPC chair believes the Committee should support the proposed amendments based on the assurance of Judge Chagares that the recommendation was made only after all the issues

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were carefully and fully considered by the Advisory Committee on Appellate Rules."

AP-2014-0002-0041: The Council of Appellate Lawyers, American Bar Association, Judicial Division, Appellate Judges Conference. The Council opposes reducing the length limits for briefs. "[T]he 14,000 word count limit was accurately derived from word-processed and professionally printed documents that carry 280 (or more) words per page—in contrast to monospaced, typewritten briefs that carry 250 words per page. Moreover, any proposed changes to Rule 32 should be based on current considerations rather than on some concept of a historical 'correction.' No such present need has been demonstrated." Shorter limits will not improve the quality of poor briefs, but such limits will require good lawyers to expend effort moving for permission (which may not be granted) to file a longer brief and will burden those whose cases are complex, have extensive records, or feature multiple parties. Adequate briefing is all the more important in light of the curtailment of oral argument. "The Council surveyed its members and the responses overwhelmingly favored maintaining the current word count." (The Council appended members' comments – 15 opposing a reduction in the length limit and two supporting such a reduction.) Briefing could be improved through educating lawyers and by altering font, line spacing, and margins. "The Advisory Committee might also consider eliminating the requirement of a summary of argument or otherwise altering the structure of briefs to try to improve their quality and lessen the occurrence of repetition."

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April 2015 testimony, David H. Tennant, Co-chair, Appellate Rules Committee, Council of Appellate Lawyers, American Bar Association, Judicial Division, Appellate Judges Conference. Mr. Tennant submitted both written and oral testimony. His written testimony reiterated the points made in Comment AP-2014-0002-0041.

Oral testimony: In one of Mr. Tennant's areas of expertise – federal Indian law – the issues are complex and courts tend to be willing to allow parties extra brief length when needed. By contrast, Mr. Tennant recently represented a defendant-appellee in a discrimination case; the appellant submitted an under-sized brief with seven incompletely-articulated grounds for reversal. In such instances the appellee's brief needs space to address the defects and fill the gaps in the appellant's brief. Lawyers need the current 14,000 words in order to assist the court when an opponent's unskilled lawyer writes a deficient brief.

Length is a very crude measure of brief quality. But the Sisk & Heise study suggests a strong positive correlation between the length of the appellant's opening brief and success on appeal.

The Committee should conduct further study of the courts' actual practices. How do courts treat motions for permission to file over-length briefs? In the set of unduly-long briefs, can patterns be discerned? Do such briefs tend to arise in particular subject areas? Areas where the law is

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settled? Multi-party cases? Appeals in which a litigant raises too many issues?

When Mr. Tennant was a law clerk, what bothered him were the briefs that omitted citations to the record and to pertinent legal authorities. He therefore prefers to err on the side of completeness. Also, lawyers must contend with "clients who make all kinds of real world demands."

At least one circuit has a local rule that requires motions for extra length to be made two weeks before the brief's due date. It can be very challenging to comply with such a timeline.

The 14,000-word limit has worked well since 1998 and should not be changed. The question on which the Committee should focus is what makes sense today, not a technical question concerning the basis for the change in 1998. It is key for litigants to feel that they have had their day in court, and with oral arguments increasingly rare, adequate space for briefing is essential.

AP-2014-0002-0042: Anne K. Small, General Counsel, Securities and Exchange Commission. Opposes the proposed "word limits for appellate briefs in Proposed Rules 28.1, 29 and 32." Those limits "could negatively affect our ability to convey important information in SEC briefs. Many SEC appeals arise from lengthy and complex district court or administrative proceedings that have voluminous records. In such matters, the SEC often must dedicate a significant number of words to the statement of the facts ...." Many such appeals

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"involve specialized securities law issues relating to complex regulations, financial instruments, transactions, markets, and frauds. Such matters may be unexplored by the other parties in the case, particularly in some of the pro se cases, and reducing the word count could force the SEC to truncate its discussions of these complex matters, increasing the burden on the court ...."

AP-2014-0002-0043: Jonathan Block. "The proposed change to the rules ... governing the length of briefs should either be rejected or modified to maintain the current word limit, but allow a greater number of words where there are complex factual, legal and technical issues presented." For many cases involving nuclear, energy, or environmental regulation, legal and technical complexity requires briefs longer than the rules currently permit. Shortening the length limits will deprive the courts of needed information and increase the risk of judicial error.

AP-2014-0002-0044: The Appellate and Constitutional Law Practice Group of Gibson, Dunn & Crutcher LLP. Opposes the proposal to reduce Rule 32's length limits for briefs. The current limits "strike the proper balance between preserving judicial economy and providing sufficient space for parties to present their positions.... [A] reduction in these word limits would impose burdens on courts and litigants that outweigh any purported benefits." Many appeals are complex due to, e.g., "intricate statutory and regulatory schemes, open jurisdictional issues, and questions at the intersection of state and federal law." Shorter limits "would impose particular harm on parties on the same side of a

consolidated or joint appeal who, under the local rules of several circuits, must submit a joint brief." Shorter length limits would burden the courts with more frequent motions to file overlength briefs, and issues of waiver (due to inadequate briefing) would arise more often. "[A]ppeals court filings have decreased by fifteen percent over the past ten years.... Consequently, the courts are less burdened, in terms of the total amount of briefing they must review, than they were when the current word limits were adopted."

AP-2014-0002-0045: Donald B. Verrilli, Jr., Solicitor General of the United States, on behalf of the United States Department of Justice ("DOJ"). As to the proposal to change page limits to word limits in Rules 5, 21, 27, 35, and 40, DOJ "defers to the views of the FRAP Committee concerning the need for such a change and whether it is more likely to reduce or exacerbate the burden on clerks' offices ...." However, the proposed word limits may be too short for some substantive motions (such as a motion for summary disposition), for petitions for a writ of mandamus, or for other filings. If those word limits are adopted, DOJ urges that the Committee Notes to Rules 5, 21, 27, 35, and 40 be amended to state in part: "Substantive filings may in some cases require additional words, and courts should apply the type-volume limits flexibly, granting leave where appropriate for a party to submit an over-length filing."

As to the proposed change in the length limits for briefs, DOJ "supports the proposal to reduce the word limit to 12,500, but with an important caveat. The Department's appellate litigators harbor a significant concern that the

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proposed reduction could, in a small but important category of cases, compromise the Department's ability to discharge its duty to represent the interests of the United States, as well as its duty to serve as an officer of the court." Most briefs can be "substantially shorter than the current word limits." But in some cases (including "with some frequency" cases to which the United States is a party), longer briefs will be necessary. The Government may need to "respond in one consolidated brief to briefs filed by multiple criminal defendants"; may need to provide factual, procedural and legal context omitted from criminal defendants' briefs; or may need to respond to multiple amicus filings. DOJ urges that this type of need be addressed "either in the rule text or in the Committee Note."

Specifically, DOJ recommends that a new Rule 32(h) be added: "(h) A party may seek leave to file a brief that exceeds the type-volume limits imposed by these rules, and courts should grant leave when a party demonstrates that the type-volume limitation is insufficient in the specific circumstances of the case." DOJ also recommends the following addition to the Committee Notes to Rules 28.1, 29, and 32: "A party that must respond to multiple briefs by opposing parties or amici, or that must include additional information in its brief explaining relevant background or legal provisions governing a particular case, may need to file a brief that exceeds the type-volume limitations specified in these rules, and courts should accommodate those situations as they arise. Rule 32(h) recognizes that those circumstances might arise, and that courts should

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accommodate them by granting leave to exceed the type-volume limitations."

AP-2014-0002-0046: Richard A. Samp, Chief Counsel, Washington Legal Foundation. Addresses the proposal "that Rule 32(a)(7)(B) be amended to reduce the word limit on principal briefs from 14,000 words to 12,500 words," and observes that "an effect of the proposed change (per the operation of Rule 29(d)) would be to reduce the word limit on amicus briefs from 7,000 words to 6,250 words." Opposes both these reductions.

Many briefs do not require 14,000 words, but in a complex case a limit tighter than 14,000 words will prevent attorneys "from fully developing important legal arguments" and/or will burden courts with more numerous requests to file overlength briefs. Nor will a tighter word limit improve the quality of briefs. The "principal cause" of the increase in brief length since 1998 is font size: "[T]he 1998 amendment to Rule 32 ... mandated that briefs be printed using 14-point font. Before 1998, most briefs used 12-point or even 11-point font."

States that he is "unaware of any instance in which a federal appeals court granted" a request by an amicus to file an overlength brief. Asserts that "[b]efore 1998, the page limit on amicus briefs was 30 pages," and based on that assertion, argues that "the Advisory Committee's rationale for limiting a party's brief – that a 12,500-word limit better approximates the pre-1998 50-page limit ... – is inapplicable to amicus briefs" and that "the Committee's rationale would support a 7,500-word limit (250

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words/page x 30 pages) for amicus briefs ...." The "most plausible argument" for tightening the length limit for parties' briefs – that "overly long, unpersuasive briefs" waste judges' time – does not apply to amicus briefs because judges do not "feel obliged to read all amicus briefs." Drafters of amicus briefs thus have incentive to self-limit their length. If the length limits for parties' briefs are tightened, Rule 29 should "be amended to state ... that amicus briefs in support of a party's principal brief shall be no longer than 7,000 words."

AP-2014-0002-0047: Alan J. Pierce on behalf of the New York State Bar Association's Committee on Courts of Appellate Jurisdiction. "We have discussed and without dissent oppose the proposed word count reduction. We oppose it for the reasons set forth in the ABA Council of Appellate Lawyers' (CAL) comments, and further point out that in our bi-annual Second Circuit CLE in October 2014 the three (3) participating judges of that Court also expressed their view that there was no reason to reduce the word count of appellate briefs. If adopted, this change will likely result in unintended adverse consequences, including substantial motion practice seeking permission to file oversized briefs, and briefs full of unnecessary footnotes to meet the reduced page limit. No problem with the 14,000 word limit in place now has been documented."

AP-2014-0002-0048: Seth P. Waxman on behalf of the appellate and Supreme Court litigation practice groups at Wilmer Cutler Pickering Hale and Dorr LLP and Akin Gump Strauss Hauer & Feld LLP, Arnold & Porter LLP, Jenner & Block LLP, Kirkland & Ellis

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LLP, Molo Lamken LLP, Morrison & Foerster LLP, O'Melveny & Myers LLP, Orrick, Herrington & Sutcliffe LLP, Sidley Austin LLP, and Vinson & Elkins LLP. Opposes the reduction in length limits for briefs. Appeals often involve "multiple causes of action, complex statutory schemes, ever-growing bodies of precedent, disputes among lower courts, threshold questions of jurisdiction and standing, interactions between state and federal law, ... complicated technologies or business arrangements[,] .... statutes with complicated common-law backgrounds or legislative histories, ... cases where several agencies have overlapping jurisdiction, and cases that have been through a prior appeal and remand." A tighter word limit could require a litigant to forgo an argument or brief it inadequately. Decreasing the length limit would burden judges with an increase in motions to file overlength briefs and with extra work to fill the gaps left by inadequate briefing. Where there are multiple litigants on the same side, shorter length limits may result in "an ineffective joint submission, or multiple briefs." The U.S. Supreme Court gives litigants 15,000 words for opening merits briefs "addressing what is often a single question of law (and usually in a clean vehicle)." The 1993 study by the D.C. Circuit Advisory Committee on Procedures surveyed "only fifteen opening briefs and thirteen reply briefs," and 11 of those briefs "would have exceeded the proposed new limits." Also, "Judge Easterbrook has disputed the assertion that the 1998 amendment resulted from a mistaken conversion ratio."

"If the Committee decides to reduce the word limits in Rule 32 notwithstanding these concerns, it should, at a

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minimum, add a statement making clear that nothing in the rule prevents the courts of appeals from granting increased page limits, especially in cases where the parties agree that the case is a complex one and warrants more words."

AP-2014-0002-0049: Professor Gregory Sisk. Attaches a paper coauthored with Michael Heise: Gregory C. Sisk & Michael Heise, "Too Many Notes"? An Empirical Study of Advocacy in Federal Appeals, 12:3 Journal of Empirical Legal Studies (forthcoming 2015). "Studying civil appeals in the U.S. Court of Appeals for the Ninth Circuit, we found that, for appellants in civil appeals in which both sides were represented by counsel, briefs of greater length were strongly correlated with success on appeal. For the party challenging an adverse decision below, persuasive completeness may be more important than condensed succinctness. Rejecting as foolish the proposition that prolixity is a positive value in itself, we suggest that the underlying cause of both greater appellant success and accompanying longer briefs may lie in the typically complex nature of the reversible civil appeal. In light of our findings, reducing the limits on number of words in federal appellate briefs could cut more sharply against appellants."

AP-2014-0002-0050: The Supreme Court and Appellate Practice of Mayer Brown LLP. Opposes reducing the length limits for briefs. "[T]he proposed limit of 12,500 words for principal briefs and the correspondingly reduced limits for cross-appeal and reply briefs are too low and would negatively affect the quality of briefing in complex cases involving multiple issues."

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Doubts that the 1998 amendment actually increased the permitted length of briefs: "although 14,000-word briefs prepared after the 1998 amendment typically exceed 50 pages because of the increase in the minimum font size to 14 points, many if not most 50-page briefs filed before the rule change were in 12-point type and contained more than 14,000 words." It is already difficult in a complex case to address the facts, cite evidence and legal authority, and include required components of the brief. A shorter limit would mean fewer useful record citations and parentheticals; more artificial devices to cut length (such as use of acronyms); and choices between paring down all arguments or omitting certain issues entirely. The latter is risky: "Members of our practice have repeatedly prevailed on appeal based on arguments that they deemed to be the least likely to succeed and that they would have jettisoned had they been required to file a shorter brief." Predictions are particularly difficult because in most circuits "the identity of panel members is unknown at the time of briefing ...." Challenges to a punitive damages award illustrate the broad range of issues on appeal, any one of which might prove decisive. The shorter limit would particularly disadvantage appellants (whose briefs have more required components). It would also lead to the omission "of important context[]," leaving courts unaware of potential broader implications of a decision. The courts will likely remain unwilling to grant requests for extra length, and such requests will burden the courts and impose uncertainty, cost, and delay on litigants.

AP-2014-0002-0051: Dershowitz, Eiger & Adelson, P.C. Voices "deep concerns about the proposed reductions

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in the word limitations." Many of the firm's cases "have involved multi-defendant trials with 10,000 pages of transcripts, hundreds of exhibits, multiple pre-trial motions and hearings, jury deliberations that last for days, and multi-day sentencing proceedings. Some indictments are ninety counts, with verdicts split irrationally on the counts of conviction. Sometimes argument by trial counsel over an evidentiary or expert issue will spread over many days of transcript, and frequently the district court will revisit an issue repeatedly during a trial. It is not uncommon for such large and complex cases to involve eight or ten meritorious issues on appeal." "Very often we are required to dedicate several days to a substantial editing process in order to meet the current word limits. Of course, we must ... preserve issues or risk waiver ... [and] the government's claims of waiver by appellants seem to have increased substantially." And collateral review may be unavailable for issues "not adequately preserved on direct appeal." Sometimes an appeal will be decided based on an issue that "counsel intended to address and dispose of" but did not, "due to space constraints." And addressing whether an error was harmless "is difficult ... under severe word limitations."

AP-2014-0002-0052: Howard J. Bashman. Opposes "the proposed word limit reduction amendment."

"[T]he Advisory Committee's explanation offered for the proposed word limit reduction appears to be erroneous," because "the current 14,000–word limit was not adopted in error." "The previous 50-page limit permitted the filing of professionally typeset printed briefs,

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resembling the printed booklets that advocates in 'paid' cases are still required to file in the U.S. Supreme Court"; such a brief could "contain[] far more than what a 50–page brief prepared on 8 1/2 by 11 inch paper would have allowed."

The proposed "11-percent across-the-board reduction in maximum brief size" is unjustified, will "[d]epriv[e] many litigants of the opportunity to say what needs to be said in their only appeal as of right," and "will disproportionately impact in a negative way the quality of the appellate briefing in the most important and complex cases, cases that are ordinarily handled by the most talented appellate advocates." "[E]ven the most highly regarded appellate advocates in particularly complex cases regularly find it necessary to file briefs that approach the current word limits." The court of appeals can affirm on a ground not addressed by the trial court, and multiple appellees sometimes file separate briefs, with the result that the appellant's reply brief may need to address a great many issues. Appeals often involve complex facts and/or law (such as foreign law) and a 14,000-word brief may be necessary to educate generalist judges.

Tightening the length limits will burden judges with the need to research issues that are briefed inadequately "(albeit not to the point of waiver)" and may increase the number of separate briefs filed per side when there are multiple parties per side on appeal. (Mr. Bashman also appears to suggest that tighter length limits might make appeals more difficult to decide because briefs that go on too long or "unnecessarily raise too many issues can make

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a case easier to decide, by reducing the effectiveness of all the claims of error.")

AP-2014-0002-0053: Esther L. Klisura on behalf of the State Bar of California's Committee on Federal Courts. "[O]pposes the reduced word count limits contained in the proposed amendments to Rules 21, 28.1, 32, 35, and 40."

Although "many appellate briefs are longer than they need to be," complexity (such as that arising from "novel legal issues or divergent precedents, or ... a complex factual record") may require longer briefs. In order properly to assist the court, a brief may need to include specific record citations, explanation of conflicting legal authorities, and/or correction of inaccuracies and omissions in an opponent's brief. The tighter length limits would fail to address briefs that are unduly long but shorter than 12,500 words, and would "disproportionately affect cases that actually require long briefs." The change would thus impair judicial decisionmaking "while doing little to lessen judges' overall burden from overlong briefs." The increase in motions for leave to file overlength briefs will burden courts and litigants, outweighing "any efficiency savings achieved by the word count reductions." Such motions will occur at an early stage in the appeal, requiring the decisionmaker either to invest time in learning the relevant facts and law for purposes of deciding the motion or to "risk inappropriately refusing extensions."

The word limits in Rules 5, 21, 35, and 40 should be derived using a conversion ratio of 280 words per page

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rather than 250 – yielding limits of 5,600 words (Rule 5(c)); 8,400 words (Rule 21); and 4,200 words (Rules 35 and 40). For petitions for panel rehearing and/or rehearing en banc, the length is needed to explain why rehearing is appropriate – such as "when an opinion has created major conflicts with circuit precedent, or when circuit precedent needs reconsideration in light of intervening Supreme Court rulings or a trend in other circuits." Also, proposed Rule 29(b)(4)'s word limit for amicus briefs in connection with a rehearing petition should be 2,240 words (not 2,000 words).

"We take no position on the other aspects of the proposed changes ... , including the proposed word count limits for motions under Rule 27, and the proposal to require word count limits instead of page limits in submissions prepared on computers. The Committee supports the proposed amendment to Rule 32(f) setting forth a uniform list of items that can be excluded when computing a document's length."

AP-2014-0002-0054: James S. Azadian on behalf of the Appellate, Writs, and Constitutional Law Practice of Enterprise Counsel Group ALC. Opposes "the proposal to reduce the maximum size for principal briefs."

Such a change would increase court burdens and delay by spurring "the proliferation of principal briefs as well as motions to file oversized briefs." Because a number of state appellate courts permit briefs to be 14,000 words or longer, lawyers who frequently practice in state court "are

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likely to more frequently file oversized-briefing motions." A 12,500-word brief typically does not suffice in "more complex or multiple-issue appeals presenting, for example, challenges to multiple trial court rulings or agency determinations." Moving for permission to file an overlength brief is burdensome and the courts of appeal disfavor such motions (as evidenced by local rules from the Second and Ninth Circuits, a standing order from the Third Circuit, and a 2012 article by Third Circuit Chief Judge Theodore A. McKee reporting the results of an informal survey (of the Circuit Clerks) by the Third Circuit Clerk's Office).

Michael Gans's research "signals the proposed rule change may be 'a solution in search of a problem' because such a change is expected to affect the maximum size of briefs in only approximately ten percent of appeals." The shorter length limit would prevent adequate briefing in complex cases and would not prevent unwarranted length in cases where the briefs should be shorter than 12,500 words. The solution for prolixity is better training (of inexperienced lawyers) by law schools, continuing legal education, and more experienced lawyers.

Other commenters have submitted "compelling evidence that the length of principal briefs was not mistakenly increased in 1998." And even if the 1998 change was a mistake, "correction after approximately 17 years" would not be appropriate.

AP-2014-0002-0055: Andrew G. McBride, Matthew J. Dowd, & Kevin P. Anderson. "[S]trongly

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urge" rejection of the proposed reduction in brief length limits (while acknowledging "valid reasons to use word limits instead of page limits for all submissions to the courts").

Any benefit from the length-limit reduction "would be outweighed by the detriment to briefing in complex appeals, particularly in patent and telecommunications appeals." Argue that Judge Easterbrook's comment (AP-2014-0002-0006), "casts serious doubt on the correctness of the Advisory Committee's conclusion" that the 1998 choice of a 14,000-word limit was the product of an error. In any event, the "key inquiry" is whether the current word limit works well, and it does. They always strive for conciseness in writing briefs, but length is necessary to address complex technologies in patent cases or "lengthy administrative hearings or rulemaking proceedings" in telecommunications cases. The availability of a motion to file an overlength brief "is not a sufficient safeguard"; such motions are often denied, and even if granted, require extra work for litigants and the court.

AP-2014-0002-0056: Patrick Bryant. "[O]ppose[s] the proposed word-limit reductions." The proposed change will fail to improve brief quality. The burden of adjudicating more motions to file overlength briefs (and/or motions for extensions of time) will outweigh the burden of reading "the small number of briefs" that exceed 12,500 words under the current rules. Federal criminal cases are increasingly complex, and full briefing is all the more important because oral argument is so rare in the Fourth Circuit. "The proposed word-limit reduction might be

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unobjectionable if it were accompanied by a liberalization of court rules concerning oversize briefs. However, in most courts such motions are disfavored." The time for seeking extra length is especially tight in the Fourth Circuit, which requires such motions to be made "10 days in advance" and which sets "shortened deadlines for briefs in criminal cases."

AP-2014-0002-0057: Steven Finell. "[J]oin[s] in the comments submitted by the American Bar Association Council of Appellate Lawyers concerning the proposal to reduce the maximum length of briefs and other papers."

Points out that "[t]he proposed amendments would delete Rule 32(a)(7)(C), which requires a certificate of compliance, and move its content (with substantial amendments) to Rule 32(g). Therefore, if Rule 32(a)(7)(A) is retained, the reference to '(C)' must be changed to 'Rule 32(g).'"

Supports "the proposal to adopt type volume limits for all length limits" in the Appellate Rules, because "type volume limits are fair and avoid gamesmanship." But "the structure of the proposed amendments is unnecessarily complex." Instead, "each type of brief or other document should have a word limit if prepared on a computer, and a page limit only for persons who do not have reasonable access to a computer on which to prepare the document." There is no need to give computer users the option of using a line limit. And giving computer users the option of a page limit for briefs invites the use of "hideously narrow,

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hard-to-read, condensed serif fonts" and the reduction of "letter and word spacing."

AP-2014-0002-0058: John Derrick on behalf of the State Bar of California's Committee on Appellate Courts. "[O]pposes these proposed amendments to the extent they would reduce current word limitations or apply a conversion rate of 250 words per page to those rules that are currently based on a page limit, not a word limit." But "supports the other proposed amendments to" Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6.

The California Court of Appeal sets a 14,000-word limit for principal merits briefs; "[i]n our experience, that word limit works best and should not be reduced." The proposed shorter limits "will impair the ... sufficient development of the facts and issues in complex appeals." The reduction "may also increase" the courts' workload by generating more motions for extra length and/or "by forcing law clerks to research legal or factual issues or that are inadequately developed in the briefs."

AP-2014-0002-0059: Earthjustice, Sierra Club, Defenders of Wildlife, and Western Environmental Law Center. Oppose the proposed reduction in brief length limits. The "shortened word limits will likely present attorneys in complex cases with a dilemma: drop valid claims or raise them in such an abbreviated form as to risk losing the claim and making bad law." The problem will be especially acute "in cases involving review of governmental agency actions, many of which are heard for

the first (and only) time in the federal courts of appeals," and which can affect the public as well as the litigants.

Agency records "are often extensive, and parties may have valid legal objections to numerous different parts of the regulation, each of which needs to be explained separately." Adequate briefing is particularly important both to avoid waiver and to overcome the applicable standard(s) for deference to agencies' statutory interpretations and factual findings.

Agency review cases often involve multiple parties with "different (and often adverse) interests." For example, "regulated entities [may] claim that a regulation is too stringent and ... environmental groups [may] claim it is insufficiently stringent." The D.C. Circuit, in such cases, "typically receives two or more petitioner briefs," but "usually reduces the number of words allowed in any individual brief substantially." If the length reductions are adopted, "it is likely that courts will continue to shorten [the limits] further in multi-party cases."

"Faced with the possibility of losing a claim (and potentially making bad law) because they do not have enough words to explain it fully, attorneys may be forced to refrain from bringing valid claims." Not only would that harm public policy, but also it "would undermine the purpose of statutory provisions by which Congress intended to provide fully for judicial review of agency actions."

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Motions for extra length "are hardly ever granted" (as illustrated by the D.C. Circuit's local rule), and even where they are granted, they are burdensome to litigants and the court. And "the current 14,000 word limit was established before the establishment of circuit rules that require parties' briefs to include additional sections" – for example, D.C. Circuit Rule 28(a)(7)'s requirement concerning the basis for standing; "such additional sections ... can substantially reduce the number of words available for merits arguments."

April 2015 testimony, James S. Pew, Earthjustice. Mr. Pew's written testimony reiterates the concerns stated in Comment AP-2014-0002-0059 and notes that judicial review of agency action frequently involves a lengthy record, intricate regulations, and "multiple claims involving complex technical issues."

Oral testimony: Mr. Pew's oral testimony reiterated concerns raised in his written submissions. Most of Mr. Pew's practice involves proceedings in the D.C. Circuit seeking judicial review of federal agency action. These cases implicate the public interest, and judicial review provides the only check on federal agencies' exercise of authority. Proceedings before the agency do not narrow the issues presented for judicial review. Rather, the petitioner may need to request that the court remand to the agency with directions to address multiple defects in the prior agency determination. A one-size-fits-all length limit does not make sense, because the need for length depends on the number of issues. An unduly short limit could force litigants to drop valid claims; and motions for extra length

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are not a good solution because courts are less likely to grant such motions when the motion is made by a private litigant than when the motion is made by the U.S. Government.

Adequate space is important in the reply brief as well as the opening brief; the respondent's brief may raise a new issue, such as standing, that the reply brief must address.

The D.C. Circuit already shortens briefing length limits on a regular basis, so the courts already have a process for addressing undue length without any change to the Appellate Rules. (In response to a question, Mr. Pew stated that he is unsure whether the D.C. Circuit shortens the length limits for briefs in cases that do not involve multiple parties on a side.) If the default length limits set by the Appellate Rules are decreased, the D.C. Circuit may continue its practice of shortening the default length limits in multi-party cases.

A system setting shorter default length limits and relying on motion practice to tailor those limits in cases that require greater length may actually end up consuming more judicial resources than the current system.

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1 **Rule 29. Brief of an Amicus Curiae**

2 **(a)** **During Initial Consideration of a Case on the**
3 **Merits.**

4 (1) **Applicability.** This Rule 29(a) governs amicus
5 filings during a court's initial consideration of a
6 case on the merits.

7 (2) **When Permitted.** The United States or its
8 officer or agency or a state may file an amicus-
9 curiae brief without the consent of the parties or
10 leave of court. Any other amicus curiae may file
11 a brief only by leave of court or if the brief states
12 that all parties have consented to its filing.

13 ~~(b)~~ (3) **Motion for Leave to File.** The motion must be
14 accompanied by the proposed brief and state:

15 ~~(1)~~ (A) the movant's interest; and

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16 ~~(2)~~ (B) the reason why an amicus brief is desirable
17 and why the matters asserted are relevant to
18 the disposition of the case.
19 ~~(c)~~ (4) **Contents and Form.** An amicus brief must
20 comply with Rule 32. In addition to the
21 requirements of Rule 32, the cover must identify
22 the party or parties supported and indicate
23 whether the brief supports affirmance or reversal.
24 An amicus brief need not comply with Rule 28,
25 but must include the following:
26 ~~(1)~~ (A) if the amicus curiae is a corporation, a
27 disclosure statement like that required of
28 parties by Rule 26.1;
29 ~~(2)~~ (B) a table of contents, with page references;
30 ~~(3)~~ (C) a table of authorities—cases (alphabetically
31 arranged), statutes, and other authorities—

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32 with references to the pages of the brief
33 where they are cited;
34 ~~(4)~~ (D) a concise statement of the identity of the
35 amicus curiae, its interest in the case, and
36 the source of its authority to file;
37 ~~(5)~~ (E) unless the amicus curiae is one listed in the
38 first sentence of Rule 29(a)(2), a statement
39 that indicates whether:
40 ~~(A)~~ (i) a party's counsel authored the brief in
41 whole or in part;
42 ~~(B)~~ (ii) a party or a party's counsel
43 contributed money that was intended
44 to fund preparing or submitting the
45 brief; and
46 ~~(C)~~ (iii) a person—other than the amicus
47 curiae, its members, or its counsel—

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contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person;

~~(6)~~ (F) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; and

~~(7)~~ (G) a certificate of compliance, if required by Rule 32(a)(7).

~~(d)~~ (5) **Length.** Except by the court's permission, an amicus brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

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64 ~~(e)~~ (6) **Time for Filing.** An amicus curiae must file its
65 brief, accompanied by a motion for filing when
66 necessary, no later than 7 days after the principal
67 brief of the party being supported is filed. An
68 amicus curiae that does not support either party
69 must file its brief no later than 7 days after the
70 appellant's or petitioner's principal brief is filed.
71 A court may grant leave for later filing,
72 specifying the time within which an opposing
73 party may answer.
74 ~~(f)~~ (7) **Reply Brief.** Except by the court's permission,
75 an amicus curiae may not file a reply brief.
76 ~~(g)~~ (8) **Oral Argument.** An amicus curiae may
77 participate in oral argument only with the court's
78 permission.

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79 **(b) During Consideration of Whether to Grant**
80 **Rehearing.**
81 (1) **Applicability.** This Rule 29(b) governs amicus
82 filings during a court's consideration of whether
83 to grant panel rehearing or rehearing en banc,
84 unless a local rule or order in a case provides
85 otherwise.
86 (2) **When Permitted.** The United States or its
87 officer or agency or a state may file an amicus-
88 curiae brief without the consent of the parties or
89 leave of court. Any other amicus curiae may file
90 a brief only by leave of court.
91 (3) **Motion for Leave to File.** Rule 29(a)(3) applies
92 to a motion for leave.
93 (4) **Contents, Form, and Length.** Rule 29(a)(4)
94 applies to the amicus brief. The brief must

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95 include a certificate under Rule 32(g) and not
96 exceed 2,600 words.
97 (5) **Time for Filing.** An amicus curiae supporting
98 the petition for rehearing or supporting neither
99 party must file its brief, accompanied by a
100 motion for filing when necessary, no later than 7
101 days after the petition is filed. An amicus curiae
102 opposing the petition must file its brief,
103 accompanied by a motion for filing when
104 necessary, no later than the date set by the court
105 for the response.

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Committee Note

Rule 29 is amended to address amicus filings in connection with requests for panel rehearing and rehearing en banc. Existing Rule 29 is renumbered Rule 29(a), and language is added to that subdivision (a) to state that its provisions apply to amicus filings during the court's initial consideration of a case on the merits. New subdivision (b) is added to address amicus filings in connection with a petition for panel rehearing or rehearing en banc. Subdivision (b) sets default rules that apply when a court does not provide otherwise by local rule or by order in a case. A court remains free to adopt different rules governing whether amicus filings are permitted in connection with petitions for rehearing, and governing the procedures when such filings are permitted.

Changes Made After Publication and Comment

The Committee changed the presumptive length limit under Rule 29(b)(4) from 2,000 words to 2,600 words and deleted the alternative line limit. The Committee changed Rule 29(b)(5)'s presumptive deadline for amicus filings in support of a rehearing petition (or in support of neither party) from three days after the petition's filing to seven days after the petition's filing.

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Summary of Public Comments

AP-2014-0002-0013 & AP-2014-0002-0015: James C. Martin (and Charles A. Bird) on behalf of the American Academy of Appellate Lawyers. Supports the proposal, except that "2,000 words for a brief of an amicus curiae on rehearing is too short." Such briefs "tend to be filed in ... difficult cases." Amici should have the same limit as the party – which, according to the comment, should be at least 4,200 words. (The comment asserts that the 15-page limits in Rules 35 and 40 should be "converted at a ratio of no less than 280 words per page, rounded up to the nearest sensible number.")

AP-2014-0002-0016: Molly C. Dwyer, conveying the views of the Ninth Circuit Court of Appeals' Executive Committee (with the support of the Court's Advisory Committee on Rules of Practice). States that the time limits proposed for amicus filings in connection with rehearing petitions are too short. "[The] short turnaround time is likely to negatively impact the quality of the briefing and invite motions for extensions of time to file such briefs. Ninth Circuit Rule 29-2(e)(1) provides a 10-day period within which to file a brief to support or oppose a petition for rehearing."

AP-2014-0002-0019: Committee on Federal Courts, Association of the Bar of the City of New York. Argues that the deadline for amicus filings in support of or opposition to a petition for rehearing should be seven days after the filing by the party supported. Argues that the

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seven-day time lag is needed so the amicus can read the filing by the party that it supports and that such a deadline would not cause undue delay and could be shortened by order when necessary. Complains of the lack of an explanation for the shorter deadlines set by proposed Rule 29(b)(5).

As noted elsewhere in the agenda materials, the Committee on Federal Courts also appears to suggest that length limits for these amicus filings should be set using the 280-words-per-page conversion ratio.

AP-2014-0002-0020: Dorothy F. Easley, Easley Appellate Practice. In an article appended to her comment, supports this proposal as "clarifying and helpful."

AP-2014-0002-0022: P. David Lopez, General Counsel, U.S. Equal Employment Opportunity Commission. Supports the idea of specifying timing for amicus filings in connection with rehearing petitions, but disagrees with specifics of timing and length.

A deadline of "one week after the party's rehearing petition" would be preferable. Three days is too short, especially "where the Office of General Counsel would have to obtain Commission approval before filing an amicus brief."

"[T]he word limits for amicus briefs and party petitions should be the same. That is the rule in most

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circuits now ....” Amici “must ... include a statement of interest” and they need space to develop their argument. Complains that the proposal does not explain the reasons for setting the limit at 2,000 words.

AP-2014-0002-0024: Charles Roth, Director of Litigation, National Immigrant Justice Center. The NIJC “welcomes additional rulemaking to clarify the standards for amicus briefs filed at the rehearing stage, but submits that the word count limitations are likely so limited as to be unhelpful to courts of appeals.”

Supports “the proposed timing of amicus briefs.” There should be some time lag between the party’s due date and the amicus’s due date. It is not always appropriate for amici to coordinate with the party whose position they support.

However, the proposed length limit (2,000 words) is too short. The party’s briefing may be inadequate, leaving to the amicus the task of adequately explaining the need for rehearing. This is often true in immigration cases. “The proposed word limits might be sufficient for amicus efforts which focus on the importance of an issue for en banc review; but this is surely not the only (or even the princip[al]) benefit of amicus briefing at the rehearing stage.... One major utility of amicus briefs on rehearing may be to convince a panel to alter or modify its decision” (for example, a panel might narrow its reasoning and reserve some issues for future decision). “Adoption of the Tenth Circuit’s [3,000-]word limit would be more likely to permit helpful amicus filings at the rehearing stage ....”

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AP-2014-0002-0035: Jeffrey R. White, Senior Litigation Counsel, Center for Constitutional Litigation, P.C. "CCL favors the amendment of Rule 29 to set forth default rules regarding the filing of amicus briefs in connection with rehearing. However, CCL opposes the unrealistic limitations in proposed Rule 29(b) and questions limiting proposed Rule 29(a) to 'the initial consideration of a case on the merits.'"

Amici should have more time and more space. The amicus's deadline "should be extended from 3 days to one week after the party has filed the petition for rehearing." 2,000 words is too short; "[r]ehearings are often sought by parties on the basis of facts that were not available to the initial panel or intervening developments in the law which would have altered the result."

Proposes "that proposed Rule 29(a) either be changed to delete the words 'initial' from both the subheading and the text of Rule 29(a)(1), or that the Committee add a provision Rule 29(c) regarding amicus filings during the panel's or en banc court's subsequent consideration of the merits. The current rule does not limit when amicus briefs may be permitted ...." Amici may wish to brief the merits "after rehearing en banc has been granted or after a case has been remanded from the Supreme Court."

AP-2014-0002-0036: Federal Courts Committee of the New York County Lawyers Association. "The Committee generally supports this clarification, particularly

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in light of the room it leaves for courts to develop their own rules." However, an amicus opposing rehearing should have a time lag of three days after the filing by the party opposing rehearing. An amicus will need "to point out how its own interests in the outcome differ from those of the parties and how its position is not otherwise adequately represented in the briefs that are already before the court" – a task that requires the amicus to review the party's brief before finalizing its own.

AP-2014-0002-0039: Peter Goldberger & William J. Genego on behalf of the National Association of Criminal Defense Lawyers. "NACDL applauds the Committee for addressing this long-overlooked issue." However, for amicus filings in connection with a petition for rehearing, the word limit should be 2,250 words rather than 2,000. Also, the proposed three-day time lag (between the filing of the petition and the deadline for amicus filings in support of the petition) is too short. "[A] five-day rule would allow the volunteer private counsel who typically author such documents a better chance to communicate with party counsel, obtain copies of needed record documents, and then fit this pro bono work into their schedules."

AP-2014-0002-0042: Anne K. Small, General Counsel, Securities and Exchange Commission. Opposes the proposed "word limits for appellate briefs in Proposed Rules 28.1, 29 and 32."

AP-2014-0002-0046: Richard A. Samp, Chief Counsel, Washington Legal Foundation. "[L]argely

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support[s]" the proposal. "Nationwide uniformity" is important. Proposed Rule 29(b)(5)'s three-day time lag (between the filing of the petition and the deadline for amicus filings in support of the petition) gives the amicus time to read the petition without "unduly interfer[ing]" with the court's process. But the length limit should be 2,500 words rather than 2,000 words; 2,500 words "better approximates current rules in most circuits, which generally allow amicus briefs of up to 10 pages."

AP-2014-0002-0050: The Supreme Court and Appellate Practice of Mayer Brown LLP. Especially in connection with a request for rehearing en banc, amicus briefs can usefully provide expertise, illuminate a holding's implications, and address points omitted by the parties. The proposed three-day time lag (between the filing of the petition and the deadline for amicus filings in support of the petition) is too short: "[A] potential amicus would have only 17 days after entry of judgment to evaluate the panel's opinion, learn whether either party plans to seek rehearing, obtain the necessary internal and external approvals to submit an amicus brief, retain counsel, and prepare the brief." Proposes "that the proposed rule be modified to require the amicus to file only a notice of intent to file a brief at the three-day deadline but permit an additional seven or ten days for the preparation and filing of the brief." As a second-best alternative, proposes "that the rule allow at least seven days after the filing of a rehearing petition for an amicus brief to be filed."

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AP-2014-0002-0053: Esther L. Klisura on behalf of the State Bar of California's Committee on Federal Courts. Proposed Rule 29(b)(4)'s word limit for amicus briefs in connection with a rehearing petition should be 2,240 words (i.e., (2,000 * 280) / 250).

AP-2014-0002-0058: John Derrick on behalf of the State Bar of California's Committee on Appellate Courts. "[S]upports clarifying the procedures for filing amicus curiae briefs at the petition for rehearing stage for those circuits that do not have existing local rules on the subject, but opposes the short word-length limits and due dates proposed. In the experience of our Committee members, the Ninth Circuit's existing local rule, Rule 29-2, serves as a better model and has proven workable." Notes that the proposed Rule 29(b) merely sets default rules and would leave the Ninth Circuit's rule in place, but argues that Rule 29(b)'s default rules should track the Ninth Circuit's rule because the latter "provides a well-tested and preferable model for other circuits."

2,000 words "is insufficient for amici to explain both their interest in the subject matter of the case and their unique view of the issue(s) presented"; Ninth Circuit Rule 29-2 permits 4,200 words. The proposed due date ("within 3 days of the petition, or on the due date of the response, depending on which party the amicus seeks to support") provides "insufficient [time] for amici to review the brief of the party being supported to avoid redundancy"; Ninth Circuit Rule 29-2 sets a due date of 10 days after the filing by the party supported.

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1 **Rule 26. Computing and Extending Time**

2 * * * * *

3 **(c) Additional Time after Certain Kinds of Service.**
4 When a party may or must act within a specified time
5 after ~~service~~being served, 3 days are added after the
6 period would otherwise expire under Rule 26(a),
7 unless the paper is delivered on the date of service
8 stated in the proof of service. For purposes of this
9 Rule 26(c), a paper that is served electronically is ~~not~~
10 treated as delivered on the date of service stated in the
11 proof of service.

Committee Note

Rule 26(c) is amended to remove service by electronic means under Rule 25(c)(1)(D) from the modes of service that allow 3 added days to act after being served.

Rule 25(c) was amended in 2002 to provide for service by electronic means. Although electronic

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transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28- day periods that allow "day-of-the-week" counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

The ease of making electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice.

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Rule 26(c) has also been amended to refer to instances when a party "may or must act . . . after being served" rather than to instances when a party "may or must act. . . after service." If, in future, an Appellate Rule sets a deadline for a party to act after *that party itself effects service* on another person, this change in language will clarify that Rule 26(c)'s three added days are not accorded to the party who effected service.

Changes Made After Publication and Comment

The Committee added language to the Committee Note to recognize the need for extensions of time in appropriate cases.

Summary of Public Comments

AP-2014-0002-0013 & AP-2014-0002-0015: James C. Martin (and Charles A. Bird) on behalf of the American Academy of Appellate Lawyers. Supports the proposal.

AP-2014-0002-0019: Committee on Federal Courts, Association of the Bar of the City of New York. Supports the proposal.

AP-2014-0002-0020: Dorothy F. Easley, Easley Appellate Practice. In an article appended to her

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comment, supports this proposal as "clarifying and helpful."

AP-2014-0002-0036: Federal Courts Committee of the New York County Lawyers Association. A majority of the Committee's members "generally endorses" the proposal (a minority dissents from this endorsement, fearing that the amendment "will lead to 'gamesmanship'"). Observes that electronic service after business hours, particularly on a Friday night, can be unfair, especially where the papers are voluminous and will need to be printed. However, difficulties can be worked out by agreement or by seeking relief from the court.

Notes that "in the New York State court system, where electronic service is permitted it is considered equivalent to service by hand; that is, it does not give rise to additional time to respond. We are not aware of any systemic problems with this practice; indeed, we understand at least anecdotally that practitioners in New York are so accustomed to electronic service being treated as equivalent to service by hand that many do not take advantage of the three extra days in federal court."

AP-2014-0002-0038: Walter K. Pyle. Opposes the proposal. "[T]he same concern exists today [as in 2002] – particularly for the small law office – that an electronic transmission will be delayed or go unnoticed, whereas a paper delivered personally during business hours simply will not." Mr. Pyle reports personal experience with lawyers who "invariably wait until late on Friday nights (especially when there is a 3-day weekend) to serve

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complex motion papers electronically." Nor is the computation of the three added days difficult.

AP-2014-0002-0039: Peter Goldberger & William J. Genego on behalf of the National Association of Criminal Defense Lawyers. Opposes the proposal as based on "arid logic." Criminal defense lawyers are overburdened and many work solo or in small firms with little support. Many "do not see their ECF notices – much less open and study the linked documents – immediately or even on the same day they are 'received' at the attorney's email address." These attorneys need the extra three days when served electronically. The change would increase the number of motions for extra time.

"[I]f the 3-day addition is to be retained," NACDL proposes adding "a subparagraph (d) which states that when a party must act within a specified time after service, and the document served is submitted with a motion for leave to file or is not accepted for filing, the time within which the party must act is determined by the date the document is deemed filed by the clerk, unless a new document is ordered to be filed, in which case the time period runs from the date of service of the superseding document."

AP-2014-0002-0040: The Pennsylvania Bar Association (PBA), upon the recommendation of its Federal Practice Committee. Opposes the proposal. Encloses a memo regarding the "Report of the PBA Federal Practice Committee Subcommittee on Proposed

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Amendments to Appellate Rules." The memo expresses "concern[] that electronic service may happen at any time of day or any day of the week," and argues that "the additional three days serves a useful purpose in alleviating the burdens that can arise if a filing is electronically served at extremely inconvenient times."

AP-2014-0002-0044: The Appellate and Constitutional Law Practice Group of Gibson, Dunn & Crutcher LLP. Acknowledges that the three-day rule for electronic service "is no longer justified given that, with electronic service, documents are transmitted to the recipient instantaneously." But argues that, if electronic service is excluded from the three-day rule, Rule 31(a)(1)'s deadline for reply briefs should be augmented by 3 days in order to retain what is now the "de facto" 17-day deadline ("fourteen days under Rule 31(a)(1) plus three for electronic service under Rule 26(c)"). The 17-day period "allow[s] counsel sufficient time to draft such briefs, coordinate with clients or other parties, and avoid burdening courts with an increase in requests for extensions of time."

AP-2014-0002-0045: Donald B. Verrilli, Jr., Solicitor General of the United States, on behalf of the United States Department of Justice (DOJ). Notes that "in most cases" there may no longer be a need for three extra days when service is made electronically, but that the extra time may be necessary if a filing is made in a different time zone, late at night, on a Friday, and/or before a holiday weekend. Otherwise attorneys might have "as little as five business days ... to respond to substantive or

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complicated jurisdictional motions." Government lawyers "typically need to confer and coordinate filings with personnel within interested government agencies and components, as well as policy officials in significant cases."

Proposes that, if Appellate Rule 26(c), Bankruptcy Rule 9006(f), Civil Rule 6(d), and Criminal Rule 45(c) are amended to exclude electronic service from the three-day rule, the Committee Notes should contain language to the following effect:

> "This amendment is not intended to discourage courts from providing additional time to respond in appropriate circumstances. When, for example, electronic service is effected in a manner that will shorten the time to respond, such as service after business hours or from a location in a different time zone, or an intervening weekend or holiday, that service may significantly reduce the time available to prepare a response. In those circumstances, a responding party may need to seek an extension, sometimes on short notice. The courts should accommodate those situations and provide additional response time to discourage tactical advantage or prevent prejudice to the responding party."

AP-2014-0002-0046: Richard A. Samp, Chief Counsel, Washington Legal Foundation. "[L]argely support[s]" the proposal, because "the three-day rule ...

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makes little sense in the context of electronic service." But many lawyers "file and serve briefs ... late in the day," after their opponents have gone home. The proposal should be revised to provide "that if electronic service is sent to other counsel after 6 p.m. in that counsel's time zone, a paper served electronically will be deemed to have been delivered on the next business day (Monday through Friday, excluding holidays) following the date of service stated in the proof of service."

AP-2014-0002-0048: Seth P. Waxman on behalf of the appellate and Supreme Court litigation practice groups at Wilmer Cutler Pickering Hale and Dorr LLP and Akin Gump Strauss Hauer & Feld LLP, Arnold & Porter LLP, Jenner & Block LLP, Kirkland & Ellis LLP, Molo Lamken LLP, Morrison & Foerster LLP, O'Melveny & Myers LLP, Orrick, Herrington & Sutcliffe LLP, Sidley Austin LLP, and Vinson & Elkins LLP. "We agree that a paper served electronically should be treated as delivered on the date of service." But if Rule 26(c) is amended to eliminate the three-day rule where service is made electronically, the deadline for reply briefs should be extended to 17 or 21 days. "The de facto deadline for most reply briefs has been more than fourteen days for many years, even before electronic service became widespread." Lawyers need the extra time when "juggling competing deadlines[,] representing incarcerated ... clients," or briefing complex cases. And a longer deadline can be shortened when necessary and, in other cases, will "reduc[e] the number of extension requests." As a point of comparison, "the Supreme Court sets a thirty-day deadline for merits reply briefs."

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AP-2014-0002-0058: John Derrick on behalf of the State Bar of California's Committee on Appellate Courts. "[A]s appellate practitioners commenting on behalf of an appellate courts committee, we limit our comments to Rule 26(c)" (and not the parallel proposals for the Civil, Criminal, and Bankruptcy rules). "Although the Committee would support a reduction of the current three days, the Committee does not support a rule that would add zero days." In contrast to personal service (which must be made at counsel's office during business hours), electronic service can occur at any hour, wherever the intended recipient may be, yet "only results in simultaneous delivery when practitioners are connected to, and reviewing, an electronic device." The Rules should not presume "[a]n 'instantaneous' review of all incoming electronic transmittals." There should be "some time" added when electronic service is used, in order to forestall "gamesmanship (for example, intentionally waiting until 11:59 p.m. on Friday to serve electronically)."

AP-2014-0002-0059: Earthjustice, Sierra Club, Defenders of Wildlife, and Western Environmental Law Center. Opposes the proposal, which the commenters assert "would eliminate the 3-day rule." "The practical effect of the proposed changes is to reduce the times for submitting [motion] responses and replies to a short period that will be, in many instances, inadequate." The change will not appreciably expedite motions' resolutions but it will burden courts and litigants with motions for extra time and "will prevent attorneys from fully presenting their

125-010909

reasons for opposing (or supporting) a motion, leaving appellate courts to make less informed decisions." The problem will be acute with respect to "dispositive motions (such as motions to dismiss) and motions to stay government regulations pending judicial review." Such motions can gravely affect both the litigants and the public – for example, when the question is whether to stay "government regulations that limit emissions of toxic pollution."

Observes that without the three-day rule, "responses to a motion filed at 11pm on the Friday before a holiday weekend would be due ... just 5 working days later." Asserts that "[w]here responses to a motion were filed on the Friday before a holiday weekend, a reply would be due the Monday after next – again, just 5 working days later." Observes that "[e]ven in the absence of an intervening holiday, the proposed revision would allow just 6 working days to respond to a motion filed on a Friday, and 5 working days for a reply to a response filed on a Friday."

Asserts that, prior to 2009, there was a 10-day period for motion responses, calculated by skipping intermediate weekends and holidays; and asserts that, prior to 2009, there was a 7-day period for motion replies, calculated by skipping intermediate weekends and holidays. Based on those assertions, argues that "although the proposed rule change appears to be intended to restore the actual times that were provided for responses and replies before electronic service was available and widely used, it actually provides times that are significantly shorter than were allowed under previous rules."

125-010910

1 **Rule 26. Computing and Extending Time**

2 **(a) Computing Time.** The following rules apply in
3 computing any time period specified in these rules, in
4 any local rule or court order, or in any statute that
5 does not specify a method of computing time.

6 * * * * *

7 **(4) ''Last Day'' Defined.** Unless a different time is
8 set by a statute, local rule, or court order, the last
9 day ends:

10 (A) for electronic filing in the district court, at
11 midnight in the court's time zone;

12 (B) for electronic filing in the court of appeals, at
13 midnight in the time zone of the circuit
14 clerk's principal office;

15 (C) for filing under Rules 4(c)(1), 25(a)(2)(B),
16 and 25(a)(2)(C)—and filing by mail under

125-010911

17 Rule ~~13(b)~~13(a)(2)—at the latest time for
18 the method chosen for delivery to the post
19 office, third-party commercial carrier, or
20 prison mailing system; and
21 (D) for filing by other means, when the clerk's
22 office is scheduled to close.
23 * * * * *

Committee Note

Subdivision (a)(4)(C). The reference to Rule 13(b) is revised to refer to Rule 13(a)(2) in light of a 2013 amendment to Rule 13. The amendment to subdivision (a)(4)(C) is technical and no substantive change is intended.

No Public Comment

As a technical amendment, this proposal is being forwarded for final approval without public comment.

125-010912

TAB 4C

125-010913

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Advisory Committee on Appellate Rules
Table of Agenda Items — May 2015

FRAP Item	Proposal	Source	Current Status
07-AP-E	Consider possible FRAP amendments in response to Bowles v. Russell (2007).	Mark Levy, Esq.	Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 04/11 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee
07-AP-I	Consider amending FRAP 4(c)(1) to clarify the effect of failure to prepay first-class postage.	Hon. Diane Wood	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08
08-AP-C	Abolish FRAP 26(c)'s three-day rule.	Hon. Frank H. Easterbrook	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee

12b-010915

FRAP Item	Proposal	Source	Current Status
08-AP-H	Consider issues of “manufactured finality” and appealability	Mark Levy, Esq.	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 10/10 Discussed and retained on agenda 04/11 Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/15
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15
09-AP-B	Amend FRAP 1(b) to include federally recognized Indian tribes within the definition of “state”	Daniel I.S.J. Rey-Bear, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed and retained on agenda 10/11 Discussed and retained on agenda 04/12; Committee will revisit in 2017
11-AP-C	Amend FRAP 3(d)(1) to take account of electronic filing	Harvey D. Ellis, Jr., Esq.	Discussed and retained on agenda 04/13
11-AP-D	Consider changes to FRAP in light of CM/ECF	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/11 Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15
12-AP-B	Consider amending FRAP Form 4's directive concerning institutional-account statements for IFP applicants	Peter Goldberger, Esq., on behalf of the National Association of Criminal Defense Lawyers (NACDL)	Discussed and retained on agenda 09/12
12-AP-D	Consider the treatment of appeal bonds under Civil Rule 62 and Appellate Rule 8	Kevin C. Newsom, Esq.	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/15

12b-010916

FRAP Item	Proposal	Source	Current Status
12-AP-E	Consider treatment of length limits, including matters now governed by page limits	Professor Neal K. Katyal	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee
12-AP-F	Consider amending FRAP 42 to address class action appeals	Professors Brian T. Fitzpatrick and Brian Wolfman and Dean Alan B. Morrison	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14
13-AP-B	Amend FRAP to address permissible length and timing of an amicus brief in support of a petition for rehearing and/or rehearing en banc	Roy T. Englert, Jr., Esq.	Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee
13-AP-H	Consider possible amendments to FRAP 41 in light of Bell v. Thompson, 545 U.S. 794 (2005), and Ryan v. Schad, 133 S. Ct. 2548 (2013)	Hon. Steven M. Colloton	Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15
14-AP-C	Address issues of appellate procedure identified in the certiorari petition in Morris v. Atchity (No. 13-1266)	Margaret Morris	Awaiting initial discussion
14-AP-D	Consider possible changes to Rule 29's authorization of amicus filings based on party consent	Standing Committee	Awaiting initial discussion
15-AP-A	Consider adopting rule presumptively permitting pro se litigants to use CM/ECF	Robert M. Miller, Ph.D.	Awaiting initial discussion
15-AP-B	Technical amendment – update cross-reference to Rule 13 in Rule 26(a)(4)(C)	Reporter	Draft approved 04/15 for submission to Standing Committee
15-AP-C	Consider amendment to Rule 31(a)(1)'s deadline for reply briefs	Appellate Rules Committee	Awaiting initial discussion

12b-010917

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TAB 4D

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125-010920

The Draft Minutes of the April 23-24, 2015 Meeting of the
Advisory Committee on Appellate Rules will be distributed separately.

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TAB 5

125-010923

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125-010924

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

JEFFREY S. SUTTON
CHAIR

REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

SANDRA SEGAL IKUTA
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

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

FROM: Honorable Sandra Segal Ikuta, Chair
Advisory Committee on Bankruptcy Rules

DATE: May 6, 2015

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on April 20, 2015, in Pasadena, California. The draft minutes of that meeting are at Bankruptcy Appendix C.

The principal matter before the Committee at its spring meeting was the package of proposed rule amendments and form amendments that was published for comment in August 2014. The Committee received 137 comments in response to the publication of these amendments, some of which addressed multiple rules and forms. Eight witnesses—all addressing the proposed chapter 13 plan form and related rules—appeared at a Committee hearing in Washington, D.C., on January 23. The Committee considered the public comments and testimony in a series of conference calls and email discussions prior to the spring meeting, as well as at the meeting itself.

The Committee now seeks the Standing Committee's final approval of one proposed new rule and five rule amendments that were published in August 2014. In addition, the Committee seeks final approval of the last major group of forms that were revised as part of the Forms

125-010925

Modernization Project ("FMP"). The Committee also seeks final approval of its recommendation to renumber and make minor revisions to several modernized forms that the Standing Committee previously approved. The Committee requests that the entire set of approved modernized forms be forwarded to the Judicial Conference with a request that the forms go into effect on December 1, 2015.

After reviewing the comments on the proposed chapter 13 plan form, the Committee determined that there is still significant opposition to this new form, and it voted not to seek final approval of the form and related rule amendments at this time. Instead, the Committee intends to give further consideration to a compromise proposal, suggested by a group of commenters, that would allow a district to opt out of the mandatory national form if it adopts a single local chapter 13 plan form that meets certain nationally mandated requirements. A status report on the Committee's deliberations regarding the chapter 13 plan form is included below as an information item.

Finally, the Committee approved a proposed rule amendment to Rule 1006(b) (relating to filing fees) for which it seeks publication.

Part II of this report discusses the action items, grouped as follows:

A. Items for Final Approval

(A1) Rules and Official Forms published for comment in August 2014—

- Rules 1010, 1011, 2002, and new Rule 1012;
- Rule 3002.1;
- Rule 9006(f);
- new Official Form 401;
- Official Form 410A; and
- modernized Official Forms 106J, 106J-2, 201, 202, 204, 205, 206Sum, 206A/B, 206D, 206E/F, 206G, 206H, 207, 309A, 309B, 309C, 309D, 309E, 309F, 309G, 309H, 309I, 312, 313, 314, 315, 410, 410S1, 410S2, 424; and the abrogation of Official Forms 11A and 11B;

(A2) Modernized forms previously approved by the Standing Committee for which the Committee seeks approval of renumbering and/or minor revisions that do not require republication—modernized Official Forms 3A, 3B, 6I, 17A, 17B, 17C, 22A-1, 22A-1Supp, 22A-2, 22B, 22C-1, 22C-2, 106A/B, 106D, 106E/F, 106G, 112, and the Committee Note to Official Form 107;

(A3) Existing forms for which the Committee seeks approval of renumbering without modernization—Exhibit A to Official Form 1, and Official Forms 16A, 16B, and 16D;

B. Previously Approved Items for Transmission to the Judicial Conference

- Official Forms 101, 101A, 101B, 104, 105, 106 Summary, 106 Declaration, 106C, 106G, 106H, 107, 119, 121, 318, 423, and 427; and

C. Item for Publication in August 2015

- Rule 1006(b)(1).

Part III of this report consists of an information item regarding the proposal for a chapter 13 plan form and related rules.

II. Action Items

A. Items for Final Approval

A1. Rules and Official Forms published for comment in August 2014. **The Committee recommends that the Standing Committee approve the proposed rule and form amendments and the new rule and official form that were published for public comment in August 2014 and are discussed below.** Bankruptcy Appendix A1 includes the rules and forms that are in this group.

Action Item 1. Rules 1010, 1011, and 2002, and proposed new Rule 1012 (governing responses to, and notices of hearings on, chapter 15 petitions for recognition). These amendments and addition to the Bankruptcy Rules are intended to improve procedures for international bankruptcy cases. Shortly after chapter 15 (Ancillary and Other Cross-Border Cases) was added to the Bankruptcy Code in 2005, the Bankruptcy Rules were amended to insert new provisions governing cross-border cases. Among the new provisions were changes to Rules 1010 and 1011, which previously governed only involuntary bankruptcy cases, and Rule 2002, which governs notice. The currently proposed amendments to the Bankruptcy Rules would make three changes: (i) remove the chapter 15-related provisions from Rules 1010 and 1011; (ii) create a new Rule 1012 (Responsive Pleading in Cross-Border Cases) to govern responses to a chapter 15 petition; and (iii) augment Rule 2002 to clarify the procedures for giving notice in cross-border proceedings.

Only one comment was submitted regarding the proposed rule changes. The Pennsylvania Bar Association expressed general approval of the proposed amendments, but suggested that Rule 1012 (Responsive Pleading in Cross-Border Cases) contain a cross-reference

125-010927

to Rule 1004.2 (Petition in Chapter 15 Cases). The latter rule prescribes a procedure for challenging the designation in a chapter 15 petition of the debtor's center of main interests. The Bar Association explained that "Rule 1004.2(b) sets forth those parties that should be served in connection with challenges to a debtor's designation in a petition." It suggested that objections and responses to a petition under proposed Rule 1012(b) should be served in the same manner.

The Committee voted unanimously to approve the proposed rules as published. It concluded that the Bar Association's comment should be treated as a new suggestion that the notice provisions of Rule 1004.2(b) should be made applicable to all objections and responses to a chapter 15 petition rather than just to challenges to the designation of the debtor's center of main interests. The Committee has added this suggestion to its list of matters for future consideration.

Action Item 2. Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence). This rule, which applies only in chapter 13 cases, requires creditors whose claims are secured by a security interest in the debtor's principal residence to provide the debtor and the trustee notice of any changes in the periodic payment amount or the assessment of any fees or charges while the bankruptcy case is pending. The rule was promulgated in 2011 in order to ensure that debtors who attempt to maintain their home mortgage payments while they are in chapter 13 will have the information they need to do so.

The proposed amendments that were published last summer seek to clarify three matters on which courts have disagreed:

1) The rule applies whenever a debtor will make ongoing mortgage payments during the chapter 13 case, whether or not a prepetition default is being cured.
2) The rule applies regardless of whether it is the debtor or the trustee who is making the payments to the mortgagee.
3) The rule generally ceases to apply when an order granting relief from the stay becomes effective with respect to the debtor's residence.

Four comments were submitted on the proposed amendments. Two of them addressed the difficulty of applying the rule to home equity lines of credit, for which payment amount changes are frequent and often de minimis. The other comments were supportive of the amendments.

The Committee voted unanimously to approve the amendments to Rule 3002.1 as published. The issue of the rule's applicability to home equity lines of credit was considered by the Committee at the fall 2014 meeting, and publication of a proposed amendment to address that issue will be sought later as part of a larger package of related amendments.

125-010928

Action Item 3. Rule 9006(f) (Computing and Extending Time). Among the proposed amendments published last summer was an amendment to Rule 9006(f) that would eliminate the 3-day extension to time periods when service is made electronically. The amendment was initially proposed by the Standing Committee's CM/ECF Subcommittee. It was published simultaneously with similar amendments to Civil Rule 6(d), Appellate Rule 26(c), and Criminal Rule 45(c).

Five comments were submitted on the proposed bankruptcy rule amendment. One expressed support for the amendment, and two raised questions about how this time computation change would apply to pending cases or would interact with other rules. A fourth comment, submitted by a bankruptcy clerk, expressed concern about having different deadlines for parties in response to service of a single document. The final comment was submitted by the Department of Justice and was similar to the comments it submitted on the other advisory committees' parallel amendments. The comment raised concerns about possible prejudice caused by end-of-day or beginning-of-weekend electronic service and suggested an addition to the Committee Note that would note the court's authority to grant extensions of time to prevent unfairness in such situations.

The Committee voted unanimously to approve the amendment as published. While the Committee preferred not to revise the Committee Note in response to the DOJ's comment, it agreed to the addition of the following language if needed to maintain uniformity with the Committee Notes of the other advisory committees: "The ease of making electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice."

Action Item 4. Official Form 401. The proposed Official Form is a new petition form for commencing chapter 15 cases. Currently all voluntary bankruptcy cases are initiated by the filing of Official Form 1, the Voluntary Petition. The U.S. Trustee Program recommended that the Committee create a separate petition form for chapter 15 cases. Doing so allows the deletion of chapter-15-specific information from Official Form 201, the new voluntary petition for non-individual debtors.

The SEC's Office of General Counsel submitted the only comment in response to the publication of Official Form 401. The comment stated that the creation of a separate chapter 15 petition would result in the omission of a requirement that the petitioner file what is now Exhibit A to the Voluntary Petition. This exhibit requires the reporting of information that the comment said is valuable to investors and the SEC. It therefore requested that a similar attachment be required for a chapter 15 petition when the debtor is a company that must file periodic reports with the SEC.

The Committee voted unanimously to approve Official Form 401 as published and to request that it go into effect on December 1, 2015, along with the other modernized forms, as

discussed under Action Item 9. Under current Form 1, only reporting companies that are requesting relief under chapter 11 are required to file Attachment A. The creation of a separate chapter 15 petition has therefore not caused any change in the requirement. Should a foreign representative file a chapter 11 petition, the attachment would then have to be filed if the debtor is a reporting company.

Action Item 5. Official Form 410A. Official Form 410A (currently Form 10A) is the Mortgage Proof of Claim Attachment. In an individual debtor case, a creditor that asserts a security interest in the debtor's principal residence must file the form with its proof of claim. The current form requires a statement of the principal and interest due as of the petition date; an itemization of prepetition fees, expenses, and charges that remain unpaid; and a statement of the amount necessary to cure any default as of the petition date. The revised form that was published for public comment last August would replace the existing form with one that requires a mortgage claimant to provide a loan payment history and other information about the mortgage claim, including calculations of the claim and the arrearage amounts.

Six comments were submitted regarding Official Form 410A or its instructions. Two of the comments suggested wording changes to the form's instructions, which the Committee accepted. Another comment said that the form should not be required when a debtor files a proof of claim on behalf of a creditor whose claim is secured by a security interest in the debtor's principal residence. The Committee considered the comment to be a suggestion for an amendment to Rule 3001(c)(2)(C), rather than a comment on the proposed form, and has added the suggestion to its list of matters for future consideration. A fourth comment opposed the simultaneous implementation of the new attachment form and a proposed amendment to Rule 3002(c). The comment is mistaken about the timing of the implementation of the form. Official Form 410A will go into effect on December 1, 2015, and the amendment to Rule 3002(c) will not go into effect before December 1, 2016. Therefore, the Committee decided to take no action in response to this comment.

The remaining two comments were the only ones that addressed the substance of the form. One questioned the division of escrow payments into two components in calculating the amount of any arrearage. The Committee determined that it was not necessary to make a change. As the comment itself acknowledged, the total arrearage amount would not be affected. Moreover, mortgage industry representatives did not express any concerns about the proposed method of reporting the escrow arrearage.

The Department of Justice expressed a preference for the current form, which requires an itemization of fees, expenses, and charges ("fees") in accordance with a specified list. It stated that, because the proposed form omits the listing of specified types of fees, creditors might aggregate fees into a single entry. As a result, the DOJ argued, there will be less transparency, accuracy, and efficiency in the bankruptcy claims process. The Committee disagreed. This form was revised in response to arguments by several constituencies that a loan-history attachment

would be preferable to the existing form. According to these constituencies, disclosure of the information on a loan history would enable a debtor to see the basis for a mortgage claim and the arrearage amount, thereby facilitating resolution of disputes about mortgage amounts in some cases and providing a basis for objecting to claim amounts in others, and the proposed loan-history form would be better for creditors because its completion could be automated, unlike the existing form that must be completed by hand. The Committee also noted that each entry of a fee or other charge in the loan history must be accompanied by a description.

The Committee voted unanimously to approve Official Form 410A as published (with changes only to the instructions that are issued by the Administrative Office ("AO")). It requests that the amended form go into effect on December 1, 2015, along with the other modernized forms, as discussed under Action Item 9.

Action Item 6. Modernized Official Forms 106J, 106J-2, 201, 202, 204, 205, 206Sum, 206A/B, 206D, 206E/F, 206G, 206H, 207, 309A, 309B, 309C, 309D, 309E, 309F, 309G, 309H, 309I, 312, 313, 314, 315, 410, 410S1, 410S2, 424; and the abrogation of Official Forms 11A and 11B. These forms—the last major group of Official Forms produced by the FMP—were published for public comment in August 2014. They consist primarily of case opening forms for non-individual debtor cases, chapter 11-related forms, the proof of claim form and supplements, and orders and court notices for use in all types of cases. Also published were two revised individual debtor forms and an announcement of the proposed abrogation of two Official Forms.

The response to the publication of this set of forms was milder than the response to the previously published individual debtor forms. Eleven comments were submitted,[1] ranging in length from one paragraph addressing a single form to 20 pages addressing multiple forms. Almost all of the comments made very specific suggestions for changes to wording, format, or substance, rather than questioning the wisdom of the project or its overall results. No comments were submitted on Official Forms 106J, 106J-2, 207, 314, 424, or the proposed abrogation of Official Forms 11A and 11B.

General Comments. The National Conference of Bankruptcy Judges ("NCBJ") commented that the titles of all of the forms numbered in the 200s should include the word "non-individual" so that they will not be confused with forms to be used by individuals. The Committee noted that while many of the 200-numbered forms do include "non-individual" in the title, the schedules do not. To avoid making the titles of those forms unwieldy, the Committee decided that they should not be revised. Users are not likely to confuse the individual and non-

[1] This count does not include comments submitted only on the mortgage proof of claim attachment (Official Form 410A), the chapter 15 petition (Official Form 401), the chapter 13 plan form (Official Form 113), or previously published individual debtor forms (Official Forms 106A/B and 106E/F). Those comments are addressed elsewhere in the report under separate action or information items.

individual forms due to the different form numbers for the two sets of forms and because all of the non-individual forms will be packaged together and separately from the individual forms in software, in paper copy booklets, and on the U.S. Courts' website.

A comment submitted on behalf of the National Association of Bankruptcy Trustees expressed disappointment that it now appears that electronic data from the new forms will not be made available to users outside the judiciary. The prospect for access to this data was a selling point for the modernized forms at the outset, the comment said, and the ability to produce customized reports was explained as offsetting the necessity of dealing with longer forms. The Committee noted that this comment raised policy issues that are outside its purview and that the possibility that such data could be made available to outside users at some time in the future has not been foreclosed. The Committee concluded that the new forms provide sufficient benefits to users to outweigh the inconveniences of adapting to them, even if electronic data is not immediately made available to outside users.

Official Form 201—Voluntary Petition for Non-Individuals Filing for Bankruptcy. The Committee voted to make a minor wording change to question 11 about venue and to require only a 4-, rather than 6-, digit NAICS (North American Industry Classification System) code to be provided in question 7. The latter change was made in response to a comment by a bankruptcy clerk that questioned the need for the code and predicted that the requirement would lead to confusion and incorrect information. The AO informed the Committee that this information, which is not currently sought on the petition, would assist it in fulfilling its reporting duties to Congress, but that it would be better to ask for a 4-digit code. According to the AO, the broader classification would provide sufficient information for AO statisticians, might be easier for unsophisticated debtors to select accurately, and is preferable to the AO programmers.

The Committee made no change in response to two comments that asserted that questions at line 8 about small-business-debtor status are redundant. The Committee agreed that the question about the amount of noncontingent, liquidated debts is subsumed within the question about whether the debtor falls within the statutory definition of a "small business debtor." Nevertheless, Congress requires the AO to report how many debtors satisfy the debt limit but do not identify themselves as small business debtors. As a result, the AO plans to collect data on both questions. An academic commenter stated that empirical evidence shows that small business debtors do a poor job of self-reporting their status. She suggested changes to several forms that would "walk[] debtor's counsel step by step through the process for determining small business status." The Committee decided to treat the comment as a new suggestion that it will consider more fully in the future.

Official Form 202—Declaration Under Penalty of Perjury for Non-Individual Debtors. This form is for officers and authorized agents of non-individual debtors to execute declarations that information in certain documents is true and correct. As published, the form had

checkboxes to indicate for which of six specified Official Forms the declaration applies, as well as a checkbox for "Other document that requires a declaration." The Committee received a comment that pointed out that Official Form 204 (Chapter 11 or Chapter 9 Cases: List of Creditors Who Have the 20 Largest Unsecured Claims and Are Not Insiders) no longer has a space for the debtor's declaration. Because that form was not specifically listed on Form 202, the commenter thought that debtors would be confused about whether they are still required to make such a declaration. The Committee agreed and added a checkbox for Official Form 204 to the list of forms in Official Form 202.

Official Form 206A/B—Schedule A/B: Assets – Real and Personal Property. The Committee made some adjustments to the form's instructions about executory contracts and unexpired leases and expanded several questions to encompass the leasing of property. The NCBJ commented that Schedule G (Executory Contracts and Unexpired Leases) and its instructions indicate that executory contracts and unexpired leases with a net value should also be listed on Schedule A/B, but there is no specific category on the latter form for doing so. It suggested that a new category be added to Schedule A/B for that purpose. The Committee decided that, rather than adding a new category to the form, an instruction should be added to question 70 (other assets not yet reported), stating, "Include all interests in executory contracts and unexpired leases not previously included on this form." After a lengthy discussion, the Committee decided that all executory contracts and unexpired leases should be reported on Schedule A/B, rather than just those with net value, and that the instructions to this form and to Schedule G should be revised accordingly. The Committee also voted that Schedule A/B should ask about property the debtor leases, in addition to property it owns, at questions 27, 38, 46, and 54.

In response to other comments by the NCBJ, the Committee also deleted the question at line 24 about possible Perishable Agricultural Commodities Act claims and added references in Part 6 to fishing-related assets.

Official Form 206D—Schedule D: Creditors Who Have Claims Secured by Property. In response to the NCBJ's comments, the Committee revised the column headings and eliminated the checkbox labeled "liquidated and neither contingent nor disputed."

Official Form 206E/F—Schedule E/F: Creditors Who Have Unsecured Claims. In response to the NCBJ's comments, the Committee revised the form's instructions for Part 2 about what to do if no other entities need to be notified, and it reworded the instruction at the beginning of the form.

Official Forms 309A-I—Bankruptcy Case Commencement Notices. Two comments objected that the revised forms no longer include "deadlines" and "meeting of creditors" in the titles. In response, the Committee revised the bolded instruction at the top of each form to draw attention to the fact that the forms include information about those topics and that both pages

should be read carefully. The Bankruptcy Noticing Working Group commented that a proof of clam form is no longer sent with the commencement notice. The Committee revised the instruction about obtaining a proof of claim form.

Official Form 410—Proof of Claim. The NCBJ made several editorial suggestions that the Committee accepted. The NCBJ also questioned the basis for the instruction in question 7 to state only the amount of default for lease claims. It said that, like most other claims, a claim based on a lease could include future amounts due, and it noted that the response to this question would duplicate the response to question 10, which asks for the amount required to cure any default on a lease as of the date of the petition. The Committee agreed and deleted the instruction in question 7.

Official Form 410S1—Notice of Mortgage Payment Change. The NCBJ pointed out that the instruction at the beginning of the form was not consistent with the proposed amendment to Rule 3002.1(a). The Committee agreed and revised the instruction to use the rule's language about when notice of a payment change must be given. An attorney suggested that this form and Official Form 410S2 should not require a creditor's agent to attach a power of attorney, because the proof of claim form no longer requires such an attachment. The Committee agreed. Because Rule 9010(c) provides that a power of attorney evidencing the authority of an agent to represent a creditor is not required for a proof of claim, a power of attorney is also not required for a supplement to a proof of claim. Therefore, the Committee removed the direction to attach a power of attorney.

Official Form 410S2—Notice of Postpetition Mortgage Fees, Expenses, and Charges. The Committee made the same changes to this form as to Official Form 410S1.

The Committee voted unanimously to approve the Official Forms listed under this action item as they appear in Bankruptcy Appendix A1 and to abrogate Official Forms 11A and 11B. It requests that these forms go into effect on December 1, 2015, along with the other modernized forms, as discussed under Action Item 9.

A2. Modernized forms previously approved by the Standing Committee for which the Committee seeks approval of renumbering and/or minor revisions that do not require republication. Bankruptcy Appendix A2 includes the forms that are in this group.

<u>Action Item 7</u>. Modernized Official Forms 3A, 3B, 6I, 17A, 17B, 17C, 22A-1, 22A-1Supp, 22A-2, 22B, 22C-1, 22C-2, 106A/B, 106D, 106E/F, 106G, 112, and the Committee Note to Official Form 107.

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Renumbering. Official Forms 3A, 3B, 6I, 17A, 17B, 17C, 22A-1, 22A-1Supp, 22A-2, 22B, 22C-1, 22C-2 are already in effect. Now that the entire set of modernized forms is going to be promulgated, the Committee requests the renumbering of these forms as follows:

Current Form	Renumbered Form
3A	103A
3B	103B
6I	106I
17A	417A
17B	417B
17C	417C
22A-1	122A-1
22A-1Supp	122A-1Supp
22A-2	122A-2
22B	122B
22C-1	122C-1
22C-2	122C-2

The Committee also seeks approval of the renumbering of one modernized form that is not yet in effect. At the May 2014 meeting, the Standing Committee gave final approval to Official Form 112 (Statement of Intention of Individuals Filing Under Chapter 7). Because of a subsequent decision to make the numbers of all the modernized forms as similar as possible to the numbers of the forms they are replacing, the Committee asks that Official Form 112 be renumbered as Official Form 108. The modernized form replaces Official Form 8.

Minor revisions. (1) Means test forms (Official Forms 22A-1, 22A-2, 22B, 22C-1, 22C-2)—The Committee approved several formatting and line numbering changes and the correction of a few errors in the listed forms. It also made a change to Official Forms 22A-2 and 22C-2 in response to the Tax Increase Prevention Act of 2014, Pub. Law No. 113-295, which authorized contributions to qualified ABLE accounts, as defined by 26 U.S.C. § 529A(b), to be included in the means test deduction for contributions to the care of household or family members.

(2) Individual debtor schedules (Official Forms 106A/B, 106D, 106E/F, 106G)—The Committee approved changes to these individual debtor schedules that are consistent with changes to the parallel non-individual debtor schedules. In Official Form 106A/B, the Committee also added qualified ABLE accounts to the list of accounts in question 24 that may be excluded from the estate.

(3) Committee Note to Official Form 107 (Statement of Financial Affairs for Individuals Filing for Bankruptcy)—An incorrect reference to Official Form 106F has been changed to Official Form 106H.

These changes have been incorporated into the forms that appear in Bankruptcy Appendix A2, and the Committee now seeks approval of the forms as revised. It requests that these forms go into effect on December 1, 2015, along with the other modernized forms, as discussed under Action Item 9.

A3. Existing forms for which the Committee seeks approval of renumbering without modernization. Bankruptcy Appendix A3 includes the forms that are in this group.

Action Item 8. Exhibit A to Official Form 1, and Official Forms 16A, 16B, and 16D.

The Voluntary Petition form currently in effect includes an exhibit—Exhibit A—that must be completed by chapter 11 debtors that are required to file periodic reports with the SEC. When the modernized forms go into effect, Exhibit A will be a separate form designated as Form 201A. Because the Committee is considering whether to make substantive changes to the form, it decided that the existing Exhibit A form should be renumbered with its current formatting and style and that any modernization of the form should be delayed until the Committee completes its consideration of the exhibit.

Official Forms 16A, 16B, and 16D are Captions that are for use in a bankruptcy case, contested matters, and adversary proceedings. In August 2014 modernized versions of the captions were published for public comment as Official Forms 416A, 416B, and 416D. The NCBJ and the Pennsylvania Bar Association filed comments opposing adoption of the new caption forms. The NCBJ commented that it did not perceive a need for altering a format that has been used by litigants and the courts for decades or adopting a format that differs from the caption format used in the district courts and courts of appeal. The Bar Association stated that while the Forms Modernization Project is to be commended, changing the style of the caption from a standard legal caption to a form-based caption denigrates the dignity of the bankruptcy court and suggests that its filings are purely administrative in nature. The Committee agreed with these objections and voted to withdraw the proposed new caption forms and to retain the current caption forms, renumbered as Official Forms 416A, 416B, and 416D.

The Committee voted unanimously to seek approval of the renumbering without modernization of the existing forms listed under this action item. It requests that these renumbered forms go into effect on December 1, 2015, along with the modernized forms, as discussed under Action Item 9.

B. Previously Approved Items for Transmission to the Judicial Conference

Action Item 9. The Committee seeks approval of the full implementation of the Forms Modernization Project. Along with the forms discussed in Action Items 4-8, the Committee requests that the Standing Committee transmit to the Judicial Conference the modernized forms

that it approved at the May 2014 meeting: **Official Forms 101, 101A, 101B, 104, 105, 106 Summary, 106 Declaration, 106C, 106G, 106H, 107, 119, 121, 318, 423, and 427.**

Effective date. When the FMP effort began, it was anticipated that the new forms would go into effect at approximately the same time as bankruptcy courts began using the redesigned case management system, known as NextGen. A goal of NextGen is to capture and store all material individual pieces of data used to complete bankruptcy forms so that users such as the court and clerk's office can prepare customized reports, putting the data in any order the user wants. This is in effect a database program that can run different reports designed by the user. The FMP, working hand-in-glove with the AO's NextGen project team, redesigned the bankruptcy forms to facilitate data collection and to make them easier to understand.

Although the FMP developed the modernized forms in a manner that would facilitate data collection by the NextGen case management system, the Committee has learned that the roll-out of NextGen is proceeding more slowly than expected. Assuming that the AO stays on its current schedule, by the end of 2015 no more than a handful of bankruptcy courts will be on the NextGen case management system. The AO estimates that by December 2016 NextGen will have the capacity to capture and store all of the data elements from forms filed by individual debtors, using the modernized forms (about 70 percent of bankruptcy cases). And by December 2017, the AO estimates that the NextGen case management system will be able to capture and store all of the data elements by all debtors, using the modernized forms. The AO also expects that by December 2017 all or nearly all of the bankruptcy courts will be capable of being on the NextGen case management system, although the actual timing of migration to the new system is dependent on the decision of each court.

Notwithstanding the delays in the implementation of NextGen, the Committee at its spring meeting voted unanimously to seek a December 1, 2015 effective date for the modernized and renumbered forms. Several considerations led to the Committee's decision to proceed with promulgation of the modernized forms rather than wait for full implementation of NextGen. First, the FMP has produced a set of vastly improved, user-friendly forms that will be a benefit to the bankruptcy community (including *pro se* filers) even if additional data is not collected or customized reports cannot be produced. Notably, by designing different sets of case opening forms for use in individual and non-individual debtors' cases, the FMP was able ask questions in a way that makes more sense to each category of debtor.

Second, the Committee has been publishing and receiving public comments on the modernized forms since 2012. The bankruptcy community and software vendors have been alerted to the likelihood of the promulgation of new forms. A delay of one or two years in promulgation of the forms could cause confusion and the loss of support for the project.

Finally, there are technological reasons to go forward now with the modernized forms. If the modernized forms take effect on December 1, 2015, the AO will be able to build a backend

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database that will store the information from the modernized forms. This is much more cost effective than the AO's prior plan to create a backend database for the current forms, and then redo the backend database for the modernized forms. The AO also reports that adopting this effective date will not affect the AO's current ability to capture the 80 data points required by the 2005 bankruptcy legislation. The Committee informed the AO regarding this decision, and the AO had no objections.

The Committee therefore recommends that the Official Forms listed in Action Items 4-9 take effect on Dec. 1, 2015, and that they govern in all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.[2]

The Committee considered one potentially serious disadvantage to implementing the modernized forms in 2015. The United States Bankruptcy Court for the District of New Jersey developed a program that lets *pro se* filers use what is essentially a Turbo Tax-like system to complete and file a chapter 7 bankruptcy case electronically. This concept, which was further developed by the court and the AO, is named the electronic self-representation (eSR) pathfinder program, and it has been expanded to include two other courts—the United States Bankruptcy Court for the Central District of California and the United States Bankruptcy Court for the District of New Mexico. At present, only the New Jersey bankruptcy court is very active; it has at least 102 eSR cases open. The Central District of California and New Mexico bankruptcy courts have only 14 and 10 cases open respectively, but they have not been publicizing the availability of this program. The courts that have implemented this eSR program emphasize its importance as an access-to-justice project.

The eSR program is linked to the current Chapter 7 forms. The eSR data-entry screens and database will not work with modernized forms, and the AO has stated that it cannot readily reprogram the eSR program so that it will be able to produce the modernized forms for filing. Accordingly, if the modernized forms become effective in December 2015, the eSR program will not be able to function until 2017, unless the eSR courts are permitted to continue using the current forms. The AO estimates that by 2017, eSR will work with the new forms.

The Committee concluded that there is no legal obstacle to allowing existing forms to remain the Official Forms for use in the eSR program only. Bankruptcy Rule 9009 authorizes the Judicial Conference to prescribe obligatory Official Forms, but it does not restrict that authority to issuing only a single set of forms.

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[2] The Committee recognizes that it will sometimes not be just or practicable to use the new forms in cases that are pending at the time the forms are adopted. For example, when a debtor amends a case-opening form such as the petition or the schedules, the amendment may be easier to understand if the debtor uses the originally filed, superseded form to show the change.

A *pro se* debtor using the eSR system for initiating a chapter 7 case uses an on-line program that elicits information used to populate the following existing forms (referred to collectively by the courts as the "electronic bankruptcy package"):

- Official Form 1 (Petition);
- Official Forms 6A-J and summaries (Schedules);
- Official Form 7 (Statement of Financial Affairs);
- Official Form 8 (Individual Debtor's Statement of Intention);
- Official Form22A-1, and if applicable Official Forms 22A-1Supp and 22A-2 (Means Test forms); and
- a mailing matrix as prescribed by local rule or form.

The debtor does not see those forms when supplying the required information electronically. Instead, the debtor answers a series of questions, and completed forms are produced at the end of the process. Hard copies of only the signature pages must be later presented to the court for filing (within a specified number of days after submitting the electronic bankruptcy package).

Because of the almost invisible use of the case-opening forms, the continued use of existing forms for eSR filings should not cause undue confusion in the three bankruptcy courts after the modernized forms go into effect generally. The existing forms will not be posted on the courts' websites or available in paper form in the clerk's office. Non-eSR chapter 7 debtors, whether represented or *pro se*, will have official access only to the modernized forms.

Because the Committee concluded that the modernized forms should go into effect generally on December 1, 2015, but without disrupting the already established eSR pilot projects, it asks the Standing Committee to seek approval of the following authorization by the Judicial Conference:

> Notwithstanding the approval of new Bankruptcy Official Forms to take effect on December 1, 2015, the following forms in effect on November 30, 2015, will remain Official Forms until December 1, 2017, in the United States Bankruptcy Courts for the Central District of California, the District of New Jersey, and the District of New Mexico, only for use by *pro se* debtors who initiate a chapter 7 case by using the court's Electronic Self-Representation (eSR) system: Official Form 1, Official Forms 6A-J and summaries, Official Form 7; Official Form 8; and Official Forms 22A-1, 22A-1Supp, and 22A-2.

C. Item for Publication in August 2015

Action Item 10. Rule 1006(b)(1) (Filing Fee). This provision governs the payment of the bankruptcy filing fee in installments, as authorized for individual debtors by 28 U.S.C. § 1930(a). The Committee received a suggestion (12-BK-I) from the Bankruptcy Judges Advisory Group ("BJAG") that proposed amending Rule 1006(b) to clarify that courts may require a debtor who applies to pay the filing fee in installments to make an initial installment payment with the petition and the application. BJAG further suggested that any requirement for an initial installment payment at the time of filing be limited to 25% of the total filing fee.

Over the course of several years, the Committee has given careful consideration to this suggestion. As part of its consideration, the Committee requested the Federal Judicial Center ("FJC") to conduct an empirical study on court practices regarding initial installment payments at the time of filing and whether there is an association between such a requirement and the rate of fee waiver applications.

The FJC study revealed that the difference between the percentage of chapter 7 cases in which a fee waiver application was filed in districts requiring an upfront installment payment and in districts not requiring such a payment was not statistically significant. The FJC study also revealed that just over one-third of the bankruptcy courts (33) require an installment payment at the time of filing the petition and the application to pay the filing fee in installments. The amount of the required initial payment ranges from $40 to $135, and for courts that specify the required payment as a percentage of the total fees due upon filing, the percentage ranges from 25% to 50%. Many of the courts do not specify the consequences of failing to make the required payment. Of those that do, a few courts state that the application to pay in installments may or will be denied if the initial installment is not paid at filing. A greater number of courts provide for the possible dismissal of the case or rejection of the petition, by the clerk or by the court, with or without further notice.

The Committee concluded that there was no need to clarify that courts may require an initial installment payment with the petition and application. Rule 1006(b)(1) requires a petition to be "accepted for filing if accompanied by the debtor's signed application" to pay the filing fee in installments. This means that a court cannot refuse to accept a petition because of the failure to make an initial installment payment, but the rule does not prohibit requiring such a payment. Therefore, the Committee decided not to make a revision to the rule in response to the BJAG suggestion.

Nevertheless, the FJC study raises a different issue. Because Rule 1006(b)(1) requires the bankruptcy clerk to accept the petition, resulting in the commencement of a bankruptcy case, the practice of some courts of refusing to accept a petition or summarily dismissing a case because of the failure to make an installment payment at the time of filing is inconsistent with Rules 1006(b)(1) and 1017(b)(1). The latter provision allows the court, only "after a hearing on

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notice to the debtor and the trustee," to dismiss a case for the failure to pay any installment of the filing fee.

In order to clarify that courts may not refuse to accept petitions or summarily dismiss cases for failure to make initial installment payments at the time of filing, the Committee is proposing the amendment to Rule 1006(b)(1) that appears in Bankruptcy Appendix B. The amendment is intended to emphasize that an individual debtor's petition must be accepted for filing so long as the debtor submits a signed application to pay the filing fee in installments and even if a required initial installment payment is not made at the same time. The Committee Note explains that dismissal of the case for failure to pay any installment must proceed according to Rule 1017(b)(1).

The Committee voted unanimously to request publication for public comment of the proposed amendment in August 2015.

III. Information Item

Status report on the proposed chapter 13 plan form and related rules. As the Committee has previously reported, it has undertaken a multi-year project to create an Official Form for plans in chapter 13 cases. The Committee sees the adoption of a form for chapter 13 plans as bringing greater coherence to the presentation of information in chapter 13 cases and improving the procedures for preparing, reviewing, and confirming chapter 13 plans.

The form (Official Form 113) was published for public comment in August 2013 along with related amendments to nine Bankruptcy Rules (Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009). After considering the public comments, many of which were critical of the undertaking, the Committee proposed a number of changes to the plan form and rule amendments. Revisions of the plan were intended in part to clear up misunderstandings of the purpose and function of the chapter 13 plan form. For example, the Committee added a prominent warning to the front of the form to emphasize that the presence of an option on the form does not necessarily mean that the option would be acceptable to a debtor's local court. The revisions also addressed specific issues raised about some of the provisions of the proposed form.

The revised form and rules were republished in August 2014, along with an invitation to comment on whether the rule amendments should be adopted even if the form is not. Like the initial round of publication, republication produced a large, although slightly diminished, volume of public comments—approximately 120 that addressed the chapter 13 project.

Comments. A substantial majority of comments opposed adoption of the plan form as a mandatory form. A number of commenters also opposed Rule 3002 (altering the time to file

proofs of claim) and Rules 3015 and 9009 (requiring use of the chapter 13 plan form and limiting alterations to an Official Form). Relatively few comments addressed the other rule amendments, and even fewer specifically addressed the question whether the rule amendments should be adopted only in conjunction with adoption of the plan form.

In general, comments opposing the adoption of the plan form raised the same objections articulated by negative comments in the first round of publication: (i) that the form diminishes the freedom of debtors to propose lawful chapter 13 plans and infringes upon the authority of local bankruptcy courts to adjudicate and administer chapter 13 cases; (ii) that the form will be ill-suited for the local variations in chapter 13 practice across the country; (iii) that current, non-uniform chapter 13 practice is satisfactory or even ideal, and therefore the plan form is a solution in search of a problem; (iv) that the form will not achieve the goal of greater uniformity in chapter 13 law because local variations will inevitably persist; (v) that the form will impose serious transition costs for lawyers, trustees, and court staff and cause uncertainty and litigation; (vi) that the form will encourage the growth of a national chapter 13 practice for creditors and debtors at the expense of the benefits derived from the expertise and accessibility of the local bar; and (vii) that the form, in seeking to capture the range of options in chapter 13 practice around the country, is too long and complicated and will be costly to complete, review, and administer. The comments showed that the revision efforts did not make an appreciable difference in the level of opposition.

Of particular significance, an ad hoc group called the Committee of Concerned Bankruptcy Judges submitted a letter opposing the plan form. The letter was signed by 144 bankruptcy judges—about 40% of the bankruptcy bench. The letter raised some specific concerns about features included (or not included) in the form. More broadly, the letter took aim at the Committee's reasons for pursuing a single national form for chapter 13 plans. At bottom, the group expressed the view that there is no need to move toward uniformity in chapter 13 practice and that attempting to do so without a consensus would be detrimental to the bankruptcy system.

There were notable comments in favor of the plan form and rule amendments. One bankruptcy judge, who is the author of the leading treatise on chapter 13 practice, strongly endorsed the project and testified in support of it at the public hearing. He acknowledged that there will be a transition period after the plan form and rule amendments go into effect, but he saw significant benefits in the prospect of greater clarity in chapter 13—clarity in the treatment of claims and clarity in the case law when disputes are no longer tied to the peculiarities of local forms. A leading academic expert on chapter 13 expressed strong approval of greater uniformity in chapter 13 practice. In her experience, mortgage creditors had difficulties in training, supervising, and auditing workers servicing bankruptcy cases because of the vast differences in local chapter 13 practices. In her view, "[a] uniform national chapter 13 plan would greatly increase creditor compliance with bankruptcy law," which in turn would redound to the benefit of debtors, as well as to the integrity of the system. A group of 34 bankruptcy judges submitted

a letter in support of the national plan form. They noted that the proposed form sets out a variety of options in order to accommodate almost all existing chapter 13 practices. They asserted that adoption of a national form would significantly reduce costs in the long run.

Compromise proposal. Near the close of the public comment period, three bankruptcy judges, three lawyers who represent creditors, and three chapter 13 trustees submitted a proposal for an alternative to the approach taken by the Committee. They proposed that the Committee adopt a chapter 13 plan form, but allow districts to opt out if they adopted a local form that met certain criteria. In broad strokes, the compromise included the following: First, each bankruptcy court could choose to adopt one local plan form or to accept Official Form 113. A district could also choose to do both. Second, a local plan form would have to conform to specified requirements regarding the contents of the form and the manner of the local form's adoption. Third, every chapter 13 plan—whether submitted on Official Form 113 or on a conforming local plan form—would have to include an information statement disclosing whether the plan contained particular features. Fourth, the time to file a proof of claim in Rule 3002(c) would be changed to 70 days after the order for relief instead of the currently proposed 60 days.

The drafters of the compromise proposal report that they have canvassed and received support for their efforts from a broad group of interested parties who hold differing views about the merits of the national plan form. They say that they have contacted: (i) lenders who service the vast majority of residential mortgages that would be affected by chapter 13 plans; (ii) lenders who are among the largest automobile financers holding claims in chapter 13 cases; (iii) prominent consumer debtor attorneys; (iv) multiple states' attorneys who handle consumer bankruptcy cases; (v) a large number of chapter 13 trustees; and (vi) multiple bankruptcy judges who have opposed the national plan form, as well as multiple bankruptcy judges who have supported the plan form. Some of those contacted support the compromise as the best approach. Others favor the national plan form or the status quo but find the compromise proposal an acceptable, second-best alternative.

The Committee's deliberations. At the spring meeting, the Committee members discussed a number of options relating to the chapter 13 national form and associated rules. None of the Committee members favored abandoning the project altogether. None favored proceeding with the amendments to the rules alone. Although there was widespread agreement regarding the benefit of having a national plan form, the Committee members generally did not want to proceed with a mandatory Official Form in the face of substantial opposition by bankruptcy judges and other bankruptcy constituencies. Accordingly, the Committee members were generally inclined to explore the possibility of a compromise along the lines suggested by the commenters. As several members noted, a compromise that resulted in reducing the number of local chapter 13 plan forms (there are currently around 200) would be preferable to the status quo and would achieve some of the underlying goals of this project. After a full discussion, the Committee voted unanimously to give further consideration to pursuing a compromise proposal

that would involve promulgating a national plan form and related rules, but would allow districts to opt out of the use of the Official Form if certain conditions were met.

The Committee has referred this matter to a subcommittee to study and refine the compromise proposal and also to obtain further input from a broad spectrum of the bankruptcy community. In addition, the appropriate subcommittees will consider the detailed substantive comments submitted on the republished Official Form and related rules. At the fall meeting, the Committee will consider the subcommittees' recommendations regarding the implementation of a compromise as well as substantive revisions to the Official Form and related rules.

The Committee will also consider whether to recommend republication of the proposed form or any of the rules. That decision will affect the timing of the eventual implementation of a national chapter 13 plan form. Assuming that the Official Form and related rules remain as a package, republication of any part of that package in August 2016 means that the form and rules would be on track to go into effect on December 1, 2018. On the other hand, if republication is not deemed necessary, the chapter 13 plan form and rules could be promulgated a year earlier, if normal procedures are followed. At the Committee's spring meeting, Judge Sutton raised the possibility of a shortened timeline for promulgation if republication is not sought. Under that scenario, the Committee would seek final approval of the Official Form and related rules at the January 2016 Standing Committee meeting. If approved, they would be transmitted to the Judicial Conference for approval at its March 2016 meeting. Then, with the Supreme Court's permission, the rule amendments would be submitted to the Court for issuance by May 1, 2016, which would allow the form and rules to go into effect on December 1, 2016.

Because a compromise proposal that allows districts to opt out of using the chapter 13 national form would reduce the impact of the original proposal for a mandatory national form, the Committee believes it would be appropriate to go forward without republishing amendments to the form and rules a third time. The Committee may nevertheless decide it is preferable to republish the amended form and rules in an abundance of caution, because the compromise represents a different approach to this project. At its fall meeting, the Committee will consider whether to recommend that the Standing Committee republish the form and associated rules or move forward without republication.

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TAB 6A

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

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CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

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

FROM: Honorable William K. Sessions, III, Chair
Advisory Committee on Evidence Rules

DATE: May 7, 2015

RE: Report of the Advisory Committee on Evidence Rules

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on April 17, 2015 at Fordham University School of Law in New York City.

The Committee seeks approval of two proposed amendments for release for public comment:

1. Abrogation of Rule 803(16), the ancient documents exception to the hearsay rule; and

2. Amendment of Rule 902 to add two subdivisions that would allow authentication of certain electronic evidence by way of certification by a qualified person.

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II. Action Items

A. Proposed Abrogation of Rule 803(16)

Rule 803(16) provides a hearsay exception for "ancient documents." If a document is more than 20 years old and appears authentic, it is admissible for the truth of its contents. The Committee considered whether Rule 803(16) should be abrogated or amended because of the development of electronically stored information. The rationale for the exception has always been questionable, because a document does not become reliable just because it is old; and a document does not magically become reliable enough to escape the rule against hearsay on the day it turns 20. The Committee concluded that the exception has been tolerated because it has been used so infrequently, and usually because there is no other evidence on point. But because electronically stored information can be retained for more than 20 years, there is a strong likelihood that the ancient documents exception will be used much more frequently in the coming years. And it could be used to admit only unreliable hearsay, because if the hearsay is in fact reliable it will probably be admissible under other reliability-based exceptions, such as the business records exception or the residual exception. Moreover, the need for an ancient documents exception is questionable as applied to ESI, for the very reason that there may well be a great deal of reliable electronic data available to prove any dispute of fact.

The Committee considered four formal proposals for amending the rule. The proposals were: 1) abrogation; 2) limiting the exception to hardcopy; 3) adding the necessity requirement from the residual exception (Rule 807); and 4) adding the Rule 803(6) requirement that the document would be excluded if the opponent could show that the document was untrustworthy under the circumstances. It ultimately determined, unanimously, that Rule 803(16) should be abrogated. In support of that determination, the Committee drew the following conclusions:

- The exception, which is based on necessity, is in fact unnecessary because an ancient document that is reliable can be admitted under other hearsay exceptions, such as Rule 807 or Rule 803(6). In fact, the only case that the original Advisory Committee relied upon in support of the ancient documents exception was one in which the court found an old document admissible because it was reliable — an analysis which today would have rendered it admissible as residual hearsay. So the only real "use" for the exception is to admit unreliable hearsay — as has happened in several reported cases.

- The exception can be especially problematic in criminal cases where statutes of limitations are not applicable, such as cases involving sexual abuse and conspiracy.

- Many forms of ESI have just become or are about to become more than 20 years old, and there is a real risk that substantial amounts of unreliable ESI will be stockpiled and subject to essentially automatic admissibility under the existing exception.

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● The ancient documents exception is not a venerated exception under the common law. While the common law has traditionally provided for authenticity of documents based on age, the hearsay exception is of relatively recent vintage. Moreover, it was originally intended to cover property-related cases to ease proof of title. It was subsequently expanded, without significant consideration, to every kind of case in which an old document would be relevant. Thus, abrogating the exception would not present the kind of serious uprooting as might exist with other rules in the Federal Rules of Evidence.

● The ancient documents exception is based on necessity (lack of other proof), but where the document is necessary it will likely satisfy at least one of the admissibility requirements of the residual exception — i.e., that the hearsay is more probative than any other evidence reasonably available. So if the document is reliable it will be admissible as residual hearsay — and if it is unreliable it should be excluded no matter how "necessary" it is.

The Committee concluded that the problems presented by the ancient documents exception could not be fixed by tinkering with it — the appropriate remedy is to abrogate the exception and leave the field to other hearsay exceptions such as the residual exception and the business records exception. In particular, there was no support for the proposal that would limit the exception to hardcopy, as the distinction between ESI and hardcopy would be fraught with questions and would be difficult to draw. For example, is a scanned copy of an old document, or a digitized version of an old book, ESI or hardcopy? As to the proposals to import either necessity or reliability requirements into the rule, Committee members generally agreed that they would be problematic because they would draw the ancient documents exception closer to the residual exception, thus raising questions about how to distinguish those exceptions.

The Committee unanimously approved the proposal to abrogate Rule 803(16), together with the following Committee Note to explain that abrogation:

The ancient documents exception to the rule against hearsay has been abrogated. The exception was based on the flawed premise that the contents of a document are reliable merely because the document is old. While it is appropriate to conclude that a document is genuine when it is old and located in a place where it would likely be — see Rule 901(b)(8) — it simply does not follow that the contents of such a document are truthful.

The ancient documents exception could once have been thought tolerable out of necessity (unavailability of other proof for old disputes) and by the fact that the exception has been so rarely invoked. But given the development and growth of electronically stored information, the exception has become even less justifiable and more subject to abuse. The need for an ancient document that does not qualify under any other hearsay exception has been diminished by the fact that reliable electronic information is likely to

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be available and will likely satisfy a reliability-based hearsay exception — such as Rule 807 or Rule 803(6). Thus the ancient documents exception is not necessary to qualify dated information that is reliable. And abuse of the ancient document exception is possible because unreliable electronic information could be easily accessible, and would be admissible under the exception simply because it has been preserved electronically for 20 years.

Recommendation: The Committee recommends that the proposed abrogation of Evidence Rule 803(16) be issued for public comment.

B. Proposed Amendment to Evidence Rule 902

At its previous meeting, the Committee approved in principle changes that would allow certain electronic evidence to be authenticated by a certification of a qualified person — in lieu of that person's testimony at trial. (Those changes were discussed as an information item at the January, 2015 Standing Committee meeting). At its Spring meeting, the Committee unanimously approved a proposal to add two new subdivisions to Rule 902, the rule on self-authentication. The first provision would allow self-authentication of machine-generated information, upon a submission of a certification prepared by a qualified person. The second proposal would provide a similar certification procedure for a copy of data taken from an electronic device, media or file. These proposals are analogous to Rules 902(11) and (12) of the Federal Rules of Evidence, which permit a foundation witness to establish the authenticity of business records by way of certification.

The proposals have a common goal of making authentication easier for certain kinds of electronic evidence that are, under current law, likely to be authenticated under Rule 901 but only by calling a witness to testify to authenticity. The Committee has concluded that the types of electronic evidence covered by the two proposed rules are rarely the subject of a legitimate authenticity dispute, but it is often the case that the proponent is nonetheless forced to produce an authentication witness, incurring expense and inconvenience — and often, at the last minute, opposing counsel ends up stipulating to authenticity in any event.

The self-authentication proposals, by following the approach taken in Rule 902(11) and (12) regarding business records, essentially leave the burden of going forward on authenticity questions to the opponent of the evidence. Under those rules a business record is authenticated by a certificate, but the opponent is given "a fair opportunity" to challenge both the certificate and the underlying record. The proposals for new Rules 902(13) and 902(14) would have the same effect of shifting to the opponent the burden of going forward (not the burden of proof) on authenticity disputes regarding the described electronic evidence.

The Committee has carefully considered whether the self-authentication proposals would raise a Confrontation Clause concern when the certificate of authenticity is offered against a

criminal defendant. The Committee is satisfied that no constitutional issue is presented, because the Supreme Court has stated in Melendez-Diaz v. Massachusetts, 557 U.S. 305, 322 (2009), that even when a certificate is prepared for litigation, the admission of that certificate litigation is consistent with the right to confrontation if it does nothing more than authenticate another document or item of evidence. That is all that these certificates would be doing under the Rule 902(13) and (14) proposals. The Committee also relied on the fact that the lower courts had uniformly held that certificates prepared under Rules 902(11) and (12) do not violate the right to confrontation; those courts have relied on the Supreme Court's statement in Melendez-Diaz. The Committee determined that the problem with the affidavit found testimonial in Melendez-Diaz was that it certified the accuracy of a drug test that was itself prepared for purposes of litigation. The certificates that would be prepared under proposed Rules 902(13) and (14) would not be certifying the accuracy of any contents or any factual assertions. They would only be certifying that the evidence to be introduced was generated by the machine (Rule 902(13)) or is data copied from the original (Rule 902(14)). In this regard, the Note approved by the Committee emphasizes that the goal of the amendments is narrow one: to allow electronic information that would otherwise be established by a witness instead to be established through a certification by that same witness.

Proposed Rule 902(13) — as unanimously approved by the Committee with the recommendation that it be released for public comment — provides as follows:

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

* * *

(13) Certified Records Generated by an Electronic Process or System. A record generated by an electronic process or system that produces an accurate result, as shown by a certification by a qualified person that complies with the certification requirements of Rule 902(11) or Rule 902(12). The proponent must meet the notice requirements of Rule 902(11).

The Proposed Committee Note to Rule 902(13) provides as follows:

The amendment sets forth a procedure by which parties can authenticate certain electronic evidence other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and inconvenience of producing a witness to authenticate an item of electronic evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony

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once it is presented. The amendment provides a procedure under which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule. The intent of the Rule is to allow the authenticity foundation that satisfies Rule 901(b)(9) to be established by a certification rather than the testimony of a live witness.

A certification under this Rule can only establish that the proffered item has satisfied the admissibility requirements for authenticity. The opponent remains free to object to admissibility of the item on other grounds. For example, if a webpage is authenticated by a certificate under this rule, that authentication does not mean that the assertions on the webpage are admissible for their truth. It means only that the item is what the proponent says it is, i.e., a particular web page that was posted at a particular time. Likewise, the certification of a process or system of testing means only that the system described in the certification produced the item that is being authenticated.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

Proposed Rule 902(14) — as unanimously approved by the Committee with the recommendation that it be released for public comment — provides as follows:

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

* * *

(14) Certified Data Copied From an Electronic Device, Storage Media or File. Data copied from an electronic device, storage media, or electronic file, if authenticated by a process of digital identification, as shown by a certification by a qualified person that complies with the certification requirements of Rule 902(11) or Rule 902(12). The proponent must meet the notice requirements of Rule 902(11).

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The Proposed Committee Note to Rule 902(14) provides as follows:

The amendment sets forth a procedure by which parties can authenticate data copied from an electronic device, storage medium, or an electronic file, other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and inconvenience of producing an authenticating witness for this evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness, and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure in which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Today, data copied from electronic devices, storage media, and electronic files are ordinarily authenticated by "hash value." A hash value is a unique alpha-numeric sequence of approximately 30 characters that an algorithm determines based upon the digital contents of a drive, media, or file. Thus, identical hash values for the original and copy reliably attest to the fact that they are exact duplicates. This amendment allows self-authentication by a certification of a qualified person that she checked the hash value of the proffered item and that it was identical to the original. The rule is flexible enough to allow certifications through processes other than comparison of hash value, including by other reliable means of identification provided by future technology.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule.

A certification under this Rule can only establish that the proffered item is authentic. The opponent remains free to object to admissibility of the item on other grounds. For example, in a criminal case in which data copied from a hard drive is proffered, the defendant can still challenge hearsay found in the hard drive, and can still challenge whether the information on the hard drive was placed there by the defendant.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

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III. Information Items

A. Symposium on the Hearsay Rule and Its Exceptions

The Committee is preparing a symposium to take place on the morning of its Fall meeting (Friday October 9) in Chicago, at the John Marshall School of Law. The Committee will be exploring recent proposals to loosen the strictures of the federal rule against hearsay. One proposal calls for broader admissibility of prior statements of testifying witnesses, on the ground that the declarant is by definition produced for trial and is under oath, and subject to cross-examination about the prior statement. The other proposal, made by Judge Posner, is to substitute most of the hearsay exceptions with an expanded version of Rule 807 (the residual exception) — meaning that the admissibility of hearsay would be dependent on a judge finding the statement reliable under the particular circumstances presented. The Committee is inviting judges, lawyers and professors to present information and recommendations at the symposium. The symposium proceedings will be published in the Fordham Law Review. As with the prior symposium on electronic evidence, the Committee hopes that the symposium will provide a foundation for future Committee recommendations regarding the hearsay rule and its exceptions.

B. Consideration of Proposal to Amend the Notice Provisions in the Federal Rules of Evidence

The Committee has recognized that there inconsistencies in the notice provisions of the Federal Rules of Evidence. Some notice provisions require notice by the time of trial, others require notice a certain number of days before trial, and some provide the flexible standard of enough time to allow the opponent to challenge the evidence. Moreover, while most of the notice provisions with a specific timing requirement provide an exception for good cause, the residual exception (Rule 807) does not. Other inconsistencies include the fact that Rule 404(b) requires the defendant to request notice from the government, while no such requirement is imposed in any other notice provision.

The Committee considered a proposal that more uniformity could be provided in two ways: 1) structure the notice provisions to require notice to be given before trial (or a number of days before trial) and include a good cause exception; or 2) structure the notice provisions to provide the more flexible standard that the proponent must provide reasonable notice so that the opponent would have enough time to challenge the evidence. The Committee extensively discussed the proposed changes, and determined that an attempt to make the notice provisions completely uniform should not be pursued. The Committee determined that some of the disuniformities may have been intentional, such as the requirement of 15 days' notice in Rules 413-415 (which were directly enacted by Congress); such substantive decisions should not be changed simply to make those provisions uniform with other notice provisions. Moreover, local rules provide notice requirements and there would be transaction costs if the national rules

are changed. Finally, any change to the notice rules could come with other unintended consequences.

The Committee did determine, however, that two provisions were problematic and should be changed, independently of any interest in uniformity. The two provisions are:

- Rule 404(b) conditions notice from the government on the defendant's request. A request requirement does not exist in any of the other notice provisions; and the Committee concluded that it is an unnecessary requirement that serves as a trap for the unwary. Most local rules require the government to provide notice as to Rule 404(b) material without regard to whether it has been requested. In many cases, notice is inevitably provided anyway when the government moves in limine for an advance ruling on admissibility of Rule 404(b) evidence. In other cases the request is little more than a boilerplate addition to a Rule 16 request. Committee members therefore determined that there was no compelling reason to retain the Rule 404(b) request requirement — and that an amendment to Rule 404(b) to limit that requirement should be considered even independently of any effort to provide uniformity to the notice provisions.

- Rule 807, the residual exception, requires pretrial notice, without any exception for good cause. This has led to a dispute in the courts about whether that exception should be read into the rule. A good cause exception is particularly necessary in Rule 807 for cases where a witness becomes unavailable after the trial starts and the proponent may need to introduce a hearsay statement from that witness. And it is particularly important to allow for good cause when it is a criminal defendant who fails to provide pretrial notice. On the merits, Committee members approved in principle the suggestion that a good cause requirement should be added to Rule 807, with or without any attempt to provide uniformity to the notice provisions.

The Committee will be considering formal proposals to amend Rules 404(b) and 807 at its next meeting.

C. Best Practices Manual on Authentication of Electronic Evidence

There are dozens of reported cases that set forth standards for authenticating electronic evidence. These cases apply the existing, flexible provisions on authenticity currently found in Federal Rules 901 and 902 and their state counterparts. The Committee has considered whether to draft new rules to govern authentication of electronic evidence. The Committee has decided that it will not at this time not to do so. The Committee concluded that amendments regulating authenticity of electronic evidence would end up being too detailed for the text of a rule; they could not account for how a court can and should balance all the factors relevant to authenticating electronic evidence in every case; and there was a risk that any factors listed would become outmoded by technological advances.

The Committee has, however, unanimously agreed that it can provide significant assistance to courts and litigants, in negotiating the difficulties of authenticating electronic evidence, by preparing and publishing a best practices manual. A best practices manual can be amended as necessary, avoiding the problem of having to amend rules to keep up with technological changes. It can include copious citations, which a rule or Committee Note could not. And it could be set forth in any number of formats, such as draft rules with comments, or all text with no rule. The Committee will be working with Greg Joseph and Judge Paul Grimm on a best practices manual that will be published by the Federal Judicial Center. Drafts have already been prepared and reviewed by the Committee on authentication of email. Drafts will be submitted for the next meeting on text messages and social media postings. In addition, Judge Grimm is preparing an introductory chapter that would discuss how Rules 104(a) and 104(b) interact when electronic evidence is authenticated.

D. Possible eHearsay (Recent Perceptions) Exception

At a previous meeting, the Committee decided not to approve a proposal that would add a hearsay exception intended to address the phenomenon of electronic communication by way of text message, tweet, Facebook post, etc. The primary reason stated for the proposed exception is that these kinds of electronic communications are an ill-fit for the standard hearsay exceptions, and that without the exception reliable electronic communications will be either be 1) excluded, or 2) admitted but only by improper application of the existing exceptions. The exception proposed was for "recent perceptions" of an unavailable declarant.

The Committee's decision not to proceed with the exception was mainly grounded in the concern that it would lead to the admission of unreliable evidence. The Committee did, however, resolve to continue to monitor the practice and case law on electronic evidence and the hearsay rule, in order to determine whether there is a real problem of reliable eHearsay either being excluded or improperly admitted by misapplying the existing exceptions. The Committee is also interested in determining how the recent perceptions exception was being applied in those few states that have adopted that exception.

At the Spring meeting, the Committee received valuable input from Professor Dan Blinka, an expert on evidence at Marquette Law School. Wisconsin is one of the states that applies the recent perceptions exception. Professor Blinka provided detailed analysis of how that exception was being applied in Wisconsin, and he also reported on a survey that he conducted in which Wisconsin state judges provided their input on the recent perceptions exception in particular and on treatment of electronic evidence more generally. Professor Blinka concluded that there was not much controversy over the application of the recent perceptions exception in Wisconsin; that it can and has been used to admit reliable electronic evidence; and that state Wisconsin state judges were generally satisfied with the application of the recent perceptions exception and its application to eHearsay.

The review on recent federal case law involving eHearsay indicates that there is no instance of reliable eHearsay being excluded, nor is it being improperly admitted under misinterpretations of other exceptions. Most eHearsay seems to be properly admitted as party-opponent statements, excited utterances, or state of mind statements. And many statements that are texted or tweeted are properly found to be not hearsay at all. The Committee will continue to monitor the treatment of eHearsay in the federal courts, and will also continue to review the practice in the states that employ a recent perception exception.

E. Crawford v. Washington and the Hearsay Exceptions in the Evidence Rules

As previous reports have noted, the Committee continues to monitor case law developments after the Supreme Court's decision in Crawford v. Washington, in which the Court held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to confront and cross-examine the declarant.

The Reporter regularly provides the Committee a case digest of all federal circuit cases discussing Crawford and its progeny. The goal of the digest is to enable the Committee to keep current on developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions. If the Committee determines that it is appropriate to propose amendments to prevent one or more of the Evidence Rules from being applied in violation of the Confrontation Clause, it will propose them for the Standing Committee's consideration.

IV. Minutes of the Spring 2015 Meeting

The draft of the minutes of the Committee's Spring 2015 meeting is attached to this report. These minutes have not yet been approved by the Committee.

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APPENDIX

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Appendix to Report to the Standing Committee from the Advisory Committee on Evidence Rules

May 2015

Rule 803. Exceptions to the Rule Against Hearsay --- Regardless of Whether the Declarant Is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

* * *

~~**(16)** ***Statements in Ancient Documents.*** A statement in a document that is at least 20 years old and whose authenticity is established.~~ **[Abrogated].**

Committee Note

The ancient documents exception to the rule against hearsay has been abrogated. The exception was based on the flawed premise that the contents of a document are reliable merely because the document is old. While it is appropriate to conclude that a document is *genuine* when it is old and located in a place where it would likely be — *see* Rule 901(b)(8) — it simply does not follow that the contents of such a document are truthful.

The ancient documents exception could once have been thought tolerable out of necessity (unavailability of other proof for old disputes) and by the fact that the exception has been so rarely invoked. But given the development and growth of electronically stored information, the exception has become even less justifiable and more subject to abuse. The need for an ancient document that does not qualify under any other hearsay exception has been diminished by the fact that reliable electronic information is likely to be available and will likely satisfy a reliability-based hearsay exception – such as Rule 807 or Rule 803(6). Thus the ancient documents exception is not necessary to qualify dated information that is reliable. And abuse of the ancient document exception is possible because unreliable electronic information could be easily accessible, and would be admissible under the exception simply because it has been preserved electronically for 20 years.

125-010964

Appendix to Report to the Standing Committee from the Advisory Committee on Evidence Rules

May 2015

Advisory Committee on Evidence Rules

Proposed Amendment: Rule 902(13)

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

* * *

(13) ***Certified Records Generated by an Electronic Process or System.*** A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11).

COMMITTEE NOTE

The amendment sets forth a procedure by which parties can authenticate certain electronic evidence other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and inconvenience of producing a witness to authenticate an item of electronic evidence

is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure under which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule. The intent of the Rule is to allow the authenticity foundation that satisfies Rule 901(b)(9) to be established by a certification rather than the testimony of a live witness.

A certification under this Rule can only establish that the proffered item has satisfied the admissibility requirements for authenticity. The opponent remains free to object to admissibility of the item on other grounds. For example, if a webpage is authenticated by a certificate under this rule, that authentication does not mean that the assertions on the webpage are admissible for their truth. It means only that the item is what the proponent says it is, i.e., a particular web page that was posted at a particular time. Likewise, the certification of a process or system of testing means only that the system described in the certification produced the item that is being authenticated.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

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Advisory Committee on Evidence Rules

Proposed Amendment: Rule 902(14)

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

* * *

(14) ***Certified Data Copied from an Electronic Device, Storage Media, or File.*** Data copied from an electronic device, storage media, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent also must meet the notice requirements of Rule 902(11).

Committee Note

The amendment sets forth a procedure by which parties can authenticate data copied from an electronic device, storage medium, or an electronic file, other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and inconvenience of producing an authenticating witness for this evidence is often unnecessary. It is often the case that a party goes to the expense of

producing an authentication witness, and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure in which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Today, data copied from electronic devices, storage media, and electronic files are ordinarily authenticated by "hash value." A hash value is a unique alpha-numeric sequence of approximately 30 characters that an algorithm determines based upon the digital contents of a drive, media, or file. Thus, identical hash values for the original and copy reliably attest to the fact that they are exact duplicates. This amendment allows self-authentication by a certification of a qualified person that she checked the hash value of the proffered item and that it was identical to the original. The rule is flexible enough to allow certifications through processes other than comparison of hash value, including by other reliable means of identification provided by future technology.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule.

A certification under this Rule can only establish that the proffered item is authentic. The opponent remains free to object to admissibility of the item on other grounds. For example, in a criminal case in which data copied from a hard drive is proffered, the defendant can still challenge hearsay found in the hard drive, and can still challenge whether the information on the hard drive was placed there by the defendant.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

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Advisory Committee on Evidence Rules

Minutes of the Meeting of April 17, 2015

New York, New York

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on April 17, 2015 at Fordham University School of Law.

The following members of the Committee were present:

Hon. William K. Sessions, Chair
Hon. Brent R. Appel (by phone)
Hon. Debra Ann Livingston
Hon. John T. Marten
Hon. John A. Woodcock, Jr.
Daniel P. Collins, Esq.
Paul Shechtman, Esq.
Elizabeth J. Shapiro, Esq., Department of Justice
A.J. Kramer, Esq., Public Defender

Also present were:

Hon. Jeffrey S. Sutton, Chair of the Committee on Rules of Practice and Procedure
Hon. Richard C. Wesley, Liaison from the Committee on Rules of Practice and Procedure
Hon. Paul S. Diamond, Liaison from the Civil Rules Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Kenneth S. Broun, Consultant to the Committee
James C. Duff, Director of the Administrative Office
Professor Daniel Coquillette, Reporter to the Standing Committee
Catherine R. Borden, Esq., Federal Judicial Center
Timothy Lau, Federal Judicial Center
Rebecca A. Womeldorf, Chief, Rules Committee Support Office
Professor Stephen A. Saltzburg, Representative of ABA Section of Criminal Justice
John Haried, Esq., Attorney, Department of Justice
Frances Skilling, Rules Committee Support Office

I. Opening Business

Welcoming Remarks

Judge Sessions welcomed everyone to the Committee meeting. He thanked Director Duff for attending the meeting and expressed the pleasure of everyone that Director Duff has returned to the Directorship of the Administrative Office. Director Duff stated that he was honored to be back at the AO and to work with the Committee.

Approval of Minutes

The minutes of the Fall, 2014 Committee meeting were approved.

January Meeting of the Standing Committee

Judge Sessions reported on the January meeting of the Standing Committee. The Evidence Rules Committee presented no action items at the meeting. Judge Sessions stated that he reported to the Standing Committee on the Committee's agenda on electronic evidence. He noted the positive response of Committee members on the proposals regarding ancient documents (Rule 803(16)) and self-authentication of certain electronic evidence (Rules 902(13) and (14)). He also noted support for the Committee's undertaking a project on the hearsay rule and admissibility of prior statements of testifying witnesses.

Judge Sessions and Judge Sutton reported on some of the pilot projects that were presented at the Standing Committee meeting. These pilot projects include voluntary disclosure, rocket dockets, and streamlined procedures in simpler cases.

FJC Video

The FJC has determined that a good way to instruct judges on rule amendments is to produce videos in which the Chair and Reporter of an Advisory Committee would discuss a recent amendment. The FJC asked Judge Sessions and Professor Capra to be the first to prepare such a video. The video covered the 2014 amendments to Evidence Rules 801(d)(1)(B) and Rules 803(6)-(8). That video is now accessible to judges on the FJC website. The video was played for members at the Committee meeting.

125-010976

II. Possible Amendment to Rule 803(16)

Rule 803(16) provides a hearsay exception for "ancient documents." If a document is more than 20 years old and appears authentic, it is admissible for the truth of its contents. At the Fall, 2014 meeting the Committee considered the Reporter's memorandum raising the possibility that Rule 803(16) should be abrogated or amended because of the development of electronically stored information. The rationale for the exception has always been questionable, because a document does not become reliable just because it is old; and a document does not magically become reliable enough to escape the rule against hearsay on the day it turns 20. The Reporter's memorandum noted that the exception has been tolerated because it has been used so infrequently, and usually because there is no other evidence on point. But because electronically stored information can be retained for more than 20 years, it is possible that the ancient documents exception will be used much more frequently in the coming years. And it could be used to admit only unreliable hearsay, because if the hearsay is in fact reliable it will probably be admissible under other reliability-based exceptions, such as the business records exception or the residual exception. Moreover, the need for an ancient documents exception is questionable as applied to ESI, for the very reason that there may well be a lot of *reliable* electronic data available to prove any dispute of fact.

At the Fall meeting, Committee members unanimously agreed that Rule 803(16) was problematic, as it was based on the false premise that authenticity of a document means that the assertions in the document are reliable. The Committee also unanimously agreed that an amendment would be necessary to prevent the ancient documents exception from providing a loophole to admit large amounts of old, unreliable ESI. But the Committee was divided on two matters: 1) whether an amendment was necessary at this point, given the fact that no reported cases have been found in which old ESI has been admitted under the ancient documents exception; and 2) which alternative for amendment should be chosen.

At the Committee's direction, the Reporter prepared a memorandum for the Spring meeting that provided four formal proposals for amending the rule. The proposals were: 1) abrogation; 2) limiting the exception to hardcopy; 3) adding the necessity requirement from the residual exception (Rule 807); and 4) adding the Rule 803(6) requirement that the document would be excluded if the opponent could show that the document was untrustworthy under the circumstances.

Committee discussion indicated that some members who had thought it unnecessary to amend Rule 803(16) at this time had changed their mind. Committee members raised the following arguments against retaining the current Rule 803(16):

● The exception, which is based on necessity, is in fact unnecessary because an ancient document that is reliable can be admitted under other hearsay exceptions, such as Rule 807 or Rule 803(6). In fact, the only case that the original Advisory Committee relied upon in support of the ancient documents exception was one in which the court found an old document admissible because it was reliable --- an analysis which today would have rendered it admissible as residual hearsay. So the only real "use" for the exception is to admit unreliable hearsay --- as has happened in several reported cases.

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● The exception can be especially problematic in criminal cases where statutes of limitations are not applicable, such as cases involving sexual abuse and conspiracy.

● Many forms of ESI have just become or are about to become more than 20 years old, and there is a real risk that substantial amounts of unreliable ESI will be stockpiled and subject to essentially automatic admissibility under the existing exception.

● The ancient documents exception is not a venerated exception under the common law. While the common law has traditionally provided for *authenticity* of documents based on age, the hearsay exception is of relatively recent vintage. Moreover, it was originally intended to cover property-related cases to ease proof of title. It was subsequently expanded, without significant consideration, to every kind of case in which an old document would be relevant. Thus, abrogating the exception would not present the kind of serious uprooting as might exist with other rules in the Federal Rules of Evidence.

● The ancient documents exception is based on necessity (lack of other proof), but where the document is necessary it will likely satisfy at least one of the admissibility requirements of the residual exception --- i.e., that the hearsay is more probative than any other evidence reasonably available. So if the document is reliable it will be admissible as residual hearsay --- and if it is unreliable it should be excluded no matter how "necessary" it is.

The discussion indicated general agreement that the Committee should act now to propose a change to Rule 803(16). The question then turned to which of the four proposals to adopt. There was no support for the proposal that would limit the exception to hardcopy, as the distinction between ESI and hardcopy would be fraught with questions and difficult to draw. For example, is a scanned copy of an old document, or a digitized version of an old book, ESI or hardcopy? As to the proposals to import either necessity or reliability requirements into the rule, Committee members generally agreed that they would be problematic because they would draw the ancient documents exception closer to the residual exception, thus raising questions about how to distinguish those exceptions.

The Committee concluded that the problems presented by the ancient documents exception could not be fixed by tinkering with it --- the appropriate remedy would be to abrogate the exception and leave the field to other hearsay exceptions such as the residual exception and the business records exception.

A motion was made and seconded to recommend to the Standing Committee that a proposal to abrogate Rule 803(16) be issued for public comment. That motion was approved unanimously.

The Committee approved the Committee Note prepared by the Reporter, with an additional suggestion that the Note emphasize that other hearsay exceptions (particularly Rules 807 and 803(6)) would be available to provide for admissibility of ancient documents that are reliable.

The Committee Note approved by the Committee provides as follows:

The ancient documents exception to the rule against hearsay has been abrogated. The exception was based on the flawed premise that the contents of a document are reliable merely because the document is old. While it is appropriate to conclude that a document is *genuine* when it is old and located in a place where it would likely be — *see* Rule 901(b)(8) — it simply does not follow that the contents of such a document are truthful.

The ancient documents exception could once have been thought tolerable out of necessity (unavailability of other proof for old disputes) and by the fact that the exception has been so rarely invoked. But given the development and growth of electronically stored information, the exception has become even less justifiable and more subject to abuse. The need for an ancient document that does not qualify under any other hearsay exception has been diminished by the fact that reliable electronic information is likely to be available and will likely satisfy a reliability-based hearsay exception – such as Rule 807 or Rule 803(6). Thus the ancient documents exception is not necessary to qualify dated information that is reliable. And abuse of the ancient document exception is possible because unreliable electronic information could be easily accessible, and would be admissible under the exception simply because it has been preserved electronically for 20 years.

III. Possible Amendments to the Notice Provisions in the Federal Rules of Evidence

The Committee considered a memo prepared by the Reporter on the inconsistencies in the notice provisions of the Federal Rules of Evidence. The Reporter's memo indicated that some notice provisions require notice by the time of trial, others require notice a certain number of days before trial, and some provide the flexible standard of enough time to allow the opponent to challenge the evidence. Moreover, while most of the notice provisions with a specific timing requirement provide an exception for good cause, the residual exception (Rule 807) does not. Other inconsistencies include the fact that Rule 404(b) requires the defendant to request notice from the government, while no such requirement is imposed in any other notice provision. Moreover, the particulars of what must be provided in the notice vary from rule to rule; and the rules also differ as to whether written notice is required.

The Reporter's memo suggested that more uniformity could be provided in two ways: 1) structure the notice provisions to require notice to be given before trial (or a number of days before trial) and include a good cause exception; or 2) structure the notice provisions to provide the more flexible standard that the proponent must provide reasonable notice so that the opponent would have enough time to challenge the evidence. The Reporter's memo also suggested that any attempt to provide uniformity to the notice provisions should not include Rule 412 (the rape shield rule) because the detailed notice and motion requirements in that rule are

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designed to protect privacy interests of rape victims, whereas none of the other notice provisions raise that sensitive issue.

The Committee extensively discussed the Reporter's memorandum, and the following points among others were made:

1) The absence of a good cause exception in Rule 807 was problematic and had led to a dispute in the courts about whether that exception should be read into the rule. A good cause exception is particularly necessary in Rule 807 for cases where a witness becomes unavailable after the trial starts and the proponent may need to introduce a hearsay statement from that witness. And it is particularly important to allow for good cause when it is a criminal defendant who fails to provide pretrial notice. On the merits, Committee members approved in principle the suggestion that a good cause requirement should be added to Rule 807, with or without any attempt to provide uniformity to the notice provisions.

2) The absence of a good cause exception in the text of Rule 807 may be due to the fact that Congress wanted the residual exception to be used only rarely, and so imposed strict procedural requirements on its invocation. But perhaps it is now time to consider whether the strictures of the residual exception --- both procedural and substantive --- should be loosened. Judge Posner has argued for an expansion of the coverage of the residual exception, so it might be a good idea to break out the residual exception from the rest of the rules with notice provisions, and to consider not only whether to add a good cause exception but also whether to loosen the standards of reliability and necessity found in the current Rule 807.

3) Judge Sutton contended that rules should not be changed simply for the purposes of uniformity, if substantive changes must be made to do so. Rather, the Committee should proceed rule by rule and determine whether the substantive requirements in any particular rule make sense and are working. He argued, for example, that the requirement of 15 days' notice in Rules 413-415 (which were directly enacted by Congress) may have been the result of a substantive decision that should not be changed simply to make those provisions uniform with other notice provisions. A member of the Committee speculated that the length of the notice provisions in Rules 413-15 may have been due to the fact that those rules are applicable mostly to litigation arising in Indian country, and so the specified time period may have been intended to account for special considerations in those locations. (Unfortunately there is no legislative history to indicate why Congress opted for the 15-day notice provision).

4) The DOJ representative stated that the Department is opposed to any attempt to provide uniformity in the notice provisions. She suggested that Congress might be concerned about changes to the Rules that it enacted directly --- i.e., Rules 413-415 --- and that any changes to those rules would not be worth the cost because they are so seldom used. She noted that local rules provide notice requirements and that there would be transaction costs if the national rules are changed. And she stated that any change to the notice rules could come with other unintended consequences.

5) A few Committee members objected to the proposal that the requirement of written notice should be deleted from the two rules that impose that requirement --- Rules 609(b) and 902(11). They noted that the requirement of a writing was a way of avoiding disputes as to whether notice was actually given. The Reporter responded that in those cases in which the opponent received actual notice but not written notice, the courts have excused the writing requirement anyway, so it is questionable whether having a requirement of written notice in a rule does anything more than impose litigation costs and a trap for the unwary. In any case, the Committee determined that the question that should be considered is whether written notice should be required in all the notice rules or none, and that this was a difficult question that required further consideration.

6) Committee members were in agreement that the request requirement in Rule 404(b) --- that the criminal defendant must request notice before the government is obligated to give it --- was an unnecessary requirement that serves as a trap for the unwary. The DOJ representative noted that most local rules require the government to provide notice as to Rule 404(b) material without regard to whether it has been requested. In many cases, notice is inevitably provided anyway when the government moves in limine for an advance ruling on admissibility of Rule 404(b) evidence. In other cases the request is little more than a boilerplate addition to a Rule 16 request. Committee members therefore determined that there was no compelling reason to retain the Rule 404(b) request requirement --- and that an amendment to Rule 404(b) to limit that requirement should be considered even independently of any effort to provide uniformity to the notice provisions.

In the end, the Committee agreed that amendments that would make the notice provisions more uniform raised a number of difficult questions that required further consideration. The Committee did determine, however, that any further consideration of uniformity in the notice provisions should exclude Rules 412-15. These rules could be justifiably excluded from a uniformity project because they were all congressionally-enacted, are rarely used, and raise policy questions on what procedural requirements should apply in cases involving sexual assaults.

The Reporter was directed to provide a memorandum to the Committee for the next meeting that would explore possible amendments to the remaining Rules that contained notice provisions --- Rules 404(b), 609(b), 807, and 902(11). Three of the proposals for possible amendment are independent from any interest in uniformity. They are:

- Deleting the requirement that notice be requested under Rule 404(b);
- Adding a good cause exception to Rule 807; and
- Broadening Rule 807 to admit more hearsay not covered by other exceptions.

Two of the proposals are grounded in uniformity. They are:

● Either adding a written notice requirement to Rules 404(b) and 807, or deleting the written notice requirement in Rules 609(b) and 807; and

● Amending Rules 609(b) and 902(11) to provide that notice must be provided before trial, but that pretrial notice can be excused for good cause --- i.e., to follow the same approach currently taken in Rule 404(b).

IV. Proposed Amendment to Rule 902 to Allow Certification of Authenticity of Certain Electronic Evidence

At its last meeting, the Committee approved in principle changes that would allow certain electronic evidence to be authenticated by a certification of a qualified person --- in lieu of that person's testimony at trial. The changes would be implemented by two new provisions added to Rule 902. The first provision would allow self-authentication of machine-generated information, upon a submission of a certificate prepared by a qualified person. The second proposal would provide a similar certification procedure for a copy of data taken from an electronic device, media or file. These proposals are analogous to Rules 902(11) and (12) of the Federal Rules of Evidence, which permit a foundation witness to establish the authenticity of business records by way of certification.

The proposals have a common goal of making authentication easier for certain kinds of electronic evidence that are, under current law, likely to be authenticated under Rule 901 but only by calling a witness to testify to authenticity. The Committee found that the types of electronic evidence covered by the two proposed rules are rarely the subject of a legitimate authenticity dispute, but it is often the case that the proponent is nonetheless forced to produce an authentication witness, incurring expense and inconvenience --- and often, at the last minute, opposing counsel ends up stipulating to authenticity in any event.

The self-authentication proposals, by following the approach taken in Rule 902(11) and (12) regarding business records, essentially leave the burden of going forward on authenticity questions to the opponent of the evidence. Under those rules a business record is authenticated by a certificate, but the opponent is given "a fair opportunity" to challenge both the certificate and the underlying record. The proposals for new Rules 902(13) and 902(14) would have the same effect of shifting to the opponent the burden of going forward (not the burden of proof) on authenticity disputes.

At the previous meeting, the Committee carefully considered whether the self-authentication proposals would raise a Confrontation Clause concern when the certificate of authenticity is offered against a criminal defendant. The Committee was satisfied that there would be no constitutional issue, because the Supreme Court has stated in *Melendez-Diaz v. Massachusetts* that even when a certificate is prepared for litigation, the admission of that certificate litigation is consistent with the right to confrontation if it does nothing more than authenticate another document or item of evidence. That is all that these certificates would be doing under the Rule 902(13) and (14) proposals. The Committee also relied on the fact that the lower courts had uniformly held that certificates prepared under Rules 902(11) and (12) do not

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violate the right to confrontation --- those courts have relied on the Supreme Court's statement in *Melendez-Diaz.* The Committee determined that the problem with the affidavit found testimonial in *Melendez-Diaz* was that it certified the accuracy of a drug test that was itself prepared for purposes of litigation. The certificates that would be prepared under proposed Rules 902(13) and (14) would not be certifying the accuracy of any contents or any factual assertions. They would only be certifying that the evidence to be introduced was generated by the machine (Rule 902(13)) or is data copied from the original (Rule 902(14)).

At the Committee's direction, the Reporter prepared formal proposals for amending Rule 902. The Committee reviewed the proposals at the meeting and provided a number of suggestions for improvement. Among them were:

● Clarifying, in proposed Rule 902(14) that what will be admitted through the certification is not a copy of an electronic device, but rather a copy of data taken from an electronic device.

● Streamlining the draft by tying the requirements of notice to those already set forth in Rule 902(11). This change had the added advantage that, if the notice provisions of Rule 902(11) were to be amended as part of a uniformity project, Rules 902(13) and (14) would not have to be changed.

● Streamlining the draft by tying the certification requirements to those already set forth in Rule 902(11) as to domestic certifications and Rule 902(12) as to foreign certifications.

● Adding material to the proposed Committee Note to Rule 902(13) to clarify that the goal of the amendment was a narrow one: to allow electronic information that would otherwise be established by a witness under Rule 901(b)(9) to be established through a certification by that same witness.

A motion was made and seconded to recommend to the Standing Committee that the proposed amendments to Rule 902, together with the proposed Committee Notes, be issued for public comment. The motion was unanimously approved by the Committee.

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Proposed Rule 902(13) as sent to the Standing Committee provides as follows:

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

* * *

(13) ***Certified Records Generated by an Electronic Process or System.*** A record generated by an electronic process or system that produces an accurate result, as shown by a certification by a qualified person that complies with the certification requirements of Rule 902(11) or Rule 902(12). The proponent must meet the notice requirements of Rule 902(11).

Proposed Committee Note to Rule 902(13)

The amendment sets forth a procedure by which parties can authenticate certain electronic evidence other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and inconvenience of producing a witness to authenticate an item of electronic evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure under which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule. The intent of the Rule is to allow the authenticity foundation that satisfies Rule 901(b)(9) to be established by a certification rather than the testimony of a live witness.

A certification under this Rule can only establish that the proffered item has satisfied the admissibility requirements for authenticity. The opponent remains free to object to admissibility of the item on other grounds. For example, if a webpage is authenticated by a certificate under this rule, that authentication does not mean that the

assertions on the webpage are admissible for their truth. It means only that the item is what the proponent says it is, i.e., a particular web page that was posted at a particular time. Likewise, the certification of a process or system of testing means only that the system described in the certification produced the item that is being authenticated.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

Proposed Rule 902(13) as sent to the Standing Committee provides as follows:

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

* * *

(14) ***Certified Data Copied From an Electronic Device, Storage Media or File.*** Data copied from an electronic device, storage media, or electronic file, if authenticated by a process of digital identification, as shown by a certification by a qualified person that complies with the certification requirements of Rule 902(11) or Rule 902(12). The proponent must meet the notice requirements of Rule 902(11).

Proposed Committee Note to Rule 902(14)

The amendment sets forth a procedure by which parties can authenticate data copied from an electronic device, storage medium, or an electronic file, other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and inconvenience of producing an authenticating witness for this evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness, and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure in which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Today, data copied from electronic devices, storage media, and electronic files are ordinarily authenticated by "hash value." A hash value is a unique alpha-numeric sequence of approximately 30 characters that an algorithm determines based upon the digital contents of a drive, media, or file. Thus, identical hash values for the original and copy reliably attest to the fact that they are exact duplicates. This amendment allows self-

authentication by a certification of a qualified person that she checked the hash value of the proffered item and that it was identical to the original. The rule is flexible enough to allow certifications through processes other than comparison of hash value, including by other reliable means of identification provided by future technology.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule.

A certification under this Rule can only establish that the proffered item is authentic. The opponent remains free to object to admissibility of the item on other grounds. For example, in a criminal case in which data copied from a hard drive is proffered, the defendant can still challenge hearsay found in the hard drive, and can still challenge whether the information on the hard drive was placed there by the defendant.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

V. Consideration of Prior Statements of Testifying Witnesses and the Rule Against Hearsay

For many years there has been a dispute over whether prior statements of testifying witnesses should be treated as hearsay when they are offered for their truth. The Federal Rules of Evidence treat such statements as hearsay, and provide for relatively narrow hearsay exceptions. The argument against treating prior witness statements as hearsay is that the declarant is on the stand testifying under oath and subject to cross-examination. Moreover, the prior statement is nearer in time to the event and so likely to be more reliable than trial testimony. And finally, admitting prior witness statements for substantive effect dispenses with the need to give a nonsensical instruction that the prior statement is admissible only for credibility purposes and not for its truth.

The Reporter prepared a memorandum for the Committee that raised the arguments both in favor of the current federal treatment and against it. The memorandum also described different approaches taken in some of the states. Finally, the memorandum discussed whether, if prior statements are to continue to be treated as hearsay, the current exceptions to the rule should be broadened . The most important question on this sub-question is whether the Congressional

limitation on substantive admissibility of prior inconsistent statements --- that they must have been made under oath at a former proceeding --- should be retained, limited, or abrogated.

At the meeting, the Reporter emphasized that there was no proposed amendment currently on the table. The treatment of prior statements of testifying witnesses under the hearsay rule is a complex question that has been debated for many years, and any proposed change would require significant study. The question for the Committee was whether a project to consider broader substantive admissibility of prior witness statements was worth undertaking. The Chair stated that the first step in that project would be to hold a symposium on the morning of the Fall 2015 Committee meeting in Chicago, at which scholars, judges and practitioners in the Chicago area could discuss these matters for the benefit of the Committee.

In discussion of the project, the Committee raised the following points among others:

● Most of the focus should be on prior inconsistent statements. The Committee has already expanded the substantive admissibility of prior consistent statements in the 2014 amendment to Rule 801(d)(1)(B). That amendment provides that a prior consistent statement is admissible when --- but only when – it properly rehabilitates the witness. Tying substantive admissibility to rehabilitation imposes an important limitation: that prior consistent statements should not be admissible if all they do is bolster the witness's credibility. That limitation also assures that parties will not try to generate prior consistent statements for trial. Thus, any further expansion of prior consistent statements will be problematic.

● The Committee should look at the practice in the states that did not adopt the Congressional limitation, i.e., where prior inconsistent statements are broadly admissible for substantive effect. The Reporter noted that Wisconsin is such a state and experts about the practice in Wisconsin can be invited to a symposium in Chicago. The Reporter also stated that he would provide information on the practice in the other states that admit prior inconsistent statements substantively without limitation.

● One concern with broader substantive admissibility of prior inconsistent statements is that they potentially could be found to provide sufficient evidence to convict a criminal defendant. The Committee should explore whether there might be limits on sufficiency that could be placed on substantively admissible prior inconsistent statements. Another possibility would be to expand substantive admissibility of prior inconsistent statements in civil cases only.

● Another concern from the criminal defense side is that if counsel impeaches a government witness with an inconsistent statement, there may be other assertions in that statement that could be used substantively. So any rule should take account of that risk.

● An oft-stated concern about admitting prior inconsistent statements is that the witness rendering the statement may just be making it up. That was at least one reason why Congress required that the prior statement be made at a formal hearing --- as there would then be no doubt that the statement was made. The Reporter noted, however, that the concern about fabricating the statement is not a hearsay concern, because the alleged fabricator is in court testifying under oath and subject to cross-examination that the statement was made. The Reporter also noted that

several states have rules with less stringent requirements than the Congressional limitation, designed to assure that the statement was actually made. For example, some states limit substantive admissibility to prior statements that are written or recorded. Illinois is one such state, and someone familiar with the Illinois practice could be invited to a symposium in Chicago.

● A project to consider expanding admissibility of prior witness statements might usefully be paired with a project that was discussed earlier in the meeting --- whether the residual exception should be amended to provide an easier road to admissibility for reliable statements that do not fit under standard hearsay exceptions. One Committee member noted that Judge Posner has advocated for a revision of the Federal Rules of Evidence that would scrap most or all of the hearsay exceptions in favor of a broadened version of the residual exception. The Chair remarked that if the Committee approved the idea of a symposium, there could be two panels --- one on prior witness statements and the other on the residual exception --- and that Judge Posner would be invited to make a presentation on his proposal.

The Committee approved the proposal that a symposium be held in Chicago on the morning of the Fall 2015 meeting. That symposium would contain two panels. Panel one would consider expansion of substantive admissibility of prior witness statements, with an emphasis on prior inconsistent statements. Panel Two would consider expansion of the residual exception.

VI. Best Practices Manual on Authentication of Electronic Evidence

At the Electronic Evidence Symposium in 2014, Greg Joseph made a presentation intended to generate discussion about whether standards could be added to Rules 901 to 902 that would specifically treat authentication of electronic evidence. There are dozens of reported cases that set forth standards for authenticating electronic evidence. These cases apply the existing, flexible provisions on authenticity currently found in Federal Rules 901 and 902 and their state counterparts. Greg crafted specialized authenticity rules to cover email, website evidence and texts; these draft rules were intended to codify the case law, as indicated by the extensive footnoted authority that Greg provided. At the Fall meeting, the Committee reviewed the draft rules to determine whether to propose them, along with any revisions, as amendments to Rule 901 and 902. The Committee decided that it would not propose extensive amendments to the authenticity rule to cover electronic evidence. Such proposals would end up being too detailed for the text of a rule; they could not account for how a court can and should balance all the factors relevant to authenticating electronic evidence in every case; and there was a risk that any factors listed would become outmoded by technological advances.

The Committee did, however, unanimously agree that it could provide significant assistance to courts and litigants, in negotiating the difficulties of authenticating electronic evidence, by preparing and publishing a best practices manual —along the lines of the work done by Greg Joseph in footnoting the support for his draft amendments. A best practices manual could be amended as necessary, avoiding the problem of having to amend rules to keep up with

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technological changes. It could include copious citations, which a rule could not. And it could be set forth in any number of formats, such as draft rules with comments, or all text with no rule.

At the Spring meeting, the Reporter submitted two preliminary drafts of best practices: authenticating email, and use of judicial notice. He informed the Committee that the FJC had already commissioned a best practices manual to be prepared by Greg Joseph and Judge Paul Grimm --- and they had both enthusiastically agreed to include the Committee on this project. When the project is completed, the Committee and the Standing Committee would then have to decide whether it should be designated as a Committee project or described in some other way.

The Reporter informed the Committee that the next drafts would cover social media postings, and would be submitted to the Committee for its next meeting. He also noted that Judge Grimm is preparing an introductory chapter that would discuss how Rules 104(a) and 104(b) interact when electronic evidence is authenticated.

VII. Recent Perceptions (eHearsay)

At the Fall meeting, the Committee decided not to approve a proposal that would add a hearsay exception intended to address the phenomenon of electronic communication by way of text message, tweet, Facebook post, etc. The primary reason stated for the proposed exception is that these kinds of electronic communications are an ill-fit for the standard hearsay exceptions, and that without the exception reliable electronic communications will be either be 1) excluded, or 2) admitted but only by improper application of the existing exceptions. The exception proposed was for "recent perceptions" of an unavailable declarant.

The Committee at the Fall meeting decided not to proceed with the recent perceptions exception, mainly out of the concern that the exception would lead to the admission of unreliable evidence. The Committee did, however, resolve to continue to monitor the practice and case law on electronic evidence and the hearsay rule, in order to determine whether there is a real problem of reliable hearsay either being excluded or improperly admitted by misapplying the existing exceptions. The Committee also expressed interest in determining how the recent perceptions exception was being applied in those few states that have adopted that exception.

At the Spring meeting, the Reporter submitted an extensive report that was graciously prepared by Professor Dan Blinka, an expert on evidence at Marquette Law School. Wisconsin is one of the states that applies the recent perceptions exception. Professor Blinka provided detailed analysis of how that exception was being applied in Wisconsin, and he also reported on a survey that he conducted in which Wisconsin state judges provided their input on the recent perceptions exception in particular and on treatment of electronic evidence more generally. Professor Blinka concluded that there was not much controversy over the application of the recent perceptions exception in Wisconsin; that it can and has been used to admit reliable electronic evidence; and that state Wisconsin state judges were generally satisfied with the application of the recent perceptions exception and its application to eHearsay.

The Reporter also submitted, for the Committee's information, a short outline on federal case law involving eHearsay. Nothing in the outline to date indicates that reliable eHearsay is being excluded, nor that it is being improperly admitted under other exceptions. Most eHearsay seems to be properly admitted as party-opponent statements, excited utterances, or state of mind statements. And many statements that are texted or tweeted are properly found to be not hearsay at all.

The Committee expressed its profound thanks to Professor Blinka. And the Committee asked the Reporter and Professor Broun to continue to monitor both federal and state case law to monitor how personal electronic communications are being treated in the courts.

VIII. *Crawford* Developments

The Reporter provided the Committee with a case digest and commentary on all federal circuit cases discussing *Crawford v. Washington* and its progeny. The cases are grouped by subject matter. The goal of the digest is to allow the Committee to keep apprised of developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions.

The Reporter's memorandum noted that the law of Confrontation continued to remain in flux. The Supreme Court has denied certiorari in a number of cases raising the question about the meaning of the Supreme Court's muddled decision in *Williams v. Illinois*: meaning that courts are still trying to work through how and when it is permissible for an expert to testify on the basis of testimonial hearsay. Moreover, the Supreme Court has recently heard arguments on a case involving whether statements made by a victim of abuse to a teacher are testimonial, when the teacher is statutorily required to report such statements. This forthcoming decision, together with the uncertainty created by *Williams* and other decisions, suggests that it is not appropriate at this point to consider any amendment to the Evidence Rules to deal with Confrontation issues. The Committee resolved to continue monitoring developments on the relationship between the Federal Rules of Evidence and the accused's right to confrontation.

VI. Next Meeting

The Fall 2015 meeting of the Committee is scheduled for Friday, October 9 in Chicago.

Respectfully submitted,

Daniel J. Capra

125-010990

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of May 28, 2015 | Washington, D.C.

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ATTENDANCE

The Judicial Conference Committee on Rules of Practice and Procedure held its spring meeting in Washington, D.C. on May 28, 2015. The following members participated in the meeting:

Judge Jeffrey S. Sutton, Chair
Dean C. Colson, Esq.
Associate Justice Brent E. Dickson
Roy T. Englert, Jr., Esq.
Gregory G. Garre, Esq.
Judge Neil M. Gorsuch
Judge Susan P. Graber (by teleconference)
Dean David F. Levi
Judge Patrick J. Schiltz
Judge Amy J. St. Eve
Larry D. Thompson, Esq.
Judge Richard C. Wesley
Judge Jack Zouhary

The following attended on behalf of the advisory committees:

Advisory Committee on Appellate Rules —
Judge Steven M. Colloton, Chair
Professor Catherine T. Struve, Reporter

Advisory Committee on Bankruptcy Rules —
Judge Sandra Segal Ikuta, Chair
Professor S. Elizabeth Gibson, Reporter

Advisory Committee on Civil Rules —
Judge David G. Campbell, Chair
Professor Edward H. Cooper, Reporter

Advisory Committee on Criminal Rules —
Judge Reena Raggi, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter

Advisory Committee on Evidence Rules —
Judge William K. Sessions III, Chair
Professor Daniel J. Capra, Reporter

The Honorable Sally Yates, Deputy Attorney General, represented the Department of Justice, along with Deputy Director for the Civil Division, Elizabeth J. Shapiro, Esq., Theodore Hirt, Esq., and Thomas Byron, Esq.

Other meeting attendees included: Professor R. Joseph Kimble, the Committee's style consultant; Judge Jeremy D. Fogel, Director of the Federal Judicial Center; Judge Michael A. Chagares, member of the Appellate Rules Advisory Committee and prior Chair of the CM/ECF Subcommittee; Judge John D. Bates, incoming Chair of the Advisory Committee on Civil Rules; Professor Troy A. McKenzie, former Associate Reporter for the Advisory Committee on Bankruptcy Rules.

Providing support to the Committee:

Professor Daniel R. Coquillette	Reporter, Standing Committee
Rebecca A. Womeldorf	Secretary, Standing Committee
Julie Wilson	Attorney, Rules Committee Support Staff
Scott Myers	Attorney, Rules Committee Support Staff
Bridget Healy	Attorney, Rules Committee Support Staff
Frances Skillman	Paralegal Specialist, Rules Committee Support Staff
Tim Reagan	Senior Research Associate, Federal Judicial Center
Emery G. Lee, III	Senior Research Associate, Federal Judicial Center

INTRODUCTORY REMARKS

Judge Sutton called the meeting to order, reviewed the agenda, and thanked those involved in providing logistical support.

Judge Sutton welcomed Deputy Attorney General Sally Yates to her first Standing Committee meeting and thanked Elizabeth Shapiro for arranging a meeting for Judge Sutton, Dan Coquillette and Rebecca Womeldorf with DAG Yates at the Department of Justice on May 27, 2015. DAG Yates spoke on the importance of the good working relationship between DOJ and the Rules Committees and her plans to participate in the rules process along with her colleagues.

Judge Sutton introduced Judge John Bates, immediate past-Director of the Administrative Office, and incoming Chair of the Civil Rules Advisory Committee, and shared the sad news of Dan Meltzer's passing. Members shared remembrances and observed a moment of silence.

Judge Sutton reported on the March 2015 Judicial Conference Session and on the proposed amendments adopted by the Supreme Court and transmitted to Congress on April 29, 2015. These amendments will become effective on December 1, 2015, absent contrary congressional action. The proposed amendments include: Bankruptcy Rule 1007; Civil Rules 1, 4, 16, 26, 30, 31, 33, 34, 37, 55; and abrogation of Rule 84 and the Appendix of Forms.

APPROVAL OF THE MINUTES OF THE LAST MEETING

Upon a motion by a member, seconded by another, and by voice vote: **The Committee approved its January 8-9, 2015 meeting minutes, with minor technical amendments as well as insertion of an additional paragraph on page 12 concerning the discussion of Multi-District Litigation cases.**

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raggi presented three action items. The first two items have been under consideration by the Advisory Committee since 2012, and were previously authorized for publication: Rule 4, which deals with service of criminal process, and Rule 41, which deals with the judicial district where search warrants can be sought. After consideration of public comments, the Advisory Committee now seeks final approval of Rules 4 and 41.

Amendments for Final Approval

FOREIGN SERVICE: FED. R. CRIM. P. 4 – Judge Raggi reported that the proposed rule contains two prongs regarding how foreign service may be accomplished:

(i) under 4(c)(3)(D)(i), by effecting service in a manner authorized by the foreign jurisdiction's law, or

(ii) under 4(c)(3)(D)(ii), by any other means that give notice, including one stipulated to by the parties, letters rogatory or a similar request submitted under an international agreement, or as otherwise permitted under an applicable international agreement.

Judge Raggi reported that comments received were generally favorable, and discussed one adverse comment filed by a U.S.-based law firm. Judge Raggi noted that the Advisory Committee considered, but declined to require, prior judicial approval before service of a criminal summons could be made in a foreign country by "other means" pursuant to 4(c)(3)(D)(ii). Judge Raggi offered the unanimous recommendation of the Advisory Committee to approve the proposed amendment as published.

The Committee discussed the proposal. One member commented on the strong need for the proposed amendment, citing the experience of having foreign corporations sending counsel to monitor proceedings in the United States who were not authorized to accept service.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendment to Rule 4 as published for submission to the Judicial Conference for final approval.**

VENUE: FED. R. CRIM. P. 41 – Judge Raggi next reported on the proposed amendment to Rule 41's territorial venue provisions. Rule 41's territorial venue provisions – which generally limit searches to locations within a district – create difficulties for the government when it investigates crimes where the location of the victim computer is known, but the source of the offending conduct is not known. Judge Raggi acknowledged the expectation that the government will investigate such crimes, and the Advisory Committee believed it better to give the government a venue to seek a warrant, rather than leaving the government to rely on allegations of exigent circumstances or harmless error after-the-fact.

Based on comments received, the Advisory Committee tailored its proposed amendment to address the two increasingly common situations in which the territorial or venue requirements now imposed by Rule 41(b) may hamper the investigation of serious federal crimes. The first scenario occurs when the

government seeks to search a particular computer with an unknown location, a situation increasingly common due to sophisticated anonymizing technologies that hide a perpetrator's true IP address, thus preventing agents from identifying the physical location and judicial district of the originating computer. Second, the government increasingly faces criminal schemes involving multiple computers located in multiple districts, such as the surreptitious infection of multiple computers with malicious software creating a "botnet" of compromised computers that operate under the remote control of an individual or group. Rather than going to every affected district, if the harm extends to five or more districts, the proposal would permit the government to apply for a warrant in any affected district.

The proposed rule generated many responses during the public comment period, including forty-four written comments from individuals and organizations, and the testimony of eight witnesses at the Advisory Committee's hearing in November 2014. Those opposing the amendment feared that the proposed rule relaxed the protections for personal privacy guaranteed by the Fourth Amendment. Multiple comments questioned whether remote searches could meet the Fourth Amendment's particularity requirement. Although the Advisory Committee believed that the proposed venue provision does not impact the duty to state with particularity the subject of a search, to address concerns the Advisory Committee added language to the Committee Note to emphasize that the amendment does not alter the government's Fourth Amendment obligations. The Advisory Committee also made plans to work with the Federal Judicial Center on judicial education. Judge Raggi explained that the revision to the caption of Rule 41, replacing "Authority to Issue a Warrant" with the new caption of "Venue for a Warrant Application" was intended to emphasize that the rule change was directed to venue only and did not substantively enlarge the "authority" to obtain a warrant, a misreading the old caption invited.

Judge Raggi explained that the amendment aims to mimic notice physical search requirements. The proposed amendment includes a change to Rule 41(f)(1)(C), which requires notice that a search has been conducted. The rule now requires that notice of a physical search be provided "to the person from whom, or from whose premises, the property was taken" or left "at the place where the officer took the property." The Advisory Committee recognized that when an electronic search is conducted remotely, it is not feasible to provide notice in precisely the same manner as when tangible property has been removed from physical premises, but reasonable efforts must nonetheless be made to provide notice to the person whose information was seized or whose property was searched.

After publication, the Advisory Committee added language to the Committee Note to explain the changes to the notice provisions and to respond to comments that criticized the proposed notice provisions as insufficiently protective. The addition draws attention to the other provisions of Rule 41 that preclude notice except when authorized by statute and provides a citation to the relevant statute.

The Advisory Committee voted to recommend the revisions to Rule 41 to the Committee, with one dissent. The dissenting member viewed the amendment as having important substantive effects, allowing judges to make ex parte determinations about core privacy concerns.

Discussion followed. One member pointed out that these searches are already being done. Although the amendment looks substantive, it simply articulates venue. The member commended Judge Raggi for taking a broad proposal from the government and narrowing it substantially to address the concerns

and comments raised. Another member spoke in support of the proposal, stating that the choice for the Committee was whether to establish a process rule or to leave the situation to Congress or to magistrates all over the country.

Another member spoke in favor of the amendment, but questioned the potential for forum shopping under the proposed rule. The Committee discussed the potential for forum shopping under any rule. DAG Yates talked about the availability of venue in more than one district under the current rules, and the benefit of the proposed amendment in allowing prosecution in the same district issuing the warrant.

Another member questioned the source of the proposal to allow a warrant to be sought in any affected district if five or more districts were impacted; why five? Judge Raggi acknowledged that the number was a compromise, and after the rule goes into effect experience with it may suggest that a different threshold would work better.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendment to Rule 41 as amended after publication, for submission to the Judicial Conference for final approval.**

Information Items

Electronic Filing – Judge Raggi noted that the Advisory Committee continues its work trying to make sure criminal rules for electronic filing parallel civil rules to the extent appropriate, while accounting for significant differences in criminal practice. A proposed amendment to the Civil Rules would mandate electronic filing, making no exception for pro se parties or inmates, but allowing exemptions for good cause or by local rule. The proposed Civil amendment was of particular concern to the Advisory Committee because Criminal Rule 49 now incorporates the Civil Rules governing service and filing. The Reporters for the various committees continue to examine these issues and coordinate on behalf of all the rules committees in search of common language that would work in various contexts. The Advisory Committee will benefit from the opportunity to study the provisions now under consideration by the Civil Rules Committee (as well as the Bankruptcy and Appellate Rules Committees), so that it can determine how best to revise the Criminal Rules.

Rule 35 – Judge Raggi briefed the Committee on a request to amend Rule 35 to bar appeal waivers before sentencing. The Advisory Committee declined to proceed with the proposal.

Judge Sutton acknowledged this meeting as the last for Judge Raggi as Chair of the Advisory Committee. Judge Sutton noted Judge Raggi's many years of excellent service on the rules committees, and particularly her work with the Rule 12 amendments, which spanned seven years, and which she guided to a consensus vote. Judge Sutton also praised Judge Raggi's sense of care about the important line of when to amend a rule, and when not to. Members voiced appreciation for Judge Raggi's service.

REPORT ON MULTI-COMMITTEE PROPOSAL TO AMEND "3-DAY RULE"

Amendments for Final Approval

COMPUTING AND EXTENDING TIME: FED. R. APP. P. 26(C), BANKRUPTCY RULE 9006(F), FED. R. CIV. P. 6(D), FED. R. CRIM. P. 45(C) – Judge Chagares provided background for the conclusion by the CM/ECF Subcommittee that the original basis for the "3-Day Rule" across various rules no longer applies in the computer age. The proposed parallel amendments to the civil, criminal, bankruptcy and appellate rules published for comment would abrogate the rule providing for an additional three days whenever service is made by electronic means. It reflects the CM/ECF Subcommittee's conclusion that the reasons for allowing extra time to respond in this situation no longer exist. Concerns about delayed transmission, inaccessible attachments, and consent to service have been alleviated by advances in technology and extensive experience with electronic transmission. Eliminating the extra three days would simplify time computation.

Professor Beale discussed Criminal Rule 45(c), and concerns specific to criminal practice about shortening the time for service. Members were concerned that the three added days were particularly important for criminal practitioners because speaking with incarcerated clients takes more time, particularly when clients are incarcerated in distant locations. Post publication, working from language proposed by DOJ, the Criminal Rules Advisory Committee endorsed an addition to the Committee Note that addresses the potential need to grant an extension of the time allowed for responding after electronic service. That new language has been added to the published Committee Note in each Committee's parallel proposal, as confirmed by Professor Cooper. It reads: "Electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice."

The Advisory Committee also agreed to amend the caption of Rule 45(c) published for comment to eliminate the additional words "Time for Motion Papers," and to revise Rule 45 as published so that the text is parallel to the language of the other rules, referring to action "within a specified time after *being served*" instead of "time after *service*."

The Chair noted that although the Advisory Committees other than the Criminal Rules Advisory Committee initially voted against the added Committee Note language, the concerns specific to the criminal context, as well as the desire for uniformity, outweighed the general preference against adding such language to committee notes.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved the proposed amendments to Appellate Rule 26, Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rule 45, as amended, for transmission to the Judicial Conference.**

REPORT OF THE ADVISORY COMMITTEE ON RULES OF EVIDENCE

Judge Sessions referenced the Advisory Committee's report, set out in the memorandum dated May 7, 2015, with attachments. Judge Sessions relayed the unanimous request of the Advisory Committee to

publish two proposed rules for comment, both of which received a positive reception at the last Committee meeting.

Amendments for Publication

ANCIENT DOCUMENTS: FED. R. EVIDENCE 803(16) – Rule 803(16)'s hearsay exception for "ancient documents" provides that a document 20 or more years old that appears authentic is admissible for the truth of its contents. Judge Sessions explained that the rule has always confused authentication and reliability, and has been used infrequently. The Advisory Committee considered whether Rule 803(16) should be abrogated or amended in light of the development of electronically stored information. Because electronically stored information can be retained for more than 20 years, we could very well see a flood of unreliable documents coming in under this rule.

The Advisory Committee considered four proposals for amending the rule. The proposals were: 1) abrogation; 2) limiting the exception to hardcopy; 3) adding the necessity requirement from the residual exception (Rule 807); and 4) adding the Rule 803(6) requirement that the document would be excluded if the opponent could show that the document was untrustworthy under the circumstances. The Advisory Committee unanimously concluded that Rule 803(16) should be abrogated, because it allows for the introduction of unreliable evidence. Evidence in ancient documents that is reliable can be admitted under other hearsay exceptions.

One member noted that the amendment might seem to some to be a substantial change, but it is not. While the rule at common law may have had a legitimate basis, no need for the exception now exists and authentication of documents traditionally thought of as ancient is still available under the rules.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved for publication for public comment the proposed abrogation of Rule 803(16), together with the Committee Note to explain the abrogation.**

AUTHENTICATION REQUIREMENTS: FED. R. EVIDENCE 902 – Judge Sessions next reviewed the proposed amendment to Rule 902 regarding authentication of electronic evidence. The Advisory Committee's ongoing study of the admissibility of electronic evidence has produced proposals to improve efficiency, including allowing certain electronic evidence to be authenticated by a certification of a qualified person in lieu of that person's testimony at trial. The Advisory Committee unanimously approved a proposal to add two new subdivisions to Rule 902, the rule on self-authentication. The first provision would allow self-authentication of machine-generated information, upon a submission of a certification prepared by a qualified person. The second proposal would provide a similar certification procedure for a copy of data taken from an electronic device, medium or file.

The proposals have a common goal of making authentication easier for certain kinds of electronic evidence that are, under current law, likely to be authenticated under Rule 901, but only by calling a witness to testify to authenticity. The Advisory Committee concluded that the types of electronic evidence covered by the two proposed rules are rarely the subject of a legitimate authenticity dispute, but it is often the case that the proponent is nonetheless forced to produce an authentication witness,

incurring expense and inconvenience – and often, at the last minute, opposing counsel ends up stipulating to authenticity in any event. The proposed change should bring cost savings to the process.

Professor Capra noted that the proposals should be viewed under the low level of proof required to show authenticity. The proposals reduce costs associated with requiring a live witness. One member noted that many proposals reflect an ongoing effort to grapple with electronic evidence. More than one member asked for clarification of the "process that produces an accurate result" language in the proposed amendment. One member noted the distinction between a declaration that says "this is what it purports to be" versus "this is an accurate result."

Professor Capra noted that the proposed language reflects language already in the rules. The proposal does not change the standard or the method of authentication under the rules; it simply allows the proponent to make the necessary showing by declaration as opposed to live testimony. One member suggested that examples in the Committee Note would help to avoid confusion.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved for publication for public comment the proposed amendment to Rule 902 to add subsections 902(13) and 902(14).**

At a later point in the meeting, Judge Sessions and Professor Capra offered an additional paragraph of language for the Committee Note accompanying the proposed amendment to Rule 902. The proposed paragraph provides two examples of what the rule covers, and what it does not. As Professor Capra explained, the examples to be added to the Committee Notes illustrate and emphasize the limited reach of the proposal; the certificate can be used only to show that the proffered item is authentic. Questions of reliability, hearsay, and probative value remain for the court and the factfinder. Subject to further comment from the Advisory Committee, Judge Sessions asked the Committee to approve the Committee Note as revised for publication. Several members voiced support for the revised Committee Note and stated the explanation would be helpful during the comment period.

Upon motion that the new language will be included in the Committee Note absent any further contrary input from the Advisory Committee, with a second, and on voice vote: **The Committee unanimously approved for publication for public comment the proposed revised Committee Note to accompany the proposed amendments to Rule 902.**

Information Items

Symposium on the Hearsay Rule and Its Exceptions – Judge Sessions reported that in conjunction with its Fall meeting on October 9, 2015, the Advisory Committee will hold a symposium on the hearsay rule at the John Marshall School of Law. The symposium will explore recent broad proposals to loosen the strictures of the federal rule against hearsay. Judge Posner has proposed to substitute most of the hearsay exceptions with an expanded version of Rule 807 (the residual exception) which render the admissibility of a hearsay statement dependent on a judicial finding of reliability under the particular circumstances presented. The symposium will include presentation of information and ideas by invited judges, lawyers and professors, and may provide a foundation for future recommendations regarding the hearsay rule and its exceptions.

Notice Provisions in the Federal Rules of Evidence – Judge Sessions noted that the Advisory Committee is thinking about addressing inconsistencies in the notice provisions of the Federal Rules of Evidence. Some notice provisions require notice by the time of trial, others require notice a certain number of days before trial, and some provide the flexible standard of enough time to allow the opponent to challenge the evidence. Two such provisions may be problematic, independently of any interest in uniformity. First, Rule 404(b) requires the defendant to request notice from the government, while no such requirement is imposed in any other notice provision. The Advisory Committee is inclined to abrogate that unnecessary requirement that serves as a trap for the unwary, particularly given that most local rules require the government to provide notice as to Rule 404(b) material without regard to whether it has been requested. Second, while most of the notice provisions with a specific timing requirement provide an exception for good cause, the residual exception (Rule 807) does not.

Best Practices Manual on Authentication of Electronic Evidence – To provide assistance to courts and litigants in negotiating the difficulties of authenticating electronic evidence, the Advisory Committee has begun work with Greg Joseph and Judge Paul Grimm on a best practices manual that will be published by the Federal Judicial Center.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Colloton reported on six sets of proposed amendments offered by the Advisory Committee on Appellate Rules for consideration by the Standing Committee for final approval.

Amendments for Final Approval

INMATE FILINGS: RULES 4(C)(1) AND 25(A)(2)(C), FORMS 1 AND 5, AND NEW FORM 7 – Judge Colloton first introduced the proposed amendments designed to clarify and improve the inmate-filing rules. After studying the matter since 2007, the Advisory Committee believes the rules should be clarified in light of concerns expressed about conflicts in case law and ambiguity in the current text. The amendments to Rules 4(c)(1) and 25(a)(2)(C) would make clear that prepayment of postage is required for an inmate to benefit from the inmate-filing provisions. The amendments clarify that a document is timely filed if it is accompanied by evidence – a declaration, notarized statement, or other evidence such as a postmark and date stamp – showing that the document was deposited on or before the due date and that the postage was prepaid. New Form 7 suggests a form of declaration that would satisfy Rules 4(c)(1) and 25(a)(2)(C). Forms 1 and 5 (suggested forms of notices of appeal) are revised to include a reference alerting inmate filers to the existence of Form 7. The amendments also clarify that if sufficient evidence does not accompany the initial filing, the court of appeals retains discretion to permit the later filing of a declaration or notarized statement to establish timely deposit.

Judge Colloton called the Committee's attention to several changes after publication. After publication, the Advisory Committee decided to abandon its prior proposal to delete the legal mail system requirement from Rules 4(c)(1) and 25(a)(2)(C). Research by Professor Struve and comments received convinced the Advisory Committee that retaining the requirement to use a legal mail system where available continues to serve a useful purpose by ensuring that mail is logged or date-stamped, thus avoiding unnecessary litigation over the timing of deposits. In addition, the Advisory Committee

revised proposed new Form 7, and the proposed amendments to Forms 1 and 5, to reflect comments received in an effort to make all three forms more user-friendly and to make the new form more accurate.

One member suggested clarifying Forms 1 and 5 by referring to "this" notice of appeal rather than "the" notice of appeal in the new notes to inmate filers; Judge Colloton accepted the suggestion as a friendly amendment. Another member questioned the procedure of relying upon convicted felons to swear under penalty of perjury as to the truth of their declarations as to timeliness. The Chair noted the tremendous variation among jurisdictions as to requirements. Judge Colloton observed that the Advisory Committee did not consider whether to require more by way of verification than the current federal rule, but that a litigant could challenge a suspicious verification.

Upon motion, duly seconded, on voice vote: **The Committee unanimously approved the proposed amendments to the inmate filing rules and related forms – Rules 4(c)(1) and 25(a)(2)(C), Forms 1 and 5, and new Form 7 – for submission to the Judicial Conference for final approval.**

TOLLING MOTIONS: RULE 4(a)(4) – Judge Colloton next reviewed the proposed amendment to Appellate Rule 4(a)(4) concerning tolling motions filed in the district court. Appellate Rule 4(a)(4) provides that "[i]f a party timely files in the district court" certain post-judgment motions, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." The question is whether a motion filed outside a non-extendable deadline under Civil Rules 50, 52, or 59 counts as "timely" under Rule 4(a)(4) if a district court mistakenly ordered an "extension" of the deadline for filing the motion, or if the opposing party did not object to the untimely filing. A majority of the circuits that have considered this question have ruled that such a motion is not "timely" for purposes of Rule 4(a)(4). The minority view holding otherwise stands in some tension with the Supreme Court's decision in *Bowles v. Russell*, which held that courts have no authority to create equitable exceptions to jurisdictional requirements.

The Advisory Committee feels that it is important to clarify the meaning of "timely" in Rule 4(a)(4) and that uniformity in this area is important. The proposed amendment adopts the majority view – *i.e.*, that post-judgment motions made outside the deadlines set by the Civil Rules are not "timely" under Rule 4(a)(4). Such an amendment would work the least change in current law.

After publication, one commenter argued that the proposed amended Rule, like the current version, sets a trap for unwary litigants, a concern discussed at length by the Advisory Committee in its deliberations. The Advisory Committee ultimately adhered to its judgment that the Rule should be amended to adopt the majority view. The Advisory Committee observed that the Committee Note includes examples to promote understanding of the Rule.

One member asked about the range of other options considered given the high percentage of cases litigated by pro se litigants and the reality that in a rare case a litigant's appeal could be dismissed as untimely even though the district court had allowed additional time for a motion. Judge Colloton discussed the policy choices faced by the Advisory Committee. Discussion followed concerning the factual scenario underlying the Supreme Court's decision in *Bowles*, where a district court told a litigant that the litigant had more time to appeal than the rule and statute actually permitted, and the

Supreme Court upheld the judgment of the Sixth Circuit finding the litigant's appeal untimely. The Advisory Committee's proposed rule would not change that result, and simply defines "timely." Discussion followed concerning possible ways to change the result in a *Bowles* scenario by rule.

Members discussed whether this is the rare instance where congressional amendment to the jurisdictional statute might be properly sought. One member noted in support of that possibility the growing number of pro se litigants and the change away from a system where most parties have lawyers. In light of the discussion, and at the request of a member of the Standing Committee, Judge Colloton agreed to put on the Advisory Committee's agenda further consideration of exceptions to appeal deadlines, whether by rulemaking or proposed legislation.

Upon motion, duly seconded, on voice vote: **The Committee unanimously approved the proposed amendment to Rule 4(a)(4) for submission to the Judicial Conference for final approval.**

LENGTH LIMITS: RULES 5, 21, 27, 28.1, 32, 35, AND 40, AND FORM 6 – Judge Colloton next reviewed the proposed amendments to Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6 – approved unanimously by the Advisory Committee after post-publication changes – that would affect length limits set by the Appellate Rules for briefs and other documents. The proposal would amend Rules 5, 21, 27, 35, and 40 to convert the existing page limits to word limits for documents prepared using a computer. For documents prepared without the aid of a computer, the proposed amendments would retain the page limits currently set out in those rules. The proposed amendments employ a conversion ratio of 260 words per page.

The genesis of this project was the suggestion that length limits set in terms of pages are subject to undesirable manipulation and in any event have been superseded by advances in technology. Given that briefs are already subject to type-volume limits, and that the Supreme Court employs type-volume limits, the Advisory Committee determined the suggestion was a sensible one, and embarked on selecting a conversion ratio from pages to words. The 1998 amendments transmuted the prior 50-page limit for briefs into a 14,000-word limit – that is, the 1998 amendments used a conversion ratio of 280 words per page. In formulating the published proposal, the Committee considered information that a traditional 50-page brief filed in the courts of appeals under the pre-1998 rules in fact contained fewer than 280 words per page.

As published for comment, the proposed amendments employed a conversion ratio of 250 words per page for Rules 5, 21, 27, 35, and 40. The published proposal also reduced Rule 32's word limits for briefs so as to reflect the pre-1998 page limits multiplied by 250 words per page – that is, 12,500 words for a principal brief. The proposals correspondingly reduced the word limits set by Rule 28.1 for cross-appeals. The published proposed amendments were subject to the local variation provision of Rule 32(e), which permits a court to increase the length limit by order or local rule. The published proposals add a new Rule 32(f) setting forth a list of items to be excluded when computing length.

Many appellate lawyers and certain judges opposed a reduction in the length limits for briefs, arguing principally that some complex appeals require 14,000 words. On the other hand, judges of two courts of appeals formally favored the proposal. Judges submitted public comments stating that unnecessarily long briefs interfere with the efficient and expeditious administration of justice. Appellate judges on

the Advisory Committee shared those concerns and reported informal input from judicial colleagues who expressed similar views. In reviewing the suggestion of commentators to withdraw the proposal, therefore, the Advisory Committee considered whether the federal rule should continue to require some courts of appeals to accept lengthy briefs that the courts say they do not need and do not want.

As noted, the Advisory Committee made several changes in an effort to address concerns, and the ultimate vote was unanimous in favor of the current proposal now before the Standing Committee. The amendments would reduce Rule 32's word limits for briefs so as to reflect the pre-1998 page limits multiplied by 260 words per page. The 14,000-word limit for a party's principal brief would become a 13,000-word limit; the limit for a reply brief would change from 7,000 to 6,500 words. The proposals correspondingly reduce the word limits set by Rule 28.1 for cross-appeals.

Any court of appeals that wishes to retain the existing limits, including 14,000 words for a principal brief, may do so under the proposed amendments. The local variation provision of existing Rule 32(e) would be amended to highlight a court's ability (by order or local rule) to set length limits that exceed those in the Appellate Rules.

The Standing Committee Liaison to the Appellate Rules Advisory Committee spoke in support of the compromise position, which was the result of a thorough, deliberative process, robust debate, and careful review of a considerable number of comments received. The process resulted in a compromise informed by voluminous comments received and many differing viewpoints.

One member expressed concern that the proposed changes attempt to solve a "non-problem" given the case-specific nature of whether a brief is too long, and this member also expressed reservations that the proposal builds lack of uniformity into the rules and invites motions for leave to file over-length briefs. This member agreed that the process was well-done and for that reason that member would not vote against the compromise but would likely abstain. Another member seconded concerns about uniformity and the difficulty of discouraging lengthy briefs by rule, but expressed support for the proposal because of strong belief that most briefs are too long.

Another member supported the proposal even though the member's circuit may opt out to avoid anticipated motions to file over-length briefs. As to concerns about lack of uniformity, lawyers can (and do) manage differences now. Circuits should not have to continue accepting briefs of a length that they think they do not need.

One member asked about the reaction of the appellate bar to the compromise proposal. Another member questioned how many circuits might opt out, and expressed concern about approving a rule when circuits might opt out. Judge Colloton declined to predict the reaction of the bar or what circuits would do. He noted that the proposal would go to the Judicial Conference, and the Chief Judges would be there and could react and express their views. Judge Colloton commented that the concerns voiced by members were considered carefully by the Advisory Committee, as they mirrored many comments received. On the uniformity point, Judge Colloton noted the absence of uniform length limits in the district courts.

Upon motion, duly seconded, on voice vote: **The Committee unanimously approved the proposed amendments related to length limits – Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6 – for submission to the Judicial Conference for final approval, with one abstention.**

One member of the Advisory Committee commended Judge Colloton for his handling of a difficult issue and brokering of compromise. Judge Sutton echoed praise for Judge Colloton and Professor Struve and for the process that produced the compromise. Professor Kimble noted his appreciation of the chart collecting length limits and encouraged similar efforts where appropriate. Judge Sutton endorsed the effort as one that improves access to justice, particularly for unrepresented litigants.

AMICUS FILINGS IN CONNECTION WITH REHEARING: RULE 29 – Judge Colloton next introduced the proposed amendment to Rule 29. The problem identified for the Advisory Committee was the absence of a national rule on timing and length of amicus briefs in support of a petition for rehearing. While some local rules do exist, given the uncertainty for practitioners, the Advisory Committee proposes amendments to establish default rules concerning timing and length of amicus briefs in connection with petitions for rehearing. The amendments would incorporate (for the rehearing stage) most of the features of current Rule 29. A circuit could alter the default federal rules on timing, length, and other matters by local rule or by order in a case. Either way, the new default federal rule would ensure that some rule governs the filings in every circuit. The published proposal would have set a time lag of three days between the filing of the petition and the due date of any amicus filings in support of the petition (or in support of neither party). Amicus opposing the petition would have the same due date as that set by the court for the response.

In response to the public comments, the Advisory Committee decided to change the length limit under Rule 29(b) from 2,000 words to 2,600 words and to change the deadline for amicus filings in support of a rehearing petition (or in support of neither party) from three days after the petition's filing to seven days after the petition's filing. The Advisory Committee also deleted the alternative line limit from the length limit as unnecessary.

One member spoke in favor of the proposal, noting his view that the selection of a particular length limit or filing deadline was not as important as providing practitioners definitive guidance. This member was one of the original proponents of addressing the issue through rulemaking.

Upon motion, duly seconded, on voice vote: **The Committee unanimously approved the proposed amendment to Rule 29 for submission to the Judicial Conference for final approval.**

RULE 26(C) – AMENDING THE "THREE-DAY RULE": RULE 26(C) – The Chair noted the approval of the proposed amendment to Rule 26(c) as part of the Committee's prior vote on the three-day rule package.

UPDATING A CROSS-REFERENCE IN RULE 26(a)(4)(C) – Judge Colloton next explained the proposal to amend Rule 26(a)(4)(C) to correct an outdated cross-reference. In 2013, Rule 13 – governing appeals as of right from the Tax Court – was revised and became Rule 13(a). A new Rule 13(b) – providing that Rule 5 governs permissive appeals from the Tax Court – was added. At that time, Rule 26(a)(4)(C)'s reference to "filing by mail under Rule 13(b)" should have been updated to refer to

"filing by mail under Rule 13(a)(2)." The Advisory Committee asks to amend Rule 26(a)(4)(C) to update this cross-reference with the understanding that the change is a technical amendment that can proceed to the Judicial Conference without publication upon approval from the Standing Committee.

Upon motion, duly seconded, on voice vote: **The Committee unanimously approved the proposed amendment to Rule 26(a)(4)(C) for submission to the Judicial Conference for final approval.**

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell addressed the intention to undertake an educational campaign concerning the Duke Rules Package approved by the Supreme Court, assuming that Congress allows the amendments to become effective December 1, 2015. These rules impact case management, discovery, and electronically-stored information, and they encourage greater cooperation. The lesson of rulemaking is that rule changes alone do not change behavior. Judge Paul Grimm, Discovery Subcommittee Chair, will lead the effort, which will include articles to be read by bench and bar, presentations at judicial conferences, preparation of materials for presentation at other conferences, videos, and more. The FJC will help to educate judges and publicize the benefits that can come with aggressive case management consistent with the anticipated rule changes. Judge Fogel explained that the FJC's primary focus will be on three areas: training of new judges, national conferences scheduled for district judges next year, and video educational opportunities. Judge Campbell solicited input, during the meeting and after, on these efforts and noted that the plans for the educational effort will be formed over the next six months or so, and that educational efforts will continue into 2016.

The Chair reported that DAG Yates offered DOJ as a resource for educational efforts. Members discussed options for undertaking educational efforts, including using the local and federal bar associations and taking advantage of trainings for new lawyers for admission to the federal bar.

Judge Campbell next turned to two minor rule changes as to which the Advisory Committee seeks final approval.

Amendments for Final Approval

RULE 4(m) – Judge Campbell introduced the proposed revision to Rule 4(m) referenced in the meeting materials. The Committee approved the August 2014 publication of a proposed amendment of Rule 4(m), adding service on an entity in a foreign country to the list in the last sentence that exempts service in a foreign country from the presumptive time limit set by Rule 4(m) for serving the summons and complaint. The amendment corrects a possible ambiguity that appears to have generated some confusion in practice. Service in a foreign country often is accomplished by means that require more than the time period specified in Rule 4(m). This problem is recognized by the two clear exceptions: for service on an individual in a foreign country under Rule 4(f), and for service on a foreign state under Rule 4(j)(1). The potential ambiguity arises from the lack of any explicit exception for service on a foreign corporation, partnership, or other unincorporated association, which the proposed amendment makes explicit.

RULE 6(d) – Judge Campbell noted the Advisory Committee's proposal regarding Rule 6(d) had been approved by the Committee.

RULE 82 – Judge Campbell referenced the Advisory Committee's last action item dealing with an amendment to Rule 82 to reflect the reality that one referenced statute no longer exists, and the venue statutes governing admiralty actions have been amended.

Upon motion, duly seconded, on voice vote: **The Committee unanimously approved the proposed amendments to Rules 4(m), 6(d), and 82 for submission to the Judicial Conference for final approval.**

Information Items

e-Rules – The Advisory Committee has been working toward publication of proposed rules on electronic filing, electronic service, and electronic certificates of service. There are dozens of provisions in the rules that would be affected, but there is a strong feeling that change is needed. Because continuing expansion of electronic communication binds these issues together, these drafts are presented as one package. There are issues that overlap the jurisdiction of other Advisory Committees, including whether and how to mandate electronic filing and service and how to treat pro se litigants. Detailed information on these topics is included in the meeting materials.

The discussion that followed surfaced the need for more detailed understanding of local court rules and standing orders regarding pro se electronic filing, both of which may vary substantially by jurisdiction. Other areas for exploration include the specifics of PACER use by pro se litigants, and potential issues of allowing access to those who are not officers of the court.

Rule 68 – The Advisory Committee continues to look at possible changes to Rule 68 – whether it should be revised to become more effective, left alone, or studied for abrogation. The Advisory Committee is examining state practices to see whether actual experience shows good results achieved under a different approach to offers of judgment.

Rule 23 Subcommittee – Judge Campbell reported that the Rule 23 Subcommittee chaired by Judge Dow has been very active and has made significant strides in identifying issues on which to focus and in exploring ideas about how rule changes might address those issues. The Subcommittee has participated in 15 events over the past six months and more are scheduled. The Advisory Committee hopes to suggest concrete proposals for publication at the Spring 2016 Standing Committee meeting.

Judge Campbell briefly reviewed the issues under consideration by the Subcommittee and invited suggestions about additional topics. Issues under consideration include: (1) settlement approval criteria; (2) settlement class certification and the wisdom of a new Rule 23(b)(4) permitting certification for purposes of settlement; (3) very challenging issue surrounding *cy pres* in class action settlements; (4) the role available to objectors in the class action settlement process, and the tricky task of writing a rule that facilitates "good" objectors while deterring "bad" objectors; (5) Rule 68 offers of judgment used to moot proposed class actions; (6) how issue classes should be managed; (7) a range of

notice issues, including possible substitution of e-notice for first-class mail, whether some form of notice should be required in (b)(1) or (b)(2) class actions, and other possible steps to make notice more effective and perhaps less expensive; (8) the concept of "frontloading," meaning the procedure to follow when the parties propose settlement before a class has been certified, so that the court has full information about the litigation and the proposed settlement to support a decision whether to give notice to the class of the proposed settlement and certification; and (9) the question of ascertainability.

The Chair noted the importance of identifying circuit splits that exist on the application and interpretation of Rule 23 and considering the potential for rulemaking in those areas, even if the Subcommittee declines to recommend pursuing certain issues through rulemaking.

The Subcommittee will host a Mini-conference on September 11, 2015 in Dallas, Texas, to explore potential amendments to Rule 23. The Subcommittee will invite 25 participants from diverse perspectives.

Requester Pays – As reflected in the Advisory Committee report, the Discovery Subcommittee continues to consider possible implementation of a "requester pays" system. Members of Congress asked the rules committees to continue to study this question. Information is being gathered to aid the Discovery Subcommittee chaired by Judge Grimm. The recent amendment package is important to the committee's consideration because like a "requester pays" regime, the proposed rule amendments aim to reduce the costs of civil litigation.

Manufactured Finality – These two projects of the Appellate-Civil Subcommittee began in the Appellate Rules Committee. In the end, the Civil Rules Committee voted, with one dissent, to advise the Appellate Rules Committee that the Civil Rules Committee does not believe that an effort should be made to draft rules to govern the many phenomena that can be characterized as "manufactured finality." The Advisory Committee concluded there is no need for national uniformity in this area, and each circuit is satisfied with its own rules.

Judge Colloton, speaking for the Appellate Rules Committee, said that although a member expressed concern about uniformity, the Committee had elected to table the matter for the time being, believing that any Rule amendment should originate in the Civil Rules Committee. Judge Sutton noted that having listened to discussion in both Advisory Committee meetings, there was not a consensus on a substantive direction to take if the rules committees were resolved to address the issue. If uniformity is a driver, perhaps the Supreme Court will resolve the issue.

Stays Pending Appeal – Subcommittee consideration of these questions is in mid-stream. One simple starting point in exploring Rule 62 was to ask whether Committee members have encountered difficulty as a result of the "gap" between expiration of the automatic Rule 62(a) stay – 14 days – and the time allowed to make the motions that support a stay under Rule 62(b) – which is 28 days. Lawyers are not reporting a problem; lawyers apparently are working this out among themselves. One question is what problems would result from extending the automatic stay to 28 or 30 days, and whether those problems would be alleviated if Rule 62 is amended to make clear the court's authority to modify or dissolve the automatic stay. The central point made in Advisory Committee discussion was that neither the judges nor the lawyers have encountered difficulties with stays of money

judgments pending appeal. Ordinarily the parties work out a reasonable solution. Judge Campbell solicited views from the Committee. One member questioned whether stating more explicitly the availability of a work around to obtaining a supersedeas bond would have the effect of discouraging use of those bonds.

Pilot Projects – The discussion of pilot projects at the January meeting of the Standing Committee stimulated further discussion of the opportunities to foster projects that will advance the base of empirical information that can be used in crafting improved rules of procedure. Judge Sutton addressed the desire to coordinate pilot project discussions with the CACM Committee and its current Chair Judge Hodges, and noted Judge St. Eve would be a great resource in a liaison role between the Rules Committees and CACM given her history of service on both.

Judge Sutton acknowledged the last meeting of Judge Campbell as Chair of the Civil Rules Advisory Committee and praised his decade of service to the rules committees, and his last four years as Chair of the Civil Rules Advisory Committee. He noted that Judge Campbell dealt effectively with all of the various cross currents of the Civil Rules Package, and, quite impressively, achieved unanimous consensus. The entire Civil Rules Package effort dignified the Rules Enabling Act process. Judge Campbell noted that the Civil Rules Package was a team effort.

LEGISLATIVE REPORT

Rebecca Womeldorf reported on legislation that may intersect with the work of the Committee, particularly the Advisory Committee on Civil Rules. Covered legislation included: patent legislation, the Lawsuit Abuse Reduction Act of 2015 ("LARA"), and the Fairness in Class Action Act of 2015. Discussion followed, particularly as to one aspect of potential patent legislation that would require designation of core versus non-core discovery, a topic that intersects with mandatory early disclosures and some of the issues discussed in connection with pilot projects under consideration. The ability of the rules committees to react in the case of legislative mandates was also discussed.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Ikuta recognized the tremendous service of Troy McKenzie as Associate Reporter to the Advisory Committee and wished him well in his new position with the Office of Legal Counsel at the Department of Justice.

Judge Ikuta summarized the action items from the Advisory Committee as seeking the Committee's final approval of one proposed new rule, four rule amendments, and the last major group of forms that were revised as part of the Forms Modernization Project ("FMP"). The Advisory Committee also seeks approval of one proposal for publication. Judge Ikuta noted that none of the committee's action items was controversial, and referred to the Advisory Committee report and appendices for additional detail on the proposals and the forms.

Amendments for Final Approval

RULES 1010, 1011, AND 2002, AND PROPOSED NEW RULE 1012 (GOVERNING RESPONSES TO, AND NOTICES OF HEARINGS ON, CHAPTER 15 PETITIONS FOR RECOGNITION, ALONG WITH NEW OFFICIAL FORM 401) – The Advisory Committee asks for final approval as published of these amendments and additions to the Bankruptcy Rules, which are part of a project to improve procedures for international bankruptcy cases and to give those rules their own "home" in the Bankruptcy Rules. The Bankruptcy Rules were amended in response to the 2005 amendments to the Bankruptcy Code to insert new provisions governing cross-border cases. Among the new provisions were changes to Rules 1010 and 1011, which previously governed only involuntary bankruptcy cases, and Rule 2002, which governs notice. The currently proposed amendments to the Bankruptcy Rules would make three changes: (i) remove the chapter 15 related provisions from Rules 1010 and 1011; (ii) create a new Rule 1012 (Responsive Pleading in Cross-Border Cases) to govern responses to a chapter 15 petition; and (iii) augment Rule 2002 to clarify the procedures for giving notice in international bankruptcy cases. The proposed Official Form 401 is a new petition form for commencing chapter 15 international cases. None of these changes generated any opposition.

Upon motion, duly seconded, on voice vote: **The Committee unanimously approved the proposed amendment to Rules 1010, 1011, and 2002, and proposed new Rule 1012, along with new official Form 401, for submission to the Judicial Conference for final approval.**

RULE 3002.1 (ALONG WITH OFFICIAL FORM 410A) – The Advisory Committee proposes a change to Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence) to ensure that debtors who attempt to maintain their home mortgage payments while they are in bankruptcy will have the information they need to do so. Rule 3002.1, which applies only in chapter 13 cases, requires creditors whose claims are secured by a security interest in the debtor's home to provide the debtor and the trustee notice of any changes in the periodic payment amount or the assessment of any fees or charges during the bankruptcy case. The proposed change clarifies how the rule applies in various scenarios on which courts have disagreed. An accompanying change to Form 410A requires a creditor to provide loan payment history information to the debtor in a format that is both more beneficial to the debtor and easier for the creditor to prepare.

Upon motion, duly seconded, on voice vote: **The Committee unanimously approved the proposed amendment to Rule 3002.1, along with official Form 410A, for submission to the Judicial Conference for final approval.**

RULE 9006(f) (ELIMINATING THE 3-DAY RULE FOR ELECTRONIC FILING) – Judge Ikuta noted prior approval by the Committee, along with similar amendments to other rules.

FORMS MODERNIZATION PROJECT – Judge Ikuta announced the final set of forms from the Advisory Committee's Forms Modernization Project (FMP) was ready for consideration, along with minor revisions to modernized forms previously approved by the Committee.

Judge Ikuta explained one issue regarding the effective date of the modernized forms. When the FMP effort began, it was anticipated that the new forms would go into effect at approximately the same time

as bankruptcy courts began using the redesigned case management system, known as the Next Generation of CM/ECF (NextGen). A goal of NextGen is to capture and store all material individual pieces of data used to complete bankruptcy forms so that users such as the court and clerk's office can prepare customized reports, putting the data in any order the user wants.

Although the FMP developed the modernized forms in a manner that would facilitate data collection by the NextGen case management system, the roll-out of NextGen is proceeding more slowly than expected. Under the current schedule, by the end of 2015 no more than a handful of bankruptcy courts will be on the NextGen case management system. The AO estimates that by December 2016, NextGen will have the capacity to capture and store all of the data elements from forms filed by individual debtors using the modernized forms (about 70 percent of bankruptcy cases). By December 2017, the AO estimates that the NextGen case management system will be able to capture and store all of the data elements by all debtors using the modernized forms.

Notwithstanding the delays in the implementation of NextGen, the Advisory Committee at its spring meeting voted unanimously to seek a December 1, 2015 effective date for the modernized and renumbered forms. Several considerations support that decision. First, the FMP has produced a set of vastly improved, user-friendly forms that will be a benefit to the bankruptcy community (including *pro se* filers) even without the extra capability with the NextGen system. Second, if the modernized forms take effect on December 1, 2015, the AO will be able to build a backend database that will store the information from the modernized forms, rather than the old forms. This approach will not prevent the AO from capturing the 80 data points required by the 2005 bankruptcy legislation.

Judge Ikuta noted one wrinkle to implementing the modernized forms in 2015, and sought the guidance of the Committee. The United States Bankruptcy Court for the District of New Jersey developed a program that lets *pro se* filers use what is essentially a Turbo Tax-like system to complete and file a chapter 7 bankruptcy case electronically. This concept, which was further developed by the court and the AO, is named the electronic self-representation (eSR) pathfinder program. The courts that have implemented this eSR program emphasize its importance as an access-to-justice project. The eSR program is linked to the current chapter 7 case opening forms. The eSR data-entry screens and database will not work with modernized forms. The AO estimates that by 2017 eSR will work with the new forms.

Because the Advisory Committee concluded that the modernized forms should go into effect generally on December 1, 2015, but without disrupting the already established eSR pilot projects, it asked the Standing Committee to seek approval of the following from the Judicial Conference:

a. To make the forms effective December 1, 2015.
b. To allow the Advisory Committee to continue to make minor typo-type changes to these forms even after Committee approval.
c. To recommend to the Judicial Conference that it allow specified chapter 7 case-opening forms to continue to be official forms for the eSR program in the Central District of California, New Jersey, and New Mexico bankruptcy courts until 2017.

One member observed this proposal was consistent with the implementation of NextGen and was the right recommendation under the circumstances.

One member noted the fortuity of having the clerk of the New Jersey bankruptcy court on the committee, and thanked the clerk for his valuable input.

Another member questioned the wisdom of specifying an effective date as opposed to leaving the provision open ended; after discussion, the member who raised the question moved the proposal as written to keep the hard target date.

Upon motion, duly seconded, on voice vote: **The Committee unanimously approved the Advisory Committee's request to ask the Judicial Conference: to authorize the modernized forms as effective December 1, 2015; to allow the Advisory Committee to make minor, non-substantive revisions to the official forms before submitting them to the Judicial Conference; and to allow specified case-opening forms in effect on November 30, 2015 to remain official forms until December 1, 2017, in the United States Bankruptcy Courts for the Central District of California, the District of New Jersey, and the District of New Mexico, only for use by pro se debtors who initiate a chapter 7 case by using the court's Electronic Self-Representation system.**

Amendment for Publication

RULE 1006(6)(1) – The provision provides for the payment of the bankruptcy filing fee in installments, as authorized for individual debtors by 28 U.S.C. § 1930(a). In order to clarify that courts may not refuse to accept petitions or summarily dismiss cases for failure to make initial installment payments at the time of filing, the Committee is proposing an amendment to Rule 1006(b)(1). The amendment is intended to emphasize that an individual debtor's petition must be accepted for filing so long as the debtor submits a signed application to pay the filing fee in installments and even if a required initial installment payment is not made at the same time. The Committee Note explains that dismissal of the case for failure to pay any installment must proceed according to Rule 1017(b)(1).

Upon motion, duly seconded, on voice vote: **The Committee unanimously approved for publication for public comment the proposed amendment to Rule 1006(b)(1).**

Information Items

Stern Amendments in Light of *Wellness v. Sharif* – Judge Ikuta reported on the Supreme Court's decision in *Wellness v. Sharif*, which held that if parties consent, bankruptcy judges can resolve claims otherwise reserved to Article III judges. The Court held that implied consent may satisfy the consent requirement, but that an express-consent approach may be easier to implement. Judge Ikuta reported that the Advisory Committee would reconsider at its Fall 2015 meeting its pending *Stern* amendments – which required express consent and had been held in abeyance pending the Court's decision in *Wellness*. Discussion followed concerning the timing of submissions to the Court.

Chapter 13 Plan Form – Judge Ikuta next reported on the status of the committee's multi-year project to create an official chapter 13 plan form. The proposal was initially published in August 2013, and re-

published in August 2014 after revision in response to substantial comments received. Again, the Advisory Committee received many comments, most in opposition, and with one opposition signed by 40% of the bankruptcy bench. After reviewing the comments on the proposed chapter 13 plan form, the Committee determined that there is still significant opposition to this new form, and it voted not to seek final approval of the form and related rule amendments at this time. Instead, the Advisory Committee intends to give further consideration to a compromise proposal, suggested by a group of commenters, that would allow a district to opt out of the mandatory national form if it adopts a single local chapter 13 plan form that meets certain nationally mandated requirements.

Discussion followed concerning the decision to develop a compromise proposal to allow a district to opt out of using a national chapter 13 plan form if the district adopted a single local plan form that met certain criteria, which will be considered at the Advisory Committee's October 2015 meeting. The Advisory Committee is considering whether such a revised approach would require republication, given that variations on the proposed form had gone through two rounds of publication already. While the Advisory Committee has discussed this issue, it decided to defer making the decision about republication until the October 2015 meeting pending more feedback from the bankruptcy community.

Discussion of the merits of republication followed, including the implications of republication on the Rules Enabling Act process.

CONCLUDING REMARKS

Judge Sutton expressed gratitude and farewell to outgoing members Dean Colson and Judge Levi. Judge Sutton also recognized the 30th anniversary of service to the Committee by Professor Coquillette.

Judge Sutton concluded the meeting and announced that the Committee will next convene on January 7-8, 2016 in Phoenix, Arizona.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary

Agenda E-19 (Summary)
Rules
September 2015

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

1. Approve the proposed amendments to Appellate Rules 4, 5, 21, 25, 26, 27, 28, 28.1, 29, 32, 35, and 40, and Forms 1, 5, and 6, and proposed new Form 7, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law. . . . . pp. 2-8

2. a. Approve the proposed amendments to Bankruptcy Rules 1010, 1011, 2002, 3002.1, 9006(f), and new Rule 1012, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law;

   b. Approve the proposed revisions to Official Forms 1, 2, 3A, 3B, 4, 5, 6Sum, 6A-J and declaration, 7, 8, 9A-I, 10, 10A, 10S-1, 10S-2, 12, 13, 14, 15, 16A, 16B, 16D, 17A-C, 18, 19, 21, 22A-1, 22A-1Supp, 22A-2, 22B, 22C-1, 22C-2, 23, 24, 27 as renumbered in the Forms Number Conversion Chart on pages 40-42 of Appendix B, and the abrogation of Official Forms 11A and 11B, to take effect on December 1, 2015, and that they govern in all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings then pending, except to the limited extent described below; and

   c. Allow that the following forms in effect on November 30, 2015, remain Official Forms until December 1, 2017, in the United States Bankruptcy Courts for the Central District of California, the District of New Jersey, and the District of New Mexico, only for use by pro se debtors who initiate a chapter 7 case by using the court's Electronic Self-Representation system: Official Form 1, Official Forms 6Sum, 6A-J and declaration, Official Form 7; Official Form 8; and Official Forms 22A-1, 22A-1Supp, and 22A-2 . . . . . pp. 8-18

3. Approve the proposed amendments to Civil Rules 4, 6, and 82, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law . . . . . pp. 20-22

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

4. Approve the proposed amendments to Criminal Rules 4, 41, and 45, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law . . . . . pp. 23-27

The remainder of this report is submitted for the record and includes the following items for the information of the Judicial Conference that do not require action:

- Federal Rules of Bankruptcy Procedure . . . . . pp. 18-20
- Federal Rules of Evidence. . . . . pp. 27-29
- Other Matters. . . . . .p. 30

Agenda E-19
Rules
September 2015

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure (the "Standing Committee") met on May 28, 2015, in Washington, D.C. All members participated.

Representing the advisory rules committees were Judge Steven M. Colloton, Chair, Professor Catherine T. Struve, Reporter, and Professor Daniel J. Capra, Associate Reporter, of the Advisory Committee on Appellate Rules; Judge Sandra Segal Ikuta, Chair, and Professor S. Elizabeth Gibson, Reporter, of the Advisory Committee on Bankruptcy Rules; Judge David G. Campbell, Chair, and Professor Edward H. Cooper, Reporter, of the Advisory Committee on Civil Rules; Judge Reena Raggi, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, of the Advisory Committee on Criminal Rules; Judge William K. Sessions III, Chair, and Professor Daniel J. Capra, Reporter, Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Daniel R. Coquillette, the Committee's Reporter; Judge Michael A. Chagares, Chair of the Committee's CM/ECF Subcommittee and member of the Advisory Committee on Appellate Rules; Professor R. Joseph Kimble, consultant to the Committee; Rebecca A. Womeldorf, the Committee's Secretary and Rules Committee Officer; Julie Wilson, Scott Myers, and Bridget M. Healy, Attorneys on the Rules Committee

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

Support Staff; Judge Jeremy D. Fogel, Director, Dr. Tim Reagan, and Dr. Emery G. Lee, of the Federal Judicial Center. David Bitkower, H. Thomas Byron III, Theodore Hirt, Elizabeth J. Shapiro, and Allison Stanton attended on behalf of the Department of Justice.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules and Forms Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 4, 5, 21, 25, 26, 27, 28.1, 29, 32, 35, and 40, and Forms 1, 5, and 6, and a proposed new Form 7, with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments were circulated to the bench, bar, and public for comment in August 2014, and were offered for approval as published except as noted below.

Inmate-Filing Rules

Rules 4(c)(1) and 25(a)(2)(C), Forms 1 and 5, and new Form 7. Proposed amendments to Rules 4(c)(1) and 25(a)(2)(C), and Forms 1 and 5, and proposed new Form 7, are designed to clarify and improve the inmate-filing rules. Proposed amendments to Rules 4(c)(1) and 25(a)(2)(C) make clear that prepayment of postage is required for an inmate to benefit from the inmate-filing provisions. The amendments further clarify that a document is timely filed if it is accompanied by evidence—a declaration, notarized statement, or other evidence such as postmark and date stamp—showing that the document was deposited on or before the due date and that postage was prepaid. New Form 7 is a suggested form of declaration. Forms 1 and 5, which are suggested forms of notices of appeal, are revised to include a reference alerting inmate filers to the existence of new Form 7. The amendments also clarify that if sufficient evidence does not accompany the initial filing, then the court of appeals may permit the later filing of a declaration or notarized statement to establish timely deposit.

The Advisory Committee received seven comments on this proposal. Commentators were divided on the published proposal to delete the requirement in Rules 4(c)(1) and 25(a)(2)(C) that an inmate use the institution's legal mail system (if one is available) in order to receive the benefit of the inmate-filing rules. After considering the comments and conducting further research, the Advisory Committee decided to abandon its proposal to delete the legal-mail-system requirement from Rules 4(c)(1) and 25(a)(2)(C). The Advisory Committee also made several post-publication technical improvements to the Forms.

Appeal Time After Post-judgment Motions

Rule 4(a)(4). A circuit split exists regarding whether a motion filed within a purported extension of a non-extendable deadline under Civil Rules 50, 52, or 59 counts as timely filed under Appellate Rule 4(a)(4). Rule 4(a)(4) provides that certain "timely" post-judgment motions restart the time to take a civil appeal. The proposed amendment addresses the split by adopting the majority view. Under the proposed rule, a motion restarts the time for taking an appeal only if it is filed within the time allowed by the Rules of Civil Procedure.

Rule 4(a)(4) provides that "[i]f a party timely files in the district court" certain post-judgment motions, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." Five circuits have held that a motion is "timely" only if it is filed within the deadline set by the rules. One circuit, however, ruled that if a district court mistakenly extends the time for filing a post-judgment motion (contrary to the prohibition in Civil Rule 6(b)), then the motion is "timely" for purposes of Rule 4(a)(4).

Given the conflict in authority, the Advisory Committee determined to clarify the meaning of Rule 4(a)(4). The proposed amendment adopts the majority view that post-judgment motions made outside the deadlines set by the Civil Rules do not restart the appeal time under

Rule 4(a)(4). This rule ensures a uniform deadline for post-judgment motions and sets a definite point in time when litigation will end. The Advisory Committee also was concerned that the minority approach taken by one circuit was "uncomfortably close" to the "unique circumstances" doctrine that the Supreme Court disapproved in *Bowles v. Russell*, 551 U.S. 205, 214 (2007). *See Blue v. Int'l Bhd. of Elec. Workers Local Union 159*, 676 F.3d 579, 583 (7th Cir. 2012).

Five of six comments received on this proposal were supportive. The Advisory Committee discussed the concerns raised by the one objector, but ultimately adhered to its initial determination to amend the rule to adopt the majority view. No changes were made following publication.

Length Limits

Rules 5, 21, 27, 28, 28.1, 32, 35, and 40, and Form 6. The proposed amendments affect length limits set by the Appellate Rules for briefs and other documents. The Advisory Committee first addressed length limits that are expressed in page limits. The committee believed that these limits have been overtaken by technology and are vulnerable to manipulation. While considering how to convert page limits to word limits, the committee also examined the present length limit for briefs. The length limit for principal briefs was converted from 50 pages to 14,000 words in 1998. Members of the judiciary have expressed concern that briefs filed under the current limit are too long. Others have questioned whether the 14,000-word limit (which reflects a conversion ratio of 280 words per page) is an accurate translation of the traditional fifty-page limit.

The proposal amends Rules 5, 21, 27, 35, and 40 to convert the existing page limits to word limits for documents, other than briefs, that are prepared using a computer. The amendment uses a conversion ratio of 260 words per page in order to approximate traditional

volume and to avoid increasing the length of documents such as motions, petitions for rehearing, and petitions for permission to appeal. For documents prepared without a computer, the proposed amendments retain the current page limits.

The proposed amendment to Rule 32 amends the word limits for briefs to reflect the pre-1998 page limits multiplied by 260 words per page. As a result, the current 14,000-word limit for a party's principal brief would become a 13,000-word limit; the word limit for a reply brief would change from 7,000 to 6,500 words. The proposal correspondingly reduces the word limits set by Rule 28.1 for cross-appeals.

New Rule 32(f) sets out a uniform list of the items that can be excluded when computing a document's length. A new appendix collects in one chart all length limits stated in the Appellate Rules. Form 6 concerning certificates of compliance is amended to account for the proposed amendments to length limits.

Under the proposal, a court of appeals that wants to retain the existing word limits for briefs may do so by local rule or by order in a case. The local variation provision of existing Rule 32(e) is amended to highlight a court's authority to do so. Unlike the present rule, however, the proposal does not require a court of appeals that prefers the amended limits to accept longer briefs that judges believe are burdensome and unnecessary.

The Advisory Committee received a large number of public comments in response to the proposed amendments. The committee also received testimony from four appellate lawyers during a public hearing. As published, the proposal would have employed a conversion ratio of 250 words per page and reduced the limit for principal briefs to 12,500 words. In an effort to accommodate views expressed by appellate lawyers who opposed the change, while still recognizing the validity of concerns voiced by judges and others with the length of briefs under

the current rules, the Advisory Committee made changes to the amendments as published for comment. The proposal as forwarded employs a conversion ratio of 260 words per page, rather than 250 words per page as published. Accordingly, the length limit for a principal brief is set at 13,000 words, rather than 12,500. The committee note also acknowledges that in a complex case, a party may need to file a brief that exceeds the type-volume limitations specified in the rules.[1]

Amicus Filings in Connection with Rehearing

Rule 29. Proposed new Rule 29(b) establishes default rules for the treatment of amicus filings in connection with petitions for rehearing. There is no national rule that establishes a filing deadline or a length limit for amicus briefs in connection with petitions for rehearing. Most circuits have no local rule on point. Attorneys reported confusion caused by the lack of guidance. The proposal developed by the Advisory Committee does not require acceptance of amicus briefs, but establishes guidelines for the filing of briefs when permitted. Most of the features of current Rule 29 are incorporated for the rehearing stage, including the authorization for certain governmental entities to file amicus briefs without party consent or court permission. Under the proposal, a circuit may alter the default federal rules on timing, length, and other matters by local rule or by order in a case.

Overall, commentators expressed support for amending Rule 29 to address amicus filings in connection with rehearing petitions and offered varying suggestions as to length and timing. Based on the comments, the Advisory Committee changed the length limit under Rule 29(b)

[1]The proposed amendments to Rule 32, as revised for style after the public comment period, required a corresponding change to Rule 28(a)(10) to reflect the relocation of the certificate-of-compliance requirement from Rule 32(a)(7) to Rule 32(g)(1).

from 2,000 words to 2,600 words, and revised the deadline for amicus filings in support of a rehearing petition from three to seven days after the filing of the petition.

3-Day Rule

Rule 26(c). A proposed amendment to Rule 26(c) eliminates the so-called "3-day rule" in cases of electronic service. The 3-day rule adds three days to a given period if that period is measured after service and service is accomplished by certain methods. A subcommittee charged with overseeing an integrated approach to issues arising from electronic filing recommended that the "3-day rule" be amended to exclude electronic service. The proposed amendment to Appellate Rule 26(c) parallels proposed amendments to Civil Rule 6(d), Criminal Rule 45(c), and Bankruptcy Rule 9006(f) as part of a "3-day rule package."

Under current Appellate Rule 26(c), applicability of the 3-day rule depends on whether the paper in question is delivered on the date of service stated in the proof of service; if so, then the 3-day rule is inapplicable. The proposed amendment to Rule 26(c) excludes electronic service from the 3-day rule by deeming a paper served electronically as delivered on the date of service stated in the proof of service.

The Advisory Committee voted to approve the amendment as published. But in response to concerns expressed by commentators about whether the 14 days allowed by Appellate Rule 31(a)(1) is sufficient time for the preparation of a reply brief, the Advisory Committee agreed to study whether that deadline should be adjusted.

The Department of Justice proposed adding language to the Committee Note accompanying each rule in the 3-day rule package to recognize that extensions of time may be warranted to prevent prejudice in certain circumstances. In the interest of uniformity, each

Advisory Committee approved adding such language to the published Committee Notes. The Standing Committee concurred, with a minor modification.

Technical Amendment

Rule 26(a)(4)(C). In 2013, then-existing Rule 13 governing appeals as of right from the Tax Court became Rule 13(a). A new Rule 13(b)—providing that Rule 5 governs permissive appeals from the Tax Court—was added. Rule 26(a)(4)(C)'s reference to "filing by mail under Rule 13(b)" should have been amended to refer to "filing by mail under Rule 13(a)(2)." The proposed amendment to Rule 26(a)(4)(C) updates the cross-reference. Because the proposed amendment is technical in nature, publication for public comment is not required.

The Standing Committee concurred with the Advisory Committee's recommendation as follows:

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Appellate Rules 4, 5, 21, 25, 26, 27, 28, 28.1, 29, 32, 35, and 40, and Forms 1, 5, and 6, and proposed new Form 7, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendments to the Federal Rules of Appellate Procedure are set forth in Appendix A, with an excerpt from the Advisory Committee report.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Official Forms Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed new Rule 1012, proposed amendments to Rules 1010, 1011, 2002, 3002.1, and 9006(f), and Official Forms 1, 2, 3A, 3B, 4, 5, 6Sum, 6A-J and declaration, 7, 8, 9A-I, 10, 10A, 10S-1, 10S-2, 12, 13, 14, 15, 16A, 16B, 16D, 17A-C, 18, 19, 21, 22A-1, 22A-1Supp, 22A-2, 22B, 22C-1, 22C-2, 23, 24, 27 as renumbered in the Forms Number Conversion Chart on pages 40-42 of Appendix B, and the

abrogation of Official Forms 11A and 11B, with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments were circulated to the bench, bar, and public for comment in August 2013 and 2014, and were offered for approval as published except as noted below.

Rules 1010, 1011, and 2002, and New Rule 1012

The proposed amendments to Rules 1010, 1011, and 2002, and proposed new Rule 1012 are intended to improve procedures for international bankruptcy cases. Shortly after chapter 15 (Ancillary and Other Cross-Border Cases) was added to the Bankruptcy Code in 2005, the Bankruptcy Rules were amended to insert new provisions governing cross-border cases. Among the new provisions were changes to Rules 1010 and 1011, which previously governed only involuntary bankruptcy cases, and Rule 2002, which governs notice. The proposed new rule and amendments would: (1) remove the chapter 15-related provisions from Rules 1010 and 1011; (2) create a new Rule 1012 (Responsive Pleading in Cross-Border Cases) to govern responses to a chapter 15 petition; and (3) augment Rule 2002 to clarify the procedures for giving notice in cross-border proceedings. One comment received will be treated as a suggestion for later consideration. The Advisory Committee determined to recommend approval of the amended rules as published.

Rule 3002.1

Rule 3002.1 applies only in chapter 13 cases and requires creditors whose claims are secured by a security interest in the debtor's principal residence to provide the debtor and the trustee notice of any changes in the periodic payment amount or the assessment of any fees or charges during the bankruptcy case. This rule intended to ensure that debtors who attempt to

maintain their home mortgage payments while they are in chapter 13 will have the information they need to do so.

The proposed amendments seek to clarify three matters on which courts have disagreed: (1) the rule applies whenever a debtor will make ongoing mortgage payments during the chapter 13 case, whether or not a prepetition default is being cured; (2) the rule applies regardless of whether it is the debtor or the trustee who is making the payments to the mortgagee; and (3) the rule generally ceases to apply when an order granting relief from the stay becomes effective with respect to the debtor's residence.

Four comments were submitted on the proposed amendments. Two of them addressed the difficulty of applying the rule to home equity lines of credit, for which changes in payment amount are frequent and often de minimis. The other comments were supportive of the amendments. The Advisory Committee determined to recommend approval of the amended rule as published.

Rule 9006(f)

The amendment to Rule 9006(f) would eliminate the 3-day extension to time periods when service is made electronically. The amendment was initially proposed by the CM/ECF Subcommittee and was published simultaneously with similar amendments to Civil Rule 6(d), Appellate Rule 26(c), and Criminal Rule 45(c) as part of the 3-day rule package. Five comments were submitted on the proposed bankruptcy rule amendment, including one by the Department of Justice similar to its comments on the other Advisory Committees' parallel amendments. To maintain uniformity with the Committee Notes of the other rules in the 3-day rule package, the Advisory Committee agreed to the addition of language to the Committee Note to address the

concerns raised by the Department of Justice. The Standing Committee concurred with the minor modification.

Official Forms

The Advisory Committee's recommended Official Form revisions mark the culmination of the forms modernization project that it began in 2008. The dual purposes of the project were to make the forms easier for filers to complete and understand, and to make them more compatible with planned enhancements to the courts' case management/electronic case files system (CM/ECF).

One aspect of making the forms easier to understand was to create separate case-opening forms (bankruptcy petition and schedules) for individual debtors and non-individual debtors. This in turn led to renumbering all revised bankruptcy forms. A Forms Number Conversion Chart is included on pages 40-42 of Appendix B.[2]

The forms modernization project occurred in stages, with the Advisory Committee recommending changes to forms grouped as follows: (1) forms previously modernized which must now be renumbered; (2) forms published in August 2013; (3) forms published in August 2014 and additional minor revisions to forms published in August 2013; and (4) forms to be renumbered but not modernized.

Renumbering Previously Modernized Forms. Official Forms 3A and 3B (the bankruptcy fee forms) and 6I and 6J (the income and expense forms) were the first modernized forms approved by the Judicial Conference. They went into effect December 1, 2013. On December 1 the following year, the Judicial Conference approved the means-test forms (Official Forms 22A-1, 22A-1Supp, 22A-2, 22B, 22C-1, and 22C-2). The Advisory Committee recommended

[2]Due to the large number of forms being considered for changes, they are not included in the attached copy of Appendix B, but are available on the Judicial Conference workplace in the electronic version of Appendix B.

renumbering these forms to match the numbering scheme of the rest of the modernized forms as set forth in the Forms Number Conversion Chart. In addition, the Advisory Committee recommended minor revisions to Official Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2. The Standing Committee concurred with these recommendations. The Advisory Committee also recommended additional changes to Official Form 6J that are discussed below.

Forms Published in August 2013. In August 2013, the Advisory Committee published case-opening forms to be used by individual debtors. Under the modernized forms numbering scheme, case-opening forms for individual debtors start at 101 and will generally track the current form numbers from which they are derived. Thus, the individual debtor petition, proposed Official Form 101, along with the associated proposed Official Forms 101A and 101B, are derived from the current bankruptcy petition, Official Form 1. Likewise, the proposed forms published as Official Forms 104, 105, 106A/B, 106C, 106D, 106E/F, 106G, 106H, 106 Summary, 106 Declaration, 107, 119, and 121 derive from current Official Forms 4, 5, 6A, 6B, and so on as set forth in the Forms Number Conversion Chart at Appendix B.

In addition to case-opening forms for individual debtors, which are numbered 1XX, the modernized numbering scheme for Official Forms has three other categories: 2XX for non-individual debtor case-opening forms, 3XX for court notices and orders, and 4XX for all other types of forms. Thus, proposed Official Forms 318, 423, and 427, published in 2013, are derived from current Official Forms 18, 23, and 27.

Twenty-five comments were submitted. The overall evaluation of the forms published in 2013 was mixed—some of the comments were positive, some were negative, and many made constructive suggestions for specific changes to particular forms. Several comments praised the proposed new forms, stating that they are more readable, easier to fill out, and easier to

understand than the current forms. Other comments were more critical, echoing comments received when the first modernized forms were published over the prior two years. Critical comments asserted that the proposed new forms would encourage pro se filings because they are easier to understand, they improperly provide legal advice, and they are too long.

There was nothing in the comments that caused the Advisory Committee to reconsider either its decision to proceed with the forms modernization project or its earlier responses to these particular criticisms. Members of the Advisory Committee believe that comprehensive instructions explaining the magnitude of what the bankruptcy filing requires and providing ample warnings about the significance of the forms and the possible consequences of inadequate filings should deter, not encourage, un-informed pro se filings. In addition, the Advisory Committee recognized that forms should be understandable to all debtors, whether or not represented, because debtors are required to sign the forms under penalty of perjury. The Advisory Committee also concluded that eliminating all instructions that provided legal statements would reduce the value of the instructions in explaining both the meaning of the forms and the information necessary to complete them.

As a result, the Advisory Committee made a number of changes suggested by the comments but concluded that the changes do not require republication. The Standing Committee agreed with the Advisory Committee's conclusion and suggested changes.

Official Forms Published in August 2014 and Additional Revisions to Forms Published in August 2013. In August 2014, the Advisory Committee published all but six of the Official Forms remaining to be modernized. This group of forms consisted of revised expense schedules for individual debtors, case-opening forms for non-individual debtors, court orders and notices,

chapter 11 related forms, the proof of claim and its attachment and supplements, and a form to initiate a chapter 15 bankruptcy case.

The following forms were published: (1) Proposed Official Forms 106J and 106J-2, derived from current Official Form 6J (which, as discussed above, was approved as a modernized form effective December 1, 2013); (2) non-individual case-opening forms 201, 202, 204, 205, 206 Sum, 206A/B, 206D, 206E/F, 206G, 206H, and 207, derived from Official Forms 1, 2, 4, 5, 6 Sum, 6A, 6B, 6D, 6E, 6F, 6G, 6H, and 7; (3) proposed Official Forms 309A, 309B, 309C, 309D, 309E, 309F, 309G, 309H, and 309I, derived from Official Forms, 9A, 9B, 9C, 9D, 9E, 9E(Alt.), 9F, 9F(Alt.), 9G, 9H, and 9I; (4) proposed Official Forms 312, 313, 314, and 315, derived from Official Forms 12, 13, 14, and 15; (5) proposed Official Form 401, a chapter 15 petition for international debtors, derived from Official Form 1; (6) proposed Official Forms 410, 410A, 410S-1, and 410S-2, derived from Official Forms 10, 10A, 10S-1, and 10S-2; (7) proposed Official Form 424, derived from Official Form 24; and (8) the abrogation of Official Forms 11A and 11B.

A number of comments were submitted, ranging in length from one paragraph addressing a single form to 20 pages addressing multiple forms. Almost all of these comments made very specific suggestions for changes to wording, format, or substance, rather than questioning the wisdom of modernizing the forms.

Proposed Official Form 410A (derived from Official Form 10A), the Mortgage Proof of Claim Attachment, received six comments. The revised form would replace the existing version with one that requires a mortgage claimant to provide a loan payment history and other information about the mortgage claim, including calculations of the claim and the arrearage amounts. Two of the comments suggested wording changes to the form's instructions (which

are produced by the Administrative Office), and the Advisory Committee agreed with those suggestions. Another comment was considered a suggestion for an amendment to Rule 3001(c)(2)(C), rather than a comment on the proposed form, and the Advisory Committee added the suggestion to its list of matters for future consideration. A fourth comment was mistaken about the timing of the implementation of the form. Only two comments addressed the substance of the form, including a comment from the Department of Justice expressing a preference for the current version of the form, which requires an itemization of fees, expenses, and charges in accordance with a specified list.

One of the other forms listed above, proposed Official Form 401 (derived from Official Form 1), is a separate petition form for commencing a chapter 15 case. Creating this separate form allowed for the deletion of chapter 15-related information from the new voluntary petition forms used in other chapters. One comment was filed supporting the creation of the form.

The Advisory Committee recommended approval of all of the forms discussed in this section with the changes noted above and minor edits and stylistic changes to proposed Official Forms 204, 206A/B, 206D, 206E/F, 309A-I, 410, 410S1, and 410S2.

The Advisory Committee also recommended minor edits and stylistic revisions to the following forms previously published in August 2013 and approved by the Standing Committee: Proposed Official Forms 106A/B, 106D, 106E/F, 106G, 112 (to be renumbered as Official Form 108 because it replaces current Official Form 8), and the Committee Note to proposed Official Form 107. The Standing Committee agreed with the recommendations.

Current Forms to be Renumbered or Revised but not Otherwise Modernized. The Advisory Committee recommended that several Official Forms be renumbered without any revisions. These are Exhibit A to Official Form 1 (to be renumbered Official Form 201A), and

Official Forms 16A, 16B, and 16D (to be renumbered Official Forms 416A, 416B, and 416D, respectively). The first of these forms, Exhibit A to Official Form 1, is a form that must be completed by chapter 11 debtors required to file periodic reports with the Securities and Exchange Commission. Although the Advisory Committee is considering substantive changes to Exhibit A, that effort is not yet complete. Accordingly, the Advisory Committee recommended that the existing Exhibit A form should be renumbered as Official Form 201A with its current formatting and style and that any modernization of the form should be delayed until the Advisory Committee completes its consideration of the exhibit.

Official Forms 16A, 16B, and 16D consist of captions used in bankruptcy cases, contested matters, and adversary proceedings. In August 2014, modernized versions of the captions were published for public comment as Official Forms 416A, 416B, and 416D. Comments were filed in opposition to the adoption of the new caption forms based on stylistic concerns. In response to the comments, the Advisory Committee withdrew the proposed new caption forms and recommended retaining the current caption forms, renumbered as Official Forms 416A, 416B, and 416D, without any additional modernizing of these forms.

Effective Date. The Advisory Committee recommended that all of the above forms go into effect December 1, 2015, and that they govern in all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings then pending, with the limited exceptions in the three courts discussed below. The Advisory Committee also recommended that it be allowed to make minor, non-substantive revisions to the official forms pending submission to the Judicial Conference. The Standing Committee accepted these recommendations.

Continued Use of Existing Official Forms 1, 6Sum, 6A-J and declaration, 7, 8, 22A-1, 22A-1Supp, and 22A-2 in Three Districts. The Advisory Committee recommended continued use of several current official forms in cases initiated through the Electronic Self-representation (eSR) program. The eSR program operates in three bankruptcy courts, the United States Bankruptcy Court for the District of New Jersey, the United States Bankruptcy Court for the Central District of California, and the United States Bankruptcy Court for the District of New Mexico. The eSR program architecture links to the current chapter 7 forms, rather than the modernized forms scheduled to become effective in December 2015. Continued operation of the eSR program as the transition to the modernized forms is accomplished by the three eSR courts would require use of the current case-opening forms.

The Advisory Committee determined that the continued use of existing forms for eSR filings should not cause undue confusion in the three bankruptcy courts after the modernized forms go into effect generally. Non-eSR chapter 7 debtors, whether represented or pro se, will have access only to the modernized forms. Because the Advisory Committee did not want to disrupt the already established eSR pilot projects, it recommended permitting until December 1, 2017, the use of current Official Forms 1, 6Sum, 6A-J and declaration, 7, 8, 22A-1, 22A-1Supp, and 22A-2 in the three courts listed above for use by pro se debtors who initiate a chapter 7 bankruptcy case by using the eSR system.

The Standing Committee concurred with the Advisory Committee's recommendations above.

Recommendation: That the Judicial Conference:

a. Approve the proposed amendments to Bankruptcy Rules 1010, 1011, 2002, 3002.1, 9006(f), and new Rule 1012, and transmit them to the Supreme Court for consideration with a recommendation that they be

adopted by the Court and transmitted to Congress in accordance with the law;

b. Approve the proposed revisions to Official Forms 1, 2, 3A, 3B, 4, 5, 6Sum, 6A-J and declaration, 7, 8, 9A-I, 10, 10A, 10S-1, 10S-2, 12, 13, 14, 15, 16A, 16B, 16D, 17A-C, 18, 19, 21, 22A-1, 22A-1Supp, 22A-2, 22B, 22C-1, 22C-2, 23, 24, 27 as renumbered in the Forms Number Conversion Chart on pages 40-42 of Appendix B, and the abrogation of Official Forms 11A and 11B, to take effect on December 1, 2015, and that they govern in all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings then pending, except to the limited extent described below; and

c. Allow that the following forms in effect on November 30, 2015, remain Official Forms until December 1, 2017, in the United States Bankruptcy Courts for the Central District of California, the District of New Jersey, and the District of New Mexico, only for use by pro se debtors who initiate a chapter 7 case by using the court's Electronic Self-Representation system: Official Form 1, Official Forms 6Sum, 6A-J and declaration, Official Form 7; Official Form 8; and Official Forms 22A-1, 22A-1Supp, and 22A-2.

The proposed new and amended Federal Rules of Bankruptcy Procedure and revisions to the Official Bankruptcy Forms are set forth in Appendix B, with excerpts from supporting Advisory Committee reports.

Rules and Forms Approved for Publication and Comment

The Advisory Committee submitted a proposed amendment to Rule 1006(b)(1) with a request that it be published for comment. The Standing Committee approved the Advisory Committee's recommendation.

Rule 1006(b)(1) governs the payment of the bankruptcy filing fee in installments, as authorized for individual debtors by 28 U.S.C. § 1930(a). The Advisory Committee received a suggestion to amend the rule to clarify that courts may require a debtor who applies to pay the filing fee in installments to make an initial installment payment with the petition and the application.

In the course of considering the suggestion over the past several years, some Advisory Committee members became concerned that requiring an upfront installment along with the installment application at the time of filing might cause an increase in chapter 7 filings because fee waivers are available in chapter 7. The Advisory Committee therefore asked the Federal Judicial Center to study current court practices regarding initial installment payments at the time of filing. The FJC study revealed that over one-third of bankruptcy courts already require an installment payment at the time of filing. The FJC study did not, however, find a statistically significant relationship between the initial payment requirement and the rate of chapter 7 fee waiver applications when comparing districts that have such a requirement and those that do not.

The FJC study also noted that many of the courts requiring initial installment payments do not specify the consequences of failing to make the required payment. Of those courts that specify consequences, a few state that the application to pay in installments may or will be denied absent payment of the initial installment at filing. A greater number of courts provide for the possible dismissal of the case or rejection of the petition.

The Advisory Committee concluded no need exists to clarify that courts may require an initial installment payment with the petition and application. Rule 1006(b)(1) requires a petition to be "accepted for filing if accompanied by the debtor's signed application" stating the debtor is unable to pay the filing fee except in installments. Although the rule requires a court to accept a petition regardless of whether the debtor makes an initial installment payment, the rule does not prohibit requiring such a payment.

Nevertheless, the FJC study highlighted a related issue. Because Rule 1006(b)(1) requires the bankruptcy clerk to accept the petition, resulting in the commencement of a bankruptcy case, the practice of some courts of refusing to accept a petition or summarily

dismissing a case because of the failure to make an installment payment at the time of filing is inconsistent with Rules 1006(b)(1) and 1017(b)(1). The latter provision allows the court to dismiss a case for the failure to pay any installment of the filing fee only "after a hearing on notice to the debtor and the trustee."

To clarify that courts may not refuse to accept petitions or summarily dismiss cases for failure to make initial installment payments at the time of filing, the Advisory Committee proposed an amendment to Rule 1006(b)(1) to emphasize that an individual debtor's petition must be accepted for filing so long as the debtor submits a signed application to pay the filing fee in installments, even absent an initial installment payment made at the same time. The Committee Note explains that dismissal of the case for failure to pay any installment must proceed according to Rule 1017(b)(1).

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted proposed amendments to Rules 4, 6, and 82, with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments were circulated to the bench, bar, and public for comment in August 2014, and are proposed for approval as published with the minor exceptions noted below.

Rule 4(m)

The proposed amendment to Rule 4(m), the rule addressing time limits for service, corrects an ambiguity regarding service abroad on a corporation. Comments received on the amendment to Rule 4(m) that was published in 2013 as part of the Duke Conference Package[3]

[3]That amendment, which was approved by the Supreme Court and transmitted to Congress on April 29, 2015, shortens the time for service from 120 days to 90 days.

revealed that many practitioners believe the time for service set forth in Rule 4(m) applies to foreign corporations. This ambiguity arises because two exceptions for service on an individual in a foreign country under Rule 4(f) and for service on a foreign state under Rule 4(j)(1) are clearly referenced, while no such explicit reference is made to service on a corporation. Rule 4(h)(2) provides for service on a corporation at a place not within any judicial district of the United States in a "manner prescribed by Rule 4(f)." It is not clear whether this is service "under" Rule 4(f). The proposed amendment makes clear that the time limit set forth in Rule 4(m) does not include service under Rule 4(h)(2). Four comments were submitted, all of which supported the proposed amendment.

3-Day Rule

Rule 6(d). The proposed amendment to Rule 6(d) parallels the proposed amendments to Appellate Rule 26(c), Bankruptcy Rule 9006(f), and Criminal Rule 45(c), which are part of the 3-day rule package discussed *supra*. The proposed amendment eliminates the three additional days to respond when service is effected by electronic means, and adds parenthetical descriptions of the modes of service that continue to allow the three additional days.

Some commentators expressed concern that the time periods in the Civil Rules are too short and, therefore, any provision that provides some relief should be retained. The Advisory Committee carefully considered this concern as well as others, but approved the text of the rule as published. The Advisory Committee approved adding language to the Committee Note as a result of the concerns expressed by the Department of Justice (*see supra*, pp. 7-8); the Standing Committee concurred with minor modifications.

Another proposed amendment to Rule 6(d) is to substitute "after being served" for "after service." The purpose of the amendment is to correct a potential ambiguity that was created

when the "after service" language was included in the rule when it was amended in 2005. "[A]fter service" could be read to refer not only to a party that has been served but also to a party that has made service. The purpose of the proposed amendment is to dispel any misreading. The proposed amendment was published in August 2013, and approved by the Committee in May 2014. It was held in abeyance for one year in order for it to be submitted to the Judicial Conference simultaneously with the proposed amendment to the 3-day rule.

Rule 82

Civil Rule 82 addresses venue for admiralty and maritime claims. The proposed amendment to Rule 82 arises from legislation that added a new § 1390 to the venue statutes in Title 28 and repealed former § 1392 (local actions). The proposed amendment deletes the reference to § 1391 and to repealed § 1392 and adds a reference to new § 1390 in order to carry forward the purpose of integrating Rule 9(h)[4] with the venue statutes through Rule 82.

The Standing Committee concurred with the Advisory Committee's recommendations above.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Civil Rules 4, 6, and 82, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendments to the Federal Rules of Civil Procedure are set forth in Appendix C, with an excerpt from the Advisory Committee report.

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[4]Rule 82 invokes Rule 9(h) to ensure that the Civil Rules do not seem to modify the venue rules for admiralty or maritime actions. Rule 9(h) provides that an action cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for purposes of Rule 82. It further provides that if a claim for relief is within the admiralty or maritime jurisdiction but also is within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted proposed amendments to Rules 4, 41, and 45, with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments were circulated to the bench, bar, and published for public comment in August 2014, and are recommended for approval as published, with the revisions noted below.

Rule 4

The proposed amendment to Rule 4 addresses service of summons on organizational defendants that have no agent or principal place of business within the United States. The current rule provides for service of an arrest warrant or summons within a judicial district of the United States. The Department of Justice advised that current Rule 4 poses an obstacle to the prosecution of foreign corporations that have committed offenses punishable in the United States. Often, such corporations cannot be served because they have no last known address or principal place of business in the United States. Given the increasing number of criminal prosecutions involving foreign entities, the Advisory Committee agreed that the Criminal Rules should provide a mechanism for foreign service on an organization.

The proposed amendment makes several changes to Rule 4. First, it fills a gap in the current rule (without expanding judicial authority) by specifying that the court may take any action authorized by law if an organizational defendant fails to appear in response to a summons. Second, the amendment changes the mailing requirement for service of a summons on an organization within the United States by eliminating the requirement of a separate mailing to an organizational defendant when delivery has been made to an officer or to a managing or general

agent, but requires mailing when delivery has been made to an agent authorized by statute, if the statute itself requires mailing to the organization. Third, the amendment authorizes service on an organizational defendant outside of the United States by prescribing a non-exclusive list of methods for service, including service in a manner authorized by the applicable foreign jurisdiction's law, stipulated by the parties, undertaken by foreign authority in response to a letter rogatory or similar request, or pursuant to an international agreement. In addition to these specifically enumerated means of service, the proposal contains an open-ended provision that allows service "by any other means that gives notice." This provision provides flexibility for cases in which the Department of Justice concludes that service cannot be made (or made without undue difficulty) by the other means enumerated in the rule.

The Advisory Committee considered at length whether to require prior judicial approval before service of a criminal summons could be made in a foreign country by other unspecified means. The Advisory Committee concluded that the Criminal Rules should not adopt such a requirement. In its view, requiring prior judicial approval might raise difficult questions regarding the appropriate institutional roles of the courts and the executive branch, as well as unripe questions of international law.

Six comments were received and one witness testified about the proposed amendment at a public hearing in Washington, D.C. In addition, the Department of Justice provided written responses to the issues raised by the comments. The commentators generally agreed the proposal: addresses a gap in the current rules that poses an obstacle to the prosecution of foreign corporations that have committed crimes in the United States; provides methods of service that are reasonably calculated to provide notice and comply with applicable laws; and gives courts appropriate discretion to fashion remedies. The Advisory Committee carefully considered the

comments and suggested revisions received, and unanimously approved the proposed amendment as published.

Rule 41

The proposed amendment to Rule 41 addresses venue for obtaining warrants for certain remote electronic searches. At present, the rule generally limits searches to locations within a district, with a few specified exceptions. The proposal to amend Rule 41 is narrowly tailored to address two increasingly common situations in which the existing territorial or venue requirements may hamper the investigation of serious federal crimes: (1) where the warrant sufficiently describes the computer to be searched but the district within which that computer is located is unknown, and (2) where the investigation requires law enforcement to coordinate searches of numerous computers in numerous districts.

The proposal would address this issue by amending Rule 41(b) to include two additional exceptions to the list of out-of-district searches permitted under that subsection.[5] Language in a new subsection 41(b)(6) would authorize a court to issue a warrant to use remote access to search electronic storage media and seize electronically stored information inside or outside of the district: (1) when a suspect has used technology to conceal the location of the media to be searched; or (2) in an investigation into a violation of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(5), when the media to be searched include damaged computers located in five or more districts. The proposal also amends Rule 41(f)(1)(C) to specify the process for providing notice of a remote access search.

[5]At present, Rule 41(b) authorizes search warrants for property located outside the judge's district in only four situations: (1) for property in the district that might be removed before execution of the warrant; (2) for tracking devices installed in the district, which may be monitored outside the district; (3) for investigations of domestic or international terrorism; and (4) for property located in a U.S. territory or a U.S. diplomatic or consular mission.

As expected, the proposed amendment generated significant response; the Advisory Committee received 44 written comments, and 8 witnesses testified at a public hearing in Washington, D.C. In addition, the Department of Justice submitted written responses to the issues raised by the comments and testimony. Many commentators raised concerns regarding the substantive limits on government searches, which are not affected by the proposal. In fact, much of the opposition reflected a misunderstanding of the scope of the proposal. The proposal addresses venue; it does not itself create authority for electronic searches or alter applicable constitutional requirements.

The Advisory Committee approved revisions to the published proposal aimed at clarifying the procedural nature of the proposed amendment. It changed the published caption from "Authority to Issue a Warrant" to "Venue for a Warrant Application" and revised the Committee Note to state that the constitutional requirements for the issuance of a warrant are not altered by the amendment. The Advisory Committee also approved revisions to the notice provision and accompanying Committee Note that directly respond to points raised by commentators.

3-Day Rule

Rule 45(c). The proposed amendment to Rule 45(c) parallels the proposed amendments to Appellate Rule 26(c), Bankruptcy Rule 9006(f), and Civil Rule 6(d). It eliminates the 3-day extension of time periods when service is effected electronically.

As discussed *supra*, pp. 7-8, the Department of Justice expressed concerns about potential hardship from elimination of electronic service from the 3-day rule. The Advisory Committee on Criminal Rules was sympathetic to these concerns, recognizing that the three additional days are particularly important for criminal practitioners who often must speak directly with their clients

and, therefore, frequently need additional time. The Advisory Committee approved the addition of language to the published Committee Note to address the concerns raised by the Department of Justice; the Standing Committee concurred with minor modifications.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Criminal Rules 4, 41, and 45, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendments to the Federal Rules of Criminal Procedure are set forth in Appendix D, with an excerpt from the Advisory Committee report.

FEDERAL RULES OF EVIDENCE

Rules Approved for Publication and Comment

The Advisory Committee on the Evidence Rules submitted to the Standing Committee a proposed amendment to Rule 902, and a proposal to abrogate Rule 803(16), with a request that the proposals be published for comment. The Standing Committee approved the Advisory Committee's request.

Rule 803(16)

Rule 803(16) provides a hearsay exception for "ancient documents"; that is, if a document is more than 20 years old and appears authentic, it is admissible for the truth of its contents. The Advisory Committee has determined that the exception is flawed because it assumes that just because the document itself is authentic, all of the statements in the document are reliable enough to be admissible despite the fact they are hearsay. Up until now, the exception has been used infrequently; however, because electronically stored information can be

retained for more than 20 years, a strong likelihood exists that the ancient documents exception will be used much more frequently going forward.

The Advisory Committee has unanimously determined that abrogation is preferable to "tinkering" with the exception. In support of that determination, the Advisory Committee drew the following conclusions: (1) the exception, which is based on necessity (lack of other proof), is unnecessary because a reliable ancient document can be admitted under other hearsay exceptions; (2) the exception can be especially problematic in criminal cases where statutes of limitations are not applicable, such as cases involving sexual abuse and conspiracy; (3) electronically stored information will be stockpiled and subject to essentially automatic admissibility under the existing exception; and (4) notwithstanding its applicability to so-called "ancient" documents, the exception is not a venerated exception under the common law, but quite recent in origin.

Rule 902

The Advisory Committee approved a proposal to amend Rule 902, the rule on self-authentication, to add two new subdivisions that would allow certain electronic evidence to be authenticated by a certification of a qualified person (in lieu of that person's testimony at trial). New Rule 902(13) would allow self-authentication of machine-generated information (such as a web page) upon a submission of a certificate prepared by a qualified person. New Rule 902(14) would provide a similar certification procedure for a copy of data taken from an electronic device, media, or file that would be authenticated by a digital process for identification.

A certification under the proposed new subdivisions to Rule 902 can establish only that the proffered item has satisfied the admissibility requirements for authenticity. The opponent

remains free to object to admissibility on other grounds. For example, assume that a plaintiff in a defamation case offers what purports to be a printout of a webpage on which a defamatory statement was made. Plaintiff offers a certification in which a qualified person describes the process by which the webpage was retrieved. Even if that certification sufficiently establishes that the webpage is authentic, defendant remains free to object that the statement on the webpage was not placed there by defendant. Similarly, a certification authenticating a computer output, such as a spreadsheet, does not preclude an objection that the information produced is unreliable—the authentication establishes only that the output came from the computer.

The proposed new subdivisions are analogous to Rule 902(11), which permits a foundation witness to establish the authenticity and admissibility of business records by way of certification. The goal is to make authentication easier for certain kinds of electronic evidence that, under current law, would likely be authenticated under Rule 901 but only after calling a witness to testify to authenticity. The Advisory Committee unanimously agreed that it would be useful to promote rules that would make the process of proving authenticity for electronic evidence simpler, cheaper, and more efficient.

OTHER MATTERS

The Committee submitted its views on drafts of the *Strategic Plan for the Federal Judiciary* to the Ad Hoc Strategic Planning Group and has no further input at this time.

Respectfully submitted,

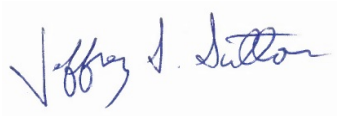

Jeffrey S. Sutton, Chair

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Appendix A – Proposed Amendments to the Federal Rules of Appellate Procedure
Appendix B – Proposed Amendments to the Federal Rules of Bankruptcy Procedure
Appendix C – Proposed Amendments to the Federal Rules of Civil Procedure
Appendix D – Proposed Amendments to the Federal Rules of Criminal Procedure

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

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MEMORANDUM

DATE: May 4, 2015

TO: Judge Jeffrey S. Sutton, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Steven M. Colloton, Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on April 23 and 24 in Philadelphia, Pennsylvania. The Committee gave final approval to six sets of proposed amendments, relating to (1) the inmate-filing provisions under Rules 4(c) and 25(a); (2) tolling motions under Rule 4(a)(4); (3) length limits for appellate filings; (4) amicus briefs in connection with rehearing; (5) Rule 26(c)'s "three-day rule"; and (6) a technical amendment to Rule 26(a)(4)(C). The Committee discussed a number of other items and added one issue to its study agenda.

Part II of this report discusses the proposals for which the Committee seeks final approval.

* * * * *

II. Action Items—for Final Approval

The Committee seeks final approval of six sets of proposed amendments.

A. Inmate filings: Rules 4(c)(1) and 25(a)(2)(C), Forms 1 and 5, and new Form 7

Under the Federal Rules of Appellate Procedure, documents are timely filed if they are received by the court on or before the due date. Rules 4(c)(1) and 25(a)(2)(C) offer an alternative way for inmates to establish timely filing of documents. If the requirements of the relevant rule are met, then the filing date is deemed to be the date the inmate deposited the document in the institution's mail system rather than the date the court received the document. *See generally Houston v. Lack*, 487 U.S. 266 (1988).

The Committee has studied the workings of the inmate-filing rules since 2007, in light of concerns expressed about conflicts in the case law, unintended consequences of the current language, and ambiguity in the current text. Must an inmate prepay postage to benefit from the rule? There are decisions saying that an inmate need not prepay postage if he uses a prison's system designed for legal mail, but must prepay postage if he does not use that system. Must an inmate file a declaration or notarized statement averring the date of filing to benefit from the rule? One court held, over a dissent from denial of rehearing en banc, that a document is untimely if there is no declaration or notarized statement, even when other evidence such as a postmark shows that the document was timely deposited in the prison mail system. When must an inmate submit a declaration designed to demonstrate timeliness? One circuit has published inconsistent decisions, holding in one case that the declaration must accompany the notice and in another that the declaration may be filed at a later date.

The Committee seeks final approval of proposed amendments that are designed to clarify and improve the inmate-filing rules. The amendments to Rules 4(c)(1) and 25(a)(2)(C) would make clear that prepayment of postage is required for an inmate to benefit from the inmate-filing provisions. The amendments clarify that a document is timely filed if it is accompanied by evidence—a declaration, notarized statement, or other evidence such as postmark and date stamp—showing that the document was deposited on or before the due date and that postage was prepaid. New Form 7 is a suggested form of declaration that would satisfy the Rule. Forms 1 and 5 (which are suggested forms of notices of appeal) are revised to include a reference alerting inmate filers to the existence of Form 7. The amendments also clarify that if sufficient evidence does not accompany the initial filing, then the court of appeals has discretion to permit the later filing of a declaration or notarized statement to establish timely deposit.

1. Text of proposed amendments and Committee Note

The Committee recommends final approval of the proposed amendments to Rules 4(c)(1) and 25(a)(2)(C) and Forms 1 and 5, and proposed new Form 7, as revised after publication and set out in the enclosure to this report.

2. Changes made after publication and comment

After publication, the Committee decided to abandon its proposal to delete the legal-mail-system requirement from Rules 4(c)(1) and 25(c)(2)(C). The Committee also made several improvements to the Forms.

Rules 4(c)(1) and 25(a)(2)(C), as published, would have deleted the requirement that an inmate use a system designed for legal mail (if one is available) in order to receive the benefit of the inmate-filing rules. The Committee proposed deleting that requirement because it perceived no purpose for it. The Committee had learned from the Deputy General Counsel of the U.S. Bureau of Prisons that the distinction between legal and non-legal mail systems, in BOP facilities, had more to do with privacy concerns than other reasons. And an inquiry to the Chief Deputy Clerk of the U.S. Supreme Court had likewise disclosed no reason to retain the legal-mail-system requirement.

Commentators were divided on the question of the legal-mail-system requirement. One commentator specifically expressed support for the published amendments' deletion of the requirement. Another commentator, however, pointed out that correctional institutions in the State of Florida log the date of deposit of inmates' legal mail but do not log the date of deposit of inmates' non-legal mail, and argued that the legal-mail-system requirement provided the State with an important way to provide evidence of the date of inmates' legal mail. The Committee's Reporter, with the assistance of the Director and Chief Counsel of the National Association of Attorneys General Center for Supreme Court Advocacy, investigated whether correctional institutions in jurisdictions other than Florida make a similar distinction (date-logging legal but not non-legal mail). The responses—from 21 states and the District of Columbia—disclosed that an appreciable number of the states do make such a distinction.[1] Further inquiry also determined that the federal Bureau of Prisons date-stamps legal mail, but does not log non-legal mail.

This new information, in the view of the Committee, provides reason to retain the legal-mail-system requirement. Requiring an inmate to use a legal mail system where available continues to serve a useful purpose by ensuring that mail is logged or date-stamped and avoiding unnecessary litigation over the timing of deposits. Accordingly, the Committee decided to restore that requirement to proposed Rules 4(c)(1) and 25(a)(2)(C). The Committee also revised proposed new Form 7, and the proposed amendments to Forms 1 and 5, to make all three forms more user-friendly and to make the new form more accurate. In particular, the Committee revised Form 7 to use the present tense ("Today ... I am depositing") rather than the past tense ("I

[1] Four states—Colorado, North Carolina, Tennessee, and Washington State—have systems that (like Florida's) log the date of legal mail but not non-legal mail. Two additional states—Alaska and Delaware—have such systems in at least some of their facilities. And though Pennsylvania does not currently date-log any outgoing mail, the Deputy Chief Counsel for Litigation at the Pennsylvania Department of Corrections reports that Pennsylvania is considering date-logging outgoing legal mail in order to provide evidence of the date of filing.

deposited ..."), to reflect that the inmate will fill out the declaration before depositing both the declaration and the underlying filing in the institution's mail system.

The Committee decided not to implement other proposed changes to the amendments. The Committee did not adopt a suggestion that the Rules should *authorize* the later filing of the declaration (as opposed to giving the court the discretion to permit its later filing). Members considered it important to encourage the inmate to provide the declaration contemporaneously, while recollections are fresh. The Committee gave careful consideration to style comments advocating deletion of the Rules' reference to a court's ability to "exercise[] its discretion to permit the later filing" of the declaration (the style suggestion was to say simply "permit[]"). But Committee members were swayed by substantive concerns about the desire to ensure that inmates understand that later filing will not necessarily be permitted. The Committee also did not adopt suggestions that the Rules should authorize courts to excuse an inmate's failure to prepay postage, as courts already have adequate authority to act if an institution refuses to provide postage when it is constitutionally required. The Committee considered whether to delete the Rules' reference to a notarized statement (as an alternative to a declaration), and decided to retain that reference because notaries are available in a number of correctional institutions, and similar language appears in the inmate-filing provisions in the Supreme Court Rules and the rules for habeas and Section 2255 proceedings. There was no opposition to the notarized statement option during the comment period.

B. Tolling motions: Rule 4(a)(4)

The proposed amendment to Appellate Rule 4(a)(4) addresses a circuit split concerning whether a motion filed outside a non-extendable deadline under Civil Rules 50, 52, or 59 counts as "timely" under Rule 4(a)(4) if a court has mistakenly ordered an "extension" of the deadline for filing the motion.

Caselaw in the wake of *Bowles v. Russell*, 551 U.S. 205 (2007), holds that statutory appeal deadlines are jurisdictional but that nonstatutory appeal deadlines are nonjurisdictional claim-processing rules. The statutory appeal deadline for civil appeals is set by 28 U.S.C. § 2107. The statute does not mention so-called "tolling motions" filed in the district court that have the effect of extending the appeal deadline, but "§ 2107 was enacted against a doctrinal backdrop in which the role of tolling motions had long been clear." 16A Wright et al., Federal Practice & Procedure § 3950.4. At the time of enactment, "caselaw stated that certain postjudgment motions tolled the time for taking a civil appeal." *Id.* Commentators have presumed, therefore, that Congress incorporated the preexisting caselaw into § 2107, and that appeals filed within a recognized tolling period may be considered timely consistent with *Bowles*.

The federal rule on tolling motions, Appellate Rule 4(a)(4), provides that "[i]f a party timely files in the district court" certain post-judgment motions, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." A number of circuits have ruled that the Civil Rules' deadlines for post-judgment motions are

nonjurisdictional claim-processing rules. On this view, where a district court mistakenly "extends" the time for making such a motion, and no party objects to that extension, the district court has authority to decide the motion on its merits. But does the motion count as a "timely" one that, under Rule 4(a)(4), tolls the time to appeal? The Third, Seventh, Ninth, and Eleventh Circuits have issued post-*Bowles* rulings stating that such a motion does not toll the appeal time. *E.g.*, *Blue v. Int'l Bhd. of Elec. Workers Local Union 159*, 676 F.3d 579, 582-84 (7th Cir. 2012); *Lizardo v. United States*, 619 F.3d 273, 278-80 (3d Cir. 2010). Pre-*Bowles* caselaw from the Second Circuit accords with this position. The Sixth Circuit, however, has held to the contrary. *Nat'l Ecological Found. v. Alexander*, 496 F.3d 466, 476 (6th Cir. 2007).

The Committee feels it is important to clarify the meaning of "timely" in Rule 4(a)(4), because the conflict in authority arises from arguable ambiguity in the current Rule, and timely filing of a notice of appeal is a jurisdictional requirement. The proposed amendment would adopt the majority view—i.e., that postjudgment motions made outside the deadlines set by the Civil Rules are not "timely" under Rule 4(a)(4). Such an amendment would work the least change in current law. And, as the court noted in *Blue*, 676 F.3d at 583, the majority approach tracks the spirit of the Court's decision in *Bowles*, which held that the Court has "no authority to create equitable exceptions to jurisdictional requirements." 551 U.S. at 214.

1. Text of proposed amendment and Committee Note

The Committee recommends final approval of the proposed amendment to Rule 4(a)(4) as set out in the enclosure to this report.

2. Changes made after publication and comment

No changes were made after publication and comment.

All but one of the commentators who addressed this proposal voiced support for it. The sole opponent argued that both the current Rule and the proposed amended Rule set a trap for unwary litigants. That commentator also argued that it is incongruous that a district court has power to rule on the merits of an untimely postjudgment motion if the opposing party fails to object to the untimeliness but that same motion lacks tolling effect under Rule 4(a)(4).

The commentator's objections tracked concerns that had already been discussed by the Committee in its prior deliberations. After noting the comment, the Committee adhered to its substantive judgment that the Rule should be amended to adopt the majority view. Committee members discussed whether the amendment, as published, could be revised to make its meaning clearer. Specifically, the Committee discussed the possibility of adding rule text specifying that a motion made outside the time permitted by the relevant Civil Rule "is not rendered timely by, for instance: (i) a court order setting a due date that is later than allowed by the Federal Rules of Civil Procedure; (ii) another party's consent or failure to object; or (iii) the court's disposition of the motion." Committee members, however, expressed concern that this addition would distend an already long and complex Rule and that a list of this nature could be read to exclude other

possible scenarios. Committee members observed, moreover, that these examples are stated in the Committee Note, so lawyers and litigants should have adequate notice to avoid a "trap."

C. Length limits: Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6

The proposed amendments to Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6—approved unanimously by the Advisory Committee after post-publication changes—would affect length limits set by the Appellate Rules for briefs and other documents. The proposal would amend Rules 5, 21, 27, 35, and 40 to convert the existing page limits to word limits for documents prepared using a computer. For documents prepared without the aid of a computer, the proposed amendments would retain the page limits currently set out in those rules. The proposed amendments employ a conversion ratio of 260 words per page for Rules 5, 21, 27, 35, and 40.

The amendments would also reduce Rule 32's word limits for briefs so as to reflect the pre-1998 page limits multiplied by 260 words per page. The 14,000-word limit for a party's principal brief would become a 13,000-word limit; the limit for a reply brief would change from 7,000 to 6,500 words. The proposals correspondingly reduce the word limits set by Rule 28.1 for cross-appeals. New Rule 32(f) sets out a uniform list of the items that can be excluded when computing a document's length. A new appendix collects in one chart all the length limits stated in the Appellate Rules.

Any court of appeals that wishes to retain the existing limits, including 14,000 words for a principal brief, may do so under the proposed amendments. The local variation provision of existing Rule 32(e) would be amended to highlight a court's ability (by order or local rule) to set length limits that exceed those in the Appellate Rules.

* * *

The genesis of this project was the suggestion that length limits set in terms of pages have been overtaken by advances in technology, and that use of page limits rather than word limits invites gamesmanship by attorneys. As noted, the proposal would amend Rules 5, 21, 27, 35, and 40 to address that concern.

Drafting those amendments required the Committee to select a conversion ratio from pages to words. The 1998 amendments transmuted the prior 50-page limit for briefs into a 14,000-word limit—that is, the 1998 amendments used a conversion ratio of 280 words per page. In formulating the published proposal, the Committee relied upon two studies indicating that a traditional 50-page brief filed in the courts of appeals under the pre-1998 rules contained fewer than 280 words per page. A study in 1993 by the D.C. Circuit Advisory Committee recommended a conversion ratio of 250 words per page; based on this study, the D.C. Circuit applied a length limit of 12,500 words for principal briefs from 1993 to 1998. A 2013 study by the Committee's clerk representative found an average of 259 words per page (or 12,950 per fifty pages) in 210 randomly-selected appellate briefs filed by counsel in the Eighth Circuit from 1995

through 1998. The 1998 Advisory Committee Note to Rule 32 did not explain the reason for the selection of the 280 words per page conversion ratio, and the published proposal said that the basis for the estimate was unknown.

As published for comment, the proposed amendments employed a conversion ratio of 250 words per page for Rules 5, 21, 27, 35, and 40. The published proposal also reduced Rule 32's word limits for briefs so as to reflect the pre-1998 page limits multiplied by 250 words per page—that is, 12,500 words for a principal brief. The proposals correspondingly reduced the word limits set by Rule 28.1 for cross-appeals. The published proposed amendments were subject to the local variation provision of Rule 32(e), which permits a court to increase the length limit by order or local rule.

During consideration of the proposed shift to type-volume limits, the Committee also observed that the rules do not provide a uniform list of the items that can be excluded when computing a document's length. The published proposals would add a new Rule 32(f) setting forth such a list.

1. Text of proposed amendment and Committee Note

The Committee recommends final approval of the proposed amendments to Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6, as revised after publication and set out in the enclosure to this report.

2. Changes made after publication and comment

The Committee received a large number of public comments on these proposed amendments. The Committee also received testimony from four appellate lawyers at a public hearing.

For documents other than briefs, a number of commentators voiced support for converting page limits to word limits. Two professional associations expressed support for the proposed amendments to Rules 5, 21, 27, 35, and 40 as published, but several commentators disagreed with the choice of word limits in some or all of those rules. Several of those commentators argued that the page-to-word conversion ratio should be 280 words per page or more, rather than the 250 words per page employed in formulating the published proposals. Commentators advocating a conversion ratio greater than 250 words per page noted that the issues addressed by these documents can be complex and important.

The Committee was not convinced to use a conversion ratio of 280 words per page. The principal basis for that ratio is the 1998 conversion of the limit for principal briefs from 50 pages to 14,000 words. The Committee was advised during the comment period that the 1998 conversion ratio was based on a word count in commercially printed briefs filed at the Supreme Court of the United States. The Committee was not persuaded that it should use the number of

words in a commercially printed Supreme Court brief as the measure of equivalence for motions, petitions for rehearing, and other documents filed in the courts of appeals.

Other data informed the Committee's deliberations. Before publication, the Committee received the studies described above, which showed average length of 251 and 259 words per page, respectively, in appellate briefs filed before the conversion from page limits to word counts in 1998. One commentator submitted anecdotal reports that briefs filed under the current Appellate Rules (with 14-point font) average 240 words per page. The clerk's representative sampled twenty-eight rehearing petitions filed in late 2014 in the Eighth Circuit and found that selected pages in those filings averaged 255 words per page, with most pages containing between 245 and 260 words. In sum, the available data suggest that a conversion ratio of 280 words per page would not accurately reflect the number of words that naturally fit on a page. The Committee ultimately determined to employ a conversion ratio of 260 words per page.

On the length of briefs, many appellate lawyers opposed a reduction in the length limit, arguing principally that some complex appeals require 14,000 words. On the other hand, judges of two courts of appeals formally favored the proposal. Judges submitted public comments stating that unnecessarily long briefs interfere with the efficient and expeditious administration of justice. Appellate judges on the Committee shared those concerns and reported informal input from judicial colleagues who expressed similar views. In considering the suggestion of commentators to withdraw the proposal, therefore, the Committee was required to ask whether the federal rule should continue to require some courts of appeals to accept lengthy briefs that the courts say they do not need and do not want.

During committee deliberations and in public comments, there were two principal reasons advanced for amending the length limit for appellate briefs: (1) concern that the conversion from pages to words in 1998 effectively increased the length limit above the length of traditional briefs filed in the courts of appeals, and (2) concern that regardless of the history, briefs filed under the current rules are too long, and that courts of appeals that wish to apply a shorter limit should be permitted to do so. The Committee received comment and gathered additional data on both points.

Judge Frank Easterbrook submitted a comment explaining that he, as a member of the Standing Committee, drafted the 1998 amendments to Rule 32. According to Judge Easterbrook, the 14,000 word limit came from a Seventh Circuit rule, which in turn was based on a word count of printed briefs filed in the Supreme Court. Judge Easterbrook reported that a similar study of briefs filed by law firms without printing showed an average of about 13,000 words for fifty pages. He wrote that the Advisory Committee selected a limit of 14,000 words, "thinking it best to err on the side of generosity if only because that would curtail the number of motions that counsel would file seeking permission to go longer." Judge Easterbrook reported that "[m]embers of the Advisory Committee (and in turn the Standing Committee) thought it more important to adopt a simple rule that would prevent cheating (by using tracking controls, smaller type, moving text to footnotes, and so on) than to clamp down on the maximum size of a brief."

The Committee also studied the official records of the Advisory Committee and the Standing Committee regarding the 1998 amendments. The 1998 Advisory Committee Note to Rule 32 states that the 14,000 word limit "approximate[s] the current 50-page limit." After hearing testimony that a 50-page brief prepared with an office typewriter would have contained approximately 12,500 words, the Committee in 1994 published a proposal to convert the 50-page limit to 12,500 words. Commentators objected on the ground that the 12,500 limit "reduces the length below the traditional 50 page limit." The Committee then published a new proposal setting a limit of 14,000 words. There was discussion in April 1997 "about reducing the word count from 14,000 to 13,000 because 14,000 is not a good equivalent to the old 50-page brief," and that 14,000 words "is closer to the length of a professionally printed brief." But the minutes of the Advisory Committee reflect that "[i]n order to avoid reopening the controversy" over the length of briefs, "several members spoke in favor of retaining the 14,000 word limit," and "[a] majority favored staying with 14,000." When the chair of the Advisory Committee presented the proposal to the Standing Committee, "[h]e pointed out that a 50-page brief would include about 14,000 words." When the Standing Committee forwarded the 1998 amendment to the Judicial Conference, the Standing Committee's report said that the rule "establishes length limitations of 14,000 words . . . (which equates roughly to the traditional fifty pages)."

Among the commentators supporting the proposed reduction in brief length limits were the judges of the D.C. Circuit; all non-recused active judges of the Tenth Circuit and a majority of the senior judges of the Tenth Circuit; two professional associations; and three individual lawyers. The Department of Justice supported the proposed reduction, while urging the Committee to include language in rule text or a committee note concerning the need for extra length in certain cases. The Solicitor General "agree[d] that in most appeals the parties can and should submit briefs substantially shorter than the current word limits permit," but noted that "in some cases parties will justifiably need to file longer briefs."

Commentators supporting a word-limit reduction asserted that the current word limits allow more length than is needed to brief most appeals. In cases where the full length is unneeded, the 14,000-word limit allows lawyers to avoid pruning away extraneous facts and tenuous arguments. A tighter word limit will drive lawyers to focus on the key facts and dispositive law. Overlong, loosely written briefs divert scarce judicial time. These commentators noted that courts retain authority to grant leave to file overlength briefs in rare cases where 12,500 words are truly inadequate. A circuit that prefers longer limits also may enlarge the limits by local rule.

Among the commentators opposing the reduction in length limits for briefs were one judge; 22 law firms (or practice groups within law firms) or public interest groups; 10 professional associations; 19 non-government lawyers; and two government lawyers. Commentators opposing the reduction in word limits asserted that the current word limit has been unproblematic since its adoption in 1998. They asserted that in simple appeals where even 12,500 words is longer than necessary, the proposed reduction will not address prolixity. These commentators expressed concern that the full 14,000-word length is necessary to brief a complex, important appeal. They noted that inadequately-briefed issues are waived, and stated

that it can be difficult to predict which arguments will persuade the court. They warned that motions for extra length will not be an adequate safety valve because a number of circuits strongly discourage such motions. A number of circuits require or instruct that motions for extra length be made a stated time in advance of the brief's due date, and the Fifth Circuit adds the requirement that a draft brief be included with the motion. A summary of all comments is included with this report, and the comments are available for review at Regulations.gov.

One commentator submitted two studies showing that lawyers could fit 300 words (or more) on a page under the pre-1998 Appellate Rules or a similar state-court framework. This information was not surprising, however, given the Standing Committee's conclusion in 1997 that "computer software programs make it possible . . . to create briefs that comply with a limitation stated in a number of pages, but that contain up to 40% more material than a normal brief."

Professor Gregory Sisk submitted a study in which he and his coauthor examined briefs filed in the Ninth Circuit. The Sisk and Heise study reports a correlation between appellant brief length and reversal. But correlation does not show causation, and the authors caution that it would be "absurd to suggest that greater brief length in itself could have a direct causal link to success on appeal."

In collecting more recent data, the Committee's clerk representative found that only two circuits had readily available data on length of briefs. In the Eighth Circuit, approximately 19 percent of briefs in argued cases contained between 12,500 and 14,000 words; another 4 percent contained more than 14,000. In the D.C. Circuit, 23 percent of all briefs contained between 12,500 and 14,000 words, and 4 percent included more than 14,000; data for argued cases only were unavailable in that circuit.

The Committee members carefully discussed the concerns raised during the public comment period, and decided to revise the published length limits to reflect a conversion ratio of 260 words per page, rather than 250 words per page as published. The length limit for a principal brief (14,000 words under the current rule) is adjusted to 13,000 words from 12,500 in the published proposal. This change addresses to some extent the points raised by commentators while still meaningfully recognizing the validity of the concerns expressed by judges and others about the current rule. For those moved by the historical data, the ratio selected also best approximates the average length of fifty-page briefs filed in courts of appeals governed by a page limit in the years immediately preceding the 1998 amendment. The Committee voted to amend Rule 32(e) to highlight a circuit court's ability to increase any or all of the Appellate Rules' length limits by local rule. The Committee added language to the Committee Notes to Rules 28.1 and 32 to recognize the need for extra length in appropriate cases. The Committee adopted style changes proposed by Professor Kimble. As an aid to users of the Appellate Rules, the Committee endorsed an appendix collecting the length limits stated in the Appellate Rules.

The Committee deleted as unnecessary the alternative line limits from the length limits for documents other than briefs. The Committee retained line limits for briefs, because the

length limits for briefs work differently than the proposed length limits for other documents. The 1998 amendments put in place page limits that were significantly more stringent than the new type-volume limits for briefs: For litigants who do not use Rule 32(a)(7)(B)'s type-volume limits, the 1998 amendments reduced the page limits by 40 percent. By including line limits in the type-volume limits for briefs, the 1998 amendments assured that the more generous type-volume limits would be available to litigants who prepared their briefs without the aid of a computer.

A majority of Committee members voiced support for some version of the proposal to reduce the length limit for briefs, while two attorney members spoke in opposition. As noted, the Committee made several changes in an effort to address concerns, and the ultimate vote was unanimous in favor of the proposal as shown in the attachment to this report.

D. Amicus filings in connection with rehearing: Rule 29

The proposed amendments to Rule 29 would re-number the existing Rule as Rule 29(a) and would add a new Rule 29(b) to set default rules for the treatment of amicus filings in connection with petitions for rehearing. The proposed amendment would not require any circuit to accept amicus briefs, but would establish guidelines for the filing of briefs when they are permitted.

Attorneys who file amicus briefs in connection with petitions for rehearing understandably seek clear guidance about the filing deadlines for, and permitted length of, such briefs. There is no federal rule on the topic. *See Fry v. Exelon Corp. Cash Balance Pension Plan*, 576 F.3d 723, 725 (7th Cir. 2009) (Easterbrook, C.J., in chambers). Most circuits have no local rule on point, and attorneys have reported frustration with their inability to obtain accurate guidance.

The proposed amendments would establish default rules concerning timing and length of amicus briefs in connection with petitions for rehearing. They also would incorporate (for the rehearing stage) most of the features of current Rule 29. A circuit could alter the default federal rules on timing, length, and other matters by local rule or by order in a case, but the new federal rule would ensure that some rule governs the filings in every circuit.

1. Text of proposed amendment and Committee Note

The Committee recommends final approval of the proposed amendment to Rule 29, as revised after publication and set out in the enclosure to this report.

2. Changes made after publication and comment

A number of commentators expressed general support for the idea of amending Rule 29 to address amicus filings in connection with rehearing petitions. Objections and suggestions focused mainly on the issues of length and timing; a third suggestion concerned amicus filings in

connection with merits briefing at times other than the initial briefing of an appeal. In response to the public comments, the Committee decided to change the length limit under Rule 29(b) from 2,000 words to 2,600 words and to change the deadline for amicus filings in support of a rehearing petition (or in support of neither party) from three days after the petition's filing to seven days after the petition's filing. The Committee also deleted the alternative line limit from the length limit as unnecessary.

The published proposal's 2,000-word limit had been derived by taking half of the 15-page limit for the party's petition, rounding up (to eight pages), and multiplying by 250 words per page. The published proposal drew from current Rule 29(d), which provides that amicus filings in connection with the merits briefing of an appeal are limited to half the length of "a party's principal brief."

The ten commentators who specifically addressed this feature of the proposal advocated setting a longer limit. Not all of these commentators stated a preferred alternative, but proposals ranged from 2,240 words to 4,200 words. The arguments in favor of a longer limit related to the nature of the cases, the nature of the issues, the quality of the party's petition, and the required contents of the amicus's brief. Rehearing petitions tend to be filed in difficult cases. Issues may include late-breaking developments in the law. The party's petition may be poorly drafted. The party may neglect the larger implications of a ruling and might not focus on ways that a ruling might usefully be narrowed while preserving the result in the case at hand. Amicus filings must include the statement of the amicus's identity, interest, and authority to file and (usually) the authorship and funding disclosure.

The Committee considered this input and examined the local rules in the four circuits that address the question of length: Two give amici essentially the same length limit as parties, and two give amici more than one-half the length limit for parties but less than the full amount. The Committee then opted to increase the proposed length limit for the federal rule from one-half of the length allowed for a party's petition to two-thirds of that length. Applying the 260-words-per-page conversion ratio noted in Part II.C.2 of this report, the Committee arrived at a revised length limit of 2,600 words.

The published proposal would set a time lag of three days between the filing of the petition and the due date of any amicus filings in support of the petition (or in support of neither party). It would give an amicus curiae opposing the petition the same due date as that set by the court for the response. Two commentators expressed support for the proposed timing rules; eight commentators believed that one or both of the periods would be too short.

Seven of those commentators proposed lengthening the period for amicus filings in support of a rehearing petition and four proposed lengthening the deadline for amicus filings in opposition. Commentators argued that the published proposal's deadlines would generate motions for extensions of time and decrease the quality of amicus filings. They noted that it may not be practicable for an amicus to coordinate with the party whose position it supports. One commentator observed that government lawyers may need time to seek relevant approvals before

filing an amicus brief. One commentator advocated adoption of a two-step process, under which the rule would set a three-day deadline by which the amicus must file a notice of intent to file a brief and a further seven- or ten-day deadline for the actual brief.

The Committee noted that in four circuits that have local provisions addressing the timing of amicus filings in support of rehearing petitions, the time allowed ranges from seven to 14 days after the filing of the party's petition. The Committee also recognized that any circuit could shorten the time period by local rule if it were concerned, for example, about inefficiencies resulting from an amicus brief arriving after a responding party has drafted a response to a petition. The Committee thus decided to adopt a deadline of seven days after the petition's filing for amicus filings in support of the petition (or in support of neither party). The Committee did not alter the deadline for amicus filings in opposition. It is rare for a court to request a response to a rehearing petition, and when the court does so, the order requesting a response can readily alter the due date for amicus filings if such an alteration is desirable.

One commentator suggested adopting a rule to govern amicus filings after the grant of rehearing en banc or after a remand from the Supreme Court. The proposed rule that was published for comment did not address those topics. In deciding not to address them, the Committee took into account three considerations. First, any new provision addressing those contexts would need to be published for comment, and it would not be worthwhile to hold up the already-published proposal for that purpose. Second, amicus filings in those contexts occur only rarely, giving reason to doubt the need for a national rule on the subject. Third, it seems likely that the courts of appeals take flexible approaches to the procedure in those contexts, suggesting that the wiser course might be to leave those topics for treatment in local provisions and orders in particular cases.

E. Amending the "three-day rule": Rule 26(c)

The proposed amendment to Rule 26(c) implements a recommendation by the Standing Committee's CM/ECF Subcommittee that the "three-day rule" in each set of national Rules be amended to exclude electronic service. The three-day rule adds three days to a given period if that period is measured after service and service is accomplished by certain methods. Now that electronic service is well-established, it no longer makes sense to include that method of service among the types of service that trigger application of the three-day rule.

The proposed amendment to Rule 26(c) accomplishes the same result as the proposed amendments to Civil Rule 6, Criminal Rule 45, and Bankruptcy Rule 9006, but does so using different wording in light of Appellate Rule 26(c)'s current structure. Under that structure, the applicability of the three-day rule depends on whether the paper in question is delivered on the date of service stated in the proof of service; if so, then the three-day rule is inapplicable. The change is thus accomplished by amending the rule to state that a paper served electronically is deemed (for this purpose) to have been delivered on the date of service stated in the proof of service.

1. Text of proposed amendment and Committee Note

The Committee recommends final approval of the proposed amendment to Rule 26(c), as revised after publication and set out in the enclosure to this report.

2. Changes made after publication and comment

The Committee voted to approve the amendment as published. But recognizing that the Criminal Rules Committee had voted to add certain language to the Committee Note accompanying the proposed amendment to Rule 45, the Committee gave the chair discretion to accede to the addition of the same language to Rule 26(c)'s Committee Note depending on discussions with the Standing Committee. It now appears that the Bankruptcy and Civil Rules Committees are prepared to accommodate the strongly-held preference of the Criminal Rules Committee. Under those circumstances, the Appellate Rules Committee would not object to including the same language in the Committee Note.

A number of commentators supported the proposal to exclude electronic service from the three-day rule. Others conceded its appeal, but proposed changes to offset its anticipated consequences. Still others opposed the proposal altogether.

Commentators' concerns fall into four basic categories: unfair behavior by opponents, hardship for the party being served, the need for time to draft reply briefs and/or motion papers, and inefficiency that would result from motions for extensions of time. Electronic service, unlike personal service, can occur outside of business hours. For example, it may be made late at night on a Friday before a holiday weekend in a different time zone. Some commentators worried that electronically served papers are more likely to be overlooked. Hardships might fall more heavily on lawyers who operate in small offices or as solo practitioners, and on lawyers who must draft complex response papers. Commentators stated that the three extra days are especially important to provide extra time to draft reply briefs, responses to motions, and replies to such responses. They state that, with the prevalence of electronic filing and service, the extra three days have become a "de facto" part of the time periods for such documents. The Department of Justice notes that government lawyers need time to confer with relevant personnel. Other commentators say that lawyers need time to deal with the competing demands of other cases and to communicate with clients who are incarcerated. Acknowledging that an extension of time could address the problems noted above, commentators argued that such motions do not provide a good solution, because making and adjudicating those motions consume lawyer and court time.

A number of commentators suggested modifications to the proposal or additional amendments that would offset some effects of the proposal. Some of the suggested revisions applied equally to the three-day rules in the Civil, Criminal, and Bankruptcy Rules. Others were specific to the Appellate Rules.

The Department of Justice proposed the addition, to each Committee Note, of language encouraging the grant of extensions when appropriate. After some discussion, the Department circulated a revised proposal that read: "The ease of making electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice." The Criminal Rules Committee voted to add the proposed language to the Committee Note to Criminal Rule 45, and noted the importance of taking a flexible approach and resolving issues on their merits in criminal cases. The other Advisory Committees now are prepared to acquiesce in that language.

Other commentators made a variety of suggestions. Two commentators proposed that although electronic service should not give rise to an automatic three-day extension, a more limited automatic extension (of one or two days) would be appropriate. One commentator proposed the adoption of a provision that would address the computation of response time when a document "is submitted with a motion for leave to file or is not accepted for filing." Two sets of comments suggested lengthening the deadline for reply briefs.

The Committee did not adopt the proposals for a one-or-two-day extension or for a provision addressing documents that are not immediately accepted for filing. Some committee members, however, were sympathetic to the concerns about the timing for reply briefs. As the commentators pointed out, the "de facto" deadline for reply briefs is now 17 days (14 day under Rule 31(a)(1), plus three days under Rule 26(c)). Before the advent of electronic service, the three-day rule existed to offset transit time in the mail; if the mail took three days, then the de facto response time would be the same as the nominal deadline, namely, 14 days. But in 2002, Rule 25 was amended to permit electronic service, and as electronic service has become more widespread, lawyers have become accustomed to a period of 17 days for filing a reply brief. A number of Committee members expressed concern that a 14-day deadline is very short and that it can be difficult to seek extensions of time.

Committee members concluded that the amendment to Rule 26(c) should proceed together with the amendments to the three-day rules in the other sets of rules. But the Committee added to its study agenda a new item concerning the deadline for reply briefs. The Committee also discussed that before the amendment to the three-day rule takes effect on December 1, 2016, the chair could alert the chief judges of the courts of appeals about the Committee's work relating to the filing deadline for reply briefs. Such notice would permit local courts to consider whether to extend the deadline for reply briefs by local rule, especially if the Committee is considering a national rule amendment on that topic.

F. Updating a cross-reference in Rule 26(a)(4)(C)

In 2013, Rule 13—governing appeals as of right from the Tax Court—was revised and became Rule 13(a). A new Rule 13(b)—providing that Rule 5 governs permissive appeals from the Tax Court—was added. At that time, Rule 26(a)(4)(C)'s reference to "filing by mail under Rule 13(b)" should have been updated to refer to "filing by mail under Rule 13(a)(2)."

The Committee voted to give final approval to an amendment to Rule 26(a)(4)(C) to update this cross-reference. The Committee noted that the change is a technical amendment that can proceed without publication.

* * * * *

PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF APPELLATE PROCEDURE*

1 **Rule 4. Appeal as of Right—When Taken**

2 * * * * *

3 **(c) Appeal by an Inmate Confined in an Institution.**

4 (1) If an institution has a system designed for legal
5 mail, an inmate confined there must use that
6 system to receive the benefit of this Rule 4(c)(1).
7 If an inmate ~~confined in an institution~~ files a
8 notice of appeal in either a civil or a criminal
9 case, the notice is timely if it is deposited in the
10 institution's internal mail system on or before the
11 last day for filing~~. If an institution has a system~~
12 ~~designed for legal mail, the inmate must use that~~
13 ~~system to receive the benefit of this rule. Timely~~
14 ~~filing may be shown by a declaration in~~

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

12b-011060

15 ~~compliance with 28 U.S.C. § 1746 or by a~~
16 ~~notarized statement, either of which must set~~
17 ~~forth the date of deposit and state that first-class~~
18 ~~postage has been prepaid.~~ and:
19 (A) it is accompanied by:
20 (i) a declaration in compliance with 28
21 U.S.C. § 1746—or a notarized
22 statement—setting out the date of
23 deposit and stating that first-class
24 postage is being prepaid; or
25 (ii) evidence (such as a postmark or date
26 stamp) showing that the notice was so
27 deposited and that postage was
28 prepaid; or
29 (B) the court of appeals exercises its discretion
30 to permit the later filing of a declaration or

31 notarized statement that satisfies

32 Rule 4(c)(1)(A)(i).

33 * * * * *

Committee Note

Rule 4(c)(1) is revised to streamline and clarify the operation of the inmate-filing rule.

The Rule requires the inmate to show timely deposit and prepayment of postage. The Rule is amended to specify that a notice is timely if it is accompanied by a declaration or notarized statement stating the date the notice was deposited in the institution's mail system and attesting to the prepayment of first-class postage. The declaration must state that first-class postage "is being prepaid," not (as directed by the former Rule) that first-class postage "has been prepaid." This change reflects the fact that inmates may need to rely upon the institution to affix postage after the inmate has deposited the document in the institution's mail system. New Form 7 in the Appendix of Forms sets out a suggested form of the declaration.

The amended rule also provides that a notice is timely without a declaration or notarized statement if other evidence accompanying the notice shows that the notice was deposited on or before the due date and that postage was prepaid. If the notice is not accompanied by evidence that establishes timely deposit and prepayment of postage, then the court of appeals has discretion to accept a declaration or notarized statement at a later date. The Rule

12b-011062

uses the phrase “exercises its discretion to permit” – rather than simply “permits” – to help ensure that pro se inmate litigants are aware that a court will not necessarily forgive a failure to provide the declaration initially.

Rule 25. Filing and Service

(a) Filing.

* * * * *

(2) **Filing: Method and Timeliness.**

* * * * *

(C) **Inmate F~~f~~iling.** If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 25(a)(2)(C). A paper filed by an inmate ~~confined in an institution~~ is timely if it is deposited in the institution's internal mail~~ing~~ system on or before the last day for filing~~. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a~~

12b-011064

18 ~~declaration in compliance with 28 U.S.C. §~~
19 ~~1746 or by a notarized statement, either of~~
20 ~~which must set forth the date of deposit and~~
21 ~~state that first-class postage has been~~
22 ~~prepaid.~~ and:
23 (i) it is accompanied by:
24 ● a declaration in compliance with
25 28 U.S.C. § 1746—or a notarized
26 statement—setting out the date of
27 deposit and stating that first-class
28 postage is being prepaid; or
29 ● evidence (such as a postmark or
30 date stamp) showing that the
31 paper was so deposited and that
32 postage was prepaid; or
33 (ii) the court of appeals exercises its
34 discretion to permit the later filing of a

35 declaration or notarized statement that

36 satisfies Rule 25(a)(2)(C)(i).

37 * * * * *

Committee Note

Rule 25(a)(2)(C) is revised to streamline and clarify the operation of the inmate-filing rule.

The Rule requires the inmate to show timely deposit and prepayment of postage. The Rule is amended to specify that a paper is timely if it is accompanied by a declaration or notarized statement stating the date the paper was deposited in the institution's mail system and attesting to the prepayment of first-class postage. The declaration must state that first-class postage "is being prepaid," not (as directed by the former Rule) that first-class postage "has been prepaid." This change reflects the fact that inmates may need to rely upon the institution to affix postage after the inmate has deposited the document in the institution's mail system. New Form 7 in the Appendix of Forms sets out a suggested form of the declaration.

The amended rule also provides that a paper is timely without a declaration or notarized statement if other evidence accompanying the paper shows that the paper was deposited on or before the due date and that postage was prepaid. If the paper is not accompanied by evidence that establishes timely deposit and prepayment of postage, then the court of appeals has discretion to accept a declaration or notarized statement at a later date. The Rule uses the phrase "exercises its discretion to permit" – rather than

12b-011066

simply "permits" – to help ensure that pro se inmate litigants are aware that a court will not necessarily forgive a failure to provide the declaration initially.

Form 1. Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court

United States District Court for the _____
District of _____
File Number _____

A.B., Plaintiff v. C.D., Defendant	Notice of Appeal

Notice is hereby given that ___(here name all parties taking the appeal)__, (plaintiffs) (defendants) in the above named case,* hereby appeal to the United States Court of Appeals for the _____ Circuit (from the final judgment) (from an order (describing it)) entered in this action on the _____ day of _____, 20___.

(s) _____
Attorney for _____
Address:_____

[***Note to inmate filers:*** *If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration along with this Notice of Appeal.*]

* See Rule 3(c) for permissible ways of identifying appellants.

12b-011068

Form 5. Notice of Appeal to a Court of Appeals from a Judgment or Order of a District Court or a Bankruptcy Appellate Panel

United States District Court for the _____
District of _____

In re _____, Debtor _____, Plaintiff v. _____, Defendant	File No. _____

Notice of Appeal to United States Court of Appeals for the _____ Circuit

_____, the plaintiff [or defendant or other party] appeals to the United States Court of Appeals for the _____ Circuit from the final judgment [or order or decree] of the district court for the district of _____ [or bankruptcy appellate panel of the _____ circuit], entered in this case on _____, 20__ [here describe the judgment, order, or decree] _____

The parties to the judgment [or order or decree] appealed from and the names and addresses of their respective attorneys are as follows:

Dated _____

Signed _____

Attorney for Appellant

Address: _____

_____

[***Note to inmate filers:*** *If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration along with this Notice of Appeal.*]

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Form 7. Declaration of Inmate Filing

_____

[*insert name of court; for example,*
United States District Court for the District of Minnesota]

A.B., Plaintiff v. C.D., Defendant	Case No. _____

I am an inmate confined in an institution. Today, _____ [*insert date*], I am depositing the _____ [*insert title of document; for example, "notice of appeal"*] in this case in the institution's internal mail system. First-class postage is being prepaid either by me or by the institution on my behalf.

I declare under penalty of perjury that the foregoing is true and correct (see 28 U.S.C. § 1746; 18 U.S.C. § 1621).

Sign your name here_____

Signed on _____ [*insert date*]

[*Note to inmate filers: If your institution has a system designed for legal mail, you must use that system in order to receive the timing benefit of Fed. R. App. P. 4(c)(1) or Fed. R. App. P. 25(a)(2)(C).*]

1 **Rule 4. Appeal as of Right—When Taken**

2 **(a) Appeal in a Civil Case.**

3 * * * * *

4 (4) **Effect of a Motion on a Notice of Appeal.**

5 (A) If a party ~~timely~~ files in the district court
6 any of the following motions under the
7 Federal Rules of Civil Procedure~~,~~ and
8 does so within the time allowed by those
9 rules—the time to file an appeal runs for all
10 parties from the entry of the order disposing
11 of the last such remaining motion:

12 * * * * *

Committee Note

A clarifying amendment is made to subdivision (a)(4). Former Rule 4(a)(4) provided that "[i]f a party timely files in the district court" certain post-judgment motions, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." Responding to a circuit split concerning the meaning of "timely" in this provision, the amendment adopts the majority approach and rejects the approach taken in

12b-011072

National Ecological Foundation v. Alexander, 496 F.3d 466 (6th Cir. 2007). A motion made after the time allowed by the Civil Rules will not qualify as a motion that, under Rule 4(a)(4)(A), re-starts the appeal time—and that fact is not altered by, for example, a court order that sets a due date that is later than permitted by the Civil Rules, another party's consent or failure to object to the motion's lateness, or the court's disposition of the motion without explicit reliance on untimeliness.

Rule 5. Appeal by Permission

* * * * *

(c) Form of Papers; Number of Copies; Length Limits. All papers must conform to Rule 32(c)(2). ~~Except by the court's permission, a paper must not exceed 20 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 5(b)(1)(E).~~ An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case. Except by the court's permission, and excluding the accompanying documents required by Rule 5(b)(1)(E):

(1) a paper produced using a computer must not exceed 5,200 words; and

(2) a handwritten or typewritten paper must not exceed 20 pages.

12b-011074

18 * * * * *

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by word limits. The word limits were derived from the current page limits using the assumption that one page is equivalent to 260 words. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the word limit and the page limit, the calculation excludes the accompanying documents required by Rule 5(b)(1)(E) and any items listed in Rule 32(f).

Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary Writs

* * * * *

(d) Form of Papers; Number of Copies; Length Limits. All papers must conform to Rule 32(c)(2). ~~Except by the court's permission, a paper must not exceed 30 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 21(a)(2)(C).~~ An original and 3 copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case. Except by the court's permission, and excluding the accompanying documents required by Rule 21(a)(2)(C):

(1) a paper produced using a computer must not exceed 7,800 words; and

12-0-011076

17 (2) a handwritten or typewritten paper must not

18 exceed 30 pages.

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by word limits. The word limits were derived from the current page limits using the assumption that one page is equivalent to 260 words. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the word limit and the page limit, the calculation excludes the accompanying documents required by Rule 21(a)(2)(C) and any items listed in Rule 32(f).

Rule 27. Motions

* * * * *

(d) Form of Papers; Length Limits; ~~Page Limits; and~~ Number of Copies.

* * * * *

(2) **~~Page~~ Length Limits.** ~~A motion or a response to a motion must not exceed 20 pages, exclusive of the corporate disclosure statement and accompanying documents authorized by Rule 27(a)(2)(B), unless the court permits or directs otherwise. A reply to a response must not exceed 10 pages.~~Except by the court's permission, and excluding the accompanying documents authorized by Rule 27(a)(2)(B):

(A) a motion or response to a motion produced using a computer must not exceed 5,200 words;

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18 (B) a handwritten or typewritten motion or
19 response to a motion must not exceed 20
20 pages;
21 (C) a reply produced using a computer must not
22 exceed 2,600 words; and
23 (D) a handwritten or typewritten reply to a
24 response must not exceed 10 pages.
25 * * * * *

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by word limits. The word limits were derived from the current page limits using the assumption that one page is equivalent to 260 words. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the word limit and the page limit, the calculation excludes the accompanying documents required by Rule 27(a)(2)(B) and any items listed in Rule 32(f).

Rule 28. Briefs

(a) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated:

* * * * *

(10) the certificate of compliance, if required by Rule ~~32(a)(7)~~32(g)(1).

* * * * *

Committee Note

Rule 28(a)(10) is revised to refer to Rule 32(g)(1) instead of Rule 32(a)(7), to reflect the relocation of the certificate-of-compliance requirement.

12b-011080

Rule 28.1. Cross-Appeals

* * * * *

(e) Length.

(1) **Page Limitation.** Unless it complies with Rule 28.1(e)(2)~~ and (3)~~, the appellant's principal brief must not exceed 30 pages; the appellee's principal and response brief, 35 pages; the appellant's response and reply brief, 30 pages; and the appellee's reply brief, 15 pages.

(2) **Type-Volume Limitation.**

(A) The appellant's principal brief or the appellant's response and reply brief is acceptable if it:

(i) ~~it~~ contains no more than ~~14,000~~13,000 words; or

(ii) ~~it~~ uses a monospaced face and contains no more than 1,300 lines of text.

(B) The appellee's principal and response brief is acceptable if it:

(i) ~~it~~ contains no more than ~~16,500~~15,300 words; or

(ii) ~~it~~ uses a monospaced face and contains no more than 1,500 lines of text.

(C) The appellee's reply brief is acceptable if it contains no more than half of the type volume specified in Rule 28.1(e)(2)(A).

~~(3) **Certificate of Compliance.** A brief submitted under Rule 28.1(e)(2) must comply with Rule 32(a)(7)(C).~~

* * * * *

12b-011082

Committee Note

When Rule 28.1 was adopted in 2005, it modeled its type-volume limits on those set forth in Rule 32(a)(7) for briefs in cases that did not involve a cross-appeal. At that time, Rule 32(a)(7)(B) set word limits based on an estimate of 280 words per page.

In the course of adopting word limits for the length limits in Rules 5, 21, 27, 35, and 40, and responding to concern about the length of briefs, the Committee has reevaluated the conversion ratio (from pages to words) and decided to apply a conversion ratio of 260 words per page. Rules 28.1 and 32(a)(7)(B) are amended to reduce the word limits accordingly.

In a complex case, a party may need to file a brief that exceeds the type-volume limitations specified in these rules, such as to include unusually voluminous information explaining relevant background or legal provisions or to respond to multiple briefs by opposing parties or amici. The Committee expects that courts will accommodate those situations by granting leave to exceed the type-volume limitations as appropriate.

Rule 32. Form of Briefs, Appendices, and Other Papers

(a) Form of a Brief.

* * * * *

(7) **Length.**

(A) **Page Limitation.** A principal brief may not exceed 30 pages, or a reply brief 15 pages, unless it complies with Rule 32(a)(7)(B)~~ and (C)~~.

(B) **Type-Volume Limitation.**

(i) A principal brief is acceptable if it:

- ~~it~~ contains no more than ~~14,000~~13,000 words; or
- ~~it~~ uses a monospaced face and contains no more than 1,300 lines of text.

(ii) A reply brief is acceptable if it contains no more than half of the type

18 volume specified in Rule
19 32(a)(7)(B)(i).
20 ~~(iii) Headings, footnotes, and quotations~~
21 ~~count toward the word and line~~
22 ~~limitations. The corporate disclosure~~
23 ~~statement, table of contents, table of~~
24 ~~citations, statement with respect to~~
25 ~~oral argument, any addendum~~
26 ~~containing statutes, rules or~~
27 ~~regulations, and any certificates of~~
28 ~~counsel do not count toward the~~
29 ~~limitation.~~
30 ~~**(C) Certificate of compliance.**~~
31 ~~(i) A brief submitted under~~
32 ~~Rules 28.1(e)(2) or 32(a)(7)(B) must~~
33 ~~include a certificate by the attorney, or~~
34 ~~an unrepresented party, that the brief~~

35 ~~complies with the type-volume~~
36 ~~limitation. The person preparing the~~
37 ~~certificate may rely on the word or~~
38 ~~line count of the word-processing~~
39 ~~system used to prepare the brief. The~~
40 ~~certificate must state either:~~
41 ~~● the number of words in the brief;~~
42 ~~or~~
43 ~~● the number of lines of~~
44 ~~monospaced type in the brief.~~
45 ~~(ii) Form 6 in the Appendix of Forms is a~~
46 ~~suggested form of a certificate of~~
47 ~~compliance. Use of Form 6 must be~~
48 ~~regarded as sufficient to meet the~~
49 ~~requirements of Rules 28.1(e)(3) and~~
50 ~~32(a)(7)(C)(i).~~
51 * * * * *

12-011086

52 **(e) Local Variation.** Every court of appeals must accept
53 documents that comply with the form requirements of
54 this rule and the length limits set by these rules. By
55 local rule or order in a particular case, a court of
56 appeals may accept documents that do not meet all ~~of~~
57 the form requirements of this rule or the length limits
58 set by these rules.
59 **(f) Items Excluded from Length.** In computing any
60 length limit, headings, footnotes, and quotations count
61 toward the limit but the following items do not:
62 ● the cover page;
63 ● a corporate disclosure statement;
64 ● a table of contents;
65 ● a table of citations;
66 ● a statement regarding oral argument;
67 ● an addendum containing statutes, rules, or
68 regulations;

69 ● certificates of counsel;

70 ● the signature block;

71 ● the proof of service; and

72 ● any item specifically excluded by these rules or

73 by local rule.

74 **(g) Certificate of Compliance.**

75 (1) **Briefs and Papers That Require a Certificate.**

76 A brief submitted under Rules 28.1(e)(2),

77 29(b)(4), or 32(a)(7)(B)—and a paper submitted

78 under Rules 5(c)(1), 21(d)(1), 27(d)(2)(A),

79 27(d)(2)(C), 35(b)(2)(A), or 40(b)(1)—must

80 include a certificate by the attorney, or an

81 unrepresented party, that the document complies

82 with the type-volume limitation. The person

83 preparing the certificate may rely on the word or

84 line count of the word-processing system used to

85 prepare the document. The certificate must state

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86 the number of words—or the number of lines of
87 monospaced type—in the document.
88 (2) **Acceptable Form.** Form 6 in the Appendix of
89 Forms meets the requirements for a certificate of
90 compliance.

Committee Note

When Rule 32(a)(7)(B)'s type-volume limits for briefs were adopted in 1998, the word limits were based on an estimate of 280 words per page. In the course of adopting word limits for the length limits in Rules 5, 21, 27, 35, and 40, and responding to concern about the length of briefs, the Committee has re-evaluated the conversion ratio (from pages to words) and decided to apply a conversion ratio of 260 words per page. Rules 28.1 and 32(a)(7)(B) are amended to reduce the word limits accordingly.

In a complex case, a party may need to file a brief that exceeds the type-volume limitations specified in these rules, such as to include unusually voluminous information explaining relevant background or legal provisions or to respond to multiple briefs by opposing parties or amici. The Committee expects that courts will accommodate those situations by granting leave to exceed the type-volume limitations as appropriate.

Subdivision (e) is amended to make clear a court's ability (by local rule or order in a case) to increase the

length limits for briefs and other documents. Subdivision (e) already established this authority as to the length limits in Rule 32(a)(7); the amendment makes clear that this authority extends to all length limits in the Appellate Rules.

A new subdivision (f) is added to set out a global list of items excluded from length computations, and the list of exclusions in former subdivision (a)(7)(B)(iii) is deleted. The certificate-of-compliance provision formerly in Rule 32(a)(7)(C) is relocated to a new Rule 32(g) and now applies to filings under all type-volume limits (other than Rule 28(j)'s word limit) – including the new word limits in Rules 5, 21, 27, 29, 35, and 40. Conforming amendments are made to Form 6.

Rule 35. En Banc Determination

* * * * *

(b) Petition for Hearing or Rehearing En Banc. A party may petition for a hearing or rehearing en banc.

* * * * *

(2) Except by the court's permission~~, a petition for an en banc hearing or rehearing must not exceed 15 pages, excluding material not counted under Rule 32.~~:

(A) a petition for an en banc hearing or rehearing produced using a computer must not exceed 3,900 words; and

(B) a handwritten or typewritten petition for an en banc hearing or rehearing must not exceed 15 pages.

(3) For purposes of the ~~page~~ limits in Rule 35(b)(2), if a party files both a petition for panel rehearing

18 and a petition for rehearing en banc, they are
19 considered a single document even if they are
20 filed separately, unless separate filing is required
21 by local rule.
22 * * * * *

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by word limits. The word limits were derived from the current page limits using the assumption that one page is equivalent to 260 words. Papers produced using a computer must include the certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the word limit and the page limit, the calculation excludes any items listed in Rule 32(f).

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1 **Rule 40. Petition for Panel Rehearing**

2 * * * * *

3 **(b) Form of Petition; Length.** The petition must comply
4 in form with Rule 32. Copies must be served and
5 filed as Rule 31 prescribes. ~~Unless the court permits~~
6 ~~or a local rule provides otherwise, a petition for panel~~
7 ~~rehearing must not exceed 15 pages.~~Except by the
8 court's permission:
9 (1) a petition for panel rehearing produced using a
10 computer must not exceed 3,900 words; and
11 (2) a handwritten or typewritten petition for panel
12 rehearing must not exceed 15 pages.

Committee Note

The page limits previously employed in Rules 5, 21, 27, 35, and 40 have been largely overtaken by changes in technology. For papers produced using a computer, those page limits are now replaced by word limits. The word limits were derived from the current page limits using the assumption that one page is equivalent to 260 words. Papers produced using a computer must include the

certificate of compliance required by Rule 32(g); Form 6 in the Appendix of Forms suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the word limit and the page limit, the calculation excludes any items listed in Rule 32(f).

Form 6. Certificate of Compliance with ~~Rule 32(a)~~ Type-Volume Limit

Certificate of Compliance With Type-Volume Limit~~ation~~, Typeface Requirements, and Type-Style Requirements

1. This ~~brief~~document complies with [the type-volume limit~~ation~~ of Fed. R. App. P. ~~32(a)(7)(B)~~[*insert Rule citation; e.g., 32(a)(7)(B)*]] [the word limit of Fed. R. App. P. [*insert Rule citation; e.g., 5(c)(1)*]] because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) [and [*insert applicable Rule citation, if any*]]:

☐ this ~~brief~~document contains [*state the number of*] words, ~~excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii),~~ **or**

☐ this brief uses a monospaced typeface and contains [*state the number of*] lines of text~~, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)~~.

2. This ~~brief~~document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because:

☐ this ~~brief~~document has been prepared in a proportionally spaced typeface using [*state name and version of word-processing program*] in [*state font size and name of type style*], **or**

25 ☐ this ~~brief~~document has been prepared in a
26 monospaced typeface using [*state name and*
27 *version of word-processing program*] with [*state*
28 *number of characters per inch and name of type*
29 *style*].

30 (s)_____

31 Attorney for _____

32 Dated: _____

Appendix:
Length Limits Stated in the
Federal Rules of Appellate Procedure

This chart summarizes the length limits stated in the Federal Rules of Appellate Procedure. Please refer to the rules for precise requirements, and bear in mind the following:

- In computing these limits, you can exclude the items listed in Rule 32(f).
- If you use a word limit or a line limit (other than the word limit in Rule 28(j)), you must file the certificate required by Rule 32(g).
- For the limits in Rules 5, 21, 27, 35, and 40:
  - You must use the word limit if you produce your document on a computer; and
  - You must use the page limit if you handwrite your document or type it on a typewriter.
- For the limits in Rules 28.1, 29(a)(5), and 32:
  - You may use the word limit or page limit, regardless of how you produce the document; or
  - You may use the line limit if you type or print your document with a monospaced typeface. A typeface is monospaced when each character occupies the same amount of horizontal space.

	Rule	Document type	Word limit	Page limit	Line limit
Permission to appeal	5(c)	• Petition for permission to appeal • Answer in opposition • Cross-petition	5,200	20	Not applicable

	Rule	Document type	Word limit	Page limit	Line limit
Extraordinary writs	21(d)	• Petition for writ of mandamus or prohibition or other extraordinary writ • Answer	7,800	30	Not applicable
Motions	27(d)(2)	• Motion • Response to a motion	5,200	20	Not applicable
	27(d)(2)	• Reply to a response to a motion	2,600	10	Not applicable
Parties' briefs (where no cross-appeal)	32(a)(7)	• Principal brief	13,000	30	1,300
	32(a)(7)	• Reply brief	6,500	15	650
Parties' briefs (where cross-appeal)	28.1(e)	• Appellant's principal brief • Appellant's response and reply brief	13,000	30	1,300
	28.1(e)	• Appellee's principal and response brief	15,300	35	1,500
	28.1(e)	• Appellee's reply brief	6,500	15	650
Party's supplemental letter	28(j)	• Letter citing supplemental authorities	350	Not applicable	Not applicable

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	Rule	Document type	Word limit	Page limit	Line limit
Amicus briefs	29(a)(5)	• Amicus brief during initial consideration of case on merits	One-half the length set by the Appellate Rules for a party's principal brief	One-half the length set by the Appellate Rules for a party's principal brief	One-half the length set by the Appellate Rules for a party's principal brief
	29(b)(4)	• Amicus brief during consideration of whether to grant rehearing	2,600	Not applicable	Not applicable
Rehearing and en banc filings	35(b)(2) & 40(b)	• Petition for hearing en banc • Petition for panel rehearing; petition for rehearing en banc	3,900	15	Not applicable

Rule 29. Brief of an Amicus Curiae

(a) During Initial Consideration of a Case on the Merits.

(1) **Applicability.** This Rule 29(a) governs amicus filings during a court's initial consideration of a case on the merits.

(2) **When Permitted.** The United States or its officer or agency or a state may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.

~~(b)~~ (3) **Motion for Leave to File.** The motion must be accompanied by the proposed brief and state:

~~(1)~~ (A) the movant's interest; and

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16 ~~(2)~~ (B) the reason why an amicus brief is desirable
17 and why the matters asserted are relevant to
18 the disposition of the case.
19 ~~(c)~~ (4) **Contents and Form.** An amicus brief must
20 comply with Rule 32. In addition to the
21 requirements of Rule 32, the cover must identify
22 the party or parties supported and indicate
23 whether the brief supports affirmance or reversal.
24 An amicus brief need not comply with Rule 28,
25 but must include the following:
26 ~~(1)~~ (A) if the amicus curiae is a corporation, a
27 disclosure statement like that required of
28 parties by Rule 26.1;
29 ~~(2)~~ (B) a table of contents, with page references;
30 ~~(3)~~ (C) a table of authorities—cases (alphabetically
31 arranged), statutes, and other authorities—

with references to the pages of the brief where they are cited;

~~(4)~~ (D) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;

~~(5)~~ (E) unless the amicus curiae is one listed in the first sentence of Rule 29(a)(2), a statement that indicates whether:

~~(A)~~ (i) a party's counsel authored the brief in whole or in part;

~~(B)~~ (ii) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and

~~(C)~~ (iii) a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended

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to fund preparing or submitting the brief and, if so, identifies each such person;

~~(6)~~ (F) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; and

~~(7)~~ (G) a certificate of compliance under Rule 32(g)(1), if ~~required by Rule 32(a)(7)~~ length is computed using a word or line limit.

~~(d)~~ (5) **Length.** Except by the court's permission, an amicus brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

66 ~~(e)~~ (6) **Time for Filing.** An amicus curiae must file its
67 brief, accompanied by a motion for filing when
68 necessary, no later than 7 days after the principal
69 brief of the party being supported is filed. An
70 amicus curiae that does not support either party
71 must file its brief no later than 7 days after the
72 appellant's or petitioner's principal brief is filed.
73 A court may grant leave for later filing,
74 specifying the time within which an opposing
75 party may answer.
76 ~~(f)~~ (7) **Reply Brief.** Except by the court's permission,
77 an amicus curiae may not file a reply brief.
78 ~~(g)~~ (8) **Oral Argument.** An amicus curiae may
79 participate in oral argument only with the court's
80 permission.
81 **(b) During Consideration of Whether to Grant**
82 **Rehearing.**

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83 (1) **Applicability.** This Rule 29(b) governs amicus
84 filings during a court's consideration of whether
85 to grant panel rehearing or rehearing en banc,
86 unless a local rule or order in a case provides
87 otherwise.
88 (2) **When Permitted.** The United States or its
89 officer or agency or a state may file an amicus-
90 curiae brief without the consent of the parties or
91 leave of court. Any other amicus curiae may file
92 a brief only by leave of court.
93 (3) **Motion for Leave to File.** Rule 29(a)(3) applies
94 to a motion for leave.
95 (4) **Contents, Form, and Length**. Rule 29(a)(4)
96 applies to the amicus brief. The brief must not
97 exceed 2,600 words.
98 (5) **Time for Filing.** An amicus curiae supporting
99 the petition for rehearing or supporting neither

100 party must file its brief, accompanied by a
101 motion for filing when necessary, no later than 7
102 days after the petition is filed. An amicus curiae
103 opposing the petition must file its brief,
104 accompanied by a motion for filing when
105 necessary, no later than the date set by the court
106 for the response.

Committee Note

Rule 29 is amended to address amicus filings in connection with requests for panel rehearing and rehearing en banc.

Existing Rule 29 is renumbered Rule 29(a), and language is added to that subdivision (a) to state that its provisions apply to amicus filings during the court's initial consideration of a case on the merits. Rule 29(c)(7) becomes Rule 29(a)(4)(G) and is revised to accord with the relocation and revision of the certificate-of-compliance requirement. New Rule 32(g)(1) states that "[a] brief submitted under Rules 28.1(e)(2), 29(b)(4), or 32(a)(7)(B) ... must include" a certificate of compliance. An amicus brief submitted during initial consideration of a case on the merits counts as a "brief submitted under Rule[] ... 32(a)(7)(B)" if the amicus computes Rule 29(a)(5)'s length limit by taking half of a type-volume limit in

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Rule 32(a)(7)(B). Rule 29(a)(4)(G) restates Rule 32(g)(1)'s requirement functionally, by providing that a certificate of compliance is required if an amicus brief's length is computed using a word or line limit.

New subdivision (b) is added to address amicus filings in connection with a petition for panel rehearing or rehearing en banc. Subdivision (b) sets default rules that apply when a court does not provide otherwise by local rule or by order in a case. A court remains free to adopt different rules governing whether amicus filings are permitted in connection with petitions for rehearing, and governing the procedures when such filings are permitted.

1 **Rule 26. Computing and Extending Time**

2 * * * * *

3 **(c) Additional Time after Certain Kinds of Service.**
4 When a party may or must act within a specified time
5 after ~~service~~being served, 3 days are added after the
6 period would otherwise expire under Rule 26(a),
7 unless the paper is delivered on the date of service
8 stated in the proof of service. For purposes of this
9 Rule 26(c), a paper that is served electronically is ~~not~~
10 treated as delivered on the date of service stated in the
11 proof of service.

Committee Note

Rule 26(c) is amended to remove service by electronic means under Rule 25(c)(1)(D) from the modes of service that allow 3 added days to act after being served.

Rule 25(c) was amended in 2002 to provide for service by electronic means. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were

concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28- day periods that allow "day-of-the-week" counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice.

Rule 26(c) has also been amended to refer to instances when a party "may or must act . . . after being served" rather than to instances when a party "may or must act. . . after service." If, in future, an Appellate Rule sets a

deadline for a party to act after *that party itself effects service* on another person, this change in language will clarify that Rule 26(c)'s three added days are not accorded to the party who effected service.

Rule 26. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

* * * * *

(4) **''Last Day'' Defined.** Unless a different time is set by a statute, local rule, or court order, the last day ends:

(A) for electronic filing in the district court, at midnight in the court's time zone;

(B) for electronic filing in the court of appeals, at midnight in the time zone of the circuit clerk's principal office;

(C) for filing under Rules 4(c)(1), 25(a)(2)(B), and 25(a)(2)(C)—and filing by mail under Rule ~~13(b)~~13(a)(2)—at the latest time for

18 the method chosen for delivery to the post
19 office, third-party commercial carrier, or
20 prison mailing system; and
21 (D) for filing by other means, when the clerk's
22 office is scheduled to close.
23 * * * * *

Committee Note

Subdivision (a)(4)(C). The reference to Rule 13(b) is revised to refer to Rule 13(a)(2) in light of a 2013 amendment to Rule 13. The amendment to subdivision (a)(4)(C) is technical and no substantive change is intended.

12b-011112

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

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SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

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

FROM: Honorable Eugene R. Wedoff, Chair
Advisory Committee on Bankruptcy Rules

DATE: May 6, 2014

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on April 22 and 23, 2014, in Austin, Texas, at the University of Texas School of Law. The draft minutes of that meeting accompany this report in Appendix C. The Committee's actions fall into two categories.

First, the Advisory Committee took action on the proposed rule and form amendments that were published for comment in August 2013. One hundred and sixty-four comments were submitted in response to the publication, some of which addressed multiple rules and forms. The comments were considered in a series of subcommittee and working group conference calls prior to the spring meeting and in Committee discussions in Austin. The Advisory Committee now seeks the Standing Committee's final approval of some of the published items: one rule amendment and 29 revised or new forms, most of which were products of the Forms Modernization Project. Because the Committee made significant changes after publication to the

chapter 13 plan form and related rules, it requests that the revised form and rules be republished. The Committee voted not to proceed further with the electronic signature amendment to Rule 5005(a). The reasons for the Committee's decision to withdraw the proposed amendment are discussed below under Information Items.

*****

II. Action Items

A. Items for Final Approval

A1. Amendments Published for Comment in August 2013. **The Advisory Committee recommends that the Standing Committee approve the proposed rule and form amendments that were published for comment in August 2013 and are discussed below.** The discussion of each action item indicates its proposed effective date. Appendix A includes the text of the amended rule and forms that are in this group.

*****

Action Item 4. Official Forms 101, 101A, 101B, 104, 105, 106Sum, 106A/B, 106C, 106D, 106E/F, 106G, 106H, 106Dec, 107, 112, 119, 121, 318, 423, and 427 are the modernized forms for individual-debtor cases that were published in 2013. They are the products of the second phase of the FMP, and they include forms filed at the commencement of an individual case (petition, schedules, and accompanying documents), the debtor's statement of financial affairs, and other documents required in individual-debtor cases.

Twenty-five formal comments were submitted by the February 18, 2014, deadline, and one other letter was informally submitted to the Committee. The overall evaluation of the published forms was mixed—some of the comments were positive, some were negative, and many made constructive suggestions for specific changes to particular forms. The Advisory Committee made a number of changes suggested by the comments but concluded that the changes do not require republication. The following discussion addresses the most significant comments and the changes made by the Advisory Committee in response.

General Comments. Some of the comments—including ones submitted by the NCBJ, Robert G. Drummond, Rommel Jairam, and Mike Waters—praised the new forms as representing a step in the right direction because they are more readable, easier to fill out, and easier to understand than the current forms. Several others, however, made critical comments similar to ones that were considered by the Advisory Committee and the Standing Committee last year in connection with the initial group of modernized forms. They included criticisms that the new forms will encourage *pro se* filings because they are easier to understand; that they improperly provide legal advice; and that they are too long.

There was nothing in the comments that caused the Advisory Committee to reconsider either its decision to proceed with the project or its earlier responses to these particular criticisms. Whether the use of plain English, clearer instructions, and a cleaner format will encourage more filing without the assistance of counsel has been the subject of discussion since the beginning of the FMP. Members of the Committee believe that comprehensive instructions that explain the magnitude of what the bankruptcy filing requires and that provide ample warnings about the significance of the forms and the possible consequences of inadequate filings should deter, not encourage, uninformed *pro se* filings. In addition, members think that it is important that forms be understandable to all debtors, whether or not represented, because debtors are required to sign the forms under penalty of perjury. The Committee also concluded that eliminating all instructions that provided legal statements would reduce the value of the instructions in explaining both the meaning of the forms and the information necessary to complete them. The instructions were revised, however, to clarify that the person completing the forms is responsible for doing so properly. Finally, the Committee continues to believe that the changes in format that contribute to greater length are likely to prompt more accurate, usable information. The forms also direct the debtor to skip inapplicable questions or sections. The ability of debtors to truncate answers—when the questions either do not apply or have been fully answered—should reduce the length of many of the filed forms.

The Petition and Related Forms—Official Forms 101, 101A, 101B, 104, and 105. The Advisory Committee made one change to the petition in response to an original suggestion rather than a comment made after publication, and the Committee made several other changes to both the petition and Forms 101A and 101B in response to comments made by the NCBJ following publication.

Line 13 of the petition was revised to remind small business debtors to attach their most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return or, if any of the documents do not exist, to follow the procedure in § 1116(1)(B) of the Bankruptcy Code. This change responded to Suggestion 13-BK-B, submitted by Bankruptcy Judge Eric Frank (E.D. Pa.), which noted that there is a frequent lack of compliance with § 1116(1), and suggested that the problem might be addressed by calling attention to the statutory requirement on the petition.

In response to the NCBJ's comments on the petition and eviction judgment forms, the Advisory Committee made several changes, including the following:

- The language regarding fee waivers on line 8 of Form 101 was clarified to explain that a judge has discretion regarding whether to waive fees.

- The description of a sole proprietorship on line 12 of Form 101 was revised to make clearer that a sole proprietor is not a separate entity.

- Among the statements in Part 7 of Form 101 that a chapter 7 debtor must sign under penalty of perjury is the statement that the debtor is aware of the option to proceed under

chapters 7, 11, 12, and 13. This statement was revised to limit it to chapters for which the debtor is eligible.

- Space was added to Form 101A for a debtor to indicate whether an eviction judgment had been entered against him and to provide information about the landlord who obtained the judgment.

- The debtor's certifications in Forms 101A and 101B were revised to clarify that the debtor is required to pay only the amount in default, not the entire amount that would ultimately be owed on the lease.

Schedules—Official Forms 106Sum, 106A/B, 106C, 106D, 106E/F, 106G, 106H, 106Dec. The publication of the revised schedules prompted a number of comments. The most significant ones are listed below, along with the Committee's response.

Schedule A/B: Property

- Several comments questioned the instruction to separately list and describe property worth more than $500. This dollar amount had been included to avoid the listing of *de minimis* property items. In response to the comments, the $500 minimum was deleted because it has no basis in the Code or rules.

- Several comments said that Schedule A/B should include information about any liens on listed property. The Committee chose not to make this change because the information is available on Schedule D, and software permits the integration of information from various schedules.

- In the description of vehicles, the published draft sought information about a vehicle's mileage in broad categories. Based on a comment that actual mileage would be more helpful in assessing the value of a vehicle, the FMP revised line 3 to ask the approximate mileage of each vehicle.

- In response to a comment, the Committee added an inquiry about the nature of the debtor's ownership interest, if known, for each item of real property.

- The Committee decided not to adopt several changes from existing practice that were proposed by commenters. It reasoned that the proposed changes were outside the scope of the modernization project and were not necessitated by changes in the law.

Schedule C: The Property You Claim as Exempt

The published version of this form included a substantive change in response to *Schwab v. Reilly*, 560 U.S. 770 (2010). In that decision the Supreme Court stated that "Where . . . it is important to the debtor to exempt the full market value of the asset or the asset itself, our decision will encourage the debtor to declare the value of her claimed exemption in a manner

that makes the scope of the exemption clear, for example, by listing the exempt value as 'full fair market value (FMV)' or '100% of FMV.'" *Id.* at 792-93.

Over the past several years, the Advisory Committee has considered several different ways to revise Schedule C so as to allow debtors to exercise the *Schwab* option. A proposed amendment to Schedule C was published in 2011, but the Committee withdrew after it met with substantial opposition, particularly from bankruptcy trustees. They stated that the option to claim as exempt "Full fair market value of the exempted property" would encourage debtors to claim the full fair market value of an asset as exempt, even when using an exemption capped at an amount less than the asset's value. They argued that the increase in such exemption claims would then lead to a "plethora of objections."

A later revision of the form that the FMP proposed was previewed by the Standing Committee at the January 2013 meeting. Some members found that attempt unclear. They suggested ways that the form might be improved, including highlighting the instructions about the *Schwab* option and allowing a debtor to claim as exempt "100% of fair market value, up to any applicable statutory limit." That wording was incorporated into the proposed draft of Schedule C that was published last summer.

Once again this aspect of the revision of Schedule C proved to be controversial. Several of the comments were critical, but from different perspectives. The National Association of Consumer Bankruptcy Attorneys objected that the form as drafted would not provide a debtor finality regarding his exemptions. It suggested that Schedule C and Rule 4003(b) be amended in a way that would allow the debtor to clearly claim as exempt the entire value of the debtor's interest in property and that would require interested parties to object by the deadline for objections to exemptions, even if the objection was based on valuation of the asset claimed as exempt. The National Conference of Bankruptcy Judges thought that the form was confusing and that it would lead to increased exemption litigation. It recommended that the second option be changed to "100% of fair market value *(for exemptions unlimited in dollar amount)*." The National Association of Bankruptcy Trustees ("NABT") objected to the second option for much the same reason that it had opposed the 2011 proposed amendment of Schedule C. It supported the change suggested by the NCBJ.

The Committee voted to retain the published wording of the second option. It allows the debtor an exemption choice of 100% fair market value, as *Schwab* authorized, without disregarding exemption limits. Unlike the NCBJ's proposal, proposed Schedule C permits a debtor to exempt all of her interest in certain property even when there is an exemption cap, so long as the value of that interest does not exceed the cap.

<u>Schedule D: Creditors Who Have Claims Secured by Property; Schedule E/F: Creditors Who Have Unsecured Claims</u>

Many of the comments on Schedules D and E/F addressed narrow wording or technical issues. One comment objected to requiring claims to be listed in the alphabetical order of the creditors' names. The Committee revised the instruction to require an alphabetical listing "as

much as possible." Another comment objected to the instruction to list creditors holding multiple claims separately for each claim and to list the last four digits of the account number for each claim. The Committee concluded that this information facilitates claims audits and assists creditors in identifying the debtor. Because some creditors are abandoning the practice of using social security numbers to identify account holders, they need account numbers. The Bankruptcy Clerks Advisory Group suggested the deletion in Part 4 of the explanation that certain totals from Schedule E/F are needed for statistical reasons. The Committee rejected this suggestion because Congress requires the collection and submission to it of the data, and debtors should be informed why the information is being sought.

Schedule G: Executory Contracts and Unexpired Leases, and Schedule H: Your Codebtors

The Committee made minor wording changes to the beginning of these forms in response to the NCBJ's editing suggestions.

Official Form 106Dec

In response to comments from the NCBJ and the US Trustee Program, the criminal penalty explanation was revised to say that individuals who commit one of the enumerated crimes related to the schedules can be fined up to $250,000, rather than $500,000, and can be imprisoned for up to 20 years, rather than 5 years.

Official Form 107—Statement of Financial Affairs for Individuals Filing For Bankruptcy. The following changes were made to Form 107 in response to comments:

- In response to comments about the omission of the debtor's marital status from the published form, the Advisory Committee added new question 1, which asks the debtor's current marital status. It does not ask, as some wanted, whether the debtor has previously been married or for the name of any former spouse. The Committee concluded that, if that information might be significant, the trustee can ask the debtor for it without having the information on forms in the public record.

- The NABT commented that line 5, which asked about whether the debtor's debts are primarily consumer debts, failed to recognize that the response for Debtor 1 and Debtor 2 in a jointly administered case could be different. As a result of this comment, line 6 (formerly line 5) was changed from "My debts are not primarily consumer debts" to "Neither Debtor 1 nor Debtor 2 has primarily consumer debts."

- At the suggestion of NCBJ, on line 18 an example of a transfer made as security was inserted in order to clarify the information requested.

- On line 22, the instruction that the debtor not include information about storage units that are part of the building where the debtor lives was deleted in response to NCBJ's comment that a debtor should provide information about storage units located elsewhere in his apartment building.

- At NCBJ's suggestion, and in order to be consistent throughout the forms, a warning to the debtor about the consequences of a false statement was added to Part 12.

Official Form 112—Statement of Intention of Individuals Filing Under Chapter 7. Two comments observed that the word "give" on the published form is not the equivalent of "surrender," which is the word used in the pertinent statutes. The Advisory Committee agreed and made the appropriate change. The options regarding what a debtor intends to do with property that secures a debt were clarified by changing the wording and format of the debtor's options.

Official Form 119—Bankruptcy Petition Preparer's Notice, Declaration, and Signature. In response to a comment that a petition preparer should separately sign each document prepared, the Advisory Committee revised Form 119 to state that the declaration on that form is made part of each document identified as having been prepared by the petition preparer. Form 119 follows the existing practice of providing a specific declaration that petition preparers can use with multiple documents.

Official Form 121—Statement About Your Social Security Numbers. Several changes were made to the introductory instructions in response to the comments. The following sentence was moved from the second paragraph to the first paragraph: "Please consult local court procedures for submission requirements." In the second paragraph, the last sentence was deleted in order to eliminate a potential misimpression about the extent to which the debtor's full social security number will be made available to creditors. The warning regarding potential criminal penalties was rewritten to make it consistent with the other warnings in the individual case commencement documents.

Official Form 318—Order of Discharge. The NCBJ suggested several changes in the discharge order, including that the information regarding the discharge be merged, rather than having separate notices to creditors and to the debtor. The Advisory Committee agreed with that suggestion and revised the discharge order to make clear that the information provided pertains to both debtors and creditors. The NABT requested that information be provided that points out the limited impact of discharge on case administration and the debtor's on-going duties to cooperate in administration. The Committee concluded that the NABT's request required going into greater detail than is necessary on this form.

Official Form 423—Certification About a Financial Management Course. The Bankruptcy Clerks Advisory Group suggested that the form explain what happens if the course provider advises the clerk of court of the debtor's completion of the course. The Advisory Committee added a sentence stating that in that situation the debtor does not need to file the certificate.

Official Form 427—Cover Sheet for Reaffirmation Agreement. The Advisory Committee made a change to the Cover Sheet after publication in response to Suggestion 13-BK-K submitted by Mike Bates. Agreeing with his suggestion, the Committee revised line 3 of the

form to clarify that § 524(k)(3)(E)(i)(I) and (ii)(I) allows, under some circumstances, disclosure of the simple rate of interest rather than the annual percentage rate.

The Advisory Committee requests that the Standing Committee approve Official Forms 101, 101A, 101B, 104, 105, 106Sum, 106A/B, 106C, 106D, 106E/F, 106G, 106H, 106Dec, 107, 112, 119, 121, 318, 423, and 427 but that the forms not be forwarded to the Judicial Conference until the Standing Committee gives final approval to the modernized forms that will be published this summer (see Action Item 13). Because of the new numbering system for the forms and because there will be separate case-opening forms for individual and non-individual cases rather than the current unified forms, both groups of forms need to take effect on the same date. The Advisory Committee recommends that the effective date be December 1, 2015, or as soon thereafter as is technologically feasible.

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

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MEMORANDUM

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

FROM: Honorable Sandra Segal Ikuta, Chair
Advisory Committee on Bankruptcy Rules

DATE: May 6, 2015

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on April 20, 2015, in Pasadena, California. The draft minutes of that meeting are at Bankruptcy Appendix C.

The principal matter before the Committee at its spring meeting was the package of proposed rule amendments and form amendments that was published for comment in August 2014. The Committee received 137 comments in response to the publication of these amendments, some of which addressed multiple rules and forms. Eight witnesses—all addressing the proposed chapter 13 plan form and related rules—appeared at a Committee hearing in Washington, D.C., on January 23. The Committee considered the public comments and testimony in a series of conference calls and email discussions prior to the spring meeting, as well as at the meeting itself.

The Committee now seeks the Standing Committee's final approval of one proposed new rule and five rule amendments that were published in August 2014. In addition, the Committee seeks final approval of the last major group of forms that were revised as part of the Forms

Modernization Project ("FMP"). The Committee also seeks final approval of its recommendation to renumber and make minor revisions to several modernized forms that the Standing Committee previously approved. The Committee requests that the entire set of approved modernized forms be forwarded to the Judicial Conference with a request that the forms go into effect on December 1, 2015.

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Finally, the Committee approved a proposed rule amendment to Rule 1006(b) (relating to filing fees) for which it seeks publication.

Part II of this report discusses the action items, grouped as follows:

A. Items for Final Approval

(A1) Rules and Official Forms published for comment in August 2014—

- Rules 1010, 1011, 2002, and new Rule 1012;
- Rule 3002.1;
- Rule 9006(f);
- new Official Form 401;
- Official Form 410A; and
- modernized Official Forms 106J, 106J-2, 201, 202, 204, 205, 206Sum, 206A/B, 206D, 206E/F, 206G, 206H, 207, 309A, 309B, 309C, 309D, 309E, 309F, 309G, 309H, 309I, 312, 313, 314, 315, 410, 410S1, 410S2, 424; and the abrogation of Official Forms 11A and 11B;

(A2) Modernized forms previously approved by the Standing Committee for which the Committee seeks approval of renumbering and/or minor revisions that do not require republication—modernized Official Forms 3A, 3B, 6I, 17A, 17B, 17C, 22A-1, 22A-1Supp, 22A-2, 22B, 22C-1, 22C-2, 106A/B, 106D, 106E/F, 106G, 112, and the Committee Note to Official Form 107;

(A3) Existing forms for which the Committee seeks approval of renumbering without modernization—Exhibit A to Official Form 1, and Official Forms 16A, 16B, and 16D;

B. Previously Approved Items for Transmission to the Judicial Conference

- Official Forms 101, 101A, 101B, 104, 105, 106 Summary, 106 Declaration, 106C, 106G, 106H, 107, 119, 121, 318, 423, and 427; and

C. Item for Publication in August 2015

- Rule 1006(b)(1).

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II. Action Items

A. Items for Final Approval

A1. Rules and Official Forms published for comment in August 2014. **The Committee recommends that the Standing Committee approve the proposed rule and form amendments and the new rule and official form that were published for public comment in August 2014 and are discussed below.** Bankruptcy Appendix A1 includes the rules and forms that are in this group.

Action Item 1. Rules 1010, 1011, and 2002, and proposed new Rule 1012 (governing responses to, and notices of hearings on, chapter 15 petitions for recognition). These amendments and addition to the Bankruptcy Rules are intended to improve procedures for international bankruptcy cases. Shortly after chapter 15 (Ancillary and Other Cross-Border Cases) was added to the Bankruptcy Code in 2005, the Bankruptcy Rules were amended to insert new provisions governing cross-border cases. Among the new provisions were changes to Rules 1010 and 1011, which previously governed only involuntary bankruptcy cases, and Rule 2002, which governs notice. The currently proposed amendments to the Bankruptcy Rules would make three changes: (i) remove the chapter 15-related provisions from Rules 1010 and 1011; (ii) create a new Rule 1012 (Responsive Pleading in Cross-Border Cases) to govern responses to a chapter 15 petition; and (iii) augment Rule 2002 to clarify the procedures for giving notice in cross-border proceedings.

Only one comment was submitted regarding the proposed rule changes. The Pennsylvania Bar Association expressed general approval of the proposed amendments, but suggested that Rule 1012 (Responsive Pleading in Cross-Border Cases) contain a cross-reference to Rule 1004.2 (Petition in Chapter 15 Cases). The latter rule prescribes a procedure for challenging the designation in a chapter 15 petition of the debtor's center of main interests. The Bar Association explained that "Rule 1004.2(b) sets forth those parties that should be served in connection with challenges to a debtor's designation in a petition." It suggested that objections and responses to a petition under proposed Rule 1012(b) should be served in the same manner.

The Committee voted unanimously to approve the proposed rules as published. It concluded that the Bar Association's comment should be treated as a new suggestion that the notice provisions of Rule 1004.2(b) should be made applicable to all objections and responses to a chapter 15 petition rather than just to challenges to the designation of the debtor's center of

main interests. The Committee has added this suggestion to its list of matters for future consideration.

Action Item 2. Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence). This rule, which applies only in chapter 13 cases, requires creditors whose claims are secured by a security interest in the debtor's principal residence to provide the debtor and the trustee notice of any changes in the periodic payment amount or the assessment of any fees or charges while the bankruptcy case is pending. The rule was promulgated in 2011 in order to ensure that debtors who attempt to maintain their home mortgage payments while they are in chapter 13 will have the information they need to do so.

The proposed amendments that were published last summer seek to clarify three matters on which courts have disagreed:

1) The rule applies whenever a debtor will make ongoing mortgage payments during the chapter 13 case, whether or not a prepetition default is being cured.
2) The rule applies regardless of whether it is the debtor or the trustee who is making the payments to the mortgagee.
3) The rule generally ceases to apply when an order granting relief from the stay becomes effective with respect to the debtor's residence.

Four comments were submitted on the proposed amendments. Two of them addressed the difficulty of applying the rule to home equity lines of credit, for which payment amount changes are frequent and often de minimis. The other comments were supportive of the amendments.

The Committee voted unanimously to approve the amendments to Rule 3002.1 as published. The issue of the rule's applicability to home equity lines of credit was considered by the Committee at the fall 2014 meeting, and publication of a proposed amendment to address that issue will be sought later as part of a larger package of related amendments.

Action Item 3. Rule 9006(f) (Computing and Extending Time). Among the proposed amendments published last summer was an amendment to Rule 9006(f) that would eliminate the 3-day extension to time periods when service is made electronically. The amendment was initially proposed by the Standing Committee's CM/ECF Subcommittee. It was published simultaneously with similar amendments to Civil Rule 6(d), Appellate Rule 26(c), and Criminal Rule 45(c).

Five comments were submitted on the proposed bankruptcy rule amendment. One expressed support for the amendment, and two raised questions about how this time computation change would apply to pending cases or would interact with other rules. A fourth comment,

submitted by a bankruptcy clerk, expressed concern about having different deadlines for parties in response to service of a single document. The final comment was submitted by the Department of Justice and was similar to the comments it submitted on the other advisory committees' parallel amendments. The comment raised concerns about possible prejudice caused by end-of-day or beginning-of-weekend electronic service and suggested an addition to the Committee Note that would note the court's authority to grant extensions of time to prevent unfairness in such situations.

The Committee voted unanimously to approve the amendment as published. While the Committee preferred not to revise the Committee Note in response to the DOJ's comment, it agreed to the addition of the following language if needed to maintain uniformity with the Committee Notes of the other advisory committees: "The ease of making electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice."

Action Item 4. Official Form 401. The proposed Official Form is a new petition form for commencing chapter 15 cases. Currently all voluntary bankruptcy cases are initiated by the filing of Official Form 1, the Voluntary Petition. The U.S. Trustee Program recommended that the Committee create a separate petition form for chapter 15 cases. Doing so allows the deletion of chapter-15-specific information from Official Form 201, the new voluntary petition for non-individual debtors.

The SEC's Office of General Counsel submitted the only comment in response to the publication of Official Form 401. The comment stated that the creation of a separate chapter 15 petition would result in the omission of a requirement that the petitioner file what is now Exhibit A to the Voluntary Petition. This exhibit requires the reporting of information that the comment said is valuable to investors and the SEC. It therefore requested that a similar attachment be required for a chapter 15 petition when the debtor is a company that must file periodic reports with the SEC.

The Committee voted unanimously to approve Official Form 401 as published and to request that it go into effect on December 1, 2015, along with the other modernized forms, as discussed under Action Item 9. Under current Form 1, only reporting companies that are requesting relief under chapter 11 are required to file Attachment A. The creation of a separate chapter 15 petition has therefore not caused any change in the requirement. Should a foreign representative file a chapter 11 petition, the attachment would then have to be filed if the debtor is a reporting company.

Action Item 5. Official Form 410A. Official Form 410A (currently Form 10A) is the Mortgage Proof of Claim Attachment. In an individual debtor case, a creditor that asserts a security interest in the debtor's principal residence must file the form with its proof of claim. The current form requires a statement of the principal and interest due as of the petition date; an

itemization of prepetition fees, expenses, and charges that remain unpaid; and a statement of the amount necessary to cure any default as of the petition date. The revised form that was published for public comment last August would replace the existing form with one that requires a mortgage claimant to provide a loan payment history and other information about the mortgage claim, including calculations of the claim and the arrearage amounts.

Six comments were submitted regarding Official Form 410A or its instructions. Two of the comments suggested wording changes to the form's instructions, which the Committee accepted. Another comment said that the form should not be required when a debtor files a proof of claim on behalf of a creditor whose claim is secured by a security interest in the debtor's principal residence. The Committee considered the comment to be a suggestion for an amendment to Rule 3001(c)(2)(C), rather than a comment on the proposed form, and has added the suggestion to its list of matters for future consideration. A fourth comment opposed the simultaneous implementation of the new attachment form and a proposed amendment to Rule 3002(c). The comment is mistaken about the timing of the implementation of the form. Official Form 410A will go into effect on December 1, 2015, and the amendment to Rule 3002(c) will not go into effect before December 1, 2016. Therefore, the Committee decided to take no action in response to this comment.

The remaining two comments were the only ones that addressed the substance of the form. One questioned the division of escrow payments into two components in calculating the amount of any arrearage. The Committee determined that it was not necessary to make a change. As the comment itself acknowledged, the total arrearage amount would not be affected. Moreover, mortgage industry representatives did not express any concerns about the proposed method of reporting the escrow arrearage.

The Department of Justice expressed a preference for the current form, which requires an itemization of fees, expenses, and charges ("fees") in accordance with a specified list. It stated that, because the proposed form omits the listing of specified types of fees, creditors might aggregate fees into a single entry. As a result, the DOJ argued, there will be less transparency, accuracy, and efficiency in the bankruptcy claims process. The Committee disagreed. This form was revised in response to arguments by several constituencies that a loan-history attachment would be preferable to the existing form. According to these constituencies, disclosure of the information on a loan history would enable a debtor to see the basis for a mortgage claim and the arrearage amount, thereby facilitating resolution of disputes about mortgage amounts in some cases and providing a basis for objecting to claim amounts in others, and the proposed loan-history form would be better for creditors because its completion could be automated, unlike the existing form that must be completed by hand. The Committee also noted that each entry of a fee or other charge in the loan history must be accompanied by a description.

The Committee voted unanimously to approve Official Form 410A as published (with changes only to the instructions that are issued by the Administrative Office ("AO")). It requests

that the amended form go into effect on December 1, 2015, along with the other modernized forms, as discussed under Action Item 9.

Action Item 6. Modernized Official Forms 106J, 106J-2, 201, 202, 204, 205, 206Sum, 206A/B, 206D, 206E/F, 206G, 206H, 207, 309A, 309B, 309C, 309D, 309E, 309F, 309G, 309H, 309I, 312, 313, 314, 315, 410, 410S1, 410S2, 424; and the abrogation of Official Forms 11A and 11B. These forms—the last major group of Official Forms produced by the FMP—were published for public comment in August 2014. They consist primarily of case opening forms for non-individual debtor cases, chapter 11-related forms, the proof of claim form and supplements, and orders and court notices for use in all types of cases. Also published were two revised individual debtor forms and an announcement of the proposed abrogation of two Official Forms.

The response to the publication of this set of forms was milder than the response to the previously published individual debtor forms. Eleven comments were submitted,[1] ranging in length from one paragraph addressing a single form to 20 pages addressing multiple forms. Almost all of the comments made very specific suggestions for changes to wording, format, or substance, rather than questioning the wisdom of the project or its overall results. No comments were submitted on Official Forms 106J, 106J-2, 207, 314, 424, or the proposed abrogation of Official Forms 11A and 11B.

General Comments. The National Conference of Bankruptcy Judges ("NCBJ") commented that the titles of all of the forms numbered in the 200s should include the word "non-individual" so that they will not be confused with forms to be used by individuals. The Committee noted that while many of the 200-numbered forms do include "non-individual" in the title, the schedules do not. To avoid making the titles of those forms unwieldy, the Committee decided that they should not be revised. Users are not likely to confuse the individual and non-individual forms due to the different form numbers for the two sets of forms and because all of the non-individual forms will be packaged together and separately from the individual forms in software, in paper copy booklets, and on the U.S. Courts' website.

A comment submitted on behalf of the National Association of Bankruptcy Trustees expressed disappointment that it now appears that electronic data from the new forms will not be made available to users outside the judiciary. The prospect for access to this data was a selling point for the modernized forms at the outset, the comment said, and the ability to produce customized reports was explained as offsetting the necessity of dealing with longer forms. The Committee noted that this comment raised policy issues that are outside its purview and that the

[1] This count does not include comments submitted only on the mortgage proof of claim attachment (Official Form 410A), the chapter 15 petition (Official Form 401), the chapter 13 plan form (Official Form 113), or previously published individual debtor forms (Official Forms 106A/B and 106E/F). Those comments are addressed elsewhere in the report under separate action or information items.

possibility that such data could be made available to outside users at some time in the future has not been foreclosed. The Committee concluded that the new forms provide sufficient benefits to users to outweigh the inconveniences of adapting to them, even if electronic data is not immediately made available to outside users.

Official Form 201—Voluntary Petition for Non-Individuals Filing for Bankruptcy. The Committee voted to make a minor wording change to question 11 about venue and to require only a 4-, rather than 6-, digit NAICS (North American Industry Classification System) code to be provided in question 7. The latter change was made in response to a comment by a bankruptcy clerk that questioned the need for the code and predicted that the requirement would lead to confusion and incorrect information. The AO informed the Committee that this information, which is not currently sought on the petition, would assist it in fulfilling its reporting duties to Congress, but that it would be better to ask for a 4-digit code. According to the AO, the broader classification would provide sufficient information for AO statisticians, might be easier for unsophisticated debtors to select accurately, and is preferable to the AO programmers.

The Committee made no change in response to two comments that asserted that questions at line 8 about small-business-debtor status are redundant. The Committee agreed that the question about the amount of noncontingent, liquidated debts is subsumed within the question about whether the debtor falls within the statutory definition of a "small business debtor." Nevertheless, Congress requires the AO to report how many debtors satisfy the debt limit but do not identify themselves as small business debtors. As a result, the AO plans to collect data on both questions. An academic commenter stated that empirical evidence shows that small business debtors do a poor job of self-reporting their status. She suggested changes to several forms that would "walk[] debtor's counsel step by step through the process for determining small business status." The Committee decided to treat the comment as a new suggestion that it will consider more fully in the future.

Official Form 202—Declaration Under Penalty of Perjury for Non-Individual Debtors. This form is for officers and authorized agents of non-individual debtors to execute declarations that information in certain documents is true and correct. As published, the form had checkboxes to indicate for which of six specified Official Forms the declaration applies, as well as a checkbox for "Other document that requires a declaration." The Committee received a comment that pointed out that Official Form 204 (Chapter 11 or Chapter 9 Cases: List of Creditors Who Have the 20 Largest Unsecured Claims and Are Not Insiders) no longer has a space for the debtor's declaration. Because that form was not specifically listed on Form 202, the commenter thought that debtors would be confused about whether they are still required to make such a declaration. The Committee agreed and added a checkbox for Official Form 204 to the list of forms in Official Form 202.

Official Form 206A/B—Schedule A/B: Assets – Real and Personal Property. The Committee made some adjustments to the form's instructions about executory contracts and unexpired leases and expanded several questions to encompass the leasing of property. The NCBJ commented that Schedule G (Executory Contracts and Unexpired Leases) and its instructions indicate that executory contracts and unexpired leases with a net value should also be listed on Schedule A/B, but there is no specific category on the latter form for doing so. It suggested that a new category be added to Schedule A/B for that purpose. The Committee decided that, rather than adding a new category to the form, an instruction should be added to question 70 (other assets not yet reported), stating, "Include all interests in executory contracts and unexpired leases not previously included on this form." After a lengthy discussion, the Committee decided that all executory contracts and unexpired leases should be reported on Schedule A/B, rather than just those with net value, and that the instructions to this form and to Schedule G should be revised accordingly. The Committee also voted that Schedule A/B should ask about property the debtor leases, in addition to property it owns, at questions 27, 38, 46, and 54.

In response to other comments by the NCBJ, the Committee also deleted the question at line 24 about possible Perishable Agricultural Commodities Act claims and added references in Part 6 to fishing-related assets.

Official Form 206D—Schedule D: Creditors Who Have Claims Secured by Property. In response to the NCBJ's comments, the Committee revised the column headings and eliminated the checkbox labeled "liquidated and neither contingent nor disputed."

Official Form 206E/F—Schedule E/F: Creditors Who Have Unsecured Claims. In response to the NCBJ's comments, the Committee revised the form's instructions for Part 2 about what to do if no other entities need to be notified, and it reworded the instruction at the beginning of the form.

Official Forms 309A-I—Bankruptcy Case Commencement Notices. Two comments objected that the revised forms no longer include "deadlines" and "meeting of creditors" in the titles. In response, the Committee revised the bolded instruction at the top of each form to draw attention to the fact that the forms include information about those topics and that both pages should be read carefully. The Bankruptcy Noticing Working Group commented that a proof of clam form is no longer sent with the commencement notice. The Committee revised the instruction about obtaining a proof of claim form.

Official Form 410—Proof of Claim. The NCBJ made several editorial suggestions that the Committee accepted. The NCBJ also questioned the basis for the instruction in question 7 to state only the amount of default for lease claims. It said that, like most other claims, a claim based on a lease could include future amounts due, and it noted that the response to this question would duplicate the response to question 10, which asks for the amount required to cure any

default on a lease as of the date of the petition. The Committee agreed and deleted the instruction in question 7.

Official Form 410S1—Notice of Mortgage Payment Change. The NCBJ pointed out that the instruction at the beginning of the form was not consistent with the proposed amendment to Rule 3002.1(a). The Committee agreed and revised the instruction to use the rule's language about when notice of a payment change must be given. An attorney suggested that this form and Official Form 410S2 should not require a creditor's agent to attach a power of attorney, because the proof of claim form no longer requires such an attachment. The Committee agreed. Because Rule 9010(c) provides that a power of attorney evidencing the authority of an agent to represent a creditor is not required for a proof of claim, a power of attorney is also not required for a supplement to a proof of claim. Therefore, the Committee removed the direction to attach a power of attorney.

Official Form 410S2—Notice of Postpetition Mortgage Fees, Expenses, and Charges. The Committee made the same changes to this form as to Official Form 410S1.

The Committee voted unanimously to approve the Official Forms listed under this action item as they appear in Bankruptcy Appendix A1 and to abrogate Official Forms 11A and 11B. It requests that these forms go into effect on December 1, 2015, along with the other modernized forms, as discussed under Action Item 9.

A2. Modernized forms previously approved by the Standing Committee for which the Committee seeks approval of renumbering and/or minor revisions that do not require republication. Bankruptcy Appendix A2 includes the forms that are in this group.

Action Item 7. Modernized Official Forms 3A, 3B, 6I, 17A, 17B, 17C, 22A-1, 22A-1Supp, 22A-2, 22B, 22C-1, 22C-2, 106A/B, 106D, 106E/F, 106G, 112, and the Committee Note to Official Form 107.

Renumbering. Official Forms 3A, 3B, 6I, 17A, 17B, 17C, 22A-1, 22A-1Supp, 22A-2, 22B, 22C-1, 22C-2 are already in effect. Now that the entire set of modernized forms is going to be promulgated, the Committee requests the renumbering of these forms as follows:

Current Form	Renumbered Form
3A	103A
3B	103B
6I	106I
17A	417A
17B	417B

17C	417C
22A-1	122A-1
22A-1Supp	122A-1Supp
22A-2	122A-2
22B	122B
22C-1	122C-1
22C-2	122C-2

The Committee also seeks approval of the renumbering of one modernized form that is not yet in effect. At the May 2014 meeting, the Standing Committee gave final approval to Official Form 112 (Statement of Intention of Individuals Filing Under Chapter 7). Because of a subsequent decision to make the numbers of all the modernized forms as similar as possible to the numbers of the forms they are replacing, the Committee asks that Official Form 112 be renumbered as Official Form 108. The modernized form replaces Official Form 8.

Minor revisions. (1) Means test forms (Official Forms 22A-1, 22A-2, 22B, 22C-1, 22C-2)—The Committee approved several formatting and line numbering changes and the correction of a few errors in the listed forms. It also made a change to Official Forms 22A-2 and 22C-2 in response to the Tax Increase Prevention Act of 2014, Pub. Law No. 113-295, which authorized contributions to qualified ABLE accounts, as defined by 26 U.S.C. § 529A(b), to be included in the means test deduction for contributions to the care of household or family members.

(2) Individual debtor schedules (Official Forms 106A/B, 106D, 106E/F, 106G)—The Committee approved changes to these individual debtor schedules that are consistent with changes to the parallel non-individual debtor schedules. In Official Form 106A/B, the Committee also added qualified ABLE accounts to the list of accounts in question 24 that may be excluded from the estate.

(3) Committee Note to Official Form 107 (Statement of Financial Affairs for Individuals Filing for Bankruptcy)—An incorrect reference to Official Form 106F has been changed to Official Form 106H.

These changes have been incorporated into the forms that appear in Bankruptcy Appendix A2, and the Committee now seeks approval of the forms as revised. It requests that these forms go into effect on December 1, 2015, along with the other modernized forms, as discussed under Action Item 9.

A3. Existing forms for which the Committee seeks approval of renumbering without modernization. Bankruptcy Appendix A3 includes the forms that are in this group.

<u>Action Item 8</u>. Exhibit A to Official Form 1, and Official Forms 16A, 16B, and 16D.

The Voluntary Petition form currently in effect includes an exhibit—Exhibit A—that must be completed by chapter 11 debtors that are required to file periodic reports with the SEC. When the modernized forms go into effect, Exhibit A will be a separate form designated as Form 201A. Because the Committee is considering whether to make substantive changes to the form, it decided that the existing Exhibit A form should be renumbered with its current formatting and style and that any modernization of the form should be delayed until the Committee completes its consideration of the exhibit.

Official Forms 16A, 16B, and 16D are Captions that are for use in a bankruptcy case, contested matters, and adversary proceedings. In August 2014 modernized versions of the captions were published for public comment as Official Forms 416A, 416B, and 416D. The NCBJ and the Pennsylvania Bar Association filed comments opposing adoption of the new caption forms. The NCBJ commented that it did not perceive a need for altering a format that has been used by litigants and the courts for decades or adopting a format that differs from the caption format used in the district courts and courts of appeal. The Bar Association stated that while the Forms Modernization Project is to be commended, changing the style of the caption from a standard legal caption to a form-based caption denigrates the dignity of the bankruptcy court and suggests that its filings are purely administrative in nature. The Committee agreed with these objections and voted to withdraw the proposed new caption forms and to retain the current caption forms, renumbered as Official Forms 416A, 416B, and 416D.

The Committee voted unanimously to seek approval of the renumbering without modernization of the existing forms listed under this action item. It requests that these renumbered forms go into effect on December 1, 2015, along with the modernized forms, as discussed under Action Item 9.

B. Previously Approved Items for Transmission to the Judicial Conference

Action Item 9. The Committee seeks approval of the full implementation of the Forms Modernization Project. Along with the forms discussed in Action Items 4-8, the Committee requests that the Standing Committee transmit to the Judicial Conference the modernized forms that it approved at the May 2014 meeting: **Official Forms 101, 101A, 101B, 104, 105, 106 Summary, 106 Declaration, 106C, 106G, 106H, 107, 119, 121, 318, 423, and 427.**

Effective date. When the FMP effort began, it was anticipated that the new forms would go into effect at approximately the same time as bankruptcy courts began using the redesigned case management system, known as NextGen. A goal of NextGen is to capture and store all material individual pieces of data used to complete bankruptcy forms so that users such as the court and clerk's office can prepare customized reports, putting the data in any order the user wants. This is in effect a database program that can run different reports designed by the user.

The FMP, working hand-in-glove with the AO's NextGen project team, redesigned the bankruptcy forms to facilitate data collection and to make them easier to understand.

Although the FMP developed the modernized forms in a manner that would facilitate data collection by the NextGen case management system, the Committee has learned that the roll-out of NextGen is proceeding more slowly than expected. Assuming that the AO stays on its current schedule, by the end of 2015 no more than a handful of bankruptcy courts will be on the NextGen case management system. The AO estimates that by December 2016 NextGen will have the capacity to capture and store all of the data elements from forms filed by individual debtors, using the modernized forms (about 70 percent of bankruptcy cases). And by December 2017, the AO estimates that the NextGen case management system will be able to capture and store all of the data elements by all debtors, using the modernized forms. The AO also expects that by December 2017 all or nearly all of the bankruptcy courts will be capable of being on the NextGen case management system, although the actual timing of migration to the new system is dependent on the decision of each court.

Notwithstanding the delays in the implementation of NextGen, the Committee at its spring meeting voted unanimously to seek a December 1, 2015 effective date for the modernized and renumbered forms. Several considerations led to the Committee's decision to proceed with promulgation of the modernized forms rather than wait for full implementation of NextGen. First, the FMP has produced a set of vastly improved, user-friendly forms that will be a benefit to the bankruptcy community (including *pro se* filers) even if additional data is not collected or customized reports cannot be produced. Notably, by designing different sets of case opening forms for use in individual and non-individual debtors' cases, the FMP was able ask questions in a way that makes more sense to each category of debtor.

Second, the Committee has been publishing and receiving public comments on the modernized forms since 2012. The bankruptcy community and software vendors have been alerted to the likelihood of the promulgation of new forms. A delay of one or two years in promulgation of the forms could cause confusion and the loss of support for the project.

Finally, there are technological reasons to go forward now with the modernized forms. If the modernized forms take effect on December 1, 2015, the AO will be able to build a backend database that will store the information from the modernized forms. This is much more cost effective than the AO's prior plan to create a backend database for the current forms, and then redo the backend database for the modernized forms. The AO also reports that adopting this effective date will not affect the AO's current ability to capture the 80 data points required by the 2005 bankruptcy legislation. The Committee informed the AO regarding this decision, and the AO had no objections.

The Committee therefore recommends that the Official Forms listed in Action Items 4-9 take effect on Dec. 1, 2015, and that they govern in all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.[2]

The Committee considered one potentially serious disadvantage to implementing the modernized forms in 2015. The United States Bankruptcy Court for the District of New Jersey developed a program that lets *pro se* filers use what is essentially a Turbo Tax-like system to complete and file a chapter 7 bankruptcy case electronically. This concept, which was further developed by the court and the AO, is named the electronic self-representation (eSR) pathfinder program, and it has been expanded to include two other courts—the United States Bankruptcy Court for the Central District of California and the United States Bankruptcy Court for the District of New Mexico. At present, only the New Jersey bankruptcy court is very active; it has at least 102 eSR cases open. The Central District of California and New Mexico bankruptcy courts have only 14 and 10 cases open respectively, but they have not been publicizing the availability of this program. The courts that have implemented this eSR program emphasize its importance as an access-to-justice project.

The eSR program is linked to the current Chapter 7 forms. The eSR data-entry screens and database will not work with modernized forms, and the AO has stated that it cannot readily reprogram the eSR program so that it will be able to produce the modernized forms for filing. Accordingly, if the modernized forms become effective in December 2015, the eSR program will not be able to function until 2017, unless the eSR courts are permitted to continue using the current forms. The AO estimates that by 2017, eSR will work with the new forms.

The Committee concluded that there is no legal obstacle to allowing existing forms to remain the Official Forms for use in the eSR program only. Bankruptcy Rule 9009 authorizes the Judicial Conference to prescribe obligatory Official Forms, but it does not restrict that authority to issuing only a single set of forms.

A *pro se* debtor using the eSR system for initiating a chapter 7 case uses an on-line program that elicits information used to populate the following existing forms (referred to collectively by the courts as the "electronic bankruptcy package"):

- Official Form 1 (Petition);
- Official Forms 6A-J and summaries (Schedules);
- Official Form 7 (Statement of Financial Affairs);
- Official Form 8 (Individual Debtor's Statement of Intention);

[2] The Committee recognizes that it will sometimes not be just or practicable to use the new forms in cases that are pending at the time the forms are adopted. For example, when a debtor amends a case-opening form such as the petition or the schedules, the amendment may be easier to understand if the debtor uses the originally filed, superseded form to show the change.

- Official Form22A-1, and if applicable Official Forms 22A-1Supp and 22A-2 (Means Test forms); and
- a mailing matrix as prescribed by local rule or form.

The debtor does not see those forms when supplying the required information electronically. Instead, the debtor answers a series of questions, and completed forms are produced at the end of the process. Hard copies of only the signature pages must be later presented to the court for filing (within a specified number of days after submitting the electronic bankruptcy package).

Because of the almost invisible use of the case-opening forms, the continued use of existing forms for eSR filings should not cause undue confusion in the three bankruptcy courts after the modernized forms go into effect generally. The existing forms will not be posted on the courts' websites or available in paper form in the clerk's office. Non-eSR chapter 7 debtors, whether represented or *pro se*, will have official access only to the modernized forms.

Because the Committee concluded that the modernized forms should go into effect generally on December 1, 2015, but without disrupting the already established eSR pilot projects, it asks the Standing Committee to seek approval of the following authorization by the Judicial Conference:

> Notwithstanding the approval of new Bankruptcy Official Forms to take effect on December 1, 2015, the following forms in effect on November 30, 2015, will remain Official Forms until December 1, 2017, in the United States Bankruptcy Courts for the Central District of California, the District of New Jersey, and the District of New Mexico, only for use by *pro se* debtors who initiate a chapter 7 case by using the court's Electronic Self-Representation (eSR) system: Official Form 1, Official Forms 6A-J and summaries, Official Form 7; Official Form 8; and Official Forms 22A-1, 22A-1Supp, and 22A-2.

C. <u>Item for Publication in August 2015</u>

<u>Action Item 10</u>. Rule 1006(b)(1) (Filing Fee). This provision governs the payment of the bankruptcy filing fee in installments, as authorized for individual debtors by 28 U.S.C. § 1930(a). The Committee received a suggestion (12-BK-I) from the Bankruptcy Judges Advisory Group ("BJAG") that proposed amending Rule 1006(b) to clarify that courts may require a debtor who applies to pay the filing fee in installments to make an initial installment payment with the petition and the application. BJAG further suggested that any requirement for an initial installment payment at the time of filing be limited to 25% of the total filing fee.

Over the course of several years, the Committee has given careful consideration to this suggestion. As part of its consideration, the Committee requested the Federal Judicial Center ("FJC") to conduct an empirical study on court practices regarding initial installment payments at the time of filing and whether there is an association between such a requirement and the rate of fee waiver applications.

The FJC study revealed that the difference between the percentage of chapter 7 cases in which a fee waiver application was filed in districts requiring an upfront installment payment and in districts not requiring such a payment was not statistically significant. The FJC study also revealed that just over one-third of the bankruptcy courts (33) require an installment payment at the time of filing the petition and the application to pay the filing fee in installments. The amount of the required initial payment ranges from $40 to $135, and for courts that specify the required payment as a percentage of the total fees due upon filing, the percentage ranges from 25% to 50%. Many of the courts do not specify the consequences of failing to make the required payment. Of those that do, a few courts state that the application to pay in installments may or will be denied if the initial installment is not paid at filing. A greater number of courts provide for the possible dismissal of the case or rejection of the petition, by the clerk or by the court, with or without further notice.

The Committee concluded that there was no need to clarify that courts may require an initial installment payment with the petition and application. Rule 1006(b)(1) requires a petition to be "accepted for filing if accompanied by the debtor's signed application" to pay the filing fee in installments. This means that a court cannot refuse to accept a petition because of the failure to make an initial installment payment, but the rule does not prohibit requiring such a payment. Therefore, the Committee decided not to make a revision to the rule in response to the BJAG suggestion.

Nevertheless, the FJC study raises a different issue. Because Rule 1006(b)(1) requires the bankruptcy clerk to accept the petition, resulting in the commencement of a bankruptcy case, the practice of some courts of refusing to accept a petition or summarily dismissing a case because of the failure to make an installment payment at the time of filing is inconsistent with Rules 1006(b)(1) and 1017(b)(1). The latter provision allows the court, only "after a hearing on notice to the debtor and the trustee," to dismiss a case for the failure to pay any installment of the filing fee.

In order to clarify that courts may not refuse to accept petitions or summarily dismiss cases for failure to make initial installment payments at the time of filing, the Committee is proposing the amendment to Rule 1006(b)(1) that appears in Bankruptcy Appendix B. The amendment is intended to emphasize that an individual debtor's petition must be accepted for filing so long as the debtor submits a signed application to pay the filing fee in installments and even if a required initial installment payment is not made at the same time. The Committee Note

explains that dismissal of the case for failure to pay any installment must proceed according to Rule 1017(b)(1).

The Committee voted unanimously to request publication for public comment of the proposed amendment in August 2015.

*****

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

Rule 1010. Service of Involuntary Petition and Summons~~; Petition for Recognition of a Foreign Nonmain Proceeding~~

(a) SERVICE OF INVOLUNTARY PETITION AND SUMMONS~~; SERVICE OF PETITION FOR RECOGNITION OF FOREIGN NONMAIN PROCEEDING~~. On the filing of an involuntary petition~~ or a petition for recognition of a foreign nonmain proceeding~~, the clerk shall forthwith issue a summons for service. When an involuntary petition is filed, service shall be made on the debtor. ~~When a petition for recognition of a foreign nonmain proceeding is filed, service shall be made on the debtor, any entity against whom provisional relief is sought under § 1519 of the Code, and on any other party as the court may direct.~~ The summons shall be served with a copy of the petition in the manner provided for service of a

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

17 summons and complaint by Rule 7004(a) or (b). If service
18 cannot be so made, the court may order that the summons
19 and petition be served by mailing copies to the party's last
20 known address, and by at least one publication in a manner
21 and form directed by the court. The summons and petition
22 may be served on the party anywhere. Rule 7004(e) and
23 Rule 4(*l*) F.R.Civ.P. apply when service is made or
24 attempted under this rule.
25 * * * * *

Committee Note

Subdivision (a) of this rule is amended to remove provisions regarding the issuance of a summons for service in certain chapter 15 proceedings. The requirements for notice and service in chapter 15 proceedings are found in Rule 2002(q).

126-011139

Rule 1011. Responsive Pleading or Motion in Involuntary~~ and Cross-Border~~ Cases

(a) WHO MAY CONTEST PETITION. The debtor named in an involuntary petition~~, or a party in interest to a petition for recognition of a foreign proceeding,~~ may contest the petition. In the case of a petition against a partnership under Rule 1004, a nonpetitioning general partner, or a person who is alleged to be a general partner but denies the allegation, may contest the petition.

* * * * *

(f) CORPORATE OWNERSHIP STATEMENT. If the entity responding to the involuntary petition~~ or the petition for recognition of a foreign proceeding~~ is a corporation, the entity shall file with its first appearance, pleading, motion, response, or other request addressed to the court a corporate ownership statement containing the information described in Rule 7007.1.

Committee Note

This rule is amended to remove provisions regarding chapter 15 proceedings. The requirements for responses to a petition for recognition of a foreign proceeding are found in Rule 1012.

126-011141

1 **Rule 1012. Responsive Pleading in Cross-Border Cases**

2 (a) WHO MAY CONTEST PETITION. The debtor
3 or any party in interest may contest a petition for
4 recognition of a foreign proceeding.

5 (b) OBJECTIONS AND RESPONSES; WHEN
6 PRESENTED. Objections and other responses to the
7 petition shall be presented no later than seven days before
8 the date set for the hearing on the petition, unless the court
9 prescribes some other time or manner for responses.

10 (c) CORPORATE OWNERSHIP STATEMENT. If
11 the entity responding to the petition is a corporation, then
12 the entity shall file a corporate ownership statement
13 containing the information described in Rule 7007.1 with
14 its first appearance, pleading, motion, response, or other
15 request addressed to the court.

Committee Note

This rule is added to govern responses to petitions for recognition in cross-border cases. It incorporates provisions formerly found in Rule 1011. Subdivision (a) provides that the debtor or a party in interest may contest the petition. Subdivision (b) provides for presentation of responses no later than 7 days before the hearing on the petition, unless the court directs otherwise. Subdivision (c) governs the filing of corporate ownership statements by entities responding to the petition.

Rule 2002. Notices to Creditors, Equity Security Holders, Administrators in Foreign Proceedings, Persons Against Whom Provisional Relief is Sought in Ancillary and Other Cross-Border Cases, United States, and United States Trustee

* * * * *

(q) NOTICE OF PETITION FOR RECOGNITION OF FOREIGN PROCEEDING AND OF COURT'S INTENTION TO COMMUNICATE WITH FOREIGN COURTS AND FOREIGN REPRESENTATIVES.

(1) *Notice of Petition for Recognition.* <u>After the filing of a petition for recognition of a foreign proceeding, the court shall promptly schedule and hold a hearing on the petition.</u> The clerk, or some other person as the court may direct, shall forthwith give the debtor, all persons or bodies authorized to administer foreign proceedings of the debtor, all entities against whom provisional relief is being sought under §1519 of the Code, all parties to

21 litigation pending in the United States in which the
22 debtor is a party at the time of the filing of the
23 petition, and such other entities as the court may
24 direct, at least 21 days' notice by mail of the hearing
25 ~~on the petition for recognition of a foreign proceeding~~.
26 The notice shall state whether the petition seeks
27 recognition as a foreign main proceeding or foreign
28 nonmain proceeding and shall include the petition and
29 any other document the court may require. If the
30 court consolidates the hearing on the petition with the
31 hearing on a request for provisional relief, the court
32 may set a shorter notice period, with notice to the
33 entities listed in this subdivision.
34 * * * * *

Committee Note

Subdivision (q) is amended to clarify the procedures for giving notice in cross-border proceedings. The amended rule provides, in keeping with Code § 1517(c), for the court to schedule a hearing to be held promptly on the

petition for recognition of a foreign proceeding. The amended rule contemplates that a hearing on a request for provisional relief may sometimes overlap substantially with the merits of the petition for recognition. In that case, the court may choose to consolidate the hearing on the request for provisional relief with the hearing on the petition for recognition, see Rules 1018 and 7065, and accordingly shorten the usual 21-day notice period.

Rule 3002.1. Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence

(a) IN GENERAL. This rule applies in a chapter 13 case to claims (1) that are ~~(1)~~secured by a security interest in the debtor's principal residence, and (2) for which the plan provides that either the trustee or the debtor will make contractual installment payments~~provided for under § 1322(b)(5) of the Code in the debtor's plan~~. Unless the court orders otherwise, the notice requirements of this rule cease to apply when an order terminating or annulling the automatic stay becomes effective with respect to the residence that secures the claim.

* * * * *

Committee Note

Subdivision (a) is amended to clarify the applicability of the rule. Its provisions apply whenever a chapter 13 plan provides that contractual payments on the debtor's home mortgage will be maintained, whether they will be paid by the trustee or directly by the debtor. The reference to § 1322(b)(5) of the Code is deleted to make

clear that the rule applies even if there is no prepetition arrearage to be cured. So long as a creditor has a claim that is secured by a security interest in the debtor's principal residence and the plan provides that contractual payments on the claim will be maintained, the rule applies.

Subdivision (a) is further amended to provide that, unless the court orders otherwise, the notice obligations imposed by this rule cease on the effective date of an order granting relief from the automatic stay with regard to the debtor's principal residence. Debtors and trustees typically do not make payments on mortgages after the stay relief is granted, so there is generally no need for the holder of the claim to continue providing the notices required by this rule. Sometimes, however, there may be reasons for the debtor to continue receiving mortgage information after stay relief. For example, the debtor may intend to seek a mortgage modification or to cure the default. When the court determines that the debtor has a need for the information required by this rule, the court is authorized to order that the notice obligations remain in effect or be reinstated after the relief from the stay is granted.

Rule 9006. Computing and Extending Time; Time for Motion Papers

* * * * *

(f) ADDITIONAL TIME AFTER SERVICE BY MAIL OR UNDER RULE 5(b)(2)(D)~~, (E),~~ OR (F) F.R. CIV. P. When there is a right or requirement to act or undertake some proceedings within a prescribed period after ~~service~~being served and that service is by mail or under Rule 5(b)(2)(D) (leaving with the clerk)~~, (E),~~ or (F) (other means consented to) F.R. Civ. P., three days are added after the prescribed period would otherwise expire under Rule 9006(a).

* * * * *

Committee Note

Subdivision (f) is amended to remove service by electronic means under Civil Rule 5(b)(2)(E) from the modes of service that allow three added days to act after being served.

Rule 9006(f) and Civil Rule 6(d) contain similar provisions providing additional time for actions after being

126-011149

served by mail or by certain modes of service that are identified by reference to Civil Rule 5(b)(2). Rule 9006(f)—like Civil Rule 6(d)—is amended to remove the reference to service by electronic means under Rule 5(b)(2)(E). The amendment also adds clarifying parentheticals identifying the forms of service under Rule 5(b)(2) for which three days will still be added.

Civil Rule 5(b)—made applicable in bankruptcy proceedings by Rules 7005 and 9014(b)—was amended in 2001 to allow service by electronic means with the consent of the person served. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow three added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and widespread skill in using electronic transmission.

A parallel reason for allowing the three added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the three added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the three added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day

periods that allow "day-of-the-week" counting. Adding three days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice.

Eliminating Rule 5(b) subparagraph (2)(E) from the modes of service that allow three added days means that the three added days cannot be retained by consenting to service by electronic means. Consent to electronic service in registering for electronic case filing, for example, does not count as consent to service "by any other means" of delivery under subparagraph (F).

Subdivision (f) is also amended to conform to a corresponding amendment of Civil Rule 6(d). The amendment clarifies that only the party that is served by mail or under the specified provisions of Civil Rule 5—and not the party making service—is permitted to add three days to any prescribed period for taking action after service is made.

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Modernized Official Forms Numbering Conversion Chart

2014 Form Number	2014 Form Name	2015 Number	New Name
B 1	Voluntary Petition	B101	Voluntary Petition for Individuals Filing for Bankruptcy *(incorporates exhibits – carves out eviction judgment statement as new form B101AB)*
		B101A	Initial Statement About an Eviction Judgment Against You
		B101B	Statement About Payment of an Eviction Judgment Against You
		B201	Voluntary Petition for Non-Individuals Filing for Bankruptcy
	Exhibit A	B201A	Attachment to Voluntary Petition for Non-Individuals Filing for Bankruptcy Under Chapter 11
	Exhibit C	B101 B201	*Hazardous Property or Property That Needs Immediate Attention -- incorporated in Forms B101 and B201*
	Exhibit D	B101	*Individual Debtor's Statement of Compliance with Credit Counseling Requirement – Incorporated in Form B101*
	[Chapter 15 questions from Petition]	B401	Petition for Recognition of Foreign Proceeding
B 2	Declaration under Penalty of Perjury on Behalf of a Corporation or Partnership	B202	Declaration Under Penalty of Perjury On Behalf of a Corporation or Partnership *(For petition, schedules, SOFA, etc).*
B 3A	Application and Order to Pay Filing Fee in Installments	B103A	Application for Individuals to Pay the Filing Fee in Installments
B 3B	Application for Waiver of Chapter 7 Filing Fee	B103B	Application to Have the Chapter 7 Filing Fee Waived
B 4	List of Creditors Holding 20 Largest Unsecured Claims	B104	For Individual Chapter 11 Cases: The List of Creditors Who Have the 20 Largest Unsecured Claims Against You Who Are Not Insiders *(individuals)*
		B204	For Chapter 11 Cases: The List of Creditors Who Have the 20 Largest Unsecured Claims Against You Who Are Not Insiders *(non-individuals)*
B 5	Involuntary Petition	B105	Involuntary Petition Against an Individual
		B205	Involuntary Petition Against a Non-Individual
B6 Sum	Summary of Schedules (Includes Statistical Summary of Certain Liabilities)	B106 -- Summary	A Summary of Your Assets and Liabilities and Certain Statistical Information (*individuals)*
		B206 -- Summary	A Summary of Your Assets and Liabilities (*non-individuals)*
B 6A	Schedule A - Real Property	B106A/B	Schedule A/B: Property (*combines real and personal property, individuals)*
B 6B	Schedule B - Personal Property	B206A/B	Schedule A/B: Property (*combines real and personal property, non-individuals)*
B 6C	Schedule C - Property Claimed as Exempt	B106C	Schedule C: The Property You Claim as Exempt (*individuals)*
B 6D	Schedule D - Creditors Holding Secured Claims	B106D	Schedule D: Creditors Who Hold Claims Secured By Property (*against individuals*)
		B206D	Schedule D: Creditors Who Hold Claims Secured By Property *(against non-individuals)*

Modernized Official Forms Numbering Conversion Chart

2014 Form Number	2014 Form Name	2015 Number		New Name
B 6E	Schedule E - Creditors Holding Unsecured Priority Claims	}	B106E/F	Schedule E/F: Creditors Who Have Unsecured Claims *(against individuals, combines priority and non-priority)*
B 6F	Schedule F - Creditors Holding Unsecured Nonpriority Claims		B206E/F	Schedule E/F: Creditors Who Have Unsecured Claims (*against non-individuals, combines priority and non-priority)*
B 6G	Schedule G - Executory Contracts and Unexpired Leases	B106G		Schedule G: Executory Contracts and Unexpired Leases (*individuals)*
		B206G		Schedule G: Executory Contracts and Unexpired Leases (*non-individuals)*
B 6H	Schedule H - Codebtors	B106H		Schedule H: Your Codebtors (*individuals)*
		B206H		Schedule H: Your Codebtors (*non-individuals)*
B 6I	Schedule I - Current Income of Individual Debtor(s)	B106I		Schedule I: Your Income (*individuals)*
		No B206I		To be a Director's Form
B 6J	Schedule J - Current Expenditures of Individual Debtor(s)	B106J		Schedule J: Your Expenses
		B106J-2		Schedule J-2: Expenses for Separate Household of Debtor 2
		No B206J		To be a Director's Form
B 6 Dec	Declaration Concerning Debtor's Schedules	B106 -- Declaration		Declaration About an Individual Debtor's Schedules
		B202		Declaration Under Penalty of Perjury On Behalf of a Corporation or Partnership *(For petition, schedules, SOFA, etc)*
B 7	Statement of Financial Affairs	B107		Your Statement of Financial Affairs for Individuals Filing for Bankruptcy
		B207		Statement of Your Financial Affairs *(non-Individuals)*
B 8	Chapter 7 Individual Debtor's Statement of Intention	B108		Statement of Intention for Individuals Filing Under Chapter 7
B 9A	Chapter 7 Individual or Joint Debtor No Asset Case	B309A		(For Individuals or Joint Debtors) Notice of Chapter 7 Bankruptcy Case – No Proof of Claim Deadline
B 9B	Chapter 7 Corporation/Partnership No Asset Case	B309C		(For Corporations or Partnerships) Notice of Chapter 7 Bankruptcy Case – No Proof of Claim Deadline Set
B 9C	Chapter 7 Individual or Joint Debtor Asset Case	B309B		(For Individuals or Joint Debtors) Notice of Chapter 7 Bankruptcy Case – Proof of Claim Deadline Set
B 9D	Chapter 7 Corporation/Partnership Asset Case (12/11)	B309D		(For Corporations or Partnerships) Notice of Chapter 7 Bankruptcy Case – Proof of Claim Deadline Set
B 9E	Chapter 11 Individual or Joint Debtor Case	}	B309E	(For Individuals or Joint Debtors) Notice of Chapter 11 Bankruptcy Case *(former Alt version combined with Form B309-E)*
B 9E(Alt.)	Chapter 11 Individual or Joint Debtor Case			
B 9F	Chapter 11 Corporation/Partnership Case	}	B309F	(For Corporations or Partnerships) Notice of Chapter 11 Bankruptcy Case *(former Alt version combined with Form B309-F)*
B 9F(Alt.)	Chapter 11 Corporation/Partnership Case			
B 9G	Chapter 12 Individual or Joint Debtor Family Farmer	B309G		(For Individuals or Joint Debtors) Notice of Chapter 12 Bankruptcy Case
B 9H	Chapter 12 Corporation/Partnership	B309H		(For Corporations or Partnerships) Notice of Chapter

Modernized Official Forms Numbering Conversion Chart

2014 Form Number	2014 Form Name	2015 Number	New Name
	Family Farmer		12 Bankruptcy Case
B 9I	Chapter 13 Case	B309I	Notice of Chapter 13 Bankruptcy Case
B 10	Proof Of Claim	B410	Proof Of Claim
B 10A	Proof Of Claim, Attachment A	B410A	Proof Of Claim, Attachment A
B 10S-1	Proof Of Claim, Supplement 1	B410S-1	Proof Of Claim, Supplement 1
B 10S-2	Proof Of Claim, Supplement 2	B410S-2	Proof Of Claim, Supplement 2
B 11A	General Power of Attorney	**Abrogated**	
B 11B	Special Power of Attorney	**Abrogated**	
B 12	Order and Notice for Hearing on Disclosure Statement	B312	Same
B 13	Order Approving Disclosure Statement and Fixing Time for Filing Acceptances or Rejections of Plan, Combined with Notice Thereof	B313	Same
B 14	Ballot for Accepting or Rejecting Plan	B314	Same
B 15	Order Confirming Plan	B315	Same
B 16A	Caption	B416A	Same
B 16B	Caption (Short Title)	B416B	Same
B 16D	Caption for Use in Adversary Proceeding other than for a Complaint Filed by a Debtor	B416D	Same
B 17A	Notice Of Appeal And Statement Of Election	B417A	Same
B17B	Optional Appellee Statement Of Election To Proceed In District Court	B417B	Same
B17C	Certificate of Compliance With Rule 8015(a)(7)(B) or 8016(d)(2)	B417C	Same
B 18	Discharge of Debtor	B318	Discharge of Debtor in a Chapter 7 Case
B 19	Declaration and Signature of Non-Attorney Bankruptcy Petition Preparer	B119	Bankruptcy Petition Preparer's Notice, Declaration and Signature
B 21	Statement of Social Security Number	B121	Your Statement About Your Social Security Numbers
B 22A-1	Chapter 7 Statement of Your Current Monthly Income and Means-Test Calculation *(published as 22A-1)*	B122A-1	Same
B 22A-1Supp	Chapter 7 Means Test Exemption Attachment	B122A-1Supp	Same
B 22A-2	Chapter 7 Means Test Calculation	B122A-2	Same
B 22B	Chapter 11 Statement of Your Current	B122B	Same
B22C-1	Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period*)*	B122C-1	Same
B22C-2	Chapter 13 Calculation of Your Disposable Income	B122C-2	Same
B 23	Debtor's Certification of Completion of Instructional Course Concerning Financial Management	B423	Certification About a Financial Management Course
B 24	Certification to Court of Appeals	B424	Same
B 27	Reaffirmation Agreement Cover Sheet	B427	Cover Sheet for Reaffirmation Agreement

Official Form 11A
12/15

United States Bankruptcy Court

_____ District Of _____

In re _____ ,
Debtor

Case No. _____
Chapter

GENERAL POWER OF ATTORNEY

[Abrogated]

125-011155

COMMITTEE NOTE

The form is abrogated. Former Official Form 11A, although abrogated as an Official Form, continues to be available as a Director's Procedural Form.

Parties routinely modify the General Power of Attorney form to conform to state law, the needs of the case, or local practice. The exact language of the form is not needed. The proposed amendment to Rule 9009, however, restricts alteration of the Official Forms, except as provided in the rules or in a particular Official Form.

The Director's Procedural Forms are issued by the Director of the Administrative Office pursuant to Rule 9009 as an accommodation for the courts and parties. The procedural forms may be altered as needed and their use is not mandatory, unless required by local rule.

Official Form 11B
12/15

United States Bankruptcy Court

_____ District Of _____

In re _____ ,
Debtor

Case No. _____
Chapter

SPECIAL POWER OF ATTORNEY

[Abrogated]

125-011157

COMMITTEE NOTE

The form is abrogated. Former Official Form 11B, although abrogated as an Official Form, continues to be available as a Director's Procedural Form.

Parties routinely modify the Special Power of Attorney form to conform to state law, the needs of the case, or local practice. The exact language of the form is not needed. The proposed amendment to Rule 9009, however, restricts alteration of the Official Forms, except as provided in the rules or in a particular Official Form.

The Director's Procedural Forms are issued by the Director of the Administrative Office pursuant to Rule 9009 as an accommodation for the courts and parties. The procedural forms may be altered as needed and their use is not mandatory, unless required by local rule.

Fill in this information to identify your case:

United States Bankruptcy Court for the:

_____ District of _____
(State)

Case number (*If known*): _____

Chapter you are filing under:
- ❑ Chapter 7
- ❑ Chapter 11
- ❑ Chapter 12
- ❑ Chapter 13

❑ Check if this is an amended filing

Official Form 101

Voluntary Petition for Individuals Filing for Bankruptcy

12/15

The bankruptcy forms use *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, these forms use *you* to ask for information from both debtors. For example, if a form asks, "Do you own a car," the answer would be *yes* if either debtor owns a car. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Identify Yourself

	About Debtor 1:	About Debtor 2 (Spouse Only in a Joint Case):
1. Your full name Write the name that is on your government-issued picture identification (for example, your driver's license or passport). Bring your picture identification to your meeting with the trustee.	_____ First name _____ Middle name _____ Last name _____ Suffix (Sr., Jr., II, III)	_____ First name _____ Middle name _____ Last name _____ Suffix (Sr., Jr., II, III)
2. All other names you have used in the last 8 years Include your married or maiden names.	_____ First name _____ Middle name _____ Last name _____ First name _____ Middle name _____ Last name	_____ First name _____ Middle name _____ Last name _____ First name _____ Middle name _____ Last name
3. Only the last 4 digits of your Social Security number or federal Individual Taxpayer Identification number (ITIN)	xxx – xx – ____ ____ ____ ____ OR **9** xx – xx – ____ ____ ____ ____	xxx – xx – ____ ____ ____ ____ OR **9** xx – xx – ____ ____ ____ ____

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	About Debtor 1:	About Debtor 2 (Spouse Only in a Joint Case):
4. Any business names and Employer Identification Numbers (EIN) you have used in the last 8 years Include trade names and *doing business as* names	❑ I have not used any business names or EINs. _____ Business name _____ Business name ___ ___ – ___ ___ ___ ___ ___ ___ ___ EIN ___ ___ – ___ ___ ___ ___ ___ ___ ___ EIN	❑ I have not used any business names or EINs. _____ Business name _____ Business name ___ ___ – ___ ___ ___ ___ ___ ___ ___ EIN ___ ___ – ___ ___ ___ ___ ___ ___ ___ EIN
5. Where you live	_____ Number Street _____ _____ City State ZIP Code _____ County **If your mailing address is different from the one above, fill it in here.** Note that the court will send any notices to you at this mailing address. _____ Number Street _____ P.O. Box _____ City State ZIP Code	**If Debtor 2 lives at a different address:** _____ Number Street _____ _____ City State ZIP Code _____ County **If Debtor 2's mailing address is different from yours, fill it in here.** Note that the court will send any notices to this mailing address. _____ Number Street _____ P.O. Box _____ City State ZIP Code
6. Why you are choosing *this district* to file for bankruptcy	*Check one:* ❑ Over the last 180 days before filing this petition, I have lived in this district longer than in any other district. ❑ I have another reason. Explain. (See 28 U.S.C. § 1408.) _____ _____ _____ _____	*Check one:* ❑ Over the last 180 days before filing this petition, I have lived in this district longer than in any other district. ❑ I have another reason. Explain. (See 28 U.S.C. § 1408.) _____ _____ _____ _____

Part 2: Tell the Court About Your Bankruptcy Case

7. The chapter of the Bankruptcy Code you are choosing to file under

Check one. (For a brief description of each, see *Notice Required by 11 U.S.C. § 342(b) for Individuals Filing for Bankruptcy* (Form 2010)). Also, go to the top of page 1 and check the appropriate box.

❑ Chapter 7

❑ Chapter 11

❑ Chapter 12

❑ Chapter 13

8. How you will pay the fee

❑ **I will pay the entire fee when I file my petition**. Please check with the clerk's office in your local court for more details about how you may pay. Typically, if you are paying the fee yourself, you may pay with cash, cashier's check, or money order. If your attorney is submitting your payment on your behalf, your attorney may pay with a credit card or check with a pre-printed address.

❑ **I need to pay the fee in installments**. If you choose this option, sign and attach the *Application for Individuals to Pay The Filing Fee in Installments* (Official Form 103A).

❑ **I request that my fee be waived** (You may request this option only if you are filing for Chapter 7. By law, a judge may, but is not required to, waive your fee, and may do so only if your income is less than 150% of the official poverty line that applies to your family size and you are unable to pay the fee in installments). If you choose this option, you must fill out the *Application to Have the Chapter 7 Filing Fee Waived* (Official Form 103B) and file it with your petition.

9. Have you filed for bankruptcy within the last 8 years?

❑ No

❑ Yes. District _____ When _____ Case number _____
MM / DD / YYYY

District _____ When _____ Case number _____
MM / DD / YYYY

District _____ When _____ Case number _____
MM / DD / YYYY

10. Are any bankruptcy cases pending or being filed by a spouse who is not filing this case with you, or by a business partner, or by an affiliate?

❑ No

❑ Yes. Debtor _____ Relationship to you _____

District _____ When _____ Case number, if known_____
MM / DD / YYYY

Debtor _____ Relationship to you _____

District _____ When _____ Case number, if known_____
MM / DD / YYYY

11. Do you rent your residence?

❑ No. Go to line 12.

❑ Yes. Has your landlord obtained an eviction judgment against you and do you want to stay in your residence?

❑ No. Go to line 12.

❑ Yes. Fill out *Initial Statement About an Eviction Judgment Against You* (Form 101A) and file it with this bankruptcy petition.

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Part 3: Report About Any Businesses You Own as a Sole Proprietor

12. Are you a sole proprietor of any full- or part-time business?

A sole proprietorship is a business you operate as an individual, and is not a separate legal entity such as a corporation, partnership, or LLC.

If you have more than one sole proprietorship, use a separate sheet and attach it to this petition.

❑ No. Go to Part 4.

❑ Yes. Name and location of business

_____
Name of business, if any

_____
Number Street

_____

_____ _____ _____
City State ZIP Code

Check the appropriate box to describe your business:

❑ Health Care Business (as defined in 11 U.S.C. § 101(27A))

❑ Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))

❑ Stockbroker (as defined in 11 U.S.C. § 101(53A))

❑ Commodity Broker (as defined in 11 U.S.C. § 101(6))

❑ None of the above

13. Are you filing under Chapter 11 of the Bankruptcy Code and are you a *small business debtor*?

For a definition of *small business debtor*, see 11 U.S.C. § 101(51D).

If you are filing under Chapter 11, the court must know whether you are a small business debtor so that it can set appropriate deadlines. If you indicate that you are a small business debtor, you must attach your most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return or if any of these documents do not exist, follow the procedure in 11 U.S.C. § 1116(1)(B).

❑ No. I am not filing under Chapter 11.

❑ No. I am filing under Chapter 11, but I am NOT a small business debtor according to the definition in the Bankruptcy Code.

❑ Yes. I am filing under Chapter 11 and I am a small business debtor according to the definition in the Bankruptcy Code.

Part 4: Report if You Own or Have Any Hazardous Property or Any Property That Needs Immediate Attention

14. Do you own or have any property that poses or is alleged to pose a threat of imminent and identifiable hazard to public health or safety? Or do you own any property that needs immediate attention?

For example, do you own perishable goods, or livestock that must be fed, or a building that needs urgent repairs?

❑ No

❑ Yes. What is the hazard? _____

_____

If immediate attention is needed, why is it needed? _____

_____

Where is the property? _____
Number Street

_____

_____ _____ _____
City State ZIP Code

Part 5: Explain Your Efforts to Receive a Briefing About Credit Counseling

15. Tell the court whether you have received a briefing about credit counseling.

The law requires that you receive a briefing about credit counseling before you file for bankruptcy. You must truthfully check one of the following choices. If you cannot do so, you are not eligible to file.

If you file anyway, the court can dismiss your case, you will lose whatever filing fee you paid, and your creditors can begin collection activities again.

About Debtor 1:

You must check one:

❑ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.**

Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.

❑ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.**

Within 14 days after you file this bankruptcy petition, you MUST file a copy of the certificate and payment plan, if any.

❑ **I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and exigent circumstances merit a 30-day temporary waiver of the requirement.**

To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the briefing, why you were unable to obtain it before you filed for bankruptcy, and what exigent circumstances required you to file this case.

Your case may be dismissed if the court is dissatisfied with your reasons for not receiving a briefing before you filed for bankruptcy.

If the court is satisfied with your reasons, you must still receive a briefing within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed.

Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.

❑ **I am not required to receive a briefing about credit counseling because of:**

❑ **Incapacity.** I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.

❑ **Disability.** My physical disability causes me to be unable to participate in a briefing in person, by phone, or through the internet, even after I reasonably tried to do so.

❑ **Active duty.** I am currently on active military duty in a military combat zone.

If you believe you are not required to receive a briefing about credit counseling, you must file a motion for waiver of credit counseling with the court.

About Debtor 2 (Spouse Only in a Joint Case):

You must check one:

❑ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.**

Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.

❑ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.**

Within 14 days after you file this bankruptcy petition, you MUST file a copy of the certificate and payment plan, if any.

❑ **I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and exigent circumstances merit a 30-day temporary waiver of the requirement.**

To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the briefing, why you were unable to obtain it before you filed for bankruptcy, and what exigent circumstances required you to file this case.

Your case may be dismissed if the court is dissatisfied with your reasons for not receiving a briefing before you filed for bankruptcy.

If the court is satisfied with your reasons, you must still receive a briefing within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed.

Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.

❑ **I am not required to receive a briefing about credit counseling because of:**

❑ **Incapacity.** I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.

❑ **Disability.** My physical disability causes me to be unable to participate in a briefing in person, by phone, or through the internet, even after I reasonably tried to do so.

❑ **Active duty.** I am currently on active military duty in a military combat zone.

If you believe you are not required to receive a briefing about credit counseling, you must file a motion for waiver of credit counseling with the court.

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Part 6: Answer These Questions for Reporting Purposes

16. What kind of debts do you have?

16a. **Are your debts primarily consumer debts?** *Consumer debts* are defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose."

- ❑ No. Go to line 16b.
- ❑ Yes. Go to line 17.

16b. **Are your debts primarily business debts?** *Business debts* are debts that you incurred to obtain money for a business or investment or through the operation of the business or investment.

- ❑ No. Go to line 16c.
- ❑ Yes. Go to line 17.

16c. State the type of debts you owe that are not consumer debts or business debts.

_____

17. Are you filing under Chapter 7?

Do you estimate that after any exempt property is excluded and administrative expenses are paid that funds will be available for distribution to unsecured creditors?

- ❑ No. I am not filing under Chapter 7. Go to line 18.
- ❑ Yes. I am filing under Chapter 7. Do you estimate that after any exempt property is excluded and administrative expenses are paid that funds will be available to distribute to unsecured creditors?
  - ❑ No
  - ❑ Yes

18. How many creditors do you estimate that you owe?

❑ 1-49	❑ 1,000-5,000	❑ 25,001-50,000
❑ 50-99	❑ 5,001-10,000	❑ 50,001-100,000
❑ 100-199	❑ 10,001-25,000	❑ More than 100,000
❑ 200-999		

19. How much do you estimate your assets to be worth?

❑ $0-$50,000	❑ $1,000,001-$10 million	❑ $500,000,001-$1 billion
❑ $50,001-$100,000	❑ $10,000,001-$50 million	❑ $1,000,000,001-$10 billion
❑ $100,001-$500,000	❑ $50,000,001-$100 million	❑ $10,000,000,001-$50 billion
❑ $500,001-$1 million	❑ $100,000,001-$500 million	❑ More than $50 billion

20. How much do you estimate your liabilities to be?

❑ $0-$50,000	❑ $1,000,001-$10 million	❑ $500,000,001-$1 billion
❑ $50,001-$100,000	❑ $10,000,001-$50 million	❑ $1,000,000,001-$10 billion
❑ $100,001-$500,000	❑ $50,000,001-$100 million	❑ $10,000,000,001-$50 billion
❑ $500,001-$1 million	❑ $100,000,001-$500 million	❑ More than $50 billion

Part 7: Sign Below

For you

I have examined this petition, and I declare under penalty of perjury that the information provided is true and correct.

If I have chosen to file under Chapter 7, I am aware that I may proceed, if eligible, under Chapter 7, 11,12, or 13 of title 11, United States Code. I understand the relief available under each chapter, and I choose to proceed under Chapter 7.

If no attorney represents me and I did not pay or agree to pay someone who is not an attorney to help me fill out this document, I have obtained and read the notice required by 11 U.S.C. § 342(b).

I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

I understand making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to $250,000, or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

✘ _____ ✘ _____

Signature of Debtor 1 Signature of Debtor 2

Executed on _____ Executed on _____
MM / DD / YYYY MM / DD / YYYY

For your attorney, if you are represented by one

If you are not represented by an attorney, you do not need to file this page.

I, the attorney for the debtor(s) named in this petition, declare that I have informed the debtor(s) about eligibility to proceed under Chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each chapter for which the person is eligible. I also certify that I have delivered to the debtor(s) the notice required by 11 U.S.C. § 342(b) and, in a case in which § 707(b)(4)(D) applies, certify that I have no knowledge after an inquiry that the information in the schedules filed with the petition is incorrect.

✘ _____ Date _____
Signature of Attorney for Debtor MM / DD / YYYY

_____
Printed name

_____
Firm name

_____
Number Street

_____

_____ _____ _____
City State ZIP Code

Contact phone _____ Email address _____

_____ _____
Bar number State

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For you if you are filing this bankruptcy without an attorney

If you are represented by an attorney, you do not need to file this page.

The law allows you, as an individual, to represent yourself in bankruptcy court, but **you should understand that many people find it extremely difficult to represent themselves successfully. Because bankruptcy has long-term financial and legal consequences, you are strongly urged to hire a qualified attorney.**

To be successful, you must correctly file and handle your bankruptcy case. The rules are very technical, and a mistake or inaction may affect your rights. For example, your case may be dismissed because you did not file a required document, pay a fee on time, attend a meeting or hearing, or cooperate with the court, case trustee, U.S. trustee, bankruptcy administrator, or audit firm if your case is selected for audit. If that happens, you could lose your right to file another case, or you may lose protections, including the benefit of the automatic stay.

You must list all your property and debts in the schedules that you are required to file with the court. Even if you plan to pay a particular debt outside of your bankruptcy, you must list that debt in your schedules. If you do not list a debt, the debt may not be discharged. If you do not list property or properly claim it as exempt, you may not be able to keep the property. The judge can also deny you a discharge of all your debts if you do something dishonest in your bankruptcy case, such as destroying or hiding property, falsifying records, or lying. Individual bankruptcy cases are randomly audited to determine if debtors have been accurate, truthful, and complete. **Bankruptcy fraud is a serious crime; you could be fined and imprisoned.**

If you decide to file without an attorney, the court expects you to follow the rules as if you had hired an attorney. The court will not treat you differently because you are filing for yourself. To be successful, you must be familiar with the United States Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and the local rules of the court in which your case is filed. You must also be familiar with any state exemption laws that apply.

Are you aware that filing for bankruptcy is a serious action with long-term financial and legal consequences?

- ❑ No
- ❑ Yes

Are you aware that bankruptcy fraud is a serious crime and that if your bankruptcy forms are inaccurate or incomplete, you could be fined or imprisoned?

- ❑ No
- ❑ Yes

Did you pay or agree to pay someone who is not an attorney to help you fill out your bankruptcy forms?

- ❑ No
- ❑ Yes. Name of Person_____.
  Attach *Bankruptcy Petition Preparer's Notice, Declaration, and Signature* (Official Form 119).

By signing here, I acknowledge that I understand the risks involved in filing without an attorney. I have read and understood this notice, and I am aware that filing a bankruptcy case without an attorney may cause me to lose my rights or property if I do not properly handle the case.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

Contact phone _____

Cell phone _____

Email address _____

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

Contact phone _____

Cell phone _____

Email address _____

COMMITTEE NOTE

Official Form 101, *Voluntary Petition for Individuals Filing for Bankruptcy*, applies only in cases of individual debtors. Form 101 replaces Official Form 1, Voluntary Petition. It is renumbered to distinguish it from the forms used by non-individual debtors, such as corporations, and includes stylistic changes throughout the form. It is revised as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. Because the goals of the Forms Modernization Project include improving the interface between technology and the forms so as to increase efficiency and reduce the need to produce the same information in multiple formats, many of the open-ended questions and multiple-part instructions have been replaced with more specific questions.

Official Form 101 has been substantially reorganized. References to Exhibits A, B, C, and D, and the exhibits themselves, have been eliminated because the requested information is now asked in the form or is not applicable to individual debtors.

Part 1, *Identify Yourself,* line 6, replaces the venue box from page 2 of Official Form 1 and deletes venue questions that pertain only to non-individuals.

Part 2, *Tell the Court About Your Bankruptcy Case,* line 7, removes choices for chapters 9 and 15 filings because they do not pertain to individuals. The status of "being filed" is added to the question regarding bankruptcy cases pending or filed by a spouse, business partner, or affiliate (line 10). Lastly, the question "Do you rent your residence?" (line 11) and Official Forms 101A, *Initial Statement About an Eviction Judgment Against You*, and 101B, *Statement About Payment of an Eviction Judgment Against You,* replace "certification by a debtor who resides as a tenant of residential property," on page 2 of Official Form 1.

Part 3, *Report About Any Businesses You Own as a Sole Proprietor,* line 12, incorporates options from the "nature of business" box from page 1 of Official Form 1 that would apply to individual debtors, thus eliminating checkboxes for railroads and clearing banks. Part 3, line 13, also eliminates a checkbox to report whether a plan was filed with the petition, or if plan acceptances were solicited prepetition. Additionally, line 13 rephrases the question relating to whether a debtor filing under Chapter 11 is a small business debtor.

Part 4, *Report if You Own or Have Any Hazardous Property or Any Property That Needs Immediate Attention,* line 14, replaces Exhibit C from Official Form 1 and adds the category of "property that needs immediate attention."

Part 5, *Explain Your Efforts to Receive a Briefing About Credit Counseling* (line 15), replaces Exhibit D from Official Form 1. Additionally, this part describes incapacity and disability using a simplified definition, tells the debtor of the ability to file a motion for a waiver, and eliminates statutory reference about districts where credit counseling does not apply because such districts are rare.

Part 6, *Answer These Questions for Reporting Purposes* (line 16c), provides a text field for the debtor to describe the type of debts owed if the debtor believes they are neither primarily consumer nor business debts.

Part 7, *Sign Below*, deletes from the debtor's declaration the phrase "to the best of my knowledge, information, and belief" in order to conform to the language of 28 U.S.C. § 1746. *See* Rule 1008. This part combines the two attorney signature blocks into one certification and eliminates signature lines for corporations/partnerships and chapter 15 Foreign Representative. The declaration and signature section for a non-attorney bankruptcy petition preparer (BPP) has also been removed as unnecessary. The same declaration, required under 11 U.S.C. § 110, is contained in Official

Form 119. That form must be completed and signed by the BPP and filed with each document prepared by a BPP.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Official Form 101A

Initial Statement About an Eviction Judgment Against You

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File this form with the court and serve a copy on your landlord when you first file bankruptcy only if:

- **you rent your residence; and**
- **your landlord has obtained a judgment for possession in an eviction, unlawful detainer action, or similar proceeding (called *eviction judgment*) against you to possess your residence.**

Landlord's name _____

Landlord's address _____
Number Street

_____ _____ _____
City State ZIP Code

If you want to stay in your rented residence after you file your case for bankruptcy, also complete the certification below.

Certification About Applicable Law and Deposit of Rent

I certify under penalty of perjury that:

☐ Under the state or other nonbankruptcy law that applies to the judgment for possession (*eviction judgment*), I have the right to stay in my residence by paying my landlord the entire delinquent amount.

☐ I have given the bankruptcy court clerk a deposit for the rent that would be due during the 30 days after I file the *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101).

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

Stay of Eviction: (a) **First 30 days after bankruptcy.** If you checked both boxes above, signed the form to certify that both apply, and served your landlord with a copy of this statement, the automatic stay under 11 U.S.C. § 362(a)(3) will apply to the continuation of the eviction against you for 30 days after you file your *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101).

(b) **Stay after the initial 30 days.** If you wish to stay in your residence after that 30-day period and continue to receive the protection of the automatic stay under 11 U.S.C. § 362(a)(3), you must pay the entire delinquent amount to your landlord as stated in the eviction judgment before the 30-day period ends. You must also fill out *Statement About Payment of an Eviction Judgment Against You* (Official Form 101B), file it with the bankruptcy court, and serve your landlord a copy of it before the 30-day period ends.

Check the Bankruptcy Rules (www.uscourts.gov/rulesandpolicies/rules.aspx) and the local court's website (to find your court's website, go to www.uscourts.gov/Court_Locator.aspx) for any specific requirements that you might have to meet to serve this statement.
11 U.S.C. §§ 362(b)(22) and 362(l)

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Official Form 101B

Statement About Payment of an Eviction Judgment Against You

12/15

Fill out this form only if:

- **you filed *Initial Statement About an Eviction Judgment Against You* (Official Form 101A); and**
- **you served a copy of Form 101A on your landlord; and**
- **you want to stay in your rented residence for more than 30 days after you file your *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101).**

File this form within 30 days after you file your *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101). Also serve a copy on your landlord within that same time period.

Certification About Applicable Law and Payment of Eviction Judgment

I certify under penalty of perjury that (*Check all that apply*):

❑ Under the state or other nonbankruptcy law that applies to the judgment for possession (*eviction judgment*), I have the right to stay in my residence by paying my landlord the entire delinquent amount.

❑ Within 30 days after I filed my *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101), I have paid my landlord the entire amount I owe as stated in the judgment for possession (*eviction judgment*).

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

You must serve your landlord with a copy of this form.

Check the Bankruptcy Rules (www.uscourts.gov/rulesandpolicies/rules.aspx) and the court's local website (go to http://www.uscourts.gov/Court_Locator.aspx to find your court's website) for any specific requirements that you might have to meet to serve this statement.

COMMITTEE NOTE

Official Form 101A, *Initial Statement About an Eviction Judgment Against You*, and Official Form 101B, *Statement About Payment of an Eviction Judgment Against You*, are new forms promulgated as part of the Forms Modernization Project. They replace the "*Certification by a Debtor Who Resides as a Tenant of Residential Property*" section on Official Form 1, *Voluntary Petition*. The forms apply only in cases of individual debtors.

Official Form 101A explains that debtors need to complete and file the form only if their landlord has a judgment for possession or an eviction judgment against them and they rent their residence. The form further explains that if the debtor wishes to stay in their residence for 30 days after filing their bankruptcy petition, the certification must be completed. The form adds references to the provisions in the Bankruptcy Code that specify when debtor-tenants subject to eviction may remain in their residence after filing for bankruptcy.

The form eliminates the checkboxes that the debtor has served the landlord with the certification and paid the court the rent that would be due during the 30 days after the filing of the bankruptcy petition. Instead, debtors are required to certify under penalty of perjury that the rent has been paid to the court, and the instructions direct debtors to serve a copy of the statement on the landlord.

The form eliminates the checkbox that the debtor claims there are circumstances under applicable nonbankruptcy law under which the debtor would be permitted to cure the monetary default that gave rise to the judgment for possession (or eviction judgment) and remain in residence. Instead, debtors are required to certify under penalty of perjury that they have the right to stay in their residence under state law or other nonbankruptcy law by paying their landlord the entire delinquent amount.

Official Form 101B is new. If debtors wish to stay in their residence for more than 30 days after filing the petition, they must complete, file, and serve the form within 30 days after the petition is filed. Under Official Form 101B, debtors certify under penalty of perjury that they have the right to stay in their residence under state law or other nonbankruptcy law by paying their landlord the entire delinquent amount and that they have paid their landlord the entire amount owed as stated in the judgment for possession or in the eviction judgment.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 103A

Application for Individuals to Pay the Filing Fee in Installments

12/15

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information.

Part 1: Specify Your Proposed Payment Timetable

1. **Which chapter of the Bankruptcy Code are you choosing to file under?**

❑ Chapter 7
❑ Chapter 11
❑ Chapter 12
❑ Chapter 13

2. **You may apply to pay the filing fee in up to four installments. Fill in the amounts you propose to pay and the dates you plan to pay them. Be sure all dates are business days. Then add the payments you propose to pay.**

You must propose to pay the entire fee no later than 120 days after you file this bankruptcy case. If the court approves your application, the court will set your final payment timetable.

You propose to pay…		
$_____	❑ With the filing of the petition ❑ On or before this date.....	_____ MM / DD / YYYY
$_____	On or before this date.....	_____ MM / DD / YYYY
$_____	On or before this date.....	_____ MM / DD / YYYY
+ $_____	On or before this date.....	_____ MM / DD / YYYY
Total $_____	◀ Your total must equal the entire fee for the chapter you checked in line 1.	

Part 2: Sign Below

By signing here, you state that you are unable to pay the full filing fee at once, that you want to pay the fee in installments, and that you understand that:

- You must pay your entire filing fee before you make any more payments or transfer any more property to an attorney, bankruptcy petition preparer, or anyone else for services in connection with your bankruptcy case.
- You must pay the entire fee no later than 120 days after you first file for bankruptcy, unless the court later extends your deadline. Your debts will not be discharged until your entire fee is paid.
- If you do not make any payment when it is due, your bankruptcy case may be dismissed, and your rights in other bankruptcy proceedings may be affected.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

✘ _____
Your attorney's name and signature, if you used one

Date _____
MM / DD / YYYY

Fill in this information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Chapter filing under:

- ❑ Chapter 7
- ❑ Chapter 11
- ❑ Chapter 12
- ❑ Chapter 13

Order Approving Payment of Filing Fee in Installments

After considering the *Application for Individuals to Pay the Filing Fee in Installments* (Official Form 103A), the court orders that:

[ ] The debtor(s) may pay the filing fee in installments on the terms proposed in the application.

[ ] The debtor(s) must pay the filing fee according to the following terms:

	You must pay…	**On or before this date…**
	$_____	_____ Month / day / year
	$_____	_____ Month / day / year
	$_____	_____ Month / day / year
+	$_____	_____ Month / day / year
Total	$_____	

Until the filing fee is paid in full, the debtor(s) must not make any additional payment or transfer any additional property to an attorney or to anyone else for services in connection with this case.

_____ **By the court:** _____
Month / day / year United States Bankruptcy Judge

COMMITTEE NOTE

The form number is updated to comport with the form numbering style developed as part of the Forms Modernization Project. Other stylistic changes were made throughout the form.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 103B

Application to Have the Chapter 7 Filing Fee Waived

12/15

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known).

Part 1: Tell the Court About Your Family and Your Family's Income

1. What is the size of your family?

Your family includes you, your spouse, and any dependents listed on *Schedule J: Your Expenses* (Official Form 106J).

Check all that apply:

❑ You
❑ Your spouse
❑ Your dependents _____ How many dependents?

_____ Total number of people

2. Fill in your family's average monthly income.

Include your spouse's income if your spouse is living with you, even if your spouse is not filing.

Do not include your spouse's income if you are separated and your spouse is not filing with you.

		That person's average monthly net income (take-home pay)
Add your income and your spouse's income. Include the value (if known) of any non-cash governmental assistance that you receive, such as food stamps (benefits under the Supplemental Nutrition Assistance Program) or housing subsidies. If you have already filled out *Schedule I: Your Income,* see line 10 of that schedule.	**You**	$_____
	Your spouse ... +	$_____
	Subtotal.....	$_____
Subtract any non-cash governmental assistance that you included above.	−	$_____
Your family's average monthly net income	Total.....	$_____

3. Do you receive non-cash governmental assistance?

❑ No
❑ Yes. Describe.....

Type of assistance

4. Do you expect your family's average monthly net income to increase or decrease by more than 10% during the next 6 months?

❑ No
❑ Yes. Explain. .....

5. Tell the court why you are unable to pay the filing fee in installments within 120 days. If you have some additional circumstances that cause you to not be able to pay your filing fee in installments, explain them.

Rules Appendix 126-011177

Part 2: Tell the Court About Your Monthly Expenses

6. Estimate your average monthly expenses.
Include amounts paid by any government assistance that you reported on line 2. **$**_____

If you have already filled out *Schedule J, Your Expenses,* copy line 22 from that form.

7. Do these expenses cover anyone who is not included in your family as reported in line 1?
- ❑ No
- ❑ Yes. Identify who .....

8. Does anyone other than you regularly pay any of these expenses?
If you have already filled out *Schedule I: Your Income*, copy the total from line 11.
- ❑ No
- ❑ Yes. How much do you regularly receive as contributions? $_____ monthly

9. Do you expect your average monthly expenses to increase or decrease by more than 10% during the next 6 months?
- ❑ No
- ❑ Yes. Explain .....

Part 3: Tell the Court About Your Property

If you have already filled out *Schedule A/B: Property (Official Form 106A/B)* attach copies to this application and go to Part 4.

10. How much cash do you have?
Examples: Money you have in your wallet, in your home, and on hand when you file this application

Cash: $_____

11. Bank accounts and other deposits of money?
Examples: Checking, savings, money market, or other financial accounts; certificates of deposit; shares in banks, credit unions, brokerage houses, and other similar institutions. If you have more than one account with the same institution, list each. Do not include 401(k) and IRA accounts.

	Institution name:	Amount:
Checking account:	_____	$_____
Savings account:	_____	$_____
Other financial accounts:	_____	$_____
Other financial accounts:	_____	$_____

12. Your home? (if you own it outright or are purchasing it)
Examples: House, condominium, manufactured home, or mobile home

_____
Number Street
_____
City State ZIP Code

Current value: $_____
Amount you owe on mortgage and liens: $_____

13. Other real estate?

_____
Number Street
_____
City State ZIP Code

Current value: $_____
Amount you owe on mortgage and liens: $_____

14. The vehicles you own?
Examples: Cars, vans, trucks, sports utility vehicles, motorcycles, tractors, boats

Make: _____
Model: _____
Year: _____
Mileage _____

Current value: $_____
Amount you owe on liens: $_____

Make: _____
Model: _____
Year: _____
Mileage _____

Current value: $_____
Amount you owe on liens: $_____

Rules Appendix B-66
12b-011178

15. Other assets?

Do not include household items and clothing.

Describe the other assets:

Current value: $_____

Amount you owe on liens: $_____

16. Money or property due you?

Examples: Tax refunds, past due or lump sum alimony, spousal support, child support, maintenance, divorce or property settlements, Social Security benefits, workers' compensation, personal injury recovery

Who owes you the money or property?

_____

_____

How much is owed?

$_____

$_____

Do you believe you will likely receive payment in the next 180 days?

❑ No

❑ Yes. Explain:

Part 4: Answer These Additional Questions

17. Have you paid anyone for services for this case, including filling out this application, the bankruptcy filing package, or the schedules?

❑ No

❑ Yes. **Whom did you pay?** *Check all that apply:*

- ❑ An attorney
- ❑ A bankruptcy petition preparer, paralegal, or typing service
- ❑ Someone else _____

How much did you pay?

$_____

18. Have you promised to pay or do you expect to pay someone for services for your bankruptcy case?

❑ No

❑ Yes. **Whom do you expect to pay?** *Check all that apply:*

- ❑ An attorney
- ❑ A bankruptcy petition preparer, paralegal, or typing service
- ❑ Someone else _____

How much do you expect to pay?

$_____

19. Has anyone paid someone on your behalf for services for this case?

❑ No

❑ Yes. **Who was paid on your behalf?** *Check all that apply:*

- ❑ An attorney
- ❑ A bankruptcy petition preparer, paralegal, or typing service
- ❑ Someone else _____

Who paid? *Check all that apply:*

- ❑ Parent
- ❑ Brother or sister
- ❑ Friend
- ❑ Pastor or clergy
- ❑ Someone else _____

How much did someone else pay?

$_____

20. Have you filed for bankruptcy within the last 8 years?

❑ No

❑ Yes. District _____ When _____ (MM/ DD/ YYYY) Case number _____

District _____ When _____ (MM/ DD/ YYYY) Case number _____

District _____ When _____ (MM/ DD/ YYYY) Case number _____

Part 5: Sign Below

By signing here under penalty of perjury, I declare that I cannot afford to pay the filing fee either in full or in installments. I also declare that the information I provided in this application is true and correct.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

Rules Appendix 126-011179

Fill in this information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Order on the Application to Have the Chapter 7 Filing Fee Waived

After considering the debtor's *Application to Have the Chapter 7 Filing Fee Waived* (Official Form 103B), the court orders that the application is:

[ ] Granted. However, the court may order the debtor to pay the fee in the future if developments in administering the bankruptcy case show that the waiver was unwarranted.

[ ] Denied. The debtor must pay the filing fee according to the following terms:

	You must pay…	On or before this date…
	$_____	_____ Month / day / year
	$_____	_____ Month / day / year
	$_____	_____ Month / day / year
+	$_____	_____ Month / day / year
Total		

If the debtor would like to propose a different payment timetable, the debtor must file a motion promptly with a payment proposal. The debtor may use *Application for Individuals to Pay the Filing Fee in Installments* (Official Form 103A) for this purpose. The court will consider it.

The debtor must pay the entire filing fee before making any more payments or transferring any more property to an attorney, bankruptcy petition preparer, or anyone else in connection with the bankruptcy case. The debtor must also pay the entire filing fee to receive a discharge. If the debtor does not make any payment when it is due, the bankruptcy case may be dismissed and the debtor's rights in future bankruptcy cases may be affected.

[ ] Scheduled for hearing.

A hearing to consider the debtor's application will be held

on _____ at _____ AM / PM at _____.
Month / day / year Address of courthouse

If the debtor does not appear at this hearing, the court may deny the application.

_____ **By the court:** _____
Month / day / year United States Bankruptcy Judge

COMMITTEE NOTE

The form number is updated to comport with the form numbering style developed as part of the Forms Modernization Project. Other stylistic changes were made throughout the form.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 104

For Individual Chapter 11 Cases: List of Creditors Who Have the 20 Largest Unsecured Claims Against You and Are Not Insiders

12/15

If you are an individual filing for bankruptcy under Chapter 11, you must fill out this form. If you are filing under Chapter 7, Chapter 12, or Chapter 13, do not fill out this form. Do not include claims by anyone who is an *insider*. Insiders include your relatives; any general partners; relatives of any general partners; partnerships of which you are a general partner; corporations of which you are an officer, director, person in control, or owner of 20 percent or more of their voting securities; and any managing agent, including one for a business you operate as a sole proprietor. 11 U.S.C. § 101. Also, do not include claims by secured creditors unless the unsecured claim resulting from inadequate collateral value places the creditor among the holders of the 20 largest unsecured claims.

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information.

Part 1: List the 20 Unsecured Claims in Order from Largest to Smallest. Do Not Include Claims by Insiders.

		Unsecured claim
1	**What is the nature of the claim?** _____	$_____
Creditor's Name _____	**As of the date you file, the claim is:** Check all that apply.	
Number Street _____	❑ Contingent	
_____	❑ Unliquidated	
City State ZIP Code _____	❑ Disputed	
Contact _____	❑ None of the above apply	
Contact phone _____	**Does the creditor have a lien on your property?**	
	❑ No	
	❑ Yes. Total claim (secured and unsecured): $_____	
	Value of security: - $_____	
	Unsecured claim $_____	
2	**What is the nature of the claim?** _____	$_____
Creditor's Name _____	**As of the date you file, the claim is:** Check all that apply.	
Number Street _____	❑ Contingent	
_____	❑ Unliquidated	
City State ZIP Code _____	❑ Disputed	
Contact _____	❑ None of the above apply	
Contact phone _____	**Does the creditor have a lien on your property?**	
	❑ No	
	❑ Yes. Total claim (secured and unsecured): $_____	
	Value of security: - $_____	
	Unsecured claim $_____	

Debtor 1 _____ Case number (*if known*) _____
First Name Middle Name Last Name

			Unsecured claim
3	Creditor's Name Number Street City State ZIP Code Contact Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a lien on your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: − $_____ Unsecured claim $_____	$_____
4	Creditor's Name Number Street City State ZIP Code Contact Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a lien on your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: − $_____ Unsecured claim $_____	$_____
5	Creditor's Name Number Street City State ZIP Code Contact Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a lien on your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: − $_____ Unsecured claim $_____	$_____
6	Creditor's Name Number Street City State ZIP Code Contact Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a lien on your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: − $_____ Unsecured claim $_____	$_____
7	Creditor's Name Number Street City State ZIP Code Contact Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a lien on your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: − $_____ Unsecured claim $_____	$_____

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

		Unsecured claim
8 Creditor's Name Number Street City State ZIP Code Contact Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a lien on your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: − $_____ Unsecured claim $_____	$_____
9 Creditor's Name Number Street City State ZIP Code Contact Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a lien on your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: − $_____ Unsecured claim $_____	$_____
10 Creditor's Name Number Street City State ZIP Code Contact Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a lien on your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: − $_____ Unsecured claim $_____	$_____
11 Creditor's Name Number Street City State ZIP Code Contact Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a lien on your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: − $_____ Unsecured claim $_____	$_____
12 Creditor's Name Number Street City State ZIP Code Contact Contact phone	**What is the nature of the claim?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed ❑ None of the above apply **Does the creditor have a lien on your property?** ❑ No ❑ Yes. Total claim (secured and unsecured): $_____ Value of security: − $_____ Unsecured claim $_____	$_____

Unsecured claim

13

Creditor's Name _____
Number Street _____
City State ZIP Code _____
Contact _____
Contact phone _____

What is the nature of the claim? _____ $_____

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $_____
  - Value of security: − $_____
  - Unsecured claim $_____

14

Creditor's Name _____
Number Street _____
City State ZIP Code _____
Contact _____
Contact phone _____

What is the nature of the claim? _____ $_____

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $_____
  - Value of security: − $_____
  - Unsecured claim $_____

15

Creditor's Name _____
Number Street _____
City State ZIP Code _____
Contact _____
Contact phone _____

What is the nature of the claim? _____ $_____

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $_____
  - Value of security: − $_____
  - Unsecured claim $_____

16

Creditor's Name _____
Number Street _____
City State ZIP Code _____
Contact _____
Contact phone _____

What is the nature of the claim? _____ $_____

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $_____
  - Value of security: − $_____
  - Unsecured claim $_____

17

Creditor's Name _____
Number Street _____
City State ZIP Code _____
Contact _____
Contact phone _____

What is the nature of the claim? _____ $_____

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $_____
  - Value of security: − $_____
  - Unsecured claim $_____

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12b-011185

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

Unsecured claim

18

_____
Creditor's Name

_____
Number Street

_____

_____
City State ZIP Code

_____
Contact

_____
Contact phone

What is the nature of the claim? _____ $_____

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $_____
  - Value of security: − $_____
  - Unsecured claim $_____

19

_____
Creditor's Name

_____
Number Street

_____

_____
City State ZIP Code

_____
Contact

_____
Contact phone

What is the nature of the claim? _____ $_____

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $_____
  - Value of security: − $_____
  - Unsecured claim $_____

20

_____
Creditor's Name

_____
Number Street

_____

_____
City State ZIP Code

_____
Contact

_____
Contact phone

What is the nature of the claim? _____ $_____

As of the date you file, the claim is: Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ None of the above apply

Does the creditor have a lien on your property?
- ❑ No
- ❑ Yes. Total claim (secured and unsecured): $_____
  - Value of security: − $_____
  - Unsecured claim $_____

Part 2: Sign Below

Under penalty of perjury, I declare that the information provided in this form is true and correct.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

COMMITTEE NOTE

Official Form 104, *For Individual Chapter 11 Cases: List of Creditors Who Have the 20 Largest Unsecured Claims Against You and Are Not Insiders*, is revised as part of the Forms Modernization Project. It replaces Official Form 4, *List of Creditors Holding 20 Largest Unsecured Claims* in chapter 11 cases filed by individuals or joint debtors. The form is renumbered to distinguish it from the version to be used in chapter 11 cases filed by non-individuals, such as corporations and partnerships, and in chapter 9 cases.

Form 104 is reformatted to make it easier to complete and understand and to be more visually appealing. Blanks and checkboxes are provided for specific information about each claim, replacing columns for listing information. A separate, numbered section is provided for each of the 20 claims.

The instruction not to include fully secured claims is restated in less technical terms. Debtors are instructed to include a secured creditor only if the creditor has an unsecured claim resulting from inadequate collateral value that is among the 20 largest unsecured claims. Blanks are provided to calculate the value of the unsecured portion of a partially secured claim.

Examples of "insiders" are provided in addition to the statutory reference. The form adds an explicit instruction not to file the form in a chapter 7, chapter 12, or chapter 13 case. An instruction to be as complete and accurate as possible is added, along with a warning that, if two married people are filing jointly, both are equally responsible for supplying correct information.

With respect to children who may be creditors, the direction to state only the initials of a minor child and the name and address of the child's parent or guardian, rather than the child's full name, is moved to the general

125-011187

instruction booklet for the forms because it applies to all of the forms.

Fill in this information to identify the case:

United States Bankruptcy Court for the:

_____ District of _____
(State)

Case number (*If known*): _____ Chapter _____

❑ Check if this is an amended filing

Official Form 105

Involuntary Petition Against an Individual

12/15

Use this form to begin a bankruptcy case against an individual you allege to be a debtor subject to an involuntary case. If you want to begin a case against a non-individual, use the *Involuntary Petition Against a Non-individual* (Official Form 205). Be as complete and accurate as possible. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write name and case number (if known).

Part 1: Identify the Chapter of the Bankruptcy Code Under Which Petition Is Filed

1. Chapter of the Bankruptcy Code

Check one:

❑ Chapter 7
❑ Chapter 11

Part 2: Identify the Debtor

2. Debtor's full name

_____
First name

_____
Middle name

_____
Last name

_____
Suffix (Sr., Jr., II, III)

3. Other names you know the debtor has used in the last 8 years

Include any assumed, married, maiden, or trade names, or *doing business as* names.

_____
_____
_____

4. Only the last 4 digits of debtor's Social Security Number or federal Individual Taxpayer Identification Number (ITIN)

❑ Unknown

xxx – xx – ____ ____ ____ ____ OR 9xx – xx – ____ ____ ____ ____

5. Any Employer Identification Numbers (EINs) used in the last 8 years

❑ Unknown

__ __ – __ __ __ __ __ __ __
EIN

__ __ – __ __ __ __ __ __ __
EIN

Rules Appendix 125-011189

6. Debtor's address

Principal residence

_____
Number Street

_____

_____
City State ZIP Code

_____
County

Mailing address, if different from residence

_____
Number Street

_____

_____
City State ZIP Code

Principal place of business

_____
Number Street

_____

_____
City State ZIP Code

_____
County

7. Type of business

❑ Debtor does not operate a business

Check one if the debtor operates a business:

❑ Health Care Business (as defined in 11 U.S.C. § 101(27A))
❑ Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))
❑ Stockbroker (as defined in 11 U.S.C. § 101(53A))
❑ Commodity Broker (as defined in 11 U.S.C. § 101(6))
❑ None of the above

8. Type of debt

Each petitioner believes:

❑ **Debts are primarily consumer debts.** *Consumer debts* are defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose."

❑ **Debts are primarily business debts.** *Business debts* are debts that were incurred to obtain money for a business or investment or through the operation of the business or investment.

9. Do you know of any bankruptcy cases pending by or against any partner, spouse, or affiliate of this debtor?

❑ No

❑ Yes. Debtor _____ Relationship _____

District _____ Date filed _____ Case number, if known_____
MM / DD / YYYY

Debtor _____ Relationship _____

District _____ Date filed _____ Case number, if known_____
MM / DD / YYYY

Part 3: Report About the Case

10. Venue

Reason for filing in this court.

Check one:

- ❑ Over the last 180 days before the filing of this bankruptcy, the debtor has resided, had the principal place of business, or had principal assets in this district longer than in any other district.
- ❑ A bankruptcy case concerning debtor's affiliates, general partner, or partnership is pending in this district.
- ❑ Other reason. Explain. (See 28 U.S.C. § 1408.) _____

11. Allegations

Each petitioner is eligible to file this petition under 11 U.S.C. § 303(b).

The debtor may be the subject of an involuntary case under 11 U.S.C. § 303(a).

At least one box must be checked:

- ❑ The debtor is generally not paying such debtor's debts as they become due, unless they are the subject of a bona fide dispute as to liability or amount.
- ❑ Within 120 days before the filing of this petition, a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.

12. Has there been a transfer of any claim against the debtor by or to any petitioner?

- ❑ No
- ❑ Yes. Attach all documents that evidence the transfer and any statements required under Bankruptcy Rule 1003(a).

13. Each petitioner's claim

Name of petitioner	Nature of petitioner's claim	Amount of the claim above the value of any lien
		$ _____
		$ _____
		$ _____
	Total	$ _____

If more than 3 petitioners, attach additional sheets with the statement under penalty of perjury, each petitioner's (or representative's) signature under the statement, along with the signature of the petitioner's attorney, and the information on the petitioning creditor, the petitioner's claim, the petitioner's representative, and the attorney following the format on this form.

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Part 4: Request for Relief

Petitioners request that an order for relief be entered against the debtor under the chapter specified in Part 1 of this petition. If a petitioning creditor is a corporation, attach the corporate ownership statement required by Bankruptcy Rule 1010(b). If any petitioner is a foreign representative appointed in a foreign proceeding, a certified copy of the order of the court granting recognition is attached.

Petitioners declare under penalty of perjury that the information provided in this petition is true and correct. Petitioners understand that if they make a false statement, they could be fined up to $250,000 or imprisoned for up to 5 years, or both.
18 U.S.C. §§ 152 and 3571. If relief is not ordered, the court may award attorneys' fees, costs, damages, and punitive damages. 11 U.S.C. § 303(i).

Petitioners or Petitioners' Representative

✘ _____
Signature of petitioner or representative, including representative's title

_____
Printed name of petitioner

Date signed _____
MM / DD / YYYY

Mailing address of petitioner

_____
Number Street

_____
City State ZIP Code

If petitioner is an individual and is not represented by an attorney:

Contact phone _____

Email _____

Name and mailing address of petitioner's representative, if any

_____
Name

_____
Number Street

_____
City State ZIP Code

Attorneys

✘ _____
Signature of attorney

_____
Printed name

_____
Firm name, if any

_____
Number Street

_____
City State ZIP Code

Date signed _____
MM / DD / YYYY

Contact phone _____ Email _____

✘ _____
Signature of petitioner or representative, including representative's title

_____
Printed name of petitioner

Date signed _____
MM / DD / YYYY

Mailing address of petitioner

_____
Number Street

_____
City State ZIP Code

Name and mailing address of petitioner's representative, if any

_____
Name

_____
Number Street

_____
City State ZIP Code

✘ _____
Signature of Attorney

_____
Printed name

_____
Firm name, if any

_____
Number Street

_____
City State ZIP Code

Date signed _____
MM / DD / YYYY

Contact phone _____ Email _____

✘ _____
Signature of petitioner or representative, including representative's title

_____
Printed name of petitioner

Date signed _____
MM / DD / YYYY

Mailing address of petitioner

_____
Number Street

_____
City State ZIP Code

Name and mailing address of petitioner's representative, if any

_____
Name

_____
Number Street

_____
City State ZIP Code

✘ _____
Signature of Attorney

_____
Printed name

_____
Firm name, if any

_____
Number Street

_____
City State ZIP Code

Date signed _____
MM / DD / YYYY

Contact phone _____ Email _____

Rules Appendix 125-011193

COMMITTEE NOTE

Official Form 105, *Involuntary Petition Against an Individual*, which is used only in cases of individual debtors, is revised in its entirety as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. In addition, the form is renumbered to distinguish it from the version to be used in non-individual cases, and stylistic changes were made throughout the form.

The form is derived from Official Form 5, *Involuntary Petition*. The new form separates questions into four parts likely to be more familiar to non-lawyers, groups questions of a similar nature together, and eliminates questions unrelated to individual debtors.

Part 1, *Identify the Chapter of the Bankruptcy Code Under Which Petition is Filed*, moves to the beginning of the form the question regarding the chapter of the Bankruptcy Code under which the petition is filed.

Part 2, *Identify the Debtor*, includes the questions regarding the debtor's name, prior names, Social Security Number, Individual Taxpayer Identification Number, and Employer Identification Number. Petitioners must list the address for the debtor's principal residence, mailing address (if different), and principal place of business. Petitioners must indicate whether the debtor operates a business, and, if so, use checkboxes to indicate whether the business falls into certain categories. The statutory definition of "consumer debts" is provided, as well as a definition of "business debts."

Part 3, *Report About the Case*, amends the question regarding venue to advise that venue is "the reason for filing in this court" and amends the choices for venue. The first option is revised to read: "Over the last 180 days before the filing of this bankruptcy, the debtor has resided, had the principal place of business, or had principal assets in this district longer than in any other district." Also, the form adds an option for "Other reason. Explain," with a statutory reference. In the question for Allegations, the exact citation to the Bankruptcy Code is provided for the second allegation, and checkboxes are provided for the last

allegation. Petitioners must check "yes" or "no" to answer whether there has been a transfer of any claim against the debtor by or to a petitioner. The information regarding the petitioner's claims is moved to this part of the form, and the portion listing the amount of the claim is amended to ask about the amount of the claim that exceeds the value of the lien, if any.

Part 4, *Request for Relief*, amends the instructions to include a warning about making a false statement, and adds a separate requirement for each petitioner's mailing address. Also, petitioners' attorneys must provide their email addresses, or if a petitioner is an individual and not represented by an attorney, the contact phone and email address of that petitioner must be provided.

125-011195

Fill in this information to identify your case and this filing:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____

❑ Check if this is an amended filing

Official Form 106A/B

Schedule A/B: Property

12/15

In each category, separately list and describe items. List an asset only once. If an asset fits in more than one category, list the asset in the category where you think it fits best. Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Describe Each Residence, Building, Land, or Other Real Estate You Own or Have an Interest In

1. **Do you own or have any legal or equitable interest in any residence, building, land, or similar property?**

❑ No. Go to Part 2.
❑ Yes. Where is the property?

1.1. _____
Street address, if available, or other description

_____

_____
City State ZIP Code

_____
County

What is the property? Check all that apply.
❑ Single-family home
❑ Duplex or multi-unit building
❑ Condominium or cooperative
❑ Manufactured or mobile home
❑ Land
❑ Investment property
❑ Timeshare
❑ Other _____

Who has an interest in the property? Check one.
❑ Debtor 1 only
❑ Debtor 2 only
❑ Debtor 1 and Debtor 2 only
❑ At least one of the debtors and another

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule D: Creditors Who Have Claims Secured by Property.*

Current value of the entire property? $_____
Current value of the portion you own? $_____

Describe the nature of your ownership interest (such as fee simple, tenancy by the entireties, or a life estate), if known.
_____

❑ **Check if this is community property** (see instructions)

Other information you wish to add about this item, such as local property identification number: _____

If you own or have more than one, list here:

1.2. _____
Street address, if available, or other description

_____

_____
City State ZIP Code

_____
County

What is the property? Check all that apply.
❑ Single-family home
❑ Duplex or multi-unit building
❑ Condominium or cooperative
❑ Manufactured or mobile home
❑ Land
❑ Investment property
❑ Timeshare
❑ Other _____

Who has an interest in the property? Check one.
❑ Debtor 1 only
❑ Debtor 2 only
❑ Debtor 1 and Debtor 2 only
❑ At least one of the debtors and another

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule D: Creditors Who Have Claims Secured by Property.*

Current value of the entire property? $_____
Current value of the portion you own? $_____

Describe the nature of your ownership interest (such as fee simple, tenancy by the entireties, or a life estate), if known.
_____

❑ **Check if this is community property** (see instructions)

Other information you wish to add about this item, such as local property identification number: _____

1.3. _____
Street address, if available, or other description

_____

_____
City State ZIP Code

_____
County

What is the property? Check all that apply.
- ❑ Single-family home
- ❑ Duplex or multi-unit building
- ❑ Condominium or cooperative
- ❑ Manufactured or mobile home
- ❑ Land
- ❑ Investment property
- ❑ Timeshare
- ❑ Other _____

Who has an interest in the property? Check one.
- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule D: Creditors Who Have Claims Secured by Property.*

Current value of the entire property? $_____ **Current value of the portion you own?** $_____

Describe the nature of your ownership interest (such as fee simple, tenancy by the entireties, or a life estate), if known.
_____

❑ **Check if this is community property** (see instructions)

Other information you wish to add about this item, such as local property identification number: _____

2. **Add the dollar value of the portion you own for all of your entries from Part 1, including any entries for pages you have attached for Part 1. Write that number here.** ……➔ $_____

Part 2: Describe Your Vehicles

Do you own, lease, or have legal or equitable interest in any vehicles, whether they are registered or not? Include any vehicles you own that someone else drives. If you lease a vehicle, also report it on *Schedule G: Executory Contracts and Unexpired Leases.*

3. **Cars, vans, trucks, tractors, sport utility vehicles, motorcycles**
- ❑ No
- ❑ Yes

3.1. Make: _____
Model: _____
Year: _____
Approximate mileage: _____
Other information:

Who has an interest in the property? Check one.
- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is community property** (see instructions)

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule D: Creditors Who Have Claims Secured by Property.*

Current value of the entire property? $_____ **Current value of the portion you own?** $_____

If you own or have more than one, describe here:

3.2. Make: _____
Model: _____
Year: _____
Approximate mileage: _____
Other information:

Who has an interest in the property? Check one.
- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is community property** (see instructions)

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule D: Creditors Who Have Claims Secured by Property.*

Current value of the entire property? $_____ **Current value of the portion you own?** $_____

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12b-011197

3.3. Make: _____
Model: _____
Year: _____
Approximate mileage: _____
Other information:

Who has an interest in the property? Check one.
- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is community property** (see instructions)

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule D: Creditors Who Have Claims Secured by Property.*

Current value of the entire property?	**Current value of the portion you own?**
$_____	$_____

3.4. Make: _____
Model: _____
Year: _____
Approximate mileage: _____
Other information:

Who has an interest in the property? Check one.
- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is community property** (see instructions)

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule D: Creditors Who Have Claims Secured by Property.*

Current value of the entire property?	**Current value of the portion you own?**
$_____	$_____

4. **Watercraft, aircraft, motor homes, ATVs and other recreational vehicles, other vehicles, and accessories**
Examples: Boats, trailers, motors, personal watercraft, fishing vessels, snowmobiles, motorcycle accessories
- ❑ No
- ❑ Yes

4.1. Make: _____
Model: _____
Year: _____
Other information:

Who has an interest in the property? Check one.
- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is community property** (see instructions)

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule D: Creditors Who Have Claims Secured by Property.*

Current value of the entire property?	**Current value of the portion you own?**
$_____	$_____

If you own or have more than one, list here:

4.2. Make: _____
Model: _____
Year: _____
Other information:

Who has an interest in the property? Check one.
- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this is community property** (see instructions)

Do not deduct secured claims or exemptions. Put the amount of any secured claims on *Schedule D: Creditors Who Have Claims Secured by Property.*

Current value of the entire property?	**Current value of the portion you own?**
$_____	$_____

5. **Add the dollar value of the portion you own for all of your entries from Part 2, including any entries for pages you have attached for Part 2. Write that number here** ..... ➔ $_____

Part 3: Describe Your Personal and Household Items

Do you own or have any legal or equitable interest in any of the following items?	Current value of the portion you own? Do not deduct secured claims or exemptions.
6. **Household goods and furnishings** *Examples*: Major appliances, furniture, linens, china, kitchenware ❑ No ❑ Yes. Describe.....	$_____
7. **Electronics** *Examples:* Televisions and radios; audio, video, stereo, and digital equipment; computers, printers, scanners; music collections; electronic devices including cell phones, cameras, media players, games ❑ No ❑ Yes. Describe.....	$_____
8. **Collectibles of value** *Examples:* Antiques and figurines; paintings, prints, or other artwork; books, pictures, or other art objects; stamp, coin, or baseball card collections; other collections, memorabilia, collectibles ❑ No ❑ Yes. Describe.....	$_____
9. **Equipment for sports and hobbies** *Examples:* Sports, photographic, exercise, and other hobby equipment; bicycles, pool tables, golf clubs, skis; canoes and kayaks; carpentry tools; musical instruments ❑ No ❑ Yes. Describe.....	$_____
10. **Firearms** *Examples:* Pistols, rifles, shotguns, ammunition, and related equipment ❑ No ❑ Yes. Describe.....	$_____
11. **Clothes** *Examples:* Everyday clothes, furs, leather coats, designer wear, shoes, accessories ❑ No ❑ Yes. Describe.....	$_____
12. **Jewelry** Examples: Everyday jewelry, costume jewelry, engagement rings, wedding rings, heirloom jewelry, watches, gems, gold, silver ❑ No ❑ Yes. Describe.....	$_____
13. **Non-farm animals** *Examples:* Dogs, cats, birds, horses ❑ No ❑ Yes. Describe.....	$_____
14. **Any other personal and household items you did not already list, including any health aids you did not list** ❑ No ❑ Yes. Give specific information.....	$_____
15. **Add the dollar value of all of your entries from Part 3, including any entries for pages you have attached for Part 3. Write that number here** ..... ➔	$_____

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Part 4: Describe Your Financial Assets

Do you own or have any legal or equitable interest in any of the following?

Current value of the portion you own?
Do not deduct secured claims or exemptions.

16. **Cash**
Examples: Money you have in your wallet, in your home, in a safe deposit box, and on hand when you file your petition

❑ No
❑ Yes..... Cash: ..... $_____

17. **Deposits of money**
Examples: Checking, savings, or other financial accounts; certificates of deposit; shares in credit unions, brokerage houses, and other similar institutions. If you have multiple accounts with the same institution, list each.

❑ No
❑ Yes..... Institution name:

17.1. Checking account: _____ $_____
17.2. Checking account: _____ $_____
17.3. Savings account: _____ $_____
17.4. Savings account: _____ $_____
17.5. Certificates of deposit: _____ $_____
17.6. Other financial account: _____ $_____
17.7. Other financial account: _____ $_____
17.8. Other financial account: _____ $_____
17.9. Other financial account: _____ $_____

18. **Bonds, mutual funds, or publicly traded stocks**
Examples: Bond funds, investment accounts with brokerage firms, money market accounts

❑ No
❑ Yes..... Institution or issuer name:

_____ $_____
_____ $_____
_____ $_____

19. **Non-publicly traded stock and interests in incorporated and unincorporated businesses, including an interest in an LLC, partnership, and joint venture**

❑ No
❑ Yes. Give specific information about them. .....

Name of entity:	% of ownership:	
_____	_____%	$_____
_____	_____%	$_____
_____	_____%	$_____

20. **Government and corporate bonds and other negotiable and non-negotiable instruments**

Negotiable instruments include personal checks, cashiers' checks, promissory notes, and money orders.
Non-negotiable instruments are those you cannot transfer to someone by signing or delivering them.

❑ No
❑ Yes. Give specific information about them. ..... Issuer name:

_____ $_____
_____ $_____
_____ $_____

21. **Retirement or pension accounts**

Examples: Interests in IRA, ERISA, Keogh, 401(k), 403(b), thrift savings accounts, or other pension or profit-sharing plans

❑ No
❑ Yes. List each account separately.. Type of account: Institution name:

401(k) or similar plan: _____ $_____
Pension plan: _____ $_____
IRA: _____ $_____
Retirement account: _____ $_____
Keogh: _____ $_____
Additional account: _____ $_____
Additional account: _____ $_____

22. **Security deposits and prepayments**

Your share of all unused deposits you have made so that you may continue service or use from a company
Examples: Agreements with landlords, prepaid rent, public utilities (electric, gas, water), telecommunications companies, or others

❑ No
❑ Yes..... Institution name or individual:

Electric: _____ $_____
Gas: _____ $_____
Heating oil: _____ $_____
Security deposit on rental unit: _____ $_____
Prepaid rent: _____ $_____
Telephone: _____ $_____
Water: _____ $_____
Rented furniture: _____ $_____
Other: _____ $_____

23. **Annuities** (A contract for a periodic payment of money to you, either for life or for a number of years)

❑ No
❑ Yes..... Issuer name and description:

_____ $_____
_____ $_____
_____ $_____

24. **Interests in an education IRA, in an account in a qualified ABLE program, or under a qualified state tuition program.**
26 U.S.C. §§ 530(b)(1), 529A(b), and 529(b)(1).

❑ No
❑ Yes ..... Institution name and description. Separately file the records of any interests.11 U.S.C. § 521(c):

_____ $_____
_____ $_____
_____ $_____

25. **Trusts, equitable or future interests in property (other than anything listed in line 1), and rights or powers exercisable for your benefit**

❑ No
❑ Yes. Give specific information about them. .. $_____

26. **Patents, copyrights, trademarks, trade secrets, and other intellectual property**
Examples: Internet domain names, websites, proceeds from royalties and licensing agreements

❑ No
❑ Yes. Give specific information about them. .. $_____

27. **Licenses, franchises, and other general intangibles**
Examples: Building permits, exclusive licenses, cooperative association holdings, liquor licenses, professional licenses

❑ No
❑ Yes. Give specific information about them. .. $_____

Money or property owed to you? **Current value of the portion you own?** Do not deduct secured claims or exemptions.

28. **Tax refunds owed to you**

❑ No
❑ Yes. Give specific information about them, including whether you already filed the returns and the tax years. .....

Federal: $_____
State: $_____
Local: $_____

29. **Family support**
Examples: Past due or lump sum alimony, spousal support, child support, maintenance, divorce settlement, property settlement

❑ No
❑ Yes. Give specific information. .....

Alimony: $_____
Maintenance: $_____
Support: $_____
Divorce settlement: $_____
Property settlement: $_____

30. **Other amounts someone owes you**
Examples: Unpaid wages, disability insurance payments, disability benefits, sick pay, vacation pay, workers' compensation, Social Security benefits; unpaid loans you made to someone else

❑ No
❑ Yes. Give specific information. ..... $_____

31. **Interests in insurance policies**
Examples: Health, disability, or life insurance; health savings account (HSA); credit, homeowner's, or renter's insurance

❑ No
❑ Yes. Name the insurance company of each policy and list its value. ...

Company name:	Beneficiary:	Surrender or refund value:
_____	_____	$_____
_____	_____	$_____
_____	_____	$_____

32. **Any interest in property that is due you from someone who has died**
If you are the beneficiary of a living trust, expect proceeds from a life insurance policy, or are currently entitled to receive property because someone has died.

❑ No
❑ Yes. Give specific information. ..... $_____

33. **Claims against third parties, whether or not you have filed a lawsuit or made a demand for payment**
Examples: Accidents, employment disputes, insurance claims, or rights to sue

❑ No
❑ Yes. Describe each claim. ..... $_____

34. **Other contingent and unliquidated claims of every nature, including counterclaims of the debtor and rights to set off claims**

❑ No
❑ Yes. Describe each claim. ..... $_____

35. **Any financial assets you did not already list**

❑ No
❑ Yes. Give specific information. ..... $_____

36. **Add the dollar value of all of your entries from Part 4, including any entries for pages you have attached for Part 4. Write that number here** ..... ➔ $_____

Part 5: Describe Any Business-Related Property You Own or Have an Interest In. List any real estate in Part 1.

37. **Do you own or have any legal or equitable interest in any business-related property?**

❑ No. Go to Part 6.
❑ Yes. Go to line 38.

Current value of the portion you own?
Do not deduct secured claims or exemptions.

38. **Accounts receivable or commissions you already earned**

❑ No
❑ Yes. Describe..... $_____

39. **Office equipment, furnishings, and supplies**
Examples: Business-related computers, software, modems, printers, copiers, fax machines, rugs, telephones, desks, chairs, electronic devices

❑ No
❑ Yes. Describe..... $_____

40. **Machinery, fixtures, equipment, supplies you use in business, and tools of your trade**

❑ No
❑ Yes. Describe..... $_____

41. **Inventory**

❑ No
❑ Yes. Describe..... $_____

42. **Interests in partnerships or joint ventures**

❑ No
❑ Yes. Describe.....

Name of entity:	% of ownership:	
_____	_____%	$_____
_____	_____%	$_____
_____	_____%	$_____

43. **Customer lists, mailing lists, or other compilations**

❑ No
❑ Yes. **Do your lists include personally identifiable information** (as defined in 11 U.S.C. § 101(41A))**?**

❑ No
❑ Yes. Describe..... $_____

44. **Any business-related property you did not already list**

❑ No
❑ Yes. Give specific information .....

_____ $_____
_____ $_____
_____ $_____
_____ $_____
_____ $_____
_____ $_____

45. **Add the dollar value of all of your entries from Part 5, including any entries for pages you have attached for Part 5. Write that number here** ..... ➔ $_____

Part 6: Describe Any Farm- and Commercial Fishing-Related Property You Own or Have an Interest In.

If you own or have an interest in farmland, list it in Part 1.

46. **Do you own or have any legal or equitable interest in any farm- or commercial fishing-related property?**

❑ No. Go to Part 7.
❑ Yes. Go to line 47.

Current value of the portion you own?
Do not deduct secured claims or exemptions.

47. **Farm animals**

Examples: Livestock, poultry, farm-raised fish

❑ No
❑ Yes..... $_____

48. **Crops—either growing or harvested**

❑ No
❑ Yes. Give specific information. ..... $_____

49. **Farm and fishing equipment, implements, machinery, fixtures, and tools of trade**

❑ No
❑ Yes..... $_____

50. **Farm and fishing supplies, chemicals, and feed**

❑ No
❑ Yes..... $_____

51. **Any farm- and commercial fishing-related property you did not already list**

❑ No
❑ Yes. Give specific information. ..... $_____

52. **Add the dollar value of all of your entries from Part 6, including any entries for pages you have attached for Part 6. Write that number here** ..... ➔ $_____

Part 7: Describe All Property You Own or Have an Interest in That You Did Not List Above

53. **Do you have other property of any kind you did not already list?**
Examples: Season tickets, country club membership

❑ No
❑ Yes. Give specific information. ..... $_____ $_____ $_____

54. **Add the dollar value of all of your entries from Part 7. Write that number here** ..... ➔ $_____

Part 8: List the Totals of Each Part of this Form

55. **Part 1: Total real estate, line 2**..... ➔ $_____

56. **Part 2: Total vehicles, line 5** $_____

57. **Part 3: Total personal and household items, line 15** $_____

58. **Part 4: Total financial assets, line 36** $_____

59. **Part 5: Total business-related property, line 45** $_____

60. **Part 6: Total farm- and fishing-related property, line 52** $_____

61. **Part 7: Total other property not listed, line 54** + $_____

62. **Total personal property.** Add lines 56 through 61..... $_____ Copy personal property total ➔ + $_____

63. **Total of all property on Schedule A/B.** Add line 55 + line 62..... $_____

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 106C

Schedule C: The Property You Claim as Exempt

12/15

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. Using the property you listed on *Schedule A/B: Property* (Official Form 106A/B) as your source, list the property that you claim as exempt. If more space is needed, fill out and attach to this page as many copies of *Part 2: Additional Page* as necessary. On the top of any additional pages, write your name and case number (if known).

For each item of property you claim as exempt, you must specify the amount of the exemption you claim. One way of doing so is to state a specific dollar amount as exempt. Alternatively, you may claim the full fair market value of the property being exempted up to the amount of any applicable statutory limit. Some exemptions—such as those for health aids, rights to receive certain benefits, and tax-exempt retirement funds—may be unlimited in dollar amount. However, if you claim an exemption of 100% of fair market value under a law that limits the exemption to a particular dollar amount and the value of the property is determined to exceed that amount, your exemption would be limited to the applicable statutory amount.

Part 1: Identify the Property You Claim as Exempt

1. **Which set of exemptions are you claiming?** *Check one only, even if your spouse is filing with you.*
   - ❑ You are claiming state and federal nonbankruptcy exemptions. 11 U.S.C. § 522(b)(3)
   - ❑ You are claiming federal exemptions. 11 U.S.C. § 522(b)(2)

2. **For any property you list on *Schedule A/B* that you claim as exempt, fill in the information below.**

Brief description of the property and line on *Schedule A/B* that lists this property	Current value of the portion you own Copy the value from *Schedule A/B*	Amount of the exemption you claim *Check only one box for each exemption.*	Specific laws that allow exemption
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____

3. **Are you claiming a homestead exemption of more than $155,675?**
   (Subject to adjustment on 4/01/16 and every 3 years after that for cases filed on or after the date of adjustment.)
   - ❑ No
   - ❑ Yes. Did you acquire the property covered by the exemption within 1,215 days before you filed this case?
     - ❑ No
     - ❑ Yes

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

Part 2: Additional Page

Brief description of the property and line on *Schedule A/B* that lists this property	**Current value of the portion you own** Copy the value from *Schedule A/B*	**Amount of the exemption you claim** *Check only one box for each exemption*	**Specific laws that allow exemption**
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____
Brief description: _____ Line from *Schedule A/B:* _____	$_____	❑ $ _____ ❑ 100% of fair market value, up to any applicable statutory limit	_____

Rules Appendix B (9/98)
12b-011207

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 106D

Schedule D: Creditors Who Have Claims Secured by Property

12/15

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, copy the Additional Page, fill it out, number the entries, and attach it to this form. On the top of any additional pages, write your name and case number (if known).

1. **Do any creditors have claims secured by your property?**
   - ❑ No. Check this box and submit this form to the court with your other schedules. You have nothing else to report on this form.
   - ❑ Yes. Fill in all of the information below.

Part 1: List All Secured Claims

2. **List all secured claims.** If a creditor has more than one secured claim, list the creditor separately for each claim. If more than one creditor has a particular claim, list the other creditors in Part 2. As much as possible, list the claims in alphabetical order according to the creditor's name.	*Column A* **Amount of claim** Do not deduct the value of collateral.	*Column B* **Value of collateral that supports this claim**	*Column C* **Unsecured portion** If any
2.1 _____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code **Who owes the debt?** Check one. ❑ Debtor 1 only ❑ Debtor 2 only ❑ Debtor 1 and Debtor 2 only ❑ At least one of the debtors and another ❑ **Check if this claim relates to a community debt** **Date debt was incurred** _____	**Describe the property that secures the claim:** **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed **Nature of lien**. Check all that apply. ❑ An agreement you made (such as mortgage or secured car loan) ❑ Statutory lien (such as tax lien, mechanic's lien) ❑ Judgment lien from a lawsuit ❑ Other (including a right to offset) _____ **Last 4 digits of account number** ___ ___ ___ ___	$_____	$_____	$_____
2.2 _____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code **Who owes the debt?** Check one. ❑ Debtor 1 only ❑ Debtor 2 only ❑ Debtor 1 and Debtor 2 only ❑ At least one of the debtors and another ❑ **Check if this claim relates to a community debt** **Date debt was incurred** _____	**Describe the property that secures the claim:** **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed **Nature of lien**. Check all that apply. ❑ An agreement you made (such as mortgage or secured car loan) ❑ Statutory lien (such as tax lien, mechanic's lien) ❑ Judgment lien from a lawsuit ❑ Other (including a right to offset) _____ **Last 4 digits of account number** ___ ___ ___ ___	$_____	$_____	$_____
Add the dollar value of your entries in Column A on this page. Write that number here:		$_____	

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

Part 1: Additional Page

After listing any entries on this page, number them beginning with 2.3, followed by 2.4, and so forth.

	Column A **Amount of claim** Do not deduct the value of collateral.	*Column B* **Value of collateral that supports this claim**	*Column C* **Unsecured portion** If any
☐ _____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code **Who owes the debt?** Check one. ☐ Debtor 1 only ☐ Debtor 2 only ☐ Debtor 1 and Debtor 2 only ☐ At least one of the debtors and another ☐ **Check if this claim relates to a community debt** **Date debt was incurred** _____	**Describe the property that secures the claim:** **As of the date you file, the claim is:** Check all that apply. ☐ Contingent ☐ Unliquidated ☐ Disputed **Nature of lien**. Check all that apply. ☐ An agreement you made (such as mortgage or secured car loan) ☐ Statutory lien (such as tax lien, mechanic's lien) ☐ Judgment lien from a lawsuit ☐ Other (including a right to offset) _____ **Last 4 digits of account number** ___ ___ ___ ___	$_____	$_____	$_____
☐ _____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code **Who owes the debt?** Check one. ☐ Debtor 1 only ☐ Debtor 2 only ☐ Debtor 1 and Debtor 2 only ☐ At least one of the debtors and another ☐ **Check if this claim relates to a community debt** **Date debt was incurred** _____	**Describe the property that secures the claim:** **As of the date you file, the claim is:** Check all that apply. ☐ Contingent ☐ Unliquidated ☐ Disputed **Nature of lien**. Check all that apply. ☐ An agreement you made (such as mortgage or secured car loan) ☐ Statutory lien (such as tax lien, mechanic's lien) ☐ Judgment lien from a lawsuit ☐ Other (including a right to offset) _____ **Last 4 digits of account number** ___ ___ ___ ___	$_____	$_____	$_____
☐ _____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code **Who owes the debt?** Check one. ☐ Debtor 1 only ☐ Debtor 2 only ☐ Debtor 1 and Debtor 2 only ☐ At least one of the debtors and another ☐ **Check if this claim relates to a community debt** **Date debt was incurred** _____	**Describe the property that secures the claim:** **As of the date you file, the claim is:** Check all that apply. ☐ Contingent ☐ Unliquidated ☐ Disputed **Nature of lien**. Check all that apply. ☐ An agreement you made (such as mortgage or secured car loan) ☐ Statutory lien (such as tax lien, mechanic's lien) ☐ Judgment lien from a lawsuit ☐ Other (including a right to offset) _____ **Last 4 digits of account number** ___ ___ ___ ___	$_____	$_____	$_____

Add the dollar value of your entries in Column A on this page. Write that number here: $_____

If this is the last page of your form, add the dollar value totals from all pages. Write that number here: $_____

Rules Appendix B (2010)
12b-011209

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

Part 2: List Others to Be Notified for a Debt That You Already Listed

Use this page only if you have others to be notified about your bankruptcy for a debt that you already listed in Part 1. For example, if a collection agency is trying to collect from you for a debt you owe to someone else, list the creditor in Part 1, and then list the collection agency here. Similarly, if you have more than one creditor for any of the debts that you listed in Part 1, list the additional creditors here. If you do not have additional persons to be notified for any debts in Part 1, do not fill out or submit this page.

☐ _____
Name
_____
Number Street
_____
_____
City State ZIP Code

On which line in Part 1 did you enter the creditor? _____
Last 4 digits of account number ___ ___ ___ ___

☐ _____
Name
_____
Number Street
_____
_____
City State ZIP Code

On which line in Part 1 did you enter the creditor? _____
Last 4 digits of account number ___ ___ ___ ___

☐ _____
Name
_____
Number Street
_____
_____
City State ZIP Code

On which line in Part 1 did you enter the creditor? _____
Last 4 digits of account number ___ ___ ___ ___

☐ _____
Name
_____
Number Street
_____
_____
City State ZIP Code

On which line in Part 1 did you enter the creditor? _____
Last 4 digits of account number ___ ___ ___ ___

☐ _____
Name
_____
Number Street
_____
_____
City State ZIP Code

On which line in Part 1 did you enter the creditor? _____
Last 4 digits of account number ___ ___ ___ ___

☐ _____
Name
_____
Number Street
_____
_____
City State ZIP Code

On which line in Part 1 did you enter the creditor? _____
Last 4 digits of account number ___ ___ ___ ___

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 106E/F

Schedule E/F: Creditors Who Have Unsecured Claims

12/15

Be as complete and accurate as possible. Use Part 1 for creditors with PRIORITY claims and Part 2 for creditors with NONPRIORITY claims. List the other party to any executory contracts or unexpired leases that could result in a claim. Also list executory contracts on *Schedule A/B: Property* (Official Form 106A/B) and on *Schedule G: Executory Contracts and Unexpired Leases* (Official Form 106G). Do not include any creditors with partially secured claims that are listed in *Schedule D: Creditors Who Have Claims Secured by Property*. If more space is needed, copy the Part you need, fill it out, number the entries in the boxes on the left. Attach the Continuation Page to this page. On the top of any additional pages, write your name and case number (if known).

Part 1: List All of Your PRIORITY Unsecured Claims

1. **Do any creditors have priority unsecured claims against you?**
   ❑ No. Go to Part 2.
   ❑ Yes.

2. **List all of your priority unsecured claims.** If a creditor has more than one priority unsecured claim, list the creditor separately for each claim. For each claim listed, identify what type of claim it is. If a claim has both priority and nonpriority amounts, list that claim here and show both priority and nonpriority amounts. As much as possible, list the claims in alphabetical order according to the creditor's name. If you have more than two priority unsecured claims, fill out the Continuation Page of Part 1. If more than one creditor holds a particular claim, list the other creditors in Part 3.
   (For an explanation of each type of claim, see the instructions for this form in the instruction booklet.)

		Total claim	Priority amount	Nonpriority amount
2.1	_____ Priority Creditor's Name _____ Number Street _____ _____ City State ZIP Code **Who incurred the debt?** Check one. ❑ Debtor 1 only ❑ Debtor 2 only ❑ Debtor 1 and Debtor 2 only ❑ At least one of the debtors and another ❑ **Check if this claim is for a community debt** **Is the claim subject to offset?** ❑ No ❑ Yes	**Last 4 digits of account number** ___ ___ ___ ___ **When was the debt incurred?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed **Type of PRIORITY unsecured claim:** ❑ Domestic support obligations ❑ Taxes and certain other debts you owe the government ❑ Claims for death or personal injury while you were intoxicated ❑ Other. Specify _____	$_____	$_____	$_____
2.2	_____ Priority Creditor's Name _____ Number Street _____ _____ City State ZIP Code **Who incurred the debt?** Check one. ❑ Debtor 1 only ❑ Debtor 2 only ❑ Debtor 1 and Debtor 2 only ❑ At least one of the debtors and another ❑ **Check if this claim is for a community debt** **Is the claim subject to offset?** ❑ No ❑ Yes	**Last 4 digits of account number** ___ ___ ___ ___ **When was the debt incurred?** _____ **As of the date you file, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed **Type of PRIORITY unsecured claim:** ❑ Domestic support obligations ❑ Taxes and certain other debts you owe the government ❑ Claims for death or personal injury while you were intoxicated ❑ Other. Specify _____	$_____	$_____	$_____

Rules Appendix B 9009

125-011211

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

Part 1: Your PRIORITY Unsecured Claims – Continuation Page

After listing any entries on this page, number them beginning with 2.3, followed by 2.4, and so forth.

	Total claim	Priority amount	Nonpriority amount
☐ _____ Priority Creditor's Name _____ Number Street _____ _____ City State ZIP Code **Who incurred the debt?** Check one. ☐ Debtor 1 only ☐ Debtor 2 only ☐ Debtor 1 and Debtor 2 only ☐ At least one of the debtors and another ☐ **Check if this claim is for a community debt** **Is the claim subject to offset?** ☐ No ☐ Yes **Last 4 digits of account number** ___ ___ ___ ___ **When was the debt incurred?** _____ **As of the date you file, the claim is:** Check all that apply. ☐ Contingent ☐ Unliquidated ☐ Disputed **Type of PRIORITY unsecured claim:** ☐ Domestic support obligations ☐ Taxes and certain other debts you owe the government ☐ Claims for death or personal injury while you were intoxicated ☐ Other. Specify _____	$_____	$_____	$_____
☐ _____ Priority Creditor's Name _____ Number Street _____ _____ City State ZIP Code **Who incurred the debt?** Check one. ☐ Debtor 1 only ☐ Debtor 2 only ☐ Debtor 1 and Debtor 2 only ☐ At least one of the debtors and another ☐ **Check if this claim is for a community debt** **Is the claim subject to offset?** ☐ No ☐ Yes **Last 4 digits of account number** ___ ___ ___ ___ **When was the debt incurred?** _____ **As of the date you file, the claim is:** Check all that apply. ☐ Contingent ☐ Unliquidated ☐ Disputed **Type of PRIORITY unsecured claim:** ☐ Domestic support obligations ☐ Taxes and certain other debts you owe the government ☐ Claims for death or personal injury while you were intoxicated ☐ Other. Specify _____	$_____	$_____	$_____
☐ _____ Priority Creditor's Name _____ Number Street _____ _____ City State ZIP Code **Who incurred the debt?** Check one. ☐ Debtor 1 only ☐ Debtor 2 only ☐ Debtor 1 and Debtor 2 only ☐ At least one of the debtors and another ☐ **Check if this claim is for a community debt** **Is the claim subject to offset?** ☐ No ☐ Yes **Last 4 digits of account number** ___ ___ ___ ___ **When was the debt incurred?** _____ **As of the date you file, the claim is:** Check all that apply. ☐ Contingent ☐ Unliquidated ☐ Disputed **Type of PRIORITY unsecured claim:** ☐ Domestic support obligations ☐ Taxes and certain other debts you owe the government ☐ Claims for death or personal injury while you were intoxicated ☐ Other. Specify _____	$_____	$_____	$_____

Part 2: List All of Your NONPRIORITY Unsecured Claims

3. Do any creditors have nonpriority unsecured claims against you?

- ❑ No. You have nothing to report in this part. Submit this form to the court with your other schedules.
- ❑ Yes

4. List all of your nonpriority unsecured claims in the alphabetical order of the creditor who holds each claim. If a creditor has more than one nonpriority unsecured claim, list the creditor separately for each claim. For each claim listed, identify what type of claim it is. Do not list claims already included in Part 1. If more than one creditor holds a particular claim, list the other creditors in Part 3.If you have more than three nonpriority unsecured claims fill out the Continuation Page of Part 2.

Total claim

4.1

_____
Nonpriority Creditor's Name

_____
Number Street

_____
City State ZIP Code

Who incurred the debt? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this claim is for a community debt**

Is the claim subject to offset?

- ❑ No
- ❑ Yes

Last 4 digits of account number ___ ___ ___ ___

When was the debt incurred? _____

$_____

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed

Type of NONPRIORITY unsecured claim:

- ❑ Student loans
- ❑ Obligations arising out of a separation agreement or divorce that you did not report as priority claims
- ❑ Debts to pension or profit-sharing plans, and other similar debts
- ❑ Other. Specify _____

4.2

_____
Nonpriority Creditor's Name

_____
Number Street

_____
City State ZIP Code

Who incurred the debt? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this claim is for a community debt**

Is the claim subject to offset?

- ❑ No
- ❑ Yes

Last 4 digits of account number ___ ___ ___ ___

When was the debt incurred? _____

$_____

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed

Type of NONPRIORITY unsecured claim:

- ❑ Student loans
- ❑ Obligations arising out of a separation agreement or divorce that you did not report as priority claims
- ❑ Debts to pension or profit-sharing plans, and other similar debts
- ❑ Other. Specify _____

4.3

_____
Nonpriority Creditor's Name

_____
Number Street

_____
City State ZIP Code

Who incurred the debt? Check one.

- ❑ Debtor 1 only
- ❑ Debtor 2 only
- ❑ Debtor 1 and Debtor 2 only
- ❑ At least one of the debtors and another

❑ **Check if this claim is for a community debt**

Is the claim subject to offset?

- ❑ No
- ❑ Yes

Last 4 digits of account number ___ ___ ___ ___

When was the debt incurred? _____

$_____

As of the date you file, the claim is: Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed

Type of NONPRIORITY unsecured claim:

- ❑ Student loans
- ❑ Obligations arising out of a separation agreement or divorce that you did not report as priority claims
- ❑ Debts to pension or profit-sharing plans, and other similar debts
- ❑ Other. Specify _____

Part 2: Your NONPRIORITY Unsecured Claims – Continuation Page

After listing any entries on this page, number them beginning with 4.5, followed by 4.6, and so forth. **Total claim**

☐

_____
Nonpriority Creditor's Name

_____
Number Street

_____
City State ZIP Code

Who incurred the debt? Check one.

- ☐ Debtor 1 only
- ☐ Debtor 2 only
- ☐ Debtor 1 and Debtor 2 only
- ☐ At least one of the debtors and another

☐ **Check if this claim is for a community debt**

Is the claim subject to offset?

- ☐ No
- ☐ Yes

Last 4 digits of account number ___ ___ ___ ___

When was the debt incurred? _____

As of the date you file, the claim is: Check all that apply.

- ☐ Contingent
- ☐ Unliquidated
- ☐ Disputed

Type of **NONPRIORITY** unsecured claim:

- ☐ Student loans
- ☐ Obligations arising out of a separation agreement or divorce that you did not report as priority claims
- ☐ Debts to pension or profit-sharing plans, and other similar debts
- ☐ Other. Specify_____

$_____

☐

_____
Nonpriority Creditor's Name

_____
Number Street

_____
City State ZIP Code

Who incurred the debt? Check one.

- ☐ Debtor 1 only
- ☐ Debtor 2 only
- ☐ Debtor 1 and Debtor 2 only
- ☐ At least one of the debtors and another

☐ **Check if this claim is for a community debt**

Is the claim subject to offset?

- ☐ No
- ☐ Yes

Last 4 digits of account number ___ ___ ___ ___

When was the debt incurred? _____

As of the date you file, the claim is: Check all that apply.

- ☐ Contingent
- ☐ Unliquidated
- ☐ Disputed

Type of **NONPRIORITY** unsecured claim:

- ☐ Student loans
- ☐ Obligations arising out of a separation agreement or divorce that you did not report as priority claims
- ☐ Debts to pension or profit-sharing plans, and other similar debts
- ☐ Other. Specify_____

$_____

☐

_____
Nonpriority Creditor's Name

_____
Number Street

_____
City State ZIP Code

Who incurred the debt? Check one.

- ☐ Debtor 1 only
- ☐ Debtor 2 only
- ☐ Debtor 1 and Debtor 2 only
- ☐ At least one of the debtors and another

☐ **Check if this claim is for a community debt**

Is the claim subject to offset?

- ☐ No
- ☐ Yes

Last 4 digits of account number ___ ___ ___ ___

When was the debt incurred? _____

As of the date you file, the claim is: Check all that apply.

- ☐ Contingent
- ☐ Unliquidated
- ☐ Disputed

Type of **NONPRIORITY** unsecured claim:

- ☐ Student loans
- ☐ Obligations arising out of a separation agreement or divorce that you did not report as priority claims
- ☐ Debts to pension or profit-sharing plans, and other similar debts
- ☐ Other. Specify_____

$_____

Part 3: List Others to Be Notified About a Debt That You Already Listed

5. Use this page only if you have others to be notified about your bankruptcy, for a debt that you already listed in Parts 1 or 2. For example, if a collection agency is trying to collect from you for a debt you owe to someone else, list the original creditor in Parts 1 or 2, then list the collection agency here. Similarly, if you have more than one creditor for any of the debts that you listed in Parts 1 or 2, list the additional creditors here. If you do not have additional persons to be notified for any debts in Parts 1 or 2, do not fill out or submit this page.

Name _____
Number Street _____
City State ZIP Code

On which entry in Part 1 or Part 2 did you list the original creditor?

Line _____ of (*Check one*): ❑ Part 1: Creditors with Priority Unsecured Claims
❑ Part 2: Creditors with Nonpriority Unsecured Claims

Last 4 digits of account number ___ ___ ___ ___

Name _____
Number Street _____
City State ZIP Code

On which entry in Part 1 or Part 2 did you list the original creditor?

Line _____ of (*Check one*): ❑ Part 1: Creditors with Priority Unsecured Claims
❑ Part 2: Creditors with Nonpriority Unsecured Claims

Last 4 digits of account number ___ ___ ___ ___

Name _____
Number Street _____
City State ZIP Code

On which entry in Part 1 or Part 2 did you list the original creditor?

Line _____ of (*Check one*): ❑ Part 1: Creditors with Priority Unsecured Claims
❑ Part 2: Creditors with Nonpriority Unsecured Claims

Last 4 digits of account number ___ ___ ___ ___

Name _____
Number Street _____
City State ZIP Code

On which entry in Part 1 or Part 2 did you list the original creditor?

Line _____ of (*Check one*): ❑ Part 1: Creditors with Priority Unsecured Claims
❑ Part 2: Creditors with Nonpriority Unsecured Claims

Last 4 digits of account number ___ ___ ___ ___

Name _____
Number Street _____
City State ZIP Code

On which entry in Part 1 or Part 2 did you list the original creditor?

Line _____ of (*Check one*): ❑ Part 1: Creditors with Priority Unsecured Claims
❑ Part 2: Creditors with Nonpriority Unsecured Claims

Last 4 digits of account number ___ ___ ___ ___

Name _____
Number Street _____
City State ZIP Code

On which entry in Part 1 or Part 2 did you list the original creditor?

Line _____ of (*Check one*): ❑ Part 1: Creditors with Priority Unsecured Claims
❑ Part 2: Creditors with Nonpriority Unsecured Claims

Last 4 digits of account number ___ ___ ___ ___

Name _____
Number Street _____
City State ZIP Code

On which entry in Part 1 or Part 2 did you list the original creditor?

Line _____ of (*Check one*): ❑ Part 1: Creditors with Priority Unsecured Claims
❑ Part 2: Creditors with Nonpriority Unsecured Claims

Last 4 digits of account number ___ ___ ___ ___

Part 4: Add the Amounts for Each Type of Unsecured Claim

6. Total the amounts of certain types of unsecured claims. This information is for statistical reporting purposes only. 28 U.S.C. § 159. Add the amounts for each type of unsecured claim.

			Total claim
Total claims from Part 1	6a. **Domestic support obligations**	6a.	$_____
	6b. **Taxes and certain other debts you owe the government**	6b.	$_____
	6c. **Claims for death or personal injury while you were intoxicated**	6c.	$_____
	6d. **Other.** Add all other priority unsecured claims. Write that amount here.	6d.	+ $_____
	6e. **Total.** Add lines 6a through 6d.	6e.	$_____

			Total claim
Total claims from Part 2	6f. **Student loans**	6f.	$_____
	6g. **Obligations arising out of a separation agreement or divorce that you did not report as priority claims**	6g.	$_____
	6h. **Debts to pension or profit-sharing plans, and other similar debts**	6h.	$_____
	6i. **Other.** Add all other nonpriority unsecured claims. Write that amount here.	6i.	+ $_____
	6j. **Total.** Add lines 6f through 6i.	6j.	$_____

Fill in this information to identify your case:

Debtor _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse If filing) First Name Middle Name Last Name

United States Bankruptcy Court for the:_____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 106G

Schedule G: Executory Contracts and Unexpired Leases

12/15

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, copy the additional page, fill it out, number the entries, and attach it to this page. On the top of any additional pages, write your name and case number (if known).

1. **Do you have any executory contracts or unexpired leases?**
   ❑ No. Check this box and file this form with the court with your other schedules. You have nothing else to report on this form.
   ❑ Yes. Fill in all of the information below even if the contracts or leases are listed on *Schedule A/B: Property* (Official Form 106A/B).

2. **List separately each person or company with whom you have the contract or lease. Then state what each contract or lease is for (for example, rent, vehicle lease, cell phone).** See the instructions for this form in the instruction booklet for more examples of executory contracts and unexpired leases.

	Person or company with whom you have the contract or lease	State what the contract or lease is for
2.1	Name Number Street City State ZIP Code	
2.2	Name Number Street City State ZIP Code	
2.3	Name Number Street City State ZIP Code	
2.4	Name Number Street City State ZIP Code	
2.5	Name Number Street City State ZIP Code	

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

Additional Page if You Have More Contracts or Leases

Person or company with whom you have the contract or lease	What the contract or lease is for
2._ Name Number Street City State ZIP Code	
2._ Name Number Street City State ZIP Code	
2._ Name Number Street City State ZIP Code	
2._ Name Number Street City State ZIP Code	
2._ Name Number Street City State ZIP Code	
2._ Name Number Street City State ZIP Code	
2._ Name Number Street City State ZIP Code	
2._ Name Number Street City State ZIP Code	

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the:_____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 106H

Schedule H: Your Codebtors

12/15

Codebtors are people or entities who are also liable for any debts you may have. Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, copy the Additional Page, fill it out, and number the entries in the boxes on the left. Attach the Additional Page to this page. On the top of any Additional Pages, write your name and case number (if known). Answer every question.

1. **Do you have any codebtors?** (If you are filing a joint case, do not list either spouse as a codebtor.)
   - ❑ No
   - ❑ Yes
2. **Within the last 8 years, have you lived in a community property state or territory?** (*Community property states and territories* include Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington, and Wisconsin.)
   - ❑ No. Go to line 3.
   - ❑ Yes. Did your spouse, former spouse, or legal equivalent live with you at the time?
     - ❑ No
     - ❑ Yes. In which community state or territory did you live? _____. Fill in the name and current address of that person.

       _____
       Name of your spouse, former spouse, or legal equivalent

       _____
       Number Street

       _____
       City State ZIP Code
3. **In Column 1, list all of your codebtors. Do not include your spouse as a codebtor if your spouse is filing with you. List the person shown in line 2 again as a codebtor only if that person is a guarantor or cosigner. Make sure you have listed the creditor on *Schedule D* (Official Form 106D), *Schedule E/F* (Official Form 106E/F), or *Schedule G* (Official Form 106G). Use *Schedule D, Schedule E/F, or Schedule G* to fill out Column 2.**

Column 1: **Your codebtor**	*Column 2:* **The creditor to whom you owe the debt** Check all schedules that apply:
3.1 _____ Name _____ Number Street _____ City State ZIP Code	❑ Schedule D, line _____ ❑ Schedule E/F, line _____ ❑ Schedule G, line _____
3.2 _____ Name _____ Number Street _____ City State ZIP Code	❑ Schedule D, line _____ ❑ Schedule E/F, line _____ ❑ Schedule G, line _____
3.3 _____ Name _____ Number Street _____ City State ZIP Code	❑ Schedule D, line _____ ❑ Schedule E/F, line _____ ❑ Schedule G, line _____

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

Additional Page to List More Codebtors

	Column 1: **Your codebtor**	*Column 2:* **The creditor to whom you owe the debt** Check all schedules that apply:
3._	Name Number Street City State ZIP Code	❑ Schedule D, line _____ ❑ Schedule E/F, line _____ ❑ Schedule G, line _____
3._	Name Number Street City State ZIP Code	❑ Schedule D, line _____ ❑ Schedule E/F, line _____ ❑ Schedule G, line _____
3._	Name Number Street City State ZIP Code	❑ Schedule D, line _____ ❑ Schedule E/F, line _____ ❑ Schedule G, line _____
3._	Name Number Street City State ZIP Code	❑ Schedule D, line _____ ❑ Schedule E/F, line _____ ❑ Schedule G, line _____
3._	Name Number Street City State ZIP Code	❑ Schedule D, line _____ ❑ Schedule E/F, line _____ ❑ Schedule G, line _____
3._	Name Number Street City State ZIP Code	❑ Schedule D, line _____ ❑ Schedule E/F, line _____ ❑ Schedule G, line _____
3._	Name Number Street City State ZIP Code	❑ Schedule D, line _____ ❑ Schedule E/F, line _____ ❑ Schedule G, line _____
3._	Name Number Street City State ZIP Code	❑ Schedule D, line _____ ❑ Schedule E/F, line _____ ❑ Schedule G, line _____

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Check if this is:

- ❑ An amended filing
- ❑ A supplement showing postpetition chapter 13 income as of the following date:

_____
MM / DD / YYYY

Official Form 106I

Schedule I: Your Income

12/15

Be as complete and accurate as possible. If two married people are filing together (Debtor 1 and Debtor 2), both are equally responsible for supplying correct information. If you are married and not filing jointly, and your spouse is living with you, include information about your spouse. If you are separated and your spouse is not filing with you, do not include information about your spouse. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Describe Employment

1. **Fill in your employment information.**

   If you have more than one job, attach a separate page with information about additional employers.

   Include part-time, seasonal, or self-employed work.

   Occupation may include student or homemaker, if it applies.

	Debtor 1	Debtor 2 or non-filing spouse
Employment status	❑ Employed ❑ Not employed	❑ Employed ❑ Not employed
Occupation	_____	_____
Employer's name	_____	_____
Employer's address	_____ Number Street _____ _____ _____ City State ZIP Code	_____ Number Street _____ _____ _____ City State ZIP Code
How long employed there?	_____	_____

Part 2: Give Details About Monthly Income

Estimate monthly income as of the date you file this form. If you have nothing to report for any line, write $0 in the space. Include your non-filing spouse unless you are separated.

If you or your non-filing spouse have more than one employer, combine the information for all employers for that person on the lines below. If you need more space, attach a separate sheet to this form.

		For Debtor 1	For Debtor 2 or non-filing spouse
2. **List monthly gross wages, salary, and commissions** (before all payroll deductions). If not paid monthly, calculate what the monthly wage would be.	2.	$_____	$_____
3. **Estimate and list monthly overtime pay.**	3.	+ $_____	+ $_____
4. **Calculate gross income.** Add line 2 + line 3.	4.	$_____	$_____

		For Debtor 1	For Debtor 2 or non-filing spouse
Copy line 4 here ➔	4.	$_____	$_____
5. **List all payroll deductions:**			
5a. **Tax, Medicare, and Social Security deductions**	5a.	$_____	$_____
5b. **Mandatory contributions for retirement plans**	5b.	$_____	$_____
5c. **Voluntary contributions for retirement plans**	5c.	$_____	$_____
5d. **Required repayments of retirement fund loans**	5d.	$_____	$_____
5e. **Insurance**	5e.	$_____	$_____
5f. **Domestic support obligations**	5f.	$_____	$_____
5g. **Union dues**	5g.	$_____	$_____
5h. **Other deductions.** Specify: _____	5h.	+ $_____	+ $_____
6. **Add the payroll deductions**. Add lines 5a + 5b + 5c + 5d + 5e +5f + 5g + 5h.	6.	$_____	$_____
7. **Calculate total monthly take-home pay.** Subtract line 6 from line 4.	7.	$_____	$_____
8. **List all other income regularly received:**			
8a. **Net income from rental property and from operating a business, profession, or farm** Attach a statement for each property and business showing gross receipts, ordinary and necessary business expenses, and the total monthly net income.	8a.	$_____	$_____
8b. **Interest and dividends**	8b.	$_____	$_____
8c. **Family support payments that you, a non-filing spouse, or a dependent regularly receive** Include alimony, spousal support, child support, maintenance, divorce settlement, and property settlement.	8c.	$_____	$_____
8d. **Unemployment compensation**	8d.	$_____	$_____
8e. **Social Security**	8e.	$_____	$_____
8f. **Other government assistance that you regularly receive** Include cash assistance and the value (if known) of any non-cash assistance that you receive, such as food stamps (benefits under the Supplemental Nutrition Assistance Program) or housing subsidies. Specify: _____	8f.	$_____	$_____
8g. **Pension or retirement income**	8g.	$_____	$_____
8h. **Other monthly income.** Specify: _____	8h.	+ $_____	+ $_____
9. **Add all other income**. Add lines 8a + 8b + 8c + 8d + 8e + 8f +8g + 8h.	9.	$_____	$_____
10. **Calculate monthly income.** Add line 7 + line 9. Add the entries in line 10 for Debtor 1 and Debtor 2 or non-filing spouse.	10.	$_____ +	$_____ = $_____

11. **State all other regular contributions to the expenses that you list in *Schedule J*.**
Include contributions from an unmarried partner, members of your household, your dependents, your roommates, and other friends or relatives.
Do not include any amounts already included in lines 2-10 or amounts that are not available to pay expenses listed in *Schedule J*.
Specify: _____ 11. + $_____

12. **Add the amount in the last column of line 10 to the amount in line 11.** The result is the combined monthly income.
Write that amount on the *Summary of Your Assets and Liabilities and Certain Statistical Information,* if it applies 12. $_____
Combined monthly income

13. **Do you expect an increase or decrease within the year after you file this form?**
❑ No.
❑ Yes. Explain:

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Check if this is:

- ❑ An amended filing
- ❑ A supplement showing postpetition chapter 13 expenses as of the following date:

_____
MM / DD / YYYY

Official Form 106J

Schedule J: Your Expenses

12/15

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach another sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Describe Your Household

1. **Is this a joint case?**

   ❑ No. Go to line 2.
   ❑ Yes. **Does Debtor 2 live in a separate household?**

   ❑ No
   ❑ Yes. Debtor 2 must file Official Form 106J-2, *Expenses for Separate Household of Debtor 2*.

2. **Do you have dependents?**

   Do not list Debtor 1 and Debtor 2.

   Do not state the dependents' names.

   ❑ No
   ❑ Yes. Fill out this information for each dependent.....

Dependent's relationship to Debtor 1 or Debtor 2	Dependent's age	Does dependent live with you?
_____	_____	❑ No ❑ Yes
_____	_____	❑ No ❑ Yes
_____	_____	❑ No ❑ Yes
_____	_____	❑ No ❑ Yes
_____	_____	❑ No ❑ Yes

3. **Do your expenses include expenses of people other than yourself and your dependents?**

   ❑ No
   ❑ Yes

Part 2: Estimate Your Ongoing Monthly Expenses

Estimate your expenses as of your bankruptcy filing date unless you are using this form as a supplement in a Chapter 13 case to report expenses as of a date after the bankruptcy is filed. If this is a supplemental *Schedule J*, check the box at the top of the form and fill in the applicable date.

Include expenses paid for with non-cash government assistance if you know the value of such assistance and have included it on *Schedule I: Your Income* (Official Form 106I.)

		Your expenses
4. **The rental or home ownership expenses for your residence.** Include first mortgage payments and any rent for the ground or lot.	4.	$_____
If not included in line 4:		
4a. Real estate taxes	4a.	$_____
4b. Property, homeowner's, or renter's insurance	4b.	$_____
4c. Home maintenance, repair, and upkeep expenses	4c.	$_____
4d. Homeowner's association or condominium dues	4d.	$_____

Rules Appendix B.1.1 12b-011223

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

		Your expenses
5. **Additional mortgage payments for your residence**, such as home equity loans	5.	$_____
6. **Utilities:**		
6a. Electricity, heat, natural gas	6a.	$_____
6b. Water, sewer, garbage collection	6b.	$_____
6c. Telephone, cell phone, Internet, satellite, and cable services	6c.	$_____
6d. Other. Specify: _____	6d.	$_____
7. **Food and housekeeping supplies**	7.	$_____
8. **Childcare and children's education costs**	8.	$_____
9. **Clothing, laundry, and dry cleaning**	9.	$_____
10. **Personal care products and services**	10.	$_____
11. **Medical and dental expenses**	11.	$_____
12. **Transportation.** Include gas, maintenance, bus or train fare. Do not include car payments.	12.	$_____
13. **Entertainment, clubs, recreation, newspapers, magazines, and books**	13.	$_____
14. **Charitable contributions and religious donations**	14.	$_____
15. **Insurance.** Do not include insurance deducted from your pay or included in lines 4 or 20.		
15a. Life insurance	15a.	$_____
15b. Health insurance	15b.	$_____
15c. Vehicle insurance	15c.	$_____
15d. Other insurance. Specify:_____	15d.	$_____
16. **Taxes.** Do not include taxes deducted from your pay or included in lines 4 or 20. Specify: _____	16.	$_____
17. **Installment or lease payments:**		
17a. Car payments for Vehicle 1	17a.	$_____
17b. Car payments for Vehicle 2	17b.	$_____
17c. Other. Specify:_____	17c.	$_____
17d. Other. Specify:_____	17d.	$_____
18. **Your payments of alimony, maintenance, and support that you did not report as deducted from your pay on line 5, *Schedule I, Your Income* (Official Form 106I).**	18.	$_____
19. **Other payments you make to support others who do not live with you.** Specify:_____	19.	$_____
20. **Other real property expenses not included in lines 4 or 5 of this form or on *Schedule I*: *Your Income.***		
20a. Mortgages on other property	20a.	$_____
20b. Real estate taxes	20b.	$_____
20c. Property, homeowner's, or renter's insurance	20c.	$_____
20d. Maintenance, repair, and upkeep expenses	20d.	$_____
20e. Homeowner's association or condominium dues	20e.	$_____

21. **Other**. Specify: _____ 21. +$_____

22. **Calculate your monthly expenses.**

22a. Add lines 4 through 21. 22a. $_____

22b. Copy line 22 (monthly expenses for Debtor 2), if any, from Official Form 106J-2 22b. $_____

22c. Add line 22a and 22b. The result is your monthly expenses. 22c. $_____

23. **Calculate your monthly net income.**

23a. Copy line 12 (*your combined monthly income*) from *Schedule I.* 23a. $_____

23b. Copy your monthly expenses from line 22c above. 23b. – $_____

23c. Subtract your monthly expenses from your monthly income.
The result is your *monthly net income*. 23c. $_____

24. **Do you expect an increase or decrease in your expenses within the year after you file this form?**

For example, do you expect to finish paying for your car loan within the year or do you expect your mortgage payment to increase or decrease because of a modification to the terms of your mortgage?

- ❑ No.
- ❑ Yes.

Explain here:

Rules Appendix B.10.1 12b-011225

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Check if this is:

- ❑ An amended filing
- ❑ A supplement showing postpetition chapter 13 expenses as of the following date:

_____
MM / DD / YYYY

Official Form 106J-2

Schedule J-2: Expenses for Separate Household of Debtor 2

12/15

Use this form for Debtor 2's separate household expenses ONLY IF Debtor 1 and Debtor 2 maintain separate households. ***If Debtor 1 and Debtor 2 have one or more dependents in common, list the dependents on both Schedule J and this form. Answer the questions on this form only with respect to expenses for Debtor 2 that are not reported on Schedule J.*** **Be as complete and accurate as possible. If more space is needed, attach another sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.**

Part 1: Describe Your Household

1. **Do you and Debtor 1 maintain separate households?**

❑ No. Do not complete this form.
❑ Yes

2. **Do you have dependents?**

Do not list Debtor 1 but list all other dependents of Debtor 2 regardless of whether listed as a dependent of Debtor 1 on Schedule J.

Do not state the dependents' names.

❑ No
❑ Yes. Fill out this information for each dependent.....

Dependent's relationship to Debtor 2:	Dependent's age	Does dependent live with you?
_____	_____	❑ No ❑ Yes
_____	_____	❑ No ❑ Yes
_____	_____	❑ No ❑ Yes
_____	_____	❑ No ❑ Yes
_____	_____	❑ No ❑ Yes

3. **Do your expenses include expenses of people other than yourself, your dependents, and Debtor 1?**

❑ No
❑ Yes

Part 2: Estimate Your Ongoing Monthly Expenses

Estimate your expenses as of your bankruptcy filing date unless you are using this form as a supplement in a Chapter 13 case to report expenses as of a date after the bankruptcy is filed.

Include expenses paid for with non-cash government assistance if you know the value of such assistance and have included it on *Schedule I: Your Income* (Official Form 106I.)

		Your expenses
4. **The rental or home ownership expenses for your residence.** Include first mortgage payments and any rent for the ground or lot.	4.	$_____
If not included in line 4:		
4a. Real estate taxes	4a.	$_____
4b. Property, homeowner's, or renter's insurance	4b.	$_____
4c. Home maintenance, repair, and upkeep expenses	4c.	$_____
4d. Homeowner's association or condominium dues	4d.	$_____

Rules Appendix B-114
12b-011226

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

		Your expenses
5. **Additional mortgage payments for your residence**, such as home equity loans	5.	$_____
6. **Utilities:**		
6a. Electricity, heat, natural gas	6a.	$_____
6b. Water, sewer, garbage collection	6b.	$_____
6c. Telephone, cell phone, Internet, satellite, and cable services	6c.	$_____
6d. Other. Specify: _____	6d.	$_____
7. **Food and housekeeping supplies**	7.	$_____
8. **Childcare and children's education costs**	8.	$_____
9. **Clothing, laundry, and dry cleaning**	9.	$_____
10. **Personal care products and services**	10.	$_____
11. **Medical and dental expenses**	11.	$_____
12. **Transportation.** Include gas, maintenance, bus or train fare. Do not include car payments.	12.	$_____
13. **Entertainment, clubs, recreation, newspapers, magazines, and books**	13.	$_____
14. **Charitable contributions and religious donations**	14.	$_____
15. **Insurance.** Do not include insurance deducted from your pay or included in lines 4 or 20.		
15a. Life insurance	15a.	$_____
15b. Health insurance	15b.	$_____
15c. Vehicle insurance	15c.	$_____
15d. Other insurance. Specify:_____	15d.	$_____
16. **Taxes.** Do not include taxes deducted from your pay or included in lines 4 or 20. Specify: _____	16.	$_____
17. **Installment or lease payments:**		
17a. Car payments for Vehicle 1	17a.	$_____
17b. Car payments for Vehicle 2	17b.	$_____
17c. Other. Specify:_____	17c.	$_____
17d. Other. Specify:_____	17d.	$_____
18. **Your payments of alimony, maintenance, and support that you did not report as deducted from your pay on line 5, *Schedule I, Your Income* (Official Form 106I).**	18.	$_____
19. **Other payments you make to support others who do not live with you.** Specify:_____	19.	$_____
20. **Other real property expenses not included in lines 4 or 5 of this form or on *Schedule I*: *Your Income.***		
20a. Mortgages on other property	20a.	$_____
20b. Real estate taxes	20b.	$_____
20c. Property, homeowner's, or renter's insurance	20c.	$_____
20d. Maintenance, repair, and upkeep expenses	20d.	$_____
20e. Homeowner's association or condominium dues	20e.	$_____

Rules Appendix B.1.1 12b-011227

21. **Other**. Specify: _____ 21. **+**$_____

22. **Your monthly expenses.** Add lines 5 through 21.
The result is the monthly expenses of Debtor 2. Copy the result to line 22b of Schedule J to calculate the total expenses for Debtor 1 and Debtor 2. 22. $_____

23. Line not used on this form.

24. **Do you expect an increase or decrease in your expenses within the year after you file this form?**

For example, do you expect to finish paying for your car loan within the year or do you expect your mortgage payment to increase or decrease because of a modification to the terms of your mortgage?

- ❑ No.
- ❑ Yes.

Explain here:

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 106Sum

Summary of Your Assets and Liabilities and Certain Statistical Information 12/15

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. Fill out all of your schedules first; then complete the information on this form. If you are filing amended schedules after you file your original forms, you must fill out a new *Summary* and check the box at the top of this page.

Part 1: Summarize Your Assets

	Your assets Value of what you own
1. *Schedule A/B: Property* (Official Form 106A/B)	
1a. Copy line 55, Total real estate, from *Schedule A/B*	$ _____
1b. Copy line 62, Total personal property, from *Schedule A/B*	$ _____
1c. Copy line 63, Total of all property on *Schedule A/B*	$ _____

Part 2: Summarize Your Liabilities

	Your liabilities Amount you owe
2. *Schedule D: Creditors Who Have Claims Secured by Property* (Official Form 106D)	
2a. Copy the total you listed in Column A, *Amount of claim,* at the bottom of the last page of Part 1 of *Schedule D*	$ _____
3. *Schedule E/F: Creditors Who Have Unsecured Claims* (Official Form 106E/F)	
3a. Copy the total claims from Part 1 (priority unsecured claims) from line 6e of *Schedule E/F*	$ _____
3b. Copy the total claims from Part 2 (nonpriority unsecured claims) from line 6j of *Schedule E/F*	+ $ _____
Your total liabilities	$ _____

Part 3: Summarize Your Income and Expenses

4. *Schedule I: Your Income* (Official Form 106I) Copy your combined monthly income from line 12 of *Schedule I*	$ _____
5. *Schedule J: Your Expenses* (Official Form 106J) Copy your monthly expenses from line 22c of *Schedule J*	$ _____

Rules Appendix B.1-1 12b-011229

Part 4: Answer These Questions for Administrative and Statistical Records

6. **Are you filing for bankruptcy under Chapters 7, 11, or 13?**

❑ No. You have nothing to report on this part of the form. Check this box and submit this form to the court with your other schedules.
❑ Yes

7. **What kind of debt do you have?**

❑ **Your debts are primarily consumer debts.** *Consumer debts* are those "incurred by an individual primarily for a personal, family, or household purpose." 11 U.S.C. § 101(8). Fill out lines 8-9g for statistical purposes. 28 U.S.C. § 159.

❑ **Your debts are not primarily consumer debts**. You have nothing to report on this part of the form. Check this box and submit this form to the court with your other schedules.

8. **From the *Statement of Your Current Monthly Income***: Copy your total current monthly income from Official Form 122A-1 Line 11; **OR**, Form 122B Line 11; **OR**, Form 122C-1 Line 14. $ _____

9. **Copy the following special categories of claims from Part 4, line 6 of *Schedule E/F***:

	Total claim
From Part 4 on *Schedule E/F*, copy the following:	
9a. Domestic support obligations (Copy line 6a.)	$_____
9b. Taxes and certain other debts you owe the government. (Copy line 6b.)	$_____
9c. Claims for death or personal injury while you were intoxicated. (Copy line 6c.)	$_____
9d. Student loans. (Copy line 6f.)	$_____
9e. Obligations arising out of a separation agreement or divorce that you did not report as priority claims. (Copy line 6g.)	$_____
9f. Debts to pension or profit-sharing plans, and other similar debts. (Copy line 6h.)	+ $_____
9g. **Total.** Add lines 9a through 9f.	$_____

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 106Dec

Declaration About an Individual Debtor's Schedules

12/15

If two married people are filing together, both are equally responsible for supplying correct information.

You must file this form whenever you file bankruptcy schedules or amended schedules. Making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to $250,000, or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

Sign Below

Did you pay or agree to pay someone who is NOT an attorney to help you fill out bankruptcy forms?

❑ No

❑ Yes. Name of person_____. Attach *Bankruptcy Petition Preparer's Notice, Declaration, and Signature* (Official Form 119).

Under penalty of perjury, I declare that I have read the summary and schedules filed with this declaration and that they are true and correct.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

COMMITTEE NOTE

The schedules to be used in cases of individual debtors are revised as part of the Forms Modernization Project, making them easier to read and, as a result, likely to generate more complete and accurate responses. The goals of the Forms Modernization Project include improving the interface between technology and the forms so as to increase efficiency and reduce the need to produce the same information in multiple formats. Therefore, many of the open-ended questions and multiple-part instructions have been replaced with more specific questions. The individual debtor schedules are also renumbered, starting with the number 106 and followed by the letter or name of the schedule to distinguish them from the versions to be used in non-individual cases.

Official Form 106Sum, *Summary of Your Assets and Liabilities and Certain Statistical Information*, replaces Official Form 6, *Summary of Schedules and Statistical Summary of Certain Liability and Related Data (28 U.S.C. § 159)*, in cases of individual debtors.

The form is reformatted and updated with cross-references indicating the line numbers of specific schedules from which the summary information is to be gathered. In addition, because most filings are now done electronically, the form no longer requires the debtor to indicate which schedules are attached or to state the number of sheets of paper used for the schedules.

Official Form 106A/B, *Schedule A/B: Property*, consolidates information about an individual debtor's real and personal property into a single form. It replaces Official Form 6A, *Real Property*, and Official Form 6B, *Personal Property*, in cases of individual debtors. In addition to specific questions about the assets, the form also includes open text fields for providing additional information regarding particular assets when appropriate.

The layout and categories of property on Official Form 106A/B have changed. Instead of dividing property interests into two categories (real or personal property), the new form uses seven categories likely to be more familiar to non-lawyers: real estate, vehicles, personal household items, financial assets, business-related property, farm- and

commercial fishing-related property, and a catch-all category for property that was not listed elsewhere in the form. The new form categories and the examples provided in many of the categories are designed to prompt debtors to be thorough and list all of their interests in property. The debtor may describe generally items of minimal value (such as children's clothes) by adding the value of the items and reporting the total.

Although a particular item of property may fit into more than one category, the instructions for the form explain that it should be listed only once.

In addition, because property that falls within a particular category may not be specifically elicited by the particular line items on the form, the debtor is asked in Parts 3–6 (lines 14, 35, 44, and 51) to specifically identify and value any other property in the category.

In Part 1, *Describe Each Residence, Building, Land, or Other Real Estate You Own or Have an Interest In*, the debtor is asked to state the "current value of the portion you own," and to also state who has an interest in the property. In addition, the debtor is asked for the nature of the ownership interest, if known by the debtor. Furthermore, instead of asking for an open-ended description of the property, the form guides the debtor in answering the description question by providing eight options from which to choose: single-family home, duplex or multi-unit building, condominium or cooperative, manufactured or mobile home, land, investment property, timeshare, and other.

Part 2, *Describe Your Vehicles*, also guides the debtor in answering the question, asking for the make, model, year, and mileage of the car or other vehicle. Because mileage is just a general indication of vehicle value, the debtor is not required to list the exact mileage, but instead is prompted to provide the approximate mileage.

Part 3, *Describe Your Personal and Household Items*, simplifies wording, updates categories, and uses more common terms. For example, "Wearing apparel" is changed to "Clothes" and examples include furs, which were previously grouped with jewelry. Firearms, on the

other hand, which were previously grouped with sports and other hobbies, are now set out as a separate category. Additionally, because a new Part 6 has been added to separately describe-farm related property, Part 3 includes a category for "Non-farm animals."

Part 4, *Describe Your Financial Assets*, prompts a listing of the debtor's financial assets through several questions providing separate space, after each listed type of account or deposit, for the institution or issuer name and the value of the debtor's interest in the asset. Two new categories of financial assets are added: "Bonds, mutual funds, or publicly traded stocks" and "Claims against third parties, whether or not you have filed a lawsuit or made a demand for payment." In addition, qualified ABLE accounts, as defined in 26 U.S.C. § 529A(b), are added to the list of accounts in question 24. This change is made in response to the Tax Increase Prevention Act of 2014, Pub. Law No. 113-295, which excludes ABLE account contributions meeting the specified requirements from property of the estate.

Part 5, *Describe Any Business-Related Property You Own or Have an Interest In*, provides prompts for listing business-related property, such as accounts receivable, inventory, and machinery, and includes a direction to list business-related real estate in Part 1, to avoid listing real estate twice.

Part 6, *Describe Any Farm- and Commercial Fishing-Related Property You Own or Have an Interest In*, provides prompts for listing farm- or commercial fishing-related property, such as farm animals, crops, and feed. It also includes a direction to list any farm- or commercial fishing-related real estate in Part 1.

Part 7, *Describe All Property You Own or Have an Interest in That You Did Not List Above*, is a catch-all provision that allows the debtor to report property that is difficult to categorize.

Part 8, *List the Totals of Each Part of this Form*¸ tabulates the total value of the debtor's interest in the listed property. The tabulation includes two subtotals, one for real estate, which corresponds to the real property total that was reported on former Official Form 6A. The second

subtotal is of Parts 2-7, which corresponds to the personal property total that was reported on former Official Form 6B.

Official Form 106C, *Schedule C: The Property You Claim as Exempt*, replaces Official Form 6C, *Property Claimed as Exempt*, in cases of individual debtors.

Part 1, *Identify the Property You Claim as Exempt*, includes a table to list the property the debtor seeks to exempt, the value of the property owned by the debtor, the amount of the claimed exemption, and the law that allows the exemption. The first column asks for a brief description of the exempt property, and it also asks for the line number where the property is listed on Schedule A/B. The second column asks for the value of the portion of the asset owned by the debtor, rather than the entire asset. The third column asks for the amount, rather than the value, of the exemption claim.

The form has also been changed in light of the Supreme Court's ruling in *Schwab v. Reilly,* 560 U.S. 770 (2010). Entries in the "amount of the exemption you claim" column may now be listed as either a dollar limited amount or as 100% of fair market value, up to any applicable statutory limit. For example, a debtor might claim 100% of fair market value for a home covered by an exemption capped at $15,000, and that limit would be applicable. This choice would impose no dollar limit where the exemption is unlimited in dollar amount, such as some exemptions for health aids, certain governmental benefits, and tax-exempt retirement funds.

Official Form 106D, *Schedule D: Creditors Who Have Claims Secured by Property*, replaces Official Form 6D, *Creditors Holding Secured Claims*, in cases of individual debtors.

Part 1, *List All Secured Claims*, now directs the debtor to list only the last four digits of the account number. Part 1 also adds four checkboxes with which to describe the nature of the lien: an agreement the debtor made (such as mortgage or secured car loan); statutory lien (such as tax lien, mechanic's lien); judgment lien from a lawsuit; and other.

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The form adds Part 2, *List Others to Be Notified for a Debt That You Already Listed*. The debtor is instructed to use Part 2 if there is a need to notify someone about the bankruptcy filing other than the creditor for a debt listed in Part 1. For example, if a collection agency is trying to collect for a creditor listed in Part 1, the collection agency would be listed in Part 2.

Official Form 106E/F, *Schedule E/F: Creditors Who Have Unsecured Claims*, consolidates information about priority and nonpriority unsecured claims into a single form. It replaces Official Form 6E, *Creditors Holding Unsecured Priority Claims*, and Official Form 6F, *Creditors Holding Unsecured Nonpriority Claims*, in cases of individual debtors.

Although both priority and nonpriority unsecured claims are reported in Official Form 106E/F, the two types of claims are separately grouped so that the total for each type can be reported for case administration and statistical purposes. The form eliminates the question "consideration for claim" and instructs debtors to list claims in the alphabetical order of creditors as much as possible.

Part 1, *List All of Your PRIORITY Unsecured Claims*, includes four checkboxes for identifying the type of priority that applies to the claim: domestic support obligations; taxes and certain other debts owed to the government; claims for death or personal injury while intoxicated; and "other." The first three categories are required to be separately reported for statistical purposes. If the debtor selects "other," the debtor must specify the basis of the priority, *e.g.*, wages or employee benefit plan contribution.

Part 2, *List All of Your NONPRIORITY Unsecured Claims*, contains four checkboxes, including three for types of claims that must be separately reported for statistical purposes: student loans; obligations arising out of a separation agreement or divorce not listed as priority claims; and debts to pension or profit-sharing plans and other similar debts. The remaining "other" checkbox treats claims not subject to separate reporting. If the debtor selects "other," the debtor must specify the basis of the claim.

Part 3, *List Others to Be Notified About a Debt That You Already Listed*, is new. The debtor is instructed to use Part 3 only if there is a need to give notice of the bankruptcy to someone other than a creditor listed in Parts 1 and 2. For example, if a collection agency is trying to collect for a creditor listed in Part 1, the collection agency would be listed in Part 3.

Finally, Part 4, *Add the Amounts for Each Type of Unsecured Claim*, requires the debtor to provide the total amounts of particular types of unsecured claims for statistical reporting purposes and the overall totals of the priority and nonpriority unsecured claims reported in this form.

Official Form 106G, *Schedule G: Executory Contracts and Unexpired Leases*, replaces Official Form 6G, *Executory Contracts and Unexpired Leases*, in cases of individual debtors.

The form is simplified. Instead of requiring the debtor to make multiple assertions about each potential executory contract or unexpired lease, the form simply requires the debtor to identify the name and address of the other party to the contract or lease, and to state what the contract or lease deals with. Definitions and examples of executory contracts and unexpired leases are included in the separate instructions for the form.

An additional page is provided in case the debtor has so many executory contracts and unexpired leases that the available page is not adequate. If the debtor needs to use the additional page, the debtor is required to fill in the entry number.

Official Form 106H, *Schedule H: Your Codebtors*, replaces Official Form 6H, *Codebtors*, in cases of individual debtors.

The form breaks out the questions about whether there are any codebters, and whether the debtor has lived with a spouse, former spouse, or legal equivalent in a community property state in the prior eight years. It also removes Alaska from the listed community property states. Finally, it asks the debtor to indicate where the debt is listed on Schedule D, Schedule E/F, or Schedule G, thereby

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eliminating the need to list the name and address of the creditor.

Official Form 106I, *Schedule I: Your Income*, replaces Official Form 6I, *Your Income*, in cases of individual debtors.

The form is one of an initial set of forms that were published as part of the Forms Modernization Project in 2012. It is renumbered and internal cross references are updated to conform to the new numbering system now being introduced by the Forms Modernization Project.

Official Form 106J, *Schedule J: Your Expenses*, replaces Official Form 6J, *Your Expenses*, in cases of individual debtors.

The form is one of an initial set of forms that were published as part of the Forms Modernization Project in 2012. It is renumbered and internal cross references are updated to conform to the new numbering system now being introduced by the Forms Modernization Project.

The form has been revised to include references to new *Schedule J-2: Expenses for Separate Household of Debtor 2* (Official Form 106J-2) at line 1 and new line 22b. The revisions clarify how to calculate monthly net income in joint cases where Debtor 1 and Debtor 2 maintain separate households. Line 22b is added so Schedule J and Schedule J-2 are easily coordinated.

Official Form 106J-2 is new. It is used to report the monthly expenses of Debtor 2 in a joint debtor case only if Debtor 1 and Debtor 2 maintain separate households.

Official Form 106Dec, *Declaration About an Individual Debtor's Schedules*, replaces Official Form 6, *Declaration Concerning Debtor's Schedules*, in cases of individual debtors.

The form, which is to be signed by the debtor and filed with the debtor's schedules, deletes the Declaration and Signature of Bankruptcy Petition Preparer (BPP). Instead, the debtor is directed to complete and file Official Form 119, *Bankruptcy Petition Preparer's Notice,*

Declaration, and Signature, if a BPP helped fill out the bankruptcy forms.

Because the form applies only to individual debtors, it no longer contains the Declaration Under Penalty of Perjury on Behalf of a Corporation or Partnership. It also deletes from the declaration the phrase "to the best of my knowledge, information, and belief" in order to conform to the language of 28 U.S.C. § 1746. *See* Rule 1008.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 107

Statement of Financial Affairs for Individuals Filing for Bankruptcy

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Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Give Details About Your Marital Status and Where You Lived Before

1. What is your current marital status?

❑ Married
❑ Not married

2. **During the last 3 years, have you lived anywhere other than where you live now?**

❑ No
❑ Yes. List all of the places you lived in the last 3 years. Do not include where you live now.

Debtor 1:	Dates Debtor 1 lived there	Debtor 2:	Dates Debtor 2 lived there
_____ Number Street _____ _____ City State ZIP Code	From _____ To _____	❑ Same as Debtor 1 _____ Number Street _____ _____ City State ZIP Code	❑ Same as Debtor 1 From _____ To _____
_____ Number Street _____ _____ City State ZIP Code	From _____ To _____	❑ Same as Debtor 1 _____ Number Street _____ _____ City State ZIP Code	❑ Same as Debtor 1 From _____ To _____

3. **Within the last 8 years, did you ever live with a spouse or legal equivalent in a community property state or territory?** (*Community property states and territories* include Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington, and Wisconsin.)

❑ No
❑ Yes. Make sure you fill out *Schedule H: Your Codebtors* (Official Form 106H).

Part 2: Explain the Sources of Your Income

4. **Did you have any income from employment or from operating a business during this year or the two previous calendar years?**
Fill in the total amount of income you received from all jobs and all businesses, including part-time activities.
If you are filing a joint case and you have income that you receive together, list it only once under Debtor 1.

❑ No
❑ Yes. Fill in the details.

	Debtor 1		Debtor 2	
	Sources of income Check all that apply.	**Gross income** (before deductions and exclusions)	**Sources of income** Check all that apply.	**Gross income** (before deductions and exclusions)
From January 1 of current year until the date you filed for bankruptcy:	❑ Wages, commissions, bonuses, tips ❑ Operating a business	$_____	❑ Wages, commissions, bonuses, tips ❑ Operating a business	$_____
For last calendar year: (January 1 to December 31, _____) YYYY	❑ Wages, commissions, bonuses, tips ❑ Operating a business	$_____	❑ Wages, commissions, bonuses, tips ❑ Operating a business	$_____
For the calendar year before that: (January 1 to December 31, _____) YYYY	❑ Wages, commissions, bonuses, tips ❑ Operating a business	$_____	❑ Wages, commissions, bonuses, tips ❑ Operating a business	$_____

5. **Did you receive any other income during this year or the two previous calendar years?**
Include income regardless of whether that income is taxable. Examples of *other income* are alimony; child support; Social Security, unemployment, and other public benefit payments; pensions; rental income; interest; dividends; money collected from lawsuits; royalties; and gambling and lottery winnings. If you are filing a joint case and you have income that you received together, list it only once under Debtor 1.

List each source and the gross income from each source separately. Do not include income that you listed in line 4.

❑ No
❑ Yes. Fill in the details.

	Debtor 1		Debtor 2	
	Sources of income Describe below.	**Gross income from each source** (before deductions and exclusions)	**Sources of income** Describe below.	**Gross income from each source** (before deductions and exclusions)
From January 1 of current year until the date you filed for bankruptcy:	_____	$_____	_____	$_____
	_____	$_____	_____	$_____
	_____	$_____	_____	$_____
For last calendar year:	_____	$_____	_____	$_____
(January 1 to December 31, _____) YYYY	_____	$_____	_____	$_____
	_____	$_____	_____	$_____
For the calendar year before that:	_____	$_____	_____	$_____
(January 1 to December 31, _____) YYYY	_____	$_____	_____	$_____
	_____	$_____	_____	$_____

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Part 3: List Certain Payments You Made Before You Filed for Bankruptcy

6. Are either Debtor 1's or Debtor 2's debts primarily consumer debts?

❑ No. **Neither Debtor 1 nor Debtor 2 has primarily consumer debts.** *Consumer debts* are defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose."

During the 90 days before you filed for bankruptcy, did you pay any creditor a total of $6,225* or more?

❑ No. Go to line 7.

❑ Yes. List below each creditor to whom you paid a total of $6,225* or more in one or more payments and the total amount you paid that creditor. Do not include payments for domestic support obligations, such as child support and alimony. Also, do not include payments to an attorney for this bankruptcy case.

* Subject to adjustment on 4/01/16 and every 3 years after that for cases filed on or after the date of adjustment.

❑ Yes. **Debtor 1 or Debtor 2 or both have primarily consumer debts.**

During the 90 days before you filed for bankruptcy, did you pay any creditor a total of $600 or more?

❑ No. Go to line 7.

❑ Yes. List below each creditor to whom you paid a total of $600 or more and the total amount you paid that creditor. Do not include payments for domestic support obligations, such as child support and alimony. Also, do not include payments to an attorney for this bankruptcy case.

	Dates of payment	Total amount paid	Amount you still owe	Was this payment for…
_____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code	_____ _____ _____	$_____	$_____	❑ Mortgage ❑ Car ❑ Credit card ❑ Loan repayment ❑ Suppliers or vendors ❑ Other _____
_____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code	_____ _____ _____	$_____	$_____	❑ Mortgage ❑ Car ❑ Credit card ❑ Loan repayment ❑ Suppliers or vendors ❑ Other _____
_____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code	_____ _____ _____	$_____	$_____	❑ Mortgage ❑ Car ❑ Credit card ❑ Loan repayment ❑ Suppliers or vendors ❑ Other _____

7. **Within 1 year before you filed for bankruptcy, did you make a payment on a debt you owed anyone who was an insider?**
Insiders include your relatives; any general partners; relatives of any general partners; partnerships of which you are a general partner; corporations of which you are an officer, director, person in control, or owner of 20% or more of their voting securities; and any managing agent, including one for a business you operate as a sole proprietor. 11 U.S.C. § 101. Include payments for domestic support obligations, such as child support and alimony.

❑ No
❑ Yes. List all payments to an insider.

	Dates of payment	Total amount paid	Amount you still owe	Reason for this payment
_____ Insider's Name _____ Number Street _____ _____ City State ZIP Code	_____ _____ _____	$_____	$_____	
_____ Insider's Name _____ Number Street _____ _____ City State ZIP Code	_____ _____ _____	$_____	$_____	

8. **Within 1 year before you filed for bankruptcy, did you make any payments or transfer any property on account of a debt that benefited an insider?**
Include payments on debts guaranteed or cosigned by an insider.

❑ No
❑ Yes. List all payments that benefited an insider.

	Dates of payment	Total amount paid	Amount you still owe	Reason for this payment Include creditor's name
_____ Insider's Name _____ Number Street _____ _____ City State ZIP Code	_____ _____ _____	$_____	$_____	
_____ Insider's Name _____ Number Street _____ _____ City State ZIP Code	_____ _____ _____	$_____	$_____	

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Part 4: Identify Legal Actions, Repossessions, and Foreclosures

9. **Within 1 year before you filed for bankruptcy, were you a party in any lawsuit, court action, or administrative proceeding?**
List all such matters, including personal injury cases, small claims actions, divorces, collection suits, paternity actions, support or custody modifications, and contract disputes.

❑ No
❑ Yes. Fill in the details.

	Nature of the case	Court or agency	Status of the case
Case title_____ _____ Case number _____		_____ Court Name _____ Number Street _____ City State ZIP Code	❑ Pending ❑ On appeal ❑ Concluded
Case title_____ _____ Case number _____		_____ Court Name _____ Number Street _____ City State ZIP Code	❑ Pending ❑ On appeal ❑ Concluded

10. **Within 1 year before you filed for bankruptcy, was any of your property repossessed, foreclosed, garnished, attached, seized, or levied?**
Check all that apply and fill in the details below.

❑ No. Go to line 11.
❑ Yes. Fill in the information below.

	Describe the property	Date	Value of the property
_____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code	**Explain what happened** ❑ Property was repossessed. ❑ Property was foreclosed. ❑ Property was garnished. ❑ Property was attached, seized, or levied.	_____	$_____
	Describe the property	**Date**	**Value of the property**
_____ Creditor's Name _____ Number Street _____ _____ City State ZIP Code	**Explain what happened** ❑ Property was repossessed. ❑ Property was foreclosed. ❑ Property was garnished. ❑ Property was attached, seized, or levied.	_____	$_____

11. Within 90 days before you filed for bankruptcy, did any creditor, including a bank or financial institution, set off any amounts from your accounts or refuse to make a payment because you owed a debt?

- ❑ No
- ❑ Yes. Fill in the details.

	Describe the action the creditor took	Date action was taken	Amount
Creditor's Name Number Street City State ZIP Code	Last 4 digits of account number: XXXX–___ ___ ___ ___	_____	$_____

12. **Within 1 year before you filed for bankruptcy, was any of your property in the possession of an assignee for the benefit of creditors, a court-appointed receiver, a custodian, or another official?**

- ❑ No
- ❑ Yes

Part 5: List Certain Gifts and Contributions

13. **Within 2 years before you filed for bankruptcy, did you give any gifts with a total value of more than $600 per person?**

- ❑ No
- ❑ Yes. Fill in the details for each gift.

Gifts with a total value of more than $600 per person	Describe the gifts	Dates you gave the gifts	Value
Person to Whom You Gave the Gift Number Street City State ZIP Code Person's relationship to you _____		_____ _____	$_____ $_____

Gifts with a total value of more than $600 per person	Describe the gifts	Dates you gave the gifts	Value
Person to Whom You Gave the Gift Number Street City State ZIP Code Person's relationship to you _____		_____ _____	$_____ $_____

14. Within 2 years before you filed for bankruptcy, did you give any gifts or contributions with a total value of more than $600 to any charity?

- ❑ No
- ❑ Yes. Fill in the details for each gift or contribution.

Gifts or contributions to charities that total more than $600	Describe what you contributed	Date you contributed	Value
_____ Charity's Name _____ _____ Number Street _____ City State ZIP Code		_____ _____	$_____ $_____

Part 6: List Certain Losses

15. **Within 1 year before you filed for bankruptcy or since you filed for bankruptcy, did you lose anything because of theft, fire, other disaster, or gambling?**

- ❑ No
- ❑ Yes. Fill in the details.

Describe the property you lost and how the loss occurred	Describe any insurance coverage for the loss Include the amount that insurance has paid. List pending insurance claims on line 33 of *Schedule A/B: Property.*	Date of your loss	Value of property lost
		_____	$_____

Part 7: List Certain Payments or Transfers

16. **Within 1 year before you filed for bankruptcy, did you or anyone else acting on your behalf pay or transfer any property to anyone you consulted about seeking bankruptcy or preparing a bankruptcy petition?**
Include any attorneys, bankruptcy petition preparers, or credit counseling agencies for services required in your bankruptcy.

- ❑ No
- ❑ Yes. Fill in the details.

	Description and value of any property transferred	Date payment or transfer was made	Amount of payment
_____ Person Who Was Paid _____ Number Street _____ _____ City State ZIP Code _____ Email or website address _____ Person Who Made the Payment, if Not You		_____ _____	$_____ $_____

	Description and value of any property transferred	Date payment or transfer was made	Amount of payment
_____ Person Who Was Paid _____ Number Street _____ _____ City State ZIP Code _____ Email or website address _____ Person Who Made the Payment, if Not You		_____ _____	$_____ $_____

17. Within 1 year before you filed for bankruptcy, did you or anyone else acting on your behalf pay or transfer any property to anyone who promised to help you deal with your creditors or to make payments to your creditors?
Do not include any payment or transfer that you listed on line 16.

- ❑ No
- ❑ Yes. Fill in the details.

	Description and value of any property transferred	Date payment or transfer was made	Amount of payment
_____ Person Who Was Paid _____ Number Street _____ _____ City State ZIP Code		_____ _____	$_____ $_____

18. **Within 2 years before you filed for bankruptcy, did you sell, trade, or otherwise transfer any property to anyone, other than property transferred in the ordinary course of your business or financial affairs?**
Include both outright transfers and transfers made as security (such as the granting of a security interest or mortgage on your property).
Do not include gifts and transfers that you have already listed on this statement.

- ❑ No
- ❑ Yes. Fill in the details.

	Description and value of property transferred	Describe any property or payments received or debts paid in exchange	Date transfer was made
_____ Person Who Received Transfer _____ Number Street _____ _____ City State ZIP Code Person's relationship to you _____			_____
_____ Person Who Received Transfer _____ Number Street _____ _____ City State ZIP Code Person's relationship to you _____			_____

19. **Within 10 years before you filed for bankruptcy, did you transfer any property to a self-settled trust or similar device of which you are a beneficiary?** (These are often called *asset-protection devices*.)

❑ No
❑ Yes. Fill in the details.

	Description and value of the property transferred	Date transfer was made
Name of trust _____		_____

Part 8: List Certain Financial Accounts, Instruments, Safe Deposit Boxes, and Storage Units

20. **Within 1 year before you filed for bankruptcy, were any financial accounts or instruments held in your name, or for your benefit, closed, sold, moved, or transferred?**
Include checking, savings, money market, or other financial accounts; certificates of deposit; shares in banks, credit unions, brokerage houses, pension funds, cooperatives, associations, and other financial institutions.

❑ **No**
❑ **Yes. Fill in the details.**

	Last 4 digits of account number	Type of account or instrument	Date account was closed, sold, moved, or transferred	Last balance before closing or transfer
Name of Financial Institution Number Street City State ZIP Code	XXXX–___ ___ ___ ___	❑ Checking ❑ Savings ❑ Money market ❑ Brokerage ❑ Other_____	_____	$_____
Name of Financial Institution Number Street City State ZIP Code	XXXX–___ ___ ___ ___	❑ Checking ❑ Savings ❑ Money market ❑ Brokerage ❑ Other_____	_____	$_____

21. **Do you now have, or did you have within 1 year before you filed for bankruptcy, any safe deposit box or other depository for securities, cash, or other valuables?**

❑ **No**
❑ **Yes. Fill in the details.**

	Who else had access to it?	Describe the contents	Do you still have it?
Name of Financial Institution Number Street City State ZIP Code	Name Number Street City State ZIP Code		❑ No ❑ Yes

22. Have you stored property in a storage unit or place other than your home within 1 year before you filed for bankruptcy?

- ❑ No
- ❑ Yes. Fill in the details.

	Who else has or had access to it?	Describe the contents	Do you still have it?
Name of Storage Facility Number Street City State ZIP Code	Name Number Street City State ZIP Code		❑ No ❑ Yes

Part 9: Identify Property You Hold or Control for Someone Else

23. Do you hold or control any property that someone else owns? Include any property you borrowed from, are storing for, or hold in trust for someone.

- ❑ No
- ❑ Yes. Fill in the details.

	Where is the property?	Describe the property	Value
Owner's Name Number Street City State ZIP Code	Number Street City State ZIP Code		$_____

Part 10: Give Details About Environmental Information

For the purpose of Part 10, the following definitions apply:

- *Environmental law* means any federal, state, or local statute or regulation concerning pollution, contamination, releases of hazardous or toxic substances, wastes, or material into the air, land, soil, surface water, groundwater, or other medium, including statutes or regulations controlling the cleanup of these substances, wastes, or material.
- *Site* means any location, facility, or property as defined under any environmental law, whether you now own, operate, or utilize it or used to own, operate, or utilize it, including disposal sites.
- *Hazardous material* means anything an environmental law defines as a hazardous waste, hazardous substance, toxic substance, hazardous material, pollutant, contaminant, or similar term.

Report all notices, releases, and proceedings that you know about, regardless of when they occurred.

24. Has any governmental unit notified you that you may be liable or potentially liable under or in violation of an environmental law?

- ❑ No
- ❑ Yes. Fill in the details.

	Governmental unit	Environmental law, if you know it	Date of notice
Name of site Number Street City State ZIP Code	Governmental unit Number Street City State ZIP Code		_____

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25. Have you notified any governmental unit of any release of hazardous material?

- ☐ No
- ☐ Yes. Fill in the details.

	Governmental unit	Environmental law, if you know it	Date of notice
Name of site Number Street City State ZIP Code	Governmental unit Number Street City State ZIP Code		_____

26. Have you been a party in any judicial or administrative proceeding under any environmental law? Include settlements and orders.

- ☐ No
- ☐ Yes. Fill in the details.

	Court or agency	Nature of the case	Status of the case
Case title_____ Case number	Court Name Number Street City State ZIP Code		☐ Pending ☐ On appeal ☐ Concluded

Part 11: Give Details About Your Business or Connections to Any Business

27. Within 4 years before you filed for bankruptcy, did you own a business or have any of the following connections to any business?

- ☐ A sole proprietor or self-employed in a trade, profession, or other activity, either full-time or part-time
- ☐ A member of a limited liability company (LLC) or limited liability partnership (LLP)
- ☐ A partner in a partnership
- ☐ An officer, director, or managing executive of a corporation
- ☐ An owner of at least 5% of the voting or equity securities of a corporation

- ☐ No. None of the above applies. Go to Part 12.
- ☐ Yes. Check all that apply above and fill in the details below for each business.

	Describe the nature of the business	Employer Identification number Do not include Social Security number or ITIN.
Business Name Number Street City State ZIP Code		EIN: __ __ – __ __ __ __ __ __ __
	Name of accountant or bookkeeper	**Dates business existed**
		From _____ To _____

	Describe the nature of the business	Employer Identification number Do not include Social Security number or ITIN.
Business Name Number Street City State ZIP Code		EIN: __ __ – __ __ __ __ __ __ __
	Name of accountant or bookkeeper	**Dates business existed**
		From _____ To _____

	Describe the nature of the business	Employer Identification number Do not include Social Security number or ITIN.
Business Name Number Street City State ZIP Code		EIN: __ __ – __ __ __ __ __ __ __
	Name of accountant or bookkeeper	Dates business existed
		From _____ To _____

28. Within 2 years before you filed for bankruptcy, did you give a financial statement to anyone about your business? Include all financial institutions, creditors, or other parties.

- ❑ **No**
- ❑ **Yes. Fill in the details below.**

	Date issued
Name Number Street City State ZIP Code	MM / DD / YYYY

Part 12: Sign Below

I have read the answers on this *Statement of Financial Affairs* and any attachments, and I declare under penalty of perjury that the answers are true and correct. I understand that making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to $250,000, or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

✘ _____ ✘ _____

Signature of Debtor 1 **Signature of Debtor 2**

Date _____ **Date** _____

Did you attach additional pages to *Your Statement of Financial Affairs for Individuals Filing for Bankruptcy* (Official Form 107)?

- ❑ No
- ❑ Yes

Did you pay or agree to pay someone who is not an attorney to help you fill out bankruptcy forms?

- ❑ No
- ❑ Yes. Name of person_____. Attach the *Bankruptcy Petition Preparer's Notice, Declaration, and Signature* (Official Form 119).

COMMITTEE NOTE

Official Form 107, *Statement of Financial Affairs for Individuals Filing for Bankruptcy*, which applies only in cases of individual debtors, is revised in its entirety as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. The goals of the Forms Modernization Project include improving the interface between technology and the forms so as to increase efficiency and reduce the need to produce the same information in multiple formats. Therefore, many of the open-ended questions and multiple-part instructions have been replaced with more specific questions. In addition, the form is renumbered to distinguish it from the version to be used in non-individual cases, and stylistic changes were made throughout the form.

The form is derived from former Official Form 7, *Statement of Financial Affairs*. The new form uses eleven sections likely to be more understandable to non-lawyers, groups questions of a similar nature together, and eliminates questions unrelated to individual debtors. The new form deletes the instruction, previously found in many questions, that married debtors filing under chapter 12 or chapter 13 must include information applicable to their spouse, even if their spouse is not filing with them, unless the spouses are separated. This change was made because a non-filing spouse's general financial affairs are not relevant to the debtor's bankruptcy case.

Part 1, *Give Details About Your Marital Status and Where You Lived Before*, moves the questions regarding the debtor's prior addresses, as well as residences in a community property state, to the beginning of the form. The form eliminates the "name used" question in reference to prior addresses. Also, the debtor is no longer required to list the name of a spouse or former spouse who lived with the debtor in a community property state since that information will be provided in Official Form 106H.

Part 2, *Explain the Sources of Your Income*, consolidates the questions regarding income, adding "wages, commissions, bonuses, tips" as a category for sources of income, and it eliminates the option to report income on a fiscal year basis. In addition, the form provides examples of types of "other income." The time period is clarified to indicate that the prior two years means two calendar years, plus the portion of the calendar year in which the bankruptcy is filed.

Part 3, *List Certain Payments You Made Before You Filed for Bankruptcy*, includes questions related to payments made in the 90 days prior to bankruptcy, with a separate question for payments made to insiders within one year before filing for bankruptcy. The statutory definition of consumer debt is provided. The question regarding the nature of the debtor's debts requires the debtor to use checkboxes to indicate whether or not they are primarily consumer debts. The form instructs debtors not to include payments for domestic support obligations in the section regarding insider payments. The form provides a separate question regarding payments or transfers on account of a debt that benefited an insider. For both questions regarding payments to insiders, the debtor is required to provide a reason for the payment. Partnerships of which the debtor is a general partner have been added to the examples of "insiders."

Part 4, *Identify Legal Actions, Repossessions, and Foreclosures*, consolidates questions regarding actions against the debtor's property. The form provides examples of types of legal actions, and requires the debtor to indicate the status of any action. The form adds the requirements that a debtor include any property levied on within a year of filing for bankruptcy and that the debtor provide the last four digits of any account number for any setoffs. Also, a debtor must list any assignment for the benefit of creditors made within one year of filing for bankruptcy.

Part 5, *List Certain Gifts and Contributions*, changes the reporting threshold to $600 per person or charity and increases the look-back period from one to two years.

Part 6, *List Certain Losses*, clarifies how to report insurance coverage for losses. It provides that the debtor must include on this form amounts of insurance that have been paid, but must list pending insurance claims on Official Form 106A/B.

Part 7, *List Certain Payments or Transfers*, includes questions regarding payments or transfers of property by the debtor. The question regarding payments or transfers to anyone who was consulted about seeking bankruptcy or preparing a bankruptcy petition requires the email or website address of the person who was paid, as well as the name of the person who made the payment if it was not the debtor. There is a separate question asked about payments or transfers to anyone who promised to help the debtor deal with creditors or make payments to creditors, reminding the debtor not to include any payments or transfers already listed. Also, the debtor must list any transfers of property, outright or for security purposes, made within two years of filing for bankruptcy, unless the transfer was made in the ordinary course of the debtor's business. There is a reminder not to list gifts or other transfers already included elsewhere on the form. The question regarding self-settled trusts adds an explanation that such trusts are often referred to as asset-protection devices.

Part 8, *List Certain Financial Accounts, Safe Deposit Boxes, and Storage Units*, adds money market accounts to the examples provided for the question regarding financial accounts or instruments and removes "other instruments" from the examples. Also, the form adds a question about whether the debtor has or had property stored in a storage unit within one year of filing for bankruptcy. The debtor must provide the name and address of the storage facility and anyone who has or had

access to the unit, as well as a description of the contents and whether the debtor still has access to the storage unit. Storage units that are part of the building in which the debtor resides are excluded.

Part 9, *Identify Property You Hold or Control for Someone Else*, instructs that the debtor should include any property that the debtor borrowed from, is storing for, or is holding in trust for someone.

Part 10, *Give Details About Environmental Information*, requires the debtor to list the case title and nature of the case for any judicial or administrative proceeding under any environmental law and to indicate the status of the case.

Part 11, *Give Details About Your Business or Connections to Any Business*, eliminates instructions that apply only to corporations and partnerships. The debtor must indicate if, within four years (previously six years) before filing for bankruptcy, the debtor owned a business or had certain connections to a business, with five categories of businesses provided as checkboxes. If the debtor has a connection to a business, the debtor must list the name, address, nature, and Employer Identification number of the business, the dates the business existed, and the name of an accountant or bookkeeper for the business. Accounting information requested is truncated; the debtor is simply required to provide the name of the business bookkeeper or accountant.

Part 12, *Sign Below*, eliminates the signature boxes for a partnership or corporation and a non-attorney bankruptcy petition preparer. Also, the debtor is asked to indicate through checkboxes whether additional pages are attached to the form.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 108

Statement of Intention for Individuals Filing Under Chapter 7

12/15

If you are an individual filing under chapter 7, you must fill out this form if:

- **creditors have claims secured by your property, or**
- **you have leased personal property and the lease has not expired.**

You must file this form with the court within 30 days after you file your bankruptcy petition or by the date set for the meeting of creditors, whichever is earlier, unless the court extends the time for cause. You must also send copies to the creditors and lessors you list on the form.

If two married people are filing together in a joint case, both are equally responsible for supplying correct information. Both debtors must sign and date the form.

Be as complete and accurate as possible. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known).

Part 1: List Your Creditors Who Have Secured Claims

1. **For any creditors that you listed in Part 1 of *Schedule D: Creditors Who Have Claims Secured by Property* (Official Form 106D), fill in the information below.**

Identify the creditor and the property that is collateral	What do you intend to do with the property that secures a debt?	Did you claim the property as exempt on Schedule C?
Creditor's name: Description of property securing debt:	❑ Surrender the property. ❑ Retain the property and redeem it. ❑ Retain the property and enter into a *Reaffirmation Agreement*. ❑ Retain the property and [explain]: _____	❑ No ❑ Yes
Creditor's name: Description of property securing debt:	❑ Surrender the property. ❑ Retain the property and redeem it. ❑ Retain the property and enter into a *Reaffirmation Agreement*. ❑ Retain the property and [explain]: _____	❑ No ❑ Yes
Creditor's name: Description of property securing debt:	❑ Surrender the property. ❑ Retain the property and redeem it. ❑ Retain the property and enter into a *Reaffirmation Agreement*. ❑ Retain the property and [explain]: _____	❑ No ❑ Yes
Creditor's name: Description of property securing debt:	❑ Surrender the property. ❑ Retain the property and redeem it. ❑ Retain the property and enter into a *Reaffirmation Agreement*. ❑ Retain the property and [explain]: _____	❑ No ❑ Yes

Part 2: List Your Unexpired Personal Property Leases

For any unexpired personal property lease that you listed in *Schedule G: Executory Contracts and Unexpired Leases* (Official Form 106G), fill in the information below. Do not list real estate leases. *Unexpired leases* are leases that are still in effect; the lease period has not yet ended. You may assume an unexpired personal property lease if the trustee does not assume it. 11 U.S.C. § 365(p)(2).

Describe your unexpired personal property leases	Will the lease be assumed?
Lessor's name: Description of leased property:	❑ No ❑ Yes
Lessor's name: Description of leased property:	❑ No ❑ Yes
Lessor's name: Description of leased property:	❑ No ❑ Yes
Lessor's name: Description of leased property:	❑ No ❑ Yes
Lessor's name: Description of leased property:	❑ No ❑ Yes
Lessor's name: Description of leased property:	❑ No ❑ Yes
Lessor's name: Description of leased property:	❑ No ❑ Yes

Part 3: Sign Below

Under penalty of perjury, I declare that I have indicated my intention about any property of my estate that secures a debt and any personal property that is subject to an unexpired lease.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

Rules Appendix B.1-0 12b-011257

COMMITTEE NOTE

Official Form 108, *Statement of Intention for Individuals Filing Under Chapter* 7, is revised in its entirety as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. In addition, the form is renumbered, and stylistic changes are made throughout the form.

The form is derived from former Official Form 8, *Chapter 7 - Individual Debtor's Statement of Intention*. The new form uses language likely to be understandable to non-lawyers. In addition, the instructions are more extensive, advising an individual Chapter 7 debtor that the form must be completed and filed within 30 days and that the debtor must deliver copies of the form to creditors and lessors listed on the form.

Part 1, *List Your Creditors Who Have Secured Claims*, refers to entering into a "Reaffirmation Agreement" rather than asking whether the debtor intends to "reaffirm the debt." In addition, the debtor is asked if the property is claimed as exempt on Schedule C (Official Form 106C).

Part 2, *List Your Unexpired Personal Property Leases*, defines unexpired leases and explains that a debtor may assume an unexpired personal property lease if the trustee does not assume it.

Fill in this information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____ Chapter _____
(If known)

Official Form 119

Bankruptcy Petition Preparer's Notice, Declaration, and Signature

12/15

Bankruptcy petition preparers as defined in 11 U.S.C. § 110 must fill out this form every time they help prepare documents that are filed in the case. If more than one bankruptcy petition preparer helps with the documents, each must sign in Part 3. A bankruptcy petition preparer who does not comply with the provisions of title 11 of the United States Code and the Federal Rules of Bankruptcy Procedure may be fined, imprisoned, or both. 11 U.S.C. § 110; 18 U.S.C. § 156.

Part 1: Notice to Debtor

Bankruptcy petition preparers must give the debtor a copy of this form and have the debtor sign it before they prepare any documents for filing or accept any compensation. A signed copy of this form must be filed with any document prepared.

Bankruptcy petition preparers are not attorneys and may not practice law or give you legal advice, including the following:

- whether to file a petition under the Bankruptcy Code (11 U.S.C. § 101 et seq.);
- whether filing a case under chapter 7, 11, 12, or 13 is appropriate;
- whether your debts will be eliminated or discharged in a case under the Bankruptcy Code;
- whether you will be able to keep your home, car, or other property after filing a case under the Bankruptcy Code;
- what tax consequences may arise because a case is filed under the Bankruptcy Code;
- whether any tax claims may be discharged;
- whether you may or should promise to repay debts to a creditor or enter into a reaffirmation agreement;
- how to characterize the nature of your interests in property or your debts; or
- what procedures and rights apply in a bankruptcy case.

The bankruptcy petition preparer _____ has notified me of
Name

any maximum allowable fee before preparing any document for filing or accepting any fee.

_____ Date _____
Signature of Debtor 1 acknowledging receipt of this notice MM / DD / YYYY

_____ Date _____
Signature of Debtor 2 acknowledging receipt of this notice MM / DD / YYYY

Rules Appendix B.10.7 12b-011259

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

Part 2: Declaration and Signature of the Bankruptcy Petition Preparer

Under penalty of perjury, I declare that:

- I am a bankruptcy petition preparer or the officer, principal, responsible person, or partner of a bankruptcy petition preparer;
- I or my firm prepared the documents listed below and gave the debtor a copy of them and the *Notice to Debtor by Bankruptcy Petition Preparer* as required by 11 U.S.C. §§ 110(b), 110(h), and 342(b); and
- if rules or guidelines are established according to 11 U.S.C. § 110(h) setting a maximum fee for services that bankruptcy petition preparers may charge, I or my firm notified the debtor of the maximum amount before preparing any document for filing or before accepting any fee from the debtor.

_____ _____ _____
Printed name Title, if any Firm name, if it applies

_____
Number Street

_____ _____ _____ _____
City State ZIP Code Contact phone

I or my firm prepared the documents checked below and the completed declaration is made a part of each document that I check:
(Check all that apply.)

- ❑ Voluntary Petition (Form 101)
- ❑ Statement About Your Social Security Numbers (Form 121)
- ❑ Summary of Your Assets and Liabilities and Certain Statistical Information (Form 106Sum)
- ❑ Schedule A/B (Form 106A/B)
- ❑ Schedule C (Form 106C)
- ❑ Schedule D (Form 106D)
- ❑ Schedule E/F (Form 106E/F)
- ❑ Schedule G (Form 106G)
- ❑ Schedule H (Form 106H)
- ❑ Schedule I (Form 106I)
- ❑ Schedule J (Form 106J)
- ❑ Declaration About an Individual Debtor's Schedules (Form 106Dec)
- ❑ Statement of Financial Affairs (Form 107)
- ❑ Statement of Intention for Individuals Filing Under Chapter 7 (Form 108)
- ❑ Chapter 7 Statement of Your Current Monthly Income (Form 122A-1)
- ❑ Statement of Exemption from Presumption of Abuse Under § 707(b)(2) (Form 122A-1Supp)
- ❑ Chapter 7 Means Test Calculation (Form 122A-2)
- ❑ Chapter 11 Statement of Your Current Monthly Income (Form 122B)
- ❑ Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period (Form 122C-1)
- ❑ Chapter 13 Calculation of Your Disposable Income (Form 122C-2)
- ❑ Application to Pay Filing Fee in Installments (Form 103A)
- ❑ Application to Have Chapter 7 Filing Fee Waived (Form 103B)
- ❑ A list of names and addresses of all creditors (*creditor or mailing matrix*)
- ❑ Other _____

Bankruptcy petition preparers must sign and give their Social Security numbers. If more than one bankruptcy petition preparer prepared the documents to which this declaration applies, the signature and Social Security number of each preparer must be provided. 11 U.S.C. § 110.

_____ ___ ___ ___ -- ___ ___ -- ___ ___ ___ ___ Date _____
Signature of bankruptcy petition preparer or officer, principal, responsible person, or partner Social Security number of person who signed MM / DD / YYYY

_____
Printed name

_____ ___ ___ ___ -- ___ ___ -- ___ ___ ___ ___ Date _____
Signature of bankruptcy petition preparer or officer, principal, responsible person, or partner Social Security number of person who signed MM / DD / YYYY

_____
Printed name

COMMITTEE NOTE

Official Form 119, *Bankruptcy Petition Preparer's Notice, Declaration, and Signature*, applies only in cases of individual debtors. It is revised as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. In addition, the form is renumbered, and stylistic changes are made throughout the form.

The form is derived from former Official Form 19, *Declaration and Signature of Non-Attorney Bankruptcy Petition Preparer*. An instruction is added to the form that provides statutory citations. Filers are advised that if more than one bankruptcy petition preparer helped with the documents, each must sign the form.

Part 1, *Notice to Debtor*, is moved to the beginning of the form and revised. An instruction is added that bankruptcy petition preparers must give the debtor a copy of the form and have the debtor sign it before they prepare any documents for filing or accept compensation, and that the form must be filed with any document prepared. It warns the debtor that bankruptcy petition preparers are not attorneys and may not practice law or give legal advice, with a list of examples of advice that may not be provided by a bankruptcy petition preparer. The signature line of this part includes a statement that the debtor acknowledges receipt of the notice.

Part 2, *Declaration and Signature of the Bankruptcy Petition Preparer*, revises the declaration by the bankruptcy petition preparer to include an officer, principal, responsible person, or partner of a bankruptcy petition preparer. The bankruptcy petition preparer must provide a firm name, if applicable, as well as a contact phone, and must indicate which documents the bankruptcy petition preparer prepared from a list of documents. An "other" option is provided for any additional documents. The signature line includes spaces for the bankruptcy petition

12b-011261

preparer to enter a social security number, and language regarding an officer, principal, responsible person, or partner of the bankruptcy petition preparer.

Fill in this information to identify your case:

United States Bankruptcy Court for the:

_____ District of _____
State

Case number (*If known*): _____

Official Form 121

Statement About Your Social Security Numbers

12/15

Use this form to tell the court about any Social Security or federal Individual Taxpayer Identification numbers you have used. Do not file this form as part of the public case file. This form must be submitted separately and must not be included in the court's public electronic records. Please consult local court procedures for submission requirements.

To protect your privacy, the court will not make this form available to the public. You should not include a full Social Security Number or Individual Taxpayer Number on any other document filed with the court. The court will make only the last four digits of your numbers known to the public. However, the full numbers will be available to your creditors, the U.S. Trustee or bankruptcy administrator, and the trustee assigned to your case.

Making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to $250,000, or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

Part 1: Tell the Court About Yourself and Your spouse if Your Spouse is Filing With You

	For Debtor 1:	For Debtor 2 (Only If Spouse Is Filing):
1. Your name	First name	First name
	Middle name	Middle name
	Last name	Last name

Part 2: Tell the Court About all of Your Social Security or Federal Individual Taxpayer Identification Numbers

2. All Social Security Numbers you have used	___ ___ ___ – ___ ___ – ___ ___ ___ ___	___ ___ ___ – ___ ___ – ___ ___ ___ ___
	___ ___ ___ – ___ ___ – ___ ___ ___ ___	___ ___ ___ – ___ ___ – ___ ___ ___ ___
	❑ You do not have a Social Security number.	❑ You do not have a Social Security number.
3. All federal Individual Taxpayer Identification Numbers (ITIN) you have used	9 ___ ___ – ___ ___ – ___ ___ ___ ___	9 ___ ___ – ___ ___ – ___ ___ ___ ___
	9 ___ ___ – ___ ___ – ___ ___ ___ ___	9 ___ ___ – ___ ___ – ___ ___ ___ ___
	❑ You do not have an ITIN.	❑ You do not have an ITIN.

Part 3: Sign Below

Under penalty of perjury, I declare that the information I have provided in this form is true and correct.	Under penalty of perjury, I declare that the information I have provided in this form is true and correct.
✘ _____	✘ _____
Signature of Debtor 1	Signature of Debtor 2
Date _____ MM / DD / YYYY	Date _____ MM / DD / YYYY

COMMITTEE NOTE

Official Form 121, *Statement About Your Social Security Numbers*, is revised as part of the Forms Modernization Project. The form, which applies only in cases of individual debtors, replaces former Official Form 21, *Statement of Social Security Number(s).* It is renumbered to distinguish it from the forms used by non-individual debtors, such as corporations and partnerships.

To make Form 121 easier to understand and complete, the form is divided into three sections, and directions on the form are simplified. The debtor's Employer Tax-Identification number (EIN) is eliminated from the form, and the debtor's name is moved from the caption to the body of the form.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number (If known) _____

Check one box only as directed in this form and in Form 122A-1Supp:

❑ 1. There is no presumption of abuse.

❑ 2. The calculation to determine if a presumption of abuse applies will be made under *Chapter 7 Means Test Calculation* (Official Form 122A–2).

❑ 3. The Means Test does not apply now because of qualified military service but it could apply later.

❑ Check if this is an amended filing

Official Form 122A–1

Chapter 7 Statement of Your Current Monthly Income

12/15

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for being accurate. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known). If you believe that you are exempted from a presumption of abuse because you do not have primarily consumer debts or because of qualifying military service, complete and file *Statement of Exemption from Presumption of Abuse Under § 707(b)(2)* (Official Form 122A-1Supp) with this form.

Part 1: Calculate Your Current Monthly Income

1. **What is your marital and filing status?** Check one only.
   - ❑ **Not married.** Fill out Column A, lines 2-11.
   - ❑ **Married and your spouse is filing with you.** Fill out both Columns A and B, lines 2-11.
   - ❑ **Married and your spouse is NOT filing with you. You and your spouse are:**
     - ❑ **Living in the same household and are not legally separated.** Fill out both Columns A and B, lines 2-11.
     - ❑ **Living separately or are legally separated**. Fill out Column A, lines 2-11; do not fill out Column B. By checking this box, you declare under penalty of perjury that you and your spouse are legally separated under nonbankruptcy law that applies or that you and your spouse are living apart for reasons that do not include evading the Means Test requirements. 11 U.S.C. § 707(b)(7)(B).

Fill in the average monthly income that you received from all sources, derived during the 6 full months before you file this bankruptcy case. 11 U.S.C. § 101(10A). For example, if you are filing on September 15, the 6-month period would be March 1 through August 31. If the amount of your monthly income varied during the 6 months, add the income for all 6 months and divide the total by 6. Fill in the result. Do not include any income amount more than once. For example, if both spouses own the same rental property, put the income from that property in one column only. If you have nothing to report for any line, write $0 in the space.

				Column A **Debtor 1**	*Column B* **Debtor 2 or non-filing spouse**
2. **Your gross wages, salary, tips, bonuses, overtime, and commissions** (before all payroll deductions).				$_____	$_____
3. **Alimony and maintenance payments.** Do not include payments from a spouse if Column B is filled in.				$_____	$_____
4. **All amounts from any source which are regularly paid for household expenses of you or your dependents, including child support.** Include regular contributions from an unmarried partner, members of your household, your dependents, parents, and roommates. Include regular contributions from a spouse only if Column B is not filled in. Do not include payments you listed on line 3.				$_____	$_____
5. **Net income from operating a business, profession, or farm**	**Debtor 1**	**Debtor 2**			
Gross receipts (before all deductions)	$_____	$_____			
Ordinary and necessary operating expenses	– $_____	– $_____			
Net monthly income from a business, profession, or farm	$_____	$_____	**Copy here➔**	$_____	$_____
6. **Net income from rental and other real property**	**Debtor 1**	**Debtor 2**			
Gross receipts (before all deductions)	$_____	$_____			
Ordinary and necessary operating expenses	– $_____	– $_____			
Net monthly income from rental or other real property	$_____	$_____	**Copy here➔**	$_____	$_____
7. **Interest, dividends, and royalties**				$_____	$_____

Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

	Column A Debtor 1	Column B Debtor 2 or non-filing spouse
8. **Unemployment compensation**	$_____	$_____
Do not enter the amount if you contend that the amount received was a benefit under the Social Security Act. Instead, list it here:..... ↓		
For you..... $_____		
For your spouse..... $_____		
9. **Pension or retirement income.** Do not include any amount received that was a benefit under the Social Security Act.	$_____	$_____
10. **Income from all other sources not listed above.** Specify the source and amount. Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, a crime against humanity, or international or domestic terrorism. If necessary, list other sources on a separate page and put the total below.		
_____	$_____	$_____
_____	$_____	$_____
Total amounts from separate pages, if any.	+ $_____	+ $_____
11. **Calculate your total current monthly income.** Add lines 2 through 10 for each column. Then add the total for Column A to the total for Column B.	$_____ +	$_____ = $_____ Total current monthly income

Part 2: Determine Whether the Means Test Applies to You

12. **Calculate your current monthly income for the year.** Follow these steps:

12a. Copy your total current monthly income from line 11. ..... **Copy line 11 here** ➔ $_____

Multiply by 12 (the number of months in a year). x 12

12b. The result is your annual income for this part of the form. 12b. $_____

13. **Calculate the median family income that applies to you.** Follow these steps:

Fill in the state in which you live. _____

Fill in the number of people in your household. _____

Fill in the median family income for your state and size of household. .....13. $_____

To find a list of applicable median income amounts, go online using the link specified in the separate instructions for this form. This list may also be available at the bankruptcy clerk's office.

14. **How do the lines compare?**

14a. ❑ Line 12b is less than or equal to line 13. On the top of page 1, check box 1, *There is no presumption of abuse.* Go to Part 3.

14b. ❑ Line 12b is more than line 13. On the top of page 1, check box 2, *The presumption of abuse is determined by Form 122A-2*. Go to Part 3 and fill out Form 122A–*2.*

Part 3: Sign Below

By signing here, I declare under penalty of perjury that the information on this statement and in any attachments is true and correct.

✘ _____ ✘ _____
Signature of Debtor 1 Signature of Debtor 2

Date _____ Date _____
MM / DD / YYYY MM / DD / YYYY

If you checked line 14a, do NOT fill out or file Form 122A–2.

If you checked line 14b, fill out Form 122A–2 and file it with this form.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 122A–1Supp

Statement of Exemption from Presumption of Abuse Under § 707(b)(2) 12/15

File this supplement together with *Chapter 7 Statement of Your Current Monthly Income* (Official Form 122A-1), if you believe that you are exempted from a presumption of abuse. Be as complete and accurate as possible. If two married people are filing together, and any of the exclusions in this statement applies to only one of you, the other person should complete a separate Form 122A-1 if you believe that this is required by 11 U.S.C. § 707(b)(2)(C).

Part 1: Identify the Kind of Debts You Have

1. **Are your debts primarily consumer debts?** *Consumer debts* are defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose." Make sure that your answer is consistent with the answer you gave at line 16 of the *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101).

   ❑ No. Go to Form 122A-1; on the top of page 1 of that form, check box 1, *There is no presumption of abuse,* and sign Part 3. Then submit this supplement with the signed Form 122A-1.

   ❑ Yes. Go to Part 2.

Part 2: Determine Whether Military Service Provisions Apply to You

2. **Are you a disabled veteran** (as defined in 38 U.S.C. § 3741(1))**?**

   ❑ No. Go to line 3.

   ❑ Yes. Did you incur debts mostly while you were on active duty or while you were performing a homeland defense activity? 10 U.S.C. § 101(d)(1); 32 U.S.C. § 901(1).

   ❑ No. Go to line 3.

   ❑ Yes. Go to Form 122A-1; on the top of page 1 of that form, check box 1, *There is no presumption of abuse,* and sign Part 3. Then submit this supplement with the signed Form 122A-1.

3. **Are you or have you been a Reservist or member of the National Guard?**

   ❑ No. Complete Form 122A-1. Do not submit this supplement.

   ❑ Yes. Were you called to active duty or did you perform a homeland defense activity? 10 U.S.C. § 101(d)(1); 32 U.S.C. § 901(1).

   ❑ No. Complete Form 122A-1. Do not submit this supplement.

   ❑ Yes. Check any one of the following categories that applies:

   ❑ **I was called to active duty after September 11, 2001**, for at least 90 days and remain on active duty**.**

   ❑ **I was called to active duty after September 11, 2001,** for at least 90 days and was released from active duty on _____, which is fewer than 540 days before I file this bankruptcy case.

   ❑ **I am performing a homeland defense activity for at least 90 days.**

   ❑ **I performed a homeland defense activity for at least 90 days**, ending on _____, which is fewer than 540 days before I file this bankruptcy case.

If you checked one of the categories to the left, go to Form 122A-1. On the top of page 1 of Form 122A-1, check box 3, *The Means Test does not apply now,* and sign Part 3. Then submit this supplement with the signed Form 122A-1. You are not required to fill out the rest of Official Form 122A-1 during the exclusion period. The *exclusion period* means the time you are on active duty or are performing a homeland defense activity, and for 540 days afterward. 11 U.S.C. § 707(b)(2)(D)(ii).

If your exclusion period ends before your case is closed, you may have to file an amended form later.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number _____
(If known)

Check the appropriate box as directed in lines 40 or 42:

According to the calculations required by this Statement:

❑ 1. There is no presumption of abuse.

❑ 2. There is a presumption of abuse.

❑ Check if this is an amended filing

Official Form 122A–2

Chapter 7 Means Test Calculation

12/15

To fill out this form, you will need your completed copy of *Chapter 7 Statement of Your Current Monthly Income* (Official Form 122A-1).

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for being accurate. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).

Part 1: Determine Your Adjusted Income

1. **Copy your total current monthly income.** ..... **Copy line 11 from Official Form 122A-1 here** ➔ ..... $_____

2. **Did you fill out Column B in Part 1 of Form 122A–1?**

   ❑ No. Fill in $0 for the total on line 3.

   ❑ Yes. Is your spouse filing with you?

   ❑ No. Go to line 3.

   ❑ Yes. Fill in $0 for the total on line 3.

3. **Adjust your current monthly income by subtracting any part of your spouse's income not used to pay for the household expenses of you or your dependents.** Follow these steps:

   On line 11, Column B of Form 122A–1, was any amount of the income you reported for your spouse NOT regularly used for the household expenses of you or your dependents?

   ❑ No. Fill in 0 for the total on line 3.

   ❑ Yes. Fill in the information below:

State each purpose for which the income was used For example, the income is used to pay your spouse's tax debt or to support people other than you or your dependents	**Fill in the amount you are subtracting from your spouse's income**
_____	$_____
_____	$_____
_____	+ $_____
Total.	$_____

Copy total here ..... ➔ — $_____

4. **Adjust your current monthly income.** Subtract the total on line 3 from line 1. $_____

Rules Appendix B-156
12b-011268

Part 2: Calculate Your Deductions from Your Income

The Internal Revenue Service (IRS) issues National and Local Standards for certain expense amounts. Use these amounts to answer the questions in lines 6-15. To find the IRS standards, go online using the link specified in the separate instructions for this form. This information may also be available at the bankruptcy clerk's office.

Deduct the expense amounts set out in lines 6-15 regardless of your actual expense. In later parts of the form, you will use some of your actual expenses if they are higher than the standards. Do not deduct any amounts that you subtracted from your spouse's income in line 3 and do not deduct any operating expenses that you subtracted from income in lines 5 and 6 of Form 122A–1.

If your expenses differ from month to month, enter the average expense.

Whenever this part of the form refers to *you*, it means both you and your spouse if Column B of Form 122A–1 is filled in.

5. **The number of people used in determining your deductions from income**

   Fill in the number of people who could be claimed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support. This number may be different from the number of people in your household. [ ]

National Standards You must use the IRS National Standards to answer the questions in lines 6-7.

6. **Food, clothing, and other items:** Using the number of people you entered in line 5 and the IRS National Standards, fill in the dollar amount for food, clothing, and other items. $_____

7. **Out-of-pocket health care allowance:** Using the number of people you entered in line 5 and the IRS National Standards, fill in the dollar amount for out-of-pocket health care. The number of people is split into two categories—people who are under 65 and people who are 65 or older—because older people have a higher IRS allowance for health care costs. If your actual expenses are higher than this IRS amount, you may deduct the additional amount on line 22.

People who are under 65 years of age

7a. Out-of-pocket health care allowance per person $_____

7b. Number of people who are under 65 X _____

7c. **Subtotal.** Multiply line 7a by line 7b. $_____ **Copy here➔** $_____

People who are 65 years of age or older

7d. Out-of-pocket health care allowance per person $_____

7e. Number of people who are 65 or older X _____

7f. **Subtotal.** Multiply line 7d by line 7e. $_____ **Copy here➔** + $_____

7g. **Total**. Add lines 7c and 7f..... $_____ **Copy total here➔** $_____

Local Standards You must use the IRS Local Standards to answer the questions in lines 8-15.

Based on information from the IRS, the U.S. Trustee Program has divided the IRS Local Standard for housing for bankruptcy purposes into two parts:

- **Housing and utilities – Insurance and operating expenses**
- **Housing and utilities – Mortgage or rent expenses**

To answer the questions in lines 8-9, use the U.S. Trustee Program chart.

To find the chart, go online using the link specified in the separate instructions for this form.
This chart may also be available at the bankruptcy clerk's office.

8. **Housing and utilities – Insurance and operating expenses:** Using the number of people you entered in line 5, fill in the dollar amount listed for your county for insurance and operating expenses. ..... $_____

9. **Housing and utilities – Mortgage or rent expenses:**

9a. Using the number of people you entered in line 5, fill in the dollar amount listed for your county for mortgage or rent expenses..... $_____

9b. Total average monthly payment for all mortgages and other debts secured by your home.

To calculate the total average monthly payment, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Then divide by 60.

Name of the creditor	Average monthly payment
_____	$_____
_____	$_____
_____	+ $_____
Total average monthly payment	$_____

Copy here ➔ — $_____ Repeat this amount on line 33a.

9c. Net mortgage or rent expense.
Subtract line 9b (*total average monthly payment*) from line 9a (*mortgage or rent expense*). If this amount is less than $0, enter $0..... $_____ Copy here ➔ $_____

10. **If you claim that the U.S. Trustee Program's division of the IRS Local Standard for housing is incorrect and affects the calculation of your monthly expenses, fill in any additional amount you claim.** $_____

Explain why: _____
_____

11. **Local transportation expenses:** Check the number of vehicles for which you claim an ownership or operating expense.

- ❑ 0. Go to line 14.
- ❑ 1. Go to line 12.
- ❑ 2 or more. Go to line 12.

12. **Vehicle operation expense:** Using the IRS Local Standards and the number of vehicles for which you claim the operating expenses, fill in the *Operating Costs* that apply for your Census region or metropolitan statistical area. $_____

13. **Vehicle ownership or lease expense:** Using the IRS Local Standards, calculate the net ownership or lease expense for each vehicle below. You may not claim the expense if you do not make any loan or lease payments on the vehicle. In addition, you may not claim the expense for more than two vehicles.

Vehicle 1 **Describe Vehicle 1:** _____

_____

13a. Ownership or leasing costs using IRS Local Standard. ..... $_____

13b. Average monthly payment for all debts secured by Vehicle 1.
Do not include costs for leased vehicles.

To calculate the average monthly payment here and on line 13e, add all amounts that are contractually due to each secured creditor in the 60 months after you filed for bankruptcy. Then divide by 60.

Name of each creditor for Vehicle 1	Average monthly payment
_____	$_____
_____	+ $_____

Total average monthly payment $_____ **Copy here** ➔ — $_____ Repeat this amount on line 33b.

13c. Net Vehicle 1 ownership or lease expense
Subtract line 13b from line 13a. If this amount is less than $0, enter $0. ..... $_____ **Copy net Vehicle 1 expense here** ..... ➔ $_____

Vehicle 2 **Describe Vehicle 2:** _____

_____

13d. Ownership or leasing costs using IRS Local Standard. ..... $_____

13e. Average monthly payment for all debts secured by Vehicle 2.
Do not include costs for leased vehicles.

Name of each creditor for Vehicle 2	Average monthly payment
_____	$_____
_____	+ $_____

Total average monthly payment $_____ **Copy here** ➔ — $_____ Repeat this amount on line 33c.

13f. Net Vehicle 2 ownership or lease expense
Subtract line 13e from 13d. If this amount is less than $0, enter $0. ..... $_____ **Copy net Vehicle 2 expense here** ... ➔ $_____

14. **Public transportation expense**: If you claimed 0 vehicles in line 11, using the IRS Local Standards, fill in the *Public Transportation* expense allowance regardless of whether you use public transportation. $_____

15. **Additional public transportation expense:** If you claimed 1 or more vehicles in line 11 and if you claim that you may also deduct a public transportation expense, you may fill in what you believe is the appropriate expense, but you may not claim more than the IRS Local Standard for *Public Transportation*. $_____

Other Necessary Expenses In addition to the expense deductions listed above, you are allowed your monthly expenses for the following IRS categories.

16. **Taxes:** The total monthly amount that you will actually owe for federal, state and local taxes, such as income taxes, self-employment taxes, Social Security taxes, and Medicare taxes. You may include the monthly amount withheld from your pay for these taxes. However, if you expect to receive a tax refund, you must divide the expected refund by 12 and subtract that number from the total monthly amount that is withheld to pay for taxes.
    Do not include real estate, sales, or use taxes. $_____

17. **Involuntary deductions:** The total monthly payroll deductions that your job requires, such as retirement contributions, union dues, and uniform costs.
    Do not include amounts that are not required by your job, such as voluntary 401(k) contributions or payroll savings. $_____

18. **Life insurance:** The total monthly premiums that you pay for your own term life insurance. If two married people are filing together, include payments that you make for your spouse's term life insurance. Do not include premiums for life insurance on your dependents, for a non-filing spouse's life insurance, or for any form of life insurance other than term. $_____

19. **Court-ordered payments:** The total monthly amount that you pay as required by the order of a court or administrative agency, such as spousal or child support payments.
    Do not include payments on past due obligations for spousal or child support. You will list these obligations in line 35. $_____

20. **Education:** The total monthly amount that you pay for education that is either required:
    - as a condition for your job, or
    - for your physically or mentally challenged dependent child if no public education is available for similar services. $_____

21. **Childcare:** The total monthly amount that you pay for childcare, such as babysitting, daycare, nursery, and preschool.
    Do not include payments for any elementary or secondary school education. $_____

22. **Additional health care expenses, excluding insurance costs:** The monthly amount that you pay for health care that is required for the health and welfare of you or your dependents and that is not reimbursed by insurance or paid by a health savings account. Include only the amount that is more than the total entered in line 7.
    Payments for health insurance or health savings accounts should be listed only in line 25. $_____

23. **Optional telephones and telephone services:** The total monthly amount that you pay for telecommunication services for you and your dependents, such as pagers, call waiting, caller identification, special long distance, or business cell phone service, to the extent necessary for your health and welfare or that of your dependents or for the production of income, if it is not reimbursed by your employer. + $_____
    Do not include payments for basic home telephone, internet and cell phone service. Do not include self-employment expenses, such as those reported on line 5 of Official Form 122A-1, or any amount you previously deducted.

24. **Add all of the expenses allowed under the IRS expense allowances.**
    Add lines 6 through 23. $_____

Additional Expense Deductions These are additional deductions allowed by the Means Test.
Note: Do not include any expense allowances listed in lines 6-24.

25. **Health insurance, disability insurance, and health savings account expenses.** The monthly expenses for health insurance, disability insurance, and health savings accounts that are reasonably necessary for yourself, your spouse, or your dependents.

Health insurance	$_____	
Disability insurance	$_____	
Health savings account	+ $_____	
Total	$_____	**Copy total here**➔ ..... $_____

Do you actually spend this total amount?

❑ No. How much do you actually spend? $_____
❑ Yes

26. **Continuing contributions to the care of household or family members.** The actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses. These expenses may include contributions to an account of a qualified ABLE program. 26 U.S.C. § 529A(b). $_____

27. **Protection against family violence.** The reasonably necessary monthly expenses that you incur to maintain the safety of you and your family under the Family Violence Prevention and Services Act or other federal laws that apply. $_____

By law, the court must keep the nature of these expenses confidential.

28. **Additional home energy costs.** Your home energy costs are included in your insurance and operating expenses on line 8.

If you believe that you have home energy costs that are more than the home energy costs included in expenses on line 8, then fill in the excess amount of home energy costs. $_____

You must give your case trustee documentation of your actual expenses, and you must show that the additional amount claimed is reasonable and necessary.

29. **Education expenses for dependent children who are younger than 18.** The monthly expenses (not more than $156.25* per child) that you pay for your dependent children who are younger than 18 years old to attend a private or public elementary or secondary school. $_____

You must give your case trustee documentation of your actual expenses, and you must explain why the amount claimed is reasonable and necessary and not already accounted for in lines 6-23.

* Subject to adjustment on 4/01/16, and every 3 years after that for cases begun on or after the date of adjustment.

30. **Additional food and clothing expense.** The monthly amount by which your actual food and clothing expenses are higher than the combined food and clothing allowances in the IRS National Standards. That amount cannot be more than 5% of the food and clothing allowances in the IRS National Standards. $_____

To find a chart showing the maximum additional allowance, go online using the link specified in the separate instructions for this form. This chart may also be available at the bankruptcy clerk's office.

You must show that the additional amount claimed is reasonable and necessary.

31. **Continuing charitable contributions.** The amount that you will continue to contribute in the form of cash or financial instruments to a religious or charitable organization. 26 U.S.C. § 170(c)(1)-(2). + $_____

32. **Add all of the additional expense deductions.** $_____
Add lines 25 through 31.

Deductions for Debt Payment

33. **For debts that are secured by an interest in property that you own, including home mortgages, vehicle loans, and other secured debt, fill in lines 33a through 33e.**

To calculate the total average monthly payment, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Then divide by 60.

		Average monthly payment
Mortgages on your home:		
33a. Copy line 9b here	➔	$_____
Loans on your first two vehicles:		
33b. Copy line 13b here.	➔	$_____
33c. Copy line 13e here.	➔	$_____

33d. List other secured debts:

Name of each creditor for other secured debt	Identify property that secures the debt	Does payment include taxes or insurance?	
_____	_____	❑ No ❑ Yes	$_____
_____	_____	❑ No ❑ Yes	$_____
_____	_____	❑ No ❑ Yes	+ $_____

33e. Total average monthly payment. Add lines 33a through 33d. $_____ **Copy total here➔** $_____

34. **Are any debts that you listed in line 33 secured by your primary residence, a vehicle, or other property necessary for your support or the support of your dependents?**

❑ No. Go to line 35.
❑ Yes. State any amount that you must pay to a creditor, in addition to the payments listed in line 33, to keep possession of your property (called the *cure amount*). Next, divide by 60 and fill in the information below.

Name of the creditor	Identify property that secures the debt	Total cure amount		Monthly cure amount
_____	_____	$_____	÷ 60 =	$_____
_____	_____	$_____	÷ 60 =	$_____
_____	_____	$_____	÷ 60 =	+ $_____
			Total	$_____

Copy total here➔ $_____

35. **Do you owe any priority claims such as a priority tax, child support, or alimony — that are past due as of the filing date of your bankruptcy case?** 11 U.S.C. § 507.

❑ No. Go to line 36.
❑ Yes. Fill in the total amount of all of these priority claims. Do not include current or ongoing priority claims, such as those you listed in line 19.

Total amount of all past-due priority claims $_____ ÷ 60 = $_____

36. **Are you eligible to file a case under Chapter 13?** 11 U.S.C. § 109(e).
For more information, go online using the link for *Bankruptcy Basics* specified in the separate instructions for this form. *Bankruptcy Basics* may also be available at the bankruptcy clerk's office.

❑ No. Go to line 37.

❑ Yes. Fill in the following information.

Projected monthly plan payment if you were filing under Chapter 13 $_____

Current multiplier for your district as stated on the list issued by the Administrative Office of the United States Courts (for districts in Alabama and North Carolina) or by the Executive Office for United States Trustees (for all other districts). x _____

To find a list of district multipliers that includes your district, go online using the link specified in the separate instructions for this form. This list may also be available at the bankruptcy clerk's office.

Average monthly administrative expense if you were filing under Chapter 13 $_____ **Copy total here➔** $_____

37. **Add all of the deductions for debt payment.**
Add lines 33e through 36. ..... $_____

Total Deductions from Income

38. **Add all of the allowed deductions.**

Copy line 24, *All of the expenses allowed under IRS expense allowances* ..... $_____

Copy line 32, *All of the additional expense deductions*..... $_____

Copy line 37, *All of the deductions for debt payment* ..... + $_____

Total deductions $_____ **Copy total here** .....➔ $_____

Part 3: Determine Whether There Is a Presumption of Abuse

39. **Calculate monthly disposable income for 60 months**

39a. Copy line 4, *adjusted current monthly income* ..... $_____

39b. Copy line 38, *Total deductions*. ..... − $_____

39c. Monthly disposable income. 11 U.S.C. § 707(b)(2). Subtract line 39b from line 39a. $_____ **Copy here➔** $_____

For the next 60 months (5 years)..... x 60

39d. **Total**. Multiply line 39c by 60. ..... $_____ **Copy here➔** $_____

40. **Find out whether there is a presumption of abuse.** Check the box that applies:

❑ **The line 39d is less than $7,475*.** On the top of page 1 of this form, check box 1, *There is no presumption of abuse.* Go to Part 5.

❑ **The line 39d is more than $12,475*.** On the top of page 1 of this form, check box 2, *There is a presumption of abuse.* You may fill out Part 4 if you claim special circumstances. Then go to Part 5.

❑ **The line 39d is at least $7,475*, but not more than $12,475*.** Go to line 41.

* Subject to adjustment on 4/01/16, and every 3 years after that for cases filed on or after the date of adjustment.

41. 41a. **Fill in the amount of your total nonpriority unsecured debt.** If you filled out *A Summary of Your Assets and Liabilities and Certain Statistical Information Schedules* (Official Form 106Sum), you may refer to line 3b on that form. ..... $_____

x .25

41b. **25% of your total nonpriority unsecured debt.** 11 U.S.C. § 707(b)(2)(A)(i)(I). Multiply line 41a by 0.25. ..... $_____ **Copy here** ➔ $_____

42. **Determine whether the income you have left over after subtracting all allowed deductions is enough to pay 25% of your unsecured, nonpriority debt.**
Check the box that applies:

❑ **Line 39d is less than line 41b.** On the top of page 1 of this form, check box 1, *There is no presumption of abuse.* Go to Part 5.

❑ **Line 39d is equal to or more than line 41b.** On the top of page 1 of this form, check box 2, *There is a presumption of abuse.* You may fill out Part 4 if you claim special circumstances. Then go to Part 5.

Part 4: Give Details About Special Circumstances

43. **Do you have any special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative?** 11 U.S.C. § 707(b)(2)(B).

❑ No. Go to Part 5.

❑ Yes. Fill in the following information. All figures should reflect your average monthly expense or income adjustment for each item. You may include expenses you listed in line 25.

You must give a detailed explanation of the special circumstances that make the expenses or income adjustments necessary and reasonable. You must also give your case trustee documentation of your actual expenses or income adjustments.

Give a detailed explanation of the special circumstances	Average monthly expense or income adjustment
_____	$_____
_____	$_____
_____	$_____
_____	$_____

Part 5: Sign Below

By signing here, I declare under penalty of perjury that the information on this statement and in any attachments is true and correct.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

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12b-011276

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❒ Check if this is an amended filing

Official Form 122B

Chapter 11 Statement of Your Current Monthly Income

12/15

You must file this form if you are an individual and are filing for bankruptcy under Chapter 11. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).

Part 1: Calculate Your Current Monthly Income

1. **What is your marital and filing status?** Check one only.

   ❑ **Not married.** Fill out Column A, lines 2-11.

   ❑ **Married and your spouse is filing with you.** Fill out both Columns A and B, lines 2-11.

   ❑ **Married and your spouse is NOT filing with you.** Fill out Column A, lines 2-11.

Fill in the average monthly income that you received from all sources, derived during the 6 full months before you file this bankruptcy case. 11 U.S.C. § 101(10A). For example, if you are filing on September 15, the 6-month period would be March 1 through August 31. If the amount of your monthly income varied during the 6 months, add the income for all 6 months and divide the total by 6. Fill in the result.
Do not include any income amount more than once. For example, if both spouses own the same rental property, put the income from that property in one column only. If you have nothing to report for any line, write $0 in the space.

	Column A **Debtor 1**	*Column B* **Debtor 2**
2. **Your gross wages, salary, tips, bonuses, overtime, and commissions** (before all payroll deductions).	$_____	$_____
3. **Alimony and maintenance payments.** Do not include payments from a spouse if Column B is filled in.	$_____	$_____
4. **All amounts from any source which are regularly paid for household expenses of you or your dependents, including child support.** Include regular contributions from an unmarried partner, members of your household, your dependents, parents, and roommates. Include regular contributions from a spouse only if Column B is not filled in. Do not include payments you listed on line 3.	$_____	$_____

5. **Net income from operating a business, profession, or farm**

	Debtor 1	**Debtor 2**			
Gross receipts (before all deductions)	$_____	$_____			
Ordinary and necessary operating expenses	− $_____	− $_____			
Net monthly income from a business, profession, or farm	$_____	$_____	**Copy here➔**	$_____	$_____

6. **Net income from rental and other real property**

	Debtor 1	**Debtor 2**			
Gross receipts (before all deductions)	$_____	$_____			
Ordinary and necessary operating expenses	− $_____	− $_____			
Net monthly income from rental or other real property	$_____	$_____	**Copy here➔**	$_____	$_____

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Debtor 1 _____ Case number (*if known*)_____
First Name Middle Name Last Name

	Column A **Debtor 1**	*Column B* **Debtor 2**
7. **Interest, dividends, and royalties**	$_____	$_____
8. **Unemployment compensation**	$_____	$_____
Do not enter the amount if you contend that the amount received was a benefit under the Social Security Act. Instead, list it here: ..... ↓		
For you ..... $_____		
For your spouse..... $_____		
9. **Pension or retirement income.** Do not include any amount received that was a benefit under the Social Security Act.	$_____	$_____
10. **Income from all other sources not listed above.** Specify the source and amount. Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, a crime against humanity, or international or domestic terrorism. If necessary, list other sources on a separate page and put the total below.		
_____	$_____	$_____
_____	$_____	$_____
Total amounts from separate pages, if any.	+ $_____	+ $_____
11. **Calculate your total current monthly income.** Add lines 2 through 10 for each column. Then add the total for Column A to the total for Column B.	$_____ +	$_____ = $_____
		Total current monthly income

Part 2: Sign Below

By signing here, under penalty of perjury I declare that the information on this statement and in any attachments is true and correct.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date_____
MM / DD / YYYY

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Check as directed in lines 17 and 21:

According to the calculations required by this Statement:

- ❑ 1. Disposable income is not determined under 11 U.S.C. § 1325(b)(3).
- ❑ 2. Disposable income is determined under 11 U.S.C. § 1325(b)(3).

- ❑ 3. The commitment period is 3 years.
- ❑ 4. The commitment period is 5 years.

❑ Check if this is an amended filing

Official Form 122C–1

Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period

12/15

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for being accurate. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).

Part 1: Calculate Your Average Monthly Income

1. **What is your marital and filing status?** Check one only.
   - ❑ **Not married.** Fill out Column A, lines 2-11.
   - ❑ **Married.** Fill out both Columns A and B, lines 2-11.

Fill in the average monthly income that you received from all sources, derived during the 6 full months before you file this bankruptcy case. 11 U.S.C. § 101(10A). For example, if you are filing on September 15, the 6-month period would be March 1 through August 31. If the amount of your monthly income varied during the 6 months, add the income for all 6 months and divide the total by 6. Fill in the result. Do not include any income amount more than once. For example, if both spouses own the same rental property, put the income from that property in one column only. If you have nothing to report for any line, write $0 in the space.

	Column A **Debtor 1**	*Column B* **Debtor 2 or non-filing spouse**
2. **Your gross wages, salary, tips, bonuses, overtime, and commissions** (before all payroll deductions).	$_____	$_____
3. **Alimony and maintenance payments.** Do not include payments from a spouse.	$_____	$_____
4. **All amounts from any source which are regularly paid for household expenses of you or your dependents, including child support.** Include regular contributions from an unmarried partner, members of your household, your dependents, parents, and roommates. Do not include payments from a spouse. Do not include payments you listed on line 3.	$_____	$_____

5. **Net income from operating a business, profession, or farm**	**Debtor 1**	**Debtor 2**			
Gross receipts (before all deductions)	$_____	$_____			
Ordinary and necessary operating expenses	– $_____	– $_____			
Net monthly income from a business, profession, or farm	$_____	$_____	Copy here➔	$_____	$_____

6. **Net income from rental and other real property**	**Debtor 1**	**Debtor 2**			
Gross receipts (before all deductions)	$_____	$_____			
Ordinary and necessary operating expenses	– $_____	– $_____			
Net monthly income from rental or other real property	$_____	$_____	Copy here➔	$_____	$_____

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	Column A **Debtor 1**	Column B **Debtor 2 or non-filing spouse**
7. **Interest, dividends, and royalties**	$_____	$_____
8. **Unemployment compensation**	$_____	$_____
Do not enter the amount if you contend that the amount received was a benefit under the Social Security Act. Instead, list it here: ..... ➔		
For you ..... $_____		
For your spouse ..... $_____		
9. **Pension or retirement income.** Do not include any amount received that was a benefit under the Social Security Act.	$_____	$_____
10. **Income from all other sources not listed above.** Specify the source and amount. Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, a crime against humanity, or international or domestic terrorism. If necessary, list other sources on a separate page and put the total below.		
_____	$_____	$_____
_____	$_____	$_____
Total amounts from separate pages, if any.	+ $_____	+ $_____
11. **Calculate your total average monthly income.** Add lines 2 through 10 for each column. Then add the total for Column A to the total for Column B.	$_____ +	$_____ = $_____
		Total average monthly income

Part 2: Determine How to Measure Your Deductions from Income

12. **Copy your total average monthly income from line 11.** ..... $_____

13. **Calculate the marital adjustment.** Check one:

- ❑ You are not married. Fill in 0 below.
- ❑ You are married and your spouse is filing with you. Fill in 0 below.
- ❑ You are married and your spouse is not filing with you.

Fill in the amount of the income listed in line 11, Column B, that was NOT regularly paid for the household expenses of you or your dependents, such as payment of the spouse's tax liability or the spouse's support of someone other than you or your dependents.

Below, specify the basis for excluding this income and the amount of income devoted to each purpose. If necessary, list additional adjustments on a separate page.

If this adjustment does not apply, enter 0 below.

_____ $_____

_____ $_____

_____ + $_____

Total ..... $_____ **Copy here** ➔ – _____

14. **Your current monthly income.** Subtract the total in line 13 from line 12. $ _____

15. **Calculate your current monthly income for the year.** Follow these steps:

15a. Copy line 14 here ➔ ..... $ _____

Multiply line 15a by 12 (the number of months in a year). **x** 12

15b. The result is your current monthly income for the year for this part of the form. ..... $_____

16. **Calculate the median family income that applies to you.** Follow these steps:

16a. Fill in the state in which you live. _____

16b. Fill in the number of people in your household. _____

16c. Fill in the median family income for your state and size of household. ..... $_____
To find a list of applicable median income amounts, go online using the link specified in the separate instructions for this form. This list may also be available at the bankruptcy clerk's office.

17. **How do the lines compare?**

17a. ❑ Line 15b is less than or equal to line 16c. On the top of page 1 of this form, check box 1, *Disposable income is not determined under 11 U.S.C. § 1325(b)(3)*. **Go to Part 3.** Do NOT fill out *Calculation of Your Disposable Income* (Official Form 122C–2).

17b. ❑ Line 15b is more than line 16c. On the top of page 1 of this form, check box 2, *Disposable income is determined under 11 U.S.C. § 1325(b)(3).* **Go to Part 3 and fill out Calculation of Your Disposable Income (Official Form 122C–2).** On line 39 of that form, copy your current monthly income from line 14 above.

Part 3: Calculate Your Commitment Period Under 11 U.S.C. § 1325(b)(4)

18. **Copy your total average monthly income from line 11.** ..... $_____

19. **Deduct the marital adjustment if it applies.** If you are married, your spouse is not filing with you, and you contend that calculating the commitment period under 11 U.S.C. § 1325(b)(4) allows you to deduct part of your spouse's income, copy the amount from line 13.

19a. If the marital adjustment does not apply, fill in 0 on line 19a. ..... — $_____

19b. **Subtract line 19a from line 18.** $_____

20. **Calculate your current monthly income for the year.** Follow these steps:

20a. Copy line 19b.. ..... $_____

Multiply by 12 (the number of months in a year). x 12

20b. The result is your current monthly income for the year for this part of the form. $_____

20c. Copy the median family income for your state and size of household from line 16c..... $_____

21. **How do the lines compare?**

❑ Line 20b is less than line 20c. Unless otherwise ordered by the court, on the top of page 1 of this form, check box 3, *The commitment period is 3 years*. Go to Part 4.

❑ Line 20b is more than or equal to line 20c. Unless otherwise ordered by the court, on the top of page 1 of this form, check box 4, *The commitment period is 5 years*. Go to Part 4.

Part 4: Sign Below

By signing here, under penalty of perjury I declare that the information on this statement and in any attachments is true and correct.

✘ _____ ✘ _____
Signature of Debtor 1 Signature of Debtor 2

Date _____ Date _____
MM / DD / YYYY MM / DD / YYYY

If you checked 17a, do NOT fill out or file Form 122C–2.
If you checked 17b, fill out Form 122C–2 and file it with this form. On line 39 of that form, copy your current monthly income from line 14 above.

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Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

❑ Check if this is an amended filing

Official Form 122C–2

Chapter 13 Calculation of Your Disposable Income

12/15

To fill out this form, you will need your completed copy of *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period* (Official Form 122C–1).

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for being accurate. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).

Part 1: Calculate Your Deductions from Your Income

The Internal Revenue Service (IRS) issues National and Local Standards for certain expense amounts. Use these amounts to answer the questions in lines 6-15. To find the IRS standards, go online using the link specified in the separate instructions for this form. This information may also be available at the bankruptcy clerk's office.

Deduct the expense amounts set out in lines 6-15 regardless of your actual expense. In later parts of the form, you will use some of your actual expenses if they are higher than the standards. Do not include any operating expenses that you subtracted from income in lines 5 and 6 of Form 122C–1, and do not deduct any amounts that you subtracted from your spouse's income in line 13 of Form 122C–1.

If your expenses differ from month to month, enter the average expense.

Note: Line numbers 1-4 are not used in this form. These numbers apply to information required by a similar form used in chapter 7 cases.

5. **The number of people used in determining your deductions from income**
Fill in the number of people who could be claimed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support. This number may be different from the number of people in your household.

National Standards You must use the IRS National Standards to answer the questions in lines 6-7.

6. **Food, clothing, and other items:** Using the number of people you entered in line 5 and the IRS National Standards, fill in the dollar amount for food, clothing, and other items. $_____

7. **Out-of-pocket health care allowance:** Using the number of people you entered in line 5 and the IRS National Standards, fill in the dollar amount for out-of-pocket health care. The number of people is split into two categories—people who are under 65 and people who are 65 or older—because older people have a higher IRS allowance for health care costs. If your actual expenses are higher than this IRS amount, you may deduct the additional amount on line 22.

People who are under 65 years of age

7a. Out-of-pocket health care allowance per person $_____

7b. Number of people who are under 65 X _____

7c. Subtotal. Multiply line 7a by line 7b. $_____ **Copy here➔** $_____

People who are 65 years of age or older

7d. Out-of-pocket health care allowance per person $_____

7e. Number of people who are 65 or older X _____

7f. Subtotal. Multiply line 7d by line 7e. $_____ **Copy here➔** + $_____

7g. **Total**. Add lines 7c and 7f. ..... $_____ **Copy here➔** ..... $_____

Local Standards You must use the IRS Local Standards to answer the questions in lines 8-15.

Based on information from the IRS, the U.S. Trustee Program has divided the IRS Local Standard for housing for bankruptcy purposes into two parts:

- **Housing and utilities – Insurance and operating expenses**
- **Housing and utilities – Mortgage or rent expenses**

To answer the questions in lines 8-9, use the U.S. Trustee Program chart. To find the chart, go online using the link specified in the separate instructions for this form. This chart may also be available at the bankruptcy clerk's office.

8. **Housing and utilities – Insurance and operating expenses:** Using the number of people you entered in line 5, fill in the dollar amount listed for your county for insurance and operating expenses. $_____

9. **Housing and utilities – Mortgage or rent expenses:**

9a. Using the number of people you entered in line 5, fill in the dollar amount listed for your county for mortgage or rent expenses. $_____

9b. Total average monthly payment for all mortgages and other debts secured by your home.

To calculate the total average monthly payment, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Next divide by 60.

Name of the creditor	Average monthly payment
_____	$_____
_____	$_____
_____	+ $_____
9b. Total average monthly payment	$_____

Copy here➔ – $_____ Repeat this amount on line 33a.

9c. Net mortgage or rent expense.

Subtract line 9b (*total average monthly payment*) from line 9a (*mortgage or rent expense*). If this number is less than $0, enter $0. $_____ **Copy here➔** ..... $_____

10. **If you claim that the U.S. Trustee Program's division of the IRS Local Standard for housing is incorrect and affects the calculation of your monthly expenses, fill in any additional amount you claim.** $_____

Explain why: _____

_____

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11. **Local transportation expenses:** Check the number of vehicles for which you claim an ownership or operating expense.

- ❑ 0. Go to line 14.
- ❑ 1. Go to line 12.
- ❑ 2 or more. Go to line 12.

12. **Vehicle operation expense:** Using the IRS Local Standards and the number of vehicles for which you claim the operating expenses, fill in the *Operating Costs* that apply for your Census region or metropolitan statistical area. $_____

13. **Vehicle ownership or lease expense:** Using the IRS Local Standards, calculate the net ownership or lease expense for each vehicle below. You may not claim the expense if you do not make any loan or lease payments on the vehicle. In addition, you may not claim the expense for more than two vehicles.

Vehicle 1 **Describe Vehicle 1:** _____
_____

13a. Ownership or leasing costs using IRS Local Standard ..... $_____

13b. Average monthly payment for all debts secured by Vehicle 1.
Do not include costs for leased vehicles.

To calculate the average monthly payment here and on line 13e, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Then divide by 60.

Name of each creditor for Vehicle 1	Average monthly payment
_____	$_____
_____	+ $_____
Total average monthly payment	$_____

Copy here ➔ — $_____ Repeat this amount on line 33b.

13c. Net Vehicle 1 ownership or lease expense
Subtract line 13b from line 13a. If this number is less than $0, enter $0. ..... $_____ **Copy net Vehicle 1 expense here** ➔ $_____

Vehicle 2 **Describe Vehicle 2:** _____
_____

13d. Ownership or leasing costs using IRS Local Standard..... $_____

13e. Average monthly payment for all debts secured by Vehicle 2.
Do not include costs for leased vehicles.

Name of each creditor for Vehicle 2	Average monthly payment
_____	$_____
_____	+ $_____
Total average monthly payment	$_____

Copy here ➔ — $_____ Repeat this amount on line 33c.

13f. Net Vehicle 2 ownership or lease expense
Subtract line 13e from 13d. If this number is less than $0, enter $0. ..... $_____ **Copy net Vehicle 2 expense here** ➔ $_____

14. **Public transportation expense: If you claimed 0 vehicles in line 11, using the IRS Local Standards, fill in the *Public Transportation* expense allowance regardless of whether you use public transportation.** $_____

15. **Additional public transportation expense:** If you claimed 1 or more vehicles in line 11 and if you claim that you may also deduct a public transportation expense, you may fill in what you believe is the appropriate expense, but you may not claim more than the IRS Local Standard for *Public Transportation*. $_____

Other Necessary Expenses In addition to the expense deductions listed above, you are allowed your monthly expenses for the following IRS categories.

16. **Taxes:** The total monthly amount that you actually pay for federal, state and local taxes, such as income taxes, self-employment taxes, social security taxes, and Medicare taxes. You may include the monthly amount withheld from your pay for these taxes. However, if you expect to receive a tax refund, you must divide the expected refund by 12 and subtract that number from the total monthly amount that is withheld to pay for taxes. Do not include real estate, sales, or use taxes. $_____

17. **Involuntary deductions:** The total monthly payroll deductions that your job requires, such as retirement contributions, union dues, and uniform costs. Do not include amounts that are not required by your job, such as voluntary 401(k) contributions or payroll savings. $_____

18. **Life insurance:** The total monthly premiums that you pay for your own term life insurance. If two married people are filing together, include payments that you make for your spouse's term life insurance. Do not include premiums for life insurance on your dependents, for a non-filing spouse's life insurance, or for any form of life insurance other than term. $_____

19. **Court-ordered payments:** The total monthly amount that you pay as required by the order of a court or administrative agency, such as spousal or child support payments. Do not include payments on past due obligations for spousal or child support. You will list these obligations in line 35. $_____

20. **Education:** The total monthly amount that you pay for education that is either required:
    - as a condition for your job, or
    - for your physically or mentally challenged dependent child if no public education is available for similar services.

    $_____

21. **Childcare:** The total monthly amount that you pay for childcare, such as babysitting, daycare, nursery, and preschool. Do not include payments for any elementary or secondary school education. $_____

22. **Additional health care expenses, excluding insurance costs:** The monthly amount that you pay for health care that is required for the health and welfare of you or your dependents and that is not reimbursed by insurance or paid by a health savings account. Include only the amount that is more than the total entered in line 7. Payments for health insurance or health savings accounts should be listed only in line 25. $_____

23. **Optional telephones and telephone services:** The total monthly amount that you pay for telecommunication services for you and your dependents, such as pagers, call waiting, caller identification, special long distance, or business cell phone service, to the extent necessary for your health and welfare or that of your dependents or for the production of income, if it is not reimbursed by your employer. Do not include payments for basic home telephone, internet or cell phone service. Do not include self-employment expenses, such as those reported on line 5 of Form 122C-1, or any amount you previously deducted. + $_____

24. **Add all of the expenses allowed under the IRS expense allowances.** Add lines 6 through 23. $_____

Additional Expense Deductions These are additional deductions allowed by the Means Test. *Note*: Do not include any expense allowances listed in lines 6-24.

25. **Health insurance, disability insurance, and health savings account expenses.** The monthly expenses for health insurance, disability insurance, and health savings accounts that are reasonably necessary for yourself, your spouse, or your dependents.

Health insurance	$_____	
Disability insurance	$_____	
Health savings account	+ $_____	
Total	$_____	**Copy total here➔** ..... $_____

Do you actually spend this total amount?

- ❑ No. How much do you actually spend? $_____
- ❑ Yes

26. **Continuing contributions to the care of household or family members.** The actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses. These expenses may include contributions to an account of a qualified ABLE program. 26 U.S.C. § 529A(b). $_____

27. **Protection against family violence.** The reasonably necessary monthly expenses that you incur to maintain the safety of you and your family under the Family Violence Prevention and Services Act or other federal laws that apply. By law, the court must keep the nature of these expenses confidential. $_____

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28. **Additional home energy costs.** Your home energy costs are included in your insurance and operating expenses on line 8.

If you believe that you have home energy costs that are more than the home energy costs included in expenses on line 8, then fill in the excess amount of home energy costs. $_____

You must give your case trustee documentation of your actual expenses, and you must show that the additional amount claimed is reasonable and necessary.

29. **Education expenses for dependent children who are younger than 18.** The monthly expenses (not more than $156.25* per child) that you pay for your dependent children who are younger than 18 years old to attend a private or public elementary or secondary school. $_____

You must give your case trustee documentation of your actual expenses, and you must explain why the amount claimed is reasonable and necessary and not already accounted for in lines 6-23.

* Subject to adjustment on 4/01/16, and every 3 years after that for cases begun on or after the date of adjustment.

30. **Additional food and clothing expense.** The monthly amount by which your actual food and clothing expenses are higher than the combined food and clothing allowances in the IRS National Standards. That amount cannot be more than 5% of the food and clothing allowances in the IRS National Standards. $_____

To find a chart showing the maximum additional allowance, go online using the link specified in the separate instructions for this form. This chart may also be available at the bankruptcy clerk's office.

You must show that the additional amount claimed is reasonable and necessary.

31. **Continuing charitable contributions.** The amount that you will continue to contribute in the form of cash or financial instruments to a religious or charitable organization. 11 U.S.C. § 548(d)(3) and (4). + $_____

Do not include any amount more than 15% of your gross monthly income.

32. **Add all of the additional expense deductions.**
Add lines 25 through 31. $_____

Deductions for Debt Payment

33. **For debts that are secured by an interest in property that you own, including home mortgages, vehicle loans, and other secured debt, fill in lines 33a through 33e.**

To calculate the total average monthly payment, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Then divide by 60.

	Average monthly payment
Mortgages on your home	
33a. Copy line 9b here ➔	$_____
Loans on your first two vehicles	
33b. Copy line 13b here. ➔	$_____
33c. Copy line 13e here. ➔	$_____

33d. List other secured debts:

Name of each creditor for other secured debt	Identify property that secures the debt	Does payment include taxes or insurance?	
_____	_____	❑ No ❑ Yes	$_____
_____	_____	❑ No ❑ Yes	$_____
_____	_____	❑ No ❑ Yes	+ $_____

33e. Total average monthly payment. Add lines 33a through 33d. $_____ **Copy total here** ➔ $_____

34. **Are any debts that you listed in line 33 secured by your primary residence, a vehicle, or other property necessary for your support or the support of your dependents?**

❑ No. Go to line 35.
❑ Yes. State any amount that you must pay to a creditor, in addition to the payments listed in line 33, to keep possession of your property (called the *cure amount*). Next, divide by 60 and fill in the information below.

Name of the creditor	Identify property that secures the debt	Total cure amount		Monthly cure amount
_____	_____	$_____	÷ 60 =	$_____
_____	_____	$_____	÷ 60 =	$_____
_____	_____	$_____	÷ 60 = +	$_____
			Total	$_____

Copy total here ➔ $_____

35. **Do you owe any priority claims—such as a priority tax, child support, or alimony— that are past due as of the filing date of your bankruptcy case?** 11 U.S.C. § 507.

❑ No. Go to line 36.
❑ Yes. Fill in the total amount of all of these priority claims. Do not include current or ongoing priority claims, such as those you listed in line 19.

Total amount of all past-due priority claims. ..... $_____ ÷ 60 $_____

36. **Projected monthly Chapter 13 plan payment** $_____

Current multiplier for your district as stated on the list issued by the Administrative Office of the United States Courts (for districts in Alabama and North Carolina) or by the Executive Office for United States Trustees (for all other districts).
To find a list of district multipliers that includes your district, go online using the link specified in the separate instructions for this form. This list may also be available at the bankruptcy clerk's office. x _____

Average monthly administrative expense $_____ Copy total here ➔ $_____

37. **Add all of the deductions for debt payment.** Add lines 33e through 36. $_____

Total Deductions from Income

38. **Add all of the allowed deductions.**

Copy line 24, *All of the expenses allowed under IRS expense allowances* ..... $_____

Copy line 32, *All of the additional expense deductions* ..... $_____

Copy line 37, *All of the deductions for debt payment* ..... + $_____

Total deductions ..... $_____ Copy total here ➔ $_____

Rules Appendix 1007-1 12b-011287

Part 2: Determine Your Disposable Income Under 11 U.S.C. § 1325(b)(2)

39. **Copy your total current monthly income from line 14 of Form 122C-1, *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period*.** ..... $_____

40. **Fill in any reasonably necessary income you receive for support for dependent children.** The monthly average of any child support payments, foster care payments, or disability payments for a dependent child, reported in Part I of Form 122C-1, that you received in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child. $_____

41. **Fill in all qualified retirement deductions.** The monthly total of all amounts that your employer withheld from wages as contributions for qualified retirement plans, as specified in 11 U.S.C. § 541(b)(7) plus all required repayments of loans from retirement plans, as specified in 11 U.S.C. § 362(b)(19). $_____

42. **Total of all deductions allowed under 11 U.S.C. § 707(b)(2)(A)**. Copy line 38 here ..... ➔ $_____

43. **Deduction for special circumstances.** If special circumstances justify additional expenses and you have no reasonable alternative, describe the special circumstances and their expenses. You must give your case trustee a detailed explanation of the special circumstances and documentation for the expenses.

Describe the special circumstances	Amount of expense
_____	$_____
_____	$_____
_____	+ $_____
Total	$_____ Copy here ➔ + $_____

44. **Total adjustments.** Add lines 40 through 43. ..... $_____ Copy here ➔ − $_____

45. **Calculate your monthly disposable income under § 1325(b)(2).** Subtract line 44 from line 39. $_____

Part 3: Change in Income or Expenses

46. **Change in income or expenses.** If the income in Form 122C-1 or the expenses you reported in this form have changed or are virtually certain to change after the date you filed your bankruptcy petition and during the time your case will be open, fill in the information below. For example, if the wages reported increased after you filed your petition, check 122C-1 in the first column, enter line 2 in the second column, explain why the wages increased, fill in when the increase occurred, and fill in the amount of the increase.

Form	Line	Reason for change	Date of change	Increase or decrease?	Amount of change
❑ 122C–1 ❑ 122C–2	____	_____	_____	❑ Increase ❑ Decrease	$_____
❑ 122C–1 ❑ 122C–2	____	_____	_____	❑ Increase ❑ Decrease	$_____
❑ 122C–1 ❑ 122C–2	____	_____	_____	❑ Increase ❑ Decrease	$_____
❑ 122C–1 ❑ 122C–2	____	_____	_____	❑ Increase ❑ Decrease	$_____

Part 4: Sign Below

By signing here, under penalty of perjury you declare that the information on this statement and in any attachments is true and correct.

✘ _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

✘ _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

COMMITTEE NOTE

Official Forms 122A-1, 122A-1Supp, 122A-2, 122B, 122C-1, and 122C-2 are updated to comport with the form numbering style developed as part of the Forms Modernization Project. The forms are derived from Official Forms 22A-1, 22A-1Supp, 22A-2, 22B, 122C-1, and 22C-2.

A statement is added to line 26 of Forms 122A-2 and 122C-2 explaining that contributions to qualified ABLE accounts, as defined in 26 U.S.C. § 529A(b), may be included in the deduction for contributions to the care of household or family members. Authorization of the deduction of such contributions was added to Bankruptcy Code § 707(b)(2)(A)(ii)(II) by the Tax Increase Prevention Act of 2014, Pub. Law No. 113-295.

Official Forms 122A-1, 122B, and 122C-1 are revised to add a workspace column for debtor 2 at questions 5 and 6 on the forms.

Official Form 122B is also revised to remove former Part 2. This portion of the form provided for the exclusion of certain income of a debtor's non-filing spouse; since that income is not required to be reported, its exclusion is unnecessary.

Other stylistic changes were made throughout the forms.

Fill in this information to identify the case:

United States Bankruptcy Court for the:

_____ District of _____
(State)

Case number (*If known*): _____ Chapter _____

❑ Check if this is an amended filing

Official Form 201

Voluntary Petition for Non-Individuals Filing for Bankruptcy

12/15

If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write the debtor's name and the case number (if known). For more information, a separate document, *Instructions for Bankruptcy Forms for Non-Individuals*, is available.

1. **Debtor's name** _____

2. **All other names debtor used in the last 8 years**

   Include any assumed names, trade names, and *doing business as* names

   _____
   _____
   _____
   _____
   _____

3. **Debtor's federal Employer Identification Number** (EIN) __ __ – __ __ __ __ __ __ __

4. **Debtor's address**

Principal place of business

_____
Number Street

_____

_____
City State ZIP Code

_____
County

Mailing address, if different from principal place of business

_____
Number Street

_____
P.O. Box

_____
City State ZIP Code

Location of principal assets, if different from principal place of business

_____
Number Street

_____

_____
City State ZIP Code

5. **Debtor's website** (URL) _____

6. **Type of debtor**

❑ Corporation (including Limited Liability Company (LLC) and Limited Liability Partnership (LLP))
❑ Partnership (excluding LLP)
❑ Other. Specify: _____

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7. Describe debtor's business

A. *Check one:*

- ❑ Health Care Business (as defined in 11 U.S.C. § 101(27A))
- ❑ Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))
- ❑ Railroad (as defined in 11 U.S.C. § 101(44))
- ❑ Stockbroker (as defined in 11 U.S.C. § 101(53A))
- ❑ Commodity Broker (as defined in 11 U.S.C. § 101(6))
- ❑ Clearing Bank (as defined in 11 U.S.C. § 781(3))
- ❑ None of the above

B. *Check all that apply:*

- ❑ Tax-exempt entity (as described in 26 U.S.C. § 501)
- ❑ Investment company, including hedge fund or pooled investment vehicle (as defined in 15 U.S.C. § 80a-3)
- ❑ Investment advisor (as defined in 15 U.S.C. § 80b-2(a)(11))

C. NAICS (North American Industry Classification System) 4-digit code that best describes debtor. See http://www.naics.com/search/ .

___ ___ ___ ___

8. Under which chapter of the Bankruptcy Code is the debtor filing?

Check one:

- ❑ Chapter 7
- ❑ Chapter 9
- ❑ Chapter 11. *Check all that apply*:
  - ❑ Debtor's aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than $2,490,925 (amount subject to adjustment on 4/01/16 and every 3 years after that).
  - ❑ The debtor is a small business debtor as defined in 11 U.S.C. § 101(51D). If the debtor is a small business debtor, attach the most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return or if all of these documents do not exist, follow the procedure in 11 U.S.C. § 1116(1)(B).
  - ❑ A plan is being filed with this petition.
  - ❑ Acceptances of the plan were solicited prepetition from one or more classes of creditors, in accordance with 11 U.S.C. § 1126(b).
  - ❑ The debtor is required to file periodic reports (for example, 10K and 10Q) with the Securities and Exchange Commission according to § 13 or 15(d) of the Securities Exchange Act of 1934. File the *Attachment to Voluntary Petition for Non-Individuals Filing for Bankruptcy under Chapter 11* (Official Form 201A) with this form.
  - ❑ The debtor is a shell company as defined in the Securities Exchange Act of 1934 Rule 12b-2.
- ❑ Chapter 12

9. Were prior bankruptcy cases filed by or against the debtor within the last 8 years?

If more than 2 cases, attach a separate list.

- ❑ No
- ❑ Yes. District _____ When _____ (MM / DD / YYYY) Case number _____
  District _____ When _____ (MM / DD / YYYY) Case number _____

10. Are any bankruptcy cases pending or being filed by a business partner or an affiliate of the debtor?

List all cases. If more than 1, attach a separate list.

- ❑ No
- ❑ Yes. Debtor _____ Relationship _____
  District _____ When _____ (MM / DD / YYYY)
  Case number, if known _____

11. Why is the case filed in *this district*?

Check all that apply:

- ❑ Debtor has had its domicile, principal place of business, or principal assets in this district for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other district.
- ❑ A bankruptcy case concerning debtor's affiliate, general partner, or partnership is pending in this district.

12. Does the debtor own or have possession of any real property or personal property that needs immediate attention?

- ❑ No
- ❑ Yes. Answer below for each property that needs immediate attention. Attach additional sheets if needed.

Why does the property need immediate attention? (*Check all that apply.*)

- ❑ It poses or is alleged to pose a threat of imminent and identifiable hazard to public health or safety.
  What is the hazard? _____
- ❑ It needs to be physically secured or protected from the weather.
- ❑ It includes perishable goods or assets that could quickly deteriorate or lose value without attention (for example, livestock, seasonal goods, meat, dairy, produce, or securities-related assets or other options).
- ❑ Other _____

Where is the property?_____
Number Street

_____

_____ _____ _____
City State ZIP Code

Is the property insured?

- ❑ No
- ❑ Yes. Insurance agency _____

Contact name _____

Phone _____

Statistical and administrative information

13. Debtor's estimation of available funds

Check one:

- ❑ Funds will be available for distribution to unsecured creditors.
- ❑ After any administrative expenses are paid, no funds will be available for distribution to unsecured creditors.

14. Estimated number of creditors

- ❑ 1-49
- ❑ 50-99
- ❑ 100-199
- ❑ 200-999
- ❑ 1,000-5,000
- ❑ 5,001-10,000
- ❑ 10,001-25,000
- ❑ 25,001-50,000
- ❑ 50,001-100,000
- ❑ More than 100,000

15. Estimated assets

- ❑ $0-$50,000
- ❑ $50,001-$100,000
- ❑ $100,001-$500,000
- ❑ $500,001-$1 million
- ❑ $1,000,001-$10 million
- ❑ $10,000,001-$50 million
- ❑ $50,000,001-$100 million
- ❑ $100,000,001-$500 million
- ❑ $500,000,001-$1 billion
- ❑ $1,000,000,001-$10 billion
- ❑ $10,000,000,001-$50 billion
- ❑ More than $50 billion

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16. Estimated liabilities

- ❑ $0-$50,000
- ❑ $50,001-$100,000
- ❑ $100,001-$500,000
- ❑ $500,001-$1 million
- ❑ $1,000,001-$10 million
- ❑ $10,000,001-$50 million
- ❑ $50,000,001-$100 million
- ❑ $100,000,001-$500 million
- ❑ $500,000,001-$1 billion
- ❑ $1,000,000,001-$10 billion
- ❑ $10,000,000,001-$50 billion
- ❑ More than $50 billion

Request for Relief, Declaration, and Signatures

WARNING -- Bankruptcy fraud is a serious crime. Making a false statement in connection with a bankruptcy case can result in fines up to $500,000 or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

17. Declaration and signature of authorized representative of debtor

The debtor requests relief in accordance with the chapter of title 11, United States Code, specified in this petition.

I have been authorized to file this petition on behalf of the debtor.

I have examined the information in this petition and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____
MM / DD / YYYY

✘ _____ _____
Signature of authorized representative of debtor Printed name

Title _____

18. Signature of attorney

✘ _____ Date _____
Signature of attorney for debtor MM / DD / YYYY

_____
Printed name

_____
Firm name

_____
Number Street

_____ _____ _____
City State ZIP Code

_____ _____
Contact phone Email address

_____ _____
Bar number State

COMMITTEE NOTE

Official Form 201, *Voluntary Petition for Non-Individuals Filing for Bankruptcy*, replaces Official Form 1, *Voluntary Petition*, for non-individual debtors. It is renumbered to distinguish it from the forms used by individual debtors and includes formatting and stylistic changes throughout the form.

Official Form 201 is revised as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. The goals of the Forms Modernization Project include improving the interface between technology and the forms so as to increase efficiency and reducing the need to produce the same information in multiple formats.

The Forms Modernization Project made a preliminary decision that separate forms should be created for individual debtors and for non-individual debtors because separate areas of inquiry apply to each group. The forms for non-individuals do not include questions that pertain only to individuals and use a more open-ended response format. Also, where possible, the forms for non-individuals parallel how businesses commonly keep their financial records.

Official Form 201 has been substantially reformatted and reorganized. References to Exhibits B, C, and D, and the exhibits themselves, have been eliminated because the requested information is now asked in the form or is not applicable to non-individual debtors. Official Form 201A, *Attachment to Voluntary Petition for Non-Individuals Filing for Bankruptcy Under Chapter 11*, has replaced Exhibit A. The debtor is instructed to file Official Form 201A if the debtor is filing under chapter 11 and is required to file periodic reports with the Securities and Exchange Commission. A checkbox has been added to the form to indicate whether it is an amended filing.

12b-011295

In Question 2, *All other names debtor used in the last 8 years*, instructions pertaining only to individuals have been deleted, and an instruction to include *doing business as* names and assumed names has been added. In Question 3, *Debtor's federal Employee Identification Number (EIN)*, references to social security numbers and individual taxpayer I.D. numbers have been deleted. In Question 4, *Debtor's address*, the order of listing the various addresses for the debtor has been rearranged, and an address for the location of principal assets is required if different from the principal place of business. Also, the form has been revised to include a space for listing the debtor's website in Question 5.

In Question 6, *Type of Debtor*, options pertaining only to individual debtors have been deleted, and an instruction that the "partnership" option does not include LLPs has been added. Question 7, *Describe debtor's business*, is revised to include a statutory citation for each business type, to add an option for "none of the above," and to delete the option for "other." A new instruction requires the debtor to indicate if the debtor is an investment company, including a hedge fund or pooled investment vehicle; an investment advisor; or a tax exempt entity. The definition of "tax exempt entity" has been removed and replaced with a statutory citation. Additionally, an instruction has been added to require the debtor to list its North American Industry Classification System 4-digit code. A hyperlink is provided for information on finding the correct code.

In *Question 8, Under which chapter of the Bankruptcy Code is the debtor filing,* several separate boxes have been combined, and the options for Chapter 13 and Chapter 15 have been deleted. More detailed options have been added for Chapter 11. The question regarding the nature of the debtor's debts has been removed.

Question 9, *Were prior bankruptcy cases filed by or against the debtor within the last 8 years*, has been revised

to instruct the debtor to include prior bankruptcy cases filed against the debtor and to list the district rather than location of the prior filings. In Question 10, *Are any bankruptcy cases pending or being filed by a business partner or an affiliate of the debtor*, the reference to spouse and the requirement to list the judge in any other cases have been removed.

Question 11, *Why is this case filed in this district*, has been revised to delete references that pertain only to individuals.

Question 12, *Does the debtor own or have possession of any real property or personal property that needs immediate attention*, replaces Exhibit C from Official Form 1. The category of "property that needs immediate attention" has been added, as well as options to indicate why the property needs immediate attention. Additionally, the form has been revised to require the debtor to list the location of the property and whether or not the property is insured and, if so, the insurance details.

Statistical and administrative information has been moved to immediately above the signature line, and the reference to exempt property has been removed. The maximum values for "Estimated Assets" and "Estimated Liabilities" have been increased from "more than $1 billion" to "more than $50 billion." *Request for Relief, Declaration, and Signatures* has been reformatted and the signature lines for individual debtors and non-attorney bankruptcy petition preparers have been removed.

12b-011297

[If debtor is required to file periodic reports (e.g., forms 10K and 10Q) with the Securities and Exchange Commission pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 and is requesting relief under chapter 11 of the Bankruptcy Code, this Exhibit "A" shall be completed and attached to the petition.]

[Caption as in Form 416B]

Attachment to Voluntary Petition for Non-Individuals Filing for Bankruptcy under Chapter 11

1. If any of the debtor's securities are registered under Section 12 of the Securities Exchange Act of 1934, the SEC file number is _____.

2. The following financial data is the latest available information and refers to the debtor's condition on _____.

a. Total assets $_____

b. Total debts (including debts listed in 2.c., below) $ _____

c. Debt securities held by more than 500 holders

				Approximate number of holders:
secured ☐	unsecured ☐	subordinated ☐	$ _____	_____
secured ☐	unsecured ☐	subordinated ☐	$ _____	_____
secured ☐	unsecured ☐	subordinated ☐	$ _____	_____
secured ☐	unsecured ☐	subordinated ☐	$ _____	_____
secured ☐	unsecured ☐	subordinated ☐	$ _____	_____

d. Number of shares of preferred stock _____

e. Number of shares common stock _____

Comments, if any: _____

_____

_____

3. Brief description of debtor's business: _____

_____

_____

4. List the names of any person who directly or indirectly owns, controls, or holds, with power to vote, 5% or more of the voting securities of debtor:

_____

_____

_____

Fill in this information to identify the case and this filing:

Debtor Name _____

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number (*If known*): _____

Official Form 202

Declaration Under Penalty of Perjury for Non-Individual Debtors

12/15

An individual who is authorized to act on behalf of a non-individual debtor, such as a corporation or partnership, must sign and submit this form for the schedules of assets and liabilities, any other document that requires a declaration that is not included in the document, and any amendments of those documents. This form must state the individual's position or relationship to the debtor, the identity of the document, and the date. Bankruptcy Rules 1008 and 9011.

WARNING -- Bankruptcy fraud is a serious crime. Making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to $500,000 or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

Declaration and signature

I am the president, another officer, or an authorized agent of the corporation; a member or an authorized agent of the partnership; or another individual serving as a representative of the debtor in this case.

I have examined the information in the documents checked below and I have a reasonable belief that the information is true and correct:

- ☐ *Schedule A/B: Assets–Real and Personal Property* (Official Form 206A/B)
- ☐ *Schedule D: Creditors Who Have Claims Secured by Property* (Official Form 206D)
- ☐ *Schedule E/F: Creditors Who Have Unsecured Claims* (Official Form 206E/F)
- ☐ *Schedule G: Executory Contracts and Unexpired Leases* (Official Form 206G)
- ☐ *Schedule H: Codebtors* (Official Form 206H)
- ☐ *Summary of Assets and Liabilities for Non-Individuals* (Official Form 206Sum)
- ☐ Amended *Schedule* ____
- ☐ *Chapter 11 or Chapter 9 Cases: List of Creditors Who Have the 20 Largest Unsecured Claims and Are Not Insiders* (Official Form 204)
- ☐ Other document that requires a declaration_____

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____
MM / DD / YYYY

✘ _____
Signature of individual signing on behalf of debtor

_____
Printed name

_____
Position or relationship to debtor

12b-011299

COMMITTEE NOTE

Official Form 202, *Declaration Under Penalty of Perjury for Non-Individual Debtors*, replaces Official Form 2, *Declaration Under Penalty of Perjury on Behalf of a Corporation or Partnership*, and the section of Official Form 6 Declaration, *Declaration Concerning Debtor's Schedules* containing a corporation's or partnership's declaration. It is renumbered to distinguish it from the forms used by individual debtors and includes formatting and stylistic changes throughout the form.

Official Form 202 is revised as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. The goals of the Forms Modernization Project include improving the interface between technology and the forms so as to increase efficiency and reducing the need to produce the same information in multiple formats.

Official Form 202 has been substantially reformatted and reorganized with elements from both Official Form 2 and the section of Official Form 6 for a corporation or partnership. Instructions have been added, along with warning language regarding bankruptcy fraud. Checkboxes are provided so the declaration will indicate the documents included with the declaration, including the schedules and Official Form 204, *Chapter 11 or Chapter 9 Cases: List of Creditors Who Have the 20 Largest Unsecured Claims and Are Not Insiders*. If the declaration accompanies another document, a space is provided to include a description of the attached document. The phrase "to the best of my information and belief" has been deleted from the declaration in order to conform to the language of 28 U.S.C. § 1746. *See* Rule 1008. The form, however, includes a statement that the person signing the declaration has examined the information in the documents subject to the declaration and has "a reasonable belief that the information is true and correct." Finally, the person signing the declaration must indicate his or her position or relationship to the debtor.

Fill in this information to identify the case:

Debtor name _____

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number (If known): _____

☐ Check if this is an amended filing

Official Form 204

Chapter 11 or Chapter 9 Cases: List of Creditors Who Have the 20 Largest Unsecured Claims and Are Not Insiders

12/15

A list of creditors holding the 20 largest unsecured claims must be filed in a Chapter 11 or Chapter 9 case. Include claims which the debtor disputes. Do not include claims by any person or entity who is an *insider,* as defined in 11 U.S.C. § 101(31). Also, do not include claims by secured creditors, unless the unsecured claim resulting from inadequate collateral value places the creditor among the holders of the 20 largest unsecured claims.

	Name of creditor and complete mailing address, including zip code	**Name, telephone number, and email address of creditor contact**	**Nature of the claim** (for example, trade debts, bank loans, professional services, and government contracts)	**Indicate if claim is contingent, unliquidated, or disputed**	**Amount of unsecured claim** If the claim is fully unsecured, fill in only unsecured claim amount. If claim is partially secured, fill in total claim amount and deduction for value of collateral or setoff to calculate unsecured claim.		
					Total claim, if partially secured	**Deduction for value of collateral or setoff**	**Unsecured claim**
1							
2							
3							
4							
5							
6							
7							
8							

Rules Appendix B.8.9
12b-011301

Debtor _____ Case number (*if known*)_____
Name

	Name of creditor and complete mailing address, including zip code	Name, telephone number, and email address of creditor contact	Nature of the claim (for example, trade debts, bank loans, professional services, and government contracts)	Indicate if claim is contingent, unliquidated, or disputed	Amount of unsecured claim If the claim is fully unsecured, fill in only unsecured claim amount. If claim is partially secured, fill in total claim amount and deduction for value of collateral or setoff to calculate unsecured claim.		
					Total claim, if partially secured	Deduction for value of collateral or setoff	Unsecured claim
9							
10							
11							
12							
13							
14							
15							
16							
17							
18							
19							
20							

COMMITTEE NOTE

Official Form 204, *Chapter 11 or Chapter 9 Cases: List of Creditors Who Have the 20 Largest Unsecured Claims and Are Not Insiders*, replaces Official Form 4, *List of Creditors Holding 20 Largest Unsecured Claims*, for non-individual debtors. It is renumbered to distinguish it from the forms used by individual debtors and includes formatting and stylistic changes throughout the form.

Official Form 204 is revised as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. The goals of the Forms Modernization Project include improving the interface between technology and the forms so as to increase efficiency and reducing the need to produce the same information in multiple formats.

The Forms Modernization Project made a preliminary decision that separate forms should be created for individual debtors and for non-individual debtors because separate areas of inquiry apply to each group. The forms for non-individuals do not include questions that pertain only to individuals and use a more open-ended response format. Also, where possible, the forms for non-individuals parallel how businesses commonly keep their financial records.

Official Form 204 has been reformatted and reorganized. The instructions have been shortened and revised to include a full cite to the definition of "insider" and a revised explanation of when to include a secured creditor's unsecured claim. The warning regarding the disclosure of a minor child's name has been deleted as a caution has been added to the general instructions for all forms regarding listing a minor child's name.

The heading of the second column of the form has been revised to require the "name, telephone number, and email address of creditor contact," eliminating the need to provide a complete mailing address for the creditor contact.

12b-011303

Additional examples of "nature of claim" have been provided in the third column. In the fourth column, "subject to setoff" has been removed as an option.

The fifth column has been revised to include three separate potential entries to be used to list the value of the unsecured claim: the total claim, if partially secured; the deduction for value of collateral or setoff; and unsecured claim. The new instructions for the fifth column contain an explanation that if a claim is a fully unsecured claim, only the final sub-column needs to be completed, and that all of the columns must be completed if a claim is partially secured.

The signature line and the instruction to include a declaration have been deleted from the form.

Fill in this information to identify the case:

United States Bankruptcy Court for the:

_____ District of _____
(State)

Case number (*If known*): _____ Chapter _____

❑ Check if this is an amended filing

Official Form 205

Involuntary Petition Against a Non-Individual

12/15

Use this form to begin a bankruptcy case against a non-individual you allege to be a debtor subject to an involuntary case. If you want to begin a case against an individual, use the *Involuntary Petition Against an Individual* (Official Form 105). Be as complete and accurate as possible. If more space is needed, attach any additional sheets to this form. On the top of any additional pages, write debtor's name and case number (if known).

Part 1: Identify the Chapter of the Bankruptcy Code Under Which Petition Is Filed

1. Chapter of the Bankruptcy Code

Check one:

❑ Chapter 7
❑ Chapter 11

Part 2: Identify the Debtor

2. Debtor's name

_____

3. Other names you know the debtor has used in the last 8 years

Include any assumed names, trade names, or *doing business as* names.

_____
_____
_____

4. Debtor's federal Employer Identification Number (EIN)

❑ Unknown

__ __ – __ __ __ __ __ __ __
EIN

5. Debtor's address

Principal place of business

_____
Number Street

_____

_____ _____ _____
City State ZIP Code

_____
County

Mailing address, if different

_____
Number Street

_____
P.O. Box

_____ _____ _____
City State ZIP Code

Location of principal assets, if different from principal place of business

_____
Number Street

_____

_____ _____ _____
City State ZIP Code

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6. Debtor's website (URL) _____

7. Type of debtor

- ❑ Corporation (including Limited Liability Company (LLC) and Limited Liability Partnership (LLP))
- ❑ Partnership (excluding LLP)
- ❑ Other type of debtor. Specify: _____

8. Type of debtor's business

Check one:

- ❑ Health Care Business (as defined in 11 U.S.C. § 101(27A))
- ❑ Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))
- ❑ Railroad (as defined in 11 U.S.C. § 101(44))
- ❑ Stockbroker (as defined in 11 U.S.C. § 101(53A))
- ❑ Commodity Broker (as defined in 11 U.S.C. § 101(6))
- ❑ Clearing Bank (as defined in 11 U.S.C. § 781(3))
- ❑ None of the types of business listed.
- ❑ Unknown type of business.

9. To the best of your knowledge, are any bankruptcy cases pending by or against any partner or affiliate of this debtor?

- ❑ No
- ❑ Yes. Debtor _____ Relationship _____

District _____ Date filed _____ Case number, if known_____
MM / DD / YYYY

Debtor _____ Relationship _____

District _____ Date filed _____ Case number, if known_____
MM / DD / YYYY

Part 3: Report About the Case

10. Venue

Check one:

- ❑ Over the last 180 days before the filing of this bankruptcy, the debtor had a domicile, principal place of business, or principal assets in this district longer than in any other district.
- ❑ A bankruptcy case concerning debtor's affiliates, general partner, or partnership is pending in this district.

11. Allegations

Each petitioner is eligible to file this petition under 11 U.S.C. § 303(b).

The debtor may be the subject of an involuntary case under 11 U.S.C. § 303(a).

At least one box must be checked:

- ❑ The debtor is generally not paying its debts as they become due, unless they are the subject of a bona fide dispute as to liability or amount.
- ❑ Within 120 days before the filing of this petition, a custodian, other than a trustee, receiver, or an agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.

12. Has there been a transfer of any claim against the debtor by or to any petitioner?

- ❑ No
- ❑ Yes. Attach all documents that evidence the transfer and any statements required under Bankruptcy Rule 1003(a).

13. **Each petitioner's claim**	Name of petitioner	Nature of petitioner's claim	Amount of the claim above the value of any lien
	_____	_____	$ _____
	_____	_____	$ _____
	_____	_____	$ _____
		Total of petitioners' claims	$ _____

If more space is needed to list petitioners, attach additional sheets. Write the alleged debtor's name and the case number, if known, at the top of each sheet. Following the format of this form, set out the information required in Parts 3 and 4 of the form for each additional petitioning creditor, the petitioner's claim, the petitioner's representative, and the petitioner's attorney. Include the statement under penalty of perjury set out in Part 4 of the form, followed by each additional petitioner's (or representative's) signature, along with the signature of the petitioner's attorney.

Part 4: Request for Relief

WARNING -- Bankruptcy fraud is a serious crime. Making a false statement in connection with a bankruptcy case can result in fines up to $500,000 or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

Petitioners request that an order for relief be entered against the debtor under the chapter of 11 U.S.C. specified in this petition. If a petitioning creditor is a corporation, attach the corporate ownership statement required by Bankruptcy Rule 1010(b). If any petitioner is a foreign representative appointed in a foreign proceeding, attach a certified copy of the order of the court granting recognition.

I have examined the information in this document and have a reasonable belief that the information is true and correct.

Petitioners or Petitioners' Representative

Name and mailing address of petitioner

_____
Name

_____
Number Street

_____ _____ _____
City State ZIP Code

Name and mailing address of petitioner's representative, if any

_____
Name

_____
Number Street

_____ _____ _____
City State ZIP Code

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____
MM / DD / YYYY

✘ _____
Signature of petitioner or representative, including representative's title

Attorneys

_____
Printed name

_____
Firm name, if any

_____
Number Street

_____ _____ _____
City State ZIP Code

Contact phone _____ Email _____

Bar number _____

State _____

✘ _____
Signature of attorney

Date signed _____
MM / DD / YYYY

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Name and mailing address of petitioner

Name

Number Street

City State ZIP Code

Name and mailing address of petitioner's representative, if any

Name

Number Street

City State ZIP Code

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____
MM / DD / YYYY

✘ _____
Signature of petitioner or representative, including representative's title

Printed name

Firm name, if any

Number Street

City State ZIP Code

Contact phone _____ Email _____

Bar number _____

State _____

✘ _____
Signature of attorney

Date signed _____
MM / DD / YYYY

Name and mailing address of petitioner

Name

Number Street

City State ZIP Code

Name and mailing address of petitioner's representative, if any

Name

Number Street

City State ZIP Code

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____
MM / DD / YYYY

✘ _____
Signature of petitioner or representative, including representative's title

Printed name

Firm name, if any

Number Street

City State ZIP Code

Contact phone _____ Email _____

Bar number _____

State _____

✘ _____
Signature of attorney

Date signed _____
MM / DD / YYYY

COMMITTEE NOTE

Official Form 205, *Involuntary Petition Against a Non-Individual*, replaces Official Form 5, *Involuntary Petition*, for non-individual debtors. It is renumbered to distinguish it from the forms used by individual debtors and includes formatting and stylistic changes throughout the form.

Official Form 205 is revised as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. The goals of the Forms Modernization Project include improving the interface between technology and the forms so as to increase efficiency and reducing the need to produce the same information in multiple formats.

The Forms Modernization Project made a preliminary decision that separate forms should be created for individual debtors and for non-individual debtors because separate areas of inquiry apply to each group. The forms for non-individuals do not include questions that pertain only to individuals and use a more open-ended response format. Also, where possible, the forms for non-individuals parallel how businesses commonly keep their financial records.

Part 1, *Identify the Chapter of the Bankruptcy Code Under Which Petition is Filed*, has been moved to the beginning of the form.

In Part 2, *Identify the Debtor*, instructions pertaining only to individuals have been deleted, and an instruction to include doing-business-as names and assumed names has been added. The references to social security numbers and individual taxpayer I.D. numbers have been deleted. The order of listing the various addresses for the debtor have been rearranged in Line 5, and an address for the location of principal assets is required if different from the principal place of business.

12b-011309

The form has been revised to include a space for listing the debtor's website in Line 6.

Also in Part 2, the options for type of debtor that pertained only to individuals have been deleted, and an instruction that the "partnership" option does not include LLPs has been added. The options regarding the type of debtor's business have been revised to include a statutory citation for each business type, to add an option for "none of the above," and to delete the option for "other." The question regarding pending bankruptcy cases has been revised to remove the reference to spouse and the requirement to list the judge in any other cases.

In Part 3, *Report About the Case*, the question regarding venue has been revised in Line 10 to read "[o]ver the last 180 days before the filing of this bankruptcy, the debtor had a domicile, principal place or business, or principal assets in this district longer than in any other district." In the question for Allegations, "each" has been added to the first allegation, the exact citation to the Bankruptcy Code has been provided for the second allegation, and checkboxes have been provided for the last allegation. Also, in Line 12, petitioners must check "yes" or "no" to answer whether there has been any transfer of any claim against the debtor by or to a petitioner.

The information regarding the petitioner's claims has been moved to Part 3, and the portion listing the amount of the claim is amended to ask about the amount of the claim that exceeds the value of the lien, if any.

Part 4, *Request for Relief*, has been amended to include a warning about making a false statement, and the declaration under penalty of perjury has been revised in order to conform to the language of 28 U.S.C. § 1746. *See* Rule 1008. A statement has been added that each petitioner, or the petitioner's representative, has reviewed the information in the petition and has "a reasonable belief that the information is true and correct." A requirement has

been added for each petitioner's mailing address. Also, petitioners' attorneys must provide their email addresses, bar number, and state of bar membership.

Fill in this information to identify the case:

Debtor name _____

United States Bankruptcy Court for the:_____ District of _____ (State)

Case number (If known): _____

❑ Check if this is an amended filing

Official Form 206A/B

Schedule A/B: Assets — Real and Personal Property

12/15

Disclose all property, real and personal, which the debtor owns or in which the debtor has any other legal, equitable, or future interest. Include all property in which the debtor holds rights and powers exercisable for the debtor's own benefit. Also include assets and properties which have no book value, such as fully depreciated assets or assets that were not capitalized. In Schedule A/B, list any executory contracts or unexpired leases. Also list them on *Schedule G: Executory Contracts and Unexpired Leases* (Official Form 206G).

Be as complete and accurate as possible. If more space is needed, attach a separate sheet to this form. At the top of any pages added, write the debtor's name and case number (if known). Also identify the form and line number to which the additional information applies. If an additional sheet is attached, include the amounts from the attachment in the total for the pertinent part.

For Part 1 through Part 11, list each asset under the appropriate category or attach separate supporting schedules, such as a fixed asset schedule or depreciation schedule, that gives the details for each asset in a particular category. List each asset only once. In valuing the debtor's interest, do not deduct the value of secured claims. See the instructions to understand the terms used in this form.

Part 1: Cash and cash equivalents

1. **Does the debtor have any cash or cash equivalents?**

❑ No. Go to Part 2.

❑ Yes. Fill in the information below.

All cash or cash equivalents owned or controlled by the debtor	Current value of debtor's interest
2. **Cash on hand**	$_____
3. **Checking, savings, money market, or financial brokerage accounts** *(Identify all)*	
Name of institution (bank or brokerage firm) / Type of account / Last 4 digits of account number	
3.1. _____ _____ ___ ___ ___ ___	$_____
3.2. _____ _____ ___ ___ ___ ___	$_____
4. **Other cash equivalents** *(Identify all)*	
4.1. _____	$_____
4.2. _____	$_____
5. **Total of Part 1** Add lines 2 through 4 (including amounts on any additional sheets). Copy the total to line 80.	$_____

Part 2: Deposits and prepayments

6. **Does the debtor have any deposits or prepayments?**

❑ No. Go to Part 3.

❑ Yes. Fill in the information below.

	Current value of debtor's interest
7. **Deposits, including security deposits and utility deposits**	
Description, including name of holder of deposit	
7.1. _____	$_____
7.2. _____	$_____

8. **Prepayments, including prepayments on executory contracts, leases, insurance, taxes, and rent**

Description, including name of holder of prepayment

8.1._____ $_____

8.2._____ $_____

9. **Total of Part 2.**
Add lines 7 through 8. Copy the total to line 81.

$_____

Part 3: Accounts receivable

10. **Does the debtor have any accounts receivable?**

❑ No. Go to Part 4.

❑ Yes. Fill in the information below.

				Current value of debtor's interest
11. **Accounts receivable**				
11a. 90 days old or less:	_____ face amount	– _____ doubtful or uncollectible accounts	= ..... ➔	$_____
11b. Over 90 days old:	_____ face amount	– _____ doubtful or uncollectible accounts	= ..... ➔	$_____

12. **Total of Part 3**
Current value on lines 11a + 11b = line 12. Copy the total to line 82.

$_____

Part 4: Investments

13. **Does the debtor own any investments?**

❑ No. Go to Part 5.

❑ Yes. Fill in the information below.

	Valuation method used for current value	Current value of debtor's interest
14. **Mutual funds or publicly traded stocks not included in Part 1**		
Name of fund or stock:		
14.1. _____	_____	$_____
14.2. _____	_____	$_____

15. **Non-publicly traded stock and interests in incorporated and unincorporated businesses, including any interest in an LLC, partnership, or joint venture**

Name of entity:	% of ownership:		
15.1._____	_____%	_____	$_____
15.2._____	_____%	_____	$_____

16. **Government bonds, corporate bonds, and other negotiable and non-negotiable instruments not included in Part 1**

Describe:		
16.1._____	_____	$_____
16.2._____	_____	$_____

17. **Total of Part 4**
Add lines 14 through 16. Copy the total to line 83.

$_____

Part 5: Inventory, excluding agriculture assets

18. **Does the debtor own any inventory (excluding agriculture assets)?**
    - ❑ No. Go to Part 6.
    - ❑ Yes. Fill in the information below.

General description	Date of the last physical inventory	Net book value of debtor's interest (Where available)	Valuation method used for current value	Current value of debtor's interest
19. **Raw materials**				
_____	_____ MM / DD / YYYY	$_____	_____	$_____
20. **Work in progress**				
_____	_____ MM / DD / YYYY	$_____	_____	$_____
21. **Finished goods, including goods held for resale**				
_____	_____ MM / DD / YYYY	$_____	_____	$_____
22. **Other inventory or supplies**				
_____	_____ MM / DD / YYYY	$_____	_____	$_____

23. **Total of Part 5** $_____
    Add lines 19 through 22. Copy the total to line 84.

24. **Is any of the property listed in Part 5 perishable?**
    - ❑ No
    - ❑ Yes

25. **Has any of the property listed in Part 5 been purchased within 20 days before the bankruptcy was filed?**
    - ❑ No
    - ❑ Yes. Book value _____ Valuation method_____ Current value_____

26. **Has any of the property listed in Part 5 been appraised by a professional within the last year?**
    - ❑ No
    - ❑ Yes

Part 6: Farming and fishing-related assets (other than titled motor vehicles and land)

27. **Does the debtor own or lease any farming and fishing-related assets (other than titled motor vehicles and land)?**
    - ❑ No. Go to Part 7.
    - ❑ Yes. Fill in the information below.

General description	Net book value of debtor's interest (Where available)	Valuation method used for current value	Current value of debtor's interest
28. **Crops—either planted or harvested**			
_____	$_____	_____	$_____
29. **Farm animals** *Examples*: Livestock, poultry, farm-raised fish			
_____	$_____	_____	$_____
30. **Farm machinery and equipment** (Other than titled motor vehicles)			
_____	$_____	_____	$_____
31. **Farm and fishing supplies, chemicals, and feed**			
_____	$_____	_____	$_____
32. **Other farming and fishing-related property not already listed in Part 6**			
_____	$_____	_____	$_____

33. **Total of Part 6.**
Add lines 28 through 32. Copy the total to line 85. $_____

34. **Is the debtor a member of an agricultural cooperative?**
- ❑ No
- ❑ Yes. Is any of the debtor's property stored at the cooperative?
  - ❑ No
  - ❑ Yes

35. **Has any of the property listed in Part 6 been purchased within 20 days before the bankruptcy was filed?**
- ❑ No
- ❑ Yes. Book value $_____ Valuation method _____ Current value $_____

36. **Is a depreciation schedule available for any of the property listed in Part 6?**
- ❑ No
- ❑ Yes

37. **Has any of the property listed in Part 6 been appraised by a professional within the last year?**
- ❑ No
- ❑ Yes

Part 7: Office furniture, fixtures, and equipment; and collectibles

38. **Does the debtor own or lease any office furniture, fixtures, equipment, or collectibles?**
- ❑ No. Go to Part 8.
- ❑ Yes. Fill in the information below.

General description	Net book value of debtor's interest (Where available)	Valuation method used for current value	Current value of debtor's interest
39. **Office furniture**			
_____	$_____	_____	$_____
40. **Office fixtures**			
_____	$_____	_____	$_____
41. **Office equipment, including all computer equipment and communication systems equipment and software**			
_____	$_____	_____	$_____
42. **Collectibles** *Examples:* Antiques and figurines; paintings, prints, or other artwork; books, pictures, or other art objects; china and crystal; stamp, coin, or baseball card collections; other collections, memorabilia, or collectibles			
42.1_____	$_____	_____	$_____
42.2_____	$_____	_____	$_____
42.3_____	$_____	_____	$_____

43. **Total of Part 7.**
Add lines 39 through 42. Copy the total to line 86. $_____

44. **Is a depreciation schedule available for any of the property listed in Part 7?**
- ❑ No
- ❑ Yes

45. **Has any of the property listed in Part 7 been appraised by a professional within the last year?**
- ❑ No
- ❑ Yes

Part 8: Machinery, equipment, and vehicles

46. **Does the debtor own or lease any machinery, equipment, or vehicles?**

- ❑ No. Go to Part 9.
- ❑ Yes. Fill in the information below.

General description Include year, make, model, and identification numbers (i.e., VIN, HIN, or N-number)	Net book value of debtor's interest (Where available)	Valuation method used for current value	Current value of debtor's interest
47. Automobiles, vans, trucks, motorcycles, trailers, and titled farm vehicles			
47.1_____	$_____	_____	$_____
47.2_____	$_____	_____	$_____
47.3_____	$_____	_____	$_____
47.4_____	$_____	_____	$_____
48. Watercraft, trailers, motors, and related accessories Examples: Boats, trailers, motors, floating homes, personal watercraft, and fishing vessels			
48.1_____	$_____	_____	$_____
48.2_____	$_____	_____	$_____
49. Aircraft and accessories			
49.1_____	$_____	_____	$_____
49.2_____	$_____	_____	$_____
50. Other machinery, fixtures, and equipment (excluding farm machinery and equipment)			
_____	$_____	_____	$_____

51. **Total of Part 8.**
Add lines 47 through 50. Copy the total to line 87.

$_____

52. **Is a depreciation schedule available for any of the property listed in Part 8?**
- ❑ No
- ❑ Yes

53. **Has any of the property listed in Part 8 been appraised by a professional within the last year?**
- ❑ No
- ❑ Yes

Part 9: Real property

54. **Does the debtor own or lease any real property?**
    - ❑ No. Go to Part 10.
    - ❑ Yes. Fill in the information below.

55. **Any building, other improved real estate, or land which the debtor owns or in which the debtor has an interest**

Description and location of property Include street address or other description such as Assessor Parcel Number (APN), and type of property (for example, acreage, factory, warehouse, apartment or office building), if available.	**Nature and extent of debtor's interest in property**	**Net book value of debtor's interest** (Where available)	**Valuation method used for current value**	**Current value of debtor's interest**
55.1_____	_____	$_____	_____	$_____
55.2_____	_____	$_____	_____	$_____
55.3_____	_____	$_____	_____	$_____
55.4_____	_____	$_____	_____	$_____
55.5_____	_____	$_____	_____	$_____
55.6_____	_____	$_____	_____	$_____

56. **Total of Part 9.**
    Add the current value on lines 55.1 through 55.6 and entries from any additional sheets. Copy the total to line 88.

    $_____

57. **Is a depreciation schedule available for any of the property listed in Part 9?**
    - ❑ No
    - ❑ Yes

58. **Has any of the property listed in Part 9 been appraised by a professional within the last year?**
    - ❑ No
    - ❑ Yes

Part 10: Intangibles and intellectual property

59. **Does the debtor have any interests in intangibles or intellectual property?**
    - ❑ No. Go to Part 11.
    - ❑ Yes. Fill in the information below.

	General description	**Net book value of debtor's interest** (Where available)	**Valuation method used for current value**	**Current value of debtor's interest**
60.	**Patents, copyrights, trademarks, and trade secrets** _____	$_____	_____	$_____
61.	**Internet domain names and websites** _____	$_____	_____	$_____
62.	**Licenses, franchises, and royalties** _____	$_____	_____	$_____
63.	**Customer lists, mailing lists, or other compilations** _____	$_____	_____	$_____
64.	**Other intangibles, or intellectual property** _____	$_____	_____	$_____
65.	**Goodwill** _____	$_____	_____	$_____

66. **Total of Part 10.**
    Add lines 60 through 65. Copy the total to line 89.

    $_____

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67. **Do your lists or records include personally identifiable information of customers** (as defined in 11 U.S.C. §§ 101(41A) and 107)**?**
    - ❑ No
    - ❑ Yes
68. **Is there an amortization or other similar schedule available for any of the property listed in Part 10?**
    - ❑ No
    - ❑ Yes
69. **Has any of the property listed in Part 10 been appraised by a professional within the last year?**
    - ❑ No
    - ❑ Yes

Part 11: All other assets

70. **Does the debtor own any other assets that have not yet been reported on this form?**
    Include all interests in executory contracts and unexpired leases not previously reported on this form.
    - ❑ No. Go to Part 12.
    - ❑ Yes. Fill in the information below.

Current value of debtor's interest

71. **Notes receivable**
    Description (include name of obligor)
    _____ _____ – _____ = ➔ $_____
    Total face amount — doubtful or uncollectible amount

72. **Tax refunds and unused net operating losses (NOLs)**
    Description (for example, federal, state, local)
    _____ Tax year _____ $_____
    _____ Tax year _____ $_____
    _____ Tax year _____ $_____

73. **Interests in insurance policies or annuities**
    _____ $_____

74. **Causes of action against third parties (whether or not a lawsuit has been filed)**
    _____ $_____
    Nature of claim _____
    Amount requested $_____

75. **Other contingent and unliquidated claims or causes of action of every nature, including counterclaims of the debtor and rights to set off claims**
    _____ $_____
    Nature of claim _____
    Amount requested $_____

76. **Trusts, equitable or future interests in property**
    _____ $_____

77. **Other property of any kind not already listed** *Examples:* Season tickets, country club membership
    _____ $_____
    _____ $_____

78. **Total of Part 11.**
    Add lines 71 through 77. Copy the total to line 90. $_____

79. **Has any of the property listed in Part 11 been appraised by a professional within the last year?**
    - ❑ No
    - ❑ Yes

Part 12: Summary

In Part 12 copy all of the totals from the earlier parts of the form.

Type of property	Current value of personal property	Current value of real property
80. **Cash, cash equivalents, and financial assets.** *Copy line 5, Part 1.*	$_____	
81. **Deposits and prepayments.** *Copy line 9, Part 2.*	$_____	
82. **Accounts receivable.** *Copy line 12, Part 3.*	$_____	
83. **Investments.** *Copy line 17, Part 4.*	$_____	
84. **Inventory.** *Copy line 23, Part 5.*	$_____	
85. **Farming and fishing-related assets.** *Copy line 33, Part 6.*	$_____	
86. **Office furniture, fixtures, and equipment; and collectibles.** *Copy line 43, Part 7.*	$_____	
87. **Machinery, equipment, and vehicles.** *Copy line 51, Part 8.*	$_____	
88. **Real property.** *Copy line 56, Part 9.* . ..... ➔		$_____
89. **Intangibles and intellectual property.** *Copy line 66, Part 10.*	$_____	
90. **All other assets.** *Copy line 78, Part 11.*	+ $_____	
91. **Total.** Add lines 80 through 90 for each column. .....91a.	$_____ +	91b. $_____

92. **Total of all property on Schedule A/B.** Lines 91a + 91b = 92. ..... $_____

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12-011319

Fill in this information to identify the case:

Debtor name _____

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number (If known): _____

❑ Check if this is an amended filing

Official Form 206D

Schedule D: Creditors Who Have Claims Secured by Property

12/15

Be as complete and accurate as possible.

1. **Do any creditors have claims secured by debtor's property?**
   - ❑ No. Check this box and submit page 1 of this form to the court with debtor's other schedules. Debtor has nothing else to report on this form.
   - ❑ Yes. Fill in all of the information below.

Part 1: List Creditors Who Have Secured Claims

2. **List in alphabetical order all creditors who have secured claims.** If a creditor has more than one secured claim, list the creditor separately for each claim.

		Column A **Amount of claim** Do not deduct the value of collateral.	Column B **Value of collateral that supports this claim**
2.1 **Creditor's name** _____ **Creditor's mailing address** _____ _____ **Creditor's email address, if known** _____ **Date debt was incurred** _____ **Last 4 digits of account number** __ __ __ __ **Do multiple creditors have an interest in the same property?** ❑ No ❑ Yes. Specify each creditor, including this creditor, and its relative priority. _____ _____	**Describe debtor's property that is subject to a lien** _____ _____ _____ **Describe the lien** _____ **Is the creditor an insider or related party?** ❑ No ❑ Yes **Is anyone else liable on this claim?** ❑ No ❑ Yes. Fill out *Schedule H: Codebtors* (Official Form 206H). **As of the petition filing date, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed	$_____	$_____
2.2 **Creditor's name** _____ **Creditor's mailing address** _____ _____ **Creditor's email address, if known** _____ **Date debt was incurred** _____ **Last 4 digits of account number** __ __ __ __ **Do multiple creditors have an interest in the same property?** ❑ No ❑ Yes. Have you already specified the relative priority? ❑ No. Specify each creditor, including this creditor, and its relative priority. _____ _____ ❑ Yes. The relative priority of creditors is specified on lines _____	**Describe debtor's property that is subject to a lien** _____ _____ _____ **Describe the lien** _____ **Is the creditor an insider or related party?** ❑ No ❑ Yes **Is anyone else liable on this claim?** ❑ No ❑ Yes. Fill out *Schedule H: Codebtors* (Official Form 206H). **As of the petition filing date, the claim is:** Check all that apply. ❑ Contingent ❑ Unliquidated ❑ Disputed	$_____	$_____

3. **Total of the dollar amounts from Part 1, Column A, including the amounts from the Additional Page, if any.** $_____

Debtor _____ Case number (*if known*)_____
Name

Part 1: Additional Page

	Column A **Amount of claim** Do not deduct the value of collateral.	*Column B* **Value of collateral that supports this claim**

Copy this page only if more space is needed. Continue numbering the lines sequentially from the previous page.

2._ Creditor's name

_____

Creditor's mailing address

_____
_____

Creditor's email address, if known

_____

Date debt was incurred _____

Last 4 digits of account number __ __ __ __

Do multiple creditors have an interest in the same property?

- ❑ No
- ❑ Yes. Have you already specified the relative priority?
  - ❑ No. Specify each creditor, including this creditor, and its relative priority.
    _____
    _____
    _____
  - ❑ Yes. The relative priority of creditors is specified on lines _____

Describe debtor's property that is subject to a lien

_____ $_____ $_____
_____
_____

Describe the lien

_____

Is the creditor an insider or related party?

- ❑ No
- ❑ Yes

Is anyone else liable on this claim?

- ❑ No
- ❑ Yes. Fill out *Schedule H: Codebtors* (Official Form 206H).

As of the petition filing date, the claim is:
Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed

2._ Creditor's name

_____

Creditor's mailing address

_____
_____

Creditor's email address, if known

_____

Date debt was incurred _____

Last 4 digits of account number __ __ __ __

Do multiple creditors have an interest in the same property?

- ❑ No
- ❑ Yes. Have you already specified the relative priority?
  - ❑ No. Specify each creditor, including this creditor, and its relative priority.
    _____
    _____
    _____
  - ❑ Yes. The relative priority of creditors is specified on lines _____

Describe debtor's property that is subject to a lien

_____ $_____ $_____
_____
_____

Describe the lien

_____

Is the creditor an insider or related party?

- ❑ No
- ❑ Yes

Is anyone else liable on this claim?

- ❑ No
- ❑ Yes. Fill out *Schedule H: Codebtors* (Official Form 206H).

As of the petition filing date, the claim is:
Check all that apply.

- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed

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Debtor _____ Case number (*if known*)_____
Name

Part 2: List Others to Be Notified for a Debt Already Listed in Part 1

List in alphabetical order any others who must be notified for a debt already listed in Part 1. Examples of entities that may be listed are collection agencies, assignees of claims listed above, and attorneys for secured creditors.

If no others need to be notified for the debts listed in Part 1, do not fill out or submit this page. If additional pages are needed, copy this page.

Name and address	On which line in Part 1 did you enter the related creditor?	Last 4 digits of account number for this entity
	Line 2. __	___ ___ ___ ___
	Line 2. __	___ ___ ___ ___
	Line 2. __	___ ___ ___ ___
	Line 2. __	___ ___ ___ ___
	Line 2. __	___ ___ ___ ___
	Line 2. __	___ ___ ___ ___
	Line 2. __	___ ___ ___ ___
	Line 2. __	___ ___ ___ ___
	Line 2. __	___ ___ ___ ___
	Line 2. __	___ ___ ___ ___
	Line 2. __	___ ___ ___ ___
	Line 2. __	___ ___ ___ ___
	Line 2. __	___ ___ ___ ___
	Line 2. __	___ ___ ___ ___
	Line 2. __	___ ___ ___ ___

Fill in this information to identify the case:

Debtor _____

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number (If known) _____

❑ Check if this is an amended filing

Official Form 206E/F

Schedule E/F: Creditors Who Have Unsecured Claims

12/15

Be as complete and accurate as possible. Use Part 1 for creditors with PRIORITY unsecured claims and Part 2 for creditors with NONPRIORITY unsecured claims. List the other party to any executory contracts or unexpired leases that could result in a claim. Also list executory contracts on *Schedule A/B: Assets - Real and Personal Property* (Official Form 206A/B) and on *Schedule G: Executory Contracts and Unexpired Leases* (Official Form 206G). Number the entries in Parts 1 and 2 in the boxes on the left. If more space is needed for Part 1 or Part 2, fill out and attach the Additional Page of that Part included in this form.

Part 1: List All Creditors with PRIORITY Unsecured Claims

1. **Do any creditors have priority unsecured claims?** (See 11 U.S.C. § 507).
   - ❑ No. Go to Part 2.
   - ❑ Yes. Go to line 2.

2. **List in alphabetical order all creditors who have unsecured claims that are entitled to priority in whole or in part.** If the debtor has more than 3 creditors with priority unsecured claims, fill out and attach the Additional Page of Part 1.

		Total claim	Priority amount
2.1	**Priority creditor's name and mailing address** _____ **Date or dates debt was incurred** _____ **Last 4 digits of account number** ___ ___ ___ ___ **Specify Code subsection of PRIORITY unsecured claim:** 11 U.S.C. § 507(a) (_____)	**As of the petition filing date, the claim is:** *Check all that apply.* ❑ Contingent ❑ Unliquidated ❑ Disputed **Basis for the claim:** _____ **Is the claim subject to offset?** ❑ No ❑ Yes	$_____
2.2	**Priority creditor's name and mailing address** _____ **Date or dates debt was incurred** _____ **Last 4 digits of account number** ___ ___ ___ ___ **Specify Code subsection of PRIORITY unsecured claim:** 11 U.S.C. § 507(a) (_____)	**As of the petition filing date, the claim is:** *Check all that apply.* ❑ Contingent ❑ Unliquidated ❑ Disputed **Basis for the claim:** _____ **Is the claim subject to offset?** ❑ No ❑ Yes	$_____
2.3	**Priority creditor's name and mailing address** _____ **Date or dates debt was incurred** _____ **Last 4 digits of account number** ___ ___ ___ ___ **Specify Code subsection of PRIORITY unsecured claim:** 11 U.S.C. § 507(a) (_____)	**As of the petition filing date, the claim is:** *Check all that apply.* ❑ Contingent ❑ Unliquidated ❑ Disputed **Basis for the claim:** _____ **Is the claim subject to offset?** ❑ No ❑ Yes	$_____

Part 1. Additional Page

Copy this page if more space is needed. Continue numbering the lines sequentially from the previous page. If no additional PRIORITY creditors exist, do not fill out or submit this page.	Total claim	Priority amount
2._ **Priority creditor's name and mailing address** _____ **As of the petition filing date, the claim is:** *Check all that apply.* ❑ Contingent ❑ Unliquidated ❑ Disputed **Date or dates debt was incurred** _____ **Basis for the claim:** _____ **Last 4 digits of account number** ___ ___ ___ ___ **Is the claim subject to offset?** ❑ No ❑ Yes **Specify Code subsection of PRIORITY unsecured claim:** 11 U.S.C. § 507(a) (_____)	$_____	$_____
2._ **Priority creditor's name and mailing address** _____ **As of the petition filing date, the claim is:** *Check all that apply.* ❑ Contingent ❑ Unliquidated ❑ Disputed **Date or dates debt was incurred** _____ **Basis for the claim:** _____ **Last 4 digits of account number** ___ ___ ___ ___ **Is the claim subject to offset?** ❑ No ❑ Yes **Specify Code subsection of PRIORITY unsecured claim:** 11 U.S.C. § 507(a) (_____)	$_____	$_____
2._ **Priority creditor's name and mailing address** _____ **As of the petition filing date, the claim is:** *Check all that apply.* ❑ Contingent ❑ Unliquidated ❑ Disputed **Date or dates debt was incurred** _____ **Basis for the claim:** _____ **Last 4 digits of account number** ___ ___ ___ ___ **Is the claim subject to offset?** ❑ No ❑ Yes **Specify Code subsection of PRIORITY unsecured claim:** 11 U.S.C. § 507(a) (_____)	$_____	$_____
2._ **Priority creditor's name and mailing address** _____ **As of the petition filing date, the claim is:** *Check all that apply.* ❑ Contingent ❑ Unliquidated ❑ Disputed **Date or dates debt was incurred** _____ **Basis for the claim:** _____ **Last 4 digits of account number** ___ ___ ___ ___ **Is the claim subject to offset?** ❑ No ❑ Yes **Specify Code subsection of PRIORITY unsecured claim:** 11 U.S.C. § 507(a) (_____)	$_____	$_____

Part 2: List All Creditors with NONPRIORITY Unsecured Claims

3. **List in alphabetical order all of the creditors with nonpriority unsecured claims.** If the debtor has more than 6 creditors with nonpriority unsecured claims, fill out and attach the Additional Page of Part 2.

Amount of claim

3.1 Nonpriority creditor's name and mailing address

_____
_____
_____

Date or dates debt was incurred _____

Last 4 digits of account number ___ ___ ___ ___

As of the petition filing date, the claim is:
Check all that apply.
❑ Contingent
❑ Unliquidated
❑ Disputed

Basis for the claim: _____

Is the claim subject to offset?
❑ No
❑ Yes

$_____

3.2 Nonpriority creditor's name and mailing address

_____
_____
_____

Date or dates debt was incurred _____

Last 4 digits of account number ___ ___ ___ ___

As of the petition filing date, the claim is:
Check all that apply.
❑ Contingent
❑ Unliquidated
❑ Disputed

Basis for the claim: _____

Is the claim subject to offset?
❑ No
❑ Yes

$_____

3.3 Nonpriority creditor's name and mailing address

_____
_____
_____

Date or dates debt was incurred _____

Last 4 digits of account number ___ ___ ___ ___

As of the petition filing date, the claim is:
Check all that apply.
❑ Contingent
❑ Unliquidated
❑ Disputed

Basis for the claim: _____

Is the claim subject to offset?
❑ No
❑ Yes

$_____

3.4 Nonpriority creditor's name and mailing address

_____
_____
_____

Date or dates debt was incurred _____

Last 4 digits of account number ___ ___ ___ ___

As of the petition filing date, the claim is:
Check all that apply.
❑ Contingent
❑ Unliquidated
❑ Disputed

Basis for the claim: _____

Is the claim subject to offset?
❑ No
❑ Yes

$_____

3.5 Nonpriority creditor's name and mailing address

_____
_____
_____

Date or dates debt was incurred _____

Last 4 digits of account number ___ ___ ___ ___

As of the petition filing date, the claim is:
Check all that apply.
❑ Contingent
❑ Unliquidated
❑ Disputed

Basis for the claim: _____

Is the claim subject to offset?
❑ No
❑ Yes

$_____

3.6 Nonpriority creditor's name and mailing address

_____
_____
_____

Date or dates debt was incurred _____

Last 4 digits of account number ___ ___ ___ ___

As of the petition filing date, the claim is:
Check all that apply.
❑ Contingent
❑ Unliquidated
❑ Disputed

Basis for the claim: _____

Is the claim subject to offset?
❑ No
❑ Yes

$_____

Debtor _____ Case number (*if known*)_____
Name

Part 2: Additional Page

Copy this page only if more space is needed. Continue numbering the lines sequentially from the previous page. If no additional NONPRIORITY creditors exist, do not fill out or submit this page.

Amount of claim

3.__ **Nonpriority creditor's name and mailing address**

_____

_____

_____

Date or dates debt was incurred _____

Last 4 digits of account number ___ ___ ___ ___

As of the petition filing date, the claim is:
Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed
- ❑ Liquidated and neither contingent nor disputed

Basis for the claim: _____

Is the claim subject to offset?
- ❑ No
- ❑ Yes

$_____

3.__ **Nonpriority creditor's name and mailing address**

_____

_____

_____

Date or dates debt was incurred _____

Last 4 digits of account number ___ ___ ___ ___

As of the petition filing date, the claim is:
Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed

Basis for the claim: _____

Is the claim subject to offset?
- ❑ No
- ❑ Yes

$_____

3.__ **Nonpriority creditor's name and mailing address**

_____

_____

_____

Date or dates debt was incurred _____

Last 4 digits of account number ___ ___ ___ ___

As of the petition filing date, the claim is:
Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed

Basis for the claim: _____

Is the claim subject to offset?
- ❑ No
- ❑ Yes

$_____

3.__ **Nonpriority creditor's name and mailing address**

_____

_____

_____

Date or dates debt was incurred _____

Last 4 digits of account number ___ ___ ___ ___

As of the petition filing date, the claim is:
Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed

Basis for the claim: _____

Is the claim subject to offset?
- ❑ No
- ❑ Yes

$_____

3.__ **Nonpriority creditor's name and mailing address**

_____

_____

_____

Date or dates debt was incurred _____

Last 4 digits of account number ___ ___ ___ ___

As of the petition filing date, the claim is:
Check all that apply.
- ❑ Contingent
- ❑ Unliquidated
- ❑ Disputed

Basis for the claim: _____

Is the claim subject to offset?
- ❑ No
- ❑ Yes

$_____

Debtor _____ Case number (*if known*)_____
Name

Part 3: List Others to Be Notified About Unsecured Claims

4. List in alphabetical order any others who must be notified for claims listed in Parts 1 and 2. Examples of entities that may be listed are collection agencies, assignees of claims listed above, and attorneys for unsecured creditors.

If no others need to be notified for the debts listed in Parts 1 and 2, do not fill out or submit this page. If additional pages are needed, copy the next page.

	Name and mailing address	On which line in Part 1 or Part 2 is the related creditor (if any) listed?	Last 4 digits of account number, if any
4.1.	_____	Line ____ ❑ Not listed. Explain _____	___ ___ ___ ___
4.2.	_____	Line ____ ❑ Not listed. Explain _____	___ ___ ___ ___
4.3.	_____	Line ____ ❑ Not listed. Explain _____	___ ___ ___ ___
4.4.	_____	Line ____ ❑ Not listed. Explain _____	___ ___ ___ ___
41.	_____	Line ____ ❑ Not listed. Explain _____	___ ___ ___ ___
4.5.	_____	Line ____ ❑ Not listed. Explain _____	___ ___ ___ ___
4.6.	_____	Line ____ ❑ Not listed. Explain _____	___ ___ ___ ___
4.7.	_____	Line ____ ❑ Not listed. Explain _____	___ ___ ___ ___
4.8.	_____	Line ____ ❑ Not listed. Explain _____	___ ___ ___ ___
4.9.	_____	Line ____ ❑ Not listed. Explain _____	___ ___ ___ ___
4.10.	_____	Line ____ ❑ Not listed. Explain _____	___ ___ ___ ___
4.11.	_____	Line ____ ❑ Not listed. Explain _____	___ ___ ___ ___

Debtor _____ Case number (*if known*)_____
Name

Part 3: Additional Page for Others to Be Notified About Unsecured Claims

	Name and mailing address	On which line in Part 1 or Part 2 is the related creditor (if any) listed?	Last 4 digits of account number, if any
4.__	_____	Line ____ ❑ Not listed. Explain _____	__ __ __ __
4.__	_____	Line ____ ❑ Not listed. Explain _____	__ __ __ __
4.__	_____	Line ____ ❑ Not listed. Explain _____	__ __ __ __
4.__	_____	Line ____ ❑ Not listed. Explain _____	__ __ __ __
4.__	_____	Line ____ ❑ Not listed. Explain _____	__ __ __ __
4.__	_____	Line ____ ❑ Not listed. Explain _____	__ __ __ __
4.__	_____	Line ____ ❑ Not listed. Explain _____	__ __ __ __
4.__	_____	Line ____ ❑ Not listed. Explain _____	__ __ __ __
4.__	_____	Line ____ ❑ Not listed. Explain _____	__ __ __ __
4.__	_____	Line ____ ❑ Not listed. Explain _____	__ __ __ __
4.__	_____	Line ____ ❑ Not listed. Explain _____	__ __ __ __
4.__	_____	Line ____ ❑ Not listed. Explain _____	__ __ __ __
4.__	_____	Line ____ ❑ Not listed. Explain _____	__ __ __ __
4.__	_____	Line ____ ❑ Not listed. Explain _____	__ __ __ __

Part 4: Total Amounts of the Priority and Nonpriority Unsecured Claims

5. Add the amounts of priority and nonpriority unsecured claims.

			Total of claim amounts
5a. **Total claims from Part 1**	5a.		$_____
5b. **Total claims from Part 2**	5b.	+	$_____
5c. **Total of Parts 1 and 2** Lines 5a + 5b = 5c.	5c.		$_____

Fill in this information to identify the case:

Debtor name _____

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number (If known): _____ Chapter _____

❑ Check if this is an amended filing

Official Form 206G

Schedule G: Executory Contracts and Unexpired Leases

12/15

Be as complete and accurate as possible. If more space is needed, copy and attach the additional page, numbering the entries consecutively.

1. Does the debtor have any executory contracts or unexpired leases?

❑ No. Check this box and file this form with the court with the debtor's other schedules. There is nothing else to report on this form.

❑ Yes. Fill in all of the information below even if the contracts or leases are listed on *Schedule A/B: Assets - Real and Personal Property* (Official Form 206A/B).

2. List all contracts and unexpired leases		**State the name and mailing address for all other parties with whom the debtor has an executory contract or unexpired lease**
2.1	**State what the contract or lease is for and the nature of the debtor's interest** **State the term remaining** **List the contract number of any government contract**	
2.2	**State what the contract or lease is for and the nature of the debtor's interest** **State the term remaining** **List the contract number of any government contract**	
2.3	**State what the contract or lease is for and the nature of the debtor's interest** **State the term remaining** **List the contract number of any government contract**	
2.4	**State what the contract or lease is for and the nature of the debtor's interest** **State the term remaining** **List the contract number of any government contract**	
2.5	**State what the contract or lease is for and the nature of the debtor's interest** **State the term remaining** **List the contract number of any government contract**	

Debtor _____ Case number (*if known*)_____
Name

Additional Page if Debtor Has More Executory Contracts or Unexpired Leases

Copy this page only if more space is needed. Continue numbering the lines sequentially from the previous page.

	List all contracts and unexpired leases	State the name and mailing address for all other parties with whom the debtor has an executory contract or unexpired lease
2._	**State what the contract or lease is for and the nature of the debtor's interest** **State the term remaining** **List the contract number of any government contract**	
2._	**State what the contract or lease is for and the nature of the debtor's interest** **State the term remaining** **List the contract number of any government contract**	
2._	**State what the contract or lease is for and the nature of the debtor's interest** **State the term remaining** **List the contract number of any government contract**	
2._	**State what the contract or lease is for and the nature of the debtor's interest** **State the term remaining** **List the contract number of any government contract**	
2._	**State what the contract or lease is for and the nature of the debtor's interest** **State the term remaining** **List the contract number of any government contract**	
2._	**State what the contract or lease is for and the nature of the debtor's interest** **State the term remaining** **List the contract number of any government contract**	
2._	**State what the contract or lease is for and the nature of the debtor's interest** **State the term remaining** **List the contract number of any government contract**	

Fill in this information to identify the case:

Debtor name _____

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number (If known): _____

❑ Check if this is an amended filing

Official Form 206H

Schedule H: Codebtors

12/15

Be as complete and accurate as possible. If more space is needed, copy the Additional Page, numbering the entries consecutively. Attach the Additional Page to this page.

1. **Does the debtor have any codebtors?**
   - ❑ No. Check this box and submit this form to the court with the debtor's other schedules. Nothing else needs to be reported on this form.
   - ❑ Yes

2. **In Column 1, list as codebtors all of the people or entities who are also liable for any debts listed by the debtor in the schedules of creditors, *Schedules D-G*.** Include all guarantors and co-obligors. In Column 2, identify the creditor to whom the debt is owed and each schedule on which the creditor is listed. If the codebtor is liable on a debt to more than one creditor, list each creditor separately in Column 2.

	Column 1: **Codebtor**		*Column 2:* **Creditor**	
	Name	**Mailing address**	**Name**	*Check all schedules that apply:*
2.1	_____	_____ Street _____ _____ City State ZIP Code	_____	❑ D ❑ E/F ❑ G
2.2	_____	_____ Street _____ _____ City State ZIP Code	_____	❑ D ❑ E/F ❑ G
2.3	_____	_____ Street _____ _____ City State ZIP Code	_____	❑ D ❑ E/F ❑ G
2.4	_____	_____ Street _____ _____ City State ZIP Code	_____	❑ D ❑ E/F ❑ G
2.5	_____	_____ Street _____ _____ City State ZIP Code	_____	❑ D ❑ E/F ❑ G
2.6	_____	_____ Street _____ _____ City State ZIP Code	_____	❑ D ❑ E/F ❑ G

Debtor _____ Case number (*if known*)_____
Name

Additional Page if Debtor Has More Codebtors

Copy this page only if more space is needed. Continue numbering the lines sequentially from the previous page.

	Column 1: **Codebtor**		*Column 2:* **Creditor**	
	Name	**Mailing address**	**Name**	*Check all schedules that apply:*
2.__	_____	_____ Street _____ _____ City State ZIP Code	_____	❑ D ❑ E/F ❑ G
2.__	_____	_____ Street _____ _____ City State ZIP Code	_____	❑ D ❑ E/F ❑ G
2.__	_____	_____ Street _____ _____ City State ZIP Code	_____	❑ D ❑ E/F ❑ G
2.__	_____	_____ Street _____ _____ City State ZIP Code	_____	❑ D ❑ E/F ❑ G
2.__	_____	_____ Street _____ _____ City State ZIP Code	_____	❑ D ❑ E/F ❑ G
2.__	_____	_____ Street _____ _____ City State ZIP Code	_____	❑ D ❑ E/F ❑ G
2.__	_____	_____ Street _____ _____ City State ZIP Code	_____	❑ D ❑ E/F ❑ G
2.__	_____	_____ Street _____ _____ City State ZIP Code	_____	❑ D ❑ E/F ❑ G

Fill in this information to identify the case:

Debtor name _____

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number (If known): _____

☐ Check if this is an amended filing

Official Form 206Sum

Summary of Assets and Liabilities for Non-Individuals

12/15

Part 1: Summary of Assets

1. ***Schedule A/B: Assets–Real and Personal Property*** (Official Form 206A/B)

1a. **Real property:**
Copy line 88 from *Schedule A/B* ..... $ _____

1b. **Total personal property:**
Copy line 91A from *Schedule A/B* ..... $ _____

1c. **Total of all property:**
Copy line 92 from *Schedule A/B* ..... $ _____

Part 2: Summary of Liabilities

2. ***Schedule D: Creditors Who Have Claims Secured by Property*** (Official Form 206D)
Copy the total dollar amount listed in Column A, *Amount of claim,* from line 3 of *Schedule D* ..... $ _____

3. ***Schedule E/F: Creditors Who Have Unsecured Claims*** (Official Form 206E/F)

3a. **Total claim amounts of priority unsecured claims:**
Copy the total claims from Part 1 from line 6a of *Schedule E/F* ..... $ _____

3b. **Total amount of claims of nonpriority amount of unsecured claims:**
Copy the total of the amount of claims from Part 2 from line 6b of *Schedule E/F* ..... + $ _____

4. **Total liabilities** .....
Lines 2 + 3a + 3b $ _____

COMMITTEE NOTE

The schedules to be used in cases of non-individual debtors have been revised as part of the Forms Modernization Project, making them easier to read and, as a result, likely to generate more complete and accurate responses. The goals of the Forms Modernization Project include improving the interface between technology and the forms so as to increase efficiency and reduce the need to produce the same information in multiple formats.

The Forms Modernization Project made a preliminary decision that separate forms should be created for individual debtors and for non-individual debtors because separate areas of inquiry apply to each group. The forms for non-individuals eliminate questions that pertain only to individuals and use a more open-ended response format. Also, where possible, the forms for non-individuals parallel how businesses commonly keep their financial records. The non-individual debtor schedules are also renumbered, starting with the number 206 and followed by the letter or name of the schedule to distinguish them from the versions to be used in individual cases. Each form includes a checkbox to indicate whether it is an amended filing.

Official Form 206Sum, *Summary of Assets and Liabilities for Non-Individuals*, replaces Official Form 6, *Summary of Schedules and Statistical Summary of Certain Liability and Related Data (28 U.S.C. § 159)*, in cases of non-individual debtors. The form is reformatted and updated with cross-references indicating the line numbers from specific schedules from which the summary information is to be gathered, and the Statistical Summary is deleted because it only applies to individual debtors. In addition, because most filings are now done electronically, the form no longer requires the debtor to indicate which schedules are attached or to state the number of sheets of paper used for the schedules.

12-011335

Official Form 206A/B, *Schedule A/B: Assets – Real and Personal Property*, consolidates information about a non-individual debtor's real and personal property into a single form and replaces Official Form 6A - *Real Property* and Official Form 6B - *Personal Property*, in cases of non-individual debtors. The layout and categories of property on Official Form 206A/B have changed. Instead of dividing property interests into two categories (real or personal property), the new form uses eleven categories of property types. For each part, the specific items are broken out and debtors are instructed to total the part and list the total on a specific line later in the form.

Part 1: *Cash and cash equivalents*, includes cash and cash equivalents and a shortened list of examples. All financial assets other than cash or cash equivalents are moved to Part 4: *Investments*. In the section to list checking, savings, money market, or financial brokerage accounts, debtors are instructed to include the name of the institution and the last 4-digits of any account number.

In Part 2: *Deposits and prepayments*, adds prepayments and examples. A requirement has been added to include the name of the holder of any deposit.

Part 3: *Accounts receivable*, has been revised to divide accounts receivable into two categories depending on age and asks for separate values for the two categories.

Part 4: *Investments*, has been expanded and includes more detail.

Part 5: *Inventory, excluding agricultural assets*, has been amended to separate non-agricultural from agricultural assets, and has been expanded to include more detail. Categories of inventory are listed, and debtors must include the last date of physical inventory, the net book value of debtor's interest (if available), the valuation method used for current value, and the current value of debtor's interest. The form has been further amended to

require the debtor to indicate whether the properties listed are perishable, whether any of the property was purchased within 20 days of the bankruptcy filing, and whether any of the property was appraised by a professional within the year prior to the bankruptcy filing.

In Part 6: *Farming- and Fishing-Related Assets (other than titled motor vehicles and land)*, the form has been amended to require more detailed responses and to require the debtor to indicate the net book value of the debtor's interest, the valuation method used for current value, and the current value of debtor's interest. A requirement to list fishing supplies has been added. The form has been further amended to require the debtor to indicate whether the properties listed are perishable, whether any of the property was purchased within 20 days of the bankruptcy filing, whether a depreciation schedule is available for any of the property listed, and whether any of the property was appraised by a professional within the year prior to the bankruptcy filing.

Part 7: *Office furniture, fixtures, and equipment; and collectibles*, has been amended to combine several categories of assets and to require more detail, including requiring the debtor to indicate the net book value of the debtor's interest, the valuation method used for current value, and the current value of debtor's interest. Examples of collectibles are provided. The form has been further amended to require the debtor to indicate whether a depreciation schedule is available for any property listed and whether any of the property listed was appraised by a professional within the year prior to the bankruptcy filing.

Part 8: *Machinery, equipment, and vehicles*, has been amended to combine several categories of property and to require more detail, including requiring the debtor to indicate the net book value of the debtor's interest, the valuation method used for current value, and the current value of debtor's interest. More examples are provided for each property type. The form has been further amended to

12-011337

indicate whether a depreciation schedule is available for any property listed and whether any of the property listed was appraised by a professional within the year prior to the bankruptcy filing.

Part 9: *Real property*, includes the elements of Official Form 6A, *Real Property*, and has been amended to expand the required information to include the net book value of the debtor's interest and the valuation method used for current value. Also, an instruction has been added for the description and location of the property. The form has been further amended to indicate whether a depreciation schedule is available for any property listed and whether any of the property listed was appraised by a professional within the year prior to the bankruptcy filing.

Part 10: *Intangibles and intellectual property*, includes amendments to combine several categories of property and to include more property types. The debtor is required to list the net book value of the debtor's interest and the valuation method used for current value. The question regarding personally identifiable information has been revised, and the form has been amended to require the debtor to indicate if there is an amortization schedule or similar schedule available for any property listed and whether any of the property listed was appraised by a professional within the year prior to the bankruptcy filing.

Part 11: *All other assets*, includes a new category for notes receivable, which requires a description, including the name of the obligor, the face amount, and any uncollectible amount. In addition, the form has been amended to combine tax refunds and net operating losses into a single question and to require more detail, to delete the requirement to list the insurance company name for any interests in insurance policies, to expand the question regarding contingent and unliquidated claims, and to include examples of other property. The form has been further amended to include a question regarding whether

the property listed was appraised by a professional within the year prior to the bankruptcy filing.

Part 12, *Summary*, has been amended to list relevant line numbers for each type of property.

Official Form 206D, *Schedule D: Creditors Who Have Claims Secured by Property*, replaces Official Form 6D, *Creditors Holding Secured Claims*, for non-individual debtors and has been revised to eliminate instructions that pertain only to individuals. The form has been further amended to instruct debtors that if a creditor has more than one secured claim, to list the creditor separately for each claim; to list the creditor's email address, if known; to indicate if multiple creditors have an interest in the same collateral; to list the order of each creditor's priority interest in the collateral; and to indicate whether the creditor is an insider or related party. The debtor is also instructed to describe the lien and to fill out *Schedule H: Codebtors*, if anyone else is liable on the claim. Finally, the form has been amended to require the debtor to list the value of the debtor's property that secures the claim.

A new Part 2: *List Others to be Notified for a Debt Already Listed in Part 1* has been added, with instructions to list any others who must be notified about the bankruptcy for a debt listed in Part 1 of the form. Examples are provided. The debtor must include the relevant line from Part 1 and the last 4 digits of the account number for the entity.

A new Part 3: *Total Amounts of Claims and the Unsecured Portion of Claims*, has been added.

Official Form 206E/F, *Schedule E/F: Creditors Who Have Unsecured Claims*, has been amended to combine Official Form 6E, *Schedule E – Creditors Holding Unsecured Priority Claims* and Official Form 6F, *Schedule F – Creditors Holding Unsecured Nonpriority Claims* for non-individual debtors. Priority unsecured claims are listed

12-011339

in Part 1, and nonpriority unsecured claims are listed in Part 2. The instructions have been revised to require the debtor to list the other party to any executory contract or unexpired lease on this schedule and on *Schedule A/B Real and Personal Property* and *Schedule G: Executory Contracts and Unexpired Leases* (Official Forms 206A/B and 206G).

Part 1, *List All Creditors with PRIORITY Unsecured Claims*, has been revised to delete the requirement to list the amount not entitled to priority and to add requirements to specify the Code section for the priority unsecured claim and whether the claim is subject to offset. A new requirement was added to Part 2, *List All Creditor's with NONPRIORITY Unsecured Claims,* to indicate if the claim is subject to offset. The instructions have also been significantly shortened. Part 3, *List Others to be Notified About Unsecured Claims*, has been added, with instructions to list any others who must be notified for claims listed in Parts 1 and 2. Examples are given. The debtor must include the relevant line from Part 1 or 2 and the last 4 digits of the account number for the entity. A new Part 4: *Total Amounts of the Priority and Nonpriority Unsecured Claims* has been added.

Official Form 206G, *Schedule G: Executory Contracts and Unexpired Leases*, replaces Official Form 6G - *Executory Contracts and Unexpired Leases* for non-individual debtors. The form has been amended to delete the instruction regarding the listing of a minor child's name from the form as a caution is included in the general instructions for all forms regarding listing a minor child's name. A new requirement has been added to state the remaining term for any contract or lease listed.

Official Form 206H, *Schedule H: Codebtors*, replaces Official Form 6H – *Codebtors* for non-individual debtors. The form has been amended to delete the instruction regarding the listing of a minor child's name from the form as a caution is included in the general

instructions for all forms regarding listing a minor child's name. A new requirement is added to indicate by checkbox what schedule applies to each codebtor.

Schedules C, *Exemptions*, I, *Income* and J, *Expenses*. There are no Official Forms for Schedules C, I, and J in non-individual debtor cases. There is no need for an Official Form 206C for non-individual debtors because exemptions are inapplicable to non-individual debtors. And, although section 521(a) of the Bankruptcy Code requires all debtors, including non-individual debtors, to provide schedules of income and expenses, uncertainty about the state of the debtor's business on the petition date – whether it is operating or not, for example – makes it difficult to create standard income and expense forms for non-individual debtors. Some bankruptcy courts have adopted local rules and forms for reporting the income and expenses of non-individual debtors, and Director's Procedural Forms 2060I and 2060J, can be used and modified as appropriate if there are no applicable local rules and forms.

***Declaration*.** There is no Official Form 206, Declaration. The portion of Official Form 6 Declaration for a declaration on behalf of a corporation or partnership has been replaced by Official Form 202, *Declaration Under Penalty of Perjury for Non-Individual Debtors.* Official Form 202 includes checkboxes for the schedules included in Official Form 206.

Fill in this information to identify the case:

Debtor name _____

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number (If known): _____

❑ Check if this is an amended filing

Official Form 207

Statement of Financial Affairs for Non-Individuals Filing for Bankruptcy

12/15

The debtor must answer every question. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write the debtor's name and case number (if known).

Part 1: Income

1. **Gross revenue from business**

❑ None

Identify the beginning and ending dates of the debtor's fiscal year, which may be a calendar year				Sources of revenue Check all that apply	Gross revenue (before deductions and exclusions)
From the beginning of the fiscal year to filing date:	From _____ MM / DD / YYYY	to	Filing date	❑ Operating a business ❑ Other _____	$_____
For prior year:	From _____ MM / DD / YYYY	to	_____ MM / DD / YYYY	❑ Operating a business ❑ Other _____	$_____
For the year before that:	From _____ MM / DD / YYYY	to	_____ MM / DD / YYYY	❑ Operating a business ❑ Other _____	$_____

2. **Non-business revenue**

Include revenue regardless of whether that revenue is taxable. *Non-business income* may include interest, dividends, money collected from lawsuits, and royalties. List each source and the gross revenue for each separately. Do not include revenue listed in line 1.

❑ None

				Description of sources of revenue	Gross revenue from each source (before deductions and exclusions)
From the beginning of the fiscal year to filing date:	From _____ MM / DD / YYYY	to	Filing date	_____	$_____
For prior year:	From _____ MM / DD / YYYY	to	_____ MM / DD / YYYY	_____	$_____
For the year before that:	From _____ MM / DD / YYYY	to	_____ MM / DD / YYYY	_____	$_____

Part 2: List Certain Transfers Made Before Filing for Bankruptcy

3. Certain payments or transfers to creditors within 90 days before filing this case

List payments or transfers—including expense reimbursements—to any creditor, other than regular employee compensation, within 90 days before filing this case unless the aggregate value of all property transferred to that creditor is less than $6,225. (This amount may be adjusted on 4/01/16 and every 3 years after that with respect to cases filed on or after the date of adjustment.)

❑ None

	Creditor's name and address	Dates	Total amount or value	Reasons for payment or transfer *Check all that apply*
3.1.	_____ Creditor's name _____ Street _____ _____ City State ZIP Code	_____ _____ _____	$_____	❑ Secured debt ❑ Unsecured loan repayments ❑ Suppliers or vendors ❑ Services ❑ Other _____
3.2.	_____ Creditor's name _____ Street _____ _____ City State ZIP Code	_____ _____ _____	$_____	❑ Secured debt ❑ Unsecured loan repayments ❑ Suppliers or vendors ❑ Services ❑ Other _____

4. Payments or other transfers of property made within 1 year before filing this case that benefited any insider

List payments or transfers, including expense reimbursements, made within 1 year before filing this case on debts owed to an insider or guaranteed or cosigned by an insider unless the aggregate value of all property transferred to or for the benefit of the insider is less than $6,225. (This amount may be adjusted on 4/01/16 and every 3 years after that with respect to cases filed on or after the date of adjustment.) Do not include any payments listed in line 3. *Insiders* include officers, directors, and anyone in control of a corporate debtor and their relatives; general partners of a partnership debtor and their relatives; affiliates of the debtor and insiders of such affiliates; and any managing agent of the debtor. 11 U.S.C. § 101(31).

❑ None

	Insider's name and address	Dates	Total amount or value	Reasons for payment or transfer
4.1.	_____ Insider's name _____ Street _____ _____ City State ZIP Code **Relationship to debtor** _____	_____ _____ _____	$_____	_____ _____ _____
4.2.	_____ Insider's name _____ Street _____ _____ City State ZIP Code **Relationship to debtor** _____	_____ _____ _____	$_____	_____ _____ _____

5. Repossessions, foreclosures, and returns

List all property of the debtor that was obtained by a creditor within 1 year before filing this case, including property repossessed by a creditor, sold at a foreclosure sale, transferred by a deed in lieu of foreclosure, or returned to the seller. Do not include property listed in line 6.

❑ None

	Creditor's name and address	Description of the property	Date	Value of property
5.1.	Creditor's name Street City State ZIP Code			$_____
5.2.	Creditor's name Street City State ZIP Code			$_____

6. Setoffs

List any creditor, including a bank or financial institution, that within 90 days before filing this case set off or otherwise took anything from an account of the debtor without permission or refused to make a payment at the debtor's direction from an account of the debtor because the debtor owed a debt.

❑ None

Creditor's name and address	Description of the action creditor took	Date action was taken	Amount
Creditor's name Street City State ZIP Code	Last 4 digits of account number: XXXX– __ __ __ __		$_____

Part 3: Legal Actions or Assignments

7. Legal actions, administrative proceedings, court actions, executions, attachments, or governmental audits

List the legal actions, proceedings, investigations, arbitrations, mediations, and audits by federal or state agencies in which the debtor was involved in any capacity—within 1 year before filing this case.

❑ None

	Case title / Case number	Nature of case	Court or agency's name and address	Status of case
7.1.	Case title Case number		Name Street City State ZIP Code	❑ Pending ❑ On appeal ❑ Concluded
7.2.	Case title Case number		Name Street City State ZIP Code	❑ Pending ❑ On appeal ❑ Concluded

8. Assignments and receivership

List any property in the hands of an assignee for the benefit of creditors during the 120 days before filing this case and any property in the hands of a receiver, custodian, or other court-appointed officer within 1 year before filing this case.

❑ None

Custodian's name and address	Description of the property	Value
_____ Custodian's name _____ Street _____ _____ City State ZIP Code	_____	$_____
	Case title	**Court name and address**
	_____	_____ Name _____ Street _____ _____ City State ZIP Code
	Case number	
	_____	
	Date of order or assignment	
	_____	

Part 4: Certain Gifts and Charitable Contributions

9. List all gifts or charitable contributions the debtor gave to a recipient within 2 years before filing this case unless the aggregate value of the gifts to that recipient is less than $1,000

❑ None

	Recipient's name and address	Description of the gifts or contributions	Dates given	Value
9.1.	_____ Recipient's name _____ Street _____ _____ City State ZIP Code	_____ _____	_____	$_____
	Recipient's relationship to debtor			
	_____			
9.2.	_____ Recipient's name _____ Street _____ _____ City State ZIP Code	_____ _____	_____	$_____
	Recipient's relationship to debtor			
	_____			

Part 5: Certain Losses

10. **All losses from fire, theft, or other casualty within 1 year before filing this case.**

❑ None

Description of the property lost and how the loss occurred	Amount of payments received for the loss If you have received payments to cover the loss, for example, from insurance, government compensation, or tort liability, list the total received. List unpaid claims on Official Form 106A/B (*Schedule A/B: Assets – Real and Personal Property).*	Date of loss	Value of property lost
_____ _____	_____	_____	$_____

Part 6: Certain Payments or Transfers

11. Payments related to bankruptcy

List any payments of money or other transfers of property made by the debtor or person acting on behalf of the debtor within 1 year before the filing of this case to another person or entity, including attorneys, that the debtor consulted about debt consolidation or restructuring, seeking bankruptcy relief, or filing a bankruptcy case.

❑ None

	Who was paid or who received the transfer?	If not money, describe any property transferred	Dates	Total amount or value
11.1.	_____	_____	_____	$_____
	Address	_____		
	_____ Street			
	_____ City State ZIP Code			
	Email or website address			
	_____			
	Who made the payment, if not debtor?			
	_____			

	Who was paid or who received the transfer?	If not money, describe any property transferred	Dates	Total amount or value
11.2.	_____	_____	_____	$_____
	Address	_____		
	_____ Street			
	_____ City State ZIP Code			
	Email or website address			
	_____			
	Who made the payment, if not debtor?			
	_____			

12. Self-settled trusts of which the debtor is a beneficiary

List any payments or transfers of property made by the debtor or a person acting on behalf of the debtor within 10 years before the filing of this case to a self-settled trust or similar device.
Do not include transfers already listed on this statement.

❑ None

Name of trust or device	Describe any property transferred	Dates transfers were made	Total amount or value
_____	_____	_____	$_____
Trustee	_____		
_____			

13. Transfers not already listed on this statement

List any transfers of money or other property—by sale, trade, or any other means—made by the debtor or a person acting on behalf of the debtor within 2 years before the filing of this case to another person, other than property transferred in the ordinary course of business or financial affairs. Include both outright transfers and transfers made as security. Do not include gifts or transfers previously listed on this statement.

❑ None

	Who received transfer?	Description of property transferred or payments received or debts paid in exchange	Date transfer was made	Total amount or value
13.1.	_____	_____	_____	$_____
	Address	_____		
	_____ Street			
	_____			
	_____ City State ZIP Code			
	Relationship to debtor			
	_____			
	Who received transfer?	_____	_____	$_____
13.2.	_____	_____		
	Address			
	_____ Street			
	_____			
	_____ City State ZIP Code			
	Relationship to debtor			
	_____			

Part 7: Previous Locations

14. Previous addresses

List all previous addresses used by the debtor within 3 years before filing this case and the dates the addresses were used.

❑ Does not apply

	Address	Dates of occupancy
14.1.	_____ Street	From _____ To _____
	_____	
	_____ City State ZIP Code	
14.2.	_____ Street	From _____ To _____
	_____	
	_____ City State ZIP Code	

Part 8: Health Care Bankruptcies

15. Health Care bankruptcies

Is the debtor primarily engaged in offering services and facilities for:

— diagnosing or treating injury, deformity, or disease, or

— providing any surgical, psychiatric, drug treatment, or obstetric care?

❑ No. Go to Part 9.

❑ Yes. Fill in the information below.

	Facility name and address	Nature of the business operation, including type of services the debtor provides	If debtor provides meals and housing, number of patients in debtor's care
15.1.	Facility name Street City State ZIP Code	**Location where patient records are maintained** (if different from facility address). If electronic, identify any service provider.	**How are records kept?** *Check all that apply:* ❑ Electronically ❑ Paper

	Facility name and address	Nature of the business operation, including type of services the debtor provides	If debtor provides meals and housing, number of patients in debtor's care
15.2.	Facility name Street City State ZIP Code	**Location where patient records are maintained** (if different from facility address). If electronic, identify any service provider.	**How are records kept?** *Check all that apply:* ❑ Electronically ❑ Paper

Part 9: Personally Identifiable Information

16. Does the debtor collect and retain personally identifiable information of customers?

❑ No.

❑ Yes. State the nature of the information collected and retained. _____

Does the debtor have a privacy policy about that information?

❑ No

❑ Yes

17. Within 6 years before filing this case, have any employees of the debtor been participants in any ERISA, 401(k), 403(b), or other pension or profit-sharing plan made available by the debtor as an employee benefit?

❑ No. Go to Part 10.

Yes. Does the debtor serve as plan administrator?

❑ No. Go to Part 10.

❑ Yes. Fill in below:

Name of plan	Employer identification number of the plan
_____	EIN: ___ ___ – ___ ___ ___ ___ ___ ___ ___

Has the plan been terminated?

❑ No

❑ Yes

Part 10: Certain Financial Accounts, Safe Deposit Boxes, and Storage Units

18. Closed financial accounts

Within 1 year before filing this case, were any financial accounts or instruments held in the debtor's name, or for the debtor's benefit, closed, sold, moved, or transferred?

Include checking, savings, money market, or other financial accounts; certificates of deposit; and shares in banks, credit unions, brokerage houses, cooperatives, associations, and other financial institutions.

❑ None

	Financial institution name and address	Last 4 digits of account number	Type of account	Date account was closed, sold, moved, or transferred	Last balance before closing or transfer
18.1.	Name Street City State ZIP Code	XXXX–___ ___ ___ ___	❑ Checking ❑ Savings ❑ Money market ❑ Brokerage ❑ Other_____	_____	$_____
18.2.	Name Street City State ZIP Code	XXXX–___ ___ ___ ___	❑ Checking ❑ Savings ❑ Money market ❑ Brokerage ❑ Other_____	_____	$_____

19. Safe deposit boxes

List any safe deposit box or other depository for securities, cash, or other valuables the debtor now has or did have within 1 year before filing this case.

❑ None

Depository institution name and address	Names of anyone with access to it	Description of the contents	Does debtor still have it?
Name Street City State ZIP Code	Address		❑ No ❑ Yes

20. Off-premises storage

List any property kept in storage units or warehouses within 1 year before filing this case. Do not include facilities that are in a part of a building in which the debtor does business.

❑ None

Facility name and address	Names of anyone with access to it	Description of the contents	Does debtor still have it?
Name Street City State ZIP Code	Address		❑ No ❑ Yes

Part 11: Property the Debtor Holds or Controls That the Debtor Does Not Own

21. Property held for another

List any property that the debtor holds or controls that another entity owns. Include any property borrowed from, being stored for, or held in trust. Do not list leased or rented property.

❑ None

Owner's name and address	Location of the property	Description of the property	Value
_____ Name _____ Street _____ _____ City State ZIP Code	_____ _____ _____	_____ _____ _____	$_____

Part 12: Details About Environmental Information

For the purpose of Part 12, the following definitions apply:

- *Environmental law* means any statute or governmental regulation that concerns pollution, contamination, or hazardous material, regardless of the medium affected (air, land, water, or any other medium).
- *Site* means any location, facility, or property, including disposal sites, that the debtor now owns, operates, or utilizes or that the debtor formerly owned, operated, or utilized.
- *Hazardous material* means anything that an environmental law defines as hazardous or toxic, or describes as a pollutant, contaminant, or a similarly harmful substance.

Report all notices, releases, and proceedings known, regardless of when they occurred.

22. **Has the debtor been a party in any judicial or administrative proceeding under any environmental law?** Include settlements and orders.

❑ No
❑ Yes. Provide details below.

Case title	Court or agency name and address	Nature of the case	Status of case
_____ **Case number** _____	_____ Name _____ Street _____ _____ City State ZIP Code	_____ _____ _____	❑ Pending ❑ On appeal ❑ Concluded

23. **Has any governmental unit otherwise notified the debtor that the debtor may be liable or potentially liable under or in violation of an environmental law?**

❑ No
❑ Yes. Provide details below.

Site name and address	Governmental unit name and address	Environmental law, if known	Date of notice
_____ Name _____ Street _____ _____ City State ZIP Code	_____ Name _____ Street _____ _____ City State ZIP Code	_____ _____ _____	_____

24. **Has the debtor notified any governmental unit of any release of hazardous material?**

❑ No
❑ Yes. Provide details below.

Site name and address	Governmental unit name and address	Environmental law, if known	Date of notice
Name Street City State ZIP Code	Name Street City State ZIP Code		

Part 13: Details About the Debtor's Business or Connections to Any Business

25. **Other businesses in which the debtor has or has had an interest**
List any business for which the debtor was an owner, partner, member, or otherwise a person in control within 6 years before filing this case. Include this information even if already listed in the Schedules.

❑ None

	Business name and address	Describe the nature of the business	Employer Identification number Do not include Social Security number or ITIN.
25.1.	Name Street City State ZIP Code		EIN: ___ ___ – ___ ___ ___ ___ ___ ___ ___ **Dates business existed** From _____ To _____
25.2.	Name Street City State ZIP Code		EIN: ___ ___ – ___ ___ ___ ___ ___ ___ ___ **Dates business existed** From _____ To _____
25.3.	Name Street City State ZIP Code		EIN: ___ ___ – ___ ___ ___ ___ ___ ___ ___ **Dates business existed** From _____ To _____

26. **Books, records, and financial statements**

26a. List all accountants and bookkeepers who maintained the debtor's books and records within 2 years before filing this case.

❑ None

	Name and address	Dates of service
26a.1.	Name Street City State ZIP Code	From _____ To _____
26a.2.	Name Street City State ZIP Code	From _____ To _____

26b. List all firms or individuals who have audited, compiled, or reviewed debtor's books of account and records or prepared a financial statement within 2 years before filing this case.

❑ None

	Name and address	Dates of service
26b.1.	Name Street City State ZIP Code	From _____ To _____
26b.2.	Name Street City State ZIP Code	From _____ To _____

26c. List all firms or individuals who were in possession of the debtor's books of account and records when this case is filed.

❑ None

	Name and address	If any books of account and records are unavailable, explain why
26c.1.	Name Street City State ZIP Code	

	Name and address	If any books of account and records are unavailable, explain why
26c.2.	Name Street City State ZIP Code	

26d. List all financial institutions, creditors, and other parties, including mercantile and trade agencies, to whom the debtor issued a financial statement within 2 years before filing this case.

❑ None

	Name and address
26d.1.	Name Street City State ZIP Code

	Name and address
26d.2.	Name Street City State ZIP Code

27. **Inventories**

Have any inventories of the debtor's property been taken within 2 years before filing this case?

❑ No
❑ Yes. Give the details about the two most recent inventories.

Name of the person who supervised the taking of the inventory	Date of inventory	The dollar amount and basis (cost, market, or other basis) of each inventory
_____	_____	$_____

	Name and address of the person who has possession of inventory records
27.1.	Name Street City State ZIP Code

Name of the person who supervised the taking of the inventory	Date of inventory	The dollar amount and basis (cost, market, or other basis) of each inventory
_____	_____	$_____

Name and address of the person who has possession of inventory records

27.2. _____
Name
_____
Street
_____
_____
City State ZIP Code

28. **List the debtor's officers, directors, managing members, general partners, members in control, controlling shareholders, or other people in control of the debtor at the time of the filing of this case.**

Name	Address	Position and nature of any interest	% of interest, if any

29. **Within 1 year before the filing of this case, did the debtor have officers, directors, managing members, general partners, members in control of the debtor, or shareholders in control of the debtor who no longer hold these positions?**
- ❑ No
- ❑ Yes. Identify below.

Name	Address	Position and nature of any interest	Period during which position or interest was held
			From _____ To _____
			From _____ To _____
			From _____ To _____
			From _____ To _____

30. **Payments, distributions, or withdrawals credited or given to insiders**

Within 1 year before filing this case, did the debtor provide an insider with value in any form, including salary, other compensation, draws, bonuses, loans, credits on loans, stock redemptions, and options exercised?

- ❑ No
- ❑ Yes. Identify below.

Name and address of recipient	Amount of money or description and value of property	Dates	Reason for providing the value
30.1. _____ Name _____ Street _____ _____ City State ZIP Code **Relationship to debtor** _____	_____	_____ _____ _____ _____ _____	_____

Name and address of recipient			
30.2 _____ Name	_____	_____	_____
_____ Street		_____	
_____		_____	
_____ City State ZIP Code		_____	
Relationship to debtor		_____	
_____			

31. **Within 6 years before filing this case, has the debtor been a member of any consolidated group for tax purposes?**
- ❑ No
- ❑ Yes. Identify below.

Name of the parent corporation	Employer Identification number of the parent corporation
_____	EIN: ___ ___ – ___ ___ ___ ___ ___ ___ ___

32. **Within 6 years before filing this case, has the debtor as an employer been responsible for contributing to a pension fund?**
- ❑ No
- ❑ Yes. Identify below.

Name of the pension fund	Employer Identification number of the pension fund
_____	EIN: ___ ___ – ___ ___ ___ ___ ___ ___ ___

Part 14: Signature and Declaration

WARNING -- Bankruptcy fraud is a serious crime. Making a false statement, concealing property, or obtaining money or property by fraud in connection w
or imprisonment for up to 20 years, or both.
18 U.S.C. §§ 152, 1341, 1519, and 3571.

I have examined the information in this *Statement of Financial Affairs* and any attachments and have a reasonable belief that the information is true and c

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____
MM / DD / YYYY

✘ _____ Printed name _____
Signature of individual signing on behalf of the debtor

Position or relationship to debtor _____

Are additional pages to *Statement of Financial Affairs for Non-Individuals Filing for Bankruptcy* (Official Form 207) attached?
- ❑ No
- ❑ Yes

Rules Appendix B1-1041
12-011355

COMMITTEE NOTE

Official Form 207, *Statement of Financial Affairs for Non-Individuals Filing for Bankruptcy*, replaces Official Form 7, *Statement of Financial Affairs*, for non-individual debtors. It is renumbered to distinguish it from the forms used by individual debtors and includes formatting and stylistic changes throughout the form.

Official Form 207 is revised as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. The goals of the Forms Modernization Project include improving the interface between technology and the forms so as to increase efficiency and reducing the need to produce the same information in multiple formats.

The Forms Modernization Project made a preliminary decision that separate forms should be created for individual debtors and for non-individual debtors because separate areas of inquiry apply to each group. The forms for non-individuals do not include questions that pertain only to individuals and use a more open-ended response format. Also, where possible, the forms for non-individuals parallel how businesses commonly keep their financial records.

The form is derived from Official Form 7, *Statement of Financial Affairs*, and has been substantially reorganized. The form is divided into 14 sections grouping similar questions together. Many of the instructions have been shortened, and questions and instructions pertaining to individual debtors have been deleted. The instructions at the beginning of the form have been shortened, and the definitions deleted or moved to other parts of the form.

In Part 1, *Income*, the questions regarding gross revenue from business and non-business revenue have been consolidated, and checkboxes have been added to indicate the source of revenue. Also, the debtor is instructed to include revenue only once.

In Part 2, *List Certain Transfers Made Before Filing for Bankruptcy*, information that pertains only to individuals has been eliminated, and the questions related to payments made in the 90 days prior to bankruptcy, payments made to insiders within one year prior to bankruptcy, repossessions, and setoffs have been consolidated. Instructions have been added to include expense reimbursements in answer to the questions regarding payments and to exclude regular employee compensation from the question regarding payments within 90 days. A dollar limitation has been added to the instructions for the question regarding payments to insiders. Checkboxes have been added to both questions to provide a reason for the payment, and the explanation that the dollar limitation changes every three years has been moved to the instructions from the footnotes. "Amount still owing" has been removed, and a definition of "insider" has been added along with a statutory citation to the question regarding insiders. Partnerships have been added to examples of "insiders." The question regarding setoffs includes a revised definition and has been revised to require that the debtor provide a description of the creditor's actions and the last four digits of any account number.

In Part 3, *Legal Actions or Assignments*, several questions have been consolidated, instructions pertaining only to individuals have been removed, and additional examples have been added. Checkboxes have been added to indicate the status of the legal action. The requirement to list the terms of any assignment or settlement has been removed.

In Part 4, *Certain Gifts and Charitable Contributions*, instructions pertaining only to individuals have been removed, and the reporting threshold has been changed to $1,000 per recipient. The look-back period has been increased from one to two years.

Part 5, *Certain Losses*, has been revised to expand the types of payments for losses, and an instruction has

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been added to list unpaid claims on Official Form 206A/B (*Schedule A/B: Assets – Real and Personal Property*). Portions of the instructions that pertain only to individuals have been removed. Losses due to gambling have been excluded from this part.

In Part 6, *Certain Payments or Transfers*, the questions regarding payments related to bankruptcy, payments to self-settled trusts, and other payments or transfers have been consolidated. Instructions and questions that relate only to individuals have been eliminated. An instruction has been added to include payments related to restructuring, and the email or website of the person who received the money or transfer is added as a requirement. In response to the question regarding self-settled trusts and other transfers not already listed, debtors are instructed to include payments or transfers of property made by a person acting on behalf of the debtor. A requirement has been added to the question regarding self-settled trusts to list the name of the trustee. The relationship to the debtor must be included for all transfers not already listed, as well as any debts paid in exchange. There is a reminder added not to include transfers already listed.

Part 7, *Previous Locations*, has been revised in the instructions, and information pertaining only to individuals has been deleted.

Part 8, *Health Care Bankruptcies*, is new. Part 8 requires additional information if the debtor is primarily engaged in offering services and facilities for diagnosing or treating injury, deformity, or disease or providing any surgical, psychiatric, drug treatment, or obstetric care. This part has been added to comply with the special requirements imposed by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

Part 9, *Personally Identifiable Information*, is also new and includes questions about pension and profit sharing plans and adds a question about whether the debtor

collects and retains personally identifiable information of customers. Questions are added about whether the debtor is the plan administrator of any pension or profit sharing plan and if any such plan is terminated. Similar to Part 8, this part has been added to comply with the special requirements imposed by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

In Part 10, *Certain Financial Accounts, Safe Deposit Boxes, and Storage Units*, money market accounts have been added to the examples provided for the question regarding financial accounts, and checkboxes have been added to indicate the type of account. The requirement of the date of surrender of any safe deposit box has been removed. A question has been added about whether the debtor has property kept in storage units or warehouses within one year of filing, and the debtor must provide the facility name and address, the name and address of anyone with access to the facility, the description of the contents, and whether the debtor still has the storage unit or warehouse. Facilities that are in a part of a building in which the debtor does business are excluded.

In Part 11, *Property the Debtor Holds or Controls That the Debtor Does Not Own*, an instruction has been added to include any property borrowed from, being stored for, or held in trust, and to exclude leased or rented property.

Part 12, *Details About Environmental Information*, has been revised to include new definitions of "Environmental law," "Site," and "Hazardous materials." An instruction to report all notices, releases, and proceedings known, regardless of when they occurred, has been added.

In Part 13, *Details About the Debtor's Business or Connections to Any Business*, questions regarding various business issues have been consolidated, and instructions that pertain only to individuals have been eliminated. The

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five-percent ownership limitation has been eliminated. The phrase "kept or supervised the keeping of books or account and records" has been replaced with "maintained the debtor's books and records." The instructions for the question regarding auditing or preparation of financial records have been revised to add compiling and reviewing the debtor's books of account and records. A requirement has been added to explain if the debtor's books of account and records are unavailable. The questions regarding current and former officers, directors, managing members, general partners, members in control, or controlling shareholders have combined the formerly separate corporate and partnership questions. The question regarding former officers and partners has been changed to add the requirement of indicating the start and end dates for each listing. The instruction for withdrawals from a partnership or distribution by a corporation has been changed to add salary, other compensation, and draws to the list of examples.

In Part 14, *Signature and Declaration*, the declaration under penalty of perjury has been revised in order to conform to the language of 28 U.S.C. § 1746. See Rule 1008. A statement has been added that the individual signing on behalf of the debtor has reviewed the information in the Statement of Financial Affairs and any attachments and has "a reasonable belief that the information is true and correct." The signature boxes for bankruptcy petition preparers have been eliminated, and checkboxes for the debtor to indicate whether additional pages are attached to the form have been added.

Information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Last 4 digits of Social Security number or ITIN ___ ___ ___ ___

EIN __ __ - __ __ __ __ __ __ __

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

Last 4 digits of Social Security number or ITIN ___ ___ ___ ___

EIN __ __ - __ __ __ __ __ __ __

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number: _____

[Date case filed for chapter 7 _____ MM / DD / YYYY OR

[Date case filed in chapter _____ _____ MM / DD / YYYY

Date case converted to chapter 7 _____] MM / DD / YYYY

Official Form 309A (For Individuals or Joint Debtors)

Notice of Chapter 7 Bankruptcy Case — No Proof of Claim Deadline

12/15

For the debtors listed above, a case has been filed under chapter 7 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors, debtors, and trustees, including information about the meeting of creditors and deadlines. Read both pages carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtors or the debtors' property. For example, while the stay is in effect, creditors cannot sue, garnish wages, assert a deficiency, repossess property, or otherwise try to collect from the debtors. Creditors cannot demand repayment from debtors by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although debtors can ask the court to extend or impose a stay.

The debtors are seeking a discharge. Creditors who assert that the debtors are not entitled to a discharge of any debts or who want to have a particular debt excepted from discharge may be required to file a complaint in the bankruptcy clerk's office within the deadlines specified in this notice. (See line 9 for more information.)

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at www.pacer.gov).

The staff of the bankruptcy clerk's office cannot give legal advice.

To help creditors correctly identify debtors, debtors submit full Social Security or Individual Taxpayer Identification Numbers, which may appear on a version of this notice. However, the full numbers must not appear on any document filed with the court.

Do not file this notice with any proof of claim or other filing in the case. Do not include more than the last four digits of a Social Security or Individual Taxpayer Identification Number in any document, including attachments, that you file with the court.

	About Debtor 1:	About Debtor 2:
1. **Debtor's full name**		
2. **All other names used in the last 8 years**		
3. **Address**		**If Debtor 2 lives at a different address:**
4. **Debtor's attorney** Name and address		Contact phone _____ Email _____
5. **Bankruptcy trustee** Name and address		Contact phone _____ Email _____

For more information, see page 2 ▶

Rules Appendix 1005-011361

6. Bankruptcy clerk's office Documents in this case may be filed at this address. You may inspect all records filed in this case at this office or online at www.pacer.gov.		Hours open _____ Contact phone _____
7. Meeting of creditors Debtors must attend the meeting to be questioned under oath. In a joint case, both spouses must attend. Creditors may attend, but are not required to do so.	_____ at _____ Date Time The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.	Location:
8. Presumption of abuse If the presumption of abuse arises, you may have the right to file a motion to dismiss the case under 11 U.S.C. § 707(b). Debtors may rebut the presumption by showing special circumstances.	[The presumption of abuse does not arise.] [The presumption of abuse arises.] [Insufficient information has been filed to permit the clerk to determine whether the presumption of abuse arises. If more complete information is filed and shows that the presumption has arisen, the clerk will notify creditors.]	
9. Deadlines The bankruptcy clerk's office must receive these documents and any required filing fee by the following deadlines.	**File by the deadline to object to discharge or to challenge whether certain debts are dischargeable:** **You must file a complaint**: if you assert that the debtor is not entitled to receive a discharge of any debts under any of the subdivisions of 11 U.S.C. § 727(a)(2) through (7), or if you want to have a debt excepted from discharge under 11 U.S.C. § 523(a)(2), (4), or (6). **You must file a motion** if you assert that the discharge should be denied under § 727(a)(8) or (9).	**Filing deadline:** _____
	Deadline to object to exemptions: The law permits debtors to keep certain property as exempt. If you believe that the law does not authorize an exemption claimed, you may file an objection.	**Filing deadline**: 30 days after the *conclusion* of the meeting of creditors
10. Proof of claim Please do not file a proof of claim unless you receive a notice to do so.	No property appears to be available to pay creditors. Therefore, please do not file a proof of claim now. If it later appears that assets are available to pay creditors, the clerk will send you another notice telling you that you may file a proof of claim and stating the deadline.	
11. Creditors with a foreign address	If you are a creditor receiving a notice mailed to a foreign address, you may file a motion asking the court to extend the deadlines in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.	
12. Exempt property	The law allows debtors to keep certain property as exempt. Fully exempt property will not be sold and distributed to creditors. Debtors must file a list of property claimed as exempt. You may inspect that list at the bankruptcy clerk's office or online at www.pacer.gov. If you believe that the law does not authorize an exemption that the debtors claim, you may file an objection. The bankruptcy clerk's office must receive the objection by the deadline to object to exemptions in line 9.	

Information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Last 4 digits of Social Security number or ITIN ___ ___ ___ ___

EIN __ __ - __ __ __ __ __ __ __

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

Last 4 digits of Social Security number or ITIN ___ ___ ___ ___

EIN __ __ - __ __ __ __ __ __ __

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number: _____

[Date case filed for chapter 7 _____ MM / DD / YYYY OR

[Date case filed in chapter _____ _____ MM / DD / YYYY

Date case converted to chapter 7 _____] MM / DD / YYYY

Official Form 309B (For Individuals or Joint Debtors)

Notice of Chapter 7 Bankruptcy Case — Proof of Claim Deadline Set

12/15

For the debtors listed above, a case has been filed under chapter 7 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors, debtors, and trustees, including information about the meeting of creditors and deadlines. Read both pages carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtors or the debtors' property. For example, while the stay is in effect, creditors cannot sue, garnish wages, assert a deficiency, repossess property, or otherwise try to collect from the debtors. Creditors cannot demand repayment from debtors by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although debtors can ask the court to extend or impose a stay.

The debtors are seeking a discharge. Creditors who assert that the debtors are not entitled to a discharge of any debts or who want to have a particular debt excepted from discharge may be required to file a complaint in the bankruptcy clerk's office within the deadlines specified in this notice. (See line 9 for more information.)

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at www.pacer.gov).

The staff of the bankruptcy clerk's office cannot give legal advice.

To help creditors correctly identify debtors, debtors submit full Social Security or Individual Taxpayer Identification Numbers, which may appear on a version of this notice. However, the full numbers must not appear on any document filed with the court.

Do not file this notice with any proof of claim or other filing in the case. Do not include more than the last four digits of a Social Security or Individual Taxpayer Identification Number in any document, including attachments, that you file with the court.

	About Debtor 1:	About Debtor 2:
1. **Debtor's full name**		
2. **All other names used in the last 8 years**		
3. **Address**		**If Debtor 2 lives at a different address:**
4. **Debtor's attorney** Name and address		Contact phone _____ Email _____
5. **Bankruptcy trustee** Name and address		Contact phone _____ Email _____

For more information, see page 2 ▶

6. Bankruptcy clerk's office Documents in this case may be filed at this address. You may inspect all records filed in this case at this office or online at www.pacer.gov.		Hours open _____ Contact phone _____
7. Meeting of creditors Debtors must attend the meeting to be questioned under oath. In a joint case, both spouses must attend. Creditors may attend, but are not required to do so.	_____ at _____ Date Time The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.	Location:
8. Presumption of abuse If the presumption of abuse arises, you may have the right to file a motion to dismiss the case under 11 U.S.C. § 707(b). Debtors may rebut the presumption by showing special circumstances.	[The presumption of abuse does not arise.] [The presumption of abuse arises.] [Insufficient information has been filed to permit the clerk to determine whether the presumption of abuse arises. If more complete information is filed and shows that the presumption has arisen, the clerk will notify creditors.]	
9. Deadlines The bankruptcy clerk's office must receive these documents and any required filing fee by the following deadlines.	**File by the deadline to object to discharge or to challenge whether certain debts are dischargeable:** **You must file a complaint**: ▪ if you assert that the debtor is not entitled to receive a discharge of any debts under any of the subdivisions of 11 U.S.C. § 727(a)(2) through (7), or ▪ if you want to have a debt excepted from discharge under 11 U.S.C. § 523(a)(2), (4), or (6). **You must file a motion:** ▪ if you assert that the discharge should be denied under § 727(a)(8) or (9).	**Filing deadline**: _____
	Deadline for all creditors to file a proof of claim (except governmental units):	**Filing deadline:** _____
	Deadline for governmental units to file a proof of claim:	**Filing deadline:** _____
	Deadlines for filing proof of claim: A proof of claim is a signed statement describing a creditor's claim. A proof of claim form may be obtained at www.uscourts.gov or any bankruptcy clerk's office. If you do not file a proof of claim by the deadline, you might not be paid on your claim. To be paid, you must file a proof of claim even if your claim is listed in the schedules that the debtor filed. Secured creditors retain rights in their collateral regardless of whether they file a proof of claim. Filing a proof of claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a proof of claim may surrender important nonmonetary rights, including the right to a jury trial.	
	Deadline to object to exemptions: The law permits debtors to keep certain property as exempt. If you believe that the law does not authorize an exemption claimed, you may file an objection.	**Filing deadline:** 30 days after the *conclusion* of the meeting of creditors
10. Creditors with a foreign address	If you are a creditor receiving a notice mailed to a foreign address, you may file a motion asking the court to extend the deadlines in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.	
11. Liquidation of the debtor's property and payment of creditors' claims	The bankruptcy trustee listed on the front of this notice will collect and sell the debtor's property that is not exempt. If the trustee can collect enough money, creditors may be paid some or all of the debts owed to them in the order specified by the Bankruptcy Code. To ensure you receive any share of that money, you must file a proof of claim as described above.	
12. Exempt property	The law allows debtors to keep certain property as exempt. Fully exempt property will not be sold and distributed to creditors. Debtors must file a list of property claimed as exempt. You may inspect that list at the bankruptcy clerk's office or online at www.pacer.gov. If you believe that the law does not authorize an exemption that the debtors claim, you may file an objection. The bankruptcy clerk's office must receive the objection by the deadline to object to exemptions in line 9.	

Information to identify the case:

Debtor _____ (Name)

EIN __ __ - __ __ __ __ __ __ __

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number: _____

[Date case filed for chapter 7 _____ MM / DD / YYYY OR

[Date case filed in chapter _____ _____ MM / DD / YYYY

Date case converted to chapter 7 _____] MM / DD / YYYY

Official Form 309C (For Corporations or Partnerships)

Notice of Chapter 7 Bankruptcy Case — No Proof of Claim Deadline

12/15

For the debtor listed above, a case has been filed under chapter 7 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors, debtors, and trustees, including information about the meeting of creditors and deadlines.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtor or the debtor's property. For example, while the stay is in effect, creditors cannot sue, assert a deficiency, repossess property, or otherwise try to collect from the debtor. Creditors cannot demand repayment from debtors by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees.

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at www.pacer.gov).

The staff of the bankruptcy clerk's office cannot give legal advice.

Do not file this notice with any proof of claim or other filing in the case.

1. **Debtor's full name**		
2. **All other names used in the last 8 years**		
3. **Address**		
4. **Debtor's attorney** Name and address		Contact phone _____ Email _____
5. **Bankruptcy trustee** Name and address		Contact phone _____ Email _____
6. **Bankruptcy clerk's office** Documents in this case may be filed at this address. You may inspect all records filed in this case at this office or online at www.pacer.gov.		Hours open _____ Contact phone _____
7. **Meeting of creditors** The debtor's representative must attend the meeting to be questioned under oath. Creditors may attend, but are not required to do so.	_____ at _____ Date Time The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.	Location:
8. **Proof of claim** Please do not file a proof of claim unless you receive a notice to do so.	No property appears to be available to pay creditors. Therefore, please do not file a proof of claim now. If it later appears that assets are available to pay creditors, the clerk will send you another notice telling you that you may file a proof of claim and stating the deadline.	
9. **Creditors with a foreign address**	If you are a creditor receiving a notice mailed to a foreign address, you may file a motion asking the court to extend the deadlines in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.	

Rules Appendix B.6-1 125-011365

Information to identify the case:

Debtor _____ EIN __ __ - __ __ __ __ __ __ __
Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number: _____

[Date case filed for chapter 7 _____ MM / DD / YYYY OR

[Date case filed in chapter _____ _____ MM / DD / YYYY

Date case converted to chapter 7 _____] MM / DD / YYYY

Official Form 309D (For Corporations or Partnerships)

Notice of Chapter 7 Bankruptcy Case — Proof of Claim Deadline Set 12/15

For the debtor listed above, a case has been filed under chapter 7 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors, debtors, and trustees, including information about the meeting of creditors and deadlines. Read both pages carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtor or the debtor's property. For example, while the stay is in effect, creditors cannot sue, assert a deficiency, repossess property, or otherwise try to collect from the debtor. Creditors cannot demand repayment from debtors by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees.

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at www.pacer.gov).

The staff of the bankruptcy clerk's office cannot give legal advice.

Do not file this notice with any proof of claim or other filing in the case.

1. **Debtor's full name**		
2. **All other names used in the last 8 years**		
3. **Address**		
4. **Debtor's attorney** Name and address	Contact phone _____ Email _____	
5. **Bankruptcy trustee** Name and address	Contact phone _____ Email _____	
6. **Bankruptcy clerk's office** Documents in this case may be filed at this address. You may inspect all records filed in this case at this office or online at www.pacer.gov.	Hours open _____ Contact phone _____	
7. **Meeting of creditors** The debtor's representative must attend the meeting to be questioned under oath. Creditors may attend, but are not required to do so.	_____ at _____ Date Time The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.	Location:

For more information, see page 2 ▶

8. Deadlines The bankruptcy clerk's office must receive proofs of claim by the following deadlines.	**Deadline for all creditors to file a proof of claim (except governmental units):** **Deadline for governmental units to file a proof of claim:**	**Filing deadline:** _____ **Filing deadline:** _____ A proof of claim is a signed statement describing a creditor's claim. A proof of claim form may be obtained at www.uscourts.gov or any bankruptcy clerk's office. If you do not file a proof of claim by the deadline, you might not be paid on your claim. To be paid, you must file a proof of claim even if your claim is listed in the schedules that the debtor filed. Secured creditors retain rights in their collateral regardless of whether they file a proof of claim. Filing a proof of claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a proof of claim may surrender important nonmonetary rights, including the right to a jury trial.
9. Creditors with a foreign address	If you are a creditor receiving a notice mailed to a foreign address, you may file a motion asking the court to extend the deadlines in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.	
10. Liquidation of the debtor's property and payment of creditors' claims	The bankruptcy trustee listed on the front of this notice will collect and sell the debtor's property. If the trustee can collect enough money, creditors may be paid some or all of the debts owed to them, in the order specified by the Bankruptcy Code. To ensure you receive any share of that money, you must file a proof of claim, as described above.	

Information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Last 4 digits of Social Security number or ITIN ___ ___ ___ ___

EIN __ __ - __ __ __ __ __ __ __

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

Last 4 digits of Social Security number or ITIN ___ ___ ___ ___

EIN __ __ - __ __ __ __ __ __ __

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number: _____

[Date case filed for chapter 11 _____ MM / DD / YYYY] OR

[Date case filed in chapter _____ _____ MM / DD / YYYY

Date case converted to chapter 11 _____] MM / DD / YYYY

Official Form 309E (For Individuals or Joint Debtors)

Notice of Chapter 11 Bankruptcy Case

12/15

For the debtors listed above, a case has been filed under chapter 11 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors and debtors, including information about the meeting of creditors and deadlines. Read both pages carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtors or the debtors' property. For example, while the stay is in effect, creditors cannot sue, garnish wages, assert a deficiency, repossess property, or otherwise try to collect from the debtors. Creditors cannot demand repayment from debtors by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although debtors can ask the court to extend or impose a stay.

Confirmation of a chapter 11 plan may result in a discharge of debt. Creditors who assert that the debtors are not entitled to a discharge of any debts or who want to have a particular debt excepted from discharge may be required to file a complaint in the bankruptcy clerk's office within the deadlines specified in this notice. (See line 10 below for more information.)

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at www.pacer.gov).

The staff of the bankruptcy clerk's office cannot give legal advice.

To help creditors correctly identify debtors, debtors submit full Social Security or Individual Taxpayer Identification Numbers, which may appear on a version of this notice. However, the full numbers must not appear on any document filed with the court.

Do not file this notice with any proof of claim or other filing in the case. Do not include more than the last four digits of a Social Security or Individual Taxpayer Identification Number in any document, including attachments, that you file with the court.

	About Debtor 1:	About Debtor 2:
1. **Debtor's full name**		
2. **All other names used in the last 8 years**		
3. **Address**		**If Debtor 2 lives at a different address:**
4. **Debtor's attorney** Name and address		Contact phone _____ Email _____
5. **Bankruptcy clerk's office** Documents in this case may be filed at this address. You may inspect all records filed in this case at this office or online at www.pacer.gov.		Hours open _____ Contact phone _____

For more information, see page 2 ▶

Rule Appendix B.256

12b-011368

6. Meeting of creditors Debtors must attend the meeting to be questioned under oath. In a joint case, both spouses must attend. Creditors may attend, but are not required to do so.	_____ at _____ Date Time The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.	Location:
7. Deadlines The bankruptcy clerk's office must receive these documents and any required filing fee by the following deadlines.	**File by the deadline to object to discharge or to challenge whether certain debts are dischargeable:** **You must file a complaint**: ■ if you assert that the debtor is not entitled to receive a discharge of any debts under 11 U.S.C. § 1141(d)(3) or ■ if you want to have a debt excepted from discharge under 11 U.S.C. § 523(a)(2), (4), or (6).	First date set for hearing on confirmation of plan. The court will send you a notice of that date later. **Filing deadline for dischargeability complaints:** _____
	Deadline for filing proof of claim:	[Not yet set. If a deadline is set, the court will send you another notice.] or [date, if set by the court)]
	A proof of claim is a signed statement describing a creditor's claim. A proof of claim form may be obtained at www.uscourts.gov or any bankruptcy clerk's office. Your claim will be allowed in the amount scheduled unless: ■ your claim is designated as *disputed*, *contingent*, or *unliquidated*; ■ you file a proof of claim in a different amount; or ■ you receive another notice. If your claim is not scheduled or if your claim is designated as *disputed*, *contingent*, or *unliquidated*, you must file a proof of claim or you might not be paid on your claim and you might be unable to vote on a plan. You may file a proof of claim even if your claim is scheduled. You may review the schedules at the bankruptcy clerk's office or online at www.pacer.gov. Secured creditors retain rights in their collateral regardless of whether they file a proof of claim. Filing a proof of claim submits a creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a proof of claim may surrender important nonmonetary rights, including the right to a jury trial.	
	Deadline to object to exemptions: The law permits debtors to keep certain property as exempt. If you believe that the law does not authorize an exemption claimed, you may file an objection.	**Filing deadline:** 30 days after the *conclusion* of the meeting of creditors
8. Creditors with a foreign address	If you are a creditor receiving mailed notice at a foreign address, you may file a motion asking the court to extend the deadlines in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.	
9. Filing a Chapter 11 bankruptcy case	Chapter 11 allows debtors to reorganize or liquidate according to a plan. A plan is not effective unless the court confirms it. You may receive a copy of the plan and a disclosure statement telling you about the plan, and you may have the opportunity to vote on the plan. You will receive notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. Unless a trustee is serving, the debtor will remain in possession of the property and may continue to operate the debtor's business.	
10. Discharge of debts	Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of a debt. See 11 U.S.C. § 1141(d). However, unless the court orders otherwise, the debts will not be discharged until all payments under the plan are made. A discharge means that creditors may never try to collect the debt from the debtors personally except as provided in the plan. If you believe that a particular debt owed to you should be excepted from the discharge under 11 U.S.C. § 523 (a)(2), (4), or (6), you must file a complaint and pay the filing fee in the bankruptcy clerk's office by the deadline. If you believe that the debtors are not entitled to a discharge of any of their debts under 11 U.S.C. § 1141 (d)(3), you must file a complaint and pay the filing fee in the clerk's office by the first date set for the hearing on confirmation of the plan. The court will send you another notice telling you of that date.	
11. Exempt property	The law allows debtors to keep certain property as exempt. Fully exempt property will not be sold and distributed to creditors, even if the case is converted to chapter 7. Debtors must file a list of property claimed as exempt. You may inspect that list at the bankruptcy clerk's office or online at www.pacer.gov. If you believe that the law does not authorize an exemption that the debtors claim, you may file an objection. The bankruptcy clerk's office must receive the objection by the deadline to object to exemptions in line 7.	

Information to identify the case:

Debtor _____ EIN __ __ - __ __ __ __ __ __ __
Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number: _____

[Date case filed for chapter 11 _____ MM / DD / YYYY OR

[Date case filed in chapter _____ _____ MM / DD / YYYY

Date case converted to chapter 11 _____] MM / DD / YYYY

Official Form 309F (For Corporations or Partnerships)

Notice of Chapter 11 Bankruptcy Case

12/15

For the debtor listed above, a case has been filed under chapter 11 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors, debtors, and trustees, including information about the meeting of creditors and deadlines. Read both pages carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtor or the debtor's property. For example, while the stay is in effect, creditors cannot sue, assert a deficiency, repossess property, or otherwise try to collect from the debtor. Creditors cannot demand repayment from the debtor by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees.

Confirmation of a chapter 11 plan may result in a discharge of debt. A creditor who wants to have a particular debt excepted from discharge may be required to file a complaint in the bankruptcy clerk's office within the deadline specified in this notice. (See line 11 below for more information.)

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at www.pacer.gov).

The staff of the bankruptcy clerk's office cannot give legal advice.

Do not file this notice with any proof of claim or other filing in the case.

1. **Debtor's full name**		
2. **All other names used in the last 8 years**		
3. **Address**		
4. **Debtor's attorney** Name and address		Contact phone _____ Email _____
5. **Bankruptcy clerk's office** Documents in this case may be filed at this address. You may inspect all records filed in this case at this office or online at www.pacer.gov.		Hours open _____ Contact phone _____
6. **Meeting of creditors** The debtor's representative must attend the meeting to be questioned under oath. Creditors may attend, but are not required to do so.	_____ at _____ Date Time The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.	Location:

For more information, see page 2 ▶

7. Proof of claim deadline	**Deadline for filing proof of claim:**	[Not yet set. If a deadline is set, the court will send you another notice.] or [date, if set by the court)] A proof of claim is a signed statement describing a creditor's claim. A proof of claim form may be obtained at www.uscourts.gov or any bankruptcy clerk's office. Your claim will be allowed in the amount scheduled unless: ■ your claim is designated as *disputed*, *contingent*, or *unliquidated*; ■ you file a proof of claim in a different amount; or ■ you receive another notice. If your claim is not scheduled or if your claim is designated as *disputed*, *contingent*, or *unliquidated*, you must file a proof of claim or you might not be paid on your claim and you might be unable to vote on a plan. You may file a proof of claim even if your claim is scheduled. You may review the schedules at the bankruptcy clerk's office or online at www.pacer.gov. Secured creditors retain rights in their collateral regardless of whether they file a proof of claim. Filing a proof of claim submits a creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a proof of claim may surrender important nonmonetary rights, including the right to a jury trial.
8. Exception to discharge deadline The bankruptcy clerk's office must receive a complaint and any required filing fee by the following deadline.	You must start a judicial proceeding by filing a complaint if you want to have a debt excepted from discharge under 11 U.S.C. § 1141(d)(6)(A). **Deadline for filing the complaint:** _____	
9. Creditors with a foreign address	If you are a creditor receiving notice mailed to a foreign address, you may file a motion asking the court to extend the deadlines in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.	
10. Filing a Chapter 11 bankruptcy case	Chapter 11 allows debtors to reorganize or liquidate according to a plan. A plan is not effective unless the court confirms it. You may receive a copy of the plan and a disclosure statement telling you about the plan, and you may have the opportunity to vote on the plan. You will receive notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. Unless a trustee is serving, the debtor will remain in possession of the property and may continue to operate its business.	
11. Discharge of debts	Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of your debt. See 11 U.S.C. § 1141(d). A discharge means that creditors may never try to collect the debt from the debtor except as provided in the plan. If you want to have a particular debt owed to you excepted from the discharge under 11 U.S.C. § 1141(d)(6)(A), you must start a judicial proceeding by filing a complaint and paying the filing fee in the bankruptcy clerk's office by the deadline.	

Information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Last 4 digits of Social Security number or ITIN ___ ___ ___ ___

EIN __ __ - __ __ __ __ __ __ __

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

Last 4 digits of Social Security number or ITIN ___ ___ ___ ___

EIN __ __ - __ __ __ __ __ __ __

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number: _____

[Date case filed for chapter 12 _____ MM / DD / YYYY OR

[Date case filed in chapter _____ _____ MM / DD / YYYY

Date case converted to chapter 12 _____] MM / DD / YYYY

Official Form 309G (For Individuals or Joint Debtors)

Notice of Chapter 12 Bankruptcy Case

12/15

For the debtors listed above, a case has been filed under chapter 12 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors, debtors, and trustees, including information about the meeting of creditors and deadlines. Read both pages carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtors, from the debtors' property, or from certain codebtors. For example, while the stay is in effect, creditors cannot sue, garnish wages, assert a deficiency, repossess property, or otherwise try to collect from the debtors. Creditors cannot demand repayment from debtors by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees.

Confirmation of a chapter 12 plan may result in a discharge of debt. Creditors who want to have a particular debt excepted from discharge may be required to file a complaint in the bankruptcy clerk's office within the deadline specified in this notice. (See line 13 below for more information.)

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at www.pacer.gov).

The staff of the bankruptcy clerk's office cannot give legal advice.

To help creditors correctly identify debtors, debtors submit full Social Security or Individual Taxpayer Identification Numbers, which may appear on a version of this notice. However, the full numbers must not appear on any document filed with the court.

Do not file this notice with any proof of claim or other filing in the case. Do not include more than the last four digits of a Social Security or Individual Taxpayer Identification Number in any document, including attachments, that you file with the court.

	About Debtor 1:	About Debtor 2:
1. **Debtor's full name**		
2. **All other names used in the last 8 years**		
3. **Address**		**If Debtor 2 lives at a different address:**
4. **Debtor's attorney** Name and address		Contact phone _____ Email _____
5. **Bankruptcy trustee** Name and address		Contact phone _____ Email _____
6. **Bankruptcy clerk's office** Documents in this case may be filed at this address. You may inspect all records filed in this case at this office or online at www.pacer.gov.		Hours open _____ Contact phone _____

For more information, see page 2 ▶

7. Meeting of creditors Debtors must attend the meeting to be questioned under oath. In a joint case, both spouses must attend. Creditors may attend, but are not required to do so.	_____ at _____ Location: Date Time The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.
8. Deadlines The bankruptcy clerk's office must receive these documents and any required filing fee by the following deadlines.	**Deadline to file a complaint to challenge dischargeability of certain debts:** **Filing deadline:** _____ You must start a judicial proceeding by filing a complaint if you want to have a debt excepted from discharge under 11 U.S.C. § 523(a)(2), (4), or (6).
	Deadline for all creditors to file a proof of claim (except governmental units): **Filing deadline:** _____ **Deadline for governmental units to file a proof of claim:** **Filing deadline:** _____ **Deadlines for filing proof of claim:** A proof of claim is a signed statement describing a creditor's claim. A proof of claim form may be obtained at www.uscourts.gov or any bankruptcy clerk's office. If you do not file a proof of claim by the deadline, you might not be paid on your claim. To be paid, you must file a proof of claim even if your claim is listed in the schedules that the debtor filed. Secured creditors retain rights in their collateral regardless of whether they file a proof of claim. Filing a proof of claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a proof of claim may surrender important nonmonetary rights, including the right to a jury trial.
	Deadline to object to exemptions: **Filing deadline:** 30 days after the *conclusion* of the meeting of creditors The law permits debtors to keep certain property as exempt. If you believe that the law does not authorize an exemption claimed, you may file an objection.
9. Filing of plan	[The debtor has filed a plan. The plan or a summary of the plan is enclosed. The hearing on confirmation will be held on: _____ at _____ Location:_____ Date Time] Or [The debtor has filed a plan. The plan or a summary of the plan and notice of confirmation hearing will be sent separately.] Or [The debtor has not filed a plan as of this date. A copy of the plan or summary and a notice of the hearing on confirmation will be sent separately.]
10. Creditors with a foreign address	If you are a creditor receiving a notice mailed to a foreign address, you may file a motion asking the court to extend the deadlines in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.
11. Filing a Chapter 12 bankruptcy case	Chapter 12 allows family farmers and family fishermen to reorganize according to a plan. A plan is not effective unless the court confirms it. You may receive a copy of the plan. You may object to confirmation of the plan and attend the confirmation hearing. The debtor will remain in possession of the property and may continue to operate the business unless the court orders otherwise.
12. Discharge of debts	Confirmation of a chapter 12 plan may result in a discharge of debts, which may include all or part of your debt. Unless the court orders otherwise, the discharge will not be effective until all payments under the plan are made. A discharge means that you may never try to collect the debt from the debtor except as provided in the plan. If you want to have a particular debt excepted under 11 U.S.C. § 523(a)(2), (4), or (6), you must start a judicial proceeding by filing a complaint and paying the filing fee in the clerk's office by the deadline.
13. Exempt property	The law allows debtors to keep certain property as exempt. Fully exempt property will not be sold and distributed to creditors, even if the case is converted to chapter 7. Debtors must file a list of property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that the law does not authorize an exemption that the debtors claim, you may file an objection. The bankruptcy clerk's office must receive the objection by the deadline to object to exemptions in line 8.

Information to identify the case:

Debtor _____ EIN __ __ - __ __ __ __ __ __ __
Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number: _____

[Date case filed for chapter 12 _____ MM / DD / YYYY OR

[Date case filed in chapter _____ _____ MM / DD / YYYY

Date case converted to chapter 12 _____] MM / DD / YYYY

Official Form 309H (For Corporations or Partnerships)

Notice of Chapter 12 Bankruptcy Case

12/15

For the debtor listed above, a case has been filed under chapter 12 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors, debtors, and trustees, including information about the meeting of creditors and deadlines. Read both pages carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtor, the debtor's property, or certain codebtors. For example, while the stay is in effect, creditors cannot sue, assert a deficiency, repossess property, or otherwise try to collect from the debtor. Creditors cannot demand repayment from the debtor by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees.

Confirmation of a chapter 12 plan may result in the discharge of debt. Creditors who want to have a particular debt excepted from discharge may be required to file a complaint in the bankruptcy clerk's office within the deadline specified in this notice. (See line 13 below for more information.)

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at www.pacer.gov).

The staff of the bankruptcy clerk's office cannot give legal advice.

Do not file this notice with any proof of claim or other filing in the case.

1. **Debtor's full name**		
2. **All other names used in the last 8 years**		
3. **Address**		
4. **Debtor's attorney** Name and address	Contact phone Email	_____ _____
5. **Bankruptcy clerk's office** Documents in this case may be filed at this address. You may inspect all records filed in this case at this office or online at www.pacer.gov.	Hours open Contact phone	_____ _____
6. **Bankruptcy trustee** Name and address	Contact phone Email	_____ _____

For more information, see page 2 ▶

7. Meeting of creditors The debtor's representative must attend the meeting to be questioned under oath. Creditors may attend, but are not required to do so.	_____ at _____ Date Time The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.	Location:
8. Exception to discharge deadline The bankruptcy clerk's office must receive a complaint and any required filing fee by the following deadline.	You must start a judicial proceeding by filing a complaint if you want to have a debt excepted from discharge under 11 U.S.C. § 523(a)(2), (4), or (6).	**Deadline for filing the complaint:** _____
9. Filing of plan	[The debtor has filed a plan. The plan or a summary of the plan is enclosed. The hearing on confirmation will be held on: _____ at _____ Location:_____ Date Time] Or [The debtor has filed a plan. The plan or a summary of the plan and notice of confirmation hearing will be sent separately.] Or [The debtor has not filed a plan as of this date. A copy of the plan or summary and a notice of the hearing on confirmation will be sent separately.]	
10. Deadlines	**Deadline for all creditors to file a proof of claim (except governmental units):** **Deadline for governmental units to file a proof of claim:** A proof of claim is a signed statement describing a creditor's claim. A proof of claim form may be obtained at www.uscourts.gov or any bankruptcy clerk's office. If you do not file a proof of claim by the deadline, you might not be paid on your claim. To be paid, you must file a proof of claim even if your claim is listed in the schedules that the debtor filed. Secured creditors retain rights in their collateral regardless of whether they file a proof of claim. Filing a proof of claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a proof of claim may surrender important nonmonetary rights, including the right to a jury trial.	**Filing deadline:** _____ **Filing deadline:** _____
11. Creditors with a foreign address	If you are a creditor receiving a notice mailed to a foreign address, you may file a motion asking the court to extend the deadlines in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.	
12. Filing a chapter 12 bankruptcy case	Chapter 12 allows family farmers and family fishermen to reorganize according to a plan. A plan is not effective unless the court confirms it. You may receive a copy of the plan. You may object to confirmation of the plan and attend the confirmation hearing. The debtor will remain in possession of the property and may continue to operate the business.	
13. Discharge of debts	Confirmation of a chapter 12 plan may result in a discharge of debts, which may include all or part of your debt. Unless the court orders otherwise, the discharge will not be effective until all payments under the plan are made. A discharge means that you may never try to collect the debt from the debtor except as provided in the plan. If you want to have a particular debt excepted from discharge under 11 U.S.C. § 523(a)(2), (4), or (6), you must start a judicial proceeding by filing a complaint and paying the filing fee in the bankruptcy clerk's office by the deadline.	

Information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Last 4 digits of Social Security number or ITIN ___ ___ ___ ___

EIN __ __ - __ __ __ __ __ __ __

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

Last 4 digits of Social Security number or ITIN ___ ___ ___ ___

EIN __ __ - __ __ __ __ __ __ __

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number: _____

[Date case filed for chapter 13 _____ MM / DD / YYYY OR

[Date case filed in chapter _____ _____ MM / DD / YYYY

Date case converted to chapter 13 _____] MM / DD / YYYY

Official Form 309I

Notice of Chapter 13 Bankruptcy Case

12/15

For the debtors listed above, a case has been filed under chapter 13 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors, debtors, and trustees, including information about the meeting of creditors and deadlines. Read both pages carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtors, the debtors' property, and certain codebtors. For example, while the stay is in effect, creditors cannot sue, garnish wages, assert a deficiency, repossess property, or otherwise try to collect from the debtors. Creditors cannot demand repayment from debtors by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although debtors can ask the court to extend or impose a stay.

Confirmation of a chapter 13 plan may result in a discharge. Creditors who assert that the debtors are not entitled to a discharge under 11 U.S.C. § 1328(f) must file a motion objecting to discharge in the bankruptcy clerk's office within the deadline specified in this notice. Creditors who want to have their debt excepted from discharge may be required to file a complaint in the bankruptcy clerk's office by the same deadline. (See line 13 below for more information.)

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at www.pacer.gov).

The staff of the bankruptcy clerk's office cannot give legal advice.

To help creditors correctly identify debtors, debtors submit full Social Security or Individual Taxpayer Identification Numbers, which may appear on a version of this notice. However, the full numbers must not appear on any document filed with the court.

Do not file this notice with any proof of claim or other filing in the case. Do not include more than the last four digits of a Social Security or Individual Taxpayer Identification Number in any document, including attachments, that you file with the court.

	About Debtor 1:	About Debtor 2:
1. **Debtor's full name**		
2. **All other names used in the last 8 years**		
3. **Address**		**If Debtor 2 lives at a different address:**
4. **Debtor's attorney** Name and address		Contact phone _____ Email _____
5. **Bankruptcy trustee** Name and address		Contact phone _____ Email _____
6. **Bankruptcy clerk's office** Documents in this case may be filed at this address. You may inspect all records filed in this case at this office or online at www.pacer.gov.		Hours open _____ Contact phone _____

For more information, see page 2 ▶

7. Meeting of creditors Debtors must attend the meeting to be questioned under oath. In a joint case, both spouses must attend. Creditors may attend, but are not required to do so.	_____ at _____ Date Time The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.	Location:
8. Deadlines The bankruptcy clerk's office must receive these documents and any required filing fee by the following deadlines.	**Deadline to file a complaint to challenge dischargeability of certain debts:** **You must file:** a motion if you assert that the debtors are not entitled to receive a discharge under U.S.C. § 1328(f), or a complaint if you want to have a particular debt excepted from discharge under 11 U.S.C. § 523(a)(2) or (4).	**Filing deadline**: _____
	Deadline for all creditors to file a proof of claim (except governmental units):	**Filing deadline:** _____
	Deadline for governmental units to file a proof of claim:	**Filing deadline:** _____
	Deadlines for filing proof of claim: A proof of claim is a signed statement describing a creditor's claim. A proof of claim form may be obtained at www.uscourts.gov or any bankruptcy clerk's office. If you do not file a proof of claim by the deadline, you might not be paid on your claim. To be paid, you must file a proof of claim even if your claim is listed in the schedules that the debtor filed. Secured creditors retain rights in their collateral regardless of whether they file a proof of claim. Filing a proof of claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a proof of claim may surrender important nonmonetary rights, including the right to a jury trial.	
	Deadline to object to exemptions: The law permits debtors to keep certain property as exempt. If you believe that the law does not authorize an exemption claimed, you may file an objection.	**Filing deadline:** 30 days after the *conclusion* of the meeting of creditors
9. Filing of plan	[The debtor has filed a plan. The plan or a summary of the plan is enclosed. The hearing on confirmation will be held on: _____ at _____ Location:_____ Date Time] Or [The debtor has filed a plan. The plan or a summary of the plan and notice of confirmation hearing will be sent separately.] Or [The debtor has not filed a plan as of this date. A copy of the plan or summary and a notice of the hearing on confirmation will be sent separately.]	
10. Creditors with a foreign address	If you are a creditor receiving a notice mailed to a foreign address, you may file a motion asking the court to extend the deadline in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.	
11. Filing a chapter 13 bankruptcy case	Chapter 13 allows an individual with regular income and debts below a specified amount to adjust debts according to a plan. A plan is not effective unless the court confirms it. You may object to confirmation of the plan and appear at the confirmation hearing. A copy of the plan [is included with this notice] or [will be sent to you later], and [the confirmation hearing will be held on the date shown in line 9 of this notice] or [the court will send you a notice of the confirmation hearing]. The debtor will remain in possession of the property and may continue to operate the business, if any, unless the court orders otherwise.	
12. Exempt property	The law allows debtors to keep certain property as exempt. Fully exempt property will not be sold and distributed to creditors, even if the case is converted to chapter 7. Debtors must file a list of property claimed as exempt. You may inspect that list at the bankruptcy clerk's office or online at www.pacer.gov. If you believe that the law does not authorize an exemption that debtors claimed, you may file an objection by the deadline.	
13. Discharge of debts	Confirmation of a chapter 13 plan may result in a discharge of debts, which may include all or part of a debt. However, unless the court orders otherwise, the debts will not be discharged until all payments under the plan are made. A discharge means that creditors may never try to collect the debt from the debtors personally except as provided in the plan. If you want to have a particular debt excepted from discharge under 11 U.S.C. § 523(a)(2) or (4), you must file a complaint and pay the filing fee in the bankruptcy clerk's office by the deadline. If you believe that the debtors are not entitled to a discharge of any of their debts under 11 U.S.C. § 1328(f), you must file a motion. The bankruptcy clerk's office must receive the objection by the deadline to object to exemptions in line 8.	

COMMITTEE NOTE

Official Forms 309A-I, collectively the Bankruptcy Case Commencement Notices, have been revised as part of the Forms Modernization Project to make them easier to read and understand. The notices, derived from Official Forms 9A-I are renumbered and stylistic changes have been made.

References to the limitations on the automatic stay imposed by 11 U.S.C. § 362(c)(3) and (4) in some repeat bankruptcy filings by individuals have been deleted from the three versions of the notice for cases filed by corporations and partnerships. Email addresses for the debtor's attorney and the trustee have been added to the form.

The parties are informed that they may review papers filed in the case through the judiciary's PACER system (Public Access to Court Electronic Records) as well as at the bankruptcy clerk's office.

The lettering scheme for the versions of Official Form 309 track the versions of Official Form 9 used in different types of bankruptcy cases with following exceptions. Official Forms 9E(Alt.) and 9F(Alt.) have been eliminated by including alternative language in Official Forms 309E and 309F to be used if the court sets a deadline for filing claims at the start of the chapter 11 case. In addition, the B and C versions have been reversed in order. That is, Official Form 9C has been designated 309B and Official Form 9B as 309C. This groups together the notices for chapter 7 individual debtors and for non-individual debtors. Finally, as a result of the reformatting, Official Form 309C has been reduced to a single page.

The four versions of the form for chapter 7 cases have been renamed to state whether the notice specifies a deadline for filing proofs of claim, rather than whether the case is an "asset" or "no-asset" case.

Official Form 312 (12/15)

[Caption as in 416A]

Order and Notice for Hearing on Disclosure Statement

To the debtor, its creditors, and other parties in interest:

A disclosure statement and a plan under chapter 11 [or chapter 9] of the Bankruptcy Code having been filed by _____ on _____,

IT IS ORDERED and notice is hereby given, that:

1. The hearing to consider the approval of the disclosure statement shall be held at:

   _____,

   on _____, at _____ o'clock __.m.

2. _____ is fixed as the last day for filing and serving in accordance with Fed. R. Bankr. P. 3017(a) written objections to the disclosure statement.

3. Within _____ days after entry of this order, the disclosure statement and plan shall be distributed in accordance with Fed. R. Bankr. P. 3017(a).

4. Requests for copies of the disclosure statement and plan shall be mailed to the debtor in possession [or trustee or debtor or _____] at the following mailing address:

   [_____].

_____
MM / DD / YYYY

By the court: _____
United States Bankruptcy Judge

12-011379

COMMITTEE NOTE

Official Form 312, *Order and Notice for Hearing on Disclosure Statement* replaces Official Form 12, *Order and Notice for Hearing on Disclosure Statement*. It is renumbered as part of the Forms Modernization Project, and includes stylistic changes throughout the form.

Official Form 313 (12/15)

[Caption as in 416A]

Order Approving Disclosure Statement and Fixing Time for Filing Acceptances or Rejections of Plan, Combined with Notice Thereof

A disclosure statement under chapter 11 of the Bankruptcy Code having been filed by _____ on _____ [*if appropriate*, and by _____, on _____], referring to a plan under chapter 11 of the Code filed by _____, on _____ [*if appropriate*, and by _____, on _____ respectively] [*if appropriate*, as modified by a modification filed on _____]; and

It having been determined after hearing on notice that the disclosure statement [or statements] contain[s] adequate information:

IT IS ORDERED, and notice is hereby given, that:

A. The disclosure statement filed by _____ dated _____ [*if appropriate*, and by _____, dated _____] is [are] approved.

B. _____ is fixed as the last day for filing written acceptances or rejections of the plan [or plans] referred to above.

C. Within _____ days after the entry of this order, the plan [or plans] or a summary or summaries thereof approved by the court, [and [if appropriate] a summary approved by the court of its opinion, if any, dated _____, approving the disclosure statement [or statements]], the disclosure statement [or statements], and a ballot conforming to *Ballot for Accepting or Rejecting Plan of Reorganization* (Official Form 314) shall be mailed to creditors, equity security holders, and other parties in interest, and shall be transmitted to the United States trustee, as provided in Fed. R. Bankr. P. 3017(d).

D. If acceptances are filed for more than one plan, preferences among the plans so accepted may be indicated.

E. [*If appropriate*] _____ is fixed for the hearing on confirmation of the plan [or plans].

F. [*If appropriate*] _____ is fixed as the last day for filing and serving pursuant to Fed. R. Bankr. P. 3020(b)(1) written objections to confirmation of the plan.

_____
MM / DD / YYYY

By the court: _____
United States Bankruptcy Judge

[If the court directs that a copy of the opinion should be transmitted in lieu of or in addition to the summary thereof, the appropriate change should be made in paragraph C of this order.]

12-011381

COMMITTEE NOTE

Official Form 313, *Order Approving Disclosure Statement and Fixing Time for Filing Acceptances or Rejections of Plan, Combined with Notice Thereof* replaces Official Form 13, *Order Approving Disclosure Statement and Fixing Time for Filing Acceptances or Rejections of Plan, Combined with Notice Thereof*. It is renumbered as part of the Forms Modernization Project, and includes stylistic changes throughout the form.

Official Form 314 (12/15)

[Caption as in 416A]

Class [ ] Ballot for Accepting or Rejecting Plan of Reorganization

[Proponent] filed a plan of reorganization dated [Date] (the *Plan*) for the Debtor in this case. The Court has [conditionally] approved a disclosure statement with respect to the Plan (the *Disclosure Statement*). The Disclosure Statement provides information to assist you in deciding how to vote your ballot. If you do not have a Disclosure Statement, you may obtain a copy from [name, address, telephone number and telecopy number of proponent/proponent's attorney.]

Court approval of the disclosure statement does not indicate approval of the Plan by the Court.

You should review the Disclosure Statement and the Plan before you vote. You may wish to seek legal advice concerning the Plan and your classification and treatment under the Plan. Your [claim] [equity interest] has been placed in class [ ] under the Plan. If you hold claims or equity interests in more than one class, you will receive a ballot for each class in which you are entitled to vote.

If your ballot is not received by [name and address of proponent's attorney or other appropriate address] on or before [date], and such deadline is not extended, your vote will not count as either an acceptance or rejection of the Plan.

If the Plan is confirmed by the Bankruptcy Court, it will be binding on you whether or not you vote.

Acceptance or Rejection of the Plan

[At this point the ballot should provide for voting by the particular class of creditors or equity holders receiving the ballot using one of the following alternatives;]

[If the voter is the holder of a secured, priority, or unsecured nonpriority claim:]

The undersigned, the holder of a Class [ ] claim against the Debtor in the unpaid amount of Dollars ($)

[or, if the voter is the holder of a bond, debenture, or other debt security:]

The undersigned, the holder of a Class [ ] claim against the Debtor, consisting of Dollars ($) principal amount of [describe bond, debenture, or other debt security] of the Debtor (For purposes of this Ballot, it is not necessary and you should not adjust the principal amount for any accrued or unmatured interest.)

[or, if the voter is the holder of an equity interest:]

The undersigned, the holder of Class [ ] equity interest in the Debtor, consisting of _____ shares or other interests of [describe equity interest] in the Debtor

[In each case, the following language should be included:]

Check one box only

❑ **Accepts the plan**

❑ **Rejects the plan**

Dated: _____

Print or type name: _____

Signature: _____ Title (if corporation or partnership) _____

Address: _____

_____

_____

Return this ballot to:

[Name and address of proponent's attorney or other appropriate address]

COMMITTEE NOTE

Official Form 314, *Ballot for Accepting or Rejecting Plan* replaces Official Form 14, *Ballot for Accepting or Rejecting Plan*. It is renumbered as part of the Forms Modernization Project, and includes stylistic changes throughout the form.

12-011385

Official Form 315 (12/15)

[Caption as in 416A]

Order Confirming Plan

The plan under chapter 11 of the Bankruptcy Code filed by _____, on _____ [*if applicable*, as modified by a modification filed on _____,] or a summary thereof, having been transmitted to creditors and equity security holders; and

It having been determined after hearing on notice that the requirements for confirmation set forth in 11 U.S.C. § 1129(a) [or, *if appropriate*, 11 U.S.C. § 1129(b)] have been satisfied;

IT IS ORDERED that:

The plan filed by _____, on _____,

[*If appropriate*, include dates and any other pertinent details of modifications to the plan] is confirmed. [*If the plan provides for an injunction against conduct not otherwise enjoined under the Code, include the information required by Rule 3020*.]

A copy of the confirmed plan is attached.

_____
MM / DD / YYYY

By the court: _____
United States Bankruptcy Judge

COMMITTEE NOTE

Official Form 315, *Order Confirming Plan* replaces Official Form 15, *Order Confirming Plan*. It is renumbered as part of the Forms Modernization Project, and includes stylistic changes throughout the form.

Information to identify the case:

Debtor 1 _____ Last 4 digits of Social Security number or ITIN _ _ _ _
First Name Middle Name Last Name

EIN _ _ - _ _ _ _ _ _ _ _

Debtor 2 _____ Last 4 digits of Social Security number or ITIN _ _ _ _
(Spouse, if filing) First Name Middle Name Last Name

EIN _ _ - _ _ _ _ _ _ _ _

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number: _____

Order of Discharge

12/15

IT IS ORDERED: A discharge under 11 U.S.C. § 727 is granted to:

_____ [_____]

[include all names used by each debtor, including trade names, within the 8 years prior to the filing of the petition]

_____
MM / DD / YYYY

By the court: _____
United States Bankruptcy Judge

Explanation of Bankruptcy Discharge in a Chapter 7 Case

This order does not close or dismiss the case, and it does not determine how much money, if any, the trustee will pay creditors.

Creditors cannot collect discharged debts

This order means that no one may make any attempt to collect a discharged debt from the debtors personally. For example, creditors cannot sue, garnish wages, assert a deficiency, or otherwise try to collect from the debtors personally on discharged debts. Creditors cannot contact the debtors by mail, phone, or otherwise in any attempt to collect the debt personally. Creditors who violate this order can be required to pay debtors damages and attorney's fees.

However, a creditor with a lien may enforce a claim against the debtors' property subject to that lien unless the lien was avoided or eliminated. For example, a creditor may have the right to foreclose a home mortgage or repossess an automobile.

This order does not prevent debtors from paying any debt voluntarily or from paying reaffirmed debts according to the reaffirmation agreement. 11 U.S.C. § 524(c), (f).

Most debts are discharged

Most debts are covered by the discharge, but not all. Generally, a discharge removes the debtors' personal liability for debts owed before the debtors' bankruptcy case was filed.

Also, if this case began under a different chapter of the Bankruptcy Code and was later converted to chapter 7, debts owed before the conversion are discharged.

In a case involving community property: Special rules protect certain community property owned by the debtor's spouse, even if that spouse did not file a bankruptcy case.

For more information, see page 2 ►

Some debts are not discharged

Examples of debts that are not discharged are:

debts that are domestic support obligations;

debts for most student loans;

debts for most taxes;

debts that the bankruptcy court has decided or will decide are not discharged in this bankruptcy case;

debts for most fines, penalties, forfeitures, or criminal restitution obligations;

some debts which the debtors did not properly list;

debts for certain types of loans owed to pension, profit sharing, stock bonus, or retirement plans; and

debts for death or personal injury caused by operating a vehicle while intoxicated.

Also, debts covered by a valid reaffirmation agreement are not discharged.

In addition, this discharge does not stop creditors from collecting from anyone else who is also liable on the debt, such as an insurance company or a person who cosigned or guaranteed a loan.

This information is only a general summary of the bankruptcy discharge; some exceptions exist. Because the law is complicated, you should consult an attorney to determine the exact effect of the discharge in this case.

Rules Appendix B.7-7 12b-011389

COMMITTEE NOTE

Official Form 318, *Order of Discharge*, is revised and renumbered as part of the Forms Modernization Project. The form is used to issue a discharge in chapter 7 cases filed by individuals or joint debtors. It replaces former Official Form 18, *Discharge of Debtor*, Director's Procedural Form 18J, *Discharge of Joint Debtors*, and Director's Procedural Form 18JO, *Discharge of One Joint Debtor*.

To make the discharge order and the explanation of it easier to read and understand, legal terms are explained more fully or replaced with commonly understood terms, and the form is reformatted.

Reaffirmed debts are explained more fully, and readers are informed that a discharge will not stop creditors from collecting debts from any property in which they have a valid lien. In addition, readers are advised that the discharge does not stop creditors from collecting from anyone else who is liable on the debt, such as a cosigner on the loan or an insurance company.

Director's Procedural Forms 18J and 18JO are no longer needed because Form 318 specifies the names of the debtors, or debtor, to whom the discharge is issued. Any alternate names of the debtor or debtors appear in the order not in the information box at the top of the form.

Fill in this information to identify the case:

United States Bankruptcy Court for the:

_____ District of _____
(State)

Case number (*If known*): _____ Chapter 15

❑ Check if this is an amended filing

Official Form 401

Chapter 15 Petition for Recognition of a Foreign Proceeding

12/15

If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write debtor's name and case number (if known).

1. Debtor's name _____

2. Debtor's unique identifier

For non-individual debtors:

❑ Federal Employer Identification Number (EIN) ___ ___ – ___ ___ ___ ___ ___ ___ ___

❑ Other _____. Describe identifier _____.

For individual debtors:

❑ Social Security number: xxx – xx– ____ ____ ____ ____

❑ Individual Taxpayer Identification number (ITIN): **9** xx – xx – ____ ____ ____ ____

❑ Other _____. Describe identifier _____.

3. Name of foreign representative(s) _____

4. Foreign proceeding in which appointment of the foreign representative(s) occurred _____

5. Nature of the foreign proceeding

Check one:

❑ Foreign main proceeding
❑ Foreign nonmain proceeding
❑ Foreign main proceeding, or in the alternative foreign nonmain proceeding

6. Evidence of the foreign proceeding

❑ A certified copy, translated into English, of the decision commencing the foreign proceeding and appointing the foreign representative is attached.

❑ A certificate, translated into English, from the foreign court, affirming the existence of the foreign proceeding and of the appointment of the foreign representative, is attached.

❑ Other evidence of the existence of the foreign proceeding and of the appointment of the foreign representative is described below, and relevant documentation, translated into English, is attached.

_____

_____

7. Is this the only foreign proceeding with respect to the debtor known to the foreign representative(s)?

❑ No. (Attach a statement identifying each country in which a foreign proceeding by, regarding, or against the debtor is pending.)

❑ Yes

12-011391

8. Others entitled to notice

Attach a list containing the names and addresses of:

(i) all persons or bodies authorized to administer foreign proceedings of the debtor,

(ii) all parties to litigation pending in the United States in which the debtor is a party at the time of filing of this petition, and

(iii) all entities against whom provisional relief is being sought under § 1519 of the Bankruptcy Code.

9. Addresses

Country where the debtor has the center of its main interests:

_____

Debtor's registered office:

_____
Number Street

_____
P.O. Box

_____
City State/Province/Region ZIP/Postal Code

_____
Country

Individual debtor's habitual residence:

_____
Number Street

_____
P.O. Box

_____
City State/Province/Region ZIP/Postal Code

_____
Country

Address of foreign representative(s):

_____
Number Street

_____
P.O. Box

_____
City State/Province/Region ZIP/Postal Code

_____
Country

10. Debtor's website (URL)

_____

11. Type of debtor

Check one:

❑ Non-individual (*check one*):

❑ Corporation. Attach a corporate ownership statement containing the information described in Fed. R. Bankr. P. 7007.1.

❑ Partnership

❑ Other. Specify: _____

❑ Individual

Rule 4 Appendix B-280
12b-011392

12. Why is venue proper in *this district*?

Check one:

- ❑ Debtor's principal place of business or principal assets in the United States are in this district.
- ❑ Debtor does not have a place of business or assets in the United States, but the following action or proceeding in a federal or state court is pending against the debtor in this district:

  _____.
- ❑ If neither box is checked, venue is consistent with the interests of justice and the convenience of the parties, having regard to the relief sought by the foreign representative, because:

  _____.

13. Signature of foreign representative(s)

I request relief in accordance with chapter 15 of title 11, United States Code.

I am the foreign representative of a debtor in a foreign proceeding, the debtor is eligible for the relief sought in this petition, and I am authorized to file this petition.

I have examined the information in this petition and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct,

✘ _____ _____
Signature of foreign representative Printed name

Executed on _____
MM / DD / YYYY

✘ _____ _____
Signature of foreign representative Printed name

Executed on _____
MM / DD / YYYY

14. Signature of attorney

✘ _____ Date _____
Signature of Attorney for foreign representative MM / DD / YYYY

_____
Printed name

_____
Firm name

_____
Number Street

_____ _____
City State ZIP Code

_____ _____
Contact phone Email address

_____ _____
Bar number State

12-011393

COMMITTEE NOTE

Official Form 401 is required for any petition seeking recognition of a foreign proceeding under chapter 15 of the Bankruptcy Code. The form, which applies to foreign proceedings involving individual and non-individual debtors, consolidates information formerly included on Official Form 1 (Voluntary Petition). The petition must be signed by the foreign representative, under penalty of perjury, and by the foreign representative's attorney.

The petition requires disclosure of the foreign proceeding in which the foreign representative has been appointed (Line 4) and whether it is a foreign main proceeding or foreign nonmain proceeding (Line 5). If the foreign representative seeks recognition of the foreign proceeding as a foreign main proceeding or, in the alternative, a foreign nonmain proceeding, that request should be indicated in Line 5. Each country where any additional foreign proceeding known to the foreign representative is pending must be disclosed on Line 7. See Bankruptcy Rule 1004.2. Evidence of the foreign proceeding and of the foreign representative's appointment must accompany the petition. See 11 U.S.C. § 1515(b). These documents must be translated into English in accordance with 11 U.S.C. § 1515(d). The foreign representative must also attach a list of persons or bodies entitled to notice. See Bankruptcy Rule 2002(q).

The petition calls for information about the debtor, including the debtor's name (Line 1), other unique identifying information, if available (Line 2), and center of main interest (Line 9). The type of debtor is also requested (Line 11).

The foreign representative must indicate the basis for venue in the district by selecting an appropriate checkbox and, if necessary, providing additional information, such as a statement explaining why venue in the district is appropriate (Line 12). See 28 U.S.C. § 1410.

Fill in this information to identify the case:

Debtor 1 _____

Debtor 2 _____
(Spouse, if filing)

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____

Official Form 410

Proof of Claim

12/15

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. **Do not send original documents;** they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) **that you received.**

Part 1: Identify the Claim

1. Who is the current creditor?

_____
Name of the current creditor (the person or entity to be paid for this claim)

Other names the creditor used with the debtor _____

2. Has this claim been acquired from someone else?

❑ No
❑ Yes. From whom? _____

3. Where should notices and payments to the creditor be sent?

Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)

Where should notices to the creditor be sent?	**Where should payments to the creditor be sent?** (if different)
Name	Name
Number Street	Number Street
City State ZIP Code	City State ZIP Code
Contact phone	Contact phone
Contact email	Contact email

Uniform claim identifier for electronic payments in chapter 13 (if you use one):

— —

4. Does this claim amend one already filed?

❑ No
❑ Yes. Claim number on court claims registry (if known) _____ Filed on _____
MM / DD / YYYY

5. Do you know if anyone else has filed a proof of claim for this claim?

❑ No
❑ Yes. Who made the earlier filing? _____

12-011395

Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. **Do you have any number you use to identify the debtor?**
   - ❑ No
   - ❑ Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____ ____ ____ ____

7. **How much is the claim?** $_____. **Does this amount include interest or other charges?**
   - ❑ No
   - ❑ Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).

8. **What is the basis of the claim?**

   Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card.

   Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c).

   Limit disclosing information that is entitled to privacy, such as health care information.

   _____

9. **Is all or part of the claim secured?**
   - ❑ No
   - ❑ Yes. The claim is secured by a lien on property.

   Nature of property:
   - ❑ Real estate. If the claim is secured by the debtor's principal residence, file a *Mortgage Proof of Claim Attachment* (Official Form 410-A) with this *Proof of Claim.*
   - ❑ Motor vehicle
   - ❑ Other. Describe: _____

   Basis for perfection: _____

   Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.)

   Value of property: $_____

   Amount of the claim that is secured: $_____

   Amount of the claim that is unsecured: $_____ (The sum of the secured and unsecured amounts should match the amount in line 7.)

   Amount necessary to cure any default as of the date of the petition: $_____

   Annual Interest Rate (when case was filed)_____%
   - ❑ Fixed
   - ❑ Variable

10. **Is this claim based on a lease?**
    - ❑ No
    - ❑ Yes. **Amount necessary to cure any default as of the date of the petition.** $_____

11. **Is this claim subject to a right of setoff?**
    - ❑ No
    - ❑ Yes. Identify the property: _____

12. **Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?**

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

❑ No

❑ Yes. *Check all that apply:*

	Amount entitled to priority
❑ Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).	$_____
❑ Up to $2,775* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).	$_____
❑ Wages, salaries, or commissions (up to $12,475*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).	$_____
❑ Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).	$_____
❑ Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).	$_____
❑ Other. Specify subsection of 11 U.S.C. § 507(a)(__) that applies.	$_____

* Amounts are subject to adjustment on 4/01/16 and every 3 years after that for cases begun on or after the date of adjustment.

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

❑ I am the creditor.

❑ I am the creditor's attorney or authorized agent.

❑ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.

❑ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date _____
MM / DD / YYYY

_____
Signature

Print the name of the person who is completing and signing this claim:

Name _____
First name Middle name Last name

Title _____

Company _____
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address _____
Number Street

_____
City State ZIP Code

Contact phone _____ Email _____

Mortgage Proof of Claim Attachment

(12/15)

If you file a claim secured by a security interest in the debtor's principal residence, you must use this form as an attachment to your proof of claim. See separate instructions.

Part 1: Mortgage and Case Information		Part 2: Total Debt Calculation		Part 3: Arrearage as of Date of the Petition		Part 4: Monthly Mortgage Payment	
Case number:	_____	Principal balance:	_____	Principal & interest due:	_____	Principal & interest:	_____
Debtor 1:	_____	Interest due:	_____	Prepetition fees due:	_____	Monthly escrow:	_____
Debtor 2:	_____	Fees, costs due:	_____	Escrow deficiency for funds advanced:	_____	Private mortgage insurance:	_____
Last 4 digits to identify:	___ ___ ___ ___	Escrow deficiency for funds advanced:	_____	Projected escrow shortage:	_____	Total monthly payment:	_____
Creditor:	_____	Less total funds on hand:	– _____	Less funds on hand:	– _____		
Servicer:	_____	Total debt:	_____	Total prepetition arrearage:	_____		
Fixed accrual/daily simple interest/other:	_____						

Part 5 : Loan Payment History from First Date of Default

		Account Activity				How Funds Were Applied/Amount Incurred						Balance After Amount Received or Incurred				
A. Date	**B.** Contractual payment amount	**C.** Funds received	**D.** Amount incurred	**E.** Description	**F.** Contractual due date	**G.** Prin, int & esc past due balance	**H.** Amount to principal	**I.** Amount to interest	**J.** Amount to escrow	**K.** Amount to fees or charges	**L.** Unapplied funds	**M.** Principal balance	**N.** Accrued interest balance	**O.** Escrow balance	**P.** Fees / Charges balance	**Q.** Unapplied funds balance

Mortgage Proof of Claim Attachment: Additional Page

(12/15)

Case number: _____

Debtor 1: _____

Part 5 : Loan Payment History from First Date of Default

		Account Activity					How Funds Were Applied/Amount Incurred					Balance After Amount Received or Incurred				
A. Date	**B.** Contractual payment amount	**C.** Funds received	**D.** Amount incurred	**E.** Description	**F.** Contractual due date	**G.** Prin, int & esc past due balance	**H.** Amount to principal	**I.** Amount to interest	**J.** Amount to escrow	**K.** Amount to fees or charges	**L.** Unapplied funds	**M.** Principal balance	**N.** Accrued interest balance	**O.** Escrow balance	**P.** Fees / Charges balance	**Q.** Unapplied funds balance

Fill in this information to identify the case:

Debtor 1 _____

Debtor 2 (Spouse, if filing) _____

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number _____

Official Form 410S1

Notice of Mortgage Payment Change

12/15

If the debtor's plan provides for payment of postpetition contractual installments on your claim secured by a security interest in the debtor's principal residence, you must use this form to give notice of any changes in the installment payment amount. File this form as a supplement to your proof of claim at least 21 days before the new payment amount is due. See Bankruptcy Rule 3002.1.

Name of creditor: _____

Court claim no. (if known): _____

Last 4 digits of any number you use to identify the debtor's account: ____ ____ ____ ____

Date of payment change:
Must be at least 21 days after date of this notice ____/____/_____

New total payment:
Principal, interest, and escrow, if any $ _____

Part 1: Escrow Account Payment Adjustment

1. **Will there be a change in the debtor's escrow account payment?**

❑ No
❑ Yes. Attach a copy of the escrow account statement prepared in a form consistent with applicable nonbankruptcy law. Describe the basis for the change. If a statement is not attached, explain why: _____

Current escrow payment: $ _____ **New escrow payment:** $ _____

Part 2: Mortgage Payment Adjustment

2. **Will the debtor's principal and interest payment change based on an adjustment to the interest rate on the debtor's variable-rate account?**

❑ No
❑ Yes. Attach a copy of the rate change notice prepared in a form consistent with applicable nonbankruptcy law. If a notice is not attached, explain why: _____

Current interest rate: _____% **New interest rate:** _____%

Current principal and interest payment: $ _____ **New principal and interest payment:** $ _____

Part 3: Other Payment Change

3. **Will there be a change in the debtor's mortgage payment for a reason not listed above?**

❑ No
❑ Yes. Attach a copy of any documents describing the basis for the change, such as a repayment plan or loan modification agreement. (*Court approval may be required before the payment change can take effect.*)

Reason for change: _____

Current mortgage payment: $ _____ **New mortgage payment:** $ _____

Debtor 1 _____ Case number (*if known*) _____
First Name Middle Name Last Name

Part 4: Sign Here

The person completing this Notice must sign it. Sign and print your name and your title, if any, and state your address and telephone number.

Check the appropriate box.

- ❑ I am the creditor.
- ❑ I am the creditor's authorized agent.

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

✘ _____ Date ____/_____/_____
Signature

Print: _____ Title _____
First Name Middle Name Last Name

Company _____

Address _____
Number Street

_____
City State ZIP Code

Contact phone (_____) _____– _____ Email _____

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Fill in this information to identify the case:

Debtor 1 _____

Debtor 2 _____
(Spouse, if filing)

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____

Official Form 410S2

Notice of Postpetition Mortgage Fees, Expenses, and Charges 12/15

If the debtor's plan provides for payment of postpetition contractual installments on your claim secured by a security interest in the debtor's principal residence, you must use this form to give notice of any fees, expenses, and charges incurred after the bankruptcy filing that you assert are recoverable against the debtor or against the debtor's principal residence.

File this form as a supplement to your proof of claim. See Bankruptcy Rule 3002.1.

Name of creditor: _____ **Court claim no**. (if known): _____

Last 4 digits of any number you use to identify the debtor's account: ____ ____ ____ ____

Does this notice supplement a prior notice of postpetition fees, expenses, and charges?

- ❑ No
- ❑ Yes. Date of the last notice: ____/____/_____

Part 1: Itemize Postpetition Fees, Expenses, and Charges

Itemize the fees, expenses, and charges incurred on the debtor's mortgage account after the petition was filed. Do not include any escrow account disbursements or any amounts previously itemized in a notice filed in this case or ruled on by the bankruptcy court.

Description	Dates incurred		Amount
1. Late charges	_____	(1)	$ _____
2. Non-sufficient funds (NSF) fees	_____	(2)	$ _____
3. Attorney fees	_____	(3)	$ _____
4. Filing fees and court costs	_____	(4)	$ _____
5. Bankruptcy/Proof of claim fees	_____	(5)	$ _____
6. Appraisal/Broker's price opinion fees	_____	(6)	$ _____
7. Property inspection fees	_____	(7)	$ _____
8. Tax advances (non-escrow)	_____	(8)	$ _____
9. Insurance advances (non-escrow)	_____	(9)	$ _____
10. Property preservation expenses. Specify:_____	_____	(10)	$ _____
11. Other. Specify:_____	_____	(11)	$ _____
12. Other. Specify:_____	_____	(12)	$ _____
13. Other. Specify:_____	_____	(13)	$ _____
14. Other. Specify:_____	_____	(14)	$ _____

The debtor or trustee may challenge whether the fees, expenses, and charges you listed are required to be paid.
See 11 U.S.C. § 1322(b)(5) and Bankruptcy Rule 3002.1.

Debtor 1 _____ Case number (*if known*) _____
First Name Middle Name Last Name

Part 2: Sign Here

The person completing this Notice must sign it. Sign and print your name and your title, if any, and state your address and telephone number.

Check the appropriate box.

❑ I am the creditor.

❑ I am the creditor's authorized agent.

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

✘ _____ Date ____/_____/_____
Signature

Print: _____ Title _____
First Name Middle Name Last Name

Company _____

Address _____
Number Street

_____
City State ZIP Code

Contact phone (_____) _____– _____ Email _____

Rules Appendix B 3002-1 **12-011403**

COMMITTEE NOTE

Official Form 410, *Proof of Claim*, applies in all cases. Form 410 replaces Official Form 10, Proof of Claim. It is renumbered to distinguish it from the forms used by debtors for case opening, and includes stylistic changes throughout the form. It is revised as part of the Forms Modernization Project, making it easier to read and, as a result, likely to generate more complete and accurate responses. Because the goals of the Forms Modernization Project include improving the interface between technology and the forms so as to increase efficiency and reduce the need to produce the same information in multiple formats, many of the open-ended questions and multiple-part instructions have been replaced with more specific questions.

Official Form 410 has been substantially reorganized. A new question has been added at line 10 that solicits information about claims based on leases.

Official Form 410A, *Mortgage Proof of Claim Attachment*, is revised in its content and format. Rather than requiring a home mortgage claimant to fill in blanks with itemized information about the principal, interest, and fees due as of the petition date and the amount necessary to cure a prepetition default, the form now requires the claimant to provide a loan history that reveals when payments were received, how they were applied, when fees and charges were incurred, and when escrow charges were satisfied. Because completion of the revised form can be automated, it will permit claimants to comply with Rule 3001(c)(2)(C) with efficiency and accuracy. Attachment of a loan history with a home mortgage proof of claim will also provide transparency about the basis for the claimant's calculation of the claim and arrearage amount.

The loan history should begin with the first date on which the borrower failed to make a payment in accordance with the terms of the note and mortgage, unless the note was subsequently brought current with no principal,

interest, fees, escrow payments, or other charges immediately payable.

Official Forms 410S1 and 410S2, *Notice of Mortgage Payment Change* and *Notice of Postpetition Mortgage Fees, Expenses, and Charges*, are revised as part of the Forms Modernization Project. There are formatting changes throughout the forms.

Form 416A. CAPTION (FULL)

United States Bankruptcy Court

_____ District Of _____

In re _____,
[Set forth here all names including married, maiden, and trade names used by debtor within the last 8 years.]

Debtor

Case No. _____

Address _____

_____

Last four digits of Social-Security or Individual Tax- Payer-Identification (ITIN) No(s)., (if any): _____

_____

Chapter _____

Employer's Tax Identification No(s). (if any): _____

_____

[Designation of Character of Paper]

COMMITTEE NOTE

Official Form 416A, *Caption*, applies on all forms where prescribed. Form 416A replaces Official Form 16A, *Caption*. It is renumbered as part of the Forms Modernization Project.

123-011407

Form 416B CAPTION (Short Title)

(May be used if 11 U.S.C. § 342(c) is not applicable)

United States Bankruptcy Court

_____ District Of _____

In re _____, Debtor	Case No. _____
	Chapter _____

[Designation of Character of Paper]

COMMITTEE NOTE

Official Form 416B, *Caption*, applies on all forms where prescribed. Form 416B replaces Official Form 16B, *Caption*. It is renumbered as part of the Forms Modernization Project.

125-011409

Form 416D Caption for Use in Adversary Proceeding

United States Bankruptcy Court

_____ District Of _____

In re	_____,	Case No. _____
	Debtor	
	_____,	Chapter _____
	Plaintiff	
	_____,	Adv. Proc. No. _____
	Defendant	

COMPLAINT [*or* other designation]

[If in a Notice of Appeal and Statement of Election (see Form 417A) or other notice filed and served by the debtor, the caption must be altered to include the debtor's address and Employer's Tax Identification Numbers(s) or last four digits of Social Security Number(s) as in Form 416A]

COMMITTEE NOTE

Official Form 416D, *Caption for Use in Adversary Proceeding Other Than for a Complaint Filed by a Debtor*, applies on all forms where prescribed. Form 416D replaces Official Form 16D, *Caption for Use in Adversary Proceeding Other Than for a Complaint Filed by a Debtor*. It is renumbered as part of the Forms Modernization Project.

12-011411

[Caption as in Form 416A, 416B, or 416D, as appropriate]

NOTICE OF APPEAL AND STATEMENT OF ELECTION

Part 1: Identify the appellant(s)

1. Name(s) of appellant(s):
   _____

2. Position of appellant(s) in the adversary proceeding or bankruptcy case that is the subject of this appeal:

For appeals in an adversary proceeding.

- ❑ Plaintiff
- ❑ Defendant
- ❑ Other (describe) _____

For appeals in a bankruptcy case and not in an adversary proceeding.

- ❑ Debtor
- ❑ Creditor
- ❑ Trustee
- ❑ Other (describe) _____

Part 2: Identify the subject of this appeal

1. Describe the judgment, order, or decree appealed from: _____

2. State the date on which the judgment, order, or decree was entered: _____

Part 3: Identify the other parties to the appeal

List the names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their attorneys (attach additional pages if necessary):

1. Party: _____ Attorney: _____
   _____
   _____
   _____

2. Party: _____ Attorney: _____
   _____
   _____
   _____

Part 4: Optional election to have appeal heard by District Court (applicable only in certain districts)

If a Bankruptcy Appellate Panel is available in this judicial district, the Bankruptcy Appellate Panel will hear this appeal unless, pursuant to 28 U.S.C. § 158(c)(1), a party elects to have the appeal heard by the United States District Court. If an appellant filing this notice wishes to have the appeal heard by the United States District Court, check below. Do not check the box if the appellant wishes the Bankruptcy Appellate Panel to hear the appeal.

- ❑ Appellant(s) elect to have the appeal heard by the United States District Court rather than by the Bankruptcy Appellate Panel.

Part 5: Sign below

_____ Date: _____

Signature of attorney for appellant(s) (or appellant(s) if not represented by an attorney)

Name, address, and telephone number of attorney (or appellant(s) if not represented by an attorney):

_____
_____
_____
_____

Fee waiver notice: If appellant is a child support creditor or its representative and appellant has filed the form specified in § 304(g) of the Bankruptcy Reform Act of 1994, no fee is required.

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COMMITTEE NOTE

The form number is updated to comport with the form numbering style developed as part of the Forms Modernization Project. Other stylistic changes were made throughout the form.

[Caption as in Form 416A, 416B, or 416D, as appropriate]

OPTIONAL APPELLEE STATEMENT OF ELECTION TO PROCEED IN DISTRICT COURT

This form should be filed only if all of the following are true:

- this appeal is pending in a district served by a Bankruptcy Appellate Panel,
- the appellant(s) did not elect in the Notice of Appeal to proceed in the District Court rather than in the Bankruptcy Appellate Panel,
- no other appellee has filed a statement of election to proceed in the district court, and
- you elect to proceed in the District Court.

Part 1: Identify the appellee(s) electing to proceed in the District Court

1. Name(s) of appellee(s):
   _____

2. Position of appellee(s) in the adversary proceeding or bankruptcy case that is the subject of this appeal:

For appeals in an adversary proceeding.

- ❑ Plaintiff
- ❑ Defendant
- ❑ Other (describe) _____

For appeals in a bankruptcy case and not in an adversary proceeding.

- ❑ Debtor
- ❑ Creditor
- ❑ Trustee
- ❑ Other (describe) _____

Part 2: Election to have this appeal heard by the District Court (applicable only in certain districts)

I (we) elect to have the appeal heard by the United States District Court rather than by the Bankruptcy Appellate Panel.

Part 3: Sign below

_____
Signature of attorney for appellee(s) (or appellee(s) if not represented by an attorney)

Date: _____

Name, address, and telephone number of attorney (or appellee(s) if not represented by an attorney):
_____
_____
_____

COMMITTEE NOTE

The form number is updated to comport with the form numbering style developed as part of the Forms Modernization Project. Other stylistic changes were made throughout the form.

[This certification must be appended to your brief if the length of your brief is calculated by maximum number of words or lines of text rather than number of pages.]

Certificate of Compliance With Rule 8015(a)(7)(B) or 8016(d)(2)

This brief complies with the type-volume limitation of Rule 8015(a)(7)(B) or 8016(d)(2) because:

- ❑ this brief contains [*state the number of*] words, excluding the parts of the brief exempted by Rule 8015(a)(7)(B)(iii) or 8016(d)(2)(D), or
- ❑ this brief uses a monospaced typeface having no more than 10½ characters per inch and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Rule 8015(a)(7)(B)(iii) or 8016(d)(2)(D).

_____ Date: _____
Signature

Print name of person signing certificate of compliance:
_____

COMMITTEE NOTE

The form number is updated to comport with the form numbering style developed as part of the Forms Modernization Project. Other stylistic changes were made throughout the form.

Fill in this information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Official Form 423

Certification About a Financial Management Course

12/15

If you are an individual, you must take an approved course about personal financial management if:

- **you filed for bankruptcy under chapter 7 or 13, or**
- **you filed for bankruptcy under chapter 11 and § 1141 (d)(3) does not apply.**

In a joint case, each debtor must take the course. 11 U.S.C. §§ 727(a)(11) and 1328(g).

After you finish the course, the provider will give you a certificate. The provider may notify the court that you have completed the course. If the provider does notify the court, you need not file this form. If the provider does not notify the court, then Debtor 1 and Debtor 2 must each file this form with the certificate number before your debts will be discharged.

- If you filed under chapter 7 and you need to file this form, file it within 60 days after the first date set for the meeting of creditors under § 341 of the Bankruptcy Code.
- If you filed under chapter 11 or 13 and you need to file this form, file it before you make the last payment that your plan requires or before you file a motion for a discharge under § 1141(d)(5)(B) or § 1328(b) of the Bankruptcy Code. Fed. R. Bankr. P. 1007(c).

In some cases, the court can waive the requirement to take the financial management course. To have the requirement waived, you must file a motion with the court and obtain a court order.

Part 1: Tell the Court About the Required Course

You must check one:

❑ **I completed an approved course in personal financial management:**

Date I took the course _____
MM / DD / YYYY

Name of approved provider _____

Certificate number _____

❑ **I am not required to complete a course in personal financial management because the court has granted my motion for a waiver of the requirement based on** *(check one)***:**

❑ **Incapacity.** I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.

❑ **Disability.** My physical disability causes me to be unable to complete a course in personal financial management in person, by phone, or through the internet, even after I reasonably tried to do so.

❑ **Active duty.** I am currently on active military duty in a military combat zone.

❑ **Residence.** I live in a district in which the United States trustee (or bankruptcy administrator) has determined that the approved instructional courses cannot adequately meet my needs.

Part 2: Sign Here

I certify that the information I have provided is true and correct.

_____ _____ Date _____
Signature of debtor named on certificate Printed name of debtor MM / DD / YYYY

COMMITTEE NOTE

Official Form 423, *Certification About a Financial Management Course*, is revised as part of the Forms Modernization Project. The form replaces former Official Form 23, *Debtor's Certification of Completion of Postpetition Instructional Course Concerning Personal Financial Management*. Form 423 is renumbered to distinguish it from the forms used by non-individual debtors, such as corporations and partnerships.

To make Form 423 easier to understand, legal terms are explained more fully or replaced with commonly understood terms, and the form is reformatted. Part 1, *Tell the Court About the Required Course*, provides definitions for "incapacity" and "disability," rather than providing statutory citations.

A statement is added that, in some cases, the court can waive the requirement to complete the financial management course. To have the requirement waived, the debtor must file a motion with the court and obtain a court order.

[Caption as described in Fed. R. Bankr. P. 7010 or 9004(b), as applicable]

Certification to Court of Appeals by All Parties

A notice of appeal having been filed in the above-styled matter on _____[Date], _____, _____, and _____, [names of all the appellants and all the appellees, if any], who are all the appellants [and all the appellees] hereby certify to the court under 28 U.S.C. § 158(d)(2)(A) that a circumstance specified in 28 U.S.C. § 158(d)(2) exists as stated below.

Leave to appeal in this matter:

- ❑ is required under 28 U.S.C. § 158(a)
- ❑ is not required under 28 U.S.C. § 158(a).

[If from a final judgment, order, or decree] This certification arises in an appeal from a final judgment, order, or decree of the United States Bankruptcy Court for the _____ District of _____ entered on _____[Date].

[If from an interlocutory order or decree] This certification arises in an appeal from an interlocutory order or decree, and the parties hereby request leave to appeal as required by 28 U.S.C. § 158(a).

[The certification shall contain one or more of the following statements, as is appropriate to the circumstances.]

The judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for this circuit or of the Supreme Court of the United States, or involves a matter of public importance.

Or

The judgment, order, or decree involves a question of law requiring resolution of conflicting decisions.

Or

An immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken.

[The parties may include or attach the information specified in Rule 8001.]

Signed: *[If there are more than two signatories, all must sign and provide the information requested below. Attach additional signed sheets if needed.]*

Attorney for Appellant (or Appellant, if not represented by an attorney):	_____	_____
Printed name of signer:	_____	_____
Address:	_____	_____
	_____	_____
	_____	_____
Telephone number:	(_____)_____–_____	(_____)_____–_____
Date:	_____/_____/_____ MM / DD / YYYY	_____/_____/_____ MM / DD / YYYY

COMMITTEE NOTE

Official Form 424, *Certification to Court of Appeal by All Parties* replaces Official Form 24, *Certification to Court of Appeal by All Parties*. It is revised as part of the Forms Modernization Project, and includes stylistic changes throughout the form.

Fill in this information to identify your case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____
(If known)

Official Form 427

Cover Sheet for Reaffirmation Agreement

12/15

Anyone who is a party to a reaffirmation agreement may fill out and file this form. Fill it out completely, attach it to the reaffirmation agreement, and file the documents within the time set under Bankruptcy Rule 4008.

Part 1: Explain the Repayment Terms of the Reaffirmation Agreement

1. **Who is the creditor?**

   _____
   Name of the creditor

2. **How much is the debt?**

   On the date that the bankruptcy case is filed $_____

   To be paid under the reaffirmation agreement $_____

   $_____ per month for _____ months (if fixed interest rate)

3. **What is the Annual Percentage Rate (APR) of interest? (See Bankruptcy Code § 524(k)(3)(E).)**

   Before the bankruptcy case was filed _____%

   Under the reaffirmation agreement _____% ❑ Fixed rate
   ❑ Adjustable rate

4. **Does collateral secure the debt?**

   ❑ No
   ❑ Yes. Describe the collateral. _____

   Current market value $_____

5. **Does the creditor assert that the debt is nondischargeable?**

   ❑ No
   ❑ Yes. Attach an explanation of the nature of the debt and the basis for contending that the debt is nondischargeable.

6. **Using information from *Schedule I: Your Income*** (Official Form 106I) **and *Schedule J: Your Expenses*** (Official Form 106J)**, fill in the amounts.**

Income and expenses reported on Schedules I and J		Income and expenses stated on the reaffirmation agreement	
6a. Combined monthly income from line 12 of Schedule I	$ _____	6e. Monthly income from all sources after payroll deductions	$ _____
6b. Monthly expenses from line 22c of Schedule J	– $ _____	6f. Monthly expenses	– $ _____
6c. Monthly payments on all reaffirmed debts not listed on Schedule J	– $ _____	6g. Monthly payments on all reaffirmed debts not included in monthly expenses	– $ _____
6d. **Scheduled net monthly income** Subtract lines 6b and 6c from 6a. If the total is less than 0, put the number in brackets.	$ _____	6h. **Present net monthly income** Subtract lines 6f and 6g from 6e. If the total is less than 0, put the number in brackets.	$ _____

7. **Are the income amounts on lines 6a and 6e different?**	❑ No ❑ Yes.	Explain why they are different and complete line 10._____
8. **Are the expense amounts on lines 6b and 6f different?**	❑ No ❑ Yes.	Explain why they are different and complete line 10._____
9. **Is the net monthly income in line 6h less than 0?**	❑ No ❑ Yes.	A presumption of hardship arises (unless the creditor is a credit union). Explain how the debtor will make monthly payments on the reaffirmed debt and pay other living expenses. Complete line 10.
10. **Debtor's certification about lines 7-9** If any answer on lines 7-9 is *Yes*, the debtor must sign here. If all the answers on lines 7-9 are *No*, go to line 11.		I certify that each explanation on lines 7-9 is true and correct. ✘ _____ Signature of Debtor 1 ✘ _____ Signature of Debtor 2 (Spouse Only in a Joint Case)
11. **Did an attorney represent the debtor in negotiating the reaffirmation agreement?**	❑ No ❑ Yes.	Has the attorney executed a declaration or an affidavit to support the reaffirmation agreement? ❑ No ❑ Yes

Part 2: Sign Here

Whoever fills out this form must sign here.

I certify that the attached agreement is a true and correct copy of the reaffirmation agreement between the parties identified on this *Cover Sheet for Reaffirmation Agreement*.

✘ _____ Date _____
Signature MM / DD / YYYY

_____
Printed Name

Check one:

❑ Debtor or Debtor's Attorney

❑ Creditor or Creditor's Attorney

Rules Appendix B Form 1 12b-011425

COMMITTEE NOTE

Official Form 427, *Cover Sheet for Reaffirmation Agreement*, is revised and renumbered as part of the Forms Modernization Project. The form replaces former Official Form 27, *Reaffirmation Agreement Cover Sheet*. To make it easier to understand, the form is reformatted, and legal terms are explained more fully or replaced with commonly understood terms.

The calculation of the debtor's net monthly income is expanded to include the debtor's net monthly income at the time the bankruptcy petition is filed, as well as the debtor's net monthly income at the time of the reaffirmation agreement. Rather than requiring filers to state their relationship to the case, checkboxes are provided for the debtor or the debtor's attorney and for the creditor or the creditor's attorney.

Line 3 of the form has been changed to clarify the requirement to disclose an annual percentage rate of interest. Section 524(k)(3)(E) of the Bankruptcy Code defines the "Annual Percentage Rate" to be disclosed in connection with a reaffirmation agreement. Line 3 of the form now includes a reference to that Code provision, which in appropriate circumstances permits disclosure of the simple interest rate as the Annual Percentage Rate.

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

JEFFREY S. SUTTON
CHAIR

REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
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CIVIL RULES

REENA RAGGI
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

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

FROM: Honorable David G. Campbell, Chair
Advisory Committee on Civil Rules

DATE: May 2, 2015

RE: Report of the Advisory Committee on Civil Rules

Introduction

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts on April 9, 2015. Draft Minutes of this meeting are attached. This report has been prepared by Professor Cooper, Committee Reporter, with Professor Marcus, Associate Reporter, and various subcommittee chairs.

Part I of this Report presents recommendations to approve for adoption several proposals that were published for comment in August, 2014. Each deals with distinctive topics presented separately as I.A., Rule 4(m); I.B., Rule 6(d); and I.C., Rule 82.

* * * * *

I. RECOMMENDATIONS TO APPROVE FOR ADOPTION

I.A. RULE 4(m) - RULE 4(h)(2)

The Standing Committee approved the August, 2014 publication of a proposed amendment of Rule 4(m). The amendment adds service on an entity in a foreign country to the list in the last sentence that exempts service in a foreign country from the presumptive time limit set by Rule 4(m) for serving the summons and complaint. It is recommended that the proposed amendment be recommended for adoption. The reasons are described in the Committee Note.

Rule 4. Summons

* * * * *

(m) Time Limit for Service. If a defendant is not served within 90[1] days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1).

* * * * *

COMMITTEE NOTE

Rule 4(m) is amended to correct a possible ambiguity that appears to have generated some confusion in practice. Service in a foreign country often is accomplished by means that require more than the 120 days originally set by Rule 4(m)[, or than the 90 days set by amended Rule 4(m)]. This problem is recognized by the two clear exceptions for service on an individual in a foreign country under Rule 4(f) and for service on a foreign state under Rule 4(j)(1). The potential ambiguity arises from the lack of any explicit reference to service on a corporation, partnership, or other unincorporated association. Rule 4(h)(2) provides for service on such defendants at a place outside any judicial district of the United States "in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i)." Invoking service "in the manner prescribed by Rule 4(f)" could easily be read to mean that service under Rule 4(h)(2) is also service "under" Rule 4(f). That interpretation is in keeping with the purpose to recognize the delays that often occur in effecting service in a foreign country. But it also is possible to read the words for what they seem to say—service is under Rule 4(h)(2), albeit in a manner borrowed from almost all, but not quite all, of Rule 4(f).

The amendment resolves this possible ambiguity.

Gap Report

[1] This anticipates adoption of the proposed amendment transmitted to Congress on April 29, 2015.

No changes were made in the published rule text or Committee Note.

I.B. RULE 6(d)

The Standing Committee approved the August, 2014 publication of a proposed amendment of Rule 6(d). Present Rule 6(d) provides 3 added days to respond after service "made under Rule 5(b)(2)(C), (D), (E), or (F)." The amendment deletes (E), service by electronic means consented to by the person served. It also adds parenthetical descriptions of the modes of service that continue to allow the 3 added days: "(C)(mail), (D)(leaving with the clerk), or (F)(other means consented to)." Parallel proposals to delete electronic service from the 3-added days provision were published for the other sets of rules that included it. It is recommended that the proposed amendment be recommended for adoption as published. It is further recommended that a new paragraph be added to the Committee Note to reflect concerns raised by the Department of Justice and several other public comments. This brief new paragraph is discussed below.

A variety of concerns were raised by the public comments. One theme is that the time periods allowed by the Civil Rules are too short as they are. Any provision that allows even some relief should be retained. A related theme focuses on strategic opportunities to manipulate the amount of time practically available to respond after electronic service. This concern is illustrated by electronic filings made just before midnight on a Friday or the eve of a holiday. "No one goes home until after midnight." Suggested remedies include either a rule barring electronic filing after 5:00 or 6:00 p.m., or treating any later filing as made the next day (or on the next day that is not a weekend or legal holiday).

The Federal Magistrate Judges Association expressed a different concern — that some hasty readers would conclude that because Rule 5(b)(2)(E) currently requires consent for electronic service, electronic service is an "other means consented to" under Rule 5(b)(2)(F), restoring the 3 added days after all. Magistrate Judges are all too familiar with the ways in which rule text can be misread. But the Committee decided not to revise the recommended rule text. Apart from the hope that few will fall into this patent misreading, it is unlikely that a court would visit any serious consequences for a filing made 3 days late. The occasion for misreading, moreover, will be reduced when the proposed amendment of Rule 5(b)(2)(E) described below is approved for publication, and if it survives the public comment process. Consent would no longer be required for service on a registered user through the court's transmission facilities. That is likely to govern an ever-growing swath of civil litigation.

The Department of Justice, after expressing concerns with failed electronic transmission, late-night filing in general, and strategic use of late-night filing in particular, recommended that language be added to the Committee Note to remind courts of the reasons to allow extensions of time when appropriate to respond to such problems. Adding anything to the Committee Note on this account could be resisted as unnecessary. Judges do not need to be told to make reasonable adjustments for these or any of the other myriad circumstances that may counsel that a time limit be extended. Brevity, moreover, is increasingly emphasized in framing Committee Notes. The Department's extensive experience with these and similar problems throughout the country, however, deserves some deference. The several advisory committees have agreed to add the new

paragraph underlined in the Committee Note set out below. Considering the question independently, the Committees took different positions. The Civil, Appellate, and Bankruptcy Rules Committees preferred not to add any new language. But the Criminal Rules Committee strongly favored adding some language, moved in part by concern that many criminal defense lawyers are occupied in court or otherwise away from their small offices and may not actually view e-service for some time after it arrives. Each Committee authorized its chair to agree to a common solution. Given the strength of the Criminal Rules Committee's position, and the value of uniformity, the joint recommendation is to adopt a much-shortened version proposed by the Department of Justice in the Committee Notes to each set of rules.

Rule 6. Computing and Extending Time; Time for Motion Papers

* * * * *

(d) ADDITIONAL TIME AFTER CERTAIN KINDS OF SERVICE. When a party may or must act within a specified time after ~~service~~ being served[2] and service is made under Rule 5(b)(2)(C) (mail), (D) (leaving with the clerk), ~~(E),~~ or (F) (other means consented to), 3 days are added after the period would otherwise expire under Rule 6(a).

COMMITTEE NOTE

Rule 6(d) is amended to remove service by electronic means under Rule 5(b)(2)(E) from the modes of service that allow 3 added days to act after being served.

Rule 5(b)(2) was amended in 2001 to provide for service by electronic means. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and in widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day periods that allow "day-of-the-week" counting. Adding 3 days at the end complicated the counting, and

[2] This wording reflects the proposed amendment approved by the Standing Committee in May 2014, but held in abeyance.

increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

The ease of making electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice.

Eliminating Rule 5(b) subparagraph (2)(E) from the modes of service that allow 3 added days means that the 3 added days cannot be retained by consenting to service by electronic means. Consent to electronic service in registering for electronic case filing, for example, does not count as consent to service "by any other means" of delivery under subparagraph (F).

Gap Report

No changes are made in the rule text as published. A new paragraph in the Committee Note is underlined.

I.C. RULE 82

The Standing Committee approved the August, 2014 publication of a proposed amendment of Rule 82. It is recommended that the proposed amendment be recommended for adoption.

Rule 82. Jurisdiction and Venue Unaffected

These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is governed by 28 U.S.C. § 1390 ~~not a civil action for purposes of 28 U.S.C. §§ 1391-1392~~.

COMMITTEE NOTE

Rule 82 is amended to reflect the enactment of 28 U.S.C. § 1390 and the repeal of § 1392.

Gap Report

No changes are made in the rule text or Committee Note as published.

* * * * *

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

1 **Rule 4. Summons**

2 * * * * *

3 **(m) Time Limit for Service.** If a defendant is not served
4 within 90[1] days after the complaint is filed, the
5 court—on motion or on its own after notice to the
6 plaintiff—must dismiss the action without prejudice
7 against that defendant or order that service be made
8 within a specified time. But if the plaintiff shows
9 good cause for the failure, the court must extend the
10 time for service for an appropriate period. This
11 subdivision (m) does not apply to service in a foreign
12 country under Rule 4(f), 4(h)(2), or 4(j)(1).

13 * * * * *

---

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

[1] This anticipates adoption of the proposed amendment transmitted to Congress on April 29, 2015.

Committee Note

Rule 4(m) is amended to correct a possible ambiguity that appears to have generated some confusion in practice. Service in a foreign country often is accomplished by means that require more than the 120 days originally set by Rule 4(m)[, or than the 90 days set by amended Rule 4(m)]. This problem is recognized by the two clear exceptions for service on an individual in a foreign country under Rule 4(f) and for service on a foreign state under Rule 4(j)(1). The potential ambiguity arises from the lack of any explicit reference to service on a corporation, partnership, or other unincorporated association. Rule 4(h)(2) provides for service on such defendants at a place outside any judicial district of the United States "in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i)." Invoking service "in the manner prescribed by Rule 4(f)" could easily be read to mean that service under Rule 4(h)(2) is also service "under" Rule 4(f). That interpretation is in keeping with the purpose to recognize the delays that often occur in effecting service in a foreign country. But it also is possible to read the words for what they seem to say—service is under Rule 4(h)(2), albeit in a manner borrowed from almost all, but not quite all, of Rule 4(f).

The amendment resolves this possible ambiguity.

126-011433

Rule 6. Computing and Extending Time; Time for Motion Papers

* * * * *

(d) Additional Time After Certain Kinds of Service. When a party may or must act within a specified time after ~~service~~being served and service is made under Rule 5(b)(2)(C) (mail), (D) (leaving with the clerk), ~~(E),~~ or (F) (other means consented to), 3 days are added after the period would otherwise expire under Rule 6(a).

Committee Note

Rule 6(d) is amended to remove service by electronic means under Rule 5(b)(2)(E) from the modes of service that allow 3 added days to act after being served.

Rule 5(b)(2) was amended in 2001 to provide for service by electronic means. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems

might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and in widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day periods that allow "day-of-the-week" counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice.

Eliminating Rule 5(b) subparagraph (2)(E) from the modes of service that allow 3 added days means that the 3 added days cannot be retained by consenting to service by electronic means. Consent to electronic service in registering for electronic case filing, for example, does not

126-011435

count as consent to service "by any other means" of delivery under subparagraph (F).

What is now Rule 6(d) was amended in 2005 "to remove any doubt as to the method for calculating the time to respond after service by mail, leaving with the clerk of court, electronic means, or by other means consented to by the party served." A potential ambiguity was created by substituting "after service" for the earlier references to acting after service "upon the party" if a paper or notice "is served upon the party" by the specified means. "[A]fter service" could be read to refer not only to a party that has been served but also to a party that has made service. That reading would mean that a party who is allowed a specified time to act after making service can extend the time by choosing one of the means of service specified in the rule, something that was never intended by the original rule or the amendment. Rules setting a time to act after making service include Rules 14(a)(1), 15(a)(1)(A), and 38(b)(1). "[A]fter being served" is substituted for "after service" to dispel any possible misreading.

1 **Rule 82. Jurisdiction and Venue Unaffected**

2 These rules do not extend or limit the jurisdiction of the
3 district courts or the venue of actions in those courts. An
4 admiralty or maritime claim under Rule 9(h) is governed by
5 28 U.S.C. § 1390 ~~not a civil action for purposes of 28 U.S.C.~~
6 ~~§§ 1391–1392~~.

Committee Note

Rule 82 is amended to reflect the enactment of 28 U.S.C. § 1390 and the repeal of § 1392.

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

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CHAIR

REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

SANDRA SEGAL IKUTA
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

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

FROM: Honorable Reena Raggi, Chair
Advisory Committee on Criminal Rules

DATE: May 6, 2015

RE: Report of the Advisory Committee on Criminal Rules

I. INTRODUCTION

The Advisory Committee on the Federal Rules of Criminal Procedure ("the Advisory Committee") met on March 16-17, 2015, in Orlando, Florida, and took action on a number of proposals. The Draft Minutes are attached. (Tab B).

This report presents three action items for Standing Committee consideration. The Advisory Committee recommends that:

(1) a proposed amendment to Rule 4 (service of summons on organizational defendants), previously published for public comment, be approved as published and transmitted to the Judicial Conference; and

(2) a proposed amendment to Rule 41 (venue for approval of warrant for certain remote electronic searches), previously published for public comment, be approved as amended and transmitted to the Judicial Conference; and

(3) a proposed amendment to Rule 45 (additional time after certain kinds of service), previously published for public comment, be approved as amended and transmitted to the Judicial Conference.

* * * * *

II. ACTION ITEMS

A. ACTION ITEM—Rule 4 (service of summons on organizational defendants)

After review of the public comments, the Advisory Committee voted unanimously to recommend that the Standing Committee approve the proposed amendment as published and transmit it to the Judicial Conference. The amendment is at Tab C.

1. Reasons for the proposal

The proposed amendment originated in an October 2012 letter from Assistant Attorney General Lanny Breuer, who advised the Committee that Rule 4 now poses an obstacle to the prosecution of foreign corporations that have committed offenses that may be punished in the United States. In some cases, such corporations cannot be served because they have no last known address or principal place of business in the United States. General Breuer emphasized the "new reality": a truly global economy reliant on electronic communications, in which organizations without an office or agent in the United States can readily conduct both real and virtual activities here. He argued that this new reality has created a "growing class of organizations, particularly foreign corporations" that have gained "'an undue advantage' over the government relating to the initiation of criminal proceedings."

At present, the Federal Rules of Criminal Procedure provide for service of an arrest warrant or summons only within a judicial district of the United States. Fed. R. Crim. P. 4(c)(2), which governs the location of service, states that an arrest warrant or summons may be served "within the jurisdiction of the United States."[1] In contrast, Fed. R. Civ. P. 4(f) authorizes service on individual defendants in a foreign country, and Fed. R. Civ. P. 4(h)(2) allows service on organizational defendants as provided by Rule 4(f).

2. The proposed amendment

Given the increasing number of criminal prosecutions involving foreign entities, the Advisory Committee agreed that it would be appropriate for the Federal Rules of Criminal Procedure to provide a mechanism for foreign service on an organization. The Advisory Committee recognized that the government may not be able to prosecute foreign entities that fail to respond to service. Nevertheless, it is expected that entities subject to collateral consequences

[1] Fed. R. Crim. P. 4(c)(2) does provide, however, that service may also be made "anywhere else a federal statute authorizes an arrest."

(forfeiture, debarment, etc.) will appear. The proposed amendment makes the following changes in Rule 4:

(1) It specifies that the court may take any action authorized by law if an organizational defendant fails to appear in response to a summons. This fills a gap in the current rule, without any expansion of judicial authority.

(2) For service of a summons on an organization within the United States, it:

- eliminates the requirement of a separate mailing to an organizational defendant when delivery has been made to an officer or to a managing or general agent, but

- requires mailing when delivery has been made on an agent authorized by statute, if the statute itself requires mailing to the organization.

(3) It also authorizes service on an organization at a place not within a judicial district of the United States, prescribing a non-exclusive list of methods for service.

In addition to the enumerated means of service, the proposal contains an open-ended provision in (c)(3)(D)(ii) that allows service "by any other means that gives notice." This provision provides flexibility for cases in which the Department of Justice concludes that service cannot be made (or made without undue difficulty) by the enumerated means. One of the principal issues considered by the Advisory Committee was whether to require prior judicial approval of other means of service. Civil Rule 4(f)(3) provides for foreign service on an organization "by other means not prohibited by international agreement, as the court orders."(emphasis added). The Committee concluded the Criminal Rules should not require prior judicial approval before service of a criminal summons could be made in a foreign country by other unspecified means. In its view, a requirement of prior judicial approval might raise difficult questions of international law and the institutional roles of the courts and the executive branch.[2]

The Committee considered the possibility that in rare cases the Department of Justice might seek to make service under (c)(3)(D)(ii) in a foreign nation without its cooperation or consent. Representatives of the Department stated that such service would be made only as a last resort, and only after the Criminal Division's Office of International Affairs and representatives

[2] These issues would be raised most starkly by a request for judicial approval of service of criminal process in a foreign country without its consent or cooperation, and in violation of its laws, or even in violation of international agreement. Fed. R. Civ. P. 4(f)(3) may permit such a request. Where there is no internationally agreed means of service prescribed, Fed. R. Civ. P. 4(f)(2) then authorizes service by various means, and Fed. R. Civ. P. 4(f)(3) provides for service by "any other means not prohibited by international agreement, as the court orders." Although Fed. R. Civ. P. 4(f)(2)(C) precludes service "prohibited by the foreign country's law," that restriction is absent from Fed. R. Civ. P. 4(f)(3). The proposed amendment to Criminal Rule 4 authorizes service "permitted by an applicable international agreement," but does not prohibit service that is not so permitted, as long as service "gives notice."

of the Department of State had considered the foreign policy and reciprocity implications of such an action. The Department also stressed the Executive Branch's primacy in foreign relations and its obligation to ensure that the laws are faithfully executed. Finally, the Department noted that the federal courts are not deprived of jurisdiction to try a defendant whose presence before the court was procured by illegal means. This principle was reaffirmed in United States v. Alvarez-Machain, 504 U.S. 655 (1992) (holding that abduction of defendant in Mexico in violation of extradition treaty did not deprive court of jurisdiction). Similarly, if service were made on an organizational defendant in a foreign nation without its consent, or in violation of international agreement, the court would not be deprived of jurisdiction. Under the Committee's proposal–which does not require prior judicial approval of the means of service–a court would never be asked to give advance approval of service contrary to the law of another state or in violation of international law. Rather, a court would consider any legal challenges to such service only when raised in a proceeding before it.

3. Public Comments and Subcommittee Review

a. Public comments

Six written comments on the proposed amendment were received, and one speaker (from the Federal Bar Council for the Second Circuit) testified about the proposed amendment. The Federal Bar Council, the Federal Magistrate Judges Association (FMJA), Mr. Kyle Druding, and the National Association of Criminal Defense Lawyers (NACDL) all supported the proposed amendment, though the FMJA and NACDL suggested revisions. Robert Feldman, Esq. of Quinn Emanuel Urquart & Sullivan opposed the amendment and urged that it be withdrawn. Additionally, the Department of Justice provided written responses. Each comment is summarized at Tab C.

With the exception of Quinn Emanuel, the commenters generally agreed that the amendment (1) addresses a gap in the current rules that may hinder the prosecution of foreign corporations that commit crimes in the United States but have no physical presence here, (2) provides methods of service that are reasonably calculated to provide notice and comply with applicable laws, and (3) gives courts appropriate discretion to fashion remedies.

b. The Subcommittee's review and recommendations

The Rule 4 Subcommittee, chaired by Judge David Lawson, received both summaries and the full text of the comments, and it held a teleconference to review the comments. The Subcommittee unanimously recommended that the Advisory Committee approve the proposed amendment as published and transmit it to the Standing Committee.

4. Recommended action

After a full discussion, the Advisory Committee concurred in the recommendation that the proposed amendment as published should be approved for transmission to the Standing Committee.

a. Opposition to the proposed amendment

Only one comment opposed the amendment and recommended that it be withdrawn. The law firm of Quinn Emanuel Urquart & Sullivan represents the Pangang Group Company and affiliated entities, a state-owned Chinese corporation. The Department of Justice has been unable to serve process on Pangang under current Rule 4.[3] The proposal to amend the rule would provide a mechanism for effecting service on foreign corporations that commit serious crimes in the United States without having any physical presence here. The amendment is intended to allow reliable service with adequate notice on these organizations so that U.S. courts can adjudicate the merits of criminal allegations and ensure appropriate accountability.

The Committee carefully considered Quinn Emanuel's arguments, and found them unpersuasive. Quinn Emanuel argued that the proposed amendment would essentially foreclose judicial review of the adequacy of notice to foreign corporations, because "the very act of challenging service might be said to conclusively establish the notice that would make service complete." Corporate defendants who wish to contest service, they argued, would face "a Hobson's choice." The Committee agreed that if a lawyer for a corporation appears in a criminal case it may be difficult to convince the court that the corporation did not receive notice. But this is appropriate. A court should be able to take into account the appearance of counsel when evaluating a corporation's claim that it did not receive notice. Moreover, nothing in the proposed amendment addresses or limits any authority of the court to allow a special appearance to contest service on other grounds, nor does it address the ability of a corporate defendant to contest notice in a collateral proceeding. Quoting *Omni Capital Int'l v. Wolff & Co.*, 484 U.S. 97, 104 (1987), Quinn Emanuel also argued that in suggesting notice was the sole criterion for service, the Rule would "eliminate a historical function of service." The Committee concluded that the *Omni Capital* decision is fully consistent with the proposed amendment. In the sentence following the language quoted by Quinn Emanuel the Court made it clear that service in compliance with the Civil Rules provided the additional element of "amenability to service." The Court explained, "Absent consent, this means there must be authorization for service of

[3] On July 10, 2014, after a two month jury trial, Walter Liew, the owner and president of a California-based engineering consulting company, was sentenced to 15 years in prison for conspiring to steal trade secrets from E.I. du Pont de Nemours & Company ("DuPont") related to the manufacture of titanium dioxide and for the benefit of Pangang. *See, Walter Liew Sentenced to Fifteen Years in Prison for Economic Espionage,* justice.gov (Jul. 11, 2014), www.justice.(_2,ov/usao-ndca/pr/walter-liew-sentenced-fifteen-years-prison-economic-espiona2,e. Liew was aware that DuPont had developed industry-leading titanium dioxide technology over many years of research and development and assembled a team of former DuPont employees to assist him in his efforts to convey DuPont's titanium dioxide technology to entities in the People's Republic of China, including Pangang. At Liew's sentencing; the Honorable Jeffrey S. White, U.S. District Court Judge, stated that the 15-year sentence was intended, in part, to send a message that the theft and sale of trade secrets for the benefit of a foreign government is a serious crime that threatens our national economic security. *Id.* Despite the fact that Pangang was indicted years ago along with Liew, and has actual notice of the indictment, to date, the United States has been unable to effectively serve Pangang pursuant to the current Rule 4. *See, e.g., United States v. Pangang Group Co., Ltd,* 879 F. Supp. 2d 1052 (N.D. Cal. 2012).

summons on the defendant." Here, the purpose of the proposed amendment is to provide the necessary "authorization for service" (as well as notice to the defendant).

The lawyers from Quinn Emanuel raised another argument that the Committee had considered as it was formulating the proposal, namely, that "other governments may reciprocate by adopting a similar regime" to "ensnare U.S. corporations in criminal prosecutions around the globe." In a related objection, Quinn Emanuel noted that a court might interpret the amendment to permit "a manner of service prohibited by international agreement . . . , so long as it appears to have provided notice to the accused," an interpretation it found objectionable. Both of these concerns were anticipated by the Committee well before the proposal was approved for publication. In response to a specific request from a Committee member, the Department of Justice provided written assurance that it had consulted with appropriate authorities in the Executive Branch about the potential international relations ramifications of the proposed amendment. The Committee agreed that in light of this assurance, concerns about any impact on diplomatic relations were not a basis for rejecting the proposed amendment.

b. Suggested revisions

The FMJA, Quinn Emanuel, and NACDL suggested revisions that the Advisory Committee declined to adopt. The FMJA suggested that an addition to the Committee Note stating that the means of service must satisfy constitutional due process. Quinn Emanuel's attorneys also argued if a corporate defendant did not receive notice and failed to appear, the court might impose sanctions, or appoint counsel and conduct trial in absentia. Similarly, NACDL requested that the amendment be revised to include in the rule's text that actions by a judge upon a corporation's failure to appear must be "consistent with Rule 43(a)," or, in the alternative that this requirement be stated in the Note. The Advisory Committee considered and rejected these suggestions. It is always assumed that a rule will be interpreted against the backdrop of existing rules, statutes, and constitutional doctrine. Absent some compelling reason to believe this point will be misunderstood, adding such a command to a rule's text or Note is unnecessary. Indeed, doing so might have the undesirable effect of suggesting that in the absence of such a cross reference, other statutes and rules are not applicable.

The Advisory Committee also rejected proposed revisions that would add procedural hurdles and might invite extended litigation. NACDL suggested that the proposed amendment be modified to allow service by alternative means only if it was not possible to deliver a copy in a manner authorized by the foreign jurisdiction's law, to a officer, manager or other general agent, or an agent appointed to receive process. The Advisory Committee chose neither to add such a condition nor to prioritize the means of service, as that would invite unnecessary litigation over whether the triggering condition had been met. Similarly, the Committee rejected the further suggestion of NACDL that the new provisions be limited to cases in which "the organization does not have a place of business or mailing address within the United States at or through which actual notice to a principal of the organization can likely be given." As noted by the Department of Justice, litigation in a recent case on the question whether a subsidiary of a foreign corporation could be served took eight months. Finally, the Committee rejected Quinn Emanuel's argument that "any other means that gives notice" renders superfluous the other sections of the proposed

amendment. Similarly, the Committee considered and rejected a suggestion that the government be required to show other options were not feasible or had been exhausted before resorting to certain options for service as unnecessarily burdensome and time consuming.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 4 be approved as published and transmitted to the Judicial Conference.

B. ACTION ITEM—Rule 41 (venue for approval of warrant for certain remote electronic searches)

After review of the public comments, the Advisory Committee voted with one dissent to recommend that Standing Committee approve the proposed amendment as revised after publication and transmit it to the Judicial Conference.

The proposed amendment (Tab D) provides that in two specific circumstances a magistrate judge in a district where the activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and seize or copy electronically stored information even when that media or information is or may be located outside of the district.

The proposal has two parts. The first change is an amendment to Rule 41(b), which generally limits warrant authority to searches within a district,[4] but permits out-of-district searches in specified circumstances.[5] The amendment would add specified remote access searches for electronic information to the list of other extraterritorial searches permitted under Rule 41(b). Language in a new subsection 41(b)(6) would authorize a court to issue a warrant to use remote access to search electronic storage media and seize electronically stored information inside *or outside* of the district in two specific circumstances.

The second part of the proposal is a change to Rule 41(f)(1)(C), regulating notice that a search has been conducted. New language would be added at the end of that provision indicating the process for providing notice of a remote access search.

1. Reasons for the proposed amendment

Rule 41's territorial venue provisions–which generally limit searches to locations within a district–create special difficulties for the Government when it is investigating crimes involving

[4] Rule 41(b)(1) ("a magistrate judge with authority in the district – or if none is reasonably available, a judge of a state court of record in the district – has authority to issue a warrant to search for and seize a person or property located within the district").

[5] Currently, Rule 41(b) (2) – (5) authorize out-of-district or extra-territorial warrants for: (1) property in the district when the warrant is issued that might be moved outside the district before the warrant is executed; (2) tracking devices, which may be monitored outside the district if installed within the district; (3) investigations of domestic or international terrorism; and (4) property located in a United States territory or a United States diplomatic or consular mission.

electronic information. The proposal speaks to two increasingly common situations affected by the territorial restriction, each involving remote access searches, in which the government seeks to obtain access to electronic information or an electronic storage device by sending surveillance software over the Internet.

In the first situation, the warrant sufficiently describes the computer to be searched, but the district within which the computer is located is unknown. This situation is occurring with increasing frequency because persons who commit crimes using the Internet are using sophisticated anonymizing technologies. For example, persons sending fraudulent communications to victims and child abusers sharing child pornography may use proxy services designed to hide their true IP addresses. Proxy services function as intermediaries for Internet communications: when one communicates through an anonymizing proxy service, the communication passes through the proxy, and the recipient of the communication receives the proxy's IP address, not the originator's true IP address. Accordingly, agents are unable to identify the physical location and judicial district of the originating computer.

A warrant for a remote access search when a computer's location is not known would enable investigators to send an email, remotely install software on the device receiving the email, and determine the true IP address or identifying information for that device. The Department of Justice provided the Committee with several examples of affidavits seeking a warrant to conduct such a search. Although some judges have reportedly approved such searches, one judge recently concluded that the territorial requirement in Rule 41(b) precluded a warrant for a remote search when the location of the computer was not known, and he suggested that the Committee consider updating the territorial limitation to accommodate advancements in technology. *In re Warrant to Search a Target Computer at Premises Unknown*, 958 F. Supp. 2d 753 (S.D. Tex. 2013) (noting that "there may well be a good reason to update the territorial limits of that rule in light of advancing computer search technology").

The second situation involves the use of multiple computers in many districts simultaneously as part of complex criminal schemes. An increasingly common form of online crime involves the surreptitious infection of multiple computers with malicious software that makes them part of a "botnet," which is a collection of compromised computers that operate under the remote command and control of an individual or group. Botnets may range in size from hundreds to millions of compromised computers, including computers in homes, businesses, and government systems. Botnets are used to steal personal and financial data, conduct large-scale denial of service attacks, and distribute malware designed to invade the privacy of users of the host computers.

Effective investigation of these crimes often requires law enforcement to act in many judicial districts simultaneously. Under the current Rule 41, however, except in cases of domestic or international terrorism, investigators may need to coordinate with agents, prosecutors, and magistrate judges in every judicial district in which the computers are known to be located to obtain warrants authorizing the remote access of those computers. Coordinating simultaneous warrant applications in many districts–or perhaps all 94 districts–requires a tremendous commitment of resources by investigators, and it also imposes substantial demands

on many magistrate judges. Moreover, because these cases concern a common scheme to infect the victim computers with malware, the warrant applications in each district will be virtually identical.

2. The proposed amendment

The Committee's proposed amendment is narrowly tailored to address these two increasingly common situations in which the territorial or venue requirements now imposed by Rule 41(b) may hamper the investigation of serious federal crimes. The Committee considered, but declined to adopt, broader language relaxing these territorial restrictions. It is important to note that the proposed amendment changes only the territorial limitation that is presently imposed by Rule 41(b). Using language drawn from Rule 41(b)(3) and (5), the proposed amendment states that a magistrate judge "with authority in any district where activities related to a crime may have occurred" (normally the district most concerned with the investigation) may issue a warrant that meets the criteria in new paragraph (b)(6). The proposed amendment does not address constitutional questions that may be raised by warrants for remote electronic searches, such as the specificity of description that the Fourth Amendment may require in a warrant for remotely searching electronic storage media or seizing or copying electronically stored information. The amendment leaves the application of this and other constitutional standards to ongoing case law development.

In a very limited class of investigations the Committee's proposed amendment would also eliminate the burden of attempting to secure multiple warrants in numerous districts. The proposed amendment is limited to investigations of violations of 18 U.S.C. § 1030(a)(5),[6] where the media to be searched are "protected computers" that have been "damaged without authorization." The definition of a protected computer includes any computer "which is used in or affecting interstate or foreign commerce or communication." 18 U.S.C. § 1030(e)(2). The statute defines "damage" as "any impairment to the integrity or availability of data, a program, a system, or information." 18 U.S.C. § 1030(e)(8). In cases involving an investigation of this nature, the amendment allows a single magistrate judge with authority in any district where activities related to a violation of 18 U.S.C. § 1030(a)(5) may have occurred to oversee the investigation and issue a warrant for a remote electronic search if the media to be searched are protected computers located in five or more districts. The proposed amendment would enable investigators to conduct a search and seize electronically stored information by remotely installing software on a large number of affected victim computers pursuant to one warrant issued by a single judge. The current rule, in contrast, requires obtaining multiple warrants to do so, in each of the many districts in which an affected computer may be located.

[6] 18 U.S.C. § 1030(5) provides that criminal penalties shall be imposed on whoever:

(A) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer;
(B) intentionally accesses a protected computer without authorization, and as a result of such conduct, recklessly causes damage; or
(C) intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage and loss.

Finally, the proposed amendment includes a change to Rule 41(f)(1)(C), which requires notice that a search has been conducted. New language would be added at the end of that provision indicating the process for providing notice of a remote access search. The rule now requires that notice of a physical search be provided "to the person from whom, or from whose premises, the property was taken" or left "at the place where the officer took the property." The Committee recognized that when an electronic search is conducted remotely, it is not feasible to provide notice in precisely the same manner as when tangible property has been removed from physical premises. The proposal requires that when the search is by remote access, reasonable efforts be made to provide notice to the person whose information was seized or whose property was searched.

3. Public Comments and Subcommittee Review

a. The public comments

During the public comment period the Committee received 44 written comments from individuals and organizations, and eight witnesses testified at the Committee's hearing in November:

> The Federal Bar Council, the Federal Magistrate Judges' Association, the National Association of Assistant United States Attorneys, and former advocate for missing and exploited children Carolyn Atwell-Davis all supported the amendment without change.
>
> The amendment was opposed by the American Civil Liberties Union (ACLU), the National Association of Criminal Defense Attorneys (NACDL), the Pennsylvania Bar Association, the Reporters Committee on the Freedom of the Press, the Clandestine Reporters Working Group, and several foundations and centers that focus on privacy and/or technology. Twenty-eight unaffiliated individuals wrote to oppose the amendment.

The Department of Justice submitted several written responses to issues raised in the public comments.

A summary of the comments is provided at Tab D. The main themes in the comments opposing the amendment are summarized below.

(i) Fourth Amendment concerns

The most common theme in the comments opposing the amendment was a concern that it relaxed or undercut the protections for personal privacy guaranteed by the Fourth Amendment. These comments focused principally on proposed (b)(6)(A), which allows the court in a district in which activities related to a crime may have occurred to grant a warrant for remote access when anonymizing technology has been employed to conceal the location of the target device or information.

Multiple comments argued that remote searches could not meet the Fourth Amendment's particularity requirement, and others emphasized that they would constitute surreptitious entries and invasive or destructive searches requiring a heightened showing of reasonableness. Many of these comments also challenged the constitutional adequacy of the notice provisions. Finally, several comments urged that the serious constitutional issues raised by remote searches would be insulated from judicial review.

A particular concern raised in many comments was that the use of anonymizing technology, such as Virtual Private Networks (VPNs), would subject law abiding citizens to remote electronic searches.

(ii) Title III

Multiple comments urged that warrant applications for remote electronic searches should be subject to requirements like those under the Wiretap Act, 18 U.S.C. § 2518 (Title III), or a surveillance warrant containing equivalent protections.

(iii) Extraterritoriality and international law concerns

Some comments focused on the possibility that the devices to be searched–whose location was by definition unknown–might be located outside the United States. They urged that the courts should not authorize searches outside the United States that would violate international law and the sovereignty of other nations, as well as any applicable mutual legal assistance treaties.

(iv) The role of Congress

An additional theme running through many of these comments was that the proposed amendment raised policy issues that should be resolved by Congress, not through procedural rulemaking. Some comments argued that only Congress could balance the competing policies and adopt appropriate safeguards. Others urged that the proposed amendment exceeded the authority granted by the Rules Enabling Act.

(v) Notice concerns

Finally, multiple comments expressed concern that the notice provisions were insufficiently protective, because they required only that reasonable efforts be made to provide notice. This, commenters argued, might lead to no notice being given to parties who were subject to remote electronic searches, or to long delays in giving notice. Some commenters also argued that all parties whose rights were affected by a search must be given notice, not either the person whose property was searched or whose information was seized or copied.

b. The Subcommittee's review and recommendation

The Rule 41 Subcommittee, chaired by Judge Raymond Kethledge, received both summaries and the full text of all comments, and it held multiple teleconferences to review the comments. The Subcommittee unanimously recommended that, with several minor revisions, the Advisory Committee should approve the proposed amendment and transmit it to the Judicial Conference.

4. Recommended action

After extended discussion, the Advisory Committee concurred in the recommendation that the proposed amendment, with minor revisions proposed by the Subcommittee, should be approved for transmission to the Standing Committee.

a. Opposition to the proposed amendment

In general the Committee concluded that the concerns of those opposing the amendment were about the substantive limits on government searches, which are not affected by the proposed amendment. Opposition comments did not address the procedure for designating the district in which a court will initially decide whether substantive requirements have been satisfied in the two circumstances prompting the amendment. Thus they furnished no basis for withdrawing the proposed amendment. The Committee is confident that judges will address Fourth Amendment requirements on a case-by-case basis both in issuing warrants under these amendments and in reviewing them when challenges are made thereafter.

Much of the opposition to the amendment reflected a misunderstanding of current law, the scope of the amendment, and the serious problems that it addresses. First, many commenters who opposed the rule did not recognize that the government must demonstrate probable cause to obtain a warrant. As noted below, the Committee recommends a revision to the caption of the relevant section referring to "venue" in order to draw attention to the limited scope of the amendment. Second, many commenters incorrectly assumed that the amendment created the authority for remote electronic searches. To the contrary, remote electronic searches are currently taking place when the government can identify the district in which an application should be made and satisfy the probable cause requirements for a warrant. Third, the opposing comments do not take account of the real need for amendment to allow the government to respond effectively to the threats posed by technology. Technology now provides the means for identity theft, corporate espionage, terrorism, child pornography, and other serious offenses to jeopardize the economy, national security, and individual privacy. The government can itself use technology to identify the perpetrators of such crimes but needs a rule clarifying the venue where it should make the Fourth Amendment showing necessary for a warrant. At the hearings, those who opposed the amendment were candid in admitting that they could offer no alternative to the proposed amendment (other than the hope that Congress might study the general issues and respond).

The Committee concluded that it was important to provide venue, thus allowing the case law on potential constitutional issues to develop in an orderly process as courts review warrant applications. This is far preferable than after-the-fact rulings on the legality of warrantless searches for which the government claims exigent circumstances. If the New York Stock Exchange were to be hacked tomorrow using anonymizing software, under current Rule 41 there is no district in which the government could seek a warrant. It would be preferable, the Committee concluded, to allow the government to seek a warrant from the court where the investigation is taking place, rather than conducting a warrantless search. Judicial review of warrant applications better ensures Fourth Amendment rights and enhances privacy. Any concern that judges may be uninformed about the technology to be used in the searches could be addressed by judicial education. The Federal Judicial Center has recently prepared some information materials about topics such as cloud computing, and additional materials could be developed to help judges review applications for remote electronic searches.

In botnet investigations, the amendment provides venue in one district for the warrant applications, eliminating the burden of attempting to secure multiple warrants in numerous districts and allowing a single judge to oversee the investigation. In prior botnet investigations, the burden of seeking warrants in multiple districts played a role in the government's strategy, providing a strong incentive to rely on civil processes. Again, the amendment addresses only a procedural issue, not the underlying substantive law regulating these searches. Allowing venue in a single district in no way alters the constitutional requirements that must be met before search warrants can be issued.

The Committee declined to make any major changes in the provisions governing notice. However, as noted below, it adopted several small changes recommended by the Subcommittee and also revised the Committee Note to address concerns made in the public comments.

Finally, the Committee concluded that arguments urging that the matter be left to Congress are not persuasive. Venue is not substance. Venue is process, and Rules Enabling Act tells the judiciary to promulgate rules of practice and procedure, not to wait for Congress to act. Instead, Congress responds to proposed rules. The Department came to the Committee with two procedural problems, created by the language of the existing Rule, not by the Constitution or other statute, that are impairing its ability to investigate ongoing, serious computer crimes. The Advisory Committee's role under the Rules Enabling Act is to propose amendments that address these problems and provide a forum for the government to determine the lawfulness of these searches.

One member dissented from the Committee's conclusions on these points and voted against forwarding the amendment to the Standing Committee. The dissenting member thought that the amendment is substantive, not procedural, because it has such important substantive effects, allowing judges to make ex parte determinations about core privacy concerns. The amendment, this member argued, would not permit adversarial testing of the underlying substantive law because defense counsel would not participate until too late in the process, in back-end litigation. For many people, computers are their lives, and the member concluded that these privacy concerns should be considered in the first instance by Congress. The remainder of

the Committee was not persuaded; computers are no more sacrosanct than homes, and search warrants for homes have long been issued ex parte and reviewed in back-end litigation.

b. Proposed revisions

The Committee unanimously accepted the Subcommittee's recommendations for several revisions in the rule as published, none of which require republication.

(i) The caption

The Committee accepted the Subcommittee's recommendation for a change in the caption of the affected subdivision of Rule 41, substituting "Venue for a Warrant Application" for the current caption "Authority to Issue a Warrant." This change responds to the many comments that assumed the amendment would allow a remote search in any case falling within the proposed amendment (for example, any case in which an individual had used anonymizing technology such as a VPN). The current caption seems to state an unqualified "authority" to issue warrants meeting the criteria of any of the subsections. Many commenters mistakenly interpreted the rule in this fashion, and strongly opposed it on this ground. The Committee considered and declined to adopt alternative language suggested by our style consultant, Professor Kimble, because it would less clearly indicate the limited purpose and effect of the amendment.

The Committee also adopted the Subcommittee's proposed addition to the Committee Note explaining the change in the caption. The new Note explicitly addresses the common misunderstanding in the public comments, stating what the amendment does (and does not) do: "the word 'venue' makes clear that Rule 41(b) identifies the courts that may consider an application for a warrant, not the constitutional requirements for the issuance of a warrant, which must still be met."

(ii) Notice

The Committee adopted the Subcommittee's two proposed revisions to the notice provisions for remote electronic searches and the accompanying Committee Note. The purpose of both revisions to the text is to parallel, as closely as possible, the requirements for physical searches. The addition to the Committee Note explains the changes to the text, and also responds to a common misunderstanding that underpinned multiple comments criticizing the proposed notice provisions.

The Committee added a requirement that the government provide a "receipt" for any property taken or copied (as well as a copy of the warrant authorizing the search). This parallels the current requirement that a receipt be provided for any property taken in a physical search. The Committee agreed that the omission of this requirement in the published rule was an oversight that should be remedied.

The Committee also rephrased the obligation to provide notice to "the person whose property was searched or who possessed the information that was seized or copied." Again, the purpose was to parallel the requirement for physical searches.

On the other hand, the Committee rejected the suggestion in some public comments that the government should be required to provide notice to both "the person whose property was searched" and whoever "possessed the information that was seized or copied, since that is not required in the case of physical searches. For example, if the Chicago Board of Trade is served with a warrant and files containing information regarding many customers are seized, the government may give notice of the search only to the Board of Trade, and not to each of the customers whose information may be included in one or more files. The same should be true in the case of remote electronic searches.

Finally, the Committee endorsed the Subcommittee's proposed addition to the Committee Note explaining the changes made in the notice provisions after publication, and also responding to the many comments that criticized the proposed notice provisions as insufficiently protective. The addition to the Note draws attention to the other provisions of Rule 41 that preclude delayed notice except when authorized by statute and provides a citation to the relevant statute. Professor Coquillette commented that because of the widespread confusion on this point in the public comments, the proposed addition was an appropriate exception to the general rule that committee notes should not be used to help practitioner.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 41 be approved as amended and transmitted to the Judicial Conference.

C. ACTION ITEM—Rule 45 (additional time after certain kinds of service)

After review of the public comments, the Advisory Committee voted unanimously to recommend that the Standing Committee approve the proposed amendment to Rule 45(c), with three revisions from the published version and transmit it to the Judicial Conference. The proposed amendment is at Tab E.

1. Reasons for the proposal

The proposed amendment to Rule 45(c) is a product of the Standing Committee's CM/ECF Subcommittee; parallel amendments to the civil, criminal, bankruptcy and appellate rules were published for comment. The proposed amendment would abrogate the rule providing for an additional three days whenever service is made by electronic means. It reflects the CM/ECF Subcommittee's conclusion that the reasons for allowing extra time to respond in this situation no longer exist. Concerns about delayed transmission, inaccessible attachments, and consent to service have been alleviated by advances in technology and extensive experience with electronic transmission. In addition, eliminating the extra three days would also simplify time computation. The proposed amendment, as well as the parallel amendments to the other Rules, includes new parenthetical descriptions of the forms of service for which three days will still be added.

2. Public Comments

The public comments are summarized at Tab E.

The Pennsylvania Bar Association and the National Association of Criminal Defense Lawyers (NACDL) opposed the amendment. Each noted that the three added days are particularly valuable when a filing is electronically served at inconvenient times. NACDL emphasized that many criminal defense counsel are solo practitioners or in very small firms, where they have little clerical help, and often do not see their ECF notices the day they are received. The Department of Justice expressed a similar concern about situations in which service after business hours, from a location in a different time zone, or during a weekend or holiday may significantly reduce the time available to prepare a response. The Department did not oppose the amendment, however, and instead suggested language be added to the Committee Note to address this issue.

NACDL also questioned the addition of the phrase "Time for Motion Papers" to the caption to Rule 45(c), suggesting that it may lead to confusion.

Ms. Cheryl Siler suggested that as part of the revision the existing language of Rule 45(c) should be amended to parallel Fed. R. Civ. P. 6(d), FRAP 26(c) and Fed. R. Bank. P. 9006(f). In contrast to Rule 45(c), which requires action "within a specified time *after service*," the parallel Civil and Bankruptcy Rules require action "within a specified [or prescribed] time *after being served*." Siler expressed concern that practitioners may interpret the current rule to mean the party serving a document (as well as the party being served) is entitled to 3 extra days.

The Federal Magistrate Judges Association (FMJA) expressed concern that readers of the amended rule might think that three days are still added after electronic service because of the cross reference to Civil Rule 5(b)(2)(F) "(other means consented to)." It suggested either eliminating all of the parentheticals in the proposed rule or revising the rule to refer to "(F) (other means consented to except electronic service)."

The Advisory Committee's CM/ECF Subcommittee, chaired by Judge David Lawson, held a telephone conference to consider the comments. After discussing the FMJA's concerns it decided not to recommend a change in the published rule. The likelihood of confusion did not seem significant, and any confusion that might arise would be short lived because of the efforts underway to eliminate the requirement for consent to electronic service. The parentheticals will be helpful to practitioners, and any revision to the parenthetical reference would require further amendment in the near future. Language in the proposed Committee Note directly addresses this issue. The Subcommittee recommended to the Criminal Advisory Committee that no change be made in the published rule on this issue, and the Advisory Committee agreed with that recommendation at its March meeting.

The Advisory Committee did approve three other revisions to the proposal, each recommended by its Subcommittee.

3. Suggested Revisions

a. Addition to Committee Note.

The first change is a proposed addition to the Committee Note that addresses the potential need to grant an extension to the time allowed for responding after electronic service. At the Advisory Committee's March meeting, two members initially opposed forwarding the published amendment to the Standing Committee, finding that the concerns voiced by the Pennsylvania Bar Association, NACDL, and the Department of Justice counseled against an amendment that would eliminate the three added days after electronic service. These members noted that the three added days are important for criminal practitioners because it is often necessary to speak directly with clients before filing responses, but speaking with incarcerated clients takes more time, particularly when clients are incarcerated in distant locations. However, the Committee eventually achieved unanimity on a compromise approach: adding language to the Committee Note. The Committee approved an addition to the Note drafted by the Department of Justice and recommended by the Advisory Committee's CM/ECF Subcommittee. The Committee decided that adding language to the Committee Note that mentioned the potential need for extensions was important not only for the reasons voiced by defense attorneys and the Department of Justice, but also because district court discretion to adjust deadlines in criminal cases is essential in order to address matters on the merits when appropriate. Such flexibility is particularly important when a person's liberty is at stake. Granting extensions in some circumstances may also be more efficient because of collateral challenges that frequently follow missed deadlines. This principal was among those that guided the Committee's recent work on Rule 12. The amendments to Rule 12 emphasized the district court's discretion to extend or modify motion deadlines so that issues can be most efficiently resolved on their merits before trial, avoiding litigation under Section 2255.

To facilitate uniformity in the Committee Note that would accompany the parallel rules making their way through the various Advisory Committees, the Criminal Advisory Committee approved the revised Note language with the understanding that modifications may be required. Indeed, subsequent to the March meeting, a much shorter version of the addition was approved by the Criminal Advisory Committee's Subcommittee on CM-ECF, and then by the Chairs of each Advisory Committee. That new language has been added to the published Committee Note in each Committees' parallel proposal. It reads: "Electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice."

b. Change to the Caption

The Advisory Committee also agreed to amend the caption of the Rule published for comment to eliminate the additional words "Time for Motion Papers." These words do not appear in the caption of the existing Rule 45, and were included in the proposed amendment in order to parallel the current caption of Civil Rule 6, on which Rule 45 was patterned, as well as

the caption to Bankruptcy Rule 9006. However, the added words do not describe the text of Rule 45. Instead, Rule 12 deals extensively with the time for motions.

c. Substituting "being served" for "service"

Finally, the Advisory Committee agreed to amend the proposed text of the amendment to Rule 45 as published so that it is parallel to the language of the other rules, referring to action "within a specified time after *being served*" instead of "time after *service*." The Committee is unaware of any substantive reason for the slightly different wording of Rule 45 as compared to the Civil and Bankruptcy Rules. The Committee believes it is prudent to revise the language of Rule 45(c) to eliminate the discrepancy while other changes are being made in Rule 45(c).

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 45 be approved as amended and transmitted to the Judicial Conference.

* * * * *

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

1 **Rule 4. Arrest Warrant or Summons on a Complaint**

2 **(a) Issuance.** If the complaint or one or more affidavits
3 filed with the complaint establish probable cause to
4 believe that an offense has been committed and that
5 the defendant committed it, the judge must issue an
6 arrest warrant to an officer authorized to execute it.
7 At the request of an attorney for the government, the
8 judge must issue a summons, instead of a warrant, to a
9 person authorized to serve it. A judge may issue more
10 than one warrant or summons on the same complaint.
11 If a<u>n individual</u> defendant fails to appear in response
12 to a summons, a judge may, and upon request of an
13 attorney for the government must, issue a warrant.<u> If</u>
14 <u>an organizational defendant fails to appear in response</u>

---

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

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15 to a summons, a judge may take any action authorized
16 by United States law.
17 * * * * *
18 **(c) Execution or Service, and Return.**
19 **(1)** ***By Whom.*** Only a marshal or other authorized
20 officer may execute a warrant. Any person
21 authorized to serve a summons in a federal civil
22 action may serve a summons.
23 **(2)** ***Location.*** A warrant may be executed, or a
24 summons served, within the jurisdiction of the
25 United States or anywhere else a federal statute
26 authorizes an arrest. A summons to an
27 organization under Rule 4(c)(3)(D) may also be
28 served at a place not within a judicial district of
29 the United States.
30 **(3)** ***Manner.***
31 (A) A warrant is executed by arresting the

32 defendant. Upon arrest, an officer
33 possessing the original or a duplicate
34 original warrant must show it to the
35 defendant. If the officer does not possess
36 the warrant, the officer must inform the
37 defendant of the warrant's existence and of
38 the offense charged and, at the defendant's
39 request, must show the original or a
40 duplicate original warrant to the defendant
41 as soon as possible.
42 (B) A summons is served on an individual
43 defendant:
44 (i) by delivering a copy to the defendant
45 personally; or
46 (ii) by leaving a copy at the defendant's
47 residence or usual place of abode with
48 a person of suitable age and discretion

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residing at that location and by mailing a copy to the defendant's last known address.

(C) A summons is served on an organization in a judicial district of the United States by delivering a copy to an officer, to a managing or general agent, or to another agent appointed or legally authorized to receive service of process. ~~A copy~~If the agent is one authorized by statute and the statute so requires, a copy must also be mailed to the organization~~organization's last known address within the district or to its principal place of business elsewhere in the United States~~.

64 (D) A summons is served on an organization
65 not within a judicial district of the United
66 States:
67 (i) by delivering a copy, in a manner
68 authorized by the foreign
69 jurisdiction's law, to an officer, to a
70 managing or general agent, or to an
71 agent appointed or legally authorized
72 to receive service of process; or
73 (ii) by any other means that gives notice,
74 including one that is:
75 (a) stipulated by the parties;
76 (b) undertaken by a foreign authority
77 in response to a letter rogatory, a
78 letter of request, or a request
79 submitted under an applicable
80 international agreement; or

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81 (c) permitted by an applicable

82 international agreement.

83 * * * * *

Committee Note

Subdivision (a). The amendment addresses a gap in the current rule, which makes no provision for organizational defendants who fail to appear in response to a criminal summons. The amendment explicitly limits the issuance of a warrant to individual defendants who fail to appear, and provides that the judge may take whatever action is authorized by law when an organizational defendant fails to appear. The rule does not attempt to specify the remedial actions a court may take when an organizational defendant fails to appear.

Subdivision (c)(2). The amendment authorizes service of a criminal summons on an organization outside a judicial district of the United States.

Subdivision (c)(3)(C). The amendment makes two changes to subdivision (c)(3)(C) governing service of a summons on an organization. First, like Civil Rule 4(h), the amended provision does not require a separate mailing to the organization when delivery has been made in the United States to an officer or to a managing or general agent. Service of process on an officer or a managing or general agent is in effect service on the principal. Mailing is required when delivery has been made on an agent authorized by statute, if the statute itself requires mailing to the entity.

Second, also like Civil Rule 4(h), the amendment recognizes that service outside the United States requires separate consideration, and it restricts Rule 4(c)(3)(C) and its modified mailing requirement to service on organizations within the United States. Service upon organizations outside the United States is governed by new subdivision (c)(3)(D).

These two modifications of the mailing requirement remove an unnecessary impediment to the initiation of criminal proceedings against organizations that commit domestic offenses but have no place of business or mailing address within the United States. Given the realities of today's global economy, electronic communication, and federal criminal practice, the mailing requirement should not shield a defendant organization when the Rule's core objective—notice of pending criminal proceedings—is accomplished.

Subdivision (c)(3)(D). This new subdivision states that a criminal summons may be served on an organizational defendant outside the United States and enumerates a non-exhaustive list of permissible means of service that provide notice to that defendant.

Although it is presumed that the enumerated means will provide notice, whether actual notice has been provided may be challenged in an individual case.

Subdivision (c)(3)(D)(i). Subdivision (i) notes that a foreign jurisdiction's law may authorize delivery of a copy of the criminal summons to an officer, or to a

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managing or general agent. This is a permissible means for serving an organization outside of the United States, just as it is for organizations within the United States. The subdivision also recognizes that a foreign jurisdiction's law may provide for service of a criminal summons by delivery to an appointed or legally authorized agent in a manner that provides notice to the entity, and states that this is an acceptable means of service.

Subdivision (c)(3)(D)(ii). Subdivision (ii) provides a non-exhaustive list illustrating other permissible means of giving service on organizations outside the United States, all of which must be carried out in a manner that "gives notice."

Paragraph (a) recognizes that service may be made by a means stipulated by the parties.

Paragraph (b) recognizes that service may be made by the diplomatic methods of letters rogatory and letters of request, and the last clause of the paragraph provides for service under international agreements that obligate the parties to provide broad measures of assistance, including the service of judicial documents. These include crime-specific multilateral agreements (e.g., the United Nations Convention Against Corruption (UNCAC), S. Treaty Doc. No. 109-6 (2003)), regional agreements (e.g., the Inter-American Convention on Mutual Assistance in Criminal Matters (OAS MLAT), S. Treaty Doc. No. 105-25 (1995)), and bilateral agreements.

Paragraph (c) recognizes that other means of service that provide notice and are permitted by an applicable

international agreement are also acceptable when serving organizations outside the United States.

As used in this rule, the phrase "applicable international agreement" refers to an agreement that has been ratified by the United States and the foreign jurisdiction and is in force.

125-011464

1 **Rule 41. Search and Seizure**

2 * * * * *

3 **(b)** **~~Authority to Issue a Warrant~~Venue for a Warrant**

4 **Application.** At the request of a federal law

5 enforcement officer or an attorney for the

6 government:

7 * * * * *

8 **(6)** a magistrate judge with authority in any district

9 where activities related to a crime may have

10 occurred has authority to issue a warrant to use

11 remote access to search electronic storage media

12 and to seize or copy electronically stored

13 information located within or outside that district

14 if:

15 (A) the district where the media or information

16 is located has been concealed through

17 technological means; or

18 (B) in an investigation of a violation of
19 18 U.S.C. § 1030(a)(5), the media are
20 protected computers that have been
21 damaged without authorization and are
22 located in five or more districts.
23 * * * * *
24 **(f) Executing and Returning the Warrant.**
25 **(1)** ***Warrant to Search for and Seize a Person or***
26 ***Property.***
27 * * * * *
28 (C) *Receipt.* The officer executing the warrant
29 must give a copy of the warrant and a
30 receipt for the property taken to the person
31 from whom, or from whose premises, the
32 property was taken or leave a copy of the
33 warrant and receipt at the place where the
34 officer took the property. For a warrant to

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35 use remote access to search electronic
36 storage media and seize or copy
37 electronically stored information, the
38 officer must make reasonable efforts to
39 serve a copy of the warrant and receipt on
40 the person whose property was searched or
41 who possessed the information that was
42 seized or copied. Service may be
43 accomplished by any means, including
44 electronic means, reasonably calculated to
45 reach that person.
46 * * * * *

Committee Note

Subdivision (b). The revision to the caption is not substantive. Adding the word "venue" makes clear that Rule 41(b) identifies the courts that may consider an application for a warrant, not the constitutional requirements for the issuance of a warrant, which must still be met.

Subdivision (b)(6). The amendment provides that in two specific circumstances a magistrate judge in a district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and seize or copy electronically stored information even when that media or information is or may be located outside of the district.

First, subparagraph (b)(6)(A) provides authority to issue a warrant to use remote access within or outside that district when the district in which the media or information is located is not known because of the use of technology such as anonymizing software.

Second, (b)(6)(B) allows a warrant to use remote access within or outside the district in an investigation of a violation of 18 U.S.C. § 1030(a)(5) if the media to be searched are protected computers that have been damaged without authorization, and they are located in many districts. Criminal activity under 18 U.S.C. § 1030(a)(5) (such as the creation and control of "botnets") may target multiple computers in several districts. In investigations of this nature, the amendment would eliminate the burden of attempting to secure multiple warrants in numerous districts, and allow a single judge to oversee the investigation.

As used in this rule, the terms "protected computer" and "damage" have the meaning provided in 18 U.S.C. §1030(e)(2) & (8).

The amendment does not address constitutional questions, such as the specificity of description that the

Fourth Amendment may require in a warrant for remotely searching electronic storage media or seizing or copying electronically stored information, leaving the application of this and other constitutional standards to ongoing case law development.

Subdivision (f)(1)(C). The amendment is intended to ensure that reasonable efforts are made to provide notice of the search, seizure, or copying, as well as a receipt for any information that was seized or copied, to the person whose property was searched or who possessed the information that was seized or copied. Rule 41(f)(3) allows delayed notice only "if the delay is authorized by statute." See 18 U.S.C. § 3103a (authorizing delayed notice in limited circumstances).

Rule 45. Computing and Extending Time

* * * * *

(c) Additional Time After Certain Kinds of Service. Whenever a party must or may act within a specified ~~period~~ time after ~~service~~ being served and service is made ~~in the manner provided~~ under Federal Rule of Civil Procedure 5(b)(2)(C) (mailing), (D) (leaving with the clerk), ~~(E),~~ or (F) (other means consented to), 3 days are added after the period would otherwise expire under subdivision (a).

Committee Note

Subdivision (c). Rule 45(c) and Rule 6(d) of the Federal Rules of Civil Procedure contain parallel provisions providing additional time for actions after certain modes of service, identifying those modes by reference to Civil Rule 5(b)(2). Rule 45(c)—like Civil Rule 6(d)—is amended to remove service by electronic means under Rule 5(b)(2)(E) from the forms of service that allow 3 added days to act after being served. The amendment also adds clarifying parentheticals identifying the forms of service for which 3 days will still be added.

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Civil Rule 5 was amended in 2001 to allow service by electronic means with the consent of the person served, and a parallel amendment to Rule 45(c) was adopted in 2002. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day periods that allow "day-of-the-week" counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Eliminating Rule 5(b) subparagraph (2)(E) from the modes of service that allow 3 added days means that the 3

added days cannot be retained by consenting to service by electronic means. Consent to electronic service in registering for electronic case filing, for example, does not count as consent to service "by any other means of delivery" under subparagraph (F).

Electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice.

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Phoenix, AZ
January 7-8, 2016

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125-011478

JUDICIAL CONFERENCE OF THE UNITED STATES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JANUARY 7-8, 2016

AGENDA

I. Opening Business

A. Welcome and opening remarks by Judge Jeffrey S. Sutton

B. Report on rules effective December 1, 2015
- Bankruptcy Rule 1007
- Civil Rules 1, 4, 16, 26, 30, 31, 33, 34, 37, and 55, and abrogation of Rule 84 and the Appendix of Forms

C. Report on September 2015 Judicial Conference Session and proposed amendments transmitted to the Supreme Court

1. Proposals transmitted on October 9, 2015:
   - Appellate Rules 4, 5, 21, 25, 26, 27, 28, 28.1, 29, 32, 35, and 40, and Forms 1, 5, and 6, and proposed new Form 7
   - Bankruptcy Rules 1010, 1011, 2002, 3002.1, 9006(f), and new Rule 1012;
   - Civil Rules 4, 6, and 82
   - Criminal Rules 4, 41, and 45
2. Supplemental proposals transmitted on October 29, 2015:
   - Bankruptcy Rules 7008, 7012, 7016, 9027, and 9033 (known as the "*Stern* Amendments")

II. ACTION – Approve Minutes of the May 28, 2015 Committee Meeting

III. Inter-Committee Work

A. Electronic Filing, Service, and Notice
Discussion of the effort undertaken by each Advisory Committee to amend the Federal Rules to require e-filing and service, subject to appropriate exceptions, with a focus on the work of the Advisory Committee on Criminal Rules to develop a proposed amendment to Criminal Rule 49 [*Serving and Filing Papers*]

B. Privacy Issues
JOE S. CECIL, ET AL., FED. JUDICIAL CTR., UNREDACTED SOCIAL SECURITY NUMBERS IN FEDERAL COURT PACER DOCUMENTS (2015).

125-011479

IV. Report of the Advisory Committee on Criminal Rules – Judge Donald W. Molloy

Information items:

1. Possible amendment to Rule 12.4(a)(2) [*Disclosure Statement–Who Must File–Organizational Victim*] in light of changes to the Code of Judicial Conduct
2. Possible amendment to Rule 15(d) [*Depositions–Expenses*] to address an inconsistency between the text of the rule and the committee note
3. Possible amendment to Rule 32.1 [*Revoking or Modifying Probation or Supervised Release*] to include certain procedural rules

V. Report of the Advisory Committee on Appellate Rules – Judge Steven M. Colloton

ACTION – Approve publishing for public comment:

1. Proposed amendments to Rule 41 [*Mandate: Contents; Issuance and Effective Date; Stay*] that would (a) clarify that a court must enter an order if it wishes to stay the issuance of the mandate; (b) address the standard for stays of the mandate; and (c) restructure the Rule to eliminate redundancy
2. Proposed amendments to Rule 29(a) [*Brief of an Amicus Curiae–When Permitted*] that would allow local rules to afford an appellate court the option to refuse an amicus brief, despite party consent, if the brief would cause disqualification
3. Proposed amendments to Rules 31(a)(1) [*Serving and Filing Briefs–Time to Serve and File a Brief*] and 28.1(f)(4) [*Cross-Appeals–Time to Serve and File a Brief*] that would change the time for filing a reply brief to 21 days

VI. Report of the Advisory Committee on Evidence Rules – Judge William K. Sessions III

Information items:

1. Report on the symposium on hearsay reform held in April 2015
2. Report on proposed amendments published for public comment in August 2015
   - Rule 803(16) [*Hearsay Exception for Statements in Ancient Documents*]
   - Rule 902 [*Evidence that is Self-Authenticating*]
3. Possible amendments to the notice provisions in the Evidence Rules
4. Best practices manual for authenticating electronic evidence

VII. Report of the Advisory Committee on Civil Rules – Judge John D. Bates

Information items:

1. Report on the work of the Rule 23 Subcommittee [*Class Actions*]
2. Report on the work of the Appellate-Civil Subcommittee
   - Civil Rule 62 [*Stay of Proceedings to Enforce a Judgment*]
3. Report on the work of the Pilot Project Subcommittee

125-011480

4. Education efforts regarding the Civil Rules Package effective December 1, 2015

VIII. Report of the Advisory Committee on Bankruptcy Rules – Judge Sandra Segal Ikuta

A. **ACTION –** Approve and transmit to the Judicial Conference:

1. Amendment to Rule 1015(b) [*Cases Involving Two or More Related Debtors*] in response to *Obergefell v. Hodges*
2. Renumbering of and minor amendment to Official Form 20A (to become Official Form 420A) [*Notice of Motion or Objection*] and Official Form 20B (to become Official Form 420B) [*Notice of Objection to Claim*]
3. Amendment to Official Form 410S2 [*Notice of Postpetition Mortgage Fees, Expenses, and Charges*]
4. Request that the Judicial Conference be asked to allow the Advisory Committee to make non-substantive, technical, or conforming changes to Official Forms effective immediately, with subsequent report to the Committee and the Judicial Conference for their retroactive approval

B. **ACTION –** Approve publishing for public comment a proposed amendment to Rule 3002.1(b) [*Notice of Payment Changes*]

C. Information items:

1. Update on the chapter 13 plan form and op-out proposal
2. Possible amendments under consideration
   - Rule 4003(c) [*Exemptions–Burden of Proof*]
   - Rule 9037 [*Privacy Protection for Filings Made with the Court*]

IX. Report of the Administrative Office

A. Report on the Committee on Court Administration and Case Management's consideration of protection of cooperator information

B. Request for suggestions regarding aspects of the *Strategic Plan for the Federal Judiciary* that should receive priority attention over the next two years

C. Legislative report

X. Next meeting: June 6-7, 2016 in Washington, D.C.

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
(Standing Committee)

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Members, Standing Committee	**Honorable Brent E. Dickson** Indiana Supreme Court 306 Indiana State House 200 West Washington Street Indianapolis, IN 46204 **Roy T. Englert, Jr., Esq.** Robbins Russell Englert Orseck Untereiner & Sauber, LLP 801 K Street, N.W. - Suite 411-L Washington, DC 20006 **Gregory G. Garre, Esq.** Latham & Watkins LLP 555 Eleventh Street, N.W. Washington, DC 20004-1304 **Daniel C. Girard, Esq.** Girard Gibbs LLP 601 California Street, 14th Floor San Francisco, CA 94108 **Honorable Neil M. Gorsuch** United States Court of Appeals Byron White United States Courthouse 1823 Stout Street, 4th Floor Denver, CO 80257-1823

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Committee on Rules of Practice and Procedure

To carry on a continuous study of the operation and effect of the general rules of practice and procedure.

Members	Position	District/Circuit	Start Date	End Date
Jeffrey S. Sutton Chair	C	Sixth Circuit	2012	2016
Brent E. Dickson	CJUST	Indiana	2014	2017
Roy T. Englert, Jr.	ESQ	Washington, DC	2010	2016
Gregory G. Garre	ESQ	Washington, DC	2011	2017
Daniel C. Girad	ESQ	California	2015	2018
Neil M. Gorsuch	C	Tenth Circuit	2010	2016
Susan P. Graber	C	Ninth Circuit	2013	2016
William K. Kelley	ACAD	Indiana	2015	2018
Patrick J. Schiltz	D	Minnesota	2010	2016
Amy J. St. Eve	D	Illinois (Northern)	2013	2016
Larry D. Thompson	ESQ	Georgia	2011	2017
Richard C. Wesley	C	Second Circuit	2011	2017
Sally Quillian Yates*	DOJ	Washington, DC	----	Open
Jack Zouhary	D	Ohio (Northern)	2012	2018
Daniel Coquillette Reporter	ACAD	Massachusetts	1985	Open

Secretary and Principal Staff: Rebecca Womeldorf 202-502-1820

* Ex-officio

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Associate Reporter, Advisory Committee on Bankruptcy Rules	**Professor Michelle M. Harner** University of Maryland Francis King Carey School of Law 500 West Baltimore Street Baltimore, MD 21201

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Associate Reporter, Advisory Committee on Criminal Rules	**Professor Nancy J. King** Vanderbilt University Law School 131 21st Avenue South, Room 248 Nashville, TN 37203-1181

Chair, Advisory Committee on Evidence Rules	**Honorable William K. Sessions III** United States District Court Federal Building 11 Elmwood Avenue, 5th Floor Burlington, VT 05401
Reporter, Advisory Committee on Evidence Rules	**Professor Daniel J. Capra** Fordham University School of Law 140 West 62nd Street New York, NY 10023

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Liaison for the Advisory Committee on Bankruptcy Rules	**Roy T. Englert, Jr., Esq.**	***(Standing)***
Liaison for the Advisory Committee on Civil Rules	**Judge Arthur I. Harris**	***(Bankruptcy)***
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Liaison for the Advisory Committee on Evidence Rules	**Judge James C. Dever III**	***(Criminal)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Solomon Oliver, Jr.**	***(Civil)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Richard C. Wesley**	***(Standing)***

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Laural L. Hooper *(Criminal Rules Committee)* Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4093 Fax 202-502-4199 lhooper@fjc.gov	**Timothy T. Lau** *(Evidence Rules Committee)* Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4089 Fax 202-502-4199 tlau@fjc.gov

TAB 1

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Item 1 will be an oral report.

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DRAFT MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of May 28, 2015 | Washington, D.C.

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ATTENDANCE

The Judicial Conference Committee on Rules of Practice and Procedure held its spring meeting in Washington, D.C. on May 28, 2015. The following members participated in the meeting:

Judge Jeffrey S. Sutton, Chair
Dean C. Colson, Esq.
Associate Justice Brent E. Dickson
Roy T. Englert, Jr., Esq.
Gregory G. Garre, Esq.
Judge Neil M. Gorsuch
Judge Susan P. Graber (by teleconference)
Dean David F. Levi
Judge Patrick J. Schiltz
Judge Amy J. St. Eve
Larry D. Thompson, Esq.
Judge Richard C. Wesley
Judge Jack Zouhary

The following attended on behalf of the advisory committees:

Advisory Committee on Appellate Rules —
Judge Steven M. Colloton, Chair
Professor Catherine T. Struve, Reporter

Advisory Committee on Bankruptcy Rules —
Judge Sandra Segal Ikuta, Chair
Professor S. Elizabeth Gibson, Reporter

Advisory Committee on Civil Rules —
Judge David G. Campbell, Chair
Professor Edward H. Cooper, Reporter

Advisory Committee on Criminal Rules —
Judge Reena Raggi, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter

Advisory Committee on Evidence Rules —
Judge William K. Sessions III, Chair
Professor Daniel J. Capra, Reporter

The Honorable Sally Yates, Deputy Attorney General, represented the Department of Justice, along with Assistant Attorney General for the Civil Division, Elizabeth J. Shapiro, Esq., Theodore Hirt, Esq., and Thomas Byron, Esq.

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Other meeting attendees included: Professor R. Joseph Kimble, the Committee's style consultant; Judge Jeremy D. Fogel, Director of the Federal Judicial Center; Judge Michael A. Chagares, member of the Appellate Rules Advisory Committee and prior Chair of the CM/ECF Subcommittee; Judge John D. Bates, incoming Chair of the Advisory Committee on Civil Rules; Professor Troy A. McKenzie, former Associate Reporter for the Advisory Committee on Bankruptcy Rules.

Providing support to the Committee:

Professor Daniel R. Coquillette	Reporter, Standing Committee
Rebecca A. Womeldorf	Secretary, Standing Committee
Julie Wilson	Attorney, Rules Committee Support Staff
Scott Myers	Attorney, Rules Committee Support Staff
Bridget Healy	Attorney, Rules Committee Support Staff
Frances Skillman	Paralegal Specialist, Rules Committee Support Staff
Tim Reagan	Senior Research Associate, Federal Judicial Center
Emery G. Lee, III	Senior Research Associate, Federal Judicial Center

INTRODUCTORY REMARKS

Judge Sutton called the meeting to order, reviewed the agenda, and thanked those involved in providing logistical support.

Judge Sutton welcomed Deputy Attorney General Sally Yates to her first Standing Committee meeting and thanked Elizabeth Shapiro for arranging a meeting for Judge Sutton, Dan Coquillette and Rebecca Womeldorf with DAG Yates at the Department of Justice on May 27, 2015. DAG Yates spoke on the importance of the good working relationship between DOJ and the Rules Committees and her plans to participate in the rules process along with her colleagues.

Judge Sutton introduced Judge John Bates, immediate past-Director of the Administrative Office, and incoming Chair of the Civil Rules Advisory Committee, and shared the sad news of Dan Meltzer's passing. Members shared remembrances and observed a moment of silence.

Judge Sutton reported on the March 2015 Judicial Conference Session and on the proposed amendments adopted by the Supreme Court and transmitted to Congress on April 29, 2015. These amendments will become effective on December 1, 2015, absent contrary congressional action. The proposed amendments include: Bankruptcy Rule 1007; Civil Rules 1, 4, 16, 26, 30, 31, 33, 34, 37, 55; and abrogation of Rule 84 and the Appendix of Forms.

APPROVAL OF THE MINUTES OF THE LAST MEETING

Upon a motion by a member, seconded by another, and by voice vote: **The Committee approved its January 8-9, 2015 meeting minutes, with minor technical amendments as well as insertion of an additional paragraph on page 12 concerning the discussion of Multi-District Litigation cases.**

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REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raggi presented three action items. The first two items have been under consideration by the Advisory Committee since 2012, and were previously authorized for publication: Rule 4, which deals with service of criminal process, and Rule 41, which deals with the judicial district where search warrants can be sought. After consideration of public comments, the Advisory Committee now seeks final approval of Rules 4 and 41.

Amendments for Final Approval

FOREIGN SERVICE: FED. R. CRIM. P. 4 – Judge Raggi reported that the proposed rule contains two prongs regarding how foreign service may be accomplished:

(i) under 4(c)(3)(D)(i), by effecting service in a manner authorized by the foreign jurisdiction's law, or

(ii) under 4(c)(3)(D)(ii), by any other means that give notice, including one stipulated to by the parties, letters rogatory or a similar request submitted under an international agreement, or as otherwise permitted under an applicable international agreement.

Judge Raggi reported that comments received were generally favorable, and discussed one adverse comment filed by a U.S.-based law firm. Judge Raggi noted that the Advisory Committee considered, but declined to require, prior judicial approval before service of a criminal summons could be made in a foreign country by "other means" pursuant to 4(c)(3)(D)(ii). Judge Raggi offered the unanimous recommendation of the Advisory Committee to approve the proposed amendment as published.

The Committee discussed the proposal. One member commented on the strong need for the proposed amendment, citing the experience of having foreign corporations sending counsel to monitor proceedings in the United States who were not authorized to accept service.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendment to Rule 4 as published for submission to the Judicial Conference for final approval.**

VENUE: FED. R. CRIM. P. 41 – Judge Raggi next reported on the proposed amendment to Rule 41's territorial venue provisions. Rule 41's territorial venue provisions – which generally limit searches to locations within a district – create difficulties for the government when it investigates crimes where the location of the victim computer is known, but the source of the offending conduct is not known. Judge Raggi acknowledged the expectation that the government will investigate such crimes, and the Advisory Committee believed it better to give the government a venue to seek a warrant, rather than leaving the government to rely on allegations of exigent circumstances or harmless error after-the-fact.

Based on comments received, the Advisory Committee tailored its proposed amendment to address the two increasingly common situations in which the territorial or venue requirements now imposed by Rule 41(b) may hamper the investigation of serious federal crimes. The first scenario occurs when the

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government seeks to search a particular computer with an unknown location, a situation increasingly common due to sophisticated anonymizing technologies that hide a perpetrator's true IP address, thus preventing agents from identifying the physical location and judicial district of the originating computer. Second, the government increasingly faces criminal schemes involving multiple computers located in multiple districts, such as the surreptitious infection of multiple computers with malicious software creating a "botnet" of compromised computers that operate under the remote control of an individual or group. Rather than going to every affected district, if the harm extends to five or more districts, the proposal would permit the government to apply for a warrant in any affected district.

The proposed rule generated many responses during the public comment period, including forty-four written comments from individuals and organizations, and the testimony of eight witnesses at the Advisory Committee's hearing in November 2014. Those opposing the amendment feared that the proposed rule relaxed the protections for personal privacy guaranteed by the Fourth Amendment. Multiple comments questioned whether remote searches could meet the Fourth Amendment's particularity requirement. Although the Advisory Committee believed that the proposed venue provision does not impact the duty to state with particularity the subject of a search, to address concerns the Advisory Committee added language to the Committee Note to emphasize that the amendment does not alter the government's Fourth Amendment obligations. The Advisory Committee also made plans to work with the Federal Judicial Center on judicial education. Judge Raggi explained that the revision to the caption of Rule 41, replacing "Authority to Issue a Warrant" with the new caption of "Venue for a Warrant Application" was intended to emphasize that the rule change was directed to venue only and did not substantively enlarge the "authority" to obtain a warrant, a misreading the old caption invited.

Judge Raggi explained that the amendment aims to mimic notice physical search requirements. The proposed amendment includes a change to Rule 41(f)(1)(C), which requires notice that a search has been conducted. The rule now requires that notice of a physical search be provided "to the person from whom, or from whose premises, the property was taken" or left "at the place where the officer took the property." The Advisory Committee recognized that when an electronic search is conducted remotely, it is not feasible to provide notice in precisely the same manner as when tangible property has been removed from physical premises, but reasonable efforts must nonetheless be made to provide notice to the person whose information was seized or whose property was searched.

After publication, the Advisory Committee added language to the Committee Note to explain the changes to the notice provisions and to respond to comments that criticized the proposed notice provisions as insufficiently protective. The addition draws attention to the other provisions of Rule 41 that preclude notice except when authorized by statute and provides a citation to the relevant statute.

The Advisory Committee voted to recommend the revisions to Rule 41 to the Committee, with one dissent. The dissenting member viewed the amendment as having important substantive effects, allowing judges to make ex parte determinations about core privacy concerns.

Discussion followed. One member pointed out that these searches are already being done. Although the amendment looks substantive, it simply articulates venue. The member commended Judge Raggi for taking a broad proposal from the government and narrowing it substantially to address the concerns

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and comments raised. Another member spoke in support of the proposal, stating that the choice for the Committee was whether to establish a process rule or to leave the situation to Congress or to magistrates all over the country.

Another member spoke in favor of the amendment, but questioned the potential for forum shopping under the proposed rule. The Committee discussed the potential for forum shopping under any rule. DAG Yates talked about the availability of venue in more than one district under the current rules, and the benefit of the proposed amendment in allowing prosecution in the same district issuing the warrant.

Another member questioned the source of the proposal to allow a warrant to be sought in any affected district if five or more districts were impacted; why five? Judge Raggi acknowledged that the number was a compromise, and after the rule goes into effect experience with it may suggest that a different threshold would work better.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendment to Rule 41 as amended after publication, for submission to the Judicial Conference for final approval.**

Information Items

Electronic Filing – Judge Raggi noted that the Advisory Committee continues its work trying to make sure criminal rules for electronic filing parallel civil rules to the extent appropriate, while accounting for significant differences in criminal practice. A proposed amendment to the Civil Rules would mandate electronic filing, making no exception for pro se parties or inmates, but allowing exemptions for good cause or by local rule. The proposed Civil amendment was of particular concern to the Advisory Committee because Criminal Rule 49 now incorporates the Civil Rules governing service and filing. The Reporters for the various committees continue to examine these issues and coordinate on behalf of all the rules committees in search of common language that would work in various contexts. The Advisory Committee will benefit from the opportunity to study the provisions now under consideration by the Civil Rules Committee (as well as the Bankruptcy and Appellate Rules Committees), so that it can determine how best to revise the Criminal Rules.

Rule 35 – Judge Raggi briefed the Committee on a request to amend Rule 35 to bar appeal waivers before sentencing. The Advisory Committee declined to proceed with the proposal.

Judge Sutton acknowledged this meeting as the last for Judge Raggi as Chair of the Advisory Committee. Judge Sutton noted Judge Raggi's many years of excellent service on the rules committees, and particularly her work with the Rule 12 amendments, which spanned seven years, and which she guided to a consensus vote. Judge Sutton also praised Judge Raggi's sense of care about the important line of when to amend a rule, and when not to. Members voiced appreciation for Judge Raggi's service.

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REPORT ON MULTI-COMMITTEE PROPOSAL TO AMEND "3-DAY RULE"

Amendments for Final Approval

COMPUTING AND EXTENDING TIME: FED. R. APP. P. 26(C), BANKRUPTCY RULE 9006(F), FED. R. CIV. P. 6(D), FED. R. CRIM. P. 45(C) – Judge Chagares provided background for the conclusion by the CM/ECF Subcommittee that the original basis for the "3-Day Rule" across various rules no longer applies in the computer age. The proposed parallel amendments to the civil, criminal, bankruptcy and appellate rules published for comment would abrogate the rule providing for an additional three days whenever service is made by electronic means. It reflects the CM/ECF Subcommittee's conclusion that the reasons for allowing extra time to respond in this situation no longer exist. Concerns about delayed transmission, inaccessible attachments, and consent to service have been alleviated by advances in technology and extensive experience with electronic transmission. Eliminating the extra three days would simplify time computation.

Professor Beale discussed Criminal Rule 45(c), and concerns specific to criminal practice about shortening the time for service. Members were concerned that the three added days were particularly important for criminal practitioners because speaking with incarcerated clients takes more time, particularly when clients are incarcerated in distant locations. Post publication, working from language proposed by DOJ, the Criminal Rules Advisory Committee endorsed an addition to the Committee Note that addresses the potential need to grant an extension of the time allowed for responding after electronic service. That new language has been added to the published Committee Note in each Committee's parallel proposal, as confirmed by Professor Cooper. It reads: "Electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice."

The Advisory Committee also agreed to amend the caption of Rule 45(c) published for comment to eliminate the additional words "Time for Motion Papers," and to revise Rule 45 as published so that the text is parallel to the language of the other rules, referring to action "within a specified time after *being served*" instead of "time after *service*."

The Chair noted that although the Advisory Committees other than the Criminal Rules Advisory Committee initially voted against the added Committee Note language, the concerns specific to the criminal context, as well as the desire for uniformity, outweighed the general preference against adding such language to committee notes.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved the proposed amendments to Appellate Rule 26, Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rule 45, as amended, for transmission to the Judicial Conference.**

REPORT OF THE ADVISORY COMMITTEE ON RULES OF EVIDENCE

Judge Sessions referenced the Advisory Committee's report, set out in the memorandum dated May 7, 2015, with attachments. Judge Sessions relayed the unanimous request of the Advisory Committee to

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publish two proposed rules for comment, both of which received a positive reception at the last Committee meeting.

Amendments for Publication

ANCIENT DOCUMENTS: FED. R. EVIDENCE 803(16) – Rule 803(16)'s hearsay exception for "ancient documents" provides that a document 20 or more years old that appears authentic is admissible for the truth of its contents. Judge Sessions explained that the rule has always confused authentication and reliability, and has been used infrequently. The Advisory Committee considered whether Rule 803(16) should be abrogated or amended in light of the development of electronically stored information. Because electronically stored information can be retained for more than 20 years, we could very well see a flood of unreliable documents coming in under this rule.

The Advisory Committee considered four proposals for amending the rule. The proposals were: 1) abrogation; 2) limiting the exception to hardcopy; 3) adding the necessity requirement from the residual exception (Rule 807); and 4) adding the Rule 803(6) requirement that the document would be excluded if the opponent could show that the document was untrustworthy under the circumstances. The Advisory Committee unanimously concluded that Rule 803(16) should be abrogated, because it allows for the introduction of unreliable evidence. Evidence in ancient documents that is reliable can be admitted under other hearsay exceptions.

One member noted that the amendment might seem to some to be a substantial change, but it is not. While the rule at common law may have had a legitimate basis, no need for the exception now exists and authentication of documents traditionally thought of as ancient is still available under the rules.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved for publication for public comment the proposed abrogation of Rule 803(16), together with the Committee Note to explain the abrogation.**

AUTHENTICATION REQUIREMENTS: FED. R. EVIDENCE 902 – Judge Sessions next reviewed the proposed amendment to Rule 902 regarding authentication of electronic evidence. The Advisory Committee's ongoing study of the admissibility of electronic evidence has produced proposals to improve efficiency, including allowing certain electronic evidence to be authenticated by a certification of a qualified person in lieu of that person's testimony at trial. The Advisory Committee unanimously approved a proposal to add two new subdivisions to Rule 902, the rule on self-authentication. The first provision would allow self-authentication of machine-generated information, upon a submission of a certification prepared by a qualified person. The second proposal would provide a similar certification procedure for a copy of data taken from an electronic device, medium or file.

The proposals have a common goal of making authentication easier for certain kinds of electronic evidence that are, under current law, likely to be authenticated under Rule 901, but only by calling a witness to testify to authenticity. The Advisory Committee concluded that the types of electronic evidence covered by the two proposed rules are rarely the subject of a legitimate authenticity dispute, but it is often the case that the proponent is nonetheless forced to produce an authentication witness,

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incurring expense and inconvenience – and often, at the last minute, opposing counsel ends up stipulating to authenticity in any event. The proposed change should bring cost savings to the process.

Professor Capra noted that the proposals should be viewed under the low level of proof required to show authenticity. The proposals reduce costs associated with requiring a live witness. One member noted that many proposals reflect an ongoing effort to grapple with electronic evidence. More than one member asked for clarification of the "process that produces an accurate result" language in the proposed amendment. One member noted the distinction between a declaration that says "this is what it purports to be" versus "this is an accurate result."

Professor Capra noted that the proposed language reflects language already in the rules. The proposal does not change the standard or the method of authentication under the rules; it simply allows the proponent to make the necessary showing by declaration as opposed to live testimony. One member suggested that examples in the Committee Note would help to avoid confusion.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved for publication for public comment the proposed amendment to Rule 902 to add subsections 902(13) and 902(14).**

At a later point in the meeting, Judge Sessions and Professor Capra offered an additional paragraph of language for the Committee Note accompanying the proposed amendment to Rule 902. The proposed paragraph provides two examples of what the rule covers, and what it does not. As Professor Capra explained, the examples to be added to the Committee Notes illustrate and emphasize the limited reach of the proposal; the certificate can be used only to show that the proffered item is authentic. Questions of reliability, hearsay, and probative value remain for the court and the factfinder. Subject to further comment from the Advisory Committee, Judge Sessions asked the Committee to approve the Committee Note as revised for publication. Several members voiced support for the revised Committee Note and stated the explanation would be helpful during the comment period.

Upon motion that the new language will be included in the Committee Note absent any further contrary input from the Advisory Committee, with a second, and on voice vote: **The Committee unanimously approved for publication for public comment the proposed revised Committee Note to accompany the proposed amendments to Rule 902.**

Information Items

Symposium on the Hearsay Rule and Its Exceptions – Judge Sessions reported that in conjunction with its Fall meeting on October 9, 2015, the Advisory Committee will hold a symposium on the hearsay rule at the John Marshall School of Law. The symposium will explore recent broad proposals to loosen the strictures of the federal rule against hearsay. Judge Posner has proposed to substitute most of the hearsay exceptions with an expanded version of Rule 807 (the residual exception) which render the admissibility of a hearsay statement dependent on a judicial finding of reliability under the particular circumstances presented. The symposium will include presentation of information and ideas by invited judges, lawyers and professors, and may provide a foundation for future recommendations regarding the hearsay rule and its exceptions.

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Notice Provisions in the Federal Rules of Evidence – Judge Sessions noted that the Advisory Committee is thinking about addressing inconsistencies in the notice provisions of the Federal Rules of Evidence. Some notice provisions require notice by the time of trial, others require notice a certain number of days before trial, and some provide the flexible standard of enough time to allow the opponent to challenge the evidence. Two such provisions may be problematic, independently of any interest in uniformity. First, Rule 404(b) requires the defendant to request notice from the government, while no such requirement is imposed in any other notice provision. The Advisory Committee is inclined to abrogate that unnecessary requirement that serves as a trap for the unwary, particularly given that most local rules require the government to provide notice as to Rule 404(b) material without regard to whether it has been requested. Second, while most of the notice provisions with a specific timing requirement provide an exception for good cause, the residual exception (Rule 807) does not.

Best Practices Manual on Authentication of Electronic Evidence – To provide assistance to courts and litigants in negotiating the difficulties of authenticating electronic evidence, the Advisory Committee has begun work with Greg Joseph and Judge Paul Grimm on a best practices manual that will be published by the Federal Judicial Center.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Colloton reported on six sets of proposed amendments offered by the Advisory Committee on Appellate Rules for consideration by the Standing Committee for final approval.

Amendments for Final Approval

INMATE FILINGS: RULES 4(C)(1) AND 25(A)(2)(C), FORMS 1 AND 5, AND NEW FORM 7 – Judge Colloton first introduced the proposed amendments designed to clarify and improve the inmate-filing rules. After studying the matter since 2007, the Advisory Committee believes the rules should be clarified in light of concerns expressed about conflicts in case law and ambiguity in the current text. The amendments to Rules 4(c)(1) and 25(a)(2)(C) would make clear that prepayment of postage is required for an inmate to benefit from the inmate-filing provisions. The amendments clarify that a document is timely filed if it is accompanied by evidence – a declaration, notarized statement, or other evidence such as a postmark and date stamp – showing that the document was deposited on or before the due date and that the postage was prepaid. New Form 7 suggests a form of declaration that would satisfy Rules 4(c)(1) and 25(a)(2)(C). Forms 1 and 5 (suggested forms of notices of appeal) are revised to include a reference alerting inmate filers to the existence of Form 7. The amendments also clarify that if sufficient evidence does not accompany the initial filing, the court of appeals retains discretion to permit the later filing of a declaration or notarized statement to establish timely deposit.

Judge Colloton called the Committee's attention to several changes after publication. After publication, the Advisory Committee decided to abandon its prior proposal to delete the legal mail system requirement from Rules 4(c)(1) and 25(a)(2)(C). Research by Professor Struve and comments received convinced the Advisory Committee that retaining the requirement to use a legal mail system where available continues to serve a useful purpose by ensuring that mail is logged or date-stamped, thus avoiding unnecessary litigation over the timing of deposits. In addition, the Advisory Committee

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revised proposed new Form 7, and the proposed amendments to Forms 1 and 5, to reflect comments received in an effort to make all three forms more user-friendly and to make the new form more accurate.

One member suggested clarifying Forms 1 and 5 by referring to "this" notice of appeal rather than "the" notice of appeal in the new notes to inmate filers; Judge Colloton accepted the suggestion as a friendly amendment. Another member questioned the procedure of relying upon convicted felons to swear under penalty of perjury as to the truth of their declarations as to timeliness. The Chair noted the tremendous variation among jurisdictions as to requirements. Judge Colloton observed that the Advisory Committee did not consider whether to require more by way of verification than the current federal rule, but that a litigant could challenge a suspicious verification.

Upon motion, duly seconded, on voice vote: **The Committee unanimously approved the proposed amendments to the inmate filing rules and related forms – Rules 4(c)(1) and 25(a)(2)(C), Forms 1 and 5, and new Form 7 – for submission to the Judicial Conference for final approval.**

TOLLING MOTIONS: RULE 4(a)(4) – Judge Colloton next reviewed the proposed amendment to Appellate Rule 4(a)(4) concerning tolling motions filed in the district court. Appellate Rule 4(a)(4) provides that "[i]f a party timely files in the district court" certain post-judgment motions, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." The question is whether a motion filed outside a non-extendable deadline under Civil Rules 50, 52, or 59 counts as "timely" under Rule 4(a)(4) if a district court mistakenly ordered an "extension" of the deadline for filing the motion, or if the opposing party did not object to the untimely filing. A majority of the circuits that have considered this question have ruled that such a motion is not "timely" for purposes of Rule 4(a)(4). The minority view holding otherwise stands in some tension with the Supreme Court's decision in *Bowles v. Russell*, which held that courts have no authority to create equitable exceptions to jurisdictional requirements.

The Advisory Committee feels that it is important to clarify the meaning of "timely" in Rule 4(a)(4) and that uniformity in this area is important. The proposed amendment adopts the majority view – *i.e.*, that post-judgment motions made outside the deadlines set by the Civil Rules are not "timely" under Rule 4(a)(4). Such an amendment would work the least change in current law.

After publication, one commenter argued that the proposed amended Rule, like the current version, sets a trap for unwary litigants, a concern discussed at length by the Advisory Committee in its deliberations. The Advisory Committee ultimately adhered to its judgment that the Rule should be amended to adopt the majority view. The Advisory Committee observed that the Committee Note includes examples to promote understanding of the Rule.

One member asked about the range of other options considered given the high percentage of cases litigated by pro se litigants and the reality that in a rare case a litigant's appeal could be dismissed as untimely even though the district court had allowed additional time for a motion. Judge Colloton discussed the policy choices faced by the Advisory Committee. Discussion followed concerning the factual scenario underlying the Supreme Court's decision in *Bowles*, where a district court told a litigant that the litigant had more time to appeal than the rule and statute actually permitted, and the

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Supreme Court upheld the judgment of the Sixth Circuit finding the litigant's appeal untimely. The Advisory Committee's proposed rule would not change that result, and simply defines "timely." Discussion followed concerning possible ways to change the result in a *Bowles* scenario by rule.

Members discussed whether this is the rare instance where congressional amendment to the jurisdictional statute might be properly sought. One member noted in support of that possibility the growing number of pro se litigants and the change away from a system where most parties have lawyers. In light of the discussion, and at the request of a member of the Standing Committee, Judge Colloton agreed to put on the Advisory Committee's agenda further consideration of exceptions to appeal deadlines, whether by rulemaking or proposed legislation.

Upon motion, duly seconded, on voice vote: **The Committee unanimously approved the proposed amendment to Rule 4(a)(4) for submission to the Judicial Conference for final approval.**

LENGTH LIMITS: RULES 5, 21, 27, 28.1, 32, 35, AND 40, AND FORM 6 – Judge Colloton next reviewed the proposed amendments to Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6 – approved unanimously by the Advisory Committee after post-publication changes – that would affect length limits set by the Appellate Rules for briefs and other documents. The proposal would amend Rules 5, 21, 27, 35, and 40 to convert the existing page limits to word limits for documents prepared using a computer. For documents prepared without the aid of a computer, the proposed amendments would retain the page limits currently set out in those rules. The proposed amendments employ a conversion ratio of 260 words per page.

The genesis of this project was the suggestion that length limits set in terms of pages are subject to undesirable manipulation and in any event have been superseded by advances in technology. Given that briefs are already subject to type-volume limits, and that the Supreme Court employs type-volume limits, the Advisory Committee determined the suggestion was a sensible one, and embarked on selecting a conversion ratio from pages to words. The 1998 amendments transmuted the prior 50-page limit for briefs into a 14,000-word limit – that is, the 1998 amendments used a conversion ratio of 280 words per page. In formulating the published proposal, the Committee considered information that a traditional 50-page brief filed in the courts of appeals under the pre-1998 rules in fact contained fewer than 280 words per page.

As published for comment, the proposed amendments employed a conversion ratio of 250 words per page for Rules 5, 21, 27, 35, and 40. The published proposal also reduced Rule 32's word limits for briefs so as to reflect the pre-1998 page limits multiplied by 250 words per page – that is, 12,500 words for a principal brief. The proposals correspondingly reduced the word limits set by Rule 28.1 for cross-appeals. The published proposed amendments were subject to the local variation provision of Rule 32(e), which permits a court to increase the length limit by order or local rule. The published proposals add a new Rule 32(f) setting forth a list of items to be excluded when computing length.

Many appellate lawyers and certain judges opposed a reduction in the length limits for briefs, arguing principally that some complex appeals require 14,000 words. On the other hand, judges of two courts of appeals formally favored the proposal. Judges submitted public comments stating that unnecessarily long briefs interfere with the efficient and expeditious administration of justice. Appellate judges on

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the Advisory Committee shared those concerns and reported informal input from judicial colleagues who expressed similar views. In reviewing the suggestion of commentators to withdraw the proposal, therefore, the Advisory Committee considered whether the federal rule should continue to require some courts of appeals to accept lengthy briefs that the courts say they do not need and do not want.

As noted, the Advisory Committee made several changes in an effort to address concerns, and the ultimate vote was unanimous in favor of the current proposal now before the Standing Committee. The amendments would reduce Rule 32's word limits for briefs so as to reflect the pre-1998 page limits multiplied by 260 words per page. The 14,000-word limit for a party's principal brief would become a 13,000-word limit; the limit for a reply brief would change from 7,000 to 6,500 words. The proposals correspondingly reduce the word limits set by Rule 28.1 for cross-appeals.

Any court of appeals that wishes to retain the existing limits, including 14,000 words for a principal brief, may do so under the proposed amendments. The local variation provision of existing Rule 32(e) would be amended to highlight a court's ability (by order or local rule) to set length limits that exceed those in the Appellate Rules.

The Standing Committee Liaison to the Appellate Rules Advisory Committee spoke in support of the compromise position, which was the result of a thorough, deliberative process, robust debate, and careful review of a considerable number of comments received. The process resulted in a compromise informed by voluminous comments received and many differing viewpoints.

One member expressed concern that the proposed changes attempt to solve a "non-problem" given the case-specific nature of whether a brief is too long, and this member also expressed reservations that the proposal builds lack of uniformity into the rules and invites motions for leave to file over-length briefs. This member agreed that the process was well-done and for that reason that member would not vote against the compromise but would likely abstain. Another member seconded concerns about uniformity and the difficulty of discouraging lengthy briefs by rule, but expressed support for the proposal because of strong belief that most briefs are too long.

Another member supported the proposal even though the member's circuit may opt out to avoid anticipated motions to file over-length briefs. As to concerns about lack of uniformity, lawyers can (and do) manage differences now. Circuits should not have to continue accepting briefs of a length that they think they do not need.

One member asked about the reaction of the appellate bar to the compromise proposal. Another member questioned how many circuits might opt out, and expressed concern about approving a rule when circuits might opt out. Judge Colloton declined to predict the reaction of the bar or what circuits would do. He noted that the proposal would go to the Judicial Conference, and the Chief Judges would be there and could react and express their views. Judge Colloton commented that the concerns voiced by members were considered carefully by the Advisory Committee, as they mirrored many comments received. On the uniformity point, Judge Colloton noted the absence of uniform length limits in the district courts.

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Upon motion, duly seconded, on voice vote: **The Committee unanimously approved the proposed amendments related to length limits – Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6 – for submission to the Judicial Conference for final approval, with one abstention.**

One member of the Advisory Committee commended Judge Colloton for his handling of a difficult issue and brokering of compromise. Judge Sutton echoed praise for Judge Colloton and Professor Struve and for the process that produced the compromise. Professor Kimble noted his appreciation of the chart collecting length limits and encouraged similar efforts where appropriate. Judge Sutton endorsed the effort as one that improves access to justice, particularly for unrepresented litigants.

AMICUS FILINGS IN CONNECTION WITH REHEARING: RULE 29 – Judge Colloton next introduced the proposed amendment to Rule 29. The problem identified for the Advisory Committee was the absence of a national rule on timing and length of amicus briefs in support of a petition for rehearing. While some local rules do exist, given the uncertainty for practitioners, the Advisory Committee proposes amendments to establish default rules concerning timing and length of amicus briefs in connection with petitions for rehearing. The amendments would incorporate (for the rehearing stage) most of the features of current Rule 29. A circuit could alter the default federal rules on timing, length, and other matters by local rule or by order in a case. Either way, the new default federal rule would ensure that some rule governs the filings in every circuit. The published proposal would have set a time lag of three days between the filing of the petition and the due date of any amicus filings in support of the petition (or in support of neither party). Amicus opposing the petition would have the same due date as that set by the court for the response.

In response to the public comments, the Advisory Committee decided to change the length limit under Rule 29(b) from 2,000 words to 2,600 words and to change the deadline for amicus filings in support of a rehearing petition (or in support of neither party) from three days after the petition's filing to seven days after the petition's filing. The Advisory Committee also deleted the alternative line limit from the length limit as unnecessary.

One member spoke in favor of the proposal, noting his view that the selection of a particular length limit or filing deadline was not as important as providing practitioners definitive guidance. This member was one of the original proponents of addressing the issue through rulemaking.

Upon motion, duly seconded, on voice vote: **The Committee unanimously approved the proposed amendment to Rule 29 for submission to the Judicial Conference for final approval.**

RULE 26(C) – AMENDING THE "THREE-DAY RULE": RULE 26(C) – The Chair noted the approval of the proposed amendment to Rule 26(c) as part of the Committee's prior vote on the three-day rule package.

UPDATING A CROSS-REFERENCE IN RULE 26(a)(4)(C) – Judge Colloton next explained the proposal to amend Rule 26(a)(4)(C) to correct an outdated cross-reference. In 2013, Rule 13 – governing appeals as of right from the Tax Court – was revised and became Rule 13(a). A new Rule 13(b) – providing that Rule 5 governs permissive appeals from the Tax Court – was added. At that time, Rule 26(a)(4)(C)'s reference to "filing by mail under Rule 13(b)" should have been updated to refer to

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"filing by mail under Rule 13(a)(2)." The Advisory Committee asks to amend Rule 26(a)(4)(C) to update this cross-reference with the understanding that the change is a technical amendment that can proceed to the Judicial Conference without publication upon approval from the Standing Committee.

Upon motion, duly seconded, on voice vote: **The Committee unanimously approved the proposed amendment to Rule 26(a)(4)(C) for submission to the Judicial Conference for final approval.**

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell addressed the intention to undertake an educational campaign concerning the Duke Rules Package approved by the Supreme Court, assuming that Congress allows the amendments to become effective December 1, 2015. These rules impact case management, discovery, electronically-stored information, and they encourage greater cooperation. The lesson of rulemaking is that rule changes alone do not change behavior. Judge Paul Grimm, Discovery Subcommittee Chair, will lead the effort, which will include articles to be read by bench and bar, presentations at judicial conferences, preparation of materials for presentation at other conferences, videos, and more. The FJC will help to educate judges and publicize the benefits that can come with aggressive case management consistent with the anticipated rule changes. Judge Fogel explained that the FJC's primary focus will be on three areas: training of new judges, national conferences scheduled for district judges next year, and video educational opportunities. Judge Campbell solicited input, during the meeting and after, on these efforts and noted that the plans for the educational effort will be formed over the next six months or so, and that educational efforts will continue into 2016.

The Chair reported that DAG Yates offered DOJ as a resource for educational efforts. Members discussed options for undertaking educational efforts, including using the local and federal bar associations and taking advantage of trainings for new lawyers for admission to the federal bar.

Judge Campbell next turned to two minor rule changes as to which the Advisory Committee seeks final approval.

Amendments for Final Approval

RULE 4(m) – Judge Campbell introduced the proposed revision to Rule 4(m) referenced in the meeting materials. The Committee approved the August 2014 publication of a proposed amendment of Rule 4(m), adding service on an entity in a foreign country to the list in the last sentence that exempts service in a foreign country from the presumptive time limit set by Rule 4(m) for serving the summons and complaint. The amendment corrects a possible ambiguity that appears to have generated some confusion in practice. Service in a foreign country often is accomplished by means that require more than the time period specified in Rule 4(m). This problem is recognized by the two clear exceptions: for service on an individual in a foreign country under Rule 4(f), and for service on a foreign state under Rule 4(j)(1). The potential ambiguity arises from the lack of any explicit exception for service on a foreign corporation, partnership, or other unincorporated association, which the proposed amendment makes explicit.

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RULE 6(d) – Judge Campbell noted the Advisory Committee's proposal regarding Rule 6(d) had been approved by the Committee.

RULE 82 – Judge Campbell referenced the Advisory Committee's last action item dealing with an amendment to Rule 82 to reflect the reality that one referenced statute no longer exists, and the venue statutes governing admiralty actions have been amended.

Upon motion, duly seconded, on voice vote: **The Committee unanimously approved the proposed amendments to Rules 4(m), 6(d), and 82 for submission to the Judicial Conference for final approval.**

Information Items

e-Rules – The Advisory Committee has been working toward publication of proposed rules on electronic filing, electronic service, and electronic certificates of service. There are dozens of provisions in the rules that would be affected, but there is a strong feeling that change is needed. Because continuing expansion of electronic communication binds these issues together, these drafts are presented as one package. There are issues that overlap the jurisdiction of other Advisory Committees, including whether and how to mandate electronic filing and service and how to treat pro se litigants. Detailed information on these topics is included in the meeting materials.

The discussion that followed surfaced the need for more detailed understanding of local court rules and standing orders regarding pro se electronic filing, both of which may vary substantially by jurisdiction. Other areas for exploration include the specifics of PACER use by pro se litigants, and potential issues of allowing access to those who are not officers of the court.

Rule 68 – The Advisory Committee continues to look at possible changes to Rule 68 – whether it should be revised to become more effective, left alone, or studied for abrogation. The Advisory Committee is examining state practices to see whether actual experience shows good results achieved under a different approach to offers of judgment.

Rule 23 Subcommittee – Judge Campbell reported that the Rule 23 Subcommittee chaired by Judge Dow has been very active and has made significant strides in identifying issues on which to focus and in exploring ideas about how rule changes might address those issues. The Subcommittee has participated in 15 events over the past six months and more are scheduled. The last look at Rule 23 was a seven-year project. The Advisory Committee hopes to suggest concrete proposals for publication at the Spring 2016 Standing Committee meeting.

Judge Campbell briefly reviewed the issues under consideration by the Subcommittee and invited suggestions about additional topics. Issues under consideration include: (1) settlement approval criteria; (2) settlement class certification and the wisdom of a new Rule 23(b)(4) permitting certification for purposes of settlement; (3) very challenging issue surrounding *cy pres* in class action settlements; (4) the role available to objectors in the class action settlement process, and the tricky task of writing a rule that allows "good" objectors while deterring "bad" objectors; (5) Rule 68 offers of judgment used to moot proposed class actions; (6) how issue classes should be managed; (7) a range of

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notice issues, including possible substitution of e-notice for first-class mail, whether some form of notice should be required in (b)(1) or (b)(2) class actions, and other possible steps to make notice more effective and perhaps less expensive; (8) the concept of "frontloading," meaning the procedure to follow when the parties propose settlement before a class has been certified, so that the court has full information about the litigation and the proposed settlement to support a decision whether to give notice to the class of the proposed settlement and certification; and (9) the question of ascertainability.

The Chair noted the importance of identifying circuit splits that exist on the application and interpretation of Rule 23 and considering the potential for rulemaking in those areas, even if the Subcommittee declines to recommend pursuing certain issues through rulemaking.

The Subcommittee will host a Mini-conference on September 11, 2015 in Dallas, Texas, to explore potential amendments to Rule 23. The Subcommittee will invite 25 participants from diverse perspectives.

Requester Pays – As reflected in the Advisory Committee report, the Discovery Subcommittee continues to consider possible implementation of a "requester pays" system. Members of Congress asked the rules committees to continue to study this question. Information is being gathered to aid the Discovery Subcommittee chaired by Judge Grimm. The recent amendment package is important to the committee's consideration because like a "requester pays" regime, the proposed rule amendments aim to reduce the costs of civil litigation.

Manufactured Finality – These two projects of the Appellate-Civil Subcommittee began in the Appellate Rules Committee. In the end, the Civil Rules Committee voted, with one dissent, to advise the Appellate Rules Committee that the Civil Rules Committee does not believe that an effort should be made to draft rules to govern the many phenomena that can be characterized as "manufactured finality." The Advisory Committee concluded there is no need for national uniformity in this area, and each circuit is satisfied with its own rules.

Judge Colloton, speaking for the Appellate Rules Committee, said that although a member expressed concern about uniformity, the Committee had elected to table the matter for the time being, believing that any Rule amendment should originate in the Civil Rules Committee. Judge Sutton noted that having listened to discussion in both Advisory Committee meetings, there was not a consensus on a substantive direction to take if the rules committees were resolved to address the issue. If uniformity is a driver, perhaps the Supreme Court will resolve the issue.

Stays Pending Appeal – Subcommittee consideration of these questions is in mid-stream. One simple starting point in exploring Rule 62 was to ask whether Committee members have encountered difficulty as a result of the "gap" between expiration of the automatic Rule 62(a) stay – 14 days – and the time allowed to make the motions that support a stay under Rule 62(b) – which is 28 days. Lawyers are not reporting a problem; lawyers apparently are working this out among themselves. One question is what problems would result from extending the automatic stay to 28 or 30 days, and whether those problems would be alleviated if Rule 62 is amended to make clear the court's authority to modify or dissolve the automatic stay. The central point made in Advisory Committee discussion was that neither the judges nor the lawyers have encountered difficulties with stays of money

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judgments pending appeal. Ordinarily the parties work out a reasonable solution. Judge Campbell solicited views from the Committee. One member questioned whether stating more explicitly the availability of a work around to obtaining a supersedeas bond would have the effect of discouraging use of those bonds.

Pilot Projects – The discussion of pilot projects at the January meeting of the Standing Committee stimulated further discussion of the opportunities to foster projects that will advance the base of empirical information that can be used in crafting improved rules of procedure. Judge Sutton addressed the desire to coordinate pilot project discussions with the CACM Committee and its current Chair Judge Hodges, and noted Judge St. Eve would be a great resource in a liaison role between the Rules Committees and CACM given her history of service on both.

Judge Sutton acknowledged the last meeting of Judge Campbell as Chair of the Civil Rules Advisory Committee and praised his decade of service to the rules committees, and his last four years as Chair of the Civil Rules Advisory Committee. He noted that Judge Campbell dealt effectively with all of the various cross currents of the Civil Rules Package, and, quite impressively, achieved unanimous consensus. The entire Civil Rules Package effort dignified the Rules Enabling Act process. Judge Campbell noted that the Civil Rules Package was a team effort.

LEGISLATIVE REPORT

Rebecca Womeldorf reported on legislation that may intersect with the work of the Committee, particularly the Advisory Committee on Civil Rules. Covered legislation included: patent legislation, the Lawsuit Abuse Reduction Act of 2015 ("LARA"), and the Fairness in Class Action Act of 2015. Discussion followed, particularly as to one aspect of potential patent legislation that would require designation of core versus non-core discovery, a topic that intersects with mandatory early disclosures and some of the issues discussed in connection with pilot projects under consideration. The ability of the rules committees to react in the case of legislative mandates was also discussed.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Ikuta recognized the tremendous service of Troy McKenzie as Associate Reporter to the Advisory Committee and wished him well in his new position with the Office of Legal Counsel at the Department of Justice.

Judge Ikuta summarized the action items from the Advisory Committee as seeking the Committee's final approval of one proposed new rule, four rule amendments, and the last major group of forms that were revised as part of the Forms Modernization Project ("FMP"). The Advisory Committee also seeks approval of one proposal for publication. Judge Ikuta noted that none of the committee's action items was controversial, and referred to the Advisory Committee report and appendices for additional detail on the proposals and the forms.

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Amendments for Final Approval

RULES 1010, 1011, AND 2002, AND PROPOSED NEW RULE 1012 (GOVERNING RESPONSES TO, AND NOTICES OF HEARINGS ON, CHAPTER 15 PETITIONS FOR RECOGNITION, ALONG WITH NEW OFFICIAL FORM 401) – The Advisory Committee asks for final approval as published of these amendments and additions to the Bankruptcy Rules, which are part of a project to improve procedures for international bankruptcy cases and to give those rules their own "home" in the Bankruptcy Rules. The Bankruptcy Rules were amended in response to the 2005 amendments to the Bankruptcy Code to insert new provisions governing cross-border cases. Among the new provisions were changes to Rules 1010 and 1011, which previously governed only involuntary bankruptcy cases, and Rule 2002, which governs notice. The currently proposed amendments to the Bankruptcy Rules would make three changes: (i) remove the chapter 15 related provisions from Rules 1010 and 1011; (ii) create a new Rule 1012 (Responsive Pleading in Cross-Border Cases) to govern responses to a chapter 15 petition; and (iii) augment Rule 2002 to clarify the procedures for giving notice in international bankruptcy cases. The proposed Official Form 401 is a new petition form for commencing chapter 15 international cases. None of these changes generated any opposition.

Upon motion, duly seconded, on voice vote: **The Committee unanimously approved the proposed amendment to Rules 1010, 1011, and 2002, and proposed new Rule 1012, along with new official Form 401, for submission to the Judicial Conference for final approval.**

RULE 3002.1 (ALONG WITH OFFICIAL FORM 410A) – The Advisory Committee proposes a change to Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence) to ensure that debtors who attempt to maintain their home mortgage payments while they are in bankruptcy will have the information they need to do so. Rule 3002.1, which applies only in chapter 13 cases, requires creditors whose claims are secured by a security interest in the debtor's home to provide the debtor and the trustee notice of any changes in the periodic payment amount or the assessment of any fees or charges during the bankruptcy case. The proposed change clarifies how the rule applies in various scenarios on which courts have disagreed. An accompanying change to Form 410A requires a creditor to provide loan payment history information to the debtor in a format that is both more beneficial to the debtor and easier for the creditor to prepare.

Upon motion, duly seconded, on voice vote: **The Committee unanimously approved the proposed amendment to Rule 3002.1, along with official Form 410A, for submission to the Judicial Conference for final approval.**

RULE 9006(f) (ELIMINATING THE 3-DAY RULE FOR ELECTRONIC FILING) – Judge Ikuta noted prior approval by the Committee, along with similar amendments to other rules.

FORMS MODERNIZATION PROJECT – Judge Ikuta announced the final set of forms from the Advisory Committee's Forms Modernization Project (FMP) was ready for consideration, along with minor revisions to modernized forms previously approved by the Committee.

Judge Ikuta explained one issue regarding the effective date of the modernized forms. When the FMP effort began, it was anticipated that the new forms would go into effect at approximately the same time

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as bankruptcy courts began using the redesigned case management system, known as the Next Generation of CM/ECF (NextGen). A goal of NextGen is to capture and store all material individual pieces of data used to complete bankruptcy forms so that users such as the court and clerk's office can prepare customized reports, putting the data in any order the user wants.

Although the FMP developed the modernized forms in a manner that would facilitate data collection by the NextGen case management system, the roll-out of NextGen is proceeding more slowly than expected. Under the current schedule, by the end of 2015 no more than a handful of bankruptcy courts will be on the NextGen case management system. The AO estimates that by December 2016, NextGen will have the capacity to capture and store all of the data elements from forms filed by individual debtors using the modernized forms (about 70 percent of bankruptcy cases). By December 2017, the AO estimates that the NextGen case management system will be able to capture and store all of the data elements by all debtors using the modernized forms.

Notwithstanding the delays in the implementation of NextGen, the Advisory Committee at its spring meeting voted unanimously to seek a December 1, 2015 effective date for the modernized and renumbered forms. Several considerations support that decision. First, the FMP has produced a set of vastly improved, user-friendly forms that will be a benefit to the bankruptcy community (including *pro se* filers) even without the extra capability with the NextGen system. Second, if the modernized forms take effect on December 1, 2015, the AO will be able to build a backend database that will store the information from the modernized forms, rather than the old forms. This approach will not prevent the AO from capturing the 80 data points required by the 2005 bankruptcy legislation.

Judge Ikuta noted one wrinkle to implementing the modernized forms in 2015, and sought the guidance of the Committee. The United States Bankruptcy Court for the District of New Jersey developed a program that lets *pro se* filers use what is essentially a Turbo Tax-like system to complete and file a chapter 7 bankruptcy case electronically. This concept, which was further developed by the court and the AO, is named the electronic self-representation (eSR) pathfinder program. The courts that have implemented this eSR program emphasize its importance as an access-to-justice project. The eSR program is linked to the current chapter 7 case opening forms. The eSR data-entry screens and database will not work with modernized forms. The AO estimates that by 2017 eSR will work with the new forms.

Because the Advisory Committee concluded that the modernized forms should go into effect generally on December 1, 2015, but without disrupting the already established eSR pilot projects, it asked the Standing Committee to seek approval of the following from the Judicial Conference:

a. To make the forms effective December 1, 2015.
b. To allow the Advisory Committee to continue to make minor typo-type changes to these forms even after Committee approval.
c. To recommend to the Judicial Conference that it allow specified chapter 7 case-opening forms to continue to be official forms for the eSR program in the Central District of California, New Jersey, and New Mexico bankruptcy courts until 2017.

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One member observed this proposal was consistent with the implementation of NextGen and was the right recommendation under the circumstances.

One member noted the fortuity of having the clerk of the New Jersey bankruptcy court on the committee, and thanked the clerk for his valuable input.

Another member questioned the wisdom of specifying an effective date as opposed to leaving the provision open ended; after discussion, the member who raised the question moved the proposal as written to keep the hard target date.

Upon motion, duly seconded, on voice vote: **The Committee unanimously approved the Advisory Committee's request to ask the Judicial Conference: to authorize the modernized forms as effective December 1, 2015; to allow the Advisory Committee to make minor, non-substantive revisions to the official forms before submitting them to the Judicial Conference; and to allow specified case-opening forms in effect on November 30, 2015 to remain official forms until December 1, 2017, in the United States Bankruptcy Courts for the Central District of California, the District of New Jersey, and the District of New Mexico, only for use by pro se debtors who initiate a chapter 7 case by using the court's Electronic Self-Representation system.**

Amendment for Publication

RULE 1006(6)(1) – The provision provides for the payment of the bankruptcy filing fee in installments, as authorized for individual debtors by 28 U.S.C. § 1930(a). In order to clarify that courts may not refuse to accept petitions or summarily dismiss cases for failure to make initial installment payments at the time of filing, the Committee is proposing an amendment to Rule 1006(b)(1). The amendment is intended to emphasize that an individual debtor's petition must be accepted for filing so long as the debtor submits a signed application to pay the filing fee in installments and even if a required initial installment payment is not made at the same time. The Committee Note explains that dismissal of the case for failure to pay any installment must proceed according to Rule 1017(b)(1).

Upon motion, duly seconded, on voice vote: **The Committee unanimously approved for publication for public comment the proposed amendment to Rule 1006(b)(1).**

Information Items

Stern Amendments in Light of *Wellness v. Sharif* – Judge Ikuta reported on the Supreme Court's decision in *Wellness v. Sharif*, which held that if parties consent, bankruptcy judges can resolve claims otherwise reserved to Article III judges. The Court held that implied consent may satisfy the consent requirement, but that an express-consent approach may be easier to implement. Judge Ikuta reported that the Advisory Committee would reconsider at its Fall 2015 meeting its pending *Stern* amendments – which required express consent and had been held in abeyance pending the Court's decision in *Wellness.* Discussion followed concerning the timing of submissions to the Court.

Chapter 13 Plan Form – Judge Ikuta next reported on the status of the committee's multi-year project to create an official chapter 13 plan form. The proposal was initially published in August 2013, and re-

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published in August 2014 after revision in response to substantial comments received. Again, the Advisory Committee received many comments, most in opposition, and with one opposition signed by 40% of the bankruptcy bench. After reviewing the comments on the proposed chapter 13 plan form, the Committee determined that there is still significant opposition to this new form, and it voted not to seek final approval of the form and related rule amendments at this time. Instead, the Advisory Committee intends to give further consideration to a compromise proposal, suggested by a group of commenters, that would allow a district to opt out of the mandatory national form if it adopts a single local chapter 13 plan form that meets certain nationally mandated requirements.

Discussion followed concerning the decision to develop a compromise proposal to allow a district to opt out of using a national chapter 13 plan form if the district adopted a single local plan form that met certain criteria, which will be considered at the Advisory Committee's October 2015 meeting. The Advisory Committee is considering whether such a revised approach would require republication, given that variations on the proposed form had gone through two rounds of publication already. While the Advisory Committee has discussed this issue, it decided to defer making the decision about republication until the October 2015 meeting pending more feedback from the bankruptcy community.

Discussion of the merits of republication followed, including the implications of republication on the Rules Enabling Act process.

CONCLUDING REMARKS

Judge Sutton expressed gratitude and farewell to outgoing members Dean Colson and Judge Levi. Judge Sutton also recognized the 30th anniversary of service to the Committee by Professor Coquillette.

Judge Sutton concluded the meeting and announced that the Committee will next convene on January 7-8, 2016 in Phoenix, Arizona.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary

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Unredacted Social Security Numbers in Federal Court PACER Documents

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This Federal Judicial Center publication was undertaken in furtherance of the Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. While the Center regards the content as responsible and valuable, the report does not reflect policy or recommendations of the Board of the Federal Judicial Center.

Summary

This study found 16,811 instances of unredacted Social Security numbers of 5,031 individuals appearing in 5,437 documents filed in federal district and bankruptcy courts in November 2013 and available through the Public Access to Court Electronic Records (PACER) service. The presence of Social Security numbers for approximately 75% (4,021) of these individuals appears to violate rules adopted by the Judicial Conference. Moreover, 314 of the unredacted Social Security numbers included one or more failed attempts at redaction in which the Social Security number appeared on the document to be obscured but the Social Security number itself remained accessible in the metadata of the document. Another 123 unredacted Social Security numbers appeared in Bankruptcy Form 21, which should not be filed with the court record.

This replication of a preliminary study in 2010 used more powerful search tools to examine the text of almost 4 million PACER documents filed in federal district and bankruptcy courts and found more instances of unredacted Social Security numbers than found in the previous study. These more powerful search techniques account for the apparent increase in incidence of unredacted Social Security numbers. In fact, after taking into account differences in the search techniques, it appears that the incidence of unredacted Social Security numbers in documents filed in bankruptcy courts has decreased by almost half since 2009.

Background

In response to The E-Government Act of 2002,[1] the Judicial Conference of the United States adopted rules effective on December 1, 2007, intended to protect private individual information in publically accessible electronic federal court records.[2] These rules require that certain personal information that fails to meet specific exemptions be redacted from documents filed with the federal courts. Such information includes Social Security and taxpayer identification numbers, names of minor children, financial account numbers, dates of birth, and, in criminal cases, home addresses.[3] The rules make clear that the responsibility for redaction of personal information rests with those who file documents with the courts and not the court clerks who accept the filings. The federal court electronic document filing system also was modified to display an enhanced message at login to remind attorneys of their obligation to redact private information from the documents that they file and to require attorneys to acknowledge this responsibility.[4]

In 2009, the Executive Committee of the Judicial Conference directed the Committee on Rules of Practice and Procedure to report on the operation of the privacy rules. The Committee's Privacy Subcommittee considered the findings of a preliminary 2010 empirical study by the Federal Judicial Center, conducted a miniconference at the Fordham School of Law, and reviewed surveys of judges, clerks of court, and assistant U.S. attorneys regarding their experiences with the operation of the privacy rules. While the Privacy Subcommittee found no general problems in the operation of the privacy rules, it recommended that "[t]o ensure

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[1] Pub. L. 107-347, § 205(c) (3) (requiring the federal judiciary to formulate rules "to protect the privacy and security concerns relating to electronic filing of documents").

[2] More specifically, the Judicial Conference adopted amendments to Appellate Rule 25 and adopted new Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule 49.1, each setting forth the requirements that those filing records with the federal court redact private information unless that information is exempt under the rules.

[3] This study and the preliminary 2010 study focused only on the presence of unredacted Social Security numbers in federal court records. In the course of this study we also found, but did not record, instances of other protected information that remained unredacted.

[4] The initial notice on electronic case filing reminding attorneys of their responsibility to redact personal information was developed in response to a recommendation of the Administrative Office Privacy Task Force in April 2009. The Judicial Conference, through its Privacy Subcommittee of the Rules Committee, further modified the message to provide links to the Federal Rules and to require the filing attorney to acknowledge this responsibility. Memorandum from Noel J. Augustyn, Assistant Director, Office of Court Administration, Administrative Office of the United States Courts, to Clerks of the United States Courts, Re: Enhanced Notice of Attorney Redaction Responsibility, July 23, 2009.

continued effective implementation, every other year the FJC should undertake a random review of court filings for unredacted personal identifier information." This report offers an overdue reassessment of implementation of those privacy protections.

The initial 2010 empirical study[5] found 2,899 federal court PACER documents with one or more unredacted Social Security numbers among the almost 10 million PACER documents filed in federal district and bankruptcy courts in a two-month period during 2009. Seventeen percent (491) of those documents appeared to qualify for an exemption from the redaction requirement under the relevant privacy rules, leaving 2,408 documents containing one or more unredacted Social Security numbers with no apparent basis for exemption under the rules. That initial report also noted that the search methodology employed was unable to detect Social Security numbers that might reside within nontext documents such as PDF documents stored as static images, and that the results likely underestimated the extent to which Social Security numbers and other private information appear in federal court documents.

This replication study differs from the initial 2010 study in three important ways. First, this study examined documents[6] filed in a one-month (November 2013) rather than two-month (November and December 2009) period. We believe that the filing practices were similar for those two months and do not attribute any differences in the findings of the two studies to reliance in this study on filings in a single month.

Second, this replication study identifies both the number of individuals whose unredacted Social Security numbers appeared, as well as the number of court documents containing such numbers. The 2010 study identified only the number of documents that included one or more unredacted Social Security numbers.

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[5] Memorandum from George Cort and Joe Cecil, Research Division, Federal Judicial Center, to the Privacy Subcommittee of the Judicial Conference Committee on Rules of Practice and Procedure, Social Security Numbers in Federal Court Documents (April 5, 2010).

[6] We use the term "document" to refer to a single electronic document as identified in the federal courts' PACER system. Such a document is often composed of several individual submissions to the court, such as a motion and attached exhibits. Especially large filings may be broken into two or more PACER documents for easier access. This is especially common in bankruptcy filings.

Third, and most importantly, this study also identified unredacted Social Security numbers appearing in documents initially filed as scanned images. Such documents were reprocessed by an optical character reader to transform the scanned images into searchable texts. The initial 2010 study identified only Social Security numbers in PACER documents that were originally filed in a text-searchable Social Security number format (i.e., 123-45-6789) without such reprocessing, thereby failing to detect Social Security numbers in documents that were filed as scanned images.[7] The specific research methods relied on in this study are set forth in Appendix A.

Although the Judicial Conference rules seek to protect a wide range of personal information in court records, we examined only the occurrence of unredacted Social Security numbers, as well as those financial account numbers that follow a Social Security number format. We did not attempt to identify the occurrence of unredacted names of minor children, financial account numbers in other formats, dates of birth, and home addresses in criminal cases, all of which are protected under the rules. However, we did notice instances of each of these types of unredacted protected information during our review of the documents.

[7] As noted in the original study, "The PERL program was unable to convert certain types of non-text documents, such as PDF documents stored as static images, and we were unable to detect Social Security numbers that might reside within such documents." (Page 2).

Findings

Tables 1 and 2 below present the findings of our effort to identify unredacted Social Security numbers in PACER documents filed in federal district and bankruptcy courts. As indicated in Table 1, we found 16,811 separate instances of unredacted Social Security numbers among the 3,900,841 PACER documents filed in November 2013. Closer examination revealed that these instances involved Social Security numbers for just over 5,000 different individuals, with some individual Social Security numbers appearing multiple times in one or more court documents. Individual Social Security numbers appear in district court documents (including both civil and criminal case documents) and in bankruptcy court documents in approximately equal numbers, 2,498 and 2,533, respectively. However, far more documents are filed in bankruptcy courts.[8] When we examined the first occurrence of an unredacted Social Security number in those documents where they were found, approximately 20 percent overall appeared to qualify for an exemption from the redaction requirement, with a somewhat higher rate of exemptions in documents filed in district courts.

Table 1: Unredacted Social Security Numbers (SSNs) in PACER Documents

	Total	District Courts	Bankruptcy Courts
Instances of SSNs	16,811	7,093	9,718
Unique Unredacted SSNs	5,031	2,498	2,533
• *First Occurrence Exempt from Redaction*	1,010	602	408
• *First Occurrence Not Exempt from Redaction*	4,021	1,896	2,125

[8] We began our task by conducting electronic searches of all 2,725,788 bankruptcy court and 1,175,053 district court PACER documents filed in November 2013.

As indicated in Table 2, these 16,811 instances are scattered across 5,437 PACER documents. Some of these documents contained numerous instances of unredacted Social Security numbers. Such instances were more common in bankruptcy court documents, which differ from district court documents in that the forms, exhibits, and attachments often include financial account numbers and other personal information for the bankruptcy filers, and occasionally for the creditors as well. A particular problem arises when the bankruptcy involves failure of a business enterprise and former employees are listed as individual creditors, sometimes with individual Social Security numbers appended along with other payroll information. In one such case we found over 2,000 instances of unredacted Social Security numbers of former employees (with some numbers appearing repeatedly) in a single bankruptcy court document. In another case hundreds of unredacted Social Security numbers appeared in a single document, comprising almost all of the unredacted Social Security numbers found in that bankruptcy court.

Table 2: PACER Documents Containing One or More Unredacted Social Security Numbers*

	Total	District Courts	Bankruptcy Courts
Including One or More Unredacted SSN(s)	5,437	2,345	3,092
Including One or More Likely Nonexempt Unredacted SSN(s)	2,974	1,634	1,340

* This measure counts individual PACER documents, which may comprise parts of a single large filing that is divided into several PACER documents to ease user access.

Unredacted Social Security numbers in district court civil and criminal documents tend to show up in exhibits, depositions, and interrogatories. In criminal cases, Social Security numbers often appear in judgment and sentencing orders. Social Security numbers in district court documents appear somewhat more likely to qualify for an exemption from the redaction requirement under the rules. In the end, approximately the same number of documents with

nonexempt unredacted Social Security numbers appeared in both district court cases and bankruptcy cases (1,634 and 1,340 cases, respectively).

We noticed several odd patterns in court documents with unredacted Social Security numbers. At least 314 of the unredacted Social Security numbers represent a failed effort by the document filer to redact the number from the court document (52 SSNs in district court documents and 262 SSNs in bankruptcy court documents). Such failed efforts included strikeovers, scratch-outs, blackouts, and use of word processing applications that remove sections of text. Despite these redaction efforts, our electronic text search program detected the full Social Security number. Of particular concern is the apparent use of word processing redaction techniques that retain the Social Security number in the metadata when the document is converted to PDF for filing in court. The full Social Security number reappears when the apparently redacted text is cut and pasted into a word processing document. As noted, such failed efforts to redact individual Social Security numbers can be especially harmful in bankruptcy records, where a single document may contain a lengthy list of individual creditors, such as the employees of a failed business enterprise. For example, we found 221 individual Social Security numbers in a single bankruptcy court document in which the Social Security number appears in the metadata of the document despite the filing party's effort to block out those numbers.

The 123 instances of unredacted Social Security numbers appearing on *Bankruptcy Form 21: Statement of Social Security Number or Individual Tax Identification Number* are a specific source of concern. This form requires the debtor to enter the unredacted Social Security number, but the form itself is not supposed to be filed as part of the court record. Yet, forms with unredacted Social Security numbers often are combined with numerous other documents into a single bankruptcy document filing.

We also made a preliminary assessment of the basis for an exemption from the redaction requirement based on information in the specific PACER document containing the Social Security number. Often we were not able to interpret the role of such a document in the larger context of the litigation, and may not have recognized the basis for an exemption when it was not apparent on the face of the document. For example, often we were unable to identify the party filing the document based on the document alone and were, therefore, sometimes unable

to identify documents filed by some *pro se* litigants who might have waived the redaction requirement.

As indicated in Table 1 and presented in greater detail in Table 3 below, just over 1,000 of the unredacted unique Social Security numbers found in this study appear to qualify for an exemption from the redaction requirement under the privacy rules adopted by the Judicial Conference. The remaining 4,000 unredacted Social Security numbers, appearing in approximately 3,000 court documents (see Table 2), are in apparent violation of the privacy rules adopted by the Judicial Conference.

Table 3: Individual Social Security Numbers Likely Exempt from Redaction Requirement

Source	Total	District Court	Bankruptcy Court
All	1,010	602	408
Non-attorney Bankruptcy Preparer	357	1	356
Record of a State Court Proceeding	193	168	25
Criminal Investigation	118	118	0
Charging Document/Affidavit	86	86	0
Apparently Pro se	82	74	8
Arrest/Search Warrant	65	64	1
Administrative or Agency Proceeding	58	48	10
Court record filed before Dec. 2007	26	24	2
Order Regarding SS Benefits	20	18	2
Filing Attorney SSN	3	0	3
Forfeiture Property Account Number	1	1	0

The pattern of exemptions from the redaction requirement differs greatly between district court and bankruptcy documents. The most common exemption, accounting for more than a third of all exemptions, was the including of a Social Security number for a non-attorney

bankruptcy petition preparer. This number is required by statute to appear on the bankruptcy document in unredacted form.[9]

The second most common exemption to the redaction requirement involved Social Security numbers appearing as part of a record of a state court proceeding. Such records often involved an earlier state court decision in a criminal case or a family law matter. We found numerous exempt unredacted Social Security numbers in criminal cases appearing in criminal investigation reports, arrest and search warrants, charging documents, and affidavits. We also found individual Social Security numbers in 82 documents that appear by the nature of the filing to be documents filed by *pro se* litigants. Such instances may be more accurately regarded as a waiver of the privacy protection by the *pro se* filer.

[9] 11 U.S.C. § 110.

Comparison with 2010 Study Findings

The previous 2010 study used different metrics and a different search methodology, making a comparison between the two studies somewhat difficult. Nevertheless, the greater incidence of unredacted Social Security numbers found in this study requires additional explanation.

The 2010 study searched almost 10 million PACER documents filed during a two-month period (November and December 2009) and found 2,899 individual PACER documents with one or more unredacted Social Security numbers. This study searched almost 4 million PACER documents filed during a one-month period (November 2013) and found 5,431 individual PACER documents with one or more unredacted Social Security numbers. While it may appear that the number of federal court PACER documents with unredacted Social Security numbers has increased since the 2010 study, in fact the greater number found in this study is due to the more thorough search methodology used. When the search methodology used in 2010 is used to examine 2013 PACER documents, the incidence of documents with one or more unredacted Social Security numbers appears to have decreased over time, especially in bankruptcy courts.

As noted earlier, the current search methodology, unlike that of the previous study, allows detection of Social Security numbers in PACER documents initially filed as scanned images. This study reprocessed scanned documents through an optical character reader, thereby transforming those scanned images into searchable text and allowing identification of unredacted Social Security numbers that had previously escaped detection. The previous study detected only those Social Security numbers that appeared in searchable text documents and overlooked numbers in documents filed as scanned images. The ability of this study to search the text of image files allowed identification of Social Security numbers appearing as an unbroken series of nine numbers as well as those following the typical format with embedded dashes. These differences allowed a more thorough examination and thus a more accurate understanding of the extent of unredaction.

When we examine the recently filed court records using the older search methodology that did not include reprocessing with the optical character reader, it becomes apparent that the increase in incidence of unredacted Social Security numbers found in this study is due to the improved search methodology and not a change in filling practices in the courts. As indicated in

Table 4, after reprocessing the imaged documents, this study found a total of 5,437 PACER documents with one or more unredacted Social Security numbers. Examining the same PACER documents using the older methodology found only 757 PACER documents with unredacted Social Security numbers.

Table 4: Identification of Social Security Numbers Using Old and New Search Methodologies

	2013 Documents Using New Search Methodology	2013 Documents Using Old Search Methodology	2009 Documents Using Old Search Methodology
Total Court Documents	3,900,841	3,900,841	9,830,721
Total Docs with 1+ SSNs	5,437*	757	2,899
Ratio	1:717	1:5,153	1:3,391
Bankruptcy Court Documents	2,725,788	2,725,788	7,738,541
Bankruptcy Docs with 1+ SSNs	2,345*	419	2,244
Ratio	1:1,162	1:6,505	1:3,448
District Court Documents	1,175,053	1,175,053	2,092,080
District Docs with 1+ SSNs	3,092*	338	655
Ratio	1:380	1:3,476	1:3,194

*These counts of PACER documents filed in November 2013 with one or more unredacted Social Security numbers include those instances of unrelated Social Security numbers that appeared in documents filed as scanned images, and unredacted Social Security numbers that appeared without dashes separating the segments of the Social Security number. Such numbers were not detected using the older search methodology used in the previous study.

Of particular interest is the apparent drop in the likelihood of finding unredacted Social Security numbers in bankruptcy court documents. As indicated in Table 4, when we use the

older search methodology to allow a meaningful comparison, the likelihood of a bankruptcy court document having one or more unredacted Social Security numbers has decreased by almost half (from 1 in 3,448 documents in the 2010 study to 1 in 6,505 documents in the current study). District court documents show only a modest decrease in the likelihood of a document including one or more unredacted Social Security numbers.

Of course, these findings also mean that the incidence of unredacted Social Security numbers in PACER documents scanned as images was far greater in 2009 than suggested by that earlier report. While the presence in court documents of any private information that should be redacted under the rules is cause for concern, this study also suggests that the federal courts have made progress in recent years in reducing the incidence of unredacted Social Security numbers in federal court documents, especially in bankruptcy court documents.

Appendix A: Methodology

We sought to identify recently filed federal court documents containing one or more unredacted Social Security numbers. The Federal Rules of Civil, Criminal, Bankruptcy, and Appellate Procedure (see Appendix B) require redaction of Social Security numbers, taxpayer-identification numbers, birth dates, the names of minors, financial account numbers, and, in criminal cases, home addresses. Our study sought to identify only documents containing Social Security numbers, including Social Security numbers designated in the document as taxpayer identification numbers and financial account numbers. This study did not examine documents filed in appellate cases or filed in paper form.

We identified and downloaded a total of 3,900,841 individual PACER documents using a computer scripting language to query federal court electronic case management data in the district and bankruptcy courts' CM/ECF databases. The Structure Query Language (SQL) program identified all documents filed in the district and bankruptcy courts in November 2013. We excluded all sealed court records and other documents that were designated as unavailable on the Public Access to Court Electronic Records (PACER) service.

After downloading the documents we used Adobe Acrobat software to perform optical character recognition (OCR) on the individual documents to convert any static PDF characters into machine-readable text. A total of 3,063,235 PACER documents were modified as a result of the OCR. All documents from one bankruptcy district were excluded from the analysis because the documents were not maintained in a format that allowed use of the OCR program. An additional 27,424 PACER documents (less than 1% of the total number of documents) were excluded because of a variety of problems that arose while trying to use the OCR program. We found a few files in almost every district that could not be read by the Acrobat OCR or search program. After searching the files in a district we would receive a message such as "Search has skipped 137 files because either the files are corrupt or you don't have permission to open them." In addition to indicating that some of these files had restricted access or were corrupt and unable to be opened, we believe this message also indicated that some of these files may have

been saved in an older version of Acrobat or had embedded graphics defeating the search program.

Using functionality built into Adobe Acrobat we were able to detect Social Security number patterns (i.e., 123-45-6789) that might reside within such documents. We also detected unbroken nine-digit strings of numbers near text that included the words "Social Security" or "SSN."

We then examined the search output files and visually reviewed over 17, 205 court documents to determine if the string of characters appeared to be a valid Social Security number. Where multiple numbers appeared in a single document, we examined each number looking for information indicating that it was in fact a Social Security number. For example, multiple Social Security numbers may appear in a bankruptcy filing for a business in which the former employees are listed as individual creditors.

Numerous such instances were not Social Security numbers. For example, we found such a pattern of digits in misspecified telephone numbers and extended zip codes. We found such patterns in numbers that were specifically designated as nonfinancial account numbers, claim numbers, model numbers, grievance numbers, real estate parcel numbers, bar membership numbers, and student ID numbers. In some instances such numbers may have been derived from an individual's Social Security number, but unless the context made clear that the number was a Social Security account number or a financial account number, we did not code the value as falling within the privacy protection of the rules. Nine-digit numbers following the typical Social Security number pattern were often found after the name of an individual, and that alone with no contrary designation was coded as a Social Security number. For example, such numbers following a name on a pay stub in a bankruptcy proceeding were regarded as Social Security numbers. We also coded such numbers designated "tax identification numbers" in income tax filings as Social Security numbers.

Social Security numbers were then reviewed in the context of the document to determine whether the entry qualified for an exemption to the privacy protection under the rules. While there was broad agreement among the coders regarding whether an entry qualified as a Social Security number, there was less agreement regarding whether such an entry qualified for one or more exemptions. Such a determination often required an assessment of the context of the

document in which the Social Security number appeared. This assessment became difficult when a single large court document was broken into two or more parts to ease the public through the PACER system. For that reason, we construed the exemptions liberally, coding an entry as exempt whenever there was a reasonable likelihood that such a document might qualify for exemption.

The exemptions under the various rules were transformed into the following coding categories and assigned to the unredacted Social Security numbers:

0 = Valid SSN with no apparent exemption
1= Not a SSN

Apparent Exemptions:
2 = Record of a state court proceeding
3 = Non-attorney bankruptcy preparer
4 = Apparently pro se filing (suggesting waiver)
5 = Record of administrative agency proceeding
6 = SSN of attorney filing document
7 = Criminal charging document/affidavit
8 = Court record filed before December 2007
9 = Criminal arrest/search warrant
10 = Criminal investigation
11 = Order regarding SS benefits
12 = Forfeiture property account number

Appendix B: Federal Procedural Rules Protecting Individual Privacy

Federal Rule of Civil Procedure Rule 5.2—Privacy Protection for Filings Made with the Court

(a) Redacted Filings. Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing may include only:

(1) the last four digits of the social-security number and taxpayer-identification number;

(2) the year of the individual's birth;

(3) the minor's initials; and

(4) the last four digits of the financial-account number.

(b) Exemptions from the Redaction Requirement. The redaction requirement does not apply to the following:

(1) a financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;

(2) the record of an administrative or agency proceeding;

(3) the official record of a state-court proceeding;

(4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;

(5) a filing covered by Rule 5.2(c) or (d); and

(6) a pro se filing in an action brought under 28 U.S.C. §§ 2241, 2254, or 2255.

(c) Limitations on Remote Access to Electronic Files; Social-Security Appeals and Immigration Cases. Unless the court orders otherwise, in an action for benefits under the Social Security Act, and in an action or proceeding relating to an order of removal, to relief from removal, or to immigration benefits or detention, access to an electronic file is authorized as follows:

(1) the parties and their attorneys may have remote electronic access to any part of the case file, including the administrative record;

(2) any other person may have electronic access to the full record at the courthouse, but may have remote electronic access only to:

(A) the docket maintained by the court; and

(B) an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record.

(d) Filings Made Under Seal. The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

(e) Protective Orders. For good cause, the court may by order in a case:

(1) require redaction of additional information; or

(2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.

(f) Option for Additional Unredacted Filing Under Seal. A person making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(g) Option for Filing a Reference List. A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

(h) Waiver of Protection of Identifiers. A person waives the protection of Rule 5.2(a) as to the person's own information by filing it without redaction and not under seal.

Federal Rule of Criminal Procedure Rule 49.1—Privacy Protection for Filings Made with the Court

(a) Redacted Filings. Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, a financial-account number, or the home address of an individual, a party or nonparty making the filing may include only:

(1) the last four digits of the social-security number and taxpayer-identification number;

(2) the year of the individual's birth;

(3) the minor's initials;

(4) the last four digits of the financial-account number; and

(5) the city and state of the home address.

(b) Exemptions from the Redaction Requirement. The redaction requirement does not apply to the following:

(1) a financial-account number or real property address that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;

(2) the record of an administrative or agency proceeding;

(3) the official record of a state-court proceeding;

(4) the record of a court or tribunal, if that record is not subject to the redaction requirement when originally filed;

(5) a filing covered by Rule 49.1(d);

(6) a pro se filing in an action brought under 28 U.S.C. §§ 2241, 2254, or 2255;

(7) a court filing that is related to a criminal matter or investigation and that is prepared before the filing of a criminal charge or is not filed as part of any docketed criminal case;

(8) an arrest or search warrant; and

(9) a charging document and an affidavit filed in support of any charging document.

(c) Immigration Cases. A filing in an action brought under 28 U.S.C. § 2241 that relates to the petitioner's immigration rights is governed by Federal Rule of Civil Procedure 5.2.

(d) Filings Made Under Seal. The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

(e) Protective Orders. For good cause, the court may by order in a case:

(1) require redaction of additional information; or

(2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.

(f) Option for Additional Unredacted Filing Under Seal. A person making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(g) Option for Filing a Reference List. A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

(h) Waiver of Protection of Identifiers. A person waives the protection of Rule 49.1(a) as to the person's own information by filing it without redaction and not under seal.

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Federal Rules of Bankruptcy Procedure Rule 9037—Privacy Protection for Filings Made with the Court

(a) Redacted Filings. Unless the court orders otherwise, in an electronic or paper filing made with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual, other than the debtor, known to be and identified as a minor, or a financial-account number, a party or nonparty making the filing may include only:

(1) the last four digits of the social-security number and taxpayer-identification number;

(2) the year of the individual's birth;

(3) the minor's initials; and

(4) the last four digits of the financial-account number.

(b) Exemptions from the Redaction Requirement. The redaction requirement does not apply to the following:

(1) a financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;

(2) the record of an administrative or agency proceeding unless filed with a proof of claim;

(3) the official record of a state-court proceeding;

(4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;

(5) a filing covered by subdivision (c) of this rule; and

(6) a filing that is subject to § 110 of the Code.

(c) Filings Made Under Seal. The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the entity that made the filing to file a redacted version for the public record.

(d) Protective Orders. For cause, the court may by order in a case under the Code:

(1) require redaction of additional information; or

(2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.

(e) Option for Additional Unredacted Filing Under Seal. An entity making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(f) Option for Filing a Reference List. A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

(g) Waiver of Protection of Identifiers. An entity waives the protection of subdivision (a) as to the entity's own information by filing it without redaction and not under seal.

TAB 4

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TAB 4A

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

JEFFREY S. SUTTON
CHAIR

REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

SANDRA SEGAL IKUTA
BANKRUPTCY RULES

JOHN D. BATES
CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

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

FROM: Honorable Donald W. Molloy, Chair
Advisory Committee on Criminal Rules

DATE: December 14, 2015

RE: Report of the Advisory Committee on Criminal Rules

I. Introduction

The Advisory Committee on the Federal Rules of Criminal Procedure ("the Committee") met on September 28, 2015, in Seattle, Washington. This report discusses briefly the following information items:

(1) the Committee's continuing consideration of Rule 49, governing filing and service, including electronic filing;

(2) the Committee's decision to study further suggested amendments to several rules:

- Rule 12.4(a)(2) (government disclosure of organizational victims);
- Rule 15(d) (deposition expenses); and
- Rule 32.1 (procedural rules for revocation and supervised release);

(3) the Committee's decision not to pursue suggested amendments to Rules 6 and 23 of the Federal Rules of Criminal Procedure.

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II. Rule 49: Electronic Filing, Service, and Notice

The Committee's attention to Rule 49 is part of an inter-committee project to develop rules mandating electronic filing, service, and notice, with appropriate exceptions. Coordination between the Civil and Criminal Rules Committees has been especially critical because Criminal Rule 49 (b) and (d) now provide that service and filing are to be made the "manner provided for [in] a civil action."[1] Thus changes in the Civil Rules will govern filing and service in criminal cases as well. Additionally, the Rules Governing Section 2254 and 2255 Cases provide that filing and service in these actions are governed by the Rules of Civil Procedure. The Criminal Rules Committee has traditionally had the responsibility for the Rules Governing Section 2254 and 2255 Cases.

It became clear last spring that the Civil and Criminal Rules Committees were not in agreement regarding the optimal default rule regarding electronic filing by pro se parties. The Civil Rules Committee favored a rule requiring all parties to file and serve electronically unless exempted for good cause or by local rule. The Criminal Rules Committee disagreed, concluding unanimously that the default rule for pro se defendants in criminal cases and pro se prisoners filing actions under §§ 2254 and 2255 should be filing and service outside the CM/ECF system. Members noted that the local rules in most districts do not now allow pro se defendants and prisoners to file electronically, and they identified many serious problems that would occur if pro se defendants and prisoners were expected to file, serve, and be served electronically in criminal cases and actions under §§ 2254 and 2255. These problems were described in the Committee's May report to the Standing Committee. I will not repeat that discussion here, but the pertinent portion of the May report is included, *infra,* as an appendix to this report. The Criminal Rules Committee recognized that districts could opt out of a national rule by adopting local rules exempting pro se criminal defendants from electronic filing, but the Committee opposed a national rule that almost all districts would need to modify by local rule.

The Civil Rules Committee displayed admirable flexibility, accommodating the concerns of the Criminal Rules Committee by altering its working draft in April to limit the default rule requiring electronic service and filing to represented parties. But the discussion of these issues and the process of inter-committee negotiation led the Criminal Rules Committee to consider a foundational question: whether the same rules should continue to govern filing and service in civil and criminal cases.

Discussions in the Civil and Criminal Rules Committees revealed that the optimal default rules for electronic filing and service in civil proceedings might be different from the optimal rules for filing and service in criminal prosecutions and actions brought by prisoners under §§ 2254 and 2255. There are critical differences between these proceedings that bear directly on

[1] Rule 49(b) refers to "the manner provided for a civil action," and (d) refers to "a manner provided for in a civil action."

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the rules governing filing and service. Accordingly, the Committee recognized that there would be advantages to severing the linkage between the Civil and Criminal Rules, and providing stand-alone rules for filing, service, and notice in the Rules of Criminal Procedure and the Rules Governing Actions Under Sections 2254 and 2255. Severing the automatic linkage would allow the rules governing criminal prosecutions and habeas actions to be tailored to the distinctive nature of those proceedings. It would also free the Civil Rules from the constraints imposed by the need to accommodate concerns specific to criminal proceedings. Finally, a stand-alone Criminal Rule would allow federal prosecutors and defenders to consult the Rules of Criminal Procedure to determine the requirements for filing, service, and notice, rather than requiring them to consult two sets of rules. Accordingly, the Rule 49 Subcommittee was given the task of exploring the feasibility of drafting a stand-alone version of Rule 49.

At the Committee's September meeting, the Rule 49 Subcommittee reported its tentative conclusion in favor of severing the link to the Civil Rules governing filing and service and revising Rule 49 to serve as a stand-alone rule governing filing, service, and notice. The Subcommittee provided a discussion draft and solicited comments on various drafting issues that would need to be resolved in a stand-alone rule. The Committee agreed that the Subcommittee should draft a stand-alone version of Rule 49 and provided input on various drafting issues. Following the September meeting, the Rule 49 Subcommittee held two teleconferences.

Although the Rule 49 Subcommittee is considering a long list of technical issues, one illustrates how differences between civil and criminal litigation may warrant different rules for filing and service. Only the government and the defendant(s) are parties to a criminal case, but the reporters developed a list of nonparties that may be permitted or required to file certain motions or other pleadings in a criminal prosecution.[2] The Subcommittee is considering whether Rule 49 should address such nonparties,[3] and, if so, what the default rule should be for filing and service. The Subcommittee anticipated that the default rule might treat nonparties like parties in criminal cases, requiring electronic filing by those who are represented, absent a showing of good cause or local rule permitting paper filing. However, as our clerk of court liaison has explained, the architecture of CM/ECF system treats civil and criminal cases–and third parties in such cases–very differently. The CM/ECF system is hardwired to allow only two parties in a criminal case: the United States and the defendant(s). Anyone with a CM/ECF login and password can, in theory, file in any civil or criminal case. But the architecture of the system

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[2] This includes, for example, victims who may present victim impact statements or assert other rights, material witnesses who seek to be deposed and released, third parties claiming an interest in property the government is seeking to forfeit, and news media seeking access to documents or proceedings.

[3] The current Rule 49(a) addresses only parties. During restyling, the effort to convert Rule 49(a) from a passive construction to the active voice deleted language that previously required all parties to be served with any motions or similar pleadings. A revision of Rule 49 to address electronic filing will also allow the Committee to reverse this unintended substantive change.

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allows options in civil cases that are not available in criminal cases. In a civil case, a registered user can add a party (e.g., an intervener) to the case. A criminal case does not provide a registered user the ability to add a party. So even a registered user (such as a lawyer representing a victim or a news media organization) with a CM/ECF login cannot file in a criminal case unless he lists himself as an attorney for either the government or the defendant(s).

If Rule 49 is amended to delete the provisions incorporating the civil rules on filing and service, the new stand-alone Criminal Rule will likely diverge in several respects from Civil Rule 5. The Committee is keenly aware that inter-committee consultation is essential throughout the drafting process. Professor Ed Cooper (the reporter for the Civil Rules Committee) and members of that Committee have been participating in the Rule 49 Subcommittee Conference calls; they have also provided extensive feedback and advice to the reporters. This close consultation, followed by the publication process and the receipt of public comments, should help to identify any unanticipated problems that might arise from new language or changes in the organization of the Criminal Rule. The Subcommittee's intensive focus on Rule 49 has also had an unanticipated benefit, highlighting possible improvements in language that Professor Cooper thinks may be incorporated in the parallel drafts of the filing and service rules under consideration by the other advisory committees.

Although this issue cannot be fully debated and decided until the Rule 49 Subcommittee concludes its work and presents a final proposal, the Committee may wish to request the Standing Committee's approval to publish two alternatives: a stand-alone version of Rule 49, amended to omit references to the Civil Rules, and a revision of Rule 49 that would continue to require that filing and service comply with the Civil Rules, specifying exceptions as needed.

III. Suggested Amendments Under Consideration

The Committee had an initial discussion of several suggested amendments that were referred to Subcommittees for further discussion or placed on the Committee's study agenda to await further developments.

A. Rule 12.4(a)(2)

Rule 12.4(a)(2), which governs the prosecution's disclosure obligations to the court, provides:

> **(2)** ***Organizational Victim***. If an organization is a victim of the alleged criminal activity, the government must file a statement identifying the victim. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 12.4(a)(1) to the extent it can be obtained through due diligence.

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The Committee Note states that "[t]he purpose of the rule is to assist judges in determining whether they must recuse themselves because of a 'financial interest in the subject matter in controversy.' Code of Judicial Conduct, Canon 3C(1)(c) (1972)."

The Department of Justice presented two reasons for reconsideration of the notice requirement regarding organizational victims. First, the Code of Judicial Conduct was significantly amended in 2009, and it no longer treats all victims entitled to restitution as parties. Since the purpose of the rules was to require the disclosure of information necessary to assist judges in making recusal decisions, a change in the recusal requirements may warrant a parallel change in Rule 12.4. Second, there are some cases in which it is difficult or impossible for the government to provide the notification required by the current rule. For example, in some antitrust cases there may be hundreds or thousands of corporate victims. Providing the notification required for each of them, even if possible, would be extremely burdensome.

After initial discussion, there was agreement that a subcommittee should be appointed to study a possible amendment to address these problems. Because the Appellate Rules Committee has discussed whether it should amend its own rules to adopt a provision parallel to Rule 12.4(b)(2), consideration of this proposal should be done in consultation with the Appellate Rules Committee.

B. Rule 15(d)

Rule 15(d) designates the party responsible for deposition expenses. The Department of Justice brought to the Committee's attention an inconsistency between the text of the rule and the committee note. This inconsistency, the Committee learned, had been noted in the minutes of Committee meeting on at least one previous occasion, but no action taken at that time. Action may be warranted at this time, however because defendants in recent cases have urged courts to follow the committee note rather than the text. The Department is concerned that the inconsistency may now be affecting the outcome of cases.

Discussion focused on several points. First, the Committee was reminded that committee notes cannot be amended unless the text of a rule is amended. Second, there is some interplay with statutory provisions, including the Criminal Justice Act and 18 U.S.C. § 4285. There are also financial implications for different branches of government.

A subcommittee was appointed to study the issues and make a recommendation to the Committee at its April meeting.

C. Rule 32.1

Judge Susan Graber wrote to the Committee suggesting that it consider an amendment to Rule 32.1, which governs the procedures for revoking or modifying probation or supervised

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release. Her letter brought to the Committee's attention two cases[4] from the Ninth Circuit in which the court imported procedural rules from Rule 32 to fill "gaps" in Rule 32.1. She suggested that the Committee consider whether it would be desirable to address these issues in the text of Rule 32.1.

Rule 32.1 reflects the development of a body of law regarding the procedural rights of parolees, probationers, and prisoners on supervised release. The Rule was created in 1979 to implement several decisions of the Supreme Court holding that due process required a hearing, and it was amended in 2002 and 2005 to include additional procedural rights in response to decisions in the lower courts. However, Rule 32.1 does not address all of the issues that are covered in Rule 32, which specifies the procedures for sentencing and judgment. In some cases in which the defendant was being sentenced for violating the terms of his supervised release the Ninth Circuit has drew upon Rule 32 to address these gaps.

In *United States v. Urrutia-Contreras*, 782 F.3d 1110 (9th Cir. 2015), the court of appeals vacated the consecutive sentence the district court had imposed and remanded the case because the district court had not allowed the government an opportunity to address the court on the sentence to be imposed upon revocation. The court began by comparing Rules 32 and 32.1. In contrast to Rule 32(i)(4)(A)(iii), which provides that "[b]efore imposing sentence, the court must . . . provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney," Rule 32.1 grants a defendant the right to make a statement but is silent as to whether the government must also be given an opportunity to do so. Id. at 1112. The court concluded that "[w]hen Rule 32.1 is silent with respect to the matters that must be considered by a district court in imposing a sentence for violating the terms of supervised release, Rule 32 may be used to 'fill in the gap' in Rule 32.1." *Id.* at 1113.

The *Urrutia-Contreras* court then considered whether the rationale for allowing the government to make a statement at sentencing was applicable in proceedings under Rule 32.1. It concluded that "like the defendant's right to allocute and the probation officer's recommendation, the government's position with respect to the sentence to be imposed for violating the conditions of supervised release is an important factor for the sentencing court to consider and include in its reasoning." *United States v. Booker*, 543 U.S. 220 (2005), requires the district court to consider and discuss the sentencing factors contained in the Sentencing Guidelines and 18 U.S.C. § 3553(a) when imposing a sentence, and this requirement "cannot be

[4] Judge Graber wrote about *United States v. Urrutia-Contreras*, 782 F.3d 1110 (9th Cir. 2015), and *United States v. Whitlock*, 639 F.3d 935, 940 (9th Cir. 2011). This report (and the Committee's discussion) focuses on *Urrutia-Contreras*, which appears to present the more significant issue. The issue in *Whitlock* was whether the district court erred when it prohibited the probation officer from disclosing that officer's sentencing recommendation to the defendant. The court held that the district court could prohibit disclosure, adapting the rule of Rule 32(e)(3). If the Committee refers Rule 32.1 to a subcommittee, this issue can be addressed as well.

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met if the district court fails to solicit the government's position, whether at a post-conviction sentencing or at a revocation proceeding." *Urrutia-Contreras*. 782 F.2d at 1113.

Members expressed interest in the issue raised in *Urrutia-Contreras*, but concluded that it might be premature to take up the issue now. The decision was quite recent and is the only case to address the issue. Members thought there might be further developments in the Ninth Circuit or elsewhere that would be relevant. Additionally, they noted that the procedural posture of *Urrutia-Contreras* was somewhat unusual: the defendant, not the government, raised the issue of the court's failure to allow the government to speak to the proper sentence. The government did not appeal this issue. To the contrary, it argued that Rule 32.1 did not require the court to allow the government to speak.[5]

Accordingly, the Committee decided to place the specific issue in *Urrutia-Contreras*–and the more general issue whether the procedures in Rule 32.1 should be further specified–on its study agenda, requesting that the reporters stay abreast of further developments.

IV. Final Actions on Other Suggestions

The Committee also discussed and decided not to pursue at this time two other suggested amendments.

A. Rule 23

Rule 23(a) now states that the trial must be by jury unless the defendant "waives a jury trial in writing," and Rule 23(b) allows the parties to "stipulate in writing" their agreement to proceed with fewer than 12 jurors. Judge Susan Graber wrote suggesting that the Committee consider revising the rule in light of cases holding that an oral waiver is sufficient if it is made knowingly and intelligently. She noted that several cases have held that the failure to make the waiver in writing was harmless error.

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[5] The court did not discuss the argument made in the government's appellate brief "that Rules 32.1 and 32 serve different purposes":

> When a defendant is sentenced at a sentencing hearing, he or she is sentenced for a crime against the United States. In that situation, it is clear why Congress would require that the court hear from the government. As the representative of the people, the government should be heard by the court in regards to a sentence being issued to a defendant who has violated the laws of the United States. When a defendant is sentenced at a revocation hearing, however, he or she is sentenced for a breach of the district court's trust. *See United States v. Reyes-Solosa*, 761 F.3d 972, 975 (9th Cir. 2014). Supervised release is about the district court's supervision of a convicted defendant, not a violation of the laws of the United States. This distinction explains why Congress intentionally left out the district court's requirement to allow the government an opportunity to make a statement regarding the violator's sentence in a revocation hearing in Rule 32.1.

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The Committee considered this suggestion in the context of other waiver requirements in the Rules of Criminal Procedure. At least twelve Criminal Rules require a party (usually the defendant) who waives a right or consents to a certain procedure must do so in writing, and other rules require that approvals, stipulations and the like be in writing.[6] These rules draw the party's attention to the importance of the decision being made, help avoid misunderstanding or ambiguity, and by providing a record of the waiver, consent, or other action, also assist in the adjudication of later claims challenging the existence, validity, scope, or nature of the waiver.

Allowing an oral, on-the-record waiver of the right to trial by jury, so long as it is knowing and intelligent, would provide for greater procedural flexibility. On the other hand, there are several reasons to hesitate to amend Rule 23's writing requirement. Rule 23's requirement of a written waiver now provides a clear, bright line rule that emphasizes to the defendant the importance of the decision and provides a reliable record should the existence or validity of the waiver be challenged. Moreover, among the many procedural rights for which the Rules now require a written waiver, the Sixth Amendment right to trial by jury is arguably the most important.[7]

The Committee concluded that, at least for the present, no change is warranted in the requirement of a written waiver. The effort required to obtain a written waiver is not particularly burdensome for trial courts, and the Committee has received no expressions of concern about this requirement from defendants, prosecutors, or trial judges. The Committee recognized that there have been occasional cases in which a written waiver was not obtained. Judge Graber identified several cases in which appellate courts used the harmless error rule to uphold a criminal judgment despite the absence of a valid written waiver, when other evidence indicated

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[6] In addition to Rule 23, the following Federal Rules of Criminal Procedure require a written waiver or consent: Rule 10(b) (defendant's written waiver of appearance); Rule 11(a) (allowing entry of conditional guilty or nolo plea that reserves in writing defendant's appellate review of a specified pretrial motion); Rule 15(c)(1) (defendant's waiver of right to be present at a deposition); Rule 17.1 (written waiver by defendant and counsel of right to exclude statements made at pretrial conference); Rule 20(a) (defendant's written waiver consent to transfer and disposition of case in transferee district and approval of transfer in writing by the U.S. Attorneys in both districts); Rule 20(d) (juvenile's written consent to the transfer of case and written approval of transfer by the U.S. Attorneys in both districts); Rule 32(e) (defendant's written consent to submission of presentence report before the defendant has been found guilty or pleaded guilty or nolo contendere); Rule 32.2 (defendant's written consent to transfer of forfeited property to a third party before appeal becomes final); Rule 43(b)(2) (defendant's consent in certain low level misdemeanor cases to participate in arraignment, plea, trial, and sentencing by video teleconferencing or for procedures top take place in defendant's absence); Rule 58(b)(3)(A) (defendant's consent to trial before a magistrate judge and waiver of trial before district judge); Rule 58(c)(2)(a) (defendant's waiver of venue and consent to disposition of the case another district by guilty or nolo contendere plea).

[7] Indeed, noting the importance of the right to jury, a majority of circuits have endorsed, in *addition* to the written waiver required by rule, some form of colloquy between the defendant and the district judge in order to ensure that the waiver is knowing and voluntary. *See, e.g.*, *United States v. Lilly*, 536 F.3d 190, 197-98 (3d Cir. 2008) (joining and listing authority from First, Second, Fourth, Sixth, Seventh, Ninth, Tenth, and D.C. Circuits).

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that the defendant's jury waiver was knowing and intelligent. By providing a mechanism to affirm convictions and sentences despite occasional violations of the requirement of a written waiver, the harmless error rule provides beneficial flexibility, reducing the pressure that might otherwise exist to modify the Rule itself.

B. Rule 6

Finally, the Committee received a request to consider several amendments to Rule 6, which governs grand jury procedures. The suggestion requested consideration of four aspects of grand jury procedure: providing for direct citizen submissions to the grand jury, providing certain instructions to the grand jury, modifying the requirements of grand jury secrecy, and providing for grand jury presentments. The suggestion did not identify any particular cases or developments that might justify these changes and did not include any supporting materials. Additionally, one aspect of the suggestion (grand jury instructions) is not covered by the Rules of Criminal Procedure.

The Committee voted to take no further action on this suggestion.

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APPENDIX
CRIMINAL RULES COMMITTEE REPORT TO STANDING COMMITTEE
MAY 2015

* * * * *

A. CM/ECF Proposals Regarding Electronic Filing

1. Discussion at the spring meeting

At the time of the Criminal Rules meeting, a proposed amendment to the Civil Rules would have mandated electronic filing, making no exception for pro se parties or inmates, but allowing exemptions for good cause or by local rule. The reporters for the Bankruptcy and Appellate Committees were also preparing parallel amendments. The proposed Civil amendment was of particular concern to the Advisory Committee on Criminal Rules because Criminal Rule 49 now incorporates the Civil Rules governing service and filing. Rule 49(b) provides that "Service must be made in the manner provided for a civil action," and Rule 49(d) states "A paper must be filed in a manner provided for in a civil action." Accordingly, any changes in the Civil Rules regarding service and filing would be incorporated by reference into the Criminal Rules. Also, the Advisory Committee on Criminal Rules has traditionally taken responsibility for amending the Rules Governing 2254 cases and 2255 Cases, and these rules also incorporate Civil Rules.

Committee members expressed very strong reservations about requiring pro se litigants, and especially prisoners, to file electronically unless they could show individual good cause not to do so, or the local district had exempted them from the national requirement.

The Committee's Clerk of Court liaison explained the development of the CM/ECF system, the current mechanisms for receiving pro se filings, and his concerns about a rule that would mandate e-filing without exempting pro se or inmate filers. The liaison explained various features of CM/ECF that work well for attorney users, but could cause significant problems with pro se filers, as well as several issues that may arise if CM/ECF filing were to be extended to those in custody or to pro se criminal defendants.

Some of the concerns raised apply to filings by pro se litigants regardless of whether they were accused of crime or in custody, such as lack of training or resources for training for pro se filers, concerns about ability or willingness of pro se litigants to obtain or comply with training, and increased burden on clerk staff to answer questions of pro se filers, particularly those who, unlike attorneys, are not routine filers. One of the most striking points our liaison made was that a person who has credentials to file in one case may, without limitation, file in other cases even those in which he is not a litigant. This feature of the system may pose much greater problems in the case of pro se filers who have not had legal training and are not bound by rules of professional responsibility.

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Other issues raised by our liaison and other members were specific to the criminal/custody contexts. These concerns included the lack of email accounts for those in custody, as well as inability to send notice of electronic filing by email. Many federal criminal defendants, and all state habeas petitioners, are housed in state jails and prisons unlikely to give prisoners access to the means to e-file, or to receive electronic confirmations. Additionally, prisoners often move from facility to facility, and in and out of custody.

Committee members from various districts stated that the majority of pro se filers in their districts would not have the ability to file electronically. There is a constitutional obligation to provide court access to prisoners and those accused of crime, and members expressed very serious concerns about applying to pro se criminal defendants and pro se litigants in custody a presumptive e-filing rule that would condition their ability to file in paper upon a showing by the defendant or prisoner that there is good cause to allow paper filing, or upon the prior adoption of a local rule permitting or requiring pro se defendants and prisoners to paper file. Because of constitutionality concerns, members anticipated that most districts would eventually adopt local rules exempting criminal defendants and pro se litigants in custody from the requirement to file electronically, but they were not in favor of a national rule that would require nearly every district to undertake local rulemaking to opt out.

Because any change to the e-filing provisions in the Civil Rules would impact criminal cases, habeas cases filed by state prisoners, and Section 2255 applications by federal prisoners, the Advisory Committee voted unanimously to direct the reporters and chair to share the concerns raised at the meeting with the other reporters, and to request that the Civil Rules Committee consider adding a specific exception for pro se filers to the text of its proposed amendment.

The Advisory Committee recognized that local rules could be adjusted to exempt pro se defendants and plaintiffs in habeas and Section 2255 cases. But there was a strong consensus among the members of the Advisory Committee that the proposed national rule should not be adopted if it will require a revision of the local rules in the vast majority of districts. The Committee members felt that any change in the national rule should carve out pro se filers in the criminal, habeas, and Section 2255 contexts. Although members recognized that a carve out for pro se filers has already been discussed and rejected by those working on the Civil Rules, they favored further consideration of a carve out given the concerns listed above.

Members also expressed support for consideration of revising the Criminal Rules to incorporate independent provisions on filing and service, rather than incorporating the Civil Rules. As demonstrated in the discussion of the issues concerning mandatory electronic filing, the considerations in criminal cases may vary significantly from those in civil cases. This project should also include the Rules Governing 2254 and 2255 cases, for which the Advisory Committee has responsibility.

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ADVISORY COMMITTEE ON CRIMINAL RULES
DRAFT MINUTES
September 28, 2015, Seattle, Washington

I. Attendance and Preliminary Matters

The Criminal Rules Advisory Committee ("Committee") met in the Federal Courthouse in Seattle, Washington, on September 28, 2015. The following persons were in attendance:

Judge Donald W. Molloy, Chair
Carol A. Brook, Esq.
Judge James C. Dever III
Judge Morrison C. England, Jr.
Judge Gary Feinerman
James N. Hatten, Esq.
Chief Justice David E. Gilbertson
Judge Raymond M. Kethledge
Judge Terence Peter Kemp
Professor Orin S. Kerr (by telephone, for morning session)
Judge David M. Lawson
John S. Siffert, Esq.
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Reporter
Judge Jeffrey S. Sutton, Standing Committee Chair
Judge Amy J. St. Eve, Standing Committee Liaison
Judge Reena Raggi, Outgoing Advisory Committee Chair
Judge Richard C. Tallman, Former Advisory Committee Chair

The following persons were present to support the Committee:
Rebecca Womeldorf, Esq.
Laural L. Hooper, Esq.
Julie Wilson, Esq. (by telephone)

II. CHAIR'S REMARKS AND OPENING BUSINESS

A. Chair's Remarks

Judge Molloy thanked Judge Richard Tallman for welcoming the Committee in Seattle and attending. He acknowledged the Committee's outgoing members: Judges David Lawson, Morrison England, and Timothy Rice for their years of dedicated service and noted they will be deeply missed. He expressed special gratitude to Judge Raggi, the Committee's outgoing Chair, for her remarkable leadership.

Judge Raggi expressed her respect and affection for the members of the Committee and praised the Committee for its collaborative, thoughtful, and determined work with some very difficult issues. She noted the importance of the Committee's decisions declining to change rules

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as well as its work in crafting changes. Judge Lawson stated that his service with the Committee has been a privilege, and he was grateful for the opportunity to work with great minds so motivated to get to the right place. Judge England echoed these sentiments and spoke with special admiration for the work of the Committee, its Reporters, and Judge Raggi on the multi-year effort to amend Rule 12.

Judges Sutton and Tallman spoke of their high regard for the work of Judge Raggi and the Committee's talented members to reach common ground and creative solutions. Professor Beale followed with particular thanks to Judges Raggi, Lawson, England, and Rice for their energy, humor, and skill, and all of the effort they put in "behind the scenes" chairing the Committee or its Subcommittees.

B. Review and Approval of Minutes of March 2015 Meeting

Professor Beale brought to the Committee's attention that the draft minutes of the March 2015 meeting include Item F, p. 38, which had been left out of the version of the draft minutes provided earlier to the Standing Committee. A motion to approve the minutes having been moved and seconded:

The Committee unanimously approved the March 2015 meeting minutes by voice vote.

C. Status of Pending Amendments.

Ms. Womeldorf reported on the status of the Rules amendments. The amendments to Rules 4 and 41 went to the Judicial Conference on the consent calendar and were approved. Judge Sutton commented on the process, indicated that the proposed amendments would advance to the Supreme Court in time for review by December, and thanked the Committee for its work.

III. Criminal Rules Actions

A. Amendments to Rule 49

Judge Lawson, Chair of the Rule 49 Subcommittee, presented the Subcommittee's work on Rule 49. Rule 49 presently mandates that papers must be filed and served "in the manner provided for a civil action." As the Reporter's Memorandum explained, the Committee had decided at its March 2015 meeting to ask the Subcommittee to draft a "stand-alone" rule for filing and service in criminal cases, as an alternative to continuing to work with the Civil Rules Committee on a change to Civil Rule 5. The Subcommittee now seeks feedback on that effort.

Judge Lawson first explained the Subcommittee's decision to propose a "delinked" or "stand-alone" criminal rule. He noted that following the March meeting the Civil Rules Committee had agreed to modify Rule 5 to accommodate the Committee's strong concern that the access to paper filing by pro se defendants and filers under Section 2255 must not require a

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showing of good cause or local rule. Nonetheless, the Subcommittee had decided to continue with the effort to draft a stand-alone rule. There are different interests and policies at stake in civil and criminal litigation, which involve heightened due process concerns, and the Subcommittee thought it would be desirable to do a comprehensive review and decide affirmatively what the Criminal Rules should include, rather than having to react to a series of future changes in the Civil Rules.

Professor Beale added that one advantage of having everything in the Criminal Rules is that criminal practitioners won't have to toggle back and forth between two rule books. Also, because parts of the civil rule may not apply in criminal cases, a stand-alone rule would allow the Committee to ensure that the criminal rule governing filing and service is tailored to fit criminal cases. On the other hand, there have been some suggestions that a short, targeted amendment to Rule 49 would be better than rewriting this whole rule, and the Subcommittee wanted to hear from Committee members on whether they agreed that the reasons for a more comprehensive stand-alone revision are sufficiently compelling.

Judge Lawson queried whether there would negative repercussions if the Committee pursued a stand-alone rule after those drafting the proposed civil revision had agreed to accommodate the Criminal Rules Committee's concern. Professor Beale stated her understanding that the Civil Rules Committee will not be offended if we go in this direction. To the contrary, the Reporters from the Civil Committee had expressed support for the Subcommittee's approach, which would free them from the necessity to compromise, and permit them to return to what they saw as the optimal Civil Rules proposal. Professor King added that the other rules committees are watching some of the changes we are considering and may find some aspects of those changes attractive for their own rules.

Several committee members commented favorably on the decision to pursue a stand-alone rule, including Mr.Wroblewski, who noted the Department's support of the approach, and two others who noted that they had been initially skeptical of delinking or tinkering with things that should be left alone, but had been persuaded by the reasons stated by Judge Lawson and in the Reporters' Memo. One member noted that although those working on the Civil Rules came around this time to our way of seeing things, there might be times in the future when they would not do so. Thus for efficiency's sake it is best to take our own path.

Judge Raggi noted the benefits of uniformity across the rules, but emphasized that service and filing in criminal cases have constitutional implications different than in civil cases. Weighing the potential that uniform rules well suited to civil cases would be inappropriate for criminal cases against the cost of drafting a comprehensive revision that would be a more complex undertaking, she said had been persuaded the latter option was worth pursuing.

Judge Sutton stated he was glad the Committee was exploring the pros and cons of a separate rule and looked forward to hearing about it at the January Standing Committee Meeting. He noted that the Standing Committee and the Judicial Conference will be looking closely at any

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negative inferences that a new Rule 49 might produce. Adopting Rule 49 language that is different from another set of Rules may not be a problem for the Criminal Rules Committee, but the choice to add, delete, or change language may affect the meaning of the Civil Rules. There are also big picture policy issues affected by the choice to stay linked to the Civil Rules, to delink, or to preserve linking while adding exceptions. He noted that one advantage of retaining the present linkage to the Civil Rules is that the Rules Committees must speak to each other before proposals to amend these rules reach the Standing Committee.

Professor Beale noted that there are other devices for unifying the rules and addressing coordination, such as the cross-committee group studying electronic filing.

Judge Sutton agreed, noting again that there can never be complete delinkage because slight differences in language may carry implications. He said he was looking forward to seeing what the Committee recommends.

Judge Lawson then moved that the Committee vote on whether it supports the Subcommittee's recommendation to compose amendments to Rule 49 to add language that governs filing and service in criminal cases, eliminating the link to the Civil Rules.

One member asked if new rule would continue to refer to the Civil Rules at all so that future dialogue between committees would be compelled. Judge Lawson replied that the Subcommittee's discussion draft did not refer specifically to Civil Rule 5, but was intended to preserve as much uniformity as possible.

Judge Sutton reiterated that because the criminal rule now refers to the civil rule, the committees have to speak with each other about proposed changes. If there was an independent rule, then the committees would no longer be required to speak to each other unless the Conference or the Court or the Standing Committee required that. He said it would not be that big a deal if the new criminal rule just lifts the exact same language already in the civil rule, because it would be incorporating all of the interpretations of the Rule 5 language that have been made over the past years. The further you get away from that, using different words, leaving out words, the more that is changed, every single one of those changes is going to be a potential complication.

Professor Beale noted that the Criminal Rules contain many provisions that use language that is identical or nearly identical to language in other rules (e.g., the rules governing indicative rulings and time computation), and we already have to be vigilant about those concerns. The Committee Notes to these rules typically explain that there is no intent to change the meaning from prior language or language from another set of rules.

A member agreed that so long as there is a continuing cross pollination between the Committees, concerns about delinkage are not an obstacle.

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Judge Raggi added that at every Standing Committee meeting the reporters from the various committees have a lunch to discuss matters of cross-committee interest. What the Subcommittee has to consider is whether the situation is so different in the criminal as opposed to civil sphere that a different rule is warranted and what differences with civil cases warrant differences in language.

Professor Beale emphasized that the Committee should be careful about changing any of the language from the civil rule provisions unless we have a good reason or it is causing some problem. She noted that the draft of any comprehensive revision of Rule 49 would go back to all of the other Committees. At that point there may be choices by other Committees that allow all of us to make the same changes.

A member stated that the one book approach makes sense and that hopefully the Committees will be encouraged to work out any concerns before they get to the Standing Committee.

Judge Lawson restated his motion for an expression of the sense of the Committee in support of drafting Rule 49 as stand-alone rule governing filing and service in criminal cases, rather than depending upon the Civil Rules governing filing and service. After being seconded,

The Committee the unanimously approved the motion, expressing its sense that a stand-alone Rule 49 be pursued.

Judge Lawson then proceeded to some of the issues raised by the Subcommittee's discussion draft.

First, he sought feedback from the Committee on the Subcommittee's recommendation that the Committee not change Rule 49(a)'s description of what must be served (lines 3-5 of the discussion draft) because the existing language had caused no confusion or difficulty.

Discussion focused initially on whether 49(a) addressed presentence reports/probation reports, which are filed electronically, and pretrial service or probation reports that prompt a revocation. Judge Lawson responded that the Subcommittee had not considered these reports, because it was focusing on documents that propel the lawsuit, not pretrial release reports handled at first appearance, or probation reports covered by Rule 32. In response, a member stated that because these filings trigger hearings, it is important to get the rules for service right.

Judge Lawson noted that Rule 49 covers the conduct of the parties, and these documents are different, generated by the Court, or an officer who works for the Court. Professor Beale pointed out that under existing Rule 49, there appears to be no problems associated with filing and serving these reports.

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Another member noted that Rule 32.1 governs these reports, and that any internal recommendation of the probation officer is not within the rubric of Rule 49. A member observed that Rule 32.1 does not cover pretrial services.

Mr. Wroblewski added that in many district those types of documents prompting revocation or modification are not served on all on the parties, just provided to the judge. The government may or may not be involved.

A member noted that districts handle these very differently, and that the Committee would need to know more about what the different districts do before we come up with a top-down rule governing such reports.

Professors King and Beale suggested that the Committee could revisit this when discussing the Subcommittee's proposed approach to filings and service by non-parties.

Judge Lawson noted that Rule 49(a) speaks to service on parties and suggested caution about extending the rule to documents that have often not been served on the parties.

Judge Molloy asked for objections to the Subcommittee's decision to leave the language in (a)(1) unchanged, noting that continued voting on sense of the Committee will help direct the activities of the Subcommittee. ***Raising no objections to the suggested approach to (a)(1), the Committee indicated its approval of that approach.***

Judge Lawson then presented the Subcommittee's suggestion that the Committee preserve the existing language in Rule 49(a)(2), lines 7-9 of the discussion draft, regarding serving an attorney when the party is represented. A member asked why the language in Rule 49 differed from that in Civil Rule 5. Professor Beale suggested that it may have been changed during restyling, and clarified that the Subcommittee's discussion draft retains the existing language of criminal rule even though it is different than civil language. To change the criminal language would have its own set of negative implications.

Hearing no objection to retaining the language in 49(a)(2), Judge Molloy asked Judge Lawson to continue.

Judge Lawson then turned to lines 11-13 of the discussion draft and the description of how service occurs through electronic filing. He noted that the proposed language saying that the party sends it through the court's electronic "transmission system" is misleading. The Court does not transmit the paper, instead the court system generates an electronic notification of filing, then the parties log on to access the paper. He wanted to know if the Committee had concerns about revising the language to read : "A party represented by an attorney may serve a paper on a registered user by filing it with the court's electronic case filing system . . ." That language best reflects what actually happens.

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Professor Beale clarified that the language about 'transmission" comes from the proposed civil revision, and if the Civil Rules Committee ultimately agrees that this language is better, it may decide to change its proposal to conform to our suggested change.

After discussion clarifying that the term "registered user" includes pro hac vice and expressions of concern that the rules take into account the large proportion of filers who are not using ECF, Judge Lawson queried whether members thought the Rule should address the idea that some things filed need not be served, such as documents filed under seal. Professor Beale suggested that would not be necessary. The Rule does not say what must be served, it says how to serve. She noted that the Reporters would take new language back to the Reporters for the Civil Rules Committee so they can consider it as well.

The vote on the sense of committee was unanimously in favor of the suggested language for lines 11 through 13.

Judge Lawson next turned to the Subcommittee's suggestions for lines 14 through 16 of the discussion draft and the question of whether consent to other forms of electronic service must be in writing.

Professor Beale clarified that the question about whether consent to being served by email must be in writing was raised by the language proposed as part of the revision of the Civil Rule.

A member asked whether an email itself would constitute a writing. Professor King pointed out that the "in writing" language now appears in Civil Rule 5, and that one advantage of keeping it in is that whatever law there is about that language would carry over to Rule 49.

Professor Beale noted that another issue this provision raises is the bigger question whether it is a good idea to list other acceptable forms of electronic service, i.e., service by fax or email.

Mr. Wroblewski reported that he looked into whether the government ever consents to email service by pro se litigants. He explained that this never comes up. When a pro se person files a document, the clerk files it using ECF, and the government receives an electronic notice. So there is no need to consent to any other form of service.

Another member agreed, noting she could not remember ever being served by email by anybody. However, a third member noted that he is regularly served by email in criminal cases, with subpoenas, other motions, adjournments, and letters to the court. He stated these documents are often filed with the court, but there are things that the government serves but does not file, such as discovery. If there is a dispute whether something was delivered, there is a notice.

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Two members agreed that it was a good idea to have consent in writing to fax or email, particularly if you are not a registered user, because otherwise there will be disagreements about whether the person ever consented.

When asked about the meaning of “person” Judge Lawson stated that it should be “person to be served.”

Another member expressed support for keeping the writing requirement, but noted the difficulty of getting consent from people in prison, and skepticism that prisoners could be served by any means other than mail.

A different member liked the "in writing" requirement, too, but noted that as drafted, the consent requirement did not address pro se people. Didn’t the Subcommittee want their consent “in writing” too?

Professor King responded that there is a later provision in the discussion draft for written consent to delivery by other means and that the Subcommittee’s choice to limit other electronic means (email and fax) only to represented parties was deliberate choice. Even if a prisoner consents to such service one day, he may not be able to receive that email or fax if moved between institutions, or if the computer at the facility’s library is down, or the mailbox is full, or other problems. Professor Beale added that the Subcommittee thought these access problems were so significant that permitting this kind of service would be a bad idea. She urged the Committee to consider that policy question.

A member asked why the Rule did not address service on other people other than parties. Professor Beale responded that Rule 49 presently just deals with service on parties, and that even proposed (d) in the discussion draft for filing and service by nonparties doesn’t deal with service on nonparties, and that the person language seems to come from the Civil Rule draft, so that may have to be changed to “party.”

Professor King noted that the word “person” is in Civil Rule 5, and Judge Raggi suggested that the word “person” must refer to the lawyer, so if “party” were substituted, it would have to include the lawyer.

When asked to vote on whether its sense was that the Subcommittee should add person "to be served" and to retain the requirement that consent be "in writing," the Committee unanimously agreed that it was.

Judge Lawson proceeded to line 15 of the discussion draft, indicating that service is not effective when the serving party did not reach the person to be served. A member raised a question about the meaning of this when service is by email (with consent). Professor King stated that this language was from the latest draft for revising the Civil Rule, which was lifted

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from current Civil Rule 5, so that any uncertainty about the meaning is already raised by existing Rule 5.

Professor Beale noted that the policy question is whether to have this safeguard for the electronic filing/service system, in addition to the use of email, which could bounce back. If the Committee wants to keep this safeguard, then we can think about how to say it.

After members discussed when various sorts of service should be considered effective, discussion turned to whether email service by consent was an option that should be preserved. A member said he valued being served by email, because it provides notice to a sender if the email is rejected. That makes it better than ECF.

Mr. Hatten added that if there is a bounce back from ECF, there is a staff member in his office that would call the person and let them know. Other members agreed that if there is a bounce back on ECF, the Court knows that.

Judge Lawson commented that the other means are a good alternative and are not mandatory.

A member suggested the Subcommittee consider inserting language that indicates parties can email papers that don't have to be filed.

Judge Sutton urged the Committee to focus on the conceptual difference for the criminal process and leave the details for later.

Professor Beale offered that it is very helpful for the Subcommittee and the reporters to hear from the Committee members what procedures they follow and what their experiences are, and noted that this was actually the first time the Committee has had the chance to discuss these particular issues. That information is needed in order to hammer out the language in lines 11 through 18 of the discussion draft, which was drawn from the inter-committee proposal for amending the Civil Rule.

Judge Lawson summed up what he thought the sense of the Committee was on the conceptual ideas for 49(a)(3) so that the Subcommittee could work on the language: (1) that a represented party (or a pro se party with permission) may achieve service on a registered user by filing in ECF; (2) a represented party may achieve service on represented or unrepresented persons by other electronic means (e-mail) only with consent; and (3) if, using ECF or email, the filing or notice did not reach the intended recipient, then with that actual knowledge another attempt has to be made.

Judge Molloy asked for any disagreement with these ideas conceptually. Judge Lawson confirmed a member's understanding that ECF use by or service on unrepresented parties should require a court order. Judge Molloy noted that the Committee's input will help the Subcommittee

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continue its work, and he stated his intention to add two more members to the Subcommittee to replace members whose terms of service had ended..

After asking for and receiving no objections to Judge Lawson's summary of the sense of the Committee regarding (a)(3) of the discussion draft, Judge Molloy suggested the Committee move on to the next section of the discussion draft, addressing whether there are conceptual issues other means of service.

Judge Lawson turned to lines 19 through 32 of the discussion draft, addressing traditional service techniques. He noted that the Subcommittee decided to flip the order of the civil rule, putting ECF before traditional means, because e-service is now the dominant means of service. The description of other means in the draft attempts to replicate language of the civil rule. He asked if the Committee agreed these methods should be retained. Judge Lawson stated the Subcommittee requested serious consideration of deleting (d), regarding leaving the paper at a person's office or home. Another option would be to look at whether (e) would provide a sufficient catch all.

Professor Beale stated that one reason for retention was to prevent negative inferences from changes or deletions. Professor King noted there are dozens of cases interpreting these provisions and that changing or dropping this language would mean dropping reliance on that case law as well.

Discussion also addressed the advantages of restricting (3) to ECF only, and moving the "other electronic means" language to (4), along with the restriction that it is not effective if the sender learns it did not reach the person to be served.

Judge Raggi questioned whether giving a document to a process server or putting in a FedEx box could ever be enough for service in a criminal case. Doesn't it have to reach the lawyer or the defendant? The Reporters responded that the Rule could specify an authorized means, but if in a particular case no notice is actually received, the defendant could raise a due process claim. Similarly, the proposed amendments to Rule 4 governing service on corporations outside the U.S. are supplemented by constitutional requirements. Judge Raggi said that may suffice.

She then asked about the purpose of specifying when the service is complete. Is this related to deadlines for service? She suggested that the Subcommittee ask the Civil Rules Committee what this requirement achieves and determine whether there is an analogy for criminal proceedings.

Judge Molloy solicited the Committee members' agreement that their sense was that the Subcommittee should retain the civil rule language describing other means of service on lines 19 to 32 of the discussion draft.

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Judge Molloy then asked Judge Lawson to turn to section (b) addressing filing. The discussion turned to documents that are served but not filed. Mention was made of alibi notices under Rule 12.1, which some members noted are served but not filed, as well as documents such as coconspirator lists and discovery, which are provided to the other side but not filed. Some are not filed because it would be highly prejudicial if they were public.

Judge Lawson noted that in some districts alibi or insanity notices are docketed, but the Rule 12.1 does not require filing of such notices, yet Rule 49(b)(1) in combination with (a)(1) suggests they must be. Professor Beale commented that the existing language or Rule 49 already creates this tension, Rule 49(a) stating that notices need to be served on parties, but that there doesn't seem to be any problem with the current practice. Professor Beale suggested that one approach would be to add specific exceptions to filing to the Rule.

Judge Raggi warned that it is one thing to leave the language as is because even if parties are not always abiding by the present rule, it is not creating a problem. It is another thing to change the rule because certain districts are not abiding. That would require fuller discussion.

Members discussed why discovery was not filed. Rule 16 mandates disclosure, but does not require filing or service. Also, judges don't want it cluttering up the docket. Members questioned why alibi notices would not be filed.

Professor King asked if there were other documents, other than discovery and notices under Rules 12.1, 12.2, and 12.3 that that are served but not filed. Was there anything else the Subcommittee should think about exempting from Rule 49? Each member noted his or her experience, which varied among districts and from judge to judge. Most stated discovery was not filed unless it became the subject of a motion, nor were notices of alibi. Mr. Wroblewski stated that ex parte filings and filings under seal are already covered by Rule 49.

Both Judges Raggi and Tallman expressed their views that generally all documents in criminal cases should be filed, and noted the costs in transparency and for the appellate process when they are not filed or are sealed.

The Reporters indicated that the discussion would be very helpful for the Subcommittee.

Following the lunch break, Judge Lawson drew the Committee's attention to the material in (b)(2)(A) of the discussion draft, concerning the signature block (lines 41-47), as well as the phrase designating the attorney's user name and password as the attorney's signature. He explained that the information in the signature block is needed by readers of a paper in order to identify who signed it, because the user name and password does not appear on the filing. If a paper is filed outside ECF, he noted, you can look at the signature. In the electronic filing world, there may be no signature.

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Professor Beale noted that the style consultant and the other reporters were opposed to the detailed listing of information.

Members asked why it is necessary now to spell out this level of detail if the civil rule didn't have it before, whether the absence of detail has created any problems, and whether there is a reason to require this information in criminal but not civil cases. Judge Lawson explained that Civil Rule 11 requires that (1) every paper must be signed by at least one attorney of record or by a party personally if the party is unrepresented, and (2) the paper must state the signer's address, e-mail address, and telephone number. The criminal rules do not have a counterpart to Civil Rule 11. Presently, by incorporating service and filing "in the manner" of the civil rules, current Rule 49 arguably incorporates Civil Rule 11. A new stand-alone rule with no cross reference to the Civil Rules would not. Also, he argued, it is a bad idea to allow people to file documents that have nothing on the last page to show who filed, and there should be certain features of identity that are mandatory for documents filed in our system.

Professor Beale noted that, as drafted, the proposed rule would not mandate this information be included on paper filings, only on papers filed electronically.

Members noted several reasons not to include these details in Rule 49. Some preferred that details of this nature be left to local rules. There was also a suggestion that these details do not belong in a rule about the manner of filing, and it would be more appropriate to adopt a new criminal rule about signing, something like Civil Rule 11.

Judge Raggi stated that the Civil Rules Committee also ought to be concerned about substituting electronic login and passwords for signatures since any registered user can file in any case.

Professor Beale noted that the past concern in the Bankruptcy Rules Committee about requiring wet signatures was different; they had focused on the need to establish the author of fraudulent filings.

When asked if members had experienced any difficulty with missing signatures or information in criminal cases in the past, the only member who recalled a problem said it had been in a civil case.

Judge Lawson noted that the Subcommittee could look at the language proposed for the civil rule, which has a lesser level of detail.

Judge Molloy asked for a voice vote on whether the Subcommittee should retain the material on lines 41-47, there were more nays then yays. ***The sense of the Committee was to remove the detailed language concerning what must be included in the signature block.***

125-011576

Moving to non-electronic filing, lines 50-55 of the discussion draft, Judge Lawson explained that it would be useful if the Committee expressed its view on the desirability of retaining the option of filing by handing a paper to the judge. No objections were raised. ***The sense of the Committee was that allowing delivery to the judge should be retained***.

Professor Beale noted that there had been a suggestion at an earlier meeting that the provisions on nonelectronic filing might include a reference to the filing of an object, such as a disk or a bloody shirt. Discussion of whether something like "paper or item" should be used throughout the rule ended with a consensus. ***Objects would normally be filed along with or as exhibits to documents, and the Subcommittee should strike the word "item" in brackets.***

Judge Lawson presented the two alternative options for describing the presumption of ECF filing by represented parties. Option 1 was shorter. Option 2 was the language proposed by the latest consensus draft going forward in the Civil Rules Committee, and was preferred by the reporters and the style consultant. Professor Beale also noted that Option 1 does not emphasize the point that paper filings must be allowed for other reasons or local rule quite as strongly as Option 2. ***Judge Molloy noted that the discussion indicated that the Committee preferred Option 2.***

Judge Lawson explained that the language limiting use of ECF by unrepresented parties (lines 63-65 of the discussion draft) emphasized the strong sense from the spring Committee meeting that the Committee strongly opposes any rule that would *require* pro se defendants and 2255 filers to use electronic filing unless they can show good cause or the district has a local rule. Committee discussion of this section focused on concerns about the fragility and unreliability of the electronic system, and whether there is any guarantee that electronic files would be available and readable decades from now. Members noted outages in ECF and the burdens they had caused. Judge Raggi preferred there be at least one paper copy filed until there was greater assurance of permanent accessibility. Judge Sutton suggested that it might be useful to have Judge Thomas Hardiman, who chairs the Committee on Technology, come and talk to the Criminal Rules or the Standing Committee about these concerns.

On the section (lines 66-68 of the discussion draft) that prohibits a clerk from refusing a filing as lacking the proper form, Judge Lawson noted that this language was drawn from Civil Rule 5. The Civil Rule reflects a policy determination that a judge, rather than the clerk of court, should make the decision whether to reject a filing. Professor Beale added that the Subcommittee had considered whether this aspect of Rule 5 was part of "the manner" of filing provided by the Civil Rule—and thus currently incorporated by Criminal Rule 49(d)—and concluded that it probably was. Discussion of this provision noted that the language is needed because of Section 2255 cases. Mr. Hatten noted that, as a clerk, he appreciated not having this responsibility. ***The sense of the Committee was to include in Rule 49 the language forbidding the clerk from rejecting filings because of form.***

125-011577

The discussion advanced to subsection (c) concerning notice of an order or judgment provided by the clerk of court. Professor Beale explained that what the clerk must do here wouldn't normally differ between civil and criminal cases. However, to complete the severance from the civil rules on filing and service, Rule 49 might incorporate the relevant provisions from Civil Rule 77. ***The sense of the Committee was that the Subcommittee should consider incorporating the language of Rule 77 in the proposed Rule 49.***

Judge Lawson explained that the tentative provision for nonparties who file and serve, on lines 82-83 of the discussion draft, was there to fill the absence of any guidance for nonparty filers. The Subcommittee's first take was that on those uncommon occasions when nonparties file in a criminal case they should follow the same rules as parties. If they are represented, they should file electronically; if not, they should file by delivering a paper to the clerk. Professor Beale explained that the Subcommittee wanted to make sure that any new language about nonparty filing wasn't granting any new rights to file, which is why it limited this to nonparties permitted or required by law to file. ***The Committee members had no objection to this approach to nonparty filing and serving.***

Professor Beale drew the Committee's attention to one last issue on lines 35-37 of the discussion draft: whether to include the "within a reasonable time after service" language. Civil Rule 5 says anything required to be served must be filed within a reasonable time after service. The Subcommittee thought the Criminal Rule could drop that phrase. Because late filing had not been a problem in criminal cases, this provision was not necessary. But the Reporters from the other committees were quite concerned about leaving this out, and Committee input would be useful.

Members noted points cutting both ways. Including the language would promote uniformity and avoid negative inferences. But no one could ever remember a filing too late after service, which seemed to be a problem that predated ECF. Now when a pro se defendant or prisoner files something on paper, notice is provided automatically through the ECF system when the clerk files it electronically. Service to unrepresented persons is accomplished by mail. ***The Committee agreed that the Subcommittee should keep the "reasonable time" language in brackets and continue to consider it.***

Professor King explained that there may be other specific omissions from the civil rule that may need review by the full Committee. The Subcommittee will go back through Civil Rule 5 and affirm that there is a good reason for each deletion and change.

Judge Molloy thanked Judge Lawson for his hard work on the Rule, and thanked Judge Feinerman for taking over Judge Lawson's duties as Chair of the Subcommittee.

125-011578

B. Rule 12.4(a)(2)

Professor Beale introduced the proposal to amend Rule 12.4, explaining that the request came from the Justice Department. The rule of judicial conduct regarding disclosure of interest in organizational victims that was the basis for the Rule had changed, and literal compliance with the current rule was difficult for prosecutors in certain cases.

Mr. Wroblewski stated that the Department decided to ask the Committee to consider an amendment when the Appellate Rules Committee began looking into a rule about disclosure paralleling Rule 12.4(a)(2). Although existing Criminal Rule 12.4(a)(2) requires disclosure of *all* corporate victims, the Code of Judicial Conduct has been amended to require recusal only if there will be a substantial impact. The hope is that both committees could adopt the same standard.

Professor Beale stated that the Department has explained that there are cases in which there are scores or hundreds of corporate victims with minor damages, it is not feasible to provide notice about each of these entities, and it would be desirable to limit mandatory disclosure to cases in which there was a substantial impact.

Judge Sutton agreed that the Criminal and Appellate Rules need to be coordinated, but noted that not all judges take the position that recusal is needed only when it is required. Some may believe recusal to be appropriate even if not required. Mr. Wroblewski responded that the Department hopes the Committees will be able to find an acceptable middle ground between the extremes of disclosing every single entity that has been a victim when the damages are trivial and disclosing only when absolutely required. The language "may be substantial" is one example, and there may be other options.

Judge Molloy appointed a new Rule 12.4 Subcommittee to consider the issue and come up with a recommendation for the Committee's April Meeting. Judge Kethledge will serve as Chair, with Mr. Wroblewski, Mr. Hatten, Mr. Siffert, Mr. Fillip, and Judge Hood serving as members.

B. Rule 15(d)

Professor Beale introduced the second proposal by the Department, to address an inconsistency between text of Rule 15(d) and its Committee Note. This inconsistency was identified in 2004, but it could not be fixed because there is no procedure to change the Committee Note without changing the text. Now the language of the Committee Note is starting to cause some problems for the Department. That Note states that the Department must pay for certain deposition expenses, but the text of the rule does not. In addition, other statutory provisions about witness fees may bear on this, as well as Rule 17(b).

125-011579

Mr. Wroblewski explained that in a handful cases a defendant wants to depose numerous witnesses overseas. If the government were required to pay all of those expenses it, the cost would threaten the prosecution. The question of who is going to pay can be debated, but the rule and text say different things. It doesn't come up very often, but when it does it is very difficult. In one case the defendant asked to depose 20 witnesses in Bosnia. The Criminal Division didn't have the funds, and the potential imposition of those costs threatened its ability to bring the prosecution. In some cases now there is negotiation about how much each side pays. The Department does not want to prevent defense depositions, but it wants clear guidance about who is responsible for what.

A member noted that the government is arguing that it shouldn't have to pay for depositions it did not request, and the member is not sure that should be the rule. Something should be done to fix Rule 15 and clarify the obligations. Also there is some uncertainty about is the interaction of Rule 15 with other statutes and rules, including the Criminal Justice Act, Rule 17 (the subpoena rule), and 18 U.S.C. § 4285 (the marshal's transportation rule).

Discussion noted the origin of the inconsistency seemed to be a mischaracterization of the Rule in the Note during restyling. Members discussed the pros and cons of amending a rule because of an inconsistency in the note. Professor Beale observed that once the Committee decides the correct substantive position about who pays, it can then decide how to say that and write a note that is consistent.

Judge Sutton suggested that if the Committee decides to take no action because it has no authority to amend the Committee Note without a rule text change, the minutes can reflect that conclusion. The Note is not the Rule, the Court does not approve the Committee Note, and there is no procedure for changing problematic Committee Notes.

One member voiced opposition to gearing up this process if the Rule is right and the Note is wrong, but Professor Beale pointed out that not everyone at the table agrees that the text of the Rule is right. Plus the Rule does not speak to what happens when the request is from a codefendant. A subcommittee may be useful to review these issues and determine whether the text of the rule is still correct or should be modified. It might also be something that could be addressed in the Benchbook.

Another member questioned whether it was part of this Committee's job to determine who bears the burden of deposition costs. Judge Sutton noted that although generally cost-shifting is governed by statute, this is not the only place in the rules where such issues arise. Judge Raggi questioned whether there might be some concern raised if the Committee were to say that the costs of a defendant's requested deposition must come out of the Department's budget instead of the CJA. Judge Tallman noted that he understood this Committee has no budgetary authority or right to recommend spending. Other Judicial Conference Committees have that responsibility.

125-011580

Judge Molloy asked if a subcommittee could add anything to this discussion.

Mr. Wroblewski answered yes, noting that it would not be requiring the Committee to take up a new issue, the Rule addresses this now. The Subcommittee might recommend that no action be taken, but just a few conversations exploring it would not hurt. A member expressed doubt that any rule a subcommittee would come up with would be better for the defense than the existing text of the Rule. Judge Raggi stated that if the Subcommittee and the Committee decide that the text is right and the Note is wrong, that could go into the Committee's report to the Standing Committee, creating a public record that this has been considered.

Judge Molloy appointed a new Rule 15 Subcommittee, with Judge Dever as chair, and Judge Kemp, Justice Gilbertson, Ms. Brook, and Mr. Wroblewski, as members.

C. Rule 6 (15-CR-B)

Professor Beale introduced a proposal from a citizen who urged a series of reforms to increase the independence of the grand jury, including direct citizen submissions, new instructions to the grand jury, changes in grand jury secrecy, and the authority to issue presentments. The suggestion was not accompanied by any supporting materials. Professor Beale explained that although some states have adopted some of these proposals, each would be a change in practice in the federal courts. As to the charge to the grand jury, there is a model charge in the Benchbook, but this would be new territory for the Rules. Grand jury secrecy is carefully regulated by Rule 6. The matter of presentment is not regulated by the Rules, but it would be a change in practice to allow presentment without the signature of the prosecutor.

Judge Molloy asked if anyone had any questions or comments.

A motion to take no further action on the proposal was seconded and passed unanimously.

D. Rule 23 (15-CR-C)

Professor Beale explained that this proposal to amend Rule 23 to drop the requirement that a jury waiver be in writing was one of two proposals submitted by Judge Susan Graber of the Ninth Circuit. Rule 23(a) allows waiver of a jury if the waiver is in writing. Judge Graber asked the Committee to consider eliminating the writing requirement, noting that failure to make the waiver in writing is considered harmless error.

The Reporters' Memorandum on this proposal states that many Rules require something be done in writing. Allowing oral waivers of trial by jury would be more flexible, is a practice followed in many states, and would raise no constitutional concern. However, the writing makes a clear record in case there is a later dispute about the existence of or agreement to a waiver, and suggests the importance of the waiver to the defendant. Other far less important waivers require

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writing. It is also not clear that the writing requirement is posing a problem for litigants or courts, as the harmless error rulings suggest.

Each member commented on the proposal. Without exception, each agreed that the reasons noted in the Reporters' Memo for leaving the writing requirement were compelling. One said that there are only three decisions clients make on their own: jury or bench trial, whether to plead guilty, and whether to testify. All are fundamental and should be in writing.

A motion to take no further action on the proposal was made, seconded, and passed unanimously.

E. Rule 32.1

Judge Molloy introduced this item, which was the second of two suggestions made by Judge Graber. Judge Graber suggested that Rule 32.1 be amended to require that the government be given the opportunity to address the court regarding the sentence to be imposed for a violation of the terms of supervised release. Her suggestion was prompted by a case in which the judge failed to ask the government to speak at a revocation proceeding, and the defendant successfully challenged his sentence on appeal. Professor Beale noted that Judge Graber's letter also raised a second related issue: whether the text of 32.1 ought to prohibit the disclosure of the sentencing recommendation to the defendant. More broadly, it raised the question how much Rule 32.1 should include--everything that Rule 32 includes?

A member focused on the nature of the revocation proceeding. The sentence has already been imposed, and this proceeding is about how the sentence is being executed. The attorney for the government does not ordinarily initiate revocation proceedings. The defendant is brought back for the court to address a problem that arose while the defendant was under the court's supervision. The government is making a courtesy appearance. It doesn't really have a dog in that fight, because the sentence has already been imposed. Requiring the court to allow the government to address it in supervised release revocation proceedings would change the character of the proceeding and recast the role of the government attorney.

Mr. Wroblewski stated that was precisely the litigating position the Department of Justice took in the Ninth Circuit. Around the country there is a lot of experimentation going on about reentry courts, and there are other very different practices concerning supervision. The Department is hoping to evaluate these experiments and identify the best practices. There may not be a full-fledged resentencing or sentencing type process for revocations. The probation officer may recommend a small modification, it is all done in chambers, and that may actually be a very good practice. The Department is not in a position to say that the practice should be much more formal with more process.

One member indicated that she was in complete agreement with the Department, and wanted that point to appear in the minutes.

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Judge Molloy asked members whether they ask the government to offer its views when they do revocations. Members responded yes, although sometimes the government has nothing to say. One member found it unbelievable that a judge would not want to know what the government has to say if the government wants to speak on a supervised release matter.

Judge Raggi stated that there ought to be flexibility for the judge to approve a modification or a minor tweak without involving the government.

Another member suggested that the Ninth Circuit's recent case may be unique, and thus not a sufficient basis for a rules change. Judge Sutton suggested that it might be desirable to hold on to the issue for a year or two and see how the Ninth Circuit decision percolates in the other circuits.

After being made and seconded, a ***motion to retain Judge Graber's proposal on the Committee's study agenda, to be examined later to see if there are further developments that warrant going forward, passed unanimously.***

IV. Status Report on Legislation

Ms. Womeldorf reported on the document in the agenda book from the Department of Justice regarding access of the Inspector General to records over which the Department has control. A Departmental statement of policy that the Inspector General does not get access to grand jury records unless one of the exceptions in Rule 6 applies has led to a series of legislative proposals. There has been no action since the hearing discussed in the document in the Agenda Book.

Mr. Wroblewski explained that there is ongoing discussion about Inspector General access to grand jury records. The Department of Justice Office of Legal Counsel concluded that there are records to which the Inspector General is not entitled to have access, and Congress has held a number of hearings on proposed legislation. Because this might implicate the rules, it has been brought to the Committee's attention.

After brief discussion of why the Inspector General might want access to grand jury materials and the dangers of eroding grand jury secrecy, Ms. Womeldorf indicated she would keep the Committee apprised of developments.

V. Information Items.

Judge Molloy asked Judge St Eve to discuss developments in the Court Administration and Court Management (CACM) Committee. She reported that CACM has been working on a policy involving cooperators, in order to prevent violent attacks of prisoners based on suspicion

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that the prisoner has cooperated with the government. These suspicions have been based in part on docket entries and documents available on PACER. Prisoners are also demanding that other prisoners produce sealed documents to prove they are not cooperating. It is an issue that has been around for many years. Judge Hodges, the Chair of CACM, agreed that it was a good idea to tell the Rules Committee that CACM had taken this up. Since he could not attend the Criminal Rules meeting, he asked Judge St. Eve to inform the Committee. CACM has not decided anything yet, is not sure what it will recommend, or the best way to coordinate going forward on this. Ms. Hooper stated that she understood that the research CACM is using is confidential. Judge St. Eve noted that CACM has traditionally looked at privacy policy and related issues.

A member noted that defenders have been fighting the increasing closure of criminal records, because it makes access to information and defending clients much more difficult. The situation is not as dire as it is suggested in this member's district, and people know who the cooperators are long before the presentence report.

Judge Raggi hoped that CACM had examined the published proceedings of a national conference held on this problem, that she co-chaired, at which everyone with a stake in this had a chance to express views on the problem – not just defense and prosecution, but also the press, researchers, the Bureau of Prisons, and more. The proceedings were published in the Fordham Law Review. The conference revealed many different local policies, all carefully thought out. One problem with these varying practices is that inmates are not aware of the variation. For example, although some districts seal certain documents in all cases, others do not, and inmates may incorrectly assume any inmate whose document was sealed must have been a cooperator. The Rules Committee should be at the table when changes are discussed. That people are being beaten and worse in prison is certainly a Bureau of Prisons problem. It may or may not be a rules problem, but the Criminal Rules Committee should be involved in the discussions.

Mr. Wroblewski stated that the BOP has taken several steps, but the problem goes beyond just the prisons. It also affects people outside of prison.

Judge Tallman said that he understood some courts are barring a defendant's access to his own presentence report so that he cannot be expected to produce his own presentence report in prison. He noted that the Ninth Circuit broadcasts arguments live on the internet, and it is receiving more and more requests to seal those proceedings. But this could be a problem if sealing an individual argument is taken as a signal that the person is a cooperator.

Judge St Eve suggested that CACM is looking to provide a recommendation to the Judicial Conference in March. When Professor Beale observed that the Criminal Rules Committee would have difficulty providing input before then, Judge Sutton inquired what a rules-related response might be. Professor King offered that the Committee might, for example, change access of the defendant to the presentence report in Rule 32 so that the defendant reviewed and returned a hard copy. Or it might amend Rule 11 concerning what is said on the record. There might be changes in the appellate rules concerning what must be filed. Judge

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Sutton stated that the Standing Committee might decide to ask CACM to wait for this Committee's input, depending upon what CACM decides to do.

Judge Molloy noted that the Committee's next meeting was scheduled for April 18 and 19th in Washington D.C., and he urged members to make it a priority to attend. He hopes to find a week in October 2016 that will work for everyone, sufficiently in advance that there would be no reason for Committee members not to attend. With a final thank you to Judges Raggi, Lawson, England, and Rice, the meeting was adjourned.

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TAB 5A

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

JEFFREY S. SUTTON
CHAIR

REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

SANDRA SEGAL IKUTA
BANKRUPTCY RULES

JOHN D. BATES
CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

TO: **Hon. Jeffrey S. Sutton, Chair**
Committee on Rules of Practice and Procedure

FROM: **Hon. Steven M. Colloton, Chair**
Advisory Committee on Appellate Rules

RE: **Report of Advisory Committee on Appellate Rules**

DATE: **December 14, 2015**

I. Introduction

The Advisory Committee on Appellate Rules met on October 29, 2015 in Chicago, Illinois. The Committee approved for publication three sets of proposed amendments. These amendments relate to (1) stays of the issuance of the mandate under Rule 41; (2) the authorization of local rules that would prevent the filing of an amicus brief based on party consent under Rule 29(a) when filing the brief would cause the disqualification of a judge; and (3) the extension of filing and serving a reply brief in appeals and cross appeals from 14 days to 21 days under Rules 31(a)(1) and 28.1(f)(4). The Committee also considered nine additional items and decided to remove three of them from its agenda. Since the October meeting, the Committee has received one additional new item to consider.

Part II of this report discusses the proposals for which the Committee seeks approval for publication. Part III covers the other matters under consideration.

The Committee has scheduled its next meeting for April 5-6, 2015. Detailed information about the Committee's activities can be found in the Reporter's draft of the minutes of the April meeting and in the Committee's study agenda, both of which are attached to this report.

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II. Action Items – for Publication

The Committee seeks approval for publication of three sets of proposed amendments as set forth in the following subsections.

A. Stays of the Issuance of the Mandate: Rule 41

Appellate Rule 41(b) provides that "[t]he court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later," but also provides that "[t]he court may shorten or extend the time." Under Rule 41(d)(1), a timely rehearing petition or stay motion presumptively "stays the mandate until disposition of the petition or motion." A party can seek a stay pending the filing of a certiorari petition; if the court grants such a stay and the party who sought the stay files the certiorari petition, then Rule 41(d)(2)(B) provides that "the stay continues until the Supreme Court's final disposition." Rule 41(d)(2)(D) directs that "[t]he court of appeals must issue the mandate immediately when a copy of the Supreme Court order denying the petition for writ of certiorari is filed."

In light of issues raised in *Ryan v. Schad*, 133 S. Ct. 2548 (2013) (per curiam), and *Bell v. Thompson*, 545 U.S. 794 (2005), the Committee has studied whether Rule 41 should be amended (1) to clarify that a court must enter an order if it wishes to stay the issuance of the mandate; (2) to address the standard for stays of the mandate; and (3) to restructure the Rule to eliminate redundancy. The Committee now seeks approval to publish proposed amendments to accomplish these changes. The proposed amendments are set out in an enclosure to this report.

Before 1998, Rule 41 referred to a court's ability to shorten or enlarge the time for the mandate's issuance "by order." The phrase "by order" was deleted as part of the 1998 restyling of the Rule. Though the change appears to have been intended as merely stylistic, it has caused uncertainty concerning whether a court of appeals can stay its mandate through mere inaction or whether such a stay requires an order. The proposed amendments to Rule 41(b) would specify that the mandate is stayed only "by order." Requiring stays of the mandate to be accomplished by court order will provide notice to litigants and facilitate review of the stay.

The amendments to Rule 41(d) simplify and clarify the current rules pertaining to issuance of a stay pending a petition for a writ of certiorari to the Supreme Court. The deletion of subdivision (d)(1) is intended to streamline the Rule by removing redundant language; no substantive change is intended. Subdivision (d)(4) – i.e., former subdivision (d)(2)(D) – is amended to specify that a mandate stayed pending a petition for certiorari must issue immediately once the court of appeals receives a copy of the Supreme Court's order denying certiorari, unless the court of appeals finds that extraordinary circumstances justify a further stay. In *Schad* and *Bell*, without deciding whether the current version of Rule 41 provides authority for a further stay of the mandate after denial of

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certiorari, the Supreme Court ruled that any such authority could be exercised only in "extraordinary circumstances." *Schad*, 133 S. Ct. at 2551. Because a court of appeals has inherent authority to *recall* a mandate in extraordinary circumstances, *Calderon v. Thompson*, 523 U.S. 538, 550 (1998), the Committee thought there was little point in considering whether to forbid extensions of time altogether. The amendment to subdivision (d)(4) makes explicit that the court may stay the mandate after the denial of certiorari, and also makes explicit that such a stay is permissible only in extraordinary circumstances.

Some have suggested that under the current rule, a court may extend the time after a denial of certiorari *without* extraordinary circumstances under Rule 41(b). The proposed amendment to Rule 41(b) would establish that a court may extend the time only "in extraordinary circumstances" or pending a petition for certiorari under the conditions set forth in Rule 41(d). The "extraordinary circumstances" requirement is based on the strong interest of litigants and the judicial system in achieving finality. The proposed amendment would apply the "extraordinary circumstances" requirement both after a denial of certiorari and when no party petitions for a writ of certiorari, because the strong interests in finality counsel against extensions unless a heightened standard is met.

B. Authorizing Local Rules on the Filing of Amicus Briefs: Rule 29(a)

Federal Rule of Appellate Procedure 29(a) specifies that an amicus curiae may file a brief with leave of the court or without leave of the court "if the brief states that all parties have consented to its filing." A potential concern is that the parties might consent to the filing of a brief by an amicus curiae, and that filing may cause the recusal of one or more judges either on the panel hearing the case or voting on whether to rehear the case en banc. Several Circuits have adopted local rules to address this concern. For example, D.C. Circuit Rule 29(b) states: "Leave to participate as amicus will not be granted and an amicus brief will not be accepted if the participation of amicus would result in the recusal of a member of the panel that has been assigned to the case or a member of the en banc court when participation is sought with respect to a petition for rehearing en banc." The Second, Fifth, and Ninth Circuits have similar local rules.

These local rules appear to be inconsistent with Rule 29(a) because they do not allow the filing of amicus briefs based solely on consent of the parties in all instances. The Committee seeks approval to publish an amendment to authorize local rules limiting the filing of amicus briefs in situations when they would disqualify a judge. The proposed amendment is set out in an enclosure to this report. The Committee believed that the local rules should be authorized because they reasonably conclude that the court's interest in avoiding disqualification of one or more judges on a hearing panel or in a rehearing vote outweighs the interest of a putative *amicus curiae* in filing a brief.

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C. Extension of Time for Filing Reply Briefs: Rules 31(a)(1) and 28.1(f)(4)

Federal Rule of Appellate Procedure Rules 31(a)(1) and 28.1(f)(4) give parties 14 days after service of the appellee's brief to file a reply brief in appeals and cross-appeals. In addition, Rule 26(c) provides that "[w]hen a party may or must act within a specified time after service, 3 days are added after the period would otherwise expire." Accordingly, parties effectively have 17 days to file a reply brief. Pending amendments, however, soon will eliminate the "three-day rule" in Rule 26(c), thus reducing the effective time for filing a reply brief from 17 days to 14 days.

The Committee considered whether Rules 31(a)(1) and 28.1(f)(4) should be amended to extend the period for filing reply briefs in light of the elimination of the three-day rule. The Committee concluded that effectively shortening the period from 17 days to 14 days could adversely affect the preparation of useful reply briefs. Because time periods are best measured in increments of 7 days, the Committee concluded the period should be extended to 21 days. The Committee now seeks approval to publish amendments to Rules 31(a)(1) and 28.1(f)(4) that would accomplish this result.

The Committee did not believe that extending the period for filing a reply brief would delay the completion of appellate litigation. For the 12-month period ending September 30, 2014, the median time from the filing of the appellee's "last brief" to oral argument or submission on the briefs was 3.6 months nationally. The Administrative Office does not specifically measure the time from filing of the "reply brief" to oral argument, perhaps because the reply brief is optional. Given this 3.6-month median time period, however, a four-day increase over the 17 days allowed under the current rules is not likely to have a discernible impact on the scheduling or submission of cases. *See* Administrative Office of the U.S. Courts, Table B-4A ("U.S. Courts of Appeals—Median Time Intervals in Months for Civil and Criminal Appeals Terminated on the Merits, by Circuit, During the 12-Month Period Ending September 30, 2014"). The Committee's clerk representative reported his understanding that the circuits typically set cases for oral argument after receipt of the appellee's brief, and that a modest change in the deadline for a reply brief should not affect this scheduling.

III. Information Items

The Committee is studying a proposal to expand the disclosure requirements in Rules 26.1 and 29(c) so judges can evaluate whether recusal is warranted. Local rules in various circuits impose disclosure requirements that go beyond those found in Rules 26.1 and 29(c), which call for corporate parties and amici curiae to file corporate disclosure statements. At its October 2015 meeting, the Committee discussed six possible amendments to these Rules. The Committee plans to study the matter further, in coordination with other advisory committees and the Committee on Codes of Conduct as warranted.

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The Committee is considering a proposal to address a potential problem involving class action settlement objectors. A member of a class may object to a settlement, file an appeal, and then offer to drop the appeal in exchange for consideration from counsel representing the class. A concern is that such class members might not make their objections in good faith based on genuine objections, but instead might simply be attempting to leverage their ability to delay the settlement in order to extract payment. Because the solution to this problem may involve changes to both the Civil and Appellate Rules, the Committee is coordinating with the Civil Rules Committee on this matter, and the Civil Rules Committee likely will report on this matter as well.

The Committee is studying possible amendments to Federal Rule Civil Procedure 62(a), which concerns bonds that an appellant must post to stay the execution of a judgment during the pendency of an appeal. Although the possible amendments would address a Civil Rule, the matter is of interest to the Appellate Rules Committee because appeal bonds are an appellate issue. The Appellate Rules Committee has conveyed its views to those working on the matter in the Civil Rules Committee, and the Civil Rules Committee likely will report on this matter.

The Committee is considering a recent suggestion that would address several aspects of appeals by litigants proceeding *in forma pauperis*. The issues raised include whether to exclude any part of a social security number in court filings, whether to seal motions to proceed in forma pauperis, and whether to require opposing counsel to make certain types of authorities available to pro se litigants. The Committee is studying the desirability and feasibility of the suggested reforms.

The Committee is considering whether to amend the Appellate Rules to address whether the $500 fee for docketing a case under 28 U.S.C. § 1913 is recoverable as costs in the district court or in the court of appeals. The Committee has been advised that there is a lack of uniformity in practice among the circuits and is seeking additional information from clerks of court about current practices. The Committee will continue to study the matter.

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APPENDIX

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE[1]

Rule 41. Mandate: Contents; Issuance and Effective Date; Stay

(a) Contents. Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

(b) When Issued. The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time by order. The court may extend the time only in extraordinary circumstances or under Rule 41(d).

(c) Effective Date. The mandate is effective when issued.

(d) Staying the Mandate Pending a Petition for Certiorari.

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[1] New material is underlined in red; matter to be omitted is lined through.

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~~(1) **On Petition for Rehearing or Motion.** The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.~~

~~(2) **Pending Petition for Certiorari.**~~

~~(A)~~ (1) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the ~~certiorari~~ petition would present a substantial question and that there is good cause for a stay.

~~(B)~~ (2) The stay must not exceed 90 days, unless the period is extended for good cause or unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay. In that case, the stay continues until the Supreme Court's final disposition.

39 ~~(C)~~ (3) The court may require a bond or other security
40 as a condition to granting or continuing a stay of
41 the mandate.

42 ~~(D)~~ (4) The court of appeals must issue the mandate
43 immediately ~~when~~ on receiving a copy of a
44 Supreme Court order denying the petition ~~for~~
45 ~~writ of certiorari is filed~~, unless extraordinary
46 circumstances exist.

Committee Note

Subdivision (b). Subdivision (b) is revised to clarify that an order is required for a stay of the mandate and to specify the standard for such stays.

Before 1998, the Rule referred to a court's ability to shorten or enlarge the time for the mandate's issuance "by order." The phrase "by order" was deleted as part of the 1998 restyling of the Rule. Though the change appears to have been intended as merely stylistic, it has caused uncertainty concerning whether a court of appeals can stay its mandate through mere inaction or whether such a stay requires an order. There are good reasons to require an affirmative act by the court. Litigants—particularly those not well versed in appellate procedure—may overlook the need to check that the court of appeals has issued its mandate in due course after handing down a decision. And, in *Bell v. Thompson*, 545 U.S. 794, 804 (2005), the lack of notice of a stay was one of the factors that contributed to the Court's holding that staying the mandate was an abuse of discretion. Requiring stays of the mandate to be accomplished by court order will provide notice to litigants and can also facilitate review of the stay.

A new sentence is added to the end of subdivision (b) to specify that the court may extend the time for the mandate's issuance only in extraordinary circumstances or

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pursuant to Rule 41(d) (concerning stays pending petitions for certiorari). The extraordinary-circumstances requirement reflects the strong systemic and litigant interests in finality. Rule 41(b)'s presumptive date for issuance of the mandate builds in an opportunity for a losing litigant to seek rehearing, and Rule 41(d) authorizes a litigant to seek a stay pending a petition for certiorari. Delays of the mandate's issuance for other reasons should be ordered only in extraordinary circumstances.

Subdivision (d). Two changes are made in subdivision (d).

Subdivision (d)(1)—which formerly addressed stays of the mandate upon the timely filing of a motion to stay the mandate or a petition for panel or en banc rehearing—has been deleted and the rest of subdivision (d) has been renumbered accordingly. In instances where such a petition or motion is timely filed, subdivision (b) sets the presumptive date for issuance of the mandate at 7 days after entry of an order denying the petition or motion. Thus, it seems redundant to state (as subdivision (d)(1) did) that timely filing of such a petition or motion stays the mandate until disposition of the petition or motion. The deletion of subdivision (d)(1) is intended to streamline the Rule; no substantive change is intended.

Subdivision (d)(4)—i.e., former subdivision (d)(2)(D)—is amended to specify that a mandate stayed pending a petition for certiorari must issue immediately once the court of appeals receives a copy of the Supreme Court's order denying certiorari, unless the court of appeals finds that extraordinary circumstances justify a further stay. Without deciding whether the prior version of Rule 41 provided authority for a further stay of the mandate after denial of certiorari, the Supreme Court ruled that any such authority could be exercised only in "extraordinary circumstances." *Ryan v. Schad*, 133 S. Ct. 2548, 2551 (2013) (per curiam). The amendment to subdivision (d)(4) makes explicit that the court may stay the mandate after the denial of certiorari, and also makes explicit that such a stay is permissible only in extraordinary circumstances. Such a stay cannot occur through mere inaction but rather requires an order.

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The reference in prior subdivision (d)(2)(D) to the *filing* of a copy of the Supreme Court's order is replaced by a reference to the court of appeals' *receipt* of a copy of the Supreme Court's order. The filing of the copy and its receipt by the court of appeals amount to the same thing (*cf.* Rule 25(a)(2), setting a general rule that "filing is not timely unless the clerk receives the papers within the time fixed for filing"), but "upon receiving a copy" is more specific and, hence, clearer.

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Rule 29. Brief of an Amicus Curiae

(a) When Permitted. The United States or its officer or agency or a state may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing, except that a court of appeals may by local rule prohibit the filing of an amicus brief that would result in the disqualification of a judge.

* * * * *

Committee Note

Under current Rule 29(a), by the parties' consent alone, an amicus curiae might file a brief that results in the disqualification of a judge who is assigned to the case or participating in a vote on a petition for rehearing. The amendment authorizes local rules, such as those previously adopted in some circuits, that prohibit the filing of such a brief.

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Rule 31. Serving and Filing Briefs

(a) Time to Serve and File a Brief.

(1) The appellant must serve and file a brief within 40 days after the record is filed. The appellee must serve and file a brief within 30 days after the appellant's brief is served. The appellant may serve and file a reply brief within ~~14~~ 21 days after service of the appellee's brief but a reply brief must be filed at least 7 days before argument, unless the court, for good cause, allows a later filing.

* * * * *

Committee Note

Subdivision (a)(1) is revised to extend the period for filing a reply brief from 14 days to 21 days. Before the elimination of the "three-day rule" in Rule 26(c), attorneys were accustomed to a period of 17 days within which to file a reply brief, and the committee concluded that shortening the period from 17 days to 14 days could adversely affect the preparation of useful reply briefs. Because time periods are best measured in increments of 7 days, the period is extended to 21 days.

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Rule 28.1. Cross-Appeals

* * * * *

(f) Time to Serve and File a Brief. Briefs must be served and filed as follows:

(1) the appellant's principal brief, within 40 days after the record is filed;

(2) the appellee's principal and response brief, within 30 days after the appellant's principal brief is served;

(3) the appellant's response and reply brief, within 30 days after the appellee's principal and response brief is served; and

(4) the appellee's reply brief, within ~~14~~ 21 days after the appellant's response and reply brief is served, but at least 7 days before argument unless the court, for good cause, allows a later filing.

* * * * *

Committee Note

Subdivision (f)(4) is amended to extend the period for filing a reply brief from 14 days to 21 days. Before the elimination of the "three-day rule" in Rule 26(c), attorneys were accustomed to a period of 17 days within which to file a reply brief, and the committee concluded that shortening the period from 17 days to 14 days could adversely affect the preparation of useful reply briefs. Because time periods are best measured in increments of 7 days, the period is extended to 21 days.

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Advisory Committee on Appellate Rules
Table of Agenda Items —December 2015

FRAP Item	Proposal	Source	Current Status
07-AP-E	Consider possible FRAP amendments in response to Bowles v. Russell (2007).	Mark Levy, Esq.	Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 04/11 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15
07-AP-I	Consider amending FRAP 4(c)(1) to clarify the effect of failure to prepay first-class postage.	Hon. Diane Wood	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08 Discussed and retained on agenda 10/15
08-AP-C	Abolish FRAP 26(c)'s three-day rule.	Hon. Frank H. Easterbrook	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15

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FRAP Item	Proposal	Source	Current Status
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15
09-AP-B	Amend FRAP 1(b) to include federally recognized Indian tribes within the definition of "state"	Daniel I.S.J. Rey-Bear, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed and retained on agenda 10/11 Discussed and retained on agenda 04/12; Committee will revisit in 2017
11-AP-C	Amend FRAP 3(d)(1) to take account of electronic filing	Harvey D. Ellis, Jr., Esq.	Discussed and retained on agenda 04/13 Discussed and retained on agenda 10/15
11-AP-D	Consider changes to FRAP in light of CM/ECF	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/11 Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15
12-AP-B	Consider amending FRAP Form 4's directive concerning institutional-account statements for IFP applicants	Peter Goldberger, Esq., on behalf of the National Association of Criminal Defense Lawyers (NACDL)	Discussed and retained on agenda 09/12 Discussed and retained on agenda 10/15
12-AP-D	Consider the treatment of appeal bonds under Civil Rule 62 and Appellate Rule 8	Kevin C. Newsom, Esq.	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15

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FRAP Item	Proposal	Source	Current Status
12-AP-E	Consider treatment of length limits, including matters now governed by page limits	Professor Neal K. Katyal	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15
12-AP-F	Consider amending FRAP 42 to address class action appeals	Professors Brian T. Fitzpatrick and Brian Wolfman and Dean Alan B. Morrison	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/15
13-AP-B	Amend FRAP to address permissible length and timing of an amicus brief in support of a petition for rehearing and/or rehearing en banc	Roy T. Englert, Jr., Esq.	Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15
13-AP-H	Consider possible amendments to FRAP 41 in light of Bell v. Thompson, 545 U.S. 794 (2005), and Ryan v. Schad, 133 S. Ct. 2548 (2013)	Hon. Steven M. Colloton	Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Draft approved 10/15 for submission to Standing Committee
14-AP-D	Consider possible changes to Rule 29's authorization of amicus filings based on party consent	Standing Committee	Awaiting initial discussion Draft approved 10/15 for submission to Standing Committee
15-AP-A	Consider adopting rule presumptively permitting pro se litigants to use CM/ECF	Robert M. Miller, Ph.D.	Awaiting initial discussion Discussed and retained on agenda 10/15
15-AP-B	Technical amendment – update cross-reference to Rule 13 in Rule 26(a)(4)(C)	Reporter	Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15
15-AP-C	Consider amendment to Rule 31(a)(1)'s deadline for reply briefs	Appellate Rules Committee	Awaiting initial discussion Draft approved 10/15 for submission to Standing Committee
15-AP-D	Amend FRAP 3(a)(1) (copies of notice of appeal) and 3(d)(1) (service of notice of appeal)	Paul Ramshaw, Esq.	Awaiting initial discussion Discussed and retained on agenda 10/15

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FRAP Item	Proposal	Source	Current Status
15-AP-E	Amend the FRAP (and other sets of rules) to address concerns relating to social security numbers; sealing of affidavits on motions under 28 U.S.C. § 1915 or 18 U.S.C. § 3006A; provision of authorities to pro se litigants; and electronic filing by pro se litigants	Sai	Awaiting initial discussion Discussed and retained on agenda 10/15
15-AP-F	Recovery of appellate fees	Prof. Gregory Sisk	Awaiting initial discussion Discussed and retained on agenda 10/15
15-AP-H	Electronic filing by pro se litigants	Robert M. Miller, Ph.D.	Awaiting initial discussion

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Minutes of the Fall 2015 Meeting of the
Advisory Committee on Appellate Rules
October 29-30, 2015

Chicago, Illinois

I. Attendance and Introductions

Judge Steven M. Colloton called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, October 29, 2015, at 9:00 a.m., at the Notre Dame Law Suite in Chicago, Illinois.

In addition to Judge Colloton, the following Advisory Committee members were present: Professor Amy Coney Barrett, Judge Michael A. Chagares, Justice Allison H. Eid, Mr. Gregory G. Katsas, Mr. Neal K. Katyal, Judge Stephen Joseph Murphy III, and Mr. Kevin C. Newsom. Solicitor General Donald Verrilli was represented by Mr. Douglas Letter, Director of the Appellate Staff of the Civil Division, U.S. Department of Justice, and by Mr. H. Thomas Byron III, Appeals Counsel of the Appellate Staff of the Civil Division, both of whom were present. Judge Brett M. Kavanaugh was absent.

Reporter Gregory E. Maggs was present and kept these minutes. Associate Reporter Catherine Struve participated by telephone for all but brief portions of the meeting.

Also present were Judge Jeffrey S. Sutton, Chair of the Standing Committee on Rules of Practice and Procedure; Ms. Rebecca A. Womeldorf, Secretary of the Standing Committee on Rules of Practice and Procedure and Rules Committee Officer; Mr. Michael Ellis Gans, Clerk of Court Representative to the Advisory Committee on Appellate Rules; Professor Daniel R. Coquillette, Reporter, Committee on Rules of Practice and Procedure; and Ms. Shelly Cox, Administrative Specialist in the Rules Committee Support Office of the Administrative Office.

Judge Robert Michael Dow Jr., a member of the Advisory Committee on Civil Rules arrived at 11:30 a.m. and left at 12:30 p.m. Mr. Alex Dahl of Lawyers for Civil Justice also attended portions of the meeting as an observer.

Judge Colloton called the meeting to order. He thanked Professor Barrett for her efforts in making the Notre Dame Law Suite available to the Committee for this meeting. Judge Colloton mentioned that Judge Peter T. Fay and Judge Richard G. Taranto had completed their service on the Committee. Judge Colloton welcomed Judge Murphy as a new member. Judge Colloton also explained that Judge Kavanaugh is a new member but was unable to attend. Judge Colloton thanked Professor Struve for her long and diligent service as the reporter and her great assistance during the transition, and the Committee applauded. Judge Colloton introduced Professor Maggs as the new

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reporter for the committee. Judge Colloton also announced that Ms. Marie Leary, Research Associate for the Appellate Rules Committee was unable to attend.

II. Approval of the Minutes of the April 2015 Meeting

Judge Colloton directed the Committee's attention to the approval of the minutes from the April 2015 meeting. An attorney member asked about the Committee's policy regarding the identification of speakers in its meetings. He observed that the minutes mostly did not identify speakers by name but sometimes included identifying information. Professor Coquillette said that the tradition was not to identify members of the Committee when they speak because of concerns about outside lobbying and about the ability of speakers to speak freely.

Two attorney members favored having the minutes identify speakers. Another attorney member spoke in favor of identifying speakers, noting that it was a public meeting. A judge member said that the practice of not identifying members had been in place for many years. He believed that the practice should be the same across committees. But he further said that he did not think that identifying members in the minutes would affect lobbying. Mr. Letter said that representatives of the Department of Justice should be identified as such, which has been the practice. The Committee did not vote on whether to change the traditional practice, leaving the matter open for further consideration.

An attorney member called the Committee's attention to page 19 of the minutes [Agenda Book at 39], and asked Judge Colloton whether a representative of the Committee had spoken to the Fifth Circuit about its local rules on the length of briefs. Judge Colloton said that no conversation had yet occurred with the Fifth Circuit because it seemed premature. The proposed amendment to the federal rules is still pending, and if it is adopted, then the Fifth Circuit might opt out of the new length limits or modify its local rule.

The minutes of the Spring 2015 meeting were approved by voice vote.

Judge Colloton mentioned that the minutes of the Standing Committee's May 2015 meeting were not available in time for inclusion in the Agenda Book for this meeting. He summarized the meeting, noting that the Standing Committee had approved all of the amendments proposed by the Appellate Committee. The judicial Conference also has approved the proposed amendments, and they have gone to the Supreme Court. Judge Sutton said that the Standing Committee was grateful to the Appellate Rules Committee for preparing the proposed amendments.

III. Action and Discussion Items

A. Item No. 13-AP-H (FRAP 41)

Judge Colloton introduced Item No. 13-AP-H, reminding the Committee that the item concerns possible amendments to Rule 41 that would (1) clarify that a court of appeals must enter an

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order if it wishes to stay the issuance of the mandate; (2) address the standard for stays of the mandate; and (3) restructure the Rule to eliminate redundancy.

Judge Colloton recounted that at its April 2014 meeting, the consensus of the Committee was that the words "by order" should be restored to Rule 41(b). Thus, a court would have to enter an order if it wished to stay the issuance of the mandate.

On the issue of the standard for ordering a stay, the Committee discussed whether to add an "extraordinary circumstances" test to Rules 41(b) and 41(d)(4). A judge member said that the standard under Rule 41(d)(4) was in fact already extraordinary circumstances and that the proposed amendment would be merely a codification of existing practice. The judge member said that it is not clear what the current standard is under Rule 41(b).

An attorney member asked whether judges should have to state their reasoning for an extension. Several members were opposed to adding such a requirement.

The consensus of the Committee was to add the "extraordinary circumstances" test to both Rules 41(b) and 41(d)(4). The Committee then discussed how to phrase the wording. An academic member suggested that Rule 41(b) and (d)(4) should be phrased consistently. An attorney member suggested that the phrase "unless extraordinary circumstances exist" for Rule 41(d). The Committee also agreed to this proposal by consensus.

The Committee then considered Professor Kimble's style suggestions as shown in the Agenda Book. The Committee approved the suggested changes, including his proposal to delete the word "certiorari" in Rule 41(d)(1) and (d)(4).

The Committee then set this item aside so that the Reporter could prepare a document showing all of the changes proposed at the meeting. The Committee resumed discussion of this item at the end of the meeting. The Reporter circulated electronically a document showing the changes.[1]

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[1] The circulated electronic document contained the following text, which the Committee approved:

Rule 41. Mandate: Contents; Issuance and Effective Date; Stay

(a) **Contents.** Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

(b) **When Issued.** The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time <u>by order</u>. <u>The court may extend the time only in extraordinary circumstances or under Rule 41(d).</u>

(c) **Effective Date.** The mandate is effective when issued.

(d) **Staying the Mandate <u>Pending a Petition for Certiorari</u>.**

~~(1) **On Petition for Rehearing or Motion.** The timely filing of a~~

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An attorney member of the Committee asserted that Rule 41(b) is warranted by the interest in finality which warrants a high bar. The member also asserted that Rule 41(d)(4) codifies the Supreme Court's decisions.

After reviewing the changes, Committee approved the revised version of the rule by consensus. A judge member moved to send the draft, as approved, to the standing committee. An academic member seconded the motion. The Committee approved the motion by voice vote.

B. Item No. 08-AP-H (Manufactured Finality)

Judge Colloton introduced Item No. 08-AP-H and recounted its history. He explained that this item concerns efforts of a would-be appellant to "manufacture" appellate jurisdiction after the disposition of fewer than all the claims in an action by dismissing the remaining claims. The Committee first discussed this matter in November 2008 and then revisited it at seven subsequent meetings. At the April 2015 meeting, by consensus, the Committee decided to take no action on the topic of manufactured finality. A judge member moved to remove the item from the agenda, and another judge member seconded the motion. Without further discussion, the Committee approved the motion by voice vote.

C. Item No. 08-AP-R (FRAP 26.1 & 29(c) disclosure requirements)

Judge Colloton introduced Item No. 08-AP-R. He reminded the Committee that local rules in various circuits impose disclosure requirements that go beyond those found in Rules 26.1 and 29(c), which call for corporate parties and amici curiae to file corporate disclosure statements. Judge Colloton said that the issue is whether additional disclosures should be required and, if so, which additional disclosures.

~~petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.~~

~~(2) **Pending Petition for Certiorari.**~~

~~(A)~~ (1) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the ~~certiorari~~ petition would present a substantial question and that there is good cause for a stay.

~~(B)~~ (2) The stay must not exceed 90 days, unless the period is extended for good cause or unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay. In that case, the stay continues until the Supreme Court's final disposition.

~~(C)~~ (3) The court may require a bond or other security as a condition to granting or continuing a stay of the mandate.

~~(D)~~ (4) The court of appeals must issue the mandate immediately on receiving ~~when~~ a copy of a Supreme Court order denying the petition ~~for writ of certiorari is filed~~, unless extraordinary circumstances exist.

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The Committee turned its attention to the discussion drafts of Rules 26.1 and 29 [Agenda Book 117-119].

A judge member said that, as a general matter, judges would prefer more disclosure up front so that they do not spend time on a case before a conflict is discovered. An attorney member said that an opposing consideration was that requiring more disclosure could be onerous to attorneys.

The committee then turned its attention to specific issues in the discussion draft. The summary of the Committee discussion in these minutes has been re-ordered to follow the structure of the rules.

Rule 26.1(a)(1): Members of the Committee discussed the draft proposal to add the words "or affiliated." Given the indefiniteness of this phrase, the Committee considered whether the words should be omitted.

Rule 26.1(a)(2): Members of the Committee were concerned that merely requiring a party to list the "trial" judges in prior proceedings might be insufficient. In a habeas case, for example, both trial and appellate judges may have taken part in prior proceedings. A judge member proposed that the word "trial" should be removed.

Rule 26.1 (a)(3): An attorney member said the term "partners and associates" should be changed to "attorneys" or "lawyers." He also asked whether the term "law firms" was appropriate, given that entities other than law firms, such as public interest organizations, might represent parties in a lawsuit. He suggested replacing "law firms" with "legal organizations."

Rule 26.1(d): Mr. Letter observed that in antitrust cases, requiring the disclosure of an organizational victim could be problematic because there could be thousands of victims.

Rule 26.1(f): The Committee considered whether the word "intervenor" should be replaced with the term "putative intervenor." The Committee also considered whether subsection (f) should be deleted as unnecessary because, following intervention, intervenors would be parties and would be covered by the rule.

Rule 29(c)(5)(D): The discussion of this provision focused on two questions. One question was whether (D) should be deleted. Two attorney members said that attorneys often do not list everyone who worked on a brief. One of the attorney members asked this hypothetical: "If a lawyer read a brief and gave a few comments, would that have to be disclosed?" A judge member asked this hypothetical: "If a judge's son or daughter wrote a brief, should that have to be disclosed or not?" An academic member asked whether there were actual examples of past problems. A judge member thought that the rule was unrealistically strict. The second question discussed was, if (D) is not deleted, whether the phrase "contributed to" was too broad. A judge member suggested using the word "authored" because it would not include those who merely reviewed a brief and made

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comments. Mr. Letter asked whether the Supreme Court has experience with what the word "authored" meant.

Following all of the discussion, the sense of the Committee appeared to be that the draft should be revised, to delete "trial" in Rule 26.1(a)(2); to replace "partners and associates" with "lawyers" and to replace "law firms" with "legal organizations" in Rule 26.1(a)(3); and either to strike Rule 29(c)(5)(D) or to replace the phrase "contributed to the preparation" with "authored in whole or part." The Committee did not make definite conclusions with respect to the other issues. Judge Colloton said that he did not think the item was ready to send to the Standing Committee.

D. Item No. 12-AP-F (FRAP 42 Class Action Appeals)

Judge Colloton introduced Item No. 12-AP-F, which concerns possible problems when objectors to class action settlements ask for consideration to drop their appeals. Judge Colloton then turned the discussion over to Judge Dow, who discussed the work of the Civil Committee. Judge Dow began by saying that Prof. Catherine Struve's memorandum [Agenda Book at 145-171] was directly on point.

Judge Dow explained that while it would be an error to say that all class action settlement objectors are bad, some objectors may be causing delays with extortionate appeals. He explained that a class member may lay low while a class action settlement is negotiated, file a pro forma objection to the settlement in the district court, and then surface by filing an appeal. After filing the appeal, the objector then may call counsel and ask for money to make the appeal go away.

Judge Dow said that the proposed changes have two parts. First, objectors must state their grounds for objection to a class action settlement under the proposed Federal Rule of Civil Procedure 23(e)(5)(A) [Agenda Book, at 203-204]. Second, a district court would have to approve any withdrawal of an objection under the proposed Rule 23(e)(5)(C) [Agenda Book at 204]. This requirement of approval would not only allow district judges to prohibit "a payoff" but also likely would discourage extortionate objections. Judge Dow said that the appellate and civil committees need to work together to determine the implementation.

A judge member asked whether the proposed Rule 23(e)(5)(C) was a permissible Civil Rule given that it effectively would limit what happens in the appellate courts. The judge member also asked how a payment would come to the attention of the court of appeals absent a rule that the objector or class counsel must disclose the payment. Another judge said that courts would not usually become involved in the withdrawal of an appeal. Judge Dow agreed that the Federal Rules of Appellate Procedure also should address the issue. Mr. Byron asked whether the sketch of Appellate Rule 42(c) [Agenda Book at 141] would suffice. Mr. Letter asked whether a payoff to a class action objector would be less of a concern if the money was coming out of the class counsel's fees. Judge Sutton asked whether an "indicative rule" under proposed Rule 42(c) would work. An attorney member said that proposed Rule 42(c) was inconsistent with general practice because it would require the court of appeals to refer a matter to the district court. Mr. Byron did not think it was inconsistent,

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and Judge Sutton suggested that the procedure contemplated would be like sending a case back for a determination of whether there is jurisdiction. Mr. Letter also thought that if there was nothing in the Appellate Rules about withdrawing appeals, litigants might not know to look at Civil Rule 23. The clerk representative asked what the district court would do with the case when it was sent back. Judge Dow suggested that perhaps Rule 42 should require disclosure and approval of a fee. Judge Sutton suggested that an alternative would be for class counsel to seek an expedited appeal to reduce the pressure for class objectors. Mr. Letter said that the procedure might be burdensome because parties settle with appellants all the time. Prof. Coquillette suggested that it is an attorney conduct problem.

Judge Dow said that he would take this matter to back to Civil Rules Committee to discuss the issues. He emphasized that the sketch of proposed Rule 42(c) is a work in progress.

Mr. Dahl asked about the "indicative ruling" under Rule 23(e)(5): If the district court does approve the payment, could the objector appeal the indicative ruling? Judge Colloton suggested that it would remain in the Court of Appeals.

The Committee was in recess for lunch.

D. Item No. 15-AP-C (Deadline for Reply Briefs)

Judge Colloton introduced Item No. 15-AP-C. He summarized past discussions, which had recognized that most appellants now have effectively a total of 17 days to serve and file reply briefs because of the 14 days provided by Rule 31(a)(1) and the 3 additional days provided by Rule 26(c). The proposed revision of Rule 26(c) to eliminate the 3 additional days when appellants serve and file documents electronically will effectively reduce the time for serving and filing a reply brief to 14 days. Judge Colloton said that the questions for the Committee are whether to modify Rule 31(a) to extend the period from 14 days and, if so, whether the extended period should be 17 days or 21 days.

Judge Colloton noted that one question previously raised had been whether extending the time for filing and serving a reply brief would reduce the time before oral argument. On this point, he noted that statistics suggest that the extension from 14 days to 21 days would be unlikely to have a material effect because in federal courts of appeal the mean period from the filing of the last appellate brief to oral argument is currently 3.6 months [see Agenda Book at 265]. In addition, the clerk representative recalled that a study had shown that no courts had waited until a reply brief is filed before scheduling oral argument.

An attorney member said that 14 days was too short for preparing and filing a reply brief. He further said that he would prefer 21 days to 17 days, explaining that the time for filing and serving a reply brief was already shorter than the time for filing other briefs. He believed that the benefit to attorneys and clients would come at very little cost to the system. Another attorney member said that attorneys in practice had internalized the 17-day period. He noted also that the period for filing a reply brief starts when the response is actually filed, not when it is due, and the uncertainty of when

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the response will be filed also may make filing a reply in 14 days difficult. He supported 21 days. Professor Coquillette supported 21 days because 21 days is a multiple of 7 days, which helps keep the reply brief due on a weekday. The appellate clerk liaison agreed that multiples of 7 days are slightly easier for the clerks office to work with. An attorney member believed that additional time will help lawyers produce better briefs. An appellate judge member said that the Supreme Court of Colorado has the same schedule as the current federal rule. Another appellate judge emphasized that there should be a replacement for the lost three days and that 21 days made more sense than 17 days.

The sense of the Committee was to modify the Rules to extend the period for filing and serving reply briefs from 14 days to 21 days. Judge Colloton suggested that the Committee's reporter prepare a marked-up draft showing the exact changes to Rules 31(a)(1) and 28.1(f)(4). The Committee would then have an opportunity to vote on the proposed changes by email.

E. Item No. 14-AP-D (amicus briefs filed by consent of the parties)

Judge Colloton introduced Item No. 14-AP-D, which came to the advisory committee's attention through discussion at the June meeting of the Standing Committee. He explained that some circuits have created local rules that appear to conflict with Rule 29(a). Although Rule 29(a) says that an amicus may file a brief if all parties have consented to its filing, some local rules bar filing of amicus briefs that would result in the recusal of a judge. Judge Colloton said that questions for the Committee are whether Rule 29(a) is optimal as written or whether Rule 29(a) should be revised to permit what the local rules provide.

An appellate judge member explained how allowing the filing of an amicus brief in some cases might require a judge to recuse himself or herself. Although this possibility might not happen often in panel cases, he explained that it could happen when a court hears a case en banc.

An attorney member supported the position of the local rules. He proposed adding this sentence to the end of Rule 29(a): "The court may reject an amicus curiae brief, including one submitted with all parties' consent, where it would result in the recusal of any member of the court." An appellate judge member asked whether there was a way to reword the proposal because it seemed odd to reject a brief after it had been filed.

Mr. Byron suggested that Rule 29(a) could be amended to allow circuits to adopt local rules. An attorney member responded that a broad authorization might be problematic because a circuit might bar all amicus briefs.

After further discussion, it was the sense of the Committee that the local rules were reasonable and that Rule 29(a) should be amended to allow the kinds of local rules that have been adopted by the D.C., Second, Fifth, and Ninth Circuits. Judge Colloton asked the Committee's reporter to draft and circulate proposed language for revising Rule 29(a) to achieve the Committee's objective. He suggested that the Committee could vote on a proposed amendment by email.

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F. Item No. 12-AP-D (Civil Rule 62/Appeal Bonds)

Judge Colloton briefly recounted the history of this agenda item and thanked all those who had worked on it. Judge Colloton then invited Mr. Newsom to discuss the matter. Mr. Newsom began by asking the Committee to compare the current version of Federal Rule of Civil Procedure 62 to the proposed "September 2015 Draft" revision of Rule 62 [Agenda Book at 294]. Mr. Newsom then identified four principal points for consideration: (1) Under the current rule, there is a gap between the automatic 14-day stay of a judgment and the deadline for filing anything attacking the judgment. (2) Most appellants currently obtain a single bond (or other form of security) to cover both the post-judgment period and the appeal period, but the current rule seems to anticipate two different bonds. (3) Although the current rule contemplates that appellants will give a bond as security, sometimes appellants provide a letter of credit or other form of security. (4) The current rule does not specify an amount for the bond.

Mr. Newsom explained that the proposed Rule 62(a)(1) would extend the automatic stay from 14 to 30 days, unless the court orders otherwise. This extension would address the current gap between the 14-day stay of judgment and the deadline for filing an appeal or other attack on the judgment. Mr. Newsom explained that a court might "order otherwise" if the court is concerned about the possibility that the losing party might try to hide assets during the period of the stay. The proposed revision of Rule 62(a)(2) authorizes a stay to be secured by a bond or by other form of security, such as a letter of credit or an escrow account. Mr. Newsom noted that the proposed rule does not contemplate that the appellant would have to post more than one form of security. The proposed rule, like the current rule, does not specify an amount of the bond or other security. Proposed Rule 62(a)(3) authorizes a court to grant a stay in its discretion.

An attorney member was concerned about what might happen if a judge did not grant a stay to the appellant and the appellee lost on appeal. Mr. Newsom explained that the proposed revision of Rule 62(c) would allow a district court to impose terms if the district court denied a stay.

An attorney member was concerned that the proposed revision of Rule 62(b) would allow a court to refuse a stay for good cause even though an appellant had provided security. The attorney member thought that this proposed rule was contrary to current practice. The attorney member asserted that practitioners currently assume that if a client who has lost at trial posts a sufficient bond, the client is entitled to a stay. An appellate judge member asked whether the proposed Rule 62(b) should be rewritten to make clear that ordinarily a stay would be granted. Another appellate judge member asked whether this portion of the proposed Rule 62(b) should be eliminated.

Mr. Byron suggested that the appellee might have other options besides needing the denial of a stay.

Mr. Letter reminded the Committee that in a case in which the government is involved there is an automatic 60-day period in which to file an appeal. *See* Fed. R. App. P. 4(a)(1)(B). As a result, even extending the automatic stay from 14 to 30 days will still lead to a gap.

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Judge Sutton said that the current version of Rule 62 is somewhat ambiguous. He wondered whether that ambiguity might not be beneficial because it affords discretion.

Judge Colloton reminded the Committee that the proposal concerned a Federal Rule of Civil Procedure, rather than a Federal Rule of Appellate Procedure. But he emphasized that the Committee may want to provide feedback to the Civil Rules Committee because the issue affects appellate lawyers. He suggested communicating to the Civil Rules Committee that concerns were raised among appellate lawyers that the current rule, in practice, has meant that there is a right to a stay if the appellant posts a bond, and that the proposed Rule 62(b) appears to represent a shift in policy, such that a stay upon posting security is not assured.

Summing up the discussion, Mr. Newsom asked whether the Committee thought it was acceptable for proposed Rule 62(a)(2) to require only a single bond and to allow for alternative forms of security other than bonds, and for proposed Rule 62(a)(1) to extend the period of the automatic stay from 14 days to 30 days. This was the sense of the Committee.

G. Item No. 12-AP-D (FRAP Form 4 and institutional-account statements)

The reporter introduced Item No. 12-AP-D, which concerns Federal Rules of Appellate Procedure Form 4. Question 4 requires a prisoner "seeking to appeal a judgment in a civil action or proceeding" to attach an institutional account statement. The proposal is to add the phrase "(not including a decision in a habeas corpus proceeding or a proceeding under 28 U.S.C. § 2255)" to Question 4 so that prisoners would not have to attach such statements in habeas cases. The reporter noted that Form 4 was amended in 2013 but the word processing templates for Form 4 which are available at the U.S. Courts website have not yet been updated and still contain the pre-2013 language.

The clerk representative said that institutional account statements are currently filed in many cases in which they are not needed. He further said that filed forms are not made public.

Mr. Letter said that he would ask the Bureau of Prisons to determine whether preparing the account statements is burdensome. The clerk representative said that he would inquire about whether the form is burdensome for clerks of courts.

The reporter said that he would notify those responsible of the need to update the word processing forms available on the U.S. Courts website.

The sense of the Committee was to leave the matter on the agenda until more information is obtained and the word processing templates are corrected.

H. Item No. 14-AP-C (Issues relating to *Morris v. Atichity*)

The reporter introduced Item No. 14-AP-C, which is a proposed rule that would require

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courts to resolve issues raised by litigants. The reporter reminded the Committee that the item was included on the agenda for the April 2015 meeting, but the Committee did not have time to address it.

Following a brief discussion of the points raised in Professor Daniel Capra's memorandum [Agenda Book at 369-370], an attorney member moved that Committee take no action and remove the item from the agenda. Another attorney member seconded the motion. The Committee approved the motion by voice vote.

I. Item Nos. 08-AP-A, 11-AP-C, 11-AP-D, 15-AP-A, and 15-AP-D (Possible amendments relating to electronic filing)

Judge Chagares introduced these items. The Committee's discussion focused on three issues. The first issue was whether pro se litigants should be permitted to file electronically. Judge Chagares said that a consensus appears to be emerging among the Advisory Committees that pro se litigants should be barred from using electronic filing unless local rules allow. Professor Coquillette cautioned that it may be undesirable to allow the circuits to adopt their own approaches because of the benefits of uniformity.

The clerk representative said that the Eighth Circuit allows pro se prisoners to file electronically and the clerk's office then uses the filing to serve the parties electronically. He said that this approach has not been problematic to date, but he cautioned that a handful of pro se litigants conceivably might abuse the system.

Judge Chagares said that the Advisory Committees have been discussing how to handle signatures on electronically filed and served documents. He suggested that the rules should specify that logging in and sending constitutes signature.

Finally, Judge Chagares addressed the current rules requiringg a filing to contain a proof of service. He suggested that proof of service should not be required when there is electronic filing.

Judge Colloton explained that the Committee at this time did not need to reach any final conclusion, but instead only to develop a sense of the issues. He suggested that the Committee should wait until the Advisory Committees on the Civil and Criminal Rules have considered the matters, and that the advisory committees should coordinate their approaches. This was the sense of the Committee.

J. Item No. 15-AP-E (FRAP amendments relating to social security numbers etc.)

The reporter introduced Item No. 15-AP-E, which concerns four proposals, namely: (1) that filings do not include any part of a social security number; (2) that courts seal financial affidavits filed in connection with motions to proceed in forma pauperis; (3) that opposing parties provide certain types of cited authorities to pro se litigants; and (4) that courts do not prevent pro se litigants from

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filing or serving documents electronically. The reporter noted that the Committee had just discussed the fourth issue in connection with the previous item.

The social security number issue concerns Federal Rule of Civil Procedure 5.2(a)(1), which allows filed documents to contain only the last four digits of a person's social security number. Although this is a rule of civil procedure, the matter concerns this Committee because Federal Rule of Appellate Procedure 25(a)(5) makes Rule 5.2 applicable to appeals. In addition, Form 4 specifically asks movants seeking leave to proceed in forma pauperis to provide the last four digits of their social security numbers. The clerk representative believed that these last four digits are no longer used for any purpose. He noted that similar forms (i.e., AO 239/240, "Application to Proceed in District Court Without Prepaying Fees or Costs") are used in the district courts.

After a brief discussion, based on the information available at the meeting, it was the sense of the Committee that Form 4 should not ask movants for the last four digits of their social security number. It was also the sense of the Committee that motions for leave to proceed in forma pauperis should not be sealed. A judge member expressed the view that these petitions are court documents and that the other party in a lawsuit should not be prevented from seeing them. No votes, however, were taken on either issue.

The proposal to require litigants to provide cited authorities to pro se litigants concerns local district court rules, but Federal Rule of Appellate Procedure 32.1(b) already partly addresses the concerns raised in the proposal. An attorney member asked whether Rule 32.1(b) refers only to free publicly accessible databases or would include databases like Westlaw and Lexis for which payment is required. Another Committee member responded that the Advisory Committee Note to Rule 32.1 says that publicly accessible databases could include "a commercial database maintained by a legal research service or a database maintained by a court."

Judge Colloton suggested that the item be retained on the agenda for the spring meeting. The Appellate Committee will see what the Civil Committee recommends before taking action.

K. Item No. 15-AP-F (Recovery of Appellate Docketing Fee after Reversal)

The reporter introduced this new item, which concerns the procedure by which an appellant who prevails on appeal may recover the $500 docketing fee. The majority of circuits allow recovery of this fee as costs in the circuit court but a few courts require litigants to recover this fee in the district court. The proposal was to amend Rule 39 to require courts to follow what is now the majority approach.

A judge member question whether an amended rule was necessary. It may be that the circuits that do not allow for the recovery of costs in the circuit courts are not following the current rule. The clerk representative said that the Eighth Circuit has not always been consistent in its approach. He further said that he would raise the issue with other clerks of court to determine their practice.

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The Committee took no action on the matter and left it on the agenda.

L. Item No. 15-AP-G (discretionary appeals of interlocutory orders)

The reporter introduced Item No. 15-AP-G, explaining that its proponent requested a "general rule authorizing discretionary appeals of interlocutory orders, leaving it to the court of appeals to sort through those requests on a case by case basis." The reporter briefly summarized the proponent's argument as outlined in the memorandum on the item [Agenda Book at 491-494].

A judge member said that in Colorado all orders are appealable with leave of the Supreme Court. In her experience, the process often took a lot of time. She said that the trial courts typically will stay the litigation while the interlocutory appeal is pending.

A judge member and an attorney member spoke against the proposal, questioning both its benefits and the authority to pass such a rule.

Following brief discussion, an attorney member moved that the Committee take no action on Item No. 15-AP-G and remove the item from the agenda. The motion was seconded. After brief discussion, the Committee voted by voice to remove the item.

IV. Concluding matters

Judge Colloton explained that the reporter would circulate for vote by email the final proposed language for two items. For Item No. 14-AP-D, the reporter will circulate a revised version of Rule 29(a), as amended to authorize local rules that would prevent the filing of an amicus brief based on party consent when filing the brief might cause the disqualification of a judge. For Item 15-AP-C, the reporter will circulate revised versions of Rules 31(a)(1) and 28.1(f)(4), amended to extend the deadline for filing and serving a reply brief from 14 days to 21 days.

Judge Colloton said that proposed revisions of Rules 26.1 and 29(c) concerning disclosure requirements were not ready for circulation. The consensus among the Committee was that Item No. 08-AP-R should be held over until the spring.

The Committee adjourned at 5:00 pm.

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

JEFFREY S. SUTTON
CHAIR

REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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BANKRUPTCY RULES

JOHN D. BATES
CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

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

FROM: Honorable William K. Sessions, III, Chair
Advisory Committee on Evidence Rules

DATE: November 7, 2015

RE: Report of the Advisory Committee on Evidence Rules

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on October 9, 2015 at John Marshall Law School in Chicago. On the day of the meeting, the Committee held a Symposium on Hearsay Reform that served to establish much of the Committee's agenda going forward. The Committee at the meeting reviewed its proposed amendments that are currently out for public comment, and discussed ongoing projects involving matters such as notice provisions, authentication of electronic evidence, and eHearsay. A full description of all of these matters can be found in the draft minutes of the Committee meeting, attached to this Report.

II. Action Items

No action items.

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III. Information Items

A. Symposium on Hearsay Reform

The Symposium on Hearsay Reform explored recent proposals to loosen the strictures of the federal rule against hearsay. Prominent judges, lawyers and professors were invited to participate, and a number of proposals for reform were made. One proposal was for broader admissibility of prior statements of testifying witnesses, on the ground that the declarant is by definition produced for trial and is under oath and subject to cross-examination about the prior statement. Other proposals involved expanding admissibility of hearsay by substituting the current hearsay exceptions for either 1) a single exception allowing the judge to admit hearsay that she finds reliable; or 2) regulating the hearsay problem by way of Rule 403, under which the judge would balance the probative value against the risk that the jury would not be able to properly discount the hearsay.

The symposium proceedings—as well as accompanying articles by many of the participants—will be published in the Fordham Law Review.

After the Symposium, Committee discussion indicated that a number of proposals were worthy of further consideration, and will be placed on the agenda for future meetings. The new agenda items include the following:

● Replacing the current rule-based system with a system of guided discretion, which would include a list of standards or illustrations taken from the existing exceptions.

● Replacing the current system with Rule 403 balancing (though the Committee is concerned that such a change might lead to unpredictability in the application of the hearsay rule).

● Retaining the current structure but expanding the residual exception (Rule 807) to allow easier and more frequent use.

● Broadening Rule 801(d)(1)(A) to allow substantive use of prior inconsistent statements if the statement has been recorded.

● Considering whether the impact of an expanded Rule 801(d)(1)(A) would have a negative impact on summary judgment cases, and if so whether that would warrant having a different rule in civil and criminal cases.

The Evidence Rules Committee is grateful for the Standing Committee's support for the Symposium on Hearsay Reform. We wish to express special thanks to Judge St. Eve, whose efforts were crucial to the Symposium's success.

B. Proposed Amendments Issued for Public Comment

The Committee has two proposed amendments out for public comment: 1) a proposal to eliminate the hearsay exception for ancient documents, Rule 803(16); and 2) a proposal that would add two subdivisions to the rule on self-authentication (Rule 902), which provisions would ease the burden of authenticating certain electronic evidence. Only a few comments have been received to date, but the Committee will of course continue to monitor the comments and will review all of them at its Spring 2016 meeting.

C. Possible Amendments to the Notice Provisions in the Federal Rules of Evidence

The Committee has been considering whether amendments should be proposed to some or all of the notice provisions in the Federal Rules of Evidence. One possibility considered by the Committee was to make all the notice rules uniform. But the Committee decided that it would not propose changes to the notice provisions in Rules 412-15 (admissibility of other acts in cases involving sexual assault) because those rules raised special considerations that are not conducive to a uniform approach with the other exceptions. The Committee determined, however, that substantive changes to two of the other notice provisions would be useful: 1) deleting the requirement in Rule 404(b) that a criminal defendant must request notice; and 2) providing a good cause exception to the pretrial notice requirement of Rule 807. But the Committee has also taken on a suggestion from a member that the notice provisions other than in Rules 412-15—specifically Rules 404(b), 609(b), 807, and 902(11)—should be amended to substitute the current disparate provisions with a uniform template. That template provides as follows:

> The proponent must give an adverse party reasonable [written] notice of an intent to offer evidence under this Rule—and must make the substance of the evidence available to the party—so that the party has a fair opportunity to meet it. The notice must be provided before trial—or during trial if the court, for good cause, excuses lack of notice.

This proposal for uniformity would make a number of substantive changes in addition to the two that have been preliminarily approved by the Committee (i.e., eliminating the request requirement of Rule 404(b) and adding a good cause exception to Rule 807). The additional substantive changes would be: 1) the Rule 404(b) notice requirement would extend to civil cases, and to the defendant in criminal cases; 2) the provisions on the "particulars" of notice in each provision would be eliminated, in place of the phrase "substance of the evidence"; and 3) each of the rules would require the notifier to identify the rule under which the evidence would be proffered.

The Committee will consider this uniformity proposal, as well as the proposals for substantive changes to Rules 404(b) and 807, at its next meeting.

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C. Best Practices Manual on Authentication of Electronic Evidence

The Committee has determined that it can provide assistance to courts and litigants in negotiating the difficulties of authenticating electronic evidence, by preparing and publishing a best practices manual. The Reporter has been working on preparing such a manual with Greg Joseph and Judge Paul Grimm. The goal is to produce a pamphlet to be issued by the FJC. For the Fall meeting, the Reporter submitted drafts on best practices for authenticating email, texts, and social media postings. In addition a draft has been recently prepared for authentication of YouTube and other videos. The next steps are: 1) preparing best practices for authenticating web pages, search engines, and chatroom conversations; 2) revising the draft on judicial notice; and 3) adding an introduction on the applicable standards of proof that Judge Grimm has already prepared. We estimate that the final product should be ready for approval by the Committee no later than the Fall 2016 meeting. At that point, the Committee and the Standing Committee will have to decide how the work will be designated, i.e., whether it should be considered a work of the Advisory Committee, or the Standing Committee, or rather a work by individuals under the guidance of the Committees.

D. Possible eHearsay (Recent Perceptions) Exception

At a previous meeting, the Committee decided not to approve a proposal that would add a hearsay exception to address the phenomenon of electronic communication by way of text message, tweet, Facebook post, etc. The primary reason stated for the proposed exception is that these kinds of electronic communications are an ill-fit for the standard hearsay exceptions, and that without a new exception reliable electronic communications will be either 1) excluded, or 2) admitted but only by improper application of the existing exceptions. The exception proposed was for "recent perceptions" of an unavailable declarant.

The Committee's decision not to proceed with the exception was mainly grounded in the concern that it would lead to the admission of unreliable evidence. The Committee did, however, resolve to continue to monitor the practice and case law on electronic evidence and the hearsay rule, in order to determine whether there is a real problem of reliable eHearsay either being excluded or improperly admitted by misapplying the existing exceptions.

For each Committee meeting the Reporter submits, for the Committee's information, an outline on federal case law involving eHearsay. Nothing in the outline to date indicates that reliable eHearsay is being routinely excluded, nor that it is being admitted by misapplying other exceptions. Most eHearsay seems to be properly admitted as party-opponent statements, excited utterances, or state of mind statements. And many statements that are texted or tweeted are properly found to be not hearsay at all. At most, there are only one or two reported cases in which hearsay was excluded that might have been admitted under a recent perceptions exception.

The Reporter will continue to monitor cases involving eHearsay and will keep the Committee apprised of developments.

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E. *Crawford v. Washington* and the Hearsay Exceptions in the Evidence Rules

As previous reports have noted, the Committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*, in which the Court held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to cross-examine the declarant.

The Reporter regularly provides the Committee a case digest of all federal circuit cases discussing *Crawford* and its progeny. The goal of the digest is to enable the Committee to keep current on developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions. If the Committee determines that it is appropriate to propose amendments to prevent one or more of the Evidence Rules from being applied in violation of the Confrontation Clause, it will propose them for the Standing Committee's consideration—as it did previously with the 2013 amendment to Rule 803(10).

IV. Minutes of the Fall 2015 Meeting

The draft of the minutes of the Committee's Fall 2015 meeting is attached to this report. These minutes have not yet been approved by the Committee.

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Advisory Committee on Evidence Rules

Minutes of the Meeting of October 9, 2015

Chicago, Illinois

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on October 9, 2015 at John Marshall School of Law.

The following members of the Committee were present:

Hon. William K. Sessions, Chair
Hon. Brent R. Appel
Hon. Debra Ann Livingston
Hon. John T. Marten
Daniel P. Collins, Esq.
Paul Shechtman, Esq.
Elizabeth J. Shapiro, Esq., Department of Justice
A.J. Kramer, Esq., Public Defender

Also present were:

Hon. Jeffrey S. Sutton, Chair of the Committee on Rules of Practice and Procedure
Hon. Milton I. Shadur, Former Chair of the Evidence Rules Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Kenneth S. Broun, Consultant to the Committee
Professor Daniel Coquillette, Reporter to the Standing Committee
Timothy Lau, Federal Judicial Center
Rebecca A. Womeldorf, Chief, Rules Committee Support Office
Bridget Healy, Rules Committee Support Office
Shelley Duncan, Rules Committee Support Office
Teresa Ohley, Esq., Liaison from the Joint Service Committee on Military Justice
Professor Liesa Richter, University of Oklahoma School of Law

I. Opening Business

Approval of Minutes

The minutes of the Spring, 2015 Committee meeting were approved.

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June Meeting of the Standing Committee

Judge Sessions reported on the June meeting of the Standing Committee. The Evidence Rules Committee proposed two amendments to the Evidence Rules: abrogation of Rule 803(16), and new provisions in Rule 902 to ease the burden of authenticating electronic evidence. Judge Sessions stated that the Standing Committee unanimously approved the proposed amendments to be issued for public comment.

II. Symposium on Hearsay Reform

The morning of the meeting was devoted to a symposium on hearsay reform. The Committee determined that a symposium would be useful to help it to determine whether the hearsay rule and its exceptions should be subject to major reform. The calls for reconsideration of the hearsay rule and its exceptions have fallen into two categories: 1) replace the current system of categorical exceptions with a single rule allowing judges to admit hearsay subject to a balancing process of probative value and prejudicial effect (or alternatively, a broadening of the discretionary standards set forth in the residual exception, Rule 807 of the Evidence Rules); and 2) eliminate or alleviate the hearsay rule's coverage of prior statements of testifying witnesses, on the ground that the declarant who made the statement is at trial subject to cross-examination.

Panelists at the symposium included judges (Posner, Schiltz and St. Eve), professors, and outstanding practitioners from the Chicago area. The proceedings will be published in the Fordham Law Review, along with accompanying articles by many of the panelists.

The afternoon session of the Advisory Committee meeting was devoted mostly to discussion among Committee members about the many ideas and arguments raised at the Symposium. The Committee generally concluded that the Symposium was excellent; that it gave the Committee plenty to think about in determining whether amendments to the current system of hearsay regulation should be proposed; and that it set an agenda for the Committee for a number of years to come. Among the specific points raised by Committee members were the following:

● In reviewing the continued validity of any hearsay exception, it should not be evaluated solely by whether the statements admissible under the exception are reliable. Reliability is one basis for a hearsay exception, but it might also be validly supported by a finding that statements under the exception can be corroborated by other evidence, or by the fact that the type of hearsay admitted can be evaluated and properly weighed by jurors using their common sense. And some exceptions, such as those for party-opponent statements, require no reliability at all but rather are based on the adversary system.

● Any argument that a particular exception allows admission of unreliable statements should not necessarily give rise to more judicial discretion to admit hearsay. Rather the solution should be to tighten the exception by including trustworthiness requirements, or by allowing the opponent to convince the judge that the particular hearsay proffered is unreliable.

● Members were struck by the uniform position of practitioners--- that the current rule-based system of hearsay regulation was far preferable to a system based solely on judicial discretion. Allowing judicial discretion over hearsay would --- in the practitioners' view --- lead to unpredictable results and, consequently, more difficulty in settling the case, fewer cases disposed on summary judgment, and more costs of pretrial motion practice.

● A member found it interesting that there was disagreement among the panelists at the symposium as to whether expanding judicial discretion with regard to hearsay would result in more or fewer trials. One member of the Committee thought that a system of judicial discretion would not lead to more trials, but rather to more pretrial motion practice to seek advance rulings on evidentiary admissibility. But because those advance rulings are themselves discretionary with the trial judge, it would seem that more trials would end up occurring in a discretionary system --- because much more information is in play as being possibly admissible, and the trial judge might wait to decide admissibility until trial.

● One member noted that a discretionary system would be an especially ill fit for the coconspirator exception. That exception is not grounded in trustworthiness; it is simply based on the proponent establishing a ground for attribution. The exception is relatively easy to apply under current law. What factors would be relevant to determining admissibility under a discretionary system? And why would it be an advantage to discard the law on the subject that has been developed for over 40 years?

● One member stated that the best way to understand the hearsay rule is as a way to require the party to produce the best person to testify about a matter, in order to be fair to the adversary by allowing that adversary to test the witness who actually knows something about the event. It is difficult to see how a discretionary system of loose standards would lead to the judge choosing the best person to present the evidence.

● One member argued that the biggest problem with a discretionary system is that application of the hearsay rule would vary from judge to judge. For example, one judge may require empirical support for arguments about trustworthiness while other judges might not. The fact that some of the existing exceptions may not be empirically supported is a problem, but it is not apparent that the problem is solved if judges decide hearsay admissibility on whatever basis is personal to them.

● Judge Shadur argued that the hearsay rule might be usefully changed to parallel the sentencing guidelines --- i.e., a list of factors, which guide discretion, but which allow the judge to depart in various circumstances. The existing hearsay exceptions might be reconstituted as standards or guidelines rather than hard rules. This would allow some discretion but yet would be likely to provide some consistency from judge to judge. Another Committee member suggested that the rule might be structured as allowing for discretion to admit hearsay, with the existing exceptions set forth as illustrations --- that is, it could be structured in the same way as Rule 901(a).

● One member suggested that if the concern is that some of the hearsay exceptions do not in fact guarantee reliability, it would be useful to review whatever empirical evidence exists. The

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FJC representative agreed to undertake a review of published data pertinent to contemporaneous and excited statements --- i.e., the purported guarantees for the hearsay exceptions criticized as being without empirical support by Judge Posner.

● Committee members discussed a proposal made at the Symposium that would substitute Rule 403 balancing for a system of categorical exceptions. Presumably this would mean that in assessing "unfair prejudice" under Rule 403, the judge would take into account the possibility that (and the degree to which) the jury would be unable to discount or properly weigh the hearsay statement. Members suggested that it might be difficult to make such an assessment with any particular piece of hearsay, and it would be difficult for such an analysis to be consistently applied from judge to judge.

● Committee members agreed that it would be worthwhile to explore possible compromise alternatives for hearsay reform --- i.e., something not as radical as removing all the exceptions in favor of a Rule 403-type balancing, and yet something more than retaining the current system of categorical rules. One possibility is to expand the applicability of Rule 807, the residual exception. This might be accomplished by removing the "more probative" requirement of that rule, so that it could be invoked without the showing of necessity that is currently required. The trustworthiness requirement might also be changed from one requiring "equivalence" with the other exceptions to something more freestanding and discretionary.

● As to prior statements of testifying witnesses, the Committee learned in the Symposium that the current Rule 801(d)(1)(A) encourages the practice of bringing "wobbler" witnesses before the grand jury --- in that way, the statement they provide would be substantively admissible should they decide to change their story at trial. Committee members observed that as a policy matter, this appears to be a good practice, albeit not an evidence-related result. Another collateral consequence is that the existing rule expands discovery in criminal cases, because the government must disclose grand jury materials, but need give no advance notice of prior witness statements outside the grand jury.

● At the Symposium, a speaker noted that the premise of excusing prior witness statements from the hearsay rule --- that the witness is available for cross-examination --- does not apply if the witness denies making the statement. A Committee member observed that such a denial would be unlikely if the statement were recorded, but another member stated that even if recorded, the witness could say something like, "they put the statement before me and I just signed it." But another member responded that the increasing use of videorecording for statements would belie that argument, because the circumstances of the preparation and signing of the statement could not be disputed.

● At the Symposium, a speaker stated that one possible problem with broadening substantive admissibility of prior inconsistent statements could arise at the summary judgment stage. A party who could suffer summary judgment due to witness statements by the party or agents might simply make an inconsistent statement for purposes of summary judgment, thereby creating a triable issue of fact. Committee members asked the Reporter to consider this problem. It might be that the impact of a change on summary judgment practice would warrant retaining the existing rule in civil cases, even if it were expanded in criminal cases. The Reporter and

Professor Broun will conduct research into the practice in states with broader substantive admissibility of prior inconsistent statements to see if there has been an impact on summary judgment practice in those states.

● One member noted that even if the Committee makes no changes to the existing rules on hearsay, the Committee's review of the suggestions made at the Symposium would be a good thing because it would show the public that the Committee continues to monitor and review calls for change.

At the end of the discussion, the Committee asked the Reporter to prepare materials on the following topics:

1. Replacing the current rule-based system with a system of guided discretion, which would include a list of standards or illustrations taken from the existing exceptions.

2. Replacing the current system with Rule 403 balancing.

3. Retaining the current structure but expanding the residual exception to allow easier and more frequent use.

4. Broadening Rule 801(d)(1)(A) to allow substantive use of prior inconsistent statements if the statement has been recorded.

5. Considering whether the impact of an expanded Rule 801(d)(1)(A) would have a negative impact on summary judgment cases, and if so whether that would warrant having a different rule in civil and criminal cases.

III. Proposed Amendment to Rule 803(16)

Rule 803(16) provides a hearsay exception for "ancient documents." If a document is more than 20 years old and appears authentic, it is admissible for the truth of its contents. At the Spring 2015 meeting, Committee members unanimously agreed that Rule 803(16) was problematic, as it was based on the false premise that authenticity of a document means that the assertions in the document are reliable. The Committee also unanimously agreed that an amendment would be necessary to prevent the ancient documents exception from providing a loophole to admit large amounts of old, unreliable ESI. The Committee concluded that the problems presented by the ancient documents exception could not be fixed by tinkering with it -- the appropriate remedy is to abrogate the exception and leave the field to other hearsay exceptions such as the residual exception and the business records exception.

The Committee's proposal to abrogate Rule 803(16) was approved by the Standing Committee for release for public comment. At the Fall meeting, the Reporter provided information on the public comment to date. He noted that there have been objections to the proposal by plaintiffs' lawyers in environmental, insurance and asbestos cases. However, most of the objections were about the difficulty of *authenticating* ancient documents --- and the Committee has not proposed any change to the existing authentication rules. Moreover, none of the objections address the possibility that ancient documents, if actually reliable, can still be admitted as business records or under the residual exception. The Reporter will provide a memo on other public comments as they are received, and all of the comments will be reviewed in detail at the next meeting.

IV. Proposed Amendment to Rule 902 to Allow Certification of Authenticity of Certain Electronic Evidence

At its last meeting, the Committee approved changes that would allow certain electronic evidence to be authenticated by a certification of a qualified person --- in lieu of that person's testimony at trial. The changes would be implemented by two new provisions added to Rule 902. The first provision would allow self-authentication of machine-generated information, upon a submission of a certificate prepared by a qualified person. The second proposal would provide a similar certification procedure for a copy of data taken from an electronic device, medium or file. These proposals are analogous to Rules 902(11) and (12) of the Federal Rules of Evidence, which permit a foundation witness to establish the authenticity of business records by way of certification.

The proposals have a common goal of making authentication easier for certain kinds of electronic evidence that are, under current law, likely to be authenticated under Rule 901 but only by calling a witness to testify to authenticity. The Committee found that the types of electronic evidence covered by the two proposed rules are rarely the subject of a legitimate authenticity dispute, but it is often the case that the proponent is nonetheless forced to produce an authentication witness, incurring expense and inconvenience --- and often, at the last minute, opposing counsel ends up stipulating to authenticity in any event. The self-authentication proposals, by following the approach taken in Rule 902(11) and (12) regarding business records, essentially leave the burden of going forward on authenticity questions to the opponent of the evidence.

The Committee's proposal for an amendment adding new Rules 902(13) and (14) was unanimously approved at the June meeting of the Standing Committee, and the proposed amendment was issued for public comment. At the Fall meeting the Reporter notified the Committee that no meaningful comment on the proposal had yet been received. He did note, though, that some law professors had made inquiries to him about whether the proposal might raise an issue in criminal cases due to the Confrontation Clause. He reported to these professors that the Committee has carefully considered whether the self-authentication proposals would raise a Confrontation Clause concern when the certificate of authenticity is offered against a criminal defendant. The Committee was satisfied that there would be no constitutional issue,

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because the Supreme Court has stated in *Melendez-Diaz v. Massachusetts* that even when a certificate is prepared for litigation, the admission of that certificate is consistent with the right to confrontation if it does nothing more than authenticate another document or item of evidence. That is all that these certificates would be doing under the Rule 902(13) and (14) proposals. The Committee also relied on the fact that the lower courts had uniformly held that certificates prepared under Rules 902(11) and (12) do not violate the right to confrontation --- those courts have relied on the Supreme Court's statement in *Melendez-Diaz.* The Committee determined that the problem with the affidavit found testimonial in *Melendez-Diaz* was that it certified the accuracy of a drug test that was itself prepared for purposes of litigation. The certificates that would be prepared under proposed Rules 902(13) and (14) would not be certifying the accuracy of any contents or any factual assertions. They would only be certifying that the evidence to be introduced was generated by the machine (Rule 902(13)) or is data copied from the original (Rule 902(14)). Nonetheless the Reporter notified the Committee that it could expect that some public comment will raise the Confrontation issue. The Reporter will provide a memo on other public comments as they are received, and all of the comments will be reviewed in detail at the next meeting.

V. Possible Amendments to the Notice Provisions in the Federal Rules of Evidence

At the Spring 2015 meeting the Committee considered a memo prepared by the Reporter on the inconsistencies in the notice provisions of the Federal Rules of Evidence. The Reporter's memo indicated that some notice provisions require notice by the time of trial, others require notice a certain number of days before trial, and some provide the flexible standard of enough time to allow the opponent to challenge the evidence. Moreover, while most of the notice provisions with a specific timing requirement provide an exception for good cause, the residual exception (Rule 807) does not. Other inconsistencies include the fact that Rule 404(b) requires the defendant to request notice from the government, while no such requirement is imposed in any other notice provision. Moreover, the particulars of what must be provided in the notice vary from rule to rule; and the rules also differ as to whether written notice is required.

The Committee at the Spring meeting agreed upon the following points:

1) The absence of a good cause exception in Rule 807 was problematic and had led to a dispute in the courts about whether that exception should be read into the rule. A good cause exception is particularly necessary in Rule 807 for cases where a witness becomes unavailable after the trial starts and the proponent may need to introduce a hearsay statement from that witness. And it is particularly important to allow for good cause when it is a criminal defendant who fails to provide pretrial notice. On the merits, Committee members approved in principle the suggestion that a good cause requirement should be added to Rule 807, with or without any attempt to provide uniformity to the notice provisions.

2) The request requirement in Rule 404(b) --- that the criminal defendant must request notice before the government is obligated to give it --- was an unnecessary limitation that serves as a trap for the unwary. Most local rules require the government to provide notice as to Rule 404(b) material without regard to whether it has been requested. In many cases, notice is inevitably provided anyway when the government moves in limine for an advance ruling on admissibility of Rule 404(b) evidence. In other cases the request is little more than a boilerplate addition to a Rule 16 request. Committee members therefore determined that there was no compelling reason to retain the Rule 404(b) request requirement --- and that an amendment to Rule 404(b) to eliminate that requirement should be considered even independently of any effort to provide uniformity to the notice provisions.

3) The notice provisions in Rules 412-415 should not be changed. These rules could be justifiably excluded from a uniformity project because they were all congressionally-enacted, are rarely used, and raise policy questions on what procedural requirements should apply in cases involving sexual assaults.

At the Fall meeting, the Committee reviewed the Reporter's memorandum that focused on deleting the request requirement of Rule 404(b) and altering the notice requirement of Rule 807. The Reporter added an issue not raised in the previous meeting --- whether Rule 807 should be amended to require the proponent to give not just notice of intent to use the hearsay but more specifically notice of intent to use the evidence *as residual hearsay.* He noted that some courts have required this more specific notice while others had not. While no vote was taken on the specific proposal, some Committee members observed that the requirement of a more specific notice would probably provide little benefit, because it would essentially become boilerplate in every case --- the proponent would provide such notice in an excess of caution, even if it was unlikely to offer the evidence as residual hearsay. Another member noted that adding procedural requirements to Rule 807 would be inconsistent with any future attempt to make the exception broader and more easily-used, which is a subject on the Committee's agenda, as discussed above.

Before the meeting, Paul Shechtman had submitted an alternative proposal to provide for a uniform approach to the notice provisions in Rules 404(b), 609(b), 807, and 902(11) --- i.e., all the notice provisions except those found in Rules 412-415. Under Paul's proposal, each of the notice provisions would be structured to provide as follows:

> The proponent must give an adverse party reasonable [written] notice of an intent to offer evidence under this Rule -- and must make the substance of the evidence available to the party -- so that the party has a fair opportunity to meet it. The notice must be provided before trial -- or during trial if the court, for good cause, excuses lack of notice.[1]

[1] Rule 902(11) would retain an existing provision requiring the proponent to make the record and certificate available for inspection.

Paul's proposal would make a number of substantive changes in addition to the two that have been preliminarily approved by the Committee (i.e., eliminating the request requirement of Rule 404(b) and adding a good cause exception to Rule 807). The additional substantive changes would be: 1) the Rule 404(b) notice requirement would extend to civil cases, and to the defendant in criminal cases; 2) the provisions on the "particulars" of notice in each provision would be eliminated, in place of the phrase "substance of the evidence"; and 3) each of the rules would require the notifier to identify the rule under which the evidence would be proffered --- effectively that is an extension of the Reporter's proposal to amend Rule 807 to require notice of intent to offer the evidence as residual hearsay.

In a preliminary discussion of Paul's uniformity proposal, the DOJ representative objected to extending the Rule 404(b) notice requirement to civil cases. She argued that this would be a major change, and questioned its necessity given the breadth of civil discovery. Other members noted that the proposal, currently in brackets, to require notice in writing was a good idea. That is the best way to know that notice has been provided --- eliminating the possibility of a dispute over whether notice was ever given.

One member noted that two of the notice provisions (404(b) and 609(b)) require notice to be provided "before trial" while the other two (807 and 902(11)) require notice to be provided "before the trial or hearing." The Reporter stated that he would look into whether there would be any substantive change if the reference to a "hearing" would be dropped from one set or added to the other set.

The Committee resolved to further consider the possible substantive changes to Rules 404(b) and 807, as well as Paul Shechtman's proposal for uniform notice provisions, at the next meeting.

VI. Best Practices Manual on Authentication of Electronic Evidence

The Committee has determined that it could provide significant assistance to courts and litigants, in negotiating the difficulties of authenticating electronic evidence, by preparing and publishing a best practices manual. The Reporter has been working on preparing such a manual with Greg Joseph and Judge Paul Grimm. The goal is to produce a pamphlet to be issued by the FJC. For the Fall meeting, the Reporter submitted drafts on best practices for authenticating email, texts, and social media postings. He informed the Committee that a draft had been recently prepared for authentication of YouTube and other videos. The next steps are: 1) preparing best practices for authenticating web pages, search engines, and chatroom conversations; 2) revising the draft on judicial notice; and 3) adding an introduction on the applicable standards of proof that Judge Grimm has already prepared. The Reporter estimated that the final product should be ready for approval no later than the Fall 2016 meeting.

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VII. Recent Perceptions (eHearsay)

The Committee has decided not to proceed on a proposal that would add a hearsay exception intended to address the phenomenon of electronic communication by way of text message, tweet, Facebook post, etc. The primary reason stated for the proposed exception is that these kinds of electronic communications are an ill-fit for the standard hearsay exceptions, and that without the exception reliable electronic communications will be either 1) excluded, or 2) admitted but only by improper application of the existing exceptions. The exception proposed was for "recent perceptions" of an unavailable declarant.

The Committee's decision not to proceed with the recent perceptions exception was mainly out of the concern that the exception would lead to the admission of unreliable evidence. The Committee did, however, resolve to continue to monitor the practice and case law on electronic evidence and the hearsay rule, in order to determine whether there is a real problem of reliable hearsay either being excluded or improperly admitted by misapplying the existing exceptions.

For the Fall meeting, the Reporter submitted, for the Committee's information, a short outline on federal case law involving eHearsay. Nothing in the outline to date indicates that reliable eHearsay is being routinely excluded, nor that it is being admitted by misapplying the existing exceptions. Most eHearsay seems to be properly admitted as party-opponent statements, excited utterances, or state of mind statements. And many statements that are texted or tweeted are properly found to be not hearsay at all. At most there was only one or two reported cases in which hearsay was excluded that might have been admitted under a recent perceptions exception.

The reporter will continue to monitor cases involving eHearsay and will keep the Committee apprised of developments.

VIII. *Crawford* Developments

The Reporter provided the Committee with a case digest and commentary on all federal circuit cases discussing *Crawford v. Washington* and its progeny. The cases are grouped by subject matter. The goal of the digest is to allow the Committee to keep apprised of developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions.

The Reporter's memorandum noted that the law of Confrontation continued to remain in flux. The Supreme Court has denied certiorari in a number of cases raising the question about the meaning of the Supreme Court's muddled decision in *Williams v. Illinois*: meaning that courts are still trying to work through how and when it is permissible for an expert to testify on the basis of testimonial hearsay. Moreover, the Supreme Court in the last term decided *Ohio v. Clark,* in which statements made by a child his teachers --- about a beating he received from the defendant --- were found not testimonial, even though the teacher was statutorily required to

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report such statements to law enforcement. The new decision in *Clark*, together with the uncertainty created by *Williams* and other decisions, suggests that it is not appropriate at this point to consider any amendment to the Evidence Rules to deal with Confrontation issues. The Committee resolved to continue monitoring developments on the relationship between the Federal Rules of Evidence and the accused's right to confrontation.

IX. Next Meeting

The next meeting of the Committee is scheduled for Friday, April 29, 2016, in Washington, D.C.

Respectfully submitted,

Daniel J. Capra

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TAB 7

125-011657

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TAB 7A

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125-011660

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

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CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

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

FROM: Honorable John D. Bates, Chair
Advisory Committee on Civil Rules

DATE: December 11, 2015

RE: Report of the Advisory Committee on Civil Rules

Introduction

The Civil Rules Advisory Committee met at S.J. Quinney College of Law at the University of Utah on November 4, 2015. Draft Minutes of this meeting are included at Tab C.

All items in this Report are presented for information about pending and possible future Civil Rules work. Several of them may advance to recommendations for publication to be made to the Standing Committee in June. These subjects include the steadily developing work on potential revisions of Civil Rule 23, joint work with the Appellate Rules Committee on stays of execution under Rule 62, and joint work with several committees on e-filing, e-service, and e-certificates of service.

Other rules proposals are in different stages of development or have been removed from the Civil Rules agenda. "Requester-pays" discovery rules and the offer-of-judgment provisions of Rule 68 have been on the agenda for some time. The Committee is suspending work on the requester-pays topic and carrying Rule 68 forward. Several new suggestions have been made as well. Most have been removed from the Committee's agenda, while some will be studied further. Each of these matters will be described briefly.

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Finally, the Committee has worked on matters that do not directly involve impending rules amendments. The Pilot Projects Subcommittee continues to consider several areas that may prove suitable for pilot projects in one form or another. A subcommittee report is included at Tab B. Work continues to encourage programs designed to educate the bench and bar about the Civil Rules amendments that became effective on December 1, 2015.

RULE 23: CLASS ACTIONS

The Rule 23 Subcommittee of the Advisory Committee on Civil Rules was originally formed in 2011. It was created in recognition of several developments that seemed together to warrant another examination of class-action practice. These included (a) the passage of about a decade since the 2003 amendments to Rule 23 went into effect; (b) the development of a body of Supreme Court cases on class-action practice; and (c) recurrent interest in the subject in Congress, including the 2005 adoption of the Class Action Fairness Act. In addition, some specific topics had emerged in the case law that suggested consideration of rule amendments might be warranted.

The Subcommittee began by developing an initial list of possible topics for serious consideration as rule-amendment possibilities. These ideas were initially discussed with the Advisory Committee during its March, 2012, meeting. Thereafter, the Advisory Committee's work shifted focus to the discovery and related items in the package of amendments eventually published for public comment in August, 2013. That package, as revised, went into effect on Dec. 1, 2015.

In late 2013, the Rule 23 Subcommittee resumed considering possible revisions of Rule 23, and returned to the list of possible topics it had developed initially in 2012. Discussions during 2014 further shaped this list, and a revised list was presented to the Advisory Committee at its Fall 2014 meeting.

Since compiling the topic list discussed by the Advisory Committee at its Fall 2014 meeting, the Subcommittee, or members of the Subcommittee, have made (or will make) presentations about the ideas under consideration at a variety of meetings and conferences. These events include the following:

ABA 18th Class Action Institute (Chicago, IL, Oct. 23-24, 2014).

Lawyers for Civil Justice Membership Meeting (New York, NY, Dec. 4-5, 2014).

The Impact Fund 13th Annual Class Action Conference (Berkeley, CA, Feb. 26-27, 2015).

George Washington University Roundtable on Settlement Class Actions (Washington, D.C., April 8, 2015).

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ALI discussion of Rule 23 issues (Washington, D.C., May 17, 2015).

ABA Litigation Section Meeting (San Francisco, CA, June 19)

American Assoc. for Justice Annual Meeting (Montreal, Canada, July 12, 2015)

Civil Procedure Professors' Conference (Seattle, WA, July 17, 2015) (special half-day program devoted to aggregate litigation issues)

Duke Law Conference on Class-Action Settlement (Washington, D.C., July 23-24, 2015)

Defense Research Institute Conference on Class Actions (Washington, D.C., July 23-24, 2015)

Discovery Subcommittee Mini-Conference (DFW Airport, Sept. 11, 2015)

National Consumer Law Center Consumer Class Action Symposium (San Antonio, TX, Nov. 14-15, 2015)

Association of American Law Schools Annual Meeting (New York, NY, Jan. 8, 2016) (Special program of AALS Civil Procedure Section devoted to Rule 23 issues)

In addition, the Advisory Committee has during this period received more than 25 written submissions about possible changes to Rule 23 and related matters. These submissions are posted at www.uscourts.gov via the link "Archived Rules Comments."

As noted above, the Subcommittee held its own mini-conference on pending Rule 23 amendment ideas on Sept. 11, 2015. The notes regarding that mini-conference and the memorandum sent to conferees to introduce the issues are included in this agenda book.

Based on its work, the Subcommittee refined its focus and reported to the Advisory Committee at its November, 2015, meeting. That committee supported the basic outline for proceeding, which identified six subjects for rule amendments, two additional topics the Subcommittee had considered but put "on hold" pending further developments, and three other topics that it had considered at the mini-conference but would be taken off the current agenda.

Since the Advisory Committee meeting, the Subcommittee has held two further conference calls to respond to comments during the Advisory Committee meeting, and has further refined its sketches of possible amendment ideas. This report includes those refinements.

125-011663

The report is organized in three sections:

I. Topics on which the Subcommittee recommends proceeding now to draft possible amendments. This report includes the current sketches that have emerged from the Subcommittee's discussions. As indicated by the presence of brackets on occasion, and footnoted materials, this drafting process is ongoing, and certain drafting questions about how best to approach the topics remain. These topics are:

1. "Frontloading" in Rule 23(e)(1), requring information relating to the decision whether to send notice to the class of a proposed settlement

2. Making clear that a decision to send notice to the class under Rule 23(e)(1) is not appealable under Rule 23(f)

3. Making clear in Rule 23(c)(2)(B) that the Rule 23(e)(1) notice does trigger the opt-out period in Rule 23(b)(3) class actions

4. Updating Rule 23(c)(2) regarding individual notice in Rule 23(b)(3) class actions

5. Addressing issues raised by "bad faith" class-action objectors

6. Refining standards for approval of proposed class-action settlements under Rule 23(e)(2).

After all six sketches are introduced, the report also includes a mock-up of the entire set of changes as they might appear together, in hopes that will make the overall plan clear.

In addition, the report presents a request from the Department of Justice that Rule 23(f) be amended to extend the time for appealing from 14 to 45 days in any case in which the federal government or a current or former United States officer or employee is a party and is sued for an action occurring in connection with that person's official duties. This request (included in these agenda materials) was submitted in December, 2015, and neither the Rule 23 Subcommittee nor the Advisory Committee has had an opportunity to review and discuss it.

II. Topics the Subcommittee has concluded should remain on its agenda, but be put "on hold" pending further developments. These topics are "ascertainability" and "pick-off" Rule 68 offers of judgment.

III. Topics the Subcommittee has considered in some detail and concluded should be removed from the current agenda. These topics include settlement class certification, cy pres treatment, and "issue classes."

125-011664

I. Topics on which the Subcommittee recommends proceeding to draft possible amendments

Below are the six topics on which the Subcommittee proposes to proceed with drafting possible amendments, along with the current sketches of possible amendment language and accompanying Committee Notes. At the end of Part I is a composite mock-up of all these changes to show how they might look together. After that, the recent Department of Justice proposal is introduced.

1. "Frontloading"

Rule 23. Class Actions

* * * * *

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class, or a class proposed to be certified as part of a settlement, may be settled, voluntarily dismissed or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) ***Notice to class***

(A) The parties must provide the court with sufficient information to enable it to determine whether to give notice to the class of the settlement proposal.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if it determines that giving notice is justified by the parties' showing regarding the prospect of:

(i) approval of the proposal; and

(ii) class certification for purposes of judgment on the settlement proposal.

Sketch of Draft Committee Note

Subdivision (e). The introductory paragraph of Rule 23(e) is amended to make explicit that its procedural requirements apply in instances in which the court has not certified a class at the time that a proposed settlement is presented to the court. The notice required under Rule 23(e)(1) then should also satisfy the notice requirements of amended Rule 23(c)(2)(B) in a class to be certified under Rule 23(b)(3), and trigger the class members' time to request exclusion. Information about the opt-out rate could then be available to the court at the time that it considers final approval of the proposed settlement.

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Subdivision (e)(1). The decision to give notice to the class of a proposed settlement is an important event. It should be based on a solid record supporting the conclusion that the proposed settlement will likely earn final approval after notice and an opportunity to object. The amended rule makes clear that the parties must provide the court with sufficient information to enable it to decide whether notice should be sent. The amended rule also specifies the standard the court should use in deciding whether to send notice—that notice is justified by the parties' showing regarding the prospect of approval of the proposal. The prospect of final approval should be measured under amended Rule 23(e)(2), which provides criteria for the final settlement review.

If the court has not previously certified a class, this showing should also provide a basis for the court to conclude that it likely will be able to certify a class for purposes of settlement. Although the order to send notice is often inaccurately called "preliminary approval" of class certification, it is not appealable under Rule 23(f). It is, however, sufficient to require notice under Rule 23(c)(2)(B) calling for class members in Rule 23(b)(3) classes to decide whether to opt out.

There are many types of class actions and class-action settlements. As a consequence, no single list of topics to be addressed in the submission to the court would apply to each one. Instead, the subjects to be addressed depend on the specifics of the particular class action and the particular proposed settlement. But some general observations can be made.

One key element is class certification. If the court has already certified a class, the only information ordinarily necessary in regard to a proposed settlement is whether the proposal calls for any change in the class certified, or of the claims, defenses, or issues regarding which certification was granted. But if class certification has not occurred, the parties must ensure that the court has a basis for concluding that it likely will be able, after the final hearing, to certify the class. Although the standards for certification differ for settlement and litigation purposes, the court cannot make the decision regarding the prospects for certification without a suitable basis in the record. The ultimate decision to certify the class for purposes of settlement cannot be made until the hearing on final approval of the proposed settlement. If the settlement is not approved and certification for purposes of litigation is later sought, the parties' submissions in regard to the proposed certification for settlement should not be considered in relation to the later request for litigation certification.

Regarding the proposed settlement, a great variety of types of information might appropriately be included in the submission to the court. A basic focus is the extent and nature of benefits that the settlement will confer on the members of the class. Depending on the nature of the proposed relief, that showing may include details on the nature of the claims process that is contemplated [and about the take-up rate anticipated]. The possibility that the parties will report back to the court on the take-up rate after notice to the class is completed is also often important. And because some funds are often left unclaimed, it is often important for the settlement agreement to address the use of those funds. Many courts have found guidance on this subject in § 3.07 of the American Law Institute, Principles of Aggregate Litigation (2010).

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It is often important for the parties to supply the court with information about the likely range of litigated outcomes, and about the risks that might attend full litigation. In that connection, information about the extent of discovery completed in the litigation or in parallel actions may often be important. In addition, as suggested by Rule 23(b)(3)(A), the existence of other pending or anticipated litigation on behalf of class members involving claims that would be released under the proposal is often important. [Particular attention may focus on the breadth of any release of class claims included in the proposal.]

The proposed handling of an attorney-fee award under Rule 23(h) is another topic that ordinarily should be addressed in the parties' submission to the court. In some cases, it will be important to relate the amount of an attorney-fee award to the expected benefits to the class, and to take account of the likely take-up rate. One method of addressing this issue is to defer some or all of the attorney-fee award determination until the court is advised of the actual take-up rate and results. Another topic that normally should be included is identification of any agreement that must be identified under Rule 23(e)(3).

The parties may supply information to the court on any other topic that they regard as pertinent to the determination whether the proposal is fair, reasonable, and adequate. The court may direct the parties to supply further information about the topics they do address, or to supply information on topics they do not address. It must not direct notice to the class until the parties' submissions demonstrate the likelihood that the court will have a basis to approve the proposal after notice to the class and a final approval hearing.

2. Rule 23(f) and the Rule 23(e)(1) order for notice to the class

Rule 23. Class Actions

* * * * *

(f) **Appeals.** A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders. <u>An order under Rule 23(e)(1) may not be appealed under subdivision (f).</u>

Sketch of Draft Committee Note

Subdivision (f). As amended, Rule 23(e)(1) provides that the court should direct notice to the class regarding a proposed class-action settlement in cases in which class certification has not yet been granted only after determining that the prospect of eventual class certification justifies giving notice. This decision is sometimes inaccurately characterized as "preliminary approval" of the proposed class certification. But it is not a final approval of class certification,

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and review under Rule 23(f) would be premature. This amendment makes it clear that an appeal under this rule is not permitted until the district court decides whether to certify the class.

(3) Clarifying that Rule 23(e)(1) notice triggers the opt-out period

Rule 23. Class Actions

* * * * *

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses

* * * * *

(2) ***Notice.***

* * * * *

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), <u>or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for settlement under Rule 23(b)(3),</u> the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. * * * * *

Sketch of Draft Committee Note

Subdivision (c)(2). As amended, Rule 23(e)(1) provides that the court must direct notice to the class regarding a proposed class-action settlement only after determining that the prospect of class certification and approval of the proposed settlement justifies giving notice. This decision is sometimes inaccurately called "preliminary approval" of the proposed class certification in Rule 23(b)(3) actions, and it is common to send notice to the class simultaneously under both Rule 23(e)(1) and Rule 23(c)(2)(B), including a provision for class members to decide by a certain date whether to opt out. This amendment recognizes the propriety of this notice practice. Requiring repeat notices to the class can be wasteful and confusing to class members.

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(4) Notice in 23(b)(3) class actions

Rule 23. Class Actions

* * * * *

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses

* * * * *

(2) ***Notice***

* * * * *

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice—by United States mail, electronic means or other appropriate means—to all members who can be identified through reasonable effort. * * * * *

Sketch of Draft Committee Note

Subdivision (c)(2). Since *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), interpreted the individual notice requirement for class members in Rule 23(b)(3) class actions, many courts interpreted the rule to require notice by first class mail in every case. But technological change since 1974 has meant that other forms of communication are more reliable and important to many. Courts and counsel have begun to employ new technology to make notice more effective, and sometimes less costly.

Rule 23(c)(2)(B) is amended to take account of these changes, and to call attention to them. The rule calls for giving class members "the best notice that is practicable." It does not specify any particular means as preferred. Although it may often be true that online methods of notice, for example by email, are the most promising, it is important to keep in mind that a significant portion of class members in certain cases may have limited or no access to the Internet. Instead of preferring any one means of notice, therefore, courts and counsel should focus on the means most likely to be effective to notify class members in the case before the court. The amended rule emphasizes that the court must exercise its discretion to select appropriate means of giving notice.

Professional claims administration firms have become expert in evaluating differing methods of reaching class members. There is no requirement that such professional guidance be sought in every case, but in appropriate cases it may be important, and provide a resource for the

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21 court and counsel. In providing the court with sufficient information to enable it to decide
22 whether to give notice to the class of a proposed class-action settlement under Rule 23(e)(1), for
23 example, it may often be important to include a report about the proposed method of giving
24 notice to the class.
25
26 In determining whether the proposed means of giving notice is appropriate, the court
27 should give careful attention to the content and format of the notice and, if this notice is given
28 under Rule 23(e)(1) as well as Rule 23(c)(2)(B), any claim form class members must submit to
29 obtain relief. Particularly if the notice is by electronic means, care is necessary not only
30 regarding access to online resources, but also to the manner of presentation and any response
31 expected of class members. As the rule directs, the means should be the "best * * * that is
32 practicable" in the given case. The ultimate goal of giving notice is to enable class members to
33 make informed decisions about whether to opt out or, in instances where a proposed settlement is
34 involved, to object or to make claims. Means, format and content that would be appropriate for
35 class members likely to be sophisticated, for example in a securities fraud class action, might not
36 be appropriate for a class made up of members likely to be less sophisticated. As with the
37 method of notice, the form of notice should be tailored to the class members' likely
38 understanding and capabilities.
39
40 Attention should focus also on the method of opting out provided in the notice. As with
41 making claims, the process of opting out should not be unduly difficult or cumbersome. [At the
42 same time, it is important to guard against the risk of unauthorized opt-out notices.] As with
43 other aspects of the notice process, there is no single method that is suitable for all cases.

44 This amendment recognizes that technological change since 1974 calls for recalibrating
45 methods of notice to take account of current realities. There is no reason to think that
46 technological change will halt soon, and there is no way to forecast what further technological
47 developments will affect the methods used to communicate. Courts seeking appropriate means
48 of giving notice to class members under this rule should attend to existing technology, including
49 class members' likely access to that technology, when reviewing the methods proposed in
50 specific cases.

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(5) Objectors

No other subject discussed in the many conferences and meetings Subcommittee members have attended—and in multiple individual communications—has generated as much concern and apparent unanimity as the problem of "bad faith" objectors. The claim repeatedly made is that such objectors exploit their ability to object and to appeal from approval of a settlement over their objections. The appeal allows them, in essence, to hold the settlement "hostage." The "business model" that has been described sometimes consists of submitting extremely uninformative objections to the district court, often seemingly cobbled together from other cases in which objector counsel has also lodged objections. These objections may not even apply to the settlement in the pending case. Persuading the district judge that the objection is warranted is not a priority. Then, when the uninformative or inapposite objection does not derail the proposed settlement and the court enters judgment on the basis of the settlement, the objector files a notice of appeal and objector counsel demands that class counsel "settle" the appeal by paying a substantial sum to objector counsel. From the perspective of class counsel, this payoff may be justified to ensure timely relief to class members, for the class action settlement ordinarily cannot be consummated until all appeals have been completed.

As amended in 2003, Rule 23(e)(5) included a provision that partly addressed the possibility of such behavior. Although it explicitly recognized the right of class members to object to a proposed settlement, the amended rule also directed that such objections could not be withdrawn unless the court approved. That provision affords a level of scrutiny regarding inappropriate demands of objectors in the district court, but the filing of a notice of appeal seemingly frees the objector from any further judicial scrutiny. Since the delay that can result from an appeal is much greater than the delay that would result from an ill-founded objection, the omission from the 2003 amendment of any ongoing approval requirement has—in at least some cases—produced unfortunate pressures on class counsel to accede to objector counsel's demands.

This post-2003 development has galvanized a significant portion of class-action practitioners to support rule changes to address these objector counsels' "business model." Several years ago, the Appellate Rules Committee received a formal proposal for adoption of an Appellate Rule forbidding any payment under any circumstances to objectors in return for dropping appeals from approvals of class-action settlements. Rule 23 Subcommittee members have received many requests to do something about abuse of the right of objectors to appeal. Even attorneys who often represent objectors favor effective action; some of them vigorously proclaim that they will not settle their own appeals for payoffs.

Despite the widespread agreement in the class-action bar that something should be done to end this practice, the Subcommittee has found it difficult to settle on a potential rule change that would be effective in defeating this "business model." A flat prohibition of any payments to settle objections or appeals seems overbroad. But the possibility that the question straddles proceedings in the district court and the court of appeals introduces complexity.

One possibility would be for the Appellate Rules Advisory Committee and the Civil Rules Advisory Committee to generate a combined amendment package that would deal with the reported problems. The Rule 23 Subcommittee has considered these possibilities, and Judge Colloton and Prof. Maggs have generously given their time to discuss the questions during Subcommittee conference calls. The possibility was also discussed during the Civil Rules Advisory Committee's Salt Lake City meeting in November, and during the Appellate Rules Advisory Committee's meeting in Chicago in October, which was attended by Judge Dow, Chair of the Rule 23 Subcommittee.

A theme that arose from these discussions was that a simpler change would be preferable to a more complicated one. Accordingly, this report presents two possibilities—a simpler one involving only a revision of Rule 23(e) and a more complicated one involving a revision of the Appellate Rules as well, along with further changes to Rule 23(e). Both approaches are sketched below, but it is important to appreciate that the Subcommittee strongly favors the simpler approach that involves only a revision of Rule 23. This proposal makes district court approval necessary for any payment or other consideration in return for forgoing, abandoning, or dismissing an objection to a proposed class-action settlement or an appeal from district court approval of a proposed settlement over an objection. It thus does not in any way affect the court of appeals' authority to rule on whether to dismiss an appeal, but permits payment for doing so only on approval of the district court.

Besides forbidding payments to objectors, the simple model seeks to assist the district court's review of proposed settlements by requiring that objectors provide specifics to support their objections. Bad-faith objectors too often do not, and failure to comply with this feature of the amendment would provide an additional reason to reject an objection.

A. Simple Model
(favored by Subcommittee)

(5) **(A)** Any class member may object to the proposal if it requires court approval under this subdivision (e)~~; the objection may be withdrawn only with the court's approval~~. The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and state with specificity the grounds [for the objection].

(B) Unless approved by the court after a hearing, no payment or other consideration may be provided to an objector or objector's counsel in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal [despite the objection].

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Drafting a Committee Note now seems premature, but one thing such a Note might say is that (B)(ii) means that even if an objector appeals and then moves to dismiss the appeal any payment or consideration in connection with that dismissal is forbidden unless approved by the district court.

Another thing a Note could observe is that this amendment means that withdrawal of an objection in the district court requires court approval only if there is a payment or other consideration in connection with it. Thus, the court-approval requirement of current 23(e)(5) is relaxed by this amendment, and the amendment focuses on the problem area we have heard about. There seems no reason, based on the experience under Rule 23(e)(5) since 2003, for requiring a formal court approval of withdrawal of an objection by a good-faith objector who decides not to pursue an objection once the specifics of a proposed settlement are explained.

It may be that research on the treatment of "collateral" matters in connection with appeals would bear on this approach.

Beyond that, some further observations may be in order:

(1) A Note should make it clear that objectors are not normally "bad," but instead provide a valuable service to the court and the parties. And the fact they want to be paid for providing this service does not make them "bad," as recognized in the Committee Note to 23(h) when adopted in 2003.

(2) (e)(5)(B) above does not explicitly require disclosure of the agreement to compensate, but that seems implicit. One cannot ask for approval of something one does not disclose.

(3) This approach does not change the Appellate Rules. The court of appeals will presumably proceed with whatever briefing schedule it would normally expect the parties to follow. That schedule might afford enough time for the parties to reach an agreement for dismissal in return for payment and submit it to the district court for its approval before the due date for the appellant's brief. But it should be noted that the district court may—under the amendment sketch—approve the payment only "after a hearing." So there may not be time to obtain that approval under the court of appeals' schedule. If so, the appellant presumably would have to file a motion in the court of appeals asking for an extension of time. It is hard to see how that motion could fail to explain that a motion has been made to the district court to approve the payment. Unless that happens, it is not clear that there is any need to direct that the parties report the deal to the court of appeals.

125-011673

B. Changing Appellate Rule 42(c) also
(not favored by Subcommittee)

Sketch of possible Appellate Rule 42(c)

Rule 42. Voluntary Dismissal

* * * * *

(c) **(1)** Unless approved by the court, no payment or other consideration may be provided to an objector or objector's counsel in connection with dismissing or abandoning an appeal from a judgment approving a proposed class-action settlement despite an objection under Rule 23(e)(5) of the Federal Rules of Civil Procedure. Such payment or consideration must be disclosed to the court.

(2) Before or after ruling on a motion to dismiss [or dismissing for failure to prosecute], the court may itself decide whether to approve a payment or other consideration disclosed under Rule 42(c)(1), or may refer the question whether to approve the payment to the district court for a recommendation, retaining jurisdiction to review the recommendation [on request by any party to the appeal].

This approach seems somewhat incompatible with the sketch of Civil Rule 23(e)(5)(B)(ii), which gives jurisdiction to the district court. So maybe the right way to proceed would be as follows in 23(e)(5):

(B) Unless approved by the court after a hearing, no payment or other consideration may be provided to an objector or objector's counsel in connection with forgoing or withdrawing an objection[, or forgoing or abandoning an appeal, or seeking dismissal of an appeal under Rule 42(a) of the Federal Rules of Appellate Procedure] {, or forgoing, abandoning, or dismissing an appeal at any time before the appeal is docketed by the circuit clerk}.

(C) If the court of appeals refers to the district court the question whether to approve payment or other consideration for dismissal or abandonment of an appeal [under Rule 42(c)(2) of the Federal Rules of Appellate Procedure], the district court must[, after a hearing,] report its recommendation to the court of appeals.

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This approach would be more elaborate. That is one of the reasons why the Subcommittee does not favor it. One question is whether or how to deal with "abandonment" in the court of appeals, or dismissal for failure to prosecute. One might expect that an order to show cause re dismissal would precede dismissal for failure to prosecute, and that is the hook for requiring disclosure of the payoff to the court of appeals in the abandonment situation. Whether that method really is employed (or would be employed) is uncertain. There does not seem to be an Appellate Rule that provides a parallel to Civil Rule 41(b) regarding failure to prosecute. It would seem that class counsel would not be willing to pay off the objector until certain that the appeal is gone, and that the abandonment situation makes that less clear. So maybe the abandonment for payoff problem is not really a problem on appeal.

This approach does not have a hearing requirement in the court of appeals. Should one be added? Is that useful in the court of appeals? The idea of requiring it before the district court is to reduce the prospect class counsel might be willing to stipulate but not to support the payment face-to-face with the judge.

(6) Settlement approval criteria

The centrality of settlement approval criteria probably cannot be overstated. Although a small number of certified class actions go to trial, a much larger number end in settlements, and certification is often only for purposes of settlement.

Rule 23 has, until now, said little about what a court should focus on in reviewing a proposed settlement. The 1966 version of Rule 23 only said that the court must approve any settlement or voluntary dismissal. The 2003 amendment clarified that it must find that the settlement is "fair, reasonable, and adequate," a standard derived from case law under original Rule 23(e). Much of that case law developed during the 1970s and 1980s, and in some places included a large number of factors. The ALI undertook to focus the analysis on core features of concern reflected in the factor lists of all circuits. See ALI, Principles of Aggregate Litigation § 3.05 (2010).

Building on the ALI approach, the sketch of possible revisions below also seeks to focus on a relatively short list of core considerations in the settlement-approval setting. This listing also may inform the decision under Rule 23(e)(1) about what information the court needs to make a decision whether a proposed settlement has enough promise to justify notice to the class.

125-011675

Rule 23. Class Actions

* * * * *

(e) **Settlement, Voluntary Dismissal, or Compromise**. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise.

* * * * *

(2) If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:~~.~~

(A) the class representatives and class counsel have adequately represented the class;

(B) the settlement was negotiated at arm's length;[1]

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the proposed method of distributing relief effectively to the class, including the method of processing class member claims, if required;

(iii) the terms, including timing of payment, of any proposed attorney-fee award; and

(iv) any agreement made in connection with the settlement proposal; and[2] [3]

---

[1] The Subcommittee has discussed combining (A) and (B) into a single provision as follows:

> **(A)** the class representatives and class counsel have adequately represented the class in prosecuting the case and negotiating its settlement at arm's length;

Consideration of this approach continues. One reason for favoring the approach in text is that it emphasizes the need to focus on the general adequacy of representation and, somewhat separately, on the course of negotiation that led to the settlement proposal. One reason for a combined approach is that all these judgments essentially involve the same criterion—whether there has been adequate representation.

[2] During its discussions, the Subcommittee has also considered an additional factor for what is now (C):

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34 **(D)** class members are treated equitably relative to each other.
35
36 Sketch of Draft Committee Note
37
38 **Subdivision (e)(2).** The central concern in reviewing a proposed class-action settlement
39 is that it is fair, reasonable, and adequate. This criterion emerged from case law implementing
40 Rule 23(e)'s requirement of court approval for class-action settlements. It was formally
41 recognized in the rule through the 2003 amendments. By then, courts had generated lists of
42 factors to shed light on this central concern. Overall, these factors focused on comparable
43 considerations, but each circuit developed its own vocabulary for expressing these concerns. In
44 some circuits, these lists have remained essentially unchanged for thirty or forty years. The goal
45 of this amendment is to focus the court and the lawyers on the core concerns of procedure and
46 substance that should guide the decision whether to approve the proposal, not to displace any of
47 these factors.
48
49 One reason for this amendment is that a lengthy list of factors can take on an independent
50 life, potentially distracting attention from the central concerns that inform the settlement-review
51 process. A particular circuit's list might include a dozen or more separately articulated factors.
52 Some of those factors—perhaps many—may not be relevant to a particular case or settlement
53 proposal. Those that are relevant may be more or less important than others to the particular
54 case. Yet counsel and courts may feel it necessary to address every single factor on a given
55 circuit's list in every case. The sheer number of factors can distract both the court and the parties
56 from the central concerns that bear on review under Rule 23(e)(2).
57
58 This amendment therefore directs the parties to present the settlement to the court in
59 terms of a shorter list of factors, by focusing on the central procedural considerations and
60 substantive qualities that should always matter to the decision whether to approve the proposal.
61
62 **Paragraphs (A) and (B).** These paragraphs identify matters that might be described as
63 "procedural" concerns, looking to the conduct of the litigation and of the negotiations leading up
64 to the proposed settlement. Attention to these matters is an important adjunct to scrutinizing the
65 specifics of the proposed settlement. If the court has appointed class counsel or interim class

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(iii) the probable effectiveness of the proposal in accomplishing the goals of the class action;

Concern has been expressed, however, about what this additional factor means, if it is distinct from the others in (C).

[3] An alternative presentation of factor (C) has recently been proposed:

> (c) the relief awarded to the class—taking into account the proposed attorney-fee award [and the timing of its payment,] and any agreements made in connection with the settlement—is adequate, given the risks, probability of success, and delays of trial and appeal; and

This possible reformulation will be before the Subcommittee as it moves forward.

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counsel, it will have made an initial evaluation of counsel's capacities and experience. But the focus at this point is on the actual performance of counsel acting on behalf of the class.

The information submitted under Rule 23(e)(1) may provide a useful starting point in assessing these topics. For example, the nature and amount of discovery may indicate whether counsel negotiating on behalf of the class had an adequate information base. The pendency of other litigation about the same general subject on behalf of class members may also be pertinent. The conduct of the negotiations may also be important. For example, the involvement of a neutral or court-affiliated mediator or facilitator in those negotiations may bear on whether they were conducted in a manner that would protect and further the class interests.

In making this analysis, the court may also refer to Rule 23(g)'s criteria for appointment of class counsel; the concern is whether the actual conduct of counsel has been consistent with what Rule 23(g) seeks to ensure. Particular attention might focus on the treatment of any attorney-fee award, both as to the manner of negotiating the fee award and its terms.

Paragraphs (C) and (D). These paragraphs focus on what might be called a "substantive" review of the terms of the proposed settlement. A central concern is the relief that the settlement is expected to provide to class members. Evaluating the proposed claims process and expected or actual claims experience (if the notice to the class calls for pre-approval submission of claims) may bear on this topic. The contents of any agreement identified under Rule 23(e)(3) may also bear on this subject, particularly regarding the equitable treatment of all members of the class.

Another central concern will relate to the cost and risk involved in pursuing a litigated outcome. Often, courts may need to forecast what the likely range of possible classwide recoveries might be and the likelihood of success in obtaining such results. That forecast cannot be done with arithmetic accuracy, but it can provide a benchmark for comparison with the settlement figure. And the court may need to assess that settlement figure in light of the expected or actual claims experience under the settlement.

[If the class has not yet been certified for trial, the court may also give weight to its assessment whether litigation certification would be granted were the settlement not approved.]

Examination of the attorney-fee provisions may also be important to assessing the fairness of the proposed settlement. Ultimately, any attorney-fee award must be evaluated under Rule 23(h), and no rigid limits exist for such awards. Nonetheless, the relief actually delivered to the class is often an important factor in determining the appropriate fee award. Provisions for reporting back to the court about actual claims experience, and deferring a portion of the fee award until the claims experience is known, may bear on the fairness of the overall proposed settlement.

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Often it will be important for the court to scrutinize the method of claims processing to ensure that it is suitably receptive to legitimate claims. A claims processing method should deter or defeat unjustified claims, but unduly demanding claims procedures can impede legitimate claims. Particularly if some or all of any funds remaining at the end of the claims process must be returned to the defendant, the court must be alert to whether the claims process is unduly exacting.

Paragraph (D) calls attention to a concern that may apply to some class action settlements—inequitable treatment of some class members vis-a-vis other class members. Matters of concern could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that affect apportionment of relief.

Composite of whole package
of amendment sketches

The Subcommittee's goal has been to develop a set of rule changes that together operate as a sensible whole. So it seems useful to present a composite of these changes (without the complication of the objector approach including an Appellate Rule change):

Rule 23. Class Actions

* * * * *

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses

* * * * *

(2) ***Notice.***

* * * * *

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), <u>or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for settlement under Rule 23(b)(3),</u> the court must direct to class members the best notice that is practicable under the circumstances, including individual notice<u>—by United States mail, electronic means or other appropriate means—</u>to all members who can be identified through reasonable effort. * * * * *

* * * * *

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(e) **Settlement, Voluntary Dismissal, or Compromise.** The claims, issues, or defenses of a certified class, or a class proposed to be certified as part of a settlement, may be settled, voluntarily dismissed or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) ***Notice to class***

(A) The parties must provide the court with sufficient information to enable it to determine whether to give notice to the class of the settlement proposal.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if it determines that giving notice is justified by the parties' showing regarding the prospect of:~~.~~

(i) approval of the proposal; and

(ii) class certification for purposes of judgment on the settlement proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:~~.~~

(A) the class representatives and class counsel have adequately represented the class;

(B) the settlement was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the proposed method of distributing relief effectively to the class, including the method of processing class member claims, if required;

(iii) the terms, including timing of payment, of any proposed attorney-fee award; and

(iv) any agreement made in connection with the settlement proposal; and

(D) class members are treated equitably relative to each other.

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* * * * *

(5) **(A)** Any class member may object to the proposal if it requires court approval under this subdivision (e)~~; the objection may be withdrawn only with the court's approval~~. The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and state with specificity the grounds [for the objection].

(B) Unless approved by the court after a hearing, no payment or other consideration may be provided to an objector or objector's counsel in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal [despite the objection].

* * * * *

(f) **Appeals**. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders. An order under Rule 23(e)(1) may not be appealed under subdivision (f).

Department of Justice Proposal

On Dec. 4, 2015, Benjamin Mizer, Principal Deputy Assistant Attorney General, wrote to Judge Dow to submit a proposal that Rule 23(f) be amended as follows:

(f) **Appeals.** A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered, except that any party may file such a petition within 45 days after the order is entered if one of the parties is the United States, a United States agency, a United States officer or employee sued in an official capacity, or a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf—including all instances in which the United States represents that person when the order is entered or files the appeal for that person. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

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The Department recommends a Committee Note as follows:

Committee Note

Subdivision (f). The amendment lengthens the time for filing a petition for permission to appeal from a class-action certification order from 14 to 45 days in civil cases involving the United States or its agencies or officers. The amendment, analogous to the provisions in Federal Rules of Appellate Procedure 4(a)(1)(B) and 40(a)(1), which extend the time for filing a notice of appeal or a petition for rehearing in cases involving the United States government, recognizes that the Solicitor General needs time to conduct a thorough review of the merits of each case and to assess the government's diverse interests before authorizing a petition for permission to appeal an order granting or denying class certification.

Present posture

Neither the Subcommittee nor the Advisory Committee has had a chance to review or discuss this proposed amendment. A copy of Mr. Mizer's Dec. 4, 2015, letter is included in this agenda book.

II. Issues "on hold"

The two issues described below also drew much attention during the various events attended by Subcommittee members. But the fluidity of current case law, and the prospect of significant change (including at least one seemingly imminent Supreme Court decision), persuaded the Subcommittee that neither issue warrants going forward with developing formal amendment proposals at this time.

A. Ascertainability

Ascertainability has emerged as a prominent issue in the last few years. The Subcommittee received many recommendations about how Rule 23 might be amended to address this concern directly. In particular, several comments urged that the rulemakers counter certain decisions by the Third Circuit about its interpretation of the ascertainability factor in class certification. Some argued that undue attention to the mechanics of distributing a class payout at the certification stage created inappropriate obstacles to class certification, particularly in class actions growing out of purchase of low-value consumer products. But others urged that a strong version of the perceived Third Circuit approach be written into the rule as an absolute prerequisite to certification, even in class actions for injunctive relief under Rule 23(b)(2).

The case law, meanwhile, appears to be fluid and continues to develop. The agenda book for the Advisory Committee's November meeting contained three court of appeals decisions issued since the Advisory Committee's April 2015 meeting that seem to reflect evolution of the courts' attitude toward handling ascertainability—*Brecher v. Republic of Argentina*, 802 F.3d

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303 (2d Cir. 2015) (per Wesley, J.); *Mullins v. Direct Digital*, LLC, 795 F.3d 654 (7th Cir. 2015); *Byrd v. Aaron's, Inc.*, 784 F.3d 184 (3d Cir. 2015). And some parties seem to make very aggressive ascertainability arguments to defeat certification. *See, e.g.*, *In re Community Bank of Northern Virginia Mortgage Lending Practices Litigation*, 795 F.3d 380, 396-97 (3d Cir. 2015) (upholding certification and rejecting defendant's ascertainability argument as "mired in speculation").

Supreme Court developments may also affect the handling of ascertainability issues. Two cases in which the Court heard arguments this Term—*Spokeo, Inc. v. Robins*, 742 F.3d 409 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 1892 (2015); *Tyson Foods, Inc. v. Bouaphakeo*, 765 F3d 791 (8th Cir. 2015), *cert. granted*, 135 S. Ct. 2806 (2015)—may bear on ascertainability issues. And two courts of appeals have stayed the mandate on decisions involving ascertainability issues to permit defendants to seek writs of certiorari—*Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015), *mandate stayed*, Aug. 18, 2015, *petition for certiorari filed* (no. 15-549), Oct. 28, 2015; *Rikos v. Proctor & Gamble Co.*, 799 F.3d 497 (6th Cir. 2015), *mandate stayed*, Oct. 28, 2015.

In addition to the volatility of current case law, the Subcommittee is not certain what should be in a rule amendment if one is warranted. For its mini-conference, it attempted to draft a "minimalist" approach (included elsewhere in this agenda book), but several participants in that event regarded it as adopting a strong version of the Third Circuit test that many have questioned. It may be that developments in the relatively near future will at least cast more light on how best to approach these issues in a possible rule change. For the present, the Subcommittee regards it as unwise to attempt to devise a reaction without regard to developments reasonably anticipated in the relatively near future.

B. "Pick-off" offers of judgment

For some time, the Subcommittee has considered various ways to deal with the possibility of inappropriate "pick-off" offers of judgment to putative class representatives that would moot their class actions. The Subcommittee does not recommend proceeding with work on an amendment to address this concern.

Until recently, the Seventh Circuit had held that, at least in some circumstances, such offers would moot proposed class actions. *See Damasco v. Clearwire Corp.*, 662 F.3d 891 (7th Cir. 2011). In reaction, plaintiff lawyers inside and outside the Seventh Circuit filed "out of the chute" class certification motions to guard against mootness, because the Seventh Circuit regarded making such a motion as sufficient to avoid the potential mootness problem. On occasion, plaintiffs would also move to stay resolution of their own class-certification motion until discovery and other work had been done to support resolution of certification.

The issues memorandum for the mini-conference contained three different possible rule-amendment approaches for dealing with these problems. The memo also raised the question

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whether the problem warranted the effort involved in proceeding to amend the rules. After the mini-conference, the Subcommittee decided that proceeding at this time is not indicated.

In *Chapman v. First Index, Inc.*, 796 F.3d 783 (7th Cir. 2015), the Seventh Circuit overruled *Damasco* and a number of its cases following that decision "to the extent they hold that a defendant's offer of full compensation moots the litigation or otherwise ends the Article III case or controversy." Judge Easterbrook noted that "Justice Kagan's dissent in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1532-37 (2013) (joined by Ginsburg, Breyer & Sotomayor, JJ.), shows that an expired (and unaccepted) offer of a judgment does not satisfy the Court's definition of mootness, because relief remains possible." He added:

> Courts of appeals that have considered this issue since Genesis Healthcare uniformly agree with Justice Kagan. *See, e.g.*, *Tanasi v. New Alliance Bank*, 786 F.3d 195 (2d Cir. 2015); *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871 (9th Cir. 2014), cert. granted, 135 S. Ct. 2311 (2015). The issue is before the Supreme Court in *Gomez*, and we think it best to clean up the law of this circuit promptly, rather than require Chapman and others in his position to wait another year for the Supreme Court's decision.

See also Hooks v. Landmark Indus. Inc., 797 F.3d 309 (5th Cir. 2015) (holding that "an unaccepted offer of judgment cannot moot a named-plaintiff's claim in a putative class action").

As noted by Judge Easterbrook, the Supreme Court has this issue before it in the *Campbell-Ewald* case (*Campbell-Ewald*, 768 F.3d 871 (9th Cir. 2015), *cert. granted*, 135 S.Ct. 2311 (2015)). The oral argument in that case occurred on Oct. 14, 2015. It seems prudent to await the result of the Court's decision, and it is quite possible that the issue will recede from the scene after that decision. It could recede even if the Court ultimately does not decide the case, or the decision leaves some questions open.

III. Issues Subcommittee is removing from its current agenda

During the Advisory Committee's November meeting, the Subcommittee presented three additional issues that it did not favor retaining on its agenda. The Advisory Committee approved the decision not to proceed presently with amendment ideas on these three topics, all of which were discussed in many meetings Subcommittee members have attended with the bar and bench, and included in the issues memorandum for the mini-conference.

A. Settlement Class Certification

The question whether certification standards should apply differently when the question is certification only for settlement rather than certification for trial has emerged on occasion since Rule 23 was amended in 1966. In 1995, a Third Circuit decision stating that settlement

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certification could not be granted in any case in which the court would not certify for full litigation prompted a published proposal to add a new Rule 23(b)(4) permitting certification for settlement in a 23(b)(3) case even though the case would not satisfy the full Rule 23(b)(3) requirements for certification for trial.

The amendment proposal proved controversial, and meanwhile the Supreme Court decided *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), which noted that the settlement class action had become a "stock device," and held that at least the manageability requirement of Rule 23(b)(3) need not be satisfied when certification only for settlement was sought. But the Court did not say that the predominance requirement was relaxed in the settlement setting.

The materials for the mini-conference included a sketch of a new Rule 23(b)(4) that would relax the predominance requirement. Several commented that this relaxation would produce dangerous results, and might prompt the filing of inappropriate proposed class actions. But few urged that such a change is acutely needed. It seemed that experienced lawyers have found the current state of the practice to afford sufficient flexibility to handle settlement class certification without the need for an amendment.

Instead, it seemed that emphasis on careful scrutiny of settlements under Rule 23(e)(2) was a more important focus for rule amendments, something that is included on the Subcommittee's list of topics to develop at present.

Given the ambivalence of many in the bar, and the existence of serious concerns about whether any rule change is really needed to enable class settlements when they are appropriate, the Subcommittee decided after the mini-conference not to proceed further with this idea.

B. Cy Pres

Chief Justice Roberts articulated concerns about cy pres provisions in his separate opinion regarding denial of certiorari in *Marek v. Lane*, 134 S. Ct. 8 (2013). Petitions seeking certiorari continue to request Supreme Court review of cy pres provisions. The ALI Aggregate Litigation Principles, in § 3.07, offer a series of recommendations about cy pres provisions that many courts of appeals have adopted. Indeed, this provision is the one from the Aggregate Litigation Principles that has been most cited and followed by the courts.

Beginning with several ideas from the ALI recommendations, the Subcommittee developed a fairly lengthy sketch of both a possible rule amendment and a possible Committee Note that were included in the issues memo for the mini-conference. That sketch has drawn very considerable attention, and also raised a wide variety of questions.

One question is whether there is any need for a rule in light of the widespread adoption of the ALI approach. It is not clear that any circuit has rejected the ALI approach, and it is clear that several have adopted it.

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Another question is whether adopting such a provision would raise genuine Enabling Act concerns. The sketch the Subcommittee developed authorized the inclusion of a cy pres provision in a settlement agreement "even if such a remedy could not be ordered in a contested case." The notion is that the parties may agree to things in a settlement that a court could not order after full litigation. Yet it might also be stressed that, from the perspective of unnamed members of the class, the binding effect of the class-action settlement depends on the force of Rule 23 and the court's decree, not just the parties' agreement. So it might be said that a rule under which a court could substitute a cy pres arrangement for the class members' causes of action is subject to challenge. That argument could be met, however, with the point that the court has unquestioned authority to approve a class-action settlement that implements a compromise of the amount claimed, so assent to a cy pres arrangement for the residue after claims are paid should be within the purview of Rule 23.

At the same time, some submissions to the Subcommittee articulated reasons for caution in the area. Some urged, for example, that cy pres provisions serve valuable purposes in supporting such worthy causes as providing legal representation to low-income individuals who otherwise would not have access to legal services. Examples of other worthy causes that have benefitted from funds disbursed pursuant to cy pres arrangements have been mentioned. *See, e.g.*, Cal. Code Civ. Pro. § 384(b) (directing that the residue left after distribution of benefits from class-action settlements should be distributed to child advocacy programs or nonprofit organizations providing civil legal services to the indigent, or to organizations supporting projects that will benefit the class).

It seems widely agreed that lump-sum settlements often produce a residue of undistributed funds after the initial claims process is completed. The ALI approach favors attempting to make a further distribution to class members who have submitted claims at that point, but it may be that the very process of trying to locate more class members or make additional distributions would use up most or all of the residue.

Items included on the Subcommittee's list of topics for present action can partly address some of these concerns. The proposed sketches for Rules 23(e)(1) and 23(e)(2) (items (1) and (6) on the list in Part I of this report) both call attention to the need to address the possibility of a left-over surplus after the claims period, and to plans for dealing with that surplus. Those sketches and the one on notice (item 4)) also emphasize the need for the court to attend to the effectiveness of the notice campaign and the way in which claims may be presented. Together, these measures may improve the handling of issues that have raised serious questions about provisions put forward as cy pres arrangements without encountering the difficulties outlined above.

Ultimately, the Subcommittee concluded that the combination of (a) uncertainty about whether guidance beyond the ALI provision and judicial adoption of it is needed, (b) the challenges of developing specifics for a rule provision, and (c) concerns about the proper limits of the rulemaking authority cautioned against adopting a freestanding cy pres provision.

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C. Issue classes

The Subcommittee included in its memorandum introducing its mini-conference several sketches of possible amendments to Rule 23(b) or (c) designed to integrate Rule 23(b)(3) and 23(c)(4). For a time it appeared that there was a conflict among the circuits about whether these two provisions could both be effectively employed under the current rule. But it is increasingly clear that the dissonance in the courts has subsided. At the same time, there have been some intimations that changing the rule along the lines the Subcommittee has discussed might actually create rather than solve problems.

The Subcommittee also circulated a sketch of a change to Rule 23(f) to authorize discretionary immediate appellate review of the district court's resolution of issues on which it had based issue class certification. This sketch raised a variety of potential difficulties about whether there should be a requirement for district court endorsement of the timing of the appeal, and whether a right to seek appellate review might lead to premature efforts to obtain review.

The Subcommittee eventually concluded that there was no significant need for rule amendments to deal with issue class issues, and that there were notable risks of adverse consequences.

RULE 62: STAYS OF EXECUTION

Introduction

The Rule 62 provisions for a stay pending appeal came on for discussion in both the Civil Rules Committee and the Appellate Rules Committee. A district judge asked the Civil Rules Committee whether there is authority to order a stay after expiration of the 14-day automatic stay provided by Rule 62(a) but before any party has filed any of the motions that, under Rule 62(b), authorize a stay "pending disposition of" those motions. The Committee initially decided that the court's inherent authority over its own judgments is so clearly adequate to the occasion that there was no need to amend the rule. But it was recognized that amendment might be desirable if doubts arose in practice. The Appellate Rules Committee was concerned that Rule 62 does not clearly support the useful practice of posting a single bond (or other security) that supports a stay that lasts from post-judgment proceedings in the district court on through final disposition of any appeal. It also thought it would be useful to adopt a clear provision that security may be provided in a form other than a bond. The Appellate Rules Committee's concerns prompted both Committees to take up Rule 62.

Deliberations by the Appellate and Civil Rules Committees have been supported by the work of a joint Subcommittee chaired by Judge Scott Matheson. Reports of the Subcommittee have been considered at earlier meetings of the Advisory Committees. Discussion at this Committee's meeting last May provided helpful guidance. With this guidance, the Subcommittee worked through the summer to develop a draft that addressed the questions that

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began the work, and took up a number of new issues. Each Committee considered a draft submitted by the Subcommittee at their meetings this fall. The Subcommittee has revised its draft in response to the conclusions reached at those meetings. The revised Subcommittee draft has not been considered by either Committee. But what remains is material that has been fully considered and tentatively approved by each Committee. If time allows, it will be useful to explore the draft fully at this meeting. The guidance provided by a full discussion will facilitate confident preparation of a recommendation to publish Rule 62 amendments for comment next summer.

The purposes of the amendments are described in the Committee Note.

The Proposed Amendments

The current draft addresses the three issues that prompted the initial revision project. The "gap" between expiration of the automatic stay and the time allowed to make a post-trial motion is eliminated by extending the automatic stay to 30 days. Security for a stay may be posted either as a bond or in some other way. And security may be provided by a single act that covers both post-judgment proceedings in the district court and all further proceedings through completion of the appeal. These changes are discussed here. The further proposals that have been withdrawn are described briefly at the end.

REVISED DRAFT

Rule 62. Stay of Proceedings to Enforce a Judgment

(a) **Automatic Stay.** Except as provided in Rule 62(c) and (d), execution on a judgment and proceedings to enforce it are stayed for 30 days after its entry, unless the court orders otherwise.

(b) **Stay by Other Means.**

(1) ***By Court Order*.** The court may at any time order a stay that remains in effect until **a** designated time [, which may be as late as issuance of the mandate on appeal], and may set appropriate terms for security or deny security.

(2) ***By Bond or Other Security.*** At any time after judgment is entered, a party may obtain a stay by providing a bond or other security. The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or security.

(c) **Stay of Injunction, Receivership, or Patent Accounting Orders.** Unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

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(1) an interlocutory or final judgment in an action for an injunction or a receivership; or

(2) a judgment or order that directs an accounting in an action for patent infringement.

(d) **Injunction Pending an Appeal.** While an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:

(1) by that court sitting in open session; or

(2) by the assent of all its judges, as evidenced by their signatures.

* * * * *

COMMITTEE NOTE

Subdivisions (a), (b), (c), and (d) of former Rule 62 are reorganized and the provisions for staying a judgment are revised.

The provisions for staying an injunction, receivership, or order for a patent accounting are reorganized by consolidating them in new subdivisions (c) and (d). There is no change in meaning. The language is revised to include all of the words used in 28 U.S.C. § 1292(a)(1) to describe the right to appeal from interlocutory actions with respect to an injunction, but subdivisions (c) and (d) apply to both interlocutory injunction orders and final judgments that grant, refuse, or otherwise deal with an injunction.

The provisions for staying a judgment are revised to clarify several points. The automatic stay is extended to 30 days, and it is made clear that the court may forestall any automatic stay. The former provision for a court-ordered stay "pending the disposition of" enumerated post-judgment motions is superseded by establishing authority to order a stay at any time. This provision closes the apparent gap in the present rule between expiration of the automatic stay after 14 days and the 28-day time set for making these motions. The court's authority to issue a stay designed to last through final disposition on any appeal is established, and it is made clear that the court can accept security by bond or by other means. A single bond or other form of security can be provided for the life of the stay.

The provision for obtaining a stay by posting a supersedeas bond is changed. New subdivision (b)(2) provides for a stay by providing a bond or other security at any time after judgment is entered; it is no longer necessary to wait until a notice of appeal is filed. The stay

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takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or security.

Subdivisions (a) and (b) address stays of all judgments, except as provided in subdivisions (c) and (d). Determining what the terms should be may be more complicated when a judgment includes provisions for relief other than—or in addition to—a payment of money, and that are outside subdivisions(c) and (d). Examples include a variety of non-injunctive orders directed to property, such as enforcing a lien, or quieting title.

Some orders that direct a payment of money may not be a "judgment" for purposes of Rule 62. An order to pay money to the court as a procedural sanction, for example, is a matter left to the court's inherent power. The decision whether to stay the sanction is made as part of the sanction determination. The same result may hold if the sanction is payable to another party. But if some circumstance establishes an opportunity to appeal, the order becomes a "judgment" under Rule 54(a) and is governed by Rule 62.

Special concerns surround civil contempt orders. The ordinary rule is that a party cannot appeal a civil contempt order, whether it is compensatory or coercive. A nonparty, however, can appeal a civil contempt order. If appeal is available, effective implementation of the contempt authority may counsel against any stay. This question is left to the court's inherent control of the contempt power and the authority to refuse a stay.

New Rule 62(a) extends the period of the automatic stay to 30 days. Former Rule 62(a) set the period at 14 days, while former Rule 62(b) provided for a court-ordered stay "pending disposition of" motions under Rules 50, 52, 59, and 60. The time for making motions under Rules 50, 52, and 59, however, was extended to 28 days, leaving an apparent gap between expiration of the automatic stay and any of those motions (or a Rule 60 motion) made more than 14 days after entry of judgment. The revised rule eliminates any need to rely on inherent power to issue a stay during this period. Setting the period at 30 days coincides with the time for filing most appeals in civil actions, providing a would-be appellant the full period of appeal time to arrange a stay by other means. Thirty days of automatic stay also suffices in cases governed by a 60-day appeal period.

Amended Rule 62(a) expressly recognizes the court's authority to dissolve the automatic stay or supersede it by a court-ordered stay. One reason for dissolving the automatic stay may be a risk that the judgment debtor's assets will be dissipated. Similarly, it may be important to allow immediate execution of a judgment that does not involve a payment of money. The court may address the risks of immediate execution by ordering dissolution of the stay only on condition that security be posted by the judgment creditor. Rather than dissolve the stay, the court may choose to supersede it by ordering a stay under Rule 62(b)(1) that lasts longer or requires security.

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Subdivision (b)(1) recognizes the court's broad general and discretionary power to stay, or to refuse to stay, execution and proceedings to enforce a judgment. The court may set terms for security or deny security. An appellant may prefer a court-ordered stay under (b)(1), hoping for terms less demanding than the terms for obtaining a stay by posting a bond or other security under (b)(2). A stay may be granted or modified with no security, partial security, full security, or security in an amount greater than the amount of a money judgment. Security may be in the form of a bond or another form. In some circumstances appropriate security may inhere in the events that underlie the litigation—for example, a contract claim may be fully secured by a payment bond.

Subdivision 62(b)(2) carries forward in modified form the supersedeas bond provisions of former Rule 62(d). A stay may be obtained under subdivision (b)(2) at any time after judgment is entered. Thus a stay may be obtained before the automatic stay has expired, or after the automatic stay has been lifted by the court. The new rule text makes explicit the opportunity to post security in a form other than a bond. The stay remains in effect for the time specified in the bond or security—a party may find it convenient to arrange a single bond or other security that persists through completion of post-judgment proceedings in the trial court and on through completion of all proceedings on appeal by issuance of the appellate mandate. This provision does not supersede the opportunity for a stay under 28 U.S.C. § 2101(f) pending review by the Supreme Court on certiorari.

Rule 62(b)(2), like former Rule 62(d), does not specify the amount of the bond or other security provided to secure a stay. As before, the stay takes effect when the court approves the bond or security. And as before, the court may consider the amount of the security as well as the form, terms, and quality of the security or the issuer of the bond. The amount may be set higher than the amount of a monetary award. Some local rules set higher figures. [E.D. Cal. Local Rule 151(d) and D.Kan. Local Rule 62.2, for example, set the figure at one hundred and twenty-five percent of the amount of the judgment.] The amount also may be set to reflect relief that is not an award of money but also is not covered by Rule 62 (c) and (d). And, in the other direction, the amount may be set at a figure lower than the value of the judgment. One reason might be that the cost of obtaining a bond is beyond the appellant's means.

Rule 62 applies no matter who appeals. A party who won a judgment may appeal to request greater relief. The automatic stay of subdivision (a) applies as on any appeal. The appellee may seek a stay under subdivision (b), although a failure to cross-appeal may be an important factor in determining whether to order a stay. And, if the judgment awards money to the appellee as well as to the appellant, either may seek a stay.

Withdrawn Proposals

Subcommittee discussions over the summer generated a draft that included provisions designed to confirm the district court's broad authority to regulate the choices governing a stay, the terms of the stay, denial of a stay accompanied by security for damages caused by

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enforcement pending appeal, and simple denial of any stay. Two basic sets of reasons appeared in the advisory committee discussions for omitting these provisions.

One set of reasons reflected the basic premise that the Enabling Act should be used to revise court rules only when a substantial need appears. Earlier discussions in the advisory committees and in the Standing Committee asked whether any problems with stay procedure have been encountered beyond the problems that launched the project. No other problems were identified. That does not of itself foreclose consideration of possible problems to ensure that present revision does not leave the work half-finished, so that new problems will require additional revisions in the near future. But once the possible problems are identified in the abstract, and efforts are made to draft solutions, it remains important to consider whether the risks of imperfect foresight and flawed implementation will generate real problems while solving only theoretical problems. That concern weighed heavily in the discussions.

The other reason was more direct, and thoroughly familiar. The Subcommittee repeatedly considered and reconsidered the question whether there should be a nearly absolute right to a stay on posting a bond. The sense of the advisory committee discussions, particularly as informed by the understanding of appellate lawyers, is that there is a right to a stay. The right may not be absolute. The language of present Rule 62(d) says that "the appellant may obtain a stay by supersedeas bond." This language is carried forward only by making it more general to encompass cross-appeals: "a party may obtain a stay." Whether "may obtain" encompasses an absolute right may be debated. But in conjunction with the requirement that the court approve the bond or other security, there is at least an ambiguity that may leave the way open for a court to deny any stay for compelling reasons.

The nearly absolute right to a stay on posting a bond or other security, moreover, does not defeat all (or nearly all) discretion. It seems to be accepted now that a court may approve security in an amount less than the judgment. The revised draft Rule 62(b)(1) makes this authority explicit by allowing the court to order a stay and set terms for security or deny security.

Omission of the provisions spelling out several details of a court's inherent power to control its own judgments does not imply any determination as to the scope of that power. The court's power is left where it is, and as it may be developed and articulated by the courts as need arises.

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Post-Script

The Committee decided to dispense with the antique-sounding description of the appeal bond as a "supersedeas" bond. If that style decision is accepted, it will be appropriate for the Appellate and Bankruptcy Rules Committees to consider deleting "supersedeas" from their sets of rules.

e-FILING, e-SERVICE, AND NEF AS CERTIFICATE OF SERVICE

The Appellate, Bankruptcy, Civil, and Criminal Rules Committees have worked to develop common proposals to advance electronic filing and electronic service. Recognizing a notice of electronic filing as a certificate of service has become part of this effort. The Criminal Rules Committee faces the most challenging task because it has decided that it is time to create a Criminal Rule that directly addresses filing and service. Present Criminal Rule 49(a) provides simply that filing and service are made as in a civil action. The Criminal Rules Committee and its Subcommittee are working carefully to prepare an independent Rule 49. Their work includes consideration of the possibility that criminal practice is sufficiently different from civil practice to justify differences between the Criminal and Civil Rules. Representatives of the Civil Rules Committee are working with them in this task. There is every hope that all advisory committees will be prepared to recommend rules for publication next June.

REQUESTER-PAYS DISCOVERY

For a few years, the Discovery Subcommittee carried on its agenda the question whether to propose rules that would set a general framework for requiring payment by the party requesting discovery of some part, or all, of the response costs. The question was raised by groups interested in the rulemaking process, and some members of Congress showed interest. Accepting a recommendation by the Subcommittee, the Committee has concluded that current work on this subject should be suspended. It will remain open for future consideration if developing discovery experience seems to show a need.

The assumption that the costs of responding to discovery are borne by the responding party is deeply entrenched. The system of civil litigation that we know would be dramatically changed by reversing course to adopt a general rule that the requesting party ordinarily must pay the costs of responding. Less dramatic alternatives are easier to contemplate, but perhaps more difficult to carry into practice. A common version would allow the requesting party to get some "core" of discovery at the expense of the responding party, but would require the requesting party to pay for the costs of responding to requests beyond the core. That approach could be made to work under judicial direction on a case-by-case basis, and has been used by some judges. But any attempt to define core discovery in a general court rule would be extraordinarily difficult.

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A more optimistic reason supplements these reasons to conclude that work on requester-pays issues would be premature. The case-management and discovery rules amendments that took effect on December 1, 2015, are designed to make discovery proportional to the needs of the case. If they can achieve in practice the high ambitions that they reflect, then the concern that disproportionate discovery costs can be reined in only by a requester-pays system will be substantially reduced. In addition, the 2015 amendments include a modest provision that calls attention to the power, already recognized in the cases, to enter a protective order under Rule 26(c) that adopts some measure of payment by the requesting party. This provision is not designed to become a general requester-pays provision, but it does recognize a safety valve when needed in a specific case.

RULE 68

The Rule 68 scheme for offers of judgment has prompted study at regular intervals. Specific proposed amendments were published for comment in 1983 and, with substantial revisions, in 1984. They were withdrawn from further consideration. The Committee studied Rule 68 again a decade later, but abandoned an intricate draft without proceeding to publication. Rule 68 continues to be addressed by more outside proposals than any rule other than the discovery rules. So it has reappeared on the agenda at regular intervals over the last twenty years without generating any specific proposals for consideration.

Rule 68 is back on the agenda again. Recognizing the challenges that have confronted earlier work, the Committee has concluded that similar state practices should be explored. It may be that practices exist that achieve the goal of encouraging earlier and fair settlements, initiated by plaintiffs as well as defendants, without coercing unwanted settlements for fear of rule-imposed consequences and without encouraging strategic posturing.

Committee resources have been absorbed by other projects. The study of state practices will be launched when resources are freed up for the work.

PRE-MOTION CONFERENCES: SUMMARY JUDGMENT

Judge Zouhary suggested consideration of the practice that requires a party to request a conference with the court before filing a motion for summary judgment. He and other judges find that this practice generates several benefits. The conference is not used to deny "permission" to make a motion—it is accepted that Rule 56 establishes the right to do so. But a conference with the court can work better than a conference between the parties alone (if one were to happen) in illuminating the facts and the law. The result may be that the motion is not made, or that the motion is better focused. The nonmovant may recognize that there is no basis for disputing some facts, further focusing the motion.

Committee members have experienced the benefits that Judge Zouhary describes. Important benefits can be gained at a pre-motion conference with a judge who is interested in actively assisting the parties as they develop the case.

A note of restraint qualified this enthusiasm. The pre-motion conference practice was actively explored by the Subcommittee that generated the package of case-management and discovery proposals that became the 2015 amendments. Rule 16(b)(3)(B)(v) was added to provide that a scheduling order may "direct that before moving for an order relating to discovery, the movant must request a conference with the court." Two compromises are reflected in this amendment. The first was to emphasize that the conference is an option available to the judge, not a mandate for all cases. This compromise responded to advice that a significant number of judges would resist a practice requiring a pre-motion conference for all discovery disputes. The second was to limit the encouragement to discovery motions. This compromise reflected a spirit of caution, even as the general benefits of pre-motion conferences were recognized. This quite recent work may suggest that further rules changes be deferred for a while.

Drafting a pre-motion conference rule would not be difficult, whether by simply expanding Rule 16(b)(3)(B)(v) to add summary judgment motions as a suitable scheduling-order topic or by amending Rule 56 to require a conference in all cases. The Committee concluded that the question should be held open, without yet moving toward developing a specific rule proposal, and with the hope that pre-motion conferences can be encouraged as a best practice.

DISCARDED PROPOSALS

Several outside proposals were considered and put aside. Brief descriptions should suffice.

One proposal, modestly enough, suggested only an addition to the Committee Notes to Rule 30. The Note would observe that it is improper to object to a question on oral deposition by saying only "objection as to form." Additional explanation would be required. Whether or not anything could be accomplished by adding a Note statement, a Note cannot be written without a simultaneous rule amendment. Amending the Rule 30(c)(2) directions on improper objections does not seem worthwhile.

Another proposal focused on a Rule 12(b)(6) motion to dismiss only part of a complaint, and went on to address the same question when the motion is converted to one for summary judgment. The concern is that some courts employ Rule 12(a)(4) to extend the time for a responsive pleading only as to the portions of the complaint challenged by the motion to dismiss. The proposed solution is to write into rule text the practice that seems to be followed by most courts, suspending the time to respond as to the whole complaint. This practice avoids duplicative pleadings and confusion over the proper scope of discovery. This subject was removed from the docket, but it was recognized that it will deserve study if it becomes apparent

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that many judges require a partial response within the original time limits, unaffected by the pending motion.

The geographic reach of trial subpoenas was addressed by a proposal that went further to suggest that an entity should be subject to a trial subpoena just as it can be subjected to a deposition. The suggestion that a representative of a nonresident corporate defendant could be commanded to appear at trial was considered in broader terms during the work that led to the still-recent amendments of Rule 45. No new reason appears to reconsider the amended rule. The suggestion that a trial subpoena could name an entity as a trial witness, directing it to produce one or more real persons to appear to testify on designated subjects, was found too fraught with problems to justify further work.

The final set of suggestions addressed four topics, each of which affects several of the advisory committees. One topic is e-filing by pro se litigants, a matter under active consideration by four advisory committees. A second is a proposal that Rule 5.2(a)(1) be amended to prohibit filing any part of a social-security or taxpayer identification number. The concern is that it is not difficult to generate a complete social security number from the final four digits if combined with additional information about a person that is often available. This concern was considered in developing Rule 5.2(a)(1), and put aside because filing the final four digits seemed important in bankruptcy practice. This question seems worthy of further consideration, beginning with the Bankruptcy Rules Committee, although the initial suggestion has been that it continues to be useful to have the final four digits. The third suggestion is for a new rule that would direct that any affidavit made to support a motion to proceed in forma pauperis under 28 U.S.C. § 1915 be filed under seal and reviewed ex parte. Initial Committee discussion suggested that this practice would impose significant burdens on the court, and that the privacy interests involved in the details of showing entitlement to forma pauperis status may not be troubling when a grant of forma pauperis status itself suggests a lack of substantial assets. The final suggestion is that when counsel cites cases or other authorities that are unpublished or reported exclusively on computerized data bases, counsel must furnish copies to any pro se party. Counsel would be similarly required to provide copies on request of such citations by the court. This practice seems useful—the proposal is modeled on a local rule for the Eastern and Southern Districts of New York—but the Committee thought it a matter too detailed to be adopted as a national rule.

APPENDIX

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125-011698

U. S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

December 4, 2015

The Honorable Robert Michael Dow, Jr.
Chair, Rule 23 Subcommittee
Advisory Committee on Civil Rules
c/o United States District Court
Everett McKinley Dirksen U.S. Courthouse
219 South Dearborn St., Room 1978
Chicago, IL 60604

Dear Judge Dow:

As discussed at the November 5, 2015, meeting of the Civil Rules Advisory Committee, the United States Department of Justice is pleased to submit to the Committee's Rule 23 Subcommittee, for consideration and approval for submission to the Committee, a proposal to amend existing Rule 23(f).

Rule 23(f) of the Federal Rules of Civil Procedure authorizes a permissive interlocutory appeal from a district court order granting or denying certification of a class. The rule requires that a petition for permission to appeal such an order must be filed in the court of appeals within 14 days after the certification order is entered. As explained below, the Department of Justice recommends that additional time—specifically, a 45-day deadline—should apply to petitions for permission to appeal under Rule 23(f) in civil cases when the federal government is a party.

Any appeal by the United States government must be authorized by the Solicitor General. 28 C.F.R § 0.20(b). That deliberative process requires substantial time to consult with components of the Department of Justice and other government agencies with an interest in the issues presented. The consultation process is particularly time consuming and searching because multiple agencies and offices within the government might have different interests implicated by a specific case. Moreover, the role of the United States is not limited to defending particular litigation. The Solicitor General must also take account of the government's interest in enforcing federal law. Those interests are sometimes in tension, particularly in cases involving class actions. Because the government's diverse interests need to be reconciled before the Solicitor General can reach a decision concerning appeal, the need for consultation and deliberation requires additional time.

The current 14-day appeal deadline in Rule 23(f) is particularly challenging because the court of appeals is expressly precluded from granting an extension of time, and it is not clear whether the district court would have the authority to extend the 14-day deadline. See *Delta Airlines* v. *Butler*, 383 F.3d 1143, 1145 (10th Cir. 2004). Moreover, unlike a notice of appeal, a petition under FRCP 23(f) is not a mere placeholder. Instead, the petition for permission to appeal is a substantive filing that must set forth reasons and arguments for reversing the class certification decision; that petition must be drafted by Justice Department attorneys, and authorized by the Solicitor General, in a very short period.

The United States government does not often seek permission to appeal under Rule 23(f), but in the circumstances where an appeal is warranted, the 14-day deadline creates serious problems of practicability and imposes extraordinary burdens on government officials. Fourteen days is not sufficient to permit the consultations and deliberations required to take account of the diverse government interests that often affect the issues and arguments the government might seek to present to the court of appeals.

Because of the time required for the Solicitor General to determine whether to authorize appeal, and to avoid unnecessary protective appellate filings that might later need to be voluntarily dismissed, other provisions of the federal rules provide additional time to appeal in cases where the United States government is a party. For example, Appellate Rule 4(a)(1)(B) provides that any party may file a notice of appeal within 60 days (rather than the usual 30 days) when the United States is a party to a civil case. Similarly, Appellate Rule 40(a)(1) provides that a petition for rehearing or rehearing en banc in a civil case may be filed within 45 days (instead of 14 days) when the United States government is a party.

The example of the deadline for rehearing petitions is closely analogous here. There, as in Rule 23(f), a 14-day period had been prescribed and was retained for non-government cases, but the rules were amended to accommodate the additional time needed for the Solicitor General to determine whether to pursue rehearing en banc when the government is a party. Also, like a rehearing petition, a petition for permission to appeal under Rule 23(f) is a substantive articulation of the government's position, requiring more time for consultation and authorization. Although the additional time may not be necessary for a non-government party that seeks to appeal, the Department of Justice recognizes that the rules should provide parity to all parties in a case where the government is a party, as in the examples of the deadlines to file a notice of appeal or a rehearing petition in civil cases.[1]

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[1] The rules provide different deadlines for the government and non-government parties in criminal cases, see FRAP 4(b)(1), but there is no reason for different treatment in the class-action context.

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The Department's proposal to extend the deadline to 45 days represents a compromise resolution of the timing problem—an extension beyond the current 14-day period but less than the full 60 days permitted to file a notice of appeal in a civil case in which the government is a party. The proposal thus reflects the need to avoid undue delay in the class-action certification context, while accommodating the government's need to consider whether an appeal would be appropriate. The final sentence in Rule 23(f), providing that an appeal does not automatically stay proceedings, would also remain unchanged under the Department's proposal.

The Department therefore recommends that Rule 23(f) be amended as follows:

> (f) APPEALS. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered, except that any party may file such a petition within 45 days after the order is entered if one of the parties is the United States, a United States agency, a United States officer or employee sued in an official capacity, or a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf — including all instances in which the United States represents that person when the order is entered or files the appeal for that person. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

The Department also recommends the following Note to accompany the amended Rule:

> **Subdivision (f).** The amendment lengthens the time for filing a petition for permission to appeal from a class-action certification order from 14 to 45 days in civil cases involving the United States or its agencies or officers. The amendment, analogous to the provisions in Federal Rules of Appellate Procedure 4(a)(1)(B) and 40(a)(1), which extend the time for filing a notice of appeal or a petition for rehearing in cases involving the United States government, recognizes that the Solicitor General needs time to conduct a thorough review of the merits of each case and to address the government's diverse interests before authorizing a petition for permission to appeal an order granting or denying class certification.

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We appreciate the Subcommittee's consideration of the Department's proposal, and we will be happy to respond to any questions you have concerning it. Please feel free to contact either me or Ted Hirt of the Civil Division at Theodore.Hirt@usdoj.gov or (202) 514-4785.

Sincerely,

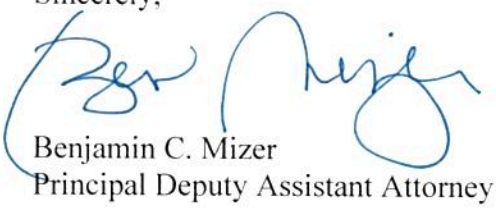

Benjamin C. Mizer
Principal Deputy Assistant Attorney General

cc. The Honorable John D. Bates
Chair, Advisory Committee on Civil Rules
c/o United States District Court
E. Barrett Prettyman U.S. Courthouse
333 Constitution Ave. N.W. Room 4114
Washington, D.C. 20001

125-011702

MINI-CONFERENCE ON CLASS ACTIONS
Rule 23 Subcommittee
Advisory Committee on Civil Rules
Dallas, Texas
Sept. 11. 2015

Participating as representatives of the Rule 23 Subcommittee were Judge Robert Dow (Chair, Rule 23 Subcommittee), Elizabeth Cabraser, Dean Robert Klonoff, and John Barkett. Also participating were Judge David Campbell (Chair, Advisory Committee), Judge Jeffrey Sutton (Chair, Standing Committee), Judge John Bates (Chair-designate, Advisory Committee), Prof. Edward Cooper (Reporter, Advisory Committee), and Prof. Richard Marcus (Reporter, Rule 23 Subcommittee). Emery Lee represented the Federal Judicial Center. Representing the Administrative Office were Rebecca Womeldorf, Derek Webb, and Frances Skillman.

Invited participants included David M. Bernick (Dechert LLP), Sheila Birnbaum (Quinn Emanuel), Leslie Brueckner (Public Justice), Theodore H. Frank (Center for Class Action Fairness), Daniel C. Girard (Girard Gibbs LLP), Jeffrey Greenbaum (Sills Cummis & Gross, P.C.), Theodore Hirt (Department of Justice), Paul G. Karlsgodt (Baker Hostetler), Prof. Alexandra Lahav (Univ. of Connecticut), Jocelyn Larkin (Impact Fund), Brad Lerman (Medtronic), Gerald Maatman (Seyfarth Shaw LLP), Prof. Francis McGovern (Duke), Prof. Alan Morrison (G.W.), Prof. Martin Redish (Northwestern), Joseph Rice (Motley Rice LLC), Stuart Rossman (Nat. Consumer Law Center), Eric Soskind (Department of Justice), Hon. Amy St. Eve (N.D. Ill.), Hon. Patti Saris (D. Mass. and U.S. Sentencing Comm'n), Christopher Seeger (Seeger Weiss), Hon. D. Brooks Smith (3d Cir.), and Ariana Tadler (Milberg LLP).

Observers included Alex Dahl (LCJ), Prof. Brendan Maher (Univ. of Connecticut), Roger Mandel (Lackey Hershman LLP), and Mary Morrison (Plunkett Cooney and LCJ).

Judge Dow welcomed and thanked all the participants, and announced that the morning session would be focused on the first three of the Subcommittee's nine topics for possible rule amendments, with the next four topics occupying most of the time after lunch and the last two topics touched upon only if time allowed. He also invited participants to introduce themselves and indicate which topics they felt were most important. Among the topics so identified by several invitees were ascertainability, cy pres, settlement approval criteria, and settlement class certification.

Topic 1 -- Disclosures regarding
class-action settlements

This idea has been known as "frontloading," and emerged from the Subcommittee discussions with interested groups during the past year about possible class-action reforms. It is designed to focus more on the decision whether or when to send notice to the

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class of a proposed settlement under Rule 23(e)(1) rather than as "preliminary approval" of the proposed settlement or (if the class has not yet been certified) of class certification. The ALI Aggregate Litigation Project and others have cautioned against the "preliminary approval" nomenclature, since the court should have an open mind until objectors have had an opportunity to state their views. In addition, the effort is designed to blunt arguments that Rule 23(f) review is available at the time of the decision to send notice to the class, while ensuring that the notice can call for class members in Rule 23(b)(3) cases to make their opt-out decisions.

Discussion began with the suggestion that it might be desirable to promote a more adversarial presentation at the "front end" of the class settlement process. In the Silicon Gel litigation, for example, Judge Pointer promoted an open process that got many class members involved at an early point. Is there a way to have the judge reach out to members or putative members of the class to solicit their views at this point?

A reaction to this suggestion was there is a serious problem with relying on the judge to take the place of the adversary process. There are strong reasons for getting objectors involved as soon as possible to ensure that the judge has an adversary process to evaluate the proposed settlement.

That idea brought the reaction "This is not doable. You don't know who the objectors are." Right now, counsel proceed on the basis of "preliminary approval." But there is no articulated standard for granting such preliminary approval. Instead, the parties themselves make sure that there are solid grounds to support the settlement proposal, and to support class certification if that has not yet been granted. They very much want to avoid final disapproval.

Putting aside the concern about the term "preliminary approval," a different concern was with a "laundry list" rule like the sketch in the materials, with fully 14 different topics to address. Many of those topics would not be relevant in many cases. In different types of cases, different concerns exist.

Another participant announced strong support for frontloading. This could "shift the paradigm," making the judge more inquisitorial. That is consistent with the view of courts that say that the judge has a fiduciary obligation to protect the interests of the unnamed class members. Indeed, it has been said that in most class actions the judge is "main objector," because there may not be any others.

Another reaction was that a detailed list of topics to address is useful for many of the lawyers who now are bringing class actions in federal courts. The lawyers invited to this

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event are the leaders of the bar, and have broad experience in the field. They already know what they have to present to the judge. Many, many lawyers do not know, and judges need help in getting the information that is necessary to making the decision whether to send notice and, later, whether to approve the proposed settlement.

A judge applauded efforts to frontload, an important adjunct to the "contingent certification" that often attends a decision to send notice to the class. Even though it is long, the 14-factor list might be expanded. One thing that is not specifically raised is the basic fairness of the settlement -- why is this damage number appropriate? Actually, although there is no articulated standard for whether to send the notice, it is a reasonableness test; one might even call it a "blush" test.

Another participant agreed that it is good to prompt disclosure of more information. Nonetheless, a laundry list rule should be avoided. That sort of detail is more appropriate in a Committee Note or a Manual.

A note of caution was sounded. This sort of requirement will compound costs. Some factors are not relevant in many cases. How much does it help to have the parties say "We produced 4.2 million documents"? Does that mean that all the members of the class get access to all those documents? How about protective orders that apply to those documents? And the reference to insurance seems far too broad; insurance is simply not relevant in many cases. The inclusion of take rates creates difficulties because that is always hard to estimate at the outset, although calling for disclosure at the end would not be a problem. Requiring disclosure of side agreements could raise many difficulties. Consider agreements with "blow provisions" that permit the settling defendants to withdraw if more than a certain number of opt outs occur. That could produce serious problems. The 2003 amendments have worked pretty well in organizing and focusing the settlement-approval process; having this laundry list is not warranted.

Another participant reported that "We have high take rates." Laundry lists are not useful and can cause problems. And something like this one is not needed now. "Judges are beginning to do this right." For example, in the NFL concussion cases the judge promoted outreach early in the process. There was a even a liaison for the objectors. That sort of good and creative management of a class action cannot be mandated by rule. It was asked whether such outreach could be required by a rule, prompting the answer that the NFL concussion case was the first time this lawyer had seen such an aggressive effort on this front.

Another participant expressed disapproval of laundry list

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rules, and worried that this might seem like "piling on" on this topic. But it is important to note that in (b)(2) cases many of these factors simply do not apply. More generally, the idea that the information this rule would require will be of use to class members is not persuasive. It will not be comprehensible to class members. For example, how many of them can interpret complicated insurance policies? The average American reading level is about the sixth grade, and if you want to provide class members with information that is useful to them you need to keep that in mind.

A judge observed that the idea of early notice to the court is very attractive. It is important, however, to say that the judge can insist on any information that seems likely to be useful, whether or not it is on the list. And even though there are instances of judges becoming active in soliciting input from class members, that sort of initiative is not true of all judges, perhaps not of most judges. A rule like this would likely produce more early involvement by judges.

Another lawyer participant expressed misgivings about laundry list rules. Guidance in some form for judges and for less experienced lawyers would be useful, but this lawyer is not confident that even this (rather costly) effort of assembling information will be useful to many objectors.

A competing view was that too often critical information does not surface until it is too late or almost too late for class members to act on it. The concern with costs is valid, but providing potential objectors with needed information need not raise costs too much. Nobody is going to want to look at 4.2 million documents. And if there is a protective order, the objectors would have to be bound by it with regard to documents covered by the order. Moreover, focusing on the claims process is very important. Having that front and center is valuable.

A suggestion was offered for those who dislike checklist or laundry list rules: How about a rule with a general direction to the court to require appropriate and pertinent information from the proponents of the settlement, coupled with a Committee Note offering a variety of ideas about topics that might be important in individual cases? That concept produced support from many participants.

A different concern emerged, however: "Why do this under the heading of notice. It's not about notice. It's about preliminary approval."

Another idea emerged: An ideal process in many cases is scheduling or case management conference with the judge when the possibility of a settlement proposal looks likely. Then the parties and the judge can review what's needed. After that's

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done, the parties should prepare and file all their materials supporting approval of the settlement up front. There's no need to do this whole briefing effort twice. Then, if there are objections or if additional issues arise, supplemental briefing is available to address these matters. That is the way to go; laundry lists are not helpful, particularly in (b)(2) cases.

This suggestion drew support. At least it is critical that all pertinent materials be on file well before the date when class members must decide whether to opt out or object. Too often in the past, it has happened that such things as the attorney fee application come in only after it's too late to opt out or object.

Another participant noted that CAFA sometimes produces involvement by state attorneys general, particularly in consumer class actions. Having access to details on the case and the settlement would be useful for the AGs.

Another voice was raised for keeping the rule open textured and short. It was suggested that perhaps local rules or standing orders could be used to provide pertinent specifics instead of a rule with a laundry list. But a concern was expressed: Adding frontloading may not work without some specifics. Nonetheless, if one wants to do this by rule, it probably should be simple. That drew the response that the default position should be that all supporting materials should be filed up front.

Another participant asked "How can you fight the idea of notice to judges?" On the other hand, this participant did not understand how there could be an obligation to decide whether to opt out unless the class has already been certified. The opt out must follow certification.

That drew concerns. The way this is done is to combine all notices into one notice program. One question is what the judge's action should be called -- "preliminary approval" or "ordering notice." On that score, it seems important not to hamstring the judge. The other is to recognize that this should be done only once; the possible need for a second notice should be avoided.

Another reaction was that "This is certainly certification. You call them class members." That drew the reaction that this highlights the problem. Unless this is certification there's no authority to require an opt-out decision.

An effort to summarize the discussion suggested that a shift to a more general rule or a shorter list seemed indicated. On that score, one could compare the more general orientation of the second topic -- settlement review criteria -- in which one might say that the current reality is that each circuit has its own

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laundry list for settlement review. Beyond that, it might be said at least that the best practice is to get all the specifics on the table early.

That drew a warning that one must be careful about the possibility that such a rule would lead to Rule 23(f) appeals from this preliminary or contingent decision.

Another participant suggested that the goal should be a rule that (1) prompts initial care in compiling information that will be needed; (2) makes it clear that notice can call for opt-out decisions; and (3) includes "preliminary certification." This approach will "make the documents" flow. At the same time, it should avoid wasteful and costly activity. Doing discovery just to be able to say that you did discovery is not sensible.

Topic 2 -- Expanded treatment of settlement-approval criteria

This topic was introduced as involving "11 dialects" of settlement review in the federal courts today. Indeed, considering the reaction to laundry lists in relation to Topic 1, one might suggest that Topic 2 seeks to replace competing laundry lists with a single set of considerations. The sketch before the group has four (and perhaps three) "core" factors that seek to consolidate and simplify the variety of expressions adopted in various circuits.

An initial reaction was skeptical: "This is a solution in search of a problem. The courts of appeals have developed their lists to make sure judges are careful. The lists we have now do the job."

A differing view was expressed: "I generally like this approach, but would add a catch-all." Certainly one could simplify too much. For example, if one argued that "fair, reasonable, and adequate" uses too many words, one answer would be that some courts have found that "fairness" and "adequacy" are different things. Meanwhile, the current lists include things that are not useful. For example, in the Third Circuit, the Gersh factors include several things that really don't often, or ever, matter.

It was observed that one thing that is not explicitly included is consideration of take rates and payouts to the class, and relating those to the attorney fee award. This is a difficult problem from the defense side, where the goal is to get the case resolved.

A reaction was that considering the take-up rate is very important. Indeed, a proposal has been submitted to the Subcommittee to mandate reports at the end of the claims period

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on the take-up rate. That's where it's needed -- on the back end. That could come with some sort of hold-back of a portion of the attorney fee award.

Discussion returned to the standard for initial Rule 23(e) notice. The suggestion was that Alternative 4 on p. 5 of the materials expresses what should guide the court, looking to whether the court "preliminarily determines that giving notice is justified by the prospect of class certification and approval of the proposal." That would not be a "preliminary approval" supporting immediate review under Rule 23(f), but should suffice to support a requirement that class members decide whether to opt out.

A judge agreed. This reflects what is happening, and it is what should be happening.

That idea drew opposition: "What governs the opt-out is real certification." One can't skip that step. This same sort of problem comes up again with the settlement-class certification proposal. The fact that something is convenient does not mean that it is justified or proper.

Another participant shifted focus to the choice between Alternative 1 and Alternative 2 on p. 9 of Topic 2, expressing support for Alternative 2 because it permits the court to approve the settlement only when it can find that all four requirements are satisfied. Separate consideration of each and separate findings would be better than generalized "consideration" (as directed by Alternative 1) of all four sets of concerns. This participant also thought that it would be good to standardize the factors.

Another participant agreed with the skepticism of the first speaker on this topic. "I'm not sure these factors are better than the current lists." This participant would certainly keep "fair, reasonable, and adequate" as a standard for the overall consideration of the factors (as in Alternative 1). This participant also does not like the bracketed language in (D) on p. 10. It also seems dubious to focus so heavily on collusion; that is not a frequent concern.

The question whether this listing is exclusive was raised. One reaction was that even if such a rule is adopted, rote listing of existing circuit factors will continue.

Another participant noted that the Third Circuit Gersh factors are also aimed at collusion. In addition, factor (C) -- the adequacy of the benefits to the class, and comparison to the amount of the attorney fee award -- is very important. Emphasizing the importance of this factor is a good idea. In addition, this participant favors the Alternative 1 approach --

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calling for an overall fairness assessment rather than discrete affirmative attention to each of the four factors. This participant agrees that it is important to avoid a rule that would permit a 23(f) appeal from these preliminary settlement review activities.

Topic 3 -- Cy pres provisions

This topic was introduced with a quick summary of some comments received from participants before the conference began. Several participants favored dropping the bracketed phrase "if authorized by law" and also favored removing any reference to making distributions to class members whose claims were rejected on grounds of timeliness. Other topics that have been raised in recent comments include reversion provisions, and the tightness of the nexus between the goals of the class action and the goals of a potential recipient of cy pres funds. Finally, some raised questions about whether cy pres amounts should count in making attorney fee awards.

The first participant raised two levels of problems. (1) It is troubling that the Civil Rules might be amended to include a substantive remedy. The "if authorized by law" proviso would be an important way to steer clear of this risk. But it's contradicted by the very next phrase -- "even if such a remedy could not be ordered in a contested case." (2) The whole idea presents great difficulties unless it is limited to cases involving trivial claims where delivering relief to class members would obviously not be possible. The procedure rules can't be used as a way to create or justify civil fines. Claims in federal court arise under the pertinent substantive law, and the procedure rules cannot augment the remedies that substantive law provides. Moreover, cy pres provisions in settlements are used too often to create faux class actions -- vehicles for enrichment of lawyers and "public interest" organizations affiliated with the lawyers.

Another participant disagreed. The "if authorized by law" phrase is inappropriate. These provisions are a matter of agreement. Certainly we want to avoid Enabling Act problems, but this is not necessary for that purpose. It's not right to say that the sole purpose of a suit is to compensate. It is also a method to enforce the law. Cy pres fulfills that private enforcement function. But there must be a significant nexus between the rights asserted in the lawsuit and the objectives and work of the cy pres recipient.

It was asked whether there is really any need for a rule. The ALI section on cy pres has gotten much support in the federal courts. Would that suffice without a rule?

One reaction was that there is a division between the state

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and federal courts on these points. This speaker would favor applying the ALI standards, but they are not universally invoked even in the federal courts. Another participant noted that there are many state law provisions that deal, in one way or another, with these issues. That drew the question whether federal courts had ever applied those standards in cases governed by state law, and the answer was that there might be a Washington case that does so, but that it surely has not been frequent.

It was suggested that empirical data on the frequency of cy pres provisions would be useful. This participant has attempted to determine how often reported instances have occurred in the last seven years, and believes there have been about 550 cases.

One approach that was suggested is class member consent. Surely class members could consent to using their claims to support public service activities. Perhaps the class notice would support the conclusion that the class has consented to such use if it specifies the cy pres provisions and enables class members to object. If some do object, that shows that others do not.

Another participant expressed considerable concern about the use of cy pres. With "leftover money," this is not really troubling, so long as it's not a huge amount. But these sorts of provisions seem to invite what might be called the "classless class." Particularly troublesome is the possibility that some lawyer would devise a "claim" about a product and claim that everyone who bought it suffered some "harm," so that the solution is that the court should direct that the defendant pay a considerable sum to a "public interest" organization selected by the lawyer. This participant would worry that any rule provision would promote such activity. It would be better to leave this to the courts, particularly under the guidance of the ALI Principles.

A judge noted that in more than ten years on the bench, only two cases had involved cy pres provisions. That drew the reaction that "there's always leftover money."

Concern was expressed about reversionary provisions, under which the defendant gets back unclaimed money. One could read the Committee Note sketch on p. 16 as endorsing such provisions. It was asked whether a rule should forbid a reversion. That drew the response that in some districts, such as the N.D. Cal., the experience is that having such a provision will lead to disapproval of the settlement.

A response was offered to the idea that class member consent can be assumed from lack of objection to cy pres provisions in settlement agreements. The purpose of litigation is to compensate. If class members want to make donations, they can do

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that on their own. But having this alternative to getting the money to class members raises very troubling issues. Whether or not this rises to a due process level, it would seem much better to give class counsel an incentive to make sure the money mainly gets to the class instead of the lawyer's pet charity. Indeed, it's odd that nobody has suggested the fluid class recovery concept. That is more like compensation than simply imposing a "civil fine" that is paid to a public interest outfit.

This prompted the observation that sometimes, particularly in some consumer class actions, the amounts left over are huge. It's very difficult to get the class members to make claims.

That prompted the reaction that, in such situations, reversion to the defendant is the logical answer. What this rule proposes instead is that the class's money can be used for public policy purposes the judge endorses. Why can't companies insist on a reversion? That facilitates settlements. The company knows that if the class members don't bother to claim the money, it will get the money back. In bankruptcy reorganizations, reversions occur all the time; why not here also? The class is not a judicial entity that can make a donation to a public interest outfit.

A reaction to this idea was that the Committee Note bracketed material on p. 16 seems to endorse reverter, but that endorsing it is a bad idea. To the contrary, the Enabling Act concern and the concern about the faux class action enabled by cy pres are both based on a false premise. The reality is that the defendant has been found to have violated the law, and the class consists of the victims. True, the defendant says that it does not concede violating the plaintiffs' rights, but usually the payment is enough to show that something wrong has occurred.

A different point was made: Usually there is money left after the initial claims process is completed. Speaking the realistically, the choice is between giving that money to the claims administrator or to the cy pres recipient.

That prompted the reaction that this is the place for reversion to the defendant. Indeed, there is no right to these funds unless the claimants come forward and claim them. Their failure to make claims does not make this a pot of money for "do good" purposes. But it was asked: What if the defendant has agreed to this arrangement. Why wouldn't that provide a sufficient basis for cy pres uses?

Another participant reacted that if defendant wants to insist on a reversion provision, that can be a target for objectors. A defense attorney participant reported that "I have been a proponent of reverters. I will push for them." Not all settlements are lump sum settlements. Some are claims made

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settlements. Then a reversion provision makes perfect sense. The amount to be paid is determined by the amount that is claimed. It was asked how one presents a claims made settlement to the court. The answer that it is really about attorney fees. From the defendant's perspective, one looks to the maximum amount that could be awarded, and that is used for the fee award. But the amount paid to the class depends on claims actually made.

The question whether a rule amendment was needed returned. "This is the most cited section of the ALI Principles. Do we need to put it into a rule? It's already being adopted in the courts."

The response was that the district courts are "all over the map." A recent Eleventh Circuit case dealt with a situation in which the class got $300,000 and the lawyers got $6 million in fees.

Another response was that cy pres is not compensation. Even fluid recovery is compensatory in orientation, but cy pres is not. If there is a substantial amount left after the claims process is completed, that indicates that the case should not have been certified. The right solution is to add a new Rule 23(a)(5), saying that a class should not be certified unless it is determined that there will be an effective method to distribute relief to the class members.

That idea drew strong disagreement: The bottom line is that defendant has violated the substantive rights of the class members, even if they are hard to identify and do not all seek compensation. Defendant must disgorge its unjust benefits. The bankruptcy comparison offered earlier is not analogous. That does not involve law enforcement, as is often the case in consumer class actions where many class members do not claim what they could claim under the settlement. Under CAFA, attorney fees are a separate consideration. Claims made is not an alternative in consumer cases. Having a reverter is anathema.

A different reaction was that the right question is the substantive law question. The procedural rules should not be distorted in order to "punish" "bad" defendants. Defendants agree to cy pres provisions because they want settlements approved and expect that a reverter would not be accepted. That is "agreement" with a gun to your head.

A response was that there already are rules that deal with "remedies." Rule 64 deals with some, and Rule 65 addresses TROs and preliminary injunctions. Moreover, this is really a common law development. If state law requires escheat, for example, the federal courts must obey that state law. But we must avoid getting caught up in formalist distinctions.

That prompted the question why the Advisory Committee should not simply leave these matters to common law development. Does anyone favor rulemaking in this area?

One reaction was to agree that the rules committees need not venture into this area. Another participant agreed. Consider the Third Circuit Baby Products decision. The court dealt with the problem creatively using common law principles. What actually happened in that case was that another outreach effort located additional claimants; the massive cy pres provision proved unnecessary.

A contrasting view was expressed: There is a value in having a rule. We need to squelch arguments about what is permissible and how these recurrent issues should be handled. It would be good to have a rule saying (1) cy pres is allowed, and (2) reversion is disfavored.

Another plaintiff-side lawyer reported being "very much on the fence." It is good to have clarity. But these are really tough issues. The problem of nexus is serious; class action settlements are not a form of taxation to do public good. But it is also true that entities like legal aid have very worthy goals and very serious needs that cy pres may partly satisfy.

One approach was offered: Is there a case in the last few years in which the ALI approach was rejected by a court? Maybe that proves we don't need a new rule. A participant identified three -- an Eleventh Circuit case that declined to adopt the ALI approach, a Google case, and a Facebook case.

An observer observed that this discussion is missing a key point. This is in Rule 23(e). It is only about the parties' agreement. The reason to have a rule is to achieve consistent treatment, not to create important new authority for such arrangements.

A reaction was that "this is not really a private contract. It requires court approval, which shows that it is not entirely private. And it achieves the goals of the court (and the parties) only if the court order is binding on both sides, including the absent plaintiffs."

Topic 4 -- Objectors

This topic was introduced as involving two general subjects, disclosure by objectors and a ban on payments to objectors or objector counsel.

One participant reported seeking test cases to try to claw back payments to bad faith objectors on behalf of the class. Rule 23(e)(3) calls for disclosure of all side agreements, and

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this should be a way to support such potential litigation.

A response was that the difficulty is with the delay after filing of a notice of appeal. At least the Rule 23(e)(5) requirement for court approval of withdrawal of the objection does not seem to apply then. The reaction was that even that sort of thing could be addressed in the settlement agreement, if one is really concerned about greenmail. Although an Appellate Rule amendment might close the appeal window partly, there would still be a 30-day gap between the entry of judgment in the district court and the filing of the notice of appeal. During that time there would be no policing.

Another participant noted that the big problem is that it makes great sense for class counsel to pay off the objectors to get the benefits to the class. Class members may be dying or in dire need of the relief that is being held up by the objector. But the proposed disclosure requirements are not effective. They are just a burden on the objector. The main solution is to require court approval of the payment to the objector or objector counsel.

That prompted the point that the amendment proposal made to the Appellate Rules Committee was that there be a flat ban on any payments to objectors or objector counsel, which would not alow payments even with court approval. Are all payments to be off limits after an appeal is taken, even those approved by the court? The response was that the important goal is to improve settlement agreements and avoid freeloading on them.

Another participant noted that there are surely good objectors, and this lawyer has recently seen several examples. A problem is that one often sees a mix of objectors. Requiring court approval is a way to shed light on this bad activity. Ideally, the courts of appeals would name names, and list the bad faith repeat-objector lawyers. But for class counsel to do this asks a lot. "Do we want to be in the business of name calling?"

Another plaintiff-side lawyer agreed. Hedge funds are stepping into this area and financing objections in hope of payoffs. We need as much transparency as possible. As a result, this lawyer likes the disclosure requirements, even though they may be burdensome to objectors, particularly good faith objectors.

Another plaintiff attorney agreed. There has to be a response. We need to know who these people are and do something about them.

A question was raised about the 2003 addition of the requirement in Rule 23(e)(3) about "identifying" side agreements. That did not require that the contents of the agreement be

revealed. For true transparency, revealing the details would be desirable. But it was observed that some things are properly and importantly kept secret. An recurrent example is the "blow factor," the level of opt-outs that will permit the defendant to withdraw from the settlement. 15 years ago "opt-out farmers" were thought to misuse such information.

Another reaction was that "the limitation on payments on page 25 is very appealing." Sunlight is desirable, and may be an antidote to the public disdain in many quarters for class actions. Suspicions are fed by secrecy.

A judge asked what the standard is for approving payments to objectors. Those who opt out can make whatever deal they prefer. Compare frivolous objectors. The judge suspects a hold up. What standard should the judge use in deciding whether to approve the payment that counsel has agreed to make?

A plaintiff-side lawyer said: "The only way to do it is to refuse to approve."

Another plaintiff-side attorney noted that the idea is that the court approval requirement will support court scrutiny. The district court could approve under some circumstances, but if the district judge refuses to approve the objector is really without a leg to stand on before the appellate court.

Another idea was suggested: What if a rule said the district court must not approve any payment to an objector unless it finds that the payment is reasonable in light of changes or improvements to the settlement resulting from the objection? That would be consistent with the orientation of Rule 23(h).

A first reaction to this idea was that often the improvement is hard to measure. "Cosmetic" improvements might be contrived. And on the other hand, changes in injunctive relief, for example, might be quite significant but difficult to value.

A defense-side lawyer noted that this is more a plaintiff-side problem. For the defendant, the delay in consummating the settlement may not be similarly urgent. Also, why can't the court approve the added payment even though it's not keyed to an "improvement" in the settlement?

Another participant warned "Be very careful what you ask for." Satellite litigation could easily occur about whether there has been an improvement. It's not always easy to determine what is a good faith objection. Indeed, the whole area is probably not typified by binary choices.

A counter to that was the example of the one-sentence objection to really says nothing. That robs the process of the

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legitimate purpose of class member objections. The basic goal is to inform the district court about possible problems with the deal. The one-sentence objection is a ticket to the appellate court, where the objector attorney can play the delay game.

That prompted the objection that courts of appeals wouldn't credit a one-sentence objection. That would lead to summary affirmance.

A different topic arose: requiring objector intervention to appeal. That would, of course, require a close consideration of Devlin v. Scardeletti, but the desirability of such a rule would be dubious anyway. If that can be litigated, it will be litigated. This lawyer has confronted such litigation three times already, even though he offers to stipulate that he will not accept any side payments and wants only to get an appellate ruling on the merits of his objections. Disclosure, on the other hand, is o.k. so long as it does not create additional things to litigate.

A defense-side lawyer said he was not in favor of a separate intervention or standing requirement for objectors. "If you're bound, how can you not have standing?"

A judge expressed support for a standard that was keyed to improvements in the settlement. That could recognize that more money was not the only way in which a settlement could be improved, but would provide the judge guidance.

But another participant pointed out that this created another appealable issue -- where the payment is rejected, the propriety of that rejection under the rule's standard could be appealed.

Topic 5 -- Ascertainability

This topic was introduced as having received much attention and somewhat divergent treatment lately. A key question is whether a rule change should be pursued, or alternatively that the committee should await a consensus in the courts.

A plaintiff-side lawyer said that the "minimalist" sketch the Subcommittee had circulated seemed to adopt the Third Circuit standard from Carrera. But the Seventh Circuit decision in Mulins "takes apart" Carrera. Carrera should be rejected insofar as it requires that certification turn on whether the court is certain that the identity of each class member can be ascertained later, and that the method of ascertaining it will be administratively feasible. All that should be required at the certification stage is that there is an objective definition of the class. The sketch relies on the phrase "when necessary" to do too much work. Moreover, any rule should be addressed only to

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(b)(3) class actions; even the Third Circuit has recognized that Carrera does not apply in (b)(2) cases. The Third Circuit standard makes identifiably a stand-alone factor for certification, and it should not be. The Committee should not proceed this way.

It was asked whether a rule change is needed. The answer was that it is needed. The Third Circuit decision in Bird v. Aaron's preserves the problem. "The Third Circuit has made it clear that you can't have a consumer class action." And the Eleventh Circuit seems to be siding with the Third Circuit on this subject.

A judge asked whether it might be that Carrera has been somewhat over-read in some quarters. A footnote in the case emphasizes that it was not announcing a new or additional requirement.

Another question was raised: Does this apply to settlements also? If so, that's a ground a for objections to settlements.

A defense-side attorney urged that any effort to address this question must take account of what happens after class certification is granted -- it is necessary to confront the question how you distribute the fruits of the suit.

Another response was that the Tyson case in the Supreme Court raises some of these issues.

Another defense lawyer argued that this "goes to the heart of what is a class action." Is it just about one person's gripe? Consumer fraud cases are good examples. It should be implicit in the rule that the objection is actually shared by others who can be identified. Indeed, typicality might be urged to require something of the sort. This lawyer supports the proposal, but thinks "it probably is a bit too early."

Another defense-side lawyer noted that trial plans also call for a relatively specific forecast of how a case will be handled. That drew the point that Judge Hamilton in Mullins said that the current rule has all the pieces needed to deal with these issues.

A plaintiff-side lawyer responded that "If you agree with Hamilton, the rule should be written to make it clear that at the certification stage only an objective definition is required." And it would be valuable to say that a Carrera-style ascertainability requirement is not a prerequisite for certification, and that self-identification is o.k.

Another plaintiff-side lawyer agreed.

Topic 6 -- Settlement class certification

The initial reaction expressed was skepticism from a defense-side lawyer. The settlement class dynamic has been in place for a long time. It reflects a fundamental tension about the proper role of class actions, and in particular about the centrality of the concept of predominance in the (b)(3) setting. Common question class actions are a precise exception to the normal course of business for American courts. They produce a quantum change in the dynamics of litigation. Though they may be very efficient for resolving multiple claims, they also exert huge leverage for compromise from defendants that have a strong basis for resisting claims on the merits. The 1990s experience emphasized mass torts, and involved quick certification decisions. First the courts of appeals put on the brakes. Then the Supreme Court emphasized in Amchem that predominance under (b)(3) is more than commonality under (a)(2). Since Amchem, the rules have tightened, but the problem of pressures has not gone away in the class action marketplace. The recent interest in issue classes and settlement class certification is evidence of this recent pressure. But the core point is that only with a vigorous predominance check can the collective pressure exerted by a (b)(3) class action be suitably cabined and focused. Weakening that check weakens the entire structure.

That statement produced the reaction "I'm not sure that's right. For example, the Third Circuit in Sullivan v. DB Investments struggled with the concept of predominance in the settlement class context." That reaction drew the response that there really is no way to try these cases. The Florida state court litigation following the Engle class action ruling, in effect an issues class outcome, proves that this effort produces a total mess. A judge that certifies for the "limited" purpose of resolving an issue will inevitably look for a settlement after that issue is resolved, at least if it is resolved in favor of the plaintiffs. We need a standards-driven activity, and removing predominance from its central position is the wrong way to go. Don't institutionalize this settlement urge.

Another participant added that there are serious Article III questions regarding a settlement class. "Contingent" certification in regard to a possible settlement destroys the adversarialness that is vital to American litigation. Similar Article III issues arise with regard to issue class certification. That produces an advisory opinion.

A defense-side lawyer responded that settlement classes are used all the time. If the courts shut down one avenue for resolving cases, lawyers will find another one. For examples, inventory settlements come into vogue if in-court resolutions are not possible. But there's no judicial involvement at all in relation to inventory settlements. That is not an improvement. With class settlements the court has a role to play, and these possible amendments can shape that role. Amchem is not really

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illustrative of the issues that arise today. That case presented critical future claims problems. Compare the NFL concussion litigation. There is no comparable futures problem there.

A plaintiff-side lawyer identified the problem: Defendants don't have tools that can be used to settle cases. That is a reason to support the settlement class idea. We need more flexibility. If the Florida situation after the Engle decision is a mess it's a mess because this set of defendants won't settle. That prompted the question whether there is any need for a rule on this subject. One could say that the courts are not following Amchem. The response was "I strongly support a rule. We need to have this in the rule book rather than relying on judicial improvisation."

Another participant said the proper attitude had a lot to do with the type of case involved. Two things are important: (1) The reverse auction problem must be kept constantly in mind, and (2) Whatever the rules, there may be courts that in essence play fast and loose with the rules. It is clear that defendants want global peace and want to use settlement classes to get it. But they also want to make litigation class certification difficult to obtain. There is an innate tension between these two desires, which tempts one to regard settlement class certification as worlds apart from litigation class certification. But that view is often hard to maintain when claims are based on class members' very varied circumstances, or on significantly different state laws. Fitting mass tort class actions into a class-action settlement with a transsubstantive rule is a great challenge.

Another participant had no strong view about the necessity of a settlement class rule, and was not troubled by the question of different standards for the settlement and litigation settings. The real concern should be fair treatment of class members. That is the weakness of settlement classes -- how the settlement pot is divided up.

Another participant recalled opposing the 1996 Rule 23(b)(4) proposal, particularly because of the reverse auction problem. How can a plaintiff lawyer drive a hard bargain when there's no way to go to trial? Inevitably the defendant is in the driver's seat, and various plaintiff lawyers are tempted to "bid" against each other by undercutting other plaintiff lawyers.

This discussion produced a question: Should there be a rule forbidding settlement in any case unless a class has already been certified? That resembles the Third Circuit attitude that prompted the publication of the 1996 Rule 23(e)(4) proposal. It also corresponds to some mid 1970s interpretations of the "as soon as possible" language then in Rule 23 about when class certification should be resolved. The idea was that class certification was the absolute first thing that should be

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resolved. That primacy has been removed, but maybe Rule 23(e) should forbid settlements in any case that cannot qualify for certification under existing Rules 23(a) and (b).

A reaction was that it's simply true that courts will try to achieve settlements. MDLs are like that; the judge regards reaching a settlement as a big part of the job. The point is that this existing pressure becomes overwhelming if the bar is lowered for certification. To offer a lower threshold for settlement certification will mean that there will be even more pressure to settle. The inventory analogy is not an apt comparison. With inventory settlements, one begins with clients who contact lawyers and have cases. That's the MDL model. Acting for the clients who have hired them, those lawyers can push for a settlement. But in a class action the "clients" don't hire the lawyer or otherwise initiate the process. They don't even know about it. The court deputizes the lawyer to make a deal for the "clients." Where is there another rule that is designed for settlement purposes? The class action setting is not the place to start.

A reaction to these points was that Rule 23 has a variety of protections in the settlement context that are not in place for MDLs. Doesn't that argue for favoring the class-action setting? The response was that the situations are qualitatively different -- in the MDL setting the client initiates the process, but in the class action the initiative belongs entirely to the lawyers.

A judge noted that the defendant can insist on a full-blown certification process. Then if that results in certification, the defendant can settle, and that sequence would not trouble those unnerved by the settlement class possibility. The reality, however, is that the parties -- including the defendant -- want resolution without that extra step. Indeed, the plaintiff lawyers could rebuff settlement overtures until the case is certified in order to strengthen their hand in settlement negotiations. But that does not happen much of the time. The parties are pushing for settlement before a full-dress certification decision.

A settlement-class skeptic responded that making a formal rule inviting settlement class certification will cause ripple effects. The process just described will be magnified. This prospect will affect how and whether cases are brought.

A settlement-class proponent noted that Rule 23(e) says that settlement is a valid outcome for a class action, albeit with the conditions the rule specifies. That drew the response that every other time settlement is referred to in the rules it is as an adjunct to the adversary proceedings that are the norm of American litigation. In this situation, that adversarialness is missing.

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A reaction to this point was that it would make consent decrees unconstitutional. The response to that point was that consent decrees are a different category because they involve governmental enforcement. That is not the same as the settlement classes we should expect under this rule. In those cases, private profit-oriented lawyers are initiating and controlling the cases. Coupled with cy pres possibilities, they may even support a deal that involves absolutely no direct payments to the class members they "represent."

Topic 7 -- Issue class certification

This topic was introduced as involving two sorts of issues. (1) Is there a split in the courts that justifies some effort to clarify how courts are to approach the option provided by (c)(4) in cases certified under (b)(3)? (2) In any event, should there be an amendment to Rule 23(f) to deal with immediate review of the court's resolution of a common issue under (c)(4)?

An initial reaction was that the effect on MDL proceedings is an important consideration. This participant's bias is to "leave the matter to the marketplace."

Another participant (defense-side) agreed. "There are so many issues with issue classes. They are really very hard to do."

A plaintiff-side participant agreed. The case law is actually fairly stable. And it bears noting that (c)(4) is also used in (b)(2) cases. This sketch might disrupt that valuable practice.

Another plaintiff-side participant agreed. In consumer cases, the issue may be the same for all class members, and (b)(2) treatment may be preferred.

A defense-side participant said that changing the rule would be "very dangerous." There would be an explosion of issue classes." Such treatment raises important 7th Amendment jury trial issues, with the jury seeing only part of the case.

Another defense-side participant did not disagree, but mentioned that the sketch's invocation of a "materially advance the litigation" standard for using this device seemed a valuable gloss on the current rule. But the courts may well be embracing this attitude on their own. Rule 23(c)(4) already says that the court should use this route only "when appropriate." That seems the most important consideration in determining whether (c)(4) certification is appropriate.

No voices were raised to support moving forward on the possible revisions to (b)(3) or (c)(4), and the modification to

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Rule 23(f) did not receive attention.

Topic 8 -- Notice

This topic was introduced with the widely shared view that everyone thinks that being flexible about ways to give notice makes sense, and that taking the 1974 Eisen decision as interpreting the current rule as requiring first class mail seems inflexible.

An initial reaction was that some public interest lawyers say the poor do not have easy access to the Internet, so email or other online notice may not reach them.

A public interest participant agreed. Consumers too often are not able to access online resources. But there may be another concern of at least equal importance -- the cognitive capability of the members of a consumer class. Even if notice "reaches" them, they may not be able to understand or interpret it. Finding ways to ensure that notices are understandable to such class members may be just as important as flexibility in method of delivery.

Another public interest participant said that electronic notice can usually be useful. But it would be important -- whatever the form of notice -- that the rule direct that it be in easily readable format. And creative use of online communications must be approached with suitable caution. For example, one might be intrigued by the possibility of opting out by email, but that raises concerns about verification of who is doing the purported opting out.

Another participant noted that first class mail is far from foolproof. Particularly with the vulnerable groups mentioned by others, is it clear that first-class mail is more likely to reach them and be understood than alternative means of communication? Don't people who have email actually change their email addresses must less frequently than their residential addresses? Many in the most vulnerable groups probably move often.

A different concern was introduced -- spam filters. As the volume of email escalates, those are increasingly prominent. How can one make sure that email notice of a class action certification or settlement does not end up in spam? A response was: How do you make sure first class mail is not discarded without being opened?

It was suggested that claims administrators actually have considerable experience and data about these very subjects. A participant with extensive experience in claims administration observed that people i the claims administration business are very resistant to revealing this information. The effectiveness

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of various methods of reaching class members is regarded as proprietary information.

Beyond simply reaching people at all, it was emphasized, there are serious issues about what you reach them with, and what they actually will understand. The goal should be to write the communications in a way that makes it easy for a recipient to make a decision. That will increase the response rate. Another comment was that one needs to tailor the notice to the case involved. A securities fraud case and a consumer class action may call for very different strategies in communicating with class members. The fundamental issue is that the judge should be paying attention to the practicalities of notice to the class in the case before the court; that focus may be more important than what any rule says.

Attention shifted to what the amendment sketch on p. 46 said. It invites "electronic or other means" to give notice. But that seems to give electronic means priority. Is that right? For one thing, it's difficult to foresee what new means of communication may arise in the future; perhaps some of them may become almost universal but not be "electronic." For another, it is not clear that electronic means should be preferred to others across the board. The discussion thus far shows that class actions are not all the same, and that tailoring the notice program to the case before the court is important. Perhaps this amendment would send the wrong signal.

Another participant suggested that "appropriate" might be more appropriate in the rule than "electronic." Then the Committee Note could say that for many Americans electronic communications are the most utilized method of communicating, but that for others more traditional means continue to predominate.

A reaction to these suggestions about phrasing of a rule change was to note the Eisen interpreted the current rule to prefer, perhaps to require, first-class mail. Should that really be privileged over other forms in the 21st century?

A response was that you can make a case for use of email in many cases. But there is no reason to throw out first class mail altogether. At the same time, another participant cautioned, one would not want the rule to appear to require the court to use first class mail where it does not make sense. It's quite expensive, and can be cumbersome and time-consuming.

An observer suggested that the rule should direct that notice be given "by the most appropriate means under the circumstances." Then the Committee Note could say that Eisen's endorsement of first class mail no longer makes sense. The Note could also add a discussion of the manner of presentation and content of the notice. Claims administrators do have data on

what works, and it makes sense to prefer evidence-based decisions about such matters.

Another reaction focused on the method of opting out. At present, the norm still is that class members must mail in something to opt out. In practice, that can operate as a disincentive to opting out. Can this be done electronically instead?

A reaction was that things are evolving very rapidly on these techniques. Sometimes it seems that the preferred way of handling these topics changes between the time the settlement is negotiated and the time that it is presented to the court.

Another comment reminded the group to keep one more thing in mind -- the distinction between reach and claims rate. It is important for a realistic assessment of differing notice strategies to attend to the matters of greatest importance.

Topic 9 -- Pick-off offers and Rule 68

This topic was introduced by noting that the Seventh Circuit announced a month before the conference that it was abandoning its prior interpretation of the effectiveness of pick-off offers, and that the Supreme Court has granted certiorari in a case that may resolve some or all issues surrounding this topic. So the question presently is how the Advisory Committee should approach the issues.

The first response was that the Committee should "pass" -- not take amendment action at this time.

A second response was that the Rule 68 sketch has appeal. Since the Kagan dissent in the FLSA case, no circuit has embraced pick-off maneuvers, but there are a couple of circuits in which this continues to be a potential issue. But there's a considerable likelihood that the Supreme Court will decide the issue in the Campbell-Ewald case.

Another participant favored the "Cooper approach." Rule 68 is not the only place where this problem can arise. It would be desirable to direct in Rule 23 that if a proposed class representative is found inadequate the court must grant time to find a substitute representative. Another thing that might warrant attention is that some district courts are entertaining motions to strike class allegations. But Rule 12(f) is not designed for such a purpose, and the rules should say that it is not.

A judge agreed that it is prudent to see what the Supreme Court does with the case in which it has granted certiorari. That prompted a prediction from another participant that the

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Court will not contradict what the lower courts have done. At the same time, this defense-side participant noted, a class action is extremely expensive to defend, and it's not at all clear that nullifying the pick-off offer possibility is important to protect significant interests of the class. That drew the response that this is a putative class upon filing of the proposed class action, and there has to be time to find another class representative if the defendant tries to behead the action at this point.

Other issues

Finally, participants were invited to suggest other topics on which the Advisory Committee might focus its attention.

One suggestion was back-end disclosures. Courts should order the parties to report back on take-up rates and other settlement administration matters when it approves a class-action settlement. This might link up to a court order deferring some of the attorney fee award until the actual claims rate is known. That might tie in somewhat with the cy pres discussion, and the question whether moneys paid to a cy pres recipient should be considered to confer a benefit on the class sufficient to warrant an award based on the "value" of the settlement.

Another topic was whether there should be a second try outreach effort if the initial claims process seems not to have drawn much response. There have been instances in which such second efforts very significantly increase the claims rate. A plaintiff-side participant reacted by saying that "I have a duty to the class to ensure delivery to class members of the agreed relief in an effective manner." Indeed NACA has guidelines on this very topic. See Guideline 15 at 299 F.R.D. 228. This is important.

* * * * *

The mini-conference having concluded, Judge Dow reiterated the hearty thanks with which he opened the event. The participants' contributions have been critical to a careful analysis of the various possible amendment ideas, and the Subcommittee is deeply indebted for the participation of each person who attended the event.

INTRODUCTORY MATERIALS
RULE 23 SUBCOMMITTEE
ADVISORY COMMITTEE ON CIVIL RULES
MINI-CONFERENCE ON RULE 23 ISSUES
SEPT. 11, 2015

This memorandum is designed to introduce issues that the Rule 23 Subcommittee hopes to explore during its mini-conference on Sept. 11, 2015. This list of issues has developed over a considerable period and is still evolving. The Subcommittee has had very helpful input from many sources during this period of development. The Sept. 11 mini-conference will provide further insights as it develops its presentation to the full Advisory Committee during its Fall 2015 meeting.

Despite the considerable strides that the Subcommittee has made in refining these issues, it is important to stress at the outset that **the rule amendment sketches and Committee Note possibilities presented below are still evolving. It remains quite uncertain whether any formal proposals to amend Rule 23 will emerge from this process. If formal proposals do emerge, it is also uncertain what those proposals would be.**

The topics addressed below range across a spectrum of class-action issues that has evolved as the Subcommittee has analyzed these issues. They are arranged in a sequence that is designed to facilitate consideration of somewhat related issues together. As to each issue, the memorandum presents some introductory comments, sketches of possible amendment ideas, often a draft (and often brief) sketch of a draft Committee Note and some Reporter's comments and questions that may help focus discussion. This memorandum does not include multiple footnotes and questions of the sort that might be included in an agenda memorandum for an Advisory Committee meeting; the goal of this mini-conference is to focus more about general concepts than implementation details, though those details are and will be important, and comments about them will be welcome.

The topics can be introduced as follows:

(1) "Frontloading" of presentation to the court of specifics about proposed class-action settlements -- Would such a requirement be justified to assist the court in deciding whether to order notice to the class and to afford class members access to information about the proposed settlement if notice is sent?;

(2) Expanded treatment of settlement approval criteria to focus and assist both the court and counsel in evaluating the most important features of proposed settlements of class actions -- Would changes be helpful and effective?;

(3) Guidance on handling cy pres provisions in class-action settlements -- Are changes to Rule 23 needed, and if so what should they include?;

(4) Provisions to improve and address objections to a proposed settlement by class members, including both objector disclosures and court approval for withdrawal of appeals and payments to objectors or their counsel in connection with withdrawal of appeals -- Would rule changes facilitate review of objections from class members, and would court approval for withdrawing an appeal be a useful way to deal with seemingly inappropriate use of the right to object and appeal?;

(5) Addressing class definition and ascertainability more explicitly in the rule -- Would more focused attention to issues of class definition assist the court and the parties in dealing with these issues?;

(6) Settlement class certification -- should a separate Rule 23(b) subdivision be added to address this possibility?;

(7) Issue class certification under Rule 23(c)(4) -- should Rule 23(b)(3) or 23(c)(4) be amended to recognize this possibility, and should Rule 23(f) be amended to authorize a discretionary interlocutory appeal from resolution of an issue certified under Rule 23(c)(4)?;

(8) Notice -- Would a change to Rule 23(c)(2) be desirable to recognize that 21st century communications call for flexible attitudes toward class notice?; and

(9) Pick-off offers of individual settlement and Rule 68 offers of judgment -- Would rule amendments be useful to address this concern?

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(1) Disclosures regarding proposed settlements

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(A) When seeking approval of notice to the class, the settling parties must present to the court:

(i) the grounds, including supporting details, which the parties contend support class certification [for purposes of settlement];

(ii) details on all provisions of the proposal, including any release [of liability];

(iii) details regarding any insurance agreement described in Rule 26(a)(2)(A)(iv);

(iv) details on all discovery undertaken by any party, including a description of all materials produced under Rule 34 and identification of all persons whose depositions have been taken;

(v) a description of any other pending [or foreseen] {or threatened} litigation that may assert claims on behalf of some class members that would be [affected] {released} by the proposal;

(vi) identification of any agreement that must be identified under Rule 23(e)(3);

(vii) details on any claims process for class members to receive benefits;

(viii) information concerning the anticipated take-up rate by class members of

50 benefits available under the proposal;
51
52 **(ix)** any plans for disposition of settlement
53 funds remaining after the initial claims
54 process is completed, including any
55 connection between any of the parties
56 and an organization that might be a
57 recipient of remaining funds;
58
59 **(x)** a plan for reporting back to the court
60 on the actual claims history;
61
62 **(xi)** the anticipated amount of any attorney
63 fee award to class counsel;
64
65 **(xii)** any provision for deferring payment of
66 part or all of class counsel's attorney
67 fee award until the court receives a
68 report on the actual claims history;
69
70 **(xiii)** the form of notice that the parties
71 propose sending to the class; and
72
73 **(xiv)** any other matter the parties regard as
74 relevant to whether the proposal should
75 be approved under Rule 23(e)(2).
76
77 **(B)** The court may refuse to direct notice to the
78 class until the parties supply additional
79 information. If the court directs notice to
80 the class, the parties must arrange for class
81 members to have reasonable access to all
82 information provided to the court.
83
84 *Alternative 1*
85
86 **(C)** The court must not direct notice to the class
87 if it has identified significant potential
88 problems with either class certification or
89 approval of the proposal.
90
91 *Alternative 2*
92
93 **(C)** If the preliminary evaluation of the proposal
94 does not disclose grounds to doubt the
95 fairness of the proposal or other obvious
96 deficiencies [such as unduly preferential
97 treatment of class representatives or
98 segments of the class, or excessive
99 compensation for attorneys] and appears to
100 fall within the range of possible approval,

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101 the court may direct notice to the class.
102
103 *Alternative 3*
104
105 **(C)** The court may direct notice to the class only
106 upon concluding that the prospects for class
107 certification and approval of the proposal
108 are sufficiently strong to support giving
109 notice to the class.
110
111 *Alternative 4*
112
113 **(C)** The court should direct notice to the class
114 if it preliminarily determines that giving
115 notice is justified by the prospect of class
116 certification and approval of the proposal.
117
118
119 **(D)** An order that notice be directed to the class
120 is not a preliminary approval of class
121 certification or of the proposal, and is not
122 subject to review under Rule 23(f)(1). But
123 such an order does support notice to class
124 members under Rule 23(c)(2)(B). If the class
125 has not been certified for trial, neither the
126 order nor the parties' submissions in
127 relation to the proposal are binding if class
128 certification for purposes of trial is later
sought.[1]

Sketch of Draft Committee Note

Subdivision (e)(1). The decision to give notice to the class of a proposed settlement is an important event. It is not the same as "preliminary approval" of a proposed settlement, for approval must occur only after the final hearing that Rule 23(e)(2) requires, and after class members have an opportunity to object under Rule 23(e)(5). It is not a "preliminary certification" of the proposed class. In cases in which class

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[1] To drive home the propriety of requiring opt-out decisions at this time, Rule 23(c)(2)(B) could also be amended as follows:

(B) *For (b)(3) classes.* For any class certified under Rule 23(b)(3), or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified [for settlement] under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances. * * * * *

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certification has not yet been granted for purposes of trial, the parties' submissions regarding the propriety of certification for purposes of settlement [under Rule 23(b)(4)] are not binding in relation to certification for purposes of trial if that issue is later presented to the court.

Paragraph (A). Many types of information may be important to the court in deciding whether giving notice to the class of a proposed class-action settlement is warranted. This paragraph lists many types of information that the parties should provide the court to enable it to evaluate the prospect of class certification and approval of the proposal. Item (i) addresses the critical question whether there is a basis for certifying a class, at least for purposes of settlement. Items (ii) through (xiii) call for a variety of pieces of information that are often important to evaluating a proposed settlement, [although in some cases some of these items will not apply]. Item (xiv) invites the parties to call the court's attention to any other matters that may bear on whether to approve the proposed settlement; the nature of such additional matters may vary from case to case.

Paragraph (B). The court may conclude that additional information is necessary to make the decision whether to order that notice be sent to the class. In any event, the parties must make arrangements for class members to have access to all the information provided to the court. Often, that access can be provided in some electronic or online manner. Having that access will assist class members in evaluating the proposed settlement and deciding whether to object under Rule 23(e)(5).

Paragraph (C). The court's decision to direct notice to the class must take account of all information made available, including any additional information provided under Paragraph (B) on order of the court. **[Once a standard is agreed upon, more detail about how it is to be approached might be included here.]**

Paragraph (D). The court's decision to direct notice to the class is not a "preliminary approval" of either class certification or of the proposal. Class certification may only be granted after a hearing and in light of all pertinent information. Accordingly, the decision to send notice is not one that supports discretionary appellate review under Rule 23(f)(1). Any such review would be premature, [although the court could in some cases certify a question for review under 28 U.S.C. § 1292(b)].

Often, no decision has been made about class certification for purposes of trial at the time a proposed settlement is submitted to the court. [Rule 23(b)(4) authorizes certification for purposes of settlement in cases that might not satisfy the requirements of Rule 23(b)(3) for certification for trial.]

Should certification ultimately be denied, or the proposed settlement not approved, neither party's statements in connection with the proposal under Rule 23(e) are binding on the parties or the court in connection with a request for certification for purposes of trial.

Although the decision to send notice is not a "preliminary" certification of the class, it is sufficient to support notice to a Rule 23(b)(3) class under Rule 23(c)(2)(B), including notice of the right to opt out and a deadline for opting out. [Rule 23(c)(2)(B) is amended to recognize this consequence.] The availability of the information required under Paragraphs (A) and (B) should enable class members to make a sensible judgment about whether to opt out or to object. If the class is certified and the proposal is approved, those class members who have not opted out will be bound in accordance with Rule 23(c)(3). This provision reflects current practice under Rule 23.

Reporter's Comments and Questions

The listing in Paragraph (A) is quite extensive. Some language alternatives are suggested, but a more basic question is whether all of the items should be retained, and whether other items should be added. The judicial need for additional information in evaluating proposed class-action settlements has been emphasized on occasion. See, e.g., Bucklo & Meites, What Every Judge Should Know About a Rule 23 Settlement (But Probably Isn't Told), 41 Litigation Mag. 18 (Spring 2015). The range of things that could be important in regard to a specific case is very broad, so Paragraph (B) enables the court to direct additional information about other subjects, and item (xiv) invites the parties to submit information about other subjects.

How often is this sort of detailed submission presently provided at the time a proposed settlement is submitted to the court? Some comments suggest that sophisticated lawyers already know that they should fully advise the court at the time of initial submission of the proposal. Other comments suggest that the "real" briefing in support of the proposed settlement should occur at the time of initial submission, and that the further briefing at the time of the final approval hearing is largely an afterthought. This sketch does not compel that briefing sequence. Would that be desirable, or unduly intrude into the flexibility of district-court proceedings? Then further submissions by the settling parties could be limited to responding to objections from class members.

Do class members already have access to this range of information at the time they have to decide whether to opt out or object? At least some judicial doctrine suggests that on occasion important information has been submitted only after the time to opt out or object has passed. For example, information

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about the proposed attorney fee award may not be available at the time class members must decide whether to object.

Are there items on the list that are so rarely of interest that they should be removed? Are there items on the list that are too demanding, and therefore should not be included? For example, information about likely take-up rates (item (viii)) may be too difficult to obtain. But if so, perhaps a plan for reporting back to the court (item (x)) and/or for taking actual claims experience into account in determining the final attorney fee award (item (xii)) might be in order.

How best should the standard for approving the notice to the class be stated? To some extent, there is a tension between saying two things in proposed Paragraph (D) -- that the decision to send notice is not an order certifying or refusing to certify the class that is subject to review under Rule 23(f), and that it is nonetheless sufficient to require class members to decide whether to opt out under Rule 23(c)(2)(B).

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(2) Expanded treatment of settlement criteria

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise.

* * * * *

Alternative 1

(2) If the proposal would bind class members, the court may approve it only after a hearing and [only] on finding that it is fair, reasonable, and adequate~~.~~, considering whether:

Alternative 2

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that: ~~it is fair, reasonable, and adequate.~~[2]

(A) the class representatives and class counsel have [been and currently are] adequately represented the class [in preparing to negotiate the settlement];

[(B) the settlement was negotiated at arm's length and was not the product of collusion;]

(C) the relief awarded to the class -- taking into account the proposed attorney fee award and any ancillary agreement made in connection with the

[2] These two alternatives offer a choice whether a rule should be more or less "confining." Alternative 1 is less confining for the district court, since it only calls for "consideration" of the listed factors. It may be that a court would regard some as more important than others in a given case, and conclude that the overall settlement is fair, reasonable, and adequate even if it might not find that all four were satisfied. Alternative 2, on the other hand, calls for separate findings on each of the four factors, and thus directs that the district court refuse to approve the settlement even though its overall judgment is that the settlement is fair, reasonable and adequate. This difference in treatment might also affect the scope of appellate review.

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17 settlement -- is fair, reasonable, and adequate,
18 given the costs, risks, probability of success,
19 and delays of trial and appeal; and
20
21 (D) class members are treated equitably relative to
22 each other [based on their facts and circumstances
23 and are not disadvantaged by the settlement
24 considered as a whole] and the proposed method of
25 claims processing is fair [and is designed to
achieve the goals of the class action].

Sketch of Draft Committee Note

Subdivision (e)(2). Since 1966, Rule 23(e) has provided that a class action may be settled or dismissed only with the court's approval. Many circuits developed lists of "factors" to be considered in connection with proposed settlements, but these lists were not the same, were often long, and did not explain how the various factors should be weighed. In 2003, Rule 23(e) was amended to direct that the court should approve a proposed settlement only if it is "fair, reasonable, and adequate." Nonetheless, in some instances the existing lists of factors used in various circuits may have been employed in a "checklist" manner that has not always best served courts and litigants dealing with settlement-approval questions.

This amendment provides more focus for courts called upon to make this important decision. Rule 23(e)(1) is amended to ensure that the court has a broader knowledge base when initially reviewing a proposed class-action settlement in order to decide whether it is appropriate to send notice of the settlement to the class. The disclosures required under Rule 23(e)(1) will give class members more information to evaluate a proposed settlement if the court determines that notice should be sent to the class. Objections under Rule 23(e)(5) can be calibrated more carefully to the actual specifics of the proposed settlement. In addition, Rule 23(e)(5) is amended to elicit information from objectors that should assist the court and the parties in connection with the possible final approval of the proposed settlement.

Amended Rule 23(e)(2) builds on the knowledge base provided by the Rule 23(e)(1) disclosures and any objections from class members, and focuses the court and the parties on the core considerations that should be the prime factors in making the final decision whether to approve a settlement proposal. It is not a straitjacket for the court, but does recognize the central concerns that judicial experience has shown should be the main focus of the court as it makes a decision whether to approve the settlement.

Paragraphs (A) and (B). These paragraphs identify matters

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that might be described as "procedural" concerns, looking to the conduct of the litigation and of the negotiations leading up to the proposed settlement. If the court has appointed class counsel or interim class counsel, it will have made an initial evaluation of counsel's capacities and experience. But the focus at this point is on the actual performance of counsel acting on behalf of the class.

Rule 23(e)(1) disclosures may provide a useful starting point in assessing these topics. For example, the nature and amount of discovery may indicate whether counsel negotiating on behalf of the class had an adequate information base. The pendency of other litigation about the same general subject on behalf of class members may also be pertinent. The conduct of the negotiations may also be important. For example, the involvement of a court-affiliated mediator or facilitator in those negotiations may bear on whether they were conducted in a manner that would protect and further the class interests.

In making this analysis, the court may also refer to Rule 23(g)'s criteria for appointment of class counsel; the concern is whether the actual conduct of counsel has been consistent with what Rule 23(g) seeks to ensure. Particular attention might focus on the treatment of any attorney fee award, both in terms of the manner of negotiation of the fee award and the terms of the award.

Paragraphs (C) and (D). These paragraphs focus on what might be called a "substantive" review of the terms of the proposed settlement. A central concern is the relief that the settlement is expected to provide to class members. Various Rule 23(e)(1) disclosures may bear on this topic. The proposed claims process and expected or actual claims experience (if the notice to the class calls for simultaneous submission of claims) may bear on this topic. The contents of any agreement identified under Rule 23(e)(3) may also bear on this subject, in particular the equitable treatment of all members of the class.

Another central concern will relate to the cost and risk involved in pursuing a litigated outcome. Often, courts may need to forecast what the likely range of possible classwide recoveries might be and the likelihood of success in obtaining such results. That forecast cannot be done with arithmetic accuracy, but it can provide a benchmark for comparison with the settlement figure. And the court may need to assess that settlement figure in light of the expected or actual claims experience under the settlement.

[If the class has not yet been certified for trial, the court may also give weight to its assessment whether litigation certification would be granted were the settlement not approved.]

Examination of the attorney fee provisions may also be important to assessing the fairness of the proposed settlement. Ultimately, any attorney fee award must be evaluated under Rule 23(h), and no rigid limits exist for such awards. Nonetheless, the relief actually delivered to the class is often an important factor in determining the appropriate fee award. Provisions for deferring a portion of the fee award until the claims experience is known may bear on the fairness of the overall proposed settlement. Provisions for reporting back to the court about actual claims experience may also bear on the overall fairness of the proposed settlement.

Often it will be important for the court to scrutinize the method of claims processing to ensure that it is suitably receptive to legitimate claims. A claims processing method should deter or defeat unjustified claims, but unduly demanding claims procedures can impede legitimate claims. Particularly if some or all of any funds remaining at the end of the claims process must be returned to the defendant, the court must be alert to whether the claims process is unduly exacting.

Ultimately, the burden of establishing that a proposed settlement is fair, reasonable, and adequate rests on the proponents of the settlement. But no formula is a substitute for the informed discretion of the district court in assessing the overall fairness of proposed class-action settlements. Rule 23(e)(2) provides the focus the court should use in undertaking that analysis.

Reporter's Comments and Questions

The question whether a rule revision along these lines would produce beneficial results can be debated. The more constrictive a rule becomes (as in Alternative 2), the more one could say it provides direction. But that direction may unduly circumscribe the flexibility of the court in making a realistic assessment of the entire range of issues presented by settlement approval. On the other hand, a more expansive rule, like Alternative 1, might not provide the degree of focus sought.

Another question revolves around the phrase now in the rule -- "fair, reasonable, and adequate," which receives more emphasis in Alternative 1. That is an appropriately broad phrase to describe the concern of the court in evaluating a proposed settlement. But to the extent that a rule amendment is designed to narrow the focus of the settlement review, perhaps the breadth of that phrase is also a drawback. Changing that phrase would vary from longstanding case law on Rule 23(e) analysis. Will a new rule along the lines sketched above meaningfully concentrate analysis if that overall description of the standard is retained?

At least a revised rule might obviate what reportedly

happens on numerous occasions -- the parties and the court adopt something of a rote recitation of many factors deemed pertinent under the case law of a given circuit. Would the sketch's added gloss on "fair, reasonable, and adequate" be useful to lawyers and district judges addressing settlement-approval applications?

If this approach holds promise to improve settlement review, are there specifics included on the list in the sketch that should be removed? Are there other specifics that should be added?

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(3) Cy pres provisions in settlements

1 **(e) Settlement, Voluntary Dismissal, or Compromise.** The claims,
2 issues, or defenses of a certified class may be settled,
3 voluntarily dismissed, or compromised only with the court's
4 approval. The following procedures apply to a proposed
5 settlement, voluntary dismissal, or compromise:
6
7 * * * * *
8
9 (3) The court may approve a proposal that includes a cy
10 pres remedy [if authorized by law][3] even if such a
11 remedy could not be ordered in a contested case. The
12 court must apply the following criteria in determining
13 whether a cy pres award is appropriate:
14
15 **(A)** If individual class members can be identified
16 through reasonable effort, and individual

---

[3] This bracketed qualification is designed to back away from creating new authority to use cy pres measures. It is clear that some courts have been authorizing cy pres treatment. Indeed, the Eighth Circuit's opinion in In re BankAmerica Corp. Securities Lit., 775 F.3d 1060 (8th Cir. 2015), suggested that it is impatient with their willingness to do so. It is less clear where the authority for them to do so comes from. In some places, like California, there is statutory authority, but there are probably few statutes. It may be a form of inherent power, though that is a touchy subject. Adding a phrase of this sort is designed to make clear that the authority does not come from this rule.

On the other hand, one might say that the inclusion of cy pres provisions in the settlement agreement is entirely a matter of party agreement and not an exercise of judicial power. Thus, the sketch says such a provision may be used "even if such a remedy could not be ordered in a contested case." That phrase seems to be in tension with the bracketed "authorized by law" provision. One might respond that the binding effect of a settlement class action judgment is dependent on the exercise of judicial power, and that the court has a considerable responsibility to ensure the appropriateness of that arrangement before backing it up with judicial power. So the rule would guide the court in its exercise of that judicial power.

In any event, it may be that there is no need to say "if authorized by law" in the rule because -- like many other agreements included in settlements -- cy pres provisions do not depend on such legal authorization, even if their binding effect does depend on the court's entry of a judgment.

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17 distributions would be economically viable,
18 settlement proceeds must be distributed to
19 individual class members;
20
21 **(B)** If the proposal involves individual distributions
22 to class members and funds remain after initial
23 distributions, the proposal must provide for
24 further distributions to participating class
25 members [or to class members whose claims were
26 initially rejected on timeliness or other grounds]
27 unless individual distributions would not be
28 economically viable {or other specific reasons
29 exist that would make such further distributions
30 impossible or unfair}];
31
32 **(C)** The proposal may provide that, if the court finds
33 that individual distributions are not viable under
34 Rule 23(e)(3)(A) or (B), a cy pres approach may be
35 employed if it directs payment to a recipient
36 whose interests reasonably approximate those being
37 pursued by the class.
38

(4~~3~~) The parties seeking approval * * *

Sketch of Draft Committee Note

Because class-action settlements often are for lump sums with distribution through a claims process, it can happen that funds are left over after the initial claims process is completed. Rule 23(e)(1) is amended to direct the parties to submit information to the court about the proposed claims process and forecasts of uptake at the time they request notice to the class of the proposed settlement. In addition, they are to address the possibility of deferring payment of a portion of the attorney fee award to class counsel until the actual claims history is known. These measures may affect the frequency and amount of residual funds remaining after the initial claim distribution process is completed. Including provisions about disposition of residual funds in the settlement proposal and addressing these topics in the Rule 23(e)(1) report to the court (which should be available to class members during the objection/opt out period) should obviate any need for a second notice to the class concerning the disposition of such a residue if one remains.

Rule 23(e)(3) guides the court and the parties in handling such provisions in settlement proposals and in determining disposition of the residual funds when that becomes necessary. [It permits such provisions in settlement proposals only "if authorized by law." Although parties may make any agreement they prefer in a private settlement, because the binding effect of the

class-action judgment on unnamed class members depends on the court's authority in approving the settlement such a settlement may not bind them to accept "remedies" not authorized by some source of law beyond Rule 23.]

[One alternative to *cy pres* treatment pursuant to Rule 23(e)(3) might be a provision that any residue after the claims process should revert to the defendant which funded the settlement program. But because the existence of such a reversionary feature might prompt defendants to press for unduly exacting claims processing procedures, a reversionary feature should be evaluated with caution.[4]]

Paragraph (A). Paragraph (A) requires that settlement funds be distributed to class members if they can be identified through reasonable effort when the distributions are large enough to make distribution economically viable. It is not up to the court to determine whether the class members are "deserving," or other recipients might be more deserving. Thus, paragraph (A) makes it clear that cy pres distributions are a last resort, not a first resort.

Developments in telecommunications technology have made distributions of relatively small sums economically viable to an extent not similarly possible in the past; further developments may further facilitate both identifying class members and distributing settlement funds to them in the future. This rule calls for the parties and the court to make appropriate use of such technological capabilities.

Paragraph (B). Paragraph (B) follows up on the point in paragraph (A), and directs that even after the first distribution is completed there must be a further distribution to those class members who submitted claims of any residue if a further distribution is economically viable. This provision applies even though class members have been paid "in full" in accordance with the settlement agreement. Settlement agreements are compromises, and a court may properly approve one that does not provide the entire relief sought by the class members through the action. Unless it is clear that class members have no plausible legal right to receive additional money, they should receive additional distributions.

[As an alternative, or additionally, a court may designate residual funds to pay class members who submitted claims late or otherwise out of compliance with the claim processing

[4] Is this concern warranted?

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requirements established under the settlement.[5]]

Paragraph (C). Paragraph (C) deals only with the rare case in which individual distributions to class members are not economically viable. The court should not assume that the cost of distribution to class members is prohibitive unless presented with evidence firmly supporting that conclusion. It should take account of the possibility that electronic means may make identifying class members and distributing proceeds to them inexpensive in some cases. When the court finds that individual distributions would be economically infeasible, it may approve an alternative use of the settlement funds if the substitute recipient's interests "reasonably approximate those being pursued by the class." In general, that determination should be made with reference to the nature of the claim being asserted in the case. Although such a distribution does not provide relief to class members that is as direct as distributions pursuant to Paragraph (A) or (B), it is intended to confer a benefit on the class.

Reporter's Comments and Questions

A basic question is whether inclusion of this provision in the rules is necessary and/or desirable. One could argue that it is not necessary on the ground that there is a growing jurisprudence, including several court of appeals decisions, dealing with these matters. And several of those decisions invoke the proposal in the ALI Aggregate Litigation Principles that provided a starting point for this rule sketch. On the other hand, the rule sketch has evolved beyond that starting point, and would likely be refined further if the rule-amendment process proceeds. Moreover, a national rule is a more authoritative directive than an ALI proposal adopted or invoked by some courts of appeals.

A different sort of argument would be that this kind of provision should not be in the rules because that would somehow be an inappropriate use of the rulemaking power. That argument might be coupled with an argument in favor of retaining the limitation "if authorized by law." It could be supported by the proposition that the only reason such an agreement can dispose of the rights of unnamed class members is that the court enters a judgment that forecloses their individual claims. And the only reason the class representative and/or class counsel can negotiate such a provision is that they have been deputized to

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[5] This follows up on bracketed language in the sketch. Would this be a desirable alternative to further distributions to class members who submitted timely and properly filled out claims?

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act on behalf of the class by the court.

One might counter this argument by observing that class-action settlements often include provisions that likely are not of a type that a court could adopt after full litigation. Yet those arrangements are often practical and supported by defendants as well as the class representatives. From this point of view, a rule that forbade them might seem impractical.

And it might also seem odd to regard certain provisions of a settlement agreement as qualitatively different from others. Assuming a class action for money damages, for example, one could contend that a primary interest of the class is in maximizing the monetary relief, via judgment or settlement. Yet nobody would question the propriety of a compromise by the class representative on the amount of monetary relief, if approved by the court under Rule 23(e). So it could be said to be odd that this sort of "plenary" power to compromise on monetary relief and surrender a claim that might result in a judgment for a higher amount is qualitatively different from authority to make arrangements for disposition of an unclaimed residue. Put differently, if the class representative and class counsel can compromise in a way that surrenders the potential for a much larger recovery, is there a reason why they can't also agree to a *cy pres* provision that creates the possibility that some of the money would be paid to an organization that would further the goals sought by the class action?

Another argument that might be made is that alternative uses for a residue of funds should be encouraged to achieve deterrence or otherwise effectuate the substantive law. Under some circumstances, a remedy of disgorgement may be authorized by pertinent law. And the law of at least some states directly addresses the appropriate use of the residue from class actions. See Cal. Code Civ. Pro. § 384. Whether a Civil Rule should be fashioned to further such goals might be questioned, however.

The sketch is not designed to confront these issues directly. Instead, it is inspired in part by the reality that cy pres provisions exist and have been included in class-action settlements with some frequency. One could say that the rules appropriately should address practices that are widespread, but perhaps treatment in the Manual for Complex Litigation is sufficient.

A related topic is suggested by a bracketed paragraph in the Committee Note draft -- whether courts should have a bias against reversionary clauses in lump fund class-action settlements. The sketches of amendments to Rule 23(e)(1) and 23(e)(2) both direct the court's attention to the details of the claims processing method called for by the settlement. Fashioning an effective and fair claims processing method is a challenge, and can involve

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considerable expense. To the extent that a defendant hoping to recoup a significant portion of the initial settlement payment as unclaimed funds might be tempted to insist on unduly exacting requirements for claims, something in the rules that encouraged courts to resist reversionary provisions in settlements might be appropriate.

A related concern might arise in relation to attorney fee awards to class counsel. Particularly when those awards are keyed to the "value" of the settlement, treating a lump sum payment by the defendant as the value for purposes of the attorney fee award might seem inappropriate. Particularly if there were a reversionary provision and the bulk of the funds were never paid to the class, it could be argued that the true value of the settlement to the class was the amount paid, not the amount deposited temporarily in the fund by the defendant. But see Boeing Co. v. Van Gemert, 444 U.S. 472 (1980) (holding that the existence of the common fund conferred a benefit on all class members -- even those who did not submit claims -- sufficient to justify charging the entire fund with the attorney fee award for class counsel).

125-011745

(4) Objectors

The problem of problem objectors has attracted much attention. Various possible responses have been suggested, and they are introduced below. They have reached different levels of development, and likely would not be fully effective without adoption of some parallel provisions in the Appellate Rules. The Appellate Rules Committee has received proposals for rule amendments that might dovetail with changes to the Civil Rules.

Below are two approaches to the problems sometimes presented by problem objectors. The first relies on rather extensive required disclosure, coupled with expanded court approval requirements designed to reach appeals of denied objections as well as withdrawal of objections before the district court, covered by the present rule. The second is more limited -- seeking only to forbid any payments to objectors or their attorneys for withdrawing objections or appeals, and to designate the district court as the proper court to approve or disapprove such payments.

Objector disclosure

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

* * * * *

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e).~~;~~ ~~the objection may be withdrawn only with the court's approval.~~ The objection must be signed under Rule 26(g)(1) and disclose this information:

(A) the facts that bring the objector within the class defined for purposes of the proposal or within an alternative class definition proposed by the objector;

(B) the objector's relationship to any attorney representing the objector;

(C) any agreement describing compensation that may be paid to the objector;

(D) whether the objection seeks to revise or defeat the proposal on behalf of:

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29 (i) the objector alone,
30 (ii) fewer than all class members, or
31 (iii) all class members;
32
33 **(E)** the grounds of the objection, including objections
34 to:
35 (i) certification of any class,
36 (ii) the class definition,
37 (iii) the aggregate relief provided,
38 (iv) allocation of the relief among class
39 members,
40 (v) the procedure for distributing relief[,
41 including the procedure for filing claims],
42 and
43 (vi) any provisions for attorney fees;
44
45 [**(6)** The objector must move for a hearing on the objection.]
46
47 [**(6.1)** An objector [who is not a member of the class
48 included in the judgment] can appeal [denial of the
49 objection] {approval of the settlement} only if the
50 court grants permission to intervene for that purpose.]
51
52 **(7)** Withdrawal of objection or appeal
53
54 **(A)** An objection filed under Rule 23(e) or an appeal
55 from an order denying an objection may be
56 withdrawn only with the court's approval.
57
58 **(B)** A motion seeking approval must include a statement
59 identifying any agreement made in connection with
60 the withdrawal.
61
62 *Alternative 1*
63
64 **(C)** The court must approve any compensation [to be
65 paid] to the objector or the objector's counsel in
66 connection with the withdrawal.
67
68 *Alternative 2*
69
70 **(C)** Unless approved by the district court, no payment
71 may be made to any objector or objector's counsel
72 in exchange for withdrawal of an objection or
73 appeal from denial of an objection. Any request
74 by an objector or objector's counsel for payment
75 based on the benefit of the objection to the class
76 must be made to the district court, which retains
77 jurisdiction during the pendency of any appeal to
78 rule on any such request.
79

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80 **(D)** If the motion to withdraw [the objection] was
81 referred to the court under Rule *XY* of the Federal
82 Rules of Appellate Procedure, the court must
83 inform the court of appeals of its action on the motion.

[As should be apparent, this would be a rather extensive rule revision, and would likely depend upon some change in the Appellate Rules as well. That possible change is indicated by the reference to an imaginary Appellate Rule *XY*[6] in the sketch above. As illustrated in a footnote, such an Appellate Rule could direct that an appeal by an objector from a court's approval of a settlement over an objection may be dismissed only on order of the court, and directing that the court of appeals would refer the decision whether to approve that withdrawal to the district court.]

Sketch of Committee Note Ideas

[The above sketches are at such a preliminary stage that it would be premature to pretend to have a draft Committee Note, or even a sketch of one. But some ideas can be expressed about what points such a Note might make.]

Objecting class members play an important role in the Rule 23(e) process. They can be a source of important information about possible deficiencies in a proposed settlement, and thus provide assistance to the court. With access to the information regarding the proposed settlement that Rule 23(e)(1) requires be submitted to the court, objectors can make an accurate appraisal

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[6] The Advisory Committee on Civil Rules does not propose changes to the Appellate Rules. But for purposes of discussion of the sketches of possible Civil Rule provisions in text, it might be useful to offer a sketch of a possible Appellate Rule 42(c):

(c) Dismissal of Class-Action Objection Appeal. A motion to dismiss an appeal from an order denying an objection under Rule 23(e)(5) of the Federal Rules of Civil Procedure to approval of a class-action settlement must be referred to the district court for its determination whether to permit withdrawal of the objection and appeal under Civil Rule 23(e)(7). The district court must report its determination to the court of appeals.

As noted above, any such addition to the Appellate Rules would have to emanate from the Advisory Committee on Appellate Rules, and this sketch is provided only to facilitate discussion of the Civil Rule sketches presented in this memorandum.

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of the merits and possible failings of a proposed settlement.

But with this opportunity to participate in the settlement review process should also come some responsibilities. And the Committee has received reports that in a significant number of instances objectors or their counsel appear to have acted in an irresponsible manner. The 2003 amendments to Rule 23 required that withdrawal of an objection before the district court occur only with that court's approval, an initial step to assure judicial supervision of the objection process. Whatever the success of that measure in ensuring the district court's ability to supervise the behavior of objectors during the Rule 23(e) review process, it seems not to have had a significant effect on the handling of objector appeals. At the same time, the disruptive potential of an objection at the district court seems much less significant than the disruption due to delay of an objector appeal. That is certainly not to say that most objector appeals are intended for inappropriate purposes, but only that some may have been pursued inappropriately, leading class counsel to conclude that a substantial payment to the objector or the objector's counsel is warranted -- without particular regard to the merits of the objection -- in order to finalize the settlement and deliver the settlement funds to the class.

The goal of this amendment is to employ the combined effects of sunlight and required judicial approval to minimize the risk of possible abuse of the objection process, and to assist the court in understanding objections more fully. It is premised in part on the disclosures of amended Rule 23(e)(1), which are designed in part to provide class members with extensive information about the proposed settlement. That extensive information, in turn, makes it appropriate to ask objectors to provide relatively extensive information about the basis for their objections.

Thus, paragraphs (A), (B), and (C) of Rule 23(e)(5) seek "who, what, when, and where" sorts of information about the role of this objector. Paragraph (B) focuses particularly on the relationship with an attorney because there have been reports of allegedly strategic efforts by some counsel to mask their involvement in the objection process, at least at the district court.

Paragraph (D) and (E), then, seek to elicit a variety of specifics about the objection itself. The Subcommittee has been informed that on occasion objections are quite delphic, and that settlement proponents find it difficult to address these objections because they are so uninformative. Calling for specifics is intended to remedy that sort of problem, and thus to provide the court and with details that will assist it in evaluating the objection.

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Paragraph 6 suggests, in brackets, that one might require an objector to move for a hearing on the objection. It may be that the ordinary Rule 23(e) settlement-approval process suffices because Rule 23(e)(2) directs the court not to approve the proposed settlement until after a hearing. Having multiple hearings is likely not useful.

Paragraph 6.1, tentative not only due to brackets but also due to numbering, suggests a more aggressive rein on objectors. It relies on required intervention as a prerequisite for appealing denial of an objection. Anything along those lines would require careful consideration of the Supreme Court's decision in Devlin v. Scardeletti, 534 U.S. 1 (2002), in which the Court held that an objector in a Rule 23(b)(1) "mandatory" class action who had been denied leave to intervene to pursue his objection to the proposed settlement nevertheless could appeal. The Court was careful to say that the objector would "only be allowed to appeal that aspect of the District Court's order that affects him -- the District Court's decision to disregard his objections." Id. at 9. And the Court emphasized the mandatory nature of that class action (id. at 10-11):

> Particularly in light of the fact that petitioner had no ability to opt out of the settlement, appealing the approval of the settlement is petitioner's only means of protecting himself from being bound by a disposition of his rights he finds unacceptable and that a reviewing court might find legally inadequate.

The Court also rejected an argument advanced by the United States (as amicus curiae) that class members who seek to appeal rejection of their objections must intervene in order to appeal. The Government "asserts that such a limited purpose intervention generally should be available to all those, like petitioner, whose objections at the fairness hearing have been disregarded," id. at 12, and the Court noted that "[a]ccording to the Government, nonnamed class members who state objections at the fairness hearing should easily meet" the Rule 24(a) criteria for intervention of right. Id. The Court reacted (id.):

> Given the ease with which nonnamed class members who have objected at the fairness hearing could intervene for purposes of appeal, however, it is difficult to see the value of the government's suggested requirement.

But it is not clear that the Court's ruling would prevent a rule requiring intervention. Thus, the Court rejected the Government's argument that "the structure of the rules of class action procedure requires intervention for the purposes of appeal." Id. at 14. It added that "no federal statute or procedural rule directly addresses the question of who may appeal from approval of class action settlements, while the right to

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appeal from an action that finally disposes of one's rights has a statutory basis. 28 U.S.C. § 1291." Id.

And it may be that reports about allegedly abusive recent experience with objectors would provide a basis for adopting such a rule. Thus, in *Devlin* the Court noted that the Government did not cite the concern with abusive appeals that has been highlighted by commentators (id. at 13):

> It [the Government] identifies only a limited number of instances where the initial intervention motion would be of any use: where the objector is not actually a member of the settlement class or is otherwise not entitled to relief from the settlement, where an objector seeks to appeal even though his objection was successful, where the objection at the fairness hearing was untimely, or where there is a need to consolidate duplicative appeals from class members.

Court approval requirement

As an alternative to the objector disclosure sketch, the following sketch relies entirely on judicial approval of any payment to an objecting class member of the objector's lawyer. It is possible that this simpler approach would be effective in dealing with inappropriate behavior by objectors. But it should be borne in mind that court approval is also an integral feature of the objector disclosure approach.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

* * * * *

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval. <u>Unless approved by the district court, no payment may be made to any objector or objector's counsel in exchange for withdrawal of an objection or appeal from denial of an objection. Any request by an objector or objector's counsel for payment based on the benefit of the objection to the class must be made to the district court, which retains jurisdiction during the pendency of any appeal to rule on any such request.</u>

Sketch of Committee Note Ideas

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Many of the general comments included in the sketch of Committee Note ideas for the objector disclosure draft could introduce the general problem in relation to this approach, but it would emphasize the role of judicial approval rather than the utility of disclosure. The reason for taking this approach would be that the prospect of a financial benefit is the principal apparent stimulus for the kind of objections that the amendment is trying to prevent or deter.

A starting point in evaluating this approach could be the 2003 amendment to add Rule 23(h), which recognized that "[a]ctive judicial involvement in measuring fee awards is singularly important to the proper operation of the class-action process." That involvement is no less important when the question is payment to an objector's counsel rather than to class counsel. Although payment may be justified due to the contribution made by the objector to the full review of proposed settlement, that decision should be for the court to make, not for the parties to negotiate entirely between themselves.

The sketch focuses on payments to objectors or their attorneys because that has been the stimulus to this concern; instances of nonmonetary accommodations leading to withdrawal of objections have not emerged as similarly problematical.

The rule focuses on "the benefit of the objection to the class." Particularly with payments to the objector's attorney, that focus may be paramount. If the objection raises an issue unique to the objector, rather than one of general application to the class, that may support a payment to the objector. As the Committee Note to the 2003 amendment to Rule 23(e) explained, approval for a payment to the objector "may be given or denied with little need for further inquiry if the objection and the disposition go only to a protest that the individual treatment afforded the objector under the proposed settlement is unfair because of factors that distinguish the objector from other class members." But compensation of the objector's attorney would then ordinarily depend on the contractual arrangements between the objector and its attorney.

Ordinarily, if an objector's counsel seeks compensation, that compensation should be justified on the basis of the benefits conferred on the class by the objection. Ordinarily, that would depend in the first instance on the objection being sustained. It is possible that even an objection of potentially general application that is not ultimately sustained nonetheless provides value to the Rule 23(e) review process sufficient to justify compensation for the attorney representing the objector, particularly if such compensation is supported by class counsel. But an objection that confers no benefit on the class ordinarily should not produce a payment to the objector's counsel.

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[Objections sometimes lack needed specifics, with the result that they do not facilitate the Rule 23(e) review process. It may even be that some objections raise points that are actually not pertinent to the proposed settlement before the court. Such objections would not confer a benefit on the class or justify payment to the objector's counsel.[7]]

Reporter's Comments and Questions

Both of these rule sketches are particularly preliminary, and should be approached with that in mind. Obviously, a basic question is whether the disclosure approach (coupled with court approval) or the court approval approach should be preferred. Requiring disclosures by objectors may be helpful to the court in evaluating objections as well as determining whether to approve payments to objectors or their lawyers. It may even be that the disclosure provisions would assist good-faith objectors in focusing their objections on the issues presented in the case.

One significant question in evaluating the court-approval approach is whether Rule 23(e)(5)'s current court-approval requirement has been effective. If it has not, does that bear on whether an expanded court-approval requirement, including a parallel provision in the Appellate Rules, would be effective? Perhaps Rule 23(e)(5) has not been fully effective because filing a notice of appeal after denial of an objection serves as something like an "escape valve" from the rule's requirement of judicial approval. If so, that may suggest that the existing rule is effective, or can become effective with this expansion.

A different question is whether the requirements of the disclosure approach would impose undue burdens on good-faith objectors. The Committee gave some consideration to various sanction ideas, but feedback has not favored that approach. One reason is that emphasizing sanctions has the potential to chill good-faith objections. The rule sketch says the disclosures must be signed under Rule 23(g)(1), which does have a sanctions provision. See Rule 26(g)(1)(C). Would that deter good-faith objectors? Except for some difficulty in supplying the information required, it would not seem that the disclosure requirements themselves would raise a risk of *in terrorem* deterrence of good-faith objectors.

Yet another question is whether such an elaborate disclosure regime could burden the court, the parties, and the objectors with disputes about whether "full disclosure" had occurred. Should there be explicit authority for a motion to require fuller

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[7] This point may be worth making if the objector disclosure provisions are not included. If they are included, these points seem unnecessary.

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disclosure? Rule 37(a)(3)(A) could be amended as follows:

> **(A)** *To Compel Disclosure.* If a party fails to make a disclosure required by Rule 26(a), or if a class member fails to make a disclosure required by Rule 23(e)(5), any other party may move to compel disclosure and for appropriate sanctions.

But it might be said to be odd to have a Rule 37(a) motion apply to a class member, and also unnerving to raise the possibility of Rule 37(b) sanctions if the order were not obeyed (although one sanction might be rejection of the objection). This approach would have the advantage of avoiding the procedural aspects of Rule 11, such as the "safe harbor" for withdrawn papers, given that Rule 23(e)(5) says that an objection may be withdrawn only with the court's approval.

Alternatively, should the rule simply say that the court may disregard any objection that is not accompanied by "full disclosure"? Should satisfying the "full disclosure" requirement be a prerequisite to appellate review of the objection? Some comments have stressed that delphic objections sometimes seem strategically designed to obscure rather than clarify the grounds that may be advanced on appeal, or as a short cut to filing a notice of appeal without actually having identified any real objections to the proposed settlement, and then inviting a payoff to drop the appeal. Disclosure could, in such circumstances, have a prophylactic effect. Should the court of appeals affirm rejections of objections on the ground that full disclosure was not given without considering the merits of the objections? Could that appellate disposition be achieved in an expedited manner, compared to an appeal on the merits of the objection?

Although not principally the province of the Civil Rules Committee, it is worthwhile to note some complications that might follow from an Appellate Rule calling on the district court to approve or disapprove withdrawals of appeals. The operating assumption may be that the district court could make quick work of those approvals, while the appellate court would have little familiarity with the case. That may often be true, but not in all cases. A 2013 FJC study of appeals by objectors found that the rate of appellate decision on the merits of the objector's appeal varied greatly by circuit. Thus, in the Seventh Circuit, none of the objector appeals had led to a resolution on the merits in the court of appeals during the period studied, while in the Second Circuit fully 63% had. Had the parties in the Second Circuit cases reached a settlement after oral argument, one might argue that the court of appeals would by then be better positioned to evaluate the proposed withdrawal of the appeal than the busy district judge, who may have approved the settlement two years earlier.

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Finally, it may be asked whether focusing on whether the objector "improved" the settlement might be useful. It seems that such a focus might invite cosmetic changes to a settlement that confer no significant benefit on the class. And it also may be that some objections that are not accepted may nonetheless impose significant costs on the objector that the court could consider worth compensating because the input was useful to the court in evaluating the settlement.

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(5) Class Definition & Ascertainability

Relatively recently, the issue of ascertainability has received a considerable amount of attention. There have been assertions that a circuit conflict is developing or has developed on this topic. The concept that a workable class definition is needed has long been recognized; "all those similarly situated" is unlikely to suffice often. In 2003, Rule 23(c) was amended to make explicit the need to define the class in a meaningful manner. The amendment sketch below builds on that 2003 amendment.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses

(1) Certification Order:

* * *

(B) *Defining the Class*~~*; Appointing Class Counsel*~~. An order that certifies a class action must define the class ~~and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g)~~ so that members of the class can be identified [when necessary] in [an administratively feasible] {a manageable} manner.

(C) *Defining the Class Claims, Issues, or Defenses*. An order that certifies a class action must define the class claims, issues, or defenses.

(D) *Appointing Class Counsel*. An order that certifies a class action must appoint class counsel under Rule 23(g).

(E~~C~~) *Altering or Amending the Order*. * * *

Initial Sketch of Draft Committee Note

A class definition can be important for various reasons. Rule 23(a)(1) requires that the members of a class be too numerous to be joined, so some clear notion who is included is necessary.. Rule 23(c)(2) requires notice to the Rule 23(b)(3) class after certification. Rule 23(c)(3) directs that the judgment in the class action is binding on all class members. Rule 23(e)(1) says that the court must direct notice of a proposed settlement to the class if it would bind them. Rule 23(e)(5) directs objectors to provide disclosures showing that they are in fact class members. And Rule 23(h)(1) requires that

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notice of class counsel's application for an award of attorney's fees be directed to class members. So a workable class definition can be important under many features of Rule 23.

But the class definition requirements of the rule are realistic and pragmatic. Thus, the rule also recognizes that identifying all class members may not be possible. For example, Rule 23(c)(2)(B) says that in Rule 23(b)(3) class actions the court must send individual notice to "all members who can be identified through reasonable effort." And in class actions under Rule 23(b)(2) -- such as actions to challenge alleged discrimination in educational institutions -- there may be instances in which it is not possible at the time the class is certified to identify all class members who might in the future claim protection under the court's injunctive decree.

Under these circumstances, Rule 23(c)(1)(B) calls for a pragmatic approach to class definition at the certification stage. As a matter of pleading, a class-action complaint need not satisfy this requirement. The requirement at the certification stage is that the court satisfy itself that members of the class can be identified in a manner that is sufficient for the purposes specified in Rule 23. It need not, at that point, achieve certainty about such identification, which may not be needed for a considerable time, if at all.

[The rule says that the court's focus should be on whether identification can be accomplished "when necessary." This qualification recognizes that the court need not always provide individual notice at the certification stage, even in Rule 23(b)(3) class actions, to all class members. Instead, that task often need be confronted only later. If the case is litigated to judgment, it may then become necessary to identify class members with some specificity whether or not the class prevails. If the case is settled, the settlement itself may include measures designed to identify class members.]

Ultimately, the class definition is significantly a matter of case management. [It is not itself a method for screening the merits of claims that might be asserted by class members.[8]] As with other case-management issues, it calls for judicial resourcefulness and creativity. Although the proponents of class certification bear primary responsibility for the class definition, the court may look to both sides for direction in fashioning a workable definition at the certification stage, and in resolving class-definition issues at later points in the action. In balancing these concerns, the court must recognize that the class opponent has a valid interest in ensuring that a claims process limits relief to those legally entitled to it,

[8] Is this a pertinent or helpful observation?

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while also recognizing that claims processing must be realistic in terms of the information likely to be available to class members with valid claims. And the court need not make certain at the time of certification that a perfect solution will later be found to these problems.

Reporter's Comments and Questions

Would a rule provision along the lines above be useful? One might regard the sketch above as a "minimalist" rule provision on this subject, in light of the considerable recent discussion of it. It avoids the use of both "ascertainable" and "objective," words sometimes used in some recent discussions of this general subject.

Some submissions to the Advisory Committee have urged that rule provisions directly address some questions that have been linked to these topics,[9] including:

> *Ensuring that all within the class definition have valid claims*: A class definition that is expressed in terms of having a valid claim can create "fail safe" class problems, because a defense victory would seem to mean that the class contains no members. A class definition that "objectively" ensures that all class members have valid claims may routinely present similar challenges.
>
> *Use of affidavits or other similar "proofs":* Another topic that has arisen is whether affidavits or similar proofs can suffice to prove membership in the class. This problem can be particularly acute when the class claim asserts that defendant made false or misleading statements in connection with inexpensive retail products. A requirement that class members present receipts proving purchase of the product may sometimes be asking too much.
>
> *"No injury" classes:* Somewhat similar to the two points above is the question whether the class includes many who have suffered no injury. Such issues may, for example, arise in data breach situations. In those cases, there may be a debate about whether the breach actually revealed confidential information from class members, and what use was made of that information. The Supreme Court has granted certiorari in a case that may present some such issues. See Bouaphakeo v. Tyson Foods, Inc., 765 F.3d 791 (6th Cir. 2014), cert. granted, 135 S.Ct. 2806 (2015).

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[9] In case these submissions might be of interest, an Appendix to this memorandum presents some of the suggestions that the Advisory Committee has received.

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The rule sketch above does not purport to address directly any of these issues. There are likely additional issues that have been discussed under the general heading "ascertainability" that this sketch does not directly address. Would that mean a rule change along these lines would not be useful?

If it appears that a rule change requires an effort to confront the sorts of issues just identified, could it be said that those issues can be handled in the same way across the wide variety of class actions in federal courts?

The courts' resolutions of these issues appear to be in a state of rapid evolution. For one recent analysis, see Mullins v. Direct Digital, ___ F.3d ___, 2015 WL 4546159 (7th Cir. No. 15-1776, July 28, 2015). Would it be best to rely on the evolving jurisprudence to address these issues rather than attempt a rule change that could become effective no sooner than Dec. 1, 2018? If the courts are genuinely split, is there a genuine prospect that the split will be resolved by judicial decisionmaking?

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(6) Settlement Class Certification

As noted again below, a key question is whether a settlement-certification addition to Rule 23(b) is needed to deal with difficulty in obtaining such certification under *Amchem*. A subsidiary issue is whether such additional certification authorization should be added only for actions brought under 23(b)(3).

1 **(b) Types of Class Actions.** A class action may be
2 maintained if Rule 23(a) is satisfied and if:
3
4 * * * * * *
5
6
7 (4) the parties to a settlement [in an action to be
8 certified under subdivision (b)(3)] request
9 certification and the court finds that the proposed
10 settlement is superior to other available methods for
11 fairly and efficiently adjudicating the controversy,
and that it should be approved under Rule 23(e).[10]

Sketch of Draft Committee Note

Subdivision (b)(4) is new. In 1996, a proposed new

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[10] The Subcommittee has also discussed an alternative formulation that would invoke criteria proposed in the ALI Aggregate Litigation project:

> (4) the parties to a settlement [in an action to be certified under subdivision (b)(3),] request certification and the court finds that significant common issues exist, that the class is sufficiently numerous to warrant classwide treatment, and that the class definition is sufficient to ascertain who is and who is not included in the class. The court may then grant class certification if the proposed settlement is superior to other available methods for fairly and efficiently adjudicating the controversy, and that it should be approved under Rule 23(e).

This approach does not fit well with the current lead-in language to Rule 23(b), which says that class actions may be maintained "if Rule 23(a) is satisfied." But the reformulation appears either to offer substitute approaches to matters covered in Rule 23(a) ("significant common issues" and "sufficiently numerous") or to call for more exacting treatment of topics also covered in Rule 23(a).

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subdivision (b)(4) was published for public comment. That new subdivision would have authorized certification of a (b)(3) class for settlement in certain circumstances in which certification for full litigation would not be possible. One stimulus for that amendment proposal was the existence of a conflict among the courts of appeals about whether settlement certification could be used only in cases that could be certified for full litigation. That circuit conflict was resolved by the holding in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), that the fact of settlement is relevant to class certification. The (b)(4) amendment proposal was not pursued after that decision.

Rule 23(f), also in the package of amendment proposals published for comment in 1996, was adopted and went into effect in 1998. As a consequence of that addition to that rule, a considerable body of appellate precedent on class-certification principles has developed. In 2003, Rule 23(e) was amended to clarify and fortify the standards for review of class settlements, and subdivisions (g) and (h) were added to the rule to govern the appointment of class counsel, including interim class counsel, and attorney fees for class counsel. These developments have provided added focus for the court's handling of the settlement-approval process under Rule 23(e). Rule 23(e) is being further amended to sharpen that focus.

Concerns have emerged about whether it might sometimes be too difficult to obtain certification solely for purposes of settlement. Some report that alternatives such as multidistrict processing or proceeding in state courts have grown in popularity to achieve resolution of multiple claims.

This amendment is designed to respond to those concerns by clarifying and, in some instances, easing the path to certification for purposes of settlement. Like the 1996 proposal, this subdivision is available only after the parties have reached a proposed settlement and presented it to the court. Before that time, the court may, under Rule 23(g)(3), appoint interim counsel to represent the interests of the putative class.

[Subdivision (b)(4) addresses only class actions maintained under Rule 23(b)(3). The (b)(3) predominance requirement may be an unnecessary obstacle to certification for settlement purposes, but that requirement does not apply to certification under other provisions of Rule 23(b). Rule 23(b)(4) has no bearing on whether certification for settlement is proper in class actions not brought under Rule 23(b)(3).]

Like all class actions, an action certified under subdivision (b)(4) must satisfy the requirements of Rule 23(a). Unless these basic requirements can be satisfied, a class settlement should not be authorized.

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Increasing confidence in the ability of courts to evaluate proposed settlements, and the tools available to them for doing so, provides important support for the addition of subdivision (b)(4). For that reason, the subdivision makes the court's conclusion under Rule 23(e)(2) an essential component to settlement class certification. Under amended Rule 23(e), the court can approve a settlement only after considering specified matters in the full Rule 23(e) settlement-review process, and amended Rules 23(e)(1) and (e)(5) provide the court and the parties with more information about proposed settlements and objections to them. Given the added confidence in settlement review afforded by strengthening Rule 23(e), the Committee is comfortable with reduced emphasis on some provisions of Rule 23(a) and (b).

Subdivision (b)(4) also borrows a factor from subdivision (b)(3) as a prerequisite for settlement certification -- that the court must also find that resolution through a class-action settlement is superior to other available methods for fairly and efficiently adjudicating the controversy. Unless that finding can be made, there seems no reason for the court or the parties to undertake the responsibilities involved in a class action.

Subdivision (b)(4) does not require, however, that common questions predominate in the action. To a significant extent, the predominance requirement, like manageability, focuses on difficulties that would hamper the court's ability to hold a fair trial of the action. But certification under subdivision (b)(4) assumes that there will be no trial. Subdivision (b)(4) is available only in cases that satisfy the common-question requirements of Rule 23(a)(2), which ensure commonality needed for classwide fairness. Since the Supreme Court's decision in *Amchem*, the courts have struggled to determine how predominance should be approached as a factor in the settlement context. This amendment recognizes that it does not have a productive role to play and removes it.

Settlement certification also requires that the court conclude that the class representatives are typical and adequate under Rule 23(a)(3) and (4). Under amended Rule 23(e)(2), the court must also consider whether the settlement proposal was negotiated at arms length by persons who adequately represented the class interests, and that it provides fair and adequate relief to class members, treating them equitably.

In sum, together with changes to Rule 23(e), subdivision (b)(4) ensures that the court will give appropriate attention to adequacy of representation and the fair treatment of class members relative to each other and the potential value of their claims. At the same time, it avoids the risk that a desirable settlement will prove impossible due to factors that matter only to a hypothetical trial scenario that the settlement is designed

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to avoid.

Should the court conclude that certification under subdivision (b)(4) is not warranted -- because the proposed settlement cannot be approved under subdivision (e) or because the requirements of Rule 23(a) or superiority are not met -- the court should not rely on any party's statements in connection with proposed (b)(4) certification in relation to later class certification or merits litigation. See Rule 23(e)(1)(D).

Reporter's Comments and Questions

A key question is whether a provision of this nature is useful and/or necessary. The 1996 proposal was prompted in part by Third Circuit decisions saying that certification could never be allowed unless litigation certification standards were satisfied. But *Amchem* rejected that view, and recognized that the settlement class action had become a "stock device." At the same time, it said that predominance of common questions is required for settlement certification in (b)(3) cases. Lower courts have sometimes seemed to struggle with this requirement. Some might say that the lower courts have sought to circumvent the *Amchem* Court's requirement that they employ predominance in the settlement certification context. A prime illustration could be situations in which divergent state laws would preclude litigation certification of a multistate class, but those divergences could be resolved by the proposed settlement.

If predominance is an obstacle to court approval of settlement certification, should it be removed? One aspect of the sketch above is that it places great weight on the court's settlement review. The sketch of revisions to Rule 23(e)(2) is designed to focus and improve that process. Do they suffice to support reliance on that process in place of reliance on the predominance prong of 23(b)(3)?

If predominance is not useful in the settlement context, is superiority useful? One might say that a court that concludes a settlement satisfies Rule 23(e)(2) is likely to say also that it is superior to continued litigation of either a putative class action or individual actions. But eliminating both predominance and superiority may make it odd to say that (b)(4) is about class actions "certified under subdivision (b)(3)." It seems, instead, entirely a substitute, and one in which (contrary to comments in *Amchem*), Rule 23(e) becomes a supervening criterion for class certification. That, in turn, might invite the sort of "grand-scale compensation scheme" that the *Amchem* Court regarded as "a matter fit for legislative consideration," but not appropriate under Rule 23.

Another set of considerations focuses on whether making this change would actually have undesirable effects. Could it be said

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that the predominance requirement is a counterweight to "hydraulic pressures" on the judge to approve settlements in class actions? If judges are presently dealing in a satisfactory way with the *Amchem* requirements for settlement approval, will making a change like this one prompt the filing of federal-court class actions that should not be settled because of the diversity of interests involved or for other reasons? And could this sort of development also prompt more collateral attacks later on the binding effect of settlement class-action judgments?

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(7) Issue Class Certification

This topic presents two different sorts of questions or concerns. One is whether experience shows that a change in Rule 23(b) or (c) is needed to ensure that issue class certification is available in appropriate circumstances. Various placements are possible for this purpose. An overarching issue, however, is whether any of these possible rule changes is really needed; if the courts are finding sufficient flexibility in the rule as presently written to make effective use of issues classes, it may be that a rule change is not indicated.

The second question looks to proceedings after resolution of the issue on which certification was based. Particularly if the class is successful on that issue, the resolution of that issue often would not lead to entry of an appealable judgment. But to complete adjudication of class members' claims might require considerable additional activity which might be wasted if there were later a reversal on appeal of the common issue. So a revision of Rule 23(f) might afford a discretionary opportunity for immediate appellate review of the resolution of that issue.

A. Revising Rule 23(b) or (c)

Rule 23(b) approaches

Alternative 1

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

* * * * *

1 **(3)** the court finds that the questions of law or fact
2 common to class members predominate over any
3 questions affecting only individual members,
4 except when certifying under Rule 23(c)(4), and
5 finds that a class action is superior to other
6 available methods for fairly and efficiently
7 adjudicating the controversy. The matters
pertinent to these findings include: * * * *

Alternative 2

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

* * * * *

1 **(4)** the court finds that the resolution of particular
2 issues will materially advance the litigation,

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3 making certification with respect to those issues
4 appropriate. [In determining whether
5 certification limited to particular issues is
6 appropriate, the court may refer to the matters
identified in Rule 23(b)(3)(A) through (D).]

Rule 23(c)(4) approach

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

* * * * *

1 **(4)** ***Particular issues.*** ~~When appropriate, a~~An action
2 may be brought or maintained as a class action
3 with respect to particular issues if the court
4 finds that the resolution of such issues will
5 materially advance the litigation. [In
6 determining whether certification limited to
7 particular issues is appropriate, the court may
8 refer to the matters identified in Rule
23(b)(3)(A) through (D).]

Sketch of Committee Note Ideas

[Very general; would need to be adapted to actual rule change pursued]

Particularly in actions brought under Rule 23(b)(3), there are cases in which certification to achieve resolution of common issues would be appropriate even if certification with regard to all issues involved in the action would not. Since its amendment in 1966, Rule 23(c)(4) has recognized this possibility. This amendment confirms that such certification may be employed.

The question whether such certification is warranted in a given case may be addressed in light of the factors listed in Rule 23(b)(3)(A) through (D). A primary consideration will be whether the resolution of the common issue or issues will materially advance the resolution of the entire litigation, or the entire claims of class members. When certifying an issues class, the court should specify the issues on which certification was granted in its order under Rule 23(c)(1)(B) and, for Rule 23(b)(3) classes, include that specification in its notice to the class under Rule 23(c)(2)(B)(iii).

[Resolution of the issues for which certification was granted may result in an appealable judgment. But even if those issues are resolved in favor of the class opponent, that may not mean that all related claims of class members are also resolved. Should resolution of the common issues not result in entry of an

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appealable judgment, discretionary appellate review may be sought under Rule 23(f)(2).]

Reporter's Comments and Questions

These sketches are obviously at an early stage of development. At a point in time, it appeared that there was a circuit split on whether (c)(4) certification could be sought in an action brought under Rule 23(b)(3) even though predominance could not be satisfied as to the claims as a whole. It is uncertain whether that seeming split has continued, and whether amendments of this sort are needed and helpful in resolving it.

If a rule change is useful, which route seems most promising? Alternative 1 may be the simplest; it seeks only to overcome preoccupation with overall predominance. It could be coupled with a revision of Rule 23(c)(4) that recognizes that the "materially advances" idea is a guide in determining whether it is appropriate to certify as to particular issues. At present, Rule 23(c)(4) says only that such certification may be granted "when appropriate." Alternatively or additionally, one could refer to the factors in Rule 23(b)(3)(A) through (D). But would they be appropriate in relation to issue certification under Rule 23(b)(1) or (2)?

Is issue certification really a concern only as to Rule 23(b)(3) cases? It may be that, particularly after *Wal-Mart*, Rule 23(b)(2) cases are not suited to (c)(4) certification. Rule 23(b)(2) says that certification is proper only when the class opponent has "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." It may be that this definition makes issue certification unimportant. In (b)(1) classes, it may be that there is a common issue such as whether there is a "limited fund" that would warrant (c)(4) certification, but if that produced the conclusion that there is a limited fund certification under (b)(1)(B) seems warranted.

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B. Interlocutory Appellate Review

1 **(f) Appeals.**
2
3 (1) *From order granting or denying class-action*
4 *certification.* A court of appeals may permit an
5 appeal from an order granting or denying class-
6 action certification under this rule if a petition
7 for permission to appeal is filed with the circuit
8 clerk within 14 days after the order is entered.
9 An appeal does not stay proceedings in the
10 district court unless the district judge or the
11 court of appeals so orders
12
13 (2) *From order resolving issue in class certified*
14 *under Rule 23(c)(4).* A court of appeals may
15 permit an appeal from an order deciding an issue
16 with respect to which [certification was granted
17 under Rule 23(c)(4)] {a class action was allowed
18 to be maintained under Rule 23(c)(4)} [when the
19 district court expressly determines that there is
20 no just reason for delay], if a petition for
21 permission to appeal is filed with the circuit
22 clerk within 14 days after the order is entered.
23 An appeal does not stay proceedings in the
24 district court unless the district judge or the
court of appeals so orders.

Sketch of Draft Committee Note Ideas

In 1998, Rule 23(f) was added to afford an avenue for interlocutory review of class-certification orders because they are frequently of great importance to the conduct of the action. That provision is retained as Rule 23(f)(1).

Rule 23(f)(2) is added to permit immediate review of another decision that can be extremely important to the further conduct of an action. Rule 23(c)(4) authorizes class certification limited to particular issues when resolution of those issues would materially advance the ultimate resolution of the litigation. In some cases, the resolution of the common issues may lead to entry of an appealable final judgment. But often it will not, and even though that resolution should materially advance the ultimate resolution of the litigation a great deal more may need to be done to accomplish that ultimate resolution.

Before the court and the parties expend the time and effort necessary to complete resolution of the class action, it may be prudent for the court of appeals to review the district court's resolution of the common issue. Rule 23(f)(2) authorizes such review, which is at the discretion of the court of appeals, as is an appeal of a certification order under Rule 23(f)(1). Such an

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appeal is allowed only from an order deciding an issue for which certification was granted. That would not include some orders relating to that issue, such as denial of a motion for summary judgment with regard to the issue.

[But to guard against premature appeals, an application to the Court of Appeals for review under Rule 23(f)(2) must be supported by a determination from the district court that there is no just reason for delay. For example, if the court has resolved one of several issues on which certification was granted, it may conclude that immediate appellate review would not be appropriate.]

Reporter's Comments and Questions

A basic question is whether adding Rule 23(f)(2) would produce positive or negative effects. Related to that is the question "What happens now when an issue is resolved in an issues class action?"

One answer to that second question is that if the defendant wins on the common issue judgment is entered in the defendant's favor and the class action ends. That may not mean that class members may not pursue individual claims, but they would likely be bound by the resolution of the common issue and limited to claims not dependent on it. Cf. Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867 (1984) (after court ruled that there was no general pattern or practice of discrimination in defendant's operation, class members could still pursue claims of individual intentional discrimination but could not rely on pattern or practice proof). But it would ordinarily mean that immediate review is available under 28 U.S.C. § 1291 with regard to the class action.

Another answer is that common issue certification often involves multiple issues, so that even if some are definitively resolved in the district court others may remain to be resolved. Under those circumstances, it may be that the district court would conclude that there is just reason for delay. Is it important to condition immediate review on the district court's determination that there is no just reason for delay? That seems to afford the appellate court useful information about whether to allow an immediate appeal, but may also give the district court undue authority to prevent immediate review.

Yet another answer is that if the class opponent loses on the common issue, that might invariably lead to a settlement essentially premised on that resolution of that issue. It could be that the settlement sometimes preserves the class opponent's right to seek appellate review, but may often be that it does not. Is that an argument for adopting Rule 23(f)(2)? One view might be that it would become a "free bite" for the class

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opponent.

Could appellate courts develop standards for decisions whether to grant review under Rule 23(f)(2)? Under current Rule 23(f), they have developed standards for review. But it may be that a similar set of general standards would not be easy to fashion. Would input from the district court be useful in making decisions on whether to permit immediate appeals? If so, is the bracketed provision calling for a district court determination that there is no just reason for delay in the appeal a useful method of providing that assistance to the court of appeals? Would it actually be more of a burden to the district court than boon to the court of appeals?

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(8) Notice

This topic has received limited attention in discussion to date. Therefore this memorandum presents the discussion that appeared in the agenda memo for the April 9 Advisory Committee meeting and adds some comments and questions.

April 2015 Agenda Materials

In Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), the Court observed (id. at 173-74, emphasis in original):

> Rule 23(c)(2) provides that, in any class action maintained under subdivision (b)(3), each class member shall be advised that he has the right to exclude himself from the action on request or to enter an appearance through counsel, and further that the judgment, whether favorable or not, will bind all class members not requesting exclusion. To this end, the court is required to direct to class members "the best notice practicable under the circumstances *including individual notice to all members who can be identified through reasonable effort*." We think the import of this language is unmistakable. Individual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort.
>
> The Advisory Committee's Note to Rule 23 reinforces this conclusion. The Advisory Committee described subdivision (e)(2) as "not merely discretionary" and added that the "mandatory notice pursuant to subdivision (c)(2) . . . is designed to fulfill requirements of due process to which the class procedure is of course subject." [The Court discussed Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), and Schroeder v. City of New York, 371 U.S. 208 (1962), emphasizing due process roots of this notice requirement and stating that "notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable."]
>
> Viewed in this context, the express language and intent of Rule 23(c)(2) leave no doubt that individual notice must be provided to those class members who are identifiable through reasonable effort.

Research would likely shed light on the extent to which more recent cases regard means other than U.S. mail as sufficient to give "individual notice." The reality of 21st century life is that other means often suffice. The question is whether or how to alter Rule 23(c)(2) to make it operate more sensibly. Here are alternatives:

1 **(2) Notice**

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2 * * * * *
3
4 **(B)** *For (b)(3) Classes.* For any class certified under Rule
5 23(b)(3), the court must direct to class members the
6 best notice that is practicable under the
7 circumstances, including individual notice by
8 electronic or other means to all members who can be
identified through reasonable effort. * * * * *

It is an understatement to say that much has changed since Eisen was decided. Perhaps it is even correct to say that a communications revolution has occurred. Certainly most Americans are accustomed today to communicating in ways that were not possible (or even imagined) in 1974. Requiring mailed notice of class certification seems an anachronism, and some reports indicate that judges are not really insisting on it.

Indeed, the current ease of communicating with class members has already arisen with regard to the cy pres discussion, topic (3) above. It appears that enterprises that specialize in class action administration have gained much expertise in communicating with class members. Particularly in an era of "big data," lists of potential class members may be relatively easy to generate and use for inexpensive electronic communications.

For the present, the main question is whether there is reason not to focus on some relaxation of the current rule that would support a Committee Note saying that first class mail is no longer required by the rule. Such a Note could presumably offer some observations about the variety of alternative methods of communicating with class members, and the likelihood that those methods will continue to evolve. The likely suggestion will be that courts should not (as *Eisen* seemed to do) embrace one method as required over the long term.

Notice in Rule 23(b)(1) or (b)(2) actions

Another question that could be raised is whether these developments in electronic communications also support reconsideration of something that was considered but not done in 2001-02.

The package of proposed amendments published for comment in 2001 included a provision for reasonable notice (not individual notice, and surely not mandatory mailed notice) in (b)(1) and (b)(2) class actions. Presently, the rule contains no requirement of any notice at all in those cases, although Rule 23(c)(2)(A) notes that the court "may direct appropriate notice to the class." In addition, Rule 23(d)(1)(B) invites the court to give "appropriate notice to some or all class members" whenever that seems wise. And if a settlement is proposed, the

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notice requirement of Rule 23(e)(1) applies and "notice in a reasonable manner" is required. But if a (b)(1) or (b)(2) case is fully litigated rather than settled, the rule does not require any notice at any time.

It is thus theoretically possible that class members in a (b)(1) or (b)(2) class action might find out only after the fact that their claims are foreclosed by a judgment in a class action that they knew nothing about.

In 2001-02, there was much forceful opposition to the proposed additional rule requirement of some reasonable effort at notice of class certification on the ground that it was already difficult enough to persuade lawyers to take such cases, and that this added cost would make an already difficult job of getting lawyers to take cases even more difficult, and perhaps impossible. The idea was shelved.

Is it time to take the idea off the shelf again? One question is whether the hypothetical problem of lack of notice is not real. It is said that (b)(2) classes exhibit more "cohesiveness," so that they may learn of a class action by informal means, making a rule change unnecessary. It may also be that there is almost always a settlement in such cases, so that the Rule 23(e) notice requirement does the needed job. (Of course, that may occur at a point when notice is less valuable than it would have been earlier in the case.) And it may be that the cost problems that were raised 15 years ago have not abated, or have not abated enough, for the vulnerable populations that are sometimes the classes in (b)(2) actions.

The Subcommittee has not devoted substantial attention to these issues. For present purposes, this invitation is only to discuss the possibility of returning to the issues not pursued in 2002. If one wanted to think about how a rule change might be made, one could consider replacing the word "may" in Rule 23(c)(2)(A) with "must." A Committee Note might explore the delicate issues that courts should have in mind in order to avoid unduly burdening the public interest lawyers often called upon to bring these cases, and the public interest organizations that often provide support to counsel, particularly when the actions may not provide substantial attorney fee or cost awards.

Reporter's Comments and Questions

Recurrent references in cases mainly addressing other issues to use of electronic means for giving notice and giving class members access to information about a class action or proposed settlement suggest that creative work is occurring without the need for any rule change. The sketch of additions to Rule 23(e)(1) in Part (1) above directs that the resulting information be made available to class members, and the likely method for

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doing so would be some sort of electronic posting. In at least some cases, electronic submission of claims is done.

No doubt participants in the Sept. 11 mini-conference are more familiar with these developments than those who only read the case reports. But these developments raise the question whether there is really any need for a rule change.

If changes are warranted for Rule 23(b)(3) actions, the question remains whether the time has come for revisiting the question of required notice of some sort in (b)(1) and (b)(2) actions.

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(9) Pick-Off and Rule 68

This topic has received limited attention since the April 9 Advisory Committee meeting. Accordingly, the material below is drawn from the agenda materials for that meeting.

One development is that the Supreme Court has granted cert. in a case that may address related issues. Gomez v. Campbell-Ewald Co., 768 F.3d 871 (9th Cir. 2014), cert. granted, 135 S.Ct. 2311 (2015). Another is the Seventh Circuit decision in Chapman v. First Index, Inc., ___ F.3d ___, 2015 WL 4652878 (7th Cir. No. 14-2772, Aug. 6, 2015). See also Hooks v. Landmark Indus., Inc., ___ F.3d ___, 2015 WL _____ (5th Cir. No. 14-20496, Aug. 12, 2015) (holding that "an unaccepted offer of judgment cannot moot a named-plaintiff's claim in a putative class action"). Below in the Reporter's Comments and Questions section, a key inquiry will be whether the present state of the law calls for rule changes.

April 2015 Agenda Materials

First Sketch: Rule 23 Moot
(Cooper approach)

1 (x) (1) When a person sues [or is sued] as a class
2 representative, the action can be terminated by a tender of
3 relief only if
4 (A) the court has denied class certification and
5 (B) the court finds that the tender affords complete
6 relief on the representative's personal claim and
7 dismisses the claim.
8 (2) A dismissal under Rule 23(x)(1) does not defeat the
9 class representative's standing to appeal the order
denying class certification.

Committee Note

1 A defendant may attempt to moot a class action before a
2 certification ruling is made by offering full relief on the
3 individual claims of the class representative. This ploy should
4 not be allowed to defeat the opportunity for class relief before
5 the court has had an opportunity to rule on class certification.
6
7 If a class is certified, it cannot be mooted by an offer
8 that purports to be for complete class relief. The offer must be
9 treated as an offer to settle, and settlement requires acceptance
10 by the class representative and approval by the court under Rule
11 23(e).
12
13 Rule 23(x)(1) gives the court discretion to allow a tender
14 of complete relief on the representative's claim to moot the
15 action after a first ruling that denies class certification. The
16 tender must be made on terms that ensure actual payment. The

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17 court may choose instead to hold the way open for certification
18 of a class different than the one it has refused to certify, or
19 for reconsideration of the certification decision. The court also
20 may treat the tender of complete relief as mooting the
21 representative's claim, but, to protect the possibility that a
22 new representative may come forward, refuse to dismiss the
23 action.
24
25 If the court chooses to dismiss the action, the would-be
26 class representative retains standing to appeal the denial of
27 certification. [say something to explain this?]
28
29 [If we revise Rule 23(e) to require court approval of a
30 settlement, voluntary dismissal, or compromise of the
representative's personal claim, we could cross-refer to that.]

Rule 68 approach

Rule 68. Offer of Judgment

* * * * *

1 **(e)** **Inapplicable in Class and Derivative Actions.** This
2 rule does not apply to class or derivative actions
under Rules 23, 23.1, or 23.2.

This addition is drawn from the 1984 amendment proposal for Rule 68. See 102 F.R.D. at 433.

This might solve a substantial portion of the problem, but does not seem to get directly at the problem in the manner that the Cooper approach does. By its terms, Rule 68 does not moot anything. It may be that an offer of judgment strengthens an argument that the case is moot, because what plaintiffs seek are judgments, not promises of payment, the usual stuff of settlement offers. Those judgments do not guarantee actual payment, as the Cooper approach above seems intended to do with its tender provisions. But a Committee Note to such a rule might be a way to support the conclusion that we have accomplished the goal we want to accomplish. Here is what the 1984 Committee Note said:

> The last sentence makes it clear that the amended rule does not apply to class or derivative actions. They are excluded for the reason that acceptance of any offer would be subject to court approval, see Rules 23(e) and 23.1, and the offeree's rejection would burden a named representative-offeree with the risk of exposure to potentially heavy liability that could not be recouped from unnamed class members. The latter prospect, moreover, could lead to a conflict of interest between the named representative and other members of the class. See, Gay v.Waiters & Dairy

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Lunchmen's Union, Local 30, 86 F.R.D. 500 (N.D. Cal. 1980).

Alternative Approach in Rule 23

Before 2003, there was a considerable body of law that treated a case filed as a class action as subject to Rule 23(e) at least until class certification was denied. A proposed individual settlement therefore had to be submitted to the judge for approval before the case could be dismissed. Judges then would try to determine whether the proposed settlement seemed to involve exploiting the class-action process for the individual enrichment of the named plaintiff who was getting a sweet deal for her "individual" claim. If not, the judge would approve it. If there seemed to have been an abuse of the class-action device, the judge might order notice to the class of the proposed dismissal, so that other class members could come in and take up the litigation cudgel if they chose to do so. Failing that, the court might permit dismissal.

The requirement of Rule 23(e) review for "individual" settlements was retained in the published preliminary draft in 2003. But concerns arose after the public comment period about how the court should approach situations in which the class representative did seem to be attempting to profit personally from filing a class action. How could the court force the plaintiff to proceed if the plaintiff wanted to settle? One answer might be that plaintiff could abandon the suit, but note that "voluntary dismissal" is covered by the rule's approval requirement. Another might be that the court could sponsor or encourage some sort of recruitment effort to find another class representative. In light of these difficulties, the amendments were rewritten to apply only to claims of certified classes.

1 **(e) Settlement, Voluntary Dismissal, or Compromise.**
2
3 (1) **Before certification.** An action filed as a class
4 action may be settled, voluntarily dismissed, or
5 compromised before the court decides whether to grant
6 class-action certification only with the court's
7 approval. The [parties] {proposed class
8 representative} must file a statement identifying any
9 agreement made in connection with the proposed
10 settlement, voluntary dismissal, or compromise.
11
12 (2) **Certified class.** The claims, issues, or defenses of a
13 certified class may be settled, voluntarily dismissed,
14 or compromised only with the court's approval. The
15 following procedures apply to a proposed settlement,
16 voluntary dismissal, or compromise:
17
18 **(A~~1~~)** The court must direct notice in a reasonable

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19 manner * * * * *
20
21 (3) **Settlement after denial of certification.** If the court
22 denies class-action certification, the plaintiff may
23 settle an individual claim without prejudice to seeking
24 appellate review of the court's denial of
certification.

The Committee Note could point out that there is no required notice under proposed (e)(1). It could also note that prevailing rule before 2003 that the court should review proposed "individual" settlements. The ALI Principles endorsed such an approach:

> This Section favors the approach of requiring limited judicial oversight. The potential risks of precertification settlements or voluntary dismissals that occur without judicial scrutiny warrant a rule requiring that such settlements take effect only with prior judicial approval, after the court has had the opportunity to review the terms of the settlement, including fees paid to counsel. Indeed the very requirement of court approval may deter parties from entering into problematic precertification settlements.

ALI Principles § 3.02 comment (b).

Proposed (e)(3) seeks to do something included also in the Cooper approach above -- ensure that the proposed class representative can appeal denial of certification even after settling the individual claim. Whether something of the sort is needed is uncertain. The issues involved were the subject of considerable litigation in the semi-distant past. See, e.g., United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980); Deposit Guaranty Nat. Bank v. Roper, 445 U.S. 326 (1980); United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977). It is not presently clear whether this old law is still good law. It might also be debated whether the class representative should be allowed to appeal denial of certification. Alternatively, should class members be given notification that they can appeal? In the distant past, there were suggestions that class members should be notified when the proposed class representative entered into an individual settlement, so that they could seek to pursue the class action.

Reporter's Comments and Questions

The above materials suggest a variety of questions that might be illuminated by discussion on Sept. 11. A basic one is the extent of the problem. One view is that (at least pending the Supreme Court's decision in the case it has taken) this problem was largely limited to one circuit, which has seemingly

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overruled the cases that had presented the problem.

But another view might be that the existence of this issue casts a shadow over cases filed in other circuits. It has happened that parties in such cases have felt obligated to file out-of-the-chute certification motions, and some district judges have stricken such motions in the ground they are premature.

Assuming there is reason to give serious consideration to a rule change, there are a variety of follow-up questions. One is whether anything more than "the minimum" change is needed. And if the minimum is all that is needed, would a change to Rule 68 saying that it is inapplicable in actions under Rules 23, 23.1, and 23.2 suffice?

As illustrated by the above sketches, a number of other issues might be addressed. These include:

(1) Undoing the limitation of Rule 23(e) to settlements that purport in form to bind the class. This limitation was added in 2003. Before that, most circuits held that court review was required for "individual" settlements as well as "class" settlements, but that notice to the class was not.

(2) A rule could require court approval of a dismissal and also require that the parties submit details of the deal to the court.

(3) A rule could affirmatively preserve the settling individual's right to seek appellate review of the district court's denial of class certification.

(4) A rule could specify that the parties must seek judicial approval of an individual settlement before certification, but leave notice to the class to the discretion of the court.

There surely are additional possibilities.

APPENDIX
Selected Ascertainability Suggestions

This listing does not purport to exhaust the submissions on this topic.

No. 15-CV-D, from Professors Adam Steinman, Joshua Davis, Alexandra Lahav & Judith Resnik, proposes adding the following to Rule 23(c)(1)(B):

> A class definition shall be stated in a manner that such an individual could ascertain whether he or she is potentially a member of the class.

No. 15-CV-I, from Jennie Anderson, proposes adding the following to Rule 23(c)(1)(B):

> An order must define the class in objective terms so that a class member can ascertain whether he or she is a member of the class. A class definition is not deficient because it includes individuals who may be ineligible for recovery.

No. 15-CV-J, from Frederick Longer proposes addressing the "splintering interpretation" of ascertainability by adding the following to Rule 23(c)(2)(B)(ii):

> the definition of the class in clear terms so that class members can be identified and ascertained through ordinary proofs, including affidavits, prior to issuance of a judgment.

No. 15-CV-N, from Public Justice, proposes adding the following to Rule 23(c)(1)(B)

> In certifying a class under Rule 23(b)(3), the court must define the class so that it is ascertainable by reference to objective criteria. The ascertainability or identifiability of individual class members is not a relevant consideration at the class certification stage.

No. 15-CV-P, from the National Consumer Law Center and National Assoc. of Consumer Advocates proposes adding the following to Rule 23(c)(1)(B):

> A class is sufficiently defined if the class members it encompasses are described by reference to objective criteria. It is not necessary to prove at the class certification stage that all class members can be precisely identified by name and contact information.

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TAB 7B

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M E M O R A N D U M

To: Standing Committee

From: Civil Rules Pilot Project Subcommittee

Date: December 12, 2015

One of the conclusions reached in the process of developing the rule amendments that became effective on December 1, 2015, was that additional innovations in civil litigation may be more likely if they are tested first in a series of pilot projects. To pursue the possible development of such pilot projects, a subcommittee was formed to investigate pilot projects already completed in other locations and to recommend possible pilot projects for federal courts.

The subcommittee began its work by collecting information. Contact was made with the National Center for State Courts, the Institute for Advancement of the American Legal System, the Conference of State Court Chief Justices, and various innovative federal courts. Exhibits A, B, C, and D contain summary memos prepared by members of the subcommittee regarding pilot projects undertaken in various state and federal courts. Exhibit E describes a pilot project undertaken at the direction of Congress in the early 1990s.

After considering a number of alternatives, the subcommittee has focused on two possible pilot projects: one on enhanced initial disclosures, and another that calls upon judges to set more aggressive schedules for completion of litigation and, at the same time, trains them on case management techniques needed to adhere to such schedules.

A. Enhanced Disclosures.

This is a rule-driven project that would make more robust the voluntary disclosures already required by Civil Rule 26(a) at the beginning of a case to include helpful *and* hurtful information known by each party. It is similar to an Arizona state court rule that has been used with some success for over a decade, as well as an analogous rule in Colorado and the federal employment law protocols currently used by many federal judges. It also is akin to a proposed amendment to Civil Rule 26(a) that failed to pass in the late 1990s.

As you may know, the Civil Rules actually required mandatory disclosure of unfavorable information in the version of Rule 26(a)(1) that was in effect from 1993 to 2000, but it permitted individual districts to opt out. So many districts opted out that the Committee eventually concluded that elimination of the opt-out provision was needed, and the only way to get such a change through the full Enabling Act process was to dial back the Rule 26(a)(1) disclosure requirements to information a party may use to support its own claims or defenses.

Nevertheless, as shown in Exhibits A-D, many state court pilot projects have included enhanced initial disclosures. The idea, of course, is to get information on the table that otherwise would be found only through expensive discovery. The discovery protocols for federal employment cases appear to have shown that enhanced disclosures can improve the efficiency of litigation. Exhibit F is a summary of a study recently completed by the Federal Judicial Center on the effect of the employment protocols. It finds significantly fewer discovery disputes in cases where the protocols are used.

Some states require more substantial initial disclosures. One example is Arizona Rule 26.1(a), a copy of which is included as Exhibit G. The idea behind Rule 26.1(a)(9) is to require parties to produce all documents relevant to the case, including unfavorable documents, at the outset of the litigation. The Rule also requires parties to identify all persons with knowledge of the case, and to provide a general description of their knowledge. This Rule, combined with other Arizona innovations (depositions limited to parties and experts, depositions limited to four hours, only one expert per issue) appears to have produced favorable results. In a survey completed for the Advisory Committee's May 2010 conference, 73% of Arizona lawyers who practice in federal and state court said that they prefer state court, as compared to 43% of lawyers nationally.

Exhibit H includes a draft set of initial disclosure rules prepared by one of the subcommittee's groups. It includes portions of the Arizona rule, but is not as aggressive. The subcommittee feels that this draft must be more specific in its description of the documents to be disclosed. Otherwise, lawyers will provide only the most general descriptions of "categories" of documents and little that is helpful will be revealed. The subcommittee is working on more specific language, and welcomes any suggestions.

In considering such a pilot project, we should keep in mind the experience from the 1990s. Attached as Exhibit I is a summary of some of the arguments made in opposition to the enhanced disclosure rule proposed at that time.

We would appreciate your thoughts on several questions: Should the Advisory Committee promote a pilot project that tests the benefits of initial disclosures? Alternatively, should the Committee proceed directly to drafting and publishing a rule amendment requiring more robust initial disclosures? If a pilot project were undertaken, what would we measure to determine its success?

B. Case Expedition.

The goal of the Civil Rules is to further the "just, speedy, and inexpensive determination of every action." Case dispositions that are not speedy and inexpensive often are not just.

Under this pilot, judges would use the initial case management conference to set a firm time cap on discovery and a firm trial date no more than 12 to 14 months from the filing of each case. For such a schedule to work, judges would be required to resolve discovery disputes and dispositive motions promptly. Exceptions to the 12-14 month trial date would be needed for some complex cases, but the subcommittee is inclined to limit the exceptions to narrowly defined categories of cases, such as patent cases, MDLs, and class actions. Pilot judges would still be required to set firm caps on discovery and firm trial dates in these cases, and to resolve discovery disputes and dispositive motions promptly.

Building on the work of several federal and state courts, this project would attempt to seize on the increased reasonableness associated with discovery that must be finished within a discrete time period. A similar dynamic is at play when trial judges allocate a set amount of time for each party to present its case at trial; redundancy is lessened and efficiency increases.

To increase the odds of success with this pilot, and to develop materials that might be used in general judge training if more aggressive schedules were to be proposed broadly, the pilot would include significant judicial training, in conjunction with the FJC, to educate the pilot judges on the kinds of tools that would make the pilot goals achievable. The pilot project could examine, over time, the ability of judges to set expeditious and effective litigation schedules as they are trained, gain experience, and share ideas in meetings with colleagues.

There are several premises for such a pilot: (1) the longer a case takes to resolve, the more expensive it is for the parties; (2) the combination of tight timetables for discovery, prompt resolution of discovery and dispositive motions,

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and firm trial dates is more likely to prompt lawyers to be reasonable in their discovery requests and litigation behavior than any rule; and (3) lawyer cooperation should increase when both parties must conduct discovery within a relatively short period of time.

C. Another Possible Pilot Project.

The subcommittee has considered a pilot project that would divide cases into separate tracks for simple, standard, and complex cases. Such case-tracking was tried in federal courts during the 1990s Congress-initiated CJRA pilots, and has been tried in several states. Case tracking is still used in some courts, but has at other times encountered difficulty in efficiently and accurately identifying cases for specific tracks. The Conference of State Chief Justices is currently preparing a tracking recommendation, and an initial draft is likely to be available in the spring. We will continue to watch that effort and consider the possible role of case tracking in our pilot project proposals.

D. Other Thoughts.

Any pilot effort would require not only the participation of the Civil Rules and Standing Committees, but also CACM and the FJC. We have made a report to CACM, which was received favorably, and CACM plans to designate one or two liaisons for our pilot project effort. Jeremy Fogel of the FJC has also been an active participant in our pilot project conference calls.

We are considering the following possible timetable:

- April 2016—approval by Civil Rules Committee.
- June 2016—approval by Standing Committee.
- September 2016—approval by Judicial Conference.
- Early 2017—initial implementation.
- End of 2019—completion.

Our current thinking is that pilot districts must be willing to make the pilot requirements mandatory, all judges in the district must be willing to participate, and at least three to five districts will be needed.

This is a work in process. We would very much appreciate your thoughts and suggestions.

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EX. A

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MEMORANDUM

To: Simplified Procedures Working Group, Pilot Project Subcommittee

From: Virginia Seitz

Re: Summary of CO, MN, IA and MA Projects and Reforms

Date: October 2015

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To assist the Simplified Procedures working group of the Pilot Project Subcommittee, this memorandum summarizes recent reforms and pilot projects undertaken by courts in Colorado, Massachusetts, Iowa and Minnesota. The Colorado, Iowa, and Massachusetts pilots all focused on "business cases." Minnesota conducted an expedited case pilot project which focused on particular types of cases (e.g., contract and consumer injury cases). Generally, all of these actions were the product of study done by task forces within the states. As was true in the state reforms discussed in Judge St. Eve's memorandum, the purpose of the reforms and the pilots was to improve access to justice by decreasing costs and time to resolution in civil cases. I reviewed the task force recommendations, the pilot projects, available evaluations and the helpful material on the website of the Institute for the Advancement of the American Legal System's ("IAALS'") Rule One initiative project. As you will see, there was far more information about the Colorado pilot than any of the other three states' pilots which were less ambitious and which did not have the benefit of an IAALS evaluation.

I. Colorado Civil Access Pilot Project ("CAPP"). Based on the recommendations of a Task Force, Colorado implemented a pilot project that applied generally to "business actions" on January 1, 2012. Five district courts in the state participated in the project. Initially, the project had a term of two years, but it was twice extended and concluded only in June 2015.

A. Pilot Rules. The pilot rules incorporated a number of components that will sound familiar to this group:

1. The rules expressly provided that proportionality principles would guide the interpretation and application of the rules.

2. The rules required that complaints and responsive pleadings include all material facts. General denials in responsive pleadings were deemed admissions.

3. The rules required robust initial disclosures, including all matters beneficial and harmful, to be accompanied by a privilege log. Both the disclosures and the log had to be filed with the court. In addition, disclosures took place on a staggered schedule, that is, the plaintiff was required to make disclosures before the defendant was required to answer. The court had the power to impose sanctions if either party failed to make proper disclosures.

4. The rules required defendant(s) to answer the complaint even when moving to dismiss the complaint.

5. The rules required the parties to meet and confer on the preservation of documents shortly after the defendant answers the complaint. In addition, the parties were required to promptly prepare a joint case management report which states the issues, makes a proportionality assessment, and proposes timelines and levels of discovery.

6. Again every early on, the Judge was required to hold an initial case management conference to shape the pretrial process. That process was then set forth in a Case Management Order, which could be modified only for "good cause."

7. The rules provided that the scope of discovery should be matters that "enable a party to prove or disprove a claim or defense or to impeach a witness" and, again, should be subject to the proportionality principle.

8. The rules allowed each party only one expert per issue or specialty at issue. In addition, expert discovery and testimony was limited to the expert report. No depositions of expert witnesses were allowed.

9. The general rule was that one judge would handle all pretrial matters and the trial; the judge would engage in "active" management of the case, holding prompt conferences to address any issues that arise on summary briefing.

10. The rules provided that no continuances would be granted absent "extraordinary circumstances."

B. Pilot Hypotheses. The developers of the project had the following hypotheses about the effect of the CAPP rules:

1. There would be a reduction in the length of time to resolution for cases.

2. There would be a decrease in the cost of resolution for cases.

3. The process would be fair for all parties.

4. There would be a substantial increase in judicial involvement in cases.

5. The number of judges per case would decrease.

6. There would be a decrease in motions practice.

7. There would be a decrease in motions practice associated with discovery.

8. There would be a decrease in trial time.

9. There would be an increase in the number of cases that went to trial.

10. There would be a decrease in the amount of trial time per trial.

11. There would be an improvement in all aspects of proportionality.

C. Pilot Evaluation. At the request of the pilot project developers, IAALS conducted an evaluation and issued a report about the CAPP rules in October 2014. The report reached the following conclusions:

1. The CAPP rules reduced the time to resolution of cases over both the existing regular and expedited procedures. Four of five attorneys surveyed expressed the view that the time spent on the case was proportionate to the nature of the case.

2. Three of four attorneys surveyed expressed the view that the cost of cases under the CAPP rules was proportionate to the nature of the case.

3. Both a docket study and the attorney survey indicated that the CAPP process was not tilted toward plaintiffs or defendants.

4. The docket study and surveys reported a general adherence to the timelines imposed.

5. The evaluation reports that parties did see the judge in a case at a much earlier stage and that cases were generally handled by a single judge. This was by far the "most approved" part of the CAPP rules – the early, active and ongoing judicial management of the cases. In addition, the evaluation concluded that the initial case management conference was the most useful tool in shaping the pretrial process, including ensuring proportionate discovery. E.g., the evaluation states: "Judges point to the initial case management conference as the most useful tool in shaping the pre-trial process to ensure that it was proportional."

6. The evaluation found that the CAPP rules significantly reduce motions practice, especially extension requests.

7. The evaluation found that far fewer discovery motions were filed.

8. The evaluation concluded that discovery was both proportionate and sufficient.

9. **Notable Non-Results.** The evaluators were surprised to see that the CAPP rules had little effect on the rate at which cases went to trial, the length of trials or the number of dispositive motions filed or granted.

The evaluation also identified certain "challenges" with respect to the CAPP rules which might more forthrightly be called criticisms. First, parties were generally critical of the staggered deadlines for a number of reasons. Because the timing of a defendant's responsive disclosures and pleadings were keyed to the time of a plaintiff's disclosures, there was no predictability about that deadline. In addition, plaintiffs sometimes sought to compress a defendant's timing by immediately filing disclosures with his or her complaint or shortly thereafter. Both the parties and the courts complained about the uncertainty resulting from making one deadline contingent upon a prior event, preferring rules that specify due dates. Second, there were complaints about the enforcement of the requirements of both expanded pleading and robust early disclosures. Third, both litigants and judges complained about the uncertainty of the extraordinary circumstances test for continuances and extensions. Fourth, the parties surveyed strongly advocated for the return of depositions of expert witnesses. Finally, the parties and judges found that the categorization of cases as "business" and within the pilot or not was too difficult and should be simplified.

One other interesting point: The evaluators noted that the anecdotal responses and comments in the attorney and judicial surveys were not nearly as positive as the data was. The parties in particular cited the complexity and bureaucracy of the CAPP rules, and observed that it was inherently confusing to have several different sets of civil rules operating at the same time in the same court. This may be an under-appreciated downside of pilot projects.

II. Minnesota Civil Justice Reform Task Force. Pursuant to a December 2011 report from the Civil Justice Reform Task Force, Minnesota implemented revisions to its Rules of Civil Procedure and General Rules of Practice and a pilot project. Minnesota's Rules of Civil Procedure and General Rules of Practice for District Courts were amended in February 2013. The rules amendments included:

1. Incorporating proportionality into the scope of discovery.

2. Adoption of the federal regime of automatic initial disclosures.

3. Requirement of a discovery conference of counsel and discovery plan in every case.

4. An expedited process for non-dispositive motions.

5. A new program to address Complex Cases.

No evaluation of these rule changes has yet occurred.

On May 7, 2013, the Minnesota Supreme Court also authorized the creation of a Pilot Expedited Civil Litigation Track in two districts. This track applies to cases involving "contract disputes, consumer credit, personal injury and some other types of civil cases." The project is intended to answer the question whether this package of changes will reduce the duration and cost of civil suits.

1. The track requires early automatic disclosures from both parties, as well as a summary of the contentions in support of every claim, a witness list and contact information and any statements of those witnesses.

2. The track requires both parties to produce copies of all documents and things that will be used to support all claims or defenses, a description of the damages sought, a disclosure of insurance coverage, and a summary of any expert's qualifications accompanied by a statement that sets forth any facts and opinions of that expert and their grounds.

3. The track requires an early case management conference that includes a discussion of settlement prospects and the setting of a trial date, as well as deadlines for the submission of documents that will be used in trial.

4. The track limits discovery to 90 days after issuance of the case management order. The track both limits written discovery and requires that it be served within 30 days of issuance of the case management order.

5. The track requires parties to meet and confer on all motions and then limits the parties to letter briefs of two pages on issues submitted to the judge for resolution.

6. The "intention" of the track is to secure the setting of an early trial date (within four to six months of filing) and to have that date be a "date certain."

It appears that the Court intended that an initial evaluation of the pilot should have occurred by this time, but I have been unable to locate any evaluation. The 2014 Annual Report of the Minnesota Judicial Branch stated that an evaluation of the pilot project is now expected sometime in 2015.

III. Iowa Civil Justice Reform Task Force. Iowa is implementing a report called *Reforming the Iowa Civil Justice System*, issued in March 2012. That report called for a specialty business court pilot project for three years starting in May of 2013. "Cases are eligible to be heard in the Business Court Pilot Project if compensatory damages totaling $200,000 or more are alleged or the claims seek primarily injunctive or declaratory relief." Parties participate in the pilot only if both sides agree and if the state administrator accepts the case for the project. The court has assigned three judges who manage all cases assigned to the project. In every accepted matter, the court assigns one judge for litigation while another is assigned to handle settlement negotiations.

I found an "initial evaluation" of the pilot project that was issued in August 2014. At that point, this specialized court had handled only ten cases, and only one attorney had submitted an evaluation, so that data set was quite limited.

The judges assigned to the business court made the following observations:

1. The strategy of assigning a separate business court judge to handle settlement negotiations works well.

2. The judges suggested that videoconferencing could save travel time and money for lawyers using a specialized court.

3. Additional steps would be needed to publicize and promote the business court program.

In addition, on August 29, 2014, Iowa adopted new Iowa Rule of Civil Procedures 1.281, an expedited civil action rule for cases involving $75,000 or less in damages, to become effective January 1, 2015. Parties with higher damages may stipulate to proceeding under this rule. [The court separately amended its rules to require proportional discovery and initial disclosures; I did not review these provisions as they fall into another working group's area.] The key features of the expedited civil action rule are:

1. Limits on discovery, i.e., no more than 10 interrogatories, 10 requests for production and 10 requests for admission (absent leave of court). There are also limited numbers of depositions.

2. One summary judgment motion may be filed by each party.

3. When cases on this track go to trial, the jury includes only six persons, and trial time is limited to six hours. In addition, cases on this track shall be tried within one year of filing unless otherwise ordered for good cause.

The new expedited civil action rule has not yet been evaluated. Within the first month of its effective date, however, more than 25 cases were filed to proceed on the expedited track.

IV. Massachusetts Business Litigation Session Pilot Project. This project was implemented on a voluntary basis in only a couple of county courts. It is focused on initial disclosures and discovery, which are the purview of another working group. The project began in January 2010 and ran through December 2011. The pilot incorporated several of the IAALS principles, including:

1. Limiting discovery proportionally to the magnitude of the claims at issue.

2. Staging discovery where possible.

3. Requiring all parties to produce "all reasonably available non-privileged, non-work product documents and things that may be used to support the parties' claims, counterclaims or defenses."

4. Requiring the parties to confer early and often and to make periodic reports to the court especially in complex cases.

At the conclusion of the pilot, the court conducted a survey which had a low rate of response, but follow up questions elicited more feedback. A large majority

of users of the project rules reported high satisfaction (80%). I could locate no substantive evaluation of the project.

* * * *

There are several elements of any regime of simplified rules that we should consider if we pursue a pilot project in this area. The following elements seem to receive universal acclaim: Robust early disclosures; an early case management conference and case management order with firm deadlines for discovery and trial date; accessible, active judicial management of the case, with short letter briefs and quick decisions on non-dispositive motions. One regular bone of contention appears to be selecting the right cases for slimmed-down procedures.

EX. B

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125-011798

SIMPLIFIED PROCEDURES SUBCOMMITTEE -- SUMMARY OF CERTAIN JUDICIAL REFORMS

As part of the "Simplified Procedures" Pilot Project Subcommittee, this memorandum summarizes recent judicial reforms employed by New Hampshire, New York, Ohio, and Texas. The New Hampshire and Ohio reforms arose out of pilot projects implemented in various counties in those states. The New York and Texas reforms were based on recommendations by Task Forces created by their respective Supreme Courts. The general goal of these judicial reforms was to increase access, decrease expenses, and increase judicial management in civil cases.

I have reviewed the relevant pilot projects, the Task Force recommendations, the new rules, various articles about the rules, an evaluation from the National Center for State Courts, and any relevant information on the Institute for the Advancement of the American Legal System's ("IAALS") Rule One initiative project.

I. New Hampshire Pilot Project:

In 2013, the Supreme Court of New Hampshire ordered the implementation of its Superior Court Proportional Discovery/Automatic Disclosure Pilot ("PAD") Rules in all counties in the state. New Hampshire originally implemented the pilot in two counties. The PAD Pilot Rules focus on changes to the pleading requirements and discovery rules. Specifically, the PAD Pilot Rules have five aspects:

1. Pleading Standards: The pleading standard changed from notice pleading to fact pleading for both complaints and answers. The parties must state the material factual basis on which any claim or defense is based. The intent behind the rule is to expedite the civil litigation process by giving sufficient factual information for the other side to evaluate the merits.

2. Early Meet and Confer: The parties must meet and confer within twenty days of the filing of the answer and establish deadlines for discovery, ADR, dispositive motions, and a trial date. The parties submit their agreement to the court and it becomes the "case structuring order." If the parties agree on the deadlines, they do not need a conference with the court.

3. Early and Meaningful Initial Disclosures: This requirement mandates automatic disclosure of names and contact information of those individuals who have information about a party's claims or defenses and a brief summary of such information. The parties also have to disclose all documents, ESI and tangible things to support their respective claims and defenses, including a) a category of damages, and b) insurance agreements or polices under which such damages may be paid. If a party fails to make

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these disclosures, a court can impose sanctions including barring the use of them at trial. This rule is intended to expedite discovery.

4. Limit on Interrogatories and Deposition Hours: The fourth aspect of the pilot project limits the number of interrogatories to no more than 25 and the number of deposition hours to 20 hours. Given the early disclosures in number 3, the PAD Pilot Project anticipated that the parties would need less discovery. The parties can waive these limitations by stipulation or the court can waive them for good cause.

5. Preservation of ESI: The fifth rule requires the parties to meet and confer to discuss the preservation of ESI and to agree on deadlines and procedures for the production of ESI. This rule includes a proportionality requirement – the ESI costs must be proportional to the significance of the issues in dispute.

The National Center for State Courts ("NCSC") evaluated the New Hampshire PAD Pilot Rules. As part of the review, the NCSC interviewed judges, attorneys, court clerks, and staff of the Administrative Office of the Courts. They also evaluated pre-implementation and post-implementation case data. The NCSC's findings are discussed below.

First, the PAD Pilot Rules have not impacted the case disposition time, although the NCSC only had a small number of cases over a short period of time to evaluate. They have, however, significantly decreased the proportion of cases that ended in a default judgment.

Second, the PAD Pilot Rules have not had any real impact on discovery disputes based on the NCSC's review of the percentage of cases both pre-implementation and post-implementation with discovery disputes. New Hampshire thought the automatic disclosure requirement in number 3 would decrease discovery disputes.

The NCSC made several recommendations based on its review:

1. Clarify the existing ambiguity in the current appearance requirement.

2. Establish a firm trial date in the case structuring order.

3. Avoid aggressive enforcement of the rules except for intentional or bad faith noncompliance.

4. Establish a uniform time standard for return of service.

II. New York Task Force

New York created a Task Force on Commercial Litigation in the 21st Century to recommend reforms to enhance litigation in its Commercial Division. The New York Task Force submitted its final report to the Chief Judge in June 2012. The report made multiple recommendations that are not relevant to our pilot project's scope including endorsing the Chief

Judge's legislative proposal to establish a new class of Court of Claims judges; increasing the monetary threshold for actions to be heard in the Commercial Division; implementing several measures to provide additional support to the Division, including additional law clerks and the creation of a panel of "Special Masters"; assigning cases to the Commercial Division earlier in the process; creating standardized forms; improving technology in the courtrooms; and appointing a statewide Advisory Council to review the recommendations and guide implementation.

In addition, the Task Force made several recommendations, some of which have resulted in the implementation of new rules. All of the recommendations apply to cases in the Commercial Division only. These areas may be appropriate for pilot projects.

1. Robust expert disclosures: The Task Force recommended the parties make more robust and timely expert disclosures, similar to the disclosure requirements in the Federal Rules. The Rule would require expert disclosures, written reports, and depositions of testifying experts to be completed no later than four months after the close of fact discovery.

2. New privilege log rules to streamline discovery: The Task Force concluded that the creation of privilege logs has become a substantial, needless expense in many complex commercial cases. In order to limit unnecessary costs and delay in the creation of such logs, the Task Force recommended limitations on privilege logs. Specifically, the Task Force recommended that parties meet and confer in advance in an effort to stipulate to limitations on privilege logs. It referenced four orders or principles as examples for limiting privilege logs:

a) The Sedona Principles: The Sedona Principles encourage parties to meet in advance and reach mutually agreed-upon procedures for the production of privileged information. The Principles encourage the acceptance of privilege logs that classify privileged documents by categories, rather than individual documents.

b) The Facciola-Redgrave Framework: Magistrate Judge John Facciola and attorney Jonathan Redgrave have proposed that parties should meet regarding privilege logs and agree to limit documents that require logging, use categories to organize privileged documents, and use detailed logs only when necessary. *See* John Facciola & Jonathan Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, 4 The Fed. Cts. L. Rev. 19 (2009).

c) The Southern District of New York's Pilot Project Regarding Case Management Techniques for Complex Civil Cases: The SDNY addresses privilege assertions in its pilot project for complex cases. The following documents do not have to be included on a privilege log: 1) communications exclusively between a party and its trial counsel; 2) work product created by trial counsel, or an agent of trial counsel other than a party, after the commencement of

the action; 3) internal communications within a law firm, a legal assistance organization, a governmental law office, or a legal department of a corporation or of another organization; and 4) documents authored by trial counsel for an alleged infringer in a patent infringement action. The order also provides a specific procedure for a person who challenges the assertion of a privilege regarding documents, including the submission of a letter to the court with no more than five representative documents that are the subject of the request.

d) The District of Delaware's Default Standard for Discovery: The District of Delaware has a Standing Order governing default standards for discovery, including privilege logs. Under this order, parties must confer on the nature and scope of privilege logs, "including whether categories of information may be excluded from any logging requirements and whether alternatives to document-by-document logs can be exchanged." It also excludes two categories of documents from inclusion on privilege logs: 1) any information generated after the complaint was filed and 2) any activities "undertaken in compliance with the duty to preserve information from disclosure and discovery" under Rule 26(b)(3)(A) and (B). In addition, the order directs the parties to confer on a non-waiver order under Federal Rule of Evidence 502.

In response to the Task Force's recommendation, New York adopted a rule in the Commercial Division that requires parties to meet and confer at the inception of the case to discuss "the scope of privilege review, the amount of information to be set out in the privilege log, the use of categories to reduce document-by-document logging, whether any categories of information may be excluded from the logging requirement, and any other issues pertinent to privilege review, including the entry of an appropriate non-waiver order."

3. E-discovery: The Task Force recommended that parties who appear at a preliminary conference before the court have an attorney appear who has sufficient knowledge of the client's computer systems "to have a meaningful discussion of e-discovery issues." The Task Force also encouraged the E-Discovery Working Group to examine how other courts are addressing e-discovery issues.

4. Deposition and Interrogatory Limits: The Task Force recommended, and the Supreme Court ultimately adopted rules, that limit depositions to ten per side for the duration of seven hours per witness. The parties can extend the number by agreement or the court can order additional depositions for good cause. In addition, New York implemented a new rule consistent with the Task Force's recommendation to limit interrogatories to 25 per side unless the court orders otherwise.

5. An accelerated adjudication procedure: The Task Force recommended an accelerated adjudication procedure for the Commercial Division. This recommendation amounts to an expedited bench trial. The Task Force suggested that this procedure involve highly truncated discovery. The Chief Judge of the New York Supreme Court

adopted an accelerated adjudication rule in response to the recommendation. Under the rule, the parties have to agree to the procedure. By agreeing to the procedure, the parties agree to waive any objections based on lack of personal jurisdiction, the right to a jury trial, and the right to punitive or exemplary damages. Under this procedure, discovery is limited to seven interrogatories, five requests to admit, and seven depositions per side. The parties also agree to certain limits on electronic discovery. As part of the accelerated adjudication procedure, the parties agree to be ready for trial within nine months from the date of the filing of a request for assignment of the case to the Commercial Division.

New York adopted the new Commercial Division rules primarily in 2014. It is too early to assess their effectiveness.

III. Ohio Pilot Project

In April 2007, the Chief Justice of the Ohio Supreme Court created the Supreme Court Task Force on Commercial Dockets to "develop, oversee, and evaluate a pilot project implementing commercial civil litigation dockets in select courts of common pleas." Four counties agreed to serve as pilot project courts and commercial dockets were created in all four counties in 2009. The Supreme Court of Ohio's Task Force on Commercial Dockets made 27 recommendations for the permanent establishment of commercial dockets in Ohio's courts of common pleas. The recommendations pertained to the permanent establishment of commercial dockets in Ohio, the selection of judges to handle the commercial dockets, the training of judges, the assignment of cases, the balancing of the workload of the judges who handle commercial dockets, and certain case management procedures. The relevant case management procedures include:

1. **The Use of Special Masters:** The Task Force recommended the use of special maters because they provided a process through which pretrial, evidentiary, and post-trial matters could be addressed timely and effectively through extra-judicial resources.
2. **Alternative Dispute Resolution:** The Task Force recommended that a commercial docket judge in one county be able to refer a commercial case to a commercial docket judge of another county.
3. **Pretrial Order:** The Task Force recommended against adopting a mandatory model case management pretrial order because most of the participating pilot project judges use their own pretrial orders and procedures.
4. **Motion Timeline:** The Task Force also recommended that commercial judges decide dispositive motions no later than 90 days from completion of briefing or oral arguments, whichever is later. It also suggested that they decide all other motions no later than 60 days from completion of briefing or oral arguments, whichever is later.

The report found that the benefits of the program included accelerating decisions, creating expertise among judges, and achieving consistency in court decisions around the state. The Supreme Court of Ohio thereafter adopted rules pertaining to commercial dockets.

IV. Texas Task Force

In May 2011, the Texas legislature passed a bill regarding procedural reforms in certain civil actions, and directed the Texas Supreme Court to adopt rules to "promote the prompt, efficient and cost-effective resolution of civil actions when the amount in controversy does not exceed $100,000." In November 2012, the Texas Supreme Court issued mandatory rules for the expedited handling of civil cases. The rules limit pre-trial discovery and trials in cases where the party seeks monetary relief of $100,000 or less. In response to the legislation, the Texas Supreme Court appointed a Task Force to address the issues and "advise the Supreme Court regarding rules to be adopted" to address the legislation. The Task Force focused on: scope of discovery, disclosure, proof of medical expenses, time limits, expedited resolution, monetary limits, and alternative dispute resolution. The Task Force submitted various recommendations to the Texas Supreme Court, but it could not agree on whether the process should be mandatory or voluntary. Based on the recommendations of the Task Force, the Supreme Court issued mandatory rules in November 2012. The goal of the new rules is to "aid in the prompt, efficient and cost effective resolution of cases, while maintaining fairness to litigants." The Texas project is not based on a pilot project, although the Task Force apparently looked at the procedures that some other States were implementing.

The new rules include the following:

1. Expedited Actions: This Rule applies to all cases that seek $100,000 or less in damages, other than cases under the Family Code, Property Code, Tax Code, or a specific section of the Civil Practice & Remedies Code. It provides for limited, expedited discovery and a trial within 90 days after the discovery period ends. A court can only continue a trial for cause twice and each continuance cannot exceed a 60 days. Each side is allowed no more than eight hours to complete its portion of the trial. The Rule also limits the court's ability to require ADR and limits challenges to expert testimony. A court may remove a case from this process for good cause.

2. Pleading Requirements Regarding Relief Sought: The Texas Supreme Court amended its pleading requirements to require a more specific statement of the relief sought. A party must state the monetary relief it seeks so a court can determine if it falls within an Expedited Action. Texas does not require fact pleading for the underlying claims.

3. Discovery Plan: For Expedited Actions, the discovery period starts when the suit is filed and continues until 180 days after the date the first request for discovery is served on a party. Parties can serve no more than 15 written interrogatories, 15 requests for production, and 15 requests for admission, and spend no more than six hours in total to

examine and cross examine all witnesses in depositions. It also provides for requests for disclosure from a party that are separate and distinct from its requests for production.

I could not find any data on the effectiveness of these new rules. The NCSC currently is evaluating the use and effectiveness of the new rules and is expected to issue its report at some point in the Fall of 2015.

CONCLUSION

Based on the evaluations that exist of these reforms and the scope of our sub-committee to focus on "simplified procedures", I recommend having further discussion on three particular reforms:

1. The New Hampshire rule requiring early and meaningful initial disclosures. A pilot project focusing on these disclosures would be fairly easy to achieve and should expedite discovery. Interestingly, the NCSC found that the PAD Pilot Rules (which include early and meaningful initial disclosures) did not have any real impact on discovery disputes. This conclusion may be based, in part, on the fact that NCSC did not have a wide range of data to work with given the initial limited implementation of the program.

2. The New York Task Force's recommendation regarding new privilege logs to streamline discovery. This recommendation focuses on the expense such logs generate in relation to the usefulness of the logs in most cases. This proposal is worth discussing further, especially given the amount of privileged information ESI generates.

3. Expedited Actions. Both Texas' and New York's Task Forces recommended expedited actions for certain types of cases. Judge Campbell has been trying to get lawyers to adopt this efficient concept for some time. It is worth discussing with Judge Campbell's insights because it would save significant time and money for the parties.

Amy J. St. Eve
September 24, 2015

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EX. C

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M E M O R A N D U M

To: Pilot Project Subcommittee

From: Dave Campbell

Date: September 25, 2015

Re: Innovations in Arizona, Utah, Oregon, and the District of Kansas

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This memo will summarize my review of materials related to civil litigation innovations adopted in Arizona, Utah, Oregon, and the Federal District Court for the District of Kansas. I have plagiarized language from various reports I have reviewed. I include a few conclusions at the end.

A. Arizona.

In 1990, the Arizona Supreme Court appointed a committee, headed by Tucson trial lawyer (and later Chief Justice) Thomas A. Zlaket, to address discovery abuse, excessive cost, and delay in civil litigation. The result was the "Zlaket Rules," a thorough revision of the state rules of civil procedure adopted by the Supreme Court effective July 1, 1992. Arizona has adopted a number of other unique procedures since then. Key provisions of the Arizona rules are described briefly.

1. Disclosures.

The rules require broad initial disclosures by all parties within 40 days after a responsive pleading is filed. Each disclosure must be under oath and signed by the party making the disclosure. The rules require disclosure of the following (in addition to disclosures required in the federal rules):

- The legal theory upon which each claim or defense is based, including, where necessary for a reasonable understanding of the claim or defense, citations of pertinent legal or case authorities;
- The names and addresses of all persons whom the party believes may have knowledge or information relevant to the case, and the nature of the knowledge or information;
- The names and addresses of all persons who have given statements related to the case, whether or not the statements were made under oath;

- The names and addresses of expert witnesses, including the substance of the facts and opinions to which the person is expected to testify;
- A list of the documents or ESI known by a party to exist and which the party believes may be relevant to the subject matter of the action, or reasonably calculated to lead to the discovery of admissible evidence, and the date on which the documents and ESI will be made available for inspection and copying.

2. Depositions.

Only depositions of parties, expert witnesses, and document custodians may be taken without stipulation or court permission, and depositions are limited to four hours each.

3. Experts.

Each side is presumptively entitled to only one independent expert on an issue, except on a showing of good cause.

4. Medical Malpractice Cases.

Within ten days after defendants answer, the plaintiff must serve on all defendants copies of all of plaintiff's available medical records relevant to the condition which is the subject matter of the action. All defendants must do the same within ten days thereafter.

5. Mandatory Arbitration.

Arizona rules require mandatory arbitration of all cases worth less than $50,000. At the time the complaint is filed, the plaintiff must file a certificate of compulsory arbitration stating the amount in controversy. If the defendant disagrees, the issue is determined by the court. Unless the parties stipulate otherwise, the trial court assigns the arbitrator from a list of active members of the State Bar.

The arbitrator must set a hearing within 60 to 120 days. Because the purpose of compulsory arbitration is to provide for the efficient and inexpensive handling of small claims, the arbitrator is directed to limit discovery "whenever appropriate." In general, the Arizona Rules of Evidence apply to arbitration hearings, but foundational requirements are waived for a number of documents, and sworn statements of any witness other than an expert are admissible. The arbitrator must issue a decision within 10 days of the hearing.

In the absence of an appeal to the court of the arbitrator's decision, any party may obtain judgment on the award. If an appeal is filed, a trial de novo is held in the state trial

court, and any party entitled to a jury may demand one. If the appellant fails to recover a judgment on appeal at least 23 percent more favorable than the arbitration result, the appellant is assessed not only normal taxable costs, but also the compensation paid to the arbitrator, attorneys' fees incurred by the opposing party on the appeal, and expert fees incurred during the appeal.

A 2004 study revealed that, in most counties, an arbitration award was filed in less than half the cases assigned to arbitration (suggesting the cases settled before the arbitration), and a trial de novo was sought in less than a third of all cases in which an award was filed. This suggests that most cases assigned to the program either settled or produced a result satisfactory to the parties after the arbitration hearing.

6. Complex Case Courts.

The Maricopa County Superior Court has established complex litigation courts staffed by judges experienced in complex case management. Cases are eligible for assignment to the complex litigation courts based on a number of factors, including the prospect of substantial pre-trial motion practice, the number of parties, the need for extensive discovery, the complexity of legal issues, and whether the case would benefit from permanent assignment to a judge who has acquired a substantial body of knowledge in the specific area of the law. A 2006 survey of attorneys who had used these courts found that 96% favored their continuation. Responding attorneys gave high marks both to the quality of the judges assigned and their ability to devote more attention than usual to the assigned cases.

7. Commercial Courts.

A few months ago, the Maricopa County Superior Court launched commercial courts for all business disputes that exceed $50,000, other than those that qualify for the complex case courts. Cases in these commercial courts will include an early conference on ESI, use of an ESI checklist and a standard ESI order, and an early case management conference that focuses on ADR options, sequencing of discovery, and proportionality in discovery.

8. Survey Results.

In a 2008 survey of fellows of the American College of Trial Lawyers, 78% of the Arizona respondents indicated that when they had a choice, they preferred litigating in state court to federal court. In contrast, only 43% of the national respondents to the ACTL survey preferred litigation in state court. 67% of the Arizona respondents indicated that cases were disposed of more quickly in state court. 56% believed that processing cases was less expensive in the state forum.

In 2009, the IAALS conducted a survey of the Arizona bench and bar about civil procedure in the State's superior courts. Over 70% of respondents reported litigation experience in federal district court, and they preferred litigating in state court over federal court by a two-to-one ratio. Respondents favoring the state court forum cited the applicable rules and procedures, particularly the state disclosure and discovery rules. Respondents favoring the state forum also indicated that state court is faster and less costly.

B. Utah.

On November 1, 2011, the Utah Supreme Court implemented a set of revisions to Rule 26 and Rule 26.1 of the Utah Rules of Civil Procedure designed to address concerns regarding the scope and cost of discovery in civil cases. The revisions included seven primary components:

- Proportionality is the key principle governing the scope of discovery — specifically, the cost of discovery should be proportional to what is at stake in the litigation.
- The party seeking discovery bears the burden of demonstrating that the discovery request is both relevant and proportional.
- The court has authority to order the requesting party to pay some or all of the costs of discovery if necessary to achieve proportionality.
- The parties must automatically disclose the documents and physical evidence which they may offer as evidence as well as the names of witnesses with a description of each witness's expected testimony. Failure to make timely disclosure results in the inadmissibility of the undisclosed evidence.
- Upon filing, cases are assigned to one of three discovery tiers based on the amount in controversy; each discovery tier has defined limits on the amount of discovery and the time frame in which fact and expert discovery must be completed. Cases in which no amount in controversy is pleaded (e.g., domestic cases) are assigned to Tier 2.
- Parties seeking discovery above that permitted by the assigned tier may do so by motion or stipulation, but in either case must certify to the court that the additional discovery is proportional to the stakes of the case and that clients have reviewed and approved a discovery budget.
- A party may either accept a report from the opposing party's expert witness or may depose the opposing party's expert witness, but not both. If a party accepts an expert witness report, the expert cannot testify beyond what is fairly disclosed in the report.

The three tiers and their limits are as follows:

- Tier 1 applies to cases of $50,000 or less and allows no interrogatories, 5 requests for production, 5 requests for admission, 3 total hours for depositions, and completion of discovery within 120 days.

- Tier 2 applies to cases between $50,000 and $300,000 and allows 10 interrogatories, 10 requests for production, 10 requests for admission, 15 total hours for depositions, and completion of discovery within 180 days.

- Tier 3 applies to cases of $300,000 or more and allows 20 interrogatories, 20 requests for production, 20 requests for admission, 30 total hours for depositions, and completion of discovery within 210 days.

Since these changes were adopted, some Utah courts have also adopted a procedure for expediting discovery disputes. It requires a requires a party to file a "Statement of Discovery Issues" no more than four pages in length in lieu of a motion to compel discovery or a motion for a protective order. The statement must describe the relief sought and the basis for the relief and must include a statement regarding the proportionality of the request and certification that the parties have met and conferred in an attempt to resolve or narrow the dispute without court involvement. Any party opposing the relief sought must file a "Statement in Opposition," also no more than 4 pages in length, within 5 days, after which the filing party may file a Request to Submit for Decision. After receiving the Request to Submit, the court must promptly schedule a telephonic hearing to resolve the dispute.

In April, 2015, the National Center for State Courts completed a comprehensive study of the Utah rule changes. The study produced the following findings:

- The new rules have had no impact on the number of case filings.
- Some plaintiffs may be increasing the amount in controversy in the complaint to secure a higher discovery tier assignment and more discovery.
- There have been increases of 13% to 18% in the settlement rate among the various tiers. The study associates this with the parties obtaining more information earlier in the litigation.
- Across all case types and tiers, cases filed after the implementation of the new rules tended to reach a final disposition more quickly than cases filed prior to the revisions.
- Contrary to expectations, the parties sought permission for additional discovery (called "extraordinary discovery" in the rules) in only a small minority of cases.

Stipulations for additional discovery were filed in 0.9% of cases, and contested motions were filed in just 0.4% of cases.

- Discovery disputes fell in Tier 1 non-debt collection cases and Tier 3 cases and did not exhibit a statistically significant change in Tier 2 cases. Discovery disputes in post-implementation cases tended to occur about four months earlier in the life of the case compared to pre-implementation cases. Attorney surveys and judicial focus groups also provided evidence for the rarity of discovery disputes under the revised rules.

The NCSC study included a survey of attorneys that afforded the opportunity to make open-ended comments. Although it may have been due to self-selection by those unhappy with the new rules, 74% of the comments were negative, with only 9% positive. The negative comments were equally divided between plaintiff and defense lawyers.

The NCSC also did judge focus groups. Among the results:

- A recurring theme across all of the focus group discussions was the difficulty involved in changing well-established legal practices and culture in a relatively short period of time.
- The judges expressed widespread suspicion that attorneys are routinely agreeing to discovery stipulations at the beginning of litigation, but not filing those stipulations with the court unless they are unable to complete discovery within the required time frame.
- Many judges indicated that they had experienced significant decreases in the number of motions to compel discovery and motions for protective orders since implementation of the new rules.
- In general, the judges who participated in the focus groups were fairly positive about the impact of the rule revisions thus far.
- There was general agreement that one benefit of the revisions was that they leveled the playing field between smaller and larger law firms and that larger firms could no longer bury the small firms with excessive discovery requests.

C. Oregon.

Although not on our list, I have heard for some time about innovative practices in Oregon, so I took a quick look. These are some of the practices used in the Oregon state courts:

- Oregon's rules require parties to plead ultimate facts rather than providing mere notice of a cause of action. Civil complaints must contain a "plain and concise statement of the ultimate facts constituting a claim for relief without unnecessary repetition." The Oregon Supreme Court has interpreted this to mean that "whatever

the theory of recovery, facts must be alleged which, if proved, will establish the right to recovery."

- Oregon's civil rules impose limitations on discovery. No more than 30 requests for admission are allowed, and interrogatories are not permitted at all.
- Discovery of experts is also significantly curtailed. The Oregon rules do not permit depositions of experts, nor do they require the production of expert reports. Indeed, the identity of expert witnesses need not even be disclosed until trial. A party may defeat summary judgment simply by filing an affidavit or a declaration of the party's attorney stating that an unnamed qualified expert has been retained who is available and willing to testify to admissible facts or opinions creating a question of fact.
- Plaintiffs must file a return or acceptance of service on the defendant within 63 days of the filing of a complaint. If the plaintiff does not meet this requirement, the court issues a notice of pending dismissal that gives the plaintiff 28 days from the date of mailing to take action to avoid the dismissal.
- Motions for summary judgment are relatively rare compared to federal court. In an IAALS study, only 91 motions were filed in 495 cases, and more than one-third of those motions were concentrated in two cases (23 motions in one case, and 11 motions in another). Interestingly, more than half of the summary judgment motions filed in Multnomah County (where Portland is located) never received a ruling from the court. Fewer than 30% of summary judgment motions filed were granted in whole or in part.
- As in Arizona, Oregon requires that all civil cases with $50,000 or less at issue, except small claims cases, go to arbitration.
- For the years 2005 to 2008 the statewide average for civil cases closed in a calendar year by trial was 1.6% and the average for Multnomah County was 1.4%.
- The IAALS study found that when compared to Oregon federal court, the Multnomah County system is faster, less prone to motion practice, and less likely to see schedules interrupted by continuances or extensions of time.

D. District of Kansas.

In early March 2012, the U.S. District Court for the District of Kansas undertook an effort to increase the just, speedy, and inexpensive determination of every matter. Spearheaded by the court's Bench-Bar Committee, the Rule 1 Task Force divided into six working groups with corresponding recommendations: 1) overall civil case management, 2) discovery involving ESI, 3) traditional non-ESI discovery, 4) dispositive-motion practice, 5) trial scheduling and procedures, and 6) professionalism and sanctions. Nearly all of the Rule 1 Task Force's recommendations were approved by the Bench-Bar Committee, and then by the court.

As a result of the Rule 1 Task Force's recommendations, the court revised its four principal civil case management forms: 1) the Initial Order Regarding Planning and Scheduling, 2) the Rule 26(f) Report of Parties' Planning Conference, 3) the Scheduling Order, and 4) the Pre-trial Order. The court also revised its Guidelines for Cases Involving Electronically Stored Information and its Guidelines for Agreed Protective Orders, along with a corresponding pre-approved form order, and developed new guidelines for summary judgment. The court has also adopted corresponding amendments to its local rules.

I am not aware of any studies that have been completed regarding these changes, but the form orders contain many best practices and helpful suggestions. In addition to standard case management orders, the district has adopted helpful ESI guidelines and a form protective order.

E. Thoughts.

1. Arizona and Utah seem to have had success requiring greater disclosures at the outset of the case. We should consider that as part of a potential pilot program.

2. The Utah model for tiering cases, limiting the discovery in each tier, and limiting the time for discovery in each tier, is intriguing. It may be responsible for the reduced disposition time found in the NCSC survey. We have heard that assigning cases to tiers based solely on the amount in controversy could be problematic in federal court.

3. I find the Utah limit on total deposition hours very appealing. It creates the right incentive for lawyers – to conclude each deposition as efficiently as possible. I have used it in several cases and have received positive feedback. Such limits could be included in any pilot that involved tiering.

4. Mandatory arbitration of cases worth $50,000 or less seems to be working well in Utah and Oregon. The statistics in Arizona suggest that it is quite successful in removing a large number of cases from the trial court and resolving them quickly. It is not clear how many federal court cases would fall in this damages range (no diversity cases would). Could we get away with setting the number higher in a pilot – say $100,000?

5. The severe limitations placed on expert discovery in Oregon is another interesting idea, but it likely would be viewed as directly contrary to Rule 26(a)(2). I also suspect it is something unique to the Oregon culture (which the IAALS survey found quite different than other states) and would not be received well in federal court.

6. If we end up putting together a package of proposed orders or forms for pilot projects, we should look at Kansas's.

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EX. D

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MEMORANDUM

To: Judge Neil M. Gorsuch

From: Stefan Hasselblad

Date: September 24, 2015

Re: Summary of Materials Concerning Simplified Federal Procedures

This memorandum briefly summarizes three reports and two law review articles that discuss the past, present, and future of efforts to reform the federal rules to create simplified procedures for less complex cases.

* * *

I. The Federal Simplified Procedure Project: A History, Institute for the Advancement of the American Legal System, 2009.

In 1999, Judge Niemeyer proposed that the Advisory Committee on Civil Rules develop a set of simplified procedural rules applicable to simple federal cases. This proposal stemmed from a concern that the current federal rules provided too much procedure for smaller cases, which raises costs and effectively bars access to courts for many litigants.

In response, the Advisory Committee initiated the Simplified Procedure Project, which aimed at developing procedures that would shift emphasis away from discovery, and toward disclosure and pleading in an effort to ensure prompt trials. As the Committee began its work, it discussed a number of possible options and difficulties: the interaction between simplified rules and federal diversity requirements, the possibility of capping damages, the possibility of simple majority jury verdicts, and whether simplified procedures could draw litigants from state to federal courts, thereby increasing federal case loads.

The Simplified Procedure Project met nine times between 1999 and 2001. The project's discussions were guided by a set of draft rules provided by Professor Edward H. Cooper, discussed below and later published in a law review article. During the project's two years of activity, some committee members

raised significant reservations about the possibility of capping damages, interference with ADR, and unintentionally creating a "cheap and inferior set of rules" for small claims. In 2001, the Advisory Committee found that the project lacked direction because of difficulty identifying the cases appropriate for application of the simplified rules. The project was then held in abeyance. Over the next seven years the project was occasionally mentioned in Committee minutes, but no further progress was made.

Professor Cooper wrote the draft rules that guided the committee's discussions. He later published these rules in a 2002 law review article. Edward H. Cooper, *Simplified Rules of Federal Procedure?*, 100 MICH. L. REV. 1794 (2002). The rationale behind Professor Cooper's simplified rules is that "current reliance on notice pleading and searching discovery puts too much weight on time-consuming and expensive discovery." *Id.* at 1796. The following is an overview of these simplified rules.

- The simplified rules are to be construed and administered to secure the just, speedy, and economical determination of simplified actions. Furthermore, discovery should be limited, and the costs of litigation should be proportional to the stakes.

- The simplified rules apply to all cases where the amount in controversy is less than $50,000, and may be applied voluntarily when the amount in controversy is between $50,000 and $250,000.

- The simplified rules provide for fact pleadings no longer than 20 pages. To the extent practicable, claims and answers must state details of the time, place, participants, and events involved in the claim. Furthermore, any documents relied on must be attached to the pleadings. This approach is designed to encourage careful preparation before litigation and limit costs for small claims. The rules also make clear that fact pleading should still be construed in the same spirit of liberality as notice pleading.

- The rules provide for a demand judgment procedure for plaintiffs, in which they may submit a demand asserting a contract claim for a sum certain. The demand must include any writings or sworn statements that establish the obligations owed under the contract. Sworn responses to demands for judgment, or admission of the amount due, must be submitted in the answer. Then, the clerk of the court is required to enter judgment for any amounts admitted due.

- Federal Rule 12 applies to simplified procedure cases, but the time frame for filing motions is limited. Motions to dismiss based on 12(b)(2)-(5) and (7) may be made in the answer or in a motion filed no later than 10 days after the answer.

- The simplified rules combine Rule 12(b)(6) and Rule 56 motions into a single motion filed no later than 30 days after an answer or reply. This reduces delay while preserving the functions of both rules.

- The simplified rules favor enhanced disclosure in an effort to make the pre-trial process more efficient. Both parties must disclose 1) the names and phone numbers of any person likely to have relevant information, 2) the source of information in any pleadings, 3) a sworn statement of known facts, and 4) any documents or tangible items known to be relevant to the facts disputed. Disclosure is based on information reasonably available to the parties and is not excused because either party has not completed an investigation or because a party believes an opponent has not provided sufficient disclosure.

- While pleading and disclosure requirements are expanded under the rules, discovery is limited. An FRCP 26(f) conference is available, but no discovery requests are available until after the conference. Even then, requests for production of documents and tangible things must specifically identify the things requested. Parties are limited to three depositions of three hours each.

- Expert witnesses are discouraged. The court should evaluate the issues and stakes of the claim to determine if party experts should be allowed.

- The simplified rules provide an early and firm trial date six months from the filing date in most cases. The rules specifically preclude consideration of a party's failure to complete investigations, disclosure, or discovery as a rationale for delaying trial.

II. Reforming Our Civil Justice System: A Report on Progress and Promise, The American College of Trial Lawyers Task Force on Discovery and Civil Justice & The Institute for the Advancement of the American Legal System, 2015.

The report presents 24 principles that aim to both reform civil rules and improve legal culture in a way that leads to full, fair, and rational resolution of disputes.

There are two "fundamental principles" for civil justice reform. The first principle makes FRCP 1 applicable to lawyers (in addition to parties and judges) in an effort to encourage lawyers to "secure the just, speedy, and inexpensive determination of every action." The second principle states that the "one size fits all approach" to current state and federal rules should be abandoned in favor of a flexible approach that applies different rules to different types of cases.

The report presents nine principles relating to case management. The first two of these principles relate to case management conferences. The report urges an initial, robust case management conference that informs the court about the issues (allowing judges to better plan case management), narrows the issues, and rationally limits discovery. These early conferences should discuss such topics as limits on discovery, financial limitations of the parties, a trial date, dispositive motions, preservation of electronic information, and the importance of cooperation and collegiality.

The report recommends engagement between the court and parties early in litigation. First, the court should set an early and firm trial date to encourage parties to work more efficiently and narrow the issues. Second, counsel should be required to confer and communicate early and often. Studies have shown that this reduces discovery and client costs. Third, all issues to be tried should be identified early so as to limit discovery.

The final case management principles deal with the general process of litigation. First, courts should have discretion to order mediation or other alternative dispute resolution unless *all* parties agree otherwise. Second, the court should rule promptly on motions, and prioritize motions that will advance the case more quickly. Third, judges should be more involved throughout the litigation process, which will likely require more judicial resources. Fourth, judges should be trained on managing trials and trial practice.

The report provides a single pleading principle: "[p]leadings should

concisely set out all material facts that are known to the pleading party to establish the pleading party's claims or defenses." Parties may plead facts on "information and belief" if they cannot obtain information necessary to support a claim, but they must still submit the basis for their belief. The report argues that more specific pleadings would enable courts to make proportionality determinations and allow parties to better target discovery.

The report's eleven principles on discovery begin by stating that proportionality should be the most important principle of discovery. Currently, discovery is crippling the legal system by creating inefficiency and undue expense. The first step is for courts to supervise an agreement to proportional discovery between the parties. Second, parties must recognize that all facts are not necessarily subject to discovery. This agreement should appropriately limit parties' expectations as they enter discovery.

The principles also call for parties to produce all known and reasonably available documents and tangible things that support or contradict specifically pleaded factual allegations. This principle is broader than the federal rules because it requires *production* rather than merely description. The next principle provides that, in general, discovery should be limited to documents or information that would enable a party to prove or disprove a claim or defense or enable a party to impeach a witness. In addition, parties should be required to disclose trial witnesses early in litigation.

After initial production, only limited discovery subject to proportionality should be allowed. And, once that discovery is complete, further discovery should be barred absent a court order granted only with a showing of good cause and proportionality. This would create more active judicial supervision of the discovery process, while reducing discovery in conjunction with increased disclosure. Finally, in some cases, courts should stay discovery and disclosure until after a motion to dismiss is decided. This procedure would ensure discovery is used to prove a claim, rather than to determine whether a valid claim exists.

Early in litigation, parties should meet and agree on procedures for preservation of electronically stored information (ESI). All parties should be responsible for reasonable efforts to protect ESI that may be relevant to claims, but all parties must also understand that it is unreasonable to expect other parties to take every conceivable step to preserve all potentially relevant ESI. Furthermore, the same principle of proportionality that controls discovery generally should apply to ESI specifically. To make ESI discovery more efficient, attorneys and judges should be trained on principles of ESI technology.

Finally, there should be only one expert per issue per party. Experts should furnish a written report setting forth their opinion, the basis for that opinion, a CV, a list of cases in which they have testified, and the materials they have reviewed. This final principle will limit the "battle of the experts" and reduce the cost of expert testimony.

III. Summary of Streamlined Pathway Efforts, Conference of Chief Justices, Civil Justice Improvements Committee, Rules/Litigation Subcommittee, 2015.

The Civil Justice Improvements Committee anticipates that in making recommendations for improving the civil justice system it will address three different paths for civil cases: the streamlined pathway, the general pathway, and the highly-managed pathway. Defining different approaches for different paths recognizes the modern reality that one size does not fit all.

In the streamlined pathway are cases with a limited number of parties, simple issues relating to liability and damages, few or no pretrial motions, few witnesses, and minimal documentary evidence. Case types that could be presumptively assigned to the streamlined pathway include:

- automobile, intentional, and premises liability torts
- insurance coverage claims arising out of such torts
- cases where a buyer or seller is a plaintiff
- consumer debt
- appeals from small claims decisions

The subcommittee is undertaking a draft of procedural rules for the streamlined pathway. Key features of rules applied to the streamlined pathway may include:

- a focus on case attributes rather than dollar value
- presumptive mandatory inclusion for cases identified by streamlined-pathway attributes
- mandatory disclosures
- truncated discovery
- simplified motion practice
- an easy standard for removal from the pathway
- conventional fact finding
- no displacement of existing procedural rules consistent with streamlined pathway rules
- an early and firm trial date

IV. Edward H. Cooper, *Simplified Rules of Federal Procedure?*, 100 MICH. L. REV. 1794 (2002).

The Federal Rules rightly provide for open-ended rules that call for wise discretion. However, there is reason to believe our litigation system does not sufficiently prevent inept misuse and deliberate strategic over-use of the rules. The draft rules in this article provide for more detailed pleading, enhanced disclosure obligations, restricted discovery opportunities, reduced motion practice, and an early and firm trial date. The purpose of these simplified rules is not to establish second-class procedures for second-class litigation, but rather to enable access to justice by creating more efficient and more affordable procedures without the unnecessary complexity of rules designed for high-stakes, multi-party litigation.

There are some potential problems with these rules. For one, it is unclear if they could be adopted as a local experiment because Civil Rule 83 only authorizes the adoption of national rules. Second, these simplified rules assume knowledge of the Federal Rules of Civil Procedure. This made drafting the rules easier, but it would make it more difficult for a *pro se* party to litigate. A self-contained, short, and clearly stated set of rules might be a better approach.

As for the rules themselves, Rule 102 states that the simplified rules apply in actions where the plaintiff seeks monetary relief less than $50,000, where the plaintiff seeks monetary relief between $50,000 and $250,000 and the defendants do not object, and where all parties consent. This rule is tentative and is included in part to illustrate the difficulty of defining the cases appropriate for simplified procedural rules. Other approaches are also possible. For example, consent of all parties could always be required, or the power to determine when to use simplified procedures could be left to the discretion of the district court.

Fact-based pleading is at the heart of the simplified rules. Rule 103 requires that a claim state, to the extent reasonably practicable, the details of time, place, participants, and events involved in the claim. Furthermore, pleaders must attach each document the pleader may use to support the claim. Answers require the same. And avoidances and affirmative defenses must be specifically identified in a pleading. These provisions should enhance parties' ability to litigate small claims effectively and efficiently. It is important to note, however, that fact-pleading should not be approached in a spirit of technicality. The spirit that has characterized notice pleading should animate Rule 103 fact pleading. What is expected is a clear statement in the detail that might be provided in proposed findings of fact. One question that remains to be answered is the

applicability of Rule 15's amendment procedures. Allowing amendments might lead to delay and strategic misuse, but *pro se* plaintiffs in simple cases may need to use good-faith amendments even more than typical litigants.

Rule 104 provides for a demand for judgment in which a party may attach a demand to a pleading that asserts a contract claim for a sum certain. The demand must be supported by a writing and sworn statements that evidence the obligation and the amount due. A defendant must admit the amount due or file a response. If the defendant admits an amount due, a court clerk may enter judgment. Essentially, Rule 104 creates a plaintiffs' motion for summary judgment. This rule is necessary because a substantial number of actions in federal court are brought to collect small sums due on contracts or unpaid loans.

Rule 104A limits motions practice. A motion to dismiss under the defenses of Rule 12(b)(2)-(5) and (7) may be made in an answer or within 10 days of an answer. The time periods to answer provided under Rule 12(a)(1)-(3) cannot be suspended by motion. And, a party seeking relief under Rule 56, 12(b)(6), 12(c), or 12(f) must combine that relief in a single motion filed no later than 30 days after the answer or reply. These rules are meant to prevent the strategic delays often created by protracted motion practice.

Rule 105's disclosure requirements are designed to reduce discovery. No later than 20 days after the last pleading, a plaintiff must provide 1) the name and telephone number of any person likely to have discoverable information relevant to the facts disputed in the pleadings, 2) sworn statements with any discoverable information known to the plaintiff or a person reasonably available, 3) a copy of all reasonably accessible documents and tangible things known to be relevant, and 4) damages computations and insurance information. 20 days later, other parties must make a corresponding disclosure. Such disclosures cannot be excused because a party has not fully completed an investigation, challenges another party's disclosure, or has not been provided another party's disclosure.

Of course, with heightened disclosure comes more limited discovery. Under Rule 106, a discovery request may only be made with the stipulation of all parties or in a Rule 26(f) conference. And a conference must be held only if requested in writing. Parties are limited to three depositions of three hours each, and 10 interrogatories. Finally, Rule 34 discovery requests must specifically identify the items requested.

Rule 108 provides that a court should first consider the issues, the amount in controversy, and the resources of the parties, and only then determine whether

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to allow expert testimony. This rule is meant to reduce the risk that a better-resourced party will introduce expert testimony merely to increase the costs of litigating.

Finally, the draft rules provide for setting a trial date six months from the initial filing. This trial date should not be extended on the basis that discovery is incomplete or an action is too complex. There may be problems with this proposal. For example, it seems to give docket priority to cases that courts typically consider low-priority.

V. Paul V. Niemeyer, *Is Now the Time for Simplified Rules of Civil Procedure?*, 46 U. MICH. J.L. REFORM 673 (2013).

The current federal civil process is inadequate for the purpose of discharging justice speedily and inexpensively. It takes three years and hundreds of thousands of dollars to try a medium-sized commercial dispute. Meanwhile, the private bar is fleeing from courts to alternative dispute resolution systems.

Although well-intentioned, the 1938 transition from fact pleading to notice pleading is part of the problem. The reformers of 1938 sought to avoid procedural maneuvering in the pleading stage that often proved too complex for the common lawyer, effectively denying litigants access to courts. The reformers' solution was notice pleading and liberal discovery rules. This reassigned resolution of procedural battles from court-supervised pleading to attorney-controlled discovery. Then, reforms in 1946, 1963, 1966, and 1970 further liberalized pleading and discovery rules. The process grew increasingly expensive, complicated, and time-consuming.

In the late 1970s, the tides shifted and courts and reformers began to attempt to limit discovery practice. In 1993, the Civil Justice Reform Act required federal districts to conduct self-study and develop a civil case management plan to reduce costs and delays. In addition, the Act called for evaluation of these plans to identify best practices. That evaluation came to three conclusions. First, early court intervention in the management of cases reduced delay, but increased litigant costs. Second, setting a firm trial date early was the most effective tool of case management – reducing delay without producing more costs. Finally, reducing the length of discovery reduced both costs and delays without adversely affecting attorney satisfaction.

In 2000, the Rules Committee and Supreme Court made several small but

beneficial changes. First, they limited discovery to any matter related to a "claim or defense of a party," rather than any matter related to a "subject matter involved in the pending action." Under the new rules, parties could still seek broader discovery, but they would need a court order that required a showing of good cause. This amendment was designed to allow courts to better supervise discovery. Second, the Rules Committee expanded mandatory disclosure and reduced interrogatories and depositions. After these reforms, Supreme Court cases in the 2000s heightened pleading standards, requiring that a complaint allege enough factual matter to state a plausible claim for relief.

It is within this context that the Civil Rules Committee chaired by Judge Niemeyer sought to draft rules that would further reduce costs and delays. From 1999 to 2000, the Rules Committee discussed a number of reform proposals but did not begin detailed debate before Judge Niemeyer's term expired. However, the Committee's reporter, Professor Edward Cooper, drafted a set of proposed simplified rules that should be the starting point for further reforms.

Professor Cooper's proposed rules would apply to all small money-damage actions and parties could choose to apply them to larger money-damage actions. These draft rules incorporated five basic elements that address known problems of costs and delay in the federal civil process. First, the rules required more detailed pleadings, enabling an early look at the merits of a case. Second, the rules would enhance early disclosures, which would have to be made within twenty days of the filing of the last pleading. Third, the draft rules restrict discovery, authorizing only three depositions and ten interrogatories. Fourth, the draft rules would reduce the burden of motions practice, combining all motions to dismiss into a single motion that must be filed early in the proceedings. Finally, the draft requires an early and strict trial date scheduled six months from the filing.

Professor Cooper's draft rules are a good basis for further reform, but there are three other ideas worthy of consideration. First, simplified rules should be applied to a wider range of cases by making them available for all damage actions, and mandatory for a larger segment of damage actions. Second, it may be wise to include incentives to encourage plaintiffs' and defendants' attorneys to use simplified rules in damage actions, as some attorneys may initially shy away from the simplified track. Third, practice under Rule 56 may need to be trimmed down, as summary judgment is now often an expensive mini-trial within the pretrial phase, creating disproportionate costs and delays.

EX. E

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To: Rebecca Womeldorf

Cc: Simplified Procedures Pilot Project Subcommittee

From: Amelia Yowell, Supreme Court Fellow

Date: October 15, 2015

RE: CACM report on the CJRA pilot program

The Civil Justice Reform Act of 1990 (CJRA) outlined a series of case management principles, guidelines, and techniques to reduce cost and delay in civil litigation. To test these procedures, Congress established a pilot program in ten districts. Congress directed the Judicial Conference to commission an independent evaluation of the program,[1] study the results, and assess whether other districts should be required to implement the same case management principles. Report at 11. I've provided a brief summary of the Judicial Conference's May 1997 final report below,[2] with an emphasis on the topics that overlap with those discussed at the pilot project subcommittee's conference call on Friday, October 9, 2015.

The CJRA Pilot Program

The pilot program consisted of twenty district courts. Report at 14–15. To obtain representative results, the Judicial Conference did not allow districts to volunteer. *Id.* at 15. Instead, the Judicial Conference chose districts based on their "size, the complexity and size of their caseloads, the status of their dockets and their locations." *Id.* At least five districts were located in a metropolitan area. *Id.* Ten of the districts were "pilot districts,"[3] which were required to implement the following principles:

- Differentiated Case Management, where cases are sorted into expedited, standard, and complex tracks that have a specific set of procedures and time lines;

- Early and ongoing control of the pretrial process, including setting early dispositive motion and trial dates and controlling the extent of discovery;

[1] The RAND Corporation conducted the independent evaluation. Report at 15.

[2] The Judicial Conference delegated oversight responsibility to the Court Administration and Case Management Committee (CACM). Report at 12–13.

[3] The ten pilot courts were: the Southern District of California, the District of Delaware, the Northern District of Georgia, the Southern District of New York, the Western District of Oklahoma, the Eastern District of Pennsylvania, the Western District of Tennessee, the Southern District of Texas, the District of Utah, and the Eastern District of Wisconsin. Report at 15 n.5.

- "Careful and deliberate monitoring" of complex cases, including bifurcation of issues, early trial dates, a defined discovery schedule, and encouragement to settle;

- Encouraging voluntary exchange of information and the use of cooperative discovery techniques;

- Prohibiting the consideration of discovery motions, unless accompanied by a good faith certification; and

- Encouraging alternative dispute resolution programs

Id. at 15, 26–38. The Judicial Conference also asked the pilot districts to implement the following litigation management techniques:

- Requiring the submission of joint discovery plans;

- Requiring a representative with the power to bind the parties to be present at all pre-trial conferences;

- Requiring all requests for extensions of discovery deadlines or trial postponements to be signed by an attorney and the party;

- Implementing a neutral evaluation program to hold a nonbinding ADR-like conference early in the litigation; and

- Requiring a representative with the power to bind the parties to be present at all settlement conferences

Id. at 15, 39–44.

These pilot districts were compared with ten "comparison districts,"[4] which were not required to implement the above principles or techniques. *Id.* at 15. In total, the RAND Study compared over 12,000 cases in the pilot and comparison courts, as well as case cost and delay data from before and after implementation of the CJRA. *Id.* The Study also collected data from

[4] The ten comparison courts were: the District of Arizona, the Central District of California, the Northern District of Florida, the Northern District of Illinois, the Northern District of Indiana, the Eastern District of Kentucky, the Western District of Kentucky, the District of Maryland, the Eastern District of New York, and the Middle District of Pennsylvania. Report at 15 n.6.

five other districts,[5] which implemented "demonstration programs to test systems of differentiated case management and alternative dispute resolution." *Id.* at 9.

The Judicial Conference's Assessment and Recommendation

After review, the Judicial Conference cautioned against implementation of the pilot program nationwide, at least "as a total package." *Id.* at 2, 15. The Conference based its recommendation on the RAND Study's finding that the pilot project, as a whole, did not have a great impact on reducing cost and delay.[6] *Id.* at 26. Assessing these results, the Conference noted that "there is a need for individualized attention to each case that a 'one size fits all' approach cannot satisfy."[7] *Id.* at 46.

The RAND Study outlined six procedures that likely were effective in reducing cost and delay: (1) establishing early judicial case management; (2) setting the trial schedule early; (3) establishing shortened discovery cutoff; (4) reporting the status of each judge's docket; (5) conducting scheduling and discovery conferences by phone; and (6) implementing the advisory group process. *Id.* at 15–16.

Notably, the RAND Study did not address several important questions: (1) the possible differential impact of procedural reforms on small law firms, solo practitioners, and those serving under contingency fee arrangements; (2) the impact of front-loading litigation costs under accelerated case management programs; and (3) the effects of the procedural reforms on particular case disposition types. *Id*. at 45–46. In particular, the Study noted that "[r]eforms that actually increase costs for small and solo practitioners may frustrate the aims of the Act by lessening access to justice for low-income litigants or those with small claims." *Id.* at 46.

The following chart summarizes the relevant parts of the CJRA Pilot Program, the RAND Study's findings, and the Judicial Conference's resulting recommendation.

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[5] The Western District of Michigan and the Northern District of Ohio experimented with systems of differentiated case management while the Northern District of California, the Western District of Missouri, and the Northern District of West Virginia experimented with various methods of reducing cost and delay, including ADR. Report at 16–17.

[6] One reason for this may be that the judiciary had already adopted many of the CJRA's case management procedures. Report at 26.

[7] The RAND Study reported that "reduction of litigation costs is largely beyond the reach of court-established procedures because: (a) most litigation costs are driven by the impact of attorney perceptions on how they manage their cases, rather than case management requirements; and (b) case management accounts for only half of the observed reductions in 'time to disposition.'" Report at 46.

Tested Procedure	Findings	Recommendation
Differentiated case management using a "track" system Report at 26–28	· The districts sorted cases into expedited, standard, and complex tracks. · The districts employed a variety of identification methods; many courts used an automatic track assignment process based on subject matter outlined in the initial pleadings. · Districts encountered significant difficulties classifying cases at the pleading stage, especially when identifying and evaluating complex cases. Because of this difficulty, most districts placed the vast majority of cases in the "standard" track. · Many districts found that a judge's ability to tailor the management of each particular case was more effective than rigid case tracks.	· Some form of differentiated case management should be used. · However, track systems "can be bureaucratic, unwieldy, and difficult to implement." · Therefore, individual districts should determine on a local basis whether the nature of the caseload calls for a more rigid track model or a judicial discretion model.
Early judicial case management Report at 19, 29–31	· Early judicial case management included "any schedule, conference, status report, joint plan, or referral to ADR that occurred within 180 days of case filing. · Early case management alone significantly reduced time to disposition (by up to two months), but significantly increased lawyer work hours. · If early judicial intervention was combined with shortened discovery (from 180 days to 120 days), then lawyer work hours (and therefore cost) decreased.	· Courts should follow Rule 16(b), which requires entry of a scheduling order within 120 days and encourages setting an early and firm trial date as well as a shorter discovery period. · The Conference was "opposed to the establishment of a uniform time-frame, such as eighteen months, within which all trials must begin," mainly because a standard time line would slow down cases that could be resolved more quickly.

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Early voluntary exchange of information and use of cooperative discovery techniques Report at 33–	· All pilot and comparison courts instituted some form of voluntary or mandatory early exchange of information. · It was difficult to analyze the effects of voluntary disclosure versus mandatory discovery. · Discovery deadlines were a major factor in decreasing the cost and length of litigation.	· The Judicial Conference did not find enough information in the RAND Study to make a specific recommendation about voluntary versus mandatory initial disclosures · The Committee on Rules of Practice and Procedure should re-examine the need for national uniformity in applying Rule 26(a).

Based on these results and recommendations, the Judicial Conference proposed the following alternative cost and delay procedures:

- Continued and increased use of district court advisory groups, composed of attorneys and other litigant representatives;
- Public reporting of court dockets;
- Setting early, firm trial dates and shorter discovery periods in complex cases;
- Effective use of magistrate judges;
- Increased use of chief judges in case management;
- Increased use of visiting judges to help with backlogged dockets;
- Educating judges and lawyers about case management, especially considering the RAND Study's finding that one of the primary drivers of litigation costs is attorney perception of case complexity; and
- Increased use of technology

Id. at 18–26.

The Judicial Conference also made several recommendations that required the action of Congress or the Executive branch. For example, the Conference pointed out that "a high number of judicial vacancies, and the delay in filling these vacancies, contribute substantially to cost and

delay." Report at 22. The Conference also noted that a court's ability to try cases in a timely manner depended on available courtrooms and facilities. *Id.* at 25.

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Report on Pilot Project Regarding Initial Discovery Protocols for Employment Cases Alleging Adverse Action

Emery G. Lee III & Jason A. Cantone
Federal Judicial Center

October 2015

Executive Summary

In November 2011, a task force of plaintiff and defendant attorneys, working in cooperation with the Institute for the Advancement of the American Legal System ("IAALS"), released a pattern discovery protocol for adverse action employment cases. The task force intended for this protocol to serve as the foundation for a pilot project examining whether it reduced costs or delays in this subset of cases. About 75 federal judges nationwide have adopted the protocols; in some districts, multiple judges have been using them.

The Judicial Conference Advisory Committee on Civil Rules asked the Federal Judicial Center ("FJC") to report on the pilot. FJC researchers identified almost 500 terminated cases that had been included in the pilot since late 2011 ("pilot cases"). For purposes of comparison, the researchers created a random sample of terminated employment discrimination cases from approximately the same filing cohorts ("control cases"). Information was collected on case processing times, case outcomes, and motions activity in the pilot and control cases. The key findings summarized in this report:

- There was no statistically significant difference in case processing times for pilot cases compared to control cases.
- There was generally less motions activity in pilot cases than in the control cases.
- The average number of discovery motions filed in pilot cases was about half the average number filed in control cases.
- Both motions to dismiss and motions for summary judgment were less likely to be filed in pilot cases.
- Although the nature of private settlements makes it difficult to determine conclusively, it appears that pilot cases were more likely to settle than control cases. On average, however, the pilot cases did not settle faster than the control cases.

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Background

In May 2010, the Judicial Conference Advisory Committee on Civil Rules ("Committee") sponsored a major Civil Litigation Review Conference at Duke University School of Law ("the Duke conference"). The Duke conference was motivated by the perception that cost and delay in civil litigation required a reevaluation of the Federal Rules of Civil Procedure. One idea to arise from the conference was that pattern discovery in certain types of civil cases could streamline the discovery process and reduce delays and costs.

A committee of plaintiff and defendant attorneys highly experienced in employment matters began meeting to debate and finalize the details of what became the Pilot Project Regarding Initial Discovery Protocols for Employment Cases Alleging Adverse Action ("protocols"). Joseph Garrison chaired the plaintiffs' subcommittee and Chris Kitchel chaired the defendants' subcommittee. District Judge John G. Koeltl (Southern District of New York) and the Institute for the Advancement of the American Legal System ("IAALS") and its director, Rebecca Love Kourlis, facilitated these meetings. At the time, Judge Koeltl chaired the civil rules subcommittee charged with following up on proposals made at the Duke conference. The protocols were formalized in November 2011 and posted, along with a standing order and model protective order, to the FJC public website (www.fjc.gov). Judges were encouraged to adopt the protocols for use in a subset of adverse action employment discrimination cases. As of this writing, about 75 judges nationwide have participated in the pilot project. In some districts, including the District of Connecticut, several judges participate.

The introduction to the protocols identifies the pilot's purposes in the following way:

> The Protocols create a new category of information exchange, replacing initial disclosures with initial discovery specific to employment cases alleging adverse action. This discovery is provided automatically by both sides within 30 days of the defendant's responsive pleading or motion. While the parties' subsequent right to discovery under the F.R.C.P. is not affected, the amount and type of information initially exchanged ought to focus the disputed issues, streamline the discovery process, and minimize opportunities for gamesmanship. The Protocols are accompanied by a standing order for their implementation by individual judges in the pilot project, as well as a model protective order that the attorneys and the judge can use a basis for discussion.

In spring 2015, FJC researchers searched court electronic records to identify cases that participating judges had included in the pilot. This search used key words likely to be found on

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the dockets of pilot cases, with the language largely drawn from the standing order made available as part of the protocols.

The searches resulted in a sample of 477 pilot cases, which was determined to be adequate for analysis. Pilot cases were identified in 10 districts (Arizona, California Northern, Connecticut, Illinois Northern, New York Eastern, New York Southern, Ohio Northern, Pennsylvania Eastern, and Texas Southern). Not all districts are represented evenly in the terminated pilot cases. More than half (55%) were in Connecticut, and almost another quarter were in New York Southern (22%). The finding that more than three-quarters of pilot cases came from only two of the districts could reflect differing docketing practices, the number of judges employing the protocols, and/or the number of eligible cases in the various districts.

A nationwide random sample of terminated employment discrimination cases (nature of suit = 442), filed in 2011 or later, was drawn for a control sample. The control sample included 672 terminated cases alleging employment discrimination.

Findings

Disposition Times. The mean disposition time for pilot cases (N=477) was 312 days, with a median of 275 days. The mean disposition time for control cases (N=672) was 328 days, with a median of 286 days. These miniscule differences in disposition times, although in the expected direction, are not statistically significant (p = .241).

Case Outcomes. The most common case outcome for pilot cases (N=477) was settlement, observed in 51% of cases. The second-most common outcome for pilot cases was voluntary dismissal, observed in 27% of cases. Many, if not most, voluntary (stipulated, in most cases) dismissals are probably settlements, but for this project a case was only coded as settled if there was some positive indication on the docket or in the stipulation that a settlement had been reached. If every voluntary dismissal is presumed to be a settlement, adding that number to the number of settlements provides a maximum estimate of 78% cases settling.

Pilot cases were dismissed on a Rule 12 motion 7% of the time, and resolved by summary judgment 7% of the time. Three pilot cases (< 1%) were resolved by trial. Seven percent of the pilot cases were resolved some other way (including dismissals for want of prosecution and for failure to exhaust administrative remedies).

The most common case outcome for control cases (N=672) was voluntary dismissal, observed in 35% of the cases. Settlement was the second-most common outcome, at 30%. The maximum, combined estimate for the settlement rate in the control cases is around 65%. The lower settlement rate for control cases corresponds with these cases being much more likely to be dismissed on a Rule 12 motion (13%) or resolved through summary judgment (12%). These two outcomes account for fully a quarter of dispositions in control cases, but only about an eighth of dispositions in pilot cases. Ten control cases (2%) were resolved by trial. Eight percent of the control cases were resolved in some other way.

Comparing the pilot cases and control cases that were either settled or voluntarily dismissed, the pilot cases did not reach settlement earlier. The pilot and control cases have essentially the same mean disposition time (just under 300 days).

Motions Practice. Fewer discovery motions were filed in the pilot cases than in the control cases. This analysis is limited to motions for protective orders and motions to compel discovery, including motions to compel initial disclosures required under the pilot. One or more discovery motions were filed in 21% of the control cases, compared to only 12% of pilot cases. The difference of means for the number of discovery motions filed between pilot and control cases is statistically significant ($p < .001$).

Cases with more than two discovery motions were quite rare. Three or more discovery motions were observed in about 1% of pilot cases and 2% of control cases.

Motions to dismiss were filed in 24% of the pilot cases and in 31% of the control cases. Motions for summary judgment were filed in 11% of pilot cases and in 24% of control cases. The court decided 71% of the motions to dismiss in the pilot cases and 87% of the motions to dismiss in the control cases.

Discussion

Some of the findings summarized above are consistent with the hypothesis that the pattern discovery required under the pilot was effective in reducing discovery disputes and perhaps reducing costs—assuming, that is, that less motions practice is associated with lower costs overall. Costs are difficult to measure directly. The findings are also consistent with the hypothesis that the pilot cases were more likely to result in settlement, although not necessarily

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an earlier settlement. Indeed, the findings indicate that case processing times were very similar for the pilot and control cases overall and for settlement cases. The pilot does not, in short, appear to have an appreciable effect on reducing delay.

Two caveats are in order, however. First, while the initial disclosures required by the pilot were docketed in some cases, this does not appear to be standard practice. Thus, it is impossible to determine how often the parties in the pilot cases actually complied with the discovery protocols and exchanged the required initial disclosures. In fact, in some cases, it was relatively clear that the parties delayed the exchange while engaging in settlement efforts. Second, this report makes no claim that the *only* factor differing between the pilot and control cases was the pattern discovery in the former. Cases were not randomly assigned to be pilot or control cases. Individual judges' practices vary and judges inclined to adopt new discovery procedures may vary in some systematic fashion from judges who decline to do so. Individual districts' local rules and procedures also vary. Some districts in the study appear to commit more resources to mediating employment disputes than others, which may explain some of the variation in settlement rates. Thus, some caution is warranted before concluding that the pilot program caused the above described differences between the pilot and control cases.

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Appendix 1: Control cases

This section summarizes the results of a study of a random, nationwide sample of terminated employment discrimination cases (Nature of suit 442) filed after January 1, 2011 (N=672). Because of the focus on terminated cases, cases filed in 2011-2013 comprise the bulk of the sample; only about 11% of the sample cases were filed in 2014 or 2015.

Disposition times by case outcomes. The median time to disposition for all control cases was 286 days (9.4 months). The mean time to disposition was 328 days (10.8 months). Leaving aside "other" outcomes, voluntary dismissals had the shortest median disposition time, 239 days (7.9 months), followed by dismissal on motion, 247 days (8.1 months), and settlement, 290 days (9.5 months). Not surprisingly, cases decided by summary judgment take much longer to resolve, median time to disposition, 504 days (16.6 months), and the small number of cases decided by trial had the longest disposition time of all, median 526 days (17.3 months).

Times to important case events. The median time from filing to the first scheduling order was 109 days (3.6 months). The median time from the first scheduling order to the discovery cut-off was 186 days (6.1 months). The median time from filing to the first discovery cut-off (in the first scheduling order, if any) was 299 days (9.8 months). The median time from filing to the filing of a motion to dismiss, if any, was 69 days (2.3 months). The median time from filing to the filing of a motion for summary judgment, if any, was 368 days (12.1 months).

Motions activity. About one in three cases had a motion to dismiss, and about one in four had a motion for summary judgment. Motions to dismiss were filed in 31% of the sampled cases, and motions for summary judgment were filed in 24%. More than one motion for summary judgment was filed in about 5% of the sample cases. Motions to compel were filed in 10% of the sampled cases, and motions for protective orders were filed in 18%. The latter figure includes stipulated protective orders.

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Appendix 2: Pilot cases

This section summarizes more detailed findings of the identified pilot cases (N=477).

Disposition times by case outcomes. The median time to disposition for all pilot cases was 275 days (9.1 months). Leaving aside "other" outcomes, dismissal on motion had the shortest median time to disposition, 236 days (7.8 months), followed by voluntary dismissals, 237 days (7.8 months), and settlement, 280 days (9.2 months). Again, cases decided by summary judgment take much longer to resolve, median time to disposition, 623 days (20.5 months), but the small number of cases decided by trial was shorter, median 459 days (15.1 months).

Times to important case events. The median time from filing to the first scheduling order was 109 days (3.6 months). The median time from the first scheduling order to the discovery cut-off was 168 days (5.5 months). The median time from filing to the first discovery cut-off (in the first scheduling order, if any) was 329 days (10.8 months). The median time from filing to the filing of a motion to dismiss, if any, was 75 days (2.5 months). The median time from filing to the filing of a motion for summary judgment, if any, was 368 days (12.1 months).

Motions activity. About one in four cases had a motion to dismiss, and about one in ten had a motion for summary judgment. Motions to dismiss were filed in 23% of the sampled cases, and motions for summary judgment were filed in 11%. More than one motion for summary judgment was filed in about 1% of the sample cases. Motions to compel were filed in 5% of the sampled cases, and motions for protective orders were filed in 9%. The latter figure includes stipulated protective orders.

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tions. The 1984 amendment to Rule 11 adequately accomplishes the purposes of Federal Rule 26(g).

The rejection of Federal Rule 26(g), and the concomitant loss of its language expressly requiring certification that the discovery request, response or objection is not unreasonable or unduly burdensome or expensive, is not intended to diminish the protection provided by Rule 26(c).

Rule 26(g). Discovery motions

No discovery motion will be considered or scheduled unless a separate statement of moving counsel is attached thereto certifying that, after personal consultation and good faith efforts to do so, counsel have been unable to satisfactorily resolve the matter.

Added and effective June 27, 2001.

Rule 26(h). Deleted. Effective Nov. 1, 1970

Rule 26.1. Prompt disclosure of information

(a) Duty to Disclose, Scope. Within the times set forth in subdivision (b), each party shall disclose in writing to every other party:

(1) The factual basis of the claim or defense. In the event of multiple claims or defenses, the factual basis for each claim or defense.

(2) The legal theory upon which each claim or defense is based including, where necessary for a reasonable understanding of the claim or defense, citations of pertinent legal or case authorities.

(3) The names, addresses, and telephone numbers of any witnesses whom the disclosing party expects to call at trial with a fair description of the substance of each witness' expected testimony.

(4) The names and addresses of all persons whom the party believes may have knowledge or information relevant to the events, transactions, or occurrences that gave rise to the action, and the nature of the knowledge or information each such individual is believed to possess.

(5) The names and addresses of all persons who have given statements, whether written or recorded, signed or unsigned, and the custodian of the copies of those statements.

(6) The name and address of each person whom the disclosing party expects to call as an expert witness at trial, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, the qualifications of the witness and the name and address of the custodian of copies of any reports prepared by the expert.

(7) A computation and the measure of damage alleged by the disclosing party and the documents or testimony on which such computation and measure are based and the names, addresses, and telephone numbers of all damage witnesses.

(8) The existence, location, custodian, and general description of any tangible evidence, relevant documents, or electronically stored information that the disclosing party plans to use at trial and relevant insurance agreements.

(9) A list of the documents or electronically stored information, or in the case of voluminous documentary information or electronically stored information, a list of the categories of documents or electronically stored information, known by a party to exist whether or not in the party's possession, custody or control and which that party believes may be relevant to the subject matter of the action, and those which appear reasonably calculated to lead to the discovery of admissible evidence, and the date(s) upon which those documents or electronically stored information will be made, or have been made, available for inspection, copying, testing or sampling. Unless good cause is stated for not doing so, a copy of the documents and electronically stored information listed shall be served with the disclosure. If production is not made, the name and address of the custodian of the documents and electronically stored information shall be indicated. A party who produces documents for inspection shall produce them as they are kept in the usual course of business.

Court Comment to 1991 Amendment

In March, 1990 the Supreme Court, in conjunction with the State Bar of Arizona, appointed the Special Bar Committee to Study Civil Litigation Abuse, Cost and Delay, which was specifically charged with the task of studying problems pertaining to abuse and delay in civil litigation and the cost of civil litigation.

Following extensive study, the Committee concluded that the American system of civil litigation was employing methods which were causing undue expense and delay and threatening to make the courts inaccessible to the average citizen. The Committee further concluded that certain adjustments in the system and the Arizona Rules of Civil Procedure were necessary to reduce expense, delay and abuse while preserving

the traditional jury trial system as a means of resolution of civil disputes.

In September, 1990 the Committee proposed a comprehensive set of rule revisions, designed to make the judicial system in Arizona more efficient, more expeditious, less expensive, and more accessible to the people. It was the goal of the Committee to provide a framework which would allow sufficient discovery of facts and information to avoid "litigation by ambush." At the same time, the Committee wished to promote greater professionalism among counsel, with the ultimate goal of increasing voluntary cooperation and exchange of information. The intent of the amendments was to limit the adversarial nature of proceedings to those areas where there is a true and legitimate dispute between the parties, and to preclude hostile, unprofessional, and unnecessarily adversarial conduct on the part of counsel. It was also the intent of the rules that the trial courts deal in a strong and forthright fashion with discovery abuse and discovery abusers.

After a period of public comment and experimental implementation in four divisions of the Superior Court in Maricopa County, the rule changes proposed by the Committee were promulgated by the Court on December 18, 1991, effective July 1, 1992.

Committee Comment to 1991 Amendment

This addition to the rules is intended to require cooperation between counsel in the handling of civil litigation. The Committee has endeavored to set forth those items of information and evidence which should be promptly disclosed early in the course of litigation in order to avoid unnecessary and protracted discovery as well as to encourage early evaluation, assessment and possible disposition of the litigation between the parties.

It is the intent of the Committee that there be a reasonable and fair disclosure of the items set forth in Rule 26.1 and that the disclosure of that information be reasonably prompt. The intent of the Committee is to have newly discovered information exchanged with reasonable promptness and to preclude those attorneys and parties who intentionally withhold such information from offering it later in the course of litigation.

The Committee originally considered including in Rule 26.1(a)(5) a requirement for disclosure of all cases in which an expert had testified within the prior five (5) years. The Committee recognized in its deliberations that information as to such cases might be important in certain types of litigation and not in others. On balance, it was decided that it would be burdensome to require this information in all cases.

Committee Comment to 1996 Amendment

Rule 26.1(a)(3). With regard to the degree of specificity required for disclosing witness testimony, it is the intent of the rule that parties must disclose the substance of the witness' expected testimony. The disclosure must fairly apprise the parties of the information and opinion known by that person. It is not sufficient to simply describe the subject matter upon which the witness will testify.

Rule 26.1(a)(5) was not intended to require automatic production of statements. Production of statements remains subject to the provisions of Rule 26(b)(3).

Rule 26.1(a)(6). A specially retained expert as described in Rule 26(b)(4)(B) is not required to be disclosed under Rule 26.1.

(b) Time for Disclosure; a Continuing Duty.

(1) The parties shall make the initial disclosure required by subdivision (a) as fully as then possible within forty (40) days after the filing of a responsive pleading to the Complaint, Counterclaim, Crossclaim or Third Party Complaint unless the parties otherwise agree, or the Court shortens or extends the time for good cause. If feasible, counsel shall meet to exchange disclosures; otherwise, the disclosures shall be served as provided by Rule 5. In domestic relations cases involving children whose custody is at issue, the parties shall make disclosure regarding custody issues no later than 30 days after mediation of the custody dispute by the conciliation court or a third party results in written notice acknowledging that mediation has failed to settle the issues, or at some other time set by court order.

(2) The duty prescribed in subdivision (a) shall be a continuing duty, and each party shall make additional or amended disclosures whenever new or different information is discovered or revealed. Such additional or amended disclosures shall be made seasonably, but in no event more than thirty (30) days after the information is revealed to or discovered by the disclosing party. A party seeking to use information which that party first disclosed later than sixty (60) days before trial shall seek leave of court to extend the time for disclosure as provided in Rule 37(c)(2) or (c)(3).

(3) All disclosures shall include information and data in the possession, custody and control of the parties as well as that which can be ascertained, learned or acquired by reasonable inquiry and investigation.

Committee Comment to 1991 Amendment

The Committee does not intend to affect in any way, any party's right to amend or move to amend or supplement pleadings as provided in Rule 15.

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INITIAL DISCLOSURE - DISCOVERY PILOT PROJECT RULE

Proposed Rule Sketch

The sketch set out below is proposed as a starting point in working toward a rule that might be tested to expand on the initial disclosure provisions in present Rule 26(a)(1). It is derived from Arizona Rule 26.1, but simplified in several ways. The reasons for this proposal follow.

(a) [*Version 1*: Within the times set forth in subdivision (b),[1] each party must disclose in writing to every other party:[2]] [*Version 2*: Before seeking discovery from any source, except in a proceeding listed in Rule 26(a)(1)(B), each party must answer these Rule 33 interrogatories {and Rule 34 requests to produce or permit entry and inspection}, providing:]

(1) (A) the factual basis of its claims or defenses;

(B) the legal theory upon which each claim or defense is based;

(C) a computation of each category of damages claimed by the disclosing party — who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of the injuries suffered;

(D) for inspection and copying as under Rule 34 any insurance [or other] agreement under which an insurance business [or other person] may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment;[3] and

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[1] The times established in present Rule 26(a)(1)(C) and (D) may need to be reconsidered in light of the increased disclosures required by this rule. See footnote 2.

[2] Version 2 makes this exchange of information a first wave of discovery. Adopting the full incidents of those rules will set times to respond, and address many other issues that may arise.

[3] This is present Rule 26(a)(1)(A)(iv) as a placekeeper. Are there reasons to broaden the disclosures it requires? Indemnification agreements, for example, are not covered. It has been observed that these questions do arise. The

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(2) whether or not the disclosing party intends to use them in presenting its claims or defenses:

(A) the names and addresses of all persons whom the party believes may have knowledge or information relevant to the events, transactions, or occurrences that gave rise to the action;

(B) the names and addresses of all persons known to have given statements, and — if known — the custodian of any copies of those statements; and

(C) a list of the categories of documents, electronically stored information, nondocumentary tangible things or land or other property, known by a party to exist whether or not in the party's possession, custody or control and which that party reasonably believes may be relevant to any party's claims or defenses, including — if known — the custodian of the documents or electronically stored information not in the party's possession, custody, or control.

Discussion

RULE DESIGN

Designing the rule to be tested in a pilot project is not entirely separate from designing the project's structure. But the first task is to determine the elements of the rule that is to be tested.

Many real-world models could be used as a point of departure, perhaps combining elements from different models, adding new elements, or subtracting elements from a truly demanding model. This proposal was framed by reducing the scope of Arizona Rule 26.1. This foundation provides solid reassurance that the elements of the proposal have been tested in practice, and in combination with each other.

Arizona Rule 26.1 is the broadest disclosure rule we know of. Over the course of twenty years it seems to have built toward substantial success. It would be difficult to implement a more

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bracketed language is used to contrast with the otherwise unchanged language of the present rule; if disclosure is to reach further, integrated language may prove more attractive. Whatever may be done on that score, the Committee decided recently that the time has not yet come to consider disclosure of litigation finance arrangements.

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demanding model. And to the extent that it may be possible to structure a pilot project in ways that make it possible to evaluate different components of the model, separating those that work from those that do not work, aiming high has real advantages.

Caution, however, suggests adoption of a model that is robust but not aggressive. The project will fail at the outset if the model is so demanding that no court can be found to test it. As described in more detail below, there may be independent reasons to question whether the Arizona rule can work on a nationwide basis, across courts with different mixes of cases and different local cultures. The proposal aims at a less demanding but still robust regime.

The first question to be addressed in working from the Arizona model is whether to frame the model as initial disclosure or as first-wave discovery. The original version of Rule 26(a)(1) was adopted in 1993 in an effort to streamline the exchange of information that inevitably would be sought in the first wave of discovery. Although more demanding than the version adopted in 2000, it was focused on a sufficiently narrow target to make it work as disclosure. The disclosure approach is illustrated by Version 1 in the model.

An alternative is to frame the model as mandatory initial discovery. This approach has at least two potential advantages. First, by incorporating Rules 33 [and 34], it incorporates the provisions of those rules that set times to respond and obligations in responding. (It might be helpful to complicate the rule text by prohibiting objections, but the complication seems unnecessary.) The second advantage is to avoid claims that the model is inconsistent with present Rule 26(a)(1). Everything in the model is well within the court’s authority to control discovery and disclosures, particularly through Rule 16(b)(3) and (c)(2)(F). These advantages may well lead to adopting this alternative.

The next questions go to the details: What elements of the Arizona rule might be reduced? Some of the changes are simple matters of drafting. For example, it suffices to say "the factual basis of its claims or defenses," instead of "the factual basis of the claim or defense. In the event of multiple claims or defenses, the factual basis for each claim or defense." Other changes are more substantive.

Model (a)(1)(B) is limited to "the legal theory on which each claim or defense is based." It omits "including, where necessary for a reasonable understanding of the claim or defense, citations of pertinent legal or case authorities." Requiring these added details will often lead to unnecessary information and provides a rich occasion for disputes about the adequacy of

the disclosures.

Arizona Rule 26.1(a)(3) calls for initial disclosure of expected trial witnesses, including a fair description of the substance of the expected testimony. It is omitted entirely, in the belief that present Rule 26(a)(3) pretrial disclosures do the job adequately, and at a more suitable time. Arizona Rule 26.1(a)(8) calls for initial disclosure of documents, electronically stored information, and tangible evidence the party plans to use at trial. It is omitted for similar reasons; the part that calls for disclosure of "relevant insurance agreements" is reflected in Model Rule (1)(D).

Model Rule subparagraphs (1)(C) and (D) are drawn verbatim from present Rule 26(a)(1)(A)(iii) and (iv). These rules seem to work well. They displace Arizona Rule 26.1(a)(7) on computation of damages and the part of (8) that calls for identification of "relevant insurance agreements."

Paragraph (2) of the model begins by requiring disclosure of additional matters "whether or not the disclosing party intends to use them in presenting its claims or defenses." Although this obligation is implicit in the initial direction to disclose, it seems wise to emphasize that this model goes beyond the "may use" limit in present Rule 26(a)(1)(A)(i) and (ii).

Subparagraph (2)(A), requiring disclosure of persons believed to have knowledge of the events in suit, is taken verbatim from the first part of Arizona Rule 26.1(a)(4), but omits "and the nature of the knowledge or information each such individual is believed to possess." There may be sufficient uncertainty or outright mistake, and sufficient difficulty in describing these matters, to urge caution in going so far.

Subparagraph (2)(B) departs from Arizona Rule 26.1(a)(5) in two ways. It omits the description of witness statements "whether written or recorded, signed or unsigned." Those words seem ambiguous as to oral "statements" not reduced to writing or recording. And it adds "if known" to the requirement to disclose the custodian of copies of the statement. This provision may need further work to decide whether to include oral statements, or to exclude them explicitly.

Subparagraph (2)(C) substantially shortens Arizona Rule 26.1(a)(9). First, the Arizona rule initially requires a list of all documents or electronically stored information, allowing a list by categories only "in the case of voluminous" information. The Model Rule is content with a list by categories for all cases. That is enough to pave the way and direction for later Rule 34 requests. Second, the Arizona rule invokes a term omitted from Federal Rule 26(b)(1) by the proposed amendments now pending in Congress: "relevant to the subject matter of the action." The

Model Rule substitutes "relevant to any party's claims or defenses." Third, the Model Rule eliminates the direction to list documents "reasonably calculated to lead to the discovery of admissible evidence." Whatever might be made of that familiar phrase in defining the outer scope of discovery, it overreaches for initial disclosure. Finally, and most importantly, the Model Rule eliminates the direction to serve a copy of the documents or electronically stored information with the disclosure "[u]nless good cause is stated for not doing so." The related provisions for identifying the custodian if production is not made, and for the mode of producing, are also omitted. Full production at this early stage is likely to encompass more — often far more — than would actually be demanded after the categories of documents and ESI are described. Too much production does no favors, either for the producing party or for the receiving party. The Arizona alternative of stating good cause for not producing everything that is listed might work if all parties behave sensibly, but it also could add another opportunity for pointless disputes.

Pilot Project Design

Designing the project itself will take a great deal of work, much of it by the experts at the Federal Judicial Center. It is imperative that the structure provide a firm basis for evaluating the model chosen for testing. But a few preliminary and often tentative thoughts may be offered.

The initial recommendation is to structure the pilot to mandate participation. The choice between mandatory or voluntary participation is one of the first questions common to all pilot projects. A choice could be introduced in various ways — as opt-in or opt-out, either at the behest of one party or on agreement of all parties. Resistance to a pilot is likely to decline as the degree of voluntariness expands. But there is a great danger that self-selection will defeat the purposes of the test. To be sure, it would be useful to learn that more and more parties opt to stay in the model as experience with it grows. But in many circumstances it would be difficult to draw meaningful lessons from comparison of cases that stay in the model to cases that opt out.

The second recommendation is that the pilot should include all cases, subject to the possibility of excluding the categories of cases now exempted by Rule 26(a)(1)(B) from initial disclosure. Those cases were selected as cases that seldom have any discovery, and they occupy a substantial portion of the federal docket. Nothing important is likely to be lost by excluding them, and much unnecessary work is likely to be spared. Beyond those cases, arguments can be made for excluding others. One of the concerns about the original version of Rule 26(a)(1) was that it would require useless duplicating work in the many cases in which the parties, not trusting the initial disclosures,

would conduct discovery exactly as it would have been without any disclosures. That might well be for complex, high-stakes, or otherwise contentious cases. But the more expanded disclosures required by the model provide some reassurance that this danger will be avoided. The model, particularly when seen as an efficient form of focused first-wave discovery, is designed in the hope that it really will reduce the cost and delay of discovery in many cases, including — perhaps particularly including — complex cases.

A quite different concern arises from cases with at least one pro se party. It may be wondered whether these initial requirements will prove overwhelming. But pro se litigants are subject to discovery now. And here too, it may be hoped that simple rule directions will provide better guidance than the complex language of lawyer-formulated Rule 33 [and Rule 34] discovery demands.

One particularly valuable consequence of including all cases is that information will be provided on how well the model actually works across the full range of litigation. There may be surprises, but that is the point of having a pilot. Any national rule that is eventually adopted would be crafted on the basis of this experience. If, for example, broad initial disclosures prove useless or even pernicious in antitrust cases, a way can be found to accommodate them. (It seems likely that the rule would recognize judicial discretion to excuse or modify the disclosure requirements, but that choice will await evaluation of the pilot’s lessons.)

Selection of pilot courts is also important. Potentially conflicting considerations must be weighed. There are obvious advantages in selecting courts in states that have some form of initial disclosure more extensive than the present federal rule. Lawyers will be familiar with the state practice, and can adapt to the federal model with some ease, at least if they can check reflexes ingrained by habitual state practice. The same may hold, although to a lesser extent, for the judges. From this perspective, the District of Arizona might be a natural choice. Another might be the District of Connecticut, where the judges have widespread experience with the protocols for initial discovery in individual employment cases. Courts in Colorado, New Hampshire, Texas, and Utah also might be considered: each state has experience with initial disclosure systems more extensive than the current federal model. A particular advantage of selecting such courts may be that because they are already primed, they will achieve better results than would be achieved in other courts. That could mean that other courts will be encouraged to adopt the practice, or the national rules to embrace it, even though success will take somewhat longer to achieve in other courts.

Reliance on courts already familiar with expanded disclosure, however, might undermine confidence in whatever favorable findings might be supported by the pilot court. That a rule works with courts and lawyers who have favorable attitudes is not a sure sign that it will work with lawyers who remain hostile. And there may be a further problem. A means must be found to compare cases managed under the model with other cases. Comparison of pilot cases with cases in the same court in earlier years runs the risk that the earlier cases were shaped by habits developed under the already familiar disclosure regime. Comparison of pilot cases with cases in other courts might encounter similar difficulties.

In the most attractive world, it might prove possible to engage a number of courts with different characteristics in the pilot program. But if the project is to be tested in only one court, or even two, it will be necessary to decide whether to look to a court that already has some experience, whether it is by vicarious connection to local practice or by direct experience.

The proper duration of a pilot project may vary by subject. A model that departs substantially from present practice in discovery and disclosure is likely to require a rather extensive period of adjustment. It takes time for lawyers and judges to learn how to make the most of a new model, and to learn how to defeat efforts to subvert it. Surely anything less than three years would be too short, and five years seems a more realistic duration.

There is a point of structure peculiar to disclosure. Comparison of results depends on sure knowledge whether the model was actually used. The pilot should include a requirement that the parties file a certificate of compliance that will lead researchers to the proper starting point.

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EX. I

125-011863

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MEMORANDUM

To: Judge Jeffrey S. Sutton
From: Derek Webb
Subject: Rule 26(a) Disclosure Reform History: A Canvas of the Criticisms in the 1990s.
Date: December 7, 2015

In the 1990s, the Civil Rules Committee attempted to reform Civil Rule 26 disclosures. The goal was to require disclosures of helpful *and* hurtful information held by each party. The rule gave district courts the choice of opting out and most of them did. Ultimately, the "hurtful" part was abandoned because too many lawyers thought it was not their job to help the other side. In response to your request, I have done a quick survey of the precise criticisms of this reform and the individuals who made them.

Let me start first with the Supreme Court's reaction. On April 22, 1993, Justices Scalia, Thomas, and Souter officially dissented from the proposed Rule 26(a) requiring the duty to disclose helpful and harmful information held by each party. Before this dissent, Supreme Court Justices had only objected twice to the substance of a proposed rule since the early 1960's. Scalia objected to the proposed rule change, which he called "potentially disastrous," for the following reasons:

> 1) It would actually add another layer of discovery, requiring litigants to determine and fight over what information was "relevant" to "disputed facts" and whether either side had adequately disclosed the required information.
>
> 2) It would undermine the adversarial nature of the litigation process and infringe upon lawyers' ethical duties to represent their clients and not to assist the opposing side.
>
> 3) It had not been tested locally in three-year "pilot project" experiments prior to the implementation of a nation-wide rule change.
>
> 4) It had been widely opposed by the bench, bar, and ivory tower.

I am appending Justice Scalia's dissent to this memo.

The response from lawyers appears to have been overwhelmingly negative. Of the 264 written comments submitted to the Federal Judicial Center, 251 opposed the rule change.

Many politicians opposed the rule change. The House of Representatives actually passed a bill, co-sponsored by William Hughes of New Jersey and Carlos Moorehead of California, to block its passage. Perhaps distracted by NAFTA, health care reform, and other pressing matters, and rushed by the eleventh-hour nature of the debate, the Senate, despite the support of Senator Howell Heflin, did not pass its own bill and thereby allowed the rule change to go into effect on December 1, 1993.

A host of academics and other lawyer-commentators chimed in with other criticisms. Some who weighed in critically included Michael J. Wagner, Randall Samborn, Carl Tobias, Carol Campbell Cure, John Koski, Thomas Mengler, Griffin Bell, Chilton Varner, and Hugh Gottschalk. Among their additional criticisms included these concerns:

1) It would lead litigants on both sides to bury the other side in voluminous and often irrelevant documents, thereby frontloading the costs of litigation to its early stages and impeding settlement because both sides would have already invested too much in the case and would want to go to trial.

2) It would make complex litigation, which is often highly technical and document-intensive, more difficult and expensive under the new rules.

3) It would be particularly onerous for defendants, especially large corporations, who have less time than plaintiffs to consider the case and determine what documents are relevant. For large corporations, it might incline them to settle more rather than go to trial.

4) It would ironically add extra responsibilities to district court judges who would have to preside over satellite litigation and mini-trials on which documents were relevant.

5) It would chill attorney-client communications, with both sides reluctant to discuss pending cases lest their content eventually need to be disclosed.

6) The ability of district courts to opt out of the rule would undermine national uniformity and make practice all that more difficult.

This is just a quick survey of the relevant terrain. Please let me know if you would like me to layer this with further research (e.g., more arguments, names, details).

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE, 146 F.R.D. 401, 507

[April 22, 1993]

Justice Scalia, with whom Justice Thomas joins, and with whom Justice Souter joins as to Part II, filed a dissenting statement.

I dissent from the Court's adoption of the amendments to Federal Rules of Civil Procedure 11 (relating to sanctions for frivolous litigation), and 26, 30, 31, 33, and 37 (relating to discovery). In my view, the sanctions proposal will eliminate a significant and necessary deterrent to frivolous litigation; and the discovery proposal will increase litigation costs, burden the district courts, and, perhaps worst of all, introduce into the trial process an element that is contrary to the nature of our adversary system.

…

II
Discovery Rules

The proposed radical reforms to the discovery process are potentially disastrous and certainly premature—particularly the imposition on litigants of a continuing duty to disclose to opposing counsel, without awaiting any request, various information "relevant to disputed facts alleged with particularity." See Proposed Rule 26(a)(1)(A), (a)(1)(B), (e)(1). This proposal is promoted as a means of reducing the unnecessary expense and delay that occur in the present discovery regime. But the duty-to-disclose regime does not replace the current, much-criticized discovery process; rather, it *adds a further layer of discovery*. It will likely *increase* the discovery burdens on district judges, as parties litigate about what is "relevant" to "disputed facts," whether those facts have been alleged with sufficient particularity, whether the opposing side has adequately disclosed the required information, and whether it has fulfilled its continuing obligation to supplement the initial disclosure. Documents will be produced that turn out to be irrelevant to the litigation, because of the early inception of the duty to disclose and the severe penalties on a party who fails to disgorge in a manner consistent with the duty. See Proposed Rule 37(c) (prohibiting, ***511** in some circumstances, use of witnesses or information not voluntarily disclosed pursuant to the disclosure duty, and authorizing divulgement to the jury of the failure to disclose).

The proposed new regime does not fit comfortably within the American judicial system, which relies on adversarial litigation to develop the facts before a neutral decisionmaker. By placing upon lawyers the obligation to disclose information damaging to their clients—on their own

initiative, and in a context where the lines between what must be disclosed and what need not be disclosed are not clear but require the exercise of considerable judgment—the new Rule would place intolerable strain upon lawyers' ethical duty to represent their clients and not to assist the opposing side. Requiring a lawyer to make a judgment as to what information is "relevant to disputed facts" plainly requires him to use his professional skills in the service of the adversary. See Advisory Committee Notes to Proposed Rule 26, p. 96.

It seems to me most imprudent to embrace such a radical alteration that has not, as the advisory committee notes, see *id.*, at 94, been subjected to any significant testing on a local level. Two early proponents of the duty-to-disclose regime (both of whom had substantial roles in the development of the proposed rule—one as Director of the Federal Judicial Center and one as a member of the advisory committee) at one time noted the need for such study prior to adoption of a national rule. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. Pitt. L. Rev. 703, 723 (1989); Brazil, The Adversary Character of Civil Discovery: A Critique and Proposals for Change, 31 Vand. L. Rev. 1295, 1361 (1978). More importantly, Congress itself reached the same conclusion that local experiments to reduce discovery costs and abuse are essential *before* major revision, and in the Civil Justice Reform Act of 1990, Pub. L. 101-650, §§ 104, 105, 104 Stat. 5097-5098, mandated an extensive pilot program for district courts. See also 28 U. S. C. §§471, 473(a)(2)(C). Under that legislation, short-term experiments ***512** relating to discovery and case management are to last at least three years, and the Judicial Conference is to report the results of these experiments to Congress, along with recommendations, by the end of 1995. Pub. L. 101-650, § 105, 104 Stat. 5097-5098. Apparently, the advisory committee considered this timetable schedule too prolonged, see Advisory Committee Notes to Proposed Rule 26, p. 95, preferring instead to subject the entire federal judicial system at once to an extreme, costly, and essentially untested revision of a major component of civil litigation. That seems to me unwise. Any major reform of the discovery rules should await completion of the pilot programs authorized by Congress, especially since courts already have substantial discretion to control discovery.[2] See Fed. Rule Civ. Proc. 26.
I am also concerned that this revision has been recommended in the face of nearly universal criticism from every conceivable sector of our judicial system, including judges, practitioners, litigants, academics, public interest groups, and national, state and local bar and professional associations. See generally Bell, Varner, & Gottschalk, Automatic Disclosure in Discovery—The Rush to Reform, 27 Ga. L. Rev. 1, 28-32, and nn. 107-121 (1992). Indeed, after the proposed rule in essentially its present form was published to comply with the notice-and-comment requirement of 28 U. S. C. §2071(b), public criticism was so severe that the advisory committee announced abandonment of its duty-to-disclose regime (in favor of limited pilot experiments), but then, without further public comment or explanation, decided six weeks later to recommend the rule. 27 Ga. L. Rev., at 35.

*** * ***

Constant reform of the federal rules to correct emerging ***513** problems is essential. Justice White observes that Justice Douglas, who in earlier years on the Court had been wont to note his disagreements with proposed changes, generally abstained from doing so later on, acknowledging that his expertise had grown stale. *Ante*, at 5. Never having specialized in trial practice, I began at the level of expertise (and of acquiescence in others' proposals) with which Justice Douglas ended. Both categories of revision on which I remark today, however, seem to me not matters of expert detail, but rise to the level of principle and purpose that even Justice Douglas in his later years continued to address. It takes no expert to know that a measure which eliminates rather than strengthens a deterrent to frivolous litigation is not what the times demand; and that a breathtakingly novel revision of discovery practice should not be adopted nationwide without a trial run.

In the respects described, I dissent from the Court's order.

Footnote:

2. For the same reason, the proposed presumptive limits on depositions and interrogatories, see Proposed Rules 30, 31, and 33, should not be implemented.

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DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

NOVEMBER 5, 2015

The Civil Rules Advisory Committee met at S.J. Quinney College of the Law at the University of Utah on November 5, 2015. (The meeting was scheduled to carry over to November 6, but all business was concluded by the end of the day on November 5.) Participants included Judge John D. Bates, Committee Chair, and Committee members John M. Barkett, Esq.; Elizabeth Cabraser, Esq.; Judge Robert Michael Dow, Jr.; Judge Joan M. Ericksen; Dean Robert H. Klonoff; Judge Scott M. Matheson, Jr.; Hon. Benjamin C. Mizer; Judge Brian Morris; Justice David E. Nahmias; Judge Solomon Oliver, Jr.; Judge Gene E.K. Pratter; Virginia A. Seitz, Esq. (by telephone); and Judge Craig B. Shaffer. Former Committee Chair Judge David G. Campbell and former member Judge Paul W. Grimm also attended. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Judge Jeffrey S. Sutton, Chair, Judge Neil M. Gorsuch, liaison, Judge Amy J. St. Eve (by telephone), and (also by telephone) Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge Arthur I. Harris participated as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., the court-clerk representative, also participated. The Department of Justice was further represented by Theodore Hirt, Esq.. Rebecca A. Womeldorf, Esq., Amelia Yowell, Esq., and Derek Webb, Esq. represented the Administrative Office. Emery G. Lee attended for the Federal Judicial Center. Observers included Jerome Scanlan, Esq. (EEOC); Joseph D. Garrison, Esq. (National Employment Lawyers Association); Brittany Kaufman, Esq. (IAALS); Alex Dahl, Esq. and Mary Massaron, Esq. (Lawyers for Civil Justice); John K. Rabiej, Esq.; John Vail, Esq.; Valerie M. Nannery, Esq. (Center for Constitutional Litigation); and Ariana Tadler, Esq..

Judge Bates opened the meeting by greeting new members, Judge Ericksen and Judge Morris.

Judge Bates also noted the presence of former Committee member Judge Grimm and former Committee Chair Judge Campbell. They, and Judge Diamond who rotated off the Committee at the same time, contributed in many and invaluable ways to the Committee's work. Looking to the package of rules amendments that are pending in Congress now, Judge Grimm chaired the Discovery Subcommittee and was a member of the Subcommittee chaired by Judge Koeltl that worked through proposals generated by the Committee's 2010 Conference on reforming the rules. Judge Campbell has devoted a decade to Committee work, and continues with the work on pilot projects and on educating bench and bar in what we hope will, on December 1, become the 2015 amendments. The Reporters also described the many lessons in drafting, practice, and wisdom they had learned in working closely with Judge Campbell as chair of the Discovery Subcommittee and then Committee Chair.

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Judge Bates concluded these remarks by observing that the new members would soon witness the Committee's determination to work toward consensus in its deliberations. The package of amendments now pending in Congress emerged from a remarkable level of agreement even on the details. Judge Campbell's strong and tireless leadership was demonstrated at every turn. Professor Coquillette "seconded" all of this high praise.

Judge Campbell expressed appreciation for the "overly kind comments." He noted that special praise is due to Judge Grimm for contributions "as substantial as anyone," especially in chairing the Discovery Subcommittee. He emphasized that the Committee is indeed a collaborative group. It is the profession's best example of collective thinking, good-faith effort, and agenda-less work. Every member who moves into alumnus standing has expressed this view. The Reporters provide excellent support. Judge Bates and Judge Sutton will carry the work forward in outstanding fashion.

Judge Campbell also noted that in 1850 his great-great grandparents came to the valley where the Committee is meeting as Mormon pioneers. Robert Lang Campbell became the first Commissioner of Public Education and was a regent of the University of Deseret, a progenitor of the University of Utah. "The University is home to me and my family."

Dean Robert W. Adler welcomed the Committee to the Law School and its new building. The new building is designed both to improve the learning experience and to advance the Law School's involvement with the community. He noted that as a professor of civil procedure he always demands that his students read the Committee Notes as they study each rule. "You can see the lights going off in their heads" as they read the Notes and come to understand that there is more in the rule texts than may appear on first reading.

April 2015 Minutes

The draft minutes of the April 2015 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

Standing Committee and Judicial Conference

Judge Campbell reported on the May meeting of the Standing Committee and the September meeting of the Judicial Conference.

The Standing Committee meeting went well. There was a good discussion of pilot projects.

At the Judicial Conference, the Chief Justice invited Judge Sutton and Judge Campbell to present a summary of the amendments now pending in Congress. They urged the Chief Judges to offer programs to explain to judges and lawyers the nature and importance of these amendments in the hoped-for event that they emerge from

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91 Congress.

92 The Judicial Conference approved and sent to the Supreme Court
93 amendments to Rule 4(m) dealing with service on corporations and
94 other entities outside the United States; Rule 6(d), clarifying
95 that the "3-added-days" provision applies to time periods measured
96 after "being served," and eliminating from the 3-added days service
97 by electronic means; and Rule 82, synchronizing it with recent
98 amendments of the venue statutes as they affect admiralty and
99 maritime cases.

100 *Legislative Report*

101 Rebecca Womeldorf provided the legislative report for the
102 Administrative Office. Two familiar sets of bills have been
103 introduced in this Congress.

104 The Lawsuit Abuse Reduction Act of 2015 (LARA) has passed in
105 the House. It would amend Rule 11 by reinstating the essential
106 aspects of the Rule as it was before the 1993 amendments. Sanctions
107 would be mandatory. The safe harbor would be removed. This bill has
108 been introduced regularly over the years. In 2013 Judge Sutton and
109 Judge Campbell submitted a letter urging respect for the Rules
110 Enabling Act process, rather than undertake to amend a Civil Rule
111 directly. The prospects for enactment remain uncertain.

112 H.R. 9, the Innovation Act, embodies patent reform measures
113 like those in the bill that passed in the House last year. There
114 are many provisions that affect the Civil Rules. Parallel bills
115 have been introduced in the Senate, or are likely to be introduced.
116 The earlier strong support for some form of action seems to have
117 diminished for the moment.

118 A proposed Fairness in Class Action Litigation Act would
119 directly amend Rule 23. A central feature is a requirement that
120 each proposed class member suffer an injury of the same type and
121 scope as every other class member. The ABA opposes this bill.

122 *Publicizing the Anticipated 2015 Amendments*

123 Judge Grimm described the work of the Subcommittee that is
124 seeking to support programs that will educate members of the bench
125 and bar in the package of rules that will become law on December 1
126 unless Congress acts to modify, suspend, or reject them.

127 The 2010 Conference emphasized themes that have persisted
128 through the ensuing work to craft these amendments. Substantial
129 reductions in cost and delay can be achieved by proportionality in
130 discovery and all procedure, cooperation of counsel and parties,
131 and early and active case management. These concepts have been
132 reflected in the rules since 1983. They have been the animating

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133 spirit of succeeding sets of rules amendments. The need for yet
134 another round of amendments has suggested that amending the rules
135 is not always enough to get the job done. So it was decided that
136 the amendments should be advanced by promoting efforts to bring
137 them home to members of the bench and bar by focused education
138 programs. Work on the programs is progressing.

139 Five videotapes are being prepared. They will be structured in
140 segments, facilitating a choice between a single viewing and
141 viewing at intervals. Judge Fogel and the FJC have been a wonderful
142 resource. Tapes by Judge Koeltl and Judge Grimm have been done. The
143 remaining tapes will be done on November 6.

144 Letters from Judge Sutton and Judge Bates will alert district
145 judges to the new rules. A powerpoint presentation is being
146 prepared.

147 Bar organizations have been encouraged to prepare programs.
148 The ABA has done one, and will do more; John Barkett is
149 participating. The American College of Trial Lawyers has planned a
150 program. The Fifth Circuit and Eighth Circuit will have programs;
151 it is hoped that other circuits will as well.

152 Many articles are being written. Judge Campbell has prepared
153 one for Judicature. Professor Gensler, a former Committee member,
154 has prepared a very good pamphlet.

155 One indication of the value of educational efforts is provided
156 by a poll Judge Grimm undertook. He asked 110 judges — 68
157 Magistrate Judges and 42 District Judges — whether they actively
158 manage discovery from the beginning of an action or, instead, wait
159 for the parties to bring disputes to them. More than 80% replied
160 that they wait for disputes to emerge. "We hope to educate them
161 that early management reduces their work."

162 One caution was noted. The Duke Center for Judicial Studies
163 has convened a group of 30 lawyers, evenly divided between 15 who
164 regularly represent plaintiffs and 15 who regularly represent
165 defendants, to prepare a set of Guidelines on proportionality. Some
166 present and former Committee members reviewed drafts. These
167 guidelines will be used in 13 conferences planned by the ABA and
168 the Duke Center that aim to advance the practice of
169 proportionality. The first conference will be held next week, a few
170 weeks before we can know that the proposed amendments will in fact
171 take hold. Professor Suja Thomas has expressed concern that these
172 guidelines will be used to "train" judges, and to be presented in
173 a way that casts an aura of official endorsement. In response to
174 this concern, Judges Sutton, Bates, and Campbell have sent out a
175 letter to federal judges making it clear that the guidelines are
176 not endorsed by the rules committees. The letter also notes that
177 these conferences are not being used to "train" judges.

178 Judge Sutton noted that December 1 has not yet arrived. "We
179 must be very careful to show that we are not presuming Congress
180 will approve the amendments." It is appropriate to anticipate the
181 expected birth of the amendments by preparing to encourage
182 implementation from and after December 1. And it is appropriate to
183 participate in programs that are presented before December 1 if it
184 is made clear that the amendments remain pending in Congress and
185 will become law only if Congress does not intervene by December 1.
186 It is proper for Committee members and former Committee members to
187 participate in these educational programs, but it is important to
188 continue the tradition that no favoritism should be shown among the
189 outside groups that organize the programs. An invitation should be
190 accepted only if the same invitation would be accepted had it been
191 extended by a different organization. And, as always, it is
192 important to emphasize both in opening and in closing that no
193 member speaks for the Committee.

194 Judge Campbell noted that the Duke Center has invested great
195 effort in promoting the new rules. "We should be grateful." It is
196 unfortunate that Professor Thomas has become concerned that the
197 Center is too closely connected to the Committee. It continues to
198 be important that all branches of the profession, teaching,
199 practicing, and judging, understand that the Committee is in fact
200 independent of all outside groups. The letter to federal judges is
201 designed to provide reassurance.

202 Judge Bates echoed this appreciation of the Duke Center's
203 efforts.

204 John Rabiej noted that the Duke Center says, explicitly and
205 repeatedly, that the Guidelines are not binding. They are only
206 suggestions. And they emerged from a working group evenly divided
207 between plaintiff interests and defense interests.

208 A Committee member noted that she observed e-mail traffic,
209 including messages focused on the Duke Center's involvement, that
210 reflects a widespread perception that the rules result from an
211 adversary process in which "someone wins and someone loses." That
212 wrong impression is unfortunate. "The rules are for everyone." As
213 a private person, she tells people that the best course is to read
214 the rules and Committee Notes. Practicing lawyers may be forgiven
215 for misperceiving the process because they are largely unaware of
216 it. But it is difficult to forgive similar ignorance when it is
217 shown by academics — within the last few weeks she had occasion to
218 ask a civil procedure teacher what he thought of the pending
219 amendments and he asked "what amendments"?

220 Another Committee member observed that it is a good process.
221 The 2010 Conference contributed a lot. But it remains important to
222 stress, without overdoing it, that the Duke guidelines are not
223 ours.

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Another Committee member underscored the importance of making it clear that members do not speak for the Committee. "I always do it." But it also is important to emphasize that the Committee is seeking to achieve the effective administration of justice.

Yet another member noted that at least some judges are uncertain whether it is appropriate to attend the ABA-Duke Center presentations. Reassurances would be helpful.

Rule 23

Judge Bates introduced the Rule 23 proposals by noting that the Class-action Subcommittee has been working with extraordinary intensity. Over the course of the summer he participated in 10 Subcommittee conference calls working on the substance of the proposals, and there was much other traffic by messages and calls on incidental matters. Judge Dow and Professor Marcus deserve much credit for pushing things along.

For today, the goal is to form a good idea of which proposals should move forward. It may be possible to work on some specifics, but "this is not the final round." The Committee will report to the Standing Committee in January. By this Committee's meeting next April we may be in a position to make formal recommendations for publication in 2016. For today, we can view the package as a whole. Much of it deals with settlements.

Judge Dow introduced the Subcommittee report by noting that it presents 11 items for discussion, generally with illustrative rule text and committee notes.

Six topics are recommended for continuing work: "frontloading" the initial presentation of a proposed settlement; adding a provision to Rule 23(f) to ensure that appeal by permission is not available from an order approving notice of a proposed settlement; amending Rule 23(c)(1) to make it clear that the notice of a proposed settlement triggers the opt-out and objection process, even though the class has not yet been certified; emphasizing opportunities for flexible choice among the means of notice; establishing a requirement that a court approve any payment to be made in connection with withdrawing an objection to a settlement or withdrawing an appeal from denial of an objection, along with provisions coordinating the roles of district courts and circuit courts of appeals when dismissal of an appeal is involved; and expanding the rule text criteria for approving a proposed settlement.

One topic, adoption of a separate provision for certifying a settlement class, is presented for discussion, although the Subcommittee is not inclined to move toward adopting such a provision.

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268 Two other topics are on hold. Each awaits further development
269 in the courts. One is "ascertainability," a set of questions that
270 are percolating in the circuits. The other is the use of Rule 68
271 offers of judgment or other settlement offers as a means of
272 attempting to moot a class action by "picking off" all class
273 representatives; this question has been argued in the Supreme
274 Court, and any further consideration should await the decision.

275 Finally, the Subcommittee recommends that two other topics be
276 removed from present work. One is "cy pres" awards in settlements.
277 The other is any attempt to address the role of "issue" classes.
278 The reasons for setting these topics aside will be developed in the
279 later discussion.

280 Frontloading: Draft Rule 23(e)(1) tells the court to direct notice
281 of a proposed class settlement if the parties have provided
282 sufficient information to support a determination that giving
283 notice is justified by the prospect of class certification and
284 approval of the settlement. The basic idea was developed in
285 response to discussion at the George Washington conference
286 described in the Minutes for the April meeting, and with help from
287 an article by Judge Bucklo about the things judges need to know
288 about a proposed class settlement but often do not know. The
289 information will enable the judge to determine whether notice to
290 the class is justified. If the class has not already been
291 certified, the notice will be in the form required by Rule 23(c)(2)
292 — for a (b)(3) class, it will trigger the opportunity to request
293 exclusion, and for all classes it will provide a basis for
294 appearing and for objecting to the proposed settlement. These
295 purposes are best served by detailed notice of the terms of
296 settlement. Many courts follow essentially this practice now, but
297 express rule text will advance the best practice for all cases.

298 This proposal begins by adding language to the initial part of
299 Rule 23(e)(1), making it clear that court approval is required to
300 settle the claims not only of a certified class but also of a class
301 that is proposed for certification at the same time as the
302 settlement is approved.

303 The frontloading concept was presented to the September
304 miniconference in the form of rule text that listed 14 kinds of
305 information the parties should provide. This "laundry list"
306 approach met a lot of resistance. There is constant fear that an
307 official list of factors will be diluted in practice to become a
308 simple check-list that routinely checks off each factor without
309 distinguishing those that are important to the specific case from
310 those that are not. The present draft channels all these factors
311 into an open-ended behest that the parties provide "relevant" or
312 "sufficient" information. Perhaps some other descriptive word
313 should be found to emphasize the purpose to provide as much as
314 possible of the information that will be presented on the motion

315 for final approval. This approach, leaving it to the court and
316 parties to identify and focus on the considerations that bear on a
317 particular proposed settlement, seemed to win support at the
318 miniconference. The Committee Note can go a long way toward calling
319 attention to the multiple factors that appeared in the "laundry
320 list" draft.

321 Judge Dow noted that the sophisticated lawyers who bring class
322 actions in his court commonly provide the kinds of information
323 required by the proposal. But not all lawyers do it. "The less
324 sophisticated practitioners need" more guidance in the rule.

325 Judge Dow further noted that the proposed rule text does not
326 address the question of what to do with the residue of a class
327 defendant's agreed relief when not all class members make claims.
328 It would be possible to say something on this score, and to support
329 the rule text with a Committee Note that identifies the factors
330 included in the original laundry list rule draft. Professor Marcus
331 added that the Note attempts "to identify, advocate, convey." It
332 does not say that all 14 factors need be checked off every time.

333 A Committee member said that the draft rule reflects what has
334 become "procedural common law." Judges created this procedure. The
335 Manual for Complex Litigation adopts it. When the parties present
336 a proposed settlement for approval in an action that has not
337 already been certified as a class, the practice calls for
338 "preliminary approval" of certification and settlement, notice to
339 the class with opportunity to opt out or object, and final
340 approval. Many experienced lawyers and judges believe that Rule 23
341 says this. "The proposal is to have the rule say what many think it
342 says now." But too often, in the hands of those who are not
343 familiar with Rule 23 practice, the important information comes out
344 too late. But the draft is ambiguous in calling for relevant
345 information about the proposed settlement — is this information
346 about the quality of the settlement, or does it include information
347 about the reasons for certifying any class and about proper class
348 definition? The response was to point to the statement in the draft
349 Committee Note that "[o]ne key element is class certification." But
350 perhaps more could be said in the rule text.

351 A drafting question was raised: would it be better to begin in
352 this form: "The court must direct notice," etc., if the parties
353 have provided the required information and if the court determines
354 that giving notice is justified, etc.? And is either of the
355 alternative words used the best that can be found to describe the
356 quantity and quality of information that must be provided?
357 "'Relevant' calls to mind the scope-of-discovery provision in rule
358 26(b)(1)." The answer was recognition that work will continue on
359 the drafting. The earlier draft that set out 14 factors was
360 troubling because in many cases several of the 14 "do not matter."
361 But drafting a more open-ended approach is a work in progress.

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362 This answer prompted the reflection that "the information
363 relevant is quite different from one type of action to another." A
364 complex antitrust action may call for quite different types of
365 information than will be called for in an action involving a single
366 form of consumer deception.

367 A similar style suggestion was offered: "I like better rules
368 that tell the parties to do things," rather than "rules that tell
369 the court to do things." The purpose of this rule is to tell the
370 parties to provide more information. Such was the approach taken in
371 the 14-factor draft, set out at p. 189 in the agenda materials:
372 when seeking approval, "the settling parties must present to the
373 court" all of the various described items of information.

374 A finer-grained drafting comment also was made. The draft
375 simply grafts a reference to a proposed settlement class into the
376 present text of subdivision (e)(1):

377 The claims, issues, or defenses of a certified class, or
378 a class proposed to be certified as part of a settlement,
379 may be settled, voluntarily dismissed, or compromised
380 only with the court's approval. * * *

381 There is a miscue — the proposal described in the new operative
382 text is only to settle, not to voluntarily dismiss or compromise
383 the action. The broader sweep that includes voluntary dismissal or
384 compromise fits better with the class that has already been
385 certified. It would be better to separate this into separate parts:
386 "The claims, issues, or defenses of a certified class may be
387 settled, voluntarily dismissed, or compromised only with the
388 court's approval; the claims, issues, or defenses of a class
389 proposed to be certified as part of a settlement may be settled
390 only with the court's approval. The following procedures apply in
391 seeking approval: * * *.

392 Judge Dow concluded the discussion by observing that the
393 Committee agrees that the frontloading proposal should be pursued
394 further, with work to refine the drafting. The rule will speak to
395 the parties' duty to provide information, and other improvements
396 will be made.

397 Rule 23(f): This proposal would add a new sentence to the Rule
398 23(f) provision for appeal by permission "from an order granting or
399 denying class-action certification": "An order under Rule 23(e)(1)
400 may not be appealed under Rule 23(f)." The concern arises from the
401 common practice that refers to "preliminary certification" of a
402 class when the court approves notice to the class. An appeal was
403 attempted at this stage in the NFL concussion litigation; the Third
404 Circuit decided not to accept the appeal. But the possibility
405 remains that appeals will be sought in other cases. And the sense
406 is that there should be only one opportunity for appeal, at least

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407 as to a single grant of certification.

408 This introduction generated no further discussion. It was
409 noted later, however, that the Department of Justice continues to
410 study a proposal to expand the time available to ask permission to
411 appeal under Rule 23(f) when the request is made in actions
412 involving the United States or its officers or employees. The
413 Department expects to have a concrete proposal ready fairly soon.

414 Rule 23(c)(2)(B): This proposal is intended to solidify the
415 practice of sending out notice to the class before actual
416 certification when a proposed settlement seems likely to be
417 approved:

418 For any class certified under Rule 23(b)(3), or upon
419 ordering notice under Rule 23(e)(1) to a class proposed
420 to be certified [for settlement] under Rule 23(b)(3), the
421 court must direct to class members the best notice
422 practicable under the circumstances * * *.

423 Judge Dow noted that sending out notice before certification
424 and approval of the settlement is intended to accomplish the
425 purposes of notice in a (b)(3) class, including establishing the
426 deadline to request exclusion and affording the opportunities to
427 enter an appearance and to object. This is consistent with present
428 practice. And it is mutually reinforcing with the frontloading
429 proposal: frontloading will support notice that provides more
430 comprehensive information, enabling better-informed decisions
431 whether to opt out or to object. The opt-out rate and objections in
432 turn will advance further evaluation of the proposed settlement at
433 the final-approval stage. An important further benefit will be to
434 reduce the risk that initial notice made defective by providing
435 inadequate information to the court will, by objections that show
436 the need for better notice or that demonstrate the inadequacy of
437 the proposed settlement, require a second round of notice.

438 Professor Marcus added that this proposal is useful to respond
439 to an argument forcefully advanced by at least one participant in
440 the miniconference. The common practice, carried forward in this
441 package of proposals, is that actual certification of the class is
442 made only at the same time as approval of the settlement. As Rule
443 23(c)(2)(B) stands now, its text literally directs that notice
444 satisfying all the requirements of (B) be sent out then, never mind
445 that the notice of proposed settlement sent out under (e)(1) has
446 already triggered an opt-out period and so on. It is better to make
447 it clear that class members can be required to decide whether to
448 opt out, to appear, or to object before the class is formally
449 certified.

450 A committee member observed that courts believe now that the
451 notice of a proposed settlement discharges the function of

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452 (c)(2)(B). Characterizing the court's initial action as preliminary
453 certification and approval brings it within the rule language. But,
454 in turn, that triggers the prospect that a Rule 23(f) appeal can be
455 taken at that stage, a disruptive prospect that is so unlikely to
456 prove justified by a grossly defective proposal that it should
457 never be available. This revision of (c)(2)(B) helps in all these
458 dimensions.

459 General Notice Provisions. Discussion turned to the draft that
460 would introduce added flexibility to the description of notice in
461 Rule 23(c)(2)(B):

462 For any class certified under Rule 23(b)(3), the court
463 must direct to class members the best notice that is
464 practicable under the circumstances, including individual
465 notice [by the most appropriate means, including first-
466 class mail, electronic, or other means] {by first-class
467 mail, electronic mail, or other appropriate means} to all
468 members who can be identified through reasonable effort
469 * * *.

470 Judge Dow noted that this proposal would "bring notice into
471 the 21st Century." First-class mail may not be the best means of
472 informing class members of their rights, but it seems to be settled
473 into general practice. The proposal is designed to establish the
474 flexibility required to provide notice by the most effective means.
475 The objective is the same as before — to provide the best notice
476 possible to the greatest number of class members. The alternative
477 presented in the first bracketed alternative, focusing on "the most
478 appropriate means," emphasizes the importance of the choice.
479 Whatever choice is made for rule text, it is important to have text
480 that supports the examples that may be useful in the Committee
481 Note.

482 The first suggestion, made and seconded, was that it might be
483 better to simplify the rule text by referring only to "the most
484 appropriate means." Amplification could be left to the Committee
485 Note. The response was that it may be important to add examples to
486 rule text to make it clear that the choice of means is technology-
487 neutral. The ingrained reliance on first-class mail may make it
488 important to make it clear that other means may be as good or
489 better. This response was elaborated by suggesting the advantages
490 of the first alternative, calling for the most appropriate means
491 and referring to "electronic means" rather than "electronic mail."
492 It may be, particularly in the not-so-distant future, that
493 appropriate means of electronic communication will evolve that
494 cannot be fairly described as part of the familiar "e-mail"
495 practices we know today.

496 Further discussion suggested that limiting the rule text to
497 "the most appropriate means" would avoid an implication that first-

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498 class mail or e-mail are always appropriate.

499 A separate question was addressed to the parts of the draft
500 Note that discuss the format and content of class notice: is it
501 appropriate to address these topics when the amended rule text does
502 not directly bear on them? The only response was that any amendment
503 addressing effective means of notice will support discussion of the
504 importance of making sure that the notice conveyed by appropriate
505 means is itself appropriately informative. Merely reaching class
506 members does little good if the notice itself is inadequate.

507 Objectors: Judge Dow began by observing that the Subcommittee has
508 repeatedly been reminded that there are both "good" and "bad"
509 objectors. Class-member objections play an important role in class-
510 action settlements. As a matter of theory, the opportunity to
511 object is a necessary check on adequate representation. As a
512 practical matter, objectors have shown the need to modify or reject
513 settlements that should not be approved as initially proposed. But
514 there are also objectors who seek to enrich themselves — that is,
515 commonly to enrich counsel — rather than to improve the settlement
516 for the class. The advice received at several of the meetings the
517 Subcommittee has attended, and at the miniconference, is that bad-
518 faith objections can be dealt with successfully in the trial court.
519 The problem that persists is appeals or threats to appeal a
520 judgment based on an approved settlement. An appeal can delay
521 implementation of the judgment by a year or more. That means that
522 class members cannot secure relief, in some cases relief that is
523 important to their ongoing lives. The objector offers not to
524 appeal, or to dismiss the appeal, in return for a payment that goes
525 only to the objector's counsel, or perhaps in part to the objector
526 as well. Too often, class counsel are unwilling to submit the class
527 to the delay of an appeal and agree to buy off the objector.

528 Starting in 2010, the Appellate Rules Committee has been
529 considering rules to regulate dismissal of objector appeals. The
530 Subcommittee has been working in coordination with them.

531 The first step in addressing objectors is a draft that
532 requires some measure of detail in making an objection. This draft
533 responds to suggestions that some "professional objectors" simply
534 file routine, boilerplate objections in every case, do nothing to
535 explain or support them, fail to appear at a hearing on objections,
536 and then seek to appeal the judgment approving the settlement. The
537 draft adds detail to the present provision that authorizes
538 objections:

539 (A) Any class member may object to the proposal if it
540 requires court approval under this subdivision (e)~~:~~. The
541 objection must [state whether the objection applies only
542 to the objector or to the entire class, and] state [with
543 specificity] the grounds for the objection. [Failure to

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544 state the grounds for the objection is a ground for
545 rejecting the objection.]

546 The first comment was that "this is the most oft-repeated
547 topic at all the conferences." The materials submitted for
548 discussion at the miniconference included a lengthy list of
549 information an objector must provide in making an objection. "It
550 seemed too much."

551 Later discussion provided a reminder that the Subcommittee
552 will continue to consider whether to retain the bracketed words
553 stating that failure to state the grounds for the objection is a
554 ground for rejecting the objection.

555 The draft in the agenda materials addresses the question of
556 payment by adding to present Rule 23(e)(5) a new subparagraph:

557 (B) T~~t~~he objection, or an appeal from an order denying an
558 objection, may be withdrawn only with the court's
559 approval. If [a proposed payment in relation to] a motion
560 to withdraw an appeal was referred to the court under
561 Rule 42(c) of the Federal Rules of Appellate Procedure,
562 the court must inform the court of appeals of its action.

563 This draft is supplemented by alternative versions of a new
564 subparagraph (C) that require court approval of any payment for
565 withdrawing an objection or an appeal from denial of an objection.
566 The overall structure is built on the premise that payment to an
567 objector may be appropriate in some circumstances. Rather than
568 prohibit payment, approval is required. It may be that the district
569 court finds it appropriate to compensate the costs of making an
570 objection that, although it did not result in any changes in the
571 settlement, played an important role in assuring the court that the
572 settlement had been well tested and does merit approval. That
573 prospect, however, is not likely to extend to payment for
574 withdrawing an appeal.

575 Recognizing that the Appellate Rules Committee has primary
576 responsibility for shaping a corresponding Appellate Rule, a sketch
577 of a possible Appellate Rule is included. The Appellate Rules
578 Committee met a week before this meeting. Their deliberations have
579 suggested some revisions in the package.

580 One question is how the court of appeals will know the problem
581 exists. A new sketch of a possible Appellate Rule 42(c) would
582 direct that a motion to dismiss an appeal from an order denying an
583 objection to a class-action settlement must disclose whether any
584 payment to the objector or objector's counsel is contemplated in
585 connection with the proposed dismissal. Then a possible Rule 42(d)
586 would provide that if payment is contemplated, the court of appeals
587 may refer the question of approval to the district court. The court

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588 of appeals would retain jurisdiction of the appeal, pending final
589 action after the district court reports its ruling to the court of
590 appeals. The court of appeals can instead choose to rule on the
591 payment without seeking a report from the district court. Finally,
592 a new Civil Rule 23(e)(5)(D) would direct the district court to
593 inform the court of appeals of the district court's action if the
594 motion to withdraw was referred to the district court.

595 One initial question is whether there should be any provision
596 regulating withdrawal of an objector's appeal when there is no
597 payment. As a matter of theory, it may be wondered whether other
598 objectors may have relied on this appeal to forgo taking their own
599 appeals. But that theory may bear little relation to reality. It
600 was not developed further in the discussion.

601 The focus of the new structure is to provide the court of
602 appeals a clear procedure for getting advice from the district
603 court. The district court is familiar with the case and often will
604 be in a better position to know whether payment is appropriate. The
605 Appellate Rules Committee is anxious to retain jurisdiction in the
606 court of appeals. That can be done whether the action by the
607 district court is simply a recommended ruling or is a ruling by the
608 district court subject to review by the ordinary standards that
609 govern the elements of fact and the elements of discretion.

610 The first question was what happens when the district court
611 refuses to approve a payment and the objector wants to appeal. The
612 response was that the draft retains jurisdiction in the court of
613 appeals. The objector can address his grievance to the court of
614 appeals, whether the question be one of independent decision by the
615 court of appeals as informed by the district court's
616 recommendation, or be one of reviewing a ruling by the district
617 court.

618 An analogy was offered: Appellate Rule 24(a) directs that a
619 party who desires to appeal in forma pauperis must file a motion in
620 the district court. If the district court denies the motion, the
621 party can file a motion in the court of appeals, in effect renewing
622 the motion. Here, the motion to dismiss the appeal is made in the
623 court of appeals, disclosing whether any payment is contemplated.
624 But what happens if the court of appeals simply dismisses the
625 appeal without deciding whether to approve the payment? The draft
626 prohibits payment without court approval, so the objector would
627 have to seek approval from the district court. The district court's
628 action would itself be a final judgment, subject to appeal.

629 Another analogy also is available. There are many
630 circumstances in which a court of appeals finds it useful to retain
631 jurisdiction of an appeal, while asking the district court to take
632 specific action or to offer advice on a specific question. The
633 court of appeals can manage its own proceedings as it wishes, but

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634 is most likely to defer further proceedings until the district
635 court reports what it has done in response to the appellate court's
636 request. There is a further analogy in the "indicative rulings"
637 provisions of Civil Rule 62.1 and Appellate Rule 12.1 — one of the
638 paths open under those rules is for the court of appeals to remand
639 to the district court for the purpose of ruling on a motion that
640 the district court otherwise could not consider because of a
641 pending appeal. The court of appeals retains jurisdiction unless it
642 expressly dismisses the appeal.

643 Further discussion suggested that at least one participant
644 thought it better to think of this process as a "remand," because
645 a "referral" does not seem to contemplate factfinding in the
646 district court.

647 A member expressed a skeptical view about the value of this
648 process. The hope is for an in terrorem effect that will deter
649 payments by the threat of exposure and the prospect that courts
650 will never approve a payment that is not supported by a compelling
651 reason. But the problem is delay in implementing the judgment; the
652 more elaborate the process for withdrawing an appeal, the greater
653 the delay.

654 This view was countered. "The use of delay as leverage for a
655 payoff is the problem. If we say no payoff without court approval,
656 we do a lot. The bad-faith objector wants delay not for its own
657 sake, but for leverage." A legitimate objector will not be affected
658 by the need for approval of any payment.

659 A different doubt was expressed: the incentive is to get rid
660 of objectors, but will this process simply encourage objectors to
661 pad their bills? The response was that the objector's lawyer does
662 not get paid unless there is a benefit to the class. But the doubt
663 was renewed: that can be met by a stipulation of the objector and
664 counsel that there was a benefit to the class. The response in turn
665 was that this procedure will eliminate the incentive for delay.
666 Bad-faith objectors self-identify before taking an appeal, or after
667 filing the notice of appeal. They do not appear at the hearing on
668 approval, they often do no more than file form objections. And the
669 good-faith objectors articulate their objections in the district
670 court. They appeal for the purpose of defeating what they view as
671 an inadequate settlement, not for the purpose of delay or coercing
672 payment for abandoning their objections.

673 This view was supported by noting that a good-faith objector
674 who participated in the miniconference reported that the business
675 model of bad-faith objectors does not support actual work on an
676 appeal. But why not let the district court be the one that decides
677 whether to approve payment? The court of appeals can grant the
678 motion to dismiss the appeal, and remand to the district court to
679 decide on payment. The district-court ruling can be appealed. This

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680 view was supported by noting that once the district court has
681 ruled, "there is something to review."

682 General support for the proposed approach was offered by
683 noting that "rulemaking cannot resolve every problem." But we can
684 accomplish the modest goal of insisting on sunlight, and creating
685 a mechanism for courts to address the issues as promptly as
686 possible.

687 A wish for simplicity was expressed by suggesting that it may
688 be enough to provide in Rule 23(e)(5)(B) that court approval is
689 required to withdraw an objection or an appeal from denial of an
690 objection, and to limit new provisions in Appellate Rule 42 to a
691 direction that any payment for dismissing the appeal be disclosed
692 to the court of appeals. The court of appeals then "does what it
693 does." It may choose to decide the appeal. Or it can simply dismiss
694 the appeal; the case is over. But an objector who wants payment
695 must apply to the district court. The key is disclosure to the
696 court of appeals. Appellate Rule 12.1 and Civil Rule 62.1 already
697 provide the opportunity to seek an indicative ruling if a motion to
698 approve payment is made in the district court while the appeal
699 remains pending. The full set of draft provisions is "too much
700 process."

701 A different vision of simplicity was suggested: the rules
702 should leave it open to the court of appeals to choose between
703 acting itself, referring to the district court, making a limited
704 remand, or adopting whatever approach seems to work best for a
705 particular case.

706 The next question was whether it might be possible to provide
707 some guidance in rule text on the circumstances that justify
708 payment for withdrawing an objection or appeal? Apart from that,
709 should we be concerned that there may be means of compensation that
710 are not obviously "payment"? One possibility may be to accord some
711 form of benefit in collateral litigation — the objector may
712 represent clients who are not in the class, or it might be agreed
713 to acquiesce in an objection made in a different class action.

714 These questions were addressed by the observation that the
715 only familiar demands are for payments to lawyers, or to clients
716 who want more than the judgment gives them. But it is possible to
717 imagine a threat of objections in all future cases, or a promise to
718 withdraw objections in other cases. So the sketch of a possible
719 Appellate Rule 42(c) on p. 102 of the agenda materials refers to
720 "payment or consideration."

721 The discussion concluded by noting the paths to be tested by
722 further drafting. It will be good to achieve as much simplicity as
723 possible. Full disclosure should be required of any payments (or
724 consideration) for withdrawing an objection or appeal from denial

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725 of an objection. The district court should be the place for
726 determining whether to approve any payment. Beyond that, this
727 structure can be effective if lawyers for the plaintiff class do
728 their part in resisting requests for payment.

729 Settlement Approval: Judge Dow introduced the draft criteria for
730 approving a class-action settlement by noting that the draft is
731 inspired in part by the approach taken in the ALI Principles of
732 Aggregate Litigation. The ALI approach was shaped by the same
733 concerns that the Subcommittee has encountered. There are as many
734 dialects as there are circuits; each circuit has its own
735 differently articulated list of factors to be applied in
736 determining whether a settlement is "fair, reasonable, and
737 adequate." The draft is an effort to capture the most important
738 procedural and substantive elements that should guide the review
739 and approval process. In its present form, it seeks to capture the
740 most important elements in four provisions that might be viewed as
741 "factors," or instead as the core concerns. The first question is
742 whether this focus will support meaningful improvement in current
743 practices.

744 Professor Marcus supplemented this introduction by identifying
745 two basic questions: Will the draft, or something like it, prove
746 helpful to judges and lawyers? The purpose begins with helping the
747 parties to shape the information they submit in seeking approval.
748 Every circuit now has a list of multiple factors. The draft
749 presented to the Committee last April included a catch-all
750 "whatever else" provision. Discussion then suggested that the
751 provision was not helpful. It was dropped during later drafting
752 efforts, but has found renewed support and is included in the
753 agenda drafts for further discussion. It takes different forms in
754 the two alternative structures. In alternative 1, the court "may
755 disapprove * * * on any ground the court deems pertinent, * * *
756 considering whether." That is less restrictive than alternative 2,
757 which directs that the court "may approve" "only * * * on finding"
758 the four core criteria are met and also that "approval is warranted
759 in light of any other matter that the court deems pertinent." The
760 choice here is whether to suggest the relevance of considerations
761 in addition to the four core showings that are explicitly
762 described, and whether to be more or less restrictive.

763 The second question is related: what prominence should be
764 given to the present rule formula, which was drawn from well-
765 developed case law, looking to whether the settlement is "fair,
766 reasonable, and adequate"? These words support consideration of
767 every factor that has been identified by any circuit. Should the
768 process remain that open?

769 The first comment was that both alternatives are open-ended.
770 A "ground" or "matter" that "the court deems pertinent" is not a
771 legal standard.

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772 The next comment was that the second alternative displaces the
773 present "fair, reasonable, and adequate" standard from its present
774 primacy, demoting it to a role as part of the factor that asks
775 whether the relief awarded to the class is fair, reasonable, and
776 adequate, taking into account the costs, risks, probability of
777 success, and delays of trial and appeal. The fair, reasonable, and
778 adequate standard is the over-arching concern. Another member
779 agreed — this is an argument for alternative 1, which allows
780 approval "[only] on finding it is fair, reasonable, and adequate."
781 The brackets would be removed, allowing approval only on making
782 this finding.

783 Alternative 2 is "more focused." It allows approval only on
784 finding that all four factors are satisfied, compared to
785 Alternative 1 that allows a finding that the settlement is fair,
786 reasonable, and adequate, after simply "considering" the four.
787 Alternative 1 is less rigorous.

788 Turning to one of the four core elements, it was asked how a
789 court is to determine whether a settlement "was negotiated at arm's
790 length and was not the product of collusion." Why is that not
791 implicit in finding the settlement is fair, reasonable, and
792 adequate?

793 This question was addressed by observing that a number of
794 circuits distinguish between procedural and substantive fairness.
795 The parties must show that the process was free of collusion. This
796 showing is made by describing the process, or by having a special
797 master or mediator participate and report. Account is taken of how
798 long the negotiations endured, and whether there was actual
799 negotiation.

800 The open-endedness of "considering whether" in Alternative 1
801 provoked the suggestion that, taken literally, it overrides a lot
802 of circuit law. It would allow a court to find a settlement is
803 fair, reasonable, and adequate, even though it was not negotiated
804 at arm's-length and was the product of collusion. But then perhaps
805 the intention is to overrule the various laundry lists of factors
806 found across the circuits?

807 A Subcommittee member responded that the purpose is not to
808 overrule existing circuit factors. In all but two circuits, these
809 factors were developed in the 1970s and 1980s. Any of these factors
810 may, at some time with respect to some proposed settlement, prove
811 relevant. But the purpose of identifying the core concerns is to
812 encourage the court to look closely at the settlement rather than
813 move unthinkingly down a check list of factors, none of them
814 clearly developed by the parties and many of them not relevant to
815 the particular settlement. Part of the purpose is to respond to the
816 increasing cynicism found in public views of class actions. Many
817 people view settlements in consumer-class actions as devices that

818 provide no meaningful value to consumers and provide undeserved
819 awards to class counsel.

820 In a similar vein, it was observed that the purpose of
821 focusing on four core concerns seems to be to simplify and codify
822 the purposes and best elements of present practice. But we should
823 consider whether the "considering whether" formula in alternative
824 1 might be seen as overruling the circuit factors. "Would any
825 circuit think we're changing what it can do"?

826 A response was that the ALI concern was that the lengthy lists
827 of factors distract attention from the central elements. A related
828 concern was that there is a tendency to view the various "factors"
829 as things to be weighed in a balancing process, albeit without any
830 direction as to how any one is to be weighed. It is better to adopt
831 the approach of Alternative 2: the court may approve "only on
832 finding." This will redirect attention to the essential elements of
833 approval.

834 But it was noted that the four subparagraphs attached to both
835 alternative 1 and alternative 2 are conjunctive: the court must
836 consider, or find, all of them. The rule is written not for the
837 experts, who understand this now. It focuses everyone on the key
838 factors in a way that is not always understood.

839 The fifth element, "any other matter" or "any ground" the
840 court deems pertinent, was questioned: what does it add? What is
841 there that could not be read into the four central elements
842 identified in the first four subparagraphs? The response was that
843 "there still will be X factors." The four factors focus on what is
844 important, and focus the parties on what to present to the court,
845 and on what to present in the notice to the class. But the
846 rejoinder asked again: what else is relevant if all four are
847 satisfied — there is adequate representation, not tainted by
848 collusion, adequate relief, and equitable treatment of class
849 members relative to each other? Should it be made clear that the
850 burden is on the objector to show reasons to reject a settlement
851 when all of these elements are present?

852 It was noted that the alternative 2 formulation, "may approve
853 only * * * on finding" the four elements leaves discretion to
854 refuse approval even if all four are found. And it implies that the
855 standard of review should be abuse of discretion. So the court can
856 draw on any factor that has been identified in any circuit that
857 seems relevant to evaluating the settlement. "There are any number
858 of things that cannot be captured in factors." As one example: the
859 settlement is negotiated while the defendant is teetering on the
860 brink of insolvency. By the time of the hearing on objections, the
861 defendant has been restored to a financial position that would
862 support more adequate relief. How do you write a specific factor
863 for that? Still, it was suggested that alternative 1, "considering

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whether," provides a more emphatic statement of discretion.

A more particular question was asked: what happens if a lawyer who initially supported a proposed settlement changes position to challenge the proposal? No answer was attempted.

The summary of this discussion began by observing that the really good lawyers the Subcommittee has been meeting in its travels do all these good things now. But not all lawyers do. "These four factors are aimed at the lowest common denominator" of lawyers who bring class actions without much experience or background learning. They are not intended to displace the factors identified in the many appellate opinions that have been written over nearly a half-century of review. The intent instead is to focus attention on the important core. The plan is to displace the process in which parties and court are distracted by routine, uninformative submissions that simply run through the local check-list of factors, some important to the particular case, some not important, and some irrelevant.

All of this pointed toward a synthesis of alternative 1 and alternative 2. "fair, reasonable, and adequate" will be retained as the entry point. The court may approve a settlement only on making the four core findings. And "fair, reasonable, and adequate" will be removed from the third core:

> If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate because: * * *
>
> (C) the relief awarded to the class * * * is ~~fair, reasonable, and~~ adequate, given the costs, risks * * *.

<u>Settlement Classes</u>: Judge Dow introduced this topic by asking whether it would be useful, or perhaps necessary, to adopt a separate provision for settlement classes. The underlying question arises from uncertainty in applying the "predominance" requirement of Rule 23(b)(3) to settlements. The Subcommittee has reached a tentative view that it should table this question, but is not prepared to recommend that course without guidance from the Committee.

The dilemma can be framed by asking what might be gained by adopting an express settlement-class provision, and what are the "unnerving things that might happen" if one were adopted.

The first question was whether settlements have failed because a class could or would not be certified? The answer was that this in fact has happened. And there is a concern that people are deterred from even attempting settlements by the obscurity of the

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907 predominance requirement as applied to settlement.

908 The most common illustration of the value of subordinating
909 predominance is choice-of-law concerns. A class that spans several
910 states may present thorny choice-of-law questions, and present the
911 prospect that different laws will be chosen for different groups
912 within the class, forestalling predominance in litigation. These
913 problems can be readily resolved, however, by settlement. At least
914 the Second and Third Circuits have approved settlements despite
915 choice-of-law predominance concerns. Beyond that, a number of
916 lawyers believe that courts are pretty much ignoring the statements
917 in the Amchem opinion that predominance is required in certifying
918 a class for settlement.

919 This comment was amplified by the observation that the role of
920 predominance in settlement classes has generated many objections by
921 "those who take Amchem literally." But courts have developed a
922 gloss on Amchem that takes the fact and value of settlement into
923 account in finding that (b)(3) criteria have been satisfied. Still,
924 the objections come in — often from "serial objectors." Adopting a
925 settlement-class rule would clarify the law, restating where it is
926 in practice today, helping to identify how account should be taken
927 of settlement in determining whether to certify a class. But as for
928 the empirical question, "I do not know how many settlements are
929 disapproved, or not attempted," for want of a clear rule.

930 But, it was asked, why not require predominance? An immediate
931 response was that Amchem would require the laws of 50 states to
932 apply at trial; on settlement, there is no need to worry about that
933 — "everyone gets the same." But it was objected that giving
934 everyone "the same" may not be right if different sets of laws
935 would prescribe differences in the awards. The rejoinder was that
936 choice-of-law questions can be resolved in settlement, perhaps
937 choosing different laws and relief for different subclasses. And if
938 the case comes to be tried, the court may chose a single state's
939 law to govern, or may choose the law of a few states to govern,
940 grouping subclasses around the similarities in the chosen separate
941 laws. So long as the class is given notice of a proposed settlement
942 — everyone gets to see what is proposed and can object — why force
943 it to trial?

944 A further response was that predominance addresses the
945 efficiencies of trial on class claims. It does not address the
946 fairness of settlement. The Court in Amchem recognized that
947 manageability is not a concern on settlement, despite the inclusion
948 of difficulties in managing a class action among the matters
949 pertinent to finding predominance and superiority. The same can be
950 true of predominance.

951 In the same vein, it was noted that in 1993 the Third Circuit
952 said that a class action cannot be certified for settlement unless

953 the same class could be certified for trial. Amchem has superseded
954 that. Amchem led the Committee to stop work on its pre-Amchem
955 proposal to add a settlement-class provision as a new Rule
956 23(b)(4). The current draft (b)(4), however, is different from the
957 1996 version.

958 A Subcommittee member said he was impressed by how little
959 reaction was provoked by the draft of a settlement-class rule.
960 People did not even seem to be worried about the prospect that
961 representations made in promoting a proposed settlement might be
962 used against them if the settlement falls through and a request is
963 then made to certify a class for trial.

964 A different perspective was suggested by the observation that
965 settlement generally is in the interests of the immediate parties.
966 But that does not ensure fairness to absent class members.
967 Settlement does avoid the risks of class adjudication, and that may
968 justify some dilution of the predominance requirement. But does it
969 justify abandoning any shadow of predominance?

970 It was suggested that the evolution that has followed Amchem
971 shows a reduced emphasis on predominance in reviewing proposed
972 class settlements.

973 Beyond that, an alternative approach that incorporates
974 settlement classes into Rule 23(b)(3) itself is also sketched in
975 the agenda materials from p. 130 to p. 132. This approach would
976 allow certification on finding "that the questions of law or fact
977 common to class members, or interests in settlement, predominate *
978 * *." (The parallel structure could be tightened further by looking
979 to "common interests in settlement.")

980 Still another approach was suggested. The role of predominance
981 could be diminished by a rule provision that the court can consider
982 whether settlement obviates problems that would arise at trial.

983 But it also was recognized that the defense bar is concerned
984 that reducing the role of predominance in settlement classes will
985 unleash still more class actions. And on the other side, there is
986 concern that the bargaining position of class representatives will
987 be eroded if they cannot make a plausible threat of certification
988 for trial.

989 It was noted again that the interest in doing anything to add
990 a separate provision for settlement classes diminished steadily as
991 the Subcommittee made the rounds of many outside groups. There was
992 substantial enthusiasm for doing something several years ago,
993 prompting the ALI to address the question in the Principles of
994 Aggregate Litigation. But that has faded.

995 The conclusion was to not go further with the settlement-class

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996 proposal.

997 Ascertainability: The question of criteria for the
998 "ascertainability" of class membership has come to the fore
999 recently. The most demanding approach is reflected in a series of
1000 Third Circuit decisions, many of them in consumer actions. The
1001 Seventh Circuit has expressly rejected the Third Circuit approach.
1002 Other circuits come close to one side or the other. This is an
1003 important topic, and it continues to be developed in the lower
1004 courts. There is some prospect that the Supreme Court may address
1005 it soon. And it is difficult to be confident about drafting rule
1006 language that would give effective guidance. The Subcommittee has
1007 put this topic on "hold," keeping it in the current cycle but
1008 without anticipating a recommendation for publication over the next
1009 several months. The Committee approved this approach.

1010 Rule 68: Pick-off Offers: Judge Dow explained that the Subcommittee
1011 looked at the use of Rule 68 offers of judgment in an attempt to
1012 moot class actions because of the Seventh Circuit decision in the
1013 Damasco case. Under that approach, an offer of complete relief to
1014 the representative plaintiffs before class certification moots
1015 their individual claims and defeats certification. Plaintiffs
1016 commonly worked around this rule by moving for certification when
1017 they filed, but also by requesting that consideration of the motion
1018 be deferred until the case had progressed to a point that would
1019 support a well-informed certification ruling. The Seventh Circuit
1020 recently overruled this approach. Most circuits now refuse to allow
1021 a defendant to defeat class certification by offers that attempt to
1022 moot the individual claims of any representative plaintiffs who may
1023 appear. More importantly, this question has been argued in the
1024 Supreme Court. The Subcommittee has deferred further work pending
1025 the Court’s decision. The Committee agreed this course is wise.

1026 Separately, it was noted that the Committee is committed to
1027 further study of Rule 68 in response to regularly repeated
1028 suggestions for revision. The timing will depend on the allocation
1029 of available resources between this and other projects that may
1030 seem more pressing.

1031 Cy pres: For some time, the Subcommittee carried forward a proposal
1032 to address cy pres awards. The proposal was based, at least for
1033 purposes of illustration, on the model adopted by the ALI. This
1034 model attempts to achieve the maximum feasible distribution of
1035 settlement funds to class members. Only when it is not feasible to
1036 make further distributions could the court approve distribution of
1037 remaining settlement funds — and even then, the first effort must
1038 be to identify a beneficiary that would use the funds in ways that
1039 would benefit the class.

1040 It seems to be generally agreed that many classes are defined
1041 in terms that make it impracticable to identify every class member

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1042 and achieve complete distribution to class members. Some
1043 undistributed residue will remain. The ALI proposal would confine
1044 cy pres awards to those circumstances. That set of issues seems to
1045 fall comfortably within the scope of the Rules Enabling Act. But
1046 these are not the only circumstances that characterize cy pres
1047 awards in present practice. More creative awards are structured,
1048 often in cases involving small injuries to large numbers of
1049 consumers, most of whom cannot be easily identified. Attempting to
1050 address cy pres awards of this sort would present tricky questions
1051 about affecting substantive rights.

1052 Cy pres awards have evolved in practice and have been accepted
1053 in many judgments. Some states have statutes addressing them. Given
1054 the difficulty of knowing how to craft a good rule, the
1055 Subcommittee recommended that further work on these questions be
1056 suspended. The Committee accepted this recommendation.

1057 Issue Classes: Judge Dow introduced the question of issue classes
1058 by noting that the subject was taken up because of a perceived
1059 split between the Fifth Circuit and other circuits on the extent to
1060 which the predominance requirement of Rule 23(b)(3) limits the use
1061 of an issue class to circumstances in which the issue certified for
1062 class treatment predominates over all other issues in the
1063 litigation. More recent Fifth Circuit decisions, however, seem to
1064 belie the initial impression. "Dissonance in the courts has
1065 subsided." There seems little need to undertake work to clarify the
1066 law. And any attempt might well create new complications.

1067 A Subcommittee member said that the Subcommittee has learned
1068 that courts address issue-class questions in case-specific ways.
1069 Difficult questions of appealability would be raised by any
1070 distinctive changes in the issue-class provisions in Rule 23(c)(4)
1071 so as to focus on final decision of a discrete issue without
1072 undertaking to resolve all remaining questions within the framework
1073 of the same action. The problems could be similar to those that
1074 arise after separate-issue trials under Rule 42.

1075 The Committee agreed with the Subcommittee recommendation that
1076 further work on these questions be suspended.

1077 Judge Bates concluded the class-action discussion by stating
1078 that the Committee had done good work. Thanks are due to both the
1079 Subcommittee and the Committee.

1080 *Requester Pays for Discovery*

1081 For some time the Committee and the Discovery Subcommittee
1082 have deliberated the questions raised by periodic suggestions that
1083 the discovery rules should be revised to transfer to the requesting
1084 party more of the costs incurred in responding to discovery
1085 requests. Many different approaches could be taken. Many

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1086 suggestions cluster around a middle ground that would leave the
1087 costs of responding where they lie as to some "core" discovery, but
1088 require the requesting party to pay — or perhaps to justify not
1089 paying — for the costs of responding to requests outside the core.
1090 Those suggestions present obvious challenges in the task of
1091 defining core discovery in terms that apply across different
1092 subjects of litigation.

1093 Beyond these questions, the assumption that the responding
1094 party bears the costs of responding is well-entrenched. Hundreds of
1095 comments addressed to the package of discovery amendments that is
1096 pending in Congress emphasize the role of discovery in supporting
1097 enforcement of public policies that provide important protection
1098 beyond the disposition of the particular action. Great difficulty
1099 would be encountered in attempting to devise a wise rebalancing of
1100 the competing interests.

1101 Additional reasons for diffidence about requester-pays
1102 proposals arise from the pending discovery amendments. They are
1103 designed in many ways to reduce the costs of discovery. The renewed
1104 emphasis on proportionality, coupled with the strong encouragement
1105 of early and active case management, and perhaps supported by the
1106 encouragement of party cooperation, may achieve substantial
1107 reductions in the cost and delay that occasionally result from
1108 searching discovery. Beyond that, if the amendments take effect the
1109 Rule 26(c) protective-order provisions will be modified to
1110 recognize expressly the court's authority to allocate the costs of
1111 responding in a particular case. This provision is not designed to
1112 inaugurate any general practice of shifting response costs, but it
1113 can be used to address specific needs in particular cases.

1114 In all, it was agreed that further work on requester-pays
1115 proposals would be premature. One or another aspect of discovery is
1116 usually on, or close to, the active agenda. Requester-pays issues
1117 will remain in the background, to be taken up again when it may
1118 seem appropriate.

1119 *Rule 62: Stays of Execution*

1120 Rule 62 came on for study in response to separate suggestions
1121 made to the Civil Rules Committee and to the Appellate Rules
1122 Committee. The work has been pursued through a joint subcommittee
1123 chaired by Judge Matheson. The materials in the agenda book were
1124 also on the agenda of the Appellate Rules Committee, which
1125 considered them last week.

1126 Judge Matheson opened the Subcommittee Report by reminding the
1127 Committee that these questions were discussed in a preliminary way
1128 last April. The Appellate Rules Committee also took up the topic
1129 then, and both Committees agreed that it makes sense to carry the
1130 work forward. At the same time, no one identified any actual

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1131 difficulties that have emerged in practice under the current rule,
1132 apart from the specific questions that prompted the project from
1133 the beginning. The Subcommittee worked through the summer and fall
1134 to simplify and improve the draft revision. The current version
1135 appears in the agenda materials at p. 342.

1136 The draft reorganizes the allocation of subjects among present
1137 subdivisions (a) through (d), and changes the provisions for
1138 judgments that do not involve an injunction, an accounting in an
1139 action for patent infringement, or a receivership.

1140 Draft Rule 62(a) addresses three kinds of stays: (1) the
1141 automatic stay; (2) a stay obtained by posting a bond; and (3) a
1142 stay ordered by the court. These provisions address all forms of
1143 judgment, whether the relief be an award of money or some other
1144 form of relief such as foreclosing a lien or a decree quieting
1145 title.

1146 Several changes are made over the current rule.

1147 The automatic stay is extended from 14 days to 30 days. This
1148 eliminates the "gap" in present Rule 62(b), which recognizes the
1149 court's authority to order a stay "pending disposition" of post-
1150 judgment motions that may be made up to 28 days after entry of
1151 judgment. This revision addresses one of the two questions that
1152 prompted the Committees to take up Rule 62. The draft also
1153 expressly recognizes the court's authority to "order otherwise,"
1154 denying or terminating an automatic stay. (In response to a later
1155 question, it was explained that the stay was extended to 30 days to
1156 allow an orderly opportunity to begin to prepare for a further stay
1157 when expiration of the 28-day period shows there will be no post-
1158 judgment motion and while a brief period remains before expiration
1159 of the 30-day appeal time that governs most civil actions.)

1160 The draft revises the supersedeas bond provisions of present
1161 Rule 62(d) in various respects. It allows the bond to be posted at
1162 any time after judgment is entered, rather than "upon or after
1163 filing the notice of appeal." It allows "other security," not only
1164 a bond. These provisions address the questions that prompted the
1165 Appellate Rules Committee to study Rule 62 by enabling a party to
1166 post a single bond or other security that runs from entry of
1167 judgment through completion of any appeal. It also expressly
1168 recognizes the opportunity to rely on security other than a bond —
1169 one example might be a letter of credit, or establishment of an
1170 escrow fund.

1171 Draft Rule 62(a)(3) allows the court to order a stay at any
1172 time. This authority could, for example, be used to substitute a
1173 stay with security for the automatic stay.

1174 Draft Rule 62(b) authorizes a court, for good cause, to refuse

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1175 a stay sought by posting security under draft 62(a)(2), or to
1176 dissolve or modify a stay. This is new.

1177 Draft Rule 62(c), also new, authorizes the court to set
1178 appropriate terms for security, or to deny security, both on
1179 entering a stay and on refusing or dissolving a stay. One example
1180 could be an order denying a stay only on condition that the
1181 judgment creditor post security to protect the judgment debtor
1182 against the injury caused by execution in case the judgment is
1183 reversed on appeal.

1184 Proposed Rule 62(d) does little more than consolidate the
1185 provisions in present subdivisions (a) and (c) for injunctions,
1186 receiverships, and accountings in actions for patent infringement.
1187 It does bring into rule text the complete array of actions that
1188 support appeal from an interlocutory order with respect to an
1189 injunction.

1190 Some attention was paid to the possibility of revising present
1191 subdivisions (e) and (f), but it was decided that no changes are
1192 needed. Subdivisions (g) and (h) were addressed in extensive
1193 memoranda prepared by Professor Struve as Reporter for the
1194 Appellate Rules Committee, but no action has been recommended as to
1195 them.

1196 The discussion by the Appellate Rules Committee led to
1197 agreement on extending the automatic stay to 30 days, closing the
1198 gap; to supporting the opportunity to post a single bond; and to
1199 recognizing alternative forms of security.

1200 The practitioner members of the Appellate Rules Committee,
1201 however, expressed concern about the features of the draft that
1202 would authorize the court to deny a stay even when the judgment
1203 debtor offers adequate security in the form of a bond or another
1204 form. They believe that the present rule recognizes a nearly
1205 absolute right to a stay on posting adequate security, and that
1206 allowing a court to deny a stay, even for "good cause," would be a
1207 dangerous departure. This question must be taken seriously.

1208 This introduction was followed by a reminder that there seems
1209 to be general agreement on the answers to the questions that
1210 launched this work. The automatic stay should be extended to 30
1211 days, closing the potential gap between its expiration on the 14th
1212 day and the time when the court is authorized to order a stay
1213 pending disposition of a motion that may not be made until 28 days
1214 after judgment is entered. A judgment debtor should be able to post
1215 security in a form other than a bond, and should be allowed to post
1216 a single security that covers both post-judgment proceedings in the
1217 district court and all proceedings on appeal.

1218 The questions that go beyond the initial concerns arose in a

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1219 familiar way. Studying Rule 62 suggested ways in which it might be
1220 made more flexible, for the most part by provisions that would
1221 expressly recognize steps a court might well be prompted to take to
1222 protect the judgment or the parties even without explicit rule
1223 provisions. This approach often leads to the common dilemma: many
1224 ideas look good in the abstract. But there may be unforeseen
1225 problems that show both abstract and practical defects, and further
1226 difficulties may arise from the attempt to translate even good
1227 ideas into specific rule language. The wisdom of restraining
1228 ambition is underscored by the responses in the Standing Committee
1229 and both advisory committees that there have been no general
1230 complaints about Rule 62 in practice.

1231 Turning more pointedly to the concerns raised in the Appellate
1232 Rules Committee, the Subcommittee discussed repeatedly, and in
1233 depth, the question whether there should be a nearly absolute right
1234 to a stay on posting adequate security. There does seem to be a
1235 general belief in this right. And it might be seen as an integral
1236 part of the system that assures one appeal as a matter of right
1237 from a final judgment. The purpose of appeal is to provide an
1238 opportunity for reversal, even if the standards of review narrow
1239 the opportunity with respect to matters of fact or discretion.

1240 Counter considerations persuaded the Subcommittee to recognize
1241 authority to deny a stay. There may be cases in which the district
1242 court can accurately predict that there is little prospect of
1243 reversal, while also recognizing the risk of injuries that cannot
1244 be compensated even by assurance that the amount of a money
1245 judgment can be collected after affirmance. The judgment creditor
1246 may have immediate needs for money that cannot be addressed by
1247 collection of money after the delay of an appeal. For example, it
1248 may be possible to revive a damaged business by immediate action,
1249 while it may fail irretrievably pending appeal. A judgment for some
1250 other form of relief may pose comparable problems. A decree
1251 quieting title, for example, may open an opportunity for an
1252 immediate transaction that will be lost by delay. The "good cause"
1253 standard was thought to be sufficient protection of the judgment
1254 debtor’s interests, particularly when coupled with the court’s
1255 further authority to require security for the judgment debtor as a
1256 condition of denying a stay.

1257 Discussion began in two directions. One question was whether
1258 there truly is a right to a stay on posting security. The other
1259 went in the other direction: why should the rule allow the court to
1260 order a stay without any security, as the draft clearly
1261 contemplates? Is the judgment itself not assurance enough of the
1262 judgment creditor’s probable right to require that the judgment be
1263 protected against defeat by delay — with the potential for
1264 concealing or dissipating assets — by requiring security?

1265 The question of absolute right turned into discussion of

1266 present Rule 62(d). It says that an appellant "may obtain a stay by
1267 supersedeas bond." Does "may obtain" imply discretion, so that the
1268 court may refuse the stay even though the bond is otherwise
1269 satisfactory in its amount, terms, and guarantor? That possible
1270 reading may be thwarted by the reading of parallel language in Rule
1271 23(b), which begins: "A class action may be maintained if Rule
1272 23(a) is satisfied and if" the requirements of paragraphs (1),(2),
1273 or (3) are satisfied. In Shady Grove Orthopedic Associates, P.A. v.
1274 Allstate Ins. Co., 130 S.Ct. 1431, 1437, 1438 (2010), the Court
1275 read "may be maintained" to entitle the plaintiff to maintain a
1276 class action on satisfying Rule 23(a) and one paragraph of Rule
1277 23(b). Rule 23 says not that the court may permit a class action,
1278 but that the class action may be maintained. "The Federal Rules
1279 regularly use 'may' to confer categorical permission." "The
1280 discretion suggested by Rule 23's 'may' is discretion residing in
1281 the plaintiff: He may bring his claim in a class action if he
1282 wishes." Parallel interpretation of present Rule 62(d) would read
1283 it to mean that all discretion resides in the judgment debtor, who
1284 has categorical permission to obtain a stay on posting suitable
1285 security.

1286 It was noted that Appellate Rule 8(a)(1) directs that a party
1287 must ordinarily move first in the district court for a stay pending
1288 appeal or approval of a supersedeas bond. But Rule 8(a)(2)
1289 authorizes a motion in the court of appeals if it is impracticable
1290 to move first in the district court, or if the district court
1291 denied the motion or failed to afford the relief requested. Rule
1292 8(a)(2)(E) says blandly that the court of appeals "may condition
1293 relief on a party's filing a bond or other appropriate security."
1294 This locution clearly recognizes appellate discretion to deny any
1295 stay — as seems almost inevitable if application has been made to
1296 the district court and denied — and to grant a stay without
1297 security.

1298 It was suggested that district courts have authority now to
1299 order a stay without any security, but that it may be unwise to
1300 emphasize that authority by explicit rule text.

1301 A tentative solution was suggested: the draft should be
1302 shortened by deleting subdivisions (b) and (c). Subdivision (b)
1303 reads: "The court may, for good cause, refuse a stay under Rule
1304 62(a)(2) or dissolve a stay or modify its terms." Subdivision (c)
1305 reads: "The court may, on entering a stay or on refusing or
1306 dissolving a stay, require and set appropriate terms for security
1307 or deny security." The final words of (c) would be transferred to
1308 paragraph (a)(3): "The court may at any time order a stay that
1309 remains in effect until a time designated by the court[, which may
1310 be as late as issuance of the mandate on appeal,] <u>and set</u>
1311 <u>appropriate terms for security or deny security</u>.

1312 A separate issue was raised. The draft rule does not describe

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1313 the appeal bond as a "supersedeas" bond. It was agreed that it
1314 would be better to move away from that antique-sounding word. But
1315 "supersedeas" appears in Appellate Rule 8(a)(1)(B), most likely
1316 because it directs that application for a stay be made first to the
1317 district court. (Appellate Rule 8(a)(2)(E) is simpler — it refers
1318 only to conditioning a stay on "a bond or other appropriate
1319 security.") The Bankruptcy Rules also refer to a supersedeas bond.
1320 It would be good to strike the word from each set of rules.

1321 Discussion concluded with the suggestion that the proposed
1322 rule should be simplified along the lines indicated above. The
1323 practicing lawyers on the Appellate Rules Committee believe there
1324 is a nearly absolute right to a stay on posting an adequate bond or
1325 other security. No one is pressing for revision. If the rule is
1326 amended to authorize the court to deny a stay by posting bond, even
1327 if the court must find good cause to deny the stay, there will be
1328 an increase in arguments seeking immediate execution. And it will
1329 be difficult to implement the good-cause concept. Imagine one
1330 simple argument: The judgment creditor is 85 years old and wants
1331 the chance to enjoy the fruits of judgment in this life time.

1332 Judge Matheson agreed that the Subcommittee will reconsider
1333 these problems in light of the discussion here and in the Appellate
1334 Rules Committee.

1335 *e-Rules*

1336 The Committee was reminded of the recent history of work on
1337 the rules for electronic filing, electronic service, and use of the
1338 Notice of Electronic Filing as a certificate of service. Last
1339 April, this Committee voted to recommend publication of a set of
1340 rules amendments addressing these topics. The Criminal Rules
1341 Committee, however, decided at the same time that the time has come
1342 to write independent provisions for these topics into Criminal Rule
1343 49. Rule 49 currently incorporates the practice of the civil rules
1344 for filing and service. Their project is designed to avoid
1345 cumbersome cross-references between different sets of rules, and
1346 also to determine whether differences in the circumstances of
1347 criminal prosecutions justify differences in the filing and service
1348 provisions. Brief discussions led to modifications in the Civil
1349 Rules provisions that were presented to the Standing Committee for
1350 discussion. The revised provisions are included in the agenda
1351 materials for this meeting. This Committee did not recommend
1352 publication at the May Standing Committee meeting. The Criminal
1353 Rules Committee continues to work on its new Rule 49. A conference
1354 call of the Criminal Rules Subcommittee will be held on November
1355 13; representatives of this Committee will participate.

1356 The goal of this work is to work toward common proposals on
1357 all topics that merit uniform treatment across the different sets
1358 of rules. That goal leaves the way open to different treatment of

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1359 topics that warrant different treatment in light of differences in
1360 the circumstances that confront the different sets of rules. The
1361 parallel proposals for the Appellate Rules already include some
1362 variations that integrate these subjects with the structure of the
1363 Appellate Rules. So it may be that the Criminal Rules Committee
1364 will find that criminal prosecutions deserve different treatment of
1365 some aspects of electronic filing and service.

1366 One of the topics that has been discussed is access to
1367 electronic filing and service by pro se litigants. The Civil Rules
1368 proposals reflect a belief that a pro se litigant, the court, and
1369 all other parties may benefit from allowing electronic filing and
1370 service by a pro se litigant. The question is how to manage this
1371 practice. It may be that uniform provisions are suitable for all
1372 sets of rules. It may be that different approaches are desirable.
1373 These questions will be addressed as all committees work toward
1374 final proposals for publication. One committee member noted that
1375 her court has had difficulty with local rules that track each other
1376 for pro se litigants in criminal and civil proceedings — the
1377 problems really are different.

1378 Once decisions are reached as to the appropriate level of
1379 substantive uniformity, style questions will remain. It will be
1380 important to work out style questions with the help of the style
1381 consultants so as to avoid any occasion for asking the Standing
1382 Committee to resolve any differences.

1383 *Pilot Projects*

1384 Judge Bates opened the discussion of pilot projects by asking
1385 Judge Campbell, who has chaired the pilot projects committee, to
1386 report on the committee's work.

1387 Judge Campbell began by noting that many people have worked in
1388 the effort to advance consideration of pilot project proposals.

1389 The interest in pilot projects was stimulated by experience in
1390 attempting to translate the lessons offered at the 2010 Conference
1391 into specific rules proposals. There are limits to what can be
1392 accomplished by rules. If a page of history is worth a volume of
1393 logic, the purpose of pilot projects may be to create pages of
1394 history by actual experience in testing new approaches. One result
1395 may be rules amendments. But pilot projects may provide valuable
1396 lessons that are implemented in other ways. The Committee on Court
1397 Administration and Case Management may find valuable practices that
1398 it can foster through its work. The Judicial Conference may gain
1399 similar benefits. It may be that approaches that have been tested
1400 and found valuable will be adopted by emulation without the need
1401 for formal action by any committee.

1402 For the rules committees, the immediate plan is to prepare

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1403 concrete proposals for possible pilot projects that can be
1404 discussed with the Committee on Court Administration and Case
1405 Management and with the Standing Committee this coming spring. The
1406 goal will be to identify one or more projects that could be
1407 implemented late in 2016.

1408 One informal pilot project, the protocols for initial
1409 discovery in individual employment actions, is already being
1410 studied. Emery Lee at the FJC has been tracking experience.

1411 Emery Lee reported that the first thing he learned was that
1412 the employment protocols are being used by more judges than he had
1413 thought. He has identified 70 judges that are using them. Drawing
1414 on cases that have concluded since 2011, he identified some 500
1415 terminated cases. He drew a random sample of cases that did not use
1416 the protocols during the same period. Overall, he studied data on
1417 1,150 cases.

1418 The positive lesson is that there are fewer discovery motions
1419 in protocol cases: motions were made in 12% of these cases, as
1420 compared to 21% of the comparison cases. The average number of
1421 motions made was half as many in the protocol cases. "That is a big
1422 number." The number suggests that the protocols made an important
1423 difference. But it is not possible to draw firm conclusions because
1424 the judges who choose to adopt the protocols may be judges who are
1425 actively engaged in managing discovery in any event.

1426 The negative lesson is that the time to disposition appears to
1427 be essentially identical in protocol cases as in non-protocol
1428 cases. The essential identity held true for the time taken to reach
1429 disposition by different methods — by motion to dismiss or by
1430 summary judgment. The time to settlement, however, appears to be
1431 different. The identity of times to disposition is puzzling.

1432 The first comment was made by a judge who requires a request
1433 for a conference before a motion can be made. That may be happening
1434 in the employment cases — the same number of discovery disputes
1435 arise, but many of them are resolved at the pre-motion conference,
1436 reducing the number of motions.

1437 A second comment was that the times to disposition may track
1438 closely if courts set the same discovery cut-off time in protocol
1439 cases as in non-protocol cases. The timing of dispositive motions
1440 tends to feed off the discovery cut-off.

1441 Another judge offered a guess that protocol judges are likely
1442 to be "more progressive — to require a conference before a
1443 discovery motion can be made." But he uses the protocols, and
1444 thinks he is seeing fewer discovery disputes. "They don’t fight
1445 over things they used to fight over because of automatic
1446 disclosures." As one example: confronted with a request to identify

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1447 the person who made the decision to terminate a plaintiff,
1448 defendants used to argue that the information was protected by work
1449 product. It is not protected, but the argument had to be resolved.
1450 Now the information is automatically disclosed and there is no
1451 dispute.

1452 Yet another judge said that lawyers use the protocols and
1453 "play nicely together." The similarity in times to disposition is
1454 probably because the case schedules are not changed.

1455 Discussion turned to pilot projects in general. Various pilot
1456 projects aimed at reducing cost and delay have been identified in
1457 eleven states. Before that, the Civil Justice Reform Act stimulated
1458 a massive set of local experiments. The Conference of Chief
1459 Justices is working on a Civil Justice Improvement Project. The
1460 Institute for the Advancement of the American Legal System has
1461 studied several pilot projects, and recommended principles to
1462 improve civil litigation. The National Center for State Courts has
1463 evaluated some projects. Projects are upcoming in Texas and
1464 Minnesota. New York State is developing a program that is aimed at
1465 trading early trial dates for curtailed pretrial procedure.

1466 One possible pilot project that has drawn attention is the one
1467 that would involve some form of expanded initial discovery, perhaps
1468 moving beyond the form embodied by Civil Rule 26(a)(1) between 1993
1469 and 2000 to a model drawn from the Arizona rule.

1470 Other possibilities focus on assigning cases to different
1471 tracks that embody different levels of pretrial procedure, as many
1472 of the CJRA plans attempted. One problem that has confronted these
1473 programs has been identification of criteria for assigning cases to
1474 the different tracks. When dollar limits are set, lawyers tend to
1475 plead around them. Other criteria become difficult to manage.

1476 A quite different approach would forgo formal experiments with
1477 new procedures to focus on training. The RAND study of the CJRA
1478 experiments confirmed that time to disposition can be reduced by a
1479 combination that includes early judicial case management, shorter
1480 discovery cut-offs, and early setting of a firm trial date. This
1481 learning could be demonstrated by a quasi-pilot project that trains
1482 judges in a district, gathers statistics, measures the progress of
1483 judges in reducing times to disposition, and seeks to persuade
1484 other judges of the value of these practices. Emery Lee noted that
1485 gathering information on individual judge performance can be
1486 sensitive. But the RAND study shows that there is real value. We
1487 know it is there.

1488 A Committee member noted that he does a lot of arbitrations as
1489 an arbitrator, usually as a neutral member. "There is a convergence
1490 of what happens in arbitration with civil litigation." In
1491 arbitration, you get only the discovery the arbitrator orders. So

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1492 a lawyer may request 10 depositions; the order is to come back
1493 after talking with the client about the cost. The next request is
1494 for one deposition. "People sign up for this." "At the Rule 16
1495 conference you quickly learn what the case is about." The idea of
1496 training judges is terrific. But we have to be able to distinguish
1497 cases for tracking purposes — small cases have to be dealt with
1498 differently. And they must be identified early. Tracking can work.
1499 Arbitration hearing dates tend to be quite firm because they must
1500 coordinate the schedules of 8, 9, 10 different people — a missed
1501 date may push the next hearing back by half a year.

1502 A judge noted that before he became a judge he was a member of
1503 the CJRA committee for his district. "We're still doing tracking."
1504 But "I can't say whether it's good or bad." Lawyers are required to
1505 address tracking in their Rule 26(f) conference. Then they discuss
1506 it with the judge. There are five tracks: expedited, standard,
1507 complex, mass tort, and administrative.

1508 Another judge reported that "tracking works." For example, he
1509 reduces the time for discovery in FDCA cases and reduces the number
1510 of discovery events.

1511 The same judge then asked how does the Arizona initial
1512 disclosure of legal theories relate to practice on motions to
1513 dismiss for failure to state a claim? Judge Campbell suggested that
1514 it does not seem to have made a significant change.

1515 A broader perspective was suggested. The RAND study of CJRA
1516 experience was expensive. We should focus on what we can try to do,
1517 and on what resources are available. Comparing pilot projects in
1518 some districts with others can be interesting, but "we do not have
1519 a lot of resources for data-driven projects." Pilot projects,
1520 however, "can be about norm changing." None of the suggested
1521 projects embodies an idea that is strong enough to be adopted
1522 without testing in a national rule that binds all 94 districts.
1523 Instead, we can find 5 or 10 districts to implement known good
1524 ideas. The hope will be that they will like the experience, carry
1525 on with it, and perhaps encourage other districts to emulate their
1526 experience. A similar comment suggested that it may be more
1527 effective to develop ideas, label them as best practices or
1528 innovations, and then draw attention to successful adoptions. But
1529 another judge expressed doubt whether "it catches on that way among
1530 judges." A different judge, however, thought that judges will be
1531 willing to adopt a practice when they become convinced that it will
1532 help move cases effectively. The question "is how to get people off
1533 the mark." A more specific suggestion was that "we can convince
1534 people to have a pre-motion telephone conference."

1535 Federal Judicial Center training of all judges may be another
1536 means of fostering ideas that have proved out in one or a few
1537 districts.

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1538 A judge suggested that the idea of pilots is to test ideas,
1539 such as initial disclosure. Initial disclosure can be tested to see
1540 how it affects the number of motions, the time to disposition, and
1541 other variables. The Committee on Court Administration and Case
1542 Management will meet to discuss these same pilot-project ideas in
1543 December. They support work on this. It was agreed that involving
1544 "CACM" is essential. If they identify districts that have long
1545 times to disposition, they can help to focus enhanced training
1546 there. And it may be possible to measure the results.

1547 A suggestion from an absent member was relayed: "Why are we
1548 thinking of small cases"? We need fact pleading, short discovery,
1549 and firm trial dates in all cases. "Do we need two rounds of
1550 pleading in every case"? Unlimited discovery? State courts working
1551 along these lines are achieving cheaper, faster resolutions. "We
1552 should be driving toward pretty radical rule change."

1553 Another judge noted that it is difficult to measure
1554 achievement of the "just" aspiration expressed in Rule 1. But it is
1555 possible to measure satisfaction of the parties, and that may be a
1556 good thing to study.

1557 The initial disclosure proposal came on for more detailed
1558 discussion. This model aims at "robust, but not aggressive"
1559 disclosure. It works from the Arizona model, but reduces the level
1560 of required disclosures in several dimensions.

1561 The first question asked why the model requires only
1562 identification of categories of relevant documents, rather than
1563 actual production. The Arizona rule requires actual production
1564 unless the documents are voluminous. Arizona lawyers report that
1565 the rule operates as a presumption for production of particular
1566 documents. The response was that the model reflects concern that
1567 too much burden will be imposed by requiring actual production at
1568 the outset of an action, particularly if that were added to the
1569 obligation to identify witnesses, the fact basis for claims and
1570 defenses, and legal theory. To be sure, not much is accomplished by
1571 disclosing that relevant information can be found in such
1572 categories as "personnel files," "R & D files," or the like. But
1573 the parties can figure out where to start discovery by other means.
1574 Still, this question is open to further consideration if this model
1575 moves toward testing in a pilot project.

1576 Initial disclosure was viewed from an expanded perspective.
1577 The bar was not ready for the 1993 rule that required disclosure of
1578 information unfavorable to the disclosing party. "The Arizona
1579 experience may not convince" federal judges in 49 other states. It
1580 would be difficult to move directly to adopting a rule that
1581 embodies the Arizona practice. But if it works in 5 or 10 pilot
1582 districts, there could be support for adopting a national practice.

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1583 A member reported work on a CJRA committee that adopted an
1584 initial disclosure rule. "It failed. Lawyers weren't ready." But
1585 the "pilot project" label may not be effective in selling a
1586 program. We want to test ideas to see whether they work. We need
1587 something that facilitates culture change. Seeing that something
1588 actually works can do a lot.

1589 A truly pointed question was asked: (a)(2) and (a)(2)(A) of
1590 the model require disclosuring:

1591 (2) whether or not the disclosing party intends to use
1592 them in presenting its claims or defenses:

1593 (A) the names and addresses of all persons whom the
1594 party believes may have knowledge or information
1595 relevant to the events, transactions, or
1596 occurrences that gave rise to the action * * *.

1597 Just what is intended? The purpose is to require disclosure of
1598 information unfavorable to the disclosing party — it is enough that
1599 the information is relevant to the events, etc.

1600 The alternative of judge training programs came back for
1601 expanded discussion with the question whether it is a fool's
1602 errand. A judge responded that there are some judges who will
1603 resist training. But overall, training can do more than can be done
1604 by rules. Still, it would be a mistake to adopt a pilot that forces
1605 all judges into training. Another judge said that newer judges are
1606 particularly likely to want to take training in subjects they do
1607 not know well. But forcing it will not work. Still another judge
1608 agreed that new judges are more amenable to this sort of training.

1609 "Baby judges school" also was noted, but it was suggested that
1610 new judges are still so new at this point that it cannot do the job
1611 of more focused and advanced programs. And in any event, "I'm not
1612 sure the problem is newer judges." However that may be, the
1613 training has to be meaningful. It will not work just to tell us
1614 judges that early case management is important. "Tell me how to
1615 make it happen."

1616 A similar perspective was offered. "The important thing is to
1617 move from the abstract to the concrete." "Here's what actually
1618 works." A phone call on a 3-page statement of a motion to dismiss
1619 leads to an amended complaint. If the motion is renewed, whatever
1620 is dismissed is with prejudice. The ideas must be packaged in a way
1621 that makes it easier for the judge to do it.

1622 So it was noted that "we learn more in gatherings of judges
1623 where we talk together." Mid-career judges help newer judges in
1624 informal exchanges that often are more useful than formal training
1625 programs. So one promising approach may be to go to the districts

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1626 to get the local judges talking among themselves about topics they
1627 would not "fly to D.C. to learn about."

1628 Other questions were raised about pilot projects. "We know a
1629 lot about what works." A pilot project will take 3 or 4 years in
1630 practice. Then it will have to be evaluated. And the result may be
1631 a simple message that it works better with more judge involvement.

1632 One note of frustration was expressed. In many districts the
1633 district judges refer all pretrial matters to magistrate judges,
1634 but do not set trial dates. The magistrate judge can move cases,
1635 but the district judge has to be involved.

1636 It was noted that sometimes a pilot project will not be able
1637 to enlist every judge in a district. It may be necessary to look
1638 for judges. The Administrative Office can tell a district whether
1639 it is moving faster or slower than the national average. "It's a
1640 question of putting the resources in the right place."

1641 A final suggestion was that it could be useful to get on the
1642 agenda of the Chief District Judges conference.

1643 *New Docket Items*

1644 **15-CV-C**

1645 This suggestion protests the overuse of "objection as to form"
1646 during oral depositions. The proposed remedy is to create a
1647 Committee Note "indicating that it is improper to merely object to
1648 'form' without providing more precise information as to how the
1649 question asked is 'defective as to form' (e.g., compound, leading,
1650 assumes facts not in evidence, etc.)."

1651 It is well established that a Committee Note can be written
1652 only as part of the process of adopting or amending a rule. Rule
1653 30(c)(2) could be amended to say something like this: "An objection
1654 must be stated in a nonargumentative and nonsuggestive manner <u>that</u>
1655 <u>reasonably explains the basis of the objection</u>." But the Committee
1656 concluded that any revisions of the rule text are unlikely to
1657 change behavior for the better, and might easily create more
1658 problems than would be solved.

1659 This suggestion was removed from the docket.

1660 **15-CV-E**

1661 This suggestion addresses the time to file a responsive
1662 pleading when a Rule 12(b)(6) motion to dismiss addresses only part
1663 of a complaint or when the motion is converted to a motion for
1664 summary judgment. The concern is that some courts rule that the
1665 time to respond is suspended by Rule 12(a)(4) only as to the parts

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1666 of the complaint challenged by the motion; an answer must be filed
1667 as to the remainder of the complaint. The same problem can persist
1668 if the motion to dismiss is converted to a motion for summary
1669 judgment.

1670 It is urged that it is better to suspend the time to respond
1671 as to the entire complaint. This practice avoids duplicative
1672 pleadings and confusion over the proper scope of discovery. Many
1673 cases support it.

1674 Discussion revealed that even though many cases support the
1675 suggested approach, not all judges follow it. One Committee member
1676 reported that some judges in his home district require a response
1677 to the parts of a pleading not addressed by the motion, even though
1678 the time to respond is suspended as to the parts addressed by the
1679 motion. There is some reason for concern.

1680 Despite these possible concerns, the Committee concluded that
1681 there is not yet evidence of a problem so general as to warrant
1682 amending the rules. This suggestion will be removed from the
1683 docket, although without any purpose to suggest that it should not
1684 be considered further if a general problem is shown.

1685 **15-CV-X**

1686 This suggestion raises two or three issues.

1687 One suggestion is that Rule 45 should be revised to extend the
1688 reach of trial subpoenas so as "to force a representative of a non-
1689 resident corporate defendant to appear at trial in the court that
1690 has jurisdiction over the parties and the case." This question was
1691 thoroughly explored in working through the recent amendments of
1692 Rule 45. A proposal similar to this one was published for comment,
1693 albeit without any recommendation that it be adopted. No sufficient
1694 reasons are offered to justify reexamination now.

1695 A second suggestion would adopt the procedure of Rule 30(b)(6)
1696 for trial subpoenas. A trial subpoena could name an entity as
1697 witness and direct the entity to produce one or more real persons
1698 to testify for the entity. Discussion noted that Rule 30(b)(6)
1699 itself has been examined twice in the recent past. Each time the
1700 Committee found problems in practice, but concluded that the
1701 problems were not sufficiently pervasive to justify amending the
1702 rule. It was concluded that however well Rule 30(b)(6) works for
1703 discovery, extending it to trial would generate additional problems
1704 that could become serious.

1705 The suggestion also might be read to urge that a nonparty
1706 entity be required to produce witnesses to testify at a deposition
1707 in the district where an action is pending.

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1708 The Committee concluded that this set of suggestions should be
1709 removed from the docket.

1710 **15-CV-EE**

1711 This submission offers four discrete suggestions, all of which
1712 touch on other sets of rules in addition to the Civil Rules.

1713 The first suggestion is to amend Rule 5.2(a)(1). The rule now
1714 permits disclosure in a filing of the last four digits of the
1715 social-security number and taxpayer-identification number. The
1716 suggestion is that no part of these numbers be disclosed. The
1717 reason is that the method of generating social security numbers
1718 relies on a well-known formula that, together with additional
1719 information about a person that is often readily available, can be
1720 used to reconstruct the full number. This phenomenon was considered
1721 by the joint subcommittee that drafted Rule 5.2 and the parallel
1722 Appellate, Bankruptcy, and Criminal Rules. The decision to allow
1723 filing the last four digits was made because this information was
1724 thought important for the Bankruptcy Rules. A preliminary inquiry
1725 suggests that this information may remain important for bankruptcy
1726 purposes. This suggestion will be carried forward for consultation
1727 with the other advisory committees.

1728 The second suggestion is that any affidavit made to support a
1729 motion to proceed in forma pauperis under 28 U.S.C. § 1915 be filed
1730 under seal and reviewed ex parte. The court could order disclosure
1731 to another party for good cause and under a protective order, or
1732 permit unsealing in appropriately redacted form. The concern seems
1733 to be to protect privacy interests. Again, the other advisory
1734 committees are involved. Brief discussion suggested that filing
1735 under seal is not a general practice now. One judge says that he
1736 does not order sealing because it imposes costly burdens on the
1737 court. Another participant suggested that i.f.p. disclosures
1738 generally invade privacy only to the extent of disclosing a lack of
1739 financial resources, a state that could be inferred from a grant of
1740 in forma pauperis permission in any event. This suggestion too will
1741 be carried forward for consultation with other advisory committees.

1742 The third suggestion is for a new Rule 7.2. It is modeled on
1743 a local rule for the Eastern and Southern Districts of New York. It
1744 would address citation by counsel of cases or other authorities
1745 "that are unpublished or reported exclusively on computerized data
1746 bases." Counsel who cites such authority would be required to
1747 provide copies to a pro se litigant. In addition, on request,
1748 counsel would be required to provide copies of such cases or
1749 authorities that are cited by the court if they were not previously
1750 cited by counsel. Discussion began by asking whether other courts
1751 have local rules similar to the E.D. & S.D.N.Y. rule; no one had
1752 information to respond. A judge noted that he makes copies
1753 available when he cites unpublished authority. A lawyer suggested

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1754 that Assistant United States Attorneys seem to do this in some
1755 districts. It was suggested that some way might be found to
1756 encourage this as a best practice. A note of this suggestion will
1757 be sent to the head of the FJC. But it was concluded that this
1758 practice involves a detail of practice that need not be enshrined
1759 in the Civil Rules.

1760 The final suggestion is that pro se litigants should be
1761 permitted, but not required, to file by paper, and should be
1762 permitted to qualify for e-filing and service to avoid burdens that
1763 other parties do not have to bear. These questions are being
1764 actively considered by several advisory committees, as noted during
1765 earlier parts of this meeting. They will continue to be considered.

1766 **Pre-Motion Conference: Rule 56**

1767 Judge Jack Zouhary, a member of the Standing Committee, has
1768 offered an informal suggestion that this Committee consider the
1769 practice of requiring a party to request a conference with the
1770 court before making a motion for summary judgment. He follows that
1771 practice, and finds that it has many benefits.

1772 The benefits that may be realized by pre-motion conference
1773 include these possibilities: The movant may decide not to make the
1774 motion, or may focus it better by omitting issues that are
1775 genuinely disputed. The nonmovant may realize that some issues are
1776 not genuinely disputed or are not material. Discussion in the
1777 conference may lead the parties to a better understanding of the
1778 facts, the law, or both. A conference with the court may work
1779 better than a conference of the parties alone. The court may not
1780 use the conference to deny permission to make the motion — Rule 56
1781 establishes a right to move. But the court can suggest and advise.

1782 Similar advantages can be gained by holding a conference with
1783 the court before other motions are made. These advantages were
1784 discussed in developing the package of case-management amendments
1785 now pending in Congress. The result of those deliberations is to
1786 add a new Rule 16(b)(3)(B)(v), which provides that a scheduling
1787 order may "direct that before moving for an order relating to
1788 discovery, the movant must request a conference with the court."
1789 This provision was limited to discovery motions in a spirit of
1790 conservatism in adding details to the rules. It was recognized that
1791 many courts require pre-motion conferences for motions other than
1792 discovery motions, including summary-judgment motions. But it also
1793 was recognized that some judges do not. One step was to reject any
1794 general requirement — the new Rule 16(b) provision serves simply as
1795 a reminder and perhaps as an encouragement.

1796 It would be easy enough to expand pending Rule 16(b)(3)(B)(v)
1797 to encompass summary-judgment motions. It would authorize a
1798 scheduling-order provision that "direct[s] that before moving for

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1799 an order relating to discovery or for summary judgment, the movant
1800 must request a conference with the court." Or Rule 56(b) could be
1801 amended to mandate this procedure: "a party may, after requesting
1802 a conference with the court, file a motion for summary judgment at
1803 any time until 30 days after the close of all discovery."

1804 Discussion began with a judge who requires a pre-motion
1805 conference for "all sorts of motions." This practice has many
1806 benefits. Recognizing that some judges would oppose a mandate, why
1807 not expand Rule 16(b) to encompass not only discovery but any
1808 "substantive" motion?

1809 Another judge thought the underlying idea is good. "But we
1810 have just been through one round of amendments. We did it
1811 carefully." We can find a way to recommend pre-motion conferences
1812 as a best practice, but should wait before suggesting another rule
1813 amendment. And then we will need to think about how broadly the
1814 rule should apply. For example, is there a sufficiently clear
1815 concept of what is a "substantive motion" to support use of that
1816 term in rule text?

1817 A lawyer noted that the AAA rules used to provide for summary
1818 disposition in general terms. The rules were amended to require
1819 permission of the arbitrator before making the motion. As an
1820 arbitrator, he has denied permission when the motion seemed
1821 inappropriate. That is not to suggest that a judge be authorized to
1822 deny leave to make a summary-judgment motion, but requiring a
1823 conference would give the judge an opportunity to observe that a
1824 motion would not have much chance of succeeding.

1825 The discussion concluded by determining to hold this
1826 suggestion open, without moving forward now.

1827 **Rules 81, 58**

1828 Two additional items were included in the agenda materials.
1829 One addresses the provisions of Rule 81(c) that govern demands for
1830 jury trial in an action that has been removed from state court. The
1831 other addresses the Rule 58 requirement that a judgment be entered
1832 in a "separate document." These items will be carried forward on
the agenda.

Respectfully submitted,

Edward H. Cooper
Reporter

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TAB 8

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

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WILLIAM K. SESSIONS III
EVIDENCE RULES

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

FROM: Honorable Sandra Segal Ikuta, Chair
Advisory Committee on Bankruptcy Rules

DATE: December 10, 2015

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met in Washington, D.C., on October 1, 2015. The draft minutes of that meeting are attached.

At the meeting the Committee approved conforming amendments to one rule and minor amendments to three official forms. It seeks the Standing Committee's approval of these amendments without publication. The Committee also voted to recommend that amendments to one rule be published for public comment in August 2016. These matters are discussed in Part II of this report, along with a request for a limited delegation of authority to the Committee to make minor changes to official forms, subject to subsequent approval by the Standing Committee and the Judicial Conference.

Part III presents four information items. The first concerns the Judicial Conference's submission to the Supreme Court of the "*Stern* amendments," which address how a party gives its consent to a bankruptcy court's adjudication of adversary proceedings. The Committee reconsidered these previously approved, but withdrawn, amendments at the fall meeting in light of the Supreme Court's decision in *Wellness International Network v. Sharif*, 135 S. Ct. 1932

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(2015). The Standing Committee and the Judicial Conference, acting on an expedited basis, accepted the Committee's recommendation that the amendments be resubmitted to the Court.

The next item provides an update on the Committee's continuing deliberations about a proposed official form for chapter 13 plans and related rule amendments.

The final information items concern two matters on the Committee's agenda that are the subject of continuing deliberations. The first concerns whether Rule 4003(c) (Exemptions) impermissibly imposes the burden of proof on a party that objects to a claimed exemption, even though some state laws place the burden on the debtor. The other matter relates to Rule 9037 (Privacy Protections for Filings Made with the Court) and how to implement a procedure for redacting previously filed documents that improperly contain personal identifiers.

II. Action Items

A. Items for Final Approval without Publication

The Committee requests that the Standing Committee approve the following rule and form amendments without publishing them for public comment due to their conforming or limited nature. The Committee recommends that the amended forms take effect on December 1, 2016. The rule and forms in this group appear in Appendix A.

Action Item 1. Rule 1015(b) (Cases Involving Two or More Related Debtors). Rule 1015(b) provides for the joint administration of bankruptcy cases in which the debtors are closely related. Among the debtors covered by the rule are "a husband and wife." The provision also implements a statutory requirement that a husband and wife with jointly administered cases choose the same exemption scheme—either federal bankruptcy exemptions, if permitted, or state exemptions.

After the decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), which held § 3 of the Defense of Marriage Act ("DOMA") unconstitutional, the Committee received a suggestion that Rule 1015(b) be amended to substitute the word "spouses" for "husband and wife" in order to include joint bankruptcy cases of same-sex couples. The Committee considered the suggestion at its spring 2014 meeting. It concluded that the first reference to "husband and wife" in Rule 1015(b) falls squarely within the holding of *Windsor*. Section 302 of the Bankruptcy Code, unlike the language of Rule 1015(b), authorizes the filing of a joint petition under a chapter by "an individual that may be a debtor under such chapter and such individual's spouse." The rule's use of the more restrictive term "husband and wife" could be justified only by reliance on § 3 of DOMA, which amended the Dictionary Act to provide that "the word 'spouse' refers only to a person of the opposite sex who is a husband or wife." 1 U.S.C. § 7. *Windsor*'s invalidation of the DOMA provision removed support for the rule's deviation from the statutory language.

The other reference to "husband and wife" in Rule 1015(b), however, is consistent with the statutory language. The rule implements § 522(b)(1) of the Code, which imposes a restriction on the choice of exemptions in cases in which the debtors are a "husband and wife." While some of the Court's reasoning in *Windsor* could be read to suggest that same-sex married couples in bankruptcy should not have a greater choice of exemptions than husbands and wives have, the decision is not directly on point. The Committee voted at the spring 2014 meeting to propose the substitution of "spouses" for both references to "husband and wife" in Rule 1015(b), but to await further clarification of the law on same-sex marriages before presenting the amendment to the Standing Committee.

At this fall's meeting, the Committee revisited the issue in light of the decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015),which held that the right to marry is a fundamental right under the Fourteenth Amendment and that same-sex couples may not be deprived of that right. *Id.* at 2599. The Court further held that the Equal Protection Clause prevents states from denying same-sex couples the benefits of civil marriage on the same terms as opposite-sex couples. *Id.* at 2604. The Committee concluded that the decision supported the proposed amendments to Rule 1015(b) to eliminate language suggesting that only opposite-sex married couples may file a joint bankruptcy petition under § 303 and that same-sex married couples are subject to different rules regarding their choice of exemptions. Because the Committee viewed the proposed changes as conforming amendments, it voted unanimously to seek approval of them without publication for public comment.

Action Item 2. Official Forms 20A (Notice of Motion or Objection) and 20B (Notice of Objection to Claim). These official forms were overlooked by the Forms Modernization Project, and thus they were not included with the large group of modernized and renumbered forms that went into effect on December 1, 2015. The Committee recommends that these forms be renumbered and that a minor wording change be made to them.

Under the new numbering convention, the forms should be designated as Official Forms 420A and 420B. In addition, the Committee noted that both forms state that the recipient of the notice must "mail" a copy of any response to the movant's or objector's attorney. To encompass other permissible methods of service, the Committee recommends that "mail" be changed to "send," as indicated on the proposed forms in Appendix A.

Action Item 3. Official Form 410S2 (Notice of Postpetition Fees, Expenses, and Charges). Rule 3002.1(c) requires a home mortgage creditor in a chapter 13 case to give notice of any fees, expenses, or charges that are assessed during the course of the case to the debtor, debtor's counsel, and the trustee. This information assists a debtor who wants to maintain mortgage payments while in bankruptcy to make payments in a sufficient amount to emerge from bankruptcy current on the mortgage. Official Form 410S2 implements the rule provision. The Committee became aware of a possible inconsistency between the rule and the form. The instructions to Part 1 of the form state, "Do not include . . . any amounts previously . . . ruled on by the bankruptcy court." Rule 3002.1(c), however, requires the creditor to give notice of all

postpetition fees, expenses, and charges without excepting ones already ruled on. This issue was discussed in *In re Sheppard*, 2012 WL 1344112 (Bankr. E.D. Va. Apr. 18, 2012). Noting the difference between the rule and the form's instruction, the court held that the form's instruction "best effectuates the ultimate goal of Rule 3002.1 to provide debtors with accurate information regarding postpetition obligations that await them at the conclusion of their bankruptcy case." *Id.* at *4. The court explained that requiring creditors to file a notice for amounts already approved by the court would result in duplication and uncertainty. Accordingly, it concluded that there was no need for the creditor to file notice of fees that had been included in a consent order resolving the creditor's motion for relief from the stay. *Id.*

Participants at a mini-conference the Committee held in 2012 came out the other way on the issue. They suggested that the instruction regarding amounts previously ruled on be deleted from Official Form 410S2 because giving notice of previously authorized fees would allow the trustee to determine if they had been paid.

The Committee concluded that the inconsistency between the form and the rule should be eliminated by deleting the instruction from the form. In order to prevent confusion or the risk of double payments, the proposed amendment adds an instruction to Form 410S2 that requires the creditor to indicate if a fee has previously been approved by the court. Because this is a minor conforming amendment, the Committee recommends that the proposed change be approved without publication.

B. <u>Item for Publication in August 2016</u>

The Committee requests that the Standing Committee approve the following rule amendments for publication for public comment.

<u>Action Item 4</u>. Rule 3002.1(b) (Notice of Payment Changes) and (e) (Determination of Fees, Expenses, or Charges). As discussed in Action Item 3, Rule 3002.1 prescribes several noticing requirements for home mortgage creditors in chapter 13 cases. The rule was enacted to ensure that chapter 13 debtors who maintain mortgage payments over the life of the plan, as permitted by Bankruptcy Code § 1322(b)(5), will have the information they or trustees need to make correct payments. Rule 3002.1(b) requires chapter 13 mortgage creditors to file a notice of any change in the mortgage payment amount at least 21 days before payment is due. Unlike subdivision (e) of the rule, which governs notices of claimed postpetition fees, expenses, and charges, subdivision (b) does not provide a procedure for challenging payment changes that are noticed. Based on concerns expressed at the Committee's 2012 mini-conference on the mortgage rules, the Committee concluded that it would be beneficial to have a national procedure for raising and determining objections to payment changes.

The Committee's proposed amendment to Rule 3002.1(b) would allow a party in interest to file a motion for a determination of the validity of a payment amount change. Although the

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rule does not set a deadline for such a motion, it does provide that if a motion is not filed within 21 days after the notice is served, the payment change goes into effect. If a payment change is later determined to be inconsistent with the underlying agreement or governing law, the court can order that payment adjustments be made to reflect any overpayments that have occurred.

The Committee also proposes an amendment to Rule 3001.2(b) that is intended to provide more flexibility in the application of the provision to home equity lines of credit ("HELOCs"). The problem that a HELOC creditor faces in complying with Rule 3002.1(b) is illustrated by *In re Adkins*, 477 B.R. 71 (Bankr. N.D. Ohio 2012). The creditor in that case sought an order excusing it from the requirements of Rule 3002.1(b) on that ground that compliance would be "'virtually impossible.'" *Id.* at 72. The bank explained that, because the loan was an open-ended revolving line of credit, its balance was constantly changing. The payment amount could change monthly due to interest rate adjustments, increased draws on the line of credit, or payments of principal in addition to the finance charges. These frequent adjustments in the payment amount, contended the creditor, would make it especially difficult to comply with the 21-day notice requirement. *Id.*

The *Adkins* court denied the creditor's Motion to Excuse Notice. Rule 3002.1(b) clearly applied, as the creditor conceded, and the court found no authority to waive its requirements. The judge, although sympathetic with the creditor's position, pointed out that the rule provides no leeway in its application. Unlike numerous other bankruptcy rules, Rule 3002.1(b) does not say "unless the court orders otherwise." *Id.* at 73.

The difficulties of compliance expressed by the creditor in *Adkins* were echoed by participants at the mini-conference, and there was a general consensus that Rule 3002.1(b) should be amended to deal more appropriately with HELOCs.

The Subcommittees on Consumer Issues and on Forms considered a proposal for the reporting of HELOC payment changes that a chapter 13 trustee and a representative of a HELOC creditor submitted to the Committee. The proposed provision would have imposed different requirements based on the amount of the payment change and whether the debtor or the trustee was making the mortgage payments, but the Subcommittees decided that a simpler approach would be preferable. They therefore recommended and the Committee approved at the fall 2014 meeting a proposed amendment to Rule 3002.1(b) that authorizes courts to modify the requirements of the provision for HELOCs. This would allow the details of an alternative procedure to be developed by local rulemaking or court order.

Finally, the Committee proposes a wording change to Rule 3002.1(e). Rather than providing that only a debtor or trustee may object to the assessment of a fee, expense, or charge, the amended rule would expand the category of objectors to any party in interest. This change would parallel the language of the proposed amendment to subdivision (b) and would authorize a

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United States trustee or bankruptcy administrator to challenge the validity of a claimed postpetition assessment.

C. Request for a Limited Delegation of Authority

Action Item 5. Non-substantive, Technical, or Conforming Amendments to Official Forms. December 1, 2015 marked the culmination of the Forms Modernization Project. The Project was begun in 2008, and by the 2015 effective date, virtually all official bankruptcy forms had been replaced by nearly 70 completely new official forms. Given the large scope of the project, it is almost inevitable that minor issues will arise regarding the wording, formatting, or other aspects of the content of some of the new forms. Indeed, as detailed below, several issues have already arisen since the Judicial Conference approved the new forms in September.

Currently, if a necessary change is sufficiently minor or technical, the Committee will propose that it be approved without publication, as in Action Items 2 and 3 of this report. Even without publication, this process is lengthy. Approval of the change has to be considered and approved by the Committee, the Standing Committee, and the Judicial Conference, a process that can take from several months to more than a year.

The Committee suggests that it would be preferable to set up a process that would allow the Committee to make needed noncontroversial and technical changes to the official bankruptcy forms, subject to retroactive notice and request for approval by the Standing Committee and the Judicial Conference. It therefore recommends that the Standing Committee request the Judicial Conference to delegate this limited authority to the Committee.

There is some precedent for this request. At its May 2015 meeting, the Standing Committee authorized the Committee to correct typographical and other minor errors in the modernized forms before they were submitted to the Judicial Conference. And the Judicial Conference on several occasions has authorized a Conference committee to make non-substantive, technical, and conforming amendments to policies it has approved.[1]

The Committee recognizes that a request for this authority needs to provide assurance to the Standing Committee and the Judicial Conference that the authority, if granted, would be exercised in a narrow set of circumstances and only for changes that do not affect the substance

[1] *See, e.g.,* JCUS - MAR 15, at 13 (the Conference authorized the Bankruptcy Committee to make "non-substantive, technical and conforming changes" to guidance for producing tax information); JCUS - SEP 14, at 9 (the Conference authorized the Court Administration and Case Management Committee (CACM) to make "non-substantive, technical or conforming amendments" to policy guidance regarding requests to redact bankruptcy records already filed); JCUS - SEP 14, at 11 (the Conference authorized CACM to make "non-substantive, technical, or conforming changes" to the Bankruptcy Noticing Center Appropriate Use Policy); JCUS - MAR 14, at 14 (the Conference, on CACM's recommendation, authorized the AO to make "non-substantive, technical and conforming revisions" to the Records Disposition Schedules).

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of a form or the rights or obligations of any entities. To this end, it includes examples of the types of amendments that would be made if authorized. They would generally fall into three categories: (1) the correction of typos and punctuation; (2) reformatting to facilitate data capture by CM/ECF; and (3) non-controversial conforming amendments needed to implement changes in the rules (such as renumbering statutory provisions), to Judicial Conference policies (such as changes in fee amounts), or statutes (such as when a temporary benefit sunsets).

Under the proposed procedure, the Committee would immediately implement minor changes it determines are non-substantive, technical, and conforming, and the Standing Committee and the Judicial Conference would be notified and asked to approve the changes at their next regular meetings. Should any change not be subsequently approved by the Standing Committee any the Judicial Conference, the prior version of the form would be restored.

The first category of changes—correction of typos and punctuation—will be the most common. The new forms were developed over the course of seven years, and there have been thousands of revisions over that time frame, including changes to line numbers, form names, and cross-references across and within forms. It is perhaps inevitable that as the forms are being implemented and put into use, new typos and inaccurate cross-references will be discovered that will need to be fixed. Since September 2015, four such changes have been identified:

- Official Form 106E/F – Line number references in the instruction at the top of Part 2 need to be changed from “4.3 followed by 4.4” to “4.4 followed by 4.5.”
- Official Form 119 – The reference to “Part 3” at the top of page 1 needs to be changed to “Part 2.”
- Official Form 206 Summary – Cross-references to line numbers 6a and 6b of Official Form 206E/F need to be changed to 5a and 5b.
- Official Form 423 – The reference near the top of the form to §1141(d)(3) needs to be changed from “does not apply” to “applies.”

The second category—reformatting to facilitate data capture—will likely be less common, but this situation has come up several times over the past several years as CM/ECF developers create and test the next generation CM/ECF database (“NextGen”) that will store the information collected on the forms. For example, as originally promulgated in 2014, the means-test forms used by individual debtors required a detailed breakdown of any net income received by the debtor from operating a business. The forms did not, however, clearly indicate how the information should be provided in the rare situation where each of two joint debtors received income from separately owned businesses. NextGen developers reported the problem shortly after the forms were approved by the Judicial Conference in 2014. The problem was addressed through a pro forma update to the means-test forms that was approved by the Committee, the

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Standing Committee and the Judicial Conference this year as a technical change that went into effect December 1, 2015.[2]

The final category—changes in the rules, Judicial Conference policy, or statutory changes requiring noncontroversial adjustments that become effective before official forms can be conformed in the ordinary course—is somewhat rare, but there is one pending example of a needed change.

- Official Form 424 – At the top of page 2, the form incorrectly refers to Rule 8001(f)(3)(C). As a result of the recent reorganization of the bankruptcy appellate rules, the correct reference should be to Rule 8006(f)(1).

An example of a Judicial Conference policy change that required expedited technical changes to official bankruptcy forms was an increase in the amount of filing fees proposed by the Committee on Court Administration and Case Management ("CACM") and approved by the Judicial Conference at its March 2014 session to become effective two and a half months later on June 1, 2014. Because filing fees are listed on some official bankruptcy forms, there was a need to get the Executive Committee of the Judicial Conference to approve revision of the forms to reflect the new amounts.

The Committee expects that expedited form changes associated with statutory changes will be very rare. There is one upcoming example of a situation of a possible change to the Bankruptcy Code where it would be helpful to expedite a form change, subject to subsequent approval. After the Bankruptcy Abuse and Consumer Protection Act of 2005 made it more difficult for individuals to qualify for chapter 7 relief, Congress enacted the National Guard and Reservists Debt Relief Act of 2008, Pub. L. No. 110-438, 122 Stat. 5000, to reward National Guard members and Reservists for their service. The law became effective on December 19, 2008. The Act was scheduled to expire in 2011, but was extended on the eve of expiration, and it is now due to sunset on December 19, 2015.

The Act creates an exception to the means test's presumption for members of the National Guard and Reserves who, after September 11, 2001, served on active duty or in a homeland defense activity for at least 90 days. Official Form 122A-1Supp includes language that implements the exemption, and that form will need to be amended if the Act expires.

Because taking away benefits from service members is controversial, the decision to allow this benefit to sunset may be changed at the last minute, and so the Committee has not started the process of obtaining approval for a corresponding change to the form. If the benefit

[2] At the time this problem was discovered, NextGen development was still at least a year away from implementation in the courts, so it was possible to make the needed change through the current one-year approval process for technical changes. Once NextGen is adopted, similar changes will need to be made much more quickly.

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does sunset as scheduled, it would be helpful for the Committee to have the authority to make the appropriate technical changes to the form to address the expiration of this benefit, subject to retroactive approval by the Standing Committee and the Judicial Conference. Having the authority in the future to make uncontroversial technical changes such as this, subject to retroactive approval, would minimize the adverse effects of leaving a form unchanged and inconsistent with the law until the current approval process has time to run its course.

The Committee unanimously recommends that the Standing Committee seek Judicial Conference delegation to the Committee of the authority to make non-substantive, technical, and conforming changes to official bankruptcy forms, with any such changes subject to retroactive notice and request for approval by the Standing Committee and Judicial Conference.

III. Information Items

A. ***Stern* amendments resubmitted to the Supreme Court**

In 2011, the Committee began considering whether the Bankruptcy Rules needed to be amended in response to the Supreme Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011). The holding in *Stern*—that the bankruptcy court lacked authority under Article III to hear and enter a final judgment on a state-law counterclaim by the estate against a creditor who had filed a claim against the estate—arguably created ambiguity concerning the meaning of the terms "core" and "non-core" in 28 U.S.C. § 157. The Committee therefore decided to propose amendments to Bankruptcy Rules 7008(a) and 7012(b) that would eliminate the distinction between core and non-core proceedings and would require parties in all adversary proceedings to state in their pleadings whether they do or do not consent to entry of a final judgment or order by the bankruptcy judge. The Committee also proposed related amendments to Rules 7016 (Pre-Trial Procedures), 9027(a) and (e) (Removal), and 9033 (Proposed Findings of Fact and Conclusions of Law).

The Committee's proposed amendments addressing the *Stern* issue were published for comment in August 2012, and were given final approval by the Standing Committee in June 2013 and by the Judicial Conference in September 2013. The Judicial Conference withdrew the amendments from the Supreme Court, however, given the Supreme Court's decision to hear *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014), a case raising issues that, among other things, implicated the effect of the parties' express or implied consent to a bankruptcy court entering final judgment on *Stern* claims. Although the Supreme Court decided *Arkison* without reaching the consent issue, it subsequently heard and decided *Wellness International Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015). In *Wellness*, the Supreme Court held that "Article III permits bankruptcy courts to decide *Stern* claims submitted to them by consent." *Id.* at 1949.

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In light of the foregoing, the Committee reconsidered the originally proposed *Stern* amendments (as well as potential alternative amendments) at its fall 2015 meeting. It determined that the original amendments (as approved by the Standing Committee and Judicial Conference in 2013) offered the best proposal to address the *Stern/Wellness* issue, and it voted to ask the Judicial Conference to resubmit the proposed amendments to the Supreme Court on an expedited basis. First the Standing Committee and then the Judicial Conference considered this request in October 2015 and approved the resubmission of the proposed *Stern* amendments to the Supreme Court. If approved by the Supreme Court, the amendments will go into effect on December 1, 2016.

B. <u>Chapter 13 plan form and opt-out proposal – update</u>

The Committee began considering the possibility of creating a chapter 13 plan official form at its spring 2011 meeting. At that meeting, the Committee discussed Suggestions 10-BK-G and 10-BK-M, which proposed the promulgation of a national plan form, and the Committee approved the creation of a working group to pursue the suggestions. A proposed chapter 13 plan form and proposed amendments to nine related rules were published for public comment in August 2013. Because the Committee made significant changes to the form in response to comments it received, the revised form and rules were published again in August 2014.

At last spring's Committee meeting, in response to comments that were submitted after republication, the Committee discussed a number of options relating to the chapter 13 national form and associated rules. No member favored completely abandoning the project, and no one favored proceeding with the proposed amendments to the nine rules without also proposing a national plan form. Although there was widespread agreement regarding the benefit of having a national plan form, Committee members generally did not want to proceed with a mandatory official form in the face of substantial opposition by bankruptcy judges and other bankruptcy constituencies. Accordingly, the Committee was generally inclined to explore the possibility of a compromise along the lines suggested by a group of commenters, led by Bankruptcy Judges Marvin Isgur and Roger Efremsky ("the compromise group"). After a full discussion, the Committee voted unanimously to give further consideration to pursuing a proposal that would involve promulgating a national plan form and related rules, but would allow districts to opt out of the use of the Official Form if certain conditions were met.

Following the spring meeting, the Committee's Forms Subcommittee and the Consumer Subcommittee worked together to: (i) study and refine an opt-out proposal, (ii) obtain further input from a broad spectrum of the bankruptcy community, and (iii) consider the detailed substantive comments submitted on the republished Official Form and related rules. The Subcommittees also corresponded with the compromise group and other bankruptcy constituencies throughout this process. The Subcommittees reached the following conclusions:

- The opt-out proposal could be implemented primarily by further amending Rule 3015 (Filing, Objection to Confirmation, and Modification of a Plan in a Chapter 12 or a

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Chapter 13 Case).[3] As published in 2014, Rule 3015 included amendments to subdivision (c) that required the use of the Official Form for a chapter 13 plan and declared ineffective any nonstandard provisions that were not placed in the section specified for such provisions or that were not identified as the Official Form required. To allow for an opt-out, proposed subdivision (c)(1) would now allow use of either the Official Form or a Local Form meeting the rule's requirements. The Local Forms would have to satisfy the requirements that the debtor identify any nonstandard provisions and place them in a section specified for such provisions. A definition of "nonstandard provision" has been added to the end of subdivision (c)(1). A proposed new Rule 3015.1 would specify the requirements that a Local Form would have to meet. The Subcommittees shared their proposed approach to implement the opt-out proposal, including the proposed revisions to Rule 3015, new Rule 3015.1, and a minor related change to Rule 3002, with the compromise group, and the reaction was favorable.

- The Subcommittees extensively reviewed all 138 comments submitted after republication of the proposed plan form (Official Form 113) and the related rules. Based on this review, the Subcommittees proposed a number of technical changes to the plan form and to Rules 3002, 3007, 3015, and the Committee Note to Rule 7001. No additional changes were proposed for Rules 2002, 3012, 4003, 5009, and 9009.

- The Subcommittees also considered the concerns expressed by the National Association of Consumer Bankruptcy Attorneys and some members of Congress regarding the publication process relating to the proposed plan form and the related rules. They also discussed and identified ways to continue productive discussions regarding the opt-out proposal with various bankruptcy constituencies, including the National Association of Consumer Bankruptcy Attorneys, the National Association of Chapter 13 Trustees, and the National Conference of Bankruptcy Judges.

The Subcommittees ultimately recommended that the Committee approve proposed Official Form 113 and the related revisions to Rules 2002, 3002, 3007, 3012, 4003, 5009, 7001, and 9009, but defer submission of those items to the Standing Committee. This deferral would allow the Committee to further consider the opt-out proposal and the necessity, timing, and scope of any republication. More specifically, the Committee could consider the opt-out proposal (proposed revisions to Rules 3015 and 3002, and new Rule 3015.1) and the republication issue at its spring 2016 meeting. The Committee approved this approach at its fall 2015 meeting.

[3] The only proposed change to Official Form 113 related to the compromise is the revision of Part 1 to require that the debtor indicate whether three types of provisions are included or are not included in the plan. Previously, the form required checking boxes only if those provisions were included.

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C. Rule 4003(c) (Exemptions – Burden of Proof) – under consideration

Under section 522 of the Bankruptcy Code, an individual debtor may claim certain property interests as exempt from her bankruptcy estate. Bankruptcy Rule 4003(c), in turn, places the burden of proof in any litigation concerning a debtor's claimed exemptions on the party objecting to the exemptions. The Committee received a suggestion from Chief Judge Christopher M. Klein, U.S. Bankruptcy Court for the Eastern District of California, questioning the validity of Bankruptcy Rule 4003(c). Chief Judge Klein asserts that, based on the Supreme Court's decision in *Raleigh v. Illinois Department of Revenue*, 530 U.S. 15 (2000), Rule 4003(c) alters a substantive right of litigants in violation of the Rules Enabling Act. The *Raleigh* decision involved the burden of proof on claims objections in bankruptcy cases, and the Supreme Court held, "[T]he burden of proof is an essential element of the claim itself; one who asserts a claim is entitled to the burden of proof that normally comes with it." *Id.* at 21. Notably, the *Raleigh* decision did not involve the interpretation of a federal bankruptcy rule; the bankruptcy rules do not address the burden of proof in claims litigation.

Based on the Committee's preliminary review, the primary issue in this matter concerns the interplay of the *Raleigh* decision and the Rules Enabling Act. Although the Supreme Court has consistently held, both before and after *Raleigh*, that the burden of proof is a substantive element of a claim, those decisions generally arise in a choice of law context. Based on research to date, it appears that none of the decisions discusses the Rules Enabling Act. This distinction is highly relevant because the Supreme Court has expressly noted that the meaning of the terms "substance" and "procedure" can "shift[] depending on the particular problem for which it is used." Hanna v. Plumer, 380 U.S. 460, 471 (1965). Accordingly, an argument exists that the Supreme Court's characterization of the burden of proof as substantive in the choice of law context does not necessarily prevent it from being procedural for purposes of the Rules Enabling Act. This analysis is just one of the several important questions underlying the issue.

The Committee is currently reviewing this matter, performing an extensive review of Supreme Court jurisprudence, as well as the legislative history to section 522 and the adoption of the federal bankruptcy rules following the enactment of the 1978 Bankruptcy Code. It plans to further deliberate on this matter at its spring 2016 meeting.

D. Rule 9037 (Privacy Protection for Filings with the Court) – redaction of previously filed documents – under consideration

CACM submitted a suggestion (14-BK-B) to the Committee regarding the procedure for redacting personal identifiers in documents that have already been filed in bankruptcy cases. It suggests that Rule 9037 (Privacy Protection for Filings Made with the Court) be amended to require that notice be given to affected individuals of a request to redact a previously filed document. This amendment would reflect the recent addition of § 325.70 to the *Guide to Judiciary Policy,* Vol. 10 (Public Access and Records) by the Judicial Conference of the United States, which states in part that "the court should require the . . . party [requesting redaction] to

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promptly serve the request on the debtor, any individual whose personal identifiers have been exposed, the case trustee (if any), and the U.S. trustee (or bankruptcy administrator where applicable)."

The Committee began its consideration of this suggestion in 2014, and its research has included a survey of bankruptcy clerks' offices to determine how these matters currently are handled. The Committee reviewed the survey results at its fall 2015 meeting. A working group of the Committee's Consumer Subcommittee is further studying the matter and exploring potential amendments to Rule 9037. This working group is considering, among other things, the procedures for requesting a redaction, whether a closed case must be re-opened to facilitate a requested redaction, the timing of any redaction, the manner of redaction, and how to restrict public access to unredacted portions of the document while the redaction request is pending. The Consumer Subcommittee anticipates making a recommendation to the Committee at its spring 2016 meeting.

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APPENDIX A

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Appendix A

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

Rule 1015. Consolidation or Joint Administration of Cases Pending in Same Court

* * * * *

(b) CASES INVOLVING TWO OR MORE RELATED DEBTORS. If a joint petition or two or more petitions are pending in the same court by or against (1) ~~a husband and wife~~spouses, or (2) a partnership and one or more of its general partners, or (3) two or more general partners, or (4) a debtor and an affiliate, the court may order a joint administration of the estates. Prior to entering an order the court shall give consideration to protecting creditors of different estates against potential conflicts of interest. An order directing joint administration of individual cases of ~~a husband and wife~~spouses shall, if one spouse has elected the exemptions under § 522(b)(2) of the

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

125-011935

16 Code and the other has elected the exemptions under
17 § 522(b)(3), fix a reasonable time within which either may
18 amend the election so that both shall have elected the same
19 exemptions. The order shall notify the debtors that unless
20 they elect the same exemptions within the time fixed by the
21 court, they will be deemed to have elected the exemptions
22 provided by § 522(b)(2).
23 * * * * *

Committee Note

Subdivision (b) is amended to replace "a husband and wife" with "spouses" in light of the Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

Because this amendment is made to conform to the Supreme Court's decision in *Obergefell v. Hodges*, final approval is sought without publication.

125-011936

United States Bankruptcy Court

_____ District of _____

In re)
[Set forth here all names including married, maiden, and trade names used by debtor within last 8 years.])
)
)
Debtor) Case No.
)
Address _____) _____
_____)
)
Last four digits of Social Security or Individual Tax-payer Identification) Chapter
(ITIN) No(s).,(if any): _____) _____
)
)
Employer's Tax Identification (EIN) No(s).(if any): _____)
_____)

NOTICE OF [MOTION TO] [OBJECTION TO]

_____has filed papers with the court to [relief sought in motion or objection].

Your rights may be affected. You should read these papers carefully and discuss them with your attorney, if you have one in this bankruptcy case. (If you do not have an attorney, you may wish to consult one.)

If you do not want the court to [relief sought in motion or objection], or if you want the court to consider your views on the [motion] [objection], then on or before (date), you or your attorney must:

[File with the court a written request for a hearing {*or, if the court requires a written response*, an answer, explaining your position} at:

{address of the bankruptcy clerk's office}

If you mail your {request}{response} to the court for filing, you must mail it early enough so the court will **receive** it on or before the date stated above.

You must also ~~mail~~send a copy to:

{movant's attorney's name and address}

{names and addresses of others to be served}]

[Attend the hearing scheduled to be held on (date), (year) , at ____ a.m./p.m. in Courtroom____, United States Bankruptcy Court, {address}.]

[Other steps required to oppose a motion or objection under local rule or court order.]

If you or your attorney do not take these steps, the court may decide that you do not oppose the relief sought in the motion or objection and may enter an order granting that relief.

Date: _____

Signature: _____
Name:
Address

Committee Note

Form 420A replaces Official Form 20A, *Notice of Motion or Objection*. It is renumbered to conform to the forms numbering scheme adopted as part of the Forms Modernization Project. It is also amended to reflect that a responding party may serve its request or response on the movant's attorney by means other than mailing.

Because this amendment consists of a minor wording change and renumbering to conform to the current forms numbering system, final approval is sought without publication.

125-011938

United States Bankruptcy Court

_____ District of _____

In re *[Set forth here all names including married, maiden, and trade names used by debtor within last 8 years.]* Debtor Address _____ _____ Last four digits of Social Security or Individual Tax-payer Identification (ITIN) No(s).,(if any): _____ Employer's Tax Identification (EIN) No(s).(if any): _____	)))))))))))))	Case No. _____ Chapter _____

NOTICE OF OBJECTION TO CLAIM

_____ has filed an objection to your claim in this bankruptcy case.

Your claim may be reduced, modified, or eliminated. You should read these papers carefully and discuss them with your attorney, if you have one.

If you do not want the court to eliminate or change your claim, then on or before (date), you or your lawyer must:

{If required by local rule or court order.}

[File with the court a written response to the objection, explaining your position, at:

{address of the bankruptcy clerk's office}

If you mail your response to the court for filing, you must mail it early enough so that the court will **receive** it on or before the date stated above.

You must also ~~mail~~send a copy to:

{objector's attorney's name and address}

{names and addresses of others to be served}]

Attend the hearing on the objection, scheduled to be held on (date), (year) , at ___ a.m./p.m. in Courtroom____, United States Bankruptcy Court, {address}.

If you or your attorney do not take these steps, the court may decide that you do not oppose the objection to your claim.

Date: _____

Signature: _____
Name:
Address:

Committee Note

Form 420B replaces Official Form 20B, *Notice of Objection to Claim*. It is renumbered to conform to the forms numbering scheme adopted as part of the Forms Modernization Project. It is also amended to reflect that the claimant may serve its response on the objector's attorney by means other than mailing.

Because this amendment consists of a minor wording change and renumbering to conform to the current forms numbering system, final approval is sought without publication.

125-011940

Fill in this information to identify the case:

Debtor 1 _____

Debtor 2 _____
(Spouse, if filing)

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____

Official Form 410S2

Notice of Postpetition Mortgage Fees, Expenses, and Charges

12/16

If the debtor's plan provides for payment of postpetition contractual installments on your claim secured by a security interest in the debtor's principal residence, you must use this form to give notice of any fees, expenses, and charges incurred after the bankruptcy filing that you assert are recoverable against the debtor or against the debtor's principal residence.

File this form as a supplement to your proof of claim. See Bankruptcy Rule 3002.1.

Name of creditor: _____ **Court claim no**. (if known): _____

Last 4 digits of any number you use to identify the debtor's account: ____ ____ ____ ____

Does this notice supplement a prior notice of postpetition fees, expenses, and charges?

q No

q Yes. Date of the last notice: ____/____/_____

Part 1: Itemize Postpetition Fees, Expenses, and Charges

Itemize the fees, expenses, and charges incurred on the debtor's mortgage account after the petition was filed. Do not include any escrow account disbursements or any amounts previously itemized in a notice filed in this case~~or ruled on by the bankruptcy court~~.
If the court has previously approved an amount, indicate that approval in parentheses after the date the amount was incurred.

Description	Dates incurred		Amount
1. Late charges	_____	(1)	$ _____
2. Non-sufficient funds (NSF) fees	_____	(2)	$ _____
3. Attorney fees	_____	(3)	$ _____
4. Filing fees and court costs	_____	(4)	$ _____
5. Bankruptcy/Proof of claim fees	_____	(5)	$ _____
6. Appraisal/Broker's price opinion fees	_____	(6)	$ _____
7. Property inspection fees	_____	(7)	$ _____
8. Tax advances (non-escrow)	_____	(8)	$ _____
9. Insurance advances (non-escrow)	_____	(9)	$ _____
10. Property preservation expenses. Specify:_____	_____	(10)	$ _____
11. Other. Specify:_____	_____	(11)	$ _____
12. Other. Specify:_____	_____	(12)	$ _____
13. Other. Specify:_____	_____	(13)	$ _____
14. Other. Specify:_____	_____	(14)	$ _____

The debtor or trustee may challenge whether the fees, expenses, and charges you listed are required to be paid.
See 11 U.S.C. § 1322(b)(5) and Bankruptcy Rule 3002.1.

Part 2: Sign Here

The person completing this Notice must sign it. Sign and print your name and your title, if any, and state your address and telephone number.

Check the appropriate box.

q I am the creditor.

q I am the creditor's authorized agent.

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

û _____ Date ____/_____/_____
Signature

Print: _____ Title _____
First Name Middle Name Last Name

Company _____

Address _____
Number Street

_____
City State ZIP Code

Contact phone (_____) _____– _____ Email _____

Committee Note

Official Form 410S2 is amended to eliminate a possible inconsistency with Rule 3002.1(c). The instructions to Part 1 are revised to omit the statement that fees, expenses, and charges that have been ruled on by the court should not be listed. Instead, such an assessment that has not been reported on a previously filed Form 410S2 should be listed, and it should be noted in the column labeled "Dates incurred" that the court has previously approved the fee, expense, or charge.

Because this amendment is made to conform to Rule 3002.1(c), final approval is sought without publication.

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APPENDIX B

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125-011946

Appendix B

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

For Publication for Public Comment

Rule 3002.1 Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence

* * * * *

(b) NOTICE OF PAYMENT CHANGES; OBJECTION. The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice of any change in the payment amount, including any change that results from an interest-rate or escrow-account adjustment, no later than 21 days before a payment in the new amount is due. For a claim arising from a home-equity line of credit, this requirement may be modified by court order. A party in interest that objects to the payment change shall file a motion to determine whether the change

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

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15 in the payment amount is required to maintain payments in
16 accordance with § 1322(b)(5) of the Code. If no motion is
17 filed within 21 days after service of the notice, the change
18 goes into effect, unless the court orders otherwise.
19 * * * * *
20 (e) DETERMINATION OF FEES, EXPENSES,
21 OR CHARGES. On motion of ~~the debtor or trustee~~a party
22 in interest filed within one year after service of a notice
23 under subdivision (c) of this rule, the court shall, after
24 notice and hearing, determine whether payment of any
25 claimed fee, expense, or charge is required by the
26 underlying agreement and applicable nonbankruptcy law to
27 cure a default or maintain payments in accordance with
28 § 1322(b)(5) of the Code.
29 * * * * *

Committee Note

Subdivision (b) is amended in two respects. First, it is amended to authorize courts to modify its requirements for claims arising from home equity lines of credit (HELOCs). Because payments on HELOCs may adjust

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frequently and in small amounts, the rule provides flexibility for courts to specify alternative procedures for keeping the person who is maintaining payments on the loan apprised of the current payment amount. Courts may specify alternative requirements for providing notice of changes in HELOC payment amounts by local rules or orders in individual cases.

Second, subdivision (b) is amended to acknowledge the right of the trustee, debtor, or other party in interest, such as the United States trustee, to object to a change in a home-mortgage payment amount after receiving notice of the change under this subdivision. The amended rule does not set a deadline for filing a motion for a determination of the validity of the payment change, but it provides as a general matter—subject to a contrary court order—that if no motion has been filed within 21 days after service of the notice on the debtor, the debtor's attorney, and the trustee, the announced change goes into effect. If there is a later motion and a determination that the payment change was not required to maintain payments under § 1322(b)(5), appropriate adjustments will have to be made to reflect any overpayments. If, however, a motion is made during the time specified in subdivision (b), leading to a suspension of the payment change, a determination that the payment change was valid will require the debtor to cure the resulting default in order to be current on the mortgage at the end of the bankruptcy case.

Subdivision (e) is amended to allow parties in interest in addition to the debtor or trustee, such as the United States trustee, to seek a determination regarding the validity of any claimed fee, expense, or charge.

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125-011952

ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of October 1, 2015
Washington D.C.

The following members attended the meeting:

Circuit Judge Sandra Segal Ikuta, Chair
Circuit Judge Adalberto Jordan
District Judge Jean Hamilton
District Judge Robert James Jonker
District Judge Amul R. Thapar
Bankruptcy Judge Stuart M. Bernstein
Bankruptcy Judge Dennis Dow
Bankruptcy Judge A. Benjamin Goldgar
Bankruptcy Judge Arthur I. Harris
Diana Erbsen, Esquire
Jeffrey Hartley, Esquire
Richardo I. Kilpatrick, Esquire
Jill Michaux, Esquire
Thomas Moers Mayer, Esquire
Professor Edward R. Morrison

The following persons also attended the meeting:

Professor S. Elizabeth Gibson, reporter
Professor Michelle Harner, assistant reporter
Circuit Judge Jeffrey S. Sutton, Chair of the Committee on Rules of Practice and Procedure (Standing Committee)
Professor Daniel Coquillette, reporter to the Standing Committee
Rebecca Womeldorf, Secretary, Standing Committee and Rules Committee Officer
Bankruptcy Judge Roger Efremsky
Bankruptcy Judge Martin Isgur
Bankruptcy Judge Eugene R. Wedoff
Roy T. Englert, Jr., Esq., liaison from the Standing Committee
Molly Johnson, Senior Research Associate, Federal Judicial Center
Ramona D. Elliot, Esq., Deputy Director/General Counsel, Executive Office for U.S. Trustees
James J. Waldron, Clerk, U.S. Bankruptcy Court for the District of New Jersey
Bridget Healy, Esq., Administrative Office
Scott Myers, Esq., Administrative Office
James Wannamaker, Esq., consultant to the Committee
Derek Webb, Administrative Office
Michael T. Bates, Lindquist & Vennum, LLP, Minneapolis, Minnesota
John Crane, John M. Crane, P.C., Port Chester, New York
Sims Crawford, Chapter 13 Trustee, Northern District of Alabama

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Marcy Ford, Trott Law Firm, Farmington Hills, Michigan
Michael McCormick, McCalla Rayner, LLC, Roswell, Georgia
Raymond J. Obuchowski, National Association of Bankruptcy Trustees
Lance Olson, RCO Legal, Bellevue, Washington
Jon M. Waage, Chapter 13 Trustee, Middle District of Florida
Nancy Whaley, National Association of Chapter 13 Trustees
Daniel A. West, SouthLaw, P.C., St. Louis, Missouri

Discussion Agenda

1. Introductions.

Judge Sandra Ikuta started the meeting at 9:00 am. She introduced assistant reporter Professor Michelle Harner, who was appointed in July 2015. Professor Harner spoke briefly. Judge Ikuta noted the re-appointments to the Committee, and thanked Judge Arthur Harris for his work in reviewing the forms. She completed her remarks by welcoming Judge Eugene Wedoff and Jon Waage, who both served as consultants for the Committee's work on the chapter 13 plan form. The members and visitors introduced themselves.

2. Approval of minutes of spring 2015 meeting.

The minutes were approved with minor edits.

3. Oral reports on meetings of other committees.

(A) May 28-29, 2015 meeting of the Committee on Rules of Practice and Procedure.

All of the bankruptcy action items were approved, including the chapter 15 items, the 3-day rule change, the various issues related to mortgage reporting, and the final approval of the modernized forms. The modernized forms were approved by the Judicial Conference on September 17, 2015, and are set to go into effect on December 1, 2015. Two rule amendments were published in August 2015: Rules 1006(b) and 1001.

(B) June 11-12, 2015 meeting of the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee).

The Bankruptcy Committee concurred in a recommendation from the Committee on Court Administration and Case Management (CACM) to amend the preamble of the miscellaneous fee schedule regarding Bankruptcy Appellate Panel services. Also, the Bankruptcy Committee approved a request for the Federal Judicial Center (FJC) to study the impact of Chapter 9 cases on the bankruptcy system. Finally, the Bankruptcy Committee

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recommended that the Administrative Office (AO) develop procedures regarding interpretation services.

4. Report by the Subcommittee on Consumer Issues.

(A) Suggestion 14-BK-B from CACM to amend various rules regarding redaction of private information in closed cases.

Judge Harris reported that this was an information item. Jim Waldron surveyed clerks' offices to determine how these matters are handled. The results showed that courts are divided as to notice to affected parties. Most courts do not require the reopening of a closed case to request a redaction. Since submitting the suggestion to the Committee, CACM made a separate request to the Judicial Conference for a specific fee for redaction requests, thus permitting redactions without requiring case reopening. As part of the request to the Judicial Conference, CACM included language regarding the potential impact and notice to affected parties. CACM's recommendation was approved by the Judicial Conference.

Judge Harris noted that the subcommittee has a small group working on the issue; they will consider privacy issues, appropriate notice, and developing a simple procedure for courts and parties. They plan to have a draft amendment ready for consideration for the spring 2016 meeting.

(B) Suggestion 15-BK-E to amend Rule 4003(c) to change the burden of proof where state law provides the rule of decision.

Judge Harris explained that the suggestion is to amend Rule 4003(c) to accommodate the decision in *Raleigh v. Illinois Department of Revenue*, 530 U.S. 15 (2000). The primary issue is the burden of proof in litigation involving a debtor's entitlement to a claimed exemption under section 522 of the Bankruptcy Code. Specifically, the suggestion asserts that the language of Bankruptcy Rule 4003(c), which places the burden of proof on the party objecting to the claimed exemption, alters the substantive rights of the parties in violation of the Rules Enabling Act. Judge Harris advised that the issue would remain under consideration by the subcommittee.

5. Joint Report by the Subcommittees on Consumer Issues and Forms.

(A) Discussion regarding proposed chapter 13 plan form (Official Form 113), and related proposed amendments to certain bankruptcy rules.

Judge Dennis Dow explained the subcommittee's process, discussion, and final recommendation regarding the chapter 13 plan and related rules. He reminded the group that the plan form and rules were published twice; after the second publication, the Committee received a compromise proposal from a group of bankruptcy judges and others that suggested permitting districts to opt out of using the national plan form if certain conditions were met. The subcommittees consulted with Judge Wedoff and Mr. Waage, as a former Committee member and Chapter 13 trustee, respectively, regarding the compromise proposal and related matters.

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The subcommittees reviewed the comments on the published form and rules (these comments were included in the spring 2015 Committee meeting agenda materials), evaluated the compromise proposal, and considered the impact on the related rule amendments. The subcommittees also sought input from Judge Marvin Isgur and Judge Roger Efremsky as representatives of the group that submitted the compromise proposal.

The subcommittees' recommendation included revisions to Rule 3015 that would permit a district to opt out of using a national plan form and impose specific requirements for opting out. The subcommittees included in the agenda materials a proposed amended version of 3015 and a proposed new Rule 3015.1, along with proposed changes to the form itself, including language regarding the location of non-standard provisions to address the problem at issue in *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010).

Judge Dow advised that subcommittee members would continue to share the revisions with the bankruptcy community in an effort to ensure that all interested parties are aware of the revised plan and rules. He reached out to the National Association of Chapter 13 Trustees (NACTT), the National Conference of Bankruptcy Judges (NCBJ), the American Bankruptcy Institute (ABI), the National Bankruptcy Conference (NBC), and the National Association of Consumer Bankruptcy Attorneys (NACBA). In doing this, he also asked for recommendations from these groups as to others who could be notified.

Judge Isgur and Judge Efremsky noted their individual support for the revised form and rules. They also indicated that they had surveyed members of the group that submitted the compromise proposal, and that such survey showed a lack of controversy over the revised form and rules. In addition, they reached out to the NACBA and the NACTT in both submitting the compromise proposal earlier in the year and in consideration of the revised plan form and rules. Judge Dow advised that while the majority of the subcommittee supported the recommendation to approve the plan form and related rules, there were a few members who objected.

Professor Gibson spoke briefly about the issue of republication. She stated that if a decision were made to republish, it would likely be to publish the revised Rule 3015 and new Rule 3015.1 rather than the plan form and other related rules. The subcommittee recommended postponing a decision on republication until the spring 2016 meeting. Judge Dow advised that the Rules Committee Support Office was contacted by two members of Congress, who expressed concern about the publication process for any revised plan or rules.

The specific recommendations of the subcommittee for approval were: (1) to approve the final version of Official Form 113 and the related rules other than Rules 3015 and 3015.1, with the understanding that the form and rules would not go forward to the Standing Committee at this time, and (2) to defer the final decision regarding republication until the spring 2016 meeting. Judge Ikuta advised that nothing would prevent the Committee from revisiting the plan form or related rules at a later time. She noted the Committee's consensus that the proposed amendments to the rules and the national plan form were a package, and neither would go forward without the other.

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A motion was made to approve Official Form 113, Rules 2002, 3002, 3007, 3012, 4003, 5009, 7001, and 9009, pending submission to the Standing Committee. It passed with one opposition. Proposed amended Rule 3007 was referred to the Business Subcommittee for consideration of an issue with the language in the version of the rule in the agenda materials. Amended Rule 3015 and new rule 3015.1 will continue to be considered by the Forms Subcommittee for a recommendation at the spring 2016 meeting.

(B) Report concerning the development of forms for subsections (f) and (g) of Rule 3002.1 - Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence, and additional amendments to the rule.

Professor Gibson explained that these issues relate to the mortgage form and rule amendments that went into effect in 2011. The issues were raised as part of a 2012 mini-conference on mortgage issues.

First, there are two proposed new Director's Forms: Form 4100N, Notice of Final Cure Payment (to implement Rule 3002.1 (f)); and Form 4100R, Response to Notice of Final Cure Payment (to implement Rule 3002.1(g)). The forms provide a vehicle for reporting information regarding the cure of arrearages, and were reviewed by the NACTT. Both proposed forms were included in the agenda materials. Currently courts have various requirements for reporting this information, and uniformity would be helpful, although the subcommittee determined that the forms did not need to be official forms. As these forms are issued by the Director of the Administrative Office and their use is not mandatory, approval of the Standing Committee and the Judicial Conference is not necessary, and the forms could be issued on December 1, 2015 along with other forms scheduled to go into effect this year. On motion, the Committee recommended that the Administrative Office issue the forms effective December 1, 2015.

Second was a proposed amendment to Rule 3002.1(b), the section of the rule that requires notice of post-petition changes to a mortgage payment. Rule 3002.1(e) provides a procedure for challenging a claimed fee, expense, or charge after the servicer gives notice of it under subdivision (c), but the rule does not provide a similar procedure for payment changes that are reported under subdivision (b). The proposed amendment would suspend the change in payment from going into effect if the debtor or trustee challenges the change within 21 days after the notice is served. If approved, it would be published in August 2016, along with a prior amendment to the same subsection that the Committee approved for publication at the fall 2014 meeting. That amendment regarding home equity lines of credit was held in abeyance so that it could be submitted with any additional amendments to the rule that the Committee decided to propose. Issues were raised with shifting the burden of persuasion to the objecting party and with limiting objections to the debtor or the trustee. The group discussed whether other parties in interest have standing to object without a change in the proposed language.

A motion was made to approve the version of the amended rule in the agenda materials with the clarification that parties in interest (in addition to the debtor and trustee) may object, and the motion passed. The amendment will go forward for publication and the outstanding issues can be considered, if needed, following the publication period.

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The final issue was an amendment to Official Form 410S2 regarding notice of post-petition fees and charges. The proposed amendment deletes an instruction to Form 410S2 not to report fees and charges already approved by the court and adds an instruction that requires the creditor to indicate if a fee has previously been approved by the court to avoid double-payments. The recommendation was to seek approval without publication as a conforming amendment. The motion to approve the recommendation was approved.

6. Report by the Subcommittee on Forms.

(A) Recommendation to request that the Judicial Conference delegate to the Advisory Committee the authority to make non-substantive, technical, conforming changes to Official Bankruptcy Forms as needed.

The Forms Subcommittee recommended that the Committee approve a request to the Judicial Conference to delegate authority to the Committee to make non-substantive, technical, and conforming changes to the Official Forms as needed. The types of changes include: typos and erroneous cross-references, amendments to conform to a change in the law, a change in fee amounts that appear on the forms, or a technical change to accommodate a requirement of the Next Generation of CM/ECF (Next Gen). Scott Myers provided several examples of these changes, including proofreading edits. Judge Sutton suggested that a process be developed to provide notice to the Judicial Conference and the Standing Committee. Judge Ikuta suggested that the subcommittee's recommendation be changed to permit the Committee to implement these types of changes immediately, with retroactive notice and request for approval to the Standing Committee and Judicial Conference. A motion was made to approve the amended recommendation, and the motion was approved.

(B) Report regarding suggestion for Notice of Change of Address Form (Suggestion 15-BK-D) submitted by Russell C. Simon, Chapter 13 Standing Trustee, on behalf of National Association of Chapter 13 Trustees.

The suggestion, from a subcommittee of the NACTT, was to create a form to provide notice of changes of address. Professor Harner reported that there are several options for implementing the suggestion, including a new Official Form, a new Director's Form, an amendment of Form 410, or an amendment to the instructions for Form 410. Samples of these options were included with the agenda materials. The subcommittee determined that it did not have enough information or data to make a decision as to how to best approach this issue, and it instructed the assistant reporter to conduct a survey of courts to determine how the matter is currently handled along with an analysis of any technological issues with implementing a new form or method of indicating a change of address. Nancy Whaley (NACTT) stated that a form would be helpful for chapter 13 cases as chapter 13 trustees are under pressure about the amount of money contributed to the registrars of courts, and that correct changes of address would likely help.

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7. Report by the Subcommittee on Business Issues.

(A) Recommendation regarding *Stern* amendments to Rules 7008, 7012, 7016, 9027, 9033, previously approved by the Judicial Conference in September 2013, but withdrawn from Supreme Court consideration pending decisions in *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014) and *Wellness International Network, Ltd. v. Sharif*, 35 S. Ct. 1932 (2015); recommendation regarding *Stern*-related Suggestions 11BK-K and 15-BK-F.

The rule amendments were previously approved by the Committee but were withdrawn from consideration by the Supreme Court following the Supreme Court's grant of certiorari in *Executive Benefits Ins. Agency v. Arkison*, 134 S.Ct. 2165 (2014). Later the Court held in *Wellness International Network, Ltd. v. Sharif*, 35 S.Ct. 1932 (2015 that parties could consent to a bankruptcy court's adjudication of proceedings that would otherwise be outside the scope of its constitutional authority. The subcommittee considered whether the original proposed rule amendments should be resubmitted or if any amendments were required based on the Court's decisions. The rule amendments, which were included in the agenda book, were published for public comment in August 2012. They were given final approval by the Standing Committee in June 2013 and by the Judicial Conference in September 2013.

After deliberations, the subcommittee recommended that the Committee ask that the Judicial Conference resubmit the original amended rules to the Supreme Court. In making its recommendation, the subcommittee considered three possible approaches for amending the Bankruptcy Rules to authorize bankruptcy courts, with the parties' consent, to adjudicate proceedings that would otherwise require Article III adjudication: (1) the pending amendments; (2) the magistrate judge model; and (3) the Seventh Amendment model. The subcommittee determined that the alternative models had practical issues as well as possible concerns regarding knowing and voluntary waivers.

A motion to approve the subcommittee's recommendation to request that the Judicial Conference resubmit the amended rules to the Supreme Court was approved. Judge Sutton stated that he would give consideration as to the best process for the approval of the amended rules.

(B) Suggestion regarding rule amendment for district court treatment of bankruptcy court judgment as proposed findings and conclusions (Suggestion 12-BK-H).

In response to the suggestion that proposed a rule amendment to address the situation in which a district judge treats a judgment or order entered by a bankruptcy judge as proposed findings of fact and conclusions of law, the subcommittee recommended amendments to the title of Rule 9033 and subsection (a) of the rule. The subcommittee concluded that *Arkison* provides legal support for the validity of the approach contained in the suggestion. After the agenda materials were published, a Committee member submitted a suggestion to change the amendment slightly to incorporate references to the other sections of the rule. The group discussed the suggested amendments, and several edits and other revisions were proposed. The Committee decided to return the issue to the subcommittee for further discussion.

(C) Report on work plan for bankruptcy rules noticing project.

The Advisory Committee has received several comments that relate to noticing issues in bankruptcy cases. Professor Harner proposed a work plan for considering general notice issues, and the specific suggestions related to noticing, including Suggestions 12-BK-M, 12-BK-B, 15-BK-H, and Comment BK-2014-0001-0062.

8. Report by the Subcommittee on Privacy, Public Access, and Appeals.

(A) Recommendation concerning pending amendments to the Federal Rules of Appellate Procedure (FRAP) and whether to publish similar amendments to the Federal Rules of Bankruptcy Procedure.

The recently revised bankruptcy appellate rules (the Part VIII Rules), are modeled on many FRAP provisions. Because the Part VIII rules track FRAP wording rather than incorporate FRAP by reference, the pending FRAP amendments will not automatically apply to bankruptcy appeals in district courts and bankruptcy appellate panels.

The prospect of changes to FRAP required the subcommittee to determine which of the FRAP provisions proposed for amendment have parallels in the Part VIII rules and whether those bankruptcy rules should be similarly amended. One of the main issues considered by the subcommittee was the change in the length limit rules in FRAP. The subcommittee will continue to consider these issues and make any suggested amendments at the spring 2016 meeting. Professor Gibson reminded the group that any changes to the bankruptcy rules would go into effect in 2018.

9. Report by the Subcommittee on Technology and Cross Border Insolvency.

(A) Proposed amendment to Rule 5005(a)(2) to address proposed amendments to Civil Rule 5(d).

Professor Gibson reported that at the spring 2015 meeting the Committee voted to propose for publication an amendment to Rule 5005(a)(2) that would conform to the proposed amendment to Civil Rule 5(d). Because the language of the proposed amendment to Civil Rule 5(d) was still under discussion at that time, the Committee authorized the chair and the reporter to participate in inter-committee negotiations over the language of the proposed Rule 5(d) amendment and to incorporate into the proposed amendment to Rule 5005(a)(2) language that was acceptable to the advisory committees. The Civil Rules Committee subsequently decided not to seek publication of amendments to Rule 5 in order to give the other advisory committees more time to consider any similar amendments they want to propose. The main concern raised by the advisory committees was the impact on pro se filers of a change in Civil Rule 5.

The proposed amendments to Civil Rule 5, as well as a possible amendment to Criminal Rule 49, are still under consideration. The subcommittee discussed how any amendment to the Civil Rule would impact Bankruptcy Rule 5005. The potential versions of Civil Rule 5 were included in the agenda materials. The subcommittee preferred the more recent version of the Civil Rule 5 amendment. No concerns were raised with regard to the specific amendments being considered by the Civil Rules Committee.

In addition to the filing amendments, the Civil Rules Committee is considering an amendment to permit notice via a court's electronic filing system. The Criminal Rules Committee is considering a similar amendment to Criminal Rule 49. The proposed amendment to Rule 5(b)(2)(E) would eliminate the consent requirement for the use of electronic service of documents filed after the original complaint, and the proposed versions of the amendments were included in the agenda materials. Members of the subcommittee expressed a preference for the second version of the Civil Rule amendment, which would eliminate the consent requirement only for service through the CM/ECF system.

A final issue is to allow the Notice of Electronic Filing (NEF) to take the place of a certificate of service. This was original proposed by CACM and is under consideration by the Civil Rules Committee. The proposed Civil Rule amendment to Civil Rule 5(d), if approved, would become applicable in adversary proceedings pursuant to Rule 7005. Rule 9014, however, does not incorporate Rule 5(d). No concerns were raised by the Committee in its prior consideration of the proposed amendment.

Judge Sutton recommended that the Civil, Criminal, and Bankruptcy Committee reporters meet to develop a consensus recommendation for the Standing Committee.

10. Report by the Subcommittee on Attorney Conduct and Health Care.

(A) Recommendation concerning the subcommittee's consideration of Suggestion 13-BK-C by the American Bankruptcy Institute's Task Force on National Ethics Standards to amend Rule 2014 (Employment of Professional Persons).

The subcommittee determined to take no further action on this suggestion to amend the requirement that an application to hire a professional list all of the professional's connections with specified persons. Judge Jonker explained the history of the Committee's consideration of this issue. The subcommittee considered various alternatives in reviewing the suggestion, and determined that there were good points in the suggestion. Some of these could be implemented through training and educational programs rather than a rule change.

11. Report on the status of bankruptcy-related legislation.

Mr. Myers advised that legislation granting an exception from the means test requirements for service members and certain homeland security members is set to expire in December 2015. It has been renewed in the past; however, if not, an amendment to the means test forms (Official Forms 122) will be required.

12. Future meetings.

The spring 2016 meeting will be held March 31-April 1, 2016 in Denver, Colorado.

13. New business.

A suggestion was submitted within the past few weeks for consideration of several amendments, including one regarding social security numbers. The Privacy, Public Access and Appeals subcommittee will consider these issues.

Consent Agenda

The Chair and Reporters proposed several items for study and consideration prior to the Advisory Committee's meeting for approval by acclamation at the meeting if no objection was raised. Judge Ikuta advised that no comments were received on the items listed on the consent agenda. A motion was made to approve the items on the consent agenda and the motion was approved. The items are detailed below.

1. Subcommittee on Consumer Issues.

(A) Suggestion 13-BK-G to amend Fed. R. Bankr. P. 1015(b)

The subcommittee recommended amending Rule 1015(b) to eliminate language suggesting that only opposite-sex married couples may file a joint bankruptcy petition under §303 or that single-sex married couples are subject to different rules regarding their choice of exemptions, per Suggestion 13-BK-G. The suggestion was previously approved at the spring 2014 meeting, but held pending a decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). The subcommittee also recommended that the Standing Committee approve the amendment without publication.

(B) Suggestion 14-BK-G regarding inclusion of the debtor's full social security number on the version of the meeting of creditor's notice that is sent to the creditors listed in the debtor's schedules.

The subcommittee recommended that the Committee not consider the issue, given its thorough consideration of a similar suggestion in 2012. The subcommittee will engage in some additional informal outreach to certain creditors to inquire whether they are reliant on full social security numbers and report back at the spring 2016 meeting.

2. Subcommittee on Forms.

(A) Suggestion 15-BK-A by Derek S. Tarson recommending that bankruptcy schedules be made gender neutral in light of *United States v. Windsor*, 570 U.S. 12 (2013).

The subcommittee determined that because the amended Official Forms that take effect December 1, 2015 address Mr. Tarson's concerns, it recommended no further action on this matter.

(B) Suggestion 15-BK-B by Bankruptcy Judge Martin Teel Jr. proposing revisions Director's Form 263, Bill of Costs.

The subcommittee agreed with the proposal to amend Director's Form 263, and an amended version of the form was included in the agenda materials. The subcommittee recommended that the Director of the Administrative Office adopt the changes as set forth in the revised Director's Form 263 and the related instructions.

(C) Recommendation to renumber Official Forms 20A, Notice of Motion or Objection, and 20B, Notice of Objection to Claim.

The subcommittee recommended that the forms be renumbered, a minor wording change be made, and that the Committee propose the forms for final approval without publication.

3. Subcommittee on Business Issues.

(A) Possible changes to Official Forms 25A-C, and 26, and Exhibit A to Official Form 201 (renumbered as Official Form 201A at the spring 2015 meeting, and on track to go into effect December 1, 2015).

The subcommittee recommended no further revisions to Official Form 201A (formerly Exhibit A), and will consider possible changes to Official Forms 25A-C, and 26 with recommendations at the spring 2016 meeting.

4. Privacy, Public Access, and Appeals.

(A) Suggestion regarding amendment of Rule 8018 (Serving and Filing Briefs; Appendices) (Suggestion 15-BK-C).

The subcommittee determined that Bankruptcy Rules 8018(a)(1) and 8010(c) adequately provide that the briefing schedule set forth in Rule 8018(a) is triggered only upon the transmission of the complete record by the clerk, unless otherwise ordered by the court. Accordingly, the subcommittee recommended no action on this matter at this time.

(B) Recommendation concerning timing of publication of deferred recommendations to revise Rules 8002(a)(5) and 8006(b) in response to Comment 12-BK-033 (approved at the fall 2013 Advisory Committee meeting), and Rule 8023 (approved at the spring Advisory Committee meeting); and concerning Comments 12-BK-005, 12-BK-015, and 12-BK-040 regarding designation of the record in bankruptcy appeals.

As to the three previously approved amendments, revisions to Rules 8002(a)(5) and 8006(b) in response to Comment 12-BK-033 (approved at the fall 2013 Advisory Committee meeting), and Rule 8023 (approved at the spring Advisory Committee meeting), the subcommittee recommended that they be submitted to the Standing Committee in June 2016, with a request that they be published with the Part VIII amendments that will be proposed to conform to the FRAP amendments. With regards to Comments 12-BK-005, 12-BK-015, and 12-BK-040 regarding designation of the record in bankruptcy appeals, the subcommittee initially referred the matters to the Standing Committee's CM/ECF Subcommittee. Given that the CM/ECF Subcommittee took no action on the comments and is now disbanded, the subcommittee recommended no further action on the comments.

Following the vote to approve the matters on the consent agenda, the meeting was adjourned at 2:40 pm.

Respectfully submitted,

Michelle Harner, assistant reporter

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TAB 9

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TAB 9A

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125-011968

Survey of Harm to Cooperators: Final Report

Prepared for the Court Administration and Case Management Committee, the Committee on Defender Services, and the Criminal Law Committee of the Judicial Conference of the United States

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Executive Summary

In March 2015, pursuant to an August 2014 request made to the Federal Judicial Center, we surveyed federal district judges, U.S. Attorney's Offices, federal defenders, CJA district panel representative's offices, and chief probation and pretrial services offices about harm or threat of harm to government cooperators. We summarize the results of the survey below.

- Respondents were asked to report harm to defendants/offenders and witnesses in the past three years for up to five cases. We limited the number of cases to five to prevent overtaxing respondents.
- Of 1,371 recipients, 976 completed the survey—a response rate of 71%.
- Respondents reported a minimum of 571 instances of harm to defendants/offenders and witnesses. Cases often involved harm to both defendants/offenders and witnesses.
- Among all types of harm or threat, respondents most often reported threats of physical harm to defendants/offenders or witnesses and to friends or family of defendants/offenders or witnesses.
- Defendants were most likely to be harmed or threatened when in some type of custody, while witnesses were either in pretrial detention or not in custody at the time of harm or threat.
- Respondents frequently reported court documents or court proceedings as the source for identifying cooperators.
- Respondents reported that concerns of harm or threat affected the willingness of both defendants/offenders and witnesses to cooperate with the government in the past three years.
- Respondent generally agreed that harm to cooperators was a significant problem and that more needed to be done, by the judiciary and/or the Bureau of Prisons, to protect cooperators from harm.

Introduction

In August 2014, Judge Julie Robinson, then chair of the Court Administration and Case Management Committee (CACM), asked the Federal Judicial Center (FJC) to conduct a study to determine the number of offenders harmed or threatened with harm because they cooperated, or were suspected of cooperating, with the government. The population of concern included inmates who were post-conviction and in the custody of the Bureau of Prisons (BOP) and identified as cooperators through the use of court documents.[1] The request, made on behalf of CACM, the Criminal Law Committee, and the Committee on Defender Services, asked that we survey federal defenders, Criminal Justice Act (CJA) panel attorneys, federal prosecutors, and probation officers and ask them to report the number of offenders harmed or threatened with harm. We added district judges, witnesses, pretrial services offices, and pretrial detention to the study design as a result of early discussions with staff from the Administrative Office of the U.S. Courts (AO staff).

After receiving feedback from the three requesting committees, the Executive Office for U.S. Attorneys (EOUSA), and AO staff, the FJC designed a research study involving Web surveys of the groups listed above. The design of the survey instrument included asking the same basic questions of all groups, with additional questions targeted to specific populations based on which ones were most likely to have the information sought. The need to target questions to specific groups resulted in multiple versions of the survey instrument (see below). The FJC worked closely with the CACM Privacy Subcommittee (Subcommittee) to develop questionnaires that would acquire the needed information and be understood by recipients.

The Subcommittee approved the questionnaires on February 24, 2015.[2] The five groups surveyed included all chief district judges, all district judges (active and senior status), U.S. Attorney's Offices, federal public defender and CJA district panel representative's offices, and chief probation and pretrial services offices. We obtained email lists for each group from various sources, including staff of the AO and EOUSA, as well as electronically available sources. Several groups made efforts to alert respondents to the survey before the initial mailing. In September 2014, Judge Julie Robinson, Judge Catherine Blake, and Judge Irene Keeley, as chairs of their respective committees, sent an initial letter to all district judges alerting them to the problem of harm to cooperators. Several other groups made efforts to alert respondents to the study at the end of February 2015, days before the survey went into the field. The EOUSA sent an email to all U.S. attorneys alerting them to the importance of their participation in the survey. The probation and pretrial services office of the AO included notification of the survey in a weekly email to all probation and pretrial services chiefs. Judge Terry Hodges, the chair of CACM, sent a letter to all circuit chief judges asking for their help in alerting judges in their circuits to the forthcoming survey invitation. Lastly, staff from the defender services office of the AO

1. Letter from Judge Julie A. Robinson, chair of the Committee on Court Administration and Case Management, to Judge Jeremy D. Fogel, director of the Federal Judicial Center, August 14, 2014.

2. We asked the initial set of questions, regarding cases involving harm and the details of that harm, of all respondents, with slight variations in wording. For most respondents, we referred to "defendants and/or witnesses" while for chief probation and pretrial services offices we referred to "defendants/offenders and/or witnesses." We use these terms interchangeably in this report.

mentioned the survey to participants at their federal defender meeting prior to survey distribution.

Survey Implementation and Administration

On March 3, 2015, we distributed the surveys electronically. A cover email, signed by the chairs of the three requesting committees, explained the purpose of the survey and included the link for completing the survey.[3] Two weeks later, we sent a reminder email to everyone who had not completed the survey. We sent a final reminder email on March 31, 2015, to everyone who had not yet completed the survey. The survey closed on April 8, 2015, although anyone asking to submit a late response was permitted to do so until we began drafting the report.[4]

A few issues pertaining to survey administration merit consideration before we present our analysis of the results. First, while chief district judges and district judges responded to the surveys for themselves, the other three groups of respondents reported for their offices. The efforts to coordinate office-wide responses made completion of the survey more difficult for these groups. Moreover, the results for all judges represent the experience of individual judges over the past three years, while the results for the other groups represent the experiences of an unknown, but substantially larger, number of people for that same period. If more harm is reported by the office respondents, this should not be considered an indication of anything more than inclusion of the responses of more people. These differences in respondent groups should be kept in mind as the results are discussed below.[5]

The overall response rates, shown below in Table 1, are quite strong. Chief probation and pretrial services offices responded at the highest rate, while district judges and U.S. Attorney's Offices responded at relatively lower rates, but still at levels sufficient for analysis.

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3. We provide a copy of this email and final versions of the survey in Appendix A. Because of an error in the survey software provided by the vendor, only half of the district judges received the email invitation on March 3. The remaining judges received the initial request for the survey on March 17, 2015. To ensure that these judges had ample time to complete the survey, we extended the field period of the survey. Like all respondents, the judges in this second wave received a follow-up email if they did not complete the survey, which we sent on March 31, 2015. Thus, the first wave of judges received an invitation and two reminders, while the second wave received the follow up and one reminder. This error did not substantially affect the overall response rate of judges, as shown below.

4. A small number of respondents, either by preference or because of technical problems, requested to complete the survey on paper. For those submitting paper responses, FJC staff electronically entered their answers to all survey questions after the survey period ended.

5. While survey responses might be weighted in such circumstances, the results reported below are the unweighted survey responses. We did not weight survey responses for two reasons. First, we did not sample any of the respondent groups; we surveyed populations. Without a sampling frame, there is nothing by which to weight survey responses—except for probability of responding. We cannot weight by the probability of responding for a second reason: the respondent groups are not the same. Chief district judges and district judges responded as individuals. All other respondent groups were responding for an entire office, representing an unknown number of respondents. Because we do not know how many people each response represents, we cannot weight the responses as such. For these reasons, and given that we report only the frequencies with which responses occurred, it is not problematic to report unweighted survey results.

Table 1. Survey Response Rate

Respondents	Questionnaires Sent	Questionnaires Completed	Response Rate
Chief District Judges	94	77	82%
District Judges	929	611	66%
U.S. Attorney's Offices	93	62	66%
Federal Defenders and CJA District Panel Representative's Offices	178	128	72%
Chief Probation and Pretrial Services Offices	113	110	97%
Total	**1,407**	**988**	**70%**

A second issue of survey administration affected the responses of judges more than the other groups, though its impact was minimal. The list of district judges participating in the survey included active and senior status judges. Some senior status judges are in inactive status, while others are in active status, but no longer hear criminal cases as a matter of preference. Additionally, judges newly appointed to the bench may not have criminal cases on their docket, especially if they served in the U.S. Attorney's Office prior to their appointment. Thus, there are two groups of judges—those very new to the bench and those very senior—for whom a survey of harm to cooperators in criminal cases did not apply. To include the responses of these individuals would bias the number of instances of harm reported toward zero (they know of no instances of harm, but that is because they have no criminal cases). While, ideally, we would have excluded these judges from the survey population at the outset, such information was not systematically available on all judges, and we were not able to do so. After receiving the survey invitation, a number of judges contacted the FJC regarding their experience with criminal cases, either because they were new to the bench or they were in senior status (inactive or active but not taking criminal cases). We gave judges who contacted the FJC the option to complete the survey if they chose.[6] We closed the surveys of judges who opted against completing the survey for these reasons and removed them from the reported results. These exclusions bring the total response rate for district judges to 599 completed surveys out of a possible 899 district judges, or 67% of potential respondents. Table 2 shows the final response rates, after excluding those judges who notified us they were ineligible to answer the questionnaire.

6. A small number of additional judges were unable to complete the survey during the allotted time for other reasons, including poor health and international travel. We also removed these judges from the survey results reported below. Undoubtedly, more newly appointed and senior status judges could have been excluded from the survey totals. If the judges did not contact the FJC, however, there is no way for us to know this information.

Table 2. Revised Survey Response Rate

Respondents	Questionnaires Sent	Questionnaires Completed	Response Rate
Chief District Judges	94	77	82%
District Judges	899	599	67%
U.S. Attorney's Offices	93	62	66%
Federal Defenders and CJA District Panel Representative's Offices	178	128	72%
Chief Probation and Pretrial Services Offices	113	110	97%
Total	**1,377**	**976**	**71%**

We addressed a third issue of survey administration, related to the first, after closing the survey on April 8, 2015. For some survey respondents (but only in groups coordinating an office response) duplicate answers appeared in the data. Typically duplicates occurred because a respondent began answering the survey and then thought a designee, such as the criminal division chief in a district office of the U.S. attorneys, would be better suited to answer the questions. In all instances of duplicate answers, respondents notified the FJC of the issue and asked for a second survey link to be emailed to the designee. We compared the two responses to ensure no loss of data occurred with the removal of duplicate (partial) answers. One response, whether for an individual or office, remains in the data.

Despite these three issues, we find the survey results to be robust and reliable. Given the difficult nature of recalling the detailed events of the last three years, the limited timeframe for completing the survey, and the required efforts to coordinate a single office-wide response for the non-judge groups, a 71% response rate is high. Undoubtedly, the advance efforts to alert recipients to the survey, the follow-up reminders, and the salience of the topic contributed to so many people completing the survey. The high response rate increases our confidence in the results of the survey, reported below.

The geographic distribution of the survey responses further increases our confidence in the results. At least one judge from each of the 94 judicial districts responded to the survey, and 61% of the districts had responses from all groups. Defender and panel representative's offices responded from 83 different districts. The responses of probation and pretrial services offices represent the experiences of 92 different judicial districts. U.S. Attorney's Office responses were distributed across 62 judicial districts. Overall, we are confident the responses to the survey represent the national picture.

We should note one final issue affecting the reporting of the survey responses. Judges, defenders, prosecutors, probation officers, and pretrial services officers all see the same defendants/offenders and witnesses at different times. The instances of harm reported below undoubtedly include responses that detail the events in the same case from the perspectives of the judge, the attorneys, and the probation officers. Totaling the instances of harm across these groups risks over-counting the same event multiple times. Because we have no way of knowing if all groups are reporting the same events from different per-

spectives, we cannot remove any duplicate reporting of events. Instead, the results below report the range in instances of harm.

Analysis of Results

The first question on the survey asked respondents to report whether they knew of an instance in the past three years of harm or threat to defendants/offenders or witnesses (or their friends or family) because of the defendant/offender's or witness's cooperation with the government. If the respondent answered yes, we asked additional questions about the details of the harm or threat (described below). After the respondent answered the detailed questions on the first case, the initial screening question, followed by the detailed questions, repeated for up to five cases.

The results in Figure 1 show the percentage of respondents in each group reporting harm on each of up to five cases. The percentages reported for cases two through five were calculated for the subgroup that reported harm in the prior case. Ninety-seven percent of the 62 responding U.S. Attorney's Offices reported harm in a first case, while 49% of the 599 responding judges, 68% of defender offices, and 73% of probation offices reported a first case with harm.[7] Of the U.S. Attorney's Offices reporting harm in a first case, 95% reported harm in a second case as well. Overall, as a percentage of respondents, U.S. Attorney's Offices reported harm with greater frequency than any other group. In fact, more than 50% of U.S. attorneys responding to the survey reported harm in all five cases. Only 3% of U.S. Attorney's Offices reported no instances of harm or threat, whereas 27% of probation offices, 32% of defender offices, and 51% of the judges reported no instances of harm or threat.

7. Twenty-nine of the judges reporting no instances of harm stated later in the survey that they knew of no instances of harm because they were very new to the bench or in senior status and no longer hearing criminal cases. If we removed these judges from the total, as we did with the judges who alerted us to their status prior to completing the survey, the percentage of judges reporting on a first case of harm would be just over 50%.

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Figure 1. Frequency of Harm Reported, by Respondent Group[8]

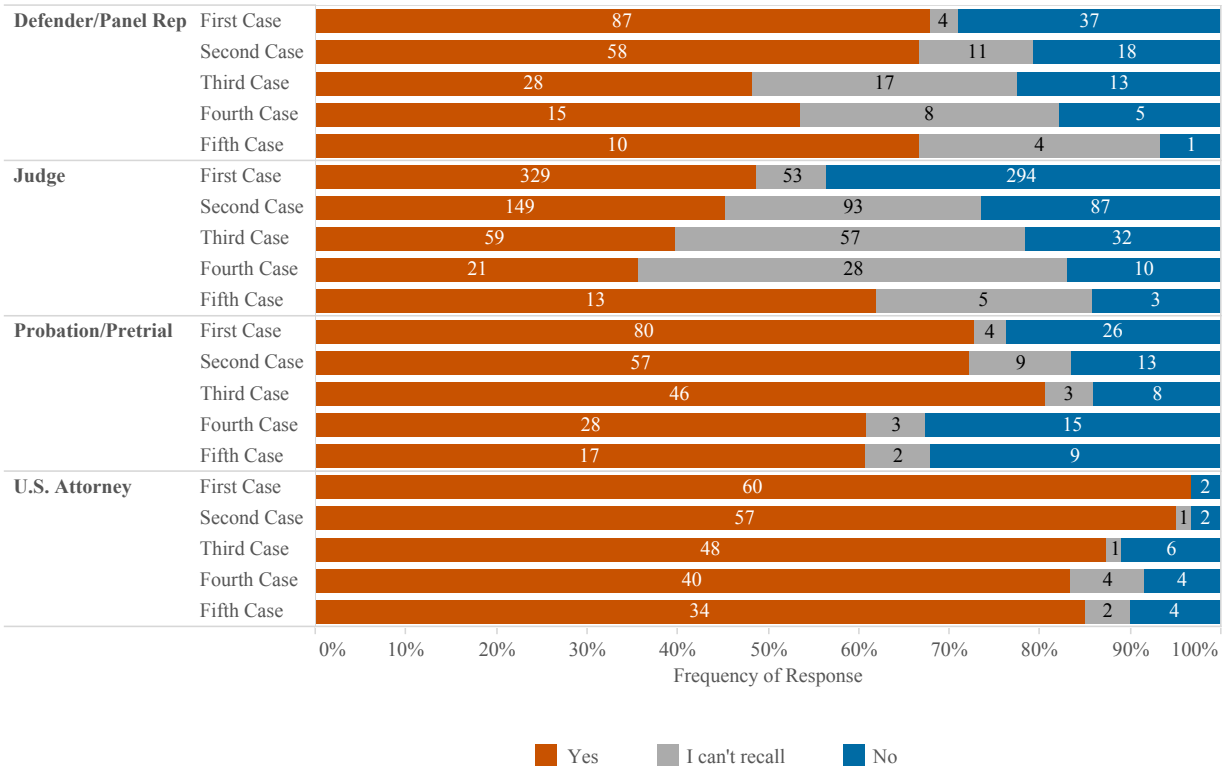

After reporting an instance of harm, respondents then described whether the harm or threat was directed at defendants/offenders or witnesses (or their family or friends). A respondent could choose both defendants/offenders and witnesses, if both were involved in the same case. Figure 2 shows the frequency with which defendants/offenders and witnesses were the subject of harm across all reported incidents. Respondents often reported harm to both defendants/offenders and witnesses in the same case.

8. Figures in this report, including Figure 1, show the frequency of an event by respondent groups, both as a percentage of the group and a number of reported events. The bars in Figure 1 show the frequency of harm as a percentage of the group, while the number on the bar is the actual number of instances of harm reported. For purposes of reporting, chief district judges and district judges are combined into a single group for all tables with one exception: Table 10, which reports district steps to protect cooperation information, includes the responses of chief district judges only, as they were the only group to receive that question.

Figure 2. Frequency of Harm to Defendants and Witness, by Respondent Group

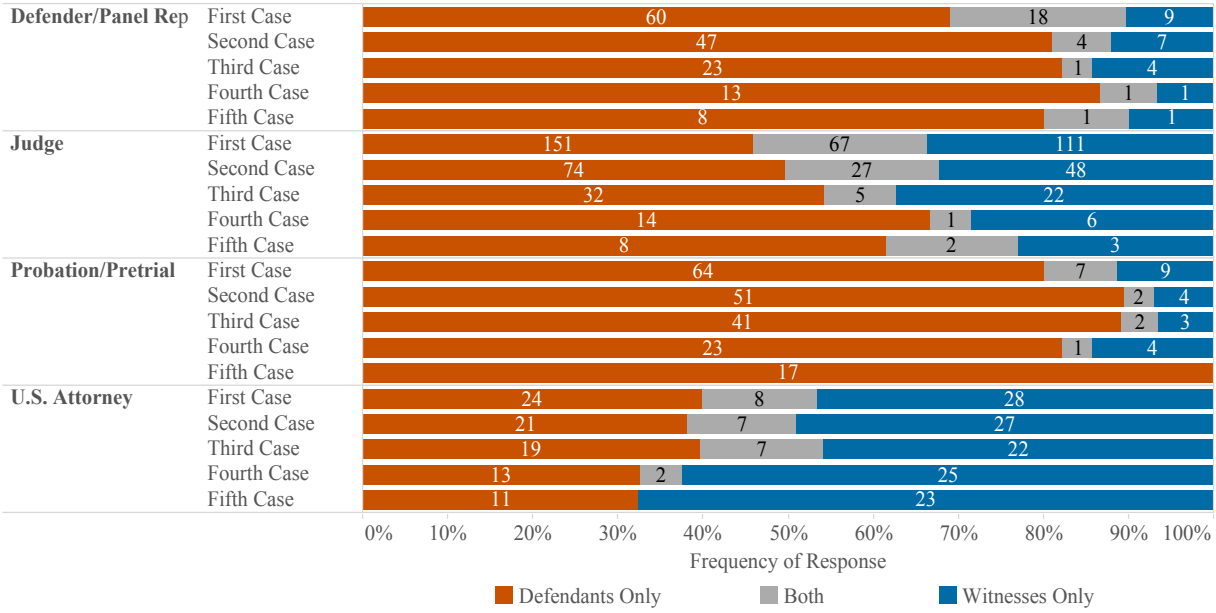

Taking these facts together, the results of the survey show that the 976 questionnaire respondents reported at least 571 instances of harm or threat to as many as 381 defendants/offenders and 292 witnesses in the past three years. These numbers, which are those reported by the judicial respondents, are the minimum number of instances of harm or threat. We assume that some number of instances reported by the other three groups of respondents are not duplicates of the instances reported by the judges and thus the actual incidence of harm and threat is higher.

Both the frequency of occurrence and the number of people harmed or threatened in the past three years are sufficient to provide details about the nature of threats and harm (reported below). While respondents did not always have complete information on the events that occurred, they provided a substantial amount of detailed information on the type of harm, the location of the individual at the time harm occurred, and the source for identifying cooperators. We report summaries of the details for defendants/offenders and witnesses separately below. The results are aggregated across all cases, though we would expect that the details of the first case are somewhat more cognitively available to the respondent (as it is the first case occurring to them) than the details of the fifth case. Of course, availability bias is more likely to be a problem for individual judicial respondents than other groups who provided an office response.

Harm or Threat to Defendants/Offenders

When respondents reported an instance of harm or threat to a defendant/offender, we asked them to detail the type of harm or threat that occurred. These details included the type of harm or threat, the location of the defendant/offender at the time of harm or threat, and the source used to identify the defendant/offender as a cooperator.

Types of harm or threat to defendants/offenders

Respondents could select as many categories as described the case in question.[9] If, for example, a defendant/offender was threatened with physical harm and then beaten, the respondent could check the boxes for both threats of physical harm and actual physical harm. Figure 3 reports all threats and harm to defendants/offenders reported by all respondent groups for all instances in the past three years. While the bar represents the frequency of the answer as a percentage of the group, the number on the bar is the actual number of responses in that category. Respondents most often reported threats of physical harm to the defendant/offender and to the friends and family of the defendant/offender. Over 80% of the incidents reported involved threats of physical harm, a minimum number of 339 instances. The minimum number of instances of actual harm (murder and other physical harm) is 133.

Those selecting the "Other" category detailed a variety of types of harm to the defendant.[10] While some of the incidents could be classified into the existing categories, two additional categories emerged from the "Other" responses: Internet/community/general threats and property damage. Internet/community/general threats included responses such as "told family members to put his name on rats.com," "flyers posted in his neighborhood," "[d]efendant's status as a cooperator was put on the internet," and "[n]ame posted on Top Snitches Facebook page." Property damage included shooting at the cars or houses of defendants, or harm to pets. We report the remaining details, which are too varied to categorize, in Appendix B.

Table 3. Categories of "Other" Harm to Defendants Specified by Respondents

Category of "Other" Harm	Number of Responses
Internet/Community/General Threats	16
Existing Categories	9
Property Damage	9
Other	5

9. It is for this reason that the types of harm or threat reported are higher than the number of defendants harmed or threatened.

10. When the questionnaire gave respondents the option to choose "Other," they were asked to specify what they meant. For every question where respondents could select "Other," we found instances of respondents selecting other without specifying what they meant, or writing in a specification without having chosen "Other." To prevent loss of information, the Appendices report all specified comments, regardless of whether "Other" was selected as a category or not. For each of the "Other" options, we made an initial attempt to categorize these comments. We report this categorization in the tables in the text, while the items coded into each category can be found in the Appendices. All specifications and open-ended responses reported in the Appendices were lightly edited for clarity and redacted to prevent identifying either the case or the respondent.

Figure 3. Frequency of the Type of Harm or Threat Directed at Defendants, by Respondent Group

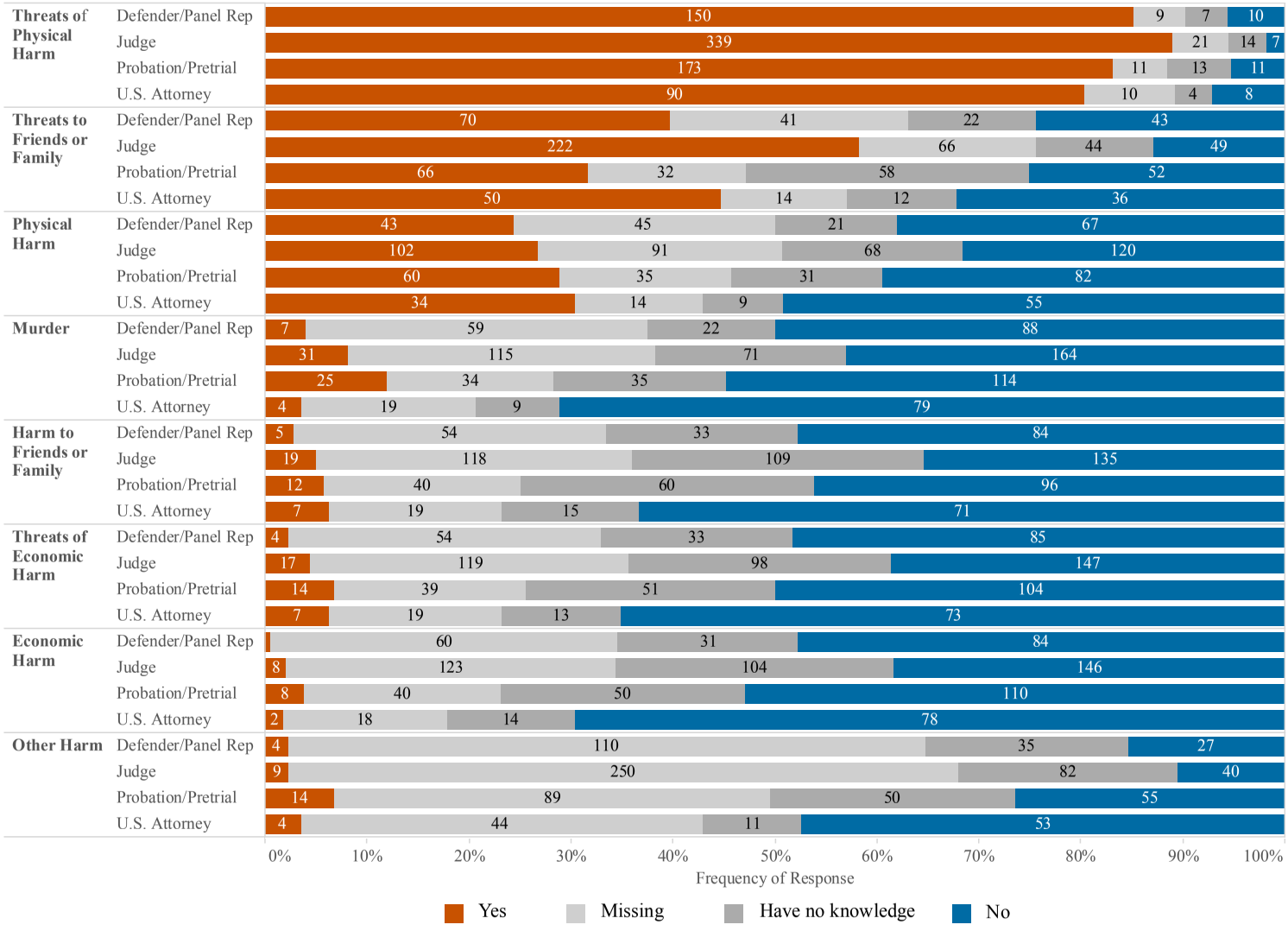

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Location of the defendant/offender at the time of harm or threat

After reporting the details of harm or threat, respondents identified the location of the defendant/offender at the time the harm or threat occurred. Once again, because respondents reported multiple instances of harm or threat for each case, more than one location could be chosen. Figure 4 reports the number and percentage of respondents reporting each location across all respondents and all cases. Respondents most often reported that defendants/offenders were harmed or threatened while in pretrial detention—a minimum of 207 instances—followed by pretrial release and incarceration—a minimum of 125 instances. Chief probation and pretrial services offices reported the location of the defendant/offender as "on probation" more often than other groups, which is not surprising given their contact with defendants/offenders at that time. Overall, as a percentage, respondents reported a substantial amount of harm occurring while defendants were in custody of some kind.

Figure 4. Frequency of Reported Location of Defendant at the Time of Harm or Threat, by Respondent Group

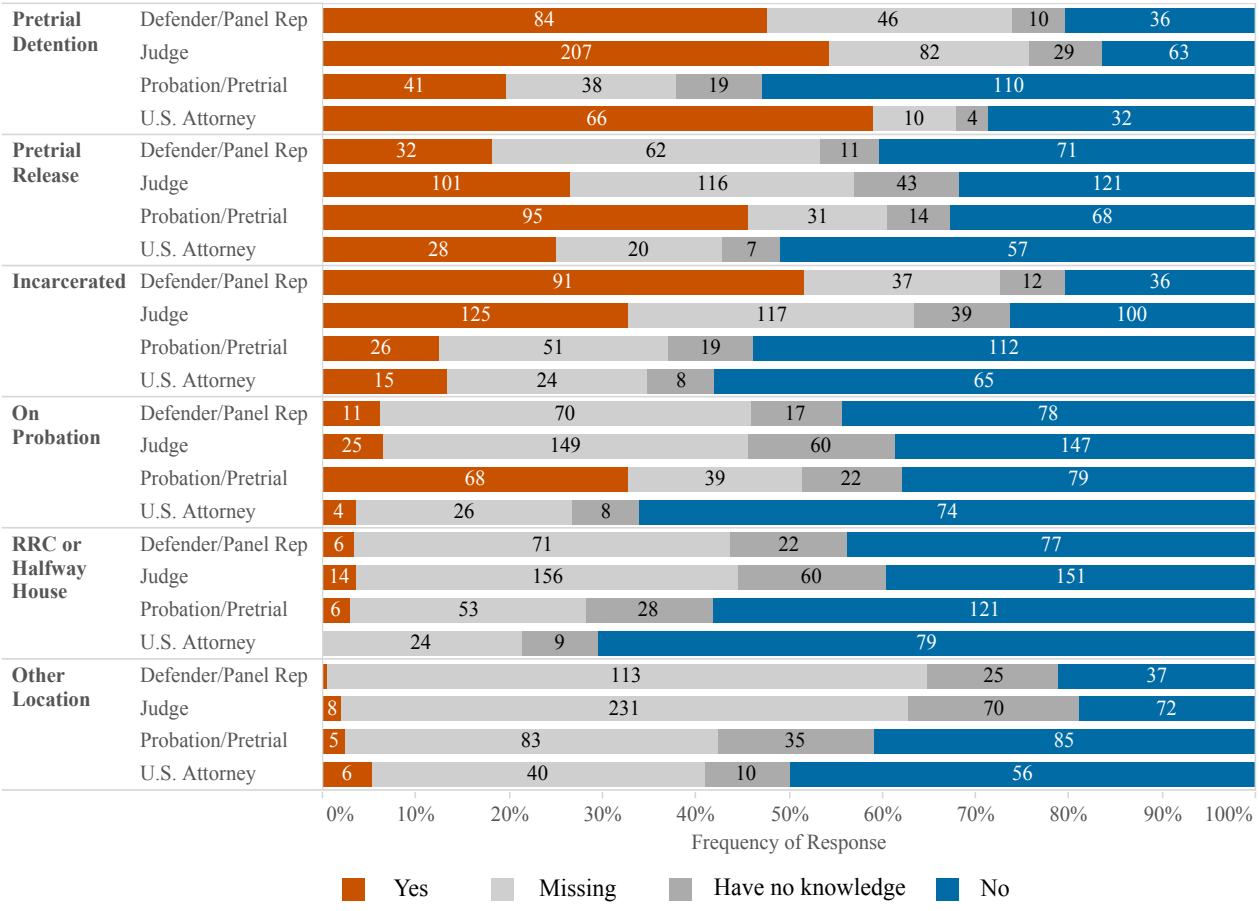

Respondents also specified "Other" locations for the defendant/offender at the time of harm or threat. The "Other" response provided most often was that the defendant/offender was not in any form of custody. The second most common response included defendants/offenders who were in some other form of custody that we did not specify. We report other specified options provided by respondents in Appendix C.

Table 4. Categories of "Other" Defendant Locations Specified by Respondents

Category of "Other" Locations	Number of Responses
Not in Custody of Any Kind	13
Other Forms of Custody	10
Other	7

Protective custody

One set of questions, only for those reporting harm to defendants/offenders, asked respondents if the defendant/offender requested or received protective custody or placement in a special housing unit (SHU). Figure 5 shows the number of respondents reporting that defendants/offenders requested protective custody and the number receiving it. Because respondents may know of defendants/offenders requesting but not receiving protective custody (or receiving it without knowing if they requested it) we asked both questions of all respondents reporting harm to defendants/offenders. Respondents knew of a minimum of 128 instances of defendants/offenders requesting protective custody and a minimum of 136 instances of defendants/offenders receiving protective custody.

Figure 5. Frequency of Defendants Requesting and Receiving Protective Custody, by Respondent Group

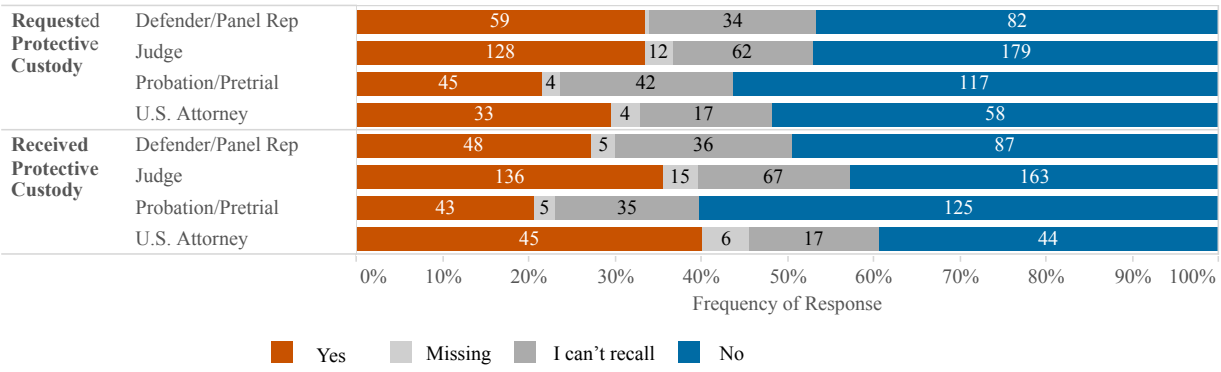

Sources for identifying defendants/offenders

We asked respondents to report any court documents used to identify the defendant/offender as a cooperator. Respondents could report multiple sources. Figure 6 shows the percentage and number of respondents reporting the use of each type of document for

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identifying the defendant/offender as a cooperator. The plea agreement or plea supplement was the document most frequently used to identify a defendant/offender as a cooperator—a minimum of 135 instances—with a 5K1.1 motion used nearly as often—a minimum of 111 instances.

Figure 6. Frequency of the Use of Court Documents to Identify Defendant Cooperators, by Respondent Group

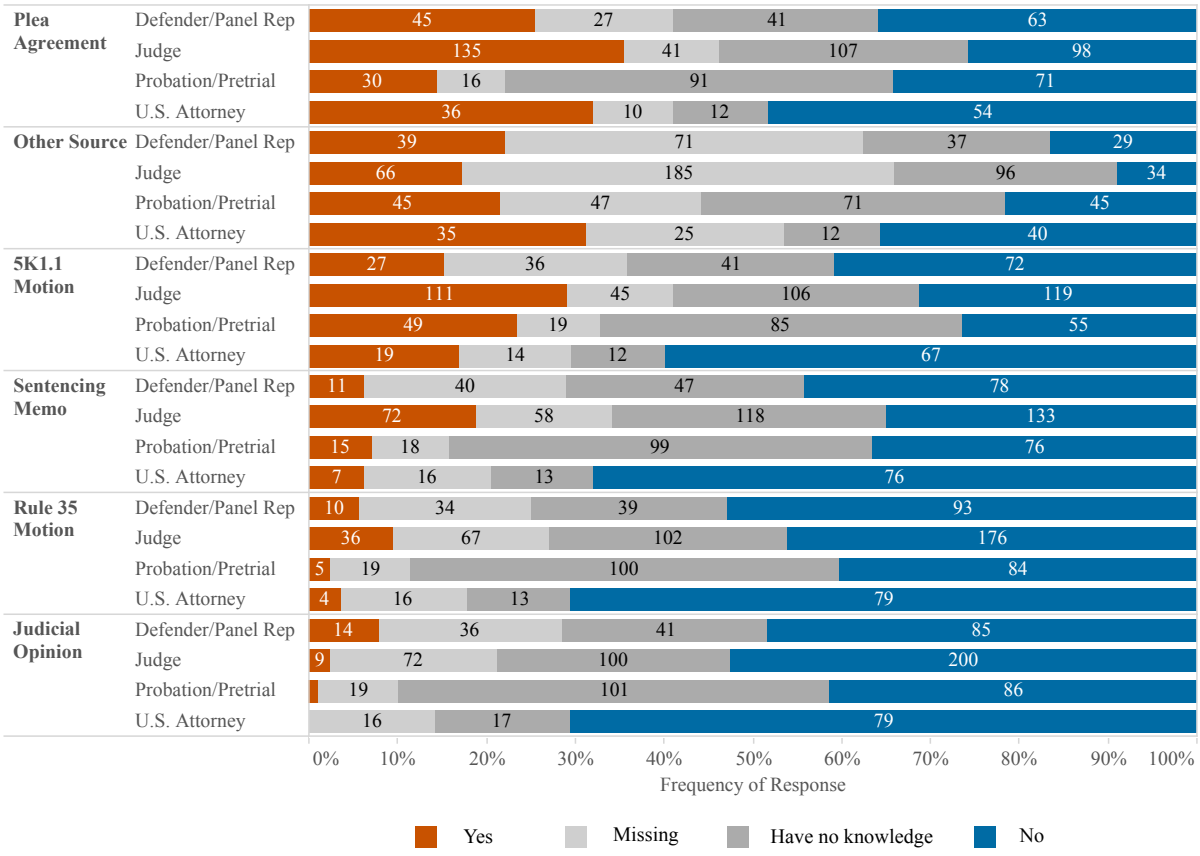

Regarding the "Other" sources by which cooperators were identified, a single category emerged. Respondents frequently reported use of other court documents or proceedings, especially discovery, testimony, and inferences from docket activity (such as sealed entries or gaps in docket sequence numbers) to identify defendant/offender cooperators. Appendix D details the exact sources of information while Table 5 shows the categorization of those details.

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Table 5. Categories of "Other" Sources Used to Identify Defendant Cooperators Specified by Respondents

Categories of "Other" Sources	Number of Responses
Other Court Documents/Proceedings	165
Talking to Agents/Debriefing/Government Disclosure	14
Codefendant/Known	14
Suspicion	12
Other	11
News Reports	5

Additional instances of harm or threat to defendants/offenders

To avoid overtaxing respondents with an excessively long questionnaire, we capped the number of cases on which respondents could provide detailed information at five. We did not, however, want the total amount of harm reported by the survey to be artificially capped by this number. To provide an indication of how much additional harm occurred in the past three years, we asked respondents reporting on a fifth case two additional questions, one regarding defendants and one regarding witnesses (discussed below). If the fifth case involved harm to a defendant/offender, we asked the following: "Not including the defendants regarding whom you've provided information in this survey, how many more defendants from your cases have you learned were harmed or threatened in the past three years?" For this question, we required respondents to enter a whole number, between 0 and 100.[11]

Figure 7 shows the number of defendants/offenders reported by all groups. If we sum the numbers provided by all respondents, and assume there were no duplicate answers across groups, we find a maximum of 579 more defendants/offenders harmed or threatened with harm in the past three years. The number of additional defendants/offenders harmed ranged from a low of 21 (reported by chief probation and pretrial services offices) to a high of 236 additional defendants/offenders (reported by defender and panel representative's offices). While few respondents reported information on a fifth case, those who did were often reporting for an office. The office responses were more likely to report 100 or more additional defendants/offenders harmed in the past three years.

11. Initial discussions within the FJC and with AO staff suggested capping this number at 100 would yield more reliable data. A handful of respondents found this cap to be a source of frustration and chose to report their frustration, as well as a number over 100, in their open-ended responses (see below).

Figure 7. Frequency of Additional Instances of Harm or Threat to Defendants, by Respondent Group

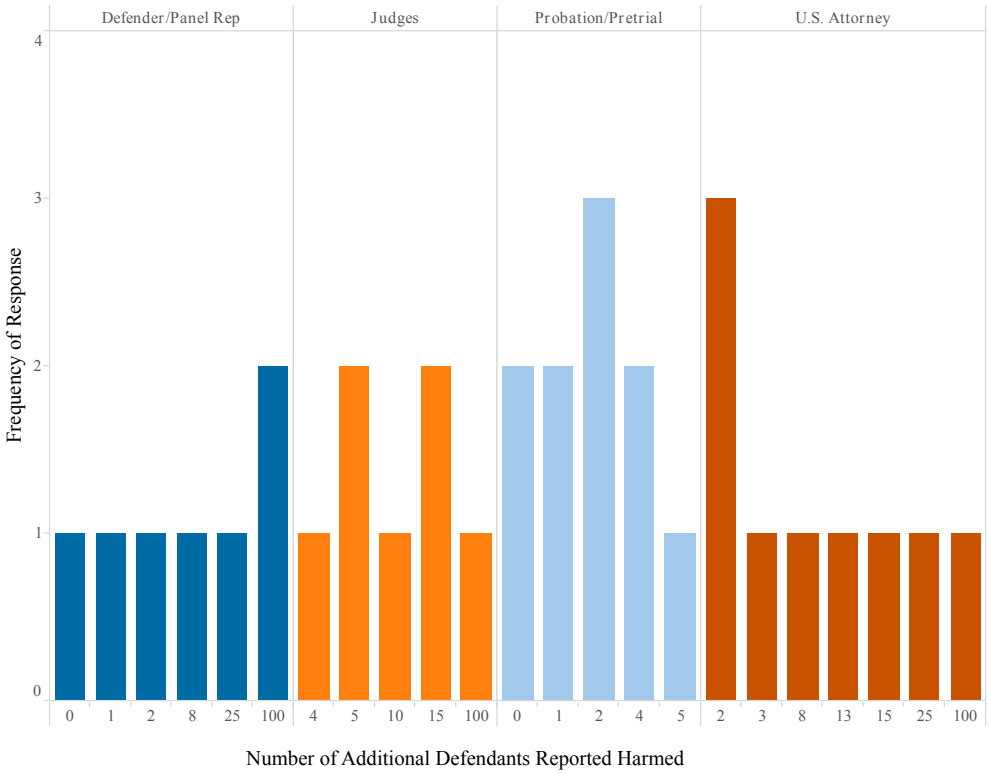

Summary of results on harm to defendants/offenders

To summarize the findings regarding harm to defendants/offenders, respondents reported a minimum of 381 instances of harm or threat directed at defendants/offenders for their cooperation (or perceived cooperation) with the federal government over the past three years (Figure 2). A minimum of an additional 236 defendants/offenders experienced harm or threat, though we have no additional information on the circumstances of these events (Figure 7). When the harm or threat occurred, the defendant/offender was in some form of custody, including pretrial detention or incarceration. In many instances defendants/offenders were identified as cooperators by use of court documents, especially plea agreements or plea supplements, 5K1.1 motions, and docketing activity such as the presence of sealed entries and gaps in docket sequence numbers (Figure 6 and Table 5).

Harm to Witnesses

In addition to reporting information on the harm to defendants/offenders for cooperating with the government, the survey asked respondents to report on harm to witnesses. While the questions are largely the same as those for defendant/offender cooperators, the results are somewhat different. Overall, detailed information on harm to witnesses appears to be less readily available to respondents. Nonetheless, there is still sufficient information for examination.

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Figure 8. Frequency of the Type of Harm or Threat Directed at Witnesses, by Respondent Group

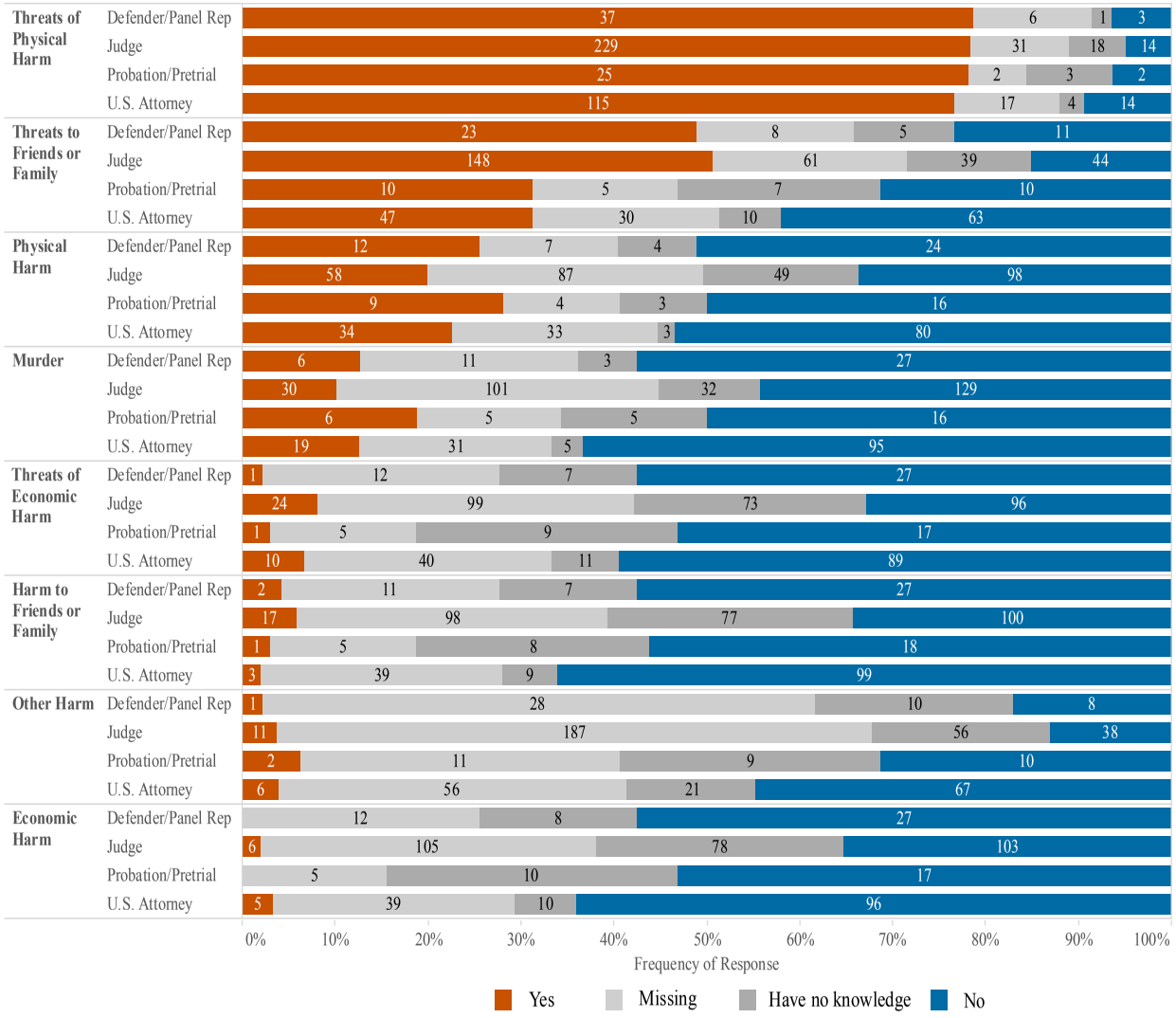

USCA11 Case: 21-10011988

Types of harm or threat to witnesses

Figure 8 reports the types of harm or threat directed at witnesses thought to be cooperating with the government. Similar to defendants/offenders, the most common types of harm are threats of physical harm, threats to friends and family, and actual physical harm. At minimum, in the three-year period, respondents reported 229 instances where a witness was threatened with physical harm, 148 instances involved threats to a friend or family member, and 88 instances involving actual physical harm (murder or physical harm other than murder). Because some of the instances reported by defender, probation, and U.S. Attorney's Offices are almost certainly not duplicates of the instances reported by judges, the actual number of instances of harm or threat of harm to witnesses was likely higher.

Relatively few respondents chose "Other" as the type of harm or threat directed at witnesses. We report the details of these other types of harm in Appendix E, including attempted murder, contracting to kill a witness, general threats and harassment, and property damage. Table 6 shows the categorization of the "Other" categories.

Table 6. Categories of "Other" Harm to Witnesses Specified by Respondents

"Other" Categories of Harm	Number of Responses
Other	15
Internet/Community/General Threats	8
Property Damage	4
Attempted Murder	3
Existing Categories	2

Location of witnesses at the time of harm or threat

Figure 9 shows the reported location of witnesses at the time the harm or threat occurred. Here we see a number of differences from the locations listed for the defendants. Witnesses were likely to be in pretrial detention (often because they are uncharged coconspirators or codefendants—as reported in the open-ended comments) or on pretrial release. At a minimum, 85 incidents occurred when the witness was in pretrial detention and 63 instances occurred when the witness was on pretrial release. The next most common locations for witnesses were "Other"—a minimum of 55 instances—and incarceration—a minimum of 49 instances. As Table 7 shows, the "Other" location for witnesses was almost always not in custody—i.e., they were at home, at work, or in their community—because they were uncharged. We report the complete list of locations in Appendix F. We should note that many respondents were unable to report the location of witnesses at the time the harm or threat occurred.

Figure 9. Frequency of Reported Location of Witness at the Time of Harm or Threat, by Respondent Group

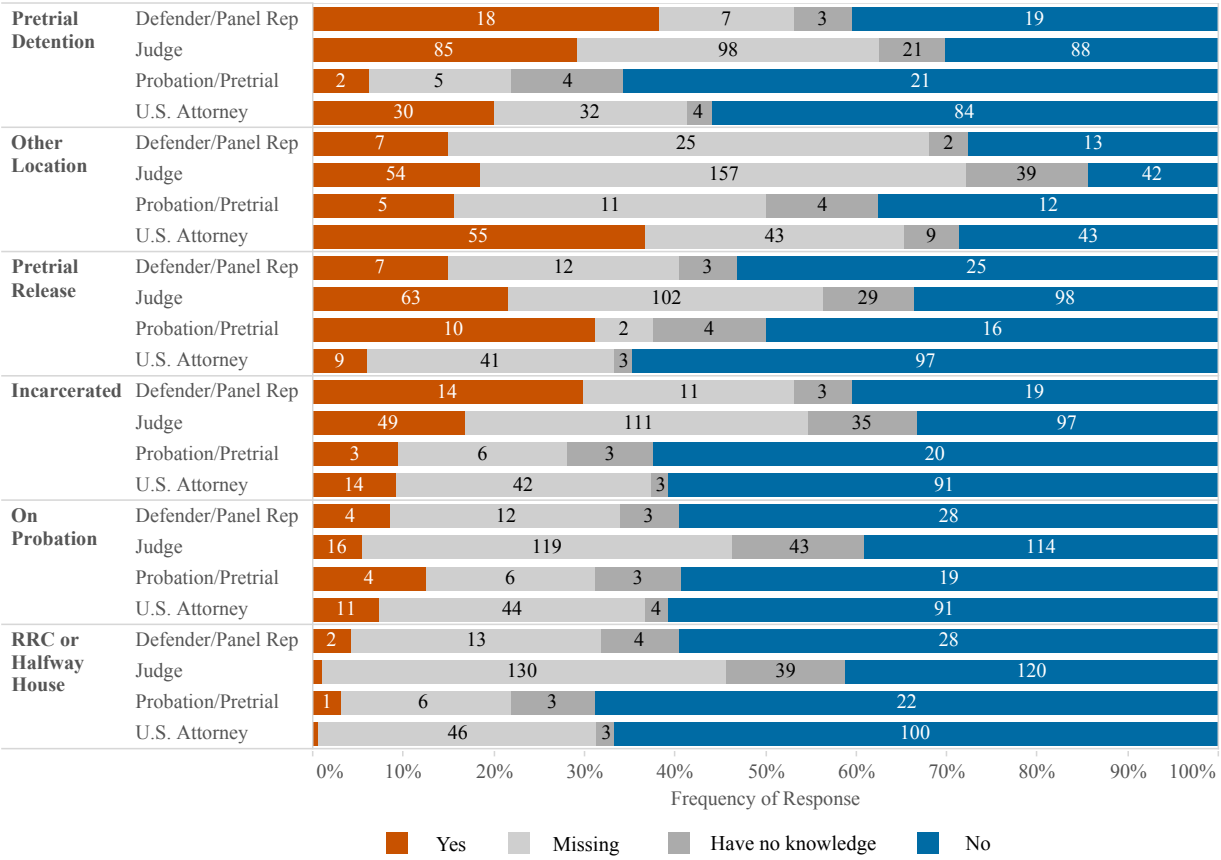

Table 7. Categories of "Other" Witness Locations Specified by Respondents

Categories of "Other" Locations	Number of Responses
Not in Custody of Any Kind	130
Other	21
Existing Category	4

Sources for identifying witnesses

The sources for identifying a cooperating witness also show a different pattern than we reported for the defendants/offenders. While respondents reported that cooperating defendants/offenders were identified in 5K1.1 motions or plea agreements, witness identification occurred most often through "Other" sources, discussed in more detail below. Figure 10 reports the sources used to identify cooperating witnesses and shows that at a minimum witnesses were identified through "Other" sources 59 times. Plea agreements or plea supplements were used to identify cooperating witnesses in 54 instances.

Figure 10. Frequency of the Use of Court Documents to Identify Witness Cooperators, by Respondent Group

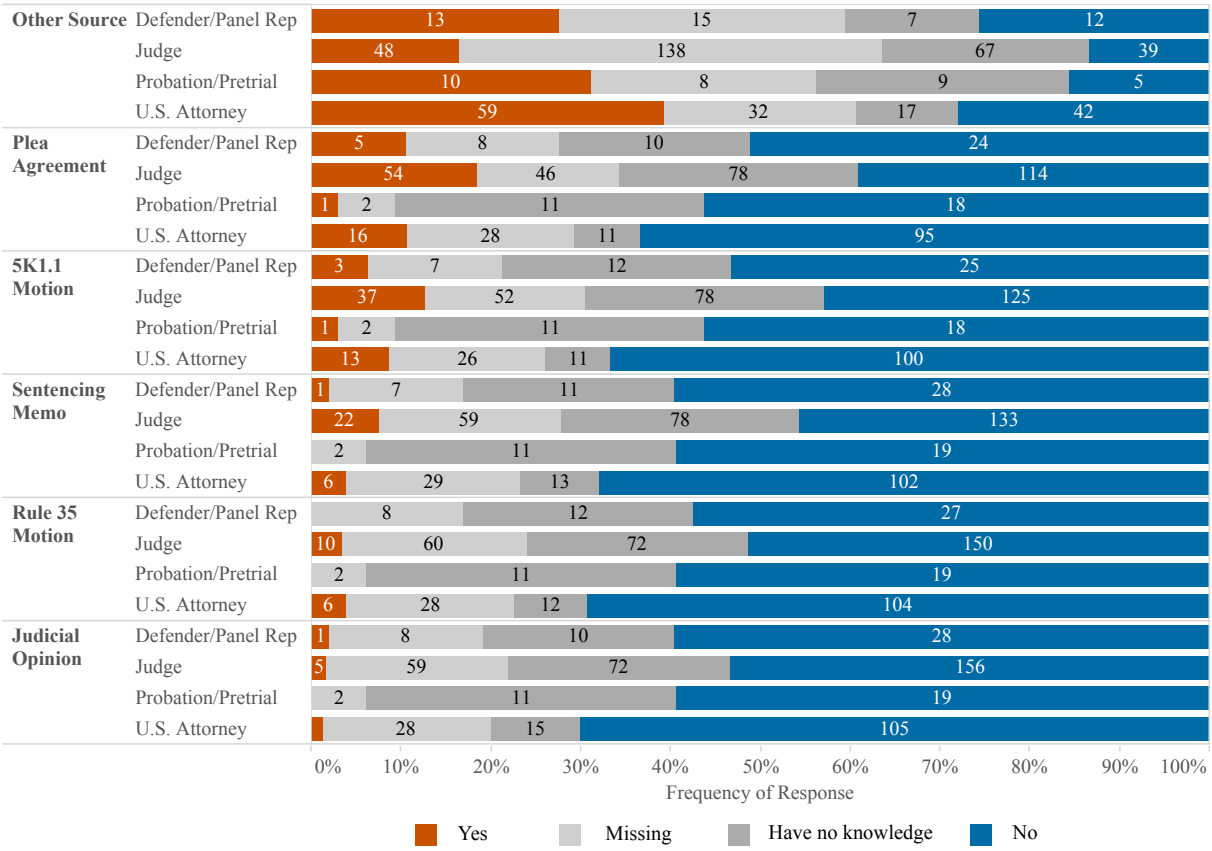

Similar to defendants/offenders, respondents often reported witnesses being identified through other court documents, especially testimony, witness lists, and during discovery. Table 8 reports the categorization of the specified responses, which are provided in Appendix G.

Table 8. Categories of "Other" Sources Used to Identify Witness Cooperators Specified by Respondents

Categories of "Other" Sources	Number of Responses
Other Court Documents/Proceedings	135
Codefendants/Known	15
Other	12
Suspicion	7
Talking to Agents/Debriefs/Government Disclosure	2
News	1

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Additional instances of harm to witnesses

We asked respondents reporting information about a fifth case of harm to witnesses to report any additional harm to witnesses from the past three years. Once again, we required the respondents to choose a number between 0 and 100. Figure 11 shows the reported number of witnesses. If we total the number of witnesses reportedly harmed, again assuming no duplicate responses, we find a maximum of 365 additional witnesses threatened or harmed in the past three years. U.S. Attorney's Offices reported an additional 301 instances of harm or threat to witnesses, while judges reported an additional 64 instances. As with defendants/offenders, while few respondents reported information on a fifth case, those who did were often reporting for an office. The office responses were more likely to report higher numbers of additional witnesses than individual respondents. It is worth noting, however, that no respondents from probation and pretrial services offices or federal defender offices reported additional instances of harm.

Figure 11. Frequency of Additional Instances of Harm or Threat to Witnesses

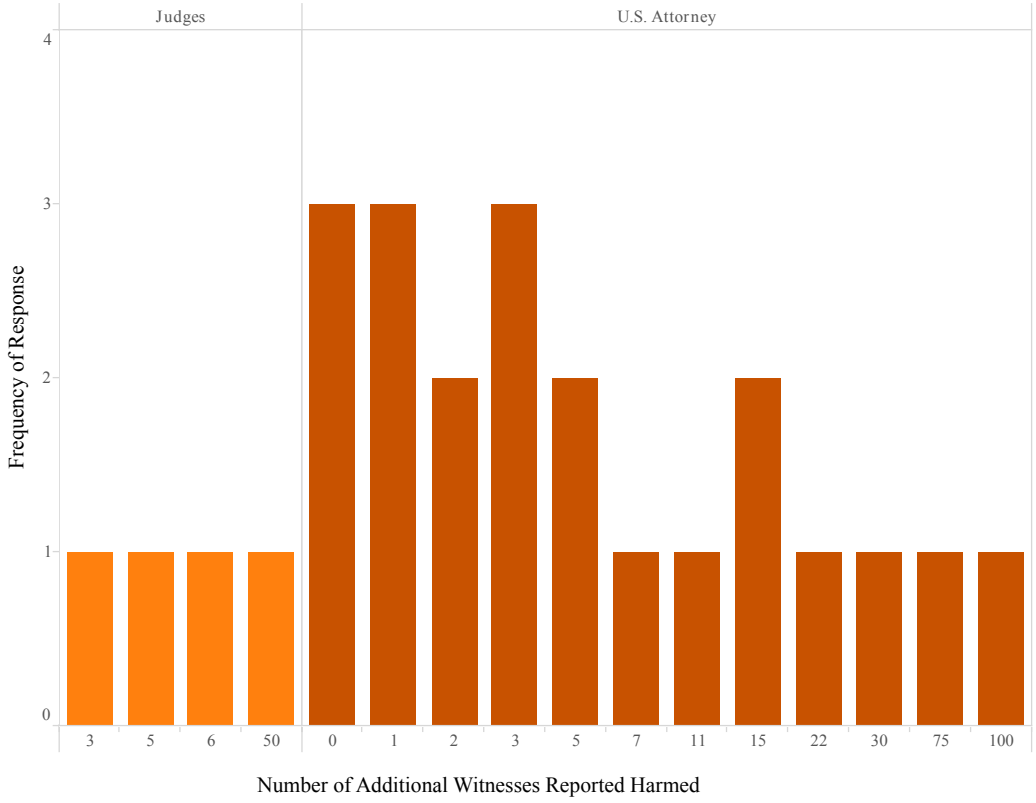

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Summary of results on harm to witnesses

While respondents reported harm to witnesses less frequently than they reported harm to defendants/offenders, a minimum of 292 instances of harm or threat to witnesses occurred in the past three years (Figure 8). An additional 301 instances of harm or threat occurred, but we cannot report the details of these additional events (Figure 11). Witnesses were more likely than defendants/offenders to be out of custody at the time they were harmed, though many were also in custody as codefendants or uncharged coconspirators (Figure 9). Identification of witnesses often occurred through court documents, specifically witness lists, testimony, and during discovery (Figure 10).

Additional Questions

In addition to questions about the frequency of harm to defendants/offenders and witnesses, the questionnaire included other items designed to shed light on harm to cooperators. We asked those questions only of the relevant respondent groups.

Defendant/offender requests for court documents or docket sealing

We asked federal defenders and CJA district panel representative's offices about the frequency with which their clients requested court documents to prove they were not a cooperator, and the frequency with which their clients asked them to seal all or part of the CM/ECF docket. For both questions, we asked respondents to enter a number between 0 and 100. The results in Figures 12 and 13 summarize the number of federal defenders and CJA district panel representatives who reported such requests, by number of defendant/offenders who made such requests. As the results demonstrate, many more defense attorneys report requests for court documents than requests to seal all or part of a CM/ECF docket. When we total the number of defendants/offenders requesting court documents, we find 1,941 requests, likely a low number given the frequency with which defense counsel reported "100 defendants" (the maximum permitted by the question format). Defense counsel also reported a total of 704 defendants/offenders requesting sealing all or part of their CM/ECF dockets.

Figure 12. Frequency of Requests for Court Documents

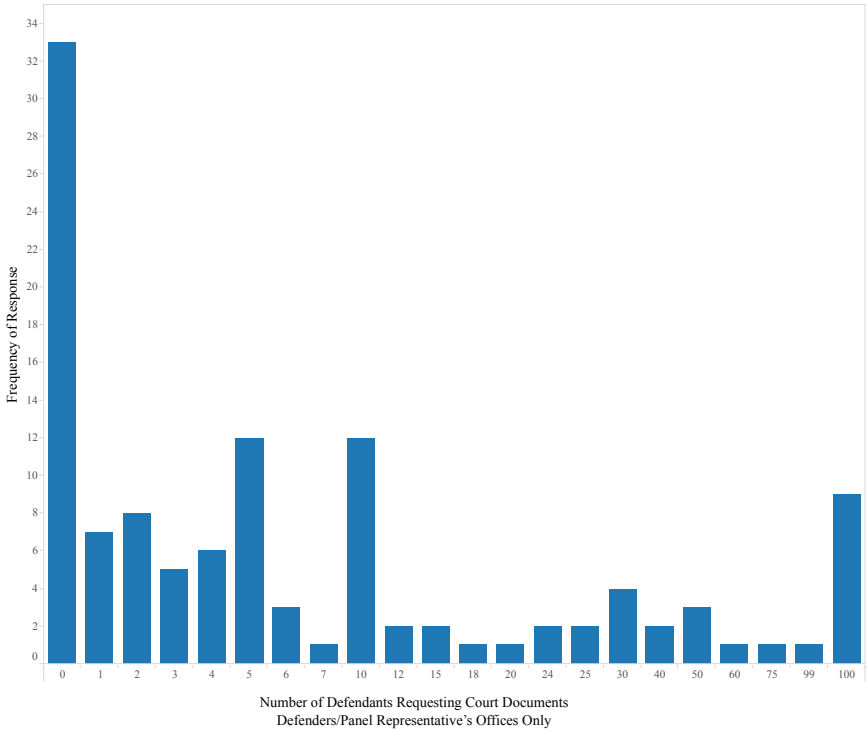

Figure 13. Frequency of Request for Docketing Sealing

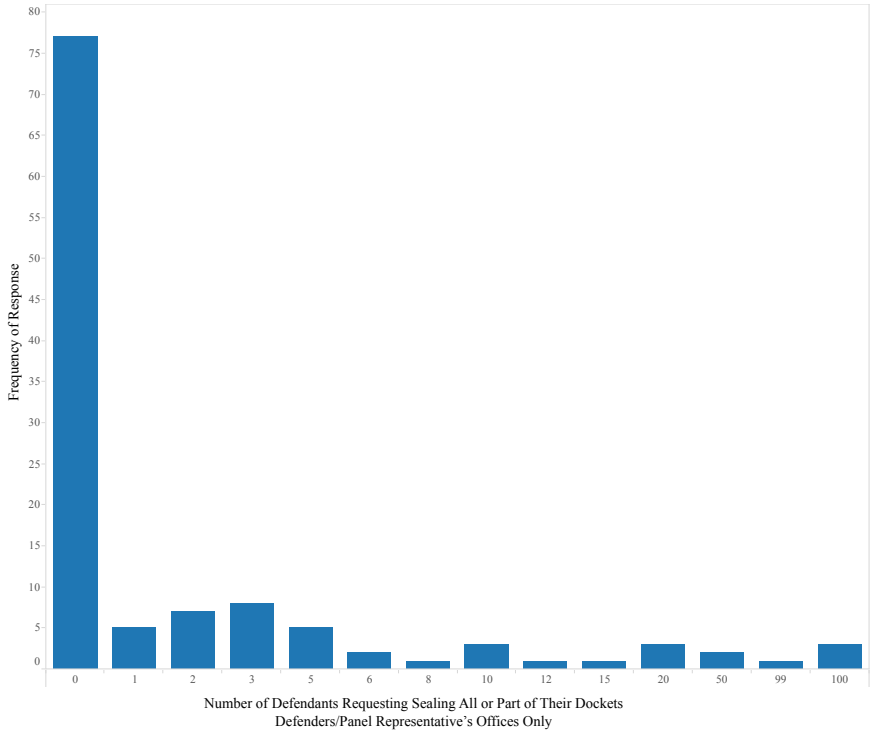

Withdrawing or refusing cooperation

Both defense and prosecuting attorneys answered two questions about the frequency with which, in the past three years, defendants/offenders and witnesses withdrew offers of cooperation, or refused cooperation, because of actual or threatened harm. Once again, we asked respondents to report a number between 0 and 100. Figures 14 and 15 report the number of respondents who reported defendant/offender withdrawal or refusal of cooperation, and Figures 16 and 17 report the same information for witnesses. The number of defendants/offenders withdrawing offers ranged from a low of 197 (reported by U.S. Attorney's Offices) to a high of 247 (reported by defenders and panel representative's offices). The number of defendants/offenders refusing cooperation ranged from a low of 527 (U.S. Attorney's Offices) to a high of 758 (defenders and panel representative's offices). Respondents reported the number of witnesses withdrawing offers of cooperation less often. U.S. Attorney's Offices reported 174 withdrawals while defender and panel representative's offices reported 192 instances of witnesses withdrawing offers of cooperation. Respondents reported witnesses refusing to cooperate more frequently than withdrawing offers. The number of witnesses refusing cooperation ranged from a low of 364 instances (defender and panel representative's offices) to a high of 467 instances (U.S. Attorney's Offices).

Figure 14. Frequency of Defendants Withdrawing Cooperation

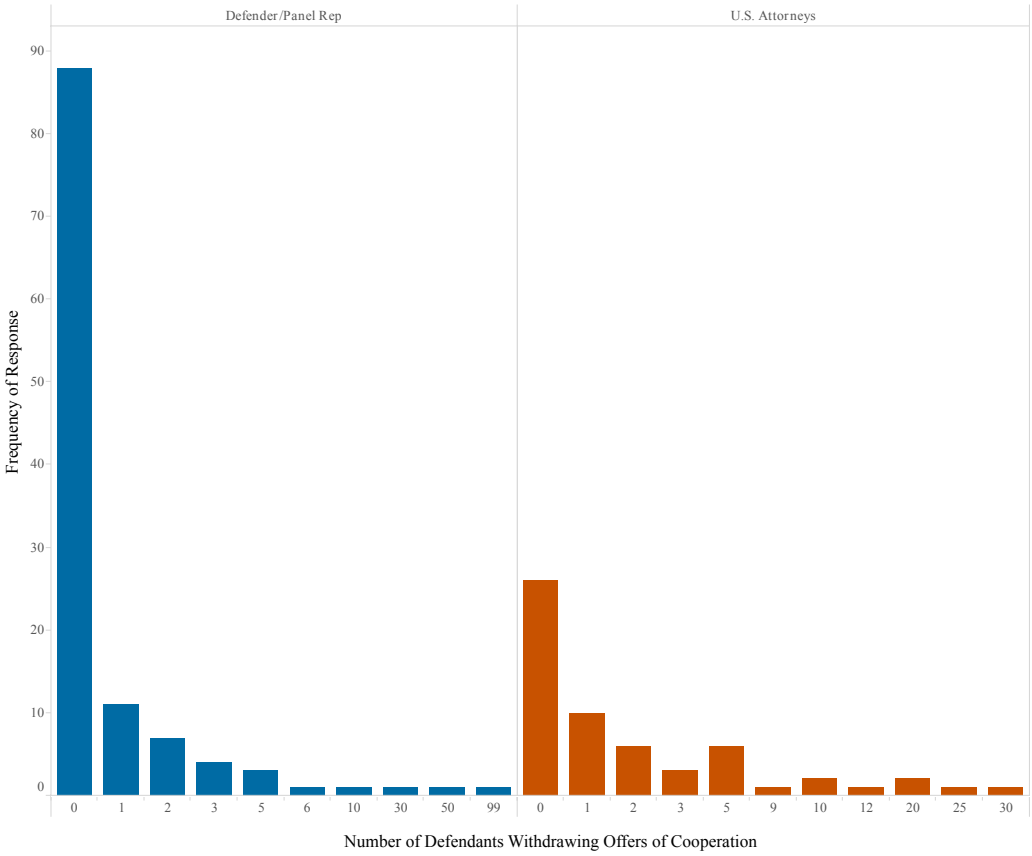

Figure 15. Frequency of Defendants Refusing Cooperation

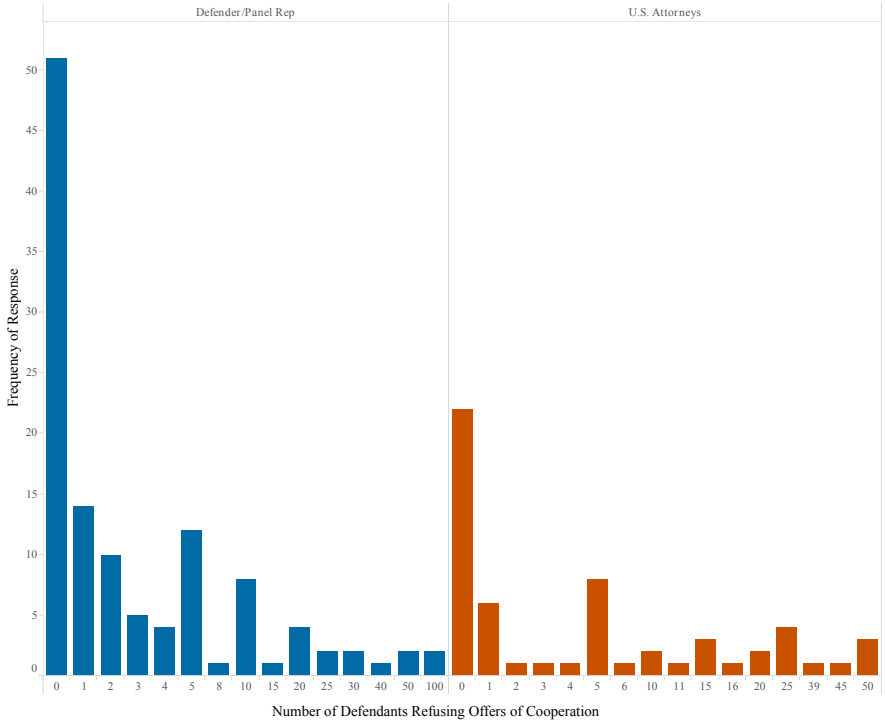

Figure 16. Frequency of Witnesses Withdrawing Cooperation

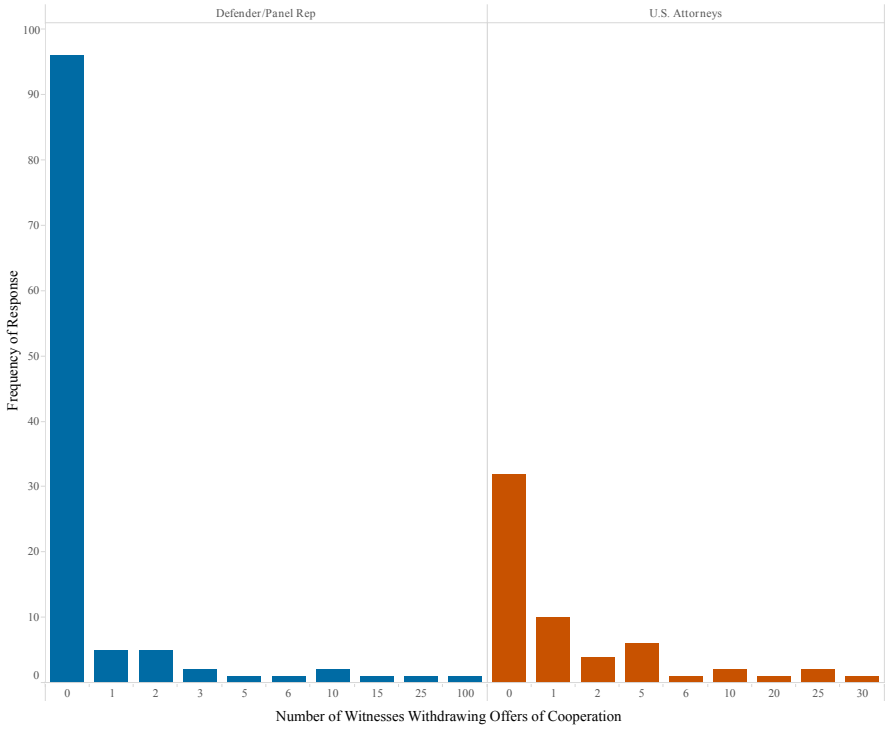

Figure 17. Frequency of Witnesses Refusing Cooperation

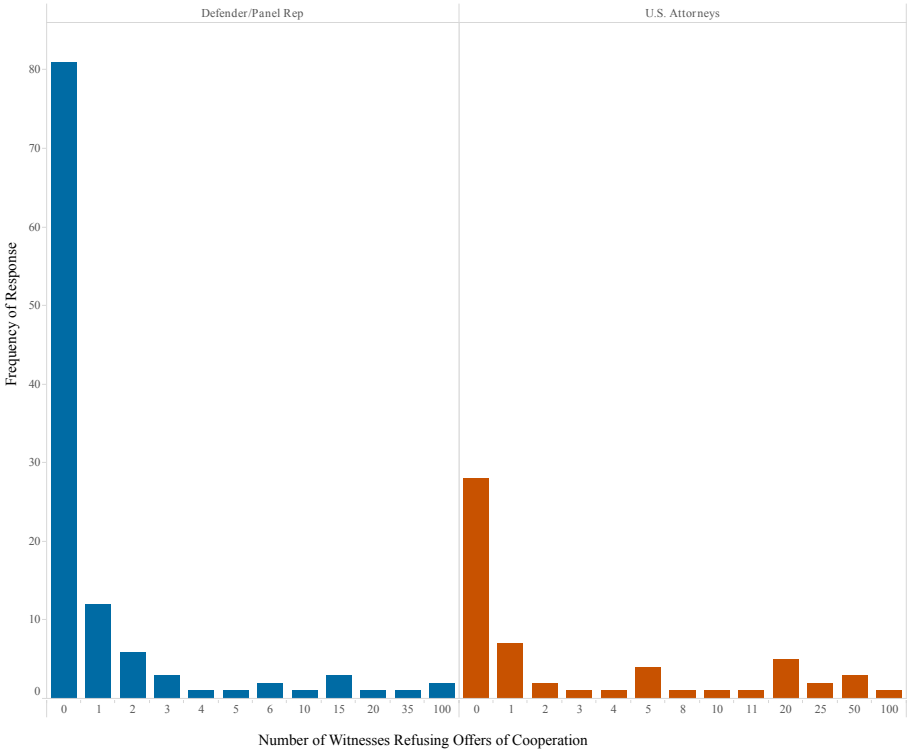

Comparing the frequency of harm in 2014 to 2013

We asked all respondent groups to compare the frequency with which defendants/offenders and witnesses were harmed in 2014 compared to 2013. Table 9 reports the results, but they should be interpreted with caution. The vast majority of respondents, across all groups, were unable to provide a comparison, choosing "I don't know" over all other options. Of the substantive categories, respondents most often reported the frequency of harm being about the same in 2014 compared with 2013. Given that respondents clearly did not have trouble remembering instances of harm, or the details of such harm, their inability to compare two years is more likely the result of the wording of the question or the difficulty of the task (for a question at the end of the survey) than a lack of harm one year to the next. The results should be read with these caveats in mind.

Table 9. Comparing the Frequency of Harm, 2014 to 2013, by Group

Respondents	Higher in 2014	About the Same in 2014	Lower in 2014	I don't know/missing	Total
Judges	32	147	15	480	**674**
Defenders/Panel Representative's Offices	10	44	5	67	**126**
U.S. Attorney's Offices	14	32	3	13	**62**
Chief Probation and Pretrial Services Offices	11	32	8	58	**109**

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District steps to protect cooperating information

One final question on the survey, asked only of chief district judges, attempted to uncover actions taken by districts to protect cooperator information. The list of options provided (shown below) allowed respondents to choose multiple items. Table 10 shows the frequency with which chief district judges reported their courts taking these steps. No one chose "none of the above" and relatively few chose to specify an "Other" option, suggesting the categories covered the majority of steps taken by districts to protect information about cooperators.

Clearly the most common action taken by the district courts has been, at the request of parties, to seal documents containing cooperation information; sixty-six of the seventy-seven chief district judges who completed the questionnaire said their district had taken this action. Nearly half of the respondents also reported that their district seals, *sua sponte*, documents containing cooperation information and/or makes criminal documents appear identically on CM/ECF to obscure cooperation information. The other specific actions are less frequently used, as shown in Table 10. (We report the specified "Other" options in Appendix H.)

Table 10. District Efforts to Protect Cooperation Information

Method of Protecting Cooperation Information	Frequency of Selection
Making criminal cases appear identically on CM/ECF to obscure cooperation information (such as requiring filing sealed supplements with a plea agreement)	33
Sealing documents containing cooperation information *sua sponte*	37
Sealing documents containing cooperation information at the request of the parties	66
Ordering parties to redact cooperation information from documents	19
Restricting remote access of documents containing cooperation information	29
Allowing public access of documents containing cooperation information only in the courthouse or clerk's office	9
Removing documents containing cooperation information from public files	19
Requiring the entry of documents containing cooperation to be private entries in CM/ECF	21
Other (please specify) _____	7
None of the above	0

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Open-ended comments summary

At the end of the survey, respondents were offered an opportunity to provide additional comments. Over a third of all respondents chose to make additional comments, and they covered a wide range of topics. We read the content of these comments and found we could group them into twelve different categories. Comments that were especially lengthy or detailed were coded into multiple categories, with no comment falling into more than six categories. Table 11 below shows the frequency of comments in each category. For those categories where comments could take a negative tone, instead of the positive or affirmative tone implied by the category, the number of negative comments is reported below the main category heading.

Table 11. Open-ended Comment Coding

Coding of Comments	Frequency
General comment about the frequency of harm	148
Harm is not frequent	15
General comments about the sources to identify cooperator	106
Court documents were not the source	4
Details about a specific incident	96
Nothing to report	85
Procedures for protecting defendants	81
General comment about harm in prison/prison culture	76
Takes issue with the survey[12]	33
Policy comments	29
Concerns about a national judiciary policy	7
Comments about refusal to cooperate out of fear	27
Refusals out of fear do not occur	1
Procedures to protect witnesses	15
"Missing"	2
Procedures for protecting juries	1

Some categories required no additional coding for tone or nuance. For example, if a respondent provided additional information about an already reported event, or chose to add information about additional instances of harm, the comment was coded into the category for "details about a specific incident." Likewise, when respondents reported spe-

12. While most of the survey comments reported more information about the scope of harm or the policy implications of harm or threat, some respondents used the open-ended comments to take issue with the use of a survey to determine the scope of the problem, or to complain about the upper bound on the number of people they could report. Overall, these comments could be categorized as suggesting that the harm occurring is more than they were able to report in the survey.

cific procedures for protecting defendants, juries, or witnesses, we coded the comment into those categories. The comments falling into the four categories of details about incidents, or procedures to protect defendants, witnesses, or juries, provided interesting information about what has happened in the past, and how districts have worked to overcome these problems. Typically the procedures to protect defendants or witnesses included sealing, either as a general principle or by local rule, or obscuring docket entries, including substituting revised plea agreements for the original, or discussing cooperation in a court proceeding rather than through written motions.

Other categories, however, required some additional clarification. Comments about the frequency of harm, for example, could either suggest that harm or threats were frequent or infrequent. Of the 148 comments about the frequency of threat or harm in the district, only 15 suggested that harm or threats were infrequent (eight judges, five defenders, one U.S. Attorney's Office, and one chief probation and pretrial services office). At times the respondents noted that harm was infrequent because of recent steps taken by the district to better protect cooperation information. Other times, respondents were noting that harm to a specific group, such as witnesses, was infrequent. Lastly, respondents also noted they did not have or were not likely to be told of such threats, so they thought such instances were infrequent. Of course, the 85 respondents who specifically said they had nothing to report, because they didn't have criminal cases, could be included with other respondents who said harm was infrequent based on their experience. Nonetheless, even after combining "nothing to report" with the 15 respondents who said harm was infrequent, the tone of the comments overall would still suggest respondents found harm to be frequent rather than infrequent.

The remaining 133 respondents who said harm was frequent used words such as "often," "every," "many," "most," "all," or "the vast majority," to describe how often cooperators were threatened, explicitly or implicitly, with harm or were victims of harm. Several of these respondents noted that the problems of threat and harm to cooperators are especially pronounced in drug and gang cases, as well as in certain geographic communities. Overall, when respondents were noting the frequency with which harm or threat occurred, they found it to be pervasive.

Comments about the sources used to identify cooperators typically provided information about which court documents were most likely to identify a cooperator, including those most frequently demanded in federal prisons when a new inmate joins a facility (discussed below). In fact, only 4 of 106 comments about sources used to identify cooperators explicitly said that court documents or docket activity were not used (three chief probation and pretrial services offices and one judge). The remaining 102 comments either mentioned a court document (the most common outcome) or were neutral with respect to court documents but focused on another source to identify a cooperator, typically the details of a specific incident. Those comments that did not explicitly mention court documents focused instead on other sources for identifying cooperators including "social media," "rats.com," "YouTube," or more generally "the internet." Of course, talk within a community, newspapers, movement in and out of the prison, and prior knowledge of the cooperator were also mentioned as sources of identification.

A final category of comments meriting further consideration was policy comments made by respondents. The 29 respondents offering specific policy comments covered two dimensions. First are those who commented on whether a national policy was necessary or not. Seven of the twenty-nine respondents made comments about a national judiciary

policy that could be considered negative in tone (four judges and three defenders). Included in this group were respondents' explicitly negative comments, such as "the need for blanket rules . . . is a canard," as well as more cautionary comments, such as "be sensitive to the public right to know." Other policy comments were more positive, suggesting a need for policy, though four suggested that this was an issue for the Department of Justice (DOJ) or, more specifically, the Bureau of Prisons (BOP) to address (three judges and one chief probation and pretrial services office). For instance, one respondent noted that the DOJ and the U.S. Attorney's Office do not consider protection of cooperators to be a priority, but they should. One comment noted that past efforts to work with BOP on this issue had not been successful. Seventeen other respondents suggested there was a need for national policy, made by the judiciary, or that the judiciary should do "something" about the issue. One judicial respondent's comment combined both elements, suggesting that this was a DOJ/BOP issue about which the judiciary needed to be concerned and take action.

Overall, while specific policy comments were rare, relative to the other types of comments provided, their tone could be categorized as suggesting a need for something to be done to protect cooperators. This is especially true if we consider all the comments as a group. In addition to the policy comments noted above, 76 respondents spoke about life in prison for cooperators, or prison culture in general, clearly noting a problem where there is an expectation of harm in prison for those who do cooperate or are unable to prove that they did not. These respondents consistently told a story of a new inmate reporting to a specific individual (the "shot caller") in the prison and being required to provide their "paperwork" within a few weeks of coming to prison. If the inmate for any reason was unable to prove they were not a cooperator, they were told to request protective custody. These concerns prompted inmates to request their docket information, or (in the case of those who did cooperate) go so far as to request fake documents to protect them in prison.

Moreover, the general comments about the frequency of harm more often suggested that threat or harm was a frequent occurrence, and this was true even after including in our count those respondents who said they had nothing to report. Further, the steps reported for protecting defendants, witnesses, and (in one case) juries, suggest that the concerns about harm are real enough for districts to make affirmative steps to better protect cooperators from harm. Despite these efforts, respondents noted that there continue to be problems. The fear of being harmed or threatened is affecting the willingness of defendants and witnesses to cooperate, a comment made by 26 respondents (with one defender/panel representative's office as the exception). Taken as a whole, but certainly not unanimously, the open-ended comments support the results reported above: harm is occurring, court documents are often the sources for identifying cooperators, and this is a problem for the criminal justice system.

Conclusion

To answer the question of how often cooperators, both defendants/offenders and witnesses, were harmed, we surveyed federal district judges, U.S. Attorney's Offices, the offices of the federal defenders and CJA district panel representatives, and chief probation and pretrial services offices. With a 71% response rate, and representation from all 94 judicial districts, we are confident that the reported results are representative of the harm experienced by

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witnesses and defendants/offenders in the past three years. These groups reported a substantial amount of harm. Overall, respondents reported a minimum of 571 cases involving harm or threat. These instances of harm involved a minimum of 381 defendants/offenders and 292 witnesses; often, both were involved in the same case. Respondents reported a minimum of an additional 236 defendants/offenders and 301 witnesses harmed, but limits placed on the survey prevent us from knowing the details of such harm.

Respondents reported that the nature of harm or threat to defendants/offenders and witnesses was largely the same. Threats of physical harm and threats to friends or family occurred most frequently, and many respondents reported multiple types of threat made against the same defendant/offender or witness. It is worth noting, however, that defendants/offenders were more likely to be subject to multiple types of threat than witnesses were, though this difference could be the result of the availability of the information to our respondent groups.

We found, not surprisingly, that the location differed for defendants/offenders and witnesses when harmed or threatened. Defendants were most often in some form of custody (pretrial detention, pretrial release, or incarceration) while witnesses were not likely to be in custody, or, if they were in custody, they were in pretrial detention as a codefendant.

The sources for identifying cooperation by defendants/offenders and witnesses also differed somewhat, according to our respondents. While court documents and proceedings were overwhelmingly the source for identifying both types of cooperators, the specific sources are different. Defendants/offenders were identified in plea agreements, 5K1.1 motions, or through general docketing practices, especially the presence of a number of sealed CM/ECF docket entries or a sentencing reduction. Respondents also reported discovery and testimony as common sources for identifying defendant/offender cooperators. We found that witnesses, while also identified through court documents, were often identified through witness lists, because they give testimony in open court, or through discovery.

Respondents also reported on the willingness of defendants/offenders and witnesses to provide cooperating information. Defense attorneys as well as prosecutors reported that, in the past three years, hundreds of defendants/offenders and witnesses withdrew offers of cooperation and refused cooperation out of concerns about harm or threat. These results are echoed in the open-ended comments of these two groups as well. Concerns about harm are so real defendants requested court documents to prove they were not a cooperator over 1,900 times in the past three years.

While respondents were able to report on specific instances of harm or threat in the past three years, they were largely unable to compare the amount of harm in 2014 to 2013. When they did answer, they reported similar levels of harm across the two years.

The final question, asked of chief district judges, sought to identify policy changes that might be considered to protect cooperating defendants/offenders and witnesses. As reported by respondents, the district courts have adopted a number of measures in an attempt to protect cooperators. Among these measures is the sealing of docket entries such as plea agreements, often *sua sponte*, to shield cooperation information. Some districts have taken the additional step of docketing all criminal cases the same way—for example, docketing blank sealed documents where no cooperation occurred. Respondents' answers to questions about sources used to identify cooperators, especially defendants/offenders, raise questions about the effectiveness of such steps. Although sealing documents may seem like a logical solution to protecting information about cooperators, the presence of sealed documents and gaps in docket sequence numbers by themselves are

considered enough by other inmates to identify cooperators and put them at risk of harm. The open-ended comments describe this phenomenon in detail. In these comments, respondents noted the problems inherent in sealing and made additional suggestions for protecting cooperating information, including a separate filing system for the public from that used by the courts. A small set of comments questioned the need for any policy for protecting cooperator information, as well as raising issues of public access to court documents and proceedings. We include all these suggestions in Appendix I.

Though the direction that policy should take is not clear from the information provided in this survey, the scope of the problem is. Respondents reported a substantial amount of harm, to both defendants and witnesses, resulting from use of court documents to identify cooperators. The problem occurs both during criminal prosecutions and once defendants (whether they cooperated or not) begin serving sentences in BOP and other facilities. Efforts to protect cooperating information, while in some instances successful, have not eliminated the problem of harm to cooperators. While respondents recognized that limiting access to these court documents would not completely eliminate harm to cooperators, there was general agreement that something needed to be done—by the judiciary, BOP, or both—to better protect cooperating information and reduce the risk of harm to defendants and witnesses assisting in criminal prosecutions.

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Appendix A: Survey Invitation and Questionnaires

Dear ${m://Title} ${m://LastName}:

There is a growing concern that information contained in publicly accessible court documents is being used to threaten or harm defendants in criminal cases because of their cooperation or suspected cooperation with the government. Some courts have already acted in a variety of ways to safeguard such documents.

We write as the chairs of three Judicial Conference Committees to ask for your help in collecting information that will assist our committees in making an important policy decision – whether to propose to the Judicial Conference the establishment of national procedures for protecting information in court documents indicating a defendant's cooperation, or intent to cooperate, with the government.

In an effort to measure the extent of this problem, we have asked the Federal Judicial Center to conduct a survey on our behalf to gather information on threats of harm to, or actual harm suffered by, defendants and witnesses in criminal cases because they were actual or suspected cooperators with the government.

District judges, federal prosecutors and defenders, CJA district panel representatives, and chief probation and pre-trial officers are being surveyed.

When you click on the link below, you will connect to the survey. It will provide important information about how to respond. **Please be assured that all survey responses will be confidential and reported to the committees only in the aggregate.**

Thank you for your time. Your participation is greatly appreciated. Click on the link below to begin the survey. **Please complete the survey by March 17th, 2015.**

Sincerely,
Wm. Terrell Hodges, Chair
Court Administration and Case Management Committee

Irene M. Keeley, Chair
Criminal Law Committee

Catherine C. Blake, Chair
Defender Services Committee

Follow this link to the Survey:
${l://SurveyLink?d=Take the Survey}

Or copy and paste the URL below into your internet browser:
${l://SurveyURL}

Cooperators - Chief District Judges Preview

Survey Instructions

Scope of the Survey. This survey asks about information you may have received regarding harm or threats of harm to defendants or witnesses on your docket because of their actual or perceived cooperation with the government. Please consider only defendants or witnesses from cases on your docket, not those of a colleague, and report information you consider to be reliable. Please consider only instances of harm or threats of harm from cases on your docket in the last three years.

Definition of "Harm." "Harm" refers to:

- Actual or threats of economic harm
- Actual or threats of physical harm
- Murder

suffered by a defendant or witness (or their friends or family), inflicted by a third party in retaliation for cooperating (or for being suspected of cooperating) with the government. Harm can occur at any point in a case, from pre-trial through conviction or acquittal or any time thereafter.

Confidentiality. All survey responses will be kept confidential and results will be reported only in the aggregate. Please do not identify any defendant or witness by name.

Who to Contact. If you have any questions about the study, you may contact any of the three committee chairs or Dr. Margaret Williams, who is directing the study. If you have questions about the items in this survey, or technical problems with the questionnaire, Dr. Williams can be reached at 202-502-4080 or mwilliams@fjc.gov.

In cases on your docket over the past three years, have you learned of any defendants and/or witnesses who were harmed or threatened (including harm or threats to friends or family) because of the defendant's or witness' cooperation with the government?

- ❍ Yes
- ❍ No
- ❍ I can't recall

Please think about the cases from the last three years for which you have the most information about actual harm or threats of harm to defendants or witnesses (or their friends or family). **This questionnaire asks a series of questions on up to five cases from your docket.** While you may not have all the information on each case, please answer as many questions as you can to provide a complete picture of the harm or threats of harm to each person.

[NOTE THIS SECTION WILL REPEAT UP TO FIVE TIMES.]

Thinking about the first case, who was harmed or threatened with harm? (Check all that apply)

- ❑ Defendant
- ❑ Witness

Did the defendant experience any of the following types of harm or threats? (Choose one per row)

	Yes	No	Have no knowledge
Threats of economic harm	❍	❍	❍
Actual economic harm	❍	❍	❍
Threats of physical harm	❍	❍	❍
Actual physical harm	❍	❍	❍
Murder	❍	❍	❍
Threats to friends or family	❍	❍	❍
Actual harm to friends or family	❍	❍	❍
Other (please specify)	❍	❍	❍

When the defendant was harmed or threatened, he/she was... (Choose one per row)

	Yes	No	Have no knowledge
in pre-trial detention	❍	❍	❍
on pre-trial release	❍	❍	❍
incarcerated post-conviction	❍	❍	❍
in an RRC or halfway house	❍	❍	❍
on probation or supervised release	❍	❍	❍
elsewhere (please specify)	❍	❍	❍

Did the defendant request protective custody or placement in a special housing unit?

❍ Yes
❍ No
❍ I can't recall

Did the defendant receive protective custody or placement in a special housing unit?

❍ Yes
❍ No
❍ I can't recall

Were any of the following court documents used to identify the defendant as a cooperator (or suspected cooperator) with the government? (Choose one per row)

	Yes	No	Have no knowledge
Judicial opinion	❍	❍	❍
Rule 35(b) motion	❍	❍	❍
§ 5K1.1 motion testimony/transcript	❍	❍	❍
Plea agreement or plea supplement	❍	❍	❍
Sentencing memorandum	❍	❍	❍
Other (please specify)	❍	❍	❍

Did the witness experience any of the following types of harm or threats? (Choose one per row)

	Yes	No	Have no knowledge
Threats of economic harm	❍	❍	❍
Actual economic harm	❍	❍	❍
Threats of physical harm	❍	❍	❍
Actual physical harm	❍	❍	❍
Murder	❍	❍	❍
Threats to friends or family	❍	❍	❍
Actual harm to friends or family	❍	❍	❍
Other (please specify)	❍	❍	❍

When the witness was harmed or threatened, he/she was... (Choose one per row)

	Yes	No	Have no knowledge
in pre-trial detention	❍	❍	❍
on pre-trial release	❍	❍	❍
incarcerated post-conviction	❍	❍	❍
in an RRC or halfway house	❍	❍	❍
on probation or supervised release	❍	❍	❍
elsewhere (please specify)	❍	❍	❍

Were any of the following court documents used to identify the witness as a cooperator (or suspected cooperator) with the government? (Choose one per row)

	Yes	No	Have no knowledge
Judicial opinion	❍	❍	❍
Rule 35(b) motion	❍	❍	❍
§ 5K1.1 motion testimony/transcript	❍	❍	❍
Plea agreement or plea supplement	❍	❍	❍
Sentencing memorandum	❍	❍	❍
Other (please specify)	❍	❍	❍

Are there other cases on your docket from the past three years in which you learned of a defendant or witness being harmed or threatened?

❍ Yes
❍ No
❍ I can't recall

[NOTE: THIS IS THE END OF THE REPEATING SECTION]

Not including the defendants regarding whom you've provided information in this survey, how many more defendants from cases on your docket have you learned were harmed or threatened in the past three years?

Not including the witnesses regarding whom you've provided information in this survey, how many more witnesses from cases on your docket have you learned were harmed or threatened in the past three years?

Was the number of defendants and/or witnesses harmed or threatened due to perceived or actual cooperation with the government higher or lower in 2014 compared to 2013?

❍ Higher in 2014
❍ About the same in 2014
❍ Lower in 2014
❍ I don't know

To the best of your knowledge, what steps, if any, has your district taken to better protect cooperation information in court documents? (Check all that apply)

- ❑ Making criminal cases appear identically on CM/ECF to obscure cooperation information (such as requiring filing sealed supplements with a plea agreement)
- ❑ Sealing documents containing cooperation information sua sponte
- ❑ Sealing documents containing cooperation information at the request of the parties
- ❑ Ordering parties to redact cooperation information from documents
- ❑ Restricting remote access of documents containing cooperation information
- ❑ Allowing public access of documents containing cooperation information only in the courthouse or clerk's office
- ❑ Removing documents containing cooperation information from public files
- ❑ Requiring the entry of documents containing cooperation to be private entries in CM/ECF
- ❑ Other (please specify) _____
- ❑ None of the above

Please use the space below to provide any additional information about harm or threats of harm experienced by defendants and/or witnesses (or their family or friends) from cases on your docket in the past three years.

Cooperators - District Judges Preview

Survey Instructions

Scope of the Survey. This survey asks about information you may have received regarding harm or threats of harm to defendants or witnesses on your docket because of their actual or perceived cooperation with the government. Please consider only defendants or witnesses from cases on your docket, not those of a colleague, and report information you consider to be reliable. Please consider only instances of harm or threats of harm from cases on your docket in the last three years.

Definition of "Harm." "Harm" refers to:

- Actual or threats of economic harm
- Actual or threats of physical harm
- Murder

suffered by a defendant or witness (or their friends or family), inflicted by a third party in retaliation for cooperating (or for being suspected of cooperating) with the government. Harm can occur at any point in a case, from pre-trial through conviction or acquittal or any time thereafter.

Confidentiality. All survey responses will be kept confidential and results will be reported only in the aggregate. Please do not identify any defendant or witness by name.

Who to Contact. If you have any questions about the study, you may contact any of the three committee chairs or Dr. Margaret Williams, who is directing the study. If you have questions about the items in this survey, or technical problems with the questionnaire, Dr. Williams can be reached at 202-502-4080 or mwilliams@fjc.gov.

In cases on your docket over the past three years, have you learned of any defendants and/or witnesses who were harmed or threatened (including harm or threats to friends or family) because of the defendant's or witness' cooperation with the government?

- ❍ Yes
- ❍ No
- ❍ I can't recall

Please think about the cases from the last three years for which you have the most information about actual harm or threats of harm to defendants or witnesses (or their friends or family). **This questionnaire asks a series of questions on up to five cases from your docket.** While you may not have all the information on each case, please answer as many questions as you can to provide a complete picture of the harm or threats of harm to each person.

[NOTE THIS SECTION WILL REPEAT UP TO FIVE TIMES.]

Thinking about the first case, who was harmed or threatened with harm? (Check all that apply)

- ❑ Defendant
- ❑ Witness

Did the defendant experience any of the following types of harm or threats? (Choose one per row)

	Yes	No	Have no knowledge
Threats of economic harm	❍	❍	❍
Actual economic harm	❍	❍	❍
Threats of physical harm	❍	❍	❍
Actual physical harm	❍	❍	❍
Murder	❍	❍	❍
Threats to friends or family	❍	❍	❍
Actual harm to friends or family	❍	❍	❍
Other (please specify)	❍	❍	❍

When the defendant was harmed or threatened, he/she was... (Choose one per row)

	Yes	No	Have no knowledge
in pre-trial detention	❍	❍	❍
on pre-trial release	❍	❍	❍
incarcerated post-conviction	❍	❍	❍
in an RRC or halfway house	❍	❍	❍
on probation or supervised release	❍	❍	❍
elsewhere (please specify)	❍	❍	❍

Did the defendant request protective custody or placement in a special housing unit?

❍ Yes
❍ No
❍ I can't recall

Did the defendant receive protective custody or placement in a special housing unit?

❍ Yes
❍ No
❍ I can't recall

Were any of the following court documents used to identify the defendant as a cooperator (or suspected cooperator) with the government? (Choose one per row)

	Yes	No	Have no knowledge
Judicial opinion	❍	❍	❍
Rule 35(b) motion	❍	❍	❍
§ 5K1.1 motion testimony/transcript	❍	❍	❍
Plea agreement or plea supplement	❍	❍	❍
Sentencing memorandum	❍	❍	❍
Other (please specify)	❍	❍	❍

Did the witness experience any of the following types of harm or threats? (Choose one per row)

	Yes	No	Have no knowledge
Threats of economic harm	❍	❍	❍
Actual economic harm	❍	❍	❍
Threats of physical harm	❍	❍	❍
Actual physical harm	❍	❍	❍
Murder	❍	❍	❍
Threats to friends or family	❍	❍	❍
Actual harm to friends or family	❍	❍	❍
Other (please specify)	❍	❍	❍

When the witness was harmed or threatened, he/she was... (Choose one per row)

	Yes	No	Have no knowledge
in pre-trial detention	❍	❍	❍
on pre-trial release	❍	❍	❍
incarcerated post-conviction	❍	❍	❍
in an RRC or halfway house	❍	❍	❍
on probation or supervised release	❍	❍	❍
elsewhere (please specify)	❍	❍	❍

Were any of the following court documents used to identify the witness as a cooperator (or suspected cooperator) with the government? (Choose one per row)

	Yes	No	Have no knowledge
Judicial opinion	❍	❍	❍
Rule 35(b) motion	❍	❍	❍
§ 5K1.1 motion testimony/transcript	❍	❍	❍
Plea agreement or plea supplement	❍	❍	❍
Sentencing memorandum	❍	❍	❍
Other (please specify)	❍	❍	❍

Are there other cases on your docket from the past three years in which you learned of a defendant or witness being harmed or threatened?

❍ Yes
❍ No
❍ I can't recall

[NOTE THIS IS THE END OF THE REPEATING SECTION]

Not including the defendants regarding whom you've provided information in this survey, how many more defendants from cases on your docket have you learned were harmed or threatened in the past three years?

Not including the witnesses regarding whom you've provided information in this survey, how many more witnesses from cases on your docket have you learned were harmed or threatened in the past three years?

Was the number of defendants and/or witnesses harmed or threatened due to perceived or actual cooperation with the government higher or lower in 2014 compared to 2013?

❍ Higher in 2014
❍ About the same in 2014
❍ Lower in 2014
❍ I don't know

Please use the space below to provide any additional information about harm or threats of harm experienced by defendants and/or witnesses (or their family or friends) from cases on your docket in the past three years.

Cooperators - Federal Defenders and CJA Panel Representatives Preview

Survey Instructions

Scope of the Survey. This survey asks about information you may have received regarding harm or threats of harm to defendants or witnesses because of their actual or perceived cooperation with the government. Please consider only defendants or witnesses from your cases, not those of a colleague, and report information you or your staff consider to be reliable. Please consider only instances of harm or threats of harm from cases in the last three years. We ask that you coordinate the responses among the members of your office to create a single response for the entire office. Please do not forward the survey link.

Definition of "Harm." "Harm" refers to:

- Actual or threats of economic harm
- Actual or threats of physical harm
- Murder

suffered by a defendant or witness (or their friends or family), inflicted by a third party in retaliation for cooperating (or for being suspected of cooperating) with the government. Harm can occur at any point in a case, from pre-trial through conviction or acquittal or any time thereafter.

Confidentiality. All survey responses will be kept confidential and results will be reported only in the aggregate. Please do not identify any defendant or witness by name.

Who to Contact. If you have any questions about the study or technical problems with the questionnaire, please contact Dr. Margaret Williams at 202-502-4080 or mwilliams@fjc.gov.

In your cases over the past three years, have you learned of any defendants and/or witnesses who were harmed or threatened (including harm or threats to friends or family) because of the defendant's or witness' cooperation with the government?

❍ Yes
❍ No
❍ I can't recall

Please think about the cases from the last three years for which you have the most information about actual harm or threats of harm to defendants or witnesses (or their friends or family). **This questionnaire asks a series of questions on up to five cases.** While you may not have all the information on each case, please answer as many questions as you can to provide a complete picture of the harm or threats of harm to each person.

[NOTE THIS SECTION WILL REPEAT UP TO FIVE TIMES.]

Thinking about the first case, who was harmed or threatened with harm? (Check all that apply)

❑ Defendant
❑ Witness

Did the defendant experience any of the following types of harm or threats? (Choose one per row)

	Yes	No	Have no knowledge
Threats of economic harm	❍	❍	❍
Actual economic harm	❍	❍	❍
Threats of physical harm	❍	❍	❍
Actual physical harm	❍	❍	❍
Murder	❍	❍	❍
Threats to friends or family	❍	❍	❍
Actual harm to friends or family	❍	❍	❍
Other (please specify)	❍	❍	❍

When the defendant was harmed or threatened, he/she was... (Choose one per row)

	Yes	No	Have no knowledge
in pre-trial detention	❍	❍	❍
on pre-trial release	❍	❍	❍
incarcerated post-conviction	❍	❍	❍
in an RRC or halfway house	❍	❍	❍
on probation or supervised release	❍	❍	❍
elsewhere (please specify)	❍	❍	❍

Did the defendant request protective custody or placement in a special housing unit?

❍ Yes
❍ No
❍ I can't recall

Did the defendant receive protective custody or placement in a special housing unit?

❍ Yes
❍ No
❍ I can't recall

Were any of the following court documents used to identify the defendant as a cooperator (or suspected cooperator) with the government? (Choose one per row)

	Yes	No	Have no knowledge
Judicial opinion	❍	❍	❍
Rule 35(b) motion	❍	❍	❍
§ 5K1.1 motion testimony/transcript	❍	❍	❍
Plea agreement or plea supplement	❍	❍	❍
Sentencing memorandum	❍	❍	❍
Other (please specify)	❍	❍	❍

Did the witness experience any of the following types of harm or threats? (Choose one per row)

	Yes	No	Have no knowledge
Threats of economic harm	❍	❍	❍
Actual economic harm	❍	❍	❍
Threats of physical harm	❍	❍	❍
Actual physical harm	❍	❍	❍
Murder	❍	❍	❍
Threats to friends or family	❍	❍	❍
Actual harm to friends or family	❍	❍	❍
Other (please specify)	❍	❍	❍

When the witness was harmed or threatened, he/she was... (Choose one per row)

	Yes	No	Have no knowledge
in pre-trial detention	❍	❍	❍
on pre-trial release	❍	❍	❍
incarcerated post-conviction	❍	❍	❍
in an RRC or halfway house	❍	❍	❍
on probation or supervised release	❍	❍	❍
elsewhere (please specify)	❍	❍	❍

Were any of the following court documents used to identify the witness as a cooperator (or suspected cooperator) with the government? (Choose one per row)

	Yes	No	Have no knowledge
Judicial opinion	❍	❍	❍
Rule 35(b) motion	❍	❍	❍
§ 5K1.1 motion testimony/transcript	❍	❍	❍
Plea agreement or plea supplement	❍	❍	❍
Sentencing memorandum	❍	❍	❍
Other (please specify)	❍	❍	❍

Are there other cases from the past three years in which you learned of a defendant or witness being harmed or threatened?

❍ Yes
❍ No
❍ I can't recall

[NOTE: THIS IS THE END OF THE REPEATING SECTION]

Not including the defendants regarding whom you've provided information in this survey, how many more defendants from your cases have you learned were harmed or threatened in the past three years?

Not including the witnesses regarding whom you've provided information in this survey, how many more witnesses from your cases have you learned were harmed or threatened in the past three years?

In the past three years, how many defendants, because of actual or threatened harm, requested case information (CM/ECF docket, pre-sentence report, etc.) to prove they were not a cooperator?

In the past three years, how many defendants, because of actual or threatened harm, requested all or part of their CM/ECF docket be sealed?

In the past three years, how many defendants withdrew offers of cooperation because of actual or threatened harm?

In the past three years, how many defendants refused cooperation because of actual or threatened harm?

In the past three years, how many witnesses withdrew offers of cooperation because of actual or threatened harm?

In the past three years, how many witnesses refused cooperation because of actual or threatened harm?

Was the number of defendants and/or witnesses harmed or threatened due to perceived or actual cooperation with the government higher or lower in 2014 compared to 2013?

- ❍ Higher in 2014
- ❍ About the same in 2014
- ❍ Lower in 2014
- ❍ I don't know

Please use the space below to provide any additional information about harm or threats of harm experienced by defendants and/or witnesses (or their family or friends) from your cases in the past three years.

Cooperators - Probation/Pre-Trial Preview

Survey Instructions

Scope of the Survey. This survey asks about information you may have received regarding harm or threats of harm to defendants/offenders or witnesses from your district because of their actual or perceived cooperation with the government. Please consider only defendants/offenders or witnesses from your district and report information you or your staff consider to be reliable. Please consider only instances of harm or threats of harm from cases from your district in the last three years. We ask that you coordinate the responses among the members of your office to create a single response for the entire office. Please do not forward the survey link.

Definition of "Harm." "Harm" refers to:

- Actual or threats of economic harm
- Actual or threats of physical harm
- Murder

suffered by a defendant/offender or witness (or their friends or family), inflicted by a third party in retaliation for cooperating (or for being suspected of cooperating) with the government. Harm can occur at any point in a case, from pre-trial through conviction or acquittal or any time thereafter.

Confidentiality. All survey responses will be kept confidential and results will be reported only in the aggregate. Please do not identify any defendant/offender or witness by name.

Who to Contact. If you have any questions about the study or technical problems with the questionnaire, please contact Dr. Margaret Williams at 202-502-4080 or mwilliams@fjc.gov.

In cases from your district over the past three years, have you learned of any defendants/offenders and/or witnesses who were harmed or threatened (including harm or threats to friends or family) because of the defendant/offender's or witness' cooperation with the government?

- ❍ Yes
- ❍ No
- ❍ I can't recall

Please think about the cases from the last three years for which you have the most information about actual harm or threats of harm to defendants/offenders or witnesses (or their friends or family). **This questionnaire asks a series of questions on up to five cases.** While you may not have all the information on each case, please answer as many questions as you can to provide a complete picture of the harm or threats of harm to each person.

[NOTE THIS SECTION WILL REPEAT UP TO FIVE TIMES.]

Thinking about the first case, who was harmed or threatened with harm? (Check all that apply)

- ❑ Defendant/Offender
- ❑ Witness

Did the defendant/offender experience any of the following types of harm or threats? (Choose one per row)

	Yes	No	Have no knowledge
Threats of economic harm	❍	❍	❍
Actual economic harm	❍	❍	❍
Threats of physical harm	❍	❍	❍
Actual physical harm	❍	❍	❍
Murder	❍	❍	❍
Threats to friends or family	❍	❍	❍
Actual harm to friends or family	❍	❍	❍
Other (please specify)	❍	❍	❍

When the defendant/offender was harmed or threatened, he/she was... (Choose one per row)

	Yes	No	Have no knowledge
in pre-trial detention	❍	❍	❍
on pre-trial release	❍	❍	❍
incarcerated post-conviction	❍	❍	❍
in an RRC or halfway house	❍	❍	❍
on probation or supervised release	❍	❍	❍
elsewhere (please specify)	❍	❍	❍

Did the defendant/offender request protective custody or placement in a special housing unit?

❍ Yes
❍ No
❍ I can't recall

Did the defendant/offender receive protective custody or placement in a special housing unit?

❍ Yes
❍ No
❍ I can't recall

Were any of the following court documents used to identify the defendant/offender as a cooperator (or suspected cooperator) with the government? (Choose one per row)

	Yes	No	Have no knowledge
Judicial opinion	❍	❍	❍
Rule 35(b) motion	❍	❍	❍
§ 5K1.1 motion testimony/transcript	❍	❍	❍
Plea agreement or plea supplement	❍	❍	❍
Sentencing memorandum	❍	❍	❍
Other (please specify)	❍	❍	❍

Did the witness experience any of the following types of harm or threats? (Choose one per row)

	Yes	No	Have no knowledge
Threats of economic harm	❍	❍	❍
Actual economic harm	❍	❍	❍
Threats of physical harm	❍	❍	❍
Actual physical harm	❍	❍	❍
Murder	❍	❍	❍
Threats to friends or family	❍	❍	❍
Actual harm to friends or family	❍	❍	❍
Other (please specify)	❍	❍	❍

When the witness was harmed or threatened, he/she was... (Choose one per row)

	Yes	No	Have no knowledge
in pre-trial detention	❍	❍	❍
on pre-trial release	❍	❍	❍
incarcerated post-conviction	❍	❍	❍
in an RRC or halfway house	❍	❍	❍
on probation or supervised release	❍	❍	❍
elsewhere (please specify)	❍	❍	❍

Were any of the following court documents used to identify the witness as a cooperator (or suspected cooperator) with the government? (Choose one per row)

	Yes	No	Have no knowledge
Judicial opinion	❍	❍	❍
Rule 35(b) motion	❍	❍	❍
§ 5K1.1 motion testimony/transcript	❍	❍	❍
Plea agreement or plea supplement	❍	❍	❍
Sentencing memorandum	❍	❍	❍
Other (please specify)	❍	❍	❍

Are there other cases from your district in the past three years in which you learned of a defendant or witness being harmed or threatened?

❍ Yes
❍ No
❍ I can't recall

[NOTE: THIS IS THE END OF THE REPEATING SECTION]

Not including the defendants/offenders regarding whom you've provided information in this survey, how many more defendants/offenders from cases in your district have you learned were harmed or threatened in the past three years?

Not including the witnesses regarding whom you've provided information in this survey, how many more witnesses from cases in your district have you learned were harmed or threatened in the past three years?

Was the number of defendants/offenders and/or witnesses harmed or threatened due to perceived or actual cooperation with the government higher or lower in 2014 compared to 2013?

❍ Higher in 2014
❍ About the same in 2014
❍ Lower in 2014
❍ I don't know

Please use the space below to provide any additional information about harm or threats of harm experienced by defendants/offenders and/or witnesses (or their family or friends) from cases in your district in the past three years.

Cooperators - U.S. Attorneys Preview

Survey Instructions

Scope of the Survey. This survey asks about information you may have received regarding harm or threats of harm to defendants or witnesses because of their actual or perceived cooperation with the government. Please consider only defendants or witnesses from cases prosecuted by your office, not those of a colleague, and report information you consider to be reliable. Please consider only instances of harm or threats of harm from cases in the last three years. We ask that you coordinate the responses among the members of your office to create a single response for the entire office. Please do not forward the survey link.

Definition of "Harm." "Harm" refers to:

- Actual or threats of economic harm
- Actual or threats of physical harm
- Murder

suffered by a defendant or witness (or their friends or family), inflicted by a third party in retaliation for cooperating (or for being suspected of cooperating) with the government. Harm can occur at any point in a case, from pre-trial through conviction or acquittal or any time thereafter.

Confidentiality. All survey responses will be kept confidential and results will be reported only in the aggregate. Please do not identify any defendant or witness by name.

Who to Contact. If you have questions about the items in this survey, or technical problems with the questionnaire, please contact Dr. Margaret Williams at 202-502-4080 or mwilliams@fjc.gov.

In cases prosecuted by your office over the past three years, have you learned of any defendants and/or witnesses who were harmed or threatened (including harm or threats to friends or family) because of the defendant's or witness' cooperation with the government?

- ❍ Yes
- ❍ No
- ❍ I can't recall

Please think about the cases from the last three years for which you have the most information about actual harm or threats of harm to defendants or witnesses (or their friends or family). **This questionnaire asks a series of questions on up to five cases.** While you may not have all the information on each case, please answer as many questions as you can to provide a complete picture of the harm or threats of harm to each person.

[NOTE THIS SECTION WILL REPEAT UP TO FIVE TIMES.]

Thinking about the first case, who was harmed or threatened with harm? (Check all that apply)

- ❑ Defendant
- ❑ Witness

Did the defendant experience any of the following types of harm or threats? (Choose one per row)

	Yes	No	Have no knowledge
Threats of economic harm	❍	❍	❍
Actual economic harm	❍	❍	❍
Threats of physical harm	❍	❍	❍
Actual physical harm	❍	❍	❍
Murder	❍	❍	❍
Threats to friends or family	❍	❍	❍
Actual harm to friends or family	❍	❍	❍
Other (please specify)	❍	❍	❍

When the defendant was harmed or threatened, he/she was... (Choose one per row)

	Yes	No	Have no knowledge
in pre-trial detention	❍	❍	❍
on pre-trial release	❍	❍	❍
incarcerated post-conviction	❍	❍	❍
in an RRC or halfway house	❍	❍	❍
on probation or supervised release	❍	❍	❍
elsewhere (please specify)	❍	❍	❍

Did the defendant request protective custody or placement in a special housing unit?

❍ Yes
❍ No
❍ I can't recall

Did the defendant receive protective custody or placement in a special housing unit?

❍ Yes
❍ No
❍ I can't recall

Were any of the following court documents used to identify the defendant as a cooperator (or suspected cooperator) with the government? (Choose one per row)

	Yes	No	Have no knowledge
Judicial opinion	❍	❍	❍
Rule 35(b) motion	❍	❍	❍
§ 5K1.1 motion testimony/transcript	❍	❍	❍
Plea agreement or plea supplement	❍	❍	❍
Sentencing memorandum	❍	❍	❍
Other (please specify)	❍	❍	❍

Did the witness experience any of the following types of harm or threats? (Choose one per row)

	Yes	No	Have no knowledge
Threats of economic harm	❍	❍	❍
Actual economic harm	❍	❍	❍
Threats of physical harm	❍	❍	❍
Actual physical harm	❍	❍	❍
Murder	❍	❍	❍
Threats to friends or family	❍	❍	❍
Actual harm to friends or family	❍	❍	❍
Other (please specify)	❍	❍	❍

When the witness was harmed or threatened, he/she was... (Choose one per row)

	Yes	No	Have no knowledge
in pre-trial detention	❍	❍	❍
on pre-trial release	❍	❍	❍
incarcerated post-conviction	❍	❍	❍
in an RRC or halfway house	❍	❍	❍
on probation or supervised release	❍	❍	❍
elsewhere (please specify)	❍	❍	❍

Were any of the following court documents used to identify the witness as a cooperator (or suspected cooperator) with the government? (Choose one per row)

	Yes	No	Have no knowledge
Judicial opinion	❍	❍	❍
Rule 35(b) motion	❍	❍	❍
§ 5K1.1 motion testimony/transcript	❍	❍	❍
Plea agreement or plea supplement	❍	❍	❍
Sentencing memorandum	❍	❍	❍
Other (please specify)	❍	❍	❍

Are there other cases prosecuted by your office in the past three years in which you learned of a defendant or witness being harmed or threatened?

❍ Yes
❍ No
❍ I can't recall

[NOTE: THIS IS THE END OF THE REPEATING SECTION]

Not including the defendants regarding whom you've provided information in this survey, how many more defendants from cases prosecuted by your office have you learned were harmed or threatened in the past three years?

Not including the witnesses regarding whom you've provided information in this survey, how many more witnesses from cases prosecuted by your office have you learned were harmed or threatened in the past three years?

In the past three years, how many defendants withdrew offers of cooperation because of actual or threatened harm?

In the past three years, how many defendants refused cooperation because of actual or threatened harm?

In the past three years, how many witnesses withdrew offers of cooperation because of actual or threatened harm?

In the past three years, how many witnesses refused cooperation because of actual or threatened harm?

Was the number of defendants and/or witnesses harmed or threatened due to perceived or actual cooperation with the government higher or lower in 2014 compared to 2013?

- ❍ Higher in 2014
- ❍ About the same in 2014
- ❍ Lower in 2014
- ❍ I don't know

Please use the space below to provide any additional information about harm or threats of harm experienced by defendants and/or witnesses (or their family or friends) from cases prosecuted by your office in the past three years.

Appendix B: Other Types of Harm to Defendants

Categories of Other Harm	Description
Property Damage	Animal
Property Damage	destruction of property
Property Damage	homes or automobiles [shot] at while occupied
Property Damage	property damage
Property Damage	The home that he and his family resided in was shot up a day before he was schedule to testify
Property Damage	Family house shot at
Property Damage	Shot window out of residence
Property Damage	they burned his house down
Property Damage	Defendant's home was fired upon by unknown individual.
internet/community/general threats	One offender [redacted] claims to have been shot at leaving the Residential Reentry Center after providing a drug test. A second [offender] [redacted] advised she had repeated threats at the gas station where [she worked] and on Facebook postings. A third offender [redacted] [is receiving] threats in the community and on [Facebook].
internet/community/general threats	isolation at prison due to threats
internet/community/general threats	made uncomfortable
internet/community/general threats	Potential threat due to offender at RRC testifying against another offender's brother
internet/community/general threats	Believed he [cooperated] but did not and he continues to receive threats
internet/community/general threats	Although not physically harmed, defendant was physically grabbed when the threat was made against him.
internet/community/general threats	Defendant's status as a cooperator was put on the internet.
internet/community/general threats	Flyers posted in his neighborhood that he cooperated.
internet/community/general threats	Name posted on Top Snitches Facebook page
internet/community/general threats	told family members to put his name on rats.com
internet/community/general threats	After testifying against co-defendants, intimidated via activity around home
internet/community/general threats	Note on floor or halfway house identifying defendant as cooperator

Categories of Other Harm	Description
internet/community/general threats	person contacted offender's mother at her residence and his wife, via Facebook, and make some veiled verbal threats and name calling
internet/community/general threats	Intimidation; showed up at work and in the neighborhood
internet/community/general threats	veiled threats via text message
internet/community/general threats	Video / You Tube Rap Video Threat
Existing Categories	One offender [redacted] claims to have been shot at leaving the Residential Reentry Center after providing a drug test. A second [offender] [redacted] advised she had repeated threats at the gas station where [she worked] and on Facebook postings. A third offender [redacted] is receiving threats in the community and on [Facebook].
Existing Categories	Implications of cultural beliefs/acts that may harm defendant/offender and family
Existing Categories	Arson of mother's house killed six people
Existing Categories	Shot 3 times
Existing Categories	[Threats] were made regarding the safety and welfare of defendant's family members in [redacted]
Existing Categories	As with the last question answered, I have had multiple defendants in pretrial detention face threats for themselves or family members abroad if they proceeded to cooperate
Existing Categories	Cultural beliefs/acts that may harm defendant and family.
Existing Categories	In [immigration] drug cases routinely defendant and family are threats by drug lords
Existing Categories	was assaulted in the middle of trial testimony
Other	Especially true in codefendants' providing substantial assistance
Other	threats to prosecution and defense counsel
Other	[Missing Comment]
Other	Media and Courtroom Testimony
Other	relocated 4 times

Appendix C: Other Locations at the Time of Harm to Defendants

Categories of Other Locations	Description
Not in custody of any kind	after completion of imprisonment and supervised release
Not in custody of any kind	less than a year following his termination of supervised release
Not in custody of any kind	Not arrested
Not in custody of any kind	not charged
Not in custody of any kind	post conviction and [sentence]
Not in custody of any kind	the defendant was harmed prior to being charged due to his cooperation
Not in custody of any kind	Witness- out of custody
Not in custody of any kind	not yet charged
Not in custody of any kind	upon release
Not in custody of any kind	one cooperator was uncharged at the time of the threat
Not in custody of any kind	pre-arrest
Not in custody of any kind	Prior to arrest - narc traffickers in [redacted]
Not in custody of any kind	non-incarcerated family members in [redacted]
Other forms of custody	pre sentencing release
Other forms of custody	state custody on another charge
Other forms of custody	witness protection program
Other forms of custody	Threats were numerous, starting while on bond and continuing into time on probation.
Other forms of custody	While awaiting sentencing.
Other forms of custody	The defendant was arrested on new criminal charges.
Other forms of custody	USMS lock-up pending a court proceeding
Other forms of custody	Custody
Other forms of custody	in [redacted] following deportation while on supervised release
Other forms of custody	USMS lock-up pending court proceeding
Other	During the course of the investigation
Other	For family members none of these applies
Other	I don't remember
Other	defendant absconded pretrial release supervision and was

Categories of Other Locations	Description
	living in [redacted]
Other	the threat -made to defendant - was of harm to his himself or his family
Other	[missing comment]
Other	suspected cooperating witness during drug conspiracy

Appendix D: Other Sources to Identify Defendants

Categories of Other Sources	Description
Suspicion	After the target's arrest, the defendant was suspected of cooperating. When the defendant was arrested (and in pre-trial detention) he was threatened. I took proactive steps to prevent disclosure of information during the court proceedings.
Suspicion	co-defendant suspicion
Suspicion	co-defendant [suspicions]
Suspicion	Defendant in an [redacted] RICO gang case was suspected by other incarcerated gang members of cooperating with law enforcement as to the murder of a police officer, and he was stabbed in a federal detention facility.
Suspicion	gossip
Suspicion	gossip
Suspicion	prison gossip
Suspicion	rumor
Suspicion	rumor of cooperation
Suspicion	rumor of cooperation
Suspicion	The Defendant was released with conditions and the co [defendants] were under the belief that anyone released was cooperating with the [government].
Suspicion	word of mouth
Other Court Document/Proceeding	302 report after debriefing
Other Court Document/Proceeding	a criminal complaint unsealed in a related case identified statements made by the defendant upon his arrest
Other Court Document/Proceeding	A plea agreement that was not filed and was presumed to include a substantial assistance provision because it was filed under seal
Other Court Document/Proceeding	a request letter to the judge to use the offender as an informant
Other Court Document/Proceeding	A tape recorded conversation between the D and the CI was disclosed in discovery. Other Defendants obtained a copy of that recorded call and threatened the D and her family as a result.
Other Court Document/Proceeding	affidavit

Categories of Other Sources	Description
Other Court Document/Proceeding	After live testimony
Other Court Document/Proceeding	Again, it is an issue with BOP inmates obtaining Docket Sheets.
Other Court Document/Proceeding	BOP inmates demanded the defendant's docket sheet, and looked for "holes" in the docket sheet--which corresponded to sealed motions, plea agreement attachments, sentencing memorandum, and the like. From those sealed docket entries, they correctly surmised the defendant was a cooperator.
Other Court Document/Proceeding	Change in Offender's length of time listed in BOP data base
Other Court Document/Proceeding	CI Agreement
Other Court Document/Proceeding	co-defendant discovery
Other Court Document/Proceeding	Community became aware client would testify at trial of co-defendants. Threats were then made to defendant and family
Other Court Document/Proceeding	court-ordered discovery
Other Court Document/Proceeding	Courtroom testimony
Other Court Document/Proceeding	courtroom testimony
Other Court Document/Proceeding	Courtroom [testimony]
Other Court Document/Proceeding	Criminal Complaint
Other Court Document/Proceeding	criminal complaint
Other Court Document/Proceeding	DEA 6
Other Court Document/Proceeding	debrief statement provided in discovery to target's [attorney]
Other Court Document/Proceeding	Defendant did NOT cooperate but was threatened until produced clean docket sheet as proof
Other Court Document/Proceeding	Defendant's cooperation was noted in a memorandum of interview that was produced to the defense in discovery. Report is that members of criminal organization will attend sentencing to hear if there are any references to cooperation.
Other Court Document/Proceeding	Defendant's Motion to Vacate
Other Court Document/Proceeding	disclosure of cooperation id discovery to codefendant
Other Court Document/Proceeding	disclosure pre-trial
Other Court Document/Proceeding	Discovery
Other Court Document/Proceeding	Discovery

Categories of Other Sources	Description
Other Court Document/Proceeding	Discovery
Other Court Document/Proceeding	Discovery
Other Court Document/Proceeding	discovery
Other Court Document/Proceeding	Discovery
Other Court Document/Proceeding	Discovery
Other Court Document/Proceeding	Discovery
Other Court Document/Proceeding	Discovery
Other Court Document/Proceeding	discovery
Other Court Document/Proceeding	Discovery
Other Court Document/Proceeding	Discovery
Other Court Document/Proceeding	Discovery Documents
Other Court Document/Proceeding	discovery documents
Other Court Document/Proceeding	discovery file
Other Court Document/Proceeding	discovery file
Other Court Document/Proceeding	discovery file
Other Court Document/Proceeding	discovery file
Other Court Document/Proceeding	discovery from co-defendant
Other Court Document/Proceeding	discovery in state case
Other Court Document/Proceeding	discovery information
Other Court Document/Proceeding	Discovery material
Other Court Document/Proceeding	Discovery material was distributed into community.
Other Court Document/Proceeding	discovery materials
Other Court Document/Proceeding	Discovery materials
Other Court Document/Proceeding	Discovery materials
Other Court Document/Proceeding	Discovery materials to codefendants
Other Court Document/Proceeding	Discovery of co-defendants
Other Court Document/Proceeding	discovery provided to counsel of codefendants
Other Court Document/Proceeding	Discovery provided to the party who issued the threat
Other Court Document/Proceeding	discussion during sentencing
Other Court Document/Proceeding	docket
Other Court Document/Proceeding	Docket entries would allow inference

Categories of Other Sources	Description
Other Court Document/Proceeding	docket entry scheduling change of plea
Other Court Document/Proceeding	docket reports of filings under seal
Other Court Document/Proceeding	docket sheet
Other Court Document/Proceeding	docket sheet
Other Court Document/Proceeding	Docket sheet
Other Court Document/Proceeding	docket sheet
Other Court Document/Proceeding	Docket sheet had sealed filings
Other Court Document/Proceeding	ECF-docket report
Other Court Document/Proceeding	everything sealed
Other Court Document/Proceeding	evidence and transcripts from co-defendant's trial
Other Court Document/Proceeding	evidence at co-defendant's trial
Other Court Document/Proceeding	FBI 302
Other Court Document/Proceeding	Gave testimony on conduct of others within prison setting.
Other Court Document/Proceeding	government witness list
Other Court Document/Proceeding	Grand jury transcript.
Other Court Document/Proceeding	He testified in a public trial but he was transported with the people against whom he testified.
Other Court Document/Proceeding	I read about the issue in the PSR
Other Court Document/Proceeding	in PSR & SOR
Other Court Document/Proceeding	[indictment]
Other Court Document/Proceeding	indictment
Other Court Document/Proceeding	indictment
Other Court Document/Proceeding	inference from docket entry
Other Court Document/Proceeding	J&C, Presentence Report
Other Court Document/Proceeding	J&C, Presentence Report
Other Court Document/Proceeding	J&S, docket sheet - sealed documents
Other Court Document/Proceeding	J&S, presence of sealed items on docket
Other Court Document/Proceeding	Jencks
Other Court Document/Proceeding	Judgment obviously reflecting a reduction from a mandatory minimum
Other Court Document/Proceeding	Letter from counsel
Other Court Document/Proceeding	memos with redactions

Categories of Other Sources	Description
Other Court Document/Proceeding	Modification of Pretrial Conditions of Release Order
Other Court Document/Proceeding	motion for transfer
Other Court Document/Proceeding	motion practice
Other Court Document/Proceeding	Motion to Seal - sealed justification
Other Court Document/Proceeding	Motion to Seal-sealed justification
Other Court Document/Proceeding	NJ state discovery
Other Court Document/Proceeding	[observers] at plea and sentencing
Other Court Document/Proceeding	Of these documents, only the [redacted] Circuit opinion publicly identified defendant as a cooperator; however BOP inmates confronted the defendant and obtained a copy of his Docket sheet, which showed gaps in entries for sealed documents. From these gaps, BOP inmates correctly deduced defendant had cooperated.
Other Court Document/Proceeding	Order Setting Conditions of Release
Other Court Document/Proceeding	Police report provided in discovery
Other Court Document/Proceeding	police report, co-defendant
Other Court Document/Proceeding	Presentence Investigation
Other Court Document/Proceeding	Presentence Investigation
Other Court Document/Proceeding	Presentence Investigation Report
Other Court Document/Proceeding	presentence report
Other Court Document/Proceeding	presentence report
Other Court Document/Proceeding	presentence report
Other Court Document/Proceeding	Proffer
Other Court Document/Proceeding	Proffer agreement, GJ testimony in discovery file
Other Court Document/Proceeding	proffer statements
Other Court Document/Proceeding	Proffer-DEA Released to defense attorneys.
Other Court Document/Proceeding	Prosecutor's Statement and quotes copied from PSI
Other Court Document/Proceeding	Prosecutor's Statement or copies of PSI
Other Court Document/Proceeding	PSR
Other Court Document/Proceeding	PSR
Other Court Document/Proceeding	PSR
Other Court Document/Proceeding	PSR
Other Court Document/Proceeding	PSR, GJ, Discovery

Categories of Other Sources	Description
Other Court Document/Proceeding	PSR,GJ, Discovery
Other Court Document/Proceeding	PSR, GJ, Discovery
Other Court Document/Proceeding	related state court documents
Other Court Document/Proceeding	report of proffer
Other Court Document/Proceeding	Rule 16 discovery (search warrant affidavit--although the defendant was referred to generally as CS. I took proactive steps to seal other documents to prevent additional disclosure.
Other Court Document/Proceeding	Rule 16 discovery (search warrant affidavit--although the defendant was referred to generally as CS. I took proactive steps to seal other information to prevent additional disclosure.
Other Court Document/Proceeding	scheduling a change of plea appearing on the docket
Other Court Document/Proceeding	search warrant affidavit
Other Court Document/Proceeding	sentencing transcript
Other Court Document/Proceeding	sentencing transcript
Other Court Document/Proceeding	Statement of Reason
Other Court Document/Proceeding	Statement of Reasons
Other Court Document/Proceeding	Statement of Reasons
Other Court Document/Proceeding	Statement of Reasons
Other Court Document/Proceeding	Statement of Reasons
Other Court Document/Proceeding	statement to police
Other Court Document/Proceeding	Suspected source was an ATF report provided in discovery as Jencks material prior to a suppression hearing.
Other Court Document/Proceeding	Testified against co-defendants
Other Court Document/Proceeding	testified in public trial
Other Court Document/Proceeding	testified vs co- deft.
Other Court Document/Proceeding	Testimony and Media
Other Court Document/Proceeding	Testimony at trial
Other Court Document/Proceeding	The defendant was believed to be a cooperator because he was on bond (after a drug arrest) when the main target of the investigation was arrested.

Categories of Other Sources	Description
Other Court Document/Proceeding	the defendant was forced to sign a letter requesting docket sheets. These docket sheets were to be used to determine whether the defendant cooperated with the [government]. The letters of request were sent to the US Probation Office and the Clerk's Office. we [redacted] chose not to send the requested documents to the defendant. The defendant's mother contacted the probation officer [who] wrote the presentence report to advise of threats being made against her son (the defendant).
Other Court Document/Proceeding	The defendant's name was noted in the grand jury testimony on a state case in which she provided testimony as a witness and received credit for on her federal case.
Other Court Document/Proceeding	the document being requested was the docket sheet which specifically indicates if the documents are sealed. We chose not to send the defendant his docket sheet as he requested.
Other Court Document/Proceeding	The Presentence Report
Other Court Document/Proceeding	Threat court paperwork would be used to determine if defendant had a 5K1.1
Other Court Document/Proceeding	transcript/discovery
Other Court Document/Proceeding	transcript/discovery
Other Court Document/Proceeding	transcripts/discovery
Other Court Document/Proceeding	transfer of inmate to attend court
Other Court Document/Proceeding	trial testimony
Other Court Document/Proceeding	trial testimony
Other Court Document/Proceeding	trial testimony
Other Court Document/Proceeding	Trial witness list
Other Court Document/Proceeding	trial witness list
Other Court Document/Proceeding	Under seal hearing in magistrate court
Other Court Document/Proceeding	under seal not disclosed
Other Court Document/Proceeding	witness disclosure
Other Court Document/Proceeding	witness list
Other Court Document/Proceeding	witness list
Other Court Document/Proceeding	Witness lists
Other Court Document/Proceeding	Witness lists
Other Court Document/Proceeding	writ

Categories of Other Sources	Description
Other Court Document/Proceeding	writ
Other Court Document/Proceeding	writ
Other Court Document/Proceeding	writted back
News	A newspaper article regarding the plea was published in [redacted]. The article made reference to my client's cooperation and named one of the person against whom he cooperated.
News	[newspaper] report about trial
News	Newspaper
News	Newspaper article
News	Government Detention Motion - which was quoted in news article
talking to agents/debriefs/ government disclosure	At initial arrest, deft was seen talking to agents by his co-defendants.
talking to agents/debriefs/ government disclosure	Defendant at government's request called drug distributor while he was under detention
talking to agents/debriefs/ government disclosure	Defendant was identified because he came to the courthouse for debriefs on days when he did not have a scheduled court hearing.
talking to agents/debriefs/ government disclosure	FBI advised PO/offender
talking to agents/debriefs/ government disclosure	Government disclosure
talking to agents/debriefs/ government disclosure	Government's disclosure of the defendant's cooperation in other unrelated cases.
talking to agents/debriefs/ government disclosure	Govt. revealed cooperation in preparation of trial
talking to agents/debriefs/ government disclosure	Jailhouse observation
talking to agents/debriefs/ government disclosure	Observed cooperating
talking to agents/debriefs/ government disclosure	questioning by FBI
talking to agents/debriefs/ government disclosure	The defendant provided [information] that was used by law enforcement to contact the person. The law enforcement contact was used as identification that the defendant was a cooperator.
talking to agents/debriefs/ government disclosure	Trips out of jail to proffer, where no court hearing was scheduled.

Categories of Other Sources	Description
talking to agents/debriefs/ government disclosure	Was pulled from the facility for multiple debriefs with agents.
talking to agents/debriefs/ government disclosure	Was pulled from the jail and brought to meet with agents.
co-defendants/known	codefendant
co-defendants/known	Co-defendant
co-defendants/known	direct threat [from] father against his son in person
co-defendants/known	Ex-boyfriend
co-defendants/known	from a co-defendant
co-defendants/known	info from other co-defendants
co-defendants/known	info from others involved in case
co-defendants/known	info from witnesses in case
co-defendants/known	Information [received] from other defendants
co-defendants/known	known cooperation
co-defendants/known	One defendant's attorney told the attorney for another defendant of his [client's] cooperation
co-defendants/known	statements by co-conspirators
co-defendants/known	The defendant is one of many defendants in a large [redacted] gang prosecution. Cooperators in this gang are routinely murdered. This defendant has pleaded guilty and everything possible is being done to assure his safety, including the use of sealed filings and proceedings
co-defendants/known	The defendant self-identified himself as cooperating against a co-defendant
Other	A 5K1.1 [motion] was filed but the defendant was shot prior to the sentencing. It is no exactly clear as to how the defendant was identified as a cooperator.
Other	extra-judicial knowledge
Other	Murdered due to cooperation
Other	narcotics traffickers in [redacted]
Other	Not sure. Was killed within a day or two of arrival at prison.
Other	other

Categories of Other Sources	Description
Other	The defendant was believed to be cooperating (post-indictment); daughter (who was believed to be an anonymous source to law enforcement) was assaulted. I took proactive steps to prevent the disclosure of sensitive documents.
Other	Unknown
Other	[Unknown]
Other	USAO submitted
Other	Was FBI Informant

Appendix E: Other Types of Harm to Witnesses

Categories of Other Harm	Description
Attempted Murder	Attempt to Murder
Attempted Murder	contract to kill witness
Attempted Murder	Defendant [solicited] the killing of witness
Other	[missing comment]
Other	Agents developed information that the defendant was associated with a gang and was part of a plan to kill an ATF agent and an AUSA.
Other	defendant was going to be a witness
Other	Disclosure of suspicion that person was a cooperator
Other	economic harm to family
Other	free world
Other	Other
Other	Other
Other	promise of gifts for favorable testimony
Other	relocation
Other	same as mentioned earlier
Other	Same person
Other	The person was not a defendant in the particular criminal action but was perceived by defendants as a cooperator. The perceived witness was in custody on a different matter.
Other	The witness was the defendant who cooperated and testified
Other	under seal
internet/community/general threats	3rd party [harassment]
internet/community/general threats	being ostracized by defendant's family and community
internet/community/general threats	[harassment] of sex trafficking victim by posting pictures
internet/community/general threats	identity of cooperator posted on [YouTube]
internet/community/general threats	nonspecific threats via social media

Categories of Other Harm	Description
internet/community/general threats	threat that defendant would sue the witness for defamation or other civil money damages or that the witness could be prosecuted for perjury if willing to testify against the defendant
internet/community/general threats	threatened by defendant
internet/community/general threats	threatened multiple times
Property Damage	destruction of property
Property Damage	homes and automobiles [shot] up while occupied
Property Damage	The witness' apartment was burned
Property Damage	Witness' home was riddled with bullets from a high-powered weapon and a child was narrowly missed on the eve of the witness/ testimony.
Existing Categories	In this case, the threating conduct occurred prior to the arrest and was part of the criminal conduct/charges. There was a threat of physical harm to a potential witness.
Existing Categories	threats of murder

Appendix F: Other Locations at the Time of Harm to Witnesses

Categories of Other Locations	Description
Not in Custody	A victim not under Court supervision and not in custody
Not in Custody	abroad
Not in Custody	At his workplace
Not in Custody	at home
Not in Custody	at home
Not in Custody	at home - not accused
Not in Custody	at large
Not in Custody	at [liberty] with no pending charges
Not in Custody	at liberty
Not in Custody	at place of employment
Not in Custody	at residence
Not in Custody	Case not yet charged
Not in Custody	[civilian] witness
Not in Custody	[civilian] witness
Not in Custody	[civilian] witness
Not in Custody	Community
Not in Custody	community
Not in Custody	Community
Not in Custody	Community
Not in Custody	cooperating witness
Not in Custody	FBI agent
Not in Custody	Free
Not in Custody	free
Not in Custody	Free
Not in Custody	Free
Not in Custody	Free from custody
Not in Custody	free world
Not in Custody	free world

Categories of Other Locations	Description
Not in Custody	Had not yet been charged. She was cooperating with the government.
Not in Custody	Home
Not in Custody	home
Not in Custody	Home
Not in Custody	Home
Not in Custody	home - not a co-conspirator
Not in Custody	Home and Work
Not in Custody	home and work
Not in Custody	Home and Work
Not in Custody	Home and work
Not in Custody	Home and Work-FBI Case Agent
Not in Custody	Home County
Not in Custody	in community
Not in Custody	in community/not [an] offender
Not in Custody	in his/her community
Not in Custody	in his/her community
Not in Custody	in home
Not in Custody	In home or automobile
Not in Custody	In one case a [defendant's] former lawyer was threatened with [murder]. In another a bank robbery witness was killed two weeks post trial. Was a brother of the defendant who was acquitted.
Not in Custody	in the community
Not in Custody	in the community
Not in Custody	informant was not in custody; he was a paid CI
Not in Custody	living at home
Not in Custody	living at home
Not in Custody	living at home
Not in Custody	living at home
Not in Custody	living in the community where the other defendants lived
Not in Custody	Living with a suspect
Not in Custody	living with Defendant [(fiancée)]

Categories of Other Locations	Description
Not in Custody	lured away from her home by defendant
Not in Custody	no pending charges
Not in Custody	No pending charges
Not in Custody	non-defendant
Not in Custody	non-incarcerated family member of witness and witness
Not in Custody	non-incarcerated family members
Not in Custody	normal residence
Not in Custody	Not arrested
Not in Custody	not arrested
Not in Custody	Not charged
Not in Custody	not charged
Not in Custody	Not charged
Not in Custody	Not charged
Not in Custody	not charged. cooperating with government
Not in Custody	not facing charges
Not in Custody	NOT IN ANY KIND OF CUSTODY
Not in Custody	not in custody
Not in Custody	Not in custody
Not in Custody	not in custody
Not in Custody	Not in custody
Not in Custody	Not in custody
Not in Custody	Not in custody
Not in Custody	not in custody- not charged
Not in Custody	not in custody though had an attorney and was attempting to cooperate
Not in Custody	Not in custody.
Not in Custody	not in [custody]
Not in Custody	Not under Court supervision or custody
Not in Custody	On street
Not in Custody	on the street
Not in Custody	On the street.
Not in Custody	on the streets

Categories of Other Locations	Description
Not in Custody	on the streets
Not in Custody	on the streets
Not in Custody	out
Not in Custody	out of custody
Not in Custody	out of custody
Not in Custody	out of custody witness
Not in Custody	public
Not in Custody	some witnesses were not charged.
Not in Custody	Someone fired a gun at a confidential informant in a bar after his picture was posted online identifying him as the source for a defendant's indictment
Not in Custody	the assailant and witness were not locked up
Not in Custody	The threat of harm occurred prior to the initial arrest.
Not in Custody	The threating conduct occurred prior to the initial arrest of the defendant.
Not in Custody	The witness was not charged with a crime
Not in Custody	The witness was not charged with any crime
Not in Custody	the witness wasn't in the criminal [system]
Not in Custody	trial witness, not in custody
Not in Custody	Uncharged
Not in Custody	under investigation
Not in Custody	under investigation
Not in Custody	[unindicted] witness not in custody
Not in Custody	[non-incarcerated] witness
Not in Custody	[non-incarcerated] witness
Not in Custody	was a trial witness
Not in Custody	was a witness
Not in Custody	was just witness
Not in Custody	Was not charged
Not in Custody	while in the community
Not in Custody	Witness in Community
Not in Custody	Witness not charged
Not in Custody	Witness not charged

Categories of Other Locations	Description
Not in Custody	Witness not charged
Not in Custody	Witness not in custody
Not in Custody	witness not in system
Not in Custody	witness was a citizen
Not in Custody	Witness was a [redacted] Police officer in the murder of a Border Patrol Officer. He testified at pre-trial hearings in a hood and with the courtroom closed. The case involved in the death of the agent and the elimination of 3 to 5 other [redacted] that were aware of the circumstances leading up to the Agent's killing.
Not in Custody	witness was an informant and a police officer giving information about police corruption
Not in Custody	witness was an informant living in society
Not in Custody	witness was an informant who was shot at
Not in Custody	witness was at liberty
Not in Custody	witness was child victim
Not in Custody	witness was the victim
Not in Custody	witnesses not in system
Other	[missing comment]
Other	a business owner
Other	co defendants, criminal
Other	confidential source
Other	cooperator
Other	court-ordered discovery
Other	defense attorneys were threatened
Other	For family members none of these applies
Other	I had a person convicted of sexual assault threaten the victim's family after a jury verdict
Other	in courtroom testifying
Other	in [redacted]
Other	in state court proceeding
Other	Individual was a member of organized crime.
Other	known to defendant
Other	paid cooperator
Other	returned to the danger zone

Categories of Other Locations	Description
Other	still in the conspiracy
Other	The person was a cooperating witness for the government who may have been a coconspirator as well as friend of defendant but do not know if government ever charged cooperator.
Other	under seal
Other	was a confidential informant
Other	witness protection
Existing Category	It is my understanding that the witness was on supervised release
Existing Category	Post conviction release
Existing Category	Post-plea pre-sentence release
Existing Category	the witness, a gang member, testified for the government in a trial before one of my colleagues. The witness would have been a witness in my court in a case related to similar issues, but he was murdered [redacted]. The witness was not in custody at the time of his death, but I believe he was on supervised release.

Appendix G: Other Sources to Identify Witnesses

Categories of Other Sources	Description
Suspicion	all were by word of mouth that he was a cooperator
Suspicion	jail house talk
Suspicion	rumor
Suspicion	suspicion of [co-conspirators]
Suspicion	The witness was murdered [because] it was believed that he was a snitch
Suspicion	word of mouth
Suspicion	word on street
Other Court Document/Proceeding	affidavit
Other Court Document/Proceeding	All documents reflecting cooperation are sealed.
Other Court Document/Proceeding	announced as a witness during the trial
Other Court Document/Proceeding	ATF Agent's Report
Other Court Document/Proceeding	Audio tapes that were used to charge an obstruction count.
Other Court Document/Proceeding	believe child protective services call disclosed cooperation
Other Court Document/Proceeding	case is pending; witness roles revealed in discovery
Other Court Document/Proceeding	Change of plea notice on ECF
Other Court Document/Proceeding	co-defendant discovery
Other Court Document/Proceeding	complaint
Other Court Document/Proceeding	Court testimony
Other Court Document/Proceeding	Court testimony
Other Court Document/Proceeding	court-ordered discovery
Other Court Document/Proceeding	court-ordered discovery
Other Court Document/Proceeding	Criminal Complaint
Other Court Document/Proceeding	Criminal Complaint
Other Court Document/Proceeding	criminal complaint
Other Court Document/Proceeding	Deduced from docket sheet
Other Court Document/Proceeding	Defendant learned that witness appeared before grand jury
Other Court Document/Proceeding	discovery
Other Court Document/Proceeding	discovery

Categories of Other Sources	Description
Other Court Document/Proceeding	discovery
Other Court Document/Proceeding	discovery
Other Court Document/Proceeding	discovery
Other Court Document/Proceeding	discovery
Other Court Document/Proceeding	Discovery
Other Court Document/Proceeding	discovery
Other Court Document/Proceeding	Discovery
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Other Court Document/Proceeding	Discovery
Other Court Document/Proceeding	discovery
Other Court Document/Proceeding	Discovery Documents
Other Court Document/Proceeding	Discovery documents -- Agent reports
Other Court Document/Proceeding	discovery material
Other Court Document/Proceeding	Discovery material
Other Court Document/Proceeding	discovery materials
Other Court Document/Proceeding	discovery materials
Other Court Document/Proceeding	Discovery provided to defense counsel for the person against whom the witness testified.
Other Court Document/Proceeding	Discovery revealed identity
Other Court Document/Proceeding	discovery to defendant
Other Court Document/Proceeding	Docket Sheets

Categories of Other Sources	Description
Other Court Document/Proceeding	fact of sealed filings
Other Court Document/Proceeding	fact of sealed filings
Other Court Document/Proceeding	FBI 302
Other Court Document/Proceeding	FBI 302
Other Court Document/Proceeding	FBI 302 and trial testimony
Other Court Document/Proceeding	Grand Jury testimony & discovery
Other Court Document/Proceeding	grand jury transcript
Other Court Document/Proceeding	grand jury transcripts/discovery
Other Court Document/Proceeding	Grand Jury Transcript
Other Court Document/Proceeding	Gvmt witness list
Other Court Document/Proceeding	identified in pretrial
Other Court Document/Proceeding	identity of informant made clear by discovery
Other Court Document/Proceeding	indictment
Other Court Document/Proceeding	Informant was identified after video surveillance was produced by the [government] in discovery
Other Court Document/Proceeding	informant's role made clear in discovery
Other Court Document/Proceeding	Interview report provided in discovery
Other Court Document/Proceeding	Investigation reports
Other Court Document/Proceeding	Jencks Act Material turned over in advance of trial despite protective orders prohibiting defendant from keeping a copy in the jail
Other Court Document/Proceeding	[Jencks] r. 16 materials
Other Court Document/Proceeding	Letter from USAO to Defense Counsel
Other Court Document/Proceeding	police report
Other Court Document/Proceeding	police report
Other Court Document/Proceeding	police report describing witnesses cooperation provided in discovery
Other Court Document/Proceeding	Police reports
Other Court Document/Proceeding	police reports
Other Court Document/Proceeding	Police Reports and proffer statements
Other Court Document/Proceeding	Possible the [redacted] Police report when one of the suspects was apprehended in [redacted].
Other Court Document/Proceeding	Presentence report
Other Court Document/Proceeding	presentence report

Categories of Other Sources	Description
Other Court Document/Proceeding	pretrial service report
Other Court Document/Proceeding	pretrial witness list
Other Court Document/Proceeding	Proffer report provided in discovery
Other Court Document/Proceeding	Prosecutor's Statement and copies of PSI
Other Court Document/Proceeding	PSR
Other Court Document/Proceeding	PSR
Other Court Document/Proceeding	PSR
Other Court Document/Proceeding	PSR
Other Court Document/Proceeding	PSR
Other Court Document/Proceeding	PSR
Other Court Document/Proceeding	Public testimony as [cooperating witness]
Other Court Document/Proceeding	recordings
Other Court Document/Proceeding	related state court documents
Other Court Document/Proceeding	role of witness made clear in discovery
Other Court Document/Proceeding	role of witness made clear in discovery
Other Court Document/Proceeding	rule to show cause hearing
Other Court Document/Proceeding	saw investigation information
Other Court Document/Proceeding	sealed trial witness list
Other Court Document/Proceeding	search warrant
Other Court Document/Proceeding	search warrant affidavit
Other Court Document/Proceeding	sentencing docs
Other Court Document/Proceeding	state complaint
Other Court Document/Proceeding	state complaint and state search warrant
Other Court Document/Proceeding	State court discovery and plea documents.
Other Court Document/Proceeding	subpoena
Other Court Document/Proceeding	testified against codefendant
Other Court Document/Proceeding	Testified at trial
Other Court Document/Proceeding	Testified in a Court Proceeding
Other Court Document/Proceeding	Testifying
Other Court Document/Proceeding	testimony
Other Court Document/Proceeding	Testimony at hearings
Other Court Document/Proceeding	Testimony at probable cause hearing

Categories of Other Sources	Description
Other Court Document/Proceeding	testimony in trial of co defendant
Other Court Document/Proceeding	testimony of the witness
Other Court Document/Proceeding	The witness was threatened and then badly beaten following his testimony before me
Other Court Document/Proceeding	The witness was verbally threatened in the [courthouse], and was targeted as a [snitch] by use of Facebook and Instagram
Other Court Document/Proceeding	the writ that identified him as a government witness was circulated at the jail
Other Court Document/Proceeding	They were identified by not being publicly filed like codefendants' documents
Other Court Document/Proceeding	transcript of trial
Other Court Document/Proceeding	trial
Other Court Document/Proceeding	trial testimony
Other Court Document/Proceeding	Trial testimony
Other Court Document/Proceeding	trial testimony
Other Court Document/Proceeding	trial testimony
Other Court Document/Proceeding	trial testimony
Other Court Document/Proceeding	trial transcript
Other Court Document/Proceeding	trial witness list
Other Court Document/Proceeding	withdrawal from the case
Other Court Document/Proceeding	withdrawal from the pending case
Other Court Document/Proceeding	witness list provided in advance of trial pursuant to court order
Other Court Document/Proceeding	Witness lists
Other Court Document/Proceeding	Witness lists
Other Court Document/Proceeding	Witness Statements
Other Court Document/Proceeding	witness testified at trial
News	newspaper
co-defendants/known	circumstances of drug sale
co-defendants/known	cooperating co def
co-defendants/known	defendant knew witness had disclosed information
co-defendants/known	Defendant knew witness was present at time of crime and observed events

Categories of Other Sources	Description
co-defendants/known	in a [redacted] Mafia case the word got out that the wife of a co-conspirator was going to be a witness and she was [targeted] to be killed.
co-defendants/known	known to defendant
co-defendants/known	known to defendant
co-defendants/known	known to target
co-defendants/known	known to target
co-defendants/known	Named co-defendant in indictment
co-defendants/known	source disclosure
co-defendants/known	statement by defendant
co-defendants/known	The witness was previously employed by the defendant, and he knew she planned to testify against him.
co-defendants/known	unindicted co-conspirators
co-defendants/known	usually identified as family members of the cooperating defendant
talking to agents/debriefs/ government disclosure	Observation in jail
talking to agents/debriefs/ government disclosure	Seen talking with authorities on a routine matter
Other	[missing comment]
Other	His lawyer disclosed
Other	I meant to share the following information as it relates to type of harm experienced by the witness. The victim was a witness in a criminal case in which her son was murdered. The victim (the young man's mother) was raped and nearly killed.
Other	Not sure how Marshal Service learned of the hit but the suspect was apprehended across the street from the court house at the time the [witness] was testifying,
Other	Not sure. he was killed within a day or two of arrival at prison
Other	on the streets
Other	Other
Other	other
Other	Other
Other	same as mentioned earlier

Categories of Other Sources	Description
Other	under seal
Other	Was detained as a material witness in alien smuggling case.

Appendix H: Other Steps to Protect Cooperation Information

Other Steps Taken, Specified by Chief District Judges
Info regarding cooperation at plea or sentencing heard at sidebar and then sealed
Not mailing out PSRs on request.
sealed portions of transcripts in every guilty plea and sentencing
The cooperation provisions of a plea agreement are in a separate document, not filed with the Clerk of Court, and maintained only [by] the judge and the prosecutor and the defense attorney. Also, the prosecutor's sentencing memo describing cooperation is not filed -- indeed even a non-cooperator's sentencing memo is not filed, so that there is no way to determine by deduction that a defendant "must" be a cooperator. Finally, any sentencing transcript is redacted for cooperating information before it is published on the docket.
unaware of clerk's procedures
US Attorney has taken steps to remove references to cooperation in hearings and documents. Court is discussing better ways to protect PSRs.
We have levels of access and access restriction and use those on a case by case basis.

Appendix I: Open-Ended Comments

Categories	Open-Ended Comments
Missing	[missing comment]
Nothing to report	[During] my tenure as a judge in the [redacted district], none of the defendants/witnesses in any of the criminal cases I presided over were ever harmed or threatened to my knowledge.
Nothing to report	I have handled only one criminal case in the past 8 years -- and there were no threats in that one. Sorry I can't be of any help.
Takes issue with the survey	I am extremely uncomfortable participating in in this survey. Your questions cross or come perilously close to crossing the line into attorney-client confidentiality. Had I possessed concrete information concerning harm or threats, I probably would have decided to assert the privilege. A lawyer is not likely to have acquired the type of information the survey seeks except by privileged communication, especially given the parameters the survey places on how to answer the question. It does not solve the problem to promise that the information will remain confidential; the disclosure is [to] be complete once the question is answered. In addition, your survey form demanded specific numerical answers. I do not keep records concerning this issue. So, in particular, my answer to the question "how many requests for file materials to show that they were not a cooperator?" is an estimate based upon my best recollection of the number of inquiries I might have received over the last several years. In a three year parameter, the number may very well be "1". Finally, in my experience, it is virtually impossible to quantify refusals to cooperate based upon threats to personal safety. There are a myriad of moral, ethical, legal and other factors, different in each case, that a client might weigh--and properly so--in reaching a decision about whether to provide information concerning associates. Because the question of whether to cooperate is intensely and uniquely personal, many lawyers, myself included, consider their fiduciary duty to be met by listing those factors and letting the client reflect upon them alone, or with loved ones. Decisions, as far as I can tell, are made after balancing all such factors. It is very rare that the decision is based upon any single one.

Categories	Open-Ended Comments
general comment about harm in prison/prison culture	The prison environment is very difficult and tense, both in my [redacted] and [redacted]. Paperwork is demanded, and people - even people who exerted a fair amount of power on the street - are genuinely intimidated.
procedures for protecting defendants; general comments about the sources to identify cooperator	On [redacted], [redacted] adopted Standing Order Regarding Sealing Documents Filed in Criminal Matters. The Order provides prior authorization for the Clerk of Court to file, under seal, documents from pro se defendants seeking reduction of sentence based on cooperation. Filings by counsel under 5K1.1, Rule 35 and section 3553(e) must be accompanied by a motion to seal. [redacted]
procedures for protecting defendants	The threatened person wrote the court advising of a threat. The court [conferred] with the defense atty and the Government atty. Also the court called the warden of the prison in the presence of the attorneys and made them aware of the alleged threat
procedures for protecting defendants; general comment about the frequency of harm	I generally will ask defendants whether they or any member of their family has been threatened as a part of the plea colloquy in an [appropriate] case. Not infrequently they will either answer yes or no. If I think from the facts or [circumstances] that it is likely that threats have occurred I will ask whether they would tell me truthfully whether such a threat had been made. It happens [a lot] in drug and immigration related cases.
details of a specific incident	I am aware of a large drug conspiracy case that involved a threat to a prosecutor and myself. The prosecutors in the case informed me that threats had been made against co-defendants in the case.
details of a specific incident	I had a large number of defendants in a heroin case which involved two murders and several threats.
general comment about the frequency of harm	I have had 2 or 3 defendants explain why, as former felons, they possess weapons all the while knowing that doing so is a violation of their [supervised release]. On these occasions, the defendants have persuasively explained to me that gang members or other criminal actors threaten to kill the defendants if they will not re-engage with gang/criminal activities. They knowingly possess guns in violation of [supervised release] to protect themselves and family. This is not linked to perceived or actual cooperation with the government, but is responsive to the "additional information about harm or threats of harm....in the past three years."
Procedures for protecting witnesses	It is difficult to determine how many of our witnesses were harmed or threatened as a result of their cooperation in our cases. We take preventive measures to assure witness safety and often relocate witnesses as soon as they begin cooperating. There are times when our witnesses are threatened in their communities because they are suspected of cooperating or they are recognized by the defendant and threatened or harmed. When that happens we immediately bring them

Categories	Open-Ended Comments
	in and offer them relocation services. It is a rare case when our witnesses are identified as cooperators through court proceedings (other than at trial) or court documents because all such documents are placed under seal. Because the [redacted district] has a high witness retaliation rate, we wait until the last possible moment to disclose the names of our witnesses and cooperators.
general comment about the frequency of harm	It seems the perception of harm/ threat is greater earlier in the process, due to the associates co-defendants have made.
general comment about the frequency of harm; details of a specific incident; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator	Most threats (real or perceived) are in drug cases. Defense attorneys routinely ask that absolutely no record of their clients' cooperation be shown anywhere in the record, including plea agreements and 5K1 motions. One defendant was so worried about being identified as a snitch that he asked to be sentenced to his statutory mandatory minimum [redacted] imprisonment) even though he qualified for a 5K1 motion at sentencing. He had been told by other defendants that when he showed up at his designated BOP facility, he would be asked to provide his Pre-Sentence Report or J&C as "proof" as to whether or not he was a rat.
details of a specific incident; general comment about harm in prison/prison culture; general comment about the frequency of harm; general comments about the sources to identify cooperator	1) Social media has been used to post discovery. 2) We had one defendant who managed to get a criminal associate hired at the law firm of a co-defendant out of desperation to determine whether anyone was cooperating, including the co-defendant. 3) Inmates regularly abuse "legal mail" privileges to send written threats to witnesses and judges while in BOP custody; 4) We had a defendant go pro se in an attempt to undermine a protective order which limited dissemination of discovery; 5) We had to relocate a witness and their entire family after he was [threatened] at gunpoint; 6) We had a witness who was shot [at] by two males, each [carrying] a gun. Had they not missed, he would have been dead; 7) threats against judicial officers have required recusal of the USAO, necessitating appointment of an SAUSA and costly travel and lodging expenses. In one such case, our AUSA was required to make [redacted] overnight air trips to another District and was out of town in a hotel during [redacted] long trial.
general comment about harm in prison/prison culture; general comment about the frequency of harm	A BOP investigator in a civil rights case testified in my court that upon entry into the FCIs he has worked in, new inmates are routinely and quickly confronted and made to produce their sentencing "paperwork" by a deadline to prove that they did not cooperate with authorities. The inmates are told that if they cannot do so, they should seek protective custody (usually by requesting transfer into the "secure" (maximum security) unit, or face violence from other inmates. An inmate corroborated this account.

Categories	Open-Ended Comments
details of a specific incident; general comments about the sources to identify cooperator; procedures for protecting defendants	A co-defendant in a multi-defendant drug conspiracy flipped and testified for the Government. He was being housed in the Metropolitan Correctional Center on a different floor from the other defendants. One day during trial, the defendant and the cooperator were brought over in the same van.
details of a specific incident; procedures for protecting defendants	A defendant in a drug conspiracy indictment before another judge in this district conspired with others to kidnap 2 defendants on pretrial release with cases before me, have the defendants transported to [redacted], then murdered. The 2 defendants cooperated with law enforcement, one posing for pictures as having been shot in a bathtub, and the government filed 5K motions for reduction.
details of a specific incident	A defendant's home was burned down when his cooperation was made known. A mother and her daughter (both witnesses) were threatened with a gun and were directed to submit affidavits prepared by the defendant regarding why they would not testify before the grand jury. A defendant made it known that anyone who testified against him would be shunned in a small rural [community]. In a case in which a member of the conspiracy was murdered for stealing drugs, cooperators described pressure from Defendant and his family members to not submit to pressure from government.
procedures for protecting defendants	Again, all the cases were filed under seal
procedures for protecting defendants	All of my knowledge is anecdotal, and non-specific. We work hard to use preventive measures identified above to avoid these situations.
general comment about the frequency of harm	Almost all inmates request Docket. I am certain they are pressured to get that information but I know of no actual threats of harm that leads them to make this request.
general comment about the frequency of harm; general comment about harm in prison/prison culture	Almost all of our clients who are sentenced to incarceration call the office from the designated institution and request some court document to prove that they have not cooperated.
Nothing to report	Although the issue is occasionally raised in criminal cases I believe that the threat to family/friends was only remotely credible on one [occasion] and the specifics were lacking.
details of a specific incident; procedures for protecting defendants; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator	An offender under supervision reported being assaulted on more than one occasion while in BOP custody. Another offender under supervision reported being severely beaten while in BOP custody and threatened several times while on supervised release. One officer reported preparing presentence reports for a [redacted] defendant drug conspiracy where numerous defendants cooperated. The cooperation activities were only disclosed through confidential memorandums and sentencing memorandums filed under seal. The case agent and a defense attorney reported one cooper-

Categories	Open-Ended Comments
	ating defendant and his/her family received numerous violent threats from other codefendants and members of the community, which caused the cooperating defendant's family to move to another city. The defendant's name and the words "rat" or "snitch" was written numerous times on the walls of the Marshals' holding cells.
Nothing to report	As noted we have no documented instances of harm or threats in these types of cases so they were neither higher nor lower from one year to the next.
Takes issue with the survey	Asking how many defendants and witnesses refused cooperation is asking for an unknown, because we don't know if a defendant or witness was interested in cooperating or why they chose not to do so. We also do not know whether threats were directed to potential witnesses.
details of a specific incident	[redacted] I presided over a trial of a heroin kingpin. All of his co-defendants pleaded guilty and none testified against him. However, one of the co-defendants had death threat from a [redacted] cartel. This may have been because the co-defendant was suspected of cooperating with the government, although the co-defendant did not have a cooperation agreement provision in his written Plea Agreement.
policy comments	Be [sensitive] to the public's right to know about the details of criminal cases even those that involve a potential for harm to cooperators.
general comment about the frequency of harm; details of a specific incident; general comments about the sources to identify cooperator	Before taking senior status, I had a fairly heavy criminal caseload. Given the number of cases, it is difficult for me to remember all the ones in which cooperating defendants and witnesses received threats. In 2014, for example, I held [redacted] sentencing hearings. Very few of those involved simple immigration cases. Most were drug conspiracies, fraud type offenses, and firearms offenses. There are often concerns in the drug cases about retaliation against cooperators. The drug gangs do their best to obtain court documents indicating who cooperates and who does not. I am sure that I have had many criminal defendants, their family members, and witnesses in criminal cases who have received threats. One was the victim of a drive-by shooting in retaliation.
general comment about the frequency of harm	Belligerent attitude among and between defendants and their respective witnesses has intensified; threatened murders of relatives of defendants is much more common and whether they have occurred may not be available information to the Court. Whatever "restraints" on behavior that may have previously existed, they have vanished!
details of a specific incident; procedures for protecting defendants	Both of the offenders experienced threats of physical harm to self and family while on supervised release; and didn't request or receive protective custody of special housing unit placement.

Categories	Open-Ended Comments
general comment about the frequency of harm; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator	Clients call to request PSR and court documents to document that they are not cooperating. I have recently heard that convicts are more apt to be requested info from other [redacted] inmates. I question whether convicts from [redacted] cooperate after conviction and threaten or force other [redacted] inmates to provide information proving that they are not "rats".
details of a specific incident; general comment about harm in prison/prison culture	co-defendant died under suspicious circumstances while at the detention center
general comment about the frequency of harm; general comment about harm in prison/prison culture	Co-Defendants and witnesses who cooperate are often threatened even though their cooperation is to be confidential. [Occasionally] actual physical violence occurs. There is clearly an element of [intimidation] present in the detention and prison facilities.
general comment about harm in prison/prison culture; general comment about the frequency of harm; procedures for protecting defendants; procedures for protecting witnesses; details of a specific incident; general comments about the sources to identify cooperator	Comments offered by AUSAs: / / / Comment 1: Defense attorneys often ask about whether it is possible to leave cooperation out of plea agreements or to seal plea agreements. Defendants who are considering cooperation are concerned about the presence of sealed 5K motions being a red flag for cooperator status with other BOP inmates, and many fear general reprisal upon reaching the BOP. The above case is a good example of this prisoner notion of being considered "soft" if one is housed in prison with a "snitch." The defendant was suspected of having a gang connection to the ultimate instigator of the violence, but his accomplices were motivated to help simply in order to remove a cooperator from their midst, or to "check the snitch off the block." / / Comment 2: The threat of harm is always a major issue in prosecuting gang cases. It is difficult to determine when there have been actual threats that we do not know of, and when the reluctant witness fears retribution in the future, but nothing has been threatened yet. In general, a substantial number of potential witnesses to gang violence appear nervous about cooperating, and it takes a great deal of effort to get people to cooperate. / / Comment 3: We are seeing an increase in defense attorneys telling us that their clients don't want to cooperate nor do they want us to put a cooperation provision in their plea agreements – and are [leery] of sealed entries in their docket sheets because when they get to prison, the cooperation or sealed entries are taken to mean they are snitches. Not sure if they are concerned only about harm to themselves, but the harm to their families, especially those back home in [redacted]. / / Comment 4: I have one defendant who cooperated in a state case. He was never explicitly threatened, but life on the street doesn't require explicit threats. When we first met this defendant he refused to discuss the source of the counterfeit currency he was caught distributing. In fact, he got it from some gang members in [re-

Categories	Open-Ended Comments
	dacted] area, but wouldn't discuss it with us. He did tell us that he wouldn't talk about the currency because he knew that members of the gang would come after his mother. He was never threatened, but there was no need of a threat. / / I don't know exactly what the survey is trying to capture, but it's missing a big problem. There need not be an actual threat to shut down cooperation, as the above example shows. I recall other anecdotes but they're older than three years. / / Comment 5: Threats from the Cartels in [redacted] continue to be an issue. One defendant and her children were forced to flee and face prosecution here because of threats to her regarding possible cooperation of her and her husband. A material witness in that same case has been pursuing asylum from the Immigration Court out of [redacted]. /
general comment about the frequency of harm; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator	cooperating defendants who are incarcerated are routinely asked to show their plea agreements to prove they are not cooperating with the government
details of a specific incident	[redacted], who agreed to cooperate with the government, was murdered the very night of her first interview. Two defendants in a multi-defendant drug conspiracy case were charged with her murder. One was convicted by jury of murder, one pleaded guilty to the murder charge.
general comment about harm in prison/prison culture; general comment about the frequency of harm; policy comments; general comments about the sources to identify cooperator	Defendants are frequently confronted and asked to provide their Docket Sheet upon arrival at their BOP facility. That Docket Sheet is then examined by other inmates for sealed documents that create "gaps" in the Docket Sheet sequential numbering. Any gaps are viewed with suspicion--as the inmates usually correctly assume those are sealed motions, plea agreements, orders, and memorandum related to cooperation. The defendant is then labeled a cooperator. This forces the defendant into protective custody, or leads to assaults, harassment, threats, and other behavior. I have tried to work with BOP Legal Counsel to ban BOP inmates from having Docket Sheets (much like the BOP bans PSRs, which were excluded from inmate possession for similar reasons). I have not heard back from BOP legal counsel on the issue.
general comment about harm in prison/prison culture; general comment about the frequency of harm; details of a specific incident; general comments about the sources to identify cooperator	Defendants are threatened with bodily harm when they arrive at their designated institutions by the prisoners that are designated the "shot callers". Before the defendants are permitted to be on the yard, he must show his paper work, (plea agreement and judgment). Some have requested their presentence report which is not permitted in the possession of an inmate. One defendant was beaten so bad, he was hospitalized. He did not cooperate, but rather another inmate with the same name. The prisoners received the information after having had family and friends look up the defendant's name.

Categories	Open-Ended Comments
general comment about harm in prison/prison culture; general comments about the sources to identify cooperator	Demands by inmates for new inmates to supply a copy of their Plea Agreements and sentencing transcripts for verification that they were not cooperators. Failure to provide the required information meant they were considered to be "rats"
details of a specific incident; Procedures for protecting witnesses; procedures for protecting defendants	During our office's prosecution of multiple defendants who were part of a local [redacted] gang, a cooperating witness ("CW") was threatened with death, and so were members of his family in [redacted]. The Government arranged for members of the CW's family to be brought to the United States for their safety. Following their arrival, the Government provided funds for the CW's family members to change residences due to additional threats from the defendants. During this prosecution, eight of the defendants who cooperated with the Government sought and received custodial wit-sec protection due to likely retaliation and threat assessment. / / During our office's investigation of several gang members of [redacted] descent, 3 cooperating defendants were threatened while in custody. / / During our office's prosecution of several corrupt police officers involved in illegal drug activities, the confidential informant ("CI") was threatened via text message by one of the defendants. Prior to receipt of the threat, the Government had already arranged for the CI to be relocated out of state for his protection. /
details of a specific incident; Procedures for protecting witnesses; procedures for protecting defendants	Each of the cases that I have had involving witnesses have been victims of domestic violence where the defendant is on supervised release and I am informed that the defendant has threatened the victim. It is brought to my attention through a supervised release revocation report. The case with the cooperating defendant being threatened and put into protective custody was also brought to my attention due to a pretrial services officer informing me.
policy comments; general comment about the frequency of harm; general comments about the sources to identify cooperator	Electronic dissemination of case information, particularly when informants are involved, is problematical for incarcerated defendants. It makes motion and appellate practice cumbersome, and it is nearly impossible to control sensitive information to the detriment of defendants and government witnesses as well. As a defense attorney, I much prefer that these matters not be publicized.
general comment about the frequency of harm; policy comments; general comments about the sources to identify cooperator	Every client sent to BOP asks for a copy of their docket sheet, even the clients who did cooperate. The cooperating clients want us to somehow amend the docket sheet so there are no sealed documents. Meanwhile, as someone who also represents the people who are cooperated against, I know that finding out information about cooperation efforts, even though it's important impeachment evidence, is becoming more and more difficult.
Nothing to report	Fear of the prosecutor and agents more prevalent fear.

Categories	Open-Ended Comments
Nothing to report	Fortunately, I have none to report
general comment about the frequency of harm	Have been a number of cases where illegal alien defendants were participants in drug distribution in U.S., usually as low-level couriers or mules, for a relatively nominal payment of money, but not otherwise a significant part of the drug operation. Many report having been threatened, or having their families threatened, in [redacted] by drug cartels operating there. The government has conceded, in at least some of the cases, that the threats and risks are real.
details of a specific incident	Higher in 2014 due to Robbery Case where four Defendant's/witnesses were assaulted or threatened.
Nothing to report	I am a new Judge appointed in [redacted]
Nothing to report	I am a recently appointed judge, and have no criminal docket at this time.
Nothing to report; Takes issue with the survey	I am not aware of any harm or threats in the past 3 years. Thus, in answering this question I was not sure whether to select "I don't know" or "about the same"....
Nothing to report	I am not aware of any instances where cooperators were threatened or harmed.
Nothing to report	I am not aware of any reported incidents or threats to defendants from our district.
Nothing to report; general comment about the frequency of harm	I am relatively new to the bench. But this has been going on for years.
Nothing to report	I am Senior Status and have not handled any criminal [cases] for the last three years.
general comment about the frequency of harm; general comment about harm in prison/prison culture; procedures for protecting witnesses; general comments about the sources to identify cooperator	I am very concerned about cooperating witnesses once they get to prison, whether they cooperated initially and received a benefit for cooperation at their initial sentencing or later got a Rule 35. Even though we try to protect them by sealing certain documents, allies of those who want to know for improper reasons can access the court file from outside of prison, and they do. When a sealed Order in an otherwise dormant file shows up, you can just about bet it is a Rule 35 reduction, and allies of others in prison know that. I had one instance of where I somehow found out about such an inquiry being made for others in prison.
Nothing to report	I began my service as a federal district court judge on [redacted]
Nothing to report	I believe I had one and possibly two alleged threats to family members, but all of it was hearsay and not much collaboration.

Categories	Open-Ended Comments
Takes issue with the survey; general comment about the frequency of harm; policy comments; general comments about the sources to identify cooperator	I believe the survey calls for speculative answers. To the extent such threats or harm can be linked [with] any court activity, which is speculative itself, if there is a link, it is the following: if anyone who wants to do harm to a so-called cooperator is sophisticated in any [respect], they know that the word "sealed" on any court docket means only one thing" : a cooperation provision is part of the case. / The fact of cooperation cannot be kept from the public [vis-à-vis] the specifics of the cooperation. At sentencing the judge of course must announce the amount of time being reduced from the sentence for cooperation. The details of the cooperation are never placed on the record except in the rare case where the defendant chooses to.
general comment about the frequency of harm; general comments about the sources to identify cooperator	I believe there was a concern that threats are generated from those who gain access to public documents that discuss cooperation or potential cooperation by a defendant in custody.
general comment about the frequency of harm; comments about refusal out of fear	I can not recall threat of harm to cooperators but do recall 1) defendants and family members who [were] threatened/harassed because people thought the defendant was cooperating or might do so, and 2) defendants who declined to proffer and help [themselves] because people might think they were cooperators
Takes issue with the survey; general comment about the frequency of harm; general comment about harm in prison/prison culture; comments about refusal out of fear	I can only answer for defendants because that's whom we represent. I can't answer for witnesses. / Limit of 100 is insufficient to express number of defendants who 1) request court documents to show they didn't cooperate (virtually all of those incarcerated make this request, so many hundreds; 2) I can't quantify number of defendants who refuse to cooperate out of fear. This is a constant theme and vastly exceeds 100.
Nothing to report; general comment about the frequency of harm; policy comments	I cannot recall the last time a client, defendant or witness in a matter I was involved in was threatened in any way. In my practice, which overwhelmingly involves the representation of federal defendants and witnesses in federal criminal matters, the threat or risk of harm has not presented itself in years. The extent to which such is an issue depends on the nature of the case and the defendants involved in it. For example, in my district, the risk of harm to a cooperating defendant or witness in a health care fraud case is typically much lower than that faced by a similar defendant or witness in large scale drug trafficking case where the leaders of the conspiracy remain free while a low ranking conspirator is enlisted as witness in an ongoing investigation that has yet result in additional arrests and charges against the leaders. I also perceive that defendants and witnesses in many cases, including drug trafficking and other organized criminal activities, are more likely to cooperate today than in the past. It is more common and there is less taboo therefore associated with "cooperating" among defendants and wit-

Categories	Open-Ended Comments
	nesses. The current mechanism whereby the parties must articulate to the court why something should be sealed appears to be working. The purported need for blanket rules allowing court records and documents to be sealed or shielded from the public is a canard.
Nothing to report	I can't recall any others
Takes issue with the survey; general comment about the frequency of harm; procedures for protecting defendants; general comments about the sources to identify cooperator; comments about refusal out of fear	I could not accurately answer the previous questions with a number. We frequently have clients call asking for their file and/or docket to prove they are not cooperators - even client who have cooperated. Most [do] not claim they are being threatened but some do. I cannot quantify how many call but it is often. Most ask that the cooperation portion of a plea agreement be placed under seal (that is not automatically done here). 5K motions and anything referencing cooperation (e.g. mtns to adjourn) are under seal. I cannot quantify. I will say that most often when they want to withdraw it is because they do not want to be exposed as a cooperator through testimony but not necessarily because they've already been threatened. It is a concern they will be threatened/harmed once their name is on a witness list. Since most cases plea, cooperators are not exposed. We also have clients who choose not to cooperate. Some make that choice because they do not want to help the government or turn on their family/friends. Others are scared of retaliation. I cannot quantify this because we do not necessarily ask our clients why they are making this decision. / / I don't know if this is helpful. I am sorry that I cannot provide a number.
Nothing to report; Takes issue with the survey; policy comments	I do believe that this is an important issue. But it is my opinion that Judges are the least likely to have knowledge of what happens after his/her case is closed.
Nothing to report	I do not recall receiving reports of harm or threats of harm experienced by any defendant, witness, or family or friends of a defendant or witness from cases on my docket in the past three years.
general comment about the frequency of harm; general comment about harm in prison/prison culture	I do not recall specifics but I do recall being informed (primarily in connection with sentencings that defendants have been threatened in detention facilities and/or their families threatened with physical harm in connection with actual or suspected cooperation. All in drug cases, some of which also involved charges of violent crime (including murder) against the person to whom the threats were attributed.
Nothing to report	I do not see any change in harm, threats, or worries about harm over the last three years (or over the last [redacted] years, for that matter). Clients are often worried about retaliation; however, I have never seen any evidence or stories about actual harm.

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details of a specific incident; Takes issue with the survey	I don't recall any cases involving witnesses being harmed or threatened before 2014. The harm experienced by a witness' family was a drive-by shooting of the family home allegedly arranged by one of the defendants.
general comment about the frequency of harm; Takes issue with the survey; general comments about the sources to identify cooperator	I got tired of answering the same way but I probably see 15 or so cases per year where a cooperating defendant in pretrial custody is [threatened] based on the knowledge he is cooperating based on debriefing statements placed in the [discovery] file of -co-[conspirators].
details of a specific incident; general comment about the frequency of harm	I had a multi-defendant case arising out of brutal assault of an expelled member of the [redacted]. All but one of the defendants pled. Three or four testified for the Government in the trial of the one defendant who went to trial. The "rule" of this prison gang is that one does not get out of it alive. Those who testified were under threat of death, and one in particular -- who had a prior State sentence to serve -- sought (unsuccessfully) a deal to avoid having to serve his State term in the State prison for fear that he would be killed. The Assistant U.S. Attorney who led the initial prosecution was removed from handling further [redacted] cases at his request after he received death threats. / / Frequent death threats are made in illegal alien trafficking cases, to control the illegal aliens until transportation fees are collected, and occasionally some of these aliens are called as witnesses. / / An assistant U.S. Attorney and [I] are currently under death threats from a detained defendant awaiting sentencing on convictions including on one count of solicitation to commit a crime of violence.
details of a specific incident	I had one cooperating witness who was concerned about potential threats once he was sentenced and started serving his custodial sentence. His main area of concern, however, centered around his deportation to [redacted] and the threat of harm facing him from drug cartels in [redacted].
details of a specific incident	I have a large drug case involving about [redacted] defendants. Two of them claim that they were threatened not to cooperate.
details of a specific incident	I have a pending case involving a local gang and allegations of 2 or more killings of cooperating witnesses.
Nothing to report	I have been a judge [redacted].
Nothing to report	I have been on senior status for [redacted] and have not had a criminal docket for the past three years.
Nothing to report	I have been on the bench less than [redacted].
Nothing to report	I have been on the bench less than [redacted].
Nothing to report	I have been on the bench only [redacted] and have had my criminal docket for only [about] [redacted]. I have am not aware of any threats thus far experienced by defendants and/or witnesses, or their family or friends.

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Nothing to report	I have had counsel represent that there may be a potential threat of harm to a defendant or witness, however, I do not believe that there has been any actual harm or threat of harm. Or, maybe, I have just not been made aware.
Nothing to report	I have had no problems with threats of harm to clients or witnesses. If I ever had any issues, I am sure I could work with the government and the court to handle them on a case-specific basis.
details of a specific incident; general comment about the frequency of harm	I have had one case in which a codefendant was murdered just before he was scheduled to appear for a change of plea. I have had other cases in which I learned that a witness was [threatened] but I cannot recall whether any of those instances occurred within the past three years.
Nothing to report	I have no information that any defendant or witness was harmed or threatened due to perceived or actual cooperation.
general comment about the frequency of harm; policy comments; general comments about the sources to identify cooperator	I have no other specific information to provide, but have the impression that the US Department of Justice and US Attorney's offices do not consider the protection of cooperating defendants (and to a lesser extent witnesses) to be much of a priority, despite the rapid increase in electronic access and search capabilities in recent years. Perhaps this is reflective of better information about the real threat to an incarcerated individual's relative safety, but fear there is a certain amount of fatalism (even cynicism) about what can be or should be to follow through on these protections. Instead, prosecutors seem to be defaulting on their telling the potential informant that, while efforts will be made to protect them, at the end of the day their safety cannot be assured.
Nothing to report	I have not been advised of any threats to anyone
Nothing to report; general comment about harm in prison/prison culture; general comment about the frequency of harm; general comments about the sources to identify cooperator; comments about refusal out of fear	I have not had any clients that, to my knowledge before or after, were threatened or harmed because of cooperation. I can tell you that the CW in jail is that other inmates at the FCI's they will be assigned to, will have access to their judgment and other docs and so will be able to tell if an inmate was granted a 5K or a reduced sentenced for cooperation and they fear retribution for that. The effect is to limit D.'s willing to cooperate. I have had a handful, maybe 6, cases in the past 3 years that the fear of retribution prevented their cooperation.
Nothing to report; general comment about the frequency of harm; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator; comments about refusal out of fear	I have not had defendants/witnesses who have received actual threats or have been harmed because of cooperation or possible cooperation. However, it is common that defendants do not wish to have a cooperation provision in the plea agreement because of safety concerns. Those concerns are two-fold. One is the general concern about their family who will remain in the community. The other concern is that the paperwork at BOP will indicate they are cooperat-

Categories	Open-Ended Comments
	ing. The fact that a defendant's cooperation is not kept secure by BOP is a major factor keeping many defendants from desiring to cooperate.
Nothing to report; general comments about the sources to identify cooperator; general comment about harm in prison/prison culture	I have not known of documents or transcripts to have been used. Typically it is the movement of the prisoner/witness in and out of the facility to meet with the AUSAs which enlighten fellow inmates.
Nothing to report	I have not received any information that defendants who are serving time after sentencing have been threatened in prison for cooperating.
details of a specific incident	I have one case where the parties' attorneys have expressed serious concerns about any possible threats being made to the defendant during the cooperation period, especially because he is in custody.
Nothing to report	I have only been a District Judge for [redacted].
Nothing to report	I have only been a federal judge for [redacted]. During my tenure, I have not experienced harm/threats to witnesses or cooperators in any of my cases.
Nothing to report	I have only been a judge for [redacted].
Nothing to report	I have only been on the bench for [redacted].
Nothing to report	I have only been on the bench for [redacted].
general comment about the frequency of harm; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator	I have only heard of threats to prisoners where their cooperation was discovered through reference to their plea agreements or 5K petition. I have no first hand knowledge of such activity in cases on my docket.
Nothing to report	I have only served as USDJ since [redacted] so I have a limited basis to compare.
Nothing to report	I have polled all current officers and supervisors and they do not recall [any] incidents within the past three years.
general comment about the frequency of harm; procedures for protecting defendants; general comment about harm in prison/prison culture; policy comments; general comments about the sources to identify cooperator	I have practiced actively in the [redacted] since [redacted]. Only one defendant (during the 90's) has been the subject of credible threats during a case and he was appropriately given a place to live outside of town by the FBI for a brief period. It is not infrequent that clients communicate from prison about cooperation allegations, including two or three times during the last three years. Clients have requested their PSR, docket sheet, phony letters from the US Attorney's office or from me. I am not aware of any client being the subject of actual harm. The current system of sealing cooperation agreements does not offer protection since plea agreements are public and anybody can do the math and compare guideline levels to actual sentences. Now that the Guidelines are discretionary, there is a risk of being falsely accused of being a cooperator if one gets a reduced sentence for some other reason. / / My view is that the only way to protect defendants is for less of the docket to be public records.

Categories	Open-Ended Comments
details of a specific incident; Takes issue with the survey; general comment about the frequency of harm	I have presided over the [redacted] [trials] lasting [redacted]; The [redacted] that were [redacted]; subsequent subsets of [redacted] trials [redacted]; The [redacted] trials [redacted] and numerous other cases involving organized criminal gangs [redacted]. Cooperating witness and [witness] intimidation are standard and the present procedures highlight their cooperation and endanger witnesses. / I did not limit my comments the last three years. / [redacted]
Nothing to report	I just became a judge in [redacted] so I can't compare . . .
Nothing to report	I just took the bench on [redacted].
details of a specific incident; general comments about the sources to identify cooperator	I know of only one case in the past three years. The case involved the exportation of military grade munitions. Once his cooperation was published in the local paper, his family in [redacted] asserted that they were compelled to move. His wife reported that [someone] shot into her vehicle, she added that her son was beaten up, and that they live in constant fear.
general comment about the frequency of harm	I learn from defense lawyers about threats. They learn about threats from [their] clients. Typically I do not learn of the details. I also am not told if the defendant requested protection. Lawyers are very reluctant to give much information about threats because sharing entails may place their clients at further risk. I believe this is a problem that is under reported to the courts.
Nothing to report	I only became a judge in [redacted], so I have no basis for comparison.
details of a specific incident; general comments about the sources to identify cooperator	I only recall one person who, when filing a 2255, requested it be sealed due to fears of threats as he had been a cooperating defendant.
details of a specific incident; general comments about the sources to identify cooperator	I recall one case where I was informed that a cooperating witness was subjected to threats, including on the internet, for participating in the trial
details of a specific incident; general comments about the sources to identify cooperator	I recall only the one case I have previously described and the Motion to Vacate at issue and the opinion were issued in 2014 but defendant's allegation of being [harassed] by inmates based on the opinion were raised in 2015
details of a specific incident; general comments about the sources to identify cooperator	I recently sentenced a defendant who had from jail instructed his girlfriend to identify a co-conspirator on rats.com for cooperating.
procedures for protecting defendants	I require all documents that reference cooperation or potential cooperation to be filed under seal. I also seal transcripts. I have sealed or moved sentencing hearings.
Nothing to report; Takes issue with the survey; general comment about the frequency of harm	I spoke with [redacted] and was told if i did not recall a specific number I should respond with the number "0", which I have done. / / Also this survey is too absolute in its questioning. A whole host of factors may go into the client's decision to cooperate or not, not only the fear of harm or retaliation. So any cause and effect analysis is misleading. Suffice it to say that fear is present in almost any drug case where there is cooperation.

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details of a specific incident	I took the oath in [redacted], so I have a limited data set from which to answer. / / The one case I described, where a shot was taken aimed at an informant, (which missed), is the only incident with which I am familiar.
general comment about harm in prison/prison culture; general comment about the frequency of harm; details of a specific incident	I tried to indicate that every client who is sent to BOP requests their "paperwork" to prove they are not a cooperator. The number is much higher than I indicated but the survey did not accept the number I put in so I dropped it to 10. A client has two weeks to produce their documents once they enter BOP to prove they are not a cooperator otherwise they are subjected to physical harm. One client was beat senseless with a lock in a sock, he suffered severe head wounds. They are all threatened once they arrive in BOP custody.
general comment about the frequency of harm; policy comments	I understand that the only way generally for a defendant to receive a departure, is to cooperate, the extension of that cooperation can not only lead to a dangerous situation for the defendant, but also for the officer supervising that defendant. It is critical that the AUSA and the agents advise officers of a defendant's cooperation, so that they are not put in an unnecessary high risk situation.
Nothing to report	I was confirmed in [redacted], so I am unable to make a comparison between 2013 and 2014.
details of a specific incident; comments about refusal out of fear	I was dealing with defendants associated with the [redacted] drug cartel. Cooperators and their family members were under constant threat. Numerous defendants refused to protect their family members in [redacted].
Nothing to report	I was not on the bench in [redacted].
Nothing to report	I was off of our criminal law draw for most of the past three years. I went on the draw for about three months in about [redacted], and drew three long cases and, therefore, took myself out of the criminal draw again. The trials were [redacted] weeks, respectively. So, I probably have little to add to this survey.
Nothing to report	I was sworn in on [redacted], so my experience is very limited.
Nothing to report	I would not have information about this because it is not a matter ordinarily brought to my attention.
general comment about the frequency of harm; comments about refusal out of fear	I wrote 15 for the number for people who withdrew. It is likely higher. We are in [redacted] where many of our clients are so fearful, b/c of the environment, that we can't even get clients to have a safety valve interview. Clients would rather do their mandatory minimum than be labeled a "snitch." Dozens and dozens of our clients refuse to cooperate out of fear and the threats.
general comments about the sources to identify cooperator	if there are sealed pleading on the docket sheet, the assumption is that client is cooperating
Nothing to report	I'm a new judge and therefore do not have relevant information.

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general comment about the frequency of harm; policy comments	I'm afraid my lack of recollection does not allow me to recount the many more instances over the [redacted] years I have been on the bench in which cooperating defendants have been afraid after they have provided information. My experience is that there is a complete disconnect between the United States Attorneys Office and the Bureau of Prisons such that once a defendant is no longer needed, he is discarded and the interest and knowledge in how best to protecting him or her is minimal to non-existent. There is no sense of commitment to the safety of the cooperator for the duration of his term in custody or upon release.
details of a specific incident; general comment about the frequency of harm	In a large drug trafficking case, a witness/cooperator received a threat via letter. The letter was sent to the witnesses/defendant's family. The FBI is investigating the case. Often, in other cases, many defendants allege that they will be harmed for cooperating - however it's difficult to verify if any actual harm might befall them.
details of a specific incident; general comment about the frequency of harm; general comments about the sources to identify cooperator	In approximately 2010 there was a huge upsurge in drug conspiracy cases involving violence. Two of the cases that I make reference to in this survey involved RICO drug conspiracies. One of the cases was a RICO drug conspiracy involving a prison gang. It was through trial testimony that I learned of the extensive use of court documents (particularly PreSentence Investigation Reports and Plea Agreements) in prison to identify cooperators.
procedures for protecting defendants	In coordination with the District Court, we have implemented a procedure to keep cooperation provisions of plea agreements under seal. Standard non-cooperation plea agreements are filed and appear on PACER. Cooperation provisions in all cases are contained in Supplemental Plea Agreements which are filed under seal using a single Magistrate (MJ) case number.
procedures for protecting defendants; general comment about the frequency of harm; details of a specific incident	In every 5K motion there is a section about potential harm -- most of the time the government says there are no known threats but that given the cooperation threats are a possibility -- my experience has been that they disclose the threats orally at sidebar at sentencing, because they don't want to write the details down, so we don't have records and my memory is not great about individual cases. The most blatant example I had involved a defendant's father's convenience store selling Tshirts with the cooperator's photo and the words "[cooperator's name] is a snitch" -- but the knowledge did not come from court, people learned of it during the investigative stage
details of a specific incident; general comments about the sources to identify cooperator	In [redacted], the defendant on supervised release in my case testified before a federal grand jury in an unrelated matter. He was murdered in [redacted] in [redacted]. It appears that the defendants in the unrelated matter found out about his grand jury testimony.

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procedures for protecting defendants	In multiple Defendant drug cases where a Defendant has cooperated, I am seeing situations where the defense attorney and prosecutor schedule a meeting with me to explain the Defendant is cooperating; however, because of safety concerns for the defendant and his family members, they do not want the docket to reflect any notations to a sealed proceeding. Instead of the U.S. filing a sealed 5k motion, there is a Rule 11(c)(1)(C) plea agreement to a specific sentence or to a specific range and the joint request by defense counsel and the prosecutor is to accept the plea agreement without making any reference on the record to the defendant's cooperation for personal safety reasons. / / My clear preference would be for a sealed 5k motion for downward departure for substantial assistance; however, I have agreed to the off the record procedure requested by defense counsel and the prosecutor because I do not want to see any harm come to the defendant and/or his or her family members.
general comment about harm in prison/prison culture; general comment about the frequency of harm	In my cases, many of my clients have contacted me to obtain transcripts of their sentencing hearings, or copies of the dockets in their cases so that they can show other inmates that they did not cooperate. They have told me that other inmates require this information so that they can prove that they are not "snitches."
details of a specific incident; general comments about the sources to identify cooperator	In one case prosecuted recently, the informant /witness was threatened after the defendant's family posted the tapes of the undercover buys the informant made on YouTube. The tapes had been provided to the public defender as discovery. The public defender turned these over to the defendant's family, and subsequently, the family posted the videos on-line. The office has addressed this problem with the public defender to ensure that such an episode will not be repeated.
details of a specific incident; general comments about the sources to identify cooperator; general comment about harm in prison/prison culture; procedures for protecting defendants	In one case, the defendant was involved with members of violent known street gangs, such as [redacted], but who also would engage in unaffiliated acts of violence for hire in connection with their drug trafficking activities. The defendant used information obtained pursuant to the Jencks Act to ascertain the identities of potential witnesses, some of whom were incarcerated, some of whom had pled guilty but were at liberty (of these some received veiled threats not to testify and one was assaulted- presumably in connection with his anticipated testimony). This defendant also tried to provide economic assistance to one cooperator to buy his silence by providing commissary money and providing money to his family. / / In the third case, the defendants involved in assaulting a perceived cooperator were members of a violent ethnic criminal group. The assault occurred without any concrete proof that the alleged cooperator was, in fact, cooperating on their case. In fact, the per-

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	son was not providing information on their case. The assault was videotaped in the federal jail facility. Additional comments provided via email: There are certain circumstances that may serve as signs to defendants or persons trying to identify who is cooperating with the government in a criminal case or ongoing investigation. For example, --- If the person has pled guilty and the sentence has been held in abeyance for any unusual length of time, usually more than 3 or 4 months. --- If the person pled guilty to a prosecutor's information as opposed to an indictment before there was an indictment filed. --- Because incarcerated defendants who have been convicted by guilty plea (or sometimes trial) are pressured by other inmates to obtain a copy of their presentence report to prove they are not cooperators, our district's Probation Department no longer mentions the defendant's cooperation with the government or the possibility of a 5K1.1 motion as a possible departure factor in the presentence reports. Any cooperation is addressed in the sentence recommendation, which is not sent to the prison officials, and is submitted to the court separately from the presentence report.
details of a specific incident; general comment about harm in prison/prison culture	In one instance, a defendant attempted to recruit an inmate incarcerated with the co-defendant cooperator to harm the cooperator. In another instance, a spouse of a co-defendant (who was also a defendant) in a drug conspiracy case was raped by members of a gang involved in the conspiracy because she agreed to cooperate with the government.
details of a specific incident; comments about refusal out of fear	In one of the cases on which I worked as a magistrate judge, a confidential informant was murdered the day after agents arrested a number of participants in a drug conspiracy. In another case involving multiple defendants who were involved in a drug conspiracy, one of the [redacted] defendants who was a minor player in the conspiracy but who had information about at least one of the leaders of the conspiracy, declined an opportunity to cooperate with the Government out of concern for his family. In that case, we learned that another member of the conspiracy was paying the defendant's attorney fees and was participating in decisions about the defense provided to the defendant. I removed the defense attorney and appointed new counsel for the defendant.
procedures for protecting defendants; general comment about harm in prison/prison culture	In our Court [redacted] we have local rules that allow the sealing of such documents as Motions for 5Ki.i and 3553 relief, Sentencing memorandum, Guilty Plea Memos and Agreements when cooperation of the pleading defendant is at issue. We cannot (and I would not) seal an entire case file, but orders to seal enough documents in a case will be revealing on the docket to those assisting a defendant tar-

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	get. Pre-sentence Investigation reports should not cite cooperation of any defendant, either. / Separating the cooperator(s) in a particular case who are all housed [in] the same facility is also a challenge, but the effort must be made by the prosecutors as well as the FDC and BOP.
procedures for protecting defendants	In our district, all sentencing memoranda, 5K motions, and plea agreement cooperation agreements are sealed by default. I believe this has been very effective in controlling the effect on cooperating defendants and witnesses.
general comment about the frequency of harm; procedures for protecting defendants; general comments about the sources to identify cooperator	In the [redacted], the United States Attorney's Office ("USAO") prosecutes a number of cases annually charging defendants who are members of violent street gangs, organized crime groups, and large-scale drug trafficking organizations. One of the central tenants of many of these organizations is that those who cooperate with law enforcement against these organizations are automatically targeted for murder or some other form of physical harm. As a result, it is not at all unusual for cooperating defendants and cooperating witnesses to receive threats directed by the criminal groups they are cooperating against. (Although, chiefly as a result of the great care that is typically taken to protect cooperating witnesses and defendants from harm, it is rare for these threats to materialize into actual harm that befalls these individuals.) / / As a result of the nature of the threat faced by cooperating witnesses and defendants who cooperating against some of the violent criminal organizations prosecuted in the [redacted], the USAO routinely seeks permission to file under seal with the court pleadings -- such as sentencing memoranda and plea agreements -- that disclose the fact a defendant or witness is cooperating with the government; and district courts in the [redacted] regularly provide authorization for the government to file such pleadings under seal. While this may provide some measure of protection for individuals who cooperate with the government, it is not a fool-proof method of concealing an individual's cooperation from those who may want to do him or her harm, as the fact that such a pleading has been filed under seal may alone signal to a member of one of these groups that a particular individual is cooperating and these groups often need only to speculate that an individual is cooperating before seeking to do him or her harm.
general comment about the frequency of harm	In the [redacted], we have a large percentage of defendants who cooperate with the government. The majority of threats are coming from drug cartel members who reside in [redacted] and travel back and forth across the border. Most of the defendants who report the threats state they have been kidnapped, beaten, and threatened by the cartel. The threats usually extend to the defendant's family members as well.

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general comment about the frequency of harm; general comments about the sources to identify cooperator	In the vast majority of the cases, rumors led to threats of harm or assault. However, the co-defendant or unindicted co-conspirator had no proof that the defendant was actually cooperating.
general comments about the sources to identify cooperator; details of a specific incident; procedures for protecting defendants	In this district both plea agreements outline the government's intent to request a sentence reduction for cooperation and the Statement of Reasons is still considered by the Court as a public document and thus is available with the judgment on CM/ECF. / / Of the two offenders threatened while on supervised release -- one we made arrangements to transfer supervision to another district and the other one is currently in process of attempting a transfer. The current one being threatened was sentenced in a different district.
procedures for protecting defendants; nothing to report; policy comments	In this district we have very few threats of harm. We believe taking actions to seal information for a minority of persons for the explicit reason of making the information more difficult to obtain, will harm the majority of our clients by making otherwise public information secret and by depriving them of potentially exculpatory or mitigating information (what agreements other similarly situated persons have obtained, how to compare others convicted of the same offense, etc.). We strongly oppose this idea for those reasons. In addition, some courts of appeals look unfavorably on sealing any documents and have strict rules as to when and how documents can be sealed.
details of a specific incident; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator	In [redacted], the defendant [redacted] was a local rap artist in [redacted]. [redacted] compiled and released a rap video on YouTube that identified (by name) government cooperators. The government was successful in having the video removed from YouTube. This occurred in [redacted]. On a separate matter, we have received information in the past that inmates in BOP custody were being required to provide other inmates with a copy of their presentence report in order to confirm that they were not cooperating with the government. No specific case references are [available].
details of a specific incident; general comments about the sources to identify cooperator; procedures for protecting defendants; procedures for protecting juries	In [redacted], the government arrested [redacted] people involved with a very violent drug conspiracy known as [redacted]. Most of those arrested were held at the Federal Detention Center, and although there were separation orders, the A.U.S.A. reported to the Court a large number of threats made by the organization leaders [redacted]. The organization took the position that even a defendant's guilty plea qualified as cooperation, even if that defendant provided no further assistance against other co-defendants. The Court broke the organization up into three groups for trial and tried four individuals in the first of the three groups, resulting in convictions for all four. The Court ordered an anonymous jury and the U.S. Marshals escorted jurors to and from the juror parking lot from undisclosed

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	locations. None of the defendants has cooperated against his or her co-defendants, though some have pleaded guilty. Those who have pleaded guilty have made clear that they are putting in a plea for themselves only, not agreeing to cooperate against any of their co-defendants.
general comments about the sources to identify cooperator	It appears most harm was done by people who knew them previously, not [through] court documents or information made public through judicial means.
general comment about the frequency of harm; general comments about the sources to identify cooperator	It appears that more uncharged witnesses (not defendant-witnesses) are threatened, than defendants. Additionally, it appears that frequently, at least at the earlier stages of the cases, the witnesses are identified through conclusions drawn from discovery (even if redacted to protect identity for a time). Additionally, in many cases there are not actual threats, but an expressed fear by the defendant of cooperating due to concern for self or family. Many such defendants express concern through their counsel about the sealing of the cooperation agreement and how it appears on the court's docket (such as whether there is a missing number on the docket).
general comment about the frequency of harm; general comment about harm in prison/prison culture	It is a recurrent theme. I could have continued to answer yes over and over again in this survey. I often read it in PSR where the officer states that the defendant and/or his family was threatened when they learned or suspected that he was cooperating. So I really wasn't thinking of one specific case but of many. Everyone seems to find out in jail about who is a snitch!
Takes issue with the survey; procedures for protecting defendants; general comments about the sources to identify cooperator; general comment about the frequency of harm	It is almost impossible to know the exact number of witnesses or defendants who have been threatened from information learned or acquired from PACER. In our district, plea supplements contain the information about cooperation and the potential for downward departures. They are filed under seal. However, one can see that there is a sealed document by the fact that a numbered document is [missing]. Likewise, 5K1.1 motions are filed under seal. However, again the missing document number and the proximity to sentencing is a give away. The same is true for Rule 35 motions, filed under seal with a missing number and shortly thereafter an Amended [Judgment] is filed. Furthermore, witnesses and cooperating defendants, when threatened, generally do not know how the assailant learned of their cooperation.
policy comments	It is essential that we develop and implement on a national basis uniform procedures and practices to reduce or eliminate the risk of harm to cooperators arising out of public access to court records. My district, [redacted], has developed procedures to do so, but these will be of little effect unless [these] procedures, or something similar to them, are adopted throughout the country.

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general comment about the frequency of harm; general comment about harm in prison/prison culture; procedures for protecting defendants; policy comments	It is increasingly true that defendant's worry they will be asked, either during pre-trial incarceration or once placed in the Bureau of Prisons, for their plea paperwork to see if they have cooperated. Refusing to provide it is considered proof of cooperation. I have had a court allow me to submit the plea paperwork with a cryptic reference to a sealed document outlining the cooperation and its 5K benefits. We definitely need a way to help [defendants] who cooperate from being put in this predicament.
general comment about the frequency of harm; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator	It is now regular BOP inmate practice to demand "papers" to determine whether another provided cooperation and assistance to the government, or is a convicted sex offender where minors were involved. Inmates regularly request copies of their docketing statement, judgment and commitment order, and statement of reasons section.
Nothing to report	I've been in this position for less than a year, so my perspective on the questions is very limited.
details of a specific incident; procedures for protecting defendants; general comments about the sources to identify cooperator	I've [only] been on the bench [redacted]...so not a lot of context to respond. I had one case where the potential for 5K1.1 was mentioned in the plea agreement. Later, the FPD asked permission to substitute a revised plea agreement (so it would appear as the "original" [agreement] on the docket), deleting reference to cooperation because of threats conveyed to defendant's family. My clerk has also reported anecdotal instances of "rough and [suspicious]" looking people coming to the [public] viewing terminal to see plea agreements and/or 5K motions.
details of a specific incident; general comments about the sources to identify cooperator	Just the one incident mentioned earlier. It occurred in a multi-defendant drug case. The witness was a defendant in a related multi-defendant drug case and was seen coming back from court. Unclear how one of the defendants (the one who threatened him) knew he had cooperated.
general comment about harm in prison/prison culture; general comment about the frequency of harm	Many clients who were sentenced to a BOP facility have requested court documents that confirm that they were not cooperators.
general comment about harm in prison/prison culture; general comment about the frequency of harm; procedures for protecting defendants; comments about refusal out of fear	Many of our clients request their paperwork after they report to BOP and tell us that if they do not prove they were not cooperating they will be in physical danger. In our district we routinely seal matters on the docket and close hearings that are related to cooperation. We do not track numbers - but we often have witnesses refuse to be interviewed by us in fear that cooperation will tag them as a "snitch" and place them in physical danger.
general comment about the frequency of harm	Many of the threats were made by the defendants appearing before me of actual and potential witnesses against them. I have seen correspondence and transcripts of phone calls containing such threats.
procedures for protecting witnesses	Many of those [threatened] went into witness protection.

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general comment about harm in prison/prison culture; general comment about the frequency of harm	Many requests for transcripts because of demands from other inmates in prison to prove that the defendant was not a cooperator. Some threats to defendants whose sentencing hearings have been postponed when co-defendant trials are postponed because they are assumed to be cooperating.
comments about refusal out of fear; general comment about harm in prison/prison culture; general comment about the frequency of harm; general comments about the sources to identify cooperator	Many times defendants will refuse to cooperate because of threats to family, friends or themselves. There is also the fear of the unknown when they reach BOP, as it is common knowledge that "cooperators" are targeted. Further, all of our plea agreements contain boilerplate language regarding cooperation, so anyone in this district could be identified as a cooperator even when they did not cooperate. We also receive many variances on factors other than cooperation, and defendants are concerned that the variances, though not related to cooperation, may target them in prison. We routinely give a copy of the sentencing memorandum we prepare to clients. 5K motions prepared by the government are not shared with us.
general comment about the frequency of harm	Most cases involved illegal aliens with ties to drug cartels in [redacted]. Defendants feared for their [families'] safety. Whether actual threats or simply fear arising out of the retributive reputations of the cartels was the cause of reluctance to provide information, I cannot say.
procedures for protecting defendants; general comments about the sources to identify cooperator	Most information is anecdotal. No hard details are available. It is our practice to seal any filing or proceeding that references cooperators, except the testimony of a cooperator in open court.
general comment about the frequency of harm; general comments about the sources to identify cooperator	Most of the cases involve individuals in either pretrial detention or release status who were threatened by individuals (often co-defendants) who knew the "victims" were assisting the government either after arrest, or had cooperated with law enforcement prior to arrest. I believe very little of the information about cooperators was gleaned through court documents, mostly it was by word of mouth or from the street.
general comment about the frequency of harm; details of a specific incident	Most of the cases where I have clients who reported threats of harm arise in in drug conspiracy cases, mostly involving [redacted]. The reported threats have been both implied and explicit. The implied threats typically involve someone telling the defendant they know where he lives or where his family lives. One [explicit] threat involved discussions as to whether to cut the defendant's fingers off or kill him.
general comment about the frequency of harm; general comments about the sources to identify cooperator	Most of the problems our clients face are because of the nature of their charges, eg child pornography cases. Those clients are very concerned about the privacy of their court files and records.
general comments about the sources to identify cooperator; nothing to report	Most of the threats came as a result of actual trial testimony by the defendants/offenders who were threatened. I have no information in any of the cases that points to court documents being used to identify the defendants/offenders as cooperators.

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general comment about the frequency of harm; procedures for protecting defendants	Most requests to seal cases have been due to the protection of the ability of a defendant to cooperate without the possible targets learning of the Defendant's agreement to cooperate which would impede the Defendant's ability to lure into traps the government has devised for the cooperation. I have not heard of any person who was a witness to a case to whom a threat was made.
comments about refusal out of fear; general comment about harm in prison/prison culture	Mostly gang defendants and witnesses don't want to cooperate because of actual or perceived harm and the need to prove they are not co operators by sufficient documentation when they enter the bureau of prisons
details of a specific incident	my client that was harmed was attacked while in transit--he was threatened several other times, also while being transported to/from court or facilities
general comment about the frequency of harm; comments about refusal out of fear	My clients are concerned about harm to themselves or family in cooperation cases but I have not had any clients decline to cooperate for that reason.
Nothing to report	My judgeship began in [redacted].
general comment about the frequency of harm; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator	My [only] [information] about possible harm to witnesses comes from occasional comments by agents or AUSAs that detained defendants have been "reaching out" to persons outside the jail to have them, in turn, contact persons believed to be [cooperators]. I don't know how often this happens, but assume that it's not uncommon. AUSAs & USMS Deputies would be better sources of data. / / I do know that prison inmates are being called on to get and provide to others copies of their PSRs and, perhaps, transcripts of sentencings. Docket sheets containing sealed plea agreements or sentencing [memoranda] area big red flag.
Takes issue with the survey	My responses to the two previous questions left blank is: fewer than 10.
Nothing to report	N.A.
Nothing to report	N/A
Nothing to report	N/A
Nothing to report	N/A
Nothing to report	N/A
Nothing to report	N/A
Nothing to report	n/a
Nothing to report; procedures for protecting defendants	Neither my staff nor I can remember any instance in the past three years of defendants or witnesses being harmed or threatened because of that person's cooperation with the government. In fact, I can't remember any such instance in my [redacted] on the bench. / I know we are careful in my jurisdiction to seal sentencing memos and transcripts of sentencing hearings whenever cooperation is involved or at least whenever I am requested to do so by defense counsel or the government. It is also, of course, possible that we just

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	haven't heard of harms or threats that occur after our cases are closed but I am [sensitive] on the subject and would remember if it had come to my attention.
Takes issue with the survey; general comment about the frequency of harm; comments about refusal out of fear; procedures for protecting witnesses	Neither the USAO nor law enforcement agencies track this data, so we have been compelled to provide estimates. Further, it is not clear what the survey means by a witness "withdrawing an offer of cooperation" as opposed to "refusing cooperation." Witnesses, especially in drug and violent crime cases, frequently live in urban areas where "snitching" carries enormous danger. Law enforcement agents commonly hit a wall of silence in a community, stemming largely from the fear that powerful groups will kill witnesses who are seen as providing information to the government. Frequently, this wall of silence can be penetrated only if we manage to arrest and detain many members of the group, freeing residents of fear of retaliation.
Nothing to report; procedures for protecting defendants; general comments about the sources to identify cooperator	No client has reported harm or threats of harm in the last three (3) years. Requests for docket info have decreased since the [redacted] has instituted a policy of sealing ALL plea agreements, not just those entitled Plea and Cooperation Agreements. Those who have asked in the last three (3) years do not report harm or threats of harm in their requests as those requests are probably being screened by those threatening/doing the harm, but that cannot be verified.
Nothing to report	No harm or threats occurred.
Nothing to report	No incidents.
Nothing to report	no threats occurred to my knowledge
Nothing to report	No threats or harm that I am aware of
Nothing to report	No threats, thus no change.
Nothing to report	None
Nothing to report	None known.
Nothing to report	None of my cases that I supervised have experienced threats or harm.
details of a specific incident; comments about refusal out of fear	None of my clients were actually harmed. I had one defendant whose family in another country was threatened. He refused to cooperate.
Nothing to report	None of these matters have been brought to my attention.
Nothing to report	None that I can recall, after checking with my Courtroom Deputy and my Probation Officer liaison.
Nothing to report	None that I know of.
Nothing to report	not applicable
Nothing to report	not applicable, because [I'm] not aware of any such threat to a witness or defendant in any of my cases.
Nothing to report	Not aware of any harm or threat of harm
Nothing to report	Not sure this is a real issue in our district.

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general comment about the frequency of harm; policy comments; takes issue with the survey; comments about refusal out of fear	Obviously, gang and prison inmate prosecution create the greatest threat of actual violence and potential for frightening witnesses from testifying. While "transparency" is at the bedrock of our judicial system, with gang, organized crime, and prison prosecutions transparency comes at a high price when cooperators are an integral part of the prosecution or investigation. Questions 2 and 4 require a highly speculative response. My experience shows that a large number of potential witnesses and defendants are [deterred] and therefore refuse to cooperate because they perceive danger to themselves or their families. I would [not] know if they didn't tell me or refuse an offer, so, my quantification of the numbers is speculative.
details of a specific incident; procedures for protecting defendants	On the first defendant, that individual was placed in protective custody after being harmed/shot. / With respect to the second defendant, that individual was housed in protective custody in a hotel. / With respect to the third defendant, that individual had physical harm but declined any protective custody.
details of a specific incident; procedures for protecting defendants	One additional threat to report (can't go back in survey). Offender on supervised release, cooperated against fellow gang members, separated while in custody and USPO work to keep him separate during supervision activities. Threat was actual physical harm.
details of a specific incident; procedures for protecting defendants	One case in which a defendant on TSR was murdered after [testifying] in court (gang related) and another case were we had to transfer or move a pretrial defendant to another district.
details of a specific incident; general comment about the frequency of harm; general comment about harm in prison/prison culture; procedures for protecting defendants; comments about refusal out of fear	One client got has face slashed in as a result of his cooperation. Numerous clients request information in order to show they did not cooperate. This number includes clients who did cooperate, but who may not have received a sentence reduction or whose plea agreement did not contain cooperation language. These clients believe they will be harmed if other inmates believe or find out the client cooperated. Two clients requested having solitary confinement protection because they could not provide the ECF docket report to other inmates, since the ECF docket report would show a reduction for cooperating with the government. No one recalls any instances where witnesses were threatened. Third party cooperators have backed out due to perceived danger.
details of a specific incident; procedures for protecting defendants	one client had to be placed in the BOP witness protection program due to the severity of the threats against him by other BOP inmates.
details of a specific incident; comments about refusal out of fear; general comment about the frequency of harm; general comment about harm in prison/prison culture	One client knew of a witness murdered in [redacted]. He flatly refused to cooperate. He received life after conviction at trial. I have many clients who ask for 'fake' documents. One client was beaten while in prison and did lengthy time in segregation. This problem has increased much in last 2 years. Not sure why.

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details of a specific incident; Takes issue with the survey	One defendant was charged with witness intimidation. Also, I assume the survey includes the gov't threatening witnesses with charges or perjury, misprision, and/or conspiracy.
details of a specific incident	One instance of a threat to family members. This was addressed by both counsel. If my docket is any example, threats and harm do not appear to be a significant problem in this district.
details of a specific incident	One of the cases was actively cooperating. The other case involved co-defendants who had been boyfriend/girlfriend and were both out on release.
general comment about harm in prison/prison culture; comments about refusal out of fear; general comments about the sources to identify cooperator	One of the main concerns regarding defendants /offenders in our district is the safety valve requirement. Once in custody and after they plea, [an] inmate has to demonstrate to other inmates that he/she is not cooperating with the government. As proof of this, they have to show their plea agreement and [often] they are not willing to comply with the safety valve for fear of retaliation
details of a specific incident; procedures for protecting defendants	One offender was victimized twice by [redacted] gang members in [redacted]. He was placed in a hotel for 30 days for safety and relocated to [redacted].
procedures for protecting witnesses; details of a specific incident	One witness was placed in the WITSEC program after cooperating. Testimony was not needed because all defendants pleaded guilty. The witness was not a successful participant in the programs due to rule violations.
general comment about the frequency of harm; policy comments; procedures for protecting defendants	Other than a general concern about a possible threat , I am unaware of a specific threat or attacks made to a specific defendant /witness, and I have handled a fairly heavy criminal docket involving "drugs and guns" for years. AUSAs have also mentioned to me that until recently there was no reason for alarm, but all of a sudden there is a big push either by defense lawyers and/or DOJ to have everything sealed for 35b's or 5k1s.. This is despite that there is not one documented incident that I am aware of in all the cases that I have handled of a problem. Many are advocating sealing everything of a cooperative nature now but this is in my opinion inconsistent with any empirical evidence that i am aware of and the first amendment right of the public to know about court proceedings and filings. / / /
general comment about the frequency of harm; procedures for protecting defendants	Our district has had numerous [redacted] cases and security is usually increased during trials/sentencings because of rumors of threats. I have very limited information regarding those threats or rumors.
procedures for protecting defendants; general comment about the frequency of harm; general comments about the sources to identify cooperator	Our practices have changed in recent years to make docket and in court references more oblique and less suggestive of cooperation. Often we [refrain] from discussion 5K1 documents and we [camouflage] them on the docket. We have been informed with increasing frequency that codefendants purchase transcripts of hearings regarding an alleged cooperating defendant and/or witness and manage to access

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	electronic dockets with help from others on the outside. These procedures require some careful management by the judge and others involved in the process.
general comment about the frequency of harm	Please keep in mind that my courthouse sits [redacted]. I hear from hundreds of defendants that they were threatened and/or harmed in [redacted] immediately prior their offenses in the [redacted]. For those who believe that narcotics traffickers are not dangerous criminals need to come sit in my court and hear/see the real stories of what happens in [redacted] by such traffickers.
Nothing to report	Please note that my statistical sample is quite small, in that I am a relatively new judge ([redacted] on the bench).
general comment about the frequency of harm	Primarily I recall threats against AUSAs and/or one defense or public defender.
general comment about harm in prison/prison culture	Prison gangs are an on-going problem.
general comment about the frequency of harm	Reported threats typically are brought to the court's [attention] by defense attorneys during the sentencing hearing, and mostly pertain to families outside the United States in drug trafficking cases. I am unaware of any reported threats being carried out.
general comment about the frequency of harm; details of a specific incident	Reports of threats against cooperating defendants are routine in this district. Actual harm is more rare, but it occurs. I have been personally involved in two cases in [redacted] in which witnesses were murdered.
general comment about harm in prison/prison culture; procedures for protecting defendants	Seems to me the real problem is what occurs after the cooperators begin serving a prison sentence. It is there that fellow prisoners request "proof" that the individual did not cooperate. It's there, too, where some have to seek refuge in the SHU. At least in my experience, it isn't that big of a problem pretrial.
general comment about the frequency of harm; general comments about the sources to identify cooperator	Some cooperators are so fearful that they do not want to receive 5K1.1 reductions to their sentences, nor do they want any mention of cooperation in court records or in court proceedings. In some instances, defendants who have not cooperated, or those who did cooperate but did not want a sentence reduction, request copies of the sentencing transcript and presentence report so that they can "prove" that did not cooperate.
general comment about the frequency of harm; general comments about the sources to identify cooperator; procedures for protecting defendants	Some of the threats were vague in my opinion. I only recall one case with specificity, but believe the frequency of the issue has not increased in the last year. Frankly, when a motion is filed by the government under seal at or about the time of the defendant's sentencing-- if it is identified as a motion filed by the government, a reader of the docket could [easily] surmise the sealed motion is a 5K1.1. I am unsure but believe the "sealed motions" are now listed as sealed documents and the filer is not identified. This is how it should be.

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details of a specific incident	The answers to the questions on this page are [estimates] based on conversations with prosecutors in our office.
procedures for protecting defendants; policy comments	The better prosecutors and criminal defense bar have become much more sophisticated in keeping documentation reflecting cooperation by third party witnesses as well as defendants out of the public eye- i.e. no initial formal arrest paper work and/or bond allowing the defendant to cooperate fully prior to being formally charged which in many instances is driven by a post-cooperation negotiated plea to a particular offense that is actually capped in terms of available sentencing options- such as the 48 month maximum sentence for use of the telephone in a drug conspiracy. In other instances plea agreements are negotiated on the basis of specific relevant conduct that may defacto serve to cap the sentence without the Court necessarily having to formally become involved with the matter of the defendant's cooperation. / / Finally, given the fact that the sentencing guidelines are advisory, along with today's more infrequent use of the 21 U.S.C. 851 enhancement, there are more cases being processed without the Court ever having to address the subject of a reduced sentence under U.S.S.G. 5K1.1 or Rule 35(b). / / All of that said, there will never be a perfect solution to the dilemmas faced by defendants, witnesses, prosecutors, defense attorneys, as well we, as judges. All we might do collectively is to reduce where possible the wrong people learning about who is or has been a cooperating defendant or witness. Truly, the long-standing practice of sealing documents as well as formal sentencing hearings has not served the laudatory goal of providing anything close to a measure of protection for cooperating defendants. /
details of a specific incident; general comments about the sources to identify cooperator; general comment about the frequency of harm	The case I described earlier in this survey was one in which, if I recall correctly, a warrant was not sealed and retaliation was either threatened or likely. I am aware of other anecdotal instances in which prosecutors and defense attorneys have felt retaliation was likely, but I am not aware of any details. Often these instances are revealed when a prosecutor or defense attorney asks during sentencing to disclose cooperation information at the bench.
details of a specific incident; general comments about the sources to identify cooperator	The case [referenced] was [redacted], in which [redacted], a member of [redacted], learned that another member of [redacted], [redacted], was quoted in [redacted] presentence report as identifying [redacted] as a made member of the [redacted]. The page from the presentence report was shown to [redacted], [redacted], who ordered a hit--the murder--of [redacted]. [redacted] was convicted of the murder at trial.

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general comment about the frequency of harm; general comment about harm in prison/prison culture; procedures for protecting defendants	The client is worsening for everyone, cooperators and non-cooperators, especially in prison. It is reported by clients in our District and nationwide that when you arrive in prison you are given a certain length of time to prove through your documents that you are not a snitch. Without such proof, you are not allowed safe access to the prison yard. If you can't prove that you are not a snitch you end up in segregation or bouncing from prison to prison or worse.
general comment about harm in prison/prison culture; general comments about the sources to identify cooperator; general comment about the frequency of harm	The consistent theme that we have heard about regarding defendants or offenders in our District, is incarcerated offenders being coerced or threatened while in BOP custody or RRC facility (pre-release) if they did not try to get a copy of their presentence investigation, or plea agreement and provide it to the threatening party. The threatening party is usually doing this to ascertain whether an offender has been a cooperating witness or received a sentence reduction for cooperation (snitching) to government officials.
details of a specific incident; general comments about the sources to identify cooperator; general comment about harm in prison/prison culture; procedures for protecting defendants	The Defendant in question not only made a deal with the Government, he actually testified at a jury trial against the other two defendants. There was no question but that his file contained plea deal specifics, and that the co defendants knew what the deal was (it was brought out on cross examination before the jury). When he went to prison for his part in the crimes, we did everything we could to protect his location, as well as his identity, but it somehow leaked about his true identity.
details of a specific incident	The defendant referenced was residing in our District and case agents relocated the individual to another District.
details of a specific incident	The defendant/witness referred to in this survey is the same person.
procedures for protecting defendants; general comment about the frequency of harm	The district court has adopted split plea procedure by which cooperation agreements are protected. We have seen no change in the level of threats to witnesses and/or cooperating defendants based on this procedure.
procedures for protecting witnesses; general comments about the sources to identify cooperator; general comment about the frequency of harm; general comment about harm in prison/prison culture	The [redacted] attempts to obtain protective orders in cases involving cooperating witnesses, and does not allow that information in the jails. Nonetheless, targets and defendants infer who the cooperators are from review of their discovery and spread the word about their cooperation in the jail. We have prosecuted two witness retaliation cases in the past three years, and have investigated several others. In the past several years, threats against cooperators have increased, and pre-trial separation orders have been ineffective in avoiding confrontations.
procedures for protecting defendants; general comments about the sources to identify cooperator	The documents where it was apparent that someone was cooperating were filed under seal. However, sophisticated reviewers of docket entries usually presume that that means cooperation.

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Nothing to report	The entire current staff of probation officers were polled. There were no other cases identified.
details of a specific incident; general comment about harm in prison/prison culture; procedures for protecting defendants; general comment about the frequency of harm	The first case I mentioned involved very serious assaults on the defendant who provided useful cooperation relating to a number of cases. He was threatened and then beaten in two different prisons before finally being provided what appears to be secure housing. He was also in pretrial detention for many years in unacceptable segregated isolation because of the recognition he was in the process or would cooperate. (In my experience, defendants who cooperate during pretrial supervision often end up being housed in the most segregated and restrictive conditions.) This particular defendant's son, who was incarcerated in a state facility, was also threatened in connection with his father's cooperation. Viable threats were made against the family members also -- who as a result had to move from their home. / / The main pattern involved in other cases involves defendants who are in pretrial detention who face threats on the safety and welfare of the family members at home in [redacted] or [redacted] if they cooperate. We often do not end up knowing what happens under these circumstances. These defendants usually are too scared to even alert authorities regarding the threats. / /
Takes issue with the survey; general comment about the frequency of harm; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator; procedures for protecting defendants; policy comments	The format of this survey was troublesome for me because this is not a yes/no/# of cases issue. I don't have exact numbers, but I can say that in the last 5 years, the number of present and former clients who have demanded that I provide them their discovery or sentencing documents to show to other inmates to prove that they are not cooperating has skyrocketed. The demand to see PSR's is very high also, which causes problems for inmates because a lot of jails/prisons will not allow inmates to receive them in the mail. Many inmates are branded as snitches who are not actually cooperating, but there is often no way to prove that they are not cooperators. Additionally, a lot of my clients do not want to ask to go into PC because it is a horrible way to serve their sentences and the fact that they requested PC once will follow them around to other institutions and increase the likelihood that they will be placed their against their wills, for institutional safety. I honestly don't know how to balance a defendant's right to review the evidence against him with protecting him from harm based on suspicion, sometimes baseless, that he is cooperating.
general comment about the frequency of harm; procedures for protecting defendants; general comments about the sources to identify cooperator	The government regularly claims that cooperators are at risk but have never cited an example. AUSAs want files sealed to conceal cooperation agreements even AFTER the cooperators testified in open court in front of the defendant. Fear is rampant. I have a [redacted] participant who testified twice against a [co-conspirator] in a case which lasted more [than] [redacted]. She was never concerned.

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procedures for protecting defendants; policy comments	The harm or threats of harm experienced by my clients was directly related to the practice of one Judge who refused to seal documents in his cases and NOT to the practice or Local Rule with respect to sealing. This particular Judge's philosophy was 'this is a public courtroom, the public should have access.' As a consequence, and to avoid harm, many clients were advised of his practice and urged to factor that practice into the decision on whether or not to offer assistance.
details of a specific incident	The last two cases, individuals went to the homes of defendants' families and threatened them, if defendant cooperated.
general comment about the frequency of harm; general comments about the sources to identify cooperator	The most common threats and attempted acts of harms, that I have encountered, occur when a defendant or a witness is a member of a well knit group of friends, gang members or connected families. Some of the acts of intimidation are not assisted by the contents of court orders, opinions or events in open court. Community knowledge of events is a common source of information about who is (or might be) allied with police or prosecution. But there are incidents where a witness or a defendant's role for the prosecution is uncovered only because lawyers and judges do not consider the danger to cooperators. There are general incentives (in gang cases) to promote a policy of harming snitches within local culture.
general comment about the frequency of harm; general comments about the sources to identify cooperator; details of a specific incident	The most frequent [occurrence] of threats is with cooperating non-defendant witnesses. Their cooperation is revealed through discovery: disclosure of immunity letters and interview reports. I had one witness kidnapped and beaten due to cooperation during investigation. Several other witnesses have been threatened once the witness list for trial is released.
Takes issue with the survey; general comment about the frequency of harm	The number 50 is a plug number because you would not accept a three figure number. These sorts of threats happen so routinely in gang and drug cases that i have lost count. The number of times I have become aware of such threats is EASILY in the hundreds.
general comment about the frequency of harm; procedures for protecting defendants; general comments about the sources to identify cooperator	The number of instances of threats were down in 2014 because the number of cases were down dramatically. Most defendants request that counsel alter court documents because inmates demand the plea agreements, court docket entries, and a [transcript] of the proceedings. If the inmate does not turn over the documents, they claim they are beaten. Sealing the documents would not be helpful in these cases. The larger problem is that co-defendants learn of cooperation against them and then disseminate the information to other co-defendants or unindicted co-conspirators. Mentally challenged defendants and older defendants seem to particularly be at risk.

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procedures for protecting defendants; general comment about the frequency of harm; general comments about the sources to identify cooperator	Additional comments provided over email: For more than three years we have following a practice of attaching a sealed supplement to every Statement in Advance of Plea regardless or whether there is a cooperation agreement or not. We do this to avoid it being apparent on the docket whether there is a cooperation agreement. Prior to our court adopting this practice, we received regular comments from counsel that defendants were subjected to threats and accusations once they arrived at the prison. I have not received similar comments since we adopted this practice. I hope this may be of help.
Takes issue with the survey; general comment about the frequency of harm; comments about refusal out of fear; procedures for protecting witnesses; general comments about the sources to identify cooperator; general comment about harm in prison/prison culture	The numbers listed above are only place holders to enable us to complete the survey. What numbers we do have and the relevant explanations are attached below. / / Not including the defendants regarding whom you've provided information in this survey, how many more defendants from cases prosecuted by your office have you learned were harmed or threatened in the past three years? / / 113 – This number is based on separation memos filed with the USMS to keep cooperators separated due to safety concerns and covers the years 2012 thru 2014. It may overstate the number of threats from co-defendants as most of these separation requests are based on concerns of AUSAs and may not necessarily involve an actual threat. / / Not including the witnesses regarding whom you've provided information in this survey, how many more witnesses from cases prosecuted by your office have you learned were harmed or threatened in the past three years? / / 22 – This number is based on the number of times the USAO provided assistance to witnesses to relocate due to concerns for their safety. This number probably under-estimates the actual number as it does not include those witnesses assisted by investigative agencies or witnesses who relocate on their own. / / / In the past three years, how many defendants withdrew offers of cooperation because of actual or threatened harm? / / While there is anecdotal evidence of defendants who withdraw offers of cooperation out of fear of retaliation, exact numbers are not known. But it is believed to be rare. / / In the past three years, how many defendants refused cooperation because of actual or threatened harm? / / We do not keep records of defendants who refuse to cooperate because of actual or threatened harm. However, regularly we do have defendants who offer to plead guilty and decline to cooperate in any way against their co-defendants for fear of retaliation. / / In the past three years, how many witnesses withdrew offers of cooperation because of actual or threatened harm? / / Again, we have no specific number; it does happen, but it is rare. / / In the past three years, how many witnesses refused cooperation because of actual or threatened harm? / / Unknown / / / Please use the space below to pro-

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	vide any additional information about harm or threats of harm experienced by defendants and/or witnesses (or their family or friends) from cases prosecuted by your office in the past three years. / / In every case involving gangs, illegal narcotics, violent crime and now even some white collar crimes, our office is very sensitive to the safety of cooperators, be they defendants or witnesses. And while we don't currently have a specific system for tracking threats against cooperators, anecdotally, we know it happens regularly. / / In the last three years, the U.S. Attorney's Office has provided assistance in [redacted] different cases to witnesses and/or their families to temporarily or permanently relocate due to concern for their safety as a result of their cooperation with the government. And while not specific to the last three years, people have been murdered on suspicion of being a government witness, even when they were not. In the same time period, our office has sponsored [redacted] defendants to the Federal Witness Security Program, and we anticipate [redacted] more this year. / / There are several ways by which cooperation becomes known. The criminal element has its own intelligence system which can be very effective. In a recent case we learned members of a gang were accessing PACER to look for documents to confirm cooperation. The most common method to signal cooperation seems to be the delay between a guilty plea and sentencing. If the defendant is not sentenced in a timely manner and removed to BOP, he is suspected of cooperating and may be at risk. Even at BOP, inmates are demanding that newly arrived inmates provide copies of their plea agreements or transcripts of plea proceedings to verify they were not cooperators. / / At times, as a result of a motions hearing or of the discovery process, witness information is obtained. Most of the direct assistance to witness mentioned above [redacted] is a result of one of these two events. / /
comments about refusal out of fear; details of a specific incident; general comments about the sources to identify cooperator; general comment about the frequency of harm	The offenders are reluctant to report the threats/harm to law enforcement since in some instances, the individuals reside in the same community; some have gone back to their prior criminal associates to seek support--could pose a risk to returning to the "gang lifestyle;" all incidents have been reported to federal or local authorities, but very little action has been taken; one offender asked for political [asylum] as threat was overseas; offenders are not aware of how the information "leaked and the threats are coming by way of messages sent by unknown individuals or means (e.g., unknown texts, callers).
details of a specific incident; general comments about the sources to identify cooperator	The one case I recall involved a witness testifying at trial, and the threats came from defendant's family.

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details of a specific incident	The only cases reported as possible threats involved co-defendants (both female) who has been continuously threatened and abused throughout the course of the offense generally. Once they made the decision to cooperate, there were no further threats or intimidation, but the women remain fearful based on both actual and threatened harm to them during the course of the offense. There is nothing to indicate that the fact of their cooperation resulted in additional threats or actual harm in either case.
details of a specific incident	The only incident I am aware of is the alleged murder of an FBI informant in a bank robbery case. I do not recall the details of how the informant's identity may have been disclosed. The U.S. Attorney never prosecuted the murder. He would have additional information that I do not have.
general comment about the frequency of harm	The only information the office has relative to threats are a number of allegations from defense attorneys that a client or family member was threatened. None of the allegations have been confirmed as being valid or related to the case being prosecuted.
details of a specific incident	The prison guard was accused of "diming" the defendant. Never able to verify.
general comment about the frequency of harm; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator	The rate of former clients (defendants) incarcerated at BOP facilities requesting copies of the their plea agreement, final judgment order, docket sheet, and sentencing transcripts, rose dramatically in calendar year 2014.
general comments about the sources to identify cooperator; general comment about the frequency of harm; procedures for protecting defendants; general comment about harm in prison/prison culture	The Rule 35 and 5K process is problematic. Our judges are resistant to routinely sealing these motions. We are increasingly hearing from cooperators about information taken from public filings being posted on sites such as "Who's a Rat". Additionally, threats to witnesses and cooperating defendants often result when the defendant learns from the discovery process that a particular co-defendant or witness is cooperating. Lately, we have begun hearing from cooperators in the BOP that when they leave their assigned institution on an ASR they are branded a cooperator and are retaliated against when they return.
Takes issue with the survey; general comment about the frequency of harm; comments about refusal out of fear; details of a specific incident; general comments about the sources to identify cooperator	The survey asked for overall numbers regarding harm or threats of harm to defendants and witnesses over the last three years. Our office does not have a system that captures such data, and therefore accurate numbers were difficult to collect. Individual Assistant United States Attorneys who are currently in the office tried to provide information based on their recollection of cases and incidents. Accordingly, we do not feel like we have an adequate quantitative result. Moreover, the actual numbers reported do not provide an adequate picture of the seriousness of the problem as, in our District, the fear of being identified as a cooperator because of fear of harm or retaliation has dramatically

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	reduced the number of individuals willing to provide information to the government and testify against others. Indeed, the experience in our District is that we are unable to get individuals to cooperate because of their fear that something will happen to them or their family if they do. This seems to be an increasing problem over the years. One reason for this change is the increased focus on drug trafficking organizations with connections to [redacted]. Defendants and witnesses are worried about violence against themselves as well as their families in [redacted]. For example, one AUSA noted that in her last three cases that involved drug trafficking organizations that had connections to [redacted] (all large, multi-defendant cases, which used wiretaps), none of the defendants or putative defendants would cooperate for fear of retaliation against them or their families, both in [redacted] and [redacted]. In addition, in the violent crime cases, witnesses will often refuse to provide information, from the earliest stages of the investigation, to law enforcement for fear of retaliation. Even when we have had success in obtaining their testimony through grand jury testimony, these same witnesses will often refuse to testify at trial or will provide different version at trial. The witnesses do not want to be perceived as cooperating with the government. / / Accordingly, in response to the questions above regarding how many witnesses and defendants refused cooperation because of actual or threatened harm, the answer that we want to provide is "many." A precise number is not available. It is very difficult for us to capture how many witnesses and defendants have told us that do not want to cooperate because of the risk. It seems to happen regularly in violent crime and drug trafficking cases. / / In addition, the stigma of being a cooperator/perceived as a cooperator seems to be so problematic that we have heard from defense counsel that even if their client/defendants provide safety valve proffers pursuant to USSG 5C1.2, they receive word from co-defendants/others in the organization that they are at risk of retaliation. The number of safety valve proffers has reduced dramatically, and the repercussions of refusal are less significant (since there has been a policy decision to apply few mandatory minimum sentences in drug cases). / / The document that most signals that someone is cooperating is a sealed plea agreement. If a plea agreement is sealed, it is a “red flag” alerting others that a particular defendant is cooperating, as there is no other reason to seal the plea agreement. / / Moreover, in most of our threat incidents, the cooperating witnesses/defendants were also identified through the discovery process. Many witnesses had to be moved for their safety. /

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details of a specific incident	The threats arose in a RICO case involving a gang. Some of the members of the gang cooperated with the Government, and they and their families were subjected to threats from the gang.
general comment about the frequency of harm	The threats I see only arise in (1) gun prosecutions of street gang members and (2) drug cases in which the witness or defendant has direct ties to [redacted] dealers.
details of a specific incident; general comment about the frequency of harm	The threats involved were between rival families while a co-[defendant] who was a member of one family was cooperating against a member of another family during a co-[defendant's] trial. These types of threats are somewhat typical between the large extended families [redacted].
general comments about the sources to identify cooperator; details of a specific incident; general comment about the frequency of harm	The USAO for the [redacted] prosecutes major crimes committed by or against [redacted]. In such cases cooperators are readily identified by defendants and their families. This circumstance routinely leads to attempts to intimidate witnesses. Additionally, in at least one public corruption case from a [redacted] who cooperated with the government as a witness was the target of an attempt to oust him from office. That effort is believed to be motivated by a desire to retaliate against the witness for his cooperation. / / /
details of a specific incident; general comment about the frequency of harm; policy comments; procedures for protecting defendants; general comments about the sources to identify cooperator	The worst case I had involved the murder of several family members of two defendants (mother and son) to punish them for losing a substantial amount of contraband and also to intimidate them into not cooperating. Credible threats against defendants are frequent. I do not recall a precise number, but they are credible enough to keep the defendant from cooperating and receiving a lower sentence. Additional comments provided over phone: Respondent completed the survey with information, but he really focused on the last year and not the last three years. He said he feels like this happens 2-4 times per year in his district, and it is most often the defendants. Defendants will qualify for the "safety valve" but then not take it out of concern of being harmed. He suggested that the committees consider two levels for a filing system. Current CM/ECF only protects information through sealing. The sealed event still provides a record, and drug traffickers know how to read the dockets for what this sealed information is really saying. If there were a public version and a private version of the docket you could better protect the information. Sealing everything just triggers an alarm. He had a case involving a drug conspiracy where the main defendant was the brother of a high level member of a drug cartel. He told his lawyer he would not cooperate because he was concerned about the safety of his family and his

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	wife's family back [redacted]. The lawyer had the [redacted] contact people in [redacted] to obtain information about the cartel [redacted]. This information was provided to federal authorities so the defendant could receive the benefits of cooperation. Nothing was ever signed, and the judge was made aware of the cooperation only through conversations with counsel, both prosecution and defense. If there were a private version of the docket this information could be recorded, even noted in a pre-sentence report.
general comment about the frequency of harm; details of a specific incident; general comments about the sources to identify cooperator; procedures for protecting defendants	There are frequently threats of harm to defendants' families since my docket is close to [redacted]. In specific cases, such as the [redacted] trial, there were threats to defendants, witnesses, families, etc. In the gang conspiracy cases, there are usually threats to defendants, witnesses and family members. I am not aware of any documents [identifying] any person individually, but, of course, I do not know what happens once the BOP gets custody. All 5 K motions and orders are filed as are Rule 35 motions and orders and Presentencing memos are also sealed at sentencings, but have to be unsealed for appeal and other post sentencing actions.
Nothing to report	There has been no actual physical harm to a defendant to my knowledge. Defendants are more concerned with perceived harm and very few [ever] receive an actual threat of harm.
general comment about harm in prison/prison culture; general comment about the frequency of harm; general comments about the sources to identify cooperator; procedures for protecting defendants	There is a disconnect in the Bureau of Prisons between Washington senior management and the experience on the ground. I believe senior management has expressed the view that harm to cooperators while incarcerated is minimal. We have a federal prison in the district and have talked to the warden. He has indicated that the problem is significant and half of his [Special] Housing population consists of cooperators in protective custody. There are also a variety of other means those intent on harming cooperators are using to gather cooperation data. I presume there will be space elsewhere in the survey to report those findings. Additional comments provided in email: Those who are seeking to identify and verify cooperation of various defendants are extremely sophisticated. They are using a variety of means to gather information. By way of example, they are requiring incarcerated, suspected cooperators to obtain a copy of their judgment and turn it over to the prison gangs. There is apparently no BOP policy precluding this. They are requiring cooperator members' families to obtain transcripts and judgments so that they can compare sentencing exposure with sentencing results, and such documents clearly reflect cooperation without expressly saying so. In this District, we are using all means at our disposal to refrain from disclosing cooperation, including sealed doc-

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	uments, sealed proceedings and attachments to the judgment, among others. However, those protocols are not eliminating the problem. There is also a developing trend in our Circuit jurisprudence that seems oblivious to the cooperation issue. We do not discuss cooperation in the context of a plea, but we fully recognize that the prospect of a cooperation departure is a prime motivating factor for the plea. The Circuit has issued some opinions that question the absence of such a conversation during the Rule 11 plea colloquy. This entire problem is national in scope, and would benefit from a national policy. However, if there continues to be a disconnect between BOP's national management and prison officials on the ground, I am not sure that any policy will alleviate the problem.
general comment about harm in prison/prison culture; general comment about the frequency of harm	There seems to be an organized effort in the BOP by some inmates to determine whether other inmates have/are cooperating. We have received an uptick in former clients wanting information to prove they didn't cooperate.
general comments about the sources to identify cooperator; procedures for protecting defendants	There were direct threats to me and my family that the Marshall addressed. If there are closed sentencing hearing it is presumed that it is to discuss cooperation. I don't mention the [cooperation] agreement on the record or close a sentencing hearing unless specifically requested by the parties. Attorneys regularly [practicing] before me understand this and it works well. There are always reasons for a variance regardless of cooperation. Newer attorneys want to discuss the cooperation agreement in detail and we have to close the hearing. It is no secret after that.
Nothing to report	There were none in 2013 or 2014
Takes issue with the survey; general comment about the frequency of harm; comments about refusal out of fear	These are not all-inclusive. Exact numbers can't be known. The "no snitching" culture is strong in [redacted]. We have not kept statistics on this, but many witnesses and defendants fear to cooperate without identifying their reasons.
Takes issue with the survey; comments about refusal out of fear	these cases are difficult to follow. The clients stop talking to us when they get really scared
general comments about the sources to identify cooperator; general comment about harm in prison/prison culture	They have access to PACER at the prisons and so prisoners and/or guards go through the dockets and tell people what the charges were and what the sentences were. This leads to being able to figure out if they cooperated.
Takes issue with the survey	This entire survey is a waste of time.
general comment about the frequency of harm; comments about refusal out of fear; procedures for protecting witnesses; procedures for protecting defendants	This is [redacted] and many defendants have links to DTOs. As such, defendants often have to balance the possibility of threats against the possibility of reduced sentences. Indeed, AUSAs in our district believed that the perceived or potential of threat or harm (without any actual threat made or harm inflicted) deters many defendants from cooperat-

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	ing and/or inhibits them from following through with the cooperation addendum. In addition, we were involved with several incidents in 2014 in which cooperators had to be relocated or placed in WITSEC due to threats. Finally, we also would note that, several years ago, our district court developed a docketing system, in consultation with USAO and FPD, to endeavor to better protect cooperators entering pleas. Called the Master Sealed Event calendar, it creates a docket skip early in every case, and then going forward a separate cooperation addendum gets appended, without a docket skip, to a special sealed calendar.
policy comments; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator; general comment about the frequency of harm	This is not a problem the judiciary can solve by sealing court records because inmates are required to "prove" they have not cooperated by producing their own paperwork. If the inmate has cooperated, which is often the case, he simply has no choice but to check himself into the Segregated Housing Unit because he knows the other inmates will access PACER and learn that he has cooperated. I have even had requests from defendants and attorneys to seal a defendant's entire court file so no member of the public could access it. Even then, however, the sealing of court documents related to sentencing raises a red flag as to whether a particular defendant has cooperated. This is a serious problem that needs to be promptly addressed by the DOJ. Defendants do not understand when they enter a plea and cooperation agreement that they are likely agreeing to serve their sentence in solitary confinement. Many of these inmates serve years in the SHU and if they are transferred to another institution the process simply starts over again and they enter the SHU for their own protection at the new institution. Although this is a DOJ/BOP problem, the judiciary has an interest in it because judges accept these pleas and they sentence defendants pursuant to the pleas. A sentence served in the SHU is a very different sentence than one served in general population. There is no programming. Any inmate serving a lengthy sentence in the SHU stands little if any chance at rehabilitation. The judiciary should insist the DOJ address this increasing problem.
Takes issue with the survey	This is useless when the relative of a defendant was murdered.
general comment about the frequency of harm; Takes issue with the survey	This issue is raised continually by defense counsel but I have no evidence of actual harm resulting. However, I lose track of cases after sentencing, so I am not the best person to ask.
details of a specific incident	This response only represents one case.

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general comment about the frequency of harm; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator	Threats against actual or perceived cooperators are very common. There is hardly a drug case where the ones caught with the drugs (or their families) are not threatened by leaders of the drug trafficking organizations. Others in the jail suspect cooperators when they get pulled from the facility and brought for a debrief. The government often discloses to codefendants the cooperation of one in order to coerce guilty pleas. I have never had a case where cooperation was learned from the filing of any document or something said in the courtroom. A person's cooperation is usually discovered or suspected long before the govt files a 5K1.1 or Rule 35 motion.
general comments about the sources to identify cooperator	Threats have been made after release of [discovery] (particularly Jencks).
general comment about the frequency of harm; general comment about harm in prison/prison culture; details of a specific incident; procedures for protecting defendants; procedures for protecting witnesses	Threats lower because our caseload has dropped since US Atty doesn't bring many cases here (he prefers [redacted] with lesser penalties). At BOP, prisoners often demand to see PSR or dkt sheet to alert them to prior cooperation. It's dangerous to give up documents and dangerous not to. One of my trials was against killers of a witness. Cooperators often face disapproving and threatening family and former friends when they get up on the stand. It causes some to be very cautious and not especially good witnesses. Family estrangement is a strong motivator to keep silent. A number of my defendants or cooperators are in WitSec and/or protective BOP custody.
general comment about the frequency of harm; general comment about harm in prison/prison culture; procedures for protecting defendants; general comments about the sources to identify cooperator	Threats of harm and harm to inmates are not limited to cooperators. Sex offenders and clients who victimize children receive some of the worst threats and injuries. It is very common for inmates to request sentencing documents to prove they are not cooperators or sex offenders. When an inmate arrives on a housing unit in a BOP facility they are required to prove they are not a snitch or a sex offender. If they do not or cannot prove they have "clean paper" they have to request protective custody. Many of these clients end up serving their sentences in the most restrictive conditions with no access to treatment or other programs. They live in fear even in protective custody. The prisons are so understaffed that prison [authorities] rely on inmates to keep order. This system of social stratification is therefore tolerated if not condoned. While PACER and CM/ECF have conferred great benefits they also have made life much more difficult for many inmates. Many inmates have someone on the outside with access to PACER to verify the status of other inmates. It is not hard to spot a snitch or a sex offender if you have access to PACER.

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general comment about the frequency of harm	Threats of harm are often recited to me from defendants during sentencing but rarely do I have any method of verifying their reliability. I do not doubt, however, that retribution for cooperation is a serious concern for many defendants faced with the Hobson's choice of cooperating or not receiving the most favorable plea agreement or the 5K or Rule 35 motion essential for avoiding the minimum mandatory sentence.
general comment about the frequency of harm; general comments about the sources to identify cooperator; general comment about harm in prison/prison culture; procedures for protecting defendants	Threats of harm to cooperators are routine in our principal pretrial detention facility and at various BOP [institutions]. Cooperators are sometimes identified through discovery documents when the case goes to trial (or very close to trial). We have reports of defendants (whether they cooperated or not) being told to provide sentencing and/or plea transcripts to prove to others at a BOP facility that they did not cooperate. Cooperators sometimes also are identified (or believed to be identified) through J&C's that contain a sentence not seeming consistent with the charges. We limit access to some documents sent to the BOP by requiring that they be viewed in the Warden's Office (or some other restricted space).
general comment about the frequency of harm; procedures for protecting defendants	Threats of harm usually made to cooperators while they are in pretrial detention with co-defendants. A request is then made to transfer to another detention center or to a different area of the present detention center. These requests are almost always granted.
general comment about the frequency of harm; general comments about the sources to identify cooperator	Threats seem to occur more often when the Govt. lets co-defendants know that a cooperator will testify at trial. At sentencing, threats against cooperators [are] used to strengthen the Govt's 5K1 motion on behalf of the cooperator.
general comment about the frequency of harm	Threats that I am aware of were addressed either to me or to the prosecutor in a given case. I am unaware of any witness that has been threatened, and I have not received any reports from the Bureau of Prisons of harm done to a cooperating defendant/inmate.
general comment about the frequency of harm	Threats to co-defendants, witnesses and victims have occurred in assault, rape, child sexual abuse and drug conspiracy cases. Threats of harm are a particular problem in [redacted] cases.
general comment about the frequency of harm; policy comments	threats to cooperating co-defendants are reported fairly frequently but I do not know if they are real threats or just talk. It often appears to be just talk. It is hard to solve the problem, because the identity of the cooperating co-defendant or witness usually cannot be kept from the defendant, who is usually the perceived source of the threat.
general comment about the frequency of harm	Threats to victims, witnesses and cooperating defendants has been increasing each year.
Nothing to report	to my knowledge [there] have been no threats

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details of a specific incident; general comments about the sources to identify cooperator	Two co-defendants were beaten in pre-trial detention when discovery/Jencks statements were given to defendants in jail and they learned of the co-defendants' cooperation. / An informant was killed when a gang learned he was informing to law enforcement.
details of a specific incident; procedures for protecting defendants	Two multi-defendant [redacted] cases in parallel prosecutions in which each had one or more cooperators and one in each case had veiled or express threats of violence or physical harm to the [cooperating] defendant or his family members which resulted in permission for each of the threatened families to relocate to another state pending completion of the case. The case ultimately ended with each/all of the defendants entering pleas of guilty and the last of them was sentenced [redacted].
general comment about the frequency of harm	Uncertain of number, but there are a few cases that have been verbally threatened.
procedures for protecting defendants	Usually the government and defense counsel have an agreed upon approach to these matters.
general comment about the frequency of harm; procedures for protecting defendants; general comment about harm in prison/prison culture; comments about refusal out of fear	Very few defendants ever tell me about threats or harm once they are sentenced. I have had a [few] (maybe 3-5) letters from prisons saying they are being threatened. In those situations we tell the AUSA or probation. Roughly half of the clients who could cooperate choose not to. A portion of these are concerned about their [safety].
Takes issue with the survey	Very hard to predict on a case [by] case basis.
general comment about the frequency of harm; general comment about harm in prison/prison culture	Virtually every defendant that we represent who ends up in BOP custody calls us to request proof that the defendant did not cooperate. Each inmate tells the same story -- he is confronted shortly after arrival at a BOP facility by an inmate or inmates saying that he has x number of days to prove he is not a cooperator or he will be beaten. Defendants routinely ask us to do things we cannot do -- i.e., provide a fake docket entry, fake statement of reasons for sentence, or to buy transcripts revealing the lack of cooperation.
procedures for protecting defendants; policy comments; general comment about harm in prison/prison culture	We are not allowed to provide copies of discovery and pre sentence reports to defendants detained due to potential threats of harm. However, this prohibition limits the defendant's ability to thoroughly review the evidence against them. / Often, once the Defendant has been sentence I have no further contact so I may not know if cooperation has [led] to threats of harm once in BOP custody.
details of a specific incident	We can only recall one other case approximately 6 years ago where a cooperator was assaulted due to his cooperation while in pretrial detention.

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general comment about the frequency of harm; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator	We constantly hear from clients about their desire to have documents to use in BOP to prove they are not cooperating. That number is in the hundreds. Media coverage of sentencings on TV leads to threats and violence against our clients. They are [savvy] enough to know that a sentence is too low following a guilty plea without cooperation.
Takes issue with the survey; nothing to report	We do not track this information so I cannot answer these questions with a specific number so I had to put 0.
general comment about the frequency of harm; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator	We do not track this information, so my numbers understate the occurrence. There has been a large increase in numbers of defendants calling or writing from BOP asking for their docket sheet. It is clear that most of the time it is because they are being pressured to produce this info to other prisoners. In one instance, another prisoner could be heard in the background telling my client what to ask for. / However, we don't track our defendants once they get to BOP, so we would not normally receive information about threats within BOP. Defendants who come back to us on Supervised Release Violations after release relate that this practice of checking docket sheets inside BOP is very common.
general comment about the frequency of harm; procedures for protecting witnesses	We experience this difficulty all the time, and constantly spend funds moving witnesses.
details of a specific incident; procedures for protecting defendants	We found two cases that fit the criteria of the [survey]. The first case is outlined above. Basically, the defendant was on bond and while he was on bond, he was working as a confidential informant. While on bond, he reported receiving death threats and was relocated for a time. He was in protective custody by A.T.F. So while he was on pretrial release we know he received death threats. We found out that after the defendant was on supervision by the probation office he was shot to death at a local bar. The second case involved a defendant reported being intimidated but not threatened. He reported a truck would drive by his house and park there and watch him. He noted several individuals also approached him and asked him questions about his family.
procedures for protecting defendants; general comments about the sources to identify cooperator; policy comments	We generally seal plea agreements with cooperation provisions, but it is an unsatisfactory approach. Inmates have become sophisticated in reading PACER, and many understand that a "sealed event" around the time of the plea is a strong indicator that the defendant is cooperating. This issue is of great concern to us, and we welcome the attention that is being paid to it.

Categories	Open-Ended Comments
general comment about the frequency of harm; details of a specific incident; general comment about harm in prison/prison culture	We have a large number of gun and drug cases that arise in the inner cities and often with gang involvement. It is very common for witnesses in these communities to experience threats and intimidation. In several state prosecutions witnesses have been harmed and in some cases murdered. We have not had any witnesses murdered but it is not uncommon for a [witness] to report that fellow gang members have made threatening remarks to them. In one of the cases referenced earlier a witness was confronted at the door to her house by a man with a gun threatening her and her son because her son was a witness to a shooting and warning not to talk to the authorities. Threats and assaults in jail on cooperating defendants or those thought to be cooperating is not uncommon.
general comment about the frequency of harm; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator; procedures for protecting defendants; procedures for protecting witnesses; details of a specific incident	We have a lot of anecdotal evidence from defense counsel that defendants are being confronted in BOP facilities based on cooperation (documents from PACER like 5K or Rule 35 motions, or even cooperation paragraphs in plea agreements), however, counsel have been reluctant to give us specifics about those threats. Many of our cases start out with the state, and defendants use documents from the state case, like complaints or search warrants, to find out who is cooperating and retaliate against them. Additional comments provided over phone: Respondent noted that his district sees a lot of harm to defendants and witnesses, but court documents, at least PACER documents, are rarely the source. Defenders know this to be an issue as well, and they were responding to the survey in the same way. Respondent then provided a brief description of how criminal cases work in his district. Even in purely federal cases, which he noted are quite rare for them, the prosecution is required early on to provide statements and plea agreements as part of discovery (within two weeks of the arraignment, by local rule). So these documents (5K, Rule 35, etc.) are given to the defense as part of discovery. The documents are sometimes the source of the information, but are RARELY obtained through PACER. Even if the name of the cooperator or witness is not included, the defendant often can figure out the name of the person based on the information (e.g., the sale of drugs on a specific day or at a specific place tells them who the buyer was). Respondent then relayed more information about the case he mentioned in his email contact. A multi-conviction drug dealer was under state investigation again. A search warrant was left as part of the investigation, so even before discovery, and from that information he was able to obtain the name of the cooperator, who he later lured onto the railroad tracks and shot. This is now a federal case. The only solution to preventing defendants from getting this kind of information is to seek a protective order, which the prosecutors almost never do be-

Categories	Open-Ended Comments
	cause they are difficult to obtain. The district does try to protect cooperation information by entering 5K and Rule 35 information orally during a sentencing hearing (after notifying the court via email that such information will be entered), so there is no PACER docket entry for this. However, if someone went to the trouble of paying to obtain the transcript, they could learn it from there.
procedures for protecting defendants	We have a procedure in place in the [redacted] to protect cooperating defendants. We have created a master sealed event in all criminal cases except immigration cases. This is where the attorneys can have docketed any matters relating to cooperation. It seems to work well.
general comments about the sources to identify cooperator	We have been informed of assumptions by outside individuals that anything sealed or any missing ECF docket numbers covers a sealed document that relates to cooperation.
general comment about the frequency of harm; general comments about the sources to identify cooperator; policy comments	We have experienced a distinct uptick in threatened and actual violence to witnesses and cooperator/targets in the last ten years. Drug traffickers are using their networks as well as [following] docket entries for sealed filings, transfer motions and waivers of pretrial motions. We believe a more secure system for filing sensitive pleading should be developed. There is also a "paralegal" who monitors some of the more significant drug cases. This [paralegal] is seen speaking with the defendants as well as the defense lawyers. Defense counsel do not welcome the input of the paralegal.
details of a specific incident; general comments about the sources to identify cooperator; general comment about harm in prison/prison culture	We have had a "certified complex" drug conspiracy case where a codefendant was afraid for his life for cooperating with agents. This case has not been sentenced yet. There was no plea agreement or 5K filed (yet), but there was a debrief with this codefendant who implicated other codefendants. This codefendant was assaulted for no reason while in custody pending sentence for the instant case and believes the leader/organizer of this conspiracy ordered the assault. / / In the past three years, we have reviewed about 3 PSRs where the material witnesses in alien smuggling cases were threatened harm if they talked to agents concerning the defendant. Names of material witnesses are disclosed in PSR's with their statement regarding the defendant and the instant offense. It is unknown if the defendant actually carried out the threat of harm as most or all of these material witnesses in these types of cases are deported before the defendant is sentenced. No additional information about these cases is known. /
general comment about the frequency of harm; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator	We have had multiple reports that defendants in BOP custody are routinely asked to "show papers," meaning J&C, PSR, transcripts of plea and sentencing hearings, etc., and that if they could not or did not they were targeted for violence. In the case of at least one facility, this was confirmed by a Correctional Officer.

Categories	Open-Ended Comments
general comment about the frequency of harm	We have other cases where the defendant/offender has indicated they were threatened by others do to the cooperation but no evidence of the validity of the threat or how others became aware of his cooperation.
Nothing to report	We know of no harm or threats of harm in 2013 or 2014.
general comment about the frequency of harm; comments about refusal out of fear	We know that sometimes witnesses and cooperators refuse to cooperate due to threats or perceived threats, but that information is not always communicated to us. Also, the threats of harm or harm may not be the sole reason to refuse the cooperation.
general comment about the frequency of harm; procedures for protecting defendants	We prosecute a large number of cases in this district that depend on the cooperation of defendants and witnesses who have reason to fear retaliation or have been actually threatened. We do not track this information; therefore the numbers above are not reliable. There are merely a guess, but it is a substantial number each year. We are [redacted] and prosecute a large number of cartel and gang cases. This is a factor in every case. And, in almost every case, the fear of retaliation or the actual threats are made against cooperators or family members in [redacted], complicating matters substantially more than where the cooperators and/or their family members are entirely [redacted].
general comment about the frequency of harm; general comments about the sources to identify cooperator; general comment about harm in prison/prison culture	We receive frequent requests for sentencing transcripts from incarcerated defendants who have no appeal or habeas pending. These requests appear to be from defendants who are being pressured/threatened to demonstrate to other inmates that they did not cooperate with the government. Although I have no information of actual threats, I have a strong impression that this is a major problem for incarcerated inmates, whether or not they actually cooperated.
general comment about the frequency of harm; procedures for protecting defendants	We take extra precaution to try to prevent harm but it is sometimes inevitable.
Takes issue with the survey; general comment about harm in prison/prison culture; general comment about the frequency of harm; general comments about the sources to identify cooperator	You are asking the wrong person when you ask my office. We represent the LEAD defendant who is usually the person being snitched on, not the person doing the snitching. That said, we do regularly receive requests from defendants in the BOP for PSRs to prove they did not cooperate. We also occasionally receive requests to doctor documents to show cooperators did not cooperate.

Categories	Open-Ended Comments
procedures for protecting defendants; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator; policy comments; general comment about the frequency of harm	We used to have mandatory plea agreement supplements that were sealed and filed in every case in an attempt to make it more difficult to tell which defendants were cooperating. Defense counsel reported that this was putting all defendants in jeopardy (including the people who did not cooperate) because the sealed docket entry suggested to fellow inmates that the defendant had cooperated. Accordingly, we stopped the practice of mandatory plea agreement supplements. Presently, motions for downward departure and cooperation agreements are automatically sealed documents. The docket entries are not visible to the public, but the docket will reflect a skipped number, which we are told is a signal to those who might wish to harm a cooperating defendant. Sealed cooperation-related documents are sealed for the duration of a defendant's term of incarceration. Counsel may move to seal things like sentencing memos which contain references to cooperation. On an adequate showing, those motions to seal are routinely granted. Our court has spent significant amount of time discussing this issue, and we have decided to await national guidance on the best way to balance the important interests at stake.
general comment about the frequency of harm	When defendants request reductions of their sentences under Rule 35, they and their lawyers generally contend that the defendants have been threatened, but I have no documented cases of such threats.
general comment about the frequency of harm; procedures for protecting defendants	While defendants at times ask for entire plea agreements to be sealed or not even docketed because of a perceived threat, I have never had any defendant or defense counsel or government attorney provide any details to support the perception.
general comment about the frequency of harm; details of a specific incident; general comments about the sources to identify cooperator; general comment about harm in prison/prison culture	While I don't have additional information about actual harm or actual threats of harm, I am frequently reminded of the dangers for offenders of being associated with the Government. In one recent large, multi-defendant heroin distribution case in which some defendants had gang affiliations, virtually every defendant [redacted] requested a copy of the transcript of his sentencing. This was not done for appeal purposes - because in each case the appeal period had run when the request was made. My court reporter told me that, in several cases, she was advised by the person requesting (and paying for) the transcript that the transcript was needed so that the defendant could show to other inmates that he was not a "snitch."

Categories	Open-Ended Comments
general comment about the frequency of harm; Takes issue with the survey	While not many AUSAs in the district advised that they experienced defendants or witnesses experiencing harm or threats in the last three years, the AUSA who serves as the district's Professional Responsibility Officer (PRO) and Appellate Chief advised that he has heard of plenty of instances surrounding these issues in his capacity as PRO and Appellate Chief. Therefore, we submit that even though AUSAs may not be quantifying these situations in their daily casework, the issues do arise and the PRO and/or appellate division may be another good source for information. / / Note, that we entered 0 to the questions above because the approximate numbers, if any, are unknown.
general comment about the frequency of harm	While we have had a few [defendants] over the past three years express fears for their safety after cooperating with the government, these fears were based on the nature of the cooperation and no direct or indirect threats were made.
general comment about the frequency of harm; general comments about the sources to identify cooperator; comments about refusal out of fear	Within the District, there is a general perception that cooperators will be harmed, even if there is no specific credible threat of harm known. Even use of the safety valve provision is generally rejected by defendants in narcotics cases given their understanding that said provision could lead to the label of cooperator and the perceived risks that entails. Many defendants do not even consider cooperation or even the safety valve as a result.
policy comments; general comments about the sources to identify cooperator; procedures for protecting defendants	Additional comments provided over email: If the survey is like other FJC surveys, I expect there will be opportunity for open-ended comments. That will be important to me. I have very strong feelings about what the Judiciary should and should not be willing to do in this arena. We are obviously all concerned about threats, intimidation and actual harm inflicted on a defendant who chooses to cooperate. We should get real, hard data on how extensive the problem is. Right now, I hear lots of anecdotes, but have very little real, hard information. This will be a good first step. But even if the survey develops hard data of a genuine and significant problem, I think the Judiciary must be very cautious about compromising the transparency and accuracy of Court records to address the problem. I don't have any problem with Courts doing what we have always done: namely, make case specific decision on whether and what to file under seal. But the recent proposals I've heard go way beyond that and would, if adopted, involve scrubbing the docket entirely of all references to the filing of Rule 35 or 5K motions (not just sealing content in appropriate cases), and in some instances even filing a public version of a plea agreement that appears to be complete but really isn't because there is a private, undisclosed rider that covers cooperation and substantial assistance.

Categories	Open-Ended Comments
	In my view, adoption of proposals like these last two go way beyond sealing records in appropriate cases, and actually strike at the core of the transparency and accountability that is so essential to the integrity and operation of the Court. Court records should, in my view, fairly reflect what actually happened in a case. If there was a Rule 35 or 5K departure motion filed, the record needs to reflect that, even if the content of the motions is sealed for good cause. Otherwise, the Court is publishing a docket that distorts the reality of what occurred in a case. Similarly, if there is a Plea Agreement with a cooperation provision, and that is actually part of the plea deal, the record should not falsely suggest that there is Plea Agreement without such a cooperation provision. The proposal I've heard to file a public version of a Plea Agreement that does not include the cooperation provision, when everyone involved realizes the real deal actually does include cooperation, would in my view put the Judiciary in the position of creating a false and misleading record of what is actually occurring. And obviously I don't think the Judiciary should countenance that sort of thing. Making individualized decisions to seal some or all of the content of a document is perfectly proper and well-established judicial practice in my view. It does result in some compromise of the normal, presumptive right of public access to Court records. But the compromise is appropriate when a judicial officer determines there is good cause for the sealed filing. But the proposals that go beyond this, and that would distort the judicial record of what is actually happening in a case are totally different in my view. At least in my District, I'm hearing the US Attorney's Office--often with support from the Defender Service--push for the more extreme record scrubbing that would, in my view distort the reality of what is happening in a case. I understand and applaud the desire to protect people who choose to cooperate. But I don't think that protection can or should come at the expense of the integrity of the Court record.
details of a specific incident; general comments about the sources to identify cooperator; procedures for protecting defendants; Procedures for protecting witnesses; Takes issue with the survey	Additional comments provided over email: I have the following information to report regarding threats or harm to offenders due to their cooperation: 1) [redacted]- was prosecuted for threatening a material witness [redacted]- see below. 2) [redacted]- was threatened by [redacted] regarding her testimony against [redacted]. [redacted] threatened with physical harm to herself and her family. No actual harm was done. [redacted] was on pretrial release at the time of the threat. No information to indicate she requested protective custody or that she received same. No infor-

TAB 9B

125-012115

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JUDICIARY STRATEGIC PLANNING (ACTION)

The Judicial Conference approved changes to the *Strategic Plan for the Federal Judiciary* in September 2015. In a letter dated November 6, 2014, Chief Judge William Jay Riley of the Eighth Circuit Court of Appeals, the judiciary's planning coordinator, requested all Judicial Conference committees to consider suggestions for the Executive Committee regarding *Strategic Plan* strategies and goals that should receive priority attention over the next two years.

BACKGROUND

On the recommendation of the Executive Committee, the Judicial Conference of the United States approved an updated *Strategic Plan for the Federal Judiciary* on September 17, 2015. The plan is included as **Attachment 1**.

The update followed committee assessments of the implementation of the 2010 *Strategic Plan*, an analysis of trends, and the consideration of committee-proposed updates and revisions. Drafts of the updated plan were prepared by an ad hoc strategic planning group that included Judicial Conference committee chairs, Executive Committee members, and at-large members, including a circuit executive and the clerk of a district court.

CHANGES TO THE *STRATEGIC PLAN*

The updated *Strategic Plan* carries forward the 2010 *Strategic Plan's* expression of the judiciary's mission and core values, and the seven strategic issues around which the plan is organized. Of the plan's 13 strategies, Strategies 4.1 and 7.2 were made broader and clearer and 11 remain unchanged.

Most of the changes are to the plan's goals and to the narrative describing the plan's issues and strategies. Highlights of the changes are described below.

Goals

- The 2015 plan includes five new goals addressing the supervision of offenders and defendants (Goal 1.1d), judiciary infrastructure (Goal 2.1c), jury representativeness (Goal 5.2c), civic education (Goal 7.2c), and communications with judges in other countries (Goal 7.2d).
- Goals about the restoration of judicial compensation and the handling of claims that cannot be properly addressed in the federal judicial system have been deleted.

125-012117

- A goal about the protection of judges, their families, court employees, and the public has been separated into two goals (Goals 1.2a and 1.2b).
- Substantive changes and edits were made to eight additional goals (Goals 1.2e, 2.1a, 2.1b, 4.1a, 4.1b, 4.1c, 4.1d, and 6.2a).

Narrative

- The language describing the *Strategic Plan's* issues and strategies was updated, with many sections rewritten.
- References to specific projects and programs were limited in order to preserve the strategic nature of the document, to avoid dating the language in the plan, and to provide flexibility to committees in their policy deliberations.

IMPLEMENTATION OF THE *STRATEGIC PLAN*

Consistent with the approach to planning approved by the Judicial Conference in September 2010, efforts to pursue the strategies and goals in the updated *Strategic Plan* will be led by the committees of the Judicial Conference, with facilitation and coordination by the Executive Committee.

The primary mechanism for committee integration of the *Strategic Plan* into regular committee business has been through the identification and reporting on a series of "strategic initiatives." A strategic initiative is a project, study, or other effort with the potential to make a significant contribution to the accomplishment of a strategy or goal in the *Strategic Plan*. Strategic initiatives are intended to be distinct from the ongoing work of committees, for which there are already a number of reporting mechanisms, including committee reports to the Judicial Conference.

Committee missions and responsibilities vary greatly. Similarly, there is great variety among the types of committee activities relating to the *Strategic Plan's* strategies and goals. The planning approach provides committees with substantial flexibility in the development of strategic initiatives. In general, committees are asked to identify the following for each initiative:

- the purpose and/or desired outcome;
- the timeframe or schedule;
- partnerships with other Judicial Conference committees or other groups; and
- the assessment approach.

Committees last reported on the implementation of strategic issues during the summer of 2014, as part of the effort to prepare for the update to the *Strategic Plan*.

125-012118

Attachment 2 reports initiatives in progress during 2014, organized by the 13 strategies in the current plan.

According to the strategic planning cycle for Judicial Conference committees, the Committee will be asked to report on the implementation of strategic initiatives during its June 2016 meeting.

PRIORITY SETTING (ACTION)

The planning approach for the Conference and its committees assigns the responsibility for priority setting to the Executive Committee, with suggestions from Judicial Conference committees and others.

In March 2011, the Executive Committee reported that it had identified four strategies and one goal that should receive priority attention for the following two years:

Strategy 1.1 Pursue improvements in the delivery of justice on a nationwide basis.

Strategy 1.3 Secure resources that are sufficient to enable the judiciary to accomplish its mission in a manner consistent with judiciary core values.

Strategy 2.1 Allocate and manage resources more efficiently and effectively.

Strategy 4.1 Harness the potential of technology to identify and meet the needs of court users and the public for information, service, and access to the courts. *(2015 language)*

Goal 7.2b Communicate and collaborate with organizations outside the judicial branch to improve the public's understanding of the role and functions of the federal judiciary.

Following the identification of priorities, the Executive Committee provided guidance to committees about how to incorporate these priorities into committee planning and policy development efforts:

> All of the strategies and goals in the Strategic Plan are important, and should continue to be pursued. Some elements of the Strategic Plan are of immediate concern, while others should be addressed in the long term. Thus, given limited time and resources, over the next two years particular attention should be directed toward the priority strategies and the priority goal. Given the cross-cutting nature of the goal and strategies that have been identified as priorities, continued coordination of efforts across committees is essential.

125-012119

In March 2013, the Executive Committee affirmed the previous priorities for an additional two years and modified the guidance to reflect the difficult budget environment confronting the judiciary:

> Everything in the Strategic Plan is important, and worthy of pursuit. However, the judiciary's financial environment will require difficult choices in the months and years ahead, and the establishment of priorities is particularly important at this time when resources are profoundly scarce. We therefore encourage you to weigh the impact on these priorities and related initiatives when considering potential cost-containment measures and other policy changes. This is not to suggest a litmus test for each policy proposal, but simply an overall commitment to each of these five priorities.

At its February 11-12, 2016 meeting, the Executive Committee will consider which strategies and goals from the updated *Strategic Plan* should receive priority attention over the next two years. Committee input is critical to the Executive Committee's deliberations.

Action Requested: The Committee is asked to provide suggestions to the Executive Committee regarding the prioritization of the strategies and goals for the *Strategic Plan* priorities over the next two years.

125-012120

ATTACHMENT 1

125-012121

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125-012122

Strategic Plan for the Federal Judiciary

September 2015

Judicial Conference of the United States

January 7-8 2016

12b-012123

Strategic Plan for the Federal Judiciary

September 2015

Judicial Conference of the United States
James C. Duff, Secretary
Administrative Office of the U. S. Courts
Washington, DC 20544
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125-012124

Strategic Plan for the Federal Judiciary

The federal judiciary is respected throughout America and the world for its excellence, for the independence of its judges, and for its delivery of equal justice under the law. Through this plan, the judiciary identifies a set of strategies that will enable it to continue as a model in providing fair and impartial justice.

This plan begins with expressions of the mission and core values of the federal judiciary. Although any plan is by nature aspirational, these are constants which this plan strives to preserve. The aim is to stimulate and promote beneficial change within the federal judiciary—change that helps fulfill, and is consistent with, the mission and core values.

Mission

The United States Courts are an independent, national judiciary providing fair and impartial justice within the jurisdiction conferred by the Constitution and Congress. As an equal branch of government, the federal judiciary preserves and enhances its core values as the courts meet changing national and local needs.

Core Values

Rule of Law: legal predictability, continuity, and coherence; reasoned decisions made through publicly visible processes and based faithfully on the law

Equal Justice: fairness and impartiality in the administration of justice; accessibility of court processes; treatment of all with dignity and respect

Judicial Independence: the ability to render justice without fear that decisions may threaten tenure, compensation, or security; sufficient structural autonomy for the judiciary as an equal branch of government in matters of internal governance and management

Accountability: stringent standards of conduct; self-enforcement of legal and ethical rules; good stewardship of public funds and property; effective and efficient use of resources

Excellence: adherence to the highest jurisprudential and administrative standards; effective recruitment, development and retention of highly competent and diverse judges and staff; commitment to innovative management and administration; availability of sufficient financial and other resources

Service: commitment to the faithful discharge of official duties; allegiance to the Constitution and laws of the United States; dedication to meeting the needs of jurors, court users, and the public in a timely and effective manner

The Plan in Brief

The *Strategic Plan for the Federal Judiciary*, updated in 2015, continues the judiciary's tradition of meeting challenges and taking advantage of opportunities while preserving its core values. It takes into consideration various trends and issues affecting the judiciary, many of which challenge or complicate the judiciary's ability to perform its mission effectively. In addition, the plan recognizes that the future may provide tremendous opportunities for improving the delivery of justice.

This plan anticipates a future in which the federal judiciary is noteworthy for its accessibility, timeliness, and efficiency, attracts to judicial service the nation's finest legal talent, is an employer of choice for highly qualified executives and support staff, works effectively with the other branches of government, and enjoys the people's trust and confidence.

This plan serves as an agenda outlining actions needed to preserve the judiciary's successes and, where appropriate, bring about positive change. Although its stated goals and strategies do not include every important activity, project, initiative, or study that is underway or being considered, the plan focuses on issues that affect the judiciary at large, and on responding to those matters in ways that benefit the entire judicial branch and the public it serves.

Identified in the plan are seven fundamental issues that the judiciary must now address, and a set of responses for each issue. The scope of these issues includes the delivery of justice, the effective and efficient management of resources, the workforce of the future, technology's potential, access to the judicial process, relations with the other branches of government, and the public's level of understanding, trust, and confidence in federal courts.

Strategic Issues for the Federal Judiciary

The strategies and goals in this plan are organized around seven issues— fundamental policy questions or challenges that are based on an assessment of key trends affecting the judiciary's mission and core values:

Issue 1: Providing Justice
Issue 2: The Effective and Efficient Management of Public Resources
Issue 3: The Judiciary Workforce of the Future
Issue 4: Harnessing Technology's Potential
Issue 5: Enhancing Access to the Judicial Process
Issue 6: The Judiciary's Relationships with the Other Branches of Government
Issue 7: Enhancing Public Understanding, Trust, and Confidence

These issues also take into account the judiciary's organizational culture. The strategies and goals developed in response to these issues are designed with the judiciary's decentralized systems of governance and administration in mind.

Issue 1. Providing Justice

How can the judiciary provide justice in a more effective manner and meet new and increasing demands, while adhering to its core values?

Issue Description. Exemplary and independent judges, high quality staff, conscientious jurors, well-reasoned and researched rulings, and time for deliberation and attention to individual issues are among the hallmarks of federal court litigation. Scarce resources, changes in litigation and litigant expectations, and certain changes in law challenge the federal judiciary's effective delivery of justice. To address this issue, this plan includes three strategies that focus on improving performance while ensuring that the judiciary functions under conditions that allow for the effective administration of justice:

Pursue improvements in the delivery of justice on a nationwide basis. (Strategy 1.1)

Strengthen the protection of judges, court staff, and the public at court facilities, and of judges and their families at other locations. (Strategy 1.2)

Secure resources that are sufficient to enable the judiciary to accomplish its mission in a manner consistent with judiciary core values. (Strategy 1.3)

Strategy 1.1. Pursue improvements in the delivery of justice on a nationwide basis.

Background and Commentary. Effective case management is essential to the delivery of justice, and most cases are handled in a manner that is both timely and deliberate. The judiciary monitors several aspects of case management, and has a number of mechanisms to identify and assist congested courts. National coordination mechanisms include the work of the Judicial Panel on Multidistrict Litigation, which is authorized to transfer certain civil actions pending in different districts to a single district for coordinated or consolidated pretrial proceedings. The work of chief judges in managing each court's caseload is critical to the timely handling of cases, and these

local efforts must be supported at the circuit and national level. Circuit judicial councils have the authority to issue necessary and appropriate orders for the effective and expeditious administration of justice, and the Judicial Conference is responsible for approving changes in policy for the administration of federal courts. Cooperative efforts with state courts have also proven helpful, including the sharing of information about related cases that are pending simultaneously in state and federal courts.

Despite ongoing efforts, pockets of delay persist in the courts. With the understanding that some delays and backlogs cannot be avoided and do not reflect upon a court's case management practices, this plan calls for a concerted and collaborative effort among courts, Judicial Conference committees, and circuit judicial councils to make measurable progress in reducing the number of cases that are unduly delayed, and the number of courts with persistent and significant backlogs that may be unwarranted.

The delivery of justice is also affected by high litigation costs. High costs make the federal courts less accessible, as is discussed in Issue 5. Litigation costs also have the potential to skew the mix of cases that come before the judiciary, and may unduly pressure parties towards settlement. Rule 1 of the Federal Rules of Civil Procedure calls for the "just, speedy, and inexpensive determination of every action and proceeding," and this plan includes a goal to reduce unnecessary costs as well as delay.

This strategy also includes a goal to ensure that persons entitled to representation under the Criminal Justice Act are afforded well qualified representation through either a federal defender or panel attorney. Well qualified representation requires sufficient resources to assure adequate pay, training, and support services. Further, where the defendant population and needs of districts differ, guidance and support must be tailored to local conditions.

In addition, the plan includes a goal to enhance the supervision of offenders and defendants. Probation and pretrial services offices have led judiciary efforts to measure the quality of services to the courts and the community, including the use of evidence-based practices in the supervision of offenders and defendants.

Other efforts to improve the delivery of justice should continue. For example, a number of significant initiatives to transform the judiciary's use of technology are underway, including the development and deployment of next-generation case management and financial administration systems. The work of the probation and pretrial services has also been enhanced through the use of applications that integrate data from other agencies with probation and pretrial services data to facilitate the analysis and comparison of supervision practices and outcomes among districts.

Goal 1.1a: Reduce delay through the work of circuit judicial councils, chief judges, Judicial Conference committees and other appropriate entities.

Goal 1.1b: Reduce unnecessary costs to litigants in furtherance of Rule 1, Federal Rules of Civil Procedure.

Goal 1.1c: Ensure that persons represented by panel attorneys and federal defender organizations are afforded well qualified representation consistent with best practices for the representation of criminal defendants.

Goal 1.1d: Enhance the supervision of offenders and defendants in order to reduce recidivism and improve public safety.

Strategy 1.2. Strengthen the protection of judges, court staff, and the public at court facilities, and of judges and their families at other locations.

Background and Commentary. Judges must be able to perform their duties in an environment that addresses their concerns for their own personal safety and that of their families. The judiciary works closely with the U.S. Marshals Service to assess and improve the protection provided to the courts and individuals. Threats extend beyond the handling of criminal cases, as violent acts have often involved pro se litigants and other parties to civil cases.

While judiciary standards for court facilities provide separate hallways and other design features to protect judges, many older court facilities require judges, court personnel, and jurors to use the same corridors, entrances, and exits as prisoners, criminal defendants, and others in custody. Assuring safety in these facilities is particularly challenging. Protection for judges must also extend beyond court facilities and include commuting routes, travel destinations, and the home. A key area of focus for the judiciary has been raising the level of awareness of security issues, assisting judges in taking steps to protect themselves while away from court facilities, and educating judges on how they can minimize the availability of personal information on the internet.

The effective implementation of this strategy is linked to other efforts in this plan. Strategy 1.3 includes a goal to ensure that judiciary proceedings are conducted in secure facilities. In addition, Strategy 4.1 includes a goal to ensure that IT policies and practices provide effective security for court records and data, including confidential personal information.

Goal 1.2a: Improve the protection of judges, court employees, and the public in all court facilities, and the protection of judges in off-site judicial locations.

Goal 1.2b: Provide increased training to raise the awareness of judges and judiciary Improve the protection of judges and their families at home and in non-judicial locations.

Goal 1.2c: Provide increased training to raise the awareness of judges and judiciary employees on a broad range of security topics.

Goal 1.2d: Improve the security of court facilities, including perimeter security at primary court facilities.

Goal 1.2e: Work with the U.S. Marshals Service and others to improve the collection, analysis and dissemination of protective intelligence information concerning individual judges.

Strategy 1.3. Secure resources that are sufficient to enable the judiciary to accomplish its mission in a manner consistent with judiciary core values.

Background and Commentary. The judiciary is likely to face an uncertain federal budget environment, with likely constraints on the ability of congressional appropriations committees to meet judiciary funding requirements. Uncertainty and shortfalls, when they occur, present

particular challenges to clerks' offices, probation and pretrial services offices, and federal defender organizations in ensuring that operations are adequately staffed.

Another key challenge for the judiciary is to address critical longer term resource needs. Many appellate, district and bankruptcy courts have an insufficient number of authorized judgeships. The judiciary has received very few Article III district judgeships, and no circuit judgeships, since 1990.

Resources are also needed for jurors. Compensation for jurors is still limited, with inadequate compensation creating a financial hardship for many jurors. And, while the judiciary has made progress in securing needed space, some court proceedings are still conducted in court facilities that are cramped, poorly configured, and lacking secure corridors separate from inmates appearing in court. As the judiciary's facilities continue to age, additional resources will be needed to provide proper maintenance and sustain courthouse functionality.

Further, the judiciary relies on resources that are within the budgets of executive branch agencies, particularly the U.S. Marshals Service and the General Services Administration. The judiciary must work with these agencies to ensure that the judiciary's resource needs are met.

The ability to secure adequate resources serves as the foundation for a vast majority of the judiciary's plans and strategies. For example, to ensure the well qualified representation of criminal defendants (Goal 1.1c), the defender services program requires funding sufficient to accomplish its mission. Strategy 3.2 and its associated goals focus on the importance of attracting, recruiting, developing and retaining the staff that are required for the effective performance of the judiciary's mission, and will be critical to supporting tomorrow's judges and meeting future workload. Also, a goal under Strategy 4.1 urges the judiciary to continue to build and maintain robust and flexible technology systems and applications, requiring a sustained investment in technology.

Goal 1.3a: Secure needed circuit, district, bankruptcy and magistrate judgeships.

Goal 1.3b: Ensure that judiciary proceedings are conducted in court facilities that are secure, accessible, efficient, and properly equipped.

Goal 1.3c: Secure adequate compensation for jurors.

Issue 2. The Effective and Efficient Management of Public Resources

How can the judiciary provide justice consistent with its core values while managing limited resources and programs in a manner that reflects workload variances and funding realities?

Issue Description. The judiciary's pursuit of cost-containment initiatives has helped to reduce current and future costs for rent, information technology, bankruptcy and magistrate judges, the compensation of court staff and law clerks, and other areas. These initiatives have helped the judiciary operate under difficult financial constraints. Cost-containment efforts have also helped the judiciary demonstrate to Congress that it is an effective steward of public resources, and that its requests for additional resources are well justified (Strategy 1.3).

The judiciary relies upon effective decision-making processes governing the allocation and use of judges, staff, facilities, and funds to ensure the best use of limited resources. These processes must respond to a federal court workload that varies across districts and over time. Developing, evaluating, publicizing and implementing best practices will assist courts and other judiciary organizations in addressing workload changes. Local courts have many operational and program management responsibilities in the judiciary's decentralized governance structure, and the continued development of effective local practices should be encouraged. At the same time, the judiciary may also need to consider whether and to what extent certain practices should be adopted judiciary-wide. This plan includes a single strategy to address this issue.

Strategy 2.1. Allocate and manage resources more efficiently and effectively.

Background and Commentary. The judiciary has worked to contain the growth in judiciary costs, and has pursued a number of studies, initiatives, and reviews of judiciary policy. Significant savings have been achieved, particularly for rent, compensation, and information technology. Cost containment remains a high priority, and new initiatives to contain cost growth and make better use of resources are being implemented or are under consideration.

This strategy includes two goals to increase the flexibility of the judiciary in matching resources to workload. The intent is to enable available judges and staff to assist heavily burdened courts on a temporary basis, and to reduce the barriers to such assistance. Supporting these goals is a third goal to ensure that the judiciary utilizes its networks, systems, and space in a manner that supports efficient operations. A fourth goal speaks to the critical need to maintain effective court operations when disaster strikes.

Goal 2.1a: Make more effective use of judges to relieve overburdened and congested courts.

Goal 2.1b: Analyze and facilitate the implementation of organizational changes and business practices that make effective use of limited administrative and operational staff.

Goal 2.1c: Manage the judiciary's infrastructure in a manner that supports effective and efficient operations.

Goal 2.1d: Plan for and respond to natural disasters, terrorist attacks, pandemics and other physical threats in an effective manner.

Issue 3. The Judiciary Workforce for the Future

How can the judiciary continue to attract, develop, and retain a highly competent and diverse complement of judges and staff, while meeting future workforce requirements and accommodating changes in career expectations?

Issue Description. The judiciary can only meet future workload demands if it can continue to attract, develop, and retain highly skilled and competent judges and staff. Chief Justice Roberts has noted that judicial appointment should be the "capstone of a distinguished career" and not "a stepping stone to a lucrative position in private practice." Attracting and retaining highly capable judges and staff will require fair and competitive compensation and benefit packages. The judiciary must also plan for new methods of performing work, and prepare for continued volatility in workloads, as it develops its future workforce. Two strategies to address this issue follow:

Support a lifetime of service for federal judges. (Strategy 3.1)

Recruit, develop, and retain highly competent staff while defining the judiciary's future workforce requirements. (Strategy 3.2)

Strategy 3.1. Support a lifetime of service for federal judges.

Background and Commentary. It is critical that judges are supported throughout their careers, as new judges, active judges, chief judges, senior judges, judges recalled to service, and retired judges. In addition, education, training, and orientation programs offered by the Federal Judicial Center and the Administrative Office will need to continue to evolve and adapt. Technology training, for example, is moving away from a focus on software applications toward an emphasis on the tasks and functions that judges perform. Training and education programs, and other services that enhance the well being of judges, need to be accessible in a variety of formats, and on an as-needed basis.

Goal 3.1a: Strengthen policies that encourage senior Article III judges to continue handling cases as long as they are willing and able to do so. Judges who were appointed to fixed terms and are recalled to serve after retirement should be provided the support necessary for them to fully discharge their duties.

Goal 3.1b: Seek the views of judges on practices that support their development, retention, and morale.

Goal 3.1c: Evolve and adapt education, training, and orientation programs to meet the needs of judges.

Strategy 3.2. Recruit, develop, and retain highly competent staff while defining the judiciary's future workforce requirements.

Background and Commentary. The judiciary continues to be an attractive employer, and staff turnover is relatively low. Employees are committed to the judiciary's mission, and the judicial branch provides staff with many resources and services, including training and education programs.

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Nonetheless, ongoing changes that the judiciary must address include an increase in the amount of work performed away from the office, shifting career expectations, and changes in how staff communicate and interact. Changes in how and where work is performed are related to Strategy 2.1, as certain types of changes provide opportunities for the judiciary to reduce its space footprint and rental costs while creating a better and more efficient work environment.

The judiciary also must develop the next generation of executives. The management model in federal courts provides individual court executives with a high degree of decentralized authority over a wide range of administrative matters. The most qualified candidates often come from within the system since the judiciary's management model is not currently replicated in other government systems. To ensure a sufficient internal supply of qualified candidates, the judiciary should initiate a meaningful leadership and executive development training program along with the creation of executive relocation programs to widen the pool of qualified internal applicants.

Goal 3.2a: Attract, recruit, develop, and retain the most qualified people to serve the public in the federal judiciary, emphasizing a commitment to nondiscrimination both in hiring and in grooming the next generation of judiciary executives and senior leaders.

Goal 3.2b: Identify future workforce challenges and develop programs and special initiatives that will allow the judiciary to remain as an employer of choice while enabling employees to strive to reach their full potential.

Goal 3.2c: Deliver leadership, management, and human resources programs and services to help judges (especially chief judges), executives and supervisors develop, assess and lead staff.

Goal 3.2d: Strengthen the judiciary's commitment to workforce diversity through expansion of diversity program recruitment, education, and training.

Issue 4. Harnessing Technology's Potential

How can the judiciary develop national technology systems while fostering the development of creative approaches and solutions at the local level?

Issue Description. Implementing innovative technology applications will help the judiciary to meet the changing needs of judges, staff, and the public. Technology can increase productive time, and facilitate work processes. For the public, technology can improve access to courts, including information about cases, court facilities, and judicial processes. The judiciary will be required to build and maintain effective IT systems in a time of growing usage, and judicial and litigant reliance. At the same time, the security of IT systems must be maintained, and a requisite level of privacy assured.

Responsibility for developing major national IT systems is shared by several Administrative Office divisions and Judicial Conference committees, and many additional applications are developed locally. In addition, local courts have substantial responsibilities for the management and operation of local and national systems, including the ability to customize national applications to meet local needs. The judiciary's approach to developing, managing, and operating national IT systems and applications provides a great deal of flexibility but also poses challenges for coordination, prioritization, and leadership. A key challenge will be to balance the economies of scale that may be achieved through certain judiciary-wide approaches with the creative solutions that may result from allowing and fostering a more distributed model of IT development and administration. The judiciary's strategy for addressing this issue follows.

Strategy 4.1. Harness the potential of technology to identify and meet the needs of court users and the public for information, service, and access to the courts.

> **Background and Commentary.** The judiciary is fortunate to be supported by an advanced information technology infrastructure and services that continue to evolve. Next-generation case management and financial administration systems are being developed, while existing systems are being updated and refined. Services for the public and other stakeholders are being enhanced, and systems have been strengthened to provide reliable service during growing usage and dependence. Collaboration and idea sharing among local courts, and between courts and the Administrative Office, foster continued innovation in the application of technology.
>
> The effective use of advanced and intelligent applications and systems will provide critical support for judges and other court users. This plan includes a goal supporting the continued building of the judiciary's technology infrastructure, and another encouraging a judiciary-wide perspective to the development of certain systems. Another goal in this section focuses on the security of judiciary-related records and information.
>
> The effective use of technology is critical to furthering other strategies in this plan. In particular, the effective use of technology is critical to judiciary efforts to contain costs, and to effectively allocate and manage resources (Strategy 2.1). Technology also supports improvements in the delivery of justice (Strategy 1.1), efforts to strengthen judicial security (Strategy 1.2), the delivery of training and remote access capabilities (Strategies 3.1 and 3.2), the accessibility of the judiciary for litigants and the public (Strategies 5.1 and 5.2), and judiciary accountability mechanisms (Strategy 7.1).

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Likewise, an effective technology program is also dependent upon the successful implementation of other strategies in this plan. In a rapidly changing field requiring the support of highly trained people, is it critical that the judiciary succeed in recruiting, developing, and retaining highly competent staff (Strategy 3.2). And, investments in technology also require adequate funding (Strategy 1.3).

Goal 4.1a: Continue to build and maintain robust and flexible technology systems and applications that anticipate and respond to the judiciary's requirements for efficient communications, record-keeping, electronic case filing, case management, and administrative support.

Goal 4.1b: Coordinate and integrate national IT systems and applications from a judiciary-wide perspective and more fully utilize local initiatives to improve services.

Goal 4.1c: Develop system-wide approaches to the utilization of technology to achieve enhanced performance and cost savings.

Goal 4.1d: Refine and update security practices to ensure the confidentiality, integrity, and availability of judiciary-related records and information.

Issue 5. Enhancing Access to the Judicial Process

How can courts remain comprehensible, accessible, and affordable for people who participate in the judicial process while responding to demographic and socioeconomic changes?

Issue Description. Courts are obligated to be open and accessible to anyone who initiates or is drawn into federal litigation, including litigants, lawyers, jurors, and witnesses. The federal courts must consider carefully whether they are continuing to meet the litigation needs of court users. This plan includes two strategies that focus on identifying unnecessary barriers to court access, and taking steps to eliminate them:

> Ensure that court rules, processes, and procedures meet the needs of lawyers and litigants in the judicial process. (Strategy 5.1)
>
> Ensure that the federal judiciary is open and accessible to those who participate in the judicial process. (Strategy 5.2)

The views of participants — including parties, lawyers and jurors — should be solicited as a first step in implementing these strategies.

Strategy 5.1. Ensure that court rules, processes, and procedures meet the needs of lawyers and litigants in the judicial process.

> **Background and Commentary.** The accessibility of court processes to lawyers and litigants is a component of the judiciary's core value of equal justice, but making courts readily accessible is difficult. Providing access is even more difficult when people look to the federal courts to address problems that cannot be solved within the federal courts' limited jurisdiction, when claims are not properly raised, and when judicial processes are not well understood.
>
> To improve access, rules of practice and procedure undergo regular review and revision to reflect changes in law, to simplify and clarify procedures, and to enhance uniformity across districts. Rules changes have also been made to help reduce cost and delay in the civil discovery process, to address the growing role of electronic discovery, and to take widespread advantage of technology in court proceedings. National mechanisms to consolidate and coordinate multidistrict litigation avoid duplication of discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel, and the judiciary. In addition, many courts provide settlement conferences, mediation programs, and other forms of alternative dispute resolution to parties interested in resolving their claims prior to a judicial decision. Despite these and other efforts, some lawyers, litigants, and members of the public continue to find litigating in the federal courts challenging. Court operations and processes vary across districts and chambers, and pursuing federal litigation can be time consuming and expensive.
>
> To improve access for lawyers and litigants in the judicial process, this plan includes the following goals:
>
> **Goal 5.1a:** Ensure that court rules, processes, and procedures are published or posted in an accessible manner.

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Goal 5.1b: Adopt measures designed to provide flexibility in the handling of cases, while reducing cost, delay, and other unnecessary burdens to litigants in the adjudication of disputes.

Strategy 5.2. Ensure that the federal judiciary is open and accessible to those who participate in the judicial process.

Background and Commentary. As part of its commitment to the core value of equal justice, the federal judiciary seeks to assure that all who participate in federal court proceedings — including jurors, litigants, witnesses, and observers — are treated with dignity and respect and understand the process. The judiciary's national website and the websites of individual courts provide the public with information about the courts themselves, court rules, procedures and forms, judicial orders and decisions, and schedules of court proceedings. Court dockets and case papers and files are posted on the internet through a judiciary-operated public access system. Court forms commonly used by the public have been rewritten in an effort to make them clearer and simpler to use, and court facilities are now designed to provide greater access to persons with disabilities. Some districts offer electronic tools to assist pro se filers in generating civil complaints. The Judicial Conference is working to enhance citizen participation in juries by improving the degree to which juries are representative of the communities in which they serve, reducing the burden of jury service, and improving juror utilization.

However, federal court processes are complex, and it is an ongoing challenge to ensure that participants have access to information about court processes and individual court cases, as well as court facilities. Many who come to the courts also have limited proficiency in English, and resources to provide interpretation and translation services are limited, particularly for civil litigants. Continued efforts are needed, and this strategy sets forth four goals to make courts more accessible for jurors, litigants, witnesses, and others.

Goal 5.2a: Provide jurors, litigants, witnesses, and observers with comprehensive, readily accessible information about court cases and the work of the courts.

Goal 5.2b: Reduce the hardships associated with jury service, and improve the experiences of citizens serving as grand and petit jurors.

Goal 5.2c: Improve the extent to which juries are representative of the communities in which they serve.

Goal 5.2d: Develop best practices for handling claims of pro se litigants in civil and bankruptcy cases.

Issue 6. The Judiciary's Relationships with the Other Branches of Government

How can the judiciary develop and sustain effective relationships with Congress and the executive branch, yet preserve appropriate autonomy in judiciary governance, management and decision-making?

Issue Description. Increasingly, the judicial branch's ability to deliver justice in a manner consistent with its core values is dependent upon its relationships with the other two branches of the federal government. An effective relationship with Congress is critical to success in securing adequate resources. In addition, the judiciary must provide Congress timely and accurate information about issues affecting the administration of justice, and demonstrate that the judiciary has a comprehensive system of oversight and review. The judiciary's relationships with the executive branch are also critical, particularly in areas where the executive branch has primary administrative or program responsibility, such as judicial security and facilities management. Ongoing communication about Judicial Conference goals, policies, and positions may help to develop the judiciary's overall relationship with Congress and the executive branch. By seeking opportunities to enhance communication among the three branches, the judiciary can strengthen its role as an equal branch of government while improving the administration of justice. At the same time, the judiciary must endeavor to preserve an appropriate degree of self-sufficiency and discretion in conducting its own affairs. This plan includes two strategies to build relationships with Congress and the executive branch:

> Develop and implement a comprehensive approach to enhancing relations between the judiciary and the Congress. (Strategy 6.1)
>
> Strengthen the judiciary's relations with the executive branch. (Strategy 6.2)

Strategy 6.1. Develop and implement a comprehensive approach to enhancing relations between the judiciary and the Congress.

> **Background and Commentary.** This strategy emphasizes the importance of building and maintaining relationships between judges and members of Congress, at the local level and in Washington. The intent is to enhance activities that are already underway, and to stress their importance in shaping a favorable future for the judiciary. Progress in implementing other strategies in this plan can also help the judiciary to enhance its relationship with Congress. Goals relating to timeliness and accessibility directly affect members' constituents, and the ability to report measurable progress in meeting goals may bring dividends.
>
> **Goal 6.1a:** Improve the early identification of legislative issues in order to improve the judiciary's ability to respond and communicate with Congress on issues affecting the administration of justice.
>
> **Goal 6.1b:** Implement effective approaches, including partnerships with the legal, academic, and private sector organizations, to achieve the judiciary's legislative goals.

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Strategy 6.2. Strengthen the judiciary's relations with the executive branch.

Background and Commentary. The executive branch delivers critical services to the judiciary, including space, security, personnel and retirement services, and more. In addition, the executive branch develops and implements policies and procedures that affect the administration of justice. This strategy focuses on enhancing the ability of the judiciary to provide input to the Department of Justice and others regarding proposed actions and policies that affect the administration of justice.

Goal 6.2a: Improve communications and working relationships with the executive branch to facilitate greater consideration of policy changes and other solutions that will improve the administration of justice.

Issue 7. Enhancing Public Understanding, Trust, and Confidence

How should the judiciary promote public trust and confidence in the federal courts in a manner consistent with its role within the federal government?

Issue Description. The ability of courts to fulfill their mission and perform their functions is based on the public's trust and confidence in the system. In large part, the judiciary earns that trust and confidence by faithfully performing its duties, adhering to ethical standards, and effectively carrying out internal oversight, review, and governance responsibilities. However, public perceptions of the judiciary are also often colored by misunderstandings about the institutional role of the federal courts and the limitations of their jurisdiction, as well as attitudes toward federal court decisions on matters of public interest and debate.

Changes in social networking and communication will continue to play a key role in how the judiciary is portrayed to and viewed by members of the public. These changes provide the judicial branch an opportunity to communicate broadly with greater ease and at far less cost. However, they also present the challenge of ensuring that judiciary information is complete, accurate, and timely. For the judiciary, this challenge is an especially difficult one because judges are constrained in their ability to participate in public discourse. This plan includes two strategies to enhance public understanding, trust and confidence in the judiciary:

Assure high standards of conduct and integrity for judges and staff. (Strategy 7.1)

Improve the sharing and delivery of information about the judiciary. (Strategy 7.2)

Strategy 7.1. Assure high standards of conduct and integrity for judges and staff.

Background and Commentary. Judges and judiciary staff are guided by codes of conduct, internal control policies, and robust accountability mechanisms within the judiciary that work together to uphold standards relating to conduct and the management of public resources. These mechanisms include complaint and dispute resolution processes, audits, and reviews of judiciary operations.

Accountability mechanisms must address critical risks and keep pace with changes in regulations and business practices. The regular review and update of policies, along with efforts to ensure that they are accessible to judges and staff, will help to improve judiciary compliance and controls. In addition, guidance relating to conduct that reflects current uses of social media and other technologies can help to avoid the inappropriate conveyance of sensitive information.

This strategy emphasizes up-to-date policies, timely education, and relevant guidance about ethics, integrity, and accountability. The strategy also relies upon the effective performance of critical internal controls, audit, investigation, and discipline functions.

Goal 7.1a: Enhance education and training for judges and judiciary employees on ethical conduct, integrity, and accountability.

Goal 7.1b: Ensure the integrity of funds, information, operations, and programs through strengthened internal controls and audit programs.

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Goal 7.1c: Perform investigative, disciplinary, and other critical self-governance responsibilities to achieve appropriate accountability.

Strategy 7.2. Improve the sharing and delivery of information about the judiciary.

Background and Commentary. Sources of news, analysis and information about the federal judiciary continue to change, as do communication tools used by the public. These changes can present challenges to the accurate portrayal of the judiciary and its work. At the same time, it is now easier to communicate directly with the public, which can help to improve the public's understanding of the federal judiciary's role and functions. The judiciary must keep pace with ongoing changes in how people access news and information when formulating its own communications practices.

Voluntary public outreach and civic education efforts by judges and court staff take place inside courthouses and in the community. These efforts could be facilitated through greater coordination and collaboration with civic education organizations. Resources to help judges and court staff participate in educational outreach efforts are available from the Administrative Office, the Federal Judicial Center, and private court administration and judges' associations.

The federal judiciary also serves as a model to other countries for its excellence, judicial independence, and the delivery of equal justice under the law. The executive branch, in carrying out its foreign relations duties, often requests the assistance of federal judges in communicating with representatives of other countries about the mission, core values, and work of the federal judiciary.

Goal 7.2a: Develop a communications strategy that considers the impact of changes in journalism and electronic communications.

Goal 7.2b: Communicate and collaborate with organizations outside the judicial branch to improve the public's understanding of the role and functions of the federal judiciary.

Goal 7.2c: Facilitate the voluntary participation by judges and court staff in public outreach and civic education programs.

Goal 7.2d: Communicate with judges in other countries to share information about the federal judiciary in our system of justice and to support rule-of-law programs around the world.

Strategic Planning Approach for the Judicial Conference of the United States and its Committees

Committees of the Judicial Conference are responsible for long-range and strategic planning within their respective subject areas, with the nature and extent of planning activity varying by committee based on its jurisdiction.

The Executive Committee is responsible for facilitating and coordinating planning activities across the committees. Under the guidance of a designated planning coordinator, the Executive Committee hosts long-range planning meetings of committee chairs, and asks committees to consider planning issues that cut across committee lines.

At its September 2010 session, the Judicial Conference approved a number of enhancements to the judiciary planning process:

Coordination: The Executive Committee chair may designate for a two-year renewable term an active or senior judge, who will report to that Committee, to serve as the judiciary planning coordinator. The planning coordinator facilitates and coordinates the strategic planning efforts of the Judicial Conference and its committees.

Prioritization: With suggestions from Judicial Conference committees and others, and the input of the judiciary planning coordinator, the Executive Committee identifies issues, strategies, or goals to receive priority attention every two years.

Integration: The committees of the Judicial Conference integrate the *Strategic Plan for the Federal Judiciary* into committee planning and policy development activities.

Assessment of Progress: For every goal in the *Strategic Plan*, mechanisms to measure or assess the judiciary's progress are developed.

Substantive changes to the *Strategic Plan for the Federal Judiciary* require the approval of the Conference, but the Executive Committee has the authority, as needed, to approve technical and non-controversial changes to the *Strategic Plan*. A review of the *Strategic Plan* takes place every five years. (JCUS-SEP 10, p. 6)

Once approved by the Judicial Conference, updated or revised editions of the *Strategic Plan for the Federal Judiciary* supersede previous long range and strategic plans as planning instruments to guide future policy-making and administrative actions within the scope of Conference authority. However, the approval of an updated or revised strategic plan should not necessarily be interpreted as the rescission of the individual policies articulated in the recommendations and implementation strategies of the December 1995 *Long Range Plan for the Federal Courts*.

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Acknowledgements

On recommendation of its Executive Committee, the 2015 edition of the *Strategic Plan for the Federal Judiciary* was approved by the Judicial Conference of the United States on September 17, 2015. This edition was prepared following an assessment of the implementation of the 2010 *Strategic Plan*, an analysis of trends and issues likely to affect the federal judiciary, and the consideration of updates and revisions proposed by Judicial Conference committees. An Ad Hoc Strategic Planning Group prepared drafts of the revised plan for review by Judicial Conference committees and consideration by the Executive Committee, which facilitates and coordinates strategic planning for the Conference and its committees.

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ATTACHMENT 2

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Judicial Conference Committee Strategic Initiatives

by Strategy

The following report displays strategic initiatives that were reported by Judicial Conference committees to be in progress during the summer of 2014, organized by the 13 strategies in the *Strategic Plan for the Federal Judiciary* . This report may be helpful to committee planning efforts by illustrating areas that may be in need of additional attention, and by displaying complementary or related efforts from other committees. Updated reports on strategic initiatives will be requested during the summer of 2016. Please note that many initiatives appear more than once in the report, as they align with more than one strategy.

Strategy	Number of Initiatives	Number of Committees	Pages
1.1. Pursue improvements in the delivery of justice on a nationwide basis.	25	6	2 - 4
1.2. Strengthen the protection of judges, court staff and the public at court facilities, and of judges and their families at other locations.	7	3	5
1.3. Secure resources that are sufficient to enable the judiciary to accomplish its mission in a manner consistent with judiciary core values.	16	9	6 - 7
2.1. Allocate and manage resources more efficiently and effectively.	37	13	8 - 11
3.1. Support a lifetime of service for federal judges.	3	1	12
3.2. Recruit, develop and retain highly competent staff while defining the judiciary's future workforce requirements.	4	3	13
4.1. Harness the potential of technology to identify and meet the needs of court users and the public for information, service, and access to the courts.	18	10	14 - 15
5.1. Ensure that court rules, processes and procedures meet the needs of lawyers and litigants in the judicial process.	8	3	16
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Strategy 1.1 Pursue improvements in the delivery of justice on a nationwide basis

Study of Reentry Court Programs. Gather data and analyze the efficacy and cost-effectiveness of reentry court programs.	Criminal Law Committee
Evidence-Based Practices. Implement evidence-based practices in the federal probation and pretrial services system.	
Probation and Pretrial Services System Transformation. Transform the Probation and Pretrial Services System into an outcome-based organization with a comprehensive outcome measurement system.	
Case Budgeting. Encourage judges to use case budgeting in qualifying CJA panel attorney cases, to provide cost-effective representation that promotes and is consistent with the best practices of the legal profession.	Defender Services Committee
Litigation Support. Develop and implement litigation support strategies. Continue collaborating with the Department of Justice's National Criminal Discovery Coordinator regarding discovery protocols and formats.	
Establish Federal Defender Organizations. Establish Federal Defender Organizations in all districts (or combined districts) where feasible.	
Fair Compensation for Panel Attorneys. Seek funding to have CJA panel attorneys paid fair compensation.	
Request DOJ Streamline its Non-Death Authorization Procedure. Continue discussions with the DOJ about ways in which it can reduce the amount of time it takes for it to decide not to seek the death penalty.	
Panel Attorney Utilization of Expert and Other Services. Analyze the utilization of investigative, expert and other necessary services under the Criminal Justice Act in panel attorney representations.	

Strategy 1.1 Pursue improvements in the delivery of justice on a nationwide basis

Jurisdictional Improvements Project. Review problem areas in the jurisdiction and venue statutes and develop proposals to clarify the law.	Federal-State Jurisdiction Committee
Outreach to State-Federal Judicial Councils. Periodically report to the councils on issues, including judicial security and public education about the judiciary, and share information among the councils regarding programs and initiatives of individual councils.	
Promoting Cooperation Between State and Federal Courts with Respect to Litigation Filed in Multiple Jurisdictions. Work with the Judicial Panel on Multidistrict Litigation and the Conference of Chief Justices to identify methods for promoting cooperation between federal and state judges presiding over related cases that have been filed in multiple jurisdictions.	
Staff Relief in Congested Courts. Assess the extent to which the addition of court law clerks provides relief to district courts with the highest congestion ratings and workloads.	Judicial Resources Committee
Improved Diversity in the Judiciary Workforce. Pursue actions, including partnerships with external leaders or organizations, to improve the judiciary's opportunities for increased minority representation among its employees.	
Comprehensive Judgeship Legislation. Pursue legislation to add judgeships throughout the judiciary.	
Targeted Judgeship Legislation. Pursue legislation to add judgeships in the courts with the most extreme workloads.	
Authority of Magistrate Judges. Consider possible legislation relating to magistrate judge authority.	Magistrate Judges Committee
Role of Magistrate Judges in Court Governance. Improve magistrate judge participation in court governance.	
Effective Utilization of Magistrate Judges. Improve courts' ability to utilize magistrate judges more effectively and to provide information, suggestions, and recommendations to courts on effective magistrate judge utilization practices.	
Technology for Magistrate Judges. Integrate additional statistical reporting into CM/ECF and consider possible alternatives to certain part-time magistrate judge positions.	

Strategy 1.1 Pursue improvements in the delivery of justice on a nationwide basis

Preserving the Judiciary's Core Values. Work with the advisory committees to ensure that the ongoing work of the Rules Committee has a strong impact on the judiciary's strategic planning issues, even when changes to the federal rules are under preliminary committee study or proposed changes are determined to be unnecessary.	Rules of Practice and Procedure Committee
Implementing the Results of the 2010 Conference on Civil Litigation. Work with the Advisory Committee on Civil Rules to implement the results of the May 2010 Conference held at the Duke University School of Law.	
Bankruptcy Forms Modernization. Revise the bankruptcy forms.	
Use of Technology in the Preparation and Development of Cases. Identify ways in which technology can be used to make the preparation and development of criminal cases more efficient.	
Analyzing and Promoting Recent Rules Amendments. Work with the advisory committees to analyze how recent rule amendments are being implemented in practice, and determine whether any educational tools might be used to make the bench and bar aware of recent rule changes.	
Impact of Technological Advances. Work with advisory rules committees to assess the impact of electronic filing and to identify ways to take advantage of technological advances.	

Strategy 1.2 Strengthen the protection of judges, court staff and the public at court facilities, and of judges and their families at other locations.

Outreach to State-Federal Judicial Councils. Periodically report to the councils on issues, including judicial security and public education about the judiciary, and share information among the councils regarding programs and initiatives of individual councils.	Federal-State Jurisdiction Committee
Promoting Cooperation Between State and Federal Courts in Court Security and in Planning for Disaster Recovery. Facilitate exchange of information among federal and state courts on planning for natural disasters and other emergencies.	
Judge Overseas Security. Take measures to contribute to the safety and security of judges, court executives, and staff traveling overseas.	International Judicial Relations Committee
Perimeter Security Pilot Program. Improve the protection of all participants in the judicial process at a more reasonable cost by consolidating within the U.S. Marshals Service the responsibility for all aspects of courthouse security.	Judicial Security Committee
Facility Access Card. Create and implement the judiciary's version of the type of identification card required in Homeland Security Presidential Directive (HSPD)-12.	
Emergency Preparedness Program. Provide assistance to the courts in the areas of emergency preparedness, crisis response, and occupant emergency and continuity of operations (COOP) planning.	
Internet Security. Provide on-going assistance to the courts in the area of threats against judges and judiciary personnel communicated via the internet and reduce the amount of personal information about judges available on the internet.	

Strategy 1.3 Secure resources that are sufficient to enable the judiciary to accomplish its mission in a manner consistent with judiciary core values.

Bankruptcy Judgeship Surveys. Conduct bankruptcy judgeship surveys to determine the need for additional bankruptcy judgeships and the continuing need for existing bankruptcy judgeships.	Bankruptcy Committee
Congressional Outreach. Continue to participate in targeted outreach and education of key members and staff, including congressional delegation visits to courts, meetings and events.	Budget Committee
Cost Containment Initiatives. Continue to coordinate with program committees to oversee the implementation of the cost-containment program and to identify and pursue areas of potential cost savings and/or cost avoidances.	
Courtroom Use and Sharing. In collaboration with other Conference committees, consider issues around courtroom use and sharing in accordance with a 2005 directive from Congress that the judiciary study courtroom sharing.	Court Administration and Case Management Committee
Fair Compensation for Panel Attorneys. Seek funding to have CJA panel attorneys paid fair compensation.	Defender Services Committee
Federal Defender Organization Case Weights. Evaluate the usefulness of Federal Defender Organization (FDO) case weights in developing FDO funding and staffing requirements.	
Judicial Compensation Restoration. Monitor economic and political conditions to gauge the receptiveness of Congress to proposals to restore judicial compensation.	Judicial Branch Committee
Judicial Benefits. Pursue benefits enhancements for judges.	

Strategy 1.3 Secure resources that are sufficient to enable the judiciary to accomplish its mission in a manner consistent with judiciary core values.

Comprehensive Judgeship Legislation. Pursue legislation to add judgeships throughout the judiciary.	Judicial Resources Committee
Targeted Judgeship Legislation. Pursue legislation to add judgeships in the courts with the most extreme workloads.	
Magistrate Judges Program Cost Containment. Identify and pursue areas of potential cost containment and/or cost avoidances in the magistrate judge program area.	Magistrate Judges Committee
Technology for Magistrate Judges. Integrate additional statistical reporting into CM/ECF and consider possible alternatives to certain part-time magistrate judge positions.	
Perimeter Security Pilot Program. Improve the protection of all participants in the judicial process at a more reasonable cost by consolidating within the U.S. Marshals Service the responsibility for all aspects of courthouse security.	Judicial Security Committee
Facility Access Card. Create and implement the judiciary's version of the type of identification card required in Homeland Security Presidential Directive (HSPD)-12.	
Express Menu of Services. An initiative for the judiciary to procure services for minor tenant alterations.	Space and Facilities Committee
Judiciary Footprint Reduction. A multi-faceted approach is being utilized by the judiciary to reduce its space footprint including the no net new policy, three percent space reduction target, and the Integrated Workplace Initiative.	

Strategy 2.1 Allocate and manage resources more efficiently and effectively.

Cost Containment Initiatives. Continue to coordinate with program committees to oversee the implementation of the cost-containment program and to identify and pursue areas of potential cost savings and/or cost avoidances.	Budget Committee
Contingency Planning. Discuss efforts to develop contingency planning strategies and options for the fiscal year 2012 and 2013 budget cycles and beyond.	
Courtroom Use and Sharing. In collaboration with other Conference committees, consider issues around courtroom use and sharing in accordance with a 2005 directive from Congress that the judiciary study courtroom sharing.	Court Administration and Case Management Committee
Study of Reentry Court Programs. Gather data and analyze the efficacy and cost-effectiveness of reentry court programs.	Criminal Law Committee
Evidence-Based Practices. Implement evidence-based practices in the federal probation and pretrial services system.	
Probation and Pretrial Services System Transformation. Transform the Probation and Pretrial Services System into an outcome-based organization with a comprehensive outcome measurement system.	
Case Budgeting. Encourage judges to use case budgeting in qualifying CJA panel attorney cases, to provide cost-effective representation that promotes and is consistent with the best practices of the legal profession.	Defender Services Committee
Litigation Support. Develop and implement litigation support strategies. Continue collaborating with the Department of Justice's National Criminal Discovery Coordinator regarding discovery protocols and formats.	

Strategy 2.1 Allocate and manage resources more efficiently and effectively.

Request DOJ Streamline its Non-Death Authorization Procedure. Continue discussions with the DOJ about ways in which it can reduce the amount of time it takes for it to decide not to seek the death penalty.	Defender Services Committee
New Federal Defender Organization Case Management System. Develop a new, automated Federal Defender Organization case management system.	
Electronic Criminal Justice Act Voucher System. Develop and deploy an electronic Criminal Justice Act voucher processing system.	
Panel Attorney Utilization of Expert and Other Services. Analyze the utilization of investigative, expert and other necessary services under the Criminal Justice Act in panel attorney representations.	
Jurisdictional Improvements Project. Review problem areas in the jurisdiction and venue statutes and develop proposals to clarify the law.	Federal-State Jurisdiction Committee
Outreach to State-Federal Judicial Councils. Periodically report to the councils on issues, including judicial security and public education about the judiciary, and share information among the councils regarding programs and initiatives of individual councils.	
Promoting Cooperation Between State and Federal Courts in Court Security and in Planning for Disaster Recovery. Facilitate exchange of information among federal and state courts on planning for natural disasters and other emergencies.	
Promoting Cooperation Between State and Federal Courts with Respect to Litigation Filed in Multiple Jurisdictions. Work with the Judicial Panel on Multidistrict Litigation and the Conference of Chief Justices to identify methods for promoting cooperation between federal and state judges presiding over related cases that have been filed in multiple jurisdictions.	
Promote Cooperation Between State and Federal Courts in the Recruitment and Retention of Court Interpreters. Encourage communication between state and federal courts with regard to recruiting and retaining court interpreters.	

Strategy 2.1 Allocate and manage resources more efficiently and effectively.

Electronic Financial Disclosure Filing and Records Management. Develop and deploy a national project for the electronic filing and records management of financial disclosure reports and data.	Financial Disclosure Committee
IT Services for Courts. Provide a number of service initiatives which courts may use at their option, and which are designed to upgrade the judiciary's IT infrastructure and contain costs by realizing economies of scale for the judiciary.	Information Technology Committee
Planning for Collaborative Applications Development. Plan for collaborative application development across courts and between local court and national applications.	
Intercircuit Assignments Database System. Develop and deploy an automated system to process and track intercircuit assignments.	Intercircuit Assignments Committee
Staff Relief in Congested Courts. Assess the extent to which the addition of court law clerks provides relief to district courts with the highest congestion ratings and workloads.	Judicial Resources Committee
Improved Precision of Staffing Formulas. Use a more precise assessment technique to estimate staffing requirements.	
Perimeter Security Pilot Program. Improve the protection of all participants in the judicial process at a more reasonable cost by consolidating within the U.S. Marshals Service the responsibility for all aspects of courthouse security.	Judicial Security Committee
Emergency Preparedness Program. Provide assistance to the courts in the areas of emergency preparedness, crisis response, and occupant emergency and continuity of operations (COOP) planning.	
Enhancements to the Judicial Security Committee's Fiduciary Oversight of the Court Security Budget. Oversee a Business Process Re-engineering (BPR) review and improvement of the USMS's security systems and equipment program.	
Internet Security. Provide on-going assistance to the courts in the area of threats against judges and judiciary personnel communicated via the internet and reduce the amount of personal information about judges available on the internet.	

Strategy 2.1 Allocate and manage resources more efficiently and effectively.

Magistrate Judges Program Cost Containment. Identify and pursue areas of potential cost containment and/or cost avoidances in the magistrate judge program area.	Magistrate Judges Committee
Authority of Magistrate Judges. Consider possible legislation relating to magistrate judge authority.	
Role of Magistrate Judges in Court Governance. Improve magistrate judge participation in court governance.	
Effective Utilization of Magistrate Judges. Improve courts' ability to utilize magistrate judges more effectively and to provide information, suggestions, and recommendations to courts on effective magistrate judge utilization practices.	
Preserving the Judiciary's Core Values. Work with the advisory committees to ensure that the ongoing work of the Rules Committees has a strong impact on the judiciary's strategic planning issues, even when changes to the federal rules are under preliminary committee study or proposed changes are determined to be unnecessary.	Rules of Practice and Procedure Committee
Use of Technology in the Preparation and Development of Cases. Identify ways in which technology can be used to make the preparation and development of criminal cases more efficient.	
Impact of Technological Advances. Work with advisory rules committees to assess the impact of electronic filing and to identify ways to take advantage of technological advances.	
Express Menu of Services. An initiative for the judiciary to procure services for minor tenant alterations.	Space and Facilities Committee
General Services Administration Validation Improving the delivery of services that the judiciary receives from GSA.	
Judiciary Footprint Reduction. A multi-faceted approach is being utilized by the judiciary to reduce its space footprint including the no net new policy, three percent space reduction target, and the Integrated Workplace Initiative.	

Strategy 3.1. Support a lifetime of service for federal judges.

Judicial Compensation Restoration. Monitor economic and political conditions to gauge the receptiveness of Congress to proposals to restore judicial compensation.	Judicial Branch Committee
Judicial Benefits. Pursue benefits enhancements for judges.	
Judiciary Wellness. Encourage circuits to pursue initiatives that enhance the well-being of judges, including mental and physical health and aging.	

Strategy 3.2. Recruit, develop and retain highly competent staff while defining the judiciary's future workforce requirements.

Promote Cooperation Between State and Federal Courts in the Recruitment and Retention of Court Interpreters. Encourage communication between state and federal courts with regard to recruiting and retaining court interpreters.	Federal-State Jurisdiction Committee
Improved Diversity in the Judiciary Workforce. Pursue actions, including partnerships with external leaders or organizations, to improve the judiciary's opportunities for increased minority representation among its employees.	Judicial Resources Committee
Broadened Workforce Competencies. Recruit, train, and retain a workforce with a broader set of competencies.	
Office of Magistrate Judge. Ensure a high caliber of magistrate judges and increase the diversity of magistrate judges.	Magistrate Judges Committee

Strategy 4.1. Harness the potential of technology to identify and meet the needs of court users and the public for information, service, and access to the courts.

Next Generation Case Management/Electronic Case Files (CM/ECF) System. Serve as the lead Conference committee on the development of requirements for a next generation case management system for all federal courts, and resolve policy issues related to the system's development.	Court Administration and Case Management Committee
Cameras in the Courtroom. Conduct a pilot to evaluate the effect of cameras in district court courtrooms.	
New Federal Defender Organization Case Management System. Develop a new, automated Federal Defender Organization case management system.	Defender Services Committee
Electronic Criminal Justice Act Voucher System. Develop and deploy an electronic Criminal Justice Act voucher processing system.	
Promoting Cooperation Between State and Federal Courts in Development of Information Technology. Promote sharing of information among state and federal courts on development of court technology.	Federal-State Jurisdiction Committee
Electronic Financial Disclosure Filing and Records Management. Develop and deploy a national project for the electronic filing and records management of financial disclosure reports and data.	Financial Disclosure Committee
New Communications Network. Institute a new communications network to transmit voice, video, and data over a single, secure network.	Information Technology Committee
Enterprise Data Management. Put into place an infrastructure and common data architecture for a judiciary-wide set of data.	
IT Services for Courts. Provide a number of service initiatives which courts may use at their option, and which are designed to upgrade the judiciary's IT infrastructure and contain costs by realizing economies of scale for the judiciary.	
Planning for Collaborative Applications Development. Plan for collaborative application development across courts and between local court and national applications.	
IT Security Services. Protect the judiciary's infrastructure through various communication, planning, assessment, and procurement vehicles.	

Strategy 4.1. Harness the potential of technology to identify and meet the needs of court users and the public for information, service, and access to the courts.

Intercircuit Assignments Database System. Develop and deploy an automated system to process and track intercircuit assignments.	Intercircuit Assignments Committee
Court Internet Website "Toolbox." Develop and encourage the use of templates and content that can be used by courts to enhance their external communications.	Judicial Branch Committee
JCD-DOCS (Judicial Conduct and Disability Act Document Submission and Database System). Develop a database and an online transactional system that will facilitate the transmission and management of certain complaint-related documents for required monitoring by the Committee.	Judicial Conduct and Disability Committee
Technology for Magistrate Judges. Integrate additional statistical reporting into CM/ECF and consider possible alternatives to certain part-time magistrate judge positions.	Magistrate Judges Committee
Bankruptcy Forms Modernization. Revise the bankruptcy forms.	Rules of Practice and Procedure Committee
Use of Technology in the Preparation and Development of Cases. Identify ways in which technology can be used to make the preparation and development of criminal cases more efficient.	
Impact of Technological Advances. Work with advisory rules committees to assess the impact of electronic filing and to identify ways to take advantage of technological advances.	

Strategy 5.1. Ensure that court rules, processes and procedures meet the needs of lawyers and litigants in the judicial process.

Monitoring Legislation Affecting Jurisdiction. Monitor legislation that would affect the allocation of jurisdiction to the federal courts and between the federal and state courts, and recommend positions for consideration by the Judicial Conference.	Federal-State Jurisdiction Committee
Promoting Cooperation Between State and Federal Courts with Respect to Litigation Filed in Multiple Jurisdictions. Work with the Judicial Panel on Multidistrict Litigation and the Conference of Chief Justices to identify methods for promoting cooperation between federal and state judges presiding over related cases that have been filed in multiple jurisdictions.	
Court Internet Website "Toolbox." Develop and encourage the use of templates and content that can be used by courts to enhance their external communications.	Judicial Branch Committee
Implementing the Results of the 2010 Conference on Civil Litigation. Work with the Advisory Committee on Civil Rules to implement the results of the May 2010 Conference held at the Duke University School of Law.	Rules of Practice and Procedure Committee
Bankruptcy Forms Modernization. Revise the bankruptcy forms.	
Use of Technology in the Preparation and Development of Cases. Identify ways in which technology can be used to make the preparation and development of criminal cases more efficient.	
Analyzing and Promoting Recent Rules Amendments. Work with the advisory committees to analyze how recent rule amendments are being implemented in practice, and determine whether any educational tools might be used to make the bench and bar aware of recent rule changes.	
Impact of Technological Advances. Work with advisory rules committees to assess the impact of electronic filing and to identify ways to take advantage of technological advances.	

Strategy 5.2. Ensure that the federal judiciary is open and accessible to those who participate in the judicial process.

Pro Se Litigant Access Initiatives. The Committee, as part of its jurisdictional responsibility to study and make recommendations on matters affecting case management has studied pro se civil litigation and related district court programs to encourage courts to develop better practices in this area.	Court Administration and Case Management Committee
Juror Utilization. The Committee's jurisdiction includes consideration of policies related to jury administration and the operation of petit and grand juries in federal district courts.	
Promote Cooperation Between State and Federal Courts in the Recruitment and Retention of Court Interpreters. Encourage communication between state and federal courts with regard to recruiting and retaining court interpreters.	Federal-State Jurisdiction Committee
Bankruptcy Forms Modernization. Revise the bankruptcy forms.	Rules of Practice and Procedure Committee
Express Menu of Services. An initiative for the judiciary to procure services for minor tenant alterations.	Space and Facilities Committee
Court Internet Website "Toolbox." Develop and encourage the use of templates and content that can be used by courts to enhance their external communications.	Judicial Branch Committee

Strategy 6.1. Develop and implement a comprehensive approach to enhancing relations between the judiciary and the Congress.

Congressional Outreach. Continue to participate in targeted outreach and education of key members and staff, including congressional delegation visits to courts, meetings and events.	Budget Committee
Monitoring Legislation Affecting Jurisdiction. Monitor legislation that would affect the allocation of jurisdiction to the federal courts and between the federal and state courts, and recommend positions for consideration by the Judicial Conference.	Federal-State Jurisdiction Committee
Electronic Financial Disclosure Filing and Records Management. Develop and deploy a national project for the electronic filing and records management of financial disclosure reports and data.	Financial Disclosure Committee
"Judiciary 101." Provide information about the judiciary, and host local court visits for members of Congress (particularly newly-elected members) and their staffs (e.g., swearing-in ceremonies).	Judicial Branch Committee
Congressional Member and Staff Contacts. Increase the number of contacts with members of Congress that are not directly related to the judiciary's legislative goals, including hosting congressional members and staff at local courthouses; inviting members to participate in naturalization ceremonies; and inviting local congressional staff to the courthouse to "shadow" a host federal judge.	
Judiciary Footprint Reduction. A multi-faceted approach is being utilized by the judiciary to reduce its space footprint including the no net new policy, three percent space reduction target, and the Integrated Workplace Initiative.	Space and Facilities Committee

6.2. Strengthen the judiciary's relations with the executive branch.

Litigation Support. Develop and implement litigation support strategies. Continue collaborating with the Department of Justice's National Criminal Discovery Coordinator regarding discovery protocols and formats.	Defender Services Committee
Request DOJ Streamline its Non-Death Authorization Procedure. Continue discussions with the DOJ about ways in which it can reduce the amount of time it takes for it to decide not to seek the death penalty.	
Electronic Financial Disclosure Filing and Records Management. Develop and deploy a national project for the electronic filing and records management of financial disclosure reports and data.	Financial Disclosure Committee
Outreach to the International Development Community. Provide information about the work of federal judges and federal courts to U.S. government officials and key organizations engaged in international rule of law and development work.	International Judicial Relations Committee

6.2. Strengthen the judiciary's relations with the executive branch.

Perimeter Security Pilot Program. Improve the protection of all participants in the judicial process at a more reasonable cost by consolidating within the U.S. Marshals Service the responsibility for all aspects of courthouse security.	Judicial Security Committee
Facility Access Card. Create and implement the judiciary's version of the type of identification card required in Homeland Security Presidential Directive (HSPD)-12.	
Enhancements to the Judicial Security Committee's Fiduciary Oversight of the Court Security Budget. Oversee a Business Process Re-engineering (BPR) review and improvement of the USMS's security systems and equipment program.	
Internet Security. Provide on-going assistance to the courts in the area of threats against judges and judiciary personnel communicated via the internet and reduce the amount of personal information about judges available on the internet.	
Express Menu of Services. An initiative for the judiciary to procure services for minor tenant alterations.	Space and Facilities Committee
General Services Administration Validation Improving the delivery of services that the judiciary receives from GSA.	
Judiciary Footprint Reduction. A multi-faceted approach is being utilized by the judiciary to reduce its space footprint including the no net new policy, three percent space reduction target, and the Integrated Workplace Initiative.	

Strategy 7.1. Assure high standards of conduct and integrity for judges and staff.

Update and Review of Internal Control Policy. Update and revise the judiciary's internal control policy.	Audits and AO Accountability Committee
Risk-Based Approach to Updating the Judiciary's Cyclical Audit Program. Conduct a pilot to implement more of a risk-based approach to the judiciary's cyclical audit program for courts and federal public defender organizations.	
Ethics Guidance. Provide timely ethics guidance to judges and judiciary employees that will promote ethical conduct, integrity, and accountability.	Codes of Conduct Committee
Ethics Information. Develop ethics information that can be published and posted on JNet and that reflects the Committee's guidance on a broad range of common ethics topics.	
Ethics Education. Development of high-quality ethics education programs for judges and judicial employees, on a wide range of topics that can be adapted to fit the needs of individual courts.	
Electronic Criminal Justice Act Voucher System. Develop and deploy an electronic Criminal Justice Act voucher processing system.	Defender Services Committee
Electronic Financial Disclosure Filing and Records Management. Develop and deploy a national project for the electronic filing and records management of financial disclosure reports and data.	Financial Disclosure Committee
Judicial Conduct and Disability Act Digest of Authorities. Produce and maintain an online, topically-organized digest of relevant sources of law and guidance.	Judicial Conduct and Disability Committee
JCD-DOCS (Judicial Conduct and Disability Act Document Submission and Database System). Develop a database and an online transactional system that will facilitate the transmission and management of certain complaint-related documents for required monitoring by the Committee.	

Strategy 7.2. Improve the sharing and delivery of information about the judiciary.

Congressional Outreach. Continue to participate in targeted outreach and education of key members and staff, including congressional delegation visits to courts, meetings and events.	Budget Committee
Cameras in the Courtroom. Conduct a pilot to evaluate the effect of cameras in district court courtrooms.	Court Administration and Case Management Committee
Outreach to State-Federal Judicial Councils. Periodically report to the councils on issues, including judicial security and public education about the judiciary, and share information among the councils regarding programs and initiatives of individual councils.	Federal-State Jurisdiction Committee
Electronic Financial Disclosure Filing and Records Management. Develop and deploy a national project for the electronic filing and records management of financial disclosure reports and data.	Financial Disclosure Committee
Outreach to the International Development Community. Provide information about the work of federal judges and federal courts to U.S. government officials and key organizations engaged in international rule of law and development work.	International Judicial Relations Committee

Strategy 7.2. Improve the sharing and delivery of information about the judiciary.

"Judiciary 101." Provide information about the judiciary, and host local court visits for members of Congress (particularly newly-elected members) and their staffs (e.g., swearing-in ceremonies).	Judicial Branch Committee
Congressional Member and Staff Contacts. Increase the number of contacts with members of Congress that are not directly related to the judiciary's legislative goals, including hosting congressional members and staff at local courthouses; inviting members to participate in naturalization ceremonies; and inviting local congressional staff to the courthouse to "shadow" a host federal judge.	
Court Internet Website "Toolbox." Develop and encourage the use of templates and content that can be used by courts to enhance their external communications.	
Programs for Judges and Journalists. Develop programs that provide more information to journalists about the work of federal judges and federal courts.	
Judicial Conduct and Disability Act Digest of Authorities. Produce and maintain an online, topically-organized digest of relevant sources of law and guidance.	Judicial Conduct and Disability Committee
JCD-DOCS (Judicial Conduct and Disability Act Document Submission and Database System). Develop a database and an online transactional system that will facilitate the transmission and management of certain complaint-related documents for required monitoring by the Committee.	
Improving the Public's Understanding of the Federal Judiciary. Communicate and seek to collaborate with organizations outside the judicial branch to improve the public's understanding of the role and functions of the federal judiciary.	Rules of Practice and Procedure Committee
Analyzing and Promoting Recent Rules Amendments. Work with the advisory committees to analyze how recent rule amendments are being implemented in practice, and determine whether any educational tools might be used to make the bench and bar aware of recent rule changes.	

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ATTACHMENT 3

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125-012176

Chambers of
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Chief Judge
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Eighth Circuit

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November 3, 2015

MEMORANDUM

To: Chairs of Judicial Conference Committees

From: William Jay Riley
Judiciary Planning Coordinator

Re: JUDICIARY STRATEGIC PLANNING

As you know, the Judicial Conference approved an update to the *Strategic Plan for the Federal Judiciary* at its September 2015 session. I am grateful for your ideas and suggestions regarding the update to the *Strategic Plan*, and for the time you set aside for planning discussions during your meetings. Please extend my thanks to all committee members for their contributions and to staff for their support.

The materials for your December and January meetings will include a judiciary strategic planning agenda item that reviews changes to the *Strategic Plan* and describes the approach to implementation for the Judicial Conference and its committees.

An important aspect of that approach is setting priorities. The planning agenda item also will seek your suggestions regarding strategies and goals from the *Strategic Plan* that should receive priority attention over the next two years. Your suggestions will be reviewed by the Executive Committee at its February 11-12, 2016 meeting. Please provide your suggestions regarding priority strategies and goals to me, with a copy to Brian Lynch, the Administrative Office's Long-Range Planning Officer.

Printed copies of the *Strategic Plan* can be provided by your committee staff or by Brian Lynch. As always, please contact me or Brian if you have any questions or suggestions.

cc: Executive Committee
Committee Staff

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MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 7, 2016 | Phoenix, AZ

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ATTENDANCE

The Judicial Conference on Rules of Practice and Procedure held its spring meeting in Phoenix, Arizona on January 7, 2016. The following members participated in the meeting:

Judge Jeffrey S. Sutton, Chair
Associate Justice Brent E. Dickson
Roy T. Englert, Esq.
Gregory G. Garre, Esq.
Daniel C. Girard, Esq.
Judge Neil M. Gorsuch
Judge Susan P. Graber
Professor William K. Kelley
Judge Patrick J. Schiltz
Judge Amy St. Eve
Judge Richard C. Wesley
Judge Jack Zouhary

The following attended on behalf of the advisory committees:

Advisory Committee on Appellate Rules –
Judge Steven M. Colloton, Chair
Professor Gregory E. Maggs, Reporter

Advisory Committee on Bankruptcy Rules –
Judge Sandra Segal Ikuta, Chair
Professor S. Elizabeth Gibson, Reporter (by teleconference)
Professor Michelle M. Harner, Reporter

Advisory Committee on Civil Rules –
Judge John D. Bates, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Reporter

Advisory Committee on Criminal Rules –
Judge Donald W. Molloy, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Reporter

Advisory Committee on Evidence Rules –
Judge William K. Sessions III, Chair
Professor Daniel J. Capra, Reporter

Elizabeth J. Shapiro, Esq., Deputy Director for the Civil Division of the Justice Department, represented the Department of Justice on behalf of the Honorable Sally Quillian Yates, Deputy Attorney General.

Other meeting attendees included: Judge David G. Campbell; Judge Scott Matheson, Jr. (teleconference); Judge Robert M. Dow (teleconference); Judge Phillip R. Martinez and Sean Marlaire, representing the Court Administration and Case Management Committee ("CACM"); Professor Bryan A. Garner, Style Consultant; Professor R. Joseph Kimble, Style Consultant; Professor Geoffrey C. Hazard, Jr., Consultant.

Providing support to the Committee:

Professor Daniel R. Coquillette	Reporter, Standing Committee
Rebecca A. Womeldorf (by teleconference)	Secretary, Standing Committee
Julie Wilson (by teleconference)	Attorney Advisor, RCSO
Scott Myers	Attorney Advisor, RCSO
Bridget M. Healy (by teleconference)	Attorney Advisor, RCSO
Shelly Cox	Administrative Specialist
Tim Reagan	Senior Research Associate, FJC
Derek A. Webb	Law Clerk, Standing Committee
Amelia G. Yowell (by teleconference)	Supreme Court Fellow, AO

INTRODUCTORY REMARKS

Judge Sutton called the meeting to order. He introduced two new members of the Standing Committee, Daniel Girard and William Kelley, welcomed back Bryan Garner as a Style Consultant, welcomed Judge John Bates as the new chair of the Advisory Committee on Civil Rules and Judge Donald Molloy as the new chair of the Advisory Committee on Criminal Rules, and introduced Greg Maggs as the new reporter for the Advisory Committee on Appellate Rules and Michelle Harner as a new reporter for the Advisory Committee on Bankruptcy Rules. He thanked Judge Phillip Martinez and Sean Marlaire for representing CACM. And he reminded the attendees that Justice O'Connor would attend the dinner meeting.

Judge Sutton reported that the civil rules package, which included revisions of Rules 1, 4, 16, 26, 30, 31, 33, 34, 37, and 55, and abrogation of Rule 84, and Bankruptcy Rule 1007, went into effect on December 1, 2015. He observed that Chief Justice Roberts devoted his year-end report to that package.

Judge Sutton also reported that the Judicial Conference submitted various rule proposals to the Supreme Court on October 9, 2015 (Appellate Rules 4, 5, 21, 25, 26, 27, 28, 28.1, 29, 32, 35, and 40, and Forms 1, 5, and 6, and proposed new Form 7; Bankruptcy Rules 1010, 1011, 2002, 3002.1, 9006(f), and new Rule 1012; Civil Rules 4, 6, and 82; and Criminal Rules 4, 41, and 45) and again on October 29, 2015 (Bankruptcy Rules 7008, 7012, 7016, 9027, and 9033, known as the "*Stern* Amendments").

APPROVAL OF THE MINUTES OF THE LAST MEETING

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee approved the minutes of the May 28, 2015 meeting.**

INTER-COMMITTEE WORK

Judge Sutton reserved discussion of electronic filing, service, and notice requirements for the Advisory Committee on Criminal Rules' report on Criminal Rule 49.

Professor Capra discussed the 2015 study conducted by Joe S. Cecil of the Federal Judicial Center entitled *Unredacted Social Security Numbers in Federal Court PACER Documents*, which discussed unredacted social security numbers in documents filed in federal courts and thus available in PACER, notwithstanding the "privacy rules" adopted in 2007 that require redaction of such information. The Standing Committee concluded that this problem could not be resolved by another rule amendment, and offered to support those in CACM who would address implementation of the existing rule at their summer 2016 meeting.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Molloy reported that the Advisory Committee on Criminal Rules had no action items and six information items.

Information Items

Rule 49 – Rule 49 provides that service and filing must be made "in the manner provided for a civil action." The Advisory Committee is considering ways to amend this rule in anticipation of a likely change in the civil rules that will require all parties to file and serve electronically. After study by the Rule 49 Subcommittee chaired by Judge David Lawson, the Advisory Committee concluded that such an electronic default rule could be problematic in the criminal context for two reasons. First, pro se defendants and pro se prisoners filing actions under § 2254 and § 2255 rarely have unfettered access to the CM/ECF system. Second, the architecture of CM/ECF does not permit non-party filings in criminal cases. Therefore, the Advisory Committee favors severing the link to the civil rules governing service and filing and is drafting a stand-alone Rule 49 that does not incorporate Civil Rule 5. They plan to submit a final draft rule to the Standing Committee in June 2016.

The Standing Committee then discussed the general topic of incorporation by reference across the various sets of rules. Consensus formed around the idea that whenever an advisory committee is considering changing a rule that is incorporated by reference, or is parallel with language in another set of rules, it should always first coordinate with the committee responsible for those other rules before sending proposed changes out for notice and comment.

Members also agreed that the presumption in favor of parallel language across the rules suggested that changes to Rule 49 should depart as little as possible from the language of Civil Rule 5.

Rule 12.4(a)(2) – After an amendment in 2009, the Code of Judicial Conduct no longer treats as "parties" all victims entitled to restitution. The Department of Justice consequently recommended a corresponding amendment to Rule 12.4(a)(2), which assists judges in

determining whether to recuse themselves based on the identity of any organizational or corporate victims. The Advisory Committee agreed with this recommendation and created a subcommittee to draft a proposed amendment. Because a parallel provision exists in the Appellate Rules, the Advisory Committee on Criminal Rules is working with the Advisory Committee on Appellate Rules to draft the amendment.

Rule 15(d) – The Advisory Committee appointed a subcommittee to study whether to amend this rule and its accompanying note, which governs payment of deposition expenses, in light of an inconsistency between the text of the rule and the committee note. Judge Molloy said the text of the rule accurately identifies who bears the costs, but the note slightly mischaracterizes the rule by suggesting that the Department of Justice would have to pay for certain depositions overseas even if it did not request them. The Advisory Committee is struggling with how to fix this problem given the presumption that it cannot amend a note absent a rule revision. The Subcommittee will make its recommendations about how to fix this potential problem at the April 2016 meeting of the Advisory Committee.

Rule 32.1 – At the suggestion of Judge Graber, the Advisory Committee has examined whether Rule 32.1 should track the language of Rule 32 and require the court to give the government an opportunity to allocute at a hearing for revocation or modification of probation or supervised release. In a couple of cases, the United States Court of Appeals for the Ninth Circuit has held that the court must grant the government this opportunity and imported procedural rules from Rule 32 to fill "gaps" in Rule 32.1. After discussing the matter at its September 2015 meeting, the Advisory Committee decided to let this issue percolate and watch for developments in other circuits before considering any rule amendments.

Rule 23 – The Advisory Committee considered a suggestion to revise Rule 23 to allow oral waivers of trial by jury. The current rule requires a written stipulation from the defendant if they want to waive a jury trial and from the parties if they want to have a jury composed of fewer than twelve persons. Several cases have held that an oral waiver is sufficient if it is made knowingly and intelligently and have held that the failure to make the waiver in writing was harmless error. After study, the Advisory Committee decided against pursuing an amendment to Rule 23 because so many other criminal rules require written waivers and because the doctrine of harmless error covers this issue.

Rule 6 – In response to a suggestion to consider several amendments to Rule 6, which governs grand jury procedures, after a thorough discussion, the Advisory Committee decided to retain the current rule.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Colloton reported that the Advisory Committee on Appellate Rules had three action items in the form of three sets of proposed amendments to be published this upcoming summer for which it sought the approval of the Standing Committee.

Action Items

STAYS OF THE ISSUANCE OF THE MANDATE: RULE 41 – The Advisory Committee sought approval of several amendments to Rule 41 designed to respond to two Supreme Court cases that highlighted some ambiguity within the Rule and to remove some redundancy from the Rule.

The proposed amendment to Rule 41(b) clarifies that a circuit court can extend the time of a stay of its mandate "by order" and not simply by inaction. In response to a question from a member, the Standing Committee discussed the pros and cons of inserting "only" in front of "by order" but decided to leave the language as is, with the potential to revisit at the June 2016 Standing Committee meeting. The proposed amendment to Rule 41(d)(4) next clarifies that a circuit court can "in extraordinary circumstances" stay a mandate even after it receives a copy of a Supreme Court order denying certiorari, thereby adopting the same extraordinary circumstances standard that the Supreme Court has found is required to recall a mandate. Finally, the Advisory Committee proposed deleting Rule 41(d)(1), which replicates Rule 41(b) regarding the effect of a petition for rehearing on the mandate, and is therefore redundant.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendments to Rule 41 and their accompanying Committee Notes.**

AUTHORIZING LOCAL RULES ON THE FILING OF AMICUS BRIEFS: RULE 29(A) – The Advisory Committee sought approval of an amendment to Rule 29(a) that would authorize local rules that prohibit the filing of amicus briefs, even if the parties have consented to their filing, in situations where they would disqualify a judge. As it stands, Rule 29(a) appears to be inconsistent with such local rules because it implies that there is an absolute right to file an amicus brief if the parties consent: "Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing." The proposed amendment adds to that sentence "except that a court of appeals may by local rule prohibit the filing of an amicus brief that would result in the disqualification of a judge."

The Standing Committee members raised and discussed several potential stylistic issues with the proposed amendment. Judge Colloton noted in advance that he plans to shorten "the disqualification of a judge" to "a judge's disqualification." Judge Sutton recommended omitting the phrase "by local rule," which received support from the members. Others raised stylistic concerns with the "except that" phrase as a whole, preferring to start a new sentence beginning with "But" or "A court of appeals may," or breaking up the sentence with a semicolon and beginning the second clause with "provided however that." Others pointed out that a third sentence might suggest that the exception would also apply to the first sentence of Rule 29(a), which governs amicus briefs submitted by the government. Finally, some members raised a concern with the meaning of the phrase "prohibit the filing," asking whether it referred to prohibiting the actual submission of the document, its delivery to the panel, or its continued appearance in the record.

Judge Colloton decided to "remand" the proposal back to the Advisory Committee for further consideration of these largely stylistic revisions before re-submission to the Standing Committee.

EXTENSION OF TIME FOR FILING REPLY BRIEFS: RULES 31(A)(1) AND 28.1(F)(4) – The Advisory Committee sought approval of an amendment to Rules 31(a)(1) and Rule 28.1(f)(4), which would lengthen the time to serve and file a reply brief from 14 days to 21 days after the service of the appellee's brief. This amendment comes in anticipation of the elimination of the "three day rule," which would effectively reduce the time to file a reply brief from 17 to 14 days. After appellate lawyers on the Advisory Committee expressed the concern that this reduced window of time would adversely effect the quality of reply briefs, and in the hope that the extra time might lead to shorter reply briefs, the Advisory Committee decided to increase the time allowed. The Advisory Committee elected to shift from 14 days to 21 days in keeping with the established convention to measure time periods in 7-day increments where feasible. Judge Colloton noted that the phrase "the committee concluded that" will be deleted from the draft Committee Notes for both amended rules.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendments to Rule 31(a)(1) and Rule 28.1(f)(4) and their accompanying Committee Notes.**

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Sessions reported that the Advisory Committee on Evidence Rules had no action items and four information items.

Information Items

SYMPOSIUM ON HEARSAY REFORM – Judge Sessions reported on the Symposium on Hearsay Reform in Chicago on October 9, 2015. Inspired by a recent decision by Judge Posner in which he had suggested the removal of all the specific exceptions to the federal rule against hearsay in favor of greater discretion for the presiding judge, the symposium brought together prominent judges, lawyers, and professors to re-examine the continuing vitality of the hearsay rule and its exceptions. Participants considered reform of the hearsay rule in the context of the electronic information era and discussed the pros and cons of various potential amendments to the hearsay rule. Participants entertained a proposal to replace the rule-based system with a guidelines system akin to the Sentencing Guidelines. Another proposal favored replacing the system of exceptions with a Rule 403 balancing analysis. And yet another was to retain the current system while expanding use of the residual exception in Rule 807. Judge Sessions added that none of these changes was likely to happen soon, particularly in view of the nearly uniform position of the practicing attorneys that the specificity of the current rules works well. He and several members remarked upon how successful the symposium had been and thanked Judge St. Eve, Judge Schiltz and Professor Capra for their help with the event.

PROPOSED AMENDMENTS TO RULES 803(16) AND RULE 902 ISSUED FOR PUBLIC COMMENT – The Advisory Committee has two proposed amendments out for public comment. The first, Rule 803(16), eliminates the hearsay exception for ancient documents. The second, Rule 902, would ease the burden of authenticating certain electronic evidence. Judge Sessions reported that since November 2015 the Advisory Committee has received more than 100 letters on the first rule

governing the ancient documents exception, principally from lawyers in asbestos and environmental toxic litigation criticizing the proposed amendment. Most expressed concern that the proposed rule would prevent the admission of documents over 20 years old, a concern Judge Sessions believed misplaced because the proposed rule does not alter the rules for authenticity, but rather reliability. Judge Sutton asked whether a Committee Note might help clarify this issue, and Professor Capra concurred. With respect to Rule 902, the proposal elicited little public comment and seems to have been universally accepted. Professor Capra added that the magistrate judges support both proposed amendments.

PROPOSED AMENDMENTS TO THE NOTICE PROVISIONS IN THE FEDERAL RULES OF EVIDENCE – The Advisory Committee continues to consider ways to increase uniformity among the various notice provisions throughout the Federal Rules of Evidence. Uniformity cannot be achieved for all provisions. For example, the notice provisions of Rules 412–415 dealing with sex abuse offenses, are congressionally mandated and cannot therefore be amended through the rules process. The Advisory Committee continues to consider uniform language that would work for other notice provisions.

Turning to specific notice provisions, the Advisory Committee is considering removing the requirement in Rule 404(b) that a criminal defendant must request notice of the general nature of any evidence that the prosecutor intends to offer at trial. Judge Sessions added that the Advisory Committee believed the existing rule was a "trap for an incompetent lawyer" and unfair because it punishes defendants whose lawyers fail to request notice. The Advisory Committee is also considering inclusion of a good faith exception to the pretrial notice provision in Rule 807.

BEST PRACTICES MANUAL ON AUTHENTICATION OF ELECTRONIC EVIDENCE – In an effort to assist courts and litigants in authenticating electronic evidence such as e-mail, Facebook posts, tweets, YouTube videos, etc., and following a suggestion from Judge Sutton, the Advisory Committee is creating a best practices manual on the subject. Judge Sessions reported that Professor Capra has worked on this manual along with Greg Joseph and Judge Paul Grimm, and the final product should be completed for presentation to the Standing Committee by its June meeting.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Ikuta reported that the Advisory Committee had five action items and four information items to present to the Standing Committee. She also announced that the modernized bankruptcy forms became effective on December 1, 2015. She added that they have been well received and that the only "criticism" made against them is that they are so clear and easy to use that they might encourage more pro se filings.

Action Items

Judge Ikuta explained that because the first three action items (a proposed change to Rule 1015(b), proposed changes to Official Forms 20A and 20B, and a proposed change to Official Form 410S2) involved just minor or conforming changes, the Advisory Committee recommended to the Standing Committee that they go through the regular approval process but without notice and public comment. She added that this would result in a December 1, 2017

effective date for the rule rather than the December 1, 2016 effective date stated in the agenda book. The forms, she said, would remain on track to go into effect on December 1, 2016.

RULE 1015(B) (CASES INVOLVING TWO OR MORE RELATED DEBTORS) – In light of the Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015), the Advisory Committee proposed that Rule 1015(b) be amended to substitute the word "spouses" for "husband and wife" in order to include joint bankruptcy cases of same-sex couples.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 1015(b).**

OFFICIAL FORMS 20A (NOTICE OF MOTION OR OBJECTION) AND 20B (NOTICE OF OBJECTION TO CLAIM) – The Advisory Committee proposed that Official Forms 20A and 20B be renumbered to 420A and 420B, to conform with the new numbering convention of the Forms Modernization Project. It also proposed substituting the word "send" for "mail" in this rule to encompass other permissible methods of service and to maintain consistency with other new forms.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Official Forms 20A and 20B.**

OFFICIAL FORM 410S2 (NOTICE OF POSTPETITION FEES, EXPENSES, AND CHARGES) – The Advisory Committee proposed resolving an inconsistency between Rule 3002.1(c) and Official Form 410S2. The rule requires a home mortgage creditor to give notice to the debtor of all fees without excluding ones already ruled on by the bankruptcy court. The form that implements the rule, however, says that the creditor should not "include…any amounts previously…ruled on by the bankruptcy court." The Advisory Committee proposed deleting the form's inconsistent instruction and adding an instruction that tells the lender to flag the fees that have already been approved by the bankruptcy court.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Official Form 410S2.**

RULE 3002.1(B) (NOTICE OF PAYMENT CHANGES) AND (E) (DETERMINATION OF FEES, EXPENSES, OR CHARGES) – The Advisory Committee sought approval from the Standing Committee of three proposed amendments to Rule 3002.1(b) for publication for public comment in August 2016. First, the Advisory Committee recommends creating a national procedure by which any party in interest can file a motion to determine whether a change in the mortgage payment made by the creditor is valid. Second, the Advisory Committee recommends giving the court the discretion to modify the 21-day notice requirement in the case of home equity lines of credit because the balance of such loans is constantly changing. And third, the Advisory Committee recommends amending Rule 3002.1(e) by allowing any party in interest, and not just a debtor or trustee as currently allowed under the rule, to object to the assessment of a fee, expense, or charge.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendments to Rule 3002.1(b) and 3002.1(e) for publication for public comment.**

REQUEST FOR A LIMITED DELEGATION OF AUTHORITY – The Advisory Committee requested a limited delegation of authority to allow it to make necessary non-substantive, technical, and conforming changes to the official bankruptcy forms that would be effective immediately but subject to retroactive approval by the Standing Committee and notice to the Judicial Conference. Judge Ikuta explained that there were three categories of such changes that would benefit from this procedure: 1) typos; 2) changes to the layout or wording of a form to ensure that CM/ECF can capture the data; and 3) conforming changes when statutes, rules, or Judicial Conference policies change in non-substantive ways. Discussion led to consensus around the idea that after the Advisory Committee identified the need for a minor change in a form, it would vote on the proposed change, and notify the chair of the Standing Committee during that approval process. Some members observed that because the process to amend forms concludes with approval by the Judicial Conference, and does not require the full Rules Enabling Act process, the delegation of authority to the Advisory Committee to make minor changes effective immediately, but subject to retroactive approval by the Standing Committee and notice to the Judicial Conference, posed no procedural problems.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously agreed to seek Judicial Conference delegation of authority to the Advisory Committee on Bankruptcy Rules to make non-substantive, technical, and conforming changes to official bankruptcy forms, with any such changes subject to retroactive approval by the Standing Committee and notice to the Judicial Conference.**

Information Items

STERN AMENDMENTS RESUBMITTED TO THE SUPREME COURT – Professor Gibson gave a brief update on the *Stern* Amendments. After the Supreme Court's decision in *Wellness International Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015), which upheld the validity of party consent to bankruptcy courts entering final judgment on *Stern* claims, the Advisory Committee resubmitted to the Standing Committee its *Stern* Amendments. It had originally submitted these amendments in 2013, and secured the approval of the Standing Committee and the Judicial Conference, but the Judicial Conference withdrew them given the Supreme Court's decision to hear *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014). The Standing Committee reapproved the amendments by e-mail vote in October 2015 and the Judicial Conference approved them shortly thereafter. The Judicial Conference submitted them to the Supreme Court as a supplemental transmittal on October 29, 2015. If approved by the Supreme Court in the spring of 2016, they will go into effect on December 1, 2016. Professor Gibson and Judge Ikuta expressed the Advisory Committee's appreciation of the Standing Committee's quick action on the *Stern* Amendments.

CHAPTER 13 PLAN FORM AND OPT-OUT PROPOSAL – Judge Ikuta gave a report on the history and current status of the Advisory Committee's plan to create a national Chapter 13 plan official form. The Advisory Committee commenced work on this at its spring 2011 meeting. It published its proposed plan form and related rules in August 2013. In response to comments received, the package was revised and republished in August 2014. The second publication prompted additional comments, most notably from numerous bankruptcy judges expressing their

preference to retain their local forms. In response, the Advisory Committee voted unanimously to consider a proposal to approve the plan form and most of the related rules with minor amendments, but to consider further rule revisions that would allow a district to use a single district-wide local plan form so long as it met certain criteria. At its April 2016 meeting, the Advisory Committee will decide whether to recommend that this "opt-out" proposal go forward without further notice and public comment. Judge Sutton and Professor Coquillette suggested that while republication might not be required because the Chapter 13 package has been published twice before, prudence might favor republication given the demonstrated public interest over the past two publication periods and the somewhat new concept of the opt-out proposal. Members generally supported the idea of further publication, but only to the rule changes needed to implement the proposed opt-out procedure, and, if acceptable to the Judicial Conference and the Supreme Court, on an accelerated basis that would allow for an effective date of December 2017, rather than December 2018. To accomplish this, the rule changes could be published for three months (August–November, 2016) and the entire Chapter 13 package could be considered by the Standing Committee in January 2017, the Judicial Conference in March 2017, and the Supreme Court by May 2017, with a target December 1, 2017 effective date assuming no contrary congressional action.

RULE 4003(C) (EXEMPTIONS – BURDEN OF PROOF) – Professor Harner reported the Advisory Committee's ongoing study regarding whether Rule 4003(c), which places the burden of proof in any litigation concerning a debtor's claimed exemptions on the objecting party, violates the Rules Enabling Act. In light of the Supreme Court's decision in *Raleigh v. Illinois Department of Revenue*, 530 U.S. 15 (2000), which held that the burden of proof is a substantive component of a claim, Chief Judge Christopher M. Klein, U.S. Bankruptcy Court for the Eastern District of California, suggested to the Advisory Committee that by placing the burden of proof on the objector, as opposed to the debtor which many states do, Rule 4003(c) alters a substantive right and thereby violates the Rules Enabling Act. Professor Harner explained that the Advisory Committee is studying whether, à la *Hanna v. Plumer*, the rule announced in *Raleigh* is substantive or procedural.

RULE 9037 (PRIVACY PROTECTION FOR FILINGS WITH THE COURT) – REDACTION OF PREVIOUSLY FILED DOCUMENTS – Judge Ikuta reported that the Advisory Committee is studying CACM's recent suggestion that it amend Rule 9037. CACM suggested that the rule require notice be given to affected individuals when a request is made to redact a previously filed document that mistakenly included unredacted information. Because a redaction request may flag the existence of unredacted information, consideration is being given to procedures to prevent the public from accessing the unredacted information before the court can resolve the redaction request. Further consideration at the Advisory Committee's spring 2016 meeting may result in a proposal.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates reported that the Advisory Committee on Civil Rules had no action items but four information items to put before the Standing Committee.

Information Items

RULE 23 SUBCOMMITTEE – Judge Bates reported on the work of the Rule 23 Subcommittee, chaired by Judge Robert Dow, which has been in existence since 2011. After various conferences and multiple submissions, the Subcommittee has identified six topics for possible rule amendments:

1. "Frontloading" in Rule 23(e)(1), requiring upfront information relating to the decision whether to send notice to the class of a proposed settlement.
2. Amendment to Rule 23(f) to clarify that a decision to send notice to the class under Rule 23(e)(1) is not appealable under Rule 23(f).
3. Amendment to Rule 23(c)(2)(B) to clarify that the Rule 23(e)(1) notice triggers the opt-out period under a Rule 23(b)(3) class action.
4. Another amendment to Rule 23(c)(2)(B) to clarify that the means by which the court gives notice may be "by United States mail, electronic means or other appropriate means."
5. Addressing issues raised by "bad faith" class action objectors. Finding a way to deter objectors from holding settlements "hostage" while pursuing an appeal until they receive a payoff and withdraw their appeal has received considerable attention. Members of the Subcommittee seem inclined to recommend a simple solution which would require district court approval of any payment in exchange for withdrawing an appeal. One potential issue with this solution is jurisdictional: Once the notice of appeal is filed, jurisdiction over a case typically transfers from the district court to the court of appeals. The Subcommittee is currently studying this issue. The Subcommittee is also considering a more complicated solution whereby it would amend both Rule 23 and Appellate Rule 42(c), on the model of an indicative ruling.
6. Refining standards for approval of proposed class action settlements under Rule 23(e)(2). The proposed amendment focuses and expands upon the "fair, reasonable, and adequate" standard incorporated into the rule in 2003 by offering a short list of core considerations in the settlement-approval setting.

The Standing Committee principally discussed the "bad faith" objector issue. Some members raised the question of whether sanctioning lawyers might help address the problem. Others asked whether securing district court approval for a payoff might actually worsen the problem by incentivizing bad faith objectors to do more work and run up a bill that they can justify to a court.

Judge Bates next reported on those issues that the Rule 23 Subcommittee has decided to place on hold.

1. Ascertainability. Because this issue is currently getting worked out by several circuit courts, is the subject of a few pending cert petitions to the Supreme Court, and may be affected by the class action cases already argued this term before the Court, the Subcommittee has decided not to propose a rule amendment at this time.
2. "Pick-off" offers of judgment. This issue has also recently been litigated in the circuit courts and, as of the time of the meeting, was pending before the Supreme Court in *Campbell-Ewald v. Gomez*, 136 S.Ct. 663 (2016).

3. Settlement class certification standards. Given the feeling of many in the bar that they and the courts can handle settlement class certification without the need for a rule amendment, the Subcommittee has decided to place this issue on hold.
4. Cy Pres. Given the many questions that have emerged in this controversial area, including the necessity of a rule and whether a rule might violate the Rules Enabling Act, the Subcommittee has decided to place this issue on hold.
5. Issue classes. The Subcommittee has concluded that whatever disagreement among the circuits there may have been on this issue at one time, it has since subsided.

RULE 62: STAYS OF EXECUTION – Judge Bates reported on the work of the joint Subcommittee of the Appellate and Civil Rules Advisory Committees chaired by Judge Scott Matheson. The Subcommittee has developed a draft amendment for Rule 62 that straightforwardly responds to three concerns raised by a district court judge and other members of the Appellate Rules Advisory Committee. First, the draft extends the automatic stay from 14 days to 30 days to eliminate a gap between the current 14-day expiration of the automatic stay and the 28-day time set for post-trial motions and the 30-day time allowed for appeals. Second, it allows security for a stay either by bond or some other security provided at any time after judgment is entered. And third, it allows security by a single act that will extend through the entirety of the post-judgment proceedings in the district court and through the completion of the appeal. Judge Bates concluded by noting that the Subcommittee had considered but withdrawn a proposal that spelled out several details of a court's inherent power to regulate several aspects of a stay. The Subcommittee withdrew it after discussion at the Advisory Committee meetings because a stay is a matter of right upon posting of a bond and because they concluded that such an amendment was not necessary to solve any problems. This preliminary draft has yet to be approved by either Advisory Committee. Judge Bates said that he planned to submit this to the Standing Committee in June 2016 for publication.

EDUCATIONAL PROGRAMS REGARDING THE CIVIL RULES PACKAGE – Judge Bates reported that the Advisory Committee has been collaborating with the Federal Judicial Center to create educational programs for judges and lawyers to help spread the word about the new discovery amendments that went into effect on December 1, 2015. Judge Campbell and others have starred in various educational videos highlighting the new rules. Judge Sutton and Judge Bates sent out letters to all chief judges of the circuit, district, and bankruptcy courts on December 1, 2015, explaining the changes. Various circuit courts are creating educational programs of their own for circuit conferences and other court gatherings. The American Bar Association and other bar groups have started to create programs as well. The Education Subcommittee, chaired by Judge Paul Grimm, is now working on additional steps in collaboration with the Federal Judicial Center. Judge Sutton underlined the ongoing responsibility of Standing Committee members to help support these local and national educational efforts.

PILOT PROJECTS – Judge Campbell reported on the ongoing work of the Pilot Project Subcommittee. The Subcommittee investigates ways to make civil litigation more efficient and collects empirical data on best practices to help inform rule making. The Subcommittee consists of members of the Advisory Committee on Civil Rules along with Judges Sutton, Gorsuch and St. Eve from the Standing Committee, Jeremy Fogel and others from the Federal Judicial Center, and in the near future one or more members of CACM. Over the past several months, members

of the Subcommittee have been researching pilot projects and various studies that have already been conducted, including 11 projects in 11 different states, efforts in 2 federal courts particularly noted for their efficiency, a pilot project conducted during the 1990s at the direction of Congress, the work of the Conference of State Court Chief Justices, and a multi-year FJC study conducted at CACM's request that examined the root causes of court congestion.

The Subcommittee has decided to focus on two possible pilot projects. First, it is looking into enhanced initial disclosures in civil litigation. Some research indicates that initial disclosure of helpful and hurtful information known by each party can improve the efficiency of litigation. But the experience with a mandatory disclosure regime in the 1990s under then Rule 26(a), which involved fierce opposition, a dissent by three Supreme Court Justices, multiple district court opt-outs, and eventual abandonment of the rule, provides something of a cautionary tale. The Subcommittee is exploring and conducting empirical and historical research on this topic at both the federal and state level. They have concluded that conducting pilot projects that test the benefits of more robust initial disclosures would be a sensible next step before proceeding to the drafting and publishing of any new possible rule amendments. Judge Campbell sought the perspective of members on several tough questions, including what the scope of the discovery requirement should be, how to handle objections to discovery obligations, how to handle electronically stored information, how to get around a categories-of-documents-based approach to discovery obligations, and how to measure the success of any pilot projects in this area (cost of litigation, time to disposition, number of discovery disputes, etc.).

The second category of possible pilot projects would focus upon expedited litigation. The Federal Judicial Center has shown that there exists a linear relationship between the length of a lawsuit and its cost. There are already a number of federal and state courts that have expedited schedules, including the Eastern District of Virginia, Southern District of Florida, Western District of Wisconsin, and the state courts of Utah and Colorado. Under the CJRA, researchers found in the 1990s that early judge intervention, efficient and firm discovery schedules, and firm trial dates are among the factors most helpful in moving cases along. Because Rule 16, in existence in its current form since 1983, already permits judges to do all of this, a change in a federal rule of procedure is less necessary than a change in local legal culture to help speed up case disposition times. The Subcommittee is considering running a pilot project that could address a court's legal culture by setting certain benchmarks for it, including requiring case management conferences within 60 days, setting firm discovery schedules and trial dates, and measuring how well the local court is meeting those benchmarks over a three-year period. At the same time, the Federal Judicial Center would provide training for the pilot judges in that court in accelerated case management.

Judge Campbell discussed another possible pilot project of having the Federal Judicial Center regularly publish a chart showing the average disposition time by a district court of different kinds of suits compared to the national average.

And finally, speaking on his own and not on behalf of the Pilot Project Subcommittee, Judge Campbell discussed with members the pros and cons of possibly shortening the time before cases and motions were placed on the CJRA list from 3 years to 2 years, and from 6 months to 3 months.

REPORT OF THE ADMINISTRATIVE OFFICE

REPORT ON THE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT'S CONSIDERATION OF PROTECTION OF COOPERATOR INFORMATION – Judge Martinez, assisted by Sean Marlaire, reported on CACM's work on the issue of harm or threat of harm to government cooperators and their families in criminal cases. This problem, which goes back at least a decade, has proven a tricky one, and seems to pit the interest in protecting cooperators from retaliation against the interest of access to court records and proceedings. CACM met in early December in Washington, D.C., where it discussed the issue. Judge Martinez reported that Judge William Terrell Hodges, the chair of CACM, recommends that the Standing Committee refer this issue to the Advisory Committee on Criminal Rules. CACM has concluded that a national approach, whether in the form of rule change or suggested best practices, would be preferable to one based on diverse local rules. Members of the Standing Committee generally agreed that the problem was a serious one that required collaboration across multiple committees and consultation with the Department of Justice and the Bureau of Prisons. Judge Molloy, on behalf of the Advisory Committee on Criminal Rules, and in consultation with his Reporters, welcomed the reference of the issue to his Committee. He added that he looked forward to inviting interested parties to the discussion, and pledged to keep the Advisory Committee on Appellate Rules informed of the Committee's work.

STRATEGIC PLAN FOR THE FEDERAL JUDICIARY – Judge Sutton observed that the Standing Committee had various ongoing initiatives that support the strategies and goals of the current *Strategic Plan for the Federal Judiciary*, which the Judicial Conference approved on September 17, 2015.

CONCLUDING REMARKS

Judge Sutton thanked the Reporters for all of the impressive work they had done on their memoranda for the meeting and the members of the Rules Committee Support Office for helping to coordinate the meeting. He then concluded the meeting. The Standing Committee will next meet in Washington, D.C., on June 6–7, 2016.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

Agenda E-19 (Summary)
Rules
March 2016

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

Delegate authority to the Advisory Committee on Bankruptcy Rules to implement non-substantive, technical, or conforming amendments to the Bankruptcy Official Forms, subject to later approval by the Standing Committee and notice to the Judicial Conference ..... pp. 5-6

The remainder of this report is submitted for the record and includes the following items for the information of the Judicial Conference that do not require action:

- Federal Rules of Appellate Procedure ..... pp. 2-4
- Federal Rules of Bankruptcy Procedure ..... pp. 7-9
- Federal Rules of Civil Procedure ..... pp. 9-12
- Federal Rules of Criminal Procedure ..... pp. 12-13
- Federal Rules of Evidence ..... pp. 13-14
- Judiciary Strategic Planning ..... p. 14

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

Agenda E-19
Rules
March 2016

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure met on January 7, 2016. All members attended except that Elizabeth J. Shapiro attended on behalf of Deputy Attorney General Sally Quillian Yates.

Representing the advisory rules committees were Judge Steven M. Colloton, Chair, and Professor Gregory E. Maggs, Reporter, of the Advisory Committee on Appellate Rules; Judge Sandra Segal Ikuta, Chair, Professor S. Elizabeth Gibson (by telephone), Reporter, and Professor Michelle M. Harner, Associate Reporter, of the Advisory Committee on Bankruptcy Rules; Judge John D. Bates, Chair, Professor Edward H. Cooper, Reporter, and Professor Richard L. Marcus, Associate Reporter, of the Advisory Committee on Civil Rules; Judge Donald W. Molloy, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, of the Advisory Committee on Criminal Rules; Judge William K. Sessions III, Chair, and Professor Daniel J. Capra, Reporter, of the Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Daniel R. Coquillette, the Committee's Reporter; Professor Geoffrey C. Hazard, Jr., Professor R. Joseph Kimble, and Professor Bryan A. Garner, consultants to the Committee; Rebecca A. Womeldorf (by telephone), the Committee's Secretary; Scott Myers, Bridget Healy (by telephone), and Julie Wilson (by telephone), Attorneys on the Rules Committee Support Staff; Derek Webb, Law Clerk to the Committee;

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

Amelia Yowell, Supreme Court Fellow; Dr. Tim Reagan of the Federal Judicial Center; Judge Philip R. Martinez, Member, and Sean Marlaire, Attorney Advisor, Judicial Conference Committee on Court Administration and Case Management; Judge David G. Campbell, immediate-past Chair, Advisory Committee on Civil Rules and Chair of the Pilot Projects Subcommittee; Judge Robert Michael Dow, Jr. (by telephone), Chair of the Rule 23 Subcommittee, Advisory Committee on Civil Rules; Judge Scott M. Matheson, Jr. (by telephone), Chair of the Appellate-Civil Subcommittee and Member of the Advisory Committee on Civil Rules.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Approved for Publication and Comment

The Advisory Committee on Appellate Rules submitted proposed amendments to Appellate Rules 28.1(f)(4), 31(a)(1), and 41 with a request that they be published for comment at a suitable time. The Committee approved the advisory committee's recommendation.

Rules 28.1(f)(4) and 31(a)(1)

Appellate Rules 28.1(f)(4) (cross-appeals) and 31(a)(1) (appeals) give parties 14 days after service of certain response briefs to file a reply brief. In addition, Rule 26(c) provides that "[w]hen a party may or must act within a specified time after service, 3 days are added after the period would otherwise expire." Accordingly, parties effectively have 17 days to file a reply brief. Pending amendments to Rule 26(c) will soon eliminate the "three-day rule," thus reducing the effective time for filing a reply brief from 17 days to 14 days.

The advisory committee concluded that effectively shortening the period from 17 days to 14 days could adversely affect the preparation of useful reply briefs; therefore, Rules 28.1(f)(4) and 31(a)(1) should be amended to extend the period for filing reply briefs. The proposed

amendments extend the time period to 21 days, in keeping with the established preference for measuring time periods in increments of seven days.

Rule 41

Appellate Rule 41(b) provides that "[t]he court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later," but also provides that "[t]he court may shorten or extend the time." Under Rule 41(d)(1), a timely rehearing petition or stay motion presumptively "stays the mandate until disposition of the petition or motion." A party can seek a stay pending the filing of a certiorari petition; if the court grants such a stay and the party who sought the stay files the certiorari petition, then Rule 41(d)(2)(B) provides that "the stay continues until the Supreme Court's final disposition." Rule 41(d)(2)(D) directs that "[t]he court of appeals must issue the mandate immediately when a copy of the Supreme Court order denying the petition for writ of certiorari is filed."

In light of issues raised in *Ryan v. Schad*, 133 S. Ct. 2548 (2013) (per curiam), and *Bell v. Thompson*, 545 U.S. 794 (2005), the advisory committee determined that Rule 41 should be amended (1) to clarify that a court must enter an order if it wishes to stay the issuance of the mandate; (2) to address the standard for stays of the mandate; and (3) to restructure the Rule to eliminate redundancy.

Before 1998, Rule 41 referred to a court's ability to shorten or enlarge the time for the mandate's issuance "by order." The phrase "by order" was deleted as part of the 1998 restyling. The change has caused uncertainty concerning whether a court of appeals can stay its mandate through inaction or whether a stay requires an order. A proposed amendment to Rule 41(b) would specify that the mandate is stayed only "by order." Requiring stays of the mandate to be accomplished by court order will provide notice to litigants and facilitate review.

The amendments to Rule 41(d) simplify and clarify the standard pertaining to issuance of a stay pending a petition for a writ of certiorari to the Supreme Court. The deletion of subdivision (d)(1) is intended to streamline the rule by removing redundant language; no substantive change is intended. Subdivision (d)(2)(D)—which would become subdivision (d)(4)—would be amended to specify that a mandate stayed pending a petition for certiorari must issue immediately once the court of appeals receives a copy of the Supreme Court's order denying certiorari, unless the court of appeals finds that extraordinary circumstances justify a further stay. In *Schad* and *Bell*, without deciding whether the current version of Rule 41 provides authority for a further stay of the mandate after denial of certiorari, the Supreme Court ruled that any such authority could be exercised only in "extraordinary circumstances." *Schad*, 133 S. Ct. at 2551. Because a court of appeals has inherent authority to recall a mandate in extraordinary circumstances, *Calderon v. Thompson*, 523 U.S. 538, 550 (1998), the amendment to subdivision (d)(2)(D) makes explicit that the court may stay the mandate after the denial of certiorari, but only in extraordinary circumstances.

Relatedly, a proposed amendment to Rule 41(b) would establish that a court may extend the time to issue the mandate after a denial of certiorari only "in extraordinary circumstances" or pending a petition for certiorari under the conditions set forth in Rule 41(d). The "extraordinary circumstances" requirement is based on the strong interest of litigants and the judicial system in achieving finality. The proposed amendment would apply the "extraordinary circumstances" requirement both after a denial of certiorari and when no party petitions for a writ of certiorari, because the strong interests in finality counsel against extensions unless a heightened standard is met.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Request for a Limited Delegation of Authority

The Advisory Committee on Bankruptcy Rules recommended a delegation of authority to implement non-substantive, technical, or conforming amendments to the Bankruptcy Official Forms, subject to retroactive approval by the Standing Committee. The Standing Committee agreed with the advisory committee's recommendation. Discussion of any delegated actions taken by the advisory committee and retroactively approved by the Committee will be included in the regular reports of the Committee to the Judicial Conference.

The forms-driven nature of bankruptcy practice elevates the potential significance of form errors or glitches, the negative effects of which can be best reduced by prompt action to correct the issue at hand. Under the multi-year Forms Modernization Project, by December 1, 2015, virtually all official bankruptcy forms had been replaced by almost 70 completely new official forms. Given the large scope of the project, minor issues inevitably will arise regarding the wording, formatting, or other aspects of the content of some of the new forms. Indeed, several issues have already arisen since the Judicial Conference approved the new forms in September 2015.

Under existing procedures to correct or update an official form, the advisory committee would propose that a necessary change deemed sufficiently minor or technical be approved without publication. Even without publication, this process is lengthy. Approval of the change has to be considered and approved by the advisory committee, the Committee, and the Judicial Conference, a process that can take from several months to more than a year.

To alleviate this delay, the advisory committee recommended a process that would allow it to make needed non-substantive, technical, or conforming changes to the official bankruptcy forms, subject to retroactive notice and request for approval by the Committee and the Judicial

Conference. The Committee agrees with the suggestion and recommends that such a process be approved.[1]

The Committee recognizes that this authority, if granted, must be exercised in a narrow set of circumstances and only for changes that do not affect the substance of a form or the rights or obligations of any entities. Such changes would generally fall into three categories: (1) the correction of typos and punctuation; (2) reformatting to facilitate data capture by a court's case management and electronic case files system (CM/ECF); and (3) non-controversial conforming amendments needed to implement changes in the rules or statutes (such as a renumbering of provisions), or changes in Judicial Conference policies (such as changes in fee amounts). Any such revisions would go before the full Committee for approval in the next regular meeting cycle, and thereafter reported to the Judicial Conference.

Authorizing a process that allows the advisory committee to implement non-substantive, technical, and conforming changes such as those described above, subject to later approval by the Committee and notice to the Judicial Conference, would minimize the adverse effects of leaving a form unchanged and inconsistent with the law under the lengthier current approval process.

> **Recommendation:** That the Judicial Conference delegate authority to the Advisory Committee on Bankruptcy Rules to implement non-substantive, technical, or conforming amendments to the Bankruptcy Official Forms, subject to later approval by the Standing Committee and notice to the Judicial Conference.

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[1]Under the Rules Enabling Act, the Supreme Court has the power to "prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under [the Bankruptcy Code]." 28 U.S.C. § 2075. One of the rules prescribed by the Court authorizes the Judicial Conference to prescribe the Official Forms that must be used in bankruptcy cases. *See* Federal Rule of Bankruptcy Procedure 9009. Because the Judicial Conference has the final authority to approve Official Forms, it may also approve a process for making technical, non-substantive, or conforming changes to those forms. Approval of such a process would be similar to authorizing a Conference committee or the Administrative Office to make noncontroversial changes to policies or guidance that the Judicial Conference has approved. *See, e.g.*, JCUS-MAR 15, p. 13 (the Conference authorized the Bankruptcy Committee to make "non-substantive, technical and conforming changes" to guidance for producing tax information).

Rules Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Bankruptcy Rule 3002.1(b) and (e) with a request that they be published for comment at a suitable time. The Committee approved the advisory committee's recommendation.

Rule 3002.1 prescribes several noticing requirements for home mortgage creditors in chapter 13 cases. The rule was enacted to ensure that chapter 13 debtors who maintain mortgage payments over the life of the plan will have the information they or trustees need to make correct payments. Rule 3002.1(b) requires chapter 13 mortgage creditors to file a notice of any change in the mortgage payment amount at least 21 days before payment is due. Subdivision (b) does not, however, provide a procedure for challenging payment changes that are noticed. The advisory committee concluded that it would be beneficial to have a national procedure for raising and determining objections to payment changes.

The proposed amendment to Rule 3002.1(b) would allow a party in interest to file a motion for a determination of the validity of a payment amount change. If no motion is filed within 21 days after the notice is served, the payment change goes into effect. If a payment change is later determined to be inconsistent with the underlying agreement or governing law, the court can adjust future payments to reflect any overpayments made.

The advisory committee also proposed an amendment to Rule 3002.1(b) to provide more flexibility in the application of the provision to home equity lines of credit (HELOCs). The problem that a HELOC creditor faces in complying with Rule 3002.1(b) is illustrated by *In re Adkins*, 477 B.R. 71 (Bankr. N.D. Ohio 2012), in which the creditor sought relief from the notice requirements of Rule 3002.1(b) on the ground that compliance would be "virtually impossible." *Id*. at 72. The bank explained that, because the loan was an open-ended revolving line of credit, its balance was constantly changing. The payment amount could change monthly due to interest

rate adjustments, increased draws on the line of credit, or payments of principal in addition to the finance charges. These frequent adjustments in the payment amount, contended the creditor, would make it especially difficult to comply with the 21-day notice requirement. *Id*.

The *Adkins* court, although sympathetic with the creditor's position, denied the creditor's Motion to Excuse Notice because Rule 3002.1(b) provides no leeway in its application. Unlike numerous other bankruptcy rules, Rule 3002.1(b) does not say "unless the court orders otherwise." *Id*. at 73. The advisory committee's proposed amendment to Rule 3002.1(b) would address the concerns raised in *Adkins* by authorizing courts to modify the requirements of the provision for HELOCs, with the details of an alternative procedure to be developed by local rulemaking or court order.

Finally, the advisory committee proposed a wording change to Rule 3002.1(e). Rather than providing that only a debtor or trustee may object to the assessment of a fee, expense, or charge, the amended rule would expand the category of objectors to any party in interest. This change would parallel the language of the proposed amendment to subdivision (b) and would authorize a United States trustee or bankruptcy administrator to challenge the validity of a claimed post-petition assessment.

Informational Items

As previously reported, at its spring 2011 meeting, the advisory committee began considering the possibility of creating a chapter 13 plan official form. A proposed chapter 13 national plan form and proposed amendments to nine related rules were published for public comment in August 2013. Because the advisory committee made significant changes to the form in response to comments it received, the revised form and rules were published again in August 2014.

At its spring 2015 meeting, in response to comments that were submitted after republication, the advisory committee discussed a number of options relating to the chapter 13 national form and associated rules. Although there was widespread agreement regarding the benefit of having a national plan form, members generally did not want to proceed with a mandatory official form in the face of substantial opposition by bankruptcy judges and other bankruptcy constituencies. Accordingly, the advisory committee voted unanimously to give further consideration to pursuing a proposal that would involve promulgating a national plan form and related rules, but would allow districts to opt out of the use of that form if certain conditions were met.

Following the spring meeting, the advisory committee determined that the opt-out option could be achieved through revisions to Rules 3015 and 3002, as well as a new rule, Rule 3015.1. The advisory committee tentatively approved the rest of the chapter 13 plan package (proposed Official Form 113 and the related revisions to Rules 2002, 3002, 3007, 3012, 4003, 5009, 7001, and 9009), but it has deferred submission of those items to the Committee so that it can further consider the opt-out proposal and the necessity, timing, and scope of any republication, including outreach to various bankruptcy constituencies regarding the opt-out proposal, at its spring 2016 meeting. The Committee approved this approach at its January 2016 meeting.

FEDERAL RULES OF CIVIL PROCEDURE

The Advisory Committee on Civil Rules presented no action items.

Informational Items

Rule 23

The Advisory Committee on Civil Rules continues to focus on potential amendments to Civil Rule 23. The Rule 23 Subcommittee began its work in 2011 in the light of several developments that taken together seemed to warrant reexamination of Rule 23. These included

(a) the passage of time since the 2003 amendments to Rule 23 went into effect; (b) the development of a body of case law on class-action practice; and (c) recurrent interest in the subject in Congress, including the 2005 adoption of the Class Action Fairness Act.

The Subcommittee began by developing an initial list of possible rule amendments. The Subcommittee members have made presentations about the ideas under consideration at nearly two dozen meetings and bar conferences with purposefully diverse memberships and attendees. On September 11, 2015, the Rule 23 Subcommittee held a mini-conference to gather additional input from a variety of stakeholders on potential rule amendments. Taking all of the above into account, consensus emerged at the advisory committee's November 2015 meeting around a basic outline for proceeding, which identified the following six subjects for rule amendments:

1. Requiring provision of information up front to the court ("frontloading") relating to the decision whether to send notice to the class of a proposed settlement;
2. Making clear that a decision to send notice to the class under Rule 23(e)(1) is not appealable under Rule 23(f);
3. Making clear in Rule 23(c)(2)(B) that the Rule 23(e)(1) notice triggers the opt-out period in Rule 23(b)(3) class actions;
4. Updating Rule 23(c)(2) regarding individual notice in Rule 23(b)(3) class actions;
5. Addressing issues raised by "bad faith" class-action objectors; and
6. Refining standards for approval of proposed class-action settlements under Rule 23(e)(2).

The Committee endorsed the general direction recommended by the advisory committee, although work remains to be done about how best to approach these topics.

Rule 62

The advisory committee formed a joint subcommittee with the Advisory Committee on Appellate Rules to address Civil Rule 62 matters relating to stays and bonds pending appeal. This joint effort has resulted in a draft of proposed amendments to Rule 62 that will be considered by each advisory committee. The goal is to present a proposal for publication in 2016.

Electronic Filing

The advisory committee continues to consider rules amendments addressing electronic filing and service. The advisory committee has determined that the national rules should mandate electronic filing for parties represented by an attorney, subject to an exception for good cause, and provide for electronic service of the papers. Courts would retain the discretion to permit electronic filing by pro se parties, either through local rule or order. The advisory committee recognizes that the Federal Rules of Criminal Procedure incorporate the civil filing rules by reference, and the Criminal Rules govern matters that raise distinct concerns. As discussed *infra*, the Advisory Committee on Criminal Rules is considering adoption of an independent electronic filing rule to address concerns specific to criminal practice.

Civil Rules Package

The advisory committee continues its work, in coordination with the Federal Judicial Center, to publicize and promote the amendments to the Civil Rules that became effective December 1, 2015 ("Civil Rules Package"). This package of rules amendments was developed over a five-year period with the objective of advancing Rule 1's goal of the just, speedy, and inexpensive determination of every action. The amendments will improve the disposition of civil cases in the federal courts by advancing cooperation among parties, emphasizing the concept of proportionality, and promoting early judicial case management. The Civil Rules

Package also includes a rule that addresses preservation and loss of electronically stored information as well as the abrogation of Rule 84 and the forms appended to the Civil Rules.

Beyond the Civil Rules Package, the Committee continues to study further ways to improve civil litigation, including testing potential innovations through one or more pilot projects. To pursue the possible development of such pilot projects, a subcommittee was formed to investigate pilot projects undertaken across the country in state and federal courts, and to recommend possible future pilot projects for federal courts. The advisory committee is coordinating its efforts with the Judicial Conference Committee on Court Administration and Case Management.

FEDERAL RULES OF CRIMINAL PROCEDURE

The Advisory Committee on Criminal Rules presented no action items.

Informational Items

At its fall 2015 meeting, the advisory committee formed a subcommittee to consider a suggestion made by the Department of Justice to reconsider the notice requirement regarding organizational victims in Rule 12.4(a)(2). Another subcommittee was formed to consider a suggestion to amend Criminal Rule 15(d), the rule governing who pays for deposition expenses, to address an inconsistency between the text of the rule and the committee note. Both of these subcommittees will report their recommendations at the next meeting of the advisory committee.

Rule 49

The advisory committee continues to consider amendments to Criminal Rule 49. This undertaking was born of a larger inter-advisory committee project to develop rules for electronic filing, service, and notice. As part of that project, the Advisory Committee on Civil Rules determined to pursue a national rule mandating electronic filing in civil cases. That decision required reconsideration of Criminal Rule 49(b) which provides that service "must be made in

the manner provided for a civil action," and Rule 49(e) which provides that a local rule may require electronic filing only if reasonable exceptions are allowed. The subcommittee concluded that such an electronic default rule could be problematic in the criminal context because pro se defendants and pro se prisoners filing actions under §§ 2254 and 2255 rarely have unfettered access to the CM/ECF system and because the architecture of CM/ECF does not permit non-party filings in criminal cases. Therefore, the advisory committee favors severing the link to the Civil Rules governing service and filing and expects to propose at the Committee's next meeting a "stand-alone" Rule 49 that does not incorporate Civil Rule 5.

FEDERAL RULES OF EVIDENCE

The Advisory Committee on Evidence Rules presented no action items.

Informational Items

On August 14, 2015, a proposed amendment to Rule 902 and a proposal to abrogate Rule 803(16) of the Federal Rules of Evidence were published for public comment. The comment period closes February 16, 2016. As previously reported, the proposed abrogation of Rule 803(16) would eliminate the hearsay exception for ancient documents. The proposed amendment to Rule 902, the rule on self-authentication, would ease the burden of authenticating certain electronic evidence. A public hearing on the proposed amendments is scheduled to be held in Washington, D.C., on February 12, 2016.

In conjunction with its fall 2015 meeting, the advisory committee held a symposium on hearsay reform. Inspired by a recent appellate decision suggesting the removal of all specific exceptions to the federal rule against hearsay in favor of greater discretion for the presiding judge, the symposium brought together prominent judges, lawyers, and professors to conduct a broad review of the hearsay rule and its exceptions. The symposium considered reform of the

hearsay rule in the context of the electronic information era and discussed various potential amendments to the hearsay rule, and potential drawbacks of such amendments.

JUDICIARY STRATEGIC PLANNING

At its January 2016 meeting, the Committee reviewed the recently updated *Strategic Plan for the Federal Judiciary* with an eye toward answering Chief Judge Riley's call to provide suggestions to the Executive Committee on which strategies and goals outlined in the *Strategic Plan* should receive priority attention over the next two years. Echoing the 2015 Year-End Report from the Chief Justice, the Committee proposes prioritization of Issue 5—Enhancing Access to the Judicial Process—by focusing on educational efforts to implement the Civil Rules Package effective December 1, 2015, which the Committee believes will advance the public's interest in speedy, fair, and efficient justice.

Respectfully submitted,

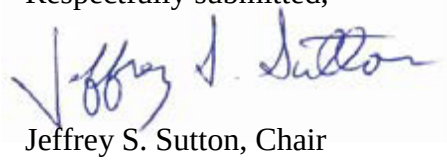

Jeffrey S. Sutton, Chair

Brent E. Dickson	Patrick J. Schiltz
Roy T. Englert, Jr.	Amy J. St. Eve
Gregory G. Garre	Larry D. Thompson
Daniel C. Girard	Richard C. Wesley
Neil M. Gorsuch	Sally Quillian Yates
Susan P. Graber	Jack Zouhary
William K. Kelley	

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Washington, DC
June 6-7, 2016

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125-012214

JUDICIAL CONFERENCE OF THE UNITED STATES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JUNE 6-7, 2016

AGENDA

I. Opening Business

A. Welcome and opening remarks by Judge Jeffrey S. Sutton

B. Report on March 2016 Judicial Conference Session

C. Report on proposed amendments transmitted to Congress by the Supreme Court on April 28, 2016:

1. Appellate Rules 4, 5, 21, 25, 26, 27, 28, 28.1, 29, 32, 35, and 40, and Forms 1, 5, and 6, new Form 7, and new Appendix
2. Bankruptcy Rules 1010, 1011, 2002, 3002.1, 7008, 7012, 7016, 9006, 9027, 9033, and new Rule 1012
3. Civil Rules 4, 6, and 82
4. Criminal Rules 4, 41, and 45

D. **ACTION** – The Committee will be asked to approve the minutes of the January 7, 2016 Committee meeting

II. Report of the Advisory Committee on Evidence Rules – Judge William K. Sessions III

A. **ACTION** – The Committee will be asked to recommend the following to the Judicial Conference for approval:

1. Rule 803(16) [*Hearsay Exception for Statements in Ancient Documents*]
2. Rule 902 [*Evidence that is Self-Authenticating*]

B. **ACTION** – The Committee will be asked to consider the future use and dissemination of:

Best Practices Manual for Authenticating Electronic Evidence

C. Information items:

1. Ongoing projects:
   a) Possible amendments to the notice provisions in the Evidence Rules
   b) Possible amendments to Rule 807 [*Residual Exception*]
   c) Possible amendments to Rule 801(d)(1)(A) [*A Declarant-Witness's Prior [Inconsistent] Statement*]

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2. Update on items considered and removed from the docket
3. Proposed symposium in conjunction with fall meeting

III. Report of the Advisory Committee on Appellate Rules – Judge Steven M. Colloton

A. **ACTION** – The Committee will be asked to approve that the following be published for public comment:

1. Proposed amendments to Rules 8 [*Stay or Injunction Pending Appeal*], 11(g) [*Forwarding the Record – Record for a Preliminary Motion in the Court of Appeals*], and 39(e)(3) [*Costs – Costs on Appeal Taxable in the District Court*] that would conform with the proposed amendments to Civil Rule 62
2. Proposed amendments to Rule 29(a) [*Brief of an Amicus Curiae – When Permitted*] that would allow local rules to afford an appellate court the option to refuse an amicus brief, despite party consent, if the brief would cause disqualification
3. Proposed amendment to Appellate Form 4 [*Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis*] that would delete the portion of question 12 requiring the movant to provide the last four digits of the movant's social security number
4. Proposed amendments to Appellate Rule 25 [*Filing and Service*] would address electronic filing, signatures, service, and proof of service in a manner conforming to the proposed revision of Civil Rule 5.

B. Information item:

Proposed amendments to Rules 26.1 [*Corporate Disclosure Statement*] and 29(c) [*Brief of an Amicus Curiae – Contents and Form*]

IV. Report of the Advisory Committee on Civil Rules – Judge John D. Bates

A. **ACTION –** The Committee will be asked to recommend the following to the Judicial Conference for approval:

1. Mandatory Initial Discovery Pilot Project
2. Expedited Procedures Pilot Project

B. **ACTION** – The Committee will be asked to approve that the following be published for public comment:

1. Proposed amendments to Rule 5 [*Serving and Filing Pleadings and Other Papers*]
2. Proposed amendments to Rule 23 [*Class Actions*]
3. Proposed amendments to Rule 62 [*Stay of Proceedings to Enforce a Judgment*]

C. Information items:

1. Education efforts regarding the Civil Rules Package that became effective December 1, 2015
2. Ongoing projects:
   a) Rule 5.2: Motion to redact
   b) Rule 30(b)(6): Deposing an entity
   c) Rule 81(c)(3): Jury demand on removal
3. Update on items considered and removed from the docket

V. Inter-Committee Work

A. Electronic Filing, Service, and Notice

Following the lead of the Civil Rules Advisory Committee, each Advisory Committee now plans to publish proposed amendments to the Federal Rules to require e-filing and service, subject to appropriate exceptions. The Civil Rules Advisory Committee proposes amendments to Civil Rule 5 that would require represented parties to file electronically (subject to "good cause" and local rule exceptions for paper filings). Each Advisory Committee proposes amendments to their respective filing rules (Appellate Rule 25, Bankruptcy Rule 5005, and Criminal Rule 49) that parallel, to the extent possible, the proposed changes to Civil Rule 5.

B. Coordination of Inter-Committee Rule Proposals

VI. Report of the Advisory Committee on Criminal Rules – Judge Donald W. Molloy

A. **ACTION** – The Committee will be asked to approve that the following be published for public comment:

1. Proposed amendments to Rule 49 [*Serving and Filing Papers*] and conforming amendment to Rule 45(c) [*Additional Time After Certain Kinds of Service*] that would create a stand-alone filing and service rule paralleling Civil Rule 5
2. Proposed amendments to Rule 12.4 [*Disclosure Statement*] in light of changes to the Code of Judicial Conduct

B. Information items:

1. Subcommittees formed to consider suggested amendments to Criminal Rule 16 and Rule 5 of the Rules Governing Section 2255 Proceedings
2. Cooperator Subcommittee activity (issue referred to the Standing Committee by the Committee on Court Administration and Case Management)

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VII. Report of the Advisory Committee on Bankruptcy Rules – Judge Sandra Segal Ikuta

A. **ACTION –** The Committee will be asked to recommend the following to the Judicial Conference for approval:

1. Rule 1001 (Scope of Rules and Forms; Short Title)
2. Rule 1006 (Filing Fee)
3. Technical changes to Official Forms 106E/F, 119, 201, 206, 206E/F, 309A, 309I, 423, and 424

B. **ACTION –** The Committee will be asked to approve that the following be published for public comment:

1. Proposed Rule 3015 and Rule 3015.1 provisions regarding national plan form and opt out provisions for truncated publication (July to October 2016)
2. Rule 5005 (electronic filing)
3. Proposed amendments to Bankruptcy Appellate Rules and Forms to conform to pending amendments to the Federal Rules of Appellate Procedure
   a) Rules 8002(c), 8011(a)(2)(C), and Official Form 417A (inmate filing provisions)
   b) Rule 8002(b) (timeliness of tolling motions)
   c) Rules 8013, 8015, 8016, 8022, Official Form 417C, and Part VIII Appendix (length limits)
   d) Rule 8017 (amicus filings)
4. Additional amendments to the Bankruptcy Appellate Rules
   a) Rule 8002(a) (separate document requirement)
   b) Rule 8006 (court statement on merits of certification)
   c) New Rule 8018.1 (district court review of judgment that the bankruptcy court lacked constitutional authority to enter)
   d) Rule 8023(cross reference added)
5. Official Form 309F (notice of chapter 11 bankruptcy – corporations and partnerships)
6. Official Forms 25A, 25B, 25C, and 26 (forms for small business debtors under bankruptcy code, and periodic report regarding entity in which debtor has a substantial interest – to be renumbered as 425A, 425B, 425C, and 426)

C. Information items:

1. Status of proposed amendment to Rule 9037 to address redaction of previously filed documents
2. Decision to take no action on suggestion 15-BK-E to amend Rule 4003(c) concerning burden of proof for objections to claimed exemptions

VIII. Report of the Administrative Office

A. Discussion of strategic initiatives of the Rules Committees related to advancement of priority initiatives identified by the Executive Committee from the *Strategic Plan for the Federal Judiciary*

B. Legislative report

IX. Next meeting: January 3-4, 2017 in Phoenix, AZ

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
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Members, Standing Committee	**Honorable Brent E. Dickson** Indiana Supreme Court 306 Indiana State House 200 West Washington Street Indianapolis, IN 46204 **Roy T. Englert, Jr., Esq.** Robbins Russell Englert Orseck Untereiner & Sauber, LLP 801 K Street, N.W. - Suite 411-L Washington, DC 20006 **Gregory G. Garre, Esq.** Latham & Watkins LLP 555 Eleventh Street, N.W. Washington, DC 20004-1304 **Daniel C. Girard, Esq.** Girard Gibbs LLP 601 California Street, 14th Floor San Francisco, CA 94108 **Honorable Neil M. Gorsuch** United States Court of Appeals Byron White United States Courthouse 1823 Stout Street, 4th Floor Denver, CO 80257-1823

Members, Standing Committee (*cont'd*)	**Honorable Susan P. Graber** United States Court of Appeals Pioneer Courthouse 700 S.W. Sixth Avenue, Suite 211 Portland, OR 97204 **Professor William K. Kelley** Notre Dame Law School P. O. Box 780 Notre Dame, IN 46556 **Honorable Patrick J. Schiltz** United States District Court United States Courthouse 300 South Fourth Street – Suite 14E Minneapolis, MN 55415 **Honorable Amy J. St. Eve** United States District Court Everett McKinley Dirksen United States Courthouse 219 South Dearborn Street, Room 1260 Chicago, IL 60604 **Professor Larry D. Thompson** University of Georgia School of Law 212 Hirsch Hall Athens, GA 30602 **Honorable Richard C. Wesley** United States Court of Appeals Livingston County Government Center Six Court Street Geneseo, NY 14454-1043 **Honorable Sally Yates** Deputy Attorney General (ex officio) United States Department of Justice 950 Pennsylvania Ave., N.W., Room 4111 Washington, DC 20530 **Honorable Jack Zouhary** United States District Court James M. Ashley and Thomas W.L. Ashley United States Courthouse 1716 Spielbusch Avenue, Room 203 Toledo, OH 43604

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Committee on Rules of Practice and Procedure

To carry on a continuous study of the operation and effect of the general rules of practice and procedure.

Members	Position	District/Circuit	Start Date	End Date
Jeffrey S. Sutton Chair	C	Sixth Circuit	2012	2016
Brent E. Dickson	CJUST	Indiana	2014	2017
Roy T. Englert, Jr.	ESQ	Washington, DC	2010	2016
Gregory G. Garre	ESQ	Washington, DC	2011	2017
Daniel C. Girad	ESQ	California	2015	2018
Neil M. Gorsuch	C	Tenth Circuit	2010	2016
Susan P. Graber	C	Ninth Circuit	2013	2016
William K. Kelley	ACAD	Indiana	2015	2018
Patrick J. Schiltz	D	Minnesota	2010	2016
Amy J. St. Eve	D	Illinois (Northern)	2013	2016
Larry D. Thompson	ESQ	Georgia	2011	2017
Richard C. Wesley	C	Second Circuit	2011	2017
Sally Quillian Yates*	DOJ	Washington, DC	----	Open
Jack Zouhary	D	Ohio (Northern)	2012	2018
Daniel Coquillette Reporter	ACAD	Massachusetts	1985	Open

Secretary and Principal Staff: Rebecca Womeldorf 202-502-1820

* Ex-officio

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Chair, Advisory Committee on Appellate Rules	**Honorable Steven M. Colloton** United States Court of Appeals U.S. Courthouse Annex, Suite 461 110 East Court Avenue Des Moines, IA 50309-2044
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Chair, Advisory Committee on Evidence Rules	**Honorable William K. Sessions III** United States District Court Federal Building 11 Elmwood Avenue, 5th Floor Burlington, VT 05401
Reporter, Advisory Committee on Evidence Rules	**Professor Daniel J. Capra** Fordham University School of Law 150 West 62nd Street New York, NY 10023

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Liaison for the Advisory Committee on Bankruptcy Rules	**Roy T. Englert, Jr., Esq.**	***(Standing)***
Liaison for the Advisory Committee on Civil Rules	**Judge Arthur I. Harris**	***(Bankruptcy)***
Liaison for the Advisory Committee on Civil Rules	**Judge Neil M. Gorsuch**	***(Standing)***
Liaison for the Advisory Committee on Criminal Rules	**Judge Amy J. St. Eve**	***(Standing)***
Liaison for the Advisory Committee on Evidence Rules	**Judge James C. Dever III**	***(Criminal)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Solomon Oliver, Jr.**	***(Civil)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Richard C. Wesley**	***(Standing)***

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Molly T. Johnson *(Bankruptcy Rules Committee)* Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 315-824-4945 mjohnson@fjc.gov	**Emery G. Lee** *(Civil Rules Committee)* Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4078 Fax 202-502-4199 elee@fjc.gov
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MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 7, 2016 | Phoenix, AZ

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ATTENDANCE

The Judicial Conference on Rules of Practice and Procedure held its spring meeting in Phoenix, Arizona on January 7, 2016. The following members participated in the meeting:

Judge Jeffrey S. Sutton, Chair
Associate Justice Brent E. Dickson
Roy T. Englert, Esq.
Gregory G. Garre, Esq.
Daniel C. Girard, Esq.
Judge Neil M. Gorsuch
Judge Susan P. Graber
Professor William K. Kelley
Judge Patrick J. Schiltz
Judge Amy St. Eve
Judge Richard C. Wesley
Judge Jack Zouhary

The following attended on behalf of the advisory committees:

Advisory Committee on Appellate Rules –
Judge Steven M. Colloton, Chair
Professor Gregory E. Maggs, Reporter

Advisory Committee on Bankruptcy Rules –
Judge Sandra Segal Ikuta, Chair
Professor S. Elizabeth Gibson, Reporter (by teleconference)
Professor Michelle M. Harner, Reporter

Advisory Committee on Civil Rules –
Judge John D. Bates, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Reporter

Advisory Committee on Criminal Rules –
Judge Donald W. Molloy, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Reporter

Advisory Committee on Evidence Rules –
Judge William K. Sessions III, Chair
Professor Daniel J. Capra, Reporter

Elizabeth J. Shapiro, Esq., Deputy Director for the Civil Division of the Justice Department, represented the Department of Justice on behalf of the Honorable Sally Quillian Yates, Deputy Attorney General.

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Other meeting attendees included: Judge David G. Campbell; Judge Scott Matheson, Jr. (teleconference); Judge Robert M. Dow (teleconference); Judge Phillip R. Martinez and Sean Marlaire, representing the Court Administration and Case Management Committee ("CACM"); Professor Bryan A. Garner, Style Consultant; Professor R. Joseph Kimble, Style Consultant; Professor Geoffrey C. Hazard, Jr., Consultant.

Providing support to the Committee:

Professor Daniel R. Coquillette	Reporter, Standing Committee
Rebecca A. Womeldorf (by teleconference)	Secretary, Standing Committee
Julie Wilson (by teleconference)	Attorney Advisor, RCSO
Scott Myers	Attorney Advisor, RCSO
Bridget M. Healy (by teleconference)	Attorney Advisor, RCSO
Shelly Cox	Administrative Specialist
Tim Reagan	Senior Research Associate, FJC
Derek A. Webb	Law Clerk, Standing Committee
Amelia G. Yowell (by teleconference)	Supreme Court Fellow, AO

INTRODUCTORY REMARKS

Judge Sutton called the meeting to order. He introduced two new members of the Standing Committee, Daniel Girard and William Kelley, welcomed back Bryan Garner as a Style Consultant, welcomed Judge John Bates as the new chair of the Advisory Committee on Civil Rules and Judge Donald Molloy as the new chair of the Advisory Committee on Criminal Rules, and introduced Greg Maggs as the new reporter for the Advisory Committee on Appellate Rules and Michelle Harner as a new reporter for the Advisory Committee on Bankruptcy Rules. He thanked Judge Phillip Martinez and Sean Marlaire for representing CACM. And he reminded the attendees that Justice O'Connor would attend the dinner meeting.

Judge Sutton reported that the civil rules package, which included revisions of Rules 1, 4, 16, 26, 30, 31, 33, 34, 37, and 55, and abrogation of Rule 84, and Bankruptcy Rule 1007, went into effect on December 1, 2015. He observed that Chief Justice Roberts devoted his year-end report to that package.

Judge Sutton also reported that the Judicial Conference submitted various rule proposals to the Supreme Court on October 9, 2015 (Appellate Rules 4, 5, 21, 25, 26, 27, 28, 28.1, 29, 32, 35, and 40, and Forms 1, 5, and 6, and proposed new Form 7; Bankruptcy Rules 1010, 1011, 2002, 3002.1, 9006(f), and new Rule 1012; Civil Rules 4, 6, and 82; and Criminal Rules 4, 41, and 45) and again on October 29, 2015 (Bankruptcy Rules 7008, 7012, 7016, 9027, and 9033, known as the "*Stern* Amendments").

APPROVAL OF THE MINUTES OF THE LAST MEETING

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee approved the minutes of the May 28, 2015 meeting.**

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INTER-COMMITTEE WORK

Judge Sutton reserved discussion of electronic filing, service, and notice requirements for the Advisory Committee on Criminal Rules' report on Criminal Rule 49.

Professor Capra discussed the 2015 study conducted by Joe S. Cecil of the Federal Judicial Center entitled *Unredacted Social Security Numbers in Federal Court PACER Documents*, which discussed unredacted social security numbers in documents filed in federal courts and thus available in PACER, notwithstanding the "privacy rules" adopted in 2007 that require redaction of such information. The Standing Committee concluded that this problem could not be resolved by another rule amendment, and offered to support those in CACM who would address implementation of the existing rule at their summer 2016 meeting.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Molloy reported that the Advisory Committee on Criminal Rules had no action items and six information items.

Information Items

Rule 49 – Rule 49 provides that service and filing must be made "in the manner provided for a civil action." The Advisory Committee is considering ways to amend this rule in anticipation of a likely change in the civil rules that will require all parties to file and serve electronically. After study by the Rule 49 Subcommittee chaired by Judge David Lawson, the Advisory Committee concluded that such an electronic default rule could be problematic in the criminal context for two reasons. First, pro se defendants and pro se prisoners filing actions under § 2254 and § 2255 rarely have unfettered access to the CM/ECF system. Second, the architecture of CM/ECF does not permit non-party filings in criminal cases. Therefore, the Advisory Committee favors severing the link to the civil rules governing service and filing and is drafting a stand-alone Rule 49 that does not incorporate Civil Rule 5. They plan to submit a final draft rule to the Standing Committee in June 2016.

The Standing Committee then discussed the general topic of incorporation by reference across the various sets of rules. Consensus formed around the idea that whenever an advisory committee is considering changing a rule that is incorporated by reference, or is parallel with language in another set of rules, it should always first coordinate with the committee responsible for those other rules before sending proposed changes out for notice and comment.

Members also agreed that the presumption in favor of parallel language across the rules suggested that changes to Rule 49 should depart as little as possible from the language of Civil Rule 5.

Rule 12.4(a)(2) – After an amendment in 2009, the Code of Judicial Conduct no longer treats as "parties" all victims entitled to restitution. The Department of Justice consequently recommended a corresponding amendment to Rule 12.4(a)(2), which assists judges in

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determining whether to recuse themselves based on the identity of any organizational or corporate victims. The Advisory Committee agreed with this recommendation and created a subcommittee to draft a proposed amendment. Because a parallel provision exists in the Appellate Rules, the Advisory Committee on Criminal Rules is working with the Advisory Committee on Appellate Rules to draft the amendment.

Rule 15(d) – The Advisory Committee appointed a subcommittee to study whether to amend this rule and its accompanying note, which governs payment of deposition expenses, in light of an inconsistency between the text of the rule and the committee note. Judge Molloy said the text of the rule accurately identifies who bears the costs, but the note slightly mischaracterizes the rule by suggesting that the Department of Justice would have to pay for certain depositions overseas even if it did not request them. The Advisory Committee is struggling with how to fix this problem given the presumption that it cannot amend a note absent a rule revision. The Subcommittee will make its recommendations about how to fix this potential problem at the April 2016 meeting of the Advisory Committee.

Rule 32.1 – At the suggestion of Judge Graber, the Advisory Committee has examined whether Rule 32.1 should track the language of Rule 32 and require the court to give the government an opportunity to allocute at a hearing for revocation or modification of probation or supervised release. In a couple of cases, the United States Court of Appeals for the Ninth Circuit has held that the court must grant the government this opportunity and imported procedural rules from Rule 32 to fill "gaps" in Rule 32.1. After discussing the matter at its September 2015 meeting, the Advisory Committee decided to let this issue percolate and watch for developments in other circuits before considering any rule amendments.

Rule 23 – The Advisory Committee considered a suggestion to revise Rule 23 to allow oral waivers of trial by jury. The current rule requires a written stipulation from the defendant if they want to waive a jury trial and from the parties if they want to have a jury composed of fewer than twelve persons. Several cases have held that an oral waiver is sufficient if it is made knowingly and intelligently and have held that the failure to make the waiver in writing was harmless error. After study, the Advisory Committee decided against pursuing an amendment to Rule 23 because so many other criminal rules require written waivers and because the doctrine of harmless error covers this issue.

Rule 6 – In response to a suggestion to consider several amendments to Rule 6, which governs grand jury procedures, after a thorough discussion, the Advisory Committee decided to retain the current rule.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Colloton reported that the Advisory Committee on Appellate Rules had three action items in the form of three sets of proposed amendments to be published this upcoming summer for which it sought the approval of the Standing Committee.

Action Items

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STAYS OF THE ISSUANCE OF THE MANDATE: RULE 41 – The Advisory Committee sought approval of several amendments to Rule 41 designed to respond to two Supreme Court cases that highlighted some ambiguity within the Rule and to remove some redundancy from the Rule.

The proposed amendment to Rule 41(b) clarifies that a circuit court can extend the time of a stay of its mandate "by order" and not simply by inaction. In response to a question from a member, the Standing Committee discussed the pros and cons of inserting "only" in front of "by order" but decided to leave the language as is, with the potential to revisit at the June 2016 Standing Committee meeting. The proposed amendment to Rule 41(d)(4) next clarifies that a circuit court can "in extraordinary circumstances" stay a mandate even after it receives a copy of a Supreme Court order denying certiorari, thereby adopting the same extraordinary circumstances standard that the Supreme Court has found is required to recall a mandate. Finally, the Advisory Committee proposed deleting Rule 41(d)(1), which replicates Rule 41(b) regarding the effect of a petition for rehearing on the mandate, and is therefore redundant.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendments to Rule 41 and their accompanying Committee Notes.**

AUTHORIZING LOCAL RULES ON THE FILING OF AMICUS BRIEFS: RULE 29(A) – The Advisory Committee sought approval of an amendment to Rule 29(a) that would authorize local rules that prohibit the filing of amicus briefs, even if the parties have consented to their filing, in situations where they would disqualify a judge. As it stands, Rule 29(a) appears to be inconsistent with such local rules because it implies that there is an absolute right to file an amicus brief if the parties consent: "Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing." The proposed amendment adds to that sentence "except that a court of appeals may by local rule prohibit the filing of an amicus brief that would result in the disqualification of a judge."

The Standing Committee members raised and discussed several potential stylistic issues with the proposed amendment. Judge Colloton noted in advance that he plans to shorten "the disqualification of a judge" to "a judge's disqualification." Judge Sutton recommended omitting the phrase "by local rule," which received support from the members. Others raised stylistic concerns with the "except that" phrase as a whole, preferring to start a new sentence beginning with "But" or "A court of appeals may," or breaking up the sentence with a semicolon and beginning the second clause with "provided however that." Others pointed out that a third sentence might suggest that the exception would also apply to the first sentence of Rule 29(a), which governs amicus briefs submitted by the government. Finally, some members raised a concern with the meaning of the phrase "prohibit the filing," asking whether it referred to prohibiting the actual submission of the document, its delivery to the panel, or its continued appearance in the record.

Judge Colloton decided to "remand" the proposal back to the Advisory Committee for further consideration of these largely stylistic revisions before re-submission to the Standing Committee.

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EXTENSION OF TIME FOR FILING REPLY BRIEFS: RULES 31(A)(1) AND 28.1(F)(4) – The Advisory Committee sought approval of an amendment to Rules 31(a)(1) and Rule 28.1(f)(4), which would lengthen the time to serve and file a reply brief from 14 days to 21 days after the service of the appellee's brief. This amendment comes in anticipation of the elimination of the "three day rule," which would effectively reduce the time to file a reply brief from 17 to 14 days. After appellate lawyers on the Advisory Committee expressed the concern that this reduced window of time would adversely effect the quality of reply briefs, and in the hope that the extra time might lead to shorter reply briefs, the Advisory Committee decided to increase the time allowed. The Advisory Committee elected to shift from 14 days to 21 days in keeping with the established convention to measure time periods in 7-day increments where feasible. Judge Colloton noted that the phrase "the committee concluded that" will be deleted from the draft Committee Notes for both amended rules.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendments to Rule 31(a)(1) and Rule 28.1(f)(4) and their accompanying Committee Notes.**

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Sessions reported that the Advisory Committee on Evidence Rules had no action items and four information items.

Information Items

SYMPOSIUM ON HEARSAY REFORM – Judge Sessions reported on the Symposium on Hearsay Reform in Chicago on October 9, 2015. Inspired by a recent decision by Judge Posner in which he had suggested the removal of all the specific exceptions to the federal rule against hearsay in favor of greater discretion for the presiding judge, the symposium brought together prominent judges, lawyers, and professors to re-examine the continuing vitality of the hearsay rule and its exceptions. Participants considered reform of the hearsay rule in the context of the electronic information era and discussed the pros and cons of various potential amendments to the hearsay rule. Participants entertained a proposal to replace the rule-based system with a guidelines system akin to the Sentencing Guidelines. Another proposal favored replacing the system of exceptions with a Rule 403 balancing analysis. And yet another was to retain the current system while expanding use of the residual exception in Rule 807. Judge Sessions added that none of these changes was likely to happen soon, particularly in view of the nearly uniform position of the practicing attorneys that the specificity of the current rules works well. He and several members remarked upon how successful the symposium had been and thanked Judge St. Eve, Judge Schiltz and Professor Capra for their help with the event.

PROPOSED AMENDMENTS TO RULES 803(16) AND RULE 902 ISSUED FOR PUBLIC COMMENT – The Advisory Committee has two proposed amendments out for public comment. The first, Rule 803(16), eliminates the hearsay exception for ancient documents. The second, Rule 902, would ease the burden of authenticating certain electronic evidence. Judge Sessions reported that since November 2015 the Advisory Committee has received more than 100 letters on the first rule governing the ancient documents exception, principally from lawyers in asbestos and

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environmental toxic litigation criticizing the proposed amendment. Most expressed concern that the proposed rule would prevent the admission of documents over 20 years old, a concern Judge Sessions believed misplaced because the proposed rule does not alter the rules for authenticity, but rather reliability. Judge Sutton asked whether a Committee Note might help clarify this issue, and Professor Capra concurred. With respect to Rule 902, the proposal elicited little public comment and seems to have been universally accepted. Professor Capra added that the magistrate judges support both proposed amendments.

PROPOSED AMENDMENTS TO THE NOTICE PROVISIONS IN THE FEDERAL RULES OF EVIDENCE – The Advisory Committee continues to consider ways to increase uniformity among the various notice provisions throughout the Federal Rules of Evidence. Uniformity cannot be achieved for all provisions. For example, the notice provisions of Rules 412–415 dealing with sex abuse offenses, are congressionally mandated and cannot therefore be amended through the rules process. The Advisory Committee continues to consider uniform language that would work for other notice provisions.

Turning to specific notice provisions, the Advisory Committee is considering removing the requirement in Rule 404(b) that a criminal defendant must request notice of the general nature of any evidence that the prosecutor intends to offer at trial. Judge Sessions added that the Advisory Committee believed the existing rule was a "trap for an incompetent lawyer" and unfair because it punishes defendants whose lawyers fail to request notice. The Advisory Committee is also considering inclusion of a good faith exception to the pretrial notice provision in Rule 807.

BEST PRACTICES MANUAL ON AUTHENTICATION OF ELECTRONIC EVIDENCE – In an effort to assist courts and litigants in authenticating electronic evidence such as e-mail, Facebook posts, tweets, YouTube videos, etc., and following a suggestion from Judge Sutton, the Advisory Committee is creating a best practices manual on the subject. Judge Sessions reported that Professor Capra has worked on this manual along with Greg Joseph and Judge Paul Grimm, and the final product should be completed for presentation to the Standing Committee by its June meeting.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Ikuta reported that the Advisory Committee had five action items and four information items to present to the Standing Committee. She also announced that the modernized bankruptcy forms became effective on December 1, 2015. She added that they have been well received and that the only "criticism" made against them is that they are so clear and easy to use that they might encourage more pro se filings.

Action Items

Judge Ikuta explained that because the first three action items (a proposed change to Rule 1015(b), proposed changes to Official Forms 20A and 20B, and a proposed change to Official Form 410S2) involved just minor or conforming changes, the Advisory Committee recommended to the Standing Committee that they go through the regular approval process but without notice and public comment. She added that this would result in a December 1, 2017

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effective date for the rule rather than the December 1, 2016 effective date stated in the agenda book. The forms, she said, would remain on track to go into effect on December 1, 2016.

RULE 1015(B) (CASES INVOLVING TWO OR MORE RELATED DEBTORS) – In light of the Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015), the Advisory Committee proposed that Rule 1015(b) be amended to substitute the word "spouses" for "husband and wife" in order to include joint bankruptcy cases of same-sex couples.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 1015(b).**

OFFICIAL FORMS 20A (NOTICE OF MOTION OR OBJECTION) AND 20B (NOTICE OF OBJECTION TO CLAIM) – The Advisory Committee proposed that Official Forms 20A and 20B be renumbered to 420A and 420B, to conform with the new numbering convention of the Forms Modernization Project. It also proposed substituting the word "send" for "mail" in this rule to encompass other permissible methods of service and to maintain consistency with other new forms.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Official Forms 20A and 20B.**

OFFICIAL FORM 410S2 (NOTICE OF POSTPETITION FEES, EXPENSES, AND CHARGES) – The Advisory Committee proposed resolving an inconsistency between Rule 3002.1(c) and Official Form 410S2. The rule requires a home mortgage creditor to give notice to the debtor of all fees without excluding ones already ruled on by the bankruptcy court. The form that implements the rule, however, says that the creditor should not "include…any amounts previously…ruled on by the bankruptcy court." The Advisory Committee proposed deleting the form's inconsistent instruction and adding an instruction that tells the lender to flag the fees that have already been approved by the bankruptcy court.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Official Form 410S2.**

RULE 3002.1(B) (NOTICE OF PAYMENT CHANGES) AND (E) (DETERMINATION OF FEES, EXPENSES, OR CHARGES) – The Advisory Committee sought approval from the Standing Committee of three proposed amendments to Rule 3002.1(b) for publication for public comment in August 2016. First, the Advisory Committee recommends creating a national procedure by which any party in interest can file a motion to determine whether a change in the mortgage payment made by the creditor is valid. Second, the Advisory Committee recommends giving the court the discretion to modify the 21-day notice requirement in the case of home equity lines of credit because the balance of such loans is constantly changing. And third, the Advisory Committee recommends amending Rule 3002.1(e) by allowing any party in interest, and not just a debtor or trustee as currently allowed under the rule, to object to the assessment of a fee, expense, or charge.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendments to Rule 3002.1(b) and 3002.1(e) for publication for public comment.**

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REQUEST FOR A LIMITED DELEGATION OF AUTHORITY – The Advisory Committee requested a limited delegation of authority to allow it to make necessary non-substantive, technical, and conforming changes to the official bankruptcy forms that would be effective immediately but subject to retroactive approval by the Standing Committee and notice to the Judicial Conference. Judge Ikuta explained that there were three categories of such changes that would benefit from this procedure: 1) typos; 2) changes to the layout or wording of a form to ensure that CM/ECF can capture the data; and 3) conforming changes when statutes, rules, or Judicial Conference policies change in non-substantive ways. Discussion led to consensus around the idea that after the Advisory Committee identified the need for a minor change in a form, it would vote on the proposed change, and notify the chair of the Standing Committee during that approval process. Some members observed that because the process to amend forms concludes with approval by the Judicial Conference, and does not require the full Rules Enabling Act process, the delegation of authority to the Advisory Committee to make minor changes effective immediately, but subject to retroactive approval by the Standing Committee and notice to the Judicial Conference, posed no procedural problems.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously agreed to seek Judicial Conference delegation of authority to the Advisory Committee on Bankruptcy Rules to make non-substantive, technical, and conforming changes to official bankruptcy forms, with any such changes subject to retroactive approval by the Standing Committee and notice to the Judicial Conference.**

Information Items

STERN AMENDMENTS RESUBMITTED TO THE SUPREME COURT – Professor Gibson gave a brief update on the *Stern* Amendments. After the Supreme Court's decision in *Wellness International Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015), which upheld the validity of party consent to bankruptcy courts entering final judgment on *Stern* claims, the Advisory Committee resubmitted to the Standing Committee its *Stern* Amendments. It had originally submitted these amendments in 2013, and secured the approval of the Standing Committee and the Judicial Conference, but the Judicial Conference withdrew them given the Supreme Court's decision to hear *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014). The Standing Committee reapproved the amendments by e-mail vote in October 2015 and the Judicial Conference approved them shortly thereafter. The Judicial Conference submitted them to the Supreme Court as a supplemental transmittal on October 29, 2015. If approved by the Supreme Court in the spring of 2016, they will go into effect on December 1, 2016. Professor Gibson and Judge Ikuta expressed the Advisory Committee's appreciation of the Standing Committee's quick action on the *Stern* Amendments.

CHAPTER 13 PLAN FORM AND OPT-OUT PROPOSAL – Judge Ikuta gave a report on the history and current status of the Advisory Committee's plan to create a national Chapter 13 plan official form. The Advisory Committee commenced work on this at its spring 2011 meeting. It published its proposed plan form and related rules in August 2013. In response to comments received, the package was revised and republished in August 2014. The second publication prompted additional comments, most notably from numerous bankruptcy judges expressing their

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preference to retain their local forms. In response, the Advisory Committee voted unanimously to consider a proposal to approve the plan form and most of the related rules with minor amendments, but to consider further rule revisions that would allow a district to use a single district-wide local plan form so long as it met certain criteria. At its April 2016 meeting, the Advisory Committee will decide whether to recommend that this "opt-out" proposal go forward without further notice and public comment. Judge Sutton and Professor Coquillette suggested that while republication might not be required because the Chapter 13 package has been published twice before, prudence might favor republication given the demonstrated public interest over the past two publication periods and the somewhat new concept of the opt-out proposal. Members generally supported the idea of further publication, but only to the rule changes needed to implement the proposed opt-out procedure, and, if acceptable to the Judicial Conference and the Supreme Court, on an accelerated basis that would allow for an effective date of December 2017, rather than December 2018. To accomplish this, the rule changes could be published for three months (August–November, 2016) and the entire Chapter 13 package could be considered by the Standing Committee in January 2017, the Judicial Conference in March 2017, and the Supreme Court by May 2017, with a target December 1, 2017 effective date assuming no contrary congressional action.

RULE 4003(C) (EXEMPTIONS – BURDEN OF PROOF) – Professor Harner reported the Advisory Committee's ongoing study regarding whether Rule 4003(c), which places the burden of proof in any litigation concerning a debtor's claimed exemptions on the objecting party, violates the Rules Enabling Act. In light of the Supreme Court's decision in *Raleigh v. Illinois Department of Revenue*, 530 U.S. 15 (2000), which held that the burden of proof is a substantive component of a claim, Chief Judge Christopher M. Klein, U.S. Bankruptcy Court for the Eastern District of California, suggested to the Advisory Committee that by placing the burden of proof on the objector, as opposed to the debtor which many states do, Rule 4003(c) alters a substantive right and thereby violates the Rules Enabling Act. Professor Harner explained that the Advisory Committee is studying whether, à la *Hanna v. Plumer*, the rule announced in *Raleigh* is substantive or procedural.

RULE 9037 (PRIVACY PROTECTION FOR FILINGS WITH THE COURT) – REDACTION OF PREVIOUSLY FILED DOCUMENTS – Judge Ikuta reported that the Advisory Committee is studying CACM's recent suggestion that it amend Rule 9037. CACM suggested that the rule require notice be given to affected individuals when a request is made to redact a previously filed document that mistakenly included unredacted information. Because a redaction request may flag the existence of unredacted information, consideration is being given to procedures to prevent the public from accessing the unredacted information before the court can resolve the redaction request. Further consideration at the Advisory Committee's spring 2016 meeting may result in a proposal.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates reported that the Advisory Committee on Civil Rules had no action items but four information items to put before the Standing Committee.

Information Items

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RULE 23 SUBCOMMITTEE – Judge Bates reported on the work of the Rule 23 Subcommittee, chaired by Judge Robert Dow, which has been in existence since 2011. After various conferences and multiple submissions, the Subcommittee has identified six topics for possible rule amendments:

1. "Frontloading" in Rule 23(e)(1), requiring upfront information relating to the decision whether to send notice to the class of a proposed settlement.
2. Amendment to Rule 23(f) to clarify that a decision to send notice to the class under Rule 23(e)(1) is not appealable under Rule 23(f).
3. Amendment to Rule 23(c)(2)(B) to clarify that the Rule 23(e)(1) notice triggers the opt-out period under a Rule 23(b)(3) class action.
4. Another amendment to Rule 23(c)(2)(B) to clarify that the means by which the court gives notice may be "by United States mail, electronic means or other appropriate means."
5. Addressing issues raised by "bad faith" class action objectors. Finding a way to deter objectors from holding settlements "hostage" while pursuing an appeal until they receive a payoff and withdraw their appeal has received considerable attention. Members of the Subcommittee seem inclined to recommend a simple solution which would require district court approval of any payment in exchange for withdrawing an appeal. One potential issue with this solution is jurisdictional: Once the notice of appeal is filed, jurisdiction over a case typically transfers from the district court to the court of appeals. The Subcommittee is currently studying this issue. The Subcommittee is also considering a more complicated solution whereby it would amend both Rule 23 and Appellate Rule 42(c), on the model of an indicative ruling.
6. Refining standards for approval of proposed class action settlements under Rule 23(e)(2). The proposed amendment focuses and expands upon the "fair, reasonable, and adequate" standard incorporated into the rule in 2003 by offering a short list of core considerations in the settlement-approval setting.

The Standing Committee principally discussed the "bad faith" objector issue. Some members raised the question of whether sanctioning lawyers might help address the problem. Others asked whether securing district court approval for a payoff might actually worsen the problem by incentivizing bad faith objectors to do more work and run up a bill that they can justify to a court.

Judge Bates next reported on those issues that the Rule 23 Subcommittee has decided to place on hold.

1. Ascertainability. Because this issue is currently getting worked out by several circuit courts, is the subject of a few pending cert petitions to the Supreme Court, and may be affected by the class action cases already argued this term before the Court, the Subcommittee has decided not to propose a rule amendment at this time.
2. "Pick-off" offers of judgment. This issue has also recently been litigated in the circuit courts and, as of the time of the meeting, was pending before the Supreme Court in *Campbell-Ewald v. Gomez*, 136 S.Ct. 663 (2016).

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3. Settlement class certification standards. Given the feeling of many in the bar that they and the courts can handle settlement class certification without the need for a rule amendment, the Subcommittee has decided to place this issue on hold.
4. Cy Pres. Given the many questions that have emerged in this controversial area, including the necessity of a rule and whether a rule might violate the Rules Enabling Act, the Subcommittee has decided to place this issue on hold.
5. Issue classes. The Subcommittee has concluded that whatever disagreement among the circuits there may have been on this issue at one time, it has since subsided.

RULE 62: STAYS OF EXECUTION – Judge Bates reported on the work of the joint Subcommittee of the Appellate and Civil Rules Advisory Committees chaired by Judge Scott Matheson. The Subcommittee has developed a draft amendment for Rule 62 that straightforwardly responds to three concerns raised by a district court judge and other members of the Appellate Rules Advisory Committee. First, the draft extends the automatic stay from 14 days to 30 days to eliminate a gap between the current 14-day expiration of the automatic stay and the 28-day time set for post-trial motions and the 30-day time allowed for appeals. Second, it allows security for a stay either by bond or some other security provided at any time after judgment is entered. And third, it allows security by a single act that will extend through the entirety of the post-judgment proceedings in the district court and through the completion of the appeal. Judge Bates concluded by noting that the Subcommittee had considered but withdrawn a proposal that spelled out several details of a court's inherent power to regulate several aspects of a stay. The Subcommittee withdrew it after discussion at the Advisory Committee meetings because a stay is a matter of right upon posting of a bond and because they concluded that such an amendment was not necessary to solve any problems. This preliminary draft has yet to be approved by either Advisory Committee. Judge Bates said that he planned to submit this to the Standing Committee in June 2016 for publication.

EDUCATIONAL PROGRAMS REGARDING THE CIVIL RULES PACKAGE – Judge Bates reported that the Advisory Committee has been collaborating with the Federal Judicial Center to create educational programs for judges and lawyers to help spread the word about the new discovery amendments that went into effect on December 1, 2015. Judge Campbell and others have starred in various educational videos highlighting the new rules. Judge Sutton and Judge Bates sent out letters to all chief judges of the circuit, district, and bankruptcy courts on December 1, 2015, explaining the changes. Various circuit courts are creating educational programs of their own for circuit conferences and other court gatherings. The American Bar Association and other bar groups have started to create programs as well. The Education Subcommittee, chaired by Judge Paul Grimm, is now working on additional steps in collaboration with the Federal Judicial Center. Judge Sutton underlined the ongoing responsibility of Standing Committee members to help support these local and national educational efforts.

PILOT PROJECTS – Judge Campbell reported on the ongoing work of the Pilot Project Subcommittee. The Subcommittee investigates ways to make civil litigation more efficient and collects empirical data on best practices to help inform rule making. The Subcommittee consists of members of the Advisory Committee on Civil Rules along with Judges Sutton, Gorsuch and St. Eve from the Standing Committee, Jeremy Fogel and others from the Federal Judicial Center, and in the near future one or more members of CACM. Over the past several months, members

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of the Subcommittee have been researching pilot projects and various studies that have already been conducted, including 11 projects in 11 different states, efforts in 2 federal courts particularly noted for their efficiency, a pilot project conducted during the 1990s at the direction of Congress, the work of the Conference of State Court Chief Justices, and a multi-year FJC study conducted at CACM's request that examined the root causes of court congestion.

The Subcommittee has decided to focus on two possible pilot projects. First, it is looking into enhanced initial disclosures in civil litigation. Some research indicates that initial disclosure of helpful and hurtful information known by each party can improve the efficiency of litigation. But the experience with a mandatory disclosure regime in the 1990s under then Rule 26(a), which involved fierce opposition, a dissent by three Supreme Court Justices, multiple district court opt-outs, and eventual abandonment of the rule, provides something of a cautionary tale. The Subcommittee is exploring and conducting empirical and historical research on this topic at both the federal and state level. They have concluded that conducting pilot projects that test the benefits of more robust initial disclosures would be a sensible next step before proceeding to the drafting and publishing of any new possible rule amendments. Judge Campbell sought the perspective of members on several tough questions, including what the scope of the discovery requirement should be, how to handle objections to discovery obligations, how to handle electronically stored information, how to get around a categories-of-documents-based approach to discovery obligations, and how to measure the success of any pilot projects in this area (cost of litigation, time to disposition, number of discovery disputes, etc.).

The second category of possible pilot projects would focus upon expedited litigation. The Federal Judicial Center has shown that there exists a linear relationship between the length of a lawsuit and its cost. There are already a number of federal and state courts that have expedited schedules, including the Eastern District of Virginia, Southern District of Florida, Western District of Wisconsin, and the state courts of Utah and Colorado. Under the CJRA, researchers found in the 1990s that early judge intervention, efficient and firm discovery schedules, and firm trial dates are among the factors most helpful in moving cases along. Because Rule 16, in existence in its current form since 1983, already permits judges to do all of this, a change in a federal rule of procedure is less necessary than a change in local legal culture to help speed up case disposition times. The Subcommittee is considering running a pilot project that could address a court's legal culture by setting certain benchmarks for it, including requiring case management conferences within 60 days, setting firm discovery schedules and trial dates, and measuring how well the local court is meeting those benchmarks over a three-year period. At the same time, the Federal Judicial Center would provide training for the pilot judges in that court in accelerated case management.

Judge Campbell discussed another possible pilot project of having the Federal Judicial Center regularly publish a chart showing the average disposition time by a district court of different kinds of suits compared to the national average.

And finally, speaking on his own and not on behalf of the Pilot Project Subcommittee, Judge Campbell discussed with members the pros and cons of possibly shortening the time before cases and motions were placed on the CJRA list from 3 years to 2 years, and from 6 months to 3 months.

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REPORT OF THE ADMINISTRATIVE OFFICE

REPORT ON THE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT'S CONSIDERATION OF PROTECTION OF COOPERATOR INFORMATION – Judge Martinez, assisted by Sean Marlaire, reported on CACM's work on the issue of harm or threat of harm to government cooperators and their families in criminal cases. This problem, which goes back at least a decade, has proven a tricky one, and seems to pit the interest in protecting cooperators from retaliation against the interest of access to court records and proceedings. CACM met in early December in Washington, D.C., where it discussed the issue. Judge Martinez reported that Judge William Terrell Hodges, the chair of CACM, recommends that the Standing Committee refer this issue to the Advisory Committee on Criminal Rules. CACM has concluded that a national approach, whether in the form of rule change or suggested best practices, would be preferable to one based on diverse local rules. Members of the Standing Committee generally agreed that the problem was a serious one that required collaboration across multiple committees and consultation with the Department of Justice and the Bureau of Prisons. Judge Molloy, on behalf of the Advisory Committee on Criminal Rules, and in consultation with his Reporters, welcomed the reference of the issue to his Committee. He added that he looked forward to inviting interested parties to the discussion, and pledged to keep the Advisory Committee on Appellate Rules informed of the Committee's work.

STRATEGIC PLAN FOR THE FEDERAL JUDICIARY – Judge Sutton observed that the Standing Committee had various ongoing initiatives that support the strategies and goals of the current *Strategic Plan for the Federal Judiciary*, which the Judicial Conference approved on September 17, 2015.

CONCLUDING REMARKS

Judge Sutton thanked the Reporters for all of the impressive work they had done on their memoranda for the meeting and the members of the Rules Committee Support Office for helping to coordinate the meeting. He then concluded the meeting. The Standing Committee will next meet in Washington, D.C., on June 6–7, 2016.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

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

JEFFREY S. SUTTON
CHAIR

REBECCA A. WOMELDORF
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CHAIRS OF ADVISORY COMMITTEES

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JOHN D. BATES
CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

TO: Hon. Jeffrey S. Sutton, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. William K. Sessions, III, Chair
Advisory Committee on Evidence Rules

RE: Report of the Advisory Committee on Evidence Rules

DATE: May 7, 2016

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on April 29, 2016 in Alexandria, Virginia.

The Committee seeks final approval of two proposed amendments for submission to the Judicial Conference:

1. Amendment to Rule 803(16), the ancient documents exception to the hearsay rule, to limit its application to documents prepared before 1998; and

2. Amendment to Rule 902 to add two subdivisions that would allow authentication of certain electronic evidence by way of certification by a qualified person.

The Committee also seeks approval of a Manual on best practices for authenticating electronic evidence, to be published by the Federal Judicial Center.

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II. Action Items

A. Amendment Limiting the Coverage of Rule 803(16)

Rule 803(16) provides a hearsay exception for "ancient documents." If a document is more than 20 years old and appears authentic, it is admissible for the truth of its contents. The Committee has considered whether Rule 803(16) should be eliminated or amended because of the development of electronically stored information. The rationale for the exception has always been questionable, because a document does not magically become reliable enough to escape the rule against hearsay on the day it turns 20. The Committee concluded that the exception has been tolerated because it has been used relatively infrequently, and usually because there is no other evidence on point. But because electronically stored information can be retained for more than 20 years, there is a strong likelihood that the ancient documents exception will be used much more frequently in the coming years. And it could be used as a receptacle for unreliable hearsay, because if the hearsay is in fact reliable it will probably be admissible under other reliability-based exceptions, such as the business records exception or the residual exception. Moreover, the need for an ancient documents exception is questionable as applied to ESI, for the very reason that there may well be a great deal of *reliable* electronic data available to prove any dispute of fact.

The proposed amendment that was issued for public comment would have eliminated the ancient documents exception. The public comment on that proposed elimination was largely negative, however. Most of the comments asserted that without the ancient documents exception, important documents in certain specific types of litigation would no longer be admissible—or would be admissible only through expending resources that are currently not necessary under Rule 803(16). Examples of litigation cited by the public comment include cases involving latent diseases; disputes over the existence of insurance; suits against churches alleged to condone sexual abuse by their clergy; cases involving environmental cleanups; and title disputes. Many of the comments concluded that the business records exception and the residual exception are not workable alternatives for ancient documents. The comments contended that the business records exception requires a foundation witness that may be hard to find, and that the residual exception is supposed to be narrowly construed. Moreover, both these exceptions would require a statement-by-statement analysis, which is not necessary under Rule 803(16), thus leading to more costs for proponents. Much of the comment was about the amendment's leading to extra costs of qualifying old documents.

In light of the public comment, the Committee abandoned the proposal to eliminate the ancient documents exception. But it also rejected the option of doing nothing. The Committee strongly believes that the ESI problem as related to Rule 803(16) is real. Because ESI can be easily and permanently stored, there is a substantial risk that the terabytes of emails, web pages, and texts generated in the last 20 or so years could inundate the courts by way of the ancient documents exception. Computer storage costs have dropped dramatically—that greatly expands

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the universe of information that could be potentially offered under the ancient documents exception. Moreover, the presumption of the ancient documents exception was that a hardcopy document kept around for 20 years must have been thought to have some importance; but that presumption is no longer the case with easily stored ESI. The Committee remains convinced that it is appropriate and necessary to get out ahead of this problem—especially because the use of the ancient documents exception is so difficult to monitor. There are few reported cases about Rule 803(16) because no objection can be made to admitting the content of the document once it has been authenticated—essentially there is nothing to report. So tracking reported cases would not be a good way to determine whether ESI is being offered under the exception. Finally, the Committee adheres to its position that Rule 803(16) is simply a flawed rule; it is based on the fallacy that because a document is old and authentic, its contents are reliable. Therefore something must be done, at least, to limit the exception as to ESI.

The Committee considered a number of alternatives for amending Rule 803(16) to limit its impact. The alternatives of adding reliability requirements, or necessity requirements, were rejected. These alternatives were likely to lead to the increased costs of qualification of old documents, and extensive motion practice, that were opposed in the public comment. Ultimately, the Committee returned to where it started—the ESI problem. The Committee determined that the best result was to limit the ancient documents exception to documents prepared before 1998. That amendment will have no effect on any of the cases raised in the public comments, because the concerns were about cases involving records prepared well before 1998. And 1998 was found to be a fair date for addressing the rise of ESI. The Committee recognizes, of course, that any cutoff date will have a degree of arbitrariness, but it also notes that the ancient documents exception itself set an arbitrary time period for its applicability.

The Committee has considered the possibility that in the future, cases involving latent diseases, CERCLA, etc. will arise. But the Committee has concluded that in such future cases, the ancient documents exception is unlikely to be necessary because, going forward from 1998, there is likely to be preserved, reliable ESI that can be used to prove the facts that are currently proved by scarce hardcopy. If the ESI is generated by a business, then it is likely to be easier to find a qualified witness who is familiar with the electronic recordkeeping than it is under current practice to find a records custodian familiar with hardcopy practices from the 1960's and earlier. Moreover, the Committee has emphasized in the Committee Note that the residual exception remains available to qualify old documents that are reliable; the Note states the Committee's expectation that the residual exception not only can, but *should* be used by courts to admit reliable documents prepared after January 1, 1998 that would have previously been offered under the ancient documents exception.

The Committee unanimously recommends that the Standing Committee approve the following amendment to Rule 803(16), and the Committee Note, for submission to the Judicial Conference:

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Rule 803. Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant Is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

* * *

(16) ***Statements in Ancient Documents***. A statement in a document ~~that is at least 20 years old~~ that was prepared before January 1, 1998 and whose authenticity is established.

Committee Note

The ancient documents exception to the rule against hearsay has been limited to statements in documents prepared before January 1, 1998. The Committee has determined that the ancient documents exception should be limited due to the risk that it will be used as a vehicle to admit vast amounts of unreliable electronically stored information (ESI). Given the exponential development and growth of electronic information around the year 1998, the hearsay exception for ancient documents has now become a possible open door for large amounts of unreliable ESI, as no showing of reliability needs to be made to qualify under the exception.

The Committee is aware that in certain cases—such as cases involving latent diseases and environmental damage—parties must rely on hardcopy documents from the past. The ancient documents exception remains available for such cases for documents prepared before 1998. Going forward, it is anticipated that any need to admit old hardcopy documents produced after January 1, 1998 will decrease, because reliable ESI is likely to be available and can be offered under a reliability-based hearsay exception. Rule 803(6) may be used for many of these ESI documents, especially given its flexible standards on which witnesses might be qualified to provide an adequate foundation. And Rule 807 can be used to admit old documents upon a showing of reliability—which will often (though not always) be found by circumstances such as that the document was prepared with no litigation motive in mind, close in time to the relevant events. The limitation of the ancient documents exception is not intended to raise an inference that 20 year-old documents are, as a class, unreliable, or that they should somehow not qualify for admissibility under Rule 807. Finally, many old documents can be admitted for the non-hearsay purpose of proving notice, or as party-opponent statements.

The limitation of the ancient documents hearsay exception is not intended to have any effect on authentication of ancient documents. The possibility of authenticating an

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old document under Rule 901(b)(8)—or under any ground available for any other document—remains unchanged.

The Committee carefully considered, but ultimately rejected, an amendment that would preserve the ancient documents exception for hardcopy evidence only. A party will often offer hardcopy that is derived from ESI. Moreover, a good deal of old information in hardcopy has been digitized or will be so in the future. Thus, the line between ESI and hardcopy was determined to be one that could not be drawn usefully.

The Committee understands that the choice of a cut-off date has a degree of arbitrariness. But January 1, 1998 is a rational date for treating concerns about old and unreliable ESI. And the date is no more arbitrary than the 20-year cutoff date in the original rule. See Committee Note to Rule 901(b)(8) ("Any time period selected is bound to be arbitrary.").

Under the amendment, a document is "prepared" when the statement proffered was recorded in that document. For example, if a hardcopy document is prepared in 1995, and a party seeks to admit a scanned copy of that document, the date of preparation is 1995 even though the scan was made long after that—the subsequent scan does not alter the document. The relevant point is the date on which the information is recorded, not when the information is prepared for trial. However, if the content of the document is *itself* altered after the cut-off date, then the hearsay exception will not apply to statements that were added in the alteration.

The formatted amendment and Committee Note, together with the GAP report and the summary of public comment, is set forth in an appendix to this report.

B. Proposed Amendment to Evidence Rule 902

At its Spring 2015 meeting, the Committee unanimously approved a proposal to add two new subdivisions to Rule 902, the rule on self-authentication. The first provision would allow self-authentication of machine-generated information, upon a submission of a certification prepared by a qualified person. The second proposal would provide a similar certification procedure for a copy of data taken from an electronic device, medium or file. These proposals are analogous to Rules 902(11) and (12) of the Federal Rules of Evidence, which permit a foundation witness to establish the authenticity of business records by way of certification.

The proposals have a common goal of making authentication easier for certain kinds of electronic evidence that are, under current law, likely to be authenticated under Rule 901 but only by calling a witness to testify to authenticity. The Committee has concluded that the types of electronic evidence covered by the two proposed rules are rarely the subject of a legitimate authenticity dispute, but it is often the case that the proponent is nonetheless forced to produce an

authentication witness, incurring expense and inconvenience—and often, at the last minute, opposing counsel ends up stipulating to authenticity in any event.

The self-authentication proposals, by following the approach taken in Rule 902(11) and (12) regarding business records, essentially leave the burden of going forward on authenticity questions to the opponent of the evidence. Under those rules a business record is authenticated by a certificate, but the opponent is given "a fair opportunity" to challenge both the certificate and the underlying record. The proposals for new Rules 902(13) and 902(14) would have the same effect of shifting to the opponent the burden of going forward (not the burden of proof) on authenticity disputes regarding the described electronic evidence.

Applications of Rules 902(13) and (14)

At the Standing Committee meeting in Spring 2015, Committee members inquired as to what kind of information might be authenticated under these new provisions. The Committee (with the substantial assistance of John Haried, who initially proposed these amendments) has prepared the following examples to illustrate how Rules 902(13) and (14) may be used:

Examples of how Rule 902(13) can be used:

1. Proving that a USB device was connected to (i.e., plugged into) a computer: In a hypothetical civil or criminal case in Chicago, a disputed issue is whether Devera Hall used her computer to access files stored on a USB thumb drive owned by a co-worker. Ms. Hall's computer uses the Windows operating system, which automatically records information about every USB device connected to her computer in a database known as the "Windows registry." The Windows registry database is maintained on the computer by the Windows operating system in order to facilitate the computer's operations. A forensic technician, located in Dallas, Texas, has provided a printout from the Windows registry that indicates that a USB thumb drive, identified by manufacturer, model, and serial number, was last connected to Ms. Hall's computer at a specific date and time.

> **Without Rule 902(13):** Without Rule 902(13), the proponent of the evidence would need to call the forensic technician who obtained the printout as a witness, in order to establish the authenticity of the evidence. During his or her testimony, the forensic technician would typically be asked to testify about his or her background and qualifications; the process by which digital forensic examinations are conducted in general; the steps taken by the forensic technician during the examination of Ms. Hall's computer in particular; the process by which the Windows operating system maintains information in the Windows registry, including information about USB devices connected to the computer; and the steps taken by the forensic examiner to examine the Windows registry and to produce the printout identifying the USB device.

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Impact of Rule 902(13): With Rule 902(13), the proponent of the evidence could obtain a written certification from the forensic technician, stating that the Windows operating system regularly records information in the Windows registry about USB devices connected to a computer; that the process by which such information is recorded produces an accurate result; and that the printout accurately reflected information stored in the Windows registry of Ms. Hall's computer. The proponent would be required to provide reasonable written notice of its intent to offer the printout as an exhibit and to make the written certification and proposed exhibit available for inspection. If the opposing party did not dispute the accuracy or reliability of the process that produced the exhibit, the proponent would not need to call the forensic technician as a witness to establish the authenticity of the exhibit. (There are many other examples of the same types of machine-generated information on computers, for example, internet browser histories and wifi access logs.)

2. Proving that a server was used to connect to a particular webpage: Hypothetically, a malicious hacker executed a denial-of-service attack against Acme's website. Acme's server maintained an Internet Information Services (IIS) log that automatically records information about every internet connection routed to the web server to view a web page, including the IP address, webpage, user agent string and what was requested from the website. The IIS logs reflected repeated access to Acme's website from an IP address known to be used by the hacker. The proponent wants to introduce the IIS log to prove that the hacker's IP address was an instrument of the attack.

Without Rule 902(13): The proponent would have to call a website expert to testify about the mechanics of the server's operating system; his search of the IIS log; how the IIS log works; and that the exhibit is an accurate record of the IIS log.

With Rule 902(13): The proponent would obtain the website expert's certification of the facts establishing authenticity of the exhibit and provide the certification and exhibit to the opposing party with reasonable notice that it intends to offer the exhibit at trial. If the opposing party does not timely dispute the reliability of the process that produced the registry key, then the proponent would not need to call the website expert to establish authenticity.

3. Proving that a person was or was not near the scene of an event: Hypothetically, Robert Jackson is a defendant in a civil (or criminal) action alleging that he was the driver in a hit-and-run collision with a U.S. Postal Service mail carrier in Atlanta at 2:15 p.m. on March 6, 2015. Mr. Jackson owns an iPhone, which has software that records machine-generated dates, times, and GPS coordinates of each picture he takes with his iPhone. Mr. Jackson's iPhone contains two pictures of his home in an Atlanta suburb at about 1 p.m. on March 6. He wants to introduce into evidence the photos together with the metadata, including the date, time, and GPS coordinates, recovered forensically from his iPhone to corroborate his alibi that he was at home several miles from the scene at the time of the collision.

Without Rule 902(13): The proponent would have to call the forensic technician to testify about Mr. Jackson's iPhone's operating system; his search of the phone; how the metadata was created and stored with each photograph; and that the exhibit is an accurate record of the photographs.

With Rule 902(13): The proponent would obtain the forensic technician's certification of the facts establishing authenticity of the exhibits and provide the certification and exhibit to the opposing party with reasonable notice that it intends to offer the exhibit at trial. If the opposing party does not timely dispute the reliability of the process that produced the iPhone's logs, then the proponent would not have to call the technician to establish authenticity.

4. Proving association and activity between alleged co-conspirators: Hypothetically, Ian Nichols is charged with conspiracy to commit the robbery of First National Bank that occurred in San Diego on January 30, 2015. Two robbers drove away in a silver Ford Taurus. The alleged co-conspirator was Dain Miller. Dain was arrested on an outstanding warrant on February 1, 2015, and in his pocket was his Samsung Galaxy phone. The Samsung phone's software automatically maintains a log of text messages that includes the text content, date, time, and number of the other phone involved. Pursuant to a warrant, forensic technicians examined Dain's phone and located four text messages to Ian's phone from January 29: "Meet my house @9"; "Is Taurus the Bull out of shop?"; "Sheri says you have some blow"; and "see ya tomorrow." In the separate trial of Ian, the government wants to offer the four text messages to prove the conspiracy.

Without Rule 902(13): The proponent would have to call the forensic technician to testify about Dain's phone's operating system; his search of the phone's text message log; how logs are created; and that the exhibit is an accurate record of the iPhone's logs.

With Rule 902(13): The proponent would obtain the forensic technician's certification of the facts establishing authenticity of the exhibit and provide the certification and exhibit to the opposing party with reasonable notice that it intends to offer the exhibit at trial. If the opposing party does not timely dispute the reliability of the process that produced the iPhone's logs, then the court would make the Rule 104 threshold authenticity finding and admit the exhibits, absent other proper objection.

Hearsay Objection Retained: Under Rule 902(13), the opponent – here, criminal defendant Ian—would retain his hearsay objections to the text messages found on Dain's phone. For example, the judge would evaluate the text "Sheri says you have some blow" under F.R.E. 801(d)(2)(E) to determine whether it was a coconspirator's statement during and in furtherance of a conspiracy, and under F.R.E. 805, to assess the hearsay within hearsay. The court might exclude the text "Sheri says you have some blow" under either rule or both.

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Example of how Rule 902(14) can be used

In the armed robbery hypothetical, above, forensic technician Smith made a forensic copy of Dain's Samsung Galaxy phone in the field. Smith verified that the forensic copy was identical to the original phone's text logs using an industry standard methodology (*e.g.*, hash value or other means). Smith gave the copy to forensic technician Jones, who performed his examination at his lab. Jones used the copy to conduct his entire forensic examination so that he would not inadvertently alter the data on the phone. Jones found the text messages. The government wants to offer the copy into evidence as part of the basis of Jones's testimony about the text messages he found.

> **Without Rule 902(14):** The government would have to call two witnesses. First, forensic technician Smith would need to testify about making the forensic copy of information from Dain's phone, and about the methodology that he used to verify that the copy was an exact copy of information inside the phone. Second, the government would have to call Jones to testify about his examination.
>
> **With Rule 902(14):** The proponent would obtain Smith's certification of the facts establishing how he copied the phone's information and then verified the copy was true and accurate. Before trial the government would provide the certification and exhibit to the opposing party—here defendant Ian—with reasonable notice that it intends to offer the exhibit at trial. If Ian's attorney does not timely dispute the reliability of the process that produced the Samsung Galaxy's text message logs, then the proponent would only call Jones.

The Committee has carefully considered whether the self-authentication proposals would raise a Confrontation Clause concern when the certificate of authenticity is offered against a criminal defendant. The Committee is satisfied that no constitutional issue is presented, because the Supreme Court has stated in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 322 (2009), that even when a certificate is prepared for litigation, the admission of that certificate is consistent with the right to confrontation if it does nothing more than authenticate another document or item of evidence. That is all that these certificates would be doing under the Rule 902(13) and (14) proposals. The Committee also relied on the fact that the lower courts have uniformly held that certificates prepared under Rule 902(11) do not violate the right to confrontation; those courts have relied on the Supreme Court's statement in *Melendez-Diaz.* The Committee determined that the problem with the affidavit found testimonial in *Melendez-Diaz* was that it certified the accuracy of a drug test that was itself prepared for purposes of litigation—a certification cannot render constitutional an underlying report that itself violates the Confrontation Clause. There is of course no intention or implication from the amendment that a certification could somehow be a means of bringing otherwise testimonial reports into court. But

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the Committee concluded that if the underlying report is not testimonial, the certification of authenticity will not raise a constitutional issue under the current state of the law.

In this regard, the Note approved by the Committee emphasizes that the goal of the amendment is a narrow one: to allow authentication of electronic information that would otherwise be established by a witness, instead to be established through a certification by that same witness. The Note makes clear that these are authentication-only rules and that the opponent retains all objections to the item other than authenticity --- most importantly that the item is hearsay or that admitting the item would violate a criminal defendant's right to confrontation.

The Committee unanimously recommends that the proposed amendment to Rule 902, adding new subdivisions (13) and (14), and their Committee Notes, be approved by the Standing Committee and submitted to the Judicial Conference. The proposed amendment, together with Committee Notes, provides as follows:

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

* * *

(13) ***Certified Records Generated by an Electronic Process or System.*** A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11).

Committee Note

The amendment sets forth a procedure by which parties can authenticate certain electronic evidence other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and inconvenience of producing a witness to authenticate an item of electronic evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment

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provides a procedure under which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule. The Rule specifically allows the authenticity foundation that satisfies Rule 901(b)(9) to be established by a certification rather than the testimony of a live witness.

The reference to the "certification requirements of Rule 902(11) or (12)" is only to the procedural requirements for a valid certification. There is no intent to require, or permit, a certification under this rule to prove the requirements of Rule 803(6). Rule 902(13) is solely limited to authentication and any attempt to satisfy a hearsay exception must be made independently.

A certification under this Rule can establish only that the proffered item has satisfied the admissibility requirements for authenticity. The opponent remains free to object to admissibility of the proffered item on other grounds—including hearsay, relevance, or in criminal cases the right to confrontation. For example, assume that a plaintiff in a defamation case offers what purports to be a printout of a webpage on which a defamatory statement was made. Plaintiff offers a certification under this Rule in which a qualified person describes the process by which the webpage was retrieved. Even if that certification sufficiently establishes that the webpage is authentic, defendant remains free to object that the statement on the webpage was not placed there by defendant. Similarly, a certification authenticating a computer output, such as a spreadsheet, does not preclude an objection that the information produced is unreliable—the authentication establishes only that the output came from the computer.

A challenge to the authenticity of electronic evidence may require technical information about the system or process at issue, including possibly retaining a forensic technical expert; such factors will effect whether the opponent has a fair opportunity to challenge the evidence given the notice provided.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

* * *

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(14) *Certified Data Copied from an Electronic Device, Storage Medium, or File.* Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent also must meet the notice requirements of Rule 902(11).

Committee Note

The amendment sets forth a procedure by which parties can authenticate data copied from an electronic device, storage medium, or an electronic file, other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and inconvenience of producing an authenticating witness for this evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness, and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure in which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Today, data copied from electronic devices, storage media, and electronic files are ordinarily authenticated by "hash value." A hash value is a number that is often represented as a sequence of characters and is produced by an algorithm based upon the digital contents of a drive, medium, or file. If the hash values for the original and copy are different, then the copy is not identical to the original. If the hash values for the original and copy are the same, it is highly improbable that the original and copy are not identical. Thus, identical hash values for the original and copy reliably attest to the fact that they are exact duplicates. This amendment allows self-authentication by a certification of a qualified person that she checked the hash value of the proffered item and that it was identical to the original. The rule is flexible enough to allow certifications through processes other than comparison of hash value, including by other reliable means of identification provided by future technology.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule.

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The reference to the "certification requirements of Rule 902(11) or (12)" is only to the procedural requirements for a valid certification. There is no intent to require, or permit, a certification under this rule to prove the requirements of Rule 803(6). Rule 902(14) is solely limited to authentication and any attempt to satisfy a hearsay exception must be made independently.

A certification under this Rule can only establish that the proffered item is authentic. The opponent remains free to object to admissibility of the proffered item on other grounds—including hearsay, relevance, or in criminal cases the right to confrontation. For example, in a criminal case in which data copied from a hard drive is proffered, the defendant can still challenge hearsay found in the hard drive, and can still challenge whether the information on the hard drive was placed there by the defendant.

A challenge to the authenticity of electronic evidence may require technical information about the system or process at issue, including possibly retaining a forensic technical expert; such factors will effect whether the opponent has a fair opportunity to challenge the evidence given the notice provided.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

The formatted amendment and Committee Notes, together with the GAP reports and the summaries of public comments, are all set forth in an appendix to this report.

C. Best Practices Manual on Authentication of Electronic Evidence

There are dozens of reported cases that set forth standards for authenticating electronic evidence. These cases apply the existing, flexible provisions on authenticity currently found in Federal Rules 901 and 902 and their state counterparts. The Committee has considered whether to draft new rules to govern authentication of electronic evidence. The Committee has decided that it will not do so at this time. The Committee concluded that amendments regulating authenticity of electronic evidence would end up being too detailed for the text of a rule; they could not account for how a court can and should balance all the factors relevant to authenticating electronic evidence in every case; and there was a risk that any factors listed would become outmoded by technological advances.

The Committee unanimously concluded, however, that publication of a best practices manual on authenticating electronic evidence would be of great use to the bench and bar. A best practices manual can be amended as necessary, avoiding the problem of having to amend rules to keep up with technological changes. It can include copious citations, which a rule or Committee Note could not.

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The Reporter to the Committee has worked with Greg Joseph and Judge Paul Grimm on a best practices manual that will be published by the Federal Judicial Center. The Committee has reviewed and approves of the final draft of the manual. The Committee believes that the manual will provide substantial assistance and guidance to courts and litigants in solving many of the problems of authenticating electronic evidence.

The Best Practices Manual, as reviewed by the Committee, is set forth in an appendix to this report. The Committee seeks guidance from the Standing Committee on how the Committee's input should be described for purposes of the publication. Currently, the Committee is listed as a co-author. Other possibilities include a statement that the pamphlet was prepared with the assistance and approval of the Committee, or under the Committee's auspices; or there might be no mention of the Committee at all. The pamphlet will be submitted to the FJC as soon as the Standing Committee determines the question of proper attribution.

III. Information Items

A. Proposal to Amend Certain Notice Provisions in the Federal Rules of Evidence

For the past two meetings, the Committee has considered a project that would provide more uniformity to the notice provisions of the Evidence Rules, and that would also make relatively minor substantive changes to two of those rules.

The Committee has agreed upon the following points:

1) The Rule 807 notice provision is problematic because it contains no language to excuse lack of timely notice upon good cause. This omission has led to a dispute in the courts about whether a good cause exception exists under the rule. A good cause exception is particularly necessary in Rule 807 for cases where a witness becomes unavailable after the trial starts and the proponent may need to introduce a hearsay statement from that witness. And it is especially important to allow for a good cause exception when it is a criminal defendant who fails to provide pretrial notice. Thus the Committee has agreed in principle to propose amending Rule 807 to add good cause language to the notice provision.

2) The request requirement in Rule 404(b)—that the criminal defendant must request notice before the government is obligated to give it—is an unnecessary limitation that serves as a trap for the unwary. Thus the Committee has agreed in principle to propose amending the Rule 404(b) notice provision to eliminate the request requirement.

3) The notice provisions in Rules 412-415 should not be changed. These rules could be justifiably excluded from a uniformity project because they were all

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congressionally-enacted, are rarely used, and raise policy questions on what procedural requirements should apply in cases involving sexual assaults.

The Committee has considered other suggestions for amendment to the notice provisions of Rules 404(b), 609(b), 807 and 902(11). One possibility was a template that would require a proponent to provide "reasonable written notice of an intent to offer evidence under" the specific rule, and to "make the substance of the evidence available to the party—so that the party has a fair opportunity to meet it." For a number of reasons, however, the Committee concluded that such a template would not work as applied to all four rules. The rules operate differently, they cover different information, and uniformity for uniformity's sake would end up making substantive changes that might be controversial.

After discarding the template, the Committee has moved to consideration of individual changes that might be made to improve one or more of the notice provisions. Committee members have agreed that a requirement that the notice be in writing should be added to Rule 807—as the writing requirement limits disputes on whether notice was actually provided. The Committee has also agreed that the Rule 807 requirement that the notice provide "particulars, including the declarant's name and address," should be modified. The requirement of disclosing an address is nonsensical when the declarant is unavailable, and superfluous when the address can be easily obtained by the opponent. Moreover the term "particulars" has given rise to petty disputes about the details of the required notice.

As discussed below, the Committee has on its agenda the possibility of modest changes to Rule 807 that would make it somewhat easier to invoke. The Committee has agreed that it would not be prudent to propose changes to the notice provisions of Rule 807 until the Committee has decided whether other changes to the rule, if any, should be proposed. That is, it would be appropriate to propose all amendments to Rule 807 at one time. The Committee has further agreed that the proposed amendment to Rule 404(b)—to delete the requirement that the defendant request notice—should be held back until other amendments are ready for proposal. Holding off on that amendment is consistent with the intent of the Standing Committee—that amendments should be packaged, in order to minimize disruption to the bench and bar. The change that would be made to Rule 404(b) is not so significant that it must be made immediately without regard to packaging.

The working proposal for amendment to the Rule 807 notice requirement, approved by the Committee, reads as follows:

(b) Notice. The statement is admissible only if~~, before the trial or hearing~~ the proponent gives an adverse party reasonable written notice of ~~the~~ an intent to offer the statement ~~and its particulars, including the declarant's name and address,~~ —including its substance and the

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declarant's name—so that the party has a fair opportunity to meet it. The notice must be provided before the trial or hearing—or during trial or hearing if the court, for good cause, excuses a lack of earlier notice.

B. Proposal to Expand the Residual Exception

The Committee is considering whether Rule 807—the residual exception to the hearsay rule—should be expanded to allow the admission of more hearsay, if it is reliable. Expansion of the residual exception might have the effect of providing more flexibility in the use of hearsay exceptions, and it might also be part of an effort to reassess some of the more controversial categorical hearsay exceptions, such as those for ancient documents, excited utterances and dying declarations. Limitations on those exceptions could be easier to implement if it could be assured that reliable hearsay currently fitting under those exceptions could be admitted under the residual exception. But currently, the residual exception is, by design, to be applied only in rare and exceptional circumstances.

The Committee recognizes the challenge involved in expanding the residual exception: the goal would be to allow the exception to be used somewhat more frequently, without broadening it so far that it would overtake the categorical exceptions entirely and lead to a hearsay system controlled by court discretion, with unpredictable outcomes.

Within these constraints, the Committee, after substantial discussion, preliminarily agreed on the following principles regarding Rule 807:

- The requirement that the court find trustworthiness "equivalent" to the circumstantial guarantees in the Rule 803 and 804 exceptions should be deleted, as it is difficult to apply, because there is no unitary standard of trustworthiness in the Rule 803 and 804 exceptions. Given the difficulty of the "equivalence" standard, a better approach is simply to require the judge to find that the hearsay offered under Rule 807 is trustworthy.

- Trustworthiness can best be defined as a consideration of both circumstantial guarantees and corroborating evidence. Most courts find corroborating evidence to be relevant to the reliability enquiry, but some do not. An amendment would be useful to provide uniformity in the approach to evaluating trustworthiness under the residual exception—and substantively, that amendment should specifically allow the court to consider corroborating evidence, as corroboration is a typical source for assuring that a statement is reliable.

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● The requirements in Rule 807 that the residual hearsay must be proof of a "material fact" and that admission of residual hearsay be in "the interests of justice" have not served any purpose. They add nothing to what is already in the rules. These provisions were added to the residual exception to emphasize that it was to be used only rarely and in truly exceptional situations. The Committee believes that deleting these provisions might constitute a change of tone—to signal that while hearsay must still be reliable to be admitted under Rule 807, there is no longer a requirement that the use must be rare and exceptional.

● The requirement in the residual exception that the hearsay statement must be "more probative than any other evidence that the proponent can obtain through reasonable efforts" should be retained. This will preserve the rule that proponents cannot use the residual exception unless they need it. And it will send a signal that the changes proposed are modest—there is no attempt to allow the residual exception to swallow the categorical exceptions, or to make use of the residual exception a commonplace event.

What follows is the working draft of an amendment to Rule 807 that the Committee has tentatively approved and will be considered further at the next meeting (including the amendment to the notice provision discussed above).

Rule 807. Residual Exception

(a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

(1) ~~the statement has equivalent circumstantial guarantees of trustworthiness~~ the court determines, after considering the pertinent circumstances and any corroborating evidence, that the statement is trustworthy.; and

~~**(2)** it is offered as evidence of a material fact;~~

(~~3~~ 2) it is more probative on the point for which it is offered than ~~any~~ other evidence that the proponent can obtain through reasonable efforts~~; and~~

~~**(4)** admitting it will best serve the purposes of these rules and the interests of justice~~.

(b) Notice. The statement is admissible only if~~, before the trial or hearing~~ the proponent gives an adverse party reasonable written notice of ~~the~~ an intent to offer the

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statement ~~and its particulars, including the declarant's name and address,~~ including its substance and the declarant's name—so that the party has a fair opportunity to meet it. The notice must be provided before the trial or hearing—or during trial or hearing if the court, for good cause, excuses a lack of earlier notice.

* * *

Finally, the Committee has decided that it would be useful to convene a miniconference on the morning of the Fall 2016 meeting, to have judges, lawyers and academics provide commentary on the proposed changes to Rule 807.

C. Proposal to Amend Rule 801(d)(1)(A)

Over the last few meetings, the Committee has been considering the possibility of expanding substantive admissibility of certain prior statements of testifying witnesses—the rationale of that expansion being that unlike other forms of hearsay, the declarant is subject to cross-examination about the statement. At the Symposium on Hearsay in October, 2015, a panel was devoted to treatment of prior witness statements.

The Committee's discussions are now focused on whether Rule 801(d)(1)(A) should be amended to provide for greater substantive admissibility of prior inconsistent statements. Currently the rule is very narrow—prior inconsistent statements are admissible substantively only if they were made under oath at a formal proceeding. The two possibilities for expansion presented were: 1) allowing for substantive admissibility of *all* prior inconsistent statements, as is the case in California, Wisconsin, and a number of other states; and 2) allowing substantive admissibility only when there is proof—other than a witness's statement—that the prior statement was ever made, as is the procedure in Connecticut, Illinois, and several other states.

The Committee has concluded that it will not propose an amendment that would provide for substantive admissibility of all prior inconsistent statements. The Committee is concerned about the possibility that a prior inconsistent statement could be used as critical substantive proof even if the witness denied ever making it and there is a substantial dispute that it was ever made. It might well be costly and distracting to take evidence and to determine whether a prior inconsistent statement was made, if there is no reliable record of it.

The Committee will be debating whether to allow for substantive admissibility if the prior inconsistent statement has been video recorded. If the statement is video recorded, any denial that it was made becomes implausible, and the proof of its making is a fact easily determined. Any dispute about the circumstances under which it is made—for example, whether police officers induced the statement—probably can be straightforwardly evaluated by the

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factfinder. Moreover, allowing substantive admissibility of videotaped inconsistent statements could lead to more statements being videotaped in the expectation that they might be useful substantively—which is a good result even beyond its evidentiary consequences.

The Committee will continue the debate over expanding substantive admissibility of prior inconsistent statements at its next meeting.

D. Proposals to Amend Rule 803(2)

The Committee has received four separate proposals for amending Rule 803(2), the hearsay exception for excited utterances (in addition to Judge Posner's suggestion that the exception be eliminated, which the Committee has previously considered and rejected). The Committee considered all four proposals at the Spring meeting.

One proposal was to add the word "continuous" to the rule—requiring the declarant to be in a continuous state of excitement for the period between the startling event and the statement. The Committee found no need to make this change. The text and the case law already require the statement to be made while under the continuous influence of the startling event. The single case cited as problematic by the professor who suggested the change is one in which the declarant is severely assaulted, and then months after the event saw the defendant's picture in the newspaper; she got upset and identified him as the perpetrator. The court held that seeing the defendant in the newspaper was a startling event, and that the identification related to both startling events (the assault and the newspaper viewing). The Committee has concluded that adding the word "continuous" would not change the result in that case—because the declarant *was* under a continuous state of excitement in the time between she viewed the newspaper and her statement. Moreover, the result in the case is sound—reliability is guaranteed by the condition of startlement. And even if the case were problematic, the fact that it is the only federal case cited as raising the so-called problem, in 40 years of litigation under Federal Rule 803(2), is indicative that there is no serious problem worth addressing.

Other proposals were made in response to the oft-stated allegation that the excited utterance exception does not provide a sufficient guarantee that evidence admitted under the exception will be reliable. One proposal was to add language—derived from the 2014 amendment to Rule 803(6)—that would allow the court to exclude an excited utterance if the opponent could show that it was in fact untrustworthy. Another proposal was to add language—derived from Rule 804(b)(3)—that would require the proponent to show corroborating circumstances clearly indicating that the excited utterance was trustworthy. And a third proposal was to transfer the exception to Rule 804, so that excited utterances would not be admissible unless the declarant is shown to be unavailable to testify.

The Committee has decided not to proceed on any of these proposals. For one thing, the proposals would have consequences beyond Rule 803(2)—consideration would have to be given to whether there should be similar treatment for other exceptions that have been found

controversial, such as the exceptions for present sense impressions and state of mind. Thus, proposing an amendment to Rule 803(2) at this point would be contrary to a systematic approach to amending the Federal Rules of Evidence. Second, and more importantly, the Committee relied on a lengthy report prepared by the FJC representative, who analyzed the social science studies that have been conducted regarding the premises of Rules 803(1) (the present sense impression exception) and 803(2)—specifically whether there is empirical support for the propositions that immediacy and excitedness tend to guarantee reliability. The FJC representative concluded that there is significant empirical data to support the premises that: 1) it takes time to make up a good lie, and 2) startlement makes it more difficult to make up a good lie. Consequently, the Committee determined that there was no need at this point to amend Rule 803(2)—or Rule 803(1), for that matter—due to any reliability concerns.

E. Consideration of a Change from Categorical Hearsay Exceptions to Guidelines

At the Hearsay Symposium in Fall 2015, Judge Shadur argued that the hearsay rule might be usefully changed to parallel the Sentencing Guidelines—i.e., a list of factors, which guide discretion, but which allow the judge to depart in various circumstances. The existing hearsay exceptions might be reconstituted as standards or guidelines rather than hard rules. At its Spring meeting, the Committee considered the viability of replacing the current rule-based system with a system of guided discretion that would include a list of standards or illustrations taken from the existing exceptions.

The Committee has determined that at this point, 40 years into the Federal Rules of Evidence, any perceived advantages in switching to a guidelines system (in terms of adding flexibility) would be outweighed by the costs (including substantial disruption; the uncertainty created by greater judicial discretion in ruling on hearsay; increased motion practice; and increased discovery cost because virtually any hearsay statement would be potentially admissible).

The Committee also rejected an alternative designed to provide significantly more flexibility and discretion within the current Federal Rules structure. That alternative would 1) add a safety valve applicable to all the exceptions, allowing a judge to exclude otherwise admissible hearsay if the opponent could show that it was untrustworthy; and 2) amend Rule 807 to allow for more frequent and easier use. The Committee determined that this provision for two-way judicial departures from the categorical exceptions would inject too much discretion and unpredictability into the system. At the Hearsay Symposium, the Committee heard from the lawyers that rules were needed to provide guidance, stability and consistency. The Committee concluded that allowing more discretion for the court to admit or exclude hearsay which it happened to find reliable or unreliable would add substantial uncertainty and inconsistency—making it more difficult to settle, obtain summary judgment, and prepare for trial. Moreover, adding so much more discretion would provide a "home team advantage" in that local counsel would learn over time the personal inclinations of a local judge in treating a hearsay problem.

Instead of an across-the-board increase of discretion to exclude and admit hearsay, the Committee has opted to consider modest changes to the residual exception, discussed above—with the goal being to make that exception somewhat more useful, without injecting too much discretion into the system. The Committee recognizes the challenge of adding a little flexibility, but not too much—which is one of the reasons why a miniconference on the possible change to Rule 807 will be so useful.

F. Consideration of a Possible Amendment to Rule 803(22)

Rule 803(22) is a hearsay exception that allows judgments of conviction to be offered to prove the truth of the facts essential to the conviction. The exception carves out two kinds of convictions that are not covered: 1) convictions resulting from a nolo contendere plea; and 2) misdemeanor convictions. Judge Graber asked the Evidence Rules Committee to consider whether these two limitations on the exception were justified. The Committee has determined that both these carve-outs are justified.

The Committee found that the nolo contendere carve-out is necessary to preserve the protection provided in Rule 410 for nolo *pleas*. Rule 410's exclusion of a nolo contendere plea—and the underlying policy of encouraging compromise—would be undermined if the conviction itself were admissible to prove the essential facts.

The reason for the misdemeanor carve-out is that misdemeanors, as a class, are less likely to be contested than felonies, and therefore there is less likely to be a reliable determination (or concession) that would justify admitting the underlying facts for their truth. The Committee noted that in many jurisdictions, indigent defendants plead guilty to misdemeanors simply because they cannot make cash bail; also, if the defendant is indigent and a misdemeanor does not lead to jail time, the state is not required to provide counsel. These factors counsel against admitting misdemeanor convictions to prove the underlying facts. Committee members recognized of course that some misdemeanor convictions might be highly contested, but noted that when that is so, courts have employed the residual exception to allow admission of the underlying facts for their truth. Thus, adding misdemeanor convictions to Rule 803(22) was found not necessary to cover cases where the facts were truly contested, and would on the other hand lead to admission of facts that have clearly not been contested.

For these reasons the Committee voted unanimously not to proceed with an amendment to Rule 803(22).

G. Consideration of a Suggestion That Rule 704(b) Be Eliminated

The Committee has received a law review article that advocates elimination of Rule 704(b), which provides that in a criminal case, an expert may not testify that the defendant did or did not have the requisite mental state to commit the crime charged. The Committee

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determined that it would not proceed with any effort to eliminate Rule 704(b). Rule 704(b) was part of the Insanity Defense Reform Act—a broad statutory overhaul of the insanity defense. Because Rule 704(b) was part of an integrated approach by Congress, it is possible that deleting the provision would have an effect on Congressional objectives beyond the Federal Rules of Evidence. While amendments to *improve* the Rule are not necessarily ruled out, deference to the Congressional scheme cautioned strongly against an amendment that would eliminate the Rule.

H. Possible eHearsay (Recent Perceptions) Exception

At a previous meeting, the Committee decided not to approve a proposal that would add a hearsay exception intended to address the phenomenon of electronic communication by way of text message, tweet, Facebook post, etc. The primary reason stated for the proposed exception is that these kinds of electronic communications are an ill-fit for the standard hearsay exceptions, and that without the exception reliable electronic communications will be either be 1) excluded, or 2) admitted but only by improper application of the existing exceptions. The exception proposed was for "recent perceptions" of an unavailable declarant.

The Committee's decision not to proceed with the exception was mainly grounded in the concern that it would lead to the admission of unreliable evidence. The Committee has, however, continued to monitor the practice and case law on electronic evidence and the hearsay rule, in order to determine whether there is a real problem of reliable eHearsay either being excluded or improperly admitted by misapplying the existing exceptions.

The review on recent federal case law involving eHearsay indicates that there are few if any instances of reliable eHearsay being excluded, nor is it being improperly admitted under misinterpretations of other exceptions. Most eHearsay seems to be properly admitted as party-opponent statements, excited utterances, or state of mind statements. And many statements that are texted or tweeted are properly found to be not hearsay at all. Moreover, the study conducted by the Committee's FJC representative on social science research counsels caution in adopting an eHearsay exception. The social science studies indicate that lies are more likely to be made when outside another person's presence—for example, by a tweet or Facebook post.

The Committee will continue to monitor the treatment of eHearsay in the federal courts, and will also continue to review the practice in the states that employ a recent perception exception.

I. *Crawford v. Washington* and the Hearsay Exceptions in the Evidence Rules

As previous reports have noted, the Committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*, in which the Court held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to confront and cross-examine the declarant.

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The Reporter regularly provides the Committee a case digest of all federal circuit cases discussing *Crawford* and its progeny. The goal of the digest is to enable the Committee to keep current on developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions. If the Committee determines that it is appropriate to propose amendments to prevent one or more of the Evidence Rules from being applied in violation of the Confrontation Clause, it will propose them for the Standing Committee's consideration.

IV. Minutes of the Spring 2016 Meeting

The draft of the minutes of the Committee's Spring 2016 meeting is attached to this report. These minutes have not yet been approved by the Committee.

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Appendix

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE*

Rule 803. Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant Is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

* * * * *

(16) ***Statements in Ancient Documents***. A statement in a document ~~that is at least 20 years old~~that was prepared before January 1, 1998 and whose authenticity is established.

* * * * *

Committee Note

The ancient documents exception to the rule against hearsay has been limited to statements in documents prepared before January 1, 1998. The Committee has determined that the ancient documents exception should be

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

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limited due to the risk that it will be used as a vehicle to admit vast amounts of unreliable electronically stored information (ESI). Given the exponential development and growth of electronic information around the year 1998, the hearsay exception for ancient documents has now become a possible open door for large amounts of unreliable ESI, as no showing of reliability needs to be made to qualify under the exception.

The Committee is aware that in certain cases—such as cases involving latent diseases and environmental damage—parties must rely on hardcopy documents from the past. The ancient documents exception remains available for such cases for documents prepared before 1998. Going forward, it is anticipated that any need to admit old hardcopy documents produced after January 1, 1998 will decrease, because reliable ESI is likely to be available and can be offered under a reliability-based hearsay exception. Rule 803(6) may be used for many of these ESI documents, especially given its flexible standards on which witnesses might be qualified to provide an adequate foundation. And Rule 807 can be used to admit old documents upon a showing of reliability—which will often (though not always) be found by circumstances such as that the document was prepared with no litigation motive in mind, close in time to the relevant events. The limitation of the ancient documents exception is not intended to raise an inference that 20 year-old documents are, as a class, unreliable, or that they should somehow not qualify for admissibility under Rule 807. Finally, many old documents can be admitted for the non-hearsay purpose of proving notice, or as party-opponent statements.

The limitation of the ancient documents hearsay exception is not intended to have any effect on authentication of ancient documents. The possibility of

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authenticating an old document under Rule 901(b)(8)—or under any ground available for any other document—remains unchanged.

The Committee carefully considered, but ultimately rejected, an amendment that would preserve the ancient documents exception for hardcopy evidence only. A party will often offer hardcopy that is derived from ESI. Moreover, a good deal of old information in hardcopy has been digitized or will be so in the future. Thus, the line between ESI and hardcopy was determined to be one that could not be drawn usefully.

The Committee understands that the choice of a cut-off date has a degree of arbitrariness. But January 1, 1998 is a rational date for treating concerns about old and unreliable ESI. And the date is no more arbitrary than the 20-year cutoff date in the original rule. See Committee Note to Rule 901(b)(8) ("Any time period selected is bound to be arbitrary.").

Under the amendment, a document is "prepared" when the statement proffered was recorded in that document. For example, if a hardcopy document is prepared in 1995, and a party seeks to admit a scanned copy of that document, the date of preparation is 1995 even though the scan was made long after that—the subsequent scan does not alter the document. The relevant point is the date on which the information is recorded, not when the information is prepared for trial. However, if the content of the document is *itself* altered after the cut-off date, then the hearsay exception will not apply to statements that were added in the alteration.

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Changes Made After Publication and Comment

The amendment as issued for public comment would have eliminated the ancient documents exception to the hearsay rule. In response to the public comment, the amendment was changed to limit the coverage of the ancient documents exception to those documents prepared before January 1, 1998.

Summary of Public Comment

David Hird (EV-20015-0003-0003), is opposed to the elimination of the ancient documents exception to the hearsay rule, on the ground that it "could have a substantial negative effect in environmental cases by excluding significant evidence that is only available from older documents."

Erin Campbell (EV-2015-0003-0004), is opposed to the elimination of Rule 803(16). She states that the deletion of the hearsay exception will "suggest to trial court judges that ancient documents should never be admitted under the residual exception" and suggests that "if you still intend to delete Rule 803(16), you advise that ancient documents remain admissible if Rule 807 is satisfied."

Nathan Schachtman (EV-2015-0003-005), states that "[t]he proposed abrogation of this exception to the rule against hearsay is welcomed and overdue." He states that "[t]he fact that a document is old may perhaps add to its authenticity, but in many technical, scientific, and medical contexts, the 'ancient' provenance actually makes the content unlikely to be true. As such, the rule as now in effect is capable of much mischief and undermines accurate fact finding." He notes that "the statements in authenticated ancient documents remain relevant to the declarant's state of mind, and nothing in the proposed amendment would affect this use of the document" because such statements would not be hearsay.

Thomas Flaskamp (EV-2015-0003-007), states that eliminating the ancient documents hearsay exception "would restrict the use of valuable evidence and benefit corporations over people."

Kim Johannessen (EV-2015-0003-008), is opposed to the elimination of Rule 803(16). She states that the elimination will "undermine efforts to prove the existence of historical

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insurance coverage, particularly in cases involving environmental claims, toxic tort claims, and real property disputes." She contends that "[t]he result will be to make it impossible for individuals and small businesses to fund Superfund cleanups or respond to environmental claims, the end result of which will be to hinder cleanups of contaminated sites and place an ever increasing risk that the burden to do so will fall on the general public."

Paul Bovarnick (EV-2015-0003-009), declares that much of the evidence that can be used against corporations is old paper documents and that the elimination of Rule 803(16) "would create obstacles, some impossible to overcome, to the admission of this ancient evidence."

Florence Murray (EV-2015-0003-0010), is opposed to the elimination of Rule 803(16). She states that "there has never been a complaint or inequity in this rule" and suggests that a more equitable alternative is "to grandfather all documents before a current date." She is concerned that the deletion of the hearsay exception will "suggest to trial court judges that ancient documents should never be admitted under the residual exception."

Conard Metcalf (EV-2015-0003-0011), argues that the elimination of Rule 803(16) will have a negative impact on plaintiffs' claims in toxic torts cases where injuries have long latency periods.

William Kohlburn (EV-2015-0003-0012), states that eliminating the ancient documents exception will "impede, not further, the search for the truth" in toxic tort cases "where long past events are in issue." He argues that ancient documents are reliable because they are old and thus probably not made in anticipation of the litigation in which they are offered.

Richard N. Shapiro (EV-2015-0003-0013), argues that if any change to the ancient documents exception is required due to a concern about the advent of electronic information, it should be "a modification or addition to the rule that will only apply to documents that were capable of being electronically stored, created on or after January 1, 2000."

David McCormick (EV-2015-0003-0013), is opposed to the elimination of the ancient documents exception to the hearsay rule.

Cynthia Brooks (EV-2015-0003-0015), opposes the elimination of Rule 803(16). She argues that it will have a negative impact on actions involving cleanup of contaminated facilities. In such cases, historic documents are necessary "to identify liable persons responsible for cleanup."

Peter Nicolas (EV-2015-0003-0016), suggests several ways in which Rule 803(16) can be amended to prevent the admission of old and unreliable ESI, short of eliminating the rule: 1) Increase the necessary age for ancient documents from 20 years to 30 years; 2) Amend Rule 803(16) to provide that the only form of authentication is through the authentication rule for ancient documents (Rule 901(b)(8); 3) Amend the rule to provide that hearsay embedded in an ancient document is not admissible; or 4) Require that the ancient document be prepared before the controversy arose and that the document was subsequently acted upon by those with an interest in the matter set forth.

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Michael Gatto (EV-2015-0003-0017), believes that "the proposed rule change unfairly inures to the benefit of the defense" and that "it is the rare case when the defense wants to avail itself of this rule."

William Harty (EV-2015-0003-0018), is opposed to the elimination of the ancient documents exception to the hearsay rule. He states that there is no evidence of a problem that is occurring with unreliable electronic information being offered under the exception. He argues that "[b]y singling out only the ancient document exception for abrogation . . . the committee's action may convey to courts and litigants a blanket, unwarranted disapproval of ancient documents themselves" making it unlikely that even reliable ancient documents will be admissible under the residual exception.

Steve Rineberg (EV-2015-0003-0019), opposes the elimination of the ancient documents hearsay exception, on the ground that it will unfairly affect plaintiffs in toxic tort cases involving latent diseases. He states that "[a]ncient documents relating to property ownership, sales, decision-making, and state of the art are extremely important for purposes of litigation in cases such as this, and such documents are often the only evidence available. The individuals responsible for drafting these documents, however, are usually unable to be located or are deceased, given the amount of time that has passed."

Amy Heins (EV-2015-0003-0020), contends that "[e]liminating the ancient document exception will unilaterally eliminate the best evidence both sides have in cases of latent disease such as mesothelioma."

Michael Mudd (EV-2015-0003-0021), is opposed to the elimination of the ancient documents exception. His comment is identical to the comment submitted by Steve Rineberg, (EV-2015-0003-0019).

Robert Paul (EV-2015-0003-0022), opposes the proposed change, on the ground that ancient documents are necessary in asbestos litigation. He concludes that the elimination of the "would certainly increase cost and multiply motion practice before judges on . . . ancient documents and prevent relevant and important evidence from reaching juries."

Frederick Jekel (EV-2015-0003-0023), opposes the elimination of the hearsay exception for ancient documents. He states that in "asbestos, lead paint and tobacco litigation . . . most of the knowledge based liability document are more than 20 years old."

Henry Bullard (EV-2015-0003-0024), states that the proposal to eliminate Rule 803(16) "is a solution in search of a problem, and there is no problem."

Devin Robinson (EV-2015-0003-0025), is opposed to the elimination of Rule 803(16), on the ground that the change "is not needed and will radically effect many injured peoples' ability to seek compensation from at fault parties" especially in cases of latent injury, where often "no one exists to authenticate the documents."

Robert Beatty-Walters (EV-2015-0003-0026), states that "[e]liminating this rule simply makes the burden on the plaintiff unnecessarily higher when conduct by nefarious manufacturers is documented in older records."

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Benno Ashrafi (EV-2015-0003-0027), is opposed to the elimination of the hearsay exception for ancient documents.

Darron Berquist (EV-2015-0003-0028), states that elimination of the ancient documents exception has a potential to impede access to justice in cases involving latent diseases. He contends that "plaintiffs in asbestos litigation often must rely upon ancient documents to prove their cases (e.g., asbestos content of products, a company's knowledge of the hazards of asbestos, a company's recommendation of the use of asbestos replacement parts, etc.)."

Thomas Melville (EV-2015-0003-0029), asserts that "[h]istoric documents are impossible to authenticate, unlike a modern document, because the author is likely long since retired from institutional employment or dead." He concludes that the proposed elimination of Rule 803(16) "will favor large corporations and tortious wrongdoers at the expense of future victims."

J.D. McMullen (EV-2015-0003-0030), states that eliminating Rule 803(16) **"**would allow companies to shield decades of knowledge as it relates to the hazards associated with the products they manufacture and sell to workers and consumers."

Patrick O'Hara (EV-2015-0003-0031), contends that "[i]t would be a mistake to delete . . . Rule of Evidence 803(16)" because "[m]any of these documents which are important to cases dealing with issues that happened decades ago will not be admissible without this rule."

Avery Waterman (EV-2015-0003-0032), opposes the elimination of Rule 803(16), because "sheer passage of time should not shield potentially dispositive evidence."

Gary Berne (EV-2015-0003-0033), states that the ancient documents hearsay exception "can be helpful in leading to a fair result in those rare instances where it is needed. In fact, it very well may be that the best reason to keep the rule is that it could be crucial in a rare instance."

Jared Placitella (EV-2015-0003-0034), states that the elimination of the ancient documents exception "will have a significant impact on toxic tort plaintiffs, leaving many people who have been harmed by corporate negligence uncompensated for their losses." He contends that a change is not yet necessary to prevent admission of old, unreliable ESI, because "we are at most only 10-15 years into the digital ESI age [and] many relevant documents and other evidence material to toxic tort and other litigation are largely still in paper-form."

Chris Placitella (EV-2015-0003-0035), opposes the elimination of Rule 803(16), because the exception "is particularly important in latent disease cases where the injury does not manifest for many years after exposure. The need for this exception is further accentuated by the fact that defendants who have destroyed original documents often object to the introduction of fraud based evidence arguing that because there is no one to testify how documents were created the documents are not admissible."

James Bedortha (EV-2015-0003-0036), opposes eliminating the ancient documents exception to the hearsay rule, on the ground that "numerous parties would be deprived of their ability to offer relevant, compelling and in most cases dispositive evidence of activities, knowledge or awareness of other parties reflected in documents subject to this rule."

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James Pettit (EV-2015-0003-0037), states that eliminating the ancient documents exception "means that the search for truth in the courtroom will be reduced to allowing current corporate personnel testifying about their memories of speaking with now-deceased persons, or testifying about their belief about corporate practices decades ago."

Scott Frost (EV-2015-0003-0038), opposes elimination of the ancient documents exception to the hearsay rule, concluding that the rationale of the rule is sound and there have been "no real changes in practice or procedure" that would require elimination of the rule.

Scott Marshall (EV-2015-0003-0039), declares that "[t]he elimination of F.R.E. 803(16) will not advance justice; instead it will impede it by allowing corporate defendants the ability to deny juries the opportunity to see important evidence that is rightfully admissible."

David Aubrey (EV-2015-0003-0040), argues that the elimination of Rule 803(16) will prevent plaintiffs with mesothelioma and lung cancer from the evidence necessary to prove that defendants had knowledge of the dangerousness of asbestos.

Jason Steinmeyer (EV-2015-0003-0041), filed a comment identical to that of David Aubrey (EV-2015-0003-0040).

Robert Jacobs (EV-2015-0003-0042), states that the ancient documents hearsay exception "is invaluable" in litigation seeking to prove the existence or value of an old insurance policy. He argues that "the continued use of paper regardless of computer storage warrants this rule to remain."

Shawn Acton (EV-2015-0003-0043), concludes that "[t]he abrogation of FRE 803(16) would have a devastating effect on Plaintiffs and Defendants who have to prove or defend their claims using documents that are decades old" because with old documents "there is often not a witness that can qualify an authentic document under a hearsay exception other than FRE 803(16)."

Susannah Chester (EV-2015-0003-0044), opposes the elimination of Rule 803(16). She states that the exception is needed for property records and that it is unlikely such records will be admissible under other exceptions such as for business records or the residual exception.

Perry Browder (EV-2015-0003-0045), opposes the elimination of Rule 803(16) on the ground that it will be "harmful to any litigation that involves older cases."

Tina Bradley (EV-2015-0003-0046), states that Rule 803(16) is "used frequently as too often, no other proof is available because parties are defunct and no longer in existence." She also states that "even if the opportunity exists to authenticate ancient documents, it is often a very expensive process." Accordingly she opposes the elimination of Rule 803(16).

Lillian Talbot (EV-2015-0003-0047), states that in litigation involving latent diseases, "[a]ncient documents relating to property ownership, sales, decision-making, and state of the art are extremely important [and] are often the only evidence available. The individuals responsible for drafting these documents, however, are usually unable to be located or deceased, given the amount of time that has passed." Accordingly, she opposes the elimination of Rule 803(16).

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Margaret Samadi (EV-2015-0003-0048), argues that "[e]liminating Rule 803(16) would result in grave injustice for latent disease sufferers."

Andrew Balcer (EV-2015-0003-0049), opposes the elimination of Rule 803(16) because it would have a negative effect on plaintiffs who are "victims of latent disease, which only now manifest, despite their exposures to dangerous products occurring many decades ago." He states that the residual exception is not an adequate substitute because it is designed to be only rarely invoked, and that the business records exception is not an adequate substitute because it is often not possible to find a custodian for old documents.

John Kerley (EV-2015-0003-0050), opposes the elimination of the ancient documents exception to the hearsay rule because "[i]n many cases, the exception is the only way to prove or disprove material facts in dispute. The exception helps both sides of litigation and needs to be left in place."

Steven Perbix (EV-2015-0003-0051), urges retention of the ancient documents exception to the hearsay rule, because it is still necessary for documents that are not electronically stored, "especially as to documents stored at sites in rural areas that have not availed themselves of technology for documents that date back into the 1970s, 1980s, and even early 1990s."

Christopher Madeksho (EV-2015-0003-0052), states that "[a]brogating the historical document hearsay exception would take away the chance for cancer-stricken Americans like my clients to seek justice for having been wrongfully exposed to carcinogens that take decades to cause their cancer."

Mark Bratt (EV-2015-0003-0053), is opposed to the elimination of Rule 803(16), arguing that the result would be "a huge windfall for large corporations and insurance companies as they will be able to use the passing of time as a sword in defending themselves in lawsuits."

Michael Patronella (EV-2015-0003-0054), argues that "[a]uthentication of ancient documents is very costly and expensive" and that the proposed change "benefits large multi-million and billion dollar defendants." He concludes that "[p]laintiffs already have an uphill battle when it comes to finding and authenticating evidence, and this amendment will make many colorable claims even more difficult to prove."

Brent Zadorozny (EV-2015-0003-0055), opposes the amendment on the ground that it would have a negative impact on plaintiffs' claims in asbestos litigation, "in which the latency period for the asbestos diseases range from up to 40 to even 80 years."

Leonard Sandoval (EV-2015-0003-0056), opposes the elimination of Rule 803(16) on the ground that the result would be to "deprive victims of latent injuries (e.g. lung cancer, mesothelioma, etc.) of a significant source of evidence in cases related to asbestos exposure."

Marc Willick (EV-2015-0003-0057), states that "[e]liminating the ancient records exception will destroy proof necessary for prosecution and defense in thousands of cases across the country that turn on long held evidence." He therefore opposes the proposed amendment.

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Jon Neumann (EV-2015-0003-0058), states: "Without the ancient document exception to the hearsay rule, evidence that may presently be admissible to support a victim's case will no longer be available for consideration by the trier of fact."

Ari Friedman (EV-2015-0003-0059), argues that the proposed elimination of Rule 803(16) "is advanced under theoretical and hypothetical concerns that may (or may not) arise in the future." He concludes that Rule 803(16) should not be abrogated because "more often than not the only thing to have survived the passage of time are the documents subject to this exception, as the people who can speak to the issues in the documents tend to move away, have faded memories, or worst of all, pass away."

Thomas Plouff (EV-2015-0003-0060), opposes the elimination of Rule 803(16) on the ground that "[t]here are some cases, particularly involving minors or others under a disability, where ancient documents may be necessary proof."

Matthew McLeod (EV-2015-0003-0061), states that the ancient documents exception to the hearsay rule "is a well-reasoned and important exception that provides a measure of fairness for victims of negligence to make their cases that would not otherwise be possible simply due to the passage of time."

Brian Wendler (EV-2015-0003-0062), opposes the elimination of the ancient documents hearsay exception because it "would be a travesty to scores of attorneys who have relied on its existence to forego depositions to save client costs."

Barrett Naman (EV-2015-0003-0063), states that "[t]his unnecessary rule change would detrimentally affect thousands of cases that rely upon these documents to prove events that occurred decades ago."

Nicholas Cronauer (EV-2015-0003-0064), opposes elimination of the hearsay exception for ancient documents. He argues that the exception "preserves evidence and permits evidence to be admitted at trial that otherwise would be barred due to incompetence of a party or the passage of time."

Thomas Bevan (EV-2015-0003-0065), opposes the proposed elimination of Rule 803(16) on the ground that asbestos victims' claims "are often admitted at trial pursuant to the ancient document rule. The elimination of the rule will further victimize these people and provide cover for the corporations who injured them."

Scott Britton-Mehlisch (EV-2015-0003-0066), states that eliminating the hearsay exception for ancient documents "will disproportionally impact plaintiffs who will have to expend substantial amounts of resources in order to authenticate and prove up these valuable documents in order to use them at trial."

Jonathan Forbes (EV-2015-0003-0067), opposes the elimination of the ancient documents exception, in a comment identical to that provided by Jason Steinmeyer, (EV-2015-0003-0041) and David Aubrey (EV-2015-0003-0040).

Barry Castleman (EV-2015-0003-0068), opposes the elimination of the ancient documents hearsay exception. He states that "[j]uries have the ability to give appropriate weight to [ancient] documents, once admitted, for their consistency with other evidence, their importance and truthfulness."

Valerie Farwell (EV-2015-0003-0069), states that the elimination of the ancient documents hearsay exception would have a negative impact on plaintiffs in asbestos litigation. The result would be "more delay and expense in the litigation process when these large corporations seek to prevent the admission of ancient documents without additional authentication."

Alexandra Caggiano (EV-2015-0003-0070), states that in cases involving latent injuries, the ancient documents hearsay exception "is a tremendous help in bringing in evidence that is obviously authentic but cannot be admitted into evidence via another exception."

Jeffrey Simon (EV-2015-0003-0071), concludes that "[t]he ancient documents exception to the hearsay rule provides a crucial basis to offer and authenticate documents where no sponsoring witness can be found, yet there is no genuine reason to believe the document has been fabricated."

Christian Hartley (EV-2015-0003-0072), argues that for cases involving conduct that occurred many years earlier, elimination of the ancient documents hearsay exception "would create a de facto statute of limitations by allowing the passage of time to extinguish the evidence."

Michael Shepard (EV-2015-0003-0073), opposes the elimination of the ancient documents hearsay exception. He states that the exception "is used more often than realized, and when it is needed, it is often crucial to either proving a plaintiff's claim, or proving a defendant's defense."

Shane Hampton (EV-2015-0003-0074), opposes the elimination of Rule 803(16). He argues that in cases involving latent injuries, "older documents are provided by parties to the case, and it would frustrate the search for truth if they became inadmissible." He also states that "[t]here are circumstances when older documents may vindicate a defendant, who was not negligent, or who did not cause the alleged injury, and this amendment would hurt those defendants rights to defend themselves." Thus the elimination of the exception is "not a plaintiff v. defendant issue."

David Norris (EV-2015-0003-0075), believes that "all of the good reasons for the creation of FRE 803(16) still exist" and that it is "an important tool for both plaintiffs and defendants." Thus he opposes elimination of the ancient documents hearsay exception.

Jason Beale (EV-2015-0003-0076), states that "abrogating the ancient document exception to the hearsay rule, outright, would directly and severely prejudice" victims of mesothelioma "and unfairly allow a negligent party to have an unnecessary, unfair, and prejudicial advantage."

Angela Bullock (EV-2015-0003-0077), states that if not for the ancient documents hearsay exception, a defendant corporation in a case involving a latent disease "would unfairly benefit" from a plaintiff being barred from introducing relevant records. She concludes that "[m]any of

the sources of these ancient documents are companies of bad actors—most of which are defunct and therefore, cannot be deposed and otherwise examined on the documents." She therefore opposes elimination of the hearsay exception for ancient documents.

Samuel Elswick (EV-2015-0003-0078), opposes the elimination of Rule 803(16). He states that the ancient documents exception is necessary in asbestos cases to qualify documents showing knowledge of the dangers of asbestos, as well as documents indicating the defendants' choice to utilize asbestos rather than some other material.

Jonathan Ruckdeschel (EV-2015-0003-0079), opposes the proposed elimination of Rule 803(16) on the ground that it would prevent recovery for victims of mesothelioma. In the alternative, he urges "that any alteration act only prospectively. That is, that it only apply to documents created after the amendment of the rule. To do otherwise will result in the denial of compensation to terminally ill Americans."

Bruce Carter (EV-2015-0003-0080), opposes the elimination of the ancient documents exception to the hearsay rule. He states that "[t]he rule has substantial safeguards to assure authenticity of the documents" and that "[d]epriving the parties of the ability to use historic documents will deny both parties the ability to be adequately represented."

Christopher Meisenkothen (EV-2015-0003-0081), states that "[t]he ancient document exception to the hearsay rule should not be eliminated. It is a vital part of many cases involving long-latent injuries where ancient documents are often important pieces of evidence."

Michelle Whitman (EV-2015-0003-0082), states that "[a]bolishing the ancient document exception to the hearsay rule would no doubt be detrimental to so many on both sides of the bar who rely on these documents in proving their cases."

Carla Guttilla (EV-2015-0003-0083), opposes the elimination of the ancient documents exception to the hearsay rule, on the ground that the change "would preclude parties on both sides of litigation from utilizing ancient documents for which no other form of authentication exists due to the passage of time and death of the authors. These documents are paramount in latent disease cases to show what actually happened and what was known or not known during the relevant periods for these cases, where exposure or injury occurred decades ago."

Marc Weingarten (EV-2015-0003-0084)—who provided written comment and testimony at the public hearing—is opposed to the elimination of Rule 803(16). He argues that it will impose new costs on the proponent to establish the admissibility of an ancient document, which he maintains runs contrary to recent Rules Committee projects designed to make federal litigation less expensive. He contends that any amendment to Rule 803(16) short of abrogation should be opposed, because an amendment would add more reliability and/or necessity requirements, requiring additional expenditure to meet those requirements. He states that ancient documents are necessary to prosecute claims against asbestos manufacturers, and that many of these documents have been found "in garages, musty warehouses, in other out of the way, and decidedly non-corporate places, and often in old file cabinets, folders and boxes" and they "cannot be authenticated in a traditional manner because there is no one from the company who is capable of doing so."

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Mark Wintering (EV-2015-0003-0085), opposes the elimination of Rule 803(16), on the ground that "[t]he ancient document exception to the hearsay rule has been crucial to the full and fair presentation of evidence in asbestos and other toxic tort cases, where key documents were not electronically preserved."

Charles Soechting, Jr. (EV-2015-0003-0086), opposes the elimination of the ancient documents hearsay exception. He asserts that "more often than not given their age there are no longer individuals able to provide the necessary testimony to authenticate [such] documents, despite their importance to the underlying litigation."

Mike Bilbrey (EV-2015-0003-0087), states that abrogation of the ancient documents exception would have an unfair impact on plaintiffs' claims of latent disease, where "[a]ncient documents are routinely used to provide evidence of the Defendant's knowledge of the dangers from these poisons, toxins and harmful substances."

Rachel Moussa (EV-2015-0003-0088), opposes the elimination of the ancient documents hearsay exception. She concludes that without the exception "[v]ictims who have suffered injuries from latent defects will be unable to prove their claims."

William Minkin (EV-2015-0003-0089), states that the ancient document exception "has been instrumental in holding wrongdoers accountable in civil litigation, particularly in cases of latent diseases, such as asbestos, lead and tobacco" because Rule 803(16) "is very often the only way" to admit the critical documents.

Michael Burnworth (EV-2015-0003-0090), opposes the elimination of the ancient documents exception to the hearsay rule, in a written comment that is identical to that provided by Jonathan Forbes, (EV-2015-0003-0067), Jason Steinmeyer, (EV-2015-0003-0041) and David Aubrey (EV-2015-0003-0040).

Lamont McClure (EV-2015-0003-0091), opposes the elimination of the ancient documents hearsay exception on the ground that the authentication requirements for ancient documents "already provide[] sufficient safeguards to the possibility of the use of fraudulent documents."

Beth Gori (EV-2015-0003-0092), opposes the elimination of the ancient documents exception to the hearsay rule, in a written comment that is identical to that provided by Michael Burnworth, (EV-2015-0003-0090), Jonathan Forbes, (EV-2015-0003-0067), Jason Steinmeyer, (EV-2015-0003-0041) and David Aubrey (EV-2015-0003-0040).

Kenneth Wilson (EV-2015-0003-0093), states that the ancient documents exception should be retained, because "[a]s time passes, witnesses become unavailable or pass away, memories fade, companies get sold or go out of business" and "oftentimes the only available evidence is in the form of ancient documents."

Mike Riley (EV-2015-0003-0094), states that in toxic tort cases, "[l]egitimate and relevant documents are often admitted at trial pursuant to the ancient document rule, and the elimination of the rule would not serve the interests of justice."

David Layton (EV-2015-0003-0095), states that the ancient documents hearsay exception "is particularly important for cases with injuries that have long latency periods." He concludes that the exception "is neutral and is often relied upon by both parties" and that without the exception, "the finder of fact will be deprived of key information."

Taylor Kerns (EV-2015-0003-0096), opposes the elimination of the ancient documents hearsay exception, on the ground that it "has been, and will continue to be, necessary to protect the rights of plaintiffs and defendants alike in areas of litigation in which information is located only in hardcopy." He states that "[t]o the extent the Committee believes ESI must be addressed, there are mechanisms by which this can be accomplished without the radical remedy of total abrogation, such as limiting the exception for hardcopy documents."

Dimitri Nichols (EV-2015-0003-0097), opposes the elimination of the hearsay exception for ancient documents, on the ground that it will "injure the rights" of plaintiffs in asbestos litigation, "whom already face a deck stacked against them when they seek justice."

Chris Romanelli (EV-2015-0003-0098), argues that "[o]lder documents are noteworthy for their truth and reliability" and that eliminating the hearsay exception for ancient documents "frustrates the search for the truth."

Christopher Hickey (EV-2015-0003-0099), argues that the elimination of the ancient documents exception "will adversely affect Americans suffering from latent disease, including our military veterans."

John Kane (EV-2015-0003-0100), objects to the elimination of the hearsay exception for ancient documents. He argues that Rule 803(16) "is a practical rule that understands that after several decades the original author of an ancient document may not be available to testify but the contents of the document are still relevant and typically critical to the case."

Holly Peterson (EV-2015-0003-0101), opposes the elimination of the ancient documents exception, emphasizing its impact on plaintiffs in latent disease cases. "Abrogation of this rule will mean I must argue [the hearsay] issue to judges in every single case—a colossal waste of attorney time and judicial resources."

Justin Shrader (EV-2015-0003-0102), contends that the ancient documents exception to the hearsay rule "has an important place in modern practice, despite the growing prevalence of ESI." He argues that the exception is especially important in cases involving toxic torts and latent injuries: "Every asbestos trial our firm has been involved in has relied on FRE 803(16) to enter into evidence key historical documents to impute knowledge to a defendant that may otherwise be inadmissible." He therefore opposes any amendment that would limit the ancient documents hearsay exception.

Keith Patton (EV-2015-0003-0103), states that "[t]he ancient documents exception is necessary in cases that require the use of documents that pre-date modern technology, such as latent injury cases." He declares that "by eliminating the exception, the proposal will prevent trial judges from exercising their discretion in determining the admissibility of these documents—a role judges are well-equipped to handle."

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Bradley Evetts (EV-2015-0003-0104), opposes the elimination of the ancient documents hearsay exception, in a written comment that is identical to that provided by Beth Gori, (EV-2015-0003-0092), Michael Burnworth, (EV-2015-0003-0090), Jonathan Forbes, (EV-2015-0003-0067), Jason Steinmeyer, (EV-2015-0003-0041) and David Aubrey (EV-2015-0003-0040).

Erin Jewell (EV-2015-0003-0105), states that "[a]ncient documents often form a quintessential part of the proof in latent disease cases, where the plaintiff is forced to prove that the defendant companies knew, had reason to know or should have known about the dangers of asbestos in the 1940s, 1950s, 1960s and 1970s, long before documents were stored electronically." She concludes that "[e]liminating the ancient document exception will only benefit corporations, at the expense of innocent victims."

Todd Neilson (EV-2015-0003-0106), asserts that Rule 803(16) "is in fact invoked frequently" and that eliminating the hearsay exception "will ultimately increase the time and expense of litigation."

John Kopesky (EV-2015-0003-0107), contends that without the ancient documents hearsay exception "individuals who suffer injuries from latent defects will be unable to prove their claims" because "[i]f the company that originated the [ancient] document no longer exists, there may be no way to authenticate the document."

Amy Gabriel (EV-2015-0003-0108), opposes the elimination of the ancient documents hearsay exception, in a written comment that is identical to that provided by Bradley Evetts, (EV-2015-0003-0104), Beth Gori, (EV-2015-0003-0092), Michael Burnworth, (EV-2015-0003-0090), Jonathan Forbes, (EV-2015-0003-0067), Jason Steinmeyer, (EV-2015-0003-0041) and David Aubrey (EV-2015-0003-0040).

Laurel Halbany (EV-2015-0003-0109), opposes the elimination of the ancient documents hearsay exception, arguing as follows: "The existence of electronically stored information for newer documents does not change the value of existing ancient documents, nor render them hearsay."

Lance Pomerantz (EV-2015-0003-0110)—in a written comment and in testimony at the public hearing—contends that the ancient documents exception has continuing vitality in land title litigation, and notes that the exception originated in land title cases under the common law. Thus any proposal to limit the ancient documents hearsay exception should leave some way for old documents to be admitted in land title litigation. One possibility might be to "grandfather" old documents and allow the abrogation to apply only to those documents generated after a certain date.

Nathaniel Mudd (EV-2015-0003-0111), is "deeply concerned about the proposed rule to abrogate FRE 803(16) regarding the admissibility of ancient documents." He states that without the ancient documents hearsay exception, many asbestos claims could not be brought.

Stacey Kurich (EV-2015-0003-0112), argues that without the ancient documents hearsay exception, many asbestos claims could not be brought because the authors of the relevant documents are long deceased.

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Kelly Battley (EV-2015-0003-0113), states that "[t]here are many kinds of litigation in which the only available and admissible evidence may be the ancient documents exception to hearsay. The rule continues to work in those situations."

Peter Janci (EV-2015-0003-0114), opposes the elimination of the ancient documents exception to the hearsay rule, on the ground that it will have a negative effect on plaintiffs' claims of sexual abuse when that abuse occurred many years before the action is brought. He states that the ancient documents exception is essential because it allows "a corporation's own internal documents to be admitted as evidence of what it knew about a danger and how it responded."

Clayton Thompson (EV-2015-0003-0115), opposes the proposal to eliminate the ancient documents hearsay exception, emphasizing its negative effect on the claims of victims of mesothelioma. He states the plaintiff must put on evidence "of what the defendant knew about the hazards of asbestos, when it used asbestos, and in which products or at which jobsites." He contends that these facts ordinarily must be proved through ancient documents.

John Harp (EV-2015-0003-0116), contends that eliminating the hearsay exception for ancient documents "would harm a substantial number of workers in fields such as the railroad industry."

Anthony Petru (EV-2015-0003-0117), opposes the elimination of the ancient documents hearsay exception, based on his experience in representing clients "who have illnesses and injuries as a result of various forms of cumulative trauma and exposure." He states that "[f]requently the only way to prove that the entities are responsible for the exposure and injury is through the use of ancient documents." The documents "often either are explicit admissions, or evidence of available information which would make a reasonable person take notice and act to protect the users."

Kristoffer Mayfield (EV-2015-0003-0118), argues that the consequence of eliminating the ancient documents exception to the hearsay rule will be that "many types of cases, where people have been very badly injured, killed, or made very sick, will not be adequately prepared and presented on the merits." He states that "[t]he issue is that corporate knowledge is extremely important to prove notice and culpability and to deter bad conduct by the world's most powerful corporations."

Victor Russo (EV-2015-0003-0119), argues that the ancient documents exception to the hearsay rule must be retained, because defendants destroy their relevant documents; "in response to this, attorneys and some expert witnesses have developed and maintain libraries of documents obtained through diligent work. As time passes those documents become 'ancient', as we use that term of art." He concludes that Rule 803(16) is necessary to qualify design guides, internal memoranda, safety suggestions, risk management assessments, and "all manner of documents that existed some years ago [and] cannot be found now, in a current litigation, because a defendant has decided to destroy them."

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Christina Stephenson (EV-2015-0003-0120), opposes the elimination of the hearsay exception for ancient documents, stating: "I don't believe that developments in technology are sufficient at this time to justify the change."

The Association of the Bar of the City of New York (EV-2016-0121), through its Committee on Federal Courts, opposes the elimination of the ancient documents exception to the hearsay rule. The Committee "appreciates the Advisory Committee's desire to be proactive to preempt any possible problem that might arise in the future with electronically stored information that survives for more than twenty years." But it states that no such problem has arisen to date. It also contends that there is a guarantee of reliability in the fact that ancient documents "must be authenticated pursuant to Rule 901(b)(8)." The Committee further opines that "Rule 403 could be used to exclude ancient documents in cases when a problem actually arises." Finally, the Committee concludes that the abrogation could lead to "unintended consequences" because other hearsay exceptions (such as Rules 803(6) and 807) may not be sufficient to qualify reliable ancient documents.

Gilion Dumas (EV-2015-0003-0122), opposes the elimination of the ancient documents hearsay exception, arguing that it is necessary for the prosecution of claims of sexual abuse that occurred many years ago. Old documents "show what the defendants knew about child molesters in their ranks, when they knew it, and what these defendants did with that knowledge." Mr. Dumas recognizes that many of the documents offered under the ancient documents exception "are arguably admissible as non-hearsay 'notice' evidence, excluded from the hearsay rule as admissions of a party opponent, or are admissible under other exceptions to the hearsay rule such as the business records exception or the (always risky) catch-all exception." But he states that "the effort and inefficiency of arguing the admissibility of every page - and every secondary or tertiary hearsay statement within each page - would make the battle almost impossible for most plaintiffs." He concludes that "[o]nly the ancient documents rule can cut through all these irrelevant, time-wasting, side arguments to allow in relevant, authentic evidence to prove these claims."

James Campbell (EV-2015-0003-0123), opposes the elimination of the ancient documents rule on the ground that it will have a negative effect on the prosecution of cases involving latent diseases. He states that "[t]he elimination of the ancient document exception to the hearsay rule would effectively bar such suits from being brought in federal court, foreclosing a significant avenue of relief for cancer patients and victims of other diseases that were wrongfully caused by exposure to toxic substances."

Gregg Meyers (EV-2015-0003-0124), urges retention of the ancient documents exception to the hearsay rule, claiming that it is "[v]ital in work involving sexual abuse cases . . . where records were kept but are hidden."

James Stang (EV-2015-0003-0125), contends that the ancient documents exception to the hearsay rule is necessary in cases involving "institutional cover-up of sexual abuse and the efforts to put assets beyond the reach of abuse survivors." He concludes that "[e]limination of the exception will perpetuate the historical wrong these children suffered."

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Will Nefzger (EV-2015-0003-0126), opposes the elimination of the ancient documents hearsay exception. He states that "[p]erhaps in another generation, it might make sense, but not now."

Raeann Warner (EV-2015-0003-0127), argues that the ancient documents exception to the hearsay rule should be retained because of its importance is cases involving asbestos contamination, as well as cases alleging sexual abuse allegedly condoned by institutions. She states that "[i]t is in the instances of the greatest cover-ups or latent diseases that don't develop for many years that these documents are the most critical to victims of corporate negligence."

Michele Betti (EV-2015-0003-0128), opposes the elimination of the ancient documents exception to the hearsay rule. She argues that the exception is essential for the admission of evidence indicating that institutions were aware of sexual abuse perpetrated by agents and employees many years before the litigation is brought.

Edward Cook (EV-2015-0003-0129), argues that the ancient documents exception should be retained because of its importance in proving liability for injuries suffered by rail workers.

Lori Watson (EV-2015-0003-0130), argues that the ancient documents hearsay exception should be retained due to its importance in proving cases involving past sexual abuse. She states that "[m]any of these cases include significant claims of fraudulent concealment and conspiracy against large institutional defendants that permitted or ratified the abuse. These defendants often have records dating back decades that are the evidence to establish these claims, and make these cases viable. Often the authors of the documents and/or witnesses referred to in the documents are deceased, therefore making the document unusable if the ancient document rule is eliminated."

Peter Kraus (EV-2015-0003-0131), states that "[f]or attorneys representing the victims of toxic injuries, Rule 803(16) is a key tool to prove liability in these already very difficult cases." He notes that "[a]lthough other exceptions to the hearsay rules may be available in some instances, the best and clearest path to the admissibility of relevant evidence from industry trade groups and other companies similarly situated to the defendant is Rule 803(16), the ancient documents exception."

Jonathan Redgrave (EV-2015-0003-0132)—in written comment and in testimony at the public hearing—supports the proposal to eliminate the ancient documents exception to the hearsay rule. He observes that "a document does not become more reliable from one day to the next by having a birthday." He states that if the rule is not abrogated, "litigants may seek to admit ESI that contains unreliable hearsay into evidence simply because the ESI is old enough to come within the ancient documents exception to the hearsay rule. The initial trickle will turn into a flood as the universe of ESI that reaches the magical 20 year milestone grows at an exponential rate." He concludes that "[u]nreliable evidence should not be admitted, whether it is in hardcopy or ESI regardless of age" and that "the only practical effects of abrogating Rule 803(16) will be to require litigants to establish the reliability of ESI before offering it for the truth of its contents, and to prevent abuses of the ancient documents exception to the hearsay rule. Both results are desirable." Finally, he finds the concerns expressed in other comments about the inapplicability of the business records exception to ancient documents "overstated

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because there are ways to meet the requisites of Rule 803(6) without a contemporaneous witness who had personal knowledge of the records being created."

Tahira Merritt (EV-2015-0003-0133), states that the ancient documents hearsay exception is "a vital tool to hold institutions accountable in cases involving alleged sexual abuses that were caused or suppressed by institutions" because "the institution's pattern and practice is often found in the institution's ancient documents." Therefore she opposes the elimination of the ancient documents hearsay exception.

Ashley Vaughn (EV-2015-0003-0134), states that the ancient documents hearsay exception "is invaluable in cases with extended statutes of limitation, such as child sexual abuse cases, and advances in technology do not dispense with the need for the rule." She argues that "[t]he evidence necessary to prove claims for child sexual abuse that occurred many years ago is often found in 'ancient documents' such as magazines, newspaper articles, and documents published by the organization at fault" and "the articles may be otherwise difficult to authenticate except through FRE 803(16)."

Mark Gallagher (EV-2015-0003-0135), states that "Federal Rule of Evidence 803(16) is absolutely necessary to parties seeking to hold accountable individuals and institutions for offenses which occurred years ago" including acts of sexual abuse. He therefore opposes elimination of the ancient documents hearsay exception.

Richard S. Walinski (EV-2015-0003-0136), supports the proposed amendment to eliminate the ancient documents exception to the hearsay rule. He reasons that "Rule 803(16) simply sets an unprincipled, 20-year expiration date for all hearsay considerations based on the bland happenstance that a statement was reduced to writing long ago, regardless of whether the author's purpose was to record fact, fiction, malice, poetic insight, or pure fancy." He states that Rule 803(16) "transfers the burden of producing the percipient witness to the opposing party without any showing or reason to presume that the opposing party is in any better position to produce the percipient-but-absent witness than is the party who would ordinary bear that burden." He concludes that "[a]brogation of Rule 803(16) will merely reinstate the same criteria for the admissibility of ancient statements that have been applied to other kinds of out-of-court declarations."

David Romine (EV-2015-0003-0137)—in a written submission and in testimony at the public hearing—opposes elimination of the ancient documents exception to the hearsay rule. He argues that the exception is critical in proving cases brought under CERCLA and in denaturalization cases. He concludes that the business records exception is not a substitute because no custodian will be found for ancient documents; and the residual exception is not a substitute because it is disfavored by the courts. Finally, he expresses concern that abrogation of Rule 803(16) "will lead to increased tangential litigation as the question of admissibility of ancient documents is pushed from the ancient documents exception to the residual exception, resulting in increased expense for litigants and increased burdens for judges."

Randy Reagan (EV-2015-0003-0138), opposes the elimination of the ancient documents exception to the hearsay rule, on the ground that it would have "an extremely negative impact" on the ability of plaintiffs in toxic tort cases to prove critical facts. He argues that "[t]here is

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already an uneven playing field between the injured parties that we represent and the corporations that are responsible for their injuries" and that the abrogation of Rule 803(16) would accentuate that imbalance.

Ross Stomel (EV-2015-0003-0139), opposes the elimination of the ancient documents hearsay exception, on the ground that it will have a negative impact on plaintiffs' claims in asbestos litigation. He states that "[d]iscovery in litigation over the past 40 years has resulted in the production of millions of pages of corporate and trade organization documents from these past decades that demonstrate widespread knowledge of the dangers of asbestos" and he fears that these documents, "admissible for their truth prior to the amendment (and not seriously challenged), would become inadmissible overnight and unavailable as proof, allowing the companies to deny the undeniable."

Christopher Paulos (EV-2015-0003-0140), opposes the elimination of the ancient documents exception to the hearsay rule. He contends that the exception should not be altered in response to electronically stored information because "in an age when everything can be created or deleted with just one click, if something can survive long enough to be considered 'ancient' then it is more reliable than not, and the truth of its contents, likely created when the case at bar had not yet been set in motion, should be presumed."

Michael Blanchard (EV-2015-0003-0141), states that "[d]oing away with the ancient document exception to the hearsay rule would be a great injustice to many claimants who must rely on ancient documents that are clearly acceptable but cannot get into evidence any other way."

Richard Cook (EV-2015-0003-0142), states that the ancient document exception to the hearsay rule "is essential in a number of cases" and eliminating the exception "will increase the cost and difficulty of establishing the truth and satisfying one's burden of proof."

Professor Roger Park (EV-2015-0003-0143), opposes the elimination of the ancient documents exception to the hearsay rule. He contends that "[t]he strongest ground for excluding hearsay is the danger of adversarial abuse. Were there no rule excluding it, adversaries might create hearsay as a substitute for live testimony, hoping that dubious witnesses will make themselves scarce so that the hearsay can take their place. The notion that this machination might occur 20 years before the evidence is needed is so fanciful as not to be worth considering." He argues that the fact that the business records exception and the residual exception would be available for admission of reliable ancient documents, "is a reason for fear, not comfort. It's an invitation to partisan judges to screen out reliable evidence on grounds of untrustworthiness. It's a destroyer of predictability because the outcome of that screening cannot be known beforehand."

Allyson Romani (EV-2015-0003-0144), objects to "the proposed amendment to FRE 901(8) [sic]." She notes the difficulty of authenticating documents in mesothelioma cases due to the passage of time.

Sidney Cominsky (EV-2015-0003-0145), is opposed to the elimination of the ancient documents hearsay exception on the ground that it would "hurt ordinary citizens."

Nathan Finch (EV-2015-0003-0146), states that "the ancient document rule is often the only way to get an important and reliable old piece of information before a jury, because frequently the company that made and kept the record no longer has any living employees who can testify to its creation." He suggests that "[i]f any editing is done to the rule, at most it should be clear that documents created prior to 1990—when electronic data storage first became widely available—are still subject to the rule in its current form."

Joseph Rice, together with the members of Motley Rice LLP (EV-2015-0003-0147), is opposed to the elimination of the ancient documents exception to the hearsay rule. He notes that the firm has "recently used the ancient documents rule to have evidence admitted in Court for situations where there is no longer a living witness to call upon who could lay a foundation to meet the business records exception to the hearsay rule. Therefore, ancient documents are vital even in litigation today." He concludes that "if a document has been preserved for more than 30 years in hard copy, and in some cases 50, 60, 70 or 80 years, it is likely there is a reason for that preservation and highly probable that the document is significant, relevant and reliable."

Ben DuBose (EV-2015-0003-0148), states that elimination of the ancient documents hearsay exception, "would create an undue burden on the parties and increase the costs of litigation"—especially in cases involving latent diseases.

Jackalyn Olinger (EV-2015-0003-0149), states that elimination of the ancient documents hearsay exception "would prolong the discovery process, and would often make it impossible to track down the information needed for victims of latent diseases like mesothelioma. It would also increase the cost of litigation, as companies, businesses, and municipalities would be required to put their ancient documents in electronic form. That cost would then likely be transferred to the victims."

Jeffrey Kaiser (2015-EV-0003-0150), opposes eliminating the ancient documents hearsay exception on the ground that it "would have a negative impact on victims of asbestos diseases—a process the typically takes decades and often 50 or more years to manifest." He argues that "[h]istorical documents are often the only evidence in these cases as those who have authored them are deceased."

Dan Brown (2015-EV-0003-0151), states that the ancient documents is necessary to allow admission of documents that "may serve as a critical basis for establishing liability and provide an important historical context for the jury in many asbestos cases."

Bart French (2015-0003-0152), states that "[m]any of the documents showing knowledge of the dangers of asbestos date back several decades. These 'ancient documents' are well known and accepted by all parties." To eliminate the ancient documents hearsay exception "would be to promote inefficiency and increase costs for all parties, both plaintiffs and defendants."

Sarah Gilson (2015-0003-0153), opposes the elimination of the ancient documents hearsay exception, stating as follows: "Ancient documents are regularly critical in establishing liability, finding proof for the material content of defective products, and showing corporate knowledge and failure to act on hazards to the public. These documents are essential to the basic needs of the practice of an asbestos litigator."

Trusha Goffe (2015-EV-0003-0154), opposes the elimination of the ancient documents exception, stating that the exception "is vital in litigation of child sexual abuse cases involving conduct decades ago" because "documents from the 1960s, 1970s and 1980s are key to both plaintiff and defense lawyers in prosecuting and defending claims." She concludes that "[t]he exception continues to be relevant even with the development of ESI and will continue to be very valuable for this type of litigation."

Brett Powers (2015-EV-0003-0155), objects to the elimination of the ancient documents hearsay exception, arguing that "the burden required for a sick and injured worker, or his widow and orphans to prove their case is difficult enough under the current civil justice system." He concludes that "[t]his amendment will simply lead to prolonged and increased litigation if not increase corporate immunity for bad acts."

Brian Kelley (2015-EV-0003-0156), asserts that the ancient document exception to the hearsay rule "is an essential rule that is necessary for several claims to be heard fairly" and that eliminating the rule "would exclude relevant evidence and provide no additional benefits to any cases."

Greg Lisemby (2015-EV-0003-0157), opposes the elimination of the ancient documents exception on the ground that it would result in the exclusion of important documentary evidence in asbestos cases. He states that "[i]t is typical in such cases to acquire documents from third-party repositories that identify a defendant's asbestos-containing products and/or a defendants' knowledge regarding the dangers of asbestos. Documents of this nature are typically not in electronic format, and defendants typically will not agree to the authenticity or admissibility of such documents."

Lin Thunder (2015-EV-0003-0158), opposes the elimination of the ancient documents hearsay exception on the ground that it would negatively impact plaintiffs in asbestos litigation. She concludes that "[t]he ancient document exception to the hearsay rule helps those whose cases involve actions that stretch back decades and has no negative impact."

Mary Nold Lattimore (2015-EV-0003-0159)—in written comment and in testimony at the public hearing— supports the elimination of the ancient documents exception to the hearsay rule. She states that "[t]he proposition that a document should be considered reliable, probative, admissible evidence based solely on the age and authenticity of the document is unsupportable." She asserts that "[i]t is frightening to think that personal assertions by non-parties in the form of personal emails, blogs, Tweets, Facebook posts, text messages, chat room dialog, voicemails, will become admissible 'evidence' once they are twenty years old." She concludes that "[t]he Committee's proposal is sound and well-reasoned. I very much appreciate that the Committee is acting in a proactive manner to ensure the integrity of the evidence presented at trials."

William A. Rossbach (2015-EV-0003-0160)—in written comment and in testimony at the public hearing—is opposed to the elimination of the ancient documents hearsay exception. He states that ancient documents are critical evidence in many cases, not only those involving asbestos, and that any concern about old unreliable ESI being admitted under the exception should not result in abrogation of the exception; he states that the concern should be "addressed with targeted and specific standards, appropriate to that unique type of evidence." Finally, he

argues that there are many hearsay exceptions that are questionable in allowing potentially unreliable evidence to be admitted, so there is no call for singling out the ancient documents exception.

Robert J. Gordon (2015-EV-0003-0161)—in written comment and in testimony at the public hearing—is opposed to the elimination of the ancient documents hearsay exception. He states that ancient documents are critical in asbestos litigation. He is also concerned that elimination of the exception will result in more motion practice and costs for the litigants, who will have to establish that the ancient document is reliable under another exception, and that there will be inconsistent application of admissibility standards to these documents under the other exceptions.

Annesley DeGaris (2015-EV-0003-0162)—in written comment and in testimony at the public hearing—is opposed to eliminating the ancient documents hearsay exception, on the ground that "[i]t places those injured by products with long latency periods at a disadvantage." He suggests consideration of amending the rule rather than eliminating it, and adopts the suggestions for amendment made by Peter Nicolas (2015-EV-0003-0016).

Marc P. Weingarten (2015-EV-0003-0163)—in written comment and in testimony at the public hearing—opposes the elimination of the ancient documents hearsay exception. He argues that ancient documents are critical in many cases, such as asbestos cases, and that without the ancient documents exception "[w]hat will happen is an entirely new series of motions, briefing, oral arguments and court decisions concerning documents which were once routinely deemed admissible." He is also concerned that "if the rule is abrogated, documents which were once routinely admitted into evidence would then become the subject of rulings by different judges in different jurisdictions, coming to different results." For these reasons, he also opposes any amendment to Rule 803(16) that would add any further admissibility requirement to the rule.

Tracy Saxe (2015-EV-0003-0164)—in written comment and in testimony at the public hearing—is opposed to eliminating the ancient documents exception to the hearsay rule. He states that the exception "is incredibly important for insurance policyholders seeking coverage" because "occurrence-based liability insurance policies offer coverage that frequently lasts indefinitely, and activate when a claim is made based on something that occurred during that long ago policy term" and so in many instances very old policies are implicated in coverage disputes between insurers and policyholders. He concludes that "in a case involving a missing policy from multiple decades ago, the only reliable way to establish the contents of a policy is through use of the Ancient Documents hearsay exception" because "[o]nly rarely will a person with knowledge of the policy still be around to testify and fulfill the requirements of the business records exception." He asserts that the residual hearsay exception is not a good substitute because courts hold that it is to be rarely applied.

James Begley (2015-EV-0003-0165), contends that the elimination of the ancient documents hearsay exception "would essentially be the end of toxic torts." He explains that elimination of the exception would "increase the costs and expense to all parties in attempting to authenticate" the necessary documents "and, even with the added cost and expenses, authentication would likely be unsuccessful, as the author and recipient(s) of those documents will not be found or have passed away."

Gregory Lynam (EV-2015-0003-0166), opposes the elimination of the ancient documents exception to the hearsay rule. He states that "the abrogation of Rule 803(16) is unnecessary and will do significant harm to those who are attempting to receive redress for acts that occurred decades prior, but the injury did not become evident until later."

The Federal Magistrate Judges Association (EV-2015-0003-0167), endorses the proposed elimination of the ancient documents hearsay exception "for the reasons stated in the Advisory Committee Report."

Joseph Whyte (EV-2015-0003-0168), opposes the elimination of the ancient documents exception to the hearsay rule, on the ground that it would lead to "unjust results" for plaintiffs in asbestos litigation.

John Camillus (EV-2015-0003-0169), states that Rule 803(16) "is an important rule that is critical to permitting the admissibility of relevant evidence that otherwise would not be admissible." He suggests that "[a]nother possibility, which I would oppose but which would make a lot more sense than removing the rule altogether, would be would be to change the definition of ancient records as, for instance, records created prior to the year 2000."

Jose Becerra (EV-2015-0003-0170), opposes the elimination of the hearsay exception for ancient documents, in a written statement that is identical to that of Gregory Lynam (EV-2015-0003-0166).

Mike Finnegan (EV-2015-0003-0171), states that without the ancient documents exception "child sex offenders and the institutions that protect them might escape justice." He explains that "[t]hese survivors have to rely on paper documents. Often the writers of the documents are dead and without the ancient document exception juries and judges would never be able to consider this evidence."

Molly Burke (EV-2015-0003-0172), opposes the elimination of the ancient documents hearsay exception, on the ground that it will prejudice plaintiffs suing for childhood sexual abuse. She states that without the exception, critical documents "although relevant and highly probative to show what an institution knew about problem actors and the risk of sexual abuse of children, would be inadmissible."

Tim Hale (EV-2015-0003-0173), states that the ancient documents exception to the hearsay rule is essential for plaintiffs who are survivors of childhood sexual abuse. He asserts that eliminating the exception "will decrease abuse survivors' opportunities for justice, and decrease the likelihood of success of litigation that forces institutional transparency and makes today's children safer."

Marc Pearlman (EV-2015-0003-0174), states that the ancient document exception to the hearsay rule "is of paramount importance to survivors of childhood sexual abuse" in which the documents regarding institutional knowledge are often "the key to proving the survivors case." He contends that "[n]one of the other hearsay exceptions or the residual rule are sufficient to ensure these documents' admission."

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Anonymous (EV-2015-0003-0175), opposes the elimination of the ancient documents exception to the hearsay rule, on the ground that in cases brought by adult survivors of childhood sexual abuse, cases often turn on ancient documents, because "[o]rganizations and individuals in these cases keep ancient documents which become critical to the case" and "Rule 803(16) is one of the most important ways that these documents get into evidence."

Erica Brady (EV-2015-0003-0176), opposes the elimination of the ancient documents hearsay exception, in a written comment that is identical to that of Jose Becerra (EV-2015-0003-0170), and Gregory Lynam (EV-2015-0003-0166).

Lance Pomerantz (EV-2015-0003-0177), posted a comment that is a follow-up to a question that was raised during his testimony at the public hearing—whether instead of eliminating the ancient document exception completely, the amendment would provide a "grandfathering" provision. He states: "I believe a grandfathering approach would be preferable to abrogation, but that the better approach (short of status quo) would be to leave the bright-line hearsay exception in place while limiting the rule's applicability to evidence involving proof of title."

Michael Dunlavy (EV-2015-0003-0178), opposes the elimination of the ancient documents hearsay exception, in a written comment that is identical to that of Erica Brady (EV-2015-0003-0176), Jose Becerra (EV-2015-0003-0170), and Gregory Lynam (EV-2015-0003-0166).

Michael Reck (EV-2015-0003-0179), opposes eliminating the ancient documents hearsay exception on the ground that it will have a negative effect on cases brought by adult survivors of sexual abuse. He explains that "[i]n cases against large institutions, plaintiffs' lawyers rely heavily on the exception to be able to shed light on decades of knowledge possessed by" those institutions.

Daniel Monahan (EV-2015-0003-0180), states that "[v]ictims of childhood sexual abuse often don't understand the harm caused by sexual abuse until years later. Documentary evidence is often the only evidence available to prove up cases due to the passage of time. The ancient document exception continues to be necessary in the litigation of these types of cases." Accordingly he opposes the elimination of the ancient documents exception to the hearsay rule.

Jeff Anderson (EV-2015-0003-0181), states that Rule 803(16) "is one of the most important evidentiary rules for survivors of childhood sexual abuse." He explains that "documents indicating the facts of abuse as well as institutional knowledge about it go back decades, often times with all of the individuals involved deceased except for the survivor. In some cases, these documents may be the only way that the survivor can prove their case, making Rule 803 (16) critical." Accordingly he opposes the elimination of the ancient documents exception to the hearsay rule.

Troy Chandler (EV-2015-0003-0182), would retain the ancient documents exception to the hearsay rule, arguing that it is critical for plaintiffs in toxic tort cases involving latent injuries. He states that in such cases the ancient documents exception is necessary to qualify documents that establish the state of mind of defendants.

Ben Snipes (EV-2015-0003-0183), argues that "[t]he use of historical documents could not be more imperative to the fair litigation of asbestos claims." He concludes that "[i]n the context of a disease with latency periods consisting of several decades, such as asbestos related disease, abolishing the ancient documents exception would substantially impair justice."

Joshua Grunda (EV-2015-0003-0184), states that in cases brought by plaintiffs for injuries from toxic substances, "the proposed change to FRE 803(16) would have a dramatic negative impact on my clients' ability to present critical evidence in court." Therefore he opposes the elimination of the hearsay exception for ancient documents.

Mickey Landry (EV-2015-0003-0185), states that the proposal to eliminate Rule 803(16) "purports to fix a problem that does not exist and will or could exclude extremely important documents." Therefore he opposes the proposed amendment.

Gary Brayton (EV-2015-0003-0186), believes that "the concerns intended to be addressed by the proposed amendment to Rule 803 can be successfully addressed with outright abrogation of Rule 803(16)." He states, however, that Rule 807 is unlikely to be an easy means of admitting ancient documents, because abrogation of the ancient documents exception "could reasonably be interpreted by trial judges as a repudiation of its underlying policy considerations, or, at a minimum, as a demotion of their importance." He concludes that "any judge already viewing Rule 807 with a jaundiced eye would almost certainly regard proffered ancient document evidence as bearing additional stigma on account of being stripped of a previously existing specific exception."

Glenn Draper (EV-2015-0003-0187), would retain the ancient documents hearsay exception. He emphasizes that in mesothelioma cases, Rule 803(16) "allows juries a window into what the corporations knew and when they knew it." He recognizes that "[i]n some instances, these documents may be admissible under another rule" but states that "often showing another hearsay exception applies is impossible or cumbersome."

Mark Berry (EV-2015-0003-0188), opposes the elimination of the ancient documents exception to the hearsay rule, noting its importance in asbestos cases. He states that "[w]ithout this rule, it is literally impossible to find a witness to prove up a document that was written 40 years ago. Obviously, the document is of great importance because it shows the state of mind of the defendant at the time of the alleged wrongdoing."

Shelby Reed (EV-2015-0003-0189), is opposed to the elimination of the ancient documents exception to the hearsay rule, concluding that "[a]brogation of this long-standing rule of evidence without justification would constitute radical activism."

Anthony Carr (EV-2015-0003-0190), states that in cases involving asbestos-related diseases, elimination of the ancient documents exception to the hearsay rule "would significantly increase the time and costs associated with our litigation of these cases, reducing the amount that should rightfully go to Plaintiffs."

Alyssa Segawa (EV-2015-0003-0191), states that in toxic tort cases, "the ancient document rule is essential in demonstrating individuals were exposed to certain products" and that

"[e]limination of this rule would prevent countless individuals who have been harmed by toxic substances from obtaining any compensation for their injuries."

United Policyholders (EV-2015-0003-0192), is opposed to the elimination of the ancient documents exception to the hearsay rule, on the ground that it will have a negative impact in cases involving insurance coverage. It states that "[p]erhaps there is a manner in which the concerns about electronic documents can be addressed without abrogating the rule in its entirety by limiting FRE 803(16) to hard copies."

Senators Edward Markey, Sheldon Whitehouse, Jeff Merkley, Barbara Boxer, Richard Durbin, Patrick Leahy, and Al Franken (EV-2015-0003-0193), oppose the elimination of the ancient documents exception to the hearsay rule. They state that the proposal "is especially troublesome because, in latent-injury, toxic-tort, products-liability, and other cases alleging corporate misconduct, abrogating Rule 803(16) could make it more difficult for plaintiffs—including the Federal Government—to prove their claims." The Senators assert that it is "premature" to eliminate Rule 803(16) out of concern that it will be used as a vehicle to introduce unreliable ESI. They conclude that eliminating the ancient documents exception "would place a significant hurdle in the way of litigants seeking to pursue . . . congressionally created federal claims in cases in which the misconduct occurred long ago, and would thereby undermine Congress's desire for injured parties to be able to seek a remedy."

The Thornton Law Firm, LLP (EV-2015-0003-0194), states that "[t] he abrogation of FRE 803(16), or the ancient documents exception to the hearsay rule, would deeply impact and diminish the likelihood of plaintiff success in toxic torts cases, particularly those filed against defunct, bankrupt or otherwise wholly acquired entities" because Rule 803(16) is necessary "for authenticating 'smoking gun' ancient documents and records that are vital in the successful litigation." The firm asserts that the other hearsay exceptions are not an alternative because "a representative of a bankrupt, defunct, or otherwise wholly acquired corporation rarely exists for authentication purposes."

Certain Members of the American Bar Association Criminal Procedure Committee (EV-2015-0003-0195), oppose the elimination of the ancient documents exception to the hearsay rule. The members "agree with the Advisory Committee that the exception has not been used much, and that many statements that fit within the exception would fit within other hearsay exceptions as well." They "also recognize that just because a document is old does not necessarily mean that it is reliable. Nevertheless, we believe that the exception has value and that eliminating it at this time would be a mistake." The members state that "Rule 803(16) is crisp and categorical in nature; it is easily applied, and its application is easy for lawyers to predict" whereas "the residual exception is necessarily open-ended." The members conclude that "the most prudent course for now is to adopt a policy of watchful waiting, perhaps with a commitment to re-examine the matter in five years" and that if "change now is necessary, it would be better to amend the Rule rather than abrogate it."

Kathy Byrne (EV-2015-0003-0196), opposes the elimination of the ancient documents exception, on the ground that it will have a negative impact in cases involving latent diseases. She states that ancient documents in such cases "provide essential evidence of what was known of toxic hazards before and at the times of exposure."

Clarisse Kobashigawa (EV-2015-0003-0198), states that "the current Ancient Documents exception makes practical sense legally and most importantly, it prevents corporations from conveniently hiding from documents that shine a magnifying glass on their knowledge and intent in continuing to use harmful products to the detriment of their unknowing victims so many years ago."

David Barrett (EV-2015-0003-0199), states that in cases involving latent diseases, eliminating the ancient documents exception to the hearsay rule "will divest the prosecuting attorney of a critical evidentiary tool, and will deprive the trier of fact of an important piece of evidence in the pursuit of truth and justice."

The American Association for Justice (EV-2015-0003-0200), opposes the elimination of the ancient documents exception to the hearsay rule. It states that "[t]he use of this straightforward, century-old exception to the hearsay rule is well-established. It has served as a means to provide fairness and protect the public interest in a variety of cases. By limiting significant, relevant and necessary evidence on the speculative premise that it could be admitted through another avenue is an insufficient protection that will lead to uncertainty, unnecessary utilization of court resources and an unfair impediment to victims' legal rights."

The Academy of Rail Labor Attorneys (EV-2015-0003-0201), opposes the elimination of the ancient documents exception to the hearsay rule. The Academy states that ancient documents are critical in cases involving latent injuries, and that "the proposed amendment would increase the cost of litigation because of the necessity to have the documents authenticated."

Ilana Waxman (EV-2015-0003-0202), opposes the elimination of the ancient documents exception to the hearsay rule, on the ground that it would deprive plaintiffs of evidence in environmental and toxic-tort litigation. She states that "[w]hile some amendment of the rule might be appropriate to address the Committee's concerns regarding ESI, a complete abrogation would only serve to make it even more difficult for litigants to address old wrongs."

Samantha Flores (EV-2015-0003-0203), objects to the elimination of the ancient documents exception to the hearsay rule, "as this would adversely affect the type of clients . . . who were exposed to toxic substances 40, 50, 60 or 70 years ago and developed diseases that have taken their lives."

J. Kirkland Sammons (EV-2015-0003-0204), states that "abrogating the ancient documents exception would serve to further encourage 'corporate amnesia.'" He asserts that without the ancient documents exception, evidence about what corporations knew about the dangers of asbestos and other substances would be inadmissible. Therefore he opposes its elimination.

Sherilyn Pastor (EV-2015-0003-0205), urges the Committee "to reconsider its proposal abrogating the ancient documents exception set forth in Federal Rule of Evidence 803(16) given the adverse, and likely unintended, impact it will have on policyholders and insureds pursuing coverage under insurance policies issued twenty or more years ago, but nonetheless covering bodily injury and property damage claims asserted by claimants against them today." She

concludes that the ancient documents exception "is an important rule for policyholders seeking to prove their right to insurance coverage" and that "[w]ithout it, insureds face increased difficulty and expense proving the existence and terms of their incomplete or missing insurance policies."

Professor Jeffrey Stempel (EV-2015-0003-0206), opposes the elimination of the ancient documents hearsay exception. He contends that the problem of old unreliable ESI being admitted under the exception will not be serious because "separating the wheat from the chaff has always been the task of adjudication." He concedes that "the Rule 807 residual exception is perhaps available to fill some of the void that would be created by abrogation of Rule 803(16)" but argues that Rule 807 "contains additional requirements that place a substantially higher burden on the party seeking to introduce evidence than does Rule 803(16), including a requirement of advance notice of intended use."

David Donadio (EV-2015-0003-0207), opposes the elimination of the ancient documents exception to the hearsay rule, stating it is commonplace in asbestos litigation "to encounter reliable ancient documents that cannot qualify under any other exception" because "the foundational witnesses necessary to establish the requisite elements for a business record exception even if living are impossible to identify or locate."

Amanda Kessler (EV-2015-0003-0208), opposes the elimination of the ancient documents hearsay exception, stating as follows: "Frequently in toxic tort litigation, the corporate officers, directors and employees with knowledge of a product that was manufactured over 40 years ago are deceased or incapacitated and unable to testify. Plaintiffs are forced to rely on company documents from many years ago, and must invoke the ancient document rule to do so."

Joseph Cirilano (EV-2015-0003-0209), objects to the elimination of the ancient documents exception, stating that the rule is needed to allow asbestos victims to prove their exposure.

Robert Buck (EV-2015-0003-0210), is opposed to the elimination of the ancient documents exception to the hearsay rule, noting that in product liability cases, "important facts relevant to both the claims and defenses being asserted in a case can only be established through introduction into evidence, as a hearsay exception, various engineering drawings, product specifications, internal corporate communications, product catalogs and brochures, as well as other forms of ancient documents because there are no living witnesses or other mechanisms to prove the facts contained in the ancient documents."

David Rancilio (EV-2015-0003-0211), opposes the elimination of the ancient documents hearsay exception. He states that in asbestos cases, "[d]efendants have consistently avoided placing documents in paper form and microfiche into an electronic format to frustrate and burden the plaintiffs bar. Now, defendants seek to be awarded for their intransigence by continuing to avoid the incorporation of these ancient documents into their electronic files, and simply wipe the relevance of these ancient documents from the record."

David Butler (EV-2015-0003-0212), opposes the elimination of the ancient documents exception, stating that in cases involving latent diseases, "[t]he abrogation of FRE 803(16) will do serious harm to the ability of innocent victims to hold those responsible accountable for their actions."

The Evangelical Lutheran Church of America (EV-2015-0003-0213), opposes the elimination of the ancient documents exception to the hearsay rule, expressing concern that it "is likely to prejudice churches and similar organizations in identifying and proving historical insurance coverage." It elaborates as follows: "By recommending the abrogation of Fed. R. Evid. 803(16), the Committee gives insurers a powerful weapon to deny coverage under policies purchased and paid for years ago. Even when a local congregation finds documents referencing a policy of insurance, the insurers can simply interpose a hearsay objection that will be almost impossible for a local congregation to overcome in a coverage action. Who will be able to testify as to the reliability of the contents of a letter from 1972? Given that most local congregations lack the wherewithal to litigate an insurance coverage action, the proposed abrogation will tilt the playing field in favor of insurance carriers and against the insureds. In addition, by facilitating the denial of coverage, the proposed abrogation will deny plaintiffs and other claimants the most likely and substantial source of possible compensation."

Kay Gundersen Reeves (EV-2015-0003-0214), states that "[t]he abrogation of FRE 803(16) will significantly diminish the ability of the victims of toxic exposure to prove their cases, people suffering from cancer that develops after a latency period that is measured in decades." She states that "[o]ne alternative might be to limit the exception to documents prepared before a particular date, say, January 1, 1996."

John Cooney (EV-2015-0003-0215), opposes the elimination of the ancient documents hearsay exception, noting that is it especially needed "in cases which involve conduct from decades ago that was accurately memorialized for non-litigation purposes at the time and the authors have since passed away."

N. Dean Nasser (EV-2015-0003-0216), opposes the elimination of the ancient documents hearsay exception, stating that "there is simply no good reason to require ancient evidence of the reliability of an ancient document when the dispute (99% of the time) did not even exist and was not even envisioned when the ancient (but authenticated) document was created."

Richard Grant (EV-2015-0003-0217), opposes the elimination of the ancient documents hearsay exception, arguing that in cases involving latent diseases, "crucial evidence such as packing slips, purchase orders, inter-office memos and reports, shipping invoices, and bills of lading, amongst many other documents that cannot be properly authenticated under other hearsay exceptions play a significant part in litigation." He suggests that any concerns about ESI being admitted under Rule 803(16) "can be addressed by prospective amendments specifically limited to those concerns."

Bart Baumstark (EV-2015-0003-0218), states that "[t]he ancient document rule is crucial in cases where toxic exposures cause cancer and other diseases decades after the exposures occurred" and that "[i]n many cases, old corporate knowledge documents would not otherwise be admissible if not for this well accepted, well grounded rule of evidence."

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Gerson Smoger (EV-2015-0003-0219 and 0220), opposes the elimination of the ancient documents exception, arguing that the exception guarantees that evidence admitted under it is reliable, and that in his experience, parties never object to admissibility of documents offered under Rule 803(16).

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1 **Rule 902. Evidence That Is Self-Authenticating**

2 The following items of evidence are self-
3 authenticating; they require no extrinsic evidence of
4 authenticity in order to be admitted:

5 * * * * *

6 **(13) *Certified Records Generated by an Electronic***
7 ***Process or System*.** A record generated by an
8 electronic process or system that produces an
9 accurate result, as shown by a certification of a
10 qualified person that complies with the
11 certification requirements of Rule 902(11) or
12 (12). The proponent must also meet the notice
13 requirements of Rule 902(11).

Committee Note

The amendment sets forth a procedure by which parties can authenticate certain electronic evidence other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and inconvenience of producing a witness to authenticate an item of electronic evidence is often unnecessary. It is often the case that a party goes to the expense of producing an

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authentication witness and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure under which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule. The Rule specifically allows the authenticity foundation that satisfies Rule 901(b)(9) to be established by a certification rather than the testimony of a live witness.

The reference to the "certification requirements of Rule 902(11) or (12)" is only to the procedural requirements for a valid certification. There is no intent to require, or permit, a certification under this rule to prove the requirements of Rule 803(6). Rule 902(13) is solely limited to authentication and any attempt to satisfy a hearsay exception must be made independently.

A certification under this Rule can establish only that the proffered item has satisfied the admissibility requirements for authenticity. The opponent remains free to object to admissibility of the proffered item on other grounds—including hearsay, relevance, or in criminal cases

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the right to confrontation. For example, assume that a plaintiff in a defamation case offers what purports to be a printout of a webpage on which a defamatory statement was made. Plaintiff offers a certification under this Rule in which a qualified person describes the process by which the webpage was retrieved. Even if that certification sufficiently establishes that the webpage is authentic, defendant remains free to object that the statement on the webpage was not placed there by defendant. Similarly, a certification authenticating a computer output, such as a spreadsheet, does not preclude an objection that the information produced is unreliable—the authentication establishes only that the output came from the computer.

A challenge to the authenticity of electronic evidence may require technical information about the system or process at issue, including possibly retaining a forensic technical expert; such factors will effect whether the opponent has a fair opportunity to challenge the evidence given the notice provided.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

Changes Made After Publication and Comment

Minor adjustments were made to the Committee Note to clarify the meaning of the certification requirement and to emphasize the importance of reasonable notice.

Summary of Public Comment

James Lundeen (2015-EV-0003-0002), argues that authentication of foreign records cannot be authorized by the Evidence Rules.

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The Committee on Federal Courts of the Association of the Bar of the City of New York (2015-EV-0003-0121), supports the proposed addition of Rule 902(13), stating that the rule "should avoid the need to call authentication witnesses in many cases where there is no real dispute about authenticity."

Jonathan Redgrave (2015-EV-0003-0132), supports the proposed addition of Rule 902(13). He states that "[s]hifting the burden of questioning the authenticity of such records to the opponent of the evidence (who will have a fair opportunity to challenge both the certification and the records themselves) will streamline the process by which these items can be authenticated, reducing the time, cost, and inconvenience of presenting this evidence at trial or on summary judgment." He concludes that the proposed amendment "will lead to increased efficiency without sacrificing the integrity of the Rules of Evidence."

The Federal Magistrate Judges Association (2015-EV-0003-0167), supports the proposed addition of Rule 902(13). The Association notes that the notice provided by the rule "should not come so shortly before the trial or hearing that the adverse party cannot realistically do the investigation required for a challenge." It suggests that "judges specify a date for serving the notification in the initial scheduling order." It further states that some electronic information might be authenticated under either Rule 902(13) or (14), but that "[a]s a practical matter, the distinction may not make a difference because both types are handled in the same way."

Certain Members of the American Bar Association Criminal Procedure and Evidence Committee (2015-EV-0003-0197), oppose the proposed addition of Rule 902(13) insofar as it would allow a certification to authenticate electronic information that was prepared in anticipation of a criminal prosecution. The members state that in criminal cases the Confrontation Clause does not permit authentication by a certificate where that certificate is "used to leverage into evidence documents that have been created for the purpose of the litigation."

125-012314

1 **Rule 902. Evidence That Is Self-Authenticating**

2 The following items of evidence are self-
3 authenticating; they require no extrinsic evidence of
4 authenticity in order to be admitted:

5 * * * * *

6 **(14) *Certified Data Copied from an Electronic***
7 ***Device, Storage Medium, or File.*** Data copied
8 from an electronic device, storage medium, or
9 file, if authenticated by a process of digital
10 identification, as shown by a certification of a
11 qualified person that complies with the
12 certification requirements of Rule 902(11) or
13 (12). The proponent also must meet the notice
14 requirements of Rule 902(11).

Committee Note

The amendment sets forth a procedure by which parties can authenticate data copied from an electronic device, storage medium, or an electronic file, other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and

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inconvenience of producing an authenticating witness for this evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness, and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure in which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Today, data copied from electronic devices, storage media, and electronic files are ordinarily authenticated by "hash value." A hash value is a number that is often represented as a sequence of characters and is produced by an algorithm based upon the digital contents of a drive, medium, or file. If the hash values for the original and copy are different, then the copy is not identical to the original. If the hash values for the original and copy are the same, it is highly improbable that the original and copy are not identical. Thus, identical hash values for the original and copy reliably attest to the fact that they are exact duplicates. This amendment allows self-authentication by a certification of a qualified person that she checked the hash value of the proffered item and that it was identical to the original. The rule is flexible enough to allow certifications through processes other than comparison of hash value, including by other reliable means of identification provided by future technology.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that

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would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule.

The reference to the "certification requirements of Rule 902(11) or (12)" is only to the procedural requirements for a valid certification. There is no intent to require, or permit, a certification under this rule to prove the requirements of Rule 803(6). Rule 902(14) is solely limited to authentication and any attempt to satisfy a hearsay exception must be made independently.

A certification under this Rule can only establish that the proffered item is authentic. The opponent remains free to object to admissibility of the proffered item on other grounds—including hearsay, relevance, or in criminal cases the right to confrontation. For example, in a criminal case in which data copied from a hard drive is proffered, the defendant can still challenge hearsay found in the hard drive, and can still challenge whether the information on the hard drive was placed there by the defendant.

A challenge to the authenticity of electronic evidence may require technical information about the system or process at issue, including possibly retaining a forensic technical expert; such factors will effect whether the opponent has a fair opportunity to challenge the evidence given the notice provided.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

126-012317

Changes Made After Publication and Comment

Minor adjustments were made to the Committee Note to clarify the meaning of the certification requirement and the definition of hash values, and to emphasize the importance of reasonable notice, and to address the relationship between Rules 902(13) and (14).

Summary of Public Comment

James Lundeen (2015-EV-0003-0002), argues that authentication of foreign records cannot be authorized by the Evidence Rules.

The Committee on Federal Courts of the Association of the Bar of the City of New York (2015-EV-0003-0121), supports the proposed addition of Rule 902(14), stating that the rule "should avoid the need to call authentication witnesses in many cases where there is no real dispute about authenticity."

Jonathan Redgrave (2015-EV-0003-0132), supports the proposed addition of Rule 902(14). He states that "[s]hifting the burden of questioning the authenticity of such records to the opponent of the evidence (who will have a fair opportunity to challenge both the certification and the records themselves) will streamline the process by which these items can be authenticated, reducing the time, cost, and inconvenience of presenting this evidence at trial or on summary judgment." He concludes that the proposed amendment "will lead to increased efficiency without sacrificing the integrity of the Rules of Evidence."

The Federal Magistrate Judges Association (2015-EV-0003-0167), supports the proposed addition of Rule 902(14). The Association notes that the notice provided by the rule "should not come so shortly before the trial or hearing that the adverse party cannot realistically do the investigation required for a challenge." It suggests that "judges specify a date for serving the notification in the initial scheduling order." It further states that some electronic information might be authenticated under either Rule 902(13) or (14), but that "[a]s a practical matter, the distinction may not make a difference because both types are handled in the same way."

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TAB 2C

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Best Practices for Authenticating Digital Evidence

Hon. Paul W. Grimm

Gregory P. Joseph, Esq.

The Judicial Conference Advisory Committee on Evidence Rules

I. Introduction

Digital evidence is now offered commonly at trial. Examples include emails, spreadsheets, evidence from websites, digitally-enhanced photographs, PowerPoint presentations, texts, tweets, Facebook posts, and computerized versions of disputed events. Does the fact that an item is electronic raise any special challenges in authenticating that item?

In Federal Courts, authenticity is governed by Rule 901(a), which requires that to establish that an item is authentic, a proponent must produce admissible evidence "sufficient to support a finding that the item is what the proponent claims it is."[1] Rule 901(b) provides many examples of evidence that satisfies the standard of proof for establishing authenticity, including testimony of a witness with knowledge,[2] circumstantial evidence,[3] and evidence describing a process or system that shows that it produces an accurate result.[4] The standards and examples provided by Rule 901(a) and (b) are flexible enough to adapt to all forms of electronic evidence.

That does not mean that authenticating digital evidence is automatic. There are a large number cases dealing with authentication of digital evidence over the last 15 years; and such evidence can present challenges in establishing that it has not been altered and that it comes from a certain source. The Judicial Conference Advisory Committee on Evidence Rules, surveying this case law, considered whether to propose an amendment to Rule 901(b) that would provide for a list of relevant factors for establishing the authenticity of the new types of digital evidence encountered by the courts --- such as email, text, chats, internet postings, and social media communications. The Advisory Committee decided not to proceed with a proposal, for a number of reasons: 1) there would be a problematic interface between any new rule and the existing, flexible rules that are currently being used to govern authentication of electronic evidence; 2) listing factors relevant to authentication would run the risk of misleading courts and litigators

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[1] Evidence proffered to support authenticity of a challenged item must itself be admissible. See, e.g., United States v. Bonds, 608 F.3d 495 (9th Cir. 2010) (records could not be authenticated where the only basis for authentication was a hearsay statement not admissible under any exception).

[2] Fed. R. Evid. 901(b)(1).

[3] Fed. R. Evid. 901(b)(4).

[4] Fed. R. Evid. 901(b)(9).

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into thinking that all of the listed factors can or should be weighed equally; 3) no existing evidence rule is structured as a list of relevant factors; and 4) given the deliberate nature of the rulemaking process—with a minimum of three years between formal consideration of an amendment and its adoption—it would be possible that authentication rules on electronic evidence would be outmoded by the time they became law.

The Advisory Committee decided that a better alternative for providing guidance to courts and litigants on authentication of digital evidence would be to prepare and publish a "Best Practices Manual" for each of the major new forms of digital evidence that are being offered in the courts. The Advisory Committee has collaborated with Hon. Paul Grimm and Gregory P. Joseph, Esq. to prepare this Best Practices Manual, to be distributed by the Federal Judicial Center.

This Manual begins with an analysis by Judge Grimm of the basic rules on authenticating evidence, with a focus on digital evidence and the interplay between Evidence Rules 104(a) (providing that the judge is to decide admissibility factors by a preponderance of the evidence) and Rule 104(b) (providing that for questions of conditional relevance --- such as authenticity --- the standard of proof for admissibility is enough evidence sufficient to support a finding).

Following Judge Grimm's introduction, this Manual sets forth some guidelines on authentication of the kinds of electronic evidence that are most frequently offered in litigation today: 1) emails; 2) texts; 3) chatroom conversations; 4) web postings; and 5) social media postings.[5] Finally, the Manual considers whether and when the proponent might argue that the court can take judicial notice of the authenticity of certain digital evidence.

At the outset it is important to emphasize that the standard for establishing authenticity of digital evidence is the same mild standard as for traditional forms of evidence. None of the checklists set forth below are going to be required to be met in toto before digital evidence is found authentic. They are just relevant factors, and usually satisfying one or two of any of the listed factors will be enough to convince the court that a juror could find the digital evidence to be authentic. But the factors will need to be applied case-by-case.

[5] This Best Practices Manual covers the relatively new forms of electronic communications. Parties have been authenticating more traditional forms of electronic evidence for many years --- examples include telephone conversations, audiotapes, and video recordings. See, e.g., United States v. Taylor, 530 F.2d 639 (5th Cir. 1976). (video evidence from a bank security camera was properly authenticated where testimony revealed the camera was present on the day in question and was facing the events of an armed robbery, and was functioning properly). This pamphlet does not cover such traditional forms of electronic communication. For more on authentication of such information, see Saltzburg, Martin & Capra, Federal Rules of Evidence Manual §901 (11th ed. 2015), which provides relevant case law and commentary.

II. An Introduction to the Principles of Authentication for Electronic Evidence: The Relationship Between Rule 104(a) and 104(b).

This Manual is designed to provide answers to the fundamental evidentiary questions of how to authenticate digital evidence. But before turning to the authentication rules themselves, there are two preliminary rules that must be discussed and understood, because without them, authentication decisions are apt to be erroneous. These rules are Fed. R. Evid. 104(a) (which states the general rule governing preliminary questions about the admissibility of evidence) and Fed. R. Evid. 104(b) (the so-called "conditional relevance" rule[6]). Understanding these two rules is essential to making correct decisions about the authentication of digital evidence.

We start with Rule 104(a). Its text is deceptively straightforward: "[t]he court must decide any preliminary question about whether a witness is qualified, a privilege exists, *or evidence is admissible*. In so deciding, the court is not bound by evidence rules, except those on privilege." (emphasis added). Most decisions about admissibility of evidence, whether digital or otherwise, are made by the judge alone. They include decisions about whether evidence is relevant, constitutes hearsay (or fits within one of the many hearsay exceptions), or is excessively prejudicial when compared to its probative value, whether experts are qualified and the extent of opinion testimony that will be allowed, and most questions regarding application of the original writing rule. When the judge makes a ruling under Rule 104(a) he or she is the sole decision maker as to whether the evidence may be heard by the jury. If admitted, of course, the jury is free to give the evidence whatever weight (if any) they think it deserves. This is familiar turf to trial judges, but with digital evidence, there is a greater likelihood that the judge alone may not be the final decision maker regarding admissibility. The jury also may have a part to play in the admissibility decision, and this is where Rule 104(b) comes in.

Rule 104(b) qualifies Rule 104(a). It provides "[w]hen the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later." Read in isolation, Rule 104(b) seems too abstract to be helpful. But, in the case of disputes over the authenticity of digital evidence, it can be an important qualifier to the general rule of 104(a) that the trial judge decides questions about the admissibility of evidence. An illustration will help bring things into focus. Imagine the following variations of a common theme. In an employment discrimination case the plaintiff, a woman, alleges that her supervisor, a man, intentionally discriminated against her in deciding to promote a lesser qualified man to a position that the plaintiff sought. As evidence of intentional discrimination, the plaintiff wants to introduce an email that she asserts her supervisor sent to her that says: "Jane, stop bugging me about the sales supervisor position. Your track record compared to the men in our sales group is terrible, and confirms what I always have suspected. Women just don't have the stuff it takes to get out there and sell our products. You should be glad you still have your sales job, and quit trying to be something you can never do well. Bob." The email is from the company email account (Bob@company.com), addressed to the plaintiff (Jane@company.com), apparently signed by the supervisor (Bob), discusses a subject matter about which the supervisor has knowledge, and is dated on a day and time the supervisor was known to be at the office. Plaintiff

[6] Fed. R. Evid. 104(b) (1972) Advisory Note.

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contends that the email is "smoking gun" evidence of intentional gender discrimination.

Imagine further the following scenarios when the plaintiff offers the email into evidence at trial. One: the defense attorney objects to the introduction of the email, the judge asks for the basis of the objection, and the defense attorney says "inadequate foundation". Two: the defense attorney objects, the judge asks for the basis of the objection, and the defense attorney says "Judge, this is an email, there is no evidence that the supervisor was the one who actually wrote it. It was found on a company computer, anyone in the company had access to that computer, including the plaintiff herself, whose office was right next to his, and my client is often away from his desk during the day, and he does not log out of his computer. Plaintiff hasn't shown that someone else didn't send that email pretending to be my client, and everyone knows how easy it is to fake an email." Three: the defense attorney objects, the judge asks for the basis of the objection, and the defense attorney says "Judge, my client will testify that on the day and time stated on the email he was at a sales meeting with the other supervisors and the president of the company. Five other people saw him there at that day and time and will testify that they did. During those meetings, no one is allowed to use their smart phone or to send or receive emails, on pain of being fired if the president sees them looking at their phones. The location of the meeting was on a different floor from where my client and the plaintiff work. He will testify that he did not send the email, and that when he leaves his office he does not log out, his computer stays on, and anyone can access it without a password and use his office email account. He also will testify that when he came back from the meeting, the plaintiff looked at him in a strange way, and said "I wouldn't look so smug if I were you. You might not be that way for very long."

With these scenarios in mind, what is the interplay between Rule 104(a) and 104(b) in determining whether the email may be admitted at trial and considered by the jury? In the first scenario, no explanation was given by the defense attorney for excluding the email other than the conclusory statement that the plaintiff had not laid a sufficient foundation. Here, the trial judge alone decides, under Rule 104(a), whether an adequate foundation has been established. If the foundation was deficient, the judge will require the plaintiff's lawyer to make a fuller showing, and allow or exclude the email accordingly. Rule 104(b) is not implicated.

In the second scenario, the defense attorney has made a conclusory legal argument that provides no facts showing that the supervisor did not author the email, but rather speculates that it *could have* been written by someone else. The argument invites the trial judge to require the plaintiff's lawyer to "prove a negative"—that no one but the supervisor was the author. But this is not the burden that the plaintiff must meet under Rule 104(a) to establish the admissibility of the email. Rather, all that plaintiff must do is to meet the obligation imposed by Rule 901(a), which is to "produce evidence sufficient to support a finding that the item is what the proponent claims it is." Certainty is not required. All that is needed is evidence sufficient to convince a reasonable juror that, more likely than not, the email is what the plaintiff claims it is—an email her supervisor drafted. And, under the hypothetical facts of the second scenario, the defense counsel is wrong in saying the plaintiff has offered no evidence that the email came from the supervisor. She has shown that the email came from the supervisor's email address, on the company email server, on a day when the supervisor was at the office, discussing a topic about which the supervisor had knowledge, and is signed with his name. Certainly this would be an example of authentication under Rule 901(b)(4), where the "appearance, contents, substance . . .

or other distinctive characteristics of the item, taken together with all the circumstances" tend to show that the supervisor authored the email.

The second scenario also raises only Rule 104(a) issues for the trial judge alone to determine admissibility. The facts, under which admissibility must be judged, are undisputed. If the trial judge concludes (as she should under these facts) that a reasonable juror *could* find from the foundation presented that it is more likely than not that the supervisor wrote the email, it is admissible. Defense counsel's speculation about what "could" have happened is reserved for argument to the jury about how much weight (if any) to give to the email. Absent from scenario two is evidence that the supervisor in fact did not author the email, to contradict the undisputed facts introduced by the plaintiff regarding the distinctive characteristics of the email that associate it with the supervisor.

Scenario three does introduce facts contradicting the evidence the plaintiff introduced about the distinctive characteristics of the email tying it to the supervisor. The defense attorney has proffered that he will introduce evidence (the supervisor, the five witnesses who corroborate that he was with them at the time the email was sent, the policy prohibiting use of cell phones during meetings with the company president, the meeting's location on a different floor of the building). Now the trial judge is presented with competing evidence that the supervisor did, and did not, author the email. If the plaintiff's evidence is accepted over that of the defendant, then it is more likely than not that the supervisor is the author, and the email is relevant to show his discriminatory intent. But, if the defendant's version of the facts is accepted over those offered by the plaintiff, then the supervisor did not author the email, and it is irrelevant to prove his state of mind. The relevance of the email turns on whether the plaintiff's version or the defendant's version is accepted, and this falls squarely within the scope of Rule 104(b). The relevance of the email depends on the existence of a disputed fact—authorship of the email. Who decides between the competing versions? If the case is tried before a jury, it is the jury, not the judge, who must resolve the dispute.[7] The judge's role under Rule 104(a) is to evaluate whether a reasonable jury *could* find (more likely than not) either that the supervisor did, or did not, author the email. If either version is plausible, then the judge conditionally admits the email, but at the time it is introduced instructs the jury that if they find that the plaintiff has shown that the supervisor more likely than not authored the email, they may consider it as evidence and give it the weight that they feel it is entitled to. Contrastingly, if they find that the defendant has persuaded them that, more likely than not, he did not author the email, they must disregard it entirely, and give it no weight in their deliberations. The final decision about whether the email has been admitted (and can be considered by the jury) or excluded (and disregarded by the jury) must await the jury's deliberation on the merits of the case. The judge makes a preliminary assessment of whether the evidence is one-sided or two, and if the latter, submits it to the jury for

[7] Fed. R. Evid. 104(b) (1972) Advisory Note ("If preliminary questions of conditional relevancy were determined solely by the judge, as provided in subdivision (a), the functioning of the jury as a trier of fact would be greatly restricted and in some cases virtually destroyed. These are appropriate questions for juries. Accepted treatment, as provided in the rule, is consistent with that given fact questions generally. The judge makes a preliminary determination whether the foundation evidence is sufficient to support a finding of fulfillment of the condition. If so, the item is admitted. If after all the evidence on the issue is in, pro and con, the jury could reasonably conclude that fulfillment of the condition is not established, the issue is for them. If the evidence is not such as to allow a finding, the judge withdraws the matter from their consideration.").

their decision. The issue of conditional relevance generated by disputed facts regarding the authenticity (and hence, relevance) of evidence is especially prevalent with digital evidence.

It is important for judges to distinguish between which of the scenarios listed above is presented to them when ruling on admissibility of digital evidence. For scenario one situations, the judge alone decides whether the proponent has laid a proper foundation to authenticate the digital evidence. Most often, the judge will consider whether one or more of the illustrations of how to authenticate found at Fed. R. Evid. 901(b)[8] or 902[9] has been shown.

For scenario two situations, the judge alone makes the decision whether to admit or exclude. In doing so, he must be careful not to let unparticularized and conclusory argument by the party objecting to the introduction of the digital evidence about what "might" or "could have happened" lead him to impose on the proponent of the evidence a burden of proof greater than that ordinarily required by Rule 104(a)—a showing that the evidence more likely than not is what it purports to be. It is a mistake for a judge to require the party introducing digital evidence to prove that no one other than the purported maker could have created the evidence if the introducing party has shown that, more likely than not, it was created by a particular person, unless there is evidence (not argument) that some other person could have done so.[10] Finally, for scenario three situations, where the judge is faced with competing facts plausibly showing that the digital evidence was, and was not, created by the person claimed by the proponent, then she should allow the evidence to be admitted "conditionally" under Rule 104(b), and instruct the jury that if they find that the evidence that the person claimed to have created the evidence did not do so is more believable than the evidence that he did, they must disregard it and give it no weight in their deliberations.

Careful attention to the interplay between Rule 104(a) and 104(b), as well as consideration of the abundant authentication tools identified in Rules 901(b) and 902, will go a

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[8] For digital evidence, the most useful authentication rules within Rule 901(b) are: 901(b)(1) (a witness with personal knowledge that the evidence is what it purports to be); 901(b)(3) (comparison of the evidence with an authenticated specimen by an expert witness or the finder of fact); 901(b)(4) (the appearance, contents, substance, internal patterns or other distinctive characteristics of the item, taken together with all the circumstances); 901(b)(5) (for audio recordings, an opinion identifying a person's voice, whether heard firsthand or through electronic transmission or recording, based on having heard that voice in the past); and 901(b)(9) (evidence describing a process or system of showing that it produces an accurate result).

[9] Fed. R. Evid. 902 provides examples of self-authentication, where no extrinsic evidence or testimony is needed to authenticate. The following self-authentication rules may be helpful for digital evidence; 902(5) (A book, pamphlet, or other publication purporting to be issued by a public authority. Most public authorities have web sites and post publications relating to their fields of jurisdiction.); 902(6) (Printed material purporting to be a newspaper or periodical. Most newspapers and periodicals have "on line editions", and this rule potentially is available to self-authenticate.); 902(11) and (12) (certified copy of domestic and foreign records of regularly conducted activities); proposed Rule 902(13) (certified copy of machine-generated information); and proposed Rule 902(14) (certified copy of computer generated or stored information).

[10] Grimm, et al, *Authentication of Social Media Evidence*, 36 American Journal of Trial Advocacy 433, 459 (2013) ("A trial judge should admit the evidence if there is plausible evidence of authenticity produced by the proponent of the evidence and only speculation or conjecture—not facts—by the opponent of the evidence about how, or by whom, it 'might' have been created.").

long way towards removing the mystery about authenticating digital evidence, even when the technology at play is unfamiliar to the judge. In the end, technical expertise is not needed. Rather, an awareness of the fundamental evidence rules governing admissibility and authentication of any evidence, whether digital or not, is all that is needed. And this Manual aims to provide illustrations to make the effort even easier.

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III. Relevant Factors for Authenticating Digital Evidence

What follows are general guidelines and lists of relevant factors for authenticating the basic forms of digital evidence that have developed over the last 20 years. The lists of relevant factors do not purport to be exclusive. There is no attempt to weigh the factors, or to take a cumulative approach, as the importance of any factor will be case-dependent. And there is no intent to imply that all of the factors listed must be met before the proffered digital evidence can be found authentic.

In evaluating all the factors below, it is important to remember that the threshold for the court's determination of authenticity under Rule 901 is not high: "the court need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the jury ultimately might do so." [11] The possibility of alteration "does not and cannot be the basis for excluding ESI as unauthenticated as a matter of course, any more that it can be the rationale for excluding paper documents."[12]

Generally speaking, it will be a rare case in which an item of digital evidence *cannot* be authenticated. The question is whether the proponent is willing and able to expend the resources necessary to do so.[13] The factors set forth below are intended to direct litigants to ways in which resources can be usefully spent on authenticating digital evidence --- and on ways to avoid such costs in certain situations.

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[11] United States v. Safavian, 435 F. Supp. 2d 36, 38 (D.D.C. 2006).

[12] *Id.* at 40.

[13] *See* Jeffrey Bellin and Andrew Guthrie Ferguson, *Judicial Notice in the Information Age*, 108 Nw. U. L.Rev. 1137, 1157 (2014) ("Although much is made of [the authentication] hurdle in the Information Age, it is * * * an easy one to surmount. Success generally depends not on legal or factual arguments, but rather the amount of time and resources a litigant devotes to the problem.")

A. Emails

The authentication questions for email most commonly focus on whether the email was sent or received by the person whom the party claims sent or received it. There are a number of factors that will assist the proponent in establishing authenticity for either or both of these purposes. Among them are:

1. A witness with personal knowledge may testify to authenticity.[14] Possibilities include:

● The author of the email in question testifies to its authenticity.[15]

● A witness testifies that s/he saw the email in question being authored/received by the by the person who the proponent claims authored/received it.[16]

2. Business Records. The custodian of records of a regularly conducted activity testifies to a foundation, or certifies, in accordance with Fed. R. Evid. 902(11) or (12), that an email satisfies the criteria of Fed. R. Evid. 803(6). It should be noted, however, that emails --- even of a business, do not automatically qualify as business records.[17]

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[14] See Fed. R.Evid. 901(b)(1).

[15] See, e.g., Anderson v. United States, 2014 U.S. Dist. LEXIS 166799, at *13 (N.D. Ga. Dec, 2, 2014) (defendant-witness acknowledged that the documents in question contained emails he sent to an undercover agent, the emails were sent from his email address, and the document contained the entirety of his email exchange with the undercover agent; this was a sufficient showing of authenticity). See also Citizens Bank & Trust v. LPS Nat'l Flood, LLC, 2014 U.S. Dist. LEXIS 134933, at *12 (N.D. Ala. Sept. 25, 2014) (witness's personal knowledge of email contents and her affidavit authenticating emails as the ones she sent sufficient for admissibility).

[16] United States v. Fluker, 698 F.3d 988 (7th Cir. 2012) (the court, in outlining the variety of ways in which an email could be authenticated, stated that testimony from a witness who purports to have seen the declarant create the email in question was sufficient for authenticity under Rule 901(b)(1)).

[17] See, e.g., United States v. Cone, 714 F.3d 197, 220 (4th Cir. 2013):

> While properly authenticated e-mails may be admitted into evidence under the business records exception, it would be insufficient to survive a hearsay challenge simply to say that since a business keeps and receives e-mails, then ergo all those e-mails are business records falling within the ambit of Rule 803(6)(B). "An e-mail created within a business entity does not, for that reason alone, satisfy the business records exception of the hearsay rule." Morisseau v. DLA Piper, 532 F. Supp. 2d 595, 621 n. 163 (S.D.N.Y. 2008).

It is probably fair to state that emails and social media postings will often be prepared too casually and irregularly to be admissible as business records. But this is not inevitably so, and again if the electronic communication does fit the admissibility requirements it is just as admissible as a hardcopy record.

3. Jury comparison with other authenticated emails.[18] The authenticity of an email can be determined by the trier of fact by comparing the email in question with emails already authenticated and in evidence. [19]

4. Production in discovery. If a document request is sufficiently descriptive, production in response to that request may serve in itself to authenticate the email, as the act of production may be a concession that the document is what the party asked for --- and thus is what the party says it is. The act of production can constitute a statement of a party-opponent and consequently admissible evidence of authenticity. See Fed.R.Evid. 801(d)(2).[20] Authentication has also been found when an adversary produces in discovery a third party's email received by the producing party in the ordinary course of business, and the email is offered against the adversary.[21]

5. Circumstantial Evidence.[22]

Applying Rule 901(b)(4) --- covering authentication on the basis of "appearance, contents, substance, internal patterns, or other distinctive characteristics of the item" --- requires consideration of the "totality of circumstantial evidence."[23] While any one factor *may* be insufficient to determine admissibility, when weighed together, authenticity may be established. "This rule is one of the most frequently used to authenticate e-mail and other electronic records."[24]

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[18] Fed.R.Evid. 901(b)(3).

[19] United States v. Safavian, 435 F. Supp. 2d 36, 40 (D.D.C. 2006)("Those emails that are not clearly identifiable on their own can be authenticated under Rule 901(b)(3), which states that evidence may be authenticated by the trier of fact with 'specimens which have been authenticated'—in this case those emails that have been independently authenticated.").

[20] See, e.g., AT Engine Controls Ltd. v. Goodrich Pump & Engine Control Sys., Inc., 2014 U.S. Dist. LEXIS 174535 (D. Conn. Dec. 18, 2014) (collecting cases holding that production of emails in discovery constitutes a concession of authenticity); Nola Fine Art, Inc. v. Ducks Unlimited, Inc., 2015 U.S. Dist. LEXIS 17450 (E.D. La. Feb. 12, 2015) ("[Defendant] produced the email to plaintiffs in discovery and therefore cannot seriously dispute the email's authenticity").

[21] Broadspring, Inc. v. Congoo, LLC, 2014 U.S. Dist. LEXIS 177838 (S.D.N.Y. Dec. 29, 2014) (third party emails sent to a party in the ordinary course of business and produced by the party in litigation are sufficiently authenticated by the act of production when offered by an opponent, but hearsay and other admissibility objections as to the third parties' statements must separately be satisfied).

[22] Fed.R.Evid. 901(b)(4).

[23] United States v. Henry, 164 F.3d 1304, 1305 (10th Cir. 1999).

[24] Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 546 (D. Md. 2007).

Set forth below are factors that can, alone or in conjunction (depending on the case), establish authenticity. Different circumstantial factors may be relevant depend on whether the authenticity dispute is over whether a person sent or received the email.

a. Authenticating Authorship Circumstantially

The inclusion of some or all of the following in an email can be sufficient to authenticate the email as having been sent by a particular person:

- the purported author's known email address;[25]
- the author's electronic signature;
- the author's name;[26]
- the author's nickname; [27]
- the author's screen name;
- the author's initials;
- the author's moniker;[28]
- the author's customary use of emoji or emoticons;
- the author's use of the same email address elsewhere;
- a writing style similar or identical to the purported author's manner of writing;
- reference to facts only the purported author or a small subset of individuals including

[25] See. e.g, United States v. Siddiqui, 235 F.3d 1318, 1322 (11th Cir. 2000) (an email identified as originating from the defendant's email address and that automatically included the defendant's address when the reply function was selected was considered sufficiently authenticated).

[26] See, e.g., United States v. Fluker, 698 F.3d 988, 999–1000 (7th Cir. 2012) (emails sent from a "More Than Enough, LLC" (MTE) email address were sufficiently authenticated when the purported author was an MTE board member and "[i]t would be reasonable for one to assume that an MTE Board member would possess an email address bearing the MTE acronym."); *Safavian*, 435 F. Supp. 2d at 40 (email messages held properly authenticated when containing distinctive characteristics, including email addresses and name of the person connected to the address).

[27] United States v. Brinson, 772 F.3d 1314 (10th Cir. 2014) (use of fake name commonly used by defendant).

[28] See United States v. Simpson, 152 F.3d 1241 (10th Cir. 1998) (chatroom log where user "Stavron" identified himself as the defendant and shared his email address was used to authenticate subsequent emails from that email address).

the purported author would know;[29]

● reference to facts uniquely tied to the author—*e.g.*, contact information for relatives or loved ones; photos of the author or items of importance to the author (e.g., car, pet); the author's personal information, such as a cell phone number, social security number, etc.[30]

Factors outside the content of the email itself can establish authenticity of authorship circumstantially. For example:

● a witness testifies that the author told him to expect an email prior to its arrival;[31]

●the purported author acts in accordance with, and in response to, an email exchange with the witness;

● the author orally repeats the contents soon after the email is sent;

● the author discusses the contents of the email with a third party;

● the author leaves a voicemail with substantially the same content.

Forensic information may be used to support a circumstantial showing that the email was sent by the purported author. Forensic sources include:

● an email's hash values;[32]

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[29] See United States v. Siddiqui, 235 F.3d 1318, 1322 (11th Cir. 2000) (messages that referred to facts only the defendant was familiar with were ruled admissible).

[30] Commonwealth v. Amaral, 78 Mass. App. Ct. 671, 674–675, 941 N.E.2d 1143, 1147 (2011) ("In other e-mails, Jeremy provided his telephone number and photograph. When the trooper called that number, the defendant immediately answered his telephone, and the photograph was a picture of the defendant. These actions served to confirm that the author of the e-mails and the defendant were one and the same") (citing Mass. G. Evid. § 901(b)(6)).

[31] State v. Ruiz, 2014 Mich. App. LEXIS 855 (Mich. Ct. App. May 15, 2014) (interpreting MRE 901) (witness testified to knowing the defendant authored an email because the defendant told him to expect an email relating to arson—the contents of the email subsequently received).

[32] A hash value is "[a] unique numerical identifier that can be assigned to a file, a group of files, or a portion of a file, based on a standard mathematical algorithm applied to the characteristics of the data set. The most commonly used algorithms, known as MD5 and SHA, will generate numerical values so distinctive that the chance that any two data sets will have the same hash value, no matter how similar they appear, is less than one in one billion. 'Hashing' is used to guarantee the authenticity of an original data set and can be used as a digital equivalent of the Bates stamp

● testimony from a forensic witness that an email issued from a particular device at a particular time.[33]

b. Authenticating Receipt Circumstantially

The following factors can be probative in authenticating an email as having been received by a particular person:

●a reply to the email was received by the sender from the email address of the purported recipient;

●the subsequent conduct of the recipient reflects his or her knowledge of the contents of the sent email;

●subsequent communications from the recipient reflects his or her knowledge of the contents of the sent email;

●the email was received and accessed on a device in the possession and control of the alleged recipient.

Finally, while it is true that an email may be sent by anyone who, with a password, gains access to another's email account, similar questions (of possible hacking) could be raised with traditional documents. Therefore, there is no need for separate rules of authenticity for emails. And importantly, the mere fact that hacking, etc., is possible is not enough to exclude an email or any other form of digital evidence. If the mere possibility of electronic alteration were enough to exclude the evidence, then no digital evidence could ever be authenticated.[34]

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used in paper document production." Federal Judicial Center, Managing Discovery of Electronic Information: A Pocket Guide for Judges, Federal Judicial Center, 2007 at 24. See also Lorraine v. Markel American Ins. Co, 241 F.R.D. 534, 547 (D. Md. 2007) (noting that "[h]ash values can be inserted into original electronic documents when they are created to provide them with distinctive characteristics that will permit their authentication under Rule 901(b)(4).").

[33] *Lorraine,* 241 F.R.D. 534 at 547–48 (because an electronic message's metadata (including an email's metadata) can reveal when, where, and by whom the message was authored, the court found it could be used to successfully authenticate a document under 901(b)(4)).

[34] See, e.g., Interest of F.P., 878 A.2d 91 (Pa. Super. 2005) (just as an email can be faked, a "signature can be forged; a letter can be typed on another's typewriter; distinct letterhead stationary can be copied or stolen. We believe that e-mail messages and similar forms of electronic communication can be properly authenticated within the existing framework of Pa. R.E. 901 and Pennsylvania case law.").

B. Text Messages

Text messages are not different in kind from email and so the rules and guidelines on authentication are similar. Here are some of the relevant factors for authenticating text messages:[35]

1. A witness with personal knowledge may testify to authenticity. Possibilities include:

● The author of the text in question testifies to its authenticity.

● A witness testifies that s/he saw the text in question being authored/received by the person who the proponent claims authored/received it.[36]

2. Jury comparison with other authenticated texts.

3. Production in discovery.

4. Establishing that an electronic system of recordation records accurately. This process of illustration, authorized by Fed.R.Evid. 901(b)(9), can be useful if the objection to authenticity is that the original text has been altered in some way. For example, in *United States v. Kilpatrick*, 2012 U.S. Dist. LEXIS 110166 (E.D. Mich. Aug. 7, 2012), the government sought to authenticate text messages sent from two SkyTel pages, each belonging to one of the defendants respectively. A SkyTel records-custodian verified that the text messages the government offered had not been and could not be edited in any way because when the messages are sent from the devices belonging to the defendants, they are automatically saved on SkyTel's server with no capacity for editing. The court ruled that this showing was sufficient, under Fed. R. Evid. 901(b)(9), to establish authenticity over a claim that the messages had been altered.

It should be noted that the showing as to the process or system in *Kilpatrick* will be able to be made by a certificate of the foundation witness --- substituting for live testimony --- under an amendment to the Evidence Rules that is scheduled to take effect on December 1, 2017.[37]

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[35] The case law cited under the various factors discussed in the section on emails should be equally useful as supportive citations for the similar (or identical) factors supporting authentication of texts.

[36] United States v. Barnes, 803 F.3d 209 (5th Cir. 2015) (government laid a proper foundation to authenticate Facebook and text messages as having been sent by the defendant; the defendant was a quadriplegic, but the witness who received the messages testified she had seen the defendant use Facebook, she recognized his Facebook account, and the Facebook messages matched the defendant's manner of communicating: "[a]lthough she was not certain that Hall [the defendant] authored the messages, conclusive proof of authenticity is not required for admission of disputed evidence").

[37] The proposed amendments would add two new subdivisions to Rule 902, which provides for various forms of self-authentication. The proposals read as follows:

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5. Circumstantial evidence.

a. Authenticating Authorship Circumstantially

The inclusion of some or all of the following in a text can be sufficient to authenticate the text as having been sent by a particular person:

- the purported author's ownership of the phone or other device from which the text was sent;[38]
- the author's possession of the phone;
- the author's known phone number;
- the author's name;
- the author's nickname;[39]
- the author's initials;
- the author's moniker;
- the author's name as stored on the recipient's phone;

Rule 902. Evidence That Is Self-Authenticating
The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:
* * *

(13) ***Certified Records Generated by an Electronic Process or System.*** A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11).

(14) ***Certified Data Copied from an Electronic Device, Storage Medium, or File.*** Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent also must meet the notice requirements of Rule 902(11).

It is the proposed Rule 902(13) that would allow proof by certification in a case like *Kilpatrick.*

[38] United States v. Mebrtatu, 543 F. App'x 137, 140–141 (3d Cir. 2013) (phone was in the purported sender's possession; phone contains texts sent to and signed with the purported author's first name, including texts from her boyfriend professing love and other texts whose content links them to her; texts sufficiently authenticated as hers).

[39] United States v. Kilpatrick, 2012 U.S. Dist. LEXIS 110166, at *11 (E.D. Mich. Aug. 7, 2012)(the court outlined a number of distinctive characteristics that established the authenticity of the pager and cellphone text messages at issue; among these factors were the defendants' use of their names (Kilpatrick) and nicknames ("Zeke" or "Zizwe") to sign the messages they sent).

● the author's customary use of emoji or emoticons;

● the author's use of the same phone number on other occasions;

● a writing style similar or identical to the purported author's manner of writing;

● reference to facts only the purported author or a small subset of individuals including the purported author would know;

● reference to facts uniquely tied to the author—*e.g.*, contact information for relatives or loved ones; photos of author or items of importance to author (e.g., car, pet); author's personal information, such as contact information, social security number, etc.; receipt of messages addressed to the author by name or reference.[40]

Factors outside the content of the text itself can establish authenticity of authorship circumstantially. For example:

● a witness testifies that the author told him to expect a text message prior to its arrival;

● the purported author acts in accordance with a text exchange;

● the purported author orally repeats the contents soon after the text message is sent or discusses the contents with a third party.

b. Authenticating Receipt Circumstantially

The following factors can be probative in authenticating a text as having been received by a particular person:

[40] United States v. Benford, 2015 U.S. Dist. LEXIS 17046, at *16–*17 (W.D. Okla. Feb. 12, 2015) (in establishing that text messages from a device were authored by the defendant, the prosecution pointed to evidence that contact information for the defendant's brother and girlfriend were saved on the phone and that incoming messages addressed the defendant by name); United States v. Ellis, 2013 U.S. Dist. LEXIS 73031, at *3–*4 (E.D. Mich. May 23, 2013) (the defendant's possession of a cellphone that received messages addressed to him by name or moniker was, among other circumstantial evidence (such as his possession of the device), sufficient to establish that he was the author of outgoing text messages from the same phone).

● a reply to the text message was received by the sender from the purported recipient's phone number;

●the subsequent conduct of the recipient reflects his or her knowledge of the sent message's contents;

●subsequent communications from the recipient reflect his or her knowledge of the contents of the sent text message;

●the text message was received and accessed on a device in the possession and control of the alleged recipient.

C. Chatroom and Other Social Media Conversations

By definition, chatroom postings and other social media communications are made by third parties, not the owner of the site. Further, chatroom participants usually use screen names (pseudonyms) rather than their real names. Thus the authenticity challenge is to provide enough information for a juror to believe that the chatroom entry or other social media communication is made by a particular person.

Simply to show that a posting appears on a particular user's webpage is insufficient to authenticate the post as one written by the account holder. Third party posts, too, must be authenticated by more than the names of the purported authors reflected on the posts. Evidence sufficient to attribute a social media or chat room posting to a particular individual may include, for example:

● testimony from a witness who identifies the social media account as that of the alleged author, on the basis that the witness on other occasions communicated with the account holder;

● testimony from a participant in the conversation based on firsthand knowledge that the transcript fairly and accurately captures the conversation;[41]

● evidence that the purported author used the same screen name on other occasions;

● evidence that the purported author acted in accordance with the posting (*e.g.*, when a meeting with that person was arranged in a chat room conversation, he or she attended);

● evidence that the purported author identified himself or herself as the individual using the screen name;

● an admission that the computer account containing the chat is that of the purported author;[42]

● use in the conversation of the customary signature, nickname, or emoticon associated with the purported author;

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[41] See, e.g., United States v. Lebowitz, 676 F.3d 1000 (11th Cir. 2012) (internet chat authenticated by credible testimony of one participant); United States v. Lundy, 676 F.3d 444 (5th Cir. 2012) (testimony by one party to chat that the chats are as he recorded them is enough to meet the low threshold for authentication); United States v. Barlow, 568 F.3d 215, 220 (5th Cir. 2009) ("English, as the other participant in the year-long 'relationship,' had direct knowledge of the chats. Her testimony could sufficiently authenticate the chat log presented at trial").

[42] United States v. Manley, 787 F.3d 937, 942 (8th Cir. 2014) ("the government presented testimony of a law enforcement officer who helped to execute the search warrant, and the officer testified that the defendant admitted adopting the username 'mem659' for his computer account. The username for his computer account was the same one used in some of the chats.").

● disclosure in the conversation of particularized information that is either unique to the purported author or known only to a small group including the purported author;

● evidence that the purported author had in his or her possession information given to the person using the screen name;

● evidence from the hard drive of the purported author's computer reflecting that a user of the computer used the screen name in question;

● evidence that the chat appears on the computer or other device of the account owner and purported author;

● evidence that the purported author elsewhere discussed the same subject matter;

D. Internet, Websites, etc.

Websites present authenticity issues because they are dynamic. If the issue is what is on the website at the time the evidence is being proffered, then there are no authenticity issues because the court and the parties can simply access the site and see what the website says.[43] But proving up historic information on the website raises the issue of whether the information was actually posted as the proponent says it was.[44]

1. Rule 901 authentication standards as applied to dynamic website information.

In applying Rule 901 authentication standards to website evidence, there are three questions that must be answered:

- What was actually on the website?
- Does the exhibit or testimony accurately reflect it?
- If so, is it attributable to the owner of the site?

A sufficient showing of authenticity of dynamic website information is usually found if a a witness testifies—or certifies in compliance with a statute or rule—that:

- the witness typed in the Internet address reflected on the exhibit on the date and at the time stated;
- the witness logged onto the website and reviewed its contents; and
- the exhibit fairly and accurately reflects what the witness perceived.[45]

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[43] Jeffrey Bellin & Andrew Guthrie Ferguson, *Trial by Google: Judicial Notice in the Information Age*, 108 Nw. U.L.Rev. 1137, 1157 (2014) ("It is hard to imagine many good faith disputes about whether proffered evidence really is a page from Google Maps or WebMD. Malfeasance would be foolish. The opposing party can simply go to the website to verify its authenticity, and if fraud is detected, the consequences for the offering party are dire."). See also Wells Fargo Bank, N.A. v. Wrights Mill Holdings, LLC, 2015 U.S. Dist. LEXIS 115610, at*21-22 (S.D.N.Y. Aug. 31, 2015) (confirming that authenticity of existing website information could be determined by conducting a "basic Internet search.").

[44] See, e.g., Adobe Sys. v. Christenson, 2011 U.S. Dist. LEXIS 16977, at *29 (D. Nev. Feb. 7, 2011) ("[a]lthough Defendants can probably determine, with little difficulty, whether a current Google search for the search terms 'software surplus' provides links on the first page [of a website], this would not prove that such a search would have resulted in such a link at a prior point in time.").

[45] See, e.g., Estate of Konell v. Allied Prop. & Cas. Ins. Co., 2014 U.S. Dist. LEXIS 10183 (D. Or. Jan. 28, 2014) ("To authenticate a printout of a web page, the proponent must offer evidence that: (1) the printout accurately

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The exhibit should bear the Internet address and the date and time the webpage was accessed and the contents downloaded.[46]

When evaluating the proffer, the court may consider the following factors as circumstantial indications that the information was posted by the owner of the site, under Rule 901(b)(4):

● distinctive website design, logos, photos, or other images associated with the website or its owner;[47]

● the contents of the webpage are of a type ordinarily posted on that website or websites of similar people or entities;

● the owner of the website has elsewhere published the same contents, in whole or in part;

● the contents of the webpage have been republished elsewhere and attributed to the website; and

● the length of time the contents were posted on the website.

Other possible means of authenticating website postings are as follows:

● testimony of a witness who created or is in charge of maintaining the website. That witness may testify on the basis of personal knowledge that the printout of a webpage came from the site.[48]

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reflects the computer image of the web page as of a specified date; (2) the website where the posting appears is owned or controlled by a particular person or entity; and (3) the authorship of the web posting is reasonably attributable to that person or entity"); *Buzz Off Insect Shield, LLC v. S.C. Johnson & Son, Inc.*, 2009 U.S. Dist. LEXIS 17530 (M.D.N.C. Mar. 6, 2009) ("[defendant] could authenticate its printouts of various websites by calling witnesses who could testify that they viewed and printed the information, or supervised others in doing so, and that the printouts were accurate representations of what was displayed on the listed website on the listed day and time"); *Rivera v. Inc. Village of Farmingdale*, 29 F. Supp. 3d 121 (E.D.N.Y. 2013) (internet postings offered to show community bias in Fair Housing Act case; testimony that witness "personally downloaded all of the postings and confirmed the identities of the key posters ... [suffices to show] a 'reasonable likelihood' that they were actually posted on the internet by members of an online community comprised of the Village's own residents").

[46] See, e.g., Foreword Magazine, Inc. v. OverDrive Inc., 2011 U.S. Dist. LEXIS 125373, at *8–*11 (W.D. Mich. Oct. 31, 2011) (admitting screenshots from websites, accompanied only by the sworn affidavit of an attorney, given "other indicia of reliability (such as the Internet domain address and the date of printout)").

[47] See, e.g., Metcalf v. Blue Cross Blue Shield of Mich., 2013 U.S. Dist. LEXIS 109641 (D. Or. Aug. 5, 2013). (authenticity of website information of an organization's purported website was established by logos or headers matching those of the organization).

● a printout obtained from the Internet Archive's "wayback machine." The Internet Archive documents and stores all websites and the "wayback machine" can retrieve website information from any particular time.[49] Some courts require a witness from the Internet archive to testify to establish that the "wayback machine" employs a process that produces accurate results under Rule 901(b)(9).[50] Other courts, as discussed infra, take judicial notice of the reliability of the "wayback machine."

The opponent of the evidence is free to challenge authenticity of dynamic website data by adducing facts showing that the exhibit does not accurately reflect the contents of a website, or that those contents are not attributable to the ostensible owner of the site. There may be legitimate questions concerning the ownership of the site or attribution of statements contained on the site to the ostensible owner.

2. Self-Authenticating Website Data

Under Fed. R. Evid. 902, three types of webpage exhibits are self-authenticating --- meaning that a presentation of the item itself is sufficient to withstand an authenticity objection from the opponent.

a. Government Websites

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[48] St. Luke's Cataract & Laser Inst., P.A. v. Sanderson, 2006 U.S. Dist. LEXIS 28873 (M.D. Fla. May 12, 2006) (web master's testimony can authenticate a printout).

[49] Another example of a website that allows users to access archival copies of webpages is www.cachedpages.org, which allows users to employ one interface to search three different archival services—the Wayback Machine, Google Cache, and Coral Cache.

[50] See, e.g., Telewizja Polska USA, Inc. v. Echostar Satellite Corp., No. 02 C 3293, 2004 WL 2367740, at 6* (N.D. Ill. Oct. 15, 2004) (approving the use of the Internet Archive's "wayback machine" to authenticate websites as they appeared on various dates relevant to the litigation). Compare Open Text S.A. v. Box, Inc., 2015 U.S. Dist. LEXIS 11312 (N.D. Cal. Jan. 30, 2015) (court was unwilling to accept a screenshot from the wayback machine into evidence without testimony from a representative of the Internet Archive confirming its authenticity).

Under a proposed amendment to the Federal Rules of Evidence, the reliability of the wayback machine process could be established by a certificate of the Internet Archive official, rather than in-court testimony). See Proposed Rule 902(13) (allowing proof of authenticity of electronic information produced by a process leading to an accurate result to be established by the certificate of a knowledgeable witness). That proposed amendment is scheduled to become effective on December 1, 2017.

Under Rule 902(5) data on governmental websites are self-authenticating.[51] As discussed below, courts regularly take judicial notice of these websites.

b. Newspaper & Periodical Websites

Under Rule 902(6) (*Newspapers and Periodicals*), "[p]rinted material purporting to be a newspaper or periodical" is self-authenticating. This includes online newspaper and periodicals, because Rule 101(b)(6) provides that any reference in the Rules to printed material also includes comparable information in electronic form. Thus all newspaper and periodical material is self-authenticating whether or not it ever appeared in hard copy.[52]

c. Websites Certified as Business Records

Rules 902(11) and (12) render self-authenticating business (organizational) records that are certified as satisfying Rule 803(6) by "the custodian or another qualified person." Exhibits extracted from websites that are maintained by, for, and in the ordinary course of, a business or other regularly conducted activity can satisfy this rule.[53]

3. Authenticating the date of information posted on a website.

In some cases, a party may need to show not only that a posting was made on a website, but also the date on which the information was generated --- this can be a distinct question from establishing what the website looked like at a particular time, which can be shown by the methods discussed above. Assume, for example, that a video is posted on YouTube on January 1, 2016. If the proponent wants to prove that it was posted on that day, this can be done by a person with knowledge, circumstantial evidence, etc. It is a different question if the proponent needs to show that the information itself was *generated* on a certain day. That will not be shown by proving it was posted on a certain date. For example, in *Sublime v. Sublime Remembered*, 2013 U.S. Dist. LEXIS 103813 (C.D. Cal. July 22, 2013), the plaintiffs brought suit against the defendant for violating a court order prohibiting defendant from performing songs belonging to the plaintiffs. As evidence, the plaintiffs sought to admit a YouTube video of the defendant

[51] See, e.g., Williams v. Long, 585 F. Supp.2d 679, 686–88 & n. 4 (D. Md. 2008) (collecting cases indicating that postings on government websites are self-authenticating).

[52] See, e.g., White v. City of Birmingham, 2015 U.S. Dist. LEXIS 39187 (N.D. Ala. Mar. 27, 2015) (noting sua sponte that news articles from Huntsville Times website (AL.com) "could be found self-authenticating at trial").

[53] See, e.g., United States v. Hassan, 742 F.3d 104, 132–134 (4th Cir. 2014) (Facebook posts, including YouTube videos were self-authenticating under Rule 902(11) where accompanied by certificates from Facebook and Google custodians "verifying that the Facebook pages and YouTube videos had been maintained as business records in the course of regularly conducted business activities"); Randazza v. Cox, 2014 U.S. Dist. LEXIS 49762 (D. Nev. April 10, 2014) (videos posted to YouTube "are self-authenticating as a certified domestic record of a regular conducted activity if their proponent satisfies the requirements of the business-records hearsay exception.").

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performing the prohibited music. The court ruled that the video was not properly authenticated without evidence that it was recorded *after* the court order was issued. The mere fact that it was *posted* after the court order was issued was not enough to establish that the video was what the proponent said it was --- performance of the music after the court order was entered.

Establishing that a video (or any other kind of information posted on a website) was *prepared* on --- or before or after --- a certain date thus presents a separate question of authenticity. But it is a question that can be addressed through the same factors discussed above: for example, by a person with personal knowledge, a forensic expert, and/or circumstantial evidence. Illustrative is *United States v. Bloomfield*, 591 Fed.Appx. 847, 848-49 (11th Cir. 2014), in which the defendant was convicted of felon-firearm possession. The government offered a YouTube video which showed the defendant discharging an AR-15 rifle in front of Fowler Firearms. The date that the video was made was obviously critical. If it was made before the defendant was a convicted felon, then it depicted no crime. The government was not required, necessarily, to prove that the video was taken on a specific day, but it was required to establish that the video was taken after the defendant was convicted of a felony. And the date that the video was posted on YouTube was not the relevant date. The court found the date was properly authenticated in the following passage:

> ● Fowler Firearms's manager testified that Broomfield was a Fowler Firearms member, that on January 21, 2011, Broomfield purchased two boxes of PMC .223 ammunition, and that he had not purchased that ammunition at any other time. Dezendorf stated that the only firearm Fowler Firearms rented to customers at the time that used PMC .223 ammunition was the AR–15 rifle.
>
> ● An employee who had worked at Fowler Firearms for ten years testified that he could discern the approximate date the video was taken. He explained that the video showed side deflectors and lights on the gun range, which Fowler Firearms had installed in late 2010 or early 2011. He also testified that Fowler Firearms paints its floors and walls at the beginning of the season, and the freshly-painted floor and walls seen in the video indicated that the footage was filmed close to the start of 2011.
>
> ● A witness who operated a maintenance business that provided repair and maintenance to Fowler Firearms testified that he installed the lighted baffles shown in the video, in late September or early October of 2010.

All this was more than enough to indicate that the video was taken around the beginning of 2011 --- post-dating the defendant's felony status --- and so depicted the crime of felon-firearm possession.

E. Social Media Postings

"Social media" is defined as "forms of electronic communications (as websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content."[54] Parties have increasingly sought to use social media evidence to their advantage at trial. A common example would be a picture or entry posted on a person's Facebook page, that could be relevant to contradict that person's testimony at trial. If the entry is challenged for authenticity, the proponent must present a prima facie case that the evidence is what the party says it is—e.g., that it is in fact a posting on the person's Facebook page. If the goal is to prove that the page or a post is that of a particular person, authenticity standards are not automatically satisfied by the fact that the post or the page is in that person's name, or that the person is pictured on the post.[55] That is because someone can create a Facebook or other social media page in someone else's name. Moreover, one person may also gain access to another's account.

What more must be done to establish authenticity of a social media page? Most courts have found that it is enough for the proponent to show that the pages and accounts can be tracked through internet protocol addresses associated with the person who purportedly made the post.[56]

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[54] Definition of Social Media, Merriam-Webster, http://www.merriam-webster.com/dictionary/social%20media# (last visited January 16, 2016).

[55] See, e.g., United States v. Vayner, 769 F.3d 125, 132 (2d Cir. 2014), where the court held that a page on the Russian version of Facebook was not sufficiently authenticated simply by the fact that it bore the name and picture of the purported "owner" Zhyltsou:

> It is uncontroverted that information about Zhyltsou appeared on the VK page: his name, photograph, and some details about his life consistent with Timku's testimony about him. But there was no evidence that Zhyltsou himself had created the page or was responsible for its contents. Had the government sought to introduce, for instance, a flyer found on the street that contained Zhyltsou's Skype address and was purportedly written or authorized by him, the district court surely would have required some evidence that the flyer did, in fact, emanate from Zhyltsou. Otherwise, how could the statements in the flyer be attributed to him?

Essentially the court in *Vayner* held that a Facebook page is not self-authenticating. Compare United States v. Encarnacion-LaFontaine, 2016 WL 611925 (2d Cir. Feb. 16, 2016)(threatening Facebook posts were properly authenticated where "the Government introduced evidence that (1) the Facebook accounts used to send the messages were accessed from IP addresses connected to computers near Encarnacion's apartment; (2) patterns of access to the accounts show that they were controlled by the same person; (3) in addition to the Goris threats, the accounts were used to send messages to other individuals connected to Encarnacion; (4) Encarnacion had a motive to make the threats, and (5) a limited number of people, including Encarnacion, had information that was contained in the messages.").

[56] United States v. Hassan, 742 F.3d 104, 133 (4th Cir. 2014) (the trial court did not abuse its discretion in admitting Facebook pages purportedly maintained by two of the defendants; the trial court properly determined that the prosecution had satisfied its burden under Rule 901(a) "by tracking the Facebook pages and Facebook accounts to Hassan's and Yaghi's email addresses via internet protocol addresses"); United States v. Brinson, 772 F.3d 1314 (10th Cir. 2014) (Facebook account linked to the defendant's email).

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Other factors that can be relied upon to support authentication of social media postings include the following:[57]

● testimony from the purported creator of the social network profile and related postings;

● testimony from persons who saw the purported creator establish or post to the page;

● testimony of a witness that she often communicated with the alleged creator of the page through that account;

● expert testimony concerning the results of a search of the social media account holder's computer hard drive;[58]

● testimony about the contextual clues and distinctive aspects in the messages themselves tending to reveal the identity of the purported author;

● testimony regarding the account holder's exclusive access to the originating computer and social media account;

● information from the social media network that links the page or post to the purported author;

● testimony directly from the social networking website that connects the establishment of the profile to the person who allegedly created it and also connects the posting sought to be introduced to the person who initiated it;

● expert testimony regarding how social network accounts are accessed and what methods are used to prevent unauthorized access;

● production pursuant to a document request;

● whether the purported author knows the password to the account, and how many others know it as well;

● that the page or post contains some of the factors previously discussed as circumstantial evidence of authenticity of texts, emails, etc., including:

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[57] See generally Honorable Paul W. Grimm, *Authentication of Social Media Evidence*, 36 AM. J. TRIAL ADVOC. 433 (2013); Richard Raysman and Peter Brown, Authentication of Social Media Evidence, New York Law Journal, November 11, 2011, p. 3.

[58] Honorable Paul W. Grimm, Authentication of Social Media Evidence, 36 AM. J. TRIAL ADVOC. 433, 468 (2013) ("A computer forensic expert can frequently authenticate the maker of social media content. Obviously, you will need to retain the proper expert and ensure that he or she has enough time and information to make the identification. Advance planning is essential, and be mindful of the potentially substantial cost.").

- ¾ nonpublic details of the purported author's life;
- ¾ other items known uniquely to the purported author or a small group including him or her;
- ¾ references or links to, or contact information about, loved ones, relatives, co-workers, others close to the purported author;
- ¾ photos and videos likely to be accessed by the purported author;
- ¾ biographical information, nicknames, not generally accessible;
- ¾ the structure or style of comments that are in the style of the purported author;
- ¾ that the purported author acts in accordance with the contents of the page or post.

Finally, a social media post meeting the foundational requirements of a business record under Fed. R. Evid. 803(6) may be self-authenticating under 902(11). While this may not be enough to authenticate the *identity* of the person posting, it will be enough to establish that the records were not altered in any way after they were posted.[59]

[59] See, e.g., United States v. Hassan, 742 F.3d 104, 134 (4th Cir. 2014):

> The government presented the certifications of records custodians of Facebook and Google, verifying that the Facebook pages and YouTube videos had been maintained as business records in the course of regularly conducted business activities. According to those certifications, Facebook and Google create and retain such pages and videos when (or soon after) their users post them through use of the Facebook or Google servers.

III. Judicial Notice of Digital Evidence

This Best Practices Manual has discussed the many ways that new forms of digital evidence might be authenticated. Almost all of these methods require expenditure of resources. Courts and parties have begun to realize that some of this new digital evidence has reached the point of being an undisputed means of proving a fact. In these circumstances, judicial notice may be used to alleviate the expenditure of resources toward authentication.

Under Fed. R. Evid. 201(b) a court may judicially notice a fact if it is not subject to reasonable dispute. An example of a court taking judicial notice of a fact obtained through an electronic process is found in *United States v. Brooks*, 715 F.3d 1069, 1078 (8th Cir. 2013). The defendant in a bank robbery prosecution challenged the admissibility of GPS data that was obtained from a GPS tracker that the teller placed in the envelope of stolen money. The trial court took judicial notice of the accuracy and reliability of GPS technology. The court of appeals found no error:

> We cannot conclude that the district court abused its discretion in taking judicial notice of the accuracy and reliability of GPS technology. Commercial GPS units are widely available, and most modern cell phones have GPS tracking capabilities. Courts routinely rely on GPS technology to supervise individuals on probation or supervised release, and, in assessing the Fourth Amendment constraints associated with GPS tracking, courts generally have assumed the technology's accuracy.

Another common example of judicial notice of digital information is that courts take judicial notice of distances, locations, and the physical contours of an area by reference to Google Maps.[60]

What follows are some examples of judicial notice of digital information.

1. Government Websites. Judicial notice may be taken of postings on government websites,[61] including:

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[60] See, e.g., United States v. Burroughs, 810 F.3d 833, 835, n.1 (D.C.Cir. 2016) ("We grant the government's motion to take judicial notice of a Google Map. It is a 'source whose accuracy cannot be reasonably questioned,' at least for the purpose of identifying the area where Burroughs was arrested and the general layout of the block."); McCormack v. Hiedeman, 694 F.3d 1004, 1008 (9th Cir. 2012) (relying on Google Maps to determine the distance between two cities; the court held that Google Maps was a website whose accuracy could not reasonably be questioned under Fed. R. Evid. 201(b)(2).). See also Cline v. City of Mansfield, 745 F. Supp. 2d 773, 800 n.23 (N.D. Ohio 2010) (the court took judicial notice that the sun set at 7:47 pm on a particular date according to www.timeanddate.com).

[61] See, e.g., United States v. Head, 2013 U.S. Dist. LEXIS 151805, at *7 n.2 (E.D. Cal. Oct. 22, 2013) ("The court may take judicial notice of information posted on government websites as it can be 'accurately and readily determined from sources whose accuracy cannot reasonably be questioned.'"); Puerto Rico v. Shell Oil Co. (In re MTBE Prods. Liab. Litig.), 2013 U.S. Dist. LEXIS 181837, at *16 (S.D.N.Y. 2013) ("Courts routinely take judicial

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● Federal, state, and local court websites.[62]

● Federal, state, and local agency, department and other entities' websites.[63]

● Foreign government websites.[64]

● International organization websites.[65]

2. Non-Government Websites. Generally, courts are reluctant to take judicial notice of non-governmental websites because the Internet "is an open source" permitting anyone to "purchas[e] an internet address and create a website" and so the information recorded is subject to dispute.[66] A few websites, however, as discussed above, have become a part of daily life — their accuracy is both objectively verifiable and actually verified millions of times a day. Other websites are the online versions of sources that courts have taken judicial notice of for years, and the courts find little reason to distinguish a reputable web equivalent from a reputable hard copy edition.

Examples of Information Found Authentic on Non-Governmental Websites Through Judicial Notice.

● Internet maps (*e.g.*, Google Maps, MapQuest).

● Calendar information.[67]

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notice of data on government websites because it is presumed authentic and reliable").

[62] See, e.g., Feingold v. Graff, 516 F. App'x 223, 226 (3d Cir. 2013).

[63] See, e.g., Lawrence v. Fed. Home Loan Mortg. Corp., 2015 U.S. Dist. LEXIS 40012 (W.D. Tex. Mar. 30, 2015) (federal government's agreement with national bank as posted on government website); Flores v. City of Baldwin Park, 2015 U.S. Dist. LEXIS 22149 (C.D. Cal. Feb. 23, 2015) (municipal police department website).

[64] See, e.g., United States v. Broxmeyer, 699 F.3d 265, 296 (2d Cir. 2012) (websites of governments of Vietnam and Brazil).

[65] See, e.g., Kirtsaeng v. John Wiley & Sons, Inc., 133 S. Ct. 1351, 1367 (2013) (World Bank website).

[66] United States v. Kane, 2013 U.S. Dist. LEXIS 154248 (D. Nev. Oct. 28, 2013).

[67] See, e.g., Tyler v. United States, 2012 U.S. Dist. LEXIS 184007, at *9–*10 n.6 (N.D. Ga. Dec. 6, 2012); Local 282, Int'l Bhd. of Teamsters v. Pile Found. Constr. Co., 2011 U.S. Dist. LEXIS 86644, at *17–*18 n.5 (E.D.N.Y. Aug. 5, 2011).

- Newspaper and periodical articles.[68]

- Online versions of textbooks, dictionaries, rules, charters.[69]

Most non-Governmental websites, even if familiar, are of debatable authenticity and therefore not appropriately the object of judicial notice. Wikipedia is a prime example. Courts have declined requests to take judicial notice of the contents of Wikipedia entries,[70] except for the fact that the contents appear on the site as of a certain date of access.[71]

3. Wayback Machine. Archived versions of websites as displayed on the "wayback machine" (www.archive.org) are frequently the subject of judicial notice,[72] but this is not always the case.[73] Note that it is only the contents of the archived pages that may warrant judicial notice—the dates assigned to archived pages may not apply to images linked to them, and more generally, links on archived pages may direct to the live web if the object of the old link is no longer available.

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[68] See, e.g., Ford v. Artiga, 2013 U.S. Dist. LEXIS 106805, at *19 n.5 (E.D. Cal. July 30, 2013); HB v. Monroe Woodbury Cent. Sch. Dist., 2012 U.S. Dist. LEXIS 141252 (S.D.N.Y. Sept. 27, 2012).

[69] See, e.g., United States v. Mosley, 672 F.3d 586, 591 (8th Cir. 2012) (PHYSICIANS' DESK REFERENCE); Shuler v. Garrett, 2014 U.S. App. LEXIS 2772, at *7 (6th Cir. Feb. 14, 2014) (OXFORD ENGLISH DICTIONARY); Dealer Computer Servs. v. Monarch Ford, 2013 U.S. Dist. LEXIS 11237, at *11 & n.3 (E.D. Cal. Jan. 25, 2013) (American Arbitration Association rules); Morgan Stanley Smith Barney LLC v. Monaco, 2014 U.S. Dist. LEXIS 149419 (D. Colo. Aug. 26, 2014) (FINRA rules); Famous Music Corp. v. 716 Elmwood, Inc., 2007 U.S. Dist. LEXIS 96789, at *12–*13 n.7 (W.D.N.Y. Dec. 28, 2007) (Articles of Association of ASCAP).

[70] See, e.g., Blanks v. Cate, 2013 U.S. Dist. LEXIS 11233, at *8 n.4 (E.D. Cal Jan. 28, 2013) (refusing to take judicial notice of a Wikipedia entry "as such information is not sufficiently reliable"); Stein v. Bennett, 2013 U.S. Dist. LEXIS 126667, at *20-21 n.10 (M.D. Ala. Sept. 5, 2013) ("Wikipedia is not a source that warrants judicial notice"); Gonzales v. Unum Life Ins. Co. of Am., 861 F. Supp. 2d 1099, 1104 n.4 (S.D. Cal. 2012) ("The Court declines Plaintiff's request to take judicial notice of the Wikipedia definition of Parkinson's Disease because the internet is not typically a reliable source of information").

[71] See, e.g., McCrary v. Elations Co., LLC, 2014 U.S. Dist. LEXIS 8443, at *4-5 n.3 (C.D. Cal. Jan. 13, 2014) ("While the court may take judicial notice of the fact that the internet, Wikipedia, and journal articles are available to the public, it may not take judicial notice of the truth of the matters asserted therein").

[72] See, e.g., Under a Foot Plant Co. v. Exterior Design, Inc., 2015 U.S. Dist. LEXIS 38190 (D. Md. Mar. 25, 2015) ("District courts have routinely taken judicial notice of content from The Internet Archive").

[73] See, e.g., Open Text S.A. v. Box, Inc., 2015 U.S. Dist. LEXIS 11312 (N.D. Cal. Jan. 30, 2015) (proffered Wayback Machine printouts not authenticated absent certification from representative of InternetArchive.org).

APPENDIX

Federal Rules of Evidence Most Commonly Used to Establish Authenticity of Digital Evidence

Rule 901. Authenticating or Identifying Evidence

(a) In General. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

(b) Examples. The following are examples only — not a complete list — of evidence that satisfies the requirement:

(1) ***Testimony of a Witness with Knowledge.*** Testimony that an item is what it is claimed to be.

* * *

(3) ***Comparison by an Expert Witness or the Trier of Fact.*** A comparison with an authenticated specimen by an expert witness or the trier of fact.

(4) ***Distinctive Characteristics and the Like.*** The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

* * *

(9) ***Evidence About a Process or System.*** Evidence describing a process or system and showing that it produces an accurate result.

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

* * *

(5) ***Official Publications.*** A book, pamphlet, or other publication purporting to be issued by a public authority.

(6) ***Newspapers and Periodicals.*** Printed material purporting to be a newspaper or periodical.

* * *

(11) ***Certified Domestic Records of a Regularly Conducted Activity.*** The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record — and must make the record and certification available for inspection — so that the party has a fair opportunity to challenge them.

(12) ***Certified Foreign Records of a Regularly Conducted Activity.*** In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification, rather than complying with a federal statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a

criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).

Proposed Additions to Rule 902, Projected Effective Date December 1, 2017:

(13) ***Certified Records Generated by an Electronic Process or System.*** A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11).

(14) ***Certified Data Copied from an Electronic Device, Storage Medium, or File.*** Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent also must meet the notice requirements of Rule 902(11).

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Rule 201. Judicial Notice of Adjudicative Facts

(a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:

(1) is generally known within the trial court's territorial jurisdiction; or

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) Taking Notice. The court:

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) Timing. The court may take judicial notice at any stage of the proceeding.

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Advisory Committee on Evidence Rules

Minutes of the Meeting of April 29, 2016

Alexandria, Virginia

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on April 29, 2016 in Alexandria, Virginia.

The following members of the Committee were present:

Hon. William K. Sessions, Chair
Hon. Brent R. Appel
Hon. Debra Ann Livingston
Hon. John T. Marten (by telephone)
Hon. John A. Woodcock
Daniel P. Collins, Esq.
Paul Shechtman, Esq.
Elizabeth J. Shapiro, Esq., Department of Justice
A.J. Kramer, Esq., Public Defender

Also present were:

Hon. Jeffrey S. Sutton, Chair of the Committee on Rules of Practice and Procedure
Hon. Richard Wesley, Liaison from the Standing Committee
Hon. Solomon Oliver, Liaison from the Civil Rules Committee
Hon. James Dever, Liaison from the Criminal Rules Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Kenneth S. Broun, Consultant to the Committee
Professor Daniel Coquillette, Reporter to the Standing Committee
Timothy Lau, Federal Judicial Center
Rebecca A. Womeldorf, Chief, Rules Committee Support Office
Shelley Duncan, Rules Committee Support Office
Teresa Ohley, Esq., Liaison from the Joint Service Committee on Military Justice
Zoe Oreck, American Association for Justice
Susan Steinman, American Association for Justice
Michael Shepard, Hogan Lovells, American College of Trial Lawyers
Jayme Herschkopf, Supreme Court Fellow
Derek Webb, Law Clerk to Judge Sutton

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I. Opening Business

Approval of Minutes

The minutes of the Fall, 2015 Committee meeting were approved.

January Meeting of the Standing Committee

Judge Sessions reported on the January, 2016 meeting of the Standing Committee. The Evidence Rules Committee had no action items at the meeting. Judge Sessions reported to the Standing Committee about the Hearsay Symposium that the Committee had sponsored in the Fall of 2015. Ideas from that Symposium will be part of the Committee's agenda for the near future.

Departure of Committee Members

Judge Sessions and the entire Committee expressed regret that the terms of two valued Committee members --- Brent Appel and Paul Shechtman --- were ending. Both Brent and Paul were thanked for their stellar service to the Committee. Both stated their appreciation for the work of the Evidence Rules Committee, the quality of its decisionmaking, and the collegiality of the members.

II. Proposed Amendment to Rule 803(16)

Rule 803(16) provides a hearsay exception for "ancient documents." If a document is more than 20 years old and appears authentic, a statement in the document is admissible under the exception for the truth of its contents. At the Spring, 2015 meeting, Committee members unanimously agreed that Rule 803(16) was problematic, as it was based on the false premise that authenticity of a document means that the assertions in the document are reliable. The Committee also unanimously agreed that an amendment would be necessary to prevent the ancient documents exception from providing a loophole to admit large amounts of old, unreliable ESI. The Committee proposed to eliminate Rule 803(16), with the expectation that old documents that are reliable could still be admitted as business records or under the residual exception, and also with the recognition that many documents currently offered under Rule 803(16) could be admitted as party-opponent statements or for the non-hearsay purpose of notice.

The Committee's proposal to abrogate Rule 803(16) was unanimously approved by the Standing Committee for release for public comment. Over 200 public comments were received, and a public hearing was held. Almost all the comment was negative. Most of the comments were to the effect that without the ancient documents exception, important documents in certain

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specific types of litigation would no longer be admissible --- or would be admissible only by expending resources that are currently not necessary under Rule 803(16). Examples of litigation cited by the public comment included cases involving latent diseases; disputes over the existence of insurance; suits against churches alleged to condone sexual abuse by their clergy; cases involving environmental cleanups; and title disputes. Many of the comments concluded that the business records exception and the residual exception are not workable alternatives for ancient documents. The commenters contended that the business records exception requires a foundation witness that may be hard to find, and that the residual exception is supposed to be narrowly construed. Moreover, both these exceptions would require a statement-by-statement analysis, which is not necessary under Rule 803(16), and which would lead to more costs for proponents.

Many of the comments were duplicative, and some were mistaken about the consequences of the change proposed. For example, some of the commenters argued that the amendment would make it impossible to authenticate ancient documents --- but there is no proposal to amend the rules on authentication. Other commenters stated that the amendment would make it harder to prove that a defendant knew about the dangers of a product --- but if a document is offered for notice, it is not covered by the hearsay rule in the first place. Yet on the whole, the public comment established that the proposed amendment raises substantial concerns about the elimination of the ancient documents exception in certain important types of cases.

At the meeting, the Committee was presented with three basic alternatives for responding to the public comment: 1) continue to propose the elimination of Rule 803(16), while adding to the Committee Note the Committee's expectation that the reliable hearsay in ancient documents would be admissible under the business records exception or the residual exception; 2) propose a limitation on, rather than elimination of, Rule 803(16); or 3) withdraw the amendment and try to find some way to monitor whether and when ESI is being offered under the ancient documents exception.

The Committee first decided that it was not appropriate to continue with the proposal to eliminate Rule 803(16) --- the public comment did raise concerns about the effect of the amendment and the costs of prosecuting certain important claims that currently rely on ancient documents. (The public comment also showed that looking at the reported cases does not give a sense of how often the ancient documents exception is actually used --- in part because with ancient documents, there is nothing to report, because there is currently no basis for any objection to the admission of such documents.) The DOJ representative added that there are a number of types of actions in which the government routinely uses ancient documents --- such as CERCLA cases and cases involving title dispute in "rails to trails" litigation --- and that elimination of the ancient documents exception would impose substantial burdens in these cases, because the documents would be difficult to qualify under the residual exception, given the particularized notice requirements of Rule 807. The Committee was sympathetic to the concerns about the costs that would be imposed in particular kinds of existing cases if the ancient documents exception were eliminated.

The Committee next decided that the "do nothing" approach was not acceptable. The Committee unanimously believed that the ESI problem was real --- because ESI can be easily and permanently stored, there is a substantial risk that the terabytes of emails, web pages, and

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texts generated in the last 20 or so years could inundate the courts by way of the ancient documents exception. Computer storage costs have dropped dramatically --- that greatly expands the universe of information that could be potentially offered under the ancient documents exception. Moreover, the presumption of the ancient documents exception was that a hardcopy document kept around for 20 years must have been thought to have some importance; but that presumption is no longer the case with easily stored ESI. The Committee remained convinced that it was appropriate and necessary to get out ahead of this problem --- especially because the use of the ancient documents exception is so difficult to monitor. (The FJC representative outlined to the Committee in detail how difficult it would be to conduct a targeted survey of judges and litigants on the use of ancient documents in litigation.) Moreover, the Committee adhered to its position that Rule 803(16) was simply a flawed rule; it is based on the fallacy that because a document is old and authentic, its contents are reliable.

The Committee then moved to drafting alternatives that would limit rather than eliminate Rule 803(16). The alternatives provided by the Reporter, in response to the public comment, were:

1) "Grandfathering" – limiting the ancient documents exception to documents prepared before a certain date;

2) Adding a necessity requirement --- applying the exception only if the proponent shows that there is no other equally probative evidence to prove the point for which the ancient document is offered;

3) Limiting the exception to hardcopy;

4) Adding a provision that ancient documents would not be admissible if the opponent could show they were untrustworthy;

5) Extending the time period for ancient documents from 20 to 30 years; and

6) Adding a requirement, as in the California rule, that a statement in an ancient document would be admissible only if it has been acted on as true by someone with an interest in the matter (often referred to as a "reliance" requirement).

The Committee thoroughly discussed these alternatives. Some were easily rejected. Thus, limiting the exception to hardcopy was rejected because hardcopy might well be derived from ESI, while on the other hand, an old hardcopy document might be digitized --- and it would be nonsensical to provide that the old hardcopy would be admissible while the same document in digitized form would not. Extending the time period for ancient documents from 20 to 30 years amounted to "kicking the can down the road" because it would simply delay the inevitable decision for ten years --- resulting in two amendments to the same rule (or more than two as the can gets kicked further) where one should do. And adding a reliance requirement would limit the use of ancient documents in the very cases where they are now found necessary, because in many of these cases the plaintiff is introducing an old document precisely to show that a party

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ignored the document; moreover, in many cases, the fact of reliance might well have to be *shown* by ancient documents.

Most of the discussion was about the remaining alternatives --- grandfathering, necessity, and trustworthiness burden-shifting. Ultimately the Committee decided that adding either a necessity requirement or a trustworthiness burden-shifting requirement to the rule would not sufficiently address the public concerns about additional costs in proving up old hardcopy documents. Adding either of these requirements would lead to challenges, *in limine* hearings, and difficult factual determinations about documents that were prepared long ago. The Committee concluded that the best result would be to turn back to its original concern --- the explosion of ESI --- and to leave the current use of ancient documents where it found it. That could only be done by an amendment that would allow the use of hearsay in ancient documents in all the cases in which they were currently being used, but to eliminate the exception going forward in order to prevent the use of Rule 803(16) as a safe harbor for unreliable ESI.

In discussions about the appropriate date for ending the ancient documents exception, the Committee considered several alternatives, and finally --- and unanimously --- decided that 1998 was a fair date. The Committee recognized, of course, that any cutoff date would have a degree of arbitrariness, but it also recognized that the ancient documents exception itself set an arbitrary time period for its applicability. The Committee determined that the cut-off date of January 1, 1998 would mean that the rule would not affect the admissibility of ancient documents in any of the existing cases that were highlighted in the public comment; also, 1998 was a fair date for addressing the rise of ESI.

The Committee considered the possibility that in the future, cases involving latent diseases, CERCLA, etc. would arise. But the Committee concluded that in such future cases, the ancient documents exception was unlikely to be necessary because, going forward from 1998, there was likely to be preserved (reliable) ESI that could be used to prove the facts that are currently proved by scarce hardcopy. If the ESI is generated by a business, then it is likely to be easier to find a qualified witness who is familiar with the electronic recordkeeping than it is under current practice to find a records custodian familiar with hardcopy practices from the 1960's. Moreover, the Committee determined that it would be useful in the Committee Note to emphasize that the residual exception remains available to qualify old documents that are reliable, and to state the Committee's expectation that the residual exception not only could, but *should* be used by courts to admit reliable documents prepared after January 1, 1998 that would have previously been offered under the ancient documents exception.

After extensive discussion, the Evidence Rules Committee unanimously approved the following amendment to Rule 803(16), to be submitted to the Standing Committee with the recommendation that it be forwarded to the Judicial Conference:

(16) ***Statements in Ancient Documents***. A statement in a document ~~that is at least 20 years old~~ <u>that was prepared before January 1, 1998</u> and whose authenticity is established.

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The Committee determined that it was not necessary to send out the proposed amendment for a new round of public comment, as the amendment would not affect the application of the ancient documents exception in any of the cases discussed in any of the public comments. Moreover, a number of the public comments specifically suggested that a grandfathering provision would properly address the Committee's ESI-related concerns while not affecting the use of the exception in the cases in which it is needed and is currently being used.

Finally, the Committee reviewed and approved the proposed Committee Note, which emphasizes the following points:

● The amendment addresses the concern about ESI, and there is no effect on the current use of the exception for documents prepared before 1998.

● In cases involving matters such as latent diseases going forward --- i.e., using records prepared after January 1, 1998 --- the ancient documents exception should not be necessary because of the existence of reliable ESI, and the ability to admit the evidence under reliability-based exceptions such as Rules 803(6) and 807.

● The limitation of the ancient documents exception is not intended to provide a signal that old documents are somehow not to be admitted under other exceptions, particularly Rule 807.

● A document prepared before 1998 might subsequently be altered; to the extent that is so, the alterations would not qualify for admissibility under Rule 803(16).

The proposed Committee Note to the amendment to Rule 803(16), as unanimously approved by the Committee, reads as follows:

The ancient documents exception to the rule against hearsay has been limited to statements in documents prepared before January 1, 1998. The Committee has determined that the ancient documents exception should be limited due to the risk that it will be used as a vehicle to admit vast amounts of unreliable electronically stored information (ESI). Given the exponential development and growth of electronic information around the year 1998, the hearsay exception for ancient documents has now become a possible open door for large amounts of unreliable ESI, as no showing of reliability needs to be made to qualify under the exception.

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The Committee is aware that in certain cases --- such as cases involving latent diseases and environmental damage --- parties must rely on hardcopy documents from the past. The ancient documents exception remains available for such cases for documents prepared before 1998. Going forward, it is anticipated that any need to admit old hardcopy documents produced after January 1, 1998 will decrease, because reliable ESI is likely to be available and can be offered under a reliability-based hearsay exception. Rule 803(6) may be used for many of these ESI documents, especially given its flexible standards on which witnesses might be qualified to provide an adequate foundation. And Rule 807 can be used to admit old documents upon a showing of reliability --- which will often (though not always) be found by circumstances such as that the document was prepared with no litigation motive in mind, close in time to the relevant events. The limitation of the ancient documents exception is not intended to raise an inference that 20 year-old documents are, as a class, unreliable, or that they should somehow not qualify for admissibility under Rule 807. Finally, many old documents can be admitted for the non-hearsay purpose of proving notice, or as party-opponent statements.

The limitation of the ancient documents hearsay exception is not intended to have any effect on authentication of ancient documents. The possibility of authenticating an old document under Rule 901(b)(8) --- or under any ground available for any other document --- remains unchanged.

The Committee carefully considered, but ultimately rejected, an amendment that would preserve the ancient documents exception for hardcopy evidence only. A party will often offer hardcopy that is derived from ESI. Moreover, a good deal of old information in hardcopy has been digitized or will be so in the future. Thus, the line between ESI and hardcopy was determined to be one that could not be drawn usefully.

The Committee understands that the choice of a cut-off date has a degree of arbitrariness. But January 1, 1998 is a rational date for treating concerns about old and unreliable ESI. And the date is no more arbitrary than the 20-year cutoff date in the

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original rule. See Committee Note to Rule 901(b)(8) ("Any time period selected is bound to be arbitrary.").

Under the amendment, a document is "prepared" when the statement proffered was recorded in that document. For example, if a hardcopy document is prepared in 1995, and a party seeks to admit a scanned copy of that document, the date of preparation is 1995 even though the scan was made long after that --- the subsequent scan does not alter the document. The relevant point is the date on which the information is recorded, not when the information is prepared for trial. However, if the content of the document is *itself* altered after the cut-off date, then the hearsay exception will not apply to statements that were added in the alteration.

III. Proposed Amendments to Rule 902 to Allow Certification of Authenticity of Certain Electronic Evidence

At its Spring 2015 meeting, the Committee approved changes that would allow certain electronic evidence to be authenticated by a certification of a qualified person --- in lieu of that person's testimony at trial. The changes would be implemented by two new provisions added to Rule 902. The first provision would allow self-authentication of machine-generated information, upon a submission of a certificate prepared by a qualified person. The second proposal would provide a similar certification procedure for a copy of data taken from an electronic device, medium or file. These proposals are analogous to Rules 902(11) and (12) of the Federal Rules of Evidence, which permit a foundation witness to establish the authenticity of business records by way of certification.

The proposals have a common goal of making authentication easier for certain kinds of electronic evidence that are, under current law, likely to be authenticated under Rule 901 but only by calling a witness to testify to authenticity. The Committee found that the types of electronic evidence covered by the two proposed rules are rarely the subject of a legitimate authenticity dispute, but it is often the case that the proponent is nonetheless forced to produce an authentication witness, incurring expense and inconvenience --- and often, at the last minute, opposing counsel ends up stipulating to authenticity in any event. The self-authentication proposals, by following the approach taken in Rule 902(11) and (12) regarding business records, essentially leave the burden of going forward on authenticity questions to the opponent of the evidence.

The Committee's proposal for an amendment adding new Rules 902(13) and (14) was unanimously approved at the June meeting of the Standing Committee, and the proposed

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amendment was issued for public comment. The public comment was sparse, but generally favorable. A few of the comments provided suggestions for additions to the Committee Note. And one comment, by professors, made an argument that Rule 902(13) is in tension with the Confrontation Clause.

At the meeting, the Committee, in response to the public comments, unanimously agreed to three changes to the Committee Notes:

● A clarification, in both Committee Notes, that the reference to the certification requirements of Rule 902(11) was only to the procedural requirements for a valid certification, and not to the information being certified in that rule. Under Rule 902(11), the content of the certification is an attestation that the admissibility requirements of the business records exception have been met. But the new proposals do not require, or permit, the witness's certification to attest to any aspect of admissibility other than authenticity.

● A minor clarification of the description of "hash value" in the Committee Note to Rule 902(14).

● New language in both Committee Notes --- suggested by the Federal Magistrate Judges Association --- observing that a challenge to the authenticity of electronic evidence may require advance access to technical information and that the need for such access should inform the notice requirements.

The Committee then discussed the concern raised by some professors that a certification made pursuant to Rule 902(13) might violate the defendant's right to confrontation in criminal cases. The Committee was satisfied that there would be no constitutional issue, because the Supreme Court has stated in *Melendez-Diaz v. Massachusetts* that even when a certificate is prepared for litigation, the admission of that certificate is consistent with the right to confrontation if it does nothing more than authenticate another document or item of evidence. That is all that these certificates would be doing under the Rule 902(13) and (14) proposals. The Committee also relied on the fact that the lower courts have uniformly held that certificates prepared under Rule 902(11) do not violate the right to confrontation --- those courts have relied on the Supreme Court's statement in *Melendez-Diaz.* The Committee determined that the problem with the affidavit found testimonial in *Melendez-Diaz* was that it certified the accuracy of a drug test that was itself prepared for purposes of litigation --- a certification cannot render constitutional an underlying report that itself violates the Confrontation Clause.

The Committee noted that even the professors agreed that Rule 902(14) presented no constitutional issue, because the certificate would state only that the electronic data is a true copy --- a process clearly permitted by *Melendez-Diaz.* As to Rule 902(13), the certification is a bit more complicated, because the witness may be attesting that the process leads to an accurate result; but that is no different than certifications under Rule 902(11), under which the affiant states that the record meets the reliability requirements of the business records exception. And these certificates have been uniformly held to be constitutional by the lower courts. There is of course no intention or implication from the amendment that a certification could somehow be a means of bringing otherwise testimonial reports into court. But the Committee concluded that if

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the underlying report is not testimonial, the certification of authenticity will not raise a constitutional issue under the current state of the law.

After full discussion, the Committee unanimously voted to approve proposed Rules 902(13) and (14), and their proposed Committee Notes, to be submitted to the Standing Committee with the recommendation that it be forwarded to the Judicial Conference. The proposed amendments and Committee Notes provide as follows:

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

* * *

(13) *Certified Records Generated by an Electronic Process or System*. A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11).

Committee Note

The amendment sets forth a procedure by which parties can authenticate certain electronic evidence other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and inconvenience of producing a witness to authenticate an item of electronic evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure under which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

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Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule. The Rule specifically allows the authenticity foundation that satisfies Rule 901(b)(9) to be established by a certification rather than the testimony of a live witness.

The reference to the "certification requirements of Rule 902(11) or (12)" is only to the procedural requirements for a valid certification. There is no intent to require, or permit, a certification under this rule to prove the requirements of Rule 803(6). Rule 902(13) is solely limited to authentication and any attempt to satisfy a hearsay exception must be made independently.

A certification under this Rule can establish only that the proffered item has satisfied the admissibility requirements for authenticity. The opponent remains free to object to admissibility of the proffered item on other grounds --- including hearsay, relevance, or in criminal cases the right to confrontation. For example, assume that a plaintiff in a defamation case offers what purports to be a printout of a webpage on which a defamatory statement was made. Plaintiff offers a certification under this Rule in which a qualified person describes the process by which the webpage was retrieved. Even if that certification sufficiently establishes that the webpage is authentic, defendant remains free to object that the statement on the webpage was not placed there by defendant. Similarly, a certification authenticating a computer output, such as a spreadsheet, does not preclude an objection that the information produced is unreliable --- the authentication establishes only that the output came from the computer.

A challenge to the authenticity of electronic evidence may require technical information about the system or process at issue, including possibly retaining a forensic

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technical expert; such factors will effect whether the opponent has a fair opportunity to challenge the evidence given the notice provided.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

* * *

(14) *Certified Data Copied from an Electronic Device, Storage Medium, or File.* Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent also must meet the notice requirements of Rule 902(11).

Committee Note

The amendment sets forth a procedure by which parties can authenticate data copied from an electronic device, storage medium, or an electronic file, other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and inconvenience of producing an authenticating witness for this evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness, and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure in which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

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Today, data copied from electronic devices, storage media, and electronic files are ordinarily authenticated by "hash value." A hash value is a number that is often represented as a sequence of characters and is produced by an algorithm based upon the digital contents of a drive, medium, or file. If the hash values for the original and copy are different, then the copy is not identical to the original. If the hash values for the original and copy are the same, it is highly improbable that the original and copy are not identical. Thus, identical hash values for the original and copy reliably attest to the fact that they are exact duplicates. This amendment allows self-authentication by a certification of a qualified person that she checked the hash value of the proffered item and that it was identical to the original. The rule is flexible enough to allow certifications through processes other than comparison of hash value, including by other reliable means of identification provided by future technology.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule.

The reference to the "certification requirements of Rule 902(11) or (12)" is only to the procedural requirements for a valid certification. There is no intent to require, or permit, a certification under this rule to prove the requirements of Rule 803(6). Rule 902(14) is solely limited to authentication and any attempt to satisfy a hearsay exception must be made independently.

A certification under this Rule can only establish that the proffered item is authentic. The opponent remains free to object to admissibility of the proffered item on other grounds --- including hearsay, relevance, or in criminal cases the right to confrontation. For example, in a criminal case in which data copied from a hard drive is

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proffered, the defendant can still challenge hearsay found in the hard drive, and can still challenge whether the information on the hard drive was placed there by the defendant.

A challenge to the authenticity of electronic evidence may require technical information about the system or process at issue, including possibly retaining a forensic technical expert; such factors will effect whether the opponent has a fair opportunity to challenge the evidence given the notice provided.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

IV. Best Practices Manual on Authentication of Electronic Evidence

The Committee has determined that it can provide significant assistance to courts and litigants in negotiating the difficulties of authenticating electronic evidence, by preparing and publishing a best practices manual. The Reporter has worked on preparing such a manual with Greg Joseph and Judge Paul Grimm. The pamphlet, in final form, was submitted to the Committee for its review and discussion.

The Committee reviewed the pamphlet and found that it would be very helpful to the bench and bar.

It was noted that there is still an issue as to whether the Advisory Committee should be listed as a co-author, or whether the attribution should be less direct --- such as some indication that it had been approved or supported by the Advisory Committee. Another possibility is that the Committee would not be referred to at all. The pamphlet will be submitted as an action item for the Standing Committee at its next meeting, so that the Standing Committee can determine how the Advisory Committee's role in the pamphlet should be described if at all.

V. Possible Amendments to the Notice Provisions in the Federal Rules of Evidence

For the past two meetings, the Committee has considered a project that would provide more uniformity to the notice provisions of the Evidence Rules, and that would also make relatively minor substantive changes to two of those rules.

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The Committee at the Spring meeting agreed upon the following points:

1) The absence of a good cause exception in Rule 807 was problematic and had led to a dispute in the courts about whether that exception should be read into the rule. A good cause exception is particularly necessary in Rule 807 for cases where a witness becomes unavailable after the trial starts and the proponent may need to introduce a hearsay statement from that witness. And it is especially important to allow for a good cause exception when it is a criminal defendant who fails to provide pretrial notice.

2) The request requirement in Rule 404(b) --- that the criminal defendant must request notice before the government is obligated to give it --- is an unnecessary limitation that serves as a trap for the unwary. Most local rules require the government to provide notice as to Rule 404(b) material without regard to whether it has been requested. In many cases, notice is inevitably provided anyway when the government moves in limine for an advance ruling on admissibility of Rule 404(b) evidence. In other cases the request is little more than a boilerplate addition to a Rule 16 request. Committee members therefore determined that there was no compelling reason to retain the Rule 404(b) request requirement --- and that an amendment to Rule 404(b) to eliminate that requirement should be considered even independently of any effort to provide uniformity to the notice provisions.

3) The notice provisions in Rules 412-415 should not be changed. These rules could be justifiably excluded from a uniformity project because they were all congressionally-enacted, are rarely used, and raise policy questions on what procedural requirements should apply in cases involving sexual assaults.

With this much agreed upon, the Committee considered other suggestions for amendment to the notice provisions of Rules 404(b), 609(b), 807 and 902(11). One possibility was a template that would require a proponent to provide "reasonable written notice of an intent to offer evidence under" the specific rule, and to "make the substance of the evidence available to the party -- so that the party has a fair opportunity to meet it. The notice must be provided before trial -- or during trial if the court, for good cause, excuses lack of notice." For a number of reasons, however, the Committee concluded that such a template would not work as applied to all four rules.

For one thing, the template would result in a change to Rule 404(b) that would require the defendant to provide notice for "reverse 404(b)" evidence in a criminal case --- such a change should not be made simply for uniformity's sake. For another, the "substance" requirement would probably constitute a tightening of the government's disclosure obligations under Rule 404(b), which currently requires a disclosure of the "general nature" of the evidence --- again, such a change should not be made purely for uniformity's sake, especially given the fact that Rule 404(b) covers a different kind of evidence than Rule 807. Finally, two of the notice provisions (404(b) and 609(b)) require notice to be provided "before trial" while the other two (807 and 902(11)) require notice to be provided "before the trial or hearing." That difference is justified because the notice provisions in Rules 404(b) and 609(b) are likely to be invoked only

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in the context of a trial, whereas Rules 807 and 902(11) might be invoked on summary judgment as well. It would be counterproductive to change two of these rules simply to provide uniformity.

After discarding the template, the Committee moved to consideration of individual changes that might be made to improve one or more of the notice provisions. Committee members were in favor written notice requirements. Rules 404(b) and 807 currently do not provide for written notice. **Committee members unanimously agreed that a written notice requirement should be added to Rule 807.** But the DOJ representative argued that there was no need to add a requirement of written notice to Rule 404(b), because the Department (the only litigant subject to the Rule 404(b) notice requirement) routinely provides notice in writing. The Committee agreed that there was no need to amend Rule 404(b) if that amendment would have no effect.

The Committee next discussed the Rule 807 requirement that the proponent disclose "the statement and its particulars, including the declarant's name and address." After discussion, the Committee determined that --- independent of any uniformity project --- this phrase should be amended. For one thing, the term "particulars" has led in some cases to petty disputes about the details of the notice provided. For another, the requirement that the proponent disclose the address of the declarant is nonsensical when the declarant is unavailable; it is unnecessary when the declarant is a person or entity whose address is known or can easily be determined; and it is problematic in cases in which disclosure of the address might raise security or privacy issues. **The Committee concluded unanimously that the requirement of disclosing an address should be deleted from Rule 807, and that the term "substance" should replace "particulars."**

The Chair then observed that the Committee has on its agenda the possibility of modest changes to Rule 807 that would make it somewhat easier to invoke. The Committee agreed that it would not be prudent to propose changes to the notice provisions of Rule 807 until the Committee has decided whether other changes to the rule, if any, should be proposed. In sum, it would be appropriate to propose all amendments to Rule 807 at one time.

The Committee further agreed that the proposed amendment to Rule 404(b) --- to delete the requirement that the defendant request notice --- should be held off until other amendments were ready for proposal. Holding off on that amendment is consistent with the intent of the Standing Committee --- that amendments should be packaged, in order to minimize disruption to the bench and bar. The change that would be made to Rule 404(b) is not so significant that it must be made immediately without regard to packaging.

The working proposal for amendment to the Rule 807 notice requirement, approved by the Committee, reads as follows:

(b) Notice. The statement is admissible only if~~, before the trial or hearing~~ the proponent gives an adverse party reasonable written notice of ~~the~~ an intent to offer the statement ~~and its particulars, including the declarant's name and address,~~ -- including its

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substance and the declarant's name -- so that the party has a fair opportunity to meet it. The notice must be provided before the trial or hearing -- or during trial or hearing if the court, for good cause, excuses a lack of earlier notice.

The working draft of the Committee Note provides as follows:

The notice provision has been amended to make three changes in the operation of the Rule.

First, the Rule requires the proponent to disclose the "substance" of the statement. This term is intended to require a description that is sufficiently specific under the circumstances to allow the opponent a fair opportunity to meet the evidence. Cf. Rule 103(a)(2) (requiring the party making an offer of proof to inform the court of the "substance" of the evidence). Prior case law on the obligation to disclose the "particulars" of the hearsay statement may be instructive, but not dispositive, of the proponent's obligation to disclose the "substance" of the statement under the Rule as amended. The prior requirement that the declarant's address must be disclosed has been deleted; that requirement was nonsensical when the declarant was unavailable, and unnecessary in the many cases in which the declarant's address was known or easily obtainable. If prior disclosure of the declarant's address is critical and cannot be otherwise obtained by the opponent, then the opponent can seek relief from the court.

Second, the Rule now requires that the notice be in writing --- which includes notice in electronic form. See Rule 101(b)(6). Requiring the notice to be in writing provides certainty and reduces arguments about whether notice was actually made.

Finally, the pretrial notice provision has been amended to provide for a good cause exception --- the same exception found in Rule 404(b). Most courts have applied a good cause exception under Rule 807 even though it was not specifically provided in the original Rule, while some courts have not. Experience under the residual exception has

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shown that a good cause exception is necessary in certain limited situations. For example, the proponent may not become aware of the existence of the hearsay statement until after the trial begins; or the proponent may plan to call a witness who without warning becomes unavailable during trial, and the proponent must then resort to residual hearsay. Where notice is made during the trial, the general requirement that notice must be in writing need not be met.

The Rule retains the requirement that the opponent receive notice in a way that provides a fair opportunity to meet the evidence. When notice is provided during trial after a finding of good cause, the court may need to consider protective measures, such as a continuance, to assure that the opponent has time to prepare for the particularized kind of argument that is necessary to counter hearsay offered under the residual exception.

VI. Proposal to Expand the Residual Exception

At previous meetings the Committee has had some preliminary discussion on whether Rule 807 --- the residual exception to the hearsay rule --- should be expanded to allow the admission of more hearsay, if it is reliable. Expansion of the residual exception might have the effect of providing more flexibility, and it could also be part of an effort to reassess some of the more controversial categorical hearsay exceptions, such as those for ancient documents, excited utterances and dying declarations. Limitations on those exceptions could be easier to implement if it could be assured that reliable hearsay currently fitting under those exceptions could be admitted under the residual exception. But currently, the residual exception is, by design, to be applied only in rare and exceptional circumstances.

The Committee discussed the possibilities of expanding the residual exception at the Spring meeting. The Committee recognized the challenge: the goal would be to allow the residual exception to be used somewhat more frequently, without broadening it so far that it would overtake the categorical exceptions entirely and lead to a hearsay system that was controlled by court discretion, with unpredictable outcomes. At the Hearsay Symposium, the Committee heard repeatedly from lawyers that they wanted predictable hearsay exceptions --- judicial discretion would lead to inconsistent results and lack of predictability would raise the costs of litigation and would make it difficult to settle cases.

Within these constraints, the Committee, after substantial discussion, preliminarily agreed on the following principles regarding Rule 807:

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● The requirement that the court find trustworthiness "equivalent" to the circumstantial guarantees in the Rule 803 and 804 exceptions should be deleted. That standard is exceedingly difficult to apply, because there is no unitary standard of trustworthiness in the Rule 803 and 804 exceptions. It is common ground that statements falling within the Rule 804 exceptions are not as reliable as those admissible under Rule 803; and it is also clear that the bases of reliability differ from exception to exception. Moreover, one of the exceptions subject to "equivalence" review --- Rule 804(b)(6) forfeiture --- is not based on reliability at all. Given the difficulty of the "equivalence" standard, a better approach is simply to require the judge to find that the hearsay offered under Rule 807 is trustworthy.

● Trustworthiness can best be defined as a consideration of both circumstantial guarantees and corroborating evidence. Most courts find corroborating evidence to be relevant to the reliability enquiry, but some do not. An amendment would be useful to provide uniformity in the approach to evaluating trustworthiness under the residual exception --- and substantively, that amendment should specifically allow the court to consider corroborating evidence, as corroboration is a typical source for assuring that a statement is reliable.

● The requirements in Rule 807 that the residual hearsay must be proof of a "material fact" and that admission of residual hearsay be in "the interests of justice" have not served any purpose. The inclusion of the language "material fact" is in conflict with the studious avoidance of the term "materiality" in Rule 403 --- and that avoidance was well-reasoned, because the term "material" is so fuzzy. The courts have essentially held that "material" means "relevant" --- and so nothing is added to Rule 807 by including it there. Likewise nothing is added to Rule 807 by referring to the interests of justice because that guidance is already provided by Rule 102. These provisions were added to the residual exception to emphasize that the exception was to be used only in truly exceptional situations. Deleting them might change the tone a bit, to signal that while hearsay must still be reliable to be admitted under Rule 807, there is no longer a requirement that the use must be rare and exceptional.

● The requirement in the residual exception that the hearsay statement must be "more probative than any other evidence that the proponent can obtain through reasonable efforts" should be retained. This will preserve the rule that proponents cannot use the residual exception unless they need it. And it will send a signal that the changes proposed are modest --- there is no attempt to allow the residual exception to swallow the categorical exceptions, or even to permit the use the residual exception if the categorical exceptions are available.

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What follows is the working draft of an amendment to Rule 807 that the Committee has tentatively approved and will be considered further at the next meeting (including the amendment to the notice provision discussed above).

Rule 807. Residual Exception

(a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

(1) ~~the statement has equivalent circumstantial guarantees of trustworthiness~~ the court determines, after considering the pertinent circumstances and any corroborating evidence, that the statement is trustworthy.; and

~~**(2)** it is offered as evidence of a material fact;~~

(~~3~~ 2) it is more probative on the point for which it is offered than ~~any~~ other evidence that the proponent can obtain through reasonable efforts~~; and~~

~~**(4)** admitting it will best serve the purposes of these rules and the interests of justice~~.

(b) Notice. **(b) Notice.** The statement is admissible only if~~, before the trial or hearing~~ the proponent gives an adverse party reasonable written notice of ~~the~~ an intent to offer the statement ~~and its particulars, including the declarant's name and address,~~ -- including its substance and the declarant's name -- so that the party has a fair opportunity to meet it. The notice must be provided before the trial or hearing -- or during trial or hearing if the court, for good cause, excuses a lack of earlier notice.

Finally, the Committee decided that it would be useful to convene a miniconference on the morning of the Fall 2016 meeting, to have judges, lawyers and academics provide commentary on the proposed changes to Rule 807.

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VII. Proposal to Amend Rule 801(d)(1)(A)

Over the last few meetings, the Committee has been considering the possibility of expanding substantive admissibility of certain prior statements of testifying witnesses --- the rationale of that expansion being that unlike other forms of hearsay, the declarant is subject to cross-examination about the statement. At the Symposium on Hearsay in October, 2015, a panel was devoted to treatment of prior witness statements.

The Committee's discussions at the previous two meetings, and the presentations at the Symposium, have served to narrow the Committee's focus on any possible amendment that would expand admissibility of prior witness statements. Here is a synopsis of the Committee's prior determinations:

- While there is a good argument that prior witness statements should not be treated as hearsay at all, amending the hearsay rule itself (Rule 801(a)-(c)) is not justified. That rule is iconic, and amending it to exclude prior witness statements will be difficult and awkward. Therefore any amendment should focus on broadening the exemption provided by Rule 801(d)(1).

- The focus on Rule 801(d)(1) should be narrowed further to the subdivision on prior inconsistent statements: Rule 801(d)(1)(A). The current provision on prior consistent statements --- Rule 801(d)(1)(B) --- was only recently amended, and that amendment properly captures the statements that should be admissible for their truth. Any expansion of Rule 801(d)(1)(B) would untether the rule from its grounding in rehabilitating the witness, and would allow parties to strategically create evidence for trial. Likewise, the current provision of prior statements of identification --- Rule 801(d)(1)(C) --- has worked well and is not controversial; there is no reason, or even a supporting theory, to expand admissibility of such statements.

At the Spring meeting, the Committee considered two possible ways to amend Rule 801(d)(1)(A) to provide for broader substantive admissibility of prior inconsistent statements. The current provision provides substantive admissibility only in unusual cases --- where the declarant made the prior statement under oath at a formal proceeding. The two possibilities for expansion presented were: 1) allowing for substantive admissibility of *all* prior inconsistent statements, as is the case in California, Wisconsin, and a number of other states; and 2) allowing substantive admissibility only when there is proof --- other than a witness's statement --- that the prior statement was actually made, as is the procedure in Connecticut, Illinois, and several other states.

The Committee quickly determined that it would not propose an amendment that would provide for substantive admissibility of all prior inconsistent statements. The Committee was concerned about the possibility that a prior inconsistent statement could be used as critical substantive proof even if the witness denied ever making it and there was a substantial dispute that it was ever made. Several Committee members noted that it would often be costly and

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distracting to seek to prove whether a prior inconsistent statement was made if there is no reliable record of it.

The Committee next turned its discussion to allowing substantive admissibility of prior inconsistent statements where there is in fact proof that it was made --- such as a statement that was recorded or was signed by the witness. Several members noted that where a statement is made at a police station, even if it is signed or audio recorded, the witness might have an argument that it was made under pressure --- and that many people who confess at the station do in fact repudiate their statements once they get a lawyer. Others responded that while audio recordings and signed statements are subject to argument as to how and perhaps even whether they were made, the same is not true for video recordings. A statement that is recorded on video might be explained away by the witness at trial --- which is perfectly suited to the trial context --- but it is all but impossible to deny that a statement was made when it has been video recorded. Moreover, any indication of police pressure or overreaching is likely to be presented in the video itself. Other members noted that allowing substantive admissibility of videotaped inconsistent statements could lead to more statements being videotaped in expectation that they might be useful substantively--- which is a good result even beyond its evidentiary consequences.

Finally, a number of Committee members noted that one of the major costs of the current rule is that a confounding limiting instruction must be given whenever a prior inconsistent statement is admissible for impeachment purposes but not for its substantive effect. That cost may be justified when there is doubt that a prior statement was fairly made, but it may well be unjustified when the prior statement is on video --- as there is easy proof of the statement and its circumstances if the witness denies making it or tries to explain it away.

The Committee took a straw vote and five members of the Committee voted in favor of an amendment to Rule 801(d)(1)(A) that would provide for substantive admissibility of a prior inconsistent statement if it was video recorded. Three members were opposed. The Committee resolved to take up the matter in the next two meetings to determine whether an amendment would be formally proposed for issuance for public comment in the Fall of 2017.

The working draft of an amendment that would allow substantive admissibility for videotaped prior inconsistent statements provides as follows:

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

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(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and ~~was~~:

(i) was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition; or

(ii) was recorded on video and is available for presentation at trial; or

(B) is consistent with the declarant's testimony and is offered:

(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

(C) identifies a person as someone the declarant perceived earlier.

A working draft of the Committee Note provides as follows:

The amendment provides for greater substantive admissibility of inconsistent statements of a testifying witness, which is appropriate because the declarant is by definition testifying under oath and is subject to cross-examination about the statement. The requirement that the statement be made under oath at a former proceeding is unnecessarily narrow. That requirement stemmed mainly from a concern that it was necessary to regulate the possibility that the prior statement was never made. But as shown in the practice of some states, there are less onerous alternatives that can assure that what is introduced is exactly what the witness said. The best proof that the witness made the statement is that it is video recorded. That is the safeguard provided by the amendment.

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While the amendment expands the substantive admissibility for prior inconsistent statements, it does not affect the use of any prior inconsistent statement for impeachment purposes. A party may wish to introduce an inconsistent statement not to show that the witness's testimony is false and prior statement is true, but rather to show that neither is true. Rule 801(d)(1)(A) does not apply if the proponent is not seeking to admit the prior inconsistent statement for its truth. If the proponent is offering the statement solely for impeachment, it does not fit the definition of hearsay under Rule 801(c), and so Rule 801(d)(1)(A) never comes into play.

VIII. Proposals to Amend Rule 803(2)

Four separate proposals have been made by academics for amending Rule 803(2), the hearsay exception for excited utterances (in addition to Judge Posner's suggestion that the exception be eliminated, which the Committee has previously considered and rejected). The Committee considered all four proposals at the Spring meeting.

One proposal was to add the word "continuous" to the rule --- requiring the declarant to be in a continuous state of excitement for the period between the startling event and the statement. The Committee found no need to make this change. The text and the case law already requires the statement to be made while under the continuous influence of the startling event. The single case cited as problematic – *United States v. Napier* --- is one in which there is a new startling event, and the declarant made a statement that related not only to that new event but also to a previous startling event. Adding the word "continuous" would not change the result in that case. More importantly, the case is correctly decided because the statement was in fact made while the declarant was under the effect of the second startling event. Finally, even if the case were problematic, the fact that it is the only federal case cited as raising the so-called problem, in 40 years of litigation under Federal Rule 803(2), is indicative that there is no serious problem worth addressing.

Other proposals were made in response to the allegation that the excited utterance exception does not provide a sufficient guarantee that evidence admitted under the exception will be reliable. One proposal was to add language --- derived from the 2014 amendment to Rule 803(6) --- that would allow the court to exclude the statement if the opponent could show that the excited utterance was in fact untrustworthy. Another proposal was to add language --- derived from Rule 804(b)(3) --- that would require the proponent to show corroborating circumstances

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clearly indicating that the excited utterance was trustworthy. And a third proposal was to transfer the exception to Rule 804, so that excited utterances would not be admissible unless the declarant is shown to be unavailable to testify.

The Committee decided not to proceed on any of these proposals. For one thing, the proposals would have consequences beyond Rule 803(2) --- consideration would have to be given to similar treatment for other exceptions that have been found controversial, such as the exceptions for present sense impressions and state of mind. Thus, proposing an amendment to Rule 803(2) at this point would be contrary to a systematic approach to amending the Federal Rules of Evidence. Second, and more importantly, the Committee relied on a lengthy report prepared by the FJC representative, who analyzed the social science studies that have been conducted regarding the premises of Rules 803(1) (the present sense impression exception) and 803(2) --- specifically whether there is support for the propositions that immediacy and excitedness tend to guarantee reliability. The FJC representative concluded that there is significant empirical data supporting both of these premises. That is, social science data support the premises that 1) it takes time to make up a good lie, and 2) startlement makes it more difficult to make up a good lie. Consequently, the Committee determined that there was no need at this point to amend Rule 803(2) --- or Rule 803(1), for that matter --- due to any reliability concerns.

IX. Consideration of a Change from Categorical Hearsay Exceptions to Guidelines

At the Hearsay Symposium in Fall 2015, Judge Shadur argued that the hearsay rule might be usefully changed to parallel the sentencing guidelines --- i.e., a list of factors, which guide discretion, but which allow the judge to depart in various circumstances. The existing hearsay exceptions might be reconstituted as standards or guidelines rather than hard rules. Similarly, a Committee member suggested that the rule might be structured as allowing for discretion to admit hearsay, with the existing exceptions set forth as illustrations --- that is, it could be structured in the same way as Rule 901(a). The Committee directed the Reporter to prepare a memorandum for the Spring meeting that would evaluate the viability of replacing the current rule-based system with a system of guided discretion that would include a list of standards or illustrations taken from the existing exceptions.

The Reporter prepared the report for the Spring meeting. The report suggested that at this point, 40 years into the Federal Rules of Evidence, any perceived advantages in switching to a guidelines system (in terms of adding flexibility) would be outweighed by the costs (including substantial disruption; the uncertainty created by greater judicial discretion in ruling on hearsay; increased motion practice; and increased discovery cost because virtually any hearsay statement would be potentially admissible). The Committee, after deliberation, agreed with this assessment.

In the memorandum for the Committee, the Reporter raised as a lesser alternative a system in which the categorical hearsay exceptions were retained, but two changes could be made: 1) add a safety valve applicable to all the exceptions allowing a judge to exclude

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otherwise admissible hearsay if the opponent could show that it was untrustworthy; and 2) amend Rule 807 to allow for more frequent and easier use. Such a system would attempt to address two oft-stated critiques about the hearsay exceptions: 1) that many of them admit unreliable evidence; and 2) that the categorical system does not adapt well to hearsay that is reliable but doesn't fit into exceptions.

But the Committee unanimously rejected the proposed alternative, on the ground that it would inject too much discretion into the system. At the Hearsay Symposium, the Committee heard loud and clear from the lawyers that rules were needed to provide guidance, stability and consistency. Allowing more discretion for the court to admit or exclude hearsay which it happened to find reliable or unreliable would add substantial uncertainty and inconsistency, making it more difficult to settle, obtain summary judgment, and prepare for trial. Moreover, adding so much more discretion would provide a "home team advantage" in that local counsel would learn over time the personal inclinations of a local judge in treating a hearsay problem.

Instead of an across-the-board increase of discretion to exclude and admit hearsay, the Committee opted to consider modest changes to the residual exception, discussed above --- with the goal being to make that exception somewhat more useful, without injecting too much discretion into the system. Committee members recognized that the change to the residual exception would be in the nature of a tightrope walk, which is one of the reasons that a miniconference on the possible change would be so useful.

X. Consideration of a Possible Amendment to Rule 803(22)

Rule 803(22) is a hearsay exception that allows judgments of conviction to be offered to prove the truth of the facts essential to the conviction. The exception carves out two kinds of convictions that are not covered: 1) convictions resulting from a nolo contendere plea; and 2) misdemeanor convictions.

Judge Graber, a member of the Standing Committee, asked the Advisory Committee to consider whether these two limitations on the exception were justified --- if not, the proposal would be to eliminate those carve-outs and treat nolo contendere and misdemeanor convictions the same as other convictions under the Rule.

The Reporter prepared a memorandum, suggesting that the two limitations in Rule 803(22) were in fact justified. The Committee agreed with the Reporter's assessment as to both those limitations. The Committee's rationales were as follows:

> 1. The reason for the nolo contendere carve-out is that Rule 410 provides that evidence of a nolo *plea* is not admissible in a subsequent civil or criminal case. As the Ninth Circuit has stated, "Rule 410's exclusion of a nolo contendere plea would be meaningless if all it took to prove that the defendant committed the crime charged was a certified copy of the inevitable judgment of conviction resulting from the plea." *United States v. Nguyen*, 465 F.3d 1128, 1131 (9th Cir. 2006). It might be argued that allowing nolo pleas is bad policy, but consideration of that question is beyond the scope of

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evidence rulemaking. Assuming that allowing nolo pleas is substantively correct, then the decision made to protect them as a means of encouraging compromise in Rule 410 is valid, and that policy should not be undermined by allowing admission of the facts supporting the conviction under Rule 803(22).

2. The reason for the misdemeanor carve-out is that misdemeanors, as a class, are less likely to be contested than felonies, and therefore there is less likely to be a reliable determination (or concession) that would justify admitting the underlying facts for their truth. One Committee member pointed out that in many jurisdictions, indigent defendants plead guilty to misdemeanors simply because they cannot make cash bail. Another member pointed out that if the defendant is indigent and a misdemeanor does not lead to jail time, the state is not required to provide counsel; thus a fair number of misdemeanor convictions are imposed without the defendant having a lawyer. Committee members recognized that some misdemeanor convictions might be highly contested, but noted that when that is so, courts have employed the residual exception to allow admission of the underlying facts for their truth. Thus, adding misdemeanor convictions to Rule 803(22) is not necessary to cover cases where the facts were truly contested, and would on the other hand lead to admission of facts that have clearly not been contested.

The Committee voted unanimously not to proceed with an amendment to Rule 803(22).

XI. Consideration of a Suggestion That Rule 704(b) Be Eliminated

The Reporter informed the Committee of a law review article that advocated elimination of Rule 704(b), which provides that in a criminal case, an expert may not testify that the defendant did or did not have the requisite mental state to commit the crime charged. The Reporter stated that before writing up a memorandum on the subject for the next meeting, he wished to get the Committee's preliminary reaction to eliminating the subdivision, as it presented a question of process: because Rule 704(b) was directly enacted by Congress, would it be appropriate to propose its elimination?

The Committee determined that two special circumstances applied that should counsel caution: 1) The proposal was to eliminate the exception entirely, as opposed to making changes that might improve the rule; and 2) Rule 704(b) was part of the Insanity Defense Reform Act --- a broad statutory overhaul of the insanity defense; because Rule 704 (b) was part of an integrated approach, it is possible that deleting the provision would have an effect on Congressional objectives beyond the Federal Rules of Evidence.

Consequently, the Committee unanimously concluded that it would not proceed with the proposal to eliminate Rule 704(b).

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XII. Recent Perceptions (eHearsay)

The Committee has decided not to proceed on a proposal that would add a hearsay exception intended to address the phenomenon of electronic communication by way of text message, tweet, Facebook post, etc. The primary reason stated for the proposed exception is that these kinds of electronic communications are an ill-fit for the standard hearsay exceptions, and that without the exception reliable electronic communications will be either 1) excluded, or 2) admitted but only by improper application of the existing exceptions. The exception proposed was for "recent perceptions" of an unavailable declarant.

The Committee's decision not to proceed with the recent perceptions exception was mainly out of the concern that the exception would lead to the admission of unreliable evidence. That decision received support from the study conducted by the FJC representative on social science research. The studies indicate that lies are more likely to be made when outside another person's presence --- for example, by a tweet or Facebook post.

The Committee did, however, resolve to continue to monitor the practice and case law on electronic evidence and the hearsay rule, in order to determine whether there is a real problem of reliable hearsay either being excluded or improperly admitted by misapplying the existing exceptions.

For the Spring meeting, the Reporter submitted, for the Committee's information, a short outline on federal case law involving eHearsay. Nothing in the outline to date indicates that reliable eHearsay is being routinely excluded, nor that it is being admitted by misapplying the existing exceptions. Most eHearsay seems to be properly admitted as party-opponent statements, excited utterances, or state of mind statements. And many statements that are texted or tweeted are properly found to be not hearsay at all. At most there was only one or two reported cases in which hearsay was excluded that might have been admitted under a recent perceptions exception.

The reporter will continue to monitor cases involving eHearsay and will keep the Committee apprised of developments.

XIII. *Crawford* Developments

The Reporter provided the Committee with a case digest and commentary on all federal circuit cases discussing *Crawford v. Washington* and its progeny. The cases are grouped by subject matter. The goal of the digest is to allow the Committee to keep apprised of developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions.

The Reporter's memorandum noted that the law of Confrontation continued to remain in flux. The Supreme Court has denied certiorari in a number of cases raising the question about the meaning of the Supreme Court's muddled decision in *Williams v. Illinois*: meaning that courts

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are still trying to work through how and when it is permissible for an expert to testify on the basis of testimonial hearsay. Moreover, the Supreme Court last term decided *Ohio v. Clark,* in which statements made by a child his teachers --- about a beating he received from the defendant --- were found not testimonial, even though the teacher was statutorily required to report such statements to law enforcement. The new decision in *Clark*, together with the uncertainty created by *Williams* and other decisions, suggests that it is not appropriate at this point to consider any amendment to the Evidence Rules to deal with Confrontation issues. And the fact that a new appointment to the Court might affect the development of the law of confrontation is another reason for adopting a wait-and-see approach. The Committee resolved to continue monitoring developments on the relationship between the Federal Rules of Evidence and the accused's right to confrontation.

XIV. Next Meeting

The location and date of the next meeting is yet to be determined.

Respectfully submitted,

Daniel J. Capra

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TAB 3

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

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DONALD W. MOLLOY
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

TO: **Hon. Jeffrey S. Sutton, Chair**
Committee on Rules of Practice and Procedure

FROM: **Hon. Steven M. Colloton, Chair**
Advisory Committee on Appellate Rules

RE: **Report of Advisory Committee on Appellate Rules**

DATE: **May 18, 2016**

I. Introduction

The Advisory Committee on Appellate Rules met on April 5, 2016 in Denver, Colorado. At this meeting and in subsequent email votes, the Committee decided to propose four sets of amendments for publication. As discussed in Part II below, these amendments would:

(1) conform Appellate Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), and 39(e)(3) to the proposed revision of Civil Rule 62 by altering clauses that use the term "supersedeas bond";

(2) allow a court to prohibit or strike the filing of an amicus brief based on party consent under Appellate Rule 29(a) when filing the brief might cause a judge's disqualification;

(3) delete a question in Appellate Form 4 that asks a movant seeking to proceed in forma pauperis to provide the last four digits of his or her social security number; and

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(4) revise Appellate Rule 25 to address electronic filing, signatures, service, and proof of service in a manner conforming to the proposed revision of Civil Rule 5.

Part III of this memorandum presents several information items. One item concerns whether Appellate Rules 26.1 and 29(c) should require litigants to make additional disclosures to aid judges in deciding whether to recuse themselves.

Detailed information about the Committee's activities can be found in the attached draft of the minutes of the April meeting and in the attached agenda. The Committee has scheduled its next meeting for October 13-14, 2016, in Washington, D.C. Judge Neil Gorsuch will preside as the new chair of the Advisory Committee.

II. Action Items – for Publication

The Appellate Rules Committee presents the following four action items for publication.

A. Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), 39(e)(3): Revising clauses that use the term "supersedeas bond" to conform with the proposed revision of Civil Rule 62(b) [Item 12-AP-D]

The Advisory Committee on Civil Rules is proposing amendments to Civil Rule 62, which concerns stays of judgments and proceedings to enforce judgments. Rule 62(b) currently says: "If an appeal is taken, the appellant may obtain a stay by supersedeas bond . . . ." The proposed amendments will eliminate the antiquated term "supersedeas" and allow an appellant to provide "a bond or other security." A letter of credit is one possible example of security other than a bond.

The Appellate Rules use the term "supersedeas bond" in Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), and 39(e)(3). These rules must be amended to conform to the revision of Civil Rule 62(b). Most of the required amendments merely change the term "supersedeas bond" to "bond or other security," with slight variations depending on the context. The proposed amendments to Rule 8(b) are a little more complicated. Rule 8(b) provides jurisdiction to enforce a supersedeas bond against the "surety" who issued the supersedeas bond. Because Rule 62(b) now authorizes both bonds and other forms of security, the term "surety" is now too limiting. For example, the issuer of a letter of credit is not a surety. The Committee proposes amending Rule 8(b) so that the terms encompass sureties and other security providers.

The Committee intends to conform the Appellate Rules to proposed Civil Rule 62 and does not intend any other change in meaning. The Committee has spelled out this objective in the Advisory Committee Notes.

Rule 8. Stay or Injunction Pending Appeal

(a) Motion for Stay.

(1) **Initial Motion in the District Court.** A party must ordinarily move first in the district court for the following relief:

* * *

(B) approval of a ~~supersedeas~~ bond or other security provided to obtain a stay of judgment; * * *

* * *

(2) **Motion in the Court of Appeals; Conditions on Relief.** A motion for the relief mentioned in Rule 8(a)(1) may be made to the court of appeals or to one of its judges.

* * *

(E) The court may condition relief on a party's filing a bond or other ~~appropriate~~ security in the district court.

(b) Proceeding Against a Surety or Other Security Provider. If a party gives security in the form of a bond, other security, ~~or~~ stipulation, or other undertaking with one or more sureties or other security providers, each ~~surety~~ provider submits to the jurisdiction of the district court and irrevocably appoints the district clerk as ~~the surety's~~ its agent on whom any papers affecting the ~~surety's~~ its liability on the bond or undertaking may be served. On motion, a ~~surety's~~ security provider's liability may be enforced in the district court without the necessity of an independent action. The motion and any notice that the district court prescribes may be served on the district clerk, who must promptly mail a copy to each surety whose address is known.

Committee Note

The amendments to subdivisions (a)(1)(B) and (b) conform this rule with the amendment of Federal Rule of Civil Procedure 62. Rule 62 formerly required a party to provide a "supersedeas bond" to obtain a stay of the judgment and proceedings to enforce the judgment. As amended, Rule 62(b)(2) allows a party to obtain a stay by providing a "bond or other security."

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Rule 11. Forwarding the Record

* * *

(g) Record for a Preliminary Motion in the Court of Appeals. If, before the record is forwarded, a party makes any of the following motions in the court of appeals:

- for dismissal;
- for release;
- for a stay pending appeal;
- for additional security on the bond on appeal or on a ~~supersedeas~~ bond or other security provided to obtain a stay of judgment; or
- for any other intermediate order—

the district clerk must send the court of appeals any parts of the record designated by any party.

Committee Note

The amendment of subdivision (g) conforms this rule with the amendment of Federal Rule of Civil Procedure 62. Rule 62 formerly required a party to provide a "supersedeas bond" to obtain a stay of the judgment and proceedings to enforce the judgment. As amended, Rule 62(b)(2) allows a party to obtain a stay by providing a "bond or other security."

Rule 39. Costs

* * *

(e) Costs on Appeal Taxable in the District Court. The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule:

(1) the preparation and transmission of the record;

(2) the reporter's transcript, if needed to determine the appeal;

(3) premiums paid for a ~~supersedeas~~ bond or other ~~bond~~ security to preserve rights pending appeal; and

58 (4) the fee for filing the notice of appeal.

59 **Committee Note**

60 The amendment of subdivisions (e)(3) conforms this rule with the amendment of
61 Federal Rule of Civil Procedure 62. Rule 62 formerly required a party to provide a
62 "supersedeas bond" to obtain a stay of the judgment and proceedings to enforce the
63 judgment. As amended, Rule 62(b)(2) allows a party to obtain a stay by providing
64 a "bond or other security."

B. Rule 29(a): Limitations on the Filing of Amicus Briefs by Party Consent [Item 14-AP-D]

Appellate Rule 29(a) specifies that an amicus curiae may file a brief with leave of the court or without leave of the court "if the brief states that all parties have consented to its filing." Several circuits have adopted local rules that forbid the filing of a brief by an amicus curiae when the filing could cause the recusal of one or more judges. For example, Second Circuit Local Rule 29.1(a) says: "The court ordinarily will deny leave to file an amicus brief when, by reason of a relationship between a judge assigned to hear the proceeding and the amicus curiae or its counsel, the filing of the brief might cause the recusal of the judge." The D.C., Fifth, and Ninth Circuits have similar local rules. These rules are inconsistent with Rule 29(a) because they do not allow the filing of amicus briefs based solely on consent of the parties.

The Advisory Committee presented a proposed amendment to Rule 29(a) in January 2016. Members of the Standing Committee made suggestions concerning the text and raised some policy questions that warranted further discussion. The Advisory Committee considered these matters at its April 2016 meeting and now submits a revised proposal for publication.

1. *Revised Proposal for Publication*

The Advisory Committee submits the following revised proposal for publication. The proposal differs from the January 2016 proposal in three ways. First, the proposed amendment no longer specifies that courts must act "by local rule." Courts may act by local rule, order, or any other means. Second, the revision modifies the text to clarify that local courts may both prohibit the filing of a brief that would cause recusal and also strike a brief after it has been filed if the potential for disqualification is discovered later in a screening process. Third, the rule contains two minor stylistic changes: deletion of a hyphen between "amicus curiae" and changing of the phrase "disqualification of a judge" to "a judge's disqualification."

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1 **Rule 29. Brief of an Amicus Curiae**

2 (a) **When Permitted.** The United States or its officer or agency or a state may file
3 an amicus- curiae[1] brief without the consent of the parties or leave of court. Any
4 other amicus curiae may file a brief only by leave of court or if the brief states that
5 all parties have consented to its filing, except that a court of appeals may strike[2] or
6 may prohibit[3] the filing of an amicus brief that would result in a judge's
7 disqualification.[4]

8 * * *

9 **Committee Note**

10 The amendment authorizes orders or local rules, such as those previously adopted
11 in some circuits, that prohibit the filing of an amicus brief by party consent if the
12 brief would result in a judge's disqualification. The amendment does not alter or
13 address the standards for when an amicus brief requires a judge's disqualification.[5]

2. *Four Additional Issues Raised at the January 2016 Standing Committee*

The Advisory Committee also considered four additional issues raised at the January 2016 Standing Committee meeting. First, a member of the Standing Committee asked whether Rule 29(a)

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[1] The Style Consultants proposed removing the hyphen between the words "amicus-curiae" in line 3. The words "amicus curiae" without a hyphen appear in the title of the Rule and in line 4. For consistency, they should all be the same.

[2] The word "strike" is new. At the January 2016 meeting, a member of the Standing Committee raised a question whether the power to "prohibit" a filing was sufficient if a court does not realize that a brief creates a recusal problem until after the brief has already been filed. The revised language would allow the court to "strike" the brief.

[3] The January 2016 version of this rule said ". . . may by local rule prohibit . . . ." A member of the Standing Committee proposed deleting the words "by local rule" in line 6 so that judges could act either by order in an individual case or by creating a local rule.

[4] The Style Consultants proposed replacing the words "disqualification of a judge" with "a judge's disqualification." Members of the Standing Committee supported this change.

[5] The Advisory Committee revised this note at its April 2016 meeting.

should announce a national rule instead of leaving the matter to local rules or court orders. The Committee decided that this is a matter appropriately left to the discretion of local circuits.

Second, a member of the Standing Committee also asked whether Rule 29(a) should be simplified so that it allows filing of an amicus brief only by leave of court. The Committee believes that the United States or a State should be permitted to file without leave of court and thus does not favor adding a universal requirement to obtain leave of court.

Third, a consultant to the Standing Committee raised a policy objection to allowing a court to prohibit the filing of an amicus brief that would cause a judge's disqualification. The objection was that a court might block an amicus brief that raises an awkward but important issue about disqualification that the parties themselves do not wish to raise. In such situations, the parties may consent to having an amicus curiae raise the issue. The Advisory Committee considered this potential objection but concluded that local circuits should be permitted to conclude that the benefits of avoiding recusals in a three-judge panel or an en banc court outweigh the potential benefits of an amicus brief.

Fourth, the Style Consultants suggested a revision to the clause beginning with the word "except" in line 5. They proposed ending the second sentence with the word "filing" and creating a new sentence beginning with the word "But." At its April 2016 meeting, the Committee discussed the matter at length and rejected the proposed revision. The Committee believed that the proposed third sentence (beginning with "But") contradicted the categorical grant of permission in the proposed second sentence. *See Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 398-99 (2010) ("The Federal Rules regularly use 'may' to confer categorical permission, as do federal statutes that establish procedural entitlements.") (citations omitted). Another proposed alternative of breaking the section into subdivisions would add unnecessary complexity. The Committee thus decided to approve the original a version with the "except" clause. This formulation is consistent with existing Appellate Rules, e.g., Fed. R. App. P. 25(a)(5), 28(b), 28.1(a), (c)(2), (c)(3), (d), and other respected texts, e.g., U.S. Const. Art. I, § 6, cl.1, Art. III, § 3, cl. 2.

C. Form 4: Removal of Question Asking Petitioners Seeking to Proceed in forma Pauperis to Provide the Last Four Digits of their Social Security Numbers [Item 15-AP-E]

Litigants seeking permission to proceed in forma pauperis must complete Appellate Form 4. Question 12 of Appellate Form 4 currently asks litigants to provide the last four digits of their social security numbers. The clerk representative to the Advisory Committee has investigated the matter and reports that the general consensus of the clerks of court is that the last four digits of a social security number are not needed for any purpose and that the question could be eliminated. Given the potential security and privacy concerns associated with social security numbers, and the

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lack of need for obtaining the last four-digits of social security numbers, the Committee proposes to amend Form 4 by deleting this question. The proposed deletion is as follows:

Form 4. Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis

* * *

12. State the city and state of your legal residence.

Your daytime phone number: (___) _____

Your age: _____ Your years of schooling: _____

~~Last four digits of your social-security number: _____~~

D. Revision of Appellate Rule 25 to address Electronic Filing, Signatures, Service, and Proof of Service [Items 08-AP-A, 11-AP-C, 11-AP-D, 15-AP-A, 15-AP-D, 15-AP-H]

At its April 2016 meeting, the Appellate Rules Committee reviewed the Civil Rules Committee's progress on revising Civil Rule 5 to address electronic filing, signatures, service, and proof of service. The Committee then decided to propose revisions of Appellate Rule 25 that would follow the proposed revisions of Civil Rule 5 as closely as possible while maintaining the current structure of Appellate Rule 25.

The proposed revision of Appellate Rule 25 has four key features. First, proposed Rule 25(a)(2)(B)(i) addresses electronic filing by generally requiring a person represented by counsel to file papers electronically. This provision, however, allows everyone else to file papers nonelectronically and also provides for exceptions for good cause and by local rule. Second, proposed Rule 25(a)(2)(B)(iii) addresses electronic signatures by specifying that when a paper is filed electronically, the "user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature." Third, proposed Rule 25(c)(2) addresses electronic service by saying that such service "may be made by sending it to a registered user by filing it with the court's electronic-filing system or by using other electronic means that the person consented to in writing." Fourth, proposed Rule 25(d)(1) is revised to make proof of service of process required only for papers that are not served electronically.

Appellate Rule 25. Filing and Service

(a) Filing.

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(1) **Filing with the Clerk.** A paper[6] required or permitted to be filed in a court of appeals must be filed with the clerk.

(2) **Filing: Method and Timeliness**.[7]

(A) **Nonelectronic Filing**

~~(A)~~(i) **In general.** ~~Filing~~ For a paper not filed electronically,[8] filing may be accomplished by mail addressed to the clerk, but such filing is not timely unless the clerk receives the papers within the time fixed for filing.

~~(B)~~(ii) **A brief or appendix.** A brief or appendix not filed electronically is timely filed, however, if on or before the last day for filing, it is:

~~(i)~~• mailed to the clerk by First-Class Mail, or other class of mail that is at least as expeditious, postage prepaid; or

~~(ii)~~• dispatched to a third-party commercial carrier for delivery to the clerk within 3 days.

~~(C)~~(iii) **Inmate filing.** A paper not filed electronically ~~filed~~ by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the

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[6] The term "paper" includes electronically filed documents under Appellate Rule 25(a)(2)(B)(iv).

[7] Appellate Rules 25(a)(2)(A) & (B) follow the approach of proposed Civil Rule 5(d)(2) and (3), addressing nonelectronic filing and electronic filing in separate sections.

[8] This rule follows the approach of proposed Civil Rule 5(d)(2), which uses the term "paper not filed electronically."

benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

~~(D) **Electronic filing.** A court of appeals may by local rule permit or require papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A local rule may require filing by electronic means only if reasonable exceptions are allowed. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.~~[9]

(B) **Electronic Filing and Signing.**

(i) **By a Represented Person — Required; Exceptions.** A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(ii) **Unrepresented Person — When Allowed or Required.** A person not represented by an attorney:

- may file electronically only if allowed by court order or by local rule; and

[9] The subject of Appellate Rule 25(a)(2)(D) will be addressed in Appellate Rule 25(a)(2)(B).

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51 • may be required to file electronically
52 only by court order, or by a local rule that
53 includes reasonable exceptions.
54 (iii) **Signing**. The user name and password of
55 an attorney of record, together with the attorney's
56 name on a signature block, serves as the attorney's
57 signature.
58 (iv) **Same as Written Paper**. A paper filed
59 electronically is a written paper for purposes of these
60 rules.
61 (3) **Filing a Motion with a Judge.** If a motion requests relief
62 that may be granted by a single judge, the judge may permit the
63 motion to be filed with the judge; the judge must note the filing date
64 on the motion and give it to the clerk.
65 (4) **Clerk's Refusal of Documents.** The clerk must not refuse
66 to accept for filing any paper presented for that purpose solely
67 because it is not presented in proper form as required by these rules
68 or by any local rule or practice.
69 (5) **Privacy Protection.** An appeal in a case whose privacy
70 protection was governed by Federal Rule of Bankruptcy Procedure
71 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of
72 Criminal Procedure 49.1 is governed by the same rule on appeal. In
73 all other proceedings, privacy protection is governed by Federal Rule
74 of Civil Procedure 5.2, except that Federal Rule of Criminal
75 Procedure 49.1 governs when an extraordinary writ is sought in a
76 criminal case.
77 **(b) Service of All Papers Required.** Unless a rule requires service
78 by the clerk, a party must, at or before the time of filing a paper, serve a copy

79 on the other parties to the appeal or review. Service on a party represented by
80 counsel must be made on the party's counsel.
81 **(c) Manner of Service.**
82 (1) ~~Service~~ Nonelectronic service[10] may be any of the
83 following:
84 (A) personal, including delivery to a responsible
85 person at the office of counsel;
86 (B) by mail; or
87 (C) by third-party commercial carrier for delivery
88 within 3 days; ~~or~~
89 ~~(D) by electronic means, if the party being served~~
90 ~~consents in writing.~~[11]
91 (2) ~~If authorized by local rule, a party may use the court's~~
92 ~~transmission equipment to make electronic service under Rule~~
93 ~~25(c)(1)(D)~~[12] Electronic service may be made by sending it to a
94 registered user by filing it with the court's electronic-filing system or
95 by using other electronic means that the person consented to in
96 writing.[13]
97 (3) When reasonable considering such factors as the
98 immediacy of the relief sought, distance, and cost, service on a party

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[10] Proposed Civil Rule 5(b)(2) addresses both electronic and non-electronic service. To retain the structure of the current Appellate Rule 25(c), the proposed revision addresses nonelectronic service in Rule 25(c)(1) and electronic service in Rule 25(c)(2).

[11] The proposed Appellate Rule 25(c)(2) makes the current Appellate Rule 25(c)(1)(D) unnecessary.

[12] The deleted clause is similar to the deleted clause in Civil Rule 5(b)(3).

[13] This sentence comes from proposed Civil Rule 5(b)(2)(E).

must be by a manner at least as expeditious as the manner used to file the paper with the court.

(4) Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on ~~transmission~~ filing, unless the party making service is notified that the paper was not received by the party served.[14]

(d) Proof of Service.

(1) A paper presented for filing other than through the court's electronic filing system[15] must contain either of the following:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) their mail or electronic addresses, facsimile numbers, or the addresses of the places of delivery, as appropriate for the manner of service.

(2) When a brief or appendix is filed by mailing or dispatch in accordance with Rule 25(a)~~(2)(B)~~(2)(A)(ii), the proof of service must also state the date and manner by which the document was mailed or dispatched to the clerk.

(3) Proof of service may appear on or be affixed to the papers filed.

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[14] This provision is similar to the last clause of Civil Rule 5(b)(2)(E).

[15] A paper filed through the court's electronic filing system does not need to include this information because the electronic filing system will automatically provide it.

123 **(e) Number of Copies.** When these rules require the filing or
124 furnishing of a number of copies, a court may require a different number by
125 local rule or by order in a particular case.

126 **Committee Note**

127 The amendments conform Rule 25 to the amendments to Federal Rule of
128 Civil Procedure 5 on electronic filing, signature, service, and proof of service. They
129 establish, in Rule 25(a)(2)(B), a new national rule that generally makes electronic
130 filing mandatory. The rule recognizes exceptions for persons proceeding without an
131 attorney, exceptions for good cause, and variations established by local rule. The
132 amendments establish national rules regarding the methods of signing and serving
133 electronic documents in Rule 25(a)(2)(B)(iii) and 25(c)(2). The amendments
134 dispense with the requirement of proof of service for electronic filings in Rule
135 25(d)(1).

III. Information Items

A. Disclosure Requirements under Rules 26.1 & 29(c) [Item 08-AP-R]

Since 2008, the Advisory Committee has carried on its agenda a matter concerning disclosure requirements under Appellate Rules 26.1 and 29(c). These rules currently require corporate parties and amici curiae to file corporate disclosure statements. The purpose of these disclosure requirements, as explained in a 1998 Advisory Committee note, is to assist judges in making a determination of whether they have any interests in any of a party's related corporate entities that would disqualify them from hearing an appeal.

In recent meetings, the Committee has considered whether to amend Rules 26.1 and 29(c) to require additional disclosures. The primary impetus for the discussion is a collection of local rules that require litigants to make disclosures that go beyond what Appellate Rules 26.1 and 29(c) require. If some circuits have concluded that more disclosure is necessary to allow an informed decision on recusal or disqualification, then should the national rules require disclosure of this information in every circuit? In each instance, the Committee has sought to assess both the benefits of additional requirements and the burden on litigants.

12b-012404

The Committee has not developed a firm view on whether amendments are warranted. What follows are the Committee's most recent discussion drafts of Rules 26.1 and 29(c). The Committee welcomes any feedback from the Standing Committee on the merit of requiring additional disclosures in the federal rules.

1 **Rule 26.1. ~~Corporate~~ Disclosure Statement**

2 **(a) Who Must File; <u>What Must Be Disclosed</u>.** Any ~~nongovernmental~~
3 ~~corporate~~[16] party to a proceeding in a court of appeals must file a statement that lists:

4 <u>(1)</u> any parent[17] corporation<u>,</u> and any publicly held ~~corporation~~ <u>entity,</u>[18] ~~that~~
5 ~~owns 10% or more of its stock~~ <u>that has a 10% or greater ownership interest in the</u>
6 <u>party</u> or states that there is no such corporation or <u>entity</u>;

7 <u>(2) the names of all judges[19] in the matter[20] and in any related state matter;</u>

8 <u>(3) the names of all lawyers and legal organizations that have appeared or are</u>
9 <u>expected to appear for the party in the matter; and</u>

10 * * *

---

[16] At the April 2016 meeting, it was the sense of the Committee that this rule no longer should apply only to corporations because the proposed new disclosure requirements now extend to facts beyond corporate ownership.

[17] The Committee considered but rejected a suggestion that litigants must disclose not only parent corporations but also "affiliates." The Committee was unsure how to define affiliates and worried about the burden of such a disclosure requirement.

[18] The Committee is unsure whether Rule 26.1 should require litigants to identify publicly held entities other than corporations (e.g., limited liability partnerships, etc.). The Fourth Circuit requires litigants to disclose whether "10% or more of the stock of a party/amicus [is] owned by a publicly held corporation or *other publicly held entity*." U.S. Court of Appeals for the Fourth Circuit, Disclosure of Corporate Affiliations Form, http://www.ca4.uscourts.gov/docs/pdfs/discl.pdf?sfvrsn=10 (emphasis added).

[19] The October 2015 discussion draft said "trial judges."

[20] The Committee considered other possible words, such as "case" or "proceeding," but concluded that "matter" was best because it would cover appeals from matters before agencies.

12b-012405

11 **(d) Organizational Victim in a Criminal Case**. In a criminal case if an
12 organization is a victim of [the alleged] criminal activity, the government must file
13 a statement identifying the victim, unless the government shows good cause for not
14 complying with this requirement.[21] If the organizational victim is a corporation or
15 publicly held entity, the statement must also disclose the information required by
16 Rule 26.1(a)(1) to the extent it can be obtained through due diligence.
17 **(e) Bankruptcy Proceedings.** In a bankruptcy proceeding, the debtor or the
18 trustee of the bankruptcy estate—or the appellant if the debtor or trustee is not a
19 party—must file a statement that lists:
20 (1) any debtor not named in the caption;
21 (2) the members of each committee of creditors;
22 (3) the parties to any adversary proceeding; and
23 (4) any active participants in a contested matter.
24 **(f) Intervenors.** A person who wants to intervene must file a statement that
25 discloses the information required by Rule 26.1.
26 **Committee Note**
27 ALTERNATIVE A: Drawing on local rules, the amendment requires additional
28 disclosures that may inform a judge's decision about whether recusal is warranted.
29 ALTERNATIVE B: Under federal law and ethical standards, judges must decide
30 whether to recuse themselves from participating in cases for various reasons. Before
31 this amendment, Rule 26(a) required corporations to disclose only "any parent
32 corporation and any publicly held corporation that owns 10% or more of its stock."
33 Local rules of court have attempted to help judges determine whether recusal is
34 necessary by requiring the parties to make additional disclosures. The amendment to
35 subdivision (a) follows the lead of these local rules by requiring the listed additional

[21] The bracketed phrase is based on a recent discussion draft of a proposed amendment to Criminal Rule 12.4. In the Appellate Rules version, the "good cause" exception appears at the end of the sentence rather than the start because of other words at the start of the sentence. No difference in meaning is intended.

disclosures. Subdivision (d) requires disclosure of organizational victims in criminal cases because a judge might have an interest in one of the victims. But the disclosure requirement is relaxed in situations in which disclosure would be overly burdensome to the government. For example, thousands of corporations might be the victims of a criminal antitrust violation, and the government may have great difficulty identifying all of them. Subdivision (e) is based on local rules and requires disclosures unique to bankruptcy cases. Subdivision (f) imposes disclosure requirements on a person who wants to intervene so that judges may decide whether they are disqualified from ruling on the intervention motion.

Rule 29. Brief of an Amicus Curiae

* * *

(c) **Contents and Form.** * * * An amicus brief need not comply with Rule 28, but must include the following:

(1) ~~if the amicus curiae is a corporation,~~ a disclosure statement with the information required of parties by Rule 26.1(a)(1), unless the amicus curaie is an individual or governmental unit;

* * *

(5) unless the amicus curiae is one listed in the first sentence of Rule 29(a), a statement that indicates whether:

(A) a party's counsel authored the brief in whole or in part;

(B) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief;

(C) a person— other than the amicus curiae, its members, or its counsel— contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person; and

(D) a lawyer or legal organization authored the brief in whole or in part, and, if so, identifies each such lawyer or legal organization.

Committee Note

12b-012407

64 Subdivision (c)(1) conforms this rule with the amendment to Rule 26.1(a).
65 Subdivision (c)(5)(D) expands the disclosure requirements to include disclosures
66 about the lawyers and legal organizations who participated in writing an amicus brief
67 because a judge also may need this information in order to decide whether recusal is
68 required.

B. Miscellaneous Items

The Committee discussed five other agenda items at its April 2016 meeting. Item No.12-AP-F concerned proposed amendments to Civil Rule 23 to address class action settlement objectors. The Civil Committee's latest proposal would require a district court to approve any payment offered to a class action objector for withdrawing an objection. The proposal would not require amendment of the Appellate Rules. After considering the matter, the sense of the Committee was that an Appellate Rule is not warranted, and that the matter ultimately is a policy question for the Civil Rules Committee.

Item No. 16-AP-A was a proposal to extend the period of filing a notice of appeal in a criminal case from 14 days to 30 days. The Committee previously considered and rejected essentially the same proposal. Item No. 11-AP-E concerned a suggestion that Appellate Rule 4(b) be amended to accord criminal defendants the same 30-day appeal period that applies to government appeals in criminal cases. The Committee discussed Item No.11-AP-E at its Spring 2012 and Fall 2012 meetings and then voted to remove the item from the Agenda without taking action. After reviewing considerations on both sides, and the history of Item No. 11-AP-E, the Committee decided to take no action and to remove Item No. 16-AP-A from its agenda.

Item No. 12-AP-B concerned a proposal to add a parenthetical phrase to the instructions that accompany Question 4 on Appellate Form 4. The amended instruction would read as follows:

1 If you are a prisoner seeking to appeal a judgment in a civil action or
2 proceeding (not including a decision in a habeas corpus proceeding or a
3 proceeding under 28 U.S.C. § 2255), you must attach a statement certified by
4 the appropriate institutional officer showing all receipts, expenditures, and
5 balances during the last six months in your institutional accounts. If you have

12b-012408

1 multiple accounts, perhaps because you have been in multiple institutions,

2 attach one certified statement of each account.

The proposed parenthetical phrase is consistent with case law and may prevent some confusion. But after discussing the matter, the Committee decided not to amend the form because the current language already tracks the applicable statute on disclosure, 28 U.S.C. § 1915(a)(2),[22] and the burden imposed by mistaken filing of unnecessary account statements is not great. The Committee agreed to remove this item from its agenda.

Item No. 15-AP-F concerned recovery of the $500 docketing fee as a cost. Most circuits have interpreted Rule 39(e)(4) as implicitly making the docketing fee a cost that is taxable in the court of appeals. At least three circuits, however, require appellants to recover this fee in the district court. The sense of the Committee was that no amendment to Appellate Rule 39(e)(4) is necessary because the majority of courts are correctly interpreting the Rule. The Committee decided to remove this item from the agenda and asked the Chair to bring the matter to the attention of the chief judges of the circuits.

The Committee also considered a memorandum prepared by Mr. Derek Webb, who is a law clerk to Judge Sutton. The memorandum listed a number of possible circuit splits on issues arising under the Appellate Rules. Mr. Webb suggested three issues that might warrant inclusion on the Committee's agenda in the future: (1) whether delay by prison authorities in delivering the order from which a prisoner wishes to appeal should be counted in computing time for appeal under Rule 4; (2) whether the costs for which a bond may be required under Rule 7 include attorney's fees; and (3) whether "the court" in Rule 39(a)(4) refers to the appellate court or the district court. The Committee thought the incoming Chair and the Reporter could decide whether to include any of these matters on the discussion agenda for the October 2016 meeting.

Enclosures:

1. Draft Minutes from the April 5, 2016 Meeting of Appellate Rules Committee
2. Agenda Table for the Appellate Rules Committee
3. Text of Proposed Revisions for Publication

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[22] Section 1915(a)(2) says: "A prisoner seeking to . . . appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor . . . shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice."

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126-012410

TAB 3B

126-012411

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126-012412

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

1 **Rule 8. Stay or Injunction Pending Appeal**

2 **(a) Motion for Stay.**

3 (1) **Initial Motion in the District Court.** A party
4 must ordinarily move first in the district court for
5 the following relief:

6 * * * * *

7 (B) approval of a ~~supersedeas~~bond or other
8 security provided to obtain a stay of
9 judgment; or

10 * * * * *

11 (2) **Motion in the Court of Appeals; Conditions**
12 **on Relief.** A motion for the relief mentioned in
13 Rule 8(a)(1) may be made to the court of appeals
14 or to one of its judges.

15 * * * * *

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

126-012413

16 (E) The court may condition relief on a party's
17 filing a bond or other ~~appropriate~~security in
18 the district court.

19 **(b) Proceeding Against a Surety or Other Security**
20 **Provider.** If a party gives security in the form of a
21 bond, other security, ~~or~~stipulation, or other
22 undertaking with one or more sureties or other
23 security providers, each ~~surety~~provider submits to the
24 jurisdiction of the district court and irrevocably
25 appoints the district clerk as ~~the surety's~~its agent on
26 whom any papers affecting ~~the surety's~~its liability on
27 the bond or undertaking may be served. On motion, a
28 ~~surety's~~security provider's liability may be enforced
29 in the district court without the necessity of an
30 independent action. The motion and any notice that
31 the district court prescribes may be served on the

126-012414

32 district clerk, who must promptly mail a copy to each

33 surety whose address is known.

* * * * *

Committee Note

The amendments to subdivisions (a)(1)(B) and (b) conform this rule with the amendment of Federal Rule of Civil Procedure 62. Rule 62 formerly required a party to provide a "supersedeas bond" to obtain a stay of the judgment and proceedings to enforce the judgment. As amended, Rule 62(b)(2) allows a party to obtain a stay by providing a "bond or other security."

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126-012416

Rule 11. Forwarding the Record

* * * * *

(g) Record for a Preliminary Motion in the Court of Appeals. If, before the record is forwarded, a party makes any of the following motions in the court of appeals:

- for dismissal;
- for release;
- for a stay pending appeal;
- for additional security on the bond on appeal or on a ~~supersedeas~~bond or other security provided to obtain a stay of judgment; or
- for any other intermediate order—

the district clerk must send the court of appeals any parts of the record designated by any party.

12b-012417

Committee Note

The amendment of subdivision (g) conforms this rule with the amendment of Federal Rule of Civil Procedure 62. Rule 62 formerly required a party to provide a "supersedeas bond" to obtain a stay of the judgment and proceedings to enforce the judgment. As amended, Rule 62(b)(2) allows a party to obtain a stay by providing a "bond or other security."

12b-012418

Rule 25. Filing and Service

(a) Filing.

(1) **Filing with the Clerk.** A paper required or permitted to be filed in a court of appeals must be filed with the clerk.

(2) **Filing: Method and Timeliness**.

(A) **Nonelectronic Filing**

~~(A)~~(i) **In general.** ~~Filing~~For a paper not filed electronically, filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the papers within the time fixed for filing.

~~(B)~~(ii) **A brief or appendix.** A brief or appendix not filed electronically

125-012419

17 is timely filed, however, if on or
18 before the last day for filing, it is:
19 ~~(i)~~• mailed to the clerk by ~~First-~~
20 ~~Class Mail~~first-class mail,
21 or other class of mail that is
22 at least as expeditious,
23 postage prepaid; or
24 ~~(ii)~~• dispatched to a third-party
25 commercial carrier for
26 delivery to the clerk within
27 3 days.
28 ~~(C)~~(iii) **Inmate filing.** A paper ~~filed~~not
29 filed electronically by an inmate
30 confined in an institution is
31 timely if deposited in the
32 institution's internal mailing
33 system on or before the last day

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34 for filing. If an institution has a
35 system designed for legal mail,
36 the inmate must use that system
37 to receive the benefit of this rule.
38 Timely filing may be shown by a
39 declaration in compliance with
40 28 U.S.C. § 1746 or by a
41 notarized statement, either of
42 which must set forth the date of
43 deposit and state that first-class
44 postage has been prepaid.
45 ~~(D) **Electronic filing.** A court of appeals may~~
46 ~~by local rule permit or require papers to be~~
47 ~~filed, signed, or verified by electronic~~
48 ~~means that are consistent with technical~~
49 ~~standards, if any, that the Judicial~~
50 ~~Conference of the United States establishes.~~

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51 ~~A local rule may require filing by electronic~~
52 ~~means only if reasonable exceptions are~~
53 ~~allowed. A paper filed by electronic means~~
54 ~~in compliance with a local rule constitutes a~~
55 ~~written paper for the purpose of applying~~
56 ~~these rules.~~
57 (B) **Electronic Filing and Signing.**
58 (i) **By a Represented Person—**
59 **Required; Exceptions.** A
60 person represented by an.
61 attorney must file electronically,
62 unless nonelectronic filing is
63 allowed by the court for good
64 cause or is allowed or required
65 by local rule.

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66 (ii) **Unrepresented Person—When**
67 **Allowed or Required.** A person
68 not represented by an attorney:
69 • may file electronically only if
70 allowed by court order or by
71 local rule; and
72 • may be required to file
73 electronically only by court
74 order, or by a local rule that
75 includes reasonable
76 exceptions.
77 (iii) **Signing**. The user name and
78 password of an attorney of
79 record, together with the
80 attorney's name on a signature
81 block, serves as the attorney's
82 signature.

126-012423

83 (iv) **Same as Written Paper**. A
84 paper filed electronically is a
85 written paper for purposes of
86 these rules.
87 (3) **Filing a Motion with a Judge.** If a motion
88 requests relief that may be granted by a single
89 judge, the judge may permit the motion to be
90 filed with the judge; the judge must note the
91 filing date on the motion and give it to the clerk.
92 (4) **Clerk's Refusal of Documents.** The clerk must
93 not refuse to accept for filing any paper
94 presented for that purpose solely because it is not
95 presented in proper form as required by these
96 rules or by any local rule or practice.
97 (5) **Privacy Protection.** An appeal in a case whose
98 privacy protection was governed by Federal Rule
99 of Bankruptcy Procedure 9037, Federal Rule of

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100 Civil Procedure 5.2, or Federal Rule of Criminal
101 Procedure 49.1 is governed by the same rule on
102 appeal. In all other proceedings, privacy
103 protection is governed by Federal Rule of Civil
104 Procedure 5.2, except that Federal Rule of
105 Criminal Procedure 49.1 governs when an
106 extraordinary writ is sought in a criminal case.

107 **(b) Service of All Papers Required.** Unless a rule
108 requires service by the clerk, a party must, at or before
109 the time of filing a paper, serve a copy on the other
110 parties to the appeal or review. Service on a party
111 represented by counsel must be made on the party's
112 counsel.

113 **(c) Manner of Service.**

114 (1) ~~Service~~Nonelectronic service may be any of the
115 following:

12b-012425

116 (A) personal, including delivery to a
117 responsible person at the office of counsel;
118 (B) by mail; or
119 (C) by third-party commercial carrier for
120 delivery within 3 days~~; or~~.
121 ~~(D) by electronic means, if the party being~~
122 ~~served consents in writing.~~
123 (2) ~~If authorized by local rule, a party may use the~~
124 ~~court's transmission equipment to make~~
125 ~~electronic service under Rule 25(c)(1)(D)~~
126 Electronic service may be made by sending it to
127 a registered user by filing it with the court's
128 electronic-filing system or by using other
129 electronic means that the person consented to in
130 writing.
131 (3) When reasonable considering such factors as the
132 immediacy of the relief sought, distance, and

12b-012426

133 cost, service on a party must be by a manner at
134 least as expeditious as the manner used to file the
135 paper with the court.
136 (4) Service by mail or by commercial carrier is
137 complete on mailing or delivery to the carrier.
138 Service by electronic means is complete on
139 ~~transmission~~filing, unless the party making
140 service is notified that the paper was not received
141 by the party served.
142 (d) Proof of Service.
143 (1) A paper presented for filing other than through
144 the court's electronic filing system must contain
145 either of the following:
146 (A) an acknowledgment of service by the
147 person served; or
148 (B) proof of service consisting of a statement
149 by the person who made service certifying:

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150 (i) the date and manner of service;

151 (ii) the names of the persons served; and

152 (iii) their mail or electronic addresses,
153 facsimile numbers, or the addresses of
154 the places of delivery, as appropriate
155 for the manner of service.

156 (2) When a brief or appendix is filed by mailing or
157 dispatch in accordance with
158 Rule 25(a)~~(2)(B)~~(2)(A)(ii), the proof of service
159 must also state the date and manner by which the
160 document was mailed or dispatched to the clerk.

161 (3) Proof of service may appear on or be affixed to
162 the papers filed.

163 **(e) Number of Copies.** When these rules require the
164 filing or furnishing of a number of copies, a court may
165 require a different number by local rule or by order in
166 a particular case.

12b-012428

Committee Note

The amendments conform Rule 25 to the amendments to Federal Rule of Civil Procedure 5 on electronic filing, signature, service, and proof of service. They establish, in Rule 25(a)(2)(B), a new national rule that generally makes electronic filing mandatory. The rule recognizes exceptions for persons proceeding without an attorney, exceptions for good cause, and variations established by local rule. The amendments establish national rules regarding the methods of signing and serving electronic documents in Rule 25(a)(2)(B)(iii) and 25(c)(2). The amendments dispense with the requirement of proof of service for electronic filings in Rule 25(d)(1).

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Rule 29. Brief of an Amicus Curiae

(a) **When Permitted.** The United States or its officer or agency or a state may file an ~~amicus curiae~~amicus curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing, except that a court of appeals may strike or may prohibit the filing of an amicus brief that would result in a judge's disqualification.

* * * * *

Committee Note

The amendment authorizes orders or local rules, such as those previously adopted in some circuits, that prohibit the filing of an amicus brief by party consent if the brief would result in a judge's disqualification. The amendment does not alter or address the standards for when an amicus brief requires a judge's disqualification.

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126-012432

Rule 39. Costs

* * * * *

(e) Costs on Appeal Taxable in the District Court. The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule:

(1) the preparation and transmission of the record;

(2) the reporter's transcript, if needed to determine the appeal;

(3) premiums paid for a ~~supersedeas~~bond or other ~~bond~~security to preserve rights pending appeal; and

(4) the fee for filing the notice of appeal.

Committee Note

The amendment of subdivisions (e)(3) conforms this rule with the amendment of Federal Rule of Civil Procedure 62. Rule 62 formerly required a party to provide a "supersedeas bond" to obtain a stay of the judgment and proceedings to enforce the judgment. As amended,

126-012433

Rule 62(b)(2) allows a party to obtain a stay by providing a "bond or other security."

12b-012434

Form 4. Affidavit Accompanying Motion for Permission to Appeal in Forma Pauperis

* * * * *

12. State the city and state of your legal residence.

    Your daytime phone number: (___) _____

    Your age: _____ Your years of schooling: _____

    ~~Last four digits of your social-security number: _____~~

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TAB 3C

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126-012438

Advisory Committee on Appellate Rules
Table of Agenda Items —April 2016

FRAP Item	Proposal	Source	Current Status
07-AP-E	Consider possible FRAP amendments in response to Bowles v. Russell (2007).	Mark Levy, Esq.	Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 04/11 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15
07-AP-I	Consider amending FRAP 4(c)(1) to clarify the effect of failure to prepay first-class postage.	Hon. Diane Wood	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16

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FRAP Item	Proposal	Source	Current Status
08-AP-C	Abolish FRAP 26(c)'s three-day rule.	Hon. Frank H. Easterbrook	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16
09-AP-B	Amend FRAP 1(b) to include federally recognized Indian tribes within the definition of "state"	Daniel I.S.J. Rey-Bear, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed and retained on agenda 10/11 Discussed and retained on agenda 04/12; Committee will revisit in 2017
11-AP-C	Amend FRAP 3(d)(1) to take account of electronic filing	Harvey D. Ellis, Jr., Esq.	Discussed and retained on agenda 04/13 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16
11-AP-D	Consider changes to FRAP in light of CM/ECF	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/11 Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee

FRAP Item	Proposal	Source	Current Status
12-AP-B	Consider amending FRAP Form 4's directive concerning institutional-account statements for IFP applicants	Peter Goldberger, Esq., on behalf of the National Association of Criminal Defense Lawyers (NACDL)	Discussed and retained on agenda 09/12 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee
12-AP-D	Consider the treatment of appeal bonds under Civil Rule 62 and Appellate Rule 8	Kevin C. Newsom, Esq.	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee
12-AP-E	Consider treatment of length limits, including matters now governed by page limits	Professor Neal K. Katyal	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15
12-AP-F	Consider amending FRAP 42 to address class action appeals	Professors Brian T. Fitzpatrick and Brian Wolfman and Dean Alan B. Morrison	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16
13-AP-B	Amend FRAP to address permissible length and timing of an amicus brief in support of a petition for rehearing and/or rehearing en banc	Roy T. Englert, Jr., Esq.	Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15

FRAP Item	Proposal	Source	Current Status
13-AP-H	Consider possible amendments to FRAP 41 in light of Bell v. Thompson, 545 U.S. 794 (2005), and Ryan v. Schad, 133 S. Ct. 2548 (2013)	Hon. Steven M. Colloton	Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Draft approved 10/15 for submission to Standing Committee Approved by Standing Committee 01/16
14-AP-D	Consider possible changes to Rule 29's authorization of amicus filings based on party consent	Standing Committee	Awaiting initial discussion Draft approved 10/15 for submission to Standing Committee Discussed by Standing Committee 1/16 but not approved Draft approved 04/16 for submission to Standing Committee
15-AP-A	Consider adopting rule presumptively permitting pro se litigants to use CM/ECF	Robert M. Miller, Ph.D.	Awaiting initial discussion Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee
15-AP-B	Technical amendment – update cross-reference to Rule 13 in Rule 26(a)(4)(C)	Reporter	Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15
15-AP-C	Consider amendment to Rule 31(a)(1)'s deadline for reply briefs	Appellate Rules Committee	Awaiting initial discussion Draft approved 10/15 for submission to Standing Committee Approved by Standing Committee 01/16
15-AP-D	Amend FRAP 3(a)(1) (copies of notice of appeal) and 3(d)(1) (service of notice of appeal)	Paul Ramshaw, Esq.	Awaiting initial discussion Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16
15-AP-E	Amend the FRAP (and other sets of rules) to address concerns relating to social security numbers; sealing of affidavits on motions under 28 U.S.C. § 1915 or 18 U.S.C. § 3006A; provision of authorities to pro se litigants; and electronic filing by pro se litigants	Sai	Awaiting initial discussion Discussed and retained on agenda 10/15 Partially removed from Agenda and draft approved 10/16 for submission to Standing Committee
15-AP-H	Electronic filing by pro se litigants	Robert M. Miller, Ph.D.	Awaiting initial discussion Discussed and retained on agenda 10/15

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DRAFT Minutes of the Spring 2016 Meeting of the
Advisory Committee on Appellate Rules

April 5, 2016
Denver, Colorado

Attendance and Introductions

The Chair, Judge Steven M. Colloton, called the meeting of the Advisory Committee on Appellate Rules to order on Tuesday, at 9:00 a.m., at the Colorado Supreme Court in Denver, Colorado.

In addition to Judge Colloton, the following Advisory Committee members were present: Professor Amy Coney Barrett, Judge Michael A. Chagares, Justice Allison H. Eid, Gregory G. Katsas, Esq., Neal K. Katyal, Esq., Judge Brett M. Kavanaugh, Judge Stephen Joseph Murphy III, and Kevin C. Newsom, Esq. Gregory Garre, Esq. participated by telephone. Solicitor General Donald Verrilli was represented by Mr. H. Thomas Byron III, Appeals Counsel of the Appellate Staff of the Civil Division.

Reporter Gregory E. Maggs was present and kept these minutes. Also present were Judge Jeffrey S. Sutton, Chair of the Standing Committee on Rules of Practice and Procedure; Ms. Rebecca A. Womeldorf, Secretary of the Standing Committee on Rules of Practice and Procedure and Rules Committee Officer; Marie Leary, Esq., Research Associate, Appellate Rules Committee, Federal Judicial Center; Mr. Michael Ellis Gans, Clerk of Court Representative to the Advisory Committee on Appellate Rules; and Ms. Shelly Cox, Administrative Specialist in the Rules Committee Support Office of the Administrative Office. Mr. Derek Webb, law clerk to Judge Sutton, participated by telephone.

Judge Colloton began the meeting by introducing Chief Justice Nancy E. Rice of the Colorado Supreme Court. Chief Justice Rice welcomed the Committee to the courthouse and spoke of the history of the building. Judge Colloton also welcomed Judge Kavanaugh to his first meeting.

Approval of the Minutes of the October 2015 Meeting

A spelling error on page 11 of the draft minutes of the October 2015 Meeting was identified and corrected. The draft minutes were then approved.

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Report on the January 2016 Meeting of the Standing Committee

Judge Colloton reported that the Standing Committee had approved two proposals from the Appellate Rules Committee for publication and public comment. One was Item 13-AP-H, which concerned proposed amendments to Rule 41(b) and (d) regarding the stays of a mandate. The other was Item 15-AP-C, which concerned proposed amendments to Rule 31(a)(1) and Rule 28.1(f)(4) to lengthen the time for filing a reply brief from 14 days to 21 days.

Judge Colloton said that a third proposal, Item No. 14-AP-D, which concerns amicus briefs filed by party consent under Appellate Rule 29(a), prompted suggestions from the Style Consultants and substantive comments from the Committee Members. Judge Colloton therefore decided to bring the item back for further discussion at today's Committee meeting.

Item No. 12-AP-D (Civil Rule 62: Bonds)

Mr. Newsom led the discussion of this item. He began by reporting the status of proposed revisions to Civil Rule 62 and addressed the discussion draft of this rule on page 70 of the Agenda Book. He explained that the revision to Rule 62 aims to accomplish three things: (1) to extend the automatic stay to 30 days; (2) to allow a party to provide security other than a bond; and (3) to require only one security for all stayed periods. He also explained that the Advisory Committee Note was edited to make it more concise.

Mr. Newsom then turned to the proposed conforming amendments to Appellate Rules 8, 11, and 39, addressing the discussion drafts of these rules on pages 61-64 of the Agenda Book. The Committee agreed with the general approach of the drafts and the policy decision to make Rule 8(b) apply to providers of security other than sureties. The Committee decided to amend the discussion draft in the following three ways:

(1) Rule 8(a)(1)(B) [lines 6-7]: The bracketed phrase "[provided to obtain the stay of a judgment or order of a district court pending appeal]" should be included but edited to say "provided to obtain the stay."

(2) Rule 8(a)(2)(E) [line 15]: The word "appropriate" should be deleted.

(3) Rule 8(b) [lines 16-20]: The wording of this section should be rephrased to say: "If a party gives security in any form, including a bond, other security, stipulation, or other undertaking, with one or more sureties or other security providers, each security provider submits . . . ." The subsequent references to "surety" in the provision should then be replaced with "security provider."

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The Committee addressed the discussion draft of Rule 11(g) at length. It considered various possible amendments but ultimately did not alter the discussion draft. The Committee did not make any amendments to the discussion draft of Rule 39(e).

Mr. Newsom moved to approve the discussion draft as amended and to send it to the Standing Committee for publication. The motion was seconded and approved.

Item No.12-AP-F (Civil Rule 23: Class Action Settlement Objectors)

Judge Colloton introduced this item, which concerns class action settlement objections. Class members sometimes object to settlements not because they have good faith objections but instead because they want to receive payments to withdraw their objections so that the settlements can go forward. Judge Colloton explained that the Civil Rules Committee decided to address this matter through what it calls "the simple approach." Under this approach, Civil Rule 23(e)(5)(B) would be amended to provide that "no payment or other consideration" can be given to an objector in exchange for withdrawing an objection without the district court's approval. The simple approach would not require amending the Appellate Rules.

Judge Colloton asked the Committee to consider whether the proposed "simple approach" was a good solution to the problem of class action objections. He also asked the Committee to consider whether requiring a district court to approve consideration paid to an objector impermissibly interferes with an appellate court's jurisdiction.

Mr. Derek Webb spoke regarding his memorandum included in the Agenda Book at page 109. He informed the Committee that the Civil and Appellate rules allow a district court to continue to act in a variety of situations even though a notice of appeal has been filed.

Two judge members expressed agreement with the "simple approach" of the Civil Rules Committee. An attorney member expressed some concern about the policy behind the approach. He was not sure that the district court would always know the case better than the court of appeals. He offered the example of a case in which there was a proposed payment to withdraw an objection after oral argument in the court of appeals. He asked, "Should the district court really decide whether the payment should be made?" The attorney member, however, thought that such situations might be rare.

Judge Sutton saw some potential for conflict between the district court and court of appeals. He noted that nothing in the proposed revision of Civil Rule 23 would require or prevent the dismissal of an objection by a court of appeals. He suggested that another, possibly better, approach might have been to require a court of appeals to ask the district court for an indicative ruling under Appellate Rule 12.1 before deciding whether to dismiss an objection. He said that this option

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remains open to the courts of appeals and suggested that the Advisory Committee Note could address this point.

Following further discussion, Judge Colloton summarized the apparent views of the Committee as follows: The Appellate Rules Committee prefers not to address the issue of class action objectors with an appellate rule, and whether the proposed revision of Civil Rule 23 is desirable is ultimately a policy question for the Civil Rules Committee.

Item No. 16-AP-A (Appellate Rule 4(b)(1) and Criminal Case Notice of Appeals)

The Reporter introduced this item, which concerns a proposal to amend Appellate Rule 4(b)(1)(A) to increase the period for filing a notice of appeal in a criminal case from 14 days to 30 days. The reporter explained that the Committee previously had considered and rejected essentially the same proposal when it addressed Item 11-AP-E. The Committee discussed Item 11-AP-E at its Spring 2012 and Fall 2012 meetings and then voted to remove the item from the Agenda without taking action.

A judge member said that limiting the period for filing a notice of appeal to 14 days was necessary for having prompt appeals. He also noted that the interests of lawyers may differ from clients; lawyers may want more time but clients may want speedier action. Expressing the view of the Department of Justice, Mr. Byron said no real need has been shown for the amendment. Other speakers emphasized that the Committee had previously considered and decided the matter.

Judge Colloton asked whether there should be further study. No member believed that further study was required. A motion to remove the item from the Committee's agenda was seconded and approved.

Item No. 14-AP-D (Appellate Rule 29(a) on Amicus Briefs Filed with Party Consent)

Judge Colloton introduced this item, which concerns amicus briefs filed by party consent. He reminded the Committee that it had proposed a modification of Appellate Rule 29(a) at its October 2016 meeting. He then explained that the Standing Committee was generally favorable to the proposal but identified issues that may require further consideration.

Judge Colloton began by discussing the policy issue of whether a court should be able to reject not only amicus briefs filed by party consent but also amicus briefs filed by the government. An attorney member said that the rules should continue to provide the government a right to file an amicus brief. Mr. Byron said that the Department of Justice's position was that the government should have a right to file an amicus brief.

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Judge Colloton then addressed the discussion draft line-by-line. The sense of the Committee was to make the following revisions:

(1) line 3: strike the hyphen in "amicus-curiae"

(2) line 5: adopt the "except" clause rather than the separate "but" sentence proposed by the Style Consultants

(3) line 6: strike "by local rule"

(4) line 6: replace "prohibit" with "prohibit or strike"

At the suggestion of a judge member, the Committee also decided to replace the Advisory Committee Note for the proposed amendment to Appellate Rule 29(a) on page 140 of the Agenda Book with the following: "The amendment authorizes orders or local rules, such as those previously adopted in some circuits, that prohibit the filing of an amicus brief by party consent if the brief would result in a judge's disqualification. The amendment does not alter or address the standards for when an amicus brief requires a judge's disqualification."

The Committee approved a motion to submit the revised version of the Rule to the Standing Committee.

Item No. 08-AP-R (Appellate Rules 26.1 and 29(c) on Disclosures)

Judge Colloton introduced this item, which concerns Appellate Rules 26.1 and 29(c). These rules currently require corporate parties and amici curiae to file corporate disclosure statements. The purpose of these disclosure requirements is to assist judges in deciding whether they need to recuse themselves. Judge Colloton explained that some local rules go further. He explained that, in the memorandum included at page 159 of the Agenda Book, Professor Daniel Capra had tried to pull together suggestions for additional disclosure requirements without necessarily advocating for them. Judge Colloton said that the initial decisions for the Committee were (1) whether to include some or all of the proposed disclosures; (2) whether to conduct more study; or (3) whether to drop the matter.

A judge member asked the attorney members how burdensome they considered such disclosure requirements. An attorney members said that some disclosure requirements are very burdensome. The committee discussed the requirement of disclosing witnesses. Several members suggested that the cost was not worth the benefit. An attorney member also said that disclosing affiliates of corporations would be burdensome. He said that such disclosures are sometimes required in state courts.

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Judge Sutton asked whether the list of required disclosures would carry with it a presumption that recusal was necessary when the listed information was disclosed. An attorney member asked whether the Advisory Committee Note could address this potential concern by saying that the additional disclosure requirements do not change the recusal standards.

Another attorney member asked how strong the need was for changing the current rules. Mr. Byron, speaking for the Justice Department, agreed that additional disclosure requirements would be burdensome and that it was not clear how beneficial they would be.

Judge Sutton said that the current rule requires disclosure of things that by statute automatically require disclosure. The proposed rule would go further. He also said that the proposal should not go to the Standing Committee for publication at this time because the Bankruptcy Rules Committee was still working on its own disclosure requirements.

Judge Colloton questioned the need for requiring parties to disclose the identity of judges, asking whether there were many judges who have to recuse themselves because of the identity of a judge during earlier proceedings in a case.

Several committee members expressed concern that disclosing the identity of all lawyers who had worked on a matter could be very burdensome, especially if there had been an administrative proceeding below. But a countervailing consideration was that judges still may have to recuse themselves based on the participation of a lawyer.

The Committee discussed the question whether clauses (a)(2), (a)(3), and (a)(4) should use the term “proceeding” or “case” or some other term. A judge member pointed out that some appeals come directly from agencies. Another judge member suggested that the word "matter" might be better. Another judge member suggested that perhaps local rules should address matters coming directly to the court of appeals from administrative proceedings.

Judge Colloton asked whether the draft of Rule 26.1(e) corresponded to any similar provision in the draft revision to the Bankruptcy Rules. The Committee decided that the reporter should coordinate with the Criminal Rules and Bankruptcy Rules Committees.

It was the sense of the committee that the following action should be taken with respect to the discussion drafts of Rule 26.1 and Rule 29(c) beginning on page 150 of the Agenda Book.

(1) The “except clause” in line 3 should be deleted so that Rule 26.1 applies to all parties.

(2) The term “affiliated” in line 5 should be deleted. A Fourth Circuit local rule requires disclosure of affiliates. But the term is complicated to define.

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(3) The term “matter” rather than “case” or “proceeding” should be in lines 10, 12, and 14

(4) The “good cause”exception in lines 17 and 18 should be included. The formulation differs from the formulation in the criminal law rules. The exception has to be included at the end of the sentence because of everything else at the start of the sentence. The substance is the same.

(5) There was no objection to the proposed language in lines 31-32 regarding persons who want to intervene.

(6) The Advisory Committee note should make clear that the Committee is not trying to change the recusal requirements.

(7) The Committee had no objection to the proposed change to Rule 29(c)(5)(D).

The Committee determined that no amendment should be proposed at this time, and that the matter should be carried over for further consideration. The Chair may receive input from the Standing Committee at its June 2016 meeting.

Item 12-AP-B (Appellate Rules Form 4 and Institutional Account Statement)

This Item concerns a proposal to add the parenthetical phrase "(not including a decision in a habeas corpus proceeding or a proceeding under 28 U.S.C. § 2255)" to one of the questions in Appellate Form 4. The reporter introduced the time and summarized the arguments in Reporter Struve's memorandum for and against the adding the parenthetical phrase.

After a brief discussion, the Committee decided to take no action for two reasons. First, the language of the Form already tracks the applicable statute. Second, although the parenthetical phrase might prevent the filing of institutional account statements unnecessarily, the consequence was not very burdensome to either confinement institutions or prisoners. A motion to remove this item from the agenda was made, seconded, and approved.

Item No. 15-AP-E (Appellate Rules Form 4 and Social Security Numbers)

The reporter introduced this item, which included five proposals. The first proposal was to amend Appellate Form 4 to remove the question asking litigants seeking leave to proceed in forma pauperis to provide the last four digits of their social security numbers. The reporter presented this item. As discussed in the memorandum on page 215 of the Agenda Book, the clerks of the courts of appeals report that this information is no longer needed for any purpose. The Committee

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discussed the matter briefly and decided that the question should be deleted. The Committee will send a proposal for publication to the Standing Committee.

The second proposal was to amend Appellate Rule 25(a)(5) to prohibit filings from containing any part of a social security number. The Committee decided to take no action on this matter because Appellate Rule 25(a)(5) incorporates the privacy standards from the Civil Rules. Any change should come from the Civil Rules.

The third proposal was to amend Appellate Rule 24(a)(1) to add a presumption that an affidavit filed in support of a motion for leave to proceed in forma pauperis would be sealed. The Committee previously had discussed this matter at its October 2015 meeting. Following a brief discussion, the sense of the Committee was that the proposal should be rejected.

The fourth proposal was that Appellate Rule 32.1(b) should be amended to require litigants to provide pro se applicants with unpublished opinions that are not available without cost from a publicly accessible database. An attorney member suggested that this proposal raised a substantive policy question about how much financial assistance should be given to pro se litigants and that this question was better addressed by Congress than by a Rules Committee. Another attorney member pointed out that the proposal concerned all pro se litigants, not just those seeking leave to proceed in forma pauperis. Some pro se litigants might be able to afford access to commercial databases. Another member of the Committee asked whether a court might order a party to provide unpublished opinions on an individual basis. The sense of the Committee was that the proposal should be rejected.

The fifth proposal was to amend Appellate Rule 25(d)(2)(D) to allow pro se litigants to file or serve documents electronically. A member suggested that the Committee should consider this proposal as part of its general consideration of electronic filing issues.

A motion was made to present the first matter (concerning social security numbers) to the Standing Committee for publication, to remove the second, third, and fourth matters from the agenda, and to fold the fifth matter into the rest of the other agenda items concerning electronic filing. The motion was seconded and approved.

Item No. 15-AP-F (Appellate Rule 39(e) and Recovery of Appellate Fees)

The reporter introduced this item, which the Committee discussed for the first time at the October 2015 Meeting. The item concerns the procedure by which an appellant who prevails on appeal may recover the $5 fee for filing a notice of appeal and the $500 fee for docketing an appeal. Rule 39(e)(4) says that the fee for filing a notice of appeal is taxable as a cost in the district court.

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In most circuits, the $500 docketing fee is seen as a cost taxable in the court of appeals, but at least three circuits require appellants to recover this fee in the district court.

The Committee considered the question whether Rule 39 should be amended. The clerk representative said that the clerks in most circuits want to tax the whole thing in the court of appeals. Mr. Byron suggested the possibility of deleting (e)(4). A judge member said that he thought that the rule was correct as written.

Following further discussion the sense of the Committee was that the Chair should communicate with the chief judges of the various circuits about the problem, with the goal of finding a resolution without amending the rules. The motion to remove the item from the agenda was made, seconded, and approved.

Item Nos. 08-AP-A, 11-AP-C, 11-AP-D, 15-AP-A, 15-AP-D, 15-AP-H (Electronic Filing and Service)

These items concern electronic filing, signature, service, and proof of service. The reporter described the progress that the Civil Rules Committee had made on revising the Civil Rules to address these subjects. Several members of the Committee expressed agreement with the four major characteristics of the reform: First, parties represented by counsel must file electronically absent an exception, such as an exception for good cause. Second, use of the court's electronic filing system constitutes a signature. Third, parties will serve papers through the court's electronic filing system. Fourth, no proof of service is required for papers served through the electronic filing system.

The Committee concluded that the reporter should prepare a discussion draft of Appellate Rule 25 that would follow the most recent draft of Civil Rule 5. The reporter would then circulate the draft to the committee members by email. The goal is to present a proposed revision of Appellate Rule 25 to the Standing Committee in June.

The Committee also directed the reporter to determine whether other Appellate Rules would also require amendment to address electronic filing.

Memo on Circuit Splits

The Committee also considered a memorandum prepared by Mr. Webb. The memorandum listed a number of circuit splits on issues under the Appellate Rules. The Committee decided to study three of these issues for possible inclusion on its agenda in the future: (1) whether delay by prison authorities in delivering the order from which the prisoner wishes to appeal can be used in computing time for appeal under Rule 4(c); (2) whether the costs for which a bond may be required under Rule 7 can include attorney's fees; and (3) whether "the court" in Rule 39(a)(4) refers to the

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appellate court or the district court. The Committee also agreed to study the other issues in the memorandum further.

Adjournment

Judge Colloton thanked Justice Eid for her 6 years of service on the Committee and for providing her input from the perspective of a state court. Judge Colloton also thanked Prof. Barrett for her service on the Committee and for hosting the meeting in Chicago. Judge Colloton noted that this was the last meeting for Judge Sutton at the Appellate Rules Committee. He also noted that this was the last meeting for Mr. Gans and himself. He noted that Mr. Gans has served for in clerk's office of the Eighth Circuit for 33 years. Judge Colloton thanked him for his insight and polling of his colleagues.

Judge Sutton announced that Judge Neil Gorsuch will be the new chair of this committee. Judge Sutton thanked Judge Colloton for his four years of service, care, and fair-mindedness. Judge Sutton also read comments from former reporter Cathie Struve who complimented and thanked Judge Colloton for his service as chair of the Committee.

The meeting adjourned.

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

JEFFREY S. SUTTON
CHAIR

REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

SANDRA SEGAL IKUTA
BANKRUPTCY RULES

JOHN D. BATES
CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

TO: Hon. Jeffrey S. Sutton, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. John D. Bates, Chair
Advisory Committee on Civil Rules

RE: Report of the Advisory Committee on Civil Rules

DATE: May 12, 2016

Introduction

The Civil Rules Advisory Committee met in Palm Beach, Florida, on April 14, 2016. Draft Minutes of this meeting are attached.

Part I of this Report presents recommendations to approve publication this summer of proposed amendments to Civil Rules 5 (e-filing and e-service); 23 (class actions); and 62 (stays of execution of judgment).

Part II presents a recommendation to approve submission to the Judicial Conference of the United States two proposed pilot projects. One project would test a system of mandatory initial discovery requests to be adopted in each participating court. The second would test the effectiveness of court-wide adoption of practices that, under the current rules, have proved effective in reducing cost and delay. The Committee on Court Administration and Court Management has participated in the work that shaped these projects. It is understood on all sides that the projects will evolve as they move along the path to implementation, both in the interlude before presentation to the Judicial Conference and, if approved, in the actual implementation period thereafter.

Part III describes other work. The first segment describes proposals under active consideration for eventual publication and adoption. These proposals include a new subdivision in Rule 5.2 that would establish a procedure for redacting information that was improperly included in a court filing; a renewal of the extensive work that was done ten years ago to evaluate concerns about the operation of Rule 30(b)(6)(deposition of an entity); and consideration of the Rule 81(c) provisions for demanding a jury trial after a case is removed from state court. The second segment briefly notes action on a number of suggestions that were submitted to the Committee through the public submission process.

125-012459

I. RECOMMENDATIONS FOR PUBLICATION

A. RULE 23

The Civil Rules Advisory Committee recommends publication of the following preliminary draft of amendments to Rule 23.

Rule 23. Class Actions

* * * * *

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

* * * * *

(2) ***Notice.***

* * * * *

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by United States mail, electronic means, or other appropriate means.
* * * * *

* * * * *

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) ***Notice to the Class.***

(A) *Information That Parties Must Provide to the Court.* The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) *Grounds for a Decision to Give Notice.* The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(e)(2); and

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(ii) certify the class for purposes of judgment on the proposal.

(2) ***Approval of the Proposal.*** If the proposal would bind class members under Rule 23(c)(3), the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:~~.~~

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of the proposed method of distributing relief to the class, including the method of processing class-member claims, if required;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) class members are treated equitably relative to each other.

(3) ***Identification of Side Agreements.*** The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) ***New Opportunity to Be Excluded.*** If the class was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) ***Class-Member Objections.***

(A) *In General.* Any class member may object to the proposal if it requires court approval under this subdivision (e)~~; the objection may be withdrawn only with the court's approval~~. The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

(B) *Court Approval Required For Payment to an Objector or Objector's Counsel.* Unless approved by the court after a hearing, no payment or other consideration may be provided to an objector or objector's counsel in connection with:

(i) forgoing or withdrawing an objection, or

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(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) *Procedure For Approval After an Appeal.* If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

* * * * *

(f) **Appeals.** A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). ~~if a petition for to appeal is filed~~ A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered, or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Committee Note

Rule 23 is amended mainly to address issues related to settlement, and also to take account of issues that have emerged since the rule was last amended in 2003.

Subdivision (c)(2). As amended, Rule 23(e)(1) provides that the court must direct notice to the class regarding a proposed class-action settlement only after determining that the prospect of class certification and approval of the proposed settlement justifies giving notice. This decision is sometimes inaccurately called "preliminary approval" of the proposed class certification in Rule 23(b)(3) actions, and it is common to send notice to the class simultaneously under both Rule 23(e)(1) and Rule 23(c)(2)(B), including a provision for class members to decide by a certain date whether to opt out. This amendment recognizes the propriety of this notice practice. Requiring repeat notices to the class can be wasteful and confusing to class members, and costly as well.

Subdivision (c)(2) is also amended to recognize contemporary methods of giving notice to class members. Since *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), interpreted the individual notice requirement for class members in Rule 23(b)(3) class actions, many courts read the rule to require notice by first class mail in every case. But technological change since 1974 has meant that other forms of communication are more reliable and important to many. Courts and counsel have begun to employ new technology to make notice more effective, and sometimes less costly. Because there is no reason to expect that technological change will halt soon, courts giving notice under this rule should consider existing technology, including class members' likely access to such technology, when selecting a method of giving notice.

Rule 23(c)(2)(B) is amended to take account of these changes, and to call attention to them. The rule continues to call for giving class members "the best notice that is practicable." It does not specify any particular means as preferred. Although it may often be true that electronic methods of notice, for example by email, are the most promising, it is important to keep in mind that a significant portion of class members in certain cases may have limited or no access to email or the Internet. Instead of preferring any one means of notice, therefore, courts and counsel should focus on the means most likely to be effective in the case before the court. The amended rule emphasizes

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that the court must exercise its discretion to select appropriate means of giving notice. Courts should take account not only of anticipated actual delivery rates, but also of the extent to which members of a particular class are likely to pay attention to messages delivered by different means. In providing the court with sufficient information to enable it to decide whether to give notice to the class of a proposed class-action settlement under Rule 23(e)(1), it may often be important to include a report about the proposed method of giving notice to the class.

In determining whether the proposed means of giving notice is appropriate, the court should give careful attention to the content and format of the notice and, if this notice is given under Rule 23(e)(1) as well as Rule 23(c)(2)(B), any claim form class members must submit to obtain relief. Particularly if the notice is by electronic means, care is necessary regarding access to online resources, the manner of presentation, and any response expected of class members. As the rule directs, the means should be the "best * * * that is practicable" in the given case. The ultimate goal of giving notice is to enable class members to make informed decisions about whether to opt out or, in instances where a proposed settlement is involved, to object or to make claims. Means, format, and content that would be appropriate for class members likely to be sophisticated, for example in a securities fraud class action, might not be appropriate for a class made up in significant part of members likely to be less sophisticated. As with the method of notice, the form of notice should be tailored to the class members' anticipated understanding and capabilities. The court and counsel may wish to consider the use of class notice experts or professional claims administrators.

Attention should focus also on the method of opting out provided in the notice. The proposed method should be as convenient as possible, while protecting against unauthorized opt-out notices. The process of opting out should not be unduly difficult or cumbersome. As with other aspects of the notice process, there is no single method that is suitable for all cases.

Subdivision (e). The introductory paragraph of Rule 23(e) is amended to make explicit that its procedural requirements apply in instances in which the court has not certified a class at the time that a proposed settlement is presented to the court. The notice required under Rule 23(e)(1) then should also satisfy the notice requirements of amended Rule 23(c)(2)(B) for a class to be certified under Rule 23(b)(3), and trigger the class members' time to request exclusion. Information about the opt-out rate could then be available to the court at the time that it considers final approval of the proposed settlement.

Subdivision (e)(1). The decision to give notice of a proposed settlement to the class is an important event. It should be based on a solid record supporting the conclusion that the proposed settlement will likely earn final approval after notice and an opportunity to object. The amended rule makes clear that the parties must provide the court with information sufficient to enable it to decide whether notice should be sent. At the time they seek notice to the class, the proponents of the settlement should ordinarily provide the court with all available materials they intend to submit in support of approval under Rule 23(e)(2). That would give the court a full picture and make this information available to the members of the class. The amended rule also specifies the standard the court should use in deciding whether to send notice—that notice is justified by the parties' showing regarding the likely approval of the proposal. The prospect of final approval should be measured under amended Rule 23(e)(2), which provides criteria for the final settlement review.

If the court has not previously certified a class, this showing should also provide a basis for the court to conclude that it likely will be able to certify a class for purposes of settlement. Although the order to send notice is often inaccurately called "preliminary approval" of class certification, it is not appealable under Rule 23(f). It is, however, sufficient to require notice under Rule 23(c)(2)(B) calling for class members in Rule 23(b)(3) classes to decide whether to opt out.

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There are many types of class actions and class-action settlements. As a consequence, no single list of topics to be addressed in the submission to the court would apply to each case. Instead, the subjects to be addressed depend on the specifics of the particular class action and proposed settlement. But some general observations can be made.

One key element is class certification. If the court has already certified a class, the only information ordinarily necessary in regard to a proposed settlement is whether the proposal calls for any change in the class certified, or of the claims, defenses, or issues regarding which certification was granted. But if a class has not been certified, the parties must ensure that the court has a basis for concluding that it likely will be able, after the final hearing, to certify the class. Although the standards for certification differ for settlement and litigation purposes, the court cannot make the decision regarding the prospects for certification without a suitable basis in the record. The decision to certify the class for purposes of settlement cannot be made until the hearing on final approval of the proposed settlement. If the settlement is not approved and certification for purposes of litigation is later sought, the parties' earlier submissions in regard to the proposed certification for settlement should not be considered in deciding on certification.

Regarding the proposed settlement, a great variety of types of information might appropriately be included in the submission to the court. A basic focus is the extent and type of benefits that the settlement will confer on the members of the class. Depending on the nature of the proposed relief, that showing may include details of the claims process that is contemplated and the anticipated rate of claims by class members. If the notice to the class calls for submission of claims before the court decides whether to approve the proposal under Rule 23(e)(2), it may be important to provide that the parties will report back to the court on the actual claims experience. And because some funds are frequently left unclaimed, it is often important for the settlement agreement to address the use of those funds. Many courts have found guidance on this subject in § 3.07 of the American Law Institute, Principles of Aggregate Litigation (2010).

It is important for the parties to supply the court with information about the likely range of litigated outcomes, and about the risks that might attend full litigation. In that connection, information about the extent of discovery completed in the litigation or in parallel actions may often be important. In addition, as suggested by Rule 23(b)(3)(A), information about the existence of other pending or anticipated litigation on behalf of class members involving claims that would be released under the proposal—including the breadth of any such release—may be important.

The proposed handling of an award of attorney's fees under Rule 23(h) is another topic that ordinarily should be addressed in the parties' submission to the court. In some cases, it will be important to relate the amount of an award of attorney's fees to the expected benefits to the class, and to take account of the likely claims rate. One method of addressing this issue is to defer some or all of the award of attorney's fees until the court is advised of the actual claims rate and results. Another topic that normally should be considered is any agreement that must be identified under Rule 23(e)(3).

The parties may supply information to the court on any other topic that they regard as pertinent to the determination whether the proposal is fair, reasonable, and adequate. The court may direct the parties to supply further information about the topics they do address, or to supply information on topics they do not address. It must not direct notice to the class until the parties' submissions show it is likely that the court will have a basis to approve the proposal after notice to the class and a final approval hearing.

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117 **Subdivision (e)(2).** The central concern in reviewing a proposed class-action settlement is
118 that it be fair, reasonable, and adequate. This standard emerged from case law implementing
119 Rule 23(e)'s requirement of court approval for class-action settlements. It was formally recognized
120 in the rule through the 2003 amendments. By then, courts had generated lists of factors to shed light
121 on this central concern. Overall, these factors focused on comparable considerations, but each circuit
122 developed its own vocabulary for expressing these concerns. In some circuits, these lists have
123 remained essentially unchanged for thirty or forty years. The goal of this amendment is not to
124 displace any of these factors, but rather to focus the court and the lawyers on the core concerns of
125 procedure and substance that should guide the decision whether to approve the proposal.

126 One reason for this amendment is that a lengthy list of factors can take on an independent
127 life, potentially distracting attention from the central concerns that inform the settlement-review
128 process. A circuit's list might include a dozen or more separately articulated factors. Some of those
129 factors—perhaps many—may not be relevant to a particular case or settlement proposal. Those that
130 are relevant may be more or less important to the particular case. Yet counsel and courts may feel
131 it necessary to address every single factor on a given circuit's list in every case. The sheer number
132 of factors can distract both the court and the parties from the central concerns that bear on review
133 under Rule 23(e)(2).

134 This amendment therefore directs the parties to present the settlement to the court in terms
135 of a shorter list of core concerns, by focusing on the primary procedural considerations and
136 substantive qualities that should always matter to the decision whether to approve the proposal.

137 Approval under Rule 23(e)(2) is required only when class members would be bound under
138 Rule 23(c)(3). Accordingly, in addition to evaluating the proposal itself, the court must determine
139 whether it can certify the class under the standards of Rule 23(a) and (b) for purposes of judgment
140 based on the proposal.

141 **Paragraphs (A) and (B).** These paragraphs identify matters that might be described as
142 "procedural" concerns, looking to the conduct of the litigation and of the negotiations leading up to
143 the proposed settlement. Attention to these matters is an important foundation for scrutinizing the
144 specifics of the proposed settlement. If the court has appointed class counsel or interim class
145 counsel, it will have made an initial evaluation of counsel's capacities and experience. But the focus
146 at this point is on the actual performance of counsel acting on behalf of the class.

147 The information submitted under Rule 23(e)(1) may provide a useful starting point in
148 assessing these topics. For example, the nature and amount of discovery in this or other cases, or
149 the actual outcomes of other cases, may indicate whether counsel negotiating on behalf of the class
150 had an adequate information base. The pendency of other litigation about the same general subject
151 on behalf of class members may also be pertinent. The conduct of the negotiations may be important
152 as well. For example, the involvement of a neutral or court-affiliated mediator or facilitator in those
153 negotiations may bear on whether they were conducted in a manner that would protect and further
154 the class interests.

155 In undertaking this analysis, the court may also refer to Rule 23(g)'s criteria for appointment
156 of class counsel; the concern is whether the actual conduct of counsel has been consistent with what
157 Rule 23(g) seeks to ensure. Particular attention might focus on the treatment of any award of
158 attorney's fees, with respect to both the manner of negotiating the fee award and its terms.

159 **Paragraphs (C) and (D).** These paragraphs focus on what might be called a "substantive"
160 review of the terms of the proposed settlement. The relief that the settlement is expected to provide

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161 to class members is a central concern. Measuring the proposed relief may require evaluation of the
162 proposed claims process and a prediction of how many claims will be made; if the notice to the class
163 calls for pre-approval submission of claims, actual claims experience may be important. The
164 contents of any agreement identified under Rule 23(e)(3) may also bear on the adequacy of the
165 proposed relief, particularly regarding the equitable treatment of all members of the class.

166 Another central concern will relate to the cost and risk involved in pursuing a litigated
167 outcome. Often, courts may need to forecast what the likely range of possible classwide recoveries
168 might be and the likelihood of success in obtaining such results. That forecast cannot be done with
169 arithmetic accuracy, but it can provide a benchmark for comparison with the settlement figure.

170 If the class has not yet been certified for trial, the court may consider whether certification
171 for litigation would be granted were the settlement not approved.

172 Examination of the attorney-fee provisions may also be important to assessing the fairness
173 of the proposed settlement. Ultimately, any award of attorney's fees must be evaluated under Rule
174 23(h), and no rigid limits exist for such awards. Nonetheless, the relief actually delivered to the class
175 can be an important factor in determining the appropriate fee award. Provisions for reporting back
176 to the court about actual claims experience, and deferring a portion of the fee award until the claims
177 experience is known, may bear on the fairness of the overall proposed settlement.

178 Often it will be important for the court to scrutinize the method of claims processing to
179 ensure that it facilitates filing legitimate claims. A claims processing method should deter or defeat
180 unjustified claims, but unduly demanding claims procedures can impede legitimate claims.
181 Particularly if some or all of any funds remaining at the end of the claims process must be returned
182 to the defendant, the court must be alert to whether the claims process is unduly demanding.

183 Paragraph (D) calls attention to a concern that may apply to some class action settlements—
184 inequitable treatment of some class members vis-a-vis others. Matters of concern could include
185 whether the apportionment of relief among class members takes appropriate account of differences
186 among their claims, and whether the scope of the release may affect class members in different ways
187 that affect the apportionment of relief.

188 **Subdivision (e)(3).** A heading is added to subdivision (e)(3) in accord with style
189 conventions. This addition is intended to be stylistic only.

190 **Subdivision (e)(4).** A heading is added to subdivision (e)(4) in accord with style
191 conventions. This addition is intended to be stylistic only.

192 **Subdivision (e)(5).** Objecting class members can play a critical role in the settlement-
193 approval process under Rule 23(e). Class members have the right under Rule 23(e)(5) to submit
194 objections to the proposal. The submissions required by Rule 23(e)(1) may provide information
195 important to decisions whether to object or opt out. Objections can provide the court with important
196 information bearing on its determination under Rule 23(e)(2) whether to approve the proposal.

197 **Subdivision (e)(5)(A).** The rule is amended to remove the requirement of court approval for
198 every withdrawal of an objection. An objector should be free to withdraw on concluding that an
199 objection is not justified. But Rule 23(e)(5)(B)(i) requires court approval of any payment or other
200 consideration in connection with withdrawing the objection.

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201 The rule is also amended to clarify that objections must provide sufficient specifics to enable
202 the parties to respond to them and the court to evaluate them. One feature required of objections is
203 specification whether the objection asserts interests of only the objector, or of some subset of the
204 class, or of all class members. Beyond that, the rule directs that the objection state its grounds "with
205 specificity." Failure to provide needed specificity may be a basis for rejecting an objection. Courts
206 should take care, however, to avoid unduly burdening class members who wish to object, and to
207 recognize that a class member who is not represented by counsel may not present objections that
208 adhere to technical legal standards.

209 **Subdivision (e)(5)(B).** Good-faith objections can assist the court in evaluating a proposal
210 under Rule 23(e)(2). It is legitimate for an objector to seek payment for providing such assistance
211 under Rule 23(h). As recognized in the 2003 Committee Note to Rule 23(h): "In some situations,
212 there may be a basis for making an award to other counsel whose work produced a beneficial result
213 for the class, such as * * * attorneys who represented objectors to a proposed settlement under
214 Rule 23(e)."

215 But some objectors may be seeking only personal gain, and using objections to obtain
216 benefits for themselves rather than assisting in the settlement-review process. At least in some
217 instances, it seems that objectors—or their counsel—have sought to extract tribute to withdraw their
218 objections or dismiss appeals from judgments approving class settlements. And class counsel
219 sometimes may feel that avoiding the delay produced by an appeal justifies providing payment or
220 other consideration to these objectors.

221 The court-approval requirement currently in Rule 23(e)(5) partly addresses this concern.
222 Because the concern only applies when consideration is given in connection with withdrawal of an
223 objection, however, the amendment requires approval under Rule 23(e)(5)(i) only when
224 consideration is involved. The term "consideration" should be broadly interpreted, particularly when
225 the withdrawal includes some arrangements beneficial to objector counsel. If the consideration
226 involves a payment to counsel for an objector, the proper procedure is by motion under Rule 23(h)
227 for an award of fees; the court may approve the fee if the objection assisted the court in
228 understanding and evaluating the settlement even though the settlement was approved as proposed.

229 Rule 23(e)(5)(B)(ii) applies to consideration in connection with forgoing, dismissing, or
230 abandoning an appeal from a judgment approving the proposal. Because an appeal by a class-action
231 objector may produce much longer delay than an objection before the district court, it is important
232 to extend the court-approval requirement to apply in the appellate context. The district court is best
233 positioned to determine whether to approve such arrangements; hence, the rule requires that the
234 motion seeking approval be made to the district court.

235 Until the appeal is docketed by the circuit clerk, the district court may dismiss the appeal on
236 stipulation of the parties. See Fed. R. App. P. 42(a). Thereafter, the court of appeals has authority
237 to decide whether to dismiss the appeal. This rule's requirement of district court approval of any
238 consideration in connection with such dismissal by the court of appeals has no effect on the authority
239 of the court of appeals over the appeal. It is, instead, a requirement that applies only to providing
240 consideration in connection with forgoing, dismissing, or abandoning an appeal. A party dissatisfied
241 with the district court's order under Rule 23(e)(5)(B) may appeal the order.

242 **Subdivision (e)(5)(C).** Because the court of appeals has jurisdiction over an objector's
243 appeal from the time that it is docketed in the court of appeals, the procedure of Rule 62.1 applies.
244 That procedure does not apply after the court of appeals' mandate returns the case to the district
245 court.

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246 **Subdivision (f).** As amended, Rule 23(e)(1) provides that the court should direct notice to
247 the class regarding a proposed class-action settlement in cases in which class certification has not
248 yet been granted only after determining that the prospect of eventual class certification justifies
249 giving notice. This decision is sometimes inaccurately characterized as "preliminary approval" of
250 the proposed class certification. But it does not grant or deny class certification, and review under
251 Rule 23(f) would be premature. This amendment makes it clear that an appeal under this rule is not
252 permitted until the district court decides whether to certify the class.

253 The rule is also amended to extend the time to file a petition for review of a class-action
254 certification order to 45 days whenever a party is the United States, one of its agencies, or a United
255 States officer or employee sued for an act or omission occurring in connection with duties performed
256 on the United States' behalf. In such a case, the extension applies to a petition for permission to
257 appeal by any party. The extension of time recognizes—as under Rules 4(i) and 12(a) and Appellate
258 Rules 4(a)(1)(B) and 40(a)(1)—that the United States has a special need for additional time in regard
259 to these matters. The extension applies whether the officer or employee is sued in an official
260 capacity or an individual capacity; the defense is usually conducted by the United States even though
261 the action asserts claims against the officer or employee in an individual capacity. An action against
262 a former officer or employee of the United States is covered by this provision in the same way as an
263 action against a present officer or employee. Termination of the relationship between the individual
defendant and the United States does not reduce the need for additional time.

Report on Topics Still Under Study

After the Rule 23 Subcommittee gave careful attention to a range of topics not specifically included in the above preliminary draft of proposed amendments to Rule 23, it decided not to proceed with several of them. It also recommended that two additional topics remain under study, and the Advisory Committee approved that decision. Below is a brief summary of those two topics.

Pick-off issues: In recent years, there have been a number of instances in which defendants in putative class actions have sought to "pick off" the named class representative by offering all the individual relief he or she could obtain and moving to dismiss on grounds of mootness. In *Campbell-Ewald Co. v. Gomez*, 136 S.Ct. 663 (2016), the Supreme Court held that such an offer does not moot a case because "an unaccepted settlement offer has no force." The decision left open the possibility, however, that the outcome could be different if the defendant deposited the money in court and consented to entry of judgment against it in favor of the putative class representative. The Rule 23 Subcommittee has been monitoring activity in the lower courts since the Supreme Court's decision. If pick-off issues continue to be important, it may return to considering these issues.

This recent discussion has also caused the Subcommittee to focus on the possibility of specifying in Rule 23 that the court must or may afford counsel time to find a replacement class representative if the initial proposed representative proves unable to continue in that role.

Ascertainability: The lower courts have, in recent years, fairly frequently addressed arguments about whether the membership in a proposed class was sufficiently ascertainable to support certification. The extent to which the lower courts' views differ on this subject remains uncertain. In two cases (from the Sixth and Seventh Circuits), the Supreme Court has denied certiorari this year. Given the evolving state of this doctrine in the lower courts, and the initial difficulties the Rule 23 Subcommittee encountered in drafting possible amendments to address this

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issue, no proposal for amendment was brought forward. Nonetheless, the issue seemed to have sufficient currency and importance to be retained on the Subcommittee's agenda.

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B. RULE 62

The Rule 62 provisions for staying execution were brought to the Committee and to the Appellate Rules Committee by independent and distinct questions. This Committee was asked about an apparent "gap" between the 14-day automatic stay provided by Rule 62(a) and the authority to issue a stay "pending disposition of" a post-judgment motion that might not be made until a time after expiration of the automatic stay. The Appellate Rules Committee was asked about authority to post security in a form other than a bond, and about authority to post a single security in a form that lasts through post-judgment proceedings in the district court and the conclusion of all proceedings on appeal. The Committee recommends approval of the following amendments for publication. They address all three of the questions that prompted the inquiry.

The groundwork has been laid by a subcommittee that includes representatives of the Appellate and Civil Rules Committees. Judge Scott Matheson chaired the subcommittee. The subcommittee began work on the three topics that launched the project, but also developed complicated drafts that sought to address several questions not treated in Rule 62. Many of the complications proved too difficult to address with any confidence. The drafts were then simplified. These simpler drafts were discussed both in the advisory committees and in the Standing Committee. These discussions continued to prune away provisions that directly recognized open-ended district-court authority to grant, amend, or deny stays, with or without security. In the end, the proposal is limited to address only the three questions that started the work. It eliminates the "gap" at the end of the automatic stay by extending the stay from 14 days to 30 days, and qualifies the automatic stay by allowing the court to order otherwise. Security can be posted by bond or in other forms; as in the present rule, the court must approve either the bond or a different form of security. And the security can be posted on terms that continue from the time it is approved to the time specified in the bond or security.

Subdivisions (a) through (d) of present Rule 62 are rearranged to bring related provisions closer together, easing the reader's path through the rule. The remaining subdivisions, (e) through (h), are left unchanged. They were thoroughly explored in a memorandum prepared by Professor Struve as Reporter for the Appellate Rules Committee, and were considered by the subcommittee. In the end, it seemed better to leave them as they are.

The rearrangement of subdivisions (a) through (d) is so thorough that presentation in the traditional over- and underline form can be hard to follow. That version is left to the end. First comes the clean text of the rule as proposed for publication, including the Committee Note. The Committee Note provides a deliberately spare explanation of the underlying purposes. A somewhat more elaborate explanation follows, and it is then followed by the over- and underline version that illustrates the changes and rearrangement of the rule text.

Rule 62 Proposed for Publication

1 **Rule 62. Stay of Proceedings to Enforce a Judgment.**

2 **(a) Automatic Stay.** Except as provided in Rule 62(c) and (d), execution on a judgment and
3 proceedings to enforce it are stayed for 30 days after its entry, unless the court orders
4 otherwise.

5 **(b) Stay by Bond or Other Security.** At any time after judgment is entered, a party may obtain a
6 stay by providing a bond or other security. The stay takes effect when the court approves the
7 bond or other security and remains in effect for the time specified in the bond or security.

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(c) No Automatic Stay of an Injunction, Receivership, or Patent-Accounting Order. Unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

(1) an interlocutory or final judgment in an action for an injunction or a receivership; or
(2) a judgment or order that directs an accounting in an action for patent infringement.

(d) Injunction Pending an Appeal. While an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:

(1) by that court sitting in open session; or
(2) by the assent of all its judges, as evidenced by their signatures.

* * * * *

Committee Note

Subdivisions (a), (b), (c), and (d) of former Rule 62 are reorganized and the provisions for staying a judgment are revised.

The provisions for staying an injunction, receivership, or order for a patent accounting are reorganized by consolidating them in new subdivisions (c) and (d). There is no change in meaning. The language is revised to include all of the words used in 28 U.S.C. § 1292(a)(1) to describe the right to appeal from interlocutory actions with respect to an injunction, but subdivisions (c) and (d) apply both to interlocutory injunction orders and to final judgments that grant, refuse, or otherwise deal with an injunction.

New Rule 62(a) extends the period of the automatic stay to 30 days. Former Rule 62(a) set the period at 14 days, while former Rule 62(b) provided for a court-ordered stay "pending disposition of" motions under Rules 50, 52, 59, and 60. The time for making motions under Rules 50, 52, and 59, however, was later extended to 28 days, leaving an apparent gap between expiration of the automatic stay and any of those motions (or a Rule 60 motion) made more than 14 days after entry of judgment. The revised rule eliminates any need to rely on inherent power to issue a stay during this period. Setting the period at 30 days coincides with the time for filing most appeals in civil actions, providing a would-be appellant the full period of appeal time to arrange a stay by other means. A thirty-day automatic stay also suffices in cases governed by a 60-day appeal period.

Amended Rule 62(a) expressly recognizes the court's authority to dissolve the automatic stay or supersede it by a court-ordered stay. One reason for dissolving the automatic stay may be a risk that the judgment debtor's assets will be dissipated. Similarly, it may be important to allow immediate execution of a judgment that does not involve a payment of money. The court may address the risks of immediate execution by ordering dissolution of the stay only on condition that security be posted by the judgment creditor. Rather than dissolve the stay, the court may choose to supersede it by ordering a stay that lasts longer or requires security.

Subdivision 62(b) carries forward in modified form the supersedeas bond provisions of former Rule 62(d). A stay may be obtained under subdivision (b) at any time after judgment is entered. Thus a stay may be obtained before the automatic stay has expired, or after the automatic

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28 stay has been lifted by the court. The new rule's text makes explicit the opportunity to post security
29 in a form other than a bond. The stay takes effect when the court approves the bond or other security
30 and remains in effect for the time specified in the bond or security—a party may find it convenient
31 to arrange a single bond or other security that persists through completion of post-judgment
32 proceedings in the trial court and on through completion of all proceedings on appeal by issuance
33 of the appellate mandate. This provision does not supersede the opportunity for a stay under 28
34 U.S.C. § 2101(f) pending review by the Supreme Court on certiorari. Finally, subdivision (b)
35 changes the provision in former subdivision (d) that "an appellant" may obtain a stay. Under new
36 subdivision (b), "a party" may obtain a stay. For example, a party may wish to secure a stay pending
37 disposition of post-judgment proceedings after expiration of the automatic stay, not yet knowing
38 whether it will want to appeal.

Further Discussion

The Appellate Rules Committee took up Rule 62 at the suggestion of a member who was interested in making it clear that a judgment debtor can secure a stay by posting continuing security, whether as a bond or by other means, that will last from termination of the automatic stay through completion of all acts by the court of appeals. This beginning led to a comprehensive report by Professor Struve, Reporter for the Committee, examining many different aspects of Rule 62 stays.

The Civil Rules Committee first looked at Rule 62 in response to a question raised by a district judge. The question grew from a complication in the relationship between automatic stays and the authority to order a stay pending disposition of a post-judgment motion. The complication arose from the Time Computation Project that led each of the several advisory committees to reset many of the time periods set in the various sets of rules. Before the Time Project changes, Civil Rules 50, 52, and 59 set the time for motions at 10 days after entry of judgment. Rule 62(a) extinguished the automatic stay 10 days after entry of judgment. Rule 62(b) recognized authority to issue a stay pending disposition of a motion under Rules 50, 52, 59, or 60. The Time Project reset the time for motions under Rules 50, 52, or 59 at 28 days. It also reset expiration of the automatic stay at 14 days after entry of judgment. The result was that the automatic stay expired half-way through the time allowed to make a post-judgment motion. Rule 62(b), however, continued to authorize a stay "pending disposition of any of" these motions. The judge submitted a suggestion that Rule 62 should be amended to make it clear that a stay could be issued before a post-judgment motion is made. The Committee decided against any immediate action. It believed that there is inherent authority to issue a stay as part of the court's necessary control over its own judgment. It concluded that the usual conservative approach made it sensible to wait to see whether actual problems might emerge in practice.

Consultation through the joint subcommittee led to consideration of many other questions.

The "gap" between expiration of the automatic stay and the later time allowed to make a post-trial motion was addressed from the beginning. The simplest adjustment would be to rewrite the rule to allow the court to enter a stay at any time. Several successive drafts included such a provision. It was abandoned, however, as unnecessarily broad. Instead, reliance was placed on a parallel amendment of Rule 62(a) that has carried through from the beginning of the subcommittee's work. The amendment extends the time of the automatic stay to 30 days. That time allows two days beyond the time for making a post-trial motion, an advantage that could become important in cases in which decisions whether to appeal may be affected by the absence of any post-trial motion. It also provides a brief window to arrange security for a court-ordered stay.

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The possible disadvantage of extending the automatic stay is the risk that it will become easier to take steps to defeat any execution. That risk is addressed at the end of proposed Rule 62(a): the automatic stay takes hold "unless the court orders otherwise." The court may dissolve the stay, perhaps on condition that the judgment creditor post security for injuries caused by execution of a judgment that is later modified, set aside, or reversed. Or the court may supersede the automatic stay by ordering a stay on different terms, most likely by including some form of security to protect the judgment creditor.

The single-security question turned attention to present Rule 62(d)'s provisions for a stay by supersedeas bond. An attempt to post a single bond to cover a stay both during post-judgment proceedings and during an appeal might run afoul of the present rule language that recognizes this procedure "If an appeal is taken," and directs that "[t]he bond may be given upon or after filing the notice of appeal." Proposed Rule 62(b) allows a single bond or other security by enabling a party to obtain a stay by providing a bond "[a]t any time after judgment is entered." Proposed Rule 62(b) also explicitly recognizes "a bond or other security."

Consideration of the stay by supersedeas bond raised the question whether there is an absolute right to a stay. Practitioners report a belief that this provision establishes a right to stay execution on posting a satisfactory bond. This belief may be supported by the rule text: "the appellant may obtain a stay by supersedeas bond * * *." There may be some offsetting implication in the further provision that the stay takes effect when the court approves the bond, although approval may be limited to considering the amount of the security, the form of the bond, and the assurance that the bond can be made good. This question was discussed at length. Successive proposed drafts recognized authority to refuse a stay for good cause even if adequate security is tendered. But in the end, ongoing practice and understanding prevailed. Proposed Rule 62(b) carries forward the critical language of present Rule 62(d): "The stay takes effect when the court approves the bond" or other security. This course means that present practice carries forward, including whatever measure of discretion the cases recognize to allow a stay on less than full security in exceptional circumstances.

The final major decision was to reorganize and carry forward the provisions in present Rule 62(a) and (c) for stays of judgments in an action for an injunction or a receivership, or judgments directing an accounting in an action for patent infringement. They are joined in proposed subdivision (d). One change is proposed. Present Rule 62(c) incorporates some, but not all, of the words used in the interlocutory injunction appeal statute, 28 U.S.C. § 1292(a)(1). The Rule refers to "an interlocutory order or final judgment that grants, dissolves, or denies an injunction." The formula in § 1292(a)(1) is more elaborate. Although the Committee is not aware of any difficulties arising from the differences, it has seemed wise to forestall any arguments about appeals from orders that "continue" or "modify" an injunction.

Over- and Underline Rule 62(a) through (d)

Rule 62. Stay of Proceedings to Enforce a Judgment

(a) Automatic Stay.~~; Exceptions for Injunctions, Receiverships, and Patent Accountings.~~ Except as provided in Rule 62(c) and (d), ~~stated in this rule, no~~ execution ~~may issue~~ on a judgment~~, nor may~~ and proceedings ~~be taken~~ to enforce it~~,~~ are stayed for 30 days ~~until 14 days have passed~~ after its entry, unless the court orders otherwise. ~~But unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:~~

~~**(1)** an interlocutory or final judgment in an action for an injunction or a receivership; or~~

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~~**(2)** a judgment or order that directs an accounting in an action for patent infringement.~~

~~**(b)Stay Pending the Disposition of a Motion.** On appropriate terms for the opposing party's security, the court may stay the execution of a judgment — or any proceedings to enforce it — pending disposition of any of the following motions:~~

~~**(1)** under Rule 50, for judgment as a matter of law;~~
~~**(2)** under Rule 52(b), to amend the findings or for additional findings;~~
~~**(3)** under Rule 59, for a new trial or to alter or amend a judgment; or~~
~~**(4)** under Rule 60, for relief from a judgment or order.~~

(b) Stay by Bond or Other Security. At any time after judgment is entered, a party may obtain a stay by providing a bond or other security. The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or security.

(c) No Automatic Stay of an Injunction, Receivership, or Patent-Accounting Order. Unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

(1) an interlocutory or final judgment in an action for an injunction or receivership; or
(2) a judgment or order that directs an accounting in an action for patent infringement.

(d~~c~~) Injunction Pending an Appeal. While an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or ~~denies~~ refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:

(1) by that court sitting in open session; or
(2) by the assent of all its judges, as evidenced by their signatures.

~~**(d) Stay with Bond on Appeal**. If an appeal is taken, the appellant may obtain a stay by supersedeas bond, except in an action described in Rule 62(a)(1) or (2). The bond may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court approves the bond.~~

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C. RULE 5: E-SERVICE AND E-FILING

The Standing Committee Subcommittee on matters electronic has suspended operations. The several advisory committees, however, have cooperated in carrying forward consideration of the ways in which the several sets of rules should be revised to reflect the increasing dominance of electronic means of preserving and communicating information. For the Civil Rules, the Advisory Committee initially worked through to recommendations to publish three rules amendments for comment in August 2015: Rule 5(d)(3) on electronic filing; Rule 5(b)(2)(E) on electronic service, with the corresponding abrogation of Rule 5(b)(3) on using the court's transmission facilities ((b)(2)(E) would supersede it); and Rule 5(d)(1) on using the Notice of Electronic Filing as a certificate of service. But continuing exchanges with the other advisory committees showed that further work was needed to achieve as much uniformity as possible in language, and at times in meaning. Much of the work has involved the Criminal Rules Committee. Criminal Rule 49 now invokes the Civil Rules on filing and service. The Criminal Rules Committee has worked long and hard to create a new and self-contained Rule 49 that will be independent of the Civil Rules. They have welcomed close collaboration with the Civil Rules e-representatives in their Subcommittee deliberations. The result has been great progress that has improved the earlier Civil Rules drafts.

There are powerful reasons to make Civil Rule 5 and Criminal Rule 49 as nearly identical as possible, recognizing that the different circumstances of criminal prosecutions may at times warrant differences in substance and that the different structural and linguistic context of the full sets of rules may at times warrant differences in expression. The value of uniform expression extends beyond the Civil and Criminal Rules to include the Appellate and Bankruptcy Rules as well. But it has not seemed useful to attempt to restructure the Appellate, Bankruptcy, and Civil Rules to emulate the structure of the all-new Criminal Rule 49. All four advisory committees have cooperated in achieving what all believe to be the fullest desirable level of uniformity.

Before turning to the present proposals, it may be useful to provide a brief reminder of broader possibilities that have been put aside.

Earlier work considered an open-ended rule that would equate electrons with paper in two ways. The first provision would state that a reference to information in written form includes electronically stored information. The second provision would state that any action that can or must be completed by filing or sending paper may also be accomplished by electronic means. Each provision would be qualified by an "unless otherwise provided" clause. Reviewing these proposals against the full set of Civil Rules showed that it is still too early to attempt to adopt them as a general approach, even with exceptions—determining what exceptions to make would be difficult, and there were likely to be many of them.

A subset of these questions was considered again in preparing the present proposal. The Rules were scanned for words that direct one party to communicate with another party by means that might, or might not, embrace e-communication. There are several of these words, and they appear in many places. The most obvious example is "mail." Other familiar words include deliver (delivery); send; and notify (notice). Somewhat less familiar words include "provide"; "return[, sequester, or destroy]"; "supplement or correct"; and "furnish." Other words seem to imply tangible embodiment in paper, most commonly "written" and "writing." Taking on all of these provisions now would needlessly delay completion of the present e-filing and e-service proposals. Practice is adjusting comfortably to the electronic era. There will be time enough for a separate project to consider which circumstances justify, or perhaps even require, communicating or acting by electronic means.

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A related general question involves electronic signatures. Many local rules address this question now, often drawing from a Model Rule. A proposal to amend the Bankruptcy Rules to address electronic signatures was published and then withdrawn. There did not seem to be much difficulty with treating an electronic filing by an authorized user of the court's e-filing system as the filer's signature. But difficulty was encountered in dealing with papers signed by someone other than the authorized filer. Affidavits and declarations are common examples, as are many forms of discovery responses. The several advisory committees share the view that it is too early to take on e-signatures in a general way. Draft Rule 5(d)(3) does provide that the user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.

Rule 5(d)(3): Electronic Filing

The Rule 5(d)(3) amendment would establish a uniform national rule that makes e-filing mandatory except for filings made by a person not represented by an attorney, and with a further exception that paper filing must be allowed for good cause and may be required or allowed for other reasons by local rule. A person not represented by an attorney may file electronically only if allowed by court order or local rule, and can be required to do so only by court order or by a local rule that includes reasonable exceptions. And the user name and password of an attorney of record, along with the attorney's name on a signature block, serves as the attorney's signature.

This proposal rests on the advantages that e-filing brings to the court and the parties. Local rules in most districts already require attorneys to file electronically. The risks of mistakes have been reduced by growing familiarity with, and competence in, electronic communication. At the same time, deliberation in consultation with other advisory committees showed that the general mandate should not extend to pro se parties. Although pro se parties are thus generally exempted from the requirement, the proposal allows them access to e-filing by local rule or court order. This treatment recognizes that some pro se parties have already experienced success with e-filing, and reflects an expectation that the required skills and access to electronic systems will expand. The court and other parties will share the benefits when pro se litigants can manage e-filing. Finally, the proposal allows a court to require e-filing by an unrepresented party. This provision is designed to support existing programs that direct e-filing in collateral proceedings brought by prison inmates. But e-filing can be required only by court order or by a local rule that includes reasonable exceptions. The language that a local rule must include reasonable exceptions is taken almost verbatim from present Rule 5(d)(3). It will protect against local-rule requirements that might impede access to courts, a concern that had troubled the Criminal Rules Committee with respect to habeas corpus and § 2255 proceedings.

1 **Rule 5. Serving and Filing Pleadings and Other Papers**

2 **(d) Filing** * * *

3 **(2)** ***Nonelectronic Filing*** ~~***How Filing is Made—In General***~~***.*** A paper <u>not filed electronically</u> is
4 filed by delivering it:

5 **(A)** to the clerk; or
6 **(B)** to a judge who agrees to accept it for filing, and who must then note the filing date on
7 the paper and promptly send it to the clerk.

8 **(3)** ***Electronic Filing and Signing*** ~~***, or Verification***~~***.***

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(A) *By a Represented Person—Generally Required; Exceptions.* ~~A court may, by local rule, allow papers to be filed, signed, or verified~~ A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule. ~~by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States~~.

(B) *By an Unrepresented Person—When Allowed or Required.* A person not represented by an attorney:

(i) may file electronically only if allowed by court order or by local rule; and

(ii) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(C) *Signing.* The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.

(D) *Same as a Written Paper.* A paper filed electronically ~~in compliance with a local rule~~ is a written paper for purposes of these rules.

Committee Note

Electronic filing has matured. Most districts have adopted local rules that require electronic filing, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it generally mandatory in all districts for a person represented by an attorney. But exceptions continue to be available. Nonelectronic filing must be allowed for good cause. And a local rule may allow or require nonelectronic filing for other reasons.

Filings by a person not represented by an attorney are treated separately. It is not yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing. Encounters with the court's system may prove overwhelming to some. Attempts to work within the system may generate substantial burdens on a pro se party, on other parties, and on the court. Rather than mandate electronic filing, filing by pro se litigants is left for governing by local rules or court order. Efficiently handled electronic filing works to the advantage of all parties and the court. Many courts now allow electronic filing by pro se litigants with the court's permission. Such approaches may expand with growing experience in these and other courts, along with the growing availability of the systems required for electronic filing and the increasing familiarity of most people with electronic communication. Room is also left for a court to require electronic filing by a pro se litigant by court order or by local rule. Care should be taken to ensure that an order to file electronically does not impede access to the court, and reasonable exceptions must be included in a local rule that requires electronic filing by a pro se litigant. In the beginning, this authority is likely to be exercised only to support special programs, such as one requiring e-filing in collateral proceedings by pro se prisoners.

The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.

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Clean Rule Text

Rule 5. Serving and Filing Pleadings and Other Papers

(d) FILING. * * *

(2) ***Nonelectronic Filing.*** A paper not filed electronically is filed by delivering it:

(A) to the clerk; or

(B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(3) ***Electronic Filing and Signing.***

(A) *By a Represented Person—Generally Required; Exceptions.* A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(B) *By an Unrepresented Person—When Allowed or Required.* A person not represented by an attorney:

(i) may file electronically only if allowed by court order or by local rule; and

(ii) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(C) *Signing.* The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.

(D) *Same as a Written Paper.* A paper filed electronically is a written paper for purposes of these rules.

Rule 5(b)(2)(E): e-Service

Present Rule 5(b)(2)(E) allows service by electronic means only if the person to be served consented in writing. It is complemented by Rule 5(b)(3), which provides that a party may use the court's transmission facilities to make electronic service "[i]f a local rule so authorizes." The proposal deletes the requirement of consent when service is made through the court's transmission facilities on a registered user. It also abrogates Rule 5(b)(3) as no longer necessary.

Consent continues to be required for electronic service in other circumstances, whether the person served is a registered user or not. A registered user might consent to service by other electronic means for papers that are not filed with the court. In civil litigation, a common example is provided by discovery materials that must not be filed until they are used in the action or until the court orders filing. A pro se litigant who is not a registered user—and very few now are—is protected by the consent requirement. In either setting, consent may be important to ensure effective service. The terms of consent can specify an appropriate address and format, and perhaps other matters as well.

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Rule 5. Serving and Filing Pleadings and Other Papers

(b) Service: How Made. * * *

(2) *Service in General.* A paper is served under this rule by:

(A) handing it to the person * * *

(E) sending it to a registered user by filing it with the court's electronic-filing system or sending it by other electronic means ~~if~~ that the person consented to in writing—in either of which events service is complete upon ~~transmission~~ filing or sending, but is not effective if the serving party learns that it did not reach the person to be served; or * * *

Committee Note

Provision for electronic service was first made when electronic communication was not as widespread or as fully reliable as it is now. Consent of the person served to receive service by electronic means was required as a safeguard. Those concerns have substantially diminished, but have not disappeared entirely, particularly as to persons proceeding without an attorney.

The amended rule recognizes electronic service on a registered user by filing with the court's electronic-filing system. A court may choose to allow registration only with the court's permission. But a party who registers will be subject to service by filing with the court's system unless the court provides otherwise. With the consent of the person served, electronic service also may be made by means that do not use the court's system. Consent can be limited to service at a prescribed address or in a specified form, and may be limited by other conditions.

Because Rule 5(b)(2)(E) now authorizes service by filing with the court's electronic-filing system as a uniform national practice, Rule 5(b)(3) is abrogated. It is no longer necessary to rely on local rules to authorize such service.

Clean Rule Text

Rule 5. Serving and Filing Pleadings and Other Papers

(b) Service: How Made. * * *

(2) ***Service in General***. A paper is served under this rule by:

(A) handing it to the person * * *

(E) sending it to a registered user by filing it with the court's electronic-filing system or sending it by other electronic means that the person consented to in writing—in either of which events service is complete upon filing or sending, but is not effective if the serving party learns that it did not reach the person to be served; or * * *

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Permission to Use Court's Facilities: Abrogating Rule 5(b)(3)

This package includes a proposal to abrogate Rule 5(b)(3) to reflect the amendment of Rule 5(b)(2)(E) that allows service on a registered user by filing with the court's electronic-filing system without requiring consent. Rule 5(b)(3) reads:

> **(3)** ***Using Court Facilities.*** If a local rule so authorizes, a party may use the court's transmission facilities to make service under Rule 5(b)(2)(E).

The basic reason to abrogate (b)(3) is to avoid the seeming inconsistency of authorizing service by filing with the court's system in (b)(2)(E) and then requiring authorization by a local rule as well. Probably there is no danger that a local rule might opt out of the national rule, but eliminating (b)(3) would ensure that none will. It remains important to ensure that a court can refuse to allow a particular person to become a registered user. It may be safe to rely on the Committee Note to (b)(2)(E), with added support in a Committee Note explaining the abrogation of (b)(3).

The published proposal would look like this:

> ~~(3) *Using Court Facilities.* If a local rule so authorizes, a party may use the court's transmission facilities to make service under Rule 5(b)(2)(E).~~

Committee Note

Rule 5(b)(3) is abrogated. As amended, Rule 5(b)(2)(E) directly authorizes service on a registered user by filing with the court's electronic-filing system. Local rule authority is no longer necessary. The court retains inherent authority to deny registration or to qualify a registered user's participation in service through the court's facilities.

Notice of Electronic Filing as Proof of Service

Rule 5(d)(1) was amended in 1991 to require a certificate of service. It did not specify any particular form. Many lawyers include a certificate of service at the end of any paper filed in the court's electronic filing system and served through the court's transmission facilities. This practice can be made automatic by amending Rule 5(d)(1) to provide that a Notice of Electronic Filing constitutes a certificate of service on any party served by the court's electronic-filing system. The draft amendment does that, retaining the requirement for a certificate of service following service by other means.

Treating the Notice of Electronic Filing as the certificate of service will not save many electrons. The certificates generally included in documents electronically filed and served through the court's facilities are brief. It may be that cautious lawyers will continue to include them. But there is an opportunity for some saving, and protection for those who would forget to add the certificate to the original document, whether the protection is against the burden of generating and filing a separate document or against forgetting to file a certificate at all. Other parties will be spared the need to check court files to determine who was served, particularly in cases in which all parties participate in electronic filing and service.

The Notice of Electronic Filing automatically identifies the means, time, and e-address where service was made and also identifies the parties who were not authorized users of the court's electronic-filing system, thus flagging the need for service by other means. There might be some value in amending Rule 5(d)(1) further to require that the certificate for service by other means

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specify the date and manner of service; the names of the persons served; and the address where service was made. Still more detail might be required. The Committee considered this possibility but decided that there is no need to add this much detail to rule text. Lawyers seem to be managing nicely without it.

The draft considered by the Committee included, as a subject for discussion, a further provision that the Notice of Electronic Filing is not a certificate of service if "the serving party learns that it did not reach the person to be served." That formula appears in Rule 5(b)(2)(E), both now and in the proposed revision. The Committee concluded that this caution need not be duplicated in Rule 5(d)(1). Learning that the attempted e-service did not work means there is no service. No service, no certificate of service.

Rule 5. Serving and Filing Pleadings and Other Papers

(d) FILING.

(1) ***Required Filings: Certificate of Service.***

(A) *Papers after the Complaint.* Any paper after the complaint that is required to be served ~~— together with a certificate of service —~~ must be filed within a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed * * *.

(B) *Certificate.* A certificate of service must be filed within a reasonable time after service, but a notice of electronic filing constitutes a certificate of service on any person served by the court's electronic-filing system.

Committee Note

The amendment provides that a notice of electronic filing generated by the court's CM/ECF system is a certificate of service on any person served by the court's electronic-filing system. But if the serving party learns that the paper did not reach the party to be served, there is no service under Rule 5(b)(2)(E) and there is no certificate of the (nonexistent) service.

When service is not made by filing with the court's electronic filing system, a certificate of service must be filed and should specify the date as well as the manner of service.

Clean Rule Text

(d) FILING.

(1) ***Required Filings: Certificate of Service.***

(A) *Papers after the Complaint.* Any paper after the complaint that is required to be served must be filed within a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed * * *.

(B) *Certificate.* A certificate of service must be filed within a reasonable time after service, but a notice of electronic filing constitutes a certificate of service on any person served by the court's electronic-filing system.

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Clean Rule Text

Rule 5. Serving and Filing Pleadings and Other Papers

* * *

(b) Service: How Made. * * *

(2) ***Service in General.*** A paper is served under this rule by:

(A) handing it to the person * * *

(E) sending it to a registered user by filing it with the court's electronic-filing system or sending it by other electronic means that the person consented to in writing—in either of which events service is complete upon filing or sending, but is not effective if the serving party learns that it did not reach the person to be served; or * * *

(d) Filing * * *

(1) ***Required Filings: Certificate of Service.***

(A) *Papers after the Complaint.* Any paper after the complaint that is required to be served must be filed within a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed * * *.

(B) *Certificate.* A certificate of service must be filed within a reasonable time after service, but a notice of electronic filing constitutes a certificate of service on any person served by the court's electronic filing system.

(2) ***Nonelectronic Filing.*** A paper not filed electronically is filed by delivering it:

(A) to the clerk; or

(B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(3) ***Electronic Filing and Signing.***

(A) *By a Represented Person—Generally Required; Exceptions.* A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(B) *By an Unrepresented Person—When Allowed or Required.* A person not represented by an attorney:

(i) may file electronically only if allowed by court order or by local rule, and

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(ii) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(C) *Signing.* The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.

(D) *Same as Written Paper.* A paper filed electronically is a written paper for purposes of these rules.

12b-012483

II. RECOMMENDATION FOR APPROVAL: PILOT PROJECTS

One of the conclusions reached in the process of developing the rule amendments that became effective on December 1, 2015, was that additional innovations in civil litigation may be more likely if they are tested first in a series of pilot projects. To pursue the possible development of such pilot projects, a subcommittee was formed consisting of Jeff Sutton, John Bates, Paul Grimm, Neil Gorsuch, Amy St. Eve, John Barkett, Parker Folse, Virginia Seitz, Ed Cooper, and Dave Campbell. Judge Phil Martinez from the Judicial Conference Committee on Court Administration and Case Management (CACM) was added as a liaison to the subcommittee. The subcommittee's charge is to investigate pilot projects already completed in other locations and recommend possible pilot projects for federal courts.

The subcommittee reported on its work at the January 2016 Standing Committee meeting. At that time, the subcommittee had made contact with the National Center for State Courts, the Institute for Advancement of the American Legal System (IAALS), the Conference of State Court Chief Justices, and various innovative federal courts, and had conducted reviews of pilot projects in ten states. Summaries of the subcommittee's findings were included in the January materials.

Since the January meeting, the subcommittee has held focus-group discussions with lawyers and judges from courts in Colorado, Arizona, and Canada, which all use enhanced initial disclosures. Summaries of the Colorado and Arizona discussions are included as Exhibits 1 and 2 to this report. The subcommittee has also collected and reviewed much additional information, including a recently-proposed revision to Arizona's longstanding enhanced disclosure rule, a recently-revised portion of a joint project by IAALS and the American College of Trial Lawyers recommending more robust initial disclosures, reactions to and comments on a 1993 proposed amendment to the Federal Rules of Civil Procedure to require enhanced initial disclosures, articles from a 1997 symposium concerning the initial disclosure efforts of the early 1990s, the robust initial disclosure rules used in various states (Ex. 3), and a recent FJC report titled "A Study of Civil Case Disposition Time in U.S. District Courts" (Ex. 4).

The subcommittee has concluded that two specific pilot projects should be implemented in federal district courts, one focused on enhanced initial disclosures and the other on expedited case management. Descriptions of these proposed pilot programs are provided below. The Civil Rules committee concurred in the pursuit of these pilot projects at its April 2016 meeting.

The subcommittee believes that more robust initial disclosure requirements could help reduce the cost and delay of civil litigation. This belief is based on several sources: (a) the employment protocol pilot project currently underway, which requires more substantial initial disclosures in employment cases and, according to a study completed by the FJC and described at the January meeting, appears to be reducing discovery disputes; (b) the Colorado Civil Access Pilot Project, which included more robust initial disclosures and was found, in a study by IAALS, to have reduced time to disposition of civil cases (the Colorado courts have now adopted the initial disclosures as part

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of their civil rules); (c) the Arizona enhanced disclosure rule, which has been in place for more than twenty years and generally is preferred by Arizona lawyers over the federal rules; and (d) the rather obvious conclusion that civil litigation will be resolved more quickly and less expensively if relevant information is disclosed earlier and with less discovery practice.

The subcommittee also believes that expedited case management practices could help reduce the cost and delay of civil litigation. Many studies have found that cases are resolved more quickly and with less cost when judges intervene early, actively manage cases, set reasonable but efficient discovery schedules, set firm trial dates, and resolve disputes quickly. The purpose of the second pilot is to implement these practices in the pilot districts, with specific time goals and focused training for judges, measuring case disposition times and other relevant milestones as the pilot progresses. The pilot would test how effectively these proven case management practices can be implemented in various districts through specific time goals and focused training.

Authority to engage in these pilot projects is found in several places. Civil Rule 16(b)(3) authorizes a district court to enter a scheduling order that addresses several relevant subjects: deadlines for the litigation, the timing of disclosures and the extent of discovery, the disclosure of ESI, procedures for prompt resolution of discovery disputes, and "other appropriate matters." Rule 26(b)(2)(C) authorizes the court, on its own, to limit the frequency or extent of discovery, considering whether information can be obtained from other sources that are more convenient, less burdensome, or less expensive. And 28 U.S.C. § 331 authorizes the Judicial Conference to "carry on a continuous study of the operation and effect of the general rules of practice and procedure" used in the federal courts, and to recommend "[s]uch changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay[.]"

A. MANDATORY INITIAL DISCOVERY PILOT PROJECT

1. Standing Order. This pilot project would be implemented through a standing order issued in each of the pilot districts. Our current draft of the order, which includes comments received during the Civil Rules committee meeting in April, is as follows:

> "The Court is participating in a pilot project that requires mandatory initial discovery in all civil cases other than cases exempted by Rule 26(a)(1)(B), patent cases governed by a local rule, and cases transferred for consolidated administration in the District by the Judicial Panel on Multidistrict Litigation. The discovery obligations addressed in this Standing Order encompass the disclosures required by Rule 26(a)(1) – separate disclosures under Rule 26(a)(1) therefore are not required – and are framed as court-ordered mandatory initial discovery pursuant to the Court's inherent authority to manage cases and Rule 16(b)(3)(B)(ii), (iii), and (vi). Unlike initial disclosures required by current Rule 26(a)(1)(A) & (C), this Standing Order does not allow the parties to opt out.

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A. Instructions to Parties.

1. The parties are ordered to respond to the following mandatory initial discovery requests before initiating any further discovery in this case. Further discovery will be as ordered by the Court. Each party's response must be based on the information then reasonably available to it. A party is not excused from providing its response because it has not fully investigated the case or because it challenges the sufficiency of another party's response or because another party has not provided a response. Responses must be signed under oath by the party certifying that it is complete and correct as of the time it was made, based on the party's knowledge, information, and belief formed after a reasonable inquiry, and signed under Rule 26(g) by the attorney.

2. The parties must provide the requested information as to facts that are relevant to the parties' claims and defenses, whether favorable or unfavorable, and regardless of whether they intend to use the information in presenting their claims or defenses. If a party limits the scope of its response on the basis of any claim of privilege or work product, the party must produce a privilege log as required by Rule 26(b)(5) unless the parties agree or the court orders otherwise. If a party limits its response on the basis of any other objection, it must explain with particularity the nature of the objection and its legal basis, and provide a fair description of the information being withheld.

3. All parties must file answers, counterclaims, crossclaims, and replies within the time set forth in Rule 12(a)(1)(A), (B), and (C) even if they have filed or intend to file a motion to dismiss or other preliminary motion. Fed. R. Civ. P. 12(a)(4). But the court may [for good cause] defer the time to answer, counterclaim, crossclaim, or reply while it considers a motion to dismiss [for lack of subject-matter jurisdiction, personal jurisdiction, sovereign immunity, or absolute immunity of a public official]. The time can be set by the court at any time no later than the time set by paragraph 4, measured from entry of the order that decides the motion. [If the court does not set a time, it is set by paragraph 4 as measured from entry of the order that decides the motion].

4. A party seeking affirmative relief must serve its responses to the mandatory initial discovery no later than 30 days after the filing of the first pleading made in response to its complaint, counterclaim, crossclaim, or third-party complaint. A party filing a responsive pleading, whether or not it also seeks affirmative relief, must serve its initial discovery responses no later than 30 days after it files its responsive pleading. However, (a) no initial discovery responses need be served if the Court approves a written stipulation by the

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parties that no discovery will be conducted in the case; and (b) initial discovery responses may be deferred, one time, for 30 days if the parties jointly certify to the Court that they are seeking to settle their dispute and have a good faith belief that the dispute will be resolved within 30 days of the due date for their responses.

5. Initial responses to these mandatory discovery requests shall be filed with the Court on the date when they are served; provided, that voluminous attachments need not be filed, nor are parties required to file documents that are produced in lieu of identification pursuant to paragraphs (B)(3), (5), or (6) below. Supplemental responses shall be filed with the Court if they are served prior to the scheduling conference held under Rule 16(b), but any later supplemental responses need not be filed, although the party serving the supplemental response shall file a notice with the Court that a supplemental response has been served.

6. The duty of mandatory initial discovery set forth in this Order is a continuing duty, and each party must serve supplemental responses when new or additional information is discovered or revealed. A party must serve such supplemental responses in a timely manner, but in any event no later than 30 days after the information is discovered by or revealed to the party. If new information is revealed in a written discovery response or a deposition in a manner that reasonably informs all parties of the information, the information need not be presented in a supplemental response.

7. The Court normally will set a deadline in its Rule 16(b) case management order for final supplementation of responses, and full and complete supplementation must occur by the deadline. In the absence of such a deadline, full and complete supplementation must occur no later than 90 days before the final pre-trial conference.

8. During their Rule 26(f) conference, the parties must discuss the mandatory initial discovery responses and seek to resolve any limitations they have made or intend to make in their responses. The parties should include in the Rule 26(f) report to the Court a description of their discussions. The report should describe the resolution of any limitations invoked by either party in its response, as well as any unresolved limitations or other discovery issues.

9. Production of information under this Standing Order does not constitute an admission that information is relevant, authentic, or admissible.

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10. Rule 37(c)(1) shall apply to mandatory discovery responses required by this Order.

B. Mandatory Initial Discovery Requests.

1. State the names and, if known, the addresses and telephone numbers of all persons whom you believe are likely to have discoverable information relevant to any party's claims or defenses, and provide a fair description of the nature of the information each such person is believed to possess.

2. State the names and, if known, the addresses and telephone numbers of all persons whom you believe have given written or recorded statements relevant to any party's claims or defenses. Unless you assert a privilege or work product protection against disclosure under applicable law, attach a copy of each such statement if it is in your possession, custody, or control. If not in your possession, custody, or control, state the name and, if known, the address and telephone number of each person whom you believe has custody of a copy.

3. List the documents, electronically stored information ("ESI"), tangible things, land, or other property known by you to exist, whether or not in your possession, custody or control, that you believe may be relevant to any party's claims or defenses. To the extent the volume of any such materials makes listing them individually impracticable, you may group similar documents or ESI into categories and describe the specific categories with particularity. Include in your response the names and, if known, the addresses and telephone numbers of the custodians of the documents, ESI, or tangible things, land, or other property that are not in your possession, custody, or control. For documents and tangible things in your possession, custody, or control, you may produce them with your response, or make them available for inspection on the date of the response, instead of listing them. Production of ESI will occur in accordance with paragraph (C)(2) below.

4. For each of your claims or defenses, state the facts relevant to it and the legal theories upon which it is based.

5. Provide a computation of each category of damages claimed by you, and a description of the documents or other evidentiary material on which it is based, including materials bearing on the nature and extent of the injuries suffered. You may produce the documents or other evidentiary materials with your response instead of describing them.

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6. Specifically identify and describe any insurance or other agreement under which an insurance business or other person or entity may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse a party for payments made by the party to satisfy the judgment. You may produce a copy of the agreement with your response instead of describing it.

7. A party receiving the list described in Paragraph 3, the description of materials identified in Paragraph 5, or a description of agreements referred to in Paragraph 6 may request more detailed or thorough responses to these mandatory discovery requests if it believes the responses are deficient. When the court has authorized further discovery, a party may also serve requests pursuant to Rule 34 to inspect, copy, test, or sample any or all of the listed or described items to the extent not already produced in response to these mandatory discovery requests, or to enter onto designated land or other property identified or described.

C. Disclosure of Hard-Copy Documents and ESI.

1. Hard-Copy Documents. Hard-copy documents must be produced as they are kept in the usual course of business.

2. ESI.

a. Duty to Confer. When the existence of ESI is disclosed or discovered, the parties must promptly confer and attempt to agree on matters relating to its disclosure and production, including:

i. requirements and limits on the preservation, disclosure and production of ESI;

ii. appropriate ESI searches, including custodians and search terms, or other use of technology-assisted review;

iii. the form in which the ESI will be produced.

b. Resolution of Disputes. If the parties are unable to resolve any dispute regarding ESI and seek resolution from the Court, they must present the dispute in a single joint motion or, if the Court directs, in a conference call with the Court. Any joint motion must include the parties' positions and the separate certification of counsel required under Rule 26(g).

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c. Production of ESI. Unless the parties agree or the Court orders otherwise, a party must produce the ESI identified under paragraph (B)(3) within 40 days after serving its initial discovery response. Absent good cause, no party need produce ESI in more than one form.

d. Presumptive Form of Production. Unless the parties agree or the Court orders otherwise, a party must produce ESI in the form requested by the receiving party. If the receiving party does not specify a form, the producing party may produce the ESI in any reasonably usable form that will enable the receiving party to have the same ability to access, search, and display the ESI as the producing party."

2. User's Manual. The pilot project will require something of a "user's manual" for the pilot judges, The precise form of that manual has not been developed, but it would include the following kinds of instructions:

Pilot judges should hold initial case management conferences under Rule 16(b) within the time specified in Rule 16(b)(2). Judges should discuss with the parties their compliance with the mandatory discovery obligations set forth in the Standing Order, resolve any disputes, and set a date for full and complete supplementation of responses.

Judges may alter the time for mandatory initial discovery responses upon a showing of good cause, but this should not be a frequent event. Early discovery responses are critical to the purposes of this pilot program.

Judges should make themselves available for prompt resolution of discovery disputes. It is recommended that judges require parties to contact the Court for a pre-motion conference, as identified in Rule 16(b)(3)(B)(v), before filing discovery motions. If discovery motions are necessary, they should be resolved promptly.

Courts should vigorously enforce mandatory discovery obligations. Experience in states with robust initial disclosure requirements has shown that diligent enforcement by judges is the key to an effective disclosure regime. Rule 37 governs sanctions.

3. Timing, Participation, and Other Issues.

We propose that the initial disclosure pilot project be approved by the Standing Committee at its June meeting. Additional details will need to be worked out, but our hope is that this pilot can be launched in 2017. We will seek the agreement of CACM and the FJC, and approval by the Judicial Conference in September.

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We think that at least three to five districts should participate. One small district has already volunteered.

To participate in this pilot, district courts must be willing to make the pilot's requirements mandatory. We have debated whether to require that all judges in the pilot districts be willing to participate. On one hand, complete participation would avoid skewing the results of the pilot through self-selection by judges, and would present a better prospect of culture change – one of the goals of the pilot. On the other hand, requiring participation by all judges might mean that larger districts do not participate. We would appreciate your thoughts on this issue.

One other issue was discussed at the civil rules committee meeting. The subcommittee's original draft required that answers be filed and mandatory disclosures be made in every case, even when motions to dismiss have been filed. Some expressed the view that exceptions should be allowed for motions raising jurisdictional or immunity issues, and language has been added to paragraph 1(A)(3) of the standing order to reflect this possibility. The counter-argument is that permitting any exceptions for motions to dismiss will only encourage such motions and delay the disclosures required by the pilot, defeating in part the purpose of prompt and complete disclosures early in every case. We would appreciate your thoughts on this issue as well.

B. EXPEDITED PROCEDURES PILOT

1. Description of Pilot Project

The goal of the Civil Rules is to further the "just, speedy, and inexpensive determination of every action." Case resolution that is not speedy and inexpensive often will not be just. This pilot will involve all civil cases where discovery and trial are possible (it will not include cases decided on an administrative record with no trial). The pilot will include three parts:

(1) Each participating court will adopt the following practices: (a) prompt case management conferences in every case (within the time allowed by amended Rule 16(b)(2)); (b) firm caps on the amount of time allocated for discovery, to be set by the judge after conferring with the parties at the case management conference, and to be extended no more than once and only for good cause based on a showing of diligence by the parties; (c) prompt resolution of discovery disputes by telephone conferences; (d) decisions on all dispositive motions within 60 days of the reply brief being filed; and (e) setting and holding firm trial dates.

(2) Metrics will be as follows: (a) if we could measure it, the level of the pilot judges' compliance with the goals in (1) above; (b) trial dates in 90% of civil cases set within 14 months of case filing, trial dates in the remaining 10% set within 18 months, and all trial dates held firm; (c) 25% reduction in the number of categories of cases in the district "dashboard" that are decided

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slower than the national average (or some comparable measure that could use the new CACM dashboard tool).

(3) Training and collaboration: (a) the FJC will do an initial one-day training session for pilot judges and staff, followed by additional FJC training every six months or year; (b) judges in the district will meet quarterly to discuss best practices and what is working and not working, and to refine their case management methods to meet the pilot goals; (c) one or two judges from outside the district will be available as resources during these quarterly conferences, with the same resource judges serving throughout the duration of the pilot; (d) the judges in the pilot district would have at least one bench-bar meeting per year to talk with lawyers in the district about how the pilot is working and to make appropriate adjustments; (e) the pilot would last three years.

Building on the work of several federal and state courts, this project seizes on the increased reasonableness associated with discovery that must be finished within a discrete time period. A similar dynamic is at play when trial judges allocate a set amount of time for each party to make its case at trial; redundancy is lessened and efficiency increases.

There are several premises of the pilot: (1) the longer a case takes to resolve, the more expensive it is for the parties; (2) the combination of tight timetables for discovery, prompt resolution of discovery and dispositive motions, and firm trial dates is more likely to prompt lawyers to be reasonable in their discovery requests and litigation behavior than any rule; (3) lawyer cooperation should increase when both parties must conduct discovery within a set period of time; and (4) prompt feedback about the impact of these practices will demonstrate their utility to the judges who use them.

2. Participants

A. Civil Rules and Standing Committees
B. CACM
C. FJC

3. Timetable

A. April 2016—approval by Civil Rules Committee
B. June 2016—approval by Standing Committee, CACM, and FJC
C. September 2016—approval by the Judicial Conference
D. Early 2017—initial implementation
E. End of 2020—completion

4. Criteria for district courts to participate

A. Court must be willing to make the pilot's requirements mandatory.

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B. All judges on the district court must be willing to participate.
C. At least three to five district courts need to participate.

This pilot project is less refined that the mandatory disclosures pilot and will require significant work over the next several months. Because of the schedule we hope to follow, we need your input now. We would appreciate your careful review and your comments and suggestions.

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III. REPORT ON PROJECTS

A. ONGOING PROJECTS

1. RULE 5:2: MOTION TO REDACT

The Bankruptcy Rules Committee is considering the addition of a new subdivision (h) to Bankruptcy Rule 9037, the Bankruptcy Rules equivalent of Civil Rule 5.2. The draft would create an explicit procedure for deleting information protected by Rule 9037(a) but mistakenly included in a filed document. The Bankruptcy Rules Committee took up this subject in response to concerns raised by the Committee on Court Administration and Case Management.

Although Rule 9037(h) has been developed to a point that would support a recommendation for publication, the Bankruptcy Rules Committee has decided that it is better to defer publication while the Appellate, Civil, and Criminal Rules Committees explore parallel amendments to the rules that parallel Rule 9037. There has been some hope that the courts' electronic filing system might be developed to effect automatic redaction of personal identifying information improperly included in court filings. Nonetheless, it is useful to move ahead with work that can be put aside if a reliable technological solution can be found.

This report of progress on a possible Civil Rule 5.2(i) is offered for two purposes. The first is the intrinsic purpose of exploring the need for a new rule and the best shape it might take.

The second purpose is to reflect on the unavoidable growing pains that commonly attend efforts to achieve the maximum level of appropriate uniformity when several different committees approach the same topic. The Standing Committee is responsible for all rules that it recommends to the Judicial Conference and, through the Conference, to the Supreme Court and Congress. When two or more rules are intended to mean the same thing, they should say it in the same way. But there are many possible ways of saying something, and minds both disciplined and creative may disagree on the most accurate way of saying it. Intellectual commitments can be hard to reconcile, even if professional detachment succeeds in putting aside any element of pride of authorship. The early draft Civil Rule 5.2(i) is presented below with footnotes that identify several styling choices. There are many reasons to avoid discussion of them by the Standing Committee itself. The advisory committees are responsible for reaching consensus on their own. But it may be useful to have this simple illustration of the process in the mid-stream evolution of a very modest rule.

Appellate Rule 25(a)(5), Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule 49.1 were adopted in a coordinated process that sought to achieve as much uniformity as possible. Appellate Rule 25(a)(5) adopts the other rules for appeals in cases that they governed in the district court, invokes Criminal Rule 49.1 when an extraordinary writ is sought in a criminal case, and adopts Civil Rule 5.2 for all other proceedings. Criminal Rule 49.1 largely parallels Civil Rule 5.2, but also limits home addresses to identifying the city and state and expands the list of exemptions to include several matters peculiar to criminal proceedings. Bankruptcy Rule 9037 hews close to Civil Rule 5.2, with an additional exception and without Rule 5.2(c) (limitations on remote access).

This common origin adds extra weight to the growing tradition that parallel rules addressing the same problems should be as nearly identical as possible. Differences can be warranted by the different circumstances that confront different sets of rules. But care should be taken in assessing the need for differences.

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There is good reason to take seriously the prospect that Civil Rule 5.2 should be amended by adding a new subdivision (i) that essentially tracks Bankruptcy Rule 9037(h) if the Bankruptcy Rules Committee goes forward with the proposed amendment.

It is possible that the circumstances of civil practice differ from those that confront bankruptcy practice. The Committee on Court Administration and Case Management referred the question to the Bankruptcy Rules Committee, reacting to reports that bankruptcy courts are receiving creditors' requests to redact previously filed documents, sometimes involving thousands of documents in numerous courts. Bankruptcy courts are, of necessity, dealing with these requests now. CACM believes it is important to establish a uniform procedure. And it may be concerned that the pressures of bankruptcy practice make it more difficult to rely on parties and courts to act to accomplish required redactions in ways that restore protection as promptly as possible.

The problem may arise more frequently in bankruptcy practice, but surely it arises in civil and criminal practice as well. The need for uniform practice across different courts also may be more pressing in bankruptcy if an improper filing can involve thousands of documents in numerous courts. That circumstance is less likely to arise in civil and criminal practice. And it is nice to believe that courts and parties should be able to manage to act effectively without need for explicit prompting in Rule 5.2.

The prospect that there is little need to add a new Rule 5.2(i), on the other hand, is offset by the prospect that little harm will be done, apart from adding to the Civil Rules word-count. The Bankruptcy Rules Committee has led the way with a carefully considered draft. And although there may be little risk that adoption of a new Bankruptcy Rule 9037(h) would mislead courts if Rule 5.2(i) is not added in parallel, uniformity is reassuring. That is particularly so if the Criminal Rules Committee believes it useful to add a parallel provision to Criminal Rule 49.1.

A draft Rule 5.2(i) is set out below. Some style differences from the Bankruptcy Rule are unavoidable. Others are a matter to be worked out when all committees have reached their own conclusions. This question has come up late enough in the winter cycle that it has not been feasible to ask all four of the advisory committees responsible for these rules to decide on recommendations in time to publish Bankruptcy Rule 9037(h) this summer. But the work will continue, subject only to the bare possibility that a technological solution may be found that will accomplish everything that might be accomplished by new rules.

1 **Rule 5.2. Privacy Protection for Filings Made with the Court**

2 * * * * *
3
4 **(i) Motion to Redact a Previously Filed Document.**

5 **(1)** ***Content of the Motion***. Unless the court orders otherwise, a person[1] that seeks
6 to redact from a previously filed document information that is protected under

[1] Draft Bankruptcy Rule 9037(h) uses "entity" because the Bankruptcy Code definition of "person" does not include a governmental unit. "Entity" does. But "entity" is a poor fit for a natural person. "Person" as used in the Civil Rules regularly includes all sorts of entities.

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7 Rule 5.2(a)[2] must file a motion under seal. The motion must:

8 **(A)** include[3] an identical[4] copy of the original document showing the
9 proposed redactions;
10 **(B)** include the docket number of the original document; and
11 **(C)** be served on all parties[5] and any person whose identifying information[6]
12 is to be redacted.

13 **(2)** ***Restricting Public Access to an Unredacted Document.*** The court must:
14 **(A)** [promptly][7] restrict [deny][8] public access to the motion and the

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[2] The Bankruptcy draft is: "information that is subject to privacy protection under," which seems longer than necessary.

[3] The Bankruptcy Draft reads: "attach a copy." That works in their draft. This version consolidates the various requirements for the motion in a series of subparagraphs. It is clearer that way: "The motion must * * *." "Include" works with that formula. It may be argued that "attach" treats the copy of the paper as an exhibit, while "include" makes it part of the motion. It is a copy either way. Although it applies only to pleadings, Civil Rule 10(c) suggests the mood: "A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes."

[4] "[I]dentical" is carried forward for uniformity with draft Rule 9037(h). But the 9037(h) Committee Note introduces an ambiguity. It explicitly states that the "identical" copy is identical to the unredacted document "except for the redaction." The intended meaning is "identical to the unredacted document except for the redactions." It seems better to delete "identical," relying on the sense of "copy" to prevent surreptitious deletion of information beyond that protected—or at least arguably protected—by Rule 5.2(a).

[5] The Bankruptcy Rule includes a long list of bankruptcy characters that do not fit the Civil Rules context.

[6] The Bankruptcy Rule is: "any individual whose personal identifying information is to be redacted." For the Civil Rule, "person" seems to fit better with a financial-account number that should have been redacted, at least assuming that an entity other than an individual can have a protected financial-account number.

[7] The Bankruptcy Rule begins: "Upon receipt of the motion, the court shall promptly restrict public access." The direction to act promptly reflects a concern that the motion itself may point out the existence and public availability of the unredacted document in the court file.

Rendered in Civil Rules language, this approach would substitute "must" for "shall," and "receiving" for "receipt of." But "filed" may be better than "receiving": "When the motion is filed, the court must promptly restrict public access * * *."

But during the Style Project the Civil Rules Committee was continually reminded that directions that a court must act promptly, or immediately, or whatever, begin to seem like the often conflicting docket priority directions of earlier and unlamented days. Perhaps it is enough to rely on the movant to request prompt action to deny access, omitting the bracketed "[promptly]."

[8] "Deny" likely is better than restrict. No public access.

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15 unredacted document:
16 (i) pending its ruling on the motion, and
17 (ii) if the motion is granted, until the court amends or vacates the
18 order; and
(B) restore public access if the motion is denied.[9]

Committee Note

1 Subdivision (i) is new. It is adopted to reflect the parallel adoption of new Bankruptcy
2 Rule 9037(h). Subdivision (i) differs from Rule 9037(h) in some details that reflect differences from
3 the circumstances that may arise in bankruptcy filings.

4 Any person may file a motion to redact a filed document to delete information protected by
5 Rule 5.2(a).

6 The motion must include a copy that is identical to the filed document except for the
7 redactions. It must identify the location of the unredacted document in the docket.

8 A single motion may relate to one or more unredacted documents. But if the proposed
9 redactions involve different documents it may be better to file separate motions, particularly if
10 different types of protected information are involved.

11 The motion should request immediate action to deny public access to [the motion and][10] the
12 unredacted document pending the court's ruling on the motion. Because the motion itself may call
13 attention to the unredacted document, the court should act as promptly as possible to deny public
14 access pending its ruling. The movant may assist the court by invoking whatever means are
15 compatible with the court's electronic and paper filing procedures.

16 If the motion is granted, the redacted document should be placed on the docket, and public
17 access to [the motion and] the unredacted document should remain restricted. If the court denies the

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[9] The Bankruptcy Rule includes a final sentence: "If the motion is denied, the restrictions shall be lifted, unless the court orders otherwise." It may not be necessary to add the provision for denial of the motion. Under (A), the document is protected pending the ruling, and that's all. The restriction dissolves unless the ruling grants the motion. But there may be some risk that the restriction will carry forward by sheer inertia—that seems to be the fate of a fair share of sealed documents.

This draft shows one way to include a direction to lift the restrictions if the motion is denied. Better drafting can be crafted if the provision seems useful—if the Bankruptcy Rules Committee wishes to retain it, the gain in uniformity is worthwhile.

Uniformity also may require that "unless the court orders otherwise" be added to the rule text. But it is difficult to believe that a court will deny the motion without further opportunity to seek redaction if the unredacted document in fact includes protected information.

[10] Once the unredacted document in the file is protected, is there any need to deny access to the motion? On the other hand, will there be any circumstances in which there is a public interest in access to the motion, so long as all parties have access to the motion?

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18 motion, generally the restriction on public access to [the motion and] the document should be lifted.

19 This procedure does not affect any remedies that a person whose personal identifiers are
20 exposed may have against the person that filed the unredacted document.

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2. RULE 30(b)(6): DEPOSING AN ENTITY

Rule 30(b)(6), which allows a party to name an entity as a deponent, was added in 1970. In rough terms, the purpose was to enable a party to discover "information known or reasonably available to the organization" more effectively than had proved possible through written interrogatories or an endless trek through named individual deponents who claim not to be the ones who know what the organization knows.

Implementation of Rule 30(b)(6) has encountered problems. In 2006, the Committee undertook an extensive study at the prompting of a submission by a committee of the New York State Bar Association. Genuine problems were identified, but it was not thought likely that effective solutions could be found in revised rule text. The question came back in 2013 in a set of proposals made by the New York City Bar. Consulting the efforts made seven years earlier, the Committee again decided to put the question aside.

Now those questions and others have been renewed in a proposal submitted by "members of the Council and Federal Task Force of the ABA Section of Litigation, in our individual capacities." The submission repeats many of the challenges made by earlier submissions. It offers views on some of them, but not all. The broad request is that the Committee "undertake a review of the Rule and the case law developed under it with the goal of resolving conflicts among the courts, reducing litigation on its requirements, and improving practice under the Rule, particularly in light of the purposes and text of the 2015 amendments to the Federal Rules."

The Committee concluded that these questions should be taken up again. The reasons are expressed in a statement by one member quoted in the Draft Minutes: These problems arise "constantly, all over the country, and even in sister cases. The Rule is constantly a source of controversy. Proper preparation issues will never go away." It will be difficult to find rule text that will encourage reasonable practice. But the Committee should at least try.

A Rule 30(b)(6) Subcommittee has been appointed. Its work is just beginning. It does not seem likely that any proposed rule amendments can be developed in time for a recommendation to publish as early as August 2017.

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3. RULE 81(c)(3)(A): JURY DEMAND ON REMOVAL

This submission to the Civil Rules Committee addresses a single word in Rule 81(c)(3)(A), altered in the Style Project. The specific problem is narrow; it will be identified after setting out the full text of Rule 81(c)(3). Examination of the specific problem in the setting of the full rule suggests more serious questions, however.

This topic is presented now to seek advice on two questions. The first is whether the Style Project erred in changing "does" to "did," as explained below, and whether the change should be undone if indeed it was unfortunate. The second is whether Rule 81(c)(3) strikes the right balance in protecting against forfeiture of the right to jury trial by assigning to the court and the party who removes a case from state court responsibility to initiate the Rule 38 demand process.

RULE 81. APPLICABILITY OF THE RULES IN GENERAL; REMOVED ACTIONS

(c) Removed Actions.

(1) ***Applicability.*** These rules apply to a civil action after it is removed from a state court.
* * *

(3) ***Demand for a Jury Trial.***

(A) *As Affected by State Law.* A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal. If the state law ~~does~~ did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time. The court must so order at a party's request and may so order on its own. A party who fails to make a demand when so ordered waives a jury trial.

(B) *Under Rule 38.* If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38 must be given one if the party serves a demand within 14 days after:
(i) it files a notice of removal; or
(ii) it is served with a notice of removal filed by another party.

[The Style Project rewording challenged by 15-CV-A is shown by overlining the pre-2007 word, "does," and underlining the substitute, "did."]

The specific suggestion focuses narrowly on the change from "does" to "did." The suggestion is that the change has created a trap for the unwary. So long as the rule said "does," it was clear that an express demand for jury trial must be made unless state law allows a jury trial without making an express request at any time. Saying "did" may lead some to believe that they need not make an express demand for jury trial after removal if state law, although requiring a demand at some point, allowed the demand to be made later than the time the case was removed to federal court. Cases are cited to show that federal courts continue to interpret the rule as if it says "does"; an appendix includes a decision granting a motion to strike a jury demand made by the lawyer who made the submission. The opinion relies on the 2007 Committee Note stating that the changes were intended to be stylistic only.

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Initial research into the change from "does" to "did" has explored Civil Rules Committee agenda books, Committee Minutes, and a substantial number of memoranda prepared for the Style Subcommittees. They show that "did" appeared in the style draft at least as early as September 30, 2004, but do not show any discussion of this specific change. They also show an intriguing hint in a note recognizing that "Joe Spaniol is right" that there is a gap in the rule, but suggesting that it cannot be fixed—if fixing is needed—in the Style Project. One question is whether there is a gap that is worth filling. A broader question is whether the whole rule is unnecessarily complicated. The complication can be illustrated by looking for the gap.

At least these situations can be imagined:

(1) A jury trial was "expressly demanded * * * in accordance with state law" before removal. It makes sense to carry the demand forward after removal. Rule 81(c)(3)(A) does that.

(2) Rule 81(c)(3)(B): All necessary pleadings have been served at the time of removal, but no express demand for jury trial was made. The rule applies the same principle as Rule 38(b)(1), adjusting the time for the circumstance of removal—a demand must be served, not "14 days after the last pleading directed to the issue is served," (the Rule 38(b)(1) timing,) but 14 days after removing or being served with the notice of removal. This provides the advantages sought by Rule 38(b): the parties and the court know whether this is to be a jury case early in the proceedings.

(3) All necessary pleadings have not been served at the time of removal. Here the principle of Rule 81(c)(1) seems to do the job—Rule 38 applies of its own force after removal. The most sensible reading of the rule text is that an exception is made for cases where state law does not require a demand for jury trial.

(4) State law does not require a demand for jury trial at any point. The Rule was amended in 1963 to say that a demand need not be made after removal. The Committee Note said this is "to avoid unintended waivers of jury trial." But the amendment went on to provide, as the rule still does, that the court may order that a demand be made; failure to comply waives the right to jury trial. The Committee Note added the suggestion that "a district court may find it convenient to establish a routine practice of giving these directions to the parties in appropriate cases." Professor Kaplan, Reporter for the Committee, elaborated on the Note in a law review article quoted in 9 Federal Practice & Procedure: Civil 3d, § 2319, p, 230, n. 12. He suggested that it might be useful to adopt a local rule "under which the direction is to be given routinely." But he further suggested that it is important to give the parties notice in each case, since relying on a local rule alone "would recreate the difficulty which the amendment seeks to meet." These observations may address the question why it would not be better to complement subparagraph (B) by providing that if all necessary pleadings have not been served at the time of removal, Rule 38(b) applies. That would require a written demand no later than 14 days after the last pleading addressed to the issue is served. The apparent concern is that people will not pay attention to the Federal Rules after removal when they are habituated to a state procedure that provides jury trial without requiring an express demand at any point. That explanation seems to fit with the observation in § 2319 that "a number of courts have held that this provision is applicable only if the case automatically would have been set for jury trial in the state court * * * without the necessity of any action on the part of the party desiring jury trial."

(5) State law does require an express demand for jury trial, but the time for the demand is set at a point after the time when the case is removed. The Nevada rule involved in the docket suggestion, for example, allows a demand to be made not later than entry of the order first setting the case for trial. This is the circumstance in which the change from "does" to "did" may create

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some uncertainty. One possible reading is that the change reflects concern that state law may have changed after removal: at the time of removal, it did not require an express demand at any point in the progress of the case to trial, but after removal it was changed to require an express demand. That is a fine-grained explanation. Another possible reading is that no demand need be made after removal so long as the state-court deadline had not been reached before removal. That reading can be resisted on at least two grounds. One is that the change was made in the Style Project, and thus must be read to carry forward the meaning of the rule as it was. A second is that the result is unfortunate: although both state and federal systems require an express demand, none need be made because of the differences in the deadlines. There is little reason to suppose that a party who wishes a jury trial should believe that removal provides relief from the demand requirement. Anyone who actually reads the rules should at least recognize the uncertainty and make a demand. It makes little sense to read the rule in a way that is most likely to make a difference only when a party belatedly decides to opt for a jury trial.

The immediate question is whether the style choice should be reversed to promote clarity. "Does" took on an apparently established and quite limited meaning. It is possible to read "did" in the Style Rule to have a different meaning. But the Committee has been reluctant to revisit choices made in the Style Project, particularly when the courts—no matter what may be the experience of particular lawyers—seem to be getting it right. If that were all that might be considered, the case for amending the rule may not be strong.

But it is worth asking whether it makes sense to perpetuate the exception for cases removed from courts in however many states there be that do not require a demand for jury trial at all. One example would be a state that does not provide for jury trial in a particular case—but that does not offer much reason to excuse a demand requirement after removal. Perhaps the rule has been too eager to protect those who refuse to read Rule 81(c) to find out that federal procedure governs after removal. There is a strong federal interest in the early demand requirement of Rule 38(b). All parties and the court know from the outset whether they are moving toward a jury trial, however likely it is that the case will ever get there. The risk that a party may decide to opt for a jury trial late in the case only because the judge does not seem sufficiently sympathetic is reduced. And if there is some reason for excusing failure to make a timely demand, Rule 39(b) protects the opportunity to reclaim a jury trial.

Rule 81(c) would be much simpler, a not inconsiderable virtue in this setting, if it were recast to read something like this:

> **(3)** ***Demand for a Jury Trial.*** Rule 38(b) governs a demand for jury trial unless, before removal, a party expressly demanded a jury trial in accordance with state law. If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38 must be given one[11] if the party serves a demand within 14 days after:
>
> (A) it files a notice of removal, or
> (B) it is served with a notice of removal filed by another party.

With all of this, the two most likely choices are these: Do nothing or undertake a thorough

[11] This version simply tracks the current rule. It might be shortened: "If all necessary pleadings have been served at the time of removal, a demand must be served within 14 days after * * *."

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reexamination of Rule 81(c). Matters can be resolved reasonably without changing "did" back to "does." But the complex and incomplete structure of Rule 81(c), built on sympathy for those who refuse to consult the rules, might benefit from significant simplification. The Committee will consider this choice at its November 2016 meeting.

B. ISSUES RESOLVED

A number of suggestions for rules amendments have been removed from the agenda. Only brief identifications are provided here. Further discussion is provided in the Draft Minutes.

A judge suggested adoption of a rule that would enhance initial disclosure, reduce discovery, and limit motions for summary judgment. The suggestion advances specific approaches to questions that have been constantly on the agenda. It was put aside now because it overlaps in many ways with the proposed pilot projects on initial mandatory disclosure and expedited procedures.

Another judge noted frustration with the "separate document" requirement of Rule 58. The problem arises when a judge offers a brief explanation of reasons in a document that is intended to be the final judgment in the case. The precise line may waver a bit in application, but it is clear that anything more than a completely minimal explanation disqualifies the document as "separate." The result under Rule 58(c)(2) is a 150-day delay before time limits start to run for post-judgment motions and appeal. These questions were explored extensively in the process of amending Rule 58 in 2002. The Appellate Rules Committee explored them again in 2008. Each time the conclusion was that the separate document requirement should be retained. It serves a valuable function in setting a clear line that begins the time for post-judgment motions and appeal. Compliance is easy. Only absent-mindedness gets in the way. The Committee concluded that renewed education, with particular attention to deputy courtroom clerks, is better than a rule amendment.

One submission offered four suggestions. The first relates to e-filing by pro se litigants; that subject is addressed in the proposed Rule 5 amendments discussed above. The other three were:

(1) To amend Rule 5.2 to forbid filing even the last four digits of a social security number. The Committee understands that the last four digits are important in bankruptcy practice and preferred to maintain uniformity with the Bankruptcy rule.

(2) To require sealing of affidavits stating the assets of a party seeking to proceed *in forma pauperis*. The Committee concluded that protection of financial privacy in this setting is outweighed by the value of public access to information about decisions to allow free filing and by the administrative burdens of sealing.

(3) To require counsel to provide a pro se party with copies of cases or other authorities cited by court or counsel "that are unpublished or reported exclusively on computerized data bases." Some courts require this by local rule now. Although it may be a desirable practice, it seems better left to local practice than enshrined in a national rule.

Another submission suggested that the pleading standard articulated in Rule 8(a)(2) has, by virtue of Supreme Court reinterpretations, become "so misleading as to be plain error." In recent years the Committee has deliberately deferred any project that would attempt to rearticulate, and perhaps to redefine, the pleading standards that have emerged in the wake of the *Twombly* and *Iqbal* decisions. The time has not yet come for such a project.

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Still other suggestions deal with a wide range of issues:

(1) A potential confusion about adding additional time to respond when a time period starts from the day when a disclosure is "made," rather than "served." The Committee concluded the rules are clear on careful reading.

(2) The need for continued monitoring of the time when it may be desirable to consider mandatory disclosure of third-party litigation financing arrangements. The Committee retains this question in its agenda, but believes that present action would be premature because these arrangements are evolving rapidly.

(3) Finding means to facilitate personal service on United States employees as defendants. The Committee concluded a court rule probably cannot direct government agencies to reveal employee home addresses, and that service by leaving the summons and complaint at the employee's office would not be desirable.

(4) Addressing "time stamps" and facilitating access to court resources by the visually impaired—a topic not appropriate for solution by a national rule of procedure, but deserving of attention by court administrators.

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RE: Discussion with Colorado Lawyers

Parker Folse to: David_Campbell@azd.uscourts.gov, Judge_Grimm@mdd.uscourts.gov 02/24/2016 11:31 AM

Cc: Edward Cooper, "coquille@law.harvard.edu" , "JBARKETT@shb.com", "Judge_Neil_Gorsuch@ca10.uscourts.gov" , "Jeffrey_Sutton@ca6.uscourts.gov"

From: Parker Folse <pfolse@SusmanGodfrey.com>

To: "David_Campbell@azd.uscourts.gov" <David_Campbell@azd.uscourts.gov>, "Judge_Grimm@mdd.uscourts.gov" <Judge_Grimm@mdd.uscourts.gov>

Cc: Edward Cooper <coopere@umich.edu>, "coquille@law.harvard.edu" <coquille@law.harvard.edu>, "JBARKETT@shb.com" <JBARKETT@shb.com>, "Judge_Neil_Gorsuch@ca10.uscourts.gov" <Judge_Neil_Gorsuch@ca10.uscourts.gov>,

History: This message has been forwarded.

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Thanks for this excellent summary. I'll add a few items.

Under the Colorado pilot project, defendants were required to file answers even if they also moved to dismiss, which seemed to be a practice that received support in the survey that Dave mentioned (perhaps in part because it helps identifies the issues in dispute and facilitates initial disclosures and early case management while the motion is pending), yet in adopting the new rules, the Colorado Supreme Court did not adopt this rule for reasons that were not explained.

I got the sense that there may not have been a lot of experience with large document cases involving significant ESI during the Colorado pilot project, but the comments indicated that in such cases the early disclosure requirements focused the parties' attention on ESI issues earlier than otherwise would have been the case and usually resulted in agreements for staged disclosures to allow time for handling ESI issues.

There seemed to be agreement among the Colorado lawyers and judges that early trial settings are meaningless (and can be inefficient) unless they really are firm. Yet it's impractical not to multi-track trial settings given the high rate of settlements. One judge said he had been lucky to have colleagues who were willing to pick up each other's trial settings to avoid continuances, but guessed that this could be a bigger problem in the federal system.

There certainly seemed to be uniform enthusiasm among the Colorado lawyers and judges for robust early disclosure and for requiring disclosure of all relevant information (harmful as well as helpful) as a means of reducing sideshow fights over what must be produced in discovery and focusing attention on the merits -- though as Dave reported, there seemed to be equally uniform agreement on the importance of early and active case management by judges to make such a system work.

Parker

Parker

From: David_Campbell@azd.uscourts.gov [David_Campbell@azd.uscourts.gov]
Sent: Wednesday, February 24, 2016 9:34 AM
To: Judge_Grimm@mdd.uscourts.gov
Cc: Edward Cooper; coquille@law.harvard.edu; JBARKETT@shb.com; Parker Folse; Judge_Neil_Gorsuch@ca10.uscourts.gov; Jeffrey_Sutton@ca6.uscourts.gov
Subject: Discussion with Colorado Lawyers

Everyone:

We had a discussion this morning with Colorado lawyers and judges who have worked under their new rules, which include expedited litigation and case management procedures as well as mandatory initial disclosures. This email will recount some of what was said. Parker, Ed, Dan, and Neil (who kindly arranged the call) can fill in any gaps.

One of the judges began by noting that he conducted a survey of lawyers after every case management conference during the early phases of the pilot program. In total, he received comments from 97 lawyers. He asked them to grade the new system on a scale of 1 to 10, with 1 being the most unfavorable and 10 the most favorable. The average grade was 3.9. He observed that this may have reflected the fact that lawyers do not like change. Becky Kourlis, who was on the call, noted that data from various states shows that it generally takes 2 to 3 years for initial resistance to subside. Colorado's pilot project has now become a formal set of rules. All of the lawyers and judges on the call seemed to like the new system.

It was observed that collection lawyers generally did not like the requirement of robust initial disclosures. Originally, those disclosures were required just 21 days into the case. Many collection cases default, and yet these lawyers found they were required to spend time and money collecting documents before they knew if the case would default. Interestingly, the initial disclosure requirements appear to have reduced the number of defaults that occur in cases. Becky said the same phenomenon has been observed in other states. To avoid this problem, the current rule does not require disclosures until after an answer has been filed.

Those on the phone observes that lawyers in complex cases tend to like the new rules the most.

We asked how e-discovery was handled in initial disclosures. One lawyer commented that the pilot program asked the parties whether there were e-discovery issues in the case, a question which prompted lawyers to engage in a discussion about e-discovery. The parties generally worked out an agreement on the issue.

One lawyer observed that the requirement to disclose good and bad information has not really increase the amount of work done at the beginning of a case because lawyers would review the bad information while searching for the good information in any event. Thus, the amount of review is essentially the same.

Folks explained that the new rules were intended to produce a culture change, from hide-the-ball to getting all information on the table. They seemed to believe that the culture change is taking hold. They noted that initial disclosure issues are often raised at the first case management conference, but that the parties virtually always work them out. One judge said that he sets the hearing one week later to address the unresolved disclosure issues and that he has never had to actually hold such a hearing because the parties always reach agreement. Another judge said that he is simply requires the parties to discuss a solution, and they have always found a solution to the disclosure issues.

The Colorado system apparently includes a form that requires the parties to indicate whether they believe the initial disclosures have been adequate. The form is provided to the court before the initial case management conference.

Folks on the call emphasized that an in-person case management conference with the judge is key to making the initial disclosures work. We should consider making this point in our pilot project proposal.

The pilot project included mandatory sanctions for disclosure violations. There was widespread unhappiness with this portion of the rule, and judges usually found ways not to apply it. It was not included in the final rule. Becky noted that the study of the Arizona disclosure rule revealed that its success turned heavily on the willingness of judges to enforce it.

The judges commented that the new rules have been successful, in part, because appellate courts have been willing to back-up trial judge decisions. Becky noted that the designers of the pilot project actually went to the Colorado appellate courts to educate them regarding the pilot and to encourage them to support it in there appellate decisions. We should consider doing the same thing with our pilot. If a district agrees to participate, but the circuit is antagonistic to the pilot, the effort may fail. We should consider an appellate education component to our pilots. (The chiefs of the circuits will hear about it ay the judicial conference, but other appellate judges will not.)

One medical malpractice lawyer expressed concern about procedures now being used by medical records and vendors. He said the vendors are deciding what is and is not a legal document, and lawyers representing defendants are able to get access only to legal documents within the system. The vendors won't disclose how they distinguish between nonlegal and legal documents, and this is causing great complexity in many states.

We talked about early trial dates. All of the lawyer say they favor them, but only when they are firm. It does no good to set an early trial date only to have it continued multiple times.

Dave

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John Barkett's Notes on Call with Arizona Judges and Lawyers on Rule 26.1 (March 1, 2016)

Arizona Rule 26.1	Comments During the Focus Group
The factual basis of the claim or defense. In the event of multiple claims or defenses, the factual basis for each claim or defense.	It is helpful as to affirmative defenses in particular. Duty to supplement is helpful here as facts are developed, new disclosures are made. If complaint is highly detailed, there is nothing more in the disclosure statement than in the complaint. But with bare bones complaints, there will be more factual detail provided. And in supplementation, if new facts are discovered, they are disclosed in a supplement.
The legal theory upon which each claim or defense is based including, where necessary for a reasonable understanding of the claim or defense, citations of pertinent legal or case authorities.	Duty to supplement is also helpful because parties generally develop new claims in litigation.
The names, addresses, and telephone numbers of any witnesses whom the disclosing party expects to call at trial with a fair description of the substance of each witness' expected testimony.	If a good disclosure statement, it will help decide who to depose. The disclosures are typically in summary form identifying the subject matter of the testimony. Sometimes there is more and the disclosure might be 2-3 paragraphs. A detailed script of what the witness knows or will say is not given. A proportionality determination has to be made. Could be lots of names on documents that will not be material to the case but may have some knowledge. And if dollar value is not large, that has to be taken into account in how much to say. Judge: problem is objection at trial comes very fast with jury sitting there. Was it "fairly described"? Will someone be prejudiced? These are inherent problems in a rule like this. "I don't think it can be better drafted." Unwritten rule: if you ask about a topic in a deposition, it is incorporated in the

Arizona Rule 26.1	Comments During the Focus Group
	disclosure statement. Or some add, "Mr. Smith will also testify on topics covered in his deposition." Some now are engaging in tactic of not deposing and then arguing not disclosed. Or last minute submissions of depositions to supplement disclosures.
The names and addresses of all persons whom the party believes may have knowledge or information relevant to the events, transactions, or occurrences that gave rise to the action, and the nature of the knowledge or information each such individual is believed to possess.	The disclosures are typically in summary form identifying the subject matter of the testimony. Sometimes there is more and the disclosure might be 2-3 paragraphs. A detailed script of what the witness knows or will say is not given. Judge: The question she asks is whether the opposing side had fair notice of a general category of information possessed by a witness.
The names and addresses of all persons who have given statements, whether written or recorded, signed or unsigned, and the custodian of the copies of those statements.	
The name and address of each person whom the disclosing party expects to call as an expert witness at trial, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, the qualifications of the witness and the name and address of the custodian of copies of any reports prepared by the expert.	No one does this. It is okay to say this disclosure will be supplemented. By the time of final disclosure, you had better answer this but not needed initially.
A computation and the measure of damage alleged by the disclosing party and the documents or testimony on	This does not happen up front. It is okay to say this disclosure will be supplemented. By the time of final

Arizona Rule 26.1	Comments During the Focus Group
which such computation and measure are based and the names, addresses, and telephone numbers of all damage witnesses.	disclosure, you had better answer this but not needed initially. Judge: you want to be sure issues are raised fairly by the disclosure. One lawyer gave an example: witness who is asked about lost profits but the disclosure does not say lost profits would be covered by this witness.
The existence, location, custodian, and general description of any tangible evidence, relevant documents, or electronically stored information that the disclosing party plans to use at trial and relevant insurance agreements.	A proposed rule would require disclosure of indemnities and surety agreements. And if it is wasting insurance policy, one has to disclose in a supplement how much of the coverage is left. If indemnity is confidential? That topic was not discussed on AZ task force that proposed the change. But judges commonly enter protective orders where warranted.
A list of the documents or electronically stored information, or in the case of voluminous documentary information or electronically stored information, a list of the categories of documents or electronically stored information, known by a party to exist whether or not in the party's possession, custody or control and which that party believes may be relevant to the subject matter of the action, and those which appear reasonably calculated to lead to the discovery of admissible evidence, and the date(s) upon which those documents or electronically stored information will be made, or have been made, available for inspection, copying, testing or sampling. Unless good cause is stated for not doing so, a copy of the documents	Could be debate over relevance. I am sure some people don't comply, but the culture in Arizona is to turn over. However, it does not work for ESI since disclosures are due 40 days after an answer is filed. It does not happen. And it should not happen. Too costly. A proposed revised rule is currently pending before the Arizona Supreme Court. If adopted, there would be staggered disclosure. ESI is carved out. Parties required to confer and talk about formatting, searches, custodians, cost. Then go before the Judge to work out any differences. In commercial court, there is an ESI checklist and the Judge goes through the checklist at the case management conference to resolve any issues. Moving to more active case management. She supports Rule 26.1. She is very aggressive in enforcing the Rule. She tells parties that she enforces the disclosure rule strictly and will keep out evidence not disclosed. She sees fewer discovery disputes. She does not allow motions to compel. She gets parties on phone after receiving 1-page summary of dispute. Objections should not be made to discovery if the production is required by 26.1. One change proposed in Arizona is to eliminate "reasonably calculated" standard

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Arizona Rule 26.1	Comments During the Focus Group
and electronically stored information listed shall be served with the disclosure. If production is not made, the name and address of the custodian of the documents and electronically stored information shall be indicated. A party who produces documents for inspection shall produce them as they are kept in the usual course of business.	and leave it just as "relevance." The disclosure rule eliminates hiding the ball and if you do so, you are in serious trouble. The Federal Rules allow you to hide the ball if no one asks for it. In this individual's cases in state court, he almost never issues interrogatories. One downside: initial disclosures accelerate the cost of prosecuting or defending the case. But parties can agree to postpone the 40-day disclosure deadline if they are going to talk settlement. Another judge spoke up. Rule is designed to make litigation civil again and eliminate gamesmanship. But there is still gamesmanship. Does not eliminate need for depositions. Does eliminate need of interrogatories. Does eliminate arguments over notice pleadings when you have disclosure rules. "Yeah, they have not given you a lot of facts, but they will in 40 days, so dismissal motion is denied." We get motions to exclude evidence based on non-disclosure. They become "gotchas" for some lawyers, who should have just picked up the phone and called to ask for a supplement. One lawyer was trained under federal rules and then moved to Arizona and encountered Rule 26.1. This lawyer also practices against highly sophisticated lawyers. This lawyer said 26.1 has been positive. Saves money. Moves matters more quickly. Parties tend to adjust timing based on Rule 26.1 This lawyer has never seen a party prejudiced by following the disclosure rule but has seen lawyers who failed to comply face evidence exclusion by virtue of the failure. One plaintiff's lawyer believes that the disclosure rule has affected plaintiff's lawyers more than defense lawyers: it is more costly; this lawyer has to constantly review the 26.1 disclosure to be sure it is supplemented as facts develop so he does not face an exclusion request at trial. A plaintiff's personal injury lawyer felt that Rule 26.1 adds a layer of discovery.

12b-012518

Arizona Rule 26.1	Comments During the Focus Group
	Statements are filed but then this lawyer still gets interrogatories and requests for production on a number of issues. This lawyer felt it would be great if all judges did what judge above does: no discovery motions—call the court instead. This lawyer suggested a discovery master could play a role in ferreting out those that comply and those that don't intentionally versus accidentally. Judge disagrees with use of discovery master. Had bad experience with it. Cost the parties too much and took too long. Court involvement can move a matter along more quickly. She would add to the Rule that a party must issue a litigation hold when a case is filed. As to ESI, she thinks the Maricopa County Superior Court model should be the one followed in the Rule. Judges need to get involved in ESI discovery immediately. This judge says rule has helped, but it has not eliminated sharp practices that judges have to police. When supplemental disclosures are produced, new information is typically bolded or in italics. Deadline for final disclosure? It is typically in the scheduling order under AZ Rule 16. Rule says 60 days before trial, but the Court can trump this deadline and make it earlier than that. Most judges do. 60 days before trial is too late. One lawyer said he could never remember seeing anything "startling" in a disclosure statement. This lawyer has gotten favorable documents from the other side, however. In a $25,000 or $50,000 case, it adds expense. Lawyers do press client for every potential relevant document to be sure you are complying with the disclosure statement. Clients do balk. The Rule then is invoked by the lawyers to support them with respect to documents when clients balk at production. Conceptually, though, it is harder to explain to some clients that AZ's rule

Arizona Rule 26.1	Comments During the Focus Group
	requires full disclosure. One has to think differently than when responding to a request for production. In that respect, it is more expensive. But on balance, this lawyer believes the disclosure rule saves money. Another lawyer: must think through your entire case, including its problems, because of what has to be disclosed. If there is a large amount of ESI, what is done? Disclosure would likely say: "we are negotiating an ESI protocol," or "we have agreed on an ESI protocol and this is what will happen…" If no discussion occurs, it might say: "We will make disclosure in due course after review." When data rich parties are against each other, they work things out. In asymmetrical cases, it is more difficult to work out. If data poor party tries to use ESI burden as leverage, then can be difficult. Judge: try to discuss with counsel and with the judge. One lawyer told story of NY lawyers dribbling out ESI and he is back to issuing requests for production. It will cost him quite a bit of money to engage in this iterative process. Should disclose sources of ESI at a minimum. If a "data dump," hard to argue something was not disclosed. Rule 26.1 is really drafted for small cases; sometimes with no lawyers involved. For larger cases, the proposed amendment on ESI will be make it self-executing versus now where lawyers have to avoid the rule in order to comply. Lawyers generally said they prefer the Arizona disclosures to federal court discovery practices.

Arizona Rule 26.1	Comments During the Focus Group
	A plaintiffs' lawyer said he finds the disclosures of facts, legal theories, and documents to be helpful. He finds that judges generally enforce the disclosure rules. A judge said she thinks the disclosure rule, when enforced, makes cases move more quickly and reduces the amount of written discovery. A defense lawyer said the rule eliminates hiding the ball and makes litigation more cost-effective. He rarely serves interrogatories because they are not necessary in light of disclosures. If he thinks information is missing, he sends a letter to the opposing side requesting it. If it is not produced, the letter provides a basis for excluding it at trial. It does front-load costs, and can interfere with settlement of smaller cases. A judge agreed that the disclosure rule generally makes interrogatories unnecessary. On balance, he thinks the disclosure approach is better than the federal rules approach. A defense lawyer who learned to practice in Chicago before moving to Arizona said that she thinks the disclosure rules are extremely positive. They reduce costs and move cases more quickly. She has never seen a party unfairly prejudiced by the disclosure rule, but has seen partiers fairly prejudice when they failed to comply. A plaintiffs' lawyer said he thinks the document disclosure requirement is helpful, but the other disclosure obligations just increase cost. Some lawyers turn them into a "gotcha" tactic by arguing something obvious was not disclosed. A plaintiffs' lawyer said he thinks the disclosure rule would be more effective if other forms of discovery were limited. He still has to respond to much discovery, which means the disclosure obligation only adds another layer of cost.

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EX. 3

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To: Judge Campbell

Cc: Rebecca Womeldorf

From: Amelia Yowell, Supreme Court Fellow

Date: December 13, 2015

RE: State Initial Disclosure Models

The Pilot Projects Subcommittee asked me to compile information about states with robust initial disclosure rules. I found seven states with initial disclosure rules that I thought would be helpful to the Subcommittee as it drafts a possible pilot program (Alaska, Arizona, Colorado, Nevada, New Hampshire, Texas, and Utah). I have provided a summary of these states' initial disclosure rules in the attached table, which I hope will provide a quick and easy way to compare the rules. Because I have simplified the rules for space and ease of comparison, I have linked each section of the table to the text of the relevant state rule.[1] If the Subcommittee thinks it would be helpful, I am happy to do additional research or analysis.

[1] You can access the text of the rule by clicking anywhere on a state's section in the table. The links are invisible. To get back to the main table, go to the bookmark bar on the left side of the PDF and click on "AGY Table."

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TABLE COMPARING SELECTED STATE INITIAL DISCLOSURE RULES

	Scope of Disclosure	List or Summary re Individuals	Produce or Identify Docs, ESI, data compilations, tangible things	Damages	Insurance Agreements
Federal **Fed. R. Civ. P. 26(a)(1)**	Helpful information (but not impeachment information)	Name, address, and telephone number and subject	A copy or description by category and location, limited to possession, custody, or control	A computation of each category and documents/material must be available for inspection or copying	Inspection and copying
New Hampshire **N.H. Superior Court Civ. R. 22(a)**	Helpful information (but not impeachment information)	Name, address, and telephone number and summary (unless the information is in a produced document)	A copy, limited to possession, custody, or control	A computation of each category and a copy of documents/materials	Inspection and copying
Nevada **Nev. R. Civ. P. 16.1(a)(1), 26(b)(1)**	Helpful and hurtful information, including impeachment *"Relevant to the subject matter"*	Name, address, and telephone number and subject	A copy or description by category and location, limited to possession, custody or control	A computation of any category and documents/materials must be available for inspection and copying	Inspection and copying
Alaska **Alaska R. Civ. P. 26(a)(1)**	The factual basis for each claim or defense Helpful and hurtful information	Name, address, and telephone number and subject	For relevant documents, a copy or a description by category and a copy of any un-privileged	List categories of damages and a computation of each category of special damages and	Produce a copy

	"Relevant to disputed facts alleged with particularity in the pleadings"		statements or the name, address, and telephone number of the custodian of the statement and photos, diagrams, and videotapes	documents/materials must be available for inspection or copying	
Colorado **Colo. R. Civ. P. 26(a)(1)**	Helpful and hurtful information *Relevant to the claims and defenses of any party"*	Name, address, and telephone number and "brief description"	A listing and a copy or description by category and location, limited to possession, custody, or control and make available for inspection and copying	A description of the categories and a computation of economic damages and relevant documents/materials must be available for inspection or copying	Inspection and copying
Utah **Utah R. Civ. P. 26(a)(1)**	For individuals: helpful information (but not impeachment information) and each fact witness the party may call in its case-in-chief For documents: any referred to in the pleadings and any the party may offer in its case-in-chief (but not charts, summaries,	Name, address, and telephone number and subject and, if an expected fact witness, a summary	A copy, limited to possession or control of the party	A computation of any damages claimed and a copy of documents/materials	Produce a copy

	and demonstrative exhibits)				
Arizona **Ariz. R. Civ. P. 26.1(a)**	The factual basis and legal theory for each claim or defense For individuals: helpful and hurtful information (*knowledge or information relevant to the events, transactions, or occurrences*) and witnesses the party intends to call at trial and all persons who have given statements (written, recorded, signed, or unsigned) and anticipated expert witnesses For documents, etc.: any the party plans to use at trial and helpful and hurtful documents (*relevant to the subject matter*), and those reasonably calculated to lead to the discovery of admissible evidence	Names, address, and telephone number and nature and, for witnesses expected at trial, a fair description of the substance of the testimony and, for witnesses who have given a statement, the identity of the custodian of the copies and, for expert witnesses, the subject matter, the facts and opinions, a summary of the grounds for the opinions, the expert's qualification, and the name and address of the custodian of the expert's reports	For documents expected to be used at trial, "the existence, location, custodian, and general description," and for relevant documents, a list or, in the case of voluminous information, a list of the categories known to exist (no possession, custody, or control limitation) and unless good cause, a copy	A computation of damages and a copy of the documents/materials and the names, addresses, and telephone numbers of all damage witnesses	List existence, location, custodian, and general description

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Texas **Tex. R. Civ. P. 194.2** **(NOT MANDATORY)**	Factual basis and legal theories for claims or defenses (but not all evidence that may be offered at trial) Helpful and hurtful information "*Relevant facts*"	Name, address, and telephone number and a brief statement of connection and for expert witnesses, the subject matter, general substance of impressions and opinions, brief summary of the basis, or documents reflecting the information (if not subject to the control of the party)	A copy of any witness statements and for experts controlled by the party, a copy of everything provided to, reviewed by, or prepared by or for the expert and the expert's current resume and bibliography	The amount and method of calculating economic damages and, if physical or mental injury, all medical records and bills reasonably related or authorization permitting disclosure	A copy

12b-012529

Federal Rules of Civil Procedure Rule 26

Rule 26. Duty to Disclose; General Provisions Governing Discovery

Currentness

<Notes of Decisions for 28 USCA Federal Rules of Civil Procedure Rule 26 are displayed in two separate documents. Notes of Decisions for subdivisions I to III are contained in this document. For Notes of Decisions for subdivisions IV to end, see second document for 28 USCA Federal Rules of Civil Procedure Rule 26.>

(a) Required Disclosures.

(1) ***Initial Disclosure.***

(A) *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information--along with the subjects of that information--that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy--or a description by category and location--of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party--who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(B) *Proceedings Exempt from Initial Disclosure.* The following proceedings are exempt from initial disclosure:

(i) an action for review on an administrative record;

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(ii) a forfeiture action in rem arising from a federal statute;

(iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

(iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(v) an action to enforce or quash an administrative summons or subpoena;

(vi) an action by the United States to recover benefit payments;

(vii) an action by the United States to collect on a student loan guaranteed by the United States;

(viii) a proceeding ancillary to a proceeding in another court; and

(ix) an action to enforce an arbitration award.

(C) *Time for Initial Disclosures--In General.* A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(D) *Time for Initial Disclosures--For Parties Served or Joined Later.* A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(E) *Basis for Initial Disclosure; Unacceptable Excuses.* A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) ***Disclosure of Expert Testimony.***

(A) *In General*. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) *Witnesses Who Must Provide a Written Report*. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report--prepared and signed by the witness--if the witness is one retained or specially

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employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) *Witnesses Who Do Not Provide a Written Report*. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) *Time to Disclose Expert Testimony*. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) *Supplementing the Disclosure*. The parties must supplement these disclosures when required under Rule 26(e).

(3) ***Pretrial Disclosures.***

(A) *In General*. In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

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(i) the name and, if not previously provided, the address and telephone number of each witness--separately identifying those the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence--separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) *Time for Pretrial Disclosures; Objections.* Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made--except for one under Federal Rule of Evidence 402 or 403--is waived unless excused by the court for good cause.

(4) ***Form of Disclosures.*** Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

(b) Discovery Scope and Limits.

(1) ***Scope in General.*** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

(2) ***Limitations on Frequency and Extent.***

(A) *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) *Specific Limitations on Electronically Stored Information.* A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

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(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

(3) ***Trial Preparation: Materials.***

(A) *Documents and Tangible Things*. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection Against Disclosure*. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) *Previous Statement*. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording--or a transcription of it--that recites substantially verbatim the person's oral statement.

(4) ***Trial Preparation: Experts.***

(A) *Deposition of an Expert Who May Testify*. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

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(B) *Trial-Preparation Protection for Draft Reports or Disclosures*. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses*. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(D) *Expert Employed Only for Trial Preparation*. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) *Payment*. Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and

(ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) ***Claiming Privilege or Protecting Trial-Preparation Materials.***

(A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

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(ii)describe the nature of the documents, communications, or tangible things not produced or disclosed--and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) *Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) Protective Orders.

(1) ***In General.*** A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending -- or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) ***Ordering Discovery.*** If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

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(3) ***Awarding Expenses.*** Rule 37(a)(5) applies to the award of expenses.

(d) Timing and Sequence of Discovery.

(1) ***Timing.*** A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) ***Early Rule 34 Requests.***

(A) Time to Deliver. More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:

(i) to that party by any other party, and

(ii) by that party to any plaintiff or to any other party that has been served.

(B) ***When Considered Served***. The request is considered to have been served at the first Rule 26(f) conference.

(3) ***Sequence.*** Unless the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

(e) Supplementing Disclosures and Responses.

(1) ***In General.*** A party who has made a disclosure under Rule 26(a)--or who has responded to an interrogatory, request for production, or request for admission--must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

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(2) ***Expert Witness.*** For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

(f) Conference of the Parties; Planning for Discovery.

(1) ***Conference Timing.*** Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable--and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).

(2) ***Conference Content; Parties' Responsibilities.*** In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) ***Discovery Plan.*** A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including -- if the parties agree on a procedure to assert these claims after production -- whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

(4) ***Expedited Schedule.*** If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule:

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(A) require the parties' conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b); and

(B) require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

(1) ***Signature Required; Effect of Signature.*** Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name--or by the party personally, if unrepresented--and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) ***Failure to Sign.*** Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) ***Sanction for Improper Certification.*** If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; January 21, 1963, effective July 1, 1963; February 28, 1966, effective July 1, 1966; March 30, 1970, effective July 1, 1970; April 29, 1980, effective August 1, 1980; April 28, 1983, effective August 1, 1983; March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; April 17, 2000, effective

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December 1, 2000; April 12, 2006, effective December 1, 2006; April 30, 2007, effective December 1, 2007; April 28, 2010, effective December 1, 2010; April 29, 2015, effective December 1, 2015.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Note to Subdivision (a). This rule freely authorizes the taking of depositions under the same circumstances and by the same methods whether for the purpose of discovery or for the purpose of obtaining evidence. Many states have adopted this practice on account of its simplicity and effectiveness, safeguarding it by imposing such restrictions upon the subsequent use of the deposition at the trial or hearing as are deemed advisable. See Ark.Civ.Code (Crawford, 1934) §§ 606 to 607; Calif.Code Civ.Proc. (Deering, 1937) § 2021; 1 Colo.Stat.Ann. (1935) Code Civ.Proc. § 376; Idaho Code Ann. (1932) § 16-906; Ill.Rules of Pract.Rule 19 (Smith-Hurd Ill.Stats. c. 110, § 259.19); Smith-Hurd Ill.Stats. c. 51, § 24; 2 Ind.Stat.Ann. (Burns, 1933) §§ 2-1501, 2-1506; Ky.Codes (Carroll, 1932) Civ.Pract. § 557; 1 Mo.Rev.Stat. (1929) § 1753; 4 Mont.Rev.Codes Ann. (1935) § 10645; Neb.Comp.Stat. (1929) ch. 20, §§ 1246-7; 4 Nev.Comp.Laws (Hillyer, 1929) § 9001; 2 N.H.Pub.Laws (1926) ch. 337, § 1; N.C.Code Ann. (1935) § 1809; 2 N.D.Comp.Laws Ann. (1913) §§ 7889 to 7897; 2 Ohio Gen.Code Ann. (Page, 1926) §§ 11525-6; 1 Ore.Code Ann. (1930) Tit. 9, § 1503; 1 S.D.Comp.Laws (1929) §§ 2713-16; Vernon's Ann.Civ.Stats.Tex. arts. 3738, 3752, 3769; Utah Rev.Stat.Ann. (1933) § 104-51-7; Wash.Rules of Practice adopted by the Supreme Ct., Rule 8, 2 Wash.Rev.Stat.Ann. (Remington, 1932) § 308-8; W.Va.Code (1931) ch. 57, art. 4, § 1. Compare [former] Equity Rules 47 (Depositions--To be Taken in Exceptional Instances); 54 (Depositions Under Revised Statutes, §§ 863, 865, 866, 867--Cross Examination); 58 (Discovery--Interrogatories--Inspection and Production of Documents--Admission of Execution or Genuineness).

This and subsequent rules incorporate, modify, and broaden the provisions for depositions under U.S.C., Title 28, [former] §§ 639 (Depositions *de bene esse;* when and where taken; notice), 640 (Same; mode of taking), 641 (Same; transmission to court), 644 (Depositions under *dedimus potestatem* and *in perpetuam*), 646 (Deposition under *dedimus potestatem*; how taken). These statutes are superseded in so far as they differ from this and subsequent rules. U.S.C. Title 28, [former] § 643 (Depositions; taken in mode prescribed by State laws) is superseded by the third sentence of Subdivision (a).

While a number of states permit discovery only from parties or their agents, others either make no distinction between parties or agents of parties and ordinary witnesses, or authorize the taking of ordinary depositions, without restriction, from any persons who have knowledge of relevant facts. See Ark.Civ.Code (Crawford, 1934) §§ 606 to 607; 1 Idaho Code Ann. (1932) § 16-906; Ill.Rules of Pract., Rule 19 (Smith-Hurd Ill.Stats. c. 110, § 259.19); Smith-Hurd Ill.Stats. c. 51, § 24; 2 Ind.Stat.Ann. (Burns, 1933) § 2-1501; Ky.Codes (Carroll, 1932) Civ.Pract. §§ 554 to 558; 2 Md.Ann.Code (Bagby, 1924) Art. 35, § 21; 2 Minn.Stat. (Mason, 1927) § 9820; Mo.St.Ann. §§ 1753, 1759, pp. 4023, 4026; Neb.Comp.Stat. (1929) ch. 20, §§ 1246-7; 2 N.H.Pub.Laws (1926) ch. 337, § 1; 2 N.D.Comp.Laws Ann. (1913) § 7897; 2 Ohio Gen.Code Ann. (Page, 1926) §§ 11525-6; 1 S.D.Comp.Laws (1929) §§ 2713-16; Vernon's Ann.Civil Stats.Tex. arts. 3738, 3752, 3769; Utah Rev.Stat.Ann. (1933) § 104-51-7; Wash.Rules of Practice adopted by Supreme Ct., Rule 8, 2 Wash.Rev.Stat.Ann. (Remington, 1932) § 308-8; W.Va.Code (1931) ch. 57, art. 4, § 1.

The more common practice in the United States is to take depositions on notice by the party desiring them, without any order from the court, and this has been followed in these rules. See Calif.Code Civ.Proc. (Deering, 1937) § 2031; 2 Fla.Comp.Gen.Laws Ann. (1927) §§ 4405-7; 1 Idaho Code Ann. (1932) § 16-902; Ill.Rules of Pract., Rule 19 (Smith-Hurd Ill.Stats. c. 110, § 259.19); Smith-Hurd Ill.Stats. c. 51, § 24; 2 Ind.Stat.Ann. (Burns, 1933) § 2-1502; Kan.Gen.Stat.Ann. (1935) § 60-2827; Ky.Codes (Carroll, 1932) Civ.Pract. § 565; 2 Minn.Stat. (Mason, 1927) § 9820; Mo.St.Ann. § 1761, p. 4029; 4 Mont.Rev.Codes Ann. (1935) § 10651; Nev.Comp.Laws (Hillyer, 1929) § 9002; N.C.Code Ann. (1935) § 1809; 2 N.D.Comp.Laws Ann. (1913) § 7895; Utah Rev.Stat.Ann. (1933) § 104-51-8.

Note to Subdivision (b). While the old chancery practice limited discovery to facts supporting the case of the party seeking it, this limitation has been largely abandoned by modern legislation. See Ala.Code Ann. (Michie, 1928) §§ 7764 to 7773; 2

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Ind.Stat.Ann. (Burns, 1933) §§ 2-1028, 2-1506, 2-1728-2-1732; Iowa Code (1935) § 11185; Ky.Codes (Carroll, 1932) Civ.Pract. §§ 557, 606(8); La.Code Pract. (Dart, 1932) arts. 347-356; 2 Mass.Gen.Laws (Ter.Ed., 1932) ch. 231, §§ 61 to 67; Mo.St.Ann. §§ 1753, 1759, pp. 4023, 4026; Neb.Comp.Stat. (1929) §§ 20-1246, 20-1247; 2 N.H.Pub.Laws (1926) ch. 337, § 1; 2 Ohio Gen.Code Ann. (Page, 1926) §§ 11497, 11526; Vernon's Ann.Civ.Stats.Tex. arts. 3738, 3753, 3769; Wis.Stat. (1935) § 326.12; Ontario Consol.Rules of Pract. (1928) Rules 237-347; Quebec Code of Civ.Proc. (Curran, 1922) §§ 286 to 290.

Note to Subdivisions (d), (e), and (f). The restrictions here placed upon the use of depositions at the trial or hearing are substantially the same as those provided in U.S.C., Title 28, [former] § 641, for depositions taken, *de bene esse*, with the additional provision that any deposition may be used when the court finds the existence of exceptional circumstances. Compare English Rules Under the Judicature Act (The Annual Practice, 1937) O. 37, r. 18 (with additional provision permitting use of deposition by consent of the parties). See also [former] Equity Rule 64 (Former Depositions, Etc. May be Used Before Master); and 2 Minn.Stat. (Mason, 1927) § 9835 (Use in a subsequent action of a deposition filed in a previously dismissed action between the same parties and involving the same subject matter).

1946 Amendment

Note. Subdivision (a). The amendment eliminates the requirement of leave of court for the taking of a deposition except where a plaintiff seeks to take a deposition within 20 days after the commencement of the action. The retention of the requirement where a deposition is sought by a plaintiff within 20 days of the commencement of the action protects a defendant who has not had an opportunity to retain counsel and inform himself as to the nature of the suit; the plaintiff, of course, needs no such protection. The present rule forbids the plaintiff to take a deposition, without leave of court, before the answer is served. Sometimes the defendant delays the serving of an answer for more than 20 days, but as 20 days are sufficient time for him to obtain a lawyer, there is no reason to forbid the plaintiff to take a deposition without leave merely because the answer has not been served. In all cases, Rule 30(a) empowers the court, for cause shown, to alter the time of the taking of a deposition, and Rule 30(b) contains provisions giving ample protection to persons who are unreasonably pressed. The modified practice here adopted is along the line of that followed in various states. See e.g., 8 Mo.Rev.Stat.Ann.1939, § 1917; 2 Burns' Ind.Stat.Ann.1933, § 2-1506.

Subdivision (b). The amendments to subdivision (b) make clear the broad scope of examination and that it may cover not only evidence for use at the trial but also inquiry into matters in themselves inadmissible as evidence but which will lead to the discovery of such evidence. The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case. *Engl v. Aetna Life Ins. Co.*, C.C.A.2, 1943, 139 F.2d 469; *Mahler v. Pennsylvania R. Co.*, E.D.N.Y.1945, 8 Fed.Rules Serv. 33.351, Case 1. In such a preliminary inquiry admissibility at trial should not be the test as to whether the information sought is within the scope of proper examination. Such a standard unnecessarily curtails the utility of discovery practice. Of course, matters entirely without bearing either as direct evidence or as leads to evidence are not within the scope of inquiry, but to the extent that the examination develops useful information, it functions successfully as an instrument of discovery, even if it produces no testimony directly admissible. *Lewis v. United Air Lines Transportation Corp.*, D.Conn.1939, 27 F.Supp. 946; *Engl v. Aetna Life Ins. Co.*, supra; *Mahler v. Pennsylvania R. Co.*, supra; *Bloomer v. Sirian Lamp Co.*, D.Del.1944, 8 Fed.Rules Serv. 26b.31, Case 3; *Rosseau v. Langley*, N.Y.1945, 9 Fed.Rules Serv. 34.41, Case 1 (Rule 26 contemplates "examinations not merely for the narrow purpose of adducing testimony which may be offered in evidence but also for the broad discovery of information which may be useful in preparation for trial."); *Olson Transportation Co. v. Socony-Vacuum Co.*, E.D.Wis.1944, 8 Fed.Rules Serv. 34.41, Case 2 (". . . the Rules . . . permit 'fishing' for evidence as they should."); Note, 1945, 45 Col.L.Rev. 482. Thus hearsay, while inadmissible itself, may suggest testimony which properly may be proved. Under Rule 26(b) several cases, however, have erroneously limited discovery on the basis of admissibility, holding that the word "relevant" in effect meant "material and competent under the rules of evidence". *Poppino v. Jones Store Co.*, W.D.Mo.1940, 1 F.R.D. 215, 3 Fed.Rules Serv. 26b.5, Case 1; *Benevento v. A. & P. Food Stores, Inc.*, E.D.N.Y.1939, 26 F.Supp. 424. Thus it has been said that inquiry might not be made into statements or other matters which, when disclosed, amounted only to hearsay. *See Maryland for use of Montvila v. Pan-American Bus Lines, Inc.*, D.Md.1940, 1 F.R.D. 213, 3 Fed.Rules Serv. 26b.211, Case 3; *Gitto v. "Italia," Societa Anonima Di Navigazione*, E.D.N.Y.1940, 31 F.Supp. 567; *Rose Silk Mills, Inc. v. Insurance Co. of North America*, S.D.N.Y.1939, 29 F.Supp. 504; *Colpak*

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v. Hetterick, E.D.N.Y.1941, 40 F.Supp. 350; *Matthies v. Peter F. Connolly Co.,* E.D.N.Y.1941, 6 Fed.Rules Serv. 30a.22, Case 1, 2 F.R.D. 277; *Matter of Examination of Citizens Casualty Co. of New York,* S.D.N.Y.1942, 3 F.R.D. 171, 7 Fed.Rules Serv. 26b.211, Case 1; *United States v. Silliman,* D.C.N.J.1944, 8 Fed.Rules Serv. 26b.52, Case 1. The contrary and better view, however, has often been stated. See, e.g., *Engl v. Aetna Life Ins. Co.,* supra; *Stevenson v. Melady,* S.D.N.Y.1940, 3 Fed.Rules Serv. 26b.31, Case 1, 1 F.R.D. 329; *Lewis v. United Air Lines Transport Corp.,* supra; *Application of Zenith Radio Corp.,* E.D.Pa.1941, 4 Fed.Rules Serv. 30b.21, Case 1, 1 F.R.D. 627; *Steingut v. Guaranty Trust Co. of New York,* S.D.N.Y.1941, 1 F.R.D. 723, 4 Fed.Rules Serv. 26b.5, Case 2; *DeSeversky v. Republic Aviation Corp.,* E.D.N.Y.1941, 2 F.R.D. 183, 5 Fed.Rules Serv. 26b.31, Case 5; *Moore v. George A. Hormel & Co.,* S.D.N.Y.1942, 6 Fed.Rules Serv. 30b.41, Case 1, 2 F.R.D. 340; *Hercules Powder Co. v. Rohm & Haas Co.,* D.Del.1943, 7 Fed.Rules Serv. 45b.311, Case 2, 3 F.R.D. 302; *Bloomer v. Sirian Lamp Co.,* supra; *Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc.,* D.Mass.1944, 8 Fed.Rules Serv. 26b.31, Case 1; *Patterson Oil Terminals, Inc. v. Charles Kurz & Co., Inc.,* E.D.Pa.1945, 9 Fed.Rules Serv. 33.321, Case 2; *Pueblo Trading Co. v. Reclamation Dist. No. 1500,* N.D.Cal.1945, 9 Fed.Rules Serv. 33.321, Case 4, 4 F.R.D. 471. See also discussion as to the broad scope of discovery in *Hoffman v. Palmer,* C.C.A.2, 1942, 129 F.2d 976, 995-997, affirmed 63 S.Ct. 477, 318 U.S. 109, 87 L.Ed. 645; Note, 1945, 45 Col.L.Rev. 482.

1963 Amendment

This amendment conforms to the amendment of Rule 28(b). See the next-to-last paragraph of the Advisory Committee's Note to that amendment.

1966 Amendment

The requirement that the plaintiff obtain leave of court in order to serve notice of taking of a deposition within 20 days after commencement of the action gives rise to difficulties when the prospective deponent is about to become unavailable for examination. The problem is not confined to admiralty, but has been of special concern in that context because of the mobility of vessels and their personnel. When Rule 26 was adopted as Admiralty Rule 30A in 1961, the problem was alleviated by permitting depositions *de bene esse,* for which leave of court is not required. See Advisory Committee's Note to Admiralty Rule 30A (1961).

A continuing study is being made in the effort to devise a modification of the 20-day rule appropriate to both the civil and admiralty practice to the end that Rule 26(a) shall state a uniform rule applicable alike to what are now civil actions and suits in admiralty. Meanwhile, the exigencies of maritime litigation require preservation, for the time being at least, of the traditional *de bene esse* procedure for the post-unification counterpart of the present suit in admiralty. Accordingly, the amendment provides for continued availability of that procedure in admiralty and maritime claims within the meaning of Rule 9(h).

1970 Amendment

A limited rearrangement of the discovery rules is made, whereby certain rule provisions are transferred, as follows: Existing Rule 26(a) is transferred to Rules 30(a) and 31(a). Existing Rule 26(c) is transferred to Rule 30(c). Existing Rules 26(d), (e), and (f) are transferred to Rule 32. Revisions of the transferred provisions, if any, are discussed in the notes appended to Rules 30, 31, and 32. In addition, Rule 30(b) is transferred to Rule 26(c). The purpose of this rearrangement is to establish Rule 26 as a rule governing discovery in general. (The reasons are set out in the Advisory Committee's explanatory statement.)

Subdivision (a)--Discovery Devices. This is a new subdivision listing all of the discovery devices provided in the discovery rules and establishing the relationship between the general provisions of Rule 26 and the specific rules for particular discovery devices. The provision that the frequency of use of these methods is not limited confirms existing law. It incorporates in general form a provision now found in Rule 33.

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Subdivision (b)--Scope of Discovery. This subdivision is recast to cover the scope of discovery generally. It regulates the discovery obtainable through any of the discovery devices listed in Rule 26(a).

All provisions as to scope of discovery are subject to the initial qualification that the court may limit discovery in accordance with these rules. Rule 26(c) (transferred from 30(b)) confers broad powers on the courts to regulate or prevent discovery even though the materials sought are within the scope of 26(b), and these powers have always been freely exercised. For example, a party's income tax return is generally held not privileged, 2A Barron & Holtzoff, *Federal Practice and Procedure,* § 651.2 (Wright ed. 1961), and yet courts have recognized that interests in privacy may call for a measure of extra protection. E.g., *Wiesenberger v. W. E. Hutton & Co.,* 35 F.R.D. 556 (S.D.N.Y.1964). Similarly, the courts have in appropriate circumstances protected materials that are primarily of an impeaching character. These two types of materials merely illustrate the many situations, not capable of governance by precise rule, in which courts must exercise judgment. The new subsections in Rule 26(b) do not change existing law with respect to such situations.

Subdivision (b)(1)--In General. The language is changed to provide for the scope of discovery in general terms. The existing subdivision, although in terms applicable only to depositions, is incorporated by reference in existing Rules 33 and 34. Since decisions as to relevance to the subject matter of the action are made for discovery purposes well in advance of trial, a flexible treatment of relevance is required and the making of discovery, whether voluntary or under court order, is not a concession or determination of relevance for purposes of trial. *Cf.* 4 *Moore's Federal Practice* ¶26-16[1] (2d ed. 1966).

Subdivision (b)(2)--Insurance Policies. Both the cases and commentators are sharply in conflict on the question whether defendant's liability insurance coverage is subject to discovery in the usual situation when the insurance coverage is not itself admissible and does not bear on another issue in the case. Examples of Federal cases requiring disclosure and supporting comments: *Cook v. Welty,* 253 F.Supp. 875 (D.D.C.1966) (cases cited); *Johanek v. Aberle,* 27 F.R.D. 272 (D.Mont.1961); Williams, *Discovery of Dollar Limits in Liability Policies in Automobile Tort Cases,* 10 Ala.L.Rev. 355 (1958); Thode, *Some Reflections on the 1957 Amendments to the Texas Rules,* 37 Tex.L.Rev. 33, 40-42 (1958). Examples of Federal cases refusing disclosure and supporting comments: *Bisserier v. Manning,* 207 F.Supp. 476 (D.N.J.1962); *Cooper v. Stender,* 30 F.R.D. 389 (E.D.Tenn.1962); Frank, *Discovery and Insurance, Coverage,* 1959 Ins.L.J. 281; Fournier, *Pre-trial Discovery of Insurance Coverage and Limits,* 28 Ford.L.Rev. 215 (1959).

The division in reported cases is close. State decisions based on provisions similar to the federal rules are similarly divided. See cases collected in 2A Barron & Holtzoff, *Federal Practice and Procedure* § 647.1, nn. 45.5, 45.6 (Wright ed. 1961). It appears to be difficult if not impossible to obtain appellate review of the issue. Resolution by rule amendment is indicated. The question is essentially procedural in that it bears upon preparation for trial and settlement before trial, and courts confronting the question, however they have decided it, have generally treated it as procedural and governed by the rules.

The amendment resolves this issue in favor of disclosure. Most of the decisions denying discovery, some explicitly, reason from the text of Rule 26(b) that it permits discovery only of matters which will be admissible in evidence or appear reasonably calculated to lead to such evidence; they avoid considerations of policy, regarding them as foreclosed. See *Bisserier v. Manning, supra.* Some note also that facts about a defendant's financial status are not discoverable as such, prior to judgment with execution unsatisfied, and fear that, if courts hold insurance coverage discoverable, they must extend the principle to other aspects of the defendant's financial status. The cases favoring disclosure rely heavily on the practical significance of insurance in the decisions lawyers make about settlement and trial preparation. In *Clauss v. Danker,* 264 F.Supp. 246 (S.D.N.Y.1967), the court held that the rules forbid disclosure but called for an amendment to permit it.

Disclosure of insurance coverage will enable counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation. It will conduce to settlement and avoid protracted litigation in some cases, though in others it may have an opposite effect. The amendment is limited to insurance coverage, which should be distinguished from any other facts concerning defendant's financial status (1) because insurance is an asset created specifically to satisfy the claim; (2) because the insurance company ordinarily controls the litigation; (3) because information

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about coverage is available only from defendant or his insurer; and (4) because disclosure does not involve a significant invasion of privacy.

Disclosure is required when the insurer "may be liable" on part or all of the judgment. Thus, an insurance company must disclose even when it contests liability under the policy, and such disclosure does not constitute a waiver of its claim. It is immaterial whether the liability is to satisfy the judgment directly or merely to indemnify or reimburse another after he pays the judgment.

The provision applies only to persons "carrying on an insurance business" and thus covers insurance companies and not the ordinary business concern that enters into a contract of indemnification. *Cf.* N.Y.Ins.Law § 41. Thus, the provision makes no change in existing law on discovery of indemnity agreements other than insurance agreements by persons carrying on an insurance business. Similarly, the provision does not cover the business concern that creates a reserve fund for purposes of self-insurance.

For some purposes other than discovery, an application for insurance is treated as a part of the insurance agreement. The provision makes clear that, for discovery purposes, the application is not to be so treated. The insurance application may contain personal and financial information concerning the insured, discovery of which is beyond the purpose of this provision.

In no instance does disclosure make the facts concerning insurance coverage admissible in evidence.

Subdivision (b)(3)--Trial Preparation: Materials. Some of the most controversial and vexing problems to emerge from the discovery rules have arisen out of requests for the production of documents or things prepared in anticipation of litigation or for trial. The existing rules make no explicit provision for such materials. Yet, two verbally distinct doctrines have developed, each conferring a qualified immunity on these materials--the "good cause" requirement in Rule 34 (now generally held applicable to discovery of documents via deposition under Rule 45 and interrogatories under Rule 33) and the work-product doctrine of *Hickman v. Taylor,* 329 U.S. 495 (1947). Both demand a showing of justification before production can be had, the one of "good cause" and the other variously described in the *Hickman* case: "necessity or justification," "denial * * * would unduly prejudice the preparation of petitioner's case," or "cause hardship or injustice" 329 U.S. at 509-510.

In deciding the *Hickman* case, the Supreme Court appears to have expressed a preference in 1947 for an approach to the problem of trial preparation materials by judicial decision rather than by rule. Sufficient experience has accumulated, however, with lower court applications of the *Hickman* decision to warrant a reappraisal.

The major difficulties visible in the existing case law are (1) confusion and disagreement as to whether "good cause" is made out by a showing of relevance and lack of privilege, or requires an additional showing of necessity, (2) confusion and disagreement as to the scope of the *Hickman* work-product doctrine, particularly whether it extends beyond work actually performed by lawyers, and (3) the resulting difficulty of relating the "good cause" required by Rule 34 and the "necessity or justification" of the work-product doctrine, so that their respective roles and the distinctions between them are understood.

Basic Standard.--Since Rule 34 in terms requires a showing of "good cause" for the production of all documents and things, whether or not trial preparation is involved, courts have felt that a single formula is called for and have differed over whether a showing of relevance and lack of privilege is enough or whether more must be shown. When the facts of the cases are studied, however, a distinction emerges based upon the type of materials. With respect to documents not obtained or prepared with an eye to litigation, the decisions, while not uniform, reflect a strong and increasing tendency to relate "good cause" to a showing that the documents are relevant to the subject matter of the action. *E.g.,* *Connecticut Mutual Life Ins. Co. v. Shields,* 17 F.R.D. 273 (S.D.N.Y.1959), with cases cited; *Houdry Process Corp. v. Commonwealth Oil Refining Co.,* 24 F.R.D. 58 (S.D.N.Y.1955); see *Bell v. Commercial Ins. Co.,* 280 F.2d 514, 517 (3d Cir. 1960). When the party whose documents are sought shows that the request for production is unduly burdensome or oppressive, courts have denied discovery for lack of "good cause", although they might just as easily have based their decision on the protective provisions of existing Rule 30(b) (new Rule 26(c)). *E.g.,* *Lauer v. Tankrederi,* 39 F.R.D. 334 (E.D.Pa.1966).

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As to trial-preparation materials, however, the courts are increasingly interpreting "good cause" as requiring more than relevance. When lawyers have prepared or obtained the materials for trial, all courts require more than relevance; so much is clearly commanded by *Hickman*. But even as to the preparatory work of nonlawyers, while some courts ignore work-product and equate "good cause" with relevance, *e.g.*, *Brown v. New York, N.H. & H.R.R.*, 17 F.R.D. 324 (S.D.N.Y.1955), the more recent trend is to read "good cause" as requiring inquiry into the importance of and need for the materials as well as into alternative sources for securing the same information. In *Guilford Nat'l Bank v. Southern Ry.*, 297 F.2d 921 (4th Cir. 1962), statements of witnesses obtained by claim agents were held not discoverable because both parties had had equal access to the witnesses at about the same time, shortly after the collision in question. The decision was based solely on Rule 34 and "good cause"; the court declined to rule on whether the statements were work-products. The court's treatment of "good cause" is quoted at length and with approval in *Schlagenhauf v. Holder*, 379 U.S. 104, 117-118 (1964). See also *Mitchell v. Bass*, 252 F.2d 513 (8th Cir. 1958); *Hauger v. Chicago, R.I. & Pac. R.R.*, 216 F.2d 501 (7th Cir. 1954); *Burke v. United States*, 32 F.R.D. 213 (E.D.N.Y.1963). While the opinions dealing with "good cause" do not often draw an explicit distinction between trial preparation materials and other materials, in fact an overwhelming proportion of the cases in which a special showing is required are cases involving trial preparation materials.

The rules are amended by eliminating the general requirement of "good cause" from Rule 34 but retaining a requirement of a special showing for trial preparation materials in this subdivision. The required showing is expressed, not in terms of "good cause" whose generality has tended to encourage confusion and controversy, but in terms of the elements of the special showing to be made: substantial need of the materials in the preparation of the case and inability without undue hardship to obtain the substantial equivalent of the materials by other means.

These changes conform to the holdings of the cases, when viewed in light of their facts. Apart from trial preparation, the fact that the materials sought are documentary does not in and of itself require a special showing beyond relevance and absence of privilege. The protective provisions are of course available, and if the party from whom production is sought raises a special issue of privacy (as with respect to income tax returns or grand jury minutes) or points to evidence primarily impeaching, or can show serious burden or expense, the court will exercise its traditional power to decide whether to issue a protective order. On the other hand, the requirement of a special showing for discovery of trial preparation materials reflects the view that each side's informal evaluation of its case should be protected, that each side should be encouraged to prepare independently, and that one side should not automatically have the benefit of the detailed preparatory work of the other side. See Field and McKusick, *Maine Civil Practice* 264 (1959).

Elimination of a "good cause" requirement from Rule 34 and the establishment of a requirement of a special showing in this subdivision will eliminate the confusion caused by having two verbally distinct requirements of justification that the courts have been unable to distinguish clearly. Moreover, the language of the subdivision suggests the factors which the courts should consider in determining whether the requisite showing has been made. The importance of the materials sought to the party seeking them in preparation of his case and the difficulty he will have obtaining them by other means are factors noted in the *Hickman* case. The courts should also consider the likelihood that the party, even if he obtains the information by independent means, will not have the substantial equivalent of the documents the production of which he seeks.

Consideration of these factors may well lead the court to distinguish between witness statements taken by an investigator, on the one hand, and other parts of the investigative file, on the other. The court in *Southern Ry. v. Lanham*, 403 F.2d 119 (5th Cir. 1968), while it naturally addressed itself to the "good cause" requirements of Rule 34, set forth as controlling considerations the factors contained in the language of this subdivision. The analysis of the court suggests circumstances under which witness statements will be discoverable. The witness may have given a fresh and contemporaneous account in a written statement while he is available to the party seeking discovery only a substantial time thereafter. *Lanham, supra* at 127-128; *Guilford, supra* at 926. Or he may be reluctant or hostile. *Lanham, supra* at 128-129; *Brookshire v. Pennsylvania RR*, 14 F.R.D. 154 (N.D.Ohio 1953); *Diamond v. Mohawk Rubber Co.*, 33 F.R.D. 264 (D.Colo.1963). Or he may have a lapse of memory. *Tannenbaum v. Walker*, 16 F.R.D. 570 (E.D.Pa.1954). Or he may probably be deviating from his prior statement. *Cf. Hauger v. Chicago, R.I.*

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& Pac. RR, 216 F.2d 501 (7th Cir. 1954). On the other hand, a much stronger showing is needed to obtain evaluative materials in an investigator's reports. *Lanham, supra* at 131-133; *Pickett v. L. R. Ryan, Inc.,* 237 F.Supp. 198 (E.D.S.C.1965).

Materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity provided by this subdivision. *Goosman v. A. Duie Pyle, Inc.,* 320 F.2d 45 (4th Cir. 1963); cf. *United States v. New York Foreign Trade Zone Operators, Inc.,* 304 F.2d 792 (2d Cir. 1962). No change is made in the existing doctrine, noted in the *Hickman* case, that one party may discover relevant facts known or available to the other party, even though such facts are contained in a document which is not itself discoverable.

Treatment of Lawyers; Special Protection of Mental Impressions, Conclusions, Opinions, and Legal Theories Concerning the Litigation.--The courts are divided as to whether the work-product doctrine extends to the preparatory work only of lawyers. The *Hickman* case left this issue open since the statements in that case were taken by a lawyer. As to courts of appeals compare *Alltmont v. United States,* 177 F.2d 971, 976 (3d Cir. 1949), cert. denied, 339 U.S. 967 (1950) (*Hickman* applied to statements obtained by FBI agents on theory it should apply to "all statements of prospective witnesses which a party has obtained for his trial counsel's use"), with *Southern Ry. v. Campbell,* 309 F.2d 569 (5th Cir. 1962) (Statements taken by claim agents not work-product), and *Guilford Nat'l Bank v. Southern Ry.,* 297 F.2d 921 (4th Cir. 1962) (avoiding issue of work-product as to claim agents, deciding case instead under Rule 34 "good cause"). Similarly, the district courts are divided on statements obtained by claim agents, compare, e.g., *Brown v. New York, N.H. & H.R.R.,* 17 F.R.D. 324 (S.D.N.Y.1955) with *Hanke v. Milwaukee Electric Ry. & Transp. Co.,* 7 F.R.D. 540 (E.D.Wis.1947); investigators, compare *Burke v. United States,* 32 F.R.D. 213 (E.D.N.Y.1963) with *Snyder v. United States,* 20 F.R.D. 7 (E.D.N.Y.1956); and insurers, compare *Gottlieb v. Bresler,* 24 F.R.D. 371 (D.D.C.1959) with *Burns v. Mulder,* 20 F.R.D. 605 (E.D.Pa.1957). See 4 Moore's *Federal Practice* ¶26.23[8.1] (2d ed. 1966); 2A Barron & Holtzoff, *Federal Practice and Procedure* § 652.2 (Wright ed. 1961).

A complication is introduced by the use made by courts of the "good cause" requirement of Rule 34, as described above. A court may conclude that trial preparation materials are not work-product because not the result of lawyer's work and yet hold that they are not producible because "good cause" has not been shown. *Cf. Guilford Nat'l Bank v. Southern Ry.,* 297 F.2d 921 (4th Cir. 1962), cited and described above. When the decisions on "good cause" are taken into account, the weight of authority affords protection of the preparatory work of both lawyers and nonlawyers (though not necessarily to the same extent) by requiring more than a showing of relevance to secure production.

Subdivision (b)(3) reflects the trend of the cases by requiring a special showing, not merely as to materials prepared by an attorney, but also as to materials prepared in anticipation of litigation or preparation for trial by or for a party or any representative acting on his behalf. The subdivision then goes on to protect against disclosure the mental impressions, conclusions, opinions, or legal theories concerning the litigation of an attorney or other representative of a party. The *Hickman* opinion drew special attention to the need for protecting an attorney against discovery of memoranda prepared from recollection of oral interviews. The courts have steadfastly safeguarded against disclosure of lawyers' mental impressions and legal theories, as well as mental impressions and subjective evaluations of investigators and claim-agents. In enforcing this provision of the subdivision, the courts will sometimes find it necessary to order disclosure of a document but with portions deleted.

Rules 33 and 36 have been revised in order to permit discovery calling for opinions, contentions, and admissions relating not only to fact but also to the application of law to fact. Under those rules, a party and his attorney or other representative may be required to disclose, to some extent, mental impressions, opinions, or conclusions. But documents or parts of documents containing these matters are protected against discovery by this subdivision. Even though a party may ultimately have to disclose in response to interrogatories or requests to admit, he is entitled to keep confidential documents containing such matters prepared for internal use.

Party's Right to Own Statement--An exception to the requirement of this subdivision enables a party to secure production of his own statement without any special showing. The cases are divided. Compare, *e.g.,* *Safeway Stores, Inc. v. Reynolds,* 176

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F.2d 476 (D.C. Cir.1949); *Shupe v. Pennsylvania R.R.,* 19 F.R.D. 144 (W.D.Pa.1956); with *e.g., New York Central R.R. v. Carr,* 251 F.2d 433 (4th Cir. 1957); *Belback v. Wilson Freight Forwarding Co.,* 40 F.R.D. 16 (W.D.Pa.1966).

Courts which treat a party's statement as though it were that of any witness overlook the fact that the party's statement is, without more, admissible in evidence. Ordinarily, a party gives a statement without insisting on a copy because he does not yet have a lawyer and does not understand the legal consequences of his actions. Thus, the statement is given at a time when he functions at a disadvantage. Discrepancies between his trial testimony and earlier statement may result from lapse of memory or ordinary inaccuracy; a written statement produced for the first time at trial may give such discrepancies a prominence which they do not deserve. In appropriate cases the court may order a party to be deposed before his statement is produced. *E.g., Smith v. Central Linen Service Co.,* 39 F.R.D. 15 (D.Md.1966); *McCoy v. General Motors Corp.,* 33 F.R.D. 354 (W.D.Pa.1963).

Commentators strongly support the view that a party be able to secure his statement without a showing. 4 *Moore's Federal Practice* ¶26.23[8.4] (2d ed. 1966); 2A Barron & Holtzoff, *Federal Practice and Procedure* § 652.3 (Wright ed. 1961); see also Note, *Developments in the Law--Discovery,* 74 Harv.L.Rev. 940, 1039 (1961). The following states have by statute or rule taken the same position: *Statutes:* Fla.Stat.Ann. § 92.33; Ga.Code Ann. § 38-2109(b); La.Stat.Ann.R.S. 13:3732; Mass.Gen.Laws Ann. c. 271, § 44; Minn.Stat.Ann. § 602.01; N.Y.C.P.L.R. § 3101(e); *Rules:* Mo.R.C.P. 56.01(a); N.Dak.R.C.P. 34(b); Wyo.R.C.P. 34(b); *cf.* Mich.G.C.R. 306.2.

In order to clarify and tighten the provision on statements by a party, the term “statement” is defined. The definition is adapted from 18 U.S.C. § 3500(e) (Jencks Act). The statement of a party may of course be that of plaintiff or defendant, and it may be that of an individual or of a corporation or other organization.

Witness' Right to Own Statement.--A second exception to the requirement of this subdivision permits a non-party witness to obtain a copy of his own statement without any special showing. Many, though not all, of the considerations supporting a party's right to obtain his statement apply also to the non-party witness. Insurance companies are increasingly recognizing that a witness is entitled to a copy of his statement and are modifying their regular practice accordingly.

Subdivision (b)(4)--Trial Preparation: Experts. This is a new provision dealing with discovery of information (including facts and opinions) obtained by a party from an expert retained by that party in relation to litigation or obtained by the expert and not yet transmitted to the party. The subdivision deals separately with those experts whom the party expects to call as trial witnesses and with those experts who have been retained or specially employed by the party but who are not expected to be witnesses. It should be noted that the subdivision does not address itself to the expert whose information was not acquired in preparation for trial but rather because he was an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit. Such an expert should be treated as an ordinary witness.

Subsection (b)(4)(A) deals with discovery of information obtained by or through experts who will be called as witnesses at trial. The provision is responsive to problems suggested by a relatively recent line of authorities. Many of these cases present intricate and difficult issues as to which expert testimony is likely to be determinative. Prominent among them are food and drug, patent, and condemnation cases. See, *e.g., United States v. Nysco Laboratories, Inc.,* 26 F.R.D. 159, 162 (E.D.N.Y.1960) (food and drug); *E. I. du Pont de Nemours & Co. v. Phillips Petroleum Co.,* 24 F.R.D. 416, 421 (D.Del.1959) (patent); *Cold Metal Process Co. v. Aluminum Co. of America,* 7 F.R.D. 425 (N.D.Ohio 1947), aff'd, *Sachs v. Aluminum Co. of America,* 167 F.2d 570 (6th Cir. 1948) (same); *United States v. 50.34 Acres of Land,* 13 F.R.D. 19 (E.D.N.Y.1952) (condemnation).

In cases of this character, a prohibition against discovery of information held by expert witnesses produces in acute form the very evils that discovery has been created to prevent. Effective cross-examination of an expert witness requires advance preparation. The lawyer even with the help of his own experts frequently cannot anticipate the particular approach his adversary's expert will take or the data on which he will base his judgment on the stand. McGlothlin, *Some Practical Problems in Proof of Economic, Scientific, and Technical Facts,* 23 F.R.D. 467, 478 (1958). A California study of discovery and pretrial in condemnation cases notes that the only substitute for discovery of experts' valuation materials is “lengthy--and often fruitless--cross-examination

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during trial," and recommends pretrial exchange of such material. Calif.Law Rev.Comm'n, Discovery in Eminent Domain Proceedings 707-710 (Jan. 1963). Similarly, effective rebuttal requires advance knowledge of the line of testimony of the other side. If the latter is foreclosed by a rule against discovery, then the narrowing of issues and elimination of surprise which discovery normally produces are frustrated.

These considerations appear to account for the broadening of discovery against experts in the cases cited where expert testimony was central to the case. In some instances, the opinions are explicit in relating expanded discovery to improved cross-examination and rebuttal at trial. *Franks v. National Dairy Products Corp.,* 41 F.R.D. 234 (W.D.Tex.1966); *United States v. 23.76 Acres,* 32 F.R.D. 593 (D.Md.1963); see also an unpublished opinion of Judge Hincks, quoted in *United States v. 48 Jars, etc.,* 23 F.R.D. 192, 198 (D.D.C.1958). On the other hand, the need for a new provision is shown by the many cases in which discovery of expert trial witnesses is needed for effective cross-examination and rebuttal, and yet courts apply the traditional doctrine and refuse disclosure. *E.g., United States v. Certain Parcels of Land,* 25 F.R.D. 192 (N.D.Cal.1959); *United States v. Certain Acres,* 18 F.R.D. 98 (M.D.Ga.1955).

Although the trial problems flowing from lack of discovery of expert witnesses are most acute and noteworthy when the case turns largely on experts, the same problems are encountered when a single expert testifies. Thus, subdivision (b)(4)(A) draws no line between complex and simple cases, or between cases with many experts and those with but one. It establishes by rule substantially the procedure adopted by decision of the court in *Knighton v. Villian & Fassio,* 39 F.R.D. 11 (D.Md.1965). For a full analysis of the problem and strong recommendations to the same effect, see Friedenthal, *Discovery and Use of an Adverse Party's Expert Information,* 14 Stan.L.Rev. 455, 485-488 (1962); Long, *Discovery and Experts under the Federal Rules of Civil Procedure,* 38 F.R.D. 111 (1965).

Past judicial restrictions on discovery of an adversary's expert, particularly as to his opinions, reflect the fear that one side will benefit unduly from the other's better preparation. The procedure established in subsection (b)(4)(A) holds the risk to a minimum. Discovery is limited to trial witnesses, and may be obtained only at a time when the parties know who their expert witnesses will be. A party must as a practical matter prepare his own case in advance of that time, for he can hardly hope to build his case out of his opponent's experts.

Subdivision (b)(4)(A) provides for discovery of an expert who is to testify at the trial. A party can require one who intends to use the expert to state the substance of the testimony that the expert is expected to give. The court may order further discovery, and it has ample power to regulate its timing and scope and to prevent abuse. Ordinarily, the order for further discovery shall compensate the expert for his time, and may compensate the party who intends to use the expert for past expenses reasonably incurred in obtaining facts or opinions from the expert. Those provisions are likely to discourage abusive practices.

Subdivision (b)(4)(B) deals with an expert who has been retained or specially employed by the party in anticipation of litigation or preparation for trial (thus excluding an expert who is simply a general employee of the party not specially employed on the case), but who is not expected to be called as a witness. Under its provisions, a party may discover facts known or opinions held by such an expert only on a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

Subdivision (b)(4)(B) is concerned only with experts retained or specially consulted in relation to trial preparation. Thus the subdivision precludes discovery against experts who were informally consulted in preparation for trial, but not retained or specially employed. As an ancillary procedure, a party may on a proper showing require the other party to name experts retained or specially employed, but not those informally consulted.

These new provisions of subdivision (b)(4) repudiate the few decisions that have held an expert's information privileged simply because of his status as an expert, *e.g., American Oil Co. v. Pennsylvania Petroleum Products Co.,* 23 F.R.D. 680, 685-686 (D.R.I.1959). See *Louisell, Modern California Discovery* 315-316 (1963). They also reject as ill-considered the decisions which have sought to bring expert information within the work-product doctrine. See *United States v. McKay,* 372 F.2d 174, 176-177

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(5th Cir. 1967). The provisions adopt a form of the more recently developed doctrine of "unfairness". See *e.g.*, *United States v. 23.76 Acres of Land*, 32 F.R.D. 593, 597 (D.Md.1963); Louisell, *supra*, at 317-318; 4 *Moore's Federal Practice* 26.24 (2d ed. 1966).

Under subdivision (b)(4)(C), the court is directed or authorized to issue protective orders, including an order that the expert be paid a reasonable fee for time spent in responding to discovery, and that the party whose expert is made subject to discovery be paid a fair portion of the fees and expenses that the party incurred in obtaining information from the expert. The court may issue the latter order as a condition of discovery, or it may delay the order until after discovery is completed. These provisions for fees and expenses meet the objection that it is unfair to permit one side to obtain without cost the benefit of an expert's work for which the other side has paid, often a substantial sum. E.g., *Lewis v. United Air Lines Transp. Corp.*, 32 F.Supp. 21 (W.D.Pa.1940); *Walsh v. Reynolds Metal Co.*, 15 F.R.D. 376 (D.N.J.1954). On the other hand, a party may not obtain discovery simply by offering to pay fees and expenses. Cf. *Boynton v. R. J. Reynolds Tobacco Co.*, 36 F.Supp. 593 (D.Mass.1941).

In instances of discovery under subdivision (b)(4)(B), the court is directed to award fees and expenses to the other party, since the information is of direct value to the discovering party's preparation of his case. In ordering discovery under (b)(4)(A)(ii), the court has discretion whether to award fees and expenses to the other party; its decision should depend upon whether the discovering party is simply learning about the other party's case or is going beyond this to develop his own case. Even in cases where the court is directed to issue a protective order, it may decline to do so if it finds that manifest injustice would result. Thus, the court can protect, when necessary and appropriate, the interests of an indigent party.

Subdivision (c)--Protective Orders. The provisions of existing Rule 30(b) are transferred to this subdivision (c), as part of the rearrangement of Rule 26. The language has been changed to give it application to discovery generally. The subdivision recognizes the power of the court in the district where a deposition is being taken to make protective orders. Such power is needed when the deposition is being taken far from the court where the action is pending. The court in the district where the deposition is being taken may, and frequently will, remit the deponent or party to the court where the action is pending.

In addition, drafting changes are made to carry out and clarify the sense of the rule. Insertions are made to avoid any possible implication that a protective order does not extend to "time" as well as to "place" or may not safeguard against "undue burden or expense."

The new reference to trade secrets and other confidential commercial information reflects existing law. The courts have not given trade secrets automatic and complete immunity against disclosure, but have in each case weighed their claim to privacy against the need for disclosure. Frequently, they have been afforded a limited protection. See, *e.g.*, *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993 (10th Cir. 1965); *Julius M. Ames Co. v. Bostitch, Inc.*, 235 F.Supp. 856 (S.D.N.Y.1964).

The subdivision contains new matter relating to sanctions. When a motion for a protective order is made and the court is disposed to deny it, the court may go a step further and issue an order to provide or permit discovery. This will bring the sanctions of Rule 37(b) directly into play. Since the court has heard the contentions of all interested persons, an affirmative order is justified. See *Rosenberg*, *Sanctions to Effectuate Pretrial Discovery*, 58 Col.L.Rev. 480, 492-493 (1958). In addition, the court may require the payment of expenses incurred in relation to the motion.

Subdivision (d)--Sequence and Priority. This new provision is concerned with the sequence in which parties may proceed with discovery and with related problems of timing. The principal effects of the new provision are first, to eliminate any fixed priority in the sequence of discovery, and second, to make clear and explicit the court's power to establish priority by an order issued in a particular case.

A priority rule developed by some courts, which confers priority on the party who first serves notice of taking a deposition, is unsatisfactory in several important respects:

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First, this priority rule permits a party to establish a priority running to all depositions as to which he has given earlier notice. Since he can on a given day serve notice of taking many depositions he is in a position to delay his adversary's taking of depositions for an inordinate time. Some courts have ruled that deposition priority also permits a party to delay his answers to interrogatories and production of documents. *E.g.*, *E. I. du Pont de Nemours & Co. v. Phillips Petroleum Co.,* 23 F.R.D. 237 (D.Del.1959); *but cf. Sturdevant v. Sears, Roebuck & Co.,* 32 F.R.D. 426 (W.D.Mo.1963).

Second, since notice is the key to priority, if both parties wish to take depositions first a race results. See *Caldwell-Clements, Inc. v. McGraw-Hill Pub. Co.,* 11 F.R.D. 156 (S.D.N.Y.1951) (description of tactics used by parties). But the existing rules on notice of deposition create a race with runners starting from different positions. The plaintiff may not give notice without leave of court until 20 days after commencement of the action, whereas the defendant may serve notice at any time after commencement. Thus, a careful and prompt defendant can almost always secure priority. This advantage of defendants is fortuitous, because the purpose of requiring plaintiff to wait 20 days is to afford defendant an opportunity to obtain counsel, not to confer priority.

Third, although courts have ordered a change in the normal sequence of discovery on a number of occasions, *e.g.*, *Kaeppler v. James H. Matthews & Co.,* 200 F.Supp. 229 (E.D.Pa.1961); *Park & Tilford Distillers Corp. v. Distillers Co.,* 19 F.R.D. 169 (S.D.N.Y.1956), and have at all times avowed discretion to vary the usual priority, most commentators are agreed that courts in fact grant relief only for "the most obviously compelling reasons." 2A Barron & Holtzoff, *Federal Practice and Procedure* 44-47 (Wright ed. 1961); see also Younger, *Priority of Pretrial Examination in the Federal Courts--A Comment,* 34 N.Y.U.L.Rev. 1271 (1959); Freund, *The Pleading and Pretrial of an Antitrust Claim,* 46 Corn.L.Q. 555, 564 (1964). Discontent with the fairness of actual practice has been evinced by other observers. Comments, 59 Yale L.J. 117, 134-136 (1949); Yudkin, *Some Refinements in Federal Discovery Procedure,* 11 Fed.B.J. 289, 296-297 (1951); *Developments in the Law-Discovery,* 74 Harv.L.Rev. 940, 954-958 (1961).

Despite these difficulties, some courts have adhered to the priority rule, presumably because it provides a test which is easily understood and applied by the parties without much court intervention. It thus permits deposition discovery to function extrajudicially, which the rules provide for and the courts desire. For these same reasons, courts are reluctant to make numerous exceptions to the rule.

The Columbia Survey makes clear that the problem of priority does not affect litigants generally. It found that most litigants do not move quickly to obtain discovery. In over half of the cases, both parties waited at least 50 days. During the first 20 days after commencement of the action--the period when defendant might assure his priority by noticing depositions--16 percent of the defendants acted to obtain discovery. A race could not have occurred in more than 16 percent of the cases and it undoubtedly occurred in fewer. On the other hand, five times as many defendants as plaintiffs served notice of deposition during the first 19 days. To the same effect, see Comment, *Tactical Use and Abuse of Depositions Under the Federal Rules,* 59 Yale L.J. 117, 134 (1949).

These findings do not mean, however, that the priority rule is satisfactory or that a problem of priority does not exist. The court decisions show that parties do battle on this issue and carry their disputes to court. The statistics show that these court cases are not typical. By the same token, they reveal that more extensive exercise of judicial discretion to vary the priority will not bring a flood of litigation, and that a change in the priority rule will in fact affect only a small fraction of the cases.

It is contended by some that there is no need to alter the existing priority practice. In support, it is urged that there is no evidence that injustices in fact result from present practice and that, in any event, the courts can and do promulgate local rules, as in New York, to deal with local situations and issue orders to avoid possible injustice in particular cases.

Subdivision (d) is based on the contrary view that the rule of priority based on notice is unsatisfactory and unfair in its operation. Subdivision (d) follows an approach adapted from Civil Rule 4 of the District Court for the Southern District of New York. That rule provides that starting 40 days after commencement of the action, unless otherwise ordered by the court, the fact that one party is taking a deposition shall not prevent another party from doing so "concurrently." In practice, the depositions are

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not usually taken simultaneously; rather, the parties work out arrangements for alternation in the taking of depositions. One party may take a complete deposition and then the other, or, if the depositions are extensive, one party deposes for a set time, and then the other. See *Caldwell-Clements, Inc. v. McCraw-Hill Pub. Co.,* 11 F.R.D. 156 (S.D.N.Y.1951).

In principle, one party's initiation of discovery should not wait upon the other's completion, unless delay is dictated by special considerations. Clearly the principle is feasible with respect to all methods of discovery other than depositions. And the experience of the Southern District of New York shows that the principle can be applied to depositions as well. The courts have not had an increase in motion business on this matter. Once it is clear to lawyers that they bargain on an equal footing, they are usually able to arrange for an orderly succession of depositions without judicial intervention. Professor Moore has called attention to Civil Rule 4 and suggested that it may usefully be extended to other areas. 4 *Moore's Federal Practice* 1154 (2d ed. 1966).

The court may upon motion and by order grant priority in a particular case. But a local court rule purporting to confer priority in certain classes of cases would be inconsistent with this subdivision and thus void.

Subdivision (e)--Supplementation of Responses. The rules do not now state whether interrogatories (and questions at deposition as well as requests for inspection and admissions) impose a "continuing burden" on the responding party to supplement his answers if he obtains new information. The issue is acute when new information renders substantially incomplete or inaccurate an answer which was complete and accurate when made. It is essential that the rules provide an answer to this question. The parties can adjust to a rule either way, once they know what it is. See 4 *Moore's Federal Practice* ¶33.25[4] (2d ed. 1966).

Arguments can be made both ways. Imposition of a continuing burden reduces the proliferation of additional sets of interrogatories. Some courts have adopted local rules establishing such a burden. *E.g.,* E.D.Pa.R. 20(f), quoted in *Taggart v. Vermont Transp. Co.,* 32 F.R.D. 587 (E.D.Pa.1963); D.Me.R. 15(c). Others have imposed the burden by decision. *E.g., Chenault v. Nebraska Farm Products, Inc.,* 9 F.R.D. 529, 533 (D.Nebr.1949). On the other hand, there are serious objections to the burden, especially in protracted cases. Although the party signs the answers, it is his lawyer who understands their significance and bears the responsibility to bring answers up to date. In a complex case all sorts of information reaches the party, who little understands its bearing on answers previously given to interrogatories. In practice, therefore, the lawyer under a continuing burden must periodically recheck all interrogatories and canvass all new information. But a full set of new answers may no longer be needed by the interrogating party. Some issues will have been dropped from the case, some questions are now seen as unimportant, and other questions must in any event be reformulated. See *Novick v. Pennsylvania R.R.,* 18 F.R.D. 296, 298 (W.D.Pa.1955).

Subdivision (e) provides that a party is not under a continuing burden except as expressly provided. Cf. Note, 68 Harv.L.Rev. 673, 677 (1955). An exception is made as to the identity of persons having knowledge of discoverable matters, because of the obvious importance to each side of knowing all witnesses and because information about witnesses routinely comes to each lawyer's attention. Many of the decisions on the issue of a continuing burden have in fact concerned the identity of witnesses. An exception is also made as to expert trial witnesses in order to carry out the provisions of Rule 26(b)(4). See *Diversified Products Corp. v. Sports Center Co.,* 42 F.R.D. 3 (D.Md.1967).

Another exception is made for the situation in which a party, or more frequently his lawyer, obtains actual knowledge that a prior response is incorrect. This exception does not impose a duty to check the accuracy of prior responses, but it prevents knowing concealment by a party or attorney. Finally, a duty to supplement may be imposed by order of the court in a particular case (including an order resulting from a pretrial conference) or by agreement of the parties. A party may of course make a new discovery request which requires supplementation of prior responses.

The duty will normally be enforced, in those limited instances where it is imposed, through sanctions imposed by the trial court, including exclusion of evidence, continuance, or other action, as the court may deem appropriate.

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1980 Amendment

Subdivision (f). This subdivision is new. There has been widespread criticism of abuse of discovery. The Committee has considered a number of proposals to eliminate abuse, including a change in Rule 26(b)(1) with respect to the scope of discovery and a change in Rule 33(a) to limit the number of questions that can be asked by interrogatories to parties.

The Committee believes that abuse of discovery, while very serious in certain cases, is not so general as to require such basic changes in the rules that govern discovery in all cases. A very recent study of discovery in selected metropolitan districts tends to support its belief. P. Connolly, E. Holleman, & M. Kuhlman, *Judicial Controls and the Civil Litigative Process: Discovery* (Federal Judicial Center, 1978). In the judgment of the Committee abuse can best be prevented by intervention by the court as soon as abuse is threatened.

To this end this subdivision provides that counsel who has attempted without success to effect with opposing counsel a reasonable program or plan for discovery is entitled to the assistance of the court.

It is not contemplated that requests for discovery conferences will be made routinely. A relatively narrow discovery dispute should be resolved by resort to Rules 26(c) or 37(a), and if it appears that a request for a conference is in fact grounded in such a dispute, the court may refer counsel to those rules. If the court is persuaded that a request is frivolous or vexatious, it can strike it. See Rules 11 and 7(b)(2).

A number of courts routinely consider discovery matters in preliminary pretrial conferences held shortly after the pleadings are closed. This subdivision does not interfere with such a practice. It authorizes the court to combine a discovery conference with a pretrial conference under Rule 16 if a pretrial conference is held sufficiently early to prevent or curb abuse.

1983 Amendment

Excessive discovery and evasion or resistance to reasonable discovery requests pose significant problems. Recent studies have made some attempt to determine the sources and extent of the difficulties. See Brazil, *Civil Discovery: Lawyers' Views of its Effectiveness, Principal Problems and Abuses,* American Bar Foundation (1980); Connolly, Holleman & Kuhlman, *Judicial Controls and the Civil Litigative Process: Discovery,* Federal Judicial Center (1978); Ellington, *A Study of Sanctions for Discovery Abuse,* Department of Justice (1979); Schroeder & Frank, *The Proposed Changes in the Discovery Rules,* 1978 Ariz.St.L.J. 475.

The purpose of discovery is to provide a mechanism for making relevant information available to the litigants. "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Hickman v. Taylor,* 329 U.S. 495, 507 (1947). Thus the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by overuse of discovery or unnecessary use of defensive weapons or evasive responses. All of this results in excessively costly and time-consuming activities that are disproportionate to the nature of the case, the amount involved, or the issues or values at stake.

Given our adversary tradition and the current discovery rules, it is not surprising that there are many opportunities, if not incentives, for attorneys to engage in discovery that, although authorized by the broad, permissive terms of the rules, nevertheless results in delay. See Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change,* 31 Vand.L.Rev. 1259 (1978). As a result, it has been said that the rules have "not infrequently [been] exploited to the disadvantage of justice." *Herbert v. Lando,* 441 U.S. 153, 179 (1979) (Powell, J., concurring). These practices impose costs on an already overburdened system and impede the fundamental goal of the "just, speedy, and inexpensive determination of every action." Fed.R.Civ.P. 1.

Subdivision (a); Discovery Methods. The deletion of the last sentence of Rule 26(a)(1), which provided that unless the court ordered otherwise under Rule 26(c) "the frequency of use" of the various discovery methods was not to be limited, is an attempt

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to address the problem of duplicative, redundant, and excessive discovery and to reduce it. The amendment, in conjunction with the changes in Rule 26(b)(1), is designed to encourage district judges to identify instances of needless discovery and to limit the use of the various discovery devices accordingly. The question may be raised by one of the parties, typically on a motion for a protective order, or by the court on its own initiative. It is entirely appropriate to consider a limitation on the frequency of use of discovery at a discovery conference under Rule 26(f) or at any other pretrial conference authorized by these rules. In considering the discovery needs of a particular case, the court should consider the factors described in Rule 26(b)(1).

Subdivision (b); Discovery Scope and Limits. Rule 26(b)(1) has been amended to add a sentence to deal with the problem of over-discovery. The objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry. The new sentence is intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse. The grounds mentioned in the amended rule for limiting discovery reflect the existing practice of many courts in issuing protective orders under Rule 26(c). See, e.g., *Carlson Cos. v. Sperry & Hutchinson Co.,* 374 F.Supp. 1080 (D.Minn.1974); *Dolgow v. Anderson,* 53 F.R.D. 661 (E.D.N.Y.1971); *Mitchell v. American Tobacco Co.,* 33 F.R.D. 262 (M.D.Pa.1963); *Welty v. Clute,* 1 F.R.D. 446 (W.D.N.Y.1941). On the whole, however, district judges have been reluctant to limit the use of the discovery devices. See, *e.g.*, *Apco Oil Co. v. Certified Transp., Inc.,* 46 F.R.D. 428 (W.D.Mo.1969). See generally 8 Wright & Miller, *Federal Practice and Procedure: Civil* §§ 2036, 2037, 2039, 2040 (1970).

The first element of the standard, Rule 26(b)(1)(i), is designed to minimize redundancy in discovery and encourage attorneys to be sensitive to the comparative costs of different methods of securing information. Subdivision (b)(1)(ii) also seeks to reduce repetitiveness and to oblige lawyers to think through their discovery activities in advance so that full utilization is made of each deposition, document request, or set of interrogatories. The elements of Rule 26(b)(1)(iii) address the problem of discovery that is disproportionate to the individual lawsuit as measured by such matters as its nature and complexity, the importance of the issues at stake in a case seeking damages, the limitations on a financially weak litigant to withstand extensive opposition to a discovery program or to respond to discovery requests, and the significance of the substantive issues, as measured in philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved. The court must apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent.

The rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis. See Connolly, Holleman & Kuhlman, *Judicial Controls and the Civil Litigative Process: Discovery* 77, Federal Judicial Center (1978). In an appropriate case the court could restrict the number of depositions, interrogatories, or the scope of a production request. But the court must be careful not to deprive a party of discovery that is reasonably necessary to afford a fair opportunity to develop and prepare the case.

The court may act on motion, or its own initiative. It is entirely appropriate to resort to the amended rule in conjunction with a discovery conference under Rule 26(f) or one of the other pretrial conferences authorized by the rules.

Subdivision (g); Signing of Discovery Requests, Responses, and Objections. Rule 26(g) imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37. In addition, Rule 26(g) is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions. The subdivision provides a deterrent to both excessive discovery and evasion by imposing a certification requirement that obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection. The term “response” includes answers to interrogatories and to requests to admit as well as responses to production requests.

If primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obliged to act responsibly and avoid abuse. With this in mind, Rule 26(g), which parallels the amendments to Rule 11, requires an attorney or unrepresented party to sign each discovery request, response, or objection. Motions relating to discovery are governed by Rule 11. However,

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since a discovery request, response, or objection usually deals with more specific subject matter than motions or papers, the elements that must be certified in connection with the former are spelled out more completely. The signature is a certification of the elements set forth in Rule 26(g).

Although the certification duty requires the lawyer to pause and consider the reasonableness of his request, response, or objection, it is not meant to discourage or restrict necessary and legitimate discovery. The rule simply requires that the attorney make a reasonable inquiry into the factual basis of his response, request, or objection.

The duty to make a "reasonable inquiry" is satisfied if the investigation undertaken by the attorney and the conclusions drawn therefrom are reasonable under the circumstances. It is an objective standard similar to the one imposed by Rule 11. See the Advisory Committee Note to Rule 11. See also *Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n,* 365 F.Supp. 975 (E.D.Pa.1973). In making the inquiry, the attorney may rely on assertions by the client and on communications with other counsel in the case as long as that reliance is appropriate under the circumstances. Ultimately, what is reasonable is a matter for the court to decide on the totality of the circumstances.

Rule 26(g) does not require the signing attorney to certify the truthfulness of the client's factual responses to a discovery request. Rather, the signature certifies that the lawyer has made a reasonable effort to assure that the client has provided all the information and documents available to him that are responsive to the discovery demand. Thus, the lawyer's certification under Rule 26(g) should be distinguished from other signature requirements in the rules, such as those in Rules 30(e) and 33.

Nor does the rule require a party or an attorney to disclose privileged communications or work product in order to show that a discovery request, response, or objection is substantially justified. The provisions of Rule 26(c), including appropriate orders after *in camera* inspection by the court, remain available to protect a party claiming privilege or work product protection.

The signing requirement means that every discovery request, response, or objection should be grounded on a theory that is reasonable under the precedents or a good faith belief as to what should be the law. This standard is heavily dependent on the circumstances of each case. The certification speaks as of the time it is made. The duty to supplement discovery responses continues to be governed by Rule 26(e).

Concern about discovery abuse has led to widespread recognition that there is a need for more aggressive judicial control and supervision. *ACF Industries, Inc. v. EEOC,* 439 U.S. 1081 (1979) (certiorari denied) (Powell, J., dissenting). Sanctions to deter discovery abuse would be more effective if they were diligently applied "not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." *National Hockey League v. Metropolitan Hockey Club,* 427 U.S. 639, 643 (1976). See also Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions,* 91 Harv.L.Rev. 1033 (1978). Thus the premise of Rule 26(g) is that imposing sanctions on attorneys who fail to meet the rule's standards will significantly reduce abuse by imposing disadvantages therefor.

Because of the asserted reluctance to impose sanctions on attorneys who abuse the discovery rules, see Brazil, *Civil Discovery: Lawyers' Views of its Effectiveness, Principal Problems and Abuses,* American Bar Foundation (1980); Ellington, *A Study of Sanctions for Discovery Abuse,* Department of Justice (1979), Rule 26(g) makes explicit the authority judges now have to impose appropriate sanctions and requires them to use it. This authority derives from Rule 37, 28 U.S.C. § 1927, and the court's inherent power. See *Roadway Express, Inc. v. Piper,* 447 U.S. 752 (1980); *Martin v. Bell Helicopter Co.,* 85 F.R.D. 654, 661-62 (D.Col.1980); Note, *Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process,* 44 U.Chi.L.Rev. 619 (1977). The new rule mandates that sanctions be imposed on attorneys who fail to meet the standards established in the first portion of Rule 26(g). The nature of the sanction is a matter of judicial discretion to be exercised in light of the particular circumstances. The court may take into account any failure by the party seeking sanctions to invoke protection under Rule 26(c) at an early stage in the litigation.

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The sanctioning process must comport with due process requirements. The kind of notice and hearing required will depend on the facts of the case and the severity of the sanction being considered. To prevent the proliferation of the sanction procedure and to avoid multiple hearings, discovery in any sanction proceeding normally should be permitted only when it is clearly required by the interests of justice. In most cases the court will be aware of the circumstances and only a brief hearing should be necessary.

1987 Amendment

The amendments are technical. No substantive change is intended.

1993 Amendment

Subdivision (a). Through the addition of paragraphs (1)-(4), this subdivision imposes on parties a duty to disclose, without awaiting formal discovery requests, certain basic information that is needed in most cases to prepare for trial or make an informed decision about settlement. The rule requires all parties (1) early in the case to exchange information regarding potential witnesses, documentary evidence, damages, and insurance, (2) at an appropriate time during the discovery period to identify expert witnesses and provide a detailed written statement of the testimony that may be offered at trial through specially retained experts, and (3) as the trial date approaches to identify the particular evidence that may be offered at trial. The enumeration in Rule 26(a) of items to be disclosed does not prevent a court from requiring by order or local rule that the parties disclose additional information without a discovery request. Nor are parties precluded from using traditional discovery methods to obtain further information regarding these matters, as for example asking an expert during a deposition about testimony given in other litigation beyond the four-year period specified in Rule 26(a)(2)(B).

A major purpose of the revision is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information, and the rule should be applied in a manner to achieve those objectives. The concepts of imposing a duty of disclosure were set forth in Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 *Vand.L.Rev.* 1348 (1978), and Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform,* 50 *U.Pitt.L.Rev. 703, 721-23 (1989).*

The rule is based upon the experience of district courts that have required disclosure of some of this information through local rules, court-approved standard interrogatories, and standing orders. Most have required pretrial disclosure of the kind of information described in Rule 26(a)(3). Many have required written reports from experts containing information like that specified in Rule 26(a)(2)(B). While far more limited, the experience of the few state and federal courts that have required pre-discovery exchange of core information such as is contemplated in Rule 26(a)(1) indicates that savings in time and expense can be achieved, particularly if the litigants meet and discuss the issues in the case as a predicate for this exchange and if a judge supports the process, as by using the results to guide further proceedings in the case. Courts in Canada and the United Kingdom have for many years required disclosure of certain information without awaiting a request from an adversary.

Paragraph (1). As the functional equivalent of court-ordered interrogatories, this paragraph requires early disclosure, without need for any request, of four types of information that have been customarily secured early in litigation through formal discovery. The introductory clause permits the court, by local rule, to exempt all or particular types of cases from these disclosure requirement *[sic]* or to modify the nature of the information to be disclosed. It is expected that courts would, for example, exempt cases like Social Security reviews and government collection cases in which discovery would not be appropriate or would be unlikely. By order the court may eliminate or modify the disclosure requirements in a particular case, and similarly the parties, unless precluded by order or local rule, can stipulate to elimination or modification of the requirements for that case. The disclosure obligations specified in paragraph (1) will not be appropriate for all cases, and it is expected that changes in these obligations will be made by the court or parties when the circumstances warrant.

Authorization of these local variations is, in large measure, included in order to accommodate the Civil Justice Reform Act of 1990, which implicitly directs districts to experiment during the study period with differing procedures to reduce the time and

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expense of civil litigation. The civil justice delay and expense reduction plans adopted by the courts under the Act differ as to the type, form, and timing of disclosures required. Section 105(c)(1) of the Act calls for a report by the Judicial Conference to Congress by December 31, 1995, comparing experience in twenty of these courts; and section 105(c)(2)(B) contemplates that some changes in the Rules may then be needed. While these studies may indicate the desirability of further changes in Rule 26(a)(1), these changes probably could not become effective before December 1998 at the earliest. In the meantime, the present revision puts in place a series of disclosure obligations that, unless a court acts affirmatively to impose other requirements or indeed to reject all such requirements for the present, are designed to eliminate certain discovery, help focus the discovery that is needed, and facilitate preparation for trial or settlement.

Subparagraph (A) requires identification of all persons who, based on the investigation conducted thus far, are likely to have discoverable information relevant to the factual disputes between the parties. All persons with such information should be disclosed, whether or not their testimony will be supportive of the position of the disclosing party. As officers of the court, counsel are expected to disclose the identity of those persons who may be used by them as witnesses or who, if their potential testimony were known, might reasonably be expected to be deposed or called as a witness by any of the other parties. Indicating briefly the general topics on which such persons have information should not be burdensome, and will assist other parties in deciding which depositions will actually be needed.

Subparagraph (B) is included as a substitute for the inquiries routinely made about the existence and location of documents and other tangible things in the possession, custody, or control of the disclosing party. Although, unlike subdivision (a)(3)(C), an itemized listing of each exhibit is not required, the disclosure should describe and categorize, to the extent identified during the initial investigation, the nature and location of potentially relevant documents and records, including computerized data and other electronically-recorded information, sufficiently to enable opposing parties (1) to make an informed decision concerning which documents might need to be examined, at least initially, and (2) to frame their document requests in a manner likely to avoid squabbles resulting from the wording of the requests. As with potential witnesses, the requirement for disclosure of documents applies to all potentially relevant items then known to the party, whether or not supportive of its contentions in the case.

Unlike subparagraphs (C) and (D), subparagraph (B) does not require production of any documents. Of course, in cases involving few documents a disclosing party may prefer to provide copies of the documents rather than describe them, and the rule is written to afford this option to the disclosing party. If, as will be more typical, only the description is provided, the other parties are expected to obtain the documents desired by proceeding under Rule 34 or through informal requests. The disclosing party does not, by describing documents under subparagraph (B), waive its right to object to production on the basis of privilege or work product protection, or to assert that the documents are not sufficiently relevant to justify the burden or expense of production.

The initial disclosure requirements of subparagraphs (A) and (B) are limited to identification of potential evidence “relevant to disputed facts alleged with particularity in the pleadings.” There is no need for a party to identify potential evidence with respect to allegations that are admitted. Broad, vague, and conclusory allegations sometimes tolerated in notice pleading--for example, the assertion that a product with many component parts is defective in some unspecified manner--should not impose upon responding parties the obligation at that point to search for and identify all persons possibly involved in, or all documents affecting, the design, manufacture, and assembly of the product. The greater the specificity and clarity of the allegations in the pleadings, the more complete should be the listing of potential witnesses and types of documentary evidence. Although paragraphs (1)(A) and (1)(B) by their terms refer to the factual disputes defined in the pleadings, the rule contemplates that these issues would be informally refined and clarified during the meeting of the parties under subdivision (f) and that the disclosure obligations would be adjusted in the light of these discussions. The disclosure requirements should, in short, be applied with common sense in light of the principles of Rule 1, keeping in mind the salutary purposes that the rule is intended to accomplish. The litigants should not indulge in gamesmanship with respect to the disclosure obligations.

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Subparagraph (C) imposes a burden of disclosure that includes the functional equivalent of a standing Request for Production under Rule 34. A party claiming damages or other monetary relief must, in addition to disclosing the calculation of such damages, make available the supporting documents for inspection and copying as if a request for such materials had been made under Rule 34. This obligation applies only with respect to documents then reasonably available to it and not privileged or protected as work product. Likewise, a party would not be expected to provide a calculation of damages which, as in many patent infringement actions, depends on information in the possession of another party or person.

Subparagraph (D) replaces subdivision (b)(2) of Rule 26, and provides that liability insurance policies be made available for inspection and copying. The last two sentences of that subdivision have been omitted as unnecessary, not to signify any change of law. The disclosure of insurance information does not thereby render such information admissible in evidence. See Rule 411, Federal Rules of Evidence. Nor does subparagraph (D) require disclosure of applications for insurance, though in particular cases such information may be discoverable in accordance with revised subdivision (a)(5).

Unless the court directs a different time, the disclosures required by subdivision (a)(1) are to be made at or within 10 days after the meeting of the parties under subdivision (f). One of the purposes of this meeting is to refine the factual disputes with respect to which disclosures should be made under paragraphs (1)(A) and (1)(B), particularly if an answer has not been filed by a defendant, or, indeed, to afford the parties an opportunity to modify by stipulation the timing or scope of these obligations. The time of this meeting is generally left to the parties provided it is held at least 14 days before a scheduling conference is held or before a scheduling order is due under Rule 16(b). In cases in which no scheduling conference is held, this will mean that the meeting must ordinarily be held within 75 days after a defendant has first appeared in the case and hence that the initial disclosures would be due no later than 85 days after the first appearance of a defendant.

Before making its disclosures, a party has the obligation under subdivision (g)(1) to make a reasonable inquiry into the facts of the case. The rule does not demand an exhaustive investigation at this stage of the case, but one that is reasonable under the circumstances, focusing on the facts that are alleged with particularity in the pleadings. The type of investigation that can be expected at this point will vary based upon such factors as the number and complexity of the issues; the location, nature, number, and availability of potentially relevant witnesses and documents; the extent of past working relationships between the attorney and the client, particularly in handling related or similar litigation; and of course how long the party has to conduct an investigation, either before or after filing of the case. As provided in the last sentence of subdivision (a)(1), a party is not excused from the duty of disclosure merely because its investigation is incomplete. The party should make its initial disclosures based on the pleadings and the information then reasonably available to it. As its investigation continues and as the issues in the pleadings are clarified, it should supplement its disclosures as required by subdivision (e)(1). A party is not relieved from its obligation of disclosure merely because another party has not made its disclosures or has made an inadequate disclosure.

It will often be desirable, particularly if the claims made in the complaint are broadly stated, for the parties to have their Rule 26(f) meeting early in the case, perhaps before a defendant has answered the complaint or had time to conduct other than a cursory investigation. In such circumstances, in order to facilitate more meaningful and useful initial disclosures, they can and should stipulate to a period of more than 10 days after the meeting in which to make these disclosures, at least for defendants who had no advance notice of the potential litigation. A stipulation at an early meeting affording such a defendant at least 60 days after receiving the complaint in which to make its disclosures under subdivision (a)(1)--a period that is two weeks longer than the time formerly specified for responding to interrogatories served with a complaint--should be adequate and appropriate in most cases.

Paragraph (2). This paragraph imposes an additional duty to disclose information regarding expert testimony sufficiently in advance of trial that opposing parties have a reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses. Normally the court should prescribe a time for these disclosures in a scheduling order under Rule 16(b), and in most cases the party with the burden of proof on an issue should disclose its expert testimony on that issue before other parties are required to make their disclosures with respect to that issue. In the absence of such a direction, the disclosures are to be made by all parties at least 90 days before the trial date or the date by which the case

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is to be ready for trial, except that an additional 30 days is allowed (unless the court specifies another time) for disclosure of expert testimony to be used solely to contradict or rebut the testimony that may be presented by another party's expert. For a discussion of procedures that have been used to enhance the reliability of expert testimony, see M. Graham, *Expert Witness Testimony and the Federal Rules of Evidence: Insuring Adequate Assurance of Trustworthiness,* 1986 U.Ill.L.Rev. 90.

Paragraph (2)(B) requires that persons retained or specially employed to provide expert testimony, or whose duties as an employee of the party regularly involve the giving of expert testimony, must prepare a detailed and complete written report, stating the testimony the witness is expected to present during direct examination, together with the reasons therefor. The information disclosed under the former rule in answering interrogatories about the "substance" of expert testimony was frequently so sketchy and vague that it rarely dispensed with the need to depose the expert and often was even of little help in preparing for a deposition of the witness. Revised Rule 37(c)(1) provides an incentive for full disclosure; namely, that a party will not ordinarily be permitted to use on direct examination any expert testimony not so disclosed. Rule 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports, and indeed, with experts such as automobile mechanics, this assistance may be needed. Nevertheless, the report, which is intended to set forth the substance of the direct examination, should be written in a manner that reflects the testimony to be given by the witness and it must be signed by the witness.

The report is to disclose the data and other information considered by the expert and any exhibits or charts that summarize or support the expert's opinions. Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions--whether or not ultimately relied upon by the expert--are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

Revised subdivision (b)(4)(A) authorizes the deposition of expert witnesses. Since depositions of experts required to prepare a written report may be taken only after the report has been served, the length of the deposition of such experts should be reduced, and in many cases the report may eliminate the need for a deposition. Revised subdivision (e)(1) requires disclosure of any material changes made in the opinions of an expert from whom a report is required, whether the changes are in the written report or in testimony given at a deposition.

For convenience, this rule and revised Rule 30 continue to use the term "expert" to refer to those persons who will testify under Rule 702 of the Federal Rules of Evidence with respect to scientific, technical, and other specialized matters. The requirement of a written report in paragraph (2)(B), however, applies only to those experts who are retained or specially employed to provide such testimony in the case or whose duties as an employee of a party regularly involve the giving of such testimony. A treating physician, for example, can be deposed or called to testify at trial without any requirement for a written report. By local rule, order, or written stipulation, the requirement of a written report may be waived for particular experts or imposed upon additional persons who will provide opinions under Rule 702.

Paragraph (3). This paragraph imposes an additional duty to disclose, without any request, information customarily needed in final preparation for trial. These disclosures are to be made in accordance with schedules adopted by the court under Rule 16(b) or by special order. If no such schedule is directed by the court, the disclosures are to be made at least 30 days before commencement of the trial. By its terms, rule 26(a)(3) does not require disclosure of evidence to be used solely for impeachment purposes; however, disclosure of such evidence--as well as other items relating to conduct of trial--may be required by local rule or a pretrial order.

Subparagraph (A) requires the parties to designate the persons whose testimony they may present as substantive evidence at trial, whether in person or by deposition. Those who will probably be called as witnesses should be listed separately from those who are not likely to be called but who are being listed in order to preserve the right to do so if needed because of developments during trial. Revised Rule 37(c)(1) provides that only persons so listed may be used at trial to present substantive evidence. This restriction does not apply unless the omission was "without substantial justification" and hence would not bar

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an unlisted witness if the need for such testimony is based upon developments during trial that could not reasonably have been anticipated--*e.g.*, a change of testimony.

Listing a witness does not obligate the party to secure the attendance of the person at trial, but should preclude the party from objecting if the person is called to testify by another party who did not list the person as a witness.

Subparagraph (B) requires the party to indicate which of these potential witnesses will be presented by deposition at trial. A party expecting to use at trial a deposition not recorded by stenographic means is required by revised Rule 32 to provide the court with a transcript of the pertinent portions of such depositions. This rule requires that copies of the transcript of a nonstenographic deposition be provided to other parties in advance of trial for verification, an obvious concern since counsel often utilize their own personnel to prepare transcripts from audio or video tapes. By order or local rule, the court may require that parties designate the particular portions of stenographic depositions to be used at trial.

Subparagraph (C) requires disclosure of exhibits, including summaries (whether to be offered in lieu of other documentary evidence or to be used as an aid in understanding such evidence), that may be offered as substantive evidence. The rule requires a separate listing of each such exhibit, though it should permit voluminous items of a similar or standardized character to be described by meaningful categories. For example, unless the court has otherwise directed, a series of vouchers might be shown collectively as a single exhibit with their starting and ending dates. As with witnesses, the exhibits that will probably be offered are to be listed separately from those which are unlikely to be offered but which are listed in order to preserve the right to do so if needed because of developments during trial. Under revised Rule 37(c)(1) the court can permit use of unlisted documents the need for which could not reasonably have been anticipated in advance of trial.

Upon receipt of these final pretrial disclosures, other parties have 14 days (unless a different time is specified by the court) to disclose any objections they wish to preserve to the usability of the deposition testimony or to the admissibility of the documentary evidence (other than under Rules 402 and 403 of the Federal Rules of Evidence). Similar provisions have become commonplace either in pretrial orders or by local rules, and significantly expedite the presentation of evidence at trial, as well as eliminate the need to have available witnesses to provide “foundation” testimony for most items of documentary evidence. The listing of a potential objection does not constitute the making of that objection or require the court to rule on the objection; rather, it preserves the right of the party to make the objection when and as appropriate during trial. The court may, however, elect to treat the listing as a motion “in limine” and rule upon the objections in advance of trial to the extent appropriate.

The time specified in the rule for the final pretrial disclosures is relatively close to the trial date. The objective is to eliminate the time and expense in making these disclosures of evidence and objections in those cases that settle shortly before trial, while affording a reasonable time for final preparation for trial in those cases that do not settle. In many cases, it will be desirable for the court in a scheduling or pretrial order to set an earlier time for disclosures of evidence and provide more time for disclosing potential objections.

Paragraph (4). This paragraph prescribes the form of disclosures. A signed written statement is required, reminding the parties and counsel of the solemnity of the obligations imposed; and the signature on the initial or pretrial disclosure is a certification under subdivision (g)(1) that it is complete and correct as of the time when made. Consistent with Rule 5(d), these disclosures are to be filed with the court unless otherwise directed. It is anticipated that many courts will direct that expert reports required under paragraph (2)(B) not be filed until needed in connection with a motion or for trial.

Paragraph (5). This paragraph is revised to take note of the availability of revised Rule 45 for inspection from non-parties of documents and premises without the need for a deposition.

Subdivision (b). This subdivision is revised in several respects. First, former paragraph (1) is subdivided into two paragraphs for ease of reference and to avoid renumbering of paragraphs (3) and (4). Textual changes are then made in new paragraph (2) to enable the court to keep tighter rein on the extent of discovery. The information explosion of recent decades has greatly

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increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression. Amendments to Rules 30, 31, and 33 place presumptive limits on the number of depositions and interrogatories, subject to leave of court to pursue additional discovery. The revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery and to authorize courts that develop case tracking systems based on the complexity of cases to increase or decrease by local rule the presumptive number of depositions and interrogatories allowed in particular types or classifications of cases. The revision also dispels any doubt as to the power of the court to impose limitations on the length of depositions under Rule 30 or on the number of requests for admission under Rule 36.

Second, former paragraph (2), relating to insurance, has been relocated as part of the required initial disclosures under subdivision (a)(1)(D), and revised to provide for disclosure of the policy itself.

Third, paragraph (4)(A) is revised to provide that experts who are expected to be witnesses will be subject to deposition prior to trial, conforming the norm stated in the rule to the actual practice followed in most courts, in which depositions of experts have become standard. Concerns regarding the expense of such depositions should be mitigated by the fact that the expert's fees for the deposition will ordinarily be borne by the party taking the deposition. The requirement under subdivision (a)(2)(B) of a complete and detailed report of the expected testimony of certain forensic experts may, moreover, eliminate the need for some such depositions or at least reduce the length of the depositions. Accordingly, the deposition of an expert required by subdivision (a)(2)(B) to provide a written report may be taken only after the report has been served.

Paragraph (4)(C), bearing on compensation of experts, is revised to take account of the changes in paragraph (4)(A).

Paragraph (5) is a new provision. A party must notify other parties if it is withholding materials otherwise subject to disclosure under the rule or pursuant to a discovery request because it is asserting a claim of privilege or work product protection. To withhold materials without such notice is contrary to the rule, subjects the party to sanctions under Rule 37(b)(2), and may be viewed as a waiver of the privilege or protection.

The party must also provide sufficient information to enable other parties to evaluate the applicability of the claimed privilege or protection. Although the person from whom the discovery is sought decides whether to claim a privilege or protection, the court ultimately decides whether, if this claim is challenged, the privilege or protection applies. Providing information pertinent to the applicability of the privilege or protection should reduce the need for in camera examination of the documents.

The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories. A party can seek relief through a protective order under subdivision (c) if compliance with the requirement for providing this information would be an unreasonable burden. In rare circumstances some of the pertinent information affecting applicability of the claim, such as the identity of the client, may itself be privileged; the rule provides that such information need not be disclosed.

The obligation to provide pertinent information concerning withheld privileged materials applies only to items “otherwise discoverable.” If a broad discovery request is made--for example, for all documents of a particular type during a twenty year period--and the responding party believes in good faith that production of documents for more than the past three years would be unduly burdensome, it should make its objection to the breadth of the request and, with respect to the documents generated in that three year period, produce the unprivileged documents and describe those withheld under the claim of privilege. If the court later rules that documents for a seven year period are properly discoverable, the documents for the additional four years should then be either produced (if not privileged) or described (if claimed to be privileged).

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Subdivision (c). The revision requires that before filing a motion for a protective order the movant must confer--either in person or by telephone--with the other affected parties in a good faith effort to resolve the discovery dispute without the need for court intervention. If the movant is unable to get opposing parties even to discuss the matter, the efforts in attempting to arrange such a conference should be indicated in the certificate.

Subdivision (d). This subdivision is revised to provide that formal discovery--as distinguished from interviews of potential witnesses and other informal discovery--not commence until the parties have met and conferred as required by subdivision (f). Discovery can begin earlier if authorized under Rule 30(a)(2)(C) (deposition of person about to leave the country) or by local rule, order, or stipulation. This will be appropriate in some cases, such as those involving requests for a preliminary injunction or motions challenging personal jurisdiction. If a local rule exempts any types of cases in which discovery may be needed from the requirement of a meeting under Rule 26(f), it should specify when discovery may commence in those cases.

The meeting of counsel is to take place as soon as practicable and in any event at least 14 days before the date of the scheduling conference under Rule 16(b) or the date a scheduling order is due under Rule 16(b). The court can assure that discovery is not unduly delayed either by entering a special order or by setting the case for a scheduling conference.

Subdivision (e). This subdivision is revised to provide that the requirement for supplementation applies to all disclosures required by subdivisions (a)(1)-(3). Like the former rule, the duty, while imposed on a “party,” applies whether the corrective information is learned by the client or by the attorney. Supplementations need not be made as each new item of information is learned but should be made at appropriate intervals during the discovery period, and with special promptness as the trial date approaches. It may be useful for the scheduling order to specify the time or times when supplementations should be made.

The revision also clarifies that the obligation to supplement responses to formal discovery requests applies to interrogatories, requests for production, and requests for admissions, but not ordinarily to deposition testimony. However, with respect to experts from whom a written report is required under subdivision (a)(2)(B), changes in the opinions expressed by the expert whether in the report or at a subsequent deposition are subject to a duty of supplemental disclosure under subdivision (e)(1).

The obligation to supplement disclosures and discovery responses applies whenever a party learns that its prior disclosures or responses are in some material respect incomplete or incorrect. There is, however, no obligation to provide supplemental or corrective information that has been otherwise made known to the parties in writing or during the discovery process, as when a witness not previously disclosed is identified during the taking of a deposition or when an expert during a deposition corrects information contained in an earlier report.

Subdivision (f). This subdivision was added in 1980 to provide a party threatened with abusive discovery with a special means for obtaining judicial intervention other than through discrete motions under Rules 26(c) and 37(a). The amendment envisioned a two-step process: first, the parties would attempt to frame a mutually agreeable plan; second, the court would hold a “discovery conference” and then enter an order establishing a schedule and limitations for the conduct of discovery. It was contemplated that the procedure, an elective one triggered on request of a party, would be used in special cases rather than as a routine matter. As expected, the device has been used only sparingly in most courts, and judicial controls over the discovery process have ordinarily been imposed through scheduling orders under Rule 16(b) or through rulings on discovery motions.

The provisions relating to a conference with the court are removed from subdivision (f). This change does not signal any lessening of the importance of judicial supervision. Indeed, there is a greater need for early judicial involvement to consider the scope and timing of the disclosure requirements of Rule 26(a) and the presumptive limits on discovery imposed under these rules or by local rules. Rather, the change is made because the provisions addressing the use of conferences with the court to control discovery are more properly included in Rule 16, which is being revised to highlight the court's powers regarding the discovery process.

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The desirability of some judicial control of discovery can hardly be doubted. Rule 16, as revised, requires that the court set a time for completion of discovery and authorizes various other orders affecting the scope, timing, and extent of discovery and disclosures. Before entering such orders, the court should consider the views of the parties, preferably by means of a conference, but at the least through written submissions. Moreover, it is desirable that the parties' proposals regarding discovery be developed through a process where they meet in person, informally explore the nature and basis of the issues, and discuss how discovery can be conducted most efficiently and economically.

As noted above, former subdivision (f) envisioned the development of proposed discovery plans as an optional procedure to be used in relatively few cases. The revised rule directs that in all cases not exempted by local rule or special order the litigants must meet in person and plan for discovery. Following this meeting, the parties submit to the court their proposals for a discovery plan and can begin formal discovery. Their report will assist the court in seeing that the timing and scope of disclosures under revised Rule 26(a) and the limitations on the extent of discovery under these rules and local rules are tailored to the circumstances of the particular case.

To assure that the court has the litigants' proposals before deciding on a scheduling order and that the commencement of discovery is not delayed unduly, the rule provides that the meeting of the parties take place as soon as practicable and in any event at least 14 days before a scheduling conference is held or before a scheduling order is due under Rule 16(b). (Rule 16(b) requires that a scheduling order be entered within 90 days after the first appearance of a defendant or, if earlier, within 120 days after the complaint has been served on any defendant.) The obligation to participate in the planning process is imposed on all parties that have appeared in the case, including defendants who, because of a pending Rule 12 motion, may not have yet filed an answer in the case. Each such party should attend the meeting, either through one of its attorneys or in person if unrepresented. If more parties are joined or appear after the initial meeting, an additional meeting may be desirable.

Subdivision (f) describes certain matters that should be accomplished at the meeting and included in the proposed discovery plan. This listing does not exclude consideration of other subjects, such as the time when any dispositive motions should be filed and when the case should be ready for trial.

The parties are directed under subdivision (a)(1) to make the disclosures required by that subdivision at or within 10 days after this meeting. In many cases the parties should use the meeting to exchange, discuss, and clarify their respective disclosures. In other cases, it may be more useful if the disclosures are delayed until after the parties have discussed at the meeting the claims and defenses in order to define the issues with respect to which the initial disclosures should be made. As discussed in the Notes to subdivision (a)(1), the parties may also need to consider whether a stipulation extending this 10-day period would be appropriate, as when a defendant would otherwise have less than 60 days after being served in which to make its initial disclosure. The parties should also discuss at the meeting what additional information, although not subject to the disclosure requirements, can be made available informally without the necessity for formal discovery requests.

The report is to be submitted to the court within 10 days after the meeting and should not be difficult to prepare. In most cases counsel should be able to agree that one of them will be responsible for its preparation and submission to the court. Form 35 has been added in the Appendix to the Rules, both to illustrate the type of report that is contemplated and to serve as a checklist for the meeting.

The litigants are expected to attempt in good faith to agree on the contents of the proposed discovery plan. If they cannot agree on all aspects of the plan, their report to the court should indicate the competing proposals of the parties on those items, as well as the matters on which they agree. Unfortunately, there may be cases in which, because of disagreements about time or place or for other reasons, the meeting is not attended by all parties or, indeed, no meeting takes place. In such situations, the report--or reports--should describe the circumstances and the court may need to consider sanctions under Rule 37(g).

By local rule or special order, the court can exempt particular cases or types of cases from the meet-and-confer requirement of subdivision (f). In general this should include any types of cases which are exempted by local rule from the requirement for

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a scheduling order under Rule 16(b), such as cases in which there will be no discovery (*e.g.*, bankruptcy appeals and reviews of social security determinations). In addition, the court may want to exempt cases in which discovery is rarely needed (*e.g.*, government collection cases and proceedings to enforce administrative summonses) or in which a meeting of the parties might be impracticable (*e.g.*, actions by unrepresented prisoners). Note that if a court exempts from the requirements for a meeting any types of cases in which discovery may be needed, it should indicate when discovery may commence in those cases.

Subdivision (g). Paragraph (1) is added to require signatures on disclosures, a requirement that parallels the provisions of paragraph (2) with respect to discovery requests, responses, and objections. The provisions of paragraph (3) have been modified to be consistent with Rules 37(a)(4) and 37(c)(1); in combination, these rules establish sanctions for violation of the rules regarding disclosures and discovery matters. Amended Rule 11 no longer applies to such violations.

2000 Amendment

Purposes of amendments. The Rule 26(a)(1) initial disclosure provisions are amended to establish a nationally uniform practice. The scope of the disclosure obligation is narrowed to cover only information that the disclosing party may use to support its position. In addition, the rule exempts specified categories of proceedings from initial disclosure, and permits a party who contends that disclosure is not appropriate in the circumstances of the case to present its objections to the court, which must then determine whether disclosure should be made. Related changes are made in Rules 26(d) and (f).

The initial disclosure requirements added by the 1993 amendments permitted local rules directing that disclosure would not be required or altering its operation. The inclusion of the “opt out” provision reflected the strong opposition to initial disclosure felt in some districts, and permitted experimentation with differing disclosure rules in those districts that were favorable to disclosure. The local option also recognized that--partly in response to the first publication in 1991 of a proposed disclosure rule--many districts had adopted a variety of disclosure programs under the aegis of the Civil Justice Reform Act. It was hoped that developing experience under a variety of disclosure systems would support eventual refinement of a uniform national disclosure practice. In addition, there was hope that local experience could identify categories of actions in which disclosure is not useful.

A striking array of local regimes in fact emerged for disclosure and related features introduced in 1993. *See* D. Stienstra, *Implementation of Disclosure in United States District Courts, With Specific Attention to Courts' Responses to Selected Amendments to Federal Rule of Civil Procedure 26* (Federal Judicial Center, March 30, 1998) (describing and categorizing local regimes). In its final report to Congress on the CJRA experience, the Judicial Conference recommended reexamination of the need for national uniformity, particularly in regard to initial disclosure. Judicial Conference, *Alternative Proposals for Reduction of Cost and Delay: Assessment of Principles, Guidelines and Techniques,* 175 F.R.D. 62, 98 (1997).

At the Committee's request, the Federal Judicial Center undertook a survey in 1997 to develop information on current disclosure and discovery practices. *See* T. Willging, J. Shapard, D. Stienstra & D. Miletich, *Discovery and Disclosure Practice, Problems, and Proposals for Change* (Federal Judicial Center, 1997). In addition, the Committee convened two conferences on discovery involving lawyers from around the country and received reports and recommendations on possible discovery amendments from a number of bar groups. Papers and other proceedings from the second conference are published in 39 Boston Col. L. Rev. 517-840 (1998).

The Committee has discerned widespread support for national uniformity. Many lawyers have experienced difficulty in coping with divergent disclosure and other practices as they move from one district to another. Lawyers surveyed by the Federal Judicial Center ranked adoption of a uniform national disclosure rule second among proposed rule changes (behind increased availability of judges to resolve discovery disputes) as a means to reduce litigation expenses without interfering with fair outcomes. *Discovery and Disclosure Practice, supra*, at 44-45. National uniformity is also a central purpose of the Rules Enabling Act of 1934, as amended, 28 U.S.C. §§ 2072-2077.

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These amendments restore national uniformity to disclosure practice. Uniformity is also restored to other aspects of discovery by deleting most of the provisions authorizing local rules that vary the number of permitted discovery events or the length of depositions. Local rule options are also deleted from Rules 26(d) and (f).

Subdivision (a)(1). The amendments remove the authority to alter or opt out of the national disclosure requirements by local rule, invalidating not only formal local rules but also informal "standing" orders of an individual judge or court that purport to create exemptions from--or limit or expand--the disclosure provided under the national rule. *See* Rule 83. Case-specific orders remain proper, however, and are expressly required if a party objects that initial disclosure is not appropriate in the circumstances of the action. Specified categories of proceedings are excluded from initial disclosure under subdivision (a)(1)(E). In addition, the parties can stipulate to forgo disclosure, as was true before. But even in a case excluded by subdivision (a)(1)(E) or in which the parties stipulate to bypass disclosure, the court can order exchange of similar information in managing the action under Rule 16.

The initial disclosure obligation of subdivisions (a)(1)(A) and (B) has been narrowed to identification of witnesses and documents that the disclosing party may use to support its claims or defenses. "Use" includes any use at a pretrial conference, to support a motion, or at trial. The disclosure obligation is also triggered by intended use in discovery, apart from use to respond to a discovery request; use of a document to question a witness during a deposition is a common example. The disclosure obligation attaches both to witnesses and documents a party intends to use and also to witnesses and to documents the party intends to use if--in the language of Rule 26(a)(3)--"the need arises."

A party is no longer obligated to disclose witnesses or documents, whether favorable or unfavorable, that it does not intend to use. The obligation to disclose information the party may use connects directly to the exclusion sanction of Rule 37(c)(1). Because the disclosure obligation is limited to material that the party may use, it is no longer tied to particularized allegations in the pleadings. Subdivision (e)(1), which is unchanged, requires supplementation if information later acquired would have been subject to the disclosure requirement. As case preparation continues, a party must supplement its disclosures when it determines that it may use a witness or document that it did not previously intend to use.

The disclosure obligation applies to "claims and defenses," and therefore requires a party to disclose information it may use to support its denial or rebuttal of the allegations, claim, or defense of another party. It thereby bolsters the requirements of Rule 11(b)(4), which authorizes denials "warranted on the evidence," and disclosure should include the identity of any witness or document that the disclosing party may use to support such denials.

Subdivision (a)(3) presently excuses pretrial disclosure of information solely for impeachment. Impeachment information is similarly excluded from the initial disclosure requirement.

Subdivisions (a)(1)(C) and (D) are not changed. Should a case be exempted from initial disclosure by Rule 26(a)(1)(E) or by agreement or order, the insurance information described by subparagraph (D) should be subject to discovery, as it would have been under the principles of former Rule 26(b)(2), which was added in 1970 and deleted in 1993 as redundant in light of the new initial disclosure obligation.

New subdivision (a)(1)(E) excludes eight specified categories of proceedings from initial disclosure. The objective of this listing is to identify cases in which there is likely to be little or no discovery, or in which initial disclosure appears unlikely to contribute to the effective development of the case. The list was developed after a review of the categories excluded by local rules in various districts from the operation of Rule 16(b) and the conference requirements of subdivision (f). Subdivision (a)(1)(E) refers to categories of "proceedings" rather than categories of "actions" because some might not properly be labeled "actions." Case designations made by the parties or the clerk's office at the time of filing do not control application of the exemptions. The descriptions in the rule are generic and are intended to be administered by the parties--and, when needed, the courts--with the flexibility needed to adapt to gradual evolution in the types of proceedings that fall within these general categories. The exclusion of an action for review on an administrative record, for example, is intended to reach a proceeding that is framed as

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an "appeal" based solely on an administrative record. The exclusion should not apply to a proceeding in a form that commonly permits admission of new evidence to supplement the record. Item (vii), excluding a proceeding ancillary to proceedings in other courts, does not refer to bankruptcy proceedings; application of the Civil Rules to bankruptcy proceedings is determined by the Bankruptcy Rules.

Subdivision (a)(1)(E) is likely to exempt a substantial proportion of the cases in most districts from the initial disclosure requirement. Based on 1996 and 1997 case filing statistics, Federal Judicial Center staff estimate that, nationwide, these categories total approximately one-third of all civil filings.

The categories of proceedings listed in subdivision (a)(1)(E) are also exempted from the subdivision (f) conference requirement and from the subdivision (d) moratorium on discovery. Although there is no restriction on commencement of discovery in these cases, it is not expected that this opportunity will often lead to abuse since there is likely to be little or no discovery in most such cases. Should a defendant need more time to respond to discovery requests filed at the beginning of an exempted action, it can seek relief by motion under Rule 26(c) if the plaintiff is unwilling to defer the due date by agreement.

Subdivision (a)(1)(E)'s enumeration of exempt categories is exclusive. Although a case-specific order can alter or excuse initial disclosure, local rules or "standing" orders that purport to create general exemptions are invalid. *See* Rule 83.

The time for initial disclosure is extended to 14 days after the subdivision (f) conference unless the court orders otherwise. This change is integrated with corresponding changes requiring that the subdivision (f) conference be held 21 days before the Rule 16(b) scheduling conference or scheduling order, and that the report on the subdivision (f) conference be submitted to the court 14 days after the meeting. These changes provide a more orderly opportunity for the parties to review the disclosures, and for the court to consider the report. In many instances, the subdivision (f) conference and the effective preparation of the case would benefit from disclosure before the conference, and earlier disclosure is encouraged.

The presumptive disclosure date does not apply if a party objects to initial disclosure during the subdivision (f) conference and states its objection in the subdivision (f) discovery plan. The right to object to initial disclosure is not intended to afford parties an opportunity to "opt out" of disclosure unilaterally. It does provide an opportunity for an objecting party to present to the court its position that disclosure would be "inappropriate in the circumstances of the action." Making the objection permits the objecting party to present the question to the judge before any party is required to make disclosure. The court must then rule on the objection and determine what disclosures--if any--should be made. Ordinarily, this determination would be included in the Rule 16(b) scheduling order, but the court could handle the matter in a different fashion. Even when circumstances warrant suspending some disclosure obligations, others--such as the damages and insurance information called for by subdivisions (a)(1)(C) and (D)--may continue to be appropriate.

The presumptive disclosure date is also inapplicable to a party who is "first served or otherwise joined" after the subdivision (f) conference. This phrase refers to the date of service of a claim on a party in a defensive posture (such as a defendant or third-party defendant), and the date of joinder of a party added as a claimant or an intervenor. Absent court order or stipulation, a new party has 30 days in which to make its initial disclosures. But it is expected that later-added parties will ordinarily be treated the same as the original parties when the original parties have stipulated to forgo initial disclosure, or the court has ordered disclosure in a modified form.

Subdivision (a)(3). The amendment to Rule 5(d) forbids filing disclosures under subdivisions (a)(1) and (a)(2) until they are used in the proceeding, and this change is reflected in an amendment to subdivision (a)(4). Disclosures under subdivision (a)(3), however, may be important to the court in connection with the final pretrial conference or otherwise in preparing for trial. The requirement that objections to certain matters be filed points up the court's need to be provided with these materials. Accordingly, the requirement that subdivision (a)(3) materials be filed has been moved from subdivision (a)(4) to subdivision (a)(3), and it has also been made clear that they--and any objections--should be filed "promptly."

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Subdivision (a)(4). The filing requirement has been removed from this subdivision. Rule 5(d) has been amended to provide that disclosures under subdivisions (a)(1) and (a)(2) must not be filed until used in the proceeding. Subdivision (a)(3) has been amended to require that the disclosures it directs, and objections to them, be filed promptly. Subdivision (a)(4) continues to require that all disclosures under subdivisions (a)(1), (a)(2), and (a)(3) be in writing, signed, and served.

"Shall" is replaced by "must" under the program to conform amended rules to current style conventions when there is no ambiguity.

GAP Report

The Advisory Committee recommends that the amendments to Rules 26(a)(1)(A) and (B) be changed so that initial disclosure applies to information the disclosing party "may use to support" its claims or defenses. It also recommends changes in the Committee Note to explain that disclosure requirement. In addition, it recommends inclusion in the Note of further explanatory matter regarding the exclusion from initial disclosure provided in new Rule 26(a)(1)(E) for actions for review on an administrative record and the impact of these exclusions on bankruptcy proceedings. Minor wording improvements in the Note are also proposed.

Subdivision (b)(1). In 1978, the Committee published for comment a proposed amendment, suggested by the Section of Litigation of the American Bar Association, to refine the scope of discovery by deleting the "subject matter" language. This proposal was withdrawn, and the Committee has since then made other changes in the discovery rules to address concerns about overbroad discovery. Concerns about costs and delay of discovery have persisted nonetheless, and other bar groups have repeatedly renewed similar proposals for amendment to this subdivision to delete the "subject matter" language. Nearly one-third of the lawyers surveyed in 1997 by the Federal Judicial Center endorsed narrowing the scope of discovery as a means of reducing litigation expense without interfering with fair case resolutions. *Discovery and Disclosure Practice, supra*, at 44-45 (1997). The Committee has heard that in some instances, particularly cases involving large quantities of discovery, parties seek to justify discovery requests that sweep far beyond the claims and defenses of the parties on the ground that they nevertheless have a bearing on the "subject matter" involved in the action.

The amendments proposed for subdivision (b)(1) include one element of these earlier proposals but also differ from these proposals in significant ways. The similarity is that the amendments describe the scope of party-controlled discovery in terms of matter relevant to the claim or defense of any party. The court, however, retains authority to order discovery of any matter relevant to the subject matter involved in the action for good cause. The amendment is designed to involve the court more actively in regulating the breadth of sweeping or contentious discovery. The Committee has been informed repeatedly by lawyers that involvement of the court in managing discovery is an important method of controlling problems of inappropriately broad discovery. Increasing the availability of judicial officers to resolve discovery disputes and increasing court management of discovery were both strongly endorsed by the attorneys surveyed by the Federal Judicial Center. *See Discovery and Disclosure Practice, supra*, at 44. Under the amended provisions, if there is an objection that discovery goes beyond material relevant to the parties' claims or defenses, the court would become involved to determine whether the discovery is relevant to the claims or defenses and, if not, whether good cause exists for authorizing it so long as it is relevant to the subject matter of the action. The good-cause standard warranting broader discovery is meant to be flexible.

The Committee intends that the parties and the court focus on the actual claims and defenses involved in the action. The dividing line between information relevant to the claims and defenses and that relevant only to the subject matter of the action cannot be defined with precision. A variety of types of information not directly pertinent to the incident in suit could be relevant to the claims or defenses raised in a given action. For example, other incidents of the same type, or involving the same product, could be properly discoverable under the revised standard. Information about organizational arrangements or filing systems of a party could be discoverable if likely to yield or lead to the discovery of admissible information. Similarly, information that could be used to impeach a likely witness, although not otherwise relevant to the claims or defenses, might be properly discoverable.

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In each instance, the determination whether such information is discoverable because it is relevant to the claims or defenses depends on the circumstances of the pending action.

The rule change signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings. In general, it is hoped that reasonable lawyers can cooperate to manage discovery without the need for judicial intervention. When judicial intervention is invoked, the actual scope of discovery should be determined according to the reasonable needs of the action. The court may permit broader discovery in a particular case depending on the circumstances of the case, the nature of the claims and defenses, and the scope of the discovery requested.

The amendments also modify the provision regarding discovery of information not admissible in evidence. As added in 1946, this sentence was designed to make clear that otherwise relevant material could not be withheld because it was hearsay or otherwise inadmissible. The Committee was concerned that the "reasonably calculated to lead to the discovery of admissible evidence" standard set forth in this sentence might swallow any other limitation on the scope of discovery. Accordingly, this sentence has been amended to clarify that information must be relevant to be discoverable, even though inadmissible, and that discovery of such material is permitted if reasonably calculated to lead to the discovery of admissible evidence. As used here, "relevant" means within the scope of discovery as defined in this subdivision, and it would include information relevant to the subject matter involved in the action if the court has ordered discovery to that limit based on a showing of good cause.

Finally, a sentence has been added calling attention to the limitations of subdivision (b)(2)(i), (ii), and (iii). These limitations apply to discovery that is otherwise within the scope of subdivision (b)(1). The Committee has been told repeatedly that courts have not implemented these limitations with the vigor that was contemplated. *See 8 Federal Practice & Procedure* § 2008.1 at 121. This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery. *Cf. Crawford-El v. Britton*, 118 S.Ct. 1584, 1597 (1998) (quoting Rule 26(b)(2)(iii) and stating that "Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly").

GAP Report

The Advisory Committee recommends changing the rule to authorize the court to expand discovery to any "matter"--not "information"--relevant to the subject matter involved in the action. In addition, it recommends additional clarifying material in the Committee Note about the impact of the change on some commonly disputed discovery topics, the relationship between cost-bearing under Rule 26(b)(2) and expansion of the scope of discovery on a showing of good cause, and the meaning of "relevant" in the revision to the last sentence of current subdivision (b)(1). In addition, some minor clarifications of language changes have been proposed for the Committee Note.

Subdivision (b)(2). Rules 30, 31, and 33 establish presumptive national limits on the numbers of depositions and interrogatories. New Rule 30(d)(2) establishes a presumptive limit on the length of depositions. Subdivision (b)(2) is amended to remove the previous permission for local rules that establish different presumptive limits on these discovery activities. There is no reason to believe that unique circumstances justify varying these nationally-applicable presumptive limits in certain districts. The limits can be modified by court order or agreement in an individual action, but "standing" orders imposing different presumptive limits are not authorized. Because there is no national rule limiting the number of Rule 36 requests for admissions, the rule continues to authorize local rules that impose numerical limits on them. This change is not intended to interfere with differentiated case management in districts that use this technique by case-specific order as part of their Rule 16 process.

Subdivision (d). The amendments remove the prior authority to exempt cases by local rule from the moratorium on discovery before the subdivision (f) conference, but the categories of proceedings exempted from initial disclosure under subdivision (a)(1)(E) are excluded from subdivision (d). The parties may agree to disregard the moratorium where it applies, and the court may so order in a case, but "standing" orders altering the moratorium are not authorized.

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Subdivision (f). As in subdivision (d), the amendments remove the prior authority to exempt cases by local rule from the conference requirement. The Committee has been informed that the addition of the conference was one of the most successful changes made in the 1993 amendments, and it therefore has determined to apply the conference requirement nationwide. The categories of proceedings exempted from initial disclosure under subdivision (a)(1)(E) are exempted from the conference requirement for the reasons that warrant exclusion from initial disclosure. The court may order that the conference need not occur in a case where otherwise required, or that it occur in a case otherwise exempted by subdivision (a)(1)(E). "Standing" orders altering the conference requirement for categories of cases are not authorized.

The rule is amended to require only a "conference" of the parties, rather than a "meeting." There are important benefits to face-to-face discussion of the topics to be covered in the conference, and those benefits may be lost if other means of conferring were routinely used when face-to-face meetings would not impose burdens. Nevertheless, geographic conditions in some districts may exact costs far out of proportion to these benefits. The amendment allows the court by case-specific order to require a face-to-face meeting, but "standing" orders so requiring are not authorized.

As noted concerning the amendments to subdivision (a)(1), the time for the conference has been changed to at least 21 days before the Rule 16 scheduling conference, and the time for the report is changed to no more than 14 days after the Rule 26(f) conference. This should ensure that the court will have the report well in advance of the scheduling conference or the entry of the scheduling order.

Since Rule 16 was amended in 1983 to mandate some case management activities in all courts, it has included deadlines for Completing these tasks to ensure that all courts do so within a reasonable time. Rule 26(f) was fit into this scheme when it was adopted in 1993. It was never intended, however, that the national requirements that certain activities be completed by a certain time should delay case management in districts that move much faster than the national rules direct, and the rule is therefore amended to permit such a court to adopt a local rule that shortens the period specified for the completion of these tasks.

"Shall" is replaced by "must," "does," or an active verb under the program to conform amended rules to current style conventions when there is no ambiguity.

GAP Report

The Advisory Committee recommends adding a sentence to the published amendments to Rule 26(f) authorizing local rules shortening the time between the attorney conference and the court's action under Rule 16(b), and addition to the Committee Note of explanatory material about this change to the rule. This addition can be made without republication in response to public comments.

2006 Amendment

Subdivision (a). Rule 26(a)(1)(B) is amended to parallel Rule 34(a) by recognizing that a party must disclose electronically stored information as well as documents that it may use to support its claims or defenses. The term "electronically stored information" has the same broad meaning in Rule 26(a)(1) as in Rule 34(a). This amendment is consistent with the 1993 addition of Rule 26(a)(1)(B). The term "data compilations" is deleted as unnecessary because it is a subset of both documents and electronically stored information.

[Subdivision (a)(1)(E).] Civil forfeiture actions are added to the list of exemptions from Rule 26(a)(1) disclosure requirements. These actions are governed by new Supplemental Rule G. Disclosure is not likely to be useful.

Subdivision (b)(2). The amendment to Rule 26(b)(2) is designed to address issues raised by difficulties in locating, retrieving, and providing discovery of some electronically stored information. Electronic storage systems often make it easier to locate and retrieve information. These advantages are properly taken into account in determining the reasonable scope of discovery in

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a particular case. But some sources of electronically stored information can be accessed only with substantial burden and cost. In a particular case, these burdens and costs may make the information on such sources not reasonably accessible.

It is not possible to define in a rule the different types of technological features that may affect the burdens and costs of accessing electronically stored information. Information systems are designed to provide ready access to information used in regular ongoing activities. They also may be designed so as to provide ready access to information that is not regularly used. But a system may retain information on sources that are accessible only by incurring substantial burdens or costs. Subparagraph (B) is added to regulate discovery from such sources.

Under this rule, a responding party should produce electronically stored information that is relevant, not privileged, and reasonably accessible, subject to the (b)(2)(C) limitations that apply to all discovery. The responding party must also identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing. The identification should, to the extent possible, provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources.

A party's identification of sources of electronically stored information as not reasonably accessible does not relieve the party of its common-law or statutory duties to preserve evidence. Whether a responding party is required to preserve unsearched sources of potentially responsive information that it believes are not reasonably accessible depends on the circumstances of each case. It is often useful for the parties to discuss this issue early in discovery.

The volume of -- and the ability to search -- much electronically stored information means that in many cases the responding party will be able to produce information from reasonably accessible sources that will fully satisfy the parties' discovery needs. In many circumstances the requesting party should obtain and evaluate the information from such sources before insisting that the responding party search and produce information contained on sources that are not reasonably accessible. If the requesting party continues to seek discovery of information from sources identified as not reasonably accessible, the parties should discuss the burdens and costs of accessing and retrieving the information, the needs that may establish good cause for requiring all or part of the requested discovery even if the information sought is not reasonably accessible, and conditions on obtaining and producing the information that may be appropriate.

If the parties cannot agree whether, or on what terms, sources identified as not reasonably accessible should be searched and discoverable information produced, the issue may be raised either by a motion to compel discovery or by a motion for a protective order. The parties must confer before bringing either motion. If the parties do not resolve the issue and the court must decide, the responding party must show that the identified sources of information are not reasonably accessible because of undue burden or cost. The requesting party may need discovery to test this assertion. Such discovery might take the form of requiring the responding party to conduct a sampling of information contained on the sources identified as not reasonably accessible; allowing some form of inspection of such sources; or taking depositions of witnesses knowledgeable about the responding party's information systems.

Once it is shown that a source of electronically stored information is not reasonably accessible, the requesting party may still obtain discovery by showing good cause, considering the limitations of Rule 26(b)(2)(C) that balance the costs and potential benefits of discovery. The decision whether to require a responding party to search for and produce information that is not reasonably accessible depends not only on the burdens and costs of doing so, but also on whether those burdens and costs can be justified in the circumstances of the case. Appropriate considerations may include: (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.

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The responding party has the burden as to one aspect of the inquiry -- whether the identified sources are not reasonably accessible in light of the burdens and costs required to search for, retrieve, and produce whatever responsive information may be found. The requesting party has the burden of showing that its need for the discovery outweighs the burdens and costs of locating, retrieving, and producing the information. In some cases, the court will be able to determine whether the identified sources are not reasonably accessible and whether the requesting party has shown good cause for some or all of the discovery, consistent with the limitations of Rule 26(b)(2)(C), through a single proceeding or presentation. The good-cause determination, however, may be complicated because the court and parties may know little about what information the sources identified as not reasonably accessible might contain, whether it is relevant, or how valuable it may be to the litigation. In such cases, the parties may need some focused discovery, which may include sampling of the sources, to learn more about what burdens and costs are involved in accessing the information, what the information consists of, and how valuable it is for the litigation in light of information that can be obtained by exhausting other opportunities for discovery.

The good-cause inquiry and consideration of the Rule 26(b)(2)(C) limitations are coupled with the authority to set conditions for discovery. The conditions may take the form of limits on the amount, type, or sources of information required to be accessed and produced. The conditions may also include payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible. A requesting party's willingness to share or bear the access costs may be weighed by the court in determining whether there is good cause. But the producing party's burdens in reviewing the information for relevance and privilege may weigh against permitting the requested discovery.

The limitations of Rule 26(b)(2)(C) continue to apply to all discovery of electronically stored information, including that stored on reasonably accessible electronic sources.

Subdivision (b)(5). The Committee has repeatedly been advised that the risk of privilege waiver, and the work necessary to avoid it, add to the costs and delay of discovery. When the review is of electronically stored information, the risk of waiver, and the time and effort required to avoid it, can increase substantially because of the volume of electronically stored information and the difficulty in ensuring that all information to be produced has in fact been reviewed. Rule 26(b)(5)(A) provides a procedure for a party that has withheld information on the basis of privilege or protection as trial-preparation material to make the claim so that the requesting party can decide whether to contest the claim and the court can resolve the dispute. Rule 26(b)(5)(B) is added to provide a procedure for a party to assert a claim of privilege or trial-preparation material protection after information is produced in discovery in the action and, if the claim is contested, permit any party that received the information to present the matter to the court for resolution.

Rule 26(b)(5)(B) does not address whether the privilege or protection that is asserted after production was waived by the production. The courts have developed principles to determine whether, and under what circumstances, waiver results from inadvertent production of privileged or protected information. Rule 26(b)(5)(B) provides a procedure for presenting and addressing these issues. Rule 26(b)(5)(B) works in tandem with Rule 26(f), which is amended to direct the parties to discuss privilege issues in preparing their discovery plan, and which, with amended Rule 16(b), allows the parties to ask the court to include in an order any agreements the parties reach regarding issues of privilege or trial-preparation material protection. Agreements reached under Rule 26(f)(4) and orders including such agreements entered under Rule 16(b)(6) may be considered when a court determines whether a waiver has occurred. Such agreements and orders ordinarily control if they adopt procedures different from those in Rule 26(b)(5)(B).

A party asserting a claim of privilege or protection after production must give notice to the receiving party. That notice should be in writing unless the circumstances preclude it. Such circumstances could include the assertion of the claim during a deposition. The notice should be as specific as possible in identifying the information and stating the basis for the claim. Because the receiving party must decide whether to challenge the claim and may sequester the information and submit it to the court for a ruling on whether the claimed privilege or protection applies and whether it has been waived, the notice should be sufficiently detailed so as to enable the receiving party and the court to understand the basis for the claim and to determine whether waiver

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has occurred. Courts will continue to examine whether a claim of privilege or protection was made at a reasonable time when delay is part of the waiver determination under the governing law.

After receiving notice, each party that received the information must promptly return, sequester, or destroy the information and any copies it has. The option of sequestering or destroying the information is included in part because the receiving party may have incorporated the information in protected trial-preparation materials. No receiving party may use or disclose the information pending resolution of the privilege claim. The receiving party may present to the court the questions whether the information is privileged or protected as trial-preparation material, and whether the privilege or protection has been waived. If it does so, it must provide the court with the grounds for the privilege or protection specified in the producing party's notice, and serve all parties. In presenting the question, the party may use the content of the information only to the extent permitted by the applicable law of privilege, protection for trial-preparation material, and professional responsibility.

If a party disclosed the information to nonparties before receiving notice of a claim of privilege or protection as trial-preparation material, it must take reasonable steps to retrieve the information and to return it, sequester it until the claim is resolved, or destroy it.

Whether the information is returned or not, the producing party must preserve the information pending the court's ruling on whether the claim of privilege or of protection is properly asserted and whether it was waived. As with claims made under Rule 26(b)(5)(A), there may be no ruling if the other parties do not contest the claim.

Subdivision (f). Rule 26(f) is amended to direct the parties to discuss discovery of electronically stored information during their discovery-planning conference. The rule focuses on "issues relating to disclosure or discovery of electronically stored information"; the discussion is not required in cases not involving electronic discovery, and the amendment imposes no additional requirements in those cases. When the parties do anticipate disclosure or discovery of electronically stored information, discussion at the outset may avoid later difficulties or ease their resolution.

When a case involves discovery of electronically stored information, the issues to be addressed during the Rule 26(f) conference depend on the nature and extent of the contemplated discovery and of the parties' information systems. It may be important for the parties to discuss those systems, and accordingly important for counsel to become familiar with those systems before the conference. With that information, the parties can develop a discovery plan that takes into account the capabilities of their computer systems. In appropriate cases identification of, and early discovery from, individuals with special knowledge of a party's computer systems may be helpful.

The particular issues regarding electronically stored information that deserve attention during the discovery planning stage depend on the specifics of the given case. *See Manual for Complex Litigation* (4th) § 40.25(2) (listing topics for discussion in a proposed order regarding meet-and-confer sessions). For example, the parties may specify the topics for such discovery and the time period for which discovery will be sought. They may identify the various sources of such information within a party's control that should be searched for electronically stored information. They may discuss whether the information is reasonably accessible to the party that has it, including the burden or cost of retrieving and reviewing the information. *See* Rule 26(b)(2)(B). Rule 26(f)(3) explicitly directs the parties to discuss the form or forms in which electronically stored information might be produced. The parties may be able to reach agreement on the forms of production, making discovery more efficient. Rule 34(b) is amended to permit a requesting party to specify the form or forms in which it wants electronically stored information produced. If the requesting party does not specify a form, Rule 34(b) directs the responding party to state the forms it intends to use in the production. Early discussion of the forms of production may facilitate the application of Rule 34(b) by allowing the parties to determine what forms of production will meet both parties' needs. Early identification of disputes over the forms of production may help avoid the expense and delay of searches or productions using inappropriate forms.

Rule 26(f) is also amended to direct the parties to discuss any issues regarding preservation of discoverable information during their conference as they develop a discovery plan. This provision applies to all sorts of discoverable information, but can be

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particularly important with regard to electronically stored information. The volume and dynamic nature of electronically stored information may complicate preservation obligations. The ordinary operation of computers involves both the automatic creation and the automatic deletion or overwriting of certain information. Failure to address preservation issues early in the litigation increases uncertainty and raises a risk of disputes.

The parties' discussion should pay particular attention to the balance between the competing needs to preserve relevant evidence and to continue routine operations critical to ongoing activities. Complete or broad cessation of a party's routine computer operations could paralyze the party's activities. *Cf. Manual for Complex Litigation* (4th) § 11.422 ("A blanket preservation order may be prohibitively expensive and unduly burdensome for parties dependent on computer systems for their day-to-day operations.") The parties should take account of these considerations in their discussions, with the goal of agreeing on reasonable preservation steps.

The requirement that the parties discuss preservation does not imply that courts should routinely enter preservation orders. A preservation order entered over objections should be narrowly tailored. Ex parte preservation orders should issue only in exceptional circumstances.

Rule 26(f) is also amended to provide that the parties should discuss any issues relating to assertions of privilege or of protection as trial-preparation materials, including whether the parties can facilitate discovery by agreeing on procedures for asserting claims of privilege or protection after production and whether to ask the court to enter an order that includes any agreement the parties reach. The Committee has repeatedly been advised about the discovery difficulties that can result from efforts to guard against waiver of privilege and work-product protection. Frequently parties find it necessary to spend large amounts of time reviewing materials requested through discovery to avoid waiving privilege. These efforts are necessary because materials subject to a claim of privilege or protection are often difficult to identify. A failure to withhold even one such item may result in an argument that there has been a waiver of privilege as to all other privileged materials on that subject matter. Efforts to avoid the risk of waiver can impose substantial costs on the party producing the material and the time required for the privilege review can substantially delay access for the party seeking discovery.

These problems often become more acute when discovery of electronically stored information is sought. The volume of such data, and the informality that attends use of e-mail and some other types of electronically stored information, may make privilege determinations more difficult, and privilege review correspondingly more expensive and time consuming. Other aspects of electronically stored information pose particular difficulties for privilege review. For example, production may be sought of information automatically included in electronic files but not apparent to the creator or to readers. Computer programs may retain draft language, editorial comments, and other deleted matter (sometimes referred to as "embedded data" or "embedded edits") in an electronic file but not make them apparent to the reader. Information describing the history, tracking, or management of an electronic file (sometimes called "metadata") is usually not apparent to the reader viewing a hard copy or a screen image. Whether this information should be produced may be among the topics discussed in the Rule 26(f) conference. If it is, it may need to be reviewed to ensure that no privileged information is included, further complicating the task of privilege review.

Parties may attempt to minimize these costs and delays by agreeing to protocols that minimize the risk of waiver. They may agree that the responding party will provide certain requested materials for initial examination without waiving any privilege or protection -- sometimes known as a "quick peek." The requesting party then designates the documents it wishes to have actually produced. This designation is the Rule 34 request. The responding party then responds in the usual course, screening only those documents actually requested for formal production and asserting privilege claims as provided in Rule 26(b)(5)(A). On other occasions, parties enter agreements -- sometimes called "clawback agreements"-- that production without intent to waive privilege or protection should not be a waiver so long as the responding party identifies the documents mistakenly produced, and that the documents should be returned under those circumstances. Other voluntary arrangements may be appropriate depending on the circumstances of each litigation. In most circumstances, a party who receives information under such an arrangement cannot assert that production of the information waived a claim of privilege or of protection as trial-preparation material.

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Although these agreements may not be appropriate for all cases, in certain cases they can facilitate prompt and economical discovery by reducing delay before the discovering party obtains access to documents, and by reducing the cost and burden of review by the producing party. A case-management or other order including such agreements may further facilitate the discovery process. Form 35 is amended to include a report to the court about any agreement regarding protections against inadvertent forfeiture or waiver of privilege or protection that the parties have reached, and Rule 16(b) is amended to recognize that the court may include such an agreement in a case-management or other order. If the parties agree to entry of such an order, their proposal should be included in the report to the court.

Rule 26(b)(5)(B) is added to establish a parallel procedure to assert privilege or protection as trial-preparation material after production, leaving the question of waiver to later determination by the court.

2007 Amendment

The language of Rule 26 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 26(a)(5) served as an index of the discovery methods provided by later rules. It was deleted as redundant. Deletion does not affect the right to pursue discovery in addition to disclosure.

Former Rule 26(b)(1) began with a general statement of the scope of discovery that appeared to function as a preface to each of the five numbered paragraphs that followed. This preface has been shifted to the text of paragraph (1) because it does not accurately reflect the limits embodied in paragraphs (2), (3), or (4), and because paragraph (5) does not address the scope of discovery.

The reference to discovery of “books” in former Rule 26(b)(1) was deleted to achieve consistent expression throughout the discovery rules. Books remain a proper subject of discovery.

Amended Rule 26(b)(3) states that a party may obtain a copy of the party's own previous statement “on request.” Former Rule 26(b)(3) expressly made the request procedure available to a nonparty witness, but did not describe the procedure to be used by a party. This apparent gap is closed by adopting the request procedure, which ensures that a party need not invoke Rule 34 to obtain a copy of the party's own statement.

Rule 26(e) stated the duty to supplement or correct a disclosure or discovery response “to include information thereafter acquired.” This apparent limit is not reflected in practice; parties recognize the duty to supplement or correct by providing information that was not originally provided although it was available at the time of the initial disclosure or response. These words are deleted to reflect the actual meaning of the present rule.

Former Rule 26(e) used different phrases to describe the time to supplement or correct a disclosure or discovery response. Disclosures were to be supplemented “at appropriate intervals.” A prior discovery response must be “seasonably * * * amend[ed].” The fine distinction between these phrases has not been observed in practice. Amended Rule 26(e)(1)(A) uses the same phrase for disclosures and discovery responses. The party must supplement or correct “in a timely manner.”

Former Rule 26(g)(1) did not call for striking an unsigned disclosure. The omission was an obvious drafting oversight. Amended Rule 26(g)(2) includes disclosures in the list of matters that the court must strike unless a signature is provided “promptly * * * after being called to the attorney's or party's attention.”

Former Rule 26(b)(2)(A) referred to a “good faith” argument to extend existing law. Amended Rule 26(b)(1)(B)(i) changes this reference to a “nonfrivolous” argument to achieve consistency with Rule 11(b)(2).

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As with the Rule 11 signature on a pleading, written motion, or other paper, disclosure and discovery signatures should include not only a postal address but also a telephone number and electronic-mail address. A signer who lacks one or more of those addresses need not supply a nonexistent item.

Rule 11(b)(2) recognizes that it is legitimate to argue for establishing new law. An argument to establish new law is equally legitimate in conducting discovery.

2010 Amendment

Rule 26. Rules 26(a)(2) and (b)(4) are amended to address concerns about expert discovery. The amendments to Rule 26(a)(2) require disclosure regarding expected expert testimony of those expert witnesses not required to provide expert reports and limit the expert report to facts or data (rather than "data or other information," as in the current rule) considered by the witness. Rule 26(b)(4) is amended to provide work-product protection against discovery regarding draft expert disclosures or reports and--with three specific exceptions--communications between expert witnesses and counsel.

In 1993, Rule 26(b)(4)(A) was revised to authorize expert depositions and Rule 26(a)(2) was added to provide disclosure, including--for many experts--an extensive report. Many courts read the disclosure provision to authorize discovery of all communications between counsel and expert witnesses and all draft reports. The Committee has been told repeatedly that routine discovery into attorney-expert communications and draft reports has had undesirable effects. Costs have risen. Attorneys may employ two sets of experts--one for purposes of consultation and another to testify at trial--because disclosure of their collaborative interactions with expert consultants would reveal their most sensitive and confidential case analyses. At the same time, attorneys often feel compelled to adopt a guarded attitude toward their interaction with testifying experts that impedes effective communication, and experts adopt strategies that protect against discovery but also interfere with their work.

Subdivision (a)(2)(B). Rule 26(a)(2)(B)(ii) is amended to provide that disclosure include all "facts or data considered by the witness in forming" the opinions to be offered, rather than the "data or other information" disclosure prescribed in 1993. This amendment is intended to alter the outcome in cases that have relied on the 1993 formulation in requiring disclosure of all attorney-expert communications and draft reports. The amendments to Rule 26(b)(4) make this change explicit by providing work-product protection against discovery regarding draft reports and disclosures or attorney-expert communications.

The refocus of disclosure on "facts or data" is meant to limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel. At the same time, the intention is that "facts or data" be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients. The disclosure obligation extends to any facts or data "considered" by the expert in forming the opinions to be expressed, not only those relied upon by the expert.

Subdivision (a)(2)(C). Rule 26(a)(2)(C) is added to mandate summary disclosures of the opinions to be offered by expert witnesses who are not required to provide reports under Rule 26(a)(2)(B) and of the facts supporting those opinions. This disclosure is considerably less extensive than the report required by Rule 26(a)(2)(B). Courts must take care against requiring undue detail, keeping in mind that these witnesses have not been specially retained and may not be as responsive to counsel as those who have.

This amendment resolves a tension that has sometimes prompted courts to require reports under Rule 26(a)(2)(B) even from witnesses exempted from the report requirement. An (a)(2)(B) report is required only from an expert described in (a)(2)(B).

A witness who is not required to provide a report under Rule 26(a)(2)(B) may both testify as a fact witness and also provide expert testimony under Evidence Rule 702, 703, or 705. Frequent examples include physicians or other health care professionals and employees of a party who do not regularly provide expert testimony. Parties must identify such witnesses under Rule 26(a)

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(2)(A) and provide the disclosure required under Rule 26(a)(2)(C). The (a)(2)(C) disclosure obligation does not include facts unrelated to the expert opinions the witness will present.

Subdivision (a)(2)(D). This provision (formerly Rule 26(a)(2)(C)) is amended slightly to specify that the time limits for disclosure of contradictory or rebuttal evidence apply with regard to disclosures under new Rule 26(a)(2)(C), just as they do with regard to reports under Rule 26(a)(2)(B).

Subdivision (b)(4). Rule 26(b)(4)(B) is added to provide work-product protection under Rule 26(b)(3)(A) and (B) for drafts of expert reports or disclosures. This protection applies to all witnesses identified under Rule 26(a)(2)(A), whether they are required to provide reports under Rule 26(a)(2)(B) or are the subject of disclosure under Rule 26(a)(2)(C). It applies regardless of the form in which the draft is recorded, whether written, electronic, or otherwise. It also applies to drafts of any supplementation under Rule 26(e); *see* Rule 26(a)(2)(E).

Rule 26(b)(4)(C) is added to provide work-product protection for attorney-expert communications regardless of the form of the communications, whether oral, written, electronic, or otherwise. The addition of Rule 26(b)(4)(C) is designed to protect counsel's work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery. The protection is limited to communications between an expert witness required to provide a report under Rule 26(a)(2)(B) and the attorney for the party on whose behalf the witness will be testifying, including any “preliminary” expert opinions. Protected “communications” include those between the party's attorney and assistants of the expert witness. The rule does not itself protect communications between counsel and other expert witnesses, such as those for whom disclosure is required under Rule 26(a)(2)(C). The rule does not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrine.

The most frequent method for discovering the work of expert witnesses is by deposition, but Rules 26(b)(4)(B) and (C) apply to all forms of discovery.

Rules 26(b)(4)(B) and (C) do not impede discovery about the opinions to be offered by the expert or the development, foundation, or basis of those opinions. For example, the expert's testing of material involved in litigation, and notes of any such testing, would not be exempted from discovery by this rule. Similarly, inquiry about communications the expert had with anyone other than the party's counsel about the opinions expressed is unaffected by the rule. Counsel are also free to question expert witnesses about alternative analyses, testing methods, or approaches to the issues on which they are testifying, whether or not the expert considered them in forming the opinions expressed. These discovery changes therefore do not affect the gatekeeping functions called for by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and related cases.

The protection for communications between the retained expert and “the party's attorney” should be applied in a realistic manner, and often would not be limited to communications with a single lawyer or a single law firm. For example, a party may be involved in a number of suits about a given product or service, and may retain a particular expert witness to testify on that party's behalf in several of the cases. In such a situation, the protection applies to communications between the expert witness and the attorneys representing the party in any of those cases. Similarly, communications with in-house counsel for the party would often be regarded as protected even if the in-house attorney is not counsel of record in the action. Other situations may also justify a pragmatic application of the “party's attorney” concept.

Although attorney-expert communications are generally protected by Rule 26(b)(4)(C), the protection does not apply to the extent the lawyer and the expert communicate about matters that fall within three exceptions. But the discovery authorized by the exceptions does not extend beyond those specific topics. Lawyer-expert communications may cover many topics and, even when the excepted topics are included among those involved in a given communication, the protection applies to all other aspects of the communication beyond the excepted topics.

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First, under Rule 26(b)(4)(C)(i) attorney-expert communications regarding compensation for the expert's study or testimony may be the subject of discovery. In some cases, this discovery may go beyond the disclosure requirement in Rule 26(a)(2)(B)(vi). It is not limited to compensation for work forming the opinions to be expressed, but extends to all compensation for the study and testimony provided in relation to the action. Any communications about additional benefits to the expert, such as further work in the event of a successful result in the present case, would be included. This exception includes compensation for work done by a person or organization associated with the expert. The objective is to permit full inquiry into such potential sources of bias.

Second, under Rule 26(b)(4)(C)(ii) discovery is permitted to identify facts or data the party's attorney provided to the expert and that the expert considered in forming the opinions to be expressed. The exception applies only to communications “identifying” the facts or data provided by counsel; further communications about the potential relevance of the facts or data are protected.

Third, under Rule 26(b)(4)(C)(iii) discovery regarding attorney-expert communications is permitted to identify any assumptions that counsel provided to the expert and that the expert relied upon in forming the opinions to be expressed. For example, the party's attorney may tell the expert to assume the truth of certain testimony or evidence, or the correctness of another expert's conclusions. This exception is limited to those assumptions that the expert actually did rely on in forming the opinions to be expressed. More general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts, are outside this exception.

Under the amended rule, discovery regarding attorney-expert communications on subjects outside the three exceptions in Rule 26(b)(4)(C), or regarding draft expert reports or disclosures, is permitted only in limited circumstances and by court order. A party seeking such discovery must make the showing specified in Rule 26(b)(3)(A)(ii)--that the party has a substantial need for the discovery and cannot obtain the substantial equivalent without undue hardship. It will be rare for a party to be able to make such a showing given the broad disclosure and discovery otherwise allowed regarding the expert's testimony. A party's failure to provide required disclosure or discovery does not show the need and hardship required by Rule 26(b)(3)(A); remedies are provided by Rule 37.

In the rare case in which a party does make this showing, the court must protect against disclosure of the attorney's mental impressions, conclusions, opinions, or legal theories under Rule 26(b)(3)(B). But this protection does not extend to the expert's own development of the opinions to be presented; those are subject to probing in deposition or at trial.

Former Rules 26(b)(4)(B) and (C) have been renumbered (D) and (E), and a slight revision has been made in (E) to take account of the renumbering of former (B).

2015 Amendment

Rule 26(b)(1) is changed in several ways.

Information is discoverable under revised Rule 26(b)(1) if it is relevant to any party's claim or defense and is proportional to the needs of the case. The considerations that bear on proportionality are moved from present Rule 26(b)(2)(C)(iii), slightly rearranged and with one addition.

Most of what now appears in Rule 26(b)(2)(C)(iii) was first adopted in 1983. The 1983 provision was explicitly adopted as part of the scope of discovery defined by Rule 26(b)(1). Rule 26(b)(1) directed the court to limit the frequency or extent of use of discovery if it determined that “the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.” At the same time, Rule 26(g) was added. Rule 26(g) provided that signing a discovery request, response, or objection certified that the request, response, or objection was “not unreasonable or unduly burdensome or expensive, given the needs of the case, the

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discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation." The parties thus shared the responsibility to honor these limits on the scope of discovery.

The 1983 Committee Note stated that the new provisions were added "to deal with the problem of over-discovery. The objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry. The new sentence is intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse. The grounds mentioned in the amended rule for limiting discovery reflect the existing practice of many courts in issuing protective orders under Rule 26(c) ... On the whole, however, district judges have been reluctant to limit the use of the discovery devices."

The clear focus of the 1983 provisions may have been softened, although inadvertently, by the amendments made in 1993. The 1993 Committee Note explained: "[F]ormer paragraph (b)(1) [was] subdivided into two paragraphs for ease of reference and to avoid renumbering of paragraphs (3) and (4). Subdividing the paragraphs, however, was done in a way that could be read to separate the proportionality provisions as "limitations", no longer an integral part of the (b)(1) scope provisions. That appearance was immediately offset by the next statement in the Note: "Textual changes are then made in new paragraph (2) to enable the court to keep tighter rein on the extent of discovery."

The 1993 amendments added two factors to the considerations that bear on limiting discovery: whether "the burden or expense of the proposed discovery outweighs its likely benefit," and "the importance of the proposed discovery in resolving the issues." Addressing these and other limitations added by the 1993 discovery amendments, the Committee Note stated that [t]he revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery ...'

The relationship between Rule 26(b)(1) and (2) was further addressed by an amendment made in 2000 that added a new sentence at the end of (b)(1): "All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii)[now Rule 26(b)(2)(C)]." The Committee Note recognized that "[t]hese limitations apply to discovery that is otherwise within the scope of subdivision (b)(1)." It explained that the Committee had been told repeatedly that courts were not using these limitations as originally intended. "This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery."

The present amendment restores the proportionality factors to their original place in defining the scope of discovery. This change reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses, or objections.

Restoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations.

Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional. The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.

The parties may begin discovery without a full appreciation of the factors that bear on proportionality. A party requesting discovery, for example, may have little information about the burden or expense of responding. A party requested to provide discovery may have little information about the importance of the discovery in resolving the issues as understood by the requesting party. Many of these uncertainties should be addressed and reduced in the parties' Rule 26(f) conference and in scheduling and pretrial conferences with the court. But if the parties continue to disagree, the discovery dispute could be brought before the court and the parties' responsibilities would remain as they have been since 1983. A party claiming undue burden or expense ordinarily has far better information -- perhaps the only information -- with respect to that part of the determination.

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A party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them. The court's responsibility, using all the information provided by the parties, is to consider these and all the other factors in reaching a case-specific determination of the appropriate scope of discovery.

The direction to consider the parties' relative access to relevant information adds new text to provide explicit focus on considerations already implicit in present Rule 26(b)(2)(C)(iii). Some cases involve what often is called “information asymmetry.” One party -- often an individual plaintiff -- may have very little discoverable information. The other party may have vast amounts of information, including information that can be readily retrieved and information that is more difficult to retrieve. In practice these circumstances often mean that the burden of responding to discovery lies heavier on the party who has more information, and properly so.

Restoring proportionality as an express component of the scope of discovery warrants repetition of parts of the 1983 and 1993 Committee Notes that must not be lost from sight. The 1983 Committee Note explained that “[t]he rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis.” The 1993 Committee Note further observed that “[t]he information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression.” What seemed an explosion in 1993 has been exacerbated by the advent of e-discovery. The present amendment again reflects the need for continuing and close judicial involvement in the cases that do not yield readily to the ideal of effective party management. It is expected that discovery will be effectively managed by the parties in many cases. But there will be important occasions for judicial management, both when the parties are legitimately unable to resolve important differences and when the parties fall short of effective, cooperative management on their own.

It also is important to repeat the caution that the monetary stakes are only one factor, to be balanced against other factors. The 1983 Committee Note recognized “the significance of the substantive issues, as measured in philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved.” Many other substantive areas also may involve litigation that seeks relatively small amounts of money, or no money at all, but that seeks to vindicate vitally important personal or public values.

So too, consideration of the parties' resources does not foreclose discovery requests addressed to an impecunious party, nor justify unlimited discovery requests addressed to a wealthy party. The 1983 Committee Note cautioned that “[t]he court must apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent.”

The burden or expense of proposed discovery should be determined in a realistic way. This includes the burden or expense of producing electronically stored information. Computer-based methods of searching such information continue to develop, particularly for cases involving large volumes of electronically stored information. Courts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery as reliable means of searching electronically stored information become available.

A portion of present Rule 26(b)(1) is omitted from the proposed revision. After allowing discovery of any matter relevant to any party's claim or defense, the present rule adds: “including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter.” Discovery of such matters is so deeply entrenched in practice that it is no longer necessary to clutter the long text of Rule 26 with these examples. The discovery identified in these examples should still be permitted under the revised rule when relevant and proportional to the needs of the case. Framing intelligent requests for electronically stored information, for example, may require detailed information about another party's information systems and other information resources.

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The amendment deletes the former provision authorizing the court, for good cause, to order discovery of any matter relevant to the subject matter involved in the action. The Committee has been informed that this language is rarely invoked. Proportional discovery relevant to any party's claim or defense suffices, given a proper understanding of what is relevant to a claim or defense. The distinction between matter relevant to a claim or defense and matter relevant to the subject matter was introduced in 2000. The 2000 Note offered three examples of information that, suitably focused, would be relevant to the parties' claims or defenses. The examples were “other incidents of the same type, or involving the same product”; “information about organizational arrangements or filing systems”; and “information that could be used to impeach a likely witness.” Such discovery is not foreclosed by the amendments. Discovery that is relevant to the parties' claims or defenses may also support amendment of the pleadings to add a new claim or defense that affects the scope of discovery.

The former provision for discovery of relevant but inadmissible information that appears “reasonably calculated to lead to the discovery of admissible evidence” is also deleted. The phrase has been used by some, incorrectly, to define the scope of discovery. As the Committee Note to the 2000 amendments observed, use of the “reasonably calculated” phrase to define the scope of discovery “might swallow any other limitation on the scope of discovery.” The 2000 amendments sought to prevent such misuse by adding the word “Relevant” at the beginning of the sentence, making clear that “‘relevant’ means within the scope of discovery as defined in this subdivision ...” The “reasonably calculated” phrase has continued to create problems, however, and is removed by these amendments. It is replaced by the direct statement that “Information within this scope of discovery need not be admissible in evidence to be discoverable.” Discovery of nonprivileged information not admissible in evidence remains available so long as it is otherwise within the scope of discovery.

Rule 26(b)(2)(C)(iii) is amended to reflect the transfer of the considerations that bear on proportionality to Rule 26(b)(1). The court still must limit the frequency or extent of proposed discovery, on motion or on its own, if it is outside the scope permitted by Rule 26(b)(1).

Rule 26(c)(1)(B) is amended to include an express recognition of protective orders that allocate expenses for disclosure or discovery. Authority to enter such orders is included in the present rule, and courts already exercise this authority. Explicit recognition will forestall the temptation some parties may feel to contest this authority. Recognizing the authority does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding.

Rule 26(d)(2) is added to allow a party to deliver Rule 34 requests to another party more than 21 days after that party has been served even though the parties have not yet had a required Rule 26(f) conference. Delivery may be made by any party to the party that has been served, and by that party to any plaintiff and any other party that has been served. Delivery does not count as service; the requests are considered to be served at the first Rule 26(f) conference. Under Rule 34(b)(2)(A) the time to respond runs from service. This relaxation of the discovery moratorium is designed to facilitate focused discussion during the Rule 26(f) conference. Discussion at the conference may produce changes in the requests. The opportunity for advance scrutiny of requests delivered before the Rule 26(f) conference should not affect a decision whether to allow additional time to respond.

Rule 26(d)(3) is renumbered and amended to recognize that the parties may stipulate to case-specific sequences of discovery.

Rule 26(f)(3) is amended in parallel with Rule 16(b)(3) to add two items to the discovery plan -- issues about preserving electronically stored information and court orders under Evidence Rule 502.

Notes of Decisions (1465)

Fed. Rules Civ. Proc. Rule 26, 28 U.S.C.A., FRCP Rule 26
Including Amendments Received Through 12-1-15

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NH Superior Court Civil Rule 22

RULE 22. AUTOMATIC DISCLOSURES

Currentness

(a) Materials that Must Be Disclosed. Except as may be otherwise ordered by the court for good cause shown, a party must without awaiting a discovery request, provide to the other parties:

(1) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support his or her claims or defenses, unless the use would be solely for impeachment, and, unless such information is contained in a document provided pursuant to Rule 22 (a)(2), a summary of the information believed by the disclosing party to be possessed by each such person;

(2) a copy of all documents, electronically stored information, and tangible things that the disclosing party has in his or her possession, custody or control and may use to support his or her claims or defenses, unless the use would be solely for impeachment;

(3) a computation of each category of damages claimed by the disclosing party together with all documents or other evidentiary materials on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(4) for inspection and copying, any insurance agreement or policy under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(b) Time for Disclosure. Unless the court orders otherwise, the disclosures required by Rule 22(a) shall be made as follows:

(1) by the plaintiff, not later than 30 days after the defendant to whom the disclosure is being made has filed his or her Answer to the Complaint; and

(2) by the defendant, not later than 60 days after the defendant making the disclosure has filed his or her Answer to the Complaint.

(c) Duty to Supplement. Each party has a duty to supplement that party's initial disclosures promptly upon becoming aware of the supplemental information.

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(d) Sanctions for Failure to Comply. A party who fails to timely make the disclosures required by this rule may be sanctioned as provided in Rule 21.

Credits

[Adopted May 22, 2013, effective October 1, 2013. Comment amended July 24, 2014, effective September 1, 2014.]

Editors' Notes

COMMENT

This rule, formerly PAD Rule 3, accomplishes a major change from prior New Hampshire practice in that it requires both the plaintiff and the defendant to make automatic initial disclosures of certain information without the need for a discovery request from the opposing party. Although there was a similar but not identical requirement in the so-called "fast-track" section of former Superior Court Rule 62(II), the rule was used very little and therefore does not provide a significant base of experience for this rule. Nonetheless, such a base of experience can be found in federal court practice, where an automatic disclosure regimen in some form has been in existence since 1993, and appears to have worked reasonably well. Requiring parties to make prompt and automatic disclosures of information concerning the witnesses and evidence they will use to prove their claims or defenses at trial will help reduce "gamesmanship" in the conduct of litigation, reduce the time spent by lawyers and courts in resolving discovery issues and disputes, and promote the prompt and just resolution of cases.

Section (a) of Rule 22 is taken largely from Rule 26(a)(1) of the Federal Rules of Civil Procedure. It differs from the federal rule, however, in that, unlike the federal rule, this rule does not permit the disclosing party to merely provide "the subjects" of the discoverable information known to individuals likely to have such information, Fed. R. Civ. P. 26(a)(1)(A)(i), and "a description by category and location" of the discoverable materials in the possession, custody or control of the disclosing party, Fed. R. Civ. P. 26(a)(1)(A)(ii). Rather, the rule requires that the disclosing party actually turn over to the opposing party a copy of all such discoverable materials, Rule 22(a)(2), and also requires that the disclosing party provide a summary of the information known to each individual identified under Rule 22(a)(1) unless that information is contained in the materials disclosed under Rule 22(a)(2). This more comprehensive discovery obligation does not impose an undue burden on either plaintiffs or defendants and will help to insure that information and witnesses that will be used by each party to support its case will be disclosed to opposing parties shortly after the issues have been joined.

Subsection (a)(3) of the rule also differs somewhat from the language of comparable Fed. R. Civ. P. 26(a)(1)(A)(iii), in that the rule eliminates reference to "privileged or protected from disclosure" information as being excepted from the disclosure obligation imposed by the subsection. By so doing, the intention is not to eliminate the ability of a party to object on privilege or other proper grounds to the disclosures relating to the computation of damages or the information on which such computations are based. However, genuine claims of privilege as a basis for avoiding disclosure of information pertinent to the computation of damages will be rare and, to the extent such claims do exist, the ability to assert the privilege is preserved elsewhere in the rules. Therefore, there is no need to make a specific reference to privileged or otherwise protected materials in this rule.

The time limits established in section (b) of the rule are reasonable and will promote the orderly and expeditious progress of litigation. The proposed rule differs from the initial disclosure proposal embodied in the Pilot Project Rules of the American College of Trial Lawyers (ACTL) and the Institute for the Advancement of the American Legal System (IAALS), in that, unlike ACTL/IAALS Rule 5.2, the rule does not require the plaintiff to make its initial disclosures before the time when the defendant is required to file its Answer. The plaintiff should have the benefit of the defendant's Answer before making its initial disclosure since the Answer will in all likelihood inform what facts are in dispute and therefore will need to be proved by the plaintiff.

Section (c) of the rule is taken directly from ACTL/IAALS Pilot Project Rule 5.4 and its substance is generally consistent with Federal Rule 26(e) and Rule 21(g). It should be noted, however, that this rule differs from Rule 21(g). Rule 21(g) sets forth

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the general rule governing discovery and contains introductory language stating that there is no duty to supplement responses and then sets forth very broad categories of exceptions from this general rule. Section (c) of this rule, relating only to materials that must be disclosed pursuant to the automatic disclosure requirements of Rule 22, is worded in positive terms to require supplementation of responses whenever the producing party becomes aware of supplemental information covered by the rule's initial disclosure requirements.

Section (d) of the rule references Rule 21 and permits the court to impose any of the sanctions specified in that rule if a party fails to make the disclosures required of it by this rule in a timely fashion.

NH Superior Court Civil Actions Rule 22, NH R SUPER CT CIV Rule 22
The state court rules are current with amendments received through August 15, 2015.

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Advisory Committee on Civil Rules
Exhibit 3

West's Nevada Revised Statutes Annotated
Rules of Civil Procedure for the Nevada District Courts
III Pleadings and Motions

Rules of Civil Procedure, Rule 16.1
Formerly cited as NV ST Rule 16.1

RULE 16.1. MANDATORY PRE-TRIAL DISCOVERY REQUIREMENTS

Currentness

<Text of rule effective for all civil proceedings except proceedings in the Family Division of the Second and Eighth Judicial District Courts and in all domestic relations cases in the judicial districts without a family division as of February 1, 2006. For text of rule applicable to proceedings in the Family Division of the Second and Eighth Judicial District Courts and all domestic relations cases in judicial districts without a family division effective February 1, 2006, see following version of Rule 16.1.>

(a) Required Disclosures.

(1) Initial Disclosures. Except in proceedings exempted or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:

(A) The name and, if known, the address and telephone number of each individual likely to have information discoverable under Rule 26(b), including for impeachment or rebuttal, identifying the subjects of the information;

(B) A copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and which are discoverable under Rule 26(b);

(C) A computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary matter, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) For inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment and any disclaimer or limitation of coverage or reservation of rights under any such insurance agreement.

These disclosures must be made at or within 14 days after the Rule 16.1(b) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in the circumstances of the action and states the objection in the Rule 16.1(c) case conference report. In ruling on the objection, the court must determine what disclosures--if any--are to be made, and set the time for disclosure. Any party first served or otherwise joined after the Rule 16.1(b) conference must make these disclosures within 30 days after being served or joined unless a different time is set by stipulation or court order. A party must make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed

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its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under NRS 50.275, 50.285 and 50.305.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The court, upon good cause shown or by stipulation of the parties, may relieve a party of the duty to prepare a written report in an appropriate case. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding 10 years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

Unless otherwise stipulated or ordered by the Court, if the witness is not required to provide a written report, the initial disclosure must state the subject matter on which the witness is expected to present evidence under NRS 50.275, 50.285 and 50.305; a summary of the facts and opinions to which the witness is expected to testify; the qualifications of that witness to present evidence under NRS 50.275, 50.285 and 50.305, which may be satisfied by the production of a resume or curriculum vitae; and the compensation of the witness for providing testimony at deposition and trial, which is satisfied by production of a fee schedule.

(C) These disclosures shall be made at the times and in the sequence directed by the court.

(i) In the absence of extraordinary circumstances, and except as otherwise provided in subdivision (2), the court shall direct that the disclosures shall be made at least 90 days before the discovery cut-off date.

(ii) If the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), the disclosures shall be made within 30 days after the disclosure made by the other party. This later disclosure deadline does not apply to any party's witness whose purpose is to contradict a portion of another party's case in chief that should have been expected and anticipated by the disclosing party, or to present any opinions outside of the scope of another party's disclosure.

(D) The parties must supplement these disclosures when required under Rule 26(e)(1).

(3) Pretrial Disclosures. In addition to the disclosures required by Rule 16.1(a)(1) and (2), a party must provide to other parties the following information regarding the evidence that it may present at trial, including impeachment and rebuttal evidence:

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(A) The name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present, those witnesses who have been subpoenaed for trial, and those whom the party may call if the need arises;

(B) The designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) An appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise directed by the court, these disclosures must be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B), and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under NRS 48.025 and 48.035, shall be deemed waived unless excused by the court for good cause shown.

(4) Form of Disclosures. Unless the court orders otherwise, all disclosures under Rules 16.1(a)(1) through (3) must be made in writing, signed, and served.

(b) Meet and Confer Requirements.

(1) Attendance at Early Case Conference. Unless the case is in the court annexed arbitration program or short trial program, within 30 days after filing of an answer by the first answering defendant, and thereafter, if requested by a subsequent appearing party, the parties shall meet in person to confer and consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by subdivision (a)(1) of this rule and to develop a discovery plan pursuant to subdivision (b)(2). The attorney for the plaintiff shall designate the time and place of each meeting which must be held in the county where the action was filed, unless the parties agree upon a different location. The attorneys may agree to continue the time for the case conference for an additional period of not more than 90 days. The court, in its discretion and for good cause shown, may also continue the time for the conference. Absent compelling and extraordinary circumstances, neither the court nor the parties may extend the time to a day more than 180 days after an appearance is served by the defendant in question.

Unless otherwise ordered by the court or the discovery commissioner, parties to any case wherein a timely trial de novo request has been filed subsequent to an arbitration, need not hold a further in person conference, but must file a joint case conference report pursuant to subdivision (c) of this rule within 60 days from the date of the de novo filing, said report to be prepared by the party requesting the trial de novo.

(2) Planning for Discovery. The parties shall develop a discovery plan which shall indicate the parties' views and proposals concerning:

(A) What changes should be made in the timing, form, or requirement for disclosures under Rule 16.1(a), including a statement as to when disclosures under Rule 16.1(a)(1) were made or will be made;

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(B) The subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(C) What changes should be made in the limitations on discovery imposed under these rules and what other limitations should be imposed;

(D) Any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c); and

(E) An estimated time for trial.

(c) Case Conference Report. Within 30 days after each case conference, the parties must file a joint case conference report or, if the parties are unable to agree upon the contents of a joint report, each party must serve and file a case conference report which, either as a joint or individual report, must contain:

(1) A brief description of the nature of the action and each claim for relief or defense;

(2) A proposed plan and schedule of any additional discovery pursuant to subdivision (b)(2) of this rule;

(3) A written list of names exchanged pursuant to subdivision (a)(1)(A) of this rule;

(4) A written list of all documents provided at or as a result of the case conference pursuant to subdivision (a)(1)(B) of this rule;

(5) A calendar date on which discovery will close;

(6) A calendar date, not later than 90 days before the close of discovery, beyond which the parties shall be precluded from filing motions to amend the pleadings or to add parties unless by court order;

(7) A calendar date by which the parties will make expert disclosures pursuant to subdivision (a)(2), with initial disclosures to be made not later than 90 days before the discovery cut-off date and rebuttal disclosures to be made not later than 30 days after the initial disclosure of experts;

(8) A calendar date, not later than 30 days after the discovery cut-off date, by which dispositive motions must be filed;

(9) An estimate of the time required for trial; and

(10) A statement as to whether or not a jury demand has been filed.

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After any subsequent case conference, the parties must supplement, but need not repeat, the contents of prior reports. Within 7 days after service of any case conference report, any other party may file a response thereto objecting to all or a portion of the report or adding any other matter which is necessary to properly reflect the proceedings occurring at the case conference.

(d) Discovery Disputes.

(1) Where available or unless otherwise ordered by the court, all discovery disputes (except those presented at the pretrial conference or trial) must first be heard by the discovery commissioner.

(2) Following each discovery motion before a discovery commissioner, the commissioner must prepare and file a report with the commissioner's recommendations for a resolution of each unresolved dispute. The commissioner may direct counsel to prepare the report. The clerk of the court shall forthwith serve a copy of the report on all parties. Within 5 days after being served with a copy, any party may serve and file written objections to the recommendations. Written authorities may be filed with an objection, but are not mandatory.

(3) Upon receipt of a discovery commissioner's report and any objections thereto, the court may affirm, reverse or modify the commissioner's ruling, set the matter for a hearing, or remand the matter to the commissioner for further action, if necessary.

(e) Failure or Refusal to Participate in Pretrial Discovery; Sanctions.

(1) If the conference described in Rule 16.1(b) is not held within 180 days after an appearance by a defendant, the case may be dismissed as to that defendant upon motion or on the court's own initiative, without prejudice, unless there are compelling and extraordinary circumstances for a continuance beyond this period.

(2) If the plaintiff does not file a case conference report within 240 days after an appearance by a defendant, the case may be dismissed as to that defendant upon motion or on the court's own initiative, without prejudice.

(3) If an attorney fails to reasonably comply with any provision of this rule, or if an attorney or a party fails to comply with an order entered pursuant to subsection (d) of this rule, the court, upon motion or upon its own initiative, shall impose upon a party or a party's attorney, or both, appropriate sanctions in regard to the failure(s) as are just, including the following:

(A) Any of the sanctions available pursuant to Rule 37(b)(2) and Rule 37(f);

(B) An order prohibiting the use of any witness, document or tangible thing which should have been disclosed, produced, exhibited, or exchanged pursuant to Rule 16.1(a).

(f) Complex Litigation. In a potentially difficult or protracted action that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems, the court may, upon motion and for good cause shown, waive any or all of the requirements of this rule. If the court waives all the requirements of this rule, it shall also order a conference pursuant to Rule 16 to be conducted by the court or the discovery commissioner.

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(g) Proper Person Litigants. When a party is not represented by an attorney, the party must comply with this rule.

Credits

Added, eff. Jan. 1, 1988. As amended, eff. Jan. 1, 2005; Jan. 1, 2013.

Editors' Notes

DRAFTER'S NOTE 2004 AMENDMENT

Subdivision (a) is amended to conform to the 1993 and 2000 amendments to Rule 26(a) of the federal rules, with some notable exceptions. Consistent with the federal rule, the revised rule imposes an affirmative duty to disclose certain basic information without a formal discovery request.

Subdivision (a)(1) incorporates the federal rule but adopts the "subject matter" standard for the scope of discovery that is retained in revised Rule 26(b) of the Nevada rules. Paragraph (1) also retains the Nevada requirement that impeachment witnesses and documents be disclosed, whereas the federal rule exempts impeachment evidence. Paragraph (1)(C) is intended to apply to special damages, not general or other intangible damages. Paragraph (1)(D) expands on the federal rule by requiring disclosure and production of liability policy denials, limitations or reservations of rights.

Subdivision (a)(2) imposes an additional duty to disclose information regarding expert testimony and requires that certain experts must prepare a detailed and complete written report. But unlike its federal counterpart, subdivision (a)(2)(B) allows the court to relieve a party of this duty upon a showing of good cause. The requirement of a written report applies only to an expert who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony. Given this limitation, a treating physician could be deposed or called to testify without any requirement for a written report. See Fed. R. Civ. P. 26(a) advisory committee note (2000). The expert witness disclosures and written reports are not part of the initial disclosure under paragraph (1). Instead, subdivision (a)(2)(C) contemplates that the court will set the time for such disclosures but that they must be made at least 90 days before the discovery cut-off date absent extraordinary circumstances. This provision differs from its federal counterpart, which allows the disclosures to be made at least 90 days before the trial date or the date the case is to be ready for trial.

Subdivision (a)(3) retains the Nevada requirement for pretrial disclosure of impeachment and rebuttal evidence and the names of witnesses who have been subpoenaed for trial. Unlike the federal rule, there is no requirement that the information disclosed be filed with the court.

Subdivision (b) is repealed in its entirety. New subdivision (b)(1) incorporates the requirement under former Rule 16.1(a) of attendance at an early case conference. It is based on Rule 26(f) of the federal rules, but is tailored to practice in state court and, unlike the federal rule, it requires the parties to meet in person. The rule also retains deadlines that are unique to Nevada. Subdivision (b)(2) incorporates provisions of Rule 26(f) of the federal rules regarding planning for discovery. But the Nevada provision expands the subjects to be discussed at the early case conference beyond those listed in the federal rule to include an estimated time for trial.

Subdivision (c) is amended to reflect the new disclosure provisions of subdivision (a). The requirements for a case conference report are more detailed and extensive than those in Rule 26(f) of the federal rules and include specific time periods for the close of discovery, filing of motions to amend pleadings or add parties, expert disclosures, and filing of dispositive motions.

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Subdivision (d) retains the Nevada provisions on discovery disputes with some revisions.

DRAFTER'S NOTE 2012 AMENDMENT

Subdivision (a)(2)(B) specifies the information that must be included in a disclosure of expert witnesses who are not otherwise required to provide detailed written reports. A treating physician is not a retained expert merely because the patient was referred to the physician by an attorney for treatment. These comments may be applied to other types of non-retained experts by analogy. In the context of a treating physician, appropriate disclosure may include that the witness will testify in accordance with his or her medical chart, even if some records contained therein were prepared by another healthcare provider. A treating physician is not a retained expert merely because the witness will opine about diagnosis, prognosis, or causation of the patient's injuries, or because the witness reviews documents outside his or her medical chart in the course of providing treatment or defending that treatment. However, any opinions and any facts or documents supporting those opinions must be disclosed in accordance with subdivision (a)(2)(B).

Notes of Decisions (22)

Civ. Proc. Rules, Rule 16.1, NV ST RCP Rule 16.1
Current with amendments received through 11/15/15

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West's Nevada Revised Statutes Annotated
Rules of Civil Procedure for the Nevada District Courts
V Depositions and Discovery

Rules of Civil Procedure, Rule 26
Formerly cited as NV ST Rule 26

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY

Currentness

(a) Discovery Methods. At any time after the filing of a joint case conference report, or not sooner than 10 days after a party has filed a separate case conference report, or upon order by the court or discovery commissioner, any party who has complied with Rule 16.1(a)(1) may obtain discovery by one or more of the following additional methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or Rule 45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admission.

As amended, eff. Jan. 1, 1988; Jan. 1, 2005.

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).

(2) Limitations. By order, the court may alter the limits in these rules or set limits on the number of depositions and interrogatories, the length of depositions under Rule 30 or the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c) of this rule.

(3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of

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the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial Preparation: Experts.

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under Rule 16.1(a)(2)(B) or 16.2(a)(3), the deposition shall not be conducted until after the report is provided.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule, the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

As amended, eff. Jan. 1, 1988; Jan. 1, 2005.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with the other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the discovery not be had;

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(2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition after being sealed be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way;

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

As amended, eff. Jan. 1, 1988; Jan. 1, 2005.

(d) Sequence and Timing of Discovery. After compliance with subdivision (a) of this rule, unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, does not operate to delay any other party's discovery.

As amended, eff. Sept. 27, 1971; Jan. 1, 2005.

(e) Supplementation of Disclosures and Responses. A party who has made a disclosure under Rule 16.1 or 16.2 or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired, if ordered by the court or in the following circumstances:

(1) A party is under a duty to supplement at appropriate intervals its disclosures under Rule 16.1(a) or 16.2(a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under Rule 16.1(a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 16.1(a)(3) are due.

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(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production or request for admission, if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

As amended, eff. Jan. 1, 1988; Jan. 1, 2005.

(f) Form of responses. Answers and objections to interrogatories or requests for production shall identify and quote each interrogatory or request for production in full immediately preceding the statement of any answer or objections thereto. Answers, denials, and objections to requests for admission shall identify and quote each request for admission in full immediately preceding the statement of any answer, denial, or objection thereto.

Added, eff. Feb. 11, 1986; Jan. 1, 2005.

(g) Signing of Disclosures, Discovery Requests, Responses, and Objections.

(1) Every disclosure and report made pursuant to Rules 16.1(a)(1), 16.1(a)(3), 16.1(c), 16.2(a)(2), 16.2(a)(4), and 16.2(d) shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(2) Every discovery request, response or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection, is:

(A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(B) not interposed for any improper purpose, such as to harass, obscure, equivocate or to cause unnecessary delay or needless increase in the cost of litigation; and

(C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response or objection and a party shall not be obligated to take any action with respect to it until it is signed.

(3) If without substantial justification a certification is made in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the disclosure, request,

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response, or objection was made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

Added, eff. Jan. 1, 1988; Jan. 1, 2005.

(h) Demand for Prior Discovery. Whenever a party makes a written demand for discovery which took place prior to the time the party became a party to the action, each party who has previously made discovery disclosures, responded to a request for admission or production or answered interrogatories shall make available to the demanding party the document(s) in which the discovery disclosures and responses in question are contained for inspection and copying or furnish to the demanding party a list identifying each such document by title and upon further demand shall furnish to the demanding party, at the expense of the demanding party, a copy of any listed discovery disclosure or response specified in the demand or, in the case of document disclosure or request for production, shall make available for inspection by the demanding party all documents and things previously produced. Further, each party who has taken a deposition shall make a copy of the transcript thereof available to the demanding party at the latter's expense.

Added, eff. Feb. 11, 1986. As amended, eff. Jan. 1, 2005.

Credits

As amended, eff. Sept. 27, 1971; Jan. 1, 2005; July 1, 2008.

Editors' Notes

DRAFTER'S NOTE 2004 AMENDMENT

The initial-disclosure provisions in Rule 26(a) of the federal rules, as amended in 2000, are adopted as modified in Rule 16.1(a) of the Nevada rules; only other discovery methods are retained as part of Rule 26(a) of the Nevada rules.

Subdivision (b) retains the Nevada rule as to the scope of discovery--“any matter, not privileged, which is relevant to the subject matter involved in the pending action.” Thus, the Nevada rule does not conform to the 2000 amendments to its federal counterpart which limits the scope of discovery to “any matter, not privileged, that is relevant to the claim or defense of any party,” except upon a showing of “good cause.”

The insurance discovery provisions in subdivision (b)(2) of the former rule have been amended and moved to Rule 16.1(a)(1)(D).

Subdivision (b)(2)(iii) does not incorporate the weighing provisions that were added to the federal rule in 1993 but instead retains the language in the Nevada rule, which was based on the federal provision as it was adopted in 1983.

Expert discovery under subdivision (b)(4) is modified consistent with expert disclosure under revised Rule 16.1(a)(2). The provisions of former subdivision (b)(5) regarding demands for expert witness lists and the exchange of reports and writings, are repealed as unnecessary under the new expert disclosure provisions in Rule 16.1. New subdivision (b)(5) conforms to the federal rule.

Subdivision (c) is amended to conform to the 1993 amendment to subdivision (c) of the federal rule. The amendment requires that the parties meet and confer in an effort to resolve discovery disputes before seeking a protective order from the court. The party filing a motion for a protective order must include a certificate stating that the parties met and conferred, or, if the moving party is unable to get opposing parties to meet and confer regarding the dispute, indicating the moving party's efforts in attempting to arrange such a meeting.

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Subdivision (d) is amended to clarify that once the parties have complied with the provisions of subdivision (a) of the rule, the parties may use any method of formal discovery provided in the rules in any sequence unless the court orders otherwise. The provision is similar to subdivision (d) of the federal rule, but it does not include the first sentence of the federal rule, which provides that with certain exceptions, the parties may not commence formal discovery until after they have met and conferred as required by subdivision (f) of the federal rule (cf. NRCP 16.1(b)). The parties must comply with subdivision (a) of the Nevada rule.

Subdivision (e) is amended to conform to the 1993 amendments to subdivision (e) of the federal rule. The rule is amended to provide that the requirement for supplementation applies to disclosures required by Rule 16.1(a). Paragraph (1) is amended to address when a party must supplement disclosures made under Rule 16.1(a) and to require supplementation of expert reports and depositions. Paragraph (2) is amended to address the duty to supplement responses to formal discovery requests including interrogatories, requests for production and requests for admissions. Like its federal counterpart, paragraph (2) does not include deposition testimony. However, under paragraph (1), a party must supplement information provided through a deposition of an expert from whom a report is required under Rule 16.1(a)(2)(B). Paragraphs (3) and (4) of the former rule are repealed.

Subdivision (f) of the former rule is repealed as duplicative of provisions in Rules 16 and 16.1. To avoid redesignating the remaining subdivisions, former subdivision (f) is replaced with the language from former subdivision (j) regarding the form of responses to discovery requests. There is no federal counterpart to this provision.

Subdivision (g) is amended to conform to the 1993 amendments to subdivision (g) of the federal rule. Paragraph (1) is added to require signatures on certain disclosures required by Rule 16.1. Paragraph (2) retains language from the former rule for signatures on discovery requests, responses, and objections with some revisions to conform to the 1993 amendments to the federal rule. Paragraph (3) retains language from the former rule regarding sanctions if a certification is made in violation of the rule with modifications to make it consistent with Rules 37(a)(4) and 37(c)(1)--in combination, these rules provide sanctions for violation of the rules regarding disclosures and discovery matters.

Subdivision (h) is amended to address technical issues. It has no federal counterpart. The provision is retained because it clarifies responsibilities to exchange discovery with new parties.

Subdivision (i) of the former rule is repealed in favor of a strong scheduling order under Rule 16 that will set discovery deadlines.

ADVISORY COMMITTEE'S NOTE

Revised in 1971 in accordance with the federal amendments, effective July 1, 1970, but with subsection (f) added.

Notes of Decisions (62)

Civ. Proc. Rules, Rule 26, NV ST RCP Rule 26
Current with amendments received through 11/15/15

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Rules of Civil Procedure, Rule 26

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

Currentness

(a) Required Disclosures; Methods to Discover Additional Matter. Disclosure under subparagraphs (a)(1), (2), and (3) of this rule is required in all civil actions, except those categories of cases exempted from the requirement of scheduling conferences and scheduling orders under Civil Rule 16(g), adoption proceedings, and prisoner litigation against the state under AS 09.19.

(1) *Initial Disclosures.* Except to the extent otherwise directed by order or rule, a party shall, without awaiting a discovery request, provide to other parties:

(A) the factual basis of each of its claims or defenses;

(B) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information and whether the attorney-client privilege applies;

(C) the name and, if known, the address and telephone number of each individual who has made a written or recorded statement and, unless the statement is privileged or otherwise protected from disclosure, either a copy of the statement or the name and, if known, the address and telephone number of the custodian;

(D) subject to the provisions of Civil Rule 26(b)(3), a copy of, or a description by category and location of, all documents, electronically stored information, data compilations, and tangible things that are relevant to disputed facts alleged with particularity in the pleadings;

(E) subject to the provisions of Civil Rule 26(b)(3), all photographs, diagrams, and videotapes of persons, objects, scenes and occurrences that are relevant to disputed facts alleged with particularity in the pleadings;

(F) each insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment;

(G) all categories of damages claimed by the disclosing party, and a computation of each category of special damages, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such claims are based, including materials bearing on the nature and extent of injuries suffered; and

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(H) the identity, with as much specificity as may be known at the time, of all potentially responsible persons within the meaning of AS 09.17.080, and whether the party will choose to seek to allocate fault against each identified potentially responsible person.

Unless otherwise directed by the court, these disclosures shall be made at or within 10 days after the meeting of the parties under subsection (f). A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) *Disclosure of Expert Testimony.*

(A) In addition to the disclosures required by subparagraph (a)(1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Evidence Rules 702, 703, or 705.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. The parties shall supplement these disclosures when required under subparagraph (e)(1).

(D) No more than three independent expert witness may testify for each side as to the same issue in any given case. For purposes of this rule, an independent expert is an expert from whom a report is required under section (a)(2)(B). The court, upon the showing of good cause, may increase or decrease the number of independent experts to be called.

(3) *Pretrial Disclosures.* In addition to the disclosures required in the preceding paragraphs, a party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment purposes:

(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

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These disclosures shall be made at the times and in the sequence directed by the court. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B), and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

(4) *Form of Disclosures.* Unless otherwise directed by the court, all disclosures under subparagraphs (a)(1) and (2) shall be made in writing, signed, and served in accordance with Rule 5.

(5) *Methods to Discover Additional Matter.* Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) *Limitations.*

(A) The court may alter the limits in these rules on the number of depositions and interrogatories, the length of depositions under Rule 30, and the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under paragraph (c).

(B) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

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(3) *Trial Preparation: Materials.* Subject to the provisions of subparagraph (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subparagraph (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) *Trial Preparation: Experts.*

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under section (a)(2)(B), the deposition shall not be conducted until after the report is provided.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subparagraph; and (ii) with respect to discovery obtained under section (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) *Claims of Privilege or Protection of Trial Preparation Materials.* When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the judicial district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the disclosure or discovery not be had; (2) that the disclosure or discovery may be had only on specified

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terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition, after being sealed, be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Timing and Sequence of Discovery.

(1) *Timing of Discovery--Non-Exempted Actions.* In an action in which disclosure is required under Rule 26(a), a party may serve up to ten of the thirty interrogatories allowed under Rule 33(a) at the times allowed by section (d)(2)(C) of this rule. Otherwise, except by order of the court or agreement of the parties, a party may not seek discovery from any source before the parties have met and conferred as required by paragraph (f).

(2) *Timing of Discovery--Exempted Actions.* In actions exempted from disclosure under Rule 26(a), discovery may take place as follows:

(A) For depositions upon oral examination under Civil Rule 30, a defendant may take depositions at any time after commencement of the action. The plaintiff must obtain leave of court if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service under Rule 4(e) if authorized, except that leave is not required (i) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (ii) the plaintiff seeks to take the deposition under Civil Rule 30(a)(2)(C).

(B) For depositions upon written questions under Civil Rule 31, a party may serve questions at any time after commencement of the action.

(C) For interrogatories, requests for production, and requests for admission under Civil Rules 33, 34, and 36, discovery requests may be served upon the plaintiff at any time after the commencement of the action, and upon any other party with or after service of the summons and complaint upon that party.

(3) *Sequence of Discovery.* Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of Disclosures and Responses. A party who has made a disclosure under paragraph (a) or Civil Rule 26.1(b) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:

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(1) A party is under a duty to supplement at appropriate intervals its disclosures under paragraph (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(f) Meeting of Parties; Planning for Discovery and Alternative Dispute Resolution. Except when otherwise ordered and except in actions exempted from disclosure under Rule 26(a), the parties shall, as soon as practicable and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, including whether an alternative dispute resolution procedure is appropriate, to make or arrange for the disclosures required by subparagraph (a)(1), and to develop a proposed discovery plan and a proposed alternative dispute resolution plan. The plan shall indicate the parties' views and proposals concerning:

(1) what changes should be made in the timing or form of disclosures under paragraph (a), including a statement as to when the disclosures under subparagraph (a)(1) were made or will be made and what are appropriate intervals for supplementation of disclosure under Rule 26(e)(1);

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(4) what changes should be made in the limitations on discovery imposed under these rules and what other limitations should be imposed;

(5) the plan for alternative dispute resolution, including its timing, the method of selecting a mediator, early neutral evaluator, or arbitrator, or an explanation of why alternative dispute resolution is inappropriate;

(6) whether a scheduling conference is unnecessary; and

(7) any other orders that should be entered by the court under paragraph (c) or under Rule 16(b) and (c).

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging and being present or represented at the meeting, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 10 days after the meeting a written report outlining the plan.

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(g) [Applicable to cases filed on or after August 7, 1997.] Limited Discovery; Expedited Calendaring. In a civil action for personal injury or property damage involving less than $100,000 in claims, the parties shall limit discovery to that allowed under District Court Civil Rule 1(a)(1) and shall avail themselves of the expedited calendaring procedures allowed under District Court Civil Rule 4.

Credits

[Amended effective July 15, 1990; July 15, 1994; July 15, 1995; July 15, 1997; August 7, 1997; August 7, 1997; July 15, 1998; October 15, 2005; April 15, 2009; October 15, 2014.]

Editors' Notes

NOTE

Note to SCO 1281: Paragraph (g) of this rule was added by ch. 26, § 40, SLA 1997. According to § 55 of the Act, the amendment to Civil Rule 26 applies "to all causes of action accruing on or after the effective date of this Act." The amendment to Rule 26 adopted by paragraph 1 of this order applies to all cases filed on or after August 7, 1997. See paragraph 17 of this order. The change is adopted for the sole reason that the legislature has mandated the amendment.

Ch. 26, § 10, SLA 1997 repeals and reenacts AS 09.17.020 concerning punitive damages. New AS 09.17.020(e) prohibits parties from conducting discovery relevant to the amount of punitive damages until after the fact finder has determined that an award of punitive damages is allowed. This provision applies to causes of action accruing on or after August 7, 1997. See ch. 26, § 55, SLA 1997. According to § 48 of the Act, new AS 09.17.020(e) has the effect of amending Civil Rule 26 by limiting discovery in certain actions.

Section 2 of chapter 95 SLA 1998 amends AS 09.19.050 to state that the automatic disclosure provisions of Civil Rule 26 do not apply in prisoner litigation against the state. According to section 13 of the act, this amendment has the effect of changing Civil Rule 26 "by providing that the automatic disclosure provisions of the rule do not apply to litigation against the state brought by prisoners."

Note to SCO 1647: The supreme court has approved certain procedures for Anchorage cases that vary from those specified in this rule. Civil Rule 26(a)(1) sets out a procedure to be used "[e]xcept to the extent otherwise directed by order or rule," and sets a timeline for disclosures "[u]nless otherwise directed by the court." Civil Rule 26(f) also sets out a procedure to be used "except when otherwise ordered." In Anchorage, Administrative Order 3AO-03-04 (Amended) applies to modify the procedures set out in subdivisions (a)(1) and (f). That Order, commonly referred to as the Anchorage Uniform Pretrial Order, was issued and adopted according to the provisions of Administrative Rule 46, and is available on the court system's website at http:/ /www.courts.alaska.gov/orders-cr16-26.htm.

Rules Civ. Proc., Rule 26, AK R RCP Rule 26
Current with amendments received through October 15, 2015

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West's Colorado Revised Statutes Annotated
West's Colorado Court Rules Annotated
Colorado Rules of Civil Procedure
Chapter 4. Disclosure and Discovery

C.R.C.P. Rule 26

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY; DUTY OF DISCLOSURE

Currentness

(a) Required Disclosures. Unless otherwise ordered by the court or stipulated by the parties, provisions of this Rule shall not apply to domestic relations, juvenile, mental health, probate, water law, forcible entry and detainer, C.R.C.P. 120, or other expedited proceedings.

(1) **Disclosures.** Except to the extent otherwise directed by the court, a party shall, without awaiting a discovery request, provide to other parties the following information, whether or not supportive of the disclosing party's claims or defenses:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to the claims and defenses of any party and a brief description of the specific information that each such individual is known or believed to possess;

(B) a listing, together with a copy of, or a description by category, of the subject matter and location of all documents, data compilations, and tangible things in the possession, custody or control of the party that are relevant to the claims and defenses of any party, making available for inspection and copying such documents and other evidentiary material, not privileged or protected from disclosure, as though a request for production of those documents had been served pursuant to C.R.C.P. 34;

(C) a description of the categories of damages sought and a computation of any category of economic damages claimed by the disclosing party, making available for inspection and copying pursuant to C.R.C.P. 34 the documents or other evidentiary material relevant to the damages sought, not privileged or protected from disclosure, as though a request for production of those documents had been served pursuant to C.R.C.P. 34; and

(D) any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment, making such agreement available for inspection and copying pursuant to C.R.C.P. 34.

Disclosures shall be served within 28 days after the case is at issue as defined in C.R.C.P. 16(b)(1). A party shall make the required disclosures based on the information then known and reasonably available to the party and is not excused from making such disclosures because the party has not completed investigation of the case or because the party challenges the sufficiency of another party's disclosure or because another party has not made the required disclosures. Parties shall make these disclosures in good faith and may not object to the adequacy of the disclosures until the case management conference pursuant to C.R.C.P. 16(d).

(2) **Disclosure of Expert Testimony.**

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(A) In addition to the disclosures required by subsection (a)(1) of this Rule, a party shall disclose to other parties the identity of any person who may present evidence at trial, pursuant to Rules 702, 703, or 705 of the Colorado Rules of Evidence together with an identification of the person's fields of expertise.

(B) Except as otherwise stipulated or directed by the court:

(I) Retained Experts. With respect to a witness who is retained or specially employed to provide expert testimony, or whose duties as an employee of the party regularly involve giving expert testimony, the disclosure shall be made by a written report signed by the witness. The report shall include:

(a) a complete statement of all opinions to be expressed and the basis and reasons therefor;

(b) a list of the data or other information considered by the witness in forming the opinions;

(c) references to literature that may be used during the witness's testimony;

(d) copies of any exhibits to be used as a summary of or support for the opinions;

(e) the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years;

(f) the fee agreement or schedule for the study, preparation and testimony;

(g) an itemization of the fees incurred and the time spent on the case, which shall be supplemented 14 days prior to the first day of trial; and

(h) a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

The witness's direct testimony shall be limited to matters disclosed in detail in the report.

(II) Other Experts. With respect to a party or witness who may be called to provide expert testimony but is not retained or specially employed within the description contained in subsection (a)(2)(B)(I) above, the disclosure shall be made by a written report or statement that shall include:

(a) a complete description of all opinions to be expressed and the basis and reasons therefor;

(b) a list of the qualifications of the witness; and

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(c) copies of any exhibits to be used as a summary of or support for the opinions. If the report has been prepared by the witness, it shall be signed by the witness.

If the witness does not prepare a written report, the party's lawyer or the party, if self-represented, may prepare a statement and shall sign it. The witness's direct testimony expressing an expert opinion shall be limited to matters disclosed in detail in the report or statement.

(C) Unless otherwise provided in the Case Management Order, the timing of the disclosures shall be as follows:

(I) The disclosure by a claiming party under a complaint, counterclaim, cross-claim, or third-party claim shall be made at least 126 days (18 weeks) before the trial date.

(II) The disclosure by a defending party shall be made within 28 days after service of the claiming party's disclosure, provided, however, that if the claiming party serves its disclosure earlier than required under subparagraph 26(a)(2)(C)(I), the defending party is not required to serve its disclosures until 98 days (14 weeks) before the trial date.

(III) If the evidence is intended to contradict or rebut evidence on the same subject matter identified by another party under subparagraph (a)(2)(C)(II) of this Rule, such disclosure shall be made no later than 77 days (11 weeks) before the trial date.

(3) [There is no Colorado Rule--see instead C.R.C.P. 16(c).]

(4) **Form of Disclosures; Filing.** All disclosures pursuant to subparagraphs (a)(1) and (a)(2) of this Rule shall be made in writing, in a form pursuant to C.R.C.P. 10, signed pursuant to C.R.C.P. 26(g)(1), and served upon all other parties. Disclosures shall not be filed with the court unless requested by the court or necessary for consideration of a particular issue.

(5) **Methods to Discover Additional Matters.** Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, pursuant to C.R.C.P. 34; physical and mental examinations; and requests for admission. Discovery at a place within a country having a treaty with the United States applicable to the discovery must be conducted by methods authorized by the treaty except that, if the court determines that those methods are inadequate or inequitable, it may authorize other discovery methods not prohibited by the treaty.

(b) Discovery Scope and Limits. Unless otherwise modified by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) **In General.** Subject to the limitations and considerations contained in subsection (b)(2) of this Rule, parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within the scope of discovery need not be admissible in evidence to be discoverable.

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(2) **Limitations.** Except upon order for good cause shown and subject to the proportionality factors in subsection (b)(1) of this Rule, discovery shall be limited as follows:

(A) A party may take one deposition of each adverse party and of two other persons, exclusive of persons expected to give expert testimony disclosed pursuant to subsection 26(a)(2). The scope and manner of proceeding by way of deposition and the use thereof shall otherwise be governed by C.R.C.P. 26, 28, 29, 30, 31, 32, and 45.

(B) A party may serve on each adverse party 30 written interrogatories, each of which shall consist of a single question. The scope and manner of proceeding by means of written interrogatories and the use thereof shall otherwise be governed by C.R.C.P. 26 and 33.

(C) A party may obtain a physical or mental examination (including blood group) of a party or of a person in the custody or under the legal control of a party pursuant to C.R.C.P. 35.

(D) A party may serve each adverse party requests for production of documents or tangible things or for entry, inspection or testing of land or property pursuant to C.R.C.P. 34, except such requests for production shall be limited to 20 in number, each of which shall consist of a single request.

(E) A party may serve on each adverse party 20 requests for admission, each of which shall consist of a single request. A party may also serve requests for admission of the genuineness of up to 50 separate documents that the party intends to offer into evidence at trial. The scope and manner of proceeding by means of requests for admission and the use thereof shall otherwise be governed by C.R.C.P. 36.

(F) In determining good cause to modify the limitations of this subsection (b)(2), the court shall consider the following:

(I) whether the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(II) whether the party seeking discovery has had ample opportunity by disclosure or discovery in the action to obtain the information sought;

(III) whether the proposed discovery is outside the scope permitted by C.R.C.P. 26(b)(1); and

(IV) whether because of the number of parties and their alignment with respect to the underlying claims and defenses, the proposed discovery is reasonable.

(3) **Trial Preparation: Materials.** Subject to the provisions of subsection (b)(4) of this Rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this Rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials

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in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of C.R.C.P. 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is:

(A) a written statement signed or otherwise adopted or approved by the person making it, or

(B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) **Trial Preparation: Experts.**

(A) A party may depose any person who has been identified as an expert disclosed pursuant to subsection 26(a)(2)(B)(I) of this Rule whose opinions may be presented at trial. Each deposition shall not exceed 6 hours. On the application of any party, the court may decrease or increase the time permitted after considering the proportionality criteria in subsection (b)(1) of this Rule. Except to the extent otherwise stipulated by the parties or ordered by the court, no discovery, including depositions, concerning either the identity or the opinion of experts shall be conducted until after the disclosures required by subsection (a)(2) of this Rule.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial, and who is not expected to be called as a witness at trial only as provided by C.R.C.P. 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subsection (b)(4); and (ii) with respect to discovery obtained pursuant to subsection (b)(4)(B) of this Rule, the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(D) Rule 26(b)(3) protects from disclosure and discovery drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded, and protects communications between the party's attorney and any witness disclosed under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(I) relate to the compensation for the expert's study, preparation, or testimony;

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(II) identify facts or data that the party's attorney provided and which the expert considered in forming the opinions to be expressed; or

(III) identify the assumptions that the party's attorney provided and that the expert relied on in forming opinions to be expressed.

(5)(A) **Claims of Privilege or Protection of Trial Preparation Materials.** When a party withholds information required to be disclosed or provided in discovery by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(B) If information produced in disclosures or discovery is subject to a claim of privilege or of protection as trial-preparation material the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must not review, use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and shall give notice to the party making the claim within 14 days if it contests the claim. If the claim is not contested within the 14-day period, or is timely contested but resolved in favor of the party claiming privilege or protection of trial-preparation material, then the receiving party must also promptly return, sequester, or destroy the specified information and any copies that the receiving party has. If the claim is contested, the party making the claim shall present the information to the court under seal for a determination of the claim within 14 days after receiving such notice, or the claim is waived. The producing party must preserve the information until the claim is resolved, and bears the burden of proving the basis of the claim and that the claim was not waived. All notices under this Rule shall be in writing.

(c) Protective Orders. Upon motion by a party or by the person from whom disclosure is due or discovery is sought, accompanied by a certificate that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the disclosure or discovery not be had;

(2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place or the allocation of expenses;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

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(6) that a deposition, after being sealed, be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

(d) Timing and Sequence of Discovery. Except when authorized by these Rules, by order, or by agreement of the parties, a party may not seek discovery from any source before service of the Case Management Order pursuant to C.R.C.P. 16(b)(18). Any discovery conducted prior to issuance of the Case Management Order shall not exceed the limitations established by C.R.C.P. 26(b)(2). Unless the parties stipulate or the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of Disclosures, Responses, and Expert Reports and Statements. A party is under a duty to supplement its disclosures under section (a) of this Rule when the party learns that the information disclosed is incomplete or incorrect in some material respect and if the additional or corrective information has not otherwise been made known to the other parties during the disclosure or discovery process, including information relating to anticipated rebuttal but not including information to be used solely for impeachment of a witness. A party is under a duty to amend a prior response to an interrogatory, request for production or request for admission when the party learns that the prior response is incomplete or incorrect in some material respect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process. With respect to experts, the duty to supplement or correct extends both to information contained in the expert's report or statement disclosed pursuant to section (a)(2)(B) of this Rule and to information provided through any deposition of the expert. If a party intends to offer expert testimony on direct examination that has not been disclosed pursuant to section (a)(2)(B) of this Rule on the basis that the expert provided the information through a deposition, the report or statement previously provided shall be supplemented to include a specific description of the deposition testimony relied on. Nothing in this section requires the court to permit an expert to testify as to opinions other than those disclosed in detail in the initial expert report or statement except that if the opinions and bases and reasons therefor are disclosed during the deposition of the expert by the adverse party, the court must permit the testimony at trial unless the court finds that the opposing party has been unfairly prejudiced by the failure to make disclosure in the initial expert report. Supplementation shall be performed in a timely manner.

(f) [No Colorado Rule--See C.R.C.P. 16].

(g) Signing of Disclosures, Discovery Requests, Responses, and Objections.

(1) Every disclosure made pursuant to subsections (a)(1) or (a)(2) of this Rule shall be signed by at least one attorney of record in the attorney's individual name. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(2) Every discovery request, or response, or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name. An unrepresented party shall sign the request, response, or objection

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and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information and belief, formed after a reasonable inquiry, the request, response or objection is:

(A) Consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(B) Not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(C) Not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

If a request, response or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

(3) If without substantial justification a certification is made in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who made the certification, the party on whose behalf the disclosure, request, response or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including reasonable attorney fees.

Credits

Repealed and Adopted eff. Jan. 1, 1995. Amended eff. Jan. 9, 1995, for all cases filed on or after that date; Jan. 1, 1998; July 1, 2001; Jan. 1, 2002; amended Oct. 20, 2005, eff. Jan. 1, 2006; Jan. 1, 2012; Sept. 18, 2014; effective July 1, 2015 for cases filed on or after July 1, 2015.

Editors' Notes

COMMENTS

1995

SCOPE

[1] Because of its timing and interrelationship with C.R.C.P. 16, C.R.C.P. 26 does not apply to domestic relations, mental health, water law, forcible entry and detainer, C.R.C.P. 120, or other expedited proceedings. However, the Court in those proceedings may use C.R.C.P. 26 and C.R.C.P. 16 to the extent helpful to the case. In most instances, only the timing will need to be modified.

COLORADO DIFFERENCES

[2] Revised C.R.C.P. 26 is patterned largely after Fed.R.Civ.P. 26 as amended in 1993 and 2000 and uses substantially the same numbering. There are differences, however. The differences are to fit disclosure/discovery requirements of Colorado's case/trial management system set forth in C.R.C.P. 16, which is very different from its Federal Rule

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counterpart. The interrelationship between C.R.C.P. 26 and C.R.C.P. 16 is described in the Committee Comment to C.R.C.P. 16.

[3] The Colorado differences from the Fed.R.Civ.P. are: (1) timing and scope of mandatory automatic disclosures is different (C.R.C.P. 16(b)); (2) the two types of experts in the Federal Rule are clarified by the State Rule (C.R.C.P. 26(a)(2)(B)), and disclosure of expert opinions is made at a more realistic time in the proceedings (C.R.C.P. 26(a)(2)(C)); (3) sequenced disclosure of expert opinions is prescribed in C.R.C.P. 26(a)(2)(C) to avoid proliferation of experts and related expenses; (4) the parties may use a summary of an expert's testimony in lieu of a report prepared by the expert to reduce expenses (C.R.C.P. 26(a)(2)(B)); (5) claiming privilege/protection of work product (C.R.C.P. 26(b)(5)) and supplementation/correction provisions (C.R.C.P. 26(e)) are relocated in the State Rules to clarify that they apply to both disclosures and discovery; (6) a Motion for Protective Order stays a deposition under the State Rules (C.R.C.P. 121 § 1-12) but not the Federal Rule (Fed.R.Civ.P. 26(c)); (7) presumptive limitations on discovery as contemplated by C.R.C.P. 16(b)(1)(VI) are built into the rule (see C.R.C.P. 26(b)(2)); (8) counsel must certify that they have informed their clients of the expense of the discovery they schedule (C.R.C.P. 16(b)(1)(IV)); (9) the parties cannot stipulate out of the C.R.C.P. 26(b)(2) presumptive discovery limitations (C.R.C.P. 29); and (10) pretrial endorsements governed by Fed.R.Civ.P. 26(a)(3) are part of Colorado's trial management system established by C.R.C.P. 16(c) and C.R.C.P. 16(d).

[4] As with the Federal Rule, the extent of disclosure is dependent upon the specificity of disputed facts in the opposing party's pleading (facilitated by the requirement in C.R.C.P. 16(b) that lead counsel confer about the nature and basis of the claims and defenses before making the required disclosures). If a party expects full disclosure, that party needs to set forth the nature of the claim or defense with reasonable specificity. Specificity is not inconsistent with the requirement in C.R.C.P. 8 for a “short, plain statement” of a party's claims or defenses. Obviously, to the extent there is disclosure, discovery is unnecessary. Discovery is limited under this system.

FEDERAL COMMITTEE NOTES

[5] Federal “Committee Notes” to the December 1, 1993 and December 1, 2000 amendments of Fed.R.Civ.P. 26 are incorporated by reference and where applicable should be used for interpretive guidance.

[6] The most dramatic change in C.R.C.P. 26 is the addition of a disclosure system. Parties are required to disclose specified information without awaiting a discovery demand. Such disclosure is, however, tied to the nature and basis of the claims and defenses of the case as set forth in the parties' pleadings facilitated by the requirement that lead counsel confer about such matters before making the required disclosures.

[7] Subparagraphs (a)(1)(A) and (a)(1)(B) of C.R.C.P. 26 require disclosure of persons, documents and things likely to provide discoverable information relative to disputed facts alleged with particularity in the pleadings. Disclosure relates to disputed facts, not admitted facts. The reference to particularity in the pleadings (coupled with the requirement that lead counsel confer) responds to the concern that notice pleading suggests a scope of disclosure out of proportion to any real need or use. To the contrary, the greater the specificity and clarity of the pleadings facilitated by communication through the C.R.C.P. 16(b) conference, the more complete and focused should be the listing of witnesses, documents, and things so that the parties can tailor the scope of disclosure to the actual needs of the case.

[8] It should also be noted that two types of experts are contemplated by Fed.R.Civ.P. and C.R.C.P. 26(a)(2). The experts contemplated in subsection (a)(2)(B)(II) are persons such as treating physicians, police officers, or others who may testify as expert witnesses and whose opinions are formed as a part of their occupational duties (except when the person is an employee of the party calling the witness). This more limited disclosure has been incorporated into the State Rule because it was deemed inappropriate and unduly burdensome to require all of the information required by C.R.C.P. 26(a)(2)(B)(I) for C.R.C.P. 26(a)(2)(B)(II) type experts.

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2001 COLORADO CHANGES

[9] The change to C.R.C.P. 26(a)(2)(C)(II) effective July 1, 2001, is intended to prevent a plaintiff, who may have had a year or more to prepare his or her case, from filing an expert report early in the case in order to force a defendant to prepare a virtually immediate response. That change clarifies that the defendant's expert report will not be due until 90 days prior to trial.

[10] The change to C.R.C.P. 26(b)(2)(A) effective July 1, 2001 was made to clarify that the number of depositions limitation does not apply to persons expected to give expert testimony disclosed pursuant to subsection 26(a)(2).

[11] The special and limited form of request for admission in C.R.C.P. 26(b)(2)(E) effective July 1, 2001, allows a party to seek admissions as to authenticity of documents to be offered at trial without having to wait until preparation of the Trial Management Order to discover whether the opponent challenges the foundation of certain documents. Thus, a party can be prepared to call witnesses to authenticate documents if the other party refuses to admit their authenticity.

[12] The amendment of C.R.C.P. 26(b)(1) effective January 1, 2002 is patterned after the December, 2000 amendment of the corresponding Federal rule. The amendment should not prevent a party from conducting discovery to seek impeachment evidence or evidence concerning prior acts.

2015

[13] Rule 26 sets the basis for discovery of information by: (1) defining the scope of discovery (26(b)(1)); (2) requiring certain initial disclosures prior to discovery (26(a)(1)); (3) placing presumptive limits on the types of permitted discovery (26(b)(2)); and (4) describing expert disclosure and discovery (26(a)(2) and 26(b)(4)).

[14] Scope of discovery.

Perhaps the most significant 2015 amendments are in Rule 26(b)(1). This language is taken directly from the proposed Fed. R. Civ. P. 26(b)(1). (For a more complete statement of the changes and their rationales, one can read the extensive commentary proposed for the Federal Rule.) First, the slightly reworded concept of proportionality is moved from its former hiding place in C.R.C.P. 26(b)(2)(F)(iii) into the very definition of what information is discoverable. Second, discovery is limited to matters relevant to the specific claims or defenses of any party and is no longer permitted simply because it is relevant to the "subject matter involved in the action." Third, it is made clear that while evidence need not be admissible to be discoverable, this does not permit broadening the basic scope of discovery. In short, the concept is to allow discovery of what a party/lawyer *needs* to prove its case, but not what a party/lawyer *wants* to know about the subject of a case.

[15] Proportionality analysis.

C.R.C.P. 26(b)(1) requires courts to apply the principle of proportionality in determining the extent of discovery that will be permitted. The Rule lists a number of non-exclusive factors that should be considered. Not every factor will apply in every case. The nature of the particular case may make some factors predominant and other factors insignificant. For example, the amount in controversy may not be an important consideration when fundamental or constitutional rights are implicated, or where the public interest demands a resolution of the issue, irrespective of the economic consequences. In certain types of litigation, such as employment or professional liability cases, the parties' relative access to relevant information may be the most important factor. These examples show that the factors cannot be applied as a mathematical formula. Rather, trial judges have and must exercise discretion, on a case-by-

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case basis, to effectuate the purposes of these rules, and, in particular, abide by the overarching command that the rules "shall be liberally construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action." C.R.C.P. 1.

[16] Limitations on discovery.

The presumptive limitations on discovery in Rule 26(b)(2)-- *e.g.*, a deposition of an adverse party and two other persons, only 30 interrogatories, etc.--have not been changed from the prior rule. They may, however, be reduced or increased by stipulation of the parties with court approval, consistent with the requirement of proportionality.

[17] Initial disclosures.

Amendments to Rule 26(a)(1) concerning initial disclosures are not as significant as those to Rule 26(b)(1). Nonetheless, it is intended that disclosures should be quite complete and that, therefore, further discovery should not be as necessary as it has been historically. In this regard, the amendment to section (a)(1) adds to the requirement of disclosing four categories of information and that the disclosure include information "whether or not supportive" of the disclosing party's case. This should not be a significant change from prior practice. In 2000, Fed. R. Civ. P. 26(a)(1) was changed to narrow the initial disclosure requirements to information a party might use to support its position. The Colorado Supreme Court has not adopted that limitation, and continues to require identification of persons and documents that are relevant to disputed facts alleged with particularity in the pleadings. Thus, it was intended that disclosures were to include matter that might be harmful as well as supportive. (Limiting disclosure to supportive information likely would only encourage initial interrogatories and document requests that would require disclosure of harmful information.)

Changes to subsections (A) (persons with information) and (B) (documents) of Rule 26(a)(1) require information related to claims for relief and defenses (consistent with the scope of discovery in Rule 26(b)(1)). Also the identification of persons with relevant information calls for a "brief *description* of the *specific* information that each individual is known or believed to possess." Under the prior rule, disclosures of persons with discoverable information identifying "the subjects of information" tended to identify numerous persons with the identification of "X is expected to have information about and may testify relating to the facts of this case." The change is designed to avoid that practice and obtain some better idea of which witnesses might actually have genuinely significant information.

[18] Expert disclosures.

Retained experts must sign written reports much as before except with more disclosure of their fees. The option of submitting a "summary" of expert opinions is eliminated. Their testimony is limited to what is disclosed in detail in their report. Rule 26(a)(2)(B)(I).

"Other" (non-retained) experts must make disclosures that are less detailed. Many times a lawyer has no control over a non-retained expert, such as a treating physician or police officer, and thus the option of a "statement" must be preserved with respect to this type of expert, which, if necessary, may be prepared by the lawyers. In either event, the expert testimony is to be limited to what is disclosed in detail in the disclosure. Rule 26(a)(2)(B)(II).

[19] Retained or non-retained experts.

Non-retained experts are persons whose opinions are formed or reasonably derived from or based on their occupational duties.

[20] Expert discovery.

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The prohibition of depositions of experts was perhaps the most controversial aspect of CAPP. Many lawyers, particularly those involved in professional liability cases, argued that a blanket prohibition of depositions of experts would impair lawyers' ability to evaluate cases and thus frustrate settlement of cases. The 2015 amendment permits limited depositions of experts. Retained experts may be deposed for up to 6 hours, unless changed by the court, which must consider proportionality. Rule 26(b)(4)(A).

The 2015 amendment also requires that, if a deposition reveals additional opinions, previous expert disclosures must be supplemented before trial if the witness is to be allowed to express these new opinions at trial. Rule 26(e). This change addresses, and prohibits, the fairly frequent and abusive practice of lawyers simply saying that the expert report is supplemented by the "deposition." However, even with the required supplementation, the trial court is not required to allow the new opinions in evidence. *Id.*

The 2015 amendments to Rule 26, like the current and proposed version of Fed. R. Civ. P. 26, emphasize the application of the concept of proportionality to disclosure and discovery, with robust disclosure followed by limited discovery.

[21] Sufficiency of disclosure of expert opinions and the bases therefor.

This rule requires detailed disclosures of "all opinions to be expressed [by the expert] and the basis and reasons therefor." Such disclosures ensure that the parties know, well in advance of trial, the substance of all expert opinions that may be offered at trial. Detailed disclosures facilitate the trial, avoid delays, and enhance the prospect for settlement. At the same time, courts and parties must "liberally construe, administer and employ" these rules "to secure the just, speedy, and inexpensive determination of every action." C.R.C.P. 1. Rule 26(a)(2) does not prohibit disclosures that incorporate by specific page reference previously disclosed records of the designated expert (including non-retained experts), provided that the designated pages set forth the opinions to be expressed, along with the reasons and basis therefor. This Rule does not require that disclosures match, verbatim, the testimony at trial. Reasonableness and the overarching goal of a fair resolution of disputes are the touchstones. If an expert's opinions and facts supporting the opinions are disclosed in a manner that gives the opposing party reasonable notice of the specific opinions and supporting facts, the purpose of the rule is accomplished. In the absence of substantial prejudice to the opposing party, this rule does not require exclusion of testimony merely because of technical defects in disclosure.

Notes of Decisions (393)

Rules Civ. Proc., Rule 26, CO ST RCP Rule 26
Current with amendments received through August 15, 2015

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Utah Rules of Civil Procedure, Rule 26

RULE 26. GENERAL PROVISIONS GOVERNING DISCLOSURE AND DISCOVERY

Currentness

(a) Disclosure. This rule applies unless changed or supplemented by a rule governing disclosure and discovery in a practice area.

(a)(1) *Initial disclosures.* Except in cases exempt under paragraph (a)(3), a party shall, without waiting for a discovery request, serve on the other parties:

(a)(1)(A) the name and, if known, the address and telephone number of:

(a)(1)(A)(i) each individual likely to have discoverable information supporting its claims or defenses, unless solely for impeachment, identifying the subjects of the information; and

(a)(1)(A)(ii) each fact witness the party may call in its case-in-chief and, except for an adverse party, a summary of the expected testimony;

(a)(1)(B) a copy of all documents, data compilations, electronically stored information, and tangible things in the possession or control of the party that the party may offer in its case-in-chief, except charts, summaries and demonstrative exhibits that have not yet been prepared and must be disclosed in accordance with paragraph (a)(5);

(a)(1)(C) a computation of any damages claimed and a copy of all discoverable documents or evidentiary material on which such computation is based, including materials about the nature and extent of injuries suffered;

(a)(1)(D) a copy of any agreement under which any person may be liable to satisfy part or all of a judgment or to indemnify or reimburse for payments made to satisfy the judgment; and

(a)(1)(E) a copy of all documents to which a party refers in its pleadings.

(a)(2) *Timing of initial disclosures.* The disclosures required by paragraph (a)(1) shall be served on the other parties:

(a)(2)(A) by the plaintiff within 14 days after filing of the first answer to the complaint; and

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(a)(2)(B) by the defendant within 42 days after filing of the first answer to the complaint or within 28 days after that defendant's appearance, whichever is later.

(a)(3) *Exemptions.*

(a)(3)(A) Unless otherwise ordered by the court or agreed to by the parties, the requirements of paragraph (a)(1) do not apply to actions:

(a)(3)(A)(i) for judicial review of adjudicative proceedings or rule making proceedings of an administrative agency;

(a)(3)(A)(ii) governed by Rule 65B or Rule 65C;

(a)(3)(A)(iii) to enforce an arbitration award;

(a)(3)(A)(iv) for water rights general adjudication under Title 73, Chapter 4, Determination of Water Rights.

(a)(3)(B) In an exempt action, the matters subject to disclosure under paragraph (a)(1) are subject to discovery under paragraph (b).

(a)(4) *Expert testimony.*

(a)(4)(A) Disclosure of expert testimony. A party shall, without waiting for a discovery request, serve on the other parties the following information regarding any person who may be used at trial to present evidence under Rule 702 of the **Utah** Rules of Evidence and who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony: (i) the expert's name and qualifications, including a list of all publications authored within the preceding 10 years, and a list of any other cases in which the expert has testified as an expert at trial or by deposition within the preceding four years, (ii) a brief summary of the opinions to which the witness is expected to testify, (iii) all data and other information that will be relied upon by the witness in forming those opinions, and (iv) the compensation to be paid for the witness's study and testimony.

(a)(4)(B) Limits on expert discovery. Further discovery may be obtained from an expert witness either by deposition or by written report. A deposition shall not exceed four hours and the party taking the deposition shall pay the expert's reasonable hourly fees for attendance at the deposition. A report shall be signed by the expert and shall contain a complete statement of all opinions the expert will offer at trial and the basis and reasons for them. Such an expert may not testify in a party's case-in-chief concerning any matter not fairly disclosed in the report. The party offering the expert shall pay the costs for the report.

(a)(4)(C) Timing for expert discovery.

(a)(4)(C)(i) The party who bears the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the close of fact discovery. Within seven days

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thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(C)(ii) The party who does not bear the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the later of (A) the date on which the election under paragraph (a)(4)(C)(i) is due, or (B) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(i). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(C)(iii) If the party who bears the burden of proof on an issue wants to designate rebuttal expert witnesses it shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the later of (A) the date on which the election under paragraph (a)(4)(C)(ii) is due, or (B) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(ii). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(D) Multiparty actions. In multiparty actions, all parties opposing the expert must agree on either a report or a deposition. If all parties opposing the expert do not agree, then further discovery of the expert may be obtained only by deposition pursuant to paragraph (a)(4)(B) and Rule 30.

(a)(4)(E) Summary of non-retained expert testimony. If a party intends to present evidence at trial under Rule 702 of the **Utah** Rules of Evidence from any person other than an expert witness who is retained or specially employed to provide testimony in the case or a person whose duties as an employee of the party regularly involve giving expert testimony, that party must serve on the other parties a written summary of the facts and opinions to which the witness is expected to testify in accordance with the deadlines set forth in paragraph (a)(4)(C). A deposition of such a witness may not exceed four hours.

(a)(5) *Pretrial disclosures.*

(a)(5)(A) A party shall, without waiting for a discovery request, serve on the other parties:

(a)(5)(A)(i) the name and, if not previously provided, the address and telephone number of each witness, unless solely for impeachment, separately identifying witnesses the party will call and witnesses the party may call;

(a)(5)(A)(ii) the name of witnesses whose testimony is expected to be presented by transcript of a deposition and a copy of the transcript with the proposed testimony designated; and

(a)(5)(A)(iii) a copy of each exhibit, including charts, summaries and demonstrative exhibits, unless solely for impeachment, separately identifying those which the party will offer and those which the party may offer.

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(a)(5)(B) Disclosure required by paragraph (a)(5) shall be served on the other parties at least 28 days before trial. At least 14 days before trial, a party shall serve and file counter designations of deposition testimony, objections and grounds for the objections to the use of a deposition and to the admissibility of exhibits. Other than objections under Rules 402 and 403 of the **Utah** Rules of Evidence, objections not listed are waived unless excused by the court for good cause.

(b) Discovery scope.

(b)(1) *In general.* Parties may discover any matter, not privileged, which is relevant to the claim or defense of any party if the discovery satisfies the standards of proportionality set forth below. Privileged matters that are not discoverable or admissible in any proceeding of any kind or character include all information in any form provided during and created specifically as part of a request for an investigation, the investigation, findings, or conclusions of peer review, care review, or quality assurance processes of any organization of health care providers as defined in the **Utah** Health Care Malpractice Act for the purpose of evaluating care provided to reduce morbidity and mortality or to improve the quality of medical care, or for the purpose of peer review of the ethics, competence, or professional conduct of any health care provider.

(b)(2) *Proportionality.* Discovery and discovery requests are proportional if:

(b)(2)(A) the discovery is reasonable, considering the needs of the case, the amount in controversy, the complexity of the case, the parties' resources, the importance of the issues, and the importance of the discovery in resolving the issues;

(b)(2)(B) the likely benefits of the proposed discovery outweigh the burden or expense;

(b)(2)(C) the discovery is consistent with the overall case management and will further the just, speedy and inexpensive determination of the case;

(b)(2)(D) the discovery is not unreasonably cumulative or duplicative;

(b)(2)(E) the information cannot be obtained from another source that is more convenient, less burdensome or less expensive; and

(b)(2)(F) the party seeking discovery has not had sufficient opportunity to obtain the information by discovery or otherwise, taking into account the parties' relative access to the information.

(b)(3) *Burden.* The party seeking discovery always has the burden of showing proportionality and relevance. To ensure proportionality, the court may enter orders under Rule 37.

(b)(4) *Electronically stored information.* A party claiming that electronically stored information is not reasonably accessible because of undue burden or cost shall describe the source of the electronically stored information, the nature and extent of the burden, the nature of the information not provided, and any other information that will enable other parties to evaluate the claim.

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(b)(5) *Trial preparation materials.* A party may obtain otherwise discoverable documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials and that the party is unable without undue hardship to obtain substantially equivalent materials by other means. In ordering discovery of such materials, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.

(b)(6) *Statement previously made about the action.* A party may obtain without the showing required in paragraph (b)(5) a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement about the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order under Rule 37. A statement previously made is (A) a written statement signed or approved by the person making it, or (B) a stenographic, mechanical, electronic, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(b)(7) *Trial preparation; experts.*

(b)(7)(A) Trial-preparation protection for draft reports or disclosures. Paragraph (b)(5) protects drafts of any report or disclosure required under paragraph (a)(4), regardless of the form in which the draft is recorded.

(b)(7)(B) Trial-preparation protection for communications between a party's attorney and expert witnesses. Paragraph (b)(5) protects communications between the party's attorney and any witness required to provide disclosures under paragraph (a)(4), regardless of the form of the communications, except to the extent that the communications:

(b)(7)(B)(i) relate to compensation for the expert's study or testimony;

(b)(7)(B)(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(b)(7)(B)(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(b)(7)(C) Expert employed only for trial preparation. Ordinarily, a party may not, by interrogatories or otherwise, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. A party may do so only:

(b)(7)(C)(i) as provided in Rule 35(b); or

(b)(7)(C)(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(b)(8) *Claims of privilege or protection of trial preparation materials.*

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(b)(8)(A) Information withheld. If a party withholds discoverable information by claiming that it is privileged or prepared in anticipation of litigation or for trial, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced in a manner that, without revealing the information itself, will enable other parties to evaluate the claim.

(b)(8)(B) Information produced. If a party produces information that the party claims is privileged or prepared in anticipation of litigation or for trial, the producing party may notify any receiving party of the claim and the basis for it. After being notified, a receiving party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

(c) Methods, sequence and timing of discovery; tiers; limits on standard discovery; extraordinary discovery.

(c)(1) *Methods of discovery.* Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; requests for admission; and subpoenas other than for a court hearing or trial.

(c)(2) *Sequence and timing of discovery.* Methods of discovery may be used in any sequence, and the fact that a party is conducting discovery shall not delay any other party's discovery. Except for cases exempt under paragraph (a)(3), a party may not seek discovery from any source before that party's initial disclosure obligations are satisfied.

(c)(3) *Definition of tiers for standard discovery.* Actions claiming $50,000 or less in damages are permitted standard discovery as described for Tier 1. Actions claiming more than $50,000 and less than $300,000 in damages are permitted standard discovery as described for Tier 2. Actions claiming $300,000 or more in damages are permitted standard discovery as described for Tier 3. Absent an accompanying damage claim for more than $300,000, actions claiming non-monetary relief are permitted standard discovery as described for Tier 2.

(c)(4) *Definition of damages.* For purposes of determining standard discovery, the amount of damages includes the total of all monetary damages sought (without duplication for alternative theories) by all parties in all claims for relief in the original pleadings.

(c)(5) *Limits on standard fact discovery.* Standard fact discovery per side (plaintiffs collectively, defendants collectively, and third-party defendants collectively) in each tier is as follows. The days to complete standard fact discovery are calculated from the date the first defendant's first disclosure is due and do not include expert discovery under paragraphs(a)(4)(C) and (D).

Tier	Amount of Damages	Total Fact Deposition Hours	Rule 33 Interrogatories including all discrete subparts	Rule 34 Requests for Production	Rule 36 Requests for Admission	Days to Complete Standard Fact Discovery

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1	$50,000 or less	3	0	5	5	120
2	More than $50,000 and less than $300,000 or non-monetary relief	15	10	10	10	180
3	$300,000 or more	30	20	20	20	210

(c)(6) *Extraordinary discovery.* To obtain discovery beyond the limits established in paragraph (c)(5), a party shall file:

(c)(6)(A) before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a stipulated statement that extraordinary discovery is necessary and proportional under paragraph (b)(2) and that each party has reviewed and approved a discovery budget; or

(c)(6)(B) before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a request for extraordinary discovery under Rule 37(a).

(d) Requirements for disclosure or response; disclosure or response by an organization; failure to disclose; initial and supplemental disclosures and responses.

(d)(1) A party shall make disclosures and responses to discovery based on the information then known or reasonably available to the party.

(d)(2) If the party providing disclosure or responding to discovery is a corporation, partnership, association, or governmental agency, the party shall act through one or more officers, directors, managing agents, or other persons, who shall make disclosures and responses to discovery based on the information then known or reasonably available to the party.

(d)(3) A party is not excused from making disclosures or responses because the party has not completed investigating the case or because the party challenges the sufficiency of another party's disclosures or responses or because another party has not made disclosures or responses.

(d)(4) If a party fails to disclose or to supplement timely a disclosure or response to discovery, that party may not use the undisclosed witness, document or material at any hearing or trial unless the failure is harmless or the party shows good cause for the failure.

(d)(5) If a party learns that a disclosure or response is incomplete or incorrect in some important way, the party must timely serve on the other parties the additional or correct information if it has not been made known to the other parties. The supplemental disclosure or response must state why the additional or correct information was not previously provided.

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(e) Signing discovery requests, responses, and objections. Every disclosure, request for discovery, response to a request for discovery and objection to a request for discovery shall be in writing and signed by at least one attorney of record or by the party if the party is not represented. The signature of the attorney or party is a certification under Rule 11. If a request or response is not signed, the receiving party does not need to take any action with respect to it. If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, may take any action authorized by Rule 11 or Rule 37(b).

(f) Filing. Except as required by these rules or ordered by the court, a party shall not file with the court a disclosure, a request for discovery or a response to a request for discovery, but shall file only the certificate of service stating that the disclosure, request for discovery or response has been served on the other parties and the date of service.

Credits

[Effective May 2, 2005; amended effective November 1, 2007; November 1, 2008; November 1, 2011; March 6, 2012; April 1, 2013; May 1, 2015.]

Editors' Notes

ADVISORY COMMITTEE NOTES

Disclosure requirements and timing. Rule 26(a)(1). The 2011 amendments seek to reduce discovery costs by requiring each party to produce, at an early stage in the case, and without a discovery request, all of the documents and physical evidence the party may offer in its case-in-chief and the names of witnesses the party may call in its case-in-chief, with a description of their expected testimony. In this respect, the amendments build on the initial disclosure requirements of the prior rules. In addition to the disclosures required by the prior version of Rule 26(a)(1), a party must disclose each fact witness the party may call in its case-in-chief and a summary of the witness's expected testimony, a copy of all documents the party may offer in its case-in-chief, and all documents to which a party refers in its pleadings.

Not all information will be known at the outset of a case. If discovery is serving its proper purpose, additional witnesses, documents, and other information will be identified. The scope and the level of detail required in the initial Rule 26(a)(1) disclosures should be viewed in light of this reality. A party is not required to interview every witness it ultimately may call at trial in order to provide a summary of the witness's expected testimony. As the information becomes known, it should be disclosed. No summaries are required for adverse parties, including management level employees of business entities, because opposing lawyers are unable to interview them and their testimony is available to their own counsel. For uncooperative or hostile witnesses any summary of expected testimony would necessarily be limited to the subject areas the witness is reasonably expected to testify about. For example, defense counsel may be unable to interview a treating physician, so the initial summary may only disclose that the witness will be questioned concerning the plaintiff's diagnosis, treatment and prognosis. After medical records have been obtained, the summary may be expanded or refined.

Subject to the foregoing qualifications, the summary of the witness's expected testimony should be just that--a summary. The rule does not require prefiled testimony or detailed descriptions of everything a witness might say at trial. On the other hand, it requires more than the broad, conclusory statements that often were made under the prior version of Rule 26(a)(1)(e.g., “The witness will testify about the events in question” or “The witness will testify on causation.”). The intent of this requirement is to give the other side basic information concerning the subjects about which the witness is expected to testify at trial, so that the other side may determine the witness's relative importance in the case, whether the witness should be interviewed or deposed, and whether additional documents or information concerning the witness should be sought. This information is important because of the other discovery limits contained in the 2011 amendments, particularly the limits on depositions.

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Likewise, the documents that should be provided as part of the Rule 26(a)(1) disclosures are those that a party reasonably believes it may use at trial, understanding that not all documents will be available at the outset of a case. In this regard, it is important to remember that the duty to provide documents and witness information is a continuing one, and disclosures must be promptly supplemented as new evidence and witnesses become known as the case progresses.

The amendments also require parties to provide more information about damages early in the case. Too often, the subject of damages is deferred until late in the case. Early disclosure of damages information is important. Among other things, it is a critical factor in determining proportionality. The committee recognizes that damages often require additional discovery, and typically are the subject of expert testimony. The Rule is not intended to require expert disclosures at the outset of a case. At the same time, the subject of damages should not simply be deferred until expert discovery. Parties should make a good faith attempt to compute damages to the extent it is possible to do so and must in any event provide all discoverable information on the subject, including materials related to the nature and extent of the damages.

The penalty for failing to make timely disclosures is that the evidence may not be used in the party's case-in-chief. To make the disclosure requirement meaningful, and to discourage sandbagging, parties must know that if they fail to disclose important information that is helpful to their case, they will not be able to use that information at trial. The courts will be expected to enforce them unless the failure is harmless or the party shows good cause for the failure.

The 2011 amendments also change the time for making these required disclosures. Because the plaintiff controls when it brings the action, plaintiffs must make their disclosures within 14 days after service of the first answer. A defendant is required to make its disclosures within 28 days after the plaintiff's first disclosure or after that defendant's appearance, whichever is later. The purpose of early disclosure is to have all parties present the evidence they expect to use to prove their claims or defenses, thereby giving the opposing party the ability to better evaluate the case and determine what additional discovery is necessary and proportional.

The time periods for making Rule 26(a)(1) disclosures, and the presumptive deadlines for completing fact discovery, are keyed to the filing of an answer. If a defendant files a motion to dismiss or other Rule 12(b) motion in lieu of an answer, these time periods normally would be not begin to run until that motion is resolved.

Finally, the 2011 amendments eliminate two categories of actions that previously were exempt from the mandatory disclosure requirements. Specifically, the amendments eliminate the prior exemption for contract actions in which the amount claimed is $20,000 or less, and actions in which any party is proceeding pro se. In the committee's view, these types of actions will benefit from the early disclosure requirements and the overall reduced cost of discovery.

Expert disclosures and timing. Rule 26(a)(3). Expert discovery has become an ever-increasing component of discovery cost. The prior rules sought to eliminate some of these costs by requiring the written disclosure of the expert's opinions and other background information. However, because the expert was not required to sign these disclosures, and because experts often were allowed to deviate from the opinions disclosed, attorneys typically would take the expert's deposition to ensure the expert would not offer “surprise” testimony at trial, thereby increasing rather than decreasing the overall cost. The amendments seek to remedy this and other costs associated with expert discovery by, among other things, allowing the opponent to choose either a deposition of the expert or a written report, but not both; in the case of written reports, requiring more comprehensive disclosures, signed by the expert, and making clear that experts will not be allowed to testify beyond what is fairly disclosed in a report, all with the goal of making reports a reliable substitute for depositions; and incorporating a rule that protects from discovery most communications between an attorney and retained expert. Discovery of expert opinions and testimony is automatic under Rule 26(a)(3) and parties are not required to serve interrogatories or use other discovery devices to obtain this information.

Disclosures of expert testimony are made in sequence, with the party who bears the burden of proof on the issue for which expert testimony will be offered going first. Within seven days after the close of fact discovery, that party must disclose: (i) the expert's curriculum vitae identifying the expert's qualifications, publications, and prior testimony; (ii) compensation information; (iii)

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a brief summary of the opinions the expert will offer; and (iv) a complete copy of the expert's file for the case. The file should include all of the facts and data that the expert has relied upon in forming the expert's opinions. If the expert has prepared summaries of data, spreadsheets, charts, tables, or similar materials, they should be included. If the expert has used software programs to make calculations or otherwise summarize or organize data, that information and underlying formulas should be provided in native form so it can be analyzed and understood. To the extent the expert is relying on depositions or materials produced in discovery, then a list of the specific materials relied upon is sufficient. The committee recognizes that experts frequently will prepare demonstrative exhibits or other aids to illustrate the expert's testimony at trial, and the costs for preparing these materials can be substantial. For that reason, these types of demonstrative aids may be prepared and disclosed later, as part of the Rule 26(a)(4) pretrial disclosures when trial is imminent.

Within seven days after this disclosure, the party opposing the retained expert may elect either a deposition or a written report from the expert. A deposition is limited to four hours, which is not included in the deposition hours under Rule 26(c)(5), and the party taking it must pay the expert's hourly fee for attending the deposition. If a party elects a written report, the expert must provide a signed report containing a complete statement of all opinions the expert will express and the basis and reasons for them. The intent is not to require a verbatim transcript of exactly what the expert will say at trial; instead the expert must fairly disclose the substance of and basis for each opinion the expert will offer. The expert may not testify in a party's case in chief concerning any matter that is not fairly disclosed in the report. To achieve the goal of making reports a reliable substitute for depositions, courts are expected to enforce this requirement. If a party elects a deposition, rather than a report, it is up to the party to ask the necessary questions to “lock in” the expert's testimony. But the expert is expected to be fully prepared on all aspects of his/her trial testimony at the time of the deposition and may not leave the door open for additional testimony by qualifying answers to deposition questions.

The report or deposition must be completed within 28 days after the election is made. After this, the party who does not bear the burden of proof on the issue for which expert testimony is offered must make its corresponding disclosures and the opposing party may then elect either a deposition or a written report. Under the deadlines contained in the rules, expert discovery should take less than three months to complete. However, as with the other discovery rules, these deadlines can be altered by stipulation of the parties or order of the court.

The amendments also address the issue of testimony from non-retained experts, such as treating physicians, police officers, or employees with special expertise, who are not retained or specially employed to provide expert testimony, or whose duties as an employee do not regularly involve giving expert testimony. This issue was addressed by the Supreme Court in Drew v. Lee, 2011 UT 15, wherein the court held that reports under the prior version of Rule 26(a)(3) are not required for treating physicians.

There are a number of difficulties inherent in disclosing expert testimony that may be offered from fact witnesses. First, there is often not a clear line between fact and expert testimony. Many fact witnesses have scientific, technical or other specialized knowledge, and their testimony about the events in question often will cross into the area of expert testimony. The rules are not intended to erect artificial barriers to the admissibility of such testimony. Second, many of these fact witnesses will not be within the control of the party who plans to call them at trial. These witnesses may not be cooperative, and may not be willing to discuss opinions they have with counsel. Where this is the case, disclosures will necessarily be more limited. On the other hand, consistent with the overall purpose of the 2011 amendments, a party should receive advance notice if their opponent will solicit expert opinions from a particular witness so they can plan their case accordingly. In an effort to strike an appropriate balance, the rules require that such witnesses be identified and the information about their anticipated testimony should include that which is required under Rule 26(a)(1)(A)(ii), which should include any opinion testimony that a party expects to elicit from them at trial. If a party has disclosed possible opinion testimony in its Rule 26(a)(1)(A)(ii) disclosures, that party is not required to prepare a separate Rule 26(a)(4)(E) disclosure for the witness. And if that disclosure is made in advance of the witness's deposition, those opinions should be explored in the deposition and not in a separate expert deposition. Otherwise, the timing for disclosure e of non-retained expert opinions is the same as that for retained experts under Rule 26(a)(4)(C) and depends on whether the party has the burden of proof or is responding to another expert. Rules 26(a)(4)(E) and 26(a)(1)(A)(ii) are not intended to elevate form over substance--all they require is that a party fairly inform its opponent that opinion testimony may

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be offered from a particular witness. And because a party who expects to offer this testimony normally cannot compel such a witness to prepare a written report, further discovery must be done by interview or by deposition.

Finally, the amendments include a new Rule 26(b)(7) that protects from discovery draft expert reports and, with limited exception, communications between an attorney and an expert. These changes are modeled after the recent changes to the Federal Rules of Civil Procedure and are intended to address the unnecessary and costly procedures that often were employed in order to protect such information from discovery, and to reduce "satellite litigation" over such issues.

Scope of discovery--Proportionality. Rule 26(b). Proportionality is the principle governing the scope of discovery. Simply stated, it means that the cost of discovery should be proportional to what is at stake in the litigation.

In the past, the scope of discovery was governed by "relevance" or the "likelihood to lead to discovery of admissible evidence." These broad standards may have secured just results by allowing a party to discover all facts relevant to the litigation. However, they did little to advance two equally important objectives of the rules of civil procedure--the speedy and inexpensive resolution of every action. Accordingly, the former standards governing the scope of discovery have been replaced with the proportionality standards in subpart (b)(1).

The concept of proportionality is not new. The prior rule permitted the Court to limit discovery methods if it determined that "the discovery was unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." The Federal Rules of Civil Procedure contains a similar provision. See Fed. R. Civ. P. 26(b)(2)(C). This method of limiting discovery, however, was rarely invoked either under the Utah rules or federal rules.

Under the prior rule, the party objecting to the discovery request had the burden of proving that a discovery request was not proportional. The new rule changes the burden of proof. Today, the party seeking discovery beyond the scope of "standard" discovery has the burden of showing that the request is "relevant to the claim or defense of any party" and that the request satisfies the standards of proportionality. As before, ultimate admissibility is not an appropriate objection to a discovery request so long as the proportionality standard and other requirements are met.

The 2011 amendments establish three tiers of standard discovery in Rule 26(c). Ideally, rules of procedure should be crafted to promote predictability for litigants. Rules should limit the need to resort to judicial oversight. Tiered standard discovery seeks to achieve these ends. The "one-size-fits-all" system is rejected. Tiered discovery signals to judges, attorneys, and parties the amount of discovery which by rule is deemed proportional for cases with different amounts in controversy.

Any system of rules which permits the facts and circumstances of each case to inform procedure cannot eliminate uncertainty. Ultimately, the trial court has broad discretion in deciding whether a discovery request is proportional. The proportionality standards in subpart (b)(2) and the discovery tiers in subpart (c) mitigate uncertainty by guiding that discretion. The proper application of the proportionality standards will be defined over time by trial and appellate courts.

Standard and extraordinary discovery. Rule 26(c). As a counterpart to requiring more detailed disclosures under Rule 26(a), the 2011 amendments place new limitations on additional discovery the parties may conduct. Because the committee expects the enhanced disclosure requirements will automatically permit each party to learn the witnesses and evidence the opposing side will offer in its case-in-chief, additional discovery should serve the more limited function of permitting parties to find witnesses, documents, and other evidentiary materials that are harmful, rather than helpful, to the opponent's case.

Rule 26(c) provides for three separate "tiers" of limited, "standard" discovery that are presumed to be proportional to the amount and issues in controversy in the action, and that the parties may conduct as a matter of right. An aggregation of all damages sought by all parties in an action dictates the applicable tier of standard discovery, whether such damages are sought by way of a complaint, counterclaim, or otherwise. The tiers of standard discovery are set forth in a chart that is embedded in the body of the

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rule itself. "Tier 1" describes a minimal amount of standard discovery that is presumed proportional for cases involving damages of $50,000 or less. "Tier 2" sets forth larger limits on standard discovery that are applicable in cases involving damages above $50,000 but less than $300,000. Finally, "Tier 3" prescribes still greater standard discovery for actions involving damages in excess of $300,000. Deposition hours are charged to a side for the time spent asking questions of the witness. In a particular deposition, one side may use two hours while the other side uses only 30 minutes. The tiers also provide presumptive limitations on the time within which standard discovery should be completed, which limitations similarly increase with the amount of damages at issue. A statement of discovery issues will not toll the period. Parties are expected to be reasonable and accomplish as much as they can during standard discovery. A statement of discovery issues may result in additional discovery and sanctions at the expense of a party who unreasonably fails to respond or otherwise frustrates discovery. After the expiration of the applicable time limitation, a case is presumed to be ready for trial. Actions for non-monetary relief, such as injunctive relief, are subject to the standard discovery limitations of Tier 2, absent an accompanying monetary claim of $300,000 or more, in which case Tier 3 applies. The committee determined these standard discovery limitations based on the expectation that for the majority of cases filed in the **Utah** State Courts, the magnitude of available discovery and applicable time parameters available under the three-tiered system should be sufficient for cases involving the respective amounts of damages.

Despite the expectation that standard discovery according to the applicable tier should be adequate in the typical case, the 2011 amendments contemplate there will be some cases for which standard discovery is not sufficient or appropriate. In such cases, parties may conduct additional discovery that is shown to be consistent with the principle of proportionality. There are two ways to obtain such additional discovery. The first is by stipulation. If the parties can agree additional discovery is necessary, they may stipulate to as much additional discovery as they desire, provided they stipulate the additional discovery is proportional to what is at stake in the litigation and counsel for each party certifies that the party has reviewed and approved a budget for additional discovery. Such a stipulation should be filed before the close of the standard discovery time limit, but only after reaching the limits for that type of standard discovery available under the rule. If these conditions are met, the Court will not second-guess the parties and their counsel and must approve the stipulation.

The second method to obtain additional discovery is by a statement of discovery issues. The committee recognizes there will be some cases in which additional discovery is appropriate, but the parties cannot agree to the scope of such additional discovery. These may include, among other categories, large and factually complex cases and cases in which there is a significant disparity in the parties' access to information, such that one party legitimately has a greater need than the other party for additional discovery in order to prepare properly for trial. To prevent a party from taking advantage of this situation, the 2011 amendments allow any party to request additional discovery. As with stipulations for extraordinary discovery, a party requesting extraordinary discovery should do so before the close of the standard discovery time limit, but only after the party has reached the limits for that type of standard discovery available to it under the rule. By taking advantage of this discovery, counsel should be better equipped to articulate for the court what additional discovery is needed and why. The requesting party must demonstrate that the additional discovery is proportional and certify that the party has reviewed and approved a discovery budget. The burden to show the need for additional discovery, and to demonstrate relevance and proportionality, always falls on the party seeking additional discovery. However, cases in which such additional discovery is appropriate do exist, and it is important for courts to recognize they can and should permit additional discovery in appropriate cases, commensurate with the complexity and magnitude of the dispute.

Protective order language moved to Rule 37. The 2011 amendments delete in its entirety the prior language of Rule **26**(c) governing motions for protective orders. The substance of that language is now found in Rule 37. The committee determined it was preferable to cover requests for an order to compel, for a protective order, and sanctions in a single rule, rather than two separate rules.

Consequences of failure to disclose. Rule **26**(d). If a party fails to disclose or to supplement timely its discovery responses, that party cannot use the undisclosed witness, document, or material at any hearing or trial, absent proof that non-disclosure was harmless or justified by good cause. More complete disclosures increase the likelihood that the case will be resolved justly, speedily, and inexpensively. Not being able to use evidence that a party fails properly to disclose provides a powerful incentive

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to make complete disclosures. This is true only if trial courts hold parties to this standard. Accordingly, although a trial court retains discretion to determine how properly to address this issue in a given case, the usual and expected result should be exclusion of the evidence.

LEGISLATIVE NOTE

(1) The amended language in paragraph (b)(1) is intended to incorporate long-standing protections against discovery and admission into evidence of privileged matters connected to medical care review and peer review into the **Utah** Rules of Civil Procedure. These privileges, found in both **Utah** common law and statute, include Sections **26**-25-3, 58-13-4, and 58-13-5, UCA, 1953. The language is intended to ensure the confidentiality of peer review, care review, and quality assurance processes and to ensure that the privilege is limited only to documents and information created specifically as part of the processes. It does not extend to knowledge gained or documents created outside or independent of the processes. The language is not intended to limit the court's existing ability, if it chooses, to review contested documents in camera in order to determine whether the documents fall within the privilege. The language is not intended to alter any existing law, rule, or regulation relating to the confidentiality, admissibility, or disclosure of proceedings before the **Utah** Division of Occupational and Professional Licensing. The Legislature intends that these privileges apply to all pending and future proceedings governed by court rules, including administrative proceedings regarding licensing and reimbursement.

(2) The Legislature does not intend that the amendments to this rule be construed to change or alter a final order concerning discovery matters entered on or before the effective date of this amendment.

(3) The Legislature intends to give the greatest effect to its amendment, as legally permissible, in matters that are pending on or may arise after the effective date of this amendment, without regard to when the case was filed.

LAW REVIEW AND JOURNAL COMMENTARIES

Appellate highlights. Rodney R. Parker and Julianne P. Blanch, 28-FEB **Utah** B.J. 38 (January/February, 2015).
Are medical records now off limits? An examination of Sorenson v. Barbuto. S. Grace Acosta, 22 **Utah** B.J. 17 (May/June, 2009).
Case Law Developments: The Work-Product Doctrine. Lauder, 1996 **Utah** L. Rev. 265 (1996).
Case Law Developments: Work Product Protection for an Insurer's Claim File. Smith, 1997 **Utah** L. Rev. 137 (1997).
AN EXPERT FOR ALL SEASONS: EXPERT TESTIMONY USUALLY REQUIRED, AND UNUSUALLY SPECIFIC. TANNER LENART, 27-APR **UTAH** B.J. 61 (2014).
How to Take an Out-of-State Deposition. Bushnell, 14 **Utah** B.J. 28 (Jan./Feb. 2001).
Standard 19. Donald J. Winder and Lance F. Sorenson, 20 **Utah** B.J. 41 (January/February 2007).
Talkin' ‘bout a revolution?: **Utah** overhauls its rules of civil discovery. Marc Therriern, 2011 **Utah** L. Rev. 669 (2011).

UNITED STATES CODE ANNOTATED

In general, see FRCP Rule **26** et seq.

Relevant Notes of Decisions (163)

View all 202

Notes of Decisions listed below contain your search terms.

In general

Trial court mooted for appeal purported creditor's argument that court erred in dismissing his debt collection claims for failure to comply with rules of civil procedure by not arranging for scheduling conference, in debtor's motion to dismiss for failure to prosecute, where court acknowledged that rule requiring a scheduling conference did not apply because some of the defendants were not represented by counsel, and court determined that the change in its analysis did not affect its original conclusion to

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dismiss for failure to prosecute. Velander v. LOL of Utah, LLC, 2015, 2015 UT App 171, 2015 WL 4130505. Appeal and Error 781(4)

Injured driver's failure to designate his witness as expert precluded consideration of witness' proposed opinion testimony regarding proper inspection and repair of tie rods on all terrain vehicle, in driver's action against mechanic for negligent inspection and repair of tie rods. Warenski v. Advanced RV Supply, 2011, 257 P.3d 1096, 685 Utah Adv. Rep. 50, 2011 UT App 197, certiorari denied 268 P.3d 192. Pretrial Procedure 45

An attorney has a responsibility to use the available discovery procedures to diligently represent her client, and in civil matters, Rules of Civil Procedure provide the means to do this. Rules of Prof.Conduct, Rule 1.3. Brown v. Glover, 2000, 16 P.3d 540, 408 Utah Adv. Rep. 12, 2000 UT 89, on remand 2001 UT App 52, 2001 WL 298577. Attorney And Client 112; Pretrial Procedure 11; Pretrial Procedure 24

Where wife filed divorce complaint and, before service of summons and without notice to husband, a hearing was held in which wife testified and thereafter an order for service of summons by publication was obtained and default of husband was entered upon his failure to answer and divorce was granted on basis of testimony which had been given by wife previously, court had no legal evidence before it upon which to grant divorce and exceeded its jurisdiction when it attempted to grant a divorce without first having taken legal evidence. U.C.A.1953, 30-3-4; Rules of Civil Procedure, rule 26 et seq. Treutle v. District Court of Salt Lake County, 1958, 7 Utah 2d 155, 320 P.2d 666. Divorce 146

Under Rules of Civil Procedure, pleadings are restricted to the task of general notice-giving, and the deposition-discovery process is invested with the vital role in the preparations of trial. Rules of Civil Procedure, rule 8(a). Blackham v. Snelgrove, 1955, 3 Utah 2d 157, 280 P.2d 453. Pleading 1; Pretrial Procedure 16; Pretrial Procedure 61

Construction and application

Rule with respect to discovery must be applied with common sense and within reasonable bounds consistent with its objective. Rules of Civil Procedure, rules 1(a), 30(b), 33. State By and Through Road Commission v. Petty, 1966, 17 Utah 2d 382, 412 P.2d 914. Pretrial Procedure 13

Nature and purpose of discovery

Rules authorizing discovery sanctions are aimed at encouraging good faith compliance with the discovery obligations imposed under the rules of civil procedure, and provide the court with the authority to sanction those who fail to live up to the requirements of those rules. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 Utah Adv. Rep. 22, 2012 UT App 61. Pretrial Procedure 44.1

Purpose of discovery rules is to facilitate fair trials with full disclosure of all relevant testimony and evidence. Roundy v. Staley, 1999, 984 P.2d 404, 374 Utah Adv. Rep. 15, 1999 UT App 229, certiorari denied 994 P.2d 1271. Pretrial Procedure 14.1

Discovery rules were intended to make procedure as simple and efficient as possible by eliminating any useless ritual, undue rigidities or technicalities and to remove elements of surprise or trickery, and accordingly rules should be liberally construed. Rules of Civil Procedure, rules 1(a), 26(b), 33. Ellis v. Gilbert, 1967, 19 Utah 2d 189, 429 P.2d 39. Pretrial Procedure 15

The objects and purposes of the Rules of Civil Procedure concerning discovery are to develop the truth and prevent surprise. Rules of Civil Procedure, rules 26(b), 30(b), 34. Mower v. McCarthy, 1952, 122 Utah 1, 245 P.2d 224. Pretrial Procedure 15

Because the courts at common law allowed parties to conceal from each other up to the time of trial the evidence on which they meant to rely, and would not compel either of them to supply the other with any evidence, the equitable remedy of bills

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for discovery to assist the prosecution or defense of an action pending in a court at law arose. Larson v. Salt Lake City, 1908, 34 Utah 318, 97 P. 483. Pretrial Procedure 14.1

Actions and proceedings in which discovery is available

Discovery is to be liberally permitted in condemnation cases. Utah Dept. of Transp. v. Rayco Corp., 1979, 599 P.2d 481. Pretrial Procedure 21

Right to discovery and grounds for allowance or refusal, generally

Former client violated discovery deadline by serving discovery on attorney in legal malpractice action on the last day for discovery, because attorney did not have time in which to respond. Dahl v. Harrison, 2011, 265 P.3d 139, 695 Utah Adv. Rep. 4, 2011 UT App 389, certiorari denied 275 P.3d 1019. Pretrial Procedure 25

Insofar as discovery will aid in eliminating noncontroversial matters and in identifying, narrowing and clarifying issues on which contest may prove to be necessary, it should be liberally permitted. Rules of Civil Procedure, rules 1(a), 30(b), 33. State By and Through Road Commission v. Petty, 1966, 17 Utah 2d 382, 412 P.2d 914. Pretrial Procedure 17.1; Pretrial Procedure 335

The fact that a party having peculiar knowledge of a matter fails to bring it forward does not furnish any basis for the court to make an order requiring such party to divulge his knowledge before trial to the adverse party, or to supply him with the means of obtaining it. Larson v. Salt Lake City, 1908, 34 Utah 318, 97 P. 483. Pretrial Procedure 17.1

Discretion of court

The trial court's failure to grant motorist's wife's request to extend the discovery deadlines so she could amend her expert designation list was not an abuse of discretion; the depositions of highway patrol officers occurred before wife's expert disclosures and reports were due, and wife admitted that she learned during the depositions which officer was most knowledgeable about the highway patrol diagram she desired to admit into evidence at trial, and thus which officer should be designated as an expert. Solis v. Burningham Enterprises Inc., 2015, 2015 UT App 11, 778 Utah Adv. Rep. 44, 2015 WL 178249. Pretrial Procedure 25

A trial court must exclude an expert witness disclosed after expiration of the established deadline unless the court chooses to exercise its equitable discretion. Callister v. Snowbird Corp., 2014, 2014 UT App 243, 771 Utah Adv. Rep. 43, 2014 WL 5305967. Pretrial Procedure 45

An abuse of discretion in the amount of a discovery sanction award may be demonstrated by showing that the district court relied on an erroneous conclusion of law or that there was no evidentiary basis for the trial court's ruling. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 Utah Adv. Rep. 22, 2012 UT App 61. Appeal and Error 961

To show that a trial court abused its discretion in choosing which discovery sanction to impose, a party must show either that the sanction is based on an erroneous conclusion of law or that the sanction lacks an evidentiary basis. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 Utah Adv. Rep. 22, 2012 UT App 61. Appeal and Error 961

Trial court did not abuse its discretion by awarding seller attorney fees incurred on seller's second motion for discovery sanctions, in purchaser's declaratory judgment action against seller of construction cranes and associate goodwill seeking to rescind its obligation to pay for goodwill and recover payments previously made, where information that seller had sought in discovery was pertinent to seller's defense, and purchaser's eventual admission, that crane trailer purchaser touted in a bank application was never built, should have been disclosed much earlier in the discovery process. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 Utah Adv. Rep. 22, 2012 UT App 61. Pretrial Procedure 44.1

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Trial courts have broad discretion regarding discovery matters, including protective orders. Smith v. Smith, 1999, 995 P.2d 14, 384 Utah Adv. Rep. 30, 1999 UT App 370, rehearing denied, certiorari denied 4 P.3d 1289. Pretrial Procedure 19; Pretrial Procedure 41

Generally, trial court is granted broad latitude in handling discovery matters. R & R Energies v. Mother Earth Industries, Inc., 1997, 936 P.2d 1068, 313 Utah Adv. Rep. 33, rehearing denied. Pretrial Procedure 19

Time, place, and manner requirements relating to discovery are committed to the discretion of the tribunal. Bennion v. Utah State Bd. of Oil, Gas & Min., 1983, 675 P.2d 1135. Pretrial Procedure 19

Tribunal has sufficient discretion to require discovery practices that are fair and effective in circumstances of pending controversy. Bennion v. Utah State Bd. of Oil, Gas & Min., 1983, 675 P.2d 1135. Pretrial Procedure 11

Wide latitude of discretion is vested in trial judge in determining whether good cause exists for requiring production of documents. Rules of Civil Procedure, rule 34. Jackson v. Kennecott Copper Corp., 1972, 27 Utah 2d 310, 495 P.2d 1254. Pretrial Procedure 336

Discovery methods and procedure

Burden is on the discovering party to be diligent in using the available procedures to obtain discovery, and to notify the court when a problem in doing so arises. Rules Civ.Proc., Rule 37. Brown v. Glover, 2000, 16 P.3d 540, 408 Utah Adv. Rep. 12, 2000 UT 89, on remand 2001 UT App 52, 2001 WL 298577. Pretrial Procedure 24

Sequence, timing, and condition of cause

The failure of third-party plaintiff property owners to take any steps in pursuit of their claim against title company between the time they purchased the cause of action back from bankruptcy trustee and the expert disclosure deadline was unjustified, and thus, the trial court did not abuse its discretion by declining to relieve the property owners of the automatic exclusion of their expert for their failure to disclose; even if the property owners were confused about their role in the case when the bankruptcy trustee was substituted, any doubt regarding their authority and responsibility to pursue their claim should have been resolved after they bought back the cause of action at auction. R.O.A. General, Inc. v. Chung Ji Dai, 2014, 2014 UT App 124, 761 Utah Adv. Rep. 10, 2014 WL 2441850. Pretrial Procedure 45

A discovery request must be served early enough that the responding party will have a full thirty days in which to respond before the discovery deadline. Dahl v. Harrison, 2011, 265 P.3d 139, 695 Utah Adv. Rep. 4, 2011 UT App 389, certiorari denied 275 P.3d 1019. Pretrial Procedure 25

Trial court properly granted protective order prohibiting any further discovery against county, in connection with action in which landowners challenged county's approval of construction of railroad loading facility, on basis that all of plaintiffs' substantive claims against county had been resolved when plaintiffs had earlier been granted partial summary judgment. Harper v. Summit County, 1998, 963 P.2d 768, 348 Utah Adv. Rep. 7, certiorari granted 982 P.2d 87, affirmed in part, reversed in part 26 P.3d 193, 414 Utah Adv. Rep. 21, 2001 UT 10, rehearing denied. Pretrial Procedure 25

Trial court did not err in striking student's motions to compel discovery after motion disposing of the case had been granted, since student could have preserved his right to discovery by seeking continuance of hearing on his first motion and, in view of dismissal, no purpose would be served by defendants' responding to outstanding request for discovery. Reece v. Board of Regents of State of Utah, 1987, 745 P.2d 457. Pretrial Procedure 25

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Scope of discovery--In general

Trial court acted within its discretion in granting protective order to limit plaintiff's discovery in action seeking recognition of an unsolemnized marriage, where plaintiff's counsel failed to meet with defendant's counsel or schedule a meeting, and order was granted two weeks before trial, after plaintiff had submitted certificate of readiness for trial one year earlier. Richards v. Brown, 2009, 222 P.3d 69, 642 Utah Adv. Rep. 25, 2009 UT App 315, certiorari granted 225 P.3d 880, affirmed on other grounds 274 P.3d 911, 704 Utah Adv. Rep. 39, 2012 UT 14. Pretrial Procedure 41

"Rebuttal evidence," which party need not disclose pursuant to discovery request, is that which a party may or may not use, depending on the testimony elicited at trial. (Per Greenwood, Associate P.J., with one Judge concurring in result.) Roundy v. Staley, 1999, 984 P.2d 404, 374 Utah Adv. Rep. 15, 1999 UT App 229, certiorari denied 994 P.2d 1271. Pretrial Procedure 38

Use of discovery should not be extended to permit ferreting unduly into detail, nor to have effect of cross-examining opposing party or his witnesses nor should it be distorted into fishing expedition in hope that something may be uncovered, but should be confined within proper limits of enabling parties to find out essential facts for legitimate objectives. Rules of Civil Procedure, rules 1(a), 30(b), 33. State By and Through Road Commission v. Petty, 1966, 17 Utah 2d 382, 412 P.2d 914. Pretrial Procedure 28

One means of accomplishing objectives of new Rules of Civil Procedure is to permit discovery of information which will aid in eliminating noncontroversial matters and identifying, narrowing and clarifying the issues on which contest may prove to be necessary. Rules of Civil Procedure, rules 1(a), 30(b), 33. State By and Through Road Commission v. Petty, 1966, 17 Utah 2d 382, 412 P.2d 914. Pretrial Procedure 27.1

---- Relevancy and materiality, scope of discovery

Ultimate objective of lawsuit is determination of dispute, and whatever helps attain that objective is "relevant" to lawsuit, within discovery rule. Rules of Civil Procedure, rule 26(b). Ellis v. Gilbert, 1967, 19 Utah 2d 189, 429 P.2d 39. Pretrial Procedure 31

---- Probable admissibility at trial, scope of discovery

Report written by former engineer for truck manufacturer was not sufficiently connected to testimony of manufacturer's door latch expert to justify its admission in products liability action brought against truck manufacturer in order to impeach its expert; manufacturer's expert could not properly lay the foundation for the engineer's report because he was not involved in its preparations, and when questioned about his reliance on the engineer's report, expert stated that he had read the engineer's report, eliminated it from the possibilities, and did his own work. Clayton v. Ford Motor Co., 2009, 214 P.3d 865, 632 Utah Adv. Rep. 12, 2009 UT App 154, certiorari denied 221 P.3d 837. Evidence 560

Provision of discovery rule authorizing discovery of testimony even though it would not be admissible is not a restriction on inquiry allowed into any matter which is relevant to subject matter of action. Rules of Civil Procedure, rule 26(b). Ellis v. Gilbert, 1967, 19 Utah 2d 189, 429 P.2d 39. Pretrial Procedure 32

---- Witnesses, scope of discovery

No expert report is required where the expert is the party's treating physician. Brussow v. Webster, 2011, 258 P.3d 615, 684 Utah Adv. Rep. 44, 2008 UT 6, 2011 UT App 193, certiorari denied 268 P.3d 192. Pretrial Procedure 39

In judicially imposing a deadline for the disclosure of witness lists in a civil case, a court must explicitly, either orally or in writing, impose a month and day deadline. Rules Civ.Proc., Rule 37(b)(2). Rehn v. Rehn, 1999, 974 P.2d 306, 363 Utah Adv. Rep. 8, 1999 UT App 41. Pretrial Procedure 40

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Requiring condemnor to answer as to what it contended was fair market value of property taken was proper, in condemnation proceeding, even though condemnor may have based his claim as to such value upon advice it had received from expert witnesses. Rules of Civil Procedure, rule 33. State By and Through Road Commission v. Petty, 1966, 17 Utah 2d 382, 412 P.2d 914. Pretrial Procedure 39

Requiring condemnor to state names and addresses of its witnesses in condemnation case was not improper particularly where they were supposed to be experts and credence to be given their testimony depended to large extent upon their qualifications. Rules of Civil Procedure, rule 33. State By and Through Road Commission v. Petty, 1966, 17 Utah 2d 382, 412 P.2d 914. Pretrial Procedure 40

Railroad's records of conclusions stated by its experts as to cause of railroad accident in which plaintiff's husband was killed were not discoverable even though denial of discovery would cause prejudice, hardship or injustice. Rules of Civil Procedure, rules 26(b), 30(b), 34. Mower v. McCarthy, 1952, 122 Utah 1, 245 P.2d 224. Pretrial Procedure 379

Under Rules of Civil Procedure, writing which reflects the conclusions of an expert based on assumed facts, but not containing evidence of events, conditions, circumstances and similar matters, is not discoverable. Rules of Civil Procedure, rules 26(b), 30(b), 34. Mower v. McCarthy, 1952, 122 Utah 1, 245 P.2d 224. Pretrial Procedure 379

---- Insurance, generally, scope of discovery

A showing of breach of express contract by insurer is not a condition precedent to an insured seeking discovery in connection with ongoing litigation of a bad faith claim. Christiansen v. Farmers Ins. Exchange, 2005, 116 P.3d 259, 523 Utah Adv. Rep. 12, 2005 UT 21, rehearing denied, on remand 2005 WL 4709726. Pretrial Procedure 37

Information underlying vehicle valuation comparison (VVC) completed by defendant motorist's insurer was irrelevant to automobile accident case brought by plaintiff truck owners, where defendant's stipulation in open court that she would not use the VVC at trial removed any need plaintiffs had for information to impeach the VVC and where plaintiffs had never suggested they would rely on the VVC at trial, and thus, information underlying the VVC was not subject to discovery. Rules Civ.Proc., Rule 26(b)(1); Rules of Evid., Rule 401. Major v. Hills, 1999, 980 P.2d 683, 369 Utah Adv. Rep. 24, 1999 UT 44. Pretrial Procedure 36.1

Information in possession of uninsured motorist (UM) carrier on similar accidents and injuries, its internal policies and procedures for handling UM claims, and internal aspects of processing of insured's claim were irrelevant in insured's tort suit in which carrier had intervened to dispute uninsured motorist's liability and damages, and, thus, information sought in interrogatories was not subject to discovery; information about other accidents and injuries would not assist in determining degree of negligence or dollar value of insured's injuries, and information on internal policies and procedures would be related only to hypothetical bad faith claim. Rules Civ.Proc., Rule 26(b)(1). Chatterton v. Walker, 1997, 938 P.2d 255, 312 Utah Adv. Rep. 3, rehearing denied. Pretrial Procedure 283

Copy of automobile liability policy of defendant motorist should be produced for plaintiff upon proper demand, but information regarding insurance should not be disclosed to jury. Rules of Civil Procedure, rules 26(b), 33. Young v. Barney, 1967, 20 Utah 2d 108, 433 P.2d 846. Pretrial Procedure 381

Defendant in automobile accident case must answer in discovery procedure whether she was insured, name of insurer, and amount of coverage. Rules of Civil Procedure, rules 1(a), 16, 26(b), 33. Ellis v. Gilbert, 1967, 19 Utah 2d 189, 429 P.2d 39. Pretrial Procedure 180

Privileged matters--In general

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Materials which are subject of protective order under Utah Rule of Civil Procedure governing protection from discovery for trade secret or other confidential research, development, or commercial information are not privileged for purposes of Freedom of Information Act trade secret exemption; rather, determination of whether documents contain trade secrets under Freedom of Information Act exemption is to be made solely by applying express exemption for trade secrets and confidential commercial or financial information found in exemption itself. 5 U.S.C.A. § 552(b)(4, 5); Utah Rules Civ.Proc., Rule 26(c)(7). Anderson v. Department of Health and Human Services, 1990, 907 F.2d 936. Records 59

The burden is on the party asserting a privilege to establish that the material sought is protected from discovery. Allred v. Saunders, 2014, 2014 UT 43, 2014 WL 5334034. Privileged Communications and Confidentiality 26

Trial court did not abuse its discretion by entering protective order prohibiting ethanol plant builder from obtaining discovery from city, which purchased electricity generated using energy from geothermal energy producer, of information that was allegedly secret, proprietary, and confidential, in builder's action against producer, claiming that producer had underpaid builder under settlement agreement requiring producer to pay builder amount based on percentage of producer's gross geothermal energy sales revenues; producer submitted affidavits demonstrating that builder was competitor of producer, and information was clearly outside realm of relevant information and was highly sensitive information that might have given builder competitive edge against producer in future energy ventures. Rules Civ.Proc., Rule 26(c). R & R Energies v. Mother Earth Industries, Inc., 1997, 936 P.2d 1068, 313 Utah Adv. Rep. 33, rehearing denied. Pretrial Procedure 41; Privileged Communications And Confidentiality 402

When statutory confidential information privilege or the common-law executive privilege is asserted in opposition to request for discovery, trial court must make an independent determination of extent to which the privilege applies to the material sought to be discovered; such determination is a result of the ad hoc balancing of the interests in the disclosure of the materials, and the government's interests in their confidentiality. U.C.A.1953, 78-24-8; Rules Civ.Proc., Rule 26(b)(1). Madsen v. United Television, Inc., 1990, 801 P.2d 912. Privileged Communications And Confidentiality 354

Where transcript of testimony given by railroad employees in railroad's own investigation of railroad accident did not constitute the reports of railroad accidents required by Federal statutes, discovery of transcript under Rules of Civil Procedure was not prohibited by those Federal statutes. Rules of Civil Procedure, rules 26(b), 30(b), 34; 45 U.S.C.A. §§ 38, 40, 41. Mower v. McCarthy, 1952, 122 Utah 1, 245 P.2d 224. Pretrial Procedure 389

---- Work product, privileged matters

Any material that would not have been generated but for the pendency or imminence of litigation receives attorney work product protection; by contrast, documents produced in the ordinary course of business or created pursuant to routine procedures or public requirements unrelated to litigation do not qualify as attorney work product. Schroeder v. Utah Attorney General's Office, 2015, 2015 UT 77, 794 Utah Adv. Rep. 109, 2015 WL 5037832. Pretrial Procedure 359

Documents created as part of a government actor's official duties receive no protection from disclosure under work product doctrine even if the documents are likely to be the subject of later litigation. Schroeder v. Utah Attorney General's Office, 2015, 2015 UT 77, 794 Utah Adv. Rep. 109, 2015 WL 5037832. Pretrial Procedure 359

Opinion work product, which includes mental impressions, conclusions, opinions or legal theories of an attorney or party, is afforded higher protection than fact work product; however, to utilize the opinion work product privilege, the party asserting it has the burden to establish that it is applicable. Southern Utah Wilderness Alliance v. Automated Geographic Reference Center, Division of Information Technology, 2008, 200 P.3d 643, 620 Utah Adv. Rep. 8, 2008 UT 88. Pretrial Procedure 35

Acts performed by a public employee in the performance of his official duties are not prepared in anticipation of litigation or for trial merely by virtue of the fact that they are likely to be the subject of later litigation; instead they are performed in the ordinary course of business and are not protected from disclosure under the work product doctrine. Southern Utah Wilderness

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Alliance v. Automated Geographic Reference Center, Division of Information Technology, 2008, 200 P.3d 643, 620 Utah Adv. Rep. 8, 2008 UT 88. Pretrial Procedure 36.1

Trial court could not order that death-sentenced defendant produce all documents relating to defendant's communications with appointed post-conviction counsel and pro-bono attorneys who originally represented defendant, for purposes of State's response to defendant's claim that he received ineffective assistance of post-conviction counsel, in motion to set aside default judgment dismissing post-conviction petition, until State first made showing that it had substantial need for documents which it could not, without undue hardship, obtain by other means, that communications were at issue, and that documents had been edited to prevent unnecessary disclosure of irrelevant information. Menzies v. Galetka, 2006, 150 P.3d 480, 567 Utah Adv. Rep. 15, 2006 UT 81. Criminal Law 1590

There is a sense in which an attorney's mental impressions, conclusions, and opinions of an attorney constitute the facts of the case and therefore may be discoverable; however, this exception must be applied very carefully in ineffective assistance of counsel cases because a discovery policy whereby counsel's files can be freely accessed in subsequent proceedings has the potential to significantly impair the trial preparation process. Menzies v. Galetka, 2006, 150 P.3d 480, 567 Utah Adv. Rep. 15, 2006 UT 81. Criminal Law 1590

Certain materials otherwise subject to discovery are, upon appropriate objection, protected from disclosure and introduction into evidence because of their creation by an attorney in preparation for litigation. Rules Civ.Proc., Rule 26(b)(3). Featherstone v. Schaerrer, 2001, 34 P.3d 194, 432 Utah Adv. Rep. 6, 2001 UT 86, rehearing denied. Pretrial Procedure 359

“Peace letter” in which insurer of both passenger who was injured in head-on collision, and driver of oncoming vehicle, had allegedly made unconditional promise to pay any judgment rendered against driver in action arising from collision, was prepared in anticipation of litigation, and thus was protected from discovery by attorney work-product privilege, even though letter was not prepared by an attorney. Rules Civ.Proc., Rule 26(b)(3). Green v. Louder, 2001, 29 P.3d 638, 426 Utah Adv. Rep. 25, 2001 UT 62. Pretrial Procedure 359

Therapy records of husband, wife, and children which independent custody evaluator relied on in recommending that wife's visitation be supervised were not prepared in anticipation of litigation, as required for discovery of documents prepared in anticipation of litigation. Rules Civ.Proc., Rule 26(b)(3). Smith v. Smith, 1999, 995 P.2d 14, 384 Utah Adv. Rep. 30, 1999 UT App 370, rehearing denied, certiorari denied 4 P.3d 1289. Divorce 85

Surveillance videotape of plaintiff was not protected from disclosure as attorney work-product in automobile negligence action, where videotape was prepared in anticipation of introduction at trial. (Per Greenwood, Associate P.J., with one Judge concurring in result.) Rules Civ.Proc., Rule 26(b)(1). Roundy v. Staley, 1999, 984 P.2d 404, 374 Utah Adv. Rep. 15, 1999 UT App 229, certiorari denied 994 P.2d 1271. Pretrial Procedure 383

While procedural rule mandates that protection against discovery of attorney's or representative's mental impressions, conclusions, opinions or legal theories be provided, such protections would not screen information directly at issue. Rules Civ.Proc., Rule 26(b)(3). Salt Lake Legal Defender Ass'n v. Uno, 1997, 932 P.2d 589, 309 Utah Adv. Rep. 11. Criminal Law 627.5(6)

In prisoner's action for postconviction relief based on claim of ineffective assistance of trial counsel, “at issue” exception to work product immunity did not apply across the board to documents and files in possession of legal defense association which had employed prisoner's trial counsel, but would only apply upon special showing by state for specific document; client's adversary was seeking access to files rather than client, at issue was performance of counsel during preparation and trial rather than solely counsel's internal processes in compiling file, and ineffective assistance of counsel was in significant part question of behavior observable from record and ascertainable from counsel's testimony. U.S.C.A. Const.Amend. 6; Rules Civ.Proc., Rule 26(b)(3). Salt Lake Legal Defender Ass'n v. Uno, 1997, 932 P.2d 589, 309 Utah Adv. Rep. 11. Criminal Law 1590

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Documents in insurance claim file may qualify for work-product protection if there is sufficient evidence to show that documents were prepared in anticipation of litigation. Rules Civ.Proc., Rule 26(b)(3). Askew v. Hardman, 1996, 918 P.2d 469. Pretrial Procedure 381

Documents in liability insurer's claim file, including insured horse owner's statement to adjuster following motor vehicle collision with horse, could be found to be protected as work product in tort action by injured passenger against owner; owner informed police of fear of suit for his animal causing the accident, insurer investigated pursuant to attorney's instructions for potential legal claims, and evidence thus indicated that documents were prepared in anticipation of litigation. Rules Civ.Proc., Rule 26(b)(3). Askew v. Hardman, 1996, 918 P.2d 469. Pretrial Procedure 381

Whether document prepared by insurer is prepared in anticipation of litigation and is protected work product is question of fact to be determined by trial court on basis of evidence before it. Rules Civ.Proc., Rule 26(b)(3). Askew v. Hardman, 1996, 918 P.2d 469. Pretrial Procedure 381

Court of Appeals erroneously concluded that document generated in investigation of accident involving insured and third party is generally discoverable; rather, documents in insurance claim file may be protected as work product. Rules Civ.Proc., Rule 26(b)(3). Askew v. Hardman, 1996, 918 P.2d 469. Pretrial Procedure 381

Case-by-case approach applies to determining whether documents in insurance claim file are protected work product prepared in anticipation of litigation; trial court should consider nature of requested documents, reason for preparation of documents, relationship between preparer of document and party seeking its protection from discovery, relationship between litigating parties, and any other facts relevant to the issue. Rules Civ.Proc., Rule 26(b)(3). Askew v. Hardman, 1996, 918 P.2d 469. Pretrial Procedure 381

Attorney need not be involved for document in insurance claim file to be deemed work product prepared in anticipation of litigation. Rules Civ.Proc., Rule 26(b)(3). Askew v. Hardman, 1996, 918 P.2d 469. Pretrial Procedure 381

Report prepared by insurance adjuster was not entitled to work-product protection; fact that no attorney was involved in preparation of claim file suggested that it was prepared in ordinary course of business, and not in anticipation of litigation. Rules Civ.Proc., Rule 26(b)(3). Askew v. Hardman, 1994, 884 P.2d 1258, certiorari granted 892 P.2d 13, reversed 918 P.2d 469. Pretrial Procedure 381

Documents which convey mental impressions, conclusions, opinions, or legal theories of attorney or party will be afforded heightened protection under work-product privilege as “opinion work product.” Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 359

Attorney involvement is only one factor to be weighed in reaching conclusion of whether documents sought in discovery are protected by work-product privilege; plain language of rule does not require that attorney be involved in preparation of material. Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 359

Fact that no attorney was involved may suggest that document was prepared in ordinary course of business and not in anticipation of litigation, so that work-product privilege would not apply. Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 359

Inquiry to determine whether document was prepared in anticipation of litigation for purposes of work-product privilege should focus on primary motivating purpose behind creation of document; if primary purpose behind creation of document is not to

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assist in pending or impending litigation, then work-product protection is not justified. Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 359

Inaction and delay of one year in filing motion for protective order constituted independent waiver of right to work product privilege over mining company memoranda discussing claim by mining partner of contractual requirement for independent feasibility study. Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 373

Mining company waived work-product privilege for memoranda discussing mining partner's claim regarding contract requirement for independent feasibility study where mining company allowed memoranda to become part of general reading file circulated among its employees without much regard for confidentiality and, as a result, employee obtained copies of memoranda and turned them over to mining partner; work-product protection was waived when disclosure substantially increased opportunity for potential adversaries to obtain information. Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 373

Inadvertent disclosure by mining company of memoranda discussing results of internal investigation resulted in waiver of work-product privilege regarding memoranda where mining company voluntarily produced memoranda in response to demand for production of documents, memoranda were used during five different depositions, and mining company did not file motion for protective order until full year after it knew that opponent had memoranda and until three months after their last use. Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 373

Letter whose tone is threatening but which does not state intent to pursue litigation is insufficient to allow party to invoke work-product protection to protect in-house report prompted by letter. Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 373

Mere possibility that litigation may occur, even mere fact that litigation does eventually ensue, is insufficient to cloak materials with mantle of work-product protection. Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 35

For written materials to fall under work-product protection, three criteria must be met: material must be documents and tangible things otherwise discoverable, prepared in anticipation of litigation or for trial, by or for another party or for or by that party's representative; even if these requirements are met, however, privilege does not apply if party seeking discovery can show need for information and that it cannot be obtained without substantial hardship. Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 35; Pretrial Procedure 359

Memoranda of mining company in response to letter from mining partner stating that mining company had not provided independent feasibility study as required by agreement were not written to assist in pending or impending litigation so that work-product privilege would not apply, even though mining partner filed lawsuit two and one-half years after letter, where letter addressed wrongs perceived by partner but did not threaten litigation, letter expressed partner's interest in purchasing mine from mining company, and memoranda were apparently written in ordinary course of business as part of mining company investigation to determine whether feasibility study had been performed. Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 805 P.2d 164. Pretrial Procedure 373

Document must have been either created for use in pending or impending litigation or intended to generate ideas for use in such litigation to meet “prepared in anticipation of litigation or for trial” element of work product doctrine. Rules Civ.Proc., Rule 26(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 801 P.2d 909. Pretrial Procedure 359

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There are three essential requirements for materials to be protected by work product doctrine: material must consist of documents or tangible things; material must be prepared in anticipation of litigation or for trial; and material must be prepared by or for another party or by or for that party's representative. Rules Civ.Proc., Rule **26**(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 801 P.2d 909. Pretrial Procedure 35; Pretrial Procedure 359

Letter to attorney outlining retainer agreement and setting plan for allocating costs and burdens among clients in event they should be involved in litigation was not protected by work product doctrine; although letter was prepared because of threatened suit against clients, its primary purpose was not to assist in pending or impending litigation. Rules Civ.Proc., Rule **26**(b)(3). Gold Standard, Inc. v. American Barrick Resources Corp., 1990, 801 P.2d 909. Pretrial Procedure 371

Condemnor's witness' appraisal report did not lie within protection of attorney's work product immunity from discovery, and refusal to order production of report for use in condemnee's cross-examination of such witness in eminent domain proceeding was prejudicial error. Rules of Civil Procedure, rules 1(a), **26**(b)(4)(A); Const. art. 1, § 22. **Utah** Dept. of Transp. v. Rayco Corp., 1979, 599 P.2d 481. Eminent Domain 262(5); Pretrial Procedure 379

Record of emissions from defendant's smelter facilities, which plaintiffs suing for damage to their motor vehicles allegedly caused by emissions sought to examine, and which had been forwarded to defendant's legal counsel allegedly in anticipation of litigation, did not qualify as a "privileged communication." Jackson v. Kennecott Copper Corp., 1972, 27 **Utah** 2d 310, 495 P.2d 1254. Pretrial Procedure 359; Privileged Communications And Confidentiality 142

In Rules of Civil Procedure which allow discovery of various documents but which prohibit discovery of "any part of the writing" which is attorney's work product, use of the words "the writing" was proper and correct to refer to the writing of which discovery is sought, the reference being to a definite writing, and prohibition would be so construed to be in harmony with the purpose of protecting the work product of the attorney. Rules of Civil Procedure, rules **26**(b), 30(b), 34. Mower v. McCarthy, 1952, 122 **Utah** 1, 245 P.2d 224. Pretrial Procedure 359

Where denial of discovery of document would have caused prejudice, hardship and injustice, document was discoverable without regard to whether it was prepared in anticipation of litigation or in preparation for trial. Rules of Civil Procedure, rules **26**(b), 30(b), 34. Mower v. McCarthy, 1952, 122 **Utah** 1, 245 P.2d 224. Pretrial Procedure 359

Proceedings to secure production of documents and things--In general

Trial court did not abuse its discretion in excluding, as a discovery sanction, evidence of attorney fees incurred by assignee of deed of trust beneficiary after discovery cutoff date, and denying its request for additional attorney fees, in action against purchasers to foreclose on property purchasers acquired at a sheriff's sale, where purchasers requested that beneficiary produce "copies of all documents or other items" that it intended to introduce into evidence, and assignee's response stated that it had not yet designated documents for trial; under amended version of rule on a party's duty to supplement discovery responses, assignee had a duty seasonably to amend its prior response. Rules Civ.Proc., Rule **26**(e). American Interstate Mortg. Corp. v. Edwards, 2002, 41 P.3d 1142, 439 **Utah** Adv. Rep. 20, 2002 UT App 16. Pretrial Procedure 403; Pretrial Procedure 434

Even if unamended version of rule requiring parties to supplement discovery responses applied, trial court did not abuse its discretion in imposing discovery sanctions excluding evidence of attorney fees incurred by assignee of deed of trust beneficiary after discovery cutoff, and denying assignee's request for additional attorney fees, in assignee's foreclosure action; assignee's responses to discovery requests were varied and contradictory, and responses did not identify what documents purchasers were entitled to inspect. Rules Civ.Proc., Rule **26**(e). American Interstate Mortg. Corp. v. Edwards, 2002, 41 P.3d 1142, 439 **Utah** Adv. Rep. 20, 2002 UT App 16. Pretrial Procedure 403; Pretrial Procedure 434

Order compelling plaintiff to produce documents she alleged had been altered by defendants was essentially one demanding a response to discovery, not requiring document production only, and thus, even though plaintiff alleged that no altered documents

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existed, she was required to state so in written response. Rules Civ.Proc., Rules 26(c), 34(b), 37(b)(2)(C). Hales v. Oldroyd, 2000, 999 P.2d 588, 391 Utah Adv. Rep. 6, 2000 UT App 75, certiorari denied 4 P.3d 1289. Pretrial Procedure 403

---- Affidavits and showing, proceedings to secure production of documents and things

Good cause for production of documents is shown where the full, accurate disclosure of facts, which it is the purpose of the discovery process to secure, could not be accomplished through other means. Rules of Civil Procedure, rule 34. Jackson v. Kennecott Copper Corp., 1972, 27 Utah 2d 310, 495 P.2d 1254. Pretrial Procedure 405

Party moving for order compelling production of documents must make showing not only that the documents are relevant and are in the possession of the other party, but that the documents sought are necessary for proof of the case and either cannot be obtained in any other way or that obtaining them another way would involve extraordinary expense that the moving party should not in fairness be expected to bear. Rules of Civil Procedure, rule 34. Jackson v. Kennecott Copper Corp., 1972, 27 Utah 2d 310, 495 P.2d 1254. Pretrial Procedure 404.1

Determination that showing of good cause had been made to compel corporation operating smelter facilities to produce records of emissions for examination by plaintiffs who claimed their motor vehicles were damaged by acid or other harmful substances flowing into air about the smelter facilities was not an abuse of discretion. Rules of Civil Procedure, rule 34. Jackson v. Kennecott Copper Corp., 1972, 27 Utah 2d 310, 495 P.2d 1254. Pretrial Procedure 405

Defendant corporation asserting that record of emissions from smelter facilities which had been forwarded to legal counsel was not subject to discovery had burden of proving that the record was a privileged communication. Rules of Civil Procedure, rule 34. Jackson v. Kennecott Copper Corp., 1972, 27 Utah 2d 310, 495 P.2d 1254. Privileged Communications And Confidentiality 173

Elements of prejudice, hardship, or injustice necessary to the discovery of documents prepared in anticipation of litigation or in preparation for trial are sufficiently shown where party seeking discovery is with due diligence, unable to obtain evidence of some material facts, events, conditions and circumstances which the discovery will probably reveal, and where, because of this situation, the party is unable to adequately prepare the case for trial. Rules of Civil Procedure, rules 26(b), 30(b), 34. Mower v. McCarthy, 1952, 122 Utah 1, 245 P.2d 224. Pretrial Procedure 404.1

On motion for production of transcript of testimony by railroad employees given in railroad's investigation of 1944 accident, although plaintiff's showing on motion was only that her case was weak and was not necessarily that she had been unable to obtain evidence of the cause of the accident, in view of fact that witnesses who knew facts were employed by defendant and that until recently many of them were unknown to plaintiff and that facilities and equipment involved in the accident had at all times been under control of defendant and had not been available to plaintiff for inspection, showing was sufficient for granting of motion. Rules of Civil Procedure, rules 26(b), 30(b), 34. Mower v. McCarthy, 1952, 122 Utah 1, 245 P.2d 224. Pretrial Procedure 404.1

---- Determination, proceedings to secure production of documents and things

Trial court was required, under the new evidence exception to the law of the case doctrine, to reconsider previous order denying seller discovery sanctions on seller's first motion for sanctions, when trial court awarded seller sanctions on seller's second motion for discovery sanctions in declaratory judgment action purchaser brought against seller of construction cranes and associate goodwill seeking to rescind its obligation to pay for goodwill, where both sanction motions involved seller's discovery requests seeking information on purchaser's asserted collaboration with a crane broker on a custom designed crane trailer, purchaser's prior responses implied that the information existed though purchaser asserted that seller's requests were overbroad, and by the time that seller made second motion for sanctions purchaser had admitted that the trailer was never built. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 Utah Adv. Rep. 22, 2012 UT App 61. Courts 99(6)

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When official confidence privilege is claimed, trial court must balance competing interests through an in camera examination of the materials for which the privilege is claimed; such review enables trial court to allow or disallow discovery as to individual items for which the privilege is claimed, or to excise or edit from individual items those matters which it determines to come within the scope of the privilege, or to take other protective measures pursuant to civil procedure rule. Rules Civ.Proc., Rule 26(c); U.C.A.1953, 78-24-8. Madsen v. United Television, Inc., 1990, 801 P.2d 912. Privileged Communications And Confidentiality 351

Although ability of movant seeking order for production of documents to obtain the desired information by other means is relevant in determining existence of good cause, the real question is whether the movant can obtain the facts without production of the documents. Rules of Civil Procedure, rule 34. Jackson v. Kennecott Copper Corp., 1972, 27 Utah 2d 310, 495 P.2d 1254. Pretrial Procedure 411

Question whether portions of writings sought by discovery come within prohibitions protecting attorney's work product and expert's conclusions should be determined without permitting opposing counsel to see the questioned matter and, to do this, the parts of the transcript which it is claimed are not discoverable should be submitted to the court for it to decide. Rules of Civil Procedure, rules 26(b), 30(b), 34. Mower v. McCarthy, 1952, 122 Utah 1, 245 P.2d 224. Pretrial Procedure 411

Objections and protective orders

Patient waived her objection to hospital's use as trial exhibit a Computed Tomography (CT) scan that was not specifically identified during pretrial discovery process, in medical malpractice action, as patient specifically designated the CT scan as a trial exhibit and then used select images from it at trial, and patient failed to object to the listing of all of patient's medical records when she submitted her other objections to the hospital's trial exhibits. Turner v. University of Utah Hosp., 2011, 271 P.3d 156, 698 Utah Adv. Rep. 51, 2011 UT App 431, certiorari granted 280 P.3d 421, reversed 310 P.3d 1212, 741 Utah Adv. Rep. 51, 2013 UT 52. Pretrial Procedure 413.1

Insurer failed to show good cause for a protective order against discovery in insureds' bad faith suit, even though they had not yet established breach of contract; the claims of breach of express contract and bad faith were premised on distinct duties that gave rise to divergent and severable causes of action. Christiansen v. Farmers Ins. Exchange, 2005, 116 P.3d 259, 523 Utah Adv. Rep. 12, 2005 UT 21, rehearing denied, on remand 2005 WL 4709726. Pretrial Procedure 41

A party seeking a protective order has the burden of showing that good cause exists for issuance of that order. Christiansen v. Farmers Ins. Exchange, 2005, 116 P.3d 259, 523 Utah Adv. Rep. 12, 2005 UT 21, rehearing denied, on remand 2005 WL 4709726. Pretrial Procedure 41

District court is entrusted with broad discretion in dealing with discovery matters, including protective orders. In re Discipline of Pendleton, 2000, 11 P.3d 284, 405 Utah Adv. Rep. 3, 2000 UT 77. Pretrial Procedure 41

The failure to respond in writing to a discovery request is not excused on the basis that the discovery is objectionable, absent a written objection or motion for a protective order. Rules Civ.Proc., Rules 26(c), 34(b). Hales v. Oldroyd, 2000, 999 P.2d 588, 391 Utah Adv. Rep. 6, 2000 UT App 75, certiorari denied 4 P.3d 1289. Pretrial Procedure 41

Trial court did not abuse its discretion in issuing protective order preventing wife from discovering therapy records of husband, wife, and children which independent custody evaluator relied on in recommending that wife's visitation be supervised, where affidavits of child therapist and guardian ad litem stated release of records could be damaging to the children and the protective order was less restrictive of discovery than a similar protective order wife later requested. Rules Civ.Proc., Rule 26(c)(4). Smith v. Smith, 1999, 995 P.2d 14, 384 Utah Adv. Rep. 30, 1999 UT App 370, rehearing denied, certiorari denied 4 P.3d 1289. Divorce 86

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Rule of civil procedure providing for protective orders upon showing of good cause applies to public records, including judicial records, under the Public and Private Writings Act; the Act is intended to apply to documents filed in court in the absence of a specific order of court to the contrary. U.C.A.1953, 78-26-1 to 78-26-8; Rules Civ.Proc., Rules 26, 26(c), Const. Art. 8, § 4. Carter v. Utah Power & Light Co., 1990, 800 P.2d 1095. Records 32; Records 34

Pretrial depositions filed with clerk of court but not used by the litigants in court are "judicial records" and thus "public writing" subject to public access under the Public and Private Writings Act, absent a showing of good cause necessary to secure a protective order from the court; rule providing for sealing of such depositions is not a mandate for secrecy but is intended to safeguard the integrity of the depositions. U.C.A.1953, 78-26-1 to 78-26-8; Rules Civ.Proc., Rules 5(d), 26(c), 30(f)(1); Judicial Administration Rules 4-202, 4-502(4); Const. Art. 8, § 12. Carter v. Utah Power & Light Co., 1990, 800 P.2d 1095. Records 32

Sanctions for failure to disclose--In general

When reviewing the imposition of discovery sanctions, appellate courts first consider whether the district court has made a factual finding that the party's behavior merits sanctions, and any such finding will be upheld unless it is clearly erroneous. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 Utah Adv. Rep. 22, 2012 UT App 61. Appeal and Error 1024.3

District court made a factual finding that purchaser's behavior merited a discovery sanction, in purchaser's declaratory judgment action against seller of construction cranes and associate goodwill seeking to rescind its obligation to pay for goodwill and recover payments previously made, though the district court's finding stated that purchaser's positions in response to seller's discovery motions were inconsistent, where the court's imposition of a not insignificant sanction demonstrated that the court did not accept purchaser's explanations for the inconsistencies. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 Utah Adv. Rep. 22, 2012 UT App 61. Pretrial Procedure 44.1

Though a district court must find on the part of the noncomplying party willfulness, bad faith, fault, or persistent dilatory tactics frustrating the judicial process, prior to entering discovery sanctions, a trial court need not specifically state that willfulness, bad faith, fault, or persistent dilatory tactics are present to impose sanctions. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 Utah Adv. Rep. 22, 2012 UT App 61. Pretrial Procedure 44.1

Trial court was within its discretion in striking all but two of gym member's experts as sanction for member's failure to comply with discovery, in member's action for injuries sustained in trip and fall in gym parking lot; member filed expert designation well after deadline had passed, failed to include expert reports, identified one expert by first name only, and after a stipulated extension, only provided a report from only one of five designated experts. Johnson v. Gold's Gym, 2009, 206 P.3d 302, 626 Utah Adv. Rep. 6, 2009 UT App 76, certiorari denied 215 P.3d 161. Pretrial Procedure 45

Necessary prerequisite to imposition of sanction for party's failure to cooperate in discovery is order that brings the offender squarely within possible contempt of court. Rules Civ.Proc., Rules 26(f), 37(b)(2). Berrett v. Denver and Rio Grande Western R. Co., Inc., 1992, 830 P.2d 291, certiorari denied 836 P.2d 1383. Pretrial Procedure 44.1

---- Dismissal or striking of pleading, sanctions for failure to disclose

Trial court did not abuse its discretion in dismissing plaintiff's complaint as discovery sanction, where plaintiff failed to respond in any way to court order compelling her to produce documents she alleged had been altered, and record indicated that plaintiff had repeatedly delayed in responding to discovery, failed to timely file pleadings, and failed to timely provide specific witness lists. Rules Civ.Proc., Rules 26(c), 34(b), 37(b)(2)(C). Hales v. Oldroyd, 2000, 999 P.2d 588, 391 Utah Adv. Rep. 6, 2000 UT App 75, certiorari denied 4 P.3d 1289. Pretrial Procedure 46; Pretrial Procedure 435

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---- Preclusion of evidence or witnesses, sanctions for failure to disclose

Expert report which contained three new damages theories not disclosed during discovery was inadmissible in secondary lender's action against borrower and bank for unjust enrichment, fraud, and other tort claims; secondary lender disclosed during initial discovery period that its damages "constitute the funds advanced, together with interest at the legal rate, less the payment received" from primary lender and clarified in response to request for admission that he sought interest at the legal rate as provided by statute, report included three new damages theories, including the benefit of the bargain rule, the modified benefit of the bargain rule, and the comparable rate of return theory, secondary lender's citation to statute was insufficient to constitute disclosure of the "computation of any category of damages claimed by the disclosing party," and borrower and bank were prejudiced by the late disclosure due to their inability to discover asserted essential facts such at secondary lender's loan history and ability to lend money to others in lieu of loan which ultimately went to borrower. Bodell Const. Co. v. Robbins, 2009, 215 P.3d 933, 636 **Utah** Adv. Rep. 3, 2009 UT 52. Pretrial Procedure 45

Plaintiff's attorney should have anticipated that his failure to comply with defendant's discovery requests would result in sanctions of not allowing one witness to testify and limiting the testimony of another witness at negligence trial, and thus, relief from judgment on grounds that attorney was "surprised" by the sanctions was not warranted, even though attorney claimed he notified defense counsel orally of his intent to call a number of witnesses at trial, where attorney did not produce documents and expert reports in response to discovery requests and failed to supplement interrogatories, and attorney failed to identify witnesses in writing with required disclosures for expert witnesses. Rukavina v. Sprague, 2007, 170 P.3d 1138, 588 **Utah** Adv. Rep. 18, 2007 UT App 331. Pretrial Procedure 45; Pretrial Procedure 313; Pretrial Procedure 434

Trial court did not abuse its discretion in excluding independent medical examiner's testimony that it was nearly impossible that fall in parking lot caused plaintiff's back injury as discovery sanction for defendant's failure to supplement its responses to interrogatories asking defendant to articulate its affirmative defenses, where defendant did not provide examiner's causation opinion until three days before trial. Rules Civ.Proc., Rules **26**, 37(b)(2). Stevenett v. Wal-Mart Stores, Inc., 1999, 977 P.2d 508, 365 **Utah** Adv. Rep. 10, 1999 UT App 80. Pretrial Procedure 312

Trial court did not abuse its discretion in limiting independent medical examiner's testimony that it was nearly impossible that fall in parking lot caused plaintiff's back injury as discovery sanction for defendant's failure to give complete answer in its interrogatories regarding affirmative defenses it would assert, where defendant did not provide examiner's causation opinion until three days before trial. Rules Civ.Proc., Rules **26**, 37(b)(2). Stevenett v. Wal-Mart Stores, Inc., 1999, 977 P.2d 508, 365 **Utah** Adv. Rep. 10, 1999 UT App 80. Pretrial Procedure 312

Expert witnesses

Evidence supported finding that motorist's wife failed to timely disclose her intent to rely on highway patrol officer as an expert witness, in negligence action against defendant driver and others following fatal automobile accident; motorist's wife disclosed that officer would be a trial witness, but failed to designate officer as an expert. Solis v. Burningham Enterprises Inc., 2015, 2015 UT App 11, 778 **Utah** Adv. Rep. 44, 2015 WL 178249. Pretrial Procedure 39

The expert disclosure discovery rule contemplates that all persons who may provide opinion testimony based on experience or training will be identified, but that only retained or specially employed experts are required to also provide an expert report. Hansen v. Harper Excavating, Inc., 2014, 2014 UT App 180, 766 **Utah** Adv. Rep. 13, 2014 WL 3747546. Pretrial Procedure 40

Treating physicians do not fall into the category of "retained or specially employed" expert witnesses, and expert reports as mentioned in the expert disclosure discovery rule are not required for treating physicians who will testify as experts. Hansen v. Harper Excavating, Inc., 2014, 2014 UT App 180, 766 **Utah** Adv. Rep. 13, 2014 WL 3747546. Pretrial Procedure 39; Pretrial Procedure 40

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Treating physicians must be disclosed as expert witnesses under the expert disclosure discovery rule if they will provide opinion testimony based on their experience or training. Hansen v. Harper Excavating, Inc., 2014, 2014 UT App 180, 766 Utah Adv. Rep. 13, 2014 WL 3747546. Pretrial Procedure 40

Plaintiff's disclosure of his intent to call treating physicians as fact witnesses was not sufficient to allow the admission of their expert opinions on causation in negligence action; treating physicians were required to be designated as experts if they were to provide expert testimony. Hansen v. Harper Excavating, Inc., 2014, 2014 UT App 180, 766 Utah Adv. Rep. 13, 2014 WL 3747546. Pretrial Procedure 45

Third-party plaintiff property owners' challenge to the trial court's dismissal of their claim against title company for failure to prosecute, after they purchased their cause of action back from bankruptcy trustee, was moot, given their inability to establish damages after the automatic exclusion of their expert report for failing to comply with the discovery rules regarding disclosure of expert witnesses. R.O.A. General, Inc. v. Chung Ji Dai, 2014, 2014 UT App 124, 761 Utah Adv. Rep. 10, 2014 WL 2441850. Pretrial Procedure 587

Court of Appeals reviews district court's exclusion of expert for abuse of discretion. Townhomes at Pointe Meadows Owners Ass'n v. Pointe Meadows Townhomes, LLC, 2014, 755 Utah Adv. Rep. 49, 2014 UT App 52, 2014 WL 868707. Appeal and Error 961

Any error in district court's permitting psychiatric physician to testify as an expert was invited by Office of Professional Conduct (OPC) in attorney disciplinary proceeding, so that OPC could not take advantage of the alleged error on appeal; OPC asked physician on cross-examination to opine on causation of attorney's misconduct, thus "opening the door" to the very kind of expert testimony of which OPC complained on appeal. In re Discipline of Corey, 2012, 274 P.3d 972, 705 Utah Adv. Rep. 40, 2012 UT 21. Attorney And Client 57

An expert report in pretrial discovery in divorce proceedings is required only if not otherwise stipulated by the parties or ordered by the court. Liston v. Liston, 2011, 269 P.3d 169, 698 Utah Adv. Rep. 24, 2011 UT App 433. Divorce 85

Former client's expert disclosures in legal malpractice case were not timely, because they were clearly inadequate. Dahl v. Harrison, 2011, 265 P.3d 139, 695 Utah Adv. Rep. 4, 2011 UT App 389, certiorari denied 275 P.3d 1019. Pretrial Procedure 44.1

Formal disclosure of experts is not pointless; knowing the identity of the opponent's expert witnesses allows a party to properly prepare for trial, including attempting to disqualify the expert testimony, retaining rebuttal experts, and holding additional depositions to retrieve the information not available because of the absence of a report. Brussow v. Webster, 2011, 258 P.3d 615, 684 Utah Adv. Rep. 44, 2008 UT 6, 2011 UT App 193, certiorari denied 268 P.3d 192. Pretrial Procedure 40

Whether the cost rule allows recovery for expert preparation time is a question of law, and the trial court's legal conclusions are reviewed for correctness. Moore v. Smith, 2007, 158 P.3d 562, 2007 UT App 101, 574 Utah Adv. Rep. 15. Appeal and Error 842(2); Costs 208

Fees for expert time spent preparing for depositions are recoverable, as long as the fees are reasonable. Moore v. Smith, 2007, 158 P.3d 562, 2007 UT App 101, 574 Utah Adv. Rep. 15. Costs 187

When determining reasonableness of expert fees for time spent preparing for depositions, factors that can but are not required to be considered include the number of hours spent preparing for the deposition, the amount of material needing to be reviewed, the scope of the deposition, and the time between the expert's preparation of the report and the taking of the deposition. Moore v. Smith, 2007, 158 P.3d 562, 2007 UT App 101, 574 Utah Adv. Rep. 15. Costs 187

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Expert testimony changed

Changes to expert's deposition after again reviewing patient's records and reading a deposition of another expert were new testimony, rather than change or supplementation, and, therefore, were properly struck in medical malpractice action; the changes did not revise incorrect information and were not minor. Daniels v. Gamma West Brachytherapy, LLC, 2009, 221 P.3d 256, 640 **Utah** Adv. Rep. 8, 2009 UT 66, rehearing denied. Pretrial Procedure 202

Written expert report

Good cause did not exist for townhome association's failure to comply with deadline for submitting expert report specified in amended case management order in construction defect action, such that trial court did not abuse its discretion in excluding association's expert, despite argument that association had agreement with developer to modify order to extend deadline; third-party defendants had also agreed to be bound by order, and reliance on agreement with only some defendants was unreasonable and did not justify extension of discovery deadline. Townhomes at Pointe Meadows Owners Ass'n v. Pointe Meadows Townhomes, LLC, 2014, 755 **Utah** Adv. Rep. 49, 2014 UT App 52, 2014 WL 868707. Pretrial Procedure 45

Townhome association's failure to timely disclose its expert in construction defect action was not harmless, such that trial court did not abuse its discretion in excluding expert, despite contention that association's final expert report would be “largely identical” to its preliminary report; preliminary report failed to properly identify association's expert in such a way as to enable developer and subcontractors to depose expert, attempt to disqualify expert, or retain rebuttal experts, report did not address scope of claimed damages, and substantial discovery would need to be revisited or performed to respond to disclosure. Townhomes at Pointe Meadows Owners Ass'n v. Pointe Meadows Townhomes, LLC, 2014, 755 **Utah** Adv. Rep. 49, 2014 UT App 52, 2014 WL 868707. Pretrial Procedure 45

Treating physician who planned to testify at trial was not retained or specially employed to testify, and therefore was not required to file written expert report pursuant to rule governing production of written expert reports in action by motorcyclist against driver of automobile arising from automobile accident; plain language of rule suggested that a “retained or specially employed” expert was a person a party hired and paid to express a particular expert opinion for the purposes of litigation, and the substance, sources, or scope of the physician's proposed testimony was irrelevant, as the court simply looked to the status of the individual as a treating physician. Drew v. Lee, 2011, 250 P.3d 48, 678 **Utah** Adv. Rep. 4, 2011 UT 15. Pretrial Procedure 379

Jurisdiction

Trial courts may determine jurisdiction on affidavits alone, permit discovery, or hold an evidentiary hearing. (Per Durham, J., with one Justice concurring and two Justices concurring in the result.) Phone Directories Co., Inc. v. Henderson, 2000, 8 P.3d 256, 402 **Utah** Adv. Rep. 7, 2000 UT 64. Courts 39; Pretrial Procedure 24

Admissibility of evidence

Plaintiff's untimely designation of expert witnesses prejudiced defendant in negligence action arising out of automobile accident, and therefore trial court properly excluded testimony of witnesses, where untimely disclosure impaired defendant's ability to defend against plaintiff's claims because defendant did not have opportunity to depose expert witnesses, and fact witnesses' memories could have faded due to protracted nature of the litigation. Brussow v. Webster, 2011, 258 P.3d 615, 684 **Utah** Adv. Rep. 44, 2008 UT 6, 2011 UT App 193, certiorari denied 268 P.3d 192. Pretrial Procedure 45

Sufficiency of evidence

Evidence was sufficient to establish that purchaser of construction cranes and associated goodwill engaged in actions that warranted the imposition of discovery sanctions, in purchaser's declaratory judgment action against seller seeking to rescind its obligation to pay for goodwill and recover payments previously made; there was evidence that purchaser was aware at hearing on seller's second motion to compel that seller was seeking information regarding the time frame of purchaser's asserted

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collaboration with a crane broker on a custom designed crane trailer, that purchaser's responses implied that the subject matter of the requests was extant though purchaser objected that the requests were overbroad, that seller was thus encouraged to pursue the information through additional discovery and judicial resources, and that purchaser through reasonable inquiry could have determined that the trailer was never built. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 Utah Adv. Rep. 22, 2012 UT App 61. Pretrial Procedure 44.1

Summary judgment

Purpose of discovery and of summary judgment procedures is to furnish method of searching out and facilitating resolution of issues which are not in dispute, and of settling rights of parties without time, trouble and expense of trial, and it is indispensable to carrying out of that purpose that parties furnish essential information when it is requested in conformity with rules of procedure. Rules of Civil Procedure, rules 31, 33, 37, 56(c). Transamerica Title Ins. Co. v. United Resources, Inc., 1970, 24 Utah 2d 346, 471 P.2d 165. Judgment 178; Pretrial Procedure 14.1; Pretrial Procedure 15

New trial

There was no error in denial of new trial on theory of surprise testimony where pretrial statement of officer who investigated accident, stating that plaintiff had said that he could not get out of way of automobile before it struck him, was not necessarily inconsistent with officer's trial testimony that plaintiff said he had “sprinted” across the road, and since the “surprise” claimed could not be so categorized since it could have been easily guarded against by the utilization of available discovery procedures. Rules of Civil Procedure, rules 26 et seq., 59, 59(a)(3). Anderson v. Bradley, 1979, 590 P.2d 339. New Trial 90; New Trial 95

Plaintiff in automobile accident case was not entitled to a new trial on the ground that he was surprised by testimony of defendant's expert witness regarding the cause of plaintiff's transient ischemic attacks, since plaintiff failed to timely object to the witness' testimony; in view of the fact that defendant, in answer to an interrogatory, had stated in substance that she would call the witness to testify concerning Raynaud's disease, an objection by plaintiff should have been immediately made when the witness at trial mentioned transient ischemic attacks and added “which I imagine, would be pertinent to address here.” Rules of Civil Procedure, rules 26(e)(1), 59(a)(3). Jensen v. Thomas, 1977, 570 P.2d 695. New Trial 97

Costs

In order to support award of prevailing costs for copies of depositions of patient and her husband, and members of patient's family, copies had to be essential to prevailing hospital's defense of malpractice case; finding that costs were “reasonable and necessary” was insufficient by itself, even if plaintiff's deposition was included in trial record and several depositions were used for impeachment. Young v. State, 2000, 16 P.3d 549, 409 Utah Adv. Rep. 3, 2000 UT 91. Costs 154; Costs 208

Absent showing that deposition of patient's expert was necessary to develop hospital's defense to malpractice claim, prevailing hospital would not be entitled to award of costs for deposition, notwithstanding fact that expert's opinion was necessary for patient to make her case. Young v. State, 2000, 16 P.3d 549, 409 Utah Adv. Rep. 3, 2000 UT 91. Costs 154

Prevailing party may recover deposition costs as long as the trial court is persuaded that the depositions were taken in good faith and, in the light of the circumstances, appeared to be essential for the development and presentation of the case. Young v. State, 2000, 16 P.3d 549, 409 Utah Adv. Rep. 3, 2000 UT 91. Costs 154

Costs of depositions not used at trial may be recovered if the trial court determines, in addition to finding that deposition was taken in good faith, that the deposition was essential to the case, either because the deposition was used in some meaningful way at trial or because the development of the case was of such a complex nature that the information provided by the deposition could not have been obtained through less expensive means of discovery. Young v. State, 2000, 16 P.3d 549, 409 Utah Adv. Rep. 3, 2000 UT 91. Costs 154

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Copies of patient's depositions of hospital's doctors were not essential to hospital's defense of malpractice claim, as would permit hospital to recover cost of copies as prevailing party in suit, where depositions were of hospital's own employees, were used only by plaintiff in her case in chief, and hospital had other methods of acquiring information contained in depositions. Young v. State, 2000, 16 P.3d 549, 409 **Utah** Adv. Rep. 3, 2000 UT 91. Costs 154

Witness fee of $1,000 paid by hospital to secure attendance of patient's expert at his deposition, to extent it exceeded witness fee allowed by statute, was not recoverable by hospital as part of prevailing party costs. U.C.A.1953, 21-5-4; Rules Civ.Proc., Rule 30(a). Young v. State, 2000, 16 P.3d 549, 409 **Utah** Adv. Rep. 3, 2000 UT 91. Costs 187

Review--In general

If a finding that a party's conduct merits discovery sanctions has been made and upheld on appeal, an appellate court will not disturb the amount of the sanction unless abuse of discretion is clearly shown. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 **Utah** Adv. Rep. 22, 2012 UT App 61. Appeal and Error 961

Denial of motion for a protective order is reviewed for an abuse of discretion, but to extent that the denial is based on the district court's interpretation of binding case law, it is reviewed for correctness. Christiansen v. Farmers Ins. Exchange, 2005, 116 P.3d 259, 523 **Utah** Adv. Rep. 12, 2005 UT 21, rehearing denied, on remand 2005 WL 4709726. Appeal And Error 840(4); Appeal And Error 961

Generally, the trial court is granted broad latitude in handling discovery matters, and appellate courts will not find abuse of discretion absent an erroneous conclusion of law or where there is no evidentiary basis for the trial court's rulings. Thurston v. Workers Compensation Fund of **Utah**, 2003, 83 P.3d 391, 490 **Utah** Adv. Rep. 9, 2003 UT App 438. Appeal And Error 961; Pretrial Procedure 19

Trial court's grant of protective discovery order and order disqualifying counsel are reviewed for an abuse of discretion. Rules Civ.Proc., Rule **26**. Spratley v. State Farm Mut. Auto. Ins. Co., 2003, 78 P.3d 603, 2003 UT 39, rehearing denied. Appeal And Error 949; Appeal And Error 961

Assignee of deed of trust beneficiary did not preserve for appellate review claim that trial court improperly applied the amended version of rule on a party's duty to supplement discovery responses, instead of the unamended version, in action to foreclose on property acquired by purchasers at a sheriff's sale; assignee did not raise that issue at trial, and argued it for the first time in his appellate brief. Rules Civ.Proc., Rule **26**(e). American Interstate Mortg. Corp. v. Edwards, 2002, 41 P.3d 1142, 439 **Utah** Adv. Rep. 20, 2002 UT App 16. Appeal And Error 199

Trial courts have broad discretion in matters of discovery, and their determinations regarding such matters are reviewed for abuse of discretion. Green v. Louder, 2001, 29 P.3d 638, 426 **Utah** Adv. Rep. 25, 2001 UT 62. Appeal And Error 961; Pretrial Procedure 19

Failure to require defendant in automobile negligence action to disclose surveillance videotape of plaintiff and the identity of its preparer was harmful error in action in which videotape and preparer's testimony were admitted to show plaintiff's injuries were less severe than she alleged; while jury did not reach damages issue because it found plaintiff more than 50 percent at fault in accident, the determination of liability hinged on parties' credibility, and plaintiff's credibility was directly undermined by evidence in question. (Per Greenwood, Associate P.J., with one Judge concurring in result.) Rules Civ.Proc., Rule **26**(b)(1). Roundy v. Staley, 1999, 984 P.2d 404, 374 **Utah** Adv. Rep. 15, 1999 UT App 229, certiorari denied 994 P.2d 1271. Appeal And Error 1043(6)

Trial court committed prejudicial error in denying tort plaintiff's discovery request for report prepared by defendant's insurance adjuster where defendant did not demonstrate that denial of discovery request was not prejudicial. Rules Civ.Proc., Rule **26**(b)

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(3). Askew v. Hardman, 1994, 884 P.2d 1258, certiorari granted 892 P.2d 13, reversed 918 P.2d 469. Appeal And Error 1043(6); Pretrial Procedure 381

Allegedly erroneous admission of testimony of defense expert who was identified for plaintiff 12 days before trial did not prejudice plaintiff; expert was one of five defense experts in response to testimony of plaintiff's 15 experts; and plaintiff thoroughly cross-examined expert. Rules Civ.Proc., Rules **26**(e)(1), 61; U.C.A.1953, 41-6-46(1)(1981). Onyeabor v. Pro Roofing, Inc., 1990, 787 P.2d 525. Appeal And Error 1043(1)

Refusal of court to permit defendant in special statutory action to remove city commissioner from malfeasance in office from taking depositions of witnesses, was error, but did not result in any prejudice to commissioner who had examined testimony which witnesses had given before grand jury, received answers to interrogatories submitted to district attorney and had procured substantially all discoverable information in action. U.C.A.1953, 77-7-1, 77-7-2, 77-7-11; Rules of Civil Procedure, rules 1, 61, 81. State v. Geurts, 1961, 11 **Utah** 2d 345, 359 P.2d 12. Appeal And Error 1170.6; Pretrial Procedure 61

---- Standard of review, review

In reviewing the imposition of discovery sanctions, an appellate court applies a two-part approach: (1) the court considers whether the district court was justified in ordering sanctions, and (2) the court then reviews the type and amount of sanctions for abuse of discretion. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 **Utah** Adv. Rep. 22, 2012 UT App 61. Appeal and Error 840(4); Appeal and Error 961

An appellate court will affirm an award of discovery sanctions so long as the findings appear in the lower court's opinion or elsewhere to sufficiently indicate the factual basis for the ultimate conclusion, or where there is evidence in the record to support the award. PC Crane Service, LLC v. McQueen Masonry, Inc., 2012, 273 P.3d 396, 703 **Utah** Adv. Rep. 22, 2012 UT App 61. Appeal and Error 1024.3

Rules **Civ**. Proc., Rule **26**, UT R RCP Rule **26**
current with amendments received through December 1, 2015.

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Arizona Revised Statutes Annotated
Rules of Civil Procedure for the Superior Courts of Arizona (Refs & Annos)
V. Depositions and Discovery (Refs & Annos)

16 A.R.S. Rules of Civil Procedure, Rule 26.1

Rule 26.1. Prompt disclosure of information

Currentness

(a) Duty to Disclose, Scope. Within the times set forth in subdivision (b), each party shall disclose in writing to every other party:

(1) The factual basis of the claim or defense. In the event of multiple claims or defenses, the factual basis for each claim or defense.

(2) The legal theory upon which each claim or defense is based including, where necessary for a reasonable understanding of the claim or defense, citations of pertinent legal or case authorities.

(3) The names, addresses, and telephone numbers of any witnesses whom the disclosing party expects to call at trial with a fair description of the substance of each witness' expected testimony.

(4) The names and addresses of all persons whom the party believes may have knowledge or information relevant to the events, transactions, or occurrences that gave rise to the action, and the nature of the knowledge or information each such individual is believed to possess.

(5) The names and addresses of all persons who have given statements, whether written or recorded, signed or unsigned, and the custodian of the copies of those statements.

(6) The name and address of each person whom the disclosing party expects to call as an expert witness at trial, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, the qualifications of the witness and the name and address of the custodian of copies of any reports prepared by the expert.

(7) A computation and the measure of damage alleged by the disclosing party and the documents or testimony on which such computation and measure are based and the names, addresses, and telephone numbers of all damage witnesses.

(8) The existence, location, custodian, and general description of any tangible evidence, relevant documents, or electronically stored information that the disclosing party plans to use at trial and relevant insurance agreements.

(9) A list of the documents or electronically stored information, or in the case of voluminous documentary information or electronically stored information, a list of the categories of documents or electronically stored information, known by a party

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to exist whether or not in the party's possession, custody or control and which that party believes may be relevant to the subject matter of the action, and those which appear reasonably calculated to lead to the discovery of admissible evidence, and the date(s) upon which those documents or electronically stored information will be made, or have been made, available for inspection, copying, testing or sampling. Unless good cause is stated for not doing so, a copy of the documents and electronically stored information listed shall be served with the disclosure. If production is not made, the name and address of the custodian of the documents and electronically stored information shall be indicated. A party who produces documents for inspection shall produce them as they are kept in the usual course of business.

COURT COMMENT TO 1991 AMENDMENT

In March, 1990 the Supreme Court, in conjunction with the State Bar of Arizona, appointed the Special Bar Committee to Study Civil Litigation Abuse, Cost and Delay, which was specifically charged with the task of studying problems pertaining to abuse and delay in civil litigation and the cost of civil litigation.

Following extensive study, the Committee concluded that the American system of civil litigation was employing methods which were causing undue expense and delay and threatening to make the courts inaccessible to the average citizen. The Committee further concluded that certain adjustments in the system and the Arizona Rules of Civil Procedure were necessary to reduce expense, delay and abuse while preserving the traditional jury trial system as a means of resolution of civil disputes.

In September, 1990 the Committee proposed a comprehensive set of rule revisions, designed to make the judicial system in Arizona more efficient, more expeditious, less expensive, and more accessible to the people. It was the goal of the Committee to provide a framework which would allow sufficient discovery of facts and information to avoid “litigation by ambush.” At the same time, the Committee wished to promote greater professionalism among counsel, with the ultimate goal of increasing voluntary cooperation and exchange of information. The intent of the amendments was to limit the adversarial nature of proceedings to those areas where there is a true and legitimate dispute between the parties, and to preclude hostile, unprofessional, and unnecessarily adversarial conduct on the part of counsel. It was also the intent of the rules that the trial courts deal in a strong and forthright fashion with discovery abuse and discovery abusers.

After a period of public comment and experimental implementation in four divisions of the Superior Court in Maricopa County, the rule changes proposed by the Committee were promulgated by the Court on December 18, 1991, effective July 1, 1992.

COMMITTEE COMMENT TO 1991 AMENDMENT

This addition to the rules is intended to require cooperation between counsel in the handling of civil litigation. The Committee has endeavored to set forth those items of information and evidence which should be promptly disclosed early in the course of litigation in order to avoid unnecessary and protracted discovery as well as to encourage early evaluation, assessment and possible disposition of the litigation between the parties.

It is the intent of the Committee that there be a reasonable and fair disclosure of the items set forth in Rule 26.1 and that the disclosure of that information be reasonably prompt. The intent of the Committee is to have newly discovered information exchanged with reasonable promptness and to preclude those attorneys and parties who intentionally withhold such information from offering it later in the course of litigation.

The Committee originally considered including in Rule 26.1(a)(5) a requirement for disclosure of all cases in which an expert had testified within the prior five (5) years. The Committee recognized in its deliberations that information as to such cases might be important in certain types of litigation and not in others. On balance, it was decided that it would be burdensome to require this information in all cases.

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COMMITTEE COMMENT TO 1996 AMENDMENT

Rule 26.1(a)(3). With regard to the degree of specificity required for disclosing witness testimony, it is the intent of the rule that parties must disclose the substance of the witness' expected testimony. The disclosure must fairly apprise the parties of the information and opinion known by that person. It is not sufficient to simply describe the subject matter upon which the witness will testify.

Rule 26.1(a)(5) was not intended to require automatic production of statements. Production of statements remains subject to the provisions of Rule 26(b)(3).

Rule 26.1(a)(6). A specially retained expert as described in Rule 26(b)(4)(B) is not required to be disclosed under Rule 26.1.

(b) Time for Disclosure; a Continuing Duty.

(1) The parties shall make the initial disclosure required by subdivision (a) as fully as then possible within forty (40) days after the filing of a responsive pleading to the Complaint, Counterclaim, Crossclaim or Third Party Complaint unless the parties otherwise agree, or the Court shortens or extends the time for good cause. If feasible, counsel shall meet to exchange disclosures; otherwise, the disclosures shall be served as provided by Rule 5. In domestic relations cases involving children whose custody is at issue, the parties shall make disclosure regarding custody issues no later than 30 days after mediation of the custody dispute by the conciliation court or a third party results in written notice acknowledging that mediation has failed to settle the issues, or at some other time set by court order.

(2) The duty prescribed in subdivision (a) shall be a continuing duty, and each party shall make additional or amended disclosures whenever new or additional information is discovered or revealed. Such additional or amended disclosures shall be made seasonably, but in no event more than thirty (30) days after the information is revealed to or discovered by the disclosing party. A party seeking to use information which that party first disclosed later than (A) the deadline set in a Scheduling Order, or (B) in the absence of such deadline, sixty (60) days before trial, must seek leave of court to extend the time for disclosure as provided in Rule 37(c)(2) or (c)(3).

(3) All disclosures shall include information and data in the possession, custody and control of the parties as well as that which can be ascertained, learned or acquired by reasonable inquiry and investigation.

COMMITTEE COMMENT TO 1991 AMENDMENT

The Committee does not intend to affect in any way, any party's right to amend or move to amend or supplement pleadings as provided in Rule 15.

COURT COMMENT TO 1991 AMENDMENT

The above rule change was part of a comprehensive set of rule revisions proposed by the Special Bar Committee to Study Civil Litigation Abuse, Cost and Delay, which was specifically charged in March, 1990 with the task of proposing rules to reduce discovery abuse and to make the judicial system in Arizona more efficient, expeditious, and accessible to the people.

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For more complete background information on the rule changes proposed by the Committee, see Court Comment to Rule 26.1(a).

(c) Deleted effective Dec. 1, 1996.

(d) Signed Disclosure. Each disclosure shall be made in writing under oath, signed by the party making the disclosure.

(e) Deleted effective Dec. 1, 1996.

COMMITTEE COMMENT TO 1991 AMENDMENT

Rule 26.1(e) is intended specifically to deal with the party and/or attorney who makes intentionally inaccurate or misleading responses to discovery.

COURT COMMENT TO 1991 AMENDMENT

The above rule change was part of a comprehensive set of rule revisions proposed by the Special Bar Committee to Study Civil Litigation Abuse, Cost and Delay, which was specifically charged in March, 1990 with the task of proposing rules to reduce discovery abuse and to make the judicial system in Arizona more efficient, expeditious, and accessible to the people.

For more complete background information on the rule changes proposed by the Committee, see Court Comment to Rule 26.1(a).

(f) Claims of Privilege or Protection of Trial Preparation Materials.

(1) *Information Withheld*. When information is withheld from disclosure or discovery on a claim that it is privileged or subject to protection as trial-preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced or disclosed that is sufficient to enable other parties to contest the claim.

(2) *Information Produced*. If a party contends that information subject to a claim of privilege or of protection as trial-preparation material has been inadvertently disclosed or produced in discovery, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has made and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

STATE BAR COMMITTEE NOTE
2008 Amendment

As with its federal counterpart, the amendment is intended merely to place a “hold” on further use or dissemination of an inadvertently produced document that is subject to a privilege claim until a court resolves its status or the parties agree to an appropriate disposition. The amendment, however, “does not address whether the privilege or protection

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that is asserted after production was waived by the production." Fed. R. Civ. P. 26(b)(5)(B), Advisory Committee Notes on 2006 Amendment.

(g) Deleted effective Dec. 1, 1996.

Credits

Added Dec. 20, 1991, effective July 1, 1992. Amended May 30, 1996, effective Dec. 1, 1996; Nov. 22, 1996, effective March 1, 1997; Sept. 5, 2007, effective Jan. 1, 2008; Dec. 20, 1991, effective July 1, 1992; July 31, 2014, effective July 31, 2014, subject to the applicability provisions of Arizona Supreme Court Order No. R-13-0017.

Editors' Notes

GUIDELINES FOR RULE 26.1 [WITHDRAWN]

Court Note

Rule 26.1 Guidelines have been withdrawn because of rule changes and court opinions that have been adopted or issued since the Guidelines were adopted.

APPLICATION

<Order R-05-0008 dated October 10, 2005, effective January 1, 2006, provided, "with respect to family law cases pending as of January 1, 2006, that if disclosure was previously made pursuant to Rule 26.1, Arizona Rules of Civil Procedure, further disclosure shall not be required under Rule 49 or 50 of the Arizona Rules of Family Law Procedure, except for the duty to seasonably supplement the earlier disclosure.">

<The text of this rule which is effective March 1, 1997 is inapplicable to cases which are set for trial between March 1 and April 30, 1997.>

Notes of Decisions (90)

16 A. R. S. Rules Civ. Proc., Rule 26.1, AZ ST RCP Rule 26.1
Arizona State court rules are current with amendments received through 10/15/15

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TX Rules of Civil Procedure, Rule 194.2

194.2. Content

Currentness

A party may request disclosure of any or all of the following:

(a) the correct names of the parties to the lawsuit;

(b) the name, address, and telephone number of any potential parties;

(c) the legal theories and, in general, the factual bases of the responding party's claims or defenses (the responding party need not marshal all evidence that may be offered at trial);

(d) the amount and any method of calculating economic damages;

(e) the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case;

(f) for any testifying expert:

(1) the expert's name, address, and telephone number;

(2) the subject matter on which the expert will testify;

(3) the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting such information;

(4) if the expert is retained by, employed by, or otherwise subject to the control of the responding party:

(A) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony; and

(B) the expert's current resume and bibliography;

(g) any indemnity and insuring agreements described in Rule 192.3(f);

(h) any settlement agreements described in Rule 192.3(g);

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(i) any witness statements described in Rule 192.3(h);

(j) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills that are reasonably related to the injuries or damages asserted or, in lieu thereof, an authorization permitting the disclosure of such medical records and bills;

(k) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills obtained by the responding party by virtue of an authorization furnished by the requesting party;

(l) the name, address, and telephone number of any person who may be designated as a responsible third party.

Credits

Aug. 5, 1998, Nov. 9, 1998 and Dec. 31, 1998, eff. Jan. 1, 1999. Amended by order of March 3, 2004, eff. March 3, 2004.

Notes of Decisions (50)

Vernon's Ann. Texas Rules Civ. Proc., Rule 194.2, TX R RCP Rule 194.2

Rules of Civil Procedure, Rules of Evidence, and Rules of Appellate Procedure are current with amendments received through September 1, 2015. Bar Rules, Rules of Disciplinary Procedure, Code of Judicial Conduct, and Rules of Judicial Administration are current with amendments received through September 1, 2015. Other state court rules and selected county rules are current with rules verified through June 1, 2015.

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A Study of Civil Case Disposition Time in U.S. District Courts

Donna Stienstra

Federal Judicial Center

May 2015

This Federal Judicial Center publication was undertaken in furtherance of the Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. While the Center regards the content as responsible and valuable, this publication does not reflect policy or recommendations of the Board of the Federal Judicial Center.

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Introduction

This report summarizes the Federal Judicial Center's research for the Court Administration and Case Management Committee on the Most Congested Courts (MCC) Project.[1] The Center submitted an earlier memorandum to the Committee on courts that dispose of their cases most slowly.[2] The present report is a full and final report to the Committee on the Center's development of a new type of caseload analysis, use of that analysis to identify courts with slower and faster disposition times, and the findings from interviews with selected districts with slower and faster disposition times.

Overall, during this project, the Center:

- developed a new method for identifying districts that are not keeping up with their caseloads, as measured by case disposition time;
- developed an analysis of case disposition time, by nature of suit, for each of the ninety-four district courts;
- identified seven districts that have particularly long disposition times on a significant number of different case types (the "most congested courts");
- in summer 2013, provided the caseload analyses to and conducted interviews with the chief judge and clerk of court in the seven districts with slower case disposition times to determine the sources of delay;
- in November 2013, submitted to the Committee's Case Management Subcommittee a confidential memo on the districts with delayed civil case disposition times, which presented findings from the interviews with these districts;
- identified seven districts that have particularly short disposition times for a significant portion of their caseload (the "expedited courts"); and
- in fall 2014, provided the caseload profiles to and conducted interviews with the chief judge and clerk of court in the seven districts with faster disposition times to determine the procedures these districts use to expedite their caseloads.

To complete the project, we are providing this final report, which presents a history of the MCC Project, an overview of the Center's development of a new method of caseload analysis, and the findings from the interviews with the fourteen districts selected for the study.

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1. We had valuable assistance and guidance from the Case Management Subcommittee at key stages of the project and thank the members for their help: Judge Richard Arcara (chair), Judge Roger Titus, Judge Dan Hovland, Judge Marcia Crone, Judge Sean McLaughlin, Judge Charles Coody, Larry Baerman, clerk of court representative to the committee, and Jane MacCracken, staff to the committee. I especially appreciate the participation of Judge Arcara, Larry Baerman, and Jane MacCracken in the interview process. Their participation was invaluable in conducting the interviews and interpreting the information obtained. And I am very grateful to my colleague Margaret Williams for the caseload analysis on which the Most Congested Courts Project relies.

2. The Center submitted its report on the courts with delayed civil case disposition times on November 20, 2013. Given the confidential nature of some of the court-specific findings, the report is not a public document.

Although the close examination of specific districts is completed with this report, there is one important respect in which the Most Congested Courts Project will continue indefinitely. Periodically the Center will update the caseload analysis for each of the ninety-four district courts and will provide each district with its analysis. The Committee approved this distribution at its December 2014 meeting because the analyses have been well received by and helpful to the districts that have received them. Each of the ninety-four districts has received the first transmission of its own caseload analysis, in the form of a case disposition time dashboard prepared by the Center and reviewed by the Case Management Subcommittee. The long-term goal is for the districts to access their caseload analyses at an intranet website. In the meantime, the Center will provide the analyses individually to each district.

MCC Project Origin and Goals

Before presenting findings from interviews with the courts, we briefly recap the purpose and methodology of the Most Congested Courts Project.

In 2001, the Judicial Conference asked the Court Administration and Case Management Committee to monitor the caseloads of the district courts, identify districts with significant caseload delay, and offer assistance to those districts. The Administrative Office (AO) developed a composite measure of caseload delay, ranked the ninety-four district courts on this measure, and identified the most delayed 25% as the "most congested courts" ("MCCs"). Approximately once every two years, the Committee then sent a letter to the chief judge of each MCC to alert the court to its ranking and to suggest a variety of remedies, including such actions as use of visiting judges, attendance at workshops, and consideration of case-management practices recommended in guides and manuals.

Some districts responded with explanations for their status, others with polite thanks, and some not at all. Over the first ten years of the Committee's efforts, it became clear that membership on the list of MCCs changed little and that the Committee's letters had limited effect. The Committee decided that it needed a new approach to the problem of courts with caseload delays and asked the Center to develop a new method for identifying and assisting courts where civil case disposition times are lengthy.

The New Analysis for Identifying District Courts with Delayed Civil Case Disposition Times

The Committee wanted the new method to provide the Committee and courts with better information about caseload delay so assistance could be more targeted. If the problem lies in habeas cases, for example, a quite different remedy might be needed than if the problem lies in patent cases. Working with the Committee's Case Management Subcommittee, the Center developed a method that examines district caseloads at the case type level—that is,

an analysis that gives a district information about the status of each case type, or nature of suit (NOS), in its civil caseload.[3]

The new method compares the average disposition time for each case type within a district to the average disposition time for each case type nationally. To develop the measure, the Center first calculated a national average disposition time for each of the nearly 100 nature of suit codes across all ninety-four districts combined. The Center then calculated the average disposition time for each nature-of-suit code for each district for the past three years.[4] In the final step of the analysis, the Center compared each district's average disposition time for each nature-of-suit code to the national historical average.

To help districts understand the analysis, the Center developed a graphic presentation that relies on colors to show a district which cases it is disposing of faster or slower than the national average—deep red for very slow, pink for slow, yellow for near the national average, light green for fast, and deep green for very fast. The Center used tables and bar charts to present the results of the analysis (see Attachment 1[5]). Because of the graphic presentation—the colors in particular—districts quickly understand where they are having problems disposing of cases and where they are doing well. More recently, the Center has developed a case disposition dashboard for presenting the results of the analysis. The dashboard also provides disposition times graphically and relies on the same color scheme, but uses a simpler graphic and also presents more information by providing the specific cases included in each NOS group (see Attachment 2 for a description of the dashboard).

Using either approach, the new analysis tells the Committee which districts have fallen seriously behind the national average in disposing of their civil caseloads, which districts are doing much better than the national average, and exactly which types of cases are most seriously delayed in the districts with delayed civil case disposition times. The new analysis does not, however, provide a single score or a method for ranking districts. Rather, it requires examination of each district to see whether a district has either a large number of case types that take more than 15% longer to dispose of than the national average or a smaller number of case types that take much, much longer (e.g., 100% longer) than the national average to terminate. If a district meets these criteria, it merits attention by the Committee.

The new analyses of case disposition time have proven to be very helpful to the courts and have been well received by the fourteen districts selected by the Committee for further discussions (see descriptions below of interviews conducted with these courts). These districts unanimously expressed their intent to use the new analyses for serious, district-

3. The analysis and the graphics produced by the analysis were developed by Margaret Williams, Senior Research Associate, of the Center's Research Division.

4. To reduce risk that a year of unusual activity would skew averages, the Center chose a three-year time frame. Longer or shorter time frames could be used, as could other comparisons, such as averages for courts of the same size.

5. The initial version of the analysis grouped the civil natures of suit into four categories (or "quartiles")—faster, fast, slow, and slower natures of suit—and included an average disposition time for criminal felony cases as well. A second generation presentation—a case disposition dashboard—does not group the natures of suit nor include the criminal felony caseload.

specific, and data-driven assessments of case-management practices. Several districts said they had, in fact, already made significant changes in case-management practices after reviewing the new caseload analyses.

Interviews: A New Approach to Assisting Districts with Delayed Civil Case Disposition Times

Based on a recommendation from the Center, the Committee agreed that the better approach to assisting courts with caseload delays would be to interview them rather than sending letters. The Committee also agreed that each district should receive its own caseload analysis, since the Committee members themselves had found the graphics exceptionally helpful in understanding their own court's caseload. Working with the new case disposition analysis and the Case Management Subcommittee, the Center identified districts that differed from the national average in either having a high number of civil case types that were delayed or in having extreme delay, even if in a smaller number of civil case types. Of the initial set of fourteen districts that met these criteria, the Subcommittee selected seven that were seriously delayed. Then-chair of the Committee, Judge Julie Robinson, sent these districts the Center's new case disposition analysis and an invitation to be interviewed, which all seven districts accepted.[6]

Because the issue of delay was potentially sensitive, the Committee agreed that it would be helpful to the Center's research staff to have a judge member of the Committee participate in the interviews. In the end, each interview was conducted by a judge member, the clerk of court representative to the Committee, a member of the Committee staff, and myself.[7] In each district, we interviewed the chief judge and clerk of court to try to understand more fully why their civil caseloads had become delayed and what kinds of targeted assistance might help them dispose of civil cases more quickly.[8] Because the seven districts were geographically disbursed, we conducted most of the interviews by telephone.

Typically each chief judge opened the discussion with an explanation of the district's caseload challenges and steps the district had taken or was planning to take to address caseload delays. Most of the districts had prepared "talking points"—and, in some districts, documentary material—for the interview. The interview team had not asked the districts to make such preparations, but they clearly were well prepared for the interview and wanted to open by providing information they felt was important for the Committee to know.[9]

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6. Because the report on the most congested courts is confidential but this report on the expedited districts very likely will be a public report, we do not identify the most congested districts.

7. The Committee member was Judge Richard Arcara, who also chairs the Case Management Subcommittee; the clerk of court representative was Larry Baerman; and the Committee staff member was Jane MacCracken.

8. The interviews took place between March and September 2013. In several districts, additional judges or court staff joined the chief judge and clerk for the interview.

9. Attachment 3 provides an example email showing the information sent to a district before the interview to help the chief judge and clerk of court understand the nature of the interview. The graphics sent for

Then, if the chief judge and clerk had not already addressed the case types that were both seriously delayed and accounted for a sizable portion of the district's caseload, the interview team asked the chief judge to talk about how these cases are handled by the court and why they might be delayed. This invitation usually generated considerable additional discussion.

The interviews generally lasted at least an hour and provided abundant information about problems encountered and actions taken by the seven selected districts. The chief judges and clerk of court were welcoming to the interviewers and generous in the information they provided. Without exception, they found the caseload analysis very helpful, particularly in identifying problems at the detailed level of individual case types. Several said the tables had opened up a dialogue in their court about how the court handles its cases, not only cases that were delayed but other cases as well, and had already led to some changes in procedure. Also without exception, the chief judges said they appreciated the Committee's inquiry and offers to help.

Challenges Identified in Districts with Delayed Civil Case Disposition Times

We relied on two sources of information for understanding civil case disposition delays in the seven courts selected for the study: the Center's caseload analyses and information the chief judge and clerk of court provided during the interviews. In reviewing the caseload analyses and talking with the courts, we focused on the case types that were both the most delayed and included the greatest number of cases. Because of their numbers, these case types have a larger impact on a district's overall disposition time, and, more importantly, delay in these cases affects a larger number of litigants.

The caseload analyses revealed how seriously delayed each district's caseload was and the case types that accounted for delay. Delays were very substantial in each district, even in case types that are typically disposed of quickly nationwide—for example, in one district the faster case types were disposed of eighty-one percent more slowly than the national average and in another these case types were disposed of seventy-two percent more slowly. In addition, the caseloads were delayed across many different case types.

From the caseload analysis, we could see a pattern across the seven districts. The most commonly delayed case types—i.e., found in five or more districts—were prisoner petitions to vacate a sentence or for habeas corpus, along with employment civil rights, ERISA, insurance, and "other" contract cases. Prisoner civil rights, foreclosure, and "other" statutory actions were delayed in four of the seven. Districts also had delayed disposition times in case types with large numbers of cases specific to that district—for example, marine personal injury cases in a district on a harbor; medical malpractice cases in a major medical center; copyright, patent, trademark, and antitrust cases in districts that are economic centers; and Social Security and consumer credit cases in districts that had experienced rapid increases in these case types. The two central points from this analysis were that in the courts with delayed case disposition times (1) delay was found across a large number of

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these interviews were the initial type prepared by the Center—i.e., the bar graphs and tables shown in Attachment 1—and not the more recently developed electronic dashboard shown in Attachment 2.

case types and was not limited to a few case types, and (2) several case types, involving large numbers of litigants—for example, prisoner cases, employment civil rights cases, and ERISA cases—were delayed in a majority of the seven districts.

From the interviews, we learned not only the districts' assessments of their problems but also that they were aware of their court's caseload delay before being contacted by the Committee and had been taking steps to resolve it. With regard to the specific reasons for delay, each district offered a number of explanations, some that had caused problems generally for the district and some that had caused problems for specific case types. Although there were idiosyncratic explanations and conditions in some districts, the reasons cited can be grouped into several categories—keeping in mind that these are perceived, and not quantitatively measured, causes.[10]

Criminal caseload

Four of the seven districts said their criminal caseloads were particularly demanding, because of either the sheer number of cases or case complexity (e.g., terrorism or death-eligible cases).

Circuit law

Circuit law required several districts to be deferential to the pleadings filed by pro se litigants. This deferential treatment of pleadings results in the courts having to deal with more amended complaints and, often, substantial motion practice and discovery disputes that do not occur in districts where circuit law is less deferential to the pleadings of pro se litigants.

Number and/or complexity of civil filings

In several districts, specialized litigation had emerged from economic activity in the district—e.g., litigation involving patents, financial and medical institutions, and contracts—and had given rise to voluminous and complex motions. In several others, specialized law firms had developed to litigate Social Security, ERISA, and consumer credit cases and, as a consequence, more such cases were being filed.

Resources

Three of the seven districts with delayed civil disposition times had long-term vacancies and several had no or few senior judges. Altogether, the seven courts with delayed disposition times had sixty-four judgeships and 434 vacant judgeship months for the five-year period 2010–2014 compared to seven courts with fast disposition times (see below), which had seventy-nine judgeships and 303 vacant judgeship months.[11] Most of the districts also

10. Although the districts provided explanations for some of their delayed case types, they also were sometimes unsure why a case type might have a longer-than-average disposition time. This was generally true, for example, for ERISA and FLSA cases.

11. Numbers are from the Federal Court Management Statistics, which can be found at http://www.uscourts.gov/statistics-reports/analysis-reports/federal-court-management-statistics. During the same years, the two groups of courts did not differ, on the whole, in the number of weighted filings. Three of the courts with delayed civil case disposition times had weighted filings averaging 500 to 600 cases per judge,

identified too few staff as a cause of delay, particularly too few pro se or staff law clerks who could help with voluminous complex motions or with prisoner litigation. Although the districts have looked for and often benefitted from outside help, they had found it difficult to get help for the most voluminous parts of their caseloads because of limits on the number of staff law clerks allocated to the courts and the reluctance of visiting judges to take a caseload consisting of motions and/or prisoner cases.

Human resource quality and organization

Four of the seven districts had had problems with the quality or organization of human resources, including law clerk problems in chambers, poor organization and lack of oversight of pro se law clerks, poor quality of pro se law clerks, and an underperforming judge.

Case-management practices

Two districts described case-management practices that delayed civil cases—in one, a tradition of judicial deference to lawyers, including lax enforcement of case schedules, and in another the liberal granting, until recently, of continuances.

Steps Taken by the Districts to Reduce Delayed Civil Case Disposition Times

Each of the seven districts had taken steps to try to solve the problem of civil caseload delay. These efforts fall into several categories.

Efforts to reorganize or reallocate work

Three districts with significant delays in prisoner litigation tried to improve the service provided by their pro se law clerks, experimenting with time limits, reallocating work between pro se clerks and chambers staff, and reassigning oversight responsibility for the pro se law clerks. One district, for example, had used the pro se law clerks to make sure pleadings in pro se cases were in order and to screen for IFP compliance under the PLRA. When the court transferred this screening to the clerk's office, it reduced the screening stage from four-to-five months to four-to-five days. This district also moved responsibility for non-prisoner pro se cases from the pro se law clerks to the magistrate judges. This district realized no improvement in civil disposition times, however, by putting magistrate judges on the civil case assignment wheel. In another effort to improve judicial resources, one district changed the assignment system for senior judges to make assignments more predictable; as a result, the senior judges took more cases.

Efforts to enhance resources

The districts with delayed disposition time have used a number of approaches to increase their staff and judge resources. Three districts have secured additional law clerks to work on motions, pro se cases, and Social Security cases. One district reported reducing its habeas backlog 39% by devoting two pro se clerks to these cases. In another approach to resolv-

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for example, but three of the courts with fast civil disposition times had weighted filings averaging over 600 cases per judge (Federal Court Management Statistics).

ing prisoner cases, a district had started working with a local law school clinic, which gave law students legal experience through work on pro se cases. One district turned to recalled magistrate judges, two others relied heavily on their own magistrate judges, and another benefitted from a large number of senior judges. Another strategy, relied on by three districts, was the use of visiting judges. Most of the districts, however, noted the reluctance of visiting judges to do the work that most needs to be done—i.e., deciding motions. One district had been able to secure visiting judge help with motions only by giving visiting judges full control of the cases through trial.

Efforts to change or enhance case-management procedures

The districts with delayed disposition time had also adopted a number of case-management practices they hoped would improve civil case processing. One had recently adopted a package of new case-management practices that included standardized discovery, standardized dates, and mandatory mediation for some types of cases; case management orientation and appointment of a mentor judge for new judges; and early conferences with lawyers and thus early identification of difficult issues in complex cases. Several districts in the same circuit had adopted electronic service to the U.S. Attorney's Office and the Department of Corrections in state habeas cases; one of these districts reported a sixty-day reduction in the time to serve. Four of the districts had mediation programs for civil cases, and one had recently started a differentiated case-tracking program. This district had also realized a reduction in case delay since ending the routine granting of continuances.

Efforts to provide assistance to pro se litigants

Two districts had made particular efforts to provide assistance to pro se litigants to help resolve these cases more quickly. One had established a mediation program at the court for pro se litigants and also provides a grant each year, from its attorney admissions fund, to support the local federal bar association's pro se clinic. A second provides mediation for pro se litigants in employment cases through collaboration with a local law school. This district has also established an outreach program to the bar and provides a day of training, involving the district's most respected judges, for attorneys who volunteer pro bono for pro se cases. The court reported that this program has greatly expanded the pro bono attorney pool, and over 100 cases have been provided full representation, saving considerable judge and staff time. This district coordinates its pro se assistance through a pro se office established by the court.

Future Assistance Suggested by Districts with Delayed Civil Case Disposition Times

In addition to efforts already made, the districts with delayed civil disposition times made suggestions for further actions that might help them dispose of their civil cases more quickly. These suggestions fall into two broad categories.

Resources

Most of the districts noted, first, the need for more judgeships and/or the need to fill vacancies. All recognized the limited prospects for such help, particularly new judgeships, and went on to identify other types of useful resources. All seven districts called for more law clerks. In some districts, additional law clerks would provide help with voluminous motions. In others, additional law clerks would help meet the demand of pro se cases. Districts with temporary law clerks called for a change in how these law clerks are funded and allocated. They specifically suggested that the appointment should be significantly longer than the current one-year term, which permits barely enough time for a law clerk to become familiar with the work. Another district suggested a visiting law clerk program. Two districts also called for more assistance from visiting judges but with an emphasis on visiting judges who are willing to handle motions.

Guidance and information on best practices

The districts had several suggestions for assistance or guidance that might be provided to courts with problems of caseload delay, as well as to courts generally. The Administrative Office and/or Federal Judicial Center might provide guidance, through a website or resource center, on how to use pro se law clerks more effectively, including position descriptions, advice on oversight and supervision, and options for organizing the pro se law clerk function and allocating pro se cases. The AO and Center might give the courts guidance on judicial case management practices, with particular emphasis on the methods used by judges who dispose of cases quickly. The AO and Center might also develop electronic tools that would help courts pull more information out of caseload data. The courts also suggested development of guidance on using mediation and setting up electronic service for prisoner pro se cases. When asked how best to disseminate information, a chief judge suggested that judges and clerks are more likely to pick up information at workshops—such as new judge training, the annual district and magistrate judge workshops, and the annual clerk of court conference—than to go online to search for information.

Interviews in Districts with Fast Civil Case Disposition Times

The Committee had been inclined to conduct interviews in the fastest—or "most expedited"—districts in addition to the delayed—or "most congested"—districts, and the interviews in the districts with delayed case disposition times confirmed the importance of doing so. First, the courts with delay had asked for information about practices used in districts with fast disposition times, but also, under its responsibility to identify and disseminate "best practices," the Committee wished to collect and publicize steps the courts were taking to resolve civil cases expeditiously.

Using the caseload analyses and working with the Case Management Subcommittee, the Center identified a set of districts that dispose of their civil cases very quickly. The Subcommittee selected seven of these districts for interviews. These districts, which are representative of large, medium, and small districts and were distributed across the country and circuits, were the following:

Central District of California	Northern District of Texas
Southern District of Florida	Western District of Washington
District of Maine	Eastern District of Wisconsin
Western District of Missouri	

Then-chair of the Committee, Judge Julie Robinson, sent a letter to the chief judges in these districts, inviting the chief judges to participate in the Most Congested Courts Project as examples of districts that were able to dispose of civil cases quickly. The letter included the Center's caseload analysis for that district. Each chief judge responded positively to the invitation. The same team of four interviewers then spoke by telephone with the chief judge and clerk of court in each district, this time focusing on steps the districts had taken to dispose of civil cases quickly.[12]

As in the courts with delayed civil case disposition times, typically each chief judge opened the interview, but in these districts the focus was on practices and rules used to move civil cases expeditiously. The chief judges and clerks were well prepared for the interviews and most proceeded through a list of practices and rules they thought might explain why their civil case disposition time was fast relative to the national average. The interview team was particularly interested in fast disposition times in case types that had long disposition times in most of the courts with delay and, if a chief judge or clerk did not address those case types, the interview team asked about practices that might explain the fast disposition times.

The interviews generally lasted at least an hour and provided a great deal of information about case-management practices and rules in the seven districts. The chief judges and clerk of court were very responsive in providing information and offered to be of further assistance if needed.

Procedures and Practices in Districts with Fast Civil Case Disposition Times

As in the districts with delayed disposition times, we relied on the Center's caseload analysis and our interviews to develop an understanding of courts that dispose of their civil cases quickly. The caseload graph and tables showed that the districts were not only expeditious overall but were expeditious across most types of cases. In fact, one of the districts disposed of every type of civil case, except four, near or faster than the national average. What explains the fast disposition times in these districts?

12. The interviews took place in October and November 2014. In one or two districts, additional judges or court staff joined the chief judge and clerk for the interview. Attachment 4 provides an example of information sent to each district shortly before the interview to inform them of the nature of the interview.

We looked for common case-management and case-assignment practices across all seven districts, thinking there might be specific practices, used by all, that could become concrete guidance for other courts—for example, having a uniform case-management order used by all judges; having magistrate judges on the civil case assignment wheel (or not); using R&Rs (or not); or providing mediation through a court-based process. We did not find that kind of uniformity across all, or even some, of the districts with fast civil disposition times or even across all judges in some districts. Although we did not find a single set of procedures or a package that, if adopted, would be the key to expeditious civil case dispositions, we did identify common characteristics across the courts with fast civil disposition times—most importantly, sufficient judicial resources, but also a commitment to and culture of early case disposition. This commitment and culture were manifest in several ways—early and active judicial case management, a court-wide approach to managing cases and solving problems, and extensive use of magistrate judges and staff law clerks. In the discussion below, keep in mind, as in the districts with delayed civil case disposition times, that we are presenting the courts' perceptions, and not a quantitative analysis, of the causes of fast civil case disposition times in these districts.

Sufficient judicial resources

In all but one of the districts, the chief judges pointed to an essential factor in their fast civil disposition times—sufficient judicial resources. Several chief judges noted this factor right at the outset of the interview. Not only were the districts fortunate to have had few vacant judgeship months, but they also had either a long-term, experienced bench or senior judges who still took a significant caseload, or both. In one district, where judicial resources were not as substantial because of a long-term need for additional judgeships, the court had maintained its fast civil disposition times through exceptionally long hours by judges and staff (but with the negative consequences of ill health and early judicial retirements).

Culture of early case disposition

In addition to sufficient judicial resources, all of the chief judges in the courts with fast civil disposition times were emphatic about their culture of early case disposition. Most of the courts were intentional about this culture—i.e., they pursued it deliberately, were committed to maintaining it, and spoke of it as central to the identity of the court. This commitment is expressed through fairly standard case-management practices—early judicial involvement in the case; early setting of a schedule; early identification of cases that can be disposed of by removal, remand, or dispositive motion; prompt decisions on motions so, as one chief judge said, "the lawyers can do their work"; and no continuances, which is generally achieved by requiring counsel to submit a proposed case schedule and then holding them to it. Above all, as described by the chief judges, their districts emphasized very early judicial involvement and control and very firm respect for the schedule.

Institutional approach to case disposition

The courts with fast civil disposition times have a number of court-wide practices and rules in place that support early judicial case management and enforcement of deadlines. But, significantly, most of these courts are not characterized by uniform practices across all

judges, which some might expect to be a hallmark of a court that disposes of its civil cases quickly. One chief judge described the court's bench as "highly individualistic" and another chief judge said the court was marked by "fierce individualism." Only two of the chief judges pointed to uniform time frames and uniform case-management orders as part of their courts' approach to civil litigation. Otherwise the courts' practices, and those of individual judges within any given court, vary considerably—for example, whether or not they hold Rule 16 scheduling conferences or in-person hearings on motions. But in these districts several other factors that support expeditious civil case processing are shared court-wide:

- The local rules emphasize early case management.
- The judges are committed to joint responsibility for the court's caseload. "If someone falls behind," said one chief judge, "we help each other out." "We're a team," said another. In one of the districts, a court-wide committee reviews the caseload and, if bottlenecks are seen, makes adjustments in case allocations.
- The courts assertively use reports on the status of the caseload to monitor individual judge and court-wide performance. These reports are detailed, and in most districts the court's own internal reports, not only the CJRA reports, identify the judges by name. The reports are issued frequently and are discussed at court meetings or individually between the chief judge and each other judge. The purpose, and effect, of the reports is to provide a case management tool and to encourage judges to keep their own caseloads within the court's norms.
- The courts have a history and culture of problem solving—or, as one chief judge said, "always wanting to improve." The caseload reports are an example of tools used by the courts to routinely examine how they are doing, but these reports are only one example of the kind of constant review used by these courts. Most of the chief judges described study groups and task forces that had taken on one or another issue—for example, delays in Social Security cases, problems of attorney access to prisoners located in distant prisons, and frequent appellate court reversal of prisoner cases involving medical malpractice—and had developed solutions for the problems. Many of these courts have also developed innovative approaches to such perennial issues as discovery disputes and voluminous summary judgment motions (see below for examples).

Extensive and effective role for magistrate judges

The role of magistrate judges varies greatly across the seven courts with fast civil disposition times—for example, in several districts they are on the wheel for assignment of a portion of the civil caseload, and in others they are not; in some they handle all civil pretrial matters, and in others they do not; in some they are responsible for the prisoner and/or Social Security caseloads, and in others they are not. Regardless of the specific duties of the magistrate judges, the chief judges noted their courts' determination to use that resource to the fullest possible extent and described the magistrate judges, in the words of one judge, as "an integral part of the team." They also emphasized the high level of respect accorded the magistrate judges by judges and attorneys, as well as efforts made to increase that respect—for example, by giving the magistrate judges work that puts them in the courtroom to heighten

their visibility and enhance their authority. Magistrate judges also participate in court governance, including, in one district, the critical committee that monitors case flow. Whatever a court's approach may be, according to the chief judges, full integration of the magistrate judges is central to expeditious case disposition.

Experienced and highly skilled staff law clerks

Many of the courts with fast civil disposition times also benefit from long term, highly experienced staff law clerks. They typically handle the court's pro se and prisoner caseloads and over time have developed efficient systems for screening these cases and moving them toward disposition. These systems vary from district to district, but the staff law clerks were typically described as being very good at "triaging" this caseload and keeping it current.

In addition to these characteristics that are common across the courts, the judges told us of a number of practices they believe have helped their court reduce delay in civil cases or solve a particular problem, such as a sudden rise in Social Security cases. We briefly describe these district-specific practices, along with several procedures adopted to more efficiently handle some of the types of cases that are often delayed in the districts with delayed civil case disposition times.

Calendars and scheduling

In the Southern District of Florida, the majority of judges follow a term calendar—i.e., the year is divided into twenty-six two-week terms. Immediately on case filing, the judge reviews the case, then brings the attorneys in two-to-four weeks after answer is filed to set a schedule for the case. The trial date is set for a specific two-week period, with most trial dates set within one year of case filing. Approximately twelve to fifteen cases are set for each two- week trial term.

The judges in the District of Maine assign all civil cases to one of seven tracks, each with its own timelines and distinct, uniform scheduling order.

The Western District of Missouri designates two weeks of each month for criminal trials to ensure compliance with the Speedy Trial Act.

In the Western District of Washington, civil trials are conducted on a clock. At a pretrial conference ten to fourteen days before trial, the judge and attorneys determine the number of days and hours for trial. A clock starts when trial begins; each morning the judge announces the number of minutes left to each side. Side bars are assessed against the losing side. The process not only streamlines trials but also provides predictability for jurors and attorneys and prompts greater cooperation among attorneys to avoid being docked time.

Discovery

To control discovery, the District of Maine gives cases on the standard track four months to complete both fact and expert discovery. In all cases, attorneys must attempt to resolve discovery disputes on their own and, if they cannot, must talk with a magistrate judge, who attempts to mediate the conflict. Only with the magistrate judge's consent may they file a discovery motion.

In the Western District of Missouri, Local Rule 37.1 prohibits the filing of discovery motions, which is intended to prompt attorneys to resolve discovery disputes on their own. If attorneys determine that they must file a discovery motion, they must include a justification for the motion. A teleconference is then scheduled by the judge.

Under a set of guidelines issued by the court, the Western District of Washington encourages attorneys to use the court-promulgated "Model Agreement Regarding Discovery of Electronically Stored Information." The model agreement is in the form of an order that can be issued by the assigned judge and includes general principles and specific guidance on electronic discovery, with an attachment that includes additional provisions for complex cases.

The Western District of Washington developed guidelines for "Best Practices for Electronic Discovery in Criminal Cases," which provide a general set of best practices, as well as guidelines for multi-defendant cases and an e-discovery checklist.

Summary judgment

Under District of Maine Local Rule 56, unless attorneys in standard track cases file a joint agreement on core matters related to summary judgment, they may not file summary judgment motions without a prefiling conference with the judge, which at minimum narrows issues and sometimes bypasses the need for a summary judgment motion altogether.

In the Northern District of Texas, Local Rule 56.2 permits only one motion for summary judgment per party unless otherwise directed by the presiding judge or permitted by law.

In an experimental procedure being used by one judge in the Eastern District of Wisconsin, attorneys may opt for a streamlined summary judgment process—the "Fast Track Summary Judgment" (FTSJ) process—to reach an early dispositive decision. In this process, the judge tolls unrelated discovery and parties must comply with a number of limits, including page limits on affidavits.

Motions generally

Under Local Civil Rule 7, judges in the Western District of Washington must rule on motions within thirty days of filing. At forty-five days, attorneys may remind the judge to rule. This practice ensures that cases with no merit are seen and decided quickly.

Mediation

The Central District of California provides three forms of settlement assistance to civil litigants: referral to a magistrate judge or district judge for a settlement conference (in practice, most referrals are to magistrate judges); selection of a mediator from the extensive private mediation market; or selection of a mediator from the court's panel of approved mediators. Except for a few exempt case types, all civil litigants are expected to select one of these forms of settlement assistance and to file their selection with the assigned judge prior to the Rule 16 scheduling conference. The local rules set a default deadline for the scheduling conference, subject to changes ordered by the judge after consultation with counsel. The judge issues a referral order at or soon after the Rule 16 conference.

The Mediation and Assessment Program (MAP) in the Western District of Missouri randomly assigns all civil cases, excluding a limited number of case types, to one of three

types of mediation providers: the court's magistrate judges, the MAP director, or a mediator in the private sector. Parties are required to mediate their case within seventy-five days of the "meet and greet" meeting required by Federal Rule of Civil Procedure 26(f). Parties may ask to opt out of the mediation process or may ask to use a different form of ADR through a written request to the MAP director.

Other

The Central District of California relies on a number of committees to govern the court. The Case Management and Assignment Committee is one of the most important. Each of the district's divisions is represented on the committee, which is composed of district judges, magistrate judges, and court staff. The committee, which has four scheduled meetings a year (and more as needed), watches the caseload and keeps it in balance, using caseload reports from the clerk and concerns brought to the committee by judges to diagnose problems and develop solutions.

The District of Maine has for many years assigned a single case manager to each case for the lifetime of the case. The case manager works closely with the judge and monitors case progress, calls attorneys if deadlines are not met, and manages all paperwork, notices, docketing, and any other matters for the case.

To ensure efficient practice by attorneys on the CJA panel, the Western District of Washington appointed a task force made up of judges, court staff, and representatives from the U.S. Attorney's Office and CJA panel, which led to adoption of "Basic Technology Requirements" for CJA panel attorneys. The requirements state the minimum technology standards CJA attorneys must meet, including requirements regarding computer equipment and software.

To ensure that all issues are ready for immediate decision, the Western District of Washington requires that all attorney filings be joint.

ADA cases

Some judges in the Southern District of Florida hold an early half-day hearing in ADA cases and issue an injunction while the defendant takes care of the problem (e.g., measuring the width of a door, which does not require experts). Cases generally settle promptly after this step.

ERISA cases

In the Central District of California, many district judges require joint briefs. The court also sets an early deadline for submission of the administrative record.

The District of Maine has an ERISA track with a very specific schedule. The magistrate judges' expertise in these cases helps to expedite them.

FLSA cases

A majority of the judges in the Southern District of Florida use a form order for FLSA cases. The order sets an early deadline for a statement of the claim.

Prisoner cases

In Maine, the U.S. Attorney's Office is added to the docket for habeas cases to ensure that that office automatically receives all notices. The court has an agreement with the Maine Attorney General's office for more efficient filing of prisoner cases.

The Western District of Missouri court has a memorandum of understanding with the Department of Corrections that prisoners may file habeas cases electronically, using equipment provided by the court.

The Northern District of Texas serves the state electronically in state habeas cases.

By agreement with the state prisons, prisoners may file electronically in the Eastern District of Wisconsin. The court also has an agreement with the prisons for more efficient service. And the court screens cases early and dictates orders of dismissal.

In the Eastern District of Wisconsin, the court is moving to electronic filing of all prisoner pleadings. Four prisons are included so far. The Wisconsin Department of Justice and one of the larger counties also have Memorandums of Understanding under which the Department or county accept service electronically on behalf of defendants, rather than requiring personal service or paperwork for a waiver. Some judges also screen prisoner cases in chambers, rather than send them to pro se law clerks because they have found it is often faster to dictate a screening order as they review the case activity. The same can be done on motions for extensions, discovery, protective orders, and other matters that arise in these cases.

Social Security cases

To keep Social Security cases on track, the Central District of California uses tight deadlines, permits no discovery or summary judgment motions without leave of court, and requires mandatory settlement conferences. In their management of these cases, most of the magistrate judges also require joint briefing.

In the District of Maine, the magistrate judges handle all Social Security cases and have developed a high level of expertise. When the court needed a solution because disposition times were close to exceeding CJRA requirements, the magistrate judge convened a task force of the Social Security bar. To shorten disposition times, the bar recommended an earlier deadline for remand motions and a decrease in the time permitted to attorneys to submit briefs. The magistrate judges also try to issue their reports and recommendations within thirty days of oral argument to enable the district judges to resolve appeals before the CJRA reporting deadlines.

In the Western District of Missouri, the magistrate judges are on the civil case assignment wheel and decide many of the Social Security cases on consent.

To meet a goal of six months to disposition in Social Security cases, the Northern District of Texas sets tight and firm briefing deadlines and permits no oral argument.

When Social Security case filings increased rapidly and the court started falling behind, the Western District of Washington took several steps to speed up the cases. First, it borrowed law clerks from the senior judges, had a full-day education program for them, and assigned them exclusively Social Security cases. The court also requested and received a re-

called magistrate judge. Third, a judge prepared statistics on the Social Security caseload, and the court then held a retreat to develop solutions. The court also created a bench/bar committee to obtain attorney input, which produced guidance on how judges could write more helpful opinions and altered the rules on length of briefs. Finally, the court held a full-day CLE workshop on Social Security cases for the bar. The court was able to catch up on the Social Security caseload in a year.

The Eastern District of Wisconsin focused on Social Security cases last year because a high reversal rate was causing significant cost and delay. After a meeting to discuss the problem with staff from the Social Security Administration, U.S. Attorneys' Office, and claimants' attorneys, a working group was formed that created a protocol for handling Social Security cases. The procedures include a form complaint, rules on service, and a briefing schedule. Most significantly in the court's view, the protocol also encourages claimants' attorneys to consult with the attorney for the government before filing the initial brief to explore whether a voluntary remand might be in order. A significant number of cases have been voluntarily remanded since the protocol became effective. The special procedures for Social Security cases are set out at the court's website under the tab "Efiling Procedures."

The Characteristics of Courts with Fast Civil Case Disposition Times

The information from our interviews with chief judges in the courts with fast civil case disposition times suggests they are fast for two primary reasons. First, the courts have sufficient judicial resources. Second, they are committed as a court to a core set of principles and practices—early judicial involvement in the case, setting deadlines and adhering to them, using magistrate judges to the fullest possible extent, effectively using staff law clerks, working as a team, actively using caseload reports to monitor court-wide and personal performance, and watching for and solving problems. These principles and practices are put into effect in diverse ways across the districts and across judges within a district—only two of the seven districts have uniform time frames and case-management orders, and many practices, such as the specific methods for setting case schedules and the role of magistrate judges, vary from district to district—but each court has procedures for, and a culture that supports, setting deadlines early and then monitoring and enforcing them. It is important to keep in mind, however, that this study is limited to review of disposition times and interviews in a small number of courts with only two—though very informed—respondents in each court. Additional understanding of disposition times in the trial courts would very likely be obtained through a more expansive study that includes quantitative measurement of the many practices and conditions that affect the management and disposition of civil and criminal cases

The Future of the Most Congested Courts Project

Perhaps one of the more interesting questions asked during the interviews was the question of benchmarks. As most of the chief judges and clerks understood, in an analysis based on

averages there will always be courts that fall above and below the average. Should courts below the average forever be labeled "most congested," even as both these courts and the average are improving? One of the judges suggested that the Committee consider developing benchmarks, which would provide fixed, not relative, measures against which courts could measure their performance.

Several chief judges also asked whether it was appropriate or informative to compare their district against the national average rather than against, for example, an average based on districts the same size or districts that had a similar number of vacant judgeships or a similar level of pro se filings. These chief judges suggested that a future stage of the project might consider developing additional analyses based on court size or other court characteristics.

The chief judges and clerks in the courts with delayed civil case disposition times also asked about the future of the Most Congested Courts Project. Regarding their own status, they were not concerned about the label but about their very real need for assistance. They wanted to know whether the Committee would stay involved with their courts and whether there would be any follow-on efforts. They understood that at a time of budget constraints they might not get additional resources, but they were concerned about the fairness of current resource allocations. They spoke of their desire for any information or guidance that would help them do their job better and be more efficient. And they genuinely appreciated the Committee's inquiry and desire to be helpful.

The courts with faster civil disposition times appreciated the Committee's interest, too, and the opportunity to discuss their practices. They also appreciated the opportunity for self-examination provided by the caseload analysis, and most had distributed them to other members of the court. One chief judge said, "This is a really healthy thing to do. Whether we're doing well or poorly in a couple of years, call us so we can go through this review again." More generally, across all the districts, the chief judges and clerks found the caseload analyses very helpful and many had sent the tables and graphs to other members of the court to prompt further discussion and to spur additional efforts to move the civil caseload quickly.

The interviews underscored several key points regarding the Committee's Most Congested Courts Project: (1) the courts appreciated the opportunity to be heard; (2) the courts with delayed civil disposition times would appreciate help accessing more re- sources, whether those resources are information, judges, or legal staff; (3) all the courts would like to learn more about rules and procedures that expedite civil cases; and (4) the caseload analysis was very helpful to the courts and prompted self-examination and change without need for a "dunning" letter from the Committee.

Given that the Committee's assignment from the Judicial Conference—to monitor district court caseloads—is a long-term assignment, the interviews suggest at least the following actions on the part of the Committee:

1. Disseminate more information to the courts about best practices, including best practices involving judicial case management, the organization and use of staff law clerks, and the use of visiting judges to supplement judicial resources that are missing in the courts with delayed civil case disposition times.

2. Update the caseload analysis at least yearly, make it easily available to all district courts (as already done and will be done on a continuing basis), and expand it to permit districts to compare themselves to other groupings, such as courts of their size or courts with similar caseloads.
3. Work with other Judicial Conference committees and the Administrative Office to explore whether more visiting judges can be provided, whether more staff law clerks can be provided, and whether temporary law clerks can be appointed for at least two years.

One additional step the Committee might consider is to ask the Center for a quantitative study that would take the understanding of case disposition time beyond the qualitative examination provided by the current study. Such a study would look at the effect on case disposition time of any practice or condition that can be readily measured—for example, judicial vacancies, the types (i.e., weightiness) of civil and criminal filings, the number of motions filed, the number of extensions granted, and the time between stages in a case. Such a study might help the Committee identify specific practices, beyond the general principles and approaches described by the present study, that support or impede expeditious civil case disposition time.

Attachment 1

Example of Graphic and Tables Showing District Court Average Time to Disposition Compared to National Average Time to Disposition, by Civil Nature of Suit Code

Graphic and Tables Developed By
Margaret Williams
Federal Judicial Center

District A: 2010–2012

Average Disposition Time for the District Relative to the Average Disposition Time Nationwide

For Criminal Felony Cases and Civil Cases in Quartiles by Faster to Slower Groupings of Natures of Suit*

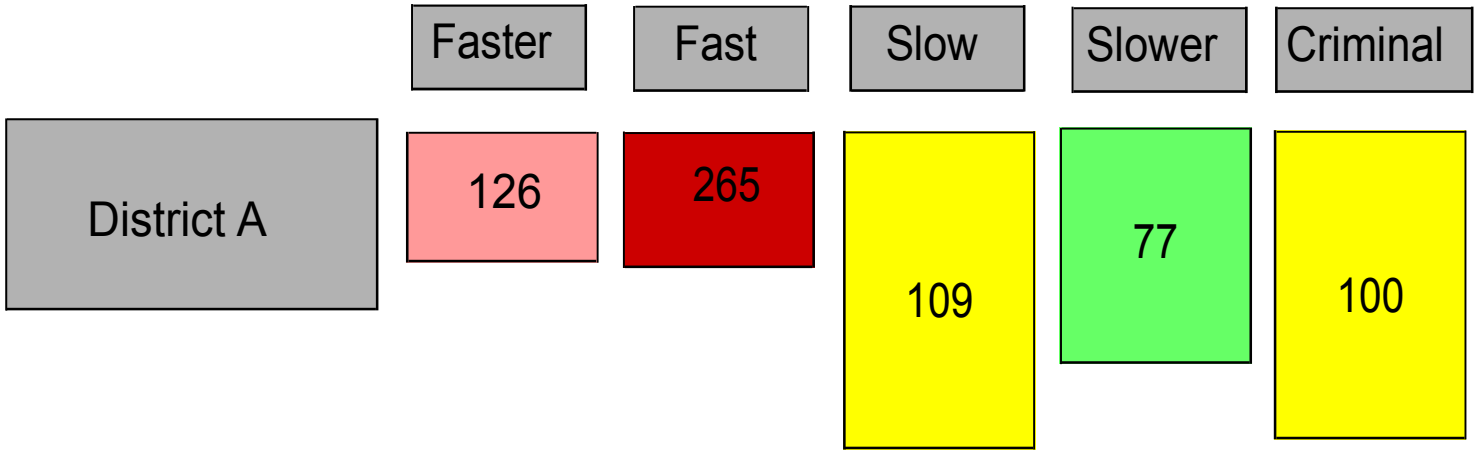

* Analysis and graphics developed by Margaret Williams, Senior Research Associate, Federal Judicial Center

District A: 2010–2012
Faster Quartile Cases
Ranked by Time*

Nature of Suit	Avg. Days to Termination	Number of Cases in District	Time Relative to National Average	Percentage of Cases in Quartile	Percentage of Cases in Docket
BANKS AND BANKING	2.00	1	1	0.61	0.10
PRISONER - PRISON CONDITION	7.00	1	3	0.61	0.10
CONSUMER CREDIT	87.50	2	51	1.21	0.20
BANKRUPTCY APPEALS RULE 28 USC 158	132.92	13	66	7.88	1.31
CONTRACT FRANCHISE	196.00	1	68	0.61	0.10
TRADEMARK	198.33	6	72	3.64	0.61
PRISONER - CIVIL RIGHTS	235.38	29	83	17.58	2.93
CIVIL RIGHTS ADA OTHER	237.00	3	88	1.82	0.30
COPYRIGHT	299.11	9	98	5.45	0.91
NATURALIZATION APPLICATION	200.00	2	120	1.21	0.20
EMPLOYEE RETIREMENT INCOME SECURITY ACT	318.95	41	120	24.85	4.14
LABOR/MANAGEMENT RELATIONS ACT	291.20	5	122	3.03	0.50
MARINE CONTRACT ACTIONS	414.15	33	137	20.00	3.33
INTERSTATE COMMERCE	427.00	1	146	0.61	0.10
FORECLOSURE	294.60	5	159	3.03	0.50
RENT, LEASE, EJECTMENT	350.50	2	257	1.21	0.20
AIRLINE REGULATIONS	387.00	1	271	0.61	0.10
RECOVERY OF DEFAULTED STUDENT LOANS	568.00	10	399	6.06	1.01
TOTAL	258.15	165	126		

Faster					Slower

*Analysis and tables developed by Margaret Williams, Senior Research Associate, Federal Judicial Center

District A: 2010–2012
Fast Quartile Cases
Ranked by Time

Nature of Suit	Avg. Days to Termination	Number of Cases in District	Time Relative to National Average	Percentage of Cases in Quartile	Percentage of Cases in Docket
PRISONER PETITIONS -VACATE SENTENCE	239.85	61	75	26.29	6.16
CIVIL RIGHTS ACCOMMODATIONS	308.00	4	94	1.72	0.40
CONSTITUTIONALITY OF STATE STATUTES	287.00	1	99	0.43	0.10
PRISONER PETITIONS - HABEAS CORPUS	414.89	70	124	30.17	7.06
OTHER PERSONAL PROPERTY DAMAGE	576.17	6	142	2.59	0.61
DRUG RELATED SEIZURE OF PROPERTY	468.76	21	150	9.05	2.12
ASSAULT, LIBEL, AND SLANDER	523.00	5	178	2.16	0.50
OTHER REAL PROPERTY ACTIONS	477.18	11	189	4.74	1.11
OTHER STATUTORY ACTIONS	691.20	49	227	21.12	4.94
FAIR LABOR STANDARDS ACT	1278.67	3	358	1.29	0.30
ASBESTOS PERSONAL INJURY - PROD.LIAB.	4116.00	1	1280	0.43	0.10
TOTAL	852.79	232	265		

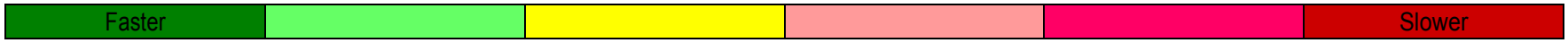

District A: 2010–2012
Slow Quartile Cases
Ranked by Time

Nature of Suit	Avg. Days to Termination	Number of Cases in District	Time Relative to National Average	Percentage of Cases in Quartile	Percentage of Cases in Docket
OTHER FORFEITURE AND PENALTY SUITS	197.53	15	59	5.15	1.51
D.I.W.C./D.I.W.W.	258.93	40	71	13.75	4.04
CIVIL RIGHTS VOTING	195.50	6	77	2.06	0.61
CIVIL RIGHTS ADA EMPLOYMENT	277.60	5	78	1.72	0.50
S.S.I.D.	281.08	25	80	8.59	2.52
MILLER ACT	287.79	14	100	4.81	1.41
OTHER LABOR LITIGATION	342.38	8	101	2.75	0.81
MARINE PERSONAL INJURY	400.00	23	104	7.90	2.32
INSURANCE	372.77	53	116	18.21	5.35
MOTOR VEHICLE PERSONAL INJURY	417.96	23	118	7.90	2.32
OTHER FRAUD	432.25	4	193	1.37	0.40
OTHER CONTRACT ACTIONS	663.42	66	212	22.68	6.66
TAX SUITS	754.67	9	109	3.09	0.91
TOTAL	375.53	291			

Faster					Slower

District A: 2010–2012
Slower Quartile Cases
Ranked by Time

Nature of Suit	Avg. Days to Termination	Number of Cases in District	Time Relative to National Average	Percentage of Cases in Quartile	Percentage of Cases in Docket
CIVIL (RICO)	9.33	3	2	0.99	0.30
SECURITIES, COMMODITIES, EXCHANGE	56.00	1	7	0.33	0.10
PERSONAL INJURY - PRODUCT LIABILITY	284.09	23	34	7.59	2.32
PATENT	153.00	1	58	0.33	0.10
OTHER PERSONAL INJURY	417.06	66	58	21.78	6.66
PROPERTY DAMAGE -PRODUCT LIABILTY	252.67	6	63	1.98	0.61
ENVIRONMENTAL MATTERS	328.79	29	64	9.57	2.93
AIRPLANE PERSONAL INJURY	296.75	4	64	1.32	0.40
OTHER CIVIL RIGHTS	235.45	88	81	29.04	8.88
OVERPAYMENTS UNDER THE MEDICARE ACT	303.00	2	92	0.66	0.20
LAND CONDEMNATION	618.50	2		0.66	0.20
FEDERAL EMPLOYERS' LIABILITY	425.00	1	94	0.33	0.10
CIVIL RIGHTS JOBS	403.33	21	151	6.93	2.12
TORTS TO LAND	673.25	4	158	1.32	0.40
MEDICAL MALPRACTICE	658.71	49	159	16.17	4.94
BANKRUPTCY WITHDRAWAL 28 USC 157	441.33	3	77	0.99	0.30
TOTAL	347.27	303			

Faster					Slower

Attachment 2

Explanation of the Civil Case Disposition Time Dashboard

Margaret Williams
Federal Judicial Center

125-012684

Civil Case Disposition Dashboard for U.S. District Courts

Courts often want to know how slowly or quickly they dispose of particular types of cases, relative to the national average. To that end, the Federal Judicial Center has compiled statistics on civil case terminations for each district and has placed the information in an electronic case termination dashboard. The dashboard allows a court to see its disposition time on each nature of suit, relative to the national average, and then drill down to the underlying case information. This drill down capability allows a court to see any problem areas where additional resources may be needed to help cases terminate more quickly. By looking at cases that terminated slowly in the past, courts can learn to better manage cases in the future.

Understanding the Dashboard – Case Terminations

The basic idea behind a dashboard is to allow a court to see at a glance which nature of suit (NOS) codes it disposes of slowly and which NOS codes it disposes of quickly. This information is displayed in a treemap (see the example below for hypothetical District 12). The overall graphic represents the total terminated civil caseload in District 12 for calendar years 2012–2014. Each of the individual boxes is the proportion of the court's terminated civil caseload represented by each NOS code. Larger boxes mean the NOS code is a larger proportion of the civil caseload.

In treemaps, the color of the boxes is meaningful as well. Red boxes show NOS codes District 12 terminates slower than the national average: the dark red boxes are the slowest cases (more than 50% slower than the national average) and the light red boxes are slow but not as slow (16%–50% slower). Green boxes are the NOS codes the court terminates faster than the national average: again, the dark green boxes are the fastest cases (more than 50% faster), and the light green boxes are fast but not as fast (16%–50% faster). Boxes in beige show an NOS code disposed of in approximately the same time as the national average (within 15% of the national average).

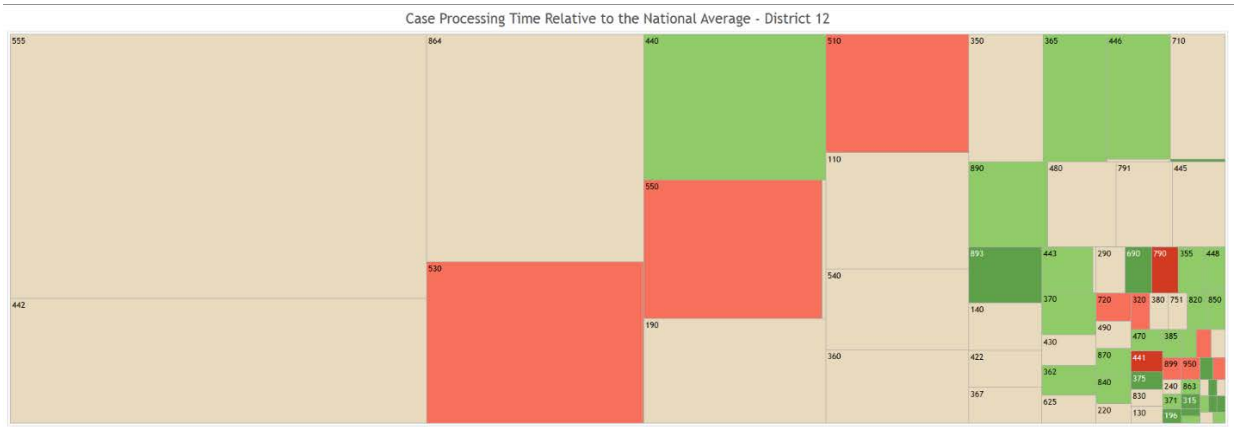

As the user hovers over the boxes, a tooltip appears that provides the specific NOS description, the court's average case disposition time, the national average disposition time, the court's overall disposition score relative to the national average, and the number of cases the court terminated in this time period. In the example below, we can see that District 12 terminated NOS 530, Prisoner Petitions – Habeas Corpus, on average, in 418 days, which is 31.75% slower than the national average of 317 days. This NOS code is a relatively large proportion of the docket (it is the largest red box in the treemap above), with 255 cases terminated between 2012 and 2014.

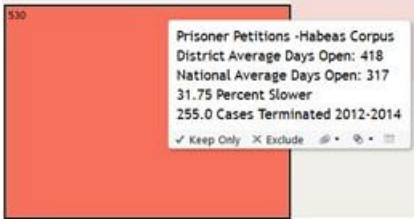

At the bottom of the dashboard, the user can see the cases used to calculate the district's average disposition times, organized by nature of suit and docket number (see below). Also listed are the plaintiffs and defendants for each case and the total number of days, from filing to termination, that the case was open.

Cases Terminated 2012-2014

NOS Code	Natureofsuit	Docket	Plaintiff	Defendant	Days
110	Insurance	05-00831	SMITH	SMITH	66
		08-00019	MAPP	GEORGIA DEPARTMENT OF C, ET AL	760
		09-00169	CULVER, ET AL	UNITED STATES OF AMERICA	94
		09-00375	HOLTCAMP	GLOBAL MEDICAL SAFETY DIVISION	822
		09-00574	NINO	MACY'S RETAIL HOLDINGS, INC.	383
		09-00713	BATISTE	LAWRENCE	380
		09-00780	ELLIS	JACKSON NATIONAL LIFE I, ET AL	324
		09-01055	BROOKS FARMS, INC.	AGRICOMMODITIES, INC., ET AL	564
		10-00222	JOHNSON	KEITH, ET AL	167
		10-00242	FRAZIER	HAYNES	748
		10-00502	GOMEZ	COLVIN	153
		10-00531	PERRY	FORT WAYNE CITY OF, IN, ET AL	70
		10-00611	BELL	MCCANN, ET AL	55
		10-00842	SHAKIR	DONAHOE, ET AL	64
		10-00858	SELLERS	SOCIAL SECURITY ADMINISTRATION	322
		10-00969	BAILEY	WALGREEN CO., ET AL	166

As the user clicks on each box in the treemap, the list of cases will filter to show only the cases within the selected nature of suit (see example on next page). To remove the filter, the user clicks on the selected box again and the screen reverts to the complete treemap.

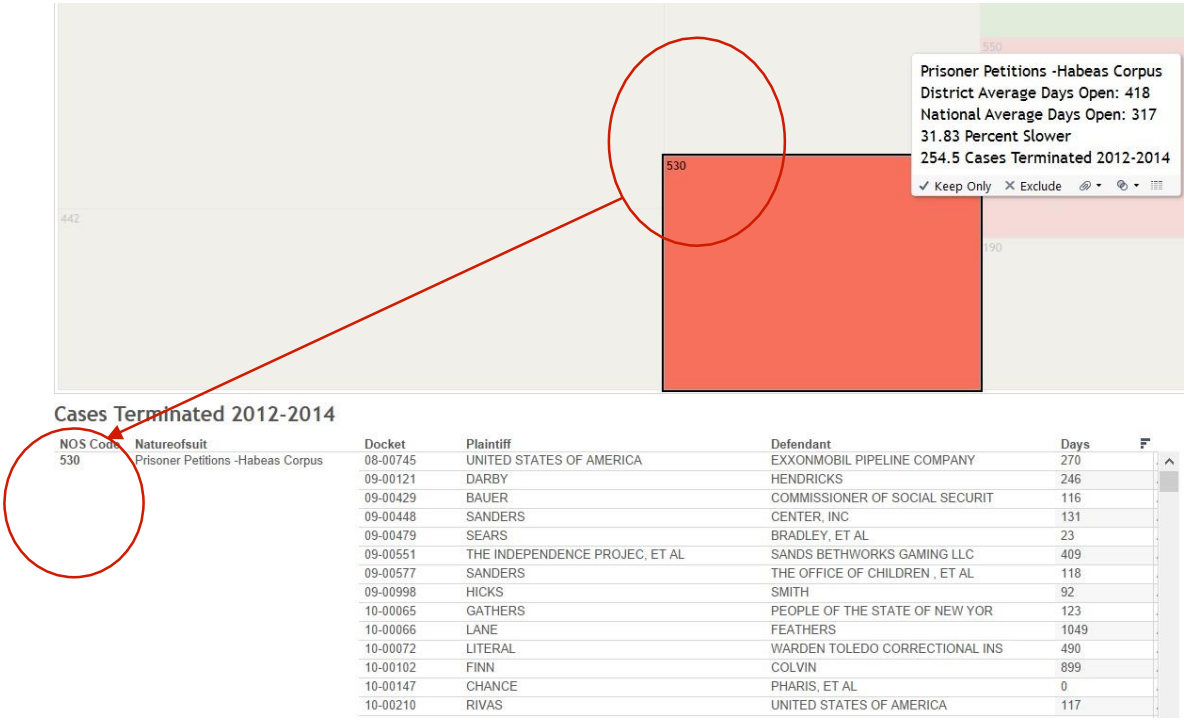

NOS Code	Natureofsuit	Docket	Plaintiff	Defendant	Days
530	Prisoner Petitions -Habeas Corpus	08-00745	UNITED STATES OF AMERICA	EXXONMOBIL PIPELINE COMPANY	270
		09-00121	DARBY	HENDRICKS	246
		09-00429	BAUER	COMMISSIONER OF SOCIAL SECURIT	116
		09-00448	SANDERS	CENTER, INC	131
		09-00479	SEARS	BRADLEY, ET AL	23
		09-00551	THE INDEPENDENCE PROJEC, ET AL	SANDS BETHWORKS GAMING LLC	409
		09-00577	SANDERS	THE OFFICE OF CHILDREN , ET AL	118
		09-00998	HICKS	SMITH	92
		10-00065	GATHERS	PEOPLE OF THE STATE OF NEW YOR	123
		10-00066	LANE	FEATHERS	1049
		10-00072	LITERAL	WARDEN TOLEDO CORRECTIONAL INS	490
		10-00102	FINN	COLVIN	899
		10-00147	CHANCE	PHARIS, ET AL	0
		10-00210	RIVAS	UNITED STATES OF AMERICA	117

If a court would like to know which cases were used to estimate their case disposition time for all NOS codes, they can download it directly from the software, or contact the FJC and we will provide it.

Understanding the Dashboard – National NOS Disposition Time

The second tab of the dashboard shows the average time to case disposition by NOS code, from the slowest to the fastest nationally, as well as a district's average time on each nature of suit. This tab presents the same basic information as the treemap (showing where a district is slower or faster than the national average) but in a different way. The bar is the district's average disposition time, and the black dash is the national average disposition time.

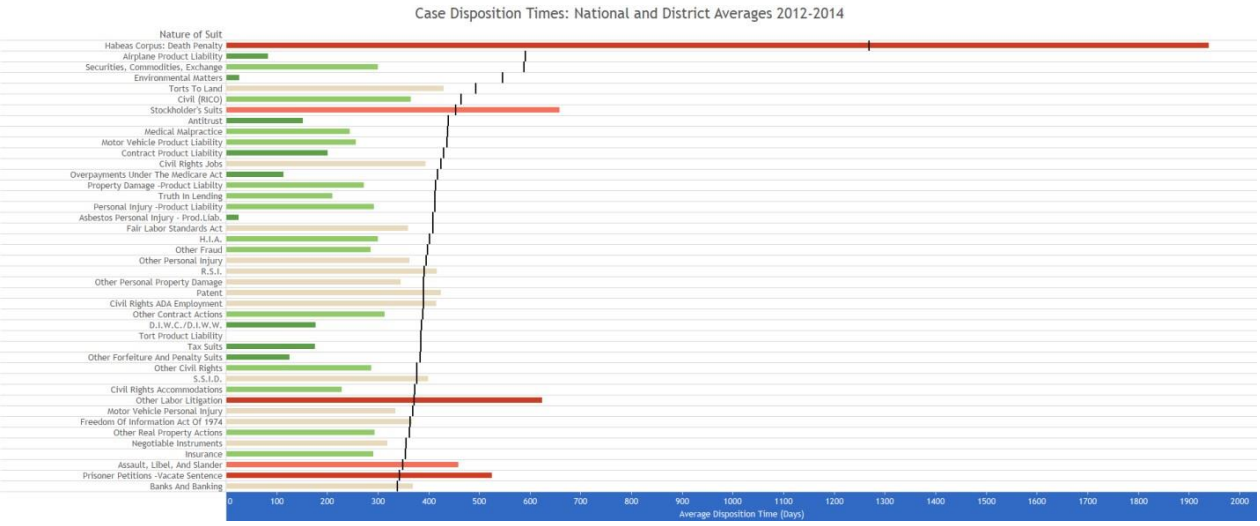

If a district is slower than the national average, the bar runs past the dash and is colored accordingly (dark red >50% slower, light red 16%–50% slower than the national average). If a district is faster than the national average, the bar stops before the black dash and is colored according to the time (dark green >50% faster, light green 16%–50% faster than the national average). District times within 15% of the national average are colored beige.

The sorting of the chart provides a different piece of information than the treemap: which cases take a long time, on average, for all districts to terminate and which ones are terminated, on average, much more quickly. While a court may know from experience that Habeas Corpus: Death Penalty cases are slow to terminate, seeing that they take, on average, twice as long nationwide as airplane product liability cases may be surprising. If courts are looking for a benchmark for case disposition time, the range of 400 and 500 days to termination is a good benchmark to keep in mind, as most civil case termination times fall into this range.

Who to Contact

Users with questions about how to use the dashboard or what other avenues might be explored may contact Margie Williams, Senior Research Associate, at the Federal Judicial Center (mwilliams@fjc.gov , 202-502-4080).

Attachment 3

Example Email Sent to Chief Judge and Clerk of Court in "Most Congested" Districts in Preparation for Telephone Interview

125-012689

From: Donna Stienstra/DCA/FJC/USCOURTS
To: Chief Judge _____
Cc: Clerk of Court_____, Richard Arcara/NYWD/02/USCOURTS@USCOURTS, Larry Baerman/NYND/02/USCOURTS@USCOURTS, Jane MacCracken/DCA/AO/USCOURTS@USCOURTS
Date: _____
Subject: Preparation for conference call

Dear Chief Judge_:

As you know, Judge Arcara, Larry Baerman, Jane MacCracken, and I will be talking with you and [clerk's name] on_____about the caseload of your district. The conversation is part of an initiative of the Court Administration and Case Management Committee (CACM), which was asked some years ago by the Judicial Conference Executive Committee to monitor district court caseloads.

Our conversation will be based on a set of tables you received several weeks ago. During the call we would like to talk with you about the types of cases that both (1) make up a substantial portion of your civil caseload and (2) are disposed of significantly more slowly than the national average for all district courts. The point of the discussion is to determine whether the court would want assistance in resolving the slower cases and what kind of assistance might be helpful.

We know your district's prisoner cases fit the description of large caseloads that are significantly slower than national averages in disposition time. For example, if you look at the table titled "Faster Quartile Cases", you can see that your district disposed of 633 prisoner civil rights cases in the years 2010-2012 and took, on average, 865 days to dispose of these cases -- or 205% longer than the national average. Habeas corpus cases, which are in the table labeled "Fast Quartile Cases", are another example, with 551 cases taking, on average, 680 days to dispose of, or 104% longer than the national average.

Below I list several additional case types we might discuss with you. You can find the information about these case types in the tables you received (which I have enclosed again below, along with information about how to interpret the tables). These case types accounted for a substantial number of the cases disposed of by your court in 2010-2012 and took substantially longer to dispose of than these case types did nationwide.

Faster Quartile	Consumer Credit	895 cases, 213 days to disposition	23% longer than the national ave.
	Foreclosure	114 cases, 264 days to disposition	43% longer than the national ave.
	ERISA	132 cases, 575 days to disposition	117% longer than the national ave.
Fast Quartile	Other Stat. Actions	162 cases, 400 days to disposition	31% longer than the national ave.
	FSLA	47 cases, 1029 days to disposition	188% longer than the national ave.
Slow Quartile	Insurance	66 cases, 518 days to disposition	58% longer than the national ave.
	Oth. Contr.Actions	200 cases, 574 days to disposition	67% longer than the national ave.
	Motor Vehicle PI	84 cases, 625 days to disposition	74% longer than the national ave.
Slower Quartile	Civil Rights Jobs	387 cases, 694 days to disposition	77% longer than the national ave.
	Other Civil Right	393 cases, 715 days to disposition	94% longer than the national ave.

During our conversation on_____, we'll be interested in your thoughts about the longer-than-average disposition times for the case types listed above, particularly what might explain the longer disposition times --- for example, characteristics of the cases themselves, relevant features of the bench or bar, or other conditions in the district. And if there are other case types or other features of the district you would like to discuss, we welcome your thoughts on those as well.

In the meantime, if you have any questions, please don't hesitate to call me. We look forward to talking with you.

Sincerely,

Donna Stienstra

Federal Judicial Center
Washington, DC
202-502-4081

Attachment: "Caseload Tables, [District Name], March 2013.pdf"

Attachment 4

Example Email Sent to Chief Judge and Clerk of Court in "Expedited" Districts in Preparation for Telephone Interview

12b-012692

From: Donna Stienstra/DCA/FJC/USCOURTS
To: Chief Judge _____
Cc: Clerk of Court_____, Richard Arcara/NYWD/02/USCOURTS@USCOURTS, Larry Baerman/NYND/02/USCOURTS@USCOURTS, Jane MacCracken/DCA/AO/USCOURTS@USCOURTS
Date: _____
Subject: Preparation for conference call

Dear Chief Judge_:

I'm writing on behalf of Judge Richard Arcara, Larry Baerman, Jane MacCracken, and myself with regard to the conversation scheduled with you and {clerk of court name] next week. That conversation, which will focus on your district's civil caseload, is part of an initiative of the Court Administration and Case Management Committee (CACM), which was asked some years ago by the Judicial Conference Executive Committee to monitor district court caseloads. Last fall we talked with seven district courts that terminate their civil caseloads more slowly than the national average. This fall we're talking with seven courts that terminate their caseloads more quickly than the national average.

The call with you and [clerk's name] is scheduled for_____at_____. The call-in number is 888-398-2342# and the access code is 3487491#.

Our conversation will be based on a set of tables you received with a letter from Judge Julie Robinson, CACM Committee chair, August 15, 2014 (attached below). As you know from the letter, the CACM Committee selected your court for an interview because you dispose of your civil caseload expeditiously compared to average disposition times nationally.

The purpose of the call is to understand how caseloads move and to identify any procedures, best practices, judicial or staff habits, etc. that could be adopted by other courts to expedite their civil caseloads. During the call we would like to talk with you about practices your court uses that foster expedited disposition times for civil cases. These practices might include judicial case management procedures, methods for tracking the caseload and identifying bottlenecks, pilot projects used to expedite specific types of cases, use of clerk's office and chambers staff, role of the magistrate judges, articulation of goals for the court, relevant features of the bench or bar, or any other conditions in the district.

In addition to the general discussion outlined above, we're interested in several specific questions:

1. We'd like to know whether your court has had slow disposition times for some types of civil cases and has overcome those slow disposition times. If so, what did the court do to bring disposition times under control?

2. Your court has disposition times near or better than the national average for some types of cases that are very slow in courts with backlogged civil caseloads--e.g., ERISA cases, consumer credit cases, prisoner civil rights cases, habeas petitions, Social Security cases, and employment civil rights cases. What does your court do to keep these case types moving quickly to disposition?

3. Given your court's expeditious processing of most of its caseload, the occasional very slow case type stands out. What is the nature of the court's "Civil rights ADA other" cases, for example, that makes them

considerably slower than the national average in disposition time?

We look forward to talking with you and, later in the project, using your experience and best practices to assist other courts. Thank you for being willing to assist the Committee with this project.

If you have any questions before we talk next week, please don't hesitate to call me.

Sincerely,

Donna Stienstra

Federal Judicial Center
Washington, DC
202-502-4081

See attached file: “Civil Caseload Analysis, [district name].pdf”

TAB 4C

126-012695

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126-012696

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

APRIL 14, 2016

The Civil Rules Advisory Committee met at the Tideline Hotel in Palm Beach, Florida, on April 14, 2016. (The meeting was scheduled to carry over to April 15, but all business was concluded by the end of the day on April 14.) Participants included Judge John D. Bates, Committee Chair, and Committee members John M. Barkett, Esq.; Elizabeth Cabraser, Esq.; Judge Robert Michael Dow, Jr.; Judge Joan M. Ericksen; Parker C. Folse, Esq. (by telephone); Professor Robert H. Klonoff; Judge Scott M. Matheson, Jr.; Hon. Benjamin C. Mizer; Judge Brian Morris; Judge Solomon Oliver, Jr.; Judge Gene E.K. Pratter; Virginia A. Seitz, Esq.; and Judge Craig B. Shaffer. Former Committee Chair Judge David G. Campbell and former member Judge Paul W. Grimm also participated by telephone. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Judge Jeffrey S. Sutton, Chair, Judge Neil M. Gorsuch, liaison (by telephone), and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge Arthur I. Harris participated as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., the court-clerk representative, also participated. The Department of Justice was further represented by Joshua Gardner, Esq.. Rebecca A. Womeldorf,Esq., Derek Webb, Esq., and Julie Wilson, Esq., represented the Administrative Office. Judge Jeremy Fogel and Emery G. Lee, Esq., attended for the Federal Judicial Center. Observers included Henry D. Fellows, Jr. (American College of Trial Lawyers); Joseph D. Garrison, Esq. (National Employment Lawyers Association); Alex Dahl, Esq.(Lawyers for Civil Justice); John K. Rabiej, Esq. (Duke Center for Judicial Studies); Natalia Sorgente (American Association for Justice); John Vail, Esq.; Valerie M. Nannery, Esq.; Henry Kelsen, Esq.; and Benjamin Robinson, Esq.

Judge Bates opened the meeting by welcoming everyone. He noted that Judge Pratter and Elizabeth Cabraser have completed serving their second terms and are due to rotate off the Committee. "We will miss you, but hope to see you frequently in the future." Judge Sutton also is completing his term as Chair of the Standing Committee, and Judge Harris is concluding his term with the Bankruptcy Rules Committee. They too will be missed.

Benjamin Mizer introduced Joshua Gardner, who will succeed Ted Hirt as a Department of Justice representative to the Committee. Gardner is a highly valued member of the Department, and makes time to teach civil procedure classes as an adjunct professor.

Judge Bates noted that the proposed amendments to Civil Rules 4, 6, and 82 remain pending in the Supreme Court. On this front, "no news is good news." The Minutes for the January meeting of the Standing Committee are in the agenda book for this meeting. The package of six proposed amendments to Rule 23 that had advanced at

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the November meeting of this Committee was discussed. The Rule 23 discussion also described the decision to defer action on the growing number of decisions grappling with "ascertainability" as a criterion for class certification and with the questions raised by different forms of "pick-off" strategies that defendants use in attempts to moot individual class representatives and thus defeat class certification. The Rule 62 stay-of-execution proposal also was discussed. Apart from specific rules proposals, the ongoing efforts to educate bench and bar on the December 1, 2015 package of amendments were described. These efforts are "important, essential." Discussion also included the continuing efforts to develop pilot projects to test reforms that do not yet seem ready to be adopted as national rules.

November 2015 Minutes

The draft minutes of the November 2015 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

Legislative Report

Rebecca Womeldorf reported that, apart from the bills noted at the November meeting, there appear to be no new legislative activities the Committee should be tracking.

Rule 5

The history of the Committee’s work on the e-filing and e-service provisions of Rule 5 was recounted. A year ago the Committee voted to recommend publication of amendments to reflect the growing maturity of electronic filing and service. Moving in parallel, the Criminal Rules Committee began a more ambitious project. Criminal Rule 49 has invoked the Civil Rules provisions for filing and service. The Criminal Rules Committee began to consider the possibility of adopting a complete and independent rule of their own. This development counseled delay in the Civil Rules proposals. The e-filing and e-service provisions in the Appellate, Bankruptcy, Civil, and Criminal Rules were developed together. The value of adopting identical provisions in each set of rules is particularly high with respect to filing and service, although it is recognized that differences in the rules may be justified by differences in the characteristics of the cases covered by each set of rules. The plan to recommend publication in 2015 was deferred.

The Criminal Rules Committee developed an independent Rule 49. The Subcommittee that developed the rule welcomed participation in their work and conference calls by representatives of the Civil Rules Committee. The Civil Rules provisions proposed now were substantially improved as a result of these discussions. The

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90 differences from the proposals developed a year ago are discussed
91 with the description of the current proposals.

92 Although filing is covered by Rule 5(d), which comes after the
93 service provisions of Rule 5(b) in the sequence of subdivisions, it
94 is easier to begin discussion with filing, which is the act that
95 leads to service.

96 Present Rule 5(d)(3) allows e-filing when allowed by local
97 rule, and also provides that a local rule may require e-filing
98 "only if reasonable exceptions are allowed." Almost all districts
99 have responded to the great advantages of e-filing by making it
100 mandatory by requiring consent in registering as a user of the
101 court's system. Reflecting this reality and wisdom, proposed Rule
102 5(d)(3) makes e-filing mandatory, except for filings "made by a
103 person proceeding without an attorney."

104 Pro se litigants have presented more difficulty. Last year's
105 draft also required e-filing by persons proceeding without an
106 attorney, but directed that exceptions must be allowed for good
107 cause and could be made by local rule. Work with the Criminal Rules
108 Subcommittee led to a revision. The underlying concern is that many
109 pro se litigants, particularly criminal defendants, may find it
110 difficult or impossible to work successfully with the court's
111 system. The current proposal allows e-filing by a person proceeding
112 without an attorney "only if allowed by court order or by local
113 rule." A further question is whether a pro se party may be required
114 to engage in e-filing. Some courts have developed successful
115 programs that require e-filing by prisoners. The programs work
116 because staff at the prison convert the prisoners' papers into
117 proper form and actually accomplish the filing. This provides real
118 benefits to all parties, including the prisoners. The Criminal
119 Rules Subcommittee, however, has been concerned that permitting a
120 court to require e-filing might at times have the effect of denying
121 access to court. Their concern with the potential provisions for
122 Rule 5 arises from application of Rule 5 in proceedings governed by
123 the Rules for habeas corpus and for § 2255 proceedings. Discussion
124 of these issues led to agreement on a provision in proposed Rule
125 5(b)(3)(B) that would allow the court to require e-filing by a pro
126 se litigant only by order, "or by a local rule that allows
127 reasonable exceptions."

128 e-Service is governed by present Rule 5(b)(2)(E) and (3).
129 (b)(2)(E) allows service by electronic means "that the person
130 consented to in writing." (b)(3) allows a party to "use" the
131 court's electronic facilities if authorized by local rule. Most
132 courts now exact consent as part of registering to use the court's
133 system. Proposed Rule 5(b)(2)(E) reflects this practice by
134 eliminating the requirement for consent as to service through the
135 court's facilities. One of the benefits of consulting with the
136 Criminal Rules Subcommittee has been to change the reference to

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137 "use" of the court's system. The filing party does not take any
138 further steps to accomplish service — the system does that on its
139 own. So the rule now provides for serving a paper by sending to a
140 registered user "by filing it with the court's electronic filing
141 system." Other means of e-service continue to require consent of
142 the person to be served. The proposal advanced last year eliminated
143 the requirement that the consent be in writing. The idea was that
144 consent often is given, appropriately enough, by electronic
145 communications. The Criminal Rules Subcommittee was uncomfortable
146 with this relaxation. The current proposal carries forward the
147 requirement that consent to e-service be in writing for all
148 circumstances other than service by filing with the court.

149 The direct provision for service by e-filing with the court in
150 proposed Rule 5(b)(2)(E) makes present Rule 5(b)(3) superfluous.
151 The national rule will obviate any need for local rules authorizing
152 service through the court's system. The proposals include
153 abrogation of Rule 5(b)(3).

154 Finally, the recommendations carry forward the proposal to
155 allow a Notice of Electronic Filing to serve as a certificate of
156 service. Present Rule 5(d)(1) would be carried forward as
157 subparagraph (A), which would direct filing without the present
158 "together with a certificate of service." A new subparagraph (B)
159 would require a certificate of service, but also provide that a
160 Notice of Electronic Filing constitutes a certificate of service on
161 any person served by filing with the court's electronic-filing
162 system. It does not seem necessary to add to this provision a
163 provision that would defeat reliance on a Notice of Electronic
164 Filing if the serving party learns that the paper did not reach the
165 person to be served. If it did not reach the person, there is no
166 service to be covered by a certificate of service.

167 Discussion noted the continuing uncertainties about amending
168 the provisions for e-filing and e-service without addressing the
169 many parallel provisions that call for acts that are not filing or
170 service. Many rules call for such as acts as mailing, or
171 delivering, or sending, or notifying. Similar words that appear
172 less frequently include made, provide, transmit[ted] return,
173 sequester, destroy, supplement, correct, and furnish. Rules also
174 refer to things written or to writing, affidavit, declaration,
175 document, deposit, application, and publication (together with
176 newspaper). On reflection, it appears that the question of
177 refitting these various provisions for the electronic era need not
178 be confronted in conjunction with the Rule 5 proposals. Rule 5
179 provides a general directive for the many rules provisions that
180 speak to serving and filing. It can safely be amended without
181 interfering with the rules that govern acts that are similar but do
182 not of themselves involve serving or filing.

183 It was noted that the parallel consideration of e-filing and

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e-service rules in the several advisory committees means that some work remains to be done in achieving as nearly identical drafting as possible, consistent with the differences in context that may justify some variations in substance. What appear to be style differences may in fact be differences in substance. It was agreed that the Committee Chair has authority to approve wording changes that resolve style differences as the several committees work to generate proposals to present to the Standing Committee in June. If some changes in substance seem called for, they likely will be of a sort that can be resolved by e-mail vote.

Rule 62: Stays of Execution

Judge Bates introduced the Rule 62 proposals by noting that this project has been developed as a joint effort with the Appellate Rules Committee. A Rule 62 Subcommittee chaired by Judge Matheson has developed earlier versions and the current proposal.

Judge Matheson noted that earlier Rule 62 proposals were discussed at the April 2015 and November 2015 meetings. The Subcommittee worked to revise and simplify the proposal in response to the concerns expressed at the November meeting. The Subcommittee reached consensus on the three changes that provided the initial impetus for taking on Rule 62. The proposal: (1) extends the automatic stay from 14 days to 30 days, and eliminates the "gap" between expiration of the stay on the 14th day and the express authority in Rule 62(b) to order a stay pending disposition of Rule 50, 52, 56, or 60 motions made as late as 28 days after judgment is entered; (2) expressly recognizes that a single security can be posted to cover the period between expiration of the automatic stay and completion of all proceedings on appeal; and (3) expressly recognizes forms of security other than a bond.

Discussion in the Standing Committee in January focused on only one question: why is the automatic stay extended to 30 days rather than 28? The answer seemed to be accepted — it may be 28 days before the parties know whether a motion that suspends appeal time will be made, and if appeal time is not suspended 30 days allows a brief interval to arrange security before expiration of the 30-day appeal time that governs most cases.

After the Standing Committee meeting, the Subcommittee made one change in the proposed rule text, eliminating these words from proposed (b)(1): " * * * a stay that remains in effect until a designated time[~~, which may be as late as issuance of the mandate on appeal,~~] * * *." The Subcommittee concluded that it may be desirable to continue the stay beyond issuance of the mandate. There may be a petition for rehearing, or a petition for certiorari, or post-mandate proceedings in the court of appeals. And the Committee Note was shortened by nearly forty percent.

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229 Discussion began with a question about proposed Rule 62(b)(1):
230 "The court may at any time order a stay that remains in effect
231 until a designated time, and may set appropriate terms for security
232 or deny security." Present Rule 62 "does not mention a stay without
233 a bond. It happens, but ordinarily only in extraordinary
234 circumstances." If there is no intent to change present practice,
235 something should be said to indicate that a stay without security
236 is disfavored. And it might help to transpose proposed paragraph
237 (2) with (1), so that the nearly automatic right to a stay on
238 posting bond comes first. That would emphasize the importance of
239 security.

240 Judge Matheson noted that earlier drafts had expressly
241 recognized the court's authority to deny a stay for good cause, and
242 to dissolve a previously issued stay. Those provisions were
243 deleted, but that was because they would have enabled the court to
244 defeat what has been seen as a nearly automatic right to obtain a
245 stay on posting security. Proposed (b)(1) is all that remains. In
246 a sense it carries over from the Committee's first recent
247 encounter with Rule 62. Before the Time Project, the automatic stay
248 lasted for 10 days and the post-judgment motions that may suspend
249 appeal time had to be made within 10 days. The Time Project created
250 the "gap" in present Rule 62 by extending the automatic stay only
251 to 14 days, while extending the time for motions under Rules 50,
252 52, and 59 to 28 days. A judge asked the Committee whether the
253 court can order a stay after 14 days but before a post-judgment
254 motion is made. The Committee concluded at the time that the court
255 always has inherent power to control its own judgment, including
256 authority to enter a stay during the "gap" without concern about
257 any negative implications from the express authority to enter a
258 stay pending disposition of a motion once the motion is actually
259 made. The Subcommittee thought that proposed (b)(1) is a useful
260 reflection of abiding inherent authority.

261 This observation was met by a counter-observation: Is the
262 proposed rule simply an attempt to codify existing practice? If so,
263 should it recognize the cases that say that only extraordinary
264 circumstances justify a stay without security? The need to be clear
265 about the relationship with present practice was pointed out from
266 a different perspective. The Committee Note says that proposed
267 subdivisions (c) and (d) consolidate the present provisions for
268 stays in actions for an injunction or receivership, and for a
269 judgment or order that directs an accounting in an action for
270 patent infringement. Does that imply that some changes in present
271 practice are embodied in proposed subdivision (b), as they are in
272 proposed subdivision (a)? The response was that proposed
273 subdivision (b)(2) clearly incorporates several changes over
274 practice under the supersedeas bond provisions of present Rule
275 62(d). Under the proposed rule, a party may obtain a stay by bond
276 at any time after judgment enters, without waiting for an appeal to
277 be taken. The new rule would expressly recognize a single security

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for the duration of post-judgment proceedings in the district court and all proceedings on appeal. It would expressly recognize forms of security other than a bond. So too, the automatic stay is extended, and the court is given express power to "order otherwise." The decision not to change the meaning of the present provisions that would be consolidated in proposed Rule 62(c) and (d) does not carry any implications, either way, as to proposed Rule 62(b)(1).

Judge Matheson asked whether, if a standard for denying a stay is to be written into rule text, it should be "good cause" or "extraordinary circumstances." Some uncertainty was expressed about what standard might be written in. "Extraordinary circumstances" may be too narrow.

A Committee member asked what experience the district-judge members have with these questions. The answers were that judges seldom encounter questions about stays of execution. One judge suggested that because questions seldom arise, judges will read the rule text carefully when a question does arise. It is important that the rule text say exactly what the rule means. A similar suggestion was that it would be better to resist any temptation to supplement rule text with more focused advice in the Committee Note. The Committee should decide on the proper approach and embody it in the rule text.

Proposed Rule 62(b)(1) will be further considered by the Subcommittee, consulting with Judge Gorsuch as liaison from the Standing Committee, with the purpose of reaching consensus on a proposal that can be advanced to the Standing Committee in June as a recommendation for publication. If changes are made that require approval by this Committee, Committee approval will be sought by electronic discussion and vote.

Rule 23

Judge Dow introduced the Rule 23 Subcommittee report. The Subcommittee continued to work hard on the package of six proposals that was presented for consideration at the November Committee meeting. Much of the work focused on the approach to objectors, and particularly on paying objectors to forgo or abandon appeals. Working in consultation with representatives of the Appellate Rules Committee, the drafts that would have included amendments of Appellate Rule 42 have been abandoned. The current proposal would amend only Civil Rule 23(e). In addition, a seventh proposal has been added. This proposal would revise the Rule 23(f) amendment to include a 45-day period to seek permission for an interlocutory appeal when the United States is a party. It was developed with the Department of Justice, and had not advanced far enough to be presented at the November meeting.

12b-012703

The rule texts shown in the agenda materials, pp. 96-99, have been reviewed by the style consultants. Only a few differences of opinion remain.

Notice. Two of the proposed amendments involve Rule 23(c)(2)(B). The first reflects a common practice that, without the amendment, may seem to be unauthorized. When a class has not yet been certified, it has become routine to address a proposal to certify a class and approve a settlement by giving "preliminary" certification and sending out a notice that, in a (b)(3) class, includes a deadline for requesting exclusion, as well as notice of the right to appear and to object. The so-called preliminary certification is not really certification. Certification occurs only on final approval of the settlement and the class covered by the settlement. This amendment would expand the notice provision to include an order "ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)." That makes it clear that an opt-out deadline is properly set by this notice. Generally, settlement agreements call for an opt-out period that expires before actual certification with final approval of the settlement.

The second change in Rule 23(b)(2)(B) is to address the means of notice. The Subcommittee worked diligently in negotiating the words and sequence of words. The Note explains that the choice of means of notice is a holistic, flexible concept. Different sorts of class members may react differently to different media. A rough illustration is provided by the quip that a class of people who are of an age to need hearing aids respond by reading first-class mail, and trashing e-mail. A class of younger people who wear ear buds, not hearing aids, trash postal mail and read e-mail. The Note emphasizes that no one form of notice is given primacy over other forms. The Note further emphasizes the need for care in developing the form and content of the notice.

Discussion began by expressing discomfort with the direction that notice "must" include individual notice to all members who can be identified through reasonable effort. **[does anyone recall the specific example Judge Ericksen gave? I did not hear it.]** The proposal carries forward the language of the present rule, but there is a continuing tension between "must" and the softer requirement that notice only be the best that is practicable under the circumstances. A determination of practicability entails a measure of discretion. Part of the tension arises from the insistence of the style consultants that the single sentence drafted by the Subcommittee was too long: "the best notice that is practicable under the circumstances, — by United States mail, electronic means, or other appropriate means — including individual notice to all members who can be identified through reasonable effort."

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370 Further discussion reflected widespread agreement that "the
371 best notice that is practicable under the circumstances" and
372 "reasonable effort" establish a measure of discretion that may be
373 thwarted by the two-sentence structure that, in a second stand-
374 alone sentence, says that "the notice must include individual
375 notice to all members who can be identified through reasonable
376 effort." The style change seems to approach a substantive change.
377 It will be better to draft with only one "must," so as to emphasize
378 what is the best practicable notice. That approach will avoid any
379 unintended intrusion on the process by which courts elaborate on
380 the meaning of "practicable" and "reasonable."

381 One suggested remedy was to delete from rule text the
382 references to examples of means — "United States mail, electronic
383 means, or other appropriate means." The examples could be left to
384 the Committee Note. But that would strain the practice that bars
385 Note advice that is not supported by a change in rule text.

386 As to the choice of means, it was noted that some comments
387 have suggested that careful analysis of actual responses in many
388 cases show that postal mail usually works better than electronic
389 notice. The Committee Note may benefit from some revision. But e-
390 mail notice is happening now, and it may help to provide official
391 authority for it.

392 The drafting question was resolved by adopting this
393 suggestion:

394 * * * the court must direct to class members the best
395 notice that is practicable under the circumstances,
396 including individual notice to all members who can be
397 identified through reasonable effort. <u>The notice may be</u>
398 <u>by United States mail, electronic means[,] or other</u>
399 <u>appropriate means.</u>

400 As revised, the Committee approved recommendation of this
401 proposal for Standing Committee approval to publish this summer.

402 <u>Frontloading</u>. Proposed Rule 23(e)(1)(A) focuses on ensuring that
403 the court is provided ample information to support the
404 determination whether to send out notice of a proposed settlement
405 to a proposed class. The underlying concern is that the parties to
406 a proposed settlement may join in seeking what has been
407 inaccurately called preliminary certification and notice without
408 providing the court much of the information that bears on final
409 review and approval of the settlement. If important information
410 comes to light only after the notice stage and at the final-
411 approval stage, there is a risk that the settlement will not
412 withstand close scrutiny. The results are costly, including a
413 second round of notice to a perhaps disillusioned class if the
414 action persists through a second attempt to settle and certify.

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415 Early drafting efforts included a long list of categories of
416 information the proponents of settlement must provide to the court.
417 The list has been shortened to more general comments in the
418 Committee Note. The rule text also has been changed to clarify that
419 it is not the court's responsibility to elicit the required
420 information from the parties, rather it is the parties that have
421 the duty to provide the information to the court.

422 The idea is transparency and efficiency. The information,
423 initially required to support the court's determination whether to
424 send notice, also supports the functions of the notice itself. It
425 enables members to make better-informed decisions whether to opt
426 out, and whether to object. Good information may show there is no
427 reason to object. Or it may show that there is reason to object,
428 and provide the support necessary to make a cogent objection.

429 The Subcommittee discussed at length the question whether the
430 rule text should direct the parties to submit all information that
431 will bear on the ultimate decision whether to certify the class
432 proposed by the settlement and approve the settlement. The
433 difficulty is that the objection process may identify a need for
434 more information. And in any event, the parties may not appreciate
435 the potential value of some of the information they have. It would
436 be too rigid to prohibit submission at the final-approval stage of
437 any information the parties had at the time of seeking approval of
438 notice to the class. But at the same time, it is important that the
439 parties not hold back useful information that they have. Alan
440 Morrison has suggested that the Note should say something like
441 this: "Ordinarily, the proponents of the settlement should provide
442 the court with all the available supporting materials they intend
443 to submit at the time they seek notice to the class, which would
444 make this information available to class members." The Committee
445 agreed that the Subcommittee should consider this suggestion and,
446 if it is adopted, determine the final wording.

447 An important difference remains between the Subcommittee and
448 the style consultants. The information required by (e)(1)(A) is to
449 support a determination, not findings, that notice should be given
450 to the class. The Subcommittee draft requires "sufficient"
451 information to enable these determinations. The style consultants
452 prefer "enough" information. If they are right that "enough" and
453 "sufficient" carry exactly the same meaning, why worry about the
454 choice? But, it was quipped, "we think 'enough' is insufficient."

455 "Sufficient" found broad support. A quick Google search found
456 British authority for different meanings for "enough" and
457 "sufficient." It was suggested that "sufficient" is qualitative,
458 while "enough" is quantitative. "Sufficiency," moreover, is a
459 concept used widely in the law, particularly in addressing such
460 matters as the sufficiency of evidence.

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The outcome was to transpose the two words: "~~sufficient~~ information sufficient to enable" the court's determination whether to send notice. This form better underscores the link between information and determination, and creates a structure that will not work with "enough." The Committee believes that this question goes to the substance of the provision, not style alone.

A different question was raised. Proposed Rule 23 (e)(1)(B) speaks of showing that the court will likely be able to approve the proposed settlement "under Rule 23(e)(2)," and "certify the class for purposes of judgment on the proposal." (e)(2) does not say anything about certification beyond the beginning: "If the proposal would bind class members * * *." That might be read to authorize creation of a settlement class that does not meet the tests of subdivision (b)(1), (2), or (3). The proposed Committee Note, at p. 102, line 131, repeats the focus on the likelihood the court will be able to certify a class, but does not pin it down.

The Subcommittee agreed that, having discussed the possibility of recommending a new "(b)(4)" category of class action, it had decided not to pursue that possibility. One possibility would be to amend the Committee Note to amplify the reference to certifying a class: "likely will be able, after the final hearing, to certify the class under the standards of Rule 23(a) and (b)." That leaves the question whether this approach relies on the Note to clarify something that should be expressed in rule text. Perhaps something could be done in (e)(1)(B)(ii), though it is not clear what — "certify the class under Rule 23(a) and (b) for purposes of judgment on the proposal" might do it.

It was pointed out that the provision for notice of a proposed settlement applies not only when a class has not yet been certified but also when a class has been certified before a settlement proposal is submitted. This dual character is reflected in (e)(1)(B)(ii)'s reference to the likely prospect that the court will, at the end of the notice and objection period, be able to certify a class not yet certified. The purpose of the proposal is to ensure the legitimacy of the common practice of sending out notice before a class is certified. There are two steps. Settlement cannot happen without certifying a class. But the common habit has been to refer to the act that launches notice and, in a (b)(3) class, the opt-out period, as preliminary certification. That led to attempts to win permission for interlocutory appeal under Rule 23(f), most prominently seen in the NFL concussion litigation. Perhaps the Committee Note should say something, but there is no apparent problem in the rule language.

One possible remedy might be to expand the tag line for Rule 23(e)(2): "Approval of the proposal and certification of the class [for settlement purposes]." But that might be misleading, since (e)(2) does not refer to certification criteria.

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508 It was observed again that when a class has not already been
509 certified, the court does not certify a class in approving notice
510 under (e)(1). Certification comes only as part of approving the
511 settlement after considering the criteria established by (e)(2).
512 Certification of the class and approval of the settlement are
513 interdependent. The settlement defines the class. The court
514 approves both or neither; it cannot redefine the class and then
515 approve a settlement developed for a different class. Not, at
516 least, without acceptance by the proponents and repeating the
517 notice process for the newly defined class.

518 A resolution was proposed: Add a reference to Rule 23(c)(3) to
519 (e)(2): "If the proposal would bind class members <u>under Rule</u>
520 <u>23(c)(3)</u>, the court may approve it only * * *." This was approved,
521 with "latitude to adjust" if the Subcommittee finds adjustment
522 advisable. Corresponding language in the Committee Note might read
523 something like this, adding on p. 103, somewhere around line 122:
524 "Approval under Rule 23(e)(2) is required only when class members
525 would be bound under Rule 23(c)(3). Accordingly, in addition to
526 evaluating the proposal itself, the court must determine whether
527 the class may be certified under the standards of Rule 23(a) and
528 (b)."

529 The proposed Rule 23(e)(2) criteria for approving a proposed
530 settlement were discussed briefly. They are essentially the same as
531 the draft discussed at the November meeting. They seek to distill
532 the many factors expressed in varying terms by the circuits, often
533 carrying forward with lists established thirty years ago, or even
534 earlier. Tag lines have been added for the paragraphs at the
535 suggestion of the style consultants.

536 The Committee approved a recommendation that the Standing
537 Committee approve proposed Rule 23(e)(1) and (2) for publication
538 this summer.

539 <u>Objectors.</u> In all the many encounters with bar groups and at the
540 miniconference last fall, there was virtually unanimous agreement
541 that something should be done to address the problem of "bad"
542 objectors. The problem is posed by the objector who files an open-
543 ended objection, often copied verbatim from routine objections
544 filed in other cases, then "lies low," saying almost nothing, and
545 — after the objection is denied — files a notice of appeal. The
546 business model is to create, at low cost, an opportunity to seek
547 advantage, commonly payment, by exploiting the cost and delay
548 generated by an appeal.

549 Part of the Rule 23(e)(5) proposal addresses the problem of
550 routine objections by requiring that the objection state whether it
551 applies only to the objector, to a specific subset of the class, or
552 to the entire class. It also directs that the objection state with
553 specificity the grounds for the objection. The Committee Note says

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554 that failure to meet these requirements supports denial of the
555 objection.

556 Another part of the proposal deletes the requirement in
557 present Rule 23(e)(5) that the court approve withdrawal of an
558 objection. There are many good-faith withdrawals. Objections often
559 are made without a full understanding of the terms of the
560 settlement, much less the conflicting pressures that drove the
561 parties to their proposed agreement. Requiring court approval in
562 such common circumstances is unnecessary.

563 At the same time, proposed Rule 23(e)(5)(B) deals with payment
564 "in connection with" forgoing or withdrawing an objection, or
565 forgoing, dismissing, or abandoning an appeal from a judgment
566 approving the proposed settlement. No payment or other
567 consideration may be provided unless the court approves. The
568 expectation is that this approach will destroy the "business model"
569 of making unsupported objections, followed by a threat to appeal
570 the inevitable denial. A court is not likely to approve payment
571 simply for forgoing or withdrawing an appeal. Imagine a request to
572 be paid to withdraw an appeal because it is frivolous and risks
573 sanctions for a frivolous appeal. Or a contrasting request to
574 approve payment to the objector, not to the class, for withdrawing
575 a forceful objection that has a strong prospect of winning reversal
576 for the class or a subclass. Approval will be warranted only for
577 other reasons that connect to withdrawal of the objection. An
578 agreement with the proponents of the settlement and judgment to
579 modify the settlement for the benefit of the class, for example,
580 will require court approval of the new settlement and judgment and
581 may well justify payment to the now successful objector. Or an
582 objector or objector's counsel may, as the Committee Note observes,
583 deserve payment for even an unsuccessful objection that illuminates
584 the competing concerns that bear on the settlement and makes the
585 court confident in its judgment that the settlement can be
586 approved.

587 The requirement that the district court approve any payment or
588 compensation for forgoing, dismissing, or abandoning an appeal
589 raises obvious questions about the allocation of authority between
590 district court and court of appeals if an appeal is actually taken.
591 Before a notice of appeal is filed, the district court has clear
592 jurisdiction to consider and rule on a motion for approval. If it
593 rules before an appeal is taken, its ruling can be reviewed as part
594 of a single appeal. The Subcommittee has decided not to attempt to
595 resolve the question whether a pre-appeal motion suspends the time
596 to appeal. Something may well turn on the nature of the motion. If
597 it is framed as a motion for attorney fees, it fits into a well-
598 established model. If it is for payment to the objector, matters
599 may be more uncertain — it may be something as simple as an
600 argument that the objector should be fit into one subclass rather
601 than another, or that the objector's proofs of injury have been

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602 dealt with improperly.

603 After the agenda materials were prepared, the Subcommittee
604 continued to work on the relationship between the district court
605 and the court of appeals. It continued to put aside the question of
606 appeal time. But it did develop a new proposed Rule 23(e)(5)(C) to
607 address the potential for overlapping jurisdiction when a motion to
608 approve payment is not made, or is made but not resolved, before an
609 appeal is docketed. The proposal is designed to be self-contained,
610 operating without any need to amend the dismissal provisions in
611 Appellate Rule 42. "The question is who has the case." The
612 proposal, as it evolved in the Subcommittee, reads:

613 (C) *Procedure for Approval After Appeal*. If approval
614 under Rule 23(e)(5)(B) has not been obtained before
615 an appeal is docketed in the court of appeals, the
616 procedure of Rule 62.1 applies while the appeal
617 remains pending.

618 Invoking the indicative ruling procedure of Rule 62.1 facilitates
619 communication between the courts. The district court retains
620 authority to deny the motion without seeking a remand. It is
621 expected that very few motions will be made simply "for" approval
622 of payment, and that denial will be the almost inevitable fate of
623 any motion actually made. But if the motion raises grounds that
624 would lead the district court either to grant the motion or to want
625 more time to consider the motion if that fits with the progress of
626 the case on appeal, the court of appeals has authority to remand
627 for that purpose.

628 Representatives of the Appellate Rules Committee have endorsed
629 this approach in preference to the more elaborate earlier drafts
630 that would amend Appellate Rule 42.

631 The first comment was that it is extraordinary that it took so
632 long to reach such a sensible resolution.

633 The next reaction asked how this proposal relates to waiver.
634 If an objector fails to make an objection with the specificity
635 required by proposed Rule 23(e)(5)(A), for example, can the appeal
636 request permission to amend the objection? Isn't this governed by
637 the usual rule that you must stand by the record made in the
638 district court? And to be characterized as procedural forfeiture,
639 not intentional waiver? The purpose of (e)(5)(A) is to get a useful
640 objection; an objection without explanation does not help the
641 court's evaluation of the proposed settlement. Pro se objectors
642 often fail to make helpful objections. So a simple objection that
643 the settlement "is not fair" is little help if it does not explain
644 the unfairness. At the same time, the proposed Committee Note
645 recognizes the need to understand that an objector proceeding
646 without counsel cannot be expected to adhere to technical legal

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647 standards. The Note also states something that was considered for
648 rule text, but withdrawn as not necessary: failure to state an
649 objection with specificity can be a basis for denying the
650 objection. That, and forfeiture of the opportunity to supply
651 specificity on appeal, is a standard consequence of failure to
652 comply with a "must" procedural requirement. The courts of appeals
653 can work through these questions as they routinely do with
654 procedural forfeiture. Forfeiture, after all, can be forgiven, most
655 likely for clear error. It is not the same as intentional waiver.

656 The Committee approved a recommendation that the Standing
657 Committee approve publication of proposed Rule 23(e)(5) this
658 summer.

659 Interlocutory appeals. The proposals would amend Rule 23(f) in two
660 ways.

661 The first amendment adds language making it clear that a court
662 of appeals may not permit appeal "from an order under Rule
663 23(e)(1)." This question was discussed earlier. The Rule 23(e)(1)
664 provisions regulating notice to the class of a proposed settlement
665 and class certification are only that — approval, or refusal to
666 approve, notice to the class. Despite the common practice that has
667 called this notice procedure preliminary certification, it is not
668 certification. There is no sufficient reason to allow even
669 discretionary appeal at this point.

670 The Committee accepted this feature without further
671 discussion.

672 The second amendment of Rule 23(f) extends the time to file a
673 petition for permission to appeal to 45 days "if any party is the
674 United States" or variously described agencies or officers or
675 employees. The expanded appeal time is available to all parties,
676 not only the United States. This provision was suggested by the
677 Department of Justice. As with other provisions in the rules that
678 allow the United States more time to act than other parties are
679 allowed, this provision recognizes the painstaking process that the
680 Department follows in deciding whether to appeal, a process that
681 includes consultation with other government agencies that often
682 have their own elaborate internal review procedures.

683 Justice Nahmias reacted to this proposal by a message to Judge
684 Dow asking whether state governments should be accorded the same
685 favorable treatment. Often state attorneys general follow similarly
686 elaborate procedures in deciding whether to appeal. A participant
687 noted that he had been a state solicitor general, and that indeed
688 his state has elaborate internal procedures. At the same time, he
689 noted that the state procedures were not as time-consuming as the
690 Department of Justice procedures.

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691 This question prompted the suggestion that perhaps states
692 should receive the same advantages as the United States. But this
693 question arises at several points in the rules, often in provisions
694 allowing extra time for action by the United States. The appeal
695 time provisions in Appellate Rule 4 are a familiar example, as well
696 as the added time to answer in Rule 12. And at least on occasion,
697 the states are accorded the same favorable treatment as the United
698 States. Appellate Rule 29 allows both the United States and a state
699 to file an amicus brief without first winning permission. It may be
700 that these questions of parity deserve consideration as a separate
701 project. There might be some issues of line drawing. If states get
702 favorable treatment, what of state subdivisions? Actions against
703 state or local officials asserting individual liability? Should
704 large private organizations be allowed to claim equally complex
705 internal procedures — and if so, how large?

706 The concluding observation was that extending favorable
707 treatment to the United States will leave states where they are
708 now. The amendment will not disadvantage them; it only fails to
709 provide a new advantage. Nor need it be decided whether the time
710 set by a court rule, such as Rule 23(f), is subject to extension in
711 a way that a statute-based time period cannot be.

712 A separate question was framed by a sentence appearing in
713 brackets in the draft Committee Note at p. 107, lines 408-409 of
714 the agenda book. This sentence suggested that the 45-day time
715 should apply as well in "an action involving a United States
716 corporation." There are not many "United States corporation[s]."
717 Brief comments for the Department of Justice led to the conclusion
718 that this sentence should be deleted.

719 The Class Action Fairness Act came into the discussion with a
720 question whether any of the Rule 23 proposals might run afoul of
721 statutory requirements. CAFA provides an independent set of rules
722 that must be satisfied. It has provisions relating to settlement,
723 including notice to state officials of proposed settlements. But
724 nothing in the proposed amendments is incompatible with CAFA.
725 Courts can fully comply with statutory requirements in implementing
726 Rule 23.

727 The Committee voted to recommend proposed Rule 23(f) to the
728 Standing Committee to approve for publication this summer.

729 <u>Ongoing Questions.</u> The Subcommittee has put aside for the time
730 being some of the proposals it has studied, often at length.

731 "Pick-off" offers raise one set of questions, addressed by a
732 number of drafts that illustrate different possible approaches. The
733 questions arise as defendants seek to defeat class certification by
734 acting to moot the claims of individual would-be representatives.
735 The problem commonly arises before class certification, and often

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736 before a motion for certification. One reason for deferring action
737 was anticipation of the Supreme Court's decision in the Campbell-
738 Ewald case. The decision has been made, and the Subcommittee has
739 been tracking early reactions in the courts. It is more difficult
740 to track responses by defendants. One recent district-court opinion
741 deals with an effort to moot a class representative by attempting
742 to make a Rule 67 deposit in court of full individual relief. The
743 attempt was rejected as outside the purposes of Rule 67. Other
744 attempts are being made to bring mooting money into court,
745 responding to the part of the Campbell-Ewald opinion that left this
746 question open, and to the separate opinions suggesting that
747 mootness might be manufactured in this way. The question whether to
748 propose Rule 23 amendments remains under consideration.

749 Consideration of offers that seek to moot individual
750 representatives has led also to discussion of the possibility that
751 Rule 23 should be amended by adopting explicit provisions for
752 substituting new representatives when the original representatives
753 fail. The rule could be narrow. One example of a narrow rule would
754 be one that addresses only the effects of involuntary mooting by
755 defense acts that afford complete relief. A broad rule could reach
756 all circumstances in which loss of one or more representatives make
757 it desirable or necessary to find replacements.

758 Discussion of substitute representatives began with the
759 observation that it can be prejudicial to the defendant when class
760 representatives pull out late in the game. An illustration was
761 offered of a case in which a former employee sought injunctive
762 relief on behalf of a class. He retired. He could not benefit from
763 injunctive relief that would benefit only current employees. The
764 plaintiffs sought to amend the complaint to substitute a new
765 representative. But they acted after expiration of the time for
766 amendments allowed by the scheduling order. And they had not been
767 diligent, since the impending retirement was well known. "It would
768 have been different if the representative had been hit by a bus,"
769 an unforeseeable event that could justify amending the scheduling
770 order.

771 A different anecdote was offered by a judge who asked about
772 the size of a proposed payment for services by the representative
773 plaintiff. The response was that the representative deserved extra
774 because he had rejected a pick-off offer.

775 It was asked whether judges understand now that they have
776 authority to allow substitution of representatives. An observer
777 suggested that it would be good to adopt an explicit substitution
778 rule. A representative seeks to assume a trust duty to act on
779 behalf of others. And after a class is certified, a set of trust
780 beneficiaries is established. It would help to have an affirmative
781 statement in the rule that recognizes substitution of trustees.

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782 The Committee agreed that the Subcommittee should continue to
783 consider the advantages of adopting an express rule to confirm, and
784 perhaps regularize, existing practices for substituting
785 representatives.

786 Finally, the Subcommittee continues to consider the questions
787 raised by the growing number of decisions that grapple with the
788 question whether "ascertainability" is a useful concept in deciding
789 whether to certify a class. The decisions remain in some disarray.
790 But the question is being actively developed by the courts.
791 Continuing development may show either that the courts have reached
792 something like consensus, or that problems remain that can be
793 profitably addressed by new rule provisions.

794 The Committee thanked the Subcommittee for its long, devoted,
795 and successful work.

796 *Pilot Projects*

797 Judge Bates introduced the work on pilot projects by noting
798 that the work is being advanced by a Subcommittee that includes
799 both present and former members of this Committee and the Standing
800 Committee. Judge Campbell, former chair of this Committee, chairs
801 the Subcommittee. Other members include Judge Sutton, Judge Bates,
802 Judge Grimm (a former member of this Committee), Judge Gorsuch,
803 Judge St. Eve, John Barkett, Parker Folse, Virginia Seitz, and
804 Edward Cooper. Judge Martinez has joined the Subcommittee work as
805 liaison from the Committee on Court Administration and Case
806 Management.

807 Judge Campbell began presenting the Subcommittee's work by
808 noting that the purpose of pilot projects is to advance
809 improvements in civil litigation by testing proposals that, without
810 successful implementation in actual practice, seem too
811 adventuresome to adopt all at once in the national rules.

812 The Subcommittee has held a number of conference calls since
813 this Committee discussed pilot projects last November. Two projects
814 have come to occupy the Subcommittee: Expanded initial disclosures
815 in the form of mandatory early discovery requests, and expedited
816 procedures.

817 Mandatory Initial Discovery. The mandatory early discovery project
818 draws support from many sources, including innovative federal
819 courts and pilot projects in ten states. The Subcommittee held
820 focus-group discussions by telephone with groups of lawyers and
821 judges from Arizona and Colorado, states that have developed
822 enhanced initial disclosures. Another conference call was held with
823 lawyers from Ontario and British Columbia to learn about initial
824 disclosures in Canada. "People who work under these disclosure
825 systems like them better than the Federal Rules of Civil

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826 Procedure."

827 The draft presented in the agenda materials has been
828 considered by the Case Management Subcommittee of the Committee on
829 Court Administration and Case Management. They have reflected on
830 the draft in a thoughtful letter that will be considered as the
831 work goes forward.

832 Judge Grimm took the lead in drafting the initial discovery
833 rule.

834 Mandatory initial discovery would be implemented by standing
835 order in a participating court. The order would make participation
836 mandatory, excepting for cases exempted from initial disclosures by
837 Rule 26(a)(1)(B), patent cases governed by local rule, and
838 multidistrict litigation cases. Because the initial discovery
839 requests defined by the order include all the information covered
840 by Rule 26(a)(1), separate disclosures under Rule 26(a)(1) are not
841 required.

842 The Standing Order includes Instructions to the Parties.
843 Responses are required within the times set by the order, even if
844 a party has not fully investigated the case. But reasonable inquiry
845 is required, the party itself must sign the responses under oath,
846 and the attorney must sign under Rule 26(g).

847 The discovery responses must include facts relevant to the
848 parties' claims or defenses, whether favorable or unfavorable. This
849 goes well beyond initial disclosures under Rule 26(a)(1), which go
850 only to witnesses and documents a party "may use." The Committee on
851 Court Administration and Case Management may raise the question
852 whether the requirement to respond with unfavorable information
853 will discourage lawyers from making careful inquiries. Experience
854 in Arizona, Colorado, and Canada suggests lawyers will not be
855 discouraged.

856 The time for filing answers, counterclaims, crossclaims, and
857 replies is not tolled by a pending motion to dismiss or other
858 preliminary motion. This provision provoked extensive discussion
859 within the Subcommittee. An answer is needed to frame the issues.
860 Suspending the time to answer would either defer the time to
861 respond to the discovery requests or lead to responses that might
862 be too narrow, broader than needed for the case, or both. The
863 Subcommittee will consider whether to add a provision that allows
864 the court to suspend the time to respond, whether for "good cause"
865 or on a more focused basis.

866 The times to respond are subject to two exceptions. If the
867 parties agree that no party will undertake any discovery, no
868 initial discovery responses need be filed. And initial responses
869 may be deferred, one time, for 30 days if the parties certify that

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870 they are seeking to settle and have a good-faith belief that the
871 dispute will be resolved within 30 days of the due date for their
872 responses.

873 Responses, and supplemental responses, must be filed with the
874 court. The purpose of this requirement is to enable the court to
875 review the responses before the initial conference.

876 The initial requests impose a continuing duty to supplement
877 the initial responses in a timely manner, with a final deadline.
878 The draft sets the time at 90 days before trial. The Court
879 Administration and Case Management Committee has suggested that it
880 may be better to tie the deadline to the final pretrial conference.
881 Later discussion recognized that the final pretrial conference may
882 indeed be the better time to choose.

883 The parties are directed to discuss the mandatory initial
884 discovery responses at the Rule 26(f) conference, to seek to
885 resolve any limitations they have made or will make, to report to
886 the court, and to include in the report the resolution of
887 limitations invoked by either party and unresolved limitations or
888 other discovery issues.

889 As a safeguard, the instructions provide that responses do not
890 constitute an admission that information is relevant, authentic, or
891 admissible.

892 Rule 37(c)(1) sanctions are invoked.

893 The mandatory initial discovery requests themselves follow
894 these instructions in the Standing Order.

895 The first category describes all persons who have discoverable
896 information, and a fair description of the nature of the
897 information.

898 The second category describes all persons who have given
899 written or recorded statements, attaching a copy of the statement
900 when possible, but recognizing that production is not required if
901 the party asserts privilege or work-product protection.

902 The third category requires a list of documents, ESI, and
903 tangible things or land, "whether or not in your possession,
904 custody, or control, that you believe may be relevant to any
905 party's claims or defenses." If the volume of materials makes
906 individual listing impracticable, similar documents or ESI may be
907 grouped into specific categories that are described with
908 particularity. A responding party "may" produce the documents, or
909 make them available for inspection, instead of listing them.

910 The fourth category requires a statement of the facts relevant

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911 to each of the responding party's claims or defenses, and of the
912 legal theories on which each claim or defense is based.

913 The fifth category requires a computation of each category of
914 damages, and a description or production of underlying documents or
915 other evidentiary material.

916 The sixth category requires a description of "any insurance or
917 other agreement under which an insurance business or other person
918 or entity may be liable to satisfy all or part of a possible
919 judgment in the action or to indemnify or reimburse a party."

920 The seventh provision authorizes a party who believes that
921 responses in categories three, five, or six are deficient to
922 request more detailed or thorough responses.

923 The Standing Order has separate provisions governing the means
924 of providing hard-copy documents and ESI.

925 Hard-copy documents must be produced as they are kept in the
926 ordinary course of business.

927 When ESI comes into play, the parties must promptly confer and
928 attempt to agree on such matters as requirements and limits on
929 production, disclosure, and production; appropriate searches,
930 including custodians and search terms "or other use of technology
931 assisted review"; and the form for production. Disputes must be
932 presented to the court in a single joint motion, or, if the court
933 directs, a conference call with the court. The motion must include
934 the parties' positions and separate certifications by counsel under
935 Rule 26(g). Absent agreement of the parties or court order, ESI
936 identified in the initial discovery responses must be produced
937 within 40 days after serving the response. Absent agreement,
938 production must be in the form requested by the receiving party; if
939 no form is requested, production may be in a reasonably usable form
940 that will enable the receiving party to have the same ability as
941 the producing party to access, search, and display the ESI.

942 Finally, the Subcommittee has begun work on a User's Manual to
943 help pilot judges implement the project. It will cover such
944 familiar practices as early initial case-management conferences,
945 reluctance to extend the times for initial discovery responses, and
946 prompt resolution of discovery disputes.

947 Judge Grimm added that the Subcommittee also had considered an
948 extensive amount of information about experience with initial
949 disclosures under the Civil Justice Reform Act. It also reviewed
950 experience with the initial disclosure requirement first adopted in
951 1993, a more extensive form than the watered-down version adopted
952 in 2000. Further help was found in the 1997 conference at Boston
953 College Law School with lawyers, judges, and professors. In

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954 addition to Arizona and Colorado, a number of other state
955 disclosure provisions were studied. "This was a comprehensive
956 approach to what can be found."

957 Judge Sutton asked what the Standing Committee will be asked
958 to approve. This proposal is more developed than the proposals for
959 earlier pilot projects have been. But there will have to be
960 refinements along the way to implementation. That is the ordinary
961 course of development. The goal will be to ask the Standing
962 Committee to approve the pilot conceptually, while presenting as
963 many of the details as can be managed. Judge Bates agreed that
964 "refinements are inevitable."

965 Discussion began with a practicing lawyer's observation that
966 he had been skeptical about the ability of lawyers to find ways to
967 avoid the requirement in the 1993 rule that unfavorable information
968 be disclosed. But this pilot is worth doing. "Let's 'go big' with
969 something that has a potential to make major changes in the speed
970 and efficiency of federal litigation." The discussions with the
971 groups in Arizona and Colorado, and the lawyers in Canada, provided
972 persuasive evidence that this can work. "They live and work with
973 many of these ideas. And they find the ideas not only workable, but
974 welcome." The proposal results from intense effort to learn from
975 actual experience. The effort will continue through the time of
976 seeking approval from the Judicial Conference in September, and on
977 to the stage of actual implementation.

978 This view was seconded by "a veteran of 1993." The 1993 rule
979 failed because the Committee did not work closely enough with the
980 bar, and was not able to provide persuasive evidence that the
981 required disclosures could work. A pilot will provide the data to
982 support broader disclosure innovations.

983 An initial question observed that much of the conversation
984 refers to this project as involving initial disclosure. But the
985 standing order refers to "requests": does the duty to respond
986 depend on having a party promulgate actual discovery requests? The
987 answer is that the pilot's standing order adopts a set of mandatory
988 initial discovery requests. The requests are addressed to all
989 parties, and must be responded to in the same way as ordinary
990 discovery requests under Rules 33 and 34.

991 Thinking about implementation of the pilot project has assumed
992 that it should be adopted only in districts that can ensure
993 participation by all judges in the district. That may make it
994 impossible to launch the project in any large district, but it
995 seems important to involve a large district or two. Discussion of
996 this question began with the observation that the pilot project
997 embodies great ideas, but that it will be easier to "sell" them if
998 they can be tested in large districts. At the same time, it is not
999 realistic to expect that all judges in a large district will be

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1000 willing to sign on, even in the face of significant peer pressure
1001 from other judges. A separate question asked whether there might be
1002 some advantage of being able to compare outcomes in cases assigned
1003 to participating and nonparticipating judges in the ordinary
1004 random-assignment practices of the district. Emery Lee responded
1005 that there could be an advantage, but that the balance between
1006 advantage and disadvantage would depend on the judges in the two
1007 pools. This prompted the observation that there is reason to be
1008 concerned about self-selection into or out of pilot projects. A
1009 judge suggested that participation in the pilot "should not be
1010 terribly onerous." It may be better to leave the program as one
1011 that expects unanimity, understanding that a pilot district might
1012 allow a judge to opt out for individual reasons. Another judge
1013 thought that his court could achieve near-unanimity: "Judges on my
1014 court take pride in what they do." Several members agreed that the
1015 project should not be changed by, for example, adopting an explicit
1016 80% threshold. Perhaps it is better to leave it as a preference for
1017 districts in which all judges participate in the pilot, recognizing
1018 that the need to enlist one or more large districts may lead to
1019 negotiation. One approach would be to design the project to say
1020 that all judges "should," not "must" participate. A judge noted
1021 that success will depend on willingness and eagerness to
1022 participate. In his relatively small district, "our senior judges
1023 are not eager."

1024 A more difficult question is raised by recognition of the
1025 possibility that some sort of exception should be adopted that
1026 allows a court to suspend the time to answer when there is a motion
1027 to dismiss. "In my district we get many well-considered motions to
1028 dismiss." They can pretty much be identified on filing. A lot of
1029 them are government cases. Another big set involve "200-page" pro
1030 se complaints that will require much work to answer. This
1031 observation was supported by the Department of Justice. The goal of
1032 speedy development of the case is important, but many motions to
1033 dismiss address cases that should not be in court at all. If the
1034 case is subject to dismissal on sovereign-immunity grounds, for
1035 instance, the government should be spared the work of answering and
1036 disclosing. In other cases, the claim may challenge a statute on
1037 its face, pretermitting any occasion for disclosure or discovery —
1038 why not invoke the ordinary rule that suspends the time to answer?
1039 A judge offered a different example: "Many cases have meritorious
1040 but flexible motions to dismiss." A diversity complaint, for
1041 example, may allege only the principal place of business of an LLC
1042 party. The citizenship of the LLC members needs to be identified to
1043 determine whether there is diversity jurisdiction. Further time is
1044 needed to decide the motion. Yet another judge observed that
1045 setting the time to respond to the initial mandatory requests at 30
1046 days after the answer can enable action on the motion to dismiss.

1047 A further suggestion was that there are solid arguments on
1048 both sides of the question whether a pleading answer should be

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1049 required before the court acts on a motion to dismiss. "The
1050 usefulness of responses turns to a significant degree on the
1051 parties' ability to understand the issues." But if the time to
1052 answer is deferred pending disposition of a motion to dismiss, it
1053 may be difficult to devise a suitable trigger for the duty to
1054 respond to the initial mandatory requests. And if the duty to
1055 respond is always deferred until after a ruling on a motion to
1056 dismiss, the result may be to encourage motions to dismiss.

1057 A judge agreed that further thought is needed, particularly
1058 for jurisdictional motions and cases in which the government is a
1059 party. But he noted that he has conferences that focus both on
1060 motions and the merits. "If there is too much possibility of
1061 deferring the time to answer, we may suffer."

1062 A lawyer member suggested that the line could be drawn at
1063 motions arguing that the defendant cannot be called on to respond
1064 in this court. These motions would go to questions like personal
1065 jurisdiction and subject-matter jurisdiction. They would not
1066 include motions that go to the substance of the claim.

1067 Another troubling example was offered: a claim of official
1068 immunity may be raised by motion to dismiss. Elaborate practices
1069 have grown up from the perception that one function of the immunity
1070 is to protect the individual defendant from the burdens of
1071 discovery as well as the burden of trial.

1072 An analogy was suggested in the variable practices that have
1073 grown up around the question whether discovery should be allowed to
1074 proceed while a motion to dismiss remains under consideration.

1075 A judge offered "total support" for the project, recognizing
1076 that further refinements are inevitable. One part of the issues
1077 raised by motions to dismiss might be addressed through the timing
1078 of ESI production, which may be the most onerous part of the
1079 initial mandatory discovery responses. The draft recognizes that
1080 ESI production can be deferred by the court or party agreement.

1081 Judge Campbell agreed that this question deserves further
1082 thought.

1083 Model orders provided another subject for discussion. A judge
1084 suggested that some judges, including open-minded innovators, would
1085 resist model orders because they think their own procedures work
1086 better. They may hesitate to buy into a full set of model orders.
1087 But Emery Lee said that model orders will be needed for research
1088 purposes. And Judge Campbell thought that the good idea of
1089 developing model orders could be pursued by looking for standard
1090 practices in Arizona and other states with expansive pretrial
1091 disclosures.

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1092 The Committee approved a motion to carry the initial mandatory
1093 discovery pilot project program forward to the Standing Committee
1094 for approval for submission to the Judicial Conference in
1095 September. The Committee recognizes that the Subcommittee will
1096 continue its deliberations and make further refinements in its
1097 recommendations.

1098 Expedited Procedures. Judge Campbell introduced the expedited
1099 procedures pilot project by observing that it rests on principles
1100 that have been proved in many courts, by many judges, and in many
1101 cases. The project is designed not to test new procedures, but to
1102 change judicial culture.

1103 The project has three parts: The procedural components; means
1104 of measuring progress in pilot courts; and training.

1105 These practices provide the components of the pilot: (1)
1106 prompt case-management conferences in every case; (2) firm caps on
1107 the time allocated for discovery, to be set by the court at the
1108 conference and to be extended no more than once, and only for good
1109 cause and on a showing of diligence by the parties; (3) prompt
1110 resolution of discovery disputes by telephone conferences; (4)
1111 decisions on all dispositive motions within 60 days after the reply
1112 brief is filed; and (5) setting and holding firm trial dates.

1113 The metrics to be measured are these: (1) if it can be
1114 measured, the level of compliance with the practices embodied in
1115 the pilot; (2) trial dates in 90% of civil cases set within 14
1116 months of case filing, and within 18 months in the remaining 10% of
1117 cases; and (3) a 25% reduction in the number of categories of cases
1118 in the district "dashboard" that are decided slower than the
1119 national average, bringing the court closer to the norm. (The
1120 "dashboard" is a tool developed for use by the Committee on Court
1121 Administration and Case Management. It measures disposition times
1122 in all 94 districts across many different categories of cases. Each
1123 district's experience in each category is compared to the national
1124 average. The dashboard is described in the article by Donna
1125 Stienstra set out as an exhibit to the Pilot Projects report. The
1126 chief judge of each district got a copy of that district's
1127 dashboard last September.)

1128 Training and collaboration will have these components: (1) an
1129 initial one-day training session by the FJC, followed by additional
1130 FJC training every six months, or possibly every year; (2)
1131 quarterly meetings by judges in the pilot district to discuss best
1132 practices, what is working and what is not working, leading to
1133 refinements of case-processing methods to meet the pilot goals; (3)
1134 making judges from outside the district available as resources
1135 during the quarterly district conferences; (4) at least one bench-
1136 bar conference a year to talk with lawyers about how well the pilot
1137 is working; and (5) a 3-year period for the pilot.

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1138 This pilot "has a lot of moving parts, but not as many as the
1139 mandatory initial disclosure pilot."

1140 Judge Fogel and Emery Lee responded to a question about the
1141 likely reaction of pilot-district judges to exploring individual
1142 disposition times. They answered that in many settings researchers
1143 are wary of compiling individual-judge statistics because many
1144 judges are sensitive to these matters. But the problem is reduced
1145 in a pilot project because the districts volunteer. They also
1146 pointed out that it will be necessary to compile a lot of pre-pilot
1147 data to compare to experience under the pilot. "The CACM-FJC model
1148 helps." At the same, the question whether individual judges'
1149 "dashboards" would become part of the public data must be
1150 approached with caution and sensitivity.

1151 Judge Fogel also noted that it is important to avoid the
1152 problem of eager volunteers. The FJC has a very positive reaction
1153 to the pilot. It will be useful to engage in a project designed to
1154 see what happens with a training program.

1155 It was noted that Judge Walton, writing for the CACM Case
1156 Management Subcommittee, raised questions regarding the deadline
1157 for decisions on dispositive motions. "[T]here are some practical
1158 considerations that may make compliance" difficult. Individual
1159 calendar and trial schedules may interfere. Supplemental briefing
1160 may be required after the reply brief. And added time may be
1161 required in cases that deserve extensive written decisions because
1162 of novel or unsettled issues of law or extensive summary-judgment
1163 records. The deadline might be extended to 90 days. Or it could be
1164 framed as a target time for disposing of a designated fraction of
1165 dispositive motions in all cases. Or it could be framed in
1166 aspirational terms, as "should" rather than "must."

1167 The trial-date target also was questioned. Perhaps it is not
1168 ambitious enough — even today, a large proportion of all cases are
1169 resolved in 14 months or less.

1170 The Committee adopted a recommendation that the Standing
1171 Committee approve the Expedited Procedures pilot project for
1172 submission to the Judicial Conference in September. As with the
1173 initial mandatory discovery pilot, it will be recognized that
1174 approval of the concept will entail further work by the
1175 Subcommittee, at times in conjunction with the FJC, the Committee
1176 on Court Administration and Case Management, and perhaps others.

1177 *Other Proposals*

1178 Several other proposals are presented by the agenda materials.
1179 Some have carried over from earlier meetings. Others respond to new
1180 suggestions for study. Each came on for discussion.

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1181 RULE 5.2: REDACTING PROTECTED INFORMATION

1182 Rule 5.2 requires redaction from paper and electronic filings
1183 of specified items of private information. It was initially adopted
1184 in conjunction with Appellate Rule 25(a)(5), Bankruptcy Rule 9037,
1185 and Criminal Rule 49.1. It has seemed important to achieve as much
1186 uniformity among these four rules as proves compatible with the
1187 different settings in which each operates.

1188 The Committee on Court Administration and Case Management
1189 referred to the Bankruptcy Rules Committee a problem that seems to
1190 arise with special frequency in bankruptcy filings. Bankruptcy
1191 courts are receiving creditors' requests to redact previously filed
1192 documents that include material that the privacy rules forbid.
1193 These requests may involve thousands of documents filed in numerous
1194 courts. The immediate question was whether Bankruptcy Rule 9037
1195 should be amended to include an express procedure for moving to
1196 redact previously filed documents. The prospect that different
1197 bankruptcy courts may become involved with the same questions
1198 arising from simultaneous filings suggests a particular need for a
1199 nationally uniform procedure, even if satisfactory but variable
1200 procedures might be crafted by each court acting alone.

1201 The Bankruptcy Rules Committee has responded by creating a
1202 draft Rule 9037(h) that would establish a specific procedure for a
1203 motion to redact. The central feature of the procedure is a copy of
1204 the filing that is identical to the paper on file with the court
1205 except that it redacts the protected information. The court would
1206 be required to "promptly" restrict public access both to the motion
1207 and the paper on file. The restriction would last until the ruling
1208 on the motion, and beyond if the motion is granted. Public access
1209 would be restored if the motion is denied.

1210 Judge Harris explained that bankruptcy courts receive hundreds
1211 of thousands of proofs of claim. "The volume is great." Redaction
1212 of information filed in violation of the rules is not as good as
1213 initial compliance. But there is good reason to have a uniform
1214 redaction procedure. If the court cannot restrict access until
1215 redaction is actually accomplished, the motion to redact may itself
1216 draw searches for the private information. The proposed Rule
1217 9037(h) relies on the assumption that the CM/ECF system can
1218 immediately restrict access when a motion to redact is filed. If
1219 not, the motion just makes things worse.

1220 Judge Sutton asked whether the Bankruptcy Rules Committee "is
1221 in a rush to publish." Judge Harris answered that the Committee is
1222 ready to wait so that all advisory committees can come together on
1223 uniform language.

1224 Clerk-liaison Briggs noted that "we get a lot of improper
1225 failures to comply with Rule 5.2. We have an established procedure

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1226 that immediately denies access."

1227 Further discussion confirmed the wisdom of the Bankruptcy
1228 Rules Committee's willingness to defer publication of their draft
1229 Rule 9037(h) pending work in the other committees. "One train is
1230 pretty far ahead of the others." Waiting for parallel development
1231 and publication will provide a better opportunity for uniformity.

1232 One possible outcome might be that the Administrative Office
1233 and other bodies could develop procedures that automatically
1234 respond to the filing of a motion to redact by closing off public
1235 access to the paper addressed by the motion. If that could be done,
1236 there might be no need for a new set of rules provisions. But the
1237 work should continue, recognizing that this happy outcome may not
1238 come to pass.

1239 RULE 30(b)(6): 16-CV-A

1240 Members of the council and Federal Practice Task Force of the
1241 ABA Section of Litigation, acting in their individual capacities,
1242 submitted a lengthy examination of problems encountered in practice
1243 under Rule 30(b)(6). Rule 30(b)(6) allows a party to depose an
1244 entity, whether a party or not a party, on topics designated in the
1245 notice. The entity is required to designate one or more witnesses
1246 to testify on its behalf, providing "information known or
1247 reasonably available to the organization."

1248 The idea that there are problems in implementing Rule 30(b)(6)
1249 is not new to the Committee. Extensive work was done in 2006 in
1250 response to proposals made by a Committee of the New York State Bar
1251 Association. The topic was considered again in 2013 in response to
1252 proposals made by the New York City Bar. Each time, the Committee
1253 concluded that there is little opportunity to adopt new rule text
1254 that would provide effective remedies for problems that are often
1255 case-specific and that often reflect deliberate efforts to subvert
1256 or misuse the Rule 30(b)(6) process.

1257 Many of the present proposals involve issues that were
1258 considered in the earlier work. One example is that Rule 30(b)(6)
1259 does not require the entity to designate as a witness the "most
1260 knowledgeable person." Another example is questions that go beyond
1261 the topics listed in the notice. Questions addressing a party's
1262 contentions in the litigation are yet another example.

1263 The question is whether the Committee should take up these
1264 questions in response to this third expression of anguish from a
1265 third respected bar group. The request, rather than urge specific
1266 answers, is that the Committee "undertake a review of the Rule and
1267 the case law developed under it with the goal of resolving
1268 conflicts among the courts, reducing litigation on its
1269 requirements, and improving practice * * *." It is clear that Rule

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1270 30(b)(6) "continues to be a source of unhappiness." On the other
1271 hand, to paraphrase Justice Jackson, there is a risk that pulling
1272 one misshapen stone out of the grotesque structure may disrupt a
1273 careful balance. So "many litigants find Rule 30(b)(6) an extremely
1274 important tool to discover important information. Others find it an
1275 enormous pain."

1276 Discussion began by noting that three important groups have
1277 now suggested the need to attempt improvements.

1278 Committee members could not, on the spot, identify any clear
1279 circuit splits on the meaning or administration of Rule 30(b)(6).
1280 It may be helpful to explore this question.

1281 It was noted that it is difficult to impose sanctions for not
1282 providing the most knowledgeable person.

1283 It also was noted that there is an acute problem of producing
1284 witnesses who are not prepared.

1285 So it was observed that the rule should be enforceable, and
1286 adding complications will make enforcement more difficult.

1287 A lawyer member said that he confronts problems with Rule
1288 30(b)(6) "constantly, all over the country, and even in sister
1289 cases. The Rule is constantly a source of controversy. Proper
1290 preparation issues will never go away." The recurring issues of
1291 interpretation and application show that as hard as it may be to
1292 make the Rule better, we should feel an obligation to address these
1293 issues. The problems are not going away. Another look would be
1294 useful.

1295 Full agreement was expressed with this view.

1296 A judge observed that the 2015 discovery amendments raise the
1297 prospect that proportionality may become a factor in administering
1298 Rule 30(b)(6). It might help to confront this integration head-on
1299 as part of a Rule 30(b)(6) project.

1300 It was agreed that Rule 30(b)(6) should move to the active
1301 agenda. Judge Bates will appoint a subcommittee to deal with the
1302 problems.

1303 RULE 81(c)(3): 15-CV-A

1304 This item was carried forward from the agenda for the November
1305 2015 meeting.

1306 The question was framed by 15-CV-A as a potential misstep in
1307 the 2007 Style Project. The question is best understood in the full
1308 frame of Rule 81(c).

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1309 Rule 81(c) begins with (c)(1): "These rules apply to a civil
1310 action after it is removed from a state court." Applying the rules
1311 is important — a federal court could not function well with state
1312 procedure, it would be awkward to attempt to blend state procedure
1313 with federal procedure, and the very purpose of removal may be to
1314 seek application of federal procedure.

1315 Rule 81(c)(3) provides special treatment for the procedure for
1316 demanding jury trial. It begins with a clear proposition in (3)(A):
1317 a party who expressly demanded a jury trial before removal in
1318 accordance with state procedure need not renew the demand after
1319 removal.

1320 A second clear step is provided by Rule 81(c)(3)(B): if all
1321 necessary pleadings have been served at the time of removal, a jury
1322 trial demand must be served within 14 days, measured for the
1323 removing party from the time of filing the notice of removal and
1324 measured for any other party from the time it is served with a
1325 notice of removal. This provision avoids the problem that otherwise
1326 would arise in applying the requirement of Rule 38(b)(1) that a
1327 jury demand be served no later than 14 days after serving the last
1328 pleading directed to the issue.

1329 The third obvious circumstance departs from the premise of
1330 Rule 81(c)(3)(B): All necessary pleadings have not been served at
1331 the time of removal. Subject to the remaining two variations, it
1332 seems safe to rely on Rule 81(c)(1): Rule 38 applies after removal.

1333 The fourth circumstance arises when state law does not require
1334 a demand for jury trial at any time. Up to the time of the Style
1335 Project, this circumstance was clearly addressed by Rule
1336 81(c)(3)(A): "If the state law **does** not require an express demand
1337 for jury trial, a party need not make one after removal unless the
1338 court orders the parties to do so within a specified time. The
1339 court must so order at a party's request and may so order on its
1340 own." The direction was clear. The underlying policy is to balance
1341 competing interests. There is a fear that a party may rely after
1342 removal on familiar state procedure — absent this excuse, the right
1343 to jury trial could be lost for failure to file a timely demand
1344 under Rule 38 after removal. At the same time, the importance of
1345 establishing whether the case is to be set for jury trial reflected
1346 in Rule 38 is recognized by providing that the court can protect
1347 itself by an order setting a time to demand a jury trial, and by
1348 further providing that a party can protect its interest by a
1349 request that the court must honor by setting a time for a demand.

1350 The Style Project changed "does," the word highlighted above,
1351 to "did." That change opens the possibility of a new meaning for
1352 this fifth circumstance: "[D]id not require an express demand"
1353 could be read to excuse any need to demand a jury trial when state
1354 law does require an express demand, but sets the time for the

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1355 demand at a point after the time the case was removed. The question
1356 was raised by a lawyer in a case that was removed from a court in
1357 a state that allows a demand to be made not later than entry of the
1358 order first setting the case for trial. The court ruled, in keeping
1359 with the Style Project direction, that the change from "does" to
1360 "did" was intended to be purely stylistic. The exception that
1361 excuses any demand applies only if state law does not require an
1362 express demand for jury trial at any point.

1363 The question put by 15-CV-A can be stated in narrow terms:
1364 Should the Style Project change be undone, changing "did" back to
1365 "does"? That would avoid the risk that "did" will be read by others
1366 to mean that a jury demand is not required after removal if,
1367 although state procedure does require an express demand, the time
1368 set for the demand in state court occurs at a point after removal.
1369 There is at least some ground to expect that the ambiguous "did"
1370 may cause some other lawyers to misunderstand what apparently was
1371 intended to be a mere style improvement.

1372 A broader question is whether a party should be excused from
1373 making a jury demand if, although a demand is required both by Rule
1374 38 and by state procedure, state procedure sets the time for making
1375 the demand after the time the case is removed. It is difficult to
1376 find persuasive reasons for dispensing with the demand in such
1377 circumstances. And there is much to be said for applying Rule 38 in
1378 the federal court rather than invoking state practice.

1379 A still broader question is whether it is time to reconsider
1380 the provision that excuses the need for any jury demand when a case
1381 is removed from a state that does not require a demand. Both the
1382 court and the other parties find it important to know early in the
1383 case whether it is to be tried to a jury. Present Rule 81(c)(3)(A)
1384 recognizes this value in the provision that allows the court to
1385 require a demand, and that directs that the court must require a
1386 demand if a party asks it to do so. In effect this rule transfers
1387 the burden of establishing whether the case is to be tried to a
1388 jury from a party who wants jury trial to the court and the other
1389 parties. The evident purpose is to protect against loss of jury
1390 trial by a party who does not familiarize itself with federal
1391 procedure even after a case is removed to federal court. It may be
1392 that the time has come to insist on compliance with Rule 38 after
1393 removal, just as the other rules apply after removal.

1394 Discussion began with the question whether it would be useful
1395 to change "did" back to "does" now, holding open for later work the
1396 question whether to reconsider this provision. Two judges responded
1397 that it is important to know, as early as possible, whether a case
1398 is to be tried to a jury. Rather than approach the question in two
1399 phases, it will better to consider it all at once.

1400 The Committee agreed to study the sketch of a simplified Rule

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1401 81(c)(3) presented in the agenda materials:

1402 (3) *Demand for a Jury Trial.* Rule 38(b) governs a demand for
1403 jury trial unless, before removal, a party expressly
1404 demanded a jury trial in accordance with state law. If
1405 all necessary pleadings have been served at the time of
1406 removal, a party entitled to a jury trial under Rule 38
1407 must be given one[1] if the party serves a demand within 14
1408 days after:
1409 (A) it files a notice of removal, or
1410 (B) it is served with a notice of removal filed by
1411 another party.
1412 [1] This version simply tracks the current rule. It might
1413 be shortened: "If all necessary pleadings have been
1414 served at the time of removal, a demand must be
1415 served within 14 days after the party * * *."

1416 If there is some discomfort with the 14-day deadline, it could
1417 be set at 21 days.

1418 15-CV-EE: FOUR SUGGESTIONS

1419 Social Security Numbers: Rule 5.2 allows a filing to include the
1420 last four digits of a social security number. The suggestion is
1421 that the last four digits can be used to reconstruct a full number
1422 for any number issued before the last few years. This risk was
1423 known at the time Rule 5.2 and the parallel provisions in other
1424 rules were adopted. The decision to allow the last four digits to
1425 be filed was made deliberately in response to the special need to
1426 have the last four digits in bankruptcy filings and the desire to
1427 have parallel provisions in all the rules. The Committee concluded
1428 that Rule 5.2 should not be amended unless another advisory
1429 committee believes the question should be studied further.

1430 Forma pauperis affidavits: This suggestion is that an affidavit
1431 stating a person's assets filed to support an application to
1432 proceed in forma pauperis should be protected by requiring filing
1433 under seal and ex parte review. Other parties could be allowed
1434 access for good cause and subject to a protective order. Unsealing
1435 could be allowed in redacted form. The purpose is to protect
1436 privacy. Committee discussion recognized the privacy interest, but
1437 concluded that the proposal should be put aside. Ex parte
1438 consideration would make difficult problems for institutional
1439 defendants that confront a party who frequently files forma
1440 pauperis actions. Requiring long-term preservation of sealed papers
1441 is not desirable. Sealing is itself a nuisance. Recognizing forma
1442 pauperis status expends a public resource, conferring a public
1443 benefit. And the interest in privacy concern may be lessened by the
1444 experience that "no one has any interest" in most i.f.p. filings.
1445 The Committee voted to close consideration of this suggestion.

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1446 Copies of Unpublished Authorities: This proposal is drawn verbatim
1447 from Local Rule 7.2, E.D. & S.D.N.Y. The rule, in some detail,
1448 requires a lawyer to provide a pro se party with a copy of cases
1449 and other authorities cited by the lawyer or by the court if the
1450 authority is unpublished or is reported exclusively on computerized
1451 databases. Discussion reflected agreement that this practice can be
1452 a good thing. Some judges do it without benefit of a local rule.
1453 But not all do, and it cannot be assumed that all lawyers do it. A
1454 lawyer will supply the court with a truly inaccessible authority,
1455 and that may entail providing it to other parties. And even large
1456 institutions may not have ready access to everything that is out
1457 there. The committee agreed that although this local rule is an
1458 attractive idea, it is not an idea that should be embodied in a
1459 national rule. The practice might prove worthy of a place on the
1460 agendas of judicial training programs.

1461 Pro se e-filing: This suggestion is addressed by the proposals for
1462 e-filing and e-service discussed earlier in the meeting.

1463 PLEADING STANDARDS: 15-CV-GG

1464 This suggestion is that Rule 8(a)(2) and the appendix of forms
1465 that was abrogated on December 1, 2015 "are so misleading as to be
1466 plain error." The underlying proposition is that although the
1467 Supreme Court wrote its Twombly and Iqbal opinions as
1468 interpretations of Rule 8(a)(2), anyone who relies on the rule text
1469 will be grievously misled as to contemporary federal pleading
1470 standards. The question thus is whether the time has come to take
1471 on a project to consider whether the pleading standards that have
1472 evolved in the last nine years should be addressed by more explicit
1473 rule language. The project would attempt to discern whether there
1474 is any standard that can be articulated in rule language, and make
1475 one of at least three broad choices: confirm present practice;
1476 heighten pleading standards beyond what courts have developed in
1477 response to the Supreme Court's opinions; or reduce pleading
1478 standards to establish some more forgiving form of "notice
1479 pleading." The Committee has considered this question repeatedly.
1480 Brief discussion concluded that it is not yet time to undertake a
1481 project on general pleading standards.

1482 RULE 6(d) AND "MAKING" DISCLOSURES

1483 This suggestion arises from the need to read carefully through
1484 the provisions of Rules 26(a)(2)(D)(2) and 26(a)(3)(B) in relation
1485 to Rule 6(d). Rule 6(d) provides an additional three days to act
1486 after service is made by specified means when the time to act is
1487 set "after service" ["after being served" as the rule may soon be
1488 amended]. The provisions in Rule 26 direct that disclosure of a
1489 rebuttal expert be "made" within 30 days after the other party's
1490 disclosure, and that objections to pretrial disclosures be made
1491 within 14 days after the disclosures "are made." The concern is

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1492 that although these provisions set times that run from the time a
1493 disclosure is "made," not the time it is served, some unwary
1494 readers may overlook the distinction and rely on Rule 6(d). The
1495 Committee concluded that this suggestion should be closed.

1496 15-CV-JJ: PRO SE E-FILING

1497 This suggestion urges that pro se litigants be allowed to use
1498 e-filing. As with 15-CV-EE, noted above, this topic is addressed by
1499 the pending proposals to amend Rule 5.

1500 THIRD-PARTY LITIGATION FINANCING: 15-CV-KK

1501 This suggestion follows up an earlier submission that the
1502 Committee should act to require disclosure of third-party financing
1503 arrangements. It provides additional information about developments
1504 in this area, including materials reflecting interest in Congress.
1505 But it does not urge immediate action. Instead, it urges the
1506 Committee "to take steps soon to achieve greater transparency about
1507 the growing use of TPLF in federal court litigation." Discussion
1508 noted that "this is a hot topic in the MDL world." It was noted
1509 that third-party funding raises difficult questions of professional
1510 responsibility. The Committee decided, as it had earlier, that this
1511 topic should remain open on the agenda without seeking to develop
1512 any proposed rules now.

1513 RULE 4: SERVICE ON INDIVIDUAL FEDERAL EMPLOYEES: 15-CV-LL

1514 This suggestion says that it can prove difficult to effect
1515 service on a federal employee who is made an individual defendant.
1516 Locating a home address can be hard, particularly as to those whose
1517 permanent address is outside the District of Columbia. It is not
1518 clear whether service can be made by leaving a copy of the summons
1519 and complaint at the defendant's place of federal work, in the
1520 manner authorized by Rule 5(b)(2)(B)(i) for service of papers after
1521 the summons and complaint. Two amendments are suggested:
1522 authorizing service by leaving the summons and complaint at the
1523 defendant's place of work, or requiring the agency that employs the
1524 defendant to disclose a residence address. Discussion began by
1525 observing that the Enabling Act may not authorize a rule directing
1526 a federal agency to disclose an employee's address. It also was
1527 noted that similar problems can arise in attempting to serve state
1528 and local government employees. The Department of Justice thinks
1529 that service by leaving at the defendant's place of work is a bad
1530 idea. The Committee concluded that although there may be real
1531 problems in making service in some circumstances, they cannot be
1532 profitably addressed by amending Rule 4. This suggestion is closed.

1533 15-CV-NN: MINIDISCOVERY AND PROMPT TRIAL

1534 This suggestion by Judge Michael Baylson, a former Committee

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1535 member, proposes a new rule for "Mini Discovery and Prompt Trial."
1536 The rule would expand initial disclosure of documents, require
1537 responses to interrogatories within 14 days, limit depositions
1538 among the parties to 4 per side at no more than 4 hours each, allow
1539 third-party discovery only on showing good cause, allow no more
1540 than 10 requests for admissions, and set the period for discovery
1541 (including expert reports) at 90 days. Motions for summary judgment
1542 would be permitted only for good cause, defined as potentially
1543 meritorious legal issues, and not for insufficiency of the
1544 evidence. Discussion noted that a rule amendment would be required
1545 to authorize a court to forbid filing a motion for summary
1546 judgment, although a court can require a pre-motion conference to
1547 discuss the matter. Judge Pratter observed that Judge Baylson is a
1548 persuasive advocate for this proposal. It was suggested that judges
1549 should be encouraged to experiment along these lines. But it was
1550 concluded that it would be premature to consider rulemaking now.
1551 There is a big overlap between this proposal and the practices that
1552 will be explored in the two pilot projects approved by the
1553 Committee in earlier actions.

1554 15-CV-00: TIME STAMPS, SEALS, ACCESS FOR VISUALLY IMPAIRED

1555 This set of suggestions addresses several issues that do not
1556 lend themselves to resolution by court rule. The concern that
1557 improvements are needed in access to courts for the visually
1558 impaired is particularly sympathetic. Emery Lee will investigate
1559 whether PACER is accessible.

1560 RULE 58: SEPARATE DOCUMENT

1561 Judge Pratter brought to the Committee's attention a Third
1562 Circuit decision that found an appeal timely only because judgment
1563 had not been entered on a separate document. The catch was that the
1564 dismissal order included a footnote that set out the district
1565 court's "opinion." The ruling that the appeal was timely reflects
1566 many other applications of Rule 58. The separate document
1567 requirement was added to Rule 58 to establish a bright-line point
1568 to start the running of appeal time. It has been interpreted to
1569 deny separate-document status to very brief orders that provide
1570 even minimal explanation in addition to a direction for judgment.
1571 For many years the result was that appeal time — and the time for
1572 post-judgment motions — never began to run in cases that were
1573 finally resolved without entry of judgment on an appropriately
1574 "separate" document. This problem was resolved by amendments made
1575 to Rule 58 in 2002. Rule 58(c) now provides that when entry of
1576 judgment on a separate document is required, judgment is entered on
1577 the later of two events: when it is set out in a separate document,
1578 or 150 days after it is entered in the civil docket.

1579 Judge Pratter said that judges on her court have the desirable
1580 practice of providing brief explanations for judgments that do not

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1581 warrant formal opinions. But that means that if a judge
1582 inadvertently fails to enter a still briefer separate document,
1583 appeal time expands from 30 days to 180 days (150 days plus 30
1584 days). Is this desirable? The summary of the work done in 2002, and
1585 repeated by the Appellate Rules Committee in 2008, shows deliberate
1586 choices carefully made in creating and maintaining the present
1587 structure. Rather than reconsider these choices now, perhaps the
1588 Committee can find a mechanism that will foster compliance with the
1589 separate-document requirement.

1590 Discussion suggested that the problem is not in the rule. "We
1591 simply need to do it better." The courtroom deputy clerk should be
1592 educated in the responsibility to ensure entry of judgment on a
1593 separate document whenever the court intends a final judgment. Some
1594 circuits have managed educational efforts that have been
1595 successful, at least in immediate effect.

1596 This agenda item was closed.

Respectfully Submitted

Edward H. Cooper
Reporter

DRAFT

126-012732

TAB 5

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126-012734

Item 5 will be an oral report.

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TAB 6

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126-012740

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

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CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

TO: Hon. Jeffrey S. Sutton, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Donald W. Molloy
Advisory Committee on Criminal Rules

RE: Report of the Advisory Committee on Criminal Rules

DATE: May 14, 2016

I. Introduction

The Advisory Committee on Criminal Rules met on April 18, 2016, in Washington, D.C. Draft minutes from the meeting are attached.

This report presents three action items. The Committee unanimously recommends publication of the following proposed amendments for public comment:

(1) Rule 49 (filing and service);
(2) Rule 45(c) (conforming amendment); and
(3) Rule 12.4 (government disclosure of organizational victims).

The report also briefly discusses several information items. The Committee will study further the following proposed amendments and has appointed subcommittees for each:

(1) Procedural protections for cooperating defendants (CACM recommendations);
(2) Rule 5(d) of the Rules Governing 2255 Actions (right to file a reply); and

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(3) Rule 16 (discovery in complex cases).

Finally, as noted below, the Committee decided that it will not, at this time, pursue several other suggested amendments.

II. Action Item: Rule 49

The Criminal Rules Committee submits proposed amendments to Rule 49 governing service and filing in criminal cases, with the recommendation that the amendments be published for public comment. Parallel amendments are before the Standing Committee from the Civil, Bankruptcy, and Appellate Rules Committees.

A. Background

The proposed amendments to Criminal Rule 49 grew out of a Standing Committee initiative to adapt the rules of procedure to the modernization of the courts' electronic filing system. A subcommittee composed of representatives from each of the advisory committees concluded that the rules governing the procedure in civil, criminal, bankruptcy, and appellate cases should be amended to require, rather than allow, electronic filing and service, with appropriate exceptions. The Standing Committee endorsed that recommendation and charged the advisory committees to work closely together and coordinate the parallel amendments on e-filing and service.

Because Rule 49(b) and (d) currently provide that service and filing be made in the "manner provided for a civil action," the threshold question facing the Criminal Rules Committee was whether to retain this linkage to the Civil Rules or to draft a comprehensive Criminal Rule on filing and service. At its September 2015 meeting, the Criminal Rules Committee unanimously approved a motion instructing the Rule 49 Subcommittee to prepare a stand-alone rule. Members emphasized the different interests and policies at stake in civil and criminal litigation: criminal cases and proceedings under § 2255 involve heightened due process concerns that should be reflected in the Criminal Rules governing filing and service. Extending the Civil Rule's new presumptive e-filing requirements to pro se defendants and prisoners in criminal cases, the Committee concluded, would be particularly problematic. Members also noted that prosecutors, defense lawyers, and pro se defendants would benefit from having the rules on filing and service included in the Federal Rules of Criminal Procedure, rather than having to consult two different sets of procedural rules.

However, in drafting the new stand-alone rule, the Committee recognized that the proposed language should replicate that used in the Civil Rule when possible to avoid raising questions about the meaning or scope of the existing language in the Civil Rules. Differences in language must be rooted in differences between civil and criminal cases or differences in existing Rules of Civil and Criminal Procedure. To ensure that the proposed Rule 49 replicated the revised provisions in the Civil Rules as closely as possible, the Criminal Rules Committee worked with representatives of the Civil Rules Committee throughout the process. Members of

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the Civil Rules Committee and Reporters from the Civil, Appellate, and Bankruptcy Committees participated in deliberations, and the style consultants worked diligently to harmonize the phrasing and structure of the proposals. Moreover, the Committee approved the amendment at its April 2016 meeting with the understanding that the chair and reporters might need to make additional minor changes to ensure uniformity with proposals from the other committees before submission to the Standing Committee (and, as always, to incorporate any changes made on the recommendation of the style consultants).[1]

B. Selected Features of Proposed Criminal Rule 49

Because most of the provisions on service and filing in proposed Criminal Rule 49 are identical to the provisions on service and filing in proposed Civil Rule 5, this report will focus on the differences. Generally, the proposed Criminal Rule departs from the proposed amendment to Rule 5 only where the Committee was persuaded that a departure was warranted by a difference between civil and criminal cases, or a difference between the criminal and civil rules themselves.

1. Organization and Structure.

In both Civil Rule 5 and Criminal Rule 49, the provisions on service precede those dealing with filing. Within those subsections, however, the proposed amendments to Rules 5 and 49 differ on the order in which they address electronic and nonelectronic means of filing and service. The proposed amendments to Rule 49 address electronic means first. Because most filing and service in criminal cases is through CM/ECF, the Criminal Rules Committee concluded that a new stand-alone rule providing instructions for filing and service should lead with instructions on electronic filing and service. Also, addressing electronic means in (a)(3) first provides needed context for the term "nonelectronic," which follows in the caption to (a)(4). And, importantly, placing the subsection on electronic means of service first highlights the specific restriction on use of CM/ECF by unrepresented parties. For unrepresented persons using the rule, the placement of electronic before nonelectronic service makes it crystal clear that

[1] A number of such minor changes were made to the proposal after the April meeting of the Criminal Rules Committee, each approved by the Chair, Subcommittee Chair, and reporters:

(1) conforming (a)(3)(A) & (B) to the civil rule phrasing ("learns that <u>it</u> did not reach the person");
(2) changing the caption of 49(a)(1) from "When Required" to "What is Required";
(3) changing the phrase "unrepresented party" to "party not represented by an attorney" in several locations;
(4) changing "using the court's electronic filing system" to "filing it with the court's …";
(5) rephrasing the cross references in subsections (c) and (d) to read "as required by" Rule 49(a);
(6) relocating the phrase "on each party" in subsection (d) to earlier in the sentence; and
(7) changing phrasing in (b)(3)(A) to "the court must allow nonelectronic filing for good cause."

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unrepresented parties must follow different rules when it comes to CM/ECF. Because the Criminal Rules Committee was writing on a clean slate, the proposed amendment did not require reordering of preexisting numbering or lettering of these provisions, which can pose difficulties for researching applications of its provisions.

In contrast, the drafters of the Civil Rules were not writing on a clean slate. Civil Rule 5 now begins with the traditional means of nonelectronic filing. Electronic filing, which is a relatively recent phenomenon, was added at the end of the list of means of filing. Putting electronic filing first would have required relettering the provisions of Rule 5(d), and the Civil Rules Committee concluded that the reasons for placing electronic provisions first did not outweigh the potential downsides of renumbering and relettering Rule 5.

The consensus view of the Committees, Reporters, and Style Consultants was that each Committee had valid reasons for the difference in structure and the different order in which the forms of service were listed posed no problem. In contrast to the use of different terminology, which might raise interpretative questions, a different order of the subsections would cause no mischief.

The Criminal Rule also incorporates in a single paragraph—(b)(1)—the language from existing Civil Rule 5 regarding the timing of filing and certificate of service. The proposed Civil Rule breaks the current single paragraph into two separate subdivisions. The consensus of the Committees, Reporters, and Style Consultants was that on this point a difference between the civil and criminal rule is appropriate. Because the single paragraph in the proposed Criminal Rule is shorter than the corresponding portion of the Civil Rule, which also addresses the filing of discovery under Civil Rule 26, subdividing the single paragraph in Rule 49 was unnecessary and indeed was opposed by the Style Consultants.

Unlike Civil Rule 5(b)(2)(E), proposed new Criminal Rule 49 contains separate provisions for service through the court's electronic filing system and electronic service by other means with written consent. The structure of the Criminal Rule differs because the substantive rule regarding electronic filing by an unrepresented party differs, as explained below.

And, unlike Civil Rule 5, proposed Criminal Rule 49 distinguishes structurally (as well as substantively) between parties (the prosecution and defense) and nonparties. This is reflected structurally in (c), "Service and Filing By Nonparties," which has no counterpart in Rule 5. The various substantive differences are discussed below in sections 2(a) and (b).

Finally, the proposed Criminal Rule contains two other provisions, not found in Civil Rule 5, that incorporate provisions found elsewhere in the Rules of Civil Procedure. These provisions will be needed when the link between the Civil and Criminal Rules is severed. They are described below in section 2(c).

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2. Substantive Differences

a. Filing and Service by Unrepresented Parties

The first major substantive difference from the Civil Rule is that under the proposed Criminal Rule an unrepresented party must file nonelectronically unless allowed to file electronically by court order or local rule. In contrast, under the proposed amendment to Civil Rule 5, an unrepresented party may be "required" to file electronically by a court order or local rule that allows reasonable exceptions. The need for different approaches to electronic filing by unrepresented parties was the main reason the Criminal Rules Committee decided that a stand-alone criminal rule was required.

As noted during the Criminal Rules Committee's report to the Standing Committee at its January 2016 meeting, electronic filing by pro se prisoners presents significant challenges. Pro se parties filing papers under the criminal rules generally lack the means to e-file or receive electronic confirmations, yet must be provided access to the courts under the Constitution.[2]

b. Filing and Service by Nonparties

The second substantive difference from the Civil Rule concerns filing and service by nonparties. Media representatives and crime victims are probably the most frequent nonparty filers, but there are others, including nonparty motions for the return of property under Rule 41(g), material witnesses who are detained under 18 U.S.C. § 3144, persons seeking disclosure of grand jury material under Rule 6, records custodians moving to quash subpoenas, amici filing at the district court level, and bail sureties.

The Committee concluded that good reasons support requiring all nonparties, represented or not, to file and serve nonelectronically in the absence of a court order or local rule to the contrary. First, the architecture of the current CM/ECF system allows only the prosecution and defendant(s) to file in a criminal case. Moreover, nonparties generally have a distinctive interest only in certain aspects of a criminal case, and it may not be desirable for them to be served with pleadings and filings that are unrelated to those aspects of the case. Some nonparties may prefer a default rule of nonelectronic filing. Some, particularly victims, provide information to the court that they may not wish to have shared with the parties. A default of nonelectronic filing helps protect those interests. If a district decides that it would prefer to adopt procedures that would

[2] For this reason, the Committee also expressed some concern about the application in § 2254 cases of language allowing local rules to require unrepresented parties to file electronically. Such language was added to Civil Rule 5 in order to provide authority for some existing local rules that require inmates in certain prisons to submit their petitions to staff in the prison library, who then scan the papers and file them electronically. In response to the Committee's concerns, the proposed amendment to Rule 5 was revised to state that local rules requiring pro se parties to file must allow reasonable exceptions.

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allow all represented media, victim, or other filers to use its electronic filing system, that would remain an option by local rule.

This policy choice is reflected in subsection (c), "Service and Filing By Nonparties," which has no counterpart in the Civil Rules. Subsection (c) also serves another important function. The introductory clause—"A nonparty may serve and file a paper only if doing so is required or permitted by law"—makes it clear that the provisions describing how nonparties must file or serve do not expand the right of nonparties to participate in criminal prosecutions.

c. Provisions Imported from Other Civil Rules

Proposed Rule 49 contains two provisions that do not appear in Civil Rule 5, but were imported from other Civil Rules. The first comes from Civil Rule 11. The Criminal Rules Committee concluded severing the link to the Civil Rules without adding the signature provision of Civil Rule 11(a) to Rule 49 would either create[3] or maintain an existing gap in the Criminal Rules. Nothing else in the Criminal Rules requires that the contact information specified in Civil Rule 11(a) be included as part of a filing. Proposed Rule 49(b)(4) fills this gap by replicating the language presently found in Civil Rule 11(a). That language has been restyled, and the word "party" changed to "person" in order to accommodate filings by nonparties.

Proposed Rule 49(c) also substitutes the language from Civil Rule 77(d)(1), governing the clerk's duty to serve notice of orders, for the command in the existing Rule that the clerk serve notice "in a manner provided for in a civil action."[4]

d. Other Differences

The Committee also noted a few other minor differences between the proposed amendments to Rule 49 and Civil Rule 5, which it concluded were justified and unlikely to give rise to any interpretative questions or difficulties.

i. The language describing what must be served was retained from existing Rule 49(a). The current language—which is familiar to and well understood by practitioners and judges—now varies from the language of Civil Rule 5(a)(1). The Civil Rule refers to types of papers that are not filed in criminal cases. There was no intention to change the scope of the service requirement in criminal cases,

[3] A few courts have assumed Civil Rule 11(a) may be applicable in criminal cases, presumably as part of the "manner" of filing referenced in Rule 49(d).

[4] Proposed Rule 49(c) omits the phase "who is not in default for failing to appear," which does not apply in criminal cases, and substitutes "Rule 49(a)" for Rule 77's reference to "Rule 5(b)."

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and the Committee was concerned that revising the wording might generate uncertainty or work an unintended change.

ii. The language concerning service on the attorney of a represented party is retained from existing Rule 49(b). It too differs slightly from that in Civil Rule 5. Unlike the criminal provision under which service on the attorney is required whenever service is required by "these" (i.e. criminal) "rules or a court order," the civil provision is restricted to service under "this rule," (i.e., Rule 5). The Note to the 2001 Amendments to Civil Rule 5 suggests that the provision on serving attorneys in the Civil Rule was restricted so that it would apply only to service made under Rules 5(a) and 77(d) and not to service under Civil Rules 4, 4.1, 45(b), and 71A(d)(3). Absent some evidence that the present scope of Criminal Rule 49(b) is presenting difficulties in criminal practice, there appears to be no basis for restricting it in the same way that the provision in the Civil Rule has been restricted.

iii. Rule 49(e)'s phrasing ("A paper filed electronically in compliance with a local rule is written or in writing under these rules") has always been slightly different than Civil Rule 5(d) ("A paper filed electronically is a written paper for purposes of these rules."). The words "or in writing," were retained because they appear in so many Rules of Criminal Procedure, including Rules 47(b), 11(a)(2), 23(b), and other rules that require the defendant to waive other important procedural rights "in writing."

e. Provisions in Civil Rules that Were Not Included.

To ensure that every deviation in the proposed amendment from the Civil Rules provisions on filing and service was identified and justified as necessary to accommodate criminal cases, the Committee examined each aspect of Civil Rule 5. The Committee also reviewed all of the other Civil Rules that might be thought to govern the "manner" of filing or service and thus fall within the rules incorporated by Criminal Rule 49(b) or (d).

Language that the Committee decided was not pertinent to criminal cases was not included in the proposed amendment to Rule 49. For example, the language in Civil Rule 5(a)(2) was not imported because there are no default judgments in criminal prosecutions or § 2255 cases. The language in Civil Rule 5(a)(3) was not imported because criminal actions are not "begun by seizing property." (Criminal forfeiture proceedings are governed by Criminal Rule

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32.2.) Also the language about serving numerous defendants in Civil Rule 5(c) was not imported because it does not apply. In a criminal prosecution, even when there are many defendants, each requires notice and must be served.

Where there were detailed provisions in the current Criminal Rules addressing matters also covered in the Civil Rules, the Committee concluded those detailed provisions rebutted any possible implication that the Civil Rule currently governs in criminal cases. For example, Civil Rule 65.1 governs service of motions to enforce a surety's liability. Criminal Rule 46(f)(3)(C) covers the same ground and rebuts any implication that Rule 49 incorporates Rule 65.1.

III. Action Item: Conforming Amendment to Rule 45

The Committee also recommends publication of a conforming amendment to Rule 45(c) in order to revise cross references that would be made obsolete by the proposed amendment of Rule 49. Although technical and conforming amendments do not require publication, in this case the Committee recommends simultaneous publication of the proposed amendments to Rule 49 and the conforming amendment to Rule 45(c).

Criminal Rule 45(c)—which governs time computation and closely matches the Civil, Bankruptcy, and Appellate Rules—now provides for additional time to take action after service by certain means authorized by Civil Rule 5. In tandem with parallel changes in the other rules, an amendment to Rule 45(c) eliminating extra time after service by electronic means is now pending before Congress. The pending amendment also incorporates cross references to the sections of Civil Rule 5 listing certain authorized modes of service.

The proposed amendment to Rule 49 imports the service rules now referenced in Rule 45(c) into Rule 49(a), rendering the existing cross references to Civil Rule 5 obsolete. The conforming amendment would replace the obsolete references to Civil Rule 5 with references to the corresponding new subsections in Rule 49(a).

The Committee recommends publication of this amendment when the proposed amendments to Rule 49 are published. Publishing the proposed amendments together will foreclose public comments suggesting that such a correction will be required.

IV. Action Item: Rule 12.4

The Criminal Rules Committee recommends publication of an amendment to Rule 12.4, which governs the parties' disclosure statements. Rule 12.4(a)(2) requires the government to identify organizational victims to assist judges in complying with their obligations under the Judicial Code of Conduct. Rule 12.4 was a new rule added in 2002. The Committee Note states that "[t]he purpose of the rule is to assist judges in determining whether they must recuse themselves because of a 'financial interest in the subject matter in controversy.' Code of Judicial Conduct, Canon 3C(1)(c) (1972)." Prior to 2009, the Code of Judicial Conduct treated any

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victim entitled to restitution as a party, and the committee note stated that the purpose of the disclosures required by Rule 12.4 was to assist judges in determining whether to recuse. In 2009, however, the Code of Judicial Conduct was amended. It no longer treats any victim who may be entitled to restitution as a party, and it requires disclosure only when the judge has an interest "that could be substantially affected by the outcome of the proceedings."

The proposed amendment to Rule 12.4(a) brings the scope of the required disclosures in line with the 2009 amendments, allowing the court to relieve the government of the burden of making the required disclosures upon a showing of "good cause." The amendment will avoid the need for burdensome disclosures when there are numerous organizational victims, but the impact of the crime on each is relatively small. For example, nearly every organization in the United States could be affected by price fixing concerning a widely-used product, such as a computer program. But each victim would suffer only a very minor harm from a price increase that might be pennies for each product purchased. In such cases, it seems unnecessarily burdensome (even if possible) for the government even to name every corporation, partnership, union, or other organizational victim. The amendment allows the government to show good cause to be relieved of making the disclosure statements because the organizations' interests could not be "substantially affected by the outcome of the proceedings."

The requirement that the government show "good cause" is a flexible standard that allows the court to weigh all of the relevant factors and determine on a case-by-case basis whether to relieve the government of the obligation to make disclosures under Rule 12.4. Although the style consultants expressed concern that the phrase "good cause" was vague, that phrase is used throughout the Criminal Rules where exceptions to general requirements are permitted, and it is well understood by judges and litigants. Moreover, "good cause" allows a holistic approach to the question whether to relieve the government of its disclosure responsibility, taking into account all of the relevant factors. It also allows the court to take a broad view of the scope of recusal and the information required in particular cases.

The proposed amendment to Rule 12.4(b) makes two changes. It specifies that the time for making the disclosures is within 28 days after the initial appearance, and it makes clear that a supplemental filing is required not only when information that has been disclosed changes, but also when a party learns of additional information that is subject to the disclosure requirements. The Committee concluded that adding these details while amending Rule 12.4(a) would be beneficial, although they might not, by themselves, warrant an amendment.

The Appellate Rules Committee has a parallel amendment under consideration, and its reporter participated in the development of the Committee's proposed amendment. However, because the Appellate Rules proposal is part of a more comprehensive revision, it is on a slower

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timeline. Efforts to coordinate the changes will continue if the Appellate Rules Committee decides to move forward with an amendment on this subject.[5]

V. Cooperators

At its January 2016 meeting, the Standing Committee referred to the Criminal Rules Committee a report and recommendations from the Committee on Court Administration and Case Management (CACM). After lengthy consideration, including a study by the Federal Judicial Center, CACM made a series of findings leading to recommendations that would require significant changes in the Rules of Criminal Procedure. It unanimously concluded:

- There is "a pervasive nationwide problem regarding the use of criminal case information to identify and harm cooperators and their families."

- The problem has been "exacerbated by widespread use of PACER and other systems that provide ready access to case information, including documents containing cooperator information and criminal dockets indicating whether cooperation did or did not occur in a case."

- "Uniform nationwide measures regarding access to particular court documents and transcripts are necessary in order to prevent the improper use of those documents to harm or threaten government cooperators in the long term."

CACM's central recommendation is that all plea agreements as well as the transcript of every guilty plea proceeding and sentencing must contain a sealed portion that would include either the defendant's cooperation or a statement that there was no cooperation. Thus every case would appear identical, and no inspection of the transcript or the documents on PACER would reveal whether any individual had cooperated. Rule 35 motions would also be sealed.

A subcommittee has been appointed to consider these recommendations. Because of the nature of the issues to be considered, the subcommittee includes representatives from CACM and the Sentencing Commission, as well as members of the Criminal Rules Committee and representatives of the Standing Committee. The members of the subcommittee are:

Judge Lewis Kaplan (chair)
Judge James Dever
Judge Terry Kemp
Ms. Carol Brook
Mr. John Siffert
Ms. Michelle Morales (Department of Justice)

[5] If that occurs, one of the issues will be the proposal that the Appellate Rule include disclosures not only for corporations, but also other "publicly held entities."

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Judge Charles Breyer (U.S. Sentencing Commission)
Judge Philip Martinez (CACM)
Judge Amy St. Eve (Ex Officio, Standing Committee representative to CACM)

The reporters prepared an introductory memorandum for the Subcommittee, which (1) provided a more detailed description of CACM's report and recommendations, (2) identified the Rules of Criminal Procedure that may be affected by CACM's recommendations, and (3) provided a brief overview of the issues raised by CACM's proposals. The Subcommittee has held one telephone conference to discuss members' initial reactions to the CACM recommendations and to determine how best to proceed.

Part of the discussion focused on how widespread the problems were and whether they warranted across-the-board changes in the Rules of Criminal Procedure. Members noted that roughly 10,000 individuals receive sentence reductions under 5K1.1 for cooperation each year, but the FJC study upon which CACM relied found only a few hundred incidents of threats or harm. Members requested more information about the prevalence of threats and harm, as well as their distribution. For example, did the incidents reported to the FCJ occur primarily in certain districts or geographic areas? Were they limited to certain offenses?

Members also expressed multiple concerns about the impact of the proposed changes on the defense. First, defense counsel presently research other sentences and agreements in order to advocate for their clients at sentencing. This would be impossible if CACM's proposals were adopted. Second, to achieve CACM's objectives, even more sealing might be required, since good advocacy weaves cooperation in throughout the motion and sentencing presentation. Indeed, it might lead to sealing of many more documents and procedures, since people learn of cooperation from other judicial documents and in open court at other procedural stages. And finally, although CACM's recommendations state that the government must continue to honor its *Brady* obligations, CACM's recommendations would greatly hamper the defense in making its own complementary investigations.

A related concern was whether the impact of the proposed changes in the Rules of Criminal Procedure would be sufficient to warrant the proposed changes. Members noted many other sources of information about cooperation would not be affected by the proposed changes.

Members also raised the question whether changes in the Rules of Criminal Procedure were the right remedy for the problem. Several members expressed the view that the executive branch, not the judiciary, should take the lead in solving the problems identified by CACM. The Department of Justice, not the court, has the best opportunity to identify cases in which problems are likely to arise. Others suggested that this might be an issue Congress should address.

Finally, members expressed concern that CACM's proposals were inconsistent with the foundational assumption of open judicial proceedings and raised significant First Amendment issues.

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Judge Sutton suggested that the Subcommittee view its task as determining the best response to the problems, which might or might not include changes in the Rules of Criminal Procedure. He encouraged the Subcommittee to consider solutions that might include changes in local rules, the Rules of Criminal Procedure, legislation, or other options.

The call concluded with the request that the reporters gather information and do additional research in preparation for the next call.

- The Subcommittee identified the following additional information or data that would be helpful:
    - How large is the problem compared to the universe of cooperators?
    - What kinds of cases give rise to problems?
    - Is this truly a nationwide problem or are there significant geographic variations?
    - How does the experience in districts that currently seal plea agreements differ, if at all, from the experience in other districts?
- The Subcommittee also requested that the reporters prepare a memorandum on the First Amendment issues raised by CACM's proposals.
- Finally, the Subcommittee requested that the Department of Justice provide the Subcommittee with (1) information regarding its practices and experience in the 10 largest districts as well as any other relevant districts and (2) its recommendations.

At the April 2016 meeting of the Criminal Rules Committee the Subcommittee described its work to date and solicited comments from Advisory Committee members. The discussion is detailed on pages 13–17 of the minutes of the meeting.

VI. Rule 5(d) of the Rules Governing 2255 Actions

Judge Richard Wesley drew the Committee's attention to a conflict in the cases construing Rule 5(d) of the Rules Governing § 2255 Proceedings. The Rule states that "The moving party may submit a reply to the respondent's answer or other pleading within a time fixed by the judge." Although the committee note and history of the amendment make it clear that this language was intended to give the inmate a right to file a reply, some courts have held that the inmate who brings the § 2255 action has no right to file a reply, but may do so only if permitted by the court. Other courts do recognize this as a right.

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After discussion at the April 2016 meeting, a subcommittee was appointed to study the proposal. Although the style consultants had advised the Committee that the text of the rule is clear, the split in the lower courts demonstrates that courts are not finding it to be clear. Inmates in some courts are not being given the opportunity to file a reply as intended by the 2004 revision. The decisions not recognizing the right to file a response may seriously affect inmates who may have a persuasive response but are not permitted to file it.

In addition to considering language that could make it clear inmates have a right to file a reply, the subcommittee will also consider whether the rule should set a presumptive time to file a reply and whether parallel changes in the Rules Governing § 2254 Proceedings would be warranted.

VII. Rule 16

A subcommittee has also been appointed to study a proposal that Criminal Rule 16 be amended to impose additional disclosure obligations on the government in complex cases. In support of a proposed amendment, The National Association of Defense Lawyers (NADL) and the New York Council of Defense Lawyers (NYCDL) stated that prosecutorial discovery is a significant problem in complex cases that involve "millions of pages of documentation," "thousands of emails," and "more gigabytes of information." Their proposal provides a standard for defining a "complex case" and steps to create reciprocal discovery.

Discussion at the April meeting indicated both support for the proposal and opposition to attempting to regulate matters that some members felt were better left to the sound discretion of the trial judge.

The Department of Justice acknowledged that the proposal for targeted reciprocal discovery presented different issues than previous across-the-board efforts to expand prosecutorial discovery obligations, which the government had strongly opposed. Nevertheless, the Department indicated that it does not view amending the rules as the best way to tackle the problems identified by NADL and the NYCDL. For example, the Department worked with the defense bar to develop guidance for judges on electronic discovery, resulting in the production of a very useful a pocket guide. That kind of collaboration is nimble and can change quickly as the technology changes. Technology is a moving target. The Department favors a focus on developing best practices and guidance, not specific prescriptive rules. Best practices and guidance, developed in collaboration with the defense bar, will be able to change quickly as the technology changes.

VIII. Suggestions That Will Not Be Pursued

The Committee also decided not to pursue several suggested amendments.

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- The Justice Department has withdrawn its proposal to amend Rule 15's provisions governing the costs of depositions requested by the defense.

- Two suggestions that the rules be amended to give pro se defendants the right to file electronically will not be pursued separately because that issue has been addressed in the Committee's proposal to amend Rule 49.

- The Committee also decided not to pursue a proposal to require redaction of the last four digits of social security numbers, since the issue was common to all of the rules and should be resolved in a uniform fashion by CACM.

- Following the lead of the other committees to whom this suggestion was also submitted, the Committee decided not to pursue a proposal to require litigants citing unpublished cases to serve those cases on pro se parties.

- The Committee decided not to pursue a suggestion that Rule 12 be amended to make it clear that the standard for dismissal of a criminal indictment for failure to state an offense is the same as the standard for dismissal of a civil complaint under Federal Rule of Civil Procedure 12(b)(6).

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TAB 6B

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE[1]

Rule 12.4. Disclosure Statement

(a) Who Must File.

(1) ***Nongovernmental Corporate Party.*** Any nongovernmental corporate party to a proceeding in a district court must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.

(2) ***Organizational Victim***. Unless the government shows good cause, it must file a statement identifying any organizational victim of the alleged criminal activity.~~If an organization is a victim of the alleged criminal activity, the~~

[1] New material is underlined in red; matter to be omitted is lined through.

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~~government must file a statement identifying the victim~~. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 12.4(a)(1) to the extent it can be obtained through due diligence.

(b) Time for Filing; Supplemental Filing. A party must:

(1) file the Rule 12.4(a) statement within 28 days after~~upon~~ the defendant's initial appearance; and

(2) promptly file a supplemental statement if the party learns of any additional required information or any changes in required information~~upon any change in the information that the statement requires~~.

Committee Note

Subdivision (a). Rule 12.4 requires the government to identify organizational victims to assist judges in complying with their obligations under the Judicial Code of

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Conduct. The 2009 amendments to Canon 3(C)(1)(c) of the Judicial Code require recusal only when a judge has "an interest that could be substantially affected by the outcome of the proceeding." In some cases, there are numerous organizational victims, but the impact of the crime on each is relatively small. In such cases, the amendment allows the government to show good cause to be relieved of making the disclosure statements because the organizations' interests could not be "substantially affected by the outcome of the proceedings."

Subdivision (b). The amendment specifies that the time for making the disclosures is within 28 days after the initial appearance, and it makes clear that a supplemental filing is required not only when information that has been disclosed changes, but also when a party learns of additional information that is subject to the disclosure requirements.

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1 **Rule 45. Computing and Extending Time.**

2 * * * * *

3 **(c) Additional Time After Certain Kinds of Service**.
4 Whenever a party must or may act within a specified
5 time after being served and service is made under
6 Federal Rule of ~~Civil~~Criminal Procedure 49(a)(4)(C),
7 (D), and (E)~~5(b)(2)(C) (mailing), (D) (leaving with~~
8 ~~the clerk), or (F) (other means consented to)~~, 3 days
9 are added after the period would otherwise expire
10 under subdivision (a).[2]

Committee Note

Rule 49 previously required service and filing "in a manner provided" in the Civil Rules, and the time counting provisions in Criminal Rule 45(c) referred to certain forms of service under Civil Rule 5. A contemporaneous amendment moves the instructions for filing and service in criminal cases from Civil Rule 5 into Criminal Rule 49.

[2] This rule text reflects amendments adopted by the Supreme Court and transmitted to Congress on April 28, 2016, which have an anticipated effective date of December 1, 2016.

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This amendment revises the cross references in Rule 45(c) to reflect this change.

12b-012761

Rule 49. Serving and Filing Papers

(a) Service on a Party.

(1) What is*~~When~~* ***Required.*** ~~A party must serve on every other party~~Each of the following must be served on every party: any written motion (other than one to be heard ex parte), written notice, designation of the record on appeal, or similar paper.

~~**(b) How Made.** Service must be made in the manner provided for a civil action.~~

(2) Serving a Party's Attorney. Unless the court orders otherwise, ~~W~~when these rules or a court order requires or permits service on a party represented by an attorney, service must be made on the attorney instead of the party~~, unless the court orders otherwise~~.

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17 **(3) *Service by Electronic Means*.**

18 (A) *Using the Court's Electronic Filing System*.
19 A party represented by an attorney may
20 serve a paper on a registered user by filing
21 it with the court's electronic-filing system.
22 A party not represented by an attorney may
23 do so only if allowed by court order or local
24 rule. Service is complete upon filing, but is
25 not effective if the serving party learns that
26 it did not reach the person to be served.

27 (B) *Using Other Electronic Means*. A paper
28 may be served by any other electronic
29 means that the person consented to in
30 writing. Service is complete upon
31 transmission, but is not effective if the
32 serving party learns that it did not reach the
33 person to be served.

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34 (4) ***Service by Nonelectronic Means***. A paper may
35 be served by:
36 (A) handing it to the person;
37 (B) leaving it:
38 (i) at the person's office with a clerk or
39 other person in charge or, if no one is
40 in charge, in a conspicuous place in
41 the office; or
42 (ii) if the person has no office or the office
43 is closed, at the person's dwelling or
44 usual place of abode with someone of
45 suitable age and discretion who
46 resides there;
47 (C) mailing it to the person's last known
48 address—in which event service is
49 complete upon mailing;
50 (D) leaving it with the court clerk if the person
51 has no known address; or

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52 (E) delivering it by any other means that the
53 person consented to in writing—in which
54 event service is complete when the person
55 making service delivers it to the agency
56 designated to make delivery.
57 **(b) Filing.**
58 **(1) *When Required; Certificate of Service.*** Any
59 paper that is required to be served—together
60 with a certificate of service—must be filed
61 within a reasonable time after service. A notice
62 of electronic filing constitutes a certificate of
63 service on any person served by the court's
64 electronic-filing system.
65 **(2) *Means of Filing.***
66 (A) *Electronically.* A paper is filed
67 electronically by filing it with the court's
68 electronic-filing system. The user name
69 and password of an attorney of record,

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70 together with the attorney's name on a
71 signature block, serves as the attorney's
72 signature. A paper filed electronically is
73 written or in writing under these rules.
74 (B) *Nonelectronically.* A paper not filed
75 electronically is filed by delivering it:
76 (i) to the clerk; or
77 (ii) to a judge who agrees to accept it for
78 filing, and who must then note the
79 filing date on the paper and promptly
80 send it to the clerk.
81 **(3) *Means Used by Represented and Unrepresented***
82 ***Parties.***
83 (A) *Represented Party.* A party represented by
84 an attorney must file electronically, unless
85 nonelectronic filing is allowed by the court
86 for good cause or is allowed or required by
87 local rule.

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88 (B) *Unrepresented Party.* A party not
89 represented by an attorney must file
90 nonelectronically, unless allowed to file
91 electronically by court order or local rule.
92 **(4)** ***Signature.*** Every written motion and other
93 paper must be signed by at least one attorney of
94 record in the attorney's name—or by a person
95 filing a paper if the person is not represented by
96 an attorney. The paper must state the signer's
97 address, e-mail address, and telephone number.
98 Unless a rule or statute specifically states
99 otherwise, a pleading need not be verified or
100 accompanied by an affidavit. The court must
101 strike an unsigned paper unless the omission is
102 promptly corrected after being called to the
103 attorney's or person's attention.
104 **(5)** ***Acceptance by the Clerk.*** The clerk must not
105 refuse to file a paper solely because it is not in

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106 the form prescribed by these rules or by a local
107 rule or practice.
108 **(c)** **Service and Filing by Nonparties.** A nonparty may
109 serve and file a paper only if doing so is required or
110 permitted by law. A nonparty must serve every party
111 as required by Rule 49(a), but may use the court's
112 electronic-filing system only if allowed by court order
113 or local rule.
114 **(d)** **Notice of a Court Order.** When the court issues an
115 order on any post-arraignment motion, the clerk must
116 ~~provide notice in a manner provided for in a civil~~
117 ~~action~~ serve notice of the entry on each party as
118 required by Rule 49(a). A party also may serve notice
119 of the entry, by the same means. Except as Federal
120 Rule of Appellate Procedure 4(b) provides otherwise,
121 the clerk's failure to give notice does not affect the
122 time to appeal, or relieve—or authorize the court to

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123 relieve—a party's failure to appeal within the allowed
124 time.

125 ~~**(d) Filing.** A party must file with the court a copy of any~~
126 ~~paper the party is required to serve. A paper must be~~
127 ~~filed in a manner provided for in a civil action.~~

128 ~~**(e) Electronic Service and Filing.** A court may, by local~~
129 ~~rule, allow papers to be filed, signed, or verified by~~
130 ~~electronic means that are consistent with any technical~~
131 ~~standards established by the Judicial Conference of~~
132 ~~the United States. A local rule may require electronic~~
133 ~~filing only if reasonable exceptions are allowed. A~~
134 ~~paper filed electronically in compliance with a local~~
135 ~~rule is written or in writing under these rules.~~

Committee Note

Rule 49 previously required service and filing in a "manner provided" in "a civil action." The amendments to Rule 49 move the instructions for filing and service from the Civil Rules into Rule 49. Placing instructions for filing and service in the criminal rule avoids the need to refer to two sets of rules, and permits independent development of those rules. Except where specifically noted, the amendments are intended to carry over the existing law on

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filing and service and to preserve parallelism with the Civil Rules.

Additionally, the amendments eliminate the provision permitting electronic filing only when authorized by local rules, moving—with the Rules governing Appellate, Civil, and Bankruptcy proceedings—to a national rule that mandates electronic filing for parties represented by an attorney with certain exceptions. Electronic filing has matured. Most districts have adopted local rules that require electronic filing by represented parties, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts for a party represented by an attorney, except that nonelectronic filing may be allowed by the court for good cause, or allowed or required by local rule.

Rule 49(a)(1). The language from former Rule 49(a) is retained in new Rule 49(a)(1), except for one change. The new phrase, "Each of the following must be served on every party" restores to this part of the rule the passive construction that it had prior to restyling in 2002. That restyling revised the language to apply to parties only, inadvertently ending its application to nonparties who, on occasion, file motions in criminal cases. Additional guidance for nonparties appears in new subdivision (c).

Rule 49(a)(2). The language from former Rule 49(b) concerning service on the attorney of a represented party is retained here, with the "unless" clause moved to the beginning for reasons of style only.

Rule 49(a)(3) and (4). Subsections (a)(3) and (4) list the permissible means of service. These new provisions duplicate the description of permissible means from Civil Rule 5, carrying them into the criminal rule.

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By listing service by filing with the court's electronic-filing system first, in (3)(A), the rule now recognizes the advantages of electronic filing and service and its widespread use in criminal cases by represented defendants and government attorneys.

But the e-filing system is designed for attorneys, and its use can pose many challenges for pro se parties. In the criminal context, the rules must ensure ready access to the courts by all pro se defendants and incarcerated individuals, filers who often lack reliable access to the internet or email. Although access to electronic filing systems may expand with time, presently many districts do not allow e-filing by unrepresented defendants or prisoners. Accordingly, subsection (3)(A) provides that represented parties may serve registered users by filing with the court's electronic filing system, but unrepresented parties may do so only if allowed by court order or local rule.

Subparagraph (3)(B) permits service by "other electronic means," such as email, that the person served consented to in writing.

Both subparagraphs (3)(A) and (B) include the direction from Civil Rule 5 that service is complete upon e-filing or transmission, but is not effective if the serving party learns that the person to be served did not receive the notice of e-filing or the paper transmitted by other electronic means. The language mirrors Civil Rule 5(b)(2)(E). But unlike Civil Rule 5, Criminal Rule 49 contains a separate provision for service by use of the court's electronic filing system.

Subsection (a)(4) lists a number of traditional, nonelectronic means of serving papers, identical to those provided in Civil Rule 5.

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Rule 49(b)(1). Filing rules in former Rule 49 appeared in subdivision (d), which provided that a party must file a copy of any paper the party is required to serve, and required filing in a manner provided in a civil action. These requirements now appear in subdivision (b).

The language requiring filing of papers that must be served is retained from former subdivision (d), but has been moved to subsection (1) of subdivision (b), and revised to restore the passive phrasing prior to the restyling in 2002. That restyling departed from the phrasing in Civil Rule 5(d)(1) and inadvertently limited this requirement to filing by parties.

The language in former subdivision (d) that required filing "in a manner provided for in a civil action" has been replaced in new subsection (b)(1) by language drawn from Civil Rule 5(d)(1). That provision used to state "Any paper . . . that is required to be served—together with a certificate of service—must be filed within a reasonable time after service." A contemporaneous amendment to Civil Rule 5(d)(1) has subdivided this provision into two parts, one of which addresses the Certificate of Service. Although the Criminal Rules version is not subdivided in the same way, it is intended to have the same meaning as the Civil Rules provision from which it was drawn.

The last sentence of subsection (b)(1), which states that a notice of electronic filing constitutes a certificate of service on a party served by using the court's electronic-filing system, mirrors the contemporaneous amendment to Civil Rule 5. When service is not made by filing with the court's electronic filing system, a certificate of service must be filed.

Rule 49(b)(2). New subsection (b)(2) lists the three ways papers can be filed. (A) provides for electronic filing

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using the court's electronic filing system and includes a provision, drawn from the Civil Rule, stating that the user name and password of an attorney of record serves as the attorney's signature. The last sentence of subsection (b)(2)(A) contains the language of former Rule 49(d), providing that e-filed papers are "written or in writing," deleting the words "in compliance with a local rule" as no longer necessary.

Subsection (b)(2)(B) carries over from the Civil Rule two nonelectronic methods of filing a paper: delivery to the court clerk and delivery to a judge who agrees to accept it for filing.

Rule 49(b)(3). New subsection (b)(3) provides instructions for parties regarding the means of filing to be used, depending upon whether the party is represented by an attorney. Subsection (b)(3)(A) requires represented parties to use the court's electronic filing system, but provides that nonelectronic filing may be allowed for good cause, and may be required or allowed for other reasons by local rule. This language is identical to that adopted in the contemporaneous amendment to Civil Rule 5.

Subsection (b)(3)(B) requires unrepresented parties to file nonelectronically, unless allowed to file electronically by court order or local rule. This language differs from that of the amended Civil Rule, which provides that an unrepresented party may be "required" to file electronically by a court order or local rule that allows reasonable exceptions. A different approach to electronic filing by unrepresented parties is needed in criminal cases, where electronic filing by pro se prisoners presents significant challenges. Pro se parties filing papers under the criminal rules generally lack the means to e-file or receive electronic

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confirmations, yet must be provided access to the courts under the Constitution.

Rule 49(b)(4). This new language requiring a signature and additional information was drawn from Civil Rule 11(a). The language has been restyled (with no intent to change the meaning) and the word "party" changed to "person" in order to accommodate filings by nonparties.

Rule 49(b)(5). This new language prohibiting a clerk from refusing a filing for improper form was drawn from Civil Rule 5(d)(4).

Rule 49(c). This provision is new. It recognizes that in limited circumstances nonparties may file motions in criminal cases. Examples include representatives of the media challenging the closure of proceedings, material witnesses requesting to be deposed under Rule 15, or victims asserting rights under Rule 60. Subdivision (c) permits nonparties to file a paper in a criminal case, but only when required or permitted by law to do so. It also requires nonparties who file to serve every party and to use means authorized by subdivision (a).

The rule provides that nonparties, like unrepresented parties, may use the court's electronic filing system only when permitted to do so by court order or local rule.

Rule 49(d). This provision carries over the language formerly in Rule 49(c) with one change. The former language requiring that notice be provided "in a manner provided for in a civil action" has been replaced by a requirement that notice be served as required by Rule 49(a). This parallels Civil Rule 77(d)(1), which requires that the clerk give notice as provided in in Civil Rule 5(d

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TAB 6C

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ADVISORY COMMITTEE ON CRIMINAL
RULES DRAFT MINUTES
April 18, 2016, Washington, D.C.

I. Attendance and Preliminary Matters

The Criminal Rules Advisory Committee ("Committee") met in Washington, D.C., on April 18, 2016. The following persons were in attendance:

Judge Donald W. Molloy, Chair
Carol A. Brook, Esq.
Judge James C. Dever
Judge Gary S. Feinerman
Mark Filip, Esq.
Chief Justice David E. Gilbertson
Judge Denise Page Hood
Judge Lewis A. Kaplan
Judge Terence Peter Kemp
Professor Orin S. Kerr
Judge Raymond M. Kethledge
Michelle Morales, Esq.[1]
John S. Siffert, Esq.
James N. Hatten, Clerk of Court Liaison
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Reporter
Professor Daniel R. Coquillette, Standing Committee Reporter
Judge Amy J. St. Eve, Standing Committee Liaison

And the following persons were present to support the Committee:

Rebecca A. Womeldorf, Rules Committee Officer and Secretary to the Committee on Practice and Procedure
Bridget M. Healy, Rules Office Attorney
Julie Wilson, Rules Office Attorney
Shelly Cox, Rules Committee Support Office
Laural L. Hooper, Federal Judicial Center
Margaret Williams, Federal Judicial Center

[1] Ms. Morales was joined at the meeting by Ms. Elizabeth Shapiro.

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II. CHAIR'S REMARKS AND OPENING BUSINESS

A. Chair's Remarks

Judge Molloy opened the meeting and thanked the reporters for their work in preparing the agenda book. He then asked members to introduce themselves, and he welcomed observers, including Peter Goldberger of the National Association of Criminal Defense Lawyers and Catherine M. Recker of the American College of Trial Lawyers. Judge Molloy also thanked all of the staff members who made the arrangements for the meeting and the hearings.

B. Minutes of September 2015 Meeting

A motion to approve the minutes having been moved and seconded, the Committee unanimously approved the September 2015 meeting minutes by voice vote.

C. Status of Criminal Rules: Report of the Rules Committee Support Office

The Committee's proposed amendments to Rules 4, 41, and 45 were submitted to the Supreme Court, which has until May 1 to transmit them to Congress. Ms. Womeldorf expressed the hope that the amendments would soon be sent to Congress.[2] Judge Molloy expressed his appreciation for the members' hard work on these amendments.

III. CRIMINAL RULES ACTIONS

A. Proposed Amendment to Rule 49

Judge Feinerman, chair of the Rule 49 Subcommittee, acknowledged the reporters' assistance and thanked the subcommittee members for their time, thought, and effort. He then presented the subcommittee's recommended amendment and committee note.

Judge Feinerman began by providing an overview of the subcommittee's work, which grew out of a Standing Committee initiative to adapt the rules of procedure to the modernization of the courts' electronic filing system. The subcommittee's work was guided by two imperatives, which were sometimes in tension: (1) the Advisory Committee's direction to draft a stand-alone rule on filing and service adapted to criminal litigation, and (2) the Standing Committee's direction to depart from the language of Civil Rule 5 only when justified by significant difference between civil and criminal practice. To achieve these objectives, the subcommittee worked closely with representatives of the Civil Rules Committee, who participated in the subcommittee's teleconferences and were in frequent communication with the reporters. Finally, the subcommittee received the advice of the style consultants.

[2] On April 28, 2016, the Supreme Court transmitted the amendments to Congress.

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Judge Feinerman then provided a section-by-section analysis of the proposed amendment to Rule 49, inviting questions and comments from members as he presented each section.

49(a)(1). Judge Feinerman noted that subsection (a) (1) preserves much of the language from the current rule. The language regarding *what must be served* is retained from existing Rule 49(a): "any written motion (other than one to be heard ex parte), written notice, designation of the record on appeal, or similar paper." Parties and courts know what the existing language means, no difficulties have arisen from the current language of the rule, and tinkering with it without a compelling reason could do more harm than good.

The subcommittee proposes, however, a change in the language governing *who must serve*, in order to reverse an unintended change that occurred when the rule was restyled from the passive to the active voice in 2002. That change inadvertently carved out nonparties. The subcommittee recommends a return to the passive construction used prior to 2002, so nonparties (as well as parties) will be required to serve the items described in (a).

Professor King noted that there had been a suggestion that the committee note might include a statement that the amendment did not modify or expand the scope of the rule or change the practice regarding concerning papers, such as discovery, that are disclosed but not necessarily filed or served. Concern had also been expressed about making clear that probation and pretrial services reports were not covered by the amended rule.

Professor Beale added that committee notes cannot change the meaning of the rule, and there is always a question how much explanation should be provided. The proposed committee note does not include language stating that the scope of the papers that must be served has not changed, or language stating that it does not apply to probation and pretrial services reports. Beale also noted that the change to the passive voice in subsection (a) was an example of a point on which the style consultants had yielded to the subcommittee because the passive voice was necessary for substantive reasons. Indeed, the discovery of —and opportunity to correct—the unintended change wrought by restyling was an unanticipated benefit of the current project.

Finally, Judge Feinerman noted that the rule explicitly covers only service "on a party." Although nothing in the existing (or pre-2002) Rule 49 addresses service on nonparties, this does not seem to have caused any problems. The parties generally use common sense in determining when to serve nonparties, and the subcommittee thought it best not to try, at this time, to craft a rule that would apply in all of the situations when a nonparty may file in a criminal case, perhaps causing unintended consequences.

Rule 49(a)(2). Judge Feinerman noted Rule 49(a)(2) was unchanged except for a minor matter of style.

Rule 49(a)(3). Judge Feinerman then moved on the Rule 49(a)(3), noting it was a completely new provision that distinguishes between electronic service and service by other means. The subcommittee felt it was very important to put electronic service, which is the dominant mode of

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service, first. Professor King noted that the both the Civil and Criminal amendments now use the language referring to the "court's electronic filing system."

Professor King then drew attention to a difference between the Civil and Criminal proposals, which use different phrasing to describe a situation in which electronic service is ineffective. The Civil proposal says electronic service is ineffective if the server learns that "*it* did not reach the person to be served." In contrast, the subcommittee's proposal provides service is ineffective if the server learns that the person to be served did not receive "the notice of electronic filing" (NEF). The subcommittee thought this language was more accurate.[3]

Members were reminded that the current rule (as well as the proposed civil rule) now treats electronic service differently than other forms of service (such as mail or delivery to a person's office or dwelling). Because of concerns about the reliability of electronic service, Civil Rule 5 (which governs in criminal cases as well) provides that service is not effective if the serving party knows that the electronic service did not reach the party to be served. In contrast, all other forms of service are effective if the serving party takes the specified action (such as mailing), even if for some reason the party to be served does not receive service. The civil and criminal proposals retain this favorable treatment for electronic service, which focuses on the serving party's knowledge that electronic service was not effective.

Discussion turned to the appropriate scope of the exception. Mr. Hatten explained that the clerk's office does not receive bounce back messages, such as "out of office" notices. The clerks do, however, receive a notice if the CM/ECF system was unable to deliver the email, which occurs, for example, when the recipient's mailbox is full. In those cases, the clerk's office will follow up with the recipient of service. As a member noted, it would be a very rare instance in which the serving party learns that CM/ECF service was not effective. A lawyer member wondered if the proposed rule imposed too great a burden on defense lawyers, including those in small firms, who may have no one to monitor their emails. Mr. Hatten responded that in order to use the CM/ECF system lawyers had to agree to receive electronic service, and thus had to have in place a system to monitor their emails.

But a party may learn of and have access to papers that have been served even if the party never received the NEF. For example, a lawyer who did not receive a NEF (because, for example, of a changed email address that was not updated) might nonetheless learn of the document or order and access it from the docket. This would not constitute service under the subcommittee's proposal, which focuses exclusively on the server's knowledge of whether the party to be served received the NEF. (On this point, the phrasing of the Civil Rule, which uses "it," might allow the serving party to argue that the party to be served had received "it.")

The Committee concluded that if the party to be served has indeed received the document by some other means—whether by mail, email, or simply reading the docket—service should be deemed effective. A member moved to amend proposed Rule 49(a)(3)(A) to provide "service . . . is not

[3] This difference was later dropped as part of the effort to eliminate all unnecessary differences between the Criminal and Civil Rules. See note 4, infra.

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effective if the serving party learns that neither the notice of electronic filing nor the paper reached the person to be served." The motion passed.[4] One member noted, however, that it might be difficult to determine the effective date of service if it became effective by some means other than receipt of the NEF, such as the party to be served reviewing the docket.

Professor Beale reminded the Committee of the importance of the use of uniform language in the Civil and Criminal Rules on filing and service, and she stated that the reporters would convey the Committee's view on this issue to the representatives of the Civil Rules Committee.

Rule 49(a)(4). Judge Feinerman noted that these provisions were drawn, verbatim, from Civil Rule 5. In general, the subcommittee recognized that it would not be helpful to tinker with the language because the Civil Rules Committee was satisfied with the language. For that reason, the subcommittee did not propose a change in the bracketed language on lines 35-36 unless the Civil Rules Committee would support a parallel amendment to Rule 5.

Rule 49(b)(1). Judge Feinerman noted that the major change from the current rule on filing was to restore the passive construction. He asked the reporters to draw the Committee's attention to key issues. Professor Beale noted that the subcommittee considered, but did not recommend, adding the qualifier "under this rule" between "served" and "together." She noted there are other rules that provide for service by specific means, such as the Committee's pending amendment to Rule 4 governing service on foreign corporations. The Subcommittee concluded that the phrase "under this rule" was not necessary. Where other rules identify specific means of service for certain documents or orders, it seems clear that the more general provisions of Rule 49 are not intended to override them. Moreover, adding the phrase "under this Rule" could engender confusion. The phrase is not included in the current rule, and its addition might suggest, misleadingly, that Rule 49 does not apply to a variety of items that other rules require to be served. Professor King noted that the rules specifying particular forms of service were Rule 4 (summons on corporations), Rule 41 (warrants), Rule 46 (sureties), and Rule 58 (appearances). Professor Beale explained that these rules will continue to coexist with Rule 49, which under (a)(1) governs service and filing of "any written motion . . . , written notice, designation of the record on appeal, or similar paper."

One other point that the subcommittee considered was whether to delete the requirement

[4] After the meeting, the reporters and chair consulted with representatives of the other committees working on parallel drafts concerning electronic filing and service. There was a consensus that time did not permit consideration of this proposal by other committees before submission to the Standing Committee. In light of the importance of consistency in the rules of electronic filing and service, the representatives of the Criminal Rules Committee agreed to delete the new language from the draft of Rule 49 submitted to the Standing Committee. As the representatives of the other committees noted, the proposal would be a change in current law. Before such a change is recommended, the committees should have an opportunity to consider the policy implications, and whether this approach, if adopted, should be applied to other forms of service. The committees can, however, take the proposal up again at a later date. As part of the later effort to reconcile differences between the various sets of rules, Judges Molloy and Feinerman and the Reporters also reviewed and approved a modification to Rule 49 to retain the language of the Civil Rule, that is, stating that service is ineffective if the serving party learns that "it" was not received.

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that filing of any paper required to be served must occur "within a reasonable time after service." The subcommittee considered deleting this restriction. Members were not aware of any problem with untimely filing in criminal cases, but decided to retain this provision to parallel Civil Rule 5.

One question that had been left open, reflected in brackets on line 40, was whether the rule should refer at this point to "any person" or "any party." Professor King noted that the Civil Rules Committee had now approved a draft amendment using "any person," which would be adopted as well in the Criminal amendment.

Rule 49(b)(2). Judge Feinerman noted that here, as in (a), the subcommittee proposed places electronic filing first in (b) for the same reasons it placed electronic service first in Rule 49(a). Also, the Subcommittee reasoned, the subsection including the definition what it means to "file electronically" should precede the use of that term. (In contrast, the civil proposal retains the current order of Rule 5's subdivisions, which places nonelectronic filing first.) Professor King stated that there was still a minor styling issue to be resolved ("by using" or some alternative such as "by use of"), which would be resolved in favor of uniformity after consultation with the style consultants and the other reporters and chairs. Professor Beale noted that the Civil Rules Committee just completed its meeting three days earlier. She reminded the Committee that because of the emphasis on uniform language among the parallel proposed amendments, it would be essential for Judges Molloy and Feinerman (with the reporters) to have leeway to agree to necessary stylistic changes as the proposals advance to the Standing Committee. Judge Feinerman agreed, though he observed that if he and Judge Molloy were asked to make significant changes in the proposal approved by the Committee, they would consider seeking approval from the Committee.

Professor Beale also drew attention to the proposed provision regarding a filer's user name and password serving as an attorney's signature, which was closely related to the signature provision in (b)(4). In September, the Committee did not approve provisions on a signature block, which were phrased differently than the current proposal. The new proposal imports the language of Civil Rule 11(a). The subcommittee found it unnecessary to determine whether Civil Rule 11's signature provisions are presently included in Rule 49(d)'s directive to file "in a manner provided for in a civil action." If this requirement is not currently imported by Rule 49(d), the subcommittee thought it would be a desirable requirement as a matter of policy. Accordingly, the subcommittee decided to adopt the language of Rule 11 verbatim. A lawyer member questioned whether it was appropriate to incorporate the language of Civil Rule 11, which requires the attorney's signature in order to impose restrictions on counsel to certify the accuracy of the pleadings. He stressed that the role of defense counsel in civil and criminal cases is quite different: in criminal cases, the defense does not make representations but rather puts the government to its proof. He expressed concern that the signature requirement signaled an unfortunate drift towards the civil understanding of the lawyer's role. Professor King responded that the portions of Rule 11 that are relevant to this member's concern about good faith representations to the court are in Rule 11(b). The subcommittee's proposal, however, imports only the language of Rule 11(a). By importing only this language, the proposal does not bring in any requirements concerning counsel's representations.

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Judge Feinerman also drew attention to one other aspect of proposed subdivision (b)(2)(A): the phrase "written or in writing." This language is now in Rule 49(e). The subcommittee favored retaining this language, rather than paring it down, because it captures the variety of phrases now used in the Rules of Criminal Procedure.

Rule 49(b)(3)(A) and (B). Noting that this provision creates a presumption that represented parties must file electronically, but that non represented parties must file by non-electronic means, Judge Feinerman invited the reporters to comment. Professor King reminded the Committee that the new presumption for electronic filing by represented parties was a central goal of the amendment process. It was the proper presumption for unrepresented parties that had originally divided the Civil and Criminal Rules Committees. This Committee took a strong stance that unrepresented parties in criminal cases should not file electronically unless specifically allowed by local rule or court order. The subcommittee's proposal implements that policy choice.

But even with a stand-alone amendment to Rule 49, the Civil Rules are still of concern to the Criminal Rule Committee because of their effect in habeas cases. Professor King noted that Rule 12 of the 2254 Rules, which govern state habeas cases, incorporates the Federal Rules of Civil Procedure unless they are inconsistent with the habeas rules. And the Rules Governing 2254 and 2255 actions are the responsibility of the Criminal Rules Committee.

The proposal just adopted by the Civil Rules Committee provides that unrepresented parties in civil cases may be permitted or required to file electronically by local rules or orders which permit reasonable exceptions. The Civil Rules Committee wanted to provide explicit authorization for existing programs in some districts that now require inmates to file 2254 pleadings electronically. The clerk of court liaison to the Civil Rules Committee is from a district that now has such a local rule, which was designed in cooperation with officials at a local prison. In that institution, prisoners are required to take their 2254 pleadings to the prison library, where the staff members PDF them and then email them to the court. The same system operates in a neighboring district. Officials in these courts and participating prisons are very pleased with the program. The proposed Civil amendment would allow the continuation of such programs. Although the Criminal Rules Committee has no formal role in the approval of the changes to Rule 5, the reporters requested discussion of the Civil Rule so that they could share the Committee's views with their Civil counterparts.

Professor Beale noted that the policy implications of the current Civil proposal are somewhat different from the issues previously discussed by the Committee. At its prior meetings, the Committee took a strong stand against a national rule that would override the current local rules in many districts that do not permit electronic filing by unrepresented criminal defendants. But the current proposal does not override any local rules. Instead, it permits districts to adopt local rules that require—with reasonable exceptions—that unrepresented inmates file electronically. She noted that some districts have large caseloads of inmate filings, and the Civil Rules Committee wants to allow them the option of requiring unrepresented inmates to file electronically.

The proposed Civil Rule states that a local rule requiring unrepresented civil parties to file

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electronically must allow reasonable exceptions. This provision requiring reasonable exceptions was added at the subcommittee's request, and it provides some protection against a local rule or order that would otherwise impose an unreasonable burden on state habeas filers.

Mr. Hatten put the proposed Civil Rule into its historical context. The current CM/ECF system began as a program in a single district with a heavy caseload of asbestos cases. It was implemented nationally in waves, allowing changes to be made based on experience. The system was designed solely for courts and attorney filers, not for lay filers. The current resources are designed for those filers, and the clerks do not screen filings. From the clerk's perspective (staffing, resources, and work measurement), he said, lay filers present very different issues. He expressed concern that the proposed Civil Rule seemed poised to expand lay filing nationwide without any redesign of the system or sufficient testing in individual courts.

Professor Beale responded that the Civil Rules proposal allowing local rules requiring unrepresented parties to file could be seen as the kind of step-by-step process that had worked well for electronic filing by attorneys and the courts. At present, these are programs developed by individual districts in conjunction with local correctional officials. They seem to be working well. On the other hand, the reporters are not sure how these local rules mesh with the current Rules Governing 2254 and 2255 Proceedings, which refer to internal prison filing systems for legal mail and inmates depositing papers to be filed showing prepaid postage.

Professor King drew attention to several aspects of the current local rules regarding electronic filing by inmates that were of special concern to the Civil Rules Committee. The inmates do not receive individual access to the CM/ECF system. Rather, officials in the prison library receive the inmates' papers, convert them to PDFs, and then submit them to the court electronically. This has many advantages: it is cheaper and faster than using the mail, and it produces a record of when the paper was sent and received. We do not know exactly how other aspects of these programs work. For example, do inmates in these programs receive NEFs?

There was general agreement that these programs would not work everywhere, and electronic filing by inmates would not be possible in many districts. Justice Gilbertson stated that in South Dakota no state prisoners have access to electronic filing, and most prisoner filings are hand written. Requiring inmates to file electronically in his state would shut down inmate filing. At Judge Molloy's request, Justice Gilbertson agreed to make enquiries about other states through the National Center for State Courts.

A member asked who determines whether a local rule permits "reasonable exceptions," or what constitutes such a "reasonable exception." The reporters stated they had not researched this question, but they pointed out that this phrase is present in current Rule 49(e), as well as its Civil counterpart, Rule 5(d)(3). No one had noted any special problems in connection with the phrase. It seems likely that the proposed Civil rule would be given the same interpretation as the current rules.

Concluding the discussion, Judge Feinerman reiterated the importance of the Civil Rules Committee's inclusion of the requirement that any local rule requiring unrepresented parties to file

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electronically must provide for reasonable exceptions. He expressed the hope that this language would accommodate due process concerns and prevent the imposition of unreasonable burdens on inmate filers. He also observed that courts are unlikely to adopt local rules requiring electronic filing by unrepresented inmates without first consulting with prison authorities to determine what is feasible.

Rule 49(b)(4). Judge Feinerman then turned to one feature of subsection (b)(4) that had not previously been discussed: the provision stating that verification of pleadings is not required unless a statute or rule specifically states otherwise. This provision was drawn from the Civil Rules. Judge Feinerman noted it might provide a useful reminder for 2255 filers, because the Rules Governing 2255 actions require verification. Professor Beale agreed that it might provide a useful clarification for filers in 2255 cases. Additionally, because this language is included in the Civil Rules, its exclusion from Rule 49 might lead to a negative implication. Since the language might have some value and could do no harm, she concluded that it seemed best to parallel the Civil Rules.

Rule 49(c). Judge Feinerman explained that this provision makes explicit that nonparties may file and serve in criminal cases. Unlike the other provisions already discussed, he pointed out, (c) does not distinguish between represented and unrepresented nonparties. All nonparties are presumptively required to file by nonelectronic means. He identified several reasons for requiring nonparties to file outside the CM/ECF system. First, the architecture of the CM/ECF system is designed to permit only the government or a defendant to file electronically. Even a registered attorney user cannot file in a criminal case unless the attorney indicates that he represents either the government or a defendant. Second, members had informed the Subcommittee that many nonparty filers prefer not to use the CM/ECF system. Finally, victims may file material that should not go into the system and be available to all parties. The rule does allow the court to permit a particular nonparty to file electronically (with the assistance of the clerk), and it gives districts the option of adopting local court rules that allow nonparties to file electronically.

Judge Feinerman noted that the proposed rule does not refer to filings by probation or pretrial services, which are neither parties nor nonparties ("neither fish nor fowl"). Because probation and pretrial services do file their reports electronically in some districts, he raised the question whether the committee note should be amended to make it clear they were not covered by Rule 49. Although there has been no question of the applicability of the current rule to probation and pretrial services, the addition of (c) now makes the application of the rule to nonparties clear. Members discussed the practice in their own districts. In some, probation and pretrial services did not use the CM/ECF system, but in others all of their reports were filed using CM/ECF (though presentence reports and some other documents were sealed). Professor Beale observed that everyone agreed that when the court issues an opinion, it is not governed by Rule 49. Since pretrial services and probation are arms of the court, the Subcommittee thought they were distinguishable from the parties and nonparties governed by the rule.

A motion was made to add language to the note stating that the rule was not applicable to the court or its probation and pretrial services divisions, but it was withdrawn after discussion. Professor

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Coquillette reminded the Committee of the limited function of committee notes. A member noted that the Federal Defenders are also, as a matter of organization, a part of the court, but they are of course subject to Rule 49. Another member stated that he did not see a problem that required any change. Everyone understands that probation and pretrial services are part of the court and not covered by the Rule. The member who had made the motion withdrew it.

Rule 49(d). Judge Feinerman then turned to the last subsection of the proposed rule, which requires the clerk to serve notice of the entry of the court's order, and allows a party to serve the notice. He stated that the language in the Subcommittee draft was drawn from Civil Rule 77(d)(1), and its inclusion was consistent with the general presumption in favor of incorporating the relevant provisions of the Civil Rules. Professor Beale noted the interaction between the notice provisions and FRAP 4. FRAP 4(a) governs civil appeals, and 4(b) governs criminal appeals. Although the impact of the provision allowing a party to give notice would be somewhat different in civil and criminal cases, she observed that it seemed to have sufficient utility in criminal cases to justify its inclusion. Under FRAP 4(b), the notice given by a party might be relevant to a defendant's efforts to establish excusable neglect or good cause for a late filing. The Subcommittee had no strong feelings about this provision. Beale stated that in her view, since this provision was in the Civil Rule, might have some benefit in criminal cases, and would do no harm, it was appropriate to include it.

There was a motion to approve the Subcommittee draft, as amended, for transmission to the Standing Committee with the recommendation that it be published for public comment, with the provision that Judge Molloy, Judge Feinerman, and the reporters would need to work with the other committees, and it might be necessary to make minor changes for consistency with the other proposed amendments.

The Committee voted unanimously to approve the proposed amendments to Rule 49, as amended, to transmit them to the Standing Committee, and to recognize the authority of the Committee chair, Subcommittee chair, and reporters to make minor changes to conform to the language of parallel proposals from other committees.

Discussion of the committee note was deferred until after the lunch break, to allow the reporters to determine what revisions would be required in light of the amendment to proposed Rule 49(a)(3)(A).

Judge Feinerman turned next to the Subcommittee's proposal to amend Rule 45. He explained that Rule 45(c) currently refers to several subsections of Civil Rule 5 describing different means of filing. As part of creating a stand-alone rule on filing and service, the Subcommittee's proposal incorporated these forms of service into Rule 49. Accordingly, the Subcommittee proposed an amendment replacing the cross references to Rule 5 with the appropriate cross references in Rule 49. Ms. Womeldorf and Professor Coquillettee confirmed that because this would be a technical and conforming amendment, it was not necessary to publish it for public comment. On the other hand, failure to publish now with the Rule 49 proposal might lead to some confusion and produce comments suggesting the need for such an amendment. Publication would make it clear that the

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Committee was aware that its proposed amendment to Rule 49 would require this technical and conforming amendment. Under these circumstances, the reporters recommended publication.

The Committee voted unanimously to approve and transmit the proposed amendment to Rule 45(c) to the Standing Committee with the recommendation that it be published for public comment.

Judge Kethledge presented the report of the Rule 12.4 Subcommittee. The current rule, he explained, provides that if an organization is a victim, the government must file a statement identifying the victim; if the organizational victim is a corporation, the government must file a statement identifying any parent corporation and any publicly held corporation that owns more than 10% of the victim corporation's stock, or stating that there is no such corporation. Prior to 2009, the Code of Judicial Conduct treated any victim entitled to restitution as a party, and the committee note stated that the purpose of the disclosures required by Rule 12.4 is to assist judges in determining whether to recuse. In 2009, however, the Code of Judicial Conduct was amended. It no longer treats any victim who may be entitled to restitution as a party, and it requires disclosure only when the judge has an interest "that could be substantially affected by the outcome of the proceedings."

In light of the amendment to the Code of Judicial Conduct, the Department of Justice asked the Committee to consider amending Rule 12.4 to restrict the scope of the government's required disclosures. It emphasized the difficulty of complying with the rule in cases with large numbers of organizational victims each of whom has sustained only a de minimus injury. The archetype, he said, was an antitrust prosecution where many victim corporations have paid a few cents more for a common product, such as a software program.

The Subcommittee agreed that the government had presented a persuasive case for bringing the rule in line with the change in the Code of Judicial Conduct in order to relieve the government of the burden of disclosure in such de minimus cases.

In drafting the language of its proposed amendment, the Subcommittee responded to feedback Judge Molloy had received from the Standing Committee. Standing Committee members stressed the importance of retaining judicial control. If the rule is to be revised, the court, not the government, should decide whether disclosure was needed in individual cases.

The Subcommittee recommended an amendment relieving the government of the burden of making the disclosures when it can show "good cause" for that relief. This standard, Judge Kethledge explained, retains judicial control and allows the court to balance the burden of disclosure against the risks of non-disclosure. Under a good cause standard, the court makes a holistic determination, rather than looking solely at the harm to the corporate victim.

The style consultants objected that "good cause" was a vague standard, but Judge Kethledge stated the Subcommittee strongly disagreed and viewed the matter as one of substance rather than mere style. Courts have a great deal of experience with the good cause standard,

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which is used in many other Federal Rules of Criminal Procedure. In contrast, the standard suggested by the style consultants—"minor harm"—is not used in any other Federal Rule of Criminal Procedure, it is not used in the Code of Judicial Conduct, and it would not allow the court to look at the overall balance of the burden of disclosure against the risks of non-disclosure.

Professor Beale stated that similar language was under consideration by the Appellate Rules Committee; the reporter for that committee had consulted with the Criminal Rules reporters and participated in the Subcommittee's telephone conferences. However, the Appellate Rules provision concerning disclosures regarding corporate victims was a small part of a larger project which was not yet ready for presentation to the Standing Committee. She noted that the current draft under consideration by the Appellate Rules Committee included not only corporations, but also other "publicly held entities." Noting that the reporters were not sure precisely what that phrase would include, she asked if Judge Kethledge or others had a view on whether similar language should be added to Rule 12.4. Judge Kethledge stated that he had no strong view. Speaking for the Department of Justice, Ms. Morales stated that the Department was satisfied with the proposal as it stood, without that phrase.

Judge Kethledge then turned to the proposed amendment to Rule 12.4(b), explaining that it was a modest proposal that had merit but likely would not have advanced on its own. But if we do amend Rule 12.4, it would be useful to set a fixed time for the disclosures, and to make it clear that not only changed, but also new information should be disclosed. In response to a member's comment that the rules now generally state time in multiples of seven, Judge Kethledge and the reporters took this as a friendly amendment. Although 30 days falls just over the line into the longer time periods that do not have to be divisible by seven, it seemed desirable to revise the time period here to 28 days.

A member also expressed concern with the wording of the Subcommittee's proposed amendment to Rule 12.4, because it did not explicitly state that new information must be disclosed only if it falls within the scope of the disclosures required by the rule. Although that is implied, lawyers might argue for a broader interpretation. Members suggested various formulations, and a motion was made to revise (b) to require the government to provide a supplemental statement "if the party learns of *any* additional *required* information or any required information changes." The motion also contained the friendly amendment making the time for filing 28 days after the defendant's initial appearance. The motion passed unanimously. Professor Beale reminded the Committee that this language was subject to revision by the style consultants.

The Committee then unanimously approved the proposed amendment to Rule 12.4, as amended, for transmission to the Standing Committee with the recommendation that it be published for public comment.

Discussion then turned to the proposed committee note. Members suggested deleting two phrases—"in relevant cases" and "the government alleges." Judge Kethledge agreed that they

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were not necessary, and accepted those suggestions on behalf of the Subcommittee. The proposed committee note was also revised to refer to 28, rather than 30, days.

The Committee voted unanimously to approve the committee note to Rule 12.4, as amended, for transmittal to the Standing Committee with the recommendation that it be published for public comment.

Following the lunch break, the reporters presented language amending the committee note to take account of the change in subsection (a)(3)(B) of the amendment to Rule 49. The proposed language stated that "(A) provides that electronic service is not effective if the serving party learns that neither "the notice of electronic filing" nor the paper to be served reached the person to be served."[5]

The Committee voted unanimously to approve the committee note to Rule 49, as amended, for transmittal to the Standing Committee with the recommendation that it be published for public comment.

Judge Dever, chair of the Rule 15 Subcommittee, informed the Committee that the Department of Justice had withdrawn its request for consideration of an amendment to address the inconsistency between the text of the rule and the committee note regarding the expenses of certain depositions requested by the defense. Ms. Morales explained that the Department was withdrawing its proposal because there had been so few instances in which the rule might create a problem that it did not seem possible to show a need for a rules change at this time. However, the Department intended to return to the Committee if it confronted a problem in a significant number of cases.

Introducing the next item on the agenda, Judge Molloy explained that, with the aid of a study prepared by the Federal Judicial Center (FJC), the Committee on Court Administration and Management (CACM) had studied the problem of threats and harm to cooperating defendants, and had endorsed recommendations that would necessitate changes in the Federal Rules of Criminal Procedure. After discussion at the January 2016 meeting of the Standing Committee, the matter was referred to the Criminal Rules Committee. Judge Molloy then appointed a subcommittee, chaired by Judge Lewis Kaplan, to consider the FJC study and CACM's recommendations.

Judge Kaplan reported on the Subcommittee's actions and sought input from members who are not on the Subcommittee. The starting point for the Subcommittee is that CACM concluded, based on the FJC study, that there is a national problem with cooperators being identified and then either the cooperator being threatened or harmed, or the cooperator's family being threatened or harmed, or others being deterred from cooperating. The FJC determined that to some degree the information used to identify these cooperators comes from court documents.

[5] Because the change to the proposed text of the rule that prompted this amendment to the note was later deleted, this change to the proposed Committee Note was deleted as well. See note 4, supra.

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Accordingly, CACM concluded that a uniform national measure, including changes to the rules and a great deal of sealing, was required. CACM felt sufficiently strongly that it recommended these procedures be adopted as an interim measure by local district rules. The recommendations seek to prevent the identification of cooperators by making all plea agreements look identical, requiring every agreement to include an unsealed portion and a sealed portion that contains either the cooperation agreement or a statement that there is no cooperation agreement. Similarly, the minutes of all plea proceedings would also contain a sealed portion for any discussion of cooperation. Thus if someone examines the court records, there is no indication which cases involved cooperation.

After receiving CACM's recommendations, the FJC study, and a background memorandum from the reporters, the Subcommittee held a lengthy and productive telephone conference to get the initial reaction of members. Judge Kaplan summarized the Subcommittee discussion. First, there was agreement that any retaliation against cooperators is very serious, and the Committee should think very hard about any measures that would address it. However, other institutions, especially the Department of Justice and Bureau of Prisons, also have a role to play. Subcommittee members also voiced a variety of concerns and raised many questions:

- How widespread is the problem? The FJC study provided anecdotal evidence concerning 400-600 instances of harm or threats, but approximately 10,000 defendants receive credit for cooperation each year.
- To what extent would the cooperators be identified even if the sealing recommendations were followed? In other words, would the recommendation solve the problem?
- What impact would the CACM recommendations have on the defense function? The defense relies on research regarding cooperation to impeach and to argue for proportional sentencing.

The Subcommittee concluded by asking the reporters to gather additional information on the following questions:

- How big is the problem compared to the universe of cooperators?
- Do identifiable classes of cases account for most of the incidents?
- Are there important geographic variations?
- How does the incidence of problems compare with the widely varied approaches taken in different districts?

The reporters were also asked to prepare a memorandum on the First Amendment issues raised by CACM's recommendations. Judge Kaplan noted that in his circuit the court of appeals has severely restricted sealing practices.

Before the Subcommittee's next telephone conference in July, further information will be gathered from the FJC and the Department of Justice. The Subcommittee asked the Department

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of Justice for its position regarding CACM's interim and long term proposals and requested additional information about the Department's practices.

Judge Kaplan then asked Committee members for their initial thoughts about the problem and CACM's recommendations.

Many members agreed that retaliation against cooperators is a serious problem, and that the Committee had a responsibility to consider potential solutions. One member described it as a moral obligation to do whatever we can to protect cooperators and not to implement or maintain procedures that could discourage cooperators. Another member noted that although he was not generally in favor of sealing, courts now seal for reasons such as the protection of trade secrets. Preventing harm to cooperators is certainly at least as pressing a reason for sealing. If our records are being used, we have to figure out what we can do to be part of the solution.

But members also raised a variety of concerns and questions about CACM's proposals.

Several members spoke of the need for more information about the scope of the problem and the degree to which it arises from court records. Several members noted that violent threats to cooperators were much more likely in certain kinds of cases (such as cases involving gangs, drugs, terrorism, and organized crime) than in white collar prosecutions. There may also be differences among districts. A member noted that in sparsely settled areas everyone knows who is cooperating, and sealing would have no effect. Members also expressed the need for more information about the connection between the records that could be sealed and the potential for threats and harm. One member stated that criminal defendants and inmates are resourceful, and they have many different ways to identify cooperating defendants without court records, including continuances, absences at status hearings, and Rule 35 motions. Other members agreed that it would be important to determine whether the recommended procedures would make a big difference in reducing threats and harm to cooperators. Members noted, however, that this will be difficult to determine for many reasons. Although we can identify cooperators who have been threatened or harmed, the threat or harm may have been the result of some interaction in the prison, not the cooperation. Similarly, family members may not know the reason for a threat or assault. It will be difficult to be certain how helpful a rule change would be.

A member noted that the experience in that member's district raised questions about the causal connection between sealing and threats/harm: that member's circuit was among those that most severely restricted sealing, but the member's district also had one of the lowest rates of threats/harm to cooperators.

Lawyer members expressed concern about the effect of CACM's proposal on their ability to represent their clients effectively. A member who represents both cooperating and non-cooperating defendants described various ways sealing would hamper the defense.

- Sealing would make it impossible to research disparity in sentencing. In the member's district, failure to conduct that research constitutes ineffective assistance of counsel.

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- Sealing would make counseling clients much more difficult.
- Sealing would hamper the ability to challenge racial disparities.
- Sealing would limit access to exculpatory material, even when prosecutors try in good faith to comply with *Brady*.

Another lawyer member noted that there may be a serious problem of retaliatory threats/harm in certain kinds of cases, such as terrorism or gang cases, but a national rule requiring sealing in all cases would also make it more difficult to effectively represent defendants in white collar cases, which present no threat of violent retaliation.

A member agreed that the Committee would need to determine how much the current rules are contributing to the problem of threats/harm; consider whether a rules change could solve the problem; and address objections including ineffective assistance of counsel, *Brady*, and the First Amendment.

Another member added other issues that should be explored. The first is a comparing the effectiveness of sealing to other alternatives that might address the problem. It would be important to know if sealing would make a significant difference. Second, it would be helpful to understand exactly what the FJC counted as physical harm in order to gauge the seriousness of the problem.

A member who had participated in CACM's deliberations stated that the FCJ study and the findings made by Judge Clark after an evidentiary hearing demonstrated the existence of a problem. The member noted that CACM had raised many of the same questions now being asked by the Committee. It is important to determine the prevalence of the problem of threats/harm to cooperators and whether it is limited to certain kinds of cases or geographic areas. It would also be very helpful to have information about the experience of cooperating defendants from the District of Maryland, which already follows the procedures CACM is recommending. Has it solved the problem?

The Department of Justice representatives, Ms. Shapiro and Ms. Morales, stated that the Department has not determined its position on the CACM proposals for interim rules in the district courts and changes in the Rules of Criminal Procedure. Ms. Shapiro was a member of the privacy subcommittee of the Standing Committee, which held the Fordham conference in 2010. At that time the Department was unable to reach an internal consensus on the best approach. It surveyed the districts at that time and is updating that survey now. In 2010, practices in the districts varied, and judges in each district were committed to their own practices and thought them most effective.

Ms. Morales expressed the view that it would be very difficult to trace particular harms/threats to rules that could be amended. Even if we can identify cooperators who have been harmed, we won't know why they were injured. It could have been because of a dispute in the prison. We can identify the individuals who get Rule 35 or 5K sentencing reductions for cooperation, but they are only a subset of the cooperators. Many other individuals may have

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cooperated at some point, but not to the degree necessary to get a Rule 35 or 5K reduction. So it will be hard to get enough information to feel comfortable that we can assess the impact of the current rules or of changes in the rules.

Professor Coquillette emphasized Judge Sutton's hope that the Subcommittee and the full Committee will take a broad view of the issue. If the Committee determines that it is not a problem that can be solved by amending the rules, it would be beneficial for it to remain engaged, be aware of what is being studied and considered by other constituencies, and be as helpful as possible.

Margaret Williams, who was one of the authors of the FJC report prepared for CACM, was present at the meeting and was asked to comment. She stated that the FJC data would permit an analysis of whether the frequency of threats/harms varies from district to district. But the FJC's data will not answer other issues that have been raised. The survey did not ask about the types of cases in which there had been threats/harm (though some respondents volunteered that information). As noted by a member, Maryland has sealing procedures like those recommended by CACM, but those procedures were already in place at the time of the FJC's study. So the FJC its data would not permit a "before and after" analysis of the effect of sealing.

Judge Kaplan thanked the members for their responses, and commented that it was likely there would be a lot of unknowns at the end of the Subcommittee's work.

The Committee turned next to new suggested amendments.

Professor Beale briefly described 15-CR-D, from Sai, which proposed multiple changes: (1) redaction of the last four digits of social security numbers in pleadings; (2) sealing of affidavits in support of applications for appointed counsel; (3) providing unpublished materials cited in pleadings to pro se litigants; and (4) electronic filing for pro se litigants. The suggestion had been addressed to all of the rules committees. The other committees had already held their spring meetings, and Professor Beale explained the actions they had taken.

Regarding the proposal to redact the last four digits of individual social security numbers, Professor Beale reported that the other committees had all agreed that the Rules Committees should not take this issue up. Rather, it should be referred to the Committee for Court Administration and Management, which made the policy decision reflected in the current rules, and is in the best position to do research and consider tradeoffs. Professor Beale noted that she and Professor King recommended that the Committee take the same approach.

With regard to the sealing of affidavits, Professor Beale noted that the Civil Rules Committee was not, at this time, moving forward with this suggestion. A member noted, however, that applications for appointments under the Criminal Justice Act are already filed ex parte under seal. So on the criminal side, no further action is needed.

With regard to requiring litigants to provide copies of unpublished opinions to pro se

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litigants, the Civil Rules Committee had decided not to move forward at this time. This may be a good practice, but is not necessarily something that should be mandated in a national rule.

Finally, with regard to the question whether pro se litigants should be permitted to file electronically using the CM/ECF system, that proposal was at odds with the Committee's decision to preclude such filing in the proposed amendment to Rule 49 absent a court order or local rule.

After a brief discussion, the Committee concurred in the decision to refer the question of the last four digits of Social Security numbers to CAMC, and it decided to take no further action on the other proposals.

The next suggestion, 15-CR-E, from Robert Miller, also proposed that indigent parties be allowed to file in the CM/ECF system. Judge Molloy and Professor Beale agreed that like 15-CR-D, this proposal had been considered and rejected by the Committee's action in approving the current proposal to amend Rule 49.

The next suggestion, 15-CR-F, came from Judge Richard Wesley, who drew a conflict in the cases construing Rule 5(d) of the Rules Governing § 2255 Proceedings to the Committee's attention. The Rule states that "The moving party may submit a reply to the respondent's answer or other pleading within a time fixed by the judge." Some courts have held that the inmate who brings the 2255 action has no right to file a reply, but may do so only if permitted by the court. Other courts (and the committee note) treat this as a right.

Professor Beale solicited the advice of the style consultants on language that might respond to this split and clarify that the rule was intended to create a right to file. She noted that the consultants thought the rule's current language clearly creates a right, and there should be no need to clarify the language. But confronted by the split in the lower courts, they did suggest some language that might be employed to make this clearer.

Professor King noted the 2255 caseload is very heavy in some districts and courts must process these cases quickly. She surmised that the courts that ruled an inmate has no right to file may have been looking at pre-2004 precedents without realizing that the rule was modified in 2004 to provide for a right to reply. She summed up the reasons in favor of putting this proposal on the Committee's agenda for further study:

- A rule is causing a problem. Inmates in some courts are not being given the opportunity to file a reply as intended by the 2004 revision.
- Although the style consultants believe the text is clear now, the split in the lower courts demonstrates that courts are not finding it to be clear.
- The decisions not recognizing the right to file a response may seriously affect inmates who may have a persuasive response but are not permitted to file it.

Professor King acknowledged that we do not know precisely how many cases would be affected

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by a clarification of the rule. However, the suggestion did come to the Committee from a member of the Standing Committee, which indicated that the Standing Committee might be receptive if the Criminal Rules Committee considered an amendment.

Judge Molloy informed the Committee of his intention to form a subcommittee to address Rule 5(d), and members were invited to make comments that might be helpful to it. Professor King noted that one issue for the subcommittee would be whether there was also a need to clarify the 2254 Rules. Another issue was whether the rule should specify a presumptive time for the filing of a reply. In 2004, the Committee felt there was no reason not to permit an inmate to file a reply to the government's response. But the Committee chose not to set a presumptive time for filing. The style consultants questioned this omission, noting that other rules specify time limits for filing.

Members discussed their practices concerning the time for filing a reply in 2255 cases. Several members set a briefing schedule giving the government 28 days to respond to the petition, and the inmate 21 or 28 days to respond. One judge who set such a schedule noted that he had never turned down a request for an extension of time. Several other members noted they typically set similar schedules: 28 days for the government and 28 for the respondent.

Later in the meeting, Judge Molloy announced that he was appointing the following to serve on the Rule 5 Subcommittee:

Judge Kemp, chair
Ms. Brook
Judge Dever
Justice Gilbertson
Mr. Hatten
Judge Hood
Ms. Morales (Department of Justice)

The next suggestion, 16-CR-A, came from James Burnham, who proposed that Rule 12(b)(3)(B)(v) be amended to make it clear that the standard for the dismissal of a criminal indictment is the same as the standard for the dismissal of a civil complaint under Civil Rule 12(b)(6). Professor Beale commented that the proposal presents the policy question whether criminal practice should be brought closer to the civil model.

A member who said he was "intrigued" by the proposal presented a recent example. Several elderly men had cut through several levels of security fences to gain entry to a nuclear facility, where they prayed. They did no other harm to the facility. After they refused to plead to a more minor offense, the government added a more serious charge that required an intent to harm the national defense. The defendant's conviction was reversed on appeal. The appellate court held that as a matter of law the facts established by the prosecution could not prove the necessary intent, and thus did not constitute sabotage. Although the appellate court concluded that the conduct in question did not, as a matter of law, constitute the offense charged, at the trial

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court level there had been a jury trial and a lengthy sentencing hearing. The member, who noted that there is a slight difference in the language of the civil and criminal rules, acknowledged that he did not know whether there are also significant differences in the pleading rules in criminal and civil cases.

Judge Molloy observed that the pleading practices are set by the appellate rulings holding that an indictment is sufficient if it states the date and parallels the language of the offense that has been charged.

Another member expressed interest in the proposal but thought it was unlikely to be adopted. He noted that a mechanism to raise claims already exists. As amended in 2014, Rule 12 of the Rules of Criminal Procedure provides for a pretrial motion to challenge "a defect in the indictment or information, including . . . failure to state an offense." But circuit law determines what constitutes failure to state an offense. The Second Circuit will uphold a conviction if the proof is sufficient and not inconsistent with the indictment, which may be bare bones.

A member responded that minimal pleading in criminal cases is hundreds of years old, not something new. This looks like a proposal to return to the old common law pleading rules. He is sympathetic to the problem this poses for defendants, but it's a problem about the pleading standards.

A judge member stated that with indictments stated in broad general terms and very limited pretrial discovery he does have occasional cases in which defense counsel at the pretrial conference says that he or she still does not know what the defendant is being accused of. The issue is closely connected to discovery. The member expressed interest in exploring the question whether the government could be required to be more specific at some point: if not at the outset, then at some point before trial.

Speaking for the Department of Justice, Ms. Morales said that the Supreme Court has ruled that the pretrial notice requirements are met by an indictment issued by a grand jury. This proposal seeks to create new substantive rights, which is beyond the authority of the Rules Committee.

Judge Molloy asked whether Mr. Burnham's objections could be met by a rules change, or were really objections to how the courts have interpreted the rule. Two members responded. One noted that Burnham had proposed specific language to amend Rule 12. Another said this was not really a proposal about changing the language of Rule 12, and that it sought a substantive change that would raise issues under the Rules Enabling Act.

A member described how the rule works in cases brought under RICO, where the government is alleging a pattern of racketeering activity that may extend over a decade or more. According to the precedents, the government can meet the pleading requirements and avoid pretrial dismissal of the indictment with language paralleling the statute defining the offense and the dates involved. Prosecutors have an incentive to do that in order to avoid post trial claims of

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some variance between the allegations in the indictment and the proof.

Some members returned to the idea that this is a sufficiency of the pleading issue. One stated that although Rule 7(c) requires a "plain, concise, and definite statement of the offense charged," the level of detail that courts accept in criminal cases is less than that required in civil cases. Another member stated that it appears more conclusory language is allowed in criminal than in civil cases.

A member stated that he was not in favor of moving forward with the proposal. He stated it would have significant implications of requiring more specificity for terrorism cases. The Department of Justice is reluctant to provide a high level of specificity in the charging documents that might reveal intelligence means and methods. During the pretrial period, under the Classified Information Procedure Act (CIPA), more specifics are provided in a manner that protects national security. Moreover, the proposal would invite in criminal cases the kind of costly, repetitive, and lengthy pretrial motions practice that now occurs in some kinds of civil cases, including big financial cases, antitrust cases, and securities class actions. If a judge needs to take control of a case to get to the core, the judge has ample tools to do so now.

Judge Molloy announced that he did not intend to set up a Subcommittee to pursue the proposed amendment to Rule 12.

Professor Beale presented 16-CR-B, from the National Association of Defense Lawyers (NACLD) and the New York Council of Defense Lawyers (NYCDL), which proposes that Rule 16 be amended to impose additional disclosure obligations on the government in complex cases. NACDL and NYCDL assert that prosecutorial discovery is a problem in complex cases that involve "millions of pages of documentation," "thousands of emails," and "more gigabytes of information." They based their proposal on orders frequently issued by courts in the Southern and Eastern Districts of New York. It provides a standard for defining a "complex case" and steps to create reciprocal discovery.

At Judge Molloy's request, the reporters briefly described the history of other attempts to amend Rule 16 to require the government to provide additional pretrial discovery. Professor Beale noted that proposals to amend Rule 16 have been defeated in the Criminal Rules Committee, in the Standing Committee, at the Judicial Conference, and in Congress. She reminded the Committee that the Rules Enabling Act process is, by design, conservative: it sets up multiple points at which a controversial proposal may be stopped. She also noted that the Department of Justice had strongly opposed amendments to Rule 16, but had itself implemented many non-rule solutions, including amendments to the U.S. Attorneys' Manual. She reminded the Committee that 18 U.S.C. § 3500 imposes serious limits on certain forms of pretrial disclosure and reflects many of the interests the Department was seeking to protect in its advocacy in the rules process. She briefly described two attempts to amend the rule during her time as reporter. The first time, after the Department took the unusual step of inviting Committee members to participate in its efforts to revise the U.S. Attorneys' Manual as an alternative to revising Rule 16, a sharply divided Committee approved an amendment that was

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rejected by the Standing Committee. The second time, responding to a letter from Judge Sullivan after the Stevens prosecution, the Committee asked the Federal Judicial Center (FJC) to survey the views of judges, defense lawyers, and prosecutors concerning the need for an amendment. The responses from judges were sharply split, and the Committee, despite a great deal of effort, was unable to formulate a beneficial revision to Rule 16 that would not run afoul of 18 U.S.C. § 3500. Accordingly, the Committee pursued other alternatives, working with the Benchbook committee to encourage judges to supervise discovery.

Ms. Hooper, one of the FJC researchers who conducted the discovery study, stated that the survey found that district judges were evenly split on whether they perceived a problem with prosecutorial failure to disclose exculpatory evidence, 90% of defense lawyers perceived a problem, and prosecutors did not perceive a problem.

Judge Molloy asked whether the judicial members had standing orders similar to the NACDL/ NYCDL proposal. One judge member stated that although he had presided over many cases that would fall within the proposal, he did not have a standing order because every case is different. In a complex case, the trial judge has to require the government to make expedited discovery (which varies depending on the case) so that the defense has adequate time to absorb. Also, if the government has the information in a form that will facilitate the defense getting into it, it must be provided in that format, e.g., hard drives in a certain format. He has ordered CJA funds for technical people to organize the electronically stored information for the defense.

The member expressed the view that it is hard to legislate wisdom for trial judges. The trial judge must get into the case far enough to determine what's required for that case. And it's not appropriate to force a case with a huge amount of documents and witnesses to trial on the normal schedule. Experienced judges understand without being told, or given specific overbroad definitions. In some cases in which enormous quantities of information may be produced, but only a tiny fraction of that material will be relevant.

Other judicial members agreed that these issues are handled by judges on a case-by-case basis, and that it was not clear whether there was a need for rules and metrics. As the case proceeds, defendants and issues may be dropped and what could have been a complex case is no longer.

A practitioner member whose practice regularly includes complex cases responded that courts don't understand the defense perspective, and how hard it is for the defense in cases with, for example, 100,000 taped conversations, to identify specific pieces of evidence that are relevant to the government's theory and to your own case. The only way this can work is for the government to identify the data it will rely on to prove its case. He agreed, however, with the premise that no one-size-fits-all rule works for all cases. But many judges now take a one-size-fits-all approach, and that approach is simply to follow Rule 16. The Rule needs an escape clause for a small set of cases that require special treatment, not a routine application of Rule 16. Although the member did not agree with every provision in the NACDL/NYCDL proposal (which was more like a regulation than a rule), the main point is that an amendment is needed for

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this subset of cases because some judges continue to apply Rule 16 in complex cases without any adjustment, which makes it impossible to mount a defense and forces defendants to plead guilty. The member reiterated that some judges do not understand what the defense must do in these cases, so they seek to move their dockets and are reluctant to impose a burden on the government.

The member advocated for something "simple" that would recognize a category of complex cases that require different treatment (e.g., requiting the government to identify its exhibits in advance) and allow the defense adequate time for preparation, but also require reciprocal defense discovery. The member was more concerned at this point about the concept of what is needed—special class of cases requiring special procedures—than the specifics.

Another member opposed moving forward with the proposal, because it was better to leave this to the discretion of judges than to try to legislate with the rules. He emphasized that the complexity of cases can vary on multiple dimensions, particularly the nature of the case and the makeup of the defense team (which could be two local lawyers or 50 lawyers in three law firms in different countries). He also predicted that the Department of Justice would strongly oppose the proposal because of the impact it could have in national security cases. He favored leaving this to judicial discretion, which is more flexible than a rule.

Another member urged consideration of the impact of complex cases on CJA lawyers, who do not have the resources of Federal Defender offices, noting that judges are not familiar with the situation CJA lawyers face in complex cases. The member strongly supported the creation of a subcommittee to try to develop an approach that would preserve judicial discretion but send a signal to judges to modify procedures in complex cases.

Speaking for the Department of Justice, Ms. Morales first stated that the Department distinguished between the current proposal and more general prior attempts to modify Rule 16. But the Department still does not think a rule is the best way to deal with these issues. The Department has worked hard with the defense bar to develop guidance for judges on electronic discovery, which led to a pocket guide. That kind of collaboration is nimble and can change quickly as the technology changes. Technology is a moving target. The Department favors a focus on developing best practices and guidance, not specific prescriptive rules.

A member agreed this is a significant issue, and is related to the broader issue of electronic data and discovery, which is being studied by another committee. That committee has been conducting hearings, and has heard repeatedly of the problems encountered by individual CJA lawyers, who lack the knowledge and resources of the Federal Defenders. He noted, however, that it was not yet clear whether this problem is a rules problem.

Judge Molloy announced the appointment of a Rule 16 Subcommittee to study the proposal and the more general issue:

Judge Kethledge, chair

126-012799

Mr. Filip
Judge Feinerman
Mr. Kerr
Ms. Morales, for the Department of Justice
Mr. Siffert

Professor Beale introduced the last agenda item. She explained that in bankruptcy cases there are routine filings of containing large amounts of personal data that should be redacted. In some cases, a failure to redact has been discovered. Although bankruptcy courts have general taken action to redact material in such cases, the Bankruptcy Committee thought it would be desirable to add a rule providing for such retroactive redaction. When the Bankruptcy Committee presented this to the Standing Committee as an information item, the Standing Committee encouraged the Civil, Criminal, and Appellate Committees to consider whether a similar rule would beneficial.

The issue was being presented at this meeting to get members' initial reactions, with the expectation that it would be on the fall agenda for a more extended discussion. Professor Beale asked for initial reactions on several questions. Had members encountered cases in which information that should have been redacted was filed in a criminal case? If so, did they think a rules change to deal with those cases would be beneficial? And if members had not encountered the problem, might it be beneficial to adopt a rules change to parallel the Bankruptcy rule? This would provide a mechanism to deal with the few cases that might arise in the future, and would avoid the negative implication that might arise from a comparison with the Bankruptcy Rule authorizing retroactive redaction.

Several members said they had encountered failure to redact material in a few cases. In each case the court or the party that failed to make the required redaction took corrective action. In some cases the clerk of court restricted access to a document while corrective action was taken. Professor Beale summed up the responses: failure to redact as required by Rule 49.1 does occur occasionally in criminal cases, and courts have been dealing with it successfully. One judge expressed an interest, if a retroactive redaction procedure is developed, to include a requirement of an explanation of the failure to make the redaction and/or to discover the failure in a timely fashion. Professor Beale stated that the reporters would collaborate with their colleagues on the other committees on these issues. They would consider the argument that a rule providing guidance would be valuable, but also the fact that the issue arises only infrequently and courts have been dealing with it successfully.

Finally, Judge Molloy noted the next meeting of the Committee will be September 19-20 in Missoula, Montana. His tentative plan is to meet in the fall of 2017 in Chicago, and perhaps in New York in the fall of 2018. The next two spring meetings be in Washington, D.C.,

The meeting was adjourned.

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TAB 7

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126-012802

TAB 7A

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126-012804

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

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CHAIR

REBECCA A. WOMELDORF
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JOHN D. BATES
CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

TO: Hon. Jeffrey S. Sutton, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Sandra Segal Ikuta
Advisory Committee on Bankruptcy Rules

RE: Report of the Advisory Committee on Bankruptcy Rules

DATE: May 10, 2016

I. Introduction

The Advisory Committee on Bankruptcy Rules met on March 31, 2016, in Denver, Colorado. The draft minutes of that meeting are attached.

The Committee's agenda included discussion of several suggestions that were submitted by bankruptcy judges, attorneys, and another Judicial Conference committee. The Committee continued its consideration of rule amendments that would allow a district to opt out of a mandatory national form for chapter 13 plans if it adopts a single local chapter 13 plan form that meets certain nationally mandated requirements. And the Committee took action on a number of amendments to bankruptcy rules to conform to proposed and pending changes to the civil and appellate rules. With regard to those amendments, the Committee discussed the coordination efforts among the affected advisory committees that had occurred or would be undertaken.

The Committee now seeks the Standing Committee's final approval of two rule amendments that were published in August 2015, as well as retroactive approval of technical amendments that have been made to several official forms.

125-012805

The Committee also requests the publication of several groups of proposed rule and form amendments for public comment. One group—amendments to Rule 3015 and new Rule 3015.1—would implement the local opt-out alternative for chapter 13 plan forms discussed above. Because two rounds of publication and extensive vetting have already occurred, the Committee recommends that the comment period following publication of these amendments be shortened to three months. It also recommends that publication occur in July, rather than August, in order to avoid confusion regarding the comment deadline for proposed rules and forms published on the regular schedule.

The Committee requests publication in August of one proposed new rule and proposed amendments to 10 existing rules, as well as amendments to seven official forms and a new appendix. The majority of these rule and form amendments are being proposed to conform to pending and proposed amendments to the civil and appellate rules and forms.

Part II of this report discusses the action items, grouped as follows:

A. Items for Final Approval

(A1) Rules published for comment in August 2015—
- Rules 1001;
- Rule 1006(b); and

(A2) Technical changes previously made to Official Forms 106E/F, 119, 201, 206 Summary, 309A, 309I, 423, and 424.

B. Items for Publication[1]

(B1) For publication in July 2016—
- Rule 3015 and new Rule 3015.1; and

(B2) For publication in August 2016—
- Rule 5005(a)(2);
- Rules 8002(c), 8011(a)(2)(C), and Official Form 417A;
- Rule 8002(b);
- Rule 8013, 8015, 8016, 8022, Official Form 417C, and new Part VIII appendix;
- Rule 8017;

[1] The items recommended for publication would be added to the proposed amendments to Rule 3002.1 (Notice Related to Claims Secured by Security Interest in the Debtor's Principal Residence), which were approved for publication by the Standing Committee at its January 2016 meeting.

125-012806

- Rule 8002(a);
- Rule 8006;
- New Rule 8018.1;
- Rule 8023;
- Official Form 309F; and
- Official Forms 25A, 25B, 25C, and 26 (renumbered as 425A, 425B, 425C, and 426).

Part III of this report consists of two information items regarding (i) the status of proposed amendments to Rule 9037 to address the redaction of previously filed documents, and (ii) the Committee's decision to take no action regarding the burden of proof for objections to claimed exemptions.

II. Action Items

A. Items for Final Approval

(A1) *Rules published for comment in August 2015.*

The Committee recommends that the Standing Committee approve and transmit to the Judicial Conference the proposed rule amendments that were published for public comment in August 2015 and are discussed below. Bankruptcy Appendix A includes the rules that are in this group.

Action Item 1. Rule 1001 (Scope of Rules and Forms; Short Title). Rule 1001 is the bankruptcy counterpart to Civil Rule 1. Rather than incorporating Civil Rule 1 by reference, Rule 1001 generally tracks the language of the civil rule. The last sentence of Rule 1001 currently states, "These rules shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding." This language deviates from Civil Rule 1, which states (as of December 1, 2015), "[These rules] should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." The proposed amendment to Rule 1001 changes the last sentence of the rule to conform to the language of Civil Rule 1.

The Committee received two comments to the proposed rule amendment and, after due deliberation, determined that the comments did not warrant any action. Accordingly, the Committee voted unanimously to approve the proposed amendment as published.

Action Item 2. Rule 1006(b) (Filing Fee). Rule 1006(b) governs the payment of the bankruptcy filing fee in installments, as authorized for individual debtors by 28 U.S.C. § 1930(a). The Committee received and over the course of several years considered a potential amendment to the rule with respect to courts requiring a debtor who applies to pay the filing fee in installments to make an initial installment payment with the petition and the application. The

Committee requested the Federal Judicial Center ("FJC") to conduct an empirical study on court practices regarding initial installment payments at the time of filing and whether there is an association between such a requirement and the rate of fee waiver applications. Although based on the FJC study and other factors, the Committee ultimately concluded that there was no need to clarify that courts may require an initial installment payment with the petition and application, the FJC study raised a different issue. Because Rule 1006(b)(1) requires the bankruptcy clerk to accept the petition, resulting in the commencement of a bankruptcy case, the practice of some courts of refusing to accept a petition or summarily dismissing a case because of the failure to make an installment payment at the time of filing is inconsistent with Rules 1006(b)(1) and 1017(b)(1). The latter provision allows the court, only "after a hearing on notice to the debtor and the trustee," to dismiss a case for the failure to pay any installment of the filing fee.

In order to clarify that courts may not refuse to accept petitions or summarily dismiss cases for failure to make initial installment payments at the time of filing, the Committee proposed, and the Standing Committee approved, publication of an amendment to Rule 1006(b)(1) clarifying that an individual debtor's petition must be accepted for filing so long as the debtor submits a signed application to pay the filing fee in installments and even if a required initial installment payment is not made at the same time. The Committee Note explains that dismissal of the case for failure to pay any installment must proceed according to Rule 1017(b)(1).

The Committee received two comments to the proposed rule amendment and, after due deliberation, determined that the comments did not warrant any action. Accordingly, the Committee voted unanimously approve the proposed amendment as published.

(A2) *Technical changes to official forms.*

<u>Action Item 3</u>. Official Forms 106E/F, 119, 201, 206 Summary, 309A, 309I, 423, and 424. The Committee recommends that the Standing Committee give retroactive approval to the technical changes described below that have been made to official bankruptcy forms since the last Standing Committee meeting and that it give notice of these changes to the Judicial Conference.

At its March 15, 2016, meeting, the Judicial Conference approved the Standing Committee's recommendation to allow the Advisory Committee to make technical, non-substantive changes to official bankruptcy forms when the need for such changes is determined, subject to retroactive approval by the Standing Committee and reporting of the changes to the Judicial Conference. Operating under that authority, the Committee has made the technical changes listed below.

- Official Form 106E/F - Line number references in the instruction at the top of Part 2 started at an incorrect number; they were changed from "4.3 followed by 4.4" to "4.4 followed by 4.5."

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- Official Form 119 - Because there is no "Part 3" on the form, the reference to "Part 3" at the top of page 1 was changed to "Part 2."

- Official Form 201 - The hyperlink in Question 7 for NACIS codes was updated to match the new landing page maintained by the Administrative Office.

- Official Form 206 Summary - Cross-references to line numbers 6a and 6b of Official Form 206E/F were incorrect and were changed to 5a and 5b.

- Official Form 309A - Line 9 was reformatted to be consistent with the remainder of the lines in the form

- Official Form 309I - The last line of instruction 13 on page 2 was deleted, and the penultimate sentence was changed to: "If you believe that the debtors are not entitled to a discharge of any of their debts under 11 U.S.C. § 1328(f), you must file a motion by the deadline."

- Official Form 423 - The reference near the top of the form to 11 U.S.C. §1141(d)(3)was changed from "does not apply" to "applies" because it had previously misstated the relationship between that statutory provision and the necessity of a chapter 11 to complete an instructional course in personal financial management in order to obtain a discharge.

- Official Form 424 - The top of page 2 was changed from Rule 8001 to Rule 8006.

B. Items for Publication

(B1) *For publication in July 2016.*

Action Item 4. Rule 3015 (Filing, Objection to Confirmation, Effect of Confirmation, and Modification of a Plan in a Chapter 12 or a Chapter 13 Case) and new Rule 3015.1 (Requirements for a Local Form for Plans Filed in a Chapter 13 Case). The Committee recommends that the following rule amendments and new rule be published for public comment in July 2016 and that the comment period extend for three months. The rules in this group appear in Appendix B1.

The amended rule would require the use of an official form for chapter 13 plans unless a district requires the use of a single local form for that purpose that meets the requirements set out in the new rule. As the Committee has previously reported, it decided to consider this opt-out possibility in response to significant opposition that was voiced to the possible adoption of a mandatory national official form for chapter 13 plans. Informal comments on the opt-out proposal have been generally favorable.

126-012809

The Committee began considering creating an official form for chapter 13 plans in 2011, prompted by the submission of two suggestions that a national plan form be adopted. *See* Suggestions 10-BK-G and 10-BK-M. A proposed chapter 13 plan form and proposed amendments to nine related rules were published for public comment in August 2013. Because the Committee made significant changes to the form in response to comments it received, the revised form and rules were published again in August 2014.

At the fall 2015 meeting, the Committee gave approval to proposed Official Form 113 (the national plan form) and related amendments to Rules 2002, 3002, 3007, 3012, 4003, 5009, 7001, and 9009, but it voted to defer submitting those items to the Standing Committee. This deferral was to allow the Committee to further consider the opt-out proposal and the necessity, timing, and scope of any republication. It directed the Forms Subcommittee to continue to obtain feedback on the opt-out proposal from a broad range of bankruptcy constituencies and to make a recommendation at the spring 2016 meeting regarding the need for additional publication.

The Subcommittee reached out to all relevant groups and invited them to provide feedback on the opt-out proposal, as set out in proposed Rules 3015 and 3015.1, as well as on whether they perceived a need for further publication. The following groups provided comments to the Subcommittee in response: National Bankruptcy Conference ("NBC"), National Conference of Bankruptcy Judges ("NCBJ"), National Association of Consumer Bankruptcy Attorneys ("NACBA"), the American Bankruptcy Institute's Consumer Committee, a large number of chapter 13 trustees whose comments were collected by the National Association of Chapter 13 Trustees, and an informal mortgage servicer group. While the bulk of the comments received were directed at the plan form itself, rather than at the opt-out proposal, three groups (NBC, NCBJ, and the mortgage servicers) and seven individual trustees did express support for allowing districts to opt out of a national plan form. In addition, Bankruptcy Judge Marvin Isgur (S.D. Tex.) circulated the opt-out proposal to the 144 bankruptcy judges who had submitted a letter in 2014 opposing a national plan form, and he reported that there was general acceptance of Rules 3015 and 3015.1 among the group.

The response of NACBA to the subcommittee's outreach was relatively brief. The president of the organization said that he could not speak for the thousands of NACBA members, and he urged the Committee to publish the proposals that were being considered. He asserted that "adoption of the 'compromise' proposal without providing a new comment period would not comply with the law and [would] subject such to litigation and added controversy." NCBJ also advised that the opt-out proposal be published for public comment.

At the spring meeting, the Committee unanimously approved the Forms Subcommittee's recommendation that the amendments to Rule 3015 and proposed new Rule 3015.1 be published for public comment. The opt-out concept was not included in the 2013 and 2014 publications, and, although it might be viewed as a lesser-included version of the proposal for a mandatory national form, it does represent a distinct change from the published proposals. Some members

of the Committee stated that they favor republication because of concern about the constituencies that do not feel that they have had a fair opportunity to express their comments on the opt-out proposal. A general desire was expressed to eliminate any possible procedural objections to the Committee's eventual recommendation.

The Committee also unanimously agreed that the Committee should seek to publish Rules 3015 and 3015.1 on a truncated schedule. According to § 440.20.40(d) of the Guide to Judiciary Policy, "The Standing Committee may shorten the public comment period or eliminate public hearings if it determines that the administration of justice requires a proposed rule change to be expedited and that appropriate notice to the public can still be provided and public comment obtained." Because of the two prior publications and the narrow focus of the revised rules, the Committee believes that the usual 6-month comment period should be shortened so that an entire year can be eliminated from the period leading up to the effective date of the Committee's proposed rules and forms.

If the regular publication schedule were followed, Rules 3015 and 3015.1 would be published in August 2016, and comments would be received by sometime in February 2017. If approved, those rules and the rest of the chapter 13 plan form package would then be on track for an effective date of December 1, 2018.

However, if Rules 3015 and 3015.1 could be published on a truncated schedule, they could be published this summer with a 3-month deadline for submitting comments. A single hearing could be scheduled. The Committee could then vote on approval at its fall meeting in November and seek the Standing Committee's approval in January 2017. Approval of the Judicial Conference could be sought in March 2017. With advance notice to and permission of the Supreme Court, it could be asked to promulgate the rules by May 1, 2017, leading to an effective date for the form and rules of December 1, 2017.

The Committee suggests that, if the shortened schedule is approved, Rules 3015 and 3015.1 be published by themselves in July 2016. A separate publication would avoid creating confusion by having two different comment deadlines for the materials published in August.

The rules and official form approved by the Committee last fall would continue to be held in abeyance until the Committee takes final action on Rules 3015 and 3015.1. This would allow the entire chapter 13 plan package to be sent forward as a package.

(B2) *For publication in August 2016.*

The Committee recommends that the following rule amendments, new rule, official forms, and rules appendix be published for public comment in August 2016. The rules, forms, and appendix in this group appear in Appendix B2.

Action Item 5. Rule 5005(a)(2) (Electronic Filing and Signing). Rule 5005(a)(2) governs the filing of documents electronically in federal bankruptcy cases. Consistent with the Standing Committee's suggestion that the advisory committees work collaboratively on electronic filing and service issues, the Committee has been working with the Civil, Criminal, and Appellate Advisory Committees on matters relating to Rule 5005(a)(2). Coordination between the Civil and Bankruptcy Advisory Committees is particularly warranted because Bankruptcy Rule 7005 makes Civil Rule 5 applicable in adversary proceedings. Therefore, an amendment to Civil Rule 5(d)(3) automatically would apply in adversary proceedings unless the Committee amended Rule 7005 to provide otherwise. The bankruptcy rules, however, also address electronic filing in Rule 5005(a)(2). That rule largely tracks the language of current Civil Rule 5(d)(3). In order to make Rule 5005(a)(2) consistent with Rule 7005's incorporation of any amendments to Civil Rule 5(d)(3), the Committee would need to amend Rule 5005(a)(2) in a similar manner.

The Committee considered potential amendments to Rule 5005(a)(2) at its April 2015, October 2015, and its March 2016 meetings. The Committee reviewed the status of potential amendments to Civil Rule 5, and it examined the implications of those amendments for the bankruptcy rules. The Committee generally agreed that Rule 5005(a)(2) should be amended to the extent necessary to conform to Civil Rule 5, as made applicable to adversary proceedings by Rule 7005. The Committee also discussed in detail the proposed amendments to Civil Rule 5 and the variations on those electronic filing and service provisions being considered by the Criminal Advisory Committee with respect to Criminal Rule 49.

In light of the foregoing, the Committee unanimously approved amendments to Rule 5005(a)(2) that would be consistent, to the greatest extent possible, with the proposed amendments to Rule 5(d)(3). The variations between the proposed amendments to Rule 5005(a)(2) and Civil Rule 5(d)(3) relate primarily to different terminology used by the bankruptcy rules and the Bankruptcy Code.[2] The two rules are otherwise consistent. The Committee believes that it is prudent to submit Rule 5005(a)(2) for publication on the same timeline as that adopted for Civil Rule 5(d)(3). Accordingly, the Committee recommends that the Standing Committee approve the proposed amendments to Rule 5005(a)(2) for publication in August 2016, or at the same time that the amendments to Civil Rule 5(d)(3) are published. This recommendation includes any further non-material refinements to the proposed amendments necessary to conform to the Civil Rule published for comment.

Action Item 6. Proposed amendments to the bankruptcy appellate rules and forms to conform to pending and proposed amendments to the Federal Rules of Appellate Procedure ("FRAP"). Part VIII of the Bankruptcy Rules (Appeals) was completely revised in

[2] The civil rule uses the term "person," which under § 101(41) of the Bankruptcy Code includes an "individual, partnership, and corporation." Because only human beings may proceed without an attorney, the bankruptcy rule uses the term "individual" rather than "person." Where the civil rule refers to "a person proceeding with an attorney," the bankruptcy rule uses the term "entity," which under Code § 101(15) includes estates, trusts, governmental units, and United States trustees, as well as persons.

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2014 to conform as closely as possible to parallel FRAP provisions. Rather than incorporating FRAP provisions by reference, the Part VIII rules largely track the language of FRAP.

The Supreme Court recently approved and transmitted to Congress a set of FRAP amendments that will go into effect on December 1, 2016, unless Congress takes action to the contrary. With one exception, the Part VIII amendments included in this action item are being proposed to bring the bankruptcy rules into conformity with relevant FRAP provisions that are being amended this year. Because there was no coordination between the two advisory committees at the time the FRAP amendments were proposed and published, the bankruptcy amendments will lag behind the FRAP amendments by two years. One other amendment, discussed below, is being proposed to conform to a parallel FRAP provision that is being proposed for publication this summer. If approved, this bankruptcy rule amendment will be able to go into effect simultaneously with the parallel FRAP amendment.

A. <u>Rules 8002(c), 8011(a)(2)(C), and Official Form 417A</u> (inmate filing provisions). Bankruptcy Rules 8002(c) (Time for Filing Notice of Appeal) and 8011(a)(2)(C) (Filing and Service; Signature) include inmate-filing provisions that are virtually identical to the existing provisions in FRAP 4(c) and FRAP 25(a)(2)(C). These rules treat notices of appeal and other papers as timely filed by such inmates if the documents are deposited in the institution's internal mail system on or before the last day for filing and several other specified requirements are satisfied. The 2016 amendments to the FRAP rules are intended to clarify certain issues that have produced conflicts in the case law. They (1) make clear that prepayment of postage is required for an inmate to benefit from the inmate-filing provisions; (2) clarify that a document is timely filed if it is accompanied by evidence—a declaration, notarized statement, or other evidence such as postmark and date stamp—showing that the document was deposited on or before the due date and that postage was prepaid; and (3) clarify that if sufficient evidence does not accompany the initial filing, the court of appeals has discretion to permit the later filing of a declaration or notarized statement to establish timely deposit. Rules 8002(c) and 8011(a)(2)(C) would be similarly amended.

To implement the FRAP amendments, a new appellate form has been devised to provide a suggested form for an inmate declaration under Rules 4 and 25. For bankruptcy appeals, the Committee recommends that a similar form—Director's Form 4170 (Inmate Filer's Declaration)—be adopted for that purpose. As a Director's rather than official form, its use would not be mandatory, just as will be true for Appellate Form 7. In addition, the Committee proposes for publication an amendment to Official Form 417A (Notice of Appeal and Statement of Election), similar to the amendment to Appellate Forms 1 and 5, that will alert inmate filers to the existence of Director's Form 4170.

B. <u>Rule 8002(b)</u> (timeliness of tolling motions). Rule 8002(b) and its counterpart, FRAP 4(a)(4), set out a list of postjudgment motions that toll the time for filing an appeal. Under the current rules, the motion must be "timely file[d]" in order to have a tolling effect. The 2016 amendment to Rule 4(a)(4) resolves a circuit split on the question whether a tolling motion

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filed outside the time period specified by the relevant rule, but nevertheless ruled on by the district court, is timely filed for purposes of Rule 4(a)(4). Adopting the majority view on this issue, the pending amendment adds an explicit requirement that the motion must be filed within the time period specified by the rule under which it is made in order to have a tolling effect for the purpose of determining the deadline for filing a notice of appeal. The Committee proposes that a similar amendment to Rule 8002(b) be published for comment.

C. Rules 8013, 8015, 8016, 8022, Official Form 417C, and Part VIII Appendix (length limits). The 2016 amendments to FRAP 5, 21, 27, 35, and 40 convert the existing page limits to word limits for documents prepared using a computer. For documents prepared without the aid of a computer, the page limits currently set out in those rules would be retained. The pending amendments employ a conversion ratio of 260 words per page. The current ratio is 280 words per page.

The FRAP amendments also reduce the word limits of Rule 32 for briefs to reflect the 260 words-per-page ratio. The 14,000-word limit for a party's principal brief becomes a 13,000-word limit; the limit for a reply brief changes from 7,000 to 6,500 words. The 2016 amendments correspondingly reduce the word limits set by Rule 28.1 for cross-appeals.

Rule 32(f) sets out a uniform list of the items that can be excluded when computing a document's length. The local variation provision of Rule 32(e) highlights a court's authority (by order or local rule) to set length limits that exceed those in FRAP. Appellate Form 6 (Certificate of Compliance with Rule 32(a)) is amended to reflect the changed length limits. Finally, a new appendix collects all the FRAP length limits in one chart.

The Committee proposes for publication parallel amendments to Rules 8013(f) (Motions), 8015(a)(7) and (f) (Form and Length of Briefs), 8016(d) (Cross-Appeals), and 8022(b) (Motion for Rehearing), along with Official Form 417C (Certificate of Compliance with Rule 8015(a)(7)(B) or 8016(d)(2)). In addition, it approved for publication a proposed appendix to Part VIII, which is similar to the proposed FRAP appendix.

D. Rule 8017 (amicus filings). Rule 8017 is the bankruptcy counterpart to FRAP 29. The pending amendment to FRAP 29 provides a default rule concerning the timing and length of amicus briefs filed in connection with petitions for panel rehearing or rehearing en banc. The rule currently does not address the topic; it is limited to amicus briefs filed in connection with the original hearing of an appeal. The 2016 amendment would not require courts to accept amicus briefs regarding rehearing, but it would provide guidelines for such briefs that are permitted.

The Committee proposes for publication a parallel amendment to Rule 8017. The proposed amendment designates the existing rule as subdivision (a) and governs amicus briefs during a court's initial consideration of a case on the merits. It adds a new subdivision (b), which governs amicus briefs during a district court's or BAP's consideration of whether to grant rehearing. The latter subdivision could be overridden by a local rule or order in a case.

The Appellate Rules Advisory Committee is proposing for publication another amendment to FRAP 29(a). It would authorize a court of appeals to prohibit or strike the filing of an amicus brief to which the parties consented if the filing would result in the disqualification of a judge. The Committee proposes publication of a similar amendment to Rule 8017 in order to maintain consistency between the two sets of rules. This proposed amendment is reflected in the draft of proposed Rule 8017(a)(2) that is included in Appendix B2.

Action Item 7. Additional amendments to the bankruptcy appellate rules. In addition to the conforming amendments to Part VIII rules discussed in the previous action item, the Committee proposes for publication three additional bankruptcy appellate rule amendments and a new bankruptcy appellate rule in response to a suggestion and comments that the Committee has received. The Committee has held the proposed amendments in abeyance until they could be published as part of a package of bankruptcy appellate rule amendments.

A. Rule 8002(a) (separate document requirement). In response to the August 2012 publication of the proposed revision of the Part VIII rules, Chief Judge Christopher M. Klein (Bankr. E.D. Cal.), commented that it would be useful for Rule 8002 to have a provision similar to FRAP 4(a)(7), which addresses when a judgment or order is entered for purposes of Rule 4(a). He noted that the provision would help clarify timing issues presented by the separate-document requirement.

FRAP 4(a)(7) specifies when a judgment or order is entered for purposes of Rule 4(a) (Appeal in a Civil Case). It provides that, if Civil Rule 58(a) does not require a separate document, the judgment or order is entered when it is entered in the civil docket under Civil Rule 79(a). If Rule 58(a) does require a separate document, the judgment or order is entered when it is entered in the civil docket and either (1) the judgment or order is set forth on a separate document, or (2) 150 days have run from the entry in the civil docket, whichever occurs first. The rule was amended in 2002 to resolve several circuit splits that arose out of uncertainties about how Rule 4(a)(7)'s definition of when a judgment or order is "entered" interacted with the requirement in Civil Rule 58 that, to be "effective," a judgment must be set forth on a separate document.

The Bankruptcy Rules have adopted Civil Rule 58 and its separate document requirement only for adversary proceedings. Rule 7058 was added in 2009, making Civil Rule 58 applicable in adversary proceedings. At the same time, Rule 9021was amended to provide that a "judgment or order is effective when entered under Rule 5003 [Records Kept by the Clerk]." The latter rule applies to contested matters and does not require a separate document.

The Committee concluded that the rules specifying when a separate document is required and the impact of the requirement on the date of entry of the judgment are sufficiently confusing that, as suggested by Chief Judge Klein, Rule 8002 would likely be improved by adding a provision similar to FRAP 4(a)(7). It voted at the fall 2013 meeting to propose a new

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subdivision (a)(5) defining entry of judgment. If so amended, it would clarify that the time for filing a notice of appeal under subdivision (a) begins to run upon docket entry in contested matters and adversary proceedings for which Rule 58 does not require a separate document. In adversary proceedings for which Rule 58 does require a separate document, the time commences when the judgment, order, or decree is entered in the civil docket and (1) it is set forth on a separate document, or (2) 150 days have run from the entry in the civil docket, whichever occurs first.

B. <u>Rule 8006(c)</u> (court statement on merits of certification). The Committee proposes for publication another amendment suggested by Chief Judge Klein in response to the 2012 publication of the Part VIII amendments. Under 28 U.S.C. § 158(d)(2)(A), which is implemented by revised Rule 8006(c), all appellants and all appellees, acting jointly, may certify a proceeding for direct appeal to the court of appeals without any action being taken by the bankruptcy court, district court, or BAP. Chief Judge Klein suggested that a provision be added to Rule 8006(c) that would be a counterpart to Rule 8006(e)(2). The latter provision authorizes a party to file a short supplemental statement regarding the merits of certification within 14 days after the court certifies a case for direct appeal on its own motion. Chief Judge Klein suggested that the bankruptcy court should have a similar opportunity to comment when the parties certify the appeal.

At the fall 2013 meeting, the Committee concluded that the court of appeals would likely benefit from the court's statement about whether the appeal satisfies one of the grounds for certification. The Committee decided, however, that authorization should not be limited to the bankruptcy court. Because under Rule 8006(b) the matter might be deemed to be pending in the district court or BAP at the time or shortly after the parties file the certification, those courts should also be authorized to file a statement with respect to appeals pending before them. The authorization would be permissive, however, so a court would not be required to file a statement. A new subdivision (c)(2) would authorize such supplemental statements by the court.

C. <u>New Rule 8018.1</u> (district court review of a judgment that the bankruptcy court lacked constitutional authority to enter). The proposed rule would authorize a district court to treat a bankruptcy court's judgment as proposed findings of fact and conclusions of law if the district court determined that the bankruptcy court lacked constitutional authority to enter a final judgment. This procedure is consistent with the Supreme Court's decision in *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014).

In response to *Stern v. Marshall*, 131 S. Ct. 2594 (2011), Professor Alan Resnick submitted Suggestion 12-BK-H, which proposed a rule amendment to address the situation in which an appeal is taken from a bankruptcy court judgment and the district court decides that the proceeding is one in which the bankruptcy court lacked constitutional authority to enter a final judgment. Adopting a procedure that some districts have authorized by local rule, the proposed rule would allow the district court to review the judgment as if the bankruptcy court had treated

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the proceeding as non-core under 28 U.S.C. § 157(c)(1).[3] This procedure would eliminate the need for a remand to the bankruptcy court for the entry of proposed findings and conclusions.

In *Arkison* the Supreme Court held that *Stern* claims can be treated as non-core under § 157(c)(1). The Court explained that "because these *Stern* claims fit comfortably within the category of claims governed by § 157(c)(1), the Bankruptcy Court would have been permitted to follow the procedures required by that provision, *i.e.*, to submit proposed findings of fact and conclusions of law to the District Court to be reviewed *de novo*." While the case before the Court "did not proceed in precisely that fashion," the Court nevertheless affirmed. *Id.* at 2174. It concluded that the petitioner had received the equivalent of the review it was entitled to—de novo review—because the district court had reviewed the bankruptcy court's entry of summary judgment de novo and had "conclude[ed] in a written opinion that there were no disputed issues of material fact and that the trustee was entitled to judgment as a matter of law." *Id.* at 2174.

The decision made clear that *Stern* claims do not fall within a statutory gap of being neither core nor non-core. Instead, once identified as *Stern* claims, they can be treated under the statutory provisions for non-core claims, as the proposed rule authorizes. Moreover, *Arkison* shows the Court's acceptance of a pragmatic approach to dealing with errors in the handling of *Stern* claims. Rather than reversing and remanding for the bankruptcy court to handle the proceeding as a non-core matter, it accepted the district court's review as being tantamount to review of a non-core proceeding. *See also Stern*, 131 S. Ct. at 2602 (noting without criticism that "[b]ecause the District Court concluded that Vickie's counterclaim was not core, the court determined that it was required to treat the Bankruptcy Court's judgment as 'proposed[,] rather than final,' and engage in an 'independent review' of the record").

The Committee discussed at the spring 2016 meeting whether to include provisions in the rule regarding the time for filing objections and responses to the bankruptcy court's proposed findings and conclusions and addressing whether parties could choose to rely on their appellate briefs instead. In the end, the Committee was persuaded by district judge members that the rule does not need to spell out procedural details for the conduct of the proceeding once the judge determines that the bankruptcy court judgment should be treated as proposed findings of fact and conclusions of law. The complexity of cases addressed by this rule will vary, and the rule should allow flexibility for the conduct of each case. The district judge, in consultation with the parties, can decide in a given case whether the appellate briefs suffice to present the issues for which de

[3] Section 157(c)(1) provides as follows:

> A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such a proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

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novo review is sought or whether they should be supplemented with specific objections and responses.

D. Rule 8023 (voluntary dismissal; cross-reference regarding settlements). The rule would be amended by adding a cross-reference to Rule 9019 (Compromise and Arbitration) to provide a reminder that when dismissal of an appeal is sought as the result of a settlement by the parties, Rule 9019 may require approval of the settlement by the bankruptcy court. The Committee proposes the amendment in response to a comment by the National Conference of Bankruptcy Judges and approved it for publication at the spring 2014 meeting.

The NCBJ stated that Rule 8023 fails to take into account that one of the parties to the appeal being voluntarily dismissed might be the bankruptcy trustee, who is required under Rule 9019 to obtain court approval of any compromise. The NCBJ raised the concern that, by its silence, Rule 8023 could be read as overriding Rule 9019.

The Committee noted that there is a division in the courts concerning a bankruptcy court's jurisdiction, without remand, to approve the settlement of a proceeding on appeal. It concluded, however, that this jurisdictional issue does not need to be resolved by the Committee or addressed in Rule 8023. A reminder in the rule of the possible need to comply with Rule 9019 would be helpful, whether or not parties seeking approval of the settlement of an appeal must first obtain a remand from the appellate court.

Action Item 8. Official Form 309F (Notice of Chapter 11 Bankruptcy Case (For Corporations and Partnerships)). Official Form 309F is used for providing notice to creditors in a chapter 11 corporate or partnership case of the case's commencement, the date of the meeting of creditors, the deadline for filing a proof of claim, the deadline for filing a complaint to determine the dischargeability of certain debts, and the existence of the automatic stay. Line 8 of the form relates to the "Exception to discharge deadline." It states that "You must start a judicial proceeding by filing a complaint if you want to have a debt excepted from discharge under 11 U.S.C. § 1141(d)(6)(A)." In response to a suggestion by Bankruptcy Judge Stuart Bernstein (S.D.N.Y.) pointing out that recent caselaw identifies ambiguities in the wording of the cited statutory provision that may render the instruction incorrect, the Committee proposes for publication an amendment to the instruction.

Section 1141(d) of the Bankruptcy Code governs the scope of the discharge in a chapter 11 case. It distinguishes between debtors that are individuals and other debtors, including corporations and partnerships. It excepts from the discharge of an individual debtor "any debt that is excepted from discharge under section 523." § 1141(d)(2). Those exceptions are not generally applicable, however, to chapter 11 debtors that are corporations or partnerships. Instead, as a general matter, those debtors are discharged from "any debt that arose before the date of [the] confirmation [of a plan]." § 1141(d)(1).

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In 2005 Congress added § 1141(d)(6), which does except some types of debts from the discharge of a chapter 11 corporate debtor. In addition to certain tax debts, the provision states that the confirmation of a corporate debtor's chapter 11 plan does not discharge the debtor

from any debt—

> (A) of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a) that is owed to a domestic governmental unit, or owed to a person as the result of an action filed under subchapter III of chapter 37 of title 31 or any similar state statute . . . .

The latter statutory reference is to the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq*.

The Bankruptcy Code provisions referred to in § 1141(d)(6)(A)—paragraphs (2)(A) and (2)(B) of § 523(a)—except from discharge debts for money, property, services, or credit obtained by false pretenses, false representations, or actual fraud, or obtained by the use of a materially false written statement about the debtor's financial condition that the creditor reasonably relied upon and that the debtor made with intent to defraud. Although on its face § 523 governs only the discharge of individual debtors, by virtue of § 1141(d)(6)(A), its coverage is partially extended to corporate debtors in chapter 11 cases.

Section 523(c)(1) provides special procedural rules applicable to debts of a kind specified in § 523(a)(2), (4), and (6). Generally, an action to determine the dischargeability of a debt may be brought at any time, even after the bankruptcy case has concluded. Rule 4007(b) provides that a "complaint other than under § 523(c) may be filed at any time." Section 523(c)(1), however, provides "the debtor shall be discharged from a debt of a kind specified paragraph (2), (4), or (6) unless, on request of the creditor to whom such debt is owed, the court determines such debt to be excepted from discharge" under one of the specified provisions. Rule 4007(c) implements this provision by requiring that "a complaint to determine the dischargeability of a debt under § 523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a)."

Recent caselaw demonstrates that § 1141(d)(6)(A) is ambiguous in at least two respects:

1. Whether the phrase "of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a)" applies both to debts owed to a domestic governmental unit and to debts "owed to a person as the result of an action filed under subchapter III of chapter 37 of title 31 or any similar state statute" or just to the former; and

2. Whether the procedure specified by § 523(c)(1) applies to a debt excepted from discharge by § 1141(d)(6)(A) because it is of a kind specified by § 523(a)(2)(A) or (B).

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The bankruptcy court in *United States ex rel. Minge v. Hawker Beechcraft Corp. (In re Hawker Beechcraft, Inc.)*, 493 B.R. 696 (Bankr. S.D.N.Y. 2013), held that § 1141(d)(6)(A) covers the following types of debts: (1) debts owed to a domestic governmental unit that fall within § 523(a)(2)(A) or (B), and (2) debts owed to a person as the result of an FCA action. 493 B.R. at 710. Critical to the result in the case was the court's determination that the language—"specified in paragraph (2)(A) or (2)(B) of section 523(a)"—applies only to debts owed to domestic governmental units and not to debts owed to persons. If that interpretation is correct, the instruction in Form 309F is overbroad. Only creditors holding debts owed to a domestic governmental unit would be required to file a complaint seeking an exception to discharge under § 1141(d)(6)(A).

On appeal in the *Hawker Beechcraft* case, the district court agreed with the bankruptcy court's interpretation, but it went further and held that, even though one part of § 1141(d)(6)(A) incorporates by reference § 523(a)(2)(A) and (B), the provision does not incorporate § 523(c)(1), nor does that procedural provision apply on its own to the discharge of debts of a chapter 11 corporate debtor. 515 B.R. 416, 425-429 (S.D.N.Y. 2014). Thus, according to that reading, there is no time limit for seeking a determination of nondischargeability under either part of § 1141(d)(6)(A), and thus the entire explanatory sentence in Form 309F is incorrect.

Although the Committee acknowledged that § 1141(d)(6)(A) can also be read in a manner that is consistent with the form's instruction, it concluded at the fall 2014 meeting that the best course is to revise the statement in Form 309F so that it does not take a position on if or when the § 523(c) procedure applies to claims described by § 1141(d)(6)(A). That approach would allow further judicial development of the issue without retaining in the form a possibly incorrect statement of the law. It therefore proposes for publication an amendment to line 8 of the form that would read, "If § 523(c) applies to your claim and you seek to have it excepted from discharge, you must start a judicial proceeding by filing a complaint by the deadline stated below."

<u>Action Item 9</u>. Official Forms 25A, 25B, 25C, 26 (Small Business Debtor Forms and Periodic Report Regarding Value, Operations, and Profitability). As part of the Committee's Forms Modernization Project that began in 2008, the Committee deferred consideration of certain forms relating to chapter 11 cases—specifically, Forms 25A, B, and C, and Form 26. The Committee has now reviewed each of these forms extensively and, as explained further below, is recommending each form, as revised and renumbered, for publication in August 2016.

The small business debtor forms—Forms 25A, 25B, and 25C—are renumbered as Official Forms 425A, 425B, and 425C. Official Forms 425A and 425B set forth an illustrative form plan of reorganization and disclosure statement, respectively, for small business debtors under chapter 11 of the Bankruptcy Code. Official Form 425C is the monthly operating report for small business debtors, which must be filed with the court and served on the U.S. Trustee under section 1107(a) (which incorporates, among other things, section 704(a)(8)) of the

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Bankruptcy Code. The revised forms incorporate stylistic and formatting changes to conform to the general structure of the modernized forms. The Committee believes that these changes make all three forms easier to read and use.

In addition, in reviewing the forms, the Committee identified several places where Official Forms 425A and 425B were inconsistent with the Bankruptcy Code or required additional information to explain fully the debtor's disclosure obligations. For example, Official Form 425A, the plan of reorganization, now provides for separate classification of priority claims that must be classified under the plan and non-priority general unsecured claims. It also clarifies treatment options for executory contracts and unexpired leases and the timing and kinds of discharges available in the small business chapter 11 case. The Committee made parallel changes to Official Form 425B, the disclosure statement, in each appropriate place. The Committee Notes to Official Forms 425A and 425B identify and explain these and the other substantive changes made and recommended by the Committee. They also explicitly state that the plan of reorganization and the disclosure statement set forth in each form are sample documents and not required forms in small business cases.

The Committee's working group sought and received significant input from the Executive Office for U.S. Trustees on Official Form 425C, which is the monthly operating report that small business debtors must file with the court and serve on the U.S. Trustee. As explained in the Committee Note to Official Form 425C, the form is rearranged to eliminate duplicative sections and further explain the kinds of information required by the form. It also clarifies that the person completing the form on behalf of the debtor must answer all questions, unless otherwise provided, and it provides a checkbox to indicate if the report is an amended filing.

Form 26 (renumbered as Official Form 426) requires periodic disclosures by chapter 11 debtors concerning the value, operations, and profitability of entities in which they hold a substantial or controlling interest. The Judicial Conference promulgated Form 26 and related Bankruptcy Rule 2015.3 in response to section 419(a) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). Section 419(a) of BAPCPA, in turn, mandated that debtors in chapter 11 cases disclose certain information on the "value, operations, and profitability of any closely held corporation, partnership or of any other entity in which the debtor holds a substantial or controlling interest." Section 419(b) explains the section's purpose as "to assist parties in interest [in] taking steps to ensure that the debtor's interest in any [controlled entity] … is used for the payment of allowed claims against the debtor."

In reviewing Form 26, the Committee determined that certain changes would help to clarify the information requested by the form in connection with Rule 2015.3. These changes involve better defining the nondebtor entities for which a debtor must provide information, as well as modifying the exhibits that describe the kinds of information that a debtor must disclose. The Committee Note to Official Form 426 explains the scope of each exhibit and the justifications for the kinds of information requested by each exhibit.

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The modified exhibits to Official Form 426 eliminate the requirement that the debtor provide a valuation estimate for the nondebtor entity. In lieu of a valuation, the modified exhibits focus on the information required by existing Exhibit B (retitled as Exhibit A)—i.e., the nondebtor entity's most recent balance sheet, income statement, cash flow statement, and statement of changes in shareholders' or partners' equity (and a summary of the footnotes to those financial statements). The revised form does not change the information concerning the nondebtor entity's business description in current Exhibit C, except to require that information in retitled Exhibit B. The revised form then adds new Exhibits C, D, and E. These new exhibits focus on intercompany claims, tax allocations, and the payment of claims or administrative expenses that would otherwise have been payable by a debtor.

The Committee unanimously approved Official Forms 425A, 425B, 425C, and 426, finding that the forms conform to the formatting and the underlying objectives of the Forms Modernization Project, including to make the forms more understandable and easier to use. Accordingly, the Committee recommends that the Standing Committee approve Official Forms 425A, 425B, 425C, and 426 for publication in August 2016.

III. Information Items

A. Status of proposed amendment to Rule 9037 to address redaction of previously filed documents. As reported at the January meeting, the Committee on Court Administration and Case Management ("CACM") submitted a suggestion (14-BK-B) to the Committee regarding the procedure for redacting personal identifiers in documents that have already been filed in bankruptcy cases. It suggested that Rule 9037 (Privacy Protection for Filings Made with the Court) be amended to require that notice be given to affected individuals of a request to redact a previously filed document. This amendment would reflect the Judicial Conference's recent addition of § 325.70 to the *Guide to Judiciary Policy*, Vol. 10 (Public Access and Records), which states in part that "the court should require the . . . party [requesting redaction] to promptly serve the request on the debtor, any individual whose personal identifiers have been exposed, the case trustee (if any), and the U.S. trustee (or bankruptcy administrator where applicable)."

The Committee began its consideration of this suggestion in 2014, and its research included a survey of bankruptcy clerks' offices to determine how these matters are currently being handled. The survey revealed a variety of procedures regarding how redaction is sought, how unredacted information is protected, and whether and when individuals affected by the request for redaction are given notice.

At the spring meeting, the Committee approved for publication, at an appropriate time, a proposed amendment to Rule 9037 that would add a new subdivision (h) to the rule to provide a procedure for redacting personal identifiers in documents that were previously filed without complying with the rule's redaction requirements. The Committee approved a procedure that would restrict access to the motion and the unredacted document in order to prevent the filing of

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the motion from highlighting the existence of the unredacted document on file. The Committee concluded that the rule itself should not specify the precise technological methods to be used, since they will likely evolve over time.

The Committee was made aware of the existence of commercial services that maintain and make available to subscribers parallel dockets for all the bankruptcy courts. The existence of these dockets outside the control of the courts means that an unredacted document can continue to be accessible despite a belated redaction and the court's restriction of access to the unredacted document in the court's files. The Committee concluded that resolution of this problem is outside the scope of rulemaking authority and that the proposed rule should address only documents within the courts' control. Knowledge of the existence of these services, however, did lead the Committee to conclude that, following a successful motion to redact, access to the motion and the unredacted document should remain restricted. The Committee also recommends that CACM be made aware of the potential impact that these unofficial dockets have on the effectiveness of courts' belated redaction of filed documents.

After the Committee's report in January, it was suggested that because the advisory committees proposed the privacy rules, including Rule 9037, in a coordinated effort, an amendment to any one of them should be considered by all of the relevant advisory committee so that uniformity of the rules could be maintained to the extent possible. Accordingly, after the Committee approved the proposed amendment to Rule 9037 and the style consultants' suggestions were incorporated, the draft was shared with the reporters for the other advisory committees. The Civil Rules Committee discussed the possibility of a similar amendment to Rule 5.2 at its spring meeting. The reporters will continue to discuss wording and organization issues in an attempt to arrive at a uniform provision. Meanwhile, Professor Capra has inquired of Administrative Office staff whether there are technologies available or in development that would allow the immediate protection of unredacted information upon the filing of a motion to redact or that might even render a rule amendment unnecessary by immediately identifying the existence of unredacted information at the time of filing so that proper redaction could occur. Further inquiry into technological solutions will be pursued.

B. Decision to take no action on Suggestion 15-BK-E to amend Rule 4003(c) concerning burden of proof for objections to claimed exemptions. As the Committee reported to the Standing Committee at its January 2016 meeting, the Committee received, and has been evaluating, a suggestion from Chief Judge Christopher M. Klein, U.S. Bankruptcy Court for the Eastern District of California, to consider the amendment or elimination of Bankruptcy Rule 4003(c). Rule 4003(c) provides: "(c) Burden of Proof. In any hearing under this rule, the objecting party has the burden of proving that the exemptions are not properly claimed. After hearing on notice, the court shall determine the issues presented by the objections." The primary issue is the burden of proof in litigation involving a debtor's entitlement to a claimed exemption under section 522 of the Bankruptcy Code. Specifically, the suggestion posits that the language of Rule 4003(c), which places the burden of proof on the

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party objecting to the claimed exemption, alters the substantive rights of the parties in violation of the Rules Enabling Act.

The Committee first considered Suggestion 15-BK-E at its October 2015 meeting. At that time, the Committee determined that additional research and further deliberations would assist in its assessment of the suggestion. The Assistant Reporter provided a supplemental research memorandum, and the Committee again considered the suggestion at its March 2016 meeting. As explained further below, the Committee has determined to take no action on Suggestion 15-BK-E at this time.

Suggestion 15-BK-E posits that Rule 4003(c) violates the Rules Enabling Act because, under the Supreme Court's decision in *Raleigh v. Illinois Department of Revenue*, 530 U.S. 15 (2000), the burden of proof is a substantive part of a litigant's claim and therefore should be governed by applicable nonbankruptcy law in exemption litigation. Notably, Suggestion 15-BK-E differs from the claims litigation at issue in *Raleigh* in at least one significant way: Suggestion 15-BK-E involves a potential conflict between a federal rule and state law. The *Raleigh* decision did not involve a federal rule. This distinction required the Committee to consider the Supreme Court's jurisprudence on the Rules Enabling Act under *Hanna v. Plumer*, 380 U.S. 460 (1965), and its progeny; this jurisprudence underscores that a different analysis applies to conflicts involving federal rules and that the procedural-substantive determination may differ in the federal rules context (compared to, for example, an *Erie* choice of law context).

In accordance with *Hanna*, the Committee considered whether (i) the state law and federal rule conflict; (ii) the federal rule is within the scope of the Rules Enabling Act; and (iii) the federal rule under the Rules Enabling Act is constitutional, that is, within Congress's Article I power. *Hanna* articulated the standard for determining whether a federal rule is constitutional as whether the rule was "rationally capable" of being characterized as procedural. *Hanna*, 380 U.S. at 472. *Hanna* articulated the standard for determining whether a federal rule is within the scope of the Rules Enabling Act as "'whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.'" *Hanna*, 380 U.S. at 464 (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)).

The issue presented to the Committee was a difficult one. The *Hanna* test does not clearly define what is substantive or procedural for purposes of the Rules Enabling Act. Moreover, the Supreme Court's most recent decision on the Rules Enabling Act raises questions about the application of the *Hanna* test and whether the inquiry (i.e., procedural or substantive) focuses on the nature of the federal rule or, rather, the state law at issue. *See Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393 (2010).

In its deliberations, the Committee acknowledged Chief Judge Klein's thoughtful analysis of Rule 4003(c) and the *Raleigh* decision in *In re Tallerico*, 532 B.R. 774 (Bankr. E.D. Ca. 2015), but agreed that the Supreme Court's decision in *Hanna* required a broader analysis of

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the issues. The Committee found that the first and third elements of the *Hanna* test were satisfied in that Rule 4003(c) conflicted with at least California law and that Rule 4003(c) was rationally capable of being characterized as procedural for purposes of the Constitutional analysis. The Advisory Committee then turned to the second element of the *Hanna* test and examined the nature of the burden of proof not only under *Raleigh*, but also under *Hanna* and similar cases that endorse a different approach to the procedural-substantive determination.

Based on the supplemental research memorandum, the Committee recognized ways in which the burden of proof could be characterized as procedural in terms of governing "the judicial process for enforcing rights and duties recognized" by federal bankruptcy law.[4] Rule4003(c), as its predecessor Bankruptcy Rule 403(c), places the burden of proof on the party objecting to a claimed exemption, regardless of the identity of the objector. This approach aligns with the presumption in favor of a debtor's claimed exemptions under section 522(l) of the Bankruptcy Code, as well as the general process for scheduling, asserting, and preserving exemptions under section 522 of the Bankruptcy Code. In addition, a state's ability to opt out of the federal exemption scheme is only one part of the overarching exemption process in federal bankruptcy litigation—a process enacted by Congress under the Bankruptcy Clause of the U.S. Constitution. Accordingly, the Committee generally agreed that Rule 4003(c) could be characterized as really regulating procedure for purposes of *Hanna* and the Rules Enabling Act.

The Advisory Committee also discussed the history to Rule 4003(c) and the fact that the Committee previously analyzed its ability to promulgate a rule allocating the burden of proof in exemption litigation.[5] Specifically, when the Committee was overhauling the federal bankruptcy rules in connection with the adoption of the 1978 Bankruptcy Code, the Committee considered whether the federal bankruptcy rules could shift the burden of proof away from the moving party. This issue was raised, in part, because of a comment in the legislative history (a report from the House of Representatives) that the bankruptcy rules would not address burden of proof issues. Nevertheless, that same legislative history (as well as a subsequent report from the Senate) specifically noted that Congress intended the federal rules committee to promulgate a bankruptcy rule allocating the burden of proof in at least the claims litigation context. Notably, similar issues were raised in the context of former Bankruptcy Rule 403(c). The Committee found the long history of a federal bankruptcy rule allocating the burden of proof in exemption litigation—despite issues similar to those identified in Suggestion 15-BK-E being raised and considered—to be persuasive evidence of Rule 4003(c)'s presumptive validity.

The Committee also considered the impact of the Supreme Court's decision in *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393 (2010), and the apparent disagreement among the Justices concerning the Rules Enabling Act. It recognized and

[4] *See Sibbach*, 312 U.S. at 14.

[5] The supplemental research memorandum includes a detailed history of Rule 4003(c) and its predecessor, Bankruptcy Rule 403(c). It also explains the legislative history to section 522 of the Bankruptcy Code and the relationship between section 522 and Rule 4003(c).

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discussed the potential import of this uncertainty, as well as the fact that only a few bankruptcy courts in California have declared Rule 4003(c) invalid. Accordingly, in addition to generally agreeing that Rule 4003(c) satisfies the three-part test of *Hanna* and is presumptively valid, the Committee also determined that it would be premature to take any action on Rule 4003(c).

For all of the foregoing reasons, the Committee determined to take no action on Suggestion 15-BK-E at this time and to monitor case law developments concerning both Rule 4003(c) and the Rules Enabling Act more generally.

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TAB 7B

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APPENDIX A

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Appendix A

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

1 **Rule 1001. Scope of Rules and Forms; Short Title**

2 The Bankruptcy Rules and Forms govern procedure
3 in cases under title 11 of the United States Code. The rules
4 shall be cited as the Federal Rules of Bankruptcy Procedure
5 and the forms as the Official Bankruptcy Forms. These
6 rules shall be construed, administered, and employed by the
7 court and the parties to secure the just, speedy, and
8 inexpensive determination of every case and proceeding.

Committee Note

The last sentence of the rule is amended to incorporate the changes to Rule 1 F.R. Civ. P. made in 1993 and 2015.

The word "administered" is added to recognize the affirmative duty of the court to exercise the authority

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

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conferred by these rules to ensure that bankruptcy cases and the proceedings within them are resolved not only fairly, but also without undue cost or delay. As officers of the court, attorneys share this responsibility with the judge to whom the case is assigned.

The addition of the phrase "employed by the court and the parties" emphasizes that parties share in the duty of using the rules to secure the just, speedy, and inexpensive determination of every case and proceeding. Achievement of this goal depends upon cooperative and proportional use of procedure by lawyers and parties.

This amendment does not create a new or independent source of sanctions. Nor does it abridge the scope of any other of these rules.

Changes Made After Publication and Comment

None.

Summary of Public Comment

BK-2015-0004, submitted by Cheryl Siler, on behalf of Aderant. "We agree with the amendments as proposed."

BK-2015-0003, submitted by M.K. The comment concerns general drafting matters and questions the use of the word "should" in proposed rules.

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1 **Rule 1006. Filing Fee**

2 * * * * *

3 (b) PAYMENT OF FILING FEE IN

4 INSTALLMENTS.

5 (1) *Application to Pay Filing Fee in*

6 *Installments*. A voluntary petition by an individual

7 shall be accepted for filing, regardless of whether any

8 portion of the filing fee is paid, if accompanied by the

9 debtor's signed application, prepared as prescribed by

10 the appropriate Official Form, stating that the debtor

11 is unable to pay the filing fee except in installments.

12 * * * * *

Committee Note

Subdivision (b)(1) is amended to clarify that an individual debtor's voluntary petition, accompanied by an application to pay the filing fee in installments, must be accepted for filing, even if the court requires the initial installment to be paid at the time the petition is filed and the debtor fails to make that payment. Because the debtor's bankruptcy case is commenced upon the filing of the petition, dismissal of the case due to the debtor's failure to

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make the initial or a subsequent installment payment is governed by Rule 1017(b)(1).

Changes Made After Publication and Comment

None.

Summary of Public Comment

BK-2015-0004, submitted by Cheryl Siler, on behalf of Aderant. "We agree with the amendments as proposed."

BK-2015-0003, submitted by M.K. The comment concerns general drafting matters and questions the use of the word "should" in proposed rules.

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APPENDIX B1

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Appendix B1

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE[1]

For Publication for Public Comment

1 **Rule 3015. Filing, Objection to Confirmation, Effect of**
2 **Confirmation, and Modification of a Plan**
3 **in a Chapter 12 ~~Family Farmer's Debt~~**
4 **~~Adjustment~~ or a Chapter 13 ~~Individual's~~**
5 **~~Debt Adjustment~~ Case**

6 (a) FILING A CHAPTER 12 PLAN. The debtor
7 may file a chapter 12 plan with the petition. If a plan is not
8 filed with the petition, it shall be filed within the time
9 prescribed by § 1221 of the Code.

10 (b) FILING A CHAPTER 13 PLAN. The debtor
11 may file a chapter 13 plan with the petition. If a plan is not
12 filed with the petition, it shall be filed within 14 days
13 thereafter, and such time may not be further extended
14 except for cause shown and on notice as the court may
15 direct. If a case is converted to chapter 13, a plan shall be

[1] New material is underlined in red; matter to be omitted is lined through.

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16 filed within 14 days thereafter, and such time may not be
17 further extended except for cause shown and on notice as
18 the court may direct.

19 (c) ~~DATING. Every proposed plan and any~~
20 ~~modification thereof shall be dated.~~ FORM OF
21 CHAPTER 13 PLAN. If there is an Official Form for a
22 plan filed in a chapter 13 case, that form must be used
23 unless a Local Form has been adopted in compliance with
24 Rule 3015.1. With either the Official Form or a Local
25 Form, a nonstandard provision is effective only if it is
26 included in a section of the form designated for
27 nonstandard provisions and is also identified in accordance
28 with any other requirements of the form. As used in this
29 rule and the Official Form or a Local Form, "nonstandard
30 provision" means a provision not otherwise included in the
31 Official or Local Form or deviating from it.

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32 (d) NOTICE~~ AND COPIES~~. If the plan ~~The plan or~~
33 ~~a summary of the plan shall be~~is not included with the~~each~~
34 notice of the hearing on confirmation mailed under
35 ~~pursuant to~~ Rule 2002, the debtor shall serve the plan on
36 the trustee and all creditors when it is filed with the court.
37 ~~If required by the court, the debtor shall furnish a sufficient~~
38 ~~number of copies to enable the clerk to include a copy of~~
39 ~~the plan with the notice of the hearing.~~
40 (e) TRANSMISSION TO UNITED STATES
41 TRUSTEE. The clerk shall forthwith transmit to the
42 United States trustee a copy of the plan and any
43 modification thereof filed under~~pursuant to~~ subdivision (a)
44 or (b) of this rule.
45 (f) OBJECTION TO CONFIRMATION;
46 DETERMINATION OF GOOD FAITH IN THE
47 ABSENCE OF AN OBJECTION. An objection to

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48 confirmation of a plan shall be filed and served on the
49 debtor, the trustee, and any other entity designated by the
50 court, and shall be transmitted to the United States trustee,
51 ~~before confirmation of the plan~~ at least seven days before
52 the date set for the hearing on confirmation, unless the
53 court orders otherwise. An objection to confirmation is
54 governed by Rule 9014. If no objection is timely filed, the
55 court may determine that the plan has been proposed in
56 good faith and not by any means forbidden by law without
57 receiving evidence on such issues.
58 (g) EFFECT OF CONFIRMATION. Upon the
59 confirmation of a chapter 12 or chapter 13 plan:
60 (1) any determination in the plan made under
61 Rule 3012 about the amount of a secured claim is
62 binding on the holder of the claim, even if the holder
63 files a contrary proof of claim or the debtor schedules

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64 that claim, and regardless of whether an objection to
65 the claim has been filed; and
66 (2) any request in the plan to terminate the stay
67 imposed by § 362(a), § 1201(a), or § 1301(a) is
68 granted.
69 ~~(g)~~(h) MODIFICATION OF PLAN AFTER
70 CONFIRMATION. A request to modify a plan ~~pursuant to~~
71 under § 1229 or § 1329 of the Code shall identify the
72 proponent and shall be filed together with the proposed
73 modification. The clerk, or some other person as the court
74 may direct, shall give the debtor, the trustee, and all
75 creditors not less than 21 days' notice by mail of the time
76 fixed for filing objections and, if an objection is filed, the
77 hearing to consider the proposed modification, unless the
78 court orders otherwise with respect to creditors who are not
79 affected by the proposed modification. A copy of the

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80 notice shall be transmitted to the United States trustee. A
81 copy of the proposed modification, or a summary thereof,
82 shall be included with the notice. ~~If required by the court,~~
83 ~~the proponent shall furnish a sufficient number of copies of~~
84 ~~the proposed modification, or a summary thereof, to enable~~
85 ~~the clerk to include a copy with each notice.~~ Any objection
86 to the proposed modification shall be filed and served on
87 the debtor, the trustee, and any other entity designated by
88 the court, and shall be transmitted to the United States
89 trustee. An objection to a proposed modification is
90 governed by Rule 9014.

Committee Note

This rule is amended and reorganized.

Subdivision (c) is amended to require use of an Official Form if one is adopted for chapter 13 plans unless a Local Form has been adopted consistent with Rule 3015.1. Subdivision (c) also provides that nonstandard provisions in a chapter 13 plan must be set out in the section of the Official or Local Form specifically

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designated for such provisions and must be identified in the manner required by the Official or Local Form.

Subdivision (d) is amended to ensure that the trustee and creditors are served with the plan before confirmation. Service may be made either at the time the plan is filed or with the notice under Rule 2002 of the hearing to consider confirmation of the plan.

Subdivision (f) is amended to require service of an objection to confirmation at least seven days before the hearing to consider confirmation of a plan, unless the court orders otherwise.

Subdivision (g) is amended to set out two effects of confirmation. Subdivision (g)(1) provides that the amount of a secured claim under § 506(a) may be determined through a chapter 12 or chapter 13 plan in accordance with Rule 3012. That determination controls over a contrary proof of claim, without the need for a claim objection under Rule 3007, and over the schedule submitted by the debtor under § 521(a). The amount of a secured claim of a governmental unit, however, may not be determined through a chapter 12 or chapter 13 plan under Rule 3012. Subdivision (g)(2) provides for termination of the automatic stay under §§ 362, 1201, and 1301 as requested in the plan.

Subdivision (h) was formerly subdivision (g). It is redesignated and is amended to reflect that often the party proposing a plan modification is responsible for serving the proposed modification on other parties. The option to serve

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a summary of the proposed modification has been retained. Unless required by another rule, service under this subdivision does not need to be made in the manner provided for service of a summons and complaint by Rule 7004.

126-012844

1 **Rule 3015.1. Requirements for a Local Form for Plans**
2 **Filed in a Chapter 13 Case**

3 Notwithstanding Rule 9029(a)(1), a district may
4 require that a Local Form for a plan filed in a chapter 13
5 case be used instead of an Official Form adopted for that
6 purpose if the following conditions are satisfied:

7 (a) a single Local Form is adopted for the district
8 after public notice and an opportunity for public comment;

9 (b) each paragraph is numbered and labeled in
10 boldface type with a heading stating the general subject
11 matter of the paragraph;

12 (c) the Local Form includes an initial paragraph for
13 the debtor to indicate that the plan does or does not:

14 (1) contain any nonstandard provision;

15 (2) limit the amount of a secured claim based
16 on a valuation of the collateral for the claim; or

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17 (3) avoid a security interest or lien;

18 (d) the Local Form contains separate paragraphs

19 for:

20 (1) curing any default and maintaining

21 payments on a claim secured by the debtor's principal

22 residence;

23 (2) paying a domestic-support obligation;

24 (3) paying a claim described in the final

25 paragraph of § 1325(a) of the Bankruptcy Code; and

26 (4) surrendering property that secures a claim

27 with a request that the stay be terminated as to the

28 surrendered collateral; and

29 (e) the Local Form contains a final paragraph for:

30 (1) the placement of nonstandard provisions, as

31 defined in Rule 3015(c), along with a statement that

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32 any nonstandard provision placed elsewhere in the
33 plan is void; and
34 (2) certification by the debtor's attorney or by
35 an unrepresented debtor that the plan contains no
36 nonstandard provision other than those set out in the
37 final paragraph.

Committee Note

This rule is new. It sets out features required for all Local Forms for plans in chapter 13 cases. If a Local Form does not comply with this rule, it may not be used in lieu of the Official Chapter13 Plan Form. *See* Rule 3015(c).

Under the rule only one Local Form may be adopted in a district. The rule does not specify the method of adoption, but it does require that adoption of a Local Form be preceded by a public notice and comment period.

To promote consistency among Local Forms and clarity of content of chapter 13 plans, the rule prescribes several formatting and disclosure requirements. Paragraphs in such a form must be numbered and labeled in bold type, and the form must contain separate paragraphs for the cure and

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maintenance of home mortgages, payment of domestic support obligations, treatment of secured claims covered by the "hanging paragraph" of § 1325(a), and surrender of property securing a claim. Whether those portions of the Local Form are used in a given chapter 13 case will depend on the debtor's individual circumstances.

The rule requires that a Local Form begin with a paragraph for the debtor to call attention to the fact that the plan contains a nonstandard provision, limits the amount of a secured claim based on a valuation of the collateral, or avoids a lien. The last paragraph of a Local Form must be for the inclusion of any nonstandard provisions, as defined by Rule 3015(c), and must include a statement that nonstandard provisions placed elsewhere in the plan are void. The form must also require a certification by the debtor's attorney or unrepresented debtor that there are no nonstandard provisions other than those placed in the final paragraph.

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APPENDIX B2

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Appendix B2

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

For Publication for Public Comment

Rule 5005. Filing and Transmittal of Papers

(a) FILING.

* * * * *

(2) *Electronic Filing and Signing~~by Electronic Means~~.*

(A) *By a Represented Entity—Generally Required; Exceptions.*~~A court may by local rule permit or require documents to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes.~~ An entity represented by an attorney shall file electronically, unless nonelectronic

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

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14 filing is allowed by the court for good cause or is
15 allowed or required by local rule.~~A local rule~~
16 ~~may require filing by electronic means only if~~
17 ~~reasonable exceptions are allowed.~~
18 (B) *By an Unrepresented Individual—*
19 *When Allowed or Required.* An individual not
20 represented by an attorney:
21 (i) may file electronically only if
22 allowed by court order or by local rule; and
23 (ii) may be required to file
24 electronically only by court order, or by a
25 local rule that includes reasonable
26 exceptions.
27 (C) *Signing.* The user name and password
28 of an attorney of record, together with the
29 attorney's name on a signature block, serves as
30 the attorney's signature.

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31 (D) *Same as a Written Paper.* A paper
32 ~~document~~filed electronically~~by electronic means~~
33 ~~in compliance with a local rule constitutes~~ is a
34 written paper for ~~the~~purposes of ~~applying~~these
35 rules, the Federal Rules of Civil Procedure made
36 applicable by these rules, and § 107 of the Code.

* * * * *

Committee Note

Electronic filing has matured. Most districts have adopted local rules that require electronic filing, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts, except for filings made by an individual not represented by an attorney. But exceptions continue to be available. Paper filing must be allowed for good cause. And a local rule may allow or require paper filing for other reasons.

Filings by an individual not represented by an attorney are treated separately. It is not yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing. Encounters with the court's system may prove overwhelming to some. Attempts to work within the system may generate substantial burdens on a pro se party, on other parties, and on the court. Rather than mandate electronic filing, filing by pro se litigants is

12b-012853

left for governing by local rules or court order. Efficiently handled electronic filing works to the advantage of all parties and the court. Many courts now allow electronic filing by pro se litigants with the court's permission. Such approaches may expand with growing experience in these and other courts, along with the growing availability of the systems required for electronic filing and the increasing familiarity of most people with electronic communication.

The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.

12b-012854

1 **Rule 8002. Time for Filing a Notice of Appeal**

2 (a) IN GENERAL.

3 * * * * *

4 (5) *Entry Defined.*

5 (A) A judgment, order, or decree is

6 entered for purposes of this Rule 8002(a):

7 (i) when it is entered in the docket

8 under Rule 5003(a), or

9 (ii) if Rule 7058 applies and

10 Rule 58(a) F.R. Civ. P. requires a separate

11 document, when the judgment, order, or

12 decree is entered in the docket under Rule

13 5003(a) and when the earlier of these events

14 occurs:

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15 • the judgment, order, or
16 decree is set out in a separate
17 document; or
18 • 150 days have run from
19 entry of the judgment, order, or
20 decree in the docket under
21 Rule 5003(a).
22 (B) A failure to set out a judgment, order,
23 or decree in a separate document when required
24 by Rule 58(a) F.R. Civ. P. does not affect the
25 validity of an appeal from that judgment, order,
26 or decree.
27 * * * * *
28 (b) EFFECT OF A MOTION ON THE TIME TO
29 APPEAL.
30 (1) *In General*. If a party ~~timely~~ files in the
31 bankruptcy court any of the following motions and

12b-012856

32 does so within the time allowed by these rules, the
33 time to file an appeal runs for all parties from the
34 entry of the order disposing of the last such remaining
35 motion:

36 * * * * *

37 (c) APPEAL BY AN INMATE CONFINED IN AN
38 INSTITUTION.

39 (1) *In General*. If an institution has a system
40 designed for legal mail, an inmate confined there must
41 use that system to receive the benefit of this
42 Rule 8002(c)(1). If an inmate ~~confined in an~~
43 ~~institution~~ files a notice of appeal from a judgment,
44 order, or decree of a bankruptcy court, the notice is
45 timely if it is deposited in the institution's internal
46 mail system on or before the last day for filing~~. If the~~
47 ~~institution has a system designed for legal mail, the~~
48 ~~inmate must use that system to receive the benefit of~~

12b-012857

49 ~~this rule. Timely filing may be shown by a~~
50 ~~declaration in compliance with 28 U.S.C. § 1746 or by~~
51 ~~a notarized statement, either of which must set forth~~
52 ~~the date of deposit and state that first-class postage~~
53 ~~has been prepaid.~~ and:
54 (A) it is accompanied by:
55 (i) a declaration in compliance
56 with 28 U.S.C. § 1746—or a
57 notarized statement—setting out the
58 date of deposit and stating that first-
59 class postage is being prepaid; or
60 (ii) evidence (such as a
61 postmark or date stamp) showing
62 that the notice was so deposited and
63 that postage was prepaid; or
64 (B) the appellate court exercises its
65 discretion to permit the later filing of a

12b-012858

66 declaration or notarized statement that satisfies

67 Rule 8002(c)(1)(A)(i).

68 * * * * *

Committee Note

Clarifying amendments are made to subdivisions (a), (b), and (c) of the rule. They are modeled on parallel provisions of F.R. App. P. 4.

Paragraph (5) is added to subdivision (a) to clarify the effect of the separate-document requirement of F.R. Civ. P. 58(a) on the entry of a judgment, order, or decree for the purpose of determining the time for filing a notice of appeal.

Rule 7058 adopts F.R. Civ. P. Rule 58 for adversary proceedings. If Rule 58(a) requires a judgment to be set out in a separate document, the time for filing a notice of appeal runs—subject to subdivisions (b) and (c)—from when the judgment is docketed and the judgment is set out in a separate document or, if no separate document is prepared, from 150 days from when the judgment is entered in the docket. The court's failure to comply with the separate-document requirement of Rule 58(a), however, does not affect the validity of an appeal.

Rule 58 does not apply in contested matters. Instead, under Rule 9021, a separate document is not required, and a judgment or order is effective when it is entered in the docket. The time for filing a notice of appeal under

12-0012859

subdivision (a) therefore begins to run upon docket entry in contested matters, as well as in adversary proceedings for which Rule 58 does not require a separate document.

A clarifying amendment is made to subdivision (b)(1) to conform to a recent amendment to F.R. App. P. 4(a)(4)—from which Rule 8002(b)(1) is derived. Former Rule 8002(b)(1) provided that "[i]f a party timely files in the bankruptcy court" certain post-judgment motions, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." Responding to a circuit split concerning the meaning of "timely" in F.R. App. P. 4(a)(4), the amendment adopts the majority approach and rejects the approach taken in *National Ecological Foundation v. Alexander*, 496 F.3d 466 (6th Cir. 2007). A motion made after the time allowed by the Bankruptcy Rules will not qualify as a motion that, under Rule 8002(b)(1), re-starts the appeal time—and that fact is not altered by, for example, a court order that sets a due date that is later than permitted by the Bankruptcy Rules, another party's consent or failure to object to the motion's lateness, or the court's disposition of the motion without explicit reliance on untimeliness.

Subdivision (c)(1) is revised to conform to F.R. App. P. 4(c)(1), which was recently amended to streamline and clarify the operation of the inmate-filing rule. The rule requires the inmate to show timely deposit and prepayment of postage. It is amended to specify that a notice is timely if it is accompanied by a declaration or notarized statement stating the date the notice was deposited in the institution's mail system and attesting to the prepayment of first-class postage. The declaration must state that first-class postage

12b-012860

"is being prepaid," not (as directed by the former rule) that first-class postage "has been prepaid." This change reflects the fact that inmates may need to rely upon the institution to affix postage after the inmate has deposited the document in the institution's mail system. A new Director's Form sets out a suggested form of the declaration.

The amended rule also provides that a notice is timely without a declaration or notarized statement if other evidence accompanying the notice shows that the notice was deposited on or before the due date and that postage was prepaid. If the notice is not accompanied by evidence that establishes timely deposit and prepayment of postage, then the appellate court—district court, BAP, or court of appeals in the case of a direct appeal—has discretion to accept a declaration or notarized statement at a later date. The rule uses the phrase "exercises its discretion to permit"—rather than simply "permits"—to help ensure that pro se inmates are aware that a court will not necessarily forgive a failure to provide the declaration initially.

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126-012862

Rule 8006. Certifying a Direct Appeal to the Court of Appeals

* * * * *

(c) JOINT CERTIFICATION BY ALL APPELLANTS AND APPELLEES.

(1) *How Accomplished.* A joint certification by all the appellants and appellees under 28 U.S.C. § 158(d)(2)(A) must be made by using the appropriate Official Form. The parties may supplement the certification with a short statement of the basis for the certification, which may include the information listed in subdivision (f)(2).

(2) *Supplemental Statement by the Court.* Within 14 days after the parties' certification, the bankruptcy court or the court in which the matter is then pending may file a short supplemental statement about the merits of the certification.

126-012863

18 * * * * *

Committee Note

Subdivision (c) is amended to provide authority for the court to file a statement on the merits of a certification for direct review by the court of appeals when the certification is made jointly by all of the parties to the appeal. It is a counterpart to subdivision (e)(2), which allows a party to file a similar statement when the court certifies direct review on the court's own motion.

The bankruptcy court may file a supplemental statement within 14 days after the certification, even if the appeal is no longer pending before it according to subdivision (b). If the appeal is pending in the district court or BAP during that 14-day period, the appellate court is authorized to file a statement. In all cases, the filing of a statement by the court is discretionary.

12b-012864

Rule 8011. Filing and Service; Signature

(a) FILING.

* * * * *

(2) *Method and Timeliness.*

* * * * *

(C) *Inmate Filing*. If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 8011(a)(2)(C). A document filed by an inmate confined in an institution is timely if it is deposited in the institution's internal mail~~ing~~ system on or before the last day for filing~~. If the institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in~~

126-012865

17 ~~compliance with 28 U.S.C. § 1746 or by a~~
18 ~~notarized statement, either of which must set~~
19 ~~forth the date of deposit and state that first-class~~
20 ~~postage has been prepaid.~~ and:
21 (i) it is accompanied by:
22 • a declaration in compliance
23 with 28 U.S.C. § 1746—or a
24 notarized statement—setting out
25 the date of deposit and stating
26 that first-class postage is being
27 prepaid; or
28 • evidence (such as a
29 postmark or date stamp) showing
30 that the notice was so deposited
31 and that postage was prepaid; or
32 (ii) the appellate court exercises its
33 discretion to permit the later filing of a

12b-012866

34 declaration or notarized statement that

35 satisfies Rule 8011(a)(2)(C)(i).

36 * * * * *

Committee Note

Subdivision (a)(2)(C) is revised to conform to F.R. App. P. 25(a)(2)(C), which was recently amended to streamline and clarify the operation of the inmate-filing rule. The rule requires the inmate to show timely deposit and prepayment of postage. It is amended to specify that a notice is timely if it is accompanied by a declaration or notarized statement stating the date the notice was deposited in the institution's mail system and attesting to the prepayment of first-class postage. The declaration must state that first-class postage "is being prepaid," not (as directed by the former rule) that first-class postage "has been prepaid." This change reflects the fact that inmates may need to rely upon the institution to affix postage after the inmate has deposited the document in the institution's mail system. A new Director's Form sets out a suggested form of the declaration.

The amended rule also provides that a notice is timely without a declaration or notarized statement if other evidence accompanying the notice shows that the notice was deposited on or before the due date and that postage was prepaid. If the notice is not accompanied by evidence that establishes timely deposit and prepayment of postage, then the appellate court—district court, BAP, or court of appeals in the case of a direct appeal—has discretion to

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accept a declaration or notarized statement at a later date. The rule uses the phrase "exercises its discretion to permit"—rather than simply "permits"—to help ensure that pro se inmates are aware that a court will not necessarily forgive a failure to provide the declaration initially.

126-012868

Rule 8013. Motions; Intervention

* * * * *

(f) FORM OF DOCUMENTS; ~~PAGE~~LENGTH LIMITS; NUMBER OF COPIES.

* * * * *

(2) *Format of an Electronically Filed Document*. A motion, response, or reply filed electronically must comply with the requirements for a paper version regarding covers, line spacing, margins, typeface, and type style. It must also comply with the ~~page~~length limits under paragraph (3).

(3) *~~Page~~Length Limits*. ~~Unless the district court or BAP orders otherwise:~~Except by the district court's or BAP's permission, and excluding the accompanying documents authorized by subdivision (a)(2)(C):

12b-012869

17 (A) a motion or a response to a motion
18 must~~ not exceed 20 pages, exclusive of the~~
19 ~~corporate disclosure statement and~~
20 ~~accompanying documents authorized by~~
21 ~~subdivision (a)(2)(C)~~ produced using a computer
22 must include a certificate under Rule 8015(h)
23 and not exceed 5,200 words; ~~and~~
24 (B) ~~a reply to a response must not exceed~~
25 ~~10 pages.~~a handwritten or typewritten motion or
26 a response to a motion must not exceed 20
27 pages;
28 (C) a reply produced using a computer
29 must include a certificate under Rule 8015(h)
30 and not exceed 2,600 words; and
31 (D) a handwritten or typewritten reply
32 must not exceed 10 pages.
33 * * * * *

126-012870

Committee Note

Subdivision (f)(3) is amended to conform to F.R. App. P. 27(d)(2), which was recently amended to replace page limits with word limits for motions and responses produced using a computer. The word limits were derived from the current page limits, using the assumption that one page is equivalent to 260 words. Documents produced using a computer must include the certificate of compliance required by Rule 8015(h); Official Form 417C suffices to meet that requirement. Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the word limit and the page limit, the calculation excludes the accompanying documents required by Rule 8013(a)(2)(C) and any items listed in Rule 8015(h).

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126-012872

Rule 8015. Form and Length of Briefs; Form of Appendices and Other Papers

(a) PAPER COPIES OF A BRIEF. If a paper copy of a brief may or must be filed, the following provisions apply:

* * * * *

(7) *Length.*

(A) *Page limitation.* A principal brief must not exceed 30 pages, or a reply brief 15 pages, unless it complies with subparagraph (B) ~~and (C)~~.

(B) *Type-volume limitation.*

(i) A principal brief is acceptable if it contains a certificate under Rule 8015(h) and:

- ~~it~~ contains no more than ~~14,000~~ 13,000 words; or

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18 • ~~it~~ uses a monospaced face
19 and contains no more than 1,300 lines
20 of text.
21 (ii) A reply brief is acceptable if it
22 includes a certificate under Rule 8015(h)
23 and contains no more than half of the type
24 volume specified in item (i).
25 ~~(iii) Headings, footnotes, and~~
26 ~~quotations count toward the word and line~~
27 ~~limitations. The corporate disclosure~~
28 ~~statement, table of contents, table of~~
29 ~~citations, statement with respect to oral~~
30 ~~argument, any addendum containing~~
31 ~~statutes, rules, or regulations, and any~~
32 ~~certificates of counsel do not count toward~~
33 ~~the limitation.~~
34 ~~(C) *Certificate of Compliance.*~~

126-012874

35 ~~(i) A brief submitted under~~
36 ~~subdivision (a)(7)(B) must include a~~
37 ~~certificate signed by the attorney, or an~~
38 ~~unrepresented party, that the brief complies~~
39 ~~with the type-volume limitation. The person~~
40 ~~preparing the certificate may rely on the~~
41 ~~word or line count of the word-processing~~
42 ~~system used to prepare the brief. The~~
43 ~~certificate must state either:~~
44 ~~• the number of words in the~~
45 ~~brief; or~~
46 ~~• the number of lines of~~
47 ~~monospaced type in the brief.~~
48 ~~(ii) The certification requirement is~~
49 ~~satisfied by a certificate of compliance that~~
50 ~~conforms substantially to the appropriate~~
51 ~~Official Form.~~

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52 * * * * *

53 (f) LOCAL VARIATION. A district court or BAP
54 must accept documents that comply with the ~~applicable~~
55 form requirements of this rule and the length limits set by
56 Part VIII of these rules. By local rule or order in a
57 particular case, a district court or BAP may accept
58 documents that do not meet all ~~of~~the form requirements of
59 this rule or the length limits set by Part VIII of these rules.

60 (g) ITEMS EXCLUDED FROM LENGTH. In
61 computing any length limit, headings, footnotes, and
62 quotations count toward the limit, but the following items
63 do not:

64 • the cover page;
65 • a corporate disclosure statement;
66 • a table of contents;
67 • a table of citations;
68 • a statement regarding oral argument;

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69 • an addendum containing statutes, rules, or
70 regulations;
71 • certificates of counsel;
72 • the signature block;
73 • the proof of service; and
74 • any item specifically excluded by these
75 rules or by local rule.
76 (h) CERTIFICATE OF COMPLIANCE.
77 (1) *Briefs and Documents That Require a*
78 *Certificate*. A brief submitted under Rule 8016(d)(2),
79 8017(b)(4), or 8015(a)(7)(B)—and a document
80 submitted under Rule 8013(f)(3)(A), 8013(f)(3)(C), or
81 8022(b)(1)—must include a certificate by the
82 attorney, or an unrepresented party, that the document
83 complies with the type-volume limitation. The
84 individual preparing the certificate may rely on the
85 word or line count of the word-processing system

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86 used to prepare the document. The certificate must
87 state the number of words—or the number of lines of
88 monospaced type—in the document.
89 (2) *Acceptable Form.* The certificate
90 requirement is satisfied by a certificate of compliance
91 that conforms substantially to the appropriate Official
92 Form.

Committee Note

The rule is amended to conform to recent amendments to F.R. App. P. 32, which reduced the word limits generally allowed for briefs. When Rule 32(a)(7)(B)'s type-volume limits for briefs were adopted in 1998, the word limits were based on an estimate of 280 words per page. Amended F.R. App. P. 32 applies a conversion ratio of 260 words per page and reduces the word limits accordingly. Rule 8015(a)(7) adopts the same reduced word limits for briefs prepared by computer.

In a complex case, a party may need to file a brief that exceeds the type-volume limitations specified in these rules, such as to include unusually voluminous information explaining relevant background or legal provisions or to respond to multiple briefs by opposing parties or amici. The Committee expects that courts will accommodate those

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situations by granting leave to exceed the type-volume limitations as appropriate.

Subdivision (f) is amended to make clear a court's ability (by local rule or order in a case) to increase the length limits for briefs and other documents. Subdivision (f) already established this authority as to the length limits in Rule 8015(a)(7); the amendment makes clear that this authority extends to all length limits in Part VIII of the Bankruptcy Rules.

A new subdivision (g) is added to set out a global list of items excluded from length computations, and the list of exclusions in former subdivision (a)(7)(B)(iii) is deleted. The certificate-of-compliance provision formerly in subdivision (a)(7)(C) is relocated to a new subdivision (h) and now applies to filings under all type-volume limits (other than Rule 8014(f)'s word limit)—including the new word limits in Rules 8013, 8016, 8017, and 8022. Conforming amendments are made to Official Form 417C.

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Rule 8016. Cross-Appeals

* * * * *

(d) LENGTH.

(1) *Page Limitation*. Unless it complies with paragraph~~s~~ (2)~~ and (3)~~, the appellant's principal brief must not exceed 30 pages; the appellee's principal and response brief, 35 pages; the appellant's response and reply brief, 30 pages; and the appellee's reply brief, 15 pages.

(2) *Type-Volume Limitation*.

(A) The appellant's principal brief or the appellant's response and reply brief is acceptable if it includes a certificate under Rule 8015(h) and:

(i) ~~it~~ contains no more than ~~14,000~~ 13,000 words; or

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17 (ii) ~~it~~ uses a monospaced face and
18 contains no more than 1,300 lines of text.
19 (B) The appellee's principal and response
20 brief is acceptable if it includes a certificate
21 under Rule 8015(h) and:
22 (i) ~~it~~ contains no more than ~~16,500~~
23 15,300 words; or
24 (ii) ~~it~~ uses a monospaced face and
25 contains no more than 1,500 lines of text.
26 (C) The appellee's reply brief is
27 acceptable if it includes a certificate under
28 Rule 8015(h) and contains no more than half of
29 the type volume specified in subparagraph (A).
30 ~~(D) Headings, footnotes, and quotations~~
31 ~~count toward the word and line limitations. The~~
32 ~~corporate disclosure statement, table of contents,~~
33 ~~table of citations, statement with respect to oral~~

126-012882

34 ~~argument, any addendum containing statutes,~~
35 ~~rules, or regulations, and any certificates of~~
36 ~~counsel do not count toward the limitation.~~
37 ~~(3) *Certificate of Compliance*. A brief~~
38 ~~submitted either electronically or in paper form under~~
39 ~~paragraph (2) must comply with Rule 8015(a)(7)(C).~~
40 * * * * *

Committee Note

The rule is amended to conform to recent amendments to F.R. App. P. 28.1, which reduced the word limits generally allowed for briefs in cross-appeals. When Rule 28.1 was adopted in 2005, it modeled its type-volume limits on those set forth in F.R. App. P. 32(a)(7) for briefs in cases that did not involve a cross-appeal. At that time, Rule 32(a)(7)(B) set word limits based on an estimate of 280 words per page. Amended F.R. App. P. 32 and 28.1 apply a conversion ratio of 260 words per page and reduce the word limits accordingly. Rule 8016(d)(2) adopts the same reduced word limits.

In a complex case, a party may need to file a brief that exceeds the type-volume limitations specified in these rules, such as to include unusually voluminous information explaining relevant background or legal provisions or to respond to multiple briefs by opposing parties or amici.

126-012883

The Committee expects that courts will accommodate those situations by granting leave to exceed the type-volume limitations as appropriate.

Subdivision (d) is amended to refer to new Rule 8015(h) (which now contains the certificate-of-compliance provision formerly in Rule 8015(a)(7)(C)).

126-012884

1 **Rule 8017. Brief of an Amicus Curiae**

2 (a) DURING INITIAL CONSIDERATION OF A
3 CASE ON THE MERITS.

4 (1) *Applicability*. This Rule 8017(a) governs
5 amicus filings during a court's initial consideration of
6 a case on the merits.

7 (2) *When Permitted*. The United States or its
8 officer or agency or a state may file an amicus-curiae
9 brief without the consent of the parties or leave of
10 court. Any other amicus curiae may file a brief only
11 by leave of court or if the brief states that all parties
12 have consented to its filing, except that a district court
13 or BAP may strike or may prohibit the filing of an
14 amicus brief that would result in a judge's
15 disqualification. On its own motion, and with notice
16 to all parties to an appeal, the district court or BAP
17 may request a brief by an amicus curiae.

12b-012885

18 ~~(b)~~(3) *Motion for Leave to File*. The motion
19 must be accompanied by the proposed brief and state:
20 ~~(1)~~(A) the movant's interest; and
21 ~~(2)~~(B) the reason why an amicus brief is
22 desirable and why the matters asserted are
23 relevant to the disposition of the appeal.
24 ~~(c)~~(4) *Contents and Form*. An amicus brief
25 must comply with Rule 8015. In addition to the
26 requirements of Rule 8015, the cover must identify
27 the party or parties supported and indicate whether the
28 brief supports affirmance or reversal. If an amicus
29 curiae is a corporation, the brief must include a
30 disclosure statement like that required of parties by
31 Rule 8012. An amicus brief need not comply with
32 Rule 8014, but must include the following:
33 ~~(1)~~(A) a table of contents, with page
34 references;

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35 ~~(2)~~(B) a table of authorities—cases
36 (alphabetically arranged), statutes, and other
37 authorities—with references to the pages of the
38 brief where they are cited;
39 ~~(3)~~(C) a concise statement of the
40 identity of the amicus curiae, its interest in the
41 case, and the source of its authority to file;
42 ~~(4)~~(D) unless the amicus curiae is one
43 listed in the first sentence of subdivision (a)(2), a
44 statement that indicates whether:
45 ~~(A)~~(i) a party's counsel authored
46 the brief in whole or in part;
47 ~~(B)~~(ii) a party or a party's counsel
48 contributed money that was intended to fund
49 preparing or submitting the brief; and
50 ~~(C)~~(iii) a person—other than the
51 amicus curiae, its members, or its counsel—

12b-012887

52 contributed money that was intended to fund
53 preparing or submitting the brief and, if so,
54 identifies each such person;
55 ~~(5)~~(E) an argument, which may be
56 preceded by a summary and need not include a
57 statement of the applicable standard of review;
58 ~~(6)~~(F) a certificate of compliance, if
59 required by Rule 8015(a)(7)(C) or 8015(b).
60 ~~(d)~~(5) *Length.* Except by the district court's
61 or BAP's permission, an amicus brief must be no
62 more than one-half the maximum length authorized by
63 these rules for a party's principal brief. If the court
64 grants a party permission to file a longer brief, that
65 extension does not affect the length of an amicus
66 brief.
67 ~~(e)~~(6) *Time for Filing.* An amicus curiae
68 must file its brief, accompanied by a motion for filing

12b-012888

69 when necessary, no later than 7 days after the
70 principal brief of the party being supported is filed.
71 An amicus curiae that does not support either party
72 must file its brief no later than 7 days after the
73 appellant's principal brief is filed. The district court
74 or BAP may grant leave for later filing, specifying the
75 time within which an opposing party may answer.

76 ~~(f)~~(7) *Reply Brief*. Except by the district
77 court's or BAP's permission, an amicus curiae may
78 not file a reply brief.

79 ~~(g)~~(8) *Oral Argument*. An amicus curiae
80 may participate in oral argument only with the district
81 court's or BAP's permission.

82 (b) DURING CONSIDERATION OF WHETHER
83 TO GRANT REHEARING.

84 (1) *Applicability*. This Rule 8017(b) governs
85 amicus filings during a district court's or BAP's

12b-012889

86 consideration of whether to grant rehearing, unless a
87 local rule or order in a case provides otherwise.
88 (2) *When Permitted*. The United States or its
89 officer or agency or a state may file an amicus-curiae
90 brief without the consent of the parties or leave of
91 court. Any other amicus curiae may file a brief only
92 by leave of court.
93 (3) *Motion for Leave to File*. Rule 8017(a)(3)
94 applies to a motion for leave.
95 (4) *Contents, Form, and Length*.
96 Rule 8017(a)(4) applies to the amicus brief. The brief
97 must include a certificate under Rule 8015(h) and not
98 exceed 2,600 words.
99 (5) *Time for Filing*. An amicus curiae
100 supporting the motion for rehearing or supporting
101 neither party must file its brief, accompanied by a
102 motion for filing when necessary, no later than 7 days

126-012890

103 after the motion is filed. An amicus curiae opposing
104 the motion for rehearing must file its brief,
105 accompanied by a motion for filing when necessary,
106 no later than the date set by the court for the response.

Committee Note

Rule 8017 is amended to conform to the recent amendment to F.R. App. P. 29, which now addresses amicus filings in connection with petitions for rehearing. Former Rule 8017 is renumbered Rule 8017(a), and language is added to that subdivision (a) to state that its provisions apply to amicus filings during the district court's or BAP's initial consideration of a case on the merits. New subdivision (b) is added to address amicus filings in connection with a motion for rehearing. Subdivision (b) sets default rules that apply when a district court or BAP does not provide otherwise by local rule or by order in a case. A court remains free to adopt different rules governing whether amicus filings are permitted in connection with motions for rehearing, and governing the procedures when such filings are permitted.

The amendment to subdivision (a)(2) authorizes orders or local rules that prohibit the filing of an amicus brief by party consent if the brief would result in a judge's disqualification. The amendment does not alter or address the standards for when an amicus brief requires a judge's disqualification. It is modeled on an amendment to F.R. App. 29(a).

12b-012891

1 **Rule 8018.1. District-Court Review of a Judgment that**
2 **the Bankruptcy Court Lacked the**
3 **Constitutional Authority to Enter**

4 If, on appeal, a district court determines that the
5 bankruptcy court did not have the power under Article III
6 of the Constitution to enter the judgment, order, or decree
7 appealed from, the district court may treat it as proposed
8 findings of fact and conclusions of law.

Committee Note

This rule is new. It is added to prevent a district court from having to remand an appeal whenever it determines that the bankruptcy court lacked constitutional authority to enter the judgment, order, or decree appealed from. Consistent with the Supreme Court's decision in *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014), the district court in that situation may treat the bankruptcy court's judgment as proposed findings of fact and conclusions of law. Upon making the determination to proceed in that manner, the district court may choose to allow the parties to file written objections to specific proposed findings and conclusions and to respond to another party's objections, *see* Rule 9033; treat the parties' briefs as objections and responses; or prescribe other procedures for the review of the proposed findings of fact and conclusions of law.

126-012892

Rule 8022. Motion for Rehearing

* * * * *

(b) FORM OF MOTION; LENGTH. The motion must comply in form with Rule 8013(f)(1) and (2). Copies must be served and filed as provided by Rule 8011. ~~Unless the district court or BAP orders otherwise, a motion for rehearing must not exceed 15 pages.~~Except by the district court's or BAP's permission:

(1) a motion for rehearing produced using a computer must include a certificate under Rule 8015(h) and not exceed 3,900 words; and

(2) a handwritten or typewritten motion must not exceed 15 pages.

Committee Note

Subdivision (b) is amended to conform to the recent amendment to F.R. App. P. 40(b), which was one of several appellate rules in which word limits were substituted for page limits for documents prepared by computer. The

126-012893

word limits were derived from the previous page limits using the assumption that one page is equivalent to 260 words. Documents produced using a computer must include the certificate of compliance required by Rule 8015(h); completion of Official Form 417C suffices to meet that requirement.

Page limits are retained for papers prepared without the aid of a computer (i.e., handwritten or typewritten papers). For both the word limit and the page limit, the calculation excludes any items listed in Rule 8015(g).

125-012894

1 **Rule 8023. Voluntary Dismissal**

2 Subject to Rule 9019, ~~T~~the clerk of the district court
3 or BAP must dismiss an appeal if the parties file a signed
4 dismissal agreement specifying how costs are to be paid
5 and pay any fees that are due. An appeal may be dismissed
6 on the appellant's motion on terms agreed to by the parties
7 or fixed by the district court or BAP.

Committee Note

The rule is amended to provide a reminder that, when dismissal of an appeal is sought as the result of a settlement by the parties, Rule 9019 may require approval of the settlement by the bankruptcy court.

126-012895

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126-012896

Appendix:
Length Limits Stated in Part VIII of
the Federal Rules of Bankruptcy Procedure

This chart shows the length limits stated in Part VIII of the Federal Rules of Bankruptcy Procedure. Please bear in mind the following:

- In computing these limits, you can exclude the items listed in Rule 8015(g).
- If you are using a word limit or line limit (other than the word limit in Rule 8014(f)), you must include the certificate required by Rule 8015(h).
- If you are using a line limit, your document must be in monospaced typeface. A typeface is monofaced when each character occupies the same amount of horizontal space.
- For the limits in Rules 8013 and 8022:

  -- You must use the word limit if you produce your document on a computer; and

  -- You must use the page limit if you handwrite your document or type it on a typewriter.

	Rule	Document Type	Word Limit	Page Limit	Line Limit
Motions	8013(f)(3)	• Motion • Response to a motion	5,200	20	Not applicable
	8013(f)(3)	• Reply to a response to a motion	2,600	10	Not applicable
Parties' briefs (where no cross-appeal)	8015(a)(7)	• Principal brief	13,000	30	1,300
	8015(a)(7)	• Reply brief	6,500	15	650
Parties' briefs (where cross-appeal)	8016(d)	• Appellant's principal brief • Appellant's response and reply brief	13,000	30	1,300
	8016(d)	• Appellee's principal and response brief	15,300	35	1,500
	8016(d)	• Appellee's reply brief	6,500	15	650

12b-012897

	Rule	Document type	Word limit	Page limit	Line limit
Party's supplemental letter	8014(f)	• Letter citing supplemental authorities	350	Not applicable	Not applicable
Amicus briefs	8017(a)(5)	• Amicus brief during initial consideration of case on merits	One-half the length set by the Part VIII Rules for a party's principal brief	One-half the length set by the Part VIII Rules for a party's principal brief	One-half the length set by the Part VIII Rules for a party's principal brief
	8017(b)(4)	• Amicus brief during consideration of whether to grant rehearing	2,600	Not applicable	Not applicable
Motion for rehearing	8022(b)	• Motion for rehearing	3,900	15	Not applicable

125-012898

Information to identify the case:

Debtor _____ (Name) EIN __ __ - __ __ __ __ __ __ __

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number: _____

[Date case filed for chapter 11 _____ MM / DD / YYYY OR

[Date case filed in chapter _____ _____ MM / DD / YYYY

Date case converted to chapter 11 _____] MM / DD / YYYY

Official Form 309F (For Corporations or Partnerships)

Notice of Chapter 11 Bankruptcy Case

12/~~15~~17

For the debtor listed above, a case has been filed under chapter 11 of the Bankruptcy Code. An order for relief has been entered.

This notice has important information about the case for creditors, debtors, and trustees, including information about the meeting of creditors and deadlines. Read both pages carefully.

The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtor or the debtor's property. For example, while the stay is in effect, creditors cannot sue, assert a deficiency, repossess property, or otherwise try to collect from the debtor. Creditors cannot demand repayment from the debtor by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees.

Confirmation of a chapter 11 plan may result in a discharge of debt. A creditor who wants to have a particular debt excepted from discharge may be required to file a complaint in the bankruptcy clerk's office within the deadline specified in this notice. (See line 11 below for more information.)

To protect your rights, consult an attorney. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below or through PACER (Public Access to Court Electronic Records at www.pacer.gov).

The staff of the bankruptcy clerk's office cannot give legal advice.

Do not file this notice with any proof of claim or other filing in the case.

1. **Debtor's full name**		
2. **All other names used in the last 8 years**		
3. **Address**		
4. **Debtor's attorney** Name and address		Contact phone _____ Email _____
5. **Bankruptcy clerk's office** Documents in this case may be filed at this address. You may inspect all records filed in this case at this office or online at www.pacer.gov.		Hours open _____ Contact phone _____
6. **Meeting of creditors** The debtor's representative must attend the meeting to be questioned under oath. Creditors may attend, but are not required to do so.	_____ at _____ Date Time The meeting may be continued or adjourned to a later date. If so, the date will be on the court docket.	Location:

For more information, see page 2 ▶

7. Proof of claim deadline	**Deadline for filing proof of claim:**	[Not yet set. If a deadline is set, the court will send you another notice.] or [date, if set by the court)] A proof of claim is a signed statement describing a creditor's claim. A proof of claim form may be obtained at www.uscourts.gov or any bankruptcy clerk's office. Your claim will be allowed in the amount scheduled unless: ■ your claim is designated as *disputed*, *contingent*, or *unliquidated*; ■ you file a proof of claim in a different amount; or ■ you receive another notice. If your claim is not scheduled or if your claim is designated as *disputed*, *contingent*, or *unliquidated*, you must file a proof of claim or you might not be paid on your claim and you might be unable to vote on a plan. You may file a proof of claim even if your claim is scheduled. You may review the schedules at the bankruptcy clerk's office or online at www.pacer.gov. Secured creditors retain rights in their collateral regardless of whether they file a proof of claim. Filing a proof of claim submits a creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a proof of claim may surrender important nonmonetary rights, including the right to a jury trial.
8. Exception to discharge deadline The bankruptcy clerk's office must receive a complaint and any required filing fee by the following deadline.	~~You~~If § 523(c) applies to your claim and you seek to have it excepted from discharge, you must start a judicial proceeding by filing a complaint ~~if you want to have a debt excepted from discharge under 11 U.S.C. § 1141(d)(6)(A).~~by the deadline stated below. **Deadline for filing the complaint:** _____	
9. Creditors with a foreign address	If you are a creditor receiving notice mailed to a foreign address, you may file a motion asking the court to extend the deadlines in this notice. Consult an attorney familiar with United States bankruptcy law if you have any questions about your rights in this case.	
10. Filing a Chapter 11 bankruptcy case	Chapter 11 allows debtors to reorganize or liquidate according to a plan. A plan is not effective unless the court confirms it. You may receive a copy of the plan and a disclosure statement telling you about the plan, and you may have the opportunity to vote on the plan. You will receive notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. Unless a trustee is serving, the debtor will remain in possession of the property and may continue to operate its business.	
11. Discharge of debts	Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of your debt. See 11 U.S.C. § 1141(d). A discharge means that creditors may never try to collect the debt from the debtor except as provided in the plan. If you want to have a particular debt owed to you excepted from the discharge under 11 U.S.C. § 1141(d)(6)(A), you must start a judicial proceeding by filing a complaint and paying the filing fee in the bankruptcy clerk's office by the deadline.	

COMMITTEE NOTE

Official Form 309F (For Corporations or Partnerships), *Notice of Chapter 11 Bankruptcy Case*, is amended at Line 8. Line 8 previously stated that a creditor seeking to have a debt excepted from discharge under § 1141(d)(6)(A) must file a complaint by the stated deadline. That statement has been revised in light of ambiguities in § 1141(d)(6)(A) regarding its relationship with § 523. Specifically, the provision is unclear about whether not only a debt "owed to a domestic governmental unit" but also a debt "owed to a person as the result of an action filed under subchapter III of chapter 37 of title 31 or any similar State statute" must be of the type described by § 523(a)(2)(A) and (B). The provision is also unclear about whether the procedural requirements of § 523(c)(1) apply, given that § 1141(d)(6)(A) specifically refers to § 523(a) but not to § 523(c). Rather than take a position on the proper interpretation of § 1141(d)(6)(A), the form leaves to creditors the determination of whether § 523(c) applies to their claims, in which case they must commence a dischargeability proceeding by the Rule 4007(c) deadline that is stated on the form.

126-012901

[Caption as in Form 416A, 416B, or 416D, as appropriate]

NOTICE OF APPEAL AND STATEMENT OF ELECTION

Part 1: Identify the appellant(s)

1. Name(s) of appellant(s):
   _____

2. Position of appellant(s) in the adversary proceeding or bankruptcy case that is the subject of this appeal:

For appeals in an adversary proceeding.

- ❑ Plaintiff
- ❑ Defendant
- ❑ Other (describe) _____

For appeals in a bankruptcy case and not in an adversary proceeding.

- ❑ Debtor
- ❑ Creditor
- ❑ Trustee
- ❑ Other (describe) _____

Part 2: Identify the subject of this appeal

1. Describe the judgment, order, or decree appealed from: _____

2. State the date on which the judgment, order, or decree was entered: _____

Part 3: Identify the other parties to the appeal

List the names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their attorneys (attach additional pages if necessary):

1. Party: _____ Attorney: _____
   _____
   _____
   _____

2. Party: _____ Attorney: _____
   _____
   _____
   _____

Part 4: Optional election to have appeal heard by District Court (applicable only in certain districts)

If a Bankruptcy Appellate Panel is available in this judicial district, the Bankruptcy Appellate Panel will hear this appeal unless, pursuant to 28 U.S.C. § 158(c)(1), a party elects to have the appeal heard by the United States District Court. If an appellant filing this notice wishes to have the appeal heard by the United States District Court, check below. Do not check the box if the appellant wishes the Bankruptcy Appellate Panel to hear the appeal.

- ❑ Appellant(s) elect to have the appeal heard by the United States District Court rather than by the Bankruptcy Appellate Panel.

Part 5: Sign below

_____ Date: _____

Signature of attorney for appellant(s) (or appellant(s) if not represented by an attorney)

Name, address, and telephone number of attorney (or appellant(s) if not represented by an attorney):

_____
_____
_____
_____

Fee waiver notice: If appellant is a child support creditor or its representative and appellant has filed the form specified in § 304(g) of the Bankruptcy Reform Act of 1994, no fee is required.

[Note to inmate filers: *If you are an inmate filer in an institution and you seek the timing benefit of Fed. R. Bankr. P. 8002(c)(1), complete Director's Form 4710 (Declaration of Inmate Filing) and file that declaration along with the Notice of Appeal.]*

Committee Note

The form is amended to include a notice to inmate filers that Director's Form 4710 may be used to provide a declaration under Rule 8002(c)(1) regarding the mailing of a notice of appeal using an institution's legal mail system.

[This certification must be appended to your ~~brief~~ document if ~~the~~ its length ~~of your brief~~ is calculated by maximum number of words or lines of text rather than number of pages.]

Certificate of Compliance with Type-Volume Limit, Typeface Requirements, and Type-Style Requirements ~~Rule 8015(a)(7)(B) or 8016(d)(2)~~

1. This ~~brief~~ document complies with [the type-volume limit~~ation~~ of ~~Rule 8015(a)(7)(B) or 8016(d)(2) because:~~ Fed. R. Bankr. P. [*insert Rule citation; e.g.,8015(a)(7)(B)*]] [the word limit of Fed. R. Bankr. P. [*insert Rule citation; e.g., 8013(f)(3)(A)*]] because, excluding the parts of the document exempted by Fed. R. Bankr. P. 8015(g) [and [*insert applicable Rule citation, if any*]]:

- ❑ this ~~brief~~ document contains [*state the number of*] words, ~~excluding the parts of the brief exempted by Rule 8015(a)(7)(B)(iii) or 8016(d)(2)(D),~~ **or**

- ❑ this brief uses a monospaced typeface ~~having no more than 10½ characters per inch~~ and contains [*state the number of*] lines of text~~, excluding the parts of the brief exempted by Rule 8015(a)(7)(B)(iii) or 8016(d)(2)(D)~~.

2. This document complies with the typeface requirements of Fed. R. Bankr. P. 8015(a)(5) and the type-style requirements of Fed. R. Bankr. P. 8015(a)(6) because:

- ❑ this document has been prepared in a proportionally spaced typeface using [*state name and version of word-processing program*] in [*state font size and name of type style*], **or**

- ❑ this brief has been prepared in a monospaced typeface using [*state name and version of word-processing program*] with [*state number of characters per inch and name of type style*].

_____ Date: _____
Signature

Print name of person signing certificate of compliance:

_____

Committee Note

The form is amended to reflect changes in the length limits specified by Part VIII of the Bankruptcy Rules for appellate documents and the broadened requirement for a certificate of compliance under Rule 8015(h). The rule now requires certification of compliance with the type-volume or word limits for briefs filed under Rule 8015(a)(7)(b) 8016(d)(2), or 8017(b)(4), and documents filed under Rule 8013(f)(3)(A), 8013(f)(3)(C), or 8022(b)(1).

Fill in this information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the:_____ District of _____
(State)

Case number: _____

Official Form 425A

Plan of Reorganization for Small Business Under Chapter 11

12/17

[Name of Proponent]'s Plan of Reorganization, Dated [Insert Date]

Article 1: Summary

This Plan of Reorganization (the *Plan*) under chapter 11 of the Bankruptcy Code (the *Code*) proposes to pay creditors of [insert the name of the Debtor] (the *Debtor*) from [Specify sources of payment, such as an infusion of capital, loan proceeds, sale of assets, cash flow from operations, or future income].

This Plan provides for:

- [ ] classes of priority claims;
- [ ] classes of secured claims;
- [ ] classes of non-priority unsecured clams; and
- [ ] classes of equity security holders.

Non-priority unsecured creditors holding allowed claims will receive distributions, which the proponent of this Plan has valued at approximately [ ] cents on the dollar. This Plan also provides for the payment of administrative and priority claims.

All creditors and equity security holders should refer to Articles 3 through 6 of this Plan for information regarding the precise treatment of their claim. A disclosure statement that provides more detailed information regarding this Plan and the rights of creditors and equity security holders has been circulated with this Plan. **Your rights may be affected. You should read these papers carefully and discuss them with your attorney, if you have one. (If you do not have an attorney, you may wish to consult one.)**

Article 2: Classification of Claims and Interests

2.01 **Class 1** ..... All allowed claims entitled to priority under § 507(a) of the Code (except administrative expense claims under § 507(a)(2), ["gap" period claims in an involuntary case under § 507(a)(3),] and priority tax claims under § 507(a)(8)).

[Add classes of priority claims, if applicable]

2.02 **Class 2** ..... The claim of [ ], to the extent allowed as a secured claim under § 506 of the Code.

[Add other classes of secured creditors, if any. *Note*: Section 1129(a)(9)(D) of the Code provides that a secured tax claim which would otherwise meet the description of a priority tax claim under § 507(a)(8) of the Code is to be paid in the same manner and over the same period as prescribed in § 507(a)(8).]

2.03	**Class 3**	All non-priority unsecured claims allowed under § 502 of the Code. [Add other classes of unsecured claims, if any.]
2.04	**Class 4**	Equity interests of the Debtor. [If the Debtor is an individual, change this heading *to The interests of the individual Debtor in property of the estate*.]

Article 3: Treatment of Administrative Expense Claims, Priority Tax Claims, and Quarterly and Court Fees

3.01	**Unclassified claims**	Under section § 1123(a)(1), administrative expense claims, ["gap" period claims in an involuntary case allowed under § 502(f) of the Code,] and priority tax claims are not in classes.
3.02	**Administrative expense claims**	Each holder of an administrative expense claim allowed under § 503 of the Code, [and a "gap" claim in an involuntary case allowed under § 502(f) of the Code,] will be paid in full on the effective date of this Plan, in cash, or upon such other terms as may be agreed upon by the holder of the claim and the Debtor.
3.03	**Priority tax claims**	Each holder of a priority tax claim will be paid [Specify terms of treatment consistent with § 1129(a)(9)(C) of the Code].
3.04	**Statutory fees**	All fees required to be paid under 28 U.S.C. § 1930 that are owed on or before the effective date of this Plan have been paid or will be paid on the effective date.
3.05	**Prospective quarterly fees**	All quarterly fees required to be paid under 28 U.S.C. § 1930(a)(6) or (a)(7) will accrue and be timely paid until the case is closed, dismissed, or converted to another chapter of the Code.

Article 4: Treatment of Claims and Interests Under the Plan

4.01 **Claims and interests shall be treated as follows under this Plan:**

Class	Impairment	Treatment
Class 1 - **Priority claims** excluding those in Article 3	❑ Impaired ❑ Unimpaired	[Insert treatment of priority claims in this Class, including the form, amount and timing of distribution, if any. For example: "Class 1 is unimpaired by this Plan, and each holder of a Class 1 Priority Claim will be paid in full, in cash, upon the later of the effective date of this Plan, or the date on which such claim is allowed by a final non-appealable order. Except: _____."] [Add classes of priority claims if applicable]
Class 2 – **Secured claim** of [*Insert name of secured creditor*.]	❑ Impaired ❑ Unimpaired	[Insert treatment of secured claim in this Class, including the form, amount and timing of distribution, if any.] [Add classes of secured claims if applicable]
Class 3 – **Non-priority unsecured creditors**	❑ Impaired ❑ Unimpaired	[Insert treatment of unsecured creditors in this Class, including the form, amount and timing of distribution, if any.] [Add administrative convenience class if applicable]
Class 4 - **Equity security holders of the Debtor**	❑ Impaired ❑ Unimpaired	[Insert treatment of equity security holders in this Class, including the form, amount and timing of distribution, if any.]

Article 5: Allowance and Disallowance of Claims

5.01	**Disputed claim**	A *disputed claim* is a claim that has not been allowed or disallowed [by a final non-appealable order], and as to which either: (i) a proof of claim has been filed or deemed filed, and the Debtor or another party in interest has filed an objection; or (ii) no proof of claim has been filed, and the Debtor has scheduled such claim as disputed, contingent, or unliquidated.
5.02	**Delay of distribution on a disputed claim**	No distribution will be made on account of a disputed claim unless such claim is allowed [by a final non-appealable order].

5.03	**Settlement of disputed claims**	The Debtor will have the power and authority to settle and compromise a disputed claim with court approval and compliance with Rule 9019 of the Federal Rules of Bankruptcy Procedure.

Article 6: Provisions for Executory Contracts and Unexpired Leases

6.01	**Assumed executory contracts and unexpired leases**	(a) The Debtor assumes, and if applicable assigns, the following executory contracts and unexpired leases as of the effective date: [List assumed, or if applicable assigned, executory contracts and unexpired leases.]
		(b) Except for executory contracts and unexpired leases that have been assumed, and if applicable assigned, before the effective date or under section 6.01(a) of this Plan, or that are the subject of a pending motion to assume, and if applicable assign, the Debtor will be conclusively deemed to have rejected all executory contracts and unexpired leases as of the effective date. A proof of a claim arising from the rejection of an executory contract or unexpired lease under this section must be filed no later than [ ] days after the date of the order confirming this Plan.

Article 7: Means for Implementation of the Plan

[Insert here provisions regarding how the plan will be implemented as required under § 1123(a)(5) of the Code. For example, provisions may include those that set out how the plan will be funded, as well as who will be serving as directors, officers or voting trustees of the reorganized Debtor.]

Article 8: General Provisions

8.01	**Definitions and rules of construction**	The definitions and rules of construction set forth in §§ 101 and 102 of the Code shall apply when terms defined or construed in the Code are used in this Plan, and they are supplemented by the following definitions: [Insert additional definitions if necessary].
8.02	**Effective date**	The effective date of this Plan is the first business day following the date that is 14 days after the entry of the confirmation order. If, however, a stay of the confirmation order is in effect on that date, the effective date will be the first business day after the date on which the stay expires or is otherwise terminated.
8.03	**Severability**	If any provision in this Plan is determined to be unenforceable, the determination will in no way limit or affect the enforceability and operative effect of any other provision of this Plan.
8.04	**Binding effect**	The rights and obligations of any entity named or referred to in this Plan will be binding upon, and will inure to the benefit of the successors or assigns of such entity.
8.05	**Captions**	The headings contained in this Plan are for convenience of reference only and do not affect the meaning or interpretation of this Plan.
[8.06	**Controlling effect**	Unless a rule of law or procedure is supplied by federal law (including the Code or the Federal Rules of Bankruptcy Procedure), the laws of the State of [ ] govern this Plan and any agreements, documents, and instruments executed in connection with this Plan, except as otherwise provided in this Plan.]
[8.07	**Corporate governance**	[If the Debtor is a corporation include provisions required by § 1123(a)(6) of the Code.]

Article 9: Discharge

Check one box.

9.01 ☐ **Discharge if the Debtor is an individual and § 1141(d)(3) is not applicable.** Confirmation of this Plan does not discharge any debt provided for in this Plan until the court grants a discharge on completion of all payments under this Plan, or as otherwise provided in § 1141(d)(5) of the Code. The Debtor will not be discharged from any debt excepted from discharge under § 523 of the Code, except as provided in Rule 4007(c) of the Federal Rules of Bankruptcy Procedure.

☐ **Discharge if the Debtor is a partnership and § 1141(d)(3) is not applicable.** On the effective date of this Plan, the Debtor will be discharged from any debt that arose before confirmation of this Plan, to the extent specified in § 1141(d)(1)(A) of the Code. The Debtor will not be discharged from any debt imposed by this Plan.

☐ **Discharge if the Debtor is a corporation and § 1141(d)(3) is not applicable.** On the effective date of this Plan, the Debtor will be discharged from any debt that arose before confirmation of this Plan, to the extent specified in § 1141(d)(1)(A) of the Code, except that the Debtor will not be discharged of any debt:

(i) imposed by this Plan; or

(ii) to the extent provided in § 1141(d)(6).

☐ **No discharge if § 1141(d)(3) is applicable.** In accordance with § 1141(d)(3) of the Code, the Debtor will not receive any discharge of debt in this bankruptcy case.

Article 10: Other Provisions

[Insert other provisions, as applicable.]

Respectfully submitted,

By The Plan Proponent: _____

By Attorney for the Plan Proponent: _____

Committee Note

Official Form 425A, *Plan of Reorganization for Small Business Under Chapter 11*, replaces Official Form 25A, *Plan of Reorganization in Small Business Case Under Chapter 11*. It is revised as part of the Forms Modernization Project, making it easier to read, and includes formatting and stylistic changes throughout the form. It is intended to provide an illustrative format, rather than a specific prescription for the form's language or content of a plan in any particular case.

In Article 1, *Summary*, a category is added for priority claims that are required to be classified and provided for under the plan, and the category for "unsecured claims" is revised to provide for only "non-priority unsecured claims." Also, the value that the proponent estimates to be distributed to unsecured claims is revised to clarify that the estimate is limited to non-priority claims. The instruction to identify and briefly summarize priority and administrative claims that will not be paid on the effective date of the plan, to the extent permitted by the Bankruptcy Code, is eliminated because it is duplicative of the information requested in Articles 3 and 4.

In Article 2, *Classification of Claims and Interests*, section 2.01 is revised to clarify that the priority of claims is determined under section 507(a) of the Bankruptcy Code and to provide for the classification of priority claims where necessary and appropriate. *See* 11 U.S.C. § 1129(a)(9)(B). Section 2.03 is revised to clarify that Class 3 "unsecured claims" are limited to "non-priority unsecured claims."

In Article 3, *Treatment of Administrative Expense Claims, Priority Tax Claims, and Quarterly and Court Fees*, the title and categories of claims have been revised to include all unclassified administrative and priority claims and all fees payable under 28 U.S.C. § 1930 for which the Bankruptcy Code specifies the treatment under the plan. *See* 11 U.S.C. § 1129(a)(9), (12). In the title, the reference to "United States Trustee fees" is changed to "Quarterly and Court Fees" to include all of the fees payable under

28 U.S.C. § 1930. Also, section 3.04 is revised to include all statutory fees under 28 U.S.C. § 1930(a), and quarterly fees payable under 28 U.S.C. § 1930(a)(6) and (7) after the effective date of the plan are moved to a new section 3.05.

Article 4, *Treatment of Claims and Interests Under the Plan*, is revised to conform to the changes made in sections 2.01 and 2.03 of the plan to classify priority claims, if applicable, and to distinguish the non-priority unsecured claims.

In Article 6, *Provisions for Executory Contracts and Unexpired Leases*, references to the assumption of executory contracts and unexpired leases are expanded to include assignment, if applicable. Section 6.01 is revised to clarify that executory contracts and unexpired leases are assumed, and if applicable assigned, under section 6.01(a) and rejected under section 6.01(b) as of the effective date of the plan. Section 6.01(b) is revised to clarify that all executory contracts and unexpired leases that have been previously assumed, and if applicable assigned, or are the subject of a pending motion to assume, and if applicable assign, as of plan confirmation are also excluded from presumed rejection under the plan.

In Article 9, *Discharge*, the third option is revised to delete the reference to Rule 4007(c) and to clarify that corporations will not be discharged of debts to the extent specified in section 1141(d)(6) of the Bankruptcy Code.

Fill in this information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the:_____ District of _____
(State)

Case number: _____

Official Form 425B

Disclosure Statement for Small Business Under Chapter 11

12/17

[Name of Proponent]'s **Disclosure Statement, Dated** [Insert Date]

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I. Introduction

This is the disclosure statement (the *Disclosure Statement*) in the small business chapter 11 case of [_____] (the *Debtor*). This Disclosure Statement provides information about the Debtor and the Plan filed on [insert date] (the *Plan*) to help you decide how to vote.

A copy of the Plan is attached as *Exhibit A*. **Your rights may be affected**. You should read the Plan and this Disclosure Statement carefully. You may wish to consult an attorney about your rights and your treatment under the Plan.

The proposed distributions under the Plan are discussed at pages [___-___] of this Disclosure Statement. [General unsecured creditors are classified in Class [___], and will receive a distribution of [___] % of their allowed claims, to be distributed as follows [_____].]

A. Purpose of This Document

This Disclosure Statement describes:

- The Debtor and significant events during the bankruptcy case,
- How the Plan proposes to treat claims or equity interests of the type you hold (*i.e.*, what you will receive on your claim or equity interest if the plan is confirmed),
- Who can vote on or object to the Plan,
- What factors the Bankruptcy Court (the *Court*) will consider when deciding whether to confirm the Plan,
- Why [the proponent] believes the Plan is feasible, and how the treatment of your claim or equity interest under the Plan compares to what you would receive on your claim or equity interest in liquidation, and
- The effect of confirmation of the Plan.

Be sure to read the Plan as well as the Disclosure Statement. This Disclosure Statement describes the Plan, but it is the Plan itself that will, if confirmed, establish your rights.

B. Deadlines for Voting and Objecting; Date of Plan Confirmation Hearing

The Court has not yet confirmed the Plan described in this Disclosure Statement. A separate order has been entered setting the following information:

- Time and place of the hearing to [finally approve this disclosure statement and] confirm the plan,
- Deadline for voting to accept or reject the plan, and
- Deadline for objecting to the [**adequacy of disclosure and**] confirmation of the plan.

If you want additional information about the Plan or the voting procedure, you should contact [insert name and address of representative of plan proponent].

C. Disclaimer

The Court has [conditionally**] approved this Disclosure Statement as containing adequate information to enable parties affected by the Plan to make an informed judgment about its terms. The Court has not yet determined whether the Plan meets the legal requirements for confirmation, and the fact that the Court has approved this Disclosure Statement does not constitute an endorsement of the Plan by the Court, or a recommendation that it be accepted.**

II. Background

A. Description and History of the Debtor's Business

The Debtor is a [corporation, partnership, etc.]. Since [insert year operations commenced], the Debtor has been in the business of [_____]. [Describe the Debtor's business].

B. Insiders of the Debtor

[Insert a detailed list of the names of Debtor's insiders as defined in § 101(31) of the United States Bankruptcy Code (the Code) and their relationship to the Debtor.

For each insider, list all compensation paid by the Debtor or its affiliates to that person or entity during the 2 years prior to the commencement of the Debtor's bankruptcy case, as well as compensation paid during the pendency of this chapter 11 case.]

C. Management of the Debtor During the Bankruptcy

List the name and position of all current officers, directors, managing members, or other persons in control (collectively the *Management*) who will not have a position post-confirmation that you list in III D 2.

Name	Position

D. Events Leading to Chapter 11 Filing

[Describe the events that led to the commencement of the Debtor's bankruptcy case.]

E. Significant Events During the Bankruptcy Case

[Describe significant events during the Debtor's bankruptcy case:

- Describe any asset sales outside the ordinary course of business, Debtor in Possession financing, or cash collateral orders.
- Identify the professionals approved by the court.
- Describe any adversary proceedings that have been filed or other significant litigation that has occurred (including contested claim disallowance proceedings), and any other significant legal or administrative proceedings that are pending or have been pending during the case in a forum other than the Court.
- Describe any steps taken to improve operations and profitability of the Debtor.
- Describe other events as appropriate.]

F. Projected Recovery of Avoidable Transfers

Check one box.

☐ The Debtor does not intend to pursue preference, fraudulent conveyance, or other avoidance actions.

☐ The Debtor estimates that up to $[ ] may be realized from the recovery of fraudulent, preferential or other avoidable transfers. While the results of litigation cannot be predicted with certainty and it is possible that other causes of action may be identified, the following is a summary of the preference, fraudulent conveyance and other avoidance actions filed or expected to be filed in this case:

Transaction	Defendant	Amount Claimed

☐ The Debtor has not yet completed its investigation with regard to prepetition transactions. If you received a payment or other transfer within 90 days of the bankruptcy, or other transfer avoidable under the Code, the Debtor may seek to avoid such transfer.

G. Claims Objections

Except to the extent that a claim is already allowed pursuant to a final non-appealable order, the Debtor reserves the right to object to claims. Therefore, even if your claim is allowed for voting purposes, you may not be entitled to a distribution if an objection to your claim is later upheld. Disputed claims are treated in Article 5 of the Plan.

H. Current and Historical Financial Conditions

The identity and fair market value of the estate's assets are listed in *Exhibit B*. [Identify source and basis of valuation.]

The Debtor's most recent financial statements [if any] issued before bankruptcy, each of which was filed with the Court, are set forth in *Exhibit C*.

[The most recent post-petition operating report filed since the commencement of the Debtor's bankruptcy case is set

forth in *Exhibit D*.]

[A summary of the Debtor's periodic operating reports filed since the commencement of the Debtor's bankruptcy case is set forth in *Exhibit D*.]

III. Summary of the Plan of Reorganization and Treatment of Claims and Equity Interests

A. What Is the Purpose of the Plan of Reorganization?

As required by the Code, the Plan places claims and equity interests in various classes and describes the treatment each class will receive. The Plan also states whether each class of claims or equity interests is impaired or unimpaired. If the Plan is confirmed, your recovery will be limited to the amount provided by the Plan.

B. Unclassified Claims

Certain types of claims are automatically entitled to specific treatment under the Code. They are not considered impaired, and holders of such claims do not vote on the Plan. They may, however, object if, in their view, their treatment under the Plan does not comply with that required by the Code. Therefore, the Plan Proponent has *not* placed the following claims in any class:

1. Administrative expenses, involuntary gap claims, and quarterly and Court fees

Administrative expenses are costs or expenses of administering the Debtor's chapter 11 case which are allowed under § 503(b) of the Code. Administrative expenses include the value of any goods sold to the Debtor in the ordinary course of business and received within 20 days before the date of the bankruptcy petition, and compensation for services and reimbursement of expenses awarded by the court under § 330(a) of the Code. The Code requires that all administrative expenses be paid on the effective date of the Plan, unless a particular claimant agrees to a different treatment. Involuntary gap claims allowed under § 502(f) of the Code are entitled to the same treatment as administrative expense claims. The Code also requires that fees owed under section 1930 of title 28, including quarterly and court fees, have been paid or will be paid on the effective date of the Plan.

The following chart lists the Debtor's estimated administrative expenses, and quarterly and court fees, and their proposed treatment under the Plan:

Type	Estimated Amount Owed	Proposed Treatment
Administrative expenses		Paid in full on the effective date of the Plan, unless the holder of a particular claim has agreed to different treatment
Involuntary gap claims		Paid in full on the effective date of the Plan, unless the holder of a particular claim has agreed to different treatment
Statutory Court fees		Paid in full on the effective date of the Plan
Statutory quarterly fees		Paid in full on the effective date of the Plan
Total		

2. Priority tax claims

Priority tax claims are unsecured income, employment, and other taxes described by § 507(a)(8) of the Code. Unless the holder of such a § 507(a)(8) priority tax claim agrees otherwise, it must receive the present value of such claim pursuant to 11 U.S.C. § 511, in regular installments paid over a period not exceeding 5 years from the order of relief.

The following chart lists the Debtor's estimated § 507(a)(8) priority tax claims and their proposed treatment under the Plan:

Description (Name and type of tax)	**Estimated Amount Owed**	**Date of Assessment**	**Treatment**		
	$		Payment interval		
			[Monthly] payment	$	
			Begin date		
			End date		
			Interest rate		%
			Total payout amount	$	
	$		Payment interval		
			[Monthly] payment	$	
			Begin date		
			End date		
			Interest rate		%
			Total payout amount	$	

C. Classes of Claims and Equity Interests

The following are the classes set forth in the Plan, and the proposed treatment that they will receive under the Plan:

1. Classes of secured claims

Allowed Secured Claims are claims secured by property of the Debtor's bankruptcy estate (or that are subject to setoff) to the extent allowed as secured claims under § 506 of the Code. If the value of the collateral or setoffs securing the creditor's claim is less than the amount of the creditor's allowed claim, the deficiency will [be classified as a general unsecured claim].

The following chart lists all classes containing Debtor's secured prepetition claims and their proposed treatment under the Plan:

Class #	**Description**		**Insider?**	**Impairment?**	**Treatment**		
	Secured claim of: Name		❑ Yes ❑ No	❑ Impaired ❑ Unimpaired	[Monthly] payment	$	
	Collateral description				Payments begin		
	Allowed secured amount	$			Payments end		
	Priority of lien				[Balloon payment]		
	Principal owed				Interest rate		%
	Pre-pet. arrearage				Treatment of lien		
	Total claim	$			[Additional payment required to cure defaults]	$	
	Secured claim of:		❑ Yes	❑ Impaired	[Monthly] payment	$	

Name	❑ No ❑ Unimpaired		
Collateral description		Payment begin	
Allowed secured amount	$	Payments end	
Priority of lien		[Balloon payment]	
Principal owed		Interest rate	%
Pre-pet. arrearage		Treatment of lien	
Total claim	$	[Additional payment required to cure defaults]	$

2. Classes of priority unsecured claims

The Code requires that, with respect to a class of claims of a kind referred to in §§ 507(a)(1), (4), (5), (6), and (7), each holder of such a claim receive cash on the effective date of the Plan equal to the allowed amount of such claim, unless a particular claimant agrees to a different treatment or the class agrees to deferred cash payments.

The following chart lists all classes containing claims under §§ 507(a)(1), (4), (5), (6), and (7) of the Code and their proposed treatment under the Plan:

Class #	Description	Impairment?	Treatment
	Priority unsecured claim pursuant to section [insert] Total amount of claims $	❑ Impaired ❑ Unimpaired	
	Priority unsecured claim pursuant to section [insert] Total amount of claims $	❑ Impaired ❑ Unimpaired	

3. Classes of general unsecured claims

General unsecured claims are not secured by property of the estate and are not entitled to priority under § 507(a) of the Code. [Insert description of § 1122(b) convenience class if applicable.]

The following chart identifies the Plan's proposed treatment of classes ___ through ___, which contain general unsecured claims against the Debtor:

Class #	Description	Impairment?	Treatment
	[1122(b) Convenience Class]	❑ Impaired ❑ Unimpaired	[Insert proposed treatment, such as "Paid in full in cash on effective date of the Plan or when due under contract or applicable nonbankruptcy law"]
	General unsecured class	❑ Impaired ❑ Unimpaired	[Monthly] payment $ Payments begin Payments end [Balloon payment] $ Interest rate from [date] % Estimated percent of claim paid %

4. Classes of equity interest holders

Equity interest holders are parties who hold an ownership interest (*i.e.*, equity interest) in the Debtor. In a corporation, entities holding preferred or common stock are equity interest holders. In a partnership, equity interest holders include both general and limited partners. In a limited liability company (*LLC*), the equity interest holders are the members. Finally, with respect to an individual who is a debtor, the Debtor is the equity interest holder.

The following chart sets forth the Plan's proposed treatment of the classes of equity interest holders: [There may be more than one class of equity interests in, for example, a partnership case, or a case where the prepetition Debtor had issued multiple classes of stock.]

Class #	Description	Impairment?	Treatment
	Equity interest holders	❑ Impaired ❑ Unimpaired	

D. Means of Implementing the Plan

1. Source of payments

Payments and distributions under the Plan will be funded by the following:

[Describe the source of funds for payments under the Plan.]

2. Post-confirmation Management

The Post-Confirmation Management of the Debtor (including officers, directors, managing members, and other persons in control), and their compensation, shall be as follows:

Name	Position	Compensation

E. Risk Factors

The proposed Plan has the following risks:

[List all risk factors that might affect the Debtor's ability to make payments and other distributions required under the Plan.]

F. Executory Contracts and Unexpired Leases

The Plan in Article 6 lists all executory contracts and unexpired leases that the Debtor will assume, and if applicable assign, under the Plan. *Assumption* means that the Debtor has elected to continue to perform the obligations under such contracts and unexpired leases, and to cure defaults of the type that must be cured under the Code, if any. Article 6 also lists how the Debtor will cure and compensate the other party to such contract or lease for any such defaults.

If you object to the assumption, and if applicable the assignment, of your unexpired lease or executory contract under the Plan, the proposed cure of any defaults, the adequacy of assurance of performance, you must file and serve your objection to the Plan within the deadline for objecting to the confirmation of the Plan, unless the Court has set an earlier time.

All executory contracts and unexpired leases that are not listed in Article 6 or have not previously been assumed, and if applicable assigned, or are not the subject of a pending motion to assume, and if applicable assign, will be rejected under the Plan. Consult your adviser or attorney for more specific information about particular contracts or leases.

If you object to the rejection of your contract or lease, you must file and serve your objection to the Plan within the deadline for objecting to the confirmation of the Plan.

[The deadline for filing a Proof of Claim based on a claim arising from the rejection of a lease or contract is _____.

Any claim based on the rejection of a contract or lease will be barred if the proof of claim is not timely filed, unless the Court orders otherwise.]

G. Tax Consequences of Plan

Creditors and equity interest holders concerned with how the plan may affect their tax liability should consult with their own accountants, attorneys, and/or advisors.

The following are the anticipated tax consequences of the Plan: [List the following general consequences as a minimum:

(1) Tax consequences to the Debtor of the Plan;

(2) General tax consequences on creditors of any discharge, and the general tax consequences of receipt of plan consideration after confirmation.]

IV. Confirmation Requirements and Procedures

To be confirmable, the Plan must meet the requirements listed in §1129 of the Code. These include the requirements that:

— the Plan must be proposed in good faith;

— if a class of claims is impaired under the Plan, at least one impaired class of claims must accept the Plan, without counting votes of insiders;

— the Plan must distribute to each creditor and equity interest holder at least as much as the creditor or equity interest holder would receive in a chapter 7 liquidation case, unless the creditor or equity interest holder votes to accept the Plan; and

— the Plan must be feasible.

These requirements are not the only requirements listed in § 1129, and they are not the only requirements for confirmation.

A. Who May Vote or Object

Any party in interest may object to the confirmation of the Plan if the party believes that the requirements for confirmation are not met.

Many parties in interest, however, are not entitled to vote to accept or reject the Plan. A creditor or equity interest holder has a right to vote for or against the Plan only if that creditor or equity interest holder has a claim or equity interest that is both

(1) allowed or allowed for voting purposes and

(2) impaired.

In this case, the Plan Proponent believes that classes [ ] are impaired and that holders of claims in each of these classes are therefore entitled to vote to accept or reject the Plan. The Plan Proponent believes that classes [ ] are unimpaired and that holders of claims in each of these classes, therefore, do not have the right to vote to accept or reject the Plan.

1. What is an allowed claim or an allowed equity interest?

Only a creditor or equity interest holder with an allowed claim or an allowed equity interest has the right to vote on the Plan. Generally, a claim or equity interest is allowed if either

(1) the Debtor has scheduled the claim on the Debtor's schedules, unless the claim has been scheduled as disputed, contingent, or unliquidated, or

(2) the creditor has filed a proof of claim or equity interest, unless an objection has been filed to such proof of claim or equity interest.

When a claim or equity interest is not allowed, the creditor or equity interest holder holding the claim or equity interest cannot vote unless the Court, after notice and hearing, either overrules the objection or allows the claim or equity interest for voting purposes pursuant to Rule 3018(a) of the Federal Rules of Bankruptcy Procedure.

The deadline for filing a proof of claim in this case was [_____].

[If applicable – The deadline for filing objections to claims is [_____].]

2. What is an impaired claim or impaired equity interest?

As noted above, the holder of an allowed claim or equity interest has the right to vote only if it is in a

class that is *impaired* under the Plan. As provided in § 1124 of the Code, a class is considered *impaired* if the Plan alters the legal, equitable, or contractual rights of the members of that class.

3. Who is not entitled to vote

The holders of the following five types of claims and equity interests are *not* entitled to vote:

- holders of claims and equity interests that have been disallowed by an order of the Court;
- holders of other claims or equity interests that are not "allowed claims" or "allowed equity interests" (as discussed above), unless they have been "allowed" for voting purposes.
- holders of claims or equity interests in unimpaired classes;
- holders of claims entitled to priority pursuant to §§ 507(a)(2), (a)(3), and (a)(8) of the Code; and
- holders of claims or equity interests in classes that do not receive or retain any value under the Plan;
- administrative expenses.

Even if you are not entitled to vote on the plan, you have a right to object to the confirmation of the Plan [and to the adequacy of the Disclosure Statement].

4. Who can vote in more than one class

A creditor whose claim has been allowed in part as a secured claim and in part as an unsecured claim, or who otherwise hold claims in multiple classes, is entitled to accept or reject a Plan in each capacity, and should cast one ballot for each claim.

B. Votes Necessary to Confirm the Plan

If impaired classes exist, the Court cannot confirm the Plan unless:

(1) all impaired classes have voted to accept the Plan; or

(2) at least one impaired class of creditors has accepted the Plan without counting the votes of any insiders within that class, and the Plan is eligible to be confirmed by "cram down" of the non-accepting classes, as discussed later in Section B.2.

1. Votes necessary for a class to accept the plan

A class of claims accepts the Plan if both of the following occur:

(1) the holders of more than ½ of the allowed claims in the class, who vote, cast their votes to accept the Plan, and

(2) the holders of at least ⅔ in dollar amount of the allowed claims in the class, who vote, cast their votes to accept the Plan.

A class of equity interests accepts the Plan if the holders of at least ⅔ in amount of the allowed equity interests in the class, who vote, cast their votes to accept the Plan.

2. Treatment of non-accepting classes of secured claims, general unsecured claims, and interests

Even if one or more impaired classes reject the Plan, the Court may nonetheless confirm the Plan upon the request of the Plan proponent if the non-accepting classes are treated in the manner prescribed by § 1129(b) of the Code. A plan that binds non-accepting classes is commonly referred to as a *cram down* plan. The Code allows the Plan to bind non-accepting classes of claims or equity interests if it meets all the requirements for consensual confirmation except the voting requirements of § 1129(a)(8) of the Code, does not *discriminate unfairly*, and is *fair and equitable* toward each impaired class that has not voted to accept the Plan.

You should consult your own attorney if a *cram down* confirmation will affect your claim or equity interest, as

the variations on this general rule are numerous and complex.

C. Liquidation Analysis

To confirm the Plan, the Court must find that all creditors and equity interest holders who do not accept the Plan will receive at least as much under the Plan as such claim and equity interest holders would receive in a chapter 7 liquidation. A liquidation analysis is attached to this Disclosure Statement as *Exhibit E*.

D. Feasibility

The Court must find that confirmation of the Plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the Debtor or any successor to the Debtor, unless such liquidation or reorganization is proposed in the Plan.

1. Ability to initially fund plan

The Plan Proponent believes that the Debtor will have enough cash on hand on the effective date of the Plan to pay all the claims and expenses that are entitled to be paid on that date. Tables showing the amount of cash on hand on the effective date of the Plan, and the sources of that cash are attached to this disclosure statement as *Exhibit F*.

2. Ability to make future plan payments and operate without further reorganization

The Plan Proponent must also show that it will have enough cash over the life of the Plan to make the required Plan payments and operate the debtor's business.

The Plan Proponent has provided projected financial information. Those projections are listed in *Exhibit G*.

The Plan Proponent's financial projections show that the Debtor will have an aggregate annual average cash flow, after paying operating expenses and post-confirmation taxes, of $ _____.

The final Plan payment is expected to be paid on _____.

[Summarize the numerical projections, and highlight any assumptions that are not in accord with past experience. Explain why such assumptions should now be made.]

You should consult with your accountant or other financial advisor if you have any questions pertaining to these projections.

V. Effect of Confirmation of Plan

A. Discharge of Debtor

Check one box.

❑	**Discharge if the Debtor is an individual and 11 U.S.C. § 1141(d)(3) is not applicable.** Confirmation of the Plan does not discharge any debt provided for in the Plan until the court grants a discharge on completion of all payments under the Plan, or as otherwise provided in § 1141(d)(5) of the Code. Debtor will not be discharged from any debt excepted from discharge under § 523 of the Code, except as provided in Rule 4007(c) of the Federal Rules of Bankruptcy Procedure.
❑	**Discharge if the Debtor is a partnership and § 1141(d)(3) of the Code is not applicable.** On the effective date of the Plan, the Debtor shall be discharged from any debt that arose before confirmation of the Plan, subject to the occurrence of the effective date, to the extent specified in § 1141(d)(1)(A) of the Code. However, the Debtor shall not be discharged from any debt imposed by the Plan. After the effective date of the Plan your claims against the Debtor will be limited to the debts imposed by the Plan.
❑	**Discharge if the Debtor is a corporation and § 1141(d)(3) is not applicable.** On the effective date of the Plan, the Debtor shall be discharged from any debt that arose before confirmation of the Plan, subject to the occurrence of the effective date, to the extent specified in § 1141(d)(1)(A) of the Code, except that the Debtor shall not be discharged of any debt: (i) imposed by the Plan, or (ii) to the extent provided in 11 U.S.C. § 1141(d)(6).
❑	**No Discharge if § 1141(d)(3) is applicable.** In accordance with § 1141(d)(3) of the Code, the Debtor will not receive any discharge of debt in this bankruptcy case.

B. Modification of Plan

The Plan Proponent may modify the Plan at any time before confirmation of the Plan. However, the Court may require a new disclosure statement and/or re-voting on the Plan.

[**If the Debtor is not an individual, add the following**:

"The Plan Proponent may also seek to modify the Plan at any time after confirmation only if

(1) the Plan has not been substantially consummated and
(2) the Court authorizes the proposed modifications after notice and a hearing.]

[**If the Debtor is an individual, add the following:**

"Upon request of the Debtor, the United States trustee, or the holder of an allowed unsecured claim, the Plan may be modified at any time after confirmation of the Plan but before the completion of payments under the Plan, to

(1) increase or reduce the amount of payments under the Plan on claims of a particular class,
(2) extend or reduce the time period for such payments, or
(3) alter the amount of distribution to a creditor whose claim is provided for by the Plan to the extent necessary to take account of any payment of the claim made other than under the Plan.]

C. Final Decree

Once the estate has been fully administered, as provided in Rule 3022 of the Federal Rules of Bankruptcy Procedure, the Plan Proponent, or such other party as the Court shall designate in the Plan Confirmation Order, shall file a motion with the Court to obtain a final decree to close the case. Alternatively, the Court may enter such a final decree on its own motion.

VI. Other Plan Provisions

[Insert other provisions here, as necessary and appropriate.]

_____
[Signature of the Plan Proponent]

_____
[Signature of the Attorney for the Plan Proponent]

Exhibits

Exhibit A: Copy of Proposed Plan of Reorganization

Exhibit B: Identity and Value of Material Assets of Debtor

Exhibit C: Prepetition Financial Statements

(to be taken from those filed with the court)

Exhibit D: [Most Recently Filed Postpetition Operating Report]
[Summary of Postpetition Operating Reports]

Exhibit E: Liquidation Analysis

Plan Proponent's Estimated Liquidation Value of Assets

Assets			
a.	Cash on hand		$
b.	Accounts receivable		$
c.	Inventory		$
d.	Office furniture and equipment		$
e.	Machinery and equipment		$
f.	Automobiles		$
g.	Building and land		$
h.	Customer list		$
i.	Investment property (such as stocks, bonds or other financial assets)		$
j.	Lawsuits or other claims against third-parties		$
K	Other intangibles (such as avoiding powers actions)		$
Total Assets at Liquidation Value			$
Less:	Secured creditors' recoveries	–	$
Less:	Chapter 7 trustee fees and expenses	–	$
Less:	Chapter 11 administrative expenses	–	$
Less:	Priority claims, excluding administrative expense claims	–	$
[Less:	Debtor's claimed exemptions]	–	$
(1)	Balance for unsecured claims		$
(2)	Total dollar amount of unsecured claims		$
Percentage of claims which unsecured creditors would receive or retain in a chapter 7 liquidation:			%
Percentage of claims which unsecured creditors will receive or retain under the Plan:			% [Divide (1) by (2)]

Exhibit F: Cash on hand on the effective date of the Plan

Cash on hand on effective date of plan			$
Less:	Amount of administrative expenses payable on effective date of the Plan	–	$
Less:	Amount of statutory costs and charges	–	$
Less:	Amount of cure payments for executory contracts	–	$
Less:	Other Plan payments due on effective date of the Plan	–	$
Balance after paying these amounts			$

The sources of the cash Debtor will have on hand by the effective date of the Plan are estimated as follows:	
Cash in Debtor's bank account now	$
Net earnings between now and effective date of the Plan [State the basis for such projections]	$
Borrowing [Separately state terms of repayment]	$
Capital contributions	$
Other	$
Total (This number should match "cash on hand" figure noted above)	$

Exhibit G: Projections of Cash Flow for Post-Confirmation Period

Committee Note

Official Form 425B, *Disclosure Statement for Small Business Under Chapter 11*, replaces Official Form 25B, *Disclosure Statement in Small Business Case Under Chapter 11*. It is revised as part of the Forms Modernization Project, making it easier to read, and includes formatting and stylistic changes throughout the form. Where possible, the form parallels how businesses commonly keep their financial records. It is intended to provide an illustrative format for disclosure, rather than a specific prescription for the form's language or content.

Part I, *Introduction*, is revised to clarify that the disclosure statement is being provided for purposes of voting on the plan. The instructions that the recipient discuss the plan and disclosure statement with an attorney are revised to clarify that, if the recipient has an attorney, the recipient is not required to consult with the attorney, but may wish to consult with an attorney regardless of whether it has one.

Part I.B., *Deadlines for Voting and Objecting; Date of Plan Confirmation Hearing*, is revised to provide for the court's entry of a separate order setting time frames for hearings and deadlines, *see* Official Form 313, and to delete those dates from the form as redundant. Also, this part is revised to clarify that requests for additional information about the voting procedure, in addition to the plan, should be directed to the plan proponent's representative.

In Part I.C., *Disclaimer*, the instruction to provide the date by which an objection to final approval of the disclosure statement must be filed is eliminated as duplicative of the court's order required under Part I.B. Repetitive language indicating that the court's approval of the disclosure statement is not final is eliminated.

In Part II.C., *Management of the Debtor During the Bankruptcy*, the title is revised to eliminate the reference to the debtor's management before the bankruptcy, and the instruction is revised to limit the required disclosure to those current officers,

directors, managing members, and other persons in control who will not retain a position after confirmation. The instruction to provide information regarding the debtor's pre-petition management is deleted because similar information is required in the *Statement of Financial Affairs of Non-Individuals Filing for Bankruptcy*, Official Form 207. The instruction to provide information regarding the debtor's post-confirmation management is incorporated in Part III.D.2, *Post-confirmation Management*, of the form.

In Part III.B.1, *Administrative expenses, involuntary gap claims, and quarterly and Court fees*, the title and form are revised to clarify that the debtor must provide for the treatment of all fees and expenses owed under 28 U.S.C. § 1930, including quarterly fees and court fees. *See* 11 U.S.C. § 1129(a)(12). Also, the title and form are revised to include involuntary "gap" period claims in an involuntary case under section 502(f) of the Bankruptcy Code. *See* 11 U.S.C. §§ 507(a)(3), 1129(a)(9)(A). The reference to the provision governing the allowance of administrative expenses is corrected and changed from section 507(a) to 503(b) of the Bankruptcy Code. The example is revised to include compensation for services and reimbursement of expenses awarded by the court under section 330(a) of the Bankruptcy Code. The requirement that any agreement to pay professional fees and expenses and other unclassified administrative expenses on a date other than the effective date be in writing is deleted. *See* 11 U.S.C. § 1129(a)(9). The list is revised to include a single category of administrative expenses allowed under section 503(b) of the Bankruptcy Code, deleting as redundant the specific categories for reclamation claims under section 503(b)(9) and approved professional fees and expenses under section 503(b)(2), and to clarify that any holder of an allowed administrative expense claim may agree to payment other than in full on the effective date. *Id.*

Part III.B.2, *Priority tax claims*, is revised to include a reference to section 511 of the Bankruptcy Code governing the rate of interest on tax claims.

Part III.C.2, *Classes of priority unsecured claims*, is revised to comply with section 1129(a)(9)(B), including the addition that any particular claimant may agree to treatment other than cash

payment in full on the effective date and to clarify that any class may agree to deferred cash payments. *See* 11 U.S.C. § 1129(a)(9)(B).

Part III.D.2, *Post-confirmation Management*, is revised to comply with section 1129(a)(5) of the Bankruptcy Code.

Part III.F., *Executory Contracts and Unexpired Leases*, is revised to incorporate changes to Official Form 425A, *Plan of Reorganization for Small Business Under Chapter 11*. "Exhibit 5.1" is changed to "Article 6" of the plan. References to the assumption of executory contracts and unexpired leases are expanded to include assignment, if applicable, including the requirement that a party objecting to the assignment of an executory contract or unexpired lease under the plan must timely file and serve an objection to the plan. The form is revised to clarify that executory contracts and unexpired leases that have been previously assumed, and if applicable assigned, or are the subject of a pending motion to assume, and if applicable assign, as of plan confirmation are also excluded from presumed rejection under the plan.

In Part IV, *Confirmation Requirements and Procedures*, the introduction is revised to delete references to subsections (a) and (b) to clarify that a plan must satisfy all of the requirements of section 1129 of the Bankruptcy Code. Also, the form is revised to clarify that the requirement to obtain the acceptance of at least one impaired accepting class of claims, excluding any acceptance by an insider, applies only if the plan proposes to impair at least one class of claims. *See* 11 U.S.C. § 1129(a)(10).

In Part IV.B.1, *Votes necessary for a class to accept the plan*, the standards for confirmation in the event the plan has impaired classes have been corrected. *See* 11 U.S.C. § 1129(a)(8)(A), (10) and (b).

The title to Part IV.B.2, *Treatment of non-accepting classes of secured claims, general unsecured claims, and interests*, is revised for clarity to exclude priority claimants. *See* 11 U.S.C. § 1129(b). Also, the requirement that the proponent must request

confirmation pursuant to section 1129(b) of the Bankruptcy Code is added.

In Part IV.D.2, *Ability to make future plan payments and operate without further reorganization*, the requirement that the plan proponent show that the business will have sufficient cash flow to operate the business, in addition to making the required plan payments, is new. See 11 U.S.C. § 1129(a)(11).

In Part V.A., *Discharge of Debtor*, the third option is revised to delete the reference to Rule 4007(c) and to clarify that corporations will not be discharged of debts to the extent specified in section 1141(d)(6) of the Bankruptcy Code.

In the title to Exhibit G, *Projections of Cash Flow for Post-Confirmation Period*, the reference to "and Earnings" is deleted to ensure consistency given the disparate ways in which "earnings" can be interpreted.

Fill in this information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the:_____ District of _____
(State)

Case number: _____

❑ Check if this is an amended filing

Official Form 425C

Monthly Operating Report for Small Business Under Chapter 11

12/17

Month: _____ Date report filed: _____
MM / DD / YYYY

Line of business: _____ NAISC code: _____

In accordance with title 28, section 1746, of the United States Code, I declare under penalty of perjury that I have examined the following small business monthly operating report and the accompanying attachments and, to the best of my knowledge, these documents are true, correct, and complete.

Responsible party: _____

Original signature of responsible party _____

Printed name of responsible party _____

1. Questionnaire

Answer all questions on behalf of the debtor for the period covered by this report, unless otherwise indicated.

		Yes	No	N/A
	If you answer *No* to any of the questions in lines 1-9, attach an explanation and label it *Exhibit A*.			
1.	Did the business operate during the entire reporting period?	❑	❑	❑
2.	Do you plan to continue to operate the business next month?	❑	❑	❑
3.	Have you paid all of your bills on time?	❑	❑	❑
4.	Did you pay your employees on time?	❑	❑	❑
5.	Have you deposited all the receipts for your business into debtor in possession (DIP) accounts?	❑	❑	❑
6.	Have you timely filed your tax returns and paid all of your taxes?	❑	❑	❑
7.	Have you timely filed all other required government filings?	❑	❑	❑
8.	Are you current on your quarterly fee payments to the U.S. Trustee or Bankruptcy Administrator?	❑	❑	❑
9.	Have you timely paid all of your insurance premiums?	❑	❑	❑
	If you answer *Yes* to any of the questions in lines 10-18, attach an explanation and label it *Exhibit B*.			
10.	Do you have any bank accounts open other than the DIP accounts?	❑	❑	❑
11.	Have you sold any assets other than inventory?	❑	❑	❑
12.	Have you sold or transferred any assets or provided services to anyone related to the DIP in any way?	❑	❑	❑
13.	Did any insurance company cancel your policy?	❑	❑	❑
14.	Did you have any unusual or significant unanticipated expenses?	❑	❑	❑
15.	Have you borrowed money from anyone or has anyone made any payments on your behalf?	❑	❑	❑
16.	Has anyone made an investment in your business?	❑	❑	❑

17. Have you paid any bills you owed before you filed bankruptcy? ❑ ❑ ❑

18. Have you allowed any checks to clear the bank that were issued before you filed bankruptcy? ❑ ❑ ❑

2. Summary of Cash Activity for All Accounts

19. **Total opening balance of all accounts**

This amount must equal what you reported as the cash on hand at the end of the month in the previous month. If this is your first report, report the total cash on hand as of the date of the filing of this case. $ _____

20. **Total cash receipts**

Attach a listing of all cash received for the month and label it *Exhibit C*. Include all cash received even if you have not deposited it at the bank, collections on receivables, credit card deposits, cash received from other parties, or loans, gifts, or payments made by other parties on your behalf. Do not attach bank statements in lieu of *Exhibit C*.

Report the total from *Exhibit C* here. $ _____

21. **Total cash disbursements**

Attach a listing of all payments you made in the month and label it *Exhibit D*. List the date paid, payee, purpose, and amount. Include all cash payments, debit card transactions, checks issued even if they have not cleared the bank, outstanding checks issued before the bankruptcy was filed that were allowed to clear this month, and payments made by other parties on your behalf. Do not attach bank statements in lieu of *Exhibit D*.

Report the total from *Exhibit D* here. − $ _____

22. **Net cash flow**

Subtract line 21 from line 20 and report the result here.
This amount may be different from what you may have calculated as *net profit*. + $ _____

23. **Cash on hand at the end of the month**

Add line 22 + line 19. Report the result here.

Report this figure as the *cash on hand at the beginning of the month* on your next operating report. = $ _____

This amount may not match your bank account balance because you may have outstanding checks that have not cleared the bank or deposits in transit.

3. Unpaid Bills

Attach a list of all debts (including taxes) which you have incurred since the date you filed bankruptcy but have not paid. Label it *Exhibit E*. Include the date the debt was incurred, who is owed the money, the purpose of the debt, and when the debt is due. Report the total from *Exhibit E* here.

24. **Total payables** $ _____

(Exhibit E)

4. Money Owed to You

Attach a list of all amounts owed to you by your customers for work you have done or merchandise you have sold. Include amounts owed to you both before, and after you filed bankruptcy. Label it *Exhibit F*. Identify who owes you money, how much is owed, and when payment is due. Report the total from *Exhibit F* here.

25. **Total receivables** $ _____

(Exhibit F)

5. Employees

26. What was the number of employees when the case was filed? _____
27. What is the number of employees as of the date of this monthly report? _____

6. Professional Fees

28. How much have you paid this month in professional fees related to this bankruptcy case? $ _____
29. How much have you paid in professional fees related to this bankruptcy case since the case was filed? $ _____
30. How much have you paid this month in other professional fees? $ _____
31. How much have you paid in total other professional fees since filing the case? $ _____

7. Projections

Compare your actual cash receipts and disbursements to what you projected in the previous month. Projected figures in the first month should match those provided at the initial debtor interview, if any.

	Column A **Projected** Copy lines 35-37 from the previous month's report.	–	Column B **Actual** Copy lines 21-23 of this report.	=	*Column C* **Difference** Subtract Column B from Column A.
32. **Cash receipts**	$ _____	–	$ _____	=	$ _____
33. **Cash disbursements**	$ _____	–	$ _____	=	$ _____
34. **Net cash flow**	$ _____	–	$ _____	=	$ _____

35. Total projected cash receipts for the next month: $ _____
36. Total projected cash disbursements for the next month: - $ _____
37. Total projected net cash flow for the next month: = $ _____

8. Additional Information

If available, check the box to the left and attach copies of the following documents.

- ❑ 38. Bank statements for each open account (redact all but the last 4 digits of account numbers).
- ❑ 39. Bank reconciliation reports for each account.
- ❑ 40. Financial reports such as an income statement (profit & loss) and/or balance sheet.
- ❑ 41. Budget, projection, or forecast reports.
- ❑ 42. Project, job costing, or work-in-progress reports.

Committee Note

Official Form 425C, *Monthly Operating Report for Small Business Under Chapter 11*, replaces Official Form 25C, *Small Business Monthly Operating Report*. It is revised as part of the Forms Modernization Project, which was designed so that persons completing the forms would do so accurately and completely. To facilitate this, Official Form 425C is renumbered and includes formatting and stylistic changes throughout the form. The form requires basic financial information that the Internal Revenue Service recommends that businesses maintain.

The form is revised to add a checkbox to indicate if the report is an amended filing. It also clarifies that persons completing the form on behalf of the debtor should answer all questions for the period covered by the report, unless otherwise indicated. All instructions indicating that the U.S. Trustee may waive the attachments to the form are eliminated.

The form is reorganized. The previous sections for *Tax* and *Banking Information* are eliminated as redundant of information requested elsewhere within the form. The previous sections for *Income*, *Summary of Cash on Hand*, *Expenses*, and *Cash Profit* are revised and incorporated into Section 2, *Summary of Cash Activity for All Accounts*.

In Part 1, *Questionnaire*, a third checkbox column option, "N/A," has been added to indicate if the question is not applicable. New exhibits to be attached provide explanations for any negative responses to questions 1 through 9 (Exhibit A) and any affirmative answers to questions 10 through 18 (Exhibit B). The questions are reorganized and renumbered, and several are revised. Question 1 is revised to ask whether the business operated during the period. Question 8, regarding the payment of quarterly fees under 28 U.S.C. § 1930(a)(6), is revised to include payments to the bankruptcy administrator. Question 15 is expanded to include payments made on the debtor's behalf. The question whether the debtor has paid anything to an attorney or other professionals is eliminated, as redundant of information disclosed in Part 6. A new

question 17 is added inquiring whether the debtor has allowed any checks to clear the bank that were issued before the bankruptcy case.

Part 2, *Summary of Cash Activity for All Accounts*, clarifies and simplifies the reporting of the debtor's cash on hand during the period, and the letters of the attached exhibits are revised. References to "income," "expenses," and "cash profit" are eliminated. Line 19 clarifies that the cash on hand at the beginning of the month is the same as the cash on hand reported at the end of the previous month (or the commencement of the case if no prior report has been submitted). Net cash flow during the month, calculated in line 22, is equal to total cash receipts in line 20 (as itemized in Exhibit C) less total cash disbursements in line 21 (as itemized in Exhibit D). Net cash flow is added to the beginning balance to calculate the cash on hand at the end of the month in line 23. The form is revised to add explanations of the receipts and disbursements to be included in Exhibits C and D, as well as an instruction to clarify that bank statements should not be submitted in lieu of the exhibits.

In Part 3, *Unpaid Bills*, the exhibit letter is revised to *Exhibit E.*

In Part 4, *Money Owed to You*, the exhibit letter is revised to *Exhibit F.*

In Part 6, *Professional Fees*, the subheadings "*Bankruptcy Related*" and "*Non-Bankruptcy Related*" are eliminated.

Part 7, *Projections*, is revised to compare the debtor's actual cash receipts, cash disbursements, and net cash flow for the month to the projections in the previous month's report (or if the case is new, that the debtor reported at the initial debtor interview). *See* 11 U.S.C. § 308(b)(2) and (3). References to "income," "expenses," "cash profit," and the 180 day look-back period are eliminated.

Part 8, *Additional Information*, is revised to clarify which documents should be attached, if available and regardless of whether the debtor prepares them internally. These documents are:

(1) redacted bank statements for each open account; (2) bank reconciliation reports for each account; (3) financial reports such as an income statement (profit & loss) or balance sheet; (4) budget, projection, or forecast reports; and (5) project, job casting, or work-in-progress reports.

Fill in this information to identify the case:

Debtor 1 _____
First Name Middle Name Last Name

Debtor 2 _____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the:_____ District of _____
(State)

Case number: _____

Official Form 426

Periodic Report Regarding Value, Operations, and Profitability of Entities in Which the Debtor's Estate Holds a Substantial or Controlling Interest

12/17

This is the *Periodic Report* as of _____ on the value, operations, and profitability of those entities in which a Debtor holds, or two or more Debtors collectively hold, a substantial or controlling interest (a "Controlled Non-Debtor Entity"), as required by Bankruptcy Rule 2015.3. For purposes of this form, "Debtor" shall include the estate of such Debtor.

[Name of Debtor] holds a substantial or controlling interest in the following entities:

Name of Controlled Non-Debtor Entity	Interest of the Debtor	Tab #

This *Periodic Report* contains separate reports (*Entity Reports*) on the value, operations, and profitability of each Controlled Non-Debtor Entity.

Each *Entity Report* consists of five exhibits.

- *Exhibit A* contains the most recently available: balance sheet, statement of income (*loss*), statement of cash flows, and a statement of changes in shareholders' or partners' equity (*deficit*) for the period covered by the *Entity Report*, along with summarized footnotes.
- *Exhibit B* describes the Controlled Non-Debtor Entity's business operations.
- *Exhibit C* describes claims between the Controlled Non-Debtor Entity and any other Controlled Non-Debtor Entity.
- *Exhibit D* describes how federal, state or local taxes, and any tax attributes, refunds, or other benefits, have been allocated between or among the Controlled Non-Debtor Entity and any Debtor or any other Controlled Non-Debtor Entity and includes a copy of each tax sharing or tax allocation agreement to which the Controlled Non-Debtor Entity is a party with any other Controlled Non-Debtor Entity.
- *Exhibit E* describes any payment, by the Controlled Non-Debtor Entity, of any claims, administrative expenses or professional fees that have been or could be asserted against any Debtor, or the incurrence of any obligation to make such payments, together with the reason for the entity's payment thereof or incurrence of any obligation with respect thereto.

This *Periodic Report* must be signed by a representative of the trustee or debtor in possession.

Debtor _____ Case number_____
Name

The undersigned, having reviewed the *Entity Reports* for each Controlled Non-Debtor Entity, and being familiar with the Debtor's financial affairs, verifies under the penalty of perjury that to the best of his or her knowledge, (i) this *Periodic Report* and the attached *Entity Reports* are complete, accurate and truthful to the best of his or her knowledge, and (ii) the Debtor did not cause the creation of any entity with actual deliberate intent to evade the requirements of Bankruptcy Rule 2015.3

For non-individual Debtors:	✘ _____ Signature of Authorized Individual _____ Printed name of Authorized Individual Date _____ MM / DD / YYYY	
For individual Debtors:	✘ _____ Signature of Debtor 1 _____ Printed name of Debtor 1 Date _____ MM / DD / YYYY	✘ _____ Signature of Debtor 2 _____ Printed name of Debtor 2 Date _____ MM / DD / YYYY

Exhibit A: Financial Statements for [Name of Controlled Non-Debtor Entity]

Exhibit A-1: Balance Sheet for [Name of Controlled Non-Debtor Entity] as of [date]

[Provide a balance sheet dated as of the end of the most recent 3-month period of the current fiscal year and as of the end of the preceding fiscal year.

Describe the source of this information.]

Exhibit A-2: Statement of Income (*Loss*) for [Name of Controlled Non-Debtor Entity] for period ending [date]

[Provide a statement of income (*loss*) for the following periods:

(i) For the initial report:

a. the period between the end of the preceding fiscal year and the end of the most recent 3-month period of the current fiscal year; and

b. the prior fiscal year.

(ii) For subsequent reports, since the closing date of the last report.

Describe the source of this information.]

Exhibit A-3: Statement of Cash Flows for [Name of Controlled Non-Debtor Entity**] for period ending [**date**]**

[Provide a statement of changes in cash position for the following periods:

(i) For the initial report:

a. the period between the end of the preceding fiscal year and the end of the most recent 3-month period of the current fiscal year; and

b. the prior fiscal year.

(ii) For subsequent reports, since the closing date of the last report.

Describe the source of this information.]

Exhibit A-4: Statement of Changes in Shareholders'/Partners' Equity (*Deficit*) for [Name of Controlled Non-Debtor Entity] for period ending [date]

[Provide a statement of changes in shareholders'/partners equity (*deficit*) for the following periods:

(i) For the initial report:

a. the period between the end of the preceding fiscal year and the end of the most recent 3-month period of the current fiscal year; and

b. the prior fiscal year.

(ii) For subsequent reports, since the closing date of the last report.

Describe the source of this information.]

Exhibit B: Description of Operations for [Name of Controlled Non-Debtor Entity]

[Describe the nature and extent of the Debtor's interest in the Controlled Non-Debtor Entity.

Describe the business conducted and intended to be conducted by the Controlled Non-Debtor Entity, focusing on the entity's dominant business segments.

Describe the source of this information.]

Exhibit C: Description of Intercompany Claims

[List and describe the Controlled Non-Debtor Entity's claims against any other Controlled Non-Debtor Entity, together with the basis for such claims and whether each claim is contingent, unliquidated or disputed.

Describe the source of this information.]

Exhibit D: Allocation of Tax Liabilities and Assets

[Describe how income, losses, tax payments, tax refunds or other tax attributes relating to federal, state or local taxes have been allocated between or among the Controlled Non-Debtor Entity and one or more other Controlled Non-Debtor Entities.

Include a copy of each tax sharing or tax allocation agreement to which the entity is a party with any other Controlled Non-Debtor Entity.

Describe the source of this information.]

Exhibit E: Description of Controlled Non-Debtor Entity's payments of Administrative Expenses or Professional Fees otherwise payable by a Debtor

[Describe any payment made, or obligations incurred (or claims purchased), by the Controlled Non-Debtor Entity in connection with any claims, administrative expenses or professional fees that have been or could be asserted against any Debtor.

Describe the source of this information.]

COMMITTEE NOTE

Official Form 426, *Periodic Report Regarding Value, Operations, and Profitability of Entities in Which the Debtor's Estate Holds a Substantial or Controlling Interest*, is revised and renumbered as part of the Forms Modernization Project. It implements section 419 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. No. 109-8, 119 Stat. 23 (April 20, 2005), which requires a chapter 11 debtor to file periodic reports on the profitability of any entities in which the estate holds a substantial or controlling interest. The form is to be used when required by Rule 2015.3, with such variations as may be approved by the court pursuant to subdivisions (d) and (e) of that rule.

In addition to formatting revisions, certain aspects of Official Form 426 are changed to make the form easier for the debtor to complete and to better identify the kinds of information that a debtor must disclose in accordance with section 419 of BAPCPA and Rule 2015.3.

Official Form 426 limits its application to entities in which the debtor has a substantial or controlling interest, which the rule defines as a "Controlled Non-Debtor Entity." The scope of this defined term is guided by subdivisions (a) and (c) of Rule 2015.3.

Official Form 426 eliminates the requirement to file a valuation of the Controlled Non-Debtor Entity. Exhibit A to Official Form 426 requires only periodic filings of the Controlled Non-Debtor Entity's most recently available balance sheet, statement of income (*loss*), statement of cash flows, and statement of changes in shareholders' or partners' equity (*deficit*), together with summarized footnotes for such financial statements. If any of these financial statements are not available, the debtor can seek relief under Rule 2015.3(d).

126-012957

Exhibit B to Official Form 426 requires a description of the Controlled Non-Debtor Entity's business, which was required by Exhibit C of former Rule 26.

Exhibits C, D, and E to Official Form 426 are new. Exhibit C requires a description of claims between a Controlled Non-Debtor Entity and any other Controlled Non-Debtor Entity. Exhibit D requires disclosure of information relating to the allocation of taxable income, losses, and other attributes among Controlled Non-Debtor Entities. Exhibit E requires disclosure about a Controlled Non-Debtor Entity's payment of claims or administrative expenses that would otherwise have been payable by a debtor.

TAB 7C

126-012959

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ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of March 31, 2016
Denver, Colorado

The following members attended the meeting:

Circuit Judge Sandra Segal Ikuta, Chair
Circuit Judge Adalberto Jordan
District Judge Jean Hamilton
District Judge Robert J. Jonker
District Judge Amul R. Thapar
Bankruptcy Judge Stuart M. Bernstein
Bankruptcy Judge Dennis Dow
Bankruptcy Judge A. Benjamin Goldgar
Bankruptcy Judge Arthur I. Harris
Diana Erbsen, Esquire
Jeffrey Hartley, Esquire
Richardo I. Kilpatrick, Esquire
Jill Michaux, Esquire
Thomas Moers Mayer, Esquire
Professor Edward R. Morrison

The following persons also attended the meeting:

Professor S. Elizabeth Gibson, reporter
Professor Michelle Harner, assistant reporter
Circuit Judge Jeffrey S. Sutton, Chair of the Committee on Rules of Practice and Procedure (Standing Committee)
Professor Daniel Coquillette, reporter to the Standing Committee
Rebecca Womeldorf, Secretary, Standing Committee and Rules Committee Officer
Bankruptcy Judge Martin Isgur
Bankruptcy Judge Eugene R. Wedoff
Ramona D. Elliot, Esq., Deputy Director/General Counsel, Executive Office for U.S. Trustee
Roy T. Englert, Jr., Esq., liaison from the Standing Committee
Kenneth Gardner, Clerk, U.S. Bankruptcy Court for the District of Colorado
Molly Johnson, Senior Research Associate, Federal Judicial Center
James J. Waldron, Clerk, U.S. Bankruptcy Court for the District of New Jersey
Bridget Healy, Esq., Administrative Office
Scott Myers, Esq., Administrative Office
Michael T. Bates, Lindquist & Vennum, LLP, Minneapolis, Minnesota
Edward Boltz, Law Offices of John T. Orcutt, National Association of Consumer Bankruptcy Attorneys
Michael Delmonico, Ford Motor Credit Company
Michael McCormick, McCalla Rayner, LLC, Roswell, Georgia

DRAFT

126-012961

Jon M. Waage, Chapter 13 Trustee, Middle District of Florida
Nancy Whaley, National Association of Chapter 13 Trustees
Alice Whitten, Wells Fargo

Discussion Agenda

1. Greetings.

Judge Sandra Ikuta opened the meeting by welcoming everyone to Denver. Participants and visitors introduced themselves. Judge Ikuta noted that Consent Agenda Item 3A had been moved from the consent agenda to the discussion agenda and would be addressed after Discussion Agenda Item 6C.

2. Approval of the minutes from the Fall 2015 Meeting.

The minutes were approved with one edit.

3. Oral reports on meetings of other committees:

(A) January 7, 2016 meeting of the Committee on Rules of Practice and Procedure (Standing Committee).

Professor Michelle Harner provided this report to the Committee. For bankruptcy, the proposed rule amendments following the Supreme Court's decision in *Stern v. Marshall*, 564 U.S. 462 (2011) (the *Stern* amendments) were approved. There was a report on private information in court documents based on a study conducted by the Federal Judicial Center (FJC); the study suggested, among other things, that bankruptcy had improved its record of preventing disclosure of private information in documents. Also, there was a discussion regarding coordination of efforts regarding similar rules among the rules committees, and the use of parallel language where possible.

Judge Ikuta stated that the Committee will discuss coordination efforts regarding rule changes at the meeting. Judge Jeffrey Sutton added that the Judicial Conference approved the Committee's requests for retroactive approval of technical form changes.

(B) November 5, 2015 meeting of the Advisory Committee on Civil Rules.

Judge Arthur Harris reported that there are several amendments under consideration by the Civil Rules Committee that may impact the Committee. Two examples are the amendments to Rule 5 and the class action rules. There are several pilot projects under consideration that may have some impact on bankruptcy. There may be some bankruptcy districts included as part of the pilot projects, although this is yet to be decided.

(C) December 10-11, 2015 meeting of the Committee on the Administration

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of the Bankruptcy System (the Bankruptcy Committee).

Judge Erithe Smith reported on the issues considered by the Bankruptcy Committee that could impact the work of the Committee. The Bankruptcy Committee considered fees related to searches for records held by the National Archives and Records Administration (NARA). The suggested fee for a record search is $10, with an additional fee for actual document retrieval. The Bankruptcy Committee supports this fee as it allows for a more focused document search and an overall better cost for the consumer.

Cost containment is still being discussed by the Bankruptcy Committee, in particular, the consolidation of bankruptcy courts. The concept is to pair bankruptcy courts for a three-year term as a pilot project for study to determine whether there are enough similarities among the courts to permit them to work together on a more permanent basis. The program will be studied by the FJC.

Subcommittee Reports and Other Action Items

4. Report by the Subcommittee on Consumer Issues.

(A) Suggestion 14-BK-B from CACM to amend various rules regarding redaction of private information in closed cases.

Tab 4A: Memo of March 3, 2016 by Professor Gibson.
-Proposed Rule 9037(h).

This suggestion is from the Court Administration and Case Management Committee (CACM), and is an effort to solve a problem with personally identifiable information on court dockets. Judge Harris noted that although there are solutions to this problem, the bigger issue is preventing the information from getting on the dockets in the first place. As noted, the FJC study was presented to the Standing Committee at its January meeting regarding documents with personally identifiable information.

The subcommittee's discussions focused on potentially adding a new subdivision (h) to Rule 9037. It determined, however, that any amendment to the bankruptcy privacy rule should be coordinated with possible amendments to the appellate, civil, and criminal versions of the privacy rule and that it may make sense for the Committee to wait to publish until other rules committees have had a chance to consider possible amendments. Professor Elizabeth Gibson suggested that the Committee hold its recommended amendment at the Committee level until such time that the other rules committees are ready with any amendments, and Judge Sutton agreed with this proposal.

Judge Harris detailed the proposed amendments as set forth in the agenda book. A suggestion was made to remove the "under seal" language because the CM/ECF system automatically restricts these types of motions from the public, making the proposed language redundant. The group discussed this issue, and the language "motion to redact" as a replacement

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for "under seal" was accepted as an amendment. A motion was passed to approve the proposed amendment, including the revised language, and to hold the amendment until the issue has been considered by the other rules committees. Professor Gibson advised the Committee about several stylistic suggestions from the reporter for the Civil Rules Committee, and the Committee agreed that the language approved at this meeting is subject to change as the other rules committees move forward in their discussions, and that it will be discussed at the Committee's fall meeting.

(B) Suggestion 15-BK-E to amend or eliminate Rule 4003(c), which currently allocates the burden of proof in exemption litigation.

Tab 4 B: Memo of March 4, 2016 by Professor Harner.
-Supplemental Memorandum of February 11, 2016.

Judge Harris introduced Suggestion 15-BK-E, noting that the Committee had discussed this matter on a preliminary basis at its fall 2015 meeting. Professor Harner then explained the structure of Rule 4003(c), which allocates the burden of proof to the objecting party in exemption litigation, and the general issues raised by Suggestion 15-BK-E. The primary issue posed by the suggestion is whether the federal bankruptcy rules or the law governing the rule of decision controls the burden of proof in exemption litigation. Under the Supreme Court's holding in *Hanna v. Plumer*, 380 U.S. 460 (1965), a federal rule promulgated under the Rules Enabling Act is valid so long as it is within Congress's Article I power and is within the scope of the Rules Enabling Act. Considering the parameters of the Rules Enabling Act, and because several states characterize the burden of proof as being procedural, Rule 4003(c) meets the Rules Enabling Act test. The basic test for whether a rule is within the scope of the Rules Enabling Act is whether the rule "really regulates procedure." Because there is a strong argument that Rule 4003(c) does really regulate procedure, the subcommittee concluded that there is no need to amend Rule 4003(c) at this time. Although the recommendation is to take no action, the issue deserves monitoring as more case law develops.

The Committee discussed this suggestion and adopted the subcommittee's recommendation to take no action at this time, but to continue to monitor the matter.

5. Report by the Subcommittee on Forms.

(A) Discussion regarding proposed chapter 13 plan form (Official Form 113), and related proposed amendments to certain bankruptcy rules.

Tab 5A: Memo of March 7, 2016 by Professor Gibson.
-Proposed Rules 3015 and 3015.1.

Judge Dow provided a brief history of the Chapter 13 plan project. Following the two rounds of publication, a compromise regarding the plan was reached involving an opt-out procedure for the official plan form. In evaluating and implementing the compromise, the subcommittee gathered informal input from relevant chapter 13 constituencies. The opt-out

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proposal would require the use of a national form for chapter 13 plans unless a district promulgated its own form that met the requirements specified in a new rule. At the fall 2015 meeting, the Committee approved proposed Official Form 113 and the related amendments to Rules 2002, 3002, 3007,[1] 3012, 4003, 5009, 7001, and 9009, but agreed to defer submitting those items to the Standing Committee. The deferral was to allow the Committee to further consider the opt-out proposal and the necessity, timing, and scope of any republication.

The subcommittee considered these issues and reached out to the relevant groups regarding the proposed amendments to Rule 3015 and new Rule 3015.1, as well as the republication issue. Several groups supported publication of the rules implementing the opt-out proposal. Based on its review, the subcommittee recommended that the Committee approve the publication of the amendment to Rule 3015 and new Rule 3015.1. The rules will implement the opt-out proposal. The subcommittee also recommended the approval of a shortened comment period that would permit for an effective date of December 2017 for the chapter 13 plan form and all related rules. Judge Isgur spoke briefly regarding his support (and his knowledge of general support among his colleagues) for this proposal.

A motion was made to approve the recommendation to publish Rules 3015 and 3015.1 on a shortened comment period, starting in July 2016, with one public hearing, and a proposed effective date of December 2017. The motion was approved.

(B) Report regarding suggestion for Notice of Change of Address Form (Suggestion 15-BK-D) submitted by Russell C. Simon, Chapter 13 Standing Trustee, on behalf of National Association of Chapter 13 Trustees.

Tab 5B: Memo of March 3, 2016 by Professor Harner.
-Appendices A and B.

Professor Harner advised that the subcommittee recommends no action at this time. Based on research completed by Professor Harner and Jim Waldron, there is no indication of need for this rule change. Mr. Waldron surveyed the clerks of court, and Professor Harner examined the issue of unclaimed funds. Although unclaimed funds are an issue for the courts, it is not necessarily something for the Committee to resolve through the rule-making process. Also, many courts have local forms for changes of address, and it wasn't clear that the existence the local forms impacted the unclaimed funds problem. A suggestion was made to refer the issue to the Bankruptcy Committee.

6. Report by the Subcommittee on Business Issues.

(A) Recommendation regarding proposed amendments to Official Forms 25A, 25B, 25C, and 26 (including renumbering the forms as 425A, 425B, 425C, and 426).

[1] At the fall meeting, the Committee approved the amendments to Rule 3007 subject to further review by the Subcommittee on Business Issues. As discussed at item 6D, the Business Subcommittee recommends the approval of the published version of the amended rule.

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Tab 6A: Memo of March 3, 2016 regarding Official Forms 425A, 425B, and 425C by Professor Harner.
Memo of March 3, 2016 regarding Official Form 426 by Professor Harner.
-Proposed Official Forms 425A, 425B, 425C, and 426.

Forms 425A, 425B, and 425C (formerly Forms 25A, 25B, and 25C) are used in small business cases. Official Forms 425A and 425B set forth an illustrative form plan of reorganization and disclosure statement, respectively, for small business debtors under chapter 11 of the Bankruptcy Code. Official Form 425C is the monthly operating report for small business debtors, which must be filed with the court and served on the U.S. Trustee under section 1107(a) of the Bankruptcy Code. The forms were revised to match the style of the forms modernization project, along with several substantive changes the subcommittee identified several places where Official Forms 425A, 425B, and 425C were inconsistent with the Bankruptcy Code, required additional information to explain fully the debtor's disclosure obligations, or contained duplicative questions. The subcommittee's working group received significant input on Form 425C from the Executive Office of the U.S. Trustee.

Form 426 (formerly Form 26) is used by chapter 11 debtors to disclose certain information regarding entities in which the debtors hold substantial or controlling interests, as mandated by Rule 2015.3. The subcommittee's working group updated the form to match the format used by the forms modernization project, clarified some of the questions, and revised the required exhibits.

The subcommittee recommended that the Committee approve Official Forms 425A, 425B, 425C, and 426 for publication with two minor edits, and a motion to approve the recommendation was passed.

(B) Suggestion 12-BK-H regarding a new rule allowing a district court to treat a bankruptcy court judgment as proposed findings of fact and conclusions of law.

Tab 6B: Memo of March 4, 2016 with proposed Rule 8018.1 by Professor Gibson.

The subcommittee is proposing a simplified version of the original proposed amendment to Rule 9033, now new Rule 8018.1. The original proposal was considered at the fall 2015 meeting and returned to the subcommittee for further discussion. The rule was changed from an amendment to Rule 9033 to new Rule 8018.1 based on a suggestion at the fall meeting to place the rule within the bankruptcy appellate rules (the Part VIII Rules). The case citation to *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014) was retained in the committee note to explain the basis for the rule. The revised amendment is recommended for publication.

An issue was raised as to whether the rule was necessary, given that it repeats the holding in *Arkison*. Several members commented that the rule is helpful. Professor Gibson noted that the citation to *Arkison* is a reminder to future committee members that if the case is overruled,

the rule must be re-visited. An issue was raised whether the rule should also address circuit court bankruptcy appeals as well.

A motion was made to approve the rule as presented for publication and the motion was approved.

(C) Report on preliminary research on noticing issues in bankruptcy cases.

Tab 6C: Memo of March 4, 2016 by Professor Harner including consideration of Suggestions 12-BK-M, 12-BK-B, 15-BK-H, and Comment BK-2014 0001-0062 (includes Appendices A, B, and C).
-Appendix D (Memo to reporters and attachment).

Professor Harner completed preliminary research on various noticing issues, and provided a chart of all bankruptcy rule noticing provisions. Unlike other rules, the bankruptcy rules are fairly onerous in terms of noticing responsibilities. Several specific suggestions regarding noticing have been submitted. The subcommittee considered whether to complete a review of all noticing in the bankruptcy rules. The general view was that the burdens and costs often associated with noticing under the current rules may be reduced by the continued use of electronic noticing. The rules committees in general are considering changing electronic noticing as a coordinated effort, and it makes sense to wait to see these changes prior to making any changes to the rules regarding noticing in bankruptcy. The subcommittee will continue to monitor the work of the other committees, and any changes in technology that impact noticing. In addition, the subcommittee indicated that it will review the specific suggestions and comments received to date concerning noticing issues in bankruptcy cases and report back to the full Committee with any specific recommendations.

(D) Recommendation to remove a previously approved amendment to Rule 3007(a) from the chapter-13-plan-form package of rule amendments and that it be reconsidered in connection with the Advisory Committee's noticing project.

This issue was moved from the consent agenda to the discussion agenda. The subcommittee recommends approving Rule 3007(a)(2) with subparagraph (b) deleted (as originally proposed prior to the fall 2015 meeting), and to leave any remaining issues with the rule for consideration as part of the noticing project.

A motion was made to approve the recommendation to include the originally published version of Rule 3007(a) as part of the chapter 13 package, and the motion was approved.

7. Report by the Subcommittee on Privacy, Public Access, and Appeals.

(A) Recommendation concerning pending amendments to the Federal Rules of Appellate Procedure and whether to publish similar amendments to the Federal Rules of Bankruptcy Procedure.

Tab 7A: Memo of March 7, 2016 by Professor Gibson.

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-Proposed Rules 8002, 8011, 8013, 8015, 8016, 8017, 8022.
-Appendix to Part VIII Rules length limits.
-Proposed Official Form 417A (Notice of Appeal).
-Proposed Official Form 417C (Certificate of Compliance with Type-Volume Limit, Typeface Requirements and Type-Style Requirements).
-Proposed Director's Form 4170 (Inmate Filer's Declaration).

Several amendments were needed to parallel the amended Federal Rules of Appellate Procedure that will likely go into effect in December 2016. When the Committee revised the Part VIII rules, the decision was made to maintain consistency with the Appellate Rules. The proposed amendments to Rules 8002, 8011, 8013, 8015, 8016, 8017, and 8022 are necessary to maintain the same language. The proposed amendments include the length limits adopted by the Appellate Rules Committee.

In addition, the subcommittee recommends the publication of amendments to Official Forms 417A and 417C and a new appendix to the Part VIII rules that sets out all of the Part VIII document-length limits. Finally, it proposes a Director's form for an inmate filer's declaration, to be promulgated when the other rule and form amendments go into effect (likely December 2018).

Professor Gibson noted several small edits to the proposed amended rules. Also, the proposed amendments to Rule 8017 are meant to go forward on the same publication schedule as the proposed amended Appellate Rules, however, the Appellate Committee is reconsidering the language of the amendment. The subcommittee's recommendation is to track the Appellate Committee's language when it is finalized. Once the changes are adopted by the Appellate Committee, this Committee can decide whether to adopt the proposed language.

Professor Gibson also explained that two amendments to the Appellate Rules were approved for publication by the Appellate Rules Committee but the subcommittee recommends that the Committee not adopt them. The first is a rule for staying the mandate, which is inapplicable to the Part VIII rules. The second was the timing for reply briefs, and the Part VIII rules already deviate from the Appellate Rules in this respect.

A motion was made to approve the recommendation to publish the Part VIII rules, along with the amended Official Forms, and proposed Director's Form. The motion was approved.

8. Report by the Subcommittee on Technology and Cross Border Insolvency.

(A) Status report on proposed amendment to Rule 5005(a)(2) to address proposed amendments to Civil Rule 5(d).

The Civil Rules Committee will consider amendments to Civil Rule 5(d) at its meeting this spring. Professor Harner noted that the Criminal and Appellate Rules Committees also were considering amendments to their respective companion rules on electronic filing and service. The Committee would continue to monitor developments with respect to these companion rules.

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Professor Gibson explained that the Committee previously approved amendments to Rule 5005(a)(2) that would track the current proposed amendments to Civil Rule 5(d). The Committee discussed the potential value to submitting the amendments to Rule 5005(a)(2) to the Standing Committee for publication on the same schedule as that pursued by the Civil Rules Committee for Civil Rule 5(d) and authorized Professor Gibson to do so with any necessary non-substantive conforming changes.

9. Coordination with Other Committees.

Judge Ikuta advised that the topic is on the agenda to promote more coordination and communication between the five advisory committees, as well as the Standing Committee, regarding potential rule amendments. There should be a heavy presumption in favor of parallel language. An example is the current electronic service rule provisions, for which the Criminal Rules Committee is going a different course for specific reasons. Professor Gibson stated that generally, one committee should lead the way on each issue. She noted the amendments regarding redaction as a good example of the need for coordination. Professor Harner created a chart with rule amendment cross-references for bankruptcy. Rebecca Womeldorf commented on the role of the Rules Committee Support Office (RCSO) in terms of coordination. The RCSO could provide alerts when a suggestion or possible rule amendment seems to impact more than one of the advisory committees, including other Judicial Conference committees.

Information Items

10. Future meetings: Fall 2016 in Washington D.C.

The Committee members will consider the list of hub cities for the spring 2017 meetings, and make a decision regarding location.

11. Deferred Recommendations.

The following previously approved recommendations will be included in the report of this meeting and submitted to the Standing Committee at its next meeting:

- Recommendation to publish amendment to line 8 of Official Form 309F. *Approved at fall 2015 Advisory Committee meeting.*

-Recommendation to publish amendments to Rules 8002 (Time for Filing Notice of Appeal), 8006 (Certifying a Direct Appeal to the Court of Appeal), and 8023 (Voluntary Dismissal). *All approved at fall 2015 Advisory Committee meeting.*

The following recommendations for final approval, all approved at the fall 2015 Advisory Committee meeting, will be bundled with the proposed amendments to Rules 3015 and 3015.1 at Discussion Agenda 5 and submitted to the Standing Committee in the future.

-Chapter 13 Plan Form (Official Form 113) and associated Rules 2002, 3002, 3012, 4003,

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5009, 7001, and 9009.

12. New business.

There is one new suggestion regarding Form 101, and the matter was referred to the Forms Subcommittee.

13. Adjourn.

Proposed Consent Agenda

The Chair and Reporters proposed the following items for study and consideration prior to the Advisory Committee's meeting. Other than item 3A, none of the matters were moved to the Discussion Agenda. On motion, the items on the Consent Agenda were approved.

1. Subcommittee on Consumer Issues.

(A) Recommendation of no action regarding Suggestion 14-BK-G to remove Social Security Number from mailed or electronically distributed 341 notices.

Tab Consent 1A: Memo of March 7, 2016 by Professor Gibson.

(B) Report on comments concerning proposed amendment to Rule 1006(b) (payment of filing fees in installments) and recommendation to approve the amendment.

Tab Consent 1B: Memo regarding Rules 1001 and 1006(b) of March 3, 2016 by Professors Gibson and Harner.
-Proposed Rule 1006(b).

2. Subcommittee on Forms.

(A) Recommendation to approve technical changes to Official Bankruptcy Forms 106E/F, 119, 201, 206 Summary, 206E/F, 309A, 309I, 423, and 424.

Tab Consent 2A: Memo of February 29, 2016 by Ms. Healy and Mr. Myers.

(B) Recommendation of no action regarding suggestion 15-BK-J (seeking clarification of proposed amendments to Rule 9009).

Tab Consent 2B: Memo of March 2, 2016 by Professor Gibson.

(C) Recommendation of no action regarding suggestion 16-BK-A concerning NAICS code on Official Form 201.

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Tab Consent 2C: Memo of March 2, 2016 by Professor Gibson.

3. Subcommittee on Business Issues.

(A) Recommendation to remove a previously approved amendment to Rule 3007(a) from the chapter-13-plan-form package of rule amendments and that it be reconsidered in connection with the Advisory Committee's noticing project.

Tab Consent 3A: Memo of March 3, 2016 by Professor Gibson.

(B) Report on comments and recommendation concerning proposed amendment to Rule 1001(scope of rules and forms) and recommendation to approve the amendment.

Consent Tab 3B: Memo regarding Rules 1001 and 1006(b) of March 3, 2016 by Professors Gibson and Harner.
-Proposed Rule 1001.

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TAB 8

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Chambers of
WILLIAM JAY RILEY
Chief Judge
United States Court of Appeals
Eighth Circuit

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April 29, 2016

MEMORANDUM

To: Chairs of Judicial Conference Committees

From: William Jay Riley
Judiciary Planning Coordinator

RE: JUDICIARY STRATEGIC PLANNING **(ACTION REQUESTED)**

RESPONSE DUE DATE: Following Summer 2016 Judicial Conference Committee Meetings

Each summer, the Executive Committee is provided with an update on the efforts of Judicial Conference committees to implement the *Strategic Plan for the Federal Judiciary*. To assist me in preparing this update, I am requesting reports on the strategic initiatives that your committees are pursuing. These initiatives are critical elements of the judiciary's strategic planning approach, transforming high-level strategies and goals from the *Strategic Plan* into specific efforts with measurable outcomes. The materials for your summer 2016 meetings will include strategic planning items detailing this request.

Also, thank you again for your suggestions about strategic planning priorities. As indicated in the Memorandum of Action from the Executive Committee's February 11-12 meeting, after considering committee suggestions the Executive Committee added one new goal (Goal 4.1d) and affirmed the four strategies and one goal that had previously been identified as priorities for the next two years:

Priority Strategies and Goals

Strategy 1.1 Pursue improvements in the delivery of justice on a nationwide basis.

Strategy 1.3 Secure resources that are sufficient to enable the judiciary to accomplish its mission in a manner consistent with judiciary core values.

Strategy 2.1 Allocate and manage resources more efficiently and effectively.

Strategy 4.1 Harness the potential of technology to identify and meet the needs of court users and the public for information, service, and access to the courts.

Goal 4.1d Refine and update security practices to ensure the confidentiality, integrity, and availability of judiciary-related records and information. *(new priority)*

Goal 7.2b Communicate and collaborate with organizations outside the judicial branch to improve the public's understanding of the role and functions of the federal judiciary.

Please consider these priority strategies and goals when setting the agendas for future committee meetings and determining which initiatives to pursue. In addition, please consider these priorities when assessing the impact of potential policy recommendations, resource allocation decisions, and cost-containment measures.

Finally, I encourage you to suggest topics for future long-range planning meetings of Judicial Conference committee chairs. Topics under consideration for the September 12 meeting are attached. These topics will also be included in the materials for your summer 2016 meeting.

Thank you for your efforts to implement the *Strategic Plan for the Federal Judiciary*. Please contact me or Brian Lynch at the Administrative Office if you have any questions or suggestions.

Attachment

cc: Executive Committee
Committee Staff

Attachment

DRAFT AGENDA

LONG-RANGE PLANNING MEETING OF JUDICIAL CONFERENCE COMMITTEE CHAIRS

MONDAY, SEPTEMBER 12, 2016

As appropriate, Judicial Conference committee chairs meet in connection with their attendance at Judicial Conference sessions to confer on judiciary-wide trends and discuss long-range planning issues that cut across committee lines.[1] Topics under consideration for the September 12, 2016 meeting are described below. Suggested topics for this meeting and future long-range planning meetings are welcome and encouraged.

POTENTIAL DISCUSSION TOPICS

1. Trends in the Use of Data to Inform Judiciary Policy and Resource Allocation Decisions

Judicial Conference committees increasingly rely on sophisticated analyses to inform policy and resource allocation recommendations and decisions. In November 2015, AO Director James Duff approved a Data Strategy and Governance Plan that includes goals to clarify data ownership and stewardship responsibilities, integrate data from multiple sources, and standardize analytical tools. A Judiciary Data Working Group was established in April 2016 to advise the AO on the execution of the plan. A description of the plan has been posted to JNet.

Anticipated results include more timely and responsive data and analysis to support Judicial Conference committees; reduced costs associated with data collection, analysis, and management; reduced burdens on AO and judiciary staff in responding to requests for data and analysis from judiciary and external stakeholders; and better-informed policy and resource allocation decisions.

Gary Yakimov, Chief of the AO's Judiciary Data and Analysis Office, will facilitate a discussion of the committee chairs on (a) committee needs for data and analysis; (b) state-of-the art data visualization tools developed for use by the courts to provide a more detailed and dynamic view of their own data; (c) best practices in federal agencies and other organizations; and (d) progress to date in the implementation of the Data Strategy and Governance Plan.

[1] *The Judicial Conference and its Committees*, August 2013, p. 6.

2. Strategic Implications of Trends in Criminal Law and Sentencing

A number of trends in criminal law and sentencing have the potential to significantly affect the volume and nature of work for judges, probation and pretrial services officers, federal public defenders, and panel attorneys, including:

- changes to sentencing guidelines, and the retroactive application of certain guidelines amendments;
- proposed legislation that would reduce some mandatory minimum sentences and allow certain inmates to petition for retroactive reduced sentences;
- litigation following *Johnson v. United States* regarding resentences for those sentenced under the Armed Career Criminal Act;
- continued interest in specialty courts, which often require more time from judges, probation and pretrial services officers, and public defenders; and
- shifts in prosecutorial priorities; including a focus on more serious offenses and changing strategies regarding drug and immigration offenses.

These trends may affect the composition of the population under supervision, altering the proportion of higher- and lower-risk defendants and offenders. Large populations of offenders have become eligible for relief, requiring intensive efforts to effectively represent clients and assess populations that may be eligible for release but still require supervision. In addition, resource allocation mechanisms may not keep pace with workload changes that are likely to vary from district to district.

Committee chairs will discuss the cross-committee strategic implications of these trends, including the impacts on workload, resource allocation mechanisms, staffing formulas, space and security.

3. Strategic Implications of the Federal Judiciary's Long-Range Budget Outlook

For the past three years, the judiciary has received essentially full funding of its appropriations requirements, with Congress treating the judiciary as a top funding priority. Fiscal year 2016 also brought long-awaited funding to the General Services Administration for the construction of courthouses on the judiciary's Courthouse Project Priorities plan, representing the judiciary's highest courthouse construction priorities. The credibility of the judiciary's appropriations requests, including a decade-long cost-containment strategy to limit the growth in judiciary resource requirements, has contributed to the judiciary's relatively favorable treatment by its appropriators.

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Despite recent successes, the budget outlook for 2017 and beyond is uncertain. The appropriations subcommittees that consider the judiciary's budget requests continue to operate under spending caps established by the Budget Control Act of 2011. Under these caps, recent judiciary budget increases have been funded in part by reductions to other agencies such as the Internal Revenue Service, a trend that may not continue. The transition to a new Administration and a new Congress could further complicate judiciary funding – if the judiciary's 2017 appropriation is not enacted during the current Congress, there could be a substantial delay in the final approval of an appropriation.

Moreover, while the judiciary continues to pursue cost-containment objectives, the need for major investments in certain areas may place pressure on the judiciary's overall effort to limit the increase in requirements. Among these requirements are long-term needs such as the need for additional judgeships and an increase in hourly rates for panel attorneys, but also requirements that have emerged more recently, including the need for additional resources to protect judiciary systems and information from cyber-attacks, and the need to upgrade physical access control systems in court facilities.

Committee chairs will discuss the strategic implications of the judiciary's long-range budget outlook. The discussion will build on a discussion between the Budget Committee and the chairs of program committees at the July 2016 Budget Committee.

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MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 6, 2016 | Washington, D.C.

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ATTENDANCE

The Judicial Conference on Rules of Practice and Procedure held its fall meeting in Washington, D.C., on June 6, 2016. The following members participated in the meeting:

Judge Jeffrey S. Sutton, Chair
Associate Justice Brent E. Dickson
Roy T. Englert, Jr., Esq.
Daniel C. Girard, Esq.
Judge Neil M. Gorsuch
Judge Susan P. Graber
Professor William K. Kelley
Judge Patrick J. Schiltz
Judge Amy St. Eve
Professor Larry D. Thompson
Judge Richard C. Wesley
Judge Jack Zouhary

The following attended on behalf of the advisory committees:

Advisory Committee on Appellate Rules –
Judge Steven M. Colloton, Chair
Professor Gregory E. Maggs, Reporter

Advisory Committee on Bankruptcy Rules –
Judge Sandra Segal Ikuta, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Michelle M. Harner, Associate Reporter

Advisory Committee on Civil Rules –
Judge John D. Bates, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate Reporter

Advisory Committee on Criminal Rules –
Judge Donald W. Molloy, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter

Advisory Committee on Evidence Rules –
Judge William K. Sessions III, Chair
Professor Daniel J. Capra, Reporter

The Honorable Sally Quillian Yates, Deputy Attorney General, represented the Department of Justice, along with Diana Erbsen, Joshua Gardner, Elizabeth J. Shapiro, and Natalia Sorgente.

Other meeting attendees included: Judge David G. Campbell; Judge Robert M. Dow; Judge Paul W. Grimm; Sean Marlaire, staff to the Court Administration and Case Management Committee (CACM); Professor Bryan A. Garner, Style Consultant; Professor R. Joseph Kimble, Style Consultant; and Joseph F. Spaniol, Jr., Consultant.

Providing support to the Committee:

Professor Daniel R. Coquillette	Reporter, Standing Committee
Rebecca A. Womeldorf	Secretary, Standing Committee
Julie Wilson	Attorney Advisor, RCSO
Scott Myers	Attorney Advisor, RCSO
Bridget M. Healy	Attorney Advisor, RCSO
Shelly Cox	Administrative Specialist
Hon. Jeremy D. Fogel	Director, FJC
Emery G. Lee	Senior Research Associate, FJC
Tim Reagan	Senior Research Associate, FJC
Derek A. Webb	Law Clerk, Standing Committee
Amelia G. Yowell	Supreme Court Fellow, AO

INTRODUCTORY REMARKS

Judge Sutton called the meeting to order. He first acknowledged a number of imminent departures from the Standing Committee effective October 1, 2016: Justice Brent Dickson, Roy Englert, Judge Neil Gorsuch, and Judge Patrick Schiltz are ending their terms as members of the Standing Committee and Judge Steve Colloton is ending his term as Chair of the Appellate Rules Advisory Committee, a position that will be assumed by Judge Gorsuch. Judge Sutton offered remarks on the contributions each has made to the Committee over the years and warmly thanked them for their service.

Judge Sutton recognized three individuals for reaching milestones of service to the Committee. Rick Marcus has served for twenty years as the Associate Reporter to the Advisory Committee on Civil Rules. Dan Capra has served for twenty years as the Reporter to the Advisory Committee on Evidence Rules. And Joe Spaniol has served twenty-five years as a style consultant to the Standing Committee.

Finally, Dan Coquillette took a moment to thank Judge Sutton, whose tenure as Chair of the Standing Committee comes to an end October 1, 2016.

APPROVAL OF THE MINUTES OF THE LAST MEETING

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee approved the minutes of the January 7, 2016 meeting.**

VISIT OF CHIEF JUSTICE ROBERTS

Chief Justice Roberts and Jeffrey Minear, the Counselor to the Chief Justice, visited the Standing Committee. Chief Justice Roberts made some brief remarks. He thanked the members of the Committee for their service and acknowledged, as an alumnus of the Appellate Rules Committee himself, that such service could be a significant commitment of time. And he congratulated the Committee on the new discovery rules that went into effect on December 1, 2015, rule amendments he highlighted in his 2015 Year-End Report on the Federal Judiciary.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Sessions and Professor Capra provided the report on behalf of the Advisory Committee on Evidence Rules, which met on April 29, 2016, in Washington, D.C. Judge Sessions presented two action items and a number of information items.

Action Items

RULE 803(16) – The first matter for final approval was an amendment to Rule 803(16), the ancient documents exception to the hearsay rule, to limit its application to documents prepared before January 1, 1998. The version of Rule 803(16) published for comment would have eliminated the exception entirely. After hearing from many lawyers who continue to rely on the ancient documents exception, the Advisory Committee decided against eliminating the exception. Instead, the Advisory Committee revised its proposal to provide a cutoff date for the application of the exception. The Advisory Committee decided against leaving the exception in its current form because, unlike certain "ancient" hard copy documents, the retention of electronically-stored information beyond twenty years does not by itself suggest reliability. Judge Sessions acknowledged that any cutoff date will have a degree of arbitrariness, but also observed that electronically-stored information (known as "ESI") first started to explode around 1998 and that the ancient documents exception itself set an arbitrary time period of twenty years for its applicability.

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 803(16), as amended after publication, for submission to the Judicial Conference for final approval.**

RULE 902(13) & (14) – The second matter for final approval was an amendment to Rule 902 to add two new subdivisions ((13) and (14)) that would allow for the authentication of certain electronic evidence through certification by a qualified person without requiring that person to testify in person. The first provision would allow self-authentication of machine-generated information upon a submission of a certification prepared by a qualified person. The second provision would provide a similar certification procedure for a copy of data taken from an electronic device, medium, or file. The proposals for new Rules 902(13) and 902(14) would have the same effect as current Rules 902(11) and 902(12), which permit a foundation witness to establish the authenticity of business records by way of certification. One Committee member suggested providing instructions on the application of the rule with the inclusion of examples in the Committee Note. After discussion, Professor Capra agreed to do that.

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee unanimously approved the proposed amendments to Rule 902 (13) and (14) for submission to the Judicial Conference for final approval.**

Information Items

Judge Sessions highlighted several information items on behalf of the Advisory Committee.

GUIDE FOR AUTHENTICATING ELECTRONIC EVIDENCE – The Standing Committee discussed the use and dissemination of the draft Guide for Authenticating Electronic Evidence. Written by Judge Grimm, Gregory Joseph, and Professor Capra, the manual would be for the use of the bench and bar and can be amended as necessary to keep pace with technological advances. The manual will be published by the Federal Judicial Center (FJC). The manual is not an official publication of the Advisory Committee itself. The members of the Standing Committee discussed the manual, noting its great value to judges and practitioners who regularly deal with the issue of authenticating electronic evidence, and expressed deep gratitude to its three authors for their work creating it and to the FJC for its assistance with publication.

POSSIBLE AMENDMENTS TO THE NOTICE PROVISIONS IN THE EVIDENCE RULES – The Advisory Committee has been considering ways to amend and make more uniform several notice provisions throughout the Federal Rules of Evidence. For the notice provision of Rule 807(b), the Residual Exception to the hearsay rule, the Advisory Committee is inclined to add a good cause exception to excuse lack of timely notice of the intent to offer statements covered under this exception. The Advisory Committee is also inclined to require that notice under 807(b) be written and not just oral. For the notice provision of Rule 404(b), the Advisory Committee is inclined to remove the requirement that the defendant in a criminal case must first specifically request that the government provide notice of their intent to offer evidence of previous crimes or other bad acts against the defendant. The Advisory Committee concluded that this requirement in Rule 404 was an unnecessary trap for the unwary lawyer and differs from most local rules. Finally, the Advisory Committee has concluded that the notice provisions in Rules 412, 413, 414, and 415 should not be changed through the Rules Enabling Act process as those rules were congressionally enacted and, in any event, are rarely used.

RESIDUAL EXCEPTION: RULE 807 – Judge Sessions reported on the symposium held in connection with the Advisory Committee's fall 2015 Chicago meeting regarding the potential elimination of the categorical hearsay exceptions (excited utterance, dying declaration, etc.) in favor of expanding the residual hearsay exception. The lawyers who testified before the Advisory Committee unanimously opposed the elimination of the hearsay exceptions. The Advisory Committee agrees that the exceptions should not be eliminated. But the Advisory Committee continues to consider expansion of the residual exception to allow the admission of reliable hearsay even absent "exceptional circumstances." The Advisory Committee included a working draft of amended Rule 807 in the agenda materials. It is planning a symposium in the fall to continue to discuss possible amendments to Rule 807, to be held at Pepperdine School of Law.

TESTIFYING WITNESS'S PRIOR INCONSISTENT STATEMENT: RULE 801(d)(1)(A) – The Advisory Committee is considering an expansion beyond what Rule 801(d)(1)(A) currently allows, which

are prior inconsistent statements made under oath during a formal proceeding. The Advisory Committee has rejected the idea of expanding the rule to cover all prior inconsistent statements, but continues to consider inclusion of prior inconsistent statements that have been video recorded.

EXCITED UTTERANCES: RULE 803(2) – The Advisory Committee considered four separate proposals to amend or eliminate Rule 803(2) on the grounds that "excited utterances" are not necessarily reliable. It determined not to take up any of the suggestions given the impact on other rules, as well as an FJC report regarding various social science studies on Rule 803(2) which provided some empirical support for the proposition that immediacy and excitedness tend to guarantee reliability.

CONVERTING CATEGORICAL HEARSAY EXCEPTIONS INTO GUIDELINES – At the suggestion of Judge Milton Shadur, the Advisory Committee considered reconstituting the categorical hearsay exceptions as standards or guidelines rather than binding rules. The Advisory Committee ultimately decided against doing so.

CONSIDERATION OF A POSSIBLE AMENDMENT TO RULE 803(22) – At the suggestion of Judge Graber, the Advisory Committee considered eliminating two exceptions to Rule 803(22): convictions from nolo contendere pleas and misdemeanor convictions. The Advisory Committee concluded that retaining each of these exceptions was warranted.

RULE 704(b) – Similarly, the Advisory Committee determined not to proceed with suggestions to eliminate Rule 704(b) or to create a specific rule regarding electronic communication and hearsay.

IMPLICATIONS OF *CRAWFORD* – The Advisory Committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*, in which the Court held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to confront and cross-examine the declarant.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Colloton and Professor Maggs provided the report on behalf of the Advisory Committee on Appellate Rules, which met on April 5, 2016, in Denver, Colorado. Judge Colloton advised that Judge Gorsuch will be the new chair of the Advisory Committee as of October 2016.

Judge Colloton reported that the Advisory Committee had four action items in the form of four sets of proposed amendments to be published this upcoming summer for which it sought the approval of the Standing Committee.

Action Items

CONFORMING AMENDMENTS TO RULES 8, 11, AND 39(e)(3) – The first set of amendments recommended for publication were amendments to Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), and 39(e)(3) to conform to the amendment to Rule of Civil Procedure 62 by revising any clauses that use the antiquated term "supersedeas bond." The language would be changed to "bond or other

security" as appropriate in each of the rules. Judge Colloton noted that the Civil Rules Committee would discuss the amendment to Rule 62 later in the meeting. He added that the Style Consultants suggested a minor edit to proposed Rule 8(b) (adding the word "a" before "stipulation" on line 16) after the publication of the agenda book materials, and that the Advisory Committee accepted the edit. The Standing Committee discussed the phrase "surety or other security provider" and whether "security provider" contained within it the term "surety" and made minor edits to the proposed amendments.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed conforming amendments to Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), and 39(e)(3), contingent on the Standing Committee's approval of the proposed amendment to Civil Rule 62 later in the meeting.**

LIMITATIONS ON THE FILING OF AMICUS BRIEFS BY PARTY CONSENT: RULE 29(a) – The proposed amendment to Rule 29(a) would allow a court to prohibit or strike the filing of an amicus brief based on party consent where the filing of the brief might cause a judge's disqualification. This amendment would ensure that local rules that forbid the filing of an amicus brief when the filing could cause the recusal of one or more judges would be consistent with Rule 29(a). Professor Coquillette observed that, as important as preserving room for local rules may be, congressional committees in the past have responded to the proliferation of local rules by urging the Rules Committee to allow them only if they respond to distinctive geographic, demographic, or economic realities that prevail in the different circuits. Judge Colloton explained that this proposed amendment is particularly relevant to the rehearing en banc process which traditionally has been decentralized and subject to local variations. He further explained that the Advisory Committee discussed and rejected expanding the exception to other types of amicus filings. The Advisory Committee made minor stylistic edits to the proposed amended rule.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Rule 29(a)**.

APPELLATE FORM 4 – Litigants seeking permission to proceed in forma pauperis are currently required by Appellate Form 4 to provide the last four digits of their Social Security number. Given the potential security and privacy concerns associated with Social Security numbers, and the consensus of the clerks of court that the last four digits of a Social Security number are not needed for any purpose, the Advisory Committee proposes to amend Form 4 by deleting this question.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Appellate Form 4**.

REVISION OF APPELLATE RULE 25 TO ADDRESS ELECTRONIC FILING, SIGNATURES, SERVICE, AND PROOF OF SERVICE – In conjunction with the publication of the proposed amendment to Civil Rule 5, and in an effort to achieve an optimal degree of uniformity, the Advisory Committee

proposes to amend Appellate Rule 25 to address electronic filing, signatures, service, and proof of service. The proposed revision generally requires all parties represented by counsel to file electronically. The Standing Committee discussed the use of "person" versus "party" throughout the proposed amended rule, as well as the use of these phrases in the companion Criminal and Civil Rules. One minor stylistic amendment was proposed. The Standing Committee decided to hold over the vote to approve publication of the proposed amendment to Rule 25 until the discussion regarding Civil Rule 5.

Information Item

Judge Colloton discussed whether Appellate Rules 26.1 and 29(c) should be amended to require additional disclosures to provide further information for judges in determining whether to recuse themselves. It is an issue that the Advisory Committee will consider at its fall meeting.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates and Professors Cooper and Marcus provided the report on behalf of the Advisory Committee on Civil Rules, which met on April 14, 2016, in Palm Beach, Florida. The Advisory Committee had four action items in the form of three sets of proposed amendments to be published this upcoming summer and the pilot project proposal.

Action Items

RULE 5 – The Advisory Committees for Civil, Appellate, Bankruptcy, and Criminal Rules have recently worked together to create uniform provisions for electronic filing and service across the four sets of rules to achieve an optimal degree of uniformity. Professor Cooper explained that the Advisory Committee for Criminal Rules wisely decided to create their own stand-alone rule, proposed Criminal Rule 49.

With regard to filing, the proposed amendment to Rule 5 requires a party represented by an attorney to file electronically unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule. It allows unrepresented parties to file electronically if permitted by court order or local rule. And it provides that an unrepresented party may be required to file electronically only by court order or by a local rule that includes reasonable exceptions. Under the amended rule, a paper filed electronically would constitute a written paper for purposes of the rules.

With regard to service, the amended rule provides that a paper is served by sending it to a registered user by filing it with the court's electronic filing system or by sending it by other electronic means if that person consents in writing. In addition, service is complete upon filing via the court's electronic filing system. Rule 5(b)(3), which allows electronic service only if a local rule authorizes it, would be abrogated to avoid inconsistency with the amended rule.

The Standing Committee discussed the use of the terms "person" and "party" throughout Rule 5 and across other sets of rules and agreed to consider this issue further after the meeting.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved the proposed amendments to Civil Rule 5 for publication for public comment**.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved for publication for public comment the proposed amendment to Appellate Rule 25 that conforms to the amended Civil Rule 5**.

RULE 23 – Judge Bates detailed six proposed changes to Rule 23, many of which concern settlements in class action lawsuits. Rule 23(c)(2)(B) extends notice consideration to a class proposed to be certified for settlement. Rule 23(e) applies the settlement procedural requirements to a class proposed to be certified for purposes of settlement. Rule 23(e)(1) spells out what information parties should give the courts prior to notice and under what circumstances courts should give notice to the parties. Rule 23(e)(2) lays out general standards for approval of the proposed settlement. Rule 23(e)(5) concerns class action objections, requiring objectors to state to whom the objection applies, requiring court approval for any payment for withdrawing an objection or dismissing an appeal, and providing that the indicative ruling procedure be used if an objector seeks approval of a payment for dismissing an appeal after the appeal has already been docketed. Finally, Rule 23(f) specifies that an order to give notice based on a likelihood of certification under Rule 23(e)(1) is not appealable and extends to 45 days the amount of time for an appeal if the United States is a party. Judge Robert Dow, the chair of the Rule 23 Subcommittee, explained the outreach efforts by the subcommittee and stated that many of the proposed changes would provide more flexibility for judges and practitioners. The Rule 23 Subcommittee, under Judge Dow's leadership and with research support from Professor Marcus, has devoted years to generating these proposed amendments, organized multiple conferences around the country with class action practitioners, and considered many other possible amendments.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved the proposed package of amendments to Civil Rule 23 for publication for public comment**.

RULE 62 – Judge Bates reported that a subcommittee composed of members of the Appellate and Civil Rules Committees and chaired by Judge Scott Matheson laid the groundwork for amendments to Rule 62. The proposed amendment includes three changes to the rule. First, Rule 62(a) extends the automatic stay from 14 days to 30 days in order to eliminate the "gap" between the 14-day automatic stay and the 28 days allowed for various post-judgment motions. Second, it recognizes the court's authority to dissolve the automatic stay or replace it with a court-ordered stay for a longer duration. Third, Rule 62(b) clarifies that security other than a bond may be posted. Another organizational change is a proposed new subsection (d) that would include language from current subsections (a) and (c). Judge Bates added that the word "automatic" would be removed from the heading of Rule 62(c) and that conforming edits will be made to the proposed rule to accommodate changes made to the companion Appellate Rules. Professor Cooper stated that Rule 65.1 would be conformed to Appellate Rules 8, 11, and 39 after the conclusion of the meeting.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved the proposed amendments to Civil Rule 62 for publication for public comment**. **It also approved granting to the Civil Rules Advisory Committee the authority to make amendments to Rule 65.1 to conform it to Appellate Rules 8, 11, and 39 with the goal of seeking approval of the Standing Committee in time to publish them simultaneously in August 2016. Finally, with the amendment to Civil Rule 62 officially approved for publication, it also approved for publication the proposed amendments to Appellate Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), and 39(e)(3) which all conform to the amended Civil Rule 62**.

PILOT PROJECTS – Judge Campbell provided the report of the Pilot Projects Subcommittee, which included participants from the Standing Committee, CACM, and the FJC. The Subcommittee has collected and reviewed a lot of information, including working with focus groups of lawyers with experience with these types of discovery regimes. As a result of this work, the Advisory Committee seeks approval to forward the Mandatory Initial Discovery Pilot Project and Expedited Procedures Pilot Project to the Judicial Conference for approval. The first project would test a system of mandatory initial discovery requests to be adopted in each participating court. The second would test the effectiveness of court-wide adoption of practices that, under the current rules, have proved effective in reducing cost and delay.

Judge Campbell proceeded to detail each pilot project and asked for comments and suggestions on the proposals. For the first pilot project, Judge Campbell explained the proposed procedures. The Standing Committee then discussed whether or not all judges in a district would be required to participate in the pilot project, how to choose the districts that should participate, and how to measure the results of the pilot studies. Judge Bates noted the Advisory Committee's strong support of the project. Several Standing Committee members voiced their support as well.

For the second pilot project, many of the procedures are already available, and the purpose of the pilot project is to use education and training to achieve greater use of available procedures. Judge Campbell advised the Committee that CACM has created a case dashboard that will be available to judges via CM/ECF, and that judges will be able to use this tool to monitor the progress of their cases. The pilot would require a bench/bar meeting each year to monitor progress.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved the recommendation to the Judicial Conference of the (i) Mandatory Initial Discovery Pilot Project and (ii) Expedited Procedures Pilot Project, with delegated authority for the Advisory Committee and the Pilot Projects Subcommittee to make refinements to the projects as discussed by the Committee.**

Information Items

EDUCATIONAL EFFORTS REGARDING 2015 CIVIL RULES PACKAGE – Judge Bates outlined some of the efforts undertaken by the Advisory Committee and the FJC to educate the bench and the bar about the 2015 discovery reforms of the Rules of Civil Procedure. Among other efforts, he mentioned the production of several short videos, a 90-minute webinar, plenary sessions at

workshops for district court judges and magistrate judges, segments on the discovery reforms at several circuit court conferences, and other programs sponsored by the American Bar Association.

Judge Bates advised that a subcommittee has been formed, chaired by Judge Ericksen, to consider possible amendments to Rule 30(b)(6). Professor Cooper stated that the Advisory Committee is considering amending Rule 81(c) in light of a concern that it may not adequately protect against forfeiture of the right to a jury trial after a case has been removed from state court.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Molloy and Professors Beale and King provided the report for the Advisory Committee on Criminal Rules, which met on April 18, 2016, in Washington, D.C. He reported that the Advisory Committee had three action items in the form of three proposed amendments to be published this upcoming summer for which it sought the approval of the Standing Committee.

Action Items

RULE 49 – Judge Molloy explained the proposed new stand-alone rule governing electronic service and filing in criminal cases. The Advisory Committee determined to have a stand-alone rule for criminal cases rather than to continue the past practice of incorporating Civil Rule 5 by reference. The proposed amendments to Rule 49 track the general order of Civil Rule 5 rule and much of its language. Unlike the civil rule, Rule 49's discussion of electronic filing and service comes before nonelectronic filing and service in the new criminal rule. Both rules provide that an unrepresented party must file nonelectronically unless allowed to file electronically by court order or local rule. But one substantive difference between the two rules is that, under Civil Rule 5, an unrepresented party may be required to file electronically by court order or local rule. A second substantive difference is that all nonparties must file and serve nonelectronically in the absence of a contrary court order or local rule. This conforms to the current architecture of CM/ECF which only allows the government and the defendant to file electronically in a criminal case. Third, proposed Rule 49 contains language borrowed from Civil Rule 11(a) regarding signatures.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendments to Rules 49 for publication for public comment.**

RULE 45(c) – The proposed amendment to Rule 45(c) is a conforming amendment. It replaces the reference to Civil Rule 5 with a reference to Rule 49(a)(4)(C),(D), and (E).

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rules 45(c) for publication for public comment.**

RULE 12.4 – The proposed amendment to Rule 12.4, changes the required disclosures for statements under Rule 12.4 regarding organizational victims. It permits a court, upon the showing of good cause, to relieve the government of the burden of filing a statement identifying any organizational victim. The proposed amendments reflect changes to the Code of Judicial Conduct and require a party to file the Rule 12.4(a) statement within 28 days after the defendant's initial appearance. The Standing Committee briefly discussed similar potential changes to the Appellate Rules regarding disclosure of organizational victims. And the Advisory Committee discussed removing the word "supplemental" from the title and body of Rule 12.4(b) in order to avoid potential confusion.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendments to Rule 12.4 for publication for public comment.**

Information Items

Judge Molloy reviewed several of the pending items under consideration by the Advisory Committee. The Cooperator Subcommittee continues to consider the problem of risk of harm to cooperating defendants and the kinds of procedural protections that might alleviate this problem. The Subcommittee includes representatives from the Advisory Committee, Standing Committee, CACM, and the Department of Justice. The Advisory Committee has formed subcommittees to consider suggested amendments to Criminal Rule 16 dealing with discovery in complex criminal cases and Rule 5 of the Rules Governing Section 2255 Proceedings regarding petitioner reply briefs. And in response to an op-ed by Judge Jon Newman, the Advisory Committee will consider the wisdom of reducing the number of peremptory challenges in federal trials.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Sandra Ikuta and Professors Gibson and Harner presented the report on behalf of the Advisory Committee on Bankruptcy Rules, which met on March 31, 2016, in Denver, Colorado. The Advisory Committee had nine action items, and sought final approval for three of the items: Rule 1001; Rule 1006, and technical changes to certain official forms.

Action Items

RULE 1001 – The first item was a request for final approval of Rule 1001, dubbed the "civility rule" by Judge Ikuta, which was published in August 2015 to track changes to Civil Rule 1. Judge Ikuta explained that the Advisory Committee considered the comments submitted, but made no changes to the published version of the amended rule.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendments to Rule 1001 for submission to the Judicial Conference for final approval.**

RULE 1006 – The second item was a proposed change to Rule 1006(b), also published for comment in August 2015. The rule explains how a person filing a petition in bankruptcy can pay

the filing fee in installments, as allowed by statute. The proposed amendment clarified that courts may not refuse to accept petitions or summarily dismiss a case because the petitioner failed to make an initial installment payment at the time of filing (even if such a payment was required by local rule). Judge Ikuta said that the Advisory Committee considered the comments submitted, but made no changes to the published version of the amended rule.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendments to Rule 1006 for submission to the Judicial Conference for final approval.**

TECHNICAL CHANGES TO OFFICIAL FORMS – Judge Ikuta next described the Advisory Committee's recommendation for retroactive approval of technical changes to nine official forms. She explained that the Judicial Conference at its March 2016 meeting approved a new process for making technical amendments to official bankruptcy forms. Under the new process, the Advisory Committee makes the technical changes, subject to retroactive approval by the Committee and report to the Judicial Conference. Judge Sutton thanked Judge Ikuta for developing the new streamlined approval process for technical changes to official bankruptcy forms.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed technical changes to Official Forms 106E/F, 119, 201, 206, 206E/F, 309A, 309I, 423, and 424, for submission to the Judicial Conference for final approval.**

Judge Ikuta reported that the Advisory Committee had six additional action items in the form of six sets of proposed amendments to be published this upcoming summer for which it sought the approval of the Committee.

Before focusing on these specific recommendations, however, Judge Ikuta first suggested that the Committee adopt a procedure for more systematically coordinating publication and approval of amendments that affect multiple rules across different advisory committees. The chair recommended that the Rules Committee Support Office lead the coordination effort over the next year and that the Committee then evaluate whether further refinement of the process is needed. Judge Ikuta next explained and sought approval for a package of conforming amendments:

RULE 5005(a)(2) – Judge Ikuta said that the proposed amendments to Rule 5005(a)(2) would make the rule consistent with the proposed amendment to Civil Rule 5(d)(3).

RULES 8002(c), 8011(a)(2)(C), OFFICIAL FORM 417A, RULE 8002(b), RULES 8013, 8015, 8016, 8022, OFFICIAL FORM 417C, PART VIII APPENDIX, AND RULE 8017 – Judge Ikuta next discussed proposed changes to Rules 8002(c), 8011(a)(2)(C), and Official Form 417A; Rule 8002(b) (regarding timeliness of tolling motions); Rules 8013, 8015, 8016, 8022, Official Form 417C, and Part VIII Appendix (regarding length limits), and Rule 8017 (regarding amicus filings). The rule and form changes were proposed to conform to pending and proposed changes to the Federal Rules of Appellate Procedure.

RULE 8002(a)(5) – The new subdivision (a)(5) to Rule 8002 includes a provision similar to FRAP 4(a)(7) specifying when a judgment or order is "entered" for purposes of appeal.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the package of conforming amendments to Rules 5005(a)(2), 8002(c), 8011(a)(2)(C), Official Form 417C, Part VIII Appendix, Rule 8017, and Rule 8002(a)(5) for publication for public comment.**

RULES 3015 AND 3015.1 – Judge Ikuta explained that the Advisory Committee published the first version of the plan form and nine related rule amendments in August 2013. The Advisory Committee received a lot of comments, made significant changes, and republished in 2014. During the second publication, the Advisory Committee again received many comments, including one comment signed by 144 bankruptcy judges who opposed a national official form for chapter 13 plans. Late in the second comment period, the Advisory Committee received a comment proposing that districts be allowed to opt out of the national plan if their local plan form met certain requirements. Many of the bankruptcy judges who opposed a national plan form supported the "opt-out" proposal.

At its fall 2015 meeting, the Advisory Committee approved the national plan form and related rule amendments, but voted to defer submitting those items for final approval pending further consideration of the opt-out proposal. The Advisory Committee reached out to bankruptcy interest groups, made refinements to the opt-out proposal, and received support from most interested parties, including many of the 144 opposing judges.

The proposed amendment to Rule 3015 and new Rule 3015.1 would implement the opt-out provision. Rule 3015 would require that the national chapter 13 plan form be used unless a district adopts a local district-wide form plan that complies with requirements set forth in proposed new Rule 3015.1. The Advisory Committee determined that a third publication period would allow for full vetting of the opt-out proposal, but it recommended a shortened three-month public comment period because of the narrow focus of the proposed change. To avoid confusion, the Advisory Committee recommended that opt-out rules be published in July 2016, a month earlier than the rules and forms to be published in August 2016.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendments to Rule 3015 and 3015.1 for publication for public comment.**

RULE 8006 – The Advisory Committee proposed to amend subdivision (c) of Rule 8006 to allow a bankruptcy court, bankruptcy appellate panel, or district court to file a statement in support of or against a direct appeal certification filed by the parties.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendment to Rule 8006 for publication for public comment.**

RULE 8018.1 –This new rule would help guide district courts in light of the Supreme Court's *Stern v. Marshall* trilogy of cases (*Stern*, *Arkison* and *Wellness*). Proposed Rule 8018.1 would address a situation where the bankruptcy court has mistakenly decided a *Stern* claim by allowing the district court to treat the bankruptcy court's erroneous final judgment as proposed findings of fact and conclusions of law to be decided de novo without having to remand the case to the bankruptcy court.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed Rule 8018.1 for publication for public comment.**

RULE 8023 – The proposed amendment to Rule 8023 would add a cross-reference to Rule 9019 to remind the parties that when they enter a settlement and move to dismiss an appeal, they may first need to obtain the bankruptcy court's approval of the settlement first.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendment to Rule 8023 for publication for public comment.**

OFFICIAL FORM 309F – Judge Ikuta said that the Advisory Committee recommended publication of amendments to five official bankruptcy forms. The first of the five forms was a proposed amendment to Official Form 309F. The form currently requires that a creditor who wants to assert that certain corporate and partnership debts are not dischargeable must file a complaint by a specific deadline. A recent district court decision evaluated the relevant statutory provisions and concluded that the form is incorrect and that no deadline should be imposed. The Advisory Committee agreed that the statute is ambiguous, and therefore proposed that Official Form 309F be amended to avoid taking a position.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendment to Official Form 309F for publication for public comment.**

OFFICIAL FORMS 25A, 25B, 25C, AND 26 – Four forms, Official Forms 25A, 25B, 25C (the small business debtor forms), and 26 (Periodic Report Regarding Value, Operations, and Profitability) were renumbered as 425A, 425B, 425C and 426 to conform with the remainder of the Forms Modernization Project, and revised to be easier to understand and more consistent with the Bankruptcy Code.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendment to Official Forms 25A, 25B, 25C, 26 for publication for public comment.**

Information Items

Judge Ikuta, Professor Elizabeth Gibson, and Professor Michelle Harner discussed the Advisory Committee's two information items. The first item was about the status of the Advisory Committee's proposal to add a new subdivision (h) to Rule 9037 in response to a suggestion

from CACM. Judge Ikuta and Professor Gibson explained that although the Advisory Committee approved an amendment, it decided to delay its recommendation for publication until the Advisory Committees for Appellate, Criminal and Civil Rules can decide whether to add a similar procedure to their privacy rules. Professor Harner summarized the second information item regarding the Advisory Committee's decision not to recommend any changes at this time to Rule 4003(c) in response to a suggestion.

REPORT OF THE ADMINISTRATIVE OFFICE

STRATEGIC PLAN FOR THE FEDERAL JUDICIARY – Rebecca Womeldorf discussed the Executive Committee's *Strategic Plan for the Federal Judiciary* which lays out various goals and priorities for the federal judiciary. She invited members to review this report and offer any input or feedback that they might have to her or Judge Sutton for inclusion in communications back to the Executive Committee.

LEGISLATIVE REPORT – There are bills currently pending in the House of Representatives and Senate intended to prevent proposed Criminal Rule 41 from becoming effective. Members of the Rules Committee have discussed this proposed rule with various members of Congress to respond to their concerns and explain the purpose and limited scope of the proposed rule.

CONCLUDING REMARKS

Judge Sutton thanked the Reporters for all their impressive work and Rebecca Womeldorf and the Rules Committee Support Office for helping to coordinate the meeting. Professor Coquillette thanked Judge Sutton again for all of his work as Chair of the Standing Committee over the past four years. Judge Sutton concluded the meeting. The Standing Committee will next meet in Phoenix, Arizona, on January 3–4, 2017.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

Agenda E-19 (Summary)
Rules
September 2016

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

1. a. Approve the proposed amendments to Bankruptcy Rules 1001, 1006(b), and 1015(b), and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with law; and.....pp. 5–7

   b. Approve the proposed revisions to Official Forms 20A and 20B (renumbered as 420A and 420B) and Official Form 410S2 to take effect on December 1, 2016, and that they govern all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings then pending. .....pp. 7–9

2. Approve the proposed (a) Mandatory Initial Discovery Pilot Project and (b) Expedited Procedures Pilot Project, each for a period of approximately three years, and delegate authority to the Committee on Rules of Practice and Procedure to develop guidelines to implement the pilot projects. .....pp. 18–21

3. Approve the proposed amendments to Evidence Rules 803(16) and 902, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.....pp. 31–33

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

- Federal Rules of Appellate Procedure .....pp. 2–5
- Federal Rules of Bankruptcy Procedure .....pp. 9–18
- Federal Rules of Civil Procedure.....pp. 21–25
- Federal Rules of Criminal Procedure.....pp. 26–30
- Federal Rules of Evidence .....p. 34
- Other Matters .....p. 35

NOTICE

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

Agenda E-19
Rules
September 2016

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure (Standing Committee) met in Washington, D.C. on June 6, 2016. All members participated except Gregory G. Garre, Esq.

Representing the advisory rules committees were Judge Steven M. Colloton, Chair, and Professor Gregory E. Maggs, Reporter, of the Advisory Committee on Appellate Rules; Judge Sandra Segal Ikuta, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Michelle M. Harner, Associate Reporter, of the Advisory Committee on Bankruptcy Rules; Judge John D. Bates, Chair, Professor Edward H. Cooper, Reporter, and Professor Richard L. Marcus, Associate Reporter, of the Advisory Committee on Civil Rules; Judge Donald W. Molloy, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, of the Advisory Committee on Criminal Rules; Judge William K. Sessions III, Chair, and Professor Daniel J. Capra, Reporter, of the Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Daniel R. Coquillette, the Standing Committee's Reporter; Professor Joseph F. Spaniol, Jr., Professor R. Joseph Kimble, and Professor Bryan A. Garner, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy, Scott Myers, and Julie Wilson, Attorneys on the Rules Committee Support Staff; Derek Webb, Law Clerk to the Standing Committee; Amelia Yowell, Supreme Court Fellow; Judge Jeremy D. Fogel, Director, Dr. Tim Reagan, and Dr. Emery G. Lee, of the Federal Judicial Center (FJC); Sean Marlaire, Attorney Advisor, Judicial

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

Conference Committee on Court Administration and Case Management; Judge David G. Campbell, immediate-past Chair, Advisory Committee on Civil Rules; Judge Robert Michael Dow, Jr., Chair of the Rule 23 Subcommittee, Advisory Committee on Civil Rules; and Judge Paul W. Grimm, former member of the Advisory Committee on Civil Rules. Diana Erbsen, Joshua Gardner, Elizabeth J. Shapiro, and Natalia Sorgente attended on behalf of the Department of Justice.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Approved for Publication and Comment

The Advisory Committee on Appellate Rules submitted proposed amendments to Appellate Rules 8, 11(g), 25, 29(a), and 39(e)(3), and Form 4 with a request that they be published for comment in August 2016. The Standing Committee approved the Advisory Committee's recommendation.

Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), and 39(e)(3)

The Advisory Committee on Civil Rules has proposed amendments to Civil Rule 62, discussed *infra* pp. 24–25. Civil Rule 62(b) currently states: "If an appeal is taken, the appellant may obtain a stay by supersedeas bond . . . ." The proposed amendments would, in part, eliminate the antiquated term "supersedeas" and allow an appellant to provide "a bond or other security." The Appellate Rules use the term "supersedeas bond" in Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), and 39(e)(3). The proposed amendments to these rules are intended to conform the Appellate Rules to the proposed amended Civil Rule 62(b). No change in meaning is intended.

Most of the proposed amendments merely change the term "supersedeas bond" to "bond or other security," with slight variations depending on the context. The proposed amendments to Rule 8(b) are slightly more involved. Current Rule 8(b) provides jurisdiction to enforce a

supersedeas bond against the "surety" who issued the supersedeas bond. Because Civil Rule 62(b) now authorizes both bonds and other forms of security, the term "surety" would be too limiting. For example, the issuer of a letter of credit is not a surety. The proposed amendments to Rule 8(b) ensure that the rule encompasses sureties and other security providers.

Rule 25

The proposed amendments to Appellate Rule 25 (Filing and Service) are part of a larger inter-advisory committee project to develop rules for electronic filing, service, and notice. As part of that project, the Advisory Committee on Civil Rules determined to pursue a national rule mandating electronic filing and service in civil cases. That decision has required the Advisory Committees on Appellate, Bankruptcy, and Criminal Rules to reconsider their respective rules on filing and service.

The proposed amendments are intended to conform Appellate Rule 25 to Civil Rule 5. The proposal has four key components. First, proposed Rule 25(a)(2)(B) addresses filing. Those represented by counsel are required to file electronically, unless nonelectronic filing is allowed for good cause or is allowed or required by local rule. Unrepresented persons may file electronically only if allowed by court order or by local rule, and may only be required to file electronically by court order or by local rule that includes reasonable exceptions. Second, proposed Rule 25(a)(2)(B)(iii) addresses electronic signatures by specifying that when a paper is filed electronically, the "user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature." Third, proposed Rule 25(c)(2) addresses service and provides that "[e]lectronic service may be made by sending a paper to a registered user by filing it with the court's electronic-filing system or by using other electronic means that the person consented to in writing." Fourth, proposed Rule 25(d)(1) is

revised to make proof of service of process required only for papers that are not served electronically through the court's electronic filing system.

Rule 29(a)

Appellate Rule 29(a) (Brief of an Amicus Curiae–When Permitted) specifies that an amicus curiae may file a brief with leave of court or without leave of the court "if the brief states that all parties have consented to its filing." Several circuits have adopted local rules that forbid the filing of a brief by an amicus curiae when the filing could cause the recusal of one or more judges.[1] These local rules are in some tension with Rule 29(a) because they do not allow the filing of amicus briefs based solely on consent of the parties.

In considering how to address the issue, the Advisory Committee determined that the local rules forbidding the filing of an amicus brief in such situations should be authorized by Rule 29 because a court reasonably could conclude that its interest in avoiding disqualification of one or more judges on a hearing panel or in a rehearing vote outweighs the interest of a putative amicus curiae in filing a brief. Accordingly, the proposed amendment to Rule 29(a) authorizes courts to strike or prohibit the filing of amicus briefs in situations when they would disqualify a judge. The Advisory Committee declined to create a national rule; instead the matter is left to the discretion of the circuits to address by local rule or court order.

Form 4

Litigants seeking permission to proceed in forma pauperis must complete Appellate Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis). Question 12 of Appellate Form 4 asks litigants to provide the last four digits of their Social

[1] For example, Second Circuit Local Rule 29.1(a) states: "The court ordinarily will deny leave to file an amicus brief when, by reason of a relationship between a judge assigned to hear the proceeding and the amicus curiae or its counsel, the filing of the brief might cause the recusal of the judge." The D.C., Fifth, and Ninth Circuits have similar local rules.

Security numbers. Given the potential security and privacy concerns associated with Social Security numbers, and the consensus among clerks of court that the last four digits of Social Security numbers are not needed, the proposed amendment deletes this question.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Official Forms Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 1001, 1006(b), and 1015(b), and Official Forms 20A, 20B, and 410S2, with a recommendation that they be approved and transmitted to the Judicial Conference.

The proposed amendments to Rules 1001 and 1006(b) were circulated to the bench, bar, and public for comment in August 2015. Because of the limited and conforming nature of the proposed amendments to Rule 1015(b) and Official Forms 20A, 20B, and 410S2, they are forwarded for approval without publication.

Rule 1001

Rule 1001 (Scope of Rules and Forms; Short Title) is the bankruptcy counterpart to Civil Rule 1, and it generally tracks the language of the civil rule. The last sentence of Rule 1001 currently states, "These rules shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding." This language deviates from Civil Rule 1, which states (as of December 1, 2015): "[These rules] should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." The proposed amendment to Rule 1001 changes the last sentence of the rule to conform to the language of Civil Rule 1.

The Advisory Committee received two comments to the proposed rule amendment. One comment supported the amendment and the other concerned general drafting issues. The

Advisory Committee determined that the comments did not warrant any changes and voted unanimously to approve the proposed amendment as published.

Rule 1006(b)

Rule 1006(b) (Filing Fee) governs the payment of the bankruptcy filing fee in installments, as authorized for individual debtors by 28 U.S.C. § 1930(a). In evaluating a suggested amendment to the rule, the Advisory Committee became aware that some courts refuse to accept a petition or summarily dismiss a case if an installment payment is not made at the time the case is filed. The Advisory Committee concluded that such a practice is inconsistent with Rules 1006(b)(1) and 1017(b)(1). The latter provision allows for dismissal of a case for the failure to pay any installment of the filing fee only "after a hearing on notice to the debtor and the trustee."

In order to clarify that courts may not refuse to accept petitions or summarily dismiss cases for failure to make initial installment payments at the time of filing, the proposed amendment to Rule 1006(b)(1) requires that an individual debtor's petition must be accepted for filing so long as the debtor submits a signed application to pay the filing fee in installments—even if a required initial installment payment is not made at the same time. The Committee Note explains that dismissal of the case for failure to pay any installment must proceed according to Rule 1017(b)(1).

The Advisory Committee received two comments to the proposed rule amendment. One comment supported the amendment and the other concerned general drafting issues. The Advisory Committee determined that the comments did not warrant any changes and voted unanimously to approve the proposed amendment as published.

Rule 1015(b)

Rule 1015(b) (Cases Involving Two or More Related Debtors) provides for the joint administration of bankruptcy cases in which the debtors are closely related. Among the debtors covered by the rule are "a husband and wife." The provision also implements a statutory requirement that a husband and wife with jointly administered cases choose the same exemption scheme—either federal bankruptcy exemptions, if permitted, or state exemptions.

After the decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), which held § 3 of the Defense of Marriage Act unconstitutional, the Advisory Committee received a suggestion that Rule 1015(b) be amended to substitute the word "spouses" for "husband and wife" in order to include joint bankruptcy cases of same-sex couples. Two years later, the Court decided *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), which held that the right to marry is a fundamental right under the Fourteenth Amendment and that same-sex couples may not be deprived of that right. *Id.* at 2599. The Court further held in *Obergefell* that the Equal Protection Clause prevents states from denying same-sex couples the benefits of civil marriage on the same terms as opposite-sex couples. *Id.* at 2604.

In light of the holdings and reasoning in *Windsor* and *Obergefell*, the Advisory Committee recommended replacing both instances of "husband and wife" with "spouses" in Rule 1015(b). Because it viewed the proposed changes as conforming amendments, the Advisory Committee voted unanimously to recommend approval without publication for public comment.

Official Forms 20A and 20B

Official Forms 20A and 20B were not included with the large group of modernized and renumbered forms that went into effect on December 1, 2015. The Advisory Committee

reviewed the forms and recommended that they be renumbered and that a minor wording change be made to them.

Under the new numbering convention, the forms should be designated as Official Forms 420A and 420B. In addition, the Advisory Committee noted that both forms state that the recipient of the notice must "mail" a copy of any response to the movant's or objector's attorney. To encompass other permissible methods of service, the Advisory Committee recommended that "mail" be changed to "send." Because of the ministerial and conforming nature of the proposed changes, the Advisory Committee recommended approval and transmission to the Judicial Conference without publication.

Official Form 410S2

The Advisory Committee became aware of a possible inconsistency between Rule 3002.1(c) and Official Form 410S2. Rule 3002.1(c) requires a home mortgage creditor in a chapter 13 case to give notice of any fees, expenses, or charges that are assessed during the course of the case to the debtor, debtor's counsel, and the trustee. This information assists a debtor who wants to maintain mortgage payments while in bankruptcy to make payments in a sufficient amount to emerge from bankruptcy current on the mortgage. Official Form 410S2 implements the rule provision.

The instructions to Part 1 of the form state: "Do not include . . . any amounts previously . . . ruled on by the bankruptcy court." Subdivision (c) of the rule, however, requires the creditor to give notice of all postpetition fees, expenses, and charges without excepting ones already ruled on by the court.

The Advisory Committee concluded that the inconsistency between the form and the rule should be eliminated by deleting the instruction from the form. In order to prevent confusion or

the risk of double payments, the proposed amendment adds an instruction to Form 410S2 that requires the creditor to indicate if a fee has previously been approved by the court. Because this is a minor conforming amendment, the Advisory Committee recommended that the proposed change be approved without publication.

The Standing Committee voted unanimously to support the recommendations of the Advisory Committee on Bankruptcy Rules.

Recommendation: That the Judicial Conference:

a. Approve the proposed amendments to Bankruptcy Rules 1001, 1006(b), and 1015(b), and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with law; and

b. Approve the proposed revisions to Official Forms 20A and 20B (renumbered as 420A and 420B) and Official Form 410S2 to take effect on December 1, 2016, and that they govern all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

The proposed amendments to the Federal Rules of Bankruptcy Procedure and revisions to the Official Bankruptcy Forms are set forth in Appendix A, with excerpts from the Advisory Committee's reports.

Rules and Official Forms Approved for Publication and Comment

The Advisory Committee submitted proposed amendments to rules and forms for two separate public comment periods beginning in 2016. The first comment period—for a proposed amendment to Rule 3015 and a proposed new Rule 3015.1—opened on July 1, 2016 and will close on October 3, 2016. The second comment period will begin August 15, 2016 and end February 15, 2017. It will be for the following rules and forms: Rules 3002.1, 5005(a)(2), 8002, 8006, 8011, 8013, 8015, 8016, 8017, new Rule 8018.1, 8022, 8023, a new Part VIII appendix,

and Official Forms 25A, 25B, 25C, 26, 309F, 417A, and 417C. The reason for two comment periods is discussed below.

July 2016 Publication

Rule 3015 and new Rule 3015.1

The proposed amendment to Rule 3015 (Filing, Objection to Confirmation, Effect of Confirmation, and Modification of a Plan in a Chapter 12 or a Chapter 13 Case) would require the use of a national official form for chapter 13 plans unless a district requires the use of a local form for that purpose that meets the requirements set out in proposed new Rule 3015.1 (Requirements for a Local Form for Plans Filed in a Chapter 13 Case).

The Advisory Committee published a proposed chapter 13 plan form and amendments to nine related rules in 2013 and again in 2014. At the end of the second comment period, the Advisory Committee received a suggestion to allow districts to opt out of the proposed national chapter 13 plan form if the district adopts a local plan form that meets certain requirements. The proposed amendment to Rule 3015 and new Rule 3015.1 would implement the opt-out proposal.

The Advisory Committee unanimously recommended that the amendments to Rule 3015 and proposed new Rule 3015.1 be published for public comment. The opt-out concept was not included in the 2013 and 2014 publications, and, although it might be viewed as a lesser-included version of the proposal for a mandatory national form, it does represent a distinct change from the published proposals.

The Advisory Committee also unanimously agreed that the rules should be published on a truncated schedule. According to Procedures for the Judicial Conference's Committee on Rules of Practice and Procedure and Its Advisory Rules Committees, Vol. 1, Ch. 4, § 40.20.40(d) of the *Guide to Judiciary Policy*: "The Committee may shorten the public comment period or

eliminate public hearings if it determines that the administration of justice requires a proposed rule change to be expedited and that appropriate notice to the public can still be provided and public comment obtained." Given the two prior publications and the narrow focus of the revised rules, the Advisory Committee believes that three months is a sufficient period of time to obtain public comments. Moreover, the shortened time frame would allow the chapter 13 plan form and related rules (including the proposed opt-out procedure) to go into effect a year earlier than would be the case if the publication period were six months. The Standing Committee unanimously agreed with the recommendations.

August 2016 Publication

Rule 3002.1

The proposed amendment to Rule 3002.1 (Notice Related to Claims Secured by Security Interest in the Debtor's Principal Residence) was approved for publication by the Standing Committee at its January 2016 meeting, and described in its March 2016 report to the Judicial Conference. The amendment would authorize courts to modify the rule's requirements for claims arising from home equity lines of credit (HELOCs), and to acknowledge the right of the trustee, debtor, or other party in interest, such as the United States trustee, to object to a change in a home-mortgage payment amount after receiving notice of the change under this subdivision.

Rule 5005(a)(2)

Rule 5005(a)(2) governs the filing of documents electronically in federal bankruptcy cases. It generally tracks the language in Civil Rule 5(d)(3), which governs the electronic filing of documents in civil cases. The Advisory Committee has been working with the Advisory Committees on Appellate, Civil, and Criminal Rules to coordinate amendments to the electronic filing rules.

The Advisory Committee considered potential amendments to Rule 5005(a)(2) at its April 2015, October 2015, and March 2016 meetings. It reviewed the status of potential amendments to Civil Rule 5, and it examined the implications of those amendments for the bankruptcy rules. It also discussed in detail the variations in the electronic filing and service provisions being considered by the Criminal Rules Advisory Committee with respect to Criminal Rule 49. The Advisory Committee generally agreed that Rule 5005(a)(2) should be amended to the extent necessary to conform to Civil Rule 5.

In light of the foregoing, the Advisory Committee unanimously approved amendments to Rule 5005(a)(2) that would be consistent, to the greatest extent possible, with the proposed amendments to Civil Rule 5(d)(3). The variations between the proposed amendments to Rule 5005(a)(2) and Civil Rule 5(d)(3) relate primarily to different terminology used in bankruptcy and civil practice.[2] The two rules are otherwise consistent, and the Advisory Committee recommended publication in August 2016, at the same time as the proposed amendments to Civil Rule 5 are published.

Conforming Amendments to the Bankruptcy Appellate Rules and Forms

Part VIII of the Bankruptcy Rules (Appeals) was completely revised in 2014 to conform as closely as possible to the Federal Rules of Appellate Procedure. Rather than incorporate the Appellate Rules by reference, the Part VIII rules largely track the language of the Appellate Rules.

[2] For example, where Civil Rule 5 refers to "a person proceeding with an attorney," Bankruptcy Rule 5005 uses the term "entity," which under the Bankruptcy Code is a broader term than "person." And where Civil Rule 5 refers to "[a] person not represented by an attorney," Bankruptcy Rule 5005 uses the term "individual" because only human beings may proceed without an attorney in bankruptcy cases, and the Code definition of "person" includes corporations and partnerships in addition to individuals.

On April 28, 2016, the Supreme Court adopted and transmitted to Congress amendments to the Appellate Rules that will go into effect on December 1, 2016, unless Congress takes action to the contrary. The Advisory Committee on Appellate Rules has also proposed an amendment to Appellate Rule 29(a) for publication in August 2016. The following Part VIII amendments for publication are proposed to bring the Bankruptcy Rules into conformity with the pending amendments to the Appellate Rules.

Bankruptcy Rules 8002(c) (Time for Filing Notice of Appeal) and 8011(a)(2)(C) (Filing and Service; Signature) include inmate-filing provisions that are virtually identical to the existing provisions in Appellate Rules 4(c) and 25(a)(2)(C). The 2016 amendments to the Appellate Rules are intended to clarify certain issues that have produced conflicts in the case law.

To implement the amendments to the Appellate Rules, a new appellate form has been devised that can be used for an inmate declaration under Rules 4 and 25. For bankruptcy appeals, the Advisory Committee recommends that a similar form—Director's Form 4170 (Inmate Filer's Declaration)—be adopted for that purpose. In addition, the Advisory Committee proposes for publication an amendment to Official Form 417A (Notice of Appeal and Statement of Election), similar to the amendment to Appellate Forms 1 and 5, that will alert inmate filers to the existence of Director's Form 4170.

Rule 8002(b) and its counterpart, Appellate Rule 4(a)(4), set out a list of post-judgment motions that toll the time for filing an appeal. Under the current rules, the motion must be "timely file[d]" in order to have a tolling effect. The 2016 amendment to Appellate Rule 4(a)(4) resolves a circuit split on the question whether a tolling motion filed outside the time period specified by the relevant rule, but nevertheless ruled on by the district court, is timely filed for purposes of Rule 4(a)(4). Adopting the majority view on this issue, the pending amendment

adds an explicit requirement that the motion must be filed within the time period specified by the rule under which it is made in order to have a tolling effect for the purpose of determining the deadline for filing a notice of appeal. The Advisory Committee proposed that a similar amendment to Rule 8002(b) be published for comment.

The 2016 amendments to Appellate Rules 5, 21, 27, 35, and 40 convert the existing page limits to word limits for documents prepared using a computer and employ a conversion ratio of 260 words per page rather than the current ratio of 280 words per page. Accordingly, the amendments reduce the existing word limits in Appellate Rules 32 and 28.1 to reflect the 260 words-per-page ratio.

Appellate Rule 32(f) sets out a uniform list of the items that can be excluded when computing a document's length. The local variation provision of Rule 32(e) highlights a court's authority (by order or local rule) to set length limits that exceed those in the Appellate Rules. Appellate Form 6 (Certificate of Compliance with Rule 32(a)) is amended to reflect the changed length limits. Finally, a new appendix collects all of the length limits in the Appellate Rules.

The Advisory Committee proposed for publication parallel amendments to Rules 8013(f) (Motions), 8015(a)(7) and (f) (Form and Length of Briefs), 8016(d) (Cross-Appeals), and 8022(b) (Motion for Rehearing), along with Official Form 417C (Certificate of Compliance with Rule 8015(a)(7)(B), or 8016(d)(2)). In addition, it approved for publication a proposed appendix to Part VIII, which is similar to the appendix added to the Appellate Rules.

Rule 8017 is the bankruptcy counterpart to Appellate Rule 29. The 2016 amendment to Appellate Rule 29 provides a default rule concerning the timing and length of amicus briefs filed in connection with petitions for panel rehearing or rehearing en banc. The amendment does not require courts to accept amicus briefs regarding rehearing, but it does provide guidelines for such

briefs that are permitted. The Advisory Committee proposed for publication a parallel amendment to Rule 8017.

As discussed *supra* p. 4, the Advisory Committee on Appellate Rules has proposed for publication another amendment to Appellate Rule 29(a) that would authorize a court of appeals to prohibit or strike the filing of an amicus brief to which the parties consented if the filing would result in the disqualification of a judge. The Advisory Committee on Bankruptcy Rules proposed publication of a similar amendment to Bankruptcy Rule 8017 in order to maintain consistency between the two sets of rules.

Additional Amendments to the Bankruptcy Appellate Rules

In response to the August 2012 publication of the proposed revision of the Part VIII rules, a comment suggested that it would be useful for Rule 8002 to have a provision similar to that in Appellate Rule 4(a)(7), which addresses when a judgment or order is entered for purposes of Rule 4(a), in order to help clarify timing issues presented by the separate-document requirement. The Advisory Committee agreed and recommended for publication a new subdivision (a)(5) to Rule 8002(a) defining entry of judgment.

Under 28 U.S.C. § 158(d)(2)(A), which is implemented by revised Rule 8006(c), all appellants and all appellees, acting jointly, may certify a proceeding for direct appeal to the court of appeals without any action being taken by the bankruptcy court, district court, or bankruptcy appellate panel ("BAP"). The Advisory Committee received a suggestion that the bankruptcy court should have the opportunity to file a short supplemental statement regarding the merits of certification when the parties certify the appeal.

The Advisory Committee agreed that the court of appeals would likely benefit from the court's statement about whether the appeal satisfies one of the grounds for certification, but concluded that authorization should not be limited to the bankruptcy court. Because the matter

might be deemed to be pending in the district court or BAP at the time or shortly after the parties file the certification, those courts should also be authorized to file a statement with respect to appeals pending before them. Proposed new subdivision (c)(2) would authorize such supplemental statements by each court.

A proposed new Rule 8018.1 would address the situation in which an appeal is taken from a bankruptcy court judgment and the district court decides that the proceeding is one in which the bankruptcy court lacked constitutional authority to enter a final judgment. It would authorize the district court to treat the bankruptcy court's judgment as proposed findings of fact and conclusions of law, which the district court would review de novo.

Rule 8023 would be amended to add a cross-reference to Rule 9019 (Compromise and Arbitration). The amendment would provide a reminder that when dismissal of an appeal is sought as the result of a settlement by the parties, Rule 9019 may require approval of the settlement by the bankruptcy court. The amended rule would take into account that one of the parties to the appeal being voluntarily dismissed might be the bankruptcy trustee, who is required under Rule 9019 to obtain court approval of any compromise.

Most of the official forms that were part of the Advisory Committee's Forms Modernization Project, which began in 2008, went into effect on December 1, 2015. The Advisory Committee deferred at that time consideration of certain forms relating to chapter 11 cases—specifically, Forms 25A, B, and C, and Form 26. The Advisory Committee reviewed each of these forms extensively over the past year and has recommended that they be published for comment, as revised and renumbered as Official Forms 425A, 425B, 425C, and 426.

Official Form 309F is used for providing notice to creditors in a chapter 11 corporate or partnership case of the case's commencement and certain deadlines. Line 8 of the form, which

relates to the "Exception to discharge deadline," states: "You must start a judicial proceeding by filing a complaint if you want to have a debt excepted from discharge under 11 U.S.C. § 1141(d)(6)(A)."

The Advisory Committee concluded that there are ambiguities in § 1141(d)(6)(A) regarding its relationship to § 523 which may cause the instruction to be incorrect. It therefore proposed for publication an amendment to line 8 of the form that would read: "If § 523(c) applies to your claim and you seek to have it excepted from discharge, you must start a judicial proceeding by filing a complaint by the deadline stated below."

The Standing Committee unanimously approved all of the above amendments for publication in August 2016.

Information Items

At its March 15, 2016 meeting, the Judicial Conference approved the Standing Committee's recommendation to allow the Advisory Committee to make technical, non-substantive changes to official bankruptcy forms when the need for such changes is determined, subject to retroactive approval by the Standing Committee and reporting of the changes to the Judicial Conference. Operating under that authority, the Advisory Committee made, and the Standing Committee approved, the following technical changes:

- Official Form 106E/F - Line number references in the instruction at the top of Part 2 started at an incorrect number; they were changed from "4.3 followed by 4.4" to "4.4 followed by 4.5."

- Official Form 119 - Because there is no "Part 3" on the form, the reference to "Part 3" at the top of page 1 was changed to "Part 2."

- Official Form 201 - The hyperlink in Question 7 for NACIS codes was updated to match the new landing page maintained by the Administrative Office.

- Official Form 206 Summary - Cross-references to line numbers 6a and 6b of Official Form 206E/F were incorrect and were changed to 5a and 5b.
- Official Form 309A - Line 9 was reformatted to be consistent with the remainder of the lines in the form.
- Official Form 309I - The last two lines of instruction 13 on page 2 inaccurately indicated that the clerk's office must *receive* an objection to discharge by a certain deadline in order to be valid. The time period is marked by the filing (not the receipt) of a motion, so the instruction was rephrased as: "If you believe that the debtors are not entitled to a discharge of any of their debts under 11 U.S.C. § 1328(f), you must file a motion by the deadline."
- Official Form 423 - The reference near the top of the form to 11 U.S.C. §1141(d)(3) was changed from "does not apply" to "applies" to clarify the relationship between that statutory provision and the need for a chapter 11 debtor to complete an instructional course in personal financial management in order to obtain a discharge.
- Official Form 424 - The erroneous reference to Rule 8001 at the top of page 2 was changed to Rule 8006.

FEDERAL RULES OF CIVIL PROCEDURE

Items Recommended for Approval

As part of an ongoing project to develop ways to improve civil litigation, the Advisory Committee is engaged in several reform efforts, including the development and testing of pilot projects. As previously reported, a subcommittee was formed to investigate pilot projects undertaken across the country in state and federal courts and to recommend possible future pilot projects for federal courts. Over the past year, the subcommittee, comprised of members of both the Standing Committee and the Advisory Committee on Civil Rules, as well as a liaison from the Judicial Conference Committee on Court Administration and Case Management (CACM Committee), consulted with numerous organizations and courts, conducted reviews of pilot projects in ten states, held focus-group discussions with lawyers and judges from courts in Colorado, Arizona, and Canada, and collected and reviewed much additional information. With

this information and the involvement of both the CACM Committee and the FJC, the subcommittee has developed two pilot projects aimed at reducing the cost and delay of civil litigation—one focused on enhanced initial discovery and the other on expedited case management. Both pilots have been endorsed by the CACM Committee.

The proposed Mandatory Initial Discovery Pilot Project would involve all civil cases in participating courts other than cases exempted by Rule 26(a)(1)(B), patent cases governed by local rule, and cases transferred for consolidated administration by the Judicial Panel on Multidistrict Litigation. The pilot would be implemented through a standing order issued in each of the participating districts. The order would include detailed instructions to the parties, mandatory initial discovery requests, and specific requirements for the disclosure of hard-copy documents and electronically stored information. The pilot would also include a user's manual for the pilot judges. The current proposed Standing Order for this pilot is included as part of Appendix B.

The proposed Expedited Procedures Pilot Project has also been developed with the participation of the rules committees, the CACM Committee, and the FJC. This pilot focuses on strict judicial application of existing case management tools and judicial training. The pilot, which would involve all civil cases in participating courts in which discovery and trial are possible, has three parts. First, participating courts would be required to adopt the following practices: (1) prompt case management conferences; (2) firm caps on the amount of time allocated for discovery with very limited opportunity for extensions of time; (3) prompt resolution of discovery disputes by telephone conferences; (4) decisions on all dispositive motions within 60 days of the reply brief being filed; and (5) setting and holding firm trial dates.

Second, clear metrics would be employed. Third, there would be an extensive training and collaboration component, to include training sessions conducted by the FJC.

The authority for the proposed pilot projects is found in several places. First, 28 U.S.C. § 331 authorizes the Judicial Conference to "carry on a continuous study of the operation and effect of the general rules of practice and procedure" used in the federal courts, and to recommend "[s]uch changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay[.]" Second, Civil Rule 16(b)(3) authorizes a district court to enter a scheduling order that addresses several relevant subjects: deadlines for the litigation, the timing of disclosures and the extent of discovery, the disclosure of electronically stored information, procedures for prompt resolution of discovery disputes, and "other appropriate matters." Third, Rule 26(b)(2)(C) authorizes the court, on its own, to limit the frequency or extent of discovery, considering whether information can be obtained from other sources that are more convenient, less burdensome, or less expensive.

The subcommittee has recommended that at least three to five districts participate in each pilot project. Each participating district would have to agree to make the pilot's requirements mandatory.

The Advisory Committee on Civil Rules approved the pilot projects at its April 2016 meeting and submitted them to the Standing Committee with a recommendation that they be approved and transmitted to the Judicial Conference. The Standing Committee voted unanimously to approve the recommendations.

Recommendation: That the Judicial Conference approve the proposed (a) Mandatory Initial Discovery Pilot Project and (b) Expedited Procedures Pilot Project, each for a period of approximately three years, and delegate authority to the Committee on Rules of Practice and Procedure to develop guidelines to implement the pilot projects.

The proposed pilot projects are explained further in an excerpt from the Advisory Committee's report set out in Appendix B.

Rules Approved for Publication and Comment

The Advisory Committee on Civil Rules submitted proposed amendments to Civil Rules 5, 23, 62, and 65.1 with a request that they be published for comment in August 2016. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 5

Over the years, the Standing Committee and its Advisory Committees have worked together to identify rule changes made necessary by changes in technology, and have coordinated the development of rules proposals. One example is the recommendation by the inter-committee CM/ECF Subcommittee that the "3-day rule" in each set of national rules be amended to exclude electronic service.[3] Another example is a current inter-advisory committee project to develop rules for electronic filing, service, and notice. This coordinated work developed after the Advisory Committee on Civil Rules determined that the Civil Rules should be amended to mandate electronic filing and service. The resulting proposal would amend Civil Rule 5 (Serving and Filing Pleadings and Other Papers) to address electronic filing, signature, and service.

The proposed amendment to Rule 5(d)(3) would establish a uniform national rule that makes electronic filing mandatory for parties represented by counsel, with exceptions for good

[3] The "3-day rule" adds three days to a given period if that period is measured after service and service is accomplished by certain methods.

cause and for non-electronic filing permitted by local rule. The username and password of an attorney of record, along with the attorney's name in the signature block, serves as the attorney's signature. Under the proposal, courts would retain the discretion to permit electronic filing by pro se parties, either through local rule or order.

Proposed amendments to Rule 5(b)(2)(E) address service. The present rule allows electronic service only if the person to be served has consented in writing. The proposal deletes the requirement of consent when service is made on a registered user through the court's electronic filing system. A related proposed amendment abrogates subsection (b)(3), which currently permits electronic service through the court's facilities "[i]f a local rule so authorizes." The proposal to authorize electronic service through CM/ECF makes subsection (b)(3)'s reliance on local rules unnecessary. Written consent is still required for electronic service by other means, whether the person served is a registered user or not. An example is service of papers not filed with the court such as discovery materials. Pro se parties who are not registered users are also still protected by the consent requirement.

Proposed amendments to Rule 5(d) address proof of service. The current rule requires a certificate of service, but does not specify a particular form. The proposal provides that a notice of electronic filing (or "NEF") generated by the court's CM/ECF system constitutes a certificate of service.

Rule 23

Since 2011, the Advisory Committee on Civil Rules, through its Rule 23 Subcommittee, has been considering amendments to Rule 23 (Class Actions). The Advisory Committee determined to take up this effort in light of several developments that seemed to warrant reexamination of Rule 23, namely, (1) the passage of time since the 2003 amendments to Rule 23

went into effect; (2) the development of a body of case law on class-action practice; and (3) recurrent interest in the subject in Congress, including the 2005 adoption of the Class Action Fairness Act.

An initial list of possible rule amendments was presented by subcommittee members at nearly two dozen meetings and bar conferences with diverse memberships and attendees. In addition, the subcommittee held a mini-conference to gather additional input from a variety of stakeholders on potential rule amendments. Based on the feedback received, consensus emerged at the Advisory Committee's November 2015 meeting around a basic outline for proceeding. At its April 2016 meeting, the Advisory Committee considered and approved for publication a package of proposed amendments to address the following seven issues:

1. Requiring earlier provision of information to the court relating to its decision whether to send notice to the class of a proposed settlement (known as "frontloading");
2. Making clear that a decision to send notice to the class under Rule 23(e)(1) is not appealable under Rule 23(f);
3. Making clear in Rule 23(c)(2)(B) that the Rule 23(e)(1) notice triggers the opt-out period in Rule 23(b)(3) class actions;
4. Updating Rule 23(c)(2) regarding individual notice in Rule 23(b)(3) class actions;
5. Addressing issues raised by "bad faith" class action objectors;
6. Refining standards for approval of proposed class action settlements under Rule 23(e)(2); and
7. A proposal by the Department of Justice to include in Rule 23(f) a 45-day period to seek permission for an interlocutory appeal when the United States is a party.

The proposed amendments to Rule 23 do not address all of the issues identified and considered by the subcommittee. The subcommittee decided not to proceed with several of them, and determined that two additional topics should remain under study: (1) instances where defendants in putative class actions have sought to "pick off" the named class representative by offering all of the individual relief he or she could obtain and moving to dismiss on grounds of mootness; and (2) whether the membership in a proposed class is sufficiently ascertainable to support class certification. The Advisory Committee concurred with this decision.

Rule 62

The proposed amendments to Rule 62 (Stay of Proceedings to Enforce a Judgment) are the product of a joint subcommittee with the Advisory Committee on Appellate Rules.

The Advisory Committee on Civil Rules initially reviewed Rule 62 to consider a complication in the relationship between automatic stays under subsection (a) and the authority to order a stay pending disposition of a post-judgment motion under subsection (b). Before the Time Computation Project, Civil Rules 50, 52, and 59 set the time for motions at 10 days after entry of judgment. Rule 62(b) recognized authority to issue a stay pending disposition of a motion under Rules 50, 52, 59, or 60. The Time Computation Project reset the time for motions under Rules 50, 52, or 59 at 28 days. It also reset the expiration of the automatic stay in Rule 62(a) at 14 days after entry of judgment. An unintentional result was that the automatic stay expired halfway through the time allowed to make a post-judgment motion. Rule 62(b), however, continued to authorize a stay "pending disposition of any of" these motions. The proposed amendment to Rule 62(a) addresses this gap in time periods by extending the time of an automatic stay to 30 days. The proposal further provides that the automatic stay takes effect "unless the court orders otherwise."

The remaining proposed amendments make clear that a judgment debtor can secure a stay by posting continuing security, whether as a bond or by other means, that will last from termination of the automatic stay through completion of all acts by the court of appeals. An attempt to post a single bond to cover a stay both during post-judgment proceedings and during an appeal might run afoul of the present Rule 62(d) language that provides "[i]f an appeal is taken, ... [t]he bond may be given upon or after filing the notice of appeal . . . ." Proposed Rule 62(b) allows a single bond or other security by enabling a party to obtain a stay by providing a bond "[a]t any time after judgment is entered." Proposed Rule 62(b) also explicitly recognizes "a bond or other security."

The proposal also reorganizes and moves to Rule 62(c) and (d) the provisions in present Rule 62(a) and (c) for stays of judgments in an action for an injunction or a receivership, or judgments directing an accounting in an action for patent infringement.

Rule 65.1

The proposed amendment to Rule 65.1 (Proceedings Against a Surety) is intended to conform that rule to the proposed amendments to Appellate Rule 8(b). As discussed *supra* pp. 2–3, the Advisory Committee on Appellate Rules has proposed amendments to the Appellate Rules to conform those rules with the amendments to Civil Rule 62, including amendments to Appellate Rule 8(b). Appellate Rule 8(b) and Civil Rule 65.1 parallel one another. The proposed amendments to Rule 65.1 imitate those to Appellate Rule 8(b), namely, incorporating the addition of the words "or other security."

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Approved for Publication and Comment

The Advisory Committee on Criminal Rules submitted proposed amendments to Criminal Rules 12.4, 45(c), and 49 with a request that they be published for comment in August 2016. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 12.4

Criminal Rule 12.4 (Disclosure Statement) is the rule that governs the parties' disclosure statements and was a new rule added in 2002. The Committee Note states that "[t]he purpose of the rule is to assist judges in determining whether they must recuse themselves because of a 'financial interest in the subject matter in controversy.' Code of Judicial Conduct, Canon 3C(1)(c) (1972)."

When Rule 12.4 was promulgated, the Code of Judicial Conduct treated all victims entitled to restitution as parties. The Code of Judicial Conduct was amended in 2009 to no longer treat any victim who may be entitled to restitution as a party, and requires disclosure only when the judge has an interest "that could be substantially affected by the outcome of the proceedings." The proposed amendments to Rule 12.4(a) are therefore intended to make the scope of the required disclosures consistent with the 2009 amendments to the Code of Judicial Conduct by allowing the court to relieve the government of the burden of making the required disclosures upon a showing by the government of "good cause." The amendment will avoid the need for burdensome disclosures when there are numerous organizational victims, but the impact of the crime on each is relatively small. For example, nearly every organization in the United States could be affected by price fixing concerning a widely-used product, such as a computer

program. But each victim would suffer only minor harm from a price increase that might be no more than pennies for each product purchased. In such cases, it seems unnecessarily burdensome (even if possible) for the government to name every corporation, partnership, union, or other organizational victim. The proposed amendment allows the government to show good cause to be relieved of making the disclosure statements because the organizations' interests—and hence those of the judge—could not be "substantially affected by the outcome of the proceedings." "Good cause" is a flexible standard that allows the court to weigh all of the relevant factors and determine on a case-by-case basis whether to relieve the government of the obligation to make disclosures under Rule 12.4.

The proposed amendment to Rule 12.4(b) makes two changes. First, it specifies that the time for making the disclosures is within 28 days after the defendant's initial appearance. Second, the proposed amendment makes clear that a party must promptly file a statement any time it learns of additional required information or of a change in previously disclosed information.

Rules 49 and 45(c)

The proposed revision of Criminal Rule 49 (Serving and Filing Papers) and a corresponding conforming amendment to Criminal Rule 45(c) (Additional Time After Certain Kinds of Service) are part of the larger inter-advisory committee project to develop rules for electronic filing, service, and notice. The decision by the Advisory Committee on Civil Rules to pursue a national rule mandating electronic filing in civil cases required reconsideration of Criminal Rule 49(b) and (d), which provide that service and filing "must be made in the manner provided for a civil action," and Rule 49(e), which provides that a local rule may require electronic filing only if reasonable exceptions are allowed.

In its consideration of the issue, the Advisory Committee concluded that the default rule proposed by the Advisory Committee on Civil Rules could be problematic in criminal cases. Therefore, the Advisory Committee determined that the best course was to eliminate the incorporation of Civil Rule 5 in the Criminal Rules and create a "stand-alone" rule applicable to criminal cases. The proposed revision of Criminal Rule 49 does not diverge completely from Civil Rule 5 and, in fact, replicates it when possible. Any differences between the two rules are rooted in differences between civil and criminal cases, or a difference in the civil and criminal rules as a whole.

The organization and structure of proposed Rule 49 differ from Civil Rule 5 in several respects. For example, the two rules differ in the order in which they address electronic and non-electronic means of filing and service. Rule 49 addresses electronic filing and service first. There are also substantive differences. Under proposed Rule 49, an unrepresented party must file non-electronically, unless permitted to file electronically by court order or local rule. In contrast, under the proposed amendment to Civil Rule 5, an unrepresented party may be "required" to file electronically by a court order or local rule that allows reasonable exceptions.

Proposed Rule 49 also requires all nonparties, represented or not, to file and serve non-electronically in the absence of a court order or local rule to the contrary. Several factors supported this decision. First, the architecture of the current CM/ECF system allows only the prosecution and defendant(s) to file in a criminal case. Second, nonparties generally have a distinctive interest only in certain aspects of a criminal case, and it may not be desirable for them to be served with pleadings and filings that are unrelated to those aspects of the case. Some nonparties, particularly victims, provide information to the court that they may not wish to share with the parties. A default of non-electronic filing helps protect those interests. If a district

decides that it would prefer to adopt procedures that would allow all represented media, victims, or other filers to use its electronic filing system, that remains an option by local rule. This policy choice is reflected in subsection (c), Service and Filing By Nonparties, which has no counterpart in the Civil Rules. Subsection (c) also serves another important function. The introductory clause—"A nonparty may serve and file a paper only if doing so is required or permitted by law"—makes it clear that the provisions describing how nonparties must file or serve do not expand the right of nonparties to participate in criminal prosecutions.

In addition, proposed Rule 49 contains two provisions that do not appear in Civil Rule 5 but were imported from other Civil Rules. The Advisory Committee concluded that severing the link to the Civil Rules without adding the signature provision of Civil Rule 11(a) to Rule 49 would create or maintain an existing gap in the Criminal Rules. Nowhere in the Criminal Rules is there a requirement that the contact information specified in Civil Rule 11(a) be included as part of a filing. Proposed Rule 49(b)(4) fills this gap by replicating the language presently found in Civil Rule 11(a). That language has been restyled, and the word "party" changed to "person" in order to accommodate filings by nonparties.

Proposed Rule 49(c) also substitutes the language from Civil Rule 77(d)(1), governing the clerk's duty to serve notice of orders, for the direction in current Rule 49 that the clerk serve notice "in a manner provided for in a civil action."

A conforming amendment to Rule 45(c) revises cross references that would be made obsolete by the proposed revision of Rule 49. Criminal Rule 45(c) provides for additional time to take action after service by certain means authorized by Civil Rule 5. An amendment to Rule 45 that eliminates the "3-day rule" for electronic service is now pending before Congress. That

amendment also incorporates cross references to the sections of Civil Rule 5 listing certain authorized modes of service.

The proposed amendment to Rule 49 imports the service rules now referenced in Rule 45(c) into Rule 49(a), rendering the existing cross references to Civil Rule 5 obsolete. The conforming amendment would replace the obsolete references to Civil Rule 5 with references to the corresponding new subsections in Rule 49(a).

Information Item

At its January 2016 meeting, the Standing Committee referred to the Advisory Committee a request by the CACM Committee to consider its concerns regarding dangers to cooperating witnesses posed by access to information in case files. For years, the CACM Committee has been tracking district court practices regarding public access to criminal case files and the illicit use of cooperation information. Most recently, the CACM Committee worked with the FJC to develop a comprehensive multi-year survey to determine the frequency and nature of threats and harms suffered by cooperators (the FJC Study).

A task force was formed to bring together the key stakeholders: members of the rules committees as well as representatives from the CACM Committee, the Department of Justice, the Bureau of Prisons, and the Sentencing Commission. Thus far, the task force has identified additional legal research and data in addition to that contained in the FJC Study needed to consider the issues raised by the CACM Committee. The task force will consider appropriate responses to the problem, including whether amendments to the Criminal Rules are a useful solution.

FEDERAL RULES OF EVIDENCE

Rules Recommended for Approval and Transmission

The Advisory Committee on Evidence Rules submitted proposed amendments to Rules 803(16) and 902, with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments were circulated to the bench, bar, and public for comment in August 2015.

Rule 803(16)

Evidence Rule 803(16) provides a hearsay exception for "ancient documents"; that is, if a document is more than 20 years old and appears authentic, it is admissible for the truth of its contents. Over the years, the rationale for the exception has been criticized because it assumes that just because the document itself is authentic, all of the statements in the document are reliable enough to be admissible despite the fact they are hearsay. The Advisory Committee has long concurred with this criticism, but has not felt the need to address it because the exception is used infrequently. However, because electronically stored information can be retained for more than 20 years, a strong likelihood exists that the ancient documents exception will be used much more frequently going forward. Accordingly, the Advisory Committee determined that the time had come to address the ancient documents exception.

The decision to address the exception was based on a concern that, with its increased use, the exception could become a receptacle for *unreliable* hearsay—that is, if the hearsay is in fact reliable it will probably be admissible under other reliability-based exceptions, such as the business records exception or the residual exception. Moreover, the need for an ancient documents exception is questionable as applied to electronically stored information, for the very

reason that there may well be a great deal of *reliable* electronic data available to prove any dispute of fact.

The proposed amendment that was issued for public comment would have abrogated the ancient documents exception. While some commentators supported elimination of the exception, most did not. Lawyers in several specific areas—*e.g.*, product liability litigation involving latent diseases, land-use disputes, environmental clean-up disputes—said they had come to rely on the exception. After considering several alternatives, the Advisory Committee decided to amend the rule to limit the ancient documents exception to documents prepared before 1998. The year was chosen for two reasons: (1) going backward, it addressed the reliance-interest concerns of many commentators; and (2) going forward, reliable electronically stored information is likely to be preserved that can be used to prove the facts that are currently proved by scarce hardcopy. If the electronically stored information is generated by a business, then it is likely to be easier to find a qualified witness who is familiar with the electronic recordkeeping than it is under current practice to find a records custodian familiar with hardcopy practices from the 1960's and earlier. Moreover, the Committee Note emphasizes that the residual exception remains available to qualify old documents that are reliable, and makes clear the expectation that the residual exception not only can, but *should*, be used by courts to admit reliable documents prepared after January 1, 1998, that would have previously been offered under the ancient documents exception. The Advisory Committee unanimously approved the modification.

Rule 902

The proposed amendments to Rule 902 (Evidence That Is Self-Authenticating) add two new subdivisions that would allow certain electronic evidence to be authenticated by a certification of a qualified person (in lieu of that person's testimony at trial). New Rule 902(13)

would allow self-authentication of machine-generated information (such as a web page) upon a submission of a certificate prepared by a qualified person. New Rule 902(14) would provide a similar certification procedure for a copy of data taken from an electronic device, media, or file. The proposed new subdivisions are analogous to Rule 902(11) and 902(12), which permit a foundation witness to establish the authenticity and admissibility of business records by way of certification, with the burden of challenging authenticity on the opponent of the evidence. The purpose of the two new subdivisions is to make authentication easier for certain kinds of electronic evidence that, under current law, would likely be authenticated under Rule 901 but only after calling a witness to testify to authenticity. The Advisory Committee has found that electronic evidence is rarely the subject of a legitimate authenticity dispute yet, under current law, a proponent must still go to the expense of producing authenticating witnesses for trial. The amendments would alleviate the unnecessary costs of this production by allowing the qualifying witness to establish authenticity by way of certification.

Commentators were generally supportive of the proposal. Following the public comment period, minor revisions to the Committee Notes were made in an effort to increase clarity and emphasize the importance of reasonable notice.

The Standing Committee voted unanimously to support both recommendations of the Advisory Committee on Evidence Rules.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Evidence Rules 803(16) and 902, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendments to the Federal Rules of Evidence are set forth in Appendix C, with an excerpt from the Advisory Committee's report.

Information Item

The volume of reported cases that set forth standards for authenticating electronic evidence led the Advisory Committee to consider whether to draft new rules to govern authentication of electronic evidence. The Advisory Committee concluded that any such amendments would be too detailed for the text of a rule, would not account for how a court can and should balance all of the factors relevant to authenticating electronic evidence, and would likely become outmoded by technological advances.

At the same time, the Advisory Committee supported the development of a practice manual on authenticating electronic evidence. Judge Paul W. Grimm, Gregory P. Joseph, Esq., and Professor Daniel J. Capra are currently engaged in developing the manual, which will be published by the FJC. The Advisory Committee appreciates the efforts of the authors and the FJC, and hopes that this resource guide will provide substantial assistance and guidance to courts and litigants.

OTHER MATTERS

Chief Judge William Jay Riley, the judiciary's planning coordinator, asked each Judicial Conference Committee for an update on strategic initiatives being implemented in support of the *Strategic Plan for the Federal Judiciary*. The Standing Committee reports that it continues to focus on educational efforts to implement the Civil Rules Package that became effective on December 1, 2015. Another initiative supportive of the *Strategic Plan* is the development and implementation of the pilot projects discussed *supra* pp. 18–21.

Respectfully submitted,

Jeffrey S. Sutton, Chair

Brent E. Dickson	Patrick J. Schiltz
Roy T. Englert, Jr.	Amy J. St. Eve
Gregory G. Garre	Larry D. Thompson
Daniel C. Girard	Richard C. Wesley
Neil M. Gorsuch	Sally Quillian Yates
Susan P. Graber	Jack Zouhary
William K. Kelley	

Appendix A – Proposed Amendments to the Federal Rules of Bankruptcy Procedure
Appendix B – Excerpt from the Report of the Advisory Committee on Civil Rules
Appendix C – Proposed Amendments to the Federal Rules of Evidence

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

1 **Rule 1001. Scope of Rules and Forms; Short Title**

2 The Bankruptcy Rules and Forms govern procedure
3 in cases under title 11 of the United States Code. The rules
4 shall be cited as the Federal Rules of Bankruptcy Procedure
5 and the forms as the Official Bankruptcy Forms. These
6 rules shall be construed, administered, and employed by the
7 court and the parties to secure the just, speedy, and
8 inexpensive determination of every case and proceeding.

Committee Note

The last sentence of the rule is amended to incorporate the changes to Rule 1 F.R. Civ. P. made in 1993 and 2015.

The word "administered" is added to recognize the affirmative duty of the court to exercise the authority conferred by these rules to ensure that bankruptcy cases and the proceedings within them are resolved not only fairly, but also without undue cost or delay. As officers of the court, attorneys share this responsibility with the judge to whom the case is assigned.

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

The addition of the phrase "employed by the court and the parties" emphasizes that parties share in the duty of using the rules to secure the just, speedy, and inexpensive determination of every case and proceeding. Achievement of this goal depends upon cooperative and proportional use of procedure by lawyers and parties.

This amendment does not create a new or independent source of sanctions. Nor does it abridge the scope of any other of these rules.

Changes Made After Publication and Comment

None.

1 **Rule 1006. Filing Fee**

2 * * * * *

3 (b) PAYMENT OF FILING FEE IN

4 INSTALLMENTS.

5 (1) *Application to Pay Filing Fee in*

6 *Installments*. A voluntary petition by an individual

7 shall be accepted for filing, regardless of whether any

8 portion of the filing fee is paid, if accompanied by the

9 debtor's signed application, prepared as prescribed by

10 the appropriate Official Form, stating that the debtor

11 is unable to pay the filing fee except in installments.

12 * * * * *

Committee Note

Subdivision (b)(1) is amended to clarify that an individual debtor's voluntary petition, accompanied by an application to pay the filing fee in installments, must be accepted for filing, even if the court requires the initial installment to be paid at the time the petition is filed and the debtor fails to make that payment. Because the debtor's bankruptcy case is commenced upon the filing of the petition, dismissal of the case due to the debtor's failure to

12b-013035

make the initial or a subsequent installment payment is governed by Rule 1017(b)(1).

Changes Made After Publication and Comment

None.

Rule 1015. Consolidation or Joint Administration of Cases Pending in Same Court

* * * * *

(b) CASES INVOLVING TWO OR MORE RELATED DEBTORS. If a joint petition or two or more petitions are pending in the same court by or against (1) ~~a husband and wife~~spouses, or (2) a partnership and one or more of its general partners, or (3) two or more general partners, or (4) a debtor and an affiliate, the court may order a joint administration of the estates. Prior to entering an order the court shall give consideration to protecting creditors of different estates against potential conflicts of interest. An order directing joint administration of individual cases of ~~a husband and wife~~spouses shall, if one spouse has elected the exemptions under § 522(b)(2) of the Code and the other has elected the exemptions under § 522(b)(3), fix a reasonable time within which either may amend the election so that both shall have elected the same

12b-013037

19 exemptions. The order shall notify the debtors that unless
20 they elect the same exemptions within the time fixed by the
21 court, they will be deemed to have elected the exemptions
22 provided by § 522(b)(2).
23 * * * * *

Committee Note

Subdivision (b) is amended to replace "a husband and wife" with "spouses" in light of the Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

Because this amendment is made to conform to the Supreme Court's decision in *Obergefell v. Hodges*, final approval is sought without publication.

United States Bankruptcy Court

_____ District of _____

In re)
[Set forth here all names including married, maiden, and trade names used by debtor within last 8 years.])
)
Debtor) Case No. _____
)
Address _____)
_____) Chapter _____
)
Last four digits of Social Security or Individual Tax-payer Identification (ITIN) No(s).,(if any): _____)
)
Employer's Tax Identification (EIN) No(s).(if any): _____)
_____)

NOTICE OF [MOTION TO] [OBJECTION TO]

_____has filed papers with the court to [relief sought in motion or objection].

Your rights may be affected. You should read these papers carefully and discuss them with your attorney, if you have one in this bankruptcy case. (If you do not have an attorney, you may wish to consult one.)

If you do not want the court to [relief sought in motion or objection], or if you want the court to consider your views on the [motion] [objection], then on or before (date), you or your attorney must:

[File with the court a written request for a hearing {*or, if the court requires a written response*, an answer, explaining your position} at:

{address of the bankruptcy clerk's office}

If you mail your {request}{response} to the court for filing, you must mail it early enough so the court will **receive** it on or before the date stated above.

You must also send a copy to:

{movant's attorney's name and address}

{names and addresses of others to be served}]

[Attend the hearing scheduled to be held on (date), (year) , at ____ a.m./p.m. in Courtroom____, United States Bankruptcy Court, {address}.]

[Other steps required to oppose a motion or objection under local rule or court order.]

If you or your attorney do not take these steps, the court may decide that you do not oppose the relief sought in the motion or objection and may enter an order granting that relief.

Date: _____

Signature: _____
Name: _____
Address: _____

United States Bankruptcy Court

_____ District of _____

In re *[Set forth here all names including married, maiden, and trade names used by debtor within last 8 years.]* Debtor	)	Case No. _____
Address _____ _____	)	Chapter _____
Last four digits of Social Security or Individual Tax-payer Identification (ITIN) No(s).,(if any): _____	)	
Employer's Tax Identification (EIN) No(s).(if any): _____	)	

NOTICE OF OBJECTION TO CLAIM

_____ has filed an objection to your claim in this bankruptcy case.

<u>Your claim may be reduced, modified, or eliminated</u>. You should read these papers carefully and discuss them with your attorney, if you have one.

If you do not want the court to eliminate or change your claim, then on or before <u>(date)</u>, you or your lawyer must:

{If required by local rule or court order.}

[File with the court a written response to the objection, explaining your position, at:

{address of the bankruptcy clerk's office}

If you mail your response to the court for filing, you must mail it early enough so that the court will **receive** it on or before the date stated above.

You must also send a copy to:

{objector's attorney's name and address}

{names and addresses of others to be served}]

Attend the hearing on the objection, scheduled to be held on <u>(date)</u>, <u>(year)</u> , at ___ a.m./p.m. in Courtroom____, United States Bankruptcy Court, {address}.

If you or your attorney do not take these steps, the court may decide that you do not oppose the objection to your claim.

Date: _____

Signature: _____
Name: _____
Address: _____

COMMITTEE NOTE

The form numbers are updated to comport with the form numbering style developed as part of the Forms Modernization project. The forms are also amended to change the phrase “mail” to “send” to reflect the fact that there are various methods of providing documents to other parties.

Fill in this information to identify the case:

Debtor 1 _____

Debtor 2 _____
(Spouse, if filing)

United States Bankruptcy Court for the: _____ District of _____
(State)

Case number _____

Official Form 410S2

Notice of Postpetition Mortgage Fees, Expenses, and Charges 12/16

If the debtor's plan provides for payment of postpetition contractual installments on your claim secured by a security interest in the debtor's principal residence, you must use this form to give notice of any fees, expenses, and charges incurred after the bankruptcy filing that you assert are recoverable against the debtor or against the debtor's principal residence.

File this form as a supplement to your proof of claim. See Bankruptcy Rule 3002.1.

Name of creditor: _____ **Court claim no**. (if known): _____

Last 4 digits of any number you use to identify the debtor's account: ____ ____ ____ ____

Does this notice supplement a prior notice of postpetition fees, expenses, and charges?

q No

q Yes. Date of the last notice: ____/____/_____

Part 1: Itemize Postpetition Fees, Expenses, and Charges

Itemize the fees, expenses, and charges incurred on the debtor's mortgage account after the petition was filed. Do not include any escrow account disbursements or any amounts previously itemized in a notice filed in this case. If the court has previously approved an amount, indicate that approval in parentheses after the date the amount was incurred.

Description	Dates incurred		Amount
1. Late charges	_____	(1)	$ _____
2. Non-sufficient funds (NSF) fees	_____	(2)	$ _____
3. Attorney fees	_____	(3)	$ _____
4. Filing fees and court costs	_____	(4)	$ _____
5. Bankruptcy/Proof of claim fees	_____	(5)	$ _____
6. Appraisal/Broker's price opinion fees	_____	(6)	$ _____
7. Property inspection fees	_____	(7)	$ _____
8. Tax advances (non-escrow)	_____	(8)	$ _____
9. Insurance advances (non-escrow)	_____	(9)	$ _____
10. Property preservation expenses. Specify:_____	_____	(10)	$ _____
11. Other. Specify:_____	_____	(11)	$ _____
12. Other. Specify:_____	_____	(12)	$ _____
13. Other. Specify:_____	_____	(13)	$ _____
14. Other. Specify:_____	_____	(14)	$ _____

The debtor or trustee may challenge whether the fees, expenses, and charges you listed are required to be paid.
See 11 U.S.C. § 1322(b)(5) and Bankruptcy Rule 3002.1.

Debtor 1 _____ Case number (*if known*) _____
First Name Middle Name Last Name

Part 2: Sign Here

The person completing this Notice must sign it. Sign and print your name and your title, if any, and state your address and telephone number.

Check the appropriate box.

q I am the creditor.

q I am the creditor's authorized agent.

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

û _____ Date ____/_____/_____
Signature

Print: _____ Title _____
First Name Middle Name Last Name

Company _____

Address _____
Number Street

_____
City State ZIP Code

Contact phone (_____) _____– _____ Email _____

Rules Appendix 12b-013043

COMMITTEE NOTE

Form 410S2, *Notice of Postpetition Mortgage Fees, Expenses, and Charges*, is amended in the instructions in Part 1 to clarify how to report previously approved fees, expenses, or charges. The following language is added: "If the court has previously approved an amount, indicate that approval in parentheses after the date the amount was incurred." This amended language replaces the prior instruction not to report any amounts previously ruled on by the bankruptcy court.

Excerpt from the December 10, 2015 Report of the Advisory Committee on Bankruptcy Rules

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

JEFFREY S. SUTTON
CHAIR

REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

SANDRA SEGAL IKUTA
BANKRUPTCY RULES

JOHN D. BATES
CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

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

FROM: Honorable Sandra Segal Ikuta, Chair
Advisory Committee on Bankruptcy Rules

DATE: December 10, 2015

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met in Washington, D.C., on October 1, 2015.

* * * * *

At the meeting the Committee approved conforming amendments to one rule and minor amendments to three official forms. It seeks the Standing Committee's approval of these amendments without publication.

* * * * *

II. Action Items

A. <u>Items for Final Approval without Publication</u>

The Committee requests that the Standing Committee approve the following rule and form amendments without publishing them for public comment due to their conforming or limited nature. The Committee recommends that the amended forms take effect on December 1, 2016. The rule and forms in this group appear in Appendix A.

Action Item 1. Rule 1015(b) (Cases Involving Two or More Related Debtors). Rule 1015(b) provides for the joint administration of bankruptcy cases in which the debtors are closely related. Among the debtors covered by the rule are "a husband and wife." The provision also implements a statutory requirement that a husband and wife with jointly administered cases choose the same exemption scheme—either federal bankruptcy exemptions, if permitted, or state exemptions.

After the decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), which held § 3 of the Defense of Marriage Act ("DOMA") unconstitutional, the Committee received a suggestion that Rule 1015(b) be amended to substitute the word "spouses" for "husband and wife" in order to include joint bankruptcy cases of same-sex couples. The Committee considered the suggestion at its spring 2014 meeting. It concluded that the first reference to "husband and wife" in Rule 1015(b) falls squarely within the holding of *Windsor*. Section 302 of the Bankruptcy Code, unlike the language of Rule 1015(b), authorizes the filing of a joint petition under a chapter by "an individual that may be a debtor under such chapter and such individual's spouse." The rule's use of the more restrictive term "husband and wife" could be justified only by reliance on § 3 of DOMA, which amended the Dictionary Act to provide that "the word 'spouse' refers only to a person of the opposite sex who is a husband or wife." 1 U.S.C. § 7. *Windsor*'s invalidation of the DOMA provision removed support for the rule's deviation from the statutory language.

The other reference to "husband and wife" in Rule 1015(b), however, is consistent with the statutory language. The rule implements § 522(b)(1) of the Code, which imposes a restriction on the choice of exemptions in cases in which the debtors are a "husband and wife." While some of the Court's reasoning in *Windsor* could be read to suggest that same-sex married couples in bankruptcy should not have a greater choice of exemptions than husbands and wives have, the decision is not directly on point. The Committee voted at the spring 2014 meeting to propose the substitution of "spouses" for both references to "husband and wife" in Rule 1015(b), but to await further clarification of the law on same-sex marriages before presenting the amendment to the Standing Committee.

At this fall's meeting, the Committee revisited the issue in light of the decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), which held that the right to marry is a fundamental right under the Fourteenth Amendment and that same-sex couples may not be deprived of that right. *Id.* at 2599. The Court further held that the Equal Protection Clause prevents states from denying same-sex couples the benefits of civil marriage on the same terms as opposite-sex couples. *Id.* at 2604. The Committee concluded that the decision supported the proposed amendments to Rule 1015(b) to eliminate language suggesting that only opposite-sex married couples may file a joint bankruptcy petition under § 303 and that same-sex married couples are subject to different rules regarding their choice of exemptions. Because the Committee viewed

the proposed changes as conforming amendments, it voted unanimously to seek approval of them without publication for public comment.

Action Item 2. Official Forms 20A (Notice of Motion or Objection) and 20B (Notice of Objection to Claim). These official forms were overlooked by the Forms Modernization Project, and thus they were not included with the large group of modernized and renumbered forms that went into effect on December 1, 2015. The Committee recommends that these forms be renumbered and that a minor wording change be made to them.

Under the new numbering convention, the forms should be designated as Official Forms 420A and 420B. In addition, the Committee noted that both forms state that the recipient of the notice must "mail" a copy of any response to the movant's or objector's attorney. To encompass other permissible methods of service, the Committee recommends that "mail" be changed to "send," as indicated on the proposed forms in Appendix A.

Action Item 3. Official Form 410S2 (Notice of Postpetition Fees, Expenses, and Charges). Rule 3002.1(c) requires a home mortgage creditor in a chapter 13 case to give notice of any fees, expenses, or charges that are assessed during the course of the case to the debtor, debtor's counsel, and the trustee. This information assists a debtor who wants to maintain mortgage payments while in bankruptcy to make payments in a sufficient amount to emerge from bankruptcy current on the mortgage. Official Form 410S2 implements the rule provision. The Committee became aware of a possible inconsistency between the rule and the form. The instructions to Part 1 of the form state, "Do not include . . . any amounts previously . . . ruled on by the bankruptcy court." Rule 3002.1(c), however, requires the creditor to give notice of all postpetition fees, expenses, and charges without excepting ones already ruled on. This issue was discussed in *In re Sheppard*, 2012 WL 1344112 (Bankr. E.D. Va. Apr. 18, 2012). Noting the difference between the rule and the form's instruction, the court held that the form's instruction "best effectuates the ultimate goal of Rule 3002.1 to provide debtors with accurate information regarding postpetition obligations that await them at the conclusion of their bankruptcy case." *Id.* at *4. The court explained that requiring creditors to file a notice for amounts already approved by the court would result in duplication and uncertainty. Accordingly, it concluded that there was no need for the creditor to file notice of fees that had been included in a consent order resolving the creditor's motion for relief from the stay. *Id.*

Participants at a mini-conference the Committee held in 2012 came out the other way on the issue. They suggested that the instruction regarding amounts previously ruled on be deleted from Official Form 410S2 because giving notice of previously authorized fees would allow the trustee to determine if they had been paid.

The Committee concluded that the inconsistency between the form and the rule should be eliminated by deleting the instruction from the form. In order to prevent confusion or the risk of double payments, the proposed amendment adds an instruction to Form 410S2 that requires the creditor to indicate if a fee has previously been approved by the court. Because this is a minor conforming amendment, the Committee recommends that the proposed change be approved without publication.

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

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CHAIR

REBECCA A. WOMELDORF
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BANKRUPTCY RULES

JOHN D. BATES
CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

WILLIAM K. SESSIONS III
EVIDENCE RULES

MEMORANDUM

TO: Hon. Jeffrey S. Sutton, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Sandra Segal Ikuta
Advisory Committee on Bankruptcy Rules

RE: Report of the Advisory Committee on Bankruptcy Rules

DATE: May 10, 2016

I. Introduction

The Advisory Committee on Bankruptcy Rules met on March 31, 2016, in Denver, Colorado.

* * * * *

The Committee now seeks the Standing Committee's final approval of two rule amendments that were published in August 2015, as well as retroactive approval of technical amendments that have been made to several official forms.

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Part II of this report discusses the action items, grouped as follows:

A. Items for Final Approval

(A1) Rules published for comment in August 2015—
- Rules 1001;
- Rule 1006(b); and

(A2) Technical changes previously made to Official Forms 106E/F, 119, 201, 206 Summary, 309A, 309I, 423, and 424.

* * * * *

II. Action Items

A. Items for Final Approval

(A1) *Rules published for comment in August 2015.*

The Committee recommends that the Standing Committee approve and transmit to the Judicial Conference the proposed rule amendments that were published for public comment in August 2015 and are discussed below. Bankruptcy Appendix A includes the rules that are in this group.

Action Item 1. Rule 1001 (Scope of Rules and Forms; Short Title). Rule 1001 is the bankruptcy counterpart to Civil Rule 1. Rather than incorporating Civil Rule 1 by reference, Rule 1001 generally tracks the language of the civil rule. The last sentence of Rule 1001 currently states, "These rules shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding." This language deviates from Civil Rule 1, which states (as of December 1, 2015), "[These rules] should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." The proposed amendment to Rule 1001 changes the last sentence of the rule to conform to the language of Civil Rule 1.

The Committee received two comments to the proposed rule amendment and, after due deliberation, determined that the comments did not warrant any action. Accordingly, the Committee voted unanimously to approve the proposed amendment as published.

Action Item 2. Rule 1006(b) (Filing Fee). Rule 1006(b) governs the payment of the bankruptcy filing fee in installments, as authorized for individual debtors by 28 U.S.C. § 1930(a). The Committee received and over the course of several years considered a potential amendment to the rule with respect to courts requiring a debtor who applies to pay the filing fee in installments to make an initial installment payment with the petition and the application. The Committee requested the Federal Judicial Center ("FJC") to conduct an empirical study on court practices regarding initial installment payments at the time of filing and whether there is an association between such a requirement and the rate of fee waiver applications. Although based on the FJC study and other factors, the Committee ultimately concluded that there was no need to clarify that courts may require an initial installment payment with the petition and application, the FJC study raised a different issue. Because Rule 1006(b)(1) requires the bankruptcy clerk to accept the petition, resulting in the commencement of a bankruptcy case, the practice of some courts of refusing to accept a petition or summarily dismissing a case because of the failure to

make an installment payment at the time of filing is inconsistent with Rules 1006(b)(1) and 1017(b)(1). The latter provision allows the court, only "after a hearing on notice to the debtor and the trustee," to dismiss a case for the failure to pay any installment of the filing fee.

In order to clarify that courts may not refuse to accept petitions or summarily dismiss cases for failure to make initial installment payments at the time of filing, the Committee proposed, and the Standing Committee approved, publication of an amendment to Rule 1006(b)(1) clarifying that an individual debtor's petition must be accepted for filing so long as the debtor submits a signed application to pay the filing fee in installments and even if a required initial installment payment is not made at the same time. The Committee Note explains that dismissal of the case for failure to pay any installment must proceed according to Rule 1017(b)(1).

The Committee received two comments to the proposed rule amendment and, after due deliberation, determined that the comments did not warrant any action. Accordingly, the Committee voted unanimously approve the proposed amendment as published.

(A2) *Technical changes to official forms.*

<u>Action Item 3</u>. Official Forms 106E/F, 119, 201, 206 Summary, 309A, 309I, 423, and 424. The Committee recommends that the Standing Committee give retroactive approval to the technical changes described below that have been made to official bankruptcy forms since the last Standing Committee meeting and that it give notice of these changes to the Judicial Conference.

At its March 15, 2016, meeting, the Judicial Conference approved the Standing Committee's recommendation to allow the Advisory Committee to make technical, non-substantive changes to official bankruptcy forms when the need for such changes is determined, subject to retroactive approval by the Standing Committee and reporting of the changes to the Judicial Conference. Operating under that authority, the Committee has made the technical changes listed below.

- Official Form 106E/F - Line number references in the instruction at the top of Part 2 started at an incorrect number; they were changed from "4.3 followed by 4.4" to "4.4 followed by 4.5."

- Official Form 119 - Because there is no "Part 3" on the form, the reference to "Part 3" at the top of page 1 was changed to "Part 2."

- Official Form 201 - The hyperlink in Question 7 for NACIS codes was updated to match the new landing page maintained by the Administrative Office.

- Official Form 206 Summary - Cross-references to line numbers 6a and 6b of Official Form 206E/F were incorrect and were changed to 5a and 5b.

- Official Form 309A - Line 9 was reformatted to be consistent with the remainder of the lines in the form.

- Official Form 309I - The last line of instruction 13 on page 2 was deleted, and the penultimate sentence was changed to: "If you believe that the debtors are not entitled to a discharge of any of their debts under 11 U.S.C. § 1328(f), you must file a motion by the deadline."

- Official Form 423 - The reference near the top of the form to 11 U.S.C. §1141(d)(3) was changed from "does not apply" to "applies" because it had previously misstated the relationship between that statutory provision and the necessity of a chapter 11 to complete an instructional course in personal financial management in order to obtain a discharge.

- Official Form 424 - The top of page 2 was changed from Rule 8001 to Rule 8006.

* * * * *

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MEMORANDUM

TO: Hon. Jeffrey S. Sutton, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. John D. Bates, Chair
Advisory Committee on Civil Rules

RE: Report of the Advisory Committee on Civil Rules

DATE: May 12, 2016 (revised July 1, 2016)

Introduction

The Civil Rules Advisory Committee met in Palm Beach, Florida, on April 14, 2016.

* * * * *

Part II presents a recommendation to approve submission to the Judicial Conference of the United States two proposed pilot projects. One project would test a system of mandatory initial discovery requests to be adopted in each participating court. The second would test the effectiveness of court-wide adoption of practices that, under the current rules, have proved effective in reducing cost and delay. The Committee on Court Administration and Case Management has participated in the work that shaped these projects. It is understood on all sides that the projects will evolve as they move along the path to implementation, both in the interlude before presentation to the Judicial Conference and, if approved, in the actual implementation period thereafter.

* * * * *

II. RECOMMENDATION FOR APPROVAL: PILOT PROJECTS

One of the conclusions reached in the process of developing the rule amendments that became effective on December 1, 2015, was that additional innovations in civil litigation may be more likely if they are tested first in a series of pilot projects. To pursue the possible development of such pilot projects, a subcommittee was formed consisting of Jeff Sutton, John Bates, Paul Grimm, Neil Gorsuch, Amy St. Eve, John Barkett, Parker Folse, Virginia Seitz, Ed Cooper, and Dave Campbell. Judge Phil Martinez from the Judicial Conference Committee on Court

Administration and Case Management (CACM) was added as a liaison to the subcommittee. The subcommittee's charge is to investigate pilot projects already completed in other locations and recommend possible pilot projects for federal courts.

The subcommittee reported on its work at the January 2016 Standing Committee meeting. At that time, the subcommittee had made contact with the National Center for State Courts, the Institute for Advancement of the American Legal System (IAALS), the Conference of State Court Chief Justices, and various innovative federal courts, and had conducted reviews of pilot projects in ten states. Summaries of the subcommittee's findings were included in the January materials.

Since the January meeting, the subcommittee has held focus-group discussions with lawyers and judges from courts in Colorado, Arizona, and Canada, which all use enhanced initial disclosures. Summaries of the Colorado and Arizona discussions are included as Exhibits 1 and 2 to this report. The subcommittee has also collected and reviewed much additional information, including a recently-proposed revision to Arizona's longstanding enhanced disclosure rule, a recently-revised portion of a joint project by IAALS and the American College of Trial Lawyers recommending more robust initial disclosures, reactions to and comments on the 1993 amendment of the Federal Rules of Civil Procedure that required enhanced initial disclosures, articles from a 1997 symposium concerning the initial disclosure efforts of the early 1990s, the robust initial disclosure rules used in various states (Ex. 3), and a recent FJC report titled "A Study of Civil Case Disposition Time in U.S. District Courts" (Ex. 4).

The subcommittee has concluded that two specific pilot projects should be implemented in federal district courts, one focused on enhanced initial discovery and the other on expedited case management. Descriptions of these proposed pilot programs are provided below. The Civil Rules committee concurred in the pursuit of these pilot projects at its April 2016 meeting.

The subcommittee believes that more robust initial discovery requirements could help reduce the cost and delay of civil litigation. This belief is based on several sources: (a) the employment protocol test project currently underway, which requires more substantial initial disclosures in employment cases and, according to a study completed by the FJC and described at the January meeting, appears to be reducing discovery disputes; (b) the Colorado Civil Access Pilot Project, which included more robust initial disclosures and was found, in a study by IAALS, to have reduced time to disposition of civil cases (the Colorado courts have now adopted the initial disclosures as part of their civil rules); (c) the Arizona enhanced disclosure rule, which has been in place for more than twenty years and generally is preferred by Arizona lawyers over the federal rules; and (d) the rather obvious conclusion that civil litigation will be resolved more quickly and less expensively if relevant information is disclosed earlier and with less discovery practice.

The subcommittee also believes that expedited case management practices could help reduce the cost and delay of civil litigation. Many studies have found that cases are resolved more quickly and with less cost when judges intervene early, actively manage cases, set reasonable but efficient discovery schedules, set firm trial dates, and resolve disputes quickly. The purpose of the second pilot is to implement these practices in the pilot districts, with specific time goals and focused training for judges, measuring case disposition times and other relevant milestones as the pilot progresses. The pilot would test how effectively these proven case management practices can be implemented in various districts through specific time goals and focused training.

Authority to engage in these pilot projects is found in several places. Civil Rule 16(b)(3) authorizes a district court to enter a scheduling order that addresses several relevant subjects: deadlines for the litigation, the timing of disclosures and the extent of discovery, the disclosure of

ESI, procedures for prompt resolution of discovery disputes, and "other appropriate matters." Rule 26(b)(2)(C) authorizes the court, on its own, to limit the frequency or extent of discovery, considering whether information can be obtained from other sources that are more convenient, less burdensome, or less expensive. And 28 U.S.C. § 331 authorizes the Judicial Conference to "carry on a continuous study of the operation and effect of the general rules of practice and procedure" used in the federal courts, and to recommend "[s]uch changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay[.]"

A. MANDATORY INITIAL DISCOVERY PILOT PROJECT

1. Standing Order. This pilot project would be implemented through a standing order issued in each of the pilot districts. Our current draft of the order is as follows:

Standing Order

The Court is participating in a pilot project that requires mandatory initial discovery in all civil cases other than cases exempted by Rule 26(a)(1)(B), patent cases governed by a local rule, and cases transferred for consolidated administration in the District by the Judicial Panel on Multidistrict Litigation. The discovery obligations addressed in this Standing Order supersede the disclosures required by Rule 26(a)(1) and are framed as court-ordered mandatory initial discovery pursuant to the Court's inherent authority to manage cases, Rule 16(b)(3)(B)(ii), (iii), and (vi), and Rule 26(b)(2)(C). Unlike initial disclosures required by current Rule 26(a)(1)(A) & (C), this Standing Order does not allow the parties to opt out.

A. Instructions to Parties.

1. The parties are ordered to respond to the following mandatory initial discovery requests before initiating any further discovery in this case. Further discovery will be as ordered by the Court. Each party's response must be based on the information then reasonably available to it. A party is not excused from providing its response because it has not fully investigated the case or because it challenges the sufficiency of another party's response or because another party has not provided a response. Responses must be signed under oath by the party certifying that it is complete and correct as of the time it was made, based on the party's knowledge, information, and belief formed after a reasonable inquiry, and signed under Rule 26(g) by the attorney.

2. The parties must provide the requested information as to facts that are relevant to the parties' claims and defenses, whether favorable or unfavorable, and regardless of whether they intend to use the information in presenting their claims or defenses. The parties also must provide relevant legal theories in response to paragraph B.4 below. If a party limits the scope of its response on the basis of any claim of privilege or work product, the party must produce a privilege log as required by Rule 26(b)(5) unless the parties agree or the Court orders otherwise. If a party limits its response on the basis of any other objection, including an objection that providing the required information would involve disproportionate expense or burden, considering the needs of the case, it must explain with particularity the nature of the objection and its legal basis, and provide a fair description of the information being withheld.

3. All parties must file answers, counterclaims, crossclaims, and replies within the time set forth in Rule 12(a)(1)(A), (B), and (C) even if they have filed or intend to file a motion to dismiss or other preliminary motion. Fed. R. Civ. P. 12(a)(4). But the Court may for good cause defer the time to answer, counterclaim, crossclaim, or reply while it considers a motion to dismiss based on: lack of subject-matter jurisdiction; lack of personal jurisdiction; sovereign immunity; or absolute immunity. In that event, the time to answer, counterclaim, crossclaim, or reply shall be set by the Court based upon entry of an order deciding the motion, and the time to serve responses to the mandatory initial discovery under paragraph 4 shall be measured from that date.

4. A party seeking affirmative relief must serve its responses to the mandatory initial discovery no later than 30 days after the filing of the first pleading made in response to its complaint, counterclaim, crossclaim, or third-party complaint. A party filing a responsive pleading, whether or not it also seeks affirmative relief, must serve its initial discovery responses no later than 30 days after it files its responsive pleading. However, (a) no initial discovery responses need be served if the Court approves a written stipulation by the parties that no discovery will be conducted in the case; and (b) initial discovery responses may be deferred, one time, for 30 days if the parties jointly certify to the Court that they are seeking to settle the case and have a good faith belief that it will be resolved within 30 days of the due date for their responses.

5. Initial responses to these mandatory discovery requests shall be filed with the Court on the date when they are served; provided, that voluminous attachments need not be filed, nor are parties required to file documents that are produced in lieu of identification pursuant to paragraphs (B) (3), (5), or (6) below. Supplemental responses shall be filed with the Court if they are served prior to the scheduling conference held under Rule 16(b), but any later supplemental responses need not be filed, although the party serving the supplemental response shall file a notice with the Court that a supplemental response has been served.

6. The duty of mandatory initial discovery set forth in this Order is a continuing duty, and each party must serve supplemental responses when new or additional information is discovered or revealed. A party must serve such supplemental responses in a timely manner, but in any event no later than 30 days after the information is discovered by or revealed to the party. If new information is revealed in a written discovery response or a deposition in a manner that reasonably informs all parties of the information, the information need not be presented in a supplemental response.

7. The Court normally will set a deadline in its Rule 16(b) case management order for final supplementation of responses, and full and complete supplementation must occur by the deadline. In the absence of such a deadline, full and complete supplementation must occur no later than 90 days before the final pretrial conference.

8. During their Rule 26(f) conference, the parties must discuss the mandatory initial discovery responses and seek to resolve any limitations they have made or intend to make in their responses. The parties should include in the Rule 26(f) report to the Court a description of their discussions. The report should describe

the resolution of any limitations invoked by either party in its response, as well as any unresolved limitations or other discovery issues.

9. Production of information under this Standing Order does not constitute an admission that information is relevant, authentic, or admissible.

10. Rule 37(c)(1) shall apply to mandatory discovery responses required by this Order.

B. Mandatory Initial Discovery Requests.

1. State the names and, if known, the addresses and telephone numbers of all persons who you believe are likely to have discoverable information relevant to any party's claims or defenses, and provide a fair description of the nature of the information each such person is believed to possess.

2. State the names and, if known, the addresses and telephone numbers of all persons who you believe have given written or recorded statements relevant to any party's claims or defenses. Unless you assert a privilege or work product protection against disclosure under applicable law, attach a copy of each such statement if it is in your possession, custody, or control. If not in your possession, custody, or control, state the name and, if known, the address and telephone number of each person who you believe has custody of a copy.

3. List the documents, electronically stored information ("ESI"), tangible things, land, or other property known by you to exist, whether or not in your possession, custody or control, that you believe may be relevant to any party's claims or defenses. To the extent the volume of any such materials makes listing them individually impracticable, you may group similar documents or ESI into categories and describe the specific categories with particularity. Include in your response the names and, if known, the addresses and telephone numbers of the custodians of the documents, ESI, or tangible things, land, or other property that are not in your possession, custody, or control. For documents and tangible things in your possession, custody, or control, you may produce them with your response, or make them available for inspection on the date of the response, instead of listing them. Production of ESI will occur in accordance with paragraph (C)(2) below.

4. For each of your claims or defenses, state the facts relevant to it and the legal theories upon which it is based.

5. Provide a computation of each category of damages claimed by you, and a description of the documents or other evidentiary material on which it is based, including materials bearing on the nature and extent of the injuries suffered. You may produce the documents or other evidentiary materials with your response instead of describing them.

6. Specifically identify and describe any insurance or other agreement under which an insurance business or other person or entity may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse a party for payments made by the party to satisfy the judgment. You may produce a copy of the agreement with your response instead of describing it.

7. A party receiving the list described in Paragraph 3, the description of materials identified in Paragraph 5, or a description of agreements referred to in Paragraph 6 may request more detailed or thorough responses to these mandatory discovery requests if it believes the responses are deficient. When the court has authorized further discovery, a party may also serve requests pursuant to Rule 34 to inspect, copy, test, or sample any or all of the listed or described items to the extent not already produced in response to these mandatory discovery requests, or to enter onto designated land or other property identified or described.

C. Disclosure of Hard-Copy Documents and ESI.

1. *Hard-Copy Documents.* Hard-copy documents must be produced as they are kept in the usual course of business.

2. *ESI.*

a. *Duty to Confer.* When the existence of ESI is disclosed or discovered, the parties must promptly confer and attempt to agree on matters relating to its disclosure and production, including:

i. requirements and limits on the preservation, disclosure, and production of ESI;

ii. appropriate ESI searches, including custodians and search terms, or other use of technology assisted review;

iii. the form in which the ESI will be produced.

b. *Resolution of Disputes.* If the parties are unable to resolve any dispute regarding ESI and seek resolution from the Court, they must present the dispute in a single joint motion or, if the Court directs, in a conference call with the Court. Any joint motion must include the parties' positions and the separate certification of counsel required under Rule 26(g).

c. *Production of ESI.* Unless the Court orders otherwise, a party must produce the ESI identified under paragraph (B)(3) within 40 days after serving its initial response. Absent good cause, no party need produce ESI in more than one form.

d. *Presumptive Form of Production.* Unless the parties agree or the Court orders otherwise, a party must produce ESI in the form requested by the receiving party. If the receiving party does not specify a form, the producing party may produce the ESI in any reasonably usable form that will enable the receiving party to have the same ability to access, search, and display the ESI as the producing party.

Instructions for Pilot Courts

Pilot judges should hold initial case management conferences under Rule 16(b) within the time specified in Rule 16(b)(2). Judges should discuss with the parties their compliance with the mandatory discovery obligations set forth in the

> Standing Order, resolve any disputes, and set a date for full and complete supplementation of responses.
>
> Judges may alter the time for mandatory initial discovery responses upon a showing of good cause, but this should not be a frequent event. Early discovery responses are critical to the purposes of this pilot program.
>
> Judges should make themselves available for prompt resolution of discovery disputes. It is recommended that judges require parties to contact the Court for a pre-motion conference, as identified in Rule 16(b)(3)(B)(v), before filing discovery motions. If discovery motions are necessary, they should be resolved promptly.
>
> Courts should vigorously enforce mandatory discovery obligations. Experience in states with robust initial disclosure requirements has shown that diligent enforcement by judges is the key to an effective disclosure regime. Rule 37 governs sanctions.

2. *User's Manual.* The pilot project will require something of a "user's manual" for the pilot judges, The precise form of that manual has not been developed, but it would include the following kinds of instructions:

Pilot judges should hold initial case management conferences under Rule 16(b) within the time specified in Rule 16(b)(2). Judges should discuss with the parties their compliance with the mandatory discovery obligations set forth in the Standing Order, resolve any disputes, and set a date for full and complete supplementation of responses.

Judges may alter the time for mandatory initial discovery responses upon a showing of good cause, but this should not be a frequent event. Early discovery responses are critical to the purposes of this pilot program.

Judges should make themselves available for prompt resolution of discovery disputes. It is recommended that judges require parties to contact the Court for a pre-motion conference, as identified in Rule 16(b)(3)(B)(v), before filing discovery motions. If discovery motions are necessary, they should be resolved promptly.

Courts should vigorously enforce mandatory discovery obligations. Experience in states with robust initial disclosure requirements has shown that diligent enforcement by judges is the key to an effective disclosure regime. Rule 37 governs sanctions.

3. *Timing, Participation, and Other Issues.*

We propose that the initial discovery pilot project be approved by the Standing Committee at its June meeting. Additional details will need to be worked out, but our hope is that this pilot can be launched in 2017. The pilot would last three years. We will seek the agreement of CACM and the FJC, and approval by the Judicial Conference in September.

We think that at least three to five districts should participate. One small district has already volunteered.

To participate in this pilot, district courts must be willing to make the pilot's requirements mandatory. We have debated whether to require that all judges in the pilot districts be willing to

participate. On one hand, complete participation would avoid skewing the results of the pilot through self-selection by judges, and would present a better prospect of culture change – one of the goals of the pilot. On the other hand, requiring participation by all judges might mean that larger districts do not participate.

One other issue was discussed at the civil rules committee meeting. The subcommittee's original draft required that answers be filed and mandatory discovery responses be made in every case, even when motions to dismiss have been filed. Some expressed the view that exceptions should be allowed for motions raising jurisdictional or immunity issues, and language has been added to paragraph 1(A)(3) of the standing order to reflect this possibility. The counter-argument is that permitting any exceptions for motions to dismiss will only encourage such motions and delay the responses required by the pilot, defeating in part the purpose of prompt and complete responses early in every case.

B. EXPEDITED PROCEDURES PILOT

1. Description of Pilot Project

The goal of the Civil Rules is to further the "just, speedy, and inexpensive determination of every action." Case resolution that is not speedy and inexpensive often will not be just. This pilot will involve all civil cases where discovery and trial are possible (it will not include cases decided on an administrative record with no trial). The pilot will include three parts:

(1) Each participating court will adopt the following practices: (a) prompt case management conferences in every case (within the time allowed by amended Rule 16(b)(2)); (b) firm caps on the amount of time allocated for discovery, to be set by the judge after conferring with the parties at the case management conference, and to be extended no more than once and only for good cause based on a showing of diligence by the parties; (c) prompt resolution of discovery disputes by telephone conferences; (d) decisions on all dispositive motions within 60 days of the reply brief being filed; and (e) setting and holding firm trial dates.

(2) Metrics will be as follows: (a) if we could measure it, the level of the pilot judges' compliance with the goals in (1) above; (b) trial dates in 90% of civil cases set within 14 months of case filing, trial dates in the remaining 10% set within 18 months, and all trial dates held firm; (c) 25% reduction in the number of categories of cases in the district "dashboard" that are decided slower than the national average (or some comparable measure that could use the new CACM dashboard tool).

(3) Training and collaboration: (a) the FJC will do an initial one-day training session for pilot judges and staff, followed by additional FJC training every six months or year; (b) judges in the district will meet quarterly to discuss best practices and what is working and not working, and to refine their case management methods to meet the pilot goals; (c) one or two judges from outside the district will be available as resources during these quarterly conferences, with the same resource judges serving throughout the duration of the pilot; (d) the judges in the pilot district would have at least one bench-bar meeting per year to talk with lawyers in the district about how the pilot is working and to make appropriate adjustments; (e) the pilot would last three years.

Building on the work of several federal and state courts, this project seizes on the increased reasonableness associated with discovery that must be finished within a discrete time period. A similar dynamic is at play when trial judges allocate a set amount of time for each party to make its case at trial; redundancy is lessened and efficiency increases.

Excerpt from the May 12, 2016 Report of the Advisory Committee on Civil Rules (Revised July 1, 2016)

There are several premises of the pilot: (1) the longer a case takes to resolve, the more expensive it is for the parties; (2) the combination of tight timetables for discovery, prompt resolution of discovery and dispositive motions, and firm trial dates is more likely to prompt lawyers to be reasonable in their discovery requests and litigation behavior than any rule; (3) lawyer cooperation should increase when both parties must conduct discovery within a set period of time; and (4) prompt feedback about the impact of these practices will demonstrate their utility to the judges who use them.

2. Participants

A. Civil Rules and Standing Committees
B. CACM
C. FJC

3. Timetable

A. April 2016—approval by Civil Rules Committee
B. June 2016—approval by Standing Committee, CACM, and FJC
C. September 2016—approval by the Judicial Conference
D. Early 2017—initial implementation
E. End of 2020—completion

4. Criteria for district courts to participate

A. Court must be willing to make the pilot's requirements mandatory.
B. All judges on the district court must be willing to participate.
C. At least three to five district courts need to participate.

This pilot project is less refined that the mandatory disclosures pilot and will require significant work over the next several months.

* * * * *

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE*

Rule 803. Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant Is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

* * * * *

(16) ***Statements in Ancient Documents***. A statement in a document ~~that is at least 20 years old~~that was prepared before January 1, 1998, and whose authenticity is established.

* * * * *

Committee Note

The ancient documents exception to the rule against hearsay has been limited to statements in documents prepared before January 1, 1998. The Committee has

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

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determined that the ancient documents exception should be limited due to the risk that it will be used as a vehicle to admit vast amounts of unreliable electronically stored information (ESI). Given the exponential development and growth of electronic information since 1998, the hearsay exception for ancient documents has now become a possible open door for large amounts of unreliable ESI, as no showing of reliability needs to be made to qualify under the exception.

The Committee is aware that in certain cases—such as cases involving latent diseases and environmental damage—parties must rely on hardcopy documents from the past. The ancient documents exception remains available for such cases for documents prepared before 1998. Going forward, it is anticipated that any need to admit old hardcopy documents produced after January 1, 1998 will decrease, because reliable ESI is likely to be available and can be offered under a reliability-based hearsay exception. Rule 803(6) may be used for many of these ESI documents, especially given its flexible standards on which witnesses might be qualified to provide an adequate foundation. And Rule 807 can be used to admit old documents upon a showing of reliability—which will often (though not always) be found by circumstances such as that the document was prepared with no litigation motive in mind, close in time to the relevant events. The limitation of the ancient documents exception is not intended to raise an inference that 20 year-old documents are, as a class, unreliable, or that they should somehow not qualify for admissibility under Rule 807. Finally, many old documents can be admitted for the non-hearsay purpose of proving notice, or as party-opponent statements.

The limitation of the ancient documents hearsay exception is not intended to have any effect on authentication of ancient documents. The possibility of authenticating an old document under Rule 901(b)(8)—or under any ground available for any other document—remains unchanged.

The Committee carefully considered, but ultimately rejected, an amendment that would preserve the ancient documents exception for hardcopy evidence only. A party will often offer hardcopy that is derived from ESI. Moreover, a good deal of old information in hardcopy has been digitized or will be so in the future. Thus, the line between ESI and hardcopy was determined to be one that could not be drawn usefully.

The Committee understands that the choice of a cut-off date has a degree of arbitrariness. But January 1, 1998 is a rational date for treating concerns about old and unreliable ESI. And the date is no more arbitrary than the 20-year cutoff date in the original rule. See Committee Note to Rule 901(b)(8) ("Any time period selected is bound to be arbitrary.").

Under the amendment, a document is "prepared" when the statement proffered was recorded in that document. For example, if a hardcopy document is prepared in 1995, and a party seeks to admit a scanned copy of that document, the date of preparation is 1995 even though the scan was made long after that—the subsequent scan does not alter the document. The relevant point is the date on which the information is recorded, not when the information is prepared for trial. However, if the content of

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the document is *itself* altered after the cut-off date, then the hearsay exception will not apply to statements that were added in the alteration.

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

* * * * *

(13) ***Certified Records Generated by an Electronic Process or System.*** A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11).

Committee Note

The amendment sets forth a procedure by which parties can authenticate certain electronic evidence other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and

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inconvenience of producing a witness to authenticate an item of electronic evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure under which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule. The Rule specifically allows the authenticity foundation that satisfies Rule 901(b)(9) to be established by a certification rather than the testimony of a live witness.

The reference to the "certification requirements of Rule 902(11) or (12)" is only to the procedural requirements for a valid certification. There is no intent to require, or permit, a certification under this rule to prove the requirements of Rule 803(6). Rule 902(13) is solely

limited to authentication and any attempt to satisfy a hearsay exception must be made independently.

A certification under this Rule can establish only that the proffered item has satisfied the admissibility requirements for authenticity. The opponent remains free to object to admissibility of the proffered item on other grounds—including hearsay, relevance, or in criminal cases the right to confrontation. For example, assume that a plaintiff in a defamation case offers what purports to be a printout of a webpage on which a defamatory statement was made. Plaintiff offers a certification under this Rule in which a qualified person describes the process by which the webpage was retrieved. Even if that certification sufficiently establishes that the webpage is authentic, defendant remains free to object that the statement on the webpage was not placed there by defendant. Similarly, a certification authenticating a computer output, such as a spreadsheet, does not preclude an objection that the information produced is unreliable—the authentication establishes only that the output came from the computer.

A challenge to the authenticity of electronic evidence may require technical information about the system or process at issue, including possibly retaining a forensic technical expert; such factors will effect whether the opponent has a fair opportunity to challenge the evidence given the notice provided.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

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Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

* * * * *

(14) ***Certified Data Copied from an Electronic Device, Storage Medium, or File.*** Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent also must meet the notice requirements of Rule 902(11).

Committee Note

The amendment sets forth a procedure by which parties can authenticate data copied from an electronic device, storage medium, or an electronic file, other than

through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11) and (12), the Committee has found that the expense and inconvenience of producing an authenticating witness for this evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness, and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure in which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Today, data copied from electronic devices, storage media, and electronic files are ordinarily authenticated by "hash value." A hash value is a number that is often represented as a sequence of characters and is produced by an algorithm based upon the digital contents of a drive, medium, or file. If the hash values for the original and copy are different, then the copy is not identical to the original. If the hash values for the original and copy are the same, it is highly improbable that the original and copy are not identical. Thus, identical hash values for the original and copy reliably attest to the fact that they are exact duplicates. This amendment allows self-authentication by a certification of a qualified person that she checked the hash value of the proffered item and that it was identical to the original. The rule is flexible enough to allow certifications through processes other than comparison of hash value, including by other reliable means of identification provided by future technology.

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Nothing in the amendment is intended to limit a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule.

The reference to the "certification requirements of Rule 902(11) or (12)" is only to the procedural requirements for a valid certification. There is no intent to require, or permit, a certification under this rule to prove the requirements of Rule 803(6). Rule 902(14) is solely limited to authentication and any attempt to satisfy a hearsay exception must be made independently.

A certification under this Rule can only establish that the proffered item is authentic. The opponent remains free to object to admissibility of the proffered item on other grounds—including hearsay, relevance, or in criminal cases the right to confrontation. For example, in a criminal case in which data copied from a hard drive is proffered, the defendant can still challenge hearsay found in the hard drive, and can still challenge whether the information on the hard drive was placed there by the defendant.

A challenge to the authenticity of electronic evidence may require technical information about the system or

process at issue, including possibly retaining a forensic technical expert; such factors will effect whether the opponent has a fair opportunity to challenge the evidence given the notice provided.

The reference to Rule 902(12) is intended to cover certifications that are made in a foreign country.

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

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MEMORANDUM

TO: Hon. Jeffrey S. Sutton, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. William K. Sessions, III, Chair
Advisory Committee on Evidence Rules

RE: Report of the Advisory Committee on Evidence Rules

DATE: May 7, 2016

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on April 29, 2016 in Alexandria, Virginia.

The Committee seeks final approval of two proposed amendments for submission to the Judicial Conference:

1. Amendment to Rule 803(16), the ancient documents exception to the hearsay rule, to limit its application to documents prepared before 1998; and

2. Amendment to Rule 902 to add two subdivisions that would allow authentication of certain electronic evidence by way of certification by a qualified person.

* * * * *

II. Action Items

A. Amendment Limiting the Coverage of Rule 803(16)

Rule 803(16) provides a hearsay exception for "ancient documents." If a document is more than 20 years old and appears authentic, it is admissible for the truth of its contents. The Committee has considered whether Rule 803(16) should be eliminated or amended because of the development of electronically stored information. The rationale for the exception has always been questionable, because a document does not magically become reliable enough to escape the rule against hearsay on the day it turns 20. The Committee concluded that the exception has been tolerated because it has been used relatively infrequently, and usually because there is no other evidence on point. But because electronically stored information can be retained for more than 20 years, there is a strong likelihood that the ancient documents exception will be used much more frequently in the coming years. And it could be used as a receptacle for unreliable hearsay, because if the hearsay is in fact reliable it will probably be admissible under other reliability-based exceptions, such as the business records exception or the residual exception. Moreover, the need for an ancient documents exception is questionable as applied to ESI, for the very reason that there may well be a great deal of *reliable* electronic data available to prove any dispute of fact.

The proposed amendment that was issued for public comment would have eliminated the ancient documents exception. The public comment on that proposed elimination was largely negative, however. Most of the comments asserted that without the ancient documents exception, important documents in certain specific types of litigation would no longer be admissible—or would be admissible only through expending resources that are currently not necessary under Rule 803(16). Examples of litigation cited by the public comment include cases involving latent diseases; disputes over the existence of insurance; suits against churches alleged to condone sexual abuse by their clergy; cases involving environmental cleanups; and title disputes. Many of the comments concluded that the business records exception and the residual exception are not workable alternatives for ancient documents. The comments contended that the business records exception requires a foundation witness that may be hard to find, and that the residual exception is supposed to be narrowly construed. Moreover, both these exceptions would require a statement-by-statement analysis, which is not necessary under Rule 803(16), thus leading to more costs for proponents. Much of the comment was about the amendment's leading to extra costs of qualifying old documents.

In light of the public comment, the Committee abandoned the proposal to eliminate the ancient documents exception. But it also rejected the option of doing nothing. The Committee strongly believes that the ESI problem as related to Rule 803(16) is real. Because ESI can be easily and permanently stored, there is a substantial risk that the terabytes of emails, web pages, and texts generated in the last 20 or so years could inundate the courts by way of the ancient documents exception. Computer storage costs have dropped dramatically—that greatly expands the universe of information that could be potentially offered under the ancient documents exception. Moreover, the presumption of the ancient documents exception was that a hardcopy document kept around for 20 years must have been thought to have some importance; but that presumption is no longer the case with easily stored ESI. The Committee remains convinced that

it is appropriate and necessary to get out ahead of this problem—especially because the use of the ancient documents exception is so difficult to monitor. There are few reported cases about Rule 803(16) because no objection can be made to admitting the content of the document once it has been authenticated—essentially there is nothing to report. So tracking reported cases would not be a good way to determine whether ESI is being offered under the exception. Finally, the Committee adheres to its position that Rule 803(16) is simply a flawed rule; it is based on the fallacy that because a document is old and authentic, its contents are reliable. Therefore something must be done, at least, to limit the exception as to ESI.

The Committee considered a number of alternatives for amending Rule 803(16) to limit its impact. The alternatives of adding reliability requirements, or necessity requirements, were rejected. These alternatives were likely to lead to the increased costs of qualification of old documents, and extensive motion practice, that were opposed in the public comment. Ultimately, the Committee returned to where it started—the ESI problem. The Committee determined that the best result was to limit the ancient documents exception to documents prepared before 1998. That amendment will have no effect on any of the cases raised in the public comments, because the concerns were about cases involving records prepared well before 1998. And 1998 was found to be a fair date for addressing the rise of ESI. The Committee recognizes, of course, that any cutoff date will have a degree of arbitrariness, but it also notes that the ancient documents exception itself set an arbitrary time period for its applicability.

The Committee has considered the possibility that in the future, cases involving latent diseases, CERCLA, etc. will arise. But the Committee has concluded that in such future cases, the ancient documents exception is unlikely to be necessary because, going forward from 1998, there is likely to be preserved, reliable ESI that can be used to prove the facts that are currently proved by scarce hardcopy. If the ESI is generated by a business, then it is likely to be easier to find a qualified witness who is familiar with the electronic recordkeeping than it is under current practice to find a records custodian familiar with hardcopy practices from the 1960's and earlier. Moreover, the Committee has emphasized in the Committee Note that the residual exception remains available to qualify old documents that are reliable; the Note states the Committee's expectation that the residual exception not only can, but *should* be used by courts to admit reliable documents prepared after January 1, 1998 that would have previously been offered under the ancient documents exception.

The Committee unanimously recommends that the Standing Committee approve the* * * * * *amendment to Rule 803(16), and the Committee Note, for submission to the Judicial Conference[.]

* * * * *

B. Proposed Amendment to Evidence Rule 902

At its Spring 2015 meeting, the Committee unanimously approved a proposal to add two new subdivisions to Rule 902, the rule on self-authentication. The first provision would allow self-authentication of machine-generated information, upon a submission of a certification prepared by a qualified person. The second proposal would provide a similar certification

procedure for a copy of data taken from an electronic device, medium or file. These proposals are analogous to Rules 902(11) and (12) of the Federal Rules of Evidence, which permit a foundation witness to establish the authenticity of business records by way of certification.

The proposals have a common goal of making authentication easier for certain kinds of electronic evidence that are, under current law, likely to be authenticated under Rule 901 but only by calling a witness to testify to authenticity. The Committee has concluded that the types of electronic evidence covered by the two proposed rules are rarely the subject of a legitimate authenticity dispute, but it is often the case that the proponent is nonetheless forced to produce an authentication witness, incurring expense and inconvenience—and often, at the last minute, opposing counsel ends up stipulating to authenticity in any event.

The self-authentication proposals, by following the approach taken in Rule 902(11) and (12) regarding business records, essentially leave the burden of going forward on authenticity questions to the opponent of the evidence. Under those rules a business record is authenticated by a certificate, but the opponent is given "a fair opportunity" to challenge both the certificate and the underlying record. The proposals for new Rules 902(13) and 902(14) would have the same effect of shifting to the opponent the burden of going forward (not the burden of proof) on authenticity disputes regarding the described electronic evidence.

Applications of Rules 902(13) and (14)

At the Standing Committee meeting in Spring 2015, Committee members inquired as to what kind of information might be authenticated under these new provisions. The Committee (with the substantial assistance of John Haried, who initially proposed these amendments) has prepared the following examples to illustrate how Rules 902(13) and (14) may be used:

Examples of how Rule 902(13) can be used:

1. Proving that a USB device was connected to (i.e., plugged into) a computer: In a hypothetical civil or criminal case in Chicago, a disputed issue is whether Devera Hall used her computer to access files stored on a USB thumb drive owned by a co-worker. Ms. Hall's computer uses the Windows operating system, which automatically records information about every USB device connected to her computer in a database known as the "Windows registry." The Windows registry database is maintained on the computer by the Windows operating system in order to facilitate the computer's operations. A forensic technician, located in Dallas, Texas, has provided a printout from the Windows registry that indicates that a USB thumb drive, identified by manufacturer, model, and serial number, was last connected to Ms. Hall's computer at a specific date and time.

> **Without Rule 902(13):** Without Rule 902(13), the proponent of the evidence would need to call the forensic technician who obtained the printout as a witness, in order to establish the authenticity of the evidence. During his or her testimony, the forensic technician would typically be asked to testify about his or her background and qualifications; the process by which digital forensic examinations are conducted in general; the steps taken by the forensic technician during the examination of Ms. Hall's

computer in particular; the process by which the Windows operating system maintains information in the Windows registry, including information about USB devices connected to the computer; and the steps taken by the forensic examiner to examine the Windows registry and to produce the printout identifying the USB device.

Impact of Rule 902(13): With Rule 902(13), the proponent of the evidence could obtain a written certification from the forensic technician, stating that the Windows operating system regularly records information in the Windows registry about USB devices connected to a computer; that the process by which such information is recorded produces an accurate result; and that the printout accurately reflected information stored in the Windows registry of Ms. Hall's computer. The proponent would be required to provide reasonable written notice of its intent to offer the printout as an exhibit and to make the written certification and proposed exhibit available for inspection. If the opposing party did not dispute the accuracy or reliability of the process that produced the exhibit, the proponent would not need to call the forensic technician as a witness to establish the authenticity of the exhibit. (There are many other examples of the same types of machine-generated information on computers, for example, internet browser histories and wifi access logs.)

2. Proving that a server was used to connect to a particular webpage: Hypothetically, a malicious hacker executed a denial-of-service attack against Acme's website. Acme's server maintained an Internet Information Services (IIS) log that automatically records information about every internet connection routed to the web server to view a web page, including the IP address, webpage, user agent string and what was requested from the website. The IIS logs reflected repeated access to Acme's website from an IP address known to be used by the hacker. The proponent wants to introduce the IIS log to prove that the hacker's IP address was an instrument of the attack.

Without Rule 902(13): The proponent would have to call a website expert to testify about the mechanics of the server's operating system; his search of the IIS log; how the IIS log works; and that the exhibit is an accurate record of the IIS log.

With Rule 902(13): The proponent would obtain the website expert's certification of the facts establishing authenticity of the exhibit and provide the certification and exhibit to the opposing party with reasonable notice that it intends to offer the exhibit at trial. If the opposing party does not timely dispute the reliability of the process that produced the registry key, then the proponent would not need to call the website expert to establish authenticity.

3. Proving that a person was or was not near the scene of an event: Hypothetically, Robert Jackson is a defendant in a civil (or criminal) action alleging that he was the driver in a hit-and-run collision with a U.S. Postal Service mail carrier in Atlanta at 2:15 p.m. on March 6, 2015. Mr. Jackson owns an iPhone, which has software that records machine-generated dates, times, and GPS coordinates of each picture he takes with his iPhone. Mr. Jackson's iPhone contains two pictures of his home in an Atlanta suburb at about 1 p.m. on March 6. He wants to introduce into evidence the photos together with the metadata, including

the date, time, and GPS coordinates, recovered forensically from his iPhone to corroborate his alibi that he was at home several miles from the scene at the time of the collision.

Without Rule 902(13): The proponent would have to call the forensic technician to testify about Mr. Jackson's iPhone's operating system; his search of the phone; how the metadata was created and stored with each photograph; and that the exhibit is an accurate record of the photographs.

With Rule 902(13): The proponent would obtain the forensic technician's certification of the facts establishing authenticity of the exhibits and provide the certification and exhibit to the opposing party with reasonable notice that it intends to offer the exhibit at trial. If the opposing party does not timely dispute the reliability of the process that produced the iPhone's logs, then the proponent would not have to call the technician to establish authenticity.

4. Proving association and activity between alleged co-conspirators: Hypothetically, Ian Nichols is charged with conspiracy to commit the robbery of First National Bank that occurred in San Diego on January 30, 2015. Two robbers drove away in a silver Ford Taurus. The alleged co-conspirator was Dain Miller. Dain was arrested on an outstanding warrant on February 1, 2015, and in his pocket was his Samsung Galaxy phone. The Samsung phone's software automatically maintains a log of text messages that includes the text content, date, time, and number of the other phone involved. Pursuant to a warrant, forensic technicians examined Dain's phone and located four text messages to Ian's phone from January 29: "Meet my house @9"; "Is Taurus the Bull out of shop?"; "Sheri says you have some blow"; and "see ya tomorrow." In the separate trial of Ian, the government wants to offer the four text messages to prove the conspiracy.

Without Rule 902(13): The proponent would have to call the forensic technician to testify about Dain's phone's operating system; his search of the phone's text message log; how logs are created; and that the exhibit is an accurate record of the iPhone's logs.

With Rule 902(13): The proponent would obtain the forensic technician's certification of the facts establishing authenticity of the exhibit and provide the certification and exhibit to the opposing party with reasonable notice that it intends to offer the exhibit at trial. If the opposing party does not timely dispute the reliability of the process that produced the iPhone's logs, then the court would make the Rule 104 threshold authenticity finding and admit the exhibits, absent other proper objection.

Hearsay Objection Retained: Under Rule 902(13), the opponent – here, criminal defendant Ian—would retain his hearsay objections to the text messages found on Dain's phone. For example, the judge would evaluate the text "Sheri says you have some blow" under F.R.E. 801(d)(2)(E) to determine whether it was a coconspirator's statement during and in furtherance of a conspiracy, and under F.R.E. 805, to assess the hearsay within hearsay. The court might exclude the text "Sheri says you have some blow" under either rule or both.

Example of how Rule 902(14) can be used

In the armed robbery hypothetical, above, forensic technician Smith made a forensic copy of Dain's Samsung Galaxy phone in the field. Smith verified that the forensic copy was identical to the original phone's text logs using an industry standard methodology (*e.g.*, hash value or other means). Smith gave the copy to forensic technician Jones, who performed his examination at his lab. Jones used the copy to conduct his entire forensic examination so that he would not inadvertently alter the data on the phone. Jones found the text messages. The government wants to offer the copy into evidence as part of the basis of Jones's testimony about the text messages he found.

> **Without Rule 902(14):** The government would have to call two witnesses. First, forensic technician Smith would need to testify about making the forensic copy of information from Dain's phone, and about the methodology that he used to verify that the copy was an exact copy of information inside the phone. Second, the government would have to call Jones to testify about his examination.
>
> **With Rule 902(14):** The proponent would obtain Smith's certification of the facts establishing how he copied the phone's information and then verified the copy was true and accurate. Before trial the government would provide the certification and exhibit to the opposing party—here defendant Ian—with reasonable notice that it intends to offer the exhibit at trial. If Ian's attorney does not timely dispute the reliability of the process that produced the Samsung Galaxy's text message logs, then the proponent would only call Jones.

The Committee has carefully considered whether the self-authentication proposals would raise a Confrontation Clause concern when the certificate of authenticity is offered against a criminal defendant. The Committee is satisfied that no constitutional issue is presented, because the Supreme Court has stated in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 322 (2009), that even when a certificate is prepared for litigation, the admission of that certificate is consistent with the right to confrontation if it does nothing more than authenticate another document or item of evidence. That is all that these certificates would be doing under the Rule 902(13) and (14) proposals. The Committee also relied on the fact that the lower courts have uniformly held that certificates prepared under Rule 902(11) do not violate the right to confrontation; those courts have relied on the Supreme Court's statement in *Melendez-Diaz.* The Committee determined that the problem with the affidavit found testimonial in *Melendez-Diaz* was that it certified the accuracy of a drug test that was itself prepared for purposes of litigation—a certification cannot render constitutional an underlying report that itself violates the Confrontation Clause. There is of course no intention or implication from the amendment that a certification could somehow be a means of bringing otherwise testimonial reports into court. But the Committee concluded that if the underlying report is not testimonial, the certification of authenticity will not raise a constitutional issue under the current state of the law.

In this regard, the Note approved by the Committee emphasizes that the goal of the amendment is a narrow one: to allow authentication of electronic information that would

otherwise be established by a witness, instead to be established through a certification by that same witness. The Note makes clear that these are authentication-only rules and that the opponent retains all objections to the item other than authenticity --- most importantly that the item is hearsay or that admitting the item would violate a criminal defendant's right to confrontation.

The Committee unanimously recommends that the proposed amendment to Rule 902, adding new subdivisions (13) and (14), and their Committee Notes, be approved by the Standing Committee and submitted to the Judicial Conference.

* * * * *